

(2003) 03 OHC CK 0057
In the Orissa High Court
Case No : First Appeal No. 456 of 1980

Gajendra Mohapatra and Others

APPELLANT

Vs

Padi Bewa (died) by L.Rs. and Others

RESPONDENT

Date of Decision : 10-03-2003

Acts Referred:

Citation : (2003) 96 CLT 55

Hon'ble Judges : P.K. Tripathy, J

Bench : Single Bench

Advocate : R.K. Mohapatra, A.N. Misra and N.N. Nanda, for the Appellant; M.N. Das, M.M. Das and N.N. Misra, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Tripathy, J.—Plaintiffs are the appellants in this First Appeal. They filed Title Suit No. 300 of 1976 in the Court of Subordinate Judge, Cuttack with the prayer to grant a decree of partition by partitioning the suit Scheduled-"A" property of Khata No. 52, measuring an area of Ac.1.23 decimals in Mouza Daradagram, Tauji No. 2173 under Jagatsinghpur P.S. and to allot the area of Ac.0.33 decimals, sold under registered sale deed dated 24.10.1949, to the share of the plaintiffs by allotting 1/3rd share in favour of late Laxman and his son, who were succeeded by the widow of Laxman namely Chanda Bewa, and said Chanda Bewa sold the suit property in favour of the father of the plaintiffs as per the registered sale deed executed on 24.10.1949. Defendants in that suit are the recorded tenants belonging to a joint Hindu family. Out of them, defendants 1 to 3, 6 to 10 and 12 to 16 contested the suit by filing a joint written statement. Inter alia, they claimed that the suit land is part and parcel of the joint family property, that was never partitioned amongst the coparceners and late Chanda Bewa being a pre-Act widow, was not eligible to alienate a portion from the ancestral homestead property through the sale deed, Ext. 1. They also pleaded that the plaintiffs or their father never acquired title and possession over that land and therefore they are not entitled to get a decree for partition. Alternatively, they

pleaded that in the event of a decree for partition, plaintiffs being stranger-purchasers, defendants exercise the right of pre-emption as per the provision in Section 4 of the Partition Act, and therefore appropriate order in that respect be passed by the Court. Broadly on these facts parties were at issues and the suit was contested. Following issues were taken up for consideration at the stage of trial and judgment.

ISSUES

1. Is the suit bad for non-joinder of parties and non-inclusion of all joint family properties ?
2. Are the defendants entitled to the benefits u/s 4 of the Partition Act ?
3. Are the plaintiffs entitled to Ac.O.33 decs, claimed ?
4. To what relief, if any, the plaintiffs are entitled ?
5. Whether the plea of adverse possession and ouster taken by the defendants is true ?

2. Plaintiffs examined one Pravakar Mohapatra, a person aged about 45 years by 9th April, 1980 as P.W. No. 1 and one Krushna Mohapatra, aged about 70 years by 10th April, 1980 as P.W. No. 2 in support of their claim. Admittedly, both of them are not parties to the transaction as attesting witness or the Scribe of the sale deeds. At the same time, plaintiffs did not examine any one amongst them in support of their claim. They relied on the sale deed, the certified copy of which has been marked as Ext. 1, two sheets of rent receipts (Exts. 2 and 2-A) which do not contain any particulars about the plot numbers etc. and four Record of Rights of different Holdings recorded in the name of Chanda Bewa and one of them in the name of some others, in proof of the contention that there had been a partition in the families of the defendants and Laxman was separated from his other coparceners. Those R.O.Rs. have been marked as Exts. 3 to 3/c. On the other hand, in the process of giving rebuttal evidence the defendants have examined defendant No. 7 as D.W. 1 and one Fakir Mohapatra aged 79 years, Bulei Mohapatra aged 90 years as D.Ws. 2 and 3 in support of their claim that by the date of sale transactions the family of the defendants was joint in mess and property, there was no partition in their family, Chanda Bewa was being maintained by the joint family, plaintiffs or their father never possessed the suit property, and that the suit property is a part and parcel of the homestead land of the families of the defendants. They relied on rent receipts marked Exts. A to A/2.

3. On the basis of such evidence, the trial Court decided the Issue Nos. 2 and 3 by stating that by the date of sale transaction vide Ext. 1 the suit property was the joint family property of the family of the defendants. Chanda Bewa being a pre-Act widow, had no legal status to alienate the property and therefore plaintiffs have not acquired title through that document nor they are in possession of the same. He also recorded that under such circumstance exercise of the

option u/s 4 of the partition Act is not necessary. On the basis of such findings, he decided the other issues in favour of the defendants and as against the plaintiffs and accordingly dismissed the suit but directed the parties to bear their respective costs of litigation.

4. Efforts of the appellants is to get a decree for partition, allotment of a share to their transferer (Chanda Bewa) and to get the lands covered under Ext. 1 allotted to their share. Facts and evidence available in the L.C.R. relating to death of Laxman and his son is not disputed while advancing argument by the appellants. Such evidence, as recorded by the Court below, gives Chanda Bewa the status of a pre-Act widow. Therefore, plaintiffs' prayer for a decree will be liable for consideration if the plaintiffs have succeeded in proving the fact that, (1) by the date of alienation under Ext. 1 Chanda Bewa was exclusive owner of that land because of partition in the family prior to the date of such alienation, or (2) even if she was a limited owner of the said property there existed any legal necessity or compelling reason for her to alienate such property. So far as that legal position is concerned, there is no dispute between the parties. When factual assertion and legal evidence is necessary to resolve an issue, it cannot be decided merely on the basis of law. As rightly noted by the trial Court, the evidence from the side of the plaintiffs is hopelessly insufficient to cater to the need of the requirement of law to record a finding about existence of any of the aforesaid two conditions in support of the claim of the plaintiffs on the basis of Ext. 1.

5. Learned counsel for the appellants referred to the evidence of the D.Ws. and states that defendants have failed to prove a case of jointness and therefore, plaintiffs' case should have been regarded as proved. The aforesaid argument is heard to be rejected inasmuch as unless the evidence adduced by the defendants amounts to admission of a fact, the weakness, if any, in the evidence of the defendants ipso facto cannot minimise absence of proof of a fact by the plaintiffs for which the burden or onus lies on such plaintiffs. It is the settled position of law that a Hindu family shall be presumed to be joint until the contrary is proved. As rightly noted by the Court below, the Record of Rights marked Exts. 3 series do not ipso facto prove the claim of the plaintiffs regarding prior partition in the family. In that respect the decisions relied on by the plaintiffs in the case of Raghav Jagatsingh (Expunged) Indra Dalai and Ors. v. Sanei Dalai and Ors. 1974 (2) CWR 1021, and Heram Patel Vs. Parikhita Patel and Others, , are of no assistance to the contention of the appellants.

6. After analysing the pleadings of the parties, the evidence on record and the findings recorded by the Court below so also that argument advanced before this Court, it is seen that the plaintiffs' claim for partition is bound to fail, because they have failed to prove, a legal status with Chanda Bewa so as to validly alienate the property by the date of the transactions in the year 1949. It is true that plaintiffs could not have produced witnesses to the alleged partition, which, according to them, took place long back, but they could have proved the same

by circumstantial evidence relating to conduct of the parties with respect to mess and estate, etc., as has been observed by this Court in the case of Heram-Patel (supra). In that aspect plaintiffs have completely lacked. They have most casually adduced evidence of two witnesses without catering to the requirement of law in support of the proof of partition in the case of an ancient partition. Under such circumstance, as noted above, the appeal is dismissed with cost ail-throughout. Hearing fee is assessed at contested scale.