

IN THE COURT OF CIVIL JUDGE(SR. DIVN.), BHUBANESWAR

Present : **Sri Sitikantha Samal**
Civil Judge(Sr. Divn.)
Bhubaneswar.

C.S No. 485/2010

1. Prabina Bhoi, aged about 45 years,
W/o Kumar Bhoi, of Vill-Panchol,
Po-Brahmanasadangi, P.S-Balianta, Khurda.
2. Malli Bhoi, aged about 35 years
W/o Akshya Bhoi of Vill-Damodarpur
Po-Damodarpur, P.S-Govindapur, Cuttack.

..... Plaintiffs

Versus -

1. Krupasindhu Bhoi, aged about 21 years
S/o Krushna Chandra Bhoi
At/Po-Sishupal, P.S-Old Town, Khurda.
2. Narayan Bhoi, aged about 50 years
S/o Sikhar Bhoi, Vill-Keshara, Po-Bankual,
P.S-Saheed Nagar, Bhubaneswar, Khurda.
3. Srikrishna Estate & Construction Pvt. Ltd,
having its registered office at Plot No. 1189
Nilakantha Nagar, Nayapalli, Bhubaneswar
Dist-Khurda represented by its Managing Director
Sri Pabitra Routray, aged about 37 years,
S/o Sri Jagabandhu Routray.
4. Deba Prakash Behera, aged about 32 years,
S/o Suresh Ch. Behera
At/Po/Ps-Karanjia, Dist-Mayurbhanj,
At PO/PS-Nayapalli, Dist-Khurda.

..... Defendants

C.S No. 689/2008

Narayan Bhoi, aged about 50 years
S/o Sikhar Bhoi, Vill-Keshara, Po-Bankual,
P.S-Saheed Nagar, Bhubaneswar, Khurda.

..... Plaintiff

- Versus -

1. Srikrishna Estate & Construction Pvt. Ltd,
having its registered office at Plot No. 1189
Nilakantha Nagar, Nayapalli, Bhubaneswar
Dist-Khurda represented by its Managing Director
Sri Pabitra Routray, aged about 37 years,

S/o Sri Jagabandhu Routray.

2. Deba Prakash Behera, aged about 32 years,
S/o Suresh Ch. Behera
At/Po/Ps-Karanjia, Dist-Mayurbhanj,
At PO/PS-Nayapalli, Dist-Khurda.

..... Defendants

COUNSELS APPEARED FOR THE PARTIES:

For the Plaintiffs : M/s Vivekananda Bhuyan & Associates

For the deft.no.1 : M/s N.Panda & Associates

For the deft.no.2 : M/s B.N.Das & Associates

For the deft.no.3 & 4: M/s Pramod Pattnaik & Associates

DATE OF ARGUMENT : 09.07.2014

DATE OF JUDGMENT : 21.07.2014

J U D G M E N T

Since it has been ordered on 11.10.2010 in C.S No. 689/08 for analogous hearing of both the suits, this common judgment arises out of both the suits.

The plaintiffs in C.S No. 485/2010 have filed the suit for a declaration of registered sale deed dt. 6022 dt. 30.05.2007 executed by the deft.no.3 in favour of deft.no.4 as illegal and void and not binding on them along with the prayer of partition in respect of the suit property and the relief of permanent injunction against the deft.no.4.

2. The case of the plaintiffs in C.S No. 485/2010 in brief is that the suit plot coming under Plot No. 760/1279 appertaining to Khata No. 464 measuring an area Ac0.530 decimals of Mouza-Keshara stands recorded in the name of one Sikhar Bhoi in the consolidation ROR, who died leaving behind his only son Narayan, the deft.no.2 and three daughters namely Prabina, the plaintiff no.1, Malli, the plaintiff no.2 and Kuntala who died leaving behind her only

son Krupasindhu, the deft.no.1. After death of the recorded owner, as the suit properties have not yet been partitioned by metes and bounds, the plaintiffs and the deft.no.1 & 2 are in joint possession as owners thereof having 1/4th share each. But while the matter stood thus, on 16.03.2007, the deft.no.2 executed an agreement with the deft.no.3 to sell the entire suit properties for a consideration of Rs. 13,94,000/- and received Rs. 1,00,000/- from the deft.no.3 as advance. On the same day, the deft.no.2 had also executed a general power of attorney in favour of the deft.no.3 and got it registered on the strength of which, the deft.no.3 transferred the entire suit property in favour of the deft.no.4 vide RSD No. 6022 dt. 30.05.2007. Since the alleged GPA is not executed by the plaintiffs so also the deft.no.1, the execution of the said GPA by the deft.no.2 for the entire suit plot is illegal and void and by that the deft.no.4 has also acquired no title and possession over the entire suit property. As on 18.03.2010, the deft.no.4 threatened to enter into the suit land and to create disturbance in the peaceful possession of the plaintiffs on the strength of the illegal and void sale deed dt. 30.05.2007, the plaintiffs have filed this suit praying the aforesaid reliefs.

All the defendants appeared. The deft.no.1, 2 and 3 & 4 have filed their written statements separately. The deft.no.1 though challenged the suit on the grounds of its maintainability and absence of cause of action, admitted the plea taken by the plaintiffs in the plaint. It is the specific case of deft.no.1 that after death of Sikhar Bhoi, his successors namely the plaintiffs and the deft.no.1 & 2 are in joint possession over the suit property having 1/4th share each and the transfer by deft.no. 2 in favour of deft.no.4 is illegal and void and not binding on him. He also taken the plea that the transaction in favour of the deft.no.4, if found

valid for the share of the deft.no.2, is also void U/s.35 of OCH and PFL Act.

The deft.no.2 filed separate W.S stating therein that the deft.no.3 on 16.03.2007 entered into an agreement with him for purchase of the suit property for consideration of Rs. 13,94,000/- and paid Rs. 1,00,000/- as advance and it was agreed that the land will be transferred after obtaining permission from the OLR authorities and on receiving the rest consideration amount within one year from the date of agreement. But the deft.no.3 while working out the said agreement, managed to prepare a power of attorney fraudulently on the same day through his own scribe by falsely mentioning therein that the deft.no.2 is the absolute owner in possession of the suit property which is also reflected in the agreement without the knowledge and consent of the deft.no.2. On strength of the above fraudulent and void power of attorney, the deft.no.3 very cunningly and clandestinely transferred the suit property in favour of the deft.no.4 for a consideration of Rs. 1,00,000/-. The deft.no.2 also challenged the validity of the power of attorney so also the registered sale deed in favour of deft.no.4 as illegal and void and admitted that the plaintiffs are his sisters and the deft.no.1 is the son of his sister Kuntala and they are in joint possession over the suit property without any partition.

The deft.no.3 & 4 filed their joint W.S in challenging the suit on the point of its maintainability and cause of action. They have taken the plea that the suit property stands recorded in the name of one Sikhar Bhoi who died leaving behind his only son the deft.no.2, Narayan Bhoi who is the only legal heir of the recorded owner. The plaintiffs do not have 1/4th share each in the suit property and at no point of time they are in possession of the same. Being the only heir, the deft.no.2 to sell the suit property, executed and

registered a power of attorney in favour of the deft.no.3 vide deed no. 54 dt. 16.03.07 and received a sum of Rs. 1,00,000/- and pursuant to such power of attorney, the deft.no.3 sold the suit property to the deft.no.4 vide RSD No. 6022 dt. 01.06.07 and gave delivery of possession to him. The deft.no.4 having in possession over the suit property has mutated the same in his favour. They have also denied the status of the plaintiffs and the deft.no.1 so also his mother. With these pleas, the deft.no.3 & 4 pressed for dismissal of the suit.

On the basis of the aforesaid rival pleadings of the parties, the following issues have been framed for consideration.

ISSUES

- (i) Is the suit maintainable ?
- (ii) Whether there is any cause of action to file the suit ?
- (iii) Whether the plaintiffs are entitled for a declaration that they are entitled to 1/4th share each in the suit property and for partition ?
- (iv) Whether the registered sale deed bearing no. 6022 dt. 30.05.2007 executed by the deft.no.3 in favour of the deft.no.4 is illegal, invalid, void, inoperative and collusive and is not binding on them ?
- (v) Whether the plaintiffs are entitled for a decree of permanent injunction against the deft.no. 4 ?
- (vi) To what relief(s), if any the plaintiffs are entitled ?

3. The plaintiff's case in C.S No. 689/2008 in brief is that the suit schedule property which comes under Plot No. 760/1279 appertaining to Khata No. 464 measuring an area Ac0.530 decimals of Mouza-Keshara stands recorded in the name of one Sikhar Bhoi in the consolidation ROR who died leaving behind his only son Narayan Bhoi, the plaintiff. On 16.03.2007 the plaintiff executed an agreement to sell the

suit property to the deft.no.1 for consideration of Rs. 13,92,000/- and received a sum of Rs. 1,00,000/- as advance on terms and conditions that the plaintiff will execute the sale deed within one year from the date of agreement after obtaining permission U/s.22 of the OLR Act and on receipt of the balance consideration. As the deft.no.1 did not pay the rest money to the plaintiff and did not cooperate for obtaining the aforesaid permission, the plaintiff canceled the agreement on dt. 04.01.2008. But taking the simplicity and innocence of the plaintiff, the deft.no.1 fraudulently got executed one general power of attorney in his favour and got it registered before the Registering Authority by playing fraud with the plaintiff and on the strength of such power of attorney, the deft.no.1 sold the suit property to the deft.no.2 for consideration. As the power of attorney dt. 16.03.2007 is the outcome of fraud practised by the deft.no.1 who was in charge of preparation of the agreement, it does not confer any power to the deft.no.1 and it is void, invalid and inoperative. Hence, basing upon such power of attorney, the purchase of the suit property by the deft.no.2 from deft.no.1 will also confer no right, title and interest upon the deft.no.2 and no possession has been delivered to the deft.no.2. He has taken the plea that on 29.05.2008, he came to know from the certified copy of the regd.sale deed dt. 30.05.2007 that the deft.no.1 has snatched away a general power of attorney in respect of the suit property fraudulently while preparing the agreement in between them. With these, the plaintiff has filed the suit to declare the general power of attorney dt. 16.03.2007 as fraudulent, invalid and void and accordingly the regd.sale deed dt. 30.05.2007 in favour of the deft.no.2 is void. He has also sought for the relief of declaration of his title and confirmation of possession over the suit property and for permanent injunction against the

deft.no.2.

The defendants have appeared and filed their written statement jointly challenging the suit on the grounds of its maintainability and cause of action. They have taken the plea that as the status of the suit property is agriculture and it is unfit for any types of construction, the plaintiff in order to sell the suit property executed and registered a general power of attorney in favour of the deft.no.1 on 16.03.2007 after receiving the full and final consideration amount by executing money receipt. Basing upon such power of attorney, the deft.no.1 executed and registered sale deed no. 6022 dt. 01.06.2007 in favour of the deft.no.2. Hence, the power of attorney executed by the plaintiff in favour of the deft.no.1 is legal and valid one and is not a mere paper transaction and on the strength of such GPA, the deft.no.1 sold the suit property to the deft.no.2 for consideration who is in possession over the same and got it mutated in his favour. Submitting the above, it is urged by the defendants to dismiss the suit.

On the basis of the aforesaid rival pleadings of the parties, the following issues have been framed for consideration.

ISSUES

- (i) Is the suit maintainable ?
- (ii) Whether there is any cause of action to file the suit ?
- (iii) Whether the plaintiff is entitled for a declaration that the general deed of power of attorney bearing no. 54 dt. 16.03.2007 is fraudulent, invalid, void and not binding on him ?
- (iv) Whether the regd.sale deed bearing no. 6022 dt. 30.05.2007 executed by the deft.no.1 in favour of the deft.no.2 is illegal, invalid, void, inoperative, sham and collusive transaction and is not binding on the

plaintiff ?

- (v) Whether the plaintiff is entitled for a declaration of right, title, interest and possession of the suit property in his favour ?
- (vi) Whether the plaintiff is entitled for a decree of permanent injunction against the deft.no.2 ?
- (vii) To what relief(s), if any the plaintiff is entitled ?

4. Since both the suits have been heard analogously and common evidence have been recorded in C.S No. 485/2010 for both the suits, the issues of both the suits are clubbed together as far as possible and practicable for determination. For the sake of convenience, while appreciating the evidences adduced in both the suits, though recorded in C.S No. 485/2010, the plaintiffs of the C.S No. 485/2010 are hereinafter called as plaintiffs. The plaintiff in C.S No. 689/2008 namely Narayan Bhoi being the deft.no.2 in C.S No. 485/2010 is hereinafter called as the deft.no.2 and similarly the deft.no.3 & 4 of this suit, who are the deft.no.1 & 2 in C.S No. 689/2008 are hereinafter called as the deft.no.3 & 4. It may be stated here that the deft.no.1 Krupasindhu Bhoi in C.S No. 485/2010 is not a party in C.S No. 689/2008.

5. In support of their case, the plaintiffs have examined as many as six witnesses including the plaintiff no.1 as P.W.6. The P.W.2 to 5 are the co-villagers of late Sikhar Bhoi and the P.W.1 is an advocate in whose favour the plaintiffs and the deft.no.1 & 2 have executed a power of attorney 03.06.2003. The plaintiffs have also marked certain documents in support of their plea vide Ext.1 to 8. The deft.no.1 examined himself as D.W.1 and the deft.no.2 examined himself as D.W.2. The D.W.3 is the deft.no.4 of the suit. The defendants have also exhibited various documents vide Ext.A to F and Ext.A-1 to C-1 in support of their plea. All

the oral and documentary evidences have been explained in detail at the foot of this judgment.

6. **Issue No. (iii) of C.S No.485/2010:-**

Since this issue is a vital issue affecting the other issues and for the sake of convenience and better appreciation of the other issues, the same is taken for consideration before consideration of other issues. From the pleas of both the suits and the evidence adduced by both the sides, it remains well admitted that the suit property bearing plot no. 760/1279 measuring Ac0.530 decimals under Khata No. 464 of Mouza- Keshara stands recorded in the name of one Sikhar Bhoi, S/o Bisi Bhoi of Village-Keshara in the ROR published in the year 1980 by the Consolidation Authorities. The ROR in respect of the suit property is admitted in evidence as Ext.2 which reveals that the suit plot along with other undisputed plots have been recorded in the name of Sikhar and this suit plot forms a chaka bearing chaka no. 353/596. It also remains admitted by both the parties that the suit land is an agricultural land. The dispute is that whether Sikhar died leaving behind his only son the deft.no.2 as his sole legal heir or the plaintiffs and the mother of the deft.no.1 are the daughters of Sikhar Bhoi or not. The plaintiff no.1 who has been examined as P.W.6, the D.W.1 and the D.W.2 (the deft.no.2 in C.S No. 485/2010 and plaintiff in C.S No. 689/2008) have categorically stated that Sikhar Bhoi died on 28.11.2001 leaving behind his three daughters namely Prabina, Malli, Kuntala and one son Narayan. The P.W.2 to 5 are the persons admittedly of the village Keshara(Kamana) to which Sikhar Bhoi belonged. The P.W.2 to 5 have also stated in their respective evidence in chief that Sikhar Bhoi died leaving behind the plaintiffs, the mother of the deft. no.1 and the deft.no.2 as his legal heirs. The learned counsel for the plaintiffs submitted that since

the plaintiffs and deft.no.1 & 2 specifically the D.W.2 who is the plaintiff in C.S No. 689/2008 have categorically and unanimously admitted that they are the heirs of Sikhar Bhoi coupled with the evidences of the P.W.2 to 5 to that effect, in absence of any contrary evidence, the Court is to hold that the plaintiffs and the mother of the deft.no.1 are the daughters of Sikhar Bhoi. At this juncture, the learned counsels for the deft.no.3 & 4 submitted that the P.W.2 to 5 though belong to village-Keshara, but their evidences are fall short to fulfill the ingredients of Section-50 of the Indian Evidence Act, as they have no special means of knowledge on the subject either being the member of the family or otherwise and in support of his submission, he relied upon a decision of our own Hon'ble High reported in AIR 1987 Orissa page-187 (Baruni Behera Vrs. Padana Behera). No doubt the P.W.2 to 5 are not the persons belonging to the family of late Sikhar Bhoi, but from their evidence, it is found that they are the agnates of Sikhar Bhoi. The learned counsel for the plaintiffs submitted that the evidence of P.W.1 along with the Ext.7, the registered deed of general power of attorney executed on 03.06.2003 by the plaintiffs, the deft.no.2 and the mother of the deft.no.1, of an undisputed point of time, in respect of an undisputed land of Sikhar Bhoi show that the plaintiffs and the mother of the deft.no.1 are the daughters of Sikhar Bhoi. In that respect, he also placed reliance on Ext.5 & 6 in respect of the matter of permission under Section-22 of OLR Act in Revenue Misc. Case No. 84/2008 which corresponds to the Ext. F (certified copy of the registered sale deed dt. 14.12.2012). In those documents, the concerned R.I has categorically reported to his authority that the plaintiffs and Kuntala, the mother of the deft.no.1 and the deft.no.2 are the successors of Sikhar Bhoi and basing upon that report the Sub-Collector accorded

the permission for transfer of a part of plot no. 704 under the suit Khata to the aforesaid heirs of late Sikhar Bhoi vide order dt. 27.12.2011 and basing upon that permission, the plaintiffs, the deft.no.2 and the deft.no.1 (son of Kuntala) executed and registered a sale deed in favour of the P.W.1 Keshab Chandra Mishra on 14.02.2012 (Ext. F). As per the submission of the learned counsel for the plaintiffs, this permission under the OLR Act issued by the competent authority clinches the matter. The learned counsel for the deft.no.3 & 4 urged that when the admitted son of Sikhar Bhoi has not whispered in C.S No. 689/2008 as to the presence of three daughters of Sikhar Bhoi and claimed his title over the suit land exclusively, that itself negatives the claims of the plaintiffs that they are the daughters of Sikhar. No doubt the deft.no.2 has filed the C.S No. 689/2008 for declaration of his title over the suit property along with other prayers and has also executed an agreement exclusively in favour of the deft.no.3 on 16.03.2007 and the general power of attorney dt. 16.03.2007 executed by the deft.no.2 in favour of the deft.no.3 reveal that he is exercising his right over the suit property exclusively. But that action or admission of the deft.no.2 in no way affects the right of succession of the plaintiffs and the mother of the deft.no.1, if it is otherwise proved and established that they are the daughters of Sikhar Bhoi. A person may lie but not the circumstances. Even otherwise it is seen that if the Deft. No.2 admits that he has three sisters, he will be entitled only for 1/4th share not only in the suit property, but also in the entire properties left by Sikhara Bhoi. When his admission that Sikhara has three daughters goes against his own interest in respect of the entire properties of Sikhara, his assertion that he is the only son of Sikhara and the exclusive owner of the suit property which is just one plot out of the

suit khata containing four plots measuring Ac2.096 decs. of land, at no stretch of imagination cannot be held true and correct. Here in this case the oral evidences of P.W.1 to 6, D.W.1 & 2 and the documents i.e. the Ext. 1 which is executed at an undisputed point of time and more particularly the Ext. 5 & 6 which corresponds to Ext. F clearly establish the fact that Sikhar Bhoi died leaving behind his three daughters namely Prabina, Malli and Kuntala and one son Narayan, the deft.no.2. In rebuttal to this evidence, there is absolutely no material placed by the deft.no.3 & 4, rather the D.W.3 who is the deft.no.4 in his cross-examination has categorically admitted that he has not verified any document or any other material as to the successors of Sikhar Bhoi. The learned counsel for the Deft.No. 3 and 4 submitted that Bina and Prabina are two different persons. In this respect, he relied upon the Ext.1, 5 & 6, Ext.F, where the name of Bina Bhoi has been written along with others as the daughters of Sikhar Bhoi. But the plaint itself shows that the plaintiff no.1 is Prabina Bhoi and in Ext. F and 7 Bina Bhoi signed her name whereas in the plaint, the plaintiff no.1 Prabina Bhoi put her L.T.Is. The learned counsel for the deft.no.3 & 4 urged that the alleged daughter Bina Bhoi is not the plaintiff no.1, Prabina Bhoi. But on careful perusal of the evidence of P.Ws 2 to 5 shows that all of them have stated Bina is also known as Prabina in the locality. The plaintiff no.1 who has been examined as P.W.6 has also stated that she is known as Bina @ Prabina and though she has signed on Ext.A and F as Bina but put her L.T.Is in the plaint as Prabina and claimed to be the daughter of late Sikhar Bhoi. When it is established that Sikhar Bhoi had 3 daughters and the plaintiff No.2 Malli Bhoi and the deft.no.1 & 2 who are the other successors of Sikhar Bhoi not disputed the identity of the plaintiff no.1, the name Bina

or Prabina or the execution by her either by signing the documents or by putting her L.T.I can not dis-entitle her to be the successor of late Sikhar Bhoi. In the aforesaid circumstances, it is held that Bina and Prabina is the self same person who is none else but one of the daughters of late Sikhar Bhoi. It also remains admitted that the deft.no.1 Krupasindhu Bhoi is the son of late Kuntala Bhoi. When it remains decided that Sikhar Bhoi died leaving behind three daughters namely the plaintiffs, Kuntala (the mother of deft.no.1) and the son, the deft.no.2, they being his successors are entitled to 1/4th share each in the suit property and accordingly, each of them has got 1/4th share in the suit property.

So far as the partition of the suit property is concerned, admittedly the suit plot is a consolidated plot (chakabhukta jami) and agricultural in nature as revealed from the ROR which is admitted in evidence as Ext.2. The nature of the land from agriculture to any other purpose has not yet been changed. When the suit plot is of such a nature, as per Section-34 of the OCH and PFL Act, the same shall not be transferred or partitioned so as to create a fragment and as per Section-35 of the said Act, any transfer or partition in contravention to Section-34 of the Act shall be void. When the Act itself does not permit for partition of the suit plot on the aforesaid grounds, even though it is held that the plaintiffs have got a 2/4th share in the same but the relief of partition can not be allowed so as to create a fragment which will frustrate the aim and object of the Act. Accordingly, this issue is answered.

7. **Issue No.(iv) of C.S No. 485/2010 & Issue No.(iii) & (iv) in C.S No. 689/2008 :**

Since these issues are inter-connected and are dependent upon each other, they are taken up together for

consideration. The learned counsel for the plaintiffs challenged the registered sale deed dt. 30.05.2007/01.06.2007 mainly on three grounds and the first ground he has raised that the plaintiffs being not the party to the said document, it has got no binding effect on them.

It is the case of the plaintiffs in C.S No. 485/2010 that they are not bound by the registered power of attorney dt. 16.03.2007 executed by the deft.no.2 in favour of deft.no.3 and the registered sale deed dt. 30.05.2007 /01.06.2007 executed by the deft.no.3 in favour of the deft.no.4 on the strength of the aforesaid registered general power of attorney. Admittedly the aforesaid GPA has been executed only by the deft.no.2 in respect of the entire suit property and the deft.no.3 on behalf of the deft.no.2 on the strength of the said power of attorney executed the registered sale deed in favour of the deft.no.4 in respect of the entire suit property. Whether the execution of GPA is the outcome of fraud or not will be decided in the latter part of these issues. But as already decided and held in the issue no. (iii) in C.S. 485/2010 that the deft.no.2 Narayan Bhoi is only entitled to 1/4th share in the suit plot, he cannot execute the said GPA or the registered sale deed in favour of the deft.no.4 in respect of the entire suit property and by that the deft.no.4 has not acquired any title or interest over the entire suit property. When the plaintiffs are the successors of late Sikhar Bhoi and have 2/4th share in the entire suit property, the alleged sale deed dt. 30.05.2007/01.06.2007 is illegal and invalid to the extent of the share of other successors of Sikhar Bhoi and not binding upon the plaintiffs.

The learned counsel for the plaintiffs and deft.no.2 (plaintiff in C.S No. 689/2008) submitted that the general power of attorney alleged to have been executed by the deft.no.2 in favour of the deft.no.3 is the outcome of fraud

practised by the deft.no.3 and the sale deed by deft.no.3 in favour of the deft.no.4 on the strength of said fraudulent and void GPA is also void and confers no title over the suit property. At this juncture, the learned counsel for the deft.no.3 & 4 urged that the plea of fraud is to be proved by the person who takes that plea and the burden lies on him. He also urged that the case of fraud is to be proved like a criminal charge. In support of his contention, he relied upon the decisions of our own Hon'ble High court reported in 1999(II) OLR page-319 (Natabara Behera Vrs. Batakrushna Das), another decision of our own Hon'ble High Court decided on 26.03.1997 in OJC No. 1081/1994 (Smt. Kamala Singh Vrs. State of Orissa) and a decision of our own Hon'ble High Court reported in 2009(Supp-II) OLR 902 (Kamalakanta Mohapatra Vrs. Pratap Chandra Mohapatra). Keeping in mind the ratios of the decisions supra, let us examine the materials available in this case. It is the case of the deft.no.2 that on 16.03.2007, he entered into an agreement with the deft.no.3 for sale of the suit property for consideration of Rs. 13,92,000/- and in accordance to said agreement, he received Rs. 1,00,000/- as advance and it was agreed in between them that after obtaining the permission U/s.22 of the OLR Act and on receiving the rest of the consideration amount within one year from the date of agreement, the sale deed will be executed. But this agreement has not been emphasized by the deft.no.3 & 4 neither in their pleading nor in their evidence. It is the positive case of the deft.no.2 that in course of preparation and registration of the agreement (Ext.D), the deft.no.3, who is a builder and was in charge of preparation and registration of the same, managed to prepare and registered a general power of attorney in his favour in respect of the suit land by playing fraud on him. He has specifically pleaded and stated in his

evidence that the contents of the said GPA, the Ext E/Ext. A-1 were not read over and explained to him and he put her signatures without knowing the contents therein and there was no occasion to execute the said GPA when he has executed an agreement for sale in favour of the deft.no.3 in respect of the suit property in respect of the suit land. The learned counsel for the deft.no.2 strongly contended that the circumstances of the execution of the agreement so also the GPA in respect of the selfsame property on the same day not only gives rise the presumption of fraud in respect of the GPA, but also proves that the said GPA is the outcome of fraud. The regd.deed of agreement dt. 16.03.2007 is admitted in evidence as Ext.D which clearly reflects that by such agreement, the deft.no.2 agreed to sell the suit property to the deft.no.3 for consideration of Rs. 13,92,000/- and received a sum of Rs. 1,00,000/- as advance and it was also agreed that the rest of the consideration amount will be paid by the deft.no.3 to deft.no.2 within one year after obtaining the permission under OLR Act. This agreement has not been challenged by the deft.no.3 or by the deft.no.4. Even the deft.no.3 has not seen the witness box to challenge the same. Admittedly, the deft.no.2 is working as peon in a Government department and the deft.no.3 is a real estate business man or a so called builder. The P.W.5 is an witness to the Ext.D who also supports the factum of the execution and registration of the Ext.D. One advocate Biswambar Das prepared the said Ext.D. It is the specific case of the deft.no.2 that the power of attorney dt. 16.03.2007 which is admitted in evidence as Ext.A-1 has been prepared behind his back, without his knowledge and consent and he executed the same without knowing the contents therein. He also specifically stated in his evidence that the contents of the said power of attorney were not read over and

explained to him. Only on 29.05.2008, he came to know from the certified copy of the regd.sale deed dt. 30.05.2007 executed in favour of the deft.no.4 that the deft.no.3 on the strength of the Ext.A-1 sold the same to deft.no.4. One of the witness to Ext.A-1 who has been examined as P.W.5 has not whispered about the execution and registration of the alleged power of attorney Ext.A-1. The deft.no.3 and 4 though cross-examined him at length have not elicited as to the knowledge of the deft.no.2 in respect of the preparation, execution and the registration of the GPA Ext.A-1. Similarly nothing was elicited from the deft.no.2 during his cross-examination that he voluntarily, knowing the contents of the Ext.A-1, executed the same. No doubt, the burden lies on the deft.no.2 that he is the victim of fraud in respect of Ext.A-1. But when the deft.no.2 pleads the fraud and adduced evidence supporting his above plea and specially when one of the attesting witness does not whisper as to the preparation and execution of the Ext.A-1, the onus shifts to the deft.no.3 to establish that the deft.no.2 executed the Ext.A-1 voluntarily and knowing its contents. More over when admittedly the deft.no.2 executed one agreement for sale on the same day in favour of the deft.no.3 in respect of the suit property and received a part consideration as advance, what prompted the parties to execute and register a general power of attorney on the same day for the self same property remains unexplained from the side of the deft.no.3. This silence of the deft.no.3 in his pleading so also his absence from the witness box to substantiate the said GPA (Ext.A-1) adds fuel to the plea of fraud taken by the deft.no.2. The deft.no.3 is the best person not only to explain the circumstances at which the said Ext.A-1 was executed in presence of the Ext.D(agreement for sale) but also the voluntary execution of the Ext.A-1 by the deft.no.2.

The D.W.3 who is the deft.no.4 in his cross-examination has admitted that the documents were prepared by the 'dharabandha' advocate of the deft.no.3. Considering the aforesaid materials available and the absence of the deft.no.3, who is alleged to be the GPA holder, from the witness box, this Court is of the view that the GPA dt. 16.03.2007 executed by deft.no.2 in favour of deft.no.3 in respect of the suit property is the outcome of fraud.

The learned counsel for the deft.no.2 submitted that the registered sale deed executed by deft.no.3 in favour of deft.no.4 is based on the alleged regd.power of attorney. If the power of attorney proves to be invalid and void, then the regd.sale deed in favour of the deft.no.4 must bound to fail. As discussed and held above that the registered general power of attorney dt. 16.03.2007 being void on the ground of fraud, the registered sale deed executed by the deft.no.3 in favour of deft.no.4 is also void, inoperative and has got no binding effect on either of the deft.no.2 or on the plaintiffs and the deft.no.1.

The learned counsel for the plaintiffs raised his third point of argument challenging the registered sale deed bearing no. 6022 dt. 30.05.2007/01.06.2007 as void on the ground that it contravenes the provisions of Section-34 & 35 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Lands Act. In support of his submission, he relied upon the decisions of our own Hon'ble High Court reported in **2010 (II) OLR page-486** (*Rama Chandra Parida Vs. Pramod Kumar Padhiary*) and *1997(II) OLR page-399* (*Smt.Binapani Sethi Vrs. Sri Bijay Kumar Sahoo*). Section-34 prohibits transfer of a portion of agricultural land of a chaka so as to create a fragment except to a land owner of a contiguous chaka with some proviso and Section-35 spells out the consequence of transfer contravening the provisions

of Section-34. As per sub-section-1 of Section-35 of the Act, a transfer in contravention of the provisions of Section-34 shall be void. The word fragmentation has been defined in Section-2(m) which means a compact parcel of agricultural land held by a land owner by himself or jointly with others comprising an area which is less than one acre in the district of Cuttack, Puri, Balasore and Ganjam. Here the land in question though at present comes under the district of Khurda but it is within the undivided district of Puri. The entire suit plot measures Ac0.530 decimals which is less than one acre. More over, if at all for the sake of argument, it is held that the GPA dt. 16.03.2007 executed by deft.no.2 is valid, then by such GPA only the deft.no.3 will be empowered to transfer the 1/4th share of the deft.no.2 in the suit property to deft.no.4 vide regd.sale deed dt. 30.05.07/ 01.06.07 and the said deed being valid for the 1/4th share which will come to Ac0.132.5 decimals which is well within the ambit of a fragment and the deft.no.4 not being a owner of the contiguous chaka, the said deed in favour of the deft.no.4 even otherwise a void deed and by that deed the deft.no.4 has acquired no title over the suit property.

So far as the possession of the suit property is concerned, the learned counsel for the deft.no.3 & 4 submitted that the deft.no.4 is in possession over the suit land from the date of his purchase and has also mutated the said sale deed in his favour and has already obtained the mutated ROR which is admitted in evidence as Ext.C-1. The learned counsel for the plaintiffs submitted that the mutation of a land after purchase is nothing but fiscal in nature and it is not the proof of possession. He further submitted that since the plaintiff and the deft.no.1 are entitled to 3/4th share in the suit plot, the mutation in favour of the deft.no.4 cannot be taken as a ground of

dispossession of the plaintiffs and the deft.no.1, as the possession of one co-sharer is the possession of all. The Ext.C-1 being based on the registered sale deed dt. 30.05.2007/01.06.2007 which is already held as invalid and void also has no binding effect and does not create any title in favour of the deft.no.4 in respect of the suit property. The learned counsel for the deft.no.2 submitted that the deft.no.2 never entered in to the possession of the suit land and the possession of the same has not yet been delivered to him. The deft.no.4 though has been examined as D.W.3 has not given any satisfactory evidence as to his possession over the suit land except his bald statement that he is in possession over the suit land. On the contrary, the plaintiffs, the deft.no.1 & 2 and the other witnesses examined from the side of the plaintiffs stated that the plaintiffs and the deft.no.1 & 2 are in possession over the suit land. When the sale deed in favour of deft.no.4 is invalid and inoperative, the mere statement of the D.W.3 that he is in possession is not at all sufficient to show that he is in possession over the suit land. These issues are answered accordingly.

8. **Issue No.(v) in C.S No. 485/2010 & Issue No. (v) & (vi) in C.S No. 689/2008 :**

Since it has already been decided and held in issue no.(iii) in C.S No. 485/2010 that the plaintiffs are entitled to 2/4th share and the deft.no.1 has got 1/4th share and the deft.no.2 has got 1/4th share in the suit property, it is held and declared that the deft.no.2 Narayan Bhoi (the plaintiff in C.S No.689/2008) has got 1/4th share in the suit property.

The regd. Sale deed dt. 30.05.2007/01.06.2007 in favour of the deft.no.4 being void and inoperative as decided in the foregoing issues and when he is not in possession over the suit property, the plaintiffs and the deft.no.2 are entitled to the relief of permanent injunction

against the deft.no.4 who is also deft.no.2 in C.S No. 689/2008 who has no right, title and interest or possession over the suit property. These issues are answered accordingly.

9. **Issues No. (i), (ii) & (vi) in C.S No. 485/2010 & Issues No.(i), (ii) & (vii) in C.S No. 689/2008**

In view of discussion in the foregoing issues, both the suits are found maintainable and the plaintiffs of the respective suits have cause of action to file the suits. As no other reliefs have prayed for in both the suits, these issues are answered accordingly.

Hence, ordered :

ORDER

The suits bearing C.S No. 485/2010 & C.S No. 689/2008 be and the same are hereby decreed in part on contest against the respective defendants, under the circumstances without any cost. The title of the plaintiffs and the deft.no.1 & 2 in C.S No.485/2010 and the title of the plaintiff in C.S No. 689/2008 is hereby declared having 1/4th share each in the suit property. The registered deed of general power of attorney bearing no. 54 dt. 16.03.2007 and the registered sale deed bearing no. 6022 dt. 30.05.2007/ 01.06.2007 are hereby declared as invalid, void and has no binding effect on the plaintiffs and the deft.no.1 & deft.no.2 (plaintiff in C.S No. 689/2008). The deft.no.4 (deft.no.2 in C.S No.689/2008) is permanently restrained from interfering in the peaceful possession of the plaintiffs and the deft.no.1 & deft.no.2 (plaintiff in C.S No. 689/2008) over the suit property.

Advocate's fees be assessed at the contested scale.

Civil Judge(Sr.Dlvn.)
Bhubaneswar.

The judgment is typed to my dictation by the Stenographer attached to this Court directly on the Computer provided under e-court project, corrected and pronounced by me in the open court today i.e. the 21st day of July, 2014 under my seal and signature below.

Civil Judge(Sr.Divn.)
Bhubaneswar.

List of witnesses examined for the plaintiffs:

P.W.1 Keshab Chandra Mishra
P.W.2 Chaitanya Bhoi
P.W.3 Arjun Bhoi
P.W.4 Kusha Bhoi
P.W.5 Arun Kumar Bhoi
P.W.6 Prabina @ Bina Bhoi

List of witnesses examined from the side of defendant:

D.W.1 Krupasindhu Bhoi
D.W.2 Narayan Bhoi
D.W.3 Deba Prakash Behera

List of documents exhibited on behalf of the plaintiff:

Ext.1 Certified copy of GPA NO. 4107/03 dt. 03.06.03.
Ext.2 ROR under Khata No. 464
Ext.3 Rent Receipt
Ext.4 Death Certificate
Ext.5 Certified copy of order in Rev Misc. Case No.84
Ext.6 R.I Report
Ext.7 Original GPA No. 4107/03
Ext.7/a Signature of P.W.5
Ext.7/b Signature of Narayan Bhoi
Ext.7/c Signature of Malli Bhoi
Ext.7/d Signature of Keshab Ch. Mishra
Ext.8 Certified copy of RSD No. 6022 dt. 30.05.2007.

List of documents exhibited on behalf of the defendants:

- Ext.A Death Certificate of Kuntala Bhoi
Ext.B Voter Identity Card of Kuntala Bhoi
Ext.C Driving License
Ext.D Certified copy and agreement for sale dt. 16.03.07
Ext.E Certified copy of regd. GPA dt. 16.03.07.
Ext.F Certified copy of RSD No. 11081204389 dt. 14.02.12
Ext.A-1 Registered Power of Attorney bearing no. 54
dt. 16.03.07.
Ext.B-1 RSD No. 6022 dt. 01.06.07.
Ext.C-1 Mutation ROR bearing Khata No. 514/443.

Civil Judge(Sr.Divn.)
Bhubaneswar.