
(1996) 02 OHC CK 0020
In the Orissa High Court
Case No : O.J.C. No. 8827 of 1992

Smt. Suka Dei

APPELLANT

Vs

Bishnu Pal and Others

RESPONDENT

Date of Decision : 07-02-1996

Acts Referred:

Citation : (1996) 1 OLR 416

Hon'ble Judges : D. Misra, J;A. Pasayat, J

Bench : Division Bench

Advocate : Prasanta Mohanty and A.K. Rath, for the Appellant; J. Gupta and R.N. Mohanty for opp. party No. 1, S. Jena, L. Jena and S.P. Mohanty for opp. party No. 4 and A.G.A. for opp. party Nos. 5 to 7, for the Respondent

Judgement

A. Pasayat, J.—Revisional order passed by the Commissioner of Consolidation, Orissa in a proceeding u/s 36 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (in short, "the Act") is underchallenge. Three revision applications were taken up together, and disposed of by the impugned order (Annexure-4 to the writ application).

2. Factual position as borne out from records is as follows : One Bishnu Pal filed three objection cases u/s 9 (3) of the Act claiming that he had equal share in the disputed properties along with Suka Dei, Dharendra Pal, Madhabi Dei, Maheswar Dutta and Basu Das. According to Bishnu, his share was 50% while that of others was 50%. Genealogy as stated by Bishnu (opp. party No. 1 in the present writ application) was to the following effect:

One Ekadasi had three sons, namely, Raghu, Rama and Dama. Raghu's wife was Hira. They had three daughters, namely, Jeme Jhuna and Puni. Puni and her husband Banchhanidhi are dead since long. Jhuna was married to Chakradhar and they had a son named Maheswar. Jema's husband was Anu and they had a daughter named Prabhati whose husband was Basu Das. Bishnu claimed adoption by Jema and Anu. Rama and his wife Padmabati died without leaving any heirs. Dama had three wives. He had two daughters named Tara and Janha,

and their husbands were Shyama and Khetrabasi respectively. Janha had a son named Dharendra and a daughter named Madhabi. Second wife of Dama did not have any issue. Dama's third wife Sali had a daughter named Suka, the present petitioner. On the basis of aforesaid genealogical position, claim of Bishnu was based.

3. The Consolidation Officer disallowed the claim by his order dated 28-6-1979. The matter was carried in appeal before the Deputy Director of Consolidation, Cuttack Range I u/s 12 of the Act. The said appellate authority upheld the decision of Consolidation Officer and disallowed the appeals.

4. Matter was carried in revision by Bishnu. Controversy was raised by the opponents of Bishnu about the school of law which governs the parties. Acceptability of the plea of adoption and the effect of registered gift-deed dated 20-12-1948 executed in favour of Suka by her father Dama recorded in 1929 settlement record-of-rights, and whether such recording took away the subsisting right of Hira and Padmahati came up for consideration by the Commissioner. He held that the disputed properties are to be recorded in favour of Suka and Bishnu each having equal share. It is to be noticed here that the revisional authority held that undisputedly the ancestors of the parties belonged to Bengal and were governed by Dayabhaga school of law. But after they migrated to Orissa, they adopted the law and usage applicable to the State of Orissa. For coming to such conclusion reference was made to an order passed in a proceeding u/s 116 of the Orissa Tenancy Act. 923 on 18-8-1927 wherein it was observed that the widows, Hira Bewa and Padma Bewa were governed by Mitakshara School of Law. There was practically no discussion on the adoption aspect. It is fairly accepted by the learned counsel for parties that the fate of claim of the parties would depend on the question of school of Hindu Law governing the parties, and the acceptability of plea of adoption.

5. The term "school of law", as applied to the different legal opinions prevalent in different parts of India, seems to have been first used by Mr. Colebrooke. (See 1 Stra. H. L. 315). There are in fact only two main school, the Mitakshara and the Dayabhaga. Undoubtedly, there are fundamental differences of doctrine between the Mitakshara the Dayabhaga schools. Any one who compares the Dayabhaga with the Mitakshara will observe that the two works differ in very vital points, and that they do so from the conscious application of completely different principles. The salient points of difference are as follows :

(i) Firstly, the Dayabhaga lays down the principle of religious efficacy as the ruling cannon in determining the order of succession; consequently, it rejects the preference of agnates to cognates, which distinguishes the other system, and arranges and limits the cognates upon principles peculiar to itself.

(ii) Secondly, it wholly denies the doctrine that property is b/ birth, which is the corner-stone of the joint family system. Hence it treats the father as the absolute owner of the property, and authorises him to dispose of it at his pleasure. It also

refuses to recognise any right in the son to a partition during his father's life.

(iii) Thirdly, it considers the brothers, or other collateral members of the joint family, as holding their shares in quasi-severally, and consequently recognises their right to dispose of them at their pleasure, while still undivided.

(iv) Fourthly, whether, as a result of the last principle, or upon independent grounds, it recognises the right of a widow in an undivided family to succeed to her husband's share if he dies without issue, and to enforce a partition on her own account. Prima facie, any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognized in that province

6. The particular school of Hindu Law or the customary law is applicable to the place to which the said Hindu belongs and recognised in the province. The law applicable to a Hindu is not merely a local law. It becomes the personal law, and a part of the status of every family which is governed by it. Consequently, where any such family migrates to another province. governed by another law, it carries its own law with it, including any custom having the force of law. That law is the law existing at the time of migration, as ascertained even from subsequent decisions in the domicile of origin and is not affected by customs incorporated therein, subsequent to the migration. if nothing is known about a person except that he has lived in a certain place, it will be assumed that his personal law is the law which prevails in that place, in that sense only domicile is important. But if more is known, then, in accordance with the knowledge of his personal law must be determined, unless it can be shown that he has renounced his original law in favour of the law of the place to which he migrated. In other words, when such an original variance of law is once established the presumption arises that it continues; and the onus of making out their contention lies upon those who assert that it has ceased by conformity to the law of the new domicile. But this presumption may be rebutted, by showing that the family has conformed in its religious or social usages to the locality in which it has settled; or that, while retaining its religious rites, it has acquiesced in a course of devolution of property, according to the common course of descent of property in that district, among persons of the same class. The rule that Hindu family residing in a particular state is prima facie governed by the law of that place is not founded on any doctrine affecting *lex loci*. the rule rests on personal law and status. In general it may be said that it matters of status, there is no *lex loci* in India and every person is governed by the law of his persona, status. The fact that the migratory family adopted some of the local usages is no ground to draw a presumption that it has renounced its original law and has adopted the *lex loci*, but if it can be shown that with regard to vital Sastric rites it has adopted the local practice, a presumption will follow that it has adopted the local law. Where a person pleads migration from another province or sets up a special custom in derogation of the rule of law in force in the province of residence, the burden lies on him to prove it.

7. In the case at hand, we find the materials on record to be inadequate to establish adoption of different school. Strong reliance has been placed by the revisional authority on some finding recorded in the proceeding u/s 116(1) of the Orissa Tenancy Act. That by itself would not suffice. It is to be borne in mind that the finding in regard to caste, custom and usage in a proceeding unconnected with those aspects would not be conclusive. Learned counsel for parties submitted that if opportunity is given, materials in support of the controversial question can be laid before the authorities.

8. Other material question relates to acceptability of the plea of adoption. of adoption. It is a singular circumstance that while the entire law of inheritance has been developed out of two verses of Yajnavalkya and half of a verse of Manu, and the doctrines of ancestral property and right by birth have been built upon a single verse of Yajnavalkya the adopted son, son, even, in early times, should have attracted greater attention the Smitas. Nonetheless the adopted or dattaka son had not in ancient India the great vogue which he has since acquired But he was not unknown even in Vedic times. it is evident that the spiritual motive was not so largely responsible for the increasing vogue of the dattaka as generally Imagined. The religious motive for adoption never altogether excluded the secular motive. The propriety of this motive was admitted by the Sanskrit writers themselves. In, V.T.S. Chandrasekhara Mudaliar (Died) and Others Vs. Kulandaivelu Mudaliar and Others, the apex Court observed that the substitution of a son of a deceased, for spiritual reasons, is the essence of adoption and the consequent devolution of property is a mere necessity to it. The validity of the adoption has to be judged by spiritual rather than temporal consideration and the devolution of property is of only secondary importance. The well-established doctrine as to the religious efficacy of sonship has been given full effect in the judgment of the Judicial Committee in AIR 1933 155 (Privy Council) .

9. The texts on the subject of adoption are fairly comprehensive and clear. The Mitakshara follows Manu, who makes the adopted son the heir not only to the adoptive father but to his kinsmen as well. The Dayabhaga citing Devala might on a prima facie view be taken to have named the adopted son in the second six of the twelve secondary sons. But it would seem that the "first six" who are mentioned as heirs to kinsmen in the Dayabhaga (x, 8) refers to the "first six" according to the order of enumeration. On that view the adopted son comes within the first six of the twelve secondary sons and is an heir to the adoptive father's collaterals as well. Manu makes the transfer of the adopted son from the natural family to the adoptive family complete, by declaring that "an adopted son shall never take the family name and the estate of his natural father...the funeral offerings of him who gives his son in adoption cease as far as that son is concerned". The Dattaka Mimamsa and the Dattaka Chandrika expressly lay down that the adopted son is a substitute for a real legitimate son both for purposes of inheritance and for purposes of funeral oblations, and that he is a Sapinda to the members of the adoptive family and that the forefathers of his adoptive mother are his "maternal grand-sires". An adopted son occupies the

same rights and privileges in the family of the adopter as the legitimate son, except in a few specified instances. The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adopters's family, as if he were born in it. It follows that an adopted son is the continuator of his adoptive father's line exactly as an "aurasa" son. and that an adoption so far as the continuity of the line is concerned, has a retrospective effect. The excepted instances relate to marriage and to the competition between the adopted son and an "aurasa" sort subsequently born to the same father. While adoption completely transfers the" adapted on to the adoptive family, as regards legal relationship and he loses all rights in the family of his birth, it does not sever the tie of physical blood relationship. There is no particular kind of evidence required to prove an adoption. Those who rely on it must establish it like any other fact, whether they are plaintiffs or defendants. Any person who seeks to displace the natural succession of property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and the performance of arty necessary ceremonies as well as all such facts as are necessary to constitute a valid adoption. It has to be borne in mind in that context that adoption is the admission of a stranger by birth to the privileges of a child by a legally recognized form of affiliation. In view of the nature of consequences which flow cm adoption, the claim of adoption has to be established by adducing cogent materials. Unfortunately the revisional authority had not considered the question of adoption in its proper perspective.

10. As the points in issue have not been properly dealt with by the revisional authority, and the parties have accepted that further materials are to be placed, we set aside the revisional authority's order (Annexure-4) and remit the matter back to the original authority for fresh consideration. We make it clear that we have not expressed any opinion on merits. The parties shall be permitted to place further materials on record if they so choose. An early decision in the matter would be appropriate, and therefore, the concerned authority would do well to dispose of the matter as early as practicable.

The writ application is disposed of accordingly. No cost.

D. Misra, J.

I agree.