HIGH COURT OF ORISSA: CUTTACK

SA No.50 of 2000

From the judgment and decree dated 3.2.1999 and 16.2.1999 respectively passed by Sri J.N. Panda, learned 1st Addl. District Judge, Berhampur in T.A. No.1/94 (T.A. No.31/92 GDC) reversing the judgment and decree dated 23.12.1991 and 7.1.1992 respectively passed by Sri K.B. Sahu, learned Subordinate Judge, Aska in T.S. No.42 of 1983.

Chandrama Padhi & others .... Appellants

Versus

Godabari Maharana (dead) through L.Rs. .... Respondents

For Appellants ... Mr.P.K. Das, Adv.

For Respondents ... None

J U D G M E N T

PRESENT:

THE HONOURABLE DR. JUSTICE A.K.RATH

Date of hearing: 23.03.2018 : Date of judgment: 30.03.2018

Dr. A.K.Rath, J This is a defendants' appeal against reversing judgment.

2. Godabari Maharana, predecessor-in-interest of respondent nos.1(a) to 1(e), as plaintiff instituted the suit for recovery of possession and mesne profits. Case of the plaintiff was that one Charan had two wives, namely, Champa and Parbati. Rukuna is the daughter of Champa. The widows of Charan intended to adopt the plaintiff. As they could not adopt the plaintiff as their son, they executed a registered deed of settlement on 19.11.1943 with the condition that none of them i.e. Champa, Parbati and the plaintiff would be entitled to sell any land of Charan to any person. The plaintiff would maintain them and after their death, the plaintiff would be the sole owner of the properties.

Champa died in the year 1957. Parbati and the plaintiff jointly sold some of the lands to different persons including Raghu Naik in the year 1953. Thereafter, Parbati sold the suit schedule property to the defendants. The plaintiff filed T.S. No.38 of 1962 in the court of the learned Subordinate Judge, Berhampur against Parbati for recovery of possession. The suit was dismissed for default. The plaintiff again filed T.S. No.86 of 1971 in the court of the learned Munsif, Aska against Parbati and the defendants claiming the suit schedule properties. The suit was dismissed on the ground that it was barred under Order 9 Rule 9 CPC. The same was dismissed. First Appeal filed by the plaintiff having been dismissed, he filed Second Appeal No.242 of 1978 before this Court, which met the same fate. It was further pleaded that Parbati had limited interest in the suit schedule properties in view of the deed of settlement dated 19.11.1943. Therefore, alienation made by Parbati in favour of the defendants is void and not binding on the plaintiff. As per the conditions laid down in the deed of settlement dated 19.11.1943, the plaintiff is the rightful owner of the suit schedule property. He is entitled to possess the same after the death of Parbati in the year 1981. With this factual scenario, he instituted the suit seeking the reliefs mentioned supra.

3. Defendants entered contest and filed a written statement denying the assertions made in the plaint. Case of the defendants was that Parbati and Champa had not executed the registered deed of settlement dated 19.11.1943 in favour of the plaintiff. After death of Charan, Champa and Parbati became the absolute owner of the properties. The deed of settlement dated 19.11.1943 might have been obtained fraudulently by the plaintiff from Parbati. The plaintiff has not acquired right, title and interest over the suit schedule properties. Parbati was a party in T.S. No.38 of 1962. She filed a written statement stating that the deed of settlement was a sham one. The plaintiff has not sold any land jointly in favour of Raghunath Naik. Parbati died on

2.8.1981. For legal necessity, Parbati sold the suit schedule property to the defendants by means of registered sale deeds for a valid consideration. The defendants are in possession of the suit schedule land. Parbati gifted Ac.0.08 cents of land to defendant no.7. Defendant no.2 is in possession of the said land on behalf of defendant no.7. In RMC No.342 of 1979, the Tahasildar, Digapahandi mutated the property in favour of defendant no.2. The plaintiff was a party to the said case. The present suit is barred by res judicata. Parbati being the absolute owner of the suit schedule property transferred the same in favour of the defendants by means of registered sale deeds.

4. On the inter se pleadings of the parties, learned trial court has framed five issues. Both the parties led evidence, oral and documentary, in support of their case. The suit having been dismissed, the plaintiff filed Title Appeal No.86 of 1989 before the learned District Judge, Berhampur. The appeal was allowed. The suit was remanded to the learned trial court for fresh disposal. Learned trial court dismissed the suit holding, inter alia, that the deed of settlement dated 19.11.1943 executed by Champa and Parbati in favour of the plaintiff is a will. The same has been obtained from Parbati, an illiterate woman, by playing fraud and as such, the same is not binding on the defendants. Defendants had obtained registered sale deeds in respect of the suit properties from Parbati. Plaintiff appealed before the learned District Judge, Berhampur, which was transferred to the court of the learned Addl. District Judge, Berhampur and re-numbered as Title Appeal No.1/94 (31/92 GDC). Learned appellate court came to hold that Ext.6 is a gift deed and not will. The plaintiff has acquired title by virtue of the said deed. Transfers made by Parbati in favour of defendants as void. It further held that Ext. 6 has been validly executed by Parbati. Defendants have not acquired title by way of adverse possession. They are in unauthorised occupation of the suit land. Held so, it allowed the

appeal. It is apt to state here that during pendency of the appeal, sole respondent died, whereafter his legal heirs have been substituted.

5. The second appeal was admitted on the substantial questions of law enumerated in Ground Nos.A to G of the appeal memo. The same are -

> "A Whether the settlement deed dated 19.11.43 (Ext.6) is a valid document and the provision of Section 90 of the Indian Evidence Act is applicable to Ext.6, since the Ext.6 is a 30 years old document and its original and its proper custody have not been proved?
> B. Whether the alleged settled deed dated 19.11.43 is a gift or will as per the condition laid down in it ?
> C. Whether the transfer of the suit scheduled property made by Parbati is to be held valid as the deed in question (Ext.6) is a will ?
> D. Whether the plaintiff was given delivery of possession after the alleged deed of settlement and remained in possession of the suit property during the life time of the donors ?
> E. Whether the present suit is maintainable under law in view of the dismissal of the earlier suits i.e. T.S. No.38/62 and T.S. No.86/71 being hit under Section 11 of the CPC ?
> F. Whether the plaintiff is entitled to suit scheduled land as per Article 65 of the Limitation Act and the suit is maintainable on that score ?

6. Heard Mr. P.K. Das on behalf of Mr. Manoj Kumar Mishra, learned Senior Advocate for the appellants. None appeared for the respondents.

7. Mr. Das, learned counsel for the appellants submitted that Ext.6 is not a gift deed, but a will. The plaintiff was not in possession of the suit property. The suit is barred by res judicata. The suit is not maintainable in view of the bar contained in Section 39 of the OEA Act.

8. On a scrutiny of the deed of settlement dated 19.11.1943 vide Ext.6, learned appellate court came to hold that the same is a gift deed. No fraud was practised on Parbati. Ext.6 had been validly executed by Parbati. The properties had been gifted to the plaintiff and possession thereof was delivered to him. Plaintiff had instituted Title Suit No.38 of 1962 as landlord for recovery of the suit land from one

Damba Naik, who was a tenant. The suit was dismissed for non-prosecution. The application for restoration of the suit was rejected. Since Parbati executed Ext.6 in favour of defendant no.2 and others, plaintiff instituted Title Suit No.86 of 1971 against them on the ground that deed of settlement of the year 1943 was binding on the defendants and no title has passed by virtue of the said deed. Defendant in T.S. No.38 of 1962 was not a party in T.S. No.86 of 1971. Defendants have not filed judgment and decree of T.S. No.86 of 1971 to show what were the issues. Therefore, the suit is not hit under Order 2 Rule 2 and Section 11 CPC. There is no perversity or illegality in the said finding. The substantial questions of law are answered accordingly.

9. In the wake of the aforesaid, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.

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DR. A.K.RATH, J

Orissa High Court, Cuttack.
Dated the 30th March, 2018/Pradeep