
(1999) 03 OHC CK 0032
In the Orissa High Court
Case No : Second Appeal No. 301 of 1986

Smt. Sita Bewa

APPELLANT

Vs

Gangadhar Bharati and Others

RESPONDENT

Date of Decision : 26-03-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Contract Act, 1872 — Section 16, 18

Citation : AIR 1999 Ori 154

Hon'ble Judges : Pradipta Ray, J

Bench : Single Bench

Advocate : Radheshyam Parida and S. Pradhan, for the Appellant; S. Mishra, S. Mantry, R.C. Rath and A.K. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

Pradipta Ray, J.—Plaintiff has filed this second appeal against the judgment and decree dated September 18, 1986 passed by the District Judge, Balasore in M. A. No. 25/84-I confirming those dated April 11, 1984 passed by the Munsif, Balasore in O.S. No. 134 of 1980-I

2. Plaintiff, appellant instituted the suit for declaration that the disputed sale deed dated 22-8-1972 executed by her was fraudulent, inoperative and that no title and interest was conveyed by such deed, for confirmation or in the alternative recovery of possession of the suit land against Gajendra Bharati, since deceased, the predecessor in interest of the present respondents.

Plaint case, inter alia, is :

3. After death of her husband plaintiff was residing with her brother-in-law (husband's brother) in jointness. Her brother-in-law and son-in-law were implicated in some criminal cases and were under arrest. As there was no other male member in the family the plaintiff had to depend upon the original defendant Gajendra Bharati to look after the criminal cases against her brother-

in-law and son-in-law. Gajendra brought the plaintiff to Soro registration office on the plea of getting a bail bond registered and got her thumb impression on a document. The plaintiff executed the said document on the representation of Gajendra that the document was a bail bond. The contents and the nature of the document were not explained to her although she is an illiterate house-wife. After being released from jail the plaintiffs brother-in-law and son-in-law were cultivating the suit land when Gajendra came and for the first time disclosed that the plaintiff had already sold the suit land to hi. When her brother-in-law and son-in-law asked her about such sale, she for the first time came to learn that Gajendra in fact got a sale deed executed by her in the name of a bail bond.

4. The original defendant contested the suit by filing a written statement denying the material allegations in the plaint. In his written statement he raised the point that the suit was barred by limitation and not maintainable. He further stated that Gajendra was approached through one Rabindra Bharati, the nephew of the plaintiff to purchase the suit land as the plaintiff was in need of money after her husband" s death and arrest of her brother-in-law and son-in-law. It has been claimed that the plaintiff with her full knowledge consciously sold the suit land to get money to release her brother-in-law and son-in-law on bail and to pay off loans incurred by her for maintaining herself. The original defendant further staled that the plaintiff is a very intelligent and litigant lady and she is in the habit of executing sale deeds and litigating on the plot of fraud and misrepresentation. During pendency of the suit Gajendra Bharati died and his heirs, the present respondents, were substituted.

5. The trial Court dismissed the suit upon findings that the plaintiff had no cause of action as she herself claimed that she had no interest in the suit land; that the suit was barred by limitation; that the sale deed was executed by the plaintiff with full knowledge of the contents thereof and that Gajendra has in possession of the suit land since execution of the disputed deed.

The plaintiff preferred M.A. No. 25/84-I before the District Judge, Balasore. The District Judge, dismissed the appeal and affirmed the findings of the trial Court.

6. In this second appeal the foundation of the appellant's case is that she being an illiterate Pardahnasin lady the burden of proving that the document was consciously executed by plaintiff with the full knowledge about the nature of the transactions was on the defendant and both the Courts below committed error in misplacing the burden. It has been further contended that the Courts below did not at all considered several important and material pieces of evidence supporting the case of the plaintiff-appellant.

7. There is no evidence that the appellant is a Pardahnasin lady. It is, however, an undisputed position that the appellant is an illiterate lady. Where the executant of a deed is an illiterate person it is incumbent that the contents of the deed arc read out and explained to such executant. The disputed document (Ext. A) does not contain any such endorsement certificate that the con tents were

read out and explained to the executant. However, absence of certificate or endorsement is not conclusive or decisive and the burden can be discharged by other evidence, direct and circumstantial. The legal position in this regard has been settled by the Supreme Court in *Mst. Kharbuja Kuer Vs. Jangbahadur Rai*, in the following manner (at p. 1206 of AIR)

"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 Pardahnasin 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."

All other decisions cited on behalf of the appellant followed the above settled principles.

8. Both the Courts below upon consideration of the evidence on record have arrived at the concurrent finding that the plaintiff executed the disputed deed of sale with necessary mental act of understanding the nature of the transaction. Such finding of fact cannot be interfered with in Second Appeal unless it is wholly absurd or materially vitiated by non-consideration of evidence to the contrary.

9. Appreciating the limited scope of a second appeal learned Advocate for the appellant has mainly pointed out that the Courts below have not taken into consideration several material portions of the evidence and such non-consideration has vitiated the ultimate findings. He has further submitted that the materials on record did not establish that Rabindra Rharati (D.W. 2) is the nephew of the plaintiff; that any consideration was actually paid for the disputed transaction and that she was apprised of the real nature of the transaction.

10. It is correct that materials on record do not clearly establish the relationship of Rabindra and plaintiff. Onus was on the defendants to prove such relationships as claimed, Rabindra (D.W. 2) himself deposed and just stated plaintiff was his aunt. He did not elaborate the relationship. D. W. 1 the wife of Gajendra also claimed that Rabindra was nephew of plaintiff, but she also did not speak about the basis of such relationship. On the contrary, D.W. 1 herself stated at one place that Rabintira is her nephew. Both D.W. 1 and D.W. 2 were interested witnesses. No independent witness was examined to support the relationship as claimed particularly when plaintiff (P.W. 1) denied any such relationship. On the basis of the evidence on record, it is not possible to come to any definite conclusion whether Rabindra is or is not a relation of the plaintiff. The findings of the Courts below in this regard cannot be accepted.

11. Although relationship between Rabindra and the plaintiff has not been established materials on record clearly indicate that Rabindra was a man of confidence of the plaintiff's family and he was taking part in transactions entered

into and documents executed by plaintiff's husband and the plaintiff. He signed as witness in two documents (Exts. C-I and D-I) executed by the plaintiff and her husband before and after the disputed transaction. Materials on record are sufficient to conclude that Rabindra negotiated the disputed sale between plaintiff and Gajendra and he was a man of confidence of the plaintiff.

12. Admittedly disputed deed was executed by the plaintiff. She herself presented it before the Sub-Registrar, Soro for registration. She alleged that Gajendra told her that it was a bail bond and she put her thumb impression and presented it to the Sub-Registrar on the bona fide belief that it was a bail bond. She also alleged that after arrest of her son-in-law and brother-in-law Gajendra was looking after her properties and offered to help her to secure bail for her brother-in-law and son-in-law. She further stated that she was not in need of money and as such there was no occasion to sell any land.

13. Documentary evidence on record clearly indicate that the plaintiff's husband Shankar and the plaintiff sold several properties from time to time both before and after the disputed transaction. No exception can be taken to the finding that she was in need of money at the material point of time. Plaintiff's husband sold some property to Gajendra Bharati by registered sale deed dated 6-9-1969 (Ext. E). She along with her daughters filed Original Suit No. 101 of 1970 against several purchasers including Gajendra Bharati. Said suit was allowed to be dismissed for default on 24-11-1971. In fact both D.W. 1 and D.W. 2 stated that Gajendra was not looking after plaintiff's properties and he was hesitant to purchase suit property from the plaintiff. Plaintiff in her evidence stated that she did not know Gajendra before the disputed transaction, it is quite unlikely that she would allow an unknown person with whom she was litigating, to look after her properties and would rely upon him and execute a document at his instance. She did not even ask Gajendra why she was being taken to Soro to furnish a bail bond when her relations were in custody at Balasore. Both the scribe and mohurer have been examined as witnesses. They have stated in their evidence that the contents of the disputed deed were read over and explained to the plaintiff before she put her thumb impressions on the deed. Admittedly she herself presented the disputed deed before the Sub-Registrar for registration. The disputed deed bears the endorsement that transaction was admitted by the plaintiff. According to the plaintiff her brother-in-law and son-in-law were not released on bail, if she was under the impression that a bail bond was executed she would have definitely enquired about the same when they did not put bail. Plaintiff has said in her evidence that she did not tell anybody else about execution of the bail bond and that she did not even tell her brother-in-law and son-in-law about execution of alleged bail bond after they were released from jail two years after the disputed transaction. She herself stated that she came to Balasore 2-4 times for releasing her relations, that she met her relations in jail twice and that she engaged lawyers. It appears unusual that the plaintiff would not tell anybody including the lawyer that she had already executed a bail bond. Above all, she has not offered any explanation why in the sale deed dated

17-9-73 (Ext. C) Gajendra Bharati was described as the owner of the land towards the west. Gajendra could be the owner of the land to the west only on the basis of the disputed sale deed. All this evidence on record disproves the plaintiff's case that she executed the disputed deed on the belief that it was a bail bond.

14. After execution of the disputed sale deed Gajendra got his name duly mutated (Ext. "N"). Thereafter rent was also paid by Gajendra (Ext. "K"). The plaintiff could not produce any rent receipt showing payment of rent during the period between execution of the disputed deed and the institution of the suit. Both the Courts below have concurrently found possession of the defendants in the lands covered by the disputed sale deed. Story of cultivation by the plaintiff's son-in-law and brother-in-law has not been accepted by the Courts below. Neither the son-in-law nor brother-in-law of the plaintiff came to depose in favour of the plaintiff.

15. It is the defence case that consideration was paid at the house of the plaintiff after registration of the document. There is inconsistency inasmuch as the D.W. 1, wife of Gajendra, stated that in the evening of the date of registration consideration was paid in the house of the plaintiff, whereas Rabindra said that consideration was paid next day in the morning. But in view of the finding that plaintiff was not under any mistaken belief and she executed the sale deed knowingly, said inconsistency does not matter much. As already held she was aware of the sale transaction. If consideration was not paid she would not have remained silent for almost eight years.

16. In view of my finding that the appellant consciously executed the disputed sale deed with knowledge of the nature of the document, it is not necessary to discuss any other point.

17. For the reasons aforesaid this Court does not find any sufficient reason for interfering with the concurrent judgments and decrees passed by the Courts below. Accordingly, the appeal is dismissed.

No order as to costs.