

**IN THE COURT OF THE CIVIL JUDGE (SR. DIVN.), TALCHER.
DISTRICT – ANGUL**

**Present : Sri S.K. Dash Ray, LL.M.,
Civil Judge (Sr.Divn.), Talcher.**

Dated, this the 23rd day of August, 2016.

Civil Suit No. 284 of 2009

Parbati Samal @ Parbati Das, aged about 38 years,
W/o Tirthabasi Das of
Village/P.O./P.S. - Rengali,
Dist.- Angul.

..... **Plaintiff.**

- **Versus** -

1. Doneswar Samal, aged about 43 years.
S/o Late Nakaphodi Samal of
Village/P.O. - Santhapada,
P.S. - Talcher, Dist.- Angul.
2. Kairi Samal, aged about 80 years,
W/o Late Nakaphodi Samal of
Village/P.O. - Santhapada,
P.S. - Talcher, Dist.- Angul. **(Deleted vide order dtd.12.08.2016)**
3. Dola Samal, aged about 75 years,
S/o Late Bhagirathi Samal of
Village/P.O. - Santhapada,
P.S. - Talcher, Dist.- Angul.
4. Tuna Samanta, aged about 33 years,
S/o Balaram Samanta of
Village/P.O. - Santhapada,
P.S. - Talcher, Dist.- Angul.

..... **Defendants.**

Appearance:

For the Plaintiff : Sri A. Biswal & Associates, Advocates,
Talcher.

For the Defendant Nos.1, 2 & 4 : Sri B.S. Sahoo & Associates, Advocates,
Talcher.

For the Defendant No.3 : Sri R.R. Dash & Associates, Advocates,
Talcher.

Date of Argument : 12.08.2016

Date of Judgment : 23.08.2016

J U D G M E N T

1. The plaintiff has filed this suit for declaration that the Registered Sale Deed No. 1234, dtd. 18.05.2009 executed by the defendant No.1 in favour of defendant No.4 with respect to the property mentioned under schedule "C" of the plaint is null and inoperative, and that the defendant No.4 did not acquire any title over the said land; for declaration that the plaintiff has got right of pre-emption over the schedule "C" property and with further prayer that necessary direction be issued to defendant No.1 to execute sale deed in favour of the plaintiff after accepting consideration money.

The case of the plaintiff, in brief, is that she and the defendant No.1 to 3 are Hindus and governed under Banaras School of Mitakshara Law. One Bhagirathi Samal was their common ancestor. He died leaving behind two sons, Nakaphodi and defendant No.3 as his legal heirs. Nakaphodi expired leaving behind the plaintiff and defendant Nos.1 and 2 (defendant No.2 expired during pendency of the suit) as his legal heirs. The property mentioned under schedule "B" of the plaint originally belonged to Bhagirathi Samal. After his death, his two sons Viz. Nakaphodi and defendant No.3 succeeded thereto. Hence, in the last settlement, the R.O.R stands recorded in their name jointly. Both Nakaphodi and defendant No.3 possessed their landed properties as per mutual convenience without partition. It is thus contended that the plaintiff has got 1/6th share over the schedule "B" properties after expiry of her father, Nakaphodi. After demise of Nakaphodi, even the schedule "B" property was also not partitioned between the plaintiff and defendant No.1. It is alleged that the defendant No.1 - who has got only 1/6th interest over the schedule "B" property - executed a Registered Sale Deed on 18.05.2009 in favour of defendant No.4

purporting to alienate Ac. 0.18 decimals thereof for a consideration of Rs. 60,000/- without knowledge or consent of the plaintiff. The said alienated land of Ac. 0.18 decimals has been mentioned under schedule "C" of the plaint. It is stated that as the suit property under schedule "B" has not been partitioned in metes and bounds between the plaintiff and defendant Nos. 1 to 3, all the co-sharers have share over the said property. Hence, it is contended that the sale deed executed by the defendant No.1 in favour of defendant No.4 purporting the alienate a specified portion, is null and void and the defendant No.1 had no alienable right. It is also stated that the property under schedule "C" not being partitioned by metes and bounds, the plaintiff has got the pre-emptory right to purchase the same. The plaintiff in the plaint also expressed her willingness to repurchase the suit property paying consideration amount mentioned in the sale deed or as fixed by this Court. On all such assertions the plaintiff has come up with this suit for aforesaid relief.

2. The defendant No.3 has filed a one lined written statement which is as follows:-

"That, this defendant No.3 admits all the claim and averments made by the plaintiff in her plaint. Hence, this defendant No.3 has no objection if the suit is decreed in her favour".

The defendant Nos. 1, 2 and 4 filed their joint written statement contending that the suit is not maintainable and is liable to be rejected. It is contended that since the plaintiff has filed this suit asking for pre-emption, she had admitted the legal right of defendant No.1 to execute the sale deed in favour of defendant No.4 and seems to have admitted that he (defendant No.1) has legal sanction to enjoy the consideration amount of the sale exclusively. It is thus contended that the first prayer of the plaintiff for declaration of the sale deed as null and void has no legal sanction. It is also contended that the plaintiff has admitted that the defendant No.1 has absolute right, title and interest over the schedule "C" property and hence he is to enjoy the consideration amount to the exclusion of all other co-sharers. It is stated that the

plaintiff cannot exercise her right of pre-emption as the property under schedule “C” of the plaint is not a dwelling house and is agricultural land. It is further stated that as the plaintiff did not furnish the total extent of the ancestral property (which is essential U/s - 4 of Partition Act), the question for exercising preferential right does not arise. It is stated that the plaintiff after her marriage belonged to her husband's family and hence she cannot claim any share over the suit property. It is asserted that there was an oral amicable partition between Nakaphodi, defendant No.1 and defendant No.3 in the year 1987 by virtue of which the suit property fell exclusively to the share of defendant No.1, and since then he (defendant No.1) has been in peaceful possession thereof being its bonafide owner. Hence, he has rightly sold the schedule “C” property to defendant No.4 and delivered possession to him. It is stated that the suit schedule “C” property is not the Hindu joint family property and is the exclusive property of defendant No.4. It is finally contended that the plaintiff had no cause of action to file this suit and hence it is prayed that the same be dismissed with cost.

3. On such rival pleadings of the parties, the following issues have been framed:-

ISSUES

- i) *Whether the suit is maintainable ?*
- ii) *Whether there is any cause of action to file the present suit ?*
- iii) *Whether the Registered Sale Deed No. 1234, dtd. 18.05.2009 be declared as null and void ?*
- iv) *Whether the plaintiff has got right of pre-emption over suit schedule “C” property ?*
- v) *Whether the suit property fell to the exclusive share of defendant No.1 in an amicable partition in the year, 1987 ?*
- vi) *Whether the schedule “B” property is not the Hindu joint family property ?*
- vii) *What other relief(s) the plaintiff is entitled to ?*

4. To prove her case, the plaintiff examined herself as P.W.1. The certified copy of the R.O.R of Khata No. 203 of Mouza-Santhapada is marked as Ext.1 and the certified copy of the Registered Sale Deed No. 1234 dtd. 18.05.2009 is marked as Ext.2.

No evidence, oral or documentary, was adduced on behalf of the defendant No.3. The defendant No.4 examined himself as D.W.1 and the defendant No.1 examined himself as D.W.2. The R.O.R of mutated Khata No. 449/405 is marked as Ext.A, the certified copy of R.O.R of Khata No. 202 is marked as Ext.B, the certified copy of R.O.R of Khata No. 203 is marked as Ext.C and the certified copy of R.O.R of Khata No. 462 is marked as Ext.D.

5. **Issue nos. (iii), (iv), (v) and (vi)** being inseparable are jointly taken up for consideration. The genealogy and the source of property in this case is admitted. Fact remains that Bhagirathi was the original ancestor and he was survived by Nakaphodi and Dola (defendant No.3). From the evidence of D.W.2 at Para-11, it is seen that Nakaphodi expired on 19.05.2007 and his wife Kairi (defendant No.2) has expired on 29.07.2015 (during the pendency of this suit). Nakaphodi is now survived by his daughter (the plaintiff) and son (defendant No.1). Ext.1 reveals that Ac. 4.480 decimals in 22 numbers of plots in Khata No.203 of Mouza- Santhapada stand recorded in the name of Nakaphodi and Dola. As the deaths of Nakaphodi and his wife Kairi (defendant No.2) occurred after the commencement of Hindu Succession (Amendment) Act, 2005, as per the decision reported in **2015 (II) CLR (SC) – 1146** {*Prakash and ors. -Vrs.- Phulavati and ors.*} the plaintiff and defendant No.1 being coparceners are entitled to ½ (half) share each over the share of Nakaphodi in the suit Khata No.203.

The defendant Nos. 1, 2 and 4 in their written statement have stated about an amicable partition in the year 1987 in which the suit Plot No.13 fell to the share of defendant No.1. In the decision reported in **1990(I) OLR – 587** (*Narasingh Dani Vrs. Collector, Bolangir and others*) it has been held that after coming into force of O.L.R.

Act, the partition of properties by three modes only are to be recognized i.e. :-

- i) *By registered instruments,*
- ii) *By decree of Court, and*
- iii) *By order of Revenue Officer as per 19(1)(c) of the Act.*

The story of oral partition in the year 1987 thus fails to evoke credence. Consequently, the story of the contesting defendants that the suit property fell to the exclusive share of defendant No.1 in an amicable partition in the year 1987 also fails. So, it can be held that the suit property is the Hindu joint family coparcenary property of the plaintiff, defendant No.1 and defendant No.3. Be it mentioned here that the defendant No.3 in his written statement has supported the plaint averments, which means he has agreed that there was no partition of the suit property in metes and bounds between the coparceners. If the share of the parties are to be calculated, then the defendant No.3 is entitled to $\frac{1}{2}$ (half) share and the plaintiff and defendant No.1 jointly [each having $\frac{1}{2}$ (half) share] are entitled to the rest $\frac{1}{2}$ (half) share. But the defendant No.1 had alienated the suit schedule 'C' property in favour of defendant No.4 by virtue of Registered Sale Deed No. 1234 dtd. 18.05.2009. He has alienated Ac. 0.18 decimals out of Ac. 0.24 decimals out of the suit plot which evidently is much more than he is actually entitled to. He has sold the property evidently without consent of any of his co-sharers i.e. the plaintiff or the defendant No.3; and none of the two are witnesses or consenting parties to the sale deed. It is also not the case of the contesting defendant no.1 that he had obtained any consent from the co-sharers prior to sale. The defendant No.1 has thus without partition sold a specific portion of land (with boundaries as per sketch-map in the deed) more than his legitimate share to the defendant No.4 (without consent of his co-sharers). The learned counsel for the plaintiff relied upon the decision reported in **AIR 1995 ORISSA 110** (*Karunakar Rout @ Thatei Vrs. Golak Behari Biswal and another*), wherein it has been observed that the transfer of the undivided coparcenary property by a co-parcener is void ab-initio and is not even valid to the extent of the vendor's share. He has also relied upon

the decision reported in **2007 (II) CLR – 239** (*Sukadev Jena Vrs. Kuna Rout & Ors.*) wherein it has been held that when the sale was neither made in the capacity of Karta of the family and nor was made with the consent of co-parceners, such transaction cannot be void ab-initio but shall be voidable at the option of the other co-parceners and that the sale deed being without any legal necessity does not convey any right or title to the purchasers. Even in the decision reported in **2008 (II) OLR – 97** {*Bina Sukla -Vrs.- Smt. Meena Devi Panch and ors.*} at Para-8 it has been held that one of the co-owners can alienate his undivided interest in a property even before a partition in metes and bounds, but it is also settled that one of the co-owners cannot alienate any specific part of such property before partition in metes and bounds. On such observations the Hon'ble court ratified the order of the lower court rendering the saledeed alienating specific portion of property before partition invalid. Hence, in view of all such decisions the RSD No. 1234 dtd. 18.05.2009 executed by the present Defendant no.1 in favour of defendant no.4 cannot confer any right on the latter and is invalid. The defendant no.4 has deposed that in the meantime he has constructed a residential house. The plaintiff has filed this suit in the very year of execution of the saledeed i.e in 2009. The defendant no.4 also entered his appearance on 13.04.2010 and contested this suit. If the defendant no.4 deemed it fit to proceed with constructions during pendency of this suit, then it can be said that he has incurred the risk knowingly. It is always the duty of the purchaser to investigate the latent or patent defect of the properties he/she is purchasing. Be that as it may, when the saledeed is being declared invalid, I think in the fitness of things the defendant no.4 should be given the liberty to recover the sale consideration amount from the defendant no.1 in appropriate proceeding.

Now the next question comes regarding pre-emption. The defendant No.1 purportedly sold the suit schedule 'C' property to the defendant No.4 by virtue of Ext.2. It has already been discussed above that the defendant no.1 without consultation or consent of his co-sharers i.e plaintiff and defendant no.3 has alienated the suit

schedule-C properties to defendant no.4. In the decision reported in 1997 (I) OLR – 211 (*Bhaskar Chandra Barik Vrs. Bishnu Chandra Pradhan and others*) and **Bina Sukla** (*Supra*) it has been held that Section 22 of Hindu Succession Act is also applicable to a complete transfer and a party can seek relief under the section by filing a regular suit in a civil court. In the decision reported in 1993 (II) OLR – 31 (*Krushna Mallik and another Vrs. Bishnu Mohan Das and others*) it has been held that the term “**immovable property**” appearing in Section 22 of Hindu Succession Act includes agricultural lands too. In the present case, the *Kissam* of the suit plot was originally *Sarad-III*. But subsequently the defendant No.4 has converted Ac. 0.10 decimals out of his purchased land of Ac. 0.18 decimals to *homestead* status and the remaining Ac. 0.08 decimals continues to be *Sarad-III*. So, it is now clear that Section 22 of Hindu Succession Act applies to the suit plot. Since the plaintiff has evinced her willingness to purchase the suit land in the interest of justice, she should be given liberty to purchase the 1/4th share of defendant No.1 over the suit plot. At this juncture, it is worthwhile to mention here that as per the provision U/o- 20, R-14(1) of CPC the court has to specify the day when the purchase money is to be deposited in court. So, duty is cast on the court to calculate the consideration amount. On a perusal of Ext.2 it is seen that the consideration amount was Rs. 60,000 /- for Ac.0.18 dec. of land. The 1/4th share of the defendant no.1 over the suit plot comes to Ac.0.06 dec. So, taking into account the consideration money in the saledeed the cost of Ac.0.06 dec. of land can be quantified to Rs. 20,000 /-. Since, the plaintiff has come up with this suit within seven months of execution of Ext.2, the consideration amount should date back to the time of execution (of Ext.2) and not the current market valuation. Hence, the plaintiff is to deposit Rs. 20,000/- before this court on or before 20.09.2016, and on such deposit she shall become title holder to the 1/4th share of the defendant no.1 over the suit plot.

All the four issues are answered in favour of the plaintiff accordingly.

6. **Issue nos. (i), (ii) and (vii)** are jointly taken up for consideration. It has

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already been held in the preceding paragraph that the defendant No.1 without partition and without consent of his co-sharers had alienated the suit schedule 'C' property to the defendant No.4 more than he is legally entitled to. Since due to such sale, cloud was definitely cast on the title of the plaintiff over the suit plot, she has rightly approached the Civil Courts for relief. She had ample cause of action, the suit filed by her is well maintainable and she is entitled to the reliefs claimed. Hence, ordered.

O R D E R

This suit is decreed on contest against the defendants in the light of the observations made above. The Registered Sale Deed No. 1234 dtd. 18.05.2009 executed by the defendant no.1 in favour of defendant no.4 is hereby declared invalid. It is hereby held that the plaintiff has a right of pre-emption over the suit plot with respect to the share of the defendant no.1 thereon. The plaintiff is directed to deposit Rs. 20,000/- before this court on or before 20.09.2016, and on such deposit she shall become title holder to the 1/4th share of the defendant no.1 over the suit plot. No costs.

Pronounced the judgment in the open court today, this the 23rd day of August, 2016, under my signature and the seal of this Court.

Typed to my dictation and
corrected by me.

Sd/-
**Civil Judge (Sr.Divn.),
Talcher.**

Sd/-
**Civil Judge (Sr.Divn.),
Talcher.**

List of the witnesses examined on behalf of the Plaintiff:

P.W.1 : Parbati Samal @ Das

List of the witnesses examined on behalf of the Defendants:

D.W.1 : Tuna Samanta

D.W.2 : Doneswar Samal

List of Exhibits marked on behalf of the Plaintiff:

- Ext.1 : Certified copy of the R.O.R. of Khata No.203 of Mouza-Santhapada.
Ext.2 : Certified copy of the Registered Sale Deed No.1234, dtd. 18.05.2009.

List of Exhibits marked on behalf of the Defendants:

- Ext.A : R.O.R. of Khata No. 449/405 of Mouza- Santhapada.
Ext.B : Certified copy of R.O.R. of Khata No.202 of Mouza- Santhapada.
Ext.C : Certified copy of R.O.R. of Khata No. 203 of Mouza- Santhapada.
Ext.D : Certified copy of R.O.R. of Khata No. 462 of Mouza- Santhapada.

Sd/-
Civil Judge (Sr.Divn.),
Talcher.