

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.18 of 2002

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 15.02.2002 and 22.02.2002 respectively passed by the learned Ad hoc Additional District Judge, Balasore in S.J.A. No.38/01 of 51/93 setting aside the judgment dated 28.08.1991 passed by the learned Additional Sub-Judge, Balasore in O.S. No.171 of 1981-I.

Purna Chandra Barik (Since Dead) through his L.Rs ***Appellants***

-versus-

Sri Mrutunjay Barik & Others ***Respondents***

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

For Appellants - Mr.B.H.Mohanty, Sr. Advocate
R.K. Nayak, B. Das,
S.C.Mohant, S.K. Dash &
D.P. Mohanty
(Advocates)

For Respondents - Mr.P.K. Mohanty &
P.K. Pradhan

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 29.03.2022 : Date of Judgment:18.04.2022

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), has assailed the judgment and decree dated 15.02.2002 and 22.02.2002 respectively passed by the learned Ad hoc Additional District Judge, Balasore in S.J.A. No.38/01 of 51/93.

By the same, the Appeal filed by the Plaintiffs in assailing the judgment and decree (as stood after amendment), has been allowed.

It may be stated here that one Paramananda Barik, as the Plaintiff, had filed the suit against Purna Chandra Barik and others arraigning them as the Defendants. Paramananda Barik, the original Plaintiff having died during pendency of the suit; his legal representatives have been substituted and they pursued the suit and accordingly had filed the First Appeal.

During pendency of the present Appeal, the original Appellant (Defendant No.1) having died, his legal representatives, being substituted, have come on record and are now pursuing the 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 Suit.

3. The suit is for partition. The Plaintiff's case is that one Panchu Barik had three sons and one daughter. After the death of eldest son of Panchu, namely, Dhar, the next son Laxmidhar became the Karta of the joint family. It is said that he had fraudulently got the land under Lot Nos.1 to 3 recorded in his name in C.S. record of right when he had absolutely no separate income of his own to acquire any such property. It is stated that Lot Nos.1 to 3 had been acquired from out of joint family funds and thus the Plaintiff Paramananda and Purna Chandra were in joint possession and enjoyment of the same. Similarly, other suit property being acquired from the joint family funds; both were also in possession and enjoyment as such. It is stated that Laxmidhar, while Karta of the joint family, taking advantage of the minority of the Plaintiff had purchased the remaining property in the name of Defendant

No.1. Some lands are separately recorded in the name of Mahednra Paramananda and Laxmidhar and some lands were jointly recorded. Due to dissension, the Plaintiff and the Defendant No.1 got separated in mess and estate and resided separately. They amicably separated the family property and enjoyed the same as such. The Defendant No.1, with the help of his man, when created disturbance in the possession of the property by the Plaintiff, he requested for a partition. That having been refused, the Plaintiff filed the suit. The Defendants 2 to 6 are said to be the purchasers and donees in respect of some property. The Plaintiff's case is that he and Defendant No.1 each have got half share over the suit land.

4. The Defendant No.1, in the written statement, raised an objection that all the properties of the joint family have not been brought to the hotchpotch. It has been stated that Laxmidhar was never the Karta of the family and the joint family had no income. It is his case that Lot No.1 to Lot No.3 are the joint family property. All the property, which that Dhar had acquired from out of joint family fund and the same are in possession of the joint family. These properties were described in the counter claim. Other joint family properties are also stated in Schedule-Kha of the counter claim. It is stated that Laxman had married two wives and got huge amount of dowry and acquired properties in his name. Accordingly, in the Record of Right of 1930, the same was recorded in his name. On 25.10.1974, with the intervention of the well wishers of the joint family members, the properties have been divided. They claim that some properties are in the name of the family Deity, which have also not been included.

5. Faced with the rival pleadings, the Trial Court in total framed twelve (12) issues. Answering all the crucial issues together, it has been held that the suit schedule properties and the properties included in the counter claim are joint family properties and thus are liable to partitioned in between the Plaintiffs and Defendant No.1 and each has half share and Defendant No.1 has half share over the same. With regard to Anabadi land, observations were given that the Commissioner, in the final decree, would allot the same in the share of Defendant No.1 and compensate the Plaintiff with other properties of the same value. The sales made by the parties have been directed to be adjusted towards the share of the respective parties. The property in the name of the family Deity has been kept out of the purview of partition. Accordingly, when the preliminary decree was drawn in the schedule of land indicated therein for partition, the land described in Schedule-Ka and Kha of the counter claim which had been held to be a joint family property and liable for partition, somehow did not find mention. So, on an application filed by the Defendant No.1 under Section 152 of the Code, it was directed that the mistake being inadvertent and purely due to clerical omission, the said property be included in the preliminary decree. The preliminary decree thus stood amended after few days.

The Plaintiffs then being aggrieved by the said amended preliminary decree filed the First Appeal, which has been allowed. So, now the Defendant No.1 represented by legal representatives has filed this instant Second Appeal.

6. The Appeal has been admitted on 13.07.2004 for answering the following substantial questions of law:-

“(a) Whether the Court below is correct in excluding from the purview of the partition, the property nominally standing in the

name of family deity, nominal debottar properties being always partible

(b) Whether the court below is correct in refusing partition of the said properties instead of calling upon the defendants to pay appropriate court fee required for the relief of partition?; and

(c) Whether for partition of properties described in the written statement, a counter claim is necessary or not, in view of the properties mentioned in the written statement as joint family property?"

7. Learned counsel for the Appellants, at the outset, fairly submitted that the substantial question of law as at (a) being not the subject matter of the First Appeal, the same does not survive for being answered. On the other substantial questions of law as at (b) and (c), he submitted that the Trial Court having merely corrected the inadvertent clerical omission in the preliminary decree which was very much in the finding noted in the judgment as well as the order at the end, the First Appellate Court has fallen in error in setting aside the same assigning some untenable technical grounds and thus the same cannot be sustained. He submitted that as per the settled position of law, in a suit for partition, position of the Plaintiffs and Defendants are inter-changeable and if any property does not find mention in the plaint as the subject matter of the suit, the Defendants have all the right to bring it to the notice of the Trial Court that said properties are the joint family property and available for partition and the Court upon consideration of the evidence, if finds that those are also so liable for partition, there remains no impediment for so directing. He, therefore, submitted that even though in the counter claim, the Defendants had brought that claim for partition of properties as described in schedules therein, but that counter claim was withdrawn, the parties when have led evidence touching upon that aspect, the Court

has all the power to adjudicate that issue as to whether those properties are liable to be partitioned or not.

8. Learned counsel for the Respondents submitted all in favour of the judgment passed by the First Appellate Court. According to him, the amendment to the decree having been carried out without notice to the Plaintiffs, they had all the right to file the Appeal after the amended decree came in place by including further properties therein. He submitted that the First Appellate Court, has rightly set aside the inclusion of the properties described in the counter claim in the preliminary decree as liable to be partitioned.

9. Keeping in view the submissions made, I have carefully gone through judgments passed by the Courts below.

The Ordering portion of the judgment of the Trial Court shows that the Plaintiffs have been found entitled to half share and the Defendant No.1 has been found entitled to half share over the properties described in the schedule of the plaint as well as the counter claim except the property of the family deity. This judgment being passed on 28.08.1991, the preliminary decree was drawn up on 16.09.1991. It is further seen that on 23.09.1991, the Defendant No.1 having filed an application under section 152 of the Code apprising the Court that despite the order passed in the suit as regards inclusion of the properties described in the counter claim as available for the partition between the Plaintiffs on one hand and the Defendant No.1 on the other, those scheduled properties of the counter claim somehow have not been included and described as under a schedule in the decree. It may be stated here that after withdrawal of the counter claim, the Defendant No.1, by way of amendment, had introduced this fact in the written

statement indicating those properties, which had been described in the schedule given in the Counter-Claim. The Trial Court, having found the omission to be inadvertent one on the part of the person associated in drawing of the decree and escaping its notice, has allowed its correction, which has gone to bring the preliminary decree in tune or in conformity with the judgment.

10. The First Appellate Court, in view of the rival contentions raised before it, has formulated the following point determination:

“whether in the absence of the counter claim for partition of the written statement properties; can the court pass a decree for the same in the partition?”

The First Appellate Court then has gone to answer that neither the Plaintiffs nor the Defendants have asked for partition of that properties in the written statement which the Trial Court has so ordered. It has further been stated that the court fees having not been paid on the counter claim, when it has been subsequently withdrawn and that merely being included in a schedule in the written statement by way of amendment, when none have sought for any partition of those properties, the Trial Court has fallen in error in passing the order on that score. It has next been stated that the amendment of the decree, by introducing the schedule of properties, as given in the written statement without notice to the Plaintiffs is not sustainable. In a partition suit, all the properties belonging to the parties are required to be brought to the hotchpotch so that once for all, in one go as far as possible, the shares of the parties are worked out in a fair and equitable manner over all the properties. It is well settled position that if any such property is left out, then the reason has to be given as to why that was not made the subject matter. In our given case, the Defendant No.1 having pleaded in the

written statement that the properties described therein are also the joint family properties; when the Trial Court has found it so which is not negated by the First Appellate Court on merit, in my considered view, the Trial Court's order for partition of the plaint schedule properties as well as the properties described in the schedule of the written statement except the properties belonging to the family deity ought not to have been set at naught. The Trial Court's order when is very clear on the score of partition of the properties described in the counter claim which has subsequently been brought to the written statement by amendment, the omission to so mention in the preliminary decree providing a schedule therein, is found to be merely an inadvertent clerical error. It did not materially affect the result of the suit nor varied/altered/modified the preliminary decree. The Plaintiffs even being noticed and then on appearance, it would have gone to object, the Trial Court could not have considered the same favourably in rejecting the petition for amendment of the preliminary decree as it was the duty of the Trial Court to see that the preliminary decree conforms with the findings and the judgment which are being formally expressed in the decree. In this case, the Trial Court has just so directed for amendment of the preliminary decree so as to bring the same in conformity with the judgment and order by rectifying the inadvertent error on its part.

Therefore, this Court finds that the First Appellate Court was not right in allowing the Appeal by directing the properties described in the schedule in the written statement, as has been directed by the Trial Court, to be incorporated in the decree, as untenable as none had so prayed for and the prayer on that score has to be so read into.

In the wake of aforesaid, the answer to the substantial question of law thus runs in favour of setting aside the judgment and preliminary

decree passed by the First Appellate Court, which in turn, confirms the judgment and decree passed by the Trial Court as it stood after amendment.

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

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

Basu

