

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.291 of 2000

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 24.06.2000 and 07.07.2000 respectively passed by the learned Additional District Judge, Sonapur in Title Appeal No.70/21 of 1993/99 confirming the judgment dated 15.05.1993 passed by the learned Subordinate Judge, Sonapur in Title Suit No.51 of 1986.

Sumitra Juadi

....

Appellant

-versus-

Parbati Bagarti and Others

....

Respondents

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

For Appellant

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Mr.P.K. Satpathy
(Advocate)

For Respondent

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Mr.R.K. Mohanty
(Senior Counsel)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 29.08.2022 : 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 dated 24.06.2000 and 07.07.2000 respectively passed by the learned Additional District Judge, Sonapur in Title Appeal No.70/21 of 1993/99.

By the same, the Appeal filed by the present Appellant, being the aggrieved Defendant No.6 in T.S. No.51 of 1986 of the Court of the

learned Subordinate Judge, Sonapur under section 96 of the Code, has been dismissed and thereby the judgment and decree passed by the learned Trial court in the said suit filed by the Respondents 1 to 3, as the Plaintiffs, by passing a preliminary decree in respect of the suit land described in Item No.1 of the schedule of the plaint allotting 2/3rd share over it to the predecessor-in-interest of Respondent Nos.4(a) to 4(c) and 1/3rd jointly to the Respondents 1 to 3 with other stipulations, have been confirmed.

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 Plaintiffs' case is that Plaintiff Nos.1 and 2 are the daughters of one Raseswari and Plaintiff No.3 is the son of Defendant No.1. It is stated that Raseswari and Arnapura were two sisters and Khaga (Defendant No.1) is their brother and they are daughters and son of Bhagabat through his wife Mukta. Bhagabat, Mukta, Raseswari and Arnapura are dead. It is stated that the suit land are their ancestral properties and were the Bhogra lands. In a Bhogra Conversion Proceeding, the suit lands were settled with Rayati status upon Raseswari (the mother of Plaintiff Nos.1 and 2), Arnapura and Khaga (Defendant No.1). The properties were never partitioned. Stating that the claim of the Plaintiffs for partition of the properties being declined by Defendant No.1, they have filed the suit.

4. The Defendants 1 to 3 and 10 have been set ex parte.

The Defendants 4 to 7 have filed their joint written statement. The Defendant No.8-A filed a separate written statement and so also Defendants 9 and 11.

5. The written statement filed by Defendants 4 to 7 and 9 project a common case. It is stated that they have purchased a portion of the land from Defendant No.1 by registered sale deeds on different dates. These Defendants are the purchasers of the land from Defendant No.1, which is situated in Village-Badjhinki, which were Bhogra lands. The case of the Plaintiffs that in Bhogra Conversion Proceeding, the lands of Village-Badjhinki were settled with Rayati status jointly in favour of Raseswari, Arnapurna and Khaga has been specifically denied. According to them, on the appointed date, Defendant No.1 alone was in possession of Bhogra lands and on his application, in the Bhogra Conversion Proceeding, the lands were exclusively settled with occupancy right in his favour and not in favour of Raseswari and Arnapurna. The subsequent publication of record of right is said to be a manipulation by insertion of the names of Raseswari and Arnapurna in a fraudulent manner. Since after the settlement of the land in respect of the suit land of Village-Badjhinki with occupancy right, a fresh title stood conferred upon Defendant No.1, he is said to be the exclusive owner. He, therefore, has sold those lands and, thus, those sales are said to have conveyed legal and valid title in favour of these Defendants. It is further stated that even if it is stated that the lands have been settled also in the names of Raseswari and Arnapurna in the Bhogra Conversion Proceeding, the order of the Collector in that regard is illegal and without jurisdiction and, therefore, the Plaintiffs have no title over the suit land. Elaborating the same, it is stated that the record of the Collector is silent as regards any enquiry and conclusion arrived at that

Raseswari and Arnapuram were in possession of those lands. It is further stated that a suit for partition in the absence of any prayer to set aside the sales made by Defendant No.1 and for reconveyance of possession of the suit lands, the suit is barred by limitation. According to them, the Defendant No.1 since had exclusive title, he having sold the land to Defendants 4 to 7 and 9, they have been conferred with title in respect of those purchased lands where the Plaintiffs have no right, title and interest and as such are not entitled to any share.

The Defendant No.8-A, who has been substituted after the death of Defendant No.8, being his legal representative, in his written statement, is claimed to have purchased the portion of the suit land of Village-Singari exclusively belonged to Defendant No.1. It is thus stated that the Plaintiffs have no title over the same.

The Defendant No.11, in his written statement, has stated to have purchased the Rayati land of Khata No.17 of Village-Badjhinki from Defendant No.10. According to him, the Plaintiffs and Defendant No.1 had sold the land to the mother of Defendant No.10 on 4.5.1959 and as such, it is said that the said property is not available for partition and the Plaintiffs have no right to claim any share over it.

The Defendants 4 to 7 have pleaded that the property being the family property and having not been sold by Arnapura and Khaga are available for partition.

6. On the above rival pleadings, the Trial Court, in total, has framed seven issues. First of all, on the issue as to whether the Bhogra lands of Village-Badjhinki have been settled with Rayati status in favour of Raseswari, Arnapura and Khaga or it had been settled with Khaga alone and the other issue as to the legality and propriety of the order of

the Collector in settling the lands being taken for decision, the finding has been rendered as under:-

“In the light of the aforesaid discussions and considering the documents and orders of the Collector and Charge Officer referred to as above, it is held on fact that the suit Bhogra lands have been settled with occupancy right with Khaga, Raseswari and Arnapurna each having equal interest over them. It is also eld that the order of the Collector setting aside the said Bhogra lands in favour of Arnapurna, Raseswari and Khaga is legal and binding and the civil court has no jurisdiction to interfere. Accordingly, both the issues are answered against the defendant and in favour of the plaintiffs.”

Then proceeding to answer issue no.3 as to the right of the Plaintiffs to claim partition of the Bhogra lands, the Trial court has ruled in favour of the Plaintiffs. In so far as the transfers made by Defendant No.1 to the other Defendants under issue no.4, it has been held as under:-

“..Since all the parties have sold the lands in Khata No.17 as in the year 1959 to the mother of the defendant no.10 from whom the defendant 11 purchased them. It is how not available for partition and also cannot be the subject matter of adjustment of share.”

In the matter of limitation on issue no.6, the Trial Court has found that the suit having been filed within 12 years and it being one for partition as the sales have been found to have been unauthorizedly made, there is no need to make a prayer for setting aside those sales.

Lastly coming to the entitlements of the share by the parties, the Trial Court, having taken up issue no.7 for decision, has finally passed the preliminary decree as aforestated.

7. The Defendant No.6, being aggrieved by the judgment and preliminary decree passed by the Trial court, having carried the First Appeal, the same has been dismissed.

8. The present Appeal has been admitted to answer the substantial question of law, as indicated in Ground No.5(C), which reads as under:

“Whether in the facts and circumstances of the case, suit for partition without any consequential relief to set aside the sale deeds executed by Defendant No.1 was maintainable in law.”

9. Learned counsel for the Appellants submitted that the Courts below have gone wrong in passing the preliminary decree in the suit for partition wherein there remains no prayer to set aside sale deeds executed by Defendant No.1. He thus submitted that the decision given by the Courts below on issue no.6 is contrary to the settled position of law. He submitted that this Defendant No.6, having purchased the land from Defendant No.1 when has remained in possession of the parties, it was incumbent on the part of the Plaintiffs to advance the prayer for setting aside the sale made by Defendant No.1 so as to reconveyed with the title and possession which stood rested upon this Defendant No.6 by virtue of the sale deed.

10. Learned counsel for the Respondents submitted all in favour of the findings returned by the Courts below. According to him, when the finding of the Courts below firmly stand that the Bhogra lands have been settled by an order passed by virtue of the order passed by the Competent Authority, which is legal and binding with occupancy right in favour of Raseswari, Arnapurna and Khaga each having equal interest over the same and when admittedly, the sales made by Defendant No.1 are without the consent of other co-sharers and as such not binding on

the Plaintiffs, which has been rightly held by the Courts below, the Plaintiffs' suit for partition without any prayer to set aside the sales is legally maintainable.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

12. The Defendant No.6 is a purchaser of a portion of the suit land from Defendant No.1. As against the positive case of the Plaintiffs that in Bhogra Conversion Proceeding, the Bhogra lands of Village-Badjhinki, which are the subject matter of the suit were settled with Rayati status jointly in favour of Raseswari, Arnapura and Khaga (Defendant No.1), this Defendant with others, who are the purchasers of the land from Defendant No.1 have pleaded inter alia that it was settled only in the name of Defendant No.1 in further stating that the subsequent record of right is a manipulation. The Trial Court, having examined the evidence and upon their evaluation, has negated the case projected by this Defendant (purchaser) in holding that Bhogra lands have been settled in favour of Raseswari, Arnapura and Khaga by a valid order to that effect. This has been affirmed by the First Appellate Court upon re-examination of the evidence on record. The right, title and interest of the Plaintiffs over said Bhogra lands of Village-Badjhinki and as such their right to claim partition over the same has been concurrently held in the affirmative by the Courts below. The Defendant No.1, in the present case, has sold the entire land without the consent of the other co-sharers and as such, the Courts below having found that those sales are not binding upon the Plaintiffs, the conclusion is seen to be wholly sustainable.

13. It is the settled position of law that where there have been unauthorized alienation of the lands belonging to the co-sharers by one co-sharer, who has definite interest and share in the property and the other co-sharers also have their definite interest and share; it is not necessary to set aside the alienation in seeking the partition of the property. The sales made by that co-sharer up to the extent on his share of equitable consideration would stand adjusted to his share to the extent as admissible towards his share and those sales made by the co-sharer beyond his share would remain beyond the realm of consideration for any purpose whatsoever. One co-sharer when sales away the property for more than his share, the same cannot cause deprivation to the other co-sharers and they, under that situation need not come forward with the prayer to set aside those sales while seeking partition and allotment of their shares over the entire property as the sales by one co-sharer encroaching upon the share of other co-sharers are void.

In that view of the matter, the Courts below are found to have rightly answered issue no.6 with the observation that so far as it may be practically possible, the land sold by the Defendants 1 to the Defendants 4 to 7 and 9 shall stand adjusted in the share of Defendant No.1 to the extent of the share of the Defendant No.1.

The substantial question of law is accordingly answered, which leads to confirm the judgments and preliminary decrees passed by the Courts below.

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

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

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