

IN THE COURT OF THE SENIOR CIVIL JUDGE, BANPUR.

Present:

Sri Satya Ranjan Pradhan, LL.B.,
Senior Civil Judge, Banpur.

C.S. 33/68 of 20-14/2011

Durga Charan Chhualsingh, aged about 68 years,
S/o Late Sanatan Chhualsingh of Vill: Khetrapala,
Po: Rahannbali, P.S: Balugaon, Dist: Khordha.

..... Plaintiff.

-Versus-

1. Aintha Chhualasingha, aged about 72 years, S/o Late Sanatan Chhualasingh of Vill: Khetrapala, Po: Rahanbeli, P.S: Balugaon, Dist: Khordha.
2. Kuntala Kumari Martha, aged about 50 years, W/o Krushna Chandra Martha of Vill: Durgapur, Po: Rahanbeli, P.S: Balugaon, Dist: Khurda.

.....Defendants

Counsel for the plaintiff ...

Sri B.S. Satapathy, Advocate
& his Associates.

Counsel for the defendants

Sri S.K.Lenka, Advocate
& his associates.

Date of Argument – 24.11 2014

Date of Judgment – 29.11.2014

J U D G M E N T .

1. This is a suit filed for partition and other consequential reliefs by the plaintiff Durga Charan Chhualasingh.

2. The case of the plaintiff as per the plaint is that:

He and defendant No.1 are brothers. The suit property measuring an area of Ac.0.373 decimals in Hal Plot No.730, Chaka No.225 and Hal Khata No.01 which corresponds to Sabik Plot No.725 and Khata No.02 situated in Mouza Samantarapur is their ancestral property. The suit property stands recorded in the name of both the brothers i.e. plaintiff and defendant No.1. The said property devolved upon by them after the death of their father. Their mother has also been

expired. It is now claimed by the plaintiff that both the brothers that means Plaintiff and defendant No.1 after death of their parents, partitioned their ancestral properties amicably between them and in the said partition the suit property fell into his share. Although it was partitioned between them. In the consolidation proceeding the suit property was recorded as a joint property of both the brothers as there was no written deed of partition. Though it is recorded jointly in the name of the two brothers, he is possessing the property exclusively as per the amicable partition to the exclusion of defendant No.1. At the same time as per the amicable settlement his brother (defendant No.1) is possessing different land. So far as the defendant No.2 is concerned it is mentioned by the plaintiff in his plaint that she has not right, title or interest over the suit property and she is also not possessing it. But on 01.12.2010 when the plaintiff was harvesting crops in the suit property the defendant No.2 prevented him from harvesting and told him that she has purchased the property from defendant No.1 in the year 1990. It is the claim of the plaintiff that the said deed bearing No.890 dated 18.04.90 was collusively obtained by defendant No.2 as he has no knowledge about the alleged sale and as the said land fell into his share. It is further alleged by the plaintiff that if the defendant No.2 had purchased the suit property in the year 1990 she could have raised her claim before the consolidation authority but she did not for which the consolidation ROR stands recorded jointly in his name as well as in the name of his brother defendant No.1. Similarly she could have preferred any appeal or revision before the Deputy Director or Commissioner of Consolidation but till date she has not done it which shows that the said deed was executed collusively in association of defendant No.1. Citing the aforesaid facts the

plaintiff prayed to pass a decree of partition allotting the suit property in his favour giving effect to the previous amicable partition and to declare the registered sale deed bearing No.890 dated 18.04.90 as null and void and not binding upon him.

3. In this suit being summoned both the defendants appeared but subsequently on 23.08.2011 the defendant No.1 did not appear. Hence he was set exparte whereas defendant No.2 filed the W.S and contested the suit. The claim of the defendant No.2 as per the W.S is that the Sabik suit Plot No.725 under Khata No.02 originally comprised an area of Ac.0.747 decimals and was recorded jointly in the name of Ainthu Chhualsingh and Durga Chhualsingh (defendant No.1 and plaintiff). Both of them were having equal interest therein. After amicable division of the suit property defendant No.1 was allotted with an area Ac.0.373 ½ decimals of land from the eastern side of Sabik Plot No.725 whereas the plaintiff was allotted with Ac.0.373 ½ decimals of land from the western side. While both of them were possessing their respective patch of land defendant No.1 sold his share of land to her for consideration and executed the registered sale deed bearing No.890 dated 18.04.90 and delivered possession thereof. Similarly the plaintiff also sold his allotted portion of the property to one Goutam Samantaray through a Regd. Sale deed bearing No. 475 dated 09.03.1992 and delivered possession to him. Thereafter this defendant is possessing her portion of land which situates on the eastern part of Sabik Plot No.725 which also corresponds to Hal Plot No.730 and the said Goutam Samantaray is in possession of western part of the suit plot. In addition to that the defendant No.2 had further claimed that the plaintiff in para-10 of the original plaint had admitted about her possession over the suit plot as he had mentioned in the said paragraph

that “defendant No.2 has not only obtained possession but also sued for her possession. Citing the aforesaid facts the defendant No.2 claimed that in view of the aforesaid sales which were made by the plaintiff and defendant No.1 and the admission of the plaintiff in para-10 of the plaint the plaintiff should be estopped from claiming right, title interest and possession over the suit property. So far as recording her name in the R.O.R is concerned it is claimed by her that for the aforesaid wrong recording in the consolidation ROR had moved to the court of Commissioner of Consolidation seeking rectification of the ROR vide R.P. Case No.15/11 and the same is still subjudice. Citing the aforesaid facts the defendant No.2 claimed to dismiss the plaint filed by the plaintiff.

4. On the above pleadings of the parties the following issues were settled.
 - 1) Is the suit maintainable ?
 - 2) Has the plaintiff any cause of action for the suit?
 - 3) Whether the plaintiff has any right, title interest and possession in the suit property?
 - 4) Whether entry in the consolidation ROR of the suit property is correct and binding against both parties?
 - 5) To what relief the plaintiff is entitled to ?
 - 6) Whether the plaintiff is entitled for a relief of partition thereby allotting the suit property in his favour giving effect to the previous amicable partition?
 - 7) Whether the registered sale deed No.890 dated 18.04.1990 was collusively obtained by defendant No.2.
 - 8) Whether the said sale deed is null and void and the plaintiff is not bound by it?
5. In order to substantiate his case the plaintiff had examined four witnesses including himself as P.W.4 and proved certain documents in his favour. Similarly the

defendant No.2 also examined three witnesses, including herself as D.W.3 and relied upon certain documents.

F I N D I N G S.

6. Issue Nos. 3,6,7 & 8 :-

As these issues are interlinked with each other are taken up together for discussion. Considering the claims of the plaintiff and the issues involved for discussion I think it proper to find out first as to 'whether there was any previous amicable partition between the plaintiff & defendant No.1 whereby the suit property fell into the share of the plaintiff's. The onus of proving such fact of previous partition is on the plaintiff as per Section-101 of Indian Evidence Act which reads as follows. Burden of proof- whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Similarly in a suit for partition the principles underlying the burden of proof is that "where there is no writing at all in such a case when the question arises as to whether there has been a partition or not the intention of the parties as to separation can only be inferred from their acts. The question is one of fact to be decided with due regard to the cumulative effect of all the facts & circumstances and primarily the burden of showing that there has been a partition is on the person setting it up". Here in this case the plaintiff alleges about the fact of previous amicable partition between him and defendant No.1. The defendant No.1 although had appeared in this suit did not appear subsequently and was set exparte. In this circumstances when Defendant No.1 did not appear to challenge the

claim of the plaintiff the version of the plaintiff about the partition could have been accepted but as Defendant No.2 had claimed to have purchased the interest of Defendant No.1 on the suit property and challenged the aforesaid fact of partition wherein the suit property for to the share of the plaintiff it was incumbent on the part of the plaintiff to discharge the onus on the basis of aforesaid principles.

To substantiate the aforesaid claim the plaintiff had examined himself as well as three other witnesses on his behalf. While being examined as P.W.4 the plaintiff had stated that the suit property measuring an area Ac.0.373 decimals pertaining to Hal Plot No.730 in Hal Khata No.01 situated in Mouza Samantarapur is their ancestral property and it was recorded jointly in his name and in the name of his brother. Thereafter they partitioned the property amicably and the suit property fell into his share whereas defendant No.1 was allotted with different land in other mouza. Although there was such amicable partition between them the said fact was not reduced in to writing. And in absence of such deed of partition in the Consolidation proceeding the suit property was wrongly again recorded jointly in the name of his brother and himself. However he is possessing the suit property by raising paddy and mung crops. Although he asked defendant No.1 on several occasions to go to the Sub-Registrar office for execution of the partition deed he did not listen to him. Similarly the other three witnesses appearing on behalf of the plaintiff categorically stated that there was an amicable partition between the plaintiff and defendant No.1 vide which this land originally with an area Ac.0.747 decimals fell into the share of the plaintiff and defendant No.1 was allotted with different land in other mouza. From the said land with an area of Ac.0.747 decimals plaintiff had sold

an area of Ac.0.373 ½ decimals to one Goutam Samantaray in the year 1992 after taking permission from the Consolidation authority. And now he is possessing the rest land i.e the suit land. Although the plaintiff and other witnesses examined as P.Ws 1,2 and 3 stated about the amicable partition they could not disclose as to when, on which date and in whose presence the said amicable partition was effected. Although P.Ws 1,2 & 3 stated about the amicable partition it was not disclosed as to whether they were present at that time or not and whether both party acted upon such partition or not. Similarly it was the duty of the plaintiff to prove whether all the ancestral properties were brought into a common Hotch pot for partition or not? It was only stated by the plaintiff and other witnesses that there was an amicable partition between them wherein the suit property fell into his share and other property in other village fell into Defendant No.1's share but could not show the properties which fell into the share of defendant No.1. No document was also produced to establish the same. So this statement of plaintiff and his witnesses seems to be evasive, vague & not clear. The plaintiff should have clearly mentioned as to which were the joint family properties and which property fell into whose share. Similarly whether at the time of partition all the joint family properties were brought into a common hotch pot or not. Because a member of joint family suing his coparceners for partition of joint family property is bound to bring into hotchpot, in order that there may be a complete and final partition of all family property. Having said so it can be said that a partial partition between coparcenaries is also permissible which may be in respect of property or in respect of persons making it. But the statement of the plaintiff and the rest of the witnesses are silent in this regard.

Instead of disclosing the aforesaid facts the plaintiff had brought this suit for a single plot claiming that the suit property fell into his share in the amicable partition. Additionally speaking the suit property is an agricultural land and after commencement of Orissa Land Reform Act 1960 any partition made on or after 1st October 1965 shall not be valid unless made in accordance with the provision of section 19 of OLR Act. which reads as follows:-

Section 19- Partition among co-sharer raiyats how to be effected:-

(1) No partition of a holding among co-sharer raiyats shall be valid unless.

Made by:-

(a) a registered instrument, or (b) a decree of a Court; or (c) an order of the Revenue Officer in the manner prescribed, on mutual agreement (2).....

So as mentioned U/s 19 of the OLR Act a partition of the property after coming into the force of the OLR Act can be effected in three ways as mentioned therein. So it was necessary on the part of the plaintiff to prove the date on which the said amicable partition was effected to find out whether it was made before 1st October 1965 or not. But no such evidence was led on his behalf. As mentioned earlier the onus was on the plaintiff to prove the fact of previous partition and such proof must be on the parameter of preponderance of probability which means greater weight that, though not sufficient to free the mind wholly from all reasonable doubt is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This being the most important issue in this suit, the plaintiff had to prove it on the touch stone of preponderance of probabilities. But considering the discussions as made earlier I am of the opinion that the plaintiff could not able to prove the same. Now

question will arise whether a relief of partition under the issue No.5 can be granted in favour of the plaintiff although he had not specifically prayed for it, considering the fact that there was no previous partition between them and considering the filing of the present suit as his intention of severance of joint family status. Answering this point it can be said that as the plaintiff had not furnished the particulars and list of his all joint family properties it is not possible in this suit to carve out their interest. So as the plaintiff could not able to prove the fact of previous partition the grant of decree of partition allotting the suit property in his favour giving effect to the previous amicable partition does not arise.

7. Now it is to be decided as to whether the R.S.D bearing No.890 dated 18.04.1990 was collusively obtained by defendant No.2 and whether it is null and void thereby not binding upon the plaintiff. Although it was said to be collusively obtained sale deed but the basis on which it is said to be collusive was not spelt out by the plaintiff. On the other hand it was claimed to be null and void by the plaintiff on the sole ground that prior to the sale the suit property was fallen into his share through the amicable partition between him and his brother (defendant No.1). But as discussed in the preceding paragraph the plaintiff could not able to prove the fact of previous amicable partition between him and defendant No.1. So as because he could not able to prove the fact of previous amicable partition between them the alleged sale deed can not be declare as null and void on that basis. As revealed from the Sabik ROR marked as Ext.A and the statement of P.Ws 1,2 and 3 originally the suit property stood recorded in the name of the plaintiff and defendant No.1 with an area of Ac.0.747 decimals. The plaintiff has also admitted the said fact. As it was

their ancestral property and as the property stood recorded in the name of both the brothers they had equal share and interest over it. Out of the total Ac.0.747 decimals the plaintiff in the year 1992 had sold his half interest i.e. $337 \frac{1}{2}$ decimals of land to one Goutam Samantaray. But prior to that the defendant No.1 had sold Ac.0.337 $\frac{1}{2}$ decimals of land to the defendant No.2 vide R.S.D No.849/90. As on the date of the alienation of the property i.e. 18.04.1990 the said property was not partitioned between both the brothers both of them had equal interest over it and by virtue of her purchase defendant No.2 acquired such interest of defendant No.1 over the suit property. That means half of the interest from the suit property. Although the defendants could not claim that particular portion of land at the time of her purchase as it was a joint property and was not partitioned she only could have asked for joint enjoyment over the property with the extent interest of defendant No.1 had, at the time of alleged sale or could have asked for the general partition of the interest of his aliener. As revealed from the record subsequently in the year 1992 the plaintiff had sold the other half of the suit property to one Goutam Samantaray which situates on the eastern side of the present suit plot. On this point during the course of argument the learned counsel for the defendant No.2 drew the attention of the court on Ext.D i.e the sale deed vide which plaintiff had sold his share of land to Goutam Samantaray. In the said deed while giving the description of the property the plaintiff had himself admitted about the possession and purchase of land by Defendant No.2 as he had mentioned that on the western side of that land "Krushna Chandra Martha" i.e. husband of Defendant No.2 has his land and also drew the attention on para-10 of the original plaint wherein , in para-10 he had admitted about the possession of

Defendant No.2. Citing the aforesaid facts the learned counsel submitted that it was within the knowledge of the plaintiff since long but did not agitate it. So he must be estopped from it. So considering the aforesaid facts, taking into account the submissions and rival submissions I am of the opinion that the plaintiff is not entitled to get the reliefs as claimed vide Issue No.3,6,7 & 8.

Issue No.1, 2 , 4 & 5

8. Although these issues regarding maintainability & cause of action were formulated the defendants as well as the plaintiff did not press those issues either during hearing or during the argument. So those issues are answered affirmly in favour of the plaintiff. Similarly so far as Issue No.4 is concerned neither party to the suit pressed this issue and as revealed from the W.S and statement of Defendant No.1 a R.P. Case is pending before the Commissioner of Consolidation who is competent to decide the said matter hence no finding is given to that effect. So far as any other relief is concerned the plaintiff is not entitled to get any such relief.

O R D E R.

The suit be and the same is dismissed on contest against the defendant No.2 and exparte against Defendant No.1 but in the circumstances without any cost.

Advocate's fee is at the contested scale.

Senior Civil Judge, Banpur.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 29th day of November, 2014.

Senior Civil Judge, Banpur.

List of witness examined on behalf of the Plaintiff :-

P.W.1 Nilamani Samantaray
P.W.2 Bidyadhar Chhualsingh
P.W.3. Gourahari Chhualsingh
P.W.4 Durga Charan Chhualsingh

List of witness examined on behalf of defendants :-

D.W.1 Krushna Chandra Martha.
D.W.2 Prahallad Martha
D.W.3 Smt. Kuntala Martha.

List of documents admitted into evidence by the Plaintiff:-

Ext-1 Khata No.1 of Samantasingharpur
Ext.2,2/a, 2/b Rent receipts.
Ext.3 Certified copy of sale deed.

List of documents admitted into evidence by defendants :-

Ext. A ROR No.2.
Ext.B ROR No.1.
Ext.C Certified copy of sale deed No. 890.
Ext.D Certified copy of No.475.
Ext-E Rent Receipt No.1.

Senior Civil Judge, Banpur.