

(1986) 11 OHC CK 0031

In the Orissa High Court

Case No : Second Appeal No. 63 of 1979

Ghanashyam Agarwalla and Another

APPELLANT

Vs

Jagabandhu Mahanta and Others

RESPONDENT

Date of Decision : 06-11-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4

Citation : (1987) 63 CLT 232

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : R. Ch. Mohanty, P.K. Patnaik, J.P. Das and K.N. Panigrahi, for the Appellant; B.B. Mohanty and S.D. Das, for the Respondent

Final Decision : Dismissed

Judgement

D.P. Mohapatra, J.—The Plaintiffs have filed this appeal against the judgment and decree of the lower appellate court dismissing their suit on reversing the decision of the trial court. They filed T.S. No. 24 of 1975-1 in the court of the Subordinate Judge, Rairangpur, for a declaration that they are the owners of the disputed land described in schedule "A" of the plaint, to demarcate the same through a civil court commissioner; for confirmation of their possession or in the alternative for delivery of possession and for permanent injunction prohibiting the Defendants from disturbing their possession. The total area of the disputed land as described in Schedule "A" was M.O.-7-4 biswas comprising of two plots, plot No. 68, Jal III under Khata No. 3 with an area of 2 gunths 2 biswas and 16 gandas, and plot No. 60 with an area of 5 gunths 1 biswa and 4 gandas. The present Respondents were impleaded as Defendants 2 to 5 in the suit. Akulu Mahanta, Defendant No. 1, having died on 10-11-1976 during pendency of the appeal before the first appellate court has not been impleaded in this appeal as a Respondent.

2. The gist of the Plaintiffs' case was that Defendant No. 1. Akulu Mahanta, with his three sons Defendants 2, 3 and 4, constituted a Hindu joint family governed by the Mitakshara School of Hindu Law. Akulu Mahanta was the Karta of the said

family. In his capacity as the Karta of the family, he sold the disputed land to the Plaintiffs for a consideration of Rs. 2.000/- under a registered sale deed dated 9-5-1960, and on the same day delivered possession of the land to the vendees. On 13-0-1967 when Jamunalal Agarwalla, the father of the Plaintiff No. 1, put up a wooden Gumuti on the disputed land, Defendant No. 2 with the help of some other persons forcibly removed the said Gumuti. The incident was the subject matter of G.R. Case No. 528 of 1967 Trial Case No. 444 of 1968 in the court of the S.D.J.M., Rairangpur in which Defendant No. 2 was acquitted. Since then the said Defendant has been putting obstructions on the way of the Plaintiffs in their enjoyment of the disputed property. The Plaintiffs could not get their names mutated in respect of the disputed land due to the objection raised by the Defendants. It was the further case of the Plaintiffs that Defendant No. 1. Akulu Mahanta, had full authority to sell the disputed land and he having sold the same with the knowledge and consent of Defendant Nos. 2, 3 and 4, the latter have no right, title and interest over the disputed land. The Plaintiffs also alleged that at the time of purchase their father made enquiries and ascertained that the disputed land was lying fallow and was not fetching any income to the family of Defendant No. 1 and that Akulu intended to acquire cultivable land for the benefit of the family as a prudent manager and being satisfied he purchased the land from Defendant No. 1. Thus the Plaintiffs contend that they being bona fide purchasers for value after due enquiry their right to the disputed land cannot be questioned. Defendant No. 5, who had purchased portions of the suit plots, raised dispute about the boundary of the land purchased by the Plaintiffs and therefore he was impleaded as a Defendant in the suit.

On these averments the Plaintiffs claimed the reliefs noticed earlier.

3. Defendant Nos. 2, 3 and 4 in a joint written statement denied the claim of the Plaintiffs. They denied that Defendant No. 1, Akulu Mahanta, was the Karta of the family at the time of the alleged sale in favour of the Plaintiffs. They also denied that the said Defendant No. 1 had any necessity to sell the land or that the sale was for the benefit of the family and the assertion made by the Plaintiffs about their father having made bona fide enquiries about the sale of the disputed land being for the benefit of the family.

According to these Defendants, Akulu Mahanta, their father, had ancestral land to the total extent of 12 Mans and 7 gunths. While he was the Karta of the family consisting of himself, his wife and Defendant Nos. 2 and 3 (Defendant No. 4 as not born at that time) he sold some lands in mouza-Ichinda to several persons. Due to such indiscriminate sale of family properties dissension arose amongst the members, which culminated in, amicable partition of family properties about fifteen years before the filing of the suit. In the said amicable partition, the disputed lands were allotted to the share of Defendants 2 and 3, and they possessed the same separately. Defendant No. 1, Akulu Mahanta and Defendant No. 4 were allotted properties in Mouza-Kusumi and Badawkruradhi. The lands sold by Defendant No. 1 in Mouza-Ichinda were also allotted to their shares.

Therefore, according to the Defendants, in 1960 Akulu ,Mahanta had no right, title, interest and possession over the suit lands. The Defendant Nos. 2 and 3 were the absolute owners of the suit lands. It was the further case of the Defendants that possession of the disputed land was all along with Defendants 2 and 3 and that the Plaintiffs never possessed the same.

On these averments the Defendants prayed for dismissal of the suit.

4. Defendant No. 5 in a separate written statement denied the claim of right, title and interest of the Plaintiffs over the disputed land and asserted his title and possession over 5 Gunths, 12 Biswas and 16 Gandas of land under plot No. 60 of Khata No. 3 purchased by him.

5. The trial court on a discussion of the evidence on record under different issues framed by him came to hold:

(a) That there was no partition in the family as alleged by Defendants 2, 3 and 4 and that Defendant No. 1 sold the suit land to the Plaintiffs when there was no partition of the property between himself and his sons.

(b) That the sale by Defendant No. 1 in favour of the Plaintiffs was genuine and that the later acquired valid title to the suit land under the said sale deed.

(c) That the oral sale alleged to have been made by Defendant No. 1 in favour of Defendant No. 5 was a myth and Defendant No. 5 had not derived any right title and interest to one gunth and one biswa of land under the alleged sale. The court accepted the contention raised on behalf of the Plaintiffs that the alleged sale was a collusive transaction created to defeat the claims of the Plaintiffs.

On the aforesaid findings the court decreed the Plaintiff's suit declaring their right, title and interest and directed possession of the suit land to be delivered to them and permanently enjoined the Defendants from disturbing their possession.

6. On appeal by the Defendants the lower appellate court on consideration of the evidence on the point confirmed the finding of the trial court that there was no partition between Defendant No. 1 and Defendants 2, 3 and 4 before the sale of the suit property to the Plaintiffs. He held that the Subordinate Judge rightly concluded that the parties were living as members of a Hindu Joint family and Defendant No. 1 was the Karta and manager of the said joint family. The lower appellate court also negatived the plea that Defendant No. 1 executed the sale deed Ext. 1 without consideration. Before the court it was conceded by counsel for both the sides that there was no legal necessity for the impugned transaction entered into between Defendant No. 1 with the Plaintiffs as per Ext. 1.

The only contention raised on behalf of the Respondents before the lower appellate court which found favour with the court was that the suit transaction was for the benefit of the estate of the joint family, inasmuch as Defendant No. 1 was not getting any income out of the suit lands and therefore wanted to purchase cultivable lands out of the sale proceeds of the suit lands and for that

purpose entered into the suit transaction. On scrutiny of the oral and documentary evidence on this question, the lower appellate court came to hold, disagreeing with the findings of the trial court, that there was no sufficient evidence on record to come to the conclusion that the sale transaction entered into by Defendant No. 1 with the Plaintiffs in respect of the joint family property was for the benefit of the estate and hence it was binding on Defendant Nos. 2 to 4. Accordingly, the court held that Defendant Nos. 2, 3 and 4 were not bound by the sale of the suit lands to the Plaintiffs. The plea of the Plaintiffs that Defendant No. 5 had encroached upon a portion of their land was negated. On the aforesaid findings, the lower appellate court dismissed the Plaintiff's suit. Hence, the second Appeal by the Plaintiffs.

7. This second Appeal was admitted by this Court by order dated 12-4-1979 wherein it was directed that ground No. 17 shall be canvassed at the time of hearing. Ground No. 17 in the memorandum of appeal is to the following effect:

17. The following substantial questions of law are involved in this appeal:

(a) Whether an alliance who has made bona fide enquiry about the sale is protected without establishing that the consideration amount was actually spent for benefit of estate.

(b) Whether sale of unproductive land for purchase of agricultural land by a prudent manager for the benefit of the family can be challenged by persons who have enjoyed the benefit of the agricultural lands.

(c) Whether in such circumstances the sale will be binding to the extent of undivided interest of the father or not.

(d) Whether the appeal in the lower appellate court has abated for not substituting the legal heirs of Respondent No. 3 who died on 10-11-1976 during the pendency of appeal.

(e) Whether a lower appellate court can give a finding on the question of adverse possession of Defendant No. 5 in the absence of any issue and evidence on that score.

8. At the hearing Shri R.C. Mohanty, learned Counsel for the Appellants, urged the following two points only:

(1) Akulu Mahanta, Defendant No. 1, having died on 10-11-1976 when the appeal was pending before the lower appellate court and all his legal representatives having not been substituted by the Defendants who are the Appellants in this Court, the appeal abated.

(2) The finding of the lower appellate court that the suit transaction was not for the benefit of the estate is vitiated by error of law, inasmuch as the court was under the impression that it was incumbent upon the Appellants to establish that the money realised from the sale of the suit properties was indeed spent for purchase of the cultivable lands elsewhere.

Shri B.B. Mohanty, learned Counsel for the Respondents, in reply to the submission of Shri Mohanty contended that the appeal before the lower appellate court cannot be held to have abated since the sons of the deceased Akulu Mahanta (Defendant No. 1) were already on record. He further urged that since there was no conflict of interest between Defendant No. 1. Akulu Mahanta and his sons in the litigation, the principle of substantial representation is applicable to the case, as such the question of abatement of the appeal does not arise. He placed reliance on Order 22, Rule 4, CPC in support of his contention. It was further contended by the learned Counsel for the Respondents that on the facts and in the circumstances of the case, the lower appellate court was right in holding that the Plaintiffs failed to establish that the suit transaction was for the benefit of the estate of the family.

9. It is pertinent to note that the contention regarding abatement of the appeal was not raised before the lower appellate court. No material is also available on record to show the date of death of Defendant No. 1. Akulu Mahanta and who are the legal representatives left out in the case. Shri R.C. Mohanty in course of his argument contended that the death of Akulu took place during the pendency of appeal before the lower appellate court and he left his sons Defendant Nos. 2 to 4 and some daughters as his legal representatives. Since the daughters were not brought on record, the appeal abated against the deceased and as a consequence thereof the entire appeal before the lower appellate court abated. This contention of Shri Mohanty cannot be accepted. Admittedly, Akulu Mahanta (Defendant No. 1 in the trial court) did not file any written statement and was set ex parte. Defendant Nos. 2 to 4 were his sons and legal representatives. After the death of Akulu, his interest in the property devolved on his sons and his daughters, if any. The success of the sons in the appeal would enure to the benefit of the daughters or any other legal representatives of the deceased Akulu. In such circumstances, it can reasonably be said that the sons, Defendant Nos. 2 to 4, could represent the estate of the deceased Akulu Mahanta and non-substitution of other heirs of the said deceased would not vitiate the appeal. Another aspect worth noting is that Akulu Mahanta, Defendant No. 1, did not contest the suit. According to the Orissa Amendment to Order 22, Rule 4 CPC in such a situation, the court, whenever it thinks fit may exempt the Plaintiff from the necessity of substituting the legal representatives of any such Defendant who failed to appear and contest the suit at the hearing, and judgment may, in such case, be pronounced against the said Defendant notwithstanding the death of such Defendant and it shall have the same force and effect as if it had been pronounced before death took place.

Applying this provision, the lower appellate court on the facts and in the circumstances of the case could have granted leave to the Appellants (Defendants in the trial court) exempting them from substituting the other legal representatives of the deceased Defendant No. 1. However, the point regarding abatement having not been taken before the lower appellate court where it is said to have occurred the question did not arise for consideration by the Court.

In the case of Mahabir Prasad Vs. Jage Ram and Others, , considering the provisions of Order 22, Rule 4 read with Order 22, Rule 11 of the CPC the Supreme Court held that when a party Respondent in an appeal dies and one of his legal representatives is already on record in another capacity, the appeal does not abate even though no application is made to bring them on record. All that was necessary to be done as held by the Court, was that such legal representative of deceased is to file an application stating that he was also on record as an heir and legal representative of the deceased.

In view of the aforesaid discussions the contention raised by the learned Counsel for the Appellants that the appeal before the lower appellate court abated for non-substitution of all the legal representatives of the deceased Akulu Mahanta has to be held to be without substance.

10. The second point urged on behalf of the Appellants relates to the question of the suit transaction being for the legal necessity or for benefit of the estate of the joint family. As noticed earlier, it was conceded before the lower appellate court that the sale of the suit property by Defendant No. 1 in favour of the Plaintiffs was not backed by the legal necessity. Therefore, the only question that remains for consideration is whether it was for the benefit of the estate of the joint family. The lower appellate court on careful consideration of the relevant averments in the sale deed, Ext. 1. the evidence adduced before him and the legal position, came to answer the question against the Plaintiffs.

11. I have given my anxious consideration to the contentions raised by the learned Counsel for the Appellants and I am unable to persuade myself to hold that the lower appellate court erred in holding on the facts and in the circumstances of the case that the Plaintiffs have failed to establish that the impugned transaction was for the benefit of the family or for the benefit of the estate. The sum total of the evidence adduced by the Plaintiffs on this point comes to this that Akulu Mahanta disclosed to their father that he wanted to sell the suit land which was lying fallow in order to purchase cultivable land at other places and on enquiry Plaintiff's father was satisfied about the representation made by Akulu. No evidence was led by the Plaintiffs to show that the suit properties were so unproductive and worthless that the sale of the property would benefit the family. There was also no evidence to show that indeed from the sale proceeds obtained by Akulu Mahanta, cultivable land yielding profit was purchased by the Karta manager of the family. The law requires that in such a transaction the purchaser is to establish that on the facts and in the circumstances of the case the action of the Karta in selling the property in question should satisfy the test of the act of a prudent manager. The purchaser cannot be said to have discharged the onus merely by establishing that the Karta made a representation to him that he attended to use the sale proceeds for purchase of better land and on enquiry he (purchaser) was satisfied about such representation.

12. In view of the decision of the Supreme Court in the case of Balmukand Vs.

Kamla Wati and Others, , there is no longer any doubt about the position that for a transaction to be regarded as of benefit to the family it need not be of defensive character so as to be binding on the family. In each case the court must be satisfied from the material before it that it was in fact as conferred or was reasonably expected to confer benefit on the family at the time it was entered into. This view has been reiterated by R.N. Misra, J. (as he then was) in *Dhobani Dei v. Lingaraj Bhuyan and Ors.* 1970 (1) C.W.T.R. 433. It is also the accepted position that the two concepts of "legal necessity" and "benefit of the estate" are not necessarily to be taken as identical though they are sometimes overlapping. But all the same, the doctrine of "benefit" of the estate" is essentially independent and may save transactions which cannot be justified by the mere principle of legal necessity. What actually amounts to "benefit" of the family or the "benefit of the estate" does not admit of any precise definition and whether the transaction impugned in a particular case can satisfy this principle, must depend on the facts and circumstances of each particular case. Applying this principle, the Rajasthan High Court in the case of *Nirmal Singh and Another Vs. Satnam and Others*, , held that where the manager of a joint Hindu family sells family property in order to run a new business and thereby imposes the risks and liabilities of such business upon the other members of the family, it cannot be accepted as something done for the benefit of the estate. The Court further held that a mortgage or a sale of family property for the purposes solely of purchasing another property cannot be treated as having been made for the benefit of the estate. Giving instances of prudent transaction, the Court observed in that case that the sale of dilapidated house which is of no use to the family unless it is renovated and such renovation is unnecessary or involves needless outlay of money thereon has been held, as a valid alienation under the doctrine of "benefit of the estate" though it may not be strictly justifiable on the principle of necessity. In all such cases a degree of prudence would be required and the principle which has prevailed is that the prudence must be of an honest or conscientious trustee. The Court further observed that the disposal of a joint family land by the manager without any legal necessity and for the purpose of purchasing another land elsewhere (which purchase has not been made and may not be made at all), cannot be justified on the doctrine of "benefit of estate". The Allahabad High Court in the case of *Hari Singh and Another Vs. Umrao Singh and Another*, , held that where a joint family property yielding no profit was agreed to be sold to purchase land available at much cheaper rate and yielding more profit at another village, the intended alienation must be construed to be for the benefit of the family and the agreement to sell was not invalid in law. A Division Bench of the Andhra Pradesh High Court in the case of *Dasari Jayachandra Prasad and Others Vs. Dasari Venkata Subbaiah and Others*, , considering the question of "benefit to the family" held that it is not enough if the vendor made bona fide enquiries about the sale of the properties in order to migrate to another village and purchase lands which are more productive, but that the sale proceeds have also been applied for purchasing properties in the other village.

13. Considering the present case in the light of the principles enunciated in the aforementioned decisions, there can be little doubt that the Plaintiffs, the alienees of the joint family property, have failed to discharge the heavy burden on them to establish that the transaction in question was for the "benefit of the family" or for the "benefit of the estate". As noticed earlier, the case of the Plaintiffs, as stated in the plaint as well as the Evidence, was that Defendant No. 1 sold the suit properties which were lying fallow with a view to purchase cultivable lands elsewhere. It was not the case of the Plaintiffs, and no evidence was led to show, that the suit lands were wholly unproductive and could fetch no benefit to the family. There is also no evidence to show that the property proposed to be purchased with the sale proceeds was expected to yield substantial profit. Indeed, no detail about the proposed purchase or of any purchase having been effected after the impugned sale has been placed before the court. On the other hand, the lower appellate court has observed that the disputed property is situated on the Baripada-Tata road and was valuable piece of property since the importance of the area was growing fast. Therefore, even if the case of the Plaintiffs is accepted in toto that Defendant No. 1 sold the suit properties to their father with a view to purchase cultivable lands elsewhere that by itself would not satisfy the requirement of the transaction being one for the "benefit of the family" or "benefit of the estate". As such, the lower appellate court rightly refused to uphold the impugned sale of the suit properties in favour of the father of the Plaintiffs on that ground.

14. On the aforesaid analysis, there is no merit in the second Appeal which is accordingly dismissed. Both parties shall bear their respective costs of this appeal.