

(1972) 07 OHC CK 0017
In the Orissa High Court
Case No : Second Appeal No. 112 of 1968

Raghunath Altia

APPELLANT

Vs

Arjuno Altia and Others

RESPONDENT

Date of Decision : 03-07-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4
Contract Act, 1872 — Section 16
Stamp Act, 1899 — Section 2(24)

Citation : AIR 1973 Ori 76

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : R.N. Sinha, for the Appellant; D. Mohanty and S.C. Adhikari, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Patra, J.—This is an appeal by the plaintiff whose suit for partition was decreed partially in the Courts below. The properties in respect of which partition was sought are 9.32 acres in extent and admittedly were Somasthanam Paik Inam lands of mouza Chedipalli. One Arta Altia was previously the holder of the office and after he became old, his eldest son Bhaiga Altia became the village carpenter and held the Inam lands. These lands were resumed by Government in the year 1961 and on 24-7-61 a Patta in respect thereof was granted to Bhaiga Altia. The following genealogical table would explain the relationship between the parties in the suit.

ARTA ALATIA (DIED) | ----- |
| | | Bhaiga=Hira Purnachandra Laxman Rama (D.12) (D.3) (dead) | | |
Nityananda ----- | | (D.8) | | | ----- Hompa
Arjuno Raghu Kanchono | | | (D.9) (D.1) (Pliff) (dead Panu Narsingh Kasinath
Brundaban =Parvati 1958) (D.4) (D.5) (D.6) (D.7). (D.2)

On 12-2-1963, Bhaiga executed a registered deed of "Nirupana Patro" Ext. D

whereunder he settled 6.29 acres of land out of the disputed lands on his daughter-in-law Parvati (Deft. No. 2). Raghu the second son of Bhaiga thereafter instituted the suit giving rise to this appeal in which he contended inter alia that on 1-5-1961, Bhaiga and his three other brothers, Purna, Laxman and Rama executed a Muchilika in favour of Bhadrals to effect a partition of the disputed lands into four equal shares, and accordingly partition was effected, but that thereafter defendants 1 and 2 prevailed upon Bhaiga and succeeded in getting the document dated 12-2-1963 (Ext. D) executed by him in favour of defendant No. 2 in respect of the 6.69 acres of land. That document was described as a collusive one executed with a view to defraud the other branches of the family and is said to contain all false recitals therein. The suit was, therefore, instituted for a declaration that the Nirupana Patro dated 12-2-63 executed by Bhaiga in favour of defendant No. 2 is not valid and binding on the plaintiff, and for a partition of the suit properties into

"5 equal shares or 8 equal shares and put the plaintiff in possession of one such share."

Although the prayer is vague and uncertain from the fact that the plaintiff had valued the suit at Rs. 1100/- which is said to be the market value of his one-fifth share therein, it is clear that what the plaintiff prayed for was to partition the properties into five equal shares and allot to him one such share. Such a prayer could be made only on the basis that the disputed properties belong to Bhaiga exclusively and as the latter died in 1961 or 1962, the plaintiff would be entitled only to a one fifth share in the properties left by Bhaiga.

2. Defendants 9 to 12 did not contest the suit. Defendants 2 to 8 who represent the branches of the three other sons of Arta contended that although after Arta, his son Bhaiga was appointed as the Sama-sthanam Paik, Bhaiga and his three other brothers were jointly working as Samasthana Paik and were jointly in possession of the Inam lands, that on 1-5-1961 all the four brothers executed a Muchilika in favour of Bhadrals to partition the suit properties into four equal shares and accordingly a division was effected and consequently the disputed deed of Nirupana Patro which is executed in respect of a major portion of the disputed properties is liable to be set aside, and that these defendants would have "no objection" if a three-fourth share in the disputed lands is allotted to their share.

3. The case of the defendants 1 and 2 is that after the resumption of the Inam lands and the grant of a Zeoroyiti Patta in respect thereof of Bhaiga, the latter became the sole owner of the properties and had full disposing power in respect thereof. On 12-2-1963, he executed a deed of settlement Ext. D in respect of 6.29 acres out of the disputed lands in favour of defendant No. 2 with full knowledge of its contents and the document is a valid one and is not liable to be challenged by the defendants. The alleged Muchilika dated 1-5-1961 said to have been executed by Bhaiga and his brothers in favour of Bhadrals is attacked as a forged document and it is contended that the Bhadrals never passed an

award nor was it ever filed in Court. The suit properties had never been partitioned as alleged by the plaintiff and defendants 3 to 8, and Bhaiga alone was in possession thereof.

4. It was not disputed before the learned Munsif who tried the suit that the disputed properties which so long as they retained the character of Inam lands were not partible, became partible, after the Inam was resumed and Patta in respect thereof was granted to Bhaiga, He, however, held that the Muchilika Ext. A/1 which Bhaiga and his brothers are alleged to have executed in favour of Bhadrals to partition the disputed properties amongst them is not genuine and that no such partition as is alleged by the plaintiff and defendants 3 to 8 had ever taken place. According to him, Bhaiga acquired an exclusive title to the disputed properties and he executed the Nirupana Patro Ext. D in favour of defendant No. 2 consciously and being fully aware of the import thereof and that consequently it is valid. In the result he passed a decree for partitioning the balance 3.03 acres of land into six equal shares and for allotment of one such share to the plaintiff.

5. Being aggrieved by the decision, the plaintiff alone filed the appeal. It appears to have been again conceded by both the parties before the learned Subordinate Judge that after resumption and settlement of the disputed lands with Bhaiga, the latter alone became the absolute owner of the properties and it is on that footing that the appeal was argued before him. The only issue that appears to have been seriously pressed before him was regarding the validity of the Nirupana Patro Ext. D and after a consideration of all aspects bearing on the question the learned Judge came to the conclusion that it is valid as a deed of settlement. In the result, he dismissed the appeal.

6. Although, in the memorandum of appeal one of the grounds set out was that the Courts below went wrong in not believing the plaintiffs case that there was a partition of the disputed properties amongst the four sons of Arta in the year 1961,, this question was not pressed at the time of hearing. At any rate, the learned Munsif who has dealt with this issue has given good and convincing reasons for coming to the conclusion that the Muchilika Ext. A/1 has not been proved to be genuine and that no partition of the properties had ever been effected by the Bhadrals and that it had never been given effect to. The learned Subordinate judge had no occasion to deal with this question as it was admitted before him by both the Parties that after resumption and settlement of the lands with Bhaiga, he must be deemed to be the sole owner of the disputed properties and it is on that footing that the appeal was argued before him. At any rate, having perused the evidence myself, I am satisfied that the finding given by the learned Munsif on this aspect of the case is unassailable and must stand.

7. The only question then which falls for consideration is regarding the validity of Ext. D described as "Deed of Settlement". The learned Subordinate Judge has in his judgment given an English translation of the relevant portion of the document

and to appreciate the contention advanced by the parties it is necessary to extract the same.

"My two sons are separate since 1856 and each is living separately enjoying his share of lands. You being the wife of my eldest son is my daughter-in-law. We the couple being unable to look after ourselves, you have nursed us well. In the meantime, my health failed and you by spending much money in the purchase of medicine have restored me to my health. You had also financed the pilgrimage that I undertook in 1960. You have also taken charge of looking after my landed properties and you have been paying me my rajbhag dues. I have been immensely pleased with you for your above work. I am now 66 years of age and have thus become old. If I do not make any arrangement for the preservation of my properties, there may be trouble in future after my death and you have thereby to become dependent on others. So for the aforesaid reason and to make arrangement for your maintenance which burden is on me and on your husband and hoping that you would nurse me till my death, on this day I execute this document in respect of the properties worth Rs. 5000/- in your favour and that I give delivery of possession today and that you and I would be maintained out of the usufructs of the said property. After my death on payment of cost, with all powers of alienation you would enjoy the properties. To this neither I nor my heirs nor anybody else can have any objection and even if any objection is raised, no Court would accept the same in the face of this document. I agree to this. Let it be noted that if in future there be any necessity then you and I would jointly alienate the property and never the alienation can be made by any one of us."

8. Mr. Sinha for the appellant contends that Ext. D is not a deed of settlement because by the time it was executed, there were no disputes which required to be settled and therefore Ext. D must be construed as a deed of gift which, having regard to the fact that the donor has not completely divested himself of the ownership of the property, must be deemed to be an invalid document conferring no title on the alleged donee. The expression "settlement" is defined in Section 2(24) of the Stamp Act and means any non-testamentary disposition, in writing, of moveable or Immovable property made inter alia for the purpose or distributing property of the settlor amongst his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him. For a valid settlement, it is not necessary that there should have been any dispute requiring settlement. For a document to be a valid deed of settlement, the object of the instrument should be to make provision for the grantee and such a document does not cease to be a deed of settlement by reason of the mere fact that it includes an agreement by the beneficiary to act in a particular way in consideration of the settlement. I, therefore, see no reason why Ext. D should not be construed what it purports to be, namely a deed of settlement.

9. Mr. Sinha then contends that having regard to the fact that Bhaiga was very old at the time he executed the document Ext. D in favour of his daughter-in-law

defendant No. 2 and the latter was at that time looking after him and in view of the further fact that the bulk of the disputed properties had been settled with her to the complete exclusion of the other heirs of Bhaiga, the Courts below ought to have come to the conclusion that undue influence had been exercised by defendants 1 and 2 on Bhaiga to execute the deed of settlement and that consequently it is not valid. Section 16 of the Indian Contract Act which deals with "undue influence" reads thus:

"16. (1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

When a person wants to set aside a deed of settlement on the ground that the settlor had executed the document under undue influence of the person in whose favour the settlement has been made, it is not sufficient to establish that the latter was in a position to dominate the will of the settlor. It is only when the transaction appears to be unconscionable that by sub-section (3) of Section 16 of the Contract Act, the burden of proving that the contract was not induced by undue influence shall lie upon the person who is in a position to dominate. In that case he must affirmatively prove that no domination was practised. The position is clearly explained by their Lordships of the Privy Council in AIR 1924 60 (Privy Council) , in the following words.

"In the first place, the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. The burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other."

It is thus clear that the unconscionableness of the bargain is not the first thing to

bo considered. The first thing to be considered is the relations of the parties. Were they such as to put one in a position to dominate the will of the other? It must be noted that merely because parties were nearly related to each other no presumption of undue influence can arise as, pointed out by the Privy Council in AIR 1920 65 (Privy Council) .

"It is a mistake to treat undue influence as having been established by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by Law of India or the Law of England more than mere influence must be proved so as to render influence, in the language of the law, "undue".

Before, however, a Court is called upon to examine whether undue influence was exercised or not, it must scrutinise the pleadings to find out that such a case has been made out and that full particulars of undue influence have been given as required under Rule 4 of Order 6, C. P. C. A vague or general plea can never serve this purpose. The party pleading undue influence must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence and the unfair advantage obtained by the other. After referring to the alleged partition of the year 1961, said to have been brought about by the Bhadrals, the plaintiff has stated as follows, in para. 5 of the plaint.

"5. Despite the aforesaid partition defendant Nos. 1 and 2 prevailed on late Bhaiga Altia and created a collusive document dated 12-2-63 styling the same as Deed of settlement in favour of defendant 2 in respect of A. 6.29 cents of the suit lands. The said document contained all false recitals and were created with a view to lay fictitious claims on the lands belonging to other defendants. It was never acted upon and the plaintiff was not a party to the said document and had no knowledge of the same. xx xx xx"

This is all the allegations made by the plaintiff regarding the execution of the document Ext. D by Bhaiga. Thus, there is no recital in the plaint that either defendant No. 1 or defendant No. 2 or both were in a position to dominate the will of Bhaiga and much less that they or any of them used that position to obtain an unfair advantage over Bhaiga. Even the expression "undue influence" has nowhere been used in the plaint. Whatever allegation has been made in para. 5 of the plaint has been denied by the contesting defendants 1 and 2 in para. 6 of their written statement. Having regard to the averments made in the pleadings, there was naturally no issue regarding undue influence. The plaintiff in his evidence has also not whispered a word about undue influence. What all he stated on the point is this:

"My father died one year prior to the suit. He died at the age of 72 years. He was living with both his sons. With my knowledge my father has not given any land to

defendant No. 2 before his death. D. 2 was not nursing my father during his old age. Neither D-1 nor D-2 was ever in exclusive possession of 6 acres of land."

Thus, I find that there is neither pleading nor evidence regarding undue influence. On the other hand, the plaintiff in his evidence has categorically stated that defendant No. 2 was not nursing Bhaiga during his old age and that all recitals contained in Ext. D are false. He only described the document as a collusive one thereby implying that Bhaiga Altia had consciously executed that document and had put in certain false recitals to justify his action in giving away the bulk of the Inam lands to defendant No. 2. It may also be stated that the terms of the document Ext. D are such that they would not support any plea of undue influence. Although it purported to transfer the properties covered under Ext. D to deft. No. 2, a burden was laid on her to maintain Bhaiga Altia during the rest of his life. Bhaiga retained his hold over the properties by stipulating in Ext. D that in spite of the transfer of title to defendant No. 2, she would not be entitled to alienate the properties by herself during the lifetime of Bhaiga and that if any alienation would be found necessary it should be done by both of them. In that view of the matter, the document also does not appear to me to be unconscionable .

10. In the result, I find no merit in this appeal which must therefore be dismissed. The trial Court had ordered partition in respect of the 3.03 acres of land belonging to Bhaiga which had not been covered by Ext, D. The heirs of Bhaiga amongst whom the partition was ordered are his two sons, plaintiff and defendant No. 1, his widow defendant No, 12, his daughter defendant No. 9 and his two grand sons defendants 10 and 11 by his deceased daughter Kanchana. Having found that these are the six heirs who are entitled to the properties of Bhaiga, the trial Court ordered that each will be entitled to 1/6th share. This is not correct. Kanchan as one of the daughters would have been entitled to only a one-fifth share and it is her one-fifth share which is to be divided amongst her two sons. The plaintiff was thus entitled to a one-fifth share and not one-sixth share as ordered by the trial Court, This mistake has not been noticed by the appellate Court and the appellant has also not complained about it in this Court. But this being an error apparent on the face of the record, it is necessary in the interest of justice that it should be rectified. The result would be that in the partition of the 3.03 acres of land referred to above, the plaintiff would be entitled to a one-fifth share. Subject to the slight modification in the decree as indicated above, the appeal is dismissed with costs.