

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.39 of 1994

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 03.09.1993 and 13.09.1993 respectively passed by the learned District Judge, Sundergarh, in Title Appeal No.26 of 1992 setting aside the judgment and decree passed by the learned Sub-Judge, Bonai, in Title Suit No.5 of 1989.

Sri Dibakar Sahu (Since Dead) ***Appellants***
through his LRs

-versus-

Smt. Sumita Sahu ***Respondent***

Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):

For Appellants - Mr.S.P. Mishra, Sr. Advocate
S.K.Mishra & A.K. Mishra

For Respondent - Mr.S.K. Jethy and
Mr.L.N. Rayatsingh, Advocates

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 23.02.2022 : Date of Judgment:28 .02.2022

The original Appellant, namely, Dibakar Sahu, had filed this Second Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') in assailing the judgment and decree dated 03.09.1993 and 13.09.1993 respectively passed by the learned District Judge, Sundergarh, in Title Appeal No.26 of 1992.

Said Dibakar Sahu having died during pendency of this Appeal, his legal representatives having come on record are pursuing this Appeal.

The Respondent being the Plaintiff had filed the suit for partition of the properties described in the plaint claiming her half share over the said property. The suit having been dismissed, she had carried an Appeal under section 96 of the code. In the Appeal, she has been successful in getting her suit decreed with allotment of half share over the suit properties in her favour. The original Appellant (Dibakar) thus, being aggrieved had filed this Second Appeal, which is now pursued by his legal representatives.

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 Suit.

3. The Plaintiff's case is that her husband, namely, Iswar Sahu and the Defendant are two brothers and the land described in the plaint schedule stands jointly recorded. For convenience, two brothers were having separate cultivation without carrying out any partition by metes and bounds. The possession of the separate lands by two brother and their cultivation etc. are all said to be merely for convenience. It is stated that after the death of Iswar, the Plaintiff inherited her husband's property including the share that he had in the property which stood jointly recorded with the Defendant, i.e, the suit land and remained in cultivating possession of the said portions of the land as were being cultivated by her husband. It is stated that the Plaintiff is the only heir of Iswar. Some time before filing of the suit, the Plaintiff had requested the Defendant to make a partition of the suit properties and that having not been acceded to, the suit has been filed.

The Defendant, while traversing the plaint averments, vehemently resisted the locus of the Plaintiff in filing the suit by asserting that she is

not the legally married wife of Iswar. It is stated that she was his mistress and for said reason, she was residing in the house of Iswar, but for that, she cannot inherit the properties of Iswar. It is stated that she had married to one Golbadan Sahu of village Satkuta and during the lifetime of Golbadan, she was staying with Iswar as his mistress. It is also stated that the Plaintiff never cultivated the suit land on her own right as the legal heir and successor of Iswar being his wife. It is stated that the Defendant is the only heir to succeed to the entire suit land. He, therefore, urged for dismissal of the suit.

4. On these rival pleadings, the Trial Court has rightly taken up to answer the most crucial issue as to the status of the Plaintiff as to whether she is the wife of Iswar or not first. On examination of the evidence and upon their evaluation, the Trial Court has recorded the finding that the claim of the Plaintiff that she is the wife of Iswar is not acceptable. Practically, this answer has led the Trial Court to dismiss the suit.

The Plaintiff being thus unsuccessful had filed the Appeal. The lower Appellate Court first has rightly gone to judge the sustainability of the finding of the Trial Court on that crucial issue as to the claimed status of Plaintiff as the wife of Iswar. Exercise of evaluation of evidence at its level has been made and at the end, the lower Appellate Court has concluded that the evidence on record established by the preponderance of probability do establish that the Plaintiff, namely, Sumitra is the wife of Iswar. Saying so, the suit filed by the Plaintiff has been decreed allotting her with half share over the said property.

5. The Appeal has been admitted on the following substantial questions of law:-

“(a) When there is no material available on record to prove the marriage between Iswar and the plaintiff, whether the learned appellate court is justified in coming to a conclusion that the plaintiff is the legally married wife of Iswar?;

(b) when the plaintiff has miserably failed to prove factum of marriage by any evidence either oral or documentary and the specific case of the defendant-appellant is that the plaintiff is not the wife of his brother Iswar whether the appellate court is justified in coming to the findings that the plaintiff is the legally married wife of Iswar?; and

(c) when admittedly the plaintiff is legally married wife of one Golbandan Sahu and there being no evidence of divorce or death of Golbandan whether the learned appellate court is justified in coming to the finding that the plaintiff is legally married wife of Iswar?”

6. Mr.S.P.Mishra, learned counsel for the Appellants-Defendants submitted that despite passing of the preliminary decree way back on 03.09.1993, as per the instructions which he has received, by now no final decree proceeding has been initiated at the instance of Sumitra or anyone else. On instruction, he placed before the Court that Sumitra, the original Plaintiff has died since long and she has left behind no children when admittedly Iswar had pre-deceased her.

Mr.L.N. Rayatsingh, learned counsel for the Respondent submitted that Sumitra is dead since long and despite all possible efforts to contact anyone from her side, the same has not at all been possible.

Mr.S.P.Mishra, learned Senior Counsel for the Appellants, under instruction, submitted that that it has not come to notice that Sumitra has made any such testamentary disposition/s during her life time and till now nobody in that regard has come forward advancing any claim of any sort over the suit property. In view of the above submission even though this Appeal at the end fails answering the substantial questions of law against the claim of the Defendants, the position would stand that

the interest and share over the land which Sumitra had inherited in respect of that, her husband had over it after her death would devolve on the heirs of the husband by virtue of operation of clause(b) of sub-section-1 of section-15 of Hindu Succession Act, if he has no son or daughter including the children of pre-deceased son or daughter. So, in that event, these Defendants would stand to succeed to the said property of Iswar or the interest that he had in the suit property which had gone to the hands of Sumitra being his wife.

7. For all the aforesaid and in view of the developments, which have taken place during pendency of this Appeal and the aforesaid facts; this Court does not feel that there remains any more the necessity to answer the substantial questions of law stated at Paragraph-5.

8. With the observation, the Appeal stands disposed of. However, there shall be no order as to cost.

(D. Dash),
Judge.