
(1993) 07 OHC CK 0029
In the Orissa High Court
Case No : Second Appeal No. 128 of 1983

Hari Behera and Another

APPELLANT

Vs

Bhagirathi Behara

RESPONDENT

Date of Decision : 28-07-1993

Acts Referred:

Limitation Act, 1963 — Article 56

Citation : (1993) 2 OLR 299

Hon'ble Judges : G.B. Pattnaik, J

Bench : Single Bench

Advocate : S.P. Misra, for the Appellant; B. Samal, for the Respondent

Final Decision : Allowed

Judgement

G.B. Pattnaik, J.—Plaintiffs are the appellants against a confirming judgment in a suit for declaration that defendant is not their adopted son and no right, title or interest accrue in favour of the defendant on the basis of the deed, Ext. A/2 alleged to have been executed by the plaintiffs acknowledging the adoption and gifting the property in favour of the alleged adopted son.

2. Plaintiff's case in brief is, that the defendant is the son of plaintiff No. 1's brother and the plaintiffs were illiterate rustic people only knowing how to put their signatures. As they could not look after their landed property and the settlement operation was on in the area, plaintiff No. 1 wanted to execute a power of attorney in favour of the defendant so that defendant can look after the property in the settlement operation. Plaintiff No. 1 went to the Sub-Registrar's office to execute the power of attorney but the defendant instead of a power of attorney got the deed, Ext. A/2 executed and in the said deed not only an acknowledgement of adoption in favour of the defendant has been made but gift of the property has been made in favour of the said defendant. When the plaintiffs came to know of the aforesaid fraud practised by the defendant they called upon the defendant to cancel the same and the defendant agreed to cancel and executed a fresh deed of relinquishment in respect of the property in

question. But on some pretext or other as he did not do so the plaintiffs ultimately considered to file the suit.

3. The defendant in the written statement denied the allegations made in the plaint and took the stand that the suit is barred by limitation. According to him the deed of acknowledgement of adoption-cum-gift, Ext. A/2 executed by plaintiff No. 1 is genuine and valid and he has been staying with the plaintiffs as their adopted son and has been taken in adoption since the childhood.

4. On these pleadings the learned trial Judge framed as many as 8 issues and on issue No. 6 came to hold that the plaintiffs have absolutely failed to establish that the defendant has fraudulently snatched away the deed of adoption-cum-gift from him on 18-6-1975 and thus Ext. A/2 is not obtained by way of fraud and the deed is a genuine one. On issue Nos. 1, 2 and 3, the learned trial Court held that the suit having been filed more than three years and three months after the plaintiffs came to know of the forgery of execution of the deed, Ext. A/2, Section 66 of the Limitation Act applies and the suit is barred by limitation. On issue No. 8, the learned trial Judge held that the adoption deed executed on 10-6-1975 is not a fraudulent one and is genuine. With these findings the suit having been dismissed, the plaintiffs carried the matter in appeal. The lower appellate Court on a re-appreciation of the evidence on record reversed the finding on the question of adoption and came to hold that there was no valid adoption of the defendant by plaintiff No. 1, but having held so, without discussing the question of limitation, he held that in view of the point of limitation, the suit fails and accordingly dismissed the appeal and hence the present second appeal.

5. Mr. Misra appearing for the plaintiffs appellants raises the sole contention that the conclusion of the Courts below that the suit is barred by limitation is wholly unsustainable as the suit is not an essential one for declaring the forgery alleged to have been committed by Executing Ext. A/2. But on the other hand, the suit is substantially for the relief for a declaration that the defendant is not the adopted son of plaintiff No. 1 and does not derive any title on the basis of Ext. A/2. According to Mr. Misra when the substantial relief sought for in the plaint is one for declaration that the defendant is not the adopted son of the plaintiff and does not derive any title by virtue of Ext. A/2, though incidentally the fraud committed by the defendant is alleged as a ground for invalidity of the deed, the suit is not covered by Art. 66 of the Limitation Act.

6. On going through the averments made in the plaint and the relief sought for, I entirely agree with the submissions made by Mr. Misra for the appellants. The relief to declare that Ext. A/2 was fraudulently obtained is subservient and ancillary to the main relief of declaration that defendant is not the adopted son and does not derive any title on the basis of Ext. A/2 and, therefore, such a suit is not governed by Art. 56 of the Limitation Act. In that view of the matter, the conclusion of both the Courts below that the suit is barred by limitation cannot be sustained and must accordingly be set aside. In view of the finding of the lower appellate Court that defendant is not the adopted son of the plaintiff which

is not being assailed before me and in view of my conclusion that the suit is not barred by limitation, the suit is bound to be decreed. Accordingly the judgment and decree of both the Courts are set aside and the plaintiffs suit is decreed.

7. The second appeal is thus allowed, but there would be no order as to costs.