

(2008) 10 OHC CK 0014
In the Orissa High Court
Case No : W.A. No. 84 of 2005

Parbati Panda and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 11 , 92
Evidence Act, 1872 — Section 13 , 32(5), 40, 41, 42
Orissa Survey and Settlement Act, 1958 — Section 32
Specific Relief Act, 1963 — Section 42 , 43

Citation : (2008) 10 OHC CK 0014

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : S.S. Das, S. Modi, B.R. Das and K. Behera, for the Appellant; S.P. Misra, S. Misra and S. Nanda for Rs. 3 and 4, S.C. Das and D. Mohanty for Rs. 5, 6, 10 and 13, P.K. Ghose, for PRs 8(a), 8(b) and 8(c) for Rule 4 and P. Panda, Additional Government Advocate for Rs. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This writ appeal has been filed against the judgment and order dated 19.8.2005 passed by the learned Single Judge in OJC No. 6688 of 1996 confirming the revisional order dated 8.7.1996 passed by the Commissioner of Land Records and Settlement, Orissa in R.P. Case No. 555 of 1996 filed u/s 32 of the Orissa Survey and Settlement Act, 1958.

2. The facts and circumstances giving rise to the case are that the suit property had been recorded in the name of a common ancestor of the private parties, namely, Khetra Panda, who had three sons, namely, Dasarath, Indramani and Chandramani. Dasarath was given away on adoption and the other son Indramani as well as his wife died leaving behind No. issue. Respondent Nos. 3 and 4 are the sons of Chandramani, who claimed to have succeeded to the properties of Khetra Panda and also claimed exclusive title over the suit property. Respondent Nos. 3 and 4 filed Objection Case against recording of different

khatas and two other Objection Cases were also filed by the purchasers in view of certain entries made in the revenue record in respect of the suit properties. All the seven cases were heard together and the applications of Respondent Nos. 3 and 4 were rejected by a common judgment. Against the said common judgment and order appeal was filed and the same also stood dismissed. Against the said appellate order, revision was filed. One Narayan Panda, who was husband of Appellant No. 1 had filed T.S. No. 99 of 1966 in the Civil Court, Jajpur for declaration that he was the adopted son of Indramani through a registered adoption deed dated 24.6.1965. The said suit was dismissed vide judgment and decree dated 30.11.1967 and Title Appeal No. 10 of 1968 filed against the said judgment and decree was also dismissed vide judgment and decree dated 10.4.1969. Having lost in both the courts, Narayan Panda got a deed of acknowledgment of adoption dated 4.11.1977 in his favour and on the basis of the same claimed title over the suit properties. The present Appellant filed objections before the Commissioner of Land Records and Settlement raising two issues. Firstly, as all the seven objection cases had been decided by a common judgment, seven appeals could have been filed; and secondly that after disposal of the Title Appeal Narayan Panda was contemplating to file Second Appeal reach a compromise between the parties therein and a deed of acknowledgement of adoption was executed. On the basis of the said acknowledgment the appellant claimed title over the suit properties and if the said acknowledgment of adoption had been accepted by the authorities below the provisional court should accept the same. However, the deed of acknowledgement of adoption was not accepted by the provisional authority vide his judgment and order dated 8.7.1996. Being aggrieved, the writ petition was filed by the present Appellants which stood dismissed by the learned Single Judge by the impugned judgment and order dated 19.8.2005. Hence this appeal.

3. Mr. S.S. Das, Learned Counsel for the Appellants has submitted that as seven objection cases had been decided by a common judgment, one revision could not have been entertained. At least seven separate revisions ought to have been filed. Once the authorities below had decided the cases on the basis of the deed of acknowledgement of adoption subsequent to the judgments and decrees of the Civil Courts, the provisional authority as well as the learned Single Judge should not have interfered with the said view. Acknowledgement was admissible u/s 32(5) of the Evidence Act. Therefore, the appeal deserves to be allowed.

4. On the contrary Shri S.P. Misra, learned Senior Counsel appearing for the private Respondents has opposed the appeal placing reliance upon the provisions of Sections 41-43 of the Evidence Act contending that the effect of the said judgments could not be nullified by the acknowledgement and as the same was executed subsequent to initiation of litigation, it was not admissible in view of the provisions of Section 32(5) of the Evidence Act. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by the Learned Counsel for

the parties and perused the record.

6. So far as the issue of filing of separate several revisions IS concerned, it is too technical to be entertained by the appellate court for the simple reason that No. prejudice has been caused to the present Appellants. More so, the issue has been dealt with by the learned Single Judge observing that the sole question to be decided was whether the present Appellants could claim title over the property on the basis of deed of acknowledgement of adoption and same had been involved in all the objection cases and No. other factual issue was in dispute. Therefore, such technical averment could not be entertained. We are in agreement with the learned Single Judge and the issue does not require any further discussion.

7. So far as the second issue is concerned, it is also admitted fact that the suit for declaration of adoption was dismissed vide judgment and decree dated 30.11.1967 and the judgment of the trial court had been affirmed by the appellate court vide judgment and decree dated 10.4.1969. We have gone through the said judgments and found that each and every issue has been dealt with by the courts elaborately, rejecting the theory of adoption.

8. The question does arise as to whether it is permissible for any authority under the Revenue Laws while dealing with the settlement proceedings to ignore the judgment and decree of a civil court which has attained finality.

9. The provisions of Sections 41 to 43 of the Evidence Act make it clear that if a judgment of the Court is a judgment in rim, it is binding in subsequent proceedings on that issue though the parties may not be the same. But if it is a judgment in persona, it does not have any binding effect in subsequent proceedings. This issue was considered by the Privy Council in *Mahomed Siddique Yousuf v. Official Assignee of Calcutta*, wherein it was held that in proceedings of insolvency, an order passed on adjudication is of a binding nature being a judgment in rim and a person, who may not be a party in the insolvency proceedings, cannot challenge the said order for the reason that the order of adjudication was conclusive in nature and cannot be disputed.

10. In *Surinder Kumar and Others Vs. Gian Chand and Others*, , the Hon''ble Supreme Court held that probate of the Will operates as a judgment in rim, therefore, the objection that the parties in any subsequent proceedings were not parties to it, is not sustainable because of the nature of the judgment.

11. In *Smt. Satya Vs. Shri Teja Singh*, , the Supreme Court observed as under:

Section 41 of the Indian Evidence Act provides, to the extent material, that a final judgment of the competent court, in the exercise of matrimonial jurisdiction, is conclusive proof that a legal character, which it confers or takes away, accrued or ceased at the time declared in the judgment for that purpose. But the judgment has to be of a competent court, i.e. a court having jurisdiction over the parties and the subject matter. Even a judgment in rim is therefore, open to

attack on the ground that the Court, which gave it, had No. jurisdiction to do so.

12. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in *R. Viswanathan Vs. Rukn-ul-Mulk Syed Abdul Wajid*, wherein it has been held that Section 41 provides that a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction shall be relevant and also conclusive proof as to certain legal character while Section 43 lays down that judgments etc. other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of such judgments etc. is a fact in issue or is relevant under some other provision of the Evidence Act. Therefore, Section 41 provides that the fact which can be proved from a judgment made conclusive for that purpose need not be proved afresh. The proof of the judgment is enough.

13. In *Gurdit Singh and Others Vs. State of Punjab and Others*, the Supreme Court explained as under:

A judgment of a court is an affirmation, by the authorized societal agent of the State, speaking by the warrant of law and in the name of the State, of the legal consequences attending of proved or admitted state of facts. Its declaratory, determinative and adjudicatory function is its distinctive characteristic. Its recording gives an official certification to a preexisting relation or establishes a new one on preexisting grounds.

14. In *State of Bihar Vs. Radha Krishna Singh and Others*, the Hon'ble Supreme Court, while considering the scope of provisions of Sections 13 and 41 to 43 of the Act, to prove the admissibility of the earlier judgment, observed as under:

122. It is also well settled that a judgment in rim like judgments passed in probate, insolvency, matrimonial or guardianship or other similar proceedings, is admissible in all cases whether such judgments are inter parties or not." (Emphasis added) The Court further summarized the law as under:

(1) judgments in rim e.g. judgments or orders passed in admiralty, probate proceedings, etc., would always be admissible irrespective of whether they are inter parties or not.

(2) Judgments in persona not inter parties are not at all admissible in evidence except for the three purposes mentioned above.

(3) On a parity of aforesaid reasoning, the recitals in a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly inadmissible in a case where neither the Plaintiff nor the Defendant were parties.

(4) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.

(5) Statements, declarations or depositions, etc., would not be admissible if they

are post liter moat.

15. While deciding the said case, the Court took into consideration the judgments in AIR 1937 69 (Privy Council) ; and Coco-cola Company of Canada Ltd. v. Pepsi-Cola Company of Canada Ltd. AIR 1942 PC 40.

16. In Raje Anandrao Vs. Shamrao and Others, , the Supreme Court held that suit u/s 92 of the Code is of public nature and unless the scheme of administration or modification thereof regarding administration of the temple not affecting the private rights of Pujaris who are not parties to the suit, is binding on them. Similar view has been reiterated in Ahmed Adam Sait and Ors. v. M.E. Makhri and Ors. AIR 1964 SC 107, observing that when a representative suit is brought and decree is passed in such a suit, law assumes that all persons, who have the same interest as the Plaintiffs in the representative suit, were represented by the said Plaintiffs and, therefore, are constructively barred, by the resjudicata, from re-agitating the matters directly or substantively in issue in the said suit. A similar rule follows if the suit is either filed or defended under Order 1 Rule 8 of the Code. In that case, persons either suing or defending an action, are doing so in a representative capacity and, so, the decree passed in such a suit binds all those whose interests were represented either by the Plaintiffs or by the Defendant.

17. In Sunni Central Board of Waqf, U.P. Vs. Sirajul Haq Khan and Others, , the Division Bench of Allahabad High Court held that a suit u/s 92 of the Code can be maintained only in respect of public trust of a permanent character and the judgment in such a suit would be a judgment in rem and not a judgment in persona. Therefore, such a judgment is admissible in any other subsequent suit and it is not open to any party to challenge the permanent public nature of the trust.

18. In Vempa Sunanda v. Vempa Venkata Subbarao AIR 1957 AP 424, the Division Bench of Andhra Pradesh High Court held that a decree dissolving a marriage determines the status of the parties and is equivalent to a judgment in rem.

19. In AIR 1941 85 (Privy Council) it has been clearly laid down that Section 41 of the Evidence Act did not apply to a case of adoption and a former judgment on the question of adoption can be considered only u/s 11, CPC and not u/s 41 of the Evidence Act.

20. A similar view has been reiterated by the Madras High Court in C.S. Nataraja Pillai and Another Vs. C.S. Subbaroya Chettiar, .

21. Therefore, it depends upon the nature of the proceedings and where the matters are of public nature, the judicial decision may be evidence though not conclusive of what they say, but where the matters are not of public nature, such evidence is not admissible as having binding effect. Therefore, decree like nullity of marriage or in probate or insolvency proceedings, determination of customary

rights, being the matters of public nature, the judgments are in rim and, therefore, may be admissible but where the question of status of joint family or a suit for restitution of conjugal right, order in lunacy, judgment u/s 42 of the Specific Relief Act or declaration of a person to be a partner in a firm or proceedings of partition suit or in case of adoption, as the judgments are not of a public nature, the same are in persona and the judgments are not admissible if the parties are not the same.

22. In view of the provisions of Section 43 a judgment though inadmissible for proving the truth on what it asserts may be treated as evidence for some other purpose. Its very existence may be a fact in issue and evidence of it may be given or it may be a fact relevant to determine the controversy therein and it may be admissible as evidence. A judgment treating to be a transaction within the solemn character has to be presumed to be faithfully recorded. Thus, in case a judgment in a previous case relates to a fact in issue in a subsequent case may not be relevant but it may be relevant where an issue is specifically raised about its existence and also it has effect on the suit, and is relevant u/s 43 of the Evidence Act. Judgment in transaction though generally binding upon the parties thereto may be used by third persons for the purpose of proving conclusively against them relationship between the parties and of the extent of relation. Though the judgments cannot be used in favor of such a third person. Such judgments recognizing rights between the parties to a suit or persons to whom they relate are not conclusive but are admissible in evidence, though the parties in the later suit may be different from those in the former suit.

23. Section 43 except in specific cases prohibits use of the previous judgment or proving the truth of the conclusions though it can be proved with the fact that such judgment was delivered where that fact itself is relevant fact. (Vide S.M. Jakati and Another Vs. S.M. Borkar and Others, .)

24. In the instant case, though the provisions of Section 41 are not attracted, but Section 43 can be pressed into service. The learned Single Judge has taken note of the fact and came to the conclusion that adoption had not taken place and therefore, there was No. occasion for execution of the deed of acknowledgement of adoption. More so, the said judgment and decree has not been set aside by any Court. As such deed of acknowledgement of adoption cannot nullify the said judgment and decree. We are in respectful agreement with the learned Single Judge.

25. We find No. force in the submission made by Mr. Das that the acknowledgement was nothing but an statement made by his adoptive father and therefore, was admissible u/s 32(5) of the Evidence Act for the simple reason that the said provision itself provides for admissibility of the statement or declaration before persons of competent knowledge made ante liter moat. In State of Bihar v. Sri Radha Krishna Singh (supra) the Apex Court held that the statements or declarations before persons of competent knowledge made ante liter moat are receivable to prove ancient rights of a public or general nature.

The admissibility of such declaration is, however, considerably weakened if it pertains not to public rights but to purely private rights. More so, it is equally settled legal proposition that the declaration or statement made post liter moat shall not be admissible because in cases of such declaration made ante liter moat, the element of bias and concoction is eliminated. Such statement should be made before commencement of the legal proceeding for the reason that after a dispute is begun or legal proceeding is about to commence the possibility of bias and concoctions or putting false plea cannot be ruled out.

26. We are guided by a Full Bench decision of the Allahabad High Court in Babu Ram, Ashok Kumar and Another Vs. Antarim Zila Parishad, wherein it has been held as under:

A court of appeal would not interfere with the exercise of discretion by the Court below, if the discretion has been exercised in good faith after giving due weight to relevant matters and without being swayed by irrelevant matters. If two views are possible on the question, then also the Court of appeal would not interfere, even though it may exercise discretion differently, were the case to come initially before it. The exercise of discretion should manifestly be wrong.

27. In the instant case, admittedly the suit was filed by the husband of Appellant No. 1 for declaration that he was the adopted son of Indramani who was issueless. The said suit was dismissed. The said judgment was affirmed by the appellate Court and attained finality. The effect of the said judgment could not be taken away by a deed of acknowledgement which was merely a registered document and it had not been proved nor could it be proved before the authorities dealing with settlement rights. The effect of such a judgment and decree could be taken away only either by entering into the compromise in the proceedings itself or by getting the same setting aside by the competent court.

The facts and circumstances of the case do not warrant any interference whatsoever.

28. The appeal lacks merit and is accordingly dismissed.

B.N. Mahapatra, J.

29. I agree.