

(1985) 02 PAT CK 0002

In the Patna High Court

Case No : Appeal from Appellate Decree No. 541 of 1976

Rameshwar Prasad Singh and Others

APPELLANT

Vs

Bhubneshwar Thakur @ Bhuna Thakur and Others

RESPONDENT

Date of Decision : 13-02-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Transfer of Property Act, 1882 — Section 3

Citation : (1985) PLJR 481

Hon'ble Judges : Satya Brata Sanyal, J

Bench : Single Bench

Advocate : A.K. Roy, Suresh Chandra Pd. Sinha, Mrs. Sabita Gupta and Mr. Bireshwar Prasad Sinha, for the Appellant; R.K. Verma and Hare Krishna Kumar, for the Respondent

Judgement

Satya Brata Sanyal, J.—These three appeals have been heard together and this judgment will govern all these three appeals. Title Suit No. 40 of, 1958 has given rise to Title. Appeal No. 96 of 1962 and Second Appeal No. 541 of 1976. This second appeal has been preferred by the defendants 2nd and 8th parties in a suit instituted by the plaintiff for declaration of title and confirmation of possession and, in the alternative, recovery of possession over the lands mentioned in Schedules 3 and 4 of the plaint. This suit relates to a considerable land in village Shahjadapur. Title Suit No. 89 of 1957 was instituted by one Bindeshwari Prasad Sahi, one of the defendants of Title Suit No. 40 of 1958, against the plaintiff and his son (Jadu) for declaration of title and recovery of possession of 1 bigha 16 kathas and 9 dhurs of land as detailed in the plaint, which gives rise to Second Appeal No. 542 of 1976. Bindeshwari Prasad Sahi, defendant 2nd party of Title Suit No. 40 of 1958, instituted another suit being Title Suit No. 206 of 1956, against the plaintiff of Title Suit No. 40 of 1958 (Jadu) for the same relief with respect to 2 bighas, 15 kathas and 18 dhurs, out of which Second Appeal No. 543 of 1976 arises.

2. Title Suit No. 40 of 1958 was dismissed by the trial court and Title Suit No 89

of 1957 and Title Suit No. 206 of 1956 were decreed. As against these three decrees, the plaintiff of Title Suit No. 40 of 1958 preferred Title Appeal Nos. 96, 97 and 98 of 1962. The lower appellate court reversed the judgment of the trial court in all these three appeals by decreeing the suit of plaintiff Jadu in Title Appeal No. 96 of 1962 and dismissed Title Suit No. 89 of 1957 and Title Suit No. 206 of 1956 instituted by Bindeshwari Prasad Sahi. The present three appeals have been filed by defendant 2nd and 8th parties of Title Suit No. 40 of 1958 and plaintiff of Title Suit No. 89 of 1957 and Title Suit No. 206 of 1956. The immediate cause of action for institution of all the three suits relates to an order passed u/s 145 of the Code of Criminal Procedure.

3. Declaration sought for by the plaintiff Jadu Thakur in Title Suit No. 40 of 1958 and the defence set forward in Title Suit No. 89 of 1957 and Title Suit No. 206 of 1956 is that he being the nearest heir of Paltu Thakur he is entitled to the entire property left by Haso Kuer as reversioner. Defendant in title Suit No. 40 of 1958 and plaintiff in Title Suit No. 89 of 1957 and Title Suit No. 206 of 1956 claimed to be mortgagee from Sohagbati and/or Most. Haso Kuer and they resist the claim of Jadu Thakur on various grounds to which I will advert hereinafter. Before I consider the case of the parties, it will be essential to set out the genealogy admitted by both the parties.

4. The disputed land was recorded in the name of mosst. Sohagbati, wife of Harkhu. Sohagbati dealt with some of her properties by way of bharna bonds in favour of different persons, first of which is dated 14.6.1909 in favour of one Gokul Jha. Sohagbati also executed a deed of gift (Ext. A) on 26.2.1909 in favour of Haso. Haso also executed a registered bharna bond on 7.8.1925 in favour of Jamuna Prasad Singh in the the name of his servant, Nanu Lal Singh. Haso also executed two sale deeds in the year 1934 and by these two documents she purported to have disposed of her entire property including the homestead. The execution of mortgage bond as well as the sale deeds in favour of different persons resulted in Title Mortgage Suit No. 41 of 1932 and Title. Suit No. 15 of 1935. Subsequently there was a 145 Cr.P.C. proceeding over the disputed land. In that proceeding some of the lands were found to be in possession of Mahanth Ram Acharya Das which are Schedule I of the plaint of Title Suit No. 206 of 1956. The properties in Schedules C and D of the plaint of Title Suit No. 89 of 1957 were declared in possession of Haso. Gaya Prasad Sahi's possession was found with respect to 17 bighas of land in Schedule 3 of the plaint of Title Suit No. 40 of 1958.

5. The plaintiff's case is that the property appertaining to Khata No. 37 belongs to Paltu Thakur, who was the last male holder and full owner of the branch of Sheo Bux. His father Harkhu died only about a year before. Paltu left behind himself his mother Sohagbati and his widow Haso. Haso thus came in possession of the estate as a limited owner. Haso became widow only about 1 1/2 years of her marriage and at a quite young age. Sohagbati kept on looking after the affairs of the family. Therefore, her name came to be entered in the record of

rights. Since the records stood in the name of Sohagbati, therefore she executed a deed of gift (Ext. A) on 24.2.1919 in favour of Haso. This, however, did not affect the legal position of Haso with respect to the property left behind by her late husband. Two ladies have been left behind over a large area of land and greedy eyes were over the estate and it is said that one Ram Thakur and the other Jamuna Prasad Singh involved the two ladies in several litigations. It is not necessary to state those litigations at this stage.

6. The contesting defendant's case is that the property in suit is the stridhan property of Sohagbati. She got those properties from Harkhu's, mother. After Sohagbati's death, Haso became the absolute owner of the said property. Therefore, the suit by the reversioner is not maintainable. They further denied that the plaintiff is the reversioner either of Harkhu or of Paltu. The further case of the contesting defendants is that the two ladies had every right to sell or transfer the lands. The deed of gift, the sale deeds and the sudbharna deeds executed by the two ladies are valid and legal documents and the vendees acquired them after payment of due consideration which cannot be challenged. It was further contended that judgment and decrees obtained against Haso Kuer will operate as estoppel and the plaintiff's suit will be hit by the principles of res judicata as also by adverse possession. Their further defence is" that the suit is barred by general and special law of limitations.

7. At the time of admission of the appeal the following substantial question of Law was framed. The substantial question framed was:

Whether in view of death of respondent No. 29 Ram Uchit Thakur during the pendency of the appeal before the lower appellate court leaving behind him his heir and legal representative Mossamat Sumitra Devi, his widow, who was not substituted, the judgment and decree of the court below are liable to be set aside?

The Court admitted the appeal on this ground but left open to the appellants to raise the point of estoppel, res judicata and limitation which all relate to maintainability of the suit by Jadu Thakur.

8. Before I consider the contention of the learned counsel of the appellants, I would like to set out the finding recorded by the lower appellate court on different issues: Harkhu Thakur pre-deceased Paltu. Haso Kuer was the absolute owner of her husband's estate. Sohagbati used to manage the affairs of the estate on behalf of Haso Kuer. Sohagbati had acquired no title by adverse possession. Exhibits G(2) and G(3), the sale deeds were nullity as the same were obtained by playing fraud upon Maso. The suit is not barred by res judicata. Jadu was the next reversioner irrespective of the fact whether Paltu pre-deceased Harkhu or vice-versa. Sohagbati executed the deed of gift as a limited owner. Haso Kuer remained in possession of the property as the widow of last male holder and the suit having been instituted within 12 years of her death it is not hit by general law of limitation. The suit being based on plaintiff's title, the

special law of limitation of three years will not apply in the instant case i.e., for setting aside an order u/s 145 of the Code of Criminal Procedure. Transactions evidenced by Exhibits G(2), G(3) and G(4) were fraudulent and Title Suit Nos. 61 of 1932 and 15 of 1933 were decreed on account of fraud perpetrated by the plaintiff of those suits. In the execution proceeding also fraud was perpetrated and no delivery of possession was effected on the spot and, therefore, Haso Kuer was not divested of her possession and she continued to remain in possession till her life. She died in the year 1954, a few years before the institution of the suit. Therefore, the plaintiff's title is a subsisting one.

9. Mr. Roy, learned counsel appearing of the appellants, raised the following points that the suit is not maintainable because the plaintiff was not reversioner of Paltu and further the properties in question are stridhan properties of Haso Kuer. He further contended that the suit is barred by res judicata, estoppel and general law of limitation. He further argued that the appellate court did not consider the reasons of the trial court even though it is a judgment of reversal and lastly the appeal abated in view of non-substitution of the heirs of Ram Uchit Thakur in the lower appellate court who was one of the transferees of the disputed property which will result in the appeal abating as a whole.

10. The contention that Paltu having predeceased Harkhu cannot be the reversioner at all is devoid of any substance. It may have a bearing only on the question of limitation which I will be dealing separately. The genealogy, as I have already stated, is an admitted one. In the grounds of appeal the genealogy has not been questioned. From the genealogy it is manifest that Jadu is a sapinda and the only nearest sapinda left in the family. Under the Hindu Law the right to inherit arises from propinquity, that is, proximity of relationship which would be evident from Article 36 of Malabar's Hindu Law, Thirteenth Edition. Article 43 shows the place of paternal uncle's son as the order of succession among the sapindas. The observation of the lower appellate court (para 36) as to whether Paltu predeceased Harkhu or Harkhu pre-deceased Paltu is quite correct for the purpose of this case. Jadu being admittedly the only surviving sapinda, he shall be, in my opinion, entitled to maintain the suit and not his sons.

11. It is only after Jadu's death that his sons become reversioners irrespective of the fact whether Harkhu died first or Paltu died first. It is not correct to contend that the court below proceeded on the assumption that Jadu is the reversioner without deciding this question. In my opinion, it has considered at length the question and rightly concluded that Jadu is a reversioner.

12. The question whether Harkhu died first and Paltu died subsequently, the court of appeal below has considered the matter at length. It has, started considering the said question from paragraph 36 onwards and has given various reasons after having referred to oral and documentary evidence and explaining the documents relied upon (see paragraph 46), the court below concluded in paragraph 51 that Harkhu Thakur pre-deceased Paltu. This is a finding of fact which in second appeal cannot be interfered with, more particularly because it

cannot be said that the consideration of the said question by the appellate court was perfunctory and not based on evidence.

13. The next question which has been strenuously argued before me is that the suit is barred by res judicata as well as estoppel in view of the decisions in Title Suit No. 111 of 1923, Title Suit No. 15 of 1932, Title Suit No. 57 of 1952 and Mortgage Suit No. 61 of 1932 it is said that in these suits it was held that Jadu was not the reversioner and Haso was the absolute owner of the property. In Title Suit No. 111 of 1923 the only issue was whether Ram Thakur was the next reversioner. In Mortgage Suit No. 61 of 1932 the plaintiff was a witness. It is also submitted that in Exhibits G(2), G(3) and A, the deed of gift executed by Sohagbati in favour of Haso Kuer, Jadu was an attesting witness. In Title Suit No. 57 of 1952 there was no issue regarding the fact whether Paltu died first or Harkhu died later on. Both the courts below were of the same view that the suit was not barred by res judicata. There is one reason why the question of res judicata and/or estoppel will not arise in the instant case. This is because the court of appeal below has found that the judgments were obtained by practising fraud and in spite of the said judgments Haso continued to remain in possession of the property. This question has been considered by the court below from paragraph 54 and after having referred to various circumstances, considering each one of the cases and the documents pressed before it and also considering the fact of unconscionable low price said to have been paid for valuable properties, so much so that she was left with not even hearth and home and for some of the documents she received no consideration whatsoever, the court below concluded that fraud was practised in bringing into existence the documents of transfer, namely, Exhibits G(2) and G(3) as would be found from paragraph 81 of the lower appellate court's judgment. The lower appellate court ultimately concluded in paragraph 82 that all these transactions were vitiated by fraud. The plea of res judicata was considered by the lower appellate court in paragraph 83 and the finding is rendered in paragraph 86. It has been held by a Division Bench of this Court in the case of Bishunath Tewari and Others Vs. Mst. Mirchi, that a judicial act may be impeached on the ground of fraud or collusion and the same can be impeached in an active proceeding for rescission by way of suit or application for review. It was further held that "the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or res judicata founded upon the judgment". To the aforesaid view Ramaswami, J. concurred with L.K. Jha, C.J. The same view has been reiterated by another Division Bench of this Court in the case of Tribeni Mishra and Others Vs. Rampujan Mishra and Others, . It was observed:

A decree or order can be challenged on ground of fraud in a collateral proceedings without any suit for setting aside the decree, irrespective of the time when the judgment was delivered or order or decree was passed.

The Court of appeal below having rendered a finding that all previous

proceedings were vitiated by fraud and the transfer documents were similarly vitiated for which very cogent reasons have been rendered by the lower appellate court, I am of the firm view that in view of the fraud the questions of res judicata and estoppel do not arise.

14. Much has been argued that Jadu Thakur being an attesting witness to Exhibits G(2), G(3) and A executed by Sohagbati in favour of Haso Kuer, he is estopped from questioning the said documents. An attesting person is also a witness. The only difference between a witness and an attesting witness is that whereas a witness sees the document executed, an attesting witness subscribes as a witness in the document itself. The affixing of signature in the presence of the executant is the mode of attestation as defined in section 3 of the Transfer of Property Act. Attestation of a deed only estops a man from denying nothing whatever except that he witnessed the execution of the deed. The mere attestation of a document is no proof that the attesting witness is aware of the contents of the document See *Panga Chandra v. Jagat Kishore* (44 Cal 186 P.C.). Of course, there may be cases coupled with other evidence of consent and acquiescence, where the question of estoppel may arise on the part of the attesting witness. That apart, as I have already found that the court of appeal below came to the conclusion that these documents were vitiated by deception and fraud, the questions of res judicata and/or estoppel will not arise in the instant case.

15. So far as the question of limitation is concerned, the lower appellate court having already found that Harkhu pre-deceased his son Paltu who was the last male holder, the question of limitation will not arise. The question of limitation will arise only after the death of Haso. In the case of *Kalipada Chakraborti and Another Vs. Palani Bala Devi and Others*, . It was observed while considering the question of law of limitation qua the principles of Hindu Law:

The right of reversionary heirs is in nature of spes successions, as the reversioners do not trace their title through or from the widow, it would be manifestly unjust if they are to lose their rights simply because the widow has suffered the property to be destroyed by the adverse possession of a stranger.

This view has been reiterated by the Supreme Court again in the case of *Ram Kristo Mandal and Another Vs. Dhankisto Mandal*, . It was observed that the reversioner is entitled to recover possession of the property, if it is immovable, within twelve years from the widow's death under Article 141 of the Limitation Act read with the principles of Hindu law and the general principle that as the right of reversioner is traceable not through or from the widow, it would be manifestly unjust if the reversioner is to lose his right by the negligence or sufferance of the widow, I am, therefore, of the opinion that the question of limitation does not at all arise and the court of appeal below was correct in its conclusion on this point as well.

16. Learned counsel, however, contended that the suit is barred under the

special law of limitation since it has been instituted beyond three years of the order passed u/s 145 of the Code of Criminal Procedure. In this connection it may be remembered that the suit was originally filed within three years of the order passed u/s 145 with a prayer for recovery of possession but that was subsequently deleted but the prayer was again restored subject to the law of limitation. Learned counsel submitted that since the prayer for recovery of possession was made beyond three years, even though the suit was instituted within three years of the order u/s 145 of the Code, the suit is barred, the amendment being beyond the period of limitation. It may be observed here that by the amendment the plaintiff did not introduce a new case but simply corrected the relief which was again restored. The relief that was sought to be restored did not change the nature of the suit. The point, in my opinion, is too technical to impress. The right of amendment can also be exercised in the interest of justice even after the period of limitation. Once the amendment is allowed it takes effect from the date of the institution of the suit. I, therefore, find no force in this submission of learned counsel for the appellants as well.

17. The last contention of learned counsel for the appellants is that the appeal in the court below abated because of non-substitution of the heirs of one Ram Uchit Thakur, who died while the appeal was pending in the lower appellate court. It may be remembered that Ram Uchit Thakur was one of the transferees of the disputed land and admittedly he died during the pendency of the appeal in the lower appellate court. It is also to be borne in mind that the three brothers of Ram Uchit Thakur were on record as respondents. An affidavit has been filed along with the written statement of the widow of Ram Uchit Thakur where she has stated that the estate of Ram Uchit Thakur really belonged to his three brothers and she had no interest in the property. In this background it has to be considered whether the appeal in the court of appeal below at all abated on or upon the death of Ram Uchit Thakur, one of the transferees of the property.

18. The law in relation to substitution and amendment is no more clouded. It is now a settled law that if the estate is represented by others already on the record, there is no question of any abatement. In the instant case it is submitted that the widow ought to have been through on record and for not doing so the appeal so far as the transferee Ram Uchit Thakur is concerned stands abated. I do not at all agree with the view of the learned counsel for the appellants. In my opinion, the estate of Ram Uchit Thakur was represented by his three brothers who are already on record coupled with the fact that the wife of Ram Uchit Thakur had made a statement in the pleading that the real owner's of the property are those three persons who are already on record. In the circumstances, I do not find any merit in this point as well. In the result, the appeals are dismissed but there would be no order as to costs.