

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A. Nos.186 and 187 of 2010

(Arising out of judgment dated 11.05.2010 passed by the Hon'ble Single Judge in W.P.(C) No.2681 of 2010 and 2682 of 2010)

W.A. No.186 of 2010

Akshaya Kumar Mohanty

Appellant

-versus-

***Pramod Kumar Padhiary and
another***

Respondents

AND

W.A. No.187 of 2010

Rama Chandra Parida and others

Appellant

-versus-

***Pramod Kumar Padhiary and
another***

Respondents

Appeared in this case:-

For Appellant :

Mr. P.K. Rath-1, Mr. S. Barik,
Mr. S. Mali, Mr. D. Jena,
Mr. S.K. Swain, Mr. S. Mohanty
and Mr. S.Sahoo

For Respondent No.1 :

Mr.Krupasindhu Sahoo, Mr. A.C.
Sarangi and Mr. U. Sahoo

For Respondent No.2 :

Mr.Debakanta Mohanty,
Addl. Govt. Advocate

CORAM:

THE CHIEF JUSTICE

JUSTICE A.K. MOHAPATRA

J U D G M E N T

Date of Hearing : 03.03.2022 | Date of Judgment: 25.03.2022

A.K. Mohapatra, J.

W.A. No.186 of 2010

1. By filing the above noted Writ Appeal, the Appellant seeks to challenge the judgment dated 11th May, 2010 passed by the learned Single judge of this Court in W.P.(C) Nos.2682 of 2010, thereby dismissing the Writ Petition filed by the Petitioner and refusing to interfere with the order dated 22nd October, 2009 passed in Misc. Case No.44 of 2007 by the Collector, Puri under Section 35(2) of the Orissa Consolidation of Holding and Prevention of Fragmentation Land Act, 1972 (in short 'OCH & PFL Act, 1972').

2. The factual matrix of the case, in brief, as culled out from the Writ Petition is that the property under Consolidation Khata No.162 bearing Plot No.444, measuring an area of Ac1.62 decimals and Consolidation Khata No.166 bearing Plot No.404, measuring an area of Ac1.84 decimals in Mouza-Patasundarpur under Kakatpur P.S. of Puri district. Initially the subject matter of dispute in this case, was recorded jointly on the name of Respondent No.1 (Opposite Party No.1) and his brother, in stitiban status. The Kisam of the land was recorded as 'Ghanapaka and Majhipadia' which

according to the Appellant is not amenable to consolidation. However, the same was included in the Chaka without proper verification with regard to the status and condition of the land.

3. It is further stated in the writ petition that Opposite Party No.1 for his legal necessity transferred his 50% interest/share in Plot No.444, measuring Ac 0.81dec. and 30% in Plot No.404 measuring Ac 0.61 dec. on 26th November, 2005 vide RSD No.2045, measuring a total area of Ac 1.42 decimal to the Petitioner, who happens to be a contiguous Chaka owner. Further on 26th November 2005, the Opposite Party No.1 sold the other chunk of the land to another person, namely, Rama Chandra Parida and his brother, who are Petitioners in the connected writ petition bearing W.P.(C) No.2682 of 2010. Pursuant to said transfer, the land has been measured and inspected by the Local Amin in presence of the vendor, vendee and other co-sharers, who have not objected to such transfer. Thereafter, the Tahasildar allowed the mutation and accordingly mutation ROR has been issued in favour of the Petitioner.

4. In the year 2007, due to a rift amongst the villagers due to political rivalry, there was a dissension between the Opposite Party

No.1 and the Petitioner. Opposite Party No.1 being instigated by some local people who were hostile to the Petitioner and wanted that the Petitioner is harassed and humiliated in public, had filed a Civil Suit vide C.S. No.92 of 2007 before the Civil Judge (S.D.), Nimapara for declaration of his right, title and interest and for confirmation of possession in respect of the above described land and further to declare that the two Registered Instruments are not Sale Deeds but Mortgage Deeds. In the said suit, Written Statement (W.S.) has been filed by the defendant-Petitioner.

5. While this was so, Opposite Party No.1 filed an application under Section 35(2) of OCH & PFL Act bearing Misc. Case No.44 of 2007 before the Collector, Puri (Opposite Party No.2). The Petitioner has further alleged in the writ petition that the said application of the Petitioner has been disposed of by the Collector, Puri without affording an opportunity of hearing to the Petitioner. To substantiate his case, Petitioner has provided a list of dates. According to the said list of dates, the application under Section 35 (2) of the OCH & PFL Act was filed on 8th November, 2007. After several dates, on 16th February 2009, it appears from record, both the parties were present and the matter was heard and thereafter the parties were directed to submit their written note of submissions.

On 22nd October 2009, final order was passed in Misc. Case No.44 of 2007 and 45 of 2007.

6. It is alleged by the Petitioner in the above noted writ petition that since the matter was not fixed for final hearing, as the same was not admitted, the Collector, Puri (Opposite Party No.2) heard the matter and disposed of the same without giving opportunity of hearing to the Petitioner and further due to laches and negligence on the part of the learned counsel for the Petitioner, no document could be filed before the Collector, Puri for its due consideration. As a result of which, the Petitioner has stated that he couldn't present his case properly and due to such failure on the part of the counsel for the Petitioner, Misc. Case Nos.44 of 2007 and 45 of 2007 were allowed by a common judgment dated 22nd October, 2009 and whereby the two Registered Instruments were cancelled as the same were executed and registered without the permission of the Tahasildar concerned as required under Section 34(1) of the OCH & PFL Act for transfer of any fragment of the consolidable area/land. Thereafter the order dated 22nd October 2009, passed by the Collector, Puri, was assailed before this Court by filing two separate writ petitions bearing W.P.(C) Nos.2681 of 2010 and 2682 of 2010. This Court by a common judgment dated 11th May, 2010

(Annexure-4) declined to interfere in the order dated 22nd October, 2009 and accordingly both the writ petitions were dismissed. Hence the present writ appeals.

W.A. No.187 of 2010

7. The above captioned writ appeal has been filed by the Appellant (Petitioner in the W.P.(C) No.2681 of 2010) assailing the common impugned judgment dated 11th May, 2010 (Annexure-4) passed in the aforesaid writ petition bearing W.P.(C) No.2681 of 2010, whereby an order refusing to interfere with the impugned common order dated 22nd October, 2009 was passed in Misc. Case No.44 of 2007 and 45 of 2007.

8. The facts of both the cases bearing W.P.(C) No.2681 and 2682 of 2010 are almost similar except the description of the parties and property the petitioner claims to have purchased. Writ petition bearing W.P.(C) No.2682/2010 involves a dispute relating to a piece of land appertaining to Plot No.755/1579, measuring an area of Ac.0.07 dec. out of Ac 0.14 dec. in Mouza-Patasundarpur, which had been jointly recorded in the name of Opposite Party No.1 and his brother and the said Mouza is notified under Section 41 of the OCH & PFL Act and thereafter the Opposite Party No.1 for his

legal necessity had mortgaged the case land vide RSD No.256, dated 25th January, 2005 in the name of the Petitioner.

9. Since common issues and questions of law are involved in both the writ petitions and the factual background of both the cases are similar coupled with the fact that both the Collector, Puri as well as the learned Single Judge of this Court have adjudicated and disposed of the matters by a common judgment, this Court is also taking up both the appeals together and disposing of the same by a common judgment.

10. Heard Mr. P.K. Rath-1, learned counsel for the Appellant and Mr.Krupasindhu Sahoo, learned counsel for the Respondent No.1 in W.A. No.186 of 2010 and Mr. Debakanta Mohanty, learned Additional Government Advocate for Respondent No.2 in both the appeals. Perused the impugned orders, pleadings of the parties, documents as well as the written note of submissions filed by the learned counsel for the Appellant.

11. Learned counsel for the Petitioner while assailing the impugned common judgment dated 11th May, 2010, at the outset submits that he did not get a fair opportunity to defend his case properly. It is further submitted by the learned counsel for the Petitioner that

permission under Section 34(2) of OCH & PFL Act is not necessary for transfer of any fragmented land as the Petitioner is the owner of contiguous Chaka on the Western side of the case land and his other family members are the owners of contiguous Chaka on the Southern side of the case land. Therefore, RSD No.2045, dated 26th November, 2005 is not a void document. He further submits that although this aspect of the matter was available on record, the same has not been considered by the learned Single Judge of this Court while adjudicating the issue. He further submits that there exists an error apparent on the face of the record as there is no dispute over any portion of the case land or with any other contiguous Chaka owner, the proceeding initiated at the instance of the Opposite Party is vague and is designed to harass the Appellant.

12. It is further contended by the learned counsel for the Petitioner that the case land even though recorded as a consolidable land, but considering the area and the transfer so made by Opposite Party No.1 in favour of the Petitioner, the same does not come within the purview of Section 37 of the OCH & PFL Act, which would call for any interference by the Collector, Puri without giving an opportunity of hearing to the Petitioner.

13. The crux of the argument of the counsel for the Petitioner is that while deciding the application filed by the Opposite Party No.1, the Collector, Puri has not followed the principles of natural justice and as such no opportunity of hearing was afforded to the Petitioner in the case. He further submits that in view of the report received by the Collector, there is no fragmentation of Chaka and hence the question of invoking the provision of Sections 2, 34 and 35 of OCH & PFL Act does not arise. It is further submitted by the learned counsel for the Petitioner that Opposite Party No.1 is estopped to challenge the impugned order by taking advantage of the wrong committed by him, more so, in the absence of any allegation made by any of his co-sharers. He further submits that the Collector has no jurisdiction to pass the impugned order declaring the registered instruments to be void.

14. Learned counsel for the Petitioner further contends that Opposite Party No.1 was compelled to file a civil suit bearing C.S. No.92 of 2007, which is pending in the Civil Court. Therefore, the proceeding under Section 34 and 35 of the OCH & PFL Act bearing Misc. Case No.44 of 2007 before the Collector, Puri, which had admittedly been instituted after filing of the suit, is not maintainable. He further challenges the finding arrived at in

paragraph-13 of the impugned judgment with regard to the nature of the document on the ground that the learned Single Judge Bench without there being any material on record to support his finding and by misinterpreting Section 92 of the Evidence Act has arrived at such findings. He further submits that the findings so arrived at are perverse and contrary to law. Further such finding is likely to impact/ influence the final adjudication of the civil suit pending in the court of Civil Judge (S.D.), Nimapara and the pleadings and evidence adduced by parties in support of their respective claims would be rendered meaningless and eventually the suit may become infructuous.

15. It is further submitted by Mr. Rath, learned counsel for the Petitioner that the transfer so effected is in respect of an area more than Ac.1.00 dec. and the land could be identified from the boundary description given in the deed which comprises of the compact area out of the total area of Ac 1.62 dec. and Ac 1.84 dec. in both the plots, thus in view of Section 2(m) of OCH & PFL Act, there is no question of fragmentation of consolidable land and there will be no difficulties for the Petitioner to amalgamate his purchased land along with his own land to promote the scheme of the consolidation. Further considering the said aspect of the matter,

the learned Single Judge passed the impugned order, which is not sustainable in the eye of law.

16. It has also been submitted by the learned counsel for the Petitioner that there has been no challenge to the mutation proceeding as of now and the mutated ROR and corrected khatiyā have been issued in the name of the Petitioner. Moreover, the ratio of the judgments of this Court in *Pradip Kumar Mangaraj and another v. Pravat Chandra Ghose and others* 1990 (1) OLR 193 and *Smt. Binapani Sethi and another v. Sri Bijay Kumar Sahoo and others* 1997 (II) OLR 399 are not applicable to the facts of the present case and the same have been grossly misinterpreted by the learned Single Judge while passing the impugned order.

17. Learned counsel appearing for the Opposite Party submits that the specific portion of Plot No.444 measuring Ac 0.81 decimals and Ac 0.61-1/3 decimals of the plot No.404 was mortgaged in favour of the present Petitioner in the shape of a Sale Deed. The Opposite Party had further stated that the present Petitioner instead of restoring the land after repayment of the mortgaged money attempted to take possession of the land and requested the Petitioner to execute a sale deed in his favour. The Opposite Party No.1 filed

C.S. No.92 of 2007 before the learned Civil Judge (Sr. Division), Nimapara for declaration of right, title and confirmation of possession and to declare the Sale Deed as a Mortgage Deed. The Opposite Party No.1 further stated that during pendency of the suit, as the Petitioner was occupying the suit land by force on the basis of the void deed, the Opposite Party No.1 was constrained to file the petition under Section 35 (2) of OCH & PFL Act to declare the Sale Deed void and for eviction.

18. After considering the case of the respective parties, as presented by them before the Collector, Puri and upon examination of the materials on record, the Collector held that the RSD No.2045 dated 26th November, 2005 and the RSD No.256 dated 25th January, 2005 are void. The Collector, Puri in his order has already passed necessary direction against the present Petitioner for eviction from the suit land.

19. Learned Single Judge while adjudicating the issue has referred to the provision of Section 34 of OCH & PFL Act, which has been quoted herein below:

“Section 34 :

(I) No agricultural land in a locality shall be transferred or partitioned so as to create a fragment.

(2) No fragment shall be transferred except to a land-owner of a contiguous Chaka:

Provided that a fragment may be mortgaged or transferred in favour of the State Government, a co-operative society, a scheduled bank within the meaning of the Reserve Bank of India Act, 1934 or such other financial institution as may be notified by the State Government in that behalf as security for the loan advanced by such Government, Society, Bank or Institution, as the case may be.

(3) When a person intending to transfer a fragment is unable to do so owing to restrictions imposed under sub-section (2), he may apply in the prescribed manner to the Tahasildar of the locality for this purpose whereupon, the Tahasildar shall, as far as practicable within forty-five days from receipt of the application determine the market value of the fragment and sell it, through an auction among the land owners contiguous Chakas at a value not less than the market value so determined.

(4) When the fragment is not sold in course of the auction, it may be transferred to the State Government and the State Government, shall, on payment of the market value determined under sub section (3), purchase the same and thereupon; the fragment shall vest in the State Government free from all encumbrances.

(5) Nothing in sub-sections (1) and (2) shall apply to a transfer of any land for such public purposes as may be specified by notification in this behalf by the State Government."

20. To understand the meaning of the word 'fragmentation', the learned Single Judge has referred to the definition of the word 'fragmentation' as defined under Section 2(m) of the OCH & PFL Act. The same is quoted herein below:

“2(m). “fragment” means a compact parcel of agricultural land held by a land owner by himself or jointly with others comprising an area which is less than:-

(i) One acre in the district of Cuttack, Puri, Balasore and Ganjam and in the Anandpur subdivision in the district of Keonjhar; and

(ii) Two acres in the other areas of the State;”

21. By taking into consideration the aforesaid two provisions in the OCH & PFL Act, the learned Single Judge has come to a conclusion that the case land which was transferred and is the subject matter of dispute in this case is squarely covered by the definition of ‘fragmentation’ as defined under the statute. Further while adjudicating the matter, the learned Single Judge has formulated two important questions, such as;

*“(i) Whether the land sold by the Petitioner’s vendor creates a fragment of consolidable land?
and*

(ii) Whether the Deed in question is a Mortgaged Deed of a Sale Deed?”

22. In reply to the first question, the learned Single Judge had referred to the recitals in the Sale Deed available on record. Further in the context of Question No.1, the learned Single Judge had referred to a judgment of this Court in the case of **Smt. Binapani Sethi (supra)**, wherein it has been held that the land sold separately and collectively measured less than one acre, which is the minimum

area prescribed for the district of Cuttack, can be sold without permission of the Tahasildar. Therefore, there had been a clear contravention of Section 34 of the OCH & PFL Act. Hence, the Collector was justified in his conclusion that the transactions were void.

23. Similarly, in the matter of *Pradip Kumar Mangaraj (supra)*, this Court has held that the Tahasildar lacks power to effect partition of a Chaka over which the interests of the parties are joint.

24. While taking into consideration the recital in the Sale Deed as well as the contention of the Petitioner's counsel is that the sale is not creating a fragmentation of the consolidable land as the vendor has sold only his share of land without carving it out, which means, he contends that he has not sold the specific portion of the land, rather his interest thereon. Further, in this case, the Sale Deed not only specifies the extent of land the vendor has sold through the Regd. Sale Deed, but he has also given the description of the lands sold by indicating the names of the boundary tenants, as such the learned Single Judge has further come to a conclusion that the transfers under both the Sale Deeds are in respect of land measuring less than one acre. Further the learned Single Judge has also taken

note of the fact that both the Sale Deeds together would construe a patch of land measuring more than one acre. In the said context, it has been categorically observed by the learned Single Judge that the Petitioner does not claim that the lands sold are contiguous to form a single piece of land measuring more than one acre. In view of the aforesaid analysis, the learned Single Judge has rightly come to a conclusion that the Sale Deed has been effected by contravening the provision of Section 34 of OCH & PFL Act and as such both the Sale Deeds are void.

25. It has also been rightly observed by the learned Single Judge that the mutation of the interest of the Petitioner by the Tahasildar, Kakatpur is unsustainable in law in view of the fact that the aforesaid two Sale Deeds are void by operation of law. Therefore, as a consequence thereof, the entry in the mutation ROR is also illegal and void.

26. So far as the second question is concerned, whether the Deed in the second case is a Mortgaged deed or sale Deed? Learned Single Judge has taken into consideration the recitals in the Deed in question. By referring to the provisions of Sections 91 and 92 of the Indian Evidence Act, 1972, the learned Single Judge has rightly

observed that when there is a deed in existence, the oral evidence is excluded. Therefore, the learned Single Judge was right in his approach while observing the recitals of the terms and conditions in the Deeds in question and the same are admissible only to determine the nature and character of the documents particularly with regard to the transaction whether the same was a Mortgaged Deed or not? Consequently, the evidence available on record is admissible and relevant for the purpose of determining the nature and character of the deeds in dispute. The recitals in the Deeds are available for consideration by the Court, which is required to be examined and has been examined in the case in hand.

27. After careful examination of the Deeds involved in the present case, the learned Single Judge has very fairly, judiciously come to a conclusion that it is normally indicated in the Sale Deed that upon receipt of a consideration money, the vendor shall execute the sale deed in favour of the vendee thereby permitting the land to be transferred in favour of the vendee, as such, the deeds involved in the present case are nothing but Sale Deeds.

28. Having heard the learned counsel for the parties and after careful examination of the records, deeds and documents and after

going through the impugned common judgement by the learned Single Judge, this Court is of the considered view that the learned Single Judge has not committed any error while refusing to interfere with the order dated 22nd October, 2009 (Annexure-3) and consequently dismissing both the writ petitions by a common judgment dated 11th May, 2010 (Annexure-4). Accordingly, this Court affirms the impugned common judgment dated 11th May, 2010 passed in both the writ petitions by the learned Single Judge.

29. In view of the above, both the Writ Appeals are found to be devoid of merits, as such, the same are hereby dismissed. However, there shall be no order as to cost.

(A.K. Mohapatra)
Judge

(S. Muralidhar)
Chief Justice

U.K. Sahoo/PA-cum-Secretary.