

(1977) 11 OHC CK 0013
In the Orissa High Court
Case No : Second Appeal No. 274 of 1974

Khirod Chandra Mohanty

APPELLANT

Vs

Banshidhar Khatua and Others

RESPONDENT

Date of Decision : 15-11-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1, Order 2 Rule 3, 100, 11
Evidence Act, 1872 — Section 44

Citation : AIR 1978 Ori 111 : (1978) 45 CLT 174

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : B.H. Mohanty, S.K. Mohanty, P.K. Sahoo and P.K. Patnaik, for the Appellant; N. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

S. Acharya, J.—Defendant No. 1 in Title Suit No. 264/14 of 1967/72 has preferred this appeal against the decision of the Court below in title Appeal No. 36/73 confirming that of the trial court.

2. The plaintiff's case, in short, is that in the family partition between Gouranga and his two brothers, the suit lands described in schedules A and B of the plaint fell to the share of Gouranga. Gouranga died the 25-9-66 leaving behind him his widow Dalimba, who was defendant No. 2 in the suit. Gouranga had alienated 29 decimals of land, described in Schedule A of the plaint, in favour of plaintiffs 1 and 2 by two registered sale deeds dated 11-8-62 and 22-7-63, He also had sold the rest Act 4.11 decimals of land as per the registered sale deed dated 31-7-63 in favour of Latika, defendant No. 3, the wife of defendant No. 4. Defendant No. 3 thereafter alienated Ac. 3,50 decimals 6 Biswas of land, described in Schedule B of the plaint, in favour of plaintiffs 3 to 10 by different registered sale deeds and these plaintiffs accordingly acquired valid title to the said properties. Defendant No. 1 (appellant herein) was not the adopted son of Gouranga and he had absolutely no right, title or interest in the suit properties. Defendant No. 1

instituted Title Suit No. 52-64 on the false averments that he was the adopted son of Gouranga and that he was not bound by the aforesaid sales. In that suit an ex parte decree was obtained by defendant No. 1 by fraud and collusion, and so the same is not binding on the plaintiffs in this suit and the decision in the said suit does not operate as res judicata for the present suit, and also does not affect the right, fide and interest of the plaintiffs in the suit properties in any manner.

3, Defendant No. 1, the only contesting defendant, asserts that he was adopted as the son of Gouranga on 5-6-60, the sale of 29 decimals of the A schedule land in favour of plaintiffs 1 and 2 was challenged in the written statement, but he expressly relinquished his claim to that effect by his petition. dated 7-8-72. The aforesaid sales in favour of defendant No. 3 by Gouranga and by defendant No. 3 in favour of plaintiffs 3 to 10 are challenged as invalid and inoperative. After Gouranga's death this defendant instituted T.S. No. 52/64 which was decreed ex parte against the defendants and Gouranga and some others. In that suit it was declared that defendant No. 1 was the adopted son of Gouranga; he (defendant No. 1) was not bound by the sale deeds executed by Gouranga; and the plaintiffs and defendant No. 3 being lis pendens transferees of the suit property they had not acquired any title over the same. It is stated that the decree in T. S. No. 52/64 was not obtained by fraud and collusion between the parties in the said suit and that decree is binding against the plaintiffs, the lis pendens transferees of defendant No. 3 and the same operates as res judicata against this present suit.

4. The other defendants did not contest the suit.

5. As stated earlier, the sales effected by Gouranga by registered sale deeds dated 11-8-62 and 22-7-63 in favour of plaintiffs 1 and 2 were not challenged at the hearing of the suit, and accordingly the decision of the courts below on this aspect of the matter has become final and is not challenged in this appeal.

6. The suit has been decreed by both the courts below on the findings that the decree passed in T.S. No. 52/64 is collusive; (2) it does not operate as res judicata for this case; and (3) that defendant No. 1 is not the adopted son of Gouranga, Hence this second appeal by defendant No. 1.

7. Mr. Mohanty, the learned counsel for the appellant, made a vain effort to challenge the above-mentioned concurrent findings of fact numbered (1) and (3) in the preceding paragraph.

In T. S. No. 52/64 Gouranga was defendant, and in his written statement he had taken the stand that defendant No. 1 was not his adopted son and he was not a member of that family, It has been admitted by defendant No. 1 that after the institution of the said suit defendant No. 1 lived with Gouranga and he was giving money to Gouranga whenever he needed the same. P. Ws. 9 and 10 have deposed that defendant No. 1 persuaded Dalimba, the wife of Gouranga, Latika and Jagabandhu, respectively defendants 2, 3 and 4 in that suit, not to contest

the said suit as that would enable him to get back the properties sold by Gouranga and Latika, and thereafter he (D. 1 in the present suit and plaintiff in T. S. 52/64) would give some properties to these defendants in T.S. No. 52/64. Their statements to the above effect get support from the admission of defendant No. 1 that after the institution of the suit he stayed with Gouranga and paid him money whenever he needed the same. That fact goes to show that the plaintiff in that case made attempts and efforts to win over Gouranga by obliging him by payment of money. It is further seen that though Gouranga contested the claim of the plaintiff in that suit, in his written statement neither he nor any of the other defendants contested the suit nor took any steps for setting aside the ex parte decree passed in that suit. The above facts induce one to accept as true the above-mentioned statements of P. Ws. 9 and 10, and all these facts go to show that the ex parte decree in T. S. No. 52/64 was collusive. Both the Courts below on a consideration of several features based on the evidence on record have arrived at the concurrent finding of fact that the ex parte decree in T. S. No. 52/64 was obtained by collusion of the parties in that suit, and Mr. Mohanty has not been able to show any satisfactory ground on which the said concurrent finding of fact can be negated in this second appeal.

8. It was urged by Mr. Mohanty that even though it was held that the ex parte decree in T.S. No. 52/64 was obtained by collusion, that decree would operate as *res judicata* in this case. In support of his above submission Mr. Mohanty cited the single Judge decision reported in *Baboo and Others Vs. Mt. Kirpa Dai and Another*, . The decision in that case was rendered entirely on facts different from those in the present case. In that case the question was whether "even if one of the defendants to the suit was in collusion with the plaintiff, the decision could be said to be binding on the defendants on the principle of *res judicata*." That question was decided in the affirmative. In the present case before me, it has been found by both the courts below that the ex parte decree in T. S. No. 52/64 was obtained by the plaintiff in collusion with all the defendants in the said suit. That being so, the above decision is not applicable to the present case.

Under Section 44 of the Evidence Act any party to a suit or other proceeding may show that any judgment, order or decree, which it or was obtained by fraud or collusion. The provision of Section 44 is not an idle provision. If it is proved that a judgment was obtained by collusion that fact will affect its force, effect, executability and value. So it will be absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as *res judicata* in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains.

In *Manchharam v. Kalidas* ILR (1895) 19 Bom 821 it was held that u/s 44, Evidence Act, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

In *Nistarini Dassi v. Nundo Lall Bose* ILR(1899) Cal 891 it was held that an

innocent party may be allowed to prove in one court that a decree obtained against him in a different proceeding in another court of concurrent jurisdiction was obtained by fraud, and if the court be of opinion that such decree so obtained in the other court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.

In Section 44 of the Evidence Act the word "Collusion" has been placed exactly on the same footing as the word "fraud" in the said section.

In the case reported in Bishunath Tewari and Others Vs. Mst. Mirchi, it has been observed:--

"Thus, a survey of the authorities of the different High Courts, shows that a judgment, decree or order of a court of competent jurisdiction can be treated as a nullity u/s 44, Evidence Act and its effect rendered nugatory if it is shown that it was obtained by fraud or collusion of the antagonist".

On the above discussion I reject the above-mentioned contention of Mr. Mohanty.

9. Mr. Mohanty in vain challenged the finding of the courts below that defendant No. 1 is not the adopted son of Gouranga. In Ext 15 (a), the relevant entry in respect of defendant No. 1's service book in the Board of Revenue, he is shown as the son of Bhikari Charan Das, his natural father. That entry shows that defendant No. 1 was appointed in service on 24-8-60, i.e. only after 2 1/2 months of the alleged adoption. If the fact of adoption was correct, then in that entry defendant No. 1 would not have been shown as the son of Bhikari Charan Das. That entry was certainly made on the declaration made by defendant No. 1 while he was appointed in Government service. That entry is a very strong piece of evidence to discard the case of adoption put forward by defendant No. 1. The defendant has not produced any documentary evidence to nullify the effect of Ext. 15 (a). Though this defendant stated that he has been described as the son of his adoptive father in the voters' list and in certain sale deeds and applications before the Sarpanch, he did not produce any of these documents. The oral evidence of D. Ws. 1, 2 and 4 regarding adoption has been rightly disbelieved by both the courts below. D- W. 1 admitted that she did not go to the temple where the alleged adoption ceremony took place. It was stated that quite a number of persons of the neighbouring villages were present at the time of the adoption, but none of those persons was examined in this case. The finding of adoption, which is a finding of fact, is based on proper consideration of the relevant evidence on record, and Mr. Mohanty has not been able to show any convincing reason to unsettle the said finding of fact in this second appeal. Hence the said, finding is confirmed.

10. Mr. Mohanty faintly submitted that this suit is not maintainable as it was instituted by a number of plaintiffs who purchased specific lands under separate sale deeds, and they claim distinct interests in respect of separate portions of the suit property. In this connection Mr. Mohanty states that as all the plaintiffs cannot be said to be jointly interested in the subject matter or the cause of

action of the suit, and the right to sue does not accrue out of a single transaction the suit has to be dismissed as not maintainable. There is absolutely no merit in this submission. The plaint case of purchase of the A schedule lands by plaintiffs 1 and 2 is not contested. Plaintiffs 3 to 10 purchased different portions of the suit B schedule property by different sale deeds, but all of them in this suit are interested in a declaration that the ex parte decree in T. S. No.52/64 was obtained by collusion, that defendant No. 1 is not the adopted son of Gouranga, and that he has no right, title or interest in Gouranga's property. All these plaintiffs have purchased the property from defendant No. 3 and are jointly interested in setting aside the decree in T. S. No. 52/64. Only common questions of law and facts arise for consideration in this suit. These plaintiffs have similar causes of action and they are jointly interested to get one decree against one and the same defendant. They therefore could rightly and legally unite their causes of action in the same suit, and the same is maintainable under the provisions of Order 1, Rule 1 and Order 2, Rule 3, C.P.C. Order 1, Rule 1. C.P.C. provides that--"All persons may be joined in one suit as plaintiffs where-

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist in such persons, whether jointly, severally or in the alternative; and

(b) if such persons brought separate suits, any common question of law or fact would arise."

Order 2, Rule 3, C.P.C. inter alia provides that any of the plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit. The institution of this suit by the plaintiffs clearly comes within the aforesaid provisions, and the above contention raised by Mr. Mohanty is entirely frivolous.

11. On the above discussions, considerations and conclusions I hold that this appeal is absolutely without any merit and is dismissed with costs.