

(1973) 04 OHC CK 0028
In the Orissa High Court
Case No : First Appeal No. 16 of 1969

Nidhi Swain and Others

APPELLANT

Vs

Khati Dibya and Others

RESPONDENT

Date of Decision : 26-04-1973

Acts Referred:

Hindu Succession Act, 1956 — Section 4

Citation : AIR 1974 Ori 70 : (1973) 39 CLT 646

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

Bench : Division Bench

Advocate : A.B. Misra, for the Appellant; Asok Das, A. Mohapatra and L. Rath, for the Respondent

Final Decision : Partly Allowed

Judgement

R.N. Misra, J.—The defendants in a suit for partition are the appellants and the appeal is directed against the judgment and decree of the learned Subordinate Judge at Nayagarh. The relationship of the members of the family appears from the genealogy below:

Bira Swain(died in 1933) | _____ | _____ | |
| Nidhi Swain(D.1) Narasingha Parikhit(D-2) | (died on 1-12-49) | =widow
Khati Dibya | (Plaintiff) _____ |
_____ | | | |

Raghunath (D.3) Gangadhar(D.4) Biswanath(D.5) Kulamanl(D.6) |
Rajkishore(D.7). It was alleged by the plaintiff that Bira and his sons constituted a joint family. The "A" schedule properties were ancestral having been recorded in the settlement of 1932-33 of the Nayagarh State in Bira's name. Bira died soon after the settlement. Defendants 1 and 2 and the deceased husband of the plaintiff with the aid of the joint family nucleus and their own labour acquired the "B" Schedule Property. As defendant No. I was the Karta of the family during the period of acquisitions (1936-52), the acquisitions were in the name of the first defendant. The "C" Schedule Properties were acquired out

of the joint family nucleus subsequent to the death of Narasingha in the names of the defendant No. 1's sons. Similarly the "D" Schedule Properties have also been purchased out of the joint family nucleus in the names of defendants 2 to 6 and the "E" Schedule Property has been purchased out of the joint family assets in the name of defendant No. 7. The "F" Schedule property constitutes the movable assets of the joint family. According to the plaintiff, she has the same share as her husband had in the properties, namely, one-third and she wants her share to be partitioned and separate possession delivered to her.

2. On the other hand, the defendants in a joint written statement have contended that some portion of the "A" Schedule property is not the joint family asset; the acquisitions of "B", "C" "D", and "E" Schedule Properties are not out of the joint family nucleus and the joint family has no interest therein; the joint family had no surplus income and, therefore, in the acquisition of "B", "C", "D" and "E" Scheduled Properties, there was no utilisation of any joint family asset. The plaintiff had withdrawn from the family of her own accord at the instance of her son-in-law.

3. The learned trial Judge found -

(1) Bira died in 1933 and Narasingha died at the age of 22 in December, 1949.

(2) The "A" Schedule property excepting 68 decimals constituted the joint assets of the family;

(3) Joint family nucleus was available for acquisition of assets. The other immovable properties were joint family assets and are liable for partition. He further found the claim of movable properties as indicated in Schedule "F" had not been established. But relying on an admission in paragraph 9 of the written statement in regard to specific movables, he decreed the suit for partition. It is against this decree of the learned Trial Judge that the present appeal has been filed at the instance of the defendants.

4. Mr. Misra for the defendants contends that:--

(1) The Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the 1937 Act) had not been extended to the ex-State of Nagpur prior to Orissa Act 4 of 1950. Since Narasingha died on 1-12-1949, at a time when that Act was not in force, the plaintiff is not entitled to lay any claim on the basis of the 1937 Act

(2) The plaintiff is not entitled to any share in the agricultural land and the Hindu Succession Act, 1956 (hereinafter referred to as the 1956 Act) has no application to succession in respect of agricultural lands.

(3) The 1937 Act had been repealed by Section 31 of the 1956 Act. Even though the repealing statute was repealed in 1960, the 1937 Act was not revived.

(4) The plaintiff has failed to establish existence of sufficient nucleus and, therefore, there could be no presumption that joint family nucleus was utilised

for acquisition of properties under the "B" to "E" Schedules of the plaint. These contentions of Mr. Misra require examination.

5. Contention No. 1.-- No specific plea has been raised in the pleadings as to whether the 1937 Act was in force in the Nayagarh State. For the first time such a contention has been advanced in appeal before this Court. We, however, find that by the Administration of Orissa State Order, 1948, made u/s 4 of the Foreign Jurisdiction Act, 1947, the 1937 Act as amended by Orissa Act 5 of 1944, in its application to the province of Orissa was extended to the merged States including the ex-State of Nayagarh. Thus by the time Narasingha died in 1949, the 1937 Act as amended by Orissa Act 5 of 1944 was the law applicable in the areas covered by the ex-State of Nayagarh.

The contention of Mr. Misra that this extension was not in accordance with law need not be entertained with any seriousness in view of the Full Bench decision of this Court in the case of Saradhakar Naik and Others Vs. The King, . The point in dispute there was the application of the Orissa Maintenance of Public Order Act to the Ex-State areas and dealing with the point Ray, C. J., stated :--

"In consideration of what I have said above, I may safely conclude that under the Extra Provincial Jurisdiction Act, 1947, of the Indian Dominion Legislature corresponding to Foreign Jurisdiction Act, 1890, of the Parliament of United Kingdom. Foreign Jurisdiction Act (XXI (21) of 1879) of the British India Legislature, later replaced by the Foreign Jurisdiction Order in Council, 1902, by which the Governor-General of India was empowered to exercise jurisdiction over foreign territories outside British India such as those of Native States and the like, the Orissa Government derives its power to exercise authority and jurisdiction in relation to the governance of the territories of the concerned States. In exercise of such power, the Orissa Government has extended to the said territory the application of several Acts (Orissa) including the Orissa Maintenance of Public Order Act.

In my judgment, the passing of the Extra Provincial Jurisdiction Act, the Notification of the Government of India delegating its authority to the Government of Orissa and Orissa Government's exercise of the powers and extension of Orissa Maintenance of Public Order Act, to the territories concerned are all intra vires, valid and binding upon the subjects of those territories....."

We shall, therefore, hold that the 1937 Act, as amended by Orissa Act 5 of 1944 had been validly extended to the ex-State of Nayagarh and the law enforced when Narasingha died on 1-12-1949.

6. Contention No. 2-- Mr. Misra next contended that the Hindu Succession Act of 1956 did not apply to agricultural lands. In support of this contention reliance is placed on a Bench decision of the Allahabad High Court in the case of Smt. Prema Devi Vs. Joint Director of Consolidation (Head quarter) at Gorakhpur Camp and Others, . The reasoning for the conclusion is that Entry No. 5 in the concurrent List of the Seventh Schedule of the Constitution which is the only

entry under which the Central Legislature has the jurisdiction to pass the Hindu Succession Act relates only to personal law. Laws passed under this entry do not apply to any particular property. They merely determine the personal law. Entry No. 18 in List II (State List) in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are, therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State Legislation. In List 3 wherever the entry relates to rights in land, agricultural land has been expressly excluded.

A Division Bench of this Court in the case of Laxmi Debi Vs. Surendra Kumar Panda and Others, , dealing with the point in paragraph 14 of the judgment stated-

"Mr. Jena further contended that the Act even if applies retrospectively, will not apply to agricultural lands, and for this, he relies upon the Federal Court decision reported in Hindu Women's Rights , to Property Act, 1937, in the matter of AIR 1941 PC 72 (K). That was a case which came up for decision by the Federal Court on a reference made by his Excellency the Governor-General of India.

Gwyer, C. J., who delivered the judgment of the Court held that the Hindu Women's Rights to Property Act of 1937, and the Hindu Women's Rights to Property (Amendment) Act of 1938, do not operate to regulate succession to agricultural land in the Governor's Provinces; and do operate to regulate devolution by survivorship of property to other than agricultural lands.

This decision, in view of the changed position in law, no longer holds good. The Federal Court decision was based upon the law of legislative competency as it then stood, by the Government of India Act, 1935. In Schedule 7, Government of India Act, 1935, this subject appears in the Concurrent Legislative List (List 3) as Item No. 7. Item 7 was in the following terms :

"Wills, Intestacy and Succession, save as regards agricultural lands". Now under the present Constitution of India the same subject has been dealt with in the Concurrent List (List 3) in Schedule 7 as Item No. 5. Item No. 5 runs as follows :--

"Marriage and divorce, infants and minors, Adoption, Wills, Intestacy and Succession, Joint Family and Partition, all matters in respect of which parties in judicial proceedings were, immediately before the commencement of this Constitution, subject to their Personal law."

It is clear that the Parliament had omitted the phrase "save as regards agricultural land" from Item No. 5 of the Concurrent List in order to have a uniform personal law for Hindus throughout India, and accordingly, it necessitated the enlargement of Entry No. 5. We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural lands also, and the decision in AIR 1941 PC 72 (K) would no longer hold good." The same reasoning

has been advanced by a Division Bench of the Mysore High Court in the case of Basavant Gouda v. Smt. Channabasawwa AIR 1971 Mys 151, to uphold the applicability of the Hindu Succession Act to agricultural lands. We prefer to follow our earlier decision on the point which also appeals to us to be the appropriate decision on the matter. Accordingly the contention of Mr. Misra is rejected.

7. Contention No. 3 -- The Act of 1937 had in fact been repealed by Section 31 of the 1956 Act. In 1960, the repeal was repealed. The point for consideration is whether the 1937 Act was revived. In view of our finding that the 1956 Act applies to agricultural lands this contention loses its emphasis and we need not examine the point for a final decision.

8. Contention No. 4 :-- The fourth contention is in regard to what property should be held partible. As we have already indicated the "A" Schedule properties excepting the area excluded by the trial Court have been found to be the joint family assets. In regard to the "B" schedule properties acquisitions whereof were said to be between 1935 and 1952, it is possible that there was contribution by the plaintiff's husband. The extent of property is such that there cannot be any assumption of extensive nucleus left for acquisition of more properties. Plaintiff's husband died at a young age but yet, taking an over-all picture of the materials on record, we are of the view that he may have contributed to the acquisition of the "B" schedule properties, bulk of which were acquired during his lifetime. We, therefore, come to the conclusion that the properties in the "A" schedule excepting what has been excluded by the trial Court and similarly properties in the "B" schedule excepting what has been excluded by the trial Court can be taken to properly constitute the joint family assets, liable for partition. In regard to other acquisitions made long after the death of the husband of the plaintiff, the position has to be maintained differently. There is no dispute about the plaintiffs' share. We would, therefore, hold that properties covered by Schedules "A" and "B" except to the extent of exclusion by the trial Court are liable to partition, the plaintiff having one-third share therein. The remaining properties are found not to be joint family assets which can be asked to be divided in this suit. We accordingly allow the appeal in part. The plaintiff's suit will be decreed for partition of her one-third share in regard to "A" and "B" schedules only (excepting to the extent excluded by the trial Court). The suit for partition in regard to other properties covered by Schedules "C", "D", "E" and "F" stand dismissed.

9. The appeal is allowed in part.

10. In the facts and circumstances of the case we direct parties to bear their own costs throughout.

B.K. Ray, J.

I agree.