

(1971) 03 OHC CK 0002

In the Orissa High Court

Case No : Second Appeal No. 73 of 1967

Raghunath Sahu

APPELLANT

Vs

Kathia Devi and Others
 Laxmi Bewa Vs Chanda Bewa
and Others

RESPONDENT

Date of Decision : 18-03-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 6 Rule 4

Citation : (1971) 37 CLT 624

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Advocate : L.K. Dasgupta, for the Appellant; B.B. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

S. Acharya, J.—In S.A. No. 73/67, Defendant No. 1 in T.S. No. 177/61 is the Appellant against the judgment of the Subordinate Judge, Jajpur confirming the trial Court's decision decreeing the suit instituted by Kathia Devi and Kuturi Devi by declaring their right, title and interest in respect of the suit land and confirming their possession to the same land and declaring the sale deed dated 23-9-1961 executed by Defendant No. 2 in favour of Defendant No. 1 as invalid. In S.S. No. 77/1967, Plaintiff Laxmi Bewa in T.S. No. 47/62 is the Appellant against the judgment of the Subordinate Judge, Jajpur confirming the decision of the trial Court dismissing the Plaintiff's suit for setting aside an ex parte decree dated 20.3.1956 passed in T.S. No. 77/65. On the agreement of the counsel appearing on behalf of both the parties these two Second Appeals are taken up together for hearing, and they both will be disposed of by this one judgment.

2. The undisputed facts which are common and relevant for both the cases may be stated as follows : Darsani Kundu was admittedly the owner of the disputed property. After his death his widow Chanda Bewa (Defendant No. 1 in the suit relating to S.A. No. 77/67) gifted away Acs. 15.97 of land by the gift deed Ext. A dated 15.1.1945 in favour of Ram Chandra her son-in-law, who married

Chanda's daughter Rani. Rani predeceased Chanda, and 80 Ram Chandra was again given in marriage to Laxmi, the Plaintiff in the suit relating to S.A. No. 77/67, and Laxmi and Ram Chandra continued to remain in the house of Chanda. Rani, the first wife of Ram Chandra, left two daughters Kathia and Kuturi, who are the Plaintiffs in T.S. No. 177/67 out of which S.A. No. 73/77 arises. Chanda again by two deeds of gift Exs. 1 and 2 dated 28.8.61 gifted away 37 acres of land in favour of the two sisters Kathia and Kuturi, the daughters of Rani, the first wife of Ram Chandra. Prior to this gift in favour of Kathia and Kuturi, the reversioners of the above named Darsani, the original owner of the property, filed T. S. No. 34(45 against the above mentioned Ram Chandra, Chanda, Kathia and Kuturi for a declaration that the aforesaid deed of gift (Ex. A) in favour of Ram Chandra was a nominal one and was inoperative after the death of Chanda. All the above named "Persons contested the suit, and the suit was decreed in favour of the "Plaintiffs in that suit as per judgment Ext. 6 dated 28.9-1946. Thereafter Chanda brought T.S. No. 77/1955 against the above named Laxmi, for a declaration that the above deed of gift, Ext. A executed by her in favour of Ram Chandra was a nominal one. That suit was decreed ex parte in favour of Chanda, the Plaintiff as per judgment Ex. 10 dated 20.3.1956. Laxmi, the 2nd wife of Ram Chandra filed T.S. No. 47/62 (out of which S.A. No. 77/67 arises) for setting aside the said judgment Ext. 10 and the decree Ex. 11 passed in T.S. No. 77/55, on the ground that the decision in T.S. No. 7 7/55 was obtained by Chanda by practising fraud., This suit has been dismissed and the said (decision has been confirmed in appeal. The above named Kathia and Kuturi, two daughters of Rani, the first wife of Ram Chandra, filed T.S. No. 177/61 out of which S.A. No. 73/67 arises) against the above named Laxmi and the purchaser of the property from her, for a declaration that the Plaintiffs got right, title and interest in the suit land, and the sale deed executed by Laxmi in favour of the purchaser is invalid and inoperative and also for confirmation and/or recovery of possession.

3. Mr. Dasgupta, the learned Counsel for the Appellant in both the appeals contends that both the Courts below have not taken into consideration a very important and significant document on record, namely Ext. 6, the judgment and decree in T.S. No. 34/45. According to Mr. Dasguptas by Ext, 6 the aforesaid gift by Chanda in favour of Ram Chandra (Ex. A) was only declared inoperative against the reversioners of Darsani, and so the said gift remained valid and effective till the life time of Chanda, who is still living. Mr. Dasgupta contends that suppression of Ext. 6 by Chanda in T.S. No. 77/55 amounts to a fraud practised on the Court., and as this item of evidence of fraud has not been considered by both the Courts below, their judgments cannot stand, and the cases have to be remanded back to the trial Court for reconsideration of the matters on all the available evidence on record.

4. Mr. Mohanty, the learned Counsel for the Respondents in both the Second Appeals, refuted the above contention of Mr. Dasgupta, and urges that T.S. No. 47, 62 instituted by Laxmi, (Appellant in S.A. No. 77 (67) was for setting aside the judgment in T. S. No. 77/55 on the only ground of fraud that Laxmi was

prevented by Chanda from contesting the suit on the misrepresentation, that the suit would be compromised and Laxmi would continue to remain in possession of the property as before, and on such representation her thumb impression was taken on a blank paper, but Chanda never filed any such compromise in that suit, and by this fraud Chanda obtained an ex parte decree against Laxmi. Mr. Mohanty contends that as this was the only item of fraud specifically alleged by Laxmi, the Plaintiff, in her suit she at this stage cannot be allowed to challenge the previous judgment on another item of fraud which was not taken by her in the suit. In support of his contention Mr. Mohanty cites the decision in *Madholal Damlal v. Gufrabi* AIR 1951 Nag. 194, the relevant portion of which may profitably be quoted;

Where fraud is charged against the Defendant, it is an acknowledged rule of pleading that the Plaintiff must set forth the particulars of the fraud which he alleges. A charge of fraud must be substantially proved as laid, and when one kind of fraud is charged another kind of fraud cannot, upon failure of proof, be substituted for it : See *Abdul Hussein v. Turner* 11 ILR Bom. 620 : 14 I.A. 111 P.C. 628. It is not open to an appellate Court to entertain a case of fraud other than the one specifically alleged in the pleadings.

In *J Julumdhari Rai and Others Vs. Debi Rai and Others*, , it is held:

Rule 2 of Order 6 of the CPC enjoins upon every party to State to his pleading, in a concise form all the material facts on which he relies for his claim and defence. In Rule 4, it is provided that in all cases in which the party relies on any fraud, he shall state in his pleading the particulars of that. Fraud is an objective fact and it is necessary to state facts and materials constituting the same. The Judicial committee held in the case of *Ganga v. Tiluckram* ILR 15 Cal. 533. (P.C.), that a plaint containing general allegations of fraud without specific instance ought to be rejected as it does not disclose a cause of action.

(The above : underlines here in italics are mine)

5. The law on the point is well set out in the paragraph quoted above. Mr. Dasgupta admits that in the plaint in T.S. No. 47/62, suppression of Ext. 6 from the Court's notice, as urged by him above, was not specifically alleged as an item of fraud for setting aside the decree in T.S. No. 77/55. There is no issue also framed on that item of fraud. This item of fraud as now urged by Mr. Dasgupta, was not sought to be raised either in the trial Court or in the first appellate Court in any manner whatsoever. That being so and as this specific item of fraud has not been pleaded in the plaint, it is not open for the Appellants to set up and agitate another item of fraud at this second appellate stage, and to ask for a remand of these matters to the trial Court for fresh decisions on the ground of fraud now raised by Mr. Dasgupta.

6. The impugned decisions relating to both the Second Appeals are not challenged on any other grounds.

7. Thus there is no merit in both the Second Appeals which are hereby dismissed, but on the facts and circumstances of these cases there will be no order as to costs of this Court.