
(2025) 10 OH CK 0033

Orissa HC

Case No: S.A.O No.8 Of 2006

Nrusinghanath Singh
(Dead) Through Lrs

APPELLANT

Vs

Skadambini Singh &
Others

RESPONDENT

Date of Decision: Oct. 27, 2025

Acts Referred:

- Code Of Civil Procedure, 1908 — Section, Order 41, Order 41 Rule 23, Order 41 Rule 23A, Order 41 Rule 25, Order 43 Rule 1(u)
- Transfer Of Property Act, 1882 — Section 123
- Evidence Act, 1872 — Section 68
- Orissa Consolidation Of Holdings And Prevention Of Fragmentation Of Land Act, 1972 — Section 15(1)

Hon'ble Judges: R.K. Pattanaik, J

Bench: Single Bench

Advocate: A.K. Moharana

Final Decision: Allowed

Judgement

R.K. Pattanaik, J

1. Instant appeal under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908 is preferred by the appellants assailing the impugned judgment in T.A. No.78 of 2001 of the learned Additional District Judge, FTC (II), Cuttack setting aside the findings of the learned 2nd Additional Civil Judge (Senior Division), Cuttack in T.S. No.71 of 1988 by judgment and decree dated 17th July, 2001 remanding the suit for a fresh hearing and disposal on the grounds inter alia that such decision is not legally tenable, hence, therefore, the same is liable to be interfered with and set at naught.

2. In fact, respondent No.1, as one of the plaintiffs, with two others instituted the suit for a preliminary decree of partition and for delivery of separate possession vis-À-vis the property allotted to them with the pleading on record. The suit property is morefully described in the schedule â€™Aâ€™™ of the plaint. According to the plaintiffs, respective shares in the suit â€™Aâ€™™ property stood recorded in the name of defendant Nos. 1 to 3 having two annas of share; Biswanath Singh and Janardan Singh, the father of

defendant No.4 combinedly having 6 annas of share; Fakir Singh and Bihari Singh, the father of defendant Nos.5 & 9 respectively having 4 annas of share and such other shares in favour of their father with the RoR finally published in 1977. With such pleading on record, the partition was demanded.

3. On the contrary, it is pleaded that defendant No.2 was first married to Sundarmani Singh and defendant No.1 is their son and plaintiff No.1 is the daughter of Biswanath Singh through defendant No.2, when she married him again after the death of his first wife named above and that Biswanath Singh sold his interest in plot Nos.12, 17 and 19 to defendant No.1 by registered sale deed dated 8th November, 1983 and with that sale, defendant No.2 had also sold her interest for the plots and since then, defendant No.1 had become owner in possession of the interest of Biswanath Singh and defendant No.2 and during consolidation operation, defendant No.1 filed objection case to settle the share in plot Nos.12, 17 & 19 on the strength of the registered sale deed, wherein, Biswanath Singh and defendant No.2 admitted to have no interest in respect of Khata No.429 and as a result, the Assistant Consolidation Officer vide order dated 25th January, 1984 deleted their names and recorded the plots exclusively in his name.

4. In reply, the plaintiffs' response is that Biswanath Singh and defendant No.2 might have wrongly made the statement before the Consolidation Authority with no interest left with them as the former was blind and the latter was very old by then but in any case, their names were deleted by an order dated 25th January, 2025. At the same time, it is claimed that Biswanath Singh had transferred Ac.0.01 decimal out of Plot No.45 by a gift deed in favour of plaintiff Nos.2 & 3 and delivered possession of the same to them, which was duly accepted through their father guardian, whereas, plaintiff No.1 succeeded to the balance interest in Schedule "A" property left after the transfer in favour of defendant No.1 and since, no partition was effected in respect thereof, the suit was instituted.

5. The suit was contested by defendant No.1 opposing the claim for partition demanded by the plaintiffs with a written statement filed pleading therein that all the plots jointly recorded in the names of the parties have not been brought to hutch potch, while denying the plea of plaintiff No.1. It has further been pleaded that defendant No.1 acquired right, title and interest over Plot Nos.12, 17, 19, 44, 45 and 46 having received it from Biswanath Singh and defendant No.2 by virtue of the sale deed executed in 1983.

6. The learned Trial Court, after considering evidence from both the sides, dismissed the suit with the conclusion that the entire share in Khata No.429 and Hal Khata No.137 stood divested and for being recorded in favour of defendant No.1, which includes Plot Nos.44, 45, 46 and, hence, Seta Singh and Biswanath Singh have had no right, title and interest left in respect of Sabik Khata No.439 and the gift deed executed in favour of plaintiff Nos.2 and 3 to be invalid.

7. Against the judgment and decree of learned 2nd Additional Civil Judge (Senior Division), Cuttack in the suit, the appeal was filed and the same was allowed setting aside the judgment therein with the remand order for a fresh hearing and decision after providing opportunity to both the sides to amend the pleadings furnishing the details of Consolidation plots and corresponding Major Settlement plots and also to file plot index considering the order of the Consolidation Authority with reference to Exhibit D, E & G and other documents received on record. Since, the appeal in T.A. No.78 of 2001 was allowed and it was followed by such an order of remand, the original appellant (respondent No.1 before the learned Court below and defendant No.1 in the suit) filed the appeal on the grounds inter alia that the impugned judgment is erroneous and without judicial application of mind being against the weight of evidence on record with the following grounds pleaded which are mentioned herein below:

(i) The father of plaintiff No.1 and the father of plaintiff Nos.2 & 3 admitted that they do not have any right and claim over right belonging to the defendant but learned Court below fell into serious error in considering such evidence;

(ii) that, Plot No.45 being not one of the plots in Schedule "A" for which partition was claimed, it was not justified on the part of the learned Lower Appellate Court in ignoring such a relevant fact;

(iii) that, the plaintiffs have not fulfilled the mandatory requirements of Section 123 of the Transfer of Property Act read with Section 68 of the Indian Evidence Act as no attesting witness was examined to

prove the gift deed dated 31st January, 1984 purportedly executed by Biswanath Singh for and in respect of Ac. 0.01 decimal of land out of Plot No.45 in favour of plaintiff Nos.2 & 3, hence, the learned Court below should have held that the said plaintiffs cannot be said to have acquired any title on the basis of such a deed;

(iv) that, the learned Trial Court has specifically held that no interest left with Biswanath Singh and defendant No.2 and therefore, no title or interest accrued to plaintiff No.1 and hence, learned Court below without proper application of mind interfered with such a finding of fact and set aside the judgment in the suit;

(v) that, when it has been proved that Biswanath Singh and Seta Singh did not have any share in Khata No.429/137, the gift deed executed in favour of plaintiff Nos.2 & 3 becomes invalid and the said fact was completely lost sight of by the learned court below;

(vi) that, the Court in appeal having not set aside the judgment and decree of the suit and only interfered with the findings of the Trial Court, the order of remand is liable to be set aside not being in accordance with law; and

(vii) that, such remand of the suit allowing the parties to amend the pleadings has practically permitted the plaintiffs to fill up the lacuna in their case, hence, it is unsustainable in law.

8. The moot question is, whether, the learned Lower Appellate Court was justified in remanding the matter back for a fresh hearing amounting to a de novo trial after necessary amendment of the pleadings of the parties?

9. Heard Mr. Panda, learned counsel for the appellants and Mr. Moharana, learned counsel for respondent Nos.1 to 3.

10. The appellants are the successors-in-interest of defendant No.1, who died during the pendency of the appeal.

11. The suit is at the behest of respondent Nos.1 to 3 demanding partition in respect of the schedule property with the allotment of specific shares in their favour but, as earlier stated, it was dismissed by the court of first instance concluding that the entire share and Sabik Khata No.429 as well as Hal Khata No.137 had been divested followed by its recording in favour of the appellant, namely, defendant No.1 therein, which included plot Nos.44, 45 and 46 and thereby, them having no right, title and interest left in respect thereof and that apart, the gift deed executed in favour of plaintiff Nos. 2 and 3 is invalid and inoperative in law. Being dissatisfied, the respondents filed appeal before the learned court below and in view of the impugned judgment in Title Appeal No.78 of 2001, the suit has suffered a remand, which is under challenge.

12. Referring to the case laws cited, Mr. Panda, learned counsel for the appellants would submit that the learned court below could not have directed the remand of the suit especially when there has been a finding in favour of the original appellant vis-à-vis title of the schedule property. It is submitted that as no interest was left with the respondents, the learned 2nd Additional Civil Judge (Senior Division), Cuttack, rightly dismissed the suit for partition. That apart, the contention is that the gift deed has not been proved in the manner and as per Section 123 of the Transfer and Property Act read with Section 68 of the Indian Evidence Act with the examination of at least one of the attesting witnesses to the same, which is claimed to have been executed in favour of plaintiff Nos.2 & 3 vis-à-vis Ac. 0.01 decimal of land out of Plot No.45. Such remand of the suit, according to Mr. Moharana, learned counsel for respondent Nos.1 to 3 is perfectly justified.

13. As per the learned Court below, schedule property of the plaint relates to Plot Nos.10, 27, 32, 52 and 53 under Consolidation Khata No.15 in respect of which partition has been sought for, whereas, the Consolidation RoR does not include Plot No.10 and also Plot No.54 and it is not proved from the record that Plot No.54 corresponds to Plot No.45 of Major Settlement RoR i.e. Ext.4. Furthermore, it has been held that the Consolidation Authority should have considered the objection of plaintiff No.1 with a conclusion

that she is entitled to the share of her parents taking judicial notice of the fact that the appellants claimed relinquishment of shares in Plot Nos.44, 45 and 46 under Ext.4, which does not receive support from Ext.E. With the above conclusion, it was considered by the learned court below to remand the suit for a fresh disposal taking into account the order of the Assistant Consolidation Officer and with reference to Exts. D, E and G and such other documents received as evidence from both the sides.

14. The scope of remand of a suit shall be subject to conditions enumerated in Order 41 Rule 23A CPC and when there is a need for framing of additional issues, if any, it would be in accordance with Rule 25 thereof. In fact, Order 41 Rule 23 CPC deals with remand of suit by an Appellate Court disposed of upon a preliminary point, wherein, the decree is reversed in appeal. In the instant case, the suit has been disposed of on all the issues and hence, any such remand as has been directed by the learned court below must have to comply Order 41 Rule 23A CPC. Law is well settled that Rule 23A of Order 41 CPC is to be sparingly used since the public policy is that litigations are concluded finally and at the earliest possible time but in case, a remand is felt to be absolutely necessary after judicial consideration and Rule 25 thereof is inadequate to meet the contingency, the Appellate Court may consider an open remand under Rule 23 A. But, before any such remand, as it is no more *res integra*, the Court in appeal is required to examine and make an endeavor to answer the disputed findings and when in spite of such an exercise, the conclusion is not arrived at either way, it would remand the suit for a fresh trial as has been reiterated by this Court in *Rushi and another Vrs. Madan Behera and another* AIR 1986 Orissa 207. It has also been reiterated by this Court in *Udayanath Pani Vrs. State Transport Authority, Orissa & others* 78 (1994) CLT 696 that a remand implies setting aside the order passed by the learned court below and it can be made when the order under appeal is based on insufficient material or some fresh evidence is needed to be considered; or where further enquiry is required or evidence to be brought in but it is not permitted otherwise when all such issues have been dealt with upon receiving evidence in full. In other words, the Appellate Court is to consider the appeal on merit instead of remand, if the evidence is on record. If any additional issue is to be framed and evidence in support of such an issue is not available, a remand may be directed for receiving evidence confined to it by the Court of first instance and upon receiving back together with the findings thereon and reasons assigned, to proceed to dispose of the appeal on merit. Unless, any of the above conditions are satisfied, the remand of a suit is not permitted. A routine or a casual order of remand is absolutely barred. Considering the relevant provisions of Order 41 CPC, as discussed herein above, the Court is to examine, whether, the learned court below rightly directed the remand of the suit, while disposing of the appeal on 30th April, 2005.

15. So far as the findings of the learned 2nd Additional Civil Judge (Senior Division), Cuttack, are concerned, it is on the premise that no interest was left with Biswanath Singh and Seta Singh, as it was acquired by the appellant, namely, defendant No.1. It has also been pleaded that the gift deed has not been proved in terms of Section 68 of the Indian Evidence Act. The dispute is over Ac.0.01 decimal from Plot No.45 and also claiming rights over the shares in respect of other plots. The RoRs have been received in the suit and marked as exhibits. No objection was invited by the Consolidation Authority, when plot No.45 was recorded in the name of the original appellant. The learned court below was of the opinion that the Assistant Consolidation Officer could not have issued the RoR without demanding a reply from plaintiff No.1 while dealing with the objection of the appellant. Besides the above, the learned court below held that there is no evidence regarding relinquishment in so far as Plot No.45 is concerned, as it has been claimed by the original appellant to have been given orally. The point is, whether, the appellants acquired interest in respect of Plot No.45 with such other plots leaving no interest succeeded by plaintiff No.1 besides the one acquired through the gift deed? The contesting respondents do not appear to have challenged the RoR which stands in the name of the original appellant on the strength of which it is pleaded that that there has been no interest left after the sale deed i.e. Ext.A executed on 8th November, 1983. From the record, it is revealed that the plaintiffs have not proved the gift deed either. In fact, two sale deeds have been marked as Exts.1 & 2 with Khatian of the suit property as Ext.3 and RoR in respect thereof as Ext.4. If the plaintiffs' claim is based on a deed of gift in respect of Ac.0.01 decimal, it is not understood as to why the same has not been received in evidence during trial. As the original appellant has been found to be absolute interest holder in respect of the plots and there has been no evidence with regard to the gift deed received, the learned Trial Court concluded that no interest is left for being partitioned.

16. There has been no evidence in the suit vis-à-vis plot No.45 and in respect of the gift deed for Ac.0.01 decimal therefrom claimed to have been conveyed to plaintiff Nos. 2 and 3. The learned court below concluded that any such gift deed executed on 31st January, 1984 by Biswanath Singh in respect of Ac. 0.01 decimal out of Plot No.45, if at all executed, it could not have been when the interest was transferred vide Ext.A in favour of the original appellant. As earlier stated, the gift deed has not been marked as an exhibit from the side of the contesting respondents. As such, no issue has been framed considering the plea based on the gift deed executed in favour of the children of plaintiff No.1. Whether there has been relinquishment of interest of Biswanath Singh and Seta Singh in favour of the original appellant including plot No.45 can be examined on the basis of evidence received in the suit but more appropriately referring to the order of the Consolidation Authority, which may be marked as an exhibit in appeal by a formal order. In fact, there has been claim of relinquishment in view of Exts. D & E, whereby, the Consolidation Authority excluded such interest and issued the RoR in favour of the appellant. It may be ascertained from the materials on record for a decision vis-a-vis shares relinquished and upon examination of the order of the Assistant Consolidation Officer, which has not been received as evidence except the letter of consent i.e. Ext.D and statement of Biswanath Singh in the case proceeding as Ext.E. In case, any such material was found deficient, the learned Court below, as earlier discussed, when was having the jurisdiction to direct additional evidence received on any additional issue framed for disposal of the appeal on merit but instead of exploring any such possibility with a finding thereon, in the considered view of the Court, the suit could not have been remanded in terms of Order 41 Rule 23A CPC. Merely for filing of plot index and other details with reference to the RoRs connected to the Consolidation plots with the corresponding plots of Major Settlement, an open remand could not have been directed by the learned court below. Any such remand would amount to a de novo trial and the same is totally forbidden.

17. As a result, the conclusion of the Court is that the decision for an open remand of the suit by the learned court below cannot be sustained in the eye of law. Rather, in the considered view of the Court, the learned court below, at best, could have resorted to any such exercise, if really necessary, exercising jurisdiction under Order 41 Rule 25 CPC but not by an open remand. Admittedly, the gift deed has not been brought into evidence, which required to be proved in the manner prescribed under Section 68 of the Indian Evidence Act but no such evidence was adduced from the side of the plaintiffs. The learned court below assumed that the gift deed would not have been executed, had the donor left with no any interest after the alleged sale and transfer in favour of defendant No.1. That apart, the decision of the Consolidation Authority was not challenged by the plaintiffs. Under such circumstances, what was the need for a de novo trial as has been directed by the learned court below is beyond one's comprehension. So, therefore, the Court is of the final conclusion that such remand of the suit as directed is legally not permissible as it has to comply and adhere to the conditions prescribed in Order 41 CPC. Having said that, what remains to be considered by the learned court below is to examine the evidence on record with reference to the decision in Objection Case No.790/158 of the learned Assistant Consolidation Officer to reassure that the relinquishment as claimed by defendant No.1 on the strength of Exts. D & E is in respect of the shares or the plots, which stood recorded in his favour and not beyond.

18. Accordingly, it is ordered.

19. In the result, the appeal stands allowed. As a necessary corollary, the impugned judgment in Title Appeal No.78 of 2001 is hereby set aside. Consequently, it is directed that the appeal upon restoration shall be disposed of in the light of the directions issued and observations made hereinabove at the earliest preferably within a period of three weeks from the date of receipt of a copy of the judgment. It is further directed that any such exercise shall be primarily to ascertain, whether, the relinquishment by Biswanath Singh and Seta Singh was in respect of the plots not sold to defendant No.1 by examining the order of the learned Assistant Consolidation Officer passed under Section 15(1) of the OCH&PFL Act and thereafter to ensure disposal of the appeal according to law within the above stipulated period.

20. In the circumstances, however, there is no order as to costs.