

(2016) 03 OHC CK 0003

In the Orissa High Court

Case No : F.A. No. 8 of 1990, (From the judgment and decree dated 18.11.1989 and 30.11.1989 respectively passed by Shri G.C.Tripathy, OSJS, learned Subordinate Judge, Angul in T.S. No.40 of 1984)

Rasananda Sahoo

APPELLANT

Vs

Prafulla Kumar Sahu

RESPONDENT

Date of Decision : 11-03-2016

Acts Referred:

Citation : (2017) 123 CutLT 246

Hon'ble Judges : K.R. Mohapatra, J.

Bench : Single Bench

Advocate : M/s Mira Ghose and N.R. Agarwal, Advocate, for the Respondent Nos. 3 to 5; Mr. R.K. Mohapatra, Sr. Advocate, M/s. B.B. Rath, R.C. Rath, S.K. Panda, S. Acharya, Advocates, for the Respondent Nos. 1 & 2; Mr. A. Mukherji, Sr. Advocate, M/s. G. Mukherji, P. M

Final Decision : Allowed

Judgement

K.R. Mohapatra, J. - Being aggrieved by the judgment and decree dated 18.11.1989 and 30.11.1989 respectively passed by the learned Subordinate Judge, Angul in T.S. No.40 of 1984, the unsuccessful defendant No.1 has filed this appeal.

2. The plaint story in brief reveals that plaintiffs and defendant No.1 are the three sons of one Jayakrushna Sahoo. Other defendants are tenants in respect of the suit house. It is the case of the plaintiffs that contesting parties (plaintiffs and defendant No.1) to the suit belonged to village Matagajpur in the district of Cuttack. They shifted to Angul for the purpose of earning their livelihood. They initially started Hotel business in the name and style of "Hindustan Hotel" at Angul bus stand in the year 1951. By then, the plaintiffs were minors and defendant No.1 acted as the Manager of the Hotel and the plaintiffs were helping him in its management. They were living in a rented house at Amalapada in Angul town. Their father, Jayakrushna Sahoo by then was pretty old, devoid of

clear vision, was hard of hearing and his hands were trembling due to old age. He was also bedridden and physically incapable. The family had a handsome income from the Hotel business and out of such income they purchased Ac.0.60 decimal of land at Amalapada (for short "the suit land") from one Sashi Bhusan Garnaik vide RSD dated 29.05.1953 for a consideration of Rs.1,500/-. The defendant No.1 taking undue advantage of incapacitation of the father, the age of the plaintiffs as well as his status in the family purchased the suit land in his name without the knowledge of the plaintiffs. On purchase, they constructed a thatched house out of the income from the said Hotel business and were residing therein. Subsequently, they constructed a pucca house over the suit land by incurring loan and utilizing the compensation, the family had received for acquisition of their ancestral properties at Matagajpur by the Railways. The said house was rented out to Telephone Department on monthly rent of Rs.90/- from 1957 to 1970. The rent was being collected by defendant No.1 and the loan was repaid out of the same. Their father, namely, Jayakrushna Sahoo had also purchased another piece of homestead land at Angul town and subsequently sold the same to one Maheswar Sahoo for a consideration of Rs.8,000/- and the sale proceeds were also utilized for repayment of the loan obtained for construction of the suit house. After, the marriage of plaintiff No.2 in the year 1970 dissension arose in the family. Defendant No.1 shifted to a portion of the suit building, which was vacated by the Telephone Department. The rest portion of the suit house was rented out to different persons. The plaintiffs resided in the thatched house over the suit land. The defendant No.1 collected a good amount of money from defendants 2 to 4 (the tenants) towards rent and appropriated the same. Since the year 1970, plaintiffs were separated in mess from defendant No.1. Their parents stayed with them. Jayakrushna died in the year 1975 and their mother died in the year 1977. In the year 1972, defendant No.1 negotiated with one Sudhakar Pradhan to sell Ac.0.10 decimal of land from the suit land, but the plaintiffs protested to such attempt. As the defendant No.1 had taken some advance from said Sudhakar Pradhan, the latter filed TS No.3 of 1975 against defendant No.1. In the year 1976, the defendant No.1 again made an attempt to sell a portion of the suit land to one Ramanath Sahoo, but due to intervention of the plaintiffs the same could not be materialized. The defendant No.1 in order to deprive the plaintiffs from their legitimate share created disturbance with an intention to evict the plaintiffs by closing the common path and by constructing some houses in front of the thatched house in which the plaintiffs were staying. Thus, the plaintiffs finding no other alternative filed suit claiming 1/3rd share each in the suit land as well as 1/3rd share from the rent collected and appropriated by defendant No.1.

3. The defendant No.1 only contested the suit by filing written statement and other defendants were set ex-parte. Challenging the maintainability and cause of action of the suit, the defendant No.1 filed his written statement. He claimed that the suit was barred by limitation and was bad for non-joinder of necessary parties. In his written statement, defendant No.1 pleaded that their common

ancestor Arta had only three acres of agricultural land at Matagajpur and the same was quite inadequate to maintain the family. Arta had four sons, namely, Iswara, Biswanath, Kusa and Basu. The family had business of selling rice purchased from outside and "Ukhuda". When the size of the family inflated, it became impossible to manage the family with the meager income from such sources. Thus, the elder son of Arta, namely, Iswara shifted to Purunagarh under Angul Sub-Division and then he shifted to Angul town about 90 years back and acquired a piece of homestead land there. He was running a sweets stall at Angul bazaar. By then, all the four sons of Arta were living jointly and also running the business jointly. Subsequently, ancestral lands at Matagajpur were divided amongst them, but the property at Angul town was kept joint. The business at Angul was being managed by all the four brothers on rotation and after the death of all those four brothers their sons also joined hands in running the said business. Their family members were then residing at Matagajpur village. The defendant No.1 and his father had also joined in running the said business and were getting Rs.400/- to Rs.600/- per annum towards their share. However, the income from the agricultural land as well as from the business was not sufficient for maintenance of the family of Jayakrushna. The defendant No.1 at the age of 7 came to Angul in the year 1942 to prosecute his studies. But he could not prosecute his studies as his father could not afford to it. Thus, he left his study and started business on pulses and oil seeds on commission basis. He was collecting oil seeds from the weekly market and giving it to the dealers and was getting commission out of it. He continued the business up to 1950. From such business, defendant No.1 could able to make profit of Rs.2,000/- to Rs.3,000/-. With such fund, the defendant No.1 started a temporary sweets stall at Village Rantalei. There was good business at Ranatalei for which his financial condition improved. After closure of the business at Ranatalei, he searched for an accommodation to start a permanent sweets stall and Hotel at Angul bus stand. Thus, he took the house of one Ratnakar Nayak on rent and started "Hindustan Hotel" in the year 1951. Out of the income from the Hindustan Hotel, he purchased the suit land in the year 1953 without any assistance of his father or family members. The Hindustan Hotel was the exclusive business of defendant No.1. He was alone managing and maintaining the Hotel without any aid or assistance either of his father or the plaintiffs. After purchase of the suit land, he repaired the thatched house standing over it and brought his wife from the village. The plaintiffs then came to Angul and stayed with him to prosecute their studies. Subsequently, the defendant No.1 incurred some loan from the House Building Society and started construction of a pucca building in the year 1956. He rented out the said building to Telephone Department. The defendant No.1 in his written statement denied to have received any share from the compensation received by the family for acquisition of land by the Railways. He also denied to have utilized any amount of compensation for construction of the suit house. As the plaintiffs became wayward, to bring them to discipline, the defendant No.1 helped them by opening another Hotel in the name and style of "Jayabharat Hotel" in the year 1963 on the leasehold land of defendant No.1. Thereafter, the

defendant No.1 asked the plaintiffs to purchase their own house and to vacate the suit house, but the plaintiffs did not pay any heed to the same. Though the plaintiffs had prospered a lot from their business and were well-established by 1970, they did not vacate the suit house. They were instigated and ill-advised by some of their friends and created problem over the suit land. Hindustan Hotel was closed in the year 1968 and the defendant No.1 had no other business. He was managing his family with much difficulty. According to him, the suit land and the house standing thereon are his self-acquired properties and plaintiffs have no manner of right, title or interest thereon. Thus, he prayed for dismissal of the suit.

4. Taking into consideration the rival contentions of parties, learned Sub-Judge framed as many as nine issues, which are as follows :

- (i) Is the suit maintainable?
- (ii) Is the suit barred by Law of Limitation?
- (iii) Have the plaintiffs any cause of action to sue against the defendants?
- (iv) Is the suit bad for non-joinder of necessary parties?
- (v) Had the parties any joint Hotel business in Angul Bus Stand in the year 1951? And out of that joint family business or otherwise had the parties purchased suit plot for construction of residential house?
- (vi) Is the suit plot self-acquired property of Defendant No.1?
- (vii) Has the defendant No.1 purchased the suit plot from the vendor Sashibhusan Garnaik as Karta of the joint family?
- (viii) Have the parties any construction over the suit plot out of the joint family business or otherwise for joint family occupation?
- (ix) Are the plaintiffs continuing in the suit plot with the permission of Defendant No.1 as licensee?

5. In order to establish their respective case, plaintiffs examined as many as 12 witnesses including plaintiff No.1 as PW-10 and exhibited several documents. On the other hand, the defendant No.1 examined as many as 4 witnesses including himself as DW-4. He also filed and proved several documents in support of his case. Learned Sub-Judge while answering issue Nos.5 and 6, categorically held that the Hindustan Hotel was the separate business of defendant No.1 only, but in the concluding part of his discussion of issue Nos.5 and 6, he came to conclusion that the defendant No.1 had intended to throw the suit land to the joint family. Then he proceeded to decide other issues and decreed the suit allotting 3rd share to each of the plaintiffs and defendant No.1 out of the suit land. Further, he held that pucca construction on the suit land being the separate property of defendant No.1 should not be the subject matter of partition. The defendant No.1 thus filed this appeal assailing the said judgment and decree.

The plaintiffs also filed cross-objection under the provisions of Order 41, Rule 22 , CPC assailing the findings on issue Nos. 5 and 6 holding the Hindustan Hotel to be the separate business of defendant No.1.

6. Mr.Gautam Mukherji, learned counsel for the appellant (defendant No.1 in the suit) and Mr.R.C.Rath, learned counsel for respondents 1 and 2 (plaintiffs in the suit) at the outset fairly submitted that the finding to the effect that defendant No.1 had blended the suit property to the joint family is not sustainable in both fact and law as it was neither pleaded nor the ingredients of doctrine of blending was satisfied. Thus, the finding on issues with regard to manner of acquisition of the suit land has to be re-looked by this Court. Mr.Mukherji, learned counsel for the appellants submitted that the defendant No.1 has in his written statement clearly pleaded the sequence of events to show that how he purchased the suit land and started the Hindustan Hotel out of his own income. On the other hand, the pleadings of the plaintiffs depict a picture that they have no idea as to how the business of Hindustan Hotel commenced. In order to claim share over the suit property, they have tried their best to make out a case which was neither supported by pleadings nor by the evidence. Learned Trial Court has also dealt with the oral and documentary evidence adduced by the parties to the suit in its proper perspective and rightly came to the conclusion that the suit land and the house standing thereon as the self-acquired property of defendant No.1. Referring to oral as well as documentary evidence on record, Mr. Mukherji argued in detail to establish the claim of the defendant No.1. Per contra, Mr.Rath, learned counsel for respondents 1 and 2 made a detailed submission to establish that Hindustan Hotel at Angul bus stand was the joint family business and out of the income from the said business, the suit land was purchased. Moreover, the expenditure for construction of the pucca house over the suit land was from the amount received by the family for acquisition of land by the Railways and the loan incurred from the House Building Society, which was repaid out of the income from Hindustan Hotel. Referring to the oral as well as documentary evidence on record, he strenuously urged that there is ample material on record to show that the suit land and the house standing thereon are the joint family property. As discussed earlier though he fairly conceded that the finding of the learned Sub-Judge with regard to applicability of doctrine of blending was not correct, at the same time, he emphatically submitted that the learned Sub-Judge was also wrong in appreciating the evidence on record to come to a conclusion that the suit land and the house standing thereon is the exclusive property of defendant No.1. He also submitted that though the suit was decreed in favour of the plaintiffs, but the decree is not workable. Thus, he prayed for dismissal of the appeal and to allow the cross-objection allotting 3rd share to each of the sons of Jayakrushna in the suit property as well as from out of the income from the suit land, which was appropriated by the defendant No.1.

7. Pleadings and the evidence of the parties have to be scrutinized keeping in view the aforesaid submissions of the learned counsel for the parties. It is categorically pleaded by the plaintiffs that Hindustan Hotel was the joint family

business. Thus, the initial burden of proof is on the plaintiffs to prove that Hindustan Hotel was a joint family business and not an exclusive business of defendant No.1 as alleged by him. Hon"ble Supreme Court in the case of G.Narayana Raju (dead) by his legal representative v. G.Chamaraju and others, reported in AIR 1968 SC 1276 dealing with a similar nature of case at paragraph-3 of the said decision held as under, which is relevant for our discussion :

"(3) The first question to be considered in this appeal is whether the business of Ambika Stores was really the business of the joint family and whether the plaintiff was entitled to a partition of his share in the assets of that business. It was contended on behalf of the appellant that the business of Ambika Stores grew out of a nucleus of the joint family funds of at least by the efforts of the members of the joint family include the appellant. The contention of the appellant has been negatived by both the lower courts and there is a concurrent finding that the Ambika Stores was the separate business of Muniswami Raju and it was neither the joint family business nor treated as joint family business. It is well established that there is no presumption under Hindu law that business standing in the name of any member of the joint family is a joint family business even if that member is the manager of the joint family. Unless it could be shown that the business in the hands of the coparcener grew up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate. The question therefore whether the business was begun or carried on with the assistance of joint family property or joint family funds or as a family business is a question of fact. (See the decisions of the Judicial Committee in Bhuru Mal v. Jagannath, AIR 1942 PC 13 and in Pearey Lal v. Nanak Chand, AIR 1948 PC 108 and of this Court in Chattanatha Karayalar v. Ramachandra Iyer, AIR 1955 SC 799)?.."

Further, in a path-paving decision with regard to partition suit, Hon"ble Supreme Court in the case of D.S. Lakshmaiah & anr. v. L. Balasubramanyam & anr., reported in AIR 2003 SC 3800 in paragraph 18 held as under :

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

Similar view is also taken in a decision reported in the case of Makhan Singh (D) By Lrs v. Kulwant Singh, reported in AIR 2007 SC 1808 (relied upon by Mr.Rath, learned counsel for the plaintiffs/respondents 1 and 2). Mr.Rath also relied upon a decision in the case of Kalwa Devadattam and two others v. The Union of India

and others, reported in AIR 1964 SC 880, in which it is held as under :

"11.The question of onus probably is certainly important in the early stages of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side; in such a contingency the party on whom the Onus lies to prove a certain fact must fail. Where however evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place; truth or otherwise of the case must always be adjudged on the evidence led by the parties."

On the principles decided in the aforesaid case laws, the respective cases of the parties are to be scrutinized.

8. It is the admitted case of the parties that the suit property was acquired in the name of defendant No.1. ROR in respect of the said property stood in his name. Defendant No.1 had incurred a loan in his name from the House Building Society for construction of the house over the suit land. However, it is the case of the plaintiffs that the suit property was acquired from the joint family nucleus. They contended that Hindustan Hotel was a joint family business and the suit property was acquired from the income of the said Hotel. Though the defendant No.1 admits that he acquired the suit property from the income of the Hindustan Hotel, he asserts that Hindustan Hotel was started from the savings he made from the business at Rantalei. The pleadings of the plaintiffs is silent about the incident occurred prior to establishment of Hindustan Hotel. The plaintiffs have categorically stated in the plaint that the contesting parties to the suit originally belonged to village Matagajpur. While in joint mess and properties, they shifted to Angul for business purpose. They started the business in the name and style of "Hindustan Hotel" at Angul bus stand. However, defendant No.1 in his written statement has given a chronology of events as to how the Hindustan Hotel at Angul bus stand started and how he acquired the suit property. He stated in the written statement that the family did not have sufficient income from the landed properties for which their father, namely, Jayakrushna was selling parched rice (Mudhi) and "Ukhuda" moving from village to village near by Matagajpur. As the size of the family increased by passage of time, it became difficult to maintain the family from the meager income from the landed property and selling of "Mudhi" and "Ukhuda". Thus, Iswara, the eldest son of Arta, shifted to Purunagarh in Angul Sub-division. Thereafter, he (Arta) shifted to Angul town and acquired a piece of homestead land for the purpose of taking up family business in Angul bazaar. At that point of time, all the four sons of Arta were in joint mess and property. Thereafter, they started a joint business at Angul. Although there was an amicable partition of Matagajpur property amongst four sons of Arta, but the business at Angul, i.e., sweets stall continued jointly and four sons of Arta were looking after the business on rotation basis as their family members were staying at Matagajpur. The income out of the said business was not sufficient for maintenance of the family. Jayakrushna was receiving a meager amount of Rs.400/- to Rs.500/- per annum from the said business, which was

being utilized for maintenance of his family at Matagajpur. Besides the said income from sweets stall, Jayakrushna was also getting two to three quintals of paddy as his share from the agriculture at village Matagajpur. He was also getting Rs.30/- to Rs.40/- per month from selling of "Mudhi" and "Ukhuda". As such, Jayakrushna was maintaining his family with much difficulty till 1950. When the defendant No.1 was only seven years old, he came to Angul town to prosecute his study and started residing in the house attached to the sweets stall at Angul bazaar till 1942. Due to paucity of funds, he could not prosecute his study. Thus, some of his well-wishers showing pity on his condition suggested the defendant No.1 to assist them in pulses and oil seeds business on commission basis. With their financial aid and assistance, defendant No.1 was purchasing oil seeds from the weekly market at Angul, Athamallik and Hindol and was getting a commission by supplying the same to the dealers and he continued the said business up to 1950 out of which he could earn a profit of Rs.2,000/- to Rs.3,000/-. With such fund, defendant No.1 opened a temporary sweetmeat stall at village Rantalei where there was a congregation of people, who used to get medicine from one "Nepala Baba". Thus, he could able to accumulate some money and his savings swelled up to Rs.5,000/- within two to three months. From the said fund, he decided to start a permanent business and started a sweets stall and Hotel in the year 1951 in Angul bus stand, which was named and styled as "Hindustan Hotel". From the income of Hindustan Hotel, he could purchase the suit land in the year 1953. Thus, defendant No.1 contended that the business of Hindustan Hotel and the acquisition of suit land were out of his own income and the plaintiffs have no share or interest in it.

It is thus clear that the pleadings of the plaintiffs is conspicuously silent about the sweets stall started by Iswara, the eldest son of Arta at Angul town, pulses and oil seeds business as described by defendant No.1 as well as the sweetmeat stall at Rantalei village. However, the plaintiffs in their evidence do not also dispute about these business. On the other hand, they led evidence to establish that those were the joint family business. Regarding separate earning of defendant No.1 from pulses and oil seeds business, the plaintiffs have not led much evidence except by saying that it was a joint family business. As it appears, they had no idea about such business at the time of filing of the plaint. PW-4, a person who was working in the Badagudia Hotel (started by Iswara) deposed in his evidence that defendant No.1 along with one Bai babu (Baishnab Sahu, the uncle of defendant No.1 as well as the plaintiffs) was doing business in black-gram etc. Further PW-6, a cousin of plaintiffs and defendant No.1, stated in his evidence that defendant No.1 was doing business on pulses with Baishnab. He also deposed that they used to store pulses and oil seeds at the backyard of the shop (Badaguida Hotel). He also deposed that the same was a joint family business. PW-6 further deposed that in 1948, defendant No.1 and Baishnab were doing business on pulses, which was closed in 1950. On the other hand, defendant No.1, who was examined as DW-4 in his deposition, has categorically stated that he left the study in the year 1942. Then he started business on

pulses and oil seeds etc. on commission basis. His friend, namely, Aziz, who is the son of Md. Hazi and brother of Naruddin when saw defendant No.1 was sitting idle, advised him (defendant No.1) to take some advance from Hazi Company and collect pulses and oil seeds on commission basis. In the year 1943, he started his business. He further deposed that one Rollchand Jagannath firm, which was situated near to Badaguida Hotel and was dealing with pulses and oil seeds engaged defendant No.1 to collect the same on commission basis. He was getting one anna per rupee as commission. He categorically deposed that he was regularly visiting Jarapada, Mantira, Bantala and Banibahal weekly markets and neighbouring villages to collect pulses and oil seeds. He was also collecting oil seeds from weekly market at Handpa, Thakurgarh and Pedipathar. Thus, he could save about Rs.3,000/- when he left said business in 1950. During his cross-examination, he admitted that he was storing the pulses and oil seeds at the backside of the Badaguida Hotel and was not paying any rent for that. Thus, Mr.R.C.Rath, learned counsel for the plaintiffs (respondents 1 and 2) submitted that when he (defendant No.1) was utilizing the joint family property for business purpose he cannot claim the business of pulses and oil seeds to be his exclusive one. The argument of Mr.Rath cannot be accepted in view of the ratio decided by the Hon"ble Supreme Court in the case of P.S.Sairam and another v. P.S.Rama Rao Pisey and others, reported in AIR 2004 SC 1619, wherein at paragraph-10 it is held as under :

"10 The question to be examined in the present case is as to whether mere user of the joint family property (item no. 1 property), as a business premises by defendant No.1, who was karta of the joint family, for running his separate business can be said to be in any manner detrimental to the joint family property? Undisputably, the joint family had not invested a single farthing in the business at any point of time as it was started by defendant No.1 by raising loans from the market.

xxx xxx xxx

This being the position, we have no option but to hold that the business carried on by defendant No.1 in the property described as item No.1 in the Schedule cannot be treated to be joint family business and the same remained his separate business throughout, especially in view of the fact that there was neither any case nor evidence to show any blending??"

In view of the above, it can't be held that the business on pulses and oil seeds was a joint family business only because, defendant No.1 was stacking the materials at the backside of Badagudia Hotel. Though there is some evidence by the plaintiffs to the effect that the defendant No.1 was running pulses and oil seeds business with Baishnab (their uncle), but there is no evidence on record to show that Baishnab was in joint mess with the family of plaintiffs and defendant No.1. Further, in absence of any corroboration to that evidence, this weak piece of evidence cannot be a basis to come to a conclusion that the business on oil seeds and pulses was running jointly by the family, more particularly when there

is no pleading to that effect and evidence to the effect that except Baishnab other family members had any contribution in it. Thus, there is no escape to the conclusion that the business on oil seeds and pulses was the exclusive business of defendant No.1.

9. Defendant No.1 claims that he started a temporary sweetmeat stall at Rantalei village from which he earned a handsome profit and his savings swelled up to Rs.5,000/-. He also corroborated the same in his evidence. He categorically stated that in 1950, Rantalei incident took place. There was a huge gathering at that place when one Nepala Baba was distributing medicines he thought of opening a temporary sweetmeat stall there. In the month of Bhadrab, he opened the temporary sweets stall at Rantalei and that business stopped in the month of "Aswina" and again it was opened in "Kartika" and continued till "Margasira". The temporary shop at Rantalei was started with the money he saved out of pulses business. He had a good income at Rantalei. It was his exclusive sweets stall and he saved about Rs.5,000/- to Rs.6,000/- from the income of that sweets stall business and denied the suggestion to the effect that it was a joint family business. His evidence in chief remained unshaken in the cross-examination. Though plaintiffs had not pleaded with regard to the business at Rantalei, they have adduced some evidence in that regard. PW-4 in his evidence deposed that at the time of Rantalei incident, a temporary shop was opened by the owners of Badagudia Hotel. Again, PW-7, who is a classmate and friend of defendant No.1, deposed in his evidence that in the year 1950, Rantalei incident took place. He also deposed that defendant No.1's father and uncle gave a temporary sweets stall at Rantalei. PW-6, a cousin brother of plaintiffs as well as defendant No.1, deposed that he knew about Rantalei incident. The family had a temporary shop at Rantalei at that time for one and half a month. Plaintiff No.1, who has been examined as PW-10 in his evidence stated that in 1951, Rantalei incident took place. Their father and defendant No.1 opened a temporary sweets stall at Rantalei. Baishnab, defendant No.1, one Narana and Gobinda were in-charge of that business. After two to three months, that business was closed. Looking at the aforesaid evidence of the plaintiffs and defendant No.1, it is manifest that except defendant No.1, who was examined as DW-4, none else have given a clear picture of Rantalei business. The plaint is silent about the Rantalei business. Defendant No.1 in his written statement, while describing the manner of acquisition of funds to start Hindustan Hotel, came out with a plea that he had a business at Rantalei in the year 1950 from which he earned a handsome amount of money out of which he started Hindustan Hotel. Though pleadings of the plaint reveals that the father of the plaintiffs as well as defendant No.1 was pretty old, devoid of clear vision and was hard of hearing due to his old age, his hands were trembling and he was physically incapable and was bedridden in the house. But, surprisingly, PW-10, who is none other than plaintiff No.1 in his evidence stated that their father and brothers opened a temporary shop at Rantalei. The witnesses examined on behalf of the plaintiffs also do not give a clear picture about the Rantalei business, i.e., regarding type

of business, earning out of that and more particularly about the time when it started and when it was closed, which was very vividly stated by the defendant No.1 both in his pleadings as well as evidence, which remained unchallenged. The only challenge was made to the claim of defendant No.1 to the effect that it was his exclusive business. In view of the discussions made above, I am inspired to hold that the pleadings and evidence of the defendant No.1 in respect of Rantalei business is more convincing and appears to be more probable. Hence, I accept the same and hold that Rantalei business was the exclusive business of defendant No.1.

10. The plaintiffs do not give a clear picture as to from which source the family of Jayakrushna acquired sufficient funds to start Hindustan Hotel. In their pleadings, they have stated that in the year 1951 they came to Angul for business purpose and started the Hotel business in Angul bus stand in the name and style as "Hindustan Hotel". Evidence of the plaintiffs also do not give a clear picture regarding sources of income or sufficient joint family nucleus to start Hindustan Hotel. The pleadings in the plaint suggest that the family of Jayakrushna had sufficient funds in their hand when they came to Angul in the year 1951 and started "Hindustan Hotel". However, on the contrary, the evidence of plaintiffs disclosed that the source of funds to start Hindustan Hotel was the business on pulses and oil seeds as well as the sweetmeat stall at Rantalei. As I have already held, the said transactions were exclusive business of defendant No.1 and it can't be held that the income out of the same is the income of the joint family; thus, the only source of acquisition of funds to start Hindustan Hotel could be from landed properties as well as the share of Jayakrushna from out of the Badagudia Hotel at Amalapada. The pleadings and the evidence of defendant No.1 to the effect that the family had only three acres of land which was not sufficient to maintain the family for which his father, namely, Jayakrushna was moving nearby villages to sell "Mudhi" and "Ukhuda" for their livelihood. He also deposed in his evidence that he had come to Angul to prosecute his studies, but due to paucity of funds he could not continue his study and had to search for his livelihood. These pleadings and evidence was not disturbed either in the cross-examination or by adducing convincing and cogent evidence. Further, the PW-10 (the plaintiff No.1) in his cross-examination (at page-99 of the paper book), categorically admitted that they had no sufficient income from the landed properties. The plaintiffs have relied upon stray statements of some of the witnesses, namely, PW-1, PW-2, PW-3, PW-4, PW-6 etc. who deposed that Hindustan Hotel was being looked after by father of the plaintiffs and defendant No.1 as well as defendant No.1 himself. Thus, the plea of the plaintiff cannot be believed, particularly in view of the specific pleadings of the plaintiffs to the effect that their father, namely Jayakrushna, was feeble, hard of hearing, devoid of clear vision and was bedridden due to his old age together with the version of plaintiff No.1 himself that the family had no sufficient income from landed properties. On the other hand, the defendant No.1 has given a clear picture as to how he acquired funds to start Hindustan Hotel, which has been discussed

earlier. In that view of the matter, the only logical conclusion that can be drawn up is that Hindustan Hotel was started from the savings the defendant No.1 had made from out of his business which he was doing exclusively. Thus, the Hindustan Hotel was the exclusive business of defendant No.1.

It needs no discussion to arrive at a conclusion that the suit land was purchased from out of the income from Hindustan Hotel as it is admitted by both parties. Thus, it leads to the conclusion that the suit land was purchased from the exclusive income of defendant No.1 and the plaintiffs had no share in it. An argument is advanced by Mr.Rath, learned counsel for the plaintiffs that the construction over the suit land was made out of the income from joint family property. It is not disputed that the suit property was purchased in the year 1953 in the name of defendant No.1. DW-4 (defendant No.1) in his evidence clearly stated that he had incurred a loan of Rs.6,500/- on two occasions from the House Building Society to start some new construction on his purchased land at Amalapada (the suit land). He also deposed that he spent Rs.16,000/- to Rs.17,000/- for construction of the pucca house over the suit land. The money over and above the loan amount was met out of the income from Hindustan Hotel. He constructed two pucca rooms with RC roof and three rooms with tiled roof. He also deposed that the construction was completed in the year 1957 and rented out to Telephone Department for Rs.90/- per month. The said arrangement continued till 1970. Thereafter, the house standing over the suit land was rented out to different persons till 1984. There is also no dispute to the fact that the loan incurred by defendant No.1 was repaid from out of the rent. Defendant No.1 further deposed in his evidence that from the year 1969 to 1975 he received notice for repayment of the loan that he incurred for construction of the house. Thus, he proposed to dispose of a portion of the suit land to one Sudhakar Pradhan and took an advance of Rs.1,000/- from him. But Sudhakar wanted a specific portion, for which the sale could not be materialized. In the year 1977, the land and the house at Amalapada (the suit land) were attached and in 1979 defendant No.1 repaid the loan and released the suit land and the house. The plaintiff No.1 (PW-10) in his evidence however deposed that his father gave consideration money for purchase of the suit land to defendant No.1 from the cash box of the Hotel. He counted it and handed over the same to Sashibhusan in Hindustan Hotel. A part of the consideration money was paid previously and the rest was paid on the date when sale took place. He also deposed that on previous occasion his father gave money to defendant No.1 who in turn gave the same to Sashibhusan towards consideration money for purchase of the suit land. This piece of evidence is not believable in view of the pleadings of the plaintiffs to the effect that Jayakrushna was virtually bedridden and suffering from different incapacitations. Further, I have already held that the Hindustan Hotel was the exclusive business of the defendant No.1. Thus, the income out of it is the exclusive one of the defendant No.1. Scrutinization of the evidence of the plaintiffs, it appears that their evidence is shaky and thus the same is unreliable. On the other hand, the pleadings and evidence of defendant

No.1 give a clear picture with regard to the transactions with accuracy. Thus, the plea of the plaintiffs to the effect that the house on the suit land was constructed out of the joint family nucleus is not believable. Accordingly, this Court endorses the findings of the learned trial Court in respect of issue Nos.5, 6, 7 and 8 except the finding with regard to blending of the suit land to the joint stock of the family.

11. The next question that arises for consideration is that whether defendant No.1 was acting as the manager and "Karta" of the joint family. Ordinarily, the senior most male member of a Hindu joint family, who takes up the responsibility of the joint family property and manages it, is called the "Karta" or sometimes "Manager". The Manager of a Hindu joint family is called a "Karta" (paragraph-234 of Mulla's Hindu Law 21st edition). Now, coming to the case at hand, it is the admitted case of the parties that the defendant No.1 is much older that is to say 16-17 years older than the plaintiffs and defendant No.1 took charge of educating the plaintiffs at Angul even during life time of their father. The plaintiffs were allowed to stay in the suit house. It was brought out from the mouth of defendant No.1 that he had repaid the loan of his father by selling out property of his father at Hakimpada. The plaintiffs also pleaded and laid evidence to establish that defendant No.1 was managing the affairs of the family, as their father was incapable of doing so. To establish the same, the plaintiffs examined PW-7, who deposed that defendant No.1 was looking after them as guardian. Defendant No.1 was even managing the affairs of the family. PW-10 (plaintiff No.1) in his evidence also supported the same and deposed that defendant No.1 was looking after all the affairs on behalf of his father, who was "Karta" of the joint family. The plaintiffs also relied upon evidence of defendant No.1, who deposed that plaintiff No.1 came to Angul in 1949-50 and plaintiff No.2 came to Angul two years thereafter. They were staying at Badagudia Hotel. After the suit land was purchased, the defendant No.1 repaired the thatched house standing over the suit land and stayed there with his wife and plaintiffs. He also deposed that apart from Hindustan Hotel, he constructed seven rooms with tin roof on a piece of leasehold land he acquired in the Angul bus stand for the purpose of running another Hotel. As plaintiff No.1 was unemployed and wasting his time after completion of his studies, the defendant No.1, in order to keep him engaged, instructed him to start a Hotel in the rooms constructed over the leasehold land. Thus, plaintiff No.1 started the business in the name and style of "Jayabharat Hotel". As plaintiff No.1 was not aware of managing affairs of the Hotel, defendant No.1 guided him for some years in the management of the hotel and for that purpose he (the defendant No.1) was also maintaining the accounts of Jayabharat Hotel. The entire family stayed in the thatched house over the suit land till the marriage of plaintiff No.2 in the year 1970. By then, their parents were staying at Matagajpur and they had come to Angul to attend the marriage ceremony of plaintiff No.2. After their parents came to Angul, the house at Matagajpur remained under lock and key and the defendant No.1 also allowed Aru and Karuna, the cognates of the plaintiffs, to use the said house. He also deposed in his evidence that he took the responsibility of educating the

plaintiffs 1 and 2 at Angul. Thus, Mr.Rath, learned counsel for the plaintiffs/respondents 1 and 2 submitted that defendant No.1 was the "Karta" of the family and thus, the suit properties acquired by him in the capacity of "Karta" or Manager of the family, are nothing but joint family properties.

12. Mr.Mukherji, learned counsel for defendant No.1 submitted that even if it is presumed that the defendant No.1 was looking after the affairs of the family in some way or the other, those are only act of generosity and kindness on the part of defendant No.1 and cannot be regarded as his legal obligation. Thus, he cannot be treated to be the "Karta" of the family at least during the life time of his father who died in the year 1975. Per contra, Mr.Rath relying upon a decision in the case of Narendrakumar J. Modi v. Commissioner Of Income Tax, Gujarat-II, Ahmedabad, reported in AIR 1976 SC 1953 submitted that a senior member may give up his right and junior member of the family can act as the "Karta" with consent of all other members. He relied upon paragraph-10 of the said decision, which reads as follows :

"10. In these circumstances he appears to have acted as the karta with consent of all the other members. A junior member of the family could do so. See Mulla's Hindu Law 296, fourteenth edn. Where occurs the following passage :

So long as the members of a family remain undivided, the senior member of the family is entitled to manage the family properties, including even charitable properties and is presumed to be the manager until the contrary is shown. But the senior member may give up his right of management, and a junior member may be appointed manager."

A similar view is taken in the case of M/s Nopany Investments (P) Ltd. v. Santokh Singh (HUF), reported in AIR 2008 SC 673. This Court in the case of Harihar Sethi and Anr. v. Ladukishore Sethi and Ors., reported in AIR 2002 Orissa 110 at paragraph 10 held as under :

"However, it is no more res integra that a senior member of the family may give up his right and a junior member of the family can act as Karta with consent of all the other members. In the present case, the defendants who put-forth a claim that the plaintiff acted as Karta of the family, though he is not the eldest member, have totally failed to prove the said fact by adducing cogent evidence. In the absence of any evidence, it is not possible to accept the contention raised by the appellants that the plaintiff, though he was not the senior member of the family, acted as the Karta?."

Needless to mention here that by the time of death of their father, namely, Jayakrushna, the suit land had already been purchased and the construction of the house was completed. Thus, it can't be held that the defendant No.1, as a "Karta" or Manager of the family or acting on behalf of his father, purchased the suit land and constructed the suit house. Further, the generosity shown by the defendant No.1, as discussed above, cannot lead to the conclusion that he was the "Karta" of the family at least during life time of Jayakrushna, more

particularly when the plaintiffs have led evidence to the effect that Jayakrushna was in the helm of affairs of the family. Further, there is no evidence on record to come to a conclusion that Jayakrushna at any point of time during his life time had relinquished his right to act as the "Karta" of the family with expressly or impliedly or by his consent. An objection was raised by Mr.Rath to the effect that PW-8, namely, Benudhar Das, Advocate, who prepared Ext.9, i.e. Chuktinama dated 15.07.1963, happened to be the lawyer of defendant No.1 and continued to appear on his behalf in the suit and also prepared and filed the written statement on the instruction and on behalf of the defendant No.1. He also relies on Sections 126, 129 and 149 of the Evidence Act and submits that PW-8 was examined by the plaintiffs only for the purpose of proving Ext.9 and not beyond that. Thus, the statement of PW-8 in his cross-examination shouldn't be taken into consideration. Mr. Mukherji on the other hand submitted that the plaintiffs themselves chose to examine the PW-8 as a witness and when his examination-in-chief is recorded, the defendant No.1 has every right to cross-examine him and can put question in conformity with Section 146 of the Evidence Act. PW-8 has also not been declared hostile by the plaintiffs. As it appears, he was examined to prove Ext.9, which is a document of settlement between the parties in which it was decided that business of Jayabharat Hotel will be managed by the plaintiff No.1 for which the plaintiff No.1 was also paid Rs.500/- by the defendant No.1. Further, the plaintiff No.1 was required to pay monthly rent of Rs.50/- to the defendant No.1 for occupation of the leasehold land of the defendant No.1 to run Jayabharat Hotel. Ext.9 alone cannot, by itself, establishes that there was joint family nucleus from which Hindustan Hotel was established. It is already held that both Hindustan Hotel and the suit land along with the construction thereon were out of the self-acquired properties of defendant No.1. Thus, the evidence of PW-8 with regard to acquisition of land for Hindustan Hotel and purchase of the suit land and construction of the house thereon is of little importance. Further, a plain reading of Ext.9 makes it clear that the said document was prepared as there was dissention between the plaintiff No.1 and defendant No.1. So the plaintiff No.1 took the leasehold land of defendant No.1 on rent of Rs.50/- per month to start "Jayabharat Hotel" exclusively. Defendant No.1 had also given Rs.500/- to plaintiff No.1 for the same. Though Ext.9 reveals that the family had a joint hotel business, it is not clear as to whether, it refers to Badagudia Hotel in the Angul market or the Hindustan Hotel at Angul bus stand. At one hand, the plaintiff No.1 relying upon Ext.9 deposes that the joint business mentioned therein refers to Hindustan Hotel. On the other hand, he deposes that he signed on Ext.9 with a belief that the document is being prepared for obtaining sales tax licence. Moreover, he admits in his cross-examination (page-99 of the paper book) that there was no sufficient income from the landed properties. Further, the plaint is conspicuously silent about business on pulses and oil seeds as well as Hotel at Rantalei as discussed earlier. Thus, it is very difficult to believe the story of plaintiffs to the effect that Hindustan Hotel was the joint business of the family, as he (plaintiff-1) is changing colours from time to time very conveniently to suit his case and more particularly when the

plaintiffs have miserably failed to establish that there was sufficient nucleus in the joint family to start Hindustan Hotel. As discussed earlier, it has already been held that the family had no sufficient nucleus to start Hindustan Hotel. Thus, from the recitals of Ext.9, it cannot be inferred that the joint business mentioned therein refers to the business of Hindustan Hotel.

13. In that view of the matter, the appeal succeeds and the cross-objection fails. The suit schedule property being the exclusive property of defendant No.1 is not partible. Thus, the suit fails, but in the circumstances there is no order as to costs.