

IN THE HIGH COURT OF ORISSA, CUTTACK

R.S.A. NO. 208 OF 2017

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 15.03.2017 and 27.03.2017 respectively passed by the learned District Judge, Khurda at Bhubaneswar in R.F.A. No.74 of 2015 confirming the judgment dated 13.07.2015 respectively passed by the learned 1st Additional Senior Civil Judge, Bhubaneswar in C.S. No.1828 of 2010.

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Jagannath Padhi

:::: Appellant

-:: VERSUS ::-

Chitta Ranjan Padhi & Others

:::: Respondents

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

For Appellant

:::: M/s. Prafulla Kumar Rath,
A. Behera, S.K. Behera,
P.Nayak, K. Kashyap and B.K.Dash
M/s.S.P.Raju, U.K.Mishra,
S.K.Kanungo,S.R.Jena,
Advocates.

For Respondents ::::

M/s.Smita R.N. Pattnaik, S.M.Dwibedi,
S.K.Nayak, P.K. Nayak, P.K. Mohanty,
S.Mohakud. S.Mohanty & S. Lenka

M/s.A.K.Pandey, D.N.Mishra

M/s.B.Bhuyan, S.Sahoo

M/s.P.C.Jena, B.S. Mishra, P.Ch. Dash &
S.K.Mohanty
Advocates

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

DATE OF HEARING:: 01.11.2021::DATE OF JUDGMENT::03.01.2022

D.Dash, J. The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure (hereinafter called as ‘the Code’) has assailed the judgment and preliminary decree passed by the learned District Judge, Khurda in RFA No.74 of 2015.

By the said judgment and preliminary decree, the First Appellate Court while confirming the judgment and preliminary decree passed by the learned Additional Senior Civil Judge Bhubaneswar in C.S. No.1828 of 2010 has given a direction to the parties to have an amicable partition of the properties in suit in line of the observation made in the order and carry out the same in consonance with the allotment as reflected in Schedule-B thereof.

Plaintiff is the Respondent No.1. The present Appellant has been arraigned as the Defendant No.1 in the Trial Court. The Plaintiff (Respondent No.1) and the Appellant (Defendant No.1) are brothers. The Respondent No.2 (Defendant No.2) is another brother; whereas Respondent Nos. 3 and 4 (Defendant Nos.3 & 4) are their sisters. It may be stated that upon the death of Respondent No.3 her legal representatives have come on record.

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 assigned with the position in the Trial Court.

3. The Plaintiff has filed the suit for declaration of his right, title, interest and possession over lot-2 of the property described in Schedule-B

of the plaint; further in the alternative, he has prayed for partition of Schedule-A property by allotting 1/3rd share in favour of the Plaintiff, Defendant No.1 and Defendant No.2 each giving due regard to the possession of the properties by the parties in consonance with the spirit as expressed in the Will executed by their father late Durga Charan Padhi.

The properties described in lot-1, 2 and 3 of the Schedule-B of the plaint was the leasehold property of late Durga Charan Padhi, the father of the parties. The lease had been granted by the Government of Odisha in the Department of the General Administration. Durga Charan Padhi had constructed a double storied building over the said land from out of his own income. In the year 1987, he expired. His wife Mandakini had pre-deceased him. Plaintiff stated that said Durga Charan Padhi during his lifetime on 15.04.1986 had executed a Will which is a registered one in bequeathing the property in the suit to his sons i.e. Plaintiff, Defendant No.1 and Defendant No.2 and had left the same. It is stated that in the said exercise of bequeathing the property, he had divided the schedule property in allotting specific portion of the same to the Plaintiff, Defendant No.1 and Defendant No.2 which find clearly indicated in the Will and shown in lot-1, 2 and 3 of the Will.

It is stated that the Plaintiff and Defendant No.1 and Defendant No.2 identified lot-1, 2 and 3 of Schedule-B of the property as so specified in the Will by due measurement and demarcation and accordingly since the year, 1987 they are in possession of the respective portion of Schedule-B property as per the lot shown in the Will in their favour. The Defendant No.1 when refused to accord consent for obtaining probate with the copy of the Will annexed, the suit has been filed. For better appreciation, the prayer advanced in the Plaint are re-produced hereunder:-

“A. Let it be declared that the Plaintiff has right, title, interest in respect of Lot No.2 of Schedule-B;

B. In the alternative let a decree for partition be passed in respect of ‘A-Schedule property declaring 1/3rd share each in favour of the Plaintiff and Defendant Nos.1 & 2 respectively and to respect the possession of the partition in the spirit of the Will;

C. Let a Civil Court Commissioner be deputed to effect partition between the parties as per the preliminary decree keeping their respective possession over the suit schedule property and the preliminary decree be made final as deem fit and proper; and

D. Cost of the suit be decreed in favour of Plaintiff.””

4. The Defendant No.1 in his written statement has not disputed the fact that the property in question was the self-acquired property of their father, late Durga Charan. It is stated that Durga Charan Padhi had executed Will which had never been handed over to him for obtaining probate annexing the copy of the Will. The Will was brought to the knowledge of all the legal heirs on the first death anniversary of their father.

The Defendant No.2 in his written statement has also not disputed the factum of acquisition of property by his father on lease from the Government of Odisha in the Department of General Administration. He submitted that Will executed by his father came to his knowledge on the first death anniversary of Durga Charan as it was in custody of Mr. G.C. Dash, the eldest brother-in-law of the parties.

The Defendant Nos. 3 & 4, the sisters of the Plaintiff and Defendant No.1 and Defendant No. 2 have not filed any written statement. They also have not contested the suit in denying the factum of execution of the Will.

5. Faced with the above pleadings, the Trial Court framed six issues. In the trial, the Plaintiff has examined himself as P.W.2 and has proved the certified copy of Khatian of Schedule-B property standing recorded in the name of Defendant No.1, Defendant No.2 and himself as Ext.1, the certified copy of the registered Will executed by Durga Charan marked Ext.2 and one affidavit jointly sworn by the Plaintiff, Defendant No.1 and Defendant No.2 on 12.12.2008 as to division of the property amongst themselves marked as Ext.3.

6. Going to address issue nos.4 & 5 as to the claim of the Plaintiff for partition and his entitlement of the parties specified in lot-2 of Schedule-B; the Trial Court has refused to declare the right, title and interest over that specific portion of the property as at Lot No.2 of Schedule-B in favour of the Plaintiff. Having said so, on the admitted case of the parties; preliminary decree has been passed for partition allotting 1/3rd share each to the Plaintiff, Defendant No.1 and Defendant No.2. Since the sisters are stated to have relinquished their interest as also they did not come to contest in claiming anything disputing the bequeath made by their father in favour of three sons in depriving them, they have not been given any share. While so holding, the Trial Court however keeping in view the equitable consideration has directed for partition and allotment of the portions of the land to the parties respecting their individual possession as far as possible and practicable.

7. The Defendant No.1 being aggrieved by the said judgment and preliminary decree, filed the Appeal under Section-96 of the Code, which has been disposed by passing the order as stated in the first paragraph. Thus, the Defendant No.1 before this Court carrying this second Appeal

which he assails the judgment and preliminary decree passed by the said lower Appellate Court.

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

1) In view of provision contained under Section-57 read with Section-213 of Indian Succession Act, whether the Courts below are correct in passing decree for partition dividing the properties contrary to the provision made in the Will particularly when the said Will is not required to be probated since is executed in a princely State of Odisha?

2) Whether the learned Courts below are correct in decreeing the suit for partition on the face of existence of a Registered Will defining the last wishes of the Testator in respect of his self-acquired property and the decree passed for partition of the suit property is inconsistent to the terms of the Will executed by the Testator?

9. Mr. P.K. Rath, learned Counsel for the Appellant (Defendant No.1) submitted that in view of the clear pleadings available on record with regard to complete division of suit schedule property between three brothers, and respective allotment as indicated in Schedule-B, the suit ought to have been dismissed. He further submitted that the Plaintiff's prayer to the effect of permitting the distribution of the property as shown in the lots of Schedule-B being accepted, the suit stands finally decreed which is wholly contrary to the declaration of the Courts below as to 1/3rd interest of the Plaintiff, Defendant No.1 and Defendant No.2 each over the said property in suit. He further submitted that since the issue that the Will having been executed in the erstwhile Princely State of Mayurbhanj, whether the same requires probate or not for the beneficiaries to claim title over the property bequeathed in their favour has not been decided by the lower Appellate Court, the judgment and preliminary decree passed by the

lower Appellate Court stand vitiated and therefore, the matter need be remanded the said Court to answer the same in clear terms.

10. Mr. D.N. Mishra, learned Counsel for the Respondent No.1 and Mr. A.K. Pandey, learned Counsel for the Respondent No.3(a) to 3(d) and Mr. B. Bhuyan, learned Counsel for the Respondent No.5 were heard.

It may be stated here that this Respondent No.5 was not a party before the Courts below and he for the first time has been impleaded in this Appeal by order dated 07.01.2021 passed in I.A. No.04 of 2021 as the purchaser of the property allotted to the Plaintiff as per final decree passed and drawn on 17.09.2018 and 09.10.2018 respectively followed by mutation after filing of this Appeal on 19.08.2017.

The Defendant No.1 claims to have no knowledge about the said passing of the final decree and mutation which according to him have been passed behind his back.

It may be stated here that the Second Appeal has been admitted on 18.09.2019 and the Plaintiff has executed registered sale-deed on 11.03.2020.

The above learned Counsels submitted all in favour of the affirmation to the findings recorded by the lower Appellate Court and the confirmation of the judgment and preliminary decree passed therein. It was also submitted that final decree having been drawn and since the suit has come to an end and the purchaser-Respondent No.5 having come into picture, the impugned judgment and preliminary decree are not also required to be interfered with.

11. From a plain reading of section 213 of the Indian Succession Act (for short called as 'the Act'), it is clear that sub-section 1 prohibits persons from establishing their rights in any Court without obtaining a probate,

while sub-section (2) restricts the application of the above prohibition to classes specifies in clauses (a) and (b) of section 57. In other words, if a particular Will is not covered by clause (a) or (b) of section 57, the prohibition under section 213(1) does not apply. Section 57 of the reads as under:-

“57. The provision of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply:-

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immoveable property situate within those territories or limits.”

12. The Ex-State of Mayurbhanj got merged with the province of Odisha w.e.f. 01.01.1949 and thus became a part of it followed by Administration of Mayurbhanj State Order 1949 and by virtue of that Order as indicated in its schedule the provision of the above, the Act came to be applied to the District of Mayurbhanj. The bar under section 213(1) of the Act to be not having the application, the nativity of the testator/testatrix does not matter and is of no significance. For attraction of that, the Will must not have been made within the territories specified in Clause (a) of Section 57 of that or that the immovable property in whole or part to which they relate must not have been within those specified territories.

In the case, the Will does not find mention about bequeath of immovable property situated in the Ex-State area of Mayurbhanj in particular but it has only been executed there. So, from the nativity of the

testator, it is not permissible to infer that the reference to immovable property made in the so called Will is also for some property situated within the Ex-State area of Mayurbhanj when no such property of that area is the subject matter of the Will either as a whole or in part being so stated/described therein. The Will covers the property at Bhubaneswar with general clause of bequeath regarding movable, immovable properties of the testator including service benefits receivable.

A careful reading of the decisions of this Court in case of *Amrutlal Majhi and Others V. Gopi Satuani and Others*; 1972(2) CWR 1451, *Balaram Tripathy and another V. Lokanath Tripathy*; AIR 1973 Orissa 112, *Radha Hota V. Dutika Satpathy*; (48) 1979 CLT 211, the above view is clearly deducible.

In view of the aforesaid, the bar contained in section 213 of the Act stands on the way of projection of this Will (Ext.2) in claiming the right, title and interest of the properties said to have been bequeathed by late Durga Charan in favour of his three sons, i.e, Plaintiff, Defendant Nos.1 and 2 in respect of the land with the house at Saheed Nagar in Bhubaneswar.

In that view of the matter, since the daughters of late Durgar Charan have relinquished their interest over the property in the suit, the Courts below have rightly held that the Plaintiff and Defendant Nos.1 and 2 each are entitled to $1/3^{\text{rd}}$ share each over the same.

13. Now, the question arises as to whether in effecting such partition in the field, it would be strictly in accordance with the respective shares, as allotted to the Plaintiff and Defendant Nos.1 and 2 giving due regard to their separate possession and enjoyment as far as practicable and possible or giving respect to the desire and wish of their father, Late Durga Charan

as the property was exclusively his own and he, in clear terms, had expressed his wish and desire to put the sons in possession of separate parcels as indicated in the Will (Ext.2). The father of a Hindu joint family has certainly the power to divide the family property at any moment during his life time, provided he gives his sons equal shares with himself, and if he does so, the effect in law is not only a separation of the father from his sons but a separation of the sons inter se, the consent of the sons is not necessary for the exercise of that power, which the father enjoys by virtue of his special status in the family. The contents of the Will being gone through, it is seen that late Durga Charan has indicated in clear terms that the movable and immovable property which he may be possessing or entitled to at his death in the schedule appended would be held by the three sons as the absolute owners with full power of dispossession as specifically indicated in three different lots. Everything are stated in future terms. So, it cannot strictly be taken to be a partition effected by late Durga Charan and any construction in that light would frustrate the very intention behind the execution of such Will that Durga Charan had never wanted to make his three sons owners in respect of his separate property in dividing the same in three parts during his life time. It also cannot be construed to be a family arrangement in strict sense of the terms as there Durga Charan has neither made any provision for himself nor has expressed to be having no further interest over the said self-acquired property since that time onwards and conduct of the parties are also not seen to be in that direction in getting those lands and house in different plots as allotted in separately recorded in the official records so as to infer that the arrangement has been acted upon.

14. With all the aforesaid, when the parties do not seriously dispute the fact as to the execution of the Will by Durga Charan; keeping in view the

wish and desire of the testator Durga Charan as expressed in clear terms in the said document, when the lower Appellate Court has found that the parties are in possession of the Schedule-A property in accordance with the allotments under Lot Nos.1, 2 and 3 as described in Schedule-B as per the desire and wish expressed by Durga Charan, it has rightly held that the possession of the land and house by the parties as such be given due regard to while partitioning the suit property in providing 1/3rd share to each of them, i.e, the Plaintiff, Defendant Nos.1 and 2 each.

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

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