

(2012) 12 OHC CK 0018

In the Orissa High Court

Case No : Regular Second Appeal No. 153 of 2010

Dillip Kumar Sahoo

APPELLANT

Vs

Smt. Malati Rout and Others

RESPONDENT

Date of Decision : 14-12-2012

Acts Referred:

Partition Act, 1893 — Section 4

Specific Relief Act, 1963 — Section 31, 34

Transfer of Property Act, 1882 — Section 31, 34, 44

Citation : (2012) 12 OHC CK 0018

Hon'ble Judges : B.K. Patel, J

Bench : Single Bench

Advocate : Banshidhar Baug and S. Rath, for the Appellant; Rama Chandra Sarangi, Siba Sankar Mohanty for Respondents 1 to 3 and M/s. Millan Kanungo, S.K. Mishra, Y. Mohanty, D. Pradhan and S.N. Das for R-5, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Patel, J.—This second appeal is directed against the judgment and decree dated 7.4.2010 passed by the learned Adhoc Additional District Judge, F.T.C. No. 3, Bhubaneswar dismissing R.F.A. No. 19/22 of 2006/2003 and confirming the judgment and decree dated 21.4.2003 passed by the Civil Judge (Senior Division), Bhubaneswar in T.S. No. 258 of 1990 by which the suit was decreed. Appellant was defendant no. 1, respondent nos. 1 to 3 were the plaintiffs and respondent no. 4 was defendant no. 2 in the suit. Respondent no. 5 was impleaded in this appeal on consent of the parties on the basis of claim as a lis pendent purchaser. In the suit, plaintiffs sought for the following reliefs:

(a) That their joint title to the suit land described in Schedules A & B of the plaint be declared and their exclusive possession over the same be confirmed.

(b) Alternatively if it be held that the sale deed in favour of defendant no. 1 covering the suit land to the extent of share of Defendant no. 2 therein is valid as the suit land is the undivided homestead of the plaintiffs and defendant no. 2 and

as defendant no. 1 being a stranger to the family of the plaintiffs is not be entitled to joint possession of the suit land with plaintiffs, defendant no. 1 be permanently restrained not to interfere with the possession of the plaintiffs over the suit land described in Schedule A & B shown in red colour in the sketch map marked as A B attached to the plaint.

(c) It be declared that the sale deeds dtd. 28.6.89 and 30.6.89 executed by Defendant No. 2 in favour of Defendant no. 1 in respect of the suit land (90 dec) are invalid, inoperative, and not binding on the plaintiffs and those have been brought into existence as a result of fraud and collusion practised by Defendant No. 1 and 2.

(d) Cost of the suit be decreed in favour of the plaintiffs and against the defendants.

(e) Plaintiffs be given such relief/reliefs which they are deemed entitled to by the court.

2. While admitting the second appeal by order dated 22.7.2010 the following substantial questions of law were formulated for adjudication.

(a) Whether, when further relief of declaring the registered general power of attorney Ext. 1 void was very much available to the plaintiffs and/or whether without nullifying the registered general power of attorney Ext. 1, the suit for declaration to nullify the sale deeds executed and registered by the general power of attorney defendant no. 2 will be maintainable ignoring the bar u/s 31 and provision of Section 34 of the Specific Relief Act?

(b) Whether the defendant no. 1 who is not a party to the general power of attorney Ext. 1 and when the said general of attorney Ext. 1 is proved by producing a true attested copies of the certified copy thereof by the plaintiffs themselves, was bound to prove the original GPA or certified copy thereof in Court. When there is no relief claimed in the suit challenging the genuineness of the said GPA?

(c) Whether the Ext. 1 (the general power of attorney), the execution and registration of which is admitted by the executants thereof (plaintiff Nos. 2 and 3) is a voidable document or void ab initio?

(d) Whether the courts below can ignore the Ext. 1 (the GPA) in absence of declaration to declare the same as void? It is humbly stated that the learned trial court in paragraph-7 of its judgment towards last has observed that "no judicial observations can be given basing upon such documents in Ext. 1". The learned trial court has not returned any finding as to whether the Ext. 1 is a void document or voidable document and the said findings was not challenged by the plaintiffs. But the lower appellate court by ignoring the aforesaid findings of the trial court has ignored the Ext. 1 as if the same is a void document.

(e) Whether the registered sale deed vide Exts. B and C executed by defendant

no. 2 in favour of defendant no. 1 (present appellant) for self and for on behalf of the plaintiff nos. 2 and 3 by virtue of the GPA (Ext. 1) can be altogether held or declared invalid/void documents if it is found that the GPA Ext. 1 is invalid or the sale deed will be valid to the extent of the share of defendant no. 2, who has sold the lands wherein he has admittedly either 1/3rd or 1/4th share.

In course of hearing by order dated 3.10.2012 leave was granted to the appellant to urge the following additional substantial question of law also:-

Whether without pleading and proof of the ingredients of the existence of dwelling house over the suit land and even if there exists a house over the suit land whether the transferee on purchase gets a right and title thereon or his sale deed is ab initio void the same being a portion from the joint homestead land?

3. Plaintiff nos. 2 and 3 as well as defendant no. 2 are sons of plaintiff no. 1, wife of late Ram Chandra Rout who died in the year 1985 leaving behind the plaintiffs and defendant no. 2 as his legal heirs. The suit land appertains to an area of Ac. 0.90 decimals of land out of suit plot measuring Ac. 4.075 decimals in total recorded under Hal Khata no. 611/10 of mouza Chandrasekharpur (Ext. A). The suit plot was originally ex-intermediary property of Madhusudan Dev who inducted late Ram Chandra Rout as an occupancy raiyat thereof in the year 1942-43. Subsequently, the estate was purchased by Raja of Kanika but late Ram Chandra Rout continued to be in possession of the suit plot on payment of rent to Raja of Kanika and, thereafter, in the Anchal office upon abolition of estate. In 1973 settlement, suit plot was recorded in the name of Government of Orissa. During 1988 settlement operation plaintiffs and defendant no. 2 took steps to get their names recorded but failed and suit plot was recorded in the name of G.A. Department. However, suit plot was recorded in the names of plaintiff nos. 2 and 3 and defendant no. 2 on the strength of order passed by the Commissioner of Land Records in Revision Case No. 398 of 1989 under Ext. A, the R.O.R. These facts are not in dispute.

4. It is also not disputed that plaintiff nos. 2 and 3 have executed Ext. 1 registered General Power of Attorney (for short, "GPA" Ext. 1) dated 3.5.1989 in respect of suit plot in favour of defendant no. 2. Defendant no. 2 executed two registered sale deeds dated 28.6.89 (Ext. B) and 30.6.89 (Ext. C) in respect of the suit land in favour of defendant no. 1.

5. Plaintiffs' case is that plaintiffs are illiterate persons. Plaintiff no. 2 was born blind whereas plaintiff no. 1 is an old and pardanashin woman. Defendant no. 2 being more literate than the plaintiffs took up the task of filing revision before the Commissioner of Land Records for getting the suit plot recorded in their names. While filing the revision defendant no. 2 with an ulterior motive omitted plaintiff no. 1 from the revision case though plaintiff no. 1 as one of the successors of late Ram Chandra Rout has got right, title and interest over the suit plot. While the revision was pending defendant no. 2 got GPA Ext. 1 executed by plaintiff nos. 2 and 3 for the purpose of contesting the revision.

However, plaintiff nos. 2 and 3 subsequently learnt that defendant no. 2 obtained the GPA Ext. 1 by practising fraud in collusion with some other persons. Contents of the GPA was not read over and explained to them and they were asked to answer in affirmative to the questions put by the Sub-Registrar. Thereafter, defendant no. 2 by practising fraud on the plaintiffs executed registered sale deeds in respect of suit land under Exts. B and C for an area of Ac. 0.40 decimals and Ac. 0.50 decimals respectively in favour of defendant no. 1 without knowledge of the plaintiffs. No consideration amount was received for the transactions nor delivery of possession was handed over in favour of defendant no. 1. On the strength of the sale deeds Exts. B and C defendant no. 1 filed mutation case to get the suit plot recorded in his name. However, plaintiffs filed objection in the mutation case.

6. Defendant no. 2 was set ex parte. Defendant no. 1 filed written statement denying plaint allegations. It is pleaded that plaintiff no. 1 is not a pardanashin woman, plaintiff no. 2 is not born blind and plaintiff no. 3 is not illiterate. As plaintiff no. 1 did not apply before the Commissioner of Settlements of Land Records, her name was not recorded in the R.O.R. Rather, plaintiff nos. 2 and 3 along with defendant no. 2 filed revision with the consent of plaintiff no. 1. Plaintiff no. 1 has no right, title and interest over the suit plot. Sale deeds Exts. B and C have been validly executed by defendant no. 2 on the strength of GPA Ext. 1. Delivery of possession of the suit land was made upon receipt of consideration amount and execution of sale deeds. There was no fraud or collusion in execution of GPA or sale deeds.

7. Considering rival pleadings the following issues were settled:-

- (1) Is the suit as laid maintainable in the eye of law?
- (2) Have the plaintiffs any cause of action to bring this suit?
- (3) Have the plaintiffs valued the suit properly and have paid necessary court fees thereon?
- (4) Is the suit barred by law of limitation?
- (5) Have the plaintiffs right, title and interest over the suit lands?
- (6) Are the plaintiffs entitled for declaration that the impugned registered sale deeds dt. 28.6.89 and 30.6.89 are invalid documents and are the result of fraud & collusion?
- (7) Are the plaintiffs entitled for alternative declaration that the suit properties being undivided homestead property and the defendant no. 1 being a stranger, is not entitled for joint possession of the suit lands along with the plaintiffs.
- (8) Are the plaintiffs entitled for a decree of permanent injunction as prayed for?
- (9) Are the plaintiffs entitled for a decree of confirmation of possession?
- (10) To what other relief, if any, the plaintiffs are entitled?

8. In order to substantiate their case plaintiffs examined six witnesses including plaintiff no. 3 as P.W. 1 and plaintiff no. 2 as P.W. 2 and also placed reliance on documents marked Exts. 1 to 9. Defendants examined two witnesses of whom D.W. 1 is defendant no. 1 and D.W. 2 is defendant no. 2. Defendants also placed reliance on documents marked Exts. A to D.

9. It is pertinent to observe that defendant no. 2 while deposing as D.W. 2 was put leading questions on behalf of defendant no. 1 as he supported the case of the plaintiffs.

10. Salient findings of the trial court in its judgment and decree are as follows:-

(i) by order passed in R.P. Case No. 398 of 1989 under Ext. 4, the suit plot was directed to be recorded in the names of plaintiff nos. 2 and 3 and defendant no. 2, and pursuant to the said order the suit plot was mutated in their favour in the R.O.R., Ext. A;

(ii) it is the boundain duty of defendant no. 1 to prove the GPA and contents thereof which the defendant has failed to do as he has not examined the scribe or any other witness to the GPA. As GPA Ext. 1, proved by the plaintiffs, is a Xerox copy, no judicial observation can be made with regard to the GPA Ext. 1;

(iii) as plaintiff no. 1 being one of the legal heirs of late Rama Ch. Rout has a substantive interest in the suit property, in absence of partition among all the legal heirs of late Rama Ch. Rout, sale deeds Exts. B and C executed by defendant no. 2 are not valid instruments for want of written consent of plaintiff no. 1;

(iv) plaintiff no. 3, examined as P.W. 1, deposed in his examination-in-chief that power of attorney was given to defendant no. 2 to look after their case, but in his cross-examination he has stated that he had given power to defendant no. 2 to sell the joint family property and that on the date of sale of suit land they were present in the office of Sub-Registrar and had not raised any objection against such sale;

(v) as defendant no. 1 had not examined the scribe or any of the witnesses to Exts. B and C to prove contents thereof, evidence of P.Ws. 1 and 2 as well as D.W. 2 that there was no passing of consideration cannot be ignored and that defendant no. 1 has not proved the legal necessity of plaintiff nos. 2 and 3 to alienate the suit lands;

(vi) even if evidence of P.W. 1 in his cross-examination to the effect that he was present at the time of execution of sale deeds on 28.6.1990 and he gave power to defendant no. 2 to sell the joint family property is accepted as genuine and voluntary, and even if defendant no. 2 admitted that execution of Exts. B and C is valid to the extent of the share of defendant no. 2, defendant no. 1 cannot acquire any interest through these impugned sale deeds because he has not adduced any evidence to disprove plaintiffs' case that the suit land is their joint homestead property and defendant no. 1 is an outsider to their family;

(vii) as P.Ws. 3, 4 and 5 have failed to describe length and breadth of the suit property even on approximation, their evidence relating to possession is not acceptable;

(viii) sale deeds Exts. B and C being not valid instruments, said sale deeds cannot be held to be impeccable instruments by placing reliance on orders passed in mutation cases under Exts. 6 and 7 as well as sale deed Ext. D; and

(ix) the fact that plaintiff nos. 2 and 3 had not cancelled the GPA is not a ground to ignore the case of the plaintiffs.

11. On the basis of above said findings the trial court decreed the suit in terms of main reliefs sought for by the plaintiffs declaring that plaintiffs have right, title and interest over the suit land and the impugned sale deeds Exts. B and C are invalid, and confirming plaintiffs' possession over the suit land as well as restraining defendant no. 1 by way of permanent injunction from interfering with possession of the plaintiffs in respect of the suit land.

12. While upholding the trial court judgment and decree the lower appellate court further held:

(i) the GPA has not been proved or filed in the suit;

(ii) defendant no. 1 has failed to prove due execution of the impugned sale deeds Exts. B and C;

(iii) onus lies on defendant no. 1 to prove the due execution of impugned sale deeds Exts. B and C by adducing cogent and reliable evidence;

(iv) defendant no. 2 sold the suit land to defendant no. 1 by virtue of sale deeds Exts. B and C without the consent and knowledge of other co-sharers;

(v) GPA Ext. 1 is not considered as a valid document and it does not empower defendant no. 2 to sell any portion of the suit plot without consent and knowledge of other co-sharers; and

(vi) defendant no. 1 has purchased the suit land from defendant no. 2 on the strength of a fake and invalid GPA.

13. In support of the second appeal it was submitted by the learned counsel for the appellant that substantial questions of law (a) to (d) relate to legality of GPA Ext. 1 whereas substantial question of law (e) relates to legality of validity of sale deeds Exts. B and C and additional substantial question of law formulated subsequently relates to legal effect of sale of suit land under the two impugned sale deeds. It was further submitted that the plaintiffs have squarely admitted execution of GPA Ext. 1 by plaintiff nos. 2 and 3 and sale deeds Exts. B and C by defendant no. 2. Execution of other sale deeds in respect of other portion of the land out of the suit plot by defendant no. 2 on the strength of GPA Ext. 1 under sale deeds Ext. D series is also not disputed.

14. It was argued that law being well settled that admitted facts are not required

to be proved, in the present case formal proof of GPA Ext. 1 and sale deeds Exts. B and C was not necessary. Moreover, copy of GPA Ext. 1 was admitted to evidence on behalf of the plaintiffs. Clause 7 of GPA Ext. 1 confers authority on Defendant no. 2 to transfer by way of sale or otherwise land out of suit plot.

15. It was also argued by the learned counsel for the appellant that in spite of the fact that the entire case of the plaintiffs in assailing the impugned sale deeds is based on their tirade against GPA Ext. 1, no relief was sought for in the suit to declare GPA Ext. 1 to be void or to cancel Ext. 1. Also, admittedly, no step has yet been taken by the plaintiff nos. 2 and 3 for revocation of the GPA Ext. 1. Considering all the circumstances, trial court was constrained to hold that no judicial observation can be given on GPA Ext. 1. Therefore, there was no scope for the lower appellate court to hold or observe that GPA Ext. 1 was not proved or that the same cannot be considered as a valid document conferring power on defendant no. 2 to sell any portion of the suit plot.

16. It was contended that in the plaint it was vaguely alleged that fraud was practised to get the GPA Ext. 1 executed by plaintiff nos. 2 and 3. Neither any particular of alleged fraud was pleaded nor any evidence was adduced to support the plea of fraud. Therefore, on this score also there is no scope for the plaintiffs to assail validity or legality of the GPA Ext. 1.

17. It was strenuously contended that the plaintiffs having not sought for the relief of cancellation of GPA Ext. 1 which is the very basis of their challenge to the sale deeds, they are precluded from assailing the validity of the impugned sale deeds Exts. B and C in view of the provision u/s 31 as well as under the proviso to section 34 of the Specific Relief Act.

18. It was argued that both the courts below not only failed to take note of the above said vital legal aspects in considering materials on record but also both the courts below committed gross illegality in not taking note of the fact that plaintiff no. 3, in his evidence, while deposing as P.W. 1, stated that they were present in the office of the Sub-Registrar on the date of sale of the suit land and had raised no objection against the registration. It was contended that such admission on the part of the plaintiff no. 3 by itself leads to the only inference that the suit property was sold to defendant no. 1 by defendant no. 2 with the knowledge and consent of the plaintiffs and plaintiffs have filed the suit in collusion with defendant no. 2 who supported the plaintiffs by not filing written statement and by deposing in their favour. Defendant no. 1 being a bona fide purchaser of the suit land recorded in the names of plaintiff nos. 2 and 3, and defendant no. 2, has legally acquired title over the suit land.

19. It was also contended that validity of GPA Ext. 1 is assailed by the plaintiffs on the ground that though no authority to sell the land out of the suit plot was given, fraudulently such authority was inserted into it. Therefore, it is not the case of the plaintiffs that GPA Ext. 1 is void ab initio. Therefore, in the absence of any prayer to declare GPA Ext. 1 to be void and in absence of any declaration by

the courts below to that effect, GPA Ext. 1 remains valid and binding on the executants.

20. It was further argued that plaintiffs have neither pleaded nor adduced evidence to the effect that the dwelling houses of plaintiffs and defendant no. 2 stand on the suit property. On their own admission plaintiffs and defendant no. 2 reside in village Patia whereas the suit plot situates in village Chandrasekharpur. Therefore, right of defendant no. 2 as a co-sharer to transfer his share in the suit property out of the entire suit plot cannot be questioned in view of provision u/s 44 of the Transfer of Property Act. It was argued that the suit land comprising of area Ac. 0.900 decimals is well below the extent of share which defendant no. 2 is entitled to, as he is entitled to at least 1/4th of suit property left behind by his late father Rama Chandra Rout. In such circumstances, there is absolutely no scope to declare sale deeds Exts. B and C to be void or invalid.

21. In course of his argument it was urged by the learned counsel for the appellant that though plea of non-payment of consideration for sale of the suit lands by defendant no. 1 to defendant no. 2 was taken, such assertion does not hold good in view of specific recitals in the sale deeds regarding payment of consideration and in view of absence of admissible evidence to rebut such recital in the sale deeds.

22. In reply, though at the initial stage of argument it was contended and conceded on behalf of the contesting respondent nos. 1 to 3 that non-payment of consideration amount by defendant no. 1 is not pressed as a ground for assailing the sale deeds Exts. B and C, at a later stage learned counsel for the contesting respondents sought to argue that both the sale deeds are vitiated by non-payment of consideration amount. Placing reliance on the decisions in Janak Dulari Devi and Another Vs. Kapildeo Rai and Another, Kaliaperumal Vs. Rajagopal and Another, Durgamani Behera & Ors. -vrs.- Ghasiram Mohanta & Ors. : 1995 (1) CCC 368 (Ori), Bhartu -vrs.- Nawal @ Chhote (Dead) through LR. & Ors.: 2012 (2) CCC 339 (All), Muddasani Sarojana -vrs.-Muddasani Venkat Narsaiah & Ors.: AIR 2007 Dhanbarti Koerin Vs. Shyam Narain Mahton and Others, and M/s. John Tinson and Co. Pvt. Ltd. and others etc. Vs. Mrs. Surjeet Malhan and another etc., and upon reference to observations made in the judgments of both the courts below it was contended by the learned counsel for the appellant that though there can be a valid sale even in the absence of payment of consideration and actual delivery of possession, each transaction is required to be examined in order to find out the intention of the parties as to whether payment of consideration was a condition precedent for effecting transfer of immovable property. It was contended that though in the sale deeds Exts. B and C there is recital that consideration was paid by defendant no. 1, both the courts below recorded the finding that defendant no. 1 failed to prove payment of consideration and delivery of possession of the suit land. It was argued that though even in the absence of delivery of possession and payment of consideration, title to immovable property passes on registration of sale deed,

both are strong circumstances to indicate that the vendor had got no intention to transfer the immovable property without receipt of consideration and delivery of possession. It was strenuously contended that in view of such finding of the courts below there is no scope to entertain substantial questions of law relating to validity or otherwise of the GPA Ext. 1 and sale deeds Exts. B and C as formulated in this second appeal. That apart, neither GPA Ext. 1 nor any of the sale deeds Exts. B and C has been duly proved by defendant no. 1 inasmuch as neither the scribe nor any of the witnesses thereto has been examined.

23. On the basis of above contentions it was further argued that in the absence of due proof of suit documents GPA Ext. 1 and sale deeds Exts. B and C, the impugned sale deeds cannot be held to be valid even to the extent of share out of the suit plot to which defendant no. 2 is entitled.

24. Learned counsel for the contesting respondents also argued that there being admittedly no partition of the suit plot among the co-sharers comprising of plaintiffs and defendant no. 2, and the suit plot being a piece of homestead land, sale deeds executed by defendant no. 2 alone without the consent of all other co-sharers is void. In this connection, reliance was placed by the learned counsel on the provisions u/s 44 of the Transfer of Property Act and Section 4 of the Partition Act as well as on the decisions in Gangadhar Malik and Another Vs. Kahnu Sethi and Others, and Ramdas -vrs.- Sitabai & Ors. : 2009 (4) CCC 259 (SC).

25. It was further contended on behalf of contesting respondents that even if execution of GPA Ext. 1 as well as sale deeds Exts. B and C are held to have been proved on admission, it was incumbent upon defendant no. 1 to adduce evidence to prove contents thereof. It was pointed out that formal proof of document does not amount to the truth of the contents thereof.

26. With regard to omission of making any prayer in the suit for declaring GPA Ext. 1 to be invalid or void, it was contended that neither Section 31 nor Section 34 of the Transfer of Property Act is applicable to the facts of the present case inasmuch as relief of such declaration is not a relief consequential to other reliefs sought for in the suit and decreed by the courts below. It was argued that plaintiffs' suit is not a suit for declaration simplicitor but the plaintiffs prayed for consequential relief of permanent injunction also. Therefore, omission to make the prayer for relief of declaration that GPA Ext. 1 is invalid or void, is inconsequential.

27. It was further argued that though no specific prayer was made for declaring GPA Ext. 1 to be invalid or void, in the plaint it was elaborately pleaded that power of attorney was got executed by defendant no. 2 from plaintiff nos. 2 and 3, who were illiterate and one of whom was blind, by practising fraud and both the courts below having rendered findings on such pleading, lower appellate court was not precluded from holding the GPA Ext. 1 to be an invalid document.

28. I have heard the contentions raised by learned counsel for the parties and

perused the materials on record upon reference to substantial questions of law formulated for adjudication in this second appeal. Substantial questions of law (b) to (d) as well as parts of substantial questions of law (a) and (e) relate to validity and legal implications of GPA Ext. 1 whereas other parts of substantial questions of law (a) and (e) and the additional substantial question of law formulated during the hearing of the appeal relate to legality of impugned sale deeds Exts. B and C. Thus, legality of these three vital documents GPA Ext. 1 and sale deeds Exts. B and C has to be determined on the basis of findings of fact arrived at by the courts below. All the substantial questions of law formulated in the present appeal involve examination of the legality of findings of the courts below with regard to validity of GPA Ext. 1 and sale deeds Exts. B and C, and adjudication thereof has to be made on the basis of, as has been held by the Hon'ble Supreme Court in Santosh Hazari -vrs.- Purushottam Tiwari (Dead) by Lrs. : AIR 2001 SC 965, legal questions arising out of pleadings of the parties and sustainable findings of fact arrived at by the courts below which are necessary for a just and proper decision of the case. It has been laid down in Santosh Hazari -vrs.- Purushottam Tiwari (Dead) by Lrs. (supra), relied upon by the learned counsel for the contesting respondents, that it will depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

29. It is to be borne in mind that execution of GPA Ext. 1 by plaintiff nos. 2 and 3 in favour of defendant no. 2 in respect of entire suit plot as well as execution of sale deeds Exts. B and C by defendant no. 2 in favour of defendant no. 1 in respect of the suit land are admitted by the plaintiffs. Plaintiffs, however, dispute to have authorized defendant no. 2 under GPA Ext. 1 for sale of any part of the suit plot. They alleged defendant no. 2 to have practised fraud in obtaining authority to sell the land out of the suit plot under GPA Ext. 1. It is not disputed that GPA Ext. 1 authorises defendant no. 2 to deal with the suit plot for the purpose of signing and executing deeds of conveyance. Clause 7 of GPA Ext. 1 reads as follows:

That he shall purchase stamp papers, sign and execute any deed of conveyance, present the same and appear before the Registering Authority, admit execution thereof in our name and on our behalf.

Not only plaintiffs do not dispute execution of GPA Ext. 1 but also a copy of GPA Ext. 1 was admitted into evidence on behalf of plaintiffs themselves. It is too fundamental to reiterate that admitted facts need not be proved. Therefore, there is absolutely no scope in the present case to raise any technical objection regarding admissibility of GPA Ext. 1 or sale deeds Exts. B and C. Plaintiffs having admitted execution as well as contents thereof, decisions relied upon by the learned counsel for the contesting respondents in order to assail admissibility

and proof thereof are of no relevance under the facts of the case. In view of circumstances of existence of endorsement in the GPA Ext. 1 that the same was read over and explained in Oriya to the executants, of absence of particulars of fraud and prayer to declare GPA Ext. 1 to be void in the plaint and of admission of GPA Ext. 1 into evidence on behalf of plaintiffs, decisions relied upon by the learned counsel for the contesting respondents relating to onus and manner of proof of a document executed by paradanashin woman are also not applicable to the facts of the present case due to want of factual foundation.

30. Plaintiffs pleaded that fraud was practised on plaintiff nos. 2 and 3 to get GPA Ext. 1 executed by them. However, plaintiffs are altogether silent regarding particulars of fraud. There is an endorsement in GPA Ext. 1 to the effect that the same was explained in Oriya to the executants. Though fraud was pleaded to assail GPA Ext. 1, no evidence was adduced in support of the allegation. Plaintiffs also did not make any prayer in the suit for declaring GPA Ext. 1 to be invalid or void document. There being no dispute regarding execution of GPA Ext. 1 by plaintiff nos. 2 and 3, there is no scope for the plaintiffs to assail the GPA Ext. 1 to be void ab initio. A voidable document in order to be avoided requires an action in law and declaration to that effect on the basis of cogent evidence. There is a presumption that a registered document is validly executed, and is prima facie valid in law. The onus of proof would be on the person who alleges to rebut the presumption. In this connection decision of the Supreme Court in Ranganayakamma and another vs. K.S. Prakash (D) by L.Rs. & Ors.: 2008 AIR SCW 6476, cited by the learned counsel for the respondents may be referred to. However, plaintiffs have chosen not to make any prayer to declare GPA Ext. 1 to be a void document. Under the circumstances, as was contended on behalf of the appellant it may not be unreasonable to assume that plaintiffs have consciously not made any prayer for declaring GPA Ext. 1 to be a void document and, rather, bound themselves to the contents thereof so far as it related to transaction with defendant no. 1 under sale deeds Exts. B and C and laid emphasis on alternative relief of injunction only.

31. Entire case of the plaintiffs in assailing the transaction under sale deeds Exts. B and C is based on the validity of GPA Ext. 1. u/s 31 of the Specific Relief Act it was open for the plaintiffs to seek avoidance of GPA Ext. 1 by making a prayer to that effect. Subsection (1) of Section 31 provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. Proviso to Section 34 of the Specific Relief Act provides for consequence of not making prayer for further relief which flows out of a declaration sought for in a suit and to which plaintiff seeking declaration is entitled to. Section 34 of the Specific Relief Act reads as follows:

Discretion of Court as to declaration of status or right.-Any person entitled to any

legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is to entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Thus, even though plaintiffs plead that GPA Ext. 1 was got executed by practising fraud and the sale deeds Exts. B and C are challenged on the basis of such pleadings, no prayer was made for cancelling or declaring GPA Ext. 1 as void as provided u/s 31 of the Specific Relief Act. Proviso to Section 34 of the Specific Relief Act prohibits making of any declaration when a party entitled to seek further relief than a mere declaration of title omits to do so.

32. In *Md. Noorul Hoda Vs. Bibi Raifunnisa and Others*, it has been held by the Hon^{ble} Supreme Court as follows:

xx xx xx When the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. Section 31 of the Specific Relief Act, 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled. xx xx xx xx

33. In *Rupa Rani Rakshit and Others Vs. Jharkhand Gramin Bank and Others*, it has been held that it is a settled legal proposition that challenge to consequential order without challenging the basic order/statutory provision on the basis of which the order has been passed cannot be entertained. Therefore, it is a legal obligation on the part of the party to challenge the basic order and only if the same is found to be wrong, consequential order may be examined.

34. Not only GPA Ext. 1 has been admitted without objection but also GPA Ext. 1 has been admitted into evidence on behalf of the plaintiffs. There is no dispute regarding execution of sale deeds Exts. B and C. In *R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another*, it has been held that when a document is admitted into evidence without objection, it cannot be said to be inadmissible being a photo copy. In *Life Insurance Corporation of India Vs. Narmada Agarwalla and Others*, this Court has held that once a document is marked on admission, contents thereof are also treated to be admitted though truth of correctness of the contents of the document is required to be ascertained from evidence on record.

35. Learned counsel for the appellant also placed reliance on the decision of the Hon'ble Supreme Court in *Ningawwa Vs. Byrappa and Others*, to contend that when a contract or other transaction is assailed on the ground of fraud, such transaction cannot be assailed to be void ab initio, but it becomes voidable at the option of the party alleging fraud. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party alleging fraud. The legal position will be otherwise if there is fraudulent misrepresentation not merely as to the contents of the document but as to its character. With reference to the former, the transaction is void, while in the case of the latter, it is merely voidable.

36. In view of the above, the trial court is found to have correctly refrained from rendering any finding or observation with regard to GPA Ext. 1. The trial court has taken note of the fact that plaintiff no. 3, who was examined as P.W. 1, categorically admitted at paragraph 7 of his cross-examination that he had given power of attorney to defendant no. 2 to sell their joint family land. Also, at paragraph 10 of his cross-examination this witness admitted that on the date of sale of the suit land they were present in the Sub-Registrar office. It is also worthwhile to note that contesting defendant no. 1 has brought on record registration copies of sale deeds Exts. D and D/1, execution of which by defendant no. 2 in favour of other transferees in respect of other land out of the suit plot on the basis of authority derived from GPA Ext. 1 has not been assailed. In such circumstances, the lower appellate court had no basis to render a finding that GPA Ext. 1 cannot be considered to be a valid document empowering defendant no. 2 to sell the land out of the suit plot. Conclusion of the lower appellate court with regard to GPA Ext. 1 to be an invalid and fake document is not sustainable in law.

37. Extent of suit land in respect of which impugned sale deeds have been executed comprises of an area measuring Ac. 0.900 decimals. It is not disputed that the extent of suit property is well within 1/4th share of the suit plot measuring Ac. 4.750 decimals to which defendant no. 2 is entitled. As has been adverted to earlier, initially it was conceded on behalf of the contesting respondents that plaintiffs do not assail validity of sale deeds Exts. B and C on the ground of nonpayment of consideration amount. However, at a later stage, attempt was made to assail the impugned sale deeds on the ground also of nonpayment of consideration amount. Execution of sale deeds Exts. B and C is an admitted fact. P.W. 1 admits that they were present in the office of the Sub-Registrar on the date of execution of the sale deeds. There are explicit recitals in the sale deeds regarding receipt of consideration amount by defendant no. 2. Defendant no. 2 was the most competent person who could have adduced evidence regarding non-payment of consideration amount on the face of pleading and evidence of defendant no. 1 that consideration amount was paid. However, defendant no. 2 did not choose to file any written statement and while deposing in court supported the plaintiffs. In the absence of any pleading by defendant no.

2 with regard to non-payment of consideration amount, assertion made by defendant no. 2 in court while deposing as witness is of no consequence and is to be ignored. In *Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others*, cited by the learned counsel for the respondents, it has been pointed out that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. In such circumstances, there is no scope for the plaintiffs to assail the sale deeds on the ground that there is no passing of consideration amount. Consequently, under the facts and circumstances of the case, sale deeds Exts. B and C have the effect of passing of title of the suit property to the purchaser upon execution and registration thereof.

38. It is well-settled that on execution and registration of a sale deed, the ownership, title and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered from the evidence, recital of the sale deed and other circumstances. In this context, decision in *Bishundeo Narain Rai (Dead) By Lrs. and Others Vs. Anmol Devi and Others*, may be referred to. In *Dulana Dei alias Dolena Dei Vs. Balaram Sahu and Others*, this Court has pointed out that when the immovable property was sold by a registered sale deed and recital in sale deed admitted that the vendor intended to transfer the title in favour of vendee on the very date of execution of sale deed, it cannot be said that for non-payment of consideration there was no passing of title. In *Janak Dulari Devi -vrs.-Kapildeo Rai and Anr. (supra)* and other decisions relied upon by the learned counsel for the contesting respondents also it has been pointed out that normally ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. However, this is not an invariable rule, as the true test of passing of property is the intention of parties. Learned counsel for the appellant has not raised any dispute with such settled principles of law.

39. Reliance was placed on the provisions u/s 4 of the Partition Act and u/s 44 of the Transfer of Property Act by the plaintiffs for assailing the sale deeds executed by defendant no. 2 as a co-sharer in respect of the suit property. Neither Section 4 of the Partition Act nor Section 44 of the Transfer of Property Act prohibits the sale of undivided interest by a co-owner. However, where the sale is in respect of the dwelling house belonging to undivided family, the purchaser cannot claim separate possession. In the decision in *Gourhari Das -vrs. Kalpataru Das and others : 34 (1992) O.J.D. 137 (Civil)* it has been pointed out by this Court that when there is no proof of the fact that the disputed properties are parts of the dwelling house, protection u/s 4 of the Partition Act is not available. In *Harekrushna Mahakud -vrs.- Radhanath Mahakud & Ors. : 2009 (1) CLR 560* also this Court with reference to Section 44 of Transfer of Property Act has pointed

out that transfer by one of the co-owners remains valid to the extent of the share of the transferor.

40. Learned counsel for the appellant has also placed reliance on the decisions of the Hon'ble Supreme Court in Hardeo Rai Vs. Sakuntala Devi and Others, and of this Court in Smt. Bina Sukla Vs. Smt. Meena Devi Panch and Others, to urge that a co-owner can transfer his undivided interest in a joint property and the transferee acquires right to enforce the sale.

41. In the present case plaintiffs have not pleaded that they have their dwelling house on the suit property. On the contrary, in the cause title and verification in the plaint the plaintiffs and while deposing in court P.Ws. 1 and 2 described themselves to be the residents of village Patia which locality is admittedly different from village Chandrasekharpur where the suit property is situated. Evidence of P.Ws. 1 and 2 also is altogether silent regarding existence of their dwelling house over the suit property. In fact, they have not stated regarding existence of any dwelling house on the same. Considering the nature of evidence adduced by plaintiffs, the trial court has rendered a positive finding to the effect that evidence of P.Ws. 3, 4 and 5 with regard to possession of the plaintiffs over the suit property is not acceptable. The finding remains un-assailed. No doubt in the record of rights the suit plot has been described to be of Gharbari kissam which means that the nature of the suit plot is homestead, but in absence of any evidence with regard to existence of dwelling house or even house on the suit property, provisions relating to transfer of undivided property, i.e., dwelling house u/s 4 of the Partition Act or under the proviso to Section 44 of the Transfer of Property Act are not attracted in the present case.

42. Thus, in view of the above discussions, not only GPA Ext. 1 remains a valid document but also there is no scope to declare the sale deeds Exts. B and C to be void or invalid documents. Defendant no. 1 has acquired title over the suit property on the strength of sale deeds Exts. B and C. As a true owner, he has acquired the right to enforce the right, title and interest over the suit property. In the absence of case for declaration of their right, title and interest over the suit property against defendant no. 1, plaintiffs are not entitled to any relief in the suit.

43. Before parting with the judgment, it is observed that it is evident from the fact of impletion of respondent no. 5 in this appeal on the basis of claim of being a lis pendent purchaser that there has been successive sale of suit property. The present suit is one of the instances of the impact of high price rise of land in Bhubaneswar. Scramble for land is leading to unscrupulous transactions even if the owner has already sold the land to bona fide purchaser. As a result, litigations of the present nature are on the rise. Plaintiff nos. 2 and 3 along with defendant no. 2 got the record of rights in respect of the suit plot prepared exclusively in their names to the exclusion of plaintiff no. 1. Plaintiff nos. 2 and 3 executed GPA Ext. 1 in respect of the suit plot in favour of defendant no. 2. Thereafter, plaintiffs combined with defendant no. 2 in instituting the present suit

which is evident from the fact that defendant no. 2 not only did not file written statement but also supported the plaintiffs while deposing in court making a somersault with regard to execution of GPA Ext. 1 and sale deeds Exts. B and C thereby leaving defendant no. 1 a bona fide purchaser in the lurch. In such circumstances, defendant no. 1 is entitled to protection not only under law as stated above but also in equity. In the result, the second appeal is allowed. Judgments passed by both the courts below are set aside. Plaintiffs' suit is dismissed. Parties shall bear their own cost.