

(1994) 02 OHC CK 0013
In the Orissa High Court
Case No : First Appeal No. 159 of 1979

Akhay Kumar S. Labantaray	Vs	APPELLANT
Sarada Dai (Dead) her L.Rs. Labani Bawa and Others		RESPONDENT

Date of Decision : 01-02-1994

Acts Referred:

Hindu Adoptions and Maintenance Act, 1956 — Section 12, 5
Hindu Succession Act, 1956 — Section 14

Citation : (1994) 02 OHC CK 0013

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : S.P. Misra, B. Sahu, M. Ghose and D. Das, for the Appellant; R.C. Mohanty, A.K. Mohanty and J.P. Das, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—Plaintiff is appellant against dismissal of suit for partition.

2. Undisputedly properties belong to Akure who died leaving behind five sons. Uchhabo is one of the sons who died in the year 1944 leaving behind his widow Ambi and two daughters Sarada and Khali. Title suit No. 96 of 1949 was filed for partition of the properties of Akure among the co-sharers and in the final decree Ambi was given a share. While she was continuing with the properties of Uchhaba as a limited owner, the Hindu Succession Act came into force on 17-6-1956, from which day she became absolute owner of those properties. Thereafter, in the year 1962, she sold some properties. In the year 1966, Ambi adopted plaintiff. Even after adoption, she alienated different properties as mentioned in Schedule "B" of the plaint. Adopted son has filed the suit for partition claiming that he is not bound by transfers made by her adoptive mother.

3. Adoption was challenged by daughters of Ambi and the purchasers. Trial Court having held adoption of plaintiff to be valid, T.A. No. 12 of 1974 was filed. The Court while confirming the finding that plaintiff is adopted son of Ambi, set aside the judgment and remanded the suit to give opportunity to plaintiff to assail

alienations by giving particulars thereof. Opportunity was given to defendants to file additional written statement. Thereafter, plaint was amended and defendant No. 2 filed additional written statement asserting that Ambi sold one acre, one decimal 6 pautis of land to defendant No. 2 on 5-6-1962 by a registered sale deed by which time plaintiff was not adopted and defendant was in peaceful possession of the same.

4. Trial Court on consideration of materials on record held that alienation by Ambi cannot be assailed by the adopted son and in respect of balance properties decreed the suit preliminarily. Exclusion of alienated property from partition, is grievance of plaintiff in this appeal.

5. Since preliminary decree for partition of properties of Uchhab in hand of his widow Ambi has become final, I am not called upon to examine correctness of that part of the decree. Mr. S. P. Misra, learned counsel for plaintiff-appellant submitted that his adoption by Ambi relates back to the date of death of Uchhab and accordingly, on death of Uchhab he has his half share in the entire properties though Ambi adopted him much after. Accordingly, alienation by Ambi before his adoption is not binding on him and the same is available for partition.

6. In spite of decision of Supreme Court reported in *Sawan Ram and Others Vs. Kala Wanti and Others*, which holds the field, jurists have expressed that son adopted by a widow though member of family of her husband, it may not be correct to say that he is son of her husband. This view is expressed in view of language of Section 5 of the Hindu Adoption and Maintenance Act, 1956. However, till the decision of Supreme Court reported in *Sawan Ram and Others Vs. Kala Wanti and Others*, holds the field, it is binding on me and son adopted by widow after death of her husband is also son of her husband. As such he is entitled to all the rights of a son. But this finding will be of no assistance to plaintiff in view of the decision reported in *Punithavalli Ammal Vs. Minor Ramalingam and Another*, and clear language of Section 12(c) of the Hindu Adoption and Maintenance Act, 1956. On a share being given to Ambi as widow of Uchhab prior to coming into force of the Hindu Succession Act, she acquired limited interest. Property of her husband did not vest in her. If at that stage she would have adopted plaintiff, question would have been different and plaintiff could have challenged alienation if any made by her. However, while she was continuing to possess properties with limited interest, the Hindu Succession Act came into force. In view of Section 14(1) of the Act she became absolute owner of the property of her husband. While continuing as absolute owner, she alienated properties. Even if she would not have alienated any property, she could not have been divested of those properties as the same vested in her absolutely and by adoption, plaintiff has no right to divest her in view of clear language of Section 12(c) of the Hindu Adoption and Maintenance Act.

7. Mr. Misra made an attempt to distinguish the decision reported in AIR 1970 SC 1730 (*supra*) by submitting that in that case adoption was prior to coming into force of that Act and Supreme Court had decided the question by referring to

Sections 4 and 14 of the Hindu Succession Act. It had not considered Section 12 of the Hindu Adoption and Maintenance Act. Though submission of Mr. Misra finds some support from a decision of Bombay High Court, in a later decision of Full Bench of Bombay High Court reported in AIR 1981 Bom 115 (Kesharbai Jagannath Gujar v. State of Maharashtra). Decision of Supreme Court has been considered in context of Section 12(c) and has been followed by this Court in ILR (1979) 1 Cut 437 : AIR 1979 NOC 100 (Kamali Dibya v. Sadasiva Moha-patra).

8. In result, there is no merit in this appeal which is accordingly, dismissed. There shall be no order as to costs.