

(2024) 05 OHC CK 0111

Orissa High Court

Case No: RSA No.275 Of 2018

Chitta Ranjan Meher
And Others

APPELLANT

Vs

Soudamini Meher

RESPONDENT

Date of Decision: May 14, 2024

Acts Referred:

- Transfer of Property Act, 1882 - Section 53A
- Registration Act, 1908 - Section 17, 17(1A), 49
- Stamp Act, 1899 - Section 35
- Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 - Section 34, 34(2)

Hon'ble Judges: Sashikanta Mishra, J

Bench: Single Bench

Advocate: D.P.Mohanty, B.S.Dasparida

Final Decision: Allowed

Judgement

Sashikanta Mishra, J

1. The Plaintiffs in C.S. No.6/2012 in the court of Civil Judge (Sr. Division), Boudh, are the appellants. In the present appeal, they seek to challenge

the judgment dated 08.2.2018 passed by learned District Judge, Boudh, followed by decree in R.F.A No.22/2017 confirming thereby the judgment

dated 19.5.2017 followed by decree passed by the Trial Court in the aforementioned suit.

2. The present respondent was the sole defendant in the suit. The suit of the plaintiffs was dismissed by the trial Court while the counter claim of the respondent was allowed, which was confirmed by the lower appellate Court.

3. For convenience, the parties are referred to as per their respective status in the trial Court.

4. The plaintiffs' case, briefly stated, is that they being the son and father respectively executed two agreements for sale on 18.7.2009 of the suit

property in favour of the defendant. The suit property consisted of two lots in the plaint as described in the schedule. The consideration was fixed at

Rs.67500/- each, which was paid in full. The plaintiffs also delivered possession to the defendant. Since the suit property was subjected to

consolidation and the proposed sale would create a fragment, applications seeking permission of the consolidation authority were submitted by the

plaintiffs under Section 34 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (OCH & PFL Act). It was

stipulated in the agreements that the deeds of conveyance would be executed after obtaining permission. However, permission could not be obtained

within the stipulated period mainly because of non-cooperation by the defendant. Under such circumstances, the plaintiffs filed the suit praying for a

decree of declaration that the two agreements dated 08.7.2009 are null and void and inoperative and further, for recovery of possession.

The defendant entered appearance and contested the suit by filing written statement. She claimed that the full consideration amount was paid and she

was in cultivating possession of the land, same being duly delivered to her. She further alleged that the plaintiffs did not take proper step in the

permission cases before the Consolidation Officer for which they were dismissed for non-prosecution. The defendant further alleged that the plaintiffs

claimed additional consideration citing escalation of price in the market, which led to the dispute between them for which the plaintiffs did not

deliberately prosecute the permission applications. The plaintiffs issued notices to the defendants offering to return the consideration and when the

defendant enquired the reason, they claimed enhanced consideration.

5. The defendant also filed a counter-claim seeking a direction to the plaintiffs to execute the deed of conveyance in respect of the suit lands in her

favour after obtaining necessary permission from the competent authority within a stipulated period as well as for award of damages of Rs.2 lakhs in

her favour.

The plaintiffs filed written statement to the counter-claim questioning its maintainability and raising the plea that they were still in possession over the suit land. They further alleged that permission from the competent authority could not be obtained due to inaction of the defendant. As such, they were compelled to issue pleaderâ€™s notices to the defendant for revocation of their agreements and to refund the advance money taken by them.

6. On the rival pleadings as above, the trial Court framed the following issues for determination;

(1) Is the suit maintainable?

(ii) Have the plaintiffs any cause of action to bring the suit ?

(iii) Whether the agreements dated 15.07.2009 entered into between the parties are null and void, in operative and not binding on the plaintiffs ?

(iv) Whether the plaintiffs are entitled to recovery of the possession of schedule ""A"" & ""B"" suit land, if they are found dispossessed?

(v) Whether the defendant is to get back her advance money from the plaintiff after due revocation of the agreements ?

(vi) To what other relief or reliefs, the parties are entitled ?

7. The plaintiffs examined two witnesses including the Plaintiff No.1 as P.W.1 and proved the documents marked Exts.1 to 9. The defendant

examined 3 witnesses including herself as D.W.1 and proved the documents marked Exts.A to J. Originally, the trial Court decreed the suit in part by

judgment dtd.31.7.2013 and dismissed the counter-claim. The defendant challenged the decree before the District Judge in RFA No.17/2013. The

appellate Court held that the agreements for sale marked Exts. A and B required compulsory registration, but the defendant should have been given

opportunity to pay stamp duty and penalty for impounding the documents by the Court. It was also held that the defendant being the land owner of the

contiguous Chaka, no permission was necessary for the proposed transfer as the same did not violate the provision of Section 34 of the OCH and PFL

Act. The suit was thus remanded for fresh disposal permitting the defendant to pay the stamp duty and penalty on the two agreements for sale. After

remand, the trial Court heard the matter afresh and this time it was held that the defendants having paid stamp duty and penalty, the agreements for

sale marked Exts.A and B are valid documents. Since the plaintiffs, after receiving the consideration money had delivered possession of the suit lands to the defendant, they are not entitled to recovery of possession thereof. It was also held that the defendant is the real purchaser of the suit lands and is in possession and thus, the counter-claim was partly allowed with direction to the plaintiffs to execute and register the sale deeds in her favour after obtaining necessary permission from the competent authority at the cost of the defendant. The suit was thus dismissed and the counter claim was allowed in part.

8. The plaintiffs carried the matter in appeal to the District Court being RFA No.22/2017. After considering the grounds raised, the lower appellate court framed the following points for determination;

(A) whether both the agreements for sale in respect of the suit lands A and B required compulsory registration and if so whether the Defendant who relies on the same should be given opportunity to pay required stamp duty and penalty after impounding the same and not to abruptly declare those as null and void?

(B) whether for the proposed sale transaction of the suit, Section 34 of the OCH and PFL Act, 1972 was a bar ?

9. After analyzing the evidence on record, the findings of the trial Court and the rival contentions, the lower appellate Court held that since the

defendant had paid stamp duty and penalty, there was nothing wrong in accepting the same as evidence in the case. It was further held that as per

Section 17(i)(v) and the proviso to Section 49 of the Registration Act, the unregistered agreement for sale can be admitted into evidence. The lower

appellate court also took note of the fact that the plaintiffs had received full consideration amount and had delivered possession of the suit lands to the

defendant. On the above findings, the appeal was dismissed.

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Being further aggrieved, the plaintiff-appellants have filed the present Second Appeal.

10. The Second Appeal has been admitted on the following substantial questions of law;

•(i)Whether the courts below have gone wrong in Law in holding that the unregistered agreements are admissible in evidence though not as instrument of

title

having failed to notice that the Defendant in her counter claim has categorically admitted that possession has been delivered in pursuance of the Agreements for sale, registration of which is compulsory under Section 17(1-A) of the Registration Act, 1908 and the consequential provisions of the State Amendment of the Act ?

(ii) Whether the Courts below before entitling the Respondent (Defendant) to a decree of specific performance of contract, in the facts and circumstances of the case

were under the legal obligation to record a finding that the Respondent (Defendant) was all along ready and willing to perform her part of the contract and the

contract had not been completed for the reasons/causes attributable only to the Appellants (Plaintiffs)?

11. Heard Mr. D.P.Mohanty, learned counsel for the appellants and Mr. B.S. Dasparida, learned counsel for the Respondent.

12. Mr. Mohanty assails the impugned judgments by contending that both the Courts below fell into error by holding that payment of stamp duty and

penalty upon impounding the documents by the Court cured the defect of non-registration of the documents as per Section 17(1-A) of the Registration

Act. Since both the documents are compulsorily registerable as per the above provision, they could not have been accepted as valid in the eye of law.

Mr. Mohanty also refers to the provision under Section 17(1)(f) of the Orissa Amendment. According to him, Exts.A and B could not have been

accepted as valid documents for the purpose of enforcement of the right of the specific performance of contract. He has also relied upon the

judgments of the Supreme Court in the cases of Mst. Kirpal Kuar v. Bachan Singh and others AIR 1958 SC 199 and K.B. Saha and Sons Pvt.

Ltd. v. Development Consultant Ltd. 2008(8) SCC 564

13. On the other hand, Mr. Dasparida would argue that once the lower Appellate Court remanded the matter to the trial Court with specific direction

to grant opportunity to the defendant to pay Stamp Duty and penalty and same having been duly complied with by the defendant, the documents

acquired validity in view of Section 35 of the Stamp Act and were therefore, admissible in evidence. Further, in view of the provision of Section 49 of

the Registration Act also, the documents became admissible in evidence. According to Mr. Dasparida therefore, the counter-claim of the defendant was rightly allowed by the trial Court and confirmed by the lower Appellate Court.

14. In view of the rival submissions noted above, the first point that falls for consideration is, regarding the validity of the agreement for sale executed

on 18.7.2009 between the plaintiffs and the defendant marked Exts.A and B. Admittedly, the agreements were not registered. What would be the

effect of such a document? In this regard, the relevant provisions under the Registration Act, 1908 are to be examined. Section 17 of the Registration

Act, deals with documents of which registration is compulsory, sub-section (1-A) of which reads as follows;

“(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53-A of the Transfer of Property

Act, 1882, shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001, and if

such documents are not registered on or after such commencement then, they shall have no effect for the purposes of the said section 53-A.”

15. Be it noted that the above provision was inserted in the statute by Amendment Act 48 of 2001 w.e.f. 24.9.2001. Section 17 was also amended in

its application to the State of Odisha by inserting clauses (f) and (g). Clause (f) being relevant in the present context, is quoted below;

“(f) Agreement to sell immovable property possession whereof has been or is handed over to the purported purchaser”

16. Before proceeding further, it would be apt to mention here that the crux of the dispute lies in the determination of validity of Exts.A and B. It is

undisputed that the consideration amount of Rs.67500/- each was paid by the defendant to the plaintiffs. It is also admitted by the plaintiffs that

possession was delivered. The suit land being part of Chaka lands and the proposed sale having the effect of creating a fragment, necessary

permission of the competent authority was required to be obtained as per Section 34 of the OCH and PFL Act. It was therefore provided in the

agreements that the deed of conveyance would be executed after obtaining the necessary permission. In fact, the plaintiffs had applied for permission

being Misc. Case Nos.9/2010 and 11/2010. It has been otherwise stated that the defendant is a contiguous land owner and therefore, the bar under

Section 34(2) would not apply. The defendant raised a counter claim in the suit asking for direction to the plaintiffs to execute the sale deed in her

favour as per the agreement after obtaining permission. This in effect amounts to a suit for part performance of contract where the defendant claims

to have performed her part of the contract by way of paying the full consideration amount. Further, the defendant also claims to be in possession. This

is therefore, not a claim for specific performance of contract simplicitor, but a suit for part performance of contract, which entails performance of the

plaintiffsâ€™ part of the contract by way of obtaining permission and executing the sale deed. In other words, this is a suit of the nature described in

Section 53-A of the Transfer of Property Act (T.P. Act). Such being the case, the provision of Section 17(1-A) would come into play. Admittedly, the

agreements were not registered and therefore, ordinarily the same could not form the basis of the counter-claim filed by the defendant in view of

Section 17 (1-A) of the Act.

17. Both the Courts below have taken the view fact that the documents being impounded, the defendant paid stamp duty and penalty as per Section 35

of the Indian Stamp Act, 1899 and therefore, same are admissible in evidence. The question is, whether payment of stamp duty and penalty would

cure the defect of non-registration as provided in Section 17(1-A) of the Registration Act. It must be kept in mind that even an unregistered

agreement can be used for collateral purposes and may be received as evidence of a contract in a suit for Specific Performance under Chapter-II of

the Specific Relief Act, 1963. But then, this Court has already held, for reasons indicated, that the suit, i.e. the counter claim of the defendant is not a

suit for Specific Performance of Contract, per se, but a suit for part performance of contract within the meaning of Section 53-A of the T.P. Act.

Therefore, though an unregistered document may be admitted into evidence as per Section 49 of the Registration Act as also in terms of Section 35 of

the Indian Stamp Act, there is no provision by which it can be held that mere payment of stamp duty or penalty would validate the contract for the

purpose of Section 53-A of the T.P. Act overcoming the bar placed in Section 17(1-A) of the Registration Act. Mere admissibility of a document as

evidence cannot in any manner do away with the mandatory requirement of registration as contemplated under Section 17(1-A) as otherwise the very

provision itself would be rendered otiose. A reading of the impugned judgment would reveal that this is where both the Courts below fell into error by

treating the documents as valid only because stamp duty and penalty was paid by the defendant. Such being the case, the counter-claim could not

have been entertained much less allowed on the basis of the unregistered agreement for sale at the instance of the defendant. This Court therefore,

finds considerable force in the contention of the appellants as noted above.

18. Such being the finding of this Court, what would be the natural corollary vis-à-vis the agreements for sale? Once the validity of the agreements is

set at naught, it goes without saying that the defendant cannot be said to have acquired any manner of right, title or interest over the suit land on such

basis.Â

19. Notwithstanding the finding as above, in view of the fact that the defendant is admittedly in possession over the suit land, it is to be seen as to how

far would she be entitled to protect the possession being the purported transferee of the contract for sale. In this context, it would be useful to refer to

the provision under Section 53-A of the Transfer of Property Act which reads as follows:

“53-A. Part performance. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from

which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, in

part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract,

Â then, notwithstanding that [***] where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law

for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.â€

Be it noted that by amendment effected on 24.9.2001 the words, â€œthe contract, though required to be registered, has not been registered,â€ was

omitted from this provision. But then, by an amendment to the Registration Act also effected on 24.9.2001, Section 17 was amended to insert subâ€

section (1-A), which has already been quoted hereinbefore. Thus, the cumulative effect of the above provisions as they exist, is that such a contract

cannot be enforced for the purposes of Section 53-A. In other words, possession of the defendant over the suit land in view of non-registration of the

contract would also become unlawful. The plaintiffs would therefore, be fully entitled to ask for recovery of possession subject of course to the

condition that the consideration amount received by them from the defendant is refunded.

20. Thus, from a conspectus of the analysis of the facts and law and the discussion made herein before, this Court is of the considered view that both

the Courts below committed manifest error in allowing the counter claim of the defendant and in dismissing the suit of the plaintiffs. The impugned

judgments therefore, warrant interference by this Court.

21. In the result, the appeal is allowed. The impugned judgments are set aside. The suit filed by the plaintiffs is decreed by holding them entitled to

recovery of possession of the suit lands from the defendant subject to the condition that they shall refund the consideration amount of Rs.67500/-each

received by them to the defendant along with interest @ 7% per annum calculated from the date of receipt of the amounts by them within three

months. Further, the counter-claim filed by the defendant is dismissed. There shall be no further order as to costs.

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