

**(1950) 12 OHC CK 0002**  
**In the Orissa High Court**  
**Case No : S.A. No. 296 of 1947**

|                                                         |            |
|---------------------------------------------------------|------------|
| Chandramoni Badhei and after him Chanda Bewa and Others | APPELLANT  |
| Vs                                                      |            |
| Kshetramoni Dei and Others                              | RESPONDENT |

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**Date of Decision :** 19-12-1950

**Acts Referred:**

Orissa Tenancy Act, 1913 — Section 116, 166

**Citation :** (1951) 17 CLT 103

**Hon'ble Judges :** Panigrahi, J; Das, J

**Bench :** Division Bench

**Advocate :** R.N. Sinha and S.N. Sen Gupta, for the Appellant; S.K. De and M.M. Das, for the Respondent

**Final Decision :** Allowed

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## Judgement

Panigrahi, J.—The Plaintiffs who are the Appellants are the son and grandsons of one Nitai Badhei who had a brother named Baja. Defendants 4, 5 and 6 are the sons of Baja. On -4-1942 Defendants 4 and 5 sold the suit property, comprising 5 annas 6 pies interest in a mokadami tenure, by a sale deed Ext, A, to Defendant 1. Defendant 2 is the husband of Defendant 1 and Defendant 3 is the father of Defendant 2.

2. The Plaintiffs' case is that the suit property was purchased by Nitai by two sale deeds, Exts. 1 & 1-A, dated 7-1-1898 and 4-5-1911 respectively, out of his own earnings and that Nitai and his brother Baja separated in the year 1913 and that in the partition that ensued the suit property was allotted exclusively to the share of Nitai and that Baja had relinquished his claim to any share therein as some other properties were given to him in exchange for his share in the suit property. The suit property has been recorded in the sole name of Nitai and the Plaintiffs allege that they had been in exclusive possession of the same throughout in their own right and that, accordingly, the alienation made by the Defendants 4 and 5 in favour of Defendant 1 under Ext. A was void. The Defendants' case, on the other hand, is that the suit property constituted the

joint property of the family consisting of Nitai & his brother Baja, that the lands had never been partitioned at any time, as alleged by the Plaintiffs and that Defendants 4, 5 and 6 having succeeded to an undivided half share in the property are entitled to that share and that consequently the alienation made by them in favour of Defendant was valid.

3. The Trial Court found that the property belonged exclusively to the Plaintiffs ancestors and that he was in exclusive possession of the same throughout and accordingly gave a decree to the Plaintiffs., On appeal the learned Subordinate Judge set aside this finding of the Trial Court and held that as it had not been established that the properties were the self-acquired properties of Nitai, they must be held to be the joint family properties in which Baja had an undivided half share. In this view of the matter he dismissed the Plaintiffs' suit. It is against this judgment that the Plaintiffs have come up in second appeal.

4. It is urged on behalf of the Appellants that the "finding of the lower appellate court proceeds upon a wrong assumption of the legal principles to be applied to the facts of this case. It is contended that there can be no presumption that any particular item of property purchased by a member of a Hindu family must be deemed to be joint family property unless it is shown that it has been acquired with joint family funds or that there was some nucleus of such joint family property from which the acquisition could have taken place. Our attention has been drawn to the latest Privy Council decision reported in *Randhi Appalaswamy v. Randhi Suryanarayanamurthy* 1947 P.C. 189 where it was laid down that proof of the existence of a joint family does not lead to a presumption that property held by any member of the family is joint and the burden rests upon anyone asserting that any item of property is joint, to establish that fact. But where it is established 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 burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.

5. The evidence adduced in this case is mostly documentary. As already pointed out above both the sale deeds Exts. 1 and 1-A stand in the name of Nitai. The Plaintiffs have relied also on an order of the Settlement Officer in proceedings u/s 116 of the Orissa Tenancy Act instituted in the year 1927. This would show that the suit property was recorded in the names of both the brothers in the preliminary stage but On objection being taken by Nitai, Baja's name was removed and the entire property came to be recorded in the sale name of Nitai. Baja claimed these properties to be joint. It was contended on behalf of Nitai that Baja had relinquished his interest in the property and had gone away to another village after taking his share. In these proceedings Nitai asserted that there had in fact been a partition between him and Baja through a panchayat, that he took the entire suit property to himself and gave Baja, in lieu of his share, some money and some other property in a different village. Nitai also

relied upon an admission said to have been made by Baja in an earlier litigation wherein he admitted the fact that Nitai was possessed of some self-acquired properties in which Baja did not claim any share. Soon after the record of Nitai's name, Baja filed a partition suit in O.S. 26 of 1928 wherein the very same contentions were put forward on behalf of the parties. The learned Munsif who tried that suit gave a decree in favour of Baja holding that the earlier partition set up by Nitai had not been made out, but on appeal this order of the Munsif was set aside-though on a technical ground. It does not appear, however, that Baja took any steps to recover what he alleged to be his share, after the pronouncement of the judgment of the appellate court on 27-6-30. The alienation in favour of the first Defendant under Ext. A was made on 2-4-42, that is to say a short time before the 12 year limitation period was about to expire. The question that has been debated before us is whether the properties ever constituted the joint family property of the two brothers, and if so, whether Baja ever remained in possession of the same either in his own right or as a member of the joint family, at any time since the purchase of the property by Nitai under Exts.1 and 1-A. It was on the Defendants, who made the allegation, to establish affirmatively that there was in fact some nucleus of some joint family property from out of which the suit property could have been purchased by Nitai.

6. The Defendants have failed to show that there was any other property belonging to the joint family (except their dwelling house) in the year 1898, when Nitai made his purchase under Ext. 1. Mr. De, learned Counsel for the Respondents, very strenuously contended that there was in fact some joint family business and particularly drew our attention to a statement made by Plaintiff 2 who was examined as P. W. 1 in the course of his cross-examination that there was a shop belonging to the joint family which had been started about fifty years ago, that is to say, even before he was born. Neither Court attached any importance to this statement. Nor can we be persuaded that this statement, even if it be true, can be held to be sufficient evidence in proof of the fact that this shop business was of such a nature as to justify an inference that the suit properties could have been purchased from out of its income. The result therefore is that Baja had failed to prove his titles to and possession of the suit properties. In fact the Trial Court observes that all the witnesses examined by the Defendants seemed to be highly interested and appeared to be entirely untrustworthy. The lower appellate Court, without giving any reasons why their evidence should be accepted, casually remarked that there was some evidence on the side of the Defendants to the effect that there was some property belonging to the family. We think that the lower appellate Court was wrong in discarding the view of the Trial Court with regard to the reliability of the evidence adduced by the Defendants and in accepting that evidence for not very convincing reasons.

7. All the documentary evidence adduced in the case go to support the case of the Plaintiffs. The Settlement Record, the rent receipt; in token of the payment of rent relating to the suit property are in favour of the Plaintiffs; and their bhag

tenants have gone into the box and deposed that the rent was being paid to the Plaintiffs only. Much controversy was raised about the admissibility and the evidentiary value of Ext. 3, a certified copy of a petition filed by Baja in Original Suit No. 698 of 1913 launched by Nitai against Defdt. 3, the father-in-law of the present, alienee contesting Defendant 1. Nitai had filed that suit for possession of certain lands the nature of which is not clear from the record that is to say, whether the suit lands related to the present Mokadami or to some other property. The objection raised by the Defendant was to the frame of the suit being bad for non-inclusion of Baja as a party-Defendant. In his objection petition Baja contended that the property in that suit was the self-acquired property of Nitai and that he (Baja) had no interest therein. The evidentiary value of this document, standing by itself, would have been very slight. But it was filed and exhibited as Ext 3 in the partition suit between Baja and Nitai in Order 8. No. 1928; and there it appears to have been assumed by both parties, as well as by the Court, that the statement made by Baja in his petition of objection in O.S. 698 of 1913 amounted to an admission by Baja that the present suit properties were the self-acquisition of Nitai. The Trial Court did not attach any importance to this admission on the ground that Baja's statement did not contain any admission of any partition having taken place prior to the suit. But it is clear that Baja did make an admission that Nitai had some self-acquired properties; and it is neither party's case that Nitai had other self-acquired properties besides the suit property. In these circumstances, we feel inclined to accept the contention made on behalf of the Appellants that the statement made by Baja related to the suit mokadami and to no other property.

8. The lower appellate court freely used not only the findings of the learned Munsif who tried the earlier partition suit but also his observations, while cowing to his own conclusions in the present suit, although he was conscious of the fact that the judgment of the learned Munsif in the partition suit had been set aside on appeal. The fact that the judgment of the learned Munsif in that partition suit was set aside on appeal though on a technical ground, nevertheless concluded the matter finally, the result being that Baja did not succeed in getting a share in the suit property by means of that suit.

9. Having regard to the controversy between the parties in the proceedings u/s 166 of Orissa Tenancy Act followed up by the suit for partition and the subsequent dismissal of that suit, the Defendants can claim no interest in the suit property and it must be held that Nitai had exclusive title to the suit property and remained in exclusive possession thereof and that, accordingly, the Plaintiffs claiming from him are entitled to a decree. In the absence of any evidence pointing to the fact the Baja was also participating in the profits, even if he were not Actually in possession of the suit lands, the Defendants can claim no interest and even if they had any, they must be held to have lost it as admittedly this controversy started over 12. years ago. The learned Subordinate Judge was hardly right in his surmise that Baja might have received his share of the profits although he was living in a different village simply because the partition, as

alleged by the Plaintiffs, had not been affirmatively established. All the evidence points to the fact that Nitai had been in continuous possession of the suit property, whether it be as a result of the earlier partition or as a result of his assertion that the property was his own self-acquired property. Secondly it is to be noticed that Natai asserted his own title to the knowledge of Baja at least since 1927 when the settlement proceedings were in progress. Thirdly Baja attempted to establish his claim by a partition suit and failed. Lastly the oral evidence regarding possession and the documents showing payment of rent support the case of the Plaintiffs. There is no satisfactory or conclusive evidence on the side of the Defendants' case to support their case. We have accordingly no hesitation in holding that Baja had never been in possession of the suit properties, either actually or constructively and had lost his title thereto, if any, long prior to the sale deed in favour of Defendant 1.

10. The judgment of the Trial Court is correct and is restored and the judgment under appeal is set aside.

The appeal is allowed with costs.

Das, J.

11. I agree.