
(2003) 02 OHC CK 0024

In the Orissa High Court

Case No : Second Appeal No. 113 of 2001

Paramananda Swain and Others

APPELLANT

Vs

Rabindranath Swain and Others

RESPONDENT

Date of Decision : 14-02-2003

Acts Referred:

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 4(4)

Citation : (2003) 02 OHC CK 0024

Hon'ble Judges : B. Panigrahi, J

Bench : Single Bench

Advocate : P. Kar, A. Mohanty, G.D. Kar, M.R. Satapathy, J.D Behera and S.K. Sahoo, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

B. Panigrahi, J.—Plaintiffs in Title Suit No. 69 of 1988 before the Munsif, Kendrapara in a suit for declaration of title, permanent injunction and pre-emption, having been unsuccessful in both the Courts below, have filed this appeal.

2. It is averred in the plaint that the Plaintiffs have derived their title from their common ancestor Kelei Swain. They partitioned their properties in the year 1963. In the said partition, Benudhar, son of Gokhei got "A" Schedule land to his share. Plaintiff No. 1 is his son whereas Plaintiff No. 2 is the wife. Benudhar has Anr. son, namely Nityananda, who has two sons and two daughters, namely, Defendants 1, 2, 4 & 5. It is further alleged that in the year 1986 the Defendant No. 6 belonging to the branch of Sankar in collusion with the Defendant Nos. 1 to 3 obtained a sale deed fraudulently in respect of "B" schedule properties which is a part of "A" schedule lands without the knowledge of the Plaintiffs though it was the joint family property belonging to the Plaintiffs and Defendant Nos. 1 to 5.

3. The Defendant No. 6, who is the purchaser from Defendants Nos. 1 to 3 filed his written statement inter alia, stating that Benudhar instituted Title Suit No. 2

of 1975 in the Court of the Subordinate Judge, Kendrapara for partition which ended in compromise. As per the terms of compromise the Plaintiff No. 1 got 1/12th share and Plaintiff No. 2 was not allotted with any share. Nityananda was given 1/12th share which was under the possession of his legal heirs. It was also further directed in the compromise decree that the parties should divide the properties mutually within two months failing which they could apply for passing of final decree. The Defendant Nos. 12 and 14 filed a Misc. Case being Misc. Case No. 170/80 under Order 9 Rule 13 of the CPC for setting aside the ex parte decree, which was however, dismissed on 22nd January, 1983. It is pleaded that the consolidation operation began in the mean time. The Defendant No. 6 filed an application to be recorded for "B" Schedule land in the consolidation R.O.R in his favour. The Plaintiffs and the wife of Plaintiff No. 1 - Santilata contested the same which was decided in favour of defendant No. 6 by the appellate Court with the observation that there was partition among the parties and that the "B" schedule suit property was purchased by Defendant No. 6 under a registered sale deed. The sale deed was recognized by the Consolidation authorities. The trial Court also held on the basis of both oral and documentary evidence that there was complete partition among the parties in terms of preliminary decree. Therefore, the sale deed in favour of Defendant No. 6 was found to be valid after separation of the parties.

4. The appellate Court upon the death of Plaintiff No. 2 impleaded legal heirs. In case no final decree is passed nor engrossed in stamped paper, the preliminary decree should be inoperative, as contended by the Appellants. The oral partition is not also permissible u/s 19 of the O.L.R. Act. The compromise decree, according to the Appellants, requires registration. The deceased-Appellant No. 2 was not given any share as there was fraud played on her.

5. It is undoubtedly true that the ancestral property was divided mutually in the year 1963. The said "A" schedule land fell to the share of Gokhei, the father of Benudhar. Defendant No. 6 further asserted that Benudhar effected partition by instituting Title Suit No. 2 of 1975 and obtained a preliminary compromise decree. The certified copy of the decree was marked as Ext. "C" and it has appeared from the decree that the parties were directed to divide the properties by metes and bound mutually within two months failing which they could file an application for passing final decree. In the preliminary decree no share was given to Plaintiff No. 2. The appellate Court has rightly held that invariably the compromise decree does not require registration. It all depends on the facts of each case. If fraud was perpetrated in getting the compromise decree. I am at a loss to understand as to why the Plaintiffs did not file any application in the same suit to set aside the terms of the compromise. Therefore, it is not open to them at this stage to challenge the preliminary decree.

6. Mr. Kar, learned advocate appearing for the Appellants has advanced a contention that when there was no partition or allocation defining the shares of the parties how could Defendants 1 to 3 alienate their undivided interest in

favour of Defendant No. 6. On carefully going through the judgments of both the Courts below, it is found that the parties mutually divided their properties. After preliminary decree the coparcenery came to an end. There is no inflexible rule that a co-owner cannot alienate his share of properties to 3rd party. In case such alienation exceeds his share then such sale can be assailed by the other co-owner. It has not been claimed by the Plaintiffs that the Defendant No. 6's vendors had sold the land in excess of their right.

7. Another contention has been advanced by Mr. Kar that it was hit u/s 4(4) of the Orissa Consolidation of Holdings & Prevention of Fragmentation of Lands Act, 1972 (hereinafter referred to as the "Act"). But it is found that such alienation was made after preliminary decree was passed. Therefore, if alienation is made after such preliminary decree there has been no legal embargo u/s 4(4) of the Act for abating the proceeding. The Plaintiff No. 1 being a party to the compromise decree cannot subsequently turn round and impeach the compromise decree. They are estopped from challenging the said decree. Since the appeal did not raise any question of law much less the substantial question, therefore, there is no legal warrant to interfere with the concurrent findings. Accordingly, the appeal fails and the same is dismissed at the admission stage.

8. In the result, the judgment and decrees passed by both the Courts below are hereby affirmed.