

(2003) 03 OHC CK 0011

In the Orissa High Court

Case No : Original Jurisdiction Case No. 14977 of 2001

Budha Narayan Kar and Others

APPELLANT

Vs

Kalinga Keshari Mohanty and Others

RESPONDENT

Date of Decision : 06-03-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 12, 3, 37(1)

Registration Act, 1908 — Section 17

Citation : (2003) 03 OHC CK 0011

Hon'ble Judges : A.S. Naidu, C.J.; A.S. Naidu, J

Bench : Division Bench

Advocate : D. Bhuyan, B.N. Bhuyan, D. Parida and U. Padhy, for the Appellant;
P.R. Sutar, B.G. Mishra, N.K. Deo and P.K. Routray, A. Routray, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Naidu, C.J.—In this Writ Petition filed under Articles 226 and 227 of the Constitution of India, the confirming orders passed by authorities under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, being Annexures-4, 5 and 6 are sought to be challenged.

2. For an effectual adjudication of the inter se disputes between the parties, which centre round Act, 1.23 decimals of land acquired as long back as in the year 1913 by a registered sale deed, the facts which are very much necessary are briefly stated hereinafter.

Kulu Kar, the common ancestor of the Petitioners and vendors of opposite parties 1 to 3, had three wives. The first wife expired without any issue. Ramahari is the only son through the second wife. Through the third wife, Kulu Kar had four sons, namely, Govinda, Banamali, Narasingha and Murali. The Petitioners belong to the branch of Govinda; whereas opposite parties 1 to 3 are purchasers of lands from branches of Ors. sons of Kulu Kar. Admittedly, on 2.6.1913 by means of a

registered sale deed (Ext.1), Ac. 1.23 decimals of land was purchased in the name of Ramahari, son through the second wife of Kelu Kar and Govinda, the eldest son through his third wife. In the year 1913, Ramahari was twenty years" old; whereas Govinda, the ancestor of the present Petitioners, was only eleven years old and was a minor. In the same year, on 25.11.1913 Kelu Kar, the common ancestor, executed a registered deed in the name and style of "ANSA NIRUPANA PATRA" (Annexure-2) allotting Ac. 14-75-5 Kadis of land equally in favour of his five sons, each having 1/5th share. Again said Kelu Kar by a registered gift deed dated 25.11.1913 gifted Ac. 1.56 decimals of land to Ramahari as "JYESTHANSA". It is pertinent to mention here that the land in disputes measuring Ac. 1.23 decimals was neither the subject-matter of "ANSA NIRUPANA PATRA" nor the gift deed.

After the death of the common ancestor, Kelu Kar, Ramahari created disturbance in the family partition of properties by claiming more lands, resulting in execution of a registered partition deed among the five brothers on 26.5.1930. A perusal of the aforesaid deed reveals that the disputed property along with other properties of the family including the property gifted to Ramahari towards "JYESTHANSA" by the gift deed dated 25.11.1913 measuring Ac. 1.28 decimals and the property covered under the "ANSA NIRUPANA PATRA" of the even date was the subject-matter of partition and the entire property was divided into five shares. It further reveals that specific properties in consonance with his share were allotted in favour of Ramahari, who got himself separated from his other four brothers and stayed separately. But then the other four brothers continued to live in their joint ancestral house and continued jointly. By efflux of time Ramahari died and so also Govinda, leaving behind the Petitioners.

3. While matters stood thus, in the year 1994 the village in which the disputed property situates came within the consolidation operation in pursuance of Notification issued u/s 3 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 and the sons of Kelu except Govinda's branch initiated Objection Case and relying upon the family arrangements and deeds executed on 21.6.1943 and 30.6.1943, got the lands recorded in the names of the parties as per their respective shares. The said recording was done in consonance with the allotments made to each son (Branch) in the family arrangement. The Petitioners, however, did not take any steps during the initial stage of the consolidation operation, but latter being aggrieved by the record of lands in favour of opposite parties 1 to 3, moved the Joint Commissioner of Consolidation (opposite party No. 4) u/s 37(1) of the Act. According to the Petitioners, the lands which were purchased in the year 1913 by their ancestors Govinda and Ramahari being self-acquired lands, should not have been partitioned among the other cosharers. It is alleged that after the death of Ramahari and Govinda, they inherited the properties as Class-I heirs exclusively, and none of the other sons of Kelu had any share in the said properties. Thus it was contended that the recording made by the Consolidation authorities without hearing the Petitioners was illegal and contrary to law.

4. The Joint Commissioner of Consolidation, after hearing the parties, remanded the case to the Consolidation Officer directing him to decide the inter se disputes among the parties afresh after giving opportunity of hearing to the parties. After remand, all the parties appeared before the Consolidation Officer (opposite party No. 6), produced all the documents relied upon by them and also adduced oral evidence in support of their respective cases. The Consolidation Officer (opposite party No. 6) after hearing the parties and perusing the records by his order dated 25.6.1996 (Annexure-4) did not accept the contention advanced by the Petitioners that the disputed properties were the self-acquired properties of Ramahari and Govinda on the ground that in the year 1913 when the said properties were purchased, Govinda, the ancestor of the Petitioners, was only eleven years old and he had absolutely no source of income. The Consolidation Officer also relied upon the registered partition deed executed on 28.5.1930 and held that the said properties were amalgamated with the other joint family properties and were partitioned among all the sons of Kelu Kar, thus, it cannot be claimed that the said properties were the exclusive properties of Govinda. On the basis of the aforesaid analysis, the Consolidation Officer disallowed the claim of the Petitioners.

5. An appeal was preferred by the Petitioners inter alia challenging the said order before the Deputy Director of Consolidation, Range-I, Cuttack (opposite party No. 5) u/s 12 of the Act. The appellate authority after scrutinising all the documents and hearing the parties at length, by a well discussed judgment, confirmed the findings arrived at by the Consolidation Officer.

6. The Petitioners thereafter preferred a Revision before the Joint Commissioner of Settlement and Consolidation, Board of Revenue, Orissa, Cuttack (opposite party No. 4) which was registered as Revision Case No. 326 of 1998. The said revisional authority, after hearing the counsel and perusing the documents, by its judgment dated 12.10.2001, held that the contention raised by the Petitioners that the deed of family arrangement of the year 1943 allotting specific lands in favour of all the sons of Kelu Kar was a forged one, was not correct. According to the Revisional authority, Govinda, the ancestor of the Petitioners, had accepted the allotment of specific share of property in his favour by the said deed of family arrangement of 1943 and had sold parcels of land out of the property that was allotted to his share, by executing registered deeds on 17.8.1943 and 8.1.1973 and some other unregistered deeds. According to the Consolidation authorities, Govinda, the ancestor of the Petitioners, was the first person who acted in accordance with the specific properties allotted to him by the deed of family arrangement of the year 1943 by executing different sale deeds and alienating properties out of the share allotted to him to different persons. The Joint Commissioner (opposite party No. 4) also confirmed the orders passed by the Consolidation Officer in the Objection Cases and the Deputy Director in appeal. The said orders, as stated above, are impugned in this Writ Petition.

7. Though the Writ Petition was listed for admission, as the counsel for the

parties were ready to argue the matter, it was heard at length.

8. Learned Counsel for the Petitioners once again reiterated the stand that the disputed property measuring Ac. 1.23 decimals was acquired by a registered sale deed by the common ancestors of the Petitioners, namely, Govinda and Ramahari, and thus it cannot be nomenclatured as joint family property and cannot be the subject-matter of partition among the cosharers. It is further averred that after the death of Ramahari and Gonda, the Petitioners being the Class-I heirs of Govinda, exclusively inherited the property and the authorities below have acted illegally and with material irregularity in accepting the unregistered deed of family arrangement as well as the plea of opposite parties 1 to 3 that the said property was partitioned among the cosharers.

9. Mr. Bhuyan, learned Counsel for the Petitioners, forcefully submitted that the property was acquired by a separate registered deed in favour of two of the cosharers and thus the same cannot be nomenclatured as joint family property and cannot be the subject-matter of partition among the cosharers. According to him, the Consolidation authorities lost sight of this legal position and acted illegally and with material irregularity in accepting the plea of opposite parties 1 to 3 that subsequently the disputed property became the joint family property and was partitioned among the cosharers. He also contended that the Consolidation authorities committed an error in accepting the unregistered deed of settlement said to have been executed by the parties in the year 1943 dividing the properties amicably and allotting specific properties to all the brothers except Ramahari.

10. At the other hand, Mr. Routray, learned Counsel appearing for opposite parties 1 to 3, relied upon the registered deed of partition dated 28.5.1930 to which Govinda, the ancestor of the Petitioners, was also a party and submitted that to avoid inter se dispute between the parties, all the properties which were acquired by separate sale deeds were brought to the common hotch-potch and partitioned among the five brothers and the orders passed by the Consolidation authorities are just and proper.

11. Mr. Routray drew our attention to the 1930 registered partition deed and submitted that the properties acquired by the registered sale deed of 1913, the properties covered under the "ANSA NIRUPANA PATRA" dated 25.11.1913, the properties covered under the gift deed executed by Kelu Kar in favour of Ramahari as "JYESTHANSA" on 25.11.1913, the properties purchased in the names of other cosharers by registered deeds dated 21.4.1909, 22.2.1911, 7.12.1911, 13.8.1917 and 28.3.1922, the properties recorded in the name of Kelu Kar in the Settlement record-of-rights and also the properties recorded exclusively in the name of Ramahari in the Settlement record-of-rights, i.e. a total extent of Ac. 21.28 decimals, was brought to hotch-potch and treated as joint family properties and were partitioned between the five brothers.

12. Mr. Routray further submits that in fact Govinda Kar, the ancestor of the

Petitioners, was only eleven years" old in 1913 when the disputed property was purchased and had no earning capacity. It is also submitted that different properties were also purchased by utilising the joint family nucleus in favour of other co-sharers either jointly or individually. All these properties admittedly being joint family properties were brought to the hotch-potch and were duly partitioned by the registered partition deed of 1930. Govinda being an executant of the said registered partition deed, the Petitioners who put forth their claim through Govinda are estopped from raising any contrary plea.

13. Mr. Routray also drew our attention to the deed of family arrangement of the year 1943 and submitted that in 1930, Ramahari, the eldest son of Kelu Kar through his second wife had partitioned and walked out of the joint family with the lands allotted to him. It is further submitted that as would be evident from the said 1930 deed, all other sons including Govinda remained joint and resided in their joint ancestral house till 1943, when in consonance with the deed of family arrangement they separated. It is submitted that the 1943 deed was only a deed acknowledging partition which took place in 1930 when shares were carved out, and the same being not a partition in presenti, did not require registration. In support of his argument Mr. Routray drew our attention to the fact that Govinda, the ancestor of the Petitioners, had not only accepted the 1930 partition deed, but had also accepted the 1943 deed of family arrangement and had acted upon the same by alienating different parcels of lands allotted in his favour by different sale deeds to outsiders. Thus the Petitioners are estopped by the conduct of their ancestors from raising any plea now and the belated claim put forward by them to the effect that the lands purchased in 1913 cannot be partitioned holds no water.

14. We have carefully heard the learned Counsel for the parties and perused the documents. Law relating to blending of separate properties with joint family property is well settled. Property separate or self-acquired of a member or members of a joint family may be impressed with the character of joint family property if it is voluntarily thrown by the owner/owners into the common stock with intention of abandoning his/their claim therein. But to establish such abandonment, a clear intention to waive separate right must be established.

15. The important point which is to be kept in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristic of joint ancestral property not by mere act of physical mixing with the joint ancestral property, but by his own volition and intention by his waiving or surrendering his separate right in the said property as his separate property. Such intention can be discovered only from his words or his acts or conduct. See *G. Narayana Raju Vs. G. Chamaraju and Others*, *Goli Eswariah Vs. Commissioner of Gift Tax, Andhra Pradesh*, and AIR 1963 SC 1610 *Venkata Reddi v. L. Lakshmana*.

16. The properties in dispute were admittedly purchased in the year 1913 in the name of Ramahari, the only son of Kelu Kar through his second wife, and

Govinda, the first son of Kelu Kar through his third wife. Admittedly Govinda was minor then. Similarly, several other properties were also purchased by different registered sale deeds in the names of other sons. Some properties were also gifted by Kelu Kar to Ramahari as "JYESTHANSA" and some to other sons as per the "ANSA NIRUPANA PATRA". However, after the death of Kelu Kar, as it reveals from the documents and the submissions made, dissension cropped up between Ramahari, the son of Kelu Kar through his second wife and Govinda, Banamali, Narasingha and Murali, the sons through the third wife, and by consent of all the parties the entire properties of the family including the properties acquired in the names of different cosharers or gifted or those recorded exclusively in the names of some members of the joint family were brought to the hotch-potch and were partitioned between the brothers inter se by registered partition deed dated 26.5.1930. Govinda, the ancestor of the Petitioners, was a signatory to the said deed of 26.5.1930 and he had accepted and consented to the amalgamation of the properties purchased in his name with the other properties. Thus, according to us, this is a clear case where the doctrine of blending would squarely apply.

17. Criticising the 1943 family arrangement, learned Counsel for the Petitioners submitted that by the said family arrangement, in fact, specific properties were partitioned and the document being not a registered one, should not have been looked into by the authorities below.

18. Law as laid down in the case of Tek Bahadur Bhujil Vs. Debi Singh Bhujil and Others, , is that family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties is to be founded. It is generally prepared as a record of what had been agreed upon, in order that there are no hazy notions about it in future. It is only when the family arrangement is reduced in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document requires registration, because it is then that it would amount to a document of title declaring for future what rights and what properties the parties possess. But a document which is no more than a memorandum of what had been agreed to between the parties does not require compulsory registration u/s 17 of the Registration Act.

19. In the touchstone of the ratio of the decision of the Supreme Court, we have examined the contents of the documents nomenclatured as deed of family arrangement and filed before us. At the outset, it should be mentioned that Govinda, the predecessor in-interest of the Petitioners was a signatory to the said document. The recitals reveal that there was a partition inter se between the parties by metes and bounds by a registered deed executed in the year 1930. By the said document, shares had been specifically carved out in favour of each of the cosharers. What has been done by the 1943 deed of family arrangement is specifically noting down the properties in consonance with the shares allotted to

the respective cosharers. It is thus more in the nature of a memorandum of partition than a partition in presenti. It further appears that the said family arrangement had been acted upon and Govinda was the first person to alienate the properties allotted to his share in the aforesaid family arrangement.

20. We are therefore satisfied that the deed of 1943 was in fact a deed of family arrangement and had been entered into bona fide and the terms thereof were fair in the circumstances of the particular case and was in consonance with the specific shares carved out in the 1930 registered partition deed.

21. In the decision in the case of Maturi Pullaiah and Another Vs. Maturi Narasimham and Others, , the Supreme Court has categorically observed that the Courts should be averse to disturb family arrangements but try to sustain them on broadest considerations of the family peace and security.

22. We have also no hesitation to observe that the conduct of the parties subsequent to the deed of family settlement shows that the arrangement made by the 1943 deed was mutually accepted and acquiesced in. Thus the contention that the said deed should be thrown out due to lack of registration is not sustainable.

23. Apart from the aforesaid fact, the conduct of Govinda alienating different parcels of land out of the lands allotted to his share as per the deed of family arrangement of 1943 leads us to irresistible conclusion that Govinda by his own volition and intention had surrendered his exclusive right, if any, upon the disputed property and threw the said property into the common stock. Needless to say, Govinda was a signatory to the aforesaid partition deed of 1930 by which the disputed property was also partitioned.

24. In view of the discussions made above, we do not find any illegality or irregularity in the impugned orders of the Consolidation authorities warranting our interference in exercise of our Certiorari jurisdiction. Accordingly, we dismiss this Writ Petition. Parties to bear their own costs.