

ORISSA HIGH COURT

Binod Naik

Vs

Chandrasekhar Padhi

Second Appeal No. 591 of 1964

(G.K. Misra, J.)

10.09.1968

JUDGMENT

G.K. Misra, J.

1. Kalu Rana (defendant No. 1) had two sons Gangadhar (defendant No. 2) and Banchhanidhi (defendant No. 3) and a daughter Chandra who was impleaded as respondent No. 1 (b) in the lower appellate Court. His wife Pata was also impleaded as respondent No. 1 (a) in the lower appellate Court. The plaintiff purchased the disputed land from defendant No. 1 by a registered sale deed Ext. 2 on 9-4-43 for Rs. 1200. Defendant No. 4 purchased 2/3rds of the suit land from defendants 2 and 3 by a registered sale deed Ext. A on 29-8-1943 for Rs. 880. The plaintiff's case is that the disputed land was the ancestral property of the family of Kalu and the sale was for legal necessity and antecedent debts made by Kalu as the Karta of the family. The subsequent sale Ext. A by defendants 2 and 3 is not valid as they had no further subsisting interest. The suit is also for recovery of possession. The learned trial Court held that the suit land was the joint family property, but by the date of sale by Kalu there was disruption of joint status and that Kalu did not sell the property as the Karta for legal necessity and antecedent debts. He dismissed the suit. The lower appellate Court reversed the trial Court's finding on all points. He held that the suit land constituted ancestral property of the family and Kalu sold the same for legal necessity and antecedent debts, and the sale was binding and valid. He accordingly decreed the suit. Against the reversing decree this Second Appeal has been filed by the legal representatives of defendant No. 4.

2. Mr. Mohanty raised the following contentions :-

- (1) In Ext. 2 there was a recital that the property was the self-acquisition of Kalu and there was no recital that he sold the same as the Karta of the family. On the aforesaid facts the lower appellate Court should have held that Kalu did not transfer the property as the Karta of the family and as such the sale under Ext. 2 was not binding on defendants 2 and 3.
- (2) The finding of the lower appellate Court that Ext. 2 was for consideration and legal necessity is contrary to law and is not based on consideration of all the relevant materials

on record.

(3) The appeal in the lower appellate Court abated as Satya, daughter of Gangadhar, was not substituted on the death of Kalu on 23-10-60 and on the death of Pata on 14-11-61.

(4) In A. H. O. No. 4 of 1950 of this Court the previous suit filed by the plaintiff was allowed to be withdrawn only on condition that the plaintiff would deposit in Court the costs incurred by the defendants in all the stages of that litigation and that such costs should be assessed by the Registrar and fixed, and the decree of the High Court would be drawn up incorporating the conditions indicated therein. Though the costs were deposited the costs were not assessed by the Registrar but by the Deputy Registrar of the High Court and as such the condition imposed in the order of the High Court dated 19-2-53 was not complied with and the present suit is not maintainable.

All these contentions require careful examination.

3. The finding of the lower Appellate Court that Ext. 2 was for consideration and supported by legal necessity and antecedent debts is a pure finding of fact and is not assailable in Second Appeal. After having carefully gone through the judgment of the lower appellate Court I am satisfied that the relevant materials have been taken into consideration. This contention must accordingly be rejected.

4. The second contention is that on the face of the recital in Ext. 2 that the property was the self-acquisition of Kalu, the Courts below acted contrary to law in arriving at a conclusion that it was joint family property. This contention has equally no force. It is open to the Courts of facts to examine the entire evidence on record and come to a conclusion whether it is joint family property despite recital to the contrary in the sale deed. Reliance has been placed by Mr. Mohanty on *Balmukand v. Kamla Wati*¹ and *Radhakrishnadas v. Kaluram*². These very decisions lay down that the intention of the parties must be gathered on the basis of all the circumstances. On the finding that the property was joint family property and the father alienated the property for consideration and for legal necessity and antecedent debts, the conclusion that he transferred the same as the Karta of the family is not contrary to law. This contention is accordingly rejected.

5. The third contention is based on a case of abatement arising in the lower appellate Court. The facts leading to the abatement may be stated in brief. Kalu died on 23-10-60. The plaintiff filed an application to make his widow Pata and daughter Chandra as parties respondents. Banchhanidhi and Lingaraj were already on record as heirs. Pata died on 14-11-61. The plaintiff filed a petition stating that the heirs of Banchhanidhi and Chandra are already on record. He, however, omitted to mention the name of Lingaraj though he is a legal representative. But the mistake has no significant value as Lingaraj is already on record. The defendants did not raise any objection at any of the two stages that Lingaraj had a sister named Satya. Substitution was allowed without objection and the first appeal was allowed. In second Appeal an application was first filed that Gangadhar had a daughter Kora. Objection was filed by the plaintiff that Kora was the wife of Gangadhar and had predeceased him in 1956.

Thereafter the appellant filed another application that Lingaraj had a sister Satya. To this no counter was filed by the plaintiff. Mr. Panda relied on the earlier counter filed in this case on 15-1-66 that Gangadhar died leaving no daughter. Two questions arise for consideration –

(i) Whether Gangadhar has a daughter Satya, and (ii) Even assuming that Gangadhar has a daughter Satya, whether the appeal would be taken to have abated in the lower appellate Court due to non-substitution of Satya as legal representative of Kalu or Pata.

So far as the first question is concerned, Mr. Panda contended that in the trial Court the substitution of Satya was in question when Gangadhar died on 28-3-1958 and therein the trial was allowed to proceed without substituting Satya. Mr. Mohanty on the other hand contended that there was no finding by the trial Court that Gangadhar had no daughter as Satya. It appears from the order dated 19-2-59 that Satya was not allowed to be substituted on the following observation :-

"As minor D. 2 (a) is already represented from beginning and no objection was taken that any L. R. is there and when practically no relief is sought against D. 2 or his L. Rs. the counter is overruled to this extent that any other L. R. is there for D. 2. Implead D. 2 (a),"

Mr. Mohanty is, therefore, correct in saying that there was no determination in the suit that Gangadhar had no daughter as Satya. All that was decided was that Lingaraj defendant No. 2 (a) represented Satya. Existence of Satya was therefore, assumed. In Second Appeal there has been no enquiry as to the existence of Satya. It is not necessary to make an enquiry as to whether Gangadhar had a daughter Satya on two grounds. The fight is between the two transferees, the plaintiff and the legal representatives of defendant No. 4. Whatever interest Gangadhar and Banchhanidhi had was transferred to original defendant No. 4. In either case the legal representatives of defendants 2 and 3 have no subsisting interest. The plaintiff is bound to succeed in respect of 1/3rd interest of Kalu. The other 2/3rds interest would go to defendant No. 4 if the plaintiff's suit fails. On this ground there is no question of abatement. Even assuming there is abatement in the facts and circumstances of this case, defendant No. 2 (a) would be taken as representing the interest of Satya. The matter is concluded by the decision of the Supreme Court in *Dolai Maliko v. Krishna Chandra Patnaik*³. On identical facts this Court held that the appeal in the lower appellate Court abated. The Supreme Court set aside the High Court judgment and observed thus :

"Even in a case where on the death of one of the appellants, his heirs apply for bringing themselves on record as his legal representatives, unless there is fraud or collusion or there are other circumstances which indicate that there has not been a fair or real trial or that against the absent heir there was a special case which was not and could not be tried in the proceeding, there is no reason why the heirs who have applied for being brought on record could not be allowed to represent the entire estate including the heirs not brought on record".

The identical principle applies to this case. Mr. Mohanty however contends that the aforesaid principle requires re-examination after the passing of the Hindu Succession Act whereunder a daughter is an heir in her own independent right, title and interest. On the question of abatement a daughter being an independent heir as the son makes no difference. The entire group of persons representing an estate can be represented through one of the heirs provided the other conditions

mentioned in the aforesaid decision subsist. I am therefore of opinion that the appeal did not abate in the lower appellate Court and defendant No. 2 (a) Lingaraj represented his interest and that of Satya.

6. The next question for consideration is whether the suit is maintainable as the costs of all the courts in the previous litigation were not assessed by the Registrar of the High Court. The order in A. H. O. No. 4 of 1950 runs thus :

"In the fresh suit that may be filed, the 4th defendant's equity, if any, to recover back his money from defendants 2 and 3 or from the plaintiff, as the case may be, may be worked out so as not to drive him to bring a fresh suit to recover his money which may be open to the bar of limitation. Subject to this the leave asked for is granted and on condition that before filing a fresh suit the plaintiff will deposit into Court the costs incurred by the defendants in all the stages of the present litigation upto date. Such costs will be assessed by the Registrar and fixed and the decree of this Court will be drawn up incorporating the conditions above indicated and specifying the amount to be paid as costs."

In accordance with this order the decree was prepared in the High Court and costs were assessed. The decree is signed by the Deputy Registrar. It is accordingly contended by Mr. Mohanty that the costs have not been assessed by the Registrar and the condition precedent has not been fulfilled. There is no substance in this contention. Under the rules of the High Court the decree is to be signed by the Deputy Registrar. Costs were assessed. The decree was notified. No objection was taken that the costs were not assessed by the Registrar or that the real costs were not assessed. There is no material on the record also to show that costs were not assessed by the Registrar. There is no dispute that the entire costs have been deposited before the institution of the suit. I am satisfied that the condition precedent was fulfilled and the suit is maintainable.

7. The last contention of Mr. Mohanty is that defendants 2 and 3 should be directed to pay Rs. 880 to defendant No. 4. The learned lower appellate court gave that direction in Para 17 of his judgment. As in the final order passed in the judgment he did not incorporate this direction, the decree does not contain it. It is hereby ordered that defendants 2 (a) and 3 do pay Rs. 880 to defendant No. 4. This amount will carry interest from today onwards at 6 per cent per annum.

8. Subject to the aforesaid observation regarding payment of Rs. 880 by defendants 2 (a) and 3 to defendant No. 4 the appeal fails and is dismissed. But in the circumstances parties to bear their own costs throughout.

Order accordingly.

Cases Referred.

¹ AIR 1964 SC 1385

² AIR 1967 SC 574

³ AIR 1967 SC 49