

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.64 of 2012

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 03.12.2011 and 17.12.2011 respectively passed by the learned Additional District Judge, Baripada in R.F.A. No.19/63 of 2011-10 confirming the judgment and decree dated 06.09.2010 & 18.09.2010 respectively passed by the learned Civil Judge, Senior Division, Baripada in T.S. No.192 of 1994.

Sarat @ Sarat Kumar Mohanty ***Appellant***

-versus-

Smt. Champabati Pattnaik ***Respondent***

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

For Appellant - M/s.Alok Ku. Mohanty, P. Kar
G.D. Kar, A.K. Mohanty &
P.K. Mallick
(Advocates)

For Respondent - Mr.Aparesh Bhoi
(Advocate)

CORAM:
MR. JUSTICE D.DASH

Date of Hearing & Judgment :29.04.2022

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 03.12.2011 and 17.12.2011 respectively passed by the learned Additional District Judge, Baripada in R.F.A. No.19/63 of 2011-10 confirming the judgment and decree dated 06.09.2010 & 18.09.2010 respectively passed by the learned Civil Judge, Senior Division, Baripada in T.S. No.192 of 1994.

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 Respondent, as the Plaintiff, had filed the suit for declaration of her title over the land measuring Ac.1.13 decimals situated in Mouza-Nalagaja under Hal Khata No.11 assigned with plot no.638 better described in Schedule-A of the plaint. It is her case that one Umakanta was the original owner of the suit land. He had other landed properties too. Umakanta died leaving behind his wife Kumudini and a daughter Sailabala. It is further stated that during the lifetime of Umakanta, in an amicable partition, he had given major portion of his landed properties to his daughter Sailabala keeping the suit property with other properties in his share and he was possessing the same peacefully till his death. The suit land with other landed properties, which Umakanata kept for himself, has been subsequently inherited by his widow Kumudini, who was possessing the same peacefully without any interference from any quarter.

It is stated that during lifetime of Kumudini, she had sold the suit land by registered sale deed dated 21.04.1987 to the Plaintiff and delivered the possession of the same who since then possessed the suit land as its owner. The Plaintiff was staying with her husband in the house of late Umakanta as her husband, since his childhood days, had been brought upon by Umakanta. Umakanta had constructed the dwelling house for the Plaintiff's husband where they were residing and it is at his instance, the husband of the Plaintiff too had joined in the service as a Forest Guard. The Defendant is the grandson of Umakanta being the son of his daughter Sailabala. It is alleged that he having no manner of right, title and interest over the suit land, forcibly entered

upon it on a fine morning of 09.04.1998 and dispossessed the Plaintiff. Local police being informed, as took no action, the suit came to be filed.

4. The Defendant, in his written statement, contended that after the death of Umakanta, the properties left by him was inherited by his widow Kumudini and daughter Sailabala. It is strongly denied that after the death of Umakanta, the suit land and other lands which were in his share were inherited by his widow alone. He disputes the fact that during the lifetime, Kumudini had sold the suit land to the Plaintiff. This sale is challenged on all such grounds that it is a sham transaction and the document is the outcome of fraud and as such the transaction is a fraudulent one. Besides, it has been pleaded that Kumudini was never in need of money for selling the suit land and she had never delivered the possession of the suit land pursuant to the said sale to the Plaintiff. The transaction which is projected as the foundation of the claim of the Plaintiff is stated to be void and inoperative and it is said that the Plaintiff has not derived any title by virtue of the same.

5. Faced with the above rival pleadings, the Trial Court has framed five issues. Answering issue nos.3 and 4 together, which concern with the right and title of the Plaintiff in so far as the suit land is concerned, upon examination of evidence and their evaluation, the Trial Court has recorded the answers in favour of the Plaintiff. Practically, this finding has led the Trial Court to decree the suit declaring her title over the suit land and, therefore, a direction has been given to the Defendant to restore the possession of the suit land in favour of the Plaintiff. The Defendant, having preferred an Appeal, has not been successful in getting the judgment and decree passed by the Trial court set aside or modified to any extent.

6. This Appeal has been admitted to answer on the following substantial questions of law:-

“(a) In view of the fact that Kumudini and Sailabala were the joint owners in possession of the suit property whether the lower appellate court has committed an illegality in not holding that the sale made by Kumudini without consent of Sailabala is illegal and void? And

(b) Whether the sale made in favour of the Plaintiff by Kumudini being in respect of a joint family property of Kumudini and Sailabala which is inherited by them from the husband of Kumudini can be held to be valid without a partition by metes and bounds between Kumudini and Sailabala?”

7. Learned counsel for the Appellant submits that the Courts below have gone wrong in saying that the sale deed (Ext.1) executed by Kumudini in favour of the Plaintiff is not void and inoperative. According to him, it being a case of execution of a document by a Pardanashin lady, who was then a widow aged about 88 years with the surrounding circumstances when her only daughter, who was then residing at her husband's place and when as per the case of the Plaintiff, Plaintiff's husband was staying in the house and was in Government service, thus being in a position to dominate the will of the executant and her husband is having relationship since his childhood and she too was having the relationship since the time of marriage for quite a long time, the burden of proof of due execution that the sale deed has been executed by Kumudini being aware of its consequences and fully having the knowledge as to the contents of the sale lies on the Plaintiff. He further submits that the Plaintiff having not been able to prove that the executant Kumudini consciously executed the sale deed and she had all such independent advice, the so-called transaction under (Ext.1) ought

to have been held to have not been duly proved. He, therefore, submits that the suit is liable to be dismissed. It is also submitted by him that on Umakanta's death, the properties remaining in his hands, be it ancestral or self-acquired stood inherited by Kumudini and Sailabala. According to him, the theory of amicable partition between Umakanta and Sailabala during the lifetime of Umakanta lands the Plaintiff nowhere and even if that is accepted for a moment that there was such a partition, on the death of Umakanta, Sailabala cannot be disentitled to inherit the property in totality which remained in the share of Umakanta in partition and only thing it could have been done as an equitable measure that the property of Sailabala which had been so given in that amicable partition could have been adjusted towards her share and in working out her subsequent entitlement with the allotment of properties vis-a-vis her mother Kumudini it is also submitted that when as it is Sailabala, had no right over the property of Umakanta during the lifetime of Umakanta, the very case projected by the Plaintiff that there was an amicable partition between the father and daughter is per se not cognizable and that could have been only by way of specific disposition either non-testamentary or testamentary. It is submitted that in any event, the Courts below should not have declared the right, title and interest of the Plaintiff over the suit land in further directing the Defendant to deliver possession of the same to the Plaintiff.

8. Learned counsel for the Respondent (Plaintiff) submits that both the Courts below have rightly held that the sale under Ext.1 made by Kumudini is valid and binding. It is stated that when Sailabala, during the lifetime of Umakanata, had been allotted with some properties, it has to be presumed that the intention of Umakanata was to prevent her at any future time after his death to again take a share from the properties

kept by Umakanta and, therefore, when the concurrent finding on the score that Ext.1 is a valid transaction between Kumudini and the Plaintiff, the Courts below are right in decreeing the suit of the Plaintiff. He further submits that the evidence on record would clearly show that the Plaintiff has discharged the burden of proof resting on her in proving the sale deed (Ext.1) to have been duly executed by Kumudini for valuable consideration and thereby the title over the suit land has been conferred upon the Plaintiff.

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 and written statement as well as depositions of the witnesses examined during trial and the documents admitted in evidence and exhibited.

In the present suit, when the Plaintiff has claimed her right, title and interest over the suit land by virtue of the registered sale deed said to have been executed by Kumudini, wife of late Umakanta. The Defendant who happens to be the grandson of that Umakanta, the original owner of the property being the son of the only daughter of Umakanta, who had no son has impeached the same on all such grounds, as already stated.

Admittedly, no document has been proved to say that there was an amicable partition or arrangement between Umakanta and Sailabala during the lifetime of Umakanta. In fact nothing is stated as to what was the reason behind the same and why such course was at all resorted to when admittedly by then, Sailabala had no interest whatsoever over the said properties in the hands of her father, Umakanta, be it ancestral or self acquired. It is also not stated that as to what provision has been made in that amicable partition in so far as Umakanta's wife Kumudini

is concerned. The position is clear that notwithstanding as to if the property had been inherited by Umakanta from his ancestors or on his own, Umakanta having died long after coming into force of Hindu Succession Act, 1956, Kumudini and her daughter being the legal heirs and successors of Umakanta, would be entitled to half share each. The property either being taken to be the exclusive property of Umakanta or the properties to have been inherited from his ancestors during the lifetime of Umakanta, Sailabala would be having no share over it during the lifetime of Umakanta.

10. First of all, going to the question as to whether the sale under Ext.1 is valid or not, the evidence on record being gone through, it is seen that the executants at that time was 88 years old widow. Admittedly, the Plaintiff's husband was remaining in the house of Umakanta since the time of his childhood days and he was serving in the Forest Department as a Forest Guard. The sale deed in question although is a registered one, the consideration is said to have been paid to the executant prior to the execution of the sale deed. When it is recited in the sale deed that the executant was in need of money for her maintenance and to clear up other loans, the Plaintiff's husband has not come to the witness box to state anything about the same who in the opinion of this Court, is the best witness to say on that when it is the very case of the Plaintiff that from his childhood days, he had not only been given the shelter in the house of Umakanta but also Umakanta had helped in getting into service. She is also not stating that after the death of Umakanta, her husband had absolutely no connection with Kumudini and they were not staying in the house where they were earlier residing. The Plaintiff having examined herself as P.W.1 has not deposed as to who has drafted the sale deed and under whose instruction, it was so

drafted and whether the contents of the same had been readover and explained to the executant and that she, understanding the contents of the same to have been truly and correctly written as desired by her, had voluntarily signed on the same. Interestingly, she has gone to state that the property of Umakanta was not partitioned after his death among his successors and Umakanta had huge extent of properties in different Mouzas like Nalagaja and in some other places even in the district of Cuttack. More interestingly, the Plaintiff has not made Sailabala, who is the mother of the Defendant a party to the suit though she was alive at the time of institution of the suit and as it reveals from evidence Kumudini was staying at her husband's place when Sailabala was staying at a distance place in her husband's place.

11. It is the settled position of law that with the above surrounding circumstances, it is the duty of the Court to ascertain from evidence that the party executing them had been a free agent and duly informed of what he/she was about to do. The ordinary presumption that a person understands the document to which he/she has affixed his/her name does not apply in the case where an executant pardanashin lady or even an old and physically unfit or disabled person as the executants of that class are under the cloak of protection. The burden of proof shall in such a case rests not with those who attack, but with those who found upon the deed as its beneficiary and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. It has also been held that having regard to the proved personality of the settlor, the nature of the settlement, the circumstances

under which it was executed, and the whole history of the parties, whether it is reasonably established that the deed so executed was the free and intelligent act of the settler bears importance and occupies the field. It is only when the answer is in the affirmative, those relying on the deed can be said to have discharged the burden, shifting the onus upon the challenger/s.

It is, however, seen that without keeping in view the above settled position of law, the Courts below have proceeded to examine the matter as to whether the execution of the document by Kumudini has been proved or not. Therefore, this Court is not in a position to accept the finding on that score and as the evidence on record, as discussed above, suggest that the said transaction as projected by the Plaintiff in her favour by Kumudini, an old widow of 88 years having not one by her side during the period, records a finding that the burden of proof as to execution of the document in question has not been discharged in her favour.

The aforesaid discussion thus provides answers to the substantial question of law against the case/claim of the Plaintiff.

12. In the result, the Appeal stands allowed and the judgments and decrees passed by the Courts below are hereby set aside. No order is, however, passed as to cost.

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

Basu

