



A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.161 of 2013

(In the matter of an appeal under Section 100 of the Code of Civil Procedure, 1908)

Shantilata Mohanty and others ***Appellants***

-versus-

Sohum World Foundation Trust & Another ***Respondents***

For Appellants - Mr. Maheswar Mohanty, Advocate

For Respondents - Mr. D.P. Mohanty, Advocate

**CORAM:
MR. JUSTICE A.C.BEHERA**

Date of Hearing :24.02.2026:: Date of Judgment :23.03.2026

A.C. Behera, J. This Second Appeal has been preferred against the reversing judgment.

2. The Appellants in this Second Appeal were the Plaintiff Nos.1 to 8 and Defendant No.1 before the learned Trial Court in the suit vide C.S. No.1107 of 2009 and Respondents before the learned 1st Appellate Court in the first appeal vide R.F.A. No.26 of 2011.

The Respondents in this 2nd Appeal were the Defendant Nos.2 and 3 before the learned Trial Court in the suit vide C.S. No.1107 of 2009 and



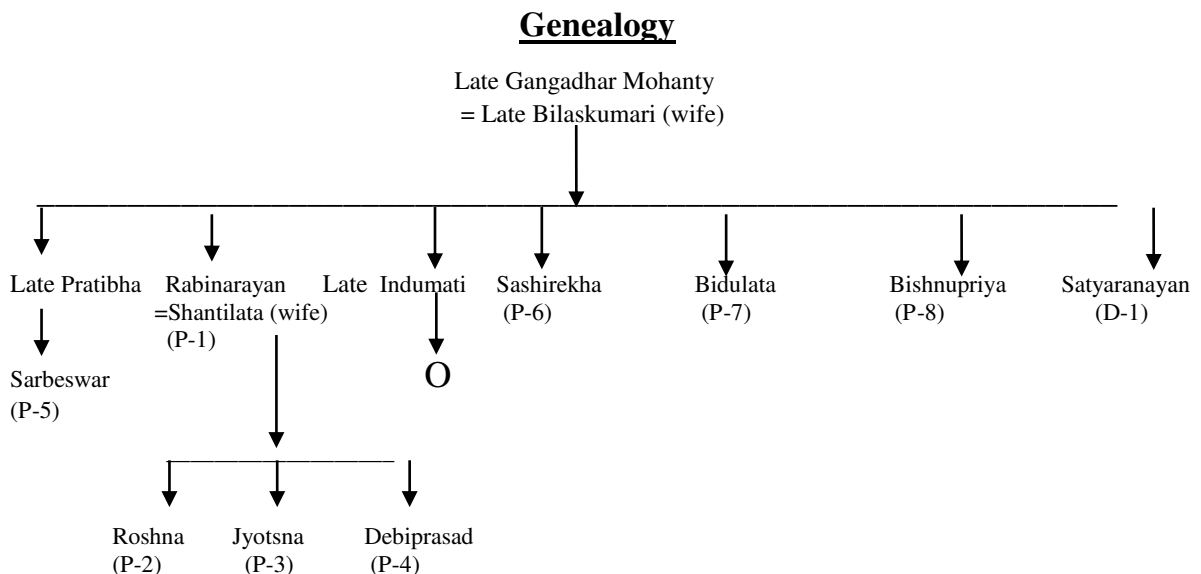
Appellants before the learned 1st Appellate Court in the 1st appeal vide R.F.A. No.26 of 2011.

3. The suit of the Plaintiffs (Appellants Nos.1 to 8 in this 2nd Appeal) vide C.S. No.1107 of 2009 was a suit for partition.

4. The properties described in the Schedule-A of the plaint i.e. Plot No.177-Ac.0.985 decimals and Plot No.178-Ac.0.285 decimals, in total Ac.1.270 decimals under Khata No.246/8 in Mouza Binjhagiri under Chandaka P.S. in the District of Khurda are the suit properties for partition.

5. According to the Plaintiffs (Appellant Nos.1 to 8 in this 2nd appeal), they are Hindus and they are guided and governed by Mitakshara School of Hindu Law.

The genealogy of the Plaintiffs and Defendant No.1 is depicted hereunder for an instant reference.





As per the aforesaid genealogy, The Plaintiffs and Defendant No.1 are the successors of Bilash Kumari Mohanty.

6. The suit properties described in Schedule-A of the plaint were the properties of Bilash Kumari Mohanty, wife of Gangadhar Mohanty. Bilash Kumari Mohanty had purchased the suit properties from one Chandra Sekhar Mohanty prior to the year 1965 from her stridhan properties. After purchase, she (Bilash Kumari Mohanty) mutated the Schedule-A suit properties to her name as per the order passed in Mutation Case No.1972 of 1965-66. As such, Bilash Kumari Mohanty was the exclusive owner and in possession over the suit properties described in Schedule-A of the plaint.

Bilash Kumari Mohanty died in the year 1978 leaving behind her husband Gangadhar Mohanty, two sons i.e. Rabinarayan Mohanty and Satyanarayan Mohanty (Defendant No.1) and five daughters i.e. Pratibha, Indumati, Sashirekha (Plaintiff No.6), Biduulata (Plaintiff No.7) and Bishnupriya (Plaintiff No.8).

The 1st daughter of Bilash Kumari Moyanty i.e. Pratibha Mohanty died leaving behind plaintiff no.5 as her successor. The 2nd daughter of Bilash Kumari Mohanty i.e. Indumati Mohanty died, while she was unmarried.



The first son of Bilash Kumari Mohanty i.e. Rabinarayan Mohanty died leaving behind the Plaintiff Nos.1 to 4 as his successors.

After the death of Bilash Kumari Mohanty, the suit properties left by her devolved simultaneously upon her husband Gangadhar Mohanty along with Plaintiffs and Defendant No.1.

By the time of death of Bilash Kumari Mohanty in the year 1978, her husband Gangadhar Mohanty was extremely old and he was incapable of looking after the management and cultivation of their properties including the Schedule-A suit properties. The eldest son of Gangadhar Mohanty i.e. Rabinarayan Mohanty was not physically and mentally fit either to cultivate or to look after the management of their properties including the Schedule-A suit properties. The father-in-law's house of Gangadhar Mohanty is at village Chhatabar, which is the native village of Kunjabehari Sahu (Defendant No.3). The father of the Defendant No.3 had intimacy with Gangadhar Mohanty. For which, Gangadhar Mohanty entrusted the management and cultivation of Schedule-A suit properties to the father of the Defendant No.3. Gangadhar Mohanty died in the year 2006, for which, his interest in the suit properties devolved upon the Plaintiffs and Defendant No.1. After the death of Gangadhar Mohanty, the Plaintiffs and Defendant No.1 possessed the suit properties being the joint



owners thereof. As such, the Plaintiffs and Defendant No.1 have/had been possessing their joint and undivided suit properties, as the joint owners of the same.

Surprisingly, in the 2nd week of June, 2009, some agents of Defendant No.2 (Sohum World Foundation Trust) came to the suit properties and made some measurements and tried to raise constructions thereon. When, the Plaintiffs came to know about the same, they (Plaintiffs) immediately rushed to the suit properties and protested against the illegal measurement to the suit properties by the agents of Defendant No.2, wherein, the agents of the Defendant No.2 disclosed that, the Defendant No.2 has purchased the suit properties from Defendant No.3 (Kunjabehari Sahu), but, they (Plaintiffs) told them that, the suit properties belong to them (Plaintiffs and Defendant No.1), therefore, the agents of the Defendant No.2 went away from the suit properties.

Thereafter, they (Plaintiffs) ascertained from the registration office that, the Defendant No.3 has sold the Schedule-A suit properties to the Defendant No.2 (Sohum World Foundation Trust) through registered sale deed dated 26.05.2009. So, the Plaintiffs applied for the certified copy of the said sale deed dated 26.05.2009 and obtained the same. From the certified copy of that sale deed dated 26.05.2009, they (Plaintiffs) came to



know that, the Defendant No.3 has sold the Schedule-A suit properties to the Defendant No.2 on the strength of a registered sale deed No.662 dated 14.04.1980 said to have been executed by Gangadhar Mohanty (husband of Bilash Kumari Mohanty) in favour of the Defendant No.3. For which, they (Plaintiffs) applied for the certified copy of the said sale deed No.662 dated 14.04.1980 and obtained the same.

In that sale deed No.662 dated 14.04.1980 said to have been executed by Gangadhar Mohanty in favour of the Defendant No.3 in respect of the suit properties, it has been reflected wrongly that, after the death of Bilash Kumari Mohanty, the suit properties left by her (Bilash Kumari Mohanty) devolved solely upon him (Gangadhar Mohanty) and he (Gangadhar Mohanty) is the only legal heir and successor of his wife Bilash Kumari Mohanty and he (Gangadhar Mohanty) alone has succeeded the suit properties left by his wife Bilash Kumari Mohanty, for which, he (Gangadhar Mohanty) sold the suit properties to the Defendant No.3 through registered sale deed No.662 dated 14.04.1980.

In fact, after the death of Bilash Kumari Mohanty, the suit properties left by her devolved upon the Plaintiffs and Defendant No.1 and Gangadhar Mohanty simultaneously. For which, Gangadhar Mohanty alone was not the owner and in possession over the suit properties. They



(Plaintiffs and Defendant No.1) were/are the joint owners of the suit properties and they also in joint possession over the same. Gangadhar Mohanty had no right to alienate the suit properties to the Defendant No.3 through registered sale deed No.662 dated 14.04.1980.

Therefore, the sale deed No.662 dated 14.04.1980 said to have been executed by Gangadhar Mohanty in favour of the Defendant No.3 as well as the sale deed dated 26.05.2009 executed by the Defendant No.3 in favour of the Defendant No.2 in respect of the suit properties are the sham deeds. The Plaintiffs and Defendant No.1 had/have their right, title, interest and possession over the suit properties. As such, the suit properties are the joint and undivided properties of the Plaintiffs and Defendant No.1. The suit properties have not been partitioned between them (Plaintiffs and Defendant No.1) as yet through any metes and bounds partition.

As, the suit properties were not divided/partitioned between them (Plaintiffs and Defendant No.1) through any metes and bounds partition, for which, the Plaintiffs requested to the Defendant No.1 for partition of the suit properties, to which, the Defendant No.1 did not pay any heed.

Therefore, the Plaintiffs approached the Civil Court by filing the suit vide C.S. No.1107 of 2009 against the Defendants praying for partition of their legitimate shares from the Schedule-A suit properties.



7. Having been noticed from the learned Trial Court in the suit vide C.S. No.1107 of 2009 filed by the Plaintiffs, the Defendant No.1 was set ex-parte without filing any written statement, but, the Defendant Nos.2 and 3 contested the suit of the Plaintiffs by filing their joint written statement denying the averments made by the Plaintiffs in their plaint taking their specific stands inter alia therein that,

the Defendant No.2 (Sohum World Foundation Trust) is a charitable trust. The suit properties are the part and parcel of the premises of the Defendant No.2-Trust. The Defendant No.2-Trust is in possession and enjoyment of the suit properties. Before purchasing the suit properties by the Defendant No.2, its vendor i.e. Defendant No.3 was the owner and in possession over the same. The suit properties are under the peaceful and uninterrupted physical possession of the Defendant No.2.

According to the Defendant Nos.2 and 3, Bilash Kumari Mohanty was the original owner of the suit properties. After the death of Bilash Kumari Mohanty, her husband i.e. Gangadhar Mohanty had become the rightful owner of the suit properties without any hindrance and he (Gangadhar Mohanty) was possessing the suit properties exclusively, openly, continuously, physically, adversely and even otherwise, the



Defendant No.2 and its vendor i.e. Defendant No.3 have/had perfected their title in the suit properties through adverse possession.

The specific/definite case/plea of the Defendant Nos.2 and 3 in their joint written statement was that, the suit properties were recorded exclusively in the name of Bilash Kumari Mohanty. The suit properties were the self-acquired properties of Bilash Kumari Mohanty. After the death of Bilash Kumari Mohanty, her husband Gangadhar Mohanty being her legal heir as well as Karta of the family, sold the suit properties to the Defendant No.3 on dated 14.04.1980 in order to clear the bank dues as well as other loan dues. Rabinarayan Mohanty, son of Gangadhar Mohanty was an identifier of the said sale deed No.662 dated 14.04.1980. Gangadhar Mohanty sold the suit properties to the Defendant No.3 to the knowledge of all concerned being the Karta and manager of the family, as the sale was necessitated for the cause of family. So, the Plaintiffs have no locus standi to claim the suit properties by filing the present suit. While, the Defendant No.3 was the exclusive owner and possession over the suit properties purchasing the same from Gangadhar Mohanty, he (Defendant No.3) sold the suit properties through sale deed No.7374 dated 26.05.2009 to the Defendant No.2 and in which, the Engineering College of the Defendant No.2 had/has been running/continuing and the said Engineering College of



the Defendant No.2 is recognized by the AICE, Utkal University, BPUT Higher Education Department, Industry Department etc. and the Defendant No.2 has been paying rent of the suit properties through proper rent receipts and Defendant No.2 had/has also been exercising ownership and possession over the same.

When, the suit properties had sold by Gangadhar Mohanty after the death of his wife Bilash Kumari Mohanty, as the Karta of the family of the Plaintiffs and Defendant No.1, in order to meet the legal necessities of their family for the repayment of loan at the Bank as well as other loan dues, then, the Plaintiffs are not entitled for the reliefs sought for by them in the suit. For which, the suit of the Plaintiffs is liable to be dismissed against them (Defendant Nos.2 and 3).

8. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether five numbers of issues were framed by the learned Trial Court in the suit vide C.S. No. 1107 of 2009 and the said issues are:-

I s s u e s

1. Whether the suit is maintainable?
2. Whether there is any cause of action to bring the suit?
3. Whether the suit is bad for non-joinder and mis-joinder of necessary parties?
4. Is the Plaintiffs are entitled for a decree as prayed for?



5. To what other relief, the Plaintiffs are entitled?

9. In order to substantiate the aforesaid relief i.e. partition, sought for by the Plaintiffs against the Defendants, they (Plaintiffs) examined three witnesses from their side including the Plaintiff Nos.1 and 7 as P.Ws.1 and 2 and relied upon the documents vide Exts.1 to 3.

On the contrary, in order to defeat/nullify the suit of the Plaintiffs, the Defendant Nos.2 and 3 examined three numbers of witnesses from their side including Defendant No.3 as D.W.2 and exhibited several documents on their behalf vide Exts.A to L.

10. After conclusion of hearing and on perusal of the materials, evidence and documents available in the record, the learned Trial Court answered issues Nos.1 to 4 in favour of the Plaintiffs and against the Defendant Nos.2 and 3 and basing upon the findings and observations made by the learned Trial Court in issue Nos.1 to 4 in favour of the Plaintiffs and against the Defendant Nos.2 and 3, the learned Trial Court decreed the suit of the Plaintiffs vide C.S. No.1107 of 2009 preliminarily for partition on contest against the Defendant Nos.2 and 3 and ex-Parte against the Defendant No.1 without cost as per its judgment and decree dated 20.05.2011 and 21.06.2011 respectively entitling the Plaintiff Nos.1 to 4 jointly to get 1/6th share and entitling the Plaintiff Nos.5 to 8 and



Defendant No.1 to get 1/6th share each in the suit properties and injunctioned the Defendant Nos.2 and 3 permanently from coming over the suit properties and from raising any construction in the same assigning the reasons that,

the suit properties described in the Schedule-A of the Plaintiff were the self-acquired purchased properties of Bilash Kumari Mohanty @ Dei from her stridhan. For which, she (Bilash Kumari Mohanty @ Dei) was the exclusive owner of the suit properties. After the death of Bilash Kumari Mohanty, the suit properties left by her devolved upon her husband Gangadhar Mohanty along with her children simultaneously. For which, After the death of Bilash Kumari Mohanty, the suit properties became the joint properties of Gangadhar Mohanty, Plaintiffs and Defendant No.1. The joint and undivided interest and possession of the Plaintiffs and Defendant No.1 in the suit properties had/has been continuing in the same. The Plaintiffs and Defendant No.1 have their joint ownership and possession in every inch of the suit properties. Gangadhar Mohanty being one of the successor of Bilash Kumari Mohanty like the Plaintiffs and Defendant No.1, he had no right to transfer the entire suit properties to the Defendant No.3 and the Defendant No.3 had no right to transfer the entire suit properties to the Defendant No.2. So, the sale of the entire suit properties by Gangadhar Mohanty to the Defendant No.3 and likewise the sale of the said entire suit properties by the Defendant No.3



in favour of the Defendant No.2 are not legal. For which, there is no necessity under law to declare the said sale deeds as illegal.

Therefore, the Plaintiffs have rightly filed the suit for partition of their shares from the suit properties, as their joint and undivided interest in the suit properties have not been partitioned between them through any metes and bound partition as yet.

11. On being dissatisfied with the aforesaid judgment and decree dated 20.05.2011 and 21.06.2011 respectively passed by the learned Trial Court in the suit vide C.S. No. 1107 of 2009 in favour of the Plaintiffs and against the Defendant Nos.2 and 3, the Defendant Nos.2 and 3 challenged the same preferring the 1st Appeal vide R.F.A. No.26 of 2011 being the Appellants against the Plaintiffs and Defendant No.1 arraying them(plaintiffs and defendant no.1) as Respondents.

12. After hearing from both the sides, the learned 1st Appellate Court allowed that first appeal vide R.F.A. No.26 of 2011 of the Defendant Nos.2 and 3 on contest against the Plaintiffs and Defendant No.1 and set aside to the judgment and decree passed by the learned Trial Court in the suit vide C.S. No. 1107 of 2009 as per its judgment and decree dated 25.03.2013 and 08.04.2013 respectively and dismissed to the suit vide C.S. No. 1107 of 2009 of the Plaintiffs assigning the reasons that,



“though, the suit of the Plaintiffs vide C.S. No. 1107 of 2009 was a suit for partition, but, they (Plaintiffs) have aimed to declare the sale deed No.662 dated 14.04.1980 executed by the Gangadhar Mohanty in favour of the Defendant No.3, as illegal, though Gangadhar Mohanty as a Karta and manager of the Hindu Joint family of the Plaintiffs and Defendant No.1 had sold the suit properties through registered sale deed No.662 dated 14.04.1980 in favour of the Defendant No.3 for the legal necessities of the family and the relief i.e. partition sought for the Plaintiffs is indirectly dependent upon the relief of declaration of the sale deed dated 14.04.1980 as illegal, for which, the suit of the Plaintiffs for partition is barred by law of limitation as per Articles 58, 113 and 119 of the Indian Limitation Act, 1963, as the suit vide C.S. No.1107 of 2009 was filed by the Plaintiffs much after three years of the execution and registration of the sale deed No.662 dated 14.04.1980 in respect of the suit properties by Gangadhar Mohanty in favour of the Defendant No.3.

Therefore, the suit of the Plaintiffs is liable to be dismissed. For which, the matter i.e., whether the sale deed by Gangadhar Mohanty was in due exercise of his special power as Karta of the Hindu family for the purposes as permitted by law is no more required to be further delve into.”

13. On being aggrieved with the aforesaid judgment and decree dated 25.03.2013 and 08.04.2013 respectively passed by the learned 1st Appellate Court in favour of the Defendant Nos.2 and 3 and against the Plaintiffs and



Defendant No.1, they (Plaintiffs and Defendant No.1) challenged the same preferring this 2nd appeal being the Appellants against the Defendant Nos.2 and 3 arraying them(defendant nos.2 and 3) as Respondents.

14. This 2nd Appeal was admitted on formulation of the following substantial question of law i.e.:-

Whether, the lower appellate Court was justified in holding that, the suit properties were alienated by father of the Plaintiffs, as the Karta of the joint family and whether the judgment and decree passed by the learned 1st Appellate Court in dismissing the suit for partition of the Plaintiffs in respect of the suit properties is sustainable under law?

15. I have already heard from the learned counsels of both the sides.

16. During the course of hearing, in order to assail the impugned judgment and decree passed by the learned 1st Appellate Court in R.F.A. No.26 of 2011 and in support of the judgment and decree passed by the learned Trial Court, the learned counsel for the Appellants (Plaintiffs) relied upon the following decisions i.e.:-

(i) In a case between *Raghuwar Vrs. Janki Prasad reported in AIR 1981 (M.P.) 39.*

(ii) In a case between *Soumen Kumar Kar and others Vrs. Swapan Kumar Kar and others reported in AIR 2008 (Cal.) 213.*

(iii) In a case between *Inder Chand Vrs. Jethi and others reported in AIR 2006 (Raj.) 251.*



17. On the contrary, in support of the impugned judgment and decree passed by the learned 1st Appellate Court, the learned counsel for the Respondents (Defendant Nos.2 and 3) relied upon the following decision i.e.:-

In a case between *Dastagirsab Vrs. Sharanappa @ Shivasharanappa Police Patil (D) by Lrs. and others reported in 2026 (1) CLR (SC) 216.*

18. Here in this suit/appeal at hand, it is the admitted case of the Parties that, the suit properties were the properties of Bilash Kumari Mohanty. After the death of Bilash Kumari Mohanty, the suit properties left by her devolved upon her children and husband simultaneously as per Sections 15 (1)(a) of the Hindu Succession Act, 1956. After the devolution of the suit properties upon the children and husband of Bilash Kumari Mohanty, the suit properties became the joint and undivided properties of the children and husband of the Bilash Kumari Mohanty indicated in the genealogy given in Para No.5 of this judgment.

It is the case of the Plaintiffs that, Gangadhar Mohanty (husband of Bilash Kumari Mohanty) alone had no right to alienate their joint and undivided suit properties through registered sale deed No.662 dated 14.04.1980 in favour of the Defendant No.3, for which, the said sale deed No.662 dated 14.04.1980 is not legal.



To which, the Defendant Nos.2 and 3 objected taking their stands in their joint written statement that, Gangadhar Mohanty transferred the suit properties through sale deed No.662 dated 14.04.1980 in favour of the Defendant No.3, as the Karta of the family of the Plaintiffs and Defendant No.1 for legal necessities of the family in order to repay the Bank loan and other loans dues of their family. For which, the said sale deed No.662 dated 14.04.1980 executed by Gangadhar Mohanty in favour of the Defendant No.3 in respect of the suit properties is not illegal.

19. Now, it will be seen, whether, Gangadhar Mohanty had transferred the suit properties as a Karta of the Plaintiffs and Defendant No.1 or in his individual capacity.

20. It is the settled propositions of law that,

when, alienation of joint properties is not approved by the children of the so-called Karta (vendor), the burden is on the alienee/transferee to establish that, the sale was supported by legal necessity or for the benefit of the family or that, he (alienee/transferee) had made reasonable enquiry about the existences of legal necessity in the family of the vendor for such transfer.

Recitals in a deed relating to the sale for legal necessities do not by themselves prove legal necessity. Recitals are however admissible in evidence, their value varies according to the circumstances, in which, the



transaction was entered into. Recitals may be used to corroborate other evidence to prove the existences of legal necessity, but, weight to be attached to the recitals looking to the circumstances of the transaction.

21. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) In a case between *Smt. Nilabati Gouda Vrs. Durga Prasad Mohapatra reported in 2017 (2) OLR 876 in Para No.12* that,

Where, the alienation of joint family property is not approved by the sons, the burden is on the alienee to establish that, the same was supported by legal necessity or benefit of the family or that he made reasonable enquiry about the existence of such necessity.

Recitals in a deed of legal necessity do not by themselves prove legal necessity—Recitals are however, admissible in evidence, their value varying according to the circumstances, in which, the transaction was entered into. Recitals may be used to corroborate other evidence of the existence of legal necessity. Weight to be attached to the recitals varies according to the circumstances.

(ii) In a case between *Radhakishna Das and another Vrs. Kaluram (dead) and after him, his heirs and legal representatives and others reported in AIR 1967 (SC) 574* & in a case between *Gopabandhu Das and others Vrs. Maheswar Mundian and others reported in 86 (1998) CLT 35* that,

Where, the alienation of joint family property is not approved by the sons, the burden is on the alienee to establish that, the same was supported by legal necessity or benefit of the family or that he made reasonable enquiry about the existence of such necessity.

(iii) In a case between *Tammineni Ramesh Naidu Vrs. Giri Lakshma Swamy and others reported in 2007 (2) CCC 390 (A.P.)* that,

Hindu Joint Family properties Sale by Karta—Alienee has to establish either the transaction was in fact justified by legal necessity or for benefit of the estate or he had made reasonable and bona fide enquiries, as to existence of necessity.



(iv) In a case between ***Harekrushna Mahakud Vrs. Radhanath Mahakud and others reported in 2009 (1) CLR 560 in Para No.8*** that,

alienation of joint family properties by Karta—Single member cannot alienate the joint family property without consent of the other co-sharer.

Even, the Manager or Karta of the joint family has limited power to alienate such properties, when, there is pressing legal necessity and the sale would be beneficial to the estate.

The burden of proving legal necessity lies upon alineee/transferee. Recitals in the sale deed is not sufficient. Alineee must prove that, legal necessity existed and after reasonable enquiry, he was satisfied with regard to the fact that, the sale was for the benefit of the estate.

(v) In a case between ***Amiya Kumar Sahu Vrs. Ajit Kumar Sahu reported in AIR 2013 Orissa 178*** that,

Burden to prove the legal necessity lies on the purchaser.

(vi) In a case between ***Selvam and Others Vrs. Mangaiyarkarasi reported in III (2013) CLT (Mad.)*** that,

Sale effected by mother, though attested by father, still then, it will be held that, the sale is executed by mother only and not by father.

22. Here in this suit/appeal at hand, absolutely, there is no indication in the contents/recitals of the sale deed No.662 dated 14.04.1980 vide Ext.2 executed by the Gangadhar Mohanty in favour of the Defendant No.3 about the alienation of the suit properties by Gangadhar Mohanty in favour of the Defendant No.3 either as a Karta of the family of the Plaintiffs and Defendant No.1 as per the consent of the Plaintiffs and Defendant No.1 for any legal necessity of the family or for the benefit of the estate, but, the contents of the Ext.2 reveals that, he (Gangadhar Mohanty) is the



only successor of the owner i.e. Bilash Kumari Mohanty and he is alienating the suit properties in his individual capacity.

Though, as per law, it was obligatory on the part of the Defendant Nos.2 and 3 to establish that, the transfer of the suit properties was made by Gangadhar Mohanty through sale deed No.662 dated 14.04.1980 vide Ext.2 in favour of the Defendant No.3, as the Karta of the family for the legal necessity of the family of the Plaintiffs and Defendant No.1, as per the consent of the co-owners of Gangadhar Mohanty i.e. Plaintiffs and Defendant No.1, but, the Defendants Nos.2 and 3 have failed to discharge their such burden.

Therefore, it is held that, Gangadhar Mohanty had not sold the suit properties through sale deed No.662 dated 14.04.1980 vide Ext.2 in favour of the Defendant No.3, as the Karta of the family of the Plaintiffs and Defendant No.1 as per the consent of his co-owners i.e. Plaintiffs and Defendant No.1 for any legal necessity of the family.

23. As such, the burden, which was lying upon the Defendant Nos.2 and 3 i.e. to prove legal necessity, they (Defendant Nos.2 and 3) have failed to discharge the same.

For which, by applying the principles of law enunciated in the ratio of the above decisions, it is held that, the alienation of the joint and



undivided properties of the Plaintiffs, Defendant No.1 and Gangadhar Mohanty i.e. the suit properties by Gangadhar Mohanty in favour of the Defendant No.3 through sale deed No.662 dated 14.04.1980 vide Ext.2 was not made either as the Karta of the family of the Plaintiffs and Defendant No.1 or for the legal necessity of the family.

24. As per the discussions and observations made above, when, it is held that, the suit properties are the joint and undivided properties of the Plaintiffs and Defendant No.1 and when, there is no material or document on behalf of the Defendant Nos.2 and 3 to show that, the joint and undivided suit properties of the Plaintiffs and Defendant No.1 have been partitioned/divided between them (Plaintiffs, Defendant No.1 and Gangadhar Mohanty) as per law through any metes and bounds partition, then at this juncture, in absence of partition of the joint and undivided suit properties, the outsiders of the family of the Plaintiffs and Defendant No.1 like Defendant Nos.2 and 3 are not entitled to take possession of any specific portion of their joint and undivided suit properties. Because, as per law, in each and every inch/parcel of the joint and undivided suit properties, the Plaintiffs and Defendant No.1 had/have their joint ownership and possession.



25. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) In a case between FGP Ltd. Vrs. Saleh Hooseini Doctor and another reported in 2009 (4) CLT (SC) 1 that,

Co-owner of property is an owner of the property till the property is partitioned.

(ii) In a case between Jai Singh and others Vrs. Gurmej Singh reported in 2010 (1) CLR (SC) 319 that,

a co-owner has an interest in the whole property and also in every parcel of it.

Possession of joint property by one co-owner is in the eye of law in possession of all, even if, all but, one are actually out of possession.

A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster, as the possession of one is deemed to be on behalf of all.

(iii) In a case between Om Pal Singh and another Vrs. Raj Krishna and Another reported in 2011 (1) CCC 98 (Allhabad) that,

in absence of partition of property belongs to co-owner jointly, an outsider purchasing an unpartitioned share in property not entitled to take forcible possession under law.

26. When, it is held above that, the suit properties are the joint and undivided properties of the Plaintiffs and Defendant No.1 and the suit properties have not been partitioned/divided between the Plaintiffs and Defendant No.1 through any metes and bounds partition as yet, then at this juncture, it will be seen, whether, the suit for partition vide C.S. No.1107 of 2009 filed by the Plaintiffs in respect of the suit properties is maintainable under law?



In a suit for partition, three questions are to be answered i.e.

- (i) *whether, the party seeking partition has share in the property.*
- (ii) *Whether, the Plaintiff or Plaintiffs seeking partition are entitled to the relief of division and*
- (iii) *The manner, in which, the property is to be divided.*

27. On this aspect, the propositions of law has already been clarified by the Apex Court in the ratio of the following decision:-

(i) In a case between ***Venigalla Koteswaramma Vrs. Malempati Suryamba and others reported in 2021 (1) OLR (SC) 601 in Para No.37*** that,

the ingredients of a suit for partition are (i) Whether, the party seeking partition should have a share in the suit properties? (ii) whether, the party seeking partition entitled to relief of division? (iii) Manner, in which, the property is to be divided.

28. It is the settled propositions of law that, claim of partition in respect of the joint and undivided properties like the suit properties described in Schedule-A of the plaint in the suit vide C.S. No.1107 of 2009 filed by the Plaintiffs creates a recurring cause of action for partition, unless the said joint and undivided properties are partitioned and delivered through actual delivery of possession to the respective parties in respect of their respective allotted properties. Each party i.e. each co-owner has right to claim partition of the said joint and undivided properties and that right is



not lost till the same are partitioned/divided between them (joint owners) through metes and bounds partition.

On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) In a case between Dilo Rana and others Vrs. Munshi Kunj Behari Prasad and others reported in AIR 1948 (Patna) 244 that,

claim of partition is a recurring cause of action. So long as the property remains joint. Plaintiff's rights of partition subsisted even after the abatement of the previous suit for partition instituted by them.

(ii) In a case between Sanatan Narain Tewari Vrs. Saran Narain Tewari and others reported in AIR 1959 Patna 331 that,

claim of partition being a recurring cause of action, unless the division of the joint property has been brought to completion by actual delivery of allotments, each party has got right to claim fresh partition of property and that right is not lost.

(iii) In a case between Arjuna Mohapatra Vrs. Dhaneswar Mohapatra and others reported in 2013 (II) OLR 458 that,

So long as there has been no division of joint property by actual delivery of allotments of shares to the co-sharers, a fresh suit for partition cannot be held to be barred under Order 22, Rule 9 CPC.

(iv) In a case between Kakumanu Peda Vrs. Kakumanu Akkamma and others reported in AIR 1958 (SC) 1042 that,

A suit for partition is a suit for property. The maxim of *actio personalis moritur cum persona*, which means a person's right to action dies with the person, has no application to a suit for partition.

(v) In a case between Arjuna Mohapatra Vrs. Dhaneswar Mohapatra and others reported in 2013 (4) CCC 126 Odisha that,

claim of partition is a recurring cause of action.

(vi) In a case between Manohar Lal Behari Lal Vrs. Onkar Das and others reported in AIR 1959 (Punjab) 252 that,

the right to enforce a partition is a continuous right.



(vii) In a case between *Chhote Khan, deceased, represented by his son, Harmat and others Vrs. Mal Khan and others reported in AIR 1954 SC 575* that,

The right to partition of a co-sharer cannot be resisted.

(viii) In a case between *Tikam Chand Lunia Vrs. Rahim Khan Ishak Khan and others reported in AIR 1971 (Madhya Pradesh) 23* that,

every co-owner has a legal right to have the joint properties partitioned. Mere reluctance or some inconvenience of other co-owners is not by itself sufficient to take away the said right.

(ix) In a case between *Rajendra Kumar Bose Vrs. Brojendra Kumar Bose reported in AIR 1923 (Calcutta) 501* that,

For instituting a suit for partition, demand is not a condition precedent. A demand for partition is not necessary to the institution of a suit for partition.

(x) In a case between *Girdhari Lal and Another Vrs. Amin Chand reported in 2017 (3) CCC 341 (H.P.) in Para No.25* that,

All co-sharers remain owners in possession entitled to use every part of the land till it is partitioned.

(xi) In a case between *Shri Narender Nath Vrs. Krishna Gupta and others reported in 2018 (1) CCC 185 (Delhi) in Para No.9* that,

Partition suit-No limitation for its filing. Because, law does not prescribe any fixed time period, in which, a suit for partition must be filed by one joint owner against other.

29. Here, in this suit/appeal at hand, when, it is held above that, the suit properties are the joint and undivided properties of the Plaintiffs and Defendants No.1 and the suit properties have not been partitioned/divided between them through any metes and bounds partition, then at this juncture, in view of the propositions of law enunciated in the ratio of the aforesaid decisions, it cannot be held that, the suit for partition vide C.S. No.1107 of 2009 filed by the Plaintiffs in respect of the suit properties is not maintainable under law.



For which, in other words, it is held that, the suit for partition filed by the Plaintiffs in respect of the suit properties against the Defendants is maintainable under law.

30. The learned 1st Appellate Court dismissed the suit for partition vide C.S. No.1107 of 2009 of the Plaintiffs as per its judgment and decree dated 25.03.2013 and 08.04.2013 respectively passed in R.F.A. No.26 of 2011 reversing the judgment and decree for partition passed by the learned Trial Court in the suit vide C.S. No.1107 of 2009 applying Articles 59, 113 and 109 of the Indian Limitation Act, 1963 observing that, the suit of the Plaintiffs vide C.S. No.1107 of 2009 for partition is barred by law of limitation, as they (Plaintiffs) filed the suit vide C.S. No.1107 of 2009 for partition indirectly challenging the sale deed No.662 dated 14.04.1980 vide Ext.2 executed by Gangadhar Mohanty in favour of the Defendant No.3 by filing that suit beyond the prescribed period of limitation i.e. three years after the execution of the said sale deed No.662 dated 14.04.1980 (Ext.2), for which, the suit of the Plaintiffs is barred by law of limitation as per Articles 59, 113 and 109 of the Indian Limitation Act, 1963.

The aforesaid observations made by the learned 1st Appellate Court in the judgment and decree passed in RFA No.26 of 2011 holding that, the suit for partition vide C.S. No.1107 of 2009 of the Plaintiffs was barred by



law of limitation is not acceptable under law. Because, the suit of the Plaintiffs vide C.S. No.1107 of 2009 is not any other suit, but, a suit for partition. There is no limitation in filing a suit for partition in respect of the joint and undivided suit properties. The suit properties are the joint and undivided properties of the Plaintiffs and Defendant No.1.

31. As per law, what partition is, the same has been clarified by the Privy Council in the ratio of the following decision:-

*In a case between **Musammatt Girja Bai Vrs. Sadashiv Dhundiraj reported in AIR 1916 (Privy Council) 104 and in a case between Shankar Rama Gaude and others Vrs. Devastan of Shri Bhyagwati of Tuem reported 2006 (3) CCC 86 (Bomay)** that,*

a partition does not give a title or create a title in a person, it only enables the person to obtain what is his own in a definite and specific form for purposes of disposition independent of the wishes of his former co-sharers.

What is effected by partition is only the adjustment of the proprietary right into specific shares. Therefore, the partition does not give the person, to whom a land is allotted, any new title or create a title in him to that land, but, partition only enables him to obtain in a definite and specific form the land, which was his own, it cannot be said that, he has acquired that land.

32. According to the discussions and observations made above, when, it is held that, the Plaintiffs and Defendant No.1 are the co-owners of the suit properties and they have not sold or transferred their interest in the suit properties to anybody and when, the joint and undivided interest of the Plaintiffs and Defendant no.1 in the suit properties have not been partitioned/divided between them as yet through any metes and bounds partition and when their relief i.e. partition is their continuing right and



when as per law there is no limitation for filing a suit for partition by them in respect of the joint and undivided suit properties and when, the Plaintiffs filed the suit vide C.S. No.1107 of 2009 for partition of their legitimate shares from the joint and undivided suit properties and when, the right to sue for partition would be a continuing right till their joint properties are divided/partitioned, then at this juncture, it cannot be held that, the suit of the Plaintiffs vide C.S. No..1107 of 2009 for partition is barred by law of limitation.

For which, the findings and observations made by the learned 1st Appellate court that, the suit of the Plaintiffs vide C.S. No.1107 of 2009 for partition was barred by law of limitation cannot be sustainable under law.

33. When, the learned 1st Appellate court had dismissed the suit of the Plaintiffs allowing the first appeal vide RFA No.26 of 2011 of the Defendant Nos.2 and 3 holding that, the suit of the Plaintiffs vide C.S. No.1107 of 2009 for partition was barred by law of limitation and when, as per the discussions and observations made above, it is held that, the above findings and observations made in the judgment and decree passed by the learned 1st Appellate Court in RFA No.26 of 2011 i.e. the suit of the Plaintiffs was barred by law of limitation are not sustainable under law and



the judgment and decree for partition passed by the learned trial court in C.S. No.1107 of 2009 is not erroneous, then at this juncture, there is justification under law for making interference with the judgment and decree passed by the learned 1st Appellate Court in R.F.A. No.26 of 2011 through this 2nd Appeal filed by the Appellants (Plaintiffs and Defendant No.1).

Therefore, the judgment and decree passed by the learned 1st Appellate Court in R.F.A. No.26 of 2011 is liable to be set aside.

As such, there is merit in this 2nd Appeal filed by the Appellants(Plaintiffs and Defendant No.1). The same must succeed.

34. In result, the 2nd appeal filed by the Appellants (Plaintiffs and Defendant No.1) is allowed on contest against the Respondents (Defendant Nos.2 and 3).

The judgment and decree passed by the learned 1st Appellate Court in R.F.A. No.26 of 2011 is set aside.

The judgment and decree passed by the learned Trial Court in the suit vide C.S. No.1107 of 2009 for partition is confirmed.

**(A.C. Behera),
Judge**