

**(1982) 04 OHC CK 0013**

**In the Orissa High Court**

**Case No : Second Appeal No. 51 of 1977**

Md. Yakub Ali and Another

APPELLANT

Vs

Md. Shibli and Another

RESPONDENT

**Date of Decision :** 30-04-1982

**Acts Referred:**

Orissa Estates Abolition Act, 1951 — Section 6, 7

**Citation :** AIR 1982 Ori 261 : (1982) 53 CLT 600

**Hon'ble Judges :** P.K. Mohanty, J

**Bench :** Single Bench

**Advocate :** G. Rath, R.K. Rath and N.C. Panigrahi, for the Appellant; R.K. Misra, M. Mohanty, A.K. Mahapatra and J.R. Dash, for the Respondent

**Final Decision :** Dismissed

## Judgement

P.K. Mohanty, J.—The second appeal, by defendants 1 and 3, is against a decree of affirmance and arises out of an action for partition.

2. The plaintiff's case may be briefly stated as follows:

The suit land measuring 2.41 acres originally belonged to Tadmul Alii, He died leaving behind him his two sons namely Sahabad and Abdul Rasid who got equal shares in the suit property, The plaintiff represents the branch of Abdul Rasid while the defendants represent the branch of Sahabad. Abdul Rasid, the father of the plaintiff, transferred his half share in the property in favour of his wife Hazira Bibi by a registered Haba-bilawaz (vide Ext. 1). On 7-12-51, Hazira Bibi sold a portion of the property out of her 8 annas share in favour of the plaintiff (vide Ext. 3). She also made an oral gift in respect of the remaining property in favour of the plaintiff. Thus, the plaintiff became the full owner of the entire 8 annas share of Abdul Rasid, After the death of Sahabad his three sons inherited his half share in the property. The third son Mohammad relinquished his share in favour of defendant No. 1 Yakub. On 21-10-54 defendant No. 1 made a gift of certain property out of his share in favour of his daughter, defendant No. 3 (vide Ext. G).

The plaintiff's contention is that there was no partition by metes and bounds but the parties were possessing separate portions of the property for the sake of convenience and accordingly separate note of possession was made in the C. Section Khatian. The plaintiff demanded amicable partition but to no effect, Hence the suit.

3. The suit was resisted by defendants 1 and 3. Their contention was that the suit properties having been already partitioned by metes and bounds between Hazira Bibi and the sons of Sahabad, a suit for re-partition did not lie, It was also contended that the parties had intermediary interest in the suit property and after abolition of the estate the plaintiff applied for settlement under Sections 6 and 7 of the O.E.A. Act and the suit plots Nos. 2432, 2433, 2435, 2441, 2442, 2445 and 2395 were settled in his favour. Similarly defendant No. 1 applied for settlement and suit plots Nos. 2434, 2436 to 2440 and 0.03 acre out of plot No. 2395 were settled in his favour. It was contended that as the lands have been separately settled in favour of the parties no suit for partition Would lie,

4. Defendant No, 2 who is the widow of the second son of Sahabad filed a separate written statement supporting the plaintiff's case. She contended that defendant No. 1 had only 2 annas 6 pies Interest in the suit property and her husband Jafar Hossain had 5 annas 6 pies interest. Jafar Hossain transferred his 5 annas interest in her favour by a registered Hiba-bil-awaz dated 5-6-39 and after her husband's death the rest 6 pies interest devolved on her. She sold 4 annas interest in the property in favour of defendant No. 1 by a registered sale deed dated 5-10-45 and retained 1 anna 6 pies interest for self. She prayed for carving out her 1 anna 6 pies interest

5. The trial Court, on a consideration of the evidence on record, disbelieved the defence plea of pre-partition and accordingly passed a preliminary decree for partition with certain directions as to how partition is to be effected. On appeal, the learned Addl. District Judge agreed with the trial Court and dismissed" the appeal,

6. The question raised in this appeal is whether separate note of possession in the C. S. record of rights, the separate dealings with the property by the parties and separate settlement under Sections 6 and 7 of the O.E.A. Act would establish previous partition by metes and bounds.

7. The note of separate possession in the settlement record-of-rights offers by itself but a very slight indication of an actual partition and cannot be regarded as sufficient evidence upon which a finding of previous partition can be based. Unless separate note of possession in favour of the co-sharers is made according to their shares no previous partition can be presumed and it may be held that such possession was for the sake of convenience. The total extent of the property is 2.41 acres out of which 1.42 acres are shown to be in possession of the defendants' branch and the remaining 0.99 acre is shown to be in possession of the plaintiff's branch. Thus the separate possession is not in conformity with

the shares of the respective parties. No explanation was offered by the defendants as to why there was unequal distribution of the property when the co-sharers were entitled to equal shares. There was neither any pleading nor any evidence as to when the alleged partition by metes and bounds took place. The defendants did not produce any evidence, either oral or documentary, to establish the plea of pre-partition. So far as the dealings of the parties are concerned all the transactions referred to above are within the respective branches. There was no transaction either between the parties inter se or with any outsider. There is no recital in any of the document referred to above that there was a previous partition. So far as the settlement under Sections 6 and 7 of the O.E.A. Act is concerned the legal position is well settled the settlement in favour of one of the co-sharers enures to the benefit of the entire body of co-sharers. On the date of vesting the plaintiff, his mother and defendant No. 1 were the co-sharers intermediaries in respect of the suit land. The settlement in favour of the plaintiff was made in respect of 0.99 acre which he had purchased from his mother by the registered sale deed--Ext. 3. The mother of the plaintiff did not apply for settlement in respect of the remaining lands but defendant No. 1 applied for the entire 1.42 acres of land in respect of which rent schedule was issued in his favour. Although rent schedule was issued to defendant No. 1 in respect of the entire 1.42 acre of land he cannot alone take the benefit of that settlement. As mentioned earlier, the settlement made in favour of the plaintiff and defendant No. 1 enured to the benefit of the entire body of co-sharers. The courts below were, therefore, justified in disbelieving the plea of pre-partition.

8. There is no merit in this appeal and it is accordingly dismissed with costs.