

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.259 of 1998

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 30.06.1998 and 14.07.1998 respectively passed by the learned Additional District Judge, Bhubaneswar in Title Appeal No.47 of 1994 confirming the judgment and decree dated 18.08.1994 and 02.09.1994 respectively passed by the learned Civil Judge, Junior Division, Bhubaneswar in Title Suit No.51 of 1990.

Prafulla Bhoi & Another

....

Appellants

-versus-

***Dhadu Bhoi (Since Deleted) &
Others***

....

Respondents

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellants - Mr.S.P. Das
(Advocate)

For Respondents - Mr.D.P.Mohanty
(Advocate)

**CORAM:
MR. JUSTICE D.DASH**

Date of Hearing : 23.08.2022 : Date of Judgment:26.09.2022

D.Dash,J. The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 30.06.1998 and 14.07.1998 respectively passed by the learned Additional District Judge, Bhubaneswar in Title Appeal No.47 of 1994.

By the same, the Appeal filed by one Ainthi Dei and the Appellants 2 and 3 as the aggrieved Defendants before the Trial Court under section 96 of the Code has been dismissed.

Be it stated here that said Ainthi Dei, having died during pendency of the First Appeal, her legal representatives had joined these Appellant Nos.2 and 3 in that Appeal. During pendency of this Appeal, the Appellant No.2, having died, his legal representative has come on record. Similarly, Respondent No.1, being dead, his name has been expunged as dead in presence of his legal representative, i.e., Respondent No.2.

The Respondents, having filed the suit, i.e., T.S. No51 of 1990 in the Court of the learned Civil Judge, Junior Division, Bhubaneswar, the same had been decreed by the following order:-

“The suit is decreed on contest against the defendants with cost. The defendants are hereby permanently restrained from interfering in the peaceful possession of the plaintiffs over the Schedule-A property and they are further directed to give vacant delivery possession of ‘B’ schedule property within three months hence failing which they are liable to be evicted through the process of court.”

The above order has received confirmation in the First Appellate Court.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The Plaintiffs’ case is that the land in Schedule-A of the plaint was belonging to Arjun Das. He had two daughters, namely, Budhi and Ainthi. One Jogi Bhoi had two sons, namely, Kartika and Shyama. Budhi married Shyama, the daughter of Arjuna. The Plaintiffs are the sons and daughters of said Kartika. Budhi died on 15.03.1990. Shyama is said to have died in or around 1988. It is stated that Arjuna, in order to meet his legal necessity, had sold the suit land way back on 19.08.1960.

Pursuant to the same, he had delivered possession of the said property to Shyama, who continued to possess the same. The land in question has been recorded in his name in the record of right published in the Consolidation Operation. The Defendant No.1, who is the sister of Budhi and her husband (Defendant No.2) at times were coming to their house at Sisupal and they used to stay for certain time in the homestead better described in Schedule-B of the plaint. The Plaintiffs, after the death of Budhi, became the owners of the suit land. The Defendants then attempted to possess the entire suit land described in Schedule-A of the plaint and declined to vacate the land described in Schedule-B of the plaint, which was in their possession. Therefore, the Plaintiffs filed the suit for eviction of Defendants from Schedule-B land seeking permanent injunction in restraining them from interfering with their possession over Schedule-A land.

4. The Defendants 1 and 2, while traversing the plaint averments, have denied that the Plaintiffs' right, title, interest and possession over the suit land. They plead that the suit land belonged to Arjun, who after giving his daughter in marriage with Shyama, continued to live in the ancestral house and possessed the same, i.e., Schedule-A land. Arjuna also gave his second daughter Ainthi in marriage with Defendant No.2 and brought them to his house and keep the Defendant No.2 as his illatom son-in-law. The Defendants and Arjuna continued to possess Schedule-B land till the death of Arjuna in the year 1974. Thereafter, the Defendants 1 and 2 possessed the suit land. The sale deed dated 19.08.1960 executed by Arjuna in favour of Shyama is attacked as a sham document and to have never been acted upon. It is stated that Shyama had never acquired right, title and interest in respect of the suit land by virtue of the said registered sale deed. These Defendants have

denied the right, title, interest and possession of the Plaintiffs over the suit land.

5. The Defendant No.2, in his written statement, claimed himself to be the adopted son of Shyam and as such, asserted his entitlement to inherit the properties.

6. The Trial Court, on the above rival pleadings, settled six issues. Proceeding to answer the first issue with regard to the validity of the sale deed and its effect; upon examination of the evidence and their evaluation, the Trial Court's answer has been in favour of the Plaintiffs. In that, it has also been said that the Defendants have failed to establish the fact that Defendant No.2 was kept by Arjuna as his illatom son-in-law. Then the Trial Court has also said that they have not perfected title over the suit land by way of adverse possession. The Trial Court has also rejected the claim of Defendant No.3 as the adopted son of Shyama. The Plaintiffs are thus being found to be the rightful owners, the suit has been decreed as per the order, as indicated above.

7. The Defendants, being aggrieved by the said judgment and decree passed by the Trial Court, having carried the First Appeal, have failed in that move.

8. The present Appeal has been admitted to answer the substantial questions of law as mentioned in Ground Nos.4 and 5 of the Memorandum of Appeal. Those are the following:-

“i. Is the suit for injunction only maintainable without a prayer for declaration of title which is disputed?; and

ii. Has the Court below acted contrary to law in relying on inadmissible evidence, i.e., Ext.1 and drawing inference of

passing of consideration under the said Ext.1 in the absence of any independent evidence?”

9. Learned counsel for the Appellants submitted that the Courts below have erred in law in placing reliance upon Ext.1, which is the registered sale deed dated 19.08.1960 and then by saying that the same being taken into account with (Ext.2), the Consolidation Record of right, have fallen in error in ruling upon the right, title and interest in respect of the suit land in favour of the Plaintiffs. He further submitted that the Courts below, on the available evidence, should have held the sale transaction reflected in Ext.1 to be a sham one when due execution of the same, receipt of consideration for the purpose have not been proved and so also it has not been established through evidence that the same has been acted upon. He further submitted that the suit for permanent injunction being not maintainable, the Courts below ought not to have decreed the suit.

10. Learned counsel for the Respondents submitted all in favour of the findings returned by the Courts below. Inviting the attention of the Court to the prayers, as advanced in the plaint, he submitted that in a suit for possession and injunction, the Plaintiffs having asserted their right, title and interest over the suit properties, which has been denied by the Defendants, the Courts below are right in passing the decrees in granting the relief of recovery of possession and injunction even in the absence of any prayer for declaration of title, which was not the legal requirement for maintaining the suit. He submitted that the present suit is not one for permanent injunction simpliciter. He also submitted that in view of the evidence on record, the Courts below have rightly found Ext.1 to be a valid sale deed. He submitted that keeping in view the age of the document, the presumption, as available under section 90 of the

Evidence Act being rightly drawn as all the parameters stand fulfilled have correctly held that thereby the right, title and interest over the suit property, has come to the hands of the Plaintiffs.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement. The evidence both oral and documentary have also been perused.

12. The prayers advanced in the suit are two folds. First one is that the Defendants be evicted from the land in Schedule-B and possession of the same be delivered to the Plaintiffs. The second prayer is for issuance of permanent injunction restraining the Defendants from creating any disturbance with the Plaintiffs possession over Schedule-A property. The land described in Schedule-A includes the property described in Schedule-B, which is the house and homestead. Admittedly, the said property belonged to Arjuna, who died in the year 1974 leaving behind his two daughters, namely, Budhi, the wife of Shyama and Ainthi. The Defendant No.2 is the husband of Defendant No.1 (Ainthi). Shyama and Kartika are two brothers being the sons of Jogi Bhoi. Plaintiff Nos.1 and 2 are the son and daughter of Kartika. It is not in dispute that Shyama died sometime in the 1987-88 and his wife Budhi died thereafter on 19.08.1986, which is four years prior to the institution of the suit. They had no issue.

The Plaintiffs' entire claim over the property in Schedule-A of which Schedule-B is a part is based on the registered sale deed (Ext.1). This sale transaction is attacked by the Defendants as a sham one. In the present case, when the Plaintiffs have claimed ownership and as such the right to possess of the property in Schedule-B stating that the same is

in unauthorized possession of the Defendants of which they had to be put back in possession, fact stands that said Schedule-B land is a part of Schedule-A land and these Defendants say that the house is standing over Schedule-A land including Schedule-B land which are the original ancestral homestead and house of Arjuna in which they were residing with Arjuna till his death and thereafter. In view of the above state of affairs in the pleadings, the suit cannot fail for non-advancement of the prayer by the Plaintiffs seeking declaration of their right, title and interest over Schedule-A land. The Courts below, therefore, have rightly proceeded to examine the evidence on record in the backdrop of the rival pleadings of the parties to rule upon the issue as to if the Plaintiffs are having the right, title and interest over Schedule-A property by virtue of Ext.1, the registered sale deed dated 19.08.1960.

13. The sale deed dated 19.08.1960 having been admitted in evidence and marked Ext.1 without objection, the challenge to the same by the Defendants is that it is a sham document and had never been acted upon. In otherwords, they say that it has simply been executed for name's sake and the transferor continued to be the real owner as before notwithstanding the execution of the old document. It reveals that Arjuna, as the vendor, has sold the suit land to his son-in-law (Syama) on receipt of consideration of Rs.500/-. The said sale deed has never been challenged by Arjuna during his life time.

The provision of Section 90 of the Evidence Act makes it clear that the presumption would stand to be raised in such cases as to the signature, execution or attestation of a document but would not extend in presuming that the contents of the document. The Defendants having come with the allegation that such registered sale deed is a sham document and had never been acted upon, the burden of proof lies upon

them. It is true that the Plaintiffs has proved that Ext.1 by calling it from the Defendants. The First Appellate Court, as regards such custody, has made a detail discussion of evidence and found that it is natural that the original sale deed would be there in the house of Arjuna where Arjuna, his daughter Budhi and son-in-law Shyama were living together and, therefore, it is not unusual to go to the custody of the Defendants, being the casual visitors, occupying the house after the death of Shyama and Budhi.

In such state of affairs in the evidence, the First Appellate Court is found to have rightly said that it cannot be said that Ext.1 was not produced from proper custody.

Keeping in view the evidence on record and the presumption, as available to the said document as aforesaid, the conclusions arrived at by the First Appellate Court that the Plaintiffs have proved their right, title and interest over the suit property by virtue of Ext.1 and that it has been acted upon, are found to be well in order.

The Courts below have also taken note of the Consolidation Record of Right (Ext.2) and other evidence available on record in support of the said findings wherein no such infirmity is noticed. In view of above, this Court finds that said concurrent findings do not suffer from the vice of perversity. The substantial questions of law being accordingly answered; this Appeal does not merit acceptance.

14. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

**(D. Dash),
Judge.**

Basu