

(1983) 01 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 42 of 1971

Ganesh Swain and Others

APPELLANT

Vs

Nakadi Swain and Others

RESPONDENT

Date of Decision : 17-01-1983

Acts Referred:

Evidence Act, 1872 — Section 35, 74(1)

Citation : AIR 1983 Ori 279

Hon'ble Judges : P.K. Mohanti, J;B.K. Behera, J

Bench : Division Bench

Advocate : Sanjit Mohanty, for R. Mohanty, for the Appellant; S.K. Dey, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanti, J.—This appeal by defendants 1, 2 and 3 is directed against a preliminary decree for partition.

2. The case for the plaintiffs may be briefly stated as follows;

Binabandhu Swain had two sons, viz. Sankar and Bhramar and four daughters, viz, Hema (defendant No. 2), Dhobani (defendant No. 3), Pata and Sori. He died in 1960. Sankar and Bhramar predeceased him. The plaintiffs are the sons of Sankar. Defendant No. 1 Genesh is the son of Bhramar. Pata and Son are dead, Jogi (defendant No. 4) is the son of Pata. Righna (defendant No. 5) is the son of Sort. The immovable and movable properties described in Schedules "B" and "C" respectively of the plaint were the ancestral properties of Dinabandhu. The plaintiffs claiming 7/18th share out of these properties. Their contention was that the suit properties have not been partitioned by metes and bounds though the parties have been Possessing separate portions for the sake of convenience.

They demanded partition of the properties, but defendant No. 1 did not agree.

3. Defendants 1 to 3 filed written statement contending, inter alia, that the

plaintiffs' father Sankar was not the son of Dinabandhu but he was the sisters' son of Dinabandhu and was allowed to live in his house along with his wife. His first wife having died, he married to one Sundari who is the mother of the plaintiffs. The plaintiffs had no connection with the family of Dinabandhu. Accordingly, it was contended that the plaintiffs have no locus standi to sue for partition of the suit properties. It was also contended that Dinabandhu had only two daughters, viz. Hema and Dhobani. Pata and Sori were not his daughters and hence defendants 4 and 5 are not entitled to any share out of the suit properties,

4. The trial Court believed the plaintiffs' case and discarded the defence plea. Accordingly it passed a preliminary decree for partition of the plaintiff's 7/18th share. The findings of the trial Court are assailed in this appeal as being against the weight of evidence on the record.

5. The main questions that arise for consideration are : (1; whether Sankar, the plaintiffs' father was the son of Dinabandhu, and (2) whether Pata and Sori were the daughters of Dinabandhu. In support of their contention the plaintiffs relied on the evidence of PWs 1 to 8 and proved the Census Register (Ext. 2) and Voters' List (Ext. 3). PWs 1 and 2 are the agnatic nephews of Dinabandhu and are also his neighbours (vide DW 2). They had, therefore, special means of knowing the relationship of Sankar, Pata and Sori with Dinabandhu). They stated that Sankar was the son of Dinabandhu and Son and Pata were his daughters. Nothing substantial has been brought out in their cross-examination so as to cast any doubt on their veracity, PW 3 Hadibandhu Pradh&a is also an agnate of Dinabandhu. He claimed to have attended all the functions in the family of Dinabandhu. According to him, Sankar was the son of Dinabandhu. His evidence has not been shaken in any manner. PW 4 was the Union President of the village of the parties from 1930 to 1954. He was appointed as Supervisor for preparation of Voters' List. He also acted as Supervisor during the census of 1981. He claimed to have personal knowledge that Sankar was the son of Dinabandhu. He also stated that he mentioned the name of Sankar as the son of Dinabandhu in the Voters' List on the information furnished by Dinabandhu. He has proved the order (Ext. 1) by which he was appointed as Supervisor by the Subdivisional Officer, PW 5 Birabar Panda was the family priest of Dinabandhu and claimed to have performed all the functions in the family. He particularly stated that he acted as priest in the marriage of Sankar and Ganesh. According to him, Sankar was the son of Dinabandhu, His evidence has also not been shaken in any manner. PW 6 Rama Nahak is the father of defendant Ho. 5 Jogi. He is an old man of 75 years. He claimed to have attended the Sudhi ceremony of Bhramar. According to him, his wife Pata was the daughter of Dinabandhu and Sankar was his wife's brother. Nothing substantial has been elicited in his cross-examination so as to discredit his sworn testimony. PW 7 Nakadi Swain is the plaintiff No. 1. He stated that Dinabandhu was his grandfather and Sori and Pata were his father's sisters. He stated that plaintiffs have been in joint possession of the lands with the defendants. PW 8. Brahmananda Swain was the Union

President of village Fakirpada and acted as Supervisor during the census of 1951. He proved the entry in the census Register showing the names of the members of Dina-bandhu's family. He claimed to have personal knowledge that Sankar was the son of Dinabandhu. He also stated that he had collected land revenue from Dinabandhu and Sankar while he was the Tahasildar of Bhingarapur.

5-A. The evidence of the above witnesses clearly establishes that Sankar was the son of Dinabandhu and Pata and Sori were his daughters. The entry in the Voters' List (Ext. 3) showing the name of Sankar as the son of Dinabandhu corroborates the oral evidence led by the plaintiffs. The trial Court did not place any reliance on the Voters' List merely on the ground that two of its pages do not bear any seal of the Panchayat office or Election Office and that though there is a seal of the Sadar Police Station there was no signature over it. The Voters' List prepared under the Representation of the People Act is a public record within the meaning of Section 35 of the Evidence Act and a public document within the meaning of Section 74(1)(iii) of the Evidence Act and is admissible in evidence as such. It is not necessary to call in evidence the author thereof or the person supplying the information to prove its genuineness. Vide AIR 1972 Qri 158 (FB) : Kirtan Sahu v. Thakur Sahu. We hold in disagreement with the trial Court that the Voters' List (Ext. 3) is admissible in evidence. The entry in the census register (Ext. 2) mentions the name of one Sagar Swain as the son of Dinabandhu. PW 4 who was the Union President from 1930 to 1954 and Supervisor in 1951-52 stated that the census list was prepared by enumerators. He stated that Sagar Swain is a mistake for Sankar Swain. The trial court did not place any reliance on Ext. 2 on account of such mistake. We see no cogent ground to differ from its finding.

6. Now coming to the defence evidence, it appears that DWs 2 and 4 are Harijans and are in no way connected with the family of Dinabandhu. Their evidence does not satisfy the tests laid down in Section 50 of the Evidence Act. DW 4 admitted that Sori was the daughter of Dinabandhu DW 3 claimed to be an agnate of Dinabandhu, but his evidence shows that he has not attended any function in the family of Dinabandhu. In cross-examination he stated that he had seen Sankar in the house of Dinabandhu since his childhood and had also witnessed the marriage of Sankar, but could not say who got him married. DW 5 Fagu Charan Sahu belongs to a different locality. He is in no way related to Dinabandhu. He admitted that he has not seen Dinabandhu. He also admitted that he has not seen the house of Dinabandhu. DW 1 Hema Bewa is the defendant No. 2. She stated that she had no sisters named Pata and Sori though DW 4 admitted that Sori was one of the daughters of Dinabandhu. Being a party to the suit her evidence is naturally interested. Her evidence on the question of disputed relationship does not find corroboration from any source. The trial Court did not place any reliance on her testimony and we see no cogent ground to take a different view.

7. On a review of the entire evidence on the record we are inclined to agree with

the trial Court that Sankar was the son of Dinabandhu and Pata and Sori were his daughters. The plaintiffs were, therefore, entitled to a decree for partition of their 7/18th share in the immovable properties described in Schedule "B" of the plaint.

8. So far as the movable properties in Schedule "C" are concerned, law is well settled that partition in respect of movables can be granted if they exist or if it is established that the family had lost the movable on account of any delinquency on the part of the persons sued against. The evidence on the record shows that the family had a bullock cart at the time of the claim for partition and this item alone is liable for partition. The proper way to divide this item would be to take its money value for convenience and allot 7/18th share thereof to the plaintiffs. As regards the other items of movable properties mentioned in Schedule "C" there is absolutely no evidence that they existed at the time when the claim for partition was made. The plaintiffs are, therefore, not entitled to a decree in respect of those items of movable properties.

9. In view of our above findings we dismiss the appeal and maintain the decree of the court below subject to the modification with regard to the movable properties in Schedule "C" of their plaint as indicated above. Parties are left to bear their own costs in this appeal.

B.K. Behera, J.

I agree.