
(1998) 08 OHC CK 0053
In the Orissa High Court
Case No : Second Appeal No. 239 of 1993

Kirtan Behari Acharya

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-08-1998

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : (1998) 2 OLR 295

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

Bench : Single Bench

Advocate : Party in Person, for the Appellant; B. Das, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—Plaintiff is the appellant against a reversing decision in a suit for declaration of title and confirmation of possession over the plaint "A" schedule property and for a direction to correct the Tenant's Ledger in favour of the plaintiff.

2. Briefly stated, the plaintiff's case is as follows.

One Mandar Dehury had sold Ac. 0.08 decimals of land in Khata No. 28 in mouza Dhananjayapur including the disputed land by registered sale deed dated 27.10.1941 to the plaintiff and delivered possession. The plaintiff continued to remain in possession of the disputed "A" schedule property. Subsequently, the plaintiff discovered that the disputed land had been recorded in the name of Kapileswar Mahadev, and the ex-proprietor of Sukinda had submitted the Tenancy Ledger in the name of the aforesaid deity. The plaintiff enquired from the Raja of Sukinda who was the ex-proprietor and the latter had executed a registered Nadabi Patra on 23.5.1978 in respect of "A" schedule property in favour of the plaintiff. The plaintiff produced the registered sale deed dated 27.10.1941 and the Nadabi Patra before the defendants for correction of the

Tenancy Ledger, but to no avail.

3. Defendants 1 and 2 took the plea that the suit was bad for non-joinder of parties as the deity, Kapileswar Mahadev had not been impleaded. Apart from taking other technical pleas such as bar of limitation, improper valuation and lack of proper notice, the defendants denied the allegations made in the original plaint. In paragraph - 8 of the written statement while describing the real facts of the case, it was pleaded that Holding No. 28 with an area of Ac. 4.08 decimals had been recorded in the current settlement Record-of-Rights in the names of Mandar Dehury and Chakra Dehury as tenants and the ex-Raja of Sukinda was the proprietor and was also the Marfatdar of the deity Kapileswar Mahadev. The suit lands were dedicated to the deity Kapileswar Mahadev and out of the undisputed land Ac. 1.39 decimals had been carved out in the name of Hadi Munda and Ac. 0.67 decimals had been kept under Holding No. 28 in the name of one Rusi Nayak and rent was being realised accordingly. It was alleged that the disputed land belongs to the deity and before vesting of the estate of Sukinda, the Raja who was the marfatdar of the deity, used to cultivate the disputed land through Sanja tenants and the usufructs were being used for sevapuja of the deity. It was further claimed that after vesting, the Government is discharging the functions of the Marfatdar since 1952 and the deity is in possession of the disputed land through its Sanja tenant, Mina Munda and defendants 1 and 2 being in charge of management of the deity have been realising Sanja dues from Mina Kunda and spending the same for sevapuja of the deity and the plaintiff was never in possession of the disputed land. It was further stated that the Raja of Sukinda had no interest in the property of the deity, after vesting of the property in 1952 and had no right to execute any Nadabi Patra and the sale deed and the Nadabi Patra were nominal, invalid and did not confer any title.

4. After the aforesaid written statement was filed, the plaintiff sought for an amendment of the plaint. The suit was instituted initially against defendants 1 and 2, but subsequently on the basis of amendment, the deity, Kapileswar Mahadev, represented by defendants 1 and 2 was impleaded as defendant No. 3, and the sister of the plaintiff was impleaded as defendant No. 4. It was asserted that the newly added defendant No. 4, who was the sister of the plaintiff and a widow from childhood, had no right over the purchased land of Ac.4.08 decimals, as the land had been purchased by the plaintiff from his own money. It was further asserted that out of Ac.4.08 decimals, the plaintiff had sold Ac. 1.39 decimals to one Hadi Munda and Ac.0.67 decimals to one Rusi Naik, who had mutated their names in respect of the properties purchased by them and the plaintiff continued to be the owner in possession of the balance Ac.2.02 decimals of land described in "A" schedule property.

After the plaintiff was permitted to amend the plaint, defendants 1 and 2 filed additional written statement wherein it was pleaded that defendants 1 and 2 having not been served with notice u/s 80, Code of Civil Procedure, in the capacity of the marfatdar of the deity, the newly added defendant No. 3, the suit

was not maintainable for want of notice. The assertions of the plaintiff relating to nominal purchase so far as his sister Dukhi (newly added defendant No. 4) was concerned and regarding the sale of land to Hadi Munda and Rusi Naik were not admitted.

The newly added defendant No. 4 filed a written statement admitting that the plaintiff had purchased Ac. 4.08 dec. of land from one Narendra Dehuri and further admitting that she had no title or possession over the purchased land of Ac.0.08 dec. including the disputed land though her was shown as the co-purchaser.

No written statement was filed on behalf of defendant No. 3 presumably because the written statement had been filed on behalf of defendants 1 and 2 as defendant No. 3 was being represented through defendants 1 and 2.

5. The trial Court found that the plaintiff had purchased Ac. 4. 08 dec. from Mandar Dehury, the recorded tenant. It further found that there was no evidence of dedication of the disputed land in favour of the deity, nor there was any evidence that the recorded tenants had surrendered their occupancy right in favour of the ex-proprietor at any time and as such, there was no scope for ex-Raja to dedicate, the land in favour of the deity. It further found that the evidence on record relating to possession was evenly balanced and, as such, invoking the presumption that possession follows title, the trial Court upheld the possession of the plaintiff. The trial Court found that notice u/s 80, Code of Civil Procedure, had been served on the Collector and Tahasildar. On the aforesaid findings, the trsal Court decreed the suit.

6. Defendants 1, 2 and 3 filed Title Appeal No. 31 of 1983 against the decision of the trial Court. During the pendency of the appeal, an application under Order 41, Rule 27, CPC was filed by them to introduce two documents being certified copy of a registered deed of mortgage with conditional sale and certified copy of a registered deed of relinquishment purported to have been executed by the plaintiff and his sister (defendant No, 4) in favour of defendant No. 3. The lower appellate Court admitted those two documents into evidence as Exts. D and E respectively and remanded the matter to the trial Court for fresh disposal observing that opportunity may be given to the plaintiff to rebut Exts. D and E. The said order of remand was challenged by the plaintiff in Misc. Appeal No. 264 of 1986 which was allowed by the High Court by order dated 17.4.1992. In the said order it was observed that there was no objection on behalf of the plaintiff-appellant to admission of Exts. D and E as evidence and further recorded the statement of the counsel for the plaintiff-appellant that the plaintiff did not want to adduce any rebuttal evidence. The High Court accordingly directed the lower appellate Court to dispose of the title appeal on the basis of the evidence on record.

7. The lower appellate Court found that title of the plaintiff had not been established. Relying particularly upon Exts. D and E and also upon Exts. B and C.

the lower appellate Court held that the title and possession of defendant No. 3 had been established.

8. In the second appeal, at the time of admission of the appeal, the following substantial questions of law were framed :

(i) Whether it is permissible in law to accept the pleas of acquisition of title by a document nomenclatured as mortgage by a conditional sale, when the pleading of the defendants was that the property was required by the deity by dedication ?

(ii) Whether the document admitted as additional evidence is required to be proved in accordance with the evidence on record ?

(iii) Whether the plaintiff's title is amply proved by the documents produced and proved by the plaintiff ?

At the time of hearing, the appellant presented his case in person. In addition to the substantial questions of law framed at the time of admission the learned counsel appearing on behalf of the State was particularly called upon to address upon the question of admissibility, proof and relevance of Exts. D and E particularly relating to applicability of Section 90 of the Evidence Act vis-a-vis Exts. D and E as those two documents were certified copies. The learned counsel for the State was also called upon to explain as to the relevance and admissibility of those documents otherwise, in view of the fact there was no specific pleading to the effect that the defendant No. 3 had acquired title on the basis of the deed of mortgage with conditional sale and on the subsequent deed of relinquishment (Nadabi). In essence those two questions are interrelated to the questions of law framed at the time of admission.

9. Ext. D is the certified copy of a registered deed of mortgage with conditional sale purported to have been executed by plaintiff and defendant No. 4 in favour of defendant No. 3. Similarly Ext. E is the certified copy of a registered deed of relinquishment (Nadabi Patra) purported to have been executed by plaintiff in favour of defendant No. 3 after expiry of the period indicated in Ext. D. The lower appellate Court has found about the title of defendant No. 3 mainly on the basis of those two documents. The lower appellate Court has observed that the documents had been executed in the years 1944 and 1947 and as such were thirty years documents requiring no proof, as envisaged in Section 90 of the Evidence Act. The lower appellate Court lost sight of the fact that the documents which were sought to be adduced in evidence and permitted to be brought on record as Exts. D and E were, in fact, certified copies and not the original documents. Even though those documents had been admitted into "evidence by the lower appellate Court as additional evidence without objection it could not have been assumed that plaintiff and defendant No. 4 had executed deed of mortgage with conditional sale and the deed of relinquishment by falling back upon Section 90 of the Evidence Act. Law is now well-settled that the presumption arising u/s 90 of the Evidence Act is applicable to original documents and not to certified copies thereof even if the original documents

might have been more than thirty years" old, admission of such documents, even without objection, would not authorise the Court to raise a presumption of due execution of the original documents or genuineness of the contents thereof. In this context, the observations made by the Privy Council in the decision reported in AIR 1935 132 (Privy Council) are very appropriate. After referring to Section 90 of the Evidence Act and some of the earlier decisions on the point, it was observed :

"..... In face of the clear language of Section 90 their Lordships are enabled to accept those decisions as sound. The section clearly requires the production to the Court of the particular document, in regard to which, the Court may make the statutory presumption. If the document produced is a copy admitted u/s 65 as secondary evidence, and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, as was done in 56 LA. 146 (Seethayya v. Subramanya Somayajulu AIR 1929 P.C. 115); in that case the dispute was as to the terms of a grant, which had admittedly been made. Their Lordships approved of the decision in 75 N.L.R. 192 (Shripuja v. Kanhayalal AIR 1918 Nag. 114) in which the Judicial Commissioner held that production of a copy was not sufficient to justify the presumption of due execution of the original u/s 90, and they are unable to agree with the subsequent overruling of that decision in 30 N.L.R. 155 (AIR 1934 67 (Nagpur))....."

This decision of the Privy Council appears to have been universally followed thereafter in several other decisions including those of the Supreme Court.

In the decision reported in Sital Das Vs. Sant Ram and Others, , it was observed:

"..... The language of Section 90 of the Indian Evidence Act requires the production of the particular document in regard to which the Court is invited to make the statutory presumption. If the document produced is a copy, admissible as secondary evidence u/s 65 of the Evidence Act and is produced from proper custody and is over 30 years old, then only the signatures authenticating the copy may be presumed to be genuine; but production of a copy is not sufficient to raise the presumption of the due execution of the original (vide AIR 1935 132 (Privy Council) (C)....."

Similarly, in the decision reported in AIR 1956 SC 305 (Harihar Prasad Singh and Anr. v. Deonarain Prasad and Ors.); it was observed :

"But Exhibits A-1 and A-1 (1) are merely certified copies of the objection petitions filed before the Survey Officer and not the originals, and it was held in " AIR 1935 132 (Privy Council) that the presumption enacted in the section can be raised only with reference to original documents and not to copies thereof."

It was observed by the Supreme Court in its decision reported in Kalidindi Venkata Subbaraju and Others Vs. Chintalapati Subbaraju and Others, :

".....The High Court appears to have relied upon Section 90 of the Evidence Act

and to have drawn the presumption that the will being more than 30 years old it was duly executed and attested by the persons by whom it purported to have been executed and attested. Such a presumption, however, under that section arises in respect of an original document. (See *Munnalal v. Mt. Kashibai* AIR 1947 PC 15). Where a certified copy of a document is produced the correct position is as stated in AIR 1935 132 (Privy Council) where the Privy Council laid down that if the document produced in a copy admitted u/s 65 as secondary evidence and it is produced from proper custody and is over 30 years old only the signatures authenticating the copy can be presumed to be genuine. The production of a copy thereafter does not warrant the presumption of due execution of the original document. The Privy Council repelled the argument that where a copy of a will has been admitted the Court is entitled to presume the genuineness of such will which purports to be 30 years old. Relying on the words "where any document purporting or proved to be 30 years old" in Section 90, the Privy Council held that the production which entitles the Court to draw the presumption as to execution and attestation is of the original and not its copy and that the decisions of the High Courts of Calcutta and Allahabad on which the argument was based were not correctly decided. This view has since then been approved of by this Court in *Harihar Prasad Singh and Another Vs. Must. of Munshi Nath Prasad and Others*, . The High Court therefore was not entitled to presume from the production of the copy either the execution or the attestation of the said will"

Again the very same position was reiterated in the decision reported in *Shiv Lal and Others Vs. Chet Ram and Others*, , wherein it was observed :

"..... Ex. P-5 is a certified copy of a statement said to have been made in a mutation proceeding. Its original has not been produced. No witness has been examined to speak to the fact that the persons who are shown to have signed the original have in fact signed the same or those persons were the mortgagors or their representatives. The signature on the original cannot be proved by production of a certified copy. Nor can the Courts raise any presumption u/s 90 of the Evidence Act in that regard. See *Harihar Prasad Singh v. Must, of Munshi Nath Prasad* 7956 SCR 1 : AIR 1956 SC 305...."

In view of the aforesaid catena of decisions of the Privy Council as well as of the Supreme Court, there cannot be any escape from the conclusion that the lower appellate Court committed grave error of law in assuming that Exts. D and E had been executed by the plaintiff and defendant No. 4, by applying the principle contained in Section 90 of the Evidence Act.

10. Apart from the above aspect, Act, there is another ground to discard Exts. D and E as the basis of title of defendant No. 3. The plaintiff had claimed title on the basis of a registered sale deed executed by the recorded tenant. In the written statement, the title of the plaintiff had been challenged and it was specifically claimed that the disputed property had been dedicated to the deity-defendant No. 3. It was nowhere pleaded that defendant No. 3 got title by virtue

of the alleged mortgage with conditional sale and the subsequent deed of relinquishment. In the pleading of defendants, there is no whisper regarding acquisition of title on the basis of the deed of mortgage with conditional sale and the deed of relinquishment. On the other hand, defendants had disclaimed the title of plaintiff. Law is well-settled that evidence in derogation of specific pleading of a party is inadmissible and irrelevant, since defendants had disclaimed the title of the plaintiff and set up the title of defendant No. 3 on the basis of dedication obviously not by the plaintiff, in view of the specific denial of the title of the plaintiff, the facts sought to be proved through Exts. D and E admitted by way of additional evidence having not been pleaded could not be looked into for the purpose of establishing the title of defendant No. 3. Since the finding of the lower appellate Court relating to title and possession of defendant No. 3 is based primarily on Exts. D and E, such finding becomes vulnerable. As has been rightly observed by the trial Court Exts. B and C, the entries in Tenants Ledger and working Khatian of the year 1972 or thereafter were not sufficient to prove the title of the defendant No. 3 on the basis of alleged dedication in the absence of any other evidence of the title or possession.

11. The plaintiff had claimed title on the basis of sale deed from the recorded tenant. The lower appellate Court has accepted that the registered sale deed had, in fact, been executed by Mandar in favour of the plaintiff and defendant No. 4. However, the lower appellate Court had observed that the property purchased had been recorded in the names of Mandar and his brother and plaintiff had not pleaded anything as to how Mandar alone sold the property. The plaintiff had categorically pleaded that the property had been purchased from Mandar, the recorded tenant. The Record-of-Rights had been proved, as also the registered sale deed. As observed by the trial Court, the plaintiff also had proved that the brother of Mandar had pre-deceased Mahdar and there was none-else in the family. The finding of the trial Court based on such categorical unchallenged evidence was ignored by the lower appellate Court on the specious reasoning that there was no specific plea on the point, completely ignoring the fact that the sole basis of the plaintiff's case was on the footing of sale deed from the recorded tenant. The lower appellate Court also observed that plaintiff had not pleaded as to how he claims only Ac. 2.02 decimals of land though the property purchased was Ac. 4.08 decimals. This is a clear error of record committed by the lower appellate Court. In paragraph-1 of the plaint, as amended by order dated 3.5.1982, it had been clearly asserted that out of Ac. 4.08 dec. of land purchased by the plaintiff, he had sold Ac. 1.39 dec. to Hadi Mundu and A. 0.67 dec. to Rusi Naik. Such clear assertion supported by unchallenged evidence on the side of the plaintiff as well as admission of the defendants in paragraph 8 (b) of the written statement to the effect that A. 1.39 decimals and Ac. 0.67 decimals had been recorded in the names of Hadi Munda and Muni Naik respectively, and the categorical finding of the trial Court on this aspect, could not have been overturned by the lower appellate Court without any cogent reason and merely on the basis of a grave error or record. The very fact that

during appellate stage the defendants relied upon the alleged deed of mortgage with conditional sale and the alleged deed or relinquishment in respect of the disputed land purported to have been executed by the plaintiff, fortifies the conclusion that plaintiff was undisputedly the owner in respect of the disputed land.

12. The next question is relating to possession. The trial Court had held that the evidence relating to possession adduced on either side was not conclusive and as such raising the presumption that possession followed title, and in view of the finding that defendants had failed to prove adverse possession, the trial Court had upheld the possession of the plaintiff. The lower appellate Court reversed the aforesaid finding relating to possession primarily on the basis of Exts. D and E. For the reasons already indicated, Exts. D and E are found to be of no effect in advancing the case of the defendants or negating the case of the plaintiff. The lower appellate Court has also referred to Exts. B and C which are entries in the Tenant's Ledger or entry relating to mutation. Those two documents relate to the year 1972 or thereafter. It is well-settled that document relating to mutation or record-of-rights neither create title nor extinguish title. Even assuming that those documents proved the possession of defendant No. 3 over the disputed land, as rightly observed by the trial Court, possession could be relatable to the year 1972. Since plaintiff was suing on the basis of title and title having been proved, it was for the defendant to plead and prove that plaintiff's title was lost by adverse possession, as envisaged in Article 65 of the Limitation Act read with Section 67 thereof. In the written statement a bald assertion had been made by the contesting, defendants relating to adverse possession. In fact, the only allegation relating to plea of adverse possession as contained in the written statement is paragraph 8 (d) and the relevant portion is quoted hereunder :

".....Alternatively the plaintiff's title, if any is lost by adverse possession of the deity "apileswar Mahadev"...."

Such vague plea cannot be taken to be a specific plea relating to adverse possession, as required to be raised in law. Even assuming that the plea was there, the burden was definitely heavy on the defendants to prove adverse possession. In this regard the defendants have singularly failed to adduce any worthwhile evidence to show their adverse possession.

13. For the foregoing reasons, I am unable to sustain the judgment and decree of the lower appellate Court which are accordingly set aside and the judgment and decree of the trial Court are restored. However, there would be no order as to costs of the present appeal.