

(1952) 11 OHC CK 0008
In the Orissa High Court
Case No : Second Appeal No. 153 of 1948

Madhabananda Mohapatra and Others	APPELLANT
Vs	
Rabindranath Misra and Others	RESPONDENT

Date of Decision : 11-11-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 41 Rule 27, 100
Evidence Act, 1872 — Section 101, 102, 103, 104, 3

Citation : AIR 1954 Ori 40 : AIR 1952 Ori 40 : (1953) 19 CLT 316

Hon'ble Judges : Panigrahi, J; Mohapatra, J

Bench : Division Bench

Advocate : D. Mohanty and S.K. De, for the Appellant; M.S. Rao, for the Respondent

Final Decision : Allowed

Judgement

Panigrahi, J.—This is a second appeal by some of the alienees from defendant 16 Abala Dibya, the widow of one Kulamoni Pauigrahi who died on 18-5-1929. The plaintiff Indumati, claimed to be his daughter by his first wife Gurubari and sued for a declaration that the alienations made by defendant 18 in favour of the other defendants are not binding upon her reversionary interest as those alienations had not been made for legal necessity. All the defendants challenged the plaintiff's claim to have been the daughter of Kulamoni, and their allegation was that she was the daughter of Jadumoni Panigrahi, the natural brother of Kulamoni who had admittedly gone away in adoption to one Nidhi Panigrahi.

2. The two important issues framed in the suit were issue No. 2: "Is the plaintiff, as alleged in the plaint, the daughter of Kulamoni?" and issue no. 10 : "Was there any legal necessity for the kabalas and are the kabalas genuine and for consideration?" The learned Munsif who tried the suit in the first instance held against the plaintiff on both the issues and dismissed the suit. The plaintiff having died, her son filed an appeal in the Court of the District Judge and the decision of the trial Court was reversed by the learned District Judge. The

appellate Court held, agreeing with the Munsif, that the alienations made by defendant 16 were not for legal necessity. But disagreeing with the finding of the trial Court he held that the plaintiff had succeeded in proving that she was the daughter of Kulomani by his first wife, Gurubari. He accordingly reversed the decision of the trial Court and gave a decree to the plaintiff as prayed for in the plaint. It is against this judgment of the learned District Judge that the alienee-defendants have come up in second appeal.

3. The only point that has been seriously contested before us is whether the plaintiff has succeeded in proving that she is the daughter of Kulamoni. In proof of her contention, the plaintiff mainly relied upon the credibility of the witnesses examined on her behalf and upon two documents, Exts. 1 and 2. The defendants also examined a number of witnesses to prove that the plaintiff was the daughter of Jadumoni, and in support of their case exhibited a few documents the most important of which are Exts. C, C-1, E, F, and F-1.

4. The learned Munsif, on an analysis of the evidence, held that the oral evidence on either side was "interested, unsatisfactory and unsafe to rely upon". He, therefore, preferred to rely on the documents filed by the respective parties as some of them had been executed at a time when the paternity of Indumati was not in dispute. Exhibit, 1 is the School Admission Register of the lower-primary school of Anantabrahmapur,. and P. W. 1 was the teacher of that school in the year 1930 The learned Munsif closely examined the entries as well as the absence of entries, made in some of the columns of. the register and held that he was unable, in view of the suspicious nature of the document, to place absolute reliance on. it and regard it as a conclusive piece of evidence in support of the plaintiff's paternity. Exhibit 2 is a postcard written by defendant 10, to the plaintiff's husband, Surendra (P. W. 9) on 16-10-1940. With reference to this document the learned Munsif observed that the reference made therein to "Indu Bou Khadi" is ambiguous and it might wo well refer to Jadumoni's wife as to defendant 16, Abala, as both these ladies stood in the same degree of relationship to the writer of that postcard.

The trial Court then referred to the registered deeds of gift, Exts. C and C-1 executed by Jadumoni in favour of Indumati on 18. 4. 31 and 4. 2. 36 respectively, wherein the plaintiff is described as the daughter of Jadumoni. By Ext. E dated 3-3-41 Indumati sold about two acres of land gifted to her under Ext. C-I, for a sum of Rs. 800/-. The property gifted by Jadumani under Ext. C-I Is referred to in Ext. E as "Pitralaya", that is to say, property acquired by her from her parents" house. Exts. F and F-1 are two letters written by Surendra the husband of the plaintiff to Jadumoni and his wife. They are dated 14-9-38 and 8-11-33 respectively. In these two letters a reference is made to the gift of lands made by Jadumoni and he is referred to as "father" and his wife as "mother" by Surendra. Relying on the above documents the learned Munsif held that they justified an inference that the plaintiff was, in fact, the daughter of Jadumoni and that the documentary evidence adduced by the defendants outweighed the oral

and documentary evidence adduced by the plaintiff.

5. The learned District Judge, however, on appeal, made the following observations while referring to the evidence of the defendants:

"Comparing the antecedents of these witnesses I cannot agree with the learned Munsif that the witnesses examined on behalf of the plaintiff have not been able to acquit themselves better than the witnesses examined on behalf of the " defendants. In fact, the challenge that has been made by the contesting defendants against the assertion of the deceased plaintiff that she was the daughter of Kulamoni has been made to rest, so far as the oral evidence is concerned on such unstable basis, that I shall have no hesitation to affirmatively hold that the oral evidence adduced on behalf of the deceased plaintiff is really superior to that adduced on behalf of the contesting defendants."

It would appear from this passage that the learned Judge thought that it was for the defendants to disprove the paternity of the plaintiff as alleged by her, rather than for the plaintiff affirmatively to establish that she was the daughter of Kulamoni.

It may be that the defendants have not succeeded in establishing their case that the plaintiff was the daughter of Jadumoni, but the onus that lies on the plaintiff to prove that she is the daughter of Kulamoni cannot, for that reason, be held to have been discharged. The learned Judge then proceeds to discuss Exts. C and C-I, F and F-I and: concludes that, in his view, "it is rather difficult to assume that the deed (Ext. C) was a bona fide one". The reason for this inference, as given by the learned Judge is that it is not likely that a father would make a gift of a few acres of his land to one of his unmarried daughters when he had other children. He accordingly holds that the recital in Ext. C "does not, and cannot, establish that Indumati was the daughter of Jadumoni". Referring to "Ext. C-I the learned Judge holds that Jadumoni executed that document "to holdup his own pretensions and intended to appear as sympathetic towards Indumati", and finally comes to the, conclusion that Exts. C and C-1 admit of better explanation and that "the real explanation must be in favour of the deceased plaintiff".

6. Referring to Ext. E the appellate court held that the reference to "Pitralaya" in the document was not inconsistent with the plaintiff's case as Jadumoni was the natural brother of Kulamoni and the reference to Pitralaya may cover both Jadumoni and Kulamoni. He accordingly concludes :

"I do not find anything directly contrary to the deceased plaintiff's assertion that she was the daughter of Kulamoni as recited in Ext. E".

In arriving at this conclusion the learned District Judge appears to have committed more than one error of record and the inference that he has drawn as to the legal effect of the proved facts is a gross error. In the first place both Exts. C and C-I were accepted by the plaintiff as genuine documents and the plaintiff acted on these documents in alienating a portion of the lands conveyed to her by

them. She is also in possession of the rest of the lands granted to her by Jadumoni. It is, therefore, strange that the learned Judge overlooked this attitude of the plaintiff and held that the deeds were not bona fide documents. To go further and hold, as he has done, that the real explanation must be in favour of the plaintiff, is not only to misinterpret the documents, but would be flying in the face of the express recitals made therein.

Exhibit E does not recite that the plaintiff is the daughter of Kulamoni, as has been assumed by the lower appellate Court. Exhibit E describes the plaintiff as the wife of Surendra and not as the daughter of Kulamoni. Having regard to the fact that both P. W. 9 and P. W. 10 stated in their oral evidence that they were aware of the description made in Exts. C and C-1 that the plaintiff was the daughter of Jadumoni and that the plaintiff did not assert herself as the daughter of Kulamoni in the later document Ext. E, it is impossible to explain away the recitals in Exts. C and C-1 as supporting the plaintiff's case. The learned Judge's finding: "Thus, in my opinion, the recital in Ext. C-1 does not and cannot establish that Indumati was the daughter of Jadumoni" appears to be wholly opposed not only to the tenor of the document but also to the conduct of the donee who benefited under that deed.

7. Exhibit F dated 14-9-38 and Ext. F-1, dated 8-11-38 are letters written by P. W. 9 Surendra, the husband of the plaintiff. He admits the genuineness of both the letters and the contents of these letters would show that he had lent some money to Jadumoni two or three years prior to the year 1938, and accused him of putting off payment on some pretext or other. He says that Jadumoni owed him Rs. 230/- and the interest. for 2 1/2 years on that amount was stated to be Rs. 107-13-0, and that it was the last demand that he was making. He says:

"If you want to keep back the amount on the ground that you have given three acres of land to the daughter, you had better tell me plainly. I was always regarding you as my guardian, but I now realise what it is. After having lent you cash I am not going to beg for its return. My heart is burning, I do not therefore have regard for relationship."

In Ext. F-1 written on 8-11-38, which was addressed to the wife of Jadumoni, P. W. 9 says: "Father was coming and putting up with us but of late he is not doing so. Without thought I conveyed many harsh words through Banchha and I was about to return the presents: I, therefore, apologise. If children commit mistakes parents should not take it to heart. I know father has great affection for us He was managing our household, he was himself going to bazar and cooking food for Indu and me and sending me to office; I can never forget it Please therefore send Lakshmi (daughter of Jadumoni by his second wife)."

The rest of the contents of the letter is couched in such affectionate and intimate terms that it is impossible to overlook the suggestion made on behalf of the defendants that they were not made euphemistically but actually conveyed what they had intended to convey. The learned District Judge does not appear to have

gone through these letters carefully, and appears to have been under the impression that apart from describing Jadumoni and his wife as "father" and "mother" there was nothing significant in them.

The learned Munsif was perfectly right when he observed that the tone and language in which these letters had been couched could not but create an impression that Indumati was, in fact, the daughter of Jadumani. The appellate Court, however, commented upon the manner in which these letters were produced and held that Jadumoni must have supplied them to D. W. 5 who produced them in Court. No objection was taken by the plaintiff when these letters were produced and exhibited, and no suggestion was made in the evidence adduced by the plaintiff and her witnesses that Jadumoni was acting against her interest. The learned Judge thought that as unlikely that P. W. 9 addressed Jadumoni and his wife as father and mother as though they were virtually in the position of parents.

He appears to have wholly overlooked the reference to the loan given to Jadumoni and the reference to his gift of lands to Indumati. Nor does he refer to the other contents of the letters in which a reference is made to Lakshmi, Babaji, Gobinda and other children of Jadumoni and to Jadumoni's stay with P. Ws. 9 and 10 at his Cuttack lodging. These are not consistent with the plaintiff's story. Admittedly, Kulomani had gone away in adoption to another family and it is strange that Jadumoni should have taken so much interest in the plaintiff, though she was his natural brother's daughter and had gone away to another family after her marriage. "This is in strange contrast to the evidence of P. W". 9 and P. W. 10 who say that they never went to the house of defendant 16 (Abala) after their marriage.

8. Finally, the learned District Judge concludes, as he started, with the observation that Exts. C and C-1, E, F and F-I do not establish that Indumati was the daughter of Jadumoni and not of Kulamoni. As stated already, the question here is whether the plaintiff had succeeded in proving that she was the daughter of Kulamoni as alleged by her; it was not for the defendants affirmatively to establish one way or the other. So, even if these documents were to be ignored and excluded from the evidence the question will still remain whether the plaintiff has, on her own evidence, discharged the onus that lay on her of proving her case.

9. Referring to the Admission Register Ext. 1 filed by the plaintiff the learned District Judge has again committed an error when he held:

"In my opinion, the whole controversy on this point should cease because of an admission made by the widow of Kulamoni. She states that Jadumoni's daughter was never put into any school" .. "If Indumati had been a student of the school in 1926 and if, owing to an accident because of Jadumoni's Secretary ship of the school Kulamoni's signature was not taken in the appropriate column this would not justify the conclusion that the entry is a forged one."

Here, again, the learned Judge appears to have put the cart before the horse. The learned Judge assumes Ext. 1 to be a genuine document and for that reason discredits the evidence of Kulamani's widow that the plaintiff never went into the school. The alleged statement of Kulamani that Indumati was his daughter must be taken not to have been proved because Kulamani's signature does not appear in the register. The only fact proved is that an entry to that effect has been made in the register by P. W. 1--assuming that the entry was made at the time it purports to have been made.

The register was issued on 6-3-26 but the entry against Indumati's name bears the date 1-3-26, and the page on which this entry appears does not bear the signature of the Inspecting Officer. The entry itself has been made in different inks and P. W. 1 was unable to explain who made the subsequent entry and when. The attester, P. W. 2, is a man of no status and has obviously put his Signature against several entries purporting to have been made on different dates, but written with the same ink. The learned Munsif therefore suspected, and in my opinion rightly that all the attesting signatures were taken at one sitting. Moreover it is to be noticed that P. W. 9 the husband of the plaintiff is an employee in the District Board office and that the school at Ananta-brahmapur is managed by the Board. It is also clear from the evidence that Jadumoni is the Secretary of the school. P. W. 1 was the teacher of the school from 1926 to 1928 and, on his own admission, his evidence that Indumati was the daughter of Kulamani was based on hearsay.

He further admitted that he is a poor man and had to go to Jadumoni's house to get paddy or rice. p. w. 2 was a witness for Basudeb, brother of P. W. 5, in a criminal case filed by defendant P. Having regard to these admissions which the lower appellate Court appears to have altogether overlooked, the learned Munsif very properly declined to place any reliance on their statements and to hold that Ext. 1 was a genuine document. The plaintiff herself deposed that she left school 7 to 8 years before her marriage proposals which took place when she was about 11 years of age. She admitted that she did not remember the names of any of her school friends. In view of the extreme vagueness of her statements regarding her joining any school or leaving it, Abala's deposition that the plaintiff never went to any school is not altogether improbable.

Furthermore the admission made by P. W. 6 that he fabricated the horoscope of Indumati at the time of her admission into the school and that a wrong date of birth was mentioned in the register, would itself weaken the value to be attached to Ext. 1 which stands, more or less, self-condemned. The learned District Judge, while disagreeing with the learned Munsif, does not give any reasons of his own as to why he came to the conclusion that Ext. 1 should be taken to be genuine. He merely criticises the trial Court's judgment and says that he was not impressed with the reasons given by the Munsif for discarding it. But it does not appear that he applied his own mind to the facts and arrived at an independent conclusion of his own.

10. Exhibit 2 is a post-card written by defendant 10 to P. W. 9 intimating the death of a child in his family and says that it was written for the information of Indumati. Then follows the following sentence on which reliance is placed: "Indu Bou Khudi (aunt Indu Bou) has gone with Dina (uncle) to Cuttack two or three days ago". P. W. 9 filed this exhibit in his chief examination, and the only statement that he made, with reference to this document, is : "Radha Nath was addressing Abala as "Khudi" (ant)". He did not say that she was also being addressed as Indubou Khadi, or that the reference in the postcard was to Abala. The plaintiff, however, wanted to make capital out of one sentence in the deposition of Abala as D. W. 9. That statement is the very last sentence in her cross-examination and was to the effect that "Radhanath calls me "Indu Bou Khudi" "But she immediately corrected herself in re-examination and said that she had got confused. The learned trial Court accepted this explanation as true. But the learned lower appellate Court failed to see that mere forms of address or description of persons by third parties, are not enough by themselves to establish the paternity of the claimant.

11. An attempt was made by the plaintiff to put in a birth register said to have been maintained by the choudidar. P. W. 4 is the ex-choudidar and his evidence is that the birth register was with his successor, Kina Malik. Beyond taking out summons to Kina Malik once during the trial the plaintiff took no further steps to cause the production of the register or to examine Kina Malik. In the lower appellate Court a petition under Order 41, Rule 27, Civil P. C. was filed, praying that the register be accepted in evidence and that Kina Malik be examined. That Court, however, refused to accept any additional evidence as it was not satisfied that the reasons given by the plaintiff for its non-production earlier were convincing. No attempt was made to file this document in this Court either, although the appeal had been pending for four years, till the last date when the respondents' counsel was about to close his case.

A petition was filed before us but no reason was given as to why the document could not be filed earlier; and we see no good ground why, after this long lapse of time, we should give the plaintiff, an opportunity to supplement her evidence by fresh evidence. We are not satisfied that the plaintiff has been sufficiently diligent, or that its non-production was due to causes beyond her control. Moreover, the document does not prove itself and would require oral evidence to prove the entry made therein relating to the plaintiff's date of birth. Admittedly neither Kina Malik nor P. W. 4 made the entry. According to the evidence P. W. 4 is an illiterate man and he says: "I got an entry about the birth of Kulamoni's daughter written by some one whose name I do not remember now". It would, there-fore, be a wild goose chase to allow the plaintiff at this stage to go about finding who the alleged maker of this entry is and prove it. Even till now, the plaintiff has not been able to ascertain, who made the entry. In such circumstances we intimated to the learned counsel for the respondents that we would not entertain her belated application at this stage.

12. Adverting to the oral evidence, the learned District Judge has just skipped through it, and does not discuss the evidence on the side of the plaintiff beyond observing that it is superior to the evidence adduced on the side of the defendants. We have been taken through the entire oral evidence and we do not find any sufficient reason to differ from the view taken by the learned trial Court who had the opportunity and privilege of seeing the witnesses in the box. In the absence of any convincing reasons given by the lower appellate Court we are disposed to agree with the finding of the trial Court that the evidence on the side of the plaintiff is unreliable and is of such character that it falls short of proof of the paternity of Indumati. I have already referred to the evidence of P. Ws. 1 and 2 and recorded the reasons for my agreement with the view taken by the trial Court of that evidence.

P. W. 3 is 37 years old and is an agnate of the plaintiff but does not know the name even of his common ancestor. He made an admission that defendant 9 filed a case against the brother of P. W. 5 & that he was a witness for the accused. P. W. 4 also made an admission that his son wanted to make some purchases of lands from Abala Dibya but was not successful. P. W. 5 admitted that he was a bhag tenant under Abala but that he was subsequently dispossessed by defendant 10. He also stated that there were cases between him and defendant 9. P. W. 6 is a self-confessed liar, having regard to his admission that he prepared a false horoscope of Indumati. He attested Exts. C and C-1, the deeds" of gift made in favour of the plaintiff, and goes to the length of saying that Jadumoni never put forward his son Gobindo, as the adopted son of Kulamoni, though the plaintiff herself did not deny it. He appears to have sold some lands under Ext. D which did not take effect. P. W. 7 is a man of a neighbouring village and is not related to either of the parties.

His evidence is that he was engaged in a case in the rent Court and was suddenly called to give evidence in this case. According to him, he attended the marriage of the plaintiff, but he could not say who acted as the karta. He also denied that Jadumoni ever made any gift of lands to the plaintiff, P. W. 8 also seems to be a casual witness and his only claim to have known about the paternity of the plaintiff is that he was a neighbour. He used to go to Anantabrahmapur and sit on the verandah of Kulamoni's house. P. W. 9 is the husband of the plaintiff and P. W. 10 is the plaintiff herself. Having regard to the nature of the evidence tendered by these witnesses the learned Munsif was, in my opinion, right in his view that it would not have been impossible for the plaintiff to have got hold of a few witnesses of that type and get them to speak to particular facts to suit her case. It is not enough, to prove a fact, that a number of witnesses should assert it. Proof of a fact would depend upon the character of the witnesses, their competency to speak to that fact, the opportunities that they had to know about the relationship of Indumati and Kulamoni, and their degree of intimacy with Kulamoni himself.

None of these witnesses can claim to have had any contact or relationship with

Kulamoni, and their evidence is so casual and interested that it lacks assurance or persuasiveness which alone would incline a judicial mind to put any reliance on their testimony. After a very careful examination of the evidence, therefore, we are persuaded that the finding of the trial Court is justified and that the lower appellate Court should not have reversed it without giving substantial reasons. The keynote of the judgment under appeal is that Jadumoni was hostile to the plaintiff; that he executed Exts. C and C-1 in order to placate indumati as he put forward his own son, Gobinda, as the adopted son of his natural brother Kulamoni; that Indumati described herself as the daughter of Kulamoni in Ext. E; that Exts. F and F-1 should be discarded as they were not produced from proper custody. None of these reasons appear to be correct or convincing and the conclusions drawn by the learned District Judge are based upon assumptions for which there is not a shred of evidence. None of the reasons given by him are conclusive and most of them are of no value at all.

On the other hand, the conclusions of fact reached by the trial Judge were based primarily on his estimate of the witnesses who gave their evidence in his presence--an opportunity which was denied to the lower appellate Court.

13. The rule to be followed in such cases is stated by Viscount Simon in -- "Watt v. Thomas", (1947) AC 484 (A), as follows:

"If the evidence," as a whole, can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony, by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies, is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallibly determining which side is telling the truth or refraining from exaggeration. Like other tribunals he may go wrong on questions of fact, but it is a cogent circumstance that Judge of first instance, when estimating the value of verbal testimony has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

14. Learned counsel for the respondent, however, contends that the function of this Court sitting in second appeal is further restricted and that this Court should not interfere with a finding of fact arrived at by the lower appellate Court, however grossly erroneous it may be. As has been very often laid down by the highest judicial tribunal, questions of law and fact are very often difficult to disentangle. It is no doubt true that in second appeal this Court has no jurisdiction to set aside a mere finding of fact, however gross the error may be. But the proper legal effect of a proved fact is essentially a question of law--See -- "Nafarchandra Pal v. Shukur Sheikh", AIR 1918 PC 92 (B). The finding of the first appellate Court upon a question of fact is regarded as final if that Court had before it evidence proper for its consideration in support of that finding. But where the Court misreads the evidence, or overlooks an important piece of

evidence, no sanctity attaches to its finding, any more than to that of the trial Court.

Where the parties are in agreement on the genuineness or the bona fide character of a document it is not open to a Court of appeal to ignore the admission, and arrive at a contrary finding. But if there is a misconstruction of the document and the appellate Court misreads a document and if its inference is derived from a misconception, then the error is not merely an error of fact but an error of law. In such a case, that Court must be held to have exceeded its jurisdiction justifying interference by this Court. A Court of appeal should hesitate long, before it disturbs the findings of the trial Judge based on "verbal" testimony, and it should satisfy itself that the plaintiff-appellant had discharged the heavy burden of showing that the decision of the trial Court was wrong. Otherwise it would be assuming a function not warranted by law. We are satisfied that the lower appellate Court was not only wrong in its estimate of the evidence, but clearly exceeded its jurisdiction in reversing the judgment of the trial Court without giving its own reasons. This second appeal must accordingly succeed, the judgment of the learned District Judge should be set aside, and that of the learned Munsif dismissing the plaintiff's suit restored. The appellants will have their own costs throughout.

Mohapatra, J.

15. I agree.