

**IN THE COURT OF THE ADDL.DISTRICT JUDGE,
BHUBANESWAR**

Present:

Shri A.C.Behera, LL.B.,
Addl. District Judge,
Bhubaneswar.

R.F.A NO.46/18/113 of 2013/09/06

(Arising out of Judgment and decree 6.9.2006 and 09.10.2006
respectively passed in C.S. No. 105/464 of 2005/2002 by the learned
2nd Additional Civil Judge, Senior Division, Bhubaneswar).

Dated, this the 31st day of January, 2015

1. Sajuman Bibi, aged about 60 years,
W/o- Late Mir Jalil.
2. Mir Babu, aged about 32 years,
3. Mir Allauddin, aged about 29 years,
4. Mir Mahi, aged about 25 years,
5. Mir Kamau, aged about 19 years,
Sl. No. 2 to 5 are sons of Late Mir Jalil.
6. Mir Khalil, aged about 64 years,
S/o-Late Mir Atru.

All are residents of vill/P.O.-Jharapada,
P.S.-Laxmisagar, Bhubaneswar,
Dist.-Khurda.

..... Appellants.
(def. No. 1 to 6 in the original Suit)

-Versus-

1. Mir Mogbul, aged about 44 years
2. Mir Razaq, aged about 41 years
3. Mir Kuna, aged about 29 years
4. Mir Babula, aged about 27 years
Sl.No. 1 to 4 are sons of late Mir Baqur
5. Jasina Bibi, aged about 64 years
W/o-Late Mir Baqur
6. Mir Faku, aged about 42 years,
S/o- Late Mir Nasir.
7. Mir Tazir, aged about 36 years,
S/o- Late Mir Nasir,
8. Maimun Bibi, aged about 69 years
9. Mir Sarif, aged about 61 years,
Son of Late Mir Atru.
10. Mir Saikat, aged about 59 years
S/o-Late Mir Piru
11. Mir Madari, aged about 49 years
S/o-Late Mir Piru
12. Gulsan Bibi, aged about 54 years
D/o-Mir Piru.

All are resident of vill/P.O.-Jharpada
P.S.-Laxmisagar, Bhubaneswar,Dist.-Khurda.

.....

Respondents.

(Sl.No.1 to 8 plaintiffs and 9 to 12 defendants in the original suit)

Counsel for the Appellants : Sri M.D.Pradhan & his Associate Advs.
Counsel for the Respondents : R.K.Mohanty & his associate Advocates.

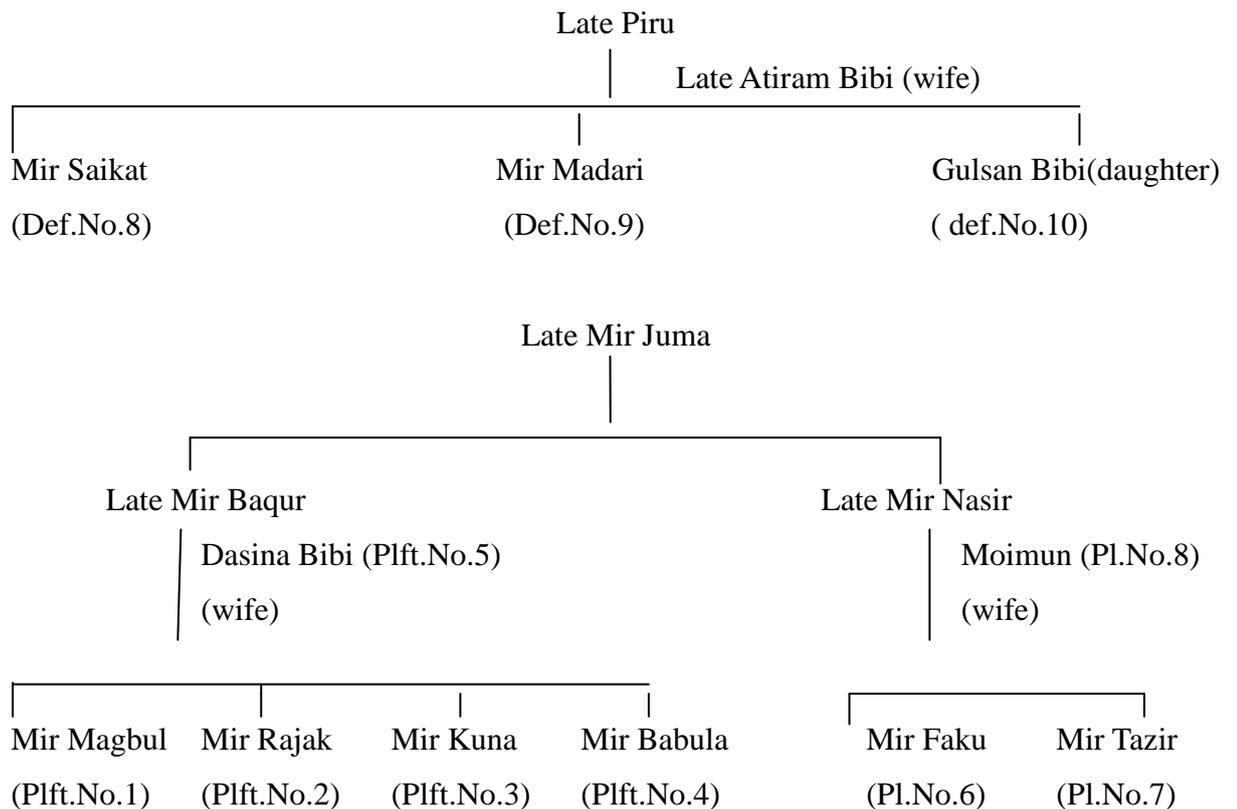
Date of Argument :19.01.2015
Date of Judgment :31.01.2015

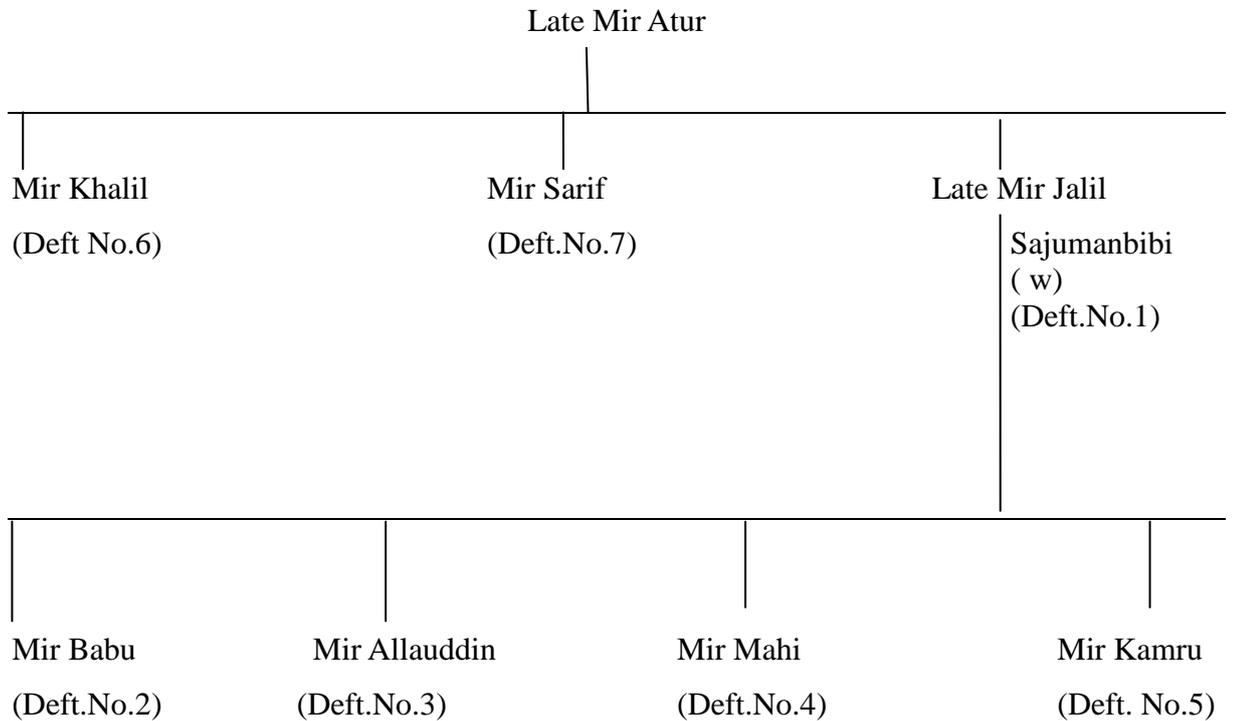
J U D G M E N T

This is an appeal U/s. 96 r/w.O.41 R.1 of the Civil Procedure Code, 1908, which has been preferred by the appellants against the judgement and decree dated 6.9.2006 and 09.10.2006 respectively passed in C.S. No. 105/464 of 2005/2002 by the learned Second Additional Civil Judge, Senior Division, Bhubaneswar, wherein the suit vide C.S. No.105/464 of 2005/2002 was decreed preliminarily for partition on contest as per the discussion made in issue No.8 at para 12 of the judgement but in the circumstances without cost.

2. The appellants were the defendant Nos. 1 to 6, the respondent Nos. 1 to 8 were the plaintiffs and the respondent Nos. 9 to 12 were the defendants in the original suit for partition before the learned Court below vide C.S. No.105/464 of 2005/2002.

3. The case of the plaintiffs (respondent Nos. 1 to 8 in this appeal) against the defendants (appellants and respondent Nos. 9 to 12) before the learned court below as per the averments made in their plaint in nutshell was that, the parties to the suit belong to muslim community and they all are guided and governed under Mahomedan law. The properties described in schedule “A” of the plaint are their joint family properties, in which they (the plaintiffs) have 1/3rd share and the defendants have 2/3rd share. In order to show the relationship between the parties, the geneology given in schedule-B of the plaint has been depicted hereunder for its instant reference.





The further case of the plaintiffs was that, the suit properties are their Ghara Bari land which stands recorded jointly in the names of the parties in the Hal Settlement record of rights, finally published in the year 1989. The same are their joint properties and the same has not at all been effected with metes and bound partition till yet. The same is under their joint possession.

The plaintiff Nos.1 to 4 are the sons of late Mir Baqur and plaintiff No.5 is his widow. Plaintiff Nos. 6 to 8 are the successors of late Mir Nasir.

Mir Baqur and Mir Nasir were two brothers being sons of Mir Juma.

The defendant Nos. 1 to 5 are the successors of late Mir Jalil (who was one of the recorded tenants of the suit land).

The defendant Nos. 6 to 8 are the successors of late Mir Piru (who was also one of the recorded tenants of the suit land as per the Hal Settlement R.O.R.).

The sale deed No.2427 dtd.11.04.1951 said to have been executed by the two predecessors of the plaintiffs i.e. Mir Nasir and Mir Baqur in favour of Asraf Khan and Maiuddin Khan in respect of the part of the suit land and then the sale made by the above vendees to the part of their said so-called purchased property in favour of defendant No.1 (Sajuman Bibi) on dated 28.06.1972 vide R.S.D. No.5758 were void. Because by the time of the alleged sale on dtd. 11.4.1951, the father of the so-called vendors thereof i.e. Mir Juma was alive. As per Muslim law, sons like Mir Nasir and Mir Baqur had no right title interest and possession in their ancestral properties during the life time of their father i.e. Mir Juma (who was alive). That apart, Mir Nasir and Mir Baqur were the minors as per law on dtd. 11.04.1951. They were not competent to alienate independently. So, the sale deed said to have been executed by the said Mir Nasir and Mir Baqur in favour of Asraf Khan and Maiuddin Khan was void and on the basis of such deed, the subsequent deed vide deed No.5758

dtd.28.6.72 in favour of Sajuman Bibi (defendant No.1) was also void automatically.

That apart, the property mentioned in the deed No.2427 dtd.11.4.1951 does not corresponds to the suit plot, for which, the said deed has no nexus with the suit land.

When the dispute arose between them (plaintiffs and defendants) due to some family quarrel, for which, the plaintiffs approached the defendants for partition of the suit land on dtd.20.07.2002, to which the defendants refused, for which, without getting any way, the plaintiff approached the learned court below by filing the suit against the defendants vide C.S.No. 464 of 2002 and prayed for partition of their 1/3rd share from the suit land.

3. Having been noticed from the learned court below, out of all the defendants, the defendant Nos. 1 to 6 and 10 contested the suit of the plaintiffs by filing their written statement jointly after taking their stand interalia therein in short that, the suit of the plaintiffs is not maintainable. There is no cause of action to file the suit. The suit is barred by limitation. The suit is bad for mis-joinder and non-joinder of necessary party. Though, they (defendant Nos. 1 to 6 &10) admitted to the averments made in para 1,2 and 3 of the plaint

regarding the status of the suit land as jointly recorded Gharabari land in the Hal settlement of the year 1989, but they denied to the jointness of the same stated in the plaint and they (defendant Nos. 1 to 6 & 10) also denied to the other averments of the plaint.

They also further took their stand in their written statement that, the suit land has been grossly undervalued by the plaintiffs. According to them, the plaintiffs have totally sold a way their entire 1/3rd share from the suit land to different persons, for which, the plaintiffs are non-suited and they (plaintiffs) do not entitled for any share from the suit land. That apart the sale deeds dtd. 11.4.51 and 28.6.72 respectively to which, the plaintiffs have stated as void, the said sale deeds are not void and the said deeds are genuine. For which, the plaintiffs are not entitled for any relief. As such, the suit of the plaintiffs is liable to be dismissed with costs being devoid of any merit.

4. Basing upon the above pleadings and matters in controversies between the parties, altogether nine numbers of issues were framed by the learned court below and the said issues are:-

ISSUES

- (i) Whether the suit is maintainable ?
- (ii) Whether the suit is barred by limitation ?

- (iii) Whether the suit is bad for misjoinder and non-joinder of necessary party ?
- (iv) Whether the suit is under valued ?
- (v) Whether there was previous partition between the ancestors of both the parties in respect of the suit schedule land ?
- (vi) Whether the ancestors of the plaintiff namely late Mir Baqur and Mir Nasir had executed sale deed in favour of Asraf Khan and Maivddin Khan vide R.S.D. No.2427 dtd. 11.4.1951 and the said sale deed can be declared as a void document ?
- (vii) Whether the sale deed executed by Nabbauddin Khan and Maiuddin Khan in favour of Sajuman Bibi vide R.S.D. No.5758 dtd.28.06.1972 be declared as void ?
- (viii) Whether a preliminary decree of partition can be passed allotting 1/3rd share in favour of plaintiffs out of the suit schedule properties ?
- (ix) What other reliefs, the plaintiffs are entitled?

5. In order to substantiate the case of the plaintiffs against the defendants, they (plaintiffs) examined altogether three numbers of witnesses i.e to plaintiff Nos. 1, 6 and 4 as P.Ws. 1, 2 & 3 and proved two documents on their behalf vide Exts. 2 and 3 i.e. two R.O.Rs.

6. On the contrary, the contesting defendants i.e. defendant Nos 1

to 6 and 10 examined three witnesses from their side including defendant Nos. 2, 6 & 1 as D.Ws. 1, 2 & 3 and proved so many documents on their behalf vide Exts. B, C, D, E, F, G, H & J.

7. After conclusion of trial and on perusal of the materials and evidence available in the record, the learned court below answered all the issues in favour of the plaintiffs and against the defendants and finally decreed the suit of the plaintiffs preliminarily for partition in part on contest but without cost making allotment of shares in favour of the parties as per the findings made in issue No. 8 at para 12 of the judgement by directing them(both the parties)for partition of the suit schedule properties amicably between them as per their respective shares indicated specifically in the findings of issue No.8 of the judgement vide his judgement and decree dated 6.9.2006 and 09.10.2006 respectively.

8. On being aggrieved with the above judgement and decree dtd. 6.9.2006 and 09.10.2006 respectively passed in C.S. No.105/464 of 2005/2002 by the learned 2nd Additional Civil Judge, Senior Division, Bhubaneswar against the defendants, they (contesting defendant Nos. 1 to 6) have challenged the same by preferring this appeal against the plaintiffs and rest other defendants after taking several grounds in their appeal memo.

9. I have already heard from the learned counsels of the parties and so also have perused the materials and evidence available in the record.

10. Basing upon the pleadings of the parties, matters in controversies between them, findings made by the learned court below in the impugned judgement, the rival submissions of the learned counsels of both the side and the grounds taken by the appellants in their appeal memo, the crux of this appeal are:-

- (i) Whether the suit land is the joint and undivided properties of the parties ?
- (ii) Whether the suit land is liable for partition ?
- (iii) Whether the findings given by the learned court below in answering issue Nos. VI & VII that, the sale deeds bearing No.2427 dtd.11.4.1951 and bearing No.5758 dtd.28.06.1972 vide Exts. B & D are void is correct ?
- (iv) Whether the impugned judgement and decree dtd. 6.9.2006 and 09.10.2006 respectively for partition of the suit land passed in C.S. No. 105/464 of 2005/2002 by the learned court below is sustainable under law ?

11. In order to have a better appreciation and so also for just decision of the appeal, the above four points fixed for determination are required to be discussed and analysed jointly and independently according to their proper perspectives with the factual matrix of the case.

12. As the above first two points i.e. point Nos. 1 & 2 are interlinked as per the matters in controversies between the parties and one among them can not be effectively discussed leaving the other, for which, the point Nos. 1 & 2 are taken up analogously for their discussion hereunder.

13. So far the point Nos. 1 & 2 i.e. whether the suit land is the joint and undivided properties of the parties & whether the suit land is liable for partition are concerned ;

The contesting defendant No.2 i.e. D.W.1 has corroborated the case of the plaintiffs by answering the questions of the learned counsel of the plaintiffs at para-21 of his deposition that “ the suit Schedule lands are joint family property. The R.O.R. was issued jointly in the name of both the parties and the parties are possessing their lands in respect of their share”.

The documents filed and proved by both the side vide Exts. 2, 3 and E are going to show that, the record of right of the suit land stand jointly in the name of both the parties.

The above oral and documentary evidence coupled with the admission made by the defendant No.2 (D.W.1) regarding the absence of metes and bound partition in respect of the suit land alongwith joint recording and possession thereof between them (parties) is ultimately confirming to the findings of the learned court below that, the suit land is the joint and undivided properties of the parties and the same has not been effected with any metes and bound partition between them till yet, which is liable for partition.

14. So far the third point i.e. whether the findings given by the learned court below in answering issue Nos. VI & VII that, the sale deeds bearing No.2427 dtd.11.4.1951 and bearing No.5758 dtd.28.06.1972 vide Exts. B & D are void is correct is concerned ;

It is the undisputed case of the parties that, the Ext.B i.e. R.S.D. No.2427 dtd. 11.4.1951 is the original document, on the basis of which, the subsequent deed vide Ext.D i.e. R.S.D. No.5758 dtd.28.06.1972 has been created/executed. So, Ext.B is the basis of Ext.D. Therefore, if the Ext.B will be void, then the Ext.D shall be

void automatically.

15. Now it is pertinent to see, whether any title of the properties covered in the sale deed in question vide Ext.B was passed from the vendors to the vendees of that deed as per law.

When the plaintiffs have challenged the document vide Ext.B as void by making necessary averments in para 6-A and 6-B of their plaint that, the vendors of the said deed had no alienable right on the date of its execution i.e. on dated 10.4.1951, as, by that time, their father Mir Juma was alive and the vendors were also not competent to alienate the same on the ground of their minority. But, to which, the contesting defendant Nos. 1 to 6 have seriously disputed and have taken their specific stand in their written statement that, the said deed vide Ext.B is a genuine one.

But, it is curious enough that, the defendant No.6 (D.W.2) has specifically deposed in para 20 of his cross-examination by answering to the questions of the learned counsel for the plaintiffs after admitting to the aforesaid pleadings of the plaintiff made in para 6-A of their plaint that, Mir Juma died in the year 1959. That apart, the defendants have not at all specifically denied in their pleadings(written statement) about the aliveness of Mir Juma on dated 11.4.1951.

16. So, the aforesaid evidence of defendant No.6 (D.W.2) having ample corroboration with the pleadings of the plaintiff is going to show that, Mir Juma had not died prior to 10.4.1951. He was alive by then and he (Mir Juma) died in the year 1959. Which, in other words is going to show that, by the time of execution of the Ext.B vide R.S.D. No.2427 dated 11.4.51, Mir Juma was alive. Because, there can not be any better proof for the plaintiffs than the aforesaid admission of the defendant No.6 (D.W.2) in his evidence that, Mir Juma died in the year 1959.

On that score, the propositions of law has been clarified in the ratio of the following decision.

2012(4) C.C.C. page-171(A.P.)--Devarapalli Malla Reddy (Dead) & others Vrs.Gadiyam Hanumavamma & others:-

Evidence Act—1872—There cannot be a better proof then the admission of a fact in issue by the defendant in a suit.

17. So, by placing reliance on the aforesaid admission of the defendant No.6(D.W.2) made in para-20 of his cross-examination, it is held that, by the time of the execution of Ext.B i.e. on dated 11.4.1951 the father of the vendors thereof i.e. Mir Juma was live.

18. It is very much clear as per the provisions of law envisaged in section 52 of MULLA'S MAHOMEDAN LAW that, Birth right is not recognized under the said act i.e. under the MAHOMEDAN LAW. So, in view of such provisions of law, Mahomedan son/sons has/have no Birth right. Therefore, during the life time of the father, the sons of Mahomedan community have no alienable right over their ancestral properties. Because, the sons of Mahomedan community has no interest over their ancestral properties at all during the life time of their father.

19. In view of the above principles of law, when, the properties covered in the sale deed vide Ext.B are the ancestral properties of the so-called vendors thereof i.e. Mir Baqur and Mir Nasir and at the time of the execution of the so-called deed vide Ext.B on dtd. 11.04.1951, the father of the above so-called vendors i.e. Mir Juma was alive, then it will be safely concluded that, at the time of execution of the so-called deed vide Ext.B, the above vendors thereof had no right, title, interest and possession over the properties covered therein. Therefore, it is ultimately held that, the vendors of the Ext.B had no alienable right at all over the properties covered therein. So, the question of passing any right, title, interest and possession from the vendors of the Ext.B to the vendees thereof through the said Ext.B does not arise at all. Accordingly, the deed in question vide Ext.B had no legal force

at all and the same has not acted upon. There is also no material in the record to show about the enforceability of the said Ext.B in any manner on its later part after dtd.11.4.1951.

Therefore it is held by endorsing and confirming the findings of the learned court below that, the deed in question vide Ext.B was not acted upon at all. The same was void one.

20. As, it is held that, the deed vide Ext.B was void, then the subsequent deed vide Ext.D on the basis of Ext.B is held to be void automatically.

Therefore, the findings made by the learned Court below in answering issue Nos. VI & VII that, the sale deeds bearing No.2427 dated 11.4.1951 and bearing No.5758 dtd.28.6.1972 vide Exts. B & D as void cannot be held incorrect.

21. So far the fourth and last point i.e. whether the impugned judgement and decree dated 6.9.2006 and 9.10.2006 respectively for partition of the suit land passed in C.S. No. 105/464 of 2005/2002 by the learned court below is sustainable under law is concerned;

When, as per the discussions made in forgoing point Nos. 1 to 3, it has already been held by accepting the findings and observations

made by the learned court below that, the suit land is the joint and undivided properties of the parties, the same is liable for partition and the sale deeds vide Exts. B & D are void and inoperative, for which, at this juncture, it cannot at all be held that, the impugned judgement and decree dated 6.9.2006 and 9.10.2006 respectively for partition of the suit land passed by the learned court below is not sustainable under law. So, in other words, it is held that, the impugned judgement and decree passed by the learned court below is not unsustainable.

22. On analysis of the facts and circumstances of the appeal/ case as per the discussions and observations made above, when it is held that, the impugned judgment and decree passed by the learned court below is not unsustainable, for which, there is no justification under law for making any interference with the same in this appeal filed by the appellants. So, it is held that, there is no merit in the appeal of the appellant. The same must fail. Hence ordered.

ORDER

23. The appeal filed by the appellant is dismissed on contest against the respondents, but under the circumstances without costs.

The impugned judgment and decree dated 6.9.2006 and

9.10.2006 respectively passed in C.S. No. 105/464 of 2005/2002 by the learned 2nd Addl.Civil Judge, (S.D.), Bhubaneswar is hereby confirmed.

Pronounced the judgment in the open court today, this the 31st day of January, 2015 under my seal and signature.

Dictated & corrected by me.

Addl.Dist.Judge.,BBSR.

Addl.Dist. Judge.,BBSR

