
(2013) 07 OHC CK 0052

In the Orissa High Court

Case No : Regular First Appeal No. 167 of 2007

Pratibha Rani Tripathy and Another

APPELLANT

Vs

Binod Bihari Tripathy and Others

RESPONDENT

Date of Decision : 29-07-2013

Acts Referred:

Citation : AIR 2014 Ori 74 : (2014) 117 CLT 150

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : A.K. Mahakud, for the Appellant; T. Nanda and S.N. Mishra, P.R. Barik, P. Choudhury and B.R. Barik and G. Rath, S. Rath, B.K. Mishra, B.K. Nayak -3, for the Respondent

Final Decision : Disposed Off

Judgement

M.M. Das, J.—This appeal has been preferred against the Judgment & decree passed in T.S. No. 7535 of 2002-03 by the Learned Additional District Judge (FTC), Bolangir. The Appellants have filed the aforesaid appeal for partition of the immovable & movable properties as described in Schedules-"A" & "B" of the plaint & for recovery of possession of the Schedule-"C" properties. The case of the Appellants as Plaintiffs is that the Defendant No. 1-Binod Bihari Tripathy is the husband of the Defendant No. 2-Snehalata Tripathy. Deceased Durga Charan Tripathy was the son of the Defendants 1 & 2. He married the Plaintiff No. 1 on 14.12.1999 as per the Hindu Rites & Customs & the Plaintiff No. 2 was born out of their wedlock on 16.12.2000. Durga Charan Tripathy expired on 29.06.2002. The suit schedule "A" land, which is the ancestral property of the Defendant No. 1 & his son, was never partitioned between them, i.e. Defendant No. 1 & his late son-Durga Charan Tripathy at any material point of time. After the death of Durga Charan Tripathy, the Plaintiffs & Defendant No. 2 succeeded to the interest of Durga Charan Tripathy over the Schedule "A" property. As regard Scheduled "B" property, the Plaintiffs pleaded that Durga Charan Tripathy, during his life time, insured his life for a sum of Rs. 2,00,000 under two Life Insurance Policies

with the Defendant No. 3, i.e., the Life Insurance Corporation of India, Sambalpur Division. The Plaintiffs filed an application before the Defendant No. 3 claiming that they along with the Defendant No. 2 are entitled to the sum assured by the Defendant No. 3.

With regard to Schedule "C" it is stated that the Plaintiff No. 1, at the time of her marriage with late Durga Charan Tripathy, had brought the articles mentioned in Schedule "C" of the plaint, which are in possession of Defendants 1 & 2. The gold ornaments were taken by the Defendant No. 1 to be kept inside the locker standing in the name of Defendant No. 1 on the plea that there is a possibility of theft of those ornaments & other properties described under Schedule "C" are in possession of Defendant 1 & 2. After death of Durga Charan Tripathy, the Plaintiff No. 1 was tortured mentally & physically. On the 14th day of death of Durga Charan Tripathy, the Plaintiff No. 1 was asked to leave the ancestral house of her deceased husband by Defendants 1 & 2, for which she was forced to leave the same out of fear of her life & the life of Plaintiff No. 2. It is further alleged by the Plaintiffs that the Defendant No. 2 attempted to take away the assured sum claiming to be the nominee of late Durga Charan Tripathy. The Plaintiffs further asserted that out of the amount of Scheduled "B" properties, the Plaintiffs are entitled to 2/3rd share & Defendant No. 2 is entitled to 1/3rd share, as they as Class-I heirs of late Durga Charan Tripathy. The Plaintiffs are entitled to 2/9th share out of Schedule "A" Property. Alleging thus they filed the suit, when the Defendants 1 & 2 refused for amicable partition & denied to give the "C" Schedule Properties to the Plaintiffs.

2. Defendants 1 & 2, in their written statement, raised a technical issue of maintainability of the suit on the ground of non-joinder of necessary parties as well as limitation. They further pleaded that there is no cause of action to bring the suit, although they admitted the relationship between the parties as stated above. It was subsequently stated by them that "A" schedule property is the self acquired & exclusive property of the Defendant No. 1. Therefore, the Plaintiffs have no share in it. So far as "B" schedule property is concerned, the pleadings of the Plaintiffs were traversed to asserting that Defendant No. 2 was made the nominee of late Durga Charan Tripathy & the Defendant No. 2, being a nominee under the two policies, is entitled to get the entire assured amount u/s 39 of the insurance Act. They further asserted that the Defendants 1 & 2 were treated by the Plaintiff No. 1 with love & affection. However, after the death of the husband of Plaintiff No. 1, she voluntarily left them along with Plaintiff No. 2.

3. With regard to the gold ornaments & other properties described in "C" schedule, it was averred that it was never kept in a locker standing in the name of the Defendant No. 1. The Plaintiff No. 1 did not bring any Colour T.V. or Godrej Refrigerator. The double bed brought by the Plaintiff No. 1 is with the Defendants 1 & 2. On the above pleadings, they urged for dismissal of the suit. In their additional written statement, after the plaint was amended, they further averred that the suit is bad for non-joinder of the daughters of Defendants 1 & 2 & the

descriptions of the scheduled plot are not correct. A separate written statement was filed by the Defendants 3 & 4, i.e., the Life Insurance Corporation of India & its Branch Manager, who admitted that late Durga Charan Tripathy had taken two policies mentioned in scheduled "B" of the plaint & he died before maturity of the policies. It was further stated by them that the Defendant No. 2 claiming to be the nominee of late Durga Charan Tripathy, filed a claim for the insured amount of Rs. 2,00,000/-, who was declared as the nominee by late Durga Charan Tripathy in his proposal form in respect of both the policies. According to them, as per the Insurance Rules & Regulations, the nominee is to receive the assured amount. The Defendants 5 & 6, who were the daughters of the Defendants 1 & 2 were set ex parte.

4. On the above pleadings, the Trial Court framed as many as nine issues & thereafter parties led their evidence in the suit. The Court below on appreciating the evidence adduced came to the following findings:

(i) Law is well settled that if the partition takes place between fathers son, mother is entitled to get a share. Therefore, in Schedule "A" land, which is the ancestral property, late Durga Charan Tripathy, Defendant No. 1 & Defendant No. 2 have 1/3rd share each. On the death of late Durga Charan Tripathy, his 1/3rd share devolved upon his wife, daughter & mother, & as such, the Plaintiffs & Defendant No. 2 are entitled to equal share out of the 1/3rd share of late Durga Charan Tripathy. Hence, the share of the Plaintiffs is 2/9th share, share of the Defendant No. 1 is 1/3rd & share of the Defendant No. 2 is 1/3rd $\frac{1}{9\text{th}} = \frac{4}{9\text{th}}$ out of "A" Schedule land, which is liable to be partitioned according to the above shares.

(ii) The Plaintiffs & Defendant No. 2 are entitled to get 1/3rd share each out of Rs. 2,00,000/- (Rupees two lakhs) assured on the policies & the Defendant Nos. 3 & 4 are liable to disburse the said amount to each of them as per their share & on this score, no further proceeding is required to be taken. The Defendant Nos. 3 & 4 are directed to disburse 2/3rd of the total amount to the Plaintiffs & 1/3rd to the Defendant No. 2 without production of the policy bonds after compliance of other formalities & proper identification. Out of the total 2/3rd amount which is to be disbursed in favour of the Plaintiffs, 1/3rd is to be deposited in any Nationalized Bank or under any L.I.C. Policy in favour of minor Plaintiff No. 2- Minati Kumari Tripathy under the guardianship of her mother till she attains her majority.

(iii) With regard to Secludedly "C" property, which, according to the Plaintiffs, was given to the Plaintiff No. 1 at the time of her marriage & are under the possession of Defendant Nos. 1 & 2, no supporting document has been filed to show that her gold ornaments weighing 14 Varis were deposited in the locker of Defendant No. 1 & a Hero Honda Motor Cycle was purchased & handed over at the time of her marriage & is under the possession of Defendant Nos. 1 & 2. So far as the Colour TV, Fridge, Wooden Furniture, Double Bed, Sofa set, Dining Table, Cooler & Utensils are concerned, the Defendant Nos. 1 & 2 in their written

statement at the paragraph-9 have averred that the Doubt Bed brought by the Plaintiff No. 1 is with Defendant Nos. 1 & 2. The Defendant Nos. 1 & 2 being the parents of the deceased Durga Charan Tripathy should not be deprived to enjoy the Wooden Furniture, Cooler, Colour TV etc. gifted by the parents of Plaintiff No. 1. In view of the above, the prayer of the Plaintiffs for recovery of "C" Schedule property is refused. The Trial Court with the above findings party decreed the suit.

5. It is submitted on behalf of the Appellants that this appeal is restricted for payment of interest on the policy amount of Rs. 2.00 lakhs by the L.I.C. & return of the articles mentioned in Schedule "C" property.

6. It appear that the Court below though found that the Wooden Furniture as well as the Cooler, Colour T.V. etc. were gifted by the parents of the Plaintiff No. 1 but recorded that the Defendant Nos. 1 & 2 should not be deprived of enjoying the game. No reason has been assigned by the Court below as to why the Defendant Nos. 1 & 2 should retain those articles instead of returning the same to the Plaintiff No. 1. therefore, the said findings of the Trial Court are reversed & it is directed that the articles i.e. wooden Furniture, Cooler, Colour TV etc. except the gold ornaments for which there is no acceptable evidence should be returned by the Defendant Nos. 1 & 2 to the Plaintiff No. 1 or the value thereof as stated in Schedule "A" which comes to Rs. 62,000 should be paid by the Defendant Nos. 1 & 2 to the Plaintiff No. 1.

7. During course of hearing of the appeal, the Defendant Nos. 5 & 6, who are daughters of Defendant Nos. 1 & 2 & sisters of late Durga Charan Tripathy, have filed a cross objection, inter alia, claiming that they have equal share in Schedule "A" property with their late brother Durga Charan Tripathy to which they are entitled to in view of the amendment of the Hindu Succession Act, 1956 by the Hindu Succession (Amendment) Act 2005. Admittedly, the said amendment came into force with effect from 9.9.2005 i.e. during pendency of the suit.

8. The moot question, therefore, arises as to whether after amendment of the Hindu Succession Act in the year 2005, the Court below should have held that the Defendant Nos. 5 & 6 have equal share with their brother late Durga Charan Tripathy in Schedule "C" Property along with their mother Defendant No. 2 Section 6 of the Hindu succession Act as it stands after the amendment in 2005 is as follows:

6. Devolution of interest in coparcenary property- (1) On & from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property

as that of a son,

& any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this Sub-Section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of Sub-Section (1) shall be held by her with the incidents of coparcenary ownership & shall be-regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act & not by survivorship, & the coparcenary property shall be deemed to have been divided as if a partition had taken place &-

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the predeceased son or a predeceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter, &

(c) the share of the predeceased child of a predeceased son or a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter, as the case may be.

Explanation.-For the purposes of this sub-Section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognize any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great-grand-father solely on the ground of the pious obligation under the Hindu Law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-Section shall affect-

(a) the right of any creditor to proceed against the son, grandson or great-

grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, & any such right or alienation shall be enforceable under the rule of pious obligation in the same manner & to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation-For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this Section shall apply to partition, which has been effected before the 20th day of December, 2004.

Explanation.-For the purposes of this Section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a Court.

9. Thus, by the date, the suit was disposed of i.e. in the year 2007, the amendment has come into force. Hence, the amended provisions of Section 6 of the Hindu Succession Act with regard to right of the daughter will operate in the instant case as there has been no partition effected prior to 20.12.2004 as per Sub-Section (5) of the said Section. Thus, the Learned Trial Court, while determining the share of the parties over the joint family property described in Scheduled "A", should have considered the amendment brought into the Hindu Succession Act by the commencement of the Hindu Succession (Amendment) Act 2005. Applying the aforesaid provision of Section 6 as well as the amendment to Section 23 of the Act, it would be seen that late Durga Charan Tripathy along with Defendant Nos. 1 & 2 & Defendant Nos. 5 & 6 would have been entitled to equal share in Schedule "A" property & therefore, each of them would have got 1/5th share. 1/5th Share of late Durga Charan Tripathy is succeeded by the Plaintiffs as well as Defendant No. 2. Therefore, the Plaintiff Nos. 1 & 2 will have 1/15th share each & Defendant No. 2 will have 1/15th + 1/15th 4/15 share. Defendant Nos. 1, 5 & 6 will have 1/5th share each. In the result, this appeal is disposed of with the aforesaid modification of the impugned Judgment & decree, but in the circumstances, parties shall bear their respective costs of this appeal.