Arjun Banchhor Vs. Buchi Banchhor (Dead) After Him Jogi Banchhor and ors.

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Court : Orissa

Decided On : Jul-28-1994

Reported in : AIR1995Ori32

Judge : R.K. Patra, J.

Acts : Hindu Adoptions and Maintenance Act, 1956 - Sections 5; Evidence Act, 1872 - Sections 101-104

Appeal No. : Second Appeal No. 226 of 1983

Appellant : Arjun Banchhor

Respondent : Buchi Banchhor (Dead) After Him Jogi Banchhor and ors.

Advocate for Def. : C.R. Nanda, ;S.K. Ghose, ;A.K. Sahoo and ;P.K. Khuntia, Advs.

Advocate for Pet/Ap. : N.C. Pati and ;B.K. Nayak, Advs.

Disposition : Appeal dismissed

Judgement :

R.K. Patra, J.

1. Defendant No. 2 is the appellant against the confirming judgment in a suit for declaration of title and for recovery of possession filed by respondents 4 to 4 (b).

2. Case of the plaintiff's (respondents 4 to 4(b)) is that one Birju Banchhor (since dead)and defendant No. 1 were brothers who partitioned their joint family properties and the suit land besides other lands fell to the share of defendant No. 1 who had been possessing the suit land in his own right till he sold it away to plaintiff No. 1 by means of a registered sale deed dated 14-2-1969 on receipt of full consideration. The vendee plaintiff No. 1 took delivery of possession of the suit land from the vendor. Defendant No. 2 claiming to be the adopted son of defendant No. 1 caused disturbance for which a proceeding under Section 145, Cr. P. C. was initiated which terminated in favour of the said defendant No. 2. According to the plaintiffs defendant No. 1 never adopted defendant No. 2 and since the decision of the proceeding under Section 145, Cr. P. C. brought clouds on the plaintiff's right, title and interest, the suit was filed for the aforesaid reliefs.

3. Defendant No. 1 in his written statement supported the case of the plaintiffs. Defendant No. 2 claimed that there was no partition between Dirju and defendant No. 1 by metes and bounds and the suit land is the joint family property of defendant No. 1 and the heirs of Dirju and as such he (defendant No. 1) could not have sold away the suit land. He claimed that he was taken in adoption by defendant No. 1 when he was a child and after the adoption defendant No. 1 subsequently executed a surrender deed relinquishing all his rights in the suit land. According to defendant No. 2 he has been in possession of the suit land in his own right and title to the exclusion of defendant No. 1.

4. On the basis of evidence, both oral and documentary the learned trial Judge held that there was partition between Dirju and defendant No. 1 by metes and bounds in which the suit land felt to the latter's share who had been possessing the same in his own right; (ii) defendant No. 1 sold the suit land to plaintiff No. 1 under the registered sale deed dated 14-2-1969 for valuable consideration and for legal necessity and gave delivery of possession to the latter who was in possession of the same till the termination of Section 145, Cr. P. C. proceeding against him; (iii) defendant No. 2 was not adopted by defendant No. 1 nor the

1995 Ori./3 II G-41suit land was ever relinquished by defendant No. 1 in favour of defendant No. 2. On the basis of the aforesaid findings, the trial Judge dismissed the suit which findings have beenconfirmed in appeal filed by defendant No. 1.

5. Before considering the contentions raised on behalf of the appellant, it is necessary to keep in view what was the scope of challenge before the learned lower appellate Court. This is what the learned Judge has recorded in the impugned judgment:

'. . . .In course of arguments the challenge of the findings of the learned lower Court has been confined to the two questions, namely, whether the adoption of defendant No. 2 by defendant No. 1 is true and valid and whether there was partition between Dirju and defendant No. 1 by metes and bounds.'

6. In view of the limited contentions raised before the lower appellate Court, the arguments of the learned counsel of the appellant are to be confined to the premises stated above. The finding whether the suit land fell to the share of defendant No. 1 in the partition held between himself and his brother Dirju is primarily a question of fact. The learned trial Judge as well as the lower appellate Court on the basis of evidence recorded the finding that the suit lands fell to the share of defendant No. 1 in the family partition. Defendant No. 1 who was himself examined as P. W. 8 in his evidence stated that there was partition by metes and bounds between himself and his four brothers including Dirju in which the suit land besides other land fell to his share. Ext. 15 is the certified copy of the Record-of-Right of village Silatpara relating to holding No. 27 of 1936 settlement wherein it has been noted that the suit land was in exclusive possession of defendant No. 1. That possession of the suit land was exclusively with defendant No. 1 prior to 1936 settlement has been spoken by P.Ws. 1, 2, 6 and 8. Evidence of defendant No. 1 supported by the testimony of P.Ws. 1, 2, 5 and 8 clearly establishes that in the partition the suit land fell to the share of defendant No. 1 who had been possessing the same till he sold the same to plaintiff No. 1 as per registered sale deed Ext. 1 dated 14-2-1969. Inview of the findings and the evidence on record indicated above, there is little scope for disturbing the finding that the suit land fell to the share of defendant No. 1 who had been in possession of the same till the

same was sold to plaintiff No. 1 by registered safe deed Ext. 1.

7. It is the case of defendant No. 2 that he was taken in adoption by defendant No. 1 in his childhood about 40 years back. Learned counsel for the appellant seriously contended that the adoption being an ancient one and the witnesses who were examined in proof of adoption being rustic, the appreciation of evidence made by the Courts below suffers from illegality inasmuch as strict proof of the same should not have been insisted upon. There can be no dispute with the legal proposition that as adoption results in changing the course of succession, very grave and serious onus rests upon such person who seeks to displace the natural succession by alleging adoption. Learned counsel submitted that the present being an ancient adoption, the proof regarding adoption may not be strictly insisted upon. In the present case, it is not the case of defendant No. 2 that the transaction being an ancient one, it has not been possible on his part to adduce any evidence. On the contrary, D.Ws. 4 and 6 were examined to prove the giving and taking ceremony. Thus, it is a case of availability of direct evidence and the evidence has to be examined like any other evidence. There is no pre-determined way of proving any fact. A fact is said to have been established where after considering the materials before it, the Court either believes that it exists or considers its existence so probable that a prudent man in the circumstances of a particular case would act upon the supposition that it exists. If after taking an overall view of the evidence adduced in the case the Court is satisfied that the story of adoption is true, no legal exception can be taken, to it. There are certain circumstances which go to belie the story of adoption as putforth by defendant No. 2 which have been taken note of by the lower appellate Court. It is the case of defendant No. 2 that he was given in adoption by his natural parents to defendant No. 1 when hewas 2 to, 4 months old. Defendant No. J has denied to have adopted defendant No. 2. At the time of the alleged adoption, defendant No. 1 was aged about 30 years and had two daughters through his wife. At that time he could not have possibly considered of not be-getting a son in future. There is nothing on record to remove the doubt as to why defendant No. 1 at the age of 30 when his wife was living gave up all hopes of begetting a son and, therefore, would think of taking a boy in adoption. D.W.4 was examined to say that defendant No. 2 at the age of 3 months wasgiven in adoption by his natural father Chandalu which; was accepted by

defendant No. 1 on the Sripanchami day in the month of Magha about 40 years back. There is no , mention in the written statement of defendant No. 2 that giving and taking ceremony took place on any Sripanchami day in the month of Magha. He (D.W.4) claimed that the act of giving and taking took place in his presence and in presence of D.W. 6 and others. It was brought out in his cross-examination thatD.W, 3 was also present at the time of adoption. But he (D.W. 3) did not breathe a word to say that there was giving and taking ceremony. D.W.4 is not related to either party and, as such, his attending the adoption ceremony on his own accord wihtout being invited by either party can be accepted by a pinch of salt. He seems to be in litigating terms with the plaintiffs. D.W. 6 who claimed to have witnessed the giving and taking ceremony is a Harijan. It was a time when the ghost of untouchability was pervading the society and it is hardly believable that he would have been allowed to attend and witness the adoption ceremony. After taking an overall picture, the Courts below disbelieved the story of adoption putforth by defendant No. 2 as the giving and taking Ceremony which is the essence of adoption was not proved. There are certain documents which would clearly show that defendant No. 2 had not gone in adoption. Exts. 3 to 6 are the sale deeds executed by defendant No. 2 in favour of one Nata Sahu and Topi Meher on 18-2-1969, 6-3-1974 and 17-7-1973. In these documents he has described himself as the son of his natural father Chandalu. The lands covered under the sale deeds were inherited by him from his natural father. Exts. 9 to 13 are the voter lists relating to 1964, 1970, 1973 and 1975 wherein he has been described as the son of Chandalu, his natural father. Ext. 14 is the certified copy of the record-of-right of holding No. 3 of the current settlement published in the year 1976 wherein he has been described as the son of his natural father Chandalu. On the facts and circumstances, the Courts below held that defendant No. 2 is not the adopted son of defendant No. 1 which is a pure finding of fact based on appreciation of evidence which cannot be interfered with in second appeal.

8. In the result, there is no merit in this second appeal which is accordingly dismissed with costs.