

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.92 of 1997

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 04.01.1997 and 18.01.1997 respectively passed by the learned District Judge, Mayurbhanj, Baripada in Title Appeal No.21 of 1990 confirming the judgment and decree dated 08.12.1989 and 20.12.1989 respectively passed by the learned Civil Judge, Senior Division, Baripada in T.S. No.44 of 1987.

Budhram Majhi & Another ***Appellants***

-versus-

Jhana Majhi (Since Dead) and Others ***Respondents***

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

For Appellants - Mr.A.K. Nayak
(Advocate)

For Respondents - Mr.A.K. Rao, M.K. Mohanty,
S.P. Das, P.K. Sandh,
S.K. Rath, M. Sampat &
J.K. Jena
(Advocates)

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 16.05.2022 :: Date of Judgment:20.06.2022

The Appellants, by filing this Appeal under Section- 100 of the Code of Civil Procedure (for short, 'the Code') have assailed the judgment and preliminary decree dated 04.01.1997 and 18.01.1997 respectively passed by the learned District Judge, Mayurbhanj, Baripada in Title Appeal No.21 of 1990.

By the same, the Appeal filed by the present Appellant No.1 (legal representative of the Defendant No.1, who had been substituted as the Appellant No.1 and the Appellant No.2 (Defendant No.2) under Section-96 of the Code in challenging the judgment and preliminary decree dated 08.12.1989 and 20.12.1989 respectively passed by the learned Civil Judge, Senior Division, Baripada in T.S. No.44 of 1987, has been dismissed. Thereby, the judgment and preliminary decree passed by the Trial Court holding the entitlement of Respondent No.1, namely, Jhana Majhiani, wife of Kamalakanta Majhi (original Plaintiff) to $1/3^{\text{rd}}$ share; the entitlement to $1/3^{\text{rd}}$ share and Defendant No.2 and 2(A) having the entitlement to rest $1/3^{\text{rd}}$ share over Schedule-B and D properties have been confirmed.

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 one Ratan Majhi was the common ancestor of the parties and he had two sons, namely, Bada Durga and Nimai. Said Nimai died unmarried. The Plaintiff, Defendant No.1 and one Salama are the three daughters of said Bada Durga. Salama is survived by Defendant No.2 and 2(A).

It may be stated here that the Original Plaintiff having died during pendency of this Second Appeal, her legal representatives, have come on record.

Defendant No.1 having died during pendency of the First appeal filed by her, has been substituted by her son and daughter, who pursued the First Appeal and have finally lost and this present Second Appeal has been filed by them.

It is stated that Bada Durga had two houses as shown in Schedule-D of the plaint and Plaintiff has 1/3rd share over those houses. It is stated that Defendant No.1 in a surreptitious manner had got her father's land recorded in her name. The Plaintiff, therefore, claims 1/3rd share over all those properties. The Defendant No.1 since dead, the predecessors-in-interest of these Appellants, who have come to be substituted in her place, have taken a stand that after the death of her father, she got her two sisters married and all such expenses for the purpose had been borne by her and her husband. It is also stated that her husband was kept by her father as illatom-son-in-law and, therefore, the Plaintiff and the Defendant No.2 and 2(A) are not entitled to any share over the properties, which entirely is her legitimate entitlement.

4. The Defendant no.1 has filed the written statement and she has taken a specific stand that after the death of her father, she got her two sisters married. Her husband was taken by her father as domesticated son-in-law.

Defendant No.2 and 2(A) have also filed their written statement in the same line supporting the case of the Plaintiff.

5. The Trial Court, faced with the above rival pleadings, having framed four issues, has finally decreed the suit in favour of the Plaintiff; in further directing that the properties given in Schedule-B & D of the plaint are divisible into three parts out of which the Plaintiff is entitled for 1/3rd share, Defendant No.1 is entitled for 1/3rd share and Defendant No.2 and 2(A) are entitled for 1/3rd share and the parties are directed to get their shares by carving out the by a Civil Court Commissioner.

6. The present Appeal has been admitted on the following substantial question of law as stated in paragraphs 2 and 3 of the Memorandum of Appeal:-

“(A) Whether the defendant no.1 being in exclusive possession and having mutated the suit property in the year 1949 to the knowledge of the plaintiff and defendant no.2 and for acts and conduct being in denial of the title of the plaintiff on the suit property has acquired title of the suit property by adverse possession?

(B) Whether the suit for partition is liable to be dismissed for not including the daughter of defendant no.2 as a party. In view of the legal position that the suit for partition is liable to be dismissed due to non-implementation of necessary parties?”

7. Learned counsel for the Appellants submitted that the Trial Court, in view of the specific pleading of the original Defendant No.1 in her written statement as regards the exclusive possession of the entire suit property by her and her husband having not framed the issue on that score as to whether she had acquired title over the properties by way of adverse possession, ought not to have decided the suit. He further submitted that although this point had been urged before the First Appellate Court that has not been considered and, therefore, the judgments and preliminary decrees are liable to be set aside and the suit has to be remanded for fresh disposal framing the above issue. He, in the alternative, submitted that in view of the overwhelming evidence both oral and documentary on record, the finding on that issue has to be rendered in favour of the Defendant No.1 and the suit has thus to be dismissed.

8. Learned counsel for the Respondents submitted that the First Appellate Court has properly addressed this issue and giving all such reasons has negated the contentions.

9. Learned counsel for the Appellants as well as the Respondents, in course of hearing, further submitted that the substantial question of law, as have been framed, to be answered in this Appeal at the time of admission on 30.09.1999 are required to be substituted by the following substantial question of law:-

“Whether the First Appellate Court has committed an error by not remanding the suit to the Trial court for deciding the same afresh after framing an issue on the question of acquisition of title over the property by adverse possession by Defendant No.1 in providing opportunities to the parties to lead further evidence.

9. Keeping in view the submissions made, I have carefully read through the judgments passed by the Courts below. I have also read the plaint, written statement and have perused the evidence.

10. Admittedly, Jhana (Plaintiff), Maya (Defendant No.1) and Salama are the three daughters of Bada Durga. Properties belong to said Bada Durga. It is not the case that there was any partition amongst three daughters, after the death of Bada Durga nor it is said that Bada Durga, during her life, had allotted some properties to each of her daughters.

The Defendant No.1 has been examined as D.W.1. She has simply claimed title over Schedule-B properties on the basis of her possession. When admittedly on the death of Bada Durga, her three daughters survived the co-owners of the properties, mere possession of the properties by the Defendant No.1 lends her nowhere as she has not projected any case of ouster. It is not at all pleaded in the written statement that from a particular time onwards, she began to possess the suit land by ousting the other two daughters and denying them to be having any right or share over the same.

So, on the face of the settled position of law, that possession of one co-owner has to be deemed the possession on his/her behalf as well as for and on behalf of other co-owners in the absence of any specific plea of ouster being taken in the written statement, there was no necessity at all for framing an issue with regard to acquisition of title over the suit property by Defendant No.1. Because of the averment taken in the written statement and her evidence that she is the possessor of the suit land when that possession is to enure her benefit as well as to the benefit of other co-owners, even framing of that issue, as above, would have no impact as the answer to that issue on the obtained evidence would not run against the claim of the Plaintiff.

The substantial question of law is accordingly answered, which goes to confirm the judgments and preliminary decrees passed by the Courts below. The parties, however, being Santals by caste and as such members of Scheduled Tribe Community; in view of the death of the parties, as the provisions of Hindu Succession Act do not apply to the; the Trial Court, in seisin of the Final Decree proceeding, would have all the liberty to re-workout their shares in accordance with the old Hindu Law in deciding as to who would now come to stand as the legal successors of Bad Durga to inherit his properties and as as amongst them.

11. With the aforesaid observations, the Appeal stands disposed of. There shall, however, be no order as to cost.

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