

(2003) 01 OHC CK 0063
In the Orissa High Court
Case No : First Appeal No. 394 of 1981

Christophar Oram and Others

APPELLANT

Vs

Julias Oram and Others

RESPONDENT

Date of Decision : 09-01-2003

Acts Referred:

Citation : (2003) 95 CLT 539

Hon'ble Judges : B. Panigrahi, J

Bench : Single Bench

Advocate : Indrajeet Mohanty and S.S. Hota, for the Appellant; B.P. Ray, for the Respondent

Final Decision : Dismissed

Judgement

B. Panigrahi, J.—This appeal is directed against the judgment and decree passed by the learned Subordinate Judge, Sundargarh (now Civil Judge, Senior Division) in T.S. No. 34 of 1977 decreeing the plaintiffs suit for partition.

2. The plaintiff-respondents have, inter alia, pleaded that their predecessor in interest, namely, Sukra Oram, had acquired some lands before the Mukherjee Settlement. After the death of Sukra Oram there was an amicable settlement among his four sons namely, Pujar Oram (appellants branch) Bhamba Oram, Karma Oram and Chamar Oram (plaintiff-respondents branch). In the said partition Pujar Oram and Chamar Oram decided to live jointly whereas the other two brothers, namely, Bhamba Oram and Karma Oram decided to live in joint mess and property. The lands covered in Khata No. 48 were alleged to have been cultivated jointly by Pujar Oram and Chamar Oram but few years after due to financial strengency Chamar Oram went to Assansol and also to Assam for his livelihood. It is further pleaded that Chamar Oram used to send money to his brother from which the lands under Khata No. 48 were considerably improved. After Chamar Oram returned from Assam he and his brother Pujar Oram continued in joint mess and stayed as before. But within a year or so, there was family dissension and unhappiness whereafter Chamar Oram decided to live in

separate mess, but the appellants" branch used to give some paddy for the maintenance of his family. The appellants" predecessor-in-interest, Pujar Oram, taking pity on the financial condition of Chamar Oram allowed to cultivate 0.03 acres of land. During the last settlement the properties covered under Schedules "A" to "C" were however recorded in the name of defendants separately notwithstanding objection raised by the plaintiffs. Therefore, the plaintiffs filed the suit for partition, separate possession and allotment of their share.

3. Defendants 1 to 5 filed a joint written statement alleging that the suit properties covered under Schedule "A" exclusively Belonged to their ancestor Pujar Oram, but Sukra Oram, father of Pujar Oram did not have any property and he died much before the Conolley Settlement (1906-10). After the death of Sukra Oram, Pujar Oram went to his father-in-law's house and his other three brothers were separate and acquired lands separately. "A" Schedule properties of Mukherjee Settlement under Khata No. 48 which corresponds to Khata No. 49 of Conolley Settlement had been acquired by Pujar Oram which originally belonged to one Gangu Oram. Likewise, the lands covered under Khata No. 67 of Mukherjee Settlement had never been possessed by the plaintiffs" branch at any time. But taking pity on the financial condition of Chamar Oram, his brother Pujar Oram in order to respect the verdict of the village Panchayati gave three Khandis of Padan lands as mentioned in Schedule "C" of the plaint. Similarly their other two brothers, namely, Bhamba and Karma gave 6 Khandis of seed capacity of paddy. But Chamar Oram in order to grab away the properties of Karma Oram fictitiously laid a claim over the properties of Karma Oram which resulted in filing of the suit being T.S. No. 62/1950 for declaration of his right, title interest and for recovery of possession. The said suit was, however, decreed against Chamar Oram. Since Sukra did not have any property of his own, the plaintiffs could not file a suit for partition only on the basis of entries made in the record of right of Mukherjee Settlement. The defendants have also taken a plea of ouster and acquisition of prescriptive title. Thus they claim that the plaintiffs should be non-suited.

4. Learned trial court on the basis of evidence placed before it held that the properties belonged to Sukra Oram had been divided into two equal parts and one such part was given to plaintiffs and the defendants" branch whereas the other was given to Bhamba Oram and Karma Oram. After such division. Pujar Oram and Chamar Oram continued to possess the land in tenancy in common. Accordingly the properties covered under Schedule "A" was recorded jointly in their favour. The learned Subordinate Judge also held that in the previous Mukherjee Settlement the lands covered under Khata No. 48 were jointly recorded in the name of the plaintiffs and defendants" branch. Similarly, the lands covered under Khata No. 67 were recorded in the name of other two branches Karma and Bhamba. The R.O.R. of those lands have been marked as Exts. 1 and 4. The trial Court has further observed that even assuming that the lands were purchased by Pujar Oram from Gangu in the State of jointness and Pujar Oram having thrown such property to the common stock and it was

accordingly blended along with other properties of the joint family, the plaintiffs' right for partition cannot, however be thwarted.

5. Mr. Misra, learned counsel appearing for the appellants had contended that there has been no presumption in law that merely existence of a joint family, it shall not raise a presumption that it owned the property. The initial burden to establish that the joint family had some nucleus is on the plaintiffs. In this case since the plaintiffs had utterly failed to establish their initial burden the approach of the trial court was therefore, erroneous. It has been further contended that there has been no evidence whatsoever to prove that Sukra Oram had no lands at the time of his death. Thus in the absence of any property left by Sukra Oram there can be no presumption that the properties covered under Khata No. 48 of Mukherjee Settlement belonged to joint family. Another contention that had been raised was that since undisputedly Pujar Oram was staying in his father-in-law's house and had acquired properties separately, there can be no presumption that he had thrown such properties to the common stock.

6. In course of argument he also laid stress on the deposition of Chamar Oram, the predecessor in interest in T.S. No 62/50 where he himself had claimed that the properties belonging to the parties had already been partitioned. In such event, there was no scope for his successor in interest to file a fresh suit claiming partition. It has been also high-lighted that during the current settlement, on their own showing the names of the plaintiffs in respect of separate possession of the land held by them was recorded. Therefore, it is not open to them to file a suit for partition suppressing the said statement of fact.

7. Mr. Ray, learned counsel appearing for the plaintiff-respondents while repelling the appellants, contention has invited my attention that it is true that while Pujar Oram was in his father-in-law's house the properties were acquired, but at that time Sukra Oram was living. There has been admittedly no document to establish that the properties were purchased from Gangu. It was brought to my notice that D.W. 3 in his deposition has unequivocally admitted that Chamar while in Assam had contributed some money for improvement of the land. Had the lands covered under Khata No. 48 not been treated as joint family property, there was no occasion for Chamar for making such contribution for improvement of those lands. It is true that Karma Oram filed a suit in T.S. No. 62/50 against Chamar Oram and in the aforesaid suit the question of partition was incidentally discussed, but that has no bearing to decide the present dispute inasmuch as in the earlier suit the question of partition was between Karma and Bhamba on one hand and Pujar Oram and Chamar Oram on the other. In the aforesaid judgment there was no clear finding with regard to the partition of the properties belonging to Pujar Oram and Chamar Oram. The statement of Chamar in T.S. No. 62/50 filed by the defendants does not in any way come to their rescue since such statement could only be used to decide controversy in the earlier suit, but not in the present suit. It has been further argued that the defendants branch were not parties in the earlier suit. Therefore, they cannot take advantage of the

statement made by Chamar Oram.

8. In the current settlement, it is indubitably true that the lands covered in Schedule "C" was recorded in the name of the plaintiffs" branch separately. That was the cause for which they filed the present suit for partition and separate possession since the other lands covered under "A" Schedule have been left out to be recorded jointly. Even in the statement made by plaintiff No. 1 for recording a portion of the land in his favour the other plaintiffs cannot be deprived of their right for partition. Plaintiff No. 1 cannot act as agent on behalf of other co-sharers. It was also strongly urged that the statement alleged to have been made by plaintiff No. 1 would not unequivocally establish disowning their right for partition over other properties covered under Schedule "A".

9. There has been no dispute with regard to the genealogy described in the trial court's judgment. The parties are Oram by caste, but converted to Christianity. At the advent of Mukherjee Settlement it appeared that Sukra Oram was already dead. The lands covered under Khata No. 48 was recorded jointly in the name of Pujar Oram and Chamar Oram. Similarly, the names of Bhamba and Karma were recorded in respect of Khata No. 67. The extent of lands covered under Khata No. 67 are almost same. It is the plaintiffs" case that Chamar had been to Assansol and Assam for earning his livelihood and out of his contribution the lands were developed which has been admitted by D.W. 3. The improvements so made of the lands covered under Khata No. 48 would positively establish that both the parties must have been enjoying the lands jointly. Lest, there was no occasion for Chamar to invest such amount upon improvement of the lands belonging to Pujar Oram.

10. There has been no document to establish notwithstanding the defendants statement about separate acquisition that there was partition of the properties between Pujar Oram and Chamar Oram prior to the date of the suit. It is true that a moiety share comprising 3 acres of land was allotted to Chamar Oram for his maintenance. But that by itself would not defeat his right for claiming partition over the other properties. The appellants" case before the trial court was that the lands covered under Khata No. 48 of Mukherjee Settlement were wrongly recorded as usual while Chamar Oram was away from the village. It is not understood why the name of Chamar could be recorded jointly with Pujar Oram while he was absent from the village unless he had some semblance of right. In T.S. No. 62/50 filed by Karma Oram it was also held that there was no partition between Pujar Oram and Chamar Oram. It is true that the Judgment in T.S. No. 62/50 was not inter party, therefore, the observation cannot be taken to be a conclusive fact, but at the same time either party can rely upon the finding of the judgment which shall be treated as piece of evidence and be considered along with other evidence. One of the significant feature which cannot be lost sight of is that the extent of land covered under Khata No. 48 and Khata No. 67 appears to be almost equal. Had there been no partition among Pujar Oram and Chamar Oram on one hand and Bhamba and Karma on the other, there could

have been no occasion to record similar extent of land in both the record of rights. The defendants have claimed that the properties were purchased from one Gangu Oram which was recorded in Khatian No. 49 of Conolly Settlement. There has been no evidence to show that it was purchased from Gangu Oram. Rather the evidence has been led by both the parties that Pujar Oram used to live in his father-in-law's house. There was no partition between Sukra Oram and his sons. Thus the trial Court held that even assuming that some purchase was made by Pujar Oram from Gangu it would raise a presumption that the other members too had a right over the same. It is not understood how the lands covered under Khata No. 67 came to the family. Therefore, the usual presumption is that it also belongs to the joint family along with the properties covered under Khata No. 48.

11. A plea has been taken by the defendants that Chamar's branch did not claim the lands for quite a long time. Therefore, their right had been ripened by ouster since, there was continuous possession by their branch for more than 12 years. In a Joint family he who takes the plea of ouster must by clear, cogent and unequivocal evidence establish that such possession was in exclusion of the other co-sharers and the time from which he started hostile animus. The trial court after discussion of the evidence held that no specific period has been stated from which the defendants have proclaimed that in derogation of the plaintiffs' right they continued to possess the same.

12. I, therefore, find that there has been either no illegality or impropriety in the judgment passed by the trial court. Accordingly, the appeal is dismissed without cost. The plaintiffs' suit for partition is hereby allowed. The appellants are directed to divide the "A" Schedule properties in two equal shares and deliver one such share to the plaintiffs within four months from date failing which it would be open to the plaintiffs to file an application for deputing a Civil Court Commissioner for the purpose of division and allotment of one such share from "A" Schedule properties and pray for passing final decree in terms of preliminary decree.