

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 881 OF 2022

Jayanti Mohanta and others* *Petitioners

Mr. Ashutosh Mohanta, Advocate

-versus-

Siba Charan Mohanta and another* *Opp. Parties

Mr. Amit Prasad Bose, Advocate

(For Opp. Party Nos.1 and 2)

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

18.11.2022

Order No.

3. 1. This matter is taken up through hybrid mode.
2. The Petitioners in this CMP seek to assail the order dated 5th July, 2022 passed by learned Senior Civil Judge, Baripada in C.S. No.109 of 2021, whereby an application under Order VI Rule 17 C.P.C. filed by the Plaintiffs-Petitioners has been partly allowed.
3. Mr. Mohanta, learned counsel for the Petitioners submits that C.S. No.109 of 2021 has been filed for partition of joint family property. During pendency of the suit, the Defendant No.1 sold out a portion of the land to Saroj Kumar Sahu and Nabanita Dwari vide registered sale dated 27th December, 2021. Since the alienation of the suit property was made during pendency of the suit, the Petitioners filed an application under Order VI Rule 17 C.P.C. to incorporate the pleadings with regard to alienation of the property and also to declare the sale deed dated 27th December, 2021 to be null and void. Learned trial Court, while allowing the pleadings with regard to alienation of the suit property, refused to

the prayer for amendment with regard to the relief sought for in the suit.

3.1. Mr. Mohanta, learned counsel for the Petitioners further submits that the suit property being the joint family property, the Defendant No.1 could not have alienated a definite portion of the land in view of Section 44 of the Transfer of Property Act, 1882 (for short 'the Act'). Thus, the sale deed alienating definite portions of the joint family property is required to be declared null and void. Learned trial Court without appreciating this material aspect passed the impugned order refusing to amend the prayer of the plaint. Hence, this CMP has been filed.

3.2 Mr. Mohanta, learned counsel for the Petitioners relying upon the decision in the case of ***Sukadev Jena –v- Kuna Rout and others***, reported in 104 (2007) CLT 756, submits that *lis pendense* purchasers are proper parties to the suit and a co-sharer cannot alienate a specific portion of the joint family property. As such, the prayer for amendment of the plaint should have been allowed.

4. Mr. Bose, learned counsel for Opposite Party Nos.1 and 2 submits that the alienation being made during pendency of the suit, it will be governed by the principles of *lis pendense* as provided under Section 52 of the Act. Hence, there is no requirement to amend the plaint incorporating the prayer to declare the sale deed to be null and void. He further submits that after the alienation is made, the Plaintiffs had filed an application under Order 1 Rule 10 C.P.C. to implead *lis pendense* purchasers as parties to the suit, which was rejected and remained unchallenged. He further submits that *lis pendense* purchasers are only entitled to enjoy the property to the extent allotted to their

vendor. Thus, learned trial Court has committed no error in rejecting the application under Order VI Rule 17 C.P.C.

5. At this stage, Mr. Mohanta, learned counsel for the Petitioners submits that the observation basing upon which the application for amendment is rejected is not sustainable.

6. Considering the submissions made by learned counsel for the parties and on perusal of the record, this Court finds that learned trial Court while rejecting the prayer to amend the relief sought for in the suit observed that since a party can sale the joint family property by showing legal necessity, the sale deed cannot be challenged as null and void in a suit for partition. Such an observation to the effect that validity of the sale deed cannot be challenged in a suit for partition is not sustainable as it is against law. However, in view of Sections 44 and 52 of the Act, the alienation made by Defendant No.1 will be limited to the extent of share allotted in his favour. Even if the relief seeking for declaration of the sale deed to be null and void is not allowed, the Plaintiffs are not going to be prejudiced in any manner in view of the discussion made above. Accordingly, I find no infirmity in the impugned order.

7. The CMP being devoid of any merit stands dismissed.

8. The interim order dated 14th September, 2022 passed in I.A. No.927 of 2022 stands vacated.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

bks