
(2004) 06 JH CK 0012
In the Jharkhand High Court
Case No : AFAD No. 25 of 1990 (R)

Mostt. Fidisita Lakra and Another	Vs	APPELLANT
Nicodin Lakra and Others		RESPONDENT

Date of Decision : 23-06-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 18, 100

Citation : (2004) 4 JCR 393

Hon'ble Judges : Vishnudeo Narayan, J

Bench : Single Bench

Advocate : B.K. Dubey, for the Appellant; Md. M. Khan and S.K. Manjhi, for the Respondent

Final Decision : Allowed

Judgement

Vishnudeo Narayan, J.—This appeal at the instance of the plaintiffs-appellant Nos. 1 and 2 has been directed against the impugned Judgment and decree dated 12.12.1989 and 21.12.1989 respectively passed in Title Appeal No. 2 of 1983 by Shri Arun Prabhat Sinha, 1st Subordinate, Gumla whereby and whereunder the said appeal was allowed setting aside the judgment and decree of learned Munsif, Gumla passed in Tide Suit No. 22 of 1979 and the suit of the plaintiffs-appellant was dismissed.

2. Plaintiffs-appellant No. 1 and 2 along with plaintiff-respondent No. 4 Sushil Lakra had filed Title Suit No, 22 of 1979 for a declaration that decree passed in Partition Suit No. 3 of 1965 for carving out a separate takhata of one-third share of defendant No. 1 is illegal and void and the said decree is not binding upon the plaintiffs and also for a decree for partition of the suit land detailed in the schedule of the plaint by carving out a separate takhata of their one-third share by appointment of a Pleader Commissioner.

3. The case of the plaintiffs, in brief, is that the suit land described in the schedule at the foot of the plaint is the raiyati land of the parties in their

possession Jointly recorded in the survey records of right in the name of Johan Oraon, Paulus Oraon and Charwa Oraon and their separate possession has been noted in the remarks column of the survey records of right but some of the suit plots were recorded in their joint possession but after the survey they also mutually began to cultivate these lands separately. Plaintiff Nos. 1, 2 and 3 are the sons of Johan Oraon. Defendant No. 1 is the son of Paulus Oraon and defendant Nos. 2 and 3 are the sons of Charwa Oraon. it is alleged that Paulus Oraon, the father of defendant No. 1 at the instigation of some illdesigned persons filed Partition Suit No. 3 of 1965 for partition of the suit land and Johan Oraon on service of notice appeared in the said Partition Suit No. 3 of 1965 and filed his written statement making out a case that there had already been a previous partition of the suit properties between the parties but during the pendency of the said suit at the intervention of the well-wishers of the parties a panchayat was held in the month of March 1966 and considering the litigation between the parties not beneficial for them as they had already separated and were in separate possession, Paulus Oraon aforesaid agreed to withdraw the said suit and believing him Johan Oraon thereafter did not appear in the said suit under the impression that the said partition suit must have been withdrawn by Paulus Oraon and further Paulus Oraon had also informed Johan Oraon that he will withdraw the said suit and thereafter the parties to the said suit continued to possess the suit land as usual and till today they are accordingly in possession over the suit land. The further case of the plaintiffs is that in the month of October 1978 in the course of survey settlement operation, plaintiffs came to know from defendant No. 1 that Partition Suit No. 3 of 1965 was decreed ex parte and final decree has already been prepared and he claimed the land as per the allotment made in the takhata of the share of his father. it is alleged that the decree in the said Partition Suit No. 3 of 1965 has been obtained by practicing fraud upon Johan Oraon, the father of the plaintiffs and keeping Charwa Oraon, the father of defendant Nos. 2 and 3 in dark. it is further alleged that no notice of the alleged final decree was ever sent to or served upon Johan Oraon through Court which is mandator and on enquiry the plaintiffs learnt that the Amin had also never sent any information to Johan Oraon in respect of preparation of the final decree in collusion with Paulus Oraon and the final decree has been prepared in Partition Suit No. 3 of 1965 by suppressing material processes and there are several illegalities committed in the report of the Amin which is the part of the final decree for the benefit of Paulus Oraon and thus the decree in Partition Suit No, 3 of 1965 is null and void and not binding upon the plaintiffs as it also purported to separate only the interest, in the suit property of Paulus Oraon. It is alleged that parties are still joint in respect of the suit property, however, they cultivate the suit land separately for the sake of convenience and plaintiffs had one-third share therein and one-third share belongs to defendant No. 1 and the remaining one-third belongs jointly to defendant No. 2 and 3.

4. The case of defendant No, 1 Nicodin Lakra, inter alia is that the suit land was recorded jointly in the survey records of right and there was no metes and

bounds partition between the parties to the suit and they are separately cultivating the suit land for the sake of convenience and his father Paulus Oraon filed Partition Suit No. 3 of 1965 for partition of the suit land and the said suit has been decided in full know of all concerned including the plaintiffs and one-third share of Paulus Oraon stands demarcated and separated as per the decree in Partition Suit No. 3 of 1965 and DP was also affected vide Execution Case No. 2 of 1973 and this defendant is in possession thereon accordingly and the said decree is binding upon the parties to the said suit. It is alleged that Amin has rightly carved out the separate takhata of Paulus Oraon after going upon the suit land and making due enquiry with the knowledge of the parties and there is no illegality therein and the decree passed in Partition Suit No. 3 of 1965 is legal and valid and the same cannot be challenged in the present suit and it is barred by res judicata. It is alleged that the claim of the plaintiff of his separate takhata can be allowed only after excluding the land for which the takhata has been prepared in favour of Paulus Oraon, the father of this defendant as per the final decree in Partition Suit No. 3 of 1965 and it cannot be repartitioned including the land allotted in the takhata of Paulus Oraon aforesaid.

5. The defendant Nos. 2 and 3 have supported the case of the plaintiffs in their written statement.

6. In view of the pleadings of the parties, the learned trial Court has formulated the following issues for adjudication in this case :-

- (i) is the suit maintainable?
- (ii) Has the plaintiff any cause of action or right to sue?
- (iii) in the suit barred by principles of waiver, estoppel and acquiescence and res Judicata?
- (iv) is the suit undervalued?
- (v) is the decree passed in PS No. 3/65 valid and legal?
- (vi) is the plaintiff entitled to a share of 1/3 in the suit-properties?
- (vii) Has the plaintiff any right, title and interest in properties?
- (viii) Does the unity of possession and unit of title lie with the plaintiff in the suit land?
- (ix) To what relief or reliefs is the plaintiff entitled?

7. In view of the oral and documentary evidence on the record, the learned trial Court while deciding issue No- (v) has held that the ex parte decree was fraudulently obtained by Paulus Oraon and it was agreed in the panchayat that Paulus Oraon will withdraw the Partition Suit No. 3 of 1965 and due to the said agreement in the panchayat, Johan Oraon has left the suit unattended believing that the said suit shall be withdrawn by Paulus Oraon. It has further been held that the final decree of Partition Suit No. 3 of 1965 is fraudulent as well as the

mandatory provision of law contained under Order XXVI, Rule 18 was not complied with which has vitiated the appointment of Pleader Commissioner and allotment of the separate takhata in the suit land by him in favour of Paulus Oraon, The learned trial Court has further held that the delivery of possession was null and void as it was not effected in respect of the suit land allotted to the share of Paulus Oraon. While deciding issue No. (iii) it has been held by the learned trial Court that once fraud is established there would be no bar in filing the suit for the same cause of action and the present suit filed by the plaintiffs is maintainable having valid cause of action and is not barred by the principle of res judicata. While deciding other issues, the learned trial has held that there is unity of title and possession between the parties in respect of the suit land. In view of the findings aforesaid, the learned trial Court decreed the suit allowing a preliminary decree in respect of one-third shares of the plaintiffs for carving out their separate takamta as per their share in the suit land by appointment of survey knowing Pleader Commissioner,

8. Being aggrieved and dissatisfied with the judgment of the trial Court, defendant Nicodin Lakra preferred title appeal No. 2 of 1983, On re-appreciation and reappraisal of the evidence on the record, the learned appellate Court below allowed the appeal and set aside the judgment and decree of the trial Court and dismissed the suit of the plaintiffs. It has been held by the learned appellate Court below that no fraud was practised upon Johan Oraon in Partition Suit No. 3 of 1965 and the ex parte decree is legal and valid and DP was issued and it was effected and on the basis of the delivery of possession, the parties are in possession of their respective shares of the suit land. It has also been held that the present suit of the plaintiff is barred by the principle of res judicata. The learned appellate Court below has further held that Rule 18 or Order XXVI of the CPC is not applicable in an ex parte decree.

9. The plaintiffs-appellant preferred this appeal before this Court and while admitting the appeal this Court vide order dated 5.4.1991 formulated the substantial question of law which runs thus :-

"Whether the learned Court of appeal below erred in reversing the judgment of the trial Court without meeting its reasonings."

10. Assailing the impugned judgment it has been submitted by the learned counsel for the plaintiffs-appellant that the learned appellate Court below did not properly consider the material facts of the case and has committed an illegality in reversing the judgment and decree of the trial Court and there is ample evidence on the record to establish the fact that there had been a panchayaii and it was agreed by Paulus Oraon to withdraw the suit and swayed by the said promise Johan Oraon left attending the said suit and Paulus Oraon fraudulently obtained ex parte decree and thus the decree of Partition Suit No. 3 of 1965 is tainted with fraud. it has further been submitted that the principle of res judicata does not apply in the case as the decree has been obtained by fraud and the decree is a fraudulent one. Lastly, it has been submitted that Rule 18 of Order XXVI of the

CPC is a mandatory provision which requires that the Court while appointing Pleader Commissioner shall direct the parties to the suit to appear before the Commissioner in person or by their agents or pleaders and in this case no notice regarding the appointment of the Pleader Commissioner for carving out a separate takhata of Paulus Oraon was ever ordered to be issued to Johan Oraon and it has vitiated the final decree and thus the final decree is fit to be set aside. it has also been submitted that the notice alleged to have been sent by the Pleader Commissioner to Johan Oraon is not sufficient compliance with Rule 18 and thus, there is no power in the Court to issue an ex parte Commissioner and as such the impugned judgment is unsustainable. in support of his contention reliance has been placed upon the ratio of the case of Mander Mukherjee Vs. Sachindra Chandra Mukherjee and Others, (Modavalasam) Latchan Naidu and Anr. v. Rama Krishna Ranga Rao Bahadur Bobbili Samasthanam. AIR 1934 Mad 584, Pedda Seetharamappa and Others Vs. Pedda Appaiah, . Further reliance has been placed upon the ratio of the cases of Khirod Chandra Mohanty Vs. Banshidhar Khatua and Others, and Sk. Shamsuddin alias Bhutka and Ors. v. Most. Bibi Harni and Ors. 1986 BLJR 217.

11. In contra, it has been submitted by the learned counsel for the defendants-respondent that Johan Oraon, the father of the plaintiffs-appellant had appeared in Partition Suit No. 3 of 1965 and has filed his written statement and when he left contesting the suit it was decreed exparte and therefore, there is no fraud practised by Paulus Oraon in obtaining the said exparte decree and the story ofponchayati in which Paulus oraon is said to have promised to withdraw the said suit is nothing but a lame excuse and the learned appellate Court below in view of the evidence on the record and its proper appreciation has held that no fraud was. practised upon Johan Oraon in Partition Suit No. 3 of 1965. It has also been submitted that since it was an ex parte decree and as such no notice is required to be served upon Johan Oraon regarding the appointment of pleader commissioner for carving out a separate takhata in the final decree preceding though, the pleader commissioner has stated in his report that he has sent notice to Johan Oraon and. therefore. Rule 18 of Order XXVI of the CPC has-no application to the facts of this case. it has also been contended that since the exparte decree of Partition Suit No. 3 of 1965 is not tainted with fraud and as such the present suit of the plaintiffs-appellant is barred by resJudicata and in such a situation it is not permissible for this Court to reappraise the evidence afresh as the question of fraud is a question of fact. in support of his contention reliance has been placed upon the ratio of the case of Dudh Nath Pandey (Dead) by Lrs Vs. Suresh Chandra Bhattasali (Dead) by Lrs, and Smt. Annapoorani Ammal Vs. G. Thangapalam, . Further reliance has been placed upon the ratio of the case of Mahalingeshwara Devaru and Another Vs. Seetharama Bhatta and Another, .

12. It is an admitted fact that the suit lands were the raiyati lands jointed recorded in the survey records of right in the name of Johan Oraon, Paulus Oraon and Charwa Oraon but they were in separate possession of the suit land as per

the entry made in the remark column of the survey records of right, though some of the suit plots were Joint but after the survey settlement operation they had mutually began to cultivate those suit plots separately. However, Paulus Oraon, the father of the present defendant No. 1 Nicodin Lakra filed Partition Suit No. 3 of 1965 for partition of the suit land and Johan Oraon. the father of the present plaintiffs appeared in the said suit on service of notice and has filed written statement on 1.7.1985 in which his specific case was that there was already previous partition of the suit property between the parties. According to the case of the present plaintiff, there was a panchayati at the intervention of the well-wishers of the parties in the month of March 1966 and as per the outcome of the panchayat, Paulus Oraon agreed to withdraw the said Partition Suit No. 3 of 1965 and being swayed by the promise Johan Oraon aforesaid left attending the said suit. There is evidence, on the record brought by the plaintiffs-appellant which shows that Paulus Oraon aforesaid obtained an ex parte decree on 23.8.1968 which was sealed and singed on 30.8.1968 and thereafter Paulus Oraon initiated a final proceeding for carving out his separate takhata of his 1/3rd share as per the preliminary ex parte decree aforesaid and in the said final decree proceeding, survey knowing pleader commissioner as appointed for carving out a separate takhata of Paulus Oraon vide order dated 22.1.1971. It is relevant to mention here that no notice was ordered to be issued upon Johan Oraon and other co-shares i.e. the descendants of Charwa Oraon directing them to appear before the Commissioner is person or by their agents or pleaders in flagrant violation of Rule 18 of Order XXVI of the Code of Civil Procedure. There is evidence on the record as per the testimony of PWs 2, 3 and 5 read with PW 1 that there has been a panchayati in which Paulus Oraon agreed to withdraw Partition Suit No. 3 of 1965 and due to that assurance Johan Oraon left attending the said partition suit. DW 1 Nicodin Lakra, the son of Paulus Oraon aforesaid has deposed that there was no panchayati in respect of Partition Suit No. 3 of 1965 but in para-5 of his cross-examination he has deposed that he has never made any pairui in Partition Suit No. 3 of 1965 and he had no knowledge at all in respect of Partition Suit No. 3 of 1965. He has also deposed that in para-8 of his evidence that he does not know as to why Johan Oraon has left contesting the said partition suit. In view of the evidence aforesaid, the learned trial Court has come to the finding that there was a panchayati in between the parties in which Paulus Oraon agreed to withdraw the suit and that was the reason that Johan Oraon has left the suit unattended on the belief that it had been withdrawn by Paulus Oraon. The learned appellate Court below disbelieved the evidence of PWs 2 and 3 and other witnesses of the plaintiff simply on the ground that they were inimical to defendant Nicodin Lakra and has come to a finding that no fraud has been practised upon Johan Oraon in getting Partition Suit No. 3 of 1965 decreed ex parte. The finding of the learned appellate Court below in respect thereof is based on the non-consideration of the evidence on the record in proper perspective. In a great majority of cases, fraud is not capable of being established by positive and tangible proof. It is by its very nature secret in its movement. It is, therefore, sufficient if the evidence given is such as may lead to

an inference that the fraud must have been committed. In most of the cases, circumstantial evidence is the only resource in dealing with the questions of fraud and the suspicious circumstances if not given proper weight, the ends of justice would be consistently if not invariably defeated. There is cogent evidence on the record brought by the plaintiffs-appellant which proves the fact that due to pa.nch.ai/citt and the promise of Paulus Oraon to withdraw the suit, Johan Oraon has left attending the said suit which resulted in the ex parte decree. The learned appellate Court below is a final Court of fact and it is its bounden duty to consider the vital and material evidence on the record in proper perspective while reversing the judgment of the trial Court and more so when such vital material evidences were considered by the trial Court. Therefore, the ratio of the case of Sk. Shamsuddin alias Bhutka and others (supra) supports the contention of the learned counsel for the plaintiffs-appellant in the facts and circumstances of this case. It, therefore, appears that the learned appellate Court below has erred in reversing the finding of the trial Court that the ex parte decree of Partition Suit No. 3 of 1965 is tainted with fraud. Since the ex parte judgment and decree is tainted with fraud and as such it will affect its force effect, executability and value. In the case of Bishunath Tewari and Others Vs. Mst. Mirchi, , it has been observed which runs thus:-

"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."

In the case of Khirod Chandra Mohanty (supra) it has been observed that when the ex parte decree in the earlier suit was obtained by the plaintiff in that suit in collusion or fraud then in that case the said decree would not operate as res judicata in the subsequent title suit, I, therefore, see force in the submissions of the learned counsel for the plaintiffs-appellant in respect thereof.

13. The learned trial Court in para-7 of its judgment has stated that the Pleader Commissioner was appointed on 22.1.1971 in the final decree proceeding for carving out a separate takhata of 1/3rd share of Paulus Oraon. There is no iota of evidence on the record brought on behalf of the defendants-respondents that the Court while appointing a survey knowing Pleader Commissioner had ordered to issue notice directing the plaintiffs-appellant to appear before the Commissioner in person or by their agents or pleaders as mandated under Rule 18 of Order XXVI of the Code of Civil Procedure. Order XXVI. Rule 18 provides that when a commission is issued under Order XXVI, the Court shall direct the parties to appear before the Commissioner in person or by their agent or pleader and, if a party does not appear, the Commissioner may proceed in the absence of the party. It seems, prima facie, that the obligation of the Court to inform the parties as provided in Rule 18 aforesaid is mandatory. It would also mean that the notice given by the Commissioner is not sufficient, if the Court does not give the direction envisaged in the rule. Following the ratio of the case of (Modal-

valasam) Latchan Naidu and another (supra) the Patna High Court in the case of Sm. Mander Mukherjee (supra) has thus observed :-

"Where the Court has not directed the parties to appear before the commission, any notice by the Commissioner himself to the defendant would not validate the appointment of the Commissioner. Under Rule 10 (2) the report of a Commissioner is evidence, and any evidence recorded by a Commissioner without notice to the parties to the suit cannot be used as evidence at all. The order of the Court appointing a Commissioner, without notice to the defendants, is obviously without jurisdiction."

Similar is the view of Andhra Pradesh High Court in the case of Pedda Seetharamappa and others (supra) in which it has been observed which runs thus :-

"However, it is mandatory by reason of Order XXVI, Rule 18 on the Court after issue of the commission to direct the parties to appear before the Commissioner. Notice issued by the Commissioner is not sufficient compliance with Rule 18. And where the local investigation is made behind the back of the defendant, no reliance can be placed on the report given by the Commissioner."

In the instant case, there is neither any notice to Johan Oraon, the father of the plaintiff-appellant before the appointment of the Commissioner nor after issue of the commission and thus, a patent illegality has been committed by the Court in Partition Suit No. 3 of 1965 which has vitiated the final decree proceeding. The notice by the survey knowing Pleader Commissioner to the plaintiff-appellant at the spot in course of the demarcation of the suit land cannot be termed to be sufficient compliance with Rule 18 aforesaid. The learned trial Court has correctly approached the matter in proper perspective. The finding of the learned appellate Court below in respect thereof that no notice is required to Johan Oraon, the father of the plaintiff-appellant in the said suit on appointment of the Pleader Commissioner since it was an ex parte decree is erroneous and against the settled proposition of law in respect thereof. Therefore, the impugned judgment of the learned appellate Court below suffers with illegality. The ratio of the cases of Dudh Nath Pandey (dead by LR's) (supra), Smt. Annapoorani Animal (supra) and Mahalingeshwara Devaru and another (supra) relied upon by the learned counsel for the defendant-respondent has no application in the context of the facts of this case.

14. There is merit in this appeal and it succeeds. The appeal is hereby allowed and the impugned judgment of the learned appellate Court below is set aside. The judgment of the trial Court is hereby restored and the suit of the plaintiff-appellant is decreed. However, there shall be no order as to cost.