

Madan Charan Das and ors. Vs. Padan Charan Das and ors.

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Court : Orissa

Decided On : Apr-16-1985

Reported in : AIR1985Ori274; 1985(II)OLR84

Judge : P.C. Misra and ;G.B. Patnaik, JJ.

Acts : Hindu Law

Appeal No. : First Appeal No. 75 of 1974

Appellant : Madan Charan Das and ors.

Respondent : Padan Charan Das and ors.

Advocate for Def. : A.B. Misra, Adv.

Advocate for Pet/Ap. : K.C. Mohanty, Adv.

Judgement :

G.B. Patnaik, J.

1. Defendants are appellants against the judgment and decree of the Subordinate Judge, Kendrapara, in Title Suit No. 23 of 1973. Plaintiff filed the suit for a declaration that the deed of partition dated 5-5-1973 is invalid, inoperative and null and void on account of fraud perpetrated on him by the defendants by including in the said document the self-acquired properties of the plaintiff to the extent of 7.592

described in Lot No. 3 of the plaint schedule.

2. According to the plaintiffs case, the plaintiff and the defendants are brothers and all of them had inherited the ancestral family property to the extent of 1.85 acres described in Lot No. 1 of the plaint schedule. By the time when plaintiffs father expired, he was only 18 years old and as the family properties were not sufficient to make both ends meet, the plaintiff left for Calcutta and started some milk business and out of the income of the said business maintained the defendants and also purchased the properties to the extent of 7.592 acres described in Lot No. 3 of the plaint schedule. Defendants have no manner of right or interest in the said property. That apart, all the defendants and the plaintiff have jointly purchased properties to the extent of 7.925 acres described in lot No. 2 of the plaint schedule. As there was dissension amongst the members of the family, defendant No. 2 suggested to partition the properties described in lot No. 1 and lot No. 2 of the plaint schedule and plaintiff having agreed to the said proposal signed in some blank papers. The said defendant No. 2 being a clever person and with the aid and advice of the scribe and attesting witnesses got the partition deed executed on 5-5-1973 and the same was registered on the same day on the pretext that the partition is in respect of the properties described in lot No. 1 and lot No. 2 of the plaint schedule. The plaintiff being illiterate and the document in question not having been read over and explained to him, the plaintiff executed the same having implicit faith in the defendants. Later on, he came to know that in the said deed, the self-acquired properties of the plaintiff described fully in lot No. 3 of the plaint schedule have also been included and the said deed is thus bad in law being the outcome of fraud played upon the plaintiff by the defendants. On these pleadings, the present suit was filed by the plaintiff.

3. The defendants filed a joint written statement. It was alleged in the written statement that the joint family had substantial property yielding some surplus after meeting the joint family expenses and after the death of their father plaintiff being the eldest son became manager of the family and continued to manage the family affairs. The second defendant left for Calcutta and started milk business which was yielding sufficient income. He was remitting money regularly from the so-called milk business to the plaintiff. When he used to come home, the plaintiff as

well as the other brother were going to Calcutta to manage the milk business of defendant No. 2. With the money that was being sent by defendant No. 2, plaintiff had made all the acquisitions and thus the properties described in lot Nos. 2 and 3 are the joint family properties and were also being cultivated jointly and the income thereof being enjoyed jointly by all members of the family. The plaintiff was incharge of the entire joint family assets. Some dissension having arisen between the brothers, it was decided that the properties would be partitioned and at the intervention of some well-wishers all the joint family properties were partitioned amongst the four brothers. After it was worked out, plaintiff took all his brothers to the scribe who was known to him and got the partition deed drawn with the assistance of his friends and witnesses. Therefore, there was no question of fraud being practised by the defendants as alleged in the plaint. The plaintiff and the scribe also told the defendants that to avoid payment of more stamp duty some of the properties need not be included in the deed of partition and this suggestion given by the plaintiff was accepted by all the brothers for which some of the joint family properties do not find place in the deed of partition, though all the brothers are enjoying their respective shares in all the joint family properties in accordance with the division made by the well-wishers. After the partition deed, the defendants came to know that plaintiff had secreted some of the family funds from which the defendants demanded a share and on this score, there were some disputes and quarrels and at the instance of the sons of the plaintiff, this suit was filed to harass the defendants. The defendants specifically asserted that the properties described in lot No. 3 of the plaint schedule were the acquisitions from out of the joint funds or alternatively the said properties had been blended with the joint family funds thereby acquiring the status of joint family property. They have further stated that they have no objection even to a fresh partition of all the properties described in lot Nos, 1, 2 and 3 of the plaint schedule and allotment of one-fourth share to each of the brothers.

4. On these pleadings, the trial court framed as many as eight issues and on consideration of the evidence on record, came to the following conclusions : --

(a) The ancestral lands being only 1.85 acres, there was no nucleus with the family for making subsequent acquisitions;

- (b) The plaintiff was the karta of the family and was managing the family affairs;
- (c) Plaintiffs case that each brother had been making some earning of his own and that all the brothers while pulling together resources were making joint acquisitions and that while they were not contributing, he was making his own acquisitions in his own name had to be accepted as true though there is no source of independent corroboration;
- (d) The conduct in keeping a difference in the mode of acquisition would lead to an inference that the plaintiff from the start desired to keep apart his acquisitions from that of his brothers;
- (e) The properties described in lot No. 3 of the plaint schedule excepting the one acquired under Ext. Q are the exclusive property of the plaintiff from out of his own earnings;
- (f) The partition deed (Ext. A) is void, on account of fraud played by the defendants in including the self-acquired properties of the plaintiff in the deed of partition;
- (g) There has been no blending of the self-acquired properties of the plaintiff. On these findings, the suit was decreed and it was further declared that excepting Ext. Q, all other properties in lot No. 3 are the self-acquired properties of the plaintiff. Hence the present appeal by the defendants.

There has also been a cross-appeal by the plaintiff against the finding of the trial court in respect of the properties covered under Ext. Q.

5.. Mr. Mohanty, the learned counsel for the appellants submits that on the evidence on record, it must be held that the properties described in lot No. 3 of the plaint schedule are the joint family properties. The only allegation of fraud in the plaint being the inclusion of properties under lot No. 3 of the plaint schedule claimed by the plaintiff to be his self-acquired properties, if the Court comes to the conclusion that those properties are joint family properties, then the basis of fraud is wiped out. He further submits that the evidence discloses that the document of partition was fully read over and explained and the plaintiff executed the same after fully understanding the contents thereof and hence the allegation of fraud is a

myth. On behalf of the respondents, the learned counsel contends that the evidence on record fully justifies the conclusion of the learned Subordinate Judge that fraud has been practised by the defendants in partitioning the self-acquired properties of the plaintiff, taking advantage of the illiteracy of the plaintiff and the confidence which the plaintiff reposed on the defendants and in that view of the matter, the appeal is bound to fail.

6. From the rival contentions in this Court as well as from the pleadings of the parties, the most important question which requires adjudication is whether the properties included in lot No. 3 of the plaint schedule are the joint family properties or the self-acquired properties of the plaintiff alone. Lot No. 3 of the plaint schedule contains 7.592 acres of properties purchased in the name of the plaintiff under nine sale deeds exhibited as Exts. E, F, H, K, L, M, N, P & Q. Exts. E and F are of the year 1964, Ext. H is of the year 1953, Ext. K is of the year 1958, Exts. L, M and N are of the year 1963, Ext. P. is of the year 1965 and Ext. Q is of the year 1969. This property under Ext. Q has been held to be joint family property which is the subject-matter of the cross-appeal filed by the plaintiff.

7. It may be stated that the admitted case of both parties is that the joint family had 1.85 acres of ancestral property described in lot No. 1 and they had acquired jointly 7.925 acres described in lot No. 2 of the plaint schedule. These lot No. 2 properties were acquired under three sale deeds in the names of all the brothers as per Exts. C, G and J in 1947, 1949 and 1953 respectively. Thus, by the time the properties under Exts. H, K, C M, N, P and Q were purchased the joint family had about 9.775 acres as described in lot Nos. 1 and 2 of the plaint schedule. It is also not disputed by the parties that the joint family continued at least till about 1969 during which period the properties described in lot No. 3 of the plaint schedule had been acquired. When defendants are claiming the properties standing in the name of the plaintiff to be the joint family properties, it is for them to prove that the family was possessed of some property with the income of which the property could have been acquired or from which a presumption can be drawn that all the properties possessed by the family are joint family properties and in that event the burden would shift to the plaintiff to establish affirmatively that the property was acquired without the aid of the joint family. We shall now examine the evidence on record

from the aforesaid standpoint.

8. From the pleadings of the parties, it appears that the so-called milk business at Calcutta is claimed to be the independent business of the plaintiff, whereas the defendants claim that it is a joint family business which was started by defendant No. 2 being assisted by all members of the joint family. A finding on this question is absolutely necessary, since the liquid cash for acquisition of properties appears to have been derived from the milk business at Calcutta. According to the case in the plaint, the plaintiff had started the said business and it was his own business, but when he used to come to his village, defendant No. 2 was managing the business by remaining at Calcutta, whereas according to the defendants, the business was started by defendant No. 2 and defendant No. 2 was sending money to the plaintiff who was the manager of the family staying in village and when occasionally he used to come to village, the plaintiff was going to Calcutta and sometimes his other brothers were going to Calcutta to look after the business.

P.W.1 who claims to be a close neighbour of the parties though in his evidence-in-chief states that plaintiff acquired 6 to 7 acres of cultivable lands from out of his earnings at Calcutta, in cross-examination he candidly admits that Mahani (defendant No. 2) used to do milk business at Calcutta and he used to send money from Calcutta to the plaintiff and plaintiff used to make purchases in consultation with all his brothers. The brothers were maintaining good terms till the time of partition. He further admits that while the parties were remaining joint, the panchayat for the two Khanjas of house was being assessed only in the name of the plaintiff. Mahani is defendant No. 2 and, therefore, this witness on behalf of the plaintiff admits that the milk business at Calcutta was the business of defendant No. 2.

P.W.2 is a Secretary of the Co-operative Society and also claims to be a close neighbour of the parties. In his cross-examination, it has been brought out : --

'.... Plaintiff was remaining engaged in cultivation..... Mahani remained at Calcutta though he comes to village. He sells milk at Calcutta..... The plaintiff was the Karta of their family and till four years back his relationship with his brothers was good.'

In paragraph 13 of his evidence he further states : --

'While they were in the process of making acquisitions, the four brothers had no source of income other than from milk business and their ancestral lands.'

Thus, even this witness has been forced to admit that it is defendant No. 2 who was doing milk business at Calcutta and plaintiff as Karta of the family was managing the family affairs.

Defendant No. 2 is D.W.5. He has categorically stated in his evidence that the plaintiff was in charge of cultivation and was cultivating all the lands. The produce was being stored at a place and after meeting the family expenses the surplus was remaining with the (Sic) for Calcutta to start the milk business and the business was yielding good profit and when he was coming home once in two to three years, plaintiff was remaining in temporary charge of the said business and when he returns back to Calcutta, plaintiff used to come back to village to take charge of the management of the family.

In view of the aforesaid evidence on record, the conclusion is irresistible that the milk business at Calcutta was being run by defendant No. 2 who used to send money from out of the profits to the plaintiff who as manager of the family was managing the family affairs in the village. We also find from the records that the joint family had 9.775 acres of land. There is also sufficient evidence on record, oral and documentary, which proves that defendant No. 2 had been remitting money to the plaintiff on several occasions. In this view of the matter, we are of the opinion that the defendants have been able to establish that the joint family had sufficient nucleus both in the shape of landed properties as well as cash being sent from the business at Calcutta to have surplus for acquisition of properties described in lot No. 3 of the plaint schedule. We also come to the further conclusion that plaintiff's evidence regarding his independent source of income for the purpose of acquisitions described in lot No. 3 of the plaint schedule is practically nil and in that view of the matter, in disagreement with the learned Subordinate Judge, we hold that the properties described in lot No. 3 of the plaint schedule are the joint family properties and not the self-acquired properties as claimed by the plaintiff. In view of our aforesaid conclusion, the basis of fraud as

alleged in the plaint completely vanished since the only allegation of fraud in the plaint was that the self-acquired properties described in lot No. 3 were included in the deed of partition. Necessarily, therefore, the allegation of fraud so far as the execution of deed of partition is concerned fails.

9. The above conclusion is sufficient for disposal of this appeal, but all the same, we would also examine the evidence in relation to execution of the document, the deed of partition. The scribe has been examined as D.W.1, who stated that the document was scribed to the instruction of the executants and Padmacharan Das (the plaintiff) gave him the papers and necessary instructions in presence of the other signatories to the document. After scribing the deed he had read over and explained its contents to all the executants and understanding the contents thereof they had all executed in his presence. D.W.5 who is defendant No. 2 fully corroborates the aforesaid statement of the scribe. The document (Ext.A) contains the certificate of the registering officer to the effect that the execution was admitted by Padmacharan, Madan Charan, Mahani Charan and Muralidhar.

The learned counsel for the plaintiff-respondent contends that plaintiff being an illiterate person is entitled to full protection and it must be fully established that the document in question was read over and explained and he appended his signature after knowing the contents thereof. No doubt, the plaintiff has given his thumb impression on the document and, therefore, can be considered to be an illiterate person. But in his evidence in cross-examination he has admitted that he has made purchases on several occasions and he was personally attending to the registration of all documents. He further stated that they used to go to the scribe and on getting the document scribed and read out thereafter put the same for registration after completing execution and attestation. The registering officer used to put questions in the nature of document and payment of consideration at the time of registration and he was himself looking after the registration of his documents without taking assistance of others. This shows that he was fully conversant with all the procedure and formalities of registration of documents and it is hard to believe that he would put his thumb impression on a document not knowing the contents thereof. In the premises, the evidence of the scribe to the effect that the document was scribed to the instruction of the plaintiff and all his

brothers and all of them signed after knowing fully the contents thereof must be accepted. Consequently, in our opinion, plaintiff has failed to establish his case that he executed the document without knowing the contents thereof. In the result, therefore, all the allegations of fraud fail and the plaintiff's suit must, therefore, be dismissed and this first appeal is allowed. So far as the cross-appeal is concerned, in respect of the properties covered under Ext. Q, in view of our earlier conclusions, the same fails and is hereby dismissed.

10. In the ultimate result, therefore, the judgment and decree of the Subordinate Judge are set aside, the plaintiffs suit is dismissed, the first appeal is allowed and the cross-appeal is dismissed, but in the facts and circumstances of the case, parties are directed to bear their respective costs of this appeal.

P.C. Misra, J.

11. I agree.

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