

(2014) 02 OHC CK 0014

In the Orissa High Court

Case No : Second Appeal No. 44 of 1993

Rama Chandra Sahu

APPELLANT

Vs

Gopinath Panigrahi

RESPONDENT

Date of Decision : 25-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54
Criminal Procedure Code, 1973 (CrPC) — Section 144, 144(2)
Registration Act, 1908 — Section 47, 58(2)
Specific Relief Act, 1963 — Section 34

Citation : (2014) 118 CLT 133 : (2014) 1 OLR 1002

Hon'ble Judges : Raghubir Dash, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Raghubir Dash, J.—The Plaintiffs are the Appellants assailing the Judgment & decree dated 11.12.1992 & 2.1.1993 respectively passed by the Learned Additional District Judge, Jeypore in T.A. No. 27 of 1989 dismissing the appeal against the Judgment & decree passed by the Learned Subordinate Judge, Gunupur in T.S. No. 21 of 1985. The Second Appeal is admitted on the following substantial questions of law:

(I) Whether the Learned lower Appellate Court was correct in dismissing the suit on the question of maintainability in view of the relief sought in the plaint? &, was it necessary for the Plaintiffs to pray for setting aside the sale deed, Ext. A & in absence of such prayer, the suit is hit u/s 34 of the Specific Relief Act.

(II) Whether the Learned Appellate Court committed grave error of record & did not consider the material evidence on record in coming to the finding in paragraph-10 of its Judgment.

2. Before going to deal with the substantial questions of law, the stand taken by each of the parties be narrated in brief.

3. Case of the Appellants-Plaintiffs is that the suit land belonged to one Dinabandhu Behera who died in the year 1970 leaving behind his widow, Chitra Beherani, & a married daughter, Manikya Beherani. On 30.4.1981 said Chitra & Manikya entered into an agreement with the Plaintiffs for sale of the suit land for a consideration of Rs. 10,000 & receiving a sum of Rs. 505 as part consideration delivered possession of the suit land to the Plaintiffs, with a stipulation that they would execute a registered sale deed within two months. On 11.5.1981 both of them executed a sale deed in favour of the Plaintiffs & the balance sale price was paid but the deed could not be presented for registration on the same day. Subsequently, on 18.6.1981 the sale deed was registered. Plaintiffs' further case is that on 12.5.1981 the Respondent-Defendant, who is a relation of the Plaintiffs, obtained L.T.I., of Chitra Beherani on Non-Judicial Stamp papers & using the same, they prepared a sale deed showing that Chitra Beherani had sold the same land to the Defendant for a consideration of Rs. 10,000 to be paid before the Sub-Registrar at the time of registration. That document was presented for registration on 19.5.1981 but the vendor, Chitra Beherani remained absent for which it could not be registered. On 22.5.1981 the vendor sent a telegram to the Sub-Registrar denying execution. So, the Sub-Registrar made an enquiry u/s 58(2) of the Registration Act & ultimately on 17.6.1981 the Sub-Registrar registered the sale deed making an endorsement thereon that the vendor, while admitting to have executed the sale deed, refused to make endorsement on the deed. The Appellants-Plaintiffs filed the suit for declaration of right, title, interest & possession over the suit land contending that since the sale deed executed in favour of the Defendant is non est in law, they need not ask for any relief to declare the deed as void. It is contended that by the time Chitra Beherani executed the sale-deed in favour of the Defendant, she had no right, title & interest over the suit land because prior to that Chitra & her daughter had executed a sale deed in favour of the Plaintiffs. That apart, Chitra was not the exclusive owner of the said land & she had no authority to convey the half share of her daughter under the sale deed-executed by her in favour of the Defendant.

4. Respondent-Defendant contested the suit contending that Dinabandhu Behera, the recorded owner of the suit land, had died about 35 years prior to the suit leaving behind his widow Chitra as the sole legal heir. Therefore, after his death Chitra became the sole owner of the suit land. Regarding the impugned sale deed, case of the Defendant is that Chitra executed the sale deed on 12.5.1981 which was registered on 17.6.1981 followed by delivery of possession of the suit land. Therefore, Chitra had no title over the suit land on the date, i.e. 18.6.1981, she sold it to the Plaintiffs. His further contention is that the Plaintiffs created the registered sale deed dated 18.6.1981 by utilizing stamp papers purchased on 10.5.1981 by a stranger, namely, Mrudubasini Padhi, & antedated the execution of the sale deed to show that it was executed earlier to the execution of the sale deed of the Defendant.

5. Both the Courts below have held that the execution of the sale deed in favour

of the Plaintiffs was ante-dated in order to show that it was executed earlier to the sale deed executed in favour of the Defendant. As regards the death of Dinabandhu, the Learned Trial Court did not record any finding but the Learned lower Appellate Court has concluded that he died in 1970. Basing on that finding, the Learned Appellate Court has further held that his widow Chitra & daughter & Manikya had 8 annas interest each in the suit land. Both the Courts below have further held that both the sale deeds under consideration were duly executed. While the Learned Trial Court has held that the Plaintiffs have acquired no right, title & interest in the suit land, Learned lower Appellate Court has held that the Plaintiffs have acquired right, title & interest in respect of 8 annas interest of Manikya & the other 8 annas interest of Chitra has passed on to the Defendant. On the maintainability of the suit, Learned Trial Court held that Plaintiffs' suit for declaration of their right, title & interest without a prayer for declaration to set aside the sale deed in favour of the Defendant is bad in law with further observation that the suit, having not been filed within three years from the date of registration of the sale deed in favour of the Defendant, is barred by Limitation. Learned lower Appellate Court did not make any observation on the point of limitation but on the maintainability of the suit it held that the sale deed executed in favour of the Defendant being not a void document, the suit for mere declaration of title & possession without consequential relief is not maintainable. On that sole ground, the Learned lower Appellate Court held that the suit is liable to be dismissed despite of the fact that the Plaintiffs have acquired the 8 annas interest of Manikya.

6. On the question of maintainability, Learned Counsel for the Plaintiffs-Appellants has argued that since the sale deed executed in favour of the Respondent-Defendant, which is marked Ext. A, was void & inoperative in law, it is not necessary for the Plaintiffs to pray for setting it aside. This submission flows from the contention that the sale deed marked Ext. 1, which was executed in favour of the Plaintiffs, was executed before the execution of Ext. A &, therefore, by the time Ext. A was executed the Defendant's vendor had no title in the suit land to convey to her vendee. On the execution of the sale deeds in question, the concurrent finding of the Learned Courts below is that execution of Ext. 1 which is said to have taken place on 11.5.1981 was ante dated in order to show that its execution was prior to the execution of Ext. A which had taken place on 12.5.1981. Learned Courts below disbelieving that the sale deed Ext. 1 was in fact executed on 11.5.1981. Therefore, the Plaintiffs failed, to establish that Ext. 1 was executed prior to the execution of Ext. A. These concurrent findings of fact which are not found to be perverse cannot be interfered with in Second appeal. Therefore, the submission made by the Learned Counsel for the Appellants that execution of Ext. 1 was earlier to Ext. A is not entertainable. Once it is held that execution of Ext. 1 has been ante-dated, the result to follow is that the execution of Ext. A preceded the execution of Ext. 1. Also the registration of Ext. A was one day before the registration of Ext. 1. Both the sale deeds have been executed by Chitra in respect of the same property, but, to two

different persons at two different time. In such a situation, Section 47 of the Registration Act is to be made applicable which runs as follows:

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made & not from the time of its registration."

7. A bare reading of this provision of Section 47 will show that when the execution & registration of a sale deed has taken place on two different dates, the deed would operate from the date of its execution. Thus, as between two registered documents, the date of execution determines the priority. The one which is executed first has priority over the other. Therefore, in the facts & circumstances of the case in hand, it cannot be said that as on the date of execution of Ext. A, Defendant's vendor, namely. Chitra Beherani had no title in the property to convey. Since her sale deed (Ext. A) in favour of the Defendant is earlier to her sale deed (Ext. 1) in favour of the Plaintiff, her 50% interest in the suit property stands validly transferred to the Defendant with effect from 12.5.1981, the date of execution of Ext. A. Consequently, the subsequent sale deed marked Ext. 1 to the extent of 50% interest of Chitra Beherani is invalid.

8. On the other hand, Ext. A is invalid to the extent of the remaining 50% interest of Manikya as she is not a party to the Ext. A. Her 50% interest could not have been alienated by her mother. Therefore, Ext. A being unenforceable by law to the extent of 50% interest of Manikya is void. A contract void from its inception is no contract at all. Since it is void ab initio, no declaration is necessary to avoid it. Since law does not take any notice of same, it can be disregarded. Therefore, the Learned lower Appellate Court, who has rightly come to a conclusion that under the sale deed Ext. 1 the Plaintiff has acquired right, title & interest in respect of 8 annas share of Manikya in the suit land, has wrongly decided that in the absence of any consequential relief the suit for mere declaration of title & possession is not maintainable. The dismissal of the appeal solely on the said ground of maintainability is not sustainable in law.

9. With reference to the substantial question No. II, it is submitted by the Learned Counsel for the Appellants that the observation made by the Learned lower Appellate Court in Para-10 of its Judgment that the Plaintiffs failed to examine any of the attesting witnesses to the sale deed Ext-1 is a grave error of record in as much as the Plaintiffs have examined P.W. 2, an Advocate in whose office the sale deed was drafted to & P.W. 3, who is the scribe of the deed, who have categorically stated in their deposition that the sale deed was executed in their presence. From perusal of para-10 of the lower Court Judgment, it transpires that the Learned lower Appellate Court considered the evidence of P.Ws. 2 & 3 & finding that their evidence was not trustworthy, further proceeded to make the observation on Plaintiff's failure to bring any of the attesting witnesses, who are eleven in number, to the witness box to prove that Ext. 1 was written & executed on 11.5.1981. On the execution of the sale deed-Ext. 1 both the Learned Courts have dealt with the evidence of record & considering the

same along with attending circumstances they have come to a concurrent finding that the execution Ext. 1 was ante-dated. Therefore, it is not a case of non-consideration of material evidence of record.

10. On the point of limitation, the Learned Trial Court has held the suit to be time barred whereas the Learned lower Appellate Court has not addressed itself to the issue on limitation. Learned Trial Court held that under Article 58 (wrongly stated as Section 58) of the Limitation Act the suit is time barred. According to the Trial Court the suit should have been filed within three years from the date of registration of the sale deed (Ext. 1).

11. According to the plaint averment the cause of action for the suit arose on 2.4.1985 when the Sub-Divisional Officer, Gunupur as the Appellate authority under Orissa Survey & Settlement Act allowed the Defendant's prayer & directed mutation in favour of the Defendant.- Prior to that, it is pleaded, on 25.6.1981 the cause of action has arisen when the Defendant led false claim of right, title, interest & possession over the suit land in Misc. Case No. 29 of 1981 initiated by the Plaintiff's u/s 144(2) of Cr.P.C. According to the Learned Trial Court the Plaintiffs ought to have filed the suit within three years from the date of registration of the sale deed in favour of the Defendant. But this proposition does not appear to be tenable. The right to sue accrues when there is a clear & unequivocal threat to infringe that right by the Defendant. So long there is no positive & overt action on the part of the Defendant to infringe Plaintiff's right, there would be no accrual of the right to sue. From that point of view, it cannot be said that the right to sue accrued when the sale deed, Ext. A, was executed in favour of the Defendant. With regard to the Plaintiff's pleading on the accrual of cause of action, the Defendant has simply replied in his written statement that there is no cause of action for the suit. From the pleadings of the parties it transpires that a clear threat to infringe the Plaintiff's right arose when the mutation of R.O.R. in respect of the suit land was allowed in favour of the Defendant by the S.D.O., Gunupur by an Order Dated 2.4.1985 which is not denied by the Defendant. Regarding the other date of cause of action, it is admitted by the Plaintiffs that in a proceeding u/s 144 Cr.P.C. the Defendant had denied their right, title, interest & possession over the suit land. But such denial appears to be ineffective & innocuous. It cannot be considered to be a clear & unequivocal threat so as to compel the Plaintiffs to file a suit. It appears, if the mutation had been allowed in favour of the Plaintiffs, they would not have filed the suit & in that event the Defendant might have filed a suit. The Plaintiff is not bound to bring a suit for declaration of his right, title, interest & possession the moment his or her right is denied. Therefore, the date of cause of action, i.e. 2.4.1985, should be accepted as the starting point of limitation. Consequently, the suit cannot be said to be time barred.

12. In view of the discussions made above, the Judgments of the Learned Courts below are liable to be set aside. It is already decided that the Plaintiffs have acquired the 50% interest of Manikya & the 50% interest of late Chitra goes to

the Defendant. The Plaintiffs have filed the suit for declaration of their right, title, interest & possession over the entire of the suit land. If the right, title, interest of the Plaintiffs-Appellants in respect of 50% interest of Manikya is simply declared without adjusting the rights of the parties as ascertained herein before, it would lead to further litigations. Since the Plaintiffs could prove their title only to half of the suit property & the other half is found to be with the Defendant, this Court considers it just & appropriate to pass a decree for partition in order to avoid further litigation & to bring the decree in conformity with the Plaintiff's right that they have established. Accordingly, the appeal is allowed. The Judgments & decrees of the Learned lower Courts are set aside. The suit is decreed preliminarily for partition & separate possession confirming Plaintiffs' title only to the extent of half share in the suit property & declaring that the Defendant has got title to the other half share. In other words, the suit property be divided equally amongst the Plaintiffs on one hand & the Defendants on the other. The parties are directed to effect mutual partition within a period of six months failing which any of the parties may seek partition to be made by the Collector or any gazetted subordinate of the Collector as per Section 54 of the Civil Procedure Code. The parties shall bear their respective cost. However, both sides shall equally share the cost that is likely to be incurred in the proceeding before the Collector.