
(1991) 06 OHC CK 0006

In the Orissa High Court

Case No : Original Jurisdiction Case No. 3522 of 1989

Brajabandhu Sahu and Others

APPELLANT

Vs

Krupasindhu Sahu and Others

RESPONDENT

Date of Decision : 18-06-1991

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (1991) 2 OLR 121

Hon'ble Judges : B.L. Hansaria, C.J.;B.N. Dash, J

Bench : Division Bench

Advocate : Ganeswar Rath, P.K. Mohapatra and A.K. Patnaik, for the Appellant; Addl. Standing Counsel for O. Ps. 2 to 5, B.L.N. Swamy, B.V.S. Das and R.K. Rath for O.P. No. 1, for the Respondent

Final Decision : Allowed

Judgement

B.N. Dash, J.—This writ application under Arts. 226 and 227 of the Constitution is for quashing Annexure-3 whereby the Commissioner of Consolidation has directed to record the disputed lands measuring Ac. 1. 88 1/2 decimals in the name of the present opp. party No. 1 and petitioners -in the Land Register prepared u/s 6 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short "the Consolidation Act").

2. One Shyamasundar Sahu died in 1976 leaving behind three sons namely, Brajibandhu (petitioner-1), Krupasindhu (O. P. 1) and Dinabandhu (petitioner-2), Radhanuni and Sundarmani were respectively the wives of Brajabandhu and Krupasindhu and they are dead, whereas Kanakamani (petitioner-3) is the wife of Dinabandhu. Admittedly, while the three- brother's were joint they purchased lands separately either in their mames or in the names of their wives. The disputed lands measuring Ac. 1.88 1/2 decimals were acquired either in the name of Brajabandhu or in the name of Dinabandhu or in the names of their wives by five registered sale deeds of the years 1953, 1969, 1976, 1977, and 1982. After the purchases, the disputed lands were recorded in the names of the

purchasers separately in the settlement operation. Similarly, Krupasindhu and his wife Sundarmani got the lands purchased in their names separately recorded in the settlement as well as. consolidation operations.

3. After notification u/s 3 of the Consolidation Act was made by the State Government in the village where the disputed lands situate, the consolidation operations commenced and in course of such operations when Land Register was maintained, the disputed lands were recorded separately in the names of the purchasers. Not being able to file objection to such entries in the Land Register u/s 9, Krupasindhu filed an application before the Director of Consolidation under Sec, 37(2) of the Consolidation Act which was registered as Revision Case No. 387 of 1985. The Director of Consolidation allowed the revision and remanded the matter for disposal according to law and after such remand Misc. Case No. 47 of 1985 was registered by the Consolidation Officer. On an examination of the evidence led before him, the Consolidation Officer found no justification in the claim of the present opp. party No. 1 that the disputed lands were the joint family properties entitling him to a share and accordingly, he rejected the Misc. Case by his order in Annexure-1. Being, aggrieved by such order, the present opp. party No. 1 filed appeal No. 58 of 1987 before the Director of Consolidation but without success. The judgment of the appellate authority is Annexure-2. The appellate judgment was challenged in Consolidation Revision No. 1124 of 1987. The revisional authority, however, while agreeing with the concurrent finding of the Consolidation Officer and Director of Consolidation that the disputed lands were the self-acquired properties of the present petitioners-, came to hold that since the purchasers had thrown the disputed lands to the common botch pot the disputed lands became joint family properties and, therefore, the present opp party No. 1 had a share therein. Accordingly, by his impugned order (Annexure-3), he allowed the revision directing to record the disputed lands jointly in the name- of the petitioners and opp. party No, 1. This order has been assailed in this writ application as stated earlier,

4. Mr. G. Rath, learned counsel for the petitioners has contended that the findings of the Commissioner of Consolidation that the disputed lands became joint family properties having been thrown to the common hotchh pot by purchasers and as such, opp party No. 1 his a share therein is liable to be set side, being untenable in law. The finding of the Commissioner and the reasons for such a finding may be usefully quoted as under :

"...From the evidence it is clear that the father of the parties died subsequent to acquisition. It further reveals that the further was the custodian of the suit property till his death. It is not the case of O.Ps. that they were in separate cultivation of the suit land on their own account. Rather it has been stated by the O.P. Nos 1 and 2 that they were maintaining the family. It is also evident that the income from the suit lands was enjoyed by the entire family member. The O. Ps. have not categorically shown about the maintenance of their separate income. From these circumstances I am of the view that although the suit lands were the

separate property of the O. Ps. the same were blended with the joint family property and have acquired the character of joint family property.

7. Since it is held that the suit lands are the joint family property, the petitioner is entitled to a share therein as a joint family member."

5. It appears that the Commissioner has held the disputed lands of the petitioners as joint family properties merely on the ground that all the joint family members were enjoying the usufructs of these lands and the petitioners were not maintaining any account of the disputed lands separately. But the question arises, whether the self-acquired property of a member of a joint family will become a joint family property, if that member does not maintain separate account for the income from that land and if all members of the family of the usufructs thereof. Such a point came up for consideration before the Apex Court in (G. Narayana Raju Vs. G. Chamaraju and Others, where it has been held as under :

"It is a well-established doctrine of Hindu Law that property which was originally self-acquired may become joint . property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims upto it. But the question whether the coparcener has done v so of not is entirely a question of fact to be decided in the light of all the circumstances of the case. It. must be established that there was a clear intention on the part of the coparcener to waive his separate rights and such an intention will not be inferred from acts which may have been done from kindness or affection. The important point to keep in mind is that the separate property of a Hindu coparcener ceases to be his separate property and acquires the characteristics of his joint family or ancestral property, not by mere, act of physical mixing with his joint family or ancestral property, but by his own volition and intention, by his waiving or surrendering his special right in it as separate property. Such intention can be discovered only from his words or from his acts and conduct."

Similar view has also been taken by the Apex Court later in K.V. Narayanan Vs. K.V. Ranganandhan and Others, and also by this Court in Ashutosh Rath v. Vyayaraju Badaresnarayan, Vol. 30(1972) CLT 857 .

6. It is abundantly clear from the aforesaid decisions that the self-acquired property of-a member of a joint Hindu family will never become a joint family property if that member does not maintain separate account for the income from that land and if all the members of the joint family enjoy the usufructs thereof. In order to make a self-acquired property a joint family property it must be shown that the owner of such self-acquired property has waived or surrendered his special right in that property by his own volition and intention. There is no finding by the Commissioner that the present petitioners had abandoned their claim or surrendered their special rights over the disputed lands when the disputed lands were being enjoyed by them. In the absence of such finding, the answer to the question posed in the preceding paragraph must be answered in

the negative. We, accordingly, hold that the disputed lands which were the separate properties of the petitioners have not acquired the character of joint family property merely for the reasons given by the Commissioner and as such, his order in Annexure-34s bound to be set aside.

7. Mr. B. L. N. Swamy, learned counsel for the opp. party No. 1 has contended that the finding of the authorities below that the disputed lands are the self-acquired properties of the petitioner is liable to be set aside, being untenable in law. His argument is that when the joint family was possessed of sufficient nucleus when the acquisitions were made, the authorities below should have held the disputed lands to be joint family properties. As to this, the contention of Mr. Rath for the petitioners is that the finding of the authorities slow on this score being on a question of fact, this Court sitting in writ jurisdiction should not alter the same.

In *Mrs Labhkuwar Bhagwani Shaha and Others Vs. Janardhan Mahadeo Kalan and Another*, , it has been held by the Apex Court that a High Court under Art. 227 of the Constitution cannot interfere with the finding of fact recorded by the lower Courts. Relying on such decision, we hold that the question whether an acquisition in the name of a member of a joint Hindu family is his self-acquisition or joint family acquisition is a question of fact and when all the three authorities below have recorded a finding that the disputed lands were the self-acquired properties of the petitioners, the same is not liable to be disturbed by this Court sitting in writ jurisdiction.

8. An examination of the merit of the contention also does not help the opp. party No. 1, The law as to how and when an acquisition in the name of a member of the joint family becomes joint family property is well-settled Where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from, which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint Could not have been acquired. Whether the evidence adduced by a party is sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of fact depending on the nature and extent of the nucleus. An important element for consideration is the income which the nucleus yielded. In the present case, the opp. party No. 1 claimed before the authorities below that the. joint family was possessed of Ac. 3.50 decimals of land which included a Bagayat (a fruit archard), whereas the petitioners claimed that the joint family was possessed of only 6 gunths (24 decimals) of paddy land and 6 gunths.(24 decimals) of Bagayat land. It is pertinent to note that before the authorities below no evidence was led to show that the said joint property, be it 48 decimals or Ac. 3.50 decimals, was yielding

surplus income from out of which the first acquisition in 1953 in particular and the later acquisitions were made. That being so, the concurrent finding of the authorities below as to the character of the disputed lands cannot be disturbed. It is, thus, seen that in either view of the matter the contention raised on behalf of the opp. party No. 1 is unacceptable and accordingly we reject the same.

9. In view of the aforesaid discussions,, we allow the writ application and quash Annexure-1. There will be, however, no order as to costs.

B.L. Hansaria, C.J.

5. I agree.