**(1999) 04 OHC CK 0003**

**In the Orissa High Court**

**Case No :** First Appeal No. 181 of 1986

Sara Dei (dead after her) Kantha Charan Swain — APPELLANT

Vs

Kamadev Pradhan and Others — RESPONDENT

**Date of Decision :** 09-04-1999

**Acts Referred:**

**Citation :** (1999) 1 OLR 662

**Hon'ble Judges :** P.K. Misra, J

**Bench :** Single Bench

**Advocate :** B. Patnaik, D. Patnaik and B.C. Swain, for the Appellant; S. Mishra-2, B. Das and B.C. Rath, for the Respondent

## Judgement

P.K. Misra, J.—Plaintiff is the appellant. Suit was filed for declaration that the sale deeds dated 29.1.1975 in respect of ''Ka'' and ''Kha'' Schedule lands are fraudulent, invalid and without consideration ,a.n.d for delivery of possession.

2. The plaintiff''s case is as follows :

The disputed properties were the joint family properties of her husband Rama Swain and elder brother Bikala Swain. After the death of Bikala, her husband remained as the ''Karta'' of the family. Both the brothers had purchased certain other properties. After the death of plaintiff''s husband in the year 1961, her nephew Kantha managed the property as ''Karta'' of the joint family. The plaintiff did not have any children, defendant No. 3, the wife of defendant No. 1, so being treated as her god-daughter and the plaintiff had full confidence in her. Defendant No. 1 persuaded the plaintiff to adopt defendant No. 2 and promised that a house would be constructed for plaintiff after purchasing new land. Defendant No. 1 also advised her to separate from her nephew and for the said purpose persuaded her to execute a power-of-attorney. In the garb of taking the power-of-attorney, actually two sale deeds were obtained from the plaintiff. The sale deeds had not been read over and explained to the plaintiff and no consideration had been paid. The documents were clandestinely registered at

Kendrapara even though the property was within the jurisdiction of Sub-Registrar''s Office at Marshaghai and for the aforesaid purpose a false document was obtained from one Kamadeb Jena in the name of the plaintiff in respect of one kadi of land by a document dated 25.1.1975 and the said land was again shown to have been sold in the sale deed dated 29.1.1975. It was pleaded that defendants 1 to 3 did not derive any right, title and interest under the sale deeds.

3. defendants 4 to 7 got themselves impleaded as parties in the said suit by filing application under Order 1, Rule 10, C.P.C. claiming that they had purchased some of the disputed lands from defendants 1 to 3. Defendants 1 to 3 have filed a joint written statement. It was pleaded by them that the plaintiff, who was the owner of the disputed lands, was in need of money for repaymentof loan and for the aforesaid purpose, two sale deeds had been executed on 29.1.1975. It was further pleaded that apart from defendants 4 to 7, there were certain other purchasers from defendants 1 to 3 in respect of some portions of the disputed land and the suit was not maintainable in the absence of such purchasers. It was further pleaded that the sale deeds in favour of defendants 1 to 3 were supported by consideration and had been duly executed.

4. On the aforesaid pleadings, the trial Court has framed several issues. It has been found by the trial Court that the sale deeds, Exts. C and D in favour of defendants 1 to 3 were not obtained by fraud. However, it was found that defendant No. 1 had failed to prove the payment of full consideration in respect of the two sale deeds. The trial Court further found that the other purchasers from defendants I to 3 having not been impleaded as defendants, the suit was hit by the principle of non-joinder of necessary parties. On the aforesaid findings, the suit was dismissed.

5. The learned counsel for the appellant has challenged all the adverse findings against the plaintiff. It has been contended that even if the plaintiff failed to prove that the sale deeds had been obtained fraudulently from her, she admittedly being an illiterate lady, the burden was on the defendants to prove that the sale deeds, Exts. C and D, had been duly executed by the plaintiff after understanding the contents thereof and independent advice was available to her before such execution of the sale deeds. It is further submitted that there is no material on record to prove the sale deeds in favour of other purchasers and, as such, the suit was not barred by principle of non-joinder of necessary parties. The learned counsel for the appellant also contended that even assuming that the sale deeds had been duly executed, in view of the finding of the trial Court that the sale deeds were not supported by consideration, no title passed in favour of defendants I to 3 under the sale deeds. It is further contended that in the two sale deeds an insignificant property allegedly purchased on 25.1.1975 by the plaintiff had been fraudulently included in the sale deeds with a view to confer jurisdiction on the Sub-Registrar of Kendrapara and such attempt being fraud on registration, the two sale deeds, Exts. C and D, must be deemed to be invalid.

 

6. The learned counsel appearing for respondents 1 to 6 have supported the findings of the trial Court and contended that due execution of the documents having been proved, the suit had been rightly dismissed. It has been further contended that the plea relating to fraud on registration had not been specifically pleaded in the plaint and no issue had been framed. It is further stated that independent advice was available to the plaintiff and her nephew (defendant No. 5) was present at the time of execution of the sale deeds and was an attesting witness. It is also submitted that the suit was barred for non-joinder of necessary parties as some of the purchasers from defendants 1 to 3 had not been impleaded. It is also contended that title under the two sale deeds passed irrespective of payment of consideration.

7. The trial Court found that the consideration amount under the sale deeds had not been paid. In the written statement of various defendants, it had been specifically pleaded that the consideration had been paid in cash in presence of the Sub-Registrar. In the two documents (Exts. C and D), there is no endorsement of the Sub-Registrar to the effect that consideration had been paid in his presence. As a matter of fact, in the evidence on the side of the defendants, it is stated that the consideration had been paid before execution of the sale deeds. Relying upon the aforesaid circumstances as well as the other circumstances, the trial Court has come to a conclusion that the consideration amount under the sale deeds had not been paid. Each finding of the trial Court appears to be based on the relevant materials on record and there is no reason to differ from such finding.

8. In the aforesaid back-drop, the main question arises as to whether title passed under the two sale deeds irrespective of payment of consideration. The question as to whether the title passes under a sale deed irrespective of the payment of consideration is dependent upon the intention of the parties and primarily such intention is to be gathered from the recitals in the sale deed. Where, however, the recitals in the sale deed are ambiguous, the Court may look to other surrounding circumstances to find out as to whether the title passes irrespective of payment of consideration. The law on this point is clear from a catena of decisions of this Court as reported in Chandrasekhar Praharaj and Others Vs. Pitambari Dibya, : Balabhadra Misra Vs. Srimati Nirmala Sundari Devi and Others, and Hara Bewa and Others Vs. Banchanidhi Barik and Others, . In Ext. C, after reciting that the vendor wanted money to repay the loan from Kendrapara Land Mortgage Bank; and to repay other loan and for purchasing land in other places and for maintenance of the vendor and for going on pilgrimage, money was necessary for the vendor and, therefore, the vendor on her free will transferred the land for Rs. 8,000/- and having received the consideration in cash, the vendee was made the owner in possession from the date of the sale deed. From the sale deed it appears that the recital relating to receipt of consideration precedes the recital relating to vesting of title. It is evident that the intention was clear that the vesting of title was dependent upon the payment of consideration. In view of the finding that the consideration had not been paid,

there is no alternative but to hold that the title did not pass under Ext. C. The recitals in Ext. D were also similar in nature. Thus, in the absence of payment of consideration, it is clear that the title did not vest with the purchasers under the two sale deeds.

9. The learned counsel appearing for the respondents however, submitted relying upon the decisions reported in Ramchandra Biharilal Firm Vs. Mathuramohan Naik and Others, : Iswar Das Vs. Muralidhar Rai and Others, : 1960 (2) OJD 136 (Nichhu Kuanr and others v. Sadhu Jena and others) and 32 (1990) OJD 300 (Civil) (Sri Dakhia Majhi and another v. Sri Rama Majhi and others) that the title passed irrespective of payment of consideration. In the aforesaid cases, the recitals in the sale deeds were of different nature. TJie facts of those cases appear to be different and are not applicable to the facts of the present case.

10. It is contended by the learned counsel for the appellant that even if the plaintiff failed to prove that the sale deeds were obtained fraudulently, the burden was on the purchasers from the illiterate lady to prove that the sale deeds had been duly executed after understanding the contents thereof and further that independent advice was available. However, it is not necessary to consider these aspects in view of the earlier finding to the effect that title did not pass under the two sale deeds due to non-payment of consideration.

11. The two sale deeds had been registered in the office of the Sub-Registrar, Kendrapara. The disputed properties are situated in an area within the jurisdiction of the Sub-Registrar of Marshaghai. It further appears that an insignificant extent of land in a village within the jurisdiction of the office of the Sub-Registrar, Kendrapara, had been included. It is stated by the plaintiff that such insignificant property in the village was included in a sale deed dated 25.1.1975 purportedly in favour of the plaintiff and such property was again purported to be sold to defendants 1 to 3 under the sale deeds. It is evident that such a course was adopted with a view to get the sale deeds registered in the office of the Sub-Registrar, Kendrapara. However, no issue had been framed by the trial Court. In normal course, since such a plea had been taken in the plaint, an issue should have been framed. However, since the appeal can be disposed of on other points, it is not necessary to give any finding on this point, nor is it necessary to direct the trial Court to consider this aspect by framing appropriate issue.

12. The next question is as to whether the suit was hit by the principle of non-joinder of necessary parties. It is claimed by defendants 1 to 3 that some of the properties have been sold to other persons named in the written statement. Defendants 4 to 7 who are some of the subsequent purchasers have been impleaded. The trial Court has, however, found that there were other purchasers who had not been impleaded. So far as the other purchasers are concerned, the sale deeds in cheir favour have not been proved. Since such persons are not parties to the suit, obviously they would not be bound by any decision passed in the present suit, if actually such persons are in possession after purchasing from

 

defendants 1 to 3. Since the sale deeds in their favour have not been proved, it is difficult to hold that the suit is barred by the principle of non-joinder of such parties. The persons on record, that is to say, defendants 1 to 7 would be bound by the present decree. However, it is made clear that if any other person had purchased property from defendants 1 to 3 prior to the institution of the suit and possession was delivered to such person, he would not be bound by this decree. Such question can be raised either during the execution proceeding, or by a separate suit.

13. In the result, the appeal is allowed. The judgment and decree of the trial Court are set aside. The plaintiff is entitled to recover possession of the disputed property from defendants 1 to 7. However, it is made clear that if any other person has purchased any of the disputed property from defendants 1 to 3 prior to the institution of the suit, he shall not be bound by this decree for recovery of possession and the property under possession of such purchaser cannot be delivered to the plaintiff pursuant to the present decree. There will be no order as to costs.

 