
(1967) 11 OHC CK 0001

In the Orissa High Court

Case No : Second Appeal No. 405 of 1964

Brundaban Moharana

APPELLANT

Vs

Dinabandhn Moharana and Others

RESPONDENT

Date of Decision : 14-11-1967

Acts Referred:

Citation : (1968) 34 CLT 26

Hon'ble Judges : A. Misra, J

Bench : Single Bench

Advocate : B.K. Pal, A. Mohanty and B. Pal, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

A. Misra, J.—Plaintiff is the Appellant before this Court. One Madhu Mohapatra had three SODA, Gouranga., Lokenath and Basu. These three brothers were divided. Basu had three sons, Kalu, Dinabandhu and Debanando. Dinabandhu is Defendant No. 1 and three of his sons are Defendants Nos. 2 to 4. Defendants Nos. 5 and 6 are widows of Kalu and Debanando respectively. The properties described in Schedules A, B, and C belonged to late Lokenath. According to Plaintiff, Dinabandhu (D/1) adopted him before the birth of Defendants Nos. 2 to 4. Lokenath being issueless executed a will on 19-5-1941 bequeathing all his proper ties to the Plaintiff, Dinabandhu (D/1) and Durga Charan (D/2) to be enjoyed in equal shares. Plaintiff filed the present suit claiming partition and allotment of 1/3rd share in the properties left by Lokenath which he claims to be entitled under the will. Defendants Nos. 1 to 4 who contested denied execution of the will and pleaded that even if such a will was executed by Lokenath he subsequently revoked it by destroying the same along with some papers. Defendant No. 1 claims to be the adopted son of Lokenath. As the properties in suit constituted the joint family assets of Lokenath, he had no power of disposition over them by will and that Defendant No. 1 as adopted son alone is entitled to the said properties. The other Defendants are the transferees for

consideration from Defendant No. 1 and they allege that their transfers were for consideration and legal necessities and in other respects they support Defendants Nos. 1 to 4.

2. The subject-matter of the suit is described in three Schedules A, B, and C annexed to the plaint. Schedule A consists of the landed property; Schedule B contains the house and Schedule C the moveables of Lokenath. In the trial Court, Plaintiff gave up his claim in respect of moveables covered by Schedule C. The trial Court decreed the suit in part holding that Plaintiff is entitled to 1/3rd share in Schedule A properties except item No. 21 together with mesne profits commencing from the year 1950. It disallowed the claim of Plaintiff in respect of Item 21 of Schedule A and the house contained in Schedule B on the ground that Lokenath had no power of disposition over these items. Defendants No. 1 to 4 preferred an appeal challenging the judgment and decree of the trial Court. The lower appellate Court allowed the appeal in part by decreeing the claim of Plaintiff only in respect of properties in Schedule A covered by the sale deeds (Ext. 7 to 11 and 13 to 16). Plaintiff has preferred the present appeal against disallowance of part of his claim by the lower appellate Court. None of the Respondents has appeared in this appeal.

3. The concurrent findings of both the Courts below are that Defendant No. 1 is the adopted son of Lokenath; that Lokenath executed a will on 19-5-1941 bequeathing all his properties in favour of Plaintiff, Defendant No. 1 and Defendant No. 2 to be enjoyed in equal shares and that the will was genuine, was not revoked and given effect to. These concurrent findings are not challenged in this appeal.

4. The finding of the trial Court that Plaintiff acquired no right in item 21 of Schedule A or the house described in Schedule B of the plaint, as Lokenath had no power of disposition over the same, was not challenged by the Plaintiff in the lower appellate Court and to that extent it has become conclusive. The only point urged by Mr. Pal, learned Counsel appearing for the Appellant is that the lower appellate Court committed a grave error in disallowing Plaintiff's claim in respect of certain items of properties in Schedule A other than those covered by the sale deeds (Exs. 7 to 11 and 13 to 16) by wrongly throwing the onus on the Plaintiff to prove that they were the self-acquisition of Lokenath and not part of the joint family properties. There appears to be considerable force in this contention.

5. Prior to the coming into force of the Hindu succession Act of 1956, it was a rule firmly established that a Hindu was not competent to bequeath by will, property which he could not have alienated by gift inter vivos, and therefore, the will executed by Lokenath will be valid only in respect of items of properties which were his separate or self-acquired properties. According to the Plaintiff, Lokenath got only about six bharans, i.e. 2 and odd acres of land constituting item 21 of Schedule A in the partition between himself and his brothers and the rest of the properties had been acquired by him. On the other hand, Defendants' case is that Lokenath got about 6 acres of ancestral property in the partition

which constituted the nucleus for acquisition of other properties subsequently by Lokenath. The trial Court found that the joint family property which Lokenath got to his share was only 2 and odd acres. Mr. Pal appearing for the Appellant urges that the lower appellate Court committed an error of record in para 19 of its judgment by observing that it agrees with the trial Court that even if Lokenath got 6 acres and odd of ancestral properties on partition, the income therefrom was not sufficient to acquire the other properties. It was pointed out that the trial Court gave a categorical finding that Lokenath got only 2 acres and odd of ancestral properties on partition and not 6 acres, as stated by the lower appellate Court. This error of record is not very material, in view of the concurrent findings that whatever be the extent of the joint family properties Lokenath got on partition, the same could not have constituted sufficient nucleus for acquisition of other properties. In view of the above concurrent findings, the point for consideration is whether the lower appellate Court's finding that only properties covered by the sale deeds (Exs. 7 to 11 and 13 to 16) could be held as self-acquisition of Lokenath can be sustained. This finding has been given by the lower appellate Court on the ground that Plaintiff has failed to prove that the rest of the properties were self-acquisitions. It is argued by Mr. Pal that as the finding has been given by the lower appellate Court as a result of erroneously throwing the onus on the Plaintiff, the same cannot be maintained.

6. It is a settled position of law that there is no presumption that a joint family possesses joint family properties. To render any property joint, it is equally settled that the burden lies on the party asserting the same either to prove that the particular item or items were joint family properties or that the family was possessed of sufficient nucleus with the income of which the properties could have been acquired or from which the presumption could be drawn that all the properties possessed by the family are joint properties. In the decision reported in *Mst. Rukhmabai Vs. Lala Laxminarayan and Others*, , the principle of law has been enunciated as follows:

The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.

To the same effect is the decision reported in *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, where it has been held that proof of existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. In the present case, in view of the concurrent finding that the extent of joint family property which Lokenath got by partition did not constitute a sufficient nucleus for acquisition of other properties, there cannot be any presumption that the properties Standing in the

name of Lokenath are joint family properties. Necessarily, the initial onus does not lie on the Plaintiff to prove that any particular item of property was self-acquisition of Lokenath. Therefore, the lower appellate Court erred in its approach to the question by throwing the initial onus on the Plaintiff by saying that the onus lies on him to show as to how much of Lokenath's property was his self-acquired or separate property. When the Defendants claim various items of Schedule A as joint family properties, the onus is on, them to establish the same. Thus, an error of law was committed by the lower appellate Court in throwing the onus on the Plaintiff in this respect, and deciding the question by taking the view that Plaintiff has failed to discharge that onus in respect of properties other than those covered by Exs. 7 to 11 and 13 to 16. Though the Courts below observe that there is no definite or positive proof about the exact extent of properties which Lokenath got towards his share in the partition from out of the ancestral properties, the trial Court has, on the evidence, found that only item 21 of Schedule A was proved to be the share in the properties which Lokenath got on such partition. The lower appellate Court has not given any definite finding on this question, but has decided the issue by stating that Plaintiff has failed to prove which items were self-acquired, The onus being on the party asserting any item of property to be joint family property to establish that fact; and the Defendants having failed to prove that properties standing in the name of Lokenath other than those covered by item 21 of Schedule A appertain to .the share of the ancestral property which he got it follows that the Test of the properties were acquired, by Lokenath after partition., and when it has been found that there was not sufficient nucleus to acquire these properties and Lokenath did not blend them with the joint family properties, it follows that all those properties must be separate or self-acquisitions of Lokenath over which he had power of disposition by will. That, Lokenath had other self- acquisitions, besides those covered by Exs. 7 to 11 and 13 to 16. also finds support from the fact that Ex. 6 shows further acquisitions by him. The lower appellate Court has ignored this acquisition on the ground that Ex. 6 does not show the exact extent which was acquired under the same.

7. Considering all these circumstances, I agree with the learned Counsel for Appellant that the lower appellate Court erred in law by throwing the onus of proof on the Plaintiff and also as a result of error of record in respect of the extent which Lokenath got in partition. The onus being on Defendants Nos. 1 to 4 to establish which items of property constituted joint family asset of Lokenath, which is limited to the share which he got in partition, and they having failed to discharge that onus, it must be held that except item 21 of Schedule A the rest of the properties of that Schedule were self-acquisitions of Lokenath over which he had the power of disposition by Will.

8. In the result, I allow this appeal ex-parte with costs and set aside the judgment and decree of the lower appellate Court. The judgment and decree of the trial Court are hereby confirmed.