

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.170 OF 1997

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, Balangir in Title Appeal No.08/26 of 1989 by setting aside the judgment and decree passed by the learned Sub-Ordinate Judge, Balangir in Title Suit No.155 of 1985.

Rahas Bihari Patel (Since Dead) Appellant.
through his LRs

-versus-

Bhubaneswar Patel (Since Dead) Respondent.
through his LRs

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

<i>For Appellant</i>	-	M/s.S.P. Misra, Sr. Advocate, M/s. S. Das, S. Rath, B.P. Das, A. Patnaik, Advocates
<i>For Respondent</i>	-	M/s. L.K. Moharana, S.J. Mohanty, B. Pati, N. Rout, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING::29.03.2022, DATE OF JUDGMENT:: 18.04.2022

The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned Additional District Judge, Balangir in Title Appeal No.08/26 of 1989.

By the same, the judgment and decree passed by the learned Sub-Ordinate Judge, Balangir in Title Suit No.155 of 1985 have been set aside.

The Appellant as the Plaintiff had filed the suit for partition against the Respondent arraigning him as the Defendant who is his elder brother. The suit property measures in total Ac.8.59 + Ac.0.45 dec. + Ac.0.91 dec. = Ac.9.95 decimals. The suit filed by the Appellant as the Plaintiff having culminated in the Trial Court on passing a preliminary decree declaring half share of the Appellant (Plaintiff) over the same and the rest half being allotted to the Respondent (Defendant); those have been set aside in the First Appeal filed by the Respondent (Defendant) under Section-96 of the Code.

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. The Plaintiff's case is that the suit property originally belonged to one Indra Patel. He sold the same to the Plaintiff and Defendant by registered sale-deed dated 12.02.1964 for consideration of Rs.4,000/-. The Plaintiff and Defendant at that time were in joint mess and estate. They purchased the property jointly and both had taken the delivery of possession of the suit land from said Indra Patel, the Vendor. In 1964 Janak Patel, Dinabandhu Patel and Jibardhan Patel created disturbance in the possession of the suit land by the Plaintiff and Defendant. So, a proceeding under Section-145 of the Code of Criminal Procedure had been initiated. The same stood terminated in favour of the Janak Patel

and others. The Plaintiff and Defendant thereafter filed Title Suit No.79 of 1967 in the Court of Sub-Ordinate Judge, Balangir against the said Janak Patel and others. The suit having been dismissed; the Plaintiff and Defendant carried First Appeal vide Title Appeal No.58 of 1973. The same came to be decided by the District Judge, Balangir. That also stood dismissed. The Plaintiff and Defendant being aggrieved by the judgments and decrees passed by the Courts below had carried an Appeal under Section-100 of the Code to this Court which stood numbered as Second Appeal No.80 of 1977. This Court by judgment dated 04.02.1982 allowed the Second Appeal and thereby set aside the judgments and decrees passed by the Courts below. In the said Second Appeal, the title of this Plaintiff and Defendant who were the Plaintiffs in that suit under consideration in that Second Appeal was declared. The possession being accordingly taken on 07.06.1983; both came to possess the same again jointly. It is stated that the Plaintiff when faced difficulties in cultivating the suit land as it was situated at a distance from his residence, he demanded partition of the same. The Defendant having refused the said request, the suit for partition claiming his half share has come to be filed.

4. The Defendant while traversing the averments taken in the plaint has averred that the Plaintiff, Defendant and one Baidyanath are the three sons of Kirti Chandra Patel. In the year 1949, all got separated in

mess and estate. Accordingly, a plain paper document came into being showing the allotment of the family properties in their names. In the year 1941, the Defendant after passing HSC Examination, joined Government service. He was having surplus funds with him. He, therefore, purchased the suit land by paying the entire consideration himself and the Plaintiff had no contribution at all in the matter of payment of consideration in the said transaction. However, he was merely a name lender and his name was included because as a Government servant it was not that easy for the Defendant to obtain permission from his authority. It is further stated that after the said sale, the Defendant was given the delivery of possession of the suit land by the Vendor and for these reasons, on 07.05.1964, the Plaintiff executed a deed of relinquishment (NA DABI PATRA) on a stamp paper indicating therein to be having no right over the suit land. It is his case that since the year 1964, he spent money and he had also borne entire expenses of prior litigation against Janak Patel and others wherein the Plaintiff had paid nothing. After the decree was passed in the Second Appeal, the Defendant alone took the delivery of possession from the concerned Revenue Inspector and he is possessing the suit land by paying the land revenue to the State. It is his case that the joint family status had ceased to exist right from the year 1949 and therefore, it is not correct to say that the suit land was purchased, when the Plaintiff

and Defendant were in jointness. The specific case of the Defendant is that the property in question is his own self-acquired property in which the Plaintiff had/ has no right, title and interest and he qua the property is a name lender.

5. On the above rival pleadings, the Trial Court framed five issues. Proceeding to decide and that to rightly the first three important issues together as those are inter-linked; upon examination of evidence and their evaluation, the Trial Court had recorded the finding that the Plaintiff and Defendant are joint owners of the suit property. Next it has been stated that Ext.C, which is the document dated 07.05.1964 cannot be utilized against the Defendant to say that he had relinquished the right over the suit property. Having said so, the Trial Court refused to hold the Defendant to be absolute owner of the suit property. With such findings, the Trial Court passed the preliminary decree for partition as prayed for by the Plaintiff, allotting half share to him and rest half to the Defendant.

The First Appellate Court being moved by the Defendant aggrieved by the judgment and preliminary decree passed by the Trial Court has allowed the Appeal. On re-appreciation of evidence on record, the First Appellate Court has arrived at a conclusion that it is more probable that the Defendant has paid the consideration of Rs.4,000/- for the said purchase of the suit land in February, 1964. Upon consideration

of evidence on record, the First Appellate Court has also arrived at a conclusion that the Plaintiff had no connection at all with the suit land and he had never taken care of the same and it is the Defendant who takes all the cares of the suit land right from the time of purchase. Examining the so called deed of relinquishment (NA DABI PATRA), Ext.C said to have been executed by the Plaintiff on 07.05.1964, the finding has been that the document is not an in-genuine one as has been held by the Trial Court. It then held that the execution of the said document by the Plaintiff has been proved. So, it has been said that the admission of the Plaintiff contained in the said document-Ext.C is binding on him which he has failed to explain. The contentions raised from the side of the Plaintiff as regards non-filing of the document Ext.C in earlier litigation which had been fought by the Plaintiff and Defendant together all through, the view of the First Appellate Court is that in that litigation, the Defendant was not required to file the same and non-filing of the same does not estopp him from asserting that the Plaintiff by virtue of the said document has no right over the property. Thus, holding the Defendant to be the exclusive owner of the suit land, the decision of the Trial Court that the suit property is liable to be partitioned between two has been upset and the suit for partition filed by the Plaintiff has been dismissed.

The Appellant as well as the Respondent having died during the pendency of this Appeal, their legal representatives have come on record.

6. The Appeal has been admitted on the following substantial questions of law:-

- “(a) Whether the nature and character of Ext.C i.e. as to whether it was an admission as found by the Appellate Court or deed of relinquishment as pleaded by the Defendant or neither of the same?
- (b) Whether the Ext.C has the effect of superseding the decree passed in Second Appeal No.80 of 1977?

9. Mr. S.P. Misra, learned Senior Counsel for the Appellant submitted that when both the Plaintiff and Defendant together fought out the litigation against the persons who created disturbance in their possession by asserting although therein that they are the owners of the property and ultimately got the decree from this Court in Second Appeal No.80 of 1977, the Defendant is estopped from saying that he is the exclusive owner of the property having purchased the same by paying the consideration from his own sources and the Plaintiff was just a name lender. He next submitted that even if for a moment, it is accepted that the Defendant has made the contribution of the entire consideration amount, the same would not give rise to a case that the property was purchased by him alone to the exclusion of the Plaintiff whose name

very much finds place in the sale-deed as one of the vendees being so stated in the deed to have contributed for the consideration and to have been delivered with the possession with the co-vendee that is the Defendant. It was further submitted that the possession of the suit land under the circumstances by anyone would not exclude the other from the ownership. In this connection, he has invited the attention of this Court to conduct of the parties all through right from the time of purchase till they finally became successful in the litigation which came to a rest by the judgment and decree passed by in the Second Appeal No.80 of 1977 relating to the suit land; when the settled principle stands that possession and dealing of the property by one co-owner is deemed to have been for that co-owner as well as for and on behalf of others. It was submitted that Ext.C ought not to have been looked into for any purpose whatsoever much less to say that in holding that the Plaintiff's right, title and interest over the suit property thereby has been lost or that he has acquiesced his right thereby. In this connection, it was submitted that the stand itself that the Plaintiff executed Ext.C runs contradictory to the plea as taken by the Defendant that it is his own property and the Plaintiff was merely a name lender or that his name was just included without being given any benefit thereof.

10. Mr. L.K. Moharana, learned Counsel for the Respondent submitted all in favour of the findings recorded by the First Appellate

Court. According to him, on elaborate discussion of the evidence on record assigning very good reasons, the First Appellate Court has rightly arrived at a conclusion that the Defendant is the absolute owner of the suit property and the Plaintiff has no right, over the same so as to claim partition. He submitted that the document Ext.C is just an acknowledgment from the side of the Plaintiff that he had no such right over the suit property and therefore, he would have no further claim over the same which has been rightly so decided by the First Appellate Court.

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

12. Before proceeding to find out the answer to the substantial question of law, some admitted facts and circumstances are required to be placed.

The registered sale deed dated 12.02.1964 is the source of title through which, the title over the suit land has passed on from the hands of one Indra Patel. In the said registered sale deed, the Plaintiff and the Defendant stand as the joint purchasers of the said land from that Indra Patel. In view of the above, the presumption stands that the Plaintiff and the Defendants, under the said sale deed, became the joint owners having equal share over the purchased property.

The Plaintiff and the Defendant had jointly filed the suit concerning the subject matter of this present suit for partition against some trespassers. They, as the owners of the suit land, by filing that suit, had prayed for declaration of their title and recovery of possession and the matter having finally travelled to this Court in SA No.80 of 1977, they have been successful. Pursuant to the said decree, possession of the suit land has been delivered to the present Defendant as has been proved through document as he was one of the Plaintiffs and decree holders therein.

13. The First Appellate Court, having rightly said that with the presumption coming to be drawn from the said registered sale deed that the Plaintiff and Defendants both are the joint owners of the suit land having purchased the same together has, however, committed an error in further saying that said presumption can be rebutted if it will be established that the Defendant alone paid the entire consideration money and the Plaintiff had no contribution to that. With such erroneous view, as it appears the First Appellate Court has further proceeded to examine the evidence and conclude that it is more probable that the Defendant had paid the entire consideration of Rs.4000/- and the Plaintiff, contributing nothing towards the same. As to why the said view taken by the First Appellate Court is said to be erroneous can be seen from the discussion to follow.

In our given case, two brothers are the purchasers under the registered sale deed. It is not said by the Defendant that the recitals in the said sale deed run on the score that the consideration money has been paid by the Defendant alone. In such a case even if for a moment, it is accepted that the entire consideration money has been paid by the Defendant and the Plaintiff had contributed nothing that is of no significance to say that by that registered sale deed and by virtue of that purchase, it is only the person, who has paid the entire consideration money, here the Defendant has acquired the title being the sole vendee-purchaser of that transaction. The Defendant is the elder brother of the Plaintiff and he is about five years elder to the Plaintiff. So, here the most important consideration stands as to whether by such purchase of the property also in the name of the Plaintiff, he was never intended to be clothed with the ownership of any part of the land, to take part in its enjoyment and so far as the derivation of benefit therefrom are concerned. The earlier suit having been filed in the year 1967 after three years of said purchase, the Plaintiff and Defendant together pursued the litigation and have become successful at the end. The Defendant nowhere in that proceeding has advanced his claim over the suit property to the exclusion of the Plaintiff and rather, he has gone all along in accepting in that earlier litigation that he with his younger brother, this Plaintiff are the title holders of the suit property and are

entitled to possess by driving out the trespassers therefrom. It being the settled position of law that delivery of possession of the property to one of the decree holders in course of execution of the decree by the Court; here in the given case, the possession of the suit land even if taken by the Defendant from the Revenue Inspector, after he with this Plaintiff became successful in the Second Appeal before the High Court has to be held to have enured to the benefit of both the Plaintiffs therein being the decree holders who in this suit are the Plaintiff and Defendant. So, it would not be correct to say that as because the Defendant has taken possession of the suit land after he with the present Plaintiff became successful in the earlier rounds of litigation, his possession of the suit land is a strong factor in support of the establishment of the case of the Defendant that the suit property is his exclusive property. The above reasons assigned by the First Appellate Court are not tenable in the eye of law. What have been pleaded by the Defendant in the present to non-suit the Plaintiff is that the Plaintiff has absolutely no right to possess the suit land much less to say of being entitled to claim a share therein. This claim is founded upon the fact that the name of the Defendant in the said transaction although was included as one of the vendee-purchasers, it was never with any intention to benefit him in any way from out of the suit land in any manner but he was merely a name-

lender and as such for name's sake joined the Defendant in that transaction as one of the beneficiaries.

The plea of the Defendant, we can say is like this that although he purchased the property for himself and it was acquired by him, the Defendant was included as one of the vendee-purchasers for just name's sake but not to be provided with any benefit from out of it in any manner. So, simply having even proved that the Defendant has paid the entire consideration for the transaction, when the fact remains that both pursued the litigation against the trespassers in respect of the suit land and ultimately got a decree in their favour as such owners having title over suit land and the right to possess the same by recovering it from the trespassers which in fact has been recovered; the Defendant cannot said to have established that it is he, who is the exclusive owner of the suit property. The Defendant's claim of exclusive ownership over the suit property now in the present suit filed by the Plaintiff who was one of the Plaintiffs in the earlier suit with the present Defendants stand not only contradictory but are in opposition to one another. This Defendant once having said that he with the Plaintiff are the owners of the suit land now when the Plaintiff claims his share denies his ownership and asserts the sole title holder unto himself. The stand taken in the earlier suit that it is the property of both the Plaintiff and the Defendant; is now given a good bye and it is advanced to the total execution of the Plaintiff who in

that suit had been admitted by this Defendant to be a co-purchaser and as such co-owner.

In fact, the First Appellate Court has not recorded specifically any finding on all the above scores, but merely taking a view that the Defendant has paid the consideration and has taken delivery of possession of the suit land and was paying rent and then accepting a document admitted in evidence and marked Ext.C from the side of the Defendant as the admission of the Plaintiff has finally non-suited the Plaintiff holding that he has no right and title over the suit land.

Ext.C is a document written on a stamp paper of value of Rs.1/-. The document dated 07.05.1964 appears to have been written by one Satyanarayan Mahakul. This document Ext.C for the first time come to limelight when filed in the suit of the year 1985 although its existence is traced way back to the mid of the year 1964. It is stated in the document that the suit land has been purchased in the name of both the Plaintiff and Defendant; the consideration money, stamps, registration fees and all other expenses such as for scribing the said document etc. had been borne by the Defendant. It further finds mention therein that the father of the parties, namely, Kirtichandra Patel when disclosed that as one Jibardhan Patel, S/o.Daya Patel has been taken in adoption by Indramani Patel, thus there arises the apprehension that litigation may crop up over the suit land purchased by the Plaintiff and Defendant. This is said to be

the main reason for execution of the document and it is said that the Plaintiff hearing this from his father then stated that he in that event, would neither spend money for litigation nor take any share from the suit land. He, therefore, out of his own will and volition is said to have written down the acknowledgement that in case in future anyone levies any litigation in respect of the suit land, his elder brother, the Defendant, if would so desire may contest the same or he may too initiate proceeding from his side wherein the Plaintiff would not appear nor would meet any such expenses and whenever, his signature would be required the Defendant can obtain the same from him It is indicated therein that in case this happens, he (the Plaintiff) would have no interest in the property if the Defendant would succeed in the litigation and he similarly would also have no liability if the Defendant fails and that the Plaintiff's successor would have also no such claim over the suit property. The contents of the document being read in entirety do not lead the Court to take a view that those are the admission of the Plaintiff that he was never the owner and title holder of the suit property with the Defendant. The statements made therein being taken into account; this Court is of the considered view that those cannot be so utilized against the Plaintiff to his deprivation in so far as the suit properties are concerned. Here he has not stated that by that purchase the Defendant became the owner. Rather, the Plaintiff being one of the co-owners, in

the event of any litigation concerning the suit property; has gone to express his stand in that event.

The document in question has not been nomenclatured. The Defendant has stated it to be a Nadabi Patra i.e. deed of relinquishment. It is thus stated that the Plaintiff by executing Ext.C has relinquished his interest over the property which was so resting in part with him by virtue of that registered sale deed. This very document in fact cuts the very root of the first plea of the Defendant that it was he who alone had the title over the suit property by virtue of the registered sale-deed as he had paid the consideration and the Plaintiff then had just lent his name without any contribution and as not having so acquired the status as one of the acquirers. It also does not stand to reason that when the purchase of the land was by the Defendant himself what was again the necessity for execution of such a document by the Plaintiff in so putting up in writing. If that is so, the purpose of this document coming into being clearly appears to be one of varying/modifying/altering the effect of that registered sale deeds in the name of the Plaintiff as well as the Defendant as two vendees to the extent of getting it confined only to the Defendant to be the real owner which is not legally permissible in this mode and by this means.

If the document is taken to be a deed of relinquishment then also the document being not registered as required under section 17(1)(b) of

the Registration Act, 1908, it cannot be looked into for that purpose. This document in question can never be said to be a family arrangement nor in my considered view, it can even be said to be a deed of acknowledgement of the facts stated therein.

14. It is the settled position of law that a document required to be registered, if not so registered, when is not admissible into evidence under section 49 of the Registration Act; nonetheless such unregistered document can ever used as an evidence of collateral purpose provided in the proviso to section 49 of the Registration Act.

It has been held in case of "*K.B. Saha & Sons Private Limited –V- M/s. Development Consultant Limited*"; (2008) 8 SCC 564 by taking into consideration the principles laid down in various decision of the Hon'ble Apex Court as have been recorded therein that the collateral purpose as provided in proviso to section 49 of the Registration Act must be in relation to a transaction not itself to be effected by a registered document, i.e., a transaction creating any right, title and interest in the immovable property of the value of Rs.100/- and upwards.

It is also been said therein that if a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

It has also been held that collateral purpose has a limited scope and meaning. It cannot be used for the purpose of saying that the deed created or declared or assigned or limited or extinguished the right to immovable property. So, the party taking aid of collateral purpose is not permitted to establish any of the above acts from the side of the document/deed.

In the backdrop of the above settled legal principles, the narration of the document (Ext.C) as stated in the foregoing paragraph are not to be looked into for any purpose whatsoever including any such collateral purpose as the very purpose of proving the document (Ext.C) and relying upon the same on the part of the Defendant is to establish his case that as because he alone had purchased the same and was the owner thereof, the Plaintiff has executed the document by admitting those facts. Here even the facts which are stated to have been admitted by the Plaintiff are so taken to have been actually admitted by him, the same cannot lead to record the finding that the Defendant is the absolute owner of the suit land wherein the Plaintiff has nothing to do.

The aforesaid discussion and reasons thus provide the answers to the substantial question of law as at (a) stated in the foregoing paragraph-6 that is not to be taken into account as deed of relinquishment and that the document, Ext. C, the so called admission of the Plaintiff said to have been contained therein do not come to the aid

of the Defendant in securing a finding that the suit properties are his exclusive and absolute property wherein the Plaintiff has nothing to do. Having thus answered the above substantial question of law; this Court does not feel the necessity to answer the other substantial question of law as at (b) in the said paragraph as its answer in either way would not impact the result of the suit filed by the Plaintiff seeking partition of the suit property.

15. In the result, the Appeal stands allowed. The judgment and decree passed by the First Appellate Court are hereby set aside and those passed by the Trial Court are hereby restored.

However, in the facts and circumstances, there shall be no order as to cost.

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

Narayan