

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.57 of 1997

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 09.10.1996 and 31.10.1996 respectively passed by the learned District Judge, Sundergarh in Title Appeal No.30 of 1992 confirming the judgment and decree dated 29.07.1992 and 17.08.1992 respectively passed by the learned Subordinate Judge, Sundergarh in Title Suit No.117 of 1987.

Mandhar Khadia & Others* *Appellants

-versus-

Rupadhar Khadia & Others* *Respondents

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

***For Appellants* - Mr.R.C. Rath,
(Advocate)**

***For Respondents* - Mr.S. Patra
(Advocate for R.1,2,5, 6 to 9 & 11)**

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 13.09.2022 : Date of Judgment:26.09.2022

D.Dash,J. The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 09.10.1996 and 31.10.1996 respectively passed by the learned District Judge, Sundergarh in Title Appeal No.30 of 1992.

The Appeal filed by the predecessor-in-interest of Appellant Nos.1 to 7 with Appellant No.8 under section 96 of the Code has been

dismissed and thereby the judgment and decree dated 29.07.1992 and 17.08.1992 respectively passed by the learned Subordinate Judge, Sundergarh in Title Suit No.117 of 1987 have been confirmed.

It be stated here that Tari Khandiani, Gudra Khadiani and Ulasa Khadiani (Appellant No.8) as the Plaintiffs had filed the suit, i.e., T.S. No.117 of 1987 for a declaration that they are the owners in possession of the land described in Schedule-E of the plaint. The suit having been dismissed, as the unsuccessful Plaintiffs, they had filed the First Appeal, which too has been dismissed. In the meantime, that Tari Khadiani and Gudra having died, Appellant Nos.1 to 7 have filed this Second Appeal with the Appellant No.8.

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' case is that one Asadhu Khadia, the father of the Plaintiffs had three other brothers, who are Manabi, Kati and Buti. It is stated that the properties as shown in detail in the Schedule of the plaint are the joint family properties of the father of the Plaintiffs and his three brothers and those lands were jointly recorded in their names in the Hal Settlement Record under Khata No.4 of Village-Mayabahal. The extent of land is Ac.24.12 decimals. It is further stated that Mara Khadia, during his life time, was residing with his sons jointly and after the death of the father of the Plaintiffs and the father of the Defendants, all were staying jointly. However, subsequently, the father of the Plaintiffs and the father of the Defendants effected a partition of their land as shown in Schedules-A & B of the plaint and after partition, they have been accordingly enjoying and possessing their lands separately.

It is stated by the Plaintiffs that after the said partition of Schedules-A & B land, the father of the plaintiffs had gifted away some land shown in Schedule-E of the plaint to the Plaintiffs by a registered gift deed way back in the year 1968 and since then, the Plaintiffs have been possessing those lands with others without any objection from any quarter. In the year 1986, they applied for mutation of their lands in respect of Schedule-E land. It was numbered as Mutation Case No.126 of 1984. The prayer for mutation was rejected for which the Plaintiffs filed the suit.

4. The Defendants, in their written statement, asserted that the suit lands were never partitioned between their father and the father of the Plaintiffs. It is stated that the said property was the joint family lands of the father of the Plaintiffs and their father and for that reason, the lands have been recorded jointly in the record of right of the Hal Settlement. It is also stated that Asadhu, the father of the Plaintiffs had no legal right to transfer the lands shown in Schedule-E of the plaint by way of gift and, therefore, it is said that the registered deed of gift to that effect is void from its inception as the properties are the joint family properties. So, it is said that by virtue of the gift, which is void and inoperative, the Plaintiffs cannot have any title over Schedule-E properties.

5. The Trial Court, on the above rival pleadings, framed in total eight issues. On detail examination of the evidence and their evaluation, the Trial Court has arrived at a conclusion that there was no previous partition in respect of the suit properties prior to the execution of the deed of gift. Its conclusion is that the father of the Plaintiffs and the father of the Defendants had never partitioned their joint family properties. In saying so, the gift made by the father of the Plaintiffs is

held to be void and inoperative as there was no consent of other coparceners, who had their coparcenary interest in the said property, which then had not undergone the change in its characteristics from that of the ancestral joint family properties as to the separate property. The Trial Court thus having dismissed the suit, the First Appellate Court, by examining the evidence and their independent analysis at its level, has concurred with the findings returned by the Trial Court.

6. The present Appeal has been admitted to answer the following substantial question of law:-

“Whether the decree for partition is valid in law inasmuch as it is solely passed on the basis of revenue records, and whether the finding that the deed of gift (Ext.1) is void is justified or not?

7. Mr.R.C. Rath, learned counsel for the Appellants submitted that the fate of the suit, as projected by the Plaintiffs for the reliefs claimed, is founded upon the factum of partition of the ancestral joint family properties of the parties between the father of the Plaintiffs and father of the Defendants prior to the execution of the deed of gift. He, therefore, submitted that this Court first is called upon to judge the sustainability of the said finding on the said claimed previous partition, which have been negatived by the Courts below; as according to him, the validity of the deed of gift in relation to Schedule-E property would stand decided accordingly. He further submitted that the finding of the Courts below that there was no prior partition is the outcome perverse appreciation of evidence and thus suffers from the vice of perversity. He submitted that on the face of the overwhelming evidence with regard to long separate dealing of the properties and their enjoyment by the parties when admittedly they were residing separately having all their other special

arrangements; all these being cumulatively viewed; ought to have held that there was a previous partition and in that partition, the Schedule-E property had fallen to the share of the father of the Plaintiffs.

None appeared on behalf of the Respondents despite due opportunities.

8. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement. The evidence both oral documentary have been perused.

9. It appears that the First Appellate Court, in deciding the Appeal, has very rightly formulated the point as to whether the finding of the Trial Court that there was no previous partition by metes and bounds prior to the institution of the suit is justified or not in view of the evidence on record and in the backdrop of the rival case projected by the parties. The record of rights relating to the suit properties, which includes Schedule-E stands jointly recorded and those are Exts.B & C. The recorded tenants are the father of the Plaintiffs and the father of the Defendants. The burden of proof on such factual setting of partition lies upon the Plaintiffs to establish that there was a prior partition of those properties even though it was not so noted in the record of right and that in that partition, Schedule-E property had fallen to the share of the father of the Plaintiffs. In paragraph-9 of the judgment of the First Appellate Court, the discussion of evidence at great length has been made. The First Appellate Court has examined the oral evidence of each of the witnesses examined from the side of the Plaintiffs. P.W.1 being unable to say as to which plots of Village-Mayabahal had fallen to the share of late Asadhu and the exact date of partition in stating further that he was

not present at the time of partition and has no knowledge about the identification of the suit land, his evidence, being discarded, it cannot be said that it has been so done erroneously. The most interesting and striking feature of the case is that none of the Plaintiffs have come to the witness box to depose on oath that there was the previous partition and that in the said partition, Schedule-E property had fallen to the share of their father. They being the direct beneficiaries under that partition, which they claim, for their non-examination, adverse inference upon their case is bound to be drawn. Moreover, their husband and other relations present at the time of partition, as pleaded by the Plaintiffs, have not been examined. Thus, the evidence of the lone witness examined from the side of the Plaintiffs, i.e., P.W.1, having been rightly found to be unsatisfactory when it has been found that the lands have been jointly recorded and there being no evidence that there was even any attempt of separate recording and that having only been made by filing the mutation application that too only in respect of Schedule-E property, the finding that the Plaintiffs have utterly failed to prove the factum of prior partition as projected by them, has to receive the seal of confirmation.

10. Having said, as above, keeping in view the settled position of law, the property being the ancestral joint family properties belonging to the father of the Plaintiffs and his three other brothers, who are the coparceners, the conclusion has to be that as all the coparceners other than the donor-cosharer had not consented to the said gift made by the father of the Plaintiffs, the same is void. The Courts below having held so are thus found to be faultless.

The substantial question of law being accordingly answered, it is held that the Appeal is liable to be dismissed.

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

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



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