

(2002) 12 OHC CK 0018
In the Orissa High Court
Case No : First Appeal No. 153 of 1980

Shri Babaji Sahoo (since dead) and after him Ram Chandra Sahoo and Others APPELLANT

Vs

Purusottam Sahoo and Others RESPONDENT

Date of Decision : 02-12-2002

Acts Referred:

Citation : (2003) 1 OLR 149

Hon'ble Judges : Pradipta Ray, J

Bench : Single Bench

Advocate : R. Ch. Mohanty, P.K. Lenka, S.M. Patnaik and S. Mohanty, for the Appellant; S. Misra (1), J.R. Mohanty, B.B. Panda, G.P. Mohapatra and Rakhi Saha for R. 1, for the Respondent

Judgement

Pradipta Ray, J.—Purusottam Sahoo, one of the sons of Babaji Sahoo, (Defendant No. 1 in the suit and Appellant No. 1 in this appeal) instituted Title Suit No. 9 of 1976 in the Court of the then Subordinate Judge, Jajpur for partition of the suit properties as described in Schedules "A", "B" and "C to the plaint for allotment of the asbestos roofed house and thatched house on Plot No. 2413 to his share and for directing the defendant to vacate the said aforesaid houses and other associated reliefs.

2. The suit is for partition of the properties which Babaji got out of the ancestral properties and those claimed to have been purchased by Babaji out of the joint family fund. The plaintiffs case inter alia is :

The original owner, Kalandi Sahoo, had three sons : Poka, Babaji (defendant No. 1) and Panchu (defendant No. 4). The said three brothers got separated in mess and partitioned their joint family properties. After such partition, Poka died in 1940 leaving behind his widow, Rambha and a daughter, Suna. The widow, Rambha got a limited life-estate which ripened into full ownership after commencement of the Hindu Succession Act, 1956. By a registered deed of gift dated June 22, 1970, Rambha made a gift of her properties described in

paragraph- 3 of the plaint and delivered possession thereof to the plaintiff. Thus, the plaintiff is entitled to get A.50.7 1/2 including the gifted lands out of the lands described in Schedule "A" to the plaint. The properties described in Schedules "B" and "C" to the plaint were purchased by Babaji (defendant No. 1) as "Karta" of the joint family consisting of himself,, plaintiff and defendant No. 2 out of the income from the joint family properties. After such purchase. Babaji blended those purchased properties with the joint family stock. The plaintiff has claimed 1/4th share in the lands described in Schedules "B" and "C" of the plaint. As dissension arose in the family of Babaji, the members of the joint family got separated in mess in 1956. In 1968, plaintiff constructed a pucca house with four rooms with asbestos roof for his residence and added another thatched house with pucca floor and walls in 1972 on Plot No. 2413 included in Lot No. 2 of Schedule "A" to the plaint. The defendants have no right, title or interest in the houses constructed by the plaintiff out of his own income. The defendants were residing in the ancestral residential house of the family. In the devastating flood of 1975, the ancestral residential house where defendant Nos. 1 to 3 were residing collapsed. As the said defendants 1 to 3 became shelterless, the plaintiff on humanitarian ground temporarily accommodated the said defendants in his asbestos house. Since then defendant Nos. 1 to 3 are residing in the said house of the plaintiff. On January 26, 1976, the plaintiff asked for amicable partition of the suit properties and also asked the defendant Nos. 1 to 3 to vacate the plaintiff's asbestos roofed house. The said defendants, however, did not accede to such request.

3. Defendant Nos. 1 to 4 contested the suit by filing joint written statement. The case as made out in the written statement, inter alia, is :

There was no partition among Kalandi and his sons and while living in the joint family Poka died in 1934 and upon Poka's death, his share and interest came to the other coparceners in the joint family. Rambha, the widow, did not get anything excepting a right to maintenance. Rambha had no right, title or interest to convey to anybody. The houses of Plot No. 2413 were constructed by the joint family out of the joint family funds and the same was not constructed by the plaintiff alone out of his own income. The land described in Schedules "B" and "C" to the plaint are the self-acquired properties of Babaji and as such, the plaintiff cannot have any right, title or interest thereon and he is entitled to claim partition of the said Schedules "B" and "C" lands.

4. On the basis of the pleadings of the parties three main issues cropped up for determination. First, whether Poka died in 1940 as claimed by the plaintiff or in 1934 as claimed by the defendants. Second, whether the houses on Plot No. 2413 were constructed by the plaintiff alone out of his own fund or by the joint family out of the joint family fund. Third, whether the properties described in Schedules "B" and "C" to the plaint are self-acquired properties by Babaji. Trial Court has found that the houses were constructed by the joint family out of the family funds and thus do not belong exclusively to the plaintiff. The Trial Court

has also found that the properties described in Schedules "B" and "C" to the plaint were self-acquired properties of Babaji and, as such, the plaintiff has no right to claim partition during the life time of Babaji. The Trial Court has also found that Poka died in 1940 and accordingly, Rambha had right, title and interest to make the deed of gift in favour of the plaintiff.

5. Defendant Nos. 1 to 4 have filed this appeal against the judgment and decree relating to the deed of gift executed by Rambha in favour of the plaintiff. The plaintiff has also filed a cross-appeal against the findings of the Trial Court rejecting his exclusive claim over the houses constructed on Plot No. 2413 and claim for partition of properties described in Schedules "B" and "C" to the plaint.

6. Trial Court has accepted the plaintiffs case that Poka died in 1940 and his widow Rambha inherited a limited life- estate which subsequently ripened into full ownership after Hindu Succession Act came into force. Plaintiff examined himself (P. W. 1) two distant relations (P.W.2 and P.W.3) and a co-villager (P.W.5) to support his case that Poka died in 1940. The defendants examined defendant No. 4, brother of Poka (D.W.I) Suromani Sahu, daughter of Poka (D.W.4), Gangadhar Sahu, first cousin of Poka (D.W.5) and also exhibited Chowkidari Hat Chita recording death of Poka in 1934. It appears that the Trial Court has failed to apply uniform standard in weighing the oral evidence adduced by the parties. Trial Court has accepted the evidence of distant relations as reliable and trustworthy and has disbelieved the evidence of the closest relations. There is no reason to discard the consistent evidence of the brother, daughter and first cousin. Trial Court also overlooked that plaintiff's witnesses have given different years as the year of Poka's death. According to plaintiff, it. was 1940. according to P.Ws. 2 and 5, 1939 and according to F.W. 3) 1941. Trial Court has rejected the evidence of Suramani. daughter of Poka (D.W.4) on the ground that she was only 7 years old in 1934 but it has accepted the evidence of the plaintiff who is even younger than Suramani. It is not possible to accept the view of the Trial Court that a daughter cannot speak about the year of her father's death as she was only seven years old at the time of the death of the father. There is no reason to place more weight on the evidence of distant relations ignoring the evidence of the closer relations who are the most competent persons to tell about the year of death of Poka. P.W.2 Mahani. Sahu could not say anything else about the family of Kalandi. He could not even say with whom daughter of Poka was married. He conveniently remembered only the year of death of Poka. Similarly P.W.3, Gobinda Sahu did not know any other fact excepting the year of death of Poka. Even if the Chowkidari Hat Chita is excluded from consideration, oral, evidence adduced on behalf of the defendants are definitely more reliable and trustworthy. This Court is unable to accept that Poka died in 1940. This Court holds that Poka died in 1934 before enactment of Hindu Women's Right to Property Act, and on Poka's death Rambha could not get any interest, in the properties left by her husband excepting right to receive maintenance from the properties left by the husband. Thus, plaintiff had not derived any right, title or interest from the deed of gift executed by Rambha, widow of Poka. Plaintiff had

only 1/4th share in the properties described in Schedule "A" to the plaint.

7. The plaintiff-Respondent No. 1 has claimed 1/4th share in the properties purchased by Babaji Sahoo (since deceased) in 1948 from one Bira Panda (part of the property described in Schedule "B." to the plaint) and from Pechiri Bewa (part of the properties described in Schedule "C" to the plaint). The defendant-appellants resisted the said claim on the plea that Babaji Sahoo, the original Appellant No. 1 acquire those properties out of his own income and the respondent No. 1 did not have any right, title or interest during life time of Babaji. The Trial Court has found that the said properties were self-acquired properties of Babaji and consequently rejected the claim for partition of those properties as Babaji was alive at the time of the preliminary decree. It appears that during pendency of this appeal Babaji Sahoo (appellant No. 1) died. After death of Babaji, the plaintiff- respondent No. 1 has become entitled to 1 /4th share in the properties left by Babaji at the time of his death even if the properties were self-acquired properties.

8. In support of his claim that the properties purchased by Babaji Sahoo in 1948 were acquired out of the joint family income, the plaintiff-respondent No. 1 has claimed that there was a family sweetmeat and lea stall at Calcutta. The said statement has not been corroborated by any other witness for the plaintiff. Defendant No. 1 Panchu Sahoo, brother of Babaji Sahoo deposed as D.W. 1. He has categorically staled that at the time of Poka's death, the joint family had only 6 gunths of chas land and Babaji had to migrate to Calcutta for earning his livelihood. Babaji along with his brother Panchu started a tiffin shop by their own exertions without any aid from the joint family property. There is no material evidence to show that Babaji started the sweetmeat and tiffin shop with the aid of any joint family property. Trial Court has considered the relevant evidence on record and no exception can be taken to such finding.

9. However, as already pointed out Babaji had died during pendency of this appeal and the respondent No. 1 has become entitled to get 1/4th share in those self-acquired properties in case Babaji died intestate and remained owner of those properties till the time of his death. None of the Advocates for the parties has been able to inform this Court whether the properties acquired by Babaji forming part of Schedules "B" and C" to the plaint continued with him till his death and whether he died intestate or not.

10. Plaintiff-Respondent No. 1 has claimed to have constructed a pucca house with asbestos roof in 1968 and a thatched house with pucca flooring with walls in 1972 on Plot No. 2413 described in Lot No. 2 of Schedule "A" to the plaint. The Court below has rejected the said claim holding that the suit house was constructed jointly by all the earning members of the family and belongs to the joint family. The plaintiff-Respondent No. 1 has filed a cross- objection assailing the said finding of the Trial Court. According to him, the materials on record clearly establish that the said house was constructed by him out of his own personal income.

11. Admittedly the disputed house stands on the land belonging to the joint family. So it is for the plaintiff-Respondent No. 1 to prove that he constructed the said house with his own income with the consent of the other members of the family. The plaintiff- respondent No. 1 has introduced the story of separation from his father in 1956. The Trial Court has disbelieved the said claim of separation on the ground of the Voter Lists of 1956 (Ext. G/3), 1966 (Ext.K), 1970 (Ext.K/1) and 1973 (Ext. K/2) in which the plaintiff and the defendants 1 and 4 were shown to have been residing in the house bearing the same No. 181. The logic of the Court below in this regard is fallacious. Living in the house bearing the same number does not rule out separate living. Many families live separate, but in the same house.

12. Materials on record clearly indicated that the money spent for construction of the disputed house came from the income of the shop in Calcutta. Undisputedly, the shop was opened by Babaji and the licence also stood in his name. Subsequently, while the plaintiff was managing the shop the landlord of the shop room filed a suit for eviction for non-payment of rent and got a decree of eviction. After such decree of eviction, the said shop room was settled with the present plaintiff by the same landlord. According to the defendants, they did not know anything of the said eviction suit, the decree passed therein and creation of subsequent tenancy in the name of the plaintiff. They have alleged that the decree and the subsequent tenancy were the result of collusion between the plaintiff and the landlord of the premises. Title Suit No. 327 of 1974 was filed by Babaji Sahoo against the plaintiff at Alipore, West Bengal for declaration of title and permanent injunction in respect of the shop room in Bhowanipur, Calcutta. From 1959 the said shop was being looked after the managed by Purusottam, the plaintiff but there is no case that at any point of time the business was transferred to the plaintiff or that Purusottam purchased the business upon payment of any consideration or that he started any new business of his own. The old business started by Babaji continued although a new tenancy was created in the name of the plaintiff and new licences were taken. Business and tenancy are not the same thing. Merely because tenancy was obtained in the name of the plaintiff and the new licences were taken, it cannot be definitely said whether the business lost its original joint character and was converted to an exclusive business of the plaintiff. The letters Ext. A/1 to Ext. A/7 show that the plaintiff was in his native village looking after the construction of the house while his father, uncle and brothers were at Calcutta and managing the business. The said letters also indicate that money was being sent from Calcutta for construction of the house. Admittedly, the building was constructed with the income from the shops at Calcutta. Unless it is proved that the business belonged to the plaintiff alone, it is not possible to accept his case of exclusive ownership of the business. The story of permitting the other defendants to reside in the disputed house is also very unlikely inasmuch as in 1974 a litigation started between Babaji and the plaintiff in Calcutta over a sweetmeat shop in Calcutta. Admittedly, the plaintiff was looking after the construction in the village

and he was placing orders for materials. In the said factual context, it is natural that the bills and vouchers were issued in the name of the plaintiff. The plaintiff-Respondent has claimed that his uncle Panchu and brother Rama were serving in his shop. Both Panchu and Rama have denied the same.

13. It appears from the evidence that one Master Babu was giving money. There is dispute about the identity of this Master Babu. Plaintiff initially denied any knowledge about Master Babu. He also denied any knowledge about Kartik Charan Ghosh, who, according to the defendants, was called Master Babu. Plaintiff's own letter shows that he knew Master Babu and he falsely denied any knowledge about Master Babu. Upon recall the plaintiff admitted that he was taking loan from Master Babu although nothing has been produced in support of such claim. Plaintiff has said that one Harkata Das was the Master Babu referred to in his letter. Ramchandra has said that Kartik Charan Ghosh was the Master Babu with whom the income from the business was being kept. It appears that initially plaintiff was trying to conceal the fact of taking money from Master Babu and subsequently he tried to make up by putting forward the story of obtaining loan from Master Babu. It is difficult to believe that anybody would give loan without any document as security.

14. Plaintiff has stated in his plaint that he constructed the disputed house out of his own fund and he permitted the defendants to reside in his house after the ancestral home collapsed in the flood of 1975. His own witnesses had said otherwise. Both P.W.2 and P.W.3 have stated that old ancestral house collapsed in the flood of 1955 and that his new house was constructed on the old site. Evidence of P.W.2 and P.W.3 supports the case of the defendant-appellants. Plaintiff has not examined any witness to corroborate his story that the fund for construction came from the plaintiff's own income.

15. Possession of the disputed house also assumes importance for the purpose of deciding the ownership of the house. Except plaintiff himself, no other witness has stated that the defendants had a separate house which collapsed in 1975. Story of grant of permission is not supported by any independent witness. Litigation started between the parties in 1974 and it is quite improbable that plaintiff would permit the defendants to reside in his house. Nature of possession also indicates that the defendants have been residing therein each occupying one room proportionate to their share. Thus, this Court does not find any reason to disturb the findings of the Trial Court with regard to the ownership of the disputed house.

16. On account of the death of Babaji Sahoo during pendency of the present appeal, shares of the parties have undergone changes and require to be respecified by the Trial Court on the basis of the findings in this judgment and taking into account the fact of death of Babaji.

17. For the foregoing reasons, the findings and the decree passed by the Trial Court with regard to the properties described in Schedule "A" to the plaintiff are

set aside. The suit is sent back on remand to the Trial Court for specifying the shares of the properties described in Schedules "A", "B" and "C in the light of this judgment and taking into consideration of death of Babaji Sahoo in the mean time. However, the judgment and decree of the Trial Court relating to the disputed house standing on Plot No. 2413 is affirmed.

Both the appeal and the cross-appeal are disposed of.