

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.187 OF 2004

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 Adhoc Additional District Judge(FTC), No.2, Puri, in Title Appeal No. 87/39 of 2001/1994 by setting aside the judgment and decree passed by the learned Additional Sub-Judge Puri in Title Suit Nos. 53/55 of 1992/1985.

Satyanarayan Mohapatra

:::

Appellant

-versus-

Sarat Chandra Nayak & Others

:::

Respondents

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellant

:::

M/s. S. Mantry, S. P. Mishra-2,
A.K. Mishra, A.K. Sharma,
M.K. Dash, P.K. Dash,
Advocates.

For Respondents

:::

Mr. S. Das, A.K. Mohanty,
A.K. Tandi, Mrs. A. Das,
S.R. Mohapatra, Advocate,
(R-1).

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:23.08.2022 DATE OF JUDGMENT:26.09.2022

The Appellant in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned Adhoc Additional District Judge(FTC), No.2, Puri, in Title Appeal No. 87/39 of 2001/1994.

By the same, the Appeal filed by the Respondent No.1 (Defendant No.1) under Section-96 of the Act has been allowed and

thereby the judgment and decree passed by the learned Additional Sub-Judge Puri in Title Suit Nos. 53/55 of 1992/1985 in decreeing the suit have been set aside. The suit filed by the Appellant, as the Plaintiff arraigning the Respondents, as the Defendants to declare his right, title and interest over the suit land described in the schedule of the Plaint and for injunction has been dismissed.

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 he is the owner of the suit land which had been purchased in his name with the help of the fund provided by his natural paternal grandfather. It is stated that the land in question was being looked after by the Defendant No.2 who is his adoptive father. The Defendant No.2 has illegally sold away the property to Defendant No.1 without any consideration by executing three registered sale-deeds on 09.05.1980, 22.11.1982 and 09.05.1983 when the Plaintiff was a minor. The sales have been made without the permission as required under section 8(2) of the Hindu Minorities and Guardianship Act, 1956 (for short, 'the HMG Act'). The Plaintiff therefore on attaining majority filed the suit seeking the reliefs as aforesaid.

4. The Defendant No.3, filing the written statement, has supported the case of the Plaintiff.

5. The Defendant No. 1 in his written statement has stated that that the suit property belonged to one Sandur Khan of Pipili and he was the owner in possession of the same. The suit property with other properties were settled in his name in Choukidari lease Case No.208 of

1952-1963 and by the order passed in Misc. Case No.162 of 1966, Sthitiban status was confirmed. It is said that Sandur Khan had sold away the property to the Plaintiff represented by the Defendant No.2 as his guardian, since the Plaintiff then was a minor. The property had been purchased by the Defendant No.2 in the name of the Plaintiff. It is further stated that Plaintiff was merely a name-lender. It is also stated that the property has been sold for the benefit of the minor and for his legal necessity. The Defendant No.2 has said that having purchased the property has obtained the possession and having constructed a building over it is occupying the same as its owner.

6. On the above rival pleadings, the Trial Court has framed seven issues. While answering issue no.3 as to whether the Plaintiff has the title over the suit property or not, the Trial Court has finally held the sale of the suit land during the minority of the Plaintiff without the permission of the competent Court as invalid. Accordingly, the Plaintiff's right, title and interest over the suit land have been declared and the Defendants have been permanently enjoined from interfering with the Plaintiff's possession over the suit land.

The Defendant No.1, being aggrieved by the judgment and decree passed by the Trial Court having moved, the First Appellate Court, it has been held therein that the suit as framed seeking the reliefs claimed is liable to be dismissed. Accordingly, the First Appeal filed by the aggrieved Defendant No.1 has been allowed and the Plaintiff has been non-suited. Hence, this Second Appeal is at the instance of the unsuccessful Plaintiff.

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

“(i). Whether the lower appellate court erred in holding that the Plaintiff’s suit is not maintainable for the relief of declaration of title in the absence of a prayer to set aside the sale-deed executed by his adoptive father during his minority and without the prayer of recovery of possession?

(ii). Whether in the facts and circumstances of the case and on the face of the view taken by the lower Appellate Court, it was under the legal obligation to consider for moulding the relief in exercise of power under Order-7 Rule-7 of the Code of Civil Procedure?”

8. Learned Counsel for the Appellant submitted that the Plaintiff having filed the suit within three years on his attaining majority seeking declaration of right, title and interest over the suit property which includes a decision that the sale-deed is void, the First Appellate Court has committed grave error in dismissing the suit in the absence of specific prayer to set aside the sale-deed and seek recovery of possession.

9. Learned Counsel for the Respondent No.1 on the other hand supported the findings of the First Appellate Court. According to him, the view taken by the First Appellate Court is based on the settled position of law and therefore, it is unassailable.

10. Keeping in view the submissions made, I have read the judgments passed by the Courts below. I have also gone through the plaint and written statements. I have perused the evidence both oral and documentary on the record.

11. Admitted factual position stands that the Plaintiff is the natural son of Defendant No.3 and the Defendant No.2 had adopted the Plaintiff sometime in the year 1972. The property in suit has been purchased in the year 1976 in the name of the Plaintiff through

adoptive father as his guardian. That adoptive father, Defendant No.2, in the year 1980, 1982 and 1983 has sold away the suit land as the guardian of the Plaintiff who was then a minor. Admittedly, no permission as required under Section-8(2) of the Hindu Minority and Guardianship Act, 1956 had been taken for such sales.

In the above, the circumstance without the permission of the Competent Court of Law the sales of the suit lands by the Defendant No.2 are voidable at the instance of the Plaintiff. The Plaintiff here has filed the suit for declaration of his right, title and interest over the suit land and injunction.

12. It has been held in case of Vishwambhar & Ors vs Laxminarayan (Dead) through LRs and another; AIR 2001 SC 2607 that the transaction being voidable at the instance of the Plaintiffs, the plaintiffs therein were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers. It has been held therein that when in law, the Plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties then a suit without such a prayer is of no avail to the Plaintiffs and that the claim for recovery of possession of property alienated could not have been made without setting aside the sale deeds.

13. In the above cited case, it was pleaded by the Plaintiffs that the alienations being void and, therefore, liable to be ignored since there were not supported by legal necessity and without permission of Competent Court and on that basis, the claim was made that the alienations did not affect the interest of the Plaintiffs in the suit property. The prayer in the plaint were inter alia to set aside the sale

deeds, recovery of possession of the properties sold from respective purchasers, partition of the properties carrying out separate possession of the share from the suit properties and to deliver the same. In that case, said prayer of setting aside the sale deeds had been introduced during the trial of the suit and that being permitted after lapse of five years from the institution of the suit. But as by then, as provided in Article 60 of the Limitation Act had elapsed in respect of the youngest of the Plaintiffs when in respect of the eldest, the period had already elapsed by the time of institution of the suit. The Trial Court having dismissed the suit as far as the elder Plaintiff is concerned had decreed the claim of the younger Plaintiff. The First Appellate Court then in appeal dismissed also the suit of that younger Plaintiff.

The Apex Court took the view and held the prayer in the suit to set aside the sale being introduced later when the realization of the mistake come as by that date, the period of three years from the attainment of the majority of the younger Plaintiff had elapsed, the suit for that relief is barred and as the original prayers advanced in the suit are not permissible to be granted without that relief of setting aside the sales, the suit is to fail.

14. In our given case, the suit is for declaration that the Plaintiff has the right, title and interest over the suit property and for injunction without the prayer to set aside the sales made by the Defendant No.2 in favour of Defendant No. 1 as the guardian of the Plaintiff. In the plaint, it is stated that the sales were without consideration and the permission had also not been taken. The Defendant No.1 has pleaded that having been delivered with the possession of the suit land, there has been construction of a building over there.

As per the settled law, a sale made as in the present case, is voidable at the instance of the Plaintiff on attaining majority as provided in Section 8(3) of the Hindu Minority and Guardianship Act, 1956. Article 60 of the Limitation Act prescribes the period of three years to set aside such sales. A minor, on attaining majority, may affirm or ratify such sale or may seek to set it aside. It is completely at the option of the minor. Thus, a prayer to set aside such sale is not a mere empty formality. The claim of title over said property by the minor is dependent upon the setting aside such sale. The sale made by the guardian in respect of the minor's property is not from its inception void and therefore, the passing of title under the transaction does not stand arrested or stalled as there is no permission. But only when a decree is passed setting aside the said sale in a suit by the minor on attaining majority or any one claiming through him within three years therefrom, then only the said transaction would be rendered to be having no value in the eye of law in continuing to have its force as before. Therefore, such a prayer for declaration of right, title and interest of the minor over the property can only be made when the Court declares the sales to be void. The said alienations are to be set aside to regain the property from the purchasers and assert the claim over there.

This being so, the Courts below could not have pressed into service the provisions contained in Order 7 Rule 7 of the Code to grant the relief of setting aside the sale and then proceed to grant the relief of declaration of title which is consequential. The provision of Order 7 Rule 7 of the Code is not intended to save the above situation.

The aforesaid discussion and reasons thus provide the answers to the substantial questions of law in favour of the affirmation of the conclusion reached by the First Appellate Court.

15. In the result, the Appeal stands dismissed. The judgment and decree passed by the First Appellate Court are hereby confirmed. There shall however be no order as to cost.

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

Narayan

