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Jayadev Tripathy @ Panda Vs. Dilip Kumar Panda and ors.

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Court : Orissa

Decided On : Jun-18-2004

Reported in : AIR2004Ori194; 98(2004)CLT295

Judge : P.K. Tripathy, J.

Acts : Civil Procedrue Code , 1908 - Sections 100 - Order 41, Rule 27

Appeal No. : Second Appeal No. 112 of 1985 and Misc. Case Nos. 47 of 1994 and 217 of 2000

Appellant : Jayadev Tripathy @ Panda

Respondent : Dilip Kumar Panda and ors.

Advocate for Def. : S.R. Patnaik, D.R. Mohapatra, B. Brahmananda, P.K. Rout, Pitambar Behera, N.C. Pati, P. Patnaik and D. Pradhan for Respondent No. 1

Advocate for Pet/Ap. : S.P. Mishra, S. Latif and J.K. Mohapatra

Disposition : Appeal dismissed

Judgement :

P.K. Tripathy, J.

1. Defendant No. 1 of Title Suit No. 48 of 1997 of the Court of Second Additional Subordinate Judge, Cuttack has preferred this appeal under Section 100 of the

Code of Civil Procedure, 1908 (in short, 'CPC') as against the reversing judgment passed by the Second Additional District Judge, Cuttack in Title Appeal No. 20/84/53 of 1981/1983/1984. Baikunthanath Panda was the original plaintiff. Dilip Kumar Panda was substituted in his place as his adopted son inasmuch as said Baikuntha died on 27.10.1980, i.e. after the trial Court passed judgment and decree on 30.9.1980. He became the appellant in the Court below and now he is the Respondent No. 1 and the other defendants are Respondent Nos. 2 to 7.

2. Plaintiff filed the suit with the prayer to declare the Gift Deed dated 18.12.1973 to be void, illegal and inoperative and to permanently restrain Defendant No. 1 to not to disturb the possession of the plaintiff in respect of the suit land described in Schedule 'B' of the plaint. Schedule 'A' is the family genealogy, which indicates that plaintiff and Banchhanidhi are the two sons of Mayadhar and in partition the suit land had fallen to the share of plaintiff's father. After death of Mayadhar, plaintiff and Banchhanidhi remained in joint family. In 1937 Banchhanidhi died and his widow Agani (Defendant No. 2) remained in jointness with the plaintiff. Defendant No. 1 (appellant) is the son of Prahallad Tripathy. Said Prahallad is the son-in-law of Defendant No. 2. Plaintiff was residing in Bangladesh and therefore, the joint family property was being looked after by said Prahallad. In the year 1973 said Prahallad, on the misrepresentation to get a power of attorney executed for looking after the settlement operation, obtained signature of the plaintiff and LTI of Defendant No. 2 and converted the said stamp paper as a deed of gift describing the Defendant No. 1 as the son of the original plaintiff, i.e. Baikuntha. ' In October, 1974 plaintiff returned from Bangladesh. The Rent Camp of the settlement operation was still going on. At that stage plaintiff could know, about the fraud and mischief of Defendant No. 1 and his father. Defendant No. 1 and his father promised to cancel the gift deed but did not fulfil the promise. On the other hand, on 1.2.1977 Defendant No. 1 wanted to take forcible possession of the suit land. Therefore plaintiff filed the aforesaid suit claiming the above noted reliefs.

3. Substance of the pleading of Defendant No. 1 is that Banchhanidhi died in the year 1941 and by then he was separate from the plaintiff. Defendant No. 1 is the adopted son of plaintiff, because he was taken on adoption on the 'Akshya Trutiya' day in the year 1961. Plaintiff was never staying at Bangladesh and therefore,

assertion of returning to India in 1974 is not true. The gift deed was voluntarily executed, which was registered on 18.12.1973 and in that respect neither there was any fraud, manipulation nor connivance, be it between the Defendant No. 1 and his father or with the Defendant No. 2. The record of right was prepared in the name of Defendant No. 1 on the basis of the said gift deed in spite of objection raised. Plaintiff having been influenced by the eldest daughter of Defendant No. 2 and the husband of 3rd daughter of the said Defendant and some of his agnetics, has filed the suit with false assertions.

4. Defendant Nos. 3 to 7, some of whom purchased part of the suit land from Defendant No. 1, were impleaded as parties to the suit. Defendant Nos. 4 to 6 filed a joint written statement supporting to the claim of Defendant No. 1, but they did not contest the suit at the stage of hearing and therefore they were set ex parte. Defendant No. 2 filed a separate written statement stating that her husband died in the year 1933 when living in the joint family with the plaintiff. She has admitted to the other facts stated in the plaint. However, she stated that Lot Nos. 3, 4 and 5 of the Schedule 'B' properties are not ancestral properties of the plaintiff.

5. On the basis of the above pleadings, trial Court framed as many as eight issues in the following manner :

ISSUES

1. Is the suit maintainable ?
2. Has the plaintiff any cause of action to file the suit ?
3. Is the suit barred by limitation ?
4. Is the suit bad for misjoinder of parties ?
5. Is the alleged gift deed dated 18.12.73 genuine and whether it has been acted upon ?
6. Whether defendant No. 1 is the adopted son of the plaintiff ?

7. Whether the transfer effected by defendant No. 1 in favour of defendant Nos. 5 and 6 is genuine and legal ?

8. To what other relief or relieves the plaintiffs are entitled to ?

6. Both the parties adduced oral and documentary evidence in support of their respective claims. Ext. 1 is the passport of the plaintiff and Ext. B is the impugned gift deed dated 18.12.1973. Defendant No. 2 was examined as D. W. No. 1 for the said defendant. Defendant No. 1 adduced his evidence as D.W. No. 2. His father was examined as D.W. No. 4 and one of the attesting witnesses was examined as D.W. No. 3.

7. On assessment of evidence on record, Trial Court recorded the findings that Defendant No. 1 is not the adopted son of the original plaintiff. The gift deed dated 18.12.1973 is not genuine and it was not acted upon in as much as possession of the gifted property has remained with the plaintiff and defendant No. 2. Though the plaintiff and defendant No. 2 knowingly executed the gift deed on 18.12.1973 but delivery of possession having not been made to defendant No. 1, the gift deed was not acted upon and therefore title did not pass to defendant No. 1 on the basis of that gift deed and under such circumstance the sale transactions entered into by defendant No. 1 with other defendants are not valid. However, he dismissed the suit on the ground that the suit is barred by law of limitation in as much as plaintiff failed to file the suit to set aside the gift deed within a period of three years from the date of its execution.

8. In the appeal before the lower Appellate Court, defendant No. 1 did not file any cross objection or any appeal challenging to the said findings which were adverse and against him in the above noted judgment of the trial Court. Learned Additional District Judge on reappreciation of the pleadings and evidence on record confirmed to the findings of the trial Court on the issue of adoption (Issue No. 6). As pointed out by that Court sole point which was raised in that forum was regarding no knowledge of the plaintiff and Defendant No. 2 about the execution of the gift-deed. On appreciation of the pleadings of the parties and the evidence on record, the lower appellate Court recorded the findings that plaintiff and Defendant No. 2 did not knowingly and consciously executed the gift deed and that

circumstance is clear from the evidence of P.W. No. 1 and D.W. No. 1 besides the evidence recorded in course of cross-examination. In that respect, learned Additional District Judge did not attach credibility to evidence of D.W. Nos. 3 and 4. After recording such finding, he also confirmed to the findings recorded by the trial Court that the gift deed was never acted upon in as much as possession of the gifted property was not delivered to defendant No. 1 and remained in possession of the plaintiff and Defendant No. 2. Accordingly, learned Additional District Judge believed the plea of fraud and mis-representation in obtaining the gift deed and therefore held the gift deed to be void. Accordingly he granted the decree in favour of the plaintiff.

9. At the stage of admission of the Second Appeal only ground No. 7 in the appeal memo was considered to be involving substantial question of law for consideration by this Court. In that ground No. 7 appellant has stated that the lower appellate Court neither set aside the finding on issue No. 3 recorded by the trial Court nor recorded a specific finding that the suit was within time for declaring the gift deed void and therefore the judgment of the lower appellate Court is illegal and bound to be set aside. At the stage of argument that point was canvassed by both the parties in support of their respective cases.

10. Before dealing with the aforesaid substantial question of law it is appropriate that the above noted two Misc. Cases filed under Order 41, Rule 27, CPC by the plaintiff-Respondent No. 1 and Defendant No. 1 (Appellant) should be disposed of in as much as according to the previous orders passed by this Court such applications were to be considered at the time of argument. During the course of argument both the parties pressed into service the aforesaid respective applications for additional evidence.

11. In Misc. Case No. 47 of 1994 plaintiff has filed the Record of Right prepared by the Consolidation Authority in April, 1988 with respect to the suit land and certified copy of the order dated 8.7.1993 in OEA Case No. 36 of 1993 of the Court of Tahasildar, Mahanga in which the Consolidation Authority have been directed to settle land of Holding No. 224 in favour of Respondent No. 1. He has also relied on the certified copy of the order passed on 4.9.1979 by the Assistant

Consolidation Officer, in objection Case No. 1582 under Section 9 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972. Appellant-Defendant No. 1 has filed no counter to that application. It is stated in his application by the Respondent No. 1 that Consolidation Proceeding was started after disposal of the appeal in the Court below and therefore such documents could not be filed earlier. He further argued that such documents are relevant for consideration relating to the right, title, interest and possession in support of the claim of the plaintiff and that may be accepted as additional evidence. Not only because the application was not opposed by the defendant No. 1/appellant but also because such documents vide additional evidence being found to be relevant to help the Court to decide the issue correctly, therefore, this Court finds it just and proper to admit such documents as additional evidence. Accordingly, the Khatian of holding Nos. 244 and 245 are marked as Exts. 5 and 6 respectively, order dated 4.9.1979 in Objection Case No. 1582 as Ext. 7 and the three rent receipts as Exts. 8, 8/a and 8/b. Such documents are marked on behalf of the plaintiff without objection from the Defendant No. 1/the present appellant.

Accordingly, the said Misc. Case is allowed.

12. Misc. Case No. 217 of 2000 has been filed by Defendant No. 1/Appellant with the prayer to accept certain documents as additional evidence. The plaintiff/Respondent No. 1 has filed a counter affidavit opposing to the admission of such documents as additional evidence. Without going into the controversy in that respect, this Court finds that once the plaintiff/Respondent No. 1 has been allowed to adduce additional evidence, the principles of natural justice demands that Defendant No. 1/appellant, who is the contesting defendant should be provided with opportunity to adduce rebuttal evidence. Thus the documents filed by the appellant be admitted into evidence subject to relevancy and the evidentiary value thereof. For the said reason the said application is allowed and the following documents filed by the appellant are marked as Exhibits on behalf of the Defendant No. 1 in the manner indicated below.

Order dated 16.10.1974 in Rent Case No. 8441, Order dated 12.10.1974 in Rent Case No. 8451, Order dated 26.11.1974 in Rent Case No. 8438 and Order dated

29.7.1974 in Rent Case No. 8437 are marked as Exhibits F to F/3 respectively but with objection. Certified copy of the registered sale deed dated 10.3.1966 vide deed No. 1223 is marked as Ext. G with objection.

The Misc. case is allowed accordingly.

All the aforesaid documents which have been marked as exhibits with or without objections shall be considered subject to relevancy.

13. Before dealing with the merit of the appeal on the issue of limitation, it is worthy to mention here that defendant No. 2 is the Respondent No. 2 in this Second Appeal. On her death, as per Order No. 13 in Misc. Case No. 448 of 1987 application for substitution was allowed and her legal representatives were brought on record as respondents 2(a) to 2(c). As per Order No. 16 dated 11.5.1988, the appeal was dismissed as against respondent Nos. 2(a) and 2(c) for not complying with the peremptory order. Appellant filed Misc. Case No. 185 of 1997 to recall the order of dismissal of the appeal as against respondent Nos. 2(a) and 2(c). As per Order No. 65 passed on 3.2.1998 by a Bench of this Court that Misc. case was rejected and the order dismissing the appeal as against the Respondent Nos. 2(a) and 2(c) was upheld. At the time of hearing of the appeal on merit, Respondent No. 1, therefore, urged on maintainability of the appeal firstly on the decision of the Consolidation Court and secondly because of non-substitution of the legal representatives and dismissal of the appeal as against defendant No. 2. Such question of maintainability being also substantial question of law and pertaining to maintainability of this appeal is taken up for consideration.

14. Respondents 2(a) to 2(c) are the legal representatives of Respondent No. 2 i.e. the defendant No. 2. Claim of the plaintiff as noted earlier is regarding joint ownership of the property in Schedule 'B' by the plaintiff and defendant No. 2. Said defendant No. 2 also filed a written statement substantially accepting the position of ownership and possession of the suit property along with the plaintiff. Therefore, when the appeal has been dismissed as against the Respondents 2(a) and 2(c) and there is nothing on record to show or suggest that Respondent No. 2(b) represents their interest, therefore, if the appeal shall be decided on merit contrary to the decision of the Courts below, then that would lead to a conflicting judgment

so far as the said legal representatives are concerned. Under such circumstance, the appeal is liable to be dismissed. Though on the question of abatement but similar view has been taken by this Court in the case of Banamali Raiguru v. Bhabani Shankar Mishra and Ors., 76 (1993) CLT 4 and Bhikari Charan Ojha @ Karu Ojha and Ors. v. Ankura Ojha and Ors., 68 (1989) CLT 528. So far as the later decision is concerned, the ratio relating to substantial representation is not supported by any document in the present case except the fact that notice was served on Respondent No. 2(b).

For the aforesaid reason, the appeal is liable to be dismissed.

15. Because of the aforesaid findings, examinations of the contention relating to limitation and the other legal consequences being academic is not required to be further discussed for recording decision on such issues.

For the reasons indicated above, the Second Appeal is dismissed. Under the given circumstances, parties are directed to bear their respective costs of litigations in this forum. Hearing-fee is assessed at contested scale.

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