

HEADINGS OF DECISION IN CIVIL SUITS

**IN THE COURT OF 1ST. ADDL. SENIOR CIVIL JUDGE, BHUBANESWAR
DISTRICT-KHURDA.**

***PRESENT:- Pranab Kumar Routray, LL.M.,
1st. Addl. Senior Civil Judge,
Bhubaneswar.***

Civil Suit No.29/569 of 2011/2004

Sri Sudhansu Sekhar Pattanaik, aged about 31 years,
S/o Late Chandra Sekhar Pattanaik,
Plot no. A-40, Rameswar Patna,
Bhubaneswar-2, P.S.- Lingaraj,
Dist- Khurda

... Plaintiff

-Versus-

1. Santosh Kumar Pattanaik, aged about 46 years,
S/o Late Chandra Sekhar Pattanaik.
2. Jotsnamayee Pattanaik, aged about 67 years,
W/o Late Chandra Sekhar Pattanaik.

(Deleted vide order dtd.13-01-2012)
3. Saroj Kumar Pattanaik, aged about 48 years,
S/o Late Chandra Sekhar Pattanaik,
All are of Plot no A-40, Rameswar Patna,
Bhubaneswar-2, P.S- Lingaraj, Dist-Khurda.
4. Sandhya Arati Pattanaik, aged about 37 years,
W/o Falguni Pattanaik,
And D/o late Chandra Sekhar Pattanaik,
At-22 Goutam Nagar, Bhubaneswar-14.
5. Swarna Bharati Pattanaik, aged about 34 years,
W/o Suresh Chandra Mohanty,
D/o Late Chandra Sekhar Pattanaik,
Of 13, Gouri Garden, PS- Lingaraj,
Bhubaneswar-2, Dist- Khurda.

... Defendants

6. State of Odisha
Represented through its
Joint Secretary to the G.A. Department
Secretariat Building, Sachivalay Marg,
Bhubaneswar, Dist- Khurda.
 7. THE BOARD OF TRUSTEES OF PARADEEP PORT
(A body corporate under the Major Port Trust Act 1963,
(Act of 38) Represented through its secretary
Pardeep Port, Paradeep, PO- Paradeep, P.S.- Tirtol,
Dist. Jagatsinghpur.
- ... Pro. Defendants.

COUNSEL APPEARED

- For the Plaintiff : Sri H.R. Routray & Associates
For the Defendant no.1 : Sri A.K. Mohanty & Associates
For Defendant no.2 to 5 : Sri S. Mohapatra & Associates
For the Defendant no.6 : Sri R.P. Nanda. G.P.
For the Defendant no.7 : Sri U.S. Tripathy

DATE OF ARGUMENT ; 26-02-2014

DATE OF JUDGMENT ; 18-03-2014

J U D G M E N T

1. The plaintiff's suit is one for partition of the suit properties claiming 1/6th share therein, for permanent injunction against defendant no.1 and for cost.

2. The case of the plaintiff in brief is that he and defendants 1 to 5 constitute a joint family governed under the Mitakshayara School of Hindu Law, their common ancestor being one Chandra Sekhar Pattnaik, since deceased. The said Chandra Sekhar Pattnaik was serving as a Senior Care taker in G.A. Department of Govt. of Odisha, Bhubaneswar. He

obtained a lease of Lot no.1 of schedule property from the G.A. Department under registered Lease deed dtd.12106/1985 on payment of Rs.3,490.50P. Thereafter he constructed a residential building over the said land covering an area of 1200 sq. ft. leaving some vacant space towards the backside. For construction of the said house, he obtained a loan besides utilising his own savings and a sizeable amount from the income of defendant no.3 who was working at Dubai at that time. It is the further case of the plaintiff that as he was an unemployed graduate started a travel agency in the name & style of M/s. The Orissa Tours & Travels in the extreme southern corner of the aforesaid house. Defendant no.1 was not pulling on well with the joint family asked the plaintiff for shifting his business from the suit premises for which he having objected defendant no.1 along with his henchmen threatened to forcibly dispossess him from the said house. Though the plaintiff approached defendant no.3, the eldest brother to dissuade defendant no.1 but no effect. It is alleged that on 27-09-2004 defendant no.1 with the help of some antisocial elements tried to dispossess him from the suit premises and to destroy the infrastructure of his business. The plaintiff approached the members of the joint family to intervene in the matter or else for partition of the suit property.

The further case of the plaintiff is that defendant no.1 is the second son of their parents and as he was unemployed, it was decided by their father to engage him so that he can contribute to supplement the joint family income. With that view he obtained the property described as Lot no.2

in the schedule of the property from Paradeep Port Trust by way of lease vide registered Lease deed no.2678 dtd.02-09-1993 on payment of Salami of Rs.39,030/-. The purpose was to open a Bata Sales Counter there but due to some unavoidable reasons the same could not be materialised though their father had already constructed a building on the said land by spending Rs.4,00,000/- from out of his own income. But defendant no.1 without the consent of the members of the joint family has let out the said building at Paradeep to a person for running a hotel on a monthly rent of Rs.10,000/- and has been misappropriating the same. When the members of the joint family asked defendant no.1 for rendition of accounts of the income of the Paradeep building he did not respond and also refused for partition of the joint family properties at Bhubaneswar and Paradeep when claimed. Hence the suit.

3. Defendant no.1 in his written statement has not disputed the source of acquisition of Lot no.1 and construction of house thereon by their deceased father but has denied the assertions of the plaintiff regarding running of a travel agency in the suit house towards the extreme corner. According to him, there is a garage on that place. He has further denied the allegations that he threatened to dispossess the plaintiff from the suit house. So far as the property described as Lot no.2 is concerned, he has stoutly denied the claim of the plaintiff that the same was acquired by their father by way of lease and on payment of Salami. It is his specific case that their father retired from service in March, 1992 and had spent all the amount received towards retirement benefits

for construction of residential building on Lot no.1 and for marriage of his daughter. On the other hand, since 1992 he was employed having sound income. He married in the year 1994 and his wife is a teacher in Govt. High School, thus, they have their source of income with which he started construction of a house over Lot no.2 in the year 2002 after obtaining approved plan for starting a restaurant-cum-lodging there. But after the construction upto plinth level he intended to let out the proposed building and accordingly negotiated with M/s. Sri Mandir, a partnership business concern who agreed to complete construction of the building and adjustment of the money spent towards monthly rent. The said firm has completed construction and after monthly adjustment from the rent towards cost of construction and at present paying Rs.4800/- per month as balance from the monthly agreed rate. According to him, Lot no.2 is his self acquired property, hence not liable for partition.

Defendant no.2 to 5 in their joint written statement have admitted the claim of the plaintiff that defendant no.3, the eldest son of the family is a highly paid employee in a private Company in Dubai since 1975 and out of his own income had contributed a substantial amount for construction of the residential building. It is their further case that defendant no.1 though joined in legal profession sometimes in the year 1993-94 but was unable to maintain himself. According to them, late Chandrasekhar Pattnaik out of his own income obtained Lot no.2 property by way of lease from Paradeep Port Trust on payment of Salami but the registered

lease deed was executed in favour of defendant no.1. Their father constructed a building over the said land spending Rs.4,00,000/- out of which defendant no.3 had also contributed to defendant no.1 to do some business at Paradeep but defendant no.1 instead of doing any business let out the building at Paradeep to a tenant at a monthly rent of Rs.10,000/- and has been appropriating the same.

Defendant no.7 in the written statement has admitted about leasing out of Lot no.2 in favour of defendant no.1 on receipt of Rs.45,230/- towards land premium, security deposit and for cost of development for the land.

4. With the aforesaid pleadings the following issues are settled.

ISSUES

1. Is the suit maintainable ?
2. Has the plaintiff any cause of action ?
3. Whether Lot no.2 of the schedule of property is the self acquired property of defendant no.1 or the same was acquired by Late Chandra Sekhar Pattnaik with the contribution of defendant no.3 ?
4. Whether the suit properties are liable for partition ?
5. Whether the plaintiff is entitled to the relief of permanent injunction against defendant no. 1 ?
6. To what other relief(s) the plaintiff is entitled ?

5. In order to prove the case the plaintiff has examined himself as P.W.1 while P.W.2 is his paternal uncle. On the other hand, defendant nos.3 and 4 examined themselves as D.W.1 and D.W.2 for defendant no.3 to 5. Defendant no.1 has examined himself as D.W.3.

Besides oral evidence, the parties have produced and proved documents on their behalf as per list.

FINDINGS

6. **Issue no.3**

This is the only issue which needs a finding before going to decide partiability of the suit properties. There is absolutely no dispute that Lot no.1 was acquired by Late Chandra Sekhar Pattnaik by way of lease and construction of a house over the same spending by himself as well as by defendant no.3.

Ext.5 is the certified copy of the registered Lease deed no.2678 dtd.02-09-1993 by the Board of Trustees of Paradeep Port in favour of defendant no.1, in respect of Lot-2 property. There is no dispute that the lease deed was executed in favour of defendant no.1 but there is dispute as to who paid the premium dues for obtaining the same and who made construction of a building over that property. There is mention in Ext.5 that lease was granted for construction of a building for opening of a Bata Sales counter. It is to be gathered from available materials on record whether defendant no.1 himself spent for depositing the premium for the lease and for construction of a building thereon in order to conclusively prove that it was his self acquired property or the lease was

obtained by Late Chandra Sekhar Pattnaik in the name of his unemployed son defendant no.1 by depositing the premium for the same and whether Late Chandra Sekhar Pattnaik and defendant no.3 spent for construction of a building over the said lease hold land and the property was treated as belonging to the joint family for all purposes.

7. Defendant no.1 has not produced and proved any scrap of paper to show that he had sufficient income of his own at the relevant time to acquire Lot no.2, to construct a building thereon for the purpose of starting a business. It is his case that he constructed the building there upto plinth level. For that purpose, he must have been maintaining accounts. He must have accounts regarding his income for spending towards obtaining the land and making construction. On the other hand, it is the case of the plaintiff and other defendants that Late Chandra Sekhar Pattnaik had income of his own out of which he obtained the lease hold property at Paradeep and with the financial support of defendant no.3 a building was constructed thereon so that defendant no.1 can be engaged there in some business for his own employment and to supplement to the joint family. Defendant no.1 claims that his wife is a teacher in a Govt. School which is not disputed by others. He should have produced documentary evidence if his wife had obtained any loan either from her G.P.F account for construction of the building over Lot no.2 or had obtained a house building loan for that purpose. On both the counts defendant no.1 has failed.

8. There is no dispute that the parties are members of a Hindu joint family. Ext.5 discloses that the lease

in respect of Lot no.2 is in the name of defendant no.1. There is no legal bar for a coparcerner or a member of a Hindu joint family to acquire property in his name. In a very recent decision of our Hon'ble High Court reported in 2013 (II) CLR 1030 between Anirudha Das Vs. Ranjeet Prasad Das & others, it has been held that *while a property is in the name of a member of a joint Hindu family there is no presumption that it has become joint family property. The burden of proving any particular item of property as joint primarily rests on the plaintiff. But where it is established that there was a nucleus of joint family property and that nucleus was such that it might have contributed to the property claimed to be self acquired, the onus shifts on to the person who claims the property as self acquisition to affirmatively establish that the property was acquired without any aid from the joint family. Hindu family does not prohibit a member of a joint family from acquiring any property for his own benefit.*

9. Besides the aforesaid authority of law the learned counsel for the plaintiff has relied on a decision of Hon'ble Madras High Court reported in 2006 (45) AIC 402 (Kothanramappa -Vs.- Thimmaiah and others) wherein it is held that *onus to prove that he purchased the suit property out of his self earned funds lies on the first defendant who claims the same as presumption is that it was joint family property.* The learned counsel for the plaintiff also relied on a decision reported in AIR 2009 S.C., 2930 where in it is held that *in a case the lease deed was recorded in the name of one member of Mitakshyara Coparcernery and in absence of any evidence to show that lease was granted to coparcerner in his individual capacity or after disruption of joint family, the lease land would vest in the joint family. Mitakshyara Coparcernery being a separate entity, property once vest in it would continue to vest in it irrespective of death of one or other coparcerners.*

On the other hand, the learned counsel for defendant no.1 has relied on 2002(I) OLR 142 (Harihar Sethi & another v. Ladu Kishore Sethi 7 others) wherein it is held that *in a suit for partition burden rests on the party asserting that a particular item of property is joint family property and there can be no presumption that the family, because it is joint, possesses joint properties*. In other decision reported in 96 (2003) CLT, 609 it has been held by our Hon'ble High Court that *proof of existence of a joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon anyone asserting that any item of property was joint to establish the fact. xxx xxxx xxxxx xxxxxxxx xxxxx*. Even if there is proof to show that a family is joint it does not lead the Court to arrive at a conclusion abruptly that the property held by any member of the said family is also joint.

10. With the touchstone of the aforesaid authorities of law it is to be found out if Lot no.2 is the self acquired property of defendant no.1 or is an item of joint family property.

There is no evidence that the family possessed any joint property, much less any nucleus of joint family property utilising the same for acquisition of Lot no.2. The evidence on record reveals that Lot no.1 was acquired by Late Chandra Sekhar Pattnaik from Govt. by way of lease and he constructed a residential building thereon with his own fund as well as with the financial assistance of defendant no.3. Lot no.1 is a residential building occupied by the joint family and there is no evidence that any part of the same was let out giving some income to the family for acquiring any other property like Lot no.2. The witnesses examined from the side of

the plaintiff and other defendants 3 to 5 have clearly and categorically stated that defendant no.1 was unemployed and he had no source of income. In order to provide employment to him and to get some additional income for the joint family it was decided to acquire the land in Lot no.2 and to construct a house thereon, and to engage defendant no.1 to start a Bata Sales counter there. Their father got the lease but in the name of defendant no.1. A building was constructed by spending money mostly contributed by defendant no.3 as he was serving in Dubai and was getting handsome income. Their such evidence has not been satisfactorily rebutted by defendant no.1, though he examined himself as a witness in this case. Defendant no.1 claims that he was a practising Advocate and his wife was serving as a teacher in a Govt. School. He has not produced any documentary evidence that they have surplus income which was utilised for acquiring Lot no.2 and constructing a building thereon upto plinth level. Here the question arises as to why he did not obtain any loan for completing construction of the building instead of asking the tenant to complete the construction work and take the building on rent and adjust the cost of construction from out of the monthly rent. There is no such agreement between them as no such document has been filed by defendant no.1. One is not reasonably expected of taking such a risk by asking another person to complete the construction without having a written document to that effect. On the other hand, it appears to be reasonable and probable that the father obtained the lease of Lot no.2 in the name of defendant no.1 and constructed a

building with financial assistance of defendant no.3 but somehow or other no business started there for settling defendant no.1. The entire family cannot lie against defendant no.1 including the mother though she died during pendency of the suit after filing a joint written statement. So the claim of defendant no.1 that Lot no.2 is his self acquired property is not well founded. On the other hand, there is ample evidence that the father obtained the lease in the name of defendant no.1 and constructed a building thereon.

In view of the aforesaid discussions, it is held that Lot no.2 is not the self acquired property of defendant no.1 but the same was acquired by Late Chandra Sekhar Pattnaik who constructed a building thereon with the major contribution of defendant no.3. This issue is answered in favour of the plaintiff and against defendant no.1.

11. **Issue no.4**

It is already held that the suit properties were acquired by Late Chandra Sekhar Pattnaik and after his death the plaintiff and defendants 1 to 5 have got equal share therein. In the meanwhile defendant no.2, the mother has expired, so each of the plaintiff and defendant nos.1, 3, 4 & 5 has got equal share therein. Here, the question comes if the properties can be physically partitioned among the co-sharers.

So far as Lot no.1 is concerned, the land measures 4000 sq. ft. with a residential building and Lot no.2 measures 2833.57 sq. fit. with a building at Paradeep. The plaintiff and defendant nos.1, 3, 4 & 5 have got equal share

therein. So, it depends on them to conveniently partition both the items as per their legal shares by amicable arrangement. Thus, this issue is answered in the affirmative.

12. **Issue no.5**

This issue relates to the prayer of the plaintiff for restraining defendant no.1 in creating any disturbance in his business running within Lot no.1. There is evidence from his side so also from the side of defendant no.2 to 5 that he has been running a travel agency in the name & style of 'The Orissa Tours & Travels', Exts. 2 & 3 are the documents with regard to the said agency recognised by the Govt. which is a registered agency having its registered office at Lot no.1. It is alleged by the plaintiff that defendant no.1 has been creating disturbance in his business with the active help of antisocial elements and has sought for the relief of permanent injunction not to interfere in his business and for dispossessing the plaintiff from the suit house. Under the fact & circumstances of the case defendant no.1 cannot be permitted to adopt such high handedness. He needs to be restrained from taking any such illegal step against the plaintiff. Hence, the plaintiff is entitled to the relief of permanent injunction till partition of the suit property by metes & bounds or otherwise. Hence, this issue is answered in favour of the plaintiff.

13. **Issue no.1 & 2**

As already held the suit properties are the joint family properties and liable for partition as per the legal share of the respective parties. Every co-sharer has a right to

claim partition of the same intending severance of joint status. Accordingly, the plaintiff when found it impossible to continue in the joint family due to the alleged conduct of defendant no.1 he laid a claim of the partition of the suit properties which was refused compelling him to approach the Court of law for the same. Thus, he has cause of action to file the suit and the suit so filed is maintainable. Both these issues are answered in favour of the plaintiff.

14. **Issue no.6**

Except the relief for the partition of the suit property and injunction against defendant no.1 the plaintiff is not entitled to any other relief.

Hence, ordered.

ORDER

The suit of the plaintiff be and the same is decreed preliminarily on contest against the defendants but under the circumstances without any cost. It is hereby declared that the plaintiff, defendant no.1, 3, 4 & 5 each has got 1/5th share over Lot no.1 & 2 property as described in the schedule of the plaint. The parties are directed to amicably partition the suit properties within a period of two months hence failing which any of them is at liberty to approach the Court to make the preliminary decree final. Till then defendant no.1 is restrained from dispossessing the plaintiff from the residential house on Lot no.1 and from creating any disturbance in his business running in Lot no.1.

*Ist. Addl. Senior Civil Judge,
Bhubaneswar*

The judgment is typed to my dictation by the Typist attached to this Court directly on my Official Laptop provided under E-Court Project, corrected and pronounced by me in the open Court today on the 18th day of March, 2014 under my seal and signature.

*1st. Addl. Senior Civil Judge,
Bhubaneswar*

LIST OF WITNESSES EXAMINED FOR THE PLAINTIFF:

P.W.1 : Sri Sudhansu Sekhar Pattanaik

P.W.2 : Sri Siba Kishore Pattanaik

LIST OF WITNESSES EXAMINED FOR THE DEFENDANTS:

D.W.1: Sri Saroj Kumar Pattanaik

D.W.2: Smt. Sandhya Arati Pattanaik

D.W.3: Sri Santosh Kumar Pattanaik

LIST OF DOCUMENTS MARKED AS EXHIBITS FOR THE PLAINTIFF :

Ext.1: Lease deed dt.15-05-85 ;

Ext.1/a

& Ext.a/b : Sketch map ;

Ext.2: Registration Certificate ;

Ext.3: Service tax assessment ;

Ext.4 : Proposed estimate of House ;

Ext.5 : Certified copy of the lease deed dtd. 02-09-1993 ;

Ext.6 to

Ext. 6/16 : Electric bills ;

**LIST OF DOCUMENTS MARKED AS EXHIBITS FOR THE
DEFENDANTS :**

- Ext.A: Letter no.14179/CA dtd.29-08-1988 issued by
G.A. Department to Chandrasekhar Pattanaik ;
- Ext.B: Mortgage Bond ;

*1st. Addl. Senior Civil Judge,
Bhubaneswar*