

ORISSA HIGH COURT: CUTTACK

SECOND APPEAL NO.211 OF 1999

From the judgment and decree dated 8.3.1999 and 22.3.1999 respectively passed by Shri P.K. De, District Judge, Kalahandi-Nuapada at Bhawanipatna in Title Appeal No.28 of 1995 confirming the judgment and decree dated 5.4.1995 and 18.4.1995 respectively passed by Sri S.K. Rajguru, Civil Judge (Senior Division), Bhawanipatna in Title Suit No.88 of 1989.

Apili Padhi Appellant

V e r s u s

Durga Prasad Padhi and another Respondents

For Appellant : M/s. S. Misra (2), S. Mantry,
A.K. Mishra & A.K. Sharma

For Respondents : M/s. M.R. Mohapatra, P.K. Pati
& P.K. Mohanty

P R E S E N T :

THE HONOURABLE MR. JUSTICE RAGHUBIR DASH

Date of hearing : 04.04.2014

Date of judgment : 25.04.2014

R. DASH, J. Being aggrieved by the judgment and decree dated 8.3.1999 and 22.3.1999 passed in Title Appeal No.28 of 1995 by the learned District Judge, Kalahandi-Nuapada at Bhawanipatna confirming the judgment and decree dated 5.4.1995 and 18.4.1995, respectively, passed by the learned Civil Judge (Senior Division), Bhawanipatna in Title Suit No.88 of 1989, the Plaintiff before the learned trial court has preferred this Second Appeal.

2. The appellant as plaintiff filed the suit against her sister (D.1) and husband of her sister (D.2) for a declaration that the registered sale deed Nos.470 and 471 dated 12.4.1976 in respect of the plaint scheduled 'A' and 'B' properties, respectively, executed by the mother of the Plaintiff and D.1 as void and for partition of the suit properties between the plaintiff and her sister in two equal shares. During pendency of the suit, plaintiff's sister (D.1) died. Therefore, the deceased's son was substituted and arrayed as D.1 (a).

3. In the Second Appeal D.1 (a) is arrayed as respondent No.1 and D.2 as respondent No.2. During pendency of the Second Appeal, R.2 has died leaving behind R.1 as his sole legal representative.

4. The plaint story is that late Somanath Panda, father of the Plaintiff and D.1, had his ancestral properties in the District of Ganjam. He died in 1957 leaving behind his widow and the two daughters. After their marriage, both the daughters with their husbands had shifted to Bhawanipatna. On their request their mother, Sita Devi, disposed of all the ancestral properties of Somnath Panda and came to Bhawanipatna where she purchased Ac.02.08 decimals land situate in village Paramanandapur in Kalahandi District out of the sale proceeds of the ancestral property, vide Registered Sale Deed No.2499 of 1968. Later on, in 1974 she also purchased a house with house-site located in Bhawanipatna in the

district of Kalahandi vide Registered sale deed No.1236. Due to her chronic illness since 1975 the mother was mentally not sound. Taking advantage thereof, in 1976 plaintiff's sister's husband (D-2) managed to obtain the two impugned sale deeds from Sita Devi in respect of the entire of the immovable properties she had purchased in Kalahandi district. The deeds were obtained by fraud and undue influence. There was no passing of consideration, nor was there delivery of possession. The plaintiff and her sister continued to be in joint possession of the property. After death of the mother, the defendants threatened the plaintiff to leave the said properties claiming to have acquired title by way of the sale deeds obtained from the mother. But the properties having been purchased from out of the sale proceeds of their ancestral properties the plaintiff and D-1 both have equal share in the suit properties. Hence, the suit for partition as well as declaration of the two registered sale deeds as void.

5. The defendants in their written statement have taken the stand that late Somanath Panda had no ancestral property in the district of Ganjam but his self-acquired property was there. After his death, his widow remained in possession and enjoyment of the property. In 1957 she executed two deeds relinquishing her interest in her husband's property. Thereafter, she divided the property in equal shares between her two daughters. The plaintiff sold away the land allotted to her share. The other half was sold by Sita Devi to

repay outstanding loans. When Sita Devi migrated to Kalahandi district she purchased some landed properties in Kalahandi district from out of the sale proceeds of her gold ornaments. Therefore, the property acquired by her in Kalahandi district is her self-acquired property. She was never mentally unsound, though she was a chronic patient under regular treatment. For her legal necessity she had executed the impugned sale deeds in favour of D.2, her son-in-law, and it was with the knowledge of the plaintiff.

6. Both sides adduced oral as well as documentary evidence. Considering the evidence, the learned trial court concluded that the Plaintiff had failed to prove that late Somanath Panda had any ancestral property in Ganjam district and that the suit properties were acquired from the sale proceeds of such ancestral property. Observing that the suit properties were the self-acquired properties of Sita Devi and that she duly executed the impugned sale deeds, learned trial court dismissed the suit. Concurring with the findings of the learned trial court the lower Appellate Court dismissed the first appeal.

7. While admitting the Second Appeal the following questions have been framed as substantial questions of law involved in the Appeal:-

- (1) Whether the special burden u/s. 101 to 103 of the Evidence Act has been discharged by non-examination of

the scribe of the document in support of the certificates given in the sale deeds of the even date.

(2) Whether the authority relied on by the courts below support the plaintiff's case and the sale deeds are liable to be ignored as the special burden has not at all been discharged by Defendant No.2 according to the leading decision reported in Kharbuja Kuer's case, reported in AIR 1963 SC 1203 ?

(3) Whether the disposal of the entire property of plaintiff's mother on one date by two registered sale deeds i.e. one for the homestead and other for the agricultural land in favour of the husband of the plaintiff's sister, is a circumstance against the valid execution of the sale deed by plaintiff's illiterate mother ?

(4) Whether the findings of the courts below that special burden is discharged by the Certificate endorsed by the Registering Officer on the sale deeds and whether the said finding is contrary to several decision of this court including 24 (1953) C.L.T. 157 ?

8. All the questions are on the discharge of burden of proving due execution of the impugned sale deeds. There is no dispute that Sita Devi who has executed the two sale deeds was an illiterate lady. Law is well settled that in the matter of execution of deeds of conveyance, the requirement of law in case of a pardanashin lady also extends to an illiterate lady. In **Narayan Mishra and others V. Champa Dibya (dead) and others; AIR 1986 Orissa 53** which is relied on in **Kuma Dei V. Md. Abdul Latif**, reported in **1993**

(II) OLR 568, it is held that in the case of execution of a deed by a pardanashin or illiterate lady, the burden of proof rests not with those who attack, but with those who rely on it. It is further held that execution of such a deed must be proved affirmatively and conclusively that it was not only executed by her but it was explained to and really understood by her. It is further held that ordinarily, the Courts insist on proof that the lady had independent legal advice although this may not be an absolute and invariable rule and there may be exceptions when the lady is shown to have business capacity and strength of will and the deed is shown to be not an unnatural disposition of her property. In **Smt. Kharbuja Kuer V. Jangbahadur Rai and others; AIR 1963 SC 1203**, their Lordships have observed that as regards documents taken from a pardanashin women the Court has to ascertain that the party executing them has been a free agent and duly informed of what she was about and it must be established that the deed was not signed under duress, but arose from the free and independent will of the lady. It is further observed that the principles of the fact that a document executed by a pardanashin lady has been explained to her is not the only mode of discharging the burden, but the fact whether she voluntarily executed the document or not could be ascertained from other evidence and circumstances in the case.

Keeping the aforestated guiding principles in mind, it is to be examined as to whether the deceased defendant No.2 in whose favour both the impugned sale deeds were executed by an illiterate lady was able to discharge the heavy burden to establish that the deeds were executed by her after its contents were read over and explained to her and she had really understood the same and she executed the deeds voluntarily free from duress or undue influence.

9. While dealing with Issue No.2 which covers due execution of the impugned deeds, both the Courts below have referred to the following facts and circumstances to come to a conclusion that due execution of the deeds has been proved:-

(i) Though it is pleaded in the plaint that since 1975 Sita Devi, on account of her chronic illness and old age, was not mentally sound but in her cross-examination the Plaintiff (P.W.1) has stated that about 2 to 3 months preceding her death the old lady had completely lost balance of mind and become bedridden. So, it gives rise to an inference that in the year 1976 when the impugned deeds were executed Sita Devi was quite conscious, able to move, and was in full possession of her mental faculty.

(ii) Sita Devi was admittedly sick. Recitals of one of the sale deeds (Ext.A) clearly reflect that she sold the land to meet the expenses of her prolonged treatment. In the other sale deed (Ext.B) there is recital about the legal necessity for selling those lands. D.W.I,

in whose favour the sale deeds have been executed, has stated in his deposition that Sita Devi sold the property to him as she required money for her treatment so also for repayment of loan. On the body of each of the sale deeds a Certificate has been given by the Registering Officer to the effect that the execution was admitted by Sita Devi.

(iii) D.W.2, one of the attesting witnesses, has stated in his deposition that the deed writer read over and explained the contents of the deeds and thereafter Sita Devi put L.T.I. and the attesting witnesses signed in the deeds. He also deposed to the effect that the consideration money was paid to Sita Devi in presence of the Sub-Registrar.

Save and except the aforestated materials, the learned Courts below have not dealt with any other facts and circumstances before arriving at the conclusion that there being due execution of the deeds, those are binding on the Plaintiff.

Aforestated materials do not reveal that when the contents of the deeds were read over and explained she had understood that she was going to dispose of the entire of her immovable properties under two different sale deeds executed in favour of the same person and registered on the same date. The only witness to execution has mechanically stated that the deed writer read over and explained the contents of the deeds. There is no other evidence, direct or circumstantial, showing that Sita Devi had really

understood what was explained to her. Learned counsel for the appellant rightly submits that though the deed-writer was available to depose in the Court on the due execution of the deeds, he has not been examined by the defendants. The deed writer has not made any endorsement on either of the sale deeds that he had read over and explained the contents of the deeds and the executant put her L.T.Is. admitting that the contents of the deeds were in accordance with her instructions. Though D.W.2 has adduced evidence on the execution of the sale deeds and has stated that the deed writer read over and explained the contents of the deed, the same has been done in a casual manner. This part of his evidence is in para-3 of his deposition. Bare perusal of para-3 of his deposition gives an impression that he has deposed as to the execution of only one sale deed. Because, he has stated that he signed in the “sale deed” as an attesting witness and “the deed was registered” in Bhawanipatana Sub-Registrar’s office and “it was scribed” by one Mohanty, who read over and explained the contents of the “deed”. Though later on he has stated that on the same date two sale deeds were executed by Sita Devi but while deposing on the due execution of the sale deeds he has deposed in a superfluous manner saying that the sale deed was scribed and after its contents were read over and explained, the vendor put her L.T.I. Thus, the oral evidence relied on by the learned courts below is quite shakey.

The evidence dealt with by the learned courts below does not betray the mental act of the lady, which is the prime requirement in proving due execution of deeds by an illiterate lady. In addition to that, all that have not been dealt with by the courts below, though very well available on record, are equally important to make an over all assessment of all the facts and circumstances of the case to find the answer on the due execution of the deeds.

10. Admittedly, the lady was illiterate and she had been suffering from chronic illness. She had two daughters. She had lost her husband when one daughter was about two years old and the other was in her womb. She had given both her daughters in marriage. After their marriage both the daughters, with their husbands, had settled in Bhawanipatana. The mother also shifted to Bhawanipatana and thereafter she had acquired the suit properties under two registered sale deeds in the year 1968 and 1974. Both the daughters with their husbands were staying in adjoining houses in the town of Bhawanipatana. There is no pleading as to with whom the mother was staying. But D.2, in whose favour the sale deeds have been executed, has stated in his evidence that after her shifting over to Bhawanipatana, Sita Devi had been residing in his house. He has also admitted that he had brought Sita Devi to Bhawanipatana. Thus, it appears that Sita Devi had been staying with D.2 who is the husband of her second daughter. The old lady was aged about 62

when the impugned deeds were executed. It is not shown that she had business capacity and/or strength of will. These circumstances give an indication that D.2 was in a position to influence the old ailing lady. Admittedly, the entire of her landed properties are shown to have been alienated under the two sale deeds. She could have executed only one sale deed to dispose of the suit properties since the transactions had taken place on one day, in favour of one person and for the same necessity.

It is neither pleaded nor proved by D.2 that Sita Devi had taken independent advice before going to dispose of her entire immovable property and had no other property to fall back upon. It is also not shown that before going to sell the property to D.2, who is Sita Devi's one of the son-in-laws, she had contacted other prospective purchasers, including her other son-in-law. It is not shown that prior to the execution of the sale deeds the Plaintiff or her husband, who reside in a house adjoining to that of Defendant No.2, were informed that in order to meet her legal necessity Sita Devi was going to dispose of her immovable properties. All these are circumstances to make out a case of unnatural disposition of property by an old ailing illiterate lady.

11. These are circumstances which rather than creating a presumption that Sita Devi had voluntarily executed the documents, generate a grave doubt that the deeds were obtained under undue

influence. All these important facts and circumstances though available on record were not taken into consideration by either of the Courts below. They also failed to take note of the absence of evidence that Sita Devi was duly informed of what she was going to do and being aware of the fact that she was going to dispose of entire of her immovable properties, she had put her endorsement on the deeds. The mere evidence that the contents of the sale deeds were read over and explained to the vendor and thereafter she put her L.T.I. is not sufficient to prove due execution of the sale deed which has been executed by an illiterate woman. Thus, D.2, who is going to get benefit under the impugned deeds, has failed to discharge the onus of proving due execution of the impugned deeds. When relevant evidence is not considered, which, if considered, would have led to opposite conclusion, it is a substantial question of law and, in Second Appeal, even the concurrent findings of the Courts below, under such circumstances, can be interfered with.

12. Having thoroughly considered the evidence on record, this Court holds in disagreement with the learned courts below that the impugned sale deeds were not legally executed by Sita Devi and are, therefore, void and inoperative. That being so, title in respect of the suit land does not pass on to D.2. Since Sita Devi died intestate leaving behind two daughters each of them is entitled to a half share in the suit property.

13. In the result, the Second Appeal is allowed on contest but without cost. The judgments and decrees of the courts below are set aside. The suit is decreed preliminarily on contest but in the facts and circumstances without cost. The impugned sale deeds bearing Nos.470 and 471 dated 12.4.1976 are declared void and not binding on the Plaintiff. The prayer for partition of the suit properties in two equal shares is allowed. The Plaintiff-appellant being one of the two daughters of late Sita Devi is entitled to a half share and Respondent No.1 being the sole heir of the second daughter of Sita Devi is entitled to the other half share in the suit property. Parties are directed to effect a mutual partition between them within a period of three months from the date of the preliminary decree failing which either of the party may approach the learned trial court to get the property partitioned by metes and bounds through the Court.

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R. Dash, J.