

(1977) 03 OHC CK 0013

In the Orissa High Court

Case No : Second Appeal No's. 441 of 1973 and 5 of 1974

Biswanath Panda and Others

APPELLANT

Vs

Dr. Lokanath Panda

RESPONDENT

Date of Decision : 15-03-1977

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9
Hindu Succession Act, 1956 — Section 6

Citation : AIR 1977 Ori 170 : (1977) 44 CLT 273

Hon'ble Judges : N.K. Das, J

Bench : Single Bench

Advocate : R. Ch. Mohanty, P.K. Patnaik, B. Ch. Mohanty, D. Mohanty and J.P. Das, for the Appellant; A.K. Padhi and R.C. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

1. Both the appeals arise out of the same judgment. Plaintiffs are appellants in both the appeals which were heard analogous.

Parties to the suit belong to the same family, Krushna Chandra Samantaray had three sons -- Laxman (who is dead), Biswanath (plaintiff No. 1) and Lokanath (defendant), Plaintiffs Nos. 2 and 3 are sons of Laxman.

2. The case of the plaintiffs is that while their family was joint. Laxman was the Sarbarakar and defendant was serving as a doctor at Narsinghpur. Plaintiff No. 1 was looking after the properties. The properties were acquired out of the joint efforts of the brothers and, after amicable partition, the brothers were possessing separate properties. On 19-3-1935, the defendant made an application on behalf of all the three brothers to the Raja Saheb of Narasinghpur for settlement of the lands described in Schedule B of the plaint and the Raja Saheb settled the lands in favour of the three brothers on 13-5-1935. These lands, like all other lands acquired by the brothers either individually or collectively, were being always treated and enjoyed as part of the joint family property and were blended with the joint family property. In the year 1946 or

1947, there was an amicable partition between the three brothers, in which the lands described in Schedule B were also divided and out of those plaintiff No. 1 got the lands described in Schedule B/1, father of plaintiffs 2 and 3 got Schedule B/2 lands and defendant got Schedule B/3 lands. When defendant tried to claim the entire Schedule B property as his exclusive property and applied to the revenue authorities for settlement of the same in his favour exclusively, the revenue authorities though they had no jurisdiction to entertain the application, settled the lands in favour of the defendant. Alternatively, it is alleged that even if the settlement is assumed to be valid, it should be deemed to be in favour of the entire body of co-sharers. Accordingly, the plaintiffs claim declaration of their title and confirmation of their possession over Schedule B/1 and B/2 lands and for declaration of joint title and confirmation of their joint possession along with the defendant over the entire B schedule lands.

Defendant has denied the claim of the plaintiffs and has claimed his exclusive title and possession over the entire B schedule lands. According to him, these lands were originally Baidya Jagir lands of one Krupasindhu Mohapatra, who relinquished the same in favour of the defendant. The Ruler of Narasinghpur settled these lands only in favour of the defendant and on rent free basis. It is also contended that the B schedule lands were Anugrahi Jagir lands and when Jagir was abolished, the lands were settled in favour of the defendant, after rejecting the claim of the plaintiffs. It is alleged that the suit is barred u/s 39 of the Orissa Estates Abolition Act. The defendant also contends that the suit is bad for non-joinder of necessary parties, as all the legal representatives of Laxman have not been impleaded in the suit, even though Laxman died in 1968.

3. The trial court held that though B, schedule lands were the self-acquired property of the defendant, yet this property was being enjoyed jointly by all the three branches of the family and was also partitioned between them, in which each branch was allotted a share and possessed the same. He further found that the suit was bad for non-joinder of necessary parties and was also barred u/s 39 of the Orissa Estates Abolition Act. On these findings, he dismissed the suit, but at the same time he passed an order that the receiver who had been appointed in the suit was to distribute the usufructs of the suit land in his possession in three shares among the three branches on the basis of their prior partition,

4. Two appeals were preferred against this judgment--one against the order of dismissal of the suit and the other against the order directing the receiver to distribute the usufructs. The lower appellate court held that though the property is the self-acquired property of the defendant, yet the trial court has not given any finding as to the question of blending which necessarily arises in this litigation. But he dismissed the suit and upheld the finding of the court below that the suit was bad for non-joinder of necessary parties. It was further held that the suit was not hit by the provisions of Section 39 of the Orissa Estates Abolition Act. Ultimately, he dismissed the appeal of the plaintiffs and allowed the appeal of the defendant setting aside the order of direction to the receiver to

distribute the usufructs of B schedule lands. Second Appeal No. 441 of 1973 is directed against the judgment in the main suit and Second Appeal No. 5 of 1974 is directed against the order setting aside the direction to the receiver to distribute the usufructs.

5. A preliminary objection was taken by the respondent that the suit is not maintainable for absence of necessary parties. It is not disputed that Laxman died after the passing of the Hindu Succession Act of 1956 and he has left two daughters, namely Rama and Lalita, and also Pramila, Sarala and Prafulla who are daughters and son of the pre-deceased daughter Uma. In para 1 of the plaint, it is stated that the plaintiffs are suing as the representatives of their respective branches and defendant is being sued as the representative and Karta of his branch. In para 2 of the plaint, it is stated that the properties of the family are now in separate possession of the parties after amicable partition. In para 6, it is also stated that in the year 1946-47 there was an amicable partition between the sons of Krushna Chandra Samantaray and the property described in Schedule B of the plaint was also partitioned along with other properties among the brothers. From out of B schedule property, plaintiff No. 1 got the property described in Schedule B/1, father of plaintiffs Nos. 2 and 3 got the property described in Schedule B/2 and the rest of the property described in Schedule B/3 was allotted to the defendant. In para 3 of the written statement, it has been stated that Laxman died in 1968 leaving behind his two sons plaintiffs 2 and 3, and two daughters --Rama and Lalita, and three grandchildren -- Pramila, Sarala and Prafulla, through his pre-deceased daughter Uma. They are necessary parties to the suit and all of them have not joined as parties. Plaintiffs 2 and 3 having adverse interest to that of the grandchildren and daughters of Laxman, they can never represent them in the suit, nor any authority to that effect has been averred in the plaint. I have already stated that it is not disputed that Laxman died in 1968 and he has left behind the aforesaid heirs. In para 15 of the plaint, the prayer is for declaration of title of the. plaintiffs over B/1 and B/2 schedule lands and for confirmation of their possession over the same, and, in the alternative, for declaration of their joint title, in case Court does not accept the fact of partition. It is further prayed that the defendant be restrained from interfering with the possession of the plaintiffs over B/1 and B/2 schedule lands. Basing on these circumstances, it is contended by the defendant that the suit is not maintainable for nonjoinder of necessary parties.

6. In Kaliappa Nadar and Others Vs. Muthu Vijaya Thambayasami Chunnichi Naickar Avergal, , a Division Bench has held that it is an elementary principle of law that persons who have got joint right should join in an action to assert that right and it is not open to one or two persons who have a joint right along with others to bring a suit for the assertion of that right on behalf of all without joining them as defendants.

A Full Bench of the Kerala High Court in Venkiteswara Pai Rama Pai Vs. Luis, , was deciding a case where one of the defendants died intestate leaving behind

widow, sons and daughters and it was held that the failure to implead the legal representatives of such deceased defendant would result in partial abatement of the suit in respect of his share and interest in the suit property, because the proviso and explanation to Section 6 of the Hindu Succession Act are attracted and it must be deemed that there was a partition in the eye of law and the interest of the deceased devolved on his heirs. The partition in such a case is not a partition inter vivos attracting Section 52 of the T.P. Act. What is provided in Section 6 of the Hindu Succession Act is not a partition at all, but devolution of interest of a person in the property. The notional partition mentioned therein is solely for the purpose of ascertaining the extent of such interest as would be the subject-matter of the devolution when the deceased Hindu died undivided from his coparceners.

The case of Narayan Prasad Ruia Vs. Mutuni Kohain and Another, was of course a suit for eviction, but it has been held therein that when Section 6 of the Hindu Succession Act read with explanation thereto was attracted, the very nexus of the joint family, was gone and the Karta could not represent his deceased son's mother and wife on partition,

In Bhanwarlal Vs. Bhulibai and Others, , it is held that when death of a party occurs subsequent to the commencement of the Hindu Succession Act, the mother of a male coparcener of a joint Hindu family cannot be said to represent the legal representatives of her son In this connection, it is also asserted that it is not a case that the plaintiffs have substituted the legal representatives of a deceased defendant and had made bona fide enquiries about the names of the legal representatives, but in spite of such bona fide enquiries, they could find out only some persons. Had it been a case like that, there would have been some scope for the plaintiffs to say that in spite of bona fide enquiries they were able to know only some of the legal representatives. But from the beginning it has been asserted that there are other heirs of Laxman and this fact is also not disputed. Plaintiffs have been well aware that those heirs are still alive. To the above effect, is the decision of this Court in Brahmananda Majhi v. Gopal Padhan 42 (1976) CLT 760. It has been observed in the aforesaid decision that the legal requirement seems to be that all legal representatives should be brought on record. The only exception is in the case where notwithstanding the bona fide and legitimate enquiries or on account of some bona fide doubts a few of the legal representatives are left out and thus those on the record are said to represent the estate appropriately. Where, however, the petitioners knew who all the legal representatives of the deceased were, but omitted to implead some, and their assertion is that all legal representatives have been impleaded, the doctrine of substantial representation cannot be invoked and the conduct of the defendants does not entitle them to fall back upon such doctrine. In Allam Gangadhara Rao Vs. Gollapalli Gangarao, , it has been held that even in the case of persons jointly entitled to any relief, the language of Rule 1 of Order 1 C.P.C. says that all such persons may be joined in one suit, either as plaintiffs or defendants. The reason is that such persons together represent a single and

indivisible right which cannot be adjudicated upon and no effective decree can be passed by the Court in absence of such persons. In *Aswini Kumar Roy and Another Vs. Kshitish Chandra Sen Gupta and Others*, , which was a case for declaration of title and recovery of possession, it was held that the suit becomes incompetent if some of the co-owners are not impleaded as parties. In the case of *Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another*, , a dispute arose relating to the property purchased by the wife with money gifted by the husband in a suit by daughter to recover property from beneficiary under will of father. The brothers were not impleaded as parties. It was held that the suit was incompetent for non-joinder of necessary parties.

7. It Is contended on behalf of the appellants that some of the aforesaid decisions relate to a claim for recovery of possession and in those cases all the co-sharers should have been made parties.

In *Silla Chandrasekharam Vs. Rahas Mahapatrani and Another*, , this Court has held that, normally, decision in a suit or appeal is binding upon the parties to such suit or appeal. The decision, however, would be binding on the legal representatives of the deceased party if there has been bona fide substitution of the deceased represented by some heirs, but not the real heirs and there is no fraud or want of bona fides in the matter of substitution, and the estate of the deceased would be bound in the hands of the real heirs. This rule will of course not apply to cases where there has been fraud or collusion between the creditor and the heir or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absentee heir had a special defence which was not and could not be tried in the earlier proceeding This case does not relate to effect of Section 6 of the Hindu Succession Act, if a party dies after passing of the Act.

Reliance is placed on the decisions in *Devidas and Others Vs. Shrishailappa and Others*, and *Dolai Molliko and Others Vs. Krushna Chandra Patnaik and Others*, . It is argued by the appellants that when plaintiffs 2 and 3 have represented the branch of Laxman relating to his one-third share, the suit is not incompetent for non-joinder of other heirs of Laxman. In the instant case, two daughters of Laxman are admittedly married and they are in their respective husbands' places, and the other daughter Uma who was also married, predeceased Laxman. She has left her heirs. The two daughters and children of the predeceased daughter are not members of the joint family of Laxman or his brothers. By virtue of Section 6 of the Hindu Succession Act, they have acquired title to the property having interest which is already asserted. The tone of para-1 of the plaint does not show that plaintiffs 2 and 3 have averred that they are representing all the heirs of Laxman. On the other hand, the assertion in that paragraph shows that only those two plaintiffs represent, the interest of Laxman. This would mean that they are denying these daughters and heirs of the predeceased daughter having any interest in the property left by Laxman. Therefore, the decisions relied on by the appellants have no application to the

present case. The decisions relied on by the respondent clearly establish that the daughters and heirs of the pre-deceased daughter of Laxman are necessary parties and in their absence the suit is not maintainable.

8. In view of the aforesaid findings, I hold that the Court below has correctly come to the conclusion that the suit must fail for non-joinder of necessary parties. Even though such a stand was taken from the beginning in the written statement, the plaintiffs did not care to implead the other heirs of Laxman as parties. This is one of the circumstances also which lends support to the fact that plaintiffs 2 and 3 are claiming as if they are the only heirs of Laxman.

9. It is admitted by both parties that the suit is not hit by Section 39 of the Orissa Estates Abolition Act. In view of the concurrent finding of both the courts below that the property is the self-acquired property of the defendant, this fact is not challenged in this Court. But it is contended that as the trial court has not given any finding as to blending of this property with other joint family properties, the suit is to be remanded to the lower court for giving a finding on that score. The lower appellate court has rightly held that when the suit is not maintainable for want of necessary parties, it is unnecessary to remand the suit for giving any finding on the question of blending.

10. As I have already held that the suit is not maintainable, findings on other points would be academic and, as such, there is no necessity for giving any finding on other points. Second Appeal No. 441/73 is to be dismissed. In view of the aforesaid findings, the other appeal, i.e. Second Appeal No. 5/74 is also to be dismissed.

11. In the result, both the appeals are dismissed, but in the circumstances of the case, there will be no order as to costs.