

IN THE HIGH COURT OF ORISSA AT CUTTACK

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, Mayurbhanj-Baripada, in RFA No. 53 of 2011 by confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Baripada in Civil Suit No.581 of 2005.

Dhrubendra Chandra Das :: **Appellant**
-versus-

Harish Chandra Das (Since Dead) :: Respondent
by his LRs & Others
Appeared in this case by Hybrid Arrangement
(virtual/physical mode)

For Appellant :::: M/s. S.P. Misra, Sr. Advocate,
S. Mishra, S.K. Samantaray,
B.S. Panigrahi, S.K. Sahoo,
D. Priyanka, S. Mishra,
Advocates.

For Respondent :::: M/s. N.C. Pati, B. Das, B. Pati,
M.R. Das, Advocates.
M/s. S.K. Mishra, S. Pattanaik,
J. Pradhan, B. Das, K.C. Ram,
Miss P.P. Mohanty, S.R. Rout,
Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 13.09.2022, DATE OF JUDGMENT::26.09.2022

These Appellant in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, ‘the Code’) assails the judgment and decree passed by the learned District Judge, Mayurbhanj-Baripada, in RFA No. 53 of 2011.

By the same, the Appeal filed by the present Appellant being the unsuccessful Plaintiff in Civil Judge (Senior Division), Baripada in Civil Suit No.581 of 2005 under Section-96 of the Code in dismissing the suit filed by the Appellant (Plaintiff) have been confirmed. The Appellant (Plaintiff) thus, having been non-suited by both the Courts below is now before this Court in the Second Appeal.

It may be stated here that Respondent No.1 having died during pendency of this Appeal, his legal representatives have come on record.

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. Plaintiff's case is that one Sitanath Das, who was the inhabitant of village Gopiballavpur in the district of Medinapur in the State of West Bengal was their common ancestor,. Khetra Mohan and Umakanta are the two sons. It is stated that Sitanath had no income of his own. Khetra Mohan on attaining the age of 15 to 16 years, in search of his livelihood, came to Baripada in the District of Mayurbhanj and started grocery business in the Municipal market of Baripada. It is stated that out of his own income, he purchased the land which has been shown in Lot-1 of Schedule-B of the plaint. Khetra

Mohan then brought his brother Umakanta from his village and they resided together in the house constructed over the said land. Said Khetra Mohan again purchased a land measuring Ac.0.76 decimals in village Benapura from out of his own income. He died sometime in the year 1959. Thereafter his wife Padmabati sold away that Benapur land and from out of the sale proceeds received therefrom, she purchased the property described in Lot-2 and Lot-3 of Schedule-B of the plaint. It is stated that Lot-2 property was purchased in her name; whereas Lot-3 property was purchased utilizing the same sale proceed in the name of Sulochana, wife of Umakanta.

After the death of Khetramohan, Plaintiff who is one of his sons was looking after the grocery business since the other sons of Khetra Mohan were in service, prosecuting study and one was looking after the land at Benapur. Govinda, the son of Umakanta was having his earning from a beetle shop and at that time, the Defendant No.1, the other son of Umakanta had not started earning. Since Umakanta was not financially sound in comparison to the other sons of Khetra Mohan, on his request, there was a mutual arrangement in which the Padmabati took back portion of the land measuring Ac.0.07 decimals that was purchased in the name of Sulochana, the wife of Umakanta and as such they exchanged land among themselves which is said to

have taken place in the year, 1970. After the said arrangement and exchange, son of Khetra Mohan out of their own funds construct a residential house over the land measuring Ac.0.07 decimals in the year 2001 and the sons of Govinda constructed a building over Ac.0.06 decimals of land on the front side of that land measuring Ac.0.07 decimals. Govinda and Paresh, who were having their earning from beetle shop and service respectively out of their own income jointly purchased Ac.0.07 decimals of land described in Lot-4 of Schedule-B. This land adjoins the land under Lot- 1 to 3. It is stated that Govinda out of his share then sold Ac.0.03 decimals of land to Laxmidhar Rout, who is the purchaser who then constructed a building over there.

Harish Chandra, the Defendant No.1 at a tender age started his practice as Maharir in Baripada Court premises and he was very shrewd and influencing. It is stated that he motivated Babaji, who filed the suit for partition and that was numbered as Title Suit No.25 of 1988 in the Court of Sub-Judge, Baripada. Babaji not aware of anything about the suit and his signatures were simply taken on whatever were written in the plaint in the said suit. It is stated that the said plaint contains a false narration that Lot-1 of Schedule-B property is the ancestral property and Lot-2 & 3 are the joint family property acquired from the funds of his joint family business. It is further stated

there was suppression of material facts in the said suit about sale of Govinda's share of the land measuring Ac.0.03 decimals of Lot-1 and further false allegation that land measuring Ac.0.04 decimals of Lot-4 is the joint family property. Since Defendant Nos. 10 to 14 were in service, the Plaintiff was looking after the suit on behalf of legal representatives of Khetra Mohan. At the time of filing of said suit, daughters of Khetra Mohan were married. Under the instigation of Defendant No.1, the Counsel was also engaged and she gave an impression to the Plaintiff that the suit having been filed for partition, they would get their legitimate share and thus there was no need for them to contest for their interest in the suit for which the Defendant Nos. 10 and 14 to 17 as well as the plaintiff who was the Defendant No.2 in the said suit remained ex-parte. Thus, it is stated that the Defendant No.1 played a fraud in connivance with the Moharir and managed to obtain the preliminary decree. After the preliminary decree, when the Babaji filed a petition to make said preliminary final, the Plaintiff consulted Lawyer and then all about the developments taken place in the said suit were known and it was unearthed as to how the mischief has been played and finally ex-parte decree in that Title Suit No.25 of 1988 had been obtained. So the present suit to declare the preliminary decree passed in the Title Suit No. 25 of 1988 as null

and void was filed with further prayer to declare Defendant Nos. 10 to 17, the owners of Lot-1 and Lot-3 properties under the Schedule-B.

4. The Defendant Nos. 1 to 5 and 9 in their written statement have stated that the common ancestor, Sitanath had come to Baripada with Khetra Mohan and Umakanta and he had acquired the property in Lot-1 of Schedule-B and constructed a thatched house over there. He started grocery business with his sons Khetra Mohan and Umakanta. So, the suit property was accordingly been acquired from out of joint family nucleus. It is stated that the Plaintiff was very much a party to the suit i.e. Title suit No. 25 of 1988 and he with others were representing the branch of Khetra Mohan. The suit was decreed ex-parte as none came to file the written statement and contest. The preliminary decree was also challenged by Sadhu Charan i.e. Defendant No.14. The ex-parte decree has attained finality. With all these they prayed to dismiss the suit.

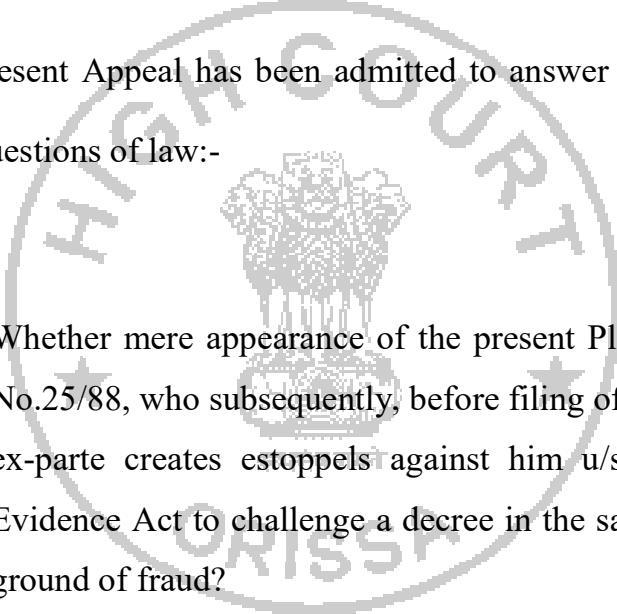
5. The Defendant No.3(a) has also prayed for dismissal of the suit since the earlier ex-parte preliminary decree in Title suit No. 25 of 1988 since holds the field.

The Defendant Nos. 7 & 8 have pleaded in the same line. However, Defendant No.10 in his separate written statement has stated that Lot-4 of Schedule-B was the self-acquired property of Govinda

and Paresh and that it had not been acquired from joint family income. Govinda had already alienated his share. So, it was prayed to set aside the ex-parte preliminary decree passed in Title suit No. 25 of 1988.

6. On the above rival pleadings, the Trial Court has framed seven (7) issues. The issues being answered against the Plaintiff, the suit stood dismissed. The unsuccessful Plaintiff having carried First Appeal has again been unsuccessful.

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

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- “(i) Whether mere appearance of the present Plaintiff in T.S. No.25/88, who subsequently, before filing of W.S. was set ex-parte creates estoppels against him u/s. 115 of the Evidence Act to challenge a decree in the said suit on the ground of fraud?
- (ii) Whether the learned lower Appellate Court has failed to discharge his duty as the highest fact finding Court u/s. 96 of the C.P.C.?”

8. At this stage, before going to undertake the exercise of answering the above substantial questions of law, it is felt apposite to take note of the submission of learned Counsel for the Respondent No.1 to 12 which stand un-refuted. It is stated that when the principal

prayer in the present suit is to declare the ex-parte preliminary decree passed in Title suit No. 25 of 1988, in the meantime the final decree in the said suit has finally been drawn over the stamp papers effecting division of the properties amongst the parties in conformity with the preliminary decree and following observations made therein.

9. Learned Counsel for the Appellant submitted that the Courts below have failed to take note of the evidence on record showing as to how the fraud has been practiced in obtaining that ex-parte preliminary decree for Title suit No. 25 of 1988. He further submitted that with such evidence on record, the Courts below ought to have declared the ex-parte decree passed in that suit i.e. Title suit No. 25 of 1988 as null and void even though there was no Appeal against that ex-parte preliminary decree nor was there application to set aside the same under Order-9 Rule -13 of the Code nor a Review under Order-47 Rule-1 of the Code. He further submitted that merely because this Plaintiff had entered appearance in the said suit, it is not permissible to say that he is estopped from questioning the ex-parte preliminary decree as the outcome of fraud. He next submitted that the first Appellate Court has failed in his duty to properly appreciate the evidence on record while recording its conclusion that the Plaintiff has not established a case of fraud so as to succeed in the suit.

10. Learned Counsel for the Respondents on the other hand submitted all in favour of the decision rendered in the suit by the Trial Court as well as by the First Appellate Court in the First Appeal. He submitted that both the Courts below having appreciated the evidence in a just and proper manner has rightly answered that issue No.4 in the negative. It was submitted that the Plaintiff having received the notice in the final decree proceeding, when has not raised the objection at the first instance that said preliminary decree had been obtained by practicing fraud is precluded from filing the present suit and for that reason, the ground taken to set aside ex-parte the preliminary decree are to be taken as afterthought.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the evidence on record, most importantly the ex-parte order and the preliminary decree passed in Title suit No. 25 of 1988 as well as the final decree drawn in the said suit upon acceptance of the report of the Civil Court Commissioner containing the allotment-sheets showing specific properties so allotted to the parties.

12. Admittedly, Sitanath is the common ancestors of the parties. Khetra Mohan and Umakanta are his two sons. Babaji one of the sons

of Khetra Mohan had filed Title suit No. 25 of 1988 for partition of schedule property, claiming therein that said properties had been acquired by utilizing the joint family fund. The present Plaintiff and others had received notice in the said suit. However, they having remained absent without filing the written statement, the suit was preliminarily decreed. This ex-parte preliminary decree sought to be questioned in the present suit wherein the principal prayer is to declare the same as null and void and that Defendant Nos. 10 to 17 are the owners of the properties described in Lot-1 and Lot-3 of Schedule-B were too the subject matter of that suit.

The Courts below have concurrently found that the Plaintiff has failed to make out a case that fraud had been practiced in obtaining that ex-party preliminary decree. The parties were noticed and they had appeared. They having the opportunity to file the written statement even that had not been done. Simply, it is said that they were advised by their Counsel not to take any step therein as no harm would occasion to them. Although the Plaintiff has let in some evidence, it is seen from the judgment of the Trial Court that upon thorough scanning of the same and the facts and circumstances emanating from the evidence the conclusion arrived as is that the ex-parte preliminary decree is not liable to be set aside having been obtained by fraud.

In that view of the matter, even though it is stated that the Plaintiff is not estopped from challenging the ex-parte preliminary decree on the ground of fraud by filing the suit yet in the present suit his claim in that regard, does not merit acceptance. The answer to the other substantial questions of law stand rendered accordingly.

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



Narayan