
(1995) 09 GAU CK 0004
In the Gauhati High Court
Case No : Civil Rule Nos. 35 and 1205 of 1989

Dhiren Chakravorty

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 22-09-1995

Acts Referred:

Citation : (1995) 2 GLJ 486 : (1995) 2 GLR 315 : (1995) 3 GLT 414

Hon'ble Judges : J.N.Sarma, J

Bench : Single Bench

Advocate : Y.K.Phukan, S.Kataki, J.P.Bhattacharjee, H.Munir , G.N.Sahewalla, G.K.Bhattacharyya, D.N.Choudhary, A.K.Goswami, Advocates appearing for Parties

Judgement

1. The fact in these two cases are different and was heard on different dates, both the cases were represented by different counsel but they raise the common question of law and as they are taken up together. This common judgment shall cover both these cases.

2. In Civil Rule No.35 of 1989, the prayer has been made to quash the orders dated 25.2.77 (Annexure II), order dated 19.9.88 (Annexure IX) and order dated 29.10 88 (Annexure VIII). All these orders were passed in ceiling cases. These Annexure II, IX and VIII are quoted below: (not quoted: Editor)

3. In Civil Rule No. 1205 of 1989 the prayer has been made to quash the order dated 18.11.85 Annexure II and the order of revision application passed by the Secretary, Govt. of Assam, Revenue Department, Annexure II to the writ application, They are quoted below: (not quoted: Editor)

4. The Assam Fixation of Ceiling on Land Holdings Act, 195 6 (hereinafter called the Act) was enacted for fixation of ceiling on land holdings. The first ceiling was fixed at 150 bighas per family and the Act of 1956, provided that the excess land of existing holdings may be acquired by the State Govt. and the method of payment of compensation to the persons holding the land has been clearly

provided. It was also provided in the Act that the excess land so acquired will be settled with landless person (including tenants) who may be in occupation of land provided certain conditions are satisfied. The Act also imposes ceiling of future acquisition of land that may be retained for personal cultivation by the land owner. By the Amendment Act, 1971 the ceiling area was reduced to 75 bighas from 150 bighas. By the subsequent Amendment Act the further ceiling limit of land holding was reduced to 50 bighas. The law as on today stands is section 4 of the Act, and section 4(1) relevant for the purpose of these two cases are quoted below:

"4. Ceiling on existing holding : (1) Notwithstanding anything to the contrary in any law, custom or agreement no person shall be entitled to hold, as owner, tenant or mortgagee in possession, land which exceeds the limit of 50 bighas in the aggregate and this limit of 50 bighas shall be applicable to the aggregate of the lands held individually by the members of a family or jointly by some of all the members of such a family.

Provided that where such person hold "orchard" land the aforementioned limit shall be increased by the actual area of orchard subject to a maximum of 4 bighas over the limit of 50 bighas mentioned above."

5. The family has been defined in section 3 (d) of the Act and that is quoted below:

"3. (d) "Family" means a family consisting of any one or more or all of the following namely:

(1) husband, (2) wife, (3) minor children, and also includes a joint family.

Explanation: "Joint family" means a family of which the members are descendants from a common ancestor and have a common mess and shall include wife or husband, as the case may be, but shall exclude married daughters, married sons and their children :

Provided that a family consisting of father and/or mother, sons and/or unmarried daughters holding lands jointly shall be presumed to be joint in spite of any one of more having a separate mess."

6. Person has been defined in section 3 (j) and that is quoted below:

"3. (j) "Person" includes an individual, a family, a joint family a trustee, a company, a body corporate, a partnership firm, a society or an association of individuals whether incorporated or not."

7. The brief facts of Civil Rule No.35 of 1989 are as follows : The three petitioners named in this writ application and the respondent Nos.6, 7 and 8 are all sons of late Dharmakanta Chakraborty who expired on 12.2.86. All the six brothers individually owned the properties. The petitioner No. 1 Shri Dhiren Chakraborty owns and possesses 12 bighas 2 kathas 2 lechas of land which had been mutated in his name about 10 years back. The petitioner No.2 Shri Bhabani

Chakraborty owns and possesses 7 bighas 4 kathas 1 lecha land and the petitioner No.3 Shri Bharat Chakraborty owns and possesses 5 bighas 4 kathas 15 lechas of land. The land had been mutated in their names. Over and above the aforesaid land, the father of the petitioner Nos. 1, 2 and 3 and respondent Nos.6, 7 and 8 distributed the land standing in his name equally among the brothers as such the 6 (six) brothers had inherited about 20 bighas of land each from their father in 1968 apart from their self acquired property and all the brothers had been possessing the said land separately, by oral agreement from around 1968. The father of the petitioners on 13.6.70 in accordance with the custom of the area, consulted the village elders and recognised the family partition made earlier by executing a Bibhagnama and in the Bibhagnama it was clearly stated that the petitioners would continue to own and possess the land as distributed earlier and that Bibhagnama was executed only to settle the dispute amongst the brothers. The Collector and Sub Divisional Officer, Goalpara vide his order dated 15.6.76 held that an area of 17 bighas 1 katha and 7 lechas of land was surplus, and the total land of the petitioner's father was shown as 222 bighas in Goalpara and Guwahati SubDivision. Thereafter, late Dharmakanta Chakraborty filed his objection stating that the entire land shown in the draft statement did not belong to him and that his 3 elder sons, respondent Nos.6, 7 and 8 were the separate owners and they were living separately. It was also pointed out in that objection that the 3 other sons the instant petitioners were also separate owners of 12 bighas 2 kathas 2 lechas, 7 bighas 4 kathas 1 lecha, 3 bighas 4 kathas 15 lechas respectively and this land could not be included in the estate of Dharmakanta Chakraborty. In spite of the said objection no notice was issued to the present petitioners who were separate owners of the land included in the estate of their father. The Director of Land Requisition, Acquisition and Reforms Assam, Gauhati by his order dated 25.2.77 held that the total area of land of Dharmakanta Chakraborty and his 5 sons was 222 bighas 0 katha 3 lechas and that three of the five sons namely the respondent Nos.6,7 and 8 were married and lived separately and that amongst them they had self acquired property totally 77 bighas 3 kathas 2 lechas and this land was excluded and 144 bighas 2 kathas 1 lecha was found to be held by him and his 2 sons and allowing 54 bighas of land the balance area of 90 bighas 2 kathas 1 lecha was ordered to be acquired under the Ceiling Act. That on 14.2.78 the respondent No.3 forwarded a final statement showing 46 bighas 0 katha 6 lechas in Guwahati and 44 bighas 1 katha 16 lechas in Goalpara being total land 90 bighas 2 kathas 1 lecha surplus land. Thereafter, the father of the petitioner being aggrieved a revision application was filed before the State Govt. as provided under the Act and the same was admitted. The respondent Nos.6,7 and the present petitioners also filed objections stating that out of 222 bighas 0 katha 3 lechas an area 104 bighas 4 kathas 0 lecha was the self acquired property of the 6 brothers and this could not be included. In the objection it was said that apart from the selfacquired property the 6 brothers had also inherited about 20 bighas from their father at the time of separation and which was also included in the estate of their father. Thereafter the Assistant Settlement Officer, Goalpara

submitted a report to the Collector, Goalpara on 20.7.84 wherein it was clearly stated that the petitioners were known to have been living separately since 1970 with separate mess and that the immovables held by them were also separated by the village people by executing Bibhagnama. But surprisingly enough from the records it was appeared that the Bibhagnama was not forwarded to the Govt. On 5.8.85 the State Govt. without applying its mind and without discussing the various issues and claims rejected the revision application filed by late Dhrama Kanta Chakraborty. The respondent No.3 on 12.9.85 forwarded the copy of the Govt. order dated 5.8.85 and directed the respondent Nos.4 and 5 to take possession of excess land. Thereafter, the father of the petitioners filed a writ application challenging the order dated 5.8.85 and the same was numbered as Civil Rule No. 1085 of 1985 and the Hon''ble Court quashed the order and remitted the case to the State Govt. The petitioners and respondent Nos.6, 7 and 8 appeared before the State Govt. after the notice was remitted during that period on 12.2.86 the father of the petitioners expired. During the hearing it was noticed that the Bibhagnama mentioned in the report dated 20.7.84 was not in the record and though this was brought to the notice of respondent No.2, no effort was made to call for the Bibhagnama. The petitioners on 29.10.88 received a copy of the Govt. order dated 19.9.88 from the respondent No.3 and it was forwarded to the respondent Nos.4 and 5. From the order dated 19.8.88 it was appeared that the respondent No.2 rejected the revision application only on the ground that there was no acceptable evidence that the petitioners should be treated as separate families so as to exclude their land on the basis of report dated 20.7.84 without going into the Bibhagnama, on the basis of which the report was prepared and held that the petitioners were living separately w.e.f..30.6.70 i.e. after the relevant date i.e. 31.3.70.

8. The following points are urged by Shri DN Chowdhury, learned Advocate for the petitioner in Civil Rule No.3 5 of 1989:

(i) That the petitioners apart from the self acquired land, had been possessing 20 bighas of land each, inherited from their father way back in 1968 and which was formally recognised by executing a Bibhagnama on 13.6.70. In the Bibhagnama it was specifically stated that the land, already in their possession from before, was being recognised and that the petitioners were possessing the land separately since one and a half year back and the respondent No.2, while rejecting the revision application, did not consider this fact and came to the erroneous finding that the petitioners could not produced any evidence.

(ii) That the respondent No.2 committed an error by not calling for and looking into the Bibhagnama and basing his finding on the incomplete and inconclusive report and as such the findings and the impugned order is bad in law.

(iii) That the respondent No.2 came to the finding that the petitioners were living separately only after 30.6.70 on the basis of the report without looking into the Bibhagnama on the basis of which the report was prepared and as such the finding is perverse.

(iv) That the petitioners were living separately and were holding their properties separately much before 1.4.70 and as such their property cannot be included in the estate of their father late Dharmakanta Chakraborty.

9. In Civil Rule No. 1205 of 1989 the petitioners are 7 (seven) in number and it is admitted that the land measuring 7 8 bighas 2kathas 16 lechas belonging to Shri Boloram Gogoi and his wife Smti Phanibala Gogoi. It is stated that the land belonging to Smti Phanibala Gogoi was distributed amongst his three sons and they started living separately and were possessing their respective shares. There was a ceiling case being Land Ceiling Case No.304 of 197576 and in that case it was found that an area of 28 bighas 2 kathas 16 lechas was ceiling surplus land. The whole case is that the three sons started living separately before 1970 and as such the lands in their possession cannot be ceiling surplus land. It is also seen that SDC published the final statement on 20.10.76 and the lands were separated, records were corrected and the excess land has been allotted in the name of four persons by issuing allotment slips. One of the allottee is the son of the original pattadar. It was found by learned ADC that the determination of ceiling surplus is legal and valid and that order was held in revision. The only question in this case is that whether a plot of land belonging to the father cannot be distributed by the father during the life time of the father to his sons.

10. In Civil Rule No.35 of 1989 reliance has been placed on a family settlement or Bibhagnama dated 13.6.70, and the question is that whether this family settlement is valid in the eye of law. The law regarding family arrangement or family settlement is that a compromise or family arrangement is based on the assumption that there is antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims of the property other than that which falls to his share and recognising the right of others as they have previously sorted it out to the portions allotted to them respectively. That explains that no writing is required in these cases to pass the title from one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as W the property falling to his or her share is concerned and therefore no writing is necessary. The Courts lean in favour of family arrangements, as it brings about harmony in a family and to do justice to its various members and avoid future dispute which might ruin them all and it is in that contest that the Court upholds an arrangement under which one set of members abandons of claims to the property and remained content by taking such property as each assigned to them. In order to be a valid family settlement that the parties to the arrangement what must have antecedent title of some sort and the agreement clinches and defines what that title is. Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes. If a party does not have any antecedent title to the property, the question of making a family settlement does not arise. A family arrangement is in no sense a transfer of property, for no right vested or contingent is conveyed

by one party to another. The arrangement proceeds upon the assumption that one or other claimant has an antecedent title to the property in whole or in part or in equal proportion and the entire claim rests not upon the transfer of a right but upon the recognition of a claim. Here in Civil Rule No.35 of 1989 it is a case where the property belongs to the father and the sons do not have any right to the property and this Annexure IV in Civil Rule No.35 of 1989 cannot be deemed to be a family settlement or family arrangement. The sons had no share to the property and by this so-called family arrangement no right, title and interest can be passed to the sons. I feel that this was made only to evade the rigour of ceiling law and that cannot be deemed to be a valid document and I find that it was rightly rejected by the authority. The sons are not the shareholders in the property of his father because the family is governed by the Dayabhaga School of Hindu Law. According to the Mitakshara Law each son acquires on his birth equal interest with his father and his ancestral property held by the father and on the death of the father the son takes the property not as his heir but by survivorship. According to the Dayabhaga Law, the sons do not acquire any interest by birth in ancestral property, their rights arise for the first time on the father's death. On the death of the father they take the property as is left by him whether separate or ancestral as heirs and not by survivorship. Since the sons do not take any interest in ancestral property in their father's life time, there can be no coparcenary in the strict sense of the word between a father and son. According to Dayabhaga Law, the father has the absolute right and power to dispose of the property by sale, gift or otherwise. Since the sons according to the Dayabhaga Law do not acquire any interest by birth they cannot demand a partition of such property from the father as they can under Mitakshara Law. The father is the absolute owner of the property and the property being his own he can manage it in any way he likes. According to the Dayabhaga Law, the efficacy of coparcenary is laid down on the death of the father. So long as the father is alive, there is no coparcenary between him and his sons. It is only on his death leaving two or more male issues and/or female issues after the Hindu Succession Act, 1956, and the question of making family arrangement will arise only after the death of the father in the Dayabhaga Law when the coparcenary first comes into existence. That is not the case here. Under the Dayabhaga Law either coparcenary male or female is entitled to enforce a partition of his coparcenary property. Under the Dayabhaga Law a son is not entitled to a partition of the property against his father. The reason is that a son according to that law does not acquire by birth any interest in the property in the name of his father.

11. This being the position of law whether the distribution of the land made by the father in Civil Rule No.35 of 1989 and made by the mother of Civil Rule No. 1205 of 1989 can be deemed to be valid transfer in the eye of law. There are three distinct modes of transfer in the property : (i) Sale, (ii) gift and (iii) exchange.

12. Relinquishment also may be a mode of transfer but we are not concerned

with that in this case. It is found in the instant case that these three valid modes of transfer were not adhered to in giving the property to the sons.

13. Shri Chowdhury, learned Advocate appearing for the petitioners in Civil Rule No.35 of 1989 in support of his contention regarding the validity of the family arrangement, relies on the following decisions :

(i) AIR 1966 SC 292 (Tek Bahadur Bhujil vs. Debi Singh Bhujil). That case does not help the petitioners inasmuch as that was a case under the Mitakshara School of Law. He specifically relies in paragraph 12 which is quoted below :

"Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be hezy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declared for future what rights in what properties the parties possess. The document Exhibit 3 does not appear to be of such a nature. It merely records the statements which the three brothers made, each referring to others as brothers and referring to the properties as joint property. In fact the appellant, in his statement, referred to respondents 1 and 2 as two brother copartners; and the last paragraph said :

"We, the three brothers, having agreed over the above statement and having made our own statements in the presence of the Panch called by us, and signed and kept a copy of each of this document as proof of it."

The document would serve the purpose of proof of evidence of what had been decided between the brothers. It was not the basis of their rights in any form over the property which each brother had agreed to enjoy to the exclusion of the others. In substance it records what had already been decided by the parties. We may mention that the appellant and respondent No.1, even under this agreement, were to enjoy the property in suit jointly and it is this agreement of theirs at the time which has later given rise to the present litigation between the two. The document, to our mind, is nothing but a memorandum of what had taken place and therefore, is not a document which would require compulsory registration under section 17 of the Registration Act."

But in that judgment itself, there in paragraph 13 there is a reference to the judgment of a Apex Court wherein it is stated that in order to be a valid family arrangement the parties to the arrangement must have a antecedent title which is lacking in both the case in hand.

(ii) In 1991 ITR Vol 187 (Income Tax Officer Calcutta vs. Smti NK Sarda

Thampatty) he relies on this observation :

"Under the Hindu Law, members of a joint family may agree to partition of the joint family property by private settlement, agreement, arbitration or through a Court's decree. Members of the family may also agree to share the income from the property according to their respective shares. In all such eventualities, the joint status may be disrupted but such disruption of family status is not recognised by the Legislature for the purpose of incometax."

This case also does not help as that also was a case under the Mitakshara School of Law.

14. Under the Dayabhaga School of Law when we speak of a partition, it means transformation of joint ownership of coowners, and separate ownership of each as to portion allotted to each owner. That sort of partition in the instant case is not possible inasmuch as the sons do not have any share to the property. So, the question of partition of the property between them or distribute between them shall not arise. A partition according to Dayabhaga Law is a matter of individual right. The sons in these cases had not right of partition and the partition as alleged in this case must be deemed to be without any authority of law and the socalled partition do not create any right in favour of the persons to whom the property was given.

15. Accordingly, there is no merit in this writ applications and the same are dismissed.