

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.275 of 2000

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree 15.07.2000 and 29.07.2000 respectively passed by the learned Additional District Judge, Jagatsinghpur in T.A. No.14 of 1990 confirming the judgment and decree dated 28.07.1990 and 20.08.1990 respectively passed by the learned Munsif, Jagatsinghpur in T.S. No.58 of 1985.

Gopal Charan Sahoo

....

Appellant

-versus-

***Sita Behera (Since Deleted) &
Others***

....

Respondents

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

For Appellant

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Mr.Soumya Mishra
(Advocate)

For Respondents

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Mr.Sanatan Pani
(Advocate)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 14.10.2022 : Date of Judgment:20.10.2022

D.Dash,J. The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree 15.07.2000 and 29.07.2000 respectively passed by the learned Additional District Judge, Jagatsinghpur in T.A. No.14 of 1990.

By the same, the Appeal filed by the present Appellant under section 96 of the Code in assailing the judgment and decree dated 28.07.1990 and 20.08.1990 respectively passed by the learned Munsif, Jagatsinghpur in T.S. No.58 of 1985, has been dismissed and thereby the judgment and decree passed by the Trial court in the suit, have been confirmed.

The Appellant, upon the death of his father and paternal uncle, having prosecuted the suit as the Plaintiffs, has been non-suited by the Courts below. It may be stated here that one Mali Sahoo and Rama Ch. Behera were the Defendants before the Trial Court. Mali being dead, finding no such necessity for substitution of her legal representatives as she was issueless, her name stood expunged as dead.

Rama Ch. Behera having also died during the pendency of the First Appeal, his legal representatives have come on record and one of them, having died, his legal representatives are on record in the present Second Appeal.

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' suit is for partition claiming half share over Schedule-B property with further alternative prayer to re-purchase of the suit property from Defendant No.2 in case the sale deed executed in his favour by that Mali Dei is held to be valid.

4. The Plaintiffs' case is that one Arta Sahoo was the common ancestor, who died leaving his two sons, namely, Jagabandhu and Bhagaban. Jagabandhu's son Sridhar, being dead without any issue, that branch has been extinct. The other son of Jagabandhu, namely, Gokhei

died leaving behind his son Nidhi, who died leaving behind his widow, the Defendant No.1 who has died during suit. Gobinda is the son of Bhagaban, who has died leaving behind his sons, namely, Banambar, Natabar and Birabar. Birabara's branch is extinct since he died unmarried. Banambar and Natabara, both sons of Govinda as the Plaintiffs had filed the suit.

It is stated that the Jagabandhu and Bhagaban although were separate in mess but joint in estate as even in respect of their homestead. It is further stated that that they were possessing those properties separately by a mutual arrangement without any partition in metes and bounds. As per the said arrangement, the suit land under Sabik Plot No.242 comprising of an area Ac.0.06 decimals was recorded in the name of Sridhar and Gokhei, the two sons of Jagabandhu. Similarly, for the land in respect of Sabik Plot No.243, a note of possession was standing in favour of Bhagaban, the other brother of Jagabandhu. It is also stated that the dwelling house of the parties were existing over land under Sabik Plot Nos.242 and 243 and the houses under one Khana (compact block), common courtyard even the roof of the houses were interconnected. It is stated that Sridhar, by a registered sale deed dated 13.07.1945, transferred his interest of 3 decimals of land in so far as C.S. Plot No.242 is concerned in favour of the Plaintiffs, who then remained jointly over that suit land with Gokhei.

The Defendant No.1 remained in the suit homestead jointly with the Plaintiffs even after the death of her husband, Nidhi. By a registered deed of exchange dated 12.01.1950, the Plaintiffs state that they had exchanged their share of 3 decimals of land in respect of C.S. Plot No.242 with Gokehi and Nidhi and in turn, they had got 1 decimal out of C.S. Plot No.246 and 3.½ decimals out of C.S. Plot No.254. It is

further asserted that notwithstanding with such exchange, Gokhei and Nidhi sold 1 decimal of land from C.S. Plot No.246 and 3½ decimals of land from C.S. Plot No.264 to one Sankar Sahoo by executing sale deed on 02.06.1956. Said Sankar, then on 14.11.1960, sold said purchased land to the Plaintiffs. So, it is said that the Plaintiffs thus regained the possession of their share of 3 decimals of land under Plot No.242, which they had given on exchange to Gokehi and Nidhi. Mali died in a state of jointness with the Plaintiffs. So, her share of 3 decimals is said to have devolved upon the Plaintiffs and thus, they became the owner in possession of the entire land in C.S. Plot No.242 measuring 6 decimals. Mali was a helpless widow and when she was alive, the Defendant No.2, taking advantage of her simplicity, obtained nominal sale deed from her without any consideration.

The Defendant No.2, on the strength of said sale deed, somehow managed to get his name recorded in the Hal Settlement Record of Right in respect of the suit property and for that, he threatened the Plaintiffs to interfere in their possession in respect of the suit property, for which the suit has been dismissed.

5. The Defendant No.2, in his written statement, has submitted that the land under C.S. Plot No.242 originally belonged to Jagabandhu, Bhagaban and Raghunath. However, in view of the partition in metes and bounds in the year 1920, it is stated that the suit plot had been exclusively allotted in the share of Jagabandhu after whose death, his two sons Sridhar and Gokhei succeeded to his interest and they came to possess the suit land measuring Ac.0.06 decimals exclusively. It is next stated that in the year 1940, Sridhar and Gokhei partitioned their entire joint family property, which included the suit plot. The partition was in metes and bounds and possession of the parties followed pursuant to the

same, which was accordingly separate and exclusive in all respect. Thus, Sridhar while in exclusive possession of his share of 3 decimals of land by registered sale deed dated 18.07.1945 is said to have transferred the same to the Plaintiffs and their brother Birabar. Thereafter, the Plaintiffs and their brother Birabara possessed the said purchased portion of the suit plot separately from Gokehi. Birabar died leaving behind his son Durga Charan as his sole heir who succeeded to his interest and remained in joint possession with the Plaintiffs.

In the year 1950, the Plaintiffs transferred their purchased land to Gokhei under registered deed of exchange dated 12.05.1950. In exchange of the same, the Plaintiffs got another land from Gokehi. In the process, Gokehi became the exclusive owner in possession of the entire suit plot. After the death of Gokhei, his only son Nidhi came to succeed his interest and he became the exclusive owner in possession of the plot. On 13.08.1983, Nidhi, by a registered sale deed, had sold the entire suit land to his wife Mali (Defendant No.1), who thus became the owner in possession of the suit land. While the matter stood thus, Mali, for her legal necessity, transferred 4 decimals of land from the northern portion of the suit plot by registered sale deed dated 10.10.1975 (Ext.8) to the Defendant No.2 for valuable consideration and gave delivery of possession to him. Such sale of 4 decimals of land purchased by the Defendant No.2 is the subject matter of the present suit.

That suit land was vacant piece of land when it was purchased and over the same, the Defendant No.2 claims to have planted some ordinary trees for fuel purpose and raised vegetables on the rest portion. The sale deed under which the Defendant No.2 had purchased the suit land had been scribed by a person chosen by Defendant No.1 (Mali). The

contents of the same were read over and explained to her. It is stated that she executed the sale deed consciously for purpose.

The Defendant No.2 has further stated that the Plaintiffs have their own dwelling house over C.S. Plot No.343 and they never possessed any portion of the suit plot at any time as their dwelling houses. They denied the case of the Plaintiffs that it was a Khanja (Compact block) house having common Courtyard and roof interconnected. According to the Defendant No.2, the Plaintiffs are separate in mess and property from the branch of Jagabandhu from the year 1920. So, they had no common dwelling house. The Defendant No.1 (Mali) never resided with the Plaintiffs jointly and they never succeeded to the entire suit plot after her death. It is further stated that the land under Plot No.242 measuring 3 decimals of land had never been exchanged under the exchange deed dated 12.01.1950 and by virtue of the registered sale deed dated 02.06.1956 said to have executed by Sankar; the Plaintiffs have never got any right, title, interest or possession over any portion of the suit land.

6. Heard Mr.Soumya Mishra, learned counsel for the Appellant and Mr.Sanatan Pani, learned counsel for the Respondents.

7. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

8. On the above rival pleadings, initially the Trial Court had framed fix issues. However, subsequent thereto, four additional issues have been framed after hearing the parties since those were found absolutely necessary for disposal of the suit.

In fact, the judgment of the Trial court would reveal that those additional issues have been taken up for decision and answers have been so recorded, which ultimately went in favour of the Defendants and against the Plaintiff resulting dismissal of the suit in declining him to be granted with any reliefs as claimed therein.

9. The First Appellate Court, in sitting over to judge the sustainability of the findings of the Trial Court, resulting in dismissal of the suit, having stated the facts as projected by the respective parties, in their rival pleadings, has rightly gone to take note of the issues as well as the additional issues those had been framed by the Trial Court and answered. It further appears from the said judgment passed by the First Appellate Court that the contentions raised by the parties have too been noted.

However, when the matter has finally arrived to judge the sustainability of the findings of the Trial Court on all those additional issues, which had been found to be the necessity to dispose of the lis by the Trial Court, the First Appellate Court, being the final court of fact, having not said that any of those additional issues, are redundant for the purpose, appears to have not at touched upon the additional issue no.2 in saying whether the finding returned by the Trial court on that additional issue no.2 is right in the fact and circumstances of the case, as emerging from the evidence piloted by the parties and as such should be allowed to stand or not. It has, however, dealt with the other additional issues, but particularly not the additional issue no.2 which too is without any reason being so noted that why then it is no more the requirement.

10. Taking into account the factual settings of the case, this Court is of the view that the answer to the additional issue no.2 is of significant

bearing in deciding the fate of the suit and in that view of the matter, the First Appellate Court, being the final Court of fact, was under the legal obligation and compulsion to sit over to decide that issue on an independent assessment of the evidence at its level in finally saying as to whether the answer so given by the Trial Court is to sustain or not. Thus, it is seen that the First Appellate Court has neither said anything on that answer, which has been returned by the Trial court on additional issue no.2 nor even in a passing manner has stated that it is not liable to be interfered with.

11. For the aforesaid discussion and reasons, this Court finds that the First Appellate court, being the final Court of fact, has not discharged its duty as ordained under law. Having already found that the answer to additional issue no.2 has the definite bearing on the ultimate result of the suit, it ought to have been cumulatively taken with the answers to the other additional issues, which the First Appellate Court has omitted to do. In that view of the matter, at this distance of time, even though there has been lapse of two decades since the decision returned by the First Appellate Court, this Court being conscious of its power, being in seisin of the Second Appeal, is led to to set aside the judgment and decree 15.07.2000 and 29.07.2000 respectively passed by the learned Additional District Judge, Jagatsinghpur in T.A. No.14 of 1990 and remand the First Appeal (T.A. No.14 of 1990) to the said Court for a decision afresh in accordance with law after providing opportunity of hearing to the parties, further keeping in view the observations.

12. In the result, the Appeal stands allowed, as aforesaid. There shall, however, be no order as to costs.

In order to arrest further delay, learned counsels for the parties are requested to instruct their respective parties to appear before the Additional District Judge, Jagatsinghpur on 21.11.2022 so as to receive further instruction in the matter of hearing of the First Appeal (T.A. No.14 of 1990) and cooperate for its early disposal in accordance with law.

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

Basu

