

(1966) 08 OHC CK 0013

In the Orissa High Court

Case No : Second Appeal No. 77 of 1964

Gobardhan Gountia and Another

APPELLANT

Vs

Labanyanidhi Bhoi and Others

RESPONDENT

Date of Decision : 17-08-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 100, Order 13 Rule 4
Evidence Act, 1872 — Section 35, 65

Citation : (1967) 33 CLT 960

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : B.K. Pal, A. Mohanty and Bijoy Pal, for the Appellant; H. Sen, for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—Madhusudan Gountia had three sons Krupasindhu, Mitrabhanu and Judhisthir-and Rambhabati was his wife. Defendants are the descendants of Krupasindhu and Plaintiffs are the descendants of Yudhisthir. A schedule property with an area of 2.94 acres in plot No. 990 of holding No. 4 situate in mouza Ambasada in the Sub-division of Bargarh is locally known as Mayabagicha. Plaintiffs' case is that in a family partition in 1905, A schedule land was allotted to the share of Rambhabati with a stipulation that after her death it would be equally partitioned amongst her three sons. The family arrangement was embodied in a registered Punch Faisala (Ex. 4) dated 18-9-1905. Rambhabati died before Hamid Settlement of the year 1923-24. After her death, A schedule land was divided amongst the three sons. B Schedule land (the disputed land) in plot 990/3 with an area 0.92 acre fell to the share of Judhisthir. Plot No. 990 with an area 1.10 acres (0 schedule land) and plot No. 990/1 and 990/2 with a total area of 0.92 acre (D schedule land) fell respectively to the shares of Krupasindhu and Mitrabhanu. Despite this division, however, the entire A schedule land was by mistake recorded in the name of Krupasindhu alone in the Hamid Settlement. As the eldest son he was the gountia of the village then. As a result of the wrong

recording, there was dispute amongst the three brothers. On 25-6-1928 an agreement was executed by Krupasindhu in favour of Judhisthir and Mitrabhanu recognising allotments of Band D schedules of land to their shares respectively. In accordance with this, Band D schedule lands were recorded in the Tabdilat papers (Ex. 3) in the year 19-29-30 in favour of Judhisthir and Mitrabhanu. In respect of Mayabagicha, one Dibakar Seth was the lessee of the trees. As he failed to pay the rent due, a suit was filed in M.S. 373/32. All the three brothers got a decree against Dibakar. Ever since the date of partition, Judhisthir and after him his son is paying rent of the land. On 7-11-1956 Defendants trespassed. So the suit was filed on 10-2-1958 for declaration of title, recovery of possession and for mesne profits of Rs. 10/ -

Defendants denied almost all the allegations in the plaint. According to them, the suit land was not allotted to the share of Rambhabati, there was no partition of the A schedule land amongst her three sons after her death, the recording of the entire A schedule land in the name of Krupasindhu was not wrong, there was no agreement in 1928 recognising the shares of Mitrabhanu and Judhisthir in D and B schedule lands, and that the Plaintiffs never paid rent for the disputed land and did not possess the same. They, on the contrary, asserted that in 1939 there was partition suit amongst the three sons of Krupasindhu and the schedule land was partitioned amongst them.

2. The learned Munsif accepted the Plaintiffs' case in toto. He recorded the following findings:

(i) A schedule land was allotted to Rambhabati with a stipulation that after her death it would be divided amongst her three sons as mentioned in Ex. 4.

(ii) There was a partition after the death of Rambhabati amongst the three sons and that A schedule land was recorded in the name of Krupasindhu alone wrongly in the Hamid Settlement Parcha of the year 1923-24.

(iii) After the mistake was known, there was difference amongst the brothers and the matter was settled by an agreement in 1928. This written agreement had been filed in M.S. 373/32 and as it was not taken back, it had been destroyed under the rules.

(iv) Plaintiffs were not parties to the partition suit (T.S. No. 35/39) and as such they are not bound by the decree. The delivery of possession by the Amin in that suit was not to the knowledge of the Plaintiffs.

(v) Plaintiffs were all through paying rent and were in actual physical possession.

3. The learned Subordinate Judge in a thoroughly perfunctory judgment reversed almost all the findings recorded by the learned Munsif. His findings are as follows:

(i) Ex. 4 dated 18-9-1905 is inadmissible in evidence inasmuch as the original of this document had not been produced and that a case for admission of its certified copy as secondary evidence u/s 65 of the Evidence Act had not been

made out.

(ii) The record-of-rights (Ex. D) of the Hamid Settlement of the year 1923-24 in the name of Krupasindhu alone is presumptive evidence of the fact that he was in possession.

(iii) The story that there was an agreement on 25-6-28 and that it had been filed in M.I.S. 373/32 and was destroyed had not been established.

(iv) As the agreement of the year 1928 has not been proved, the Tabdilat papers (Ex. 3) recording possession of the three brothers as per schedules B, C and D, are not admissible in evidence.

(v) The fact that Plaintiffs claimed to have got title to B schedule land by a lease in 1928 amounts to acknowledgment of title of Krupasindhu in the disputed land.

(vi) M.S. 373/32 was not in respect of Mayabagicha.

(vii) The fact that A schedule land was partitioned

amongst the three sons of Krupasindhu in 1939 and delivery of possession was given in accordance with the partition established that Plaintiffs had no title to the disputed land.

(viii) Plaintiffs failed to prove title and possession. It is to be noted that the oral evidence of actual possession discussed by the learned Munsif was not touched by the learned Subordinate Judge.

4. The judgment of the lower appellate Court is highly unsatisfactory and contrary to law on each of the points as would appear from the discussion hereunder.

5. Ex. 4 is the certified copy of the registered Punch Faisala (Award by Punches) recording partition of the family properties of Madhusudan Gountia and his sons. It was during the life time of Madhusudan and his wife Rambhabati, Madhusudan and his three sons are signatories to this document. Paragraph 8 of this document recites that Mayabagicha would be in the enjoyment of the mother till her death and after her death the three brothers would divide it in three equal shares. If this document is admissible, it fully supports Plaintiffs version and gives a complete lie to the defence story. Ex. 4 was filed on 4-7-1958 by the Plaintiffs. It was marked as an exhibit on 16-1-62 without objection. Objection to its admissibility was taken for the first time before the lower appellate Court. Under Order 13, Rule 4, C.P.C. there shall be endorsed on every document which has been admitted in evidence in the suit certain particulars enumerated in the rule including a statement of the document having been so admitted and the endorsement shall be signed or initialled by the Judge. Thus relating to documents filed in Court, there are two stages. Firstly, the document must be filed by the parties in Court and next the document has to be formally proved and tendered in evidence. At the second stage, the Court has to decide whether it is to be admitted or rejected. If the document is admitted, then alone the

endorsement prescribed in Order 13 Rule 4 is to be made.

It is now well settled that the endorsement means that the document is admitted in evidence as proved. Where objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted upon at the trial see AIR 1943 83 (Privy Council)

Thus in this case Ex. 4 could not have been admitted in evidence without the Plaintiffs making out a case for admission of secondary evidence as laid down in Section 65 of the Evidence Act. By the attitude of the Defendants in conceding that the document would be marked as an exhibit, Plaintiffs did not find it necessary to prove the conditions for admission of secondary evidence. It is not the case of the Defendants that the recitals in Ex. 4 are per se inadmissible. Suppose, for instance, the recitals in Ex. 4 were hearsay of the category which is not admissible. Those would have been inadmissible in evidence and objection to such inadmissibility can be raised at any stage but no objection as to the mode of proof can be put forward. The learned Subordinate Judge acted contrary to law in rejecting Ex. 4 as inadmissible in evidence.

6. Tabdil papers (Ex. 3) of the year 1929-30 show that Judhisthir was recorded in respect of plot 990/3 with an area of 0.92 acre. Similarly Mitrabhanu was recorded in respect of D schedule and Krupasindhu in respect of C schedule lands. These are public documents maintained under the Revenue Rules. They are also admissible u/s 35 of the Evidence Act. "Tabdil" means to mutate, to substitute or to alter. The entry in Tabdil papers showing separate mutations in favour of different branches as per various schedules given in the plaint fully supports the Plaintiffs' version. The learned Subordinate Judge held this document as inadmissible for the simple reason that the document of agreement dated 25-6-1928, referred to in the remarks column of Ex. 3, has not been produced. His argument is that the agreement not having been produced, the Tabdil papers, based on such document, are inadmissible. This view is contrary to law. Apart from the fact that reference to such document in the remarks column fully established that there was such a document, the Tabdil papers are admissible in evidence to show that mutation was made in the names of different branches in accordance with their shares in A schedule property. Even if the document could not be produced, the public document cannot lose its value.

7. It is to be noted that Defendant-1 (p.w.1) is the only Defendant examined in the case. His age was 39 at the time of his deposition. Though Defendants 4 and 5 are 12 to 13 years older than him, they have not been examined. Defendant No. 1 was born near about 1923. On each of the important points in the case he stated that he had no knowledge. His evidence does not throw any light as to

whether there was any agreement in 1928. Plaintiff-2 (p.w.1), the son of Judhisthir, was 55 years at the time of deposition. He gave a vivid picture of the agreement of the year 1928. The decree in M.S. 373/32 (Ex. 5) shows that Krupasindhu, Mitrabhanu and Judhisthir filed the suit against one Dibakar Seth for recovery of Thicca rent in respect of certain trees for three years. Plaintiffs' version is that this suit was in respect of Mayabagicha which had been leased out to Debakar Seth. According to them, the deed of agreement of the year 1928 had been filed in this suit; as it was not taken return of, it was destroyed under the rules for destruction of records. Ex. 6 is the certified copy of the entry in the suit register showing that the records of M.S. 373/32 have been destroyed. D.W.2, the son of Dibakar, stated that a suit was filed by Krupasindhu 1967 and that there was no, other Dibakar Seth in the village. D.w.2 has no clear idea as to in respect of what rent and which land the suit had been filed. The evidence of p.w.1 is categorical that it was in respect of the lease money of Mayabagicha. The learned Munsif discussed all the evidence and came to the conclusion that there was an agreement in 1928 whereby Krupasindhu recognised the claims of Judhisthir and Mitrabhanu in Band D schedule lands. The learned Subordinate Judge did not refer to these materials and exercised his jurisdiction with material irregularity in overlooking relevant pieces of evidence in this regard and in holding that the existence of the agreement was not proved. On the aforesaid discussion I am satisfied that there was an agreement which has been destroyed as alleged by the Plaintiffs in 1928 and M.S. 373/32 was for recovery of rent of the trees in Mayabagicha. The suit was filed by the three brothers which is evidence of the fact all of them had right, title and interest in A schedule land.

8. The learned Munsif discussed the oral evidence of p. ws. 1, 2 and 3 regarding possession. He considered p.w.2 as an independent witness. P.w.3 was a lessee of Mayabagicha for 20 to 25 years. P.w.2 has land contiguous to Mayabagicha. On the evidence of p. ws. 2 and 3 he held that the Plaintiffs were in possession of the suit land all through. He discarded the evidence of d.w.2, the only witness for possession for Defendants, as unreliable. The learned Subordinate Judge did not discuss at all the oral evidence regarding actual possession, This by itself is sufficient to set aside the finding of the learned Subordinate Judge that the Defendants were in possession. The learned Munsif's finding that the Plaintiffs were all through in possession until dispossessed in] 956 stands unassailed.

9. The finding that in 1928 there was an agreement amongst the three brothers recognising division of the property in accordance with B, C and D schedules, the mutation of the names of the three brothers in Ex. 3, the suit jointly filed by the three brothers for recovery of rent of the trees in Mayabagicha from Dibakar Seth and that the plan tiffs were all through paying rent to Krupasindhu and, after him, to-the other Defendants and were in actual physical possession clearly establishes Plaintiffs' independent title and acquisition of title by adverse possession and possession within 12 years of the suit. Thus the evidence establishes that the entry in the Hamid settlement was mistaken. The presumption arising under the entry has been sufficiently rebutted.

10. The only other question for consideration is the effect of the partition decree in 1939 amongst the sons of Krupasindhu were in A schedule land was partitioned amongst them. To this partition suit, Plaintiffs were not parties. There is no proof that when the delivery of possession was effected in accordance with the final decree, Plaintiffs had knowledge. So far as Plaintiffs are concerned, the document relating to the partition decree must be construed as paper transaction. When the Plaintiffs are found to be in possession, they cannot be posted with notice of events taking place behind their back. Even in this matter, the learned Subordinate Judge failed to take into consideration the criticisms levelled by the learned Munsif.

11. u/s 100, CPC the finding of fact of the learned lower appellate Court is binding in second appeal except in certain circumstances. In this case, the learned: Subordinate Judge failed to take into consideration important pieces of evidence which produced an error in the decision of the case upon merits. Moreover he also acted contrary to law in rejecting Exs. 3 and 4 as inadmissible in evidence. His judgment cannot therefore be supported and must be set aside.

12. In the result, the judgment and decree of the learned lower appellate Court are set aside and the Plaintiffs' suit is decreed. The second appeal is allowed with costs throughout.