

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.44 OF 2016

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 Additional District Judge, Jagatsinghpur, in RFA No. 07 of 2013 by confirming the judgment and decree passed by the learned Civil Judge (Junior Division), Jagatsinghpur in Civil Suit Nos.156 of 2008.

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Laxmidhar Behera

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Appellant

-versus-

Krishna Behera & Others

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Respondents

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

For Appellants

M/s. S.A. Nayeem,
P.K. Pattanayak, S.N. Mallick,
D.K. Dash, Advocates.

For Respondents



M/s. A.R. Dash, S.K. Nanda-1,
K.S. Sahu, L.D. Achari,
Advocates. (Res. No.1 & 2),
M/s. R.C. Behera, D. Sabudhi,
Advocates, (Res. No.3).

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M/s. D.P. Pradhan, P.R. Nayak,
G.C. Beja, Advocates,
(Res. Nos.3 (a) to 3(c)).

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:: 25.08.2022, DATE OF JUDGMENT::06.09.2022

These Appellant in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, ‘the Code’) have assailed the

judgment and decree passed by the learned Additional District Judge, Jagatsinghpur, in RFA No. 07 of 2013.

By the same, the Appeal filed by the present Respondent Nos.1 and 2 being the unsuccessful Defendant Nos. 2 & 3 in Civil Suit Nos.156 of 2008 under Section-96 of the Code has been allowed and thereby, the judgment preliminary and decree passed by the learned Civil Judge (Junior Division), Jagatsinghpur in the above noted suit have been set aside and the suit filed by the present Appellant as the Plaintiff has been dismissed and he has 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 Suit.

3. Plaintiff's case is that one Gurabari Behera was the common ancestor of the parties by leaving behind two sons namely, Bhaiga and Hadibandhu. They having succeeded to the property remained in the enjoyment of the same till the year 1929. It is stated that some time in that year 1929, an oral family settlement being made between the two, there being severance of joint status of the family, partition in metes and bounds had been affected. Accordingly, in terms of the allotment of their respective shares, C.S. Khata Nos.224, 225, 332 and 333 were recorded in the name of Bhaiga and those being converted to consolidation Khata Nos. 74, 116 and 119 stood jointly recoded in the name of Plaintiff and

Defendants. The property allotted to Hadibandhu was recorded in the name of his widow Dami Bewa in S.C. Khata No.30 jointly with Bhaiga with note of possession in their favour. The Consolidation Khata Nos. 316 and 315 corresponding to C.S. Khata No.30 have been recorded jointly in the name of Plaintiff and Defendants. It is stated that after publication of the final record of right in the Consolidation Operation, the Plaintiff carried an Appeal vide Consolidation Appeal No.26 of 2002 seeking declaration of Four Anas interest in respect of the suit properties described in Schedule-A and B of the plaint which covered the land under Consolidation Khata Nos. 74, 116 and 119; and Ten Anas share in respect of the properties described in Schedule-C and D of the plaint which over Consolidation Khata Nos. 315 and 316. The Appeal stood allowed by order dated 31.01.2003.

4. The Defendants then being aggrieved preferred a revision before the Commissioner Consolidation vide C.R. No.2733 of 2003. In that revision, the order of the Appellate Forum was confirmed. It is stated that the Plaintiff has got Four Anas share over the Schedule-A property and Eight Anas share over the Schedule-B properties and he has got Ten Anas share in Schedule-C property and absolute right, title and interest over the Schedule-D property covered under the suit Khata No.316 which he got by gift under the registered deed of gift executed by Dami Bewa in favour of his father on 23.0.5.1932. The Plaintiff having

approached the Defendants for effecting partition of the suit schedule properties, the refusal of the Defendants has compelled the Plaintiff to file the suit.

5. Defendant Nos. 2 & 3 while traversing the plaint averment have asserted that there had been no partition between Bhaiga and Hadibandhu and each had half share over the suit schedule properties. On Hadibandhu's death, his share is said to have devolved upon the members of the branch of Bhaiga and the Defendant No.1 has alienated his 1/4th share in favour of Defendant Nos.2 and 3. Registered deed of gift dated 23.05.1932, is said to be a void document as Dami being the widow of Hadibandhu could not have executed such a deed as having no such authority and power. So, it is stated that no right, title and interest has accrued in favour of the father of the Plaintiff in respect of the properties covered under the said deed of gift and that the Plaintiff has no right, title and interest over the same. It is further stated that the Plaintiff is not entitled to Ten Anas share as claimed over Schedule-C property, since that very relief as prayed for in earlier Title Suit No.39 of 1998 has been declined.

6. On the above rival pleadings, the Trial Court framed five (5) issues for being answered.

Taking the crucial issues i.e. is issue nos.3 & 5 together, upon examination of evidence and their analysis, the answer has been

recorded that the suit properties has never been partitioned between Hadibandhu and Bhaiga during their lifetime as also later among the four sons of Bhaiga. Having said as above, basing upon the share carved out by the Consolidation Authorities, the Trial Court has allotted the share over the suit schedule properties to the parties. It has also been said in course of discussion that the decision in Title Suit No.39 of 1998 would not operate as resjudicata for the suit at hand. The Trial Court has accordingly, drawn the preliminary decree in respect of Schedule-A, B, C and D properties.

7. The Defendant Nos. 2 & 3 being aggrieved by the aforesaid judgment and preliminary decree passed by the Trial Court having carried the Appeal, said move has yielded as fruitful result for them as the First Appellate Court while allowing the Appeal has set aside the judgment and preliminary decree passed by the Trial Court.

8. The Appeal has been admitted to answer the following substantial question of law:-

“Whether the lower appellate court committed error of law while holding that Dami being the Pre-Act widow (husband having died prior to the year 1937) had no right to alienate of the property in question by overlooking the other factor that the donee having remained in possession of the said property for much more than 12 years from the date of death of the widow has perfected title by adverse

possession in view of the inaction at the instance of those who came to succeed the property after death of the widow and whether said alienation is still open to challenge and the relief on that score being barred by the law of limitation if could have been granted?”

9. Learned Counsel for the Appellant first of all submitted that the Consolidation Authorities having finally passed the order, the same are not liable to be questioned in this suit and the Civil Court’s jurisdiction is barred. In this light, he submitted that the Consolidation Authorities having finally held that Dami had all the right to alienate the properties, the First Appellate Court has gone wrong in holding that Registered deed of gift of the year, 1932 admitted in evidence and marked Ext.15 as a document having no worth of even the paper written on and as such according to him, there should not have been the finding that through that document, Dami could not have gifted away the property in favour of Musei, the father of the Plaintiff. He thus submitted that the First Appellate Court could not have set aside that conclusion arrived at by the Consolidation Authorities. He next submitted that when from that time onwards, the gifted properties has remained in the hands of Musei and he openly and peacefully possessed the same continuously in asserting the status as the donee and as such claiming title over the same which is hostile to other members of the family; keeping in view the inaction of other members of the family, who claimed to have succeeded

to the properties after the death of Dami, it ought to have been held that the Plaintiff has perfected title by way of adverse possession;.

10. Learned Counsel for the Respondents on the other hand supported the findings of the First Appellate Court. It was submitted that the First Appellate Court has rightly held that, no reliance could have been placed by the Consolidation Authorities upon such deed of gift as the same is void *ab initio*. According to him, in that view of the matter, the First Appellate Court has very rightly taken the view that banking upon the aforesaid orders of the Consolidation Authorities, the Trial Court should not have allotted the shares over the properties to the parties. He next submitted that here the Plaintiff is not a stranger to the family and as such for establishment of a claim of acquisition of title over the said properties by way of adverse possession; he was under the legal obligation to specifically plead and prove ouster and that having not been done, at this stage, even accepting for a moment that the possession of the properties was with the Plaintiff that cannot be so found in his favour in returning a finding that he has acquired title by adverse possession.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below and I have also gone through the

plaint and written statements. I have perused the evidence both oral and documentary tendered by the parties.

12. The Full Bench decision of this Court in case of ***Guljar Khan Vrs. Commissioner Consolidation and Others***; 1993 (1) OLR 194 states the details of the scope of revision under Section-37 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of the Land Act, 1972 (for short called as the OCH&PFL Act). While stating that the power remains that the Consolidation Authorities as provided under section-37 of the OCH&PFL Act, even after closure of the Consolidation Operation to tinker with the decision of the sub-ordinate Consolidation Authorities, it has been held that the same is however exercisable under compelling circumstances and in a reasonable manner. The orders of the Appellate Forum in Consolidation Appeal no.26 of 2002 and that of the Revisional Forum in Consolidation Revision No.2733 of 2003 have been admitted in evidence and marked Exts.13 and 14 respectively. The First Appellate Court having gone through the same has arrived at a conclusion that there was no such compelling circumstance for the Consolidation Authorities to exercise such power.

The orders reveal that the deed of gift executed by Dami Bewa, the widow of Hadibandhu on 23.05.1932 gifting away certain property to Musei, the father of the Plaintiff and Defendant No.6 had been the

subject of consideration. As per the Plaintiff's case, Dami Bewa died in the year 1958 long after the death of Hadibandhu in the year 1929. But the Plaintiff himself in his evidence has stated that Dami died in the year 1935. When his age is taken into account, the First Appellate Court is found to be right in saying that he had no occasion to see Dami. For all these reasons, rightly it has been said that the Plaintiff has not been able to prove that Dami was alive till 1958. The property in the hands of Dami was not her absolute properties. She being a Pre-Act widow and died in the year 1935 was having no power of disposition of the said properties as by then Hindu Women's Right to Property Act, 1937 had not been enacted. She was only having the right of maintenance and on the interest a charge that her husband had over the joint Hindu undivided family property. In that view of the matter upon the death of Handibandhu, his properties have devolved upon his brother Bhaiga by way of survivorship and thereafter, has come to the hands of the successors of Bhaiga.

The properties covered under the Consolidation Khata Nos. 116 and 119 as described in Schedule-A stand recorded in the name of the successors in interest of late Uddi, late Musei, late Kanduri and his brother late Bauribandhu.

The suit Schedule-B property stands recorded in the name of the successors in interest of late Musei and late Kanduri. The Schedule –C property stands recorded in the name of Bauribandhu, Krushna Chandra, Rama Chandra and Laxmidhar, when the properties described in Schedule-D stand recorded in the name of successors in interest of late Uddi, late Musei, late Kanduri and Bauribandhu. The Consolidation Record of Right have been admitted in evidence and marked Exts. 1 to 5 in respect of the suit properties. Despite the orders passed in Consolidation Appeal and Revision, those Records of Rights have not been so corrected in carrying out the orders. The gift being wholly void, when the same is pressed into service for any purpose whatsoever in any proceeding does not stand for being looked into. In the given case, the Consolidation Authorities thus have fallen in grave error in giving full effect to the deed of gift which is void from its inception being without any authority and power resting with the donor in gifting away the property and therefore those orders to said extent are nonest. Under the circumstance, the Civil Court can very well assume the jurisdiction to set the matter right. The view of the First Appellate Court in that regard is thus found to be well in order in the factual scenario and being in consonance with the settled position of law.

13. Even accepting the factum of possession of the said land covered under the deed of gift by the donee; in the present case in view of the relationship between the parties, the said possession of the donee under that invalid gift cannot be taken or deemed to be adverse not only during the lifetime of the donor Dami but also even after her death as against the heirs of her husband i.e. the reversioners. In that view of the matter, when there remains no such pleading as to ouster as also the evidence do not satisfy all such ingredients as required in law; the claim of acquisition of title over the so called gifted property by way of adverse possession has to fail.

Having said all these above, the suit schedule properties being Consolidable lands, in view of the bar contained under Section-34 & 35 of the OCH&PFL Act, the view taken by the First Appellate Court that the suit is not maintainable has to prevail. Furthermore, on the face of the proven documents Exts. 1 to 5, the Plaintiff having not arraigned Nabani, Agani and Sunei, who are among the recorded tenants of those suit schedule lands under Khata Nos. 74, 116, 119 and 316; the Court below is found to have rightly held that the suit is liable to be dismissed.

The aforesaid discussion and reasons provide the answer to the substantial question of law against the claim / case of the Plaintiff which

leads to confirm the judgment and decree passed by the learned First Appellate Court in RFA No. 07 of 2013.

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

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

Narayan

