

ORISSA HIGH COURT

Hemalata

Vs

Umasankari

A.H.O. No. 2 of 1974

(G.K. Misra, C.J. and N.K. Das, J.)

12.02.1975

JUDGMENT

G.K. Misra, C.J.

1. The disputed properties belonged to one Hadibandhu Moharana who died in 1943 leaving behind Chanda, Dinabandhu and Hemalata who were respectively his widow, son and daughter. Chanda filed a suit for partition in forma pauperis against Dinabandhu and Hemalata. While the pauper application was pending, Dinabandhu died on 2-4-1964. His widow Umasankari (defendant No. 1-ka) and his two daughters Jyoshnarani (defendant No. 1-kha) and Sandhyarani (defendant No. 1-ga) and his son Satchidananda (defendant No. 1-gha) were impleaded as parties in his place. On 4-8-1964 Chanda died. Hemalata was transposed as the plaintiff, paid court-fees on the plaint and the application was numbered as T. S. No. 96 of 1965. On 2-3-1965 Hemalata amended the plaint to bring it in consonance with her claim. It is to be noted that in the original claim Chanda would have been entitled to half interest while Hemalata would have been entitled to 3/10th interest in the total property. On 30-10-1965 the trial Court gave a direction to the plaintiff to file a consolidated plaint incorporating the amendment. Such a plaint was filed on 9-12-1965. The plaintiff averred that in the ancestral house the defendants were residing while the other house was let out to tenants. This averment was not disputed in the written statement and the only plea taken was that Hemalata cannot sue for partition under Section 23 of the Hindu Succession Act, 1956 (hereinafter to be referred to as the Act). The trial Court decreed the suit, but gave a direction that the plaintiff would get 3/10ths interest out of the building which was not in occupation of the defendants. The defendants filed First Appeal No. 108 of 1970. The learned Single Judge dismissed the suit holding that the claim of Hemalata was not in consonance with the plaint filed by Chanda. He unfortunately overlooked that the plaint had been amended and a consolidated amended plaint had been filed incorporating the amendment. He did not advert to any discussion under Section 23 of the Act and dismissed the suit. The plaintiff has filed this appeal.

2. Mr. B. H. Mohanty for the plaintiff-appellant advanced two contentions :-

- (i) Section 23 of the Act does not stand as a bar to the plaintiff's suit for partition, and
- (ii) Even if Section 23 of the Act stands as a bar the plaintiff is entitled to partition of the

house which is not in occupation of the defendants.

3. Section 23 of the Act runs thus :-

"Special provision respecting dwelling-houses - Where a Hindu intestate has left surviving him or her both male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family then, notwithstanding anything contained in this Act. the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein : but the female heir shall be entitled to a right of residence therein :

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

The proviso has no application to this case. Hemalata is a female heir of deceased Chanda as daughter. She is married and is not either unmarried nor has she been deserted by or separated from her husband nor she is a widow.

4. The main part of the section requires consideration. Mr. B. B. Mohanty contends that the plaintiff as a female heir shall be entitled to a right of residence in the disputed houses but she has no right of partition. A bare perusal of the section indicates that a female heir is not entitled to enforce her right of partition unless the male heirs exercise their right. If the male heirs ask for partition the female heir can claim her legitimate share so far as the dwelling house is concerned. In this case the only male heir of Hadibandhu is Dinabandhu. There are no plurality of male heirs. Consequently the question of any other male heir claiming a partition with Dinabandhu does not arise. Where there is a single male heir, the right to claim partition of the dwelling house by a female heir is not excluded. The expression "the male heirs" towards the last part of the main section furnishes the clue to the meaning of the section. If there are more than one male heir then there is a possibility of anyone of such heirs asking for a partition of the dwelling house and the female heir in such a case can claim partition. But where there is a single male heir, there is no possibility of that male heir claiming any partition against another male heir. We are therefore clearly of opinion that where there is a single male heir and others are female heirs then those female heirs are entitled to claim partition.

5. On the aforesaid analysis the plaintiff is entitled to claim partition of both the houses to the extent of 3/10ths interest.

6. In view of our conclusion on the first point, the second point does not arise. The plaintiff would get her interest in both the houses unless in the final decree proceeding the court for purposes of convenience or on account of agreement of the parties allots one house to each giving compensation to the other on account of inequality of share.

7. In the result the appeal succeeds, the judgment of the learned Single Judge is set aside and the suit is decreed. A preliminary decree for partition be passed declaring that the plaintiff is entitled to 3/10ths interest in both the houses. In the circumstances parties would bear their own costs

throughout.

DAS, J.

8. I agree.

Appeal allowed.