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Court : Orissa

Decided On : Dec-24-1969

Reported in : AIR1970Ori218

Judge : R.N. Misra, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 54; [Evidence Act, 1872](#) - Sections 21

Appeal No. : Second Appeal No. 604 of 1965

Appellant : Nrusinghanath Deb and ors.

Respondent : Banamali Panda and ors.

Advocate for Def. : B. Mohapatra, Adv.

Advocate for Pet/Ap. : M. Mohanti, Adv.

Disposition : Appeal allowed

Judgement :

R.N. Misra, J.

1. This is an appeal by the plaintiffs against a reversing judgment of the learned Subordinate Judge, Puri in a suit for declaration of title and possession and for other reliefs.

2. The case made out by the plaintiffs was that the suit properties along with certain other properties belonged to the deity Sri Nrusingnanath Deb. Plaintiffs 2 and 3 and the predecessors of the defendants were in possession of such properties as marfat-dars. For convenience of possession, the marfatdars had divided the properties of the deity among themselves and in such division the suit properties came to be allotted to the share of Ananda Panda, father of plaintiffs 2 and 3. Ananda's eldest son Agadhu died issueless. Taking advantage of a dispute between late Agadu Panda and plaintiff No. 2 (plaintiff No. 3 was a minor then) Bhagaban Panda, uncle of defendant No. 1 obtained a permanent lease in respect of the disputed properties in the names of himself and his brother Banchhanidhi, father of defendant No. 1. This lease was not acted upon and was a fraudulent one. Notwithstanding the fraudulent character of the lease deed : defendant No. 1 created trouble in respect of the disputed properties. At the instance of certain well-wishers it was settled that plaintiffs 2 and 3 would purchase the right of defendant No. 1 in respect of the suit land for a consideration of Rs. 300 and in pursuance of such arrangement defendant No. 1 executed and registered the sale deed Ext. A dated 19-5-60 and received the entire consideration of Rs. 300. But the original sale deed Ext. A was kept with him and later defendant No. 1 brought a false criminal case against plaintiffs 2 and 3 on the allegation that they had plucked cocoanuts from the suit land. Though there was an acquittal in the criminal case, the plaintiffs in order to remove the cloud from their title have filed the suit.

3. Defendants 4, 6 to 8, 10, 12, 14, 15 and 19 supported the plaintiffs. Defendant No. 1 actually contested the litigation. His case was that late Banchhanidhi Panda and Bhagaban Panda obtained a permanent lease of the suit properties from plaintiff No. 2 late Agadhu Panda and their mother Jamuna by a registered deed of lease on payment of salami for the purpose of the deity. Defendant No. 1 as the sole surviving heir of Ban-mali and Banchhanidhi has been in possession of the leasehold. In order to purchase other properties defendant No. 1 agreed to alienate the suit properties to plaintiffs Nos. 2 and 3 for, a consideration of Rs. 300 and it was further agreed that the consideration money would be paid by plaintiffs Nos. 2 and 3 to defendant No. 1 at the time of endorsing the registration ticket in favour of plaintiffs Nos. 2 and 3 and delivery of possession of the suit properties

would be given to plaintiffs Nos. 2 and 3 then Accordingly the sale deed Ext. A was executed and registered by defendant No. 1. As plaintiffs Nos. 2 and 3 failed to pay the consideration money defendant No. 1 did not endorse the registration ticket in their favour and executed a cancellation deed Ext. C on 6-1-61. Defendant No. 1 has been in possession throughout and no title has been acquired under Ext. A by plaintiffs 2 and 3.

4. The trial court came to find that the permanent lease deed dated 2-4-1917 was genuine and for consideration; the plaintiffs were not in possession of the suit properties and the defendant No. 1 was in possession of the same; and title passed independent of passing of consideration. It was needless to discuss the evidence on the question of passing of consideration. The learned Mun-sif decreed the suit.

5. Before the lower appellate court it was conceded that the consideration money had not passed under the sale deed Ext. A, nor was the genuineness of the lease deed of 1917 challenged. Therefore, the only question with which the lower appellate court concerned itself was as to whether title passed under the sale deed Ext. A even if the consideration had not been paid. The material portion of the sale deed has been translated by the lower appellate court in the following manner :--

'That in order to purchase new landed properties, I sell the above mentioned 1.08 acres land to you with cocoanut, mango, jackfruit, Chakunda and other trees standing thereon at the highest prevailing price of Rs. 300/- and having agreed to receive the consideration money at the time of endorsing the registration ticket, I deliver possession of the sold land and become disentitled thereto. From today you will cultivate the said land or get it cultivated as your purchased property and appropriate the income thereof from generation to generation by paying rent, obtaining receipt and getting your name mutated in place or mine.'

The learned Appellate Judge referred to two decisions of this Court in 1960-2 OJD 136 = (AIR 1961 Orissa 19), Michu Kuanr v. Raghu Jena and ILR (1964) Cut 551 = (AIR 1964 Orissa 239), Ramchandra Biharilal Firm v. Mathuramohan and came to hold ultimately that no title had passed under Ext. A and, therefore, he reversed

the decree of the trial court.

6. Mr. Mohanti wanted to contend that the concession said to have been made before the lower appellate court that the consideration money has not passed under the sale deed Ext. A is not a correct one. I do not find any challenge in the grounds of appeal to support the present contention of Mr. Mohanti. Normally a statement in the judgment of a court must be accepted to be true unless it is properly challenged. Even mere incorporation of a ground in the memorandum of appeal has been held not to constitute a sufficient challenge to the correctness of such a statement. The concession is on a question of fact and parties or their learned counsel are entitled to make such a concession. In the circumstances, I must hold that the concession has been made and the statement made in the lower appellate court's judgment to record such a concession cannot be disputed.

7. The only point that arises for consideration is as to whether on the footing that no consideration was paid for Ext. A title can be said to have passed. 'Sale' has been defined in Section 54 of the T. P. Act as 'a transfer of ownership in exchange for a price paid or promised or part-promised.' In the present case, the narrative portion, as extracted above, goes to show that the consideration was to be received subsequently at the time of endorsing the registration ticket. It was not indicated as to on which date or at what point of time the registration ticket would be endorsed. Without waiting for such endorsement to be made of the ticket and the consideration to be received, it was stated in the conveyance,

'I deliver possession of the sold land and become disentitled thereto. From today you will cultivate the said land or get it cultivated as your purchased property and appropriate the income thereof from generation to generation by paying rent, obtaining receipt and getting your name mutated in place of mine.'

As such the intention seems to be unequivocal of making a conveyance of the title in praesenti and not dependent upon passing of the consideration. A Division Bench of this Court in ILR (1953) Cut 531 = (AIR 1953 Orissa 23), Balabhadra Misra v. Nir-mala Sundari Devi came to consider a similar question where the narration in the sale deed ran thus :--

'But being in need of money to make part payment of the mortgage dues of Sree Babu M. Subba Rao we of our own accord and free will sell the zamindari consisting of the undermentioned village to the above-mentioned vendee for Rs. 1205 as the consideration for the said zamindari and we have counted the said money and received it from the vendee out of her Stridhan through her father in one instalment and acknowledge that from this day the vendee will be entitled to possess all rights, including land, water, trees, stones, property, underground, idols and temples,..... all rights and after her sons and grandsons for all time to come and they will deposit the sadarzama of the property.....'

and held that in such a case the passing of title was not dependent upon payment of consideration. I think, the reasons that appealed to the learned Judges in that case are well applicable to the facts of the present case and it must be held on the aforesaid basis that passing of title was not made dependent upon passing of the consideration money. In the circumstances, it must be held that title passed under Ext. A being not dependent upon the passing of consideration. Once it is so found, it must also be held that the judgment of the lower appellate Court is wrong and the appellants are entitled to succeed.

8. The Second Appeal is allowed with costs throughout. The judgment of the lower appellate court is reversed and that of the trial court is restored.

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