

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.421 OF 2013

In the matter of an appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned District Judge, Kendrapara in RFA No.07 of 2010 by confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Kendrapara in Title Suit No.126 of 1981.

Kanhu Charan Jena

:::

Appellant.

-versus-

***Hrusikesh Jena (Since Dead) by
his LRs & Others***

:::

Respondents.

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellant

:::

M/s. A.K. Mishra-2,
B.P. Samal, Advocates.

For Respondents

:::

M/s.R.K.Mohanty, Sr. Advocate
D. Mohapatra, A. Mohanty, S.
Mohanty, D. Varadwaj,
Advocates, (R-1).

:::

Mr. Debajyoti Chhatoi,
Advocate, (R-2 to 11).

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:12.09.2022 DATE OF JUDGMENT:: 26.09.2022

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 passed by the learned District Judge, Kendrapara in RFA No.07 of 2010.

By the same, the Appeal filed by the present Appellant (Defendant No.1) under Section-96 of the Code in challenging the

judgment and decree passed by the learned Civil Judge (Sr. Division), Kendrapara in Title Suit No.126 of 1981 has been dismissed and thereby, the judgment and decree passed by the Trial Court in declaring the right, title and interest of the Respondent No.1(Plaintiff) over the suit land on the strength of the registered sale-deed dated 17.06.1980 (Ext.1) has been confirmed and this Appellant (Defendant No.1) has been held to be having no right, title and interest over the suit land by virtue of the sale-deed dated 30.08.1973 (Ext.C) standing in his favour.

2. At this stage, it may be stated that the predecessor-in-interest of Respondent Nos.2 to 6 who had been arraigned as the Defendant No.2 and the predecessor-in-interest of Respondent Nos. 8 and 9 i.e. Defendant No.3 had died during the suit. The Respondent No.1, who was the Plaintiff, having died during pendency of this Appeal, his legal representatives have come on record as Respondent Nos.1(a) to 1(f) and here in this Appeal, Respondent No.1(a), 1(b), 1(e) and 1(f) having appeared, represent the estate and interest of the Respondent No.1 (Plaintiff)

3. 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.

4. Plaintiffs case is that the Defendant No.9 was a minor when the suit land with other lands in total measuring Ac.4.95 decimals had been purchased by him from one Baidyanath Jena under registered sale-deed dated 30.12.1964. It is stated that the consideration money for said purchase had come from the funds provided by his mother. The Defendant No.9 being a minor, he in that transaction was represented by his father i.e. Defendant No.8. It is stated that Defendant no.9 on 17.06.1980 sold the suit land to the Plaintiff for valuable consideration

and pursuant to that had given the delivery of possession of the sold land to the Plaintiff. Accordingly the Plaintiff is said to be in possession of the suit land from said date. On 21.07.1980. When Plaintiff wanted to construct a building over the suit land; surprisingly there came resistance from the Defendant Nos. 1 to 7 who threatened to dispossess him from the suit land. The Plaintiff therefore, filed Title suit No. 187 of 1980 seeking permanent injunction against said Defendants in the Court of Munsif, Kendrapara. The Defendant No. 1 in his written statement in the said suit claimed to have purchased the suit land from Defendant No.8 on 30.08.1973. On enquiry that it was known that said sale-deed had been executed by Defendant No.8 as the father guardian of Defendant No.9 without obtaining the required permission from the Competent Court of law as required under Section-8(2) of the Hindu Minority and Guardianship Act. Thus, it is stated that said sale is illegal and void. It is also stated that there was no payment of consideration under that sale-deed purported to have made in favour of Defendant No.1 and he had never been delivered with the possession of the same. It is also stated that in the year, 1968, when Defendant No.8 had sold Ac.0.33 decimals of land of his minor son i.e. Defendant No.9 to one Digambar Nath Sharma, he had done so by obtaining due permission from the Competent Court under Section-8(2) of the Hindu Minority and Guardianship Act. It is further stated that Defendant No.1 to 7 thus were aware about the fact that the property in question was the self-acquired property of Defendant No.9. Thus, it is said that the Defendant No.1 has not acquired any right, title and interest over the suit land and therefore the Consolidation Authority has rightly recorded the suit land in the name of the Plaintiff. In view of the defence taken by the Defendants in that suit, the Plaintiff having withdrawn the suit which

was for permanent injunction simpliciter filed the present suit for declaration and other consequential reliefs.

5. The Defendant No.1 in his written statement has stated that the Defendant No.8, the father of Defendant No.9 in order to avoid the claim of share of his brother, namely, Gopinath over the land had purchased the suit land with other lands measuring Ac.4.92 decimals on 30.12.1964 in the name of his minor son, Defendant No.9 by pay total consideration money from his own exclusive purse and as such for all practical purposes, he was the exclusive owner in possession of the suit land and was regularly paying rent. It is stated that the Defendant No.8, only for the purpose of avoiding the claim of his brother, had got it written in the said sale-deed dated 30.12.1964 that the consideration money had been provided by the mother of the Defendant No.9, when she had actually no income nor had any Stridhan property in her hands. It is further stated that in the year 1971 on account of Cyclone, the residential house of Defendant No.8 was raised to the ground and, therefore, in order to repair the same as also to meet other legal necessities, the Defendant No.8 took money from Defendant No.1 and sold the suit land to him by executing registered sale-deed for valuable consideration. It is further stated that the Defendant No.1, is in possession of the suit land since time of his purchase and has constructed house over a portion of the same where he is residing with his family by paying rent to the Tahasildar. It is also stated that other lands have been sold by Defendant No.8 to one Rohit Mallick on 22.06.1965 without seeking the permission from the Competent Court as required under the provision of under Section-8(2) of the Hindu Minor and Guardianship Act, 1956 (for short, 'the HMG Act'). The Defendant No.1 asserts that the purchase of the suit land by him by

registered sale-deed dated 30.08.1973 is valid in the eye of law and he has the right, title and interest and possession over the same.

6. On the above rival pleadings, the Trial Court has framed six issues. Having taken up issue no.4 as to claim of the Plaintiff as having the right, title and interest over the suit land, the evidence on record being discussed and applying the principles of law as stated in the judgment, the Trial Court's conclusion is that the Ext.C, the sale-deed dated 30.08.1973 by which the Defendant No.1 claims right, title and interest over the suit land as also the possession pursuant to the same is void and it has been held that the Plaintiff has the right, title and interest over the suit land owned by Defendant No.9 on the strength of Ext.1 the sale deed dated 17.06.1980 executed by Defendant No.9 in his favour after the Defendant No.9 became major.

The First Appellate Court being moved by the aggrieved Defendant No.1 has confirmed the judgment and decree passed by the Trial Court decreeing the suit of the Plaintiff.

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

- 1) Whether the Courts below are right in decreeing the suit filed by the Respondent No.1 as the Plaintiff who is a subsequent purchaser of the property from the Defendant No.9 (Respondent No.12) who having acquired the property during his minority had not impeached the sale of the property made during his minority by his father guardian-Defendant No.8 without permission as required under Section-8(2) of the Hindu Minority and Guardianship Act, 1956 within the period as prescribed under Article-60 of the Limitation Act?

8. Mr.A.K.Mishra-2, learned counsel for the Appellant submitted that the Courts below, in view of the specific provision contained in Section 8 (3) of the HMG Act as well as the sale deed in favour of this Defendant No.1, being voidable at the instance of the minor and not void, the suit filed by the subsequent purchaser of the property from that minor on attaining majority without the prayer for recovery of possession ought to have been dismissed. He further submitted that the Defendant No.9, whose property has been sold by his father guardian (Defendant No.8) by registered sale deed dated 30.08.1973 having not been set aside at the instance of the minor, the Plaintiff, as the purchaser, cannot indirectly seek for declaration of said sale deed as void by praying for a declaration that the Defendant No.1 has acquired no title on the strength of the sale deed dated 30.08.1973. He next submitted that for avoiding such a transaction, a suit must be filed by the minor within the prescribed period of limitation under section 60 of the Limitation Act, 1963 and, therefore, in the present case, that having not been done, the suit, at the instance of subsequent purchaser, i.e., the Plaintiff even though has purchased the property from the minor after he attained majority, he has no right. He, therefore, submitted that both the Courts below have committed grave error in decreeing the suit filed by the Plaintiff granting the reliefs, as prayed for.

9. Mr.R.K.Mohanty, learned Senior Counsel for the Respondents submitted that as per the settled position of law, it is not always necessary that the Plaintiff, in order to avoid the said sale, which is voidable under section 8(3) of the HMG Act is to file a suit to declare the earlier sale made by his natural guardian to declare it as void being not supported by the permission as required under section 8(3) of the HMG Act. He submitted that the minor, on attaining majority, when transfers that very property in favour of another, that act and conduct on

his part is to be in the direction of avoidance of the said transaction and, therefore, the suit filed by the subsequent purchaser as has been filed in the present case by the Plaintiff is maintainable in seeking the reliefs as advanced here. He next submitted that the decision of our own High Court in case of Chaniram Sahu -V- Samaru Nag & Others; AIR 1988 Orissa 136 and Brundaban Mohanty -V- Abakash Rout & Others; 75 (1993) CLT 522 are clear on the point that the minor, attaining majority, can repudiate the sale executed by his father guardian during his minority without the required permission under section 8(2) of the HMG Act and the mode of avoidance may be by an unilateral act or conduct as like transferring the property to anybody else or remaining in possession of the property. It is thus submitted that the Courts below have rightly found that the sale deed dated 30.08.1973 has not conferred the right, title and interest in respect of the land in favour of Defendant No.1 and the sale deed dated 17.06.1980 executed by Defendant No.9 being valid in all respect, has clothed the Plaintiff with the right, title and interest.

10. 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 on record both oral and documentary, as piloted by both sides, have been extensively travelled through.

11. The question as to whether the property purchased in the name of Defendant No.9 by registered sale deed dated 30.12.1964 is the property of that Defendant No.9 or that it was the property held by Defendant No.8 benami in the name of Defendant No.9 has been concurrently answered by the Courts below in favour of Defendant No.9. It has been said that the property involved in the suit was the property of Defendant

No.9 and acquired in his name during his minority. This Court, keeping in view the relationship between the Defendant Nos.8 and 9 and on going through the evidence and the relevant discussion made by the Courts below on those points, finds no such infirmity with the said answer returned by the Courts below. Learned counsel for the parties also, in course of hearing, have not touched upon this point. This Court thus is wholly in agreement with the said conclusion as it has not been possible to find out any perversity in the matter of appreciation of evidence on that score by the Courts below.

12. Thus, the property in the suit was the property of the minor. Admittedly, the Defendant No.8, the father guardian has sold the property in favour of the Defendant No.1 without obtaining the permission of the competent court as required under section 8(2) of the HMG Act. The Plaintiff is the purchaser of the said property from the minor after he attained majority. The present suit is not by the quondam minor being the Plaintiff by the said subsequent purchaser.

Section 8(3) of the HMG Act clearly says that such a sale is voidable at the instance of the minor or any person claiming under him. Keeping in view of the provision of sections 8(2) and 8(3) of the HMG Act to say that the transaction, in violation of the provision of section 8(2) is void would not only be the contrary to the plain words of the statute but would also deprive the minor of his right to affirm or ratify the transaction upon attaining majority which is not prohibited by the enactment and rather permitted. In view of the above, it cannot be said that by virtue of execution of the sale deed by Defendant No.8 as the natural guardian of Defendant No.9 without obtaining the permission required under section 8(2) of the HMG Act in favour of Defendant No.1, the passing of title had not taken place being not from inception void. The Defendant No.1 thus having got the title over the property by

that deed, he continues to remain as such subject to the subsequent action at the instance of Defendant No.9 in either affirming or ratifying the same or in impeaching the same on attaining majority within the period. The said title the minor when gets the decree as to declaration of the sale void has to regained by the minor.

The settled position of law is that the possession follows title. A person having the title has to be presumed to be having the property in question. The Defendant No.9, in the present case, instead of filing a suit to set aside the said sale deed, has sold the property in favour of the Plaintiff and that shows an act of avoidance on the part of the minor. On analysis of the provision of law containing section 8 of HMG Act, it is seen that Article 60 of the Limitation Act specifically prescribes a period of three years for setting aside a transfer of a property made by a guardian of a ward by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. In this case, it cannot be said that since the Defendant No.8-minor was entitled to avoid the transfer effected by his guardian, on the ground of absence of permission of the Court, it became void or rendered nullity for his unilateral act of selling the property to the Plaintiff and for that, it cannot be said that the legal value attached to the sale deed dated 30.08.1973 (Ext.C) got reduced to nil.

The suit having not been filed by the Plaintiff to set aside the sale deed dated 30.08.1973, the prayer is to declare his right, title and interest in favour of the Plaintiff on the basis of subsequent sale deed dated 16.09.1980 with further declaration that the Defendant No.1 has no right, title and interest on the basis of that earlier sale deed and for injunction. The declaration as prayed for is dependant upon the Court first setting aside the sale deed (Ext.C). The Plaintiff having first filed suit for permanent injunction has now filed suit for title and injunction

but then has not felt is proper to take a decree to set aside the sale deed (Ext.C) in favour of the Defendant No.1. In view of that, this Court is of the considered view that the suit is not maintainable for the reliefs claimed.

13. In that view of the matter, the substantial question of law being accordingly; this Court is of the considered view that the Trial Court as well as the First Appellate Court have erred in decreeing the suit filed by the Plaintiff granting him the reliefs, as aforestated.

14. In the Result, the Appeal is allowed. There shall, however, be no order as to cost.



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

Narayan