HIGH COURT OF ORISSA: CUTTACK

S.A. No.16 of 2000 & S.A. No.15 of 2000

A.F.R.

S.A. No.16 of 2000

From the judgment and decree dated 28.10.1999 and 18.11.1999 respectively passed by Shri J.N. Panda, learned 1st Additional District Judge, Berhampur in T.A. No.37/99 (T.A. No.20/94 GDC) confirming the judgment and decree dated 22.2.1994 and 3.3.1994 respectively passed by Sri R.N. Panda, learned Munsif, Berhampur in T.S. No.117 of 1992.

S.A. No.15 of 2000

From the judgment and decree dated 28.10.1999 and 18.11.1999 respectively passed by Shri J.N. Panda, learned 1st Additional District Judge, Berhampur in T.A. No.38/99 (T.A. No.25/94 GDC) reversing the judgment and decree dated 22.2.1994 and 3.3.1994 respectively passed by Sri R.N. Panda, learned Munsif, Berhampur in T.S. No.117 of 1992.

Nainalu Krishna ..... Appellant

---versus—

K. Debraj @ K. Debraj Patra ..... Respondent

For Appellant : Mrs. Jyotsnamayee Sahoo, Advocate

For Respondent : Mr. B.K. Mohanty, Advocate

J U D G M E N T

P R E S E N T:

THE HON'BLE DR. JUSTICE A.K. RATH

Date of Hearing :11.12.2017 | Date of Judgment:22.12.2017

Dr. A.K. Rath, J. Since the common question of facts and law are involved in both the appeals, the same were heard together and are disposed of by this common judgment.

02. These appeals have been filed against the common judgment of the learned 1st Additional District Judge, Berhampur. The plaintiff-appellant instituted the suit for declaration.

03. The case of the plaintiff was that N. Narsamma was the daughter of N. Sarathi. She was serving as sweeper in Khallikote College, Berhampur. The plaintiff is the son of N. Chinneyya, brother of N. Narsamma. N. Narsamma was a spinster. She adopted the plaintiff at about 9 A.M on makar sankaranti day, when he was aged about 10 years old. There was giving and taking ceremony. The parents of the plaintiff physically handed over to him to N. Narsamma, who accepted him as her adopted son in presence of the relatives. The plaintiff was also looking after Narsamma, when she was ill. Narsamma executed a deed of acknowledgement of adoption as a token of evidence of adoption of the plaintiff on 20.3.92 before the Notary Public. Narsamma died on 24.8.92. The plaintiff was entitled to her retiral benefits. He was entitled to a post under the rehabilitation scheme. It was further pleaded that the defendant, who is the grandson of K. Papamma, the elder sister of Narsamma, had made a false claim and wanted to take all the death benefits of Narsamma on the ground that her grandfather K. Simadri had married to Narsamma and he is the only legal heir to get such benefits. He had created certain documents like affidavit said to have been sworn by Narsamma before the Notary Public and had made a counter claim on the basis of those false affidavits. With this factual scenario, the plaintiff instituted the suit seeking the reliefs mentioned supra.

04. The defendant filed a written statement. The case of the defendant was that N. Sarathi had two sons and two daughters, namely, N. Sanyasi, N. Chinneyya, K. Papamma and N. Narsamma. K. Papamma. The elder daughter of N. Sarathi married to K.

Simadri. The father of the defendant K. Krushnamurty was the only son of K. Papamma, the first wife of K. Simadri. His father, grandfather and grandmother K. Papamma are all dead. As K. Papamma was sick, K. Simadri married to N. Narsamma. After death of N. Narsamma, the defendant being her only legal heir was entitled to get the entire death benefits of her. But then the plaintiff, son of N. Chinneyya, by a fake document of adoption claimed the death benefits of Narsamma. Plaintiff is not the adopted son of N. Narsamma. He was all through rendering the services to his grandmother Narsamma, when she was ill. Narsamma died on 24.8.92. She had also sworn affidavits before the Executive Magistrate that she married to K. Simadri and as such, the defendant is the only legal heir and successor to her. She had nominated the defendant to get all the death benefits including her service benefits under the rehabilitation scheme.

05. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence. Learned trial court came to hold that the plaintiff is not the adopted son of N. Narsamma. He disbelieved the marriage of Narsamma with K. Simdari. Held so, it dismissed the suit. Feeling aggrieved, the plaintiff filed T.A. No.20/94 before the learned District Judge, Berhampur. The defendant also filed T.A. No.25/94. Both the appeals were transferred to the court of the learned 1st Additional District Judge, Berhampur and renumbered as T.A. No.37/99 and T.A. No.38/99 respectively and heard analogously. Learned lower appellate court dismissed T.A. No.37/99. In T.A. No.38/99, it held that Narsamma married to K. Simadri during life time of his first wife, K. Papamma, for the second time. The marriage is void. No petition under Sec.11 of the Hindu Marriage Act, 1955 was filed to declare the marriage void. With regard to succession of the death

and service benefits of Narsamma, it held that the plaintiff had created certain documents from 20.3.92 onwards initially creating a deed of acknowledgement of adoption getting the same sworn before the Notary Public. The rest of the documents were created thereafter. The defendant had proved Ext.A, the certified copy of the application dated 28.8.91 said to have been filed by Narsamma indicating therein that he will be entitled to get her death benefits. The transfer certificate, Ext.A/1, disclosed the name of the father of defendant as K. Krishnamurty. Ext.A/2 is an affidavit sworn by Narsamma before the Executive Magistrate intending to make the defendant as her nominee. It further held that though the marriage is void, but there is no decree declaring the same as void. Marriage is deemed to be in existence. Therefore, the defendant is entitled to succeed to the share of Narsamma under Sec.15(1)(b) of the Hindu Succession Act.

07. The second appeal was admitted on the substantial questions of law enumerated in ground nos.A, B and D of the memorandum of appeal. The same are:

> "(A) Whether the impugned judgments are perverse for non-consideration of the material on record more specifically Ext.2 ?
>
> (B) Whether the plaintiff has duly discharged the burden of proving his adoption ?
>
> (D) Whether the impugned finding of the learned courts below that the plaintiff is not entitled to get the service benefit of late Narsamma is perverse for non-consideration of Ext.4 ?"

08. Heard Mrs. Jyotsnamayee Sahoo on behalf of Mr. Manoj Kumar Misrha, learned Senior Advocate for the appellant and Mr. B.K. Mohanty, learned counsel for the respondent.

09. Mrs. Sahoo, learned counsel for the appellant submitted that plaintiff is the adopted son of Narsamma. There is ample

evidence on record that the plaintiff is the son of Narsamma. The medical prescription, money receipt, unregistered adoption deed and nomination form of N. Narsamma would show that plaintiff is the adopted son of Narsamma. The courts below committed a manifest illegality in non-suiting the plaintiff.

10. Per contra, Mr. Mohanty, learned counsel for the respondent submitted that since K. Papamma was ill, her husband, K. Simadri married to N. Narsamma, younger sister of K. Papamma. No petition was presented declaring the marriage is void. Learned lower appellate court has rightly holding that the defendant is entitled to the estate of Narsamma.

11. On a thorough scrutiny of evidence on record and pleadings, both the courts concurrently held that plaintiff is not the adopted son of N. Narsamma. The medical prescription, money receipt, nomination paper and unregistered adoption deed are not substitute of factum of giving and taking. The so-called adoption deed was made before the Notary Public. Rightly the courts below held that the plaintiff is not the adopted son.

12. The next question crops up as to whether the learned lower appellate court is justified in holding that the defendant is entitled to the estate of Narsamma, since there is no decree declaring the marriage void once it held that K. Simadri married to N. Narsamma for the second time during subsistence of the marriage.

13. In *Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another,* AIR 1988 SC 644, the apex Court held:

> "xxx xxx xxx
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> Clause (i) of S.5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in

contravention of this condition, therefore, is null and void. It was urged on behalf of the appellant that a marriage should not be treated as void because such a marriage was earlier recognised in law and custom. A reference was made to S.12 of the Act and it was said that in any event the marriage would be voidable. There is no merit in this contention. By reason of the overriding effect of the Act as mentioned in S.4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. So far as S.12 is concerned, it is confined to other categories of marriage and is not applicable to one solemnised in violation of S.5(i) of the Act. Sub-section (2) of S.12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by S.11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of S.16, which is quoted below, also throw light on this aspect:

"16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a

> decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents. (Emphasis added).
>
> Sub-section (1), by using the words underlined above clearly implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by S.12, sub- section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Ss. 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception."

14. The seminal question that hinges for consideration is as to whether the word 'son' in clause (a) of sub-sec.(1) of Sec.15 of Hindu Succession Act, 1956 takes within its sweep 'step son' also ?

15. Sec.15 of the Hindu Succession Act, 1956 provides general rules of succession in the case of female Hindus. It reads thus:

> "**15. General Rules of succession in the case of female Hindus**.—(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,--
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> (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
> (b) secondly, upon the heirs of the husband;
> (c) thirdly, upon the mother and father;
> (d) fourthly, upon the heirs of the father; and
> (e) lastly, upon the heirs of the mother.
>
> (2) Notwithstanding anything contained in sub-section(1),--
>
> (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs

> referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and
>
> (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband."

16. Sec.15(1)(a) of the Hindu Succession Act, 1956 was the subject matter of interpretation in *Lachman Singh vs. Kirpa Singh and others,* AIR 1987 SC 1616. The apex Court held:

> "4.The only question which is to be determined here is whether the expression 'sons' in clause (a) of S.15(1) of the Act includes step-sons also, i.e., sons of the husband of the deceased by another wife. In order to decide it, it is necessary to refer to some of the provisions of the Act. Section 3(j) of the Act defines 'related' as related by legitimate kinship but the proviso thereto states that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another and that any word expressing relationship or denoting 9 relative shall be construed accordingly. Section 6 and section 7 of the Act respectively deal with devolution of interest in co-parcenary property and devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru and illom. Sections 8 to 13 of the Act deal with rules of succession to the property of a male Hindu dying intestate. We are concerned in this case with the rules of succession to the property of a female Hindu dying intestate. Sections 15 and 16 of the Act are material for our purpose. Ordinarily laws of succession to property follow the natural inclinations of men and women. The list of heirs in section 15(1) of the Act is enumerated having regard to the current notions about propinquity or nearness of relationship. The words 'son' and 'step-son' are not defined in the Act. According to Collins English Dictionary a 'son' means a male offspring and 'step son' means a son of one's husband or wife by a former union. Under the Act a son of a female by her first marriage will not succeed to the estate of her 'second husband' on his dying intestate. In the case of a woman it is natural that a step son, that is, the son of her husband by his another wife is a step away from the son who has

come out of her own womb. But under the Act a step-son of a female dying intestate is an heir and that is so because the family headed by a male is considered as a social unit. If a step-son does not fall within the scope of the expression 'sons' in clause (a) of section 15(1)of the Act, he is sure to fall under clause (b) thereof being an heir of the husband. The word 'sons' in clause (a) of section 15(1) of the Act includes (i) sons born out of the womb of a female by the same husband or by different husbands including illegitimate sons too in view of section 3(j) of the Act and (ii) adopted sons who are deemed to be sons for purposes of inheritance. Children of any predeceased son or adopted son also fall within the meaning of the expression 'sons'. If Parliament had felt that the word 'sons' should include 'step-sons' also it would have said so in express terms. We should remember that under the Hindu law as it stood prior to the coming into force of the Act, a step-son, i.e., a son of the husband of a female by another wife did not simultaneously succeed to the stridhana of the female on her dying intestate. In that case the son born out of her womb had precedence over a step-son. Parliament would have made express provision in the Act if it intended that there should be such a radical departure from the past. We are of the view that the word 'sons' in clause (a) of section 15(1) of the Act does not include 'step-sons' and that step-sons fall in the category of the heirs of the husband referred to in clause (b) thereof."

xxx xxx xxx

6. ……The words 'sons and daughters ..... and the husband' in clause (a) of section 15(1) only mean 'sons and daughters ..... and the husband' of the deceased. They cannot be 'sons and daughters ..... and the husband' of any body else. All relatives named in the different clauses in sub-section (1) of section 15 of the Act are those who are related to the deceased in the manner specified therein. They are sons, daughters, husband, heirs of the husband, mother and father, heirs of the father and heirs of the mother of the deceased. The use of the words 'of the deceased' following 'son or daughter' in clauses (a) and (b) of sub-section (2) of section 15 of the Act makes no difference. The words 'son or daughter of the deceased (including the children of any predeceased son or daughter)' in clauses (a) and (b) of section 15(2) of the Act refer to the entire body of heirs failing under clause(a) of section 15(1) of the Act except the husband. What clauses (a) and (b) of sub-section (2) of section 15 of the Act do is that they make a

> distinction between devolution of the property inherited by a female Hindu dying intestate from her father or mother on the one hand and the property inherited by her from her husband and from her father-in-law on the other. In the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter), in a case failing under clause (a) of section 15(2) of the Act the property devolves upon the heirs of the father of the deceased and in a case falling under clause(b) of section 15(2) of the Act the property devolves upon the heirs of the husband of the deceased."
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> xxx xxx xxx
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> Is it just and proper to construe that under clause (a) of section 15(1) of the Act her stepsons and step-daughters, i.e., children of the husband by another wife will be entitled to a share along with her own children when the Act does not expressly says so? We do not think that the view expressed by the High Court of Allahabad represents the true intent of the law. When once a property becomes the absolute property of a female Hindu it shall devolve first on her children (including children of the' predeceased son and daughter) as provided in section 15(1)(a) of the Act and then on other heirs subject only to the limited change introduced in section 15(2) of the Act. The step-sons or step-daughters will come in as heirs only under clause (b) of section 15(1) or under clause (b) of section 15(2) of the Act. We do not, therefore, agree with the reasons given by the Allahabad High Court in support of its decision. We disagree with this decision."

17. In the result, the judgment of the learned lower appellate court in T.A. No.37/99 is confirmed; and that of T.A. No.38/99 is set aside. Consequently, the suit is dismissed. The appeal is allowed to the extent indicated above. No costs.

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Dr. A.K. Rath,J.

Orissa High Court, Cuttack
The 22nd December, 2017/Basanta