

(1990) 09 OHC CK 0003

In the Orissa High Court

Case No : Second Appeal No. 95 of 1983

Mani Bewa and Others

APPELLANT

Vs

Bijaya Kumari alias Kanakalata Dei and Another

RESPONDENT

Date of Decision : 12-09-1990

Acts Referred:

Hindu Succession Act, 1956 — Section 15, 16, 4

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 4(4)

Orissa Estates Abolition Act, 1951 — Section 39

Citation : (1990) 70 CLT 838

Hon'ble Judges : G.B. Patatnaik, J

Bench : Single Bench

Advocate : P.N. Misra, for the Appellant; R.K. Mohapatra and K.B. Kar, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—The legal representatives of the Defendant are the Appellants against a confirming- judgment in a suit for declaration of title, recovery of possession and for a declaration that the order of settlement under Ext. C would enure to the benefit of the Plaintiffs and for permanent injunction. It was alleged in the plaint that Haramani was a Devadasi attached to the temple of Lord Jagannath Puri. She had adopted Plaintiff No. 1 as per the custom prevalent in the community of Devadasies. Plaintiff No. 1 was brought up by the said Haramani and was given in marriage. Plaintiff No. 2 is the son of Plaintiff No. 1. The said Haramani had a lot of properties and the Defendant was a widower and had developed illicit connection with Haramani. On account of his connection with Haramani the said Defendant was managing her properties as her agent. Haramani died in 1963. Haramani had gifted the properties in Schedule "C" of the plaint to Plaintiff No. 2 by a registered deed of gift dated 24-5-1957. Plaintiff No. 1 was looking upon the Defendant as her God-father and was guided by the advice of the Defendant Haramani was the owner, in possession of the properties

described in Schedules "A" and "B" of the plaint till her death and after her death, Plaintiff No. 1 being her successor came to possess the lands. The Defendant was collecting the usufructs and was paying the same to the Plaintiffs, but as after some time he avoided to pay the dues the Plaintiffs became suspicious and on enquiry, came to know that the defendant by falsely representing himself as the heir of Haramani had got the lands settled in his name under the provisions of the Orissa Estates Abolition Act. It was also learnt that although the properties described in Schedule "B" of plaint were purchased by Haramani, the Defendant had purchased the same in his name. According to the Plaintiffs, It is late Haramani who had paid the entire consideration and was in possession of the same and the Defendant had no manner of right over the same. Hence the suit by the Plaintiffs.

2. The Defendant in his written statement claimed that he was the husband of Haramani and Plaintiff No. 1 had never been adopted by Haramani. It was also pleaded that the settlement made under the Orissa Estates Abolition Act confers a fresh title on the Defendant and the Plaintiffs cannot have any claim over the same. The Defendant also pleaded a case of adverse possession. The Defendant also pleaded that the properties described in Schedules "A" and "C" of the plaint had been purchased by him benami in the name of Haramani and that the suit is barred by limitation.

3. On these pleadings, the learned trial Judge framed as many as eleven issues and recorded the following findings:

(i) Plaintiff No. 1 had been adopted by Haramani as per the custom of their community for the purpose of performing the Mahari Seva inside the temple as the successor of Haramani;

(ii) The said adoption is void being opposed to public policy;

(iii) It is hard to conclude that the Plaintiffs had been in effective possession of the suit properties;

(iv) Defendant is not the husband of Haramani but he had kept Haramani as his concubine and under Hindu Law, he can not inherit the properties of his mistress;

(v) The first Plaintiff will be pupil of Haramani and there by has better right than the Defendant to have the properties of Haramani and cannot claim as the successor of Haramani;

(vi) Haramani was in possession of the properties till her death in 1963 and therefore, the defence plea of adverse possession did not arise for consideration ;

(vii) The settlement made by the Estates Abolition Collector in favour of the Defendant would enure to the benefit of the Plaintiffs to whom he was giving the impression that he was the foster father of the first Plaintiff and therefore, the possession of the Defendant must be held to be the possession of a trustee on behalf of Haramani's successors, namely, the Plaintiffs;

(viii) The plea of benami taken by the Defendant cannot be sustained;

(ix) So far as the properties in Schedule "B" of the plaint are concerned, since the same have been acquired in the name of the Defendant the Plaintiffs cannot claim any interest over the same;

(x) So far as the property in Schedule "C" of the plaint is concerned, the Defendant cannot have any right since the same has been gifted away by Haramani to the Plaintiff No. 2 under a registered instrument and the suit is not barred by limitation; and

(xi) On the question of application of Section 39 of the Orissa Estates Abolition Act it was held that the suit was not barred under said provision.

On these findings, the suit was decreed so far as the plaint "A" and "C" schedules of properties were concerned and was dismissed so far as the plaint "B" schedule of properties were concerned.

4. On appeal by the Defendant the learned Second Additional District Judge confirmed all the findings of the learned trial Judge and dismissed the appeal. It may be noted that the Defendant Appellant died during the pendency of the appeal and was substituted by his legal heirs in the lower appellate Court.

5. Mr. P.K. Misra, learned Counsel for the Appellants, raised the following contentions in assailing the confirming judgment and decree of the two Courts below so far as they relate to the properties covered under Schedules "A" and "C" of the plaint and the properties described in Schedule "B" of the plaint are not subject matter of dispute in this Second Appeal, as the Plaintiffs never assailed the decree of the learned trial Judge, to that extent.

(i) According to Mr. Misra, Haramani having died after the Hindu Succession Act came to force, her properties would devolve according to the rules set out in Section 16 and the principles of old Hindu Law regarding succession which were applied by the two Courts below can not have any application, as Section 4 of the Hindu Succession Act clearly states that the said Act will have the over-riding effect. Thus the Plaintiff No. 1 cannot have any title over the properties as a pupil on which basis the Courts below have conferred a title on her;

(ii) In view of the settlement made in favour of the Defendant by the Estates Abolition Collector, a fresh title has accrued in his favour and the said order of settlement not having been found to be invalid title of the Defendant in respect of the land cannot be taken away; and

(iii) Though during the pendency of the appeal on account of consolidation operation in the area, an application had been filed that the suit would abate u/s 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act and the learned lower appellate Court had ordered that the said question would be considered while hearing the appeal but unfortunately no order had been passed thereon and in view of such notification the Consolidation

Act, the appeal as well as the such out of which this second Appeal arises must be held to have abated.

Mr. Mohapatra, learned Counsel appearing for the Respondents, on the other hand I tried to support the decree in favour of the Plaintiffs on the ground that the adoption of Plaintiff No. 1 by Haramani can not hold to be invalid in law and contended that once her adoption is upheld, she would be the legal heir of Haramani and would succeed to the properties. Mr. Mohapatra fairly Stated that if the finding of the two Courts below that the Plaintiff No. 1's adoption as invalid is upheld, then certainly the Plaintiffs cannot get any title to the properties.

6. I will now examine the rival submissions. So far as the first submission of Mr. Misra is concerned it depends upon the interpretation of different provisions of Hindu Succession Act. Admittedly Haramani died in 1963 much after the Hindu Succession Act came into force Section 4 of the Hindu Succession Act clearly stipulates that the Act would have over-riding effect and in respect of any matters dealt with in the Act, it repeals all existing, laws whether in the shape of enactments or otherwise, Which are in consistent with the Act. Hindu Succession Act having brought out some fundamental and radical changes in the law of succession on the coming into operation of the Act the law of succession hitherto applicable to Hindus whether by virtue of any text, rule or interpretation of Hindu Law to any custom or usage having the force of law ceases to have the effect. This over-riding effect of the express provisions of the Act has been emphasised in numerous decisions of the Supreme Court (See Punithavalli Ammal Vs. Minor Ramalingam and Another, and S.S. Munna Lal Vs. S.S. Rajkumar and Others,). Section 4 of the Hindu Succession Act is quoted herein- below in extense for a better appreciation of the point in issue:

4. (1) Save as otherwise expressly provided in this Act

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect which respect to any matter for which provision is made in this Act ;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For this removal of doubts, it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

Section 15 of the Hindu Succession Act provides rules of succession in the case of a female Hindu dying intestate the rules have been set out in section 16 of the said Act. In view of the aforesaid legal position the two Court below committed

gross error in applying Article 57 of the Hindu Law and holding the Plaintiff No. 1 to be a disciple of Haramani and thereby entitled to inherit the properties of Haramani. Under the said provision in default of kindred the property of a deceased Hindu even though he be a Sudra, passes to his preceptor if there be no preceptor, to his disciple and if there be no disciple to his fellow-student. In determining who is a preceptor a disciple or of fellow-student the Court will only consider the imparting of purely religious instruction. Apart from the fact that the aforesaid principle of law will not have any application to cover inheritance after Hindu Succession Act came into force as discussed earlier, I am unable to appreciate how Plaintiff No. 1 can be held to be a disciple of Haramani if consideration is made from the stand point of "imparting of purely religious instruction". Be that as it may in view of Section 4 read with Section 15 and 16 of the Hindu Succession Act, the conclusion of the two Courts below that Plaintiff No. 1 succeeds to the properties of Haramani as her disciple can not be sustained and his accordingly quashed. Under the rules of succession contained in Sections 15 and 16 Plaintiff No. 1 does not come in and therefore Plaintiff No. 1 cannot inherit the properties of the deceased Haramani as her disciple.

7. At this stage, it would be appropriate to consider the submission of Mr. Mohapatra appearing, for the Respondents since if the Plaintiff No. 1's adoption, by Haramani is held to be valid, then she would inherit the properties of Haramani. The question, therefore, that arises for consideration is whether a dancing girl can adopt a daughter. In Mulla's Hindu Law it has been stated that according to Bombay and Calcutta decisions, the adoption of a daughter by a dancing girl is invalid notwithstanding a custom to the contrary, such custom being regarded as immoral; whereas according to the Madras decisions, it is valid provided the adoption is not made with the objection, of disposing of the girl for the purposes of prostitution (See Article 487 of Mulla Hindu Law). According to Raghavachariar's Hindu Law, the law on the subject is as follows. Adoption of a daughter is invalid except in the case of the dancing girl community. Adoption of girls was not known into the general law of the Hindus and the onus of establishing a local, tribal or family custom validating such an adoption is upon those who allege it. Even amongst the dancing girls, if the purpose of the adoption is immoral, the adoption is invalid and there can be no question of estoppel in favour of the adoptee, since estoppel can not defeat a prohibition on grounds of public policy. But if the adoption of a girl is not to promote prostitution, but to, wean the girl away from it and settle her unmarried life, a custom validating such adoption can be upheld by the Court in the case of dancing girls and there is no presumption that such an adoption is for the purpose of prostitution. There is no doubt, a clear cut conflict on the question of the validity of such customary adoptions among, dancing women of the prostitute class between the Madras and the Bombay High Courts, the Bombay High Court holding that such adoption is opposed to public policy and hence void because it is invariably meant to promote prostitution. (See Article 180).

In Mayne's Hindu Law, the subject has been discussed as follows: Though

adoption of a daughter is invalid under Hindu Law, but among the dancing girls it was customary in Madras and Pandicherry and in Western India, to adopt girls to follow their adoptive mothers profession, and the girls so adopted succeeded to their property. No particular ceremonies were necessary, recognition alone being sufficient. The custom of adoption of a girl has to be proved by the party who relies on the adoption. In Calcutta and Bombay, however, such adoption have been held illegal. But in Madras an adoption of a daughter by an dancing girl, where it is not for the purpose of prostitution, has been held to be valid by custom.

8. It thus transpires that there is a divergence of views between the Madras High Court on the one hand and Bombay and Calcutta High Courts on the other Mr. Mohapatra, however, relying upon the decision of the Madras High Court reported in AIR 1953 Mad 571 (Venamuddala Venkata Challamm aalias Venkata Lakshmamma v. Cheekati alias Gaddeni Subbarao and Ors.) strenuously argued that there is no reason why the said view should not be followed particularly when the finding of the two Courts below is that Mahari, a devotee of Lord Jagarnath could adopt a girl according, to the prevailing, custom. Mr. Mohapatra contended that there being no finding, that the adoption Plaintiff No. 1 by Haramani was for any immoral, purposes and once it is found that by custom Haramani could adopt a daughter so the adoption must be held to be valid. Mr. Misra appealing for the Appellants, on the other hand contended that in view of the decision of the Calcutta High Court which have a binding effect on this Court so far as the law of precedence is concerned there is no reason to accept the Madras view and therefore, the Courts below lightly have come to the conclusion that the adoption of Plaintiff No. 1 is invalid in law. From the evidence of P.W. 3, the Courts below have come to the finding that Haramani was making earnings as a dancer as well as a prostitution The Courts below also came to the conclusion that the dancing girl attached to Puri temple were to supple merit their income by indulging them- selves in prostitution and Labanya to whom Haramani succeeded was also earning money by prostitution. In view of this finding, it can not be said that the object of adopting Plaintiff No. 1. by Haramani was only for the purpose of dancing before the Lord Jagarnath and that he would not indulge in prostitution. That being the position. Accepting the views expressed by the Bombay and Calcutta High Courts as discussed earlier, I would hold that the adoption of Plaintiff No. 1 by Haramani is invalid in law. Necessarily therefore the Plaintiff No. 1 cannot inherit the properties left by Haramani. Mr. Misra's first contention accordingly succeeds.

9. So far as the second contention of Mr. Misra is concerned, it is to well-settled that after the apolition of the intermediary interest, the rights of the intermediary came to an end and thereafter a settlement in favour of party made by the Estates Abolition Collector confers a new and independent title on the settle which is not in any way connected with or dependent upon pasing of a title that might have occurred earlier. As such a title obtained from the State Government, cannot be taken away unless the same is annulled through the procedure

prescribed under the provisions of the Orissa Estates Abolition Act (See 38 (1972) C.L.T. 225, Jogendranath Mohanty and Anr. v. Jagarnath Mohanty and Ors.). That being the position and admittedly the lands in question having been settled in favour of the Defendants, under the provisions of the Orissa Estates Abolition Act, the Courts below committed gross error in holding that such settlement was in favour of a trustee and would enure to the benefit of the Plaintiffs. That apart in view of my conclusion on the first submission, the further question of settlement, enuring to the benefit of the Plaintiffs does not arise at all as a valid title has accrued in favour of the Defendants by virtue of the settlement under the provisions of the Orissa Estates Abolition Act. The second contention of Mr. Misra also must succeed.

10. So far as the third contention of Mr. Misra is concerned, he is not in a position to intimate whether there is any material to come to the conclusion that the settlement operation is still continuing in the area in question. In that view of the matter it would not be worthwhile to consider the question of abatement and the said contention is accordingly rejected. However, in view of my conclusion on the first and second contentions raised by Mr. Misra for the Appellants, this second appeal succeeds.

11. In the net result, therefore, the judgments and decrees of the two Courts below are set aside so far as they relate to the properties described in Schedules "A" and "C" of the plaint and the Plaintiffs' suit is dismissed in toto. This Second Appeal is thus allowed and there would be no order as to costs.

Appeal allowed.