

(2004) 09 OHC CK 0012
In the Orissa High Court
Case No : First Appeal No. 209 of 1985

Gouri Meher

APPELLANT

Vs

Tapisa Meher and Others

RESPONDENT

Date of Decision : 30-09-2004

Acts Referred:

Citation : (2004) 98 CLT 793 : (2005) 1 DMC 560

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : A. Mahakud, for the Appellant; R.C. Rath, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—Defendant No. 3 is the appellant before this Court against the judgment and decree dated 26th August, 1985 and 4th September, 1985 respectively passed by the learned Sub-ordinate Judge, Padampur in Title Suit No. 40/12 of 1981-84.

2. The case of the plaintiff-Respondent No. 1 is that one Sridhar had two sons namely, Duguru and Ganthia. Plaintiff is the only daughter of Duguru and Defendants 1 and 2 are the widow and son of Ganthia respectively. After death of Sridhar, both the brothers mutually separated in mess as well as in cultivation even though there was no partition by metes and bounds. The "Ka" and "Kha" schedule properties are the ancestral properties inherited by both the brothers and in due course Duguru purchased "Ga" and "Gha" schedule properties of his own. It is further case of the plaintiff that Ganthia and after him, his son Defendant No. 2 also purchased lands out of their own income. Duguru died in the year 1980. After death of Duguru, Defendant No. 3 claiming herself to be the widow of Duguru colluded with other defendants and tried to take away the properties of the father of the plaintiff. On these allegations the plaintiff filed the suit for partition of "Ka" and "Kha" schedule properties claiming 1/2 share and for declaration of her title over "Ga" and "Gha" schedule properties being self

acquired properties of Duguru and for recovery of possession. In the alternative the plaintiff also prayed that in the event the Defendant No. 3 is found to be the widow of Duguru, she is entitled to 1/4th share in "Ka" and "Kha" schedule properties and 1/2 share in "Ga" and "Gha" schedule properties.

3. Defendant No. 2 filed written statement stating that the Defendant No. 3 is the legally married wife of Duguru and soon after the death of his father, the properties were partitioned between him and Duguru by metes and bounds and since then they have been possessing their respective shares. It is further stand of the Defendant No. 2 that at the time of death of Duguru, the Defendant No. 3 had obtained some loan for his treatment and funeral obsequies and in order to repay the loan she had sold some land to him, which are also in his possession after the sale. Defendant No. 3 filed separate written statement supporting the case of the Defendant No. 2 claiming herself to be the legally married wife of Duguru.

4. On the basis of pleadings of the parties as stated above, the Trial Court framed seven issues and passed a preliminary decree declaring that plaintiff has 1/2 share in "Ka, "Kha" and "Gha" schedule properties and the Defendants 1 and 2 have other half share. The Trial Court also declared that the plaintiff is exclusive owner of "Ga" schedule property. So far as prayer for partition of "Una" schedule property is concerned, the prayer was turned down.

5. Shri Mahakud, Learned Counsel appearing for the appellant submitted that there being a dispute with regard to the claim of Defendant No. 3 that she is the legally married wife of late Duguru, an issue was framed to that extent vide issue No. 5. According to Shri Mahakud, the said issue was answered against the Defendant No. 3 and, therefore, in the event the appellant fails to prove the said finding with regard to issue No. 5 successfully, there may not be any need to look into the other issues. Shri Rath, the Learned Counsel appearing for the Respondent No. 1 also agreed with the argument advanced by the Learned Counsel for the appellant.

6. On verification of the pleadings of the respective parties the Court also finds that if the Defendant No. 3 fails to prove that she is the legally married wife of late Duguru, the appeal at her instance has to fail. I, therefore, proceed to examine the evidence with regard to the said issue. Shri Mahakud, the Learned Counsel appearing for the appellant drew attention of the Court to the evidence of all the witnesses examined on behalf of the defendants and tried to convince the Court that there are materials on record to show that the Defendant No. 3 is the legally married wife of late Duguru and the marriage took place prior to 1955. In this connection, the evidence of Defendant No. 3 who has been examined as D.W. 5 may be looked into. The Defendant No. 3 her evidence admitted that by the time she married Duguru, the first wife of Duguru was living and both stayed together for some time till the death of Duguru. In view of such statement of Defendant No. 3, the question that comes for consideration is whether such marriage took place after Hindu Marriage Act, 1955 came into

force or prior to that. If the marriage took place after 1955 Act came into force, the same shall be null and void even if the marriage is proved. As submitted by the Learned Counsel for both the parties as well as on verification of the records, it is found that none of the witnesses examined on behalf of the defendants has been able to say the year of marriage of Defendant No. 3 with Duguru. According to Defendant No. 3 she got married to Duguru during the life time of Duguru's first wife and at the time of her marriage, she was 15 to 16 years old. D.W. 3 who claimed to have attended the marriage has stated that Duguru was also 75 years old when he married Defendant No. 3 and that the marriage took place twenty years prior to his date of examination in Court. These witnesses were examined in the year 1985. There is no evidence on record to show at what stage Duguru died and it is stated by D.W. 1 that Duguru died sometime in the year 1980. In absence of any evidence to show as to at what age Duguru died, the Court has no other option except making arithmetical calculation to find out the approximate time of marriage as claimed by the Defendant No. 3 with late Duguru. The age of Defendant No. 3 has been described as 45 years in her deposition in the year 1985. Therefore, she might have taken birth in the year 1940. If she married at the age of 15 to 16 it is likely that the marriage took place between 1955-1956. This does not indicate that the marriage took place prior to the date Hindu Marriage Act, 1955 came into force. Apart from the above, as is evident from the evidence of the witnesses examined on behalf of the defendants the purpose of marriage between Duguru and Defendant No. 3 was that Duguru had no male child through his first wife and therefore, he got married to-Defendant No. 3 to have a male child. Admittedly at the time of marriage Duguru was 75 years old and, therefore, such a story advanced by the defendants is not acceptable. Reliance was also placed on some entries made in the Voter list to prove that Defendant No. 3 is the legally married wife of Duguru. Even accepting such evidence that Defendant No. 3 married Duguru, in view of the finding arrived at earlier that such marriage took place after Hindu Marriage Act 1955 came into force, the second marriage was null and void and, therefore, the Defendant No. 3 is not entitled to any share in the properties of Duguru and as such she could not have sold any part of the property for any purpose. I therefore, do not find any illegality in the order of the Trial Court in respect of the said issue.

7. In view of the discussions made above, I do not find any merit in the appeal and the same is dismissed.