

(2008) 01 OHC CK 0056

In the Orissa High Court

Case No : Regular Second Appeal No. 608 of 2005

Mangaraj Paspupalak and Others

APPELLANT

Vs

Krushna Chandra Pasupalak and Others

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25, 151

Citation : (2008) 1 OLR 507 Supp

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Advocate : K.B. Kar and Associates, for the Appellant; R.K. Nayak and Associates for Res. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Parichha, J.—This is a Defendants appeal against the judgment and decree passed by the learned District Judge, Cuttack in R.F.A. No. 117 of 2003 modifying the judgment and decree of the learned Civil Judge (Junior Division), 2nd Court, Cuttack in Title Suit No. 72 of 1998. The following genealogy will show the relationship between the parties.

_____ | | Sripat Abakash, | | Chaitanya _____
_____ | _____ | | | | | Daitary Hema (pt.2) Jai Hadibandhu |
Dasarathi Pranakrushna | | (after his death | | extinguished) rushnachandra
_____ | _____ (Pt.f) | | | Mangaraj Biranchi Baraju (D-1) D-2) |
Sarat(D-4) Judhistir(D-3)

2. Respondents, as Plaintiff, filed the above noted suit asking for partition of the suit properties claiming Ac.0.31 decimal 21/2 kadies in the same leaving a balance land measuring Ac.0.15 (sic) kadies to the share of the Defendants. The essential pleading of the Plaintiffs was that they are son and mother representing the branch of Sripati whereas Defendants 1 to 4 are heirs and successors of the branch of Abakash, who was the brother of Sripati. Sripati and Abakash had 8

annas share each in the family property measuring Ac. 0.49 decimals. Out of these lands, Ac.0.02 decimals were acquired by the Irrigation Department for canal and compensation for this land was received by the family. Prakakrushna succeeded 4 annas share of his father Hadibandhu and sold his share to Daitari, son of Chaitanya under registered sale deed dated 13.6.1950 as a result Daitary and his mother Hadi not only succeeded to 8 annas share of Chaitanya but also the 4 annas share of Prakakrushna. Daitary sold Ac.0.04 dec. land out of his share to Dasarathi as a result Dasarathi roughly possessed his Ac.0.11 21/2 kadies + Ac.0.04 dec. Daitary further sold Ac. 0.06 decimals to Madhusudan Pasupalak, the husband of Plaintiff No. 2 under registered sale deed dated 2.3.1957 and Ac.0.19 decimals 5 kadies to Plaintiff No. 1 by sale deed dated 15.7.1967 as a result Daitari was left only Ac.0.5 decimals 71/2 kadi, which on his death was succeeded by his mother Hadi. This share of Hadi also devolved upon the Plaintiffs and in the process they became entitled to Ac.0.31 decimals 21/2 kadies of land, whereas Defendants remained entitled to Ac.0.15 decimals 71/2 kadies of land. Plaintiff No. 1 was working outside the State and Plaintiff No. 2 was an illiterate lady and therefore, they could not properly present their claim before the settlement authorities as a result there was wrong recording in the settlement records of right, which gave rise to misunderstanding between the parties. Plaintiffs, therefore, filed the suit for declaration of their right, title and correction of the settlement records. But the Defendants in that suit took a plea that the Plaintiffs should file the suit for partition. Therefore, the Plaintiffs filed the suit for partition seeking the aforementioned reliefs.

3. Defendants, who are the present Appellants did not file written statement and did not also take part in the hearing of the suit. So, the suit was decreed ex parte. But while decreeing the suit, learned trial Court observed that the Plaintiffs are entitled to Ac.0.05 decimals 71/2 kadies towards the share of Daitari and Ac.0.06 decimals which they succeeded after the death of Madhusudan and allotted allotting Ac.0.11 decimals 7? kadies only to their share. Being aggrieved, the Plaintiffs filed an appeal wherein they basically took the plea that the apportionment of share by the learned trial Court is against the weight of evidence on record as well as contrary to the provisions of law. In that appeal, the present Appellants appearing as Respondents took part in the hearing of the appeal. They also filed a petition bearing C.M.A. No. 135 of 2005 under Order 41, Rules 22, 23, 25 read with Section 151, CPC for open remand of the suit for fresh disposal. The learned 1st appellate Court after considering the submissions of the parties and the evidence on record, dismissed CMA No. 135 of 2005 and allowed the appeal allotting Ac.0.31 decimals 21/2 kadies of land out of Schedule "B" property to the Plaintiffs. The Appellants have challenged the said judgment and decree in this appeal.

4. Large number of questions was noted in the appeal memo, but learned Counsel for the Appellants confined his attack on the following questions of law:

(i) Whether rejection of the prayer of the present Appellants for open remand of

the suit was against the provisions of Order, 41, Rule 23-A of the Code of Civil Procedure?

(ii) Whether the judgments of the Courts below are unsustainable for non-consideration of the effect of pendency of C.S. No. 72 of 1998 and the orders of the OEA proceeding?

5. As per Order 41, Rule 23-A CPC order of remand can be made in cases disposed of otherwise than on preliminary points where the decree is reversed in appeal and re-trial is considered necessary. It is well settled that power of open remand under Order 41, Rule 23-A is to be used sparingly as because public policy is that litigation is to be finally concluded as early as possible. So, the appellate Court must make all endeavour to answer the disputed findings and only when in spite of all efforts, it is not possible to decide the disputed questions one way or the other, it would remand the suit for fresh disposal. In other words, the appellate Court is to make all possible efforts to answer the findings from the evidence on record and in case it cannot be done from the existing materials, it may remand the case for fresh disposal giving reasons. In the present case, the Plaintiffs prayed for partition claiming their specific share in the suit property. The Defendants did not file any written statement and did not lead any oral or documentary evidence before the trial Court. Even after the ex parte decree, they did not file any appeal or cross appeal. Since there was no counter pleading or evidence from the said of the Defendants and evidence led by the Plaintiffs were available on record for perusal of the Court, learned appellate Court held that there was no necessity for remand of the suit to the trial Court for fresh disposal and decided the disputed questions from the existing materials itself. Such approach and action are not at all contrary to the provisions of Order 41, Rule 23-A of the Code of Civil Procedure

6. In paragraph 7 of the plaint, the Plaintiffs mentioned that due to incorrect noting in the -settlement records, there was some confusion between the parties and therefore, they filed Title Suit No. 60 of 1995 in the Court of learned Civil Judge (Junior Division), 1st Court, Cuttack for declaration of their right, title in respect of their undivided interest in the suit property. Learned Counsel for the Appellants submitted that the Courts below could not have passed the decree for partition when the aforesaid suit, i.e., T.S. No. 60 of 1995 was pending. According to him, the judgment and decree of the Courts below are invalid for non-consideration of the effect of this title suit. First of all, there was no written statement by the Defendants incorporating such plea of non-maintainability of the suit due to pendency of T.S. No. 60 of 1995. So, there was no occasion for the Courts below to consider this aspect. Even otherwise, it was available on record that the Defendants in their written statement in T.S. No. 60 of 1995 pleaded that in spite of filing that suit, the Plaintiffs should file the suit for partition and after such pleading of the Defendants, the Plaintiffs filed the present suit for partition, which the Defendants do not contest. In that situation, pendency of T.S. No. 60 of 1995 could not have formed a bar for the partition

suit. When there was no issue in this regard before the Courts, non-consideration or not giving any finding in this regard will not render the impugned judgments and decree illegal or unsustainable.

7. On a close reading of the judgments of the trial Court as well as first appellate Court, it is seen that both the Courts below took into consideration the pleading and evidence on record and came to the concurrent conclusion that the Plaintiffs inherited Ac.0.5 decimals 71/2 kadis left by Daitary and Ac.0.06 dec. which was left by Madhusudan. Since learned trial Court did not consider as to what happened to the land purchased by Krushna Ch. Pasupalak (Plaintiff No. 1) from Daitary"" measuring Ac.0.19 decimals 5 kadies although such sale was not disputed by any of the parties, learned 1st appellate Court ruled that besides the above said Ac.0.11 decimals 7? kadies of land, the Plaintiffs, who are son and mother are also entitled to Ac.0.19 decimals 5 kadies purchased by Plaintiff No. 1 from Daitari. So, the allotment of Ac.0.31 decimals 21/2 kadies towards the share of the Plaintiffs could not have factually or legally faulted.

8. For the aforesaid reasons, the substantial questions of law raised by the Appellants are all answered in negative. The impugned judgment passed in RFA No. 117 of 2003 is, therefore, confirmed and the appeal is dismissed on contest with cost.