

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.223 of 1989

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 28.02.1989 and 18.03.1989 respectively passed by the learned Additional District Judge, Balangir in T.A. No.15/1 of 1983-87 setting aside the judgment and decree dated 16.08.1983 passed by the learned Sub-Judge, Patnagarh in T.S. No.33 of 1982.

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Chandu Banchhor & Another *Appellants*

-versus-

Narasingh Putel *Respondent*

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

For Appellants - Mr.N.C. Pati, S.K. Swain
A.K. Sahoo & B. Das
(Advocates)

For Respondent - Mr.P.K. Mohapatra

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 18.04.2022 :: Date of Judgment:25.04.2022

The Appellants, by filing this Appeal under Section- 100 of the Code of Civil Procedure (for short, ‘the Code’), have assailed the judgment and decree dated 28.02.1989 and 18.03.1989 respectively passed by the learned Additional District Judge, Balangir in T.A. No.15/1 of 1983-87.

By the same, the Appeal filed by the Respondent (Plaintiff) challenging the judgment and decree passed by the learned Sub-Judge, Patnagarh in T.S. No.33 of 1982, has been allowed and he having been

non-suited by the Trial Court, in the Appeal has obtained the decree of declaration of his right, title, interest and possession over the suit land as against the Respondent (Plaintiff).

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 Suit.

3. The Plaintiff's case is that the Defendants belong to the family of Pratap Banchhor. Pratap had four sons, namely, Bhakta, Partha, Mahata and Bhaja Jaladhar, Sridhar and Gunadhar are the sons of Bhakta whereas Tanka and Tike (Defendant No.2) are the sons of Bhaja. Dasa and Defendant No.1 are the sons of Jaladhar. Ghasi, Lochan and Padmalochan are the sons of Sridhar. It is said that Gunadhar died leaving behind his widow Maharagi. Mahata is dead and has left behind Jara, Rupa and Suru. Said Jara has died leaving behind Bhika and Jugi. Rupa died leaving Makaru when Partha died leaving behind Kuladhar, who was survived by Chakra and Tanka by Gayeswar.

It is stated that the suit lands are the ancestral properties of the Defendants and that had been partitioned amongst the four sons of Pratap prior to 1936 settlement. Accordingly, they were living separate in mess and estate and for that reasons, separate note of possession in respect of the land in their respective possession in the record of right of the year 1936 had been so noted. The suit land is said to be the part of the land as had fallen in the share of Defendant No.1 having come down from his father and it is said that he was thus in exclusive enjoyment of the same. The Plaintiff's father had partitioned the lands with his brothers. The Defendant No.1 sold the land to the Plaintiff by registered sale deed for a consideration of Rs.3000/- with the consent of Dasa, the

brother of Defendant No.1 of the branch of Bhakta, Ghasi, the son of Sridhar of the branch of Bhakta and Maharagi; the widow of Gunadhar, the other brother of Sridhar. It is further stated that after purchase, the Plaintiff remained in possession of the suit land and applied for mutation of the same where the Defendants by taking advantage of the joint record of right of published in the current settlement raised objection. There was then the challenge to the transfer of the land by Defendant No.1. The Tahasildar when rejected the mutation prayer, the Plaintiff filed the suit.

4. The Defendants have pleaded that there was no partition amongst the brothers of Pratap prior to 1936 settlement. Although, the Defendants along with co-sharers were in possession of some land out of their joint family properties including the suit land separately and were cultivating some parcels of land/ each, that was for convenience. It is stated that for the above reason, the record of right in the current settlement has remained joint. They state that Defendant No.1 did not transfer the suit land to the Plaintiff on 21.02.1979 nor the Plaintiff was delivered with the possession of the suit land pursuant to it. The Defendant No.1 was a drunkard and way-ward gambler, who was not looking after the affairs of the family and was thus an out-caste. It is asserted that taking advantage of this, the Plaintiff has obtained the registered sale deed by practicing fraud and suppressing the truth. It is further stated that for that purpose, he has somehow managed to obtain the signatures of Dasa and Ghasi and Maharagi by false representation playing fraud upon them. The Plaintiff is said to have made no payment of consideration to the Defendant No.1. It is stated that the Defendant No.1 was not the Karta of the family and he had no right of alienation

nor was then having any legal necessity. In view of all these, they attack the sale deed as void and not binding on all.

5. Faced with the above rival pleadings, the Trial Court in total framed eight issues. Answering the first two issues, the Trial Court, upon examination of evidence and their evaluation, has held that there was no partition in the family Pratap and all were possessing the lands jointly for which the Defendant No.1 had no right to alienate the suit property to the Plaintiff and, therefore, it has been said that the Plaintiff did not acquire any title over the same by virtue of the said sale deed executed by Defendant No.1 which has been so registered. The Plaintiff is said to have proved that the transaction is a bona fide one. It has also been held that the said sale deed is void as the Plaintiff has failed to prove that there was any necessity on the part of Defendant No.1 to transfer the said land by paying consideration and that there was the delivery of possession of the said land to him.

6. The First Appellate Court, in addressing the rival contentions raised before it, having gone in detail through the averments taken in the written statement and the evidence on record, has come to a conclusion that the Defendants having not placed in their pleading as to the detail particulars of fraud and having not led positive evidence on the score, the grounds of attack to the said sale deed as to have been obtained by playing fraud etc are beyond the pale of examination and adjudication. Next, upon examination of Ext.1, the registered sale deed standing in favour of the Plaintiff as well as Ext.2, the registered sale deed executed by Ghasi Banchhor and Ext.3 executed by Bhika Banchhor where Jara Banchhor and Dasa Banchhor as co-sharers are the consenting parties, the First Appellate Court has come to a conclusion that there was

previous partition of the properties amongst the members of the family of Pratap and for that it has derived further support from the note as to separate possession of different parcels of land as those appear in the old record of right of 1936 settlement which has held the field till the publication of the Settlement RORs. In this connection, the First Appellate Court having admitted the certified copy of the judgment and decree passed by the learned Munsif in T.S. No.13 of 1955 between Chakradhar of the branches of Bhakta and Mahata and sale of land by Chakradhar in favour of Tikedhar and Juga as additional evidence for just decision of the Appeal and to enable the Court to pronounce the judgment in the right manner marked as Exts.7 & 8 and another certified copy of the record of right showing land to have been recorded separately in the name of Tikedhar and Jugi, the vendees under the sale deed executed by Chakradhar is marked as Ext.9 has taken those to be standing to support a finding of partition.

In that view of the matter, it having been held that the attacks to that sale deed by the Defendants have fallen flat, the Plaintiff's title over the suit land by virtue of Ext.1 has been declared.

7. The Appeal has been admitted for answering the following substantial question of law:-

“(a) Whether the lower appellate court was justified in reversing the finding of the trial court in regard to partition solely on the basis of Ext.1, the so-called deed of transfer executed by appellate no.1 in favour of the respondent, and whether the suit was maintainable in the absence of necessary parties?

8. Learned counsel for the Appellants submitted that the First Appellate Court, without any compelling/justifiable reason, has erroneously upset the findings of the Trial Court that the sale deed in question is invalid in the eye of law and that there was no partition as

pleaded by the Plaintiff. According to him, when such findings of the Trial Court are the outcome of just and proper appreciation of evidence on record in the backdrop of the rival pleadings, the First Appellate Court is not right in setting those aside by merely taking a different view when there was no perversity with the same. He submitted that merely basing on the recitals in Ext.1 where the factum of partition finds mention stating that the very suit property had fallen in that partition to the share of father of Defendant No.1, the First Appellate Court ought not to have recorded that finding. He thus submitted that the First Appellate Court has fallen in grave error in holding so and thereby upsetting the result rendered in the suit.

None appeared on behalf of the Respondent during hearing despite all such opportunities being provided.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have gone through the plaint and written statement and have perused the evidence both oral and documentary including those admitted as additional evidence in the First Appeal.

10. In so far as the attack on the validity of the sale deed (Ext.1) is concerned, the First Appellate Court having narrated all such facts pleaded in the written statement, appears to have rightly found that the Defendants have not pleaded nor have led any positive evidence as to the particulars of fraud. In this connection, the First Appellate Court appears to be also right in saying that the Trial Court's view that the burden of proof lies on the Plaintiff in establishing the validity of the sale which is a registered one is not legally tenable. There being no denial of execution of the sale deed (Ext.1), which is a registered one,

when the Defendants have also not been able to establish any such suspicious circumstance/s surrounding the transaction, the First Appellate Court has rightly held that the view of the Trial Court that it was for the Plaintiff to prove that the vendor had the legal necessity to sale and that he had received the consideration for the transaction and given delivery of possession of the land involved in the transaction to sustain the same, is unsustainable.

The sale deed (Ext.1) no doubt contains the recitals as to partition of the family properties, separate possession of the same for long and particularly, the suit land by the Defendant No.1. So, the Defendant No.1 is certainly bound by such recitals and is stopped from saying. He has also no locus to question the same on the ground that there was no partition in further saying that it was not so allotted to him. In the present case, not only Ext.1, but also the other two documents (Exts.2 & 3) appear to be of great importance as to the proof of separate dealing of the properties by the members of the family which provide further support to the same. These documents have been duly proved as required under section 67 of the Evidence Act. Ghasi and Dasa being the co-sharers have consented to the transfer of the suit land under Ext.1 which stands proved. The sale deeds under Exts.2 and 3 also contain the recitals as to the previous partition in the family of Pratap and co-sharers possessing separate parcels of land. These recitals certainly provide corroboration to the recitals in Ext.1. In addition to this, way back in the year 1936, as per the settlement record, then prepared and published, separate possession of the members of the family in respect of different parcels of land has been found to have been noted therein. The judgment dated 31.07.1956 passed in T.S. No.13 of 1956 admitted in evidence and marked Ext.7 shows that in that suit between Chakradhar of the

branches of Bhakta & Mahata, the lands were part of the Khata involved in the suit. In a compromise in the said suit, those lands were given to Chakdradhar and he, in turn, had sold the same to Tikedhar and Juga reciting in the deeds that the lands were allotted to the vendor in the family partition and also in the suit. Subsequently, said Tikedhar and Juga, as the vendees, in the sale deed executed by Chakradhar are seen to have got their purchased land recorded separately vide the Record of Right (Ext.9). With all such documentary evidence on record overwhelmingly disclosing the factum of partition and on the face of the assertion of the Plaintiff in his evidence as to the partition and also separate possession when it emanates from the evidence that the Defendants since the time of their ancestors were separately dealing with the properties stretching over a long period of time, the view taken by the First Appellate Court that the sale deed (Ext.1) is not impeachable on the ground that there was no partition of the family properties so as to take a view that the Defendant No.1 had no absolute alienate the suit property to the Plaintiff needs affirmation, which is hereby done.

In the wake of aforesaid, the answer to the substantial question of law thus runs in favour of confirmation of the judgment and decree passed by the First Appellate Court in setting aside the judgment and decree passed by the Trial Court.

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

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

Basu

