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**(2002) 08 OHC CK 0046**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 80 of 1987**

Niladrinath Mohanty

APPELLANT

Vs

Ashok Kumar Mohanty and Others

RESPONDENT

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**Date of Decision :** 14-08-2002

**Acts Referred:**

Specific Relief Act, 1963 — Section 38

**Citation :** AIR 2003 Ori 55 : (2002) OLR 41 Supp

**Hon'ble Judges :** L. Mohapatra, J

**Bench :** Single Bench

**Advocate :** B.B. Ratho, Manoj Mishra, R.P. Mohapatra Biswanath Rath and S.N. Mohapatra, for the Appellant; S.K. Padhi, S.S. Das, P.K. Mishra No. 2, Debasis Panda, G.C. Mohapatra and Dipti Rekha Nanda, for the Respondent

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## Judgement

L. Mohapatra, J.—Plaintiff is the appellant before this Court against a reversing judgment.

2. The suit was filed for permanent injunction restraining the defendants=respondents from interfering with the peaceful possession of the plaintiff in respect of the suit properties described in the schedule attached to the plaint.

3. The case of the plaintiff is that the suit properties are self acquired properties received by him under two deeds namely, "registered gift deed dated 14-7-1976 and registered sale deed dated 5-1-1978. According to the plaintiff-appellant, he is in peaceful possession of the suit properties received by him under the aforesaid two deeds and the suit properties have been recorded in his name in the R. O. R. and he is paying rent for the same. Defendant No. 1 is the eldest son of the plaintiff staying separately. The further allegation of the plaintiff is that the defendant No. 1 is pulling on well with the other defendants and on 20th December, 1981 they attempted to trespass into the suit properties and interfere with the peaceful possession of the plaintiff. On the above allegations, the suit was filed for permanent injunction.

4. The defendants 3 and 4 were set ex parte and defendants 1 and 2 filed a joint written statement whereas defendant No. 5 filed a separate written statement. Defendants 1 and 2 in their written statement denied all the allegations made in the plaint and the specific case of the defendant was that the sale deed and the gift deed were obtained fraudulently by the plaintiff for which a Title Suit No. 175 of 1980 has been filed for declaration that the plaintiff has no title or interest and possession over the suit properties. The further case of the defendants is that the defendant No. 2 and his mother were staying separately from his elder brother namely, one Manmohan Panigrahi. In the year 1975, the plaintiff came to their house and being the nephew of mother of defendant No. 2, he requested for shelter. He also offered himself to look after the properties of defendant No. 2 and his mother. When the plaintiff was looking after the properties, he prevailed upon defendant No. 2 and his mother and managed to get a power of attorney from the mother of the defendant No. 2 to look after her properties. He also managed to get a gift deed in respect of some of the properties and also managed to get a sale deed executed by the wife of defendant No. 2 in respect of other part of the suit properties-. When the mother of the defendant No. 2 came to know the fraud practised by the plaintiff, he cancelled the gift deed and another deed was executed in favour of wife of defendant No. 2. She also executed a sale deed dated 7-12-1981 in favour of defendant No. 5 in respect of the suit properties and gave delivery of possessions of the same to the defendant No. 5. A revision has also been filed before the Board of Revenue challenging the entries made in the R. O. R. showing plaintiff as the owner of the suit properties.

5. Considering the pleadings of the parties, the trial Court framed 6 issues. Referring to the oral and documentary evidence available on record, the trial Court found that the gift deed dated 14-7-1976 executed by Swornamayee Panigrahi in favour of the plaintiff in respect of a part of the suit properties is genuine, valid and binding on the parties. The trial court also found that the sale deed Ext. A dated 7-12-1981 executed by Swornonamaye Panigrahi in favour of defendant No. 5 in respect of same land as not genuine, valid and binding on the parties. So far as the sale deed dated 5-1-1978 executed in favour of the plaintiff is concerned, the trial Court found that the same is valid, genuine and binding on the parties. The trial Court also found possession by the plaintiff over the suit properties obtained by him under both the gift deed and sale deed. On the above findings, the suit having been decreed, the defendants preferred an appeal before the learned Second Additional District Judge, Berhampur. The learned Addl. District Judge, Berhampur in paragraph-8 of the judgment while discussing the evidence led on the registered gift deed and registered sale deed observed that the description of the lands given in the two deeds do not tally with that of the suit properties mentioned in the plaint schedule. The reasons assigned by the lower appellate Court are that the lands purported to have been conveyed under Exts. 1 and 2 i.e. sale deed and gift deed do not describe definite limits and boundaries of the lands conveyed thereunder and the total extent of lands claimed by the plaintiff in the schedule attached to the plaint differs from the

total extent of lands received by him under the aforesaid two deeds. He further found that there is nothing on record to show that the survey numbers given in two deeds correspond to plot numbers given in the plaint schedule. On the above grounds, the lower appellate Court having reversed the findings of the trial Court and having dismissed the suit, the plaintiff has filed the second appeal against the said judgment.

6. At the time of admission, this Court formulated the following substantial questions of law as enumerated in ground Nos. (a) to (d) of the memo of appeal which are quoted below :--

(a) Whether the learned lower appellate Court has committed error of records in observing that the plaintiff has not pleaded as to the delivery of possession in respect of the suit land ?

And whether such error has vitiated the ultimate decision ?

(b) Whether the impugned finding disbelieved the plaintiff's title on the ground of indefiniteness and uncertainty of land claimed in the suit is perverse in view of the fact that identity of the suit land has not been challenged by the defendants and there is no allegation as to the definiteness and certainty of the suit land as referred to under Exts. 1 and 2 ?

(c) Whether the lower appellate Court has acted without jurisdiction in making out a third case not borne out from the records and pleadings of the parties and in dismissing the suit for permanent injunction on the ground that the plaintiff has not pleaded or proved which particular plot in the suit she acquired under the gift deed and which other plot she acquired under the sale deed especially when the said document i.e. gift deed and sale deed are proved as Exts. 1 and 2 wherein detailed description of the suit lands are given ?

(d) Whether in view of the specific challenge by the defendants as to execution of Exts. 1 and 2 on the ground of mis-representation and fraud and not acted upon and in view of the trial Court's categorical finding disbelieving the allegation of mis-representation, fraud and holding plaintiffs title and possession, the impugned judgment of the lower appellate Court reversing the judgment and decree of the trial Court on the ground extraneous to the pleadings and evidence of parties is legal and justified ?

7. In reference to the substantial questions of law on which the appeal has been admitted Shri Rath, learned counsel appearing for the appellant submits that the record of rights mentioned the same plot numbers as that of plot numbers mentioned in the plaint schedule. He further submitted that the entries made in the R. O. R. are the plots mentioned in the plaint schedule and the description of the lands given in the two registered deeds are same. Therefore, the lower appellate Court should not have come to the conclusion that the lands received by the plaintiff-appellant under the two deeds are not the same lands as mentioned in the plaint schedule. The learned counsel appearing for the

respondents, on the other hand, submits that there being no definite evidence on record indicating the link between the lands received by the plaintiff under the two deeds and the lands mentioned in the plaint schedule, the lower appellate Court was justified in dismissing the suit on the ground that the lands described in the plaint are not the same lands which was received by him under the aforesaid two deeds.

8. Ext. 1 is the deed of gift under which the plaintiff claimed to have received a portion of the suit properties from Swornmayee Panigrahi. In the said document the properties given to the plaintiff has been described as Survey Nos. 2/1 and 2, village Kamapalli, 50 cents out of 103.27 cents bounded by P. W. D. canal, Swornamayee Nagar and lands of the plaintiff on the other sides. Under Exts. 2, the registered sale deed, plaintiff claims to have received the properties, i.e. Survey Ns. 2/1 and 2, village Kamapalli 50 cents out of Ac. 3.27 decimals. The record of rights possessed by the plaintiff is Ext. 5. The said document speaks of some other plots which finds place in the schedule attached to the plaint. Though Sri Rath, learned counsel appearing for the appellant strenuously submitted that the lands received by the plaintiff under the aforesaid two deeds are the same lands that find place in the R. O. R., there is no evidence on record to show that Survey Nos. 2/1 and 2 as mentioned in the aforesaid two J deeds i.e. Exts. 1 and 2 correspond to plots mentioned in the R. O. R. or the plots mentioned in the schedule attached to the plaint. I, therefore, find no illegality in the order of the lower appellate Court in coming to such a conclusion. But I find that the lower appellate Court has not discussed any other findings of the trial Court with regard to the validity of the two documents relied upon by the parties. Under these circumstances, the lower appellate Court should have framed an issue to the effect as to whether the lands received by the plaintiff under the registered sale deed and the gift deed vide Exts. 1 and 2 respectively are the same lands mentioned in the plaint schedule and should have first asked the trial Court to answer the issue and thereafter should have proceed with the hearing of the appeal.

9. I, therefore, allow the appeal and direct the lower appellate Court to frame an issue as indicated above and ask the trial Court to answer the issue after giving opportunities to the parties to give evidence and dispose of the appeal after receipt of the finding from the trial Court on the said issue.

The record be immediately sent back to the lower appellate Court for passing necessary order. Since both the parties are present before this Court, it is further directed that they shall appear through counsel before the lower appellate Court on 23rd September, 2002 and only after their appearance, the lower appellate Court shall fix the date.