

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.221 OF 2007

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, Bolangir in Title Appeal No.16/14 of 1996-2000 by dismissing the judgment and decree passed by the learned Additional Civil Judge (Junior Division), Bolangir in Title Suit No.51/09 of 1993-95.

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Sambhu Bhoi & Others

Appellants

-versus-

Gobinda Bhoi & Others

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Respondents.

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellants



M/s.Sidhartha Mishra,
M.R. Satpathy, M.R. Satpathy,
J. Behera, P.K. Mohanty,
Advocates.

For Respondents -

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M/s. T. Nanda, S.N. Mishra,
A.K. Mishra, Advocates.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING::19.07.2022, DATE OF JUDGMENT:: 25.07.2022

D.Dash, J. The Appellants 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, Bolangir in Title Appeal No.16/14 of 1996-2000.

By the same, the Appeal filed by the Respondents as the unsuccessful Plaintiffs under Section-96 of the Code has been allowed

and thereby the judgment and decree passed by the learned Additional Civil Judge (Junior Division), Bolangir in Title Suit No.51/09 of 1993-95 have been set aside. The right, title, interest and possession of the Respondents (Plaintiffs) over the suit land has thereby been declared and these Appellants (Defendants) have been enjoined from coming over the suit land and creating disturbance. The Trial Court had dismissed the suit filed by the Respondents (Plaintiffs).

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. Govinda Bhoi, Sunadhar, Samaratan Bhoi all sons of Kusha Bhoi and Dhoba Bhoi son of Adi Bhoi as the Plaintiffs had filed the suit. Out of them (Samaratan and Dhoba are the Respondent Nos. 2 & 3 in the present Appeal and Gobinda having died during the pendency of the Appeal, his legal representatives are Respondent No.1(a) to 1(d). Sambhu Bhoi, son of Kanekasingh Bhoi, Muccha Bhoi, son of Nichal Bhoi were the Defendant Nos. 1 & 2 respectively. Four sons of Abhel Bhoi namely, Trinath, Raghua, Satrugan and Suru are the Defendant Nos. 2 to 6 respectively.

It is the case of the Plaintiffs that the suit land originally belonged to Sanu Bhoi, the common ancestors of the parties namely, Plaintiffs and Defendant Nos. 1 & 2. A partition being effected prior to 1936

settlement, The suit land is said to have fallen in the share of Nakula Bhoi, the grandfather of the Plaintiffs and after 1936, there being another partition, the suit land is stated to have fallen in the share of father of the Plaintiffs. It is stated that though there was a complete partition due to cordial relationship existing between the parties, no separate record of right had been prepared in the name of the parties in respect of their allotted share in the partition and that old position had not only stood reflected in the 1936 ROR but also in the ROR of the Hal Settlement. The Defendants are stated to have no right, title and interest over the suit land and as they created disturbance, the suit has come to be filed when it was known that the Defendant Nos. 3 to 6 are falsely advancing the claim as to have purchased the property from the Defendant Nos. 1 & 2 by registered sale-deed dated 24.02.1993.

5. The Defendants entering appearance contested the suit in saying that by virtue of the partition, the suit land had fallen to the share of the father of Defendant Nos.1 and 2. It is stated that the Defendant Nos. 3 to 6 being the bonafide purchaser of the suit land for consideration are in possession of the same.

6. On the above rival pleadings, the Trial Court framed five issues. Coming to answer the crucial issue i.e. issue no. 1 with regard to the right, title and interest over the suit land as the Plaintiffs claimed; upon examination of the evidence and their evaluation, the finding has been

recorded in the negative as against the Plaintiffs. Thus has led the Trial Court to dismiss the suit.

Plaintiffs being thus non-suited having filed the Appeal have become successful therein.

The First Appellate Court on re-evaluation of the evidence has arrived at the following finding:-

“Plaintiffs have succeeded to prove that the suit land fell to their share in partition, whereas Defendants failed to prove that the suit land fell to their share in partition. When the suit land is the property allotted to the Plaintiff’s father, the Defendant Nos. 1 & 2 have no right, title and interest thereon and accordingly they have no right, to convey the same under Exts. A & B in favour of Defendant Nos.3 to 6.”

Having said as above, the issue with regard to the claim of Defendant Nos. 1 & 2 as having right, title and interest over the suit property has been answered in the negative. The sale-deeds, Exts. A & B projected by the Defendant Nos. 3 to 6 in support of their purchase of the land covered thereunder from Defendant Nos. 1 & 2 have been held as invalid and not binding on the Plaintiffs being void. Thus now the Defendants being aggrieved by the decision of the First Appellate Court have filed this Second Appeal.

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

- (a) Whether the impugned decision of the learned lower Appellate Court is vitiated for non-substitution of the Appellant No.2 and Respondent No.2 during the pendency of the said proceeding therein and the Appeal abated as against them in resulting total abatement?
- (b) Whether the learned lower Appellate Court completely erred in law in casting the onus of proof of partition and possession on Defendants when admitting the properties are jointly recorded?

7. Learned Counsel for the Appellants submitted that the First Appellate Court in the absence of the legal representatives of the Respondent No.2 therein as arraigned in the suit as Defendant No.2 could not have given a finding that in the partition that the suit land had fallen to the share of father of the Plaintiffs and that they had been so allotted to him. He submitted that no such finding that the Defendant Nos. 1 & 2 in the said partition had never got that property could have also been rendered as on account of death of the Defendant No.2 and the appeal having abated as against him, since his legal representatives had not been brought on record, said finding returned by the Trial Court could not have been upset. He submitted that the Defendants being successful before the Trial Court, when admittedly by the time of hearing of the First Appeal, Defendant No.2 was dead; the First Appeal ought to have been held to have abated in the absence of his legal

representatives in entirety. He, therefore, submitted that the judgment and decree passed by the First Appellate Court can't be allowed to stand as those are void as have been passed in an Appeal which had abated by the time, the decision was rendered.

8. Learned Counsel for the Respondents submitted that in presence of other Defendant i.e. Defendant Nos.1 and 3 to 6, the estate of Defendant No.2 stood substantially represented and therefore, the First Appellate Court's decision is not at all vulnerable even though the legal representatives of the Defendant No.2 were not on record.

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

10. Adverting to the facts placed by the rival parties in their respective pleadings, here it is seen that when the Plaintiffs claim that their father had been allotted with the suit land in his share in a partition of the joint family properties; the case of the Defendants is the suit land had fallen to the share of Defendant Nos. 1 & 2 in the partition of the joint family property and they in turn sold the land to Defendant Nos. 3 to 6. The Trial Court having answered the above issue against the case/claim of the Plaintiffs, the First Appellate Court has held just to the contrary. The decree passed by the Trial Court in dismissing the suit filed by the Plaintiffs against the Defendants was joint and indivisible with categorical finding against the allotment of the suit land in the

share of the father of the Plaintiffs in the partition of the joint family properties. The Defendant No.2 as per the genealogy given by the Plaintiffs is the grandson of Nichhal who is the son of Sanu, the common ancestor whereas the Defendant No.1 is the son of Kanaksingh, the other son of Nichhal. Thus the Defendant Nos.1 & 2 represent two branches of Nichhal son of Sanu whereas the Plaintiffs belong to the branch of Nakul, the brother of Nichhal son of Sanu. Therefore, in the absence of the legal representatives of the Defendant No.2, the First Appeal having abated as against him as his legal representatives were not brought on record, the finding of the Trial Court that the suit property had not fallen to the share of the father of the Plaintiffs has attained finality in so far as the legal representatives of the Defendant No.2 are concerned. So in their absence, the First Appellate Court could not have upset the said finding in further going to say that the Defendant Nos. 1 and 2 had not got that property in their share and had no right. On the face of the case projected by the Plaintiffs; the estate of the Defendant No.2 cannot be said to have been substantially represented by the Defendant Nos. 1 and 3 to 6. Thus said abatement has to be held to be in entirety as the estate of Defendant No.2 under the given factual settings cannot be said to have been represented by rest of the Defendants. The answer to the first question of law thus leads to hold

that the judgment and decree passed by the Appellate Court are void and thus, having no force in the eye of law.

Above being the answer returned to the first substantial question of law, the other substantial question of law does not surviving for being further answered.

11. In the result, the Appeal stands allowed. The judgment and decree passed in Title Appeal No.16/14 of 1996-2000 are hereby set aside; and those passed in Title Suit No.51/09 of 1993-95 stand restored. The suit filed by the Respondents/ Plaintiffs stand dismissed. In the peculiar facts and circumstances, no order as to cost is passed.

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

Narayan