
(1970) 05 PAT CK 0018
In the Patna High Court
Case No : A.F.A.D. No. 203 of 1967

Langa Manjhi and Others

APPELLANT

Vs

Jaba Majhian and Others

RESPONDENT

Date of Decision : 14-05-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Evidence Act, 1872 — Section 115

Citation : AIR 1971 Patna 185 : (1970) 3 PLJR 573

Hon'ble Judges : R.J. Bahadur, J;Kanhaiyaji, J

Bench : Division Bench

Advocate : G.C. Mukherji and N.N. Roy, for the Appellant; B.C. Ghose, M.N. Pandey, M.N. Banerji and Sanat Kumar Chattopadhyaya, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiyaji, J.—This appeal by the defendants arises out of a suit instituted by the plaintiff for declaration of title to and recovery of possession of the suit lands situated in village Sadant Kuchai, Police Station Kharsawan, district Singhbhum appertaining to khata No. 17.

2. The lands in suit are 12 bighas 13 kathas and 13 dhurs, fully described in the schedule attached to the plaint. The case of the plaintiff, Jaba Majhain, who had brought the suit, was that the lands belonged to her father, Baya Majhi, who died leaving behind his widow Deola Majhain and his only daughter, the plaintiff. On the death of Baya Majhi, his widow Deola Majhain came in possession of all his properties as his heir and remained so till her death in the year 1950. The parties are Santhals but are Hindus by religion and are governed by the Hindu Law in the matter of succession and inheritance. Therefore, the plaintiff inherited all the properties of her father and came into possession in permanent raiyati right. The defendants forcibly dispossessed the plaintiff in Jeth, 1368 B.S. on the plea that they had taken possession in execution of a decree obtained by them. The plaintiff stated in the plaint that Deola Majhain had executed a deed of gift in

favour of the plaintiff's sons, but the same was not acted upon and was also invalid because Deola, being a limited owner, could not make a valid gift.

3. The suit was contested by the appellants who claimed to be agnatic relations of Baya Majhi. They denied that they were Hindus and asserted that they were governed by their own tribal customary law, and, as such they were the legal heirs of Baya Majhi to the exclusion of his widow or daughter. According to them, Deola died on the 10th October, 1947 and not in 1950. They denied that the plaintiff or her mother Deola ever came in possession of the suit lands. It was alleged that Deola illegally executed a deed of gift in favour of the plaintiff's sons, for the setting aside of which the defendants had to bring Title Suit No. 23 of 1946 in the court of Munsif, Kharsawan, but during the pendency of that suit, Deola died. So, the defendants got their plaint amended by adding a prayer for immediate khas possession. The suit was decreed on contest, and, in execution of that decree, the defendants obtained delivery of possession through court. The defendants also alleged that the plaintiff had no cause of action and that the suit was barred by limitation.

4. The learned Subordinate Judge, who tried the suit in the first instance, decreed the suit holding that the Santhals of village Kutchai have been sufficiently Hinduized and they follow Hindu Law in the matter relating to succession and inheritance and hence the plaintiff was entitled to the properties of her father, Baya Manjhi. He also held that the suit was not barred by res judicata, and the plaintiff was not estopped from asserting her title to the disputed lands. On appeal, the learned Additional District Judge affirmed the findings of the trial Judge and further held that the defendants have failed to prove that they were the nearest agnates of deceased Baya Manjhi, and, therefore, the appeal was dismissed.

5. Learned counsel for the appellants has mainly urged that (1) the suit was barred by limitation, (2) that the plaintiff is estopped from claiming right and interest which she has claimed in the suit, and (3) that the parties are governed by tribal laws and the courts below have committed errors of law in holding otherwise.

6. In support of the first point, reliance was placed on Article 141 of the Limitation Act, 1908, which provides that in a "suit by a Hindu or Muhammadan entitled to the possession of immovable property on the death of a Hindu or a Muhammadan female", the possession of the defendant shall be deemed to become adverse only after twelve years "when the female dies". It is alleged by the plaintiff that on the death of her mother Deola, she came in possession of the suit lands till she was dispossessed by the defendants in Jeth 1368 B.S. She also claims to have paid rent for the suit lands since then, and, in support of her contention, she has produced rent receipts (Exts. 1 series). In these rent receipts, the name of the plaintiff's son is mentioned in the tenancy column but the payments have been noted through the plaintiff. It has been held that Deola died not in 1950, but in 1947. This finding has not been challenged on behalf of

the plaintiff before us. Mr. Mukherji contends that the interest of the plaintiff was adverse to her mother, because she has claimed title for herself. Therefore, he argues that on undisputed facts it must be held that the plaintiff has failed to prove her possession within twelve years of the suit which was filed in 1961. The starting point of limitation in this case is from the death of Deola in the year 1947, but the plaintiff can show that she came in possession and remained in such possession after Deola's death and was dispossessed only when the defendants took delivery of possession in execution of a decree which they obtained in Title Suit No. 23 of 1946. The plaintiff has examined three witnesses to prove that she came in possession of the disputed lands after the death of her mother, Deola, and remained in possession till she was dispossessed by the defendants. The plaintiff's sons lived with her. The defendants claimed to have taken delivery of possession through court within twelve years of the suit. Considering the material evidence on this point, both the courts below have concurrently held that the suit was not barred by limitation. The finding thus arrived at by the courts below is valid, and the contention of learned counsel must be rejected.

7. It is admitted fact that the plaintiff was not a party to the former Title Suit No. 23 of 1946-47. Therefore, Mr. Mukherji rightly conceded that the suit is not barred by the principles of *res judicata*. However, he contends that the plaintiff is estopped from asserting her title now, because she did not claim the property in Title Suit No. 23 of 1946. It is argued that because of the representation of the plaintiff, the defendants did not implead her in the former title suit. If the plaintiff would have asserted her title, the defendants would have made her a party in the former title suit and got the issue decided. According to Mr. Mukherji, on account of the plaintiff having made such a representation by conduct, she is estopped from asserting her title. This contention, in my opinion, is based on some misapprehension. The question of estoppel arises only when one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. It is an admitted fact that the plaintiff was not a party to the former title suit. She was merely a witness supporting the gift in favour of her sons. In that suit, her mother and her minor sons were parties. The plaintiff is not claiming either through her mother or through her sons. She is claiming in her own right as being the heir of her deceased father Baya Majhi. There is nothing on the record to show that the plaintiff before the filing of the former suit by the defendants had made any representation that she was not interested in the inheritance of Baya Majhi. The plaintiff cannot be estopped to claim the lands left by Baya Majhi if she had deposed in favour of her sons in support of a gift executed by her mother on any principle of law. The gift in favour of her sons was declared to be invalid and inoperative, still the plaintiff continued to be in possession of the lands and when the defendants took delivery of possession through court, she was perfectly within her rights to file the present suit for the aforesaid reliefs. In my opinion, there is no substance in this contention and it must be rejected.

8. The next point is important and requires proper consideration. Mr. Mukherji urges that the parties belong to an aboriginal community called Santhals and are outside the pale of Hinduism. He attacked the findings of the courts below on the ground that the courts below have committed errors of law in placing the onus wrongly on the defendants and rejecting documentary evidence adduced by them showing that the tribal custom has been followed in their community relating to succession. He asserts that as the evidence on record does not establish that the Santhals to which class the parties belong have been converted Into Hinduism out and out or sufficiently Hinduised, the onus lay heavily upon the plaintiff to prove that they were governed in matters of succession and inheritance by the rule of Hindu law, but she has failed to discharge the same. Learned counsel urged that the point under consideration is a mixed question of law and fact, and, therefore, he was entitled to refer to the evidence in order to show that the courts below have committed errors in arriving at the conclusion.

9. Learned counsel on behalf of the respondents has urged that the Santhals are sufficiently Hinduised, even though they have retained some of the relics of their ante-Hinduism period and are, therefore, governed by the Hindu law which is *lex loci* of the area in which the parties live. He further contended that the matter is concluded by the concurrent findings of fact of both the courts and it is not open to the Court in second appeal to go into the facts once more.

10. The material question, therefore, is whether the parties are Hindus or sufficiently Hinduised, and as such, governed by Mitakshara School of Hindu Law in the matter of inheritance and succession or, whether the plaintiff is an heir to her father in preference to the latter's agnates who are the defendants in the suit.

11. The term "Hindu" is not an anthropological one but is used in a theological sense as distinguished from national or racial sense, and, therefore, many persons of aboriginal tribes and origins have been absorbed in the Hindu faith and have come under the sway of Hindu law, for example, Naiks in Madhya Pradesh who were originally of Gond origin. The courts below have held that the Santhals of village Kutchai share Hindu beliefs and observe Hindu usages and practices. They worship Hindu deities and their mode of life is that of Hindu. Therefore, they have become sufficiently Hinduised and are governed by the Hindu law in the matter of succession and inheritance. Mr. Mukherji has strongly challenged these findings of the courts below. Learned counsel in support of his contention of agnatic rule of succession relied upon a decision of Macpherson, J. sitting with Dawson-Miller, C. J. in *Krittibash Mahton and Others Vs. Budhan Mahtani and Others*, . There, the case was of Kurmi-Mahtos of Manbhum pargana of the Manbhum district. The only point which was argued before their Lordships, was whether the parties were governed by the Dayabhaga School of Hindu Law. Both the courts below had found that the parties were so governed. It was contended in this Court that the court below was not justified in coming to the conclusion that even if the parties were undoubtedly governed by Hindu Law,

they were still governed by the Dayabhaga School of Hindu Law In that connection, Dawson-Miller, C. J., said that in the circumstances it was futile to send back the case to determine the very question of fact which was conceded, and, therefore, the appeal was dismissed. Macpherson, J., had agreed and given his own judgment. In dealing with the matter at page 737 of the report, he said as follows:

"In cases relating to inheritance among aboriginals in Manbhum it is always necessary to enquire whether even if Hinduised (slightly partially, or completely) they have abandoned the tribal custom as to inheritance (usually they have not, even where, as is unusual, Hinduization is complete) and then if they have abandoned the tribal custom what particular school of Hindu Law they have adhered to."

The observation of his Lordship, with respect, in view of the facts and arguments in the case, was obiter.

12. The expressions "Hindus out and out" and "become sufficiently Hinduised" are the expressions used by the Privy Council. It is also a settled law now that no ceremony of purification is a prerequisite of Hinduisation. It is not correct to say that one must be born a Hindu, since Hinduism has grown by, gradually Hinduising the non-Hindu, specially the wilder tribes of India, and the process still continues. The question, therefore, has to be decided by coming to the conclusion as to how far the parties have either become "Hindus out and out" or "sufficiently Hinduised" in order to attract the principles of Hindu law in the matter of inheritance and succession. Now, the well established position in law is that it is possible that aboriginals of non-Hindu origin can become sufficiently Hinduised so that in the matter of inheritance and succession they are prima facie governed by the Hindu Law, except so far as any custom at variance with such law is proved [vide *Chunku Manjhi v. Bhabani Majhan* AIR 1946 Pat 2181.

13. In case it is established that the parties of non-Hindu origin have been Hinduised, prima facie they are governed by the rules of Hindu Law and the burden of proving that the old custom of that community still exists is upon the party who sets it up.

14. The learned Additional District Judge has very ably discussed this point in his judgment and has come to a correct conclusion that the Santhals of village Kutchai have become sufficiently Hinduised, and they are governed by the Hindu law in the matter of succession and inheritance. The defendants have failed to prove that the parties are still governed by the tribal customary law of agnatic succession.

15. In my opinion, whether a person is Hinduised completely or otherwise is a question of fact. Mr. Mukherji drew our attention to certain observations in the judgment of Ray, J. in the case of *Chunku Manjhi and Others Vs. Bhabani Majhan and Others*, to the effect that the question whether a person is Hinduised either completely or partially is a mixed question of law and fact, and, therefore, this

Court should go into that question in second appeal itself. In that case, the other learned Judge, namely, Fazl Ali C. J., as he then was, had said that in view of the pleadings and findings arrived at by the courts below which were based on evidence, he agreed that the view taken by the courts below was correct; in other words, he did not treat the question as a mixed question of law and fact. I am fortified in my view expressed in the beginning of this paragraph by the observations made in the cases of *Krittibash Mahton and Others Vs. Budhan Mahtani and Others*, . *Harakhanth Ohdar and Others Vs. Ganpat Rai and Others*, and *Baburam Rajeshwari Prasad Ojha and Others Vs. Deo Narain Sao and Others*, . The question being one of fact, it is, in my opinion, concluded by the concurrent findings of fact arrived at by the courts below and it cannot be gone into over again by this court in second appeal.

16. Before concluding it is proper for me to dispose of some other points raised by the Counsel for the parties. Mr. Mukherji argued that a plaintiff in possession, if she is governed by Hindu Law, can relinquish her right in the property, and, if she does so, then she cannot claim title later on. Mr. Ghose, appearing for the plaintiff-respondent, urged that this point was not available to the appellants as it was never raised before the courts below. Mr. Mukherji contended that although the point is a new point, it arises on the admitted facts of the case, for example, the gift executed by the plaintiff's mother, the evidence of the plaintiff in the former suit, and moreover this court requires no further investigation of facts in order to decide the point. It is a pure question of law and hence Mr. Mukherji urges that it can be raised even at the second appellate stage. In my opinion, even if the question be allowed to be raised in this court, Mr. Mukherji cannot succeed on the basis of the above mentioned two admitted facts. The correct position under the Hindu law is that a Hindu lady in possession can relinquish, and by relinquishing anticipate for the reversioners their period of succession; and, if she does this in favour of second reversioners with the consent of the first, then the relinquish-ment is valid. In the instant case there is no such relinquishment by the plaintiff. Mr. Mukherji relied in this connection on a decision in *Mt. Chito Vs. Jhunni Lal and Others* . In that case, the plaintiff was the mother of certain judgment-debtors in whose favour the plaintiff's mother executed a deed of gift. The plaintiff gave her consent to the deed of gift. The mother of the plaintiff died and ever since then the judgment-debtors had been in possession. When the decree-holder attached this property, the plaintiff objected that the property really belonged to her because she was not bound by the gift executed by her mother. The judgment was pronounced against her. The learned Judge, who decided that case relied on two other decisions, referred to us by Mr. Mukherji, namely, *Chinnaswami v. Appaswami* ILR Mad 25 : (AIR 1919 Mad 865) and *Pratab Chunder v. Joy Monee Debee* (1864) 1 WR 98 (Cal.). The facts of that case are entirely different and are of no assistance to the appellants.

17. The next point argued on behalf of the appellant was that the courts below were wrong in rejecting the documents which the defendants have produced in support of their case on inheritance. The plaintiff in her plaint asserted that she

and the members of her community are Hindus and are governed by the Hindu Law in matters of succession and, therefore, the defendants led documentary evidence to show by instances that they are not governed by the Hindu Law. The documents of the defendants do not throw any light on the question, because the relevant issue framed by the trial court on the pleadings of the parties is:

"Are the parties governed by Hindu law or the Santhal tribal law in the matter of succession and inheritance?" Some of the documents relate to dispute between Santhals of different villages and other documents do not support the defendants. Therefore, in spite of such documents as observed earlier it must be held that the plaintiff has succeeded in establishing that the parties are governed by the Hindu Law in the matter of succession and inheritance and not by Santhal tribal law.

18. It was argued by Mr. Ghose that in the instant case it was not essential to decide any point, because the suit could have been decreed only on the finding of the learned Additional District Judge that the defendant failed to prove that they were the nearest agnates of deceased Baya Majhi. In my opinion, the contention has no substance. It is to be noted in this connection that the point was raised for the first time by learned counsel for the plaintiff before the learned Additional District Judge. In paragraph 7 of the plaint, it is stated that the defendants are distant agnates of the father of the plaintiff; but the plaintiff is entitled to the property because of her being a Hindu. Thus, in my opinion, the point decided by the learned Additional District Judge was not in controversy between the parties. The question of correctness of the genealogy was not raised before the trial court. The appellate court could not have reversed or substantially varied the decree on account of any misjoinder of parties in view of Section 99 and Order 1, Rule 9 of the Code of Civil Procedure. Therefore, I hold that this finding of the learned Additional District Judge that the defendants have failed to prove that they were the nearest agnates of Baya Majhi deceased is unwarranted and cannot be supported. However, the expression of this view will have no repercussion on the decision of the appeal.

19. In the result, the appeal fails and is dismissed with costs.

R.J. Bahadur, J.

20. I agree.