
(2018) 11 OHC CK 0003

In the Orissa High Court

Case No : Regular Second Appeal No. 35 Of 2017

Jadab Sri Raghunath Barik

APPELLANT

Vs

Sri Harekrushna Sahu And Others

RESPONDENT

Date of Decision : 19-11-2018

Acts Referred:

Code Civil Procedure, 1908 — Section 96, 100, Order 41, Rule 27
Orissa Land reforms Act, 1960 — Section 22

Citation : (2018) 11 OHC CK 0003

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Advocate : Samir Ku. Mishra, J. Pradhan, S. Rout, P.S. Mohanty, S.K. Biswal, J.K. Mishra

Final Decision : Dismissed

Judgement

D. Dash, J

1. This appeal under section 100 of the Code of Civil Procedure (for short, called as "Code") has been filed challenging the judgment dated 15.12.2016 passed by the learned District Judge, Balasore in R.F.A. No.27 of 2013 followed by the decree, confirming the judgment and decree passed by the learned 1st Additional Senior Civil Judge, Balasore in C.S. No.52 of 1998-I

The predecessors in interest of respondent nos.1 to 8, respondent no.9 and respondent no.10, as the plaintiffs, have filed the suit for partition and permanent injunction arraying this appellant as defendant no.13. The suit having been preliminarily decreed, this appellant (defendant no.13) had carried the first appeal under section 96 of the Code. The appellant having failed to get the desired result in the first appeal, has approached this court with this second appeal.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial

court.

3. The plaintiffs' case is that the property, involved in the suit, originally stood recorded in the name of Ex-Zamindar under Anabadi Khata in the C.S. record of right. It is stated that one Sukamani Dasi, W/o-Panchanan Nath had taken the property from said Ex-Zamindar on payment of salami in the year 1944. After vesting of the Ex-intermediary interest in respect of the land by virtue of the provisions of the Orissa Estate Abolition Act coming into force, tenancy ledger had been opened in the name of said Sukamani Dasi and she accordingly, went on paying rent to the State. It is stated that when she was in possession of the land in the suit, being in need of money, sold a portion to Upendre Behera and his nephew, namely, Taranisen Behera for valuable consideration. She had executed registered sale deed dated 18.07.1961 to that effect. Pursuant to said sale, possession of the suit land had been handed over by Sukamani Dasi to the vendors, namely, Upendra Behera and Taranisen Behera. When they were in possession of the land, Taranisen Behera died unmarried for which his interest in the purchased property came to be devolved upon Upendra Behera. So, Upendra Behera, while continuing to possess the entire purchased property, as its sole owner, sold a portion of it measuring Ac.1.20 decimals to defendant nos.1 to 6 by registered sale deeds dated 25.02.1981. The defendant nos.1 to 6, by virtue of their purchase, became the owner of the land in question and got those mutated in their name. At this point of time, it is said that although they had purchased land measuring Ac.1.20 decimals, the land measuring Ac.1.28 decimals had been mutated in their name. It is next said that subsequent to the above sale, Upendra Behera gifted land measuring Ac.0.32 decimals to defendant no.11 by registered gift deed dated 18.06.1981 and delivered possession of the gifted land to her. After the above sale and gift, Upendra Behera and his sons, who are defendant nos.7 to 10, sold the remaining land measuring Ac.0.57 decimals to the plaintiffs by registered sale deed dated 12.06.1985 having taken permission as required under section 22 of the O.L.R. Act in Misc. Case No.175 of 1984 and delivered possession of the same. The plaintiffs thus claim to be the owner in possession of the said purchased property.

It is said that since during that time, the major settlement operation was at its fag end, the final ROR in respect of the purchased property came out in the name of Upendra Behera and Taranisen Behera. So, taking advantage of such recording and ignoring the transactions and throwing those to wind, the defendant nos.7 to 10, who are the sons of Upendra Behera, sold the property measuring Ac.0.48 decimals in favour of defendant no.12, who in turn, sold the same to defendant no.13.

4. It is the case of the plaintiffs that all the purchasers of Upendra Behera are in possession of their purchased property being demarcated. It is stated that since this defendant no.13, by virtue of such sale deed, has not been clothed with any right, title and interest in respect of the said so called purchased land and being not in possession of the same, tried to create disturbance in peaceful possession

of the suit land by the plaintiff, the suit has been filed.

5. The defendant nos.1 to 6, in their joint written statement, asserted that since the parties are in possession of their property separately since long, there arises no scope for further partition of their property. They claim to be in possession of their purchased property measuring Ac.1.20 decimals keeping it under enclosure and using the same as their homestead land, with a house standing over there. They alternatively stated that in case of partition, their purchased property of Ac.1.20 decimals has to be accordingly adjusted and carved out.

Other defendants including this defendant no.13 (present appellant) did not contest the suit.

6. The trial court, on the above rival pleadings, framed as many as five issues. Taking up the issues as to the tenability of the claim of partition of the property described in the plaint and the interest and entitlement of the parties thereto, on examination of the evidence and upon their analysis, finding has been recorded by the trial court in favour of the plaintiffs and accordingly, the preliminary decree has been passed.

7. At this stage, for better appreciation, the order passed by the trial court is placed hereunder:

"O R D E R

The suit be and the same is decreed preliminarily on contest against defendant no.1 to 6 and ex-parte against the defendant no.7 to 13, but in the circumstances, without costs. The plaintiffs are entitled to get Ac.0.57 decimals of land, defendant No.1 to 6 are entitled to get Ac.1.20 decimals of land and defendant No.11 is entitled to get Ac.0.32 decimals of land out of the suit land respectively by virtue of their purchase. The defendants No.7 to 10, 12 and 13 are hereby permanently restrained from interfering in the peaceful enjoyment of the plaintiffs, defendant No.1 to 6 & 11 on the suit land. The plaintiffs, defendant No.1 to 6 and 11 are directed to effect amicable partition of the suit land within two months hence, failing which any of them is at liberty to get the same partitioned through the process of law, in which event, the Civil Court Commissioner shall be deputed to carve out the shares of the parties taking into consideration the possession of the respective parties."

8. In the first appeal filed by this defendant no.13 in questioning the judgment and preliminary decree on merit, it was contended that the suit at the instance of the plaintiffs for partition of the properties is not maintainable as there is no unity of title and possession. Next contention was that the properties purchased by the plaintiffs, defendant nos.1 to 6 and gifted in favour of defendant no.11 are unidentifiable for the reason that those are left without necessary boundary description. Another contention was raised that the gift has not been proved as mandated under law for which defendant no.1 cannot derive any benefit out of that. This defendant no.13 in that first appeal had filed an application under

Order 41, Rule 27 of the Code to permit him to adduce additional evidence, which is the sale deed executed by defendant nos.7 to 10 in favour of defendant no.12 and the subsequent sale deed executed by defendant no.12 in favour of said defendant no.13, which are the foundation of the claim of defendant no.13's title over the land covered under those documents.

The appellate court, considering the rival contention, has formulated a point for determination as regards the plaintiffs claim of title over their purchased property with an alternative prayer for partition. Searching for necessary answer on the said point, the lower appellate court has gone to thoroughly examine all the sale deeds and gift deeds. The conclusion has been that when no such land was available in the hands of Upendra Behera, after all the transactions, the question of his sons, i.e, defendant nos.7 to 10 coming to succeed the property on the death of Upendra Behera does not arise and, therefore, the transactions of sale made by them in favour of defendant no.12 as also the subsequent transaction made by defendant no.12 in favour of defendant no.13 are absolutely of no value in the eye of law, not even worth the paper written on. With such finding, the first appeal has been dismissed.

9. Learned counsel for the appellant submitted that before going to dispose of the appeal, the lower appellate court has not rightly disposed of the application filed under Order 41, Rule 27 of the Code filed by the defendant no.13. So, it was contended that the judgment and decree passed by the lower appellate court are not sustainable in the eye of law. It was further contended that both the courts below have failed to appreciate the most important contention that in the absence of any unity of title and possession in respect of the properties by the parties, no preliminary decree for partition can be passed. Therefore, she submitted that these are the substantial questions of law which surface in this case for being so formulated to receive their answer, meriting the admission of this appeal.

10. In order to address the submission of the learned counsel for the appellant, at the cost of repetition, it may be stated that this defendant no.13 had not contested the suit by filing written statement and it is also not his case that he had not been noticed in the said suit.

Fact remains that after passing of the said preliminary decree, this defendant no.13 had called in question the judgment and preliminary decree passed by the trial court on merit by carrying the first appeal. The lower appellate court has mentioned in its judgment that defendant no.13 had filed an application under Order 41, Rule 27 of the Code seeking permission to adduce additional evidence. Those are the sale deeds by which this defendant no.13 claims to have purchased the property from defendant no.12. Practically the existence of these sale deeds are not denied. The moot question is whether under these sale deeds, title in respect of the land covered under those, have ultimately come to the hands of this defendant no.13 or not. It is the case of the plaintiffs that by virtue of these documents which had been created by taking advantage of mere

recording of the land made in the major settlement record of right because of the unavoidable circumstance, this defendant no.13 when created disturbances in their possession, they have filed the suit.

11. In fact the lower appellate court has not at all taken any adverse view for non-production and for non-proving of these documents. The lower appellate court appears to have made a detail analysis of the evidence, more importantly the documentary evidence and then it has found that the vendors of the defendant no.12 from whom this defendant no.13 had purchased the property were left with no land in their hand so as to transfer the same in favour of the defendant no.12. The lower appellate court thus having found the sale deed executed by defendant nos.7 to 10 in favour of the defendant no.12 to be in respect of land which were not then in existence in their hands and had already been transferred to others, this defendant no.13's claim of title, by virtue of his purchase from the defendant no.12, has not been honoured and has accordingly been rejected.

The relevant part of the judgment of the lower appellate court as reproduced hereunder depicts a clear picture:

"13. From the aforesaid recording, it appears, when Upendra and his nephew Taranisen purchased an area measuring Ac.2.09 decimals from Sukamani Dasi under Ext.10 and after the death of Taranisen, the entire property devolved upon Upendra and subsequently Upendra transferred the entire property in favour of plaintiffs, defendant No.1 to 6 and 11 through Registered Sale Deeds and Gift Deed, recording of an area measuring Ac.1.28 decimals and Ac.0.48 decimals respectively against holding No.255/418 and 255/452 in the name of Upendra and Taranisen is absolutely wrong. When there is no such land available with Upendra Behera or after the death of Upendra, his sons never succeeded the property, taking advantage of such recording, the defendant no.7 to 10 sold away an area measuring Ac.0.48 decimals which is the purchased property of the plaintiffs, as it evident from plot index under Ext.14, in favour of defendant no.12, who subsequently transferred the same to the defendant no.13, i.e, the appellant, more particularly during the pendency of the suit. Neither the defendant no.7 to 10 nor the defendant no.12 nor even the defendant no.13 contested the suit. The defendant no.13 cannot derive any title over his purchased property as the sale deed executed by defendant no.7 to 10 is non-est in the eye of law....."

The above factual findings are not questioned by this defendant no.13. Nothing is shown before this Court that the above conclusion is totally erroneous being contrary to the evidence and have been arrived at ignoring any such other evidence touching their claim or by taking note of some facts and circumstances, which are not available in the evidence and thus being extraneous.

In that view of the matter, the lower appellate court having found the application under Order 41, Rule 27 of the Code filed by the defendant no.13 to be devoid of

merit, no such fault is found with it.

The aforesaid discussion and reasons repel the submissions of the learned counsel for the appellants. Accordingly, this Court is not in a position to search out any such substantial question of law for being formulated in this case for their answer, meriting the admission of the appeal.

12. Resultantly, the RSA is dismissed. No order as to cost is passed.