

**(2000) 06 OHC CK 0043**  
**In the Orissa High Court**  
**Case No : First Appeal No. 450 of 1981**

Ganga Prasad Singh (having died) L.Rs. Kumudini Singh and Others APPELLANT

Vs

Ajodhya Prasad Singh and Others RESPONDENT

**Date of Decision :** 19-06-2000

**Acts Referred:**

**Citation :** (2000) 90 CLT 347 : (2000) 2 OLR 150

**Hon'ble Judges :** P.K. Misra, J

**Bench :** Single Bench

**Advocate :** N. Mukherjee, K.C. Mishra, Md. Irshid, P.K. Rath, R.N. Subudhi, R.C. Behera and Minerva Pradhan, for the Appellant; Ashok Mohanty, Pradip Mohanty and B.P. Ray (Rs. 1-4), M.M. Sahoo and S. Bhagat (R-5), R.K. Praharaj, S.K. Mohanty, A.K. Rath and Ananda Chandra (R-6), H.M. Dhal (Rs. 7-9) and P.K. Mahapatra (Tenant), for the Respondent

## Judgement

P.K. Misra, J.—Plaintiff was the appellant and on his death, his legal representatives are continuing the present appeal. The suit was filed for declaration that the property described in Schedule-B/1 had fallen to the share of the plaintiff and property described in Schedule-B/2 had fallen to the share of defendants 1 to 5. In the alternative, it was prayed that in case the prior partition is disbelieved the Schedule-B properties should be partitioned in equal proportion and property described in Schedule-B/1 should be allotted to plaintiff's share.

2. The genealogy is given below :

|                                                                            |        |       |                                                           |     |         |
|----------------------------------------------------------------------------|--------|-------|-----------------------------------------------------------|-----|---------|
| Ajodhya                                                                    | Prasad | Singh | =                                                         | (W) | Parbati |
|                                                                            |        |       |                                                           |     |         |
|                                                                            |        |       | Radhamoni Sarjorajmoni Ramprasad Krushnaprasad (Daughter) |     |         |
| (Daughter) Married   _____  to Rana Gangaprasad (Plaff.)  - Ajodhya (D-1 ) |        |       |                                                           |     |         |
| Brajamohan = (W) Santibala  - Sarat(D-2) _____  _____   -                  |        |       |                                                           |     |         |
| Gopal(D-3)  - Purnaparakram      - Bijoy Keshari (D-6)  -Sailendra (pre-   |        |       |                                                           |     |         |

deceased) |-Jagannath (D-4) |- Khira (Not party) | = (W) Kumudini |-Rajendra Kumari(D-5) |- Dhira " | (Appellant No. 1/a) |- Nira" | |- Haramani" | \_\_\_\_\_|\_\_\_\_\_ || | | |Jayashree Rajshree Pujashrec |(App.l/ b) (App.l/c) (App.l/d) | |--- Snehalata (R-7) |--- Premalata (R-8) |--- Kanakalata (R-9) |---Laxminarayan (died unmarried)

3. According to the plaintiff's case, the disputed property belonged to the two brothers -Ramprasad and Krushnaprasad and dissension having arisen between them, they separated in mess and boarding in the year 1938 and subsequently partitioned in the year 1973, wherein the property described in Schedule-B/1 fell to the share of the plaintiff and Schedule-B/2 property fell to the share of Krushnaprasad and the allotment papers were prepared accordingly. After the death of Krushnaprasad in 1974, defendants 1 to 5 refused to abide by the said arrangement relating to partition thus forcing the plaintiff to file the present suit.

4. Defendants 1 to 4 filed written statement denying the allegation relating to earlier partition. They claimed that properties described in the Schedule of the written statement filed by them were also joint family properties which should have been included in the hotch-pot.

5. In view of such stand taken by defendants 1 to 4, the plaintiff amended the plaint by incorporating paragraph - 5(a). It was claimed in the amended plaint that property described in "C" Schedule of the plaint (corresponding to item-2 of the Schedule of the Written Statement) had been purchased by the wife of the plaintiff from out of her Stridhan property in the name of their son on 6.2.1939 and after the death of wife in 1946 and of the son about ten years thereafter, the plaintiff has become the sole heir of the property mentioned in "C" Schedule.

6. Defendants 1 to 4 filed additional written statement stating that the property described in "C" Schedule of the plaint had been purchased by the Karta Gangaprasad Singh (plaintiff) in the name of his minor child from out of the joint family fund.

7. Defendant No. 6 in his written statement claimed that item No. 3 in Schedule-B properties was not the joint family property and the same was the Stridhan property of late Parbati Bai, wife of Ajodhya Prasad Singh, the common ancestor, and the said property had been gifted by Parbati Bai on 12.8.1948 to the predecessor-in-interest of defendant No. 6. In the alternative, it was claimed that defendant No. 6 had perfected title by adverse possession in respect of the said property.

8. On the basis of the aforesaid pleadings, the trial Court framed nine Issues out of which Issues 6, 7 and 8 are important for the purpose of deciding the present appeal. Those Issues are as follows :

"6. Whether the properties described in the Written Statement are joint family properties and whether defendants have a share in it ?

7. Whether any time of the properties described in the Written Statement has

been acquired benami out of the joint family funds?

8. Whether any item of property described in the Written Statement . has acquired the joint family character by blending ?"

9. It has to be noticed that the trial Court found that there was no previous partition under Issue No. 4 and such finding has not been challenged by any of the parties.

10. Under Issues 6, 7, and 8, it was held by the trial Court that "C" Schedule property had been acquired out of joint family fund and the properties described in said "C Schedule as well as items-1 and 2 of the "B" Schedule properties were to be partitioned between plaintiff and defendants 1 to 5. In respect of item No. 3 of "B" Schedule, it was held that defendant No. 6 had perfected his title by adverse possession over the said property.

11. The present appeal has been filed by the plaintiff claiming that "C" Schedule property should have been treated to be the separate property of the plaintiff. The decree of the trial Court in respect of item No. 3 of the "B" Schedule property upholding the right of defendant No. 6 has been challenged by the appellants in the appeal as well as by respondents 1 to 4, who have filed Cross-Objection against the aforesaid portion of the decree.

12. The property described in "C" Schedule was admittedly purchased in the name of Laxminarayan, son of the present plaintiff. Even though assuming that Gangaprasad was the Karta, the property having been purchased in the name of a member of the joint family property that the joint family had sufficient nucleus from out of which the said property could have been purchased. The trial Court has discarded the case of the plaintiff that the property had been purchased from out of the ornaments of Shantibala, wife of the plaintiff. The counsel for the appellants has sought to prove that Shantibala had ornaments from which the said property had been purchased. Even without going into this aspect, the contention of the appellants that the property was the separate property of Laxminarayan, is to be accepted, as there is no material on record to indicate that the joint family consisting of Gangaprasad and his son, Krushnaprasad and his sons had any surplus from out of which the said property could have been purchased. In the present case, the contesting defendants 1 to 4 have merely pleaded that the property had been purchased in the name of Laxminarayan from out of the joint family and without disclosing anything about the extent of joint family nucleus. No evidence has been adduced indicating about the extent of joint family nucleus from out of which such property could have been purchased. Since the defendants have failed to adduce any evidence indicating about the joint family nucleus from out of which the property in question could have been purchased, it must be taken that the property purchased in the name of Laxminarayan was his separate property, even assuming that the plaintiff had failed to prove that such property had been purchased from out of the ornaments belonging to Shantibala. The trial Court without discussing the relevant law and

material on record has jumped to the conclusion that the property was joint family property. Such finding of the trial Court being without any basis cannot be accepted and as such, the appellants' contention relating to their exclusive right over "C Schedule property must be upheld.

13. The next question relates to item No. 3 of Schedule-B. The trial Court has held that defendant No. 6 being in possession of the said property by virtue of an unregistered deed of gift has acquired right by adverse possession. For the aforesaid purpose, the trial Court has relied upon the decision of the Privy Council reported in AIR 1919 PC 44 (N. Varada Pillai and another v. Jeevarathnammal). The learned counsel appearing for the appellants has not seriously challenged such finding. However, learned counsel appearing for respondents 1 to 4 has vehemently contended that defendant No. 6 had not raised sufficient plea regarding alleged adverse possession. He has further submitted that since the possession was initially permissive, in the absence of specific plea and proof regarding commencement of adverse possession, the contention of defendant No. 6 should have been negativeed. He has relied upon the decision of the Supreme Court reported in 88 (1999) CLT 433 (SC) (Shri Sarbeswar Mohanty v. Chintamani Sahoo (dead) by Lrs.) in support of his submission.

14. In paragraph-15 of the Written Statement, it has been pleaded by defendant No. 6 that Parbati Bai gifted Lot No. 3 of Schedule-B to defendant No. 6 by a deed of gift dated 12.8.1948 and since the date of gift, defendant No. 6 is in peaceful possession and enjoyment of the property without any hindrance from any quarter. In paragraph-15(b), it was pleaded that in case it is found that title has not passed on the basis of deed of gift dated 12.8.1948, the defendant being in exclusive possession and enjoyment of Lot No. 3 since 12.8.1948, for more than statutory period in the knowledge of plaintiff and defendants 1 to 5, has perfected his title by way of adverse possession. A careful reading of the Written Statement clearly indicates that defendant No. 6 has advanced a plea of adverse possession.

15. It is, of course, true that no specific issue has been framed by the trial Court on the question of adverse possession. However, it is apparent that all the parties have adduced evidence on this aspect and the trial Court had discussed the question and come to a conclusion that defendant No. 6 has perfected title by adverse possession. From the decision reported in AIR 1919 PC 44 (supra), it is clear that possession on the basis of an invalid transaction is adverse per se. Similar view has been expressed by the Supreme Court in the decisions reported in Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, and State of West Bengal Vs. The Dalhousie Institute Society, . It is apparent that defendant No. 6 entered into possession on the basis of a deed of gift which being unregistered was invalid and the possession of defendant No. 6 on the basis of such invalid transaction must be taken to be adverse from the inception. The learned counsel for respondents 1 to 4 submitted that decision of

the Supreme Court reported in 88 (1999) CLT433 (SC) (supra) has the effect of overruling the decision reported in AIR 1919 PC 44. Assuming it to be so, the views expressed in AIR 1919 PC 44 are similar to the views expressed by the Constitutional Bench of the Supreme Court in Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, This decision of the Supreme Court has been subsequently followed in the decision reported in State of West Bengal Vs. The Dalhousie Institute Society, The decision of the Supreme Court by a Bench consisting of two Honourable Judges relied upon by the learned counsel cannot be preferred to the Constitutional Bench decision of the Supreme Court reported in Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others, It has been held in series of decisions of the Supreme Court that if there is any conflict between the decisions of the Supreme Court, the opinion expressed by larger Bench should be followed . in preference to the opinion expressed by the Smaller Bench. (See, Union of India (UOI) and Another Vs. K.S. Subramanian, and; The State of U.P. Vs. Ram Chandra Trivedi, . Moreover, in the decision reported in 88 (1999) CUT433 (SC), the question of adverse possession when the lease was invalid was in issue. The question of adverse possession when a transaction like sale or gift is invalid was not involved. Thus, the views expressed by the Supreme Court in the decision reported in 88 (1999) CLT 433 (SC) are applicable to the peculiar facts and circumstances of the said case.

16. For the aforesaid reasons, the appeal is to be allowed in part and the right of the appellants in respect of "C" Schedule property is upheld. The Cross-Objection is dismissed and right of respondent No. 6 in respect of Lot No. 3 of Schedule-B property is upheld. The decree of the trial Court for partition of other properties described in Schedule-B of the plaint is confirmed. There will be no order as to costs.