
(1974) 01 OHC CK 0012
In the Orissa High Court
Case No : Second Appeal No. 225 of 1970

Sita Dei and Others

APPELLANT

Vs

Brajabandhu Sahu and Others

RESPONDENT

Date of Decision : 30-01-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100(2)

Citation : (1974) 40 CLT 469

Hon'ble Judges : G.K. Misra, C.J

Bench : Single Bench

Advocate : L.K. Dasgupta, for the Appellant; K.M. Swain, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—Plaintiff-2 is the father and Plaintiff-3 is the mother of Plaintiff-1 and Defendant-2 who are their daughter. Defendant-1 is the husband of Defendant-2. Plaintiff-1 had married Dharanidhar Jena d. w. 1. She states to have married Suryamani Sahu p.w. 8 after divorce by d.w. 1. Whether she married p.w. 8 for the second time or not, the admitted position is that she lives with p.w. 8 as his wife.

The disputed properties admittedly belong to Plaintiffs 2 and 3. The homestead belonging to the family stood in the name of Plaintiff-3.

On 25th January, 1955, Plaintiff-2 executed a registered deed of gift (ext. G) in favour of Plaintiff-1 in respect of 0.675? acre and another registered deed of gift (not produced in Court) in favour of Defendant-2 in respect of another 0.6751 acre. These lands were agricultural lands. On 26th of March 1965, three documents were executed. Plaintiff-1 executed a registered Nadabi deed (ext. B) in favour of Plaintiff-2 in respect of 0.675? acre gifted to her by ext. G. Plaintiff-2 executed a registered deed of gift (ext. C/3) in favour of Defendant-1 in respect of 1.510 acres and 5 Kadis. These are agricultural lands. Plaintiff-3 executed a registered deed of gift (ext: D/2) in favour of Defendant-1 in respect of 0.144

acre. This is homestead in which Plaintiffs 2 and 3 reside.

It is to be noted that no Nadabi deed was taken from Defendant-2 in respect of 0.675? acre of land gifted in her favour on 25-1-1956 by registered document. Though no such Nadabi was taken from Defendant-2 Plaintiff-2 transferred those very, lands in favour of Defendant-1 under ext. C/3.

The case of the Plaintiffs is that exts. B, C/3 and D/2. were not executed by them, and were not read over to them. They do not know the contents and import of those documents. They were taken from them on misrepresentation by Defendant-1 that powers-of-attorney were being executed by the Plaintiffs in his favour to look after the settlement operation which were pending.

All the three Plaintiffs are illeterate. Besides Plaintiffs 1 and 3 are Pardanashin ladies. They obtained no independent advice in the matter of execution of those documents taken from them under the garb of powers-of-attorney. They filed the suit for a declaration that ext. G was valid, and the three documents taken on 26-3-1965 were invalid, and were not binding on them, and that Defendant-1 did nut acquire any title under those documents. Declaration or title, and confirmation of possession in the alternative for recovery of possession in respect of 0-675? acre in favour of Plaintiff-1 and in respect of 0.144 acre in favour of Plaintiff 3 were also sought for.

2. Defendant-1 alone contested the suit. His case was that the deed of gift, ext. G, was not acted upon, and the three documents executed on 26-3-1965 were genuine. The executants fully understood the import of those documents after they were read over and explained to them and the suit has been engineered at the instance of Suryamani Sahu, p.w. 8.

3. Both the Courts below have dismissed the suit. They held that ext. G was not acted upon, and the three documents executed on 26-3-1965 were genuine where after Defendant-1 was in possession of the disputed properties. Plaintiffs have filed this second appeal against the affirming judgment.

4. Certain facts are undisputed. They are: that an the three Plaintiffs are illiterate. Defendant-1 (d.w. 8) himself admitted that the Plaintiffs are illiterate. After conclusion of the hearing of the second appeals there was a talk of compromise which ultimately failed. Plaintiffs 1 and 3 appeared in Court before me. On seeing them, I am satisfied that they are not only illiterate, but are Pardanashin. Once they are illiterate, it hardly matters whether they are Pardanashin or not. The legal protection is identical in both the cases see Nitei Sahu v. Chand Bewa 30 (1964) C.L.T. 463.

5. In Mst. Kharbuja Kuer Vs. Jangbahadur Rai, , their Lordships examined the scope and extent of protection to which a Pardanashin lady is entitled. They referred to a number of Privy Council decisions. In case of documents taken from Pardanashin women, the Court has to ascertain that the party executing them has been a free agent and duly informed of what she was about. The reason for

the rule is that the ordinary presumption that the person understands the document to which he has affixed his name does not apply in the case of a Pardanashin woman. After thorough analysis their Lordships summed up the legal position 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 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.

6.Plaintiffs 2, 1 and 3 were respectively examined as p.ws. 1 to 3. Though they are illiterate, they ably stood cross-examination that the three documents purported to have been executed on 26-3-1965 were taken from them by Defendant-1 giving them to understand that powers-of-attorney were being executed to enable Defendant-1 to look after settlement operations. Defendant-1 admitted in cross-examination that settlement operations were not over by the time of the execution of these documents. Khannapuri had been over, but not attestation and publication of the final record-of-rights. p.w. 2 answered in cross-examination thus:

At Salepur (place of Sub-Registrar's office) I was confined in one room. I did not go outside. Nobody came to me to that house at Salepur. We left Salepur when it, was midday. My parents and myself were the only persons who remained in that house. I went to the office of the Sub-Registrar. My thumb impression was taken in the rest-shed where I was taking shelter at Salepur. I do not remember how many thumb,marks I gave. Even by guess, I cannot say on how many papers I gave my thumb impression. I could not understand what the Sub-Registrar asked me. I simply said "yes" without making any enquiry of the Sub-Registrar

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Suryamani Sahu, my present husband, was at Calcutta at the time of my executing the deeds.

xx xx xx

I consulted my father when Defendant-1 asked me to execute a power of attorney. My father advised be to do so. So I agreed to execute the power of attorney in favour of Defendant-1

Her evidence clearly shows that she got no independent advice. Her husband, p.w. 8, was absent at Calcutta. The advice given by her father (p.w. 1) is of no consequence as he himself was old and illiterate.

P. w. 3 said thus:

Defendant-1 wanted a power-of-attorney to be given to him for his looking after the properties in the settlement operation. He (Defendant-1) took us to Salepur and got three documents from us on the pretext of getting three powers-of-attorney. Myself, Plaintiff-I and Plaintiff-2 are all illiterate. All of us were kept in a house and Defendant-1 took our thumb marks in three written papers. These papers were not written before us. We do not know who scribed them and who stood as investing witnesses. The contents of the three documents obtained from us were not read over

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Had we known a bout the actual contents of the deeds, we would have never become parties to them. Except Defendant-I there was no independent person to give us advice in the matter. It is false to say that Defendant-I is maintaining us and possesses the Gharbari lands.

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Defendant-I and another man whom I do not know came to us to take thumb marks from us. Both Defendant-I and the other unknown man who came with him to us asked us to give thumb marks.

All the three Plaintiffs were subjected to severe cross-examination. Nothing was elicited to demolish their thin statements on solemn testimony. Both the Courts below were not alive to this significant feature of three illiterate persons ably standing cross-examination, particularly when they were deposing against their own son-in-law, Defendant-I, who obtained by registered deeds of gift the entire property of Plaintiffs 2 and 3 including the homestead and the house. D. w. 8 admits that Plaintiffs 2 and 3 are still residing in their residential house which stood in the name of Plaintiff-3.

Defendant-1 to establish his honesty of purpose went to the extent of deposing that he took no part in the transaction of execution of the three documents on 26-3-1965. He stated thus:

It is Jogi who gave money for purchase of stamps. It is Jogi who knew what amount of stamps would be required. I was not with Jogi when he purchased the stamps. Three of them, that is Jogi, Fula and Sita each purchased stamps for their respective deeds. There were three Chithas made by the scribe. But I was not present when such Chithas for the deeds were prepared. I was sitting at a distance of four cubits from the place where the scribe was writing out the deeds. I did not have the scope to hear the contents of the deeds written by the scribe. I cannot say what documents were referred to be the scribe when ext. C/3 and Ext. B (Nadabi) were being written. I also cannot say what papers and documents were referred to when ext. D/2 was being written by the scribe and executed by Fula Dei was not present when the three deeds were presented for registration. I did not go to the office of the Sub-Registrar.

The aforesaid statement of Defendant-1 is wholly belied by the evidence of the

scribe (d. w. 5). and the attester (d.w. 6). D.w. 5 deposed thus:

Brajabandhu Sahu (Defendant-I) was present when I was writing out the deeds.

D.w. 6 stated:

Brajabandhu Sahu (Defendant-I) was present all through and looking after the scribing and execution of the three deeds.

Thus, the first Defendant is a bold liar. He was interested in the entire transaction inasmuch as he obtained title to the entire property of the Plaintiffs by taking those documents. Naturally he must have looked after the scribing and purchase of stamps. Though in fact he looked after the transaction, to absolve himself from all suspicion and to convince the Court that his conduct was bona fide and fair, he disclaimed taking part in the matter of execution of the three documents. The learned Courts below were completely oblivious of this aspect of the matter.

7. Both the Courts concurrently found that there was no marriage between Plaintiff-1 and Suryamani Sahu and the marriage the between Plaintiff-1 and d.w. 1 is still subsisting. The question whether Plaintiff-1 married for the second time to Suryamani Sahu is wholly irrelevant to the, point in issue. Whether both of them are married or not, the accepted position is that, as has been deposed to even by the first husband, Plaintiff-1 is living as wife with p.w.8 for, a number of years. If Plaintiff-I renounced the company of her husband and is staying with p.w. 8, it is only the latter's independent advice which she is to get. There are abundant materials on record that at the time of execution of these documents p.w. 8 was absent at Calcutta. That fits in also with the broad probabilities of the case. It is the consistent case of the defence witnesses that Suryamani Sahu is a clever person and has engineered this litigation. If that fact be true, he could never have allowed execution of these three documents if he was really present in the village at the time the transactions took place.

8. Under ext. G, Plaintiff-1 was to look after the comforts of Plaintiffs-2 and 3 during their lifetime. Even acceptance of the defence case that Plaintiff-2 continued in possession of the gifted property covered by ext. G till 28-3-1965 does not derogate the case of the Plaintiffs that Plaintiff-1 discharged her duties of looking after Plaintiffs 2 and 3. If the, daughter allowed the parents to remain in possession of the agricultural property and enjoy the same, the obligation cast under ext. G is discharged. The custody of ext. G with Plaintiffs, 2 and 3 with whom Plaintiff-1 was frequently staying because of her dissensions with the first Defendant does not militate against ext. G having been acted upon.

9. The fact of the Plaintiffs having stood the test of cross-examination and Defendant-1 being not worthy of belief in regard to his version that he never took any interest in the matter of execution of the three documents, lends credence to the evidence of the arrestor (p.w. 5) that the three documents were not read over and explained to the Plaintiffs at the time of their execution and that the Plaintiffs had no independent advice.

10. From the various features discussed above, I am satisfied that the three documents executed on 26-3-1965 were not read over and explained to the Plaintiffs, nor did the Plaintiffs understand the contents and import thereof, and that they had no independent advice all being illiterate.

The first Defendant who is the son-in-law of Plaintiffs 2 and 3 wanted to grab the entire property of the Plaintiffs including their residential house. The execution of the documents has not been proved. They are accordingly declared invalid and inoperative.

11. The next question or consideration is whether the concurrent findings of fact should be disturbed in second appeal.

The principles to be borne in mind in that regard have been authoritatively pronounced in *R. Ramachandran Ayyar Vs. Ramalingam Chettiar*, .

Under Section 100(2)(c) of the Code of Civil Procedure, an appeal shall be to the High Court from every decree passed in appeal by a subordinate Court, if a substantial error or defect in the procedure provided by the Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. If the lower appellate Court has placed the onus on a wrong party and its finding of fact has resulted substantially in a wrong approach that must be regarded as a defect in the procedure. Similarly, if the appellate Court ignores important pieces of evidence and circumstances and bases his finding on a non-consideration thereof resulting in error of decision on merits, then a defect of procedure arises which vitiates the finding.

12. In this case, the various essential features which I have indicated, were not taken into consideration by the lower appellate Court. His ultimate conclusion was therefore vitiated. The High Court is not bound by such a finding. Two courses are open either to remand the case or to determine the issue of fact which has been wrongly determined by reason of the omission of the essential features from consideration. The entire property involved is less than two acres. Parties have been too much harassed. In the circumstances, I prefer the after course. I gave full opportunity to the learned advocates to place entire evidence before me.

13. In the result the judgments of the learned Courts below are set aside and the second appeal is allowed. Parties to bear their own costs throughout.

Plaintiffs' suit is decreed in respect of the following reliefs:

- (i) A declaration be given that ext. G is valid.
- (ii) Exts. B, C/3 and D/2 be declared invalid and inoperative.
- (iii) Title of Plaintiff-1 to the lands covered by ext. G is hereby declared and they be put in possession thereof.

(iv) Title of Plaintiff-3 in respect of lands covered by ext. D/2 is hereby declared and her possession is confirmed.