

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

**RSA No.280 of 2011**

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and preliminary decree passed by the learned District Judge, Bolangir in RFA No.40 of 2007 confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Patnagarh in C.S. No. 156 of 2002.

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***Purusottam Sahu***

***:::: Appellant.***

***-:: VERSUS ::-***

***Khyamananda Sahu & Others***

***:::: Respondents.***

**Advocate(s) who appeared in this case by hybrid arrangement  
(virtual/physical) mode.**

***For Appellant***

***... M/s. A.K Tripathy, P.K. Nayak, U.C.  
Barik & P.Kar, Advocates***

***For Respondents***

***... M/s. A.P. Bose, N. Hota, R.K.  
Mohanta, D.J. Sahoo, S.S.  
Routray & Mrs. V. Kar,  
Advocates.***

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

**Date of Hearing & Judgment:06.01.2022**

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and preliminary decree passed by the learned District Judge, Balangir in RFA No.40 of 2007.

By the said judgment and preliminary decree, while dismissing the Appeal filed by the Appellant (Defendant No.1) under section 96 of the Code, the First Appellate Court has confirmed the judgment and

preliminary decree passed by the learned Civil Judge (Senior Division), Patnagarh in C.S. No.156 of 2002 filed by the Plaintiffs arraigning the Appellant as the Defendant No.1 and one Paramanda Sahu as Defendant No.2.

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. Plaintiffs' case:-**

One Jaganath had a son namely, Chakradhar. Chakradhar had married Sana. On the death of Sana, Chakradhar again married Padmini. The Defendant No. 1 is the son of Chakradhar through Sana. The two Plaintiffs and Defendant No. 2 are three sons of Chakradhar through his second wife Padmini. One part of the suit land measuring Ac.30.82 decimals stands recorded in the name of Jaganath and another part of the suit land extending Ac.29.15 decimals stands recorded in the name of Chakradhar. Upon death of Chakradhar, the parties remained under joint possession and enjoyment of the properties. When the size of the family grew, sometime in the month of October, 2002, the Plaintiffs approached the Defendants for partition of the entire properties as aforesaid in metes and bounds. The Defendants having declined the request, the Plaintiffs filed the suit for partition of the properties.

4. The Defendant No. 1 coming to contest the suit in filing the written statement has stated that the Defendant No. 2 had earlier filed a suit for partition in the Court of Munsif, Patnagarh vide T.S. No. 7 of 1977 that the suit later on being transferred to the Court of learned Civil Judge (Senior Division), Patnagarh was renumbered as T.S. No. 7/31 of 1977 which ultimately was dismissed for default. It is stated that in view of the said institution of the suit, Chakradhar sensing the dissention

amongst his three sons settled Ac.15.38 decimals of land, from out of the Holding No. 44 and Ac. 12.05 decimals of land from Holding No. 37 in favour of Defendant No. 1 under a deed of acknowledgment dated 25.10.1977. The Defendant No.1 claimed that he thus was separated from the family and has been in exclusive and peaceful enjoyment of the said properties. Thus he has taken the defence that in view of the above severance of joint status and settlement of the land by his father in his favour, the suit for partition is not maintainable.

5. On the above rival pleadings, the Trial Court framed five issues. Coming to answer the crucial issue as to the previous partition of the suit properties taken as defence by the Defendant No. 1 in thwarting the suit for partition filed by the Plaintiffs; upon examination of evidence and their evaluation, answer has been recorded that the Defendant No. 1 has not been able to discharge the burden of proof of the previous partition of the suit properties.

Next coming to the other issue, the Trial Court having found that Chakradhar had five daughters through his second wife and one of them being dead, her children are alive has also held that those daughters have equal interest over the said properties with the sons. Having said so, it has been held that though those daughters were not party to the suit and accordingly, their shares would stand worked out in the final decree proceeding.

The following order has been passed:-

“The suit be and the same is preliminary decreed in part on contest against defendant No. 1 and without contest as against the defendant No. 2. The parties and daughters of Chakradhar Sahu have equal interest over the suit properties. The parties are directed to get the suit properties divided between them and their sisters within a period of six months

hence. Failing which any of them would be at liberty to initiate a final decree proceeding for specific allotment of the share. In such proceeding, the daughters have to be made parties. In the Proceeding the commissioner when appointed shall give due regard to equity and convenience of the parties in allotment of the shares.

The parties to bear their respective costs.”

6. The Defendant No. 1 being aggrieved by the said judgment and preliminary decree passed by the Trial Court had carried an Appeal. The Appeal has also been dismissed.

7. Learned counsel for the Appellant submits that on the face of the document Ext.B/2, the Courts below have grossly erred in holding against the previous partition. According to him, when the document clearly reveals that there has been a prior partition in which the Defendant No. 1 has been allotted with specific properties by his father which he has acknowledged in writing, the courts below ought to have accepted the same at least by saying that as the father, Chakradhar duly exercised his authority in making a partition. . He further submits that when the daughters were not parties to the suit, the Courts below in a general manner ought not to have decreed the suit by holding them to be having equal right with the sons, which is not at all tenable. He therefore submits that the above stands as the substantial questions of law for being answered in this Appeal.

8. Learned counsel for the Respondents assigning the Court in hearing on admission submits all in favour of the findings returned by the courts below. He submits that when it is not disputed that Chakradhar has five daughters so, the Courts below have acted within their rights by observing that the same would be decided and worked out in the final decree proceeding.

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

10. The Defendant No. 1 having taken the defence of prior partition in order to non-suit the Plaintiffs who have filed the suit for partition is under the obligation to discharge the burden of proof on that score. According to him, there was a partition in respect of the properties at the instance of their father. For the purpose, the Defendant No. 1 has mainly relied upon a unregistered deed of acknowledgement of partition so nomenclature which has been admitted in evidence and marked as Ext. B/2.

A careful perusal of the documents reveals that it has been scribed on 25.10.1977. Although Chakradhar's signature appears at the bottom of that one paged document, no date finds mention below his signature. This document show that almost half of the properties of Chakradhar have been given to the Defendant No.1. A reading to the documents given, it is not seen that there being earlier partition, the same is being reduced into writing at that point of time. Moreover, no such specific allotment of the properties has been made in favour of three other brothers nor anything is stayed as to deprivation of the daughters. Thus it cannot be construed as memorandum of family partition. Chakradhar thus having made specific allotment out of properties in favour of Defendant No. 1 when even we take it for a moment that rest were allotted to the other children, that document Ext.B/2 is clearly inadmissible in evidence being compulsory registerable when has not been so done. So now its user can only be for collateral purpose of separate living and enjoyment of properties which cannot be taken as partition in metes and bounds. Moreover, the evidence too is wanting on the score of the said arrangement of being acted upon in as much as the

Defendant No. 1 has failed to establish through clear, cogent and acceptable evidence that he is in possession of those properties to the exclusion of all others whereas others are in possession of the rest.

Chakradhar's act of allotment of the properties of such large extent in favour of the Defendant No. 1 by making division, does not appear to be fair and reasonable.

In view of the all these aforesaid, the Courts below in my considered view have committed no error in eschewing the documents, Ext. B/2 from consideration in support of the claim of Defendant No. 1 that there was previous partition.

11. In that view of the matter, the Courts below having held that the suit for partition to be maintainable are found to have not committed any mistake in decreeing the suit for partition holding that the entitlement of share of the daughters of Chakradhar would be worked out in the final decree by arraigning the as parties

In the wake of aforesaid, the submission of the learned counsel for the Appellant cannot be countenanced with for admission of this Appeal in holding that there arises the substantial question of law for being answered.

12. Accordingly, the Appeal stands dismissed.

The parties are to bear their respective cost of litigation throughout.

While parting, this Court feels it expedient to observe that if the final decree proceeding is initiated by any party/parties, he/she would make the prayer for adding the daughters of Chakradhar and their heirs in case any of them is dead as parties and then upon issuance of notice

to them and hearing would so arraign them as parties and proceed for passing a second preliminary decree allotting the share to all the parties as per their entitlement in law. It is then the Court would proceed in the final decree proceeding for its final preparation and sealing and signing.

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

*Aksethy*

