

(1972) 07 OHC CK 0010
In the Orissa High Court
Case No : Second Appeal No. 292 of 1968

Trinath Parida

APPELLANT

Vs

Sobha Bholaini and Another

RESPONDENT

Date of Decision : 25-07-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1

Citation : AIR 1973 Ori 37

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : A.K. Padhi, for R.C. Patnaik, for the Appellant; H.G. Panda, for the Respondent

Final Decision : Allowed

Judgement

Patra, J.—The defendant is the appellant. The suit was filed for the issue of a permanent injunction restraining the defendant from entering on the disputed land measuring 0.70 acre and for recovery of possession thereof if it was found that the defendant had clearly trespassed on the same. One Bina Bhol had two daughters, namely. Sundari and Kumari (plaintiff No. 2). Sundari died about six years back fin about 1958) leaving behind her husband Trinath the defendant and a daughter by name Basanti. Bina Bhol died in 1962 and plaintiff No. 1 Sobha is Ms widow.

2. It is the plaintiffs case that on 12-7-1950, Bina Bhol purchased the disputed land benami in the name of his daughter Sundari. In spite of such purchase, however. Bina remained in possession thereof in his own right till his death. After Bina's death, the property was enjoyed by his widow and the surviving daughter Kumari plaintiff No. 2. After Bina's death, plaintiff No. 1 executed a deed of gift in respect of the same in favour of plaintiff No. 2. After Sundari's death, defendant married again and thereafter taking advantage of the fact that the sale deed in respect of the disputed land stood in the name of his deceased wife Sundari, began to lay a claim thereto. This gave a cause of action to the plaintiff

to file the suit.

2-A. The case of the defendant is that it is he who had advanced the consideration for the sale deed, but got the same executed benami in the name of Sundari. Neither Bina Bhol nor after his death the plaintiffs have any right thereto. In any event, Basanti the daughter of Sundari has got a share in the disputed property and is consequently a necessary party to the suit. The suit is, therefore, liable to be dismissed for nonjoinder of Basanti. In the alternative, he also laid a claim to the property on the ground that he had acquired a right thereto by adverse possession.

3. The trial Court found that the consideration for the sale deed under which the disputed property was purchased was advanced by Bina Bhol but the transaction was not intended to be a benami transaction but it was intended that Sundari should be the owner of the property. On the question of possession he found that the plaintiffs were never in possession thereof. His conclusion was that after Sundari's death, her daughter Basanti became entitled to the suit property and non-joinder of Basanti was, therefore, fatal to the suit. As Basanti was a minor and her father the defendant is in possession of the property on her behalf, no order of injunction could be issued against him.

4. On appeal the learned Subordinate Judge of Aska concurred in the finding recorded by the trial Court that it is Bina Bhol who had advanced consideration for the sale deed. But differing from the trial Court he came to the conclusion that it was a benami transaction and that title to the property vested in Bina. Adverting to the plea of non-joinder of Basanti he held that as Sundari was not the owner of the property, her daughter Basanti cannot claim any title thereto, and consequently was not a necessary party to the suit. He held that after Bina's death, the property devolved on his widow and his daughter Kumari, and in this view, passed a decree in their favour. Hence this appeal by the defendant.

5. The concurrent finding of the Courts below that defendant Trinath had not paid the consideration for the sale deed and that he had no title to the disputed property is not assailed before me. Mrs. Padhi learned Advocate for the appellant contended that even if the finding of the first appellate Court that Bina Bhol had acquired title to the disputed property is accepted, the position would be that after Bina's death in 1962, the disputed property would devolve not only on the two plaintiffs but also on Basanti the daughter of Bina Bhol's pre-deceased daughter Sundari. Mr. H.G. Panda, learned Advocate for respondent has fairly conceded that this proposition is correct and that the learned Subordinate Judge was not correct when he stated that as Sundari had no title to the disputed property her daughter Basanti would get no share in the same. Realising that Basanti is a necessary party to the suit, and that the suit would therefore fail for non-joinder of Basanti, Mr. Panda filed an application under Order 23, Rule 1, Civil P. C. for permission to withdraw from the suit with liberty to file a fresh suit on the same cause of action, and this application is vehemently opposed by the appellant. The question, therefore, for consideration is whether having regard to

the facts and circumstances of the case, permission as sought for by the respondents should be accorded.

6. Rule 1 of Order 23. Civil P. C. provides, inter alia, that at any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit, and where the Court is satisfied that the suit must fail by reason of a formal defect it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. The question, therefore, is whether non-joinder of a necessary party is a mere formal defect so as to attract the applicability of Order 23. Rule 1, Civil P. C.

7. Opinion appears to be unanimous in all the High Courts that non-joinder of a necessary party is not a formal defect within the meaning of this rule. It is a defect which affects the root of the plaintiff's case and cannot be said to be a mere formal defect, (see *The Asian Assurance Co. Ltd. Vs. Madholal Sindhu and Others*, and *Tarachand Bapuchand Vs. Gaibihaji Ahmed Bagwan*, . In the circumstances, the application filed under Order 23, Rule 1, Civil P. C. has to be dismissed.

8. The plea of defect of nonjoinder of parties was taken by the defendant at the earliest opportunity in his written statement. The trial Court accepted this contention although it was on the ground that the property belonged to Sundari and after her death it devolved upon Basanti. It is not that the plaintiffs were unaware that Sundari had left behind her a daughter because the existence of this daughter has been referred to in the plaint itself. Even on the basis of the claim advanced in the plaint that the disputed property belonged to Bina Bhol. Basanti who is the daughter of a predeceased daughter of Bina is a Class I heir, and consequently is a necessary party to the suit. But no steps had been taken either in the trial Court or in the first appellate Court to implead Basanti as a party. If steps had been taken in proper time to implead Basanti as a party, the respondents would not have been in the predicament in which they have found themselves to-day. But this is a situation which cannot be helped having regard to the position of law, indicated above. Irrespective of the merits of the case, therefore, the suit filed by the plaintiff-respondents has to fail for non-joinder of a necessary party, namely Basanti.

9. In the result, I would allow this appeal set aside the judgment and decree passed by the learned Subordinate Judge and dismiss the suit. In the circumstances of the case, however, parties should bear their own costs here and in the Courts below.