

**(2016) 10 OHC CK 0025**

**In the Orissa High Court**

**Case No :** R.S.A. No.30 of 2010(From a judgment and decree dated 22.10.2009 and 3.11.2009 respectively passed by Shri B.P.Routray, Additional District Judge, Sambalpur in R.F.A.No.6/3 of 2007-08 confirming the judgment and decree dated 11.12.2006 and 21.12.2006 resp

Kamaljit Mishra

APPELLANT

Vs

Suchitra Mishra

RESPONDENT

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**Date of Decision :** 07-10-2016

**Acts Referred:**

Hindu Succession Act, 1956 — Section 6

**Citation :** (2016) 168 AIC 807

**Hon'ble Judges :** Dr. A.K. Rath, J.

**Bench :** Single Bench

**Advocate :** Mr. R.K. Mohanty, Senior Advocate, Mr. S.K. Sarangi, Advocate, for the Respondents; Ms. Savitri Ratho Advocate, for the Appellant

**Final Decision :** Dismissed

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**Judgement**

Dr. A.K. Rath, J. - This is an appeal against the judgment and decree dated 22.10.2009 and 3.11.2009 respectively of the learned District Judge, Sambalpur in R.F.A.No.6/3 of 2007-08 confirming the judgment and decree dated 11.12.2006 and 21.12.2006 of the learned Civil Judge (Sr. Division), Sambalpur in T.S. No.41 of 2001.

2. The following genealogy would show the relationship of the parties.

3. Case of the plaintiff was that T.S.No.83 of 1990 was instituted by defendants 1 and 2 against defendant no.3 for partition. The same was decreed in terms of a compromise petition dated 16.4.1991. She was not a party to the suit. No share was allotted to her. She came to know about the suit and compromise decree in the month of January, 2001. With the aforesaid factual scenario, the suit was filed for a declaration that the compromise decree passed in T.S.No.83 of 1990 is null and void and not binding on her and to allot a share in the schedule A and B properties.

4. Pursuant to issuance of summons, defendant no.2 entered appearance and filed written statement contending inter alia that T.S.No.83 of 1990 as well as compromise petition was within the knowledge of the plaintiff. She was instrumental in filing the suit. She voluntarily relinquished her share. The decree passed in the suit is binding on her. Defendants 1 and 3 were set ex parte. Be it noted that during pendency of the suit, defendant no.3 died, where after his legal representatives have been substituted. Further during pendency of the appeal, the sole appellant died, where after his legal representatives have been substituted.

5. Stemming on the pleadings of the parties, the learned trial court struck five issues. They are :-

"1. Is the suit maintainable ?

2. Whether the compromise decree passed in T.S.No.83 of 1990 was at the instance of the plaintiff and is binding on her ?

3. Whether the plaintiff is entitled to get a share in respect of the suit property ?

4. Whether the plaintiff has knowledge about the previous partition suit (T.S.No.83 of 90) ?

5. To what relief the plaintiff is entitled ?"

6. To prove the case, the plaintiff had examined herself as P.W.1 and on her behalf, certified copy of original decree of T.S.No.83 of 1990 was exhibited as Ext.1. Defendant No.2 had examined two witnesses including himself and on his behalf, one document was exhibited. The learned trial court came to hold that though defendant No.2 took a plea that the plaintiff has relinquished her share, but the same was not supported by any document. The suit was not filed at the instance of the plaintiff. Accordingly, issue Nos. 2 and 4 answered in favour of the plaintiff. While answering issue No.3, the learned trial court came to hold that the plaintiff is entitled to a share from the joint family property. It was further held that the suit was maintainable and the judgment and decree passed in T.S. No. 83 of 1990 was not binding on the plaintiff, since she was not a party to the suit. Held so, the learned trial court decreed the suit. It is apt to state here.

7. Assailing the judgment and decree passed by the learned trial court, defendant no.2 filed R.F.A.No.6 of 2003 before the learned District Judge, Sambalpur. The same was transferred to the learned Additional District Judge, Sambalpur and re-numbered as R.F.A.No.6/3 of 2007-08, which was eventually dismissed.

8. This Second Appeal was admitted on 21.5.2010 on the following substantial question of law:-

"(a) Whether the question of limitation for filing the suit has been rightly decided by the learned Courts below ?"

9. Heard Ms. S.Ratho, learned Advocate for the appellants and Mr. R.K.Mohanty, learned Senior Advocate along with Mr. S.K.Sarangi, learned Advocate for the respondents.

10. Ms. Ratho, learned Advocate for the appellants, submitted that the dispute pertains to mother and sons with respect to joint family property. Title Suit No.83 of 1990 was instituted by the sons against their father for partition. Though the plaintiff was entitled to a share, but she had relinquished her share. In view of the same, she was not a party to the suit. Relinquishment of share need not be in writing. The same can be inferred from her conduct. Earlier suit was filed as per the instruction of the plaintiff. Further, the decree was passed on 16.4.1991, but the present suit was filed after lapse of 10 years and, as such, the suit is barred by limitation. She further submitted that the appellate court has not dealt with all issues and recorded the findings and as such the judgment is vitiated. To buttress her submission, she relied on the decisions in the case of Pratapmull Agarwalla v. Dhanabati, Indian Law Reports 1935 Privy Council 691; Man Singh (D) By LRs v. Ram Kala (D) By LRs. and Ors, (Civil Appeal No.7179 of 2005 disposed of 9.12.2010); Anar Devi and others v. Parmeshwari Devi and others, (2006) 8 SCC 656; North Delhi Power Limited v. Jagdamba Gasket (RSA No.178/2008 and CM No. 10951/2008 disposed of on 10.5.2010); Dwijendra Nath Singh and another v. Govinda Chandra and another (disposed of on 5.8.1952); Santosh Hazari v. Purushottam Tiwari (deceased) by LRs, (2001) 3 SCC 179 and Ranganayakamma and another v. K.S. Prakash (dead) by LRs and others, (2008) 15 SCC 673.

11. Per contra, Mr. R.K. Mohanty, learned Senior Advocate and Mr. S.K. Sarangi, learned Advocate for the respondents supported the judgments of the courts below.

12. Before proceeding further, it is apt to refer the decisions cited by Ms. Ratho, learned Advocate for the appellants. In Pratapmull Agarwalla (supra), the Privy Council held that a woman has no right in the joint family property. The right is wholly in the male members. She cannot claim a partition. In Man Singh (supra), the apex Court had the occasion to consider the claim of son of earlier marriage in widowed mother's inheritance through second husband. In Anar Devi (supra), Section 6 of the Hindu Succession Act was the subject matter of interpretation. In North Delhi Power Limited (supra), the question arose for consideration before the Delhi High Court as to whether subsequent registration of partnership firm during pendency of the suit cures the inherent defect of suit having been filed by an unregistered firm. In Dwijendra Nath Singh (supra), the same question arose for consideration before the Calcutta High Court. In Santosh Hazari (supra), the apex Court held that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal. It was further held that the judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the

parties for decision of the appellate court. On a bare reading of the decisions, it is evident that there is a significant difference in the factual matrix in which the said case arose for consideration. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. Thus reliance placed on the aforesaid decisions is of no assistance to the appellants.

13. The hyper technical submissions of Ms. Ratho, learned Advocate for the appellants cannot be countenanced, since during pendency of the suit, Hari Prasad Mishra, husband of the plaintiff, defendant no.3, died. Even if the suit filed by the plaintiff is treated to be incompetent, if pending the suit before a decree is obtained her husband defendant no.3 died, the defect in the earlier filing which even though may result in treating the original suit as still born, would no longer survive if the suit is treated to be deemed to be instituted on the date on which her husband died. If such an approach is adopted, no harm shall be caused to either side. Thus, issue of maintainability of the suit pales into insignificance.

14. The decision of this appeal rests on interpretation of proviso to Section 6 of Hindu Succession Act (30 of 1956), which stood prior to amendment of the Act (Act 39 of 2005). Section 6 reads thus:-

"6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left 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 Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. - For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2. - Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein".

15. The plaintiff is not a coparcener. She is a class-I heir. She is not entitled to demand partition, but then, if a partition was to take place between her husband and her sons, she would be entitled to receive a share equal to that of a son. Hari Prasad Mishra died leaving behind his widow, sons and daughters. Thus, the

proviso to Section 6 comes into play. Hari Prasad's interest in the coparcenary property devolves by intestate succession under the Act and not by survivorship in view of proviso to Section 6 of the Act.

16. The courts below have rightly held that there is no material on record to come to a conclusion that the plaintiff has relinquished her share. Though a feeble attempt has been made by Ms. Ratho, learned Advocate for the appellants to substantiate the same, but on a deeper scrutiny of the evidence, both oral and documentary as well as the pleadings, the submission appears to be billabong.

17. Both the courts have concurrently held that the knowledge of the plaintiff about the compromise decree first known in the year 2001. There is no perversity in the findings of the courts below. Further, the judgment and decree of the earlier suit would not operate as res judicata since the plaintiff was not a party to the earlier suit.

18. In the result, this appeal fails and is hereby dismissed. There shall be no order as to costs.