
(1970) 10 OHC CK 0008
In the Orissa High Court
Case No : Second Appeal No. 364 of 1966

Gurubari Lenka and Another

APPELLANT

Vs

Dulani Thakurani and Others

RESPONDENT

Date of Decision : 21-10-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 3, 100
Transfer of Property Act, 1882 — Section 54

Citation : (1970) 10 OHC CK 0008

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : D. Mohanty and P. Mohanty, for the Appellant; L.K. Dasgupta, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Defendants 1 and 2 are in appeal against a reversing decision of the learned Subordinate Judge of Cut-tack in a suit for title, possession and recovery of damages.

2. The plaintiffs claimed that defendants 1 and 2 were the owners of the disputed property and sold the same to plaintiff No. 1--a deity represented by Its marfatdars plaintiffs 3 to 6, 10 and some others--under a registered sale deed dated 19-8-49 for a consideration of Rs. 100/-. It was settled that the consideration for the sale would be paid at the time of endorsement of the registration ticket. Title passed under the sale deed and the vendee, that is, the deity represented by the marfatdars became the owner of the property. Defendants 1 and 2 gave up possession of the disputed property and the deity came to possess the same. The sale deed was lying with defendants 1 and 2 and they refused to part with it during the current settlement operations and even went to the extent of denying the sale. In 1950 defendants 1 and 2 took away the crop raised by the plaintiff.

3. Defendants 1 to 3 in their joint written statement contended that defendants 1

and 2 were the owners in possession of the disputed property and they have been continuing in such possession qua owners. The execution of the sale deed and the plaintiff's claim of parting with possession were denied. It was further contended that defendant No. 3 was never in custody of the sale deed and there was no occasion for him to refuse to part with it. Defendants 4, 6, 9 and 10 filed another joint written statement supporting the claim of defendants 1 to 3.

4. During the trial, plaintiffs 3, 6, 12, 14, 18 and 21 and defendants 4 to 6 and 10 compromised their litigation with defendants 1 to 3. Defendants 7 and 8 went ex parte. The trial court came to hold that consideration under the sale deed (Ext. B) did not pass; the plaintiffs had never been put in possession of the disputed property; in the absence of passing of consideration title was not intended to pass. On these findings it dismissed the suit.

5. The plaintiffs thereupon appealed and the learned Appellate Judge came to differ with the conclusions of the trial court and ultimately decreed the suit. This reversing appellate decision is impugned in the present Second Appeal.

6. Three contentions are mainly advanced by Mr. D. Mohanty, the learned counsel for the defendants 1 and 2--appellants. According to him, the entire suit must be taken to have abated as plaintiffs 20 and 21 died during the pendency of the suit and there was no substitution. In this Court an application supported by affidavit was filed taking this ground of abatement. By order No. 5 dated 11-2-67 this question was directed to be taken up at the hearing and objection, if any, by the respondents was called upon to be filed. No objection has at all been filed. The suit was filed on 30-1-60. Plaintiff No. 20 died on 25-2-60 and plaintiff No. 21 died on 24-10-60. Admittedly there has been no substitution. Mr. Mohanty, therefore, contends that the suit must be taken to have abated. In support of this contention of his he relies upon two decisions of this Court in ILR 1962 Cut 17 (Kanhu Padhan v. Bhutulu Padhan) and AIR 1967 Ori 6 (Nilamani v. Radhamohan). It is further stated by Mr. Mohanty that in view of the "fact that the plaintiffs came forward with a common case if the suit abates as against plaintiffs 20 and 21, the entire suit must be taken to have abated. There is no challenge to the allegation about the death of plaintiffs 20 and 21. Mr. Das-gupta appearing for the respondents, however, states that while he accepts the fact of death it has no bearing on the maintainability of the Second Appeal. The two other contentions relate to the merit of the matter. Mr. Mohanty contends that in view of the finding that there was no consideration under Ext. B it must be taken that the sale deed failed for want of consideration and no title can be taken to have passed under it. There was previously a compromise on 15-8-49 (Ext. C-4). Four days after the compromise the sale deed (Ext. B) came into existence on 19-8-49. In the background of Ext. C-4 the respective contentions in relation to Ext. B have to be appreciated. According to Mr. Mohanty the finding regarding consideration and the real intention of the parties as found by the trial court having not been disturbed in the appellate court the judgment of reversal is contrary to law. The third contention of Mr. Mohanty is in regard to the

misleading finding on the question of possession as indicated in Para 9 of the judgment of the lower appellate court.

7. Let me now proceed to consider the three contentions of Mr. Mohanty one after the other. There is no dispute that the suit at its inception had been duly constituted. The property is claimed to belong to the deity and its marfat-dars represented the deity. In view of want of objection to the allegation of death raised by defendants 1 and 2, it must be concluded that plaintiffs 20 and 21 died during the pendency of the suit leaving behind legal representatives and there has been no substitution. The question, however, is to find out the effect of non-substitution in place of plaintiffs 20 and 21. Admittedly the deity is the real plaintiff and the others are its marfatdars. Mr. Mohanty relied upon a Single Judge decision of this Court in Nilamani Dhal Vs. Radhamohan Jiw Thakur and Others, wherein R.K. Das, J. took the view that there was abatement of the title appeal for want of substitution. The matter here is substantially different. In that case there was a decree of the trial court which was varied by the lower appellate court in spite of abatement. Inconsistency of decrees was the basis of test. Here admittedly there has been no decree. The abatement is In the trial court itself.

8. The question as to whether a properly constituted suit at its inception can be taken to have abated as a whole on account of non-substitution in place of one of the joint marfatdars came up for examination before a Division Bench of this Court recently. My learned Brother Ray, J. and I had occasion to examine this matter in Second Appeal No. 476 of 1963 (Orissa). In that case the suit had been properly constituted, but subsequently there had been death of some of the marfatdars of the deity and there was no substitution. Examining the question of abatement at a considerable length we held,

"The legal position that emerges out of the discussion can now be stated thus, A deity is entitled to sue and be sued in law. Normally the deity has to be represented by the entire body of shebait, but a suit by some of the shebait, if it is in the interests of the deity, can be maintained in certain special circumstances. If the suit at its inception had been properly constituted by the deity being represented by all the shebait, there can be no abatement particularly because the consent of all shebait to the institution of the suit can be presumed from the fact that they had all come to represent the deity when the suit was filed. It is open to the plaintiff, if dispute is raised about maintainability of the suit on the ground that all shebait had not been impleaded to represent the deity, to prove that the suit as filed was with the consent or approval of all and if the court is satisfied that the claim made in the suit is with the consent of all, the suit must be held to be perfectly in order. As to whether the deity represented by some of its shebait is adequately represented or as to whether the suit proceeds with the consent and approval of the entire body of shebait is in the final analysis a mere question of procedure and expediency and is meant more to protect the interest of the shebait than of the deity itself. Therefore, if the court is satisfied keeping in view the facts of the

particular case before it that the deity is adequately represented and on account of non-impletion of some of the co-shebaits the deity is not affected, the suit cannot be thrown out. Whenever such a dispute is raised, it is convenient to follow the rule indicated in *Probir Chandra Pal and Others Vs. Panchanan Choudhury*, than to enter into an unnecessary battle to decide as to who should be the proper representatives of the deity. After all, the court would be more interested in protecting the interest of the deity than in determining collaterally as to who should represent the deity."

In the ultimate analysis we held that there was no abatement. I think, to the facts of the present case the aforesaid dictum would fully apply. The result is that the preliminary point regarding abatement has no substance. The suit was in order and is not affected by non-substitution of the legal representatives of the two plaintiffs in the trial court.

9. Let me consider the question of passing of title under Ext. B. Ext. B is the sale deed dated 19-9-49. As far as material, the relevant term when translated into English would read as follows:

"We are the owners in possession of the property scheduled below. We are in need of money for purchase of lands and, therefore, out of our own accord and not being persuaded by any other person and having agreed to receive the consideration money at the time of endorsement of the ticket we sell the disputed property according to the local market value to you and make you the owner thereof. We give up possession."

It is settled law and the learned counsel for the parties do not dispute before me that if the term in the sale deed is not ambiguous any external aid is not available to find out the true intention of the parties and the narration in the document would be the sole guiding feature.

Mr. Mohanty contends that this sentence which is translated above contains an involved position and the true intention is not very clearly apparent. In such circumstances he contends that the oral evidence can be looked into and taken notice of in order to come to a conclusion about the exact position. Having stated thus he relies upon an admission by P. W. 2 who is no other than the second plaintiff himself that the parties had intended that title would not pass without payment of the consideration money. For the aforesaid proposition Mr. Mohanty relies upon a decision of this Court in *Ramchandra Biharilal Firm Vs. Mathuramohan Naik and Others*, ,

Mr. Dasgupta, however, contends that the term is very clear and unambiguous. Parties have really indicated their agreement on this aspect of the matter, namely, that there would be sale and passing of title in praesenti and the consideration would be paid only at the time of endorsement of the registration ticket. Normally, under the law title passes upon execution and registration of the sale deed. It is also contemplated in law that there can be a valid sale for a deferred consideration. Thus, in a given case where the parties agreed that the

payment of the consideration money would be deferred and yet title would pass, there is nothing wrong in law and in such a circumstance title must be taken to have passed even without passing of consideration. Mr. Dasgupta emphasised on the fact that it was clearly stipulated in the sale deed itself that title in praesenti was being passed on to the plaintiffs in spite of the fact that payment of consideration was being deferred until the time of the endorsement of the registration ticket.

10. Having examined the document at some length I am of the view that there is no scope for any ambiguity. As the term is clear, the intention is to be gathered only from the term of the document. In such circumstances external aid is not available for finding out the intention. Mr. Dasgupta's contention has substantial force. The parties had stipulated that there would be passing of title even upon deferred payment of the consideration money. The admission of P.W. 2 is not available to be utilised in such background. The contention of Mr. Mohanty on this scope has, therefore, to be negatived.

11. The next attack is on the ground of improper treatment on the question of possession by the lower appellate court. The learned Appellate Judge has referred to the evidence and has come to a conclusion in favour of the plaintiffs on the question of possession. On reappraisal of the evidence it is quite possible that there may be a different view available to be adopted. In Second Appeal, such an attempt need not be done. I would, therefore, decline to interfere with the finding regarding possession.

12. The plaintiffs, however, cannot be allowed to take advantage of the position without complying with what they were called upon to do in terms of the agreement. I would, therefore, call upon the plaintiffs to give the consideration money under Ext. B within a month hence and upon their failure to make the payment the appellants would be free to execute the decree to be passed in the Second Appeal for realisation of the consideration money along with costs of the execution. The Second Appeal accordingly fails and is dismissed. The judgment of the lower appellate court is upheld subject to the modification that the plaintiffs are called upon to pay the consideration money under Ext. B to defendants 1 and 2 within a month hence. Both parties do bear their own costs of this appeal. The decree for costs passed in the lower appellate court is sustained.