

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.372 of 2017

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 11.07.2017 and 20.07.2017 respectively passed by the learned District Judge, Keonjhar in RFA No.12 of 2015 confirming the judgment and decree dated 10.04.2015 and 23.04.2015 respectively passed by the learned Civil Judge, Senior Division, Keonjhar in C.S. No.114 of 2012.

Dhanurjay Mahanta

....

Appellant

-versus-

Kalakar Mahanta and Another

....

Respondents

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

For Appellant

-

Mr. B.S. Panigrahi
(Advocate)

For Respondents

-

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 21.06.2022 : Date of Judgment:04.07.2022

D.Dash,J. The Appellant, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and preliminary decree dated 11.07.2017 and 20.07.2017 respectively passed by the learned District Judge, Keonjhar in RFA No.12 of 2015.

By the same, the Appeal filed by the Appellant under section 96 of the Code has been dismissed and thereby the judgment and preliminary decree passed by the learned Senior Civil Judge, Senior Division, Keonjhar in C.S. No.114 of 2012 have been confirmed.

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 Trial Court.

3. The Plaintiff's case is that the Defendant No.1 is his brother and they are the two sons Late Sudarsan Mahanta. The Plaintiff and his brother Defendant No. 1 had jointly purchased the land measuring Ac. 0.47 decimals from its owner namely Harihar Panigrahi. While so possessing the land as its owner they had sold Ac. 0.18 decimal out of the purchased land and thereafter the balance land of Ac. 0.29 decimal remained with them. It is stated that there has been no partition between the two brothers by metes and bounds in respect of that property. The Defendant No.1 is residing over the suit land in the house jointly constructed by them whereas the son and daughter-in-law of the Plaintiff have been residing on another partition of the residential house when the Plaintiff used to reside in the native village at Shyamasundarpur.

It is alleged that taking advantage of the absence of the Plaintiff, the Defendant No.1 sold Ac. 0.075 decimals of land to Defendant No.2 by registered sale deeds dated 07.12.1998 and 18.02.2005. The sale deeds are said to have been executed by Defendant No.1 without the consent and the knowledge of the Plaintiff. So it is said that those transactions are illegal, void and not binding on the Plaintiff. It is further stated that behind the back of the Plaintiff, Defendant No.2 has mutated the purchased land in his name. So the Plaintiff filed the suit for partition, claiming his legitimate half share over the said properties.

4. The Defendant No.1 in his written statement while not disputing the fact that he with the Plaintiff had purchased Ac. 0.47 decimal of land, however, states that after said purchase, it is he who alone

possessed the same on his own right to the knowledge of the Plaintiff and all others. It is further stated that on the request of the Plaintiff, the Defendant No.1 had sold Ac. 0.18 decimal of land but the entire consideration amount for the said transaction had been taken by the Plaintiff without a pie being taken by the Defendant No.1 and this was with an understanding and assurance from the side of the Plaintiff that in respect of remaining Ac. 0.29 decimal, he would have no claim and that would completely be left to the Defendant No.1 who would own the same exclusively. The Defendant No.1 thus admits to have sold from out of that remaining land, the land measuring Ac. 0.075 decimal to the Defendant No.2 on receipt of valuable consideration in order to meet the expenses for the marriage of her daughter.

The Defendant No.2 in his written statement claims to have purchased the land measuring Ac. 0.075 decimals from Defendant No.1 and it is stated that she has been residing in a house constructed by her over the said purchased land.

5. On the above rival pleadings, the Trial Court framed as many as six issues. Answering the crucial issues that is Issue No. 4 and 5, upon examination of evidence and their evaluation, the case/claim of the Defendant No.1 that after sale of Ac. 0.18 decimal of land from out of the total purchased land of the Plaintiff and Defendant No.1, he remained the exclusive owner of the rest land from which he has sold a part to Defendant No.2 has been answered in the negative. It has been further said that in respect of the rest of the land after the first sale of land to the extent of Ac. 0.18 decimal, the Plaintiff and Defendant No.1 have equal share being the joint owners and when this Defendant No.1 admits to have sold the part out of that land, the same is liable to be

adjusted towards the share of the Defendant No.1, the share of the Plaintiff remaining unaffected.

Other issues have received the answers in the same way and accordingly, the Trial Court has preliminarily decreed the suit as stated in the order.

6. The First Appellate Court being moved by this appellant as the aggrieved Defendant No.1 has dismissed the appeal, affirming the findings of the Trial Court on those crucial issues, finding no such reason and justification to accord any note of dissent even after detail examination and evaluation of the evidence on record independently at its level in addressing the rival contention raised before it.

7. Learned counsel for the appellant submitted that the Courts below have committed grave error in not recording finding that there was a prior partition between the Plaintiff and Defendant No.1 in respect of the suit properties even though the evidence on record are overwhelming. He further submitted that when the Defendant No.1 in the year 1998 has alienated a portion of the said property whereby Ac. 0.18 decimal of land had been sold and he remained in possessing the balance land as its owner, the suit having been filed after 14 years of the sale transaction that is in the year 2012, the Courts below ought to have dismissed the suit as barred by limitation. He further submitted that simply because a prayer for partition has been advanced, the Courts below in the facts and circumstances have gone wrong in holding the suit to be not barred by limitation. He further submitted that the Courts below should have taken into account the recitals in the sale deeds Ex. A/1, B/1 and those coupled with the oral evidence on record, the Issue No. 4 and 5 ought to have been answered in favour of the Defendant No.1. He therefore contended

for admission of this appeal in order to answer the above as the substantial questions of law.

8. Keeping in view the above submission, I have carefully read the judgments passed by the Courts below.

9. The admitted case of the parties is that the Plaintiff and Defendant No.1 had purchased Ac. 0.47 decimal of land jointly. So, it is the joint properties of the two. It is also not in dispute that both sold Ac. 0.18 decimals of land jointly leaving a balance of Ac. 0.29 decimals. At this juncture the case of the Defendant No.1 comes that then the entire consideration money towards that sale of Ac. 0.18 decimals of land had been taken by the Plaintiff with the understanding and assurance from his side that in respect of balance Ac. 0.29 decimal he would have nothing to do. This being the specific case of the Defendant No.1, the recital of the document whereby the Plaintiff and the Defendant No.1 have sold Ac. 0.18 decimal have not been proved and it is also not stated by anyone that the said sale deed contains any recitals on that score showing the intention of the Plaintiff in that light. The Defendant No.1 has not proved any such document in support of the claim that although the two brothers had purchased the entire land after sale of Ac. 0.47 decimal of land, the Plaintiff having taken entire consideration for the said sale of Ac. 0.18 decimal of land had abandoned/surrendered all his interest over the balance land in favour of the Defendant No.1. Thus on the face of the admitted case of the parties when even on the balance land of Ac. 0.29 decimals, the Plaintiff and Defendant No.1 stands as co-owners having equal right over the property and in the event of partition entitled to equal share, the evidence on record are wholly insufficient to say that the Defendant No.1 has been able to discharge

the heavy burden in proving his case as said in his written statement to make the Plaintiff, disentitled from any right, title and interest from the rest of the land of Ac. 0.29 decimal. Merely basing upon the recitals contained in the two sale deed executed by the Defendant No.1 in favour of the Defendant No.2 which are self-serving, it is not at all permissible to favorably rule in upholding the case/claim of the Defendant No.1 to deprive the Plaintiff of his right from the remaining land of Ac. 0.29 decimals.

Therefore, the Courts below are found to have not committed any error in finally passing the preliminary decree as has been ordered therein the submission of learned Counsel for the Appellant that the Appeal merits admission to answer the substantial questions of law, as placed, fails.

10. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

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