
(1960) 02 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 50 of 1957

Michhu Kuanr and Others

APPELLANT

Vs

Raghu Jena and Others

RESPONDENT

Date of Decision : 10-02-1960

Acts Referred:

Evidence Act, 1872 — Section 101, 92
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1961 Ori 19

Hon'ble Judges : S. Barman, J

Bench : Single Bench

Advocate : P.C. Chatterji, for the Appellant; G.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

S. Barman, J.—The unsuccessful defendants in both the Courts below, being defendants Michhu Kuanr, Chema Kuanr and Sarabhu Kuanr, are the appellants in this second appeal from a confirming decision of the learned Subordinate Judge, Keonjhar, whereby he confirmed the decision of the learned Munsif, Anandapur, in Title Suit No. 123 of 1951.

2. The dispute between the parties relates to a plot of land 1.83 acres fully described in the plaint schedule. The relevant facts leading to the present litigation between the parties are shortly stated, these: On March 22, 1949 one Aparti Kuanr being defendant No. 2 in the suit (now pro forma respondent No. 5 in this appeal) by a registered sale deed (Ex. 1) sold the suit land-area 1.83 acres as aforesaid to the plaintiffs-respondents Raghu Jena, Radhu Jena, Juja Jena and Budhj Jena (hereinafter referred to as the Jena Plaintiffs-respondents) for a consideration of Rs. 500/- said to have been received in cash by the said vendor Aparti Kuanr. Eight months thereafter on November 29, 1949 the said Aparti Kuanr appears to have executed a deed of cancellation (Ext. A) of his sale deed (Ext. 1).

By the said document the said Aparti Kuanr purported to have executed the cancellation on the ground as recited in the document that the said vendees, namely the Jena plaintiffs-respondents got the suit land registered by him (Aparti Kuanr) in favour of the said Jenas without payment of consideration and on terms that they would pay him the same; it further appears from the recitals in the cancellation deed that as the said Aparti Kuanr had some urgent business in Calcutta at that time, the said Jenas promised to pay him the amount after his return from Calcutta and relying on their words he (Aparti) went to Calcutta, that after his return from Calcutta, he asked the Jenas for the money and as they had not paid the amount though they repeatedly promised to pay, he (Aparti) by the said document executed the cancellation refuting all conditions of the sale deed (Ext. 1).

It is significant that in the said document of purported cancellation (Ext. A), there is a further recital made by the said Aparti Kuanr that if in case he executed another sale deed in favour of some other vendee in respect of the land, the new sale deed will be valid and the vendee therein, on the strength of such sale deed, would be entitled to possession and ownership; and further that the conditions embodied in the registered sale deed (Ext. 1) were by the said deed of cancellation declared by him to be null and void from the date of execution of cancellation deed, namely November 29, 1949 and that the previous sale deed (Ext. 1) would not be treated as having been executed by the said Aparti Kuanr.

The following day on November 30, 1949 the said Aparti Kuanr purported to have executed another registered sale deed (Ext. B) whereby the said Aparti Kuanr as vendor appears to have sold the said suit land to the defendants-appellants Michhu Kuanr, Chema Kuanr and Sambhu Kuanr (hereinafter referred to as the Kuanr defendants-appellants) for a consideration of Rs. 1000/- which the vendor Aparti Kuanr stated to have received in cash.

3. Thus the dispute arose between the Jena plaintiffs-respondents and the said Kuanr defendants-appellants both claiming title to the suit land by virtue of their respective purchases from the common vendor the said Aparti Kuanr, who had undisputably good title to the said suit land 1.83 acres. The plaintiffs based their title on the registered said deed dated March 22, 1949 (Ext. 1). The plaintiffs' case is that they, were obstructed by the defendant Michhu in respect of their possession and enjoyment over Kuanr the suit land. The Kuanr defendants-appellants' rival claim to the suit land was based in the registered sale deed (Ext. B) dated November 30, 1949 by which the Kuanr defendants had purchased the suit land from the same vendor, namely, the said Aparti Kuanr. In support of their case they also relied on the purported deed of cancellation (Ext. A) dated November 29, 1949 whereby the vendor Aparti Kuanr is said to have cancelled the earlier sale deed of March 22, 1949 (Ext. 1) before selling the said suit land to the Kuanrs by the registered sale deed dated November 30, 1949 as aforesaid.

The main point for consideration in this appeal is whether the deed of cancellation (Ext. A) dated November 29, 1949 had the effect of nullifying the earlier executed sale in favour of the Jenas by the registered sale deed dated March 22, 1949 (Ext. 1) as aforesaid.

4. Mr. P. C. Chatterji, learned counsel appearing for the Kuanr defendants-appellants challenged the sale deed in favour of the Jenas (Ext. 1) in the perspective of the subsequent deed of cancellation (Ext. A) the defence contention is that no consideration passed under the previous sale deed in favour of the Jenas (Ext. 1) and therefore no title passed to the plaintiffs Jenas, under the said document. There Can be no dispute that if there was passing of consideration under the previous sale-deed (Ext. 1), the plaintiffs Jenas, as purchasers must necessarily succeed in their claim to the suit land. The learned Counsel for the Kuanr defendants-appellants contended that the onus of proof was wrongly placed on the defendants to prove their case as pleaded in defence.

5. On the question of onus alleged to have been wrongly placed on the defendants, undoubtedly the onus is normally on the plaintiffs to prove their title and that the plaintiffs can recover only on the strength of their own title and not by the weakness of that of the Defendants (Rense Kolh v. Singa Hoe ILR (1958)Cut 186). This argument made on behalf of the defendants-appellants however overlooks the circumstances in the present case that the execution of the sale deed Ext. 1 having been admitted by the defendants the onus was on them to prove that the (no ?) consideration passed for the sale.

Under proviso 1 to Section 92 of the Evidence Act it was open to the defendants to prove any fact which would invalidate the sale deed such as want of failure of consideration. The defendants however did not choose to adduce any evidence to prove the alleged absence of consideration for the sale deed although in fact the defendants challenged in the written statement that there was no consideration for the sale, the defendant No. 2 Aparti Kuanr, the vendor himself who received the consideration was not examined to deny the facts of his having received the consideration for the sale.

Mr. G. K. Misra, learned counsel for the plaintiff-respondents, urged that in view of the position that execution of the sale deed Ext. 1 had been admitted the onus is on the defendants to prove that there was no consideration. On this point, he relied on a decision of the Privy Council in AIR 1940 114 (Privy Council) whets action was brought for recovery of Rs. 44,000/- on a mortgage which was in fact the last in a series by way of renewal of an original mortgage whereby one D had mortgaged some of his ancestral lands to one B for Rs. 25,000/-, the consideration for the mortgage is stated in the deed to be the discharge of two promissory notes with interest amounting to Rs. 6,221/8/- and Rs. 18,778/8/ cash, for payment of a debt due under a bond; the execution and completion of the original mortgage and the receipt of Rs. 6,221/8/- were admitted by the mortgagor in the presence of the Sub Registrar who certified the cash payment of Rs. 18,778/8/- and the two promissory notes were given to the mortgagor in

his presence.

The only material issue was "Was the bond in suit executed for consideration and is it not binding on the defendants?" The High Court reversed the learned Subordinate Judge's decision and granted a decree for the full amount claimed. In appeal to the Privy Council, their Lordships observed that there seems to have been some misunderstanding as to onus of proof in that case. Their Lordships quoted from the judgment of the High Court where the High Court said:

"We are of opinion that the burden of showing that consideration had passed under the mortgage of 1892 had been discharged by the plaintiffs and the defendants did not produce any satisfactory evidence to show that the money was returned to the mortgagee".

On this finding of the High Court, their Lordships of the Privy Council gave their opinion that the onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage had in fact passed, is wholly on the defendants and it is not for the plaintiffs to prove matter affirmatively. In the present case I therefore hold that the onus was certainly on the defendants to prove want of consideration. It appears that neither the attesor nor the scribe of the sale deed were examined on behalf of the defendants-appellants. In fact, the vendor defendant No. 2 Aparti Kuanr did not come to the box to say that he did not receive the consideration for the sale deed which he executed in favour of his purchasers.

The question of intention could only arise if no consideration passed In the context of this back ground and the surrounding circumstances the subsequent deed of cancellation is irrelevant. Once by the registered sale deed Ext. 1 title had passed to the vendees, the subsequent deed of cancellation Ext, A certainly could not nullify the effect of the already completed sale deed Ex. 1.

It was contended on behalf of the defendants-appellants that the admission of the execution oi the document did not amount to admission of passing of consideration and accordingly the deed of cancellation Ext. A should have been considered and that in the absence of a finding on such basic facts the case should go back to the Court below for reconsideration on these facts. This contention on behalf of the defendants-appellants is not acceptable in view of my conclusions on the point as hereinafter fully discussed.

6. Now, as the alleged non-passing of consideration under the previous sale deed (Ext. 1), Mr. Chatterji relied on the position in law that in cases of this nature where the question arises whether title passed on the registration of the document of sale or that passing of title depends upon the passing of consideration, the primary criterion is the recitals in the document: it requires no reiteration that only if the recitals in the document are indecisive or ambiguous, the surrounding circumstances and the conduct of the parties will be relevant; if really the recitals are to the effect that on receipt of the consideration money the vendor sells the property to the purchaser and makes the purchaser full owner

thereof, it would have been clear enough to show that the passing of title would depend on the passing of consideration; on the contrary if there is a clear conveyance that the executant conveys title in favour of the vendee from the date of the execution of the document and the recital regarding consideration comes later independently of the clause regarding title, then only it is clear that the title passes independent of the question of consideration.

In *Hara Bewa and Others Vs. Banchanidhi Barik and Others*, relied on on behalf of the defendants-appellants, the striking distinction is that in the present case the clause in the sale deed dated 22-3-1949 (Ext. 1) conveying the title stands by itself independently of the clause of passing of consideration and this was the main reason why this Court in an earlier case *Balabhadra Misra Vs. Srimati Nirmala Sundari Devi and Others*, on the facts of that particular case, held that title passed independently of the passing of consideration; that where the recitals in sale deeds were that the consideration passed on the date of the execution of the document and that the vendee shall be entitled to all the rights in the property from that day but it was admitted that the consideration was not paid, it was held that from the circumstance alone that the recital in the document about passing of consideration is incorrect it cannot be inferred that the intention of the parties was that passing of the consideration was a condition precedent to the transfer of the title and that title passed to the vendee by virtue of the sale deed.

7. This leads me to the consideration of the recitals in the prior sale deed dated 22-3-1949 (Ext. 1) in the present case. The relevant passage from the sale deed Ext. 1 is as follows as translated:

"I today in sober mind, without being persuaded by any, sell the above mentioned land measuring A. 1.83 decimals at a consideration of Rs. 500/- and receive the whole amount in cash and hereby execute that you and your successors will be enjoying the same for all time to come -- I cease to be the owner of this land from this day".

I have also gone through the original document carefully. It appears to me that the recitals are clearly decisive in the instant case; that there is a clear recital that the executant conveys title in favour of the vendees from the date of the execution of the document and the recital regarding consideration comes independently of the clause regarding title and thus title passed independently of the question of consideration. Very much unlike the terms of the sale deed in *Hara Bewa and Others Vs. Banchanidhi Barik and Others*, cited above, the terms regarding passing of title, passing of consideration and the vendees being the owners in respect of the property sold in the present case, are clear and unambiguous and not intermingled as in the said cited case, so as not to give rise to any difficulty to make out from recitals a definite position that in fact the parties intended that title would pass independent of the question of consideration. In the present case on a plain reading of the sale deed Ext. 1 it is quite clear that title had passed to the vendees,

8. The defendants-appellants strongly relied on the deed of cancellation dated 29-11-1949 by which the vendor Aparti Kuanr purported to have cancelled the sale deed Ext. 1. Mr. P. C. Chatterji, learned counsel for the defendants-appellants, commented on the aspect that the Courts below did not deal with the deed of cancellation which, according to him, had an important bearing on the entire aspect of the case. To this contention, the plaintiffs' answer was that the deed of cancellation Ext. A cannot take away the effect of the sale deed Ext. 1 by which the vendor had passed title to the vendees in clear and unambiguous terms as aforesaid. It is significant that the plaintiff Raghu Jena (P.W. 4) who gave evidence at the trial was not cross-examined about the deed of cancellation.

The substance of the defence case, as propounded by Mr. P. C. Chatterji, is this: The plaintiffs must prove their subsisting title to the suit property in order to succeed in the suit; the sale deed Ext. 1 according to him, would not be sufficient to establish the plaintiffs' title in the perspective of the deed of cancellation Ext. A followed by the subsequent sale deed in favour of the Kuanr defendants dated 30-11-1949 Ext. B which militates against the earlier sale deed Ext. 1: that the deed of cancellation is not a mere myth; that the plaintiffs had to prove that the deed of cancellation Ext. A was a mere eyewash. Considered from the point of view, as discussed above, in the light of authorities cited as aforesaid, none of these contentions urged by the learned counsel for the defendants-appellants can be accepted as tenable in law.

9. It was also contended on behalf of the plaintiffs that the defendants-appellants did not take the point of alleged non-passing of consideration for the sale deed (Ext. 1) as a ground of appeal before the lower appellate Court. In fact, the point now taken, on behalf of the defendants-appellants, that there was no consideration for the sale deed Ext. 1, as now urged in this second appeal, was not the subject matter of the appeal before the lower appellate Court.

With regard to the decided cases relied on on behalf of the defendants-appellants discussed above, there the point was not directly raised as to whether or not consideration passed for the sale deed in those particular cases in the same manner as it was in the present case. If there was payment of consideration, no further discussion was necessary --title passed by registration. On the other hand, if there was no payment of consideration, then alone the occasion would arise for discussion of the extraneous circumstances such as the intention and conduct of the parties, custody of the document etc. as appears from the said decided cases. In the present case, however, as I have already found, the terms of the sale deed Ext. 1, by themselves are decisive and unambiguous so as to pass a clear title to the vendees (plaintiffs) independently of the passing of consideration and accordingly their claim in the suit must succeed.

10. In this view of the matter, the decision of the lower appellate Court is upheld. This appeal is accordingly dismissed with costs throughout.