

**Benirani Ray and ors. Vs. Ashok Kumar Ghosh and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/533759](http://sooperkanoon.com/533759)

**Court :** Orissa

**Decided On :** Jun-22-2009

**Reported in :** AIR2010Ori7; 108(2009)CLT362

**Judge :** A.S. Naidu, J.

**Appellant :** Benirani Ray and ors.

**Respondent :** Ashok Kumar Ghosh and ors.

**Judgement :**

**A.S. Naidu, J.**

1. Durga Charan Ray, the Predecessor in interest of the present Appellants, as Plaintiff filed T.S. No. 25/1976. in the Court of the then Munsif, 2nd Court, Cuttack, inter alia, praying for declaration that the sale deed dtd.12.2.1976 executed by Madhusudan Ray (Defendant No. 4) in favour of original Defendant Nos. 1 to 3, as illegal & invalid & to confirm the possession of the Plaintiff, over the suit lands & also to permanently restrain the original Defendants 1 to 3 from interfering with the possession of the Plaintiffs over the suit lands or in the alternative if the sale deed dtd.12.2.1976 is held to be genuine document for granting an opportunity to Plaintiffs to purchase the suit lands covered under the said sale deed.

The Trial Court decreed the suit on contest. Being aggrieved the Defendants 1 to 3 filed an appeal in the Court of Addt. District & Sessions Judge, Cuttack which was

registered as T.A. No. 63/77, the Appellate Court allowed the appeal in part. The sale deed dtd. 12.2.1976 executed by Defendant No. 4 in favour of Defendant Nos. 1 to 3 was held to be legal & valid with regard to the property described in Schedules 'B' & 'C' only, further the decree for permanent injunction passed with respect to the suit plot No. 2881 was set aside. The said Judgment & decree is assailed by the legal heirs of the original Plaintiff in this Second Appeal.

2. The inter se facts flowing from the pleadings have been dealt with in extenso in the Judgment passed by the Trial Court as well as the Appellate Court. This Court, therefore, refrains from reiterating all the facts, but then confines to only those facts which are necessary for better understanding of the inter se disputes. Mahendranath Ray was the common ancestor. He had seven sons. Unfortunately five of them had died before they got married. Thus, the properties were inherited by the two surviving sons being the original Plaintiff, Durga Charan Ray, as well as original Defendant No. 4, Madhusudan Ray. It appears that in the mean while Mahdusudan Ray who was impleaded as proforma Respondent has also expired & as he has not left behind any legal heirs his name has been deleted. It is averred that the disputed 'B' Schedule properties were purchased by the original Plaintiff, Defendant No. 4 & their brother Laxmikanta Ray. After the death of Laxmikanta in the year 1971 the suit properties were possessed jointly by the original Plaintiff & Defendant No. 4.

The properties, described in Schedule 'C' of the plaint were recorded jointly in the name of the original Plaintiff & Defendant No. 4 with their other brothers. However, after the death of all other brothers, the suit properties were also inherited by the original Plaintiff & Defendant No. 4.

The properties described in Schedule 'D' of the plaint are recorded in the name of Sri Sri Subarneswar Mahadev, the family deity of which the original Plaintiff & Defendant No. 4's mother were the Marfatdars. It is further averred that there was no partition by metes & bounds either between the son of Mahendranath or between the original Plaintiff & Defendant No. 4. According to the plaint case, Defendant No. 4 who was unmarried lost his eye sight & taking advantage of such infirmity Defendant Nos. 1 to 3 got a sale deed executed through him in respect of

Ac.0.09.5 kadis of lands more fully described in Schedules A, Band D of the plaint. It is alleged that neither the contents of the sale deed was explained to Defendant No. 4 nor any consideration amount was paid. On the basis of such allegation a prayer was made to set aside the said registered sale deed dtd.12.2.1976. In the alternative it was averred, that as the properties are homestead & bari lands having residential house of the joint family, the Plaintiffs may be given an opportunity to repurchase the land.

3. Defendant Nos. 1 to 3 only contested the suit. Defendant No. 4 become ex parte. In a joint written statement Defendant Nos. 1 to 3 contended that there was a prior partition between the original Plaintiff & Defendant No. 4 & the properties which were sold by Defendant No. 4 fell to his share. The allegation that Defendant No. 4 had lost his eye sight was denied. It was further averred that Defendant No. 4 alienated the property for his legal necessities & the consideration amount was duly paid to him.

4. On the basis of the pleadings the Trial Court framed as many as 6 issues.

5. To substantiate their case, the parties adduced evidence, both oral & documentary. The Trial Court after disusing the evidence in extenso came to the conclusion that the suit lands were homestead in nature & were part & parcel of the dwelling house of the original Plaintiff & Defendant No. 4 & there was no partition between the original Plaintiff & Defendant No. 4 & the disputed plots were in joint possession. That Defendant No. 4 was blind WAS admitted by the witnesses examined on behalf of the contesting Defendants & it was also admitted by some of the witnesses that Defendant No. 4 was physically incapable at the time of execution of the impugned sale deed & that he was in the care & custody of the original Plaintiff. The plea of delivery of possession by Defendant No. 4 to Defendant Nos. 1 to 3 was negatived. The Trial Court further held that the sate deed dtd.12.2.1076 executed by Defendant No. 4 in favour of Defendant Nos. 1 to 3 was not a genuine & valid document. It was concluded that Defendant Nos. 1 to 3 being complete strangers to the family of the Plaintiffs & Defendant No. 4 were not entitled to any joint possession of the suit land along with the Plaintiff as per the provision of Section 4 of the Partition Act & Section 44 of the Transfer of

Property Act. On the basis of such finding the suit was decreed & the sale deed dtd.12.2.1976 was declared to be invalid & Defendant Nos. 1 to 3 were permanently restrained from entering into the suit lands & interfering with the possession of the Plaintiffs over the same.

6. The Judgment & decree passed by the Trial Court was assailed by Defendant Nos. 1 to 3 in T.A. No. 63/77. The Appellate Court also meticulously discussed the evidence, both oral & documentary. After hearing Learned Counsel for the parties, the Appellate Court came to the following conclusions;

(i) The properties more fully described in Schedule 'D' of the plaint belong to the deity Sri Sri Subarneswar Mahadev. The deity having not been impleaded as a party no decree can be passed with regard to the suit properties.

(ii) The sale deed Ext. A so far as Schedule 'D' land is concerned was neither legal nor valid & Defendant Nos. 1 to 3 had acquired absolutely no right, title & interest in respect of the suit lands.

(iii) There was no partition by metes & bounds between the original Plaintiff & Defendant No. 4 & Defendant Nos. 1 to 3 being stranger to the family is not entitled to joint with Plaintiff under Section 44 of the T.P, Act.

(iv) The Appellate Court further held that in absence of any issue with regard to permanent injunction, the Trial Court acted illegally in passing a decree to that effect. Consequently, the decree for permanent injunction so far as Plot No. 2776 described in Schedule 'D' is concerned was confirmed. In substance the appeal was allowed in part, the sale deed dtd.12.2.1976 was held to be legal & valid only with regard to 'C' Schedule property.

The said Judgment & decree, as stated earlier, is assailed in this Second Appeal by the legal heirs & successors of the original Plaintiff, The appeal is confined to only one substantial question of law, i.e., 'affect of Section 22 of the Hindu Succession Act on transfer'.

7. Heard Mr. Sahu, Learned Counsel appearing for the Appellants & Mr. Pal, Learned Counsel appearing for the Respondents & perused the pleadings &

Judgments meticulously. Admittedly, original Defendant No. 4 had executed a registered sale deed in favour of original Defendant Nos. 1 to 3 on 12.2.1976. According to the appellants the said sale deed was an invalid one mainly on the ground that the original Defendant No. 4, Madhusudan Ray, was blind person & the deed had been obtained from him by adopting unfair means.

The second contention of Mr. Sahu is that even if it is found that sale deed was a valid one there being no partition between Durga Chgaran & Madhusudan, the only two surviving, the co-sharers, as the joint family residential house & bari lands are situated over the lands, the Defendants 1 to 3 being strangers to the family lands, the Defendants 1 to 3 being strangers to the family were not entitled to joint possession, as such the Plaintiffs should be given an opportunity to repurchase.

8. So far as validity of the sale deed, Ext. A, is concerned, it appears, by the said sale deed Defendant No. 4 had alienated the properties which were described in Schedules 'B', 'C & 'D' of the plaint. Lands appertaining to Schedule 'B' are self-acquired properties of Plaintiffs, Defendant No. 4 & another brother who had expired.

Properties mentioned in Schedule C are ancestral properties inherited by Plaintiff & Defendant No. 4.

The properties which are covered under Schedule 'D' & which have been alienated by the sale deed, Ext. A, as would be evident from the records, belonged to the deity Sri Sri Subarneswar Mahadev. Admittedly, the deity is not a party to the suit, nor the recital's made in the sale deed reveal that the alienation was for the benefit of the Deity. Consequently, the sale of 'D' schedule properties, are invalid & the sale deed so far as 'D' schedule properties are concerned have been rightly declared to be invalid by the Appellate Court. The said finding suffers from no infirmity & is hereby confirmed.

9. So far as the rest of the properties alienated by virtue of Ext.A, the sale deed, is concerned, it appears from the evidence of some of the witnesses examined on behalf of the Defendants that, Defendant No. 4 was blind at the relevant time. The Appellate Court drew an adverse inference as Plaintiff did not examine Defendant

No. 4, without realizing the fact that Defendant No. 4 was the vendor of Defendant Nos. 1 to 3, & it was incumbent upon them to that with knowledge & consent the sale deed Ext. A was executed by him. Having failed to do so the Defendants cannot take advantage for non-examination of Defendant No. 4 as a witness. The Trial Court after going through the evidence had arrived at a conclusion that the properties described in Schedules 'B' 'C & 'D' were joint family properties & there was no partition in respect of the same between the Plaintiff & Defendant No. 4. It was also held that Defendant No. 4 was not in possession of the suit land separately. This finding has not been disturbed by the Appellate Court. On the other hand, the Appellate Court has proceeded on the ground that the Plaintiffs have admitted that Defendant No. 4 had executed the sale deed in favour of Defendant Nos. 1 to 3 & declined to set aside the said sale deed except with regard to the lands described in Schedule 'D' which belong to the deity.

10. Admittedly, the parties are governed by Mitakshara Hindu Law. As per law every co-sharer has a right on every inch of land belonging to the joint family. It is also no more res integra that in consonance with law one of the co-sharers cannot alienate any specific portion of the joint family lands without the consent of other. That apart Section 22 of the Hindu Succession Act creates an embargo with regard to alienation of joint family properties by a co-sharer without consent of the other. For the sake of brevity, the Sub-section (1) of Section 22 of the Hindu Succession Act, 1956 (hereinafter called as 'the Act') is quoted herein below;

(1) Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon to or more heirs him or her, whether solely or in conjunction with others, devolves upon to or more heirs specified in Class I of the Schedule, & any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

Section 22 was brought into the act as an anti-dote to mitigate inconvenience resulting from transfer to an outsider by a co-heir of his or her interest in property inherited along with other co-heirs. The provisions of the said Section are

analogous to the right of pre-emption which tends to raise clogs & fetters on the full sale & purchase of property & is in general regarded as opposed any to equity & good conscience desires to transfer his or her interest in the Law requires that in case heir property inherited under the provisions of this Act, the right of pre-emption should be given to other co-heirs. For better understanding the effect of Section 22 of the Hindu Succession Act can be summarized as follows:

(i) In case any heir specified in Class I of the Schedule desired to dispose of his interest in the property (immovable property or interest in a business) inherited by him simultaneously with any other heir or heirs of an intestate under the provisions of the Act, the latter have a preferential right to acquire that interest by purchase.

(ii) If the parties are unable to agree as to the quantum of consideration payable by the heir or heirs who intend to exercise the right conferred by Sub-section (1) of Section 22 of the Act the price will be determined by the Court in an application made for the purpose. The intending purchase is not, however, bound to pay, the price fixed by the Court. If he does not choose to pay the same, he will only be liable to pay costs of the application.

(iii) In case of two or more heirs seeking to exercise the right conferred by Sub-section (1) that heir who offers the highest consideration must be preferred & allowed to acquire the interest.

Where in a case envisaged by this Section any property is already transferred by co-heir the remedy of the other co-heirs to enforce their pre-emptive right would be by a regular suit & not by way of an application under this Section. In other words the alienation envisaged of the Section is not void but is voidable, (see Mulla's Hindu Law).

11. In the case at hand, it has been held by both the that the properties sold were used as residential Courts house & Courtyard (bari) & that there was no partition by metes & bounds between the Plaintiff & Defendant No. 4, & as such it is open for the party aggrieved to file a regular suit & work out his remedy in consonance with the provisions of Section 22 of the Hindu Succession Act & as such no specific direction can be issued in this Second Appeal. The substantial questions

framed, thus stands answered.

12. After going through the Judgments & decree passed by the Courts below, this Court further finds that the Courts below have correctly appreciated the evidence & the same does not suffer from any infirmity or illegality. The conclusions arrived at are based on cogent evidence which need no interference in exercise of powers conferred under Section 100 of the Code of Civil Procedure.

Accordingly, the Judgment & decree passed by the Appellate Court is confirmed & the Second Appeal is dismissed granting liberty to the Appellant to work out his remedy in accordance with law.

Parties to bear their own cost.

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