
(2021) 12 OHC CK 0175
In the Orissa High Court
Case No : A.H.O. No. 27 Of 1996

Ajaya Kumar Jena And Others	Vs	APPELLANT
Bhikari Chandra Naik And Others		RESPONDENT

Date of Decision : 24-12-2021

Acts Referred:

Partition Act, 1893 — Section 4

Citation : (2021) 12 OHC CK 0175

Hon'ble Judges : Dr. S. Muralidhar, CJ;A. K. Mohapatra, J

Bench : Division Bench

Advocate : S. Mishra, J. Biswal

Final Decision : Dismissed

Judgement

Dr. S. Muralidhar, CJ

1. The present appeal by the legal heirs of the unsuccessful Defendant No.2 in Title Suit No.46 of 1997 is directed against the judgment dated 12th December, 1995 passed by the learned Single Judge of this Court in FAO No.283 of 1979. By the said impugned judgment, the learned Single Judge allowed the appeal in part only in relation to the value of the property sold by the Defendant No. 1 to Defendant No. 2. It was held the Plaintiff (Respondents herein) would be required to pay Rs.4211/- for getting back the property in accordance with the direction contained in the judgment of dated 27th October, 1979 passed by the learned Subordinate Judge, Jajpur (hereafter 'the trial Court'). In effect, the judgment of the trial Court partly decreeing the Title Suit No.46 of 1997 was affirmed subject to the above modification.

2. The background facts are that the predecessor-in-interest of Respondent Nos.1(a) to 1(d) (Plaintiffs) instituted T.S. No.46 of 1977 in the trial Court against the predecessor-in-interest i the present Appellants praying for the following reliefs:

"(a) Let the plaint A and B schedule properties be partitioned with the help of a

Civil Court Commissioner and the lands allotted to the share of the plaintiff be given possession to the plaintiff.

(b) The plaintiffs be given relief under section 4 of the Partition Act in respect of the 8 annas of share of defendant No.1 said to have been purchased by defendant No.2.

(c) The defendant no.2 be permanently enjoined not to enter upon the plaint A schedule land and create disturbance in the smooth possession of the plaintiff.

(d) Costs of the suit be given to the plaintiff.

(e) Any other relief to which the plaintiff is entitled to be given to the plaintiff. "

3. On completion of pleadings, the following issues were framed by the trial Court:

"i. Is the suit maintainable as laid?

ii. Is the plaintiff son of defendant No.1?

iii. Are the suit lands the self-acquired property of defendant No.1?

iv. Is the plaintiff entitled to any share of the suit property?

v. To what relief, if any, is the plaintiff entitled to?"

4. As already noted by the judgment dated 27th October, 1979 the suit was partly decreed by the trial Court. The operative portion of the said judgment reads as under:

"That the suit be preliminarily decreed in part on contest against both the defendants, but in the circumstances of the case without cost. Plaintiff being entitled to moiety share in the suit properties as per Lot No.1 of schedule 'A' of the plaint, shall deposit a sum of Rs.100/- tentatively towards the fees of the civil court commissioner, who shall affect partition of the same by metes and bounds. On plaintiff's payment of Rs.2185/- to defendant No.2 within a period of two months hence, defendant No.2 shall execute a registered sale deed in respect of Ac 0.02 decimals in suit Plot No.786 and Ac 0.14 decimals in suit plot No.787 at the cost and expenses of the plaintiff. In case of non-acceptance of the said amount of consideration by defendant No.2 and his default in execution of the sale deed, plaintiff shall deposit the said amount of Rs.2105/- in Court within, a period of one month thereafter, where upon the sale deed shall be executed by court in his favour at his cost and expenses. In case of the plaintiff's failure to deposit the said amount in court within the time as fixed, his right of presumption in respect of the aforesaid Ac 0.16 decimals the partition to be affected by the civil court commissioner, not before three months hence, Plaintiff's prayer for partition of the suit property as per Lot No.2 of schedule 'A' and suit lands as per schedule 'B' of the plaint stands rejected...."

5. On issue (ii) the trial Court, on the basis of the evidence led by the parties,

concluded that the Plaintiff was in fact the son of Defendant No.1. While deciding issues (iii) and (iv), based on the evidence of Defendant No.1, the trial Court held that out of the Ac 0.40 decimals of land, Defendant No.1 had purchased Ac 0.08 decimals of land from his own sources. It was held that the remaining extent of Ac 0.03 decimals of land was the joint family property, which comprised of his sons. Accordingly, the trial Court held that the Plaintiff [predecessor-in-interest of Respondent 1 (a) to (d)] was entitled to Ac 0.16 decimals out of Ac 0.32 decimals of land under Schedule 'A'. However, in respect of Schedule 'B' property, as there were no legal heirs in the suit, the trial Court held that it could not be partitioned by metes and bounds.

6. In other words, the trial Court held that the Plaintiff was entitled for half moiety share in the suit property as per Lot No.1 of Schedule 'A' of the plaint. The trial Court ordered that the Plaintiff should deposit a sum of Rs.100/- tentatively towards the fees of the Civil Court Commissioner and on payment of Rs.2185/- to Defendant No.2 within a period of two months, the latter shall execute a registered sale deed in respect of Ac 0.02 decimals of land in suit plot No.786 and Ac 0.14 decimals of land in suit plot No.787.

7. Against the said judgment dated 27th October, 1979 of the trial Court, defendant Nos.1 and 2 (Appellants herein) preferred F.A. No.283 of 1979 in this Court. By the impugned judgment dated 12th December, 1995 the learned Single Judge partly allowed the appeal by modifying to the extent of payment of Rs.2185/- to Rs.4211/- while confirming the remaining portion of the judgment of the trial Court. The operative portion of the impugned judgment of the learned Single Judge reads as under:

"14. The Trial Court has recorded a finding that the value of the property sold by defendant No.1 to defendant No.2 has been inflated and that the said property was sold for total consideration of Rs.5,000/-. It appears that no issue for the purpose of determination was framed. The said finding is also not justified by the materials on record. Accordingly, the said finding cannot be sustained. There is no reason to disbelieve the value mentioned in the deed of sale. It is accordingly held that the Ac 0.38 decimals of the land was sold for Rs.10,000/-. In order to get back the property the plaintiff will have to pay the price of 16 decimals on the basis of the aforesaid value i.e. Rs.10,000/- for Ac 0.38 decimals. The judgment and decree of the Trial Court is modified to the extent that the plaintiff will be required to pay Rs.4211/- instead of Rs.2105/-

15. The appeal is allowed in part to the extent indicated above. The findings of the Trial Court excepting the finding regarding the value of the property sold by defendant No.1 to defendant No.2 are affirmed. The finding relating to the value of the property sold by defendant No.1 to defendant No.2 is set-aside. The plaintiff will be required to pay Rs.4211/- for getting back the property in accordance with the direction contained in the Judgment of the Trial Court. The period prescribed in the Trial Court's decree will be counted from the date of this judgment."

8. To recapitulate, the Appellants herein are the legal heirs of original Defendant No.2 in T.S. No.47 of 1977, and Respondent No.1(a) to 1(d) are the legal heirs of the original Plaintiff. Respondent No.2 is the legal heir of original Defendant No.1

9. This Court has heard the submissions of Mr. S. Mishra, learned counsel for the Appellants and Mr. J. Biswal, learned counsel for the Respondents.

10. It must be noted at the outset that on 20th March, 1996 the operation of the impugned judgment of the trial Court was stayed by this Court. That interim order has continued since.

11. The submissions of Mr. S. Mishra, learned counsel for the Appellants are as under:

(i) The predecessor of the present Appellant that Defendant No.2 is the legal heir of Defendant No.1. The purchased property, as concurrently held by the trial Court as well as the 1st Appellate Court, is not capable of being partitioned. The predecessor of the Appellants did not initiate any suit for partition or file any applications seeking separation of his share of the undivided property. Consequently, it was not open for the Plaintiff [the predecessor-in-interest of Respondents 1 (a) to (d)] to claim relief under Section 4 of the Partition Act, 1893. Reliance is placed on the decisions in *Ghanteswar Ghosh v. Madan Mohan Ghosh* (1996) 11 SCC 446 and *Babu Lal v. Habibnoor Khan* (2000) 5 SCC 662.

(ii) It is further submitted that since the learned Single Judge of this Court passed the impugned order much prior to the decision of the Supreme Court in *Ghanteswar Ghosh* (supra) there was no occasion for the learned Single Judge to decide the applicability of Section 4 of the Partition Act, 1893. Equally, it is not open to the Respondents to contend that this objection was never raised by the Defendants at any stage of the proceedings in the trial Court or the appellate Court and, therefore, cannot be permitted to be raised at this stage. Reliance is placed on the decision of the Supreme Court in *National Textile Corporation v. Naresh Kumar Badri Kumar Jagad* AIR 2012 SC 264 to urge that a new ground raising purely a legal issue for which no inquiry/proof is required can be permitted to be raised at any stage of the proceedings. Accordingly, it is prayed that the suit under Section 4 of the Partition Act should be held to be not maintainable at the instance of the Plaintiff and the judgment and decree of the trial Court should be set aside.

12. Mr. J. Biswal, learned counsel for the Respondents on the other hand submitted as under:

(i) The Appellants (Defendant No.2) never raised the question of maintainability of the suit for partition under Section 4 of the Partition Act 1893 either before the trial Court or before this Court in the first appeal. It is not even pleaded in the memorandum of the present appeal.

(ii) The judgment in *Babu Lal* (supra) is distinguishable on facts. In the present case, Defendant No.2 was already a contesting party in the suit.

(iii) The joint family property can be partitioned while the remaining part of the property can stay undivided. Reliance is placed on the decisions in *Kashinathsa Yamosa Kabadi v. Narasingh Bhaskara Kabadi* AIR 1961 SC 1077; *Kalloomal Tapeswari Prasad v. Commissioner of Income Tax, Kanpur* (1982) 1 SCC 661; *Kamala v. K.T. Eshwara Sa* (2008) 12 SCC 661.

(iv) It is further submitted that a suit under Section 4 of the Partition Act is maintainable even at the instance of the co-sharers. Reliance is placed on the decisions *Babulal v. Habibnoor Khan (Dead)* by Lrs. (supra) and *Alekha Mantri v. Jagabandhu Mantri* AIR 1971 Ori 127.

13. The above submissions have been considered.

14. At the outset it requires to be noted that while it may be true that a pure question of law can be raised at any stage of the proceedings, in the present case, the issues regarding maintainability of a suit for partition in terms of Section 4 of the Partition Act 1893, could well have been raised at the first instance but was in fact never raised at any stage of the proceedings. Even in the first appeal no attempt was made to amend the grounds of appeal to urge such a plea before the learned Single Judge. Even in the memorandum of the present appeal filed in 1996, the said issue was not pleaded. Considering that the suit was filed way back in 1979, there cannot be any valid excuse in not urging this objection to the maintainability of the suit in all these long years.

15. That apart, the Court finds merit in the contention of learned counsel for the Respondents that the judgment in *Babu Lal* (supra) is distinguishable on facts. It must be recalled here that the decision in *Babu Lal* (supra) followed the earlier decision in *Ghanteswar Ghosh* (supra) while distinguishing this Court's decision in *Alekha Mantri* (supra). The highlighted portion of the following passage in *Babu Lal* (supra) brings out this distinguishing feature as far as the present case is concerned:

"It has also to be noted that in *Alekha Mantri's* case (supra) the alienee of undivided share of a co-owner in a joint family house was already defendant No. 1 in the suit filed by the plaintiff for partition and separate possession of his undivided share. The question before the Orissa High Court was whether alienee from the co-owner who was already defendant No. 1 could be subject to proceedings under Section 4 of the Partition Act by the plaintiff. The Court had to examine the question whether the person who had brought the suit for partition was himself not the stranger purchaser but one who was a member of the family and when he is seeking to purchase the share of the vendee from the co-owner alienating his share in favour of a stranger purchaser and when such a vendee was himself a party to the suit as defendant No. 1 could make such a vendee defendant answerable under Section 4 of the Act or not. In the background of this fact situation, the Court observed in para 13 of the report that Section 4 of the Partition Act would also be applicable where the suit for partition was brought by a member of the undivided family against the stranger transferee, and that it

is not necessary that the latter should have filed the suit. He being a defendant could have specifically claimed a share in the residential house. Now, it must be noted that in a partition suit even defendants are as good as plaintiffs and the Court has to ascertain their respective shares in the joint property and subsequently has to separate them by metes and bounds. This decision obviously cannot apply to the facts of the present case where the alienating stranger purchaser of undivided interest of a co-owner in the suit house was neither plaintiff nor defendant in the suit. The Trial Court in the present case has clearly noted that the transferee Kundanbai or Babu Lal were not parties to the suit. Consequently, it could not be said that the transferee stranger purchaser of co-owner interest in the joint property was suing for partition either as a plaintiff or even as a defendant in the suit for partition. If the ratio of the aforesaid decision is held to take the view that a stranger purchaser who does not move for partition of joint property against the remaining co-owners either as a plaintiff or even as a defendant in the partition suit claiming to be as good as the plaintiff nor even as a successor of the decree holder seeks execution of partition decree, can still be subjected to Section 4 of the Petition Act proceedings, then the said view would directly conflict with the decision of this Court in Ghantesher Ghosh 's case (supra) and to that extent it must be treated to be overruled".

(emphasis supplied)

16. The fact remains that Defendant No.2, the Purchaser of Defendant No.1 was already a party to the suit in the present case. The facts are therefore akin to those in Alekha Mantri (supra) Therefore, the decision in Babu Lal (supra) is distinguishable on facts.

17. As rightly pointed out by learned counsel for the Respondents the decisions in Kashinathsa Yamosa Kabadi (supra), Kalloomal Tapeswari Prasad (supra) and Kamala (supra) do support his proposition that even part of a joint family property can be partitioned while the remaining part, which is shown to be self-acquired, can be left out. That is what has happened in the present case.

18. For the aforementioned reasons, the Court finds no ground made out for interference with the impugned judgment of the learned Single Judge. The appeal is accordingly dismissed. The interim order stands vacated.

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