

(2010) 06 CAL CK 0032
In the Calcutta High Court
Case No : G.A. 13 of 1989

State of West Bengal

APPELLANT

Vs

Narayan Kundu and Others

RESPONDENT

Date of Decision : 16-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 145
Penal Code, 1860 (IPC) — Section 148, 149, 302, 324

Citation : (2010) 06 CAL CK 0032

Hon'ble Judges : Raghunath Ray, J; Amit Talukdar, J

Bench : Division Bench

Advocate : Biplab Mitra, Amajit Deand Trina Mitra, for the Appellant; Archita Sen, Amicus Curiae, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.—The above appeal has been filed by the plaintiffs/appellants being dissatisfied with the judgment and decree passed by the learned Trial Judge in Title Suit No. 173 of 1988 refusing to pass preliminary decree in respect of one of the four suit properties namely premises No. D-642 Lake Gardens, Calcutta (hereinafter referred to as the said suit properties). The appellants/plaintiffs brought the said suit in the 3rd Court of Assistant District Judge at Alipore against as many as 12 persons. Besides the suit property premises No. 162/8/1 Lake Garden, Kolkata now renumbered as D-620 Lake Gardens Kolkata, and 135 shares in the joint stock company known as R. Cambray & Company Private Limited and 150 shares in the joint stock company having its registered office at premises No. P-33 Mission Row Extension in the town of Calcutta are also subject-matter of the suit. Sum and substance of the case made out in the plaint is that the plaintiffs and the defendants are male and female descendants of one Narendra Chandra Kar, since deceased, who died on 15th of February 1962 intestate leaving him surviving three sons viz. Sisir, Sasadhar and Sunil and one daughter Protiva Bose and sole widow, all since deceased. The plaintiffs are the sons and daughter of late Sasadhar, while the

defendants are sons and daughter of late Sisir and late Sunil. The plaintiffs' case was that all the suit properties belonged to late Narendra though ostensibly in the name of other persons. Their father inherited undivided 1/3rd share of the suit properties in view of death of his mother and sister Protiva. Hence the plaintiffs are jointly entitled to undivided 1/3rd share in the suit properties. All the suit properties did not stand in the name of Narendra. The immovable properties being item Nos. 1 and 2 were in the name of Protiva daughter of Narendra and Subasini being grandmother of the parties and wife of Narendra, since deceased respectively. As such, the plaintiffs in the plaint stated that those two immovable properties were really owned by one Narendra but the same were owned by Subasini and Protiva as benamidars. It was claimed that neither Subasini nor Protiva did anything to acquire such property. Protiva being the daughter could not acquire the said property as her husband was not well placed in his working life and he was merely an employee of the Reserve Bank of India and had a small monthly income as such he could not probably supply money to Protiva to acquire the said item No. 1 of the suit property. Therefore, the said property was a joint family property. In the plaint it was further claimed that alleged story of adoption by Protiva, of Swapan is illegal, invalid and the same was never acted upon, so Swapan cannot claim ownership of the said item No. 1 property to the exclusion of any other person.

In the plaint the following reliefs were claimed:

- (a) Preliminary partition decree of the suit properties;
- (b) Final partition decree;
- (c) Declaration that the defendant No. 1 has not been the adopted son of Smt. Protiva Bose, since deceased.

2. None except the first defendant, Swapan contested the suit filing written statement of the defendants. All the defendants contested the said suit and said that the plaintiffs cannot have any share except in the premises No. D-620 Lake Gardens which stood in the name of the wife of Narendra. It was said that the first defendant, Swapan Kumar Kar was adopted by Protiva and this has been decided in another suit being Title Suit No. 11 of 1950 by judgment and decree. It is pertinent to mention that in both the written statements plea of maintainability of the suits as well as question of limitation was taken. The learned Trial Judge framed the following issues:

- 1) Is the suit maintainable in its present form ?
- 2) Is there any cause of action to sue ?
- 3) Is the suit bad for defect of parties ?
- 4) Are the plaintiffs entitled to get decree as prayed for ?
- 5) To what other relief or relief are the plaintiffs entitled ?

3. It is recorded in the judgment of the learned trial Judge that the defendants/respondents herein did not suggest any issue nor any issue was framed on the question of limitation. Learned trial Judge decided the issue No. 4 only and while deciding the same the learned Trial Judge has held that the case of adoption made out by the first defendant Protiva, since deceased, is legal, valid and acceptable in view of the judgment passed in Title Suit No. 11/1950 and said judgment is judgment in rem and not in personam. Therefore, the plaintiffs/appellants cannot in direct way challenge the decree which has become final. So far as the property being No. 2 is concerned, since acquired in the name of the wife of Narendra being the grandmother of the parties the same was declared to be the joint properties of the parties having their respective shares as claimed. Shares of the companies were not touched as the same has been decided by this Hon"ble Court in company jurisdiction in company petition. The case of benami was not accepted by the learned trial Judge. Hence, the properties taken in the name of Protiva was declared to be her own self-acquired property and as the first defendant is the adopted son of Protiva the same was excluded from the purview of partition suit.

4. In the appeal various grounds were taken to challenge the decree both on the plea of benami as well as invalidity and illegality of the adoption. But at the time of hearing of this appeal only point urged before us is whether the adoption is valid or not. Mr. P.K. Das, learned Senior Advocate, submits that Swapan was never adopted by Protiva and there is no proof in this suit that at any point of time adoption took place. Swapan's original and biological mother, though alive, has not come forward to depose that Swapan was taken in adoption by Protiva. There is no proof by any credible evidence that there has been any adoption and there is no document either. Moreover, adoption by Protiva, according to Hindu Adoptions and Maintenance Act, 1955 is invalid and illegal. Under the provision of Section 8 of Hindu Adoptions and Maintenance Act a woman cannot adopt without consent of her husband. This position of the law has been settled by recent decision of the Supreme Court judgment reported in AIR 2008 SC 1056 and also the decision of the Division Bench judgment of this Court reported in AIR 2007 Cal 4. Rather it will appear from evidence adduced by the plaintiff/appellant being Exhibit Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 that adoption was never acted upon nor accepted and that Swapan was always and still is son of Sunil at all material times, and Pratibha did not adopt her.

5. He submit that as per the judgment and decree in another suit as stated above the same is binding upon Kar's family. Kars were not parties. Moreover, declaration of the status of being adopted son is not a judgment in rem under the provisions of Sections 40, 41, 42 and 43 of the Evidence Act. In the aforesaid Sections it has been clearly stated what are the cases that could be termed judgment in rem. The decree of adoption is not a judgment in rem rather in personam. The evidence given in the Title Suit No. 11/1950 in support of the case of the adoption is neither relevant nor admissible in the present suit as the same does not satisfy the conditions mentioned in Section 33 of the Evidence Act.

6. The plea of limitation taken in the appeal for the first time is not acceptable as though pleaded, no issue was raised nor any decision has been rendered by the learned trial Judge. No cross-objection has been filed.

7. If the case of adoption is not established this property could be the exclusive property of Protiva who died intestate on 29th August, 1967 without having any issue and whose husband predeceased her in 1942. Therefore, by virtue of the provision of Section 15 her shares will go to the heirs of her husband failing which to the mother and father and the heirs of her father and lastly to the heirs of the mother. He submits that there is no case nor there has been proof of the fact who were heirs of her husband on her death. Therefore, the property will not go to her mother and father who predeceased her but will go to the heirs of the father being the parties herein.

8. The learned Counsel for the respondent No. 1 submits that the relief for the declaration as claimed in the plaint is barred by limitation and such plea of limitation was taken in the written statement. It is true that the said point of limitation was not decided nor there has been any cross-objection but by virtue of provision of Order 41, Rule 33 of the CPC point of limitation can be decided by the Appeal Court. Learned Counsel further said that even if the case of adoption is not established still then plaintiffs cannot get the property as Protiva died in 1967 and her property will go to the heirs of her husband not to her father and mother or heirs and legal representatives of the father under the provision of Section 15 of the Hindu Succession Act, 1956. If the plaintiffs cannot have any claim under such circumstances, the claim in relation to the said property being item No. 2 will automatically fail and the declaration under the learned trial Judge is held to be correctly decided. He submits further that the decree passed in earlier suit being T.S. No. 11 of 1950 was neither challenged nor upset by the competent Court. As such, it has become final. So, according to him, the plea taken in this suit on the question of adoption is hit by the law of res judicata. He further submits that the evidence adduced by dead persons namely father, grandfather before the Competent Court of law is admissible in the present suit by virtue of Section 32 of Indian Evidence Act. According to him, the declaration about the status of adoption is judgment in rem. In support of his submission he has relied on the meaning and definition of the judgment in rem as given in Black's Law Dictionary at page 439. He has also relied on the principle of the Halsbury's Laws of England, volume 22, page 742. He further Submits that if the documents are carefully read it will appear that Protiva had validly and lawfully adopted Swapan and as such the decree passed by the learned trial Judge does not require any interference.

9. We have heard the contentions of the learned Counsel and gone through the judgment and decree and the respective pleadings of the parties. In the appeal Mr. Das had come up with his client's case of benami in respect of the immovable property being premises No. D-642 Lake Gardens Calcutta which is the subject-matter of the appeal being item No. 1 of the schedule to the plaint

which stood ostensibly in the name of Protiva Bose since deceased but owned really by Narendra, since deceased. But this plea of benami is not pressed by him. His argument on behalf of his client is that if it is found by this Court that the first defendant is not the adopted son of said Protiva Bose contrary to what has been found by the learned trial Judge then preliminary decree passed by the learned Court below has to be modified touching the said property. As such, he has laid much emphasis on this point. According to us, as rightly contended by the learned Counsel for the respondents, it hardly matters whether Protiva Bose, since deceased lawfully adopted first respondent or not. The learned trial Judge has held that the said item No. 1, property in the plaint is a self-acquired property of Protiva since deceased. The challenge against the aforesaid findings on the plea of benami ostensibility having since been abandoned this finding of the learned trial Judge has now reached finality. Hence this appeal has to be decided finding answer of the question what would be the position of inheritance of Mr. Das's client namely the appellants, vis-a-vis the said property of Protiva.

10. It is admitted position that Protiva died on 29th August, 1967 intestate. Going by the genealogical table Annexure "A" to the plaint the relationship between Protiva and the appellant is aunt and nephew. By virtue of Section 15 of the Hindu Succession Act 1956 general rule of succession in the case of female Hindus dying intestate is as follows:

15. General rules of succession in the case of female Hindus.--

(1) The property of a female Hindus dying intestate shall devolve according to the rules set out in Section 16,--

(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband;

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father, and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in Sub-section (1),--

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in Sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in Sub-section (1) In the order specified therein, but

upon the heirs of the husband.

11. In order to understand the rule of succession of the properties of the female Hindu dying Intestate Section 16 has to be considered and the same is set out hereunder:

16. Order of succession and manner of distribution among heirs of a female Hindu.--The order of succession among the heirs referred to In Section 15 shall be, and the distribution of the intestates property among those heirs shall take place according to the following rules, namely:

Rule 1: Among the heirs specified In Sub-section (1) of Section 15, those In one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously.

Rule 2 : If any son or daughter of the Intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3 : The devolution of the property of the intestate on the heirs referred to in Clauses (b), (d) and (e) of Sub-section (1) and in Sub-section (2) to Section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

12. In case of a partition suit the parties who are asking for partition of the property must establish their co-ownership meaning thereby they must have right, title, interest in the property as the joint owners thereof. Going by the provisions of Section 15 of the said Act the plaintiffs or the defendants do not come within the purview of the preferential heirs and heiress. It is an admitted position that her husband predeceased her and they did not have their own issue. Therefore, it can undisputedly be held that there is no heirs as mentioned in Clause (a) of Section 15 however we are not commenting whether first respondent is validly adopted or not. Following the order of succession as mentioned in Section 16 this property would go to the heirs of the husband and according to us these heirs Include the persons both male and female, other than sons, daughter or children of any predeceased son or daughter.

13. Therefore, going by rule of preference regarding succession as mentioned in Section 16 of the said Act, ordinarily neither of the parties can claim any right, title, interest in the said property of Protiva since deceased, unless a case is made out that the said Protiva did not have at the time of her death, heirs of her husband by reason of the fact that if there be any heirs of the husband then obviously the other heirs as mentioned in Clauses (c), (d) and (e) of Section 15 will not have any right at all since heirs and heiress mentioned in Clause (b) as per Rule 3 of Section 16 shall be preferred to heirs mentioned in other clauses.

Neither in plaint nor in the written statement there is any case having been made out that Protiva did not have any heirs and legal representatives at the time of her death or her husband. Had such case been made out this Court would have considered the question of adoption as alleged by the Respondent No. 1.

14 As rightly argued by the learned Counsel for the respondent, going by fact disclosed in the pleading the appellants have no right, title or interest to the self-acquired property of Protiva even if the case of adoption is not accepted. We are of the view that learned trial Judge ought not to have gone into the question of adoption, simply it was not called for on the facts of this case. Hence these findings in this matter is set aside.

15. Learned trial Judge has taken note of this aspect, which is a mixed question of fact and law and we appreciate these findings of the learned Trial Judge. The moment the case of the benami as initially put forward in the plaint is not accepted by the learned Trial Judge and such decision of the trial Judge is accepted by the appellant at the stage of appeal then the plaintiffs/appellants do not have any case as far as the property being item No. 1 is concerned going by the aforesaid provision of rule of succession in respect of property of the female Hindu dying intestate.

16. Therefore, the argument advanced by Mr. Das with regard to the adoption and the decisions cited on this aspect are not at all relevant, hence we do not wish to deal with the same at all. The plea of limitation raised by the learned Counsel for the respondent cannot be allowed to be raised at this stage, since the same was not raised before the learned Trial Judge, as such, no issue was framed nor any argument was advanced at the time of the trial of the suit, we do not think at this stage the respondent could be allowed to raise such abandoned point notwithstanding the provision of the Order 41, Rule 33 of the Civil Procedure Code. It is true that by virtue of Order 41, Rule 33 of the CPC the Appellate Court can examine the point of limitation though no separate appeal or cross-objection has been filed. In our view, the provision for Order 41, Rule 33 will be applicable in a case where any issue or any point which has been raised but has not been dealt with and/or erroneously dealt with by the learned Trial Judge, the Appellate Court can decide this matter without having formal appeal or cross-objection. The Appellate Court will exercise this power where there is decision on the issue raised and framed, not otherwise. Our conclusion on this aspect is substantially supported by a judgment of the Supreme Court in case of Food Corporation of India and Others Vs. Babulal Agrawal, . In this paragraph the Hon"ble Supreme Court observed as the statement of law "...But in case the Court does not prima facie find it to be beyond time at that stage (trial stage) it would not be necessary by us to record any such finding on the point which is a detailed one.

17. Therefore, the point of limitation raised by the learned Counsel for the respondent does not appeal to us and such point is rejected. However, on totality of the case as discussed above we do not find any merit in this appeal and the

same is accordingly dismissed. Judgment and order of the learned trial Judge is hereby affirmed.

Prasenjit Mandal, J.

18. I agree