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. 9/9 of 2015/2010.

(Arising out of Judgment and decree dated 24.11.2009 passed by the learned Civil Judge (Sr. Division), Bhubaneswar in Civil Suit No. 193 of 2006.)

1. Smt. Sujata Panda, aged about 33 years, w/o. Premananda Panda,

2. Ashutosh Panda, aged about 08 yrs,s/o. Premananda Panda,
3. Subhalaxmi Panda, aged about 11 years, d/o. Premananda Panda,

Sl.No.2 and 3 are represented by their mother guardian Smt. Sujata Panda, the appellant no.1.

All are of vill. Kulasahi, P.O. Prataprudrapur, P.S. Balianta, Dist.Khurda.

... **Appellants.**

Versus.

1. Umakanta Panda, aged about 51 years, s/o. Hadibandhu Panda,
2. Premananda Panda, aged about 45 years, s/o. late Pranakrushna Panda,
   Both are of village- Kulasahi, P.O. Prataprudrapur, P.S. Balianta, Dist.Khurda.

... **Respondents.**

3. Brahamananda Panda, aged about 43 years, s/o. late Pranakrushna Panda,village- Kulasahi, P.O. Prataprudrapur, P.S. Balianta, Dist.Khurda.

4. Abhimanyu Panda, aged about 52 years, s/o. late Pranakrushna Panda, At Plot No. 593, Tankapani Road, Bhubaneswar-14, Dist. Khurda.

5. Pranakrushna Panda (dead)

(a) Suryamani Panda, aged about 75 years, w/o. late Pranakrushna Panda, village- Kulasahi, P.O. Prataprudrapur, P.S. Balianta, Dist.Khurda.

(b) Sanjukta Panda, aged about 50 years, d/o. late Pranakrushna Panda, w/o. Bhikari Charan Panda, vill. Kumbharajpur, P.O. Telengapentha, P.S. Cuttack Sadar, Dist. Cuttack.

... **Proforma Respondents.**

For the Appellants: Sri B.K.Mohanty (B) and Associates, Advocates.

For the Respondent No.1: Sri P.K.Pattanaik & Associates, Advocates.

Date of Argument : 18.1.2016.
Date of Judgment : 25.1.2016.

JUDGMENT

1. The unsuccessful plaintiffs have assailed the judgment and decree dated 24.11.2009 in dismissing Civil Suit No.193 of 2006 by Civil Judge (Senior Division.) Bhubaneswar. The defendants are respondents. Respondents No.2 to 5 (a) and (b) are set ex-parte for having not taken part in hearing vide order dated 18.1.2016. Original proforma defendant Pranakrushna Panda, against whom impugned judgment was passed, is substituted by Respondent No.5 (a) and 5 (b) in this appeal.

2. The factual matrix referring the ranks of the parties in the lower court may be recapitulated as follows:

(2-a) Suit land admeasuring Ac.0.12 decimals appertains to Plot No.698 and 668 under Khata No.691 in Mouza Prataprudrapur.

(2-b) The interse relationship between the parties vis-a-vis the suit property is that defendant no.5 Pranakrushna was the recorded owner of the joint family property including suit

lands. Defendants No.2, 3 and 4 are the sons of Pranakrushna. There was a partition of the joint family properties amongst the father, Deft.No.5 and his three sons Defendants no.2, 3 and 4, by a registered deed dated 29.9.2004- Ext.1. The suit land was allotted to the share of defendant no.2. The family of defendant no.2 consisting of his wife (plaintiff no.1) and minor son and daughter (Plaintiff Nos.2 and 3) were residing over the suit land.

(2-c) So far, so good. Defendant No.2 Pramod sold the suit land to defendant no.1 by a registered sale deed dated 17.3.2006- Ext.2. As per plaintiffs, the defendant No.2 had no legal necessity to sell the total homestead suit land .Rather taking advantage of waywardness of defendant no-2, the sale deed was snatched away by defendant no.1 fraudulently without paying consideration. There was no delivery of possession. The plaintiffs raised objection before Sub-Registrar, Balipatna on 20.3.2006 i.e. within three days of registration and the release of sale deed was withheld. As per plaintiffs, in absence of any partition, the stranger purchaser had no right to squat over their homestead land and such sale was behind back of other co-sharers who could have purchased the same. Homelessness was to be prevented, lest the interest of minor son and daughter. The plaintiff no.1 representing them as mother guardian filed the suit on 21.3.2006 for declaration of their right, title and interest as well as confirmation of possession over the suit land on cancellation of the registered sale deed dated 17.3.2006, Ext.2. Prayer was also made for permanent injunction against defendant no.1. Defendant No.3 to 5 who are brothers and father of defendant no.2, were made proforma defendants.

(2-d) Defendant No.2 to 5 neither filed written statement nor contested the suit and were set exparte.

(2-e) Defendant No.1, the purchaser, filed written statement challenging the maintainability of suit as well as the cause of action averring that as a genuine purchaser, he had been in possession of the suit land since the date of purchase. He has admitted the partition dated 29.9.2004 vide Ext.1 and allotment of suit land to the share of defendant no.2. Specifically it was pleaded that for the construction of a new house at Bhubaneswar where he was residing and for the betterment of his children, the legal necessity reasoned out, the defendant no. 2 sold the suit land which was an open bari in front of his (deft.-1's) house on receipt of consideration of Rs.61,200/- and having delivered possession, he (defendant No.2) had been possessing the same as exclusive owner thereof. It was also pleaded that there was no house standing over the suit land and defendant no.2 along with the plaintiffs used to stay at Bhubaneswar. It was further averred that the registered sale deed was already released in his favour as the allegation of the plaintiffs was found false and frivolous by the Sub-Registrar and in view of partition amongst brothers and father, they had no preferential right to purchase the suit land, and as the minor son and daughter were under the care and custody of the father, it was beyond his comprehension as to who would pray for partition. Thus seen, on the ground of sale for legal necessity and for want of legal right by minor son and daughter to challenge the sale deed, the suit was sought to be dismissed.

3. Plaintiff No.1 herself and another independent witness are examined as P.W.1 and P.W.2 on behalf of the plaintiffs. The

original partition deed, certified copy of registered sale deed, acquittal judgment in favour of defendant no.2 as well as objection before Sub-Registrar by plaintiff no.1 and vendor defendant no.2 are marked Ext.1 to Ext.5. Evidence neither oral nor documentary is adduced on behalf of defendant no.1. Learned lower court framed as many as five issues including issue no.3 relating to the validity of the sale deed- Ext.2 and issue no.4 with regard to plaintiffs right, title, and interest over the suit land.

4. Analyzing the evidence, learned lower court has recorded finding that minor son plaintiff no.2 had an interest over the ancestral property by birth while plaintiff no.3 minor daughter had no such interest as the suit properties were partitioned prior to 20.12.2004 (re-Hindu Succession Amendment Act, 2005). The father defendant no. 2 had power to alienate the suit property for legal necessity and selling of suit land to defray the cost of medical treatment was nothing but sale of joint family property for legal necessity. No evidence regarding perpetration of fraud behind execution of sale deed by defendant no.2 was found by learned lower court and accordingly the suit was dismissed.

5. The impugned judgment was assailed on many grounds but learned counsel for appellant kept his contention within the following bounds:

Firstly, proforma defendant no.5 having died on 21.112009 prior to delivery of judgment, the decree passed against him, a dead person, is nullity.

Secondly, When the contesting defendant has not adduced any evidence, the burden that sale was for legal necessity, could not have been said discharged and sell of only homestead over

which the plaintiffs reside having effect of rendering plaintiffs homeless, cannot be connotatively said legal necessity on the part of Karta to effect valid sale.

Thirdly, The plaintiff no.2 and 3 ,minor son and daughter respectively, having vested interest over the suit land, their father defendant no.2 had no authority to execute sale deed and in absence of any evidence that possession was delivered, the stranger-purchaser defendant no.1 should be restrained by way of permanent injunction. In support of his submission, learned counsel has relied on a decision reported in **2013 (II) CLR (S.C.) 397 Rohit Chauhan vs Surinder Singh & Ors judgment dated 15 July, 2013**

6. Learned counsel for respondent no.1 repelled the above contention supporting the impugned judgment stating that on the basis of allotment of suit land to the share of vendor-defendant no.2 in the partition dated 29.9.2004 Ext.1, the defendant no.2 acquired the property suit land as his separate property u/s. 8 of the Hindu Succession Act, and his son and daughter ,Plaintiff No.2 and 3, cannot be said to have any right over the same for being grand son and daughter of original owner. In support of above contention he relied upon a decision of our own Hon'ble High Court reported in **2013 (II) OLR Page-183, Sri Prasanna Kumar Ram-vs-Nabakishore Ram and others.**

7. Rival contentions have occasioned to pose following points for consideration.

(i) Whether death of proforma defendant no.5 on 21.11.2009 had effect of nullity over the impugned judgment passed on 24.11.2009?

(ii) Whether plaintiffs had right, title, and interest over the suit land allotted to defendant no.2 in the partition dated 29.9.2004- Ext.1?

(iii) Whether registered sale deed in respect of suit land dated 17.3.2006 in favour of defendant no.1 by defendant no.2 is valid?

(iv) Whether the plaintiffs are in possession of the suit land and thereby entitled to relief of permanent injunction?

8. Answer to Point No.1.

Whether death of proforma defendant no.5 on 21.11.2009 had effect of nullity over the impugned judgment passed on 24.11.2009?

Defendant No.5 Pranakrushna Panda was set ex-parte on 7.11.2006. After closer of evidence from both sides, the argument was heard on 11.11.2009 and on the fixed date 24.11.2009 the impugned judgment was delivered. It is stated in the appeal memo vide ground no.4 that Pranakrushna died on 21.11.2009. So, factually death of Pranakrushna was in between the conclusion of hearing and the date of judgment. Order XXII rule 6 of Code of civil procedure protects the suit from abatement as an exception to the general rule. In view of such clear statutory stipulation, the impugned judgment and decree cannot be stamped as nullity on the ground of death of defendant no.5.

9. Answer to point No.2.

Whether plaintiffs had right, title, and interest over the suit land allotted to defendant no.2 in the partition dated 29.9.2004- Ext.1?

There is no dispute that suit land was allotted to the share of defendant no.2 in a partition given effect vide registered deed dated 27.3.2004 amongst the father and his three sons. The said partition deed Ext.1 is admitted. The suit land was ancestral joint family properties. The partition was

amongst the father and of his three sons. By the time of partition, grand-son plaintiff no.2 and granddaughter plaintiff no.3 through defendant no.2, were alive. The nature of acquisition, of allotted properties including suit land by the co-sharer in a partition, is the meat of the matter. If the allotted property in the hands of son would maintain the character of joint family property for his son and daughter, then plaintiff could be said to have share in the suit land post-partition. If the allotted property would maintain the character of separate property, the plaintiff could be said to have no interest and thereby the maintainability of the suit at their instance would be at jeopardy. While referring son and daughter, I am alive of law brought by the amendment of Hindu Succession Act vide Amendment Act 39 of 2005 coming into force on 9.9.2005. By that amendment, the daughter of a coparcener by birth became a coparcener in her own right in the same manner as the son. The law is settled by the Hon'ble Apex Court in the decision reported in **2015 (CCC) 269 (S.C.) Prakas and others -vs- Phoolabati & others** in the following words.

"23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation".

(9-a) Learned lower court is found to have landed in a confusion between the partition already done on 29.9.2004 vide Ext.1 between Pranakrushna and his three sons and no

partition in the family of defendant no.2 consisting of his wife and minor son and daughter. Considering the nature of suit land allotted to defendant no.2 on 29.9.2004, the right of minor daughter plaintiff no.3 would be in the same manner as the son plaintiff no.2, under section 6 the Hindu Succession (Amendment) Act, 2005.

(9-b) Now returning to the core of contest, it is apt to note that the ratio of the Hon'ble Apex Court would be followed as law of the land. For that the decision cited by learned counsel for respondent in **Rohit Chauhan** case may first be referred to where in it is stated that

"In our opinion coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenary is a narrower body than the Joint Hindu family and before commencement of Hindu Succession (Amendment) Act, 2005, only male members of the family used to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would

acquire interest in that and become a coparcener. The view which we have taken finds support from a judgment of this Court in the case of M. Yogendra v. Leelamma N., (2009) 15 SCC 184, in which it has been held as follows:

"29. It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid." Now referring to the decision of this Court in the case of Bhanwar Singh (supra), relied on by respondents, the same is clearly distinguishable. In the said case the issue was in relation to succession whereas in the present case we are concerned with the status of the plaintiff vis-à-vis his father who got property on partition of the ancestral property.''

But in the decision **of our Hon'ble High Court in Prasanna Kumar Ram** case, it is stated that:

"15. Section 8 of the Hindu Succession Act, 1958 lays down the scheme of succession to the property of a Hindu dying intestate. The schedule classified the heirs on whom such property should devolve. Those specified in Class 1 took simultaneously to the exclusion of all other heirs. A son's son was not mentioned as an heir under class-1 of the schedule, and, therefore, he could not get any right in the property of his grandfather under the provision. The right of a son's son on his

grandfather's property during the lifetime of his father which existed under Hindu law as in force before the Act, was not saved expressly by the Act, and, therefore, the earlier interpretation of Hindu law giving a right by birth in such property ceased to have effect.

It is needless to mention here that “Section 8 of the Hindu Succession Act, 1956 confers the right of succession only on the son of a predeceased son and not on a grandson when his father is living at the time of succession and he does not get anything on the ground that he gets a right by birth”.

9(c) On careful reading of above two decisions, it is found that the Hon'ble Apex court has relied upon the earlier decision **M. Jogendra -vs- Leelimma N (2009) 15 S.C.C. Page 184** while distinguishing the **Banwar Singh -vrs- Puran (2008) 3 S.C.C. 87** decision. The M.Jogendra case has referred to the decision of Apex Court in **Commissioner Wealth Tax, Kanpur -vrs- Chandrasen AIR 1963 S.C. 1753 (decided on 16.7.1986)**. The distinguished judgment Banwar Singh case has also referred to the Commissioner of Wealth Tax decision as well as the decision of **Yudhisteer -vs- Ashok Kumar reported in AIR 1987 S.C. Page-558 (decided on 11.12.1986).**

Precedential Authority is attached to the decision of Hon'ble Apex Court under Article-141 of the constitution and for that the ratio of Rohit Chauhan decision is to be given effect to the case at hand. The material facts of Rohit Chauan case are similar to the facts and circumstances of the case at hand. The present appeal involves a dispute where the ancestral property was allotted in a partition, not acquired by successor. This distinct feature is decisive enough to warrant

the ratio of **Rohit Chauhan** case and basing upon that, for the events leading up to sale deed having remained uncontroverted throughout, I have no hesitation to hold that the suit land, allotted to the share of defendant no.2 under partition deed Ext.1 on 29.9.2004, was continued to maintain the character and nature of coparcenary property in respect of his minor son and daughter, plaintiff No.2 and 3 respectively. Section 8 of the Hindu Succession Act is yet to operate as it prescribes devolution of interest of a male Hindu dying intestate. With the command of law referred to above and for the admitted facts with regard to allotment of suit land to the share of defendant no.2 on 29.9.2004, it is sequentially established that plaintiff no.2 and 3 had right, title, and interest over the suit land subsequent to the partition dated 29.9.2004 along with their father defendant no.2 for having formed a joint family interse qua Suitland. With this conclusion on the independent analysis of facts and law, the contrary finding by the learned lower court in this regard is not sustainable.

10. **Answer to point no.3.**

Whether registered sale deed in respect of suit land dated 17.3.2006 in favour of defendant no.1 by defendant no.2 is valid?

The execution and registration of sale deed dated 17.3.2006 Ext.2 by defendant No.2 in favour of defendant no.1 is not in dispute. The property involved therein measures Ac.0.012 decimals pertaining to two plots. The vendor defendant no.2 got the suit land along with other properties in the partition with his father dated 29.9.2004 vide Ext.1. The partition deed reveals that the defendant no.2 Premananda was allotted Ac.03.029 decimals land including one chaka plot

measuring Ac.03.017 decimals. This clarity is necessary to appreciate the evidence on record. The sale deed is challenged on the ground that defendant no.2 had no legal necessity to sell the suit land and the sale deed was snatched away without paying consideration taking advantage of addiction of defendant no.2 to drug. Defendant no.1, purchaser, has averred in the written statement that the sale was made as defendant no.2 was in need of money for construction of a new house at Bhubaneswar where he was residing and also for betterment of children. With these words pitted against each other, defendant no.2 choose not to adduce any evidence. Instead, he relied upon the evidence particularly the cross-examination of P.W.1 who happens to be the wife of vender Premananda (deft.no.2). While in chief examination P.W.1 has categorically stated that there was no legal necessity to sell the suit land which had effect of landing them as beggars in the street, in cross- examination she has admitted that her husband had sold away all the lands totalling to his share except the house and such sale was to defray the cost of his medical treatment amounting to Rs.2,00,000/-. Banking upon this statement, learned counsel for respondent argued that money required for medical expenses and also for education of the children was a legal necessity on the part of a Karta to sell the land. On careful reading of the evidence of P.W.1 in the back drop of total land allotted to defendant no.2 in the partition deed, I find that Rs.2,00,000/- stated was not meant to be the consideration for the sale of the suit land. The said money relates to the sale of other lands allotted to his share. Fact remains proved that the suit land was not sold to defray the medical expenses or education of the children. In fact such

a plea by the defendant no.1 is contrary to his pleading in the written statement that the suit land was sold for purpose of construction of a new house at Bhubaneswar. P.W.2 who is not cross-examined has thrown weight behind p.w-1 to state that there was no legal necessity to sell the suit land and the plaintiffs were and are residing in the house standing thereon and they have no other house to abode. The plea of defendant no.1 that the sale of suit land was for construction of a new house at Bhubaneswar is not proved in any manner. In the wake of above evidence, it is to be seen as to whether the onus of proving legal necessity is duly discharged by the purchaser defendant no.1?

10(a) With regard to burden of proof, law is reiterated by the Hon'ble Apex court in the decision reported in **AIR 1971 SupremeCourt 1028, Rani & another-vrs- Santa Bala Devnath and others, that**

"Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of providing legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquires about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in; evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The, weight to be attached to the recitals varies according to the circumstances''.

10(b) In the light of above dictums, on reading of the certified copy of sale deed Ext.2, it is found that there is no mention that vendor defendant no.2 had claimed the status of Karta to sell the suit land. Further, it is mentioned therein that after allotment, he became the absolute owner in possession of the suit land and the consideration money would be spent for construction of a new house at a different place. The recital of the sale deed contributes vital perspective.

In the decision reported in **AIR 1974 Orissa Page- 218 Dhana Das & others -vs- Pandaba Das and others, it is stated that**

"*Even where the manager of a joint Hindu family alienates joint family property, the alienee is bound to inquire into the necessity for the alienation, and the burden lies on the alienee to prove either that there was legal necessity in fact, or that he made proper and bona fide enquiries as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.''*

(10-c) There is total dearth of evidence that defendant no. 1 had indeed made any enquiry about the need of defendant no.2 to sell the Suitland. When sale was made in the capacity of absolute owner, not as a Karta, the plea of legal necessity is not available and such sale would not bind the other members of coparcener. In the aforesaid **Dhana Das & others -vs- Pandaba Das and others**, decision His lordship in a fact involving a sale deed like at hand observed that

'' *But here, the position seems to be peculiar. The courts below have recorded a finding that the alienated property belonged to the joint family of the defendant No. 1 and the plaintiffs. Ext. C in clear terms shows that the*

defendant No. 1 made the sale by asserting that the property was his self-acquired property. The courts below omitted to take into account this circumstance which would go a long way on the question of legal necessity behind the transaction. The defendant No. 1 was not alienating in the capacity of Karta. It is true that if his status was that of Karta, non-mention of his status would not matter but the statement that the property sold was the self-acquisition of the alienor very much militates against the alienor alienating qua Karta so as to bind the coparcenary. The narration in the sale deed thus is not of any avail. As already indicated the oral evidence is almost nothing to meet the requirement of the law in the matter and thus it indeed turns out to be case of no evidence for the finding of fact on the question of legal necessity.''

(10-d) The sequence of events highlights a disturbing reason i.e. homelessness behind sale. The evidence on record proves that the suit land was the only homestead available for the plaintiffs' family and they were residing thereon. The sale of entire homestead land as claimed under Ext.2 had the effect of rendering the plaintiffs homeless. The minor son was two years old while the minor daughter was seven years old by the time of filing of the suit in the year 2006. There is no evidence that the plaintiffs had other landed property. Throwing the family consisting of wife, minor son and daughter to the state of homelessness by the husband cannot be said an expression of normal conduct. Here assumes the importance of certified copy of judgment dated 7.11.1996 in S.T. Case No. 39/159 of 1993 of the Additional Sessions Judge, Bhubaneswar vide Ext.3 under which the defendant no.2 was acquitted from the charge of possessing brown sugar u/s.21 of the N.D.P.S.Act. Defendant

No.2 himself had lodged a protest before Tahasildar objecting mutation alleging that the sale deed was snatched away fraudulently from him vide Ext.5. Throwing the family to a nomadic state by sale of entire homestead cannot be regarded as the benefit to the estate and this is what reiterated on the appreciation of evidence in the decision reported in **AIR 1982 Orissa page-30 SurendraNath Das Adhikari -vrs- Sudhir Kumar Behera** in the following manner:

'' *The sale of the entire homestead land by the respondent No. 23 in favour of the appellant No. 2 only for the purpose of shifting to another place could not be said to be for the benefit to the estate of the family. ‘’*

(10-e) Legal necessity has been doing rounds of pleadings without any substantiation but the sale deed in question has no reference to it. It is not body of inference, but defendant’s deed that goes to demolish his den. The defendant no.1 has utterly failed to discharge his burden to prove legal necessity behind the sale. Learned lower court has wrongly placed onus on the plaintiff to prove legal necessity and misdirected to appreciate the evidence when purchaser-defendant himself choose not to adduce any evidence to discharge his burden. On careful analysis of evidence in the light of law stated above, it is apparent that contesting defendant No.1 has failed to discharge his burden and the sale deed to the extent of vendor's share is valid while to the extent of share of plaintiff no.2 and 3 is invalid.

11. **Answer to point No.4.**

Whether the plaintiffs are in possession of the suit land and thereby entitled to relief of permanent injunction?

It is the pleading and the evidence consistently and coherently pleaded and adduced that the suit land was the only homestead land of the plaintiffs over which they were residing. Their shelter was never shattered by any overt act of either defendant no.1 or defendant no.2. In other words they were not dispossessed from the suit land. The evidence of P.W.1 and P.W.2 establishes such fact which is not rebutted by any counter evidence. There is no iota of evidence that the defendant no.1 had taken possession or was in possession of the suit land at any point of time. Thus, plaintiff no.2 and 3 having interest over the suit land are found to be in the possession of the same. They are entitled to protect the same. But by purchasing share of defendant no.2, the defendant no.1 relegated to the position of a co-sharer. Perhaps keeping this fact of co-sharership status in mind, the purchaser-defendant no.1 has pleaded in para-13 of his written statement that "*Again the children being minors and they are under the care and custody of their father. It is not understood who will pray for partition for them".* The defendant no.1, thereby, has put himself into a status of stranger-purchaser. As a result of that the plaintiffs are entitled to the relief of injunction.

12. To sum, plaintiff no.2 and 3 are found to have right, title and interest over the suit land equal to their father defendant no.2 and all the plaintiffs have possession over the total suit land. The sale deed dated 17.3.2006 vide Ext.2 is valid to the extent of the share of vendor defendant No.1. The defendant no.1 being a stranger -purchaser is to be restrained from disturbing the possession of the plaintiffs till the parties work out their remedies as per law in appropriate proceeding. Learned lower court having not appreciated the evidence in

the proper perspective of law, the impugned judgment is not sustainable and the decree of dismissal is to be set aside. Hence, it is ordered.

ORDER

The appeal is allowed on contest against the respondent No.1 and on ex-parte against respondent No.2 to 5 (a) and (b). The impugned judgment and decree dated 24-11-2009 is hereby set aside and the suit be and the same is decreed partly. Let a decree be passed declaring that plaintiff nos.2 and 3 have right, title and interest, over the suit land to the extent of the share of their father defendant no.1 and the possession of the plaintiffs over the suit land is confirmed. Let it be declared that the sale deed (of which certified copy is Ext.2) dated 17.3.2006 in favour of defendant No.1 is valid to the extent of the share of vendor- defendant no.2. Let a decree for permanent injunction be passed restraining the defendant no.1 from disturbing the possession of the plaintiffs over the suit land till lawful remedy is worked out in appropriate proceeding.

In the peculiarity of the facts of the case, the parties to bear their respective costs.

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

Dictated and corrected by me. Judgment is pronounced in the open court today this the 25th January, 2016.

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