

Rajkishore Satpathy Vs. Harekrushna Satpathy and ors.

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Court : Orissa

Decided On : Aug-08-1995

Reported in : 1995(II)OLR332

Judge : P. Ray, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 and 103

Appeal No. : Second Appeal No. 206 of 1985

Appellant : Rajkishore Satpathy

Respondent : Harekrushna Satpathy and ors.

Advocate for Def. : Y.S.N. Murty and K.T. Rao

Advocate for Pet/Ap. : G. Rath, N.C. Panigrahi, B. Sahoo and A. Mukherjee

Disposition : Appeal allowed

Judgement :

P. Ray, J.

1. The present Second Appeal is at the instance of defendant No. 1-appellant against the judgment and decree of the reversal.

2. The plaintiffs being the heirs of one Somanath Satpathy instituted a suit for declaration of title in respect of eastern portion of Plot No. 483 and western portion of Plot No. 484 claiming to be in their possession for confirmation of possession of alternatively for recovery of possession in case they were found to be dispossessed and permanent injunction.

3. The case of the plaintiff is briefly stated hereinbelow :

The Plot Nos. 483 and 484 were the joint properties of Somanath Satpathy, D. Jena,. B. Jena, Rajib Jena, Daitari Mohapatra and Batakrishna Mohapatra and Somanath had 8 annas share in those properties. The said plots were amicably partitioned and Somanath got eastern 140 decimals of Plot No. 483 and western 100 decimals of Plot No. 484 in his allotment. The said 240 decimals comprised a compact area and Somanath was possessing the same along with the members of his family by separating it by raising fences. Since the death of Somanath the plaintiffs were in possession of the aforesaid allotted portion. On February 19,1986 the defendant No. 1 Rajkishore forcibly removed the eastern boundary wall of the said area and wanted to raise boundary wall along the middle portion of Plot No. 483. On enquiry the plaintiffs came to learn that Somanath during his life time purported to make a gift of 120 decimals out of the said lands in favour of defendant No. 2 by a registered deed of gift dated December 22. 1966 and the defendant No. 2 in turn executed a registered sale deed dated February 12, 1970 purporting to sell those gifted portion to defendant No. 1. The plaintiffs have claimed that there being no legal necessity for making such gift Somanath could not alienate the suit properties by way of gift. According to the plaintiffs, the defendant No. 2 did not derive any title by the said illegal deed of gift and accordingly he could not convey any title to defendant No. 1 by the sale deed dated February 12, 1970.

4. The defendant No. 1 contested the suit inter alia claiming that the suit properties were the separate and self-acquired properties of Somanath and he had right to alienate the suit lands. According to the defendant No. 1, suit lands were gifted to defendant No. 2 and possession of the same was handed over to defendant No. 2. Defendant No. 2 initially mortgaged the suit properties with the defendant No. 1

and when he found that it was not possible for him to redeem the mortgaged lands he sold away the same to the defendant No. 1 and delivered possession of the suit lands.

5. The defendants 2 and 3 filed a written statement supporting the case of the plaintiffs. According to them, the deed of gift though executed, was never acted upon and the possession of the suit lands was all along with Somanath and thereafter with the plaintiffs. The said defendants have also alleged that the sale deed in favour of defendant No. 1 was without any consideration. They have claimed that the defendant No. 1 told the defendant No. 2 that if the deed of sale was executed in his favour he would be able to take possession of the suit lands and after taking possession of the suit lands he would hand over possession to the defendant No. 2.

6. Defendant No. 2 deposed as witness No.1 for the plaintiffs. In his evidence also he has claimed that although Somanath executed the deed of gift in his favour it was never acted upon and the possession was all along with Somanath and members of his family. He has also asserted that he did not receive any consideration for the alleged sale in favour of the defendant No. 1.

7. The trial Court dismissed the suit inter alia, holding that the suit property was the self-acquired property of Somanath and that Somanath gifted away the suit property to defendant No. 2, who in turn first mortgaged the same and thereafter sold it to the defendant No. 1 by a registered deed of sale. The trial Court also found that the plaintiffs were not in possession of the suit land since the execution of the deed of gift.

8. Appeal preferred by the plaintiffs was allowed by the Court of appeal below. The Court below held that the suit property was the ancestral property of Somanath and he having no right to gift away the suit property, the gift was illegal and void. The Court of appeal below followed the doctrine of non-traverse in arriving at the finding that the suit property was ancestral property. According to the first appellate Court, defendant No. 1 in his written statement did not specifically deny the plaintiff's positive assertion in the plaint that the suit property was the ancestral property of Somanath.

9. It appears that both the Courts below failed to appreciate the case of the contending parties and misdirected themselves in the adjudicating process. It is not the case of the plaintiffs that the suit property originally belonged to a co-parcenary of which Somanath was a co-parcener. The suit property was recorded in the name of Somanath and some other persons who were admittedly not the coparceners of Somanath. They were not members of Somanath's family. Somanath acquired the suit properties along with those outsiders. It appears from the materials on record that Somanath and one Lingaraj were brothers and it is nobody's case that Lingaraj was ever a co-owner or co-parcener of plot Nos. 483 and 484. Defendant No. 2 is the son of Lingaraj and he has also not claimed that plot Nos. 483 and 434 belonged to the co-parcenary comprising Somanath, Lingaraj and their heirs or that Lingaraj or he ever had any share in the said plots. The plaintiffs have not claimed in the plaint that the suit properties were the ancestral properties' of Somanath and Lingaraj. Nobody has claimed that Birabar Satpathy, Gouranga Mohapatra (recorded co-owners of Plot No. 483), D. Jena, B. Jena, Rajib Jena, Daitari Mohapatra and Batakrushna Mohapatra (recorded co-owners of Plot No. 484) belonged to the family of Somanath or were Somanath's co-parceners. Plaintiffs have only claimed that the suit properties were the properties of joint family of the plaintiffs meaning Somanath and his heirs. There is also no material on record to show that the said two plots belonged to Somanath and his brother Lingaraj or any coparcener. Rather the record of rights and time statement of the witnesses of the plaintiffs clearly indicate that Somanath acquired those properties along with some other outsiders and upon amicable partition he got his half-share separated. The Courts below have misconstrued the plaint in thinking that the plaintiffs claimed the suit properties as the ancestral properties of Somanath Plaintiff. No. 1 deposed as witness No 2. In his evidence he has nowhere stated that Somanath had any co-parcener or the suit lands belonged to Somanath and any co-parcener. It appears that the plaintiffs have made a confusion between a co-sharer who is not a member of the family and a coparcener in Mitakshara law.

10. There being no claim or evidence that the plot Nos. 483 and 434 were the properties inherited by Somanath from his ancestors, lineal descendants of Somanath did not become co-parceners or did not take any vested interest in the

said properties during the life time of Somanath. Thus Somanath had right and authority to make a gift of a portion of such self-acquired properties.

11. Admittedly the deed of gift (Ext. E) was executed by Somanath in favour of defendant No. 2. Defendant No. 2 (PW 1) has stated in his evidence that the said deed of gift was not acted upon and the possession of the suit properties was not handed over to him. In view of the said claim of the defendant No. 2, it is necessary to determine whether the deed of gift was acted upon and whether defendant No. 2 derived any title to the suit properties by virtue of the said deed of gift (Ext. E) The Court of appeal below did not at all advert to the said question as it proceeded on the view that the suit properties were the ancestral properties and Somanath had no authority to make a gift of the said properties.

12. Mr. Mukherjee appearing for the appellant has advanced an argument that even if the deed of gift was assumed to be illegal or void on any ground whatsoever the plaintiffs being out of possession for more than 12 years prior to the institution of the suit, the same was not maintainable. In support of the said argument Mr. Mukherjee has referred to decisions reported in AIR 1981 Ori-93 (Angaru Bhojani and Ors. v. Kanhei Misra and Anr.) and AIR 1980 Patna 113 (Govind Yadav and Ors. v. Deoki and Ors.). In the decision reported in AIR 1981 Ori. 93 (supra) it was found that under an unregistered sale deed the possession was delivered and the plaintiffs therein were in possession of the suit land for more than 12 years on the strength of an unregistered sale deed. On the basis of the said finding about possession, this Court held that such possession on the strength of an unregistered sale deed amounted in law to adverse possession and the plaintiffs therein protected their title by such adverse possession.

13. To meet the said contention of Mr. Mukherjee, Mr. M. Mishra, learned Advocate for the plaintiff-respondents has argued that the defendants never pleaded acquisition of title by adverse possession and they cannot be permitted to raise the question of adverse possession for the first time in second appeal. Mr. Mishra referred to the decision reported in AIR 1978 Ori. 172 (Ramachandra Das v. Hiralal Modi) to contend that a party should not be allowed to lead evidence in absence of pleading. Mr. Mukherjee, however, has relied upon the decision of the

Patna High Court in Govind Yadav's case (supra) to point out that the plea of title by adverse possession need not always be specifically pleaded and a question of law based upon facts either admitted or proved can be raised for the first time even in a Court of last resort. He further submits that in the present case the plea of adverse possession can be entertained on the basis of plaintiffs' own case that the deed of gift was void on the trial Court's finding regarding possession.

14. In the present case the trial Court held that since the time of deed of gift dated December 13, 1966, the plaintiffs were not possessing the suit properties. The Court of appeal below, however, did not consider the question of possession and/or validity of the said finding regarding possession. In the present case the possession and the nature thereof has an important bearing on the issues involved. The first appellants has also not considered whether the deed of gift was acted upon or not.

15. As already pointed out the Courts below particularly the first appellate Court failed to appreciate the points for determination in the case and did not advert to the material aspects. The approach itself was vitiated due to such misappreciation. First appellate Court is the final Court of fact and it failed in its duty to consider and decide the material questions of fact involved in the present case.

16. In the facts and circumstances of this case. I feel that the first appellate Court should be directed to rehear the appeal and make determination whether the deed of gift executed by Somanath was acted upon or not, whether Birabar derived title to the suit property by virtue of the said deed of gift and whether the materials on record support the alternative plea of acquisition of title by adverse possession raised on behalf of the defendant No. 1. The first appellate Court will also determine the question of possession and the nature thereof on the basis of the materials already on record.

17. The appeal is allowed. The judgment and decree of the Court of appeal below are set aside. The case is sent back to the first appellate Court for a fresh decision in the light of the observations made in this judgment. The suit being a very old one, the first appellate Court is directed to dispose of the appeal within a period of three months from the date of the arrival of the records. Let the records be sent

down immediately.

No order as to costs.

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