

ORISSA HIGH COURT: CUTTACK

F.A.O. NO.43 OF 2012

From the order dated 10.01.2012 passed by learned Civil Judge (Senior Division), Jajpur in I.A. No.297 of 2011 arising out of C.S.No.510 of 2011.

Rajanibala Sahoo Appellant

V e r s u s

Manju Biswal & others Respondents

For Appellant : M/s. Susanta Kumar Dash,
Surya Kanta Dash, H.K. Maharana
& B.P. Dhal

For Respondents : M/s. A.K. Tripathy, P.K. Nayak
& P. Kar

P R E S E N T :

THE HONOURABLE MR. JUSTICE RAGHUBIR DASH

Date of hearing : 16.07.2014 Date of judgment : 30.07.2014

R. DASH, J. Being aggrieved by the order dated 10.01.2012 passed by learned Civil Judge (Senior Division), Jajpur in I.A. No.297 of 2011 arising out of C.S.No.510 of 2011 allowing the I.A., the appellant, who is the sole opposite party in the I.A. and defendant No.6 in the suit, has preferred this appeal to have the impugned order restraining her from making any construction or changing the nature and character of the suit land till disposal of the suit set aside.

2. Respondent Nos.1 to 6 are the plaintiffs-petitioners before the lower Court. They have filed the suit claiming that the

plaint Schedule 'B' land measuring Ac0.75 decimals is the undivided ancestral homestead property of their family and though there has been severance of joint status of the family, there has been no partition of the suit land as yet. It is contended by them that on 12.08.2002 an unregistered deed of partition was created by some members of the joint family showing the suit property to have been partitioned amongst the co-sharers and then, on the same day, one of the co-sharers late Jairam Biswal executed a sale deed alienating a specific portion of the suit land measuring Ac0.06 decimals of land in favour of another co-sharer, Laxmidhar Biswal (Defendant No.2). On the same day Jairam executed another sale deed alienating Ac0.11.03 decimals out of the suit land in favour of defendant Nos.8 and 9 who are strangers to the family. Out of his purchased land defendant No.2 sold Ac0.04 decimals to defendant No.7, a stranger to the family, by executing a Registered Sale Deed on 11.04.2011. Defendant No.7, in turn, sold his purchased land to the present appellant under Registered Sale Deed dated 14.09.2011. On the strength of that sale deed the appellant, it is alleged, is trying to intrude upon the suit land to raise construction of a house. It is the specific case of respondents-plaintiffs that the unregistered deed of partition is a fraudulent one. No one representing respondent-plaintiff Nos.1 to 5 is a signatory to the deed of partition. No part of the suit land has been allotted to the share of plaintiff-respondent Nos.1 to 5. So far

plaintiff-respondent No.6 is concerned, it is contended that her signature on the unregistered partition deed was fraudulently obtained. Taking different grounds on the validity of the impugned partition deed dated 12.08.2002, the suit has been failed to declare the same to be void and inoperative and the sale deed executed by Jairam to Laxmidhar (Defendant No.2) and subsequent sale deeds executed by defendant No.2 in favour of defendant No.7 and by defendant No.7 in favour of the Appellant may also be declared illegal and void.

3. The appellant in her counter has contended that having purchased Ac.0.04 decimals of land on payment of Rs.2,02,000/- she has got delivery of possession of her purchased land. She claims that the entire joint family properties were already partitioned amicably amongst the different branches of the joint family prior to 12.08.2002. The unregistered deed dated 12.08.2002 signed by different branches of the joint family is a deed of acknowledgement of the earlier partition. The partition has been acted upon and the plaintiffs have never objected to it. Basing on the partition Jairam executed one sale deed on 12.08.2002 in favour of defendant No.2 and on the same day he executed another sale deed in favour of defendant No.8 and defendant No.9 who are strangers to the joint family. After such sale transactions the strangers have constructed separate building over their respective purchased land. Not only

Jairam but also plaintiff-respondent No.6, who is a signatory to the impugned deed of partition, has sold Ac.0.07 decimals of land to one Annapurna Mohapatra vide Registered Sale Deed No.626 dated 20.04.2005 who has already constructed a building on her purchased land. It is the further case of the appellant that the plaintiffs-respondents were well aware of the fact that there was a partition amongst the family members, but in order to score personal gain they have filed the suit challenging the sale deed executed in her favour while not challenging the sale transactions made in favour of defendant Nos.8 and 9 and, suppressing the fact that plaintiff-respondent No.6, out of her share, has sold a portion to one Annapurna Mohapatra who is not arrayed as a party to the suit. The appellant asserts that plaintiff-respondent No.6 has clearly admitted in the sale deed executed by her that there was previous partition of the suit land. It is also the appellant's case that the branch which plaintiff-respondent Nos.1 to 5 belong to was represented by defendant No.4 who is the mother-in-law of plaintiff-respondent No.1 and paternal grand-mother of plaintiff-respondent Nos.2 to 4.

4. Learned trial Court heard argument and considering the respective stand taken by the parties allowed the application for temporary injunction solely on the ground that the appellant being a stranger to the family and the suit land being house and homestead property of the joint family, she is not entitled for joint possession

and if injunction is refused and the appellant constructs a house over her purchased land the petitioner would suffer irreparable loss which could not be compensated in terms of money.

5. Learned counsel for the appellant challenges the impugned order arguing that the learned court below has mechanically rendered a finding that the suit land is house and homestead of a joint family to which the appellant is a stranger and that the three cardinal principles that require consideration before granting temporary injunction have not at all been considered by the learned lower court. It is also submitted that the plaintiffs-respondents having not approached the civil court with clean hands, the equitable remedy ought not to have been extended to them. Learned counsel for the respondents on the other hand supports the impugned order and urges this Court not to interfere with the order.

6. There is no dispute that the plaint Schedule 'B' property consists of several plots, all of them recorded as Gharabari in kisan. It measures A0.75 in area. But there is no pleading that there is a dwelling house of an undivided family and all the plots constituting the suit property are used for beneficial enjoyment of the house. Section 44 of the Transfer of Property Act prevents intrusion of strangers into such family residence which is to be enjoyed by members of the family alone in spite of transfer of share therein to strangers (*Bhim Singh V. Ratnakar Singh*; AIR 1971 Orissa 198).

In the case at hand, it is not disputed that much before the appellant purchased a piece of land from out of one of the suit plots, one of the plaintiffs-respondents (R-6) had sold a piece of land from out of the plaint Schedule 'Kha' to one Annapurna Mohapatra and it is claimed that she has already constructed a house thereon. That apart, the appellant's assertion that D.8 and 9, who are strangers to the family, after purchasing portions from out of the suit plots, constructed their own house over their respective purchased land. Plaintiffs admit that such sale transactions have taken place but they have not challenged those sale transactions. If these strangers are not sought to be enjoined from making construction of houses over portions of the suit land as well as occupying and enjoying the houses they have already constructed, the appellant in the absence of any special reason cannot be prevented from raising construction over her purchased land merely on the ground that she being a stranger to the family is not entitled to possess and enjoy the portion of the suit land she has purchased.

7. So far the ingredient of prima facie case is concerned, it cannot be said that the plaintiff-respondents have failed to raise a substantial question which needs investigation and decision on merit. But the plaintiffs have no explanation as to why the four decimals of land sold to the plaintiffs out of the 75 decimals of the suit land should be preserved in its present actual condition until the

questions raised by the plaintiffs in challenging the impugned deeds are decided. Some other strangers have not been persecuted to check them from raising constructions over portions of the suit land. One of the plaintiffs has made alienation of a piece of land from out of the suit land in favour of a stranger but that sale transaction has not been challenged in the suit. She is Plaintiff-respondent No.6. In the sale deed that Plaintiff-respondent No.6 has executed, she has admitted that there was an earlier partition. She does not challenge the validity of that sale deed. But while challenging the sale deed executed in favour of the appellant she has pleaded that there was no previous partition and that the unregistered partition deed is void. When she has joined hands with other plaintiffs-respondents to seek an equitable relief, she ought to have come to the Court with a clean hand. She cannot be said to have come with a clean hand because while challenging the alienation made in favour of the appellant she has not challenged the validity of the sale deed that she has executed in favour of one Annapurna Mohapatra. Under the aforesaid circumstances, the equitable relief sought for could not have been extended to the respondents.

8. Now, let it be examined if the respondents have made out that they would suffer either any injury or any inconvenience if the prayer for interim injunction is refused. The suit property is homestead in nature. It is not shown that the entire of the suit land

is a dwelling house of an undivided family. Some of the purchasers have already raised constructions within the area of the suit land. It is not pleaded precisely as to what area out of the suit land has already been alienated to outsiders by different co-sharers and whether any co-sharers, while making such alienation, has exceeded the limit and extent of his share in the suit property. It is also not pleaded that a piece of land sold to the appellant is situated at such a strategic position that the co-sharers, including the plaintiffs-respondents, would experience any inconvenience for the enjoyment of their dwelling houses or any other part of the suit land. From the plaint it can be asserted that late Jairam has alienated 18 decimals of land and plaintiff-respondent No.6 has sold six decimals of land from out of the suit land. If the plaintiff-respondents apprehend that their co-sharers are likely to alienate the land in excess of their respective share then the proper remedy would be to seek temporary injunction against the co-sharers restraining them from making any further alienation till disposal of the suit because, it is the case of the respondent-plaintiffs that in the unregistered deed of partition no portion of the suit land has been allotted to the share of plaintiff-respondent Nos.1 to 5. Under such circumstances, it cannot be said that the balance of convenience tilts in favour of the respondents and that they would suffer irreparable injury if the appellant is not restrained from making any construction over her purchased land. In

the result, the impugned order restraining the appellant from making any construction over the suit land as well as changing the nature and character of the same till disposal of the suit is liable to be set aside. However, it is made clear that for the construction she might raise on her purchased land she would not claim any equity on the event the final result of the suit goes against her.

9. In the result, the appeal is allowed. The I.A. is dismissed and the impugned order is set aside.

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R. Dash, J.