

HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) NO.24781 of 2012

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Manoj Kumar Nayak and another ----- Petitioners

-Versus-

Guna Mohanty and others Opposite
Parties

For Petitioners : Sri Shyamananda Mohapatra,
Sr. Advocate
M/s. Bibekananda Bhuyan,
B.N. Das, R. Ray, A.K. Rout
and B.N. Mishra

For Opp. Parties : M/s. P.N. Mohapatra, A.K. Rath
and S.P. Das (Caveator)

PRESENT:

THE HONOURABLE SHRI JUSTICE B.K. PATEL

Date of Hearing : 2.4.2013 : Date of Judgment – 25.4.2013

B.K. PATEL, J. In this writ petition, petitioners have assailed legality of order dated 24.11.2012 passed by learned District Judge, Khurda at Bhubaneswar dismissing FAO No.111 of 2012 and confirming the order dated 27.8.2012 passed by learned Civil Judge (Senior Division), Bhubaneswar in I.A. No.391 of 2012, a proceeding for temporary injunction under Order 39 Rules 1 and 2 read with Section 151 of the C.P.C., arising out of C.S. No.580 of 2012 by

which parties were directed to maintain *status quo* over the suit property during pendency of the suit.

2. C.S. No.580 of 2012 is a suit for partition in respect of the suit lands described in the schedule to the plaint under Lot Nos.I and II. Lot No.I relates to Plot No.557 comprising of an area of Ac.0.59 decimals whereas Lot No.II relates to Plot No.1451 comprising of an area of Ac.0.400 decimals under Khata No.161 of Mouza Patia. At present Ac.0.200 decimals of land out of Lot No.II has been recorded under Mutation Khata No.474/2447 in the name of defendant no.5 and an area of Ac.0.200 decimals of land out of Lot No.II has been recorded under Mutation Khata No.474/2021 in the name of defendant no.4.

3. Opposite party no.1 as the plaintiff has filed the suit against the petitioners as defendant nos.4 and 5 respectively, opposite party nos.2 and 3 as defendant nos.2 and 3 respectively and defendant nos.1 and 6 claiming 1/4th share over the suit lands. The suit lands originally belonged to and was recorded in the name of late Chintamani who died leaving behind his widow late Sebati, two daughters who are the plaintiff and defendant no.1, and two sons who are defendant nos.2 and 3. On 4.2.1986 defendant no.3 and his mother late Sebati executed registered sale deed in respect of Ac.0.200 decimals of land out of Lot No.II in favour of defendant no.6 and thereafter on 17.2.1997 defendant no.6 executed registered sale

deed in respect of the said land in favour of defendant no.5. Defendant no.2 was a signatory to the registered sale deed dated 4.2.1986 as a witness. Defendant no.5 got the land purchased by her mutated in her name under Khata No.474/2447 in Mutation Case No.5249/ 2003. Also she has got the status of the land purchased by her converted to the status of 'Gharabari' in OLR Case No.5674/2007. It is also not disputed that on 7.3.2001 defendant no.2 executed registered sale deed in respect of balance Ac.0.200 decimals of land out of Lot No.II in favour of defendant no.4. Defendant no.3 was a signatory to the sale deed as a consenting party. After purchase, defendant no.4 has got the land purchased by him mutated in his name under Khata No.474/2021 in Mutation Case No.1644/2001 and has got the status of the land purchased by him converted to the status of 'Gharabari' in OLR Case No.532/2008. These facts are not in dispute.

4. Plaintiff's case is that on 19.3.2012, when she was in peaceful possession over the suit lands, defendant no.4 threatened her of dispossession on the strength of registered sale deed executed and mutation of the case land made in his favour. Thereafter only the plaintiff could learn regarding alienation of the suit lands under Lot No.II by her co-sharers under the above said registered sale deeds. Plaintiff has assailed the sale deeds as wrong, illegal, misrepresentation of fact, nullity, void and not binding on the plaintiff in any manner. It is asserted by her that there being no

partition of the joint family property left behind by late Chintamani, she is entitled to 1/4th share out of the suit lands under Lot Nos.I and II.

5. In her application under Order 39, Rules 1 and 2 read with Section 151 of the C.P.C. for temporary injunction, presented along with the plaint, plaintiff, in the backdrop of her claim to be a co-sharer in respect of the joint family property, alleged that not only defendant no.4 threatened her of dispossession from the suit property over which she is in peaceful possession but also defendant no.4 stacked raw materials to construct permanent structure. Also she could come to learn that defendant nos.2 and 3 were negotiating with outsiders to alienate land under Lot No.I. Under these assertions, prayer was made for grant of injunction against defendant nos.2 to 5 to restrain from alienating as well as from making construction of permanent structure over the suit land.

6. Defendant no.3 did not file any objection in the proceeding for temporary injunction.

7. Defendant nos.4 and 5 filed joint objection resisting the claim of temporary injunction. It is pleaded that after death of late Chintamani there was division in the family in course of which plaintiff and defendant no.1 took money value of their share of the joint property and specifically agreed not to claim any share by executing agreement dated 21.9.1999. As per amicable partition, eastern portion of the land under Lot No.II was allotted to defendant no.2 and

western portion was allotted to defendant no.3. Defendant no.3 along with his mother late Sebati, for legal necessity, sold his share under Lot No.II to defendant no.6 for consideration through registered sale deed dated 3.2.1986 with the consent of defendant no.2 and delivered possession of the land to the vendee. Defendant no.6 while in exclusive peaceful possession over his purchased land sold the same to defendant no.5 by registered sale deed dated 17.2.1997 for a consideration and delivered possession thereof. It is further pleaded that similarly defendant no.2 by registered sale deed dated 7.3.2001 sold his share out of the land under Lot No.II to defendant no.4 for consideration and delivered possession thereof with the consent of defendant no.3. Defendant nos. 4 and 5 claim to be in possession over the lands purchased by them. It is also pleaded that defendant no.5 has executed registered General Power of Attorney dated 24.2.2010 in respect of her purchased land in favour of M/s Uprise Constructions Pvt. Ltd. for construction of a residential multistoried complex in the name and style of 'SOURYA'. Accordingly after completion of construction work individual apartments have been transferred to different purchasers who are in peaceful possession of their respective purchased area. Plaintiff having not impleaded said purchasers in the suit for partition, the suit is liable to be dismissed. Claim of plaintiff to be in possession over the suit land is stoutly denied by these defendants.

8. Defendant no.2 in his objection has supported the case of defendant nos.4 and 5 and plead that late Chintamani, during his life time got his daughters, the plaintiff and defendant no.1, married by taking assistance from defendant no.2. After death of late Chintamani, the plaintiff and defendant no.1 voluntarily executed deed of relinquishment dated 21.9.1999 in the form of agreement in respect of the suit property. Consequently, defendant nos.2 and 3 became absolute owners of the suit lands. There was partition between defendant nos.2 and 3 on 15.2.2002 and they have disposed of the lands which fell to their shares to different persons and also gave delivery of possession of lands sold by them. Possession of the plaintiff has also been denied.

9. It was contended by the learned counsel for the petitioners that in passing the blanket order directing the parties to maintain *status quo* over the entire suit lands, including the lands under Lot No.II also, both the courts below utterly failed to appreciate the facts of the case as well as the legal ramification thereof. In arriving at their conclusion that the plaintiff has established existence of all the three ingredients, i.e., *prima facie* case, balance of convenience and irreparable loss, to be entitled to an order of temporary injunction, both the courts below have relied solely on 1973 Settlement ROR in which entire suit lands stood recorded in the name of late Chintamani. However, it is not disputed that subsequently the suit lands under Lot No.II have been mutated and

recorded in the names of defendant nos.4 and 5. Execution of sale deeds by defendant no.3 and late Sebatl in favour of defendant no.6, by defendant no.6 in favour of defendant no.5 and by defendant no.2 in favour of defendant no.4 is not disputed. That apart, defendant nos.4 and 5 got the kissam of lands under Lot No.II converted to 'Gharabari' in OLR proceedings. Neither of the court below has taken note of all these transactions which remain undisputed. Presumptive value of possession, if any, arising out of the entries in the 1973 Settlement ROR in favour of all the legal heirs of late Chintamani stands rebutted by the entries made in the subsequent mutation records of right. That apart, it is also pertinent to note that the plaintiff has not made any prayer in the suit for setting aside any of the sale deeds. Placing reliance on the decision of the Hon'ble Supreme Court in **Kishorsinh Ratansinh Jadeja -vrs.- Maruti Corp. & Ors.** : 2010 (I) CLR (SC) 305, it was also contended that apart from *prima facie* case, balance of convenience and irreparable loss, in considering the application for temporary injunction under Order 39, Rules 1 and 2 of the C.P.C. the Court is required to consider also the conduct of the parties prior to institution of the suit. In the present case, the suit lands under Lot No.II were sold by the co-sharers of the plaintiff way back on 17.2.1997 and 7.3.2001. In the meanwhile, by virtue of General Power of Attorney dated 24.2.2010 executed by defendant no.5 not only multistoried complex has been constructed by third party

builder but also apartments constructed thereon have been transferred to different purchasers who are in possession. Plaintiff claimed that each of the legal heirs of late Chintamani is entitled to 1/4th share only out of the entire suit properties. Admittedly, neither defendant no.2 nor defendant no.3 has sold more than the extent of his share over the suit lands. Rather, Lot No.I comprises of an area of Ac.0.59 decimals which is more than the extent of share which the plaintiff and her sister defendant no.1 may be entitled to. In such circumstances, the impugned order of restraint so far as it relates to the lands under Lot No.II is not sustainable in law.

6. In reply learned counsel for the contesting opposite party no.1 supported and defended the impugned orders. It was contended that admittedly the entire suit lands belong to late Chintamani. There has been no partition of the suit lands between the plaintiff and her co-sharers. None of the co-sharers is entitled to transfer the joint property even to the extent of his/her undivided interest therein. In such circumstances, the court below rightly directed the parties to maintain *status quo* over the suit property until adjudication of plaintiff's claim of purchase.

7. It has been rightly pointed out by the learned counsel for the petitioners that both the courts below have referred only to the fact of recording of the suit lands in the name late Chintamani as the basis for coming to the conclusion that the plaintiff has established

existence of *prima facie* case, balance of convenience and irreparable loss in her favour. Neither the plaintiff nor the defendant nos.1,2 and 3 dispute execution of sale deeds by defendant no.3 and his late mother with the consent of the defendant no.2 in favour of defendant no.6, by defendant no.6 in favour of defendant no.5 and defendant no.2 with the consent of defendant no.3 in favour of defendant no.4 so far as suit schedule Lot No.II lands are concerned. After purchase of lands mutation Records-of-Right have been issued in favour of defendants 4 and 5 and also defendants 4 and 5 have got kissam of lands under Lot No.II converted to homestead. Orders in the mutation cases as well as conversion proceedings under the Orissa Land Reforms Act have to be presumed to have passed after due enquiry. Mutation Records-of-Right in favour of defendants 4 and 5 having been issued much later than publication of 1973 Settlement R.O.R., entries in mutation Records-of-Right have more presumptive value than the entries in the earlier Record-of-Right. In such circumstances, plaintiff could not have been held to have satisfied regarding existence of a *prima facie* case in her favour on the basis of entries in 1973 Settlement R.O.R. only. That apart, not only the defendants 4 and 5 but also plaintiff's co-sharer defendant no.2 have pleaded that there was partition of the joint family property. Specific case of defendant no.2 is that plaintiff and defendant no.1 voluntarily executed relinquishment deed dated 21.9.1999 in respect of the entire suit lands in favour of their brothers. Plaintiff has not

prayed for relief of declaration that the three sale deeds on the basis of which defendants 4 and 5 claim title and possession are void documents. There is no prayer in the suit to set aside the sale deeds. Moreover, plaintiff does not dispute entitlements of each of defendants 2 and 3 to 1/4th share out of the entire suit lands and the extent of lands out of Lot No.II by each of defendant nos. 2 and 3 does not exceed the latent of his share. It is well settled that transfer by one of the co-owners remains valid to the extent of the share of the transferor. The co-owner can transfer his undivided interest in a joint property and the transferee acquires right to enforce the sale. Reference in this connection may be made to the decisions in **Gourhari Das -vs- Kalpataru Das and others** : 34 (1992) OJD 137; **Hardeo Rai -vs- Sankutala Devi and others**: (2008) 7 SCC 46; **Smt. Bina Sukla -vs- Smt. Meena Devi Panch and others**: 106(2008) CLT 330 and **Harekrushna Mahakud -vs- Rathanath Mahakud & Ors**: 2009(1) CLR 560.

8. The three sale deeds on the basis of which defendants 4 and 5 claim title and possession over Lot No.II property were executed on 4.2.1986, 17.2.1997 and 7.3.2001. In the meanwhile, multi-storied building is asserted to have been constructed on a part thereof. It is also asserted that apartments of the building have been sold to a number of persons who are in possession. Plaintiff has all along remained silent till filing of the present suit in the year 2012. Therefore the conduct of the plaintiff also comes on the way of

granting equitable relief of temporary injunction in her favour. In **Kishorsinh Ratansinh Jadeja -vrs.- Maruti Corp. & Ors.**(supra) the Supreme Court having point out that Court is required to consider principles of *prima facie* case, balance of convenience and inconvenience, and irreparable loss and injury in passing interim order of injunction, further held that the Court is required to consider also conduct of the party. It was held as follows:

“the question of conduct of the Respondent No.1 also becomes relevant, inasmuch as, having slept over its rights for more than 19 years, it will be inequitable on its prayer to restrain the owners of the property from dealing with the same, having particular regard to the fact that a large portion of the land has already been conveyed to as many as 280 purchasers who are in the process of erecting constructions thereupon.”

9. Thus, in view of sale transactions made long back and entries made in the Records-of-Right on the basis of such transactions in mutation and OLR conversion proceedings, it cannot be held that the plaintiff has established a *prima facie* case to be entitled to grant of temporary injunction in respect of lands under suit schedule Lot No.II. The entries in the Records-of-Right and construction of multistoried building have tilted balance of convenience in favour of defendants 4 and 5. Any interference with such balance shall certainly result inconvenience and irreparable loss to the defendants 4 and 5. Therefore, the impugned order so far as it relates to lands under suit schedule Lot No.II is concerned, is not sustainable.

10. Accordingly, the order passed by the both the courts below so far as it relates to maintenance of *status quo* over the lands under suit schedule Lot No.II is concerned, is set aside. The writ petition is accordingly disposed of.

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B.K. Patel, J.

*Orissa High Court, Cuttack,
Dated 25th April, 2013/Palai*