

HIGH COURT OF ORISSA : CUTTACK
SA NO.232 OF 1993

In the matter of appeal under Section-100 of the Code of Civil Procedure, assailing the judgment and decree passed by the learned Sub-Judge, Nuwapara in Title Appeal No.11 of 1989 in confirming the judgment passed by the learned Munsif Nuwapara in Title Suit No.27 of 1985.

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Umrao Singh Majhi & Another :::: Appellants.

-:: VERSUS ::-

Darbar Singh Majhi & Others :::: Respondents.

Advocate(s) who appeared in this case by Video Conferencing mode.

For Appellants ... M/s.P.V. Ramdas, P.V. B. Rao,
Advocates.

For Respondents ... -----

P R E S E N T :
THE HON'BLE MR. JUSTICE D.DASH

Date of Hearing: 17.02.2022 :: Date of Judgment: 22.02.2022

D.Dash,J. The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by the learned Sub-Judge, Nuwapara in Title Appeal No.11 of 1989; whereby the Appeal filed by Darbar Singh Majhi, the original Defendant No.1 and Respondent Nos. 2 to 4 (Defendant Nos.2 to 4) under Section-96 of the Code has been allowed and thereby, the judgment passed by the learned Munsif Nuwapara in

Title Suit No.27 of 1985, followed by a preliminary for partition of A Schedule property in two equal shares; allotting one half to the Plaintiffs and rest half to the Defendants have been set aside. The Appellants (Plaintiffs) have thus been non-suited.

It may be stated here that during pendency of the First Appeal, the original Defendant No.1 having died, besides the legal heirs by then already on record, other legal heirs have also been substituted.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The case of the Plaintiff is that on the death of one Dakari Gonda, his son Bhao Singh succeeded to the suit property described in Schedule-A and it was so recorded in his name in the records of the year, 1935 settlement. Bhao Singh died prior to 1955. During his lifetime, he had amicably distributed his Schedule-A land as amongst his two sons Sonu and Darbar. The lands described in Schedule-B and C of the plaint have fallen to the share of that Sonu and Darbar respectively. However, that Schedule-A land continued to be recorded in the name of Bhao, Sonu and Darbar. It is stated that in view of the distribution and allotment as above, the parties accordingly possessed the land although the land's stood recorded as aforesaid. The Plaintiff

No.1 married Nira Bai and since that time onwards, he remained in his father-in-laws house as an illatom son-in-law. As Sonu had no male issue, the Plaintiff No. 1 looked after Schedule-B land for and on behalf of his mother-in-law and wife, Nira Bai. The Mother-in-law of the Plaintiff No.1, namely Ramin Bai died in the year, 1975 leaving behind her daughter Nira Bai as the sole successor of Schedule-B land which was owned and possessed exclusively by Nira and her husband having the right, title and interest. Nira died in the year, 1977 leaving behind her husband-Plaintiff No.1 and son, Plaintiff No.2 as her legal heirs and successors who inherited Schedule-B land and accordingly, possessed the same. It is stated that when the Defendants falsely raised their claim over the property, the suit has come to be filed mainly advancing the following prayer:-

- (a) the right, title and interest over the property of the Schedule-B land to be declared by confirming the possession thereof and in the alternative if the Court holds that there was no prior partition, Schedule-A land to be divided in two equal shares and the Plaintiffs to be allotted properties described in Schedule-B.

4. The Defendants in their written statement have denied the factum of partition of the land in Schedule-A as has been pleaded by the Plaintiffs. They also denied that Ramin was the wife of Sonu and Nira to

be Sonu's daughter. It is stated that the original owner Bhao Singh had gifted the suit land to them in the year, 1966 by registered document No.477. They denied the possession of the Plaintiffs over any part of the suit land at any point of time.

5. On the above rival pleadings, the Trial Court has framed six issues. The crucial issue i.e. issue no.2 as to the partition between Sonu and Darbar during the life time of their father followed by the allotment of the Schedule-B lands to Sonu and Schedule- C land to Darbar; the Trial Court held that there was no such partition during the life time of Bhao Singh. With that finding, the Trial Court had passed the preliminary decree for partition of entire property of Schedule-A property.

It may be made stated that this finding that there was no partition between Sonu and Darbar by allotment of specific properties as pleaded in the Plaint was not called in question by filing any cross-appeal or cross-objection by the Plaintiffs on receiving the notice in the Appeal filed by the Defendants. The answer to this issue as given by the Trial Court has also not been assailed during the hearing of the First Appeal. The First Appellate Court keeping in view the fact that the parties being the members of Scheduled Tribe community are governed by old Hindu law and the provisions of Hindu Succession Act, 1956 are not applicable

to them has held that the Plaintiffs have no right, title and interest over the property and therefore have no right to claim partition. Besides the above, the First Appellate Court having held that the suit is under-valued has also gone to say that the Trial Court had no jurisdiction to try the same.

6. The Appeal has been admitted on the following substantial question of law:-

- “i) Whether the lower Appellate Court considered the matter relating to custom in its proper perspective and regarding applicability of Hindu law?
- ii) When the Appellate Court having held that the suit is undervalued, he has no further jurisdiction to arrive at findings on the merits of the case. On the other hand, the learned Appellate Court should have followed the procedure as laid down under order-7 rule-10 or order-7 rule-11 of the Code of Civil Procedure?
- iii) Whether the lower Appellate Court can entertain an appeal when the memorandum is not accompanied by a certified copy of the Trial Court’s judgment. The provision of order-41, rule-1 of the CPC operates in such circumstances?

7. Mr. P.V. B. Rao, learned Counsel for the Appellants submitted that the learned First Appellate court has not considered the matter relating to the custom of the parties in its proper perspective and thus

has committed grave error in finally holding that the Traditional Hindu law is to apply to them and not the provisions of Hindu Succession Act, 1956. He also advanced his argument on the two other substantial questions of law in placing that the learned First Appellate court has committed grave error in reaching at the conclusion on those facts.

Despite notice, none appeared on behalf of the Respondents and even on the date of hearing none was present to represent the Respondents.

8. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. To find out the answer to the first substantial question, I have also gone through the plaint averments as also the averments taken in the written statement. The evidence of both oral and documentary let in by the parties have been perused.

9. Admittedly, the parties are members of Scheduled Tribe community. Therefore, as provided in sub-section-2 of section-2 of the Hindu Succession Act, 1956, there being no notification of the Central Government as yet as required thereunder, the provisions contained in the said Act do not apply to the parties and govern them in any way. In the plaint, nothing has been pleaded as regards the customs which are prevalent in the community from which the parties hail. In such state of affairs, when no such custom is pleaded and proved for the present

purpose of having a departure from the Traditional Hindu law, the same would apply to them and govern the field of succession.

10. The factum of partition as pleaded by the Plaintiffs said to have been effected during the lifetime of Bhao Singh as amongst his two sons namely, Sonu and Darbar has been held in the negative by the Trial Court which has attained finality being not further assailed. As per the plaint case, Sonu died in the year, 1964. The position stands that on the death of Sonu by virtue of section-3(3) of the Hindu Women's Right to Property Act, 1937 which brought about a far reaching change in the law of succession under Hindu law, Ramin, the widow of Sonu stood conferred with the right to succeed to Sonu's property equally with the male issue; the interest however remaining as limited. Prior to that Act, coming into force, the widow was a maintenance holder and had no right to succeed to the interest of her husband in the joint family property on the death of her husband and for the purpose of maintenance right, there was a charge over the interest that her husband was having over the joint family property. Ramin after losing her husband has never filed any suit for partition during her life time. The evidence on record also is not there to record a clear finding that there was a complete severance of status between the two brothers during between Sonu and Darbar or between Ramin and Darbar with an intention to put

an end to the rule of survivorship so as to say that on the death of the limited owner Ramin in so far as the interest of her husband over the property is concerned, that interest of her husband would no more pass to the surviving male coparceners of the family but to the heir/s of the widow holding as limited owner. In that view of the matter in the given case, the coparceners stand entitled to the said property in entirety including said Sonu's undivided interest which had passed to his widow Ramin having the limited right and ownership.

For all the aforesaid, the Plaintiffs have no right over the suit property described in Schedule-A of the plaint and the suit for partition at their instance being not maintainable is liable to be dismissed which has been rightly ordered by the First Appellate Court. The first substantial question of law is accordingly answered against the case of the Plaintiffs and their stand. Having record the answer to the first substantial question of law as above; there arises no further need to answer the other substantial questions of law.

Accordingly, the judgment and decree passed by the First Appellate Court in non-suiting the Plaintiffs stand confirmed.

11. Resultantly, this Appeal fails. There shall however be no order as to cost.

**(D. Dash),
Judge.**