

HIGH COURT OF ORISSA: CUTTACK

RSA NO.175 of 2021

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 12.11.2021 and 26.11.2021 respectively passed by the learned District Judge, Mayurbhanj, Baripada in RFA No.14 of 2019 in partly setting aside the judgment and decree 14.02.2019 and 21.02.2019 passed by the learned Civil Judge (Senior Division), Baripada in Civil Suit No.271 of 2016.

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Sankar Mohanta & Another

:::: Appellants

-:: VERSUS ::-

Champamani Behera & Others

:::: Respondents

**Advocate(s) who appeared in this case by hybrid arrangement
(virtual/physical) mode.**

For Appellants

... M/s.A.K. Tripathy,
P.K. Nayak, P. Kar &
B.K. Panda, (Advocates)

For Respondents

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CORAM :

MR. JUSTICE D.DASH

Date of Hearing: 06.12.2022 :: Date of Judgment: 23.12.2022

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 decree passed by the learned District Judge, Mayurbhanj, Baripada in R.F.A. No.14 of 2019. The Respondent No.1 as the Plaintiff

had filed the suit for partition and other consequential reliefs. The Trial Court decreed the suit preliminarily in part by passing the following order:-

“The suit be and the same is preliminarily decreed in part on contest against the Defendants without any cost. The Defendant Nos.1,2,3 and 4 are entitled to 1/4th share each out of the Schedule-B land of the plaint. The RSD No.1038 dt.22.12.2009 is valid to the extent of the share of Defendant No.2. The parties to the suit are accordingly directed to effect mutual partition, within a period of two months, failing which any of the parties may seek to make the decree final and to carve out the share as declared above through a survey knowing Civil Court Commissioner as per law. In effecting partition, the Civil Court Commissioner shall take into consideration the convenience and equities of the parties and shall make adjustment as would be legal and proper. The cost of the final decree proceeding shall be borne by the parties in proportion to their respective shares.”

The Appellant being the aggrieved Defendant No.3 having filed the Appeal under section 96 of the Code in questioning the judgment and preliminary decree passed by the Trial Court in the suit filed by her, the First Appellate Court has passed the order as under:-

“The Appeal is allowed in part. The Plaintiff is entitled to get Ac.0.11 decimals 500 Bargakadi of land from Schedule ‘B’ which is 1/4th share of her vendor Defendant No.2 and the RSD of the Plaintiff vide Ext.1 is valid to the extent of the above share of Defendant No.2.”

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. Plaintiff is a purchaser of Ac.0.19 dec. of land pertaining to Mouza Chhotraipur, Khata No.7, Plot No.61 Ac.0.70 dec. out of Ac.0.40 dec. under Khata No.7 and Plot No.62 Ac.0.500 dec. out of 150 dec. under the said khata as described in schedule 'B-1' of the plaint. It is stated that the above lands were recorded in the name of one Atmaram Mohanta and the Defendant Nos.1 to 4 are the daughters and sons of said Atmaram. The Plaintiff claims to have purchased the above land from Defendant No.3 by registered sale deed dated 22.12.2009. It is stated that here the vendor had delivered possession of the said land to the Plaintiff, who has remained in possession of the same and she then having filed mutation case, the land has been separately recorded in her name. For some dispute with regard to possession, an earlier suit filed by the Plaintiff for injunction had gone to the First Appellate Court and there she was granted with the liberty to file a suit for regular partition and hence this Second Appeal.

The Defendant nos.1,3 and 4 in their written statement have denied the plaint averments. They state that Atmaram Mahanta sold Ac.0.11 dec. of land from Plot No.63 to Defendant No.1 by registered sale deed dated 12.05.2006 when he was in need of money for the treatment of Defendant No.2. It is stated that the property in Khata No.7 standing in the name of Atmaram is the homestead land. It is further

stated that Atmaram having sold Ac.0.11 dec. to Defendant No.1, rest land of Ac.0.46 dec. remained as residue. He died in the year 2008. As per the provision of Hindu Succession (Amendment) Act, 2005, the daughters became the coparceners and they have equal share over that land. It is stated that Defendant No.2 is only entitled to Ac.0.11 dec. 500 sq. links. They state that the sale of the suit land, which is a homestead land, by the coparceners, i.e., Defendant No.6, which is without the consent of all the co-sharers is without authority and the Defendant No.2 should have requested others in offering them to purchase before selling the suit which he has not done. The Defendant No.1 claims to be ready and willing to purchase the suit land sold to the Plaintiff. In their written statement, it has been prayed that the Plaintiff be given a direction to sale her purchased land to Defendant No.1 or in the alternative the sale to be declared void.

4. The Trial Court on the above rival pleadings having framed six issues has held that the Defendant Nos.1,3 and 4 have not pleaded and proved through evidence that a dwelling house or house was existing over the suit land. It then has held the registered sale deed executed in favour of the Plaintiff to be valid to the extent of the share of the vendor of the Plaintiff.

5. The Defendant No.3 being aggrieved by the said judgment and preliminary decree passed by the Trial Court by the order as aforesaid, alone having carried the First Appeal; the First Appellate Court has concurred with the finding of the Trial Court that the purchased land of the Plaintiff was vacant land and no house or dwelling house was/is standing over the same. Then coming to address the prayer of repurchase, the answer has been returned against the Defendant No.3. The First Appellate Court then in view of the sale of Ac.0.11 dec. by Atmaram to Defendant No.1, computing the area as Ac.0.59 dec., has held the left over/balance land of Ac.0.46 dec. as the available land for partition. The Defendant Nos.1 to 4 have been held entitled to 1/4th share each on the same. But then computing the share of Defendant No.2 as Ac.0.11 dec. 500 sq. links towards his share, as entitled, the purchase made by the Plaintiff being found to be for excess land, the sale has been held valid to the extent of Ac.0.11 dec. 500 sq. links, falling within the 1/4th share of the Plaintiff's vendor over the suit land.

6. Learned counsel for the Appellants (Defendant Nos.1 and 3) submitted that the Courts below have erroneously been swayed away with the Ext.A-the registered sale deed and failed to appreciate Ext.3 and 4 in their proper prospective. According to him, in the absence of any partition of joint family homestead and in view of the pleading and

document available on record, the Courts below are not justified in denying the relief of repurchase to the Defendant Nos.1 and 3 by resorting to erroneous meaning of the word 'dwelling house'. He further submitted that the First Appellate Court is not right in concurring with the finding of the Trial Court that the Defendant No.3 cannot pray at the stage of the First Appeal to repurchase when it had only been sought for by the Defendant No.1 who has not assailed the denial of that relief of repurchase by filing Appeal. In view of all these above, he contended for admission of this Appeal to answer the above as the substantial questions of law.

7. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

8. It is seen that the Courts below have concurrently held that no house was standing over the suit land. In arriving at said finding that the suit land is lying vacant and no house or dwelling house was standing over the same, it appears that the Courts below have thoroughly examined the evidence on record, both oral and documentary. This Court finds no such infirmity therein.

The Defendant Nos.1,3 and 4 in their joint written statement had pleaded that Defendant No.1 is ready and willing to repurchase the land from the Plaintiff. The Trial Court has not accepted such claim. The

First Appeal was filed only by Defendant No.3 and she has never pleaded in her written statement that she is willing to repurchase the suit land from the Plaintiff. That was too the evidence of Defendant No.1 himself. The Defendant No.1 had neither filed any cross-appeal nor cross-objection on receipt of the notice in the First Appeal nor it is stated that he had filed the First Appeal against the refusal of his prayer to repurchase by the Trial Court. In a very cunning move, now that Defendant No.1 and Defendant No.3 together have filed this second Appeal seeking permission to proceed as such. The right of repurchase if so available having not been pressed into service by this Defendant No.3 in the Trial Court and the sale being not void; she cannot be said to be the person aggrieved by that order of the Trial Court in refusing said prayer as advanced by the Defendant No.1 which is a relief claimed by him in person and the Defendant No.1 having accepted the order of refusal of his prayer of repurchase by not filing the First Appeal, cross-objection or cross-appeal in that First Appeal filed by the Defendant No.3 under section 96 of the Code cannot now join the Defendant No.3 in filing this Second Appeal under section 100 of the Code in giving rise to his claim as to the relief of repurchase which has attained finality so far as the Defendant No.1 is concerned. Accordingly, the Application giving rise to I.A. No.830 of 2021 stands dismissed.

In such state affair, the First Appellate Court having refused to sit over the decision of the Trial Court as to the refusal of the claim to repurchase by Defendant No.1 in the Appeal filed by the Defendant No.3 has not at all committed any such error. For all the aforesaid, I am of the view that there arises no substantial question of law to be answered meriting admission of this Appeal.

9. In the result, the Appeal stands dismissed. No order as to cost.



*(D. Dash),
Judge.*