IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT BHUBANESWAR.

Present:

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 24th July'14.

R.F.A. No. 14 of 2010.

[Arising out of the judgment dated 25.02.2010 & decree dated 11.03.2010 passed by the learned 2nd Addl. Civil Judge (Sr. Division), Bhubaneswar in Civil Suit No.137/255 of 2009/2004.]

Sudarshan Behera (Dead).
1A. Smt. Hullash Behera, aged about 50 years,
W/o. Late Sudarsan Behera.
1B. Sri Srinibas Behera, aged about 32 years.
1C. Sri Subash Behera, aged about 30 years.
1D. Sri Suresh Behera, aged about 28 years.
1E. Sri Manash Behera, aged about 25 years.
Appellant Nos.1B to 1E are sons of
Late Sudarsan Behera. All are residents of
Durgapurpatna, P.O. - Bankuala, P.S. - Saheed Nagar,
District – Khurda.

... **Appellants.**

-***V e r s u s***-

1. Smt. Sashi Behera, aged about 61 years,
W/o. Late Banamali Behera.
2. Babuli Behera, aged about 41 years,
S/o. Late Banamali Behera.
3. Pramod Behera, aged about 37 years,
S/o. Late Banamali Behera.
4. Dhaneswar Behera, aged about 67 years,
S/o. Late Nanda Behera.
All are residents of Village – Durgapurpatna,

P.O. - Bankuala, P.S. - Saheed Nagar, District – Khurda.

5. Smt. Kuntala Dei, aged about 78 years,
W/o. Narana Behera (D/o. Late Nanda Behera),
At – Bagalpur, P.O. - Sundargaon, P.S. - Govindpur,
District – Cuttack.

... **Respondents.**

Counsel :

For Appellants -- Shri K.K. Panda & Associates.
For Res. Nos.1 to 4-- Shri A. Gajendra & Associates.
For Res. No.5 -- None.

Date of argument : 26.06.2014.
Date of judgment : 24.07.2014.

J U D G M E N T

Plaintiffs in the Court below have preferred this appeal challenging the judgment dated 25.02.2010 & decree dated 11.03.2010 passed by the learned 2nd Addl. Civil Judge (Sr. Division), Bhubaneswar in Civil Suit No.137/255 of 2009/2004. dismissing the suit.

2. The parties hereinafter have been referred to as they have been arrayed in the trial Court for the sake of convenience and proper appreciation.

3. The factual matrix of the case of the plaintiffs is that the suit property, as described in schedule 'B' of the plaint, and other properties originally belonged to Nanda Behera. Nanda Behera died leaving behind him his wife Taia and sons, namely, Banamali, Dhaneswar (defendant No.4), Sudarsan (plaintiff) and daughter Kuntala (defendant No.5). Banamali died leaving behind him his wife Sashi (defendant No.1) and two sons, namely, Babuli (defendant No.2) and Pramod (defendant No.3).

In the meantime, Taia has expired. Plaintiff Sudarsan expired and he has been survived by his legal heirs. After death of Nanda, finding difficulties with the increase of family members, Sudarsan, the original plaintiff, filed T.S. No.161 of 1990 in the Court of Sub-Judge, Bhubaneswar seeking partition of the suit property, as described in schedule 'B' of the plaint, and other ancestral property described in schedule 'C' of the plaint. That suit was decreed on 07.01.1991 in terms of compromise, wherein schedule 'B' property (suit property) being a chaka land and not partible according to the provisions of Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter called “the Act”) 1/3rd interest of plaintiff was only declared and by mutual arrangement, plaintiff Sudarsan remained in cultivable interest over his undivided share in schedule 'B' property. Defendants taking advantage of the development of the properties at nearby plots tried to alienate the suit property by converting the same into different sub-plots and illegally created fragmentation of chaka land, for which plaintiff filed C.S. No.255 of 2004 seeking a decree for permanent injunction to restrain the defendants from alienating or in any way delivering the suit property or any portion of it to any outsiders and other reliefs. Hence the suit.

4. Defendant No.5 has been set ex parte. Defendant Nos.1 to 4 filed joint written statement stating that the suit is not maintainable in the eye of law and there is no cause of action to file the suit. Defendants admitted the genealogy and the facts

narrated in the plaint in para 1 to 10. They also admitted about compromise decree dated 07.01.1991 passed in T.S. No.161 of 1990 and plaintiff's possession over 1/3rd share measuring an area of Ac.0.802 decimals out of total area of Ac.2.406 decimals. It is the case of defendants that since last fifteen years, by the time of filing written statement, not only the suit land but also the nearby land of the same mouza became unfit for cultivation and there was demand from some property dealers to develop the land over the adjoining land of the suit land. Not only this, but also defendants pleaded that the suit property has been duly converted to homestead land by the parties vide O.L.R. Case No.2929 of 2006, as they are not fit for agricultural purpose since long. It is alleged, inter alia, that plaintiff's contention that the suit land is used for cultivation is false and imaginary and they have pleaded such fact to harass the defendants. Defendants also refuted the charge that they are bent upon to sell the suit land for which they are making negotiations with different real estate organizations. According to these defendants, since the plaintiff has already got his 1/3rd share out of the suit property towards western side of the suit plot, he has no manner of right, title, interest and possession over the rest of the property, which is admittedly shared by the defendants. It is further pleaded by defendants in their written statement that much before filing of the suit, they had executed agreement for sale of their respective shares in favour of Mahalaxmi Real Estate & Construction and received consideration during pendency of the suit and they have already

put the said real estate into possession in respect of their shares over the suit plot. They have also executed power of attorney in favour of the said real estate firm. It is also averred that plaintiff has also received consideration for sale of suit land to the aforesaid Real Estate & Construction and put the said Company into possession, although he has no right, title, interest and possession over the suit land. It is prayed by the defendants to dismiss the suit.

5. Basing upon the pleadings in the plaint and written statement, the learned 2nd Addl. Civil Judge (Sr. Division) has framed the following issues :

i) Whether suit is maintainable ?
ii) Whether plaintiff has got any cause of action to file the suit ?
iii) Whether suit is bad for non-joinder of necessary party ?
iv) Whether plaintiff is entitled for the relief of permanent injunction ?
v) To what other relief, plaintiff is entitled ?

6. The learned trial Court picked up issue No.(iv) for the sake of convenience and after a threadbare discussion has concluded that the right of the plaintiff in respect of his share over the suit land has not been affected and since defendants are in possession of their respective shares, plaintiff is not entitled for permanent injunction and, as such, answered the said issue in the negative. Likewise, while answering issue Nos.(i) & (ii), the learned trial Court has held that there is no cause of action to file the suit and the suit is not maintainable. While answering issue

No.(iii), the learned Court below has held that the suit is bad for non-joinder of necessary party and, finally, answered issue No. (v) in the negative against the plaintiff and, accordingly, dismissed the suit on contest.

CONTENTIONS :

7. Learned counsel appearing for the appellants submitted that the order of the learned trial Court is wrong and illegal, as she has failed to appreciate the compromise decree wherein schedule 'B' property being a chaka land was not partible according to the provisions of the Act and Sudarsan's undivided 1/3rd interest was only declared, but there was no partition by metes and bounds. He further submitted that the learned trial Court has committed error creating fragmentation of the chaka suit land by refusing permanent injunction in restraining defendants from alienating any portion of the suit land. The learned trial Court has erred in law by holding that plaintiff has no manner of right, title, interest and possession, although plaintiff has 1/3rd interest over the suit land. That apart, the learned trial Court has appreciated the facts and law in this case in a most capricious manner and the findings are not based on the weight of evidence on record. The learned trial Court has also erred in law by not appreciating the decision of the Hon'ble Apex Court wherein it has been observed that when both parties have adduced evidence, the question of burden of proof becomes insignificant. The learned trial Court has further committed illegality by holding that amicable arrangement of possession

over the suit land by the parties amounts to partition and that kisam of the suit land has been changed. Learned counsel for the appellants further submitted that the finding of the learned trial Court is illegal by not paying attention to the provisions of Order 7, Rule 7 of the C.P.C. and she should have held that while the order of injunction against the defendants restraining alienation of the suit land by them was in force, alienation in violation of the said order of injunction invalidates the sale being an unlawful act. As such, learned counsel for the appellants submitted to set aside the judgment and decree passed by the learned trial Court and allow the appeal.

8. Learned counsel appearing for the respondents submitted that there being partition of the suit land as per the decree passed in T.S. 161 of 1990 and plaintiff being in possession of his 1/3rd share, the question of further partition does not arise. He further submitted that at different stages of plaintiff's evidence while being examined as P.W.1, it is found that plaintiff has admitted to have been possessing 1/3rd share after the suit was disposed of. He cited many paragraphs of the evidence of witnesses. According to learned counsel for the respondents, when partition in the joint family property is admitted and proved, presumption will be that there has been complete partition of all the properties. He further submitted that due to improper identity of the suit property, plaint is liable to be rejected under Order 7, Rule 10 of the C.P.C. Finally, he submitted to dismiss the appeal and uphold the judgment and

decree passed by the learned lower Court.

DISCUSSIONS :

9. It is well settled law that the first Appellate Court being the Court of finding of facts and law has to answer in every issue decided by the learned trial Court. It is also well settled law that the evidence adduced in the lower Court has to be reappreciated by the first Appellate Court while deciding the appeal. Bearing in mind the settled principles, let me find out if the findings of the learned trial Court are liable to be interfered with.

10. Let me first discuss issue No.(iv). Plaintiff has averred in the plaint about filing of T.S. No.161 of 1990 in the Court of Sub-Judge, Bhubaneswar seeking partition of the suit property described in schedule 'B' and about compromise of the same where his 1/3rd interest has been declared. By mutual arrangement, plaintiff remained in cultivating possession over his undivided interest. On the other hand, defendants have admitted in written statement about such filing of T.S.161 of 1990 and decree thereon dated 07.01.1991 as well as 1/3rd interest being enjoyed by plaintiff. But, at the same time, plaintiff has claimed that there was no partition by metes and bounds even if such compromise decree has been passed. Since plaintiff has prayed for permanent injunction and he has averred about jointness of the property after the decree in T.S. 161 of 1990 was passed, onus lies on him to prove that non-consolidable suit land was not partitioned in the said title suit.

However, both the parties have led evidence. It is reported in the case of ***Union of India and others*** Vs. ***Sugauli Sugar Works (P) Ltd.*** **(AIR 1976 SC 1414)** that once both the parties have adduced evidence, the question of onus loses its significance and it becomes an academic issue. With due respect to the said decision, I find in the instant case that both the parties have adduced evidence for which the burden of proof loses its importance.

11. Plaintiff in order to discharge onus has examined himself and adduced documentary evidence. P.W.1 in his examination-in-chief stated that he has filed T.S.161 of 1990 in the Court of Sub-Judge, Bhubaneswar seeking partition of the suit property and other ancestral property of his father. In para-5 of his examination-in-chief, he has stated that schedule 'B' property in T.S.161 of 1990 being a consolidable land, not being partible by metes and bounds, his 1/3rd share in the said suit property was declared. He has also stated that as per compromise decree, he has got his 1/3rd undivided interest over the entire suit land and, subsequent to passing of such decree, he remained in cultivating possession thereon to the extent of his share by raising paddy crops. He has proved the certified copy of the terms of decree in T.S.161 of 1990 vide Ext.2, certified copy of order dated 07.01.1991 in the same suit vide Ext.3 and certified copy of Record of Right of the suit land vide Ext.1. I went through the same. It appears from Ext.2 that schedule 'B' property of that suit is the suit land in this case and, according to

the terms of compromise, which forms part of the compromise decree, schedule 'B' property being a chaka land and as the other disputed property was left with the possession of defendants in that suit, 1/3rd interest over the suit land was given to the plaintiff. In fact, in that suit, as per the genealogy, which has been admitted by both the parties, Nanda Behera died leaving behind his wife, three sons and one daughter. Plaintiff has got 1/3rd share over the suit property. It is further revealed from the said document that the parties have amicably decided to deliver 1/3rd share over schedule 'B' land to the plaintiff. It is further revealed that according to the parties, plaintiff and his brothers would measure their respective share and possess the same and this decree is taken as final decree. Ext.1 is the certified copy of the Record of Right, which shows that the suit land stands recorded in favour of Nanda Behera. Ext.3 shows that the compromise petition was decreed finally being part of the original decree. In view of such clear cut mandate in the certified copy of the compromise decree, it is to be seen whether the same has been carried out by the parties. So, it cannot be said that the preliminary decree passed in T.S.161 of 1990 cannot be executable. In cross-examination of P.W.1, it is revealed that he has been in cultivating possession over his 1/3rd share and 2/3rd portion of the suit land is cultivated by defendants. In para-17, he has admitted that there was mutual understanding between them following which on the basis of partition, he has got the western side and defendants have got the eastern side of the suit

land. He has also admitted that prior to 1971, the suit land was partitioned between them and he is in possession of 1/3rd share on the western side of the suit land. Thus, the evidence of P.W.1 is very much clear that after the preliminary decree, which has reached its finality, plaintiff has been possessing 1/3rd share, whereas defendants have been possessing 2/3rd share over the suit land. So, the evidence of P.W.1 coupled with Exts.1, 2 & 3 go to prove that during course of hearing of T.S.161 of 1990, the matter was compromised between the parties and P.W.1 has been possessing his share for the last fifteen years. On the other hand, he has not proved that there is no partition of the suit land by metes and bounds even if the compromise decree has been passed, because in pursuance of the said compromise decree he has been possessing 1/3rd share, which has been declared in such suit, and it is well settled law that a long, separate possession of a co-sharer after the partition decree defining his share, the partition of the property by metes and bounds can well be inferred.

12. Defendants have examined two witnesses and adduced documentary evidence. D.W.1, who is the uterine brother of the original plaintiff Sudarsan, has stated that after the partition decree in terms of compromise, plaintiff remained in possession of Ac.0.802 decimals on the western side and defendants remained in possession on the eastern side of the suit land. It is also revealed from the evidence of D.W.1 that there was conversion of paddy land to homestead vide O.L.R. Case

No.2929 of 2006; but it was submitted on behalf of appellants that appeal was preferred before the Sub-Collector. Even if appeal has been filed, the result in the said O.L.R. Case will remain valid as long as it has not been set aside. D.W.1 has proved the certified copy of the Record of Right in respect of suit plot No.588, which has been recorded in favour of defendants and the name of plaintiff is not there. In cross-examination, he has admitted to have not filed the written statement. Even if a party has not filed written statement, he can participate in the hearing of a case. There is no infirmity in the evidence of D.W.1. He has admitted that his mother has expired ten to fifteen years back. Till then, she was living with them. In para-24 of his cross-examination, he has admitted that he has sold some portions of the suit land three years back. Similarly, in para-27, he has admitted that the same has been sold to Mahalaxmi Real Estate on the strength of two Registered Sale Deeds. In para-36 of his cross-examination, he has stated that Sudarsan (plaintiff) has got 1/3rd share over the suit plot, who has filed the suit for joint property of defendants. So, it has been brought out in cross-examination that on the basis of the partition effected by the compromise decree vide Ext.2, they have been possessing their respective shares and in no way plaintiff's 1/3rd share has been disturbed. When the nature and character of the suit land has been converted to homestead land, the provisions of the Act will not apply. Moreover, partition has taken place in 1991. As per D.W.1, defendants have alienated some portions out of their

share to a third party. It is also revealed from the evidence of D.W.1 that plaintiff being in possession over suit plot has sold a portion thereof to the above Real Estate and he has no manner of right, title, interest and possession thereon. There is no challenge to such evidence during cross-examination by plaintiff. So, D.W.1 has also proved that plaintiff is equally dealing with his share separately. In the case of ***Paramananda Swain and others*** Vs. ***Rabindranath Swain and others*** **[2003 (Supp.) OLR-55]**, His Lordship has been pleased to observe in para-6 & 7 that :

> "6....., it is found that the parties mutually divided their properties. After preliminary decree the coparcenery came to an end. There is no inflexible rule that a co-owner cannot alienate his share of properties to 3rd party. In case such alienation exceeds his share then such sale can be assailed by the other co-owner. It has not been claimed by the plaintiffs that the defendant No.6's vendors had sold the land in excess of their right.
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> 7. Another contention has been advanced by Mr. Kar that it was hit U/s.4(4) of the Orissa Consolidation of Holdings & Prevention of Fragmentation of Lands Act, 1972 (hereinafter referred to as the 'Act'). But it is found that such alienation was made after preliminary decree was passed. Therefore, if alienation is made after such preliminary decree there has been no legal embargo U/s.4(4) of the Act for abating the proceeding. The plaintiff No.1 being a party to the compromise decree cannot subsequently turn round and impeach the compromise decree. They are estopped from challenging the said decree. Since the appeal did not raise any objection of law much less the substantial question, therefore, there is no legal warrant to interfere with the concurrent findings".

With due respect to the above decision, I find in the instant case that after the preliminary decree was passed,

coparcenary has come to an end and defendants being co-sharers have made agreement for sale of their share for which plaintiff cannot challenge it. Moreover, after the preliminary decree when the alienation of share of defendants arises, the provision of the Act that it is a chaka land cannot stand on the way. The evidence of D.W.1 read with the documents prove that defendants being in possession of their share after the compromise decree have got right over their 2/3rd share of the suit land.

13. D.W.2, who is a legal heir of one of the defendants, has supported the evidence of D.W.1; but in cross-examination, nothing is found to contradict the case of the defendants. Only he has stated in para-23 that no partition of the suit land was made between the parties. Since he was not a party to the original suit in T.S.161 of 1990 and his father was a party, he must have no knowledge about such partition. Nothing is brought out in his cross-examination to discard the case of defendants.

14. From the foregoing discussion, it appears that defendants have discharged their onus by proving both oral and documentary evidence that after partition, they have got right, title, interest and possession of their 2/3rd share over the suit plot.

15. To prove permanent injunction, plaintiff has to satisfy the parameters of section 38 of the Specific Relief Act, 1963. When plaintiff has no right, title, interest and possession of 2/3rd share over the suit plot and he has only right, title, interest and possession over his 1/3rd share in view of partition that has

taken place as per the above discussion, there is no prima facie case proved by him to show that defendants have tried to invade his right over the suit property. Moreover, it is not proved by plaintiff to indicate that the invasion will cause irreparable loss or injury to him and the injunction is necessary to prevent a multiplicity of judicial proceedings. In either way, the ingredients of perpetual injunction required to be proved have not been proved by the plaintiff. I have carefully gone through the judgment of the lower Court and found that the learned Court below has rightly held that plaintiff is not entitled to the relief of permanent injunction and, for the discussion made above, I concur with her finding on this issue.

16. Since the plaintiff has failed to prove that he is entitled to the relief of permanent injunction against the defendants, as he has already been possessing his share as per partition, there is no cause of action to file the suit and, accordingly, the suit is not maintainable. I also agree with the findings of the learned trial Court on issue Nos.(i) & (ii).

17. As regards issue No.(iii), I find that this is a suit filed by the plaintiff against his co-sharers for restraining them from alienating a portion of the suit property. Thus, I do not find any other party necessary to be impleaded in this case. So, the suit is not bad for non-joinder of necessary party and I agree with the finding arrived at by the learned trial Court on this issue. Consequently, the plaintiff is not entitled to any other relief, as correctly held by the learned trial Court on issue No.(v). Hence

ordered :

O R D E R

The appeal fails and the same is dismissed with cost. The judgment dated 25.02.2010 & decree dated 11.03.2010 passed by the learned 2nd Addl. Civil Judge (Sr. Division), Bhubaneswar in Civil Suit No.137/255 of 2009/2004 are hereby confirmed.

District Judge, Khurda
at Bhubaneswar.
24.07.2014.

Dictated, corrected by me and pronounced in the open Court this day the 24th July, 2014.

District Judge, Khurda
at Bhubaneswar.
24.07.2014.