
(1984) 12 OHC CK 0020
In the Orissa High Court
Case No : First Appeal No. 168 of 1973

Putti Ramulu and Another	Vs	APPELLANT
Smt. Kotha Gunnamma and Others		RESPONDENT

Date of Decision : 14-12-1984

Acts Referred:

Hindu Succession Act, 1956 — Section 23

Citation : AIR 1985 Ori 70

Hon'ble Judges : P.C. Misra, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : N.V. Ramdas and N.B.K. Murty, for the Appellant;

Judgement

P.C. Misra, J.—Defendants 1 and 2 in T.S. No. 76 of 1970 of the Court of Subordinate Judge, Berhampur, are appellants against the judgment and decree dated 30-6-1973 and 6-7-1973 respectively passed in the said suit The plaintiffs' suit was for declaration of their title, confirmation of possession or in the alternative for recovery of possession of the suit properties described in schedules A and B of the plaint.

2. The facts relevant for this appeal are as follows:

One Kuti Parasuramudu was the common ancestor of the plaintiffs and defendants 1 to 5. He died on 15-5-1958 leaving his widow Puti Chitamma, adopted son Ganapati (father of defendants 3 and 4), natural sons defendants and 2 and a daughter who is plaintiff 1 in this suit Plaintiff 2 is the son of plaintiff 1. Defendant 5 is the son of defendant 1. According the plaintiffs the said family properties (were settled) by a deed of partition Ex. 1 dated 24-6-1955. In the said family settlement the suit properties fell to the share of Parasuramudu. It is alleged that Parasuramudu died on 15-4-1958 and his widow Chitamma died on 10-4-1970. It is the plaintiffs' case that Parasuramudu during his lifetime gave an oral direction that the properties which fell to his share in the aforesaid partition would be given to his only daughter namely Gunnamma (plaintiff 1). In

accordance with such oral direction Chitamma executed a document on 3-4-1968 (Ex, 4) giving the suit properties to plaintiff 1 and her son plaintiff 2. According to the plaintiffs they have been in enjoyment of the suit properties in their own rights by virtue of the said document. The plaintiffs further alleged that their possession with respect to the A schedule properties was interfered with by defendants 1 to 5 for which the plaintiffs along with Chitamma started a proceeding u/s 144, Cr. P.C, which was subsequently converted to one u/s 145, Cr. P.C, and this proceeding ultimately ended in favour of the plaintiffs and Chitamma on 20-9-1969. After the death of Chitamma on 10-4-1970 defendants 1 to 5 tried to occupy the suit A schedule lands with the help of their supporters who/are defendants 6 to 8 in this suit. The plaintiffs alleged that the defendants have no manner of right title and interest in the suit properties and this gives a cause of action to them to file this suit for the aforesaid reliefs.

3. Defendants 1, 3, 4 and 5 filed a joint written statement whereas defendants 2, 6, 7 and 8 filed separate written statements. Defence taken by the said defendants was substantially the same. They contended that immediately after the death of Parasuramudu, defendants 1 and 2 along with Ganapati (adopted son of Parasuramudu) divided the share of Parasuramudu which was allotted to him in the partition deed in the year 1955. Chitamma and plaintiff 1. gave their consent to such division. According to the defendants the defendants 1, 2 and Ganapati separately possessed the portions out of the share of Parasuramudu and continued to pay cost separately in their own rights. After the said division of property Pudi Ganapati sold away one acre of land at Godagoda Palli village to defendant 6 for valuable consideration and another plot of land measuring about 38 cents in Puttigopalpur to defendants and delivered possession thereof to the said purchasers. Similarly, defendant 2 sold 61 1/2 cents of land to one Mahala who is in possession of the same. Ultimately the said mutual partition was reduced into writing under a registered deed of partition dated 12-2-1968. The father of defendants 1 and 2 gave three bharanams of land to plaintiff 1 as dowry at the time of her marriage and he also gave some landed properties to his wife late Chitamma prior to the family partition which took place in the year 1955. The allegation that the late Parasuramudu expired after giving an oral direction that the properties which fell to his share in the family partition should be given to his only daughter plaintiff after the death of his wife Chitamma is denied as false. It is alleged that the settlement deed dated 3-4-1968 executed by Chitamma is a sham and fraudulent document which has been created with active connivance and at the instance of plaintiff 1's husband behind the back of defendants 1, 2 and 3 to 5 and their alienees. According to the defendants the said document is invalid in law and had not conveyed any title in favour of the plaintiffs. The plaintiffs case that they have been in possession of the suit properties was stoutly denied. Their title as claimed was denied. They also alleged that they have otherwise acquired valid title as they have been in possession of the suit properties for more than the statutory period.

4. Defendant 6 in his written statement while adopting the written statement of

defendants 3 and 4 claims to have purchased 60 cents of land out of item 1 and 40 cents of land out of item 4 of the schedule A of the plaint from defendants 3 and 4 and their father under a registered sale deed dated 17-3-1961 for a consideration of Rs. 500/-. He further claims that he is in possession of the aforesaid one acre area as owner thereof. He denies the plaintiffs' case that the plaintiffs or Chitamma was in possession of the suit lands.

5. Defendant 7 in his written statement denied to be supporter of defendants 1 to 5 and does not claim any interest in any of the suit properties.

6. Defendant 8 while adopting the written statement filed by defendants 3 and 4 claims that his wife has purchased Order 33 cents out of item 14 of the plaint A schedule under a registered sale deed dated 1-8-1961 from defendants 3 and 4 and their father Ganapati for consideration and continued in possession till her death in 1964. After her death defendant 8 and his son and daughters claim to be in possession of the said properties.

7. The learned Subordinate Judge framed issues which arose for consideration and after receiving evidence adduced before him held that the deed of settlement dated 3-4-1968 is valid only to the extent of 1/5th share which Chitamma had at the time of death and consequently the plaintiffs have acquired 1/5th share in the suit properties, by virtue of the said document. The learned Subordinate Judge did not decide the question of possession as the lawyers appearing for the parties represented that such question is not required to be decided in this suit. Having found that the plaintiffs have 1/5th share according to the deed of settlement dated 3-4-1968, the learned Subordinate Judge decreed the suit for partition of the said share, even though the prayer for partition was not made. He relied upon a decision reported in *Sankhi Bewa Vs. Chandra Majhi*, for the aforesaid purpose. His further finding is that plaintiff 1 is further entitled to 1/5th share and defendants 1 and 2 are entitled to 1/5th share each and from out of the remaining 1/5th share which defendants 3 to 5 are entitled to, there will be an adjustment of the lands sold by them along with their father. The further direction of the trial court is that in the final decree proceeding defendants 6 and 8 will be entitled to separate allotment to the extent of their purchased areas not exceeding the share of their vendor upon proof in the genuineness of their purchase.

8. The learned counsel for the appellants mainly challenges the finding of the learned Subordinate Judge with respect to the deed of settlement dated 3-5-1968.

9. It has not been disputed before this Court that there was a family settlement as per Ex. 1 dated 24-6-1955 and that the said properties were given to Parasuramudu. There is no dispute that Parasuramudu died on 15-4-1958 after coming into force of the Hindu Succession Act in 1956. Therefore on the death of Parasuramudu his properties are to devolve on his heirs in accordance with the provisions of the said Act. The plaintiffs claimed full title to the suit properties. It

is alleged by the plaintiffs that Parasuramudu during his lifetime had given his share of the properties as per deed of partition to his daughter plaintiff 1 after the death of Chitamma.

10. The plaintiffs have examined P.Ws. 1 and 2 to prove this fact P.W. 1 is the husband of plaintiff 1 who has deposed to the effect that 2 months prior to his death of Parasuramudu he expressed his intention before his wife that after his(death?) she would enjoy the property and after her the daughter would get it According to P.W. 2 Parasuramudu expressed his intention as aforesaid The evidence of P. W.2 is discrepant with that of P.W. 1. According to P.W.2 they . became separate in mess and property in 1955, but they all lived in one house. We are, therefore, in agreement with the learned Subordinate Judge that Ex. 4 is valid only to the extent of the share of Chitamma.

11. The learned Subordinate Judge has passed a preliminary decree for partition of the schedules A and B properties The shares of the parties have been ascertained as noted above. The direction of partition of the schedule B properties cannot, however, be maintained in view of the provisions of Section 23, Hindu Succession Act Section 23, Hindu Succession Act provides that : --

"Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

xxxx "

Of course a female heir shall be entitled to a right of residence in such dwelling-house. Thus, the plaintiffs being female heirs specified in Class 1 of the Schedule they cannot enforce a partition so far as dwelling-house is concerned We, therefore, vacate the decree for partition of the schedule B properties at the instance of the plaintiffs.

12. In the result the appeal is allowed with respect to Schedule B properties and the decree passed by the learned Subordinate Judge so far Schedule A is concerned is confirmed. In the peculiar facts and circumstances of this case there would be no order as to costs.

G.B. Patnaik, J.

13. I agree.