
(2001) 04 OHC CK 0024
In the Orissa High Court
Case No : Second Appeal No. 158 of 1984

Narahari Dhal and another	Vs	APPELLANT
Subarna Dei (Died), Dibakar Sahu and others		RESPONDENT

Date of Decision : 06-04-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 32(3)

Citation : (2001) 3 CivCC 603 : (2001) 92 CLT 384 : (2001) 1 OLR 716

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

Bench : Single Bench

Advocate : M/s P. Kar and D. K. Sahu, for the Appellant; M/s S.C. Ray and Mrs. N. Ray, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—Defendants are the appellants against a reversing decree in a suit for declaration of title, confirmation of possession, in the alternative, for recovery of possession. The disputed land is homestead land with an extent of Ac.0.17 decimals, The case of the plaintiff is as follows :--

The plaintiff is the daughter of one Jagabandhu. Her father had executed a nominal sale deed dated 23-8-1943 in favour of father of defendant No. 2 under Ext. 6. No consideration had been paid and the sale deed had not been acted upon and after the death of her father, plaintiff and her mother remained in possession. Defendant No. 2 on the basis of such sham sale deed sold the disputed land to defendant No. 1 on 18-1-1979 on the basis of which defendant No. 1 threatened to interfere in the possession of the plaintiff forcing her to file the present suit.

2. Defendants in their joint written statement denied the plaint allegations and pleaded that the sale deed had been executed for consideration and defendant No. 2 had possessed the disputed land. It was claimed that under the sale deed dated 23-8-1943, a total extent of Ac.0.24 decimals of land including the

disputed Ac.0.17 decimals of land had been sold and the father of defendant No. 2 and thereafter the defendant No. 2 had remained in possession and subsequently the property had been validly sold to defendant No. 1. It was also pleaded that during Settlement operation, defendant No. 2 who had confidence in the son of the plaintiff had given the sale deed, but taking advantage of such temporary custody, the son of the plaintiff got the disputed property recorded in the name of the plaintiff.

3. The trial court dismissed the suit on the finding that Jagabandhu, father of the plaintiff, had sold the property for consideration. It was also found that plaintiff and her mother were not in possession and plaintiff had failed to prove adverse possession.

4. The lower appellate court has reversed the decision of the trial court on the finding that defendant No. 1 had failed to establish that he was in possession and the sale deed (Ext. 6) had not been acted upon.

5. At the time of admission of the appeal, it was indicated that the substantial questions of law formulated in ground Nos. 2 to 4 of the memorandum of appeal are required to be determined. For convenience, the aforesaid grounds are extracted hereunder :--

"2. For that by virtue of the sale deed dated 23-8-43 Jagabandhu Behera had sold Ac.0.24 decimals of land which consist of Ac.0.07 decimals of agricultural and A.017 decimals of homestead land but the plaintiff does not challenge the document relating to the agricultural land and confines her case to the homestead land which aspect has not been considered by the learned lower appellate Court and has passed a decree holding that the Ext. 6 is a nominal document which is unsustainable in law.

3. For that the plaint averments and statement of the plaintiff indicate that the plaintiff has set up a case of benami character of Ext. 6 but she has failed to establish such a case; it is submitted that in Ext. 6 there is recital to the effect that to repay the debt and payment of rent the land under Ext. 6 had been sold and the vendor had received the consideration money which has not been considered by the learned the lower appellate Court.

4. For that admittedly Ext. 6 was of the year 1943 and there is a cleat recital to the effect that the executant had received the consideration money and it is in evidence that the plaintiff had no knowledge about the property affairs of her father and the settled position of law that the statement of a dead person against his pecuniary interest is a good evidence in support of passing of consideration and u/s 32(3) of the Evidence Act, there should be a presumption of passing of consideration (See I. L. R. 1969 Cut 571, 1977 C. L. T. 552). It is submitted that this aspect of the matter has not been considered by the learned lower appellate court which has resulted in miscarriage of justice."

6. Even though apparently the conclusions of the lower appellate court can be

considered to be findings of fact, not liable to be interfered with in exercise of jurisdiction u/s 100, C. P. C., a closer scrutiny of the reasonings given by the lower appellate court makes it clear that the judgment of the lower appellate court cannot be sustained. It is apparent from the plea taken by the plaintiff that she had pleaded a case that the transaction in favour of father of defendant No. 2 was a sham transaction by her father. Obviously, it means that while plaintiff admitted that a sale deed had been executed, she had come out with the specific case that the transaction was a sham transaction not intended to be acted upon. The lower appellate court seems to have put the onus on the defendants to prove the genuineness of the transaction apparently on the footing that the vendor had put thumb impression on the document. It is not the case of the plaintiff that the document in question had not been read over and explained to her father, the vendor. It was the specific case that though a sale deed had been executed, it was not intended to be acted upon. In other words, while admitting about the due execution, the plaintiff had come out with a specific case that the transaction was intended to be a sham transaction and title was not intended to be conferred on the vendee. Since the lower appellate court has proceeded on a wrong footing relating to onus, the findings recorded by it are required to be scrutinized.

7. The learned counsel appearing for the appellants has submitted that even though Ac. 024 decimals of land had been purportedly sold under Ext. 6, the suit had been filed only in respect of Ac. 0.17 decimals and no explanation had been furnished as to why the suit was not filed in respect of the entire Ac. 0.24 decimals of land apparently sold under EXE. 6. It is also contended that both the vendor and vendee being dead, the recital in the sale deed relating to payment of consideration had great evidentiary value which has not been considered by the lower appellate court. It is further contended that plaintiff herself has admitted that the vendees were in possession and there is no finding regarding the motive for the alleged sham transaction. It is well settled that while considering the question as to whether a transaction is sham or genuine, the Court is required to find out about the motive, possession and consideration as well as relationship between the parties and custody of the document. It is, of course, true that the document was produced by the plaintiff, but an explanation had been furnished by defendants. In this context, the counsel for the appellants has rightly submitted that the lower appellate court has not tried to appreciate the explanation furnished by the defendants on the basis of wrong assumption that no such plea had been taken in the written statement. So far as motive for the alleged sham transaction is concerned, it is simply the case of the plaintiff that in order to avoid payment of land revenue, such a sale deed had been executed. This does not appear to be strong enough motive for the alleged sham transaction. So far as relationship is concerned, the plaintiff has failed to adduce any evidence in the matter and there is nothing to show that the father of defendant No.2 was a man of confidence so far as plaintiff's father was concerned. So far as payment of consideration is concerned, it is not disputed that the earlier transaction was of the year 1943 and the suit had been filed after

about thirty-six years in the year 1979. There is a recital in the sale deed regarding receipt of consideration. Apart from the bare denial of the plaintiff, who obviously did not have any direct knowledge in the matter, there is no material to rebut the recital regarding payment of consideration. It has been held in the decision reported in A. I. R. 1971 Supreme Court 1028 (Smt. Rani and another v. Smt. Santa Bala Debanath and others) that recital in old sale deed relating to payment of consideration particularly when the vendor and the vendee are dead, is admissible. So far as possession is concerned, the lower appellate court has observed that defendant No. 2 had failed to prove that he was in possession. The lower appellate court has accepted the possession on the basis of the entry in the Record-of-Rights. The fact that Ac. 0.24 decimals had been sold out of which the suit was filed only in respect of Ac. 0.17 decimals has been lost sight of. Moreover, the plaintiff in her evidence had categorically admitted in paragraph-11 :-

".....All lands sold by my father are possessed by vendees but are recorded in my name....."

This clearly indicates that the plaintiff was not in possession. It is not the evidence of the plaintiff that she had been forcibly dispossessed. In the face of such a statement by plaintiff herself, the finding that, defendant No. 2 was not in possession must be held to be a finding based on non-consideration of material evidence on record. Even otherwise, p. w. 2 examined on behalf of the plaintiff, had also stated that plaintiff lives at a distance of one mile from the homestead land. It was further admitted by the said witness that defendant No. 1 had constructed a house towards western end of the suit homestead. It is thus apparent that the lower appellate court without considering these vital pieces of evidence and without considering the reasons given by the trial court came to the conclusion that defendants had failed to prove possession. The lower appellate court seems to have been much swayed away by the fact that the document (sale deed) had been produced by the plaintiff. Defendant No. 2 had taken the plea that the sale deed had been handed over to the son of the plaintiff during Settlement operation to facilitate recording of the land in the name of the purchaser, but taking advantage the property was illegally noted in the name of the plaintiff. The very fact that plaintiff herself admitted that the purchasers from her father were in possession, but the lands had been recorded in her name clearly indicates that the Record-of-Rights did not reflect the correct position. The lower appellate court has refused to consider the explanation furnished by the defendants on the pretext that such a plea had not been taken. However, this appears to be an error of record, as the defendant No. 2 had taken a plea that the document had been handed over to the son of the plaintiff,

8. For the aforesaid reasons, in disagreement with the conclusion of the lower appellate court, I hold that the plaintiff has failed to prove that the sale deed in favour of defendant No. 2 by her father was a sham transaction and has failed to prove her possession over the suit land. As such, the Second Appeal is allowed

and the plaintiff's suit is dismissed. There will be no order as to costs.

9. Second appeal allowed.