ORISSA HIGH COURT: CUTTACK

FIRST APPEAL NO.161 OF 1988

From the Judgment dated 28.4.1988 and Decree dated 6.5.1988 passed by Sri S.K. Pattnaik, Subordinate Judge, Champua in Title Suit No.10 of 1984.

Natabar Pradhan (dead) after him,
his LRs Kulamani Pradhan & another ..... Appellants

V e r s u s

Smt. Chudamani Dei (dead) after her,
her LRs Sarbeswar Giri & others ... ... Respondents

For Appellants : M/s. B.H. Mohanty, J.K. Bastia, R.N. Panda, R.K. Nayak, S.C. Mohanty & B.Das

For Respondents : M/s. E. Raheman, N.C. Dey & R.Kar
Mr. S.B. Mohanta

P R E S E N T :

THE HONOURABLE MR. JUSTICE RAGHUBIR DASH

Date of hearing : 19.9.2013 Date of judgment : 27.9.2013

R. DASH, J. Being aggrieved by the judgment dated 28.4.1988 and the decree dated 6.5.1988 of the Court of the Subordinate Judge, Champua passed in T.S. No.10 of 1984 decreeing the plaintiff's suit for partition, defendant No.1 before the learned lower Court has preferred this appeal. Respondent No.1 (since dead) was the plaintiff before the learned lower Court. Consequent upon her death, her son and daughter have been substituted and arrayed as Respondent

No.1(a) and 1 (b). Respondent Nos.2 to 9 are defendant Nos.2 to 9, respectively.

2. The genealogy furnished by the plaintiff in the plaint is not in dispute. As per the genealogy Gananath Pradhan is the common predecessor who is the recorded owner of the plaint schedule 'A' land. Gananath had four sons, namely, Jadumani, Bhikari, Jagannath and Natabar. Jadumani died leaving behind two daughters, namely, Ahalya and Dukhini (the daughters are not arrayed as parties to the partition suit). Plaintiff is the daughter of Bhikari Pradhan. Jagannath Pradhan died issueless. Natabar Pradhan is defendant No.1.

According to the plaintiff, Jadumani died in 1939 leaving behind her daughters, Ahalya and Dukhini. Since Jadumani died while in joint ness, his interest in the joint family property devolved upon the three surviving brothers. After his death there was an amicable separation and the joint family properties were divided into three shares amongst Bhikari, Jagannath and Natabar. However, there was no partition by metes and bounds. Thereafter, Jagannath and his wife died leaving behind no issues. So, the interest of Jagannath in the joint family property devolved on the remaining two brothers, namely, Bhikari and Natabar. The two brothers orally divided the entire joint family properties but there was no partition by

metes and bounds. After the death of Bhikari in the year 1941 his daughter, the plaintiff, 'inherited' her father's property.

Further case of the plaintiff is that since she was staying in her matrimonial home, she experienced difficulties in looking after her properties (that she had inherited from her father). So she entered into an oral agreement with his paternal uncle, D.1, that the latter would look after her properties and both would share the profit derived therefrom in equal parts. This arrangement continued till 1981. In 1982 her uncle stopped making payment of her share of profit. Hence, the plaintiff has filed the suit claiming a half-share in the suit properties.

D.2 is a purchaser of plaint schedule 'B' land. D.3 to 9 are persons whose names find place in the remarks column of Hal R.O.R. with note of "Jabar Dakhali" made in the remarks column. According to the plaintiff, none of them is actually in possession of any portion of the suit land. Plaint schedule 'A-1' properties is said to be corresponding to the properties shown in plaint schedule 'A'. The Hal R.O.R. in respect of plaint schedule 'A.1' properties stands jointly recorded in the names of the plaintiff and D.1.

3. Basing on the pleadings of the parties, the learned trial Court framed the following issues:

1. Is the suit maintainable ?

2. Is there any cause of action ?

3. Is the suit barred by limitation ?

4. Is the suit bad for non-joinder of necessary parties ?

5. Was there any previous partition and the plaintiff was enjoying her share ?

6. Has the defendant deprived the plaintiff of her share ?

7. To what relief, the plaintiff is entitled to ?

4. All the defendants except Defendant No.1 have been set ex parte. D.1 has filed W.S. It is admitted in the W.S. that Jadumani, while in joint-ness, died in the year 1939. But it is denied that after the death of Jadumani there was any oral or amicable partition amongst the three surviving brothers, namely, Bhikari, Natabar and Jagannath. It is claimed that all the three brothers continued to remain in joint-ness and Jagannath, while in joint-ness, died issueless. It is also denied that after Jagannath's death, Bhikari and Natabar orally divided the joint family properties and after death of Bhikari his daughter inherited her interest in the joint family properties. It is also denied that there was any agreement between the plaintiff and defendant No.1 that the latter would look after the former's property and that till 1981 plaintiff and D.1 use to share the profit derived from plaintiff's inherited property.

5. Specific case of D.1 is that during life time of plaintiff's father, the entire family was joint in mess, residence and estate and

at no point of time till the death of all the three brothers of D.1 there was any separation in mess, residence and estate. Therefore, it is claimed, D.1 being the sole surviving son of Gananath has been owning and possessing the entire of the joint family properties in which the plaintiff has no share.

6. Plaintiff examined four witnesses and defendant No.1 examined two witnesses. Both the parties have exhibited documents. Learned trial court decreed the suit for partition mainly on the ground that plaintiff's mother after the death of Bhikari in the year 1941, inherited limited interest in the property under the Hindu Women's Right to Property Act, 1937 (for short, the Act of 1937) and she having died in 1987, after commencement of the Hindu Succession Act, 1956 (for short, the Act, 1956), had already become absolute owner of the property possessed by her and after her mother, the plaintiff succeeded to the property and there being no partition of the joint family property by metes and bound, the plaintiff is entitled to half of the suit property.

7. The appeal is preferred mainly on the grounds that the findings of the learned lower Court are contrary to law and beyond the pleadings of the parties and against the weight of evidence on record. It is contended that the learned Court below ought to have held that the interest of Bhikari in the joint family property devolved upon his surviving brother Natabar by survivorship and therefore,

nothing was left to be inherited by Bhikari's daughter. It is also contended that in the absence of pleadings, the learned lower Court could not have made out a third story that under the Act of 1937, Bhikari's widow inherited the interest of Bhikari which subsequently became absolute by virtue of Section 14 of the Act of 1956. In this appeal the following points are for determination:

(i) Whether the learned Court below is correct in its conclusion that plaintiff's father died in 1941 survived by his widow who inherited his interest under the provisions of the Act of 1937 and that interest became absolute under the provisions of the Act of 1956 and ultimately the plaintiff inherited the interest of Bhikari after the death of her mother.

(ii) Whether the interest of Bhikari, upon his death, devolved upon his surviving brother Natabar;

8. At the time of hearing, none appeared on behalf of the Respondents.

9. First, the point No.(i) for determination is taken up. While adjudicating on Issue No.5, which is on previous partition, the learned trial Court has concluded that there was no prior partition amongst the brothers of Bhikari. On a plain reading of the plaint itself it is nowhere found that the plaintiff asserted that there was partition by metes and bounds amongst the brothers of Bhikari. It is claimed

that there was amicable separation first, after the death of Jadumani and for the second time after the death of Jagannath Pradhan. But on both the occasions, as claimed by the plaintiff, there was no partition by metes and bounds. Though it is claimed that the brothers were living separately and the joint family properties were possessed separately, the plaintiff has failed to prove that plea. No reliable evidence is adduced on this assertion. Though the plaintiff has deposed to the effect that her father died while living separately, there is no other corroborative evidence in this regard. She was hardly 10 years old when her father died. The fact that she had no knowledge about the status of the joint family is evident from the fact that while in para-4 of her deposition she has stated that her father, Bhikari, and his brothers Jagannath and Natabar were living in joint mess and property when his father died, in para-5 of her deposition, which was recorded few days after her deposition recorded in para-4, she has stated that her father Bhikari died while living separately. No other witnesses from the village Balibandha, the village of the parties, have been examined by the plaintiff. P.Ws.2 to 4 do not say anything about the separate living of the brothers of Bhikari. The plaintiff herself is unable to say in which 'chaka' the property enjoyed by her father situated. It is also not specifically stated in the plaint as to which portions of the plaint schedule 'A' property were in the exclusive possession of plaintiff's father. Under such circumstances,

it cannot be said that even there was severance of joint status by the time Bhikari died and that Bhikari was separately possessing any portions of the joint family property. Consequently, P.W.1 is not believable when she claims in her deposition that after the death of her father she remained in cultivating possession of the landed property which was allotted to his father's share.

10. Thus, it is found that the learned trial Court has rightly held that there was no partition of the joint family property prior to the death of Bhikari and the brothers of Bhikari were living in joint mess and property till the death of Bhikari in the year 1941.

11. In the plaint there is no averment that Bhikari was survived by his widow as well. Nothing had been stated in the plaint about the plaintiff's mother. But, P.W.2 in his cross-examination dated 7.4.1988 has stated that plaintiff's mother died "last year". Thus, according to P.W.2 plaintiff's mother died in 1987. This statement of P.W.2 is not at all reliable. Had the plaintiff's mother been alive beyond 1956 then she would have filed the suit claiming that her limited interest in the property that she had inherited from her husband had become absolute under the provisions of the Act of 1956 or, the plaintiff would have made her a party to this suit. Plaintiff has stated that her mother died 4 to 5 years after the death of her father. Learned trial Court did not accept the plaintiff's statement observing that she is an illiterate rustic lady. But absence

of any averment in the plaint regarding the existence of plaintiff's mother gives rise to a presumption that her mother died before the Act of 1956 came into force. The learned trial Court accepted the statement of P.W.2 and on that uncorroborated statement built up a third story to come to a conclusion that since plaintiff's father died in 1941 survived by his widow who inherited his interest under the provisions of the Act of 1937, that interest became absolute under the provisions of the Act of 1956. In the absence of pleading on such an important fact the learned trial Court could not have based his aforestated findings solely on the basis of the statement of P.W.2. There is absolutely no pleading as to whether Bhikari left behind his widow and the widow remained in possession of any portion of the joint family property and she continued to be possessed of that property till the Act of 1956 came into force. In the absence of such pleadings any amount of evidence cannot be said to be sufficient to form the foundation of the findings that the learned lower Court has arrived at. In ***Abubakar Abdul Inamdar v. Harun Abdul Inamdar, AIR 1996 SC 112*** it is observed that no amount of proof can substitute pleadings which are the foundation of claim of a litigating party. The case of the plaintiff was never built up on the plank of Section 14 (1) of the Act of 1956. Therefore, the learned trial Court is not correct in its conclusion that the plaintiff inherited the interest of Bhikari after the death of her mother.

12. Now I shall come to point No.(ii). Plaint averment is to the effect that after death of Jagannath the remaining two brothers Bhikari and Natabar divided the entire property, though there was no partition by metes and bounds and, subsequently, after the death of Bhikari in the year 1941, the plaintiff being his daughter inherited his property. But according to D.1, all the sons of the common ancestor, Gananath, were living in joint mess and property till the death of Bhikari. And D.1 being the sole surviving coparcener, the entire joint family property devolved on him by survivorship.

13. It is not in dispute that the parties are governed by Mitakshara Law according to which when a Hindu male at the time of his death was a member of the joint and undivided family, his undivided interest in the coparcenary property devolves on his coparcener by survivorship. But if the deceased was separate at the time of his death from his other coparcener(s), his property passes to his heirs by succession (Chapter-IV, Article 34 of principles of Hindu Law by Mulla). In the case at hand, it is not proved by the plaintiff that Bhikari was separate at the time of his death. Therefore, the plaintiff cannot claim that Bhikari's property passed to her by succession. On the other hand, when it is found that Bhikari died in joint-ness, his undivided interest in the joint family property devolved on the other coparcener by survivorship. Consequently, the suit for partition at the instance of the plaintiff is not sustainable.

14. In the result, the First Appeal is allowed but, in the facts and circumstances, without cost. The impugned judgment dated 28.4.1988 and the decree dated 6.5.1988 of the Court of the Subordinate Judge, Champua passed in T.S. No.10 of 1984 are set aside. The plaintiff's suit for partition stands dismissed.

.....
R. Dash, J.

Orissa High Court, Cuttack
The 27th September, 2013/A.K.Kar, Secretary