
(1983) 07 OHC CK 0013
In the Orissa High Court
Case No : Second Appeal No. 100 of 1978

Sahadeb Nayak

APPELLANT

Vs

Satyabadi Nayak and Others

RESPONDENT

Date of Decision : 25-07-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 100, 11

Citation : AIR 1984 Ori 30

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : B. Pal, Ashok Mohanty and N. Prusty, for the Appellant; R.C. Misra and P.N. Misra, for the Respondent

Judgement

R. C. Patnaik, J.—The plaintiff brought an action for partition claiming 1/4 share together for himself and defendant 1, his brother. The suit was dismissed by the trial court; but decreed in appeal. Hence this second appeal by defendant 11.

2. The parties are relations. One Arta had four sons, Ganga and Narayan through the first wife and Jagannath and Raghu through the second wife. Satya-badi, the plaintiff, and Bira (defendant 1) are the grandsons of Narayan. Debahari (defendant 2), Niranjana (defendant 3), Chitrasen (defendant 4) and Basanta (defendant 5) are the descendants of Ganga. Kamaraju (defendant 6) Laxman (defendant 7), Rajan (defendant 8), Arjuna (defendant 9), Nakula (defendant 10) and Sahadeb (defendant 11) are the descendants of Jagannath. Tarini (defendant 12), Tribeni (defendant 13) and Kalu (defendant 14) are the descendants of Raghu Nayak. Partition was sought in respect of three plots-- Survey Nos. 56 and 201 under Patta No. 23 and Survey No. 64 under Patta No. 762, two acres and twenty decimals in extent. The plaintiff alleged that the suit property had not been partitioned by metes and bounds though separate parcels were being amicably enjoyed for convenience. As in a proceeding u/s 145, Criminal P. C. possession of Sahadeb (defendant 11) was declared in respect of some land comprised in Survey Nos. 64 and 201, the plaintiff filed Title Suit No.

133 of 1964 for ejectment of Sahadeb. The matter ultimately came to this Court in Second Appeal No. 207 of 1967. This Court perceiving certain technical difficulties in the matter, remanded the suit to the trial court observing that the parties, if they so desired could amend the pleadings. The plaintiff, however, withdrew the said suit and filed the present one for partition alleging that the shares of the parties were not clear and there was no clear proof of partition of the property in suit. Defendants 3 and 5 supported the plaintiff. The only other defendant who filed written statement was defendant 11. He controverted the plaintiff's allegations stating that there had been a complete partition of all the properties amongst the parties and refuted the assertion that the property in suit was being enjoyed by the parties in separate parcels according to convenience. He asserted further that in Title Suit No. 133 of 1964, the plaintiff had taken a stand that there was a complete partition of all the properties. In view thereof a suit for fresh partition was not maintainable.

3. The principal finding recorded by the trial Judge was that all properties including the property in suit had been partitioned in a partition in the year 1918. So, the suit was not maintainable. The appellate court decreed the suit holding that defendant 11, on whom the onus lay to establish previous partition, having failed to produce the material document, the property was available to be partitioned.

4. During the pendency of the second appeal, an application was filed by defendant 11-appellant under Order 41, Rule 21, Civil P. C. for acceptance of the certified copy of an award of the year 1918 which had been marked as Ext. A-1 in Title Suit No. 141 of 1952 and as Ext. A in Title Suit no. 133 of 1964.

5. The plaintiff filed certified copy of the judgment of this Court in Second Appeal No. 207 of 1967 which was marked at Ext. 1. Defendant 11 relied upon the judgment in Original Suit No. 30 of 1928 marked as Ext. B and the decree therein marked as Ext. A. Pura, the predecessor-in-interest of defendants 2, 3, 4 and 5 was the plaintiff in Title Suit No. 30 of 1928, Jagannath, the predecessor-in-interest of defendants 6 to 11, was defendant 1, Khetra, the predecessor-in-interest of defendants 12 to 14 was defendant 2, Bira, the present defendant 1, was defendant 3, Chaitan, the predecessor-in-interest of present defendants 2 to 5, was defendant 4 and Satyabadi, the present plaintiff, was defendant 5. The suit was one for partition. Plots Nos. 64 and 201 were a part of the suit schedule in Original Suit No. 30 of 1928. The court held therein that there had been a partition as per the award of arbitrators and dismissed the suit.

6. Title Suit No. 133 of 1964 was before this Court in Second Appeal No. 207 of 1967. Certified copy of the judgment therein has been marked as Ext. 1. In course of the hearing of this appeal parties admitted that there was a partition in 1918 and the said partition was by way of an award. I quote a few of the observations of this Court :

".....Both sides admitted the partition of 1918, but disputed the manner of

allotment. Admittedly, the partition of 1918 was evidenced by a regular award....."

Dispute, however, was as to what property had been allotted to the shares of the different parties. As the relevant documents were not before this Court, this Court remanded the matter giving the parties opportunity to amend their pleadings. Instead of following that course, the suit was withdrawn by the plaintiff who was also the plaintiff in Title Suit No. 133 of 1964.

7. Mr. B. Pal, the learned counsel for the appellant, urged that the decision in Title Suit No. 30 of 1928, judgment wherein was exhibited as Ext. B, operated as *res judicata*. On going through the pleadings, however, it is evident that no such plea had been taken by the appellant. A plea of *res judicata* has to be specifically pleaded and proved. The plea for the first time urged in the second appeal is, therefore, not available to the appellant. I reject the said contention. Mr. Pal then canvassed that in view of the admitted stand taken by the parties that there was a previous partition in the year 1918, a fresh suit for partition was not maintainable. Merely because a party faced certain difficulty decades after being in the enjoyment could not furnish a cause of action for a suit for fresh partition. The parties admitted previous partition as is evident from the judgment of this Court in Second Appeal No. 207 of 1967. Partition dissolves the coparcenary. Community of interest is lost. The members upon partition hold their respective shares as their separate property. A fresh partition is possible if the male members to the original partition fuse their separate interests by reunion with the intention to reunite in estate and interest, to revert to their former status.

8. It is nobody's case here that the separate interests of the parties were fused by reunion so that the parties reverted to their former status of joint-ness. In view of the aforesaid position in law, it is difficult to entertain a suit for fresh partition of properties which had been decided by metes and bounds amongst the parties.

9. The plaintiff, no doubt, is being faced with a difficult situation by reason of certain transaction inter se between the parties in the enjoyment of the property. But the sympathy for the plaintiff is ineffective in the teeth of the law. He had pursued the correct course in Title Suit no. 133 of 1964. Withdrawal of that suit for ejection of the defendants and institution of the present suit for partition were in the facts and circumstances ill-advised actions.

10. I also reject the belated application filed for reception of additional evidence. I, therefore, hold that the suit is not entertainable. The decree of the trial court is, therefore, restored and the judgment and decree passed by the appellate court are vacated. In the circumstances, there would be no order as to costs throughout.