

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.485 of 2003

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 18.02.2003 and 26.02.2003 respectively passed by the learned Additional District Judge, Jajpur in Title Appeal No.43 of 1994 confirming the judgment and decree dated 11.08.1994 and 26.08.1994 respectively passed by the learned Additional Civil Judge, Junior Division, Jajpur Road in T.S. No.8 of 1986.

Sabitri Singh & Others

Appellants

-versus-

Abdul Rasid Khan & Others

Respondents

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

For Appellants - M/s.S.R. Pattnaik, L. Mishra,
P.K. Mohanty & A. Jena
(Advocates)

For Respondents -

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 25.08.2022 : Date of Judgment:06.09.2022

D.Dash,J. The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 18.02.2003 and 26.02.2003 respectively passed by the learned Additional District Judge, Jajpur in Title Appeal No.43 of 1994.

By the same, the Appeal filed by the present Appellants under section 96 of the Code in challenging the judgment and decree dated

11.08.1994 and 26.08.1994 respectively passed by the learned Additional Civil Judge, Junior Division, Jajpur Road in T.S. No.8 of 1986, has been dismissed. Thereby, the judgment and decree passed in the suit, while being confirmed, the Appellants (Plaintiffs) have been non-suited.

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 Hazari Kunja Bihari Singh, Hazari Dayal Singh and Hazari Parsuram Singh were the recorded owners in respect of the land in plot no.60 appertaining to khata no.241 measuring Ac.2.41 decimals and thus each had 1/3rd share over the same. It is stated that in a family partition amongst them, the suit land which comprises of Ac.0.80 decimals out of the above stated Ac.2.41 decimals had fallen to the share of Kunja Bihari Singh and he was in possession of the same. In the year 1960, Kunja Bihari died leaving behind three daughters, namely, Sabitri (Plaintiff No.1), Kanakalata (Defendant No.2) and Sailabala (Dead). Sailabala, being unmarried, is stated to have gifted away her property in favour of Plaintiff Nos.2 and 3, who happens to be the sons of Kanakalata. The gift is said to have been made by executing registered deed of gift on 28.10.1977. It is further stated that Kanakalata transferred her interest over the said property, which she inherited from her father in favour of the Defendant No.1 and the predecessors-in-interest. It is thus stated that the Plaintiffs have jointly 2/3rd interest over the suit land measuring Ac.0.80 decimals under plot no.601 appertaining to khata no.241. It is further stated that there has been no partition amongst the co-owners. Since the Defendant No.1 created trouble in the possession of the Plaintiffs, the Plaintiffs were

compelled to file the suit in claiming their $2/3^{\text{rd}}$ interest over the suit property. It is also stated that Defendant No.2 has transferred her property to Defendant Nos.3 to 10 and Defendant No.11 and they are accordingly in possession of their purchased property.

4. The Defendant No.1, coming to contest the suit, in his written statement, while resisting the suit as not maintainable for partition, raising the ground for non-joinder of necessary parties, has further pleaded that the land under plot no.601 measuring Ac.2.41 decimals was in exclusive possession of late Hazari Kunja Bihari Singh. Therefore, his three daughters inherited the same; each having $1/3^{\text{rd}}$ interest over it. It is further stated that the three daughters of Kunja Bihari, having inherited the property, had gone for a mutual partition and accordingly, began to possess their respective shares. Kanakalata, while possessing the suit land, is said to have sold Ac.0.80 decimals of land to Defendant No.1 by executing the sale deed dated 08.05.1979 on receipt of Rs.1200/- and pursuant to the same, she has delivered the possession of the land to the Defendant No.1. The Defendant No.1 further states to be thus in possession of the suit land measuring Ac.0.80 decimals under plot no.601 appertaining to Khata No.24. Accordingly, the land is said to have been mutated in his name and he asserts that being in possession of the suit land, he is paying the rent and obtaining the receipts to that effect. In the Major Settlement Operation, recording of the land has been made in the name of Defendant No.1. Therefore, asserting that there was a prior partition amongst the three daughters of Kunja Bihari in respect of the entire land of Ac.2.41 decimals of land, it is said that the suit for partition is liable to be dismissed.

5. On the above rival pleadings, the Trial Court framed as many as five issues. Coming to answer those issues, upon examination of

evidence and their analysis, it has been said that there was no partition amongst the recorded tenants, i.e, Hazari Kunja Bihari Singh, Hazari Parsuram Singh and Hazari Dayal Singh. In that view of the matter, in the absence of legal heirs of all the three co-owners/recorded tenants, the suit has been held to be not maintainable.

It has next been stated that the Defendant No.1, having purchased the property under the registered sale deed (Ext.A), which concern with the 1/3rd interest of the vendor, namely, Kanakalata, the same is valid and thus the Defendant No.1 has acquired the title and is in possession of the said land. Having said, as aforesaid, the Trial Court has dismissed the suit.

6. The Plaintiffs, being unsuccessful in the Trial court, having carried an Appeal, have failed in that move. The First Appellate Court, rightly proceeding to judge the sustainability of the finding of the Trial court that there was no previous partition, having re-appreciated the evidence at its level, has disagreed with the finding of the Trial Court. It has further been held that the deed of gift (Ext.1) made by Sailabala is valid to the extent of her share and interest and the Plaintiff Nos.2 and 3 would be entitled to reap the benefit of the same. Having found as above, the First Appellate Court has held that fresh suit for partition of the suit plot would not lie and that all the necessary parties being not before the Court, no such preliminary decree for partition that to in respect of Ac.0.80 decimals of total land can be passed.

7. Learned counsel for the Appellants submitted that findings of the Trial Court that there was no previous partition being contrary to the weight of evidence on record has been rightly set aside. He further submitted that with the overwhelming evidence on record with regard to

the partition of the property amongst Hazari Kunja Bihari Singh, Hazari Parsuram Singh and Hazari Dayal Singh, the recorded tenants as also the long standing dealing with such property by the parties, the First Appellate Court having rightly held that there was partition has however committed grave error in answering that issue against the Plaintiffs in saying that the suit, as laid, is not maintainable. He further submitted that the First Appellate Court has committed an error by holding the registered sale deed (Ext.A) to be having the legal force. He thus contended for admission of this Appeal to answer the above as the substantial question of law.

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

9. In the present case, the Plaintiffs have taken the stand that there was no partition amongst three daughters of Kunja Bihari, i.e., Sailabala, Kanakalata and Sabitri and as per the case of the Plaintiffs, all the above three daughters have succeeded to the property of Kunja Bihari in respect of the share that he got in the partition with Dayal and Parsuram. In view of this, the onus heavily lies upon the Defendant No.1 to prove the factum of prior partition. The First Appellate Court, as seen from the discussion, is right in saying that on the face of certain averments contained in the deed of gift and sale, the Trial Court has committed the error in wrongly holding that there was no prior partition between Hazari Kunja Bihari, Parsuram and Dayal. On going through the evidence on record, when it is found that the three daughters succeeded to the property of Kunja Bihari, who died in the year 1960, then by virtue of the provision contained in section 8 of the Hindu Succession Act, 1950 all the three being Class-I heirs, have succeeded to the estate of their late father as tenants-in-common and thus the three daughters

can be said to have independent right, and title over their respective shares in the suit property. As here no such coparcenery is in existence, thus each one is free under the law to alienate her interest by way of gift, sale etc. In that view of the matter, the First Appellate Court is found to have rightly held that the deed of gift (Ext.1) made by Sailabala would remain valid to the extent of her share and interest and that would enure to the benefit of Plaintiff Nos.2 and 3. Having said, as above, the evidence both oral and documentary let in by the parties being gone through, when it is seen that the suit has been filed for partition of only Ac.0.80 decimals of land as against total Ac.2.41 decimals that too without arraigning other members of the family who are necessary parties as the Defendants; this Court finds no such error in the decision of the First Appellate Court that the suit, as laid, is not maintainable. While parting, the First Appellate Court's conclusion that Defendant No.1 has acquired the right, title and interest over the land as per the record of right (Ext.E) which he has purchased under sale deed (Ext.A) and is in possession is also found to be well in order.

For the aforesaid discussion and reasons, this Court is not in a position to accept the submission of the learned counsel for the Appellants that there surfaces the substantial questions of law surfaces for being answered meriting admission of this Appeal.

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

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

Basu