(1980) 04 OHC CK 0003

In the Orissa High Court

Case No : Second Appeal No. 145 of 1977

Ramhari Parida APPELLANT

Vs

Brajendra Patra RESPONDENT

Date of Decision : 17-04-1980

Acts Referred:

Evidence Act, 1872 — Section 91, 92, 99
Stamp Act, 1899 — Section 29

Citation : (1981) 51 CLT 401

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : N. Patra, for the Appellant; S.C. Dash, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Defendant is in appeal against the affirming judgment and decree of the learned Additional District Judge of Balasore in a suit for declaration that the document dated 24-7-1967 executed by the Plaintiff in favour of the Defendant (Ext. B) was in fact not a deed of sale but a deed of mortgage and no title had passed under it in favour of the alienee. Both the Courts below have allowed parole evidence and held the document to be really a mortgage. The Defendant challenges the decrees of the Courts below on the footing that Section 92 of the Evidence Act stood as a bar to receiving of external evidence for considering the nature of the document, inasmuch as the terms of the document were not ambigous and, therefore, the contents of the document and not any external aid should have been taken into account for determining the true nature of the deed.

2. Section 92 of the Evidence Act occuring in Chapter VI with the main heading of Exclusion of evidence of oral agreement provides:

when the terms of any such contract grant to other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives In interest, for the purpose of contradicting, varying, adding to, or substracting from, its terms.

Six provisos each providing an exception to the rule have been appended to the main provision. The relevant provisos are provisos (1), (2) and (4) which are extracted below:

Proviso (1) - Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating hereto; such as fraud, intimidation, illegality want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2) - The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree or formality of the document.

Proviso (4) - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved. Except in cases in which such contract, grant or disposition of of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing or has been registered according to the la w in force for the time being as to the registration of documents.

In the case of Bai Hira Devi and Others Vs. The Official Assignee of Bombay, the import of the provision of Section 92 was considered by the Supreme Court Gajendragadkar, J. as he then was, speaking for the Court, observed:

The question raised by Shri Purushottam which still remains to be considered is whether the Appellants who undoubtedly are the representatives in interest of the insolvent can avoid the application of Section 92. In our opinion, the answer to this question must be In favour of the Appellants. It is urged before us by Shri Purushottam that the scheme of the relevant provisions of Chapter VI of the Evidence Act is inconsistent with the Appellant''s contention that they can lead oral evidence about the alleged agreement which may tend to change the character (sic) the transaction itself Shri Purushottam bases his argument mainly on the provisions of Section 91 read with Section 99 of the Act. He contends that Section 91 requies the production and proof of the document itself for the purpose of proving the contents of the document; and by necessary implication all evidence about any oral agreement which may affect the terms of the document is excluded by Section 91 itself, we are not impressed by this argument. As we have already observed-Sections 91 and 92 really supplement each other. It is because Section 91 by itself would not have excluded evidence of oral agreements which may tend to vary the terms of the document that Section 92 has been enacted; and if Section 92 does not apply in the present case, there is no other section in the Evidence Act which can be said to exclude evidence of the agreement set up by the Appellants. What Section 91 prohibits is the admission of oral evidence to prove the contents of the document. In the present case, the terms of the document are proved by the production of the document itself. Whether or not the said terms could be varied by proof of an oral agreement is a matter which is not covered by Section 91 at all. That is the subject-matter of Section 92 and so, if Section 92 does not apply, there is no reason to exclude evidence about an oral agreement solely on the ground that if believed the said evidence may vary the terms of the transaction.... As a matter of fact, from the terms of Section 92 itself, it is clear that strangers to the document are outside the scope of Section 92 but Section 99 has presumably been enacted to clarify the same position. It would be unreasonable, we think, to hold that Section 99 was intended not only to clarify the position with regard to the strangers to the document, but also to lay down a rule of exclusion of oral evidence by implication in respect of the parties to the document or their representatives in interest. In our opinion, the true position is that, if the terms of any transfer reduced to writ 109 are in dispute between a stranger to a document and a party to it or his representative in interest, the restriction imposed by Section 92 in regard to the exclusion of evidence of oral agreement is inapplicable and both the stranger to the document and the party to the document or his representative in interest are at liberty to lead evidence of oral agreement notwithstanding the fact that such evidence, if believed, may contradict, vary, add to or substract from its terms. The rule of exclusion enunciated by Section 92 applied to both parties to the document and is based on the doctrine of mutuality. It would be inequitable and unfair to enforce that rule against a party to a document or his representative in interest to the case of a dispute between the said parry or his representative in interest on the one hand an the stranger on the other....

Support for the Appellant''s contention was asked from a decision of this Court in the case of Haramani Dei v. Bauri Bewa 36 (1970) C.L.T. 551. That was a case where three questions came for consideration as indicated in paragraph-6 of the Judgment. The matter was examined on the background of the specific pleas taken in the suit and different stands adopted at the actual trial. Nothing has been said there which would indeed assist us in disposing of the present question. The ambit of Section 92 of the Evidence Act has been examined in several cases in this Court. See Baikoli Dibas v. Harihar Chakraverty and Ors., Gadadhar Mohanty v. Gangadhar Mohanty and Ors. and Balaram Agasti and Ors. v. Ramesh Chandra Mohanty and Ors.

3. Admittedly, in the instant case, the dispute is between the parties and keeping the principle Indicated in Bai Hira Devi and Others Vs. The Official Assignee of Bombay, , the matter would be within the purview of Section 92 of the Act. Even applying that section, I am inclined to hold in agreement with Respondent''s advocate that the exception in the proviso applied and it was open to the Plaintiff to show that the document in question was indeed not a sale deed but a mortgage. Counsel for the Respondent pointed out that the usual indemnity

clause was not there. The stamp had been purchased by the Plaintiff who had styled himself as the vendor, whereas u/s 29(c) of the Indian Stamp Act, ordinarily it would be for the purchaser to supply the stamp. Besides, the valuation mentioned in the document as consideration shows that it was much less than the market value and, therefore, it is suggestive of the fact that the document was intended to be security for the loan and not to be for transfer of title. I must say that these are considerations which become relevant only when parole evidence becomes admissible, Since I have already held that the proviso applied and evidence suggesting to the contrary to what the document purported to be was admissible, the conclusion seems to be well justified. The second appeal fails and is dismissed. There will be no order for costs.

