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Date of conclusion of Argument – 30.10.2014

Date of pronouncement of Judgment – 19.11.2014  
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**JUDGMENT**

This is a suit for partition.

02. The plaintiff's case is that the homestead property recorded under khata No. 686, plot No. 1301 extending to Ac. 0.055 decimals of mouza Mukundaprasad (hereinafter referred to as the suit property) stands recorded in the name of Kelu Behera and Panu Behera. Kelu Behera has one son namely Udayanath. Kelu Behera and Udayanath were succeeded by the plaintiff. Similarly, Panu Behera has two sons namely Arakhita and Raghunath. Arakhita died being succeeded by defendant Nos. 1, 2, 3, 5 & 6, whereas Raghunath is succeeded by defendant No. 4. The specific case of the plaintiff is that in the year 1970 the suit property was amicably partitioned and accordingly Ac. 27.5 decimals of land from the middle of the suit property was allotted to Arakhita and Raghunath. The northern side 13.5 decimals (Schedule B property) and the southern side 14 decimals of land total measuring Ac. 27.5 decimals was allotted to the share of the plaintiff. Defendant No. 4 got 1/4th interest over the suit property. It is again contended that the plaintiff sold the entire southern side land measuring Ac.0.014 decimal having one room and court yard to Arakhita Behera on 11.05.1990 and for which the Northern side land measuring Ac. 13.5 decimals having

a house over it only remained in possession of the plaintiff. It is again contended by the plaintiff that the defendants are now trying to grab some portion of the homestead land (Schedule B property as per the plain) of the plaintiff and particularly on 17.03.2001, the defendants attempted to occupy some portion of the homestead property and for which on 18.03.2011, the plaintiff requested the defendants not to disturb his peaceful possession over the B schedule property. But they did not listen to the same and as such the present suit has been filed for partition.

03. The defendant Nos. 1 to 4 only moved to the court to defend their case, whereas the suit against defendant Nos. 5 & 6 set ex-parte. Defendants No. 1 to 4 in their written statement have contended that the suit is not maintainable and there is also no cause of action to bring the suit. The suit is also defective for non-joinder and mis-joinder of necessary parties. The defendants have completely negative all the facts of the plaint by saying that the plaintiff has come with misconceived and misleading facts. The suit property was never partition by the co-sharers or any of the parties and as such the question of allotment as mentioned by the plaintiff does not arise at all. The plaintiff has no house over the suit property and he has not also alienated any portion of it to anybody else. On the above basis the defendants have prayed the court for dismissal of the suit with cost.

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

**I S S U E S.**

- i) Whether the suit is maintainable?
- ii) Whether the plaintiff has any cause of action to bring the suit?
- iii) Whether the suit property has been partitioned among the co-sharers and accordingly the plaintiff got his share of Ac. 0.027.5 decimals of land from the north and south of the suit property and the middle portion was allotted to other co-sharers?
- iv) Whether the suit properties partible in nature?
- vi) To what relief, the plaintiff is entitled to?

05. In order to substantiate its case, the plaintiff has examined two witnesses including himself as P.W. 2. On the other hand the defendant No. 2 is examined on behalf of the defendant Nos. 1 to 4 as their solitary witness.

Four documents have been admitted in this case by the plaintiff. The ROR in khata No. 686 of mouza Mukundaprasad is marked as Ext. 1, five sheets of Municipality holding Tax receipts as Ext. 2 to 2/d respectively, certified copy of RSD No. 1698 dt. 11.05.1990 as Ext. 3 and the deed of correction vide document No. 5211 dt. 31.10.2012 as Ext. 4.

The defendants have relied no document.

**F I N D I N G S.**

**Issue No. iii, iv & v.**

6. The above issues being interrelated and deal with the core questions, are taken up first for consideration.

The plaintiff has come with a suit for partition with a further claim that the suit property has already been partitioned and by virtue of such partition his share was determined and allotted to him since 1970. He again contended that by virtue of such partition he also alienated a portion of the suit property out of his share. He has mentioned the cause of action by saying that the defendants are creating disturbances with his peaceful possession over the rest portion of his homestead allotted to him as per such partition. If the case of the plaintiff is accepted, he has to come with a suit for declaration and permanent injunction, but not absolutely a suit for partition. But, since the factum of partition has been admitted by the plaintiff and denied by the defendants, this court has proceeded to decide whether the suit property has been earlier partitioned or not? The plaintiff has mentioned in his plaint as well as in his evidence in chief that the entire suit property was Ac. 0.055 decimals and in the year 1970 the suit property was partitioned. Except an one line statement nothing has been described or adduced in the evidence to clarify the same. The parties to the partition and the witness to the same or the cause and reason of such partition if any have not also been mentioned. The plaintiff rather pounced upon to a different fact by saying that the middle Ac. 27.5 decimals was allotted to the share of Arakhita and Raghunath, who are the successors of Panu Behera and the northern and southern side of the suit property was allotted to him. While, this court has gone through the

evidence came to know that the sale deed vide Ext-3 was executed by the plaintiff in favour of Arakhita and Raghunath in the year 1990, but the sale deed was found to be incorrectly executed and as such in the year 2012, during pendency of the suit a deed for correction of the sale deed was executed vide document No. 5211 dt. 31.10.2012 (Ext. 4). Both the documents are objected by the defendants. In the present case, while the plaintiff has specifically stated that the suit property has been partitioned and basing on such partition he alienated a portion of his share to somebody else, than the question arises basing on which cause of action and for what purpose he further approached the court for partition. This fact remained undisclosed by the plaintiff.

07. Needless to say that the partition as claimed by the plaintiff is not a partition by metes and bounds and the said fact has been admitted by the plaintiff himself in his plaint in paragraph-6. The stand of the plaintiff is self-contradictory. If the same admission of the plaintiff is accepted, he cannot alienate his interest in any specific property belonging to co- coparcener for the simple reason that no coparcener can before partition claim any such property as his own and that any such alienation would remain valid only to the extent of the seller's interest in the alienated property. 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 coparcener. This being the settled law as decided by the Hon'ble High Court of Orissa reported in '**104 (2007) CLT-575 a case between Sukadev Jena – versus- Kuna Rout and others**, such an alienation is

not permissible in the eye of law. It is further well asserted by this court that the plaintiff in order to provide a sanction to his sale deed executed in favour of Arakhita and Raghunath vide sale deed No. 1698 dt. 11.05.1990 tried to use this court and filed the present suit so that his vendees can get rid of the legal complications arises out of execution of an incorrect sale deed vide Ext-3. After all, the suit property is the undivided joint family property of the plaintiff and defendants, which has not yet been partitioned by metes and bound.

08. Coming to the subsequent question, whether the suit property is partible or not, this court has visited the evidence. The plaintiff himself is examined as P.W. 2. He in his cross-examination has deposed that besides the suit property, they have other joint family coparcenary properties, which have not yet been partitioned. He again stated that there are five rooms over the suit plot and he is in occupation of one room and three other rooms are in occupation of the defendants in the middle and rest two rooms have been destroyed by fire.

09. The above admission denotes that the plaintiff has come to the court for a partial partition. The plaintiff admits that they have other ancestral coparcenary properties, those have not yet been partitioned. This is sufficient to establish that the claim of the plaintiff regarding partition of the suit property is completely false and if so, a partial partition is not permissible in the eye of law. Here in the present case the plaintiff clearly admits that they have other joint family coparcenary properties, but he only came to the court for partition of their homestead. The reason of keeping other

property away has not been mentioned in the plaint. It can be well asserted that the plaintiff has nowhere in the plaint has stated that the suit property includes all of their ancestral or joint family property and without keeping their other properties away, he has come to the court for partition. The plaintiff has not come with a fair and good case. He has approached the court for partial partition and as such the same is not permissible at this stage. The reason being so, the suit property being part of the joint family property cannot be partitioned by keeping apart the other joint family property. After all, the suit property at this stage is not partible in nature.

10. The plaintiff in his plaint has sought for the relief of partition by excluding the 14 decimals of land, which has been disposed of by him to others. This is a very peculiar prayer of the plaintiff, who firstly stated about an earlier partition and basing on which he sold around half of his share and again came for partition with the entire suit property. If he has sold a portion of his specific interest over the suit property, the same may be excluded from his share, but without making any effort in his plaint, he approached the court for partition, but without mentioning his interest. However, the above discussion leads to the conclusion that the suit property is not partible in nature and the relief, sought for by the plaintiff for partial partition cannot be entertained as not permissible in the eye of law. The plaintiff is not entitled for any relief.

**Issue No. i & ii.**

11. So far as the question of maintainability of the suit is concerned, the forgoing discussion drives to the destination that the plaintiff has come with highly misconceived and misleading facts. The cause of action as assigned by him is different from the relief as sought for. The plaintiff admittedly came to the court for partial partition, which is not permissible in the eye of law. He has also suppressed the material facts in his plaint. The suit is not maintainable at all. Hence it is order.

**ORDER.**

The suit of the plaintiff be and the same is dismissed on contest against defendant Nos. 1 to 4, while ex-parte against defendant Nos. 5 & 6, 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 19<sup>th</sup> day of November, 2014.

Senior Civil Judge, Khordha.

List of witnesses examined on behalf of Plaintiff :-

P.W. 1            Subash Chandra Das.

P.W. 2            Gobinda Behera.

List of witnesses examined on behalf of Defendants :-

D.W. 1            Ramesh Behera. .

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

Ext. 1            ROR in khata No. 686 of mouza Mukundaprasad.

- Ext. 2 to 2/d 5 sheets of Municipality holding Tax receipt.  
Ext. 3 Certified copy of RSD No. 1698 dt. 11.05.1990.  
Ext. 4 Deed of correction vide document No. 5211 dt. 31.10.2012.  
Ext. 4/a Signature of P.W. 2 on Last page of Ext. 4.

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

Nil.

Senior Civil Judge, Khordha.