

**HEADING OF DECISION IN THE ORIGINAL SUIT.
DIST: KHORDHA.**

**IN THE COURT OF THE SENIOR CIVIL JUDGE, KHORDHA
PRESENT :-**

*Sri Raj Kishore Lenka
Senior Civil Judge, Khordha.*

Dated this the 22nd day of October, 2014

C.S. 393/ 2009

1. Adhikari Swain, aged about 50 yrs.
2. Subash Swain, aged about 45 yrs.

Both are sons of Dhusasan Swain at Chhotaraypur, P.O.- Jariput,
P.S./Dist- Khordha.

..... Plaintiffs.

-Versus-

1. M/s Subhashree Builders, 36. Forest Park, P.S.- Capital, BBSR,
Dist- Khordha through It's Managing Director, Ramanath Mohanty,
aged about 46 yrs, S/o- Brajaraj Mohanty.
2. Sambad “AMA ODISSA” Charitable Trust, C/o- Managing Trustee
“Soumya Ranjan Pattnaik”, aged about 56 yrs, S/o- Brajabandhu Pattanaik,
At- A.62 Nayapalli, BBSR, P.O./P.S.- Nayapalli, Dist- Khordha
At present residing Plot No. 185, VIP Area, Paika Nagar,
P.S.- Nayapalli, BBSR, Dist- Khordha.

..... Defendants.

3. Dhusasan Swain, aged about 90 yrs, S/o- Late Bhuj Swain
of Vill.- Chhotaraypur, P.O.- Gudum, P.S./Dist- Khordha.

..... Prof. Defendant.

Counsel for Plaintiff	...	Sri M.A. Khan & Associates Advocates, Khordha
Counsel for defendant No. 1	...	Sri B.D. Patra & Associates

Counsel for Proforma defendant No. Ex-parte.

Date of conclusion of Argument – 13.09.2014

Date of pronouncement of Judgment – 22.10.2014

JUDGMENT

This is a suit for declaration.

02. The plaintiffs case is that the property involving in this suit is recorded in Mouza-Daleiput, under Sabik khata No. 194, plot No. 1108 measuring Ac. 0.225 decimals and in Mouza- Jariput, under khata No. 151, plot No. 1116 measuring Ac. 0.160 decimals, plot No. 1255 measuring Ac. 0.029 decimals and plot No. 1259 measuring Ac. 0.220 decimals, in total Ac. 0.409 decimals (hereinafter referred to as suit land) are the ancestral property of the plaintiffs and their father Dhusasan Swain, who is the proforma defendant No. 3 in this case. The said Dhusasan Swain is a man of 90 years old and residing at 'Chhotraypur'. The plaintiffs are residing elsewhere and often coming to the village to look after their father Dhusasan as well as their landed properties. Their specific case is that the defendant No. 1 taking advantage of the absence of the plaintiffs has prepared a false registered power of attorney bearing No. 5983 dt. 08.04.2008 in his favour before the District Sub-Registrar, Khordha at Bhubaneswar, seems to be executed by Dhusasan Swain and on the strength of such power of attorney, defendant No. 1 prepared a false sale deed in favour of defendant No. 2 in respect of the suit land before the District Sub-Registrar, Khordha at Bhubaneswar vide sale deed No. 5970 dt. 18.04.2008 and another sale deed bearing No. 2245 dt. 06.02.2009. Wherein, the age of their father Dhusasan Swain has been

mentioned to be 69 years. The further case of the plaintiffs is that on the strength of the said false sale deed defendant No. 2 mutated the suit land in his favour vide M.C. No. 871/2008 vide Hal Khata No. 601/50, plot No. 1108 measuring Ac. 0.225 decimals of mouza Daleiput, Kmisam Gharabari. Whereas no notice has been issued to the plaintiffs in the said mutation proceeding. It is again contended by the plaintiffs that their father Dhusasan Swain was completely unaware about the transaction and no consideration amount has been paid to their father. The plaintiffs again claimed that since they were absent in the village they had no occasion to know about the said fact, but while the defendant No. 2 constructed a building by the side of the suit land, the plaintiffs inquired into the matter and obtain the certified copy of the sale deed from the District Sub-Registrar, Khordha on 07.11.2009 and came to know about the above facts. The plaintiff's further claim is that they have every right over the suit land and their father has not executed any power of attorney in favour of defendant No. 1. All the transactions are fake and void transactions executed in absence of their father as well as without the knowledge of the plaintiffs. The plaintiffs again contended that the cause of action arose on 07.11.2009 when the plaintiffs obtained the certified copy of the registered sale.

03. Defendant Nos. 1 & 2 have filed their joint written statement, whereas the suit against defendant No. 3 set ex-parte on 14.09.2011.

The defendant Nos. 1 & 2 have contended in their written statement that the suit is not maintainable in the eye of law, there is no cause of action, bad for non-joinder of necessary parties and the plaintiffs have not also paid the proper court

fees and for which the suit is liable to be dismissed. While, disputing the basic claims of the plaintiffs, the above defendants have to say that the registered power of attorney and the registered sale deeds have been executed in favour of defendant Nos. 1 & 2 with the knowledge of the plaintiffs and as such those registered documents have not been prepared fraudulently. Defendant No. 2 has muted his name in respect of his purchased land vide mutation case No. 871/2008 in the court of Tahasildar, Khordha in respect of Ac. 0.225 decimals of Land of mouza Daleiput. The Tahasildar, Khordha after observing all the principles of law has muted the name of defendant No. 2, which was also within the knowledge of the plaintiffs. The father of the plaintiffs has duly authorized defendant No. 1 by virtue of the registered power of attorney to sale the suit land and accordingly defendant No. 1 has rightly and lawfully sold the suit land to defendant No. 1 after payment of a good consideration amount. Therefore, the case of the plaintiffs is completely baseless and false and the suit is liable to be dismissed with cost.

04. Taking account of the rival disputes between the parties and in order to adjudicate the disputes lawfully and purposefully, the following issues have been settled.

I S S U E S.

- i) Whether the suit is maintainable?
- ii) Whether the plaintiffs have any cause of action to institute this suit?
- iii) Whether the suit land is the ancestral property of the plaintiffs and proforma defendant No. 3?

- iv) Whether the power of attorney bearing No. 5983 dt. 10.04.2008 executed in favour of the defendant No. 1 by the plaintiffs can be declared void on the ground that the same has been obtained fraudulently?
- v) Whether the sale deed bearing No. 5970 dt. 18.08.2008 and the sale deed bearing No. 2245 dt. 06.02.2009 executed by the defendant No. 1 in favour of defendant No. 2 can be declared as void on the ground that the same have been obtained fraudulently?
- vi) Whether the mutation ROR bearing No. 601/50 published in favour of the defendant No. 2 has been correctly published?
- vii) Whether the plaintiffs are entitled to any other relief?

05. In order to prove the case, two witnesses have been examined on behalf of the plaintiffs including the plaintiff No. 2 as P.W. 1. Three documents have been admitted in the evidence on behalf of the plaintiffs, such as the certified copy of the mutation ROR of khat No. 601/50, certified copy of RSD No. 5970 dt. 18.04.2008 and Hal-Sabik information sheet in respect of khata No. 194 as Ext. 1, 2 & 3 respectively.

On the other hand four witnesses have been examined on behalf of the defendants including the Managing Director of defendant No. 1 and proforma defendant No. 3. Two documents have been admitted in the evidence from the side of the defendants such as the registered sale deed No. 5970 dt. 18.04.2009 and Power of attorney executed by defendant No. 3 as Ext. A & B respectively.

FINDINGS.

Issue No. iii.

06. This being the most pivotal issue is taken up first for consideration.

The forceful claim of the plaintiffs over the suit land is that the same is the ancestral property of the plaintiffs and their father, who is proforma defendant No. 3. Therefore, the alienation by the suit land solely by their father is not permissible in the eye of law. To that effect P.W. 1 in his examination in chief has stated that the suit land is their ancestral property and the plaintiffs have every right over the suit land. Their father has never transferred the suit land in favour of defendant No. 2. On the other hand the defendants have to say that the suit land is not the ancestral property of the plaintiffs and proforma-defendant No. 3. This court has also gone through the evidence adduced by both the parties. It is true that any sale by one of the coparcener of the undivided interest in the coparcener property without the consent of other coparceners would not be void ab-initio, but would be voidable at the option of others coparceners. Learned counsel for the plaintiffs for the sake of their case have also relied upon a judgment reported in **1997 (1) CCC 63 (SC)**, in a case between, Sher Singh and Others-- Appellants -Vrs- Damodar Singh-- Respondent. In that case the Hon'ble Apex Court of India held that

“HINDU LAW - Ancestral property held by Hindu Joint Family – It assumes the character of a coparcenary – Every member of the family would be entitled by birth to a share in it – Finding by courts below that property belonged to Joint Hindu Family – Respondent was entitled to share by virtue of his birth was well justified – Previous decree obtained by appellant to which respondent was not party was tainted by fraud and not binding upon respondent.”

But, here in this case, while the plaintiffs have claiming the suit property to be ancestral property, the proforma defendant No. 3, who is the father of the plaintiffs, has specifically claimed that the suit property is not the ancestral property. In the cross-examination the defendant No. 3 (D.W-3) has specifically stated that the suit property has been purchased by him from Judhistira Pattanaik and Banchhanidhi Mangaraj around 20 years back. This being the stand of the defendants, the onus heavily lies on the plaintiffs to prove that the suit land is their ancestral property and if they will be succeeded to prove the same, it will become easier for them to prove that they have a definite interest each over the suit land. While, this court has gone through the pleading and evidence in chief, it is seen that the plaintiffs have not relied upon any document or referred any document to prove that the suit land is the ancestral property and they have not also mentioned as to how the suit land has been acquired by their father and on which basis they are claiming the suit land to be their ancestral property. In the cross-examination P.W. 1, who is the plaintiff No. 2 in this case has admitted that the suit land stands recorded in the name of their father Dhusasan Swain (D-3) in the consolidation ROR. Very surprising fact is that neither the ROR nor any relevant document or any cogent and concrete evidence has been put forwarded by the plaintiffs to establish that the suit land was ever recorded in the name of any of their common ancestor/ ancestors to establish that the suit land was devolved upon his father or allotted to his father and the same is not the exclusive property of their father. Ext. 1 is the mutation ROR recorded in the name of the defendant No-2 in the name and Style "*Sambad ama Odisha charitable trust, traf*

managing trustee". Ext. 2 is the certified copy of the sale deed and Ext. 3 is the Hal Sabik information sheet which related to the property recorded in the name of their father Dhusasan Swain under khata No. 194, plot No. 1108 *vis-avis* to Ext. 1. Therefore, the piece of documents vide Ext. 3 does not relates to any documentary evidence to prove that the suit land is the ancestral property of the plaintiffs. There is absolutely no evidence in the hand of the plaintiffs to prove that the suit land is their ancestral property and they have a definite interest over the same. The above issue is answered accordingly.

Issue No. iv, v & vi.

07. The above three issues being inter related to each other are taken up together for consideration and decision.

The plaintiffs further case is that their father, who is the recorded owner of the property has not executed any power of attorney in favour of the defendant No. 1 and as such the sale of the suit land by defendant No. 1 to defendant No. 2 is completely a void document and not tenable in the eye of law. Consequent upon the above pleading the plaintiffs have further to say that both the documents have been prepared fraudulently by exercising fraud and as such the documents such as the power of attorney alleged to have been executed by defendant No. 3 in favour of defendant No. 1 and the sale deeds executed by defendant No. 1 in favour of defendant No. 2 are *void-ab-initio*.

In view of the decision in the forgoing issue, the suit land is deemed to be the exclusive property of the father of the defendant, who is none else than the

proforma defendant No. 3 in this case. The plaintiffs have taken a specific plea that the power of attorney bearing No. 5983 dt. 08.04.2008 executed in favour of defendant No. 1 by their father (proforma defendant No. 3) and the sale deeds bearing No. 5970 dt. 18.04.2008 and the sale deed bearing No. 2245 dt. 06.02.2009 are fraudulently executed by defendant No. 1 in favour of defendant No. 3. Since the plaintiffs have taken a specific plea of fraud the onus is also heavily lies on them to establish that fraud has been exercised in execution of the above three documents. Dealing with the said subject it may be noted that fraud has been defined in section 17 of the Indian Contract Act, which is surfaced as follows:-

17. 'fraud' defined- "Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :-

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. a promise made without any intention of performing it;
3. a promise made without any intention of performing it;
4. any other act fitted to deceive;
5. any such act or omission as the law specially declares to be fraudulent.

Explanation :- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are

such that, regard being had to them it is the duty of the person keeping silence to speak², or unless his silence, is, in itself, equivalent to speech”.

Out of the above three documents challenged by the plaintiffs, only the certified copy of one sale deed bearing No. 5970 dt. 18.04.2008 has been produced in this case. Whereas the defendants No-1 and 2 have only made available the original registers sale deed bearing No. 5970 dt. 18.07.2009, which is marked as Ext. 1. The other two documents have not been produced by the plaintiffs nor the plaintiffs have taken any steps for production of the same nor they have taken any endeavor as per the provisions of law for production of the copies of those documents to accept the same in norm of secondary evidence. The above conduct is sufficient to explain the intention of the plaintiffs and in absence of all the documents, it is not possible on the part of the court to take a judicial notice to the documents which have been challenged but not produced before the court.

08. Proforma defendant No. 3 is the person who executed the power of attorney in favour of defendant No. 1, which is challenged by the plaintiffs. The same is also marked as Ext. B by the defendants and the certified copy of the said document is also marked as Ext. 2. Apart from raising a question of fraud the plaintiffs have also put forwarded their case by saying that their father Dhusasan Swain is an old man about 92 years old and taking advantage of his old age, the power of attorney was obtained by exercising fraud and also by mentioning the age of their father in the power of attorney to be 69 years. On the other hand the executant of Ext-1/Ext-B namely Dhusasan Swain is examined as D.W. 3. He in his evidence in chief has

deposed that he has executed the power of attorney in favour of defendant No. 1 for sale of the aforesaid landed properties (suit land) for repayment of the loan as he was not able to do so. He again stated that he is aged about 74 years (by the time of deposing evidence on 13.01.2014) and able to perform his day to day work. He is the manager and '*Karta*' of his family and also looking after his house hold affairs. He also admitted the power of attorney executed by him to be Ext. B. He has been elaborately cross-examined but not a pinch of evidence has been retracted from him to prove that the power of attorney vide ext-1 has been executed by exercising fraud. Since the executant of such power of attorney himself is available before the court and deposing that the same has been duly executed, the plaintiffs, who are no way connected with the execution of such power of attorney nor present at the time of execution or having any personal knowledge about such execution are now lost their *locos standai* to challenge the same on the ground of fraud. Therefore, it is the further opinion of this court that the power of attorney executed by the defendant No. 3 in favour of defendant No. 1 is a valid document. So far as the sale deeds bearing No. 5970 dt. 18.04.2008 and 2245 dt. 06.02.2009 are concerned, only the sale deed bearing No- 5970 dt. 18.04.2008 is made available to the court. Since the power of attorney executed by defendant No-3 in favour of defendant No-1 is proved to be a valid document, the sale deeds, those are executed by virtue of such power of attorney by defendant N0-1 cannot said to be a void document.

09. The plaintiffs again urged that the consideration amount has not been paid properly to proforma defendant No-3. In the sale deed vide-Ext-2, the

consideration amount has been mentioned to be Rs. 81,000/- to be paid to the proforma defendant No. 3 by his vendee, but the proforma defendant No. 3 in his evidence in chief only stated that he has only received Rs. 4,000/- and Rs. 5,000/- respectively from the two lands. While going through the above contention of the plaintiffs, it is learnt that the plaintiffs might have not gone through the record properly. In fact, the document which has been admitted as Ext. 2 (Ext-A) is a sale deed executed by defendant No. 1 in favour of defendant No. 2. Therefore, the consideration amount Rs. 81,000/- is a matter between defendant No. 1 & 2 and for which, the same cannot be made applicable to the case of proforma defendant NO. 3. Transfer of such property by the lawful owner being effective one and legally enforceable, the plaintiffs are also not entitled for any discretionary relief. The issues are answered accordingly.

Issue Nos. i, ii, iii.

10. So far as the question of maintainability of the suit is concerned, consequent upon the forgoing discussions it is quite needful to mention that at the moment the plaintiffs have failed to substantiate their legitimate interest over the suit land, they lost their locos-standai to institute the suit. The documents basing on which the suit has been instituted such as the sale deed bearing No. 5970/2008 and 2245/2008 have not also been produced in this case by the plaintiffs. The plaintiffs in view of the above fact and circumstances also failed to bring a cause of action in their favour. The suit is not maintainable at all and as such they are not entitled for any relief as sought for. Hence it is order.

ORDER.

The suit of the plaintiffs be and the same is dismissed on contest against the defendants, but in the circumstances without any cost.

Advocates fees are at contested scale.

Senior Civil Judge, Khordha.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 22nd day of October, 2014.

Senior Civil Judge, Khordha.

List of witnesses examined on behalf of Plaintiffs :-

P.W. 1 Subash Swain.

P.W. 2 Dhruva Muduli.

List of witnesses examined on behalf of Defendants :-

D.W. 1 Pradipta Kumar Mohapatra.

D.W. 2 Ramanath Mohanty.

D.W. 3 Dhusasan Swain.

D.W. 4 Laxmidhar Nayak.

List of documents admitted in the evidence on behalf of the Plaintiff :-

Ext. 1 Certified copy of mutation ROR of khata No. 601/50.

Ext. 2 Certified copy of RSD No. 5970 dt. 18.04.2008.

Ext. 3 Hal-Sabik information in respect of Khata No. 194 of mouza Daleiput.

List of documents admitted in the evidence on behalf of Defendants :-

Ext. A Regd. Sale deed No. 5970/2009.

Ext. A/1 Signature of D.W. 2 on Ext. A.

Ext. A/2 Signature of Soumya Ranjan Pattnaik on Ext. A.

Ext. B Power of attorney executed by defendant No. 3.

- Ext. B/1 Signature of D.W. 2 on Ext. B.
Ext. B/2 Signature of Laxmidhar Nayak on Ext. B.
Ext. B/3 Signature of Gaurahari Ranasingh.

Senior Civil Judge, Khordha.