

HIGH COURT OF ORISSA : CUTTACK
SA NO.180 OF 2002

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned Additional District Judge, Kendrapara in Title Appeal No.16 of 1994 in setting aside the judgment and decree passed by the learned Additional Munsif, Kendrapara in Title Suit No.39 of 1985.

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Sulochana Dei @ Swain

:::: Appellant.

-:: VERSUS ::-

Indramani Swain & Another

:::: Respondents

**Advocate(s) who appeared in this case by hybrid arrangement
(virtual/physical) mode.**

For Appellant

... M/s.N.C. Pati,
B. Das, A.K. Mohapatra,
S. Mishra, S.K. Nanda & N.Singh,
(Advocates).

For Respondents

... M/s.Niranjan Lenka,
H.K. Mohanty, P.K. Barik &
N. Lenka, (Advocates).

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

Date of Hearing: 29.11.2022 :: 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 decree passed by the learned Additional District Judge, Kendrapara in Title Appeal No.16 of 1994. By the same, the Appeal filed by the Respondent No.1 being the aggrieved Defendant in Title Suit No.39 of

1985 in challenging the judgment and decree passed therein by the learned Additional Munsif, Kendrapara under section 96 of the Code has been allowed.

The Trial Court having decreed the suit declaring the sale deed dated 04.11.1981 as illegal and further injunction the Respondent No.1 (Defendant) from dispossessing the Appellant and Respondent No.1 (Plaintiffs) those have been set aside in the First Appeal. Finally, by the judgment and decree passed in the First Appeal, the Appellant and Respondent No.2 (Plaintiffs) have been non-suited. It be stated here that although the Appellant and Respondent No.2 had together filed the suit as the Plaintiffs; the Respondent No.2 (Plaintiff No.2) did not contest in the First Appeal nor has he being the co-Plaintiff of the suit before the Trial Court joined with the present Appellant (Plaintiff) in this 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. Plaintiff's case is that the suit land measures Ac.03 dec. and there stands a thatched house over the same on its eastern portion. This land is part of the land measuring Ac.0.16 dec. under Sabik Khta No.249 and Plot No.1062 which corresponds to Hal Khata No.401 and Hal Plot No.432 in total measuring Ac.0.16 dec. This land is stated to be the ancestral homestead land of Brahmananda Pradhan, who was in possession of the same. The Plaintiff No.1 is the daughter of Brahmananda, who was living

with him along with her mother Sundari even after her marriage with one Pahali Swain were living with Brahmananda and his wife. Her husband being the illatum son-in-law was looking after the family affairs including the cultivation work on behalf of Brahmananda. After death of Brahmananda, the Plaintiff No.1 and her husband remained in possession of the suit land and the house standing thereon. In about the year 1978, the mother of the Plaintiff No.1 died. Brahmananda and his wife then adopted the Plaintiff No.2 and subsequently executed a registered deed of adoption on 17.08.1981. Said Brahmananda by registered sale deed dated 11.07.1941 had sold the suit land along with his other lands to his wife Sundari and had delivered the possession of the same to her. So, Sundari became the rightful owner in possession of the purchased land and on her death, the Plaintiffs succeeded to those properties. The Defendant taking advantage of the old age and ill health of Brahmananda said to have managed to obtain from him a sale deed in his favour in respect of the suit land behind the back of the Plaintiff which they came to know only in the year 1982 when the Defendant forcibly plucked some coconuts from the trees standing on the suit land and took those away, which has led the Plaintiffs to file complaint in the court of law vide I.C.C. No.32 of 1982. It is next stated that prior to the institution of the suit with Brahmananda's permission, the Defendant had been staying in the outhouse standing on the suit land and was taking Brahmananda to the hospital as and when so needed for the purpose of treatment. Once instead of taking Brahmananda

to the hospital, the Defendant had taken him to Marssghai Sub-Registrar's Office and with the help of his chosen scribe and witnesses without paying consideration had obtained the said sale deed in his favour. He thus stood as the purchaser of the suit land by the said sale deed dated 04.11.1981. This is being challenged as nominal and illegal and is so impeached. The Defendant then having managed to gain over the Settlement Authority in recording his name in respect of the suit land, the Plaintiffs were constrained to file the suit.

4. The Defendant in his written statement while traversing the plaint averments has questioned the status of the Plaintiff No.1 as well as the Plaintiff No.2 by stating that they are not the daughter and adopted son of Brahmananda. He further pleaded that the sale deed in favour of Sundari said to have been executed by Brahmananda on 11.07.1941 was a nominal one without any consideration and delivery of possession. Despite execution of such sale deed Brahmananda is stated to be in possession of the said land and other lands all along during the lifetime of his wife Sundari and even after her death. The Plaintiff no.1 and her husband Pahali were in visiting terms to the house of Brahmananda being his relations and were taking care and looking after the cultivation. It is stated that the husband of the Plaintiff No.1 took Brahmananda to Marsaghai Sub-Registrar's Office and obtained a deed of adoption on 17.08.1981 in favour of his second son, i.e., Defendant No.2 with the help of his chosen scribe and set up witnesses in the pretext of executing a power of attorney to look

after his affairs. That deed of adoption is said to be void. It is his further case that after the death of Sundari, Brahmananda became the recorded owner in respect of the suit land and other lands in the Hal Settlement record and while in possession of the same as its owner, he had sold away the suit land to the Defendant by executing a registered sale deed dated 04.11.1981 for a consideration of Rs.2,500/- and had delivered possession of the same. The Defendant claims to be in possession of the said land on his own right, title and interest being the lawful purchaser.

5. On the above rival pleadings, the Trial Court framed in total six issues. On examination of evidence, both oral and documentary, in the backdrop of the rival pleadings, the Trial Court has found the status of the Plaintiffs as claimed by them to be true and correct. Having held so, on the crucial issue raised in the suit with regard to the validity of the sale deed executed by Brahmananda in favour of the Defendant on 04.12.1981 (Ext.A) upon examination of evidence and their evaluation, the Trial Court's answer in holding the said sale deed to be nominal and illegal. In that view of the matter, the suit having been decreed granting the reliefs to the Plaintiff as prayed for, the Defendant being aggrieved by the same had carried the First Appeal.

6. The First Appellate Court has turned down the finding of the Trial Court on the crucial issue as to the validity of the sale deed (Ext.A) which stands in favour of the Defendant in holding that the same is valid and as such has clothed the Defendant with the title in respect of the interest of

Brahmananda which he was holding on entire Ac.0.16 dec. of land in further saying that the sold land is even less than the extent of share of Brahmananda. The Plaintiff No.1 is therefore before this court with the present Second Appeal.

7. The Appeal has been admitted to answer the substantial questions of law as projected in Ground No. 1 and 2 of the Memorandum of Appeal, which read as under:-

“(a) Whether the findings of the learned lower Appellate Court that fraud has not been specifically pleaded relating to execution of Ext.A is an error of record and sustainable in law?

(b) Whether due execution of Ext.A, legal necessity and passing of consideration have been proved by the Defendant in view of the evidence and circumstances narrated in paragraph 5 of this appeal memo?”

8. Learned counsel for the Appellant submitted that when the Trial Court after detail analysis of evidence and their assessment from every possible angle had held the sale deed to be illegal as its due execution has not been proved and it was also not for consideration and followed by delivery of possession, the First Appellate Court has unjustifiably without assigning any such good and acceptable reason has set the same at naught. He submitted that the First Appellate Court for the purpose has not taken into account the surrounding circumstances which emerged from the evidence in their proper prospective and simply being swayed away by the fact that there was no such detail pleadings in the plaint has over turned

such a solid finding based on just and proper appreciation of evidence. He, therefore, urged in favour of restoration of the findings recorded by the Trial Court by setting aside the findings returned by the First Appellate Court.

9. Learned counsel for the Respondent, on the other hand, while supporting the conclusion arrived at by the First Appellate Court contended that when the evidence on record reveal that Brahmananda was a literate man and had all the ideas as to execution of the documents and their registration as would be evident from the fact that way back in the year 1941 he had executed the registered sale deed in respect of the suit land and other lands in favour of his wife Sundari and then too had executed a deed of adoption (Ext.1); in the absence of any specific pleading as to the facts and other detail particulars constituting the fraud said to have been practiced upon Brahmananda by the Defendant in obtaining the registered sale deed (Ext.A), the First Appellate Court has rightly held the said sale deed in favour of the Defendant is valid.

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 and have perused the evidence.

11. The admitted factual position stands that Brahmananda was the erstwhile owner of the suit land and other lands. He had sold the suit land to his wife Sundari by executing a registered sale deed on 11.07.1941. This registered sale deed having held the field all along, Sundari became the

owner in possession of the property. Sundari died intestate. The Plaintiff No.1 has been held to be the daughter of Brahmananda and Sundari and the Plaintiff No.2 has been held to be their adopted son, which finding is concurrent on facts. The Defendant having not challenged these findings returned by the Courts below by filing any cross-appeal or cross-objection; those have attained finality and for our purpose is conclusive. So, on the death of Sundari, her property was succeeded by her husband Brahmananda, Plaintiff No.2-son and Plaintiff No.3, the daughter in consonance with the provision contained in section 15(1) of the Hindu Succession Act, 1956. Each thus had 1/3rd interest over the said property which had earlier been transferred by Brahmananda in favour of his wife Sundari. The area of the total land under Sabik Khata No.249 and Plot No.1062, which corresponds to Hal Khata No.401 and Plot No.432 is Ac.0.16 dec. Thus the extent of land over which Brahmananda, Plaintiff No.1 and Plaintiff No.2 each had the interest comes to Ac.0.051/3 dec. Such was the entitlement of Brahmananda, Plaintiff No.1 and Plaintiff No.2 each. The sale deed which is under challenge which stands in favour of the Defendant, i.e., (Ext.A) is concerned with the land measuring Ac.0.03 dec., which is well within the share of Brahmananda. This sale deed executed by Brahmananda on 04.11.1981, which has been admitted in evidence and marked Ext.A is challenged on two grounds, (i) the same had been obtained by practicing fraud; and (ii) that there was no payment of consideration for the same and delivery of possession.

12. It is the settled position of law that where allegations of fraud or misrepresentation are raised in impeaching a transaction, the person coming forward to impeach the transaction must set forth, the particulars of fraud or misrepresentation and mere stating the general words like those would not suffice the purpose. The purpose for this is that a person who is the beneficiary under the transaction gets all the opportunities to know all those facts, which are projected in support of the fraudulent practice resorted to and the misrepresentation so directed so as to get the opportunity to refute if he so desires. It is also the settled position of law that the person who takes the plea of fraud and misrepresentation while pleading all those as stated above carries the burden of proof of establishing all those facts and the standard of proof is beyond reasonable doubt since such a finding puts a stigma upon the person which is criminal in nature.

13. Adverting to the facts of the case, the Plaintiffs in the suit have stated that the Defendant was taking Brahmananda for his treatment because of his ill health in a trolley rickshaw to Marsaghai Health Centre and on that date instead of taking him to the Hospital, he had taken him to the Sub-Registrar's Office where with the help of his chosen scribe and set up witnesses without payment of any consideration had obtained the sale deed in his favour in respect of the suit land. There is no denial of the fact from the side of the Defendant that he was a trolley rickshaw puller. Brahmananda, the vendor of the said sale deed standing in favour of the

Defendant was not an illiterate person. He had the experience of executing and registered deeds in the office of the Sub-Registrar as is evident from the fact that on the earlier occasion way back in the year 1941, he had executed the sale deed in favour of the wife Sundari and then too had executed a deed of adoption prior to the execution of the registered sale deed in question and thereby he had acknowledged the adoption of Plaintiff No.2, which was certainly of serious impact much more than the present transaction. The Plaintiffs having been examined have not let in any such evidence to provide assurance to the plea of fraud. The P.W.6 is none other than the Plaintiff No.1 herself. She had no knowledge about the execution of the impugned sale deed (Ext.A). It is her statement that during the rent camp of the settlement, she could know for the first time about such sale deed to have been executed by her in favour of the Defendant in respect of the suit land. Although she has supported the plaint averment that Defendant had taken Brahmananda and obtained the sale deed by stating the same in a general manner, during cross-examination she has revealed a startling fact that said Brahmananda had also sold one piece of land to one Dhruba Swain and another piece of land to one Madhu Swain. This P.W.6 was not present when the impugned sale deed was executed by her father in favour of the Defendant. She does not say that Brahmananda even to have ever disclosed before her at any point of time thereafter that she was ever taken to the Office of the Sub-Registrar, being so taken by the Defendant, when he was to go to the health centre and there he had

executed a power of attorney in favour of the Defendant. This being the evidence let in by the Plaintiffs, the Defendant has led evidence by examining a witness to the very said sale deed (Ext.A) as D.W.1, who has stated regarding the details of execution of the said deed by Brahmananda in stating that Brahmananda being then unable to sign has lent his LTI and admitted before the Sub-Registrar to have received the consideration. His positive evidence is on the score that Brahmananda was then not ill. The scribe of the sale deed has come to the witness box as D.W.2, who has also stated all the details as to have scribed the sale deed under the instruction of Brahmananda who executed the same by putting his LTI and in token of the same had placed his LTI. This witness is also the scribe of earlier deed of adoption which is standing in favour of the Plaintiff No.2 and had been executed by that Brahmananda. So, the allegation that the Defendant for the purpose had chosen his own scribe falls flat and it is seen that the scribe has having old acquaintance with Brahmananda as his client since long. Therefore, the fact pleaded that the Defendant No.1 had obtained the sale deed by managing to get its scribed through his chosen scribe and citing his chosen witnesses is not believable. The Sub-Registrar has been examined as D.W.3, who has deposed that Brahmananda had personally taken part in the registration of the sale deed before him and admitted to have received the consideration of Rs.2,500/- and, therefore, a certificate to that effect had been given. The document thus carrying the legal presumption as to one execution and follow up registration process;

the Plaintiffs are found to have not been able to dislodge the same by establishing the burden of proof in shifting the onus upon the shoulder of the Defendant. To add to this, the Defendant being examined as D.W.5 has also so stated.

The evidence on record as let in by the Defendants, those appears to have not been shaken despite cross-examination from the side of the Plaintiffs. Thus here is a case where the Plaintiff when are found to have not been able to discharge the burden of proof of the fact that the sale deed (Ext.A) had been obtained by practicing fraud and by misrepresentation; on the other hand, the Defendant has proved its due execution and registration. Merely because Brahmananda was old at that time of execution of Ext.A that, itself, is no ground to say that he had no knowledge with regard to the act that he did on that day in the Sub-Registrar's Office and that everything were then stage-managed and done at the instance of the Defendant. Over and above this, it reveals from the evidence let in by the Plaintiffs that the Defendant was staying in the land of Brahmananda by constructing a Chalia for 10 to 12 years and that has been said to be explained away by the Plaintiffs that it was with the permission of Brahmananda when there is no evidence in that light at all. So the possession of the suit land by Brahmananda being also there, the same stands as a strong circumstance to provide support to the case of the Defendant as admittedly after the death of Brahmananda, no such step has been taken by the Plaintiffs to drive out

the Defendant prior to the filing this suit where they too seek recovery of possession.

For the forgoing discussions and reasons, the substantial question of law as at (a) stands answered against the Plaintiffs. In view of this, there arises no further necessity to answer the subsequent substantial question of law as at (b). It is thus held that the judgment and decree passed by the First Appellate Court are well in order and have to hold the field.

14. In the result, the Appeal stands dismissed. However, there shall be no order as to cost.



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