

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.345 of 2015

In the matter of an Appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 20.07.2015 and 04.08.2015 respectively passed by the learned District Judge, Nayagarh in R.F.A. No.26 of 2014 confirming the judgment and decree dated 25.09.2014 passed by the learned Civil Judge (Junior Division) Ranapur in Civil Suit No.03 of 2014.

***Asish Kumar Mohapatra and
Others*** ***Appellants***

-versus-

Shrismaya Mohapatra ***Respondent***

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

<i>For Appellants</i>	-	M/s.J. Rath, P.K. Tripathy, K.C. Biswal, Advocates.
<i>For Respondent</i>	-	M/s. S.R. Pattnaik, Mrs. P.Pattnaik, D.Pradhan, N.K. Senapati, D. Pattnaik, Advocates.

**CORAM:
MR. JUSTICE D.DASH**

Date of Hearing : 21.10.2022 : Date of Judgment: 23.12.2022

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 preliminary decree dated 20.07.2015 and 04.08.2015

respectively passed by the learned District Judge, Nayagarh in R.F.A. No.26 of 2014.

By the same, the Appeal filed by these Appellants in assailing the judgment and preliminary decree passed by the learned Additional Civil Judge, Junior Division, Ranpur in Civil Suit No.03 of 2014, under section 96 of the Code has been dismissed.

The Respondent as the Plaintiff had filed the suit for partition and for presumption arraigning these Appellants as the Defendants. The suit has been preliminarily decreed by the Trial Court by passing the order:-

“The suit be and same is preliminarily declared on contest but under the circumstances without any cost. The parties are directed to make amicable partition of the suit properties in carving out 1/6th share each within two months failing which any of them are at liberty to approach the court for deputation of Civil Court Commissioner for carving out their share. Further, it is declared that the Plaintiff has a preferential right and he is allowed to repurchase the suit property as mentioned in Schedule-C of the plaint, i.e. Plot No.213, Khata No.185, Area-Ac.0.08 Decs. which was sold to the defendant No.6 at the prevailing rate during the date of filing the suit and the defendant No.6 is directed to retransfer the said property to the Plaintiff.”

The Respondents being the aggrieved Defendants having moved the first Appellate Court, the said judgment and Preliminary decree passed by the Trial Court have been confirmed.

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 Plaintiff and Defendant No.1 are brothers and Defendant No.3 to 5 is their sisters. Their widow mother is Defendant No.2. The parties are Hindus and governed by the Mitakshara School of Hindu law. It is stated that the father of the Plaintiff died leaving behind the Plaintiff and the Defendant No.1 to 5 as his class-I heirs. The Defendant No.6 is the transferee of a portion of joint family property from Defendant No.1 to 3.

4. The landed property measuring Ac.2.620 decimal which are agricultural and home stead have been described in schedule 'A' and 'B' of the plaint and those are the subject matter of the suit. It is stated that the schedule 'A' lands are the agricultural landed property and those in schedule 'B' are the home state belonging to the parties. The parties are in joint possession of the same without any partition in the metes and bounds. The Plaintiffs states that the property described in the schedule 'C' of the plaint is the part of the suit land in schedule 'A' and that has been transferred to Defendant No.6 by Defendant No.1 to 3. The suit property being the joint family properties of the parties those have been

recorded as such in the record of right in the name of the parties along with one Sharmistha Mohapatra who died unmarried. The Plaintiff states that she being the earning member of the family has been contributing regularly for the management of the joint family affairs who still was neglected by the Defendant No.1 and 2 who are not giving any account of the income of the joint family to him and as such being the eldest male member of the family, he is overlooked. He stated that the Defendant No. 1 to 3 in convenience of Defendant No. 4 to 5 with the knowledge had transferred a part of the joint family property in schedule 'C' to Defendant No.6 on 13.09.2013 for a consideration of Rs.8,000/-. This land is said to be a valuable piece of land. The Plaintiff claims to have the preferential right of repurchase of said property from Defendant No.6 on payment of the consideration. When he asked Defendant No.6 to retransfer the property he bluntly refused. The Plaintiff therefore demanded partition of the suit property seeking his share and that being denied he filed the suit for partition. None of the Defendants have filed any written statement but they contested during the trial. The Trial Court on going through the available evidence on record has held that the Plaintiff and Defendant No. 1 to 5 each are entitled to 1/6th share over the suit property.

Next coming to the claim of the Plaintiff as to repurchase the same has been allowed subject to payment of the price of the land as prevailing on the date of filing of the suit. The Trial Court has thus decreed the suit preliminarily by passing the order as aforesaid. The Defendants being aggrieved by the said judgment and preliminary decree passed by the Trial Court having carried the First Appeal has been unsuccessful. The present Appeal has been admitted to answer the following substantial question of law:-

“Whether the findings of the Court below that in the facts and circumstances of the present case and in view of the evidence on record, the Plaintiff has established a case of having a preferential right to repurchase the suit property in view of the provision of Section 22(1) of the Hindu Succession Act is sustainable in the eye of law and if the same is based upon proper construction of the said provision of law?”

5. Learned counsel for the Appellant submitted that the Courts below banking upon the provision contained in Section 22 of Hindu Succession Act 1956 have erred in granting the relief of repurchase of the property described in schedule ‘C’ which the Defendant No.1 to 3 have sold to Defendant No.6. He submitted that while deciding the right of repurchase as said to be available to the Plaintiff, the Courts below did not take into account the provisions contained in section 4 of the

partition act as well as section 44 of the Transfer of Property Act in their proper perspective.

6. Learned counsel for the Respondent on the other hand contended that the first Appellate Court upon proper interpretation of the provision contended in section 22 of the Hindu Succession Act as well as Section 44 of the transfer of Property Act and section 4 of the Partition Act has rightly affirmed the conclusion of Trial Court in confirming the decree on that score.

7. At this stage, it would be apposite to refer to the provision of Section 22 of the Hindu Succession Act, 1956 which reads as under:-

“22. (1). Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it

for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred. Explanation - In this section, "Court" means the Court within the limits of whose jurisdiction the immovable property is situated or the business is carried on, and includes any other Court which the State Government may, by notification in the Official Gazette, specify in this behalf."

8. In the present case, the transfer has already been effected which is said to be in contravention of provision of sub section 1 of section 22. Therefore, it is necessary that resort to the appropriate legal process in obtaining the declaration from the competent Civil Court with the sale affected by the co-heir in favour of strangers as invalid be taken.

"The object of sub-section (1) as we understood it is that in cases where by virtue of intestate succession under the Act, any interest in immovable property has devolved upon two or more heirs specified in class-I of the schedule and anyone of such heirs proposes to transfer his interest in the property the other heirs should have a preferential right to acquire the interest which is so proposed to be transferred. The said intention of Parliament can be effectuated only if we consider the

section as conferring an enforceable right on the heirs other than the one who proposes to transfer his interest.”

9. It has to be noticed in this connection that even though section 22 (1) does confer a right in the co-share to acquire the share of another co-share who proposes to transfer of the share, there is nothing in the said section which warrants the alienation affected in contravention of provision being regarded as void. Such an alienation at best will only be voidable at the instance of the sharer who instituted the suit for enforcement of his right under sub section-(1) and subject to the said limited contingencies, sale will be operative and binding. In the present suit, we find no such prayer to declare this transfer as void has been advanced. In that view of the matter, the substantial question of law is answered against the claim of the Plaintiff in holding that in so far as the declaration given that the Plaintiff has a preferential right and accordingly allowed to repurchase the property sold to the Defendant No.6 at the prevailing rate during the date of filing of this suit and the direction to Defendant No.6 to retransfer to the suit property to Plaintiff cannot be sustained.

10. Therefore, the preliminary decree passed by the Courts below in declaring that the Plaintiff has a preferential right and as such being

allowed to repurchase the suit property as mentioned in the schedule 'C' property i.e. Plot No.213 Khata No.185 Ac.0.08 decimal which was sold to Defendant No.6 at the prevailing rate during the date of filing of the suit and the direction of the Defendant No.6 to retransfer the suit property to the Plaintiff cannot be allowed to stand as it is not permissible to declare the sale deed as void in the absence of any specific prayer to that effect.

11. Therefore, the preliminary decree to that extent of repurchase of the land purchased by the Defendant No.6 is set aside and instead, it is directed that the said extent of land sold by Defendant Nos. 1 to 3 would stand adjusted towards their shares as permissible.

12. The Appeal is thus allowed in part to the extent as indicated above. No order as to cost is passed.

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