

**IN THE COURT OF THE ADDL. DISTRICT JUDGE –CUM- SPECIAL
JUDGE, C.B.I.-II, BHUBANESWAR.**

PRESENT:

Dr. A.K.Mishra,
Addl. District Judge –cum-
Special Judge, C.B.I.-II, Bhubaneswar

R.F.A. No. 13/65 of 2015/2013.

(Arising out of Ex-parte Judgment and decree dated 29.7.2013 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in Civil Suit No. 73/481 of 2013/2007)

Rabi Jena, aged about 59 years,
s/o. late Shyam Jena,
At village-Injana, P.O. Kalarahanga,
P.S. Mancheswar, Dist. Khurda.

... Appellant.

Versus.

Pravasini Pradhan, aged about 40 years,
w/o. Pramod Kumar Pradhan,
At Vill. Injana, P.O. Kalarahanga, Dist. Khurda.

... Respondent.

For the Appellant : Sri R.L.Rout & Associates, Advocates.
For the Respondent : Sri P.Pattanaik & Associates, Advocates.

Date of Argument : 13.1.2016.

Date of Judgment : 20.1.2016.

JUDGMENT

The unsuccessful plaintiff has assailed the ex-parte judgment and decree dated 29.7.2013 in dismissing the suit No. T.S. 79/481 of 2013/2007 passed by 2nd Addl.

Senior Civil Judge, Bhubaneswar. The sole defendant is the respondent.

2. Adumbrated in brief, the plaintiff case may be narrated thus: The suit Khata no.222 as per ROR published in the year 1973, Ext.7, stood recorded in the name of Plaintiff Rabi Jena and his brother Bansidhar Jena. Out of 8 plots, two plots i.e. area measuring Ac.0.02decimals appertaining to plot No.1030 and Ac.0.03 decimals appertaining to Plot No.1034 total measuring Ac.0.05 decimals covered under sale deed dated 10.5.2000 Ext.1 are made suit lands. The sale deed was executed by Nayana, the wife of Bansidhar (Plaintiff's brother's wife) in favour of defendant. Bansidhar and Nayana had no issue. Bansidhar died in the year 1969. Nayana died on 12.3.2006. As per plaintiff, Nayana has disassociated herself from the life of Bansidhar and did not attend his "Sudhi Kriya". While the suit property was in joint, Nayana being influenced by the village touts executed the sale deed without consent of the plaintiff co-sharer for which neither any possession was delivered nor was recited the correct particulars of the sold land. The plaintiff filed one partition suit bearing No. T.S. 438 of 2000 in the court of Civil Judge (Sr.Dvn.) Bhubaneswar against Nayana and her vendee and the said suit was withdrawn on 4.3.2002 vide Ext.5. The plaintiff then filed another suit bearing No. T.S. 141/2002 in the same court against Nayana and her vendee which was decreed ex-parte on 30.6.2007 granting permanent injunction from alienating the suit property against the purchaser vide Ext.3 and order

reveals that defendant no.1 Nayana was deleted from the suit.

3. The specific case of the plaintiff that after death of Nayana, the suit property having devolved upon him (plaintiff), his right title interest and possession over the same should be declared and the sale between Nayana and present defendant being void, the sale deed should be declared unenforceable. The plaint was presented on 18.7.2007. The sole defendant neither filed any written statement nor took part in the hearing and consequently was set ex-parte. Learned lower court dismissed the suit recording finding that Nayana had half interest in the suit plots and to the extent of her half share, the sale deed was valid.
4. Learned counsel for appellant vehemently urged that when the learned lower court found the sale deed valid to the extent of the half share of Bansidhar (husband of Nayana) and there was no partition, the suit should not have been dismissed in view of Section 4 of Partition Act and Section 41 of the Transfer of Property Act.
5. Learned counsel for respondent repelled the above contention stating that once the status of Nayana as the wife of Bansidhar remain uncontroverted, the sale deed cannot be said void and collective possession over the joint holding by several co-owners is permissible to which shoe the purchaser defendant had stepped into after execution and registration of the sale deed on 10.5.2002 and thereby no fault can be found with the impugned judgment. In support of his contention he relied upon two decisions reported in **AIR 1974 Orissa 192 Ganapati**

Sahu and another -vrs- Smt. Buli Sahu and others and Judgment dated 26.7.2012 by Hon'ble Delhi High Court in case of Sh. Prem Prakash vrs- Smt. Champa Devi and others.

6. Having drawn the battle line in the above manner, admitted facts which obviate debate, may be recapitulated. Nayana was the legal married wife of Bansidhar who had half share in the suit plots. After death of her husband, Nayana executed the sale deed Ext.1 on 10.5.2000 and during her life time she had not questioned the sale. Plaintiff had filed two suits, one for partition , T.S.NO.438 of 2000 vide Ext.5 and another for permanent injunction, C.S.No. 141 of 2002 Ext.3, impleading Nayana and her vendee in respect of the present suit land. The first suit for partition was withdrawn on the ground that consolidation proceeding was in operation and in the second suit the vendor Nayana was deleted and the relief of permanent injunction was obtained against the present defendant vendee. Thus seen, in the above two suits, both vendor and vendee, were the parties and the meat of the matter was the registered sale deed dated 10.5.2000.
7. The present suit, third in succession, qua the party and property was instituted and at first blush draws the attention regarding its maintainability under order II rule 2 of The Code of Civil Procedure and under Article-59 of the Limitation Act, 1963. Points posited need narration in this appeal.
8. For cancellation of any instrument like sale deed the prescribed limitation is three years when the facts first became known to plaintiff as per Article-59 of Limitation Act, 1963. In view of earlier suit filed in the year 2000, the knowledge of the plaintiff

can be said to have run from that day and in the mean time, three years limitation period having been elapsed , the present suit for declaration of unenforceability of the sale deed dated 10.5.2000 is barred by limitation.

9. With regard to the bar under Order II Rule 2 CPC , in the decision **reported in 2013 (1) Supreme Court Cases 625 Virgo Industries (Eng) P. Ltd -vs- Venture Tech Solution P.Ltd** , the Hon'ble Apex court has reiterated the law in the following words :

" 9. Order II Rule 1 requires every suit to include the whole of the claim to which the plaintiff is entitled in respect of any particular cause of action. However, the plaintiff has an option to relinquish any part of his claim if he chooses to do so. Order II Rule 2 contemplates a situation where a plaintiff omits to sue or intentionally relinquishes any portion of the claim which he is entitled to make. If the plaintiff so acts, Order II Rule 2 of CPC makes it clear that he shall not, afterwards, sue for the part or portion of the claim that has been omitted or relinquished. It must be noticed that Order II Rule 2 (2) does not contemplate omission or relinquishment of any portion of the plaintiff's claim with the leave of the court so as to entitle him to come back later to seek what has been omitted or relinquished. Such leave of the Court is contemplated by Order II Rule 2(3) in situations where a plaintiff being entitled to more than one relief on a particular cause of action, omits to sue for all such reliefs. In such a situation, the plaintiff is precluded from bringing a subsequent suit to claim the relief earlier omitted except

in a situation where leave of the Court had been obtained. It is, therefore, clear from a conjoint reading of the provisions of Order II Rule 2 (2) and (3) of the CPC that the aforesaid two sub-rules of Order II Rule 2 contemplate two different situations, namely, where a plaintiff omits or relinquishes a part of a claim which he is entitled to make and, secondly, where the plaintiff omits or relinquishes one out of the several reliefs that he could have claimed in the suit. It is only in the latter situations where the plaintiff can file a subsequent suit seeking the relief omitted in the earlier suit provided that at the time of omission to claim the particular relief he had obtained leave of the Court in the first suit”.

- 10.** Tested in the touch stone of above law, the cause of action for earlier two suits i.e the partition suit and permanent injunction suit filed by plaintiff against defendant and her vendee, had common cause of action as raised in the present suit. The relief claimed in the present suit was available by the time earlier suits were filed, but plaintiff did not choose to seek such relief. The identity of cause of action in three suits including the present one being common, the bar under order II Rule-2 of CPC is squarely attracted and the plaintiff is disentitled to bring the present suit. The suit as laid was not maintainable and on that score the dismissal of the suit by the learned lower court in the impugned judgment cannot be interfered with. Hence, it is ordered.

ORDER.

The appeal stands dismissed on contest without cost.

Addl. District Judge -cum-
Special Judge, C.B.I.-II, Bhubaneswar.

Dictated and corrected by me.
Judgment is pronounced in the open court,
this the 20th January, 2016.

Addl. District Judge -cum-
Special Judge, C.B.I.-II, Bhubaneswar.