

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.41 of 2012

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 24.12.2011 and 05.01.2012 respectively passed by the learned District Judge, Baleswar in R.F.A. No.61 of 2009 setting aside the judgment and decree dated 15.05.2009 and 26.06.2009 respectively passed by the learned Additional Civil Judge, Senior Division, Baleswar in T.S. No.980 of 2000-I.

Nityananda Dash (Since Dead) by *Appellants*
his LRs

-versus-

Smt. Sabitri Dash & Others *Respondents*

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

For Appellants - M/s.D.R. Swain, R.K. Rath and
M.M. Swain
(Advocates)

For Respondents - M/s.S.K. Mishra, J. Pradhan and
D. K. Pradhan
(Advocates)

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 16.08.2022 : Date of Judgment:22.08.2022

D.Dash,J. The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and preliminary decree dated 24.12.2011 and 05.01.2012 respectively passed by the learned District Judge, Baleswar in R.F.A. No.61 of 2009.

By the same, the Appeal filed by these Respondents (Plaintiffs) under section 96 of the Code challenging the order of dismissal of the suit by the judgment and decree dated 15.05.2009 and 26.06.2009 respectively passed by the learned Additional Civil Judge, Senior Division, Baleswar in T.S. No.980 of 2000-I in dismissing their suit has been allowed.

The First Appellate Court has set aside the order of dismissal of the suit pursued by the Respondents as the Plaintiffs and has decreed the same and at the same time, has dismissed the counter claim filed by the Appellant (Defendant No.1).

It may be stated here that one Gouranga Prasad Das had filed the suit as the Plaintiff against the Respondents being arraigned as the Defendants for partition of Schedule-Kha property. The Appellant No.1 being the Defendant No.1 had filed the counter claim praying therein to declare him as the exclusive owner of Schedule-Kha property. Said Plaintiff having died during pendency of the suit, his legal representatives (Respondents) pursued the suit and they having lost in the Trial Court, had carried the First Appeal, which has been allowed.

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. The Plaintiff's case is that he and the Defendant No.1 are the two sons of Rudra Charan Dash and they with their mother Chanchala Dash succeeded to the properties of Rudra Charan Dash. It is stated that in the record of Major Settlement Operation, most of the suit lands have been jointly recorded in the name of the legal heirs of Rudra Charan. It is stated that even though some records prepared in the name of their

mother, after her death, he and his brother Nityananda (Defendant No.1) are possessing the same by an amicable arrangement almost in half and half. It is stated that though the property described in Lot No.1 of Schedule-Kha appertaining to Khata No.144 consisting of five plots extends to Ac.1.69 decimals, only four plots have been shown in Lot No.1 as Plot No.1350 comprising Ac.0.56 decimals have been sold by the Plaintiff and Defendant No.1. He filed the suit for partition of the properties described in Lot Nos.1 to 5 of Schedule-Kha in half and half.

The Defendants contended that Gouranga is not the son of Rudra Charan and he was never born through the wedlock to Rudra Charan and Chanchala. It is, therefore, said that he has no right over the property and his claim for partition of the same is liable to be dismissed.

The Defendant No.1 further advanced the counter claim that the lands in Lot Nos.1 and 5 to Schedule-Kha exclusively belong to him and it be so declared.

4. On the above rival pleadings, the Trial Court framed as many as eleven issues. Taking up the exercise to answer issue nos.8, 9 and 10, which concern with the unity of title and possession of claim of partition, as advanced by the Plaintiff and his entitlement to half share over the suit property, upon examination of evidence and their analysis, the answer has been recorded against the Plaintiff in holding that he has not been established that Gouranga is the son of Rudra and Chanchala. It is, therefore, held that the suit for partition is liable to be dismissed. With such finding, the other issues have accordingly been answered and the counter claim advanced by Defendant No.1, has been allowed holding him to be the exclusive owner of the suit properties.

5. The First Appellate Court, being moved by the unsuccessful Plaintiffs, having sat over to examine the sustainability of the issue with regard to the sonship of Gouranga, on re-appreciation of evidence at its level and its detail evaluation, has up-set the finding of the Trial court. It has been held that Gouranga is the son of Rudra and Chanchala and as such is entitled to the share over the suit property. The counter claim advanced by the Defendants thus been dismissed. The First Appellate Court has passed the following order:-

“The Appeal is allowed. The judgment and decree passed by the trial Court are hereby set aside. The Suit of the Plaintiff is decreed on contest against the Defendant No.1 and exparte against the remaining Defendants. Plaintiff and Defendant No.1 are entitled to half and half from the suit land. Parties are directed to effect an amicable partition within three months of passing of the preliminary decree, failing which, any of the parties may apply for making the preliminary decree final. Transfers made by Plaintiff and Defendant No.1 are to be adjusted from their legitimate shares, so that the purchasers’ right can be protected and the same shall be adjudicated during final decree proceeding. The counter claim of Defendant No.1 is dismissed in view of the preliminary decree passed in favour of Plaintiff and Defendant No.1 jointly, as both are equally entitled to the suit property and are to divide half and half with exception that the transfers made by any co-sharer shall be adjusted from his legitimate share. In the peculiar circumstances, parties to bear their own cost.”

6. The following substantial question of law now stands for being answered in this Appeal:-

“Whether the finding of the First Appellate Court that Gouranga is the son of Rudra Charan Das is not only based on the erroneous appreciation of evidence on record but also contrary to the settled law especially when, the First Appellate Court, instead of placing the burden of proof upon the Plaintiff to establish the said fact that Gouranga is the son of Rudra Charan Das has taken the view that the burden of

proof lies upon the Defendants to disprove the said fact in going to held at the end that it has not been discharged by the Defendants?”

7. Learned counsel for the Appellants submitted that the First Appellate Court has misdirected itself in placing the burden of proof upon the Defendants in proving the fact that Gouranga is not the son of Rudra and Chanchala by taking completely a contrary view as taken by the Trial Court, which had rightly placed the burden of proof of the fact that Gouranga is the son of Rudra and Chanchala upon the Plaintiffs. He further submitted that the appreciation of evidence on record as made by the First Appellate Court is perverse and as such said finding that Gouranga is the son of Rudra and Chanchala is liable to be set at naught and consequently the ultimate order that has been passed by the First Appellate Court in decreeing the suit preliminary and dismissing the counter claim of Defendant No.1 are liable to be reversed in restoring the order passed by the Trial Court.

8. Learned counsel for the Respondents, on the other hand, supported the finding returned by the First Appellate Court. According to her, on the face of the documents, as placed by the parties, which have been admitted in evidence and marked exhibits and upon their appreciation, the First Appellate Court has rightly held that Gouranga is the son of Rudra and Chanchala. In support of the same, she has invited the attention of the Court to the documents on record and then having taken this Court through the oral evidence, submitted that the First Appellate Court did commit no mistake in decreeing the suit and dismissing the counter claim.

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

plaint, written statement and the documents admitted in evidence as also the evidence of the witnesses examined on behalf of the parties.

10. The facts stand admitted that the properties in the suit were the properties of Rudra Charan Das, who died leaving behind his widow Chanchala. When it is said by the Plaintiff that he and the Defendant No.1 are the two sons of Rudra Charan Das, the Defendants assert that the original Plaintiff, namely, Gouranga is not the son of Rudra Prasad. The Defendants have proved the registered sale deed dated 17.04.1949, which has been admitted in evidence and marked Ext.B. This registered sale deed being of the year 1949 has held the field all along facing no challenge from any quarter. That apart interestingly enough when Gouranga filed the suit claiming partition of the properties of Rudra, it is none other than the Defendants, who have proved this registered sale deed from their side Ext.B and in the meantime fifty years have passed since that transaction. It is seen therefrom that Rudra had purchased the property covered under that but as the father guardian of his minor son, i.e., Gouranga, the original Plaintiff who was then aged about ten years. Thus it contains the admission of Rudra since dead as regards the sonship of Gouranga expressing in no unclear terms as the father of Gouranga and describing as such. Another registered sale deed has been admitted from the side of the Defendant No.1, is Ext.D and it is dated 09.11.1977. By the said sale deed, the Defendant No.1 (Nityananda) had purchased the property from Gouranga, i.e., the Plaintiff and that Gouranga as the vendor having described his father's name as Rudra Prasad Das, the Defendant No.1 has accepted the same that Gouranga, being the son of Rudra Prasad is his vendor. The other registered sale deed proved from the side of the Defendants is dated 10.09.1958, which has been admitted in evidence and marked Ext.H. Very importantly, the

said sale deed has been executed by Gouranga (Plaintiff) and Nityananda (Defendant No.1) together and they have sold the land covered under the said sale deed to one Rama Charan Sahu wherein both have been described and that was so declared before the vendee and the Authority as the son of Rudra Prasad. In the said sale deed, Chanchala as the widow of Rudra Prasad has represented Nityananda (Defendant No.1) as his mother guardian. By registered sale deed dated 20.07.1991 (Ext.J) again Gouranga (Plaintiff) and Nityananda (Defendant No.1) have sold lands to one Sagar Sahu and there also, both have been described as the son of Rudra.

With such overwhelming documentary evidence coming on record as well as the records prepared during the Major Settlement Operation, the findings of the First Appellate Court that Gouranga is the son of Rudra has to be said to be the outcome of proper appreciation of evidence and as such is hereby affirmed.

The substantial question of law is accordingly answered in favour of the claim of the Plaintiff.

11. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

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