

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.179 of 1991

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 18.02.1991 and 16.03.1991 respectively passed by the learned Additional sub-Judge-Cum-C.J.M., Balasore in M.A. No.67 of 1988-I partly setting aside the judgment and decree dated 12.08.1988 and 31.08.1988 respectively passed by the learned Additional Munsif, Balasore in O.S. No.58 of 1985-I.

Satrughna Das (Since Dead) ***Appellants***
through his L.Rs

-versus-

Muktikanta Das & Others ***Respondents***

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

For Appellants - Dr. Sujata Das
Advocate

For Respondents - Mr.A.K. Mohanty
Advocate

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 30.03.2022 : Date of Judgment:11.04.2022

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), has assailed the judgment and decree dated 18.02.1991 and 16.03.1991 respectively passed by the learned Additional Sub-Judge-Cum-C.J.M., Balasore in M.A. No.67 of 1988-I.

By the same, the Appeal filed by the Respondents 1 and 2 (Defendant Nos.1 and 2) under section 96 of the Code, has been allowed in part.

The present Appellant, as the Plaintiff, had filed the suit for partition of the properties described in Schedule-KHA of the plaint allotting him his 1/6th share thereon and further seeking the relief of repurchase of the land described in Schedule-Ga of the plaint which is said to be the homestead land of the Appellant (Plaintiff) and Respondents 3 to 8 (Defendants 3 to 8) from Respondents 1 and 2 (Defendants 1 and 2), who are said to be the stranger purchasers of the said land.

During pendency of the Appeal, the original Appellant (Plaintiff) having died, his legal representatives, being substituted, have come on record and they are now pursuing the 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 Suit.

3. The Plaintiff's case is that Schedule-KHA land measuring 53 decimals of land is the joint homestead land of the Plaintiff and Defendants 3 to 8 of which Schedule-GA land is a part and that measures 5/86 decimals.

It is stated that Birabhadra was the common ancestor of Plaintiff and Defendants 3 to 8. He had three sons, namely, Rajana, Laxman and Bharat. Baidyanath and Bandhu are the sons of Raajana whereas Plaintiff is the son of Baidyanath and Mathuri is the son of Bandhu. Ananta is son of Mathuri. Sudhakar is the son of Ananta.

It is stated that Laxman died leaving behind two sons, namely, Rudra and Khetra. Before major settlement operation, Rudra died leaving behind Bhima who died leaving behind his wife Anika and daughter Suryamjani. Siba and Purusottam survived Khetramoha. Siba died leaving behind his widow Asamani and daughter Radhika. The further case of the Plaintiff that Radhika sold away her share over the suit property on 19.02.1982 by registered sale deed to the Plaintiff. Bharat died leaving two sons, namely, Akuli and Gaurahari. The Defendant No.3 is the son of Akuli whereas Defendant No.4 is the son of Gaurahari. It is stated that although the parties have separated their agricultural lands; the homestead land still remains joint which has been reflected in the record of right in the Major Settlement. The Defendants 1, 2 and 7 are the strangers to the family and they had no right, title and interest over Schedule-Ka land at any point of time. The Defendant No.7 is the husband of Defendant No.8. The Defendant No.7 was never in possession of any portion of the suit land. On 25.10.1984, Defendants 1 to 7 came to possess Schedule-GA land claiming to have purchased the same from Defendant No.7 on 18.09.1984 by a registered sale deed. So, the Plaintiff approached the Defendants 1 to 8 to transfer the said land in his favour and thereafter he approached other Defendants for partition of Schedule-KA land. As they did not agree, he filed the suit for obtaining a preliminary decree for partition with regard to Schedule-KA land as well as a decree of repurchase of Schedule-GA land from Defendants 1 and 2 in exercise of his right as available under Section 4 of the Partition Act.

4. The Defendants 1 and 2 contested the suit on the ground that the Plaintiff is not entitled to repurchase Schedule-GA land in exercise of the right under section 4 of the Partition Act. They state that they are not

the strangers. It is stated that the genealogy given by the Plaintiff in Schedule-KA of the plaint is incomplete. According to them, Birabhadra is the common ancestor of the parties, who had another brother Bhuban, who had three sons, namely, Kandar, Jujhasti and Mohan. Jujhasti's branch being extinct, Mohan died leaving only behind his only son Ganapati, who died leaving his two sons, Ghanashyam and Murali. Kandar died leaving behind his six sons, namely, Pandab, Nalu, Panchu, Dasarathi, Dukhiram and Kasi. Panu is the son of Pandab and these Defendants 1 and 2 are the sons of said Panu. Nalu is said to have died leaving behind his only daughter Subasini and Dasarathi died leaving behind only son Bunu. The branch of Panu, Kasi and Dukhiram are extinct. It is their further case that Rajan, Laxman and Bharat are the three sons of Birabhadra and Kandar. Jujhasti and Mohan are three sons of Bhuban and they had purchased Schedule-KA land as well as other homestead land into six equal shares. In the said partition between six co-sharers, each co-sharer being allotted with his portion of land remained in possession but as they did not come forward to agree at the time of settlement operation for separate recording of the lands. The land under plot nos.1279, 1280, 1281, 1282 and 1284 stood recorded in the names of three branches of Bhuban. The lands under plot nos.1285, 1286, 1287 and 1288 are recorded in the names of heirs of Bhuban. The lands under 1289 and 1300 are still used as joint tank by the heirs of Birabhadra and Bhuban. As per the case of Defendants 1 and 2, the shares of different co-sharers were and are possessing their respective share separately. It is stated that Defendant No.8, after marrying Defendant No.7 remained in her father's house and Defendant No.7 stayed as their illatom son-in-law. Anika Bewa, the widow of Bhima accordingly sold her share, i.e., Schedule-GA land to Defendant No.7 on

23.07.1968 by registered sale deed. The Defendant No.7, while in possession of the same after the death of Anika, left for his paternal house. At that time, Defendant No.7 had approached the Plaintiff to purchase the said land but as the same did not materialize, he sold the same to Defendants 1 and 2 by registered sale deed dated 18.09.1994 for valuable consideration and delivery of possession of the land to them. The Defendants 1 and 2 claim to be in possession of the said purchased homestead land. It is stated that Schedule-GA land which they have purchased was not part and parcel of joint homestead land.

5. Faced with the rival pleadings, the Trial Court has framed six issues. Answering the crucial issues as to the claim of partition of the properties, the entitlement of the parties to the share as regards the relief of repurchase advanced by the Plaintiff in so far as Schedule-GA land is concerned, upon discussion of evidence and their evaluation, the answer has been recorded in favour of the Plaintiff. Accordingly, the suit stood preliminary decreed for partition allotting $1/6^{\text{th}}$ share to Plaintiff over Schedule-KHA and the Defendants 3 to 5 and 6 as entitled to get $1/6^{\text{th}}$ share each. The Trial also Court granted the right relating to repurchase of Schedule-GA land as claimed by the Plaintiff from Defendants 1 and 2 on payment of consideration which they have paid to Defendant No.7.

6. The Defendants 1 and 2 having suffered from the judgment and preliminary decree, as well as the order as to repurchase of Schedule-GHA property from them as passed by the Trial Court, having carried the First Appeal, have succeeded in so far as Schedule-GA land is concerned in respect of which the Trial Court had granted the right of repurchase to the Plaintiff in setting aside the relief of repurchase as aforesaid and granted by the Trial Court.

The Plaintiff being aggrieved by that order passed by the First Appellate Court in modifying the decree declining him to exercise the right of repurchase as available under section 4 of the Partition Act, has filed the present Second Appeal.

7. The Appeal has been admitted on 10.03.1992 for answering the following substantial question of law:-

“(a) Whether the Plaintiff is entitled to right of re-purchase from the purchased area of Defendant Nos.1 and 2 either under Section 4 of Partition Act or under Section 23 of the Hindu Succession Act.

8. Dr.Sujata Dash, learned counsel for the Appellant submitted that the First Appellate Court is not right in allowing the Appeal in part in so far as it has set aside the right of repurchase of Schedule-GA land as allowed in favour of the Plaintiff by the Trial Court. According to her, the reasons assigned are not tenable in law. She submitted that the land falls within the definition of “dwelling House” belonging to the undivided family” therefore, the Trial Court, on analysis of evidence, finding Defendants 1 and 2 to be strangers, had rightly granted the said relief in favour of the Plaintiff.

9. Mr.A.K. Mohanty, counsel for the Respondents submitted that even without going to judge the acceptability of the reasons given by the First Appellate Court in declining the Plaintiff with the relief of repurchase of Schedule-GA land; in view of the position of law, which has been set at rest by the Hon’ble Apex Court in “Gyan Chand & Another –V- Sumat Rani & Others”; AIR 2002 SC 2434, the said prayer, as advanced by the Plaintiff, for repurchase of Schedule-GA land in exercise of the rights under section 4 of Partition Act cannot be granted in the present suit for partition of Schedule-Kha property.

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

11. Proceeding to examine the legal ground as to the availability of such a right of repurchase being pressed into service in this suit for partition brought by the Plaintiff, one of the Co-owners; it is seen that in case of Alekha Mantri –V- Jagabandhu Mantri & others; AIR 1971 Ori 127, this Court had held that section 4 of the Partition Act would also be applicable where the suit for partition is brought by a member of the undivided family against the stranger transferee and that it is not necessary that the latter should have filed the suit. The divergent views of different High Courts including this court in the case of Alekh Mantri (Supra) with regard to scope and ambit of section 4 of the Partition Act have been set at rest by Hon'ble Apex Court in the case of Ghanteswar Ghosh –V- Madan Mohan Ghosh & Others; AIR 1997 SC 471. The Apex Court has held as under:-

"A mere look at the aforesaid provision shows that for its applicability at any stage of the proceedings between the contesting parties, the following conditions must be satisfied:

- (i) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;
- (ii) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;
- (iii) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the concerned co-owner;
- (iv) As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(v) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house".

12. In *Babulal v Habibnoor Khan (Dead) by L.Rs. and others*, AIR 2000 SC 2684, the Apex Court, taking a cue from *Ghantesher Ghosh (supra)*, held that one of the basic conditions for applicability of section 4 as laid down by the aforesaid decision and also as expressly mentioned in the section is that the stranger/transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned. Before section 4 of the Partition Act can be pressed into service by any of the other co-owners of the dwelling house, it has to be shown that the occasion had arisen for him to move under section 4 of the Act because of the stranger transferee himself moving for partition and separate possession of the share of the other co-owner which he would have purchased. It was further held that if the ratio of *Alekha Mantri (supra)* is held to take the view that a stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be subjected to section 4 of the Partition Act proceedings, then said view would

directly conflict with the decision of the Court in Ghantesher Ghosh's case (supra) and to that extent it must be treated to be overruled.

13. In Gautam Paul v. Debi Rani Paul and others; AIR 2001 SC 61, the Apex Court having held that section 4 of the Partition Act should be given a liberal interpretation has, however, placed the rider that giving a liberal interpretation does not mean that the wordings of the section and the clear interpretation thereof be ignored.

In Gyan Chand (Supra), the view taken in Gautam Pal (Supra) has been reiterated.

14. In view of the above settled position, even without going to delve upon the sustainability of the reasons assigned by the First Appellate Court at its level in arriving at a conclusion that the Plaintiff is not entitled to the relief of repurchase, the substantial question of law receives its answer in saying that in the present suit for partition filed by the Plaintiff, he is not entitled to advance a claim of repurchase in exercise of the right available under Section 4 of the Partition Act. For the omission of the provision of section 23 of the Hindu Succession Act by the Amendment Act of 2005, said limb of substantial question of law does no more survive.

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

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