

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.214 of 2016

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and preliminary decree dated 06.02.2016 and 19.02.2016 respectively passed by the learned District Judge, Kalahandi in RFA No.03 of 2003 confirming the judgment and decree dated 04.12.2002 and 09.12.2002 respectively passed by the learned Civil Judge, Senior Division, Bhawanipatna in T.S. No.85 of 2000.

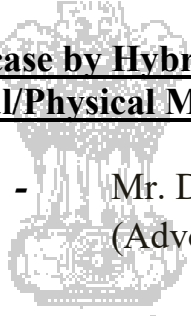
Gagan Kumari Das & Others *Appellants*

-versus-

Susila Das and Others *Respondents*

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

For Appellants - Mr. D. Mund
(Advocate)

For Respondents -  *सम्पत्ति नश्यते*

**CORAM:
MR. JUSTICE D.DASH**

Date of Hearing : 21.06.2022 : Date of Judgment:04.07.2022

D.Dash,J. The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and preliminary decree dated 06.02.2016 and 19.02.2016 respectively passed by the learned District Judge, Kalahandi in RFA No.03 of 2003.

By the same, the Appeal filed by the Appellants (Defendant No.6 to 10) 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 T.S. No.85 of 2000 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 Purandar Das, the common ancestor of the parties had seven sons namely, Achyuta, Hita, Abodhuta, Jagdish, Hari, Bhagaban and Radhamohan. Purandar is dead and so also his elder son Achyuta. The Plaintiff and Defendant No. 1 to 5 are serving the sons of Purandar. Defendant No. 6 is the widow of Achyuta and Defendant No. 7 to 10 are the sons and daughters of Achyuta.

It may be stated that original Defendant No.1 having died during pendency of the suit, his legal representatives are on record as Defendant No.1(a) and 1(g). The Plaintiff, having died during pendency of the First Appeal, his legal heirs are on record, who are the Respondent Nos.1 to 3.

It is stated that the suit lands are the ancestral properties of the parties and it was recorded as such in the record of 1955 settlement. The name of father of the Plaintiff and Defendant No.1 to 5 had been wrongly recorded as Bibachha Das in place of Purandar Das. It is the further case of the Plaintiff that suit land was never partitioned in metes and bounds. However, when members of the family increased, for the sake of convenience, the parties went to possess separate portions of lands remaining in separate mess. The Plaintiff however wanted a partition of the suit land in metes and bounds and proposed the same to the Defendant's and when the same was not paid any heed to, the suit has come to filed for partition of the suit properties.

4. The Defendant Nos. 2, 4 and 5, in their written statement, have admitted the case of the Plaintiff and have accepted the proposal of the Plaintiff that there should be partition of the suit properties in metes and bounds.

The Defendant No. 6 to 10 in their written statement have however, challenged the claim of the Plaintiff for partition of the suit properties stating that they have already separated themselves from the joint family since long and the properties in suit are no more the joint family property available for the partition amongst the parties. They thus claim that they are no more the members of the undivided joint Hindu family and all are leaving in separate mess and estate.

It is specifically stated that during the lifetime of Purandar, due to frequent quarrel and disturbances in the joint family, Achyuta had been given the properties described in Schedule 'X' of the written statement and since that time onwards, Achyuta was possessing the same and thereafter, these Defendant Nos. 6 to 10 have been possessing the said land by making many improvements therein. This land in Schedule 'X' of the written statement is said to be no more the joint family property and as such according to them, cannot be taken as the subject matter of the suit for partition as upon that land the parties other than the Defendant No. 6 to 10 have no right at all.

5. On the above rival pleadings, the Trial Court framed as many as four issues. Coming to the answer the crucial issue, i.e., Issue No.1 with regard to the specific claim of the Defendant Nos.6 to 10 in so far as land in Schedule 'X' in written statement is concerned, the Trial Court, on examination of evidence and their evaluation, has recorded the finding against the Defendant Nos.6 to 10. Then accordingly answering

the other issues, the suit has been preliminarily decreed by the declaring as under:-

“1/7th interest of each branch of seven sons of Purandar Das in the suit land is hereby declared.”

6. These Defendant No.6 to 10 being aggrieved by the said judgment and preliminary decree passed by the Trial Court, having preferred the appeal, have been unsuccessful. Hence, the present Second Appeal.

7. Learned counsel for the Appellants submitted that the findings of the Court below in declining the specific case/claim of Defendant No.6 to 10 in respect of Schedule 'X' land as indicated in written statement to keep the same out of the purview of the partition although is concurrent yet those suffer from the vice of perversity in as much as the important evidence on record relating to the dealing of the properties exclusively by the Defendant Nos.6 to 10, the improvements made there over stretching over a long period of time to the knowledge of all and the conduct of the parties all through in respect of that particular property have been completely ignored. According to him, had those been taken into account in proper perspective, the finding would have been otherwise that said properties are no more available for partition. He, therefore, submitted for admission of this Appeal 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 claim of the Defendant Nos.6 to 10 is that there was a prior partition amongst the seven sons of Purandar, the common ancestor of the parties. In the said partition the properties shown in Schedule 'X' of

the written statement have been allotted to Achyuta Das who happens to be their predecessors in interest. The parties admit that they are residing separately in separate mess and having possession that some parcels of land each. In other words they are separate in mess and estate. It is stated by the parties that except Defendant No.6 to 10 that such separate leaving and possession of the joint family properties are purely for convenience and as per mutual arrangement. The Defendant No.6 to 10 accept that there had been a prior partition but they say that it was complete in every respect and in that partition their predecessors in interest i.e. Achyuta had been allotted in land dispute Schedule 'X' of the written statement as his share.

10. In the above background, the burden lies on the Defendant No.6 to 10 to specifically prove by leading clear, cogent and acceptable evidence that there had been a prior partition and in that partition Achyuta had been allotted with that Schedule 'X' land towards his share and it was so done during the lifetime of Purandar. In support of the same, the Defendant Nos.6 to 10 have simply led evidence that such Schedule 'X' land are under their possession. But that itself is not enough to say that said properties are in their possession as the same had been allotted to Achyuta in the previous partition which had taken place during the lifetime of Purandar as amongst his sons. It is for the reason that this Schedule 'X' property even if is said to be in possession of the Defendant No.6 to 10 then also it can be said to be in their possession as like other properties which are in separate possession of the parties as per convenience but not as of their share as so allotted in the partition affected during the lifetime of Purandar. The document of Ext.A which is an order passed by the Executive Magistrate under a proceeding under Section 155 Cr.P.C. initiated by Radhamohan Das and another against

Bhagaban Das and Others does not at all come to the aid of in serving the interest of the Defendant No.6 to 10 as projected by them regarding the prior partition and distribution of the properties amongst the sons of Purandar towards their shares, the order goes to show that such proceeding had been dropped as the Executive Magistrate did not find any apprehension of breach of peace over the subject matter of the proceeding.

The oral evidence piloted by the Defendants appear which have been deeply examined by the Courts below. The Courts upon analysis of the same at their respective level and keeping in view the documentary evidence i.e. the records of the land have held that Defendant No.6 to 10 have failed to prove their case/claim the properties described in Schedule 'X' of the plaint are not liable to be partitioned. Separate note of possession of the parties in respect of lands in the record of right is a circumstance standing to favour that they are in separate possession of the portion of the suit land but from that no such presumption can be drawn that it was on the basis of prior partition and allotment of those properties in their respective shares.

Furthermore one important feature here which strikes to mind is that when the total land which are available for partition measures Ac. 37.41 decimals, these Defendant No.6 to 10 have laid their claim over Ac. 11.51 decimal which itself being unreasonable gives rise to a strong suspicion in mind that how during the lifetime of Purandar, a partition amongst his seven sons allotting major chunk of land to one could be made to the exclusion and huge deprivation of other six. Although it is the settled position of law that father during his lifetime has a right to make a partition amongst the sons in respect of the joint family properties and that in many cases is given respect to yet the Court in that

event owes a duty to look to the reasonableness that whether it is fair and reasonable. So on that score too the claim/case of the Defendant's in saying that Achyuta had been allotted with the properties shown in Schedule-'X' of the written statement gets pushed to thick cloud and as such is not acceptable.

For all the aforesaid, submission of the learned Counsel for the Appellants that there stands the substantial questions of law as indicated in the aforesaid paragraph for being answered meriting admission of this Appeal cannot be countenanced with.

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

While parting it be observed that while affecting the partition of the properties in metes and bounds in accordance with the shares as allotted to the parties under the preliminary decree, the separate possession of the properties by the parties, their convenience and all other relevant equitable factors would be taken note of for being given effect to as far as possible and practicable.

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

Basu