

(1962) 11 OHC CK 0008
In the Orissa High Court
Case No : Second Appeal No. 282 of 1960

P. Rammurty

APPELLANT

Vs

A. Kalpo Patra and Others

RESPONDENT

Date of Decision : 26-11-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Transfer of Property Act, 1882 — Section 48

Citation : AIR 1963 Ori 136

Hon'ble Judges : R.K. Das, J

Bench : Single Bench

Advocate : B.K. Pal and Y.S.N. Murthy, for the Appellant; P.V.B. Rao and P.V. Ramdas, for the Respondent

Final Decision : Allowed

Judgement

R.K. Das, J.—This appeal by defendant-1 is directed against the appellate decree passed by the Additional District Judge, Ganjam, allowing the plaintiff's claim for declaration of title and recovery of possession in respect of some of the suit plots.

2. The disputed plots, (except plot No. 396/ 9) along with some other plots such as plot Nos. 406/6 and 406/19 were allotted to the defendant No. 5 by a compromise decree (Ext. L) of the court of the Subordinate Judge of Berhampur. Defendant No. 5 on 12-1-49 sold the above undisputed two plots along with some other plots comprising an area of one acre to defendant-1 for a consideration of Rs. 600/- under a registered sale deed, Ext. A. Defendant-5, however, had no interest in the other plots sold along with the above two plots, nor did they form part of Ext. L. The suit plots however (excepting plot No. 396/9) were allotted to defendant No. 5 in the said decree.

Again on 11-4-51 defendant No. 5 sold the suit plots along with plot No. 396/9 comprising an area of 90 decimals to plaintiff for a consideration of Rs. 300/- under Ext. 1. Plot No. 396/9 had however been previously sold by defendant-3 (husband of defendant-5) on 23-6-48 in favour of defendant No. 6, daughter of

defendant No. 1. On 12-7-51 defendant-5 executed and registered a deed of rectification (Ext. B) saying that the plots other than plot Nos. 406/6 and 406/19 were noted by mistake in the sale-deed, Ext. A in place of the suit-plots.

According to her, she really intended to sell the suit plots under Ext. 1 but some other plots were wrongly entered in Ext. A and in fact in respect of those other plots she is not the real owner. Accordingly on 2-8-51 she cancelled the sale-deed (Ext. 1) executed in favour of the plaintiff by a deed of cancellation (Ext. C) on the ground that no consideration did ever pass under Ext. 1 and there was never any delivery of possession and the property was not intended or sale to the plaintiff as the same was already sold to defendant I and possession delivered in pursuance of the sale.

3. The plaintiff and defendant No. 1 both claimed to be in possession of the suit plots which gave rise to a proceeding u/s 145, Cr. P. C. (Misc. Case No. 30/51). The learned Magistrate by his order dated 22-5-52 declared possession of defendant-1 and restrained the plaintiff from interfering with his possession until evicted in due course of law. The plaintiff, therefore, has filed the present suit on 5-0-52 basing his claim on sale deed, Ext. 1, against defendants 1 to 4, defendants Nos. 2 to 4 being tenants in respect of the suit land for declaration of his title and recovery of possession and also for mesne profits including a sum of Rs. 60/-which was kept in deposit in the Section 145 proceeding in the Court of the Magistrate, First Class, Ghumsur.

4. The suit was mainly contested by defendant No. 1. He contended that he had purchased the suit property on 12-1-49 under Ext. A and had been in possession throughout and though by mistake the suit lands were not entered in his sale-deed, Ext. A, the vendor had actually effected the delivery of possession to him as it was the contention of the parties that the property in suit was also meant to be sold. Defendant-5 having once sold the property to him, had no right to execute another sale-deed in favour of the plaintiff and as such the plaintiff had not acquired any title or interest under the subsequent sale-deed in his favour and the plaintiff was not in possession of the same.

5. The trial court decreed the suit of the plaintiff in respect of plot No. 396/9 and dismissed his claim with respect to the rest. On appeal, however, the judgment of the trial court was set aside and the suit was remanded to enable the plaintiff to add defendants 5 and 6 as parties to the suit and to make an alternative prayer for refund of the consideration money of Rs. 300/-from defendant-5, which were complied with by the plaintiff after remand.

6. Defendant-5 alleged that she had duly executed the sale-deed in favour of the plaintiff in respect of the suit property and had duly delivered possession of the same and that defendant-1 had no title or possession in the suit lands. Defendant-6 on the other hand contended that she had purchased the suit-plot No. 396/9 on 23-8-48 from the true owner, defendant-3 and that she had been in continuous possession since the date of her purchase.

7. The learned trial court dismissed the suit of the plaintiff against defendants 1 to 4 and 6 holding that no title or possession had ever passed under Ext. 1. He, however, believed the passing of consideration under Ext. 1 and directed the refund of Rs. 300/- by way of equitable relief to the plaintiff by defendant-5 only. Against this decision the plaintiff did not file any appeal. So the decision became final so far as the plaintiff is concerned. Defendant No. 5 however filed an appeal in so far as the decree directed her to refund the consideration money of Rs. 300/-. The appellate Court set aside the judgment of the trial court, and though the plaintiff did not file any appeal or cross-objection, the Court gave a decree for declaration of title and recovery of possession in his favour in respect of the suit plots except plot No. 396/9 in purported exercise of his jurisdiction under Order 41, Rule 33 C. P. C. It is against this decree of the appellate Court the present appeal has been filed.

8. Mr. Pal, learned counsel for the appellant raised the following contentions : --

(1) In the absence of an appeal by the plaintiff the decree against him becomes final, and the appellate Court had no jurisdiction under Order 41, Rule 33, C. P. C. to reverse the finding of the trial court and award a decree in plaintiff's favour so as to affect the interest of the appellant;

(2) In the 145 proceeding, defendant-5 not being a party was not bound by the order of the learned Magistrate within meaning of Article 47 of the Limitation Act and the only person who could have filed an appeal against the decree of the trial court was the plaintiff himself; and

(3) The appeal of defendant No, 5 being confined only to the question of refund of Rs. 300/-the appellate Court could have given that relief to the appellant without having the necessity of going into the question of title and possession of defendant No. 1 vis-a-vis the plaintiff, and the appellate Court has acted illegally in doing so undct Order 41 Rule 22 C. P. C.

9. I will now take up the first and third contentions raised on behalf of the appellant. Before dealing with those contentions, it is necessary however, to broadly state a few facts relevant to the matter in question. As has already been stated, defendant 5 executed a sale deed, Ext. A in favout of defendant No. 1 in respect of some properties in which she had obviously no title except in plot No. 406/6 and 406/9. She in fact got her pro perties on the basis of the compromise decree, Ext. L. Those other plots as mentioned in Ext. A do not find any place in Ext. L. In other words, she conveyed to defendant-1 under Ext. A some plots of land in respect of which she had no title. This was discovered to be a mistake to remedy which the Rectification deed Ext. B was executed, by her on 12-9-1951.

It is clear from the said document that the suit properties were intended to be sold and in fact were sold under Ext. A and delivery of possession of the same was already effected. As, stated earlier, defendant No. 5. in between the dates of execution of Exts. A and B made a conveyance of the suit properties in favour of the plaintiff and later cancelled the same also on the ground of want of

consideration, mistake etc. It Ext. A really represented a conveyance of the suit property in favour of defendant No. 1 and he was given delivery of possession, the plaintiff's case is bound to fail as on the date of execution of his sale-deed, defendant 5 had no right to convey the property. Apart from the admission of defendant 5 in Ext. B, there is clear evidence of her supporting the case of defendant 1 when she said that she gave delivery of possession to defendant 1 about nine or ten years back, which takes us back to the year 1949 when Ext. A was executed.

Once it is accepted that the parties really intended to convey the suit properties and possession of the said properties was in fact delivered to the vendee in pursuance of the said conveyance, the mere omission of the plot numbers in the sale-deed is not of any consequence. The candid admission of the vendor, defendant 5 clearly supports the case of defendant 1 as stated above. In that view of the matter, the subsequent sale-deed Ext. I in the year 1951 in favour of the plaintiff in respect of the very same property is of no avail. The learned appellate Court though noticed this aspect of the evidence of defendant 5, did not feel inclined to accept it on the ground that the time of delivery of possession as admitted by defendant 5 cannot be taken with any amount of execution (sic). But in view of the clear admission of defendant 5 in Ext. B and her evidence in Court, it was no longer open to the Court to take a different view of the matter and it must therefore be held that the delivery of possession was in fact given at the time of execution of Ext. A in 1949.

10. That apart, the question for consideration is whether the learned appellate Court was justified in declaring the title of the plaintiff to the suit property in the absence of an appeal by the plaintiff himself. It is pertinent to note that the trial Court dismissed the plaintiff's suit against defendants 1 to 4 and 6, but granted him an equitable relief for the refund of consideration of Rs. 300/- from defendant No. 5. The plaintiff, however, felt satisfied with the decree of the trial Court and did not choose to prefer an appeal in respect of his title to the property. Therefore, the only question before the appellate Court was whether the order for refund of the consideration money was justified. Whether the plaintiff was entitled to get refund from defendant No. 5 is a matter independent of the question of title of the defendant No. 1 to the suit property. But as already stated, the appellate Court preferred to grant a decree to the plaintiff in exercise of his jurisdiction under Order 41, Rule 33.

No doubt, Order 41, Rule 33 confers wide and unlimited jurisdiction on the Court of Appeal, and in a proper case the appellate Court can vary and reverse a decree or order of the trial Court even in favour of a party who has not filed any appeal or cross-objection. But that power has to be exercised with due consideration of the other provisions such as Order 41, Rule 22 of the Code. In a Division Bench case reported in *Kora Rana Vs. Saibo Behera and Others*, their Lordships while setting aside an order made in exercise of jurisdiction under Order 41, Rule 33 C. P. C. observed as follows:

"Doubtless Rule 33 of Order 41 of the C. P. C. confers a wide and unlimited jurisdiction on the Court of appeal to pass a decree in favour of a party who has not preferred cross-appeal or objection; but that does not mean that the other provisions of the Code should be completely abridged or abrogated Normally a party who is aggrieved by a decree should, if he seeks to escape from its operation appeal against it within time allowed after complying with the requirement of law. Where he fails to do so, no relief should ordinarily be given to him under Order 41, Rule 33.

But there are well-recognised exceptions to this rule. One is where as a result of interference in favour of the appellant it becomes necessary to re-adjust the rights of other parties. A second class of cases based on the same principle is where the question is one of settling mutual rights and obligations between the same parties. A third class of cases is when the relief prayed for is single and indivisible, but is claimed against a number of defendants. In such cases if the suit is decreed and there is an appeal only by some of the defendants and if the relief is granted only to the appellants, there is the possibility that there might come into operation at the same time and with reference to the same subject-matter two decrees which are inconsistent and contradictory".

Applying the above principles to the present controversy it would appear that the passing of the decree in favour of the plaintiff was neither necessary for settlement of any of the mutual rights or obligations of the parties, nor would any inconsistent finding or decree would follow by merely allowing the appeal of defendant 5 and without giving the aforesaid relief to the plaintiff. This view was also taken in a case reported in Ravipudi Abbayya Vs. State of Andhra Pradesh and Others, where it was held that a careful reading of Order 41 Rule 33 makes it clear that the appellate Court has no power to set aside a decree against a party before it which had become final by reason of its not having been appealed against by that party, the extreme case that is covered by the rule is the one that is given in the illustration under Order 41 Rule 33 C. P. C. Thus, it must be held that the learned appellate Court did not properly exercise his jurisdiction in awarding the decree to the plaintiff.

11. Mr. Rao, learned Counsel for the respondents, contended that the powers of the appellate Court under Order 41, Rule 33 are wide enough to give any relief to a non-appealing party and such powers are free and not fettered in any manner whatsoever and in support of his contention, he relied upon a decision reported in *Sir Harisankar Pal v. Anath Nath*, AIR 1949 FC 106. I do not think this decision unequivocally supports the contention of Mr. Rao. In that case a dispute arose between a body of proprietors and the lessees regarding the apportionment between the lessors and the lessees of certain amount of compensation money in respect of some premises in Calcutta which were the subject-matter of a compulsory acquisition. The Calcutta Improvement Tribunal accepted the contention of the lessees and held that the proprietors were entitled to 25 times of the monthly rent.

Against this decision an appeal was taken to the High Court of Calcutta by some of the proprietors who represented only 1/3rd of the proprietary interest and the other proprietors were made respondents to the appeal. The High Court reversed the decision of the Improvement Tribunal and declared that the landlords were entitled to 25 times of the annual rent and declared that the appellant proprietors who had one third interest in the total sum will be given their dues and no relief was given to the non-appealing proprietors with regard to whom the decision of the Improvement Tribunal was left intact. Later on, however, the other proprietors who did not join in filing the appeal, but figured merely as respondents presented an application for review of the judgment on the ground that though they did not file an appeal, relief could have been given to them under Order 41, Rule 33, C. P. C., inasmuch as the case of the non-appealing proprietors was on the same footing as those of the appealing proprietors as the entire decision of the Tribunal was found to be wrong. This application was allowed by the High Court and relief was granted, in favour of all the proprietors. It is against this decision of the Calcutta High Court an appeal was carried to the Privy Council which ultimately came to be decided by their Lordships of the Federal Court and it was held:

"It cannot be disputed -that in a proper case, the appellate Court can under the provision of Order 41 Rule 33 of the C. P. C. vary or reverse a decree in favour of a party who has not preferred an appeal or cross-objection. But those powers should indeed be cautiously used and with due regard to the circumstances of each individual case, but no rigid rule can be laid down fettering the discretion of the Court in such matters".

In the above case it was found that the grounds urged in support of the appeal were common to all proprietors and it challenged the propriety of the entire decision of the Improvement Tribunal and their Lordships held that the interference by the High Court was in sound exercise of their judicial discretion. In the present case, however, the decision as I have already said, cannot be of any help to the respondents. In fact, there is nothing in common in the case so far as the interest of defendant 5 who preferred the appeal and the other respondents are concerned, so as to attract the application of the decision. In this view of the law, I do not think the learned appellate Court has properly exercised his discretion by giving a decree for declaration of title and possession in respect of the suit-property when the plaintiff did not choose to file an appeal.

12. The other contention of Mr. Pal is based on the interpretation of Article 47 of the Limitation Act which says that any person bound by an order respecting possession of Immovable property under the Cr. P. C. may file a suit within three years from the date of the final order in the case. Defendant 5 was admittedly not a party to the 145 - proceeding and it was confined only to the plaintiff and defendants 1 to 4. It was contended that defendant 5 not being a party to the 145 -proceeding was not bound by the decision given therein as contemplated in Article 47 stated above, and as such it was not competent for him to file a suit or

an appeal to set aside such an order. He contended that it was the plaintiff alone who could have filed a suit as he was the person who was restrained from interfering with the possession of defendant 1 by an order of the Magistrate.

It was also contended that since three years had already passed, the right of the plaintiff to prosecute the appeal had also been extinguished by reason of Section 28 of the Limitation Act, and it was no longer open to him to agitate the matter. There, no doubt, appears to be some force in this contention. But since the first contention is sufficient to dispose of the appeal, it is unnecessary for me to examine the question for the purpose of this case. Thus it must be held that the decision of the learned appellate Court in so far as he has awarded a decree for declaration of title and recovery of possession in favour of the plaintiff in respect of the suit properties, is clearly wrong and has to be set aside.

In the result, I would set aside the judgment of the lower appellate Court and allow this appeal with costs.