1959

May 12.

PARES NATH THAKUR

v.

SMT. MOHANI DASI AND OTHERS

(B. P. SINHA, P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Execution—Deity's claim based on deed of trust upheld by executing court—Suit by decreeholder—Deed, if fraudulent in character—Burden of proof—Concurrent findings of fact—Power of High Court in Second Appeal—Code of Civil Procedure O. 21., rr. 60, 63.

The respondents as plaintiffs brought the suit, out of which the present appeal arises, under the provisions of O. 21, r. 63 of the Code of Civil Procedure for a declaration that the deed of trust executed in favour of the appellant deity was a sham and fictitious document and the properties covered by it were liable to sold in execution of their decree. The courts below dismissed the suit but the High Court, by misplacing the onus on the deity to prove its title, set aside the concurrent findings of the Courts below and decreed the respondents' suit.

Held, that the question whether a trust deed was a fictitious document or not was essentially a question of fact.

Meenakshi Mills, Madurai v. *The Commissioner of Income-tax, Madras*, [1956] S.C.R. 691, referred to.

It was well settled by a long series of decisions of the Privy Council and of this Court that the High Court could not, in a second appeal, interfere with findings of fact arrived at by the Courts below, however erroneous they might be.

Even assuming that it was open to the High Court to go behind the findings of fact, it was clear that it had completely misdirected itself on the question of onus. In a suit, such as the present, where the plaintiff sought for a declaration that a document solemnly executed and registered was a fictitious one, the burden lay heavily on him to prove that it was so and that burden became still more heavy where he sought a declaration that an order passed by the court upholding a claim of a third party under O. 21, r. 60 of the Code was erroneous.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 655 of 1957.

Appeal by special leave from the judgment and decree dated April 22, 1954, of the Orissa High Court in Second Appeal No. 174 of 1948, arising out of the judgment and decree dated January 12, 1948, of the District Judge, Cuttack, in Munsif Appeal No. 309 of 1946 against the judgment and decree of the second

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Munsif, Cuttack, dated August 31, 1946, in Title Suit No. 120 of 1943.

A. V. Viswanatha Sastri and *B. P. Maheshwari*, for the appellant.

S. P. Sinha and *R. Patnaik*, for respondents, Nos. 2, 3 and 4.

1959. May 12. The Judgment of the Court was delivered by

Sinha J.

SINHA J.—This appeal by special leave is directed against the judgment and decree dated April 27, 1954, of the Orissa High Court, passed on second appeal, reversing the concurrent decisions of the courts below, dismissing the plaintiffs' suit instituted under the provisions of r. 63 of O. 21 of the Code of Civil Procedure (hereinafter referred to as 'the Code'). The suit had been instituted by the respondents for a declaration that the deed of trust dated December 15, 1926, in favour of the first defendant, Pares Nath Thakur, installed in the Digamber Jain Temple, in the town of Cuttack in Orissa, was sham and fraudulent and had not been meant to be acted upon, and that the properties covered by the said deed of trust, belonged to the defendants 2 to 4, and were liable to be sold in execution of the decree obtained by the plaintiffs against the defendants-second party (defendants 2 to 4). The deity, the first defendant, was sued under the guardianship of the trustees.

The facts of this case, leading upto this appeal, in so far as they are necessary for the determination of this appeal, are as follows: The plaintiffs are the assignees of the mortgagee's interest in respect of a simple mortgage bond dated April 14, 1927, executed by the predecessors-in-interest of the defendants-second party aforesaid. The mortgagees instituted a suit in the court of the Subordinate Judge at Cuttack to enforce the mortgage. They obtained a preliminary decree on June 11, 1935, which was made final on October, 13, 1936. In due course, the mortgaged properties were sold and purchased by the decree-holders, but as the decretal dues were not satisfied by the sale

of the mortgage properties, a money decree was obtained against the defendants 2 to 4 for Rs. 11,000 odd, on April 29, 1940. The disputed properties covered by the deed of trust aforesaid, had been attached before judgment, on September 23, 1934. When the decree-holder proceeded against the properties covered by the deed of trust, the defendant-first party, through the trustees, preferred a claim to the properties under r. 63 of O. 21 of the Code, claiming the properties as belonging to the deity and not to the judgment-debtors. The executing court, after holding an inquiry under the Code, passed an order in favour of the claimant. Hence, the plaintiffs instituted the suit under the provisions of r. 63 of O. 21 of the Code, alleging that the trust deed aforesaid, by virtue of which the claim had been allowed by the court, as aforesaid, was a sham and fraudulent transaction which did not convey any title to the property covered by the deed of trust and the subject-matter of the suit. The two courts of fact agreed in holding that there was an idol in fact, and that the deed of dedication was effective to transfer title from the donors to the donee, and that the donors, who were the predecessors-in-title of the defendants-second party, had completely divested themselves of any interest in the properties which were the subject-matter of the deed of trust. It was also found that the disputed properties did not belong to the family of the mortgagors, and that the deed of trust had been executed only with a view to putting the title to the property beyond all doubt or dispute. The plaintiffs, being unsuccessful in the first two courts, preferred a second appeal to the High Court of Judicature at Cuttack. The appeal was heard by a Division Bench, consisting of Panigrahi, C. J., and Narasimham, J. The judgment of the Court was delivered by the learned Chief Justice who set aside the decisions of the courts below, and allowed the appeal with costs throughout. As the defendant-first party failed to obtain from the High Court the necessary leave to appeal to this Court, it moved this Court for special leave which was granted. Hence, this appeal.

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It is manifest that the question to be determined by the High Court on the second appeal, was essentially one of fact. That the High Court was cognizant of this aspect of the case, appears from the following observation with which the decision of the High Court begins :—

> "In second appeal the substantial point urged before us is whether the evidence, both oral and documentary, would warrant an inference that the properties had in fact been dedicated to the deity."

It is well-settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second appeal, cannot go into questions of fact, however erroneous the findings of fact recorded by the courts of fact, may be. It is not necessary to cite those decisions. Indeed, the learned counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two courts of fact. The High Court then set out to examine the evidence, both oral and documentary, and after an elaborate examination of the large volume of evidence adduced by the parties, recorded the finding that :

> "defendant No. 1 has failed to prove his title and that the plaintiffs are entitled to have the suit properties sold with a view to satisfy the decree obtained by them against the judgment-debtors."

In our opinion, the High Court has completely misdirected itself both in law and on facts, as will presently appear, even assuming that it was open to it to go behind findings of fact.

In the first place, the High Court has mis-placed the onus of proof, as will appear from the conclusion just quoted above. The onus of proof loses much of its importance where both the parties have adduced their evidence. But the High Court seems to have laid some emphasis on onus of proof, with a view to examining for itself whether that onus had been discharged by the contesting defandant, the deity. This becomes clear from the following observation of the High Court ; —

"Judged by these principles Ext. F, the deed of trust by itself creates no endowment; and it is necessary for the defendants to show by evidence *aliunde* that there had been an existing endowment in favour of this particular idol to which the description 'Devottar' can be applied."

Further down, the High Court observed as follows, after referring to what it characterised as "innumerable decisions" :—

"Applying the above principles to the facts of this case, we find that no evidence has been given with regard to the formal dedication of the properties to the deity except what is recited in Ex. F. This recital is insufficient to support a finding that there had been a real dedication of these properties."

With due respect to the High Court, it must be remarked that it appears to have lost sight of the well-established rule applicable to suits of the kind it was dealing with, that the burden of proof is heavy on a plaintiff who sues for a declaration of a document solemnly executed and registered, as a fictitious transaction. The burden becomes doubly heavy when the plaintiff seeks to set aside the order of the civil court, passed in execution proceedings, upholding the claim of a third party to a property sought to be proceeded against in execution. The plaintiff, who seeks to get rid of the effect of the adverse order against him, has to show affirmatively that the order passed on due inquiry by the executing court, was erroneous. Hence in this case, apart from the fact that the respondents were the plaintiffs, there was an initial heavy burden on them not only to show that the order of the civil court in the claim case, was erroneous, but also that the deed of trust relied upon by the contesting defendant, was fictitious. The two courts of fact had discussed all the relevant evidence in great detail, and had agreed in finding that the plaintiffs had failed to prove their case. The question which the courts below decided and which was the only question in controversy before the High Court; was whether the trust deed was a fictitious transaction. Such a question is essentially one of fact. See the

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latest decision of this Court in the case of *Meenakshi Mills, Madurai* v. *The Commissioner of Income-tax. Madras* (1), where it has been laid down, *inter alia*, that a finding of fact, even when it is an inference from other facts found on evidence, is not a question of law, except in certain specified cases. The case before us certainly is not one of those specified cases. These observations are sufficient completely to displace the decision of the High Court, but we shall examine the reasons of the High Court for setting aside the concurrent findings of fact of the courts below, to see whether the High Court was right in its conclusions, assuming all the time that the High Court was competent to go into those questions of fact. The High court was considerably influenced by certain recitals in the deed, as will appear from the following observations :—

> "Above all, there is a further significant recital which appears to have escaped the notice of both the courts below, and that is that the 'trustees can dispose of the properties if ever they think it necessary, and may also appoint a Pujari for conducting the daily worship of the deity '."

In making these observations, the High Court has completely missed the real significance of the following paragraph towards the end of the deed :—

> "Be it stated that if it will be required at any time, you the trustees according to your unanimous opinion will sell the property situated at Mouzas Baramunda, Siripur and Nuapalli etc., in Killa Khurda and Zilla Dandimal out of the immovable properties described in schedule 'kha' of this deed and will appoint any servant etc., for the purpose of worship."

It will be noticed from the above-quoted provision in the deed that the trustees were specifically empowered by the deed to alienate certain specific properties which, according to the evidence, were very inconveniently situated. The properties in dispute in this case, are not in that category. The properties are land and house in the town of Cuttack, were the deity is located. Hence, in the first instance, the specific power of

(1) [1956] S. C. R. 691.

alienation granted to the trustees, did not apply to the properties in dispute. Secondly, such a provision in a deed of trust is not wholly out of place, which could lend itself to the inference that the document was not intended to be acted upon.

The High Court then examined in detail the evidence of D. W. 3, who, on its own findings, is a respectable person. About this witness, the High Court observed:

> "Undoubtedly, the testimony of this witness is entitled to great respect and the courts below have accepted it as reliable."

While dealing with the evidence of this witness, the High Court proceeded to make the further remarks:

> "We are here concerned with the determination of the sole question as to whether there has, in fact, been a dedication in favour of the deity. No witness has been called to prove the gift of any single item of the properties in suit. Even the evidence relating to the installation of the idol is extremely obscure."

Here again, the High Court appears to have overlooked the evidence of D. W. 1, Kunjabahari Lal, who has stated as follows:—

> "The disputed shop house belongs to the Thakur. In 1870 or 1872, one person probably of the name of Maniklal gifted the disputed shop house to the Thakur."

While dealing with the question whether the deed of trust had been given effect to, the High Court made the following significant observations:—

> "There is no evidence of the appropriation of the rents and profits of the properties upto the year 1938, and even the accounts, which are alleged to have been maintained, have not been produced."

The High Court, here again, appears to have overlooked some material evidence, bearing on this aspect of the matter. Particularly significant, is the evidence of one Dhaneswar Lal who was examined by the executing court in the claim case aforesaid, on behalf of the claimant. The following statement in his evidence, which was marked as ext. M at the trial because the witness was dead, is pertinent:—

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"I. look after the Thakur's affair. I am a Panchayat member of the Thakur. I also perform its Puja and get a pay of Rs. 12 for it. Since 1934, I work as Thakur's Pujhari, and look after the Thakur's land since 1936. I regularly maintain accounts. These accounts have been filed in the 2nd Munsif's Court in connection with Suit No. 94 of 1941. The disputed property relates to lots 1 and 2 of the trust deed. Plot 216 is Thakur's temple. It is a two-storeyed building."

The witness had been cross-examined by the plaintiffs who were opposing the claim, and in his cross-examination, it was brought out that the accounts which the witness stated had been filed in the 2nd Munsif's Court, also included expenditure made in the temple. In this connection, it is noteworthy that the plaintiffs had not called upon the contesting defendant to produce those account-books in respect of the properties in dispute. If that party had been called upon to produce those documents and it had failed to produce them, an adverse inference might have been permissible to a court of fact. But apparently, the High Court was inclined, on the second appeal, to draw such an adverse inference even though no foundation had been laid at the trial for justifying such an inference. To the same effect, are the following observations of the High Court:—

"On the other hand, the other facts and circumstances of the case raise a strong presumption that there had, in fact, been no such endowment."

It is clear, therefore, that the decision of the High Court on the second appeal, reversing the concurrent findings of fact of the two courts below, is based upon inferences drawn from evidence oral and documentary, after mis-placing the onus of proof. This, the High Court was not entitled to do. Besides, as we have already indicated. even on the merits, the findings of the High Court are open to serious criticism and must be held to be unsound.

For the reasons aforesaid, it is clear that the judgment of the High Court cannot be supported. The appeal is, accordingly, allowed with costs throughout, and the suit will stand dismissed.

Appeal allowed.