HIGH COURT OF ORISSA : CUTTACK

S.A. No.243 of 1989

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 15.02.1989 and 02.03.1989 respectively passed by the learned Sub-ordinate Judge, Aska in T.A. No.13 of 1985 reversing the judgment and decree dated 29.04.1985 and 17.06.1985 respectively passed by the learned Munsif, Kodala in T.S. No.42 of 1982

.....

Natabar Padhan and others … Appellants.

-VERSUS-

Lalita Padhan and another … Respondents.

Advocate(s) who appeared in this case by Video Conferencing mode:-

---

For appellants … M/s.N.C.Pati, A.K.Nanda and S.K.Swain (Advocate)

For respondents … M/r.C.R. Misra, B.N.Nayak and G.Misra (Advocates)

.....

P R E S E N T :

THE HON'BLE MR. JUSTICE D.DASH

Date of judgment:27.11.2020

***D.Dash,J*.** The appellants, by filing this appeal, under section 100 of the Code of Civil Procedure (for short, 'the Code') have assailed the judgment and decree passed by the the learned Sub-Ordinate Judge, Aska (as then was) in Title Appeal No.13 of 1985.

By the same, the lower appellate court having set aside the judgment and decree passed by the learned Munsif, Kodala (as it was then) in Title Suit No.42 of 1982 which had been called in question in

that appeal at the instance of the plaintiffs (respondents) as against the dismissal of their suit; has decreed the suit declaring the right, title and interest of the plaintiffs (respondents) over the suit land and for recovery of possession.

2. For the purpose of convenience and clarity; the parties hereinafter have been referred to in the same rank as assigned to them in the original suit, namely, the appellants as the defendants whereas the respondents as the plaintiffs in the same chronological order.

It may be stated here that the appellant nos. 1 to 4 (defendant nos. 1 to 4) having died during pendency of this appeal; the same is being pursued by the appellant no.5 (defendant no.5). By a specific order assigning reasons, it has already been said that the non-substitution of the legal representatives of those deceased appellants-defendants is not fatal to the appeal.

3. The plaintiff's case is as under:-

Ghanashyam, Natabara, Banchanidhi, Balaram, Bibhisan and Balya are the six sons of late Damburu Padhan. He had also three daughters. Dambaru died about 25 years prior to the suit. The joint family consisting of Dambaru and his six sons had around 120 bighas of landed properties as well as 8 houses. After the death of Dambaru, his six sons continued to remain in joint possession of the properties for few years when dissension for some reason or others arose amongst the family members in the year 1969 or so. All having joined against Ghanashyam, who happens to be the father of plaintiff no.1 and father-in-law of plaintiff no.2 to deprive him of his legitimate share over the landed properties of the joint family; that Ghanashyam had to file a suit for partition against other members of the family, which stood numbered as T.S. No.48 of 1970. It is said that then due to intervention

of the local gentlemen, the properties were then divided in six halves and one share was granted to Ghanashyam. In view of the same, the said suit for partition was not further prosecuted by Ghanashyam. The house, which now forms the subject matter of the suit is said to have been allotted to Ghanashyam. So, it is said by the plaintiffs that Ghanashyam became the right, title and interest holder of the suit house and remained in possession of the same which is now with the plaintiffs.

It is further stated that Ghanashyam since had no son when this plaintiff no.1 was having hand to mouth living in her in-law's place, he had bequeathed the suit house and Ac.0.82 cents of land in her favour by a will executed by him on 28.07.1972, which is a registered one to the knowledge of all the defendants and other local gentlemen. Few months thereafter, Ghanashyam, in order to see that in future, no such trouble arises for her daughter, he also gave the very same property to her by a registered deed of settlement made on 22.11.1972. The plaintiff with her family claim to have been in exclusive possession of the suit land and house to the exclusion of all other members of the family.

It is stated that the defendants and their children having failed in their attempt to cause deprivation to the plaintiffs in getting any property, remained in enimical term with the plaintiffs and an incident having once arisen, there was a criminal case and that was concerning the occupation of the suit house. On 03.06.1978 the suit house was gutted with fire and then the defendants threatened to trespass upon the same, which was somehow prevented by the plaintiffs by initiating a proceeding under section 144 Cr.P.C. in the court of the Executive Magistrate, Chhatrapur and obtaining an order of restraint. The plaintiffs claimed that after the suit house was destroyed

by fire, they have put up thatched roof and during that period, severe threat came from the side of the defendants. So, once for all to avoid any future dispute/litigation, the suit had to be filed for the reliefs as stated above.

4. The defendants 1 to 5, in their written statement, denied the assertion made by the plaintiffs that the suit house had been allotted to Ghanashyam in a prior partition. It is stated that out of the total area at the site, half had been purchased by Natabar (defendant no.1) in the year 1952 and the remaining half had been purchased by Dambaru, the father of the defendants in the year 1948 and that half has been given to Natabar (defendant no.1) as Jyesthansa and the rest half, with the consent of other defendants, who are his brothers. Still all the defendants are in occupation of the suit house by converting it into a chow shed. Although all the defendants have stated that defendant no.1 alone has the right, title and interest over the suit site, they assert that their joint possession still continues. Refuting the case of the plaintiffs, as aforesaid, the defendants prayed to non-suit the plaintiffs.

5. The trial court, on the above rival pleadings, framed as many as six issues.

Taking up the issues concerning the allotment of the suit house in favour of the father of the plaintiff no.1 in a family partition vis-à-vis, the issue as to if the father of the defendant had got the suit house in partition and then as his Jyesthansa; upon consideration of the evidence in the backdrop of the rival pleadings, culling out certain circumstances, the trial court has rendered its finding that the property had been purchased in the name of different persons of the family and they were in joint possession. The defendant no.1’s claim that it is his property has been held in the negative. The final finding is that the suit

house is the joint family property of the family in the joint possession of the parties. Practically, this has gone to provide the answer to the other important issue as to the claim of the plaintiffs' exclusive right, title and interest over the suit land and their possession in the negative. With such findings, however, the suit has been dismissed.

6. Grieved by the said judgment and decree dismissing the suit, the plaintiffs carried an appeal under section 96 of the Code before the learned Sub-Ordinate Judge, Aska. The lower appellate court, on analysis the evidence both oral and documentary at its level and upon their examination, has come to conclude that the finding rendered by the trial court on issue no.2 and 3 are not correct. Having said so, it has substituted its finding in favour of the plaintiffs. Practically, this finding has led to decide the fate of the appeal as the lower appellate court has simultaneously negated the claim of title by the defendants by way of adverse possession. Thus, the suit has been decreed.

7. The defendants are thus now questioning the above findings of the lower appellate court in opposition to the findings as had been rendered by the trial court.

8. The appeal has been admitted on ground nos.1 and 4 having been said that those are the substantial questions of law, which are reproduced hereinbelow:

> "(a)If the lower appellate court committed serious illegality in holding that the suit house was allotted to the share of Ghanashyam Padhan in view of the admission of Ext.2 into evidence without objection in spite of the evidence of P.Ws2, 3 and 4 to the effect that they are unable to say as to when item no.18 was included in Ext.2? and
>
> (b)If Ext.2 is admissible as a document of partition without being registered?"

9. I have heard the learned counsel for the appellants at length. None appeared for the respondents despite several opportunities. The judgments of the trial court and lower appellate court have been carefully gone through in the backdrop of the rival pleadings with simultaneous perusal of the evidence both oral and documentary let in by the parties. The written notes of submission by the learned counsel for the appellant; the same has been taken on record and gone through.

10. In the case at hand the findings rendered by the trial court have been reversed by the lower appellate court. The unsuccessful plaintiffs, being the appellants, before the lower appellate court had first of all raised the contention that the partition list admitted in evidence from their side and marked as Ext.2 is genuine and binding on the defendants and thus the factum of partition in the year 1972 between Ghanashyam and others with the allotment of properties as amongst the parties thereunder ought to have been upheld by the trial court. It was also contended that the gift deed executed by Ghanashyam marked as Ext.4 although was genuine, the trial court has erred both in fact and law by rejecting the same. The conclusion of the trial court as to the inclusion of the property under item no.18 in that partition list (Ext.2) to have been made later and as such manipulation was questioned to be against the weight of the evidence on record and for that, it was urged that such a finding cannot be allowed to stand.

Such contentions were refuted by the defendants before the appellate court and they strenuously urged in support of the findings rendered by the trial court.

11. It is seen that the lower appellate court has first of all gone to address as to whether there was a partition between Ghanashyam

and his other brothers in the year 1972 in metes and bounds and if the suit house had fallen to the share of Ghanashyam who then gifted to the plaintiff no.1. Ext.2 is the document which has been admitted in evidence from the side of the plaintiffs and that is the list of properties with a mention that these are in the share of Ghanashyam. As regards this partition list of the year 1972, the defendants have averred in the written statement to be having no knowledge and then it has been stated that if that would be so proved by the plaintiffs, the same being void is of no value and thus cannot form the foundation of the plaintiff's claim. It has been further stated in paragraph-4 of the written statement that mention of the suit house in the property list of those documents is an act of manipulation and as such void and that has not clothed Ghanashyam with any title over the said property. The averments appear to be ambiguous.

It was first contended by the learned court for the appellant that this Ext.2 being inadmissible in evidence ought not to have been looked into for any purpose whatsoever. Then, he contended that this Ext.2 being rendered suspect especially as to inclusion of the property under item no.18 which is the crux issue here to decide the fate of the suit, the lower appellate court's conclusion in accepting that Ext.2 in decreeing the suit, contrary to the finding of the trial court is faulty not only in law but on fact as that finding overruling the interpolation of item no.18 properly therein is based on perverse appreciation of evidence. The learned counsel for the appellant had taken this Court through the evidence of P.W.2 and 4 is showing as to how inconsistent their evidence on this score run.

The pleadings laying down the claim of the defendants for non-suiting the plaintiff shows that they, instead of projecting any specific case, find the averments like beating around the bush in

watching as to how far the plaintiffs are able to prove the same so as to heavily rely upon the failure of the plaintiffs on the score to that extent. The parties admit that preparation of the typed copies of the partition list, one concerning the cultivable land and the other for the house. The execution of Ext.2 is not disputed by the defendants which is the list of properties allotted to Ghanashyam. So far as the houses are concerned, the partition list has been admitted as Ext.3. The dispute lies in a narrow campus as to the property under item no.18 as finds mention in Ext.2. The defendants assert during trial that it was not there in the original list at the time of its preparation and is an act of subsequent insertion to suite the purpose. In order to provide justification/support to the same, the use of different carbon resulting appearance of deep coloured typed letters which in other words using new carbon paper is stressed upon in support of the challenge as to later inclusion. P.W.2 is the author of said document (Ext.2). This document has been admitted without any objection. It is his evidence that there were twelve (12) numbers of such list which had been prepared and each brother was given two copies, one relating to the agricultural land and the other for the houses. His evidence is pin pointed that the suit house was given to Ghanashyam and that had been typed out by him to mentioning at the end which was within the knowledge of the defendants as also Ghanashyam. The defendants do not deny the status of this P.W.2 that he was one among those associated in the process. This P.W.2 was never asked to offer his explanation or confronted as to this item no.18 with its description in Ext.2 by deep coloured letters using new carbon papers. The defendants being in custody of these lists of properties as has been stated by P.W.2 have not produced any of the copy with them to show that item no.18 with its description has been an interpolation

and made subsequent to the preparation of Ext.2 by way of insertion without the knowledge of all the signatories thereto.

Had it been so made, on the face of available evidence, clear conclusion would have emerged out. That being so, this non-production of the document to enable the court to have the concluded say in the matter leads the court to draw an adverse inference on the assertion of the defendants as to subsequent inclusion of item no.18 property in Ext.2 only to suit the plaintiffs claim.

Ghanashyam has been examined as P.W.4. It is his evidence that when Ext.2 and 3 were prepared, he claimed that the cost for the suit for partition that he had filed he made good of by the defendants; so in lieu of that the suit house was allotted to him in his share. This explanation of P.W.4 for such item no.18 in Ext.2 has not been shaken by bringing/placing any such surrounding circumstances so as to create doubt in mind. Therefore, this Court is not in a position to hold that in the above conclusion arrived at by the lower appellate court suffers from the vice of perversity warranting interference.

12. The document (Ext.2) being the list of properties fallen to the share of Ghanashyam cannot be taken to be a document by which the partition of the properties amongst the parties has been made. The settled position of law is that when by virtue of a family settlement or arrangement, members of a family descending from a common ancestor or any near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed title once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family, such arrangements are governed by a special equity peculiar to themselves and would be enforced if honestly made. The object of such arrangement is to protect the family from long drawn litigation, perpetual strifes which mars the unity and

solidarity of the family and create hatred and bad blood between the various members of the family. However, the court is to see that the family arrangement is a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family. The registration of such a document is necessary only if the terms of the family arrangement are reduced into writing where also there lies distinction that the said document if is a mere memorandum prepared after the family arrangement already made and the document is made after that for the purpose of the record or for information of the court for making necessary changes in the record and other papers relating to the properties; as in that case the memorandum itself does not create or extinguish any rights in immovable properties and thus is not required to be registered as the same would not fall within the mischief of section 17(2) of the Registration Act. So it is admissible in evidence without being so registered. In the given case the reasons for such settlement cannot be said to be non-existent. Ghanashyam had filed the suit for partition and this settlement is subsequent to that. The other evidence, as discussed also heavily lean in favour of the finding of the lower appellate court.

On a seemly analysis of the principles as stated and the discussions made above, this Court finds that the view taken by the lower appellate court that Ext.2 is acceptable to judge character as to ownership of the properties as stated under item no.18 therein from that time onwards is right more particularly when the evidence as to possession of the parties after Ext.2 is not so clarified in detail by the defendants so as to negate plaintiffs claim.

In view of all the aforesaid, this Court is unable to provide the answers to the substantial questions of law favouring annulment of

the judgment and decree as passed by the lower appellate court in finally decreeing the suit with the relief as ordered therein and thereby restoration of the judgment and decree passed by the trial court.

13. Resultantly, the appeal stands dismissed and in the facts and circumstances, without cost.

.....
D. Dash, J.

Orissa High Court, Cuttack
Dated the 27th day of Nov, 2020/ B.Nayak