

Savitri Dei Vs. Bhaskar Bhuyan and ors.

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Court : Orissa

Decided On : Oct-26-1971

Reported in : AIR1972Ori148

Judge : G.K. Misra, C.J. and ;S. Acharya, J.

Acts : [Evidence Act, 1872](#) - Sections 32(3), 32(5), 90 and 114; [Code of Civil Procedure \(CPC\), , 1908](#) - Sections 11 - Order 23, Rule 3

Appeal No. : Frist Appeal No. 147 of 1967

Appellant : Savitri Dei

Respondent : Bhaskar Bhuyan and ors.

Advocate for Def. : R.C. Patnaik, Adv.

Advocate for Pet/Ap. : S. Misra-I and ;S.C. Misra, Advs.

Disposition : Appeal dismissed

Judgement :

G.K. Misra, C.J.

1. Plaintiff's case may be stated in short. The disputed properties measure 6-28 acres of land with a house standing thereon. These properties belonged to deceased Pratap Bhuyanwho left behind his widow Sukuti and a daughter Mali

(plaintiff). Savitri (appellant) is the daughter of Mali who died after the disposal of the suit and before the filing of the First Appeal.

Plaintiff's case is that after Pratap's death, Sukuti was in possession of the disputed properties and she being a Pardanashin lady got the properties managed through defendant No. 1 who is the agnatic brother of Pratap and married to the sister of Sukuti. Defendant No. 1 filed O. S. No. 631 of 1931-32 against Sukuti for a declaration that he was the adopted son of Pratap and obtained a fraudulent decree. Defendant No. 1 cultivated the suit lands and paid rent on behalf of Sukuti and had retained rent-receipts with him. The present suit was filed in 1964. Sukuti died about 7 years before the institution of the suit, that is, in 1957-58. After her death, plaintiff entrusted the disputed properties to defendant No. 1 for cultivation and management. In 1963 she came to know during the settlement operation that defendant No. 1 fraudulently got himself recorded in respect of the suit lands and had obtained a fraudulent decree in 1931-32. She accordingly prayed for a declaration of title and recovery of possession and for further declaration that defendant No. 1 was not the adopted son of Pratap and that the decree obtained in 1931-32 was fraudulent and was not binding on her.

Defendant No. 1 alone contested the suit. His case is that Pratap had no issues for many years after his marriage with Sukuti. He adopted defendant No. 1 after due performance of necessary ceremonies. After adoption, Pratap had two daughters through Sukuti. One of the daughters died and the plaintiff was the other daughter. After Pratap's death, defendant No. 1 has been in possession of the disputed properties as an adopted son in his own right, title and interest and Sukuti was entitled to maintenance only. The assertion in the plaint that the suit properties were entrusted to him by Sukuti and after her death by the plaintiff is denied by him. He further asserts that the compromise petition filed by Sukuti in O. S. No. 631/31-32 was genuine and valid and the compromise decree was not tainted with fraud. In 1946 he got himself mutated in respect of all lands of Pratap.

2. The learned Subordinate Judge recorded the following findings:

(i) Pratap adopted defendant No. 1.

(ii) Defendant No. 1 is in possession of the disputed properties in his own right, title and interest and not on behalf of Sukuti and after her death the plaintiff.

(iii) The compromise petition (Ext. A) dated 30-3-1932 is genuine and was duly executed by Sukuti. The compromise decree (Ex. C) based on the basis of the compromise petition was not fraudulently obtained and is binding on the plaintiff and that the suit is barred by res judicata.

(iv) The suit is barred by limitation. On the aforesaid findings the learned Subordinate Judge dismissed the suit. Plaintiff is the appellant.

3. Mr. S. Misra raises the following contentions:

(i) The compromise petition (Ex. A) its not genuine. The compromise decree (Ex. C) was fraudulently obtained and the suit is not barred by res judicata.

(ii) Adoption of defendant No. 1 has not been established and the finding is contrary to law.

(iii) The suit is not barred by limitation.

Each of these contentions require careful examination.

4. Ex. A is the compromise petition. The original was called for from the Record Room and proved through D.W. 3 and D.W. 4 (defendant No. 1). The original compromise petition at the time it was exhibited in Court before the Subordinate Judge contained the thumb-mark of Sukuti and the signature of defendant No. 1. It was scribed by deceased Luxmidhar Mohapatra. The attestors are deceased Krupasindhu Debata and Bauli Padhihary (D.W. 3). On this aspect of the matter D.W. 3 deposed thus:

'I signed this compromise and Sukuti gave her T.I. on it.'

The only question in cross-examination suggested to this witness was that the compromise document was forged and fraudulent and Sukuti never joined it. D.W. 3 denied the suggestion by saying that it was not true.

D.W. 4 in examination-in-chief asserted the genuineness of the compromise. His statement may be extracted:

'I filed a suit against Sukuti about 80 years back as Sukuti tried to oust me. It was compromised. Sukuti came to court to file it. Laxmidhar Mohapatra, Mukhtear, wrote the compromise. It was read over to me and Sukuti. This is my signature and this is the thumb impression of Sukuti on the compromise. Bauli Padhihari and Krupasindhu Debata signed the compromise. Compromise petition marked Ext. A. Bauli Padhiari and some others brought about the compromise.'

There was no effective cross-examination to dislodge the witness. A suggestion given to the witness was repelled thus:

'It is not true that the compromise was forged. It is not true that I filed a suit against a person named Suka who did not exist.'

D.Ws. 3 and 4 thus satisfactorily proved that Ext. A is genuine and it was read over to Sukuti. The suggestion on behalf of the plaintiff that Sukuti did not at all appear in Court is repelled by the recital in the decree itself wherein it is stated that the decree was passed in the presence of Suka Bewa. There is no dispute that Suka is Sukuti. We accordingly held that Ext. A was duly executed by Suka Bewa after the contents thereof were read over to her.

That apart, Ex. A has been proved to be 30 years old. It is produced from the Record Room where it has been kept as a part of the decree. It contains the thumb impression and the signatures of Sukuti (Suka), defendant No. 1, the scribe and the attestors. Even if the evidence of D.Ws. 3 and 4 was not available, the presumption under S. 90 of the Evidence Act is to be drawn in support of the conclusion of its having been duly executed.

Section 90 of the Evidence Act runs thus:

'Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's

handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation:-- Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.'

Applying the principle laid down in the section, it is clear that Ex. A is produced from proper custody. There is no dispute that Ex. A was in existence in 1931-32. The dispute is that Suka did not execute it and she was personated by somebody else. The Court may, therefore, presume that Laxmidhar Mohapatra scribed it and Suka and defendant No. 1 respectively put their thumb impression and signature and the witnesses attested it. Ex. A can be taken to be genuine and duly executed on the application of Section 90, Evidence Act.

5. The next question for consideration is whether the compromise decree (Ex. C) obtained by defendant No. 1 against Sukuti is binding on the plaintiff. The law on the point is no longer in doubt. In AIR 1918 PC 87, (Risal Singh v. Balwant Singh) their Lordships of the Judicial Committee formulated the law in clearest terms. They said that where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, is binding on the reversionary heir. Lest it may create some difficulty that the reversioner does not claim the property through the widow but through the last male owner and it can be argued that the principle of *res judicata* in terms does not apply, their Lordships made it further clear that Section 11, C.P.C. was not strictly applicable to the case as the plaintiffs were not parties to the suit and did not claim under a party to the suit. The principle has been applied by the Courts in India so as to bind the reversioners by decisions in litigations fairly and honestly conducted given for or against Hindu females who represented the estate. It is also established by series of Privy Council decisions that the widow is not comparable to a trustee. She represents the estate fully but subject to certain limitations with regard to power of alienation.

The onus of proving that the decree (Ex. C) was tainted with fraud is on the plaintiff and the onus is to be discharged beyond reasonable doubt as in a criminal charge. (See AIR 1940 PC 98, *Hansraj v. Dehra Dun M. E. T. Co. Ltd.* and AIR 1941 PC 93, *Narayanan v. Official Assignee, Rangoon*). Except pleading that Sukuti did not appear in Court and some body impersonated her, no proof has been adduced in support of the story of fraud. Mr. Misra frankly conceded that the plaintiff has failed to establish that the decree was fraudulently obtained.

6. About thirty years ago defendant No. 1 brought the suit as Sukuti raised some objections regarding his adoption. The suit was fairly and honestly conducted and ultimately culminated in a compromise. The admission of adoption in the compromise disinherited Sukuti; but for adoption she would have inherited the entire properties of her deceased husband. On the adoption being accepted, she would be only a maintenance-holder. The compromise decree which was passed in her presence in Court after the compromise petition was explained to her was fairly and honestly obtained. Such a decree is binding on the plaintiff. In AIR 1964 Orissa 156 (*Baishnab Padhan v. Parma Padhan*) a similar conclusion was correctly reached on analogous facts.

Reliance is placed by Mr. Misra on AIR 1952 SC 207 (*Mt. Phool Kuer v. Mt. Pem Kuer*). The Supreme Court decision is consistent with the Privy Council view though on the facts of that case their Lordships held that the compromise was neither prudent or reasonable as it was made for the personal advantage of the limited owner and would not bind the estate or the reversioners. The position here is different. The compromise effected by Sukuti was not for her personal advantage but was directly adverse to her interest. By admission of adoption, she was disinherited of the entire properties of her deceased husband and became a maintenance-holder only. The compromise decree is binding on the plaintiff and the present suit is barred by *res judicata*. The suit is liable to be dismissed on this ground alone.

7. Assuming that the compromise decree is not binding on the plaintiff and does not constitute *res judicata* we would examine the fundamental question whether defendant No. 1 was adopted by Pratap. The adoption is alleged to have taken

place when defendant No. 1 was 11 years old. His age during trial was about 60 years. So the adoption is said to have taken place about 50 years ago. Clearly it will come within the category of an ancient adoption.

The onus is on defendant No. 1 to prove that he was duly adopted, D.Ws. 3 and 4 are the only witnesses to the performance of the adoption ceremony. D.W. 3 stated that there was a Puja; Sankar Bhuyan (the natural father of defendant No. 1) and his wife gave defendant No. 1 as son. He claims to be brother of Sukuti as being the son of Pahali Padhiari. According to him, all witnesses to adoption excepting him are dead. One Bhola Acharya was the Purohit and Muli was Barber in the adoption ceremony. In cross-examination nothing substantial has been elicited to discredit his testimony. Doubtless there have been some discrepancies in his statement regarding his age at different times as to when Sukuti was married and the adoption took place. Taking into consideration the fact that these villagers may confuse regarding age and years, we do not attach much importance to such discrepancies. Plaintiff (P.W. 3) admitted that Dai Padhiari was the older brother of Pahali Padhiari, her maternal grand-father. She admitted that D.W. 3 is the son of Dai Padhiari. Thus even assuming that D.W. 3 is not the son of Pahali Padhiari and not the own brother of P.W. 3, he is admittedly the first cousin of Sukuti. P.W. 3 also admitted that she had no dispute with DW. 3. Even on plaintiff's case, D.W. 3 is Sukuti's first cousin and has no axe to grind in favour of defendant No. 1 against the plaintiff. We do not agree with the learned Subordinate Judge that D.W. 3's evidence is to be discarded merely because he made some confusion regarding time of occurrence of different incidents. We accept him as a reliable witness and his story regarding adoption is believable. D.W. 4 (defendant No. 1) was 11 years old at the time of adoption. He is, therefore, a competent witness to remember all facts associated with the adoption. He describes how the giving and taking ceremonies took place and his natural father resorted to the physical act of giving and the adoptive father to the act of taking. The only witness on the side of the plaintiff to deny the adoption is P.W. 2 who is 63 years old and is a neighbour of Pratap. We do not, however, attach importance to his evidence as on his own admission he and defendant No. 1 had Tenants Relief cases and counter cases against each other. On the evidence of D.Ws. 3 and 4 we have no doubt that the ceremonies of giving and taking have been established and adoption has been

proved.

The evidence of D.Ws. 3 and 4 gets strong corroboration from the statement of Sukuti in Ex. A which has been held to be genuine by us. Therein she stated her deceased husband adopted defendant No. 1 while he was 11 years old and that defendant No. 1 had been nourished in their house. She also admitted that defendant No. 1 performed the obsequial ceremony and annual Sradha of Pratap. On account of dissension arising out of house-hold affairs she denied the adoption on account of which defendant No. 1 filed the suit.

The first question for consideration is whether the statement is admissible in evidence. It was contended that it was admissible both under Section 32 (3) and (5) of the Evidence Act. These sub-sections may be quoted:

'Section 32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:--

X X X

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

X X X

(5) When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.'

Clearly the statement is admissible under Section 32(3) of the Evidence Act. Sukuti's statement that Pratap adopted defendant No. 1 affects her pecuniary and

proprietary interest inasmuch as she would be disinherited of the properties and would become only a maintenance-holder. It is a relevant piece of evidence. The statement, however, is not admissible under Section 32(5) though it relates to the existence of relationship by adoption, as to whose relationship Sukuti had special means of knowledge, yet the statement was not made before the question in dispute was raised. Now it has been authoritatively pronounced that the expression 'before the question in dispute was raised' would cover a statement not only before actual litigation in which the dispute is to be decided but before any controversy regarding the subject-matter of that statement was raised. (See AIR 1968 SC 947, K.V. Subbaraju v. C. Subbaraju). Here the statement was made after Sukuti challenged the adoption.

Thus even if the compromise decree does not itself constitute *res judicata*, the compromise petition (Ex. A) is a relevant piece of evidence in support of the case of adoption.

In 1946 defendant No. 1 applied for mutation of his name in respect of the properties of Pratap. His name was mutated. The order (Ex. E) dated 10-8-1946 of the Mutation Officer shows that defendant No. 1 applied for mutation of his name in place of his adoptive father Pratap. Proclamation was published and no objection was raised. He also referred to the fact that adoption had been recognised in civil suit No. 631/31-32. Under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustration (e) says that the Court may presume that judicial and official acts have been regularly performed. Apart from the fact that the ordersheet clearly records issue of notice and proclamation, it is legitimate to presume that proclamation must have been issued in due discharge of official business. Sukuti died in 1957-58. that is, about 25 years after the compromise petition and 11/12 years after mutation of the name of defendant No. 1. She did not raise her little finger that this was all surreptitious. Mutation of defendant No. 1's name and want of challenge to the same for a pretty length of time are strong circumstances in support of defendant No. 1's possession as an adopted son.

Admittedly defendant No. 1 is in possession of the disputed lands since after the death of Pratap till the date of the suit. The onus of proving entrustment of the lands to defendant No. 1 by Sukuti and after her death by the plaintiff has not been established by any acceptable evidence. We reject the theory of entrustment. Thus defendant No. 1 is in possession in his own right, title and interest and was paying rent all through. This is consistent with the theory of his adoption.

On the basis of the aforesaid essential facts we are satisfied that defendant No. 1 was adopted by Pratap.

In view of our aforesaid conclusion, it is not necessary to examine the question of limitation.

8. There is no merit in this appeal. It is accordingly dismissed; but in the circumstances, parties to bear their own costs throughout.

S. Acharya, J.

9. I agree.

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