

(1991) 02 OHC CK 0002

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 1763, 1764 and 1765 of 1983

Hemamani Swain and Others

APPELLANT

Vs

Kulamani Swain and Others

RESPONDENT

Date of Decision : 07-02-1991

Acts Referred:

Citation : (1991) 1 OLR 377 : (1991) 1 OLR 337

Hon'ble Judges : L. Rath, J;K.C. Jagadeb Roy, J

Bench : Division Bench

Advocate : S.K. Dey, for the Appellant; M.K. Mohanty, on behalf of Y.S.N. Murty, for Opp. party No. 3 and H.K. Jena, Additional Government Advocate for Opp. party No. 4, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—These three cases arise out of the same order of the Consolidation Commissioner and relate to the same questions of fact and law and hence are disposed of by this common judgment. The order passed in revision cases by the Consolidation Commissioner remanding the cases to the -Consolidation" Officer for effecting a fair partition amongst the parties as indicated by him, overruling the case- of the petitioners that there had been a previous partition amongst the parties effected by a registered deed of partition on 27-7-1948, has led the petitioners to come before this Court assailing the order. For an appreciation of the facts involved in the case, the genealogy of the parties is necessary to be referred to and is as follows:

Genealogy ----- Ghana | ----- | | Nilakantha Govinda | | Dharmu Gopi | | Harihar ----- (Pet. 1) | | | Udaya Arjuna Kanhu | (Pet. No. 2) (O.P. No. 3) | ----- | | Kula Krushna (O.P. No. 1) (O.P. NO. 2) It was the case of the opp. party Nos. 1 and 2 that their father Udaya was the adopted son of Dharmu and that after such adoption, the petitioner No 1 Harihar was born to Dharmu. The facts, which are not disputed are that on 27-7-1948 a partition was purported to be effected through a

registered deed (Annexure-1) between the petitioner No. 1 his father Dharmu the opp. party No. 1. the opp. party No. 2, the petitioner No. 2 and Gopinath. The opp. party No. 3, who was then a minor, was not shown in the deed of partition. On 16-8-1967 the opp. party Nos. 1 and 2 sold some lands through a registered sale deed (Annexure-2). In such deed the fact of prior partition on 27-7-1918 was referred to. On the day the registered deed of partition was executed, Dharmu also executed another registered deed annexed to the writ petition as Annexure-3 purporting to dedicate some of his self-acquired properties to the family deity, Bhagabat Goswami and appointing the petitioner No. 1 as Marfatdar of the properties. On the commencement of the consolidation proceeding the opp. party Nos. 1 and 2 filed objection cases u/s 9 (3) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (hereinafter referred to as "the Act") in respect of Khata Nos. 99, 100 and 101, i.e. the properties enjoyed, and possessed by the opp. party No. 3 staking their claim to it as grandsons of Gopinath and that after death of Gopinath such property being also heritable by them. Their claim was resisted with the contention that in the partition, Kanhu was not allotted any share with the understanding that he would inherit the share of Gopinath, The objection of opp. party Nos. 1 and 2 having been rejected by the Assistant Consolidation Officer they preferred appeals before the. Deputy Director of Consolidation where their claim was likewise negatived. In revisions preferred before the Commissioner, two petitions were filed on 22-1-1981 and 25-4-1981 by the opp. party Nos. 1 and 2 to implead the present petitioner Nos. 1 and 2 as parties to the case and to include some other properties for adjudication in the revision proceedings. Such properties were the properties which had been dedicated as self-acquired properties by Dharmu to the family deity under Annexure-3. The Commissioner allowed the revisions holding that neither the registered deed of partition nor the registered deed or dedication to the family deity had been acted upon and that there were bhag chasis upon the land who also needed to be recorded as against the shares of the petitioner Nos. 1 and 2 and the opp. party No. 3.

2. Mr. Dey, the learned counsel appearing for the petitioners in all the cases, has urged in assailing the order that the Commissioner could not have included and decided regarding the properties which issues were for the first time agitated before him in revisions and regarding which no objection's had been filed at; any time by the opp. party Nos. 1 and 2 and that further he had no authority to declare the registered deed of partition or the registered deed of dedication as having not been acted upon.

3. A perusal of the order of the Commissioner shows him to have relied upon 5.3 (1982) CLT 547 (B. N. Das and Ors. v. Bijay Ketan Mohanty) for impleading the petitioner Nos. 1 and 2 as parties to the revision proceedings. The decision has no application since the question before the Commissioner was not whether the petitioners were to be impleaded as parties at that stage, but whether the subject-matter of the dispute, as was before the Commissioner, could be widened so as to include other properties in respect of which no objections had been

raised at any earlier point of time. It is not disputed by the learned counsel for the petitioners that If in deciding the case the Commissioner felt that the presence of the petitioner Nos. 1 and 2 was necessary, they could be impleaded as parties. The scheme of the Act contemplates that at the land register preparation stage the parties who are aggrieved by the land records can file objections. Such objections are adjudicated upon as regular Us between the parties with opportunity given to them to adduce evidence both oral and documentary if necessary and on consideration of such materials the objections are disposed of. The decisions are subject to appeal and revision. Admittedly the opp. party Nos. 1 and 2-never filed objections before the Assistant Consolidation Officer with respect to the lands covered under Annexure-3 and did never challenge the dedication made by Dharmu. Thus such a contention could not have been raised before the Commissioner for the first time. It also cannot be said that the decision on the question of validity of Annexure-3 was intrinsically and essentially necessary for deciding the validity of the objections raised as regards recording of the lands in Khata Nos. 99, 1Q0 and 101.

4. That apart, the question of validity of the registered deed of partition or that of Annexure-3 could hardly have been taken up by the Commissioner. It is the settled-view of law that wherever the right, title and interest of the parties emanate from a document which is void in law, the authorities under the Act would have jurisdiction to decide the question of right, title and interest, but where the document is a voidable one and the determination of right, title and interest relates to such document, the matter has to be left to the care of the Civil Courts. Dealing with the question, it was held by this Court in 1988 (I) OLR 185 (Rama Chandra Bal and Anr. v. Suresh Chandra Nayak and others):

"The position has thus been made clear that where the document is one which is ab initio void, say for example as was in the case before the Supreme Court, executed by a person without having competence to execute it, either wholly or partly, the consolidation authorities would have undoubtedly the power to decide the question of its invalidity on that count and may for the purpose adjudicate upon the contested rights of the parties In deciding such rights, when they come to the conclusion that a document has been executed by a person who had no authority to execute the same and hence being a void document needs no cancellation by a competent Court, they have to proceed to adjudicate the right, title or interest of the parties in respect of the land as being the designated authorities under the statute for the purpose. The other examples of such type of documents would be where a document has been executed admittedly by a minor or an unregistered document where registration is necessary or other similar class of documents. But save only such documents, if the documents are such which are to be actually cancelled so as to nullify or wipe out their effect, say for example, where the execution of the document is admitted but challenged on the ground of having been obtained by fraud or as a sale without consideration, or other similar documents, the jurisdiction is that of the Civil Court to pronounce upon their invalidity and cannot be encroached upon by the

consolidation authorities."

5. A registered deed of partition would prima facie point to the fact of partition having taken place under it. The deed is executed by persons competent to execute it. It is as such not ipso facto void document though it may be a voidable one. A suit may undoubtedly be brought for partition in spite of such registered deed of partition alleging that the deed of partition had never taken effect or that it was a sham deed. Such a declaration can only be made by the Civil Court the document not being, ab initio void but as needing a declaration to that effect by a competent Court, The Commissioner was thus not authorised to declare that the partition had not taken effect and that the deed of partition was in fact a document created to avoid payment of agricultural Income Tax since such a finding in effect was to order that the registered deed of partition was being cancelled. A question arose in Civil Revision No. 630 of 1986 (Hadi Sewa and Anr. v. Krushna Chandra Pradh an and another), decided on 18-9-1989, that when a suit is brought to set aside an ex parte decree for partition on the ground of fraudulent suppression of summons and being a void one, whether court-fee is payable u/s 7(iv-a) of the Court-foes Act. It was held that since the relief claimed by the petitioners- of the case was to declare a decree previously obtained void, the relief in essence was one to set aside the decree and court-fee was payable under Section.

The decision was based upon a previous decision of this Court in Rabindranath Subudhi Vs. Simhadri Subudhi and Others, where a suit brought for . declaring a previous decree for partition having been obtained fraudulently was held a suit impliedly asking for cancellation of the decree. There is qualitatively no difference between seeking a declaration to set aside a previous decree" of partition on the ground of fraud and that of a decree for declaration of a registered deed of partition as being a sham transanction, and hence it would amount to actually seek a cancellation of the deed of partition. Since the functionaries under the Act are not constituted authorities to cancel such deed, the Commissioner could not have returned a finding of the registered deed of partition having not been acted upon. Similarly the Commissioner could also far less declare the deed of dedication "of the property to the family deity as having not been acted upon. Even otherwise we find that not only the question of registered deed of partition had not been raised by the opp. party Nos 1 and 2 at any "previous stage but that in effect they had also throughout accepted such deed of partition. In the very revision petition before the Commissioner, the statement of facts referred to the partition on 27-7-1948 itself and the appellate order also show that they had as a matter of fact relied upon the partition deed.

6. In that view of the matter, we have no hesitation to hold that the order if the Commissioner is one not sustainable in law and hence is quashed and the orders of the Assistant Consolidation Officer and the Deputy Director of Consolidation are restored. The writ petitions are allowed. Hearing fee is assessed at Rs. 300/-.

K.C. Jagadeb Roy, J.

I agree