

IN THE HIGH COURT OF ORISSA : CUTTACK
RSA No.236 of 2014

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 24.01.2014 and 05.02.2014 respectively passed by the learned District Judge, Baleswar in RFA No.108 of 2006 in dismissing the Appeal and upholding the judgment and decree dated 31.07.2006 and 11.08.2006 respectively by the learned Civil Judge (Junior Division), Jaleswar in T.S. No. 89 of 1997.

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Sri Shiba Prasad Jena :::: ***Appellant.***

--: VERSUS :-

Sri Ananta Kumar Giri & Others :::: ***Respondents.***

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

For Appellant ... M/s. S.P. Mishra, S.Mishra, B.S.
Panigrahi, S.K. Sahoo, D. Priyanka,
S. Modi and E. Agarwal, Advocates

For Respondents ... None.

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

Date of Hearing:03.01.2022 :: Date of Judgment:10.01.2022

The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree dated 24.01.2014 and 05.02.2014 respectively passed by the learned District Judge, Baleswar in RFA No.108 of 2006.

By the said judgment and decree, the First Appellate Court while dismissing the Appeal filed by the present Appellant

(Plaintiff) under section 96 of the Code has confirmed the judgment and decree dated 31.07.2006 and 11.08.2006 respectively passed by the learned Civil Judge (Junior Division), Jaleswar in T.S. No. 89 of 1997 in dismissing the suit filed by the Appellant as the Plaintiff against the Respondents (Defendants).

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. **Plaintiff's case:-**

The suit land originally belonged to one Mahendranath Das who had sold the land to Banchhanidhi Mohanty, the elder brother of Akhaya Kumar Mohanty who happens to be the husband of Defendant No. 4 and father of Defendant Nos. 5 to 10 vide registered sale deed dated 10.12.1969. Banchhanidhi and his wife Sasimani died issueless and Akhaya being the brother of Banchhanidhi came to succeed the property. He sold the suit land to the Plaintiff for valuable consideration vide registered sale deed dated 25.11.83. Accordingly, the Plaintiff has been in possession of the said land and the Record of Right has been prepared in his name when he is also paying the rent. It is stated that the Defendant No.1 with Defendant Nos. 2 and 3 had managed to obtain an agreement for sale in respect of the suit land from that Banchhanidhi.

Basing upon that agreement, they had filed the Title Suit No. 50 of 1984 in the court of learned Sub-Judge, Balasore (as it was then) against said Akhaya Kumar Mohanty as Banchhanidhi was dead by then and Akhaya succeeded to the properties of Banchhanidi. In the said suit, the present Plaintiff was also a party

as Defendant No.2. The suit coming to be heard by learned Additional Sub-Judge, Balasore, it stood decreed *ex parte*. The said *ex parte* was put to execution in Execution Case No. 6 of 1989. It is alleged that in that proceeding, without service of notice on the Plaintiff, the court finally executed the sale deed in favour of the Decree-Holders on 4.11.92. It is stated that in Title Suit No. 50 of 1984, although the Plaintiff had not prayed for cancellation of the sale deed, executed by Akhaya in favour of the Plaintiff; the court illegally cancelled the sale deed executed by Akhaya in favour of the present Plaintiff.

It is further stated that the deed executed by the court in favour of Defendant Nos. 1 to 3 has not been acted upon. Alleging that the Defendant Nos. 1 to 3 being armed with sale deed attempted to dispossess the Plaintiff from the suit land, the present suit has been filed.

4. The Defendant Nos. 1 to 3 in filing the written statement have also advanced the counter-claim.

While traversing the averments taken in the plaint, it is stated that Banchhanidhi had duly executed the agreement for sale in their favour on receipt of part consideration and in spite of their readiness and willingness to perform their part of the agreement although, Banchhanidhi till his death, paid a deaf ear to it without coming forward to execute the sale deed and register the same on receipt of balance consideration. So they filed the suit i.e. T.S. No. 50 of 1984 against Akhaya, the brother of that Banchhanidhi who succeeded to the property and this Plaintiff who claimed to have purchased the land from that Akhaya, which was decreed and that

decree being put to execution, the sale deed in respect of the suit land has been executed in their favour under the orders of the court.

It is next stated that the present Plaintiff and Akhaya had filed applications under order 9 rule 13 of the Code to set aside the *ex parte* decree passed in T.S. No. 50 of 1984. Those Misc. Cases being dismissed; Akhaya had carried Misc. Appeal under order 43 rule 1 (d) of the Code and that having been dismissed. Now when the record of right being mutated in favour of Defendant Nos. 1 to 3; the present suit has been filed.

5. The Trial Court on the above rival pleadings having framed ten (10) issues appears to have rightly proceeded to decide issue Nos. 5 and 6 first. Issue No. 5 relates to the claim of the Plaintiff that the judgment and decree passed in T.S. Case No. 50 of 1984 and the orders passed in Execution Case No. 6/89 are illegal and in-operative whereas issue No. 6 concerns with the right, title and interest of the Plaintiff over the suit as claimed by him. Both the issues have been decided against the Plaintiff. This has practically led to the dismissal of the suit. The counter-claim of the Defendant Nos. 1 to 3 has been allowed issuing permanent injunction against the Plaintiffs in not disturbing the Defendant Nos. 1 to 3 in their possession of the suit property. The Plaintiff being non-suited having moved the Lower Appellate Court has been unsuccessful.

6. Mr. S.P. Mishra, learned Senior Counsel for the Appellant submits that the Plaintiff being a bona fide purchaser for value from the owner of the suit land who came to succeed the same upon the death of Banchhanidhi having absolutely no knowledge about the agreement for sale; the courts below ought to have held that the judgment and decree passed in T.S. No. 50 of 1984 and the

consequential orders passed in Execution No. 6/89 are illegal and as such in-operative and not binding upon the Plaintiff. According to him, in the absence of any prayer to declare the registered sale deed standing in favour of the Plaintiff as void and in-operative, the court in T.S. No. 50 of 1984 has illegally so declared and that is nonest in the eye of law which ought to have been so decided in this subsequent suit which is maintainable and no question of *res judicata* arises in view of the dismissal of the application under Order 9 Rule 13 of the Code. He thus submits that the following substantial questions of law arise in the case for being answered:-

“A. Whether the dismissal of the application under Order-9 Rule 13 CPC operates as res-judicata in the present suit when the issue raised in the present suit challenging the binding nature of the decree in T.S. No. 50 of 1984 has not been finally adjudicated in the proceeding under Order-9 Rule-13 CPC?

B. Whether the cancellation of the sale deed vide Ext.2 is a smaller relief in nature of relief sought for in T.S. No. 50 of 1984 and available to be granted under Order-7 Rule 7 CPC?”

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

8. In respect of the subject matter of the present suit is concerned, the Defendant Nos. 1 to 3 had earlier filed one suit i.e. T.S. No. 50 of 1984 for specific performance of the agreement for sale said to have been executed by Banchhanidhi in their favour. In the said suit, the present Plaintiff as also his vendor Akhaya, the

brother of Banchhanidhi were parties. The decree being passed in the said suit in favour of the Defendant Nos. 1 to 3, the same has been put to execution in Execution Case No. 6/89. Ext. 10 is the certified copy of the judgment passed in the said suit. The order sheet of the execution case has been admitted in evidence as marked Ext.6. It had been pleaded in the plaint filed therein that Akhaya, the vendor of the Plaintiff was well aware of agreement for sale executed by his brother, Banchhanidhi in favour of Defendant Nos. 1 to 3 and in spite of that, he had executed the sale deed in favour of the present Plaintiff. The suit stood decreed directing Akhaya to execute the sale deed in favour of Defendant Nos. 1 to 3 and register the same and he having failed to do, finally in execution case; the sale deed has been made in favour of the Defendant Nos. 1 to 3.

9. Both the present Plaintiff and Akhaya had filed applications under order 9 rule 13 of the Code giving rise to Misc. Case Nos. 9 of 1987 and 8 of 1987 respectively to set aside the *ex parte* judgment and decree. The applications have been dismissed as would be seen from Exts. D and E. The application under order 9 rule 13 of the Code filed by Akhaya having been dismissed for default, he had filed another application under order 9 rule 13 of the Code which stood numbered as Misc. Case No. 27 of 1991. That again having been dismissed, he had carried an Appeal as provided under order 43 rule 1 (d) of the Code to the court of District Judge. The Appeal also stood dismissed on contest.

The present Plaintiff having failed in his attempt to get the judgment and decree set aside in Misc. Case No. 9/87 did not proceed further. The certified copy of the judgment passed by the

District Judge in Misc Appeal No. 79 of 1992 has been admitted in evidence and marked Ext. F.

The position as to the availability of the remedies to the aggrieved party to a suit decreed *ex parte* are that, (i) he may file Appeal from *ex parte* decree under section 96 of the Code; (ii) may apply in review of judgment under order 47 rule 1 of the code; (iii) may apply under order 9 rule 13 of the Code to set aside the *ex parte* decree; and he may file a separate suit only on the limited ground of fraud.

Here, the Plaintiff as well as his vendor being quite alive to the legal provisions holding the field and well aware of the remedy as provided under order 9 rule 13 of the Code have ultimately accepted the decision rendered therein. Thus the judgment and decree passed in T.S. No. 50 of 1984 have been holding the field all along and that has also been duly carried into execution.

It is the settled position of law that an *ex parte* decree is as effective as contested one if not set aside under due process of law. It has the force of the decree and binding on the parties to the suit.

10. In the instant case, the present Plaintiff being aggrieved by the *ex parte* decree passed in T.S. No. 50 of 1984 had availed the remedy of getting it set aside by filing application under order 9 rule 13 of the Code. His application numbered as Misc. Case No. 9 of 1987 has been rejected and that of his vendor's application having been rejected, the same has also been upheld in the Appeal. The *ex parte* decree passed in that suit i.e. T.S. No. 50 of 1984 has not been called in question on merit by carrying any Appeal under section 96 of the Code.

The present suit to declare the judgment and decree passed in T.S. No. 50 of 1984 and the consequential orders in Execution Case No. 6/89 as illegal and in-operative is mainly based on the claim that in that said suit when no relief of cancellation of the sale deed executed by Akhaya in favour of the Plaintiff had been prayed for, the court could not have granted the same and even in doing so, the said court should have touched upon the most important aspect in giving a clear ruling upon the fact as to if the so-called agreement executed by Banchhanidhi in favour of the Defendant Nos. 1 to 3 was within the knowledge of Akhaya and the present Plaintiff in saying that they knowing about such agreement had entered into the said transaction of sale. So, it is urged that the judgment and decree passed in T.S. No. 50 of 1984 and the subsequent orders in the Execution Proceeding are of no value in the eye of law.

Thus it is said that in the absence of any finding on above score, the court in that T.S. No. 50 of 1984 could not have held the sale deed executed by Akhaya in favour of the Plaintiff to be of no value in the eye of law in finally cancelling the sale and directing Akhaya to execute the registered sale deed in respect of the suit land in favour of Defendant Nos. 1 to 3.

Even accepting this contention if we say that the court in passing the decree in T.S. No. 50 of 1984 did commit that error yet the said issue could have only been raised by filing an appeal in questioning the *ex parte* decree passed in T.S. No. 50 of 1984 and that having not been done in the absence of any claim that the judgment and decree passed in T.S. No. 50 of 1984 are vitiated on account of fraud that to without giving any hint of such fraud if any so perpetuated in the plaint, the present suit for the reliefs claimed

is not maintainable in the eye of law. The settled position of law stands that an erroneous decree cannot be equated with the one which is a nullity being so passed by the court having no jurisdiction; ultra virus the powers of the court passing the decree. Thus the *ex parte* judgment and decree in that suit as well as the consequential orders in the Execution Proceeding are no more amenable to challenge in this suit as laid. So when the judgment and decree passed in T.S. No. 50 of 1984 are holding the field and binding on the parties, the present suit for the reliefs claimed is not maintainable in the eye of law.

In view of the aforesaid, the suit having been dismissed by the courts below and the counter-claim being so allowed; the submission of the learned Senior Counsel for the Appellant that the Appeal merits admission to answer the substantial questions of law as indicated in para-6 fails.

11. Accordingly, the Appeal stands dismissed. No order as to cost.

12. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

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