

(1963) 04 OHC CK 0009
In the Orissa High Court
Case No : Second Appeal No. 177 of 1961

Narahari Parida

APPELLANT

Vs

Sitamani Dasi and Another

RESPONDENT

Date of Decision : 19-04-1963

Acts Referred:

Orissa Tenancy Act, 1913 — Section 117(3)

Citation : (1963) 29 CLT 419

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : B.K. Pal and D.P. Mohapatra, for the Appellant; Raghunath Das, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—Defendant No. 1 is the Appellant. The following genealogy will show the relationship of the parties.

Plaintiff's case is that Bai and Jhampad constituted a joint Hindu Mitakshara family. After the death of Bai, Upendra and Jhampad were the members of the joint family. Upendra died unmarried in a state of jointness in 1941 and Barendra succeeded to the entire joint family properties. In 1942 Barendra went to Calcutta and since then he is unheard of Plaintiff is the owner of the entire joint family property as Barendra is civilly dead. She is in possession of the entire joint family property. Defendant No. 2 executed a registered sale deed (ext. A) dated 29th October 1956 in respect of the disputed land in favour of Defendant No. 1. The sale is without consideration and collusive. Plaintiff brought the suit for declaration of title and confirmation of possession and in the alternative for recovery of possession after cancellation of ext. A.

2. Defendant No. 2 did not contest the suit. Defendant No. 1 contested alleging that there was severance of joint status between Bai and Jhampad; that on the death of Upendra, Defendant No. 2 was entitled to his interest as heir and that

the sale in his favour was for consideration and valid. Barendra died before Upendra.

3. The trial court held that Upendra predeceased Barendra, that there was severance of joint status in the family, that the sale in favour of Defendant No. 1 was for consideration, that the Plaintiff was not in possession of the disputed land and that the suit was barred by Limitation. He accordingly dismissed the suit.

4. Before the lower Appellate court the findings that Upendra predeceased Barendra and that the sale was for consideration were not assailed. He held that there was no severance of joint status in the family, that on the death of Upendra, Barendra was the owner of the entire joint family property by survivorship and on his civil death Plaintiff is entitled to the entire joint family property as the heir of Barendra. He also found that the Plaintiff is all through in possession and accordingly decreed the suit.

5. The finding that the Plaintiff is in possession all through after the death of Barendra is a pure question of fact is not assailable in second appeal. This finding has no bearing on the case as on the common case of the parties, there was no partition by metes and bounds and the Plaintiff does not claim acquisition of title by prescription as a co-owner of Defendant No. 2. The only question that needs examination is whether there was severance of joint status between Bai and Jhampad so that on the death of Upendra his interest in the property would devolve upon Defendant No. 2.

6. In the Current Settlement Khatians (Exts. B and B/I) Bai and Jhampad have been jointly recorded, but their shares have been mentioned as equal. The trial court held that this entry established severance of joint status in the family while the lower Appellate court held that this entry, by itself, was not conclusive and, taken along with other documentary evidence on record, there cannot be any finding that there was severance of joint status.

7. The position of law is well settled that definement of shares in the settlement or revenue records constitutes some evidence of separation though cases may arise in which this, by itself, may not be conclusive evidence of partition. The basis underlying the juristic theory as to why ascertainment of shares in the settlement records would constitute some evidence of severance of joint status is that in a Mitakshara coparcenary, no individual member of the family, while it remains joint, can predicate that a particular member has a definite share in the joint undivided property. It is only on partition that definite share of each individual coparcener can be ascertained. The interest of each coparcener until partition is a fluctuating one capable of being enlarged by deaths and diminished by births in the family. There are community of interests and unity of possession until partition. The mention in the settlement Khatians that the shares of each coparcener are equal is only consistent with the theory that the shares have been ascertained which can arise only when there is severance of joint status. In

Chunilal Ojha v. Mulsankar Ojha and Ors. ILR 1961 Cutt 635 a Bench of this Court arrived at the conclusion by taking resort to the presumption arising in settlement entries u/s 117(3) of the Orissa Tenancy Act. Such entries shall be presumed to be correct until it is proved by evidence to be incorrect. Their Lordships held that in cases under the Orissa Tenancy Act, the presumption cannot be rebutted merely by the general presumption of ordinary Hindu law. The question whether the settlement entry was rebutted is essentially a question of fact and that the conduct of the parties, both before and after the making of the settlement entry, was relevant.

8. It is necessary to examine whether there are other materials on record which militate against the inference of severance of joint status based on settlement entries. The document produced on behalf of the Plaintiff can be classified into two categories. Exts. 6 and 2 are the only documents to which Upendra was a party. In none of these documents there is any mention that the family was continuing joint. On the contrary, in ext. 2 dated 17th June 1935, Barendra, who was a minor and was represented through the Plaintiff-guardian, was one of the executants with Upendra. If the joint family was continuing, Upendra, who was the Karta, could have executed the document on behalf of the joint family and there was no necessity for the minor to become an executent through the mother guardian.

Again this by itself may not be conclusive but is a piece of circumstance consistent with the theory that there was no continuance of joint status. The recital in ext. 6 is that the money was necessary for payment of ret and for paying up certain sundry loans. The lower Appellate court committed an error of record in saying that there was recital of the existence or-joint family loans. On the common case of the parties there was no partition by metes and bounds and obviously when effecting either sale or mortgage, both the cosharers had to execute documents in respect of loans standing in their joint names.

9. The rest of the documents came into existence after the death of Upendra. Ext. 1 is a registered sale deed dated 10th November 1941 executed by Barendra through his mother in favour of Prahallad Mohanty. There is a recital that money was necessary to defray the Sudhi expenses of Upendra. This document is not of much value as it appears that after the death of Upendra Defendant No. 2 did not take interest in respect of the property and Barendra and the Plaintiff continued in possession of Upendra's share and defrayed the funeral expenses. It was in ordinary course of business and there is nothing strange in it. Defendant No. 2 had gone in marriage to a distant village of Rasulpur in P.S. Baliapal while the disputed land is in village Badamandaruni in P.S. Bhograi and he seems to have taken no interest in the property until the alienation effected in favour of Defendant No. 1. To the same effect is another registered sale deed (ext. 4) executed by Barendra through the Plaintiff on 2nd May 1942. Ext. 3 series show that Upendra was a member of a co-operative society. He had incurred certain loans and after his death some of these loans

were paid by the Plaintiff. As have already said after the death of Upendra, Barendra and his mother continued in possession of the joint property which had not been partitioned by metes and bounds and naturally Plaintiff defrayed some of the liabilities of Upendra while he was alive and incurred certain expenses in connection with his funeral ceremony. Plaintiff does not claim any acquisition of title by adverse possession against Defendant No. 2 on the basis that she was a co-owner on the death of her brother Upendra in respect of half the interest of the entire joint property. Had such a case been advanced, these documents (ext. 1, 4 and 3 series) might have been of some value as evidence of hostile animus of the cosharer. Those documents however are irrelevant for the purpose of establishing that the joint family status was continuing.

10. Taking all the evidence into consideration I am of the view that the lower Appellate court acted contrary to law in not keeping in view the legal position with regard to the ascertainment of shares as mentioned in the settlement entries and the construction of the subsequent documents relevant to the question. There was severance of joint status in the family. On the finding that the sale in favour of Defendant No. 1 was for consideration, the suit must fail.

11. The appeal is allowed, the judgment of the lower Appellate court is set aside and the suit is dismissed. In the circumstances, parties to bear their own costs throughout.