
(1996) 11 OHC CK 0027

In the Orissa High Court

Case No : O.J.C. No's. 4421, 4430 and 4431 of 1994

Giridhari Rautray and Prahallad Rautray

APPELLANT

Vs

Sarat Chandra Rautray and Netamani and Others

RESPONDENT

Date of Decision : 01-11-1996

Acts Referred:

Registration Act, 1908 — Section 17, 49

Citation : (1996) 2 OLR 649

Hon'ble Judges : P.K. Misra, J;D.M. Patnaik, J

Bench : Division Bench

Advocate : Ashok Mukherji, for the Appellant; K.D. Kar, For Opp. parties 1 and 2 and A.K. Mohapatra, Additional Government Advocate For Opp. parties 3 and 5, for the Respondent

Final Decision : Dismissed

Judgement

D.M. Patnaik, J.—The petitioners assail the order (Annexure-3) of the Commissioner of Consolidations (opp. party No. 3) under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (for short, "the Act") directing to record the lands in the proportion of half and half between the parties instead of 2/3rd and 1/3rd as claimed by them. The points involved and the parties to the writ petitions being the same, this judgment would dispose of all the three petitions.

2. The dispute relates to the Land Register Khata Nos. 362 and 49 being the Stithiban recorded lands and Khata No. 51 the lands of an intermediary interest in Thana No. 49 of Bhubaneswar Tahasil. The details of the lands with particulars are found in the orders of the consolidation authorities in Annexures-1 and 2.

The case of the parties is that the petitioners represent the branch of Nabaghan, their father and opp. parties 1 and 2 represent the branch of Biswambar, both the branches being the successors of the common ancestor Chintamani. The petitioners claim higher share in the property on two grounds. Firstly that, the

lands covered under Land Register Khata No. 51 was an intermediary interest which vested in the State and thereafter settled in the name of Nabaghan, father of the petitioners in Misc. Case No. 256 of 1959-60 for which the petitioners alone are entitled to be recorded since that being the self-acquired property of their father; and secondly, the claim for such recording is on the basis that both the parties mutually agreed under a Panchyat Faisalanama dated 30-1-1973 that the petitioners would be entitled to 2/3rd and the opposite parties would be entitled to 1/3rd share in the properties in question. Though the Consolidation Officer and the Deputy Director of Consolidations (opp. parties 5 and 4 respectively) held that the petitioners were entitled to be recorded on the basis of such Panchayat Faisalanama, the Commissioner of Consolidations reversed the decision by stating that under the law the parties are entitled to be recorded half and half in respect of the properties in question. This decision of the Consolidation Commissioner is challenged before this Court.

3. Mr. Mukherji, learned counsel for the petitioner strenuously urged that the property covered under Land Register Khata No. 51. i.e. the intermediary interest, should be held as the self-acquired of Nabaghana because the same having been settled with him under the provisions of the Orissa Estates Abolition Act, the opp. parties 1 and 2 cannot claim any interest in that property.

I am unable to accept this contention because there is no material before this Court that the parties were separated when this land was settled in the name of Nabaghana. Therefore, the presumption is that as on the date of vesting the parties were the members of joint family. Any settlement of property in favour of a member of that family except otherwise proved, would enure to the benefit of all the co-sharers. That apart, since the property also formed the subject-matter of the Panchayat Faisalanama dated 30-1-1970 on which the petitioners rely, it is rather admitted case of the petitioners that the property has assumed the character of joint family property and therefore the petitioners claiming exclusive ownership over the property does not arise.

The second contention of Mr. Mukherji is that the family settlement (Annexure-6 in OJC No. 4421/94) is a document which binds the of opposite parties wherein they relinquished 1/3rd interest in the property in question and agreed for reasons recorded therein that the recording should be in the proportionate of 2/3rd and 1/3rd.

Mr. K.B. Kar, learned counsel for opp. parties 1 and 2, seriously controverted the submission of Mr. Mukherji and submitted that the document cannot form the basis of any such recording in favour of the petitioners firstly because it is an unregistered document and secondly even assuming for the sake of argument that the document is a valid one, yet the same was not acted upon, inasmuch as after execution of the sale-deed the petitioners have sold the lands which fell to the share of the opposite parties.

The rival contentions need careful examination.

4. The recitals in Annexure-6 the Faislanama in categorical terms mentions that the partition of the properties in question took place on the basis of the deed itself on that day i. e. 30-1-1973 and there was transfer of ownership "in presentee". Law is well-settled that in such a case the document will be hit by Section 49 of the Indian Registration Act having not been registered as provided u/s 17 of the Act. Therefore, as rightly submitted by Mr. Kar the Panchayat Faislanama does not convey any title in respect of such relinquished share of the opposite parties in the properties under the Faislanama.

5. Being confronted with this legal huddle Mr. Mukherji switched on his submission to an alternative argument stating that even though the document is required to be compulsorily registered yet the document could be admissible for "collateral" purposes and such "collateral" purpose according to Mr. Mukherji is that the opposite parties would be bound by the principles of estoppel by conduct inasmuch as they have relinquished their interest in the said property in question. For that purpose Mr. Mukherji has relied on the decisions of the Supreme Court in the case of Savita Dey Vs. Nageswar Majumdar and Another, and Kale and Ors. v. Deputy Director of Consolidation and Ors. : AIR 1978 SC 807.

So far as the decision in the case of Express Newspaper (supra) is concerned the same related to a case of promissory estoppel. I am afraid that it will be incorrect to apply the principles laid down in that case to the present case. The concept of promissory estoppel and the concept of estoppel by conduct are applicable to circumstances which are totally different. So far as the decision in Kale's case (supra) is concerned, the same is not applicable to the present case since in that case the dispute was between the two sisters on one side and their nephew being the son of the third sister on the other. In the family settlement in that case the parties were legitimately allotted equal shares but during the consolidation operation one of the parties was recorded in respect of a certain share. Therefore the fact in the case is just apposite to the facts in the case at hand. In the case before us the so-called family settlement brings out inequality in the share. Therefore, the facts are different in the two cases. That apart, the Court in para 24 of the judgment observed that :

"The Court has also clearly laid down that a family being binding on the parties to the arrangement clearly operates as an estoppel so as to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same."

Admittedly, the opposite parties have not taken any advantage in the present case. Rather this worked out against their interest. Once this clearly indicates a relinquishment of the interest in the property, the same cannot be valid except under a duly registered deed of relinquishment. There cannot be any estoppel against law. If the opposite parties are entitled to half interest in the property they cannot be divested on the basis of an unregistered document. The law on the point may be appreciated in the following manner.

6. In the case of Gerua Biswal Vs. Kshyama Biswal, a Division Bench of this Court held that, where in the case of an unregistered Kararnama when the members of a joint family effect a severance in status and each of the parties gave up his claim in respect of certain family lands already in the exclusive possession of the other, the document is inadmissible u/s 49 of the Indian Registration Act as evidence of any transaction affecting the properties for want of registration and further no oral evidence can be given to prove the terms of the partition in view of Section 91 of the Evidence Act, Though the document could be used for "collateral" purpose for proving the severance of joint family status it would not be admissible to prove the nature of possession subsequent to the execution of the document because that would be using the document virtually for proving the allotment of the properties at the partition, the very purpose for which it is prohibited to be used u/s 49 of the Registration Act. In a subsequent decision in the case of Dandapani Sahu v. Kshetra Sahu and Ors. reported in 31 (1965) CLT 33 this Court held that there is no dispute over the proposition to an unregistered partition deed can be used as an evidence to show severance of joint status, but it is not admissible to prove the actual allotment of specific properties to different shares. In the case of Gurnam Singh Vs. Smt. Ass Kaur and Others, the Court held that in an unregistered document prepared before the Panchayat containing a statement that a party before the said Panchayat relinquished his right in certain properties in favour of another party is inadmissible. In the cases of Jayaram Jati and Anr v. Prasadi Chandra Biswal reported in ILR 1968 Cut 943 and Padmanabha Gountia and Anr. v Balganjan Patel and Ors. 25 (1959) CLT 147 this Court held that where the "collateral" transaction in proof of which the contents of an unregistered document are to be admitted is itself to be effected by a registered document, then the proviso to Section 49 of the Registration Act shall not operate in favour Of such "collateral" transaction.

In the case at hand, if we accept the submission of Mr. Mukherji that "collateral" transaction would mean as binding the opposite parties in regard to relinquishing their share in the property, then that itself would amount to creation of title and ownership in favour of the petitioners in respect of the property so relinquished. This is what exactly prohibited under the provisions of Section 49 of the Registration Act.

7. Mr. Kar, the learned counsel for the opposite parties, submitted that Neta, mother of opp. party No. 1 having a legitimate share in the property, being not a signatory to the said Faislanama, the document is invalid.

Mr. Mukherji, to meet this argument of Mr. Kar relying on the decision of Autoways (India) Vs. Commissioner of Income Tax, submitted that the law is well-settled that within a joint family, there may exist a smaller joint family with a Karta/Manager and any acquisition or disposition of property by such Karta/Manager shall bind the other co-sharers. I do not propose to give a decision on the point so raised since for the reasons already given in the foregoing

paragraphs. I have held the Faislanama as not affecting the disputed lands thereunder. Therefore, the question of opposite party representing the interest of his mother would not arise.

8. In the result, the writ petitions have no merit and are dismissed but without any cost.

P.K. Mishra, J.

I agree.