



IN THE HIGH COURT OF ORISSA AT CUTTACK

SAO NO.15 of 2023

(An appeal U/O.XLIII. Rule-1(u) of the Code of Civil Procedure, 1908).

Damayanti Sen ***Appellant***

-versus-

Chabirani Sen & Others ***Respondents***

For Appellant : ***Mr. S.K. Mishra, Sr. Advocate***

For Respondents : ***Mr. S.P. Mishra, Sr.
Advocate (R-1)***

CORAM:

JUSTICE G. SATAPATHY

DATE OF HEARING : 11.12.2024

DATE OF JUDGMENT: 25.02.2025

G. Satapathy, J.

1. This appeal under order U/O.XLIII Rule-1(u) r/w. Section 105 of the Code of Civil Procedure, 1908 (in short, "the CPC") by the appellant seeks to challenge the judgment dated 19.07.2023 passed by learned District Judge, Balasore in RFA No. 221 of 2015 by which the final decree drawn up on 01.06.2015 and sealed and signed on 04.09.2015 by the learned 1st Addl. Senior Civil Judge, Balasore in T.S. No. 400 of 1994 was set aside and the matter was remitted back



to the trial Court to depute a Salaried Amin Commissioner afresh for effecting partition of the suit land on the basis of Hal ROR and Map with co-relation to Sabik ROR and Map in terms of the decree passed by the learned 1st Appellate Court within a period of three months from the date of receipt of copy of such judgment.

2. The undisputed facts involved in this case in precise are, the present Respondent No.1 (R-1) being the plaintiff had instituted a suit in T.S. No. 400 of 1994 against the present Appellant and other Respondents as Defendants for partition of suit schedule "Ka" land comprising of CS plot No. 388 measuring an area of Ac 0.08 13/20 decimal on the southern side, out of an area measuring Ac. 0.10 decimal which according to the present Appellant is a tank; Plot No. 389 (Bari) measuring Ac. 0.06 07/20 decimal on the southern side, out of an area of Ac. 0.15 decimal; and Plot No. 384 measuring an area of Ac. 0.04 decimal, total measuring an area of Ac. 0.19 decimal of Sabik Khata No. 96 of Akatpur Mouza in Balasore District. According



to the Plaintiff, in addition to "Ka" schedule land, the father of the Appellant who was Defendant No.2(D2) in the suit purchased "Kha" Schedule land which was adjacent to "Ka" Schedule land, comprising of an area of Ac. 0.01 7/20 decimal, out of CS Plot No. 388 with Kisam Gadia and Ac. 0.08 13/20 decimal, out of CS Plot No. 389 measuring Ac. 0.15 decimal, total measuring Ac. 0.10 decimal of Sabik Khata No.96 of the Mouza Akatpur in the District of Balasore. Accordingly, the suit went to the trial, but it was dismissed resulting in present R-1-cum-Plaintiff preferring an appeal in RFA No. 54 of 2003 which was preliminary decreed in favour of the R-1-cum-Plaintiff directing the allotment of the purchase land of D-2 in the name of his legal heirs and partition of balance land in the ratio of half and half between Plaintiff and D-1. It was stipulated in the order in RFA No. 53 of 2003 that the division between Plaintiff and D-1 shall as far as equitable and practicable. The aforesaid preliminary decree was challenged before this Court by the present Appellant in RSA No. 153 of 2011 which was dismissed on 05.12.2016, but during the



pendency of the RSA No. 153 of 2011, R-1-cum-Plaintiff filed a final decree proceeding in which the present Appellant filed his objection, but the learned trial Court proceeded with the final decree, however, it was ordered on 19.06.2013 not to seal and sign the final decree till disposal of RSA No. 153 of 2011. It is further stated by the Appellant that on 07.08.2014, the learned trial Court closed the final decree by recalling its earlier orders dated 28.02.2013 and 19.06.2013, which was challenged by the Appellant before the learned District Judge, Balasore in RFA No. 439 of 2014, but the same was quashed by an order dated 15.07.2015 passed by this Court on the application of R-1 in CMP No. 1090 of 2015. Accordingly, the final decree was signed and sealed on 04.09.2015. The Appellant challenged the drawing of the aforesaid final decree by filing the appeal in RFA No. 221 of 2015 mainly on two grounds; firstly, the division of land has been made with reference to Sabak Records and Plot No. 388 being a "tank" Jalasaya is not partible, but while upholding the first plea/challenge of the Appellant for drawing of the



final decree on the basis of Sabak map and ROR to be unsustainable in the eye of law, the learned District Judge, Balasore rejected the second plea/challenge of the Appellant by observing that Plot No. 388 having lost all its characteristics of Jalasaya, the same is partible amongst the parties. Against such finding of the learned District Judge, the Appellant has preferred this appeal.

3. In the course of hearing, Mr. Samir Kumar Mishra, learned Senior Counsel appearing for the Appellant submits that law is fairly well settled that unless there is conversion of the type of land from tank to general land in accordance with law, no direction can be passed to partition a tank which is not partible, but the learned District Judge ignoring the fundamental principle has observed that the ditch in question having been filled up with sand has lost its character of Jalasaya and thereby, such land is liable for partition which is erroneous interpretation of law and therefore, the impugned judgment cannot sustain on that score. Mr. Mishra further submits that the



learned District Judge has taken into consideration the pleading of the Appellant in the WS to say that the Appellant is estopped, but the law of estoppel is not applicable against the provisions of law and in this case, the land in question being a tank is not partible according to the law, irrespective of what has been stated in the written statement by the Appellant. It is also submitted on behalf of the Appellant that unless the kisam of the land in question in plot No.388 is changed to general partible land, it cannot be said that the Appellant has approbated and reprobated in the same proceeding by saying one thing in WS and raising another plea in the Appeal. While summing up his argument, Mr. Mishra has prayed to set aside the impugned judgment of the learned District Judge to the extent that the land in question in Plot No. 388 is not partible by determining the interest of the parties therein.

4. On the other hand, Mr. S.P. Mishra, learned Senior Counsel appearing for the R-1 has submitted that the Appellant who was D-1 having categorically



pleaded in paragraph Nos. 8 and 9 of her written statement that her husband constructed shop rooms, residential houses and one ice factory by filling up the deep ditch in plot no. 388 of the suit schedule "Ka" land cannot turn around and say contrary to contend for the first time in a final decree proceeding that the said land being a Jalasaya (Tank) cannot be partible and the appellant having tried to approbate and reprobate her stand with regard to partition of suit schedule "ka" land, more particularly land in Plot No. 388 which is impermissible under law, the claim of the Appellant merits no consideration and, therefore, the present appeal being unmerited may kindly be dismissed.

5. After having considered the rival submissions as advanced by the learned Senior Counsels appearing for the parties upon perusal of record, the only ground of challenge as it appears to this Court is whether the land under Plot No.388 is partible or not. In addressing the rival contention, it appears that the learned District Judge, Balasore has remitted the matter back for deputation of a fresh



Salaried Amin Commissioner for partition of the suit schedule land afresh by setting aside the final decree passed in the suit, but the undisputed fact reveals that the Plaintiff-cum-R-1 had instituted the suit for partition of suit schedule "ka" land which includes CS Plot No. 388 of Sabik Khata No. 96 and the type (Kisam) of the land was described in the suit schedule "Ka" of the plaint to be a "Gadia" which means a ditch, but the dictionary meaning of ditch is "a narrow channel dug at the side of a road or field to hold or carry away water" and, therefore, ditch cannot be legally considered as a Jalasaya which means larger water body. Further, D-1 in his written statement has never raised any plea that the said land under Plot No. 388 being a ditch is not partible, rather her pleading in WS is that the said land was a deep ditch at the time of purchase and her husband spent huge amount to fill up the said ditch with sand and leveled it and her husband in association with her father run an ice factory thereon and out of his own income, he constructed houses over the same which was let out to the tenants for residential purpose



as well as for running of the shops. The written statement of D-1 further discloses that the ice factory and Pucca houses were constructed by the husband of D-1 prior to 1994 when the suit was filed. It is obvious that the Appellant is taking a plea subsequently at the time of final decree that the land in question under CS plot No. 388 being a Jalasaya is not partible, but this Court is reluctant to accept that the aforesaid land was Jalasaya and at best, it can be considered to be a ditch in terms of the admitted pleadings of the parties, but ditch cannot be considered as a Jalasaya which is larger water body. True it is that when the pleading of the appellant itself discloses that the land is no more a ditch and houses having been constructed thereon, he cannot subsequently deny for partition of such land by claiming the type of the land to be ditch (Gadia).

6. Law is no more *res integra* that a party cannot approbate or reprobate a fact in the same proceeding at different stages. In this regard, the decision as relied on by the R-1 in ***Union of India and others Vrs. N. Murugesan and others; (2022) 2 SCC 25*** fits to the



situation inasmuch as the Apex Court in paragraph 26 of such decision has held as under:-

"26. These phrases "approve" and "reprobate" are borrowed from the Scotts law. They would only mean that no party can be allowed to accept and reject the same thing, and thus one cannot blow hot and cold. The principle behind the doctrine of election is inbuilt in the concept of approve and reprobate. Once again, it is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to have the benefit of an instrument while questioning the same. Such a party either has to affirm or disaffirm the transaction. This principle has to be applied with more vigour as a common law principle, if such a party actually enjoys the one part fully and on near completion of the said enjoyment, thereafter questions the other part. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party."

7. It is, however, considered that there cannot be any estoppel to the provision of law, but such contention of the Appellant appears to be his figments of imagination inasmuch as the dispute concerning parties relates to a fact as to whether the disputed land



has lost its character in the meanwhile, inasmuch as in terms of the admission of D-1-cum-Appellant, there is no more a ditch, rather shop rooms, houses and ice factories are standing thereon. Further, law is also well settled that no Court can go beyond the decree passed by a Competent Civil Court, unless the same is set aside/varied and in this case, the claim of the plaintiff-cum-R-1 was for partition of the suit land having been preliminary decreed in 1st Appellate Court and subsequently, confirmed in second appeal by this Court, it is not permissible for the Appellant to challenge the decree passed in the suit in an appeal against the final decree, since the preliminary decree having been affirmed by the Appellate Court and even in second appeal, it cannot be varied or modified, unless the preliminary decree is varied or modified. The learned District Judge by referring to the pleadings of the parties and admission of the D-1-cum-Appellant with regard to the disputed land in question in Plot No. 388 and on analysis has rightly come to a finding that the land in Plot No. 388 having lost all its



characteristics of a Gadia (ditch) is partible amongst the parties. No other ground having been raised by the Appellant, the appeal merits no consideration.

8. In the result, the SAO stands dismissed on contest, but in the circumstance there is no order as to costs.

(G. Satapathy)
Judge

*Orissa High Court, Cuttack,
Dated the 25th February, 2025/Priyajit*

Signature Not Verified

Digitally Signed
Signed by: PRIYAJIT SAHOO
Designation: Jr. Stenographer
Reason: Authentication
Location: HIGH COURT OF ORISSA
Date: 25-Feb-2025 17:08:26

