
(1968) 08 OHC CK 0034
In the Orissa High Court
Case No : Second Appeal No. 525 of 1964

Mahadeb Patnaik and Another	Vs	APPELLANT
Dula Dei		RESPONDENT

Date of Decision : 22-08-1968

Acts Referred:

Citation : (1968) 34 CLT 1360

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : R.N. Misra, R.C. Patnaik and B. Harichandan, for the Appellant; M. Mohanty and N.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—Bairagi and Lachman were brothers. Bairagi died in 1941 leaving behind his two sons Mahadeb (Plaintiff-1) and Krupasindhu (Plaintiff-2). Lachman died in 1957 leaving behind his daughter Dula (Defendant). The suit relates to ka and Kha schedule lands. ka schedule land is the jagir property and kha schedule is ancestral property of the family. Plaintiff's case is that Lachman died in a joint status with them. The entire property under Ka and Kha schedules devolved by survivorship on the Plaintiffs and the Defendant had no interest therein. The defence case is that before his death Lachman was partitioned by metes and bounds from the Plaintiffs and Bairagi.

Plaintiffs were therefore not entitled to the entire disputed property. It is to be noted that Ka schedule jagir land, after integration, has been settled on occupancy basis on the Plaintiffs and the Defendant under the provisions of Section 7(g) of the Orissa Merged States (Laws) Act, 1950, (here in after referred to as the Act). Plaintiffs challenged conferment of this occupancy right on the Defendant who had no title to the property as a service-tenure holder.

The Courts below have concurrently found that Lachman died in a joint status with the Plaintiff and the Kha schedule property devolved upon the Plaintiffs by

survivorship. The trial Court held that Ka schedule jagir property belonged to the family, and after the Act came into force, Plaintiffs alone were entitled to the Ka schedule property and that it should have been settled with them on occupancy basis. The Defendant filed the first appeal. The lower Appellate Court confirmed the judgment of the trial Court so far Kha schedule land is concerned. With regard to Ka schedule land it observed that the question of title in respect of this land should be kept open as the State was not a party to the suit. Against the Appellate decree keeping open the title with regard to Ka schedule, Plaintiffs have filed the second appeal. The Defendant has filed the cross objection with regard to the concurrent finding of fact, both regarding Ka and Kha schedule lands, that they were joint family property.

2. The concurrent finding of the Courts below is that Lachman died in a state of jointness with the Plaintiff and that both Ka and Kha schedule lands belonged to the joint family. This finding is not assailable in second appeal and has not been assailed by the advocate.

3. Mr. Misra contends that on the finding that Ka schedule land is a service tenure, Section 7(g) of the Act in terms applies. It runs thus:

When the land is held by service-tenure either under the Rules or any member of his family, the liability of the holder of such tenure to render service for the use and occupation thereof, shall cease, and he shall on payment of such rent as may be assessed by the State Government as fair and equitable, acquire occupancy right therein.

Mr. Misra contends that on the concurrent findings of the Courts below on the admitted case of the parties that the service-tenure belonged to the joint family the contest being confined only to the question of partition, the liability to performance of the service ceases and the Plaintiffs are entitled to the occupancy right therein on payment of such rent as may be assessed by the State Government. Mr. Misra's contention is unassailable.

4. To negate this contention of Mr. Misra, Mr. Mohanty urges that the service-tenure in respect of the Ka schedule land came to an end on the death of Bairagi and Lachman and unless a fresh Paruana was granted (in the language of Mr. Mohanty), issued Plaintiffs were not to be treated as service-tenure-holders. This argument is wholly inadmissible in the absence of pleading. On the contrary, Defendant took the positive stand that she inherited the property-both Ka and Kha-as there was a complete partition between Bairagi and Lachman. Such a contention involving question of the fact is wholly untenable and is accordingly rejected.

On the common case of the parties the accepted position is that the Plaintiffs were service-tenure-holders by the time the Act came into force. Even in the eye of law, unless it is pleaded and established that service-tenure was extinguished, the property would necessarily devolve upon the successors, namely, the Plaintiffs, by the law of inheritance. Heritability is a characteristic attribute of

property and unless contrary is pleaded and proved, the property is heritable. The question, is however, academic in this case in view of the admitted pleading of the parties that the service-tenure continued, the controversy being confined only to the question whether Plaintiffs would alone inherit or the Defendant would inherit along with the Plaintiffs.

5. This being the position, Plaintiffs have title to the property and the State had no authority to confer occupancy right on the Defendant. Plaintiffs are alone entitled to be recognized as occupancy raiyats on payment of fair and equitable rent.

6. It is contend (sic) by Mr, Mohanty that the State is a necessary party to the Suit. Such a plea was not taken in the written statement. Moreover this is of an order passed by the State in exercise of statutory powers and in the absence of the State, the order can be declared as without jurisdiction.

7. One more point was urged by Mr. Mohanty that in respect of Kha schedule land there were Borne co-sharers. This position is not disputed by the Plaintiff. The point was taken in the written-statement. The trial Court did not attach import once to it. Though the Defendant was the Appellant before the lower Appellate Court, no ground was taken in the memorandum of appeal and neither the point was pressed. The question is also of not much significance in the facts and circumstances of this case. If the finding would have been that there was a partition between Bairagi and Lachman and there would have any controversy with regard to any particular item of property, the non-joinder of to the co-sharers might have affected the case. But here, as has already been stated, the issue of non-joinder was not pressed before the lower Appellate Court and the point cannot be urged in second appeal.

8. In the result, Plaintiffs' suit is decreed in toto. The second appeal is allowed and the cross-objection is dismissed. In the circumstances, parties to bear their own costs throughout.