
(1969) 10 OHC CK 0023

In the Orissa High Court

Case No : Second Appeal No's. 209 and 210 of 1964

Sobhabati Panigrahi

APPELLANT

Vs

Raghunath Panigrahi and Another

RESPONDENT

Date of Decision : 07-10-1969

Acts Referred:

Hindu Succession Act, 1956 — Section 11(2), 14, 14(1), 14(2)

Citation : (1970) 36 CLT 121

Hon'ble Judges : S. Acharya, J;B.K. Patra, J

Bench : Division Bench

Advocate : B. Pal, for the Appellant; R.C. Misra and A.K. Padhj, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Patra, J.—These two appeals arise out of a suit brought by Respondent No. 1 Raghunath Panigrahi against the Appellant Sobhabati for a declaration that the latter had no right to alienate the suit lands and that the sale affected by her in respect of a portion of these lands in favour of Defendant Respondent No. 2 Kondho Padhi is not binding on the Plaintiff Respondent. Sobhabati's husband Natabar and Respondent No. 1 Raghunath Panigrahi are brothers. Natabara died in 1950. Shortly before his death he executed a Will (Ext. 1) dated 29-4-1950 in favour of his wife Sobhabat J. An English translation of the relevant provisions of the Will as set out in the judgment of the trial Court is reproduced below:

I am now 36 years of age and have become diseased in body and have no hope of living. I have no issues born to me. I have got lands and a house at Hinjili village. I have kept with me and brought up Abhimanyu Panigrahi, son of Raghunath Panigrahi my brother, with the intention of adopting him but have not yet executed a deed of adoption. Shall my death occur before I can take a son in adoption, you (Sobhabati) will enjoy the income of my properties without however, any rights of alienation over the same you will take a Son in adoption for me from my family. If unfortunately he dies, you are to take another son in

adoption. In case you and the adopted son do not pull on well together, you will divide my properties into two equal parts and you will enjoy one such part again without any right of alienation. After you, the adopted son will be the absolute owner of all my properties and he will look after you during life time. May it be known that I have been divided from my brother 5 years ago and am in exclusive possession of all my properties.

According to the Plaintiff-Respondent, Sobhabati did not acquire under the terms of the Will any power to alienate the properties but that despite it she sold a portion of the disputed lands to Respondent No. 2 for Rs. 80/- on 2.6.1959 and delivered possession of the same to him. It is on these allegations that the Plaintiff Respondent brought the suit claiming the reliefs above mentioned. Sobhabati in her written statement contended that Natabara Panigrahi was separate from his brother Raghunath Panigrahi and was in exclusive possession of the disputed properties which had fallen to his share in partition and that although a limited estate therein was bequeathed to her under the Will she acquired an absolute right therein on the coming into force of the Hindu Succession Act (hereinafter referred to as the Act) and at present she is the absolute owner of the properties. She denied having alienated any portion of the suit properties and that consequently the Plaintiff-Respondent has no cause of action to bring the suit.

2. Issue No. 3 framed in the suit runs thus:

3. Whether the first Defendant (Sobhabati) is not the absolute owner of the suit lands as the share of her husband under the Hindu Succession Act?

In answering this issue, the learned Munsif held that Defendant No. 1 got a Hindu widow's estate under Ext. 1 but repelled the contention of Defendant No. 1 that this estate was enlarged into an absolute estate on the coming into force of the Act as in the opinion of the learned Munsif Section 14(2) of the Act clearly excludes such a contention. But having said so, he answered the issue against the Plaintiff. Issue No. 2 framed in the suit was that whether there was any alienation of land in favour of the Defendant No. 2 and the judgment shows that this issue was not pressed. In the result, the suit was dismissed.

3. As against the judgment, two appeals were filed one by the Plaintiff (T.A. No. 46 of 1963) and the other by the first Defendant (T.A. No. 43 of 1963). The learned Subordinate Judge held that under the Will Sobhabati got a life estate to enjoy the income of the property and had no right to alienate any portion thereof and by reason of Section 11(2) of the Act such a limited estate could not be enlarged into an absolute estate. Regarding the cause of action for the suit he held that the evidence let in on the Plaintiff's side that portion of the suit properties had been sold by Sobhabati in favour of Defendant No. 2 has gone unchallenged and that therefore the Plaintiff had a cause of action to bring the suit. In the result he dismissed T.A. No. 43 of 1963 and allowing T. A. No. 46 of 1963, he passed a decree declaring that Sobhabati had no right to alienate the

suit properties and that the sale effected by her in respect of portion of the suit lands in favour of Defendant No. 2 is invalid and not binding on the Plaintiff. Aggrieved by these decisions, Sobhabati has filed these two appeals contending that the Courts below have erred in holding that this case comes within the mischief of Section 14(2) of the Act and secondly that in view of the fact that issue No. 2 relating to the alleged alienation having not been pressed in the trial Court it was not open to the learned Subordinate Judge to hold on a consideration of the evidence on record that Defendant No. 1 had in fact alienated a portion of the suit properties in favour of Defendant No. 2 and that in view of the fact that this issue was not pressed in the trial Court, the suit should have been dismissed.

4. The main question for consideration in this case is whether the right which Sobhabati had over the disputed property of which she was admittedly in possession when the Act came into force in 1956 was by operation of Section 14(1) thereof enlarged so as to confer upon her an absolute right over the same. To appreciate this contention it is necessary to set down Section 14 of the Act.

14. Property of female Hindu to be her absolute property:

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as a limited owner.

Explanation: In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise or at a partition, or in lieu of maintenance, or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhan immediately before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a Will, or any other instrument or under a decree or order of a Civil Court or under an award when the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Thus, under Sub-section (1) the property possessed by a Hindu female whether acquired before or after the commencement of the Act which would under the Explanation include acquisitions by the several modes mentioned therein, namely, by inheritance or devise or at a partition, or in lieu of maintenance, or by gift or by her self-exertion or the property held by her as stridhan immediately before the commencement of the Act would become her absolute property if she was in possession thereof. While this is so, Sub-section (2) of Section 14 grafts an exception in Sub-section (1) and says that where a Hindu female acquires property in any of the modes enumerated in that sub-section and the terms of the instrument under which the right so acquired creates a restricted estate in

her, the provisions of Sub-section (1) would not apply to such a case and consequently such a restricted estate will not be enlarged. A property is said to be acquired when prior to the acquisition, the person acquiring it had no interest in the property. Relying on these general propositions of law, it is contended by Mr. H.C. Misra appearing for the Respondents that Sobhabati having acquired a right to the disputed properties under the Will Ext. 1, from the terms of which it is clear that she would have a restricted right over the properties without having any power of alienation whatsoever, the case would be one governed by Sub-section (2) of Section 14 and that Sub-section (1) would not have any application thereto. In support of his contention, he relied on two decisions of this Court in *Malli Bewa v. Dadhi Das* 1959 C.L.T. 551 and *Arakhit Das v. Hari Mohapatra and Ors.* 1963 C.L.T. 397. In the first case by a compromise decree between the adopted son and his widow mothers, the son got half share in the property and the widows got the remaining half share for their maintenance. The decree contained also that the widows would remain in possession of their shares till their life time, meet their maintenance out of the usufruct and if for any reason the usufruct be not sufficient then they would be entitled to sell such portion of their share as may be necessary. The property was in joint possession of the mothers and the son. Upon the death of one of the mothers, the other widow brought a suit for partition and claimed that as she was in possession of property along with her son at the commencement of the Act she became the full owner and not a limited owner. It was held by Barman, J. that by the compromise decree which was passed before the commencement of the Act only a restricted right was given to the widows and not an absolute right and therefore the case fell under Sub-section (2) and not under Sub-section (1) of Section 14 of the Act. In the other case, there was a dispute between one Antaryami and his adoptive mother Paluni Bewa. The dispute was carried to the Court of the Deputy Commissioner who passed an order that half of the properties would be recorded in the name of Paluni Bewa for her maintenance which she would enjoy till her death. In February, 1957, she executed a sale deed for a portion of the properties in favour of her brother's daughter's son, who in turn, transferred the property in favour of two others. On a suit filed by Antaryami, the question arose whether on the coming into force of the Act Paluni who was in possession of the property which she got under the orders of the Deputy Commissioner acquired an absolute right therein. Misra, J. (as he then was) held that the estate alienated by Paluni was a limited estate and the alienation which was not for legal necessity was not binding on AntaryamJ. The case of *Raghunath Sahu and Another Vs. Bhimsen Naik and Another*, decided by Barman and Misra JJ., was also cited. In that case, one Arakhit died leaving behind his Bon Plaintiff, widow (def. No. 3) and mother Dulei Bewa (deft. No. 2). Admittedly, Defendant No. 2 was entitled to a half share in the joint family properties under the Hindu Women's Right to Property Act as her husband died after 1937. The total lands of the family were about 21 acres and odd. Defendant No. 2 was therefore entitled to 10.69 acres in her own right. Dulei Bewa filed a suit for partition against the Plaintiff and Defendant No. 3 and it was ultimately compromised.

Under the compromise, Dulei Bewa was allotted 4.10 acres of land out of which she was given absolute right in respect of 1.10 acres (Ka schedule) and life interest in respect of the rest three acres of land (Kha and Ga schedules). In consideration thereof, she relinquished her right in respect of the other lands of the family. In May 1959, Defendant No. 2 sold the Kha schedule land to Defendant No. 1 by (sic) registered sale deed (Ext. A). The Plaintiff thereupon filed a suit for a declaration that the sale deed (Ext. A) was not binding on him beyond the life time of Defendant No. 2. The finding affected was that the sale deed Ext. A was without legal necessity. The Courts below held that Defendant No. 2 had only a limited estate in respect of the Kha and Ga schedule lands by virtue of Section 14(2) of the Act and in this view they decreed the Plaintiff's suit. On appeal, the learned Judges reversed the decree and dismissed the suit on the ground that where a decree for partition merely recognises the pre-existing right of a female to the property, it would come under the operation of Section 14(1) of the Act. They held that prior to the date of the compromise decree, Defendant No. 2 had already acquired title by inheritance to a half share in the family properties and that all that the compromise decree did was to declare that pre-existing title of Defendant No. 2 in the same, especially when there was no evidence to show that the value of the right which she got under the decree is in any way higher than the value of the right she possessed in the family properties before the decree. In the circumstance, it was held that she did not acquire for the first time the right to the 4.10 acres of land under the compromise decree. The case of *Th. Ajab Singh and Ors. v. Th. Ram Singh and Ors.* AIR 1959 J&K relates to a case of acquisition of rights under a Will. The property in dispute in that case was the self-acquired property of one Natha Singh who died leaving a Will. This Will gave Mst. Ram Piari the concubine of the testator, an estate for life in the property and expressly forbade her from alienating the corpus. On her death, the property was to devolve on the collateral heirs of the testator and failing them on the Arya Samaj. Mst. Ramo. Piari after taking the property under the will made an absolute alienation of it in favour of one Ajab Singh, as though she was the full owner. Thereupon, Ram Singh, the son of the testator and the other collateral heirs of the testator brought a suit for a declaration that the sale in favour of Ajab Singh did not enure beyond the life of Mst. Ram Piari. It was held that Section 12(2) of the Jammu and Kashmir Hindu Succession Act, 1956 (Section 12 corresponding to Section 14 of the Hindu Succession Act, 1956) applied in terms and that there can be no question of Mst. Ram Piari being the full owner of the suit property by virtue of Sub-section (1) of Section 12.

5. On the Appellant's side reliance is placed on the Bench decisions in *Raghunath Sahu v. Bhimsen Naik* AIR 1965 Orissa 59 already referred to and *Ude Chand and Ors. v. Mst. Raj* AIR 1965 P&H 329 which follows *Raghunath Sahu and Another Vs. Bhimsen Naik and Another*, and two single Bench decisions of Katju J. in *Shakuntala Devi Vs. Beni Madhav*, and of A. Misra J. in *Purna Chandra Barik and Ors. v. Nimai Charan Barik and Ors.* 1968 C.L.T. 853. We have already

referred to the facts in Raghunath Sahu a case and pointed out that even before the compromise decree, Dulei Bewa had a half share in the family properties measuring about 21 acres of land, although in character it was a limited estate and that in the compromise decree in the subsequent partition suit she was given 1.10 acres of land absolutely and about 3 acres of land to be held by her during the life time as a limited owner and it was not shown that the value of the rights allotted to her under the compromise decree was in any way higher than the value of the right which she had in the family properties before the compromise decree. In these circumstances, the learned Judges rightly held that she cannot be said to have acquired a right to the 4.10 acres of land for the first time under the compromise decree and that therefore Section 14(2) of the Act would not apply. The facts in the Punjab case were also similar. There on the death of one Desh Raj who owned about 65 bighas of land, the properties devolved on his widow Smt. Rajo. In 1954 the collaterals of Desh Raj brought a suit for possession of the properties against Rajo on the ground that she contracted a Karewa marriage and therefore forfeited her rights in the property. That suit was compromised whereby Rajo was allowed to continue in possession of 40 bighas of land during her life time and it was provided that after her death the property would go to the collaterals. The compromise further provided that Rajo would not have the right to alienate the properties in any manner. While Smt. Rajo was in possession of the properties, the Act came into force and thereafter Rajo filed a suit for a declaration that she was the full owner of the properties. The learned Judges held as regards 40 bighas of land which were in possession of Rajo at the time of the enforcement of the Act that the case was not covered by Sub-section (2) but by Sub-section (1) of Section 14 of the Act. They held that she had not acquired title to the lands on the basis of the compromise deed but being the widow of Desh Raj she acquired widow's estate on his death and this estate was converted into an absolute state by the coming into force of the Act in 1956. In the case reported in Purna Chandra Barik and Ors. v. Nimai Charan Barik and Ors. 1968 C.L.T. 853 in a family portion, some properties were allotted to one Laxmi towards her maintenance to be possessed and enjoyed by her. The recitals in the partition deed did not purport to create a restricted estate. A. Misra, J. there fore held that Section 14(2) did not apply and that by virtue of Section 14(1) she acquired full rights over the properties on the coming into force of the Act. In the Allahabad case Shakuntala Debi v. Dani Madhab AIR 1964 All the facts are these: The property in dispute belonged to one Pundri Kaksh who died in 1947. Shortly before his death, he had executed a Will the relevant portion of which runs thus:

That after my death my wife Smt. Shakuntala. Devi will be entitled to my share in the property and will enjoy the same as a Hindu widow.

She was also given the authority to adopt. She was in possession of the property when the Act came into force and the question arose whether the interest she had in the property would be enlarged into an absolute estate. The learned Judge recognised the position that if Shakuntala had been given only a life interest by

her husband under the Will she would not be entitled to the benefit of Sub-section (1) of Section 14 of the Act. But what she was given under the Will was a "widow's interest" under the Hindu Law which was very unlike the interest of a limited owner in the ordinary sense. A Hindu widow has authority to deal with the property of her husband. She is entitled to alienate the property for legal necessity. She can spend a portion itself on such necessity which is aimed at giving solace to the soul of her deceased husband. Subject to these conditions, she cannot sell the property during her life time and after her death, the property is to revert to the heirs of her husband.

That being the difference between a widow's estate and a limited heir's estate in the ordinary sense of the term, the learned Judge held that what Pundri Kaksha gave to Shakuntla was not only the life interest in the property but the interest of a Hindu widow and an interest which she was entitled by law to get in case she predeceased her husband. In these circumstances, the learned Judge held that Sub-section (2) of Section 14 of the Act did not apply but by virtue of Section 14(1) the widow's estate was enlarged into an absolute estate on the coming into force of the Act.

6. Now reverting to the facts of the present case it is quite clear from the recitals of the Will Ext. 1 that what was given there under to Sobhabati is not a widow's estate as it was in the Allahabad case referred to above. She was specifically prohibited from making any alienation of the property, a feature which is foreign to the conception of a widow's estate where a widow has got certain restricted right of alienation of the corpus of the property. This is not a case akin to the one dealt with in *Purna Chandra Barik and Ors. v. Nimai Charan Barik and Ors.* 1968 C.L.T. 853 because the document Ext. 1 which creates the right under which Sobhabati got the right itself, prescribes a restricted estate. It is, however, argued on the Appellant's side that the rights which Sobhabati acquired under the Will Ext. 1 are not higher than the rights which she would have got over the properties on the death of her husband and as her right to succeed to her husband's property and her right to take properties under the Will accrued simultaneously on the death of her husband, this must be construed to be a case where the Will gave her no higher rights than these she would have got had her husband died intestate and that therefore Section 14(1) applied and not Section 14(2) of the Act. It is not disputed that the property dealt with under the Will was separate property of Sobhabati's husband Natabara and therefore he was free to dispose of the same by Will, and he did execute a Will Ext. 1 in respect of the property. If only Natabar had died intestate leaving behind him the disputed property his wife would have inherited and held the same as a widow's estate. But Natabara did not die intestate and hence the question of Sobhabati succeeding to the property of her husband did not arise. She was the legatee under the Will and she is entitled to take the property only as such. It is not therefore open to her to say that what she got under the Will was only a recognition of her pre-existing right in the property or what she got under the Will is nothing higher than the right she had over it. There can therefore be no

doubt that Section 14(2) of the Act applies and consequently the right which Sobhabati got under the Will Ext. I could not be enlarged to that of an absolute interest. As under the Will she had no right to alienate the property, any alienation she might have made in favour of Defendant No. 2 would not be binding on the Plaintiff who is admittedly the reversioner of Natabara entitled to succeed to the property on the death of Sobhabati.

7. It is next argued that the alleged alienation of a portion of the suit property by Sobhabati in favour of Kondha Padhi Respondent No. 2 on which the cause of action for the suit was based having not been established, the suit in any event must be dismissed. It is already stated that the judgment of the trial Court shows that the issue relating to the alleged alienation in favour of Respondent No. 2 has not been pressed. But in appeal, the learned Subordinate Judge referred to the evidence on record and held that the alienation is true. It is argued on the Appellant's side that in view of the fact that the issue relating to the alienation was not pressed in the trial Court, it was not open to the learned Subordinate Judge to reopen the same and give his finding. Reliance is placed on a Bench decision of this Court in Hema Santra and Ors. v. Rani Soudamini Manjari Devi ILR 1962 Cutt. 673. That case, however, is distinguishable on facts. In that case, the Rani brought a suit for recovery of certain properties from the Defendants and contended that her title to the properties was based on a sale deed executed in her favour by the Raja. The plea taken by the Defendants was that the sale deed was executed Benami in her name. The sale deed itself was not executed by the Raja but by one Lokanath who claimed to do so under the power of attorney executed in his favour by the Raja. The power of attorney was on record and it was contended that this document did not give any specific authority to Lokanath to execute a sale deed on behalf of the Raja. It gave the authority to present documents on behalf of the Raja and to admit execution thereof. One of the issues framed in the suit was whether the suit was maintainable and this issue was not pressed in the trial Court by the Defendants. The trial Court decreed the suit and in appeal in this Court it was contended that on the basis of the recitals of the power of attorney it should be held that the sale deed was not validly executed in favour of the Plaintiff. This Court while repelling the contention stated that far from challenging the due execution of the sale deed by the Raja, the Defendants had contended that it was Benami thereby implying that the execution by the Raja was not disputed and that therefore it must be held that the document was executed at the Raja's instance and with his authority. It was observed that had the Defendants challenged the valid execution of the document at the proper stage, the Plaintiff might have given good evidence to repudiate this point. Having said so, their Lordships incidentally observed that the Defendants did not press issue No. 4 which relates to the cause of action for the suit and therefore it was not open to them to agitate the matter in appeal. The circumstances are entirely different in the present case. The cause of action for the suit brought by the Respondents is based on the alienation in favour of Defendant No. 2. Evidence was let in on the Respondents'

side to prove the alienation and this evidence has gone unchallenged. Admission of their evidence was not challenged in the trial Court on the ground that as the issue itself was not pressed such evidence was irrelevant. The contention now advanced on the Appellant's side does not appear to have been put forth before the learned Subordinate Judge that issue No. 1 in the suit having not been pressed, the entire cause of action had disappeared and that irrespective of findings on merits the suit has to fail. It appears to us that the learned Munsif having found that the Plaintiffs' suit has to fail on merits did not consider it necessary to deal with the further question about the alienation and recorded that the issue relating thereto was not pressed. That apart, it has not been shown that the Appellant is in any way prejudiced by the course adopted by the learned Subordinate Judge who on a consideration of the evidence already on record held that the alienation has been proved. This contention of the Appellant must also fail.

8. In the result, both the appeals fail and are hereby dismissed, but in the circumstances, without costs.

Acharya, J.

9. I agree.