
(2014) 09 OHC CK 0033
In the Orissa High Court
Case No : R.F.A. No. 168 of 2008

Sarojini Dei and Others

APPELLANT

Vs

Satya Prasad Pattnaik and Others

RESPONDENT

Date of Decision : 24-09-2014

Acts Referred:

Citation : (2015) 120 CLT 148 : (2015) 1 ILR 614 : (2014) 2 OLR 932

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Advocate : Susanta Kumar Dash, A.K. Otta, S.K. Dash, A. Dhalasamant, S. Das and B.P. Dhal, Advocates for the Appellant

Judgement

D. Dash, J.—The unsuccessful plaintiff as the appellant has filed this appeal against the judgment and decree passed by the learned Civil Judge (Sr. Division), Bhubaneswar dismissing her suit.

2. For the sake of convenience, to bring clarity and avoid confusion, the parties herein after have been referred to as they have been arranged in the Court below.

3. The plaintiff has filed this suit for a declaration that the registered deed of partition purported to have been executed on 08.09.2003 by her as void.

It is pertinent to mention here that the defendant No. 1 is the son of the plaintiff whereas the defendant No. 2 is her grandson i.e., predeceased son's son and defendant No. 3 to 6 are her daughters.

4. According to the case of the plaintiff, the subject matter of the purported partition deed is her self acquired immovable property where the defendants have no manner of right, title, interest and possession. It is her case that she being an old illiterate, rustic and pardanashin lady was depending on her son defendant No. 1. The defendant No. 1 who is her son persuaded her to execute a deed of power of attorney in his favour for better management of her immovable

properties and to look after those. So, she was taken to the Sub-Registrar's office by the defendant No. 1 under an impression that she was to execute a deed of power of attorney. The plaintiff claims to be having not known reading and writing except putting her signature. It is her further case that defendant No. 1 got the deed drafted and the contents were never read over and explained to her. She was asked to simply put her signature on the document that too under the impression that she was executing a deed of power of attorney and accordingly it was registered on 12.09.2004. When the defendant No. 1 openly declared to sale some property, out of acquired property of the plaintiff, it came to her knowledge that by practicing fraud by way of misrepresentation and undue influence taking advantage of relationship as well as her age, ignorance etc., such a deed of partition has been brought into existence instead of a deed of power of attorney which she actually intended to execute.

Therefore, she filed this suit for the declaration that registered sale deed No. 6632 dt. 08.09.2003 is invalid, inoperative and void.

5. The defendant No. 1 in his written statement while traversing the plaint averments pleaded that property forming the subject matter of said deed of partition originally belonged to the mother of the plaintiff which she had transferred during her life time in favour of the plaintiff by registered the sale deed dated 06.04.1950. It is his further case that this land was purchased in the name of the plaintiff by her husband i.e. the father of the defendant No. 1. However, though the ROR has remained in the name of the plaintiff, she alone was not having the right, title and interest over the same. So, it is stated that the property under the partition deed is the joint family property. It is further stated that the plaintiff has consciously executed the deed of partition with full knowledge and was registered in accordance with law. With these pleadings he prayed to non-suit the plaintiff.

6. The defendant No. 2 almost sail in the same boat with defendant No. 1. It is his case that all the properties covered under the deed of partition are their joint family properties being purchased by his grandfather in the name of the plaintiff who is his grandmother and it has been in joint enjoyment of all the members of the family. It is his case that in order to maintain cordially, peace amongst them for all times to come, there came the suggestion for partition and they all sat together in the village and discussed the matter in great detail. Whereafter, as per the instruction of the plaintiff, the deed of partition was drafted and she knowing fully well the nature and contents of the said partition deed as well as its true import became a signatory to the same which was ultimately registered. It is also his case that on 08.09.2003 said plaintiff had sold the land measuring Ac. 0.54 decimals to her granddaughter. Subhadarshinee Pattnaik and also prior to it on 12.02.2004 some lands were sold by her. Thus it is stated that the deed of partition is immune from being attacked on the grounds as projected in the plaint.

7. The daughters of the plaintiff are defendant No. 3 to 6 and they have filed

separate written statement in support of the case of the plaintiff.

8. On such rival pleading, the Court below has framed three issues and out of all those the most important is that of the validity of registered deed of partition dated 08.03.2003 and as to it is sustainable in the eye of law or not. The other issues are in respect of existence of cause of action and entitlement of the plaintiff to the reliefs claimed.

9. In the trial the plaintiff has examined two witnesses including herself where as from the side of the contesting defendants, the mother of defendant No. 2 has been examined. Besides the above, the defendant No. 2 has proved the certified copy of the registered sale deeds dated 08.09.2003 as Ext. A-1, dated 11.02.2004; Exc. C-1 and the original of those as Exts. J-1 and H-1 respectively.

10. The trial Court as it appears has rightly taken up the issue No. 2 first for decision. It has been held that the scope in the suit does not remain to decide as to whether the properties described in the so called deed of partition is the joint family property or not. Next, it is held that the Court cannot adjudicate upon the issue of the execution of the deed in question by the plaintiff which would have stood for decision, had the defendant filed the suit challenging validity of the deed of the partition.

It has been held that the plaintiff is neither a pardanashin nor illiterate women and thus the burden rests on her to prove that defendant No. 1 and 2 had obtained the deed of partition in the guise of power of attorney.

Lastly coming to the factual aspect of the rival case, on the basis of evidence and upon their appreciation, the trial Court has arrived at a conclusion that this deed of partition, Ext. 2 was duly executed by the plaintiff with full knowledge and understanding. With these findings, the plaintiff has been non-suited.

11. Learned counsel for appellant in challenging the findings submitted as under-

(A)(i) that as per the pleading of the defendant No. 1 and 2, that the property was purchased by the husband of the plaintiff in her name, the property is to be presumed to be the property of the plaintiff when there is no evidence at all that it was purchased from the joint family nucleus;

(ii) that the registered deed of partition, (Ext. 2) even if accepted for the sake of argument to have been duly executed, the same on the admitted facts and circumstances as well as the evidence on record has no value in the eye of law and is nonest for the reason (a) that accepting the case of the plaintiff when it is her self-acquired property, it can't be the subject matter of partition and so by this deed of partition even admitting it to have been duly executed, legally, there can be no flow of right, title and interest of allotted properties in favour of defendant No. 1 which could have been only by way of gift;

(iii) that accepting the case of defendant No. 1 and 2 that it is the joint family property as pleaded to have been because of purchase in the name of plaintiff by

her husband, the deed of partition in the absence of defendant No. 3 to 6 carries no value in the eye of law.

(B), that the plaintiff being an old, pardanashin, illiterate and rustic lady, the burden of proof of execution of said deed being with defendant No. 1 and 2 and they having filed to do so, the suit ought to have been decreed.

12. None appeared for the respondents despite of the opportunities being given in that regard.

13. Admittedly, the subject matter of the deed of partition, which is the immovable property stood recorded in the name of the plaintiff. When it is claimed by the plaintiff to have been her own self acquired property, the contesting defendants counter it projecting a case that it is joint family property giving the reason thereof that it is so because it has been purchased by the husband of the plaintiff in her name.

This Court is unable to accept for a moment that how the trial Court could bypass said controversy by saying that the same is not required to be decided in the present suit. The view appears to be erroneous. When the immovable property which is the subject matter of so called partition is asserted by the plaintiff that it was her self-acquired property stating thereby that it could not have formed the subject matter of partition and when the defendant Nos. 1 and 2 bank upon the said partition and assert their respective right, title and interest over the allotted properties, there remains no reason for the trial Court not to take up such an exercise when it touches the very root. The trial Court was therefore under legal obligation to decide this aspect in order to effectually and finally answer the issue No. 2.

14. The position of law is well settled that the property standing in the name of individual member of a joint family would not ipso facto constitute joint family property. One who asserts that such property takes the character of joint family property has to show that the joint family had sufficient nucleus available for acquisition of the property and on such fact being proved, the burden shifts to the individual member claiming the property to be his self-acquisition in showing that surplus of the joint family nucleus was not utilized for such acquisition. (Debaraj Pradhan and Others Vs. Ghanshyam and Another, .

15. The presumptive doctrine available in respect of the property acquired in the name of a male member of the joint family is not available in case of property standing in the name of the female members and that in the latter case, it is for the party who claims properties as joint family property to specifically plead the particulars and details in the pleadings and establish the same by adducing necessary evidence. Smt. Manohari Devi and Others Vs. Choudhury Sibanava Das and Others, .

16. Adverting to the case in hand, the said property has been put to partition and deed of partition has come into being with said property as the subject

matter. In the present case, on the face of the record standing in the name of the plaintiff and the presumption standing in her favour that it was her property, first of all it is found that the contesting defendants have not been able to discharge the burden of proof by giving evidence of that nature and in the above stated light that the property is to be taken to be the joint family property. Moreover, if on a plain reading their pleading is accepted that the property was purchased by the husband of the plaintiff in her name, that itself does not make out a case that the property would be taken to be joint family property in the absence of such pleading and clear, cogent and acceptable evidence that the money utilized for the purpose of acquisition of the said property was from the joint family fund or with utilization of the surplus of nucleus of the joint family. If husband purchases a property in the name of his wife then no presumption also lies that it is the property of the husband and if it is claimed so, it has to be proved that the said purchase was not only made by the husband but also that the benefit was not intended under the transaction to percolate to the so-called purchaser so as to say that was just a name lender. So, here when the pleadings of the parties are gone through, this Court do not find any difficulty in coming to a conclusion in the absence of any evidence being let in by the Contesting defendants in the light of what has been stated above, the property has to be held to be the property of the plaintiff.

17. Furthermore the enjoyment of said property by defendant Nos. 1 and 2 in view of relationship cannot also give rise to an inference to the contrary. Next point arises that it is a case where during the life time of the plaintiff, a partition is being made in respect of her own property amongst her, her son and grandson leaving other members of the family i.e. daughters. So, in view of the above finding that it is the property of plaintiff, there was absolutely no occasion for partition of the same as has been said to have been done. If at all the property was intended to be parted with in part by the plaintiff, it could have been by way of gift. In that view of the matter, this document of partition has no legal foundation. Law is well settled that what cannot be done directly is not permissible to be made indirectly. So, on this ground alone the purported deed of partition, Ext. 2-Ext. J-1 is nonest in the eye of law and cannot be taken to have conferred any sort of right in favour of defendant Nos. 1 and 2 in respect of that property as said to have been allotted.

18. Now, let us accept for a moment that it is the joint family property and it was the subject matter of partition between the plaintiff and the defendant Nos. 1 and 2, which is the very case of the contesting defendants. If that is so, as per the case of the contesting defendants that the husband having purchased the property in the name of the plaintiff-wife, the members of the joint family were having the right over the property, the plaintiff and all the defendants, who come as the class-1 heirs of the husband of the plaintiff have their right, title and interest over it. So, here the partition has been effected leaving some members having subsisting right over the property that too having unity of title and possession with those members who are parties to the so called partition. When

all those heirs of the husband of the plaintiff have the interest over the property having unity of title and possession, it does not appear to be permissible in such a case for some, members of the family to sit and partition the property amongst themselves depriving others which could have only been done after the relinquishment of the interest by those other members of the joint family i.e. the defendant-daughters. So, examining the case from that angle also the deed of partition Ext. 2 = Ext. J/2 has no value in the eye of law and it conveys no right, title and interest whatsoever, in favour of defendant Nos. 1 and 2 in exclusion of daughters-defendants with respect to the property specifically allotted to them. Even, ignoring the nomenclature of the document as deed of partition, it cannot for a moment be considered as a family arrangement when it is not the case of defendant Nos. 1 and 2 and moreover that is also legally not tenable as the defendant-daughters are not parties to it. This aspect has been overlooked by the Trial Court.

19. Adverting to the case of plaintiff as regards her ignorance of execution of such a deed of partition and taken from her in the guise of a deed of power of attorney, it is seen that the plaintiff in the case is aged about 70 years. She is none other than the mother of the defendant No. 1 and grandmother of defendant No. 2 when also she is having three daughters. By this deed of partition, she is not only parting her interest in respect of those properties allotted to the defendant Nos. 1 and 2 depriving herself of that but also further depriving her daughters. Admittedly, the plaintiff was then residing with the defendant Nos. 1 and 2, who was a minor and was being looked after by his mother guardian. It is the case of the plaintiff that she was taken to the Sub-Registrar's Office for the purpose of execution of power of attorney for appointing defendant No. 1 as the attorney to look after the said property and for better management. The case of the plaintiff appears to be more probable if the facts and circumstances are viewed that the property being her property, there was no scope for partition of the same during her life time; that the age of the plaintiff as a factor standing on the way of better management, when also it is the eldest male member of the family i.e. the son is being appointed as the agent which in view of all the above is a natural and ordinary feature. In view of such relationship as well as other surrounding circumstances and in view of the evidence available on record, I disagree with the view of the trial Court that the principles relating to execution of a document as regards its burden of proof would not be resting upon the defendant Nos. 1 and 2 to prove that plaintiff executed said deed of partition fully knowing the nature and contents of the same with independent advice and that it was a conscious execution on her part. The Trial Court on the basis of prior sales by plaintiff etc. has held her not to be a pardanashin lady. The view is untenable in the eye of law. It is not the law that one who has executed the deeds before cannot fall within the category of pardanashin woman. The mental state of the executants and all other surrounding factors at that time are also relevant consideration and upon cumulatively viewing all those, a decision on that score is " taken. Furthermore,

when there stands such direct relationship, living together, it remains the duty to see that the relationship is not taken advantage of and the trust and confidence of the executant upon the beneficiaries are not abused. The principle in that regard is very clear that the law throws around her a cloak of protection.

20. At this juncture, before proceeding for further examination, the settled position of law are required to be discussed and stated for reference for proper appreciation of evidence in arriving at a correct decision.

The law as to the burden of proof has been summarized in a decision of Privy Council in case of Smt. Manohari Devi and Others Vs. Choudhury Sibanova Das and Others, :

"The law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not With those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained so, and was really understood by the granter. In such cases, it must also, of course, be established, that the deed was not signed under duress, but arose from the free and independent will of the granter. The law as just stated too well settled to be doubted or upset.:"

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"The law of India contains well known principles for own disadvantage when they have not the usual means of duly understanding the nature and effect of what they are doing."

The position thus emerges that executant being a pardanashin woman, the deed was read out to her; it must further be shown that it was explained to her, or that she understood its conditions and effect, and that the explanation included all material points" as well as the general nature of transaction. The principle upon Which the law affords protection as above is founded on equity and good conscience.

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"..... The legal position has been very well-settled. Shortly, it may be stated thus: The burden of proof shall always rest upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was executed by her after clearly understanding the nature of the transaction. It should be established that it was not only her physical act but also her mental act. The burden can be discharged not only by proving that the document was explained to her and that she understood it, but also by other evidence, direct and circumstantial."

As held by this Court in Chandhala Bewa Vs. Madhab Panda and Others, , that when a question arises as to whether the document has duly been executed by an old and illiterate lady belonging to a village, in order that the documents may

be enforced against her, or, as a matter of that, in order that it may be found by the Court that the documents were properly executed, the vendee must prove that the documents were read over and explained to the illiterate executant, who is a lady, and she knew the nature and character of the transactions while she became a willing party to the documents and particularly that she was aware of the average involved in the transactions.

On the aforesaid, this Court then has taken a view that there is no justification as to why a rule applicable to a pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not also apply to the case of a poor lady who is equally ignorant and illiterate, but is not pardanashin, simply because she does not belong to that class, the object of the rule of law being to protect the weak and the helpless, the distressed and the down-trodden and it should not be restricted to a particular class or community. Even in the case of a lady who is outside the pardanashin class, it is for those who deal with her to establish that she had the capacity of understanding that she has been entering into the transaction voluntarily and with full knowledge and import of what the transactions actually meant. In case of *Prasanna Kumar Giri and Others Vs. Radhashyam Paul and Others and Sandhya Rani Paul*, , it has also been so held. Same is the view taken in case of *Kuma Dei Vs. Md. Abdul Latif*, . Reliance has been placed upon the decision in *Mst. Kharbuja Kuer Vs. Jangbahadur Rai*, , that as regards documents taken from a pardanashin women, the Court has to ascertain that the party executing them has a free agent and has been duly informed of what she was about that reason for the rule is; that ordinary presumption that a person understands the document to which he has affixed his name does not apply in case of a pardanashin women; that burden shall always rests upon the person who seeks to sustain a transaction entered into with a pardanashin lady to establish that the said document was entered into by her after clearly understanding the nature of the transaction; that it should be established that it was not only her physical act but also her mental act and that the burden can be discharged not only by proving that the document was explained to her and that she understood it but also by other evidence direct and circumstantial.

21. Testing the facts and circumstances as it reveals from the evidence on record in the light of the principles enunciated in the aforementioned decided cases, it is seen that the defendant No. 1 who is the eldest male member of the family and one such beneficiary, has not come to the dock to give evidence and instead, the mother of the defendant No. 2, has given the evidence particularly when the plaintiff has asserted that she being given to understand that she was to execute a deed of power of attorney in favour of defendant No. 1, this deed of partition has been taken from her which she came to know later. Under the circumstance, adverse inference is bound to be drawn against due execution of the so called deed of partition as he would have been the best person to state in denial with other facts as well. Plaintiff in her evidence has denied to have executed any deed of partition having any knowledge about it and has further stated to have

not executed Ext. 2 = Ext. J-1 knowing it to have been a deed of partition. He has further stated to have not been read over or explained with the contents of the document and that it was not her conscious execution backed by any independent advice. She has further stated to have gone to the Sub-Registrar's office for execution of a deed of power of attorney and under that impression when she had signed; the defendant Nos. 1 and 2 had fraudulently snatched away such deed of partition.

From the side of defendant Nos. 1 and 2 neither the scribe of the document has been examined nor any other witness in respect of due execution of the deed of partition by the plaintiff to prove that having fully understood its nature and contents, plaintiff affixed her signatures. D.W. 1-Malabika Mohanty, the mother of the defendant No. 2 is also not stating in any specific term in that regard as what the law requires to discharge the burden of proof of due execution of the document especially in view of the challenge levelled by the plaintiff. Therefore, the case of defendant Nos. 1 and 2 neither gets saved from Scylla nor from Charybdis.

22. In the upshot of the above discussion the finding rendered by the trial Court on issue No. 2 is found to be unsustainable in the eye of law and thus, this Court has the least hesitation in setting it aside. Consequent upon the same, the issue Nos. 1 and 3 are also accordingly answered in favour of the plaintiff. Therefore, the judgment passed by the learned Civil Judge (Sr. Division), Bhubaneswar, dismissing the suit of the plaintiff and the decree accordingly drawn are liable set aside.

23. Resultantly, the appeal stands allowed and in the circumstances without cost throughout. The suit of the plaintiff is hereby decreed declaring the so called deed of partition dated 08.09.2003 as nonest in the eye of law.