

(1989) 08 OHC CK 0006

In the Orissa High Court

Case No : Second Appeal No. 17 of 1980

Officiating Common Manager, Bhingarpur Debottar Estate and
Another

APPELLANT

Vs

Brahman Nijon, Uttar Bada and Dakshinabada and Others

RESPONDENT

Date of Decision : 17-08-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 2, 100
Registration Act, 1908 — Section 28
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1990 Ori 190

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : R.N. Sinha, for the Appellant; R.k. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—This second appeal is by the contesting defendants in a suit for declaration of title of the plaintiff over "A" schedule land with the house standing thereon and for, delivery of possession of the same to the plaintiff and further if it is found that defendant No. 1 has title to the extent of 15 annas 6 pies, then for partition and to carve out the plaintiff's share of 6 pies in the property.

2. The plaintiff's case is that Bhahman Nijog of Uttar Bada and Dakshina Banda consisting of Bhahmin Supakars are the Sebaites of Lord Lingaraj and the said organisation resolved that the President of the Nijog should file the suit. The suit plot No. 737 belonged to Choudhury family of Bingharpur. Several houses stood on the same which were being used by members of the family. Ac.0.005 decimals out of the said plot was acquired for the purpose of road and the balance Ac.0.046 decimals is the suit land in which the family Deity Gopinath Deb had 15 annas 6 pies interest and Choudhury Ramanarayan Das had only 6 pies interest. Ananta Narayan Das, father of Ramanarayan as guardian executed a registered sale deed on 18-8-1956 in favour of the plaintiff Nijog in respect of 6

pies interest of Ramanarayan. The Choudhury family representing their family Deity Gopinath Deb sold remaining 15 annas 6 pies interest in the suit property in favour of the plaintiff-Nijog and delivered possession of the same. Thus the plaintiff-Nijog became owner of the entire plot. Defendant No. 1 had a tea stall in a small thatched house standing on a portion of the land. He was paying rent of Rs. 5/- to the plaintiff after the plaintiff purchased the land. Subsequently, defendant No. 1 tried to record his name in respect of that thatched house in the Notified Area Council on the strength of a sale deed dated 9-8-1956 alleged to have been executed by the Manager of Bingharpur Estate in his favour. The sale deed covered Ac.0.044 1/2 i.e. 15 annas 6 pies interest of the Deity described in Schedule B of the plaint. The plaintiff objected to the same but ultimately the Board of Revenue by order dated 29-5-1963 directed that the record should stand in the name of the original assessee. Therefore, the Executive Officer of the Notified Area Council continues to record the name of the plaintiff's vendor. The plaintiff further alleges that the common manager appointed by the District Judge, Cuttack, in respect of Bingharpur Debottar Estate had never been entrusted with the properties of the estate nor had he ever taken possession of the land in question and the sale dated 9-8-1956 in favour of defendant No. 1 does not confer any title. The sale deed is also contrary to the sanction of the District Judge since the District Judge had allowed the Manager to execute only lease deed on annual rental of Re. 1 / -. Since the plaintiff had acquired good title over the land and requested defendant No. 1 to vacate the suit land but yet he did not vacate the same, the plaintiff filed the suit in question. In the suit, the vendors of the plaintiff-Nijog merely members of Choudhury family have also been arrayed as parties.

2-A Defendant No. 1 as well as the Common Manager (defendant No. 47) contested the suit and others remained ex parte. Defendant No. 1 in his written statement took several legal objections with regard to maintainability of the suit namely, the Nijog not being registered, the suit is not maintainable; the suit is bad for defect of parties; the suit is barred by limitation and plaintiff had no cause of action for the suit. That apart, the stand of defendant No. 1 is that the plaintiff never had purchased the land on the basis of the two sale deeds as alleged and according to him the Common Manager was in possession and management of the property and of necessity after obtaining due permission from the District Judge sold the property to him and, therefore, he acquired good title over the land in question. He also claimed an alternative title by way of adverse possession. Defendant No. 1 also took the stand that the suit was not maintainable u/s 28 of the Registration Act since the plaintiff practised fraud on registration inasmuch as the sale deed was registered at Cuttack by inclusion of some fictitious property which has no existence.

3. Defendant No. 47 in his written statement contends that the plaintiff has no locus standi to bring the suit and the 15 annas 6 pies interest in the land devolved on him, and he had let out the house to defendant No. 1. According to him, the devolution of interest of co-sharers is by virtue of a sale deed dated

12-8-1927 and the earlier suit filed by the co-sharers to set aside the sale was dismissed. He further pleaded that by the order of the District Judge he has sold the land in favour of defendant No. 1 on 9-8-1956 and, therefore, the suit is liable to be dismissed.

4. On these pleadings, the trial Court framed six issues and recorded the following findings :--

(i) Though Gopinath Deb was the owner and the Common Manager was in charge of the property, yet the said Common Manager had no authority to sell the land to defendant No. 1 and, therefore, defendant No. 1 could not acquire title over 15 annas 6 pies interest of Gopinath Deb and consequently, no title passed unto defendant No. 1 by virtue of the sale deed (Ext. B) executed by defendant No. 47.

(ii) Gopinath Deb, the admitted owner, had not executed Ext. 1 and only some of the Choudhury family members as marfatdars had executed the sale deed and, therefore, the sale deed (Ext. 1) was invalid and inoperative and no title passed unto the plaintiff under Ext. 1.

(iii) The oral evidence that other marfatdars consented to the sale would not cure the invalidity.

(iv) Plaintiff and plaintiff's vendors played fraud on the law of registration.

(v) The plaintiff acquired good title in respect of 6 pies interest which the plaintiff had purchased from Ramanarayan.

(vi) Defendant No. 1 did not prescribe title by adverse possession in respect of 6 pies interest of Ramanarayan.

(viii) The plaintiff is entitled to the alternative relief claimed for partition and carving out the 6 pies interest which the plaintiff had purchased from Ramanarayan.

(viii) On the question of maintainability, it was held that the suit was maintainable.

Accordingly the suit was decreed only in respect of 6 pies interest of Ramanarayan which the plaintiff had purchased and it was directed that the property be partitioned and the plaintiffs share be carved out in the final decree proceeding.

5. The plaintiff carried an appeal against the judgment and decree of the learned Munsif. Defendant No. 1 also filed a cross-objection. The lower appellate court came to hold that under the sale deed (Ext. 1) besides the suit property covered under plaint "B" Schedule, a patch of agricultural land measuring twenty decimals in Cuttack District had been sold and that patch had been acquired by Choudhury family in the name of one Radha-krushna Das who was one of the members of the family, in a court sale vide sale certificate (Ext. 19) dated 26-9-1942. Disagreeing with the trial Court, the lower appellate Court held that

there was no fraud on the law of registration in executing Ext. 1 and the same would stand if otherwise maintainable. Ext. 1 had been executed with the approval of all the marfatdars of the Deity and would bind the interest of all. Defendant No. 1 having failed to establish his title in respect of the land covered by Ext. 1 could not question the plaintiffs title under the same. The lower appellate court further held that the plaintiff was entitled to get the property covered under plaintiff Schedule A from the possession of defendant No. 1 in view of plaintiffs title on the basis of Exts. 1 and 6. In this view of the matter, the lower appellate Court decreed the plaintiffs suit in full and accordingly held that it was not necessary to grant the alternative relief which had been granted by the trial Court and the cross-objection filed by defendant No. 1 was dismissed.

6. Defendants 1 and 47 have preferred the second appeal against the said appellate judgment and decree. Mr. Sinha, the learned counsel appearing for the appellants does not assail the concurrent finding of the two courts below with regard to the validity of Ext. 6 under which the plaintiff acquired title in respect of 6 pies interest from Ramanarayan and on the basis of which the trial Court had decreed the alternative relief for partition. But the challenge in this appeal is with regard to the validity of Ext. 1 which had been held by the trial Court to be invalid but the lower appellate court reversed the same. According to Mr. Sinha, Ext. 1 must be held to be invalid, inoperative and void since the parties have played fraud on registration by including a fictitious property and thereby registering the document at Cuttack and Section 28 of the Registration Act would operate as a bar. In support of the aforesaid contention, he placed reliance on the decision of the Privy Council in the case of AIR 1936 91 (Privy Council) . He further contends that since admittedly all the Sebait had not executed Ext. 1, the same is invalid in the eye of law and does not confer any title on the plaintiff.

The learned counsel appearing for the plaintiff-respondent No. 1, on the other hand, submits that the property in the district of Cuttack which is included in the sale deed is neither fictitious nor non-existent and, therefore, there was no fraud on the law of registration. He also urges that there has been no pleading to the effect that the sale is invalid on account of fraud on the law of registration and, therefore, such a point could not have been permitted to be urged. So far as the execution of sale deed by some of the marfatdars is concerned, it has been contended that on the evidence on record it is fully established that though some of the marfatdars have executed the document, but all others consented to the same and since they do not assail the validity of the said document the document confers valid title on the plaintiff.

7. At the outset, the contention of the learned counsel for the plaintiff-respondent that there has been no pleading with regard to fraud on registration cannot be sustained since it transpires that an application for amendment had been filed on 27-1-1973 during the pendency of the appeal in the lower appellate court and defendant No. 1 was permitted to amend the written statement by adding paragraph 24 wherein a positive assertion with regard to fraud on

registration has been made: That apart, there has been a specific issue on this score and parties led evidence and both the courts below have discussed the evidence also and in that view of the matter, the contention of the learned counsel for the plaintiff-respondent with regard to absence of such a pleading must be rejected.

8. Coming to the question of fraud on the law of registration u/s 28 of the Registration Act, every document mentioned in Section 17 of the said Act has to be presented for registration in the office of a Sub-Registrar within whose sub-district, the whole or some portion of the property to which such document relates is situate. Therefore, if the property in the district of Cuttack would not have been included in the sale deed (Ext. 1), then the said Ext. , could not have been registered at Cuttack, as has been done in the present case. Where a document is registered by including a property which is non-existent merely for conferring jurisdiction on the Sub-Registrar where it is registered, such a document has been held to be invalid. Where a property does not belong to the mortgagor and was not intended by the parties to be mortgaged but was merely included to get the document registered, the said document was held to be invalid. (See, Harendra Lal Roy Chowdhuri v. Sm. Haridasi Debi AIR 1914 PC 67). Similarly, where property which was included in a sale deed exists but to which the vendor had no title and yet included the same in the document merely for enabling the document to be registered in the district where the said property situates, it has been held that the registration of the document is invalid (See, Mathura Prashad v. Chandra Narayan Chowdhury AIR 1921 PC 8). In the present case, either of the two aforesaid contingencies does not arise since it is not the case of defendant No. 1 that the property in the district of Cuttack which is included in Ext. 1 was either non-existent or that the vendors had no title to the same. According to Mr. Sinha, the learned Counsel for the appellants, the said Cuttack property had never been intended by the parties to be transferred and was solely included for the purpose of registration and, therefore, the registration must be held to be invalid. In support of the aforesaid contention, he places reliance on AIR 1936 91 (Privy Council) . In the case of AIR 1934 157 (Privy Council) , their Lordships of the Privy Council have held that the word "fictitious" used in Harendra Lal Roy's case AIR 1914 PC 67 is not confined to non-existing properties and it is satisfied if the deed does not "relate" to a specified property for any effective purpose of enjoyment or use. After analysing the evidence in that case their Lordships came to the conclusion that an insignificant item of property included in the sale deed was of no value, both in respect of the interest taken in it and in respect of its complete inaccessibility and it was incapable either of being utilized or enjoyed by the purchaser and the vendor refused to include in the sale any property to which these disadvantages did not attach in the place where registration was effected. It was, therefore, concluded that one of the inferences alone was possible; either that it was never intended by either party that the sitting room should for any purpose other than that of registration be subject of sale at all, or that the vendor only included it because he knew that

it never could become an effective subject of enjoyment or occupation by the purchasers; and consequently, the circumstances leave no doubt that the parties never intended that the undivided share of the sitting-room should really be sold and the sale was a mere device to evade the Registration Act. In AIR 1936 91 (Privy Council) , it was held by the Privy Council;--

"Where the property sought to be transferred by a deed is situated in one district but a small strip of land situated in another district is included in the deed, without any intention on the part of the parties that it should pass under the deed but solely with a view to obtain registration in the latter district, it amounts to fraud on the law of registration, being a device to evade the Registration Act, and the registration obtained in such a way is not valid. There being no effective registration, a suit for possession on basis of the deed does not lie."

(quoted from the headnote)

It was further held :--

"The criterion by which the question as to validity or otherwise of the registration is to be decided is whether upon the facts established by evidence, the small strip of land was really intended to pass under the deed. The motive may be immaterial if the requirements of law have been complied but of this the intention is critical."

(quoted from the headnote)

In the said case, their Lordships held that there was no intention that the small strip of land should pass under the deed and accordingly the deed was held to have been executed in contravention of Section 28.

This being the position of law, I shall now examine the materials on record to find out whether in fact, there has been a fraud on the law of registration. Relying upon the evidence of P.W. 6, who states that no price had been paid for the Cuttack land since the vendors said that they would give it free and the Cuttack land was included for getting the registration of Ext. 1 at Sub-Registrar, Cuttack, Mr. Sinha, the learned Counsel for the appellants, contends that there was no intention of the parties to part with the land at Cuttack and it was so included only to evade registration. Mr. Sinha also relies upon the evidence of P.W. 4 who states that the sale deed in favour of the plaintiff-Nijog was registered at Cuttack Sub-Registrar's Office as it was disadvantageous to come to Khurda for registration. In my considered opinion, on the aforesaid evidence it is difficult for me to hold that either the land at Cuttack was never intended to be sold or can it be said that it was merely a device to evade the provisions of the Registration Act. The onus to prove that fraud on law of registration has been practised is on the party who alleges it. The defendants have failed to establish by placing materials on record that the vendors of Ext. 1 had no title in respect of the property in the district of Cuttack which was included in Ext. 1. The evidence of P.W. 6 that no consideration was paid in respect of the Cuttack land

cannot lead to the conclusion that the vendors never intended to part with the property, nor can it be held that the said property was included in the sale deed merely to evade the law of registration. The ratio of the two decisions of the Privy Council on which Mr. Sinha has placed reliance will have no application to the facts and circumstances of the present case. On the materials on record; I hold that the property in the district of Cuttack which was also included in Ext. 1 really existed and was intended to be dealt with bona fide though the motive of such inclusion may be that the entire property could be registered at Cuttack. Such a motive will not render the registration invalid. (See Jageshwar Prasad Onkar Prasad v. Mul-chand AIR 1939 MP 57 (FB) and Chekkur Puthalath Pothak Etathil Kunhi Sankaran Nambiar v. Ponniath Akathoothu Narayanan Thirumumpu AIR 1920 Mad 596. In this view of the matter, I am unable to accept Mr. Sinha's contention and hold that the defendants have failed to establish any fraud being played on the law of registration and Ext. I cannot be held to be invalid on that score.

9. So far as the non-execution by all the marfatdars are concerned, the lower appellate court has fully discussed the evidence on record and has come to the conclusion after analysing the entire evidence that the non-executing marfatdars consented to the execution. Those non-executing marfatdars are not assailing the validity of the same and in the view of the matter, the conclusion of the lower appellate court that Ext. 1 was validly executed conferring valid title on the plaintiff cannot be assailed and the same is accordingly confirmed. The second submission of Mr. Sinha also is rejected.

10. In the net result, therefore, both the contentions urged by Mr. Sinha, the learned counsel for the appellants, fail and this second appeal is accordingly dismissed, but without any order as to costs.