(1976) 11 OHC CK 0018

In the Orissa High Court

Case No : A.H.O. No''s. 56 and 78 of 1975

Narasingha Charan Sahu APPELLANT

Vs

Lokanath Sahu and Others
 Lokanath Sahu Vs Narasingha Charan Sahu and Others RESPONDENT

Date of Decision : 03-11-1976

Acts Referred:

Citation : (1977) 43 CLT 218

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : B. Pal, N. Prusty, A. Mohanty, B.K. Pal, in A.H.O. No. 56 of 1975, P.K. Dhal and M.K. Jena, in A.H.O. No. 78 of 1975, for the Appellant; P.K. Dhal, S.C. Sahoo, R.C. Patnaik for Respondent No. 1 in A.H.O. No. 56 of 1975, B. Harichandan, for Respondent Nos. 1 and 2, B. Pal, in A.H.O. No. 78 of 1975, for the Respondent

Judgement

K.B. Panda, J.—This is a Letters Patent Appeal filed by Defendant No. 1 Narasingha Charan Sahu (AHO 56/75) from the judgment of a Single Judge of this Court dated 12-9-1975 reversing the judgment and decree of the Subordinate Judge, Berhampur, in part, in a partition suit. The suit (T.S. No. 34 of 1971) had been filed by the Plaintiff Lokanath Sahu against his brother Narasingha Charan Sahu (Defendant No. 1), his wife Saraswati Sahuani (Defendant No. 2) and Manikya Sahuani (Defendant No. 3), the mother of both Plaintiff and Defendant. No. 1.

2. Briefly the Plaintiff''s case is thus: Laxman Sahu the father of the Plaintiff and Defendant No. 1 died in 1942. Then Defendant No. 1 was nine years old. The Plaintiff is a posthumous child. The property of the family initially was the residential house (item No. 1 of schedule A) and a shop named Ganesh Bhandar (item No. 1 of schedule B). As the widow could not run the shop her brother Kali Charan (p.w.2) came to their rescue, purchased the stock for Rs. 5,000/ - and ran it with the understanding to pay Rs. 50/ - per month to Defendant No. 3

towards bonus and goodwill of the business. The widow supported the family by money-lending supplemented by the money she got monthly from her brother in running ''Ganesh Bhandar''. Defendant No. 1 on attaining majority became the Karta of the joint family and under an agreement (Ext. G/1) between himself and p.w. 2, the maternal uncle dated 30-4-1955, he (Defendant No. 1) purchased the stock of Ganesh Bhandar from p.w. 2. Yet p.w. 2 remained connected with it till 1962. Defendant No. 1 as the Karta of the joint family took over management of the money-lending business although it continued in the name of Defendant no 3 as before. Defendant No. 1 while acting as Karta and running the joint family business acquired four houses included in schedule ''A'' and a press named "Ganesh Printing Press" included in schedule ''B''. The properties liable for partition are described as follows:

Schedule A:

Item No. 1 - Ancestral homestead land standing in the name of Defendant No. 3.

Item No. 2 - House purchased in 1959 in the name of Defendant No. 1 for Rs. 1200/ - under Ext. A/1.

Item No. 3 - House purchased in the name of Defendant No. 1 for Rs. 5500/ - in 1962 under Ext. B/1.

Item No. 4 - House purchased in the name of Defendant No. 2 for Rs. 7000/ - in 1967 under Ext. E/1.

Item No. 5 - House purchased in the name of Defendant No. 2 in 1970 for Rs. 3000/. under Ext. D/1.

Schedule B:

Item No. 1 - Ganesh Bhandar.

Item No. 2 - Ganesh Printing Press and Bank account.

Item 3 and 4 - Bank accounts and cash in hand.

3. Defendant No. 3 the mother supported the claim of the Plaintiff for partition of the above properties.

4. Defendant No. 1 contested the claim. According to him the parties were no longer members of a joint Hindu family: that the properties described in items 2 and 3 of schedule A and items 1 and 2 of schedule B of the plaint, namely, Ganesh Bhandar and Ganesh Printing Press are his self-acquired properties while items 4 and 5 of schedule A are his wife''s self acquisitions purchased from her stridhan. The money lying in deposit in his accounts are exclusively his own. The joint family had neither any nucleus nor any family business as alleged. He never took management of the alleged family business. Rather. Defendant No. 3 who was having money-lending business kept the entire income to herself and with that started a book-shop named "Bidya Bhandar" benami in the name of her brother Kalicharan and therefore that should be taken as a joint family concern.

Defendant No. 3 had also kept with her about 100 tolas of gold and a cash of about Rs. 2,500/ -. The money lying in deposit in the accounts of the Plaintiff and sister Jamuna as well as the gold and cash of Rs. 2,500/ - with Defendant No. 3 are the joint family properties liable to partition. Also he alleged that the Plaintiff and Defendant No. 3 have purchased several pieces of land benami in the name of Kalicharan should be made available for partition being joint family properties. The properties claimed by him have been acquired by his own earnings from the business he was having with his father-in-law and other persons.

5. In the trial Court besides documents, the Plaintiff examined four witnesses of whom Kalicharan is p.w. 2 and the Plaintiff himself is p.w. 4. Defendant No. 3 examined herself and another witness. Defendant No. 1 Narasingha Sahu examined two witnesses of whom he was d.w.2 himself.

6. The learned trial Court on a discussion of the evidence oral and documentary decreed the suit only in respect of item No. 1 of schedule A property, that is, the ancestral house. Regarding items Nos. 2 and 3 of schedule A he held them to be the self-acquisitions of Defendant No. 1 and items 4 and 5 as belonging to Defendant No. 2 and so not liable to partition. Regarding moveable properties described in schedule B, he held them to be the self acquisitions of Defendant No. 1. With regard to the properties in the hands of the mother he ordered thus:

... the mother may be asked to submit accounts of the money-lending business which are to be divided between the parties.

xx xx xx xx Order

.... Defendant - 3 do submit her accounts by the date of the suit to be divided amongst the two sons and herself.

However, he negatived the claim of Defendant No. 1 that the Bank accounts standing in the name of the Plaintiff, Bidya Bhandar and Satyanarayan Press to be joint family properties.

7. The Plaintiff preferred an appeal (P.A. 118 of 1972) against this judgment and decree. While disposing of the same, the learned Single Judge held that items 2 and 3 of schedule A and also "Ganesh Bhandar" and the "Ganesh Printing Press" described in items 1 and 2 of schedule B are joint family properties and so liable to partition. He confirmed the finding of the lower Court that items 4 and 5 of schedule A are not partible as they belong to Defendant No. 2, the wife of Defendant No. 1. Although there was no appeal by Defendant No. 3, yet he held that she is not accountable for the money-lending business or the alleged gold or cash in her hands.

8. As against these findings of the learned Single Judge, two appeals have been filed; the one filed by Defendant No. 1 is numbered as A.H.O. No. 56 of 1975 and that by the Plaintiff as A.H. Order 78 of 1975. In the letter, the prayer is:

For setting aside the first appeal to the extent with respect to item Nos. 4 and 5 of schedule A and items 3 and 4 of the schedule B of the plaint.

Both these appeals were heard analogously and this judgment will dispose of them both.

9. Four points arise for consideration in the two appeals, namely,

(1) Whether items 2 and 3 of schedule A property are the self-acquisitions of Defendant No. 1 and are not liable to partition.

(2) Whether items 1 and 2 of schedule B property, i. e. "Ganesh Bhandar" and "Ganesh Printing Press" are the self-acquisitions of Defendant No. 1 and so not available for partition.

(3) Whether Defendant No. 3 should render accounts regarding the cash and gold in her possession to be partitioned between herself, the Plaintiff and Defendant No. 1.

(4) Whether items 4 and 5 of schedule A properties purchased in the name of Defendant No. 2 are liable to partition.

10. Before answering any of these questions, we consider it worthwhile to decide a controversial point that has a great bearing on them. The Plaintiffs claim partition on the assertion that the family was joint and Defendant No. 1 as the senior male member was the Karta of the family. As such he was managing the family business and the purchases made by him either in his name or in his wife''s name are joint family properties having been acquired from joint family funds. Defendant No. 1 while denying the same asserts that since his marriage in 1954 his mother did not like that he should continue in the joint family and so he left the joint family house. At that time he had not been given a ''single pie'' from the joint family properties. Ever since he (Defendant No. 1) was remaining separate; while the joint family properties continued to be in possession of the Plaintiff and Defendant No. 3. It is of great significance as to which of these versions is correct. Doubtless the presumption of law is that all Hindu families are joint unless the contrary is proved. Further property belonging to a joint family is ordinarily managed by the father or other senior members for the time being of the family who is called Karta (See Mulla''s Hindu Law - S. 236). Thus this presumption of law favours the Plaintiff''s case. That apart, various documents, as will be discussed hereafter, strengthen the same. To begin with Ext. G/1 dated 30-4-1955 is the agreement between Defendant No. 1 and p.w. 2 wherein Defendant No. 1 purchased the stock of "Ganesh Bhandar" from p.w. 2. Herein Defendant No. 1 is described as the Proprietor of "Ganesh Bhandar" and of Sandha Mohantisahi. Secondly in the agreement dated 7-1-1962 (Ex. H/1) under which p.w. 2 disclaimed his interest in Ganesh Bhandar and the agreement dated 11-5-1963 (Ex. 2), wherein final accounting was made in respect of "Ganesh Bhandar" between p.w. 2 and Defendant No. 1 (described therein as second party) only reinforces the presumption. Again the two sale deads under

which Defendant No. 1 purchased properties described as items 2 and 3 of schedule ''A'' (Ex. 4/1 dated 4-4-1959) and (Ex. B/1 dated 20-10-1962) respectively show at several places how Defendant No. 1 was a resident of Sandhamahanti Sahi where the joint family house is situated and not Kalupatra Sahi where his father-in-law''s house is there. If he has been separately staying since 1954 as asserted or had started "Ganesh Bhandar" in 1962 afresh with his own funds, these documents give a lie to that. To cap all in the tenth para of his written statement it is stated.

It is not at all true that this Defendant has been and is submitting income tax returns of his own self acquired business and his two concerns in his capacity as the Karta and Manager of the joint family as alleged by the Plaintiff.

But while stating "true facts of this case" it is said,

While submitting the income tax returns of his properties in the year 1963 the uncle of this Defendant Shri Kali Charan Sahu suggested to this Defendant to describe the properties to be properties of the Hindu undivided family saying that would be more convenient for this Defendant and it would cover up the expenses etc. given by this Defendant to the Plaintiff.

This Defendant was not in a position to question the advice of his uncle and believing in good faith had agreed to submit the return describing the properties to be of Hindu undivided family.

For the years 1969-70 and 1970-71, Defendant No. 1 has submitted two income tax returns Exts. 4/a and 4 respectively. P.w. 2 severed all connections with "Ganesh Bhandar" from 1962. Thus the explanation given by Defendant No. 1 that being misguided by p.w. 2 he submitted false returns is a mere ruse. In these returns Defendant No. 1 has described himself as the Karta of the Hindu undivided family. The source of income is shown as (1) business dealing in books, papers, stationery etc., (2) Printing Press, (3) House property and (4) other sources. These two returns and the orders passed thereon greatly undermine the case of Defendant No. 1 who should not be allowed to blow hot and cold as it suits him.

11. From the above it is also clear that the family had at least Rs. 5,000/ - cash obtained from p.w. 2 which was invested in money-lending and further after some years Defendant No. 1 managed the ancestral shop "Ganesh Bhandar". Defendant No. 1 admits in his evidence that sales tax registration No. 1605 dated 5-12-1947 in relation to "Ganesh Bhandar" was issued in his name and continues to be so till now. This unmistakably shows that before the final accounting in 1962 whereafter p.w. 2 cut off all connections with "Ganesh Bhandar", Defendant No. 1 was managing it. Thus the joint family had sufficient nucleus in the nature of cash - invested in money-lending besides the shop "Ganesh Bhandar".

In this context it is convenient to discuss the case over "Ganesh Printing Press" purchased in the name of Defendant No. 1 on 5-9-1966 for Rs. 4,0001- under Ext. T/1. This property, as already indicated, has also been shown in the income tax returns as belonging to Hindu undivided family in 1969-70 and 1970-71. There is no contrary evidence that Defendant No. 1 acquired it from his separate earnings. In short, there is very cogent evidence that Defendant No. 1 was the Karta of the joint family; that the family had sufficient nucleus and that "Ganesh Bhandar" and "Ganesh Printing Press" belonging to the joint family and as such liable for partition. Even if these properties were acquired by Defendant No. 1 without the aid of joint family nucleus, the unilateral declarations given by him in the returns made under the Income Tax Act contemporaneously with this litigation established blending of such self-acquisition with the properties of the joint family. Thus the second point is decided in favour of the Plaintiff.

12. Point No. -1: Purchase of item Nos. 2 and 3 of Schedule ''A'' properties in the name of Defendant No. 1 was made for Rs. 1200/ - and Rs. 5500/ - on 4-4-1959 and 20-10-1962 under Exts. A/1 and B/1 respectively. Defendant No. 1 claims them to be his self-acquired properties purchased from his income derived from business with his father-in-law and others and not from joint family assets. So far as the first item is concerned, one Baya Sethi had taken a loan of Rs. 1,000/ - from the joint family funds (Ext. C/1 by mortgaging the house, i. e. item No. 2 of Schedule ''A'' in favour of Defendant No. 3 in whose name the money-lending business stood. For satisfaction of this mortgage dues Baya sold the house in favour of Defendant No. 1 as evidenced from the sale deed. But Defendant No. 1 attempted to explain it away saying that out of his own earnings he paid the mortgage dues to Defendant No. 3 and got the document in his name. Defendant No. 3 does not support this nor there is any other evidence to support Defendant No. 1. On the contrary, the document shows that only Rs. 50/ - was paid by Defendant No. 1 to Baya in presence of the Sub-Registrar.

Regarding the second item, i. e. item No. 3 in Schedule ''A'' it appears that one Brundaban Padhi had borrowed a sum of Rs. 4,000/ - from Defendant No. 3 by executing a pronote (Ext. J/1) dated 18-3-1962 and for satisfaction of that loan the sale deed was executed in favour of Defendant No. !. Out of the entire consideration of Rs. 5,500/ - Rs. 4,280/ - was towards the pronote and the balance Rs. 1220/ - was paid to the vendor in presence of the Sub-Registrar. The payment of the dues under the pronote is said to have been made earlier on 18-10-1962 in presence of Defendant No. 1 and his father-in-law. Defendant No. 3 denies the claim of Defendant No. 1 that he paid the loan from his separate earnings. The father-in-law of Defendant No. 1 who is a signatory to the payment under Ext. J/1 has not been examined. There is no independent evidence to support the claim of Defendant No. 1 that he purchased this house from his own funds.

Thus in the above two instances while the claim of Defendant No. 1 goes unsupported; the presumption that he Defendant No. 1 as Karta of the family got the sale deeds; in his favour, though the properties were purchased from joint family funds, operates. Besides, even if it be taken, though not proved, that Defendant No. 1 purchased the properties from his separate income, circumstances indicate that it is a case of complete blending and throwing them into the common hotchpot and as such, they have lost their separate identity and have been a part and parcel of joint family property liable for partition. Thus this point is also decided in favour of the Plaintiff and against Defendant no 1.

13. Point No. 3: There is ample evidence on record both oral and documentary that after the death of Laxman, the widow (Defendant No. 3) carried on money-lending business. Defendant No. 3 admits the same and the pronote and the mortgage deed referred to above establish the same. There is no acceptable evidence that at any particular time the money-lending business was transferred by her to Defendant No. 1. Further the Plaintiff has admitted thus:

All these bank accounts related to family fund these accounts are not shown in income tax statement.

xx xx xx

I have not shown the money-lending of mother in plaint schedule.

We would, therefore, hold that the learned trial Court had rightly ordered that Defendant No. 3 is accountable for the money-landing business in her hands. This part of the order is against Defendant No. 3. But she did not choose to prefer any appeal and as such it is final and cannot be challenged by the Plaintiff. Accordingly we would hold that the finding of the learned Judge, "Defendant No. 3 to render accounts cannot be sustained" is without jurisdiction and as such not sustainable.

14. Point No. 4: So far items 4 and 5 of Schedule A property are concerned, since they have been purchased in the name of Defendant No. 2 exclusively who is not a coparcener, prima facie those properties are deemed to be not belonging to the joint family. There is no evidence that the consideration for those purchases was from joint family funds. Were it so, there was no justification for making the sale deed in her name instead of in the name of the Karta of the family. Accordingly We would hold that these properties standing in the name of Defendant No. 2 are not available for partition.

15. In the result, therefore, we would order thus:

A.H.O. No. 56 of 1975 succeeds in part and A.H.O. No. 78 of 1976 is dismissed in toto. Item Nos. 1, 2, and 3 of Schedule ''A'' of the plaint and items 1 and 2 of Schedule ''B'' being joint family properties are liable for partition. Defendant No. 3 who was running the money-lending business is to render accounts as directed by the learned trial Court. The Judgment of the learned Single Judge stands modified to the extent indicated above. In view of the divided success, parties to bear their own costs.

R.N. Misra, J.

16. I agree.

