
(1975) 03 OHC CK 0016
In the Orissa High Court
Case No : Second Appeal No. 263 of 1971

Sofa alias Fatima Bibi

APPELLANT

Vs

Sk. M.K.N. Mahamad Thibi and Others

RESPONDENT

Date of Decision : 12-03-1975

Acts Referred:

Transfer of Property Act, 1882 — Section 43, 53, 53A, 54

Citation : (1975) 41 CLT 474

Hon'ble Judges : N.K. Das, J

Bench : Single Bench

Advocate : R.C. Patnaik, for the Appellant; B.K. Pal and S.C. Adhikari, for the Respondent

Final Decision : Allowed

Judgement

N.K. Das, J.—Plaintiff No. 1 is the Appellant against a reversing judgment. Plaintiffs 2, to 5 are issues of Petitioner No. 1. Plaintiffs have filed this suit for declaration of title and confirmation of possession and for declaration that the ex parte decree obtained by Defendant No. 2 against Defendant No. 1 is not binding on them. They have also claimed arrears of maintenance as against Defendant No. 1. Plaintiff No. 1 claims to be married wife (If Defendant No. 1 and the suit property consisting of AO. 76 decimals with house standing thereon appertaining to plot No. 5319, khata No. 477 in Durgaprasad, Nayagarh was given as dower to Petitioner No. 1 at the time of her marriage by Defendant No. 1 on 11-11-1949 by Ex. 1 and Petitioner No. 1 was put in possession of the same. Defendant No. 2 managed to start a civil suit against Defendant No. 1 without impleading Petitioner No. 1 as a party and obtained an ex parte decree in his favour. Plaintiff No. 1 not being a party in that suit and having acquired the suit properties by dower and being in possession of the same is not bound by that decree. The Petitioners have further claimed that Defendant No. 1 is bound to pay the arrear of maintenance to the Petitioners.

2. Defendant No. 1 did not contest the suit. Defendant No. 2 contended that

Petitioner No. 1 is not the married wife of Defendant No. 1 and there was no dower gift in favour of Petitioner No. 1 and she was not in possession of the same. Defendant No. 1 was all along in possession and sold the property to Defendant No. 2 and as such Defendant No. 2 is entitled to take possession of the property by virtue of the decree obtained against Defendant No. 1.

3. The concurrent findings of both the Courts are that the Petitioner no 1 is the legally married wife of Defendant No. 1 and the document Ex. 1 is a genuine document and possession was delivered to Petitioner No. 1 in 1949 at the time of her marriage by Defendant No. 1. The trial Court has held that the Petitioner No. 1 has title to the properties but the appellate Court held that no title passed to Petitioner No. 1 because the document is not registered and Defendant No. 1 was a temporary lessee under the Debottar department of Nayagarh in 1949 and as such he cannot transfer any right in favour of Petitioner No. 1.

4. It IS contended by the -Appellant that even if Defendant No. 1 was a temporary lessee the gift Ex. 1 will convey right of temporary lessee in favour of Petitioner No. 1 and as such she has some interest in the properties and the decree is not binding against her. If the gift is considered as sale and requires registration the valuation of the property in 1949 should be Rs. 100/- or above. There is no pleading to that effect. It is further contended that even if it is assumed that the Petitioner No. 1 might have a temporary interest over the land she was full owner in respect of the house by dower gift and has been in possession by virtue of her own right.

5. The question that arises for consideration is whether the Petitioner No. 1 acquired any right by Ex. 1 at the time of marriage. From the recital in Ex. 1 it is clear that the property was gifted as "maher" and possession was delivered to Petitioner No. 1. It is contended by Mr. Pal that this document is Hiba-bil -Ewaz and not pure Hiba and therefore it is in the nature of a sale deed and attracts the provisions of Section 54 of the Transfer of Property Act. Mr. Patnaik on the other hand contends that there is no evidence on record on behalf of the Defendants to show that in 1949 this property was worth more than Rs. 100/- and if Defendant No. 2 wants to take the stand that the documents should be registered he has to establish that the valuation of the property was Rs. 100/- or more in 1949. In fact, there is no evidence on record from the side of Defendant No. 2 as to valuation of the property in 1949. It is further contended by Mr. Patnaik that the view of some High Courts in India is that if the property is gifted as Hiba it will not be considered as a sale. But the majority view of the High Courts in India is that it will be considered as a sale because it is in lieu of dower. Under Mahomedan Law marriage is a contract of which dower is a consideration and the transfer of land in lieu of dower is in the nature of Hiba-bil-Ewaz. In Mohomedan Law a husband may validly make transfer of his property to his wife in lieu of the dower subject to the provisions u/s 53 of the Transfer of Property Act. Once a dower IS made, the wife has right to retain possession of the property and her possession cannot be interfered with. In Haji Mokshed Mondal and Others Vs. Del

Rouson Bibi and Another, , there was a Kabilnama for the dower. This Kabilnama was a document of transfer and contained in it the relevant agreement or contract of transfer in writing. This was not registered. It was held that even if it required registration, having regard to the fact that Defendant No. 1 was put in possession of the disputed property in pursuance of that contract and that Defendant No. 1 had married in terms of contract the Petitioner was precluded from taking shelter u/s 53A of the Transfer of Property Act from enforcing any rights against the Defendant No. 1 in respect of the disputed property. Even though Ex. 1 had not been registered yet it is definitely an evidence of delivery of possession and also existence of the house on the property and this property has been given as dower and Petitioner No. 1 being in possession of the property can retain possession. There being no evidence as to the valuation of the property in 1949, the Petitioner can reasonably take this stand that title can be conferred on her by delivery of possession.

6. It is contended by Mr. Pal that Defendant No. 1 was a temporary lessee at the time of Ex. 1 and in 1959 he got the permanent lease from the Debottar department. The temporary lease was for a period of 10 years and Ex. 1 cannot confer any right. It is clear from the recital of Ex. 1. that Defendant No. 1 had taken a temporary lease of the suit property. He has constructed a house on it, he will get permanent lease of the property and also apply for mutation in the name of Petitioner No. 1. from the Debottar estate. In fact, after getting permanent lease the Defendant No. 1. applied for mutation of the name of Petitioner No. 1 and this was also allowed by estate. This clearly shows that Defendant No. 1 relinquished the property in favour of Petitioner No. 1 which will show that he claimed no interest in the property since that year and the Petitioner No. 1. was the owner of the property. As records of Debottar office stood in the name of Defendant No. 1 it continued in the name of Defendant No. 1. and immediately after permanent lease there was an application by Defendant No. 1 for recording the name of Petitioner No. 1 in the place of his name which was also allowed by the Debottar department. This clearly shows that the Petitioner has been in possession since 1949 of her own right and not behalf of Defendant No. 1. It is an undisputed fact that since 1949 the Petitioner No. 1 has been in possession of the property. Even though it may be said that there was a breakage after the expiry of the temporary lease yet the fact stands that the Petitioner No. 1 has been in possession of the disputed house and land continuously. The subsequent recognition by the landlord also adds force to Petitioner"s right of possession.

7. The lower appellate Court has found that there is a house on the property existing since 1949. Unfortunately no finding has been given about the right of Petitioner No. 1 in respect of the house. I have already held that the Petitioner No. 1 has been in possession of the house in her own tight since 1949 and Defendant No. 1 had relinquished his interest or right whatsoever in favour of Petitioner No. 1. As such Petitioner No. 1 definitely has interest over the property.

8. Defendant No. 2 has got a sale deed from Defendant No. 1 in respect of suit property situated at Nayagarh. Strongly enough the sale deed has been registered at Puri. Necessity for sale as found in the recitals in the sale deed does not fit in with the necessity as stated in Court. Defendant No. 2 did not come to the dock to place his statement on oath. Defendant No. 1 has fully supported Petitioner in this case. There is no evidence on the side of the Defendant No. 2 that he was not aware of the gift though in fact he has produced document from Debottar office to show that there Defendant No. 1 had applied for mutation of the name of Petitioner No. 1 in respect of the suit property. Consideration under the sale deed was also not paid before the Sub-Registrar. Thus it appears that the sale deed in favour Defendant No. 2 does not appear to be genuine transaction.

9. The appellate Court has held that Petitioner No. 1 did not acquire any title inasmuch as under Articles 162 and 163 of the Mulla's Mohomadan Law, a gift cannot be made of anything to be performed in future on happening of a contingency. The appellate Court is completely wrong in his approach and has misapplied the said provisions of the Mahomedan Law which has no bearing on the present case. Illustrations to Article 162 make it clear that the provisions of this Article are not applicable to the present case. So also the gift in the present case is not a contingent gift. As such I hold that the finding of the lower appellate Court on this ground is wrong. The evidence in detail has been discussed by the trial Court but the appellate Court has come to conclusion that because the document Ext. 1 has not been registered and because it is a contingent contract it confers no title and possession to the Petitioner. This is not correct in view of the finding made above I hold that the Petitioner No. 1 has got interest in the suit property and being in actual possession since 1949 asserting on her own right it cannot be said that she has acquired no title to the property. It can also be said that apart from the land the Petitioner has absolute right over the house.

10. It was argued at the Bar that Petitioner No. 1 could have taken the stand u/s 43 of the Transfer of property Act but that is not the case here. In my opinion the provisions of that section are not applicable to this case. In view of the clear case in the plaint and as it appears from Ex. 1 there was no fraudulent representation at any time by Defendant No. 1 and as such the provisions of that section are not applicable to the present case.

11. Plaintiff No. 1 having got title to the property was a necessary party to the suit filed by Defendant No. 2 against Defendant No. 1 and that the decree in that suit is not binding against the Petitioner No. 1.

12. In view of the aforesaid decision the findings on other questions do not arise.

13. In the result, the decision of the appellate Court is set aside and that of the trial Court is restored. The appeal is allowed with costs.