

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.357 of 2008

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the the judgment and decree dated 09.09.2008 and 24.09.2008 respectively passed by the learned Additional District Judge, Gajapati, Parlakhemundi in R.F.A. No.19 of 2006 setting aside the judgment and decree dated 08.08.2006 and 23.09.2006 respectively passed by the learned Civil Judge (Senior Division), Parlakhemundi in C.S. No.5 of 2003.

Smt. Binodini Adhikari & Others* *Appellants

-versus-

Sri Sarat Kumar Panda* *Respondent

Appeared in this case by Video Conferencing Mode

***For Appellants* - M/s.Prabhu Pr. Mohanty, A.K.Kanungo and
B.P.Das, Advocates**

***For Respondent* - None.**

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 10.01.2022 : Date of Judgment: 21.01.2022

The appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') have challenged the judgment and decree dated 09.09.2008 and 24.09.2008 respectively passed by the learned Additional District Judge, Gajapati, Parlakhemundi in R.F.A. No.19 of 2006.

By the said judgment and decree, the Appeal filed by the Respondent under Section 96 of the Code has been allowed and the judgment and decree dated 08.08.2006 and 23.09.2006 respectively passed by the learned Civil Judge (Senior Division), Parlakhemundi in C.S. No.5 of 2003 non-suiting the Respondent as the Plaintiff has been decreed by declaring the registered Will dated 29.12.2001 (Ext.F) as invlaid in the eye of law.

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 Plaintiff's case, in short, is that he is the natural son of Laxmikanta Adhikari and Saraswati Adhikari. He had been adopted by late Laxmi Narayan Panda and Bhanumati Panda. The natural as well as adoptive mother of the Plaintiff are dead. The Defendant No.1 is the wife of Gopal Krushna Adhikari, who happens to be the natural brother of the Plaintiff. The Defendant Nos.2 and 3 are the sons of Gopal Krushna. The lands in schedule-A lands are the agricultural lands and over Schedule-B land, the residential house stands. These are the subject matter of the suit.

The Plaintiff is the Trustee of the Deity Sri Sri Madanmohan Mahaprabhu Bijee, Kabichandra Street of Parlakhemundi. The Deity is the owner of the suit land. It is stated that the natural mother of the Plaintiff had absolutely no manner of right, title, interest and possession over the said suit land nor she had purchased the same. It is said that he had purchased the tenancy right in respect of the suit land from one Bipra Charan Biswasray in the year 1997 under the registered deed. Bhanumati Panda is stated to be the owner of the suit house and the same had been allotted to her under a deed of family settlement dated 03.07.1942. The Plaintiff, being the adopted son of Bhanumati, thus claims to have the exclusive right, title, interest and possession over the suit house. Neither the Defendants nor the natural mother of the Plaintiff stand to have any right, title, interest and possession over the same. It is alleged that taking advantage of the disturbances and misunderstanding, amongst the members of the family of Saraswati, the Defendants have managed to obtain a Will dated 29.12.2001 to their benefit

and advantage by exercising undue influence, coercion, fraud and misrepresentation upon Saraswati Adhikari and finally, the same has been managed to be the registered. By the time of execution of the Will, the age of Saraswati, the Testatrix was 80 years when she was not in a proper state of mind and health to know and understand the nature of her disposition. As stated, being involved in several litigations concerning the family members as well as the properties of Deity, Saraswati was in a broken health and shattered mind and she was not even able to do her normal pursuits. She was dependent upon one of her relations, namely, Simanchal Adhikari. The Defendants had all the knowledge that Saraswati had no alienable right over the suit property. The Defendants, with the ill-advice of that Simanchal, registered the Willnama, which has never been executed by Saraswati in a free of state mind and health when she had also no capacity and was not in a position to exercise her free mind so to execute the Will. On 21.05.2002, Saraswati expired. The Defendants then basing upon the Will applied for mutation of the suit land in their name before the Tahasildar, Parlakhemundi. The Plaintiff, on receipt of notice, could learn about the creation of such a Will dated 29.12.2001. Gopal Krushna, the husband of Defendant No.1 then filed a suit, i.e., C.S. No.35 of 2003 in the Court of the learned Civil Judge, Senior Division, Parlakhemundi where his plea that he was the adopted son of Bhanumati was rejected. Thus, as the adopted son of Bhanumati, the Plaintiff has exclusive title and possession over the suit land. The Defendants having taken the action for mutation of the suit land in their favour banking upon the Will, as cloud got cast over the right, title and interest of the Plaintiff over the suit land; he, therefore, filed the suit seeking the relief of declaration that the Will dated 29.12.2001 executed by Saraswati is null, void and inoperative in the eye of law.

4. The Defendants, filing the written statement, have disputed the status of the Plaintiff as the adoptive son of Bhanumati as well as his claimed position as the Trustee of the Deity Sri Sri Mandanmohan Mahaprabhu Bijee. Their specific case is that Schedule-A land was originally Inam lands and being vested with the Government of Orissa was settled in the name of Saraswati in accordance with the provisions of Orissa Estate Abolition Act. The suit land was thus not the private land but trust estate and declared as such. The right of intermediary over suit land stood extinguished when the O.E.A. Act came into force and Sarawati being found to be in khas possession of the suit land as a tenant, the same has been settled in her name and after such settlement, the suit land assumed the character of rayati land and thus became the absolute property of Saraswati, who possessed the same on her own right on payment of land revenue and water taxes. So, she had all the alienable right over the same and being in a sound state of mind, out of her free will and volition, had executed the Will on 29.12.2001 bequeathing the suit property in favour of the Defendants. The Will being scribed under the instruction of Testatrix, Saraswati in presence of the witnesses, there has been due attestation in accordance with law too. The suit land was not owned by the Deity nor it was the trust property. So, after the death of the Saraswati on the basis of that Will, the Defendants have acquired the right, title and interest and as such are in possession of the suit property. The suit house was the exclusive property of Laxmikanta Adhikari, the father-in-law of Defendant No.1 and the grandfather of Defendants 2 and 3. The sons of Laxmikanta were separate and had taken respective shares from him since 1975. The daughters of Laxminarayan are all married and well off. On the death of Laxminarayan on 21.09.1986, his widow and Saraswati became the exclusive owners of the suit land and accordingly, taking pity upon the

Defendants as they were deserted by Gopal Krushna who having taken a second wife was leaving with her with children begotten through her, she bequeathed the same in favour of Defendant No.1. Saraswati being the exclusive title holder of the suit land was in possession of the same till 29.05.20020 and after her death, the Defendants are in possession of the same. Thus it is stated that they are the exclusive right, title and interest over the suit land which by that Will as has been bequeathed by the Testatrix, the absolute owner in their favour. It is stated that the Plaintiff has nothing to do with the suit property and as such has no right to challenge the said registered Will executed by Saraswati.

5. On the above rival pleadings, the Trial Court has framed seven issues. Answering the crucial issues, i.e., issue nos.5, 6 and 7 concerning the execution, attestation and registration of the Will and its validity, upon examination of the evidence on record and their evaluation, the Trial Court has answered those in favour of the Defendants holding the Will and its consequences in their favour as per law. The other technical issues as to the non-joinder of necessary parties and maintainability of the suit being answered against the Plaintiff, the suit stood dismissed.

The unsuccessful Plaintiff having carried the Appeal, the lower Appellate Court, upon independent appreciation of the evidence on record and detail discussion of the same at its level, has held that late Saraswati, the Testatrix under the Will vide Ext.2=Ext.A had no title over the Schedule-A property, had no title over the same.

In respect of Schedule-B property, it has been held that Saraswati, the Testatrix, in presence of her sons, had no absolute right of alienation or the power of testamentary disposition.

6. Mr. B.P. Das, learned counsel for the Appellants submits that the findings of the lower Appellate Court are all against the weight of evidence on record and those offend the settled position of law holding the field. According to him, the lower Appellate Court has given those two conclusions against the right over the property to be resting with the Testatrix so as to bequeath are wholly unsustainable both on fact and law. He, therefore, submitted that the above substantial question of law arises for being answered in this Appeal, which thus merits admission.

7. In the given case, this Court is now required to find out as to whether the conclusion of lower Appellate Court that Saraswati, the Testatrix of the Will had the right, title and interest over the property covered under the Will is free from any infirmity either on fact or law so as to say that there surfaces the substantial question/s of law for being answered in the Appeal.

In respect of Schedule-A property, the Defendants say that it belongs to the Deity and the Defendant No.1 claims to be hereditary trustee of the Deity being so declared by the Endowment Commissioner, Orissa vide order dated 17.03.1993 passed in O.A. No.14 of 1987 admitted in evidence and marked Ext.1. The registered sale deed dated 11.07.1957 under Ext.2 has not been produced by the Defendants but has come on record from the side of the Deity through the Plaintiff. The same speaks that the cultivable right over the property had been transferred to Saraswati by one Bipra Biswasray with the condition that the purchaser (Saraswati) was required to pay Rajbhag, the periodical premium to the Deity and that the property was the 'Amrutamanohi' land of the Deity. The document (Ext.2) though reveals the extent of land to be Ac.7.47 decimals, it speaks about Ac.2.0 only as "Sisena Bilo". This has been clarified in the Yadast record of Hal settlement Ext.E/2

that Saraswati purchased two acres of land under Ext.2 for a consideration of Rs.500/- from Bipra Biswasray. The other similar yadast under Ext.E series concern with other sale deed and it is not the case of the Defendants that the said land is also covered under the said Yadast order. The extent of suit land here is Ac.4.752 decimals and thus the burden lying upon the Defendants to remove the ambiguity has not been discharged. The Defendants claim that the property was the trust estate and Saraswati was in khas possession for which the land has been settled in her name by virtue of the provisions of the OEA Act after the land vested with the State free from all encumbrances. However, no such document in support of the same has been proved nor the order of said asserted settlement of the property has been shown. The lower Appellate Court has, therefore, rightly discarded the said claim of the Defendants in holding that there is no proof that the property bequeathed formed a part of any trust estate and that Testatrix had all the authority and power in view of the settlement.

The lower Appellate Court having also found nothing in the Yadast order hinting the khas possession of Saraswati over the land in question, has held that such a claim of settlement of the land in favour of Saraswati being in khas possession of the same is not tenable which is found to be in order. Having said so, finding no proof about the status of the Deity as intermediary about vesting and about settlement under the OEA Act as claimed, when the lower Appellate Court has held that Schedule-A property continued to be the property of Deity without being vested and without having being settled in favour of Saraswati notwithstanding with the issue of hal ROR vide Ext.A, which has no impact in the matter of conferment or right, title and interest over the property, this court finds no such infirmity therein. It is seen that this important aspect which had lost sight of the Trial Court has rightly been taken

up and the view so taken is thus in the direction of rectification of an error committed by the Trial court.

8. The lower Appellate Court then taking a cue from the evidence of D.W.1 who is none other than the Defendant No.1, who has stated that the possession of the suit property in Schedule-A was not by her but by a tenant being inducted by her mother-in-law, i.e. Saraswati and her further statement about the receipt of landlords share from out of the produce either by herself or by Saraswati from the tenant is not found to have fallen in error in holding that the evidence of D.W.4, who is eldest son of Saraswati when he stated that they are in cultivating possession of the same, it cannot be accepted.

In view of all these above, the lower Appellate court having said that the property under Schedule-A continued to be the property of Deity, Sri Sri Madanmohan Mohapatra Bije for 'Amrutamanohi' purpose as before, this Court finds all the reasons and justifications to approve the same.

With regard to the Schedule-B property, the finding of the lower Appellate court is again that in the absence of any document showing the so called separation of Saraswati's other sons by partition in metes and bounds and in the absence of any document showing the so called giving of the suit house by her father-in-law to Saraswati either as her share or otherwise, it has to follow that the property retained its character as the joint family property besides being non-partiable in nature. Having said so, the Will executed by Saraswati placing the said property as the subject matter therein is of no impact in favour of the beneficiary/ies named therein. The view on the obtained facts and circumstances is not liable to be interfered with.

9. In the wake of the aforesaid, the submission of the learned counsel for the Appellants cannot be countenanced with to say that there arises the substantial question of law meriting admission of this Appeal.

10. Resultantly, the Appeal stands dismissed. There shall be, however, no order as to costs.

11. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587 dated 25th March, 2020 as modified by Court's Notice No.4798 dated 15th April, 2021, and Court's Office Order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

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D. Dash, J.