
(2015) 06 OHC CK 0005
In the Orissa High Court
Case No : R.S.A. No. 453 of 2003

Kalu Sahu and Others

APPELLANT

Vs

Kundana Sahu and Others

RESPONDENT

Date of Decision : 17-06-2015

Acts Referred:

Evidence Act, 1872 — Section 68
Hindu Succession Act, 1956 — Section 14

Citation : (2015) 2 OLR 673

Hon'ble Judges : D. Dash, J.

Bench : Single Bench

Advocate : S.C. Sanataray, N.C. Sahoo, D. Mohanty, S.K. Nanda, Sidhartha Mishra and A. Mishra, Advocates, for the Appellant; S.K. Padhi Advocate, D. Mohapatra, B.K. Sahoo, S.K. Mohapatra, D. Das, G. Misra, P.N. Patra, Ananda Das, B. Panigrahi and S.S. Mishra, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

D. Dash, J.—The unsuccessful defendant Nos. 1, 2 and 3 in the trial court have filed this second appeal challenging the judgment and decree dtd. 2.7.2003 and 10.7.2003 respectively passed by the learned 1st Addl. District Judge, Berhampur in Title Appeal No. 34 of 1989 confirming the judgment and decree dtd. 15.12.1988 and 2.01.1989 respectively passed by the learned Munsif, Berhampur (as it was then) in Title Suit No. 174 of 1982.

2. For the shake of convenience, to avoid confusion and bring in clarity the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. The suit is one for partition. One Binayak Sahu died in the year 1952 and he during his life time had acquired the suit house where he was residing with his family till his death. Binayak had married Ratani and he had two sons namely Damodar, Purnachandra and two daughters namely Kundan (Plaintiff) and Sabitri. It is stated that Ratani died in the year 1956. Binayak had another wife

namely Subarni who is said to have died in the year 1958. However, Binayak had begotten no child through Subarni. Son of Binayak i.e. Purnachandra died issueless in the year 1961 leaving behind his widow who re-married. They also did not beget any child. Damodar died in the year 1971 and his wife Champa had predeceased him having died in the year 1969. One of the daughters of Binayak namely Sabitri said to have died in the year 1978 leaving behind his two sons namely Biswanath and Kalu who is defendant No. 1. Biswanath is dead and his wife Uma is defendant No. 3. Kalu's only sister is Apurba and she is defendant No. 2.

4. Plaintiff in the suit is one of the two daughters of Binayak. She has claimed half share over the suit house with the other half share for being allotted to defendant Nos. 1 to 4 jointly. The defendant Nos. 1 to 3 filed the written statement. They have admitted the genealogy which is given as under for better appreciation.

It is the case of the defendants that Biswanath died leaving behind his widow Uma. After the death of Purnachandra, his widow Kanchana married again in another family and severed all her relationship with the family- Damodar the natural son of Binayak and his wife Champa thus became the owner of the suit house and remained in peaceful enjoyment of the same. They had no issue, so had adopted Kalu, the defendant No. 1 who is the sister's son of Damodar. Adoption is said to have taken place when Kalu was aged about 5 years old and since then Kalu, the defendant No. 1 is said to have been brought up by them. He was staying with the adoptive parents under one roof all through. He was also taking care of Damodar and his wife Champa. They had executed a registered document nomenclature as "Niripama Patra" in favour of Kalu on 27.01.1964. Damodar and his wife transferred the suit schedule house to defendant No. 1 for his maintenance and put him in possession with further condition that all the three would enjoy the suit properties jointly exercising joint right and would be so possessing. This defendant No. 1 having remained in physical possession over the suit land exercising all sorts of right as its absolute owner to the exclusion of others, he also claims to have acquired absolute right, title, interest and possession over the same. It is stated that plaintiff and her, sister Sabitri never succeeded the suit property and they were neither in possession nor enjoyment of the same. The plaintiff and Sabitri had never possessed the suit house and it is said that they had absolutely no such right. It is further stated that the possession and enjoyment of the suit house by defendant No. 1 has been since 1964. Damodar and Champa jointly having continued to possess for a long period, they have become the absolute owners and therefore Kalu, the defendant No. 1 claims himself as the lone successor so far as the suit house is concerned.

5. The trial court framed as many as eight issues. In answering those in favour of the plaintiff, the suit has been decreed. The followings are the findings;

"i) Nirupama Patra, Ext. H, having not been proved in accordance with law is inadmissible in evidence and the claim of title on the basis that is untenable, ii)

Ext. H though is the certified copy of a public document, its relevancy and validity is not proved and established, iii) Mere possession for a long time does not ipso facto leads to adverse possession."

It has also been held that the plaintiff being the daughter of Binayak has right over her share in the property since the property has devolved upon her and the children of Sabitri. It is further held that after the death of Binayak the property devolved upon his widow and sons, and on their death devolved with the plaintiff and her sister Sabitri whose interest is succeeded by her children.

6. With the above, the plaintiffs suit for a preliminary decree for partition having been decreed, the matter was carried to the appellate court The findings rendered therein are the followings;

"i) Nirupama Patra (Ext. H) is not a valid document,

ii) The factum of recording of the suit house coupled with the fact of payment of holdings tax proved through receipts, payment of the electricity bill, raised towards consumption of energy enure in favour of all. Defendant No. 1's possession has been found to be unauthorised and he is said to have not acquired absolute right, title and interest by way of adverse possession more particularly when it has also not been established that other-co-sharers have no intention to possess."

7. I have heard the teamed counsel for the parties at length and have, carefully gone through the written note of submission placed by them.

8. Submission by the learned counsel for the appellant:--

"a) Admittedly the suit property belongs to Binayak who died in the year 1952 leaving his two widows, two sons and two daughters. Therefore, the plaintiff being the daughter has no independent right to maintain the suit for partition.

b) Ratni the widow of Binayak is simply said to have died in the year 1956 and there is neither any pleading nor it is there in the evidence that the death was prior to 17.6.1956 or thereafter- So, it must be presumed that after death of Binayak, Ratni and Subarni who died in the year 1958, two sons Damodar and Purnachandra became the joint owners of the suit house. So, Purnachandra having died in the year 1961 without any partition and without leaving any issue and his widow having remarried in another family, in absence of any heir/s as specified in Class-I of the schedule of the Hindu Succession Act, his undivided interest in the property passed over to Damodar. So, Damodar became the absolute owner of the property. Damodar was issue less and the defendant No. 1 claims that for the same Damodar with his wife Champa transferred the suit house to him putting him in possession by a deed of settlement dtd. 27.01.1984 marked as Ext. H, and there remained no dispute on that score during life time of Damodar and Champa nor any challenge to the said deed was made. Therefore, defendant No. 1 claims to be having exclusive right over the said property is to be accepted. The deed in question is a registered one and has not

been questioned for a period of 20 years. The challenge to the said deed at the behest of the plaintiff as now made is untenable in law.

c) The defendant No. 1 is not only claiming exclusive ownership on the basis of said settlement deed Ext. H but also has set up a case that for having remained in possession of the suit house w.e.f. 27.01.1964 till 09.05.1984 for more than 20 years openly and continuously to the knowledge of all concerned asserting exclusive ownership thereon has perfected title by way of adverse possession and more so when none have ever objected to it. Thus, it is the defendant No. 1's alternative case that he has perfected title by adverse possession and thereby right, title and, interest of others to claim possession has stood extinguished long since and that cannot be whittled down."

9. Submission by the learned counsel for the respondent Nos. 1 (a) and 1(e):--

"a) Binayak having died in the year 1952 leaving two widows, two sons and two daughters. The widows succeeded to the suit property-with two sons and those widows were having the limited interest. Lastly Subarni having died in the year 1958, the limited interest of the widows came to the hands of two sons to the exclusion of daughters and therefore upon extinguishment of the branch of one of the sons the surviving sort i.e. Damodar succeeded to the entire properties of Binayak and on the death of Damodar the property has to be succeeded by his legal heirs as available as per the schedule of the Hindu Succession Act. So, the plaintiff and also the defendants have the right over the property as the heirs of Damodar, who has left behind no class-I heir as per the schedule of the Act. Therefore, the defendant No. 1's claim in view of that the document Ext-H of the year 1964 said to have been executed by Damodar and Champa needs due consideration and it is proper to discard it saying that executants being not exclusive owners had no right to do so and exception has to be taken from the fact that plaintiff is not a signatory to it.

c) When it is said that Ext. H is a deed of settlement, but at the same time it is seen that thereby right has only been conferred upon defendant No. 1 to the deprivation and exclusion of the right of others. The same is an invalid document

d) The factum of adoption as pleaded by defendant No. 1 has not at all been established by clear, cogent and acceptable evidence and the circumstances emanating from the evidence tendered by the party pushes the said case of adoption for having shrouded with suspicion.

e) Accepting for a moment that on the basis of the deed of settlement Ext. H, the defendant No. 1 remained in possession, with all other incidental and ancillary activities being done over the suit house, the same can not be taken for the purpose of holding that defendant No. has acquired title by adverse possession when Ext H has also been factually disbelieved to have been executed."

10. On such rival submission the following substantial questions of law have been formulated;

"1) Whether attestation of registered deed of settlement is required to be proved U/s. 68 of the Evidence Act?

2) Whether the courts below has committed an error of law is not considering as to whether any interest over the property in dispute was transferred to defendant No. 1 under Ext. H?

3) Whether the courts below have erred in law by decreeing the suit in absence of pleadings and evidence for deriving necessary benefits as provided U/s. 14 of the Hindu Succession Act, so as to maintain the suit for partition?"

11. In order to answer the substantial questions of law as stated above taking into consideration the rival submission as also the pleadings and evidence on record, it is felt apposite to first of all go to determine that by leaving aside Ext. H as also burying the alternative case of defendant No. 1 as regards acquisition of title by adverse possession for a moment, as to who are the present owners of the suit house, in other words to answer the last question first. This Court feels looking at the submission of the counsels for the parties that the approaches as made by them on this point is not as it ought to have been and therefore, there remains lack of clarity and the confusion has arisen.

12. Binayak having died in the year 1952 leaving his two widows, two sons and two daughters as per the position of law as it stood then his sons Damodar, Purnachandra and two widows succeeded to the suit property when Damodar and Purnachandra each had 1/3rd interest. The two widows jointly had 1/3rd. As per the settled principle of succession under the Hindu Law on the death of Ratni let us accept for moment that she died prior to even coming into force of the Hindu Succession Act, 1956, her the 1/6th interest came to the hands of the surviving widow Subarni. The position is that when two widows succeed with the sons both the widows being taken to be one unit gets one share whereas each sons as an unit by himself get one share each. So, from 1956 to 1958 Subarni the second widow of Binayak held limited interest over 1/3rd of the suit house. It is pertinent to state here that such limited interest has been conferred upon the female by virtue of the provision of Hindu Women's Right to Property Act, 1937 which was in force when Binayak died and thus the widows are not pre Act Widows. The admitted case remains that Subarni when died Hindu Succession Act had already come into force. So, the question arises as to whether the limited interest of Subarni got matured to absolute by virtue of the provision of Sec. 14 of Hindu Succession Act or not.

13. The provision reads that any property possessed by a female Hindu, whether acquired before or after commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. So, the concept of limited ownership stood abrogated thereby and by virtue of operation of law the same ripens to absolute. The above is sub-section (1) of Section 14. Thereby the interest of a Hindu female in property however restricted the nature of that interest under Sastric Hindu Law may be got converted into absolute estate.

14. The Hon'ble Apex Court in case of V. Tulasamma and Others Vs. Sesha Reddy (Dead) by Lrs., pointed out that the Hindu Succession Act, 1956 "is a codifying enactment, and has made far-reaching changes in the structure of the Hindu law of inheritance and succession. The Act confers upon Hindu females full rights of inheritance and sweeps away the traditional limitations on her powers of disposition which were regarded under the Hindu law as inherent in her estate". Sub-section (1) of Section 14 is wide in its scope and ambit and uses language of great amplitude. It says that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The words "any property" are, even without any amplification, large enough to cover any and every kind of property, but in order to expand the reach and ambit of the section and make it all comprehensive, the Legislature has enacted an explanation which says that property would include "both movable and immovable property acquired by a female Hindu by inheritance or devise or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement" of the Act. Whatever be the kind of property, movable or immovable and whichever be the mode of acquisition, it would be covered by sub-section (1) of section 14, the object of the Legislation being to wipe out the disabilities from which a Hindu female suffered in regard to ownership of property under the old Sastric Law, to abridge the stringent provisions against the proprietary rights which were often regarded as evidence of her perpetual tutelage and to recognize her status as an independent and absolute owner of property. This Court has also in a series of decisions giving a most expansive interpretation to the language of sub-section (1) of section 14 with a view to advancing the social purpose of the legislation and as part of that process, construed the words "possessed of" also in a broad sense and in their widest connotation. It was pointed out in *Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others*, that the words "Possessed of" mean "the state of owning or having in one's hand or power". It need not be actual or physical possession or personal occupation of the property by the Hindu female, but may be possession in law: It may be actual or constructive or in any form recognised by law. Elaborating the concept, this Court pointed out in *Mangal Singh and Others Vs. Shrimati Rattno and Another*, that the section covers all cases of property owned by a female Hindu although she may not be in actual, physical or constructive possession of the property, provided of course, that she has not parted with her rights and is capable of obtaining possession of the property. It will, therefore, be seen that sub-sec. (1) of Section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed, she would become the full owner of the property.

Sub-section (2) of section 14 provides that nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property. This provision is more in the nature of a proviso or exception to sub-section (1) and it was regarded as such by Apex Court in Seth Badri Prasad Vs. Srimati Kanso Devi, . It excepts certain kinds of acquisition of property by a Hindu female from the operation of Sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of women in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner which would rob Sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1). The language of Sub-section (2) is apparently wide to include acquisition of property by a Hindu female under an instrument or a decree or order or award where the instrument, decree, order or award prescribes a restricted estate for her in the property and this would apparently cover a case where property is given to a Hindu female at a partition or in lieu of maintenance and the instrument, "decree, order or award giving such property prescribes limited interest for her in the property. But that would virtually emasculate sub-section (1), for in that event, a large number of cases where property is given to a Hindu female at a partition or in lieu of maintenance under an instrument order or award would be excluded from the operation of the beneficent provision enacted in sub-section (1), since in most of such cases, where property is allotted to the Hindu female prior to the enactment of the Act, there would be a provision, in consonance with the old Sastric law then prevailing, prescribing limited interest in the property and where property is given to the Hindu female subsequent to the enactment of the Act, it would be the easiest thing for the dominant male to provide that the Hindu female shall have only a restricted interest in the property and thus make a mockery of sub-section (1). The Explanation to sub-section (1) which includes within the scope of that sub-section property acquired by female Hindu at a partition or in lieu of maintenance would also be rendered meaningless, because there would hardly be a few cases where the instrument, decree, order or award given property to a Hindu female at a partition or in lieu of maintenance would not contain a provision prescribing restricted estate in the property. The social purpose of the law would be frustrated and the reformist zeal underlying the statutory provision would be chilled. That surely could never have been the intention of the Legislature in enacting sub-section (2). It is an elementary rule of construction that each provision of a statute should be construed in isolation but it should be construed With reference to the context and in the light of other provisions of the statute so as, as far as possible, to make a consistent enactment of the whole statute. Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation" as possible to sub-section (1)

and so read, it must be confined to cases where property is acquired by a female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. This constructional approach finds support in the decision in Badri Prasad's case (supra); where this Court observed that sub-section (2) can come into operation only if acquisition in any of the methods enacted therein is made for the first time without there being any pre-existing right in the female Hindu who is in possession of the property". It may also be noted that when the Hindu Succession Bill 1954, which ultimately culminated into the Act, was referred to a Joint Committee of the Rajya Sabha, CL. 18(2) of the Draft Bill, corresponding to the present Sub-section (2) "of Section 14 , referred only to acquisition of property by a Hindu female " under gift or will and it was subsequently that the other modes of acquisition were added so as to include acquisition of property under an instrument, decree, order or award. This circumstance would also seem to indicate that the legislative intendment was that sub-section (2) should be applicable only to cases where acquisition of property is made by a Hindu female for the first time without any pre-existing right - a kind of acquisition akin to one under gift or will. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.

This has been followed with full approval in Bai Vajia (Dead) by Lrs. Vs. Thakorbbhai Chelabhai and Others, and series of cases.

In Eramma Vs. Verrupanna and Others, , the Hon"ble Apex Court has discussed the ambit and object of the section and that has been referred to in case of V. Tulasamma and Others Vs. Sesha Reddy (Dead) by Lrs., .

15. It has been held that the expression "Any property possessed by a female Hindu read with expression in any other manner whatsoever in the explanation of sub-section is wide never show as to envisage a female Hindu coming into possession of the property otherwise than by the modes prescribed in the earlier part of the explanation. The use of the above words demonstrates that the legislature also envisage other legal modes by a female can also come into possession of the property". It has also been held that the word possessed as use under the section has been in a broad sense and in its widest connotation it referred to have the state of owning or having in once hand or power it need not be actual physical possession or personal occupation of the property by female but very position in law. It may either be actual or constructive or in any form recognised by law. This thus includes the right to possess. The series of decisions run on this score that the section covers all kinds of property owned by a female Hindu, although she may not be in actual physical or constructive possession of that property, provided of course she has not parted with her rights who is

capable of obtaining. possession of the property. The female owner would be regarded as being possessed of the property, if the trespasser perfected his title by adverse possession before the Act came into force.

16. The above being the law of the land when we advert to the case has to be said that after death of Ratani in the year 1958 Subami was having absolute interest and ownership to the extent of 1/3rd over the suit land. When the rest was remaining equally with Damodar and Pumachandra. Next when Subami died in the year 1958, the property is to go back to the heirs of Binayak and that, 1/3rd interest of Subami came to the hands of Damodar and Pumachandra who became owners with half interest remaining with each of them. On the death of Pumachandra, Damodar became the absolute owner of the entire property and lastly when Damodar died without any issue of his own and his wife Champa had predeceased him, he is found to be having left behind no Class-I heirs as given in the schedule of the Hindu Succession Act. Damodar had two sisters who were living by then and they are, namely, Kundan, the plaintiff and Sabitri, mother of defendant Nos. 1, 2 and 3. They come in entry No. ii of Class-2 heirs as given in the schedule. Now by virtue of the provision of Hindu Succession Act, these properties are became the absolute property in the hands of two sisters with each of them having equal share and accordingly they succeeded. Therefore, the plaintiff is entitled to half share over the suit house, whereas the children of Sabitri are entitled to the rest half. This is the position in my considered view so far as the resting of the ownership in respect of the properties of Binayak.

17. Now arise the question as to if the defendant No. 1 can be said to have acquired absolute right exclusively upon himself on the basis of Ext. H. On this score it may be first of all stated that there stands a concurrent finding of fact that Ext. H is invalid. This Ext. H is a document styled as a deed of settlement. The certified copy of the said document has been proved. Both the Courts have held that the defendant No. 1 has utterly failed to prove its due execution by Pumachandra and Champa by leading required evidence. The trial court has discussed the evidence of the witnesses in great detail for the purpose, and it is seen that by assigning very good reasons, the finding has been given against defendant No. 1 where by his claim on the basis of Ext. H has been discarded. The lower appellate court has also taken the pain of reappraisal of evidence which is the duty of the first appellate court being the final court of fact Next it has been said that Damodar and Champa had no absolute right to transfer the property, this view of course is not acceptable as is evident from the discussion made in the foregoing paragraph but it" has hardly any impact on the contentions issue. Therefore, when this document Ext. H is kept out of consideration. The possession by defendant No. 1 alone, for any length of time by paying the rent, holding tax, and taking electricity connection/etc, in the absence of specific pleading as to when others have been firmly and assertively denied of their right to possess the suit house and by what overt act and from which time onwards, no fault is found with the finding of the courts below against defendant No. 1 on that score.

The substantial questions of law as framed are accordingly answered.

18. In the result, the appeal stands dismissed and in the peculiar facts and circumstances of the case, the parties are to bear their respective cost of litigation all throughout.