

(2008) 10 OHC CK 0030
In the Orissa High Court

Jogendra Ram, after him his L.Rs. and Another	APPELLANT
Vs	
Purna Chandra Ram and Others	RESPONDENT

Date of Decision : 01-10-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Marriage Act, 1955 — Section 11, 5
Hindu Succession Act, 1956 — Section 6

Citation : (2008) 106 CLT 837 : (2008) 2 OLR 1095 Supp

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Judgement

A.S. Naidu, J.—The Judgment/decreed passed by the Learned 2nd Addl. District Judge, Cuttack in Title Appeal No. 56 of 1995 confirming the Judgment/decreed passed by the Learned Civil Judge (SD), 1st Court, Cuttack in T.S. No. 223 of 1984 are assailed in this Second Appeal by the Defendants in the suit.

2. The suit was one for partition and mesne profits. Bereft of unnecessary details, the facts necessary for effectual adjudication of the dispute among the parties are as stated hereinafter:

One Kartik Ram (since dead) had two wives, Dukhi (Defendant No. 1 - since dead) and Malli (Plaintiff No. 1-since dead). Dukhi Defendant No. 1 had two sons being Jogendra (Defendant No. 2 - Appellant No. 1 in this appeal - since dead) and Bholanath (Defendant No. 3 - present Appellant No. 2). Malli had three daughters and two sons, namely, Gouri Ram (Plaintiff No. 4), Haramani (Plaintiff No. 5), Puma (Plaintiff No. 2), Sarojini (Plaintiff No. 6) and Manorapjan (Plaintiff No. 3). The suit property as would be evident from the pleadings was the ancestral property of Kartik who died in the year 1977. According to the Plaintiffs after death of Kartik they and Defendants were entitled to inherit the property, but then as the Defendants did not accede to the amicable partition the suit was filed.

3. The Defendants filed a joint written statement admitting the fact that Plaintiff

No. 1 Malli was the second wife of Kartik and Plaintiffs 2 to 5 were the sons and daughters born to Kartik through Malli. They also admitted that the suit property was the joint ancestral property of the parties. According to them during the lifetime of Kartik dissension cropped up between Malli and Dukhi, the two wives of Kartik and others. In order to amicably settle the dispute and to avoid litigations on 23-11-1966 Kartik had executed a Will but then as the properties bequeathed in favour of different persons were not approved by all the family members, Kartik executed another Will on 19-3-1968 which had been registered.

4. The said Will was however cancelled and a third Will was executed by Kartik on 17-2-1976 which was also registered. As per the said registered Will the Plaintiffs were entitled to six annas" interest and the Defendants were entitled to ten annas" interest in the suit schedule property. After death of Kartik, the parties were in possession as per the aforesaid allotments made in the Will, but then under ill-advice of others, the Plaintiffs filed the suit with the motive to grab more share in the suit property.

5. So far as mesne profit is concerned, it was averred that the Plaintiffs and Defendants being in possession of the suit property as per the shares allotted to them in the Will the Defendants were not liable to pay anything to the Plaintiff towards mesne profit.

6. On the basis of the pleadings of the parties, the Trial Court framed as many as six issues. In order to substantiate their case, the Plaintiffs got one witness examined and the Defendants also got one witness examined. The Plaintiffs exhibited a certified copy of Judgment passed in O.S. No. 1 of 1988 of the Court of the then Subordinate Judge, 1st Court, Cuttack which was marked Ext.I. After threadbare discussion of the evidence, both oral and documentary, and the pleadings, the Trial Court arrived at the conclusion that the suit property being joint ancestral property of the parties the same was liable to be partitioned among the parties and that the Plaintiffs were entitled to 51/96th share and Defendants 2 and 3 were entitled to 45/96th share and that the Plaintiffs were not entitled to any mesne profit.

7. Being aggrieved by the said Judgment of the Trial Court, Defendants 2 and 3 preferred a Title Appeal which was numbered as 56 of 1995 and was heard and disposed of by the Learned 2nd Addl. District Judge, Cuttack. The Plaintiffs also preferred a Cross Objection assailing the shares carved out.

8. Before the Appellate Court the Defendants raised the question of maintainability of the suit on the ground that one of the persons who had purchased some lands from Kartik had not been impleaded in the suit. The Appellate Court however found that the said question was devoid of any merit. The Appellate Court did not interfere with the Judgment/decreed of the Trial Court but then held that the Plaintiffs were entitled to mesne profit and partly allowed the Cross Appeal. The said Judgment of the Appellate Court is assailed in this Second Appeal.

9. Before proceeding to decide this appeal, it would be worthwhile to mention that during pendency of the suit, Dukhi (Defendant No. 1 and first wife of Kartik) died in the year 1994.

The Second Appeal was admitted on the following substantial questions of law:

(1) Whether the determination of shares made by the Courts below was legal and valid and was in accordance with law? and

(2) Whether Plaintiff No. 1 who (sic) married to (sic) Kartik ?

10. Mr. Nanda, Learned Counsel for the Appellants, forcefully submitted that during the lifetime of Dukhi (Defendant No. 1. the first wife, Kartik had married Plaintiff No. 1 Malli. Thus the second marriage being invalid Malli was not entitled to any share in the joint ancestral property. This submission of Mr. Nanda is strongly repudiated by Mr. Samantaray, Learned Counsel for the Respondents. According to Mr. Samantaray, admittedly Kartik died in the year 1977. He had first married Dukhi and through her two sons were born. There is also no dispute that Kartik had married Malli during the lifetime of Dukhi.

11. Thus the point for determination is whether the second marriage was valid or not. It is pertinent to mention that no averment was made in the written statement challenging the validity of second marriage of Kartik with Malli nor was any issue framed in that regard.

12. It is well settled that a question of law can be raised at any stage of a proceeding. But when for determination of a point of law facts are necessary, unless the said facts are specifically pleaded, a litigant should not be allowed to raise the same at the second Appellate stage for the first time. In other words, a party should not be permitted to set up a new case for the first time or raise a new issue, other than jurisdiction which is not supported by pleadings or evidence on record in a Second Appeal (see AIR 1977 SC 1041 Panchu Gopal Barua v. Umesh Ch. Goswami and Ors. and v. Seshammal). - Hero Vinoth (minor) (2006) CLT 393

13. Section 100 of the CPC stipulates that jurisdiction of a High Court to entertain a Second Appeal after the 1976 Amendment is confined only to such appeals which involve substantial question(s) of law specifically set out in the memorandum of appeal and formulated by the High Court. The proviso to the said Section, however, does not create an embargo on jurisdiction of High Court, nor does it take away or abridge the power of High Court to consider a question for reasons to be recorded; provided the Court is satisfied that the matter involves such question.

14. Admittedly in the case at hand, there was no pleading challenging the validity of the second marriage of Kartik with Malli. Section 11 of the Hindu Marriage Act, 1955 deals with void marriage and states that to construe a marriage valid, three conditions have to be fulfilled, viz., (1) neither party had a spouse living at the time of marriage; (2) the parties were not within the degree of prohibited

relationship unless the custom or usage governing each of them permitted such marriage; and (3) the parties were "Sapindas" of each other unless the custom or usage governing each of them permitted marriage between the two; besides other grounds as stipulated u/s 5. Prior to enactment of the Hindu Marriage Act, 1955, there was no prohibition for a second marriage. It would appear from the facts and circumstances of the case at hand that marriage of Kartik and Malli was before 1955. The age of the children born of their wedlock also fortifies such conclusion.

15. Thus this Court is not inclined to entertain the question raised for the first time in the Second Appeal with regard to validity of marriage between Kartik and Malli.

16. According to Mr. Nanda, a Will was executed by Kartik during his lifetime bequeathing 60% share in the property in favour of Dukhi and children born through her and 40% share in favour of Malli and children born through her and the said wish of the executant has to be respected. Mr. Samantaray, Learned Counsel for the Respondents, on the other hand submitted that the Defendants sought probate of Will dated 17-2-1976 in O.S. No. 1 of 1988. The said suit was dismissed with the finding that the Will in question was not a genuine or valid document. No material has been produced either before the Courts below or before this Court that the said decision was ever varied and as such the Trial Court rightly came to the conclusion that the entire property was joint ancestral property and is liable to be partitioned.

17. Section 6 of the Hindu Succession Act deals with succession of coparcenary property. The proviso to the said Section reads as follows:

Provided that if the deceased had left behind him surviving a female relative specified in Class I of the schedule or a male relative specified in that Class who claims through such female relative, the interest of the deceased in the Mitakshare coparcenary property shall devolve by testamentary intestate or succession, as the case may be under this Act and not by survivorship.

18. Thus where a Hindu died after the enforcement of the Act leaving behind his widow or widows, sons and daughters, the devolution of the Mitakshara coparcenary property would be as per Section 6.

A perusal of the impugned Appellate Judgment reveals that the Court below rightly carved out the shares of the parties keeping in mind the provisions of Section 6 and the Explanations thereto in the Hindu Succession Act. The decision of the Appellate Court therefore needs no interference in this Second Appeal.

19. The only other question that needs determination is as to whether Plaintiffs are entitled to any mesne profit. The Trial Court had held that they were not entitled to any mesne profit. The Appellate Court however decreed mesne profit as claimed by the Plaintiffs. After going through the evidence and hearing the Learned Counsel for the parties, this Court finds that there are discrepancies in

the evidence with regard to possession of the property by different parties inasmuch as there was also no specific pleading with regard to possession of different parties. In a partition suit like the present one where different properties and buildings were let out to many outsiders, the question of accounts and joint liability and assets of the family to be partitioned becomes essential, but then in the case at hand it is not very much apparent as to which property was in possession of which party. Therefore this Court feels that ends of justice and equity will be better served if this aspect is dealt with in the final decree proceeding. Accordingly this Court disposes of the Second Appeal with liberty to the parties to raise all their contentions with regard to mesne profits in the final decree proceeding and directs the Trial Court to decide the same in consonance with law.