

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**SA No.155 of 1999**

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 18.02.1999 and 15.03.1999 respectively passed by the learned 2<sup>nd</sup> Additional District Judge, Bhubaneswar in title Appeal No.9/51 of 1998/1997 confirming the judgment and decree dated 28.06.1997 and 17.07.1997 respectively passed by the learned Civil Judge, Junior Division, Bhubaneswar in T.S. No.28 of 1993-I.

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***Smt. Tulasi Sahoo & Others*                      ....                      *Appellants***

-versus-

***Basanta Kumar Pradhan & Others*                      ....                      *Respondents***

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

***For Appellants*       -       Mr.D.P. Mohanty, J.K. Bastia,  
R.K. Nayak & T.K. Mohanty  
(Advocates)**

***For Respondents*   -       Mr.S.N. Mohanty,  
N.C. Pattnaik, A.C. Baral,  
H.S. Mohanty, P.K. Rout,  
D.K. Bhoi  
(Advocates for R.1,2,3,5,6,  
7,9,10 & 11)**

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

**Date of Hearing : 11.05.2022       :       Date of Judgment:20.06.2022**

The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), have assailed the judgment and decree dated 18.02.1999 and 15.03.1999 respectively

passed by the learned 2<sup>nd</sup> Additional District Judge, Bhubaneswar in title Appeal No.9/51 of 1998/1997.

By the same, the Appeal filed by the present Appellants (Plaintiff No.1 to 4 and 7 & 8) as well as Respondents Nos.12 to 14 (Plaintiff Nos.5, 6 & 9) under section 96 of the Code has been dismissed and the judgment and decree dated 28.06.1997 and 17.07.1997 respectively passed by the learned Civil Judge, Junior Division, Bhubaneswar in T.S. No.28 of 1993-I have been confirmed. The Appellants (Plaintiffs), being non-suited by the Trial court where their suit stood dismissed, the move of the Appellants (Plaintiffs) by filing the First Appeal has also been unsuccessful.

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 Plaintiffs' case is that one Nidhi Sahoo had three sons, namely, Bhramarabar, Banambar and Krupasindhu; all are dead. The Plaintiff Nos.1 to 6 are the legal heirs and successors of said Krupasindhu. The Plaintiff No.1 is the wife of Krupasindhu whereas Plaintiff Nos.2 and 3 are the sons of Krupasindhu. The Plaintiff Nos.4 to 6 are the daughters of Krupasindhu. The Plaintiff Nos.7 to 9 are the sons of Banambar. Bhramarabara had a son named Dwijabara whose sons are the Defendant Nos.8 and 9 whereas Defendant Nos.10 and 11 are his two daughters. Nidhi had in total Ac.5.47 decimals of land as it stood recorded in the record of right of the year 1927 better described in Schedule-B of the plaint. After alienation of some portions of the said land, by the time of publication of record of right in the settlement of the year 1976, Ac.4.53 decimals of land was remaining as shown in

Schedule-C of the plaint. This was recorded in the name of three sons of Nidhi. Thus each was having  $1/3^{\text{rd}}$  interest. In the settlement of the year 1976, the land recorded under Khata No.428 appertaining to Plot No.1565 measuring Ac.0.25 decimals found mention to have been purchased by Defendants 1 and 2 from Bhramarabar, the eldest son of Nidhi. It is alleged that said sale of joint family property by Bhramarabar is illegal as he being a member of the undivided family, had no such power to alienate of his undivided interest over the joint family property to any stranger and, therefore, it is stated that said sale is not binding on them as also others. It is stated that the properties coming to the hands of three sons from their father Nidhi had never been partitioned by metes and bounds. Said Bhramarabar, Banambar and the Plaintiff Nos.1 and 2 sold away Ac.1.11 decimals of land to Defendants 4 to 7 by registered sale deed dated 16.12.1972 and 22.12.1972 respectively. During consolidation operation, Ac.1.11 decimals of land were reduced to Ac.1.02 decimals. It is further stated that the sales were during the minority of Plaintiff Nos.2 and 3 when there was no legal necessity. So, they challenged the sale as hit under the provisions of Section 8 of Hindu Minority and Guardianship Act, 1956. During the Consolidation Operation, Chaka Khatian No.382/82 was issued in favour of the Plaintiffs and all the Defendants except Defendant No.3 and, therefore, Defendants 1 and 2 are entitled to get  $1/3^{\text{rd}}$  share out of that Ac.0.25 decimals as purchased by them under registered sale deed and similarly, Defendants 4 to 7 are entitled to Ac.1.02 decimals on the strength of their purchase. The Consolidation Record of Right was jointly issued in the name of the Plaintiffs and all the Defendants except Defendant No.3 in respect of those plots bearing nos.570, 945 and 288 as shown in Schedule-D of the plaint. Thus, it is

said that Defendants 1 and 2 are entitled to an equal extent of land measuring Ac.0.8  $1/3^{\text{rd}}$  decimals in respect of those three plots. It is stated that the Defendant Nos.1 and 2, without having any manner of right, title and interest in the land over and above Ac. $8^{1/3}_{\text{rd}}$  decimals have transferred Ac.0.36 decimals from Chaka No.561, Khata No.342 appertaining to plot no.945 measuring Ac.1.69 decimals by registered sale deed dated 27.11.1992. Therefore, the Defendant No.3 had no right, title and interest land beyond Ac.0.04 decimals as shown in Schedule-E of the plaint and the transfer in relation to Ac.0.32 decimals of land is illegal which has conferred no right, title and interest. It is, however, stated that the Defendants 4 to 7 have unauthorizedly raised a shopping centre building for commercial purpose over the land under Consolidation Chaka No.561 over an area of Ac.0.06 decimals in plot no.945 and are in possession of Ac.0.49 decimals in that very plot. Having pleaded all these above, the Plaintiffs filed the suit seeking the relief of declaring the joint ownership in respect of suit properties along with the Defendants except Defendant No.3 and for issuance of injunction against Defendants 3 to 7.

4. The Defendants 1 to 3 having filed the written statement did not adduce evidence. The Defendants 4 to 7 also filed their joint written statement.

It has been averred by them that the Plaintiffs have alienated a portion of the suit land in favour of Defendants 4 to 7 and the Plaintiffs are not in possession of the same. So, in the absence of the relief of recovery of possession, no decree for permanent injunction can be passed in favour of the Plaintiffs. It is stated that there was no partition amongst the legal heirs and successors of three brothers, namely, Bhramarabar, Banambar and Krupasindhu. During the Consolidation

Operation, the names of the Plaintiffs and the Defendants have been recorded jointly and the three Chakas had been carved out. It is stated that prior to consolidation proceeding, Defendants 4 to 7 purchased the land under Sabik Plot No.1747, 1744, 1771 and 1777 under Khata No.49 measuring Ac.0.60 decimals, Ac.0.10 decimals, Ac.0.20 decimals and Ac.0.18 decimals respectively whereas Hal Plot No.1892 under Hal Khata No.78 measuring an area of Ac.0.01 ½ decimals out of Ac.0.33 decimals by virtue of two registered sale deeds. The Defendants 4 to 7 have admitted that the Defendants 1 and 2 have purchased Ac.0.26 decimals by registered sale deed dated 17.08.1968. It is further stated that the during the time of creation of Chaka, the area of Defendants 4 to 7, i.e., Ac.1.11 decimals was reduced to Ac.1.02 decimals and after that, an amicable settlement between the Plaintiffs and Defendants 4 to 7 had taken place in the year 1981 and an area of Ac.1.00 decimals from the western side of Chaka Plot No.561 being plot no.945 was given to Defendants 4 to 7 and an area of Ac.0.45 decimals which had been given to Defendants 1 and 2 was just adjoining to the western side of their land.

5. The Defendants 1 to 3 pleaded that after the death of Nidhi, his three sons succeeded to the properties and they have amicably partitioned the suit properties amongst themselves which is in the year 1976 by keeping some properties as joint and accordingly, each party was in possession of their respective shares. In the consolidation proceeding, a separate Chaka in respect of Ac.0.10 decimals has been prepared in the name of Defendants 1 and 2 and in respect of Ac.0.36 decimals of land, the record stood jointly in the name of Plaintiffs and the Defendants other than Defendant No.3. These Defendants claimed to have been in the process of construction of a building over their

purchased land and Defendant No.3, after purchase of the land from the Defendants 1 and 2, is in the process of constructing the house.

6. Faced with the rival pleadings, the Trial Court has framed four issues. On the basis of the evidence on record, although the Trial Court has not been able to give a specific finding that there was a partition amongst the parties in respect of their joint family property, has, however, said that each of them are in separate possession of some portions of land by mutual convenience. In that view of the matter, the Trial Court has refused to pass the decree in the suit, as prayed for.

7. The First Appellate Court, being moved by the unsuccessful Plaintiffs, on appreciation of evidence, when has found that the Plaintiffs have admitted that they have no dispute over the land possessed by Defendants 1 and 2 and that has been subsequently sold to Defendant No.3; in the absence of any specific case of the Plaintiffs, being laid that the sale under Ext.5 is void or illegal and as the Defendant No.3 has acquired valid title over the suit land, it has agreed with the ultimate result of the suit as has been recorded by the Trial Court. Finding the Plaintiffs and Defendants to be the joint title holders in respect of the suit schedule properties and on assessment of evidence, in coming to a conclusion that the parties are in possession according to their convenience, the suit as laid by the Plaintiffs for the reliefs claimed has been dismissed.

8. The present Appeal has been admitted on 17.06.2002 only to answer the substantial question of law as indicated in Ground No.8(B) of the Memorandum of Appeal, which reads as under:-

“When the Defendant No.3 has purchased some portion of land out of Chaka Plot No.945 (Chaka No.561) from the

Defendant Nos.1 and 2 and when section 34 of the O.C.H. and P.F.L. Act is a bar for this transfer and in contravention of section 34 of the Consolidation Act, the sale deed being void under section 35 of the Consolidation Act, are the Courts below justified in holding that the sale deed (Ext.5) in favour of the Defendant No.3 is valid?"

9. Learned counsel for the Appellants submitted that the Courts below, in view of the provisions of Section 34 of the Odisha Consolidation of Holding and Prevention of Fragmentation of Land Act, 1972 (in short, 'the OCH & PFL Act'), ought to have held that Ext.5, the sale deed standing in favour of Defendant No.3 is void. Further placing the discussion of the First Appellate Court on this aspect as at paragraph-10 of its judgment, he submitted that although this contention had been raised in the plaint, the First Appellate Court has held that it has been raised for the first time before it. He submitted that on the teeth of the conclusion that the properties are still joint without any partition being affected, the Courts below have decreed the suit by declaring the properties to be the joint family properties.

10. None appeared for the Respondents despite service of notice and the opportunities so provided.

11. Proceeding for discussion to answer the substantial question of law, in addressing the submission of the learned counsel for the Appellants, the provision of Section 34 of the OCH & PFL Act being gone through; it is seen that sub-section 1 of section 34 of the said Act says that no agricultural land in a locality shall be transferred or partitioned so as to create a fragment and sub-section 2 of section 34 says that it can only be transferred to a land owner of a contiguous Chaka.

Adverting to the facts and circumstances of the case, admittedly Defendants 1 and 2 had purchased the suit land prior to the publication of the Consolidation Record of Right and that very land they have transferred at a later point of time though after the publication of the Consolidation Record of Right in favour of Defendant No.3 by executing the registered sale deed (Ext.5). In such situation, the Defendants 1 and 2, when are found to be in possession of their purchased land prior to publication of the record of right in the consolidation operation and that being now in possession of Defendant No.3 and when it is also stated by the Plaintiffs in the plaint that Defendants 4 to 7 have raised a shopping centre building for commercial purpose, moreso as none of the witnesses examined from the side of the Plaintiffs has stated that there has been a fragmentation of the land which were being used for agricultural purpose, the Courts below, having repelled such contention, are found to have committed no error. The conclusion that the properties are still joint without any partition being affected, on the base of the peculiar factual settings as emerge from the pleadings and evidence, the Courts below are found to be right in not passing a mere declaratory relief, as prayed for.

In that view of the matter, the answer to the substantial question of law stands against the claim/case of the Plaintiffs as laid in the suit in seeking the reliefs as have been prayed for.

**12.** In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

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