

(1974) 01 OHC CK 0003
In the Orissa High Court
Case No : First Appeal No. 67 of 1968

Satyabadi Tripathy

APPELLANT

Vs

Sankirtan alias Gulhi alias Hayagriba Tripathy and Others

RESPONDENT

Date of Decision : 15-01-1974

Acts Referred:

Citation : (1974) 40 CLT 568

Hon'ble Judges : K.B. Panda, J

Bench : Single Bench

Advocate : S.C. Mohapatra, for the Appellant; R.N. Sinha and S.N. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

K.B. Panda, J.—Out of three Defendants in a suit for partition brought by the Plaintiff-Respondents 1, 2 and 3, Defendant No. 1 alone has preferred this appeal in the circumstances stated hereinafter.

2. One Madan Tripathy had two wives, namely, Chanda and Pakala. Through Chanda his first wife, he had two sons, Satyabadi and Balaram Defendants 1 and 2 respectively. Through second wife Pakla he had four sons, namely, Sankirtan, Khorodra, Sashi Bhusan and Suru. The first three are the Plaintiffs 1, 2 and 3 respectively in the Title Suit No. 152 of 1966. The fourth son Suru, however, did not join in that suit and so had been impleaded as Defendant No. 3 in the suit. Admittedly by the time of the suit Madan and his two wives were dead. The Plaintiffs brought the suit claiming 1/6th share each leaving 1/6th share for Suru who did not join them in the suit.

3. So far the present controversy in the appeal is concerned, the relevant facts are like this: The Plaintiffs brought the suit claiming 1/6th share each over Schedules A, B, C, D and E properties to the plaint. Admittedly, Schedule A and B properties are ancestral immoveable properties belonging to villages Satlama and Haldipali 28.82 acres belonging to the former and 13.31 acres belonging to

the latter. Schedule C properties are alleged to have been acquired by Defendant No. 1 out of joint family properties and as such liable to partition. Schedule D and E properties are movables alleged to be belonging to the joint family.

4. The Defendants contested the suit mainly on the ground that there had been a partition in the year 1910 and the parties are possessing their lands according to the terms of the said partition and as such there cannot be again a partition. Defence relied on a document Ext. E alleged to be a deed of partition dated 10-4-1910 executed by Madan Tripathy the common ancestor in favour of his sons.

5. The learned lower Court framed 7 issues. Issues No. 4 was in respect of Schedule C properties and he held that the same to be the self-acquired property of Defendant No. 1 and so not liable to partition. This finding has not been challenged in any cross-appeal and so no more in controversy. Issue No. 5 was in respect of Schedule D and E moveable properties and the learned lower Court decided it against the Plaintiffs. Seventh issue was regarding the plea of previous partition and so the suit to have been barred by the principle of *res judicata* but it was held in favour of the Plaintiffs and the same was also not canvassed in the appeal and would be taken to be final. The two main issues were regarding the alleged metes and bounds partitions by the Defendant in 1910 and if the same is binding on all the Plaintiffs. It is only this point which was agitated in the appeal.

6. Mr. Mohapatra, learned Counsel for the Appellant raised the following contentions:

(i) Ext. E is a document more than 30 years old evidencing partition and the learned lower Court is wrong in holding that it is not genuine. In the alternative it was contended that Ext. E is a document of evidencing family arrangement wherein the father had not retained any share for himself which amounts to relinquishing his share and as such sons born to him subsequent to such relinquishment are not entitled to reopen partition; and

(ii) There is no direct decision on the point by this Court or by the Supreme Court. The Full Bench decision reported in *Katragadda China Anjaneyulu and Another Vs. Katragadda China Ramayya and Others*, , which deals with a case of relinquishment supports the contention advanced by him that sons born after relinquishment of the father's share are not entitled to a share in the ancestral properties and as such at least the matter need be referred to a larger Bench.

7. The learned lower Court on an assessment of the oral evidence and the law on the point has held in respect of Ext. E in para 11 of his judgment thus:

The learned Advocate for the Plaintiffs next contends that Ext. E is a fabricated document and no importance should be attached to it to utilise it for the purpose of proving severance of joint status. Though this fact was alleged by the Plaintiffs in their plaint, the contesting Defendants made no attempt to prove execution of Ext. E, by Madan by independent witnesses or by examining the signatures of

Madan in Ext. E by an Expert. The Defendant-1 himself speaks in his evidence that half share was allotted to Madan and his sons which is quite at variance with the recitals in Ext. E. Defendant has failed to examine the scribe and attesting witnesses or persons present at the time of the alleged execution of Ext. E. The terms of Ext. E, appear to be highly inequitable. It is therein the testimony of the Defendant-1 that Madan's second wife was not agreeable to execution of document like Ext. E. In the circumstance, I entertain great doubt as to execution of Ext. E by Madan who had hope of begetting more children by his second wife. The Defendant No. 1 himself was looking after Hamid Settlement operation in respect of the suit A and B schedule properties. Had the suit A and B schedule properties been partitioned in 1910, in 1925 he must have got his share of properties if any recorded in his name either under separate khunti or by noting separate possession. Till now the khunti remains joint and the parties are paying rent jointly and the rent is mostly being paid by Defendant-1 alone for the entire A and B schedule lands. Thus, I hold that Ext. E is not a genuine document and even assuming that it is a genuine document it is not admissible for any other purpose of proving severance of joint status of the members of the then joint family.

While accepting the line of reasoning adopted by the learned lower Court, I would like to add that if there was a metes and bounds partition in the year 1910 it would have been more proper for the contesting Defendants particularly the Appellant to say what are the plots that had fallen to the share of the coparceners in that partition of 1910. But unfortunately it has not been given in the written statement. Further, the Defendant-Appellant was looking after the Hamid Settlement operation yet he did not take care to see that the lands are recorded separately in the settlement according to the earlier partition of 1910. Admittedly rents were being paid jointly. There are certain circumstances to indicate that even if Ext. E be genuine it had not been acted upon. In Ext. E there is no mention of division of the ancestral properties by metes and bounds. Consequently, it was urged by Mr. Mohapatra that this not being a document of partition the learned lower Court was wrong in holding that it is inadmissible in evidence not having been registered. It would at least show either a family arrangement or severance of the joint status. To me it appears, a detailed discussion on this issue will be more academic than otherwise for everything would rest on the determination of the law on the point whether sons born after partition can claim a share in the ancestral property or not. According to Mr. Mohapatra they cannot as has been held by the learned Judges of the Full Bench reported in Katragadda China Anjaneyulu and Another Vs. Katragadda China Ramayya and Others, . Thus the moot point for consideration is in the Circumstances of the case whether sons born after 1910 to Madan can claim partition or not. Admittedly by 1910 through first wife Madan had Satya badi and Balaram Defendants 1 and 2. By that date through his second wife he had two sons named Sankirtan Plaintiff No. 1 and one Deba who is now dead. Thus Khirodra (Plaintiff No. 2), Sashi Bhusan (Plaintiff No. 3) and Suru (Defendant No.

3) were born after 1910-the year of alleged partition under Ext.E. The learned lower Court relying on Mulla's Hindu Law held that they are entitled to reopen partition since no share had been reserved by the father for himself and his wife.

8. Mr. Mohapatra in support of his contention relied firstly on the Treatise on Hindu Law in Oriya styled evolution of law in Hindu Society at page 362 and secondly on Articles 309 and 310 of Mulla's Hindu Law (13th Edition)¹, besides relying on a case laws reported in Athilinga Goundar by guardian Thirumal Ammal Vs. Ramaswami Goundar and Others, and Katragadda China Anjaneyulu and Another Vs. Kattragadda China Ramayya and Others, . I do not think any of these citations further the case of the Appellant. Under Article 309 of Mulla's Hindu Law it is said:

A son who was in his mother's womb at the time of partition, is entitled to a share though born after partition, as if he was in existence at the time of partition. If no share is reserved for him at the time of partition, he is entitled to have the partition re-opened and share allotted to him.

In Article 310 it is said:

A father separating from his sons mayor may not reserve to himself a share on partition. The rights of a son born as well as begotten after partition are different according as the father has or has not reserved a share to himself.

(1) Where the father has reserved a share to himself, a son who is begotten as well as born after partition is not entitled to leave the partition re-opened; but in lieu thereof he is entitled, after the father's death to inherit not only the share allotted to the father on partition, but the whole of the separate property of the father, whether acquired by him before or after partition, to "the entire exclusion of the separated sons.

(2) Where the father has not reserved a share to himself on a partition with his sons, a son who is both as well as begotten after the partition is entitled to have the partition re-opened and to have a share allotted to him not only in the property as it stood at the time of the original partition, but in the accumulations made with the help of that property.

The Oriya Hindu Law referred to above does not propound any theory contrary to the same.

In the case of Athilinga Goundar by guardian Thirumal Ammal Vs. Ramaswami Goundar and Others, , it has been said that:

Where a partition is made by the father by dividing the family property amongst his sons (by different wives), but reserving no share for himself, a son begotten and born after the partition is entitled to have the partition reopened and obtain for himself share equal to that of his brothers. Retaining some property as a provision for maintenance does not amount to taking a share in the property. A direction in the partition deed that the future-born son should get his share out

of the share allotted to his uterine brother or brothers cannot take away his right to have the partition reopened.

This is a direct case on the point which applies in all fours to the facts and circumstances of the case. However, Mr. Mohapatra distinguished the same and contended that the ratio of this case has not been followed in a Bench decision of the Andhra Pradesh High Court in the case of Katragadda China Anjaneyulu and Another Vs. Katragadda China Ramayya and Others, . In this case the earlier case namely Athilinga Goundar by guardian Thirumal Ammal Vs. Ramaswami Goundar and Others, , has been referred to. Their Lordships in the Full Bench decision do not disapprove of the law laid down in Athilinga Goundar by guardian Thirumal Ammal Vs. Ramaswami Goundar and Others, , and observe thus:

(41) To the same effect is the judgment of another Division Bench of the Court. In Athilinga Goundar by guardian Thirumal Ammal Vs. Ramaswami Goundar and Others, , it was held that a son born after partition was entitled to have the partition re-opened and to obtain for himself a share equal to that of his brothers in a case where the father while dividing the family property amongst his sons kept no share for himself.

After discussing several authorities on the point their Lordships in the Full Bench case summarise the law which is as follows:

(45) This reflects an anxiety on the part of the authors of these texts to protect the unborn sons who otherwise might be left destitute. It is not out of place to mention here that there are equally authoritative texts which lay down that an after-born son would receive only the share allotted to the father and could not re-open the division of the family estate that had already taken place. As put by Mayne in his treatise on Hindu Law "Mitakshara reconciled the conflict by saying that the latter texts lay down the general rule while the former is limited to the case of a son who was in the mother's womb." Be that as it may, it is now well-settled as a result of judicial decisions which embody the opinion of some of the commentators, the foremost of which is ILR Mad. 64 (F.B.) that even a son conceived after a partition arrangement could challenge a partition effected by his father amongst his sons if he had not retained a share for himself.

(46) But it is to be observed that these texts restrict this right to the case of a division of the joint family property by a father amongst his sons and do not cover cases of partition between the father, his brothers and father. The texts of Vishnu and Yajnavalkya which have been extracted above bear out this proposition.

Thus there is no conflict in these two decisions namely, Athilinga Goundar by guardian Thirumal Ammal Vs. Ramaswami Goundar and Others, and Katragadda China Anjaneyulu and Another Vs. Katragadda China Ramayya and Others, . Father, the latter decision approves the earlier decision. In that background there is no justification for referring the matter to a larger Bench. The law has been consistently so and there is no diversity anywhere to take a different view than

that has been enunciated in the text or in the judicial pronouncement. Applying those principles to the case at hand the position is clear that the father had not retained anything either for himself or his wife even if there was a partition in 1910. Accordingly, the after-born sons are entitled to re-open the same. In the result therefore, whatever may be the validity of Ext. E in the eye of law the after-born sons, namely, Plaintiffs 2 and 3 have a right to re-open partition which they have done and Ext. E cannot stand as a bar.

9. The only question that yet remains for consideration is a point raised by Mr. Mohapatra that the lands acquired 2.72 decimals by the Canal Department out of Schedule A property should not be form the share of the Appellant alone as has been decreed by the learned lower Court. To that the answer of Mr. Sinha, learned Counsel for the Respondent is that the Appellant had taken the compensation alone and as such those acquired lands should be taken from the share to be allotted to the Appellant in the final decree. That the Appellant had taken the entire compensation is not disputed. But I do not think it will be equitable to order that the Appellant alone should bear the brunt of it. He did it in a different context under the assumption that there has been a metes and bounds partition and on that assumption also the Plaintiff-Respondents did not object to the grant of compensation to him alone. In this background and in view of the contention of the Plaintiff-Respondents that there has been no partition it would be only meet and proper that all the co-sharers should share the burden provided the Appellant who has received the compensation alone is prepared to share it along with others. In the result, this acquired land of 2.72 acres by the Canal Department should be apportioned from the share of all the co-sharers in case the Appellant gives them their due share from the compensation money received by him. The appeal is allowed only to this extent and it fails in other aspects.

In the result, therefore, with this minor modification of the judgment and decree the appeal stands dismissed. Parties to bear their own costs in this appeal.