

(1978) 07 OHC CK 0005
In the Orissa High Court
Case No : First Appeal No. 28 of 1970

Pandab Panigrahi and Others		APPELLANT
	Vs	
Mst. Laxmi Misrani and Others		RESPONDENT

Date of Decision : 14-07-1978

Acts Referred:

Hindu Womens Right to Property Act, 1937 — Section 3(2)

Citation : AIR 1979 Ori 64 : (1978) 46 CLT 215

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

Bench : Division Bench

Advocate : B.K. Pal, for the Appellant; R.N. Sinha and S.N. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Defendants have appealed against the decree given by the learned Subordinate Judge of Sambalpur declaring plaintiff's title to the "B" Sch. property and recovery of possession through court thereof.

2. One Banamali was the common ancestor of the parties. He has three sons being Basudeb, Durga Prasad and Debi Prasad, Basudeb died sometime in 1928 while the other two died in 1952 and 1953 respectively. On. 5-7-1933" under a registered deed of partition to which Kali Prasad. Durga Prasad and Debi Prasad were parties, each party was given one-third share in Banamali's properties. In the same partition, the one third share allotted to Durga Prasad was sub-divided between himself and (his) only son Bhabani (defendant No. 12) each getting one-sixth share. The onesixth share allotted to Durga Prasad is the "Kha" schedule property of the partition deed and the property in Bhabani's share was shown in "Ga" schedule thereof. After the partition, Durga Prasad acquired certain more properties. Defendant No. 12 looked after the properties of the plaintiff as she had become disabled on account of old age. Plaintiff came to learn that the said defendant No. 12 had allowed defendants 1 and 2 to be in possession of certain properties and those two defendants in their turn had allowed defendants 5 to 11

also to possess properties along with them. She maintained that defendant No. 12 was not entitled to any share in the properties left behind by Durga Prasad and plaintiff was the only legal heir.

3. Defendants 1, 2 and 6 to 11 filed a joint written statement and disputed plaintiff's claim to the property. Defendants 15 and 20 also filed separate written statements on the same line.

4. The point that arose for consideration was essentially one of law, namely, where the property belonged to a male owner who had a widow and a son and in a partition, the male owner and his son were allotted a moiety share each with no share for the widow, whether after the death of the male owner, the separated son would be entitled to a share or the widow would succeed. The learned Subordinate Judge has decreed the suit holding that the widow was entitled to the entire property to the exclusion of the separated son. In this appeal by the defendants that position of law is assailed.

5. There is no dispute that the property that fell to Durga Prasad in the partition of 5-7-1933 was divided between him and his son (defendant No. 12). Durga Prasad died in 1952 and the property in dispute is admittedly Durga Prasad's. Plaintiff is also admittedly the widow of Durga Prasad. The provisions of the Hindu Women's Rights to Property Act of 1937 apply to the facts of the case. Relying on a Bench decision of the Nagpur High Court in the case of AIR 1949 108 (Nagpur) , it has been contended that defendant No. 12 was entitled to the entire property to the exclusion of the widow. Hidayatullah, J, as the learned Judge then was, spoke for the Division Bench thus:--

"The dispute here is not between divided and undivided sons but between the widow of the father and a separated son who is now represented by his sons. Further the dispute is not about the self-acquired property of Pandurang but about the separate property in the sense of the share allotted to a coparcener on partition. The position of a widow vis-avis a separated son is discussed by Mulla in Sections 340 and 341 of his book. According to the learned author, the effect of a partition is to dissolve the coparcenary with the result that the separating members hold their respective shares as their separate property and the share of each member passes on his death to his heirs. The position of the divided son is superior to that of the widow. The learned author says that if there be no undivided son, the divided son is entitled to succeed to the self-acquired property in preference to his father's widow. No distinction is made between self-acquired property and property obtained on partition as a separate share"

The ratio in the Nagpur decision was considered by a Bench of this Court in the case of Tayi Visalamma Vs. Tayi Jagannadha Rao and Another, . The Division Bench differed from the ratio and held that the property which came on partition to the male owner and after him was held by the widow was joint family property and Section 3(2) of the 1937 Act applied. The Court, therefore, concluded that the disputed properties were joint family properties within the meaning of

Section 3(2) of the said Act and after the death of the male owner, the widow was entitled to the same interest (herein which the male owner had, i.e. the entire sixteen annas interest. The separated son had no share therein.

Counsel for the appellants tried to distinguish the Bench decision of this Court by contending that the Orissa decision dealt with a case to which the Madras School of Hindu Law applied. We do not think, the distinction asked to be drawn has any basis. In the case of *Jana and Another Vs. Parvati*, , the ratio in the Orissa case was applied without any reservation. The selfsame view has been taken in a later Bombay case being *Parwati Vs. Janabai*, . The Nagpur decision AIR 1949 108 (Nagpur) was not followed by the Madhya Pradesh High Court in the case of *Jhangalu Shivcharan Vs. Pancho Bai*, . It was pointed out that the application of Section 3(2) of the 1937 Act had not at all been considered in the Nagpur case and, therefore, an erroneous conclusion had been reached. In the cases of *Onnamalai Ammal v. Seethapathi Reddiar* AIR 1961 Mad 90 and *The Commissioner of Income Tax Vs. S.S. Thiagarajan Shiyali*, , the Bench decision of this Court has also been approved. A Full Bench of the Patna High Court in the case of *Mt. Khatrani Kuer Vs. Smt. Tapeshwari Kuer*, , followed the ratio in the Orissa case. We are inclined to hold that the Nagpur view is not in consonance with the judicial opinion of different High Courts on the point and the distinction attempted to be drawn by appellants' counsel that the Bench of this Court had come to its conclusion by applying the Madras School of Hindu Law is not a correct one. The ratio has been applied by different High Courts where the special rules of the Madras School of Hindu Law are not in vogue. The observation quoted by Hidayatullah, J. as the learned Judge then was, from Mulla's Hindu Law, therefore, does not represent the correct state of the legal position. Where the male owner had separated from his son and left behind a widow, and the provisions of Hindu Women's Rights to Property Act, 1937, apply, the separated son would not be entitled to any share and the entire property will go to the widow by application of Section 3(2) of the Act of 1937 Plaintiff, therefore, has been rightly given a decree and defendant No. 12 or the other defendants claiming through him have no share in Durga Prasad's property. There is no merit in the appeal. It is accordingly dismissed with costs throughout.

B.K. Ray, J.

6. I agree.