

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.118 OF 2015

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, Chatrapur, in RFA No. 60 of 2013 (RFA No.02 of 2013-CJSD, Chatrapur) by allowing in part the judgment and decree passed by the learned Civil Judge (Junior Division), Hinjilicut in Civil Suit No.14 of 2012.

Umesh Chandra Sahu

:::

Appellant

-versus-

Sakuntala Sahu & Another

:::

Respondents

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

For Appellant

:::

M/s. S.S. Pattnaik,
M. Mohanty, A. Barik,
B. Moharana, S. Priyadarshinee
Advocates.

For Respondents

:::

Mr. P.K. Rath, A. Behera,
S. Mishra, S. Rath, S. Das,
P. Nayak, S.K. Behera,
(R-1) Advocates.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:: 27.09.2022, DATE OF JUDGMENT: 20.10.2022

These Appellant in 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,

Chatrapur, in RFA No. 60 of 2013 (RFA No.02 of 2013-CJSD, Chatrapur).

By the same, the Appeal filed by the Respondent Nos. 1 & 2 being the aggrieved Defendant Nos. 1 & 2 in the suit i.e. Civil Suit No. 14 of 2012 in the Court of learned Civil Judge (Junior Division), Hinjilicut-Ganjam under Section 96 of the Code has been allowed in part and thereby, the judgment and decree passed by the Trial Court in the suit has been modified to the extent of holding the partition deed Ext.3 and Will, Ext.5 as invalid and in turn accepting the KUTUMBA NISPATI PATRA, Ext. A as null and void.

2. The present Appellant as the Plaintiff had filed the suit for declaration of possessory title over the suit land with further relief of permanent injunction in restraining the Defendant Nos. 1 to 3 from interfering with his peaceful possession.

The Trial Court decreed the suit with the following order:-

“The suit is decreed partly on contest against the Defendants but in the peculiar facts and circumstances, without costs. The Registered Partition Deed vide document No.540 of 1985 and the registered Will Deed vide document No. 18 of 1985 are declared as valid documents. The “Hindu Kutumba Nispati Patra” is declared as null and void. The Counter claim is dismissed against the Plaintiff, without cost.”

The Defendant Nos. 1 & 2 being aggrieved by the said judgment and decree passed by the Trial Court having carried First Appeal; the First Appellate Court has ordered as under:-

“In the result, the appeal is allowed in part on contest against the Respondents, but in the circumstances without cost. The judgment and decree passed by the learned court below in declaring the impugned partition deed dt. 01.02.1985 vide document No.540/1985 marked Ext.3 and the registered will dt. 09.05.1985 vide document no.18/1985 Ext.5 as valid document are hereby set aside. But the judgment and decree of the learned court below in declaring the “Hindu Kutumba Nispati Patra” marked Ext.A on behalf of the defendant no.1 and 2 as null and void is hereby upheld on a different ground. The judgment and decree of the learned court below in dismissing the counter claim of the defendant nos.1 and 2 is hereby upheld. Both the parties shall bear their respective cost of this appeal proportionately at the contested scale.”

3. 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.

4. The Plaintiff's case is that he is the adopted son of one Duryodhan Sahoo and the Defendant No.2 is the second wife of Duryodhan and Defendant No.1 is the daughter of Duryodhan through the Defendant No.2. It is the case of the Plaintiff that his adopted father

had first married to one Radha Sahooani and since no child was born through her for quite some time, he again married Defendant No.2 and then also for a long time, no child was born through that wedlock. So, Duryodhan adopted Plaintiff as his son by performing due ceremony as prevalent in their caste and custom. However, three years after the adoption, the Defendant No.2's birth took place. It is stated that Duryodhan had given Defendant No.1 in marriage and at that time she was given sufficient dowry. It is stated that Duryodhan executed a registered deed of partition on 01.02.1985 to protect the interest of Defendant No.1 (daughter). In the said partition, the properties described in Schedule-A were allotted to the Defendant No.1 and those described in Schedule-B were allotted to the Plaintiff and his adoptive father. Parties are stated to have taken physical possession after the said partition. It is more specifically stated that Defendant No.1 possessed the suit property in Schedule-A exclusively. It is further stated that some properties which were not the subject matter of the earlier partition were acquired by the joint effort of the Plaintiff and his adoptive father by running the business in clothes. Duryodhan executed a Will bequeathing in faovur of first wife Radha Sahoo, second wife, the Defendant No.2 and the Plaintiff. By the said Will, limited rights were given to the first wife and second wife-Defendant

No.2 and absolute right over the properties had been conferred on the Plaintiff. So, after the death of the father, the Plaintiff claimed to have succeeded to the same as bequeathed under the said Will.

It is stated that after few years of death of the father, the Defendant No.1 being instigated by her husband, Defendant No.3 demanded a share in the property in possession of the Plaintiff for which the dissension arose between them. The Defendant No.2 supported the Defendant No.1 and left the house. She then filed objection in the Mutation Case claiming that the Plaintiff is the stranger to the family. It is further alleged that the Defendant No.1 in collusion with her husband other Defendants fabricated an unregistered document styled as HINDU KUTUMBA NISPATI PATRA by forging the signatures of the Plaintiff. The document is said to be forged and fabricated and being unregistered is not enforceable under law and as such not binding on the Plaintiff. The Defendant No. 1 too had raised objection before the Bharat Sanchar Nigam Limited Authority. Basing upon that similar objection was also raised in the mutation proceeding filed by the Plaintiff. The Defendant No.1 & 2 without any rhyme and reason since created disturbance in the peaceful possession of the suit by the Plaintiff, the present suit has come to be filed by the Plaintiff that he be declared to be having the absolute right, title and interest

over the land in Schedule-B and the Defendants to be permanently enjoined.

5. Defendant Nos.1 and 2 in the written statement denied the status of the Plaintiff as the adopted son of Duryodhan in saying that Duryodhan had never adopted the Plaintiff as his son. They claim that the partition deed is valid document. They have also denied the execution any such Will by Duryodhan.

It is stated that when dissension arose in the family after the death of Duryodhan, due to intervention of well wishers and local gentries, the deed of family settlement had come into being and in that family settlement, the Plaintiff and Defendant Nos. 1 & 2 were parties which was prepared on 07.03.2009. The document was also Notarized. However, the Plaintiff raised objection to the same at a later stage by advancing a false claim. The Defendant Nos.1 & 2 state that said document was duly and validly executed by the Plaintiff in recognition of the earlier partition and division of properties made between them therein.

6. The other Defendants although practically have not advanced any independent claim over the properties in suit have supported the case of Defendant Nos. 1 & 2.

The Defendant Nos. 1 & 2 in the written statement advanced the counter claim to declare that the Plaintiff is not the adoptive son of Duryodhan. The Plaintiff in answering to the counter claim submitted his written statement reiterating his claim of status as the adopted son of Duryodhan.

7. The Trial Court on the above rival pleadings has framed nine issues. Issue no.7 is rightly taken up for first for decision as it relates to the status of the Plaintiff and consequently, his locus to file the suit as laid and for the reliefs claimed. This issue has been answered on examination of evidence and their analysis in favour of the Plaintiff holding him to be the adopted son of Duryodhan. This answer has led to the dismissal of the counter claim filed by the Defendant Nos. 1 & 2 in respect of the prayer advanced therein.

Then coming to issue nos.5 and 6 with regard to the validity of the Partition Deed, Will, and Kutumba Nispati Patra, on going through the evidence let in by the parties and their evaluation, following answers have been returned:-

- (i) the Deed of Partition and Will, Ext.3 and 5 respectively were duly executed and binding on the Plaintiff as well as the Defendant Nos. 1 & 2; and
- (ii) the Kutumba Nispati Patra, Ext.A is forged document.

Having said as above, the Trial Court has found the Plaintiff to have not been able to prove that he is having exclusive right, title and interest over the Schedule-B properties so as to get the declaration of his right, title, interest and permanent injunction as sought for. The suit according being disposed of by the order as already noted in the foregoing paragraph, the Defendant Nos. 1 & 2 called in question the said judgment and decree passed by the Trial Court by carrying the First Appeal. The First Appellate Court has allowed the Appeal in part by the order as already indicated in the foregoing paragraph.

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

- “1) Whether the lower Appellate Court is right in holding Ext.3 to be not a valid document simply on the ground that the Defendant No.2 was not a party to it when evidence stands that Defendant Nos. 1 and 2 who are now defending the case jointly and when Defendant No.1 has in the meantime already alienated a portion of the property which she had got under Ext.3 in favour of a stranger who has also been delivered with the possession of the property? and
- 2) Whether the lower Appellate Court in the facts and circumstances of the case and in view of the evidence on record ought to have held that Defendant No. 2 had the implied consent for the said arrangement under the deed,

Ext.3 whereby the Plaintiff and his father on one hand and the Defendant No.1 on the other got their ancestral property distributed even settling larger extent of land in favour of Defendant No.1”

9. Learned Counsel for the Appellant submitted that the First Appellate Court is not right in holding Ext.3 to be an invalid document merely for the reason that Defendant No.2 is not the party to the same. According to him, strictly speaking document being a deed of family settlement, the Defendant No.2 was not a necessary party when Duryodhan and Plaintiff are very much parties to the same. He further submitted that assuming the document to be the deed of partition, it being between father and the son, when the mother is entitled to the share therein is not the party. He, therefore submitted that the First Appellate Court ought not to have disturbed the finding of the Trial Court on that score. It was submitted that the First Appellate Court ought to have held Ext.5, the Will to be a valid document and accepted the same as such as no probate is required for the purpose in that area where the parties reside and where the property situates.

10. Learned Counsel for the Respondents submitted all in favour of the findings returned by the First Appellate Court. He submitted that the first Appellate Court by assigning very good reasons has answered the point on the validity of the deed of partition in ruling against its

acceptance. According to him, when a person is entitled to a share in the properties put to partition or placed under settlement, he/she is a necessary party to the document, and in the absence of him / her, it is not binding on him/her. He, however, submitted that the Defendant Nos. 1 & 2 have not further challenged the judgment and decree passed by the First Appellate Court returning the finding that the Plaintiff is the adopted son of Duryodhan as also the finding that the Kutumba Nispati Patra, Ext.A as invalid.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also read the plaint and written statements and have extensively travelled through evidence let in by parties both oral and documentary.

12. The substantial questions of law which have been framed for being answered in this Appeal concern only on Ext.3 as to its acceptance both in law and fact.

13. The status of the Plaintiff as the adopted son of Duryodhan has been found concurrently by the Courts below and that being not further challenged by the Defendant Nos. 1 & 2, the same has attained finality. So, now in so far as the properties of Duryodhan are concerned, the

Plaintiff and Defendant Nos. 1 & 2 are the successors being the Class-I heirs.

14. The certified copy of the registered deed of partition dated 01.02.1985 has been admitted in evidence and marked as Ext.3. It reveals therefrom that the properties described in Schedule-A of the plaint were allotted to Defendant Nos. 1 & 6 and those in Schedule-B of the plaint were allotted to Plaintiff and Duryodhan together. The Plaintiff states that pursuant to the said partition, when he with his father possessed properties in Schedule-B, the Defendant No.1 possessed the properties in Schedule-A exclusively. She accordingly dealt with the same by alienating a portion of the same to the outsider. Thus, it is stated that the partition effected under the said deed had been acted upon. When the properties were divided under the deed of partition, the Defendant No. 2 being the wife of Duryodhan, there has been no provision for her in the said partition nor there is any explanation as to why she had been excluded therefrom, when ordinarily she would have been entitled to a share in that event and it is also not said that she voluntarily gave up her claim on that score. Even no such provision in any other form is provided for her in that partition. She has thus been not joined as party to the said partition nor in any way a beneficiary. In that view of the matter, simply because

some properties came to the hands of the Plaintiff and Duryodhan, the Defendant No.2 cannot be said to be a beneficiary of the said allotment flowing therefrom, wherein it is nowhere also so indicated. Moreover, when it is stated that the Plaintiff and Duryodhan jointly got the properties, had it been so stated that it was for the Plaintiff, Duryodhan and the Defendant No.2, it could have been so interfered that she was not wholly deprived of. So, under that partition deed total deprivation having been caused to the Defendant No.2 behind her back, the same cannot be held to be valid in the eye of law without being so ratified or affirmed by Defendant No.2 at any subsequent stage which too is completely absent in the present case.

The Plaintiff has neither pleaded the same nor through evidence has established any such conduct on the part of the Defendant No.2 is in that direction.

The Defendant No.1 having sold some portion under Ext.9, out of the said allotted properties in the partition that cannot be taken as the conduct in the direction of ratification and the affirmation by the Defendant No.2. Therefore, under the circumstances, neither factually nor legally, it is permissible to hold that the Defendant No.2 had the implied consent to the said partition under Ext.3.

The answers to the substantial questions of law thus stand returned accordingly which lead to affirm the finding returned by the First Appellate Court. Consequently, the judgment and decree passed by the First Appellate Court are held not liable to be interfered with.

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

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

Narayan

