IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.335 OF 2011

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 District Judge, Kalahandi-Nuapada, in Title Suit No. 04 of 2008 by confirming the judgment and decree passed by the learned Civil Judge (Junior Division), Bhawanipatna in Civil Suit No.95 of 2001.

Krushna Behera @ Krushna Chandra Behera & Another	:::	***Appellants***

-versus-

Jamini Kanta Mund	:::	***Respondent***

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

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For Appellants	-	M/s. U.C. Mishra, A. Mishra, D.R. Sendh, B.P.Chhualsingh Advocates
For Respondent	-	Mr. S.S. Rao, J.N. Panda, R.K. Mund, R.N. Mohanty, P.C. Das, D.K. Mishra, P. Behera, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 09.09.2022, DATE OF JUDGMENT:: 26.09.2022

These Appellants in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') assail the judgment and decree passed by the learned District Judge, Kalahandi-Nuapada, in Title Suit No. 04 of 2008.

By the same, the Appeal filed by the Respondent being the unsuccessful Plaintiff under Section-96 of the Code has been allowed and thereby, the judgment and decree passed by the learned Civil Judge (Junior Division), Bhawanipatna in Civil Suit No.95 of 2001 have been set aside. The Respondent as the Plaintiff being non-suited by the Trial Court in respect of the Principal reliefs claimed; has been successful in obtaining a decree of declaration of his right, title and interest over the suit land described in Schedule-A of the plaint which corresponds to Schedule-C as indicated therein and the Appellants (Defendants) therein have been permanently restrained from interfering with the possession of the Respondent (Plaintiff) over the suit land.

It is stated here that the Appellant No.1 (Defendant no.1) is the son of the Appellant No.2 (Defendant No.2) and they together contested the suit as well as the First Appeal. The Appellant No.2 (Defendant No.2) having died during pendency of this Appeal, his legal representatives other than the Appellant No.1(Defendant No.1) have also come on record have pursuing this Appeal against the Respondent (Plaintiff).

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 had purchased the suit land from Defendant No.2 by registered sale-deed dated 22.05.1976 for a consideration of Rs.3,500/-. It is stated that Defendant No.2 in order to meet his household expenses, when proposed to sale the suit land, the Plaintiff agreed and accordingly, the consideration for the said sale being fixed finally, the sale-deed come to be executed by Defendant No.2 which stood registered.

It is also stated that pursuant to the said sale, the Plaintiff was delivered with the possession of the suit land by Defendant No.2 and since then he remained in possession of the said land.

The fact however stood that in the year 1975, the Tahasildar, Kalahandi had initiated a Ceiling Proceeding under Chapter-IV of the Orissa Land Reforms Act, 1960 (for short, 'the OLR Act') against the Defendant No.2 as a ceiling surplus land holder. The Plaintiff having came to know about the said proceeding being the lawful purchaser of the suit land has intervened by filing objection. The Competent Authority after recording the claim of the Plaintiff included the suit land within the land retained by the Defendant No.2 as within the ceiling area. It is further stated during that Proceeding, the Defendant No.2 admitted possession of the Plaintiff over the suit land. When the matter stood thus, the current settlement operation commenced. The Plaintiff then produced his sale-deed before the Settlement Authority. However, the Settlement Authority recorded the land in the name of the Defendants leaving a note of possession of the said land in favour of the Plaintiff. The Plaintiff then approached the Tahasildar, Kalahandi by filing Mutation Case No. 661 of 1991. The Tahasildar allowed the said application and passed an order of mutation of the said land in favour of the Plaintiff.

The Defendants then carried an Appeal which stood numbered as Mutation Appeal No.661 of 1991. The order of the Mutation Officer was confirmed in the said Appeal. Thereafter, on 22.06.2001, when the Plaintiff went to plough the suit for undertaking cultivation, the Defendant No.1 who is the son of Defendant No.2 created problem and threatened the Plaintiff with dire consequences, if he would proceed further in the matter. So, the suit came to be filed.

4. The Defendant Nos. 1 & 2 jointly filing the written statement although admitted that the suit land had been sold to the Plaintiff by registered sale-deed dated 22.05.1976, they however questioned the validity of the said sale in view of the pendency of the Ceiling Proceeding against Defendant No.1 vide OLR Case No.29 of 1975. They said that for the sale had taken place during pendency of the Ceiling Proceeding under Chapter-IV of the OLR Act, the same is invalid in the eye of law. It is further stated that the Plaintiff was well aware of the running of the Ceiling Proceeding against Defendant No.2, when he purchased the suit land. It is further stated that the Civil Court has no jurisdiction to sit over the order of the Revenue Officer in connection with the OLR Case.

These Defendants have then posed a question in the written statement that the land being the subject matter of the Ceiling Proceeding was under the control of the Government during the Proceeding and therefore it is not known as to how the Plaintiff got the physical possession of the suit land. Then, it is stated that even if the Plaintiff was delivered with the possession of the suit land, for the involvement of said land in the Ceiling Proceeding, the same would not be binding on the Defendants. The order passed by the Mutation Officer as well as the Appellate Authority are said to have been set aside by the Commissioner of Land Records and Settlement in MRA No.49 of 1993. The Defendants have finally stated that the sale-deed by virtue of the Plaintiff is claiming the right, title and interest over the land being void, the suit is liable to be dismissed.

5. On the above rival pleadings, the Trial Court has framed five (5) issues.

First taking up issue no.1 as to the claim of the Plaintiff having right, title, interest and possession over the suit land as to the validity of the sale deed mainly by going through the provisions of section-40 of the OLR Act, the Trial Court recorded the that the sale-deed is void. Then coming to next issue as to the Plaintiff's claim of right, title, interest and possession over the suit land; when it fell within the retained area of the Defendants as per the order in that Ceiling Proceeding; the Trial Court has held that even then the Plaintiff is not entitled to reap the benefit with the aid of the provisions of section-43 of the Transfer of Property Act (for short, 'the T.P. Act'). Even though finally in the Ceiling Proceeding, the suit land had come to the hands of the Defendants within their retained area; according to the Trial Court, the transfer being forbidden by law on the ground of public policy, the Plaintiff (Vendee) would not be entitled to the benefit thereunder.

Then as the Defendants had received the consideration amount; the Trial Court has directed them to pay a sum of Rs.13,343/- which includes the interest within a stipulated period failing which to pay further interest.

6. The Plaintiff's suit being dismissed in respect of the main prayer as to declaration of his right, title, interest and permanent injunction, the First Appeal being filed; the same has been allowed.

The First Appellate Court however has gone to decree the suit holding that the Plaintiff has acquired title by way of adverse possession having remained in possession of the property in question from the date of said purchase as its owner on the strength of that invalid sale-deed.

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

> "1. Whether the sale deed vide Ext. 5 executed by defendant no.2 in favour of the plaintiff is valid when the same was executed during pendency of ceiling proceeding under Section-36 of the OLR Act i.e. OLR Case No.29 of 1975 without taking prior permission from the competent authority?
>
> 2. Whether the learned appellate court is justified in reversing the judgment and decree of the learned trial court when the sale deed was executed during pendency of the ceiling surplus proceeding?"

8. Learned Counsel for the Appellants first of all submitted that since as per the provision contained in section-40 of the OLR Act, the said sale vide registered sale-deed Ext.4 is void, the Trial Court was right in rejecting the claim of the Plaintiff that he has derived the right, title and interest over the suit land by virtue of the said registered sale-deed. He further submitted that the Trial Court very rightly on going through the provisions of Section-40 of the OLR Act as well as Section-43 of the T.P. Act has held that the provision of Section-43 of the T.P. Act does not come to the aid of the case of the Plaintiff; as the said sale-deed was void from its inception. He submitted that the First Appellate Court has completely gone wrong in inventing a third case for the Plaintiff for which no issue had been framed nor the Trial Court had made any discussion on that question as it had not been contended therein. He next submitted that the sale in question although is void for the contravention of the provisions of

Section-40 of the OLR Act; keeping in view intention of the legislature as well as the very objective behind the said provisions in Chapter-IV and the purpose sought to be achieved thereby, the delivery of possession pursuant to such sale is not legally permissible and as such not visible in the eyes of law. He, therefore, submitted that even if for a moment, such possession is taken to have remained in the hands of the Plaintiff, it is of no legal significance at all and the Plaintiff's possession as such cannot be taken as like expressing hostile animus and in exercise of all the rights as its owner. He however placed the position that the Defendants had not filed any Appeal against the decree passed by the Trial Court directing them to pay a sum of Rs.13,343/- nor to have lodged any Cross-Appeal or Cross-Objection in the First Appeal by the Plaintiff nor it was so contended in course of hearing of the First Appeal.

9. Learned Counsel for the Respondent submitted that the Defendant no.2 having admitted to have sold the property to the Plaintiff on receipt of valuable consideration by executing a registered sale-deed to that effect, now cannot take advantage of his own wrong and suppression of the material facts as to the pendency of the Ceiling Proceeding being faced by him. He further submitted that it being not the case of the Defendants that the sale was a collusive or nominal one or that the Plaintiff having the knowledge of the running of the Ceiling Proceeding against the Defendant No.2 had purchased the suit land in order to defeat the proceeding or save Defendant No.2 to that extent of property, he cannot be said to be a party to the wrong done by the Defendant No.2 and therefore, he cannot be made to suffer. He further submitted that the objective behind the provision of Section-40 of the OLR Act and the very intention of the legislature in engrafting such a provision by way of prohibition is to see and prevent that such ceiling surplus land holders by bringing in any purchaser to the fold and also by going for such collusive transactions are not able to avoid the rigours of Ceiling Proceeding in avoiding to part with such properties as ceiling surplus or escape from the declaration, as the ceiling surplus land holder. He therefore submitted that the above objective being taken in its proper perspective, the view of the Trial Court that the Plaintiff's case is not even saved by virtue of Section-43 of the T.P. Act is untenable. He further submitted that when now the Defendants claim title over the suit property, the Plaintiff having remained in possession over the same from the time of his purchase claiming to be the owner in place and in substitution of the Defendants under that status and there being no factual controversy on that question, the conclusion arrived at by the First Appellate Court is also well in order.

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 statement. The evidence both oral and documentary have been perused.

11. Factual settings of the case are that the Defendant No.2 was facing a Ceiling Proceeding initiated by the Competent Authority under Chapter-IV of the OLR Act, wherein an inquiry as to if he was the ceiling surplus land holder or not was on its way at the time of sale. The Proceeding was to decide that if the Defendant No.2 was a ceiling surplus land holder and if so, how much and which land would vest with the State and how much and which land would be retained by the said land holder as within the ceiling area. The Defendants are not coming forward to say that they had disclosed about the pendency of the Ceiling Proceeding to the Plaintiff at the time of or prior to the sale. It is also not stated by them that the Plaintiff was having the knowledge about such proceeding running against Defendant No.2 when as a matter of duty, the Defendant No.2 being the vendor under law was to provide a declaration that the land he was going to sale is not involved in a Ceiling Proceeding.

The important fact remains here that after closure of the Ceiling Proceeding, the very land covered under the said registered sale-deed, Ext.4 has come within the retained area of the Defendants. The suit land even though was involved in the Ceiling Proceeding running against Defendant No.2; has ultimately not vested with the State being so taken as the ceiling surplus land and thus saved in the hands of the Defendant No.2.

12. Now the Defendants are claiming title over the suit land in saying that the registered sale-deed, Ext.4 being executed by the Defendant No.2 in favour of the Plaintiff during the Ceiling Proceeding is void for contravention of the provisions of Section-40 of the OLR Act. Thus, the Plaintiff has not derived any right, title, interest and possession by virtue of the same. So, the person who has acted directly in contravention of the provision of law and is the contravener/ violator is coming forward to take advantage of the same. The Plaintiff here himself is the contravener and he now stands up to reap the benefit of the contravention that he has made as if on closure of the ceiling proceeding, he having taken a holy dip in Ganges has been a law abiding person from that of a law violating person wherein the other side i.e. the Plaintiff is neither said to be nor found to be having any role or hand at all. But it kept in mind that here the defence of taking the full benefit alleging the contravention of law is being projected by that person who himself is the contravener and violator of law.

13. Before proceeding further, at this stage, it is apposite to have a look at the provisions of Section-39 of the OLR Act. The provision reads as under:-

> "**Section-39:-Principles for determining the ceiling area** - In determining the ceiling area in respect of a person, the following principles shall be followed, namely:-
>
> (a) homestead lands, or tanks with their embankments, or both, to the extent of three acres in the aggregate shall not be taken into account;
>
> (b) the transfer of any land by sale, gift or otherwise or the partition thereof by a person during the period beginning with the 26th day of September, 1970 and ending with the commencement of the Orissa Land Reforms (Amendment) Act, 1973 shall, if such person was holding land on the said day in excess of the ceiling area, be deemed to be void, anything contained in any law or agreement or in any decree or order of any Court notwithstanding;
>
> (bb) the lands so transferred or partitioned shall be taken into account as if the transfer or partition had not taken effect and the Revenue Officer may, at his discretion ignore the selection made by the person of lands to be retained in his possession;
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> (c) where the person is a member of a co-operative farming society, the extent of land which he would get as his share if the land held by such society is divided shall be taken into account;

(d) lands in the possession of a tenant or a mortgage shall be deemed to be lands held by the person.".

For our purpose for proper appreciation, the next provision contained in Section-40 of the OLR Act is also to be gone through.

"**Section-40:-Prohibition of transfer and partition of land and restriction of suits for specific performance of contracts**:–

(1) Except where he is permitted in writing by the Revenue Officer so to do, no person holding land in excess of the ceiling area shall, after the commencement of the Orissa Land Reforms (Amendment) Act, 1973, transfer by sale, gift or otherwise or effect any partition of such land or any part thereof until the surplus land, which is to vest in the Government under section 45, has been determined and taken possession of by or on behalf of the Government and all transfers made and partitions effected in contravention of this sub-section shall be void : Provided that nothing contained in this sub-section shall apply to.

(a) any transfer by way of mortgage executed in favour of –

(i) the Central Government or any State Government;

(ii) any public financial institution;

(iii) any bank to which the Orissa Co-operative Societies Act, 1962 applies;

(iv) any corporation established by law which is owned controlled or managed by the Central Government or by a State Government;

(v) any company in which not less than fifty-one per cent, of the paid-up share capital is held by the Central Government or by anyone or more State Governments; or

(b) any sale of land in execution of a decree or order or an award for the realisation of money due under any such mortgage.

> (2) Every suit for the specific performance of a contract for the transfer of land, instituted after the 26th day of September, 1970 and before the commencement of the Orissa Land Reforms (Amendment) Act, 1973 shall abate and no suit for the specific performance of any such commencement shall entered into before such commencement shall be maintainable.
>
> (3) All suits for partition of land instituted in a Civil Court after the 26th day of September, 1970 and pending on the date of commencement of the Orissa Land Reforms (Second Amendment) Act, 1975 shall, if the land forming the subject-matter of the suit exceeds the ceiling area in respect of the person who is liable to submit a return under section 40-A in relation to such land, abate".

So far as the case at hand is concerned, the relevant provision is Section-39(b) and 39(bb) of the OLR Act as above quoted.

14. From the above it is clear that transfer of any land by sale with effect from 24.09.1970 and before 02.10.1973 <u>by the holder of the land</u> <u>in excess of the ceiling area</u> would be deemed to be void, notwithstanding anything contained in any law or agreement or in any decree or order of any Court. It is also clear that the lands so transferred or partitioned shall be taken into account as if the transfer had not taken effect and the Revenue Officer may at his discretion ignore the selection made by the person i.e. the holder of land in excess of the ceiling area of lands to be retained in his possession.

Thus, the very objective of the above is seen that any such transfer of land by sale, gift or otherwise during the period by the holder of the land in excess of the ceiling area should not stand on the way of finalization of the Ceiling Proceeding within the four corners of the legal provisions contained in Chapter-IV of the OLR Act and that has been intended to be so achieved thereby.

The provisions contained in Section-40 (1)of the OLR Act puts restriction for that sale until the surplus land which is to vest in the Government has been determined and taken possession of by or on behalf of the Government and then it is said that all transfers made in contravention of the sub-section shall be void. So, this provision making such sale void has to be construed for the purpose of determination of the ceiling surplus land in case the land holder is found to be having ceiling surplus land with him. But this contravention cannot be taken to mean that even if such sold lands are retained by the ceiling surplus land holder either by disclosing the sale or even by not disclosing sale, then also a bonafide purchaser for value from that land holder would be deprived of the property for the mischief and wrong committed by the vendor against whom the Ceiling Proceeding was running so as to reap the benefit of his wrong and violation. Thus, the sale being not void for any purpose other than during the ceiling proceeding culminating with the vesting of the ceiling surplus land with the State; the vendee who of course cannot have any claim over the said property in asserting that the same would not vest with the Government as the Revenue Officer is not bound by the said sale and it is not to be so recognized by him while determining the ceiling surplus land and even deciding as to which lands would be allowed to be retained by the said ceiling surplus land holder within the ceiling area, certainly cannot be so deprived if it falls within the retained area of the land holder or if ultimately that land holder is not found to be the ceiling surplus land holder. The vendee then under the sale cannot be denied of the fruit of the transaction which has admittedly been made by the owner-land holder. Here the Defendant No. 2 even though for a moment is said to have no such authority to sale the suit land and he having sold it by contravening the provision of Section-40 of the OLR Act, when the very land has again remained with him after the finalization of the Ceiling Proceeding, he is bound to feed the grant to the vendee as that invaliding of the deed under the circumstances would no more continue and that stands as valid in so far as the vendor and the persons claiming through him are concerned. Thus there can be no challenge by the vendor-land holder to the said sale made either by him on that ground that it being executed during the ceiling proceeding its of no value in the eye of law. I may say here that the fate of the said sale in favour of the Plaintiff was subject to the decision of the Ceiling Proceeding and that proceeding being over and the land under the transaction being saved from vesting and finally left in the hands of the Defendants, now the deed is no more void and it has its full play as against the Defendants.

15. In the given case, the sale of land by Defendant No.2 is admitted. The sale deed Ext.4 is silent about the pendency of any ceiling proceeding in discharging that duty of the vendor where to so disclose, where the Defendant No.2 has committed the breach. It is not stated that the Plaintiff knowing about the pendency of the Ceiling Proceeding had purchased. Even the Plaintiff being examined as P.W.1 has not been given any such suggestion in that regard. It is also not stated nor is surfacing from the evidence that said transaction was a collusive one so as to defeat the Ceiling Proceeding or create hurdles in its culmination in accordance with law. Here the Defendant

No.2 was having the title but not the authority for the period as noted till culmination of the Ceiling Proceeding, it was a temporary restriction on his authority only to see that the Ceiling Proceeding culminates as per law as is not defeated in any way for that. The land having not been vested has rather remained with the Defendant No.2 with the same authority that he was having as before. In view of the aforesaid, I am of the considered view that the sale in question having remained dormant in taking its effect, after culmination of the Ceiling Proceeding has spray into all such lively action as per law and merely for that reason of sale taking place during the Ceiling Proceeding, the Plaintiff cannot be now be deprived of all the benefits flowing therefrom over his purchased land and the Defendants cannot derive the benefit of their own wrong doing and violation of law at the anterior point of time. It being so that the land has not been vested with the State and has remained with the Defendants as before they have to surrender to the transaction which is otherwise found to be valid in feeding the grant being estopped to so challenge/attack that its invalid for their contravention and fraudulent action, I also find no reason as to why in this case the provision of section-43 of the Transfer of Property Act would not come into play and in my opinion for the discussion made to hold that said provision of Section-43 of the T.P. Act would have no application would amount causing violence upon that provision of law and that would rather run against the very objective of the enactment as well as the intention of the legislature.

In the wake of the above discussions, the substantial questions of law are answered in favour of the claim and case of the Plaintiff. Resultantly, although for different reasons as noted above, the ultimate judgment and decree passed by First Appellate Court do not warrant interference.

16. Resultantly, the Appeal stands dismissed with cost all throughout.

(D. Dash),
Judge.

Narayan