Ambalika Padhi and another

Vs

Radhakrishna Padhi and others

Civil Appeal No. 3173 of 1981

(M.M. Punchhi, B.P. Jeevan Reddy JJ)

06.12.1991

JUDGEMENT

JEEVAN REDDY, J. :-

1. This Civil Appeal is preferred by the plaintiffs against the judgment and decrees of the Orissa High Court made in three appeals viz., F..A. No, 145 of 1971, F.A. No. 9 of 1972 and F.A. No. 15 of 1972 (reported in AIR 1981 Orissa 63),

2. The suit was instituted by Smt. Urmila Padhi for declaration of her title to plaint B schedule lands and confirmation of her possession thereon. The basis of her claim was the partition effected on 22-6-1968. Alternatively, she prayed for a fresh partition. (Certain other minor reliefs were sought for which need not be set out here). According to her, Judhishter (D-1) and Srinivas were brothers. Defendants 2 and 3 are the sons of first defendant. Srinivas had a son, Khalli who died long prior to the institution of the suit. Plaintiff is his widow. First defendant was the karta of thejoint family and was managing its affairs. In the year 1967, there was a partition wherein plaintiff was given six annas' share while 10 annas' share was kept by first defendant and his family. A deed of partition was executed on 22-6-1968 and registered on 27-6-1968. Since then, parties are in separate possession and enjoyment of the lands falling to their respective shares. Plaintiff was atflicted by cancer. D-4 is her sister. She appointed the husband of the fourth defendant as her power of attorney-holder to manage her properties. On 31-10-1968, she executed a deed of settlement in respect of some of her properties (mentioned in plaint-D schedule) in favour of fourth defendant and simultaneously cancelled the power of attorney in favour of her husband. On 24-1-1969, she executed a will in favour of her brother,s son in respect of her remaining properties. While she was at Cuttack, defendants 1, 2 and 3 did not allow her or her representatives/ agents to harvest the paddy or collect the uslufruct from her lands. Hence the suit.

3. Plaintiff Urmila died pending the suit. Her brother's son Bhojakrishna Panda came on record as her legal representative on the basis of the will dated 24-1-1969. Fourth defendant supported the plaintiffs case and later transposed as plaintiff No. 2.

4. First defendant too died after institution of the suit. His daughter Mahalakshmi was brought on records as his legal representative along with defendants 2 and 3. Son of Mahalakshmi was impleaded as fifth defendant. The case of Mahalakshmi and D-5 was that fifth defendant was taken in adoption by plaintiff on 17-4-1968 after performing the necessary rites, which is evidenced by a registered deed of adoption. They admitted the story of partition set up by the plaintiff. They denied the validity of the will dated 24-11-1969. According to them, plaintiff Urmila died on 20-4-1967 at Cuttack while undergoing treatment for cancer. On the date of alleged will (i.e. on 21-4-1969),she

was not in a fit state of mind nor did she have any independent advice available to her. The fourth defendant took advantage of her situation and obtained the said will from her, they stated.

5. D-2 along with her wife D-6 filed a separate written statement. They did not seriously contest the case except trying to safeguard the partition between the plaintiff and Judhishter. They put forward an inter se partition between D-2 and the third defendant.

6. Third defendant also filed a separate written statement wherein he denied the story of partition. According to him, the second defendant is the culprit behind the whole game and it is he who, with a view to secure a major portion of the property, created several documents with the help of the fourth defendant's husband. According to him, a partition had taken place between defendants 1, 2 and 3 in the year, 1952 and, therefore, there was no occasion for another partition in the year,1968.

7. On the above pleadings the trial court framed appropriate issues and decreed the suit with the following findings:

> (a) the plea of partition in the year 1952 put forward by third defendant is not established;
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> (b) there was a partition in 1968 as alleged by plaintiff and it was also acted upon;
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> (c) the claim of adoption of fifth defendant by plaintiff, Urmila is not established; and

(d) the deed of settlement and the will executed by the first plaintiff are valid.

8. Accordingly, a declaration of title over the disputed property was granted in favour of the plaintiffs and the defendants were restrained from interfering with the plaintiffs possession. The claim for mesne profits was, however, negatived.

9. Three appeals were preferred in the Orissa High Court. F.A. No. 145 of 1971 by third defendant, F.A. No. 9 of 1972 by defendant No.l (c) (Mahalakshmi) and her son, fifth defendant and F.A. No. 15 of 1972 by the second defendant and his wife, the sixth defendant. All the three appeals were heard together by a Division Bench. Before the Division Bench a "preliminary objection" was raised by the appellants/ defendants that "the suit as it stands is not maintainable and plaintiffs 1 and 2 who have been substituted in place of Urmila after her death during the pendency of the suit cannot proceed on with the suit and they are also not entitled to the reliefs which were claimed by Urmila". It was contended by the defendants/ appellants that the legal representatives of the deceased plaintiff, Urmila, are not members of the family; that they are strangers and that "they cannot prosecute the suit as if the original plaintiff is not dead." They relied upon certain decisions in support of their contentions. The Division Bench referred to those decisions, to the wording of reliefs sought for in the plaint and observed (AIR 1981 Orissa 63, para 5):

> "Thus, it would appear that the contention of Urmila in the plaint was that she was in possession of the properties, especially schedule 'B' properties, and she prayed for injunction against defendants 1 to 3 for restraining them from interfering with her possession in respect of the said properties. Ambalika (plaintiff No. 2) is a settlee. If Ambalika now claims possession by virtue of the deed of settlement, then it would be contrary to the claim of Urmila made in the plaint and would go against the interest claimed by Urmila. Plaintiff No. 1 claims on the strength of a will. Of course,

> probate is not necessary in the district of which the properties belong. But for claim of title on the strength of will, all the requirements or the genuineness of the Will are to be gone into. But from the nature of the suit set up by Urmila which is being continued by both the plaintiffs, these questions cannot be gone into. Therefore, title to be set up by both the plaintiffs relates on the deeds of assignments and testamentary document in favour of the respective plaintiffs. They have to claim title and either for confirmation of possession or for recovery of possession. This cannot be the prayer of Urmila. The claims of both the plaintiffs are based on their own individual rights, but not as representatives of Urmila to continue the suit for the reliefs claimed in the suit."

10. The Division Bench then proceeded to observe that the plaintiffs (brought on record as legal representatives of original plaintiff, Urmila) cannot agitate their rights based upon the deed of settement or deed of will in this suit and that they can do so only in a separate suit. The Division Bench observed further (AIR 1981 Orissa 63, Para 7):

> "the right of partition or the right as prayed for was personal to the original plaintiff namely Urmila and the present plaintiff not being the natural heirs cannot continue the suit for partition unless they establish their right by devolution under settlement and will.,,

11. The Division Bench was of the opinion that the cause of action for both the present plaintiffs (who have been substituted and transposed) is entirely different from the cause of action which was available to the plaintiff. While one claims under a statement, the other claims under a will. The deed of settlement also does not say that the possession has been delivered to second plaintiff. Therefore, they are also not entitled to the injunction. Another observation made by the Bench is to the following effect (AIR 1981 Orissa 63 at pp. 67-68):

> "There is no prayer for declaration of title or for recovery of possession. The present plaintiffs are not entitled to injunction inasmuch as they are not in possession. There cannot be any injunction against the defendants in respect of the entire joint family properties when admittedly they are cosharers. In view of this possession, the decree as described above is wrong."

12. Finally, the Division Bench reiterated its view, stated earlier, that since the present plaintiffs are claiming on the basis of settlement and will, their cause of action is different from that of the original plaintiff and therefore, they cannot continue the suit. Accordingly, the Bench vacated all the findings of the trial court with the observation that the legal representatives of the original plaintiff should be left to work out their own rights in independent suits. All the three appeals were allowed and the suit filed by Urmila was dismissed.

13. We have heard counsel for the parties and are of the considered opinion that the High Court was wrong in allowing the appeals and dismissing the suit on the so called "preliminary objection", without going into the merits of the appeals. The trial court has fond both the settlement and will in favour of the present plaintiffs true and valid. The present plaintiffs are claiming under the original plaintiff and are continuing the same suit. They have not amended the basis of the suit or the reliefs asked for. We are unable to see how their cause of action is different from the cause of action of the oiginal plaintiff merely because they are claiming to be legal representatives under a settlement and a will. The Division Bench considers that had the present plaintiffs been natural heirs they would

have been entitled to continue the suit but, they say, since the present plaintiffs are claiming on the basis of a deed of settlement and a will, they cannot do so. With respect, we are unable to understand this reasoning. The present plaintiffs were indeed seeking to continue the suit as filed by the original plaintiff and for the same reliefs as were claimed by her. They were not claiming any other or different right. Indeed, the settlement and will executed in their favour were in issue in the suit filed by the original plaintiff herself and findings were recorded affirming both the deeds. The right claimed by the original plaintiff was not a personal right. It was right to property which she settled upon and bequeathed to the present plaintiffs. In such circumstances, the "preliminary objection" raised by the appellants in their appeals, which they did not raise in the suit, ought not to have been entertained much less accepted.

14. We may now briefly refer to the decisions relied upon by the High Court in support of its propositions.

15. The first decision cited is in Mahindra Singh v. Chander Singh (AIR 1957 Patna 79). The reference of this decision is not given in the body of the judgment and, therefore, it is not possible to deal with the principle of the said judgment. However, two paragraphs from this judgment are quoted in the judgment under appeal which merely reiterate the well established principle that a legal representative can only prosecute the cause of action as originally framed in the suit and that if it becomes apparent that the original cause of action is being substituted by another cause of action the matter must be directed to be agitated by way of a separate suit.

The next decision is in Dukh Haran Tewary v. Dulhin Bihasa Kuer, AIR 1963 Patna 390. This decision merely holds that an order impleading certain persons as legal representatives of a deceased party does not confer upon them any title as such and that such order does not bar a regular suit regarding the question as to who is the. real heir to the deceased party.

16. The next decision cited is in Om Prakash v. Union of India, AIR 1978 Punj & Har 272. A learned single Judge held that in personal actions, the cause of action comes to an end with the death of the plaintiff. In that case the plaintiff was retired from service on his attaining the age of superannuation taking his date of birth as 1-12-1913. He filed a suit for a declaration that his retirement on the c said basis is illegal. He also questioned certain punishment imposed upon him for producing false certificate. During the pendency of the appeal, he died. In those circumstances, it was held that since the claim made by him was personal in nature, the cause of action does not survive.

17. Kunwar Singh V. Om Kant, AIR 1978 Jammu and Kashmir 22, is a decision of a learned single Judge of Jammu and Kashmir High Court. The landlord sued for eviction of the tenant on the ground of personal necessity. Pending the appeal, the landlord died.It was held that since the right claimed was personal in nature, it does not survive the plaintiff.

18. The next decision is in Vanamamalai Thevar v. Narayana Pillai, (1968) 2 Mad LJ 622. That was a case where the plaintiff had only a life interest conferred upon him under a deed of settlement. He instituted a suit to recover possession from alienee/defendants. Pending the appeal, the plaintiff dies. It was held that since his interest was only a life interest, the relief claimed by him in the suit cannot be granted in favour of his legal representatives.

19. Dareppa Alaguoda v. Mallappa Shivalingappa, AIR 1947 Bombay 307 is again a case where it was reiterated that the legal representatives of a deceased defendant cannot assert his own individual

or hostile title in the suit and that he must abide by and continue the defence taken by the deceased defendant.

20. The last decision cited is in Ram Ugrah v. Ganesh Singh, AIR 1940 Allahabad 99, a decison of a Full Bench of Allahabad High Court. In this case too, the principle affirmed is that a legal representative brought on record in place of mortgagor cannot raise a defence in the final decree proceedings.that the mortgage being without legal necessity is not binding on them.

21. It would be evident that none of the decisions support the proposition that even where the subject matter of the suit is right to property and the legal representatives wish to continue the suit as originally framed, they cannot be permitted to do so if they are not natural heirs or if they claim on the basis of a deed of settlement and/ or will.

22. The Civil Appeal, accordingly, succeeds and is allowed herewith. The judgment and decree of the Orissa High Court in the three first appeals mentioned hereinabove are set aside. The High Court shall now bear and dispose of the said appeals on merits, in accordance with law. The appellants/defendants are entitled to costs in this appeal and costs of the appeals in the High Court from the defendants.

Appeal allowed.

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