

IN THE HIGH COURT OF ORISSA AT CUTTACK

Second Appeal No.258 of 1989

In the matter of an Appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree 22.05.1989 and 22.06.1989 respectively passed by the learned 2ND Additional District Judge, Berhampur in T.A. No.98 of 1988 (T.A. No.33/84 GDC) setting aside the judgment and decree dated 25.04.1984 and 05.05.1984 respectively passed by the learned Subordinate Judge, Aska in T.S. No.80 of 1980.

Trinath Gouda

....

Appellant

-versus-

***Krishna Chandra Patnaik &
Another***

....

Respondents

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

For Appellant - Mr.G.Mukherjee
(Senior Advocate)

For Respondents - Mr.A.N. Misra, Adv.
Mr.J. Gupta, Adv. for R.2(b) to 2(d)

CORAM:

JUSTICE D.DASH

Date of Hearing : 29.11.2022 : Date of Judgment:23.12.2022

D.Dash,J. The Appellant, in this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree 22.05.1989 and 22.06.1989 respectively passed by the learned 2ND Additional District Judge, Berhampur in T.A. No.98 of 1988 (T.A. No.33/84 GDC).

The Respondent No.1, as the Plaintiff, had filed the suit arraigning this Appellant as the Defendant No.1 and another, namely, Naran Gouda as Defendant No.2. The suit stood numbered as T.S.

No.80 of 1980 in the Court of the learned Subordinate Judge, Aska. The suit was for declaration of title and recovery of possession. The said suit being dismissed, the Respondent No.1, as the unsuccessful Plaintiff, had carried the First Appeal.

During pendency of that First Appeal, the Defendant No.2, who had been arraigned therein as Respondent No.2, having died, his legal representatives have come on record and they are the Respondent Nos.2(a) to 2(d).

The First Appeal filed by the Respondent No.1, as the unsuccessful Plaintiff, has been allowed and the right, title and interest of Respondent No.1 (Plaintiff) over the suit land has been declared and the Defendants have been directed to give vacant possession of the suit land.

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 Plaintiff's case is that one Ganesh Chandra Panda had purchased the suit land from one Madhaba Gouda in the year 1955 and he was in possession of the same. Ganesh, having purchased the suit land, had sold portions of the same to Rusia Gouda and others. Subsequently, the suit land to the extent of Ac.0.81 cents was left with him, which he sold to the Plaintiff in the year 1968 for a consideration of Rs.500/- followed by delivery of possession. The Plaintiffs claim to be in possession of the same. It is stated that the Defendants, without any justification, created trouble in his possession. He, therefore, filed the suit.

4. The Defendants, in their written statement, have taken the stand that the suit land is the ancestral property of Ganesh Panda and Prasanna and in the family partition, it had fallen to the share of Prasanna, who, in turn, had sold it to the Defendants on 31.01.1963 by registered sale deed in which that Ganesh was an attesting witness. According to their case, the suit land having been purchased by them from Prasanna way back in the year 1963 under registered sale deed, Ganesh had no such right over the suit land and had no authority to execute any sale deed for sale of the said land. The sale deed thus is a fake one being not followed by delivery of possession and also without consideration. It is stated that the Executive Magistrate has rightly declared their possession over the same.

5. On the above rival pleadings, the Trial Court has framed four issues. Answering the crucial issues with regard to the right, title and interest in respect of the suit land in favour of Ganesh and consequentially, the same flowing from the Plaintiffs, who are the purchasers from Ganesh; upon examination of evidence and their evaluation, the answer is that no title has been conveyed to the Plaintiff under Ext.4, the registered sale deed executed by Ganesh on 01.02.1968 and the title of the Defendants over the suit land has in no way been affected thereby.

The suit having been dismissed, the unsuccessful Plaintiff, having carried the Appeal, has been successful. The First Appellate Court has overturned the finding of the Trial Court with regard to the right of Ganesh over the suit land so as to alienate the same to the Plaintiff.

6. The Appeal has been admitted to answer the substantial question of law as at Ground No.6, which reads as under:-

“XX XX XX

i) Is the Plaintiff entitled to a decree for right, title and interest for recovery of possession on the straight of the document Ext.4 which has been executed in the year 1968, when the Defendants are in possession of the disputed land since 1963 by virtue of a registered sale deed?;

ii) Whether the non-consideration of the material evidence on record renders the judgment passed by the learned lower appellate court unsustainable in law?; and

iii) Is the Appellate Court justified in holding that since the litigation between the parties continued in respect of the suit property from 1968 till final disposal of the suit, adverse possession stands suspended while deciding the question of limitation?”

7. Learned Senior Counsel for the Appellant submitted that the Defendants have purchased the property by registered sale deed dated 31.03.1963 executed by Prasanna and in that very sale deed, Ganesh, who is the vendor of the Plaintiff, is very much a witness. When the Plaintiffs claim their title through Ganesh by way of their purchase, it is seen that said Ganesh had given his consent for sale of the land by Prasanna to the Defendants and he is said to be having his proprietary interest is certainly bound by the recitals and cannot feign his ignorance or it can be so avoided by saying that simply he is an identifying witness. The sale made by him again in the year 1968 to the Plaintiff thus has no value in the eye of law. He thus submitted that the First Appellate Court has misdirected itself by not attaching any importance to the above startling facts which on being accepted stands as the turning point. He further submitted that under the above circumstances, when the

Defendants are the prior purchasers of the suit land from Prasanna with the full knowledge, consent of the transferee Ganesh, the Plaintiff being the subsequent purchasers of the property from Ganesh when has not advanced any prayer to declare the sale deed standing in the name of the Defendant as void, the suit ought to have been dismissed.

8. None appeared on behalf of the Respondents despite service.

9. 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 statements and have travelled through the evidence both oral and documentary.

10. Plaintiffs case is that the suit land originally belonged to Madhaba Gouda and Ganesh Panda had purchased it from him in the year 1955. Ext.1 is the certified copy of the registered sale deed dated 29.4.1955 and the land has been recorded in the name of Ganesh Panda. The Plaintiff claims to be in possession of the suit land after purchase of the same from Ganesh after getting the sale deed (Ext.4) in the year 1968. The Defendants had purchased the property from Prasanna vide Ext.A. In this Ext.A, Ganesh Panda stood as a witness. This Ext.A has come into being much prior to Ext.4. So, Ganesh Panda having asserted to be having definite proprietary interest as can be seen from the subsequent sale deed when stands as a witness to the earlier sale deed executed by his brother is selling the same and the knowledge of the Defendants as to the contents has to be presumed and he can only wriggle out of the same by offering acceptable explanation which is wanting in this case and at the same time, Ganesh Panda has not come as a witness from the side of the Defendants to explain the said fact. He having admitted the

contents of the sale deed as executed by his brother Prasanna in favour of the Defendants and thus accepted the right of Prasanna to alienate the property when it also reveals from Ext.A that a sum of Rs.400/- was paid before the Sub-Registrar to Prasanna and Ganesh was then a witness, he cannot turn back and as such estopped to either impeach the said document or avoid the same. The circumstances in the given case would reveal that Ganesh Panda, having fully understood the particular transaction in standing as a attesting witness during the transaction of sale between Prasanna and the Defendants. Here, on the basis of these glaring features appearing in the evidence, the Trial Court further having recorded the finding with regard to the possession of the suit land by the Defendants when was right in dismissing the suit; the First Appellate Court has erred in decreeing it.

In that view of the matter, the judgment and decree passed by the First Appellate Court, in my considered view are vulnerable and those are liable to be set aside because the answers to the substantial questions of law run in favour of the dismissal of the suit filed by the Respondents.

11. In the result, the Appeal is allowed. The judgment and decree passed by the First Appellate Court are hereby set aside and those passed by the Trial Court are restored. There shall, however, be no order as to cost.

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

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