

(1983) 12 OHC CK 0015
In the Orissa High Court
Case No : Second Appeal No. 115 of 1979

Judhistir Sahu and Others

APPELLANT

Vs

Sesha Patra

RESPONDENT

Date of Decision : 19-12-1983

Acts Referred:

Hindu Succession Act, 1956 — Section 8

Citation : AIR 1984 Ori 142 : (1984) 1 OLR 206

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : P.K. Misra, for the Appellant; S.P. Misra, for the Respondent

Final Decision : Dismissed

Judgement

G.B. Patnaik, J.—Defendants are appellants against an affirming judgment in a suit for declaration of title and confirmation of possession or in the alternative for recovery of possession.

2. The suit property comprises of 5.89 acres of agricultural land and a house standing on a portion of it in village Randha which is admittedly the property of one Nabin Patra. Nabin's son is Ulla. Nabin died in 1914 and Ulla died in 1928. Nabin's second wife is Jhara Patrani. It is alleged that plaintiff who is the natural born son of Krishna, brother of Nabin was taken in adoption by Jhara. Jhara executed a deed of gift in favour of defendant No. 1 in 1943. Certain disputes having arisen between Jhara Patrani and the present plaintiff, the present plaintiff filed a suit for declaration of title and recovery of possession claiming right, title and interest on the basis that he was the adopted son of Jhara Patrani. That litigation was fought up to the High Court and disposed of by the High Court in Second Appeal No. 232 of 1949 (Ext. J in this case) and the plaintiff's claim of adoption was negatived. It was also held in the said litigation that the deed of gift was invalid since Jhara had a limited interest. The High Court affirmed the finding of the two courts below in the said case that Jhara possessed the properties as limited owner. According to the present plaintiff case, despite this

decision, the property continued to be in possession of the plaintiff and Jhara never enjoyed the same. Jhara died in the year 1971 and was physically incapable and mentally unsound to execute any document, but defendants 2 and 3 got a will executed by Jhara in their favour on 22-8-1971--marked Ext. A/3 and in a proceeding initiated u/s 145 of the Code of Criminal Procedure, the Magistrate declared the possession of the property in favour of the defendants and hence the present suit.

3. Two sets of written statements were filed one by defendant No. 1 and another by defendants 2 and 3. Defendant No. 1 pleaded that defendants 2 and 3 were in possession and enjoyment of the property by virtue of the will (Ext. A/31 and defendant no. 1 was not a necessary party to the suit.

Defendants 2 and 3 resisted the suit on the ground that Jhara came to possess the properties after the death of Ulla and continued to possess the same till her death in 1971. On 22-8-1971, she had executed the will (Ext. A/3) in a sound state of mind and out of her own free will and the will had been acted upon, inasmuch as defendants 2 and 3 were possessing the land covered under the Will and on the basis of the Will the revenue papers had been changed in the names of defendants 2 and 3. According to these defendants, the plaintiff having been unsuccessful in getting his title declared in earlier suit (Title Suit No. 295 of 1944) and who was never in possession of the property had filed this present suit mischievously to grab the property.

4. The trial court found that Jhara Patrani was in possession of the property from the year 1928 onwards till her death in 1971 and, therefore, by operation of Section 14 of the Hindu Succession Act, the limited rights of Jhara Patrani ripened into absolute rights. So far as the Will (Ext. A/3) was concerned, he held that the Will was not genuine and several suspicious features in which the document was prepared as well as the unreliable and untrustworthy character of the propounders of the Will made the plaintiff's case of Will being fabricated by the defendants subsequent to the death of Jhara very much probable. On these findings, the plaintiff's suit was decreed as the plaintiff was the nearest reversioner of Jhara being Nabin's brother's son.

5. On appeal by the defendants, the learned District Judge confirmed the finding of the trial court that the Will was a fabricated one, but reversed the finding of the trial court with regard to interest of Jhara Patrani and held that Jhara Patrani who had limited interest could not be held to have acquired absolute right in the property and, therefore, she had no power of disposition and so the Will even if genuine must be held to be invalid and inoperative. On these findings, the appeal was dismissed as the plaintiff was the sole surviving reversioner of Ulla, the original owner of the property.

6. In this second appeal by the defendants. Mr. P.K. Misra, the learned counsel for the appellants, does not challenge any of the findings of the lower appellate court, but contends that on Jhara's death in 1971, the property would devolve

on the heirs of the last male holder, namely Ulla as if Ulla himself died in the year 1971, applying the principles of Section 8 of the Hindu Succession Act. Though this point had not been taken by the learned counsel in the memorandum of appeal and though this Court, therefore, did not admit this second appeal taking this as a substantial question of law, yet, as the point is a pure question of law. I permitted the learned counsel to urge this point.

Mr. S. P. Misra, the learned counsel for the plaintiff respondent, on the other hand, submits that the last male holder Ulla having died prior to coming into force the Hindu Succession Act. 1956, the said Act cannot have any operation in the facts and circumstances of this case and section 8 of the Hindu Succession Act, therefore, cannot have any application. In such an event, the plaintiff is the nearest reversioner of Ulla being entitled to succeed to the property on the death of Ulla and the courts below are right in decreeing the plaintiff's suit.

7. The main dispute, therefore, is whether Section 8 of the Hindu Succession Act has application to the facts and circumstances of the present case. The learned counsel for the appellants in support of his contention placed reliance on the decisions in *Daya Singh (Dead) through Lrs. and Another Vs. Dhan Kaur*, : *Ramachandra Bhat v. Srideviamma* AIR 1974 Kant 68 (FB); and *Kumaraswami Gounder v. D.R. Naniappa Gounder* AIR 1978 Mad 285 (FB). The learned counsel for the respondent, on the other hand, submitted that the Bench decision of this Court in the case of *Mst. Jandebi Vs. Upendra Sahu and Another*, , ran contrary to the submission of the learned counsel for the appellants and was based upon the decision of the Supreme Court in the case of *Eramma Vs. Verrupanna and Others*, . He further submitted that the Supreme Court decision reported in *Eramma Vs. Verrupanna and Others*, being a decision of three learned Judges must be followed in preference to the decision of the Supreme Court in *Daya Singh (Dead) through Lrs. and Another Vs. Dhan Kaur*, which is a decision of two learned Judges.

8. There is no doubt that the decision of this Court in *Mst. Jandebi Vs. Upendra Sahu and Another*, supports the contention of the learned counsel for the respondent. In the said case, it was held:--

"Section 8 of the Hindu Succession Act is not retrospective and applies to cases where a male Hindu dies after the commencement of the Act. The death of a male Hindu after the commencement of the Act refers in actual and not fictional death." (quoted from Headnote) The learned Judges of this Court in that case relied upon the decision of the Supreme Court in *Eramma Vs. Verrupanna and Others*, and held that Section 8 of the Hindu Succession Act had no application, inasmuch as Section 6 of the Act clearly laid down that devolution of property provided therein would operate only if the male Hindu died after the commencement of the Act and according to the learned Judges. Section 8 must be interpreted keeping in view the provisions of Section 6 of the Act. In my opinion, this decision must be held to be no longer good law in view of the later decision of the Supreme Court in *Daya Singh (Dead) through Lrs. and Another*

Vs. Dhan Kaur, and in fact has been so held by the Karnataka High Court in the Full Bench case reported in AIR 1974 Kant 68 (FB). Venkataramiah. J. (as he then was) speaking for the Court, held in paragraph 17 of the judgments:--

With great respect we do not also agree with the views expressed on the above question in Renuka Bala Chatterji Vs. Aswini Kumar Gupta and Others, , Nathuni Missir Vs. Mosammat Ratna Kuer and Others, : (Chaturbhuj Pradhan and Others Vs. Sarbeshwar Pradhan and Another, , Mst. Jandebi Vs. Upendra Sahu and Another, : Sampath Kumari v. Lakshmiammal AIR 1963 Mad 50 and Rameshwar v. Hardas, AIR 1964 All 308. In all these cases the view expressed by the Privy Council in AIR 1946 173 (Privy Council) which has been later approved by the Supreme Court in Fateh Bibi etc. Vs. Charan Dass, regarding the time at which the succession opens has either been lost sight of or has not been given due weight in deciding the question. In view of the decision of the Supreme Court in Fateh Bibi's case the view expressed in these cases to the contrary should be treated as having been overruled."

It may be noted that the Karnataka High Court had not the opportunity of going through the decision of the Supreme Court in Daya Singh's case (AIR 1974 SC 6651 when the Full Bench decision of the Karnataka High Court was delivered as the decision in Daya Sinah's case is later in point of time. In fact, in Daya Singh's case, the Supreme Court took the same view as the Karnataka High Court had taken in the Full Bench judgment referred to supra and held that succession opened on the death of the limited owner and the law then in force would govern the succession. In my opinion, the decision of the Supreme Court in Daya Singh's case applies fully to the facts and circumstances of the present case. The only thing which has to be seen further is whether this later decision of the Supreme Court is in any way in conflict with the earlier three-Judge decision of the Supreme Court reported in Eramma Vs. Verrupanna and Others, . In fact, in the later judgment, the Supreme Court has considered the decision in Eramma Vs. Verrupanna and Others, and in paragraph 4 of the judgment, the distinguishing features were noted. In the concluding portion of paragraph 4 in the later judgment, the Supreme Court observed:--

".....This Court had therefore also no occasion to consider the effect of the earlier decisions on the question as to what happens when a female limited owner, whether she is a widow, mother or daughter who succeeds the last male holder dies."

Thereafter, the Court relied upon the decision of the Privy Council in AIR 1946 173 (Privy Council) and held :--

"Now if this proposition is correct, as we hold it is, that, where a female heir succeeds to an estate, the person entitled to succeed on the basis as if the last male holder had lived up to and died at the death of the limited owner, succession to Wadhawa Singh's Estate in the present case opened when his widow died and it would have to be decided on the basis that Wadhawa Sinsh had died in

1963 when his widow died....."

It was further held :--

".....In that case the succession to his estate would have to be decided on the basis of Section 8 of the Hindu Succession Act. The various High Courts which have held otherwise seem to have been oppressed by the feeling that this amounted to giving retrospective effect to Section 8 of the Hindu Succession Act whereas it is only prospective. As the Privy Council pointed out it means no such thing. The accepted position under the Hindu Law is that where a limited owner succeeds to an estate the succession to the estate on her death will have to be decided on the basis that the last full owner died on that day. It would be unreasonable to hold that in such a circumstance the law as it existed at the time when the last male holder actually died should be given effect to. If the person who is likely to be the person who would have succeeded if the limited owner had not intervened, there is nothing unreasonable in holding that the law as to the person who is entitled to succeed on the limited owner's death should be the law then in force and not the law in force at the time of the last full owner's death."

Relying on the aforesaid decision of the Supreme Court, the later Full Bench decision of the Madras High Court in the case reported in AIR 1978 Mad 285 at p. 2881 held: --

"The expression "a male Hindu dying intestate" had received judicial interpretation and, as held by the Privy Council with reference to the Hindu Law of Inheritance Amendment Act, 1929, it only referred to the status of the person dying and it had no effect upon the time of death so that the expression would be apt to apply to a Hindu dying intestate before or after that Act....."

In view of this position of law, I do not find any inconsistency between the decisions of the Supreme Court in Eramma's case (AIR 1966 SC 18791 and Daya Singh (Dead) through Lrs. and Another Vs. Dhan Kaur, . 9. Now applying the ratio of Daya Singh's case, on the death of Jhara in 1971, the heirs of Ulla, if Ulla would have died in 1971, would succeed to the property. Defendants 1 and 3 and the plaintiff would not come as heirs in Class-I of the last male holder, namely Ulla. Defendants 1 and 3 are the sister's sons of Ulla and, therefore, would come within entry-IV of Class-II, whereas plaintiff does not come within any of the entries in Class-II and, therefore, defendants 1 and 3 are entitled to succeed to the property.

10. In the result, therefore, the judgments and decrees of the two courts below are set aside and the plaintiff's suit is dismissed, but in the facts and circumstances of the case, there will be no order for costs.