

(1979) 01 PAT CK 0012
In the Patna High Court
Case No : A.F.A.D. No. 562 of 1969

Mst. Dhanti Devi and Others

APPELLANT

Vs

Kartar Singh and Another

RESPONDENT

Date of Decision : 03-01-1979

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, Order 22 Rule 3
Evidence Act, 1872 — Section 115

Citation : AIR 1980 Patna 77

Hon'ble Judges : Hari Lal Agrawal, J;B.P. Jha, J

Bench : Division Bench

Advocate : S.C. Ghosh and Amarjit Singh, for the Appellant; K.D. Chatterjee, Aftab Alam and Sukumar Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Hari Lal Agrawal, J.—This second appeal arises out of a suit filed by the plaintiff-respondent No. 1 under the provisions of Order 21, Rule 63 of the Civil P. C.

2. The relevant facts giving rise to this appeal are as follows:

In the year 1936 Dewan Singh (since deceased) and Gurbux Singh, defendant No. 2, started a business in copartnership in the name and style of M/s. Vishwakarma Furniture Works. Both of them came from different families. The plaintiff Kartar Singh is the brother of Gurbux Singh and the appellant Dhanti Devi (defendant No. 1) is the widow of Dewan Singh. The plaintiff also impleaded his brother Gurbux Singh as defendant No. 2 and Bir Singh, a brother of Dewan Singh as defendant No. 3. The two daughters of Dewan Singh were also made defendants Nos. 4 and 5.

By a sale deed dated 11-1-1946 (Ext. 3) some landed properties appertaining to holding Nos. 390, 434 and 609 bearing Plot No. 1427 in Mauza Jugsalai, fully described in Schedule A to the plaint were purchased jointly in the names of

Kartar Singh, Gurbux Singh, Bir Singh and Dewan Singh. Later on, by another sale deed dated 29-2-1956 (Ext. 3-a), another property appertaining to Plot No. 1427 bearing holding No. 608 in Mauza Jugsalai was purchased in the names of Kartar Singh and Bir Singh.

On the death of Dewan Singh the partnership was reconstituted on 15-7-1961 between Gurbux Singh and Dhanti Devi, but soon thereafter, i.e., on 18-4-1962. Dhanti Devi instituted a title suit in the Court of the Subordinate Judge at Jamshedpur for dissolution of the firm and accounts of M/s. Vishwakarma Furniture Works. The dispute was referred to an Arbitrator who gave an award in the matter. It appears that the Arbitrator not only dissolved the firm and struck the accounts between the erstwhile partners, but also purported to distribute the assets of the firm between the two partners, namely, defendants Nos. 1 and 2, The Arbitrator allotted the Vishwakarma Furniture Works, a building and cash of Rs. 1,28,433.51 to Gurbux Singh and the structure Schedules A and B lands and a cash of Rs. 88,304.87 to Dhanti Devi, the appellant.

The above award was made a rule of the Court and decree was passed in terms thereof. It may be mentioned that the properties covered by Schedules A and B lands were allotted to the share of Dhanti Devi treating them as the assets of the firm. Dhanti Devi thereafter filed Execution Case No. 60 of 1965 seeking delivery of possession in terms of the decree aforesaid in respect of the lands.

3. The case of the plaintiff is that he was not aware of the above proceedings inasmuch as he was not at all interested in the business of the firm, but when the execution proceeding was started and he became aware of the efforts of Dhanti Devi to take delivery of possession over the entire Schedules A and B lands in which he had share to the extent of 1/4th in Schedule A lands and 1/2 in Schedule 2 lands, in terms of sale deeds mentioned above, he filed an application under Order 21, Rule 58 of the Code.

The Executing Court, however, by its order dated 28-5-1966 rejected the claim of the plaintiff who accordingly instituted the present suit. The plaintiff pleaded that the properties in suit were not the partnership properties and that he was in exclusive possession of his share therein in his own rights and, therefore, the same could not be allotted to defendant No.], treating them as the assets of the firm. He accordingly prayed for a declaration that defendant No. 1 was not entitled to take delivery of possession over the properties to the extent of his share in execution of the decree, i.e., 1/4 in Schedule A lands and 1/2 share in Schedule B lands. He also sought for a permanent injunction restraining the said defendant from taking delivery of possession over the aforesaid property.

4. A joint written statement was filed on behalf of defendants Nos. 1, 3, 4 and 5, i.e., all the members of the family of Dewan Singh, and their defence in essence was that the suit properties exclusively belonged to the firm and were purchased with the money of the firm, the plaintiff and defendant No. 3 Bir Singh being merely name-lenders. It was similarly alleged that the structures standing on the

aforesaid properties were constructed with the fund of the firm and the plaintiff and defendant No. 3 have op had no share in the said properties, nor they were in possession of the same. The defendant No. 2 did not appear in the suit.

5. The plaintiff succeeded in both the Courts below and they concurrently recorded findings of facts in favour of the plaintiff to the effect that the purchasers of Schedules A and B lands were their real owners and the plaintiff and defendant No. 3 were not merely name lenders; in other words, the purchases made by the two sale deeds were not benami transactions. The above finding was recorded on considering the report of the Pleader Commissioner and the question of payment of consideration, possession and motive besides other ingredients of a benami transaction.

On the aforesaid finding the trial Court had decreed the suit of the plaintiff-respondent as against all the contesting defendants and ex parte against defendant No. 2, and held that the plaintiff had 1/4th share in Schedule A lands and 1/2 share in Schedule B lands and that defendant No. 1 was not entitled to take delivery of possession over the same in execution of the decree.

6. Apparently the finding recorded by the ultimate Court of fact is conclusive and binding on this Court in second appeal, but Mr. S.C. Ghosh, appearing for, the appellants, strenuously endeavoured to make out a question of law for consideration of this Court, and that was that the plaintiff was estopped in law from raising the above questions for consideration of the Court as he never objected to the allotment of the lands to the share of defendant No. 1, the appellant, and maintained silence; the result of his silence has been that all the disputed properties were allotted to the share of the appellant and, therefore, great prejudice was caused to the appellant.

7. Long arguments were addressed by Mr. Ghosh on the above question and a series of decisions were cited, but now it would not be necessary to consider this question in all its details as an abatement has set in, in the appeal. I would, however, like to discuss the facts relating to abatement before I proceed on to briefly notice and answer the argument of Mr. Ghosh on the question of estoppel.

8. It has already been seen that Bir Singh (defendant No. 3) one of the purchasers, in his joint written statement with the contesting defendants had pleaded that the purchases under the two sale deeds were by and on behalf of the firm and not by him and the plaintiff as such. The above plea has been negatived by the Courts below and in this Court Bir Singh was appellant No. 2. He, however, died on 18-5-1975 leaving behind two sons and two daughters, but no step for substitution was taken by the appellants until 18-8-1976.

In the petition for substitution after setting aside the abatement, it has been stated that appellant No. 1 was living at Jullundur "for some time" and was not aware of the death of Bir Singh earlier, until she came to Jamshedpur only a week before and learnt of the death, and also that she did not know that no step had been taken by the heirs for their substitution. It was further stated that Bir

Singh was not interested in the appeal and no relief was claimed against him and, therefore, his death would not render the appeal incompetent. Nonetheless, the appellants contended that in order to avoid any complication his heirs and legal representatives may be added.

It may be mentioned that admittedly Bir Singh was the Attorney of the appellant and was holding a duly executed Power of Attorney from her so much so that it was he who had affirmed the written statement on behalf of all the defendants.

In the counter-affidavit filed on behalf of respondent No. 1 it has been asserted that the appellants were living together and appellant No. 1 was fully aware of the death so much so that she was present in his Bhog ceremony. The petition for substitution was taken up on 18-1-1978 and was ordered to be put up for consideration along with the hearing of the appeal itself.

9. Having examined the facts and circumstances mentioned in the petition for substitution and the counter-affidavit, it is not possible to hold that the appellants have succeeded in making out a case for condoning the delay in making the application for substitution and setting aside the abatement of the appeal against the heirs of appellant No. 2 Bir Singh, I would accordingly reject the petition for substitution.

10. The question now arises as to whether the abatement of the appeal against the heirs of Bir Singh would render the entire appeal incompetent or the appeal can proceed even in their absence. Mr. Ghosh contended that in a suit instituted under Order 21, Rule 63 of the Civil P. C., Bir Singh was not a necessary party as the only parties necessary to be impleaded, on the facts of this case, were the judgment-debtor and the decree-holder. He contended that the suit of the plaintiff was declaratory in nature, filed on a declaratory court-fee and, therefore, no declaration of his title could be made on that amount of court-fee binding on Bir Singh. In order to appreciate this contention, I may indicate the relief prayed for by the plaintiff.

It has been seen that Bir Singh was a co-purchaser with the plaintiff in both the sale deeds. The plaintiff prayed for a "declaration of his title by virtue of the purchases aforesaid..... to the extent of his shares" in presence of Bir Singh as well who, as already seen, had set up an adverse title to the plaintiff. The Courts below have decreed the plaintiff's suit against all the defendants. It cannot be disputed that the finding of the Courts below that the ostensible owners are the real owners of the property and not benami-dars for the firm, is a finding which would be operative and binding on the heirs of Bir Singh. The appellants seek reversal of that finding by this Court and to hold that the properties were purchased for and on behalf of the firm by the aforesaid purchasers.

I am afraid, in the absence of the heirs of Bir Singh, it is not possible for this Court to upset the said finding as it would give rise to two conflicting decrees. I neither find any force in the contention of Mr. Ghosh that the nature of the plaintiffs suit could be only a declaratory one and Bir Singh was not a proper

party to the same. Rule 63 of Order 21 of the Code does not contain any limitation as regards the nature of the suit to be filed and does not envisage any particular restriction relating to its scope. The scope of an enquiry under Rule 58 is limited one and confined to the question of possession only but a suit under Rule 63 is concerned not only with possession but title also. No restriction is imposed as regards the nature of a suit, though a defeated party is placed at a disadvantage as regards the period of limitation for filing the suit. The plaintiff in a suit under this rule is not precluded from asking for other reliefs than a mere declaration of the right denied to him by the executing Court. I would accordingly hold that the findings of facts arrived at by the Courts below cannot be varied or altered in the absence of the heirs of Bir Singh.

The Supreme Court in the case of *The State of Punjab Vs. Nathu Ram*, has held that one of the tests to determine as to whether on the death of a respondent the whole appeal abates is, whether the success of the appeal may lead to the Court's coming to a decision between the appellant and the deceased respondent, and, therefore, it would lead to the Court's passing a decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent. In my view, on the facts of this case, the failure of the appellants to substitute the heirs would lead to the said situation and, therefore, the whole appeal has become in-competent and it must fail on this account alone.

11. As already said earlier, since the appeal was argued at a considerable length on the point of estoppel, I would also record my view on that question but very briefly, although it is not necessary in view of my finding on the question of abatement

The rule of estoppel is based on equity and good conscience and is treated as a rule of evidence and has been given a place in the Evidence Act, u/s 115. The rule of evidence under this section is a rule of estoppel by conduct as distinguished from an estoppel by record which constitutes *res judicata*. In order to constitute the bar of estoppel the act or omission of the person must be intentional. Estoppel always deals with questions of fact and is a rule of civil action. Mr. Ghosh wanted to apply this principle against the plaintiff on the ground that when Schedules A and B properties were allotted to the share of appellant No. 1, he did not object to the inclusion thereof and kept silent and: by that omission and maintaining a complete silence, led defendant 1 to act upon the belief that Schedules A and B properties were the assets of the firm.

12. With due deference to Mr. Ghosh, I have no doubt in my mind that this contention is entirely erroneous and misconceived. The plaintiff was not a party to the suit much less a person present during the arbitration proceedings going before the Arbitrator. The suit of defendant No. 1 was a suit for dissolution of partnership and accounts. The plaintiff admittedly had no interest in the same. If the arbitrator, therefore, in the absence of the plaintiff and without any representation on his part, allotted any property not belonging to the firm, then

certainly the plaintiff cannot be responsible for that. Presence of Gurbux Singh, his brother, in that title suit would not in any way debar the plaintiff from claiming his own properties. It was neither contended before us that the presence of Gurbux Singh would in any way detract the plaintiff from asserting his right.

It is well settled that the estoppel must be clear, unambiguous and certain and that the principle of estoppel would have no application when both parties are equally acquainted with true facts. Dhanti Devi who was a plaintiff in the earlier suit was a partner of the firm and must be deemed to be fully acquainted with the true facts, and according to the finding of facts now binding on her, the properties in suit were not the properties of the firm. If, therefore, she deliberately got the said properties allotted to her own share, certainly she cannot fall on the plaintiff to acquiesce in the said allotment and thereby give up his claim and right in the same. The plaintiff must be deemed to be wholly unaware as to what was happening in the arbitration proceedings and, for that matter, in the suit instituted by the plaintiff.

In order to apply the principle of estoppel by silence there must be a duty to speak and a person who is sought to be bound by that principle must be shown to be aware of the transaction. No general rule can be formulated as to when silence may operate as estoppel, but certainly it can apply only when a party fails to make his rights known, where fairness and good conscience require that he should do so to protect the interest of others. Where no duty is cast by law on a person to speak and act, silence does not amount to estoppel. Nothing was shown to us to indicate that the plaintiff was aware of the proceedings of the earlier suit and that he "stood by" in allotment of Schedules A and B properties to the share of defendant No. 1. It was held by the Supreme Court in *Union of India (UOI) Vs. Watkins Mayor and Co.*, that mere silence was not acquiescence.

13. For the reasons discussed above, I would hold that the question of law urged by Mr. Ghosh has no substance and this appeal has got no merit. The appeal is accordingly dismissed with costs.

B.P. Jha, J.

I agree.