

ORISSA HIGH COURT

Hara Bewa

Vs

Banchanidhi Barik

Second Appeal No. 350 of 1952

(Narasimham, C.J. and Mohapatra, J.)

26.04.1957

JUDGMENT

Mohapatra, J.

1. This second appeal is by defendants 1, 6 and 7 against the confirming judgment of Sri I. C. Misra, Subordinate Judge of Balasore, arising out of a suit brought by the plaintiffs for declaration of title and for possession in respect of three schedules of lands described in the plaint. It is the case of both parties that defendant No. 1 Kara Bewa inherited the properties on the death of her husband Ranka Barik. The plaintiffs base their title on a registered sale-deed (Ext. A) dated 19-5-1949, conveying the entire properties for a consideration of Rs. 200/-. On 8-7-1949 she cancelled the document (Ext. A) by a registered cancellation deed (Ext. B) stating therein that the consideration money was not paid by the vendees as agreed. On 19-9-1949 she sold these properties by another registered sale-deed (Ext. C) in favor of defendants 6 and 7.

2. The defence is that title had not passed in favor of the plaintiffs on the basis of the earlier document as the intention of the parties to the document was to the effect that title would not pass unless consideration is paid. It was further urged by defendant No. 1 that the plaintiffs had contracted to pay a sum of Rs. 480/- as consideration money even though a consideration of Rs. 200/- was only mentioned in the sale deed in favor of the plaintiffs. Defendants 6 and 7 claim title on the basis of the sale-deed (Ext. C) executed in their favor relying on the position that title had not passed in favor of the plaintiffs on account of non-payment of the consideration money.

3. The Courts below concurrently found that Ex. A the sale-deed in favor of the plaintiffs dated 19-5-1949 was only for Rs. 200/- and not for Rs. 480/- as stated by defendant No. 1. They have concurrently found that the consideration money had not been paid.

4. The lower appellate Court has indeed approached the case from the right point of view that in cases of this nature where the question arises whether title passes on the registration of the document of sale, or that passing of the title depends upon the passing of consideration, the primary criterion is the recitals in the document. It requires no reiteration that only if the recitals in the document are indecisive or ambiguous, the surrounding circumstances in the conduct of

the parties would be relevant. The relevant passage from the sale-deed (Ext. A) is as follows as translated :

"I today having duly sold to you (the Vendees) A. 2-19½ decimals of land, as scheduled below at the present prevailing rate for the aforesaid consideration of Rs. 200/- and having received the entire consideration money in cash from you today, hereby stipulate as follows :

"That you the vendees with your lineal descendants will enjoy the properties under sale with all sorts of rights appertaining thereto till the sun and moon endure. You will get your name mutated in the zamindari sherista according to notice under Section 31. You will alienate the property according to your necessity."

I have gone through the original document carefully. To me it appears the recitals are not clearly decisive. If really the recitals were to the effect that on receipt of the consideration money I sell the property to you and make you the full owner thereof, it would have been clear enough to show that the passing of title would depend upon the passing of consideration. On the contrary if there is a clear conveyance that the executant conveys title in favor of the vendee from the date of the execution of the document and the recital regarding consideration comes later independently of the clause regarding title, then only it is clear that title passes independent of the question of consideration. But here the sentence is so involved and the terms regarding passing of title, passing of consideration and the vendees being the owners in respect of the properties sold are so intermingled that it is very difficult to make out from the recitals a definite position that in fact the parties intended that title would pass independent of the question of consideration. It is not possible to take a contrary view also on a plain reading of the document. I have therefore to take into consideration the extraneous circumstances, such as, the custody of the document, the conduct of the parties, etc.

5. The Courts below have gone wrong in confining themselves to the recitals in this case and in not discussing the surrounding circumstances to gather the intention of the parties. It is always held by high authorities that the custody of the document is a very strong piece of circumstance to throw light in the matter. The document is with the vendor and the plaintiff's explanation has been rightly discarded by the trial Court. The lower appellate Court did not discuss this position; but on a perusal of the judgment of the trial Court I am convinced that the plaintiff's explanation is to be rejected. It is significant also to note that the widow, defendant No. 1, executed a deed of cancellation (Ex. B) on 8-7-1949 on the ground that the consideration for Ex. A was not paid, and thereafter the widow has executed a sale-deed (Ex. C) in favor of defendants 6 and 7. On a consideration of these two important pieces of circumstances I feel convinced to find that it was the intention of the parties that the plaintiffs would not be getting title on the basis of the sale-deed (Ex. A) unless the consideration of Rs. 200/- must be paid and the consideration not having been paid, as found by the Courts below and accepted by us, the suit must fail.

6. I will, however, avail of this occasion to make some observation on the question how far and under what circumstances, extraneous evidence is admissible to gather intention of the parties. As I have indicated above, it has been uniformly held that in such case the document itself is the primary guide. I may refer to a few decisions only on the subject. In the case of *Radhamohan v.*

*Bipin Behari*¹ their Lordships, after reviewing several decisions on the subject laid down the position, as would be found from the judgment of Courtney-Terrell, C.J. :

"The question when the property is to pass is a matter of contract. In that respect it differs from the recital of fact, that is to say, the passing of the consideration which is not a matter of contract but matter of fact. If the terms of the contract as to when the property is to pass are ambiguous, then recourse may be had to external evidence with a view to determining what the intention of the parties was; but if the intention of the parties has been stated in unambiguous terms, those terms must remain the sole criterion of the intention of the parties."

Indeed in all cases of this nature when the passing of consideration is denied, it is permissible for parties to adduce evidence. But that stands entirely on a different footing. When the question covers what exactly was the intention of the parties as to the time of passing of title, there if the document is unambiguous, it remains as the sole criterion. The same view was reiterated in the case of *Pitaram Singh v. Jagannath Sarawgi*²,

7. I will now take up a Bench decision of Our High Court in the case of *Chandrashekhar v. Pitambari*³, Panigrahi, C.J., observes as follows :

"To gather the intention of the parties the Court is bound to look to the terms of the contract and not to speculate as to the intention from evidence de hors the instrument. The only evidence that the Court will look into is that afforded by what the parties have said, and evidence aliunde is not admissible to prove their intention if the language employed is unambiguous."

In paragraph 45 appearing at p. 397 (of ILR Cut) of the report, on a consideration of the terms of the sale-deeds, his Lordship observed :

"The covenants in both the sale deeds will thus appear to be that payment of consideration is made a condition precedent to the passing of title. Thereafter his Lordship reviews various decisions cited before us. He has also referred to a decision of the Patna High Court reported in *Murtaza Hussain Md. v. Abdul Rahaman*⁴, and particularly the judgment of Meredith, J., in that decision. I will come to that decision later. It appears from the judgment of Panigrahi, C.J., at page 399 (of ILR Cut) that his Lordship particularly followed the latest decision of the Patna High Court reported in *Panchu Sahu v. Janki Mandar*⁵, where it was held "This question has been considered by this Court in various cases and it is now well settled that the intention is to be gathered from the sale-deed itself.

After discussing this latest decision, Panigrahi, C.J., observed "I am in entire agreement with the view taken in this case, if I may respectfully say so". On a reading of this decision delivered by Panigrahi, C.J., it cannot be said that we have followed the dictum laid down by Meredith, J., in

AIR 1949 Patna 364. In *Balabhadra v. Nirmala*⁶, such a question also arose. Narasimham, J., (as he then was) categorically expressed his views in following the decision in AIR 1947 Patna 1, and on a consideration of the terms of the deed his Lordship came to the conclusion that the terms were explicit enough to show that the vendees should be entitled to all the rights in the property from the date of the execution. But nevertheless we also considered the other circumstances to strengthen this conclusion that the title passed immediately.

8. It has been contended by the learned advocate, appearing on behalf of the respondents, that the terms in the sale-deed in the instant case are parallel to those in the sale deed in the case of *Balabhadra v. Nirmala (F)*. In my opinion, it is not so. The striking distinction is that the clause conveyancing the title stands, by itself, independently of the clause of passing of consideration. This was the main reason why we held in that case that title passed independent of the passing of consideration.

9. I will now take up the case of *Murtaza Hussain Md. v. Abdul Rahaman*, where some observations of Meredith, J., appear to me to be a departure from the long series of decisions on account of which I am not prepared to accept. In this case two separate judgments were delivered, one by Agarwala, C.J., and the other by Meredith, J., Agarwala, C.J., observed that evidence was admissible to prove the fact whether consideration had been paid or not. But nevertheless he confirmed the judgment of Ray, J., which was in appeal under Letters Patent, on the ground that on a proper construction of the document the intention of the parties was that the passing of title was dependent on the passing of consideration. But Meredith, J., in a separate judgment while discussing the previous judgment of Courtney-Terrell, C.J., observed that the position had been put rather too broadly. In cases where there is a recital that consideration has passed, but the passing of consideration is disputed, in order to clarify the latent ambiguity, extraneous evidence is admissible. He goes further on to observe: "Once the ambiguity has been made apparent in this way then external evidence can be let in and considered to clear up the ambiguity and show what was the intention of the parties." In the conclusion of course his Lordship observes that on a pure construction of the document itself, the appeal must be dismissed but it must be doubly dismissed if external circumstances are considered in view of the ambiguity. If Meredith, J., meant by his judgment that in all cases where passing of consideration is disputed in spite of the recital to the contrary, external evidence being admissible, other extraneous evidence is also admissible for the purpose of ascertaining the intention of the parties, it is a distinct departure from all the decisions on the point as I have discussed above. It is to be noted, such cases will come only when there is a dispute regarding the passing of consideration which has been recited in the document; and to accept the dictum laid down by Meredith, J., is to accept the proposition that in all such cases extraneous evidence is admissible in spite of the clearest terms of the document itself showing the intention of the parties as to whether title will pass on the execution of the document and independent of passing of consideration, or whether the passing of title will depend upon the passing of consideration. In my view the distinction made by Courtney Terrell, C.J., is the correct distinction. The factum of passing of consideration may be disputed and extraneous evidence may be admissible for determining that issue but the terms of the contract as to the passing of title will be proved from the document alone if the terms are clear and unambiguous. If the terms are indecisive and ambiguous, then only the Courts will take into consideration other extraneous circumstances.

10. But as I have already found that the terms are indecisive and ambiguous in consideration of

the extraneous circumstances and the conduct of the parties, the plaintiffs' suit must fail. Accordingly the appeal is allowed. The judgments and decrees of the Courts below are set aside. The plaintiff's suit is dismissed with costs, throughout.

Narasimham, C. J.

11. I agree.

Appeal allowed.

Cases Referred.

¹ AIR 1938 Pat 505(A)

² AIR 1947 Pat 1

³ ILR (1953) Cut 343

⁴ AIR 1949 Pat 364

⁵ AIR 1952 Pat 263

⁶ AIR 1954 Oris 23