
(2007) 11 OHC CK 0012
In the Orissa High Court
Case No : F.A. No. 231 of 1987

Lala Bhagat Charan Ray and Others

APPELLANT

Vs

Lala Prafulla Kumar Ray and Others

RESPONDENT

Date of Decision : 26-11-2007

Acts Referred:

Evidence Act, 1872 — Section 50

Citation : (2007) CLT 419 Supp : (2007) 2 OLR 665 Supp : (2007) OLR 419 Supp

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Advocate : P.K. Nanda, for the Appellant; B. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Parichha, J.—This is an appeal by some of the Defendants against the judgment and decree of the learned Subordinate Judge, Jagatsinghpur passed in T.S. No. 1 of 1980.

2. The present Respondent Nos. 1 and 2 as Plaintiffs filed the above noted suit praying for a preliminary decree of partition of the properties described in Schedules A to D of the plaint. Their case, in essence, is that the parties belong to "Lala family" and trace their decent to a common ancestor. Though that family still continues undivided in respect of Schedules A to D properties, yet the other properties have already been partitioned and recorded separately. Defendants 2 to 4 are the legal heirs of Late Lala Gouraballav Ray, Defendants 5 to 9 are the legal heirs of Lala Jagdish Ch. Ray and Plaintiffs (sons of Lala Madhab Ch. Ray) and Defendant No. 1 are legal heirs of Lala Padma Charana Ray. The Plaintiffs pleaded that in the properties covered under Schedule "A", Lala Gouraballav Ray had 9 annas interest, Late Lala Jagdish Prasad Ray had 3 annas six pies, and late Lala Padma Charana Ray had 3 annas six pies interest. In the Schedule-B properties, Late Lala Makhan Kumar Ray, the father of Defendant Nos. 10 to 17 had 1/2 share and the rest 1/2 share belonged to late Lala Padma Charana Ray. They pleaded that Schedule "C" and "D" properties exclusively belonged to Late

Lala Padma Charan Ray. They alleged that taking advantage of their absence, Defendant No. 1 is exclusively enjoying the properties of late Lala Padma Charana Ray and is not affecting partition despite their repeated request. The Plaintiffs, therefore, claimed their one anna 9 pies share in Schedule-A properties, 4 annas in Schedule "B" property, 8 annas share in Schedules C and D properties. Their claim is based on the plea that being the sons and legal heirs of Late Padma Ch. Ray, Late Madhab Ch. Ray and Defendant No. 1 had equal share in the properties left by late Lala Padma Charana Ray. Defendants 2, 3 and 4 did not file written statement and were set ex parte. Defendant Nos. 1, 5 to 9 and 10 to 17 filed three sets of separate written statement. Defendant No. 1 in his written statement pleaded that the suit is barred by limitation, suffers from non-joinder and misjoinder of parties and lack of cause of action. He specifically pleaded that he is the only son and legal heir of Late Lala Padma Charan Ray and Lala Madhaba Ch. Ray, father of the Plaintiffs was never the son of Late Lala Padma Charan Ray. He pleaded that Late Lala Padma Charan Ray's sister Chanda Bibi was married to one Rangalal Ray of Khurda (Kateni) and Lala Madhaba Chandra Ray is the son of said Rangalal Ray. It was further averred that since Rangalal Ray died when Lala Madhaba Ch. Ray was a child, Late Lala Padma Charan Ray out of compassion kept Madhab Chandra Ray with him in his house. Defendant No. 1 pleaded that his father Padma Ch. Ray died when he (Defendant No. 1) was only one year old and taking advantage of the fact that his mother was illiterate pardanishini lady of 40 years and he was only one year old, Lala Madhab Ch. Ray created some documents describing himself as the son of Late Lala Padma Charan Ray. Defendant No. 1 thus claimed that the Plaintiff as son of Lala Madhab Chandra Ray have no right over any of the scheduled properties and are not entitled to seek partition on the same.

Defendant Nos. 10 to 17 supported the case of Defendant No. 1 and further pleaded that Late Lala Padma Charan Ray never had half share in Schedule "B" properties and that he had only 1/7th share in the same. They claimed that by purchasing the shares of other co-sharers, their predecessor in interest, Makhan Kumar Ray became owner of 6/7th interest in Schedule "B" property. Defendant No. 5 to 9 in their written statement supported the stand of Defendant No. 1 and took a further stand that Schedule "A" property is not liable for partition as the same has already been partitioned. From the above pleadings of the parties, the following issues were framed.

1. Is the suit as framed maintainable according to law?
2. Have the Plaintiffs any cause of action to file the suit?
3. Is the suit bad for non-joinder of necessary party?
4. Is the suit valued properly?
5. Are the Plaintiffs entitled to get the share claimed in the suit?
6. To what relief, if any, the Plaintiffs are entitled to get?

7. Whether Lala Madhaba Chandra Ray, father of the Plaintiff, is the son of Lala Padma Charan Ray?

3. Plaintiffs examined 9 witnesses and produced documents, which were marked as Exts.1 to 22. Defendants examined 5 witnesses and produced documents, which were marked as Exts. A to J. On consideration of these evidence, learned trial Judge came to the conclusion that Late Madhab Ch. Ray and Defendant No. 1 are both sons of Late Lala Padma Charan Ray and each of them had equal share in the property/interest of Late Lala Padma Charan Ray. He also concluded that the suit schedule properties are liable for partition. Taking note of the evidence and admission of the Plaintiffs, he allotted one annas 9 pies share in Schedule "A" property, 1/14th share in Schedule "B" property and 1/2 share in Schedule "C" property to the Plaintiffs, but did not give them any share in Schedule "D" property as they were not entitled to any share in the same. Simultaneously, learned trial Court allotted similar share to Defendant No. 1 in Schedules "A", "B" and "C" properties and allotted the entire Schedule "D" property to him. Defendant Nos. 2 to 4 were jointly allotted 9 annas interest in Schedule "A" property, but were not given any share in the other properties. Defendant Nos. 5 to 9 were jointly granted 3 annas 6 pies interest in Schedule "A" but no share in the other schedule properties. Learned trial Court gave three months time to the parties to affect partition amicably. Not being satisfied with the said judgment and decree, Defendant No. 1 and 5 to 9 have filed this appeal. The other Defendants have been arrayed as proforma Respondents.

4. The main contest is over the finding on issue No. 7. Learned Counsel for the Appellants submitted that the finding of the learned trial Court on the issue is contrary to the evidence and materials on record. According to him, Lala Madhab Ch. Ray was working as Forester and was a Government servant, but the Plaintiffs did not produce his service book and other Government records to show that he was the son of Late Lala Padma Charan Ray although such documents were the best and reliable evidence. According to him, learned trial Court should have drawn adverse inference for non-production of such evidence. He indicated that although it is apparent from Ext.8,1,2 and H that the age difference between the wife of Padma Charan Ray and that of Madhab Ch. Ray was hardly 12 years and the age difference between Madhab Ch. Ray and Defendant No. 1 was 30 years, which makes the claim of the Plaintiffs that Madhab Ch. Ray was the son of Late Lala Padma Charan Ray improbable; learned trial Court did not take that aspect into consideration. He further argued that the horoscope Ext.H produced by Defendants about the age and parantage of Madhab Ch. Ray was unreasonably discarded by the learned trial Court although the said document was reliable.

5. Mr. B. Patnaik, learned Counsel for the Respondents while supporting the impugned judgment stated that the school admission register, voter list, sale deed, khewat of village Patanigaon, settlement appeal orders etc. along with the oral evidence of several senior citizens of the village were produced by the

Plaintiffs to prove that Lala Madhab Ch. Ray was the son of Late Lala Padma Charan Ray and because these evidences were reliable and were not discredited in any manner, learned trial Court rightly concluded that Madhab Ch. Ray was the son of Late Lala Padma Charan Ray. He stated that production of service records of Lala Madhab Chandra Ray was not essential.

6. The Plaintiffs pleaded that their father Late Madhab Ch. Ray and Defendant No. 1 were the sons of Late Lala Padma Charan Ray and therefore, each had half share in the properties of Late Lala Padma Charan Ray. The Defendants contested this claim with specific pleading that Lala Madhab Ch. Ray was never the son of Late Lala Padma Charan Ray, but he was the son of one Rangalal Ray of Khurda area. In view of this pleading, the burden was on the Plaintiffs to prove by cogent evidence and circumstances that their father Madhab Ch. Ray was the son of Late Lala Padma Charan Ray. In this regard, the Plaintiff No. 2 examined himself as P.W.9 and examined P.Ws.5 to 8, who are the neighbours, caste man/relatives of Late Lala Padma Charan Ray. P.W.9 stated that he and Plaintiff No. 1 are sons of Late Madhab Ch. Ray, who was a son of Late Lala Padma Charan Ray. Though he is not very old yet, being a family member, he can speak about the relationship. P.W.5 is a close neighbour, aged 72 years, who claims that he had access to the house of Late Lala Padma Charan Ray and has special means of knowledge regarding the conduct, attitude and behaviour of the family members of Late Lala Padma Charan Ray towards Madhab. He clearly stated that Lala Madhab Ch. Ray and Defendant No. 1 are sons of Late Lala Padma Charan Ray and that the wife of Late Lala Padma Charan Ray was locally known as "Madhama". He further stated that when Late Lala Padma Charan Ray died, Lala Madhab Ch. Ray performed his sudhi ceremony etc. in the village. According to this witness, Late Lala Padma Charan Ray bore all the expenses of the education and marriage of Late Madhab Ch. Ray and acted as "bara-karta" in the marriage. P.W.5 claimed that he was present in that marriage. This witness also stated that Lala Madhab Ch. Ray used to address Lala Padma Ch. Ray as father and wife of Padma Ch. Ray as mother and in the society he was treated as son of Late Lala Padma Charan Ray. P.W.6 is a co-villager, aged about 79 years. He also gave similar statement as that of P.W.5. P.W.7 is a caste man and close neighbour of Lala Padma Ch. Ray. He stated that Lala Madhab Ch. Ray was the son of Lala Padma Charan Ray and he was born and brought up by Padma Charan Ray and his wife. This witness claimed that he attended the marriage ceremony of Late Madhab Ch. Ray where Late Lala Padma Charan Ray acted as "bara-karta" and he also bore the expenses of that marriage. This witness further stated that when Late Lala Padma Charan Ray died Late Madhab Ch. Ray performed the obsequies as the eldest son. P.W.8 is a retired Government servant and a close neighbour as well as relative of Lala family. He also supported the statement of P.Ws.5 to 7 and stated that Lala Madhab Ch. Ray was the son of Late Lala Padma Charan Ray and he was treated in the locality as such. The evidence of the above named witnesses was not discredited by the Defendants in any manner. There was objection to the statement of P.W.8 on the ground that he is the maternal

uncle of the Plaintiffs and he is an interested person. But fact remains that the family members, relatives, neighbours, caste man are persons, who can speak about the relationship because they normally have access to the family. P. Ws. 5 to 8 are neighbours, relatives, caste man of Late Lala Padma Charan Ray. So, their evidence are admissible u/s 50 of the Evidence Act.

7. Besides oral evidence, Plaintiffs also produced several documents to show that Lala Madhab Ch. Ray was the son of Late Lala Padma Charan Ray. The admission register and transfer certificate, counter folios were called for from the B.J.B. High School, Khurda. P.W.1, who produced this document stated that these documents are maintained in a regular course of business and that he is the custodian of these documents. The relevant entry at Sl. No. 36 dated 26.1.1921 in the admission register was marked as Ext.1. This entry shows that Lala Madhab Ch. Ray was admitted to the school on the aforesaid date and in the register, he has been shown as the son of Late Lala Padma Charan Ray. The counter foil Sl. No. 62 of the T.C. register of the said school, Ext.2 shows that Lala Madhab Ch. Ray took S.L.C. only on 24.1.1923 and in the transfer certificate also he has been shown as son of Lala Padma Charan Ray. The Defendants alleged that these documents are not genuine and are created for the purpose of this case, basically on the ground that the signatures of the guardians are not there in the admission register and the cover page is torn. A careful look at the register and T.C. counter foils show clearly that they are maintained in regular course of business over years. Ext.1 contains the names of innumerable students, who were admitted to the school during a period of 20-30 years. Similarly, the counter foil of the T.C. book also shows that transfer certificate were issued over years and the counter foils were maintained chronologically. Moreover, the school authorities have come forward to testify that these are authentic records maintained in regular course of business. There is letter of the Headmaster, Ext.3 regarding production of these documents from their proper custody. That apart, there is also counter foil of T.C. register of S.K. Academy, Jagatsinghpur and the relevant entry, Ext.56 relates to Lala Madhab Ch. Ray wherein he has been shown as son of Late Lala Padma Charan Ray. The documents coming from S.K. Academy, Jagatsinghpur co-relates with Ext.2 in the sense that soon after the transfer certificate was obtained from B.J.B. School, Khurda and the admission was made in S.K. Academy, Jagatsinghpur. Documents like Exts.1, 2 cannot be created over night. There is also no reason why the school authorities would create false document for the Plaintiffs. It cannot also be forgotten that the documents were produced on the direction of the Court. Besides these records of the school, there is sale deed, Ext.8 wherein Chandramani Bibi, wife of Late Lala Padma Charan Ray sold some lands to one Balakrushna Rath and others and because she is a paradanishini lady, the registration was effected at her residence on commission. In this document, there is an endorsement of the Sub-Registrar that the vendor Chandramani Bibi was identified to him by her son Lala Madhab Ch. Ray and he was satisfied about the identification. The identification of Chandramani Bibi was done in presence of

the Sub-Registrar and the witnesses and the Sub-Registrar has certified that he was satisfied about the relationship and the identification. Exts.9 and 10 are the certified copies of the orders passed in the Settlement Appeal Nos. 199 and 200 relating to the properties of Late Lala Padma Charan Ray. It appears from these orders that at the initial stage of the settlement, the lands of Late Lala Padma Charan Ray was recorded in the name of Defendant No. 1 alone, but during attestation stage, the Plaintiffs raised objection and after enquiry the settlement authorities recorded these lands jointly in the name of the Plaintiffs and Defendant No. 1 with the observation that Defendant No. 1 and Lala Madhab Ch. Ray were two sons of Late Lala Padma Charan Ray. These orders in Exts.9 and 10 were not challenged in any higher forum. Ext.16 is the "munsori mistake list". In this document there is a genealogy wherein Lala Madhab Ch. Ray and Defendant No. 1 have been shown as co-sharer being the sons of Late Lala Padma Charan Ray. The Defendants alleged that the genealogy was appended subsequent to the "munsori mistake list". But such objection is of no avail because the genealogy contains the signature of Defendant No. 1 and there is clear recital in the petition Ext.17 that the genealogy is appended to the petition and there is signature of Defendant No. 1 on Ext.17. Ext.5 is another sale deed of the year 1943 executed by Sundarmani Bibi, wife of Late Madhab Ch. Ray and Chandamani Bibi, wife of Late Lala Padma Charan Ray, wherein the former has been described as the guardian of minor Plaintiffs and the latter has been described as the guardian of Defendant No. 1. The property involved in the sale deed belongs to Late Lala Padma Charan Ray. It is pertinent to note that in these documents some properties were transferred in favour of late Lala Makhan Ku. Ray, the father of Defendant Nos. 10 to 17 and these Defendants have admitted in their written statement that the Plaintiffs and Defendant No. 1 have jointly got 1/7th interest in Schedule "B" property. Most of the above documents are ancient in nature and are coming from proper custody of Government and public officials. So, their genuineness and credibility cannot be denied.

8. As against the aforesaid evidence of the Plaintiffs, Defendant No. 1 as D.W.5 denied that Lal Madhab Ch. Ray was the son of Late Lala Padma Charan Ray. He however, admitted in cross examination that he was only one year old when his father died and he has no direct knowledge about the old incidents. He simply stated that his father Late Lala Padma Charan Ray had a sister, Chanda Bibi, who had married to one Rangalal of Khurda area and Lala Madhab Ch. Ray is the son of said Rangalal and Chanda Bibi. He denied that Madhab Ch. Ray was staying with Late Lala Padma Charan Ray from his childhood, which was against the pleading in the written statement. Defendant No. 1 also examined D.Ws.2 to 4 on the issue of relationship. Defendant No. 6, who has examined himself as D.W.2 stated that Lala Madhab Ch. Ray was not the son of Late Lala Padma Charan Ray, but was the son of Rangalal Ray. He however admitted that he was born in the year 1949 and further admitted that he had never gone to village Katni, never saw Rangalal, never had the occasion to see Late Lala Padma Charan Ray or the happenings in that family. In fact in cross-examination, he

was even unable to say what stand he has taken in his own written statement. He admitted about the joint recording of the lands of Late Lala Padma Charan Ray in the name of the Plaintiffs and Defendant No. 1 and that the Plaintiffs along with Defendant No. 1 jointly performed the shradha and sudhi ceremony of wife of Late Lala Padma Charan Ray. The witnesses also admitted that the Plaintiffs and Defendant No. 1 have been enlisted in the voter list against holding of Late Lala Pama Charan Ray. D.W.3 is another witness, who is aged 41 years. So, he could not have any direct knowledge about the birth of Lala Madhab Ch. Ray or his relationship with Late Lala Padma Charan Ray. He however stated that Lala Madhab Ch. Ray is the son of Late Rangalal Ray of Khurda area. In the cross-examination he stated that Lala Rangalal Ray had only one issue, namely, Lala Madhab Ch. Ray whereas it is the case of the Defendants that Late Lala Padma Charan Ray had three sons and one daughter. This witness candidly admitted that he has no knowledge about the family relationship of the parties, but basing on what he heard from his father he is deposing in the Court. He further admitted that his father is alive. In such a situation, his evidence becomes hearsay evidence and is of no avail. Similarly, D.W.4 is a person of 36 years and is not competent to speak about the birth of Madhab Ch. Ray and his relationship with Rangalal Ray. On the contrary, he admitted in cross-examination that the homestead of late Lala Padma Charan Ray stands recorded in the name of the Plaintiffs and Defendants jointly. Besides the oral evidence, the Defendants primarily relied on the documents, Ext.B and H. Ext.B is a money receipt allegedly granted by Lala Madhab Ch. Ray and Ext.H is a Khata containing the horoscope allegedly prepared by Lala Madhab Ch. Ray. The genuineness of these documents and the handwriting thereof were disputed by the Plaintiffs. The Defendants relied on these documents to show that Lala Madhab Ch. Ray described himself as son of Rangalal Ray in these documents. According to these Defendants, these documents were in their custody. But there was no mention about these documents in the written statement and they also did not produce these documents at the appropriate stage, but produced the same at a late stage. There are some cuttings and interpolations in Ext.H, which has not been properly explained. The handwriting of Exts.H and B do not appear to be of the same person. The witness who produced these documents admitted that he has not seen the writing of Lala Madhab Ch. Ray at any point of time. No relative, family member or senior person was brought to prove the handwriting of these documents. Defendant No. 1 in his evidence admitted that there were several letters written by Lala Madhab Ch. Ray along with Ext.H, but those documents were destroyed by fire and only Ext.H survived by that fire. Such explanation appears to be farfetched and improbable. The above circumstance along with the fact that both the documents Ext.B and H were produced at a very late stage indicate that they are not genuine documents and were produced to support the case of the Defendants as an after thought.

9. The evidence both oral and documentary were there overwhelmingly in favour of the Plaintiffs to establish that Lala Madhab Ch. Ray was the son of Late Lala

Padma Charan Ray and therefore, for non-production of the service book of Late Lala Madhab Chandra Ray adverse inference cannot be drawn. Moreover, if the Defendants felt that the entries in the service book would go against the Plaintiffs case, then they could have called for the same from the concerned office.

10. Learned Counsel for the Appellant submitted that the learned trial Court failed to take note of the age difference between Lala Madhab Ch. Ray and the wife of Late Lala Padma Charan Ray. According to him, the age difference as would be evident from Ext.8 and Ext.H, of the above noted persons was only 12 years, so, it was highly improbable that Lala Madhab Ch. Ray was the son of Late Lala Padma Charan Ray. In Ext.8, the age of Chandramani Bibi was shown as 46 years. This document was executed on 26.11.1937. The age of Lala Madhab Ch. Ray in the school register has been shown as 1903. In horoscope, Ext.H, the year of birth of Late Madhab Ch. Ray has been shown as 1900. As has been said, Ext.H is not a reliable document. If the date of birth in the school register is accepted, then the age difference between Lala Madhab Ch. Ray and wife of Late Lala Padma Charan Ray comes to 12 to 13 years. It will be pertinent to mention that the age noted in a sale deed is always approximate as the age is usually noted by the scribe. So, the age mentioned in Ext.8 cannot be taken rigidly. Moreover in earlier days, marriages of girls used to be done at a very early age and it was not uncommon for a lady of 14-15 years to give birth to a child. So, it was not highly improbable that Lala Madhab Chandra Ray was born to Chandramani Bibi. Moreover, this aspect was never raised before the learned trial Court either in the pleadings or in the evidence. Be that as it may, the evidence and circumstances on record noted supra clearly established that Late Madhab Ch. Ray was the son of Late Lala Padma Charan Ray. Issue No. 7 was thus rightly answered against the Appellants.

11. So far as issue Nos. 1 and 2 are concerned, there is clear statement of P.W.9 that he requested Defendant No. 1 for amicable partition of the suit properties, but Defendant No. 1 did not oblige. In such a situation, there was cause of action for filing the suit. The suit properties stand jointly recorded and it is found from evidence that it is still joint. So, the suit for partition was maintainable. Issue Nos. 1 and 2 were thus rightly answered in favour of the Plaintiffs.

12. Issue Nos. 3 and 4 relating to non-joinder of necessary parties and under valuation were not pressed in the trial Court. Therefore, no finding has been recorded on those issues. These aspects were also not raised in the appeal by the Appellants. Therefore, no discussion is necessary.

13. In the plaint it was pleaded that in Schedule "A"; property Gourballav Ray and 9 annas share, Jagdish Ch. Ray has 3 annas 6 pies share and Lala Padma Charan Ray has 3 annas 6 pies interest. This proposition was not disputed by any of the Defendants. The only objection of the Defendants was that the Plaintiffs have no share in the property of Late Lala Padma Charan Ray. Since in issue No. 7 it has already been held that Lala Madhab Ch. Ray and Defendant No. 1 are the two sons of Late Lala Padma Charan Ray and Plaintiffs are sons and heirs of Lala

Madhab Ch. Ray learned trial Court rightly awarded half share out of the property of Late Lala Padma Charan Ray to the Plaintiffs on one hand and Defendant No. 1 on the other hand. In that process, the Plaintiffs have been correctly awarded one annas 9 pies share in Schedule "A" property. Though the Plaintiffs claimed in the plaint that they have half share in Schedule "B" property, in course of the evidence, they admitted that Lala Makhan Kumar Ray by purchasing the shares of his co-sharers except Late Lala Padma Charan Ray acquired 6/7th interest in Schedule "B" property and the remaining 1/7th interest in the same remained in favour of Late Lala Padma Charan Ray. As has been stated earlier, Defendant No. 1 and Plaintiffs are entitled to half share each in the properties of Late Padma Charan Ray. So, the learned trial Court rightly awarded 1/14th interest in Schedule "B" property to the Plaintiffs. In Schedule "C" properties, the Plaintiffs claimed half share with the plea that this property exclusively belonged to Late Lala Padma Charan Ray. Plaintiff No. 2 as P.W.9 stated that Schedule "C" property exclusively belonged to Late Lala Padma Charan Ray. This claim was neither refuted nor any counter claim was made by any of the Defendants. Therefore, rightly the learned trial Court held this property to be the exclusive property of Late Lala Padma Charan Ray and allotted half share to the Plaintiffs. So far as Schedule "D" properties is concerned, the same are movable properties and Plaintiffs could not adduce any credible evidence to show that these properties were joint family properties in the hands of Defendant No. 1. Therefore, rightly their claim of share in Schedule "D" property was rejected.

14. In view of the foregoing discussions and conclusion, the appeal is found to be without any merit and the same is accordingly dismissed on contest. The judgment and decree of the learned trial Court is hereby confirmed. Since this is a litigation for partition, parties to bear their own cost of this appeal.