

(2011) 12 OHC CK 0019
In the Orissa High Court
Case No : Writ Petition (C) No. 7377 of 2010

Ratnamanjari Swain

APPELLANT

Vs

Ritanjali Pattanaik and Another

RESPONDENT

Date of Decision : 16-12-2011

Acts Referred:

Hindu Succession Act, 1956 — Section 22

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 4(4), 41(1)

Citation : (2011) 12 OHC CK 0019

Hon'ble Judges : C.R. Dash, J

Bench : Single Bench

Advocate : Ram Prasad Mohapatra, Deepali Mohapatra and S. Patra, for the Appellant; B.K. Dagara and P.K. Pattnaik, (for Opp.Party No. 1), for the Respondent

Judgement

C.R. Dash, J.—This Writ Petition is directed against the order dated 31.03.2010 passed by learned Civil Judge (Sr. Division), Kendrapara in Civil Suit No. 75 of 2005 allowing an application filed by defendant No. 1 u/s 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 ("Consolidation Act" for short). Facts relevant for disposal of this writ petition are as follows :-

Ratnamanjari Swain, petitioner in this writ petition as the plaintiff filed Civil Suit No. 75 of 2005 in the Court of learned Civil Judge (Sr. Division), Kendrapara against the present opposite party No. 1 - Ritanjali Pattnaik (defendant No. 1 in the Court below) impleading also other co-sharers namely opposite party nos.2 to 5 and another co-sharer namely Banambar Swain (not a party to this writ petition), praying inter alia for setting aside the Sale Deed bearing No. 150, dated 02.02.2005 executed by Defendant Nos.2 and 3 (present opposite party No. 2 Nishamani Swain and aforesaid Banambar Swain) being illegal, void and not acted upon, for demolition of the constructions raised on the northern side of the suit land and for the relief of permanent injunction against defendant No. 1.

2. Plaintiff's case, in short, is that the plaintiff and defendant nos.2 to 6 are successors-in-interest of Late Ram Swain and Laxmidhar Swain. The suit land in the Sabik Khata was recorded jointly in the names of the cosharers. In the Major Settlement, Sabik Plot No. 1076 was recorded as Hal Plot No. 1087/1667 under Hal Khata No. 390 in Mouza Talagaon jointly in the names of the plaintiff and defendant nos.2 to 6. On initiation of the Consolidation Proceeding, the suit plot has again been recorded jointly in the names of the plaintiff and defendant nos.2 to 6. Plaintiff and defendant nos.2 to 6 being in joint possession of the suit land, are enjoying the same by exercising their joint right and title. Defendant nos.2 and 3, without any consultation with and consent of the plaintiff and defendant nos.4 to 6, executed Sale Deed No. 150, dated 02.02.2005 in favour of defendant No. 1 (opp. party No. 1 in this writ petition) in excess to their share, though they had no locus-standi to execute the impugned sale deed. Defendant No. 1 (present opp. Party No. 1) being a stranger to the family, may encroach upon privacy of the joint enjoyment of the suit land by the plaintiff and defendant nos.4 to 6. Therefore the suit for the reliefs, as delineated supra.

3. Defendant No. 1 filed written statement denying the plaint averments and took the plea of previous partition among the parties though the record is joint. In course of hearing of the suit, defendant No. 1 filed a petition u/s 4 (4) of the Consolidation Act. The plaintiff (present petitioner) resisted the petition on the following grounds :-

(i) The suit land being homestead land, does not come under the purview of Consolidation Act;

(ii) The Consolidation Authorities having no jurisdiction to issue interim relief like injunction against any person or to direct re-purchase of the suit land by the plaintiff, the suit would not abate.

4. Defendant No. 1 (present opp. Party No. 1) on the other hand stressed on the following points :

(i) The Consolidation Operation being still in force in the suit village and there being no Notification for closure of the Consolidation Operation u/s 41(1) of the Consolidation Act, the suit would abate;

(ii) In view of the amendment of the Consolidation Act, homestead land also having come under the purview of the Act, the objection by the plaintiff is misconceived;

(iii) When the relief of injunction, as claimed by the plaintiff, is dependent upon title and possession of the properties, the suit is to abate.

5. Learned Court below, on consideration of the points of law and facts raised by learned counsels for the parties, passed order for abatement of the suit.

6. Learned counsel for the petitioner strenuously submits that in the present case the document in question, i.e., Sale Deed bearing No. 150, dated 02.02.2005

being a voidable document, only the Civil Court has jurisdiction to try the issue; and secondly, the Consolidation Authorities having no jurisdiction to adjudicate upon the preferential rights of the plaintiff to repurchase the suit property, the suit would not abate.

7. Learned counsel for opposite party No. 1 on the other hand submits that the specific plea of the plaintiff being to the effect that defendant nos.2 and 3 have sold the suit land vide the impugned Sale Deed in excess of their rights and the Sale Deed in question being a void document, the suit would abate in view of the fact that Consolidation Authorities have jurisdiction to ignore the said document. It is contended further that the plaintiff having not set up her preferential right to repurchase the suit land in the plaint and having sought for setting aside the Sale Deed in question, relief of permanent injunction as against defendant No. 1 and mandatory injunction in respect of the alleged illegal construction by defendant No. 1 on the northern side of the suit land and for delivery of vacant possession of the suit land on the basis of preferential right of repurchase by the plaintiff, as claimed by learned counsel for the petitioner, is a submission beyond record.

8. Coming to the law on the point, Hon'ble Supreme Court in *Gorakh Nath Dube Vs. Hari Narain Singh and Others*, has held thus :-

There is distinction between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be to the extent of the excess of power, invalid. An adjudication on the effect of such purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject matter of consolidation proceedings. But where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it can be said that the consolidation authorities have no power to cancel the deed and therefore it must be held to be binding on them so long as it is not cancelled by a Court having the power to cancel it.

Thus, where the plaintiff's claim is that the sale of his half share by his uncle is invalid, inoperative and void, such a claim can be adjudicated upon by consolidation courts. In such case the suit for cancellation of the sale-deed, which is pending on the date of notification under S.4, would abate under Sec. 5(2).

A Division Bench of this Court in *Pranakrushna Sahu and Others Vs. Raghunath Sahu and Others*, having taken note of the case of *Gorakh Nath Dube vs. Hari Narain Singh* (supra) and other decisions of this Court, has held that for abatement of the suit, substance of the plaint has to be considered and to be read as a whole. If it is found that the document in question is void and can be ignored, the obvious result is abatement of the suit. But, in case of voidable

documents, the competent forum is the Civil Court and not the Consolidation Authorities. Proceeding further, this Court has taken note of a situation where alienation is challenged on several grounds and some of the grounds, if accepted, would render the document voidable while other grounds would render the selfsame document void. It has been held further on analysis of such a situation that when it is difficult to say on mere perusal of the plaint that the alienation is ab initio void, the suit filed in the Civil Court would not abate. This Court in *Sridhar Mohanty Vs. Kamal Kumar Agarwalla*, , has held that alienation by a person without any authority is void and not voidable and, therefore, Consolidation Authorities would be deemed to be invested with the jurisdiction by necessary implication of their statutory powers to adjudicate upon the rights of the parties either ignoring the document if it is void or relying upon the document if it is found to be valid. On question of granting of injunction, this Court has proceeded further to formulate the principle by holding that where the ground of injunction depends upon the determination of title, a suit for mere injunction may not be maintainable. It is not possible to lay down a formula or an exhaustive list of nature of cases where the suit for injunction simplicitor is maintainable.

Each case is to be decided in the fact of its own keeping in view the judicial precedence and guidelines given in the cases dealing with the subject. It is equally true that merely because the question of title or possession may be required to be gone into incidentally would not make the suit for injunction simplicitor incompetent. Therefore, in order to determine whether the suit for injunction simplicitor is maintainable or not, the substance of the pleadings has to be looked into and not merely the form of pleadings of the plaintiff alone or the prayer made by him.

9. A single Bench of this Court in the case of *Bamadev Swain and Another Vs. Sunakar Swain and Another*, relying on the case of *Gorakh Nath Dube (supra)*, has held that an alienation by a person without any authority is void and not voidable and therefore the Consolidation Authorities would be deemed to be invested with the jurisdiction to adjudicate.

In the Supreme Court's case (*Gorakh Nath Dube vs. Hari Narain Singth, supra*), the situation was that the plaintiff had challenged the sale of his half share by his uncle as invalid and inoperative. It was observed that such a claim could be adjudicated upon by the Consolidation Authorities and, therefore, the suit of the plaintiff was to abate under the analogous provision contained in the U.P. Consolidation of Holdings Act. Similarly, in Orissa High Court's case (*Sridhar Mohanty vs. Kamal Kumar Agarwalla, supra*) it was reiterated that an alienation by a person without any authority is void and not voidable and, therefore, the Consolidation Authorities would be deemed to be invested with the jurisdiction to adjudicate. In the case of *Bamadev Swain and another vs. Sunakar Swain and another (supra)*, the situation was that defendant No. 1 in excess of his shares had transferred the suit land in favour of defendant nos.2 and 3. This Court

reiterated that the documents being void, the Consolidation Authorities are invested with the jurisdiction to adjudicate.

10. Applying the aforesaid principles to the facts of the present case, it is submitted by learned counsel for opposite party No. 1 that the case of the plaintiff being transfer of the suit land by defendant nos.2 and 3 in excess of their share in favour of defendant No. 1 (present opp. Party No. 1), such a transaction is squarely covered within the mischief of the observation made by Hon'ble Supreme Court in Gorakh Nath Dube (supra), and this Court in Sridhar Mohanty (supra), Bamadev Swain and another (supra) and Pranakrushna Sahu (supra), and therefore the writ petition is to be dismissed.

11. Learned counsel for the petitioner (plaintiff in Court below) with her anxiety to wriggle out of the situation, submits that the suit land being a piece of homestead land, it does not come under the purview of Consolidation Operation and the Consolidation Authorities having no jurisdiction to adjudicate upon preferential rights of the plaintiff, the suit would not abate. It is also submitted that the plaintiff having sought for the relief of permanent injunction, the suit would not abate.

12. Submissions advanced by learned counsel for the petitioner is entirely misconceived, in as much as learned Trial Court has rightly held that in view of the amendment in Consolidation Act, even a piece of homestead land comes within the purview of the Consolidation Operation. Further, the question of preferential rights of repurchase by the plaintiff is a plea beyond record and there is also no basis for such a plea, as on an entire reading of the plaint, I do not find that even by implication the plaintiff has asserted such a plea in the plaint. Needless to say here that the petitioner, in order to substantiate her plea of preferential right of repurchase, has had to bring the suit u/s 22 of the Hindu Succession Act and there being no basis for such a contention, which is raised for the first time now, it merits no consideration. In view of ruling of this Court in Sridhar Mohanty's case (supra), jurisdiction of the Consolidation Authorities cannot be barred or the Civil Court (in view of the impugned document being void) cannot be invested with jurisdiction in as much as the relief of injunction is dependent upon title of defendant nos. 2 and 3 to transfer the suit land in favour of defendant No. 1. In the result, the writ petition must fail. The impugned order is confirmed. Plaintiff's suit is held to be not maintainable in the Civil Court as being hit by the provision of Section 4 (4) of the O.C.H. & P.F.L. Act. There is no order as to cost.