

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.260 OF 2009

In the matter of an appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned District Judge, Sundargarh in RFA No.73 of 2005 by dismissing the judgment and decree passed by the learned Civil Judge (Senior Division), Sundargarh in Title Suit No.131 of 1996.

Mohan Chandra Patel

:::

Appellant

-versus-

***Lalindra Patel (since dead)
through his LRs. & Others.***

:::

Respondents.

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellant

:::

M/s. A.P. Bose, D.J. Sahoo,
A. Pattnaik, S.K. Nayak,
Advocates.

For Respondents

:::

M/s. B. Sahoo, B. Mohanty,
Advocates (R-1(a) to 1(g) &
(R-5,7,8 & 18).
M/s. Nibedita Mohanty,
Ch. Nrusingh Ch. Dash,
Advocates (R-6 & R-12).

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:17.10.2022,DATE OF JUDGMENT:25.11.2022

D.Dash, J.

The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and preliminary decree passed by the learned District Judge, Sundargarh in RFA No.73 of 2005.

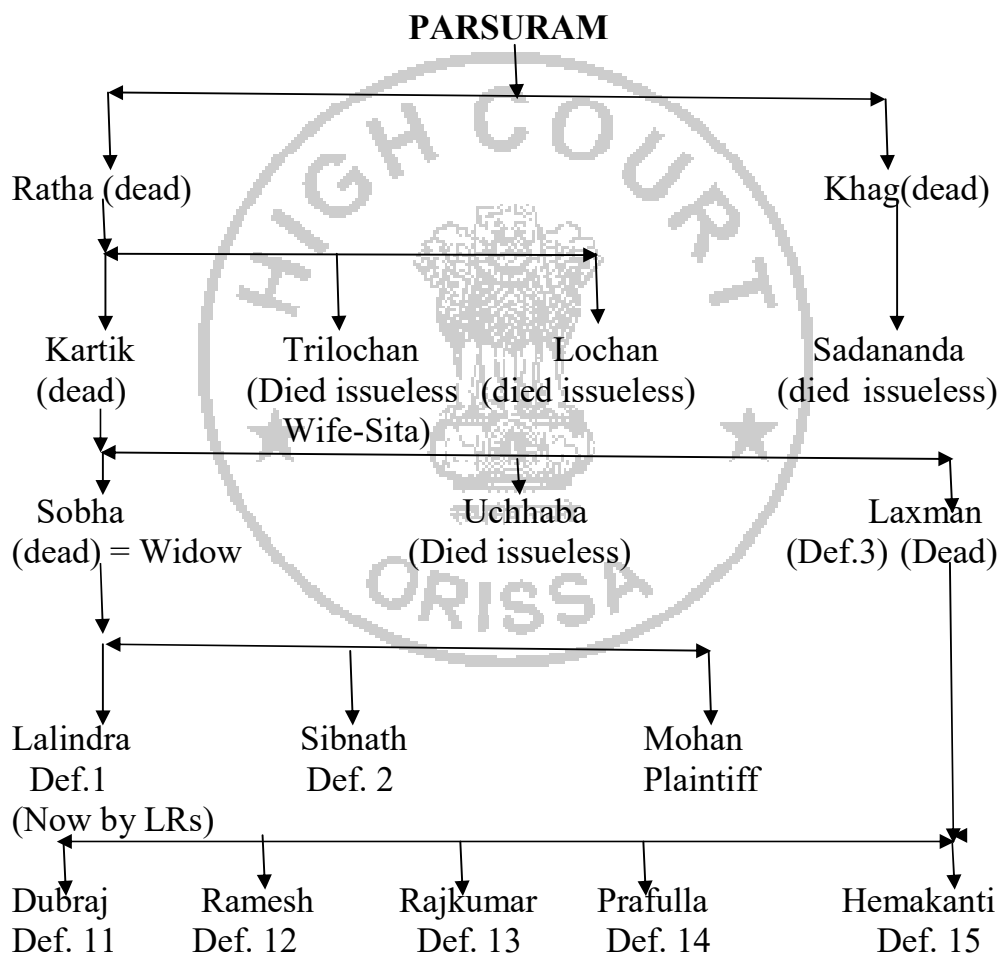
By the same, the Appeal filed by the original Respondent No.1, who is now represented in this Appeal by his legal representatives, under Section-96 of the Code has been allowed in part and thereby, the judgment and preliminary decree passed by the Civil Judge (Senior Division), Sundargarh in Title Suit No.131 of 1996 have been set aside to the extent of exclusion of the property described in Schedule-B of the plaint from the purview of the preliminary decree for partition and as per the order of the First Appellate Court the preliminary decree has remained confined to Schedule-A property.

The Appellant as the Plaintiff having filed the suit seeking a preliminary decree for partition of Schedule-A & B of the property described in the plaint, the Trial Court had decreed the same. The original Defendant No.1 in the said suit being aggrieved by the same having carried the First Appeal that preliminary decree passed by the Trial Court has been set aside in part in respect of Schedule-B property.

It may be stated here that now the Plaintiff is the Appellant in this Second Appeal before this Court and the original Defendant No.1 having been died during pendency of this Appeal, his legal representatives so also the legal representatives of other parties are thereon record.

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 Parsuram Patel was the common ancestor of the parties. The relationship amongst the parties as described by the Plaintiff can be seen from the following:-



It is stated that the second son of Parsuram namely, Khaga Patel. Kartika, the son of Ratha died leaving behind three sons namely, Sobha, Uchhaba and Laxman, Defendant Nos. 1, 2 and 3, the

Plaintiff are the sons of Sobha. Uchhaba died issueless, Laxman, the original Defendant No.3, (He is represented by his legal representatives i.e. Defendant No.11 to 15). Wife of Sobha is stated to have died in the year 1994. After death of her husband, she allotted some portion from out of Schedule-A & B land amongst her three sons and kept reserved some portions for her maintenance. The Defendant No.1 became the Karta of the family after death of his father. The parties started cultivating the lands separately for convenience without any partition in metes and bounds.

Khaga Patel, the second son of Parsuram is stated to have gifted away Schedule-B land which was his separate property to the family of Sobha Patel and Laxman Patel to look after the maintain him. During the Major Settlement, the Schedule-B has been recorded in the name of Defendant No.2 and the Plaintiff. It is further stated after acquisition of the land, the Schedule-B land had been blended with their ancestral property and as such they continued to possess jointly. It is stated that Defendant No.1 by registered sale-deed dated 10.05.1996 without the consent of other co-sharers has sold a portion of Schedule-B land to the Defendant No.16 and thus the same is not binding on all. Since the Defendants recreated disturbance over the possession of the land by the Plaintiff, the suit for partition has been filed.

4. The Defendant Nos.1 & 2 in their joint written statement have admitted that originally the suit property was their ancestral properties. It is stated that Khaga Patel was the owner of Schedule-B land and he gifted away the property to Defendant No.1 and Defendant No.3 by registered deed of gift dated 06.11.1956. Although the property described in Schedule-B of the plaint was originally given to Khirabati Patel by Khaga Patel under a Will, that had been cancelled by a document dated 06.11.1956 and on that day, the suit land was gifted in favour of the Defendant No.1 and Defendant No.3. It is stated that since Schedule-B land is the separate property, the Plaintiff has no interest over it. It is further stated that wife of Trilochan namely Sita Patel had adopted Defendant No.1 by a document dated 01.02.1954 after observing all formalities and he was separately living from the Plaintiff and Defendant No.2. As such it is said that he has got half share over the Schedule-A property. Defendant No.1 has denied to have been Karta of the family at any point of time. It is stated that Bhagyabati Patel their mother was the head of the family and she was managing all the family affairs, when Defendant No.1 was living separately.

5. The Defendant Nos.11 to 15 having filed the written statement have later on remained absent. In their written statement admitting the averments of the plaint, they claim half share over the suit property

being the legal heirs of Defendant No.3. The Defendant No.16 is the purchaser of Ac.0.06 decimals of land from Defendant No.1. He has asserted to be the owner of the said property by virtue of his purchase from the owner.

6. The suit having been initially disposed of vide judgment dated 26.03.2003 holding Schedule-A property to be liable for partition and not the Schedule-B property, the Plaintiff had preferred the First Appeal. The matter then stood remanded to the Trial Court for allowing an amendment in the plaint and addition of Defendant No.16 as party and to decide the suit afresh after giving opportunity to the parties.

7. The Trial Court on remand on discussion of evidence and their evaluation had held that the properties Schedule-A & B are liable to be partitioned amongst the parties. Accordingly, the following order has been passed:-

“The suit is decree preliminarily on contest against defendants No.1, 2, 11 to 16, defendants No.11 to 15 (being the LRs of defendant No.3) and exparte against defendants No.4 to 10 but without costs. The above parties are directed to effect partition of “A” and “B” schedule properties allotting 1/6th share to plaintiff, defendants No.1 and 2 each and 1/2 share jointly to defendants No.11 to 15. The land alienated by defendant No.1 in favour of defendant No.16 be adjusted towards

the share of defendant No.1 subject to convenience and other related matters. The parties are directed to effect partition within three months of this order failing which the Plaintiff will be at liberty to enforce the same through Court.”

8. The Defendant No.1 having carried the Appeal. The First Appellate Court while confirming the preliminary decree in respect of Schedule-A property has set aside the preliminary decree in respect of Schedule-B property by overturning the finding of the Trial Court that it had assumed the character of the joint family property and as such liable for partition.

The First Appellate Court’s finding is that the said property in Schedule-B was never the joint family ancestral property of the parties nor it had been thrown to the common stock and blended with the joint family property.

9. In the present Appeal the following substantial question of law arises for being answered:-

Whether the lower Appellate Court is correct in reversing the finding of Trial Court as regards the blending of Schedule –B property in view of the admission on this score in the settlement proceeding and other evidence available on record?

10. Learned Counsel for the Appellant submitted that the First Appellate Court has erroneously set aside the finding of the Trial

Court that in going to hold Schedule-B property is liable to be partitioned by taking a view which is contrary to the facts and circumstances emanating from evidence as well as the settled position of law. According to him, the Trial Court has rendered such a finding in favour of the Plaintiff assigning very good reasons by culling out the same from the facts and circumstances as emerge in evidence and passing the same through the required legal tests in respect of the subject; and the First Appellate Court ought not to have upset the same in so far the Schedule-B property is concerned.

10. Learned Counsel for the Respondents on the other hand supported the findings returned by the First Appellate Court. According to him, the First Appellate Court is right in holding that the Schedule-B property being the property obtained by Defendant Nos. 1 and 3 by way of gift from the admitted owner Khaga and the Plaintiff having not been able to establish the theory of blending providing specific proof that the donees under that deed of gift had voluntarily thrown the property to the common stock for being made available for partition amongst the parties by voluntarily surrendering all their independent right over the same, the Trial Court's finding has been rightly set aside.

11. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below; I have also gone through the plaint and written statements and also the evidence adduced by the parties have been perused.

12. Proceeding to undertake the exercise of finding out the answer to the substantial question of law, some admitted facts are required to be taken note of and those are thus placed herein below:-

Khaga, the original owner of Schedule-B property had executed a Will in favour of his daughter Khirabati Patel which has been cancelled by a deed dated 06.11.1956. On that very day, the land in Schedule-B has been gifted in favour of Defendant Nos. 1 and 3. The property in Schedule-B is said to be the separate property of Khaga. The deed of gift has been admitted in evidence and marked Ext.A. This property in Schedule-B is a part of the property standing recorded in the name of Khaga Patel, the donor. The total extent of land of Khaga Patel as it reveals from Ext.11=Ext.D was Ac.25.25 decimals. Subsequently, the extent of land in the said record of right in the name of Khaga has undergone reduction in view of those sales made by said Khaga. It had been reduced to Ac.12.94 decimals. After the deed of gift come into being on 06.11.1956 in favour of Defendant Nos. 1 and 3, an extent of land measuring Act.11.43 decimals has been recorded in the name of Defendant Nos. 1 and 3

vide Ext.F. From out of the said gifted land while carrying out the mutation, there has again been reduction of Ac.1.51 decimals which has gone to the khata created in the name of Khirabati. This has been done as the Defendant Nos. 1 and 3 entered into a compromise with Khirabati. The compromise petition filed in Mutation Case No.194/176 of 1958-59, has been admitted in evidence and marked Ext.B. It is seen that the Defendant Nos. 1 and 3 having got Ac.12.94 decimals of land under the deed by way of gift from Khaga; they themselves have parted with the land measuring Ac.1.51 decimals in favour of Khirabati, when the situation had so arisen that they had to compromise in the proceeding which they had levied for mutation of their entire gifted land. Thus it clearly appears to be an arrangement made by the Defendant Nos. 1 and 3 with Khirabati. So, the Defendant Nos. 1 and 3 by such act on their part in parting with and giving away the property of the extent of Ac.1.51 decimals to Khirabati can very well be said to have made a family arrangement with her to save the rest property in their hands. In that event to save the gifted property, they had not asserted their right over the entire gifted property.

13. In case of *Goli Eswariah Vrs. Commissioner of Gift Tax, Andhra Pradesh*; AIR 1970 SC 1722, it has been held that the doctrine of throwing into the common stock or common hotch potch

postulates that the owner of a separate property being a coparcener property having interest in his coparcener and having the desire to blend his separate property with the coparcenary property has voluntarily thrown that property into common stock with an intention of abandoning his separate claim therein. Thus, the separate property that member of the joint Hindu family gets impressed with the character of joint family property losing its character as self-acquired property from that time onwards. It acquires characteristic of joint family property or ancestral property. This is not simply by physical mixing but by the own volition and intention by waiving and surrendering his separate right in it as the separate property. It is no doubt a unilateral act and for the same there is no requirement of its acceptance by other family members. This being a question of fact is required to be decided in the light of the facts and circumstances emanating from evidence and being so tested in the backdrop of the pleadings.

14. Now advertent to the case at hand, from the beginning, it is seen that the donees i.e. Defendant Nos. 1 and 3 although had got the property to the extent of Ac.12.94 decimals, yet soon thereafter they have abandoned their right and rather surrendered their right over a portion of their property which of sizable extent i.e. Ac.1.51 decimals in favour of daughter of Khaga namely, Khirabati. This, they have

done in the very mutation proceeding which they had filed for recording of the gifted land and by filing compromise petition therein when Khirabati raised objection or advanced her claim over the said property in questioning the gift and creation of record of right in the name of the Defendant Nos. 1 and 3. Although, it has been pleaded by Defendant Nos. 1 and 3 that they have parted with such property out of the property that they had got by gift from Khaga, nothing has either been pleaded or stated in the evidence as to the circumstances under which they did so.

With such position of law in the mutated record of right standing in favour of the Defendant Nos. 1 and 3 with the reduction of the area of the gifted land, when the settlement operation commenced, the said property has been recorded jointly. Ext.1 is the order in that Mistake Case No.05/37 for such joint recording and that is the basis for preparation of the hal ROR in the year 1972 vide Ext.6. The Defendant No.1 merely in a casual fashion states that said ROR had been wrongly prepared. The Munsarin Mistake List, Ext.1 indicates that the Defendant Nos. 1 and 3 agreed for joint recording of Schedule-B property with the Plaintiff and the Defendant No.2. It is also seen that the parties have signed on the order-sheet before the Settlement Officials. This has given rise to the publication of Ext.6 jointly in the name of the parties and the fact remains that the

Defendant Nos. 1 and 3 have not further challenged the same. So, when Khirabati raised the protest, the Defendant Nos. 1 and 3 have parted with that portion of their gifted land and when the Plaintiff and Defendant No.2 have protested during the Hal Settlement Operation, the Defendant Nos. 1 and 3 have agreed for joint recording which certainly would show that they had made the property available for partition amongst themselves and others without keeping it confined to themselves based upon the gift. The contents of Ext.2, a document of maintenance and Ext.10, certified copy of the compromise petition indicate about the treatment of Schedule-B property as joint family property.

The First Appellate Court on the face of the fact that the Defendant Nos. 1 and 3 are the signatories to the said Munsarin Mistake List is not right in saying that the same is the statement of the writer of that order sheet. The parties having signed cannot wriggle out of the contents or withdraw themselves just expressing their ignorance but they are required to be explained away. Basing upon the same, when the order has been passed for joint recording, the Defendant Nos. 1 and 3 have no doubt again objected as seen from the order dated 10.06.1970, but then their subsequent conduct of not challenging the record of right finally published expose their intention to accept the said joint recording in not pressing any more their

exclusive right and that can be taken as the expression of their intention to waive their separate right in surrendering it, making those lands available with their shares over it along with others. The Amin report, Ext.9 reveals that the gifted land was distributed amongst the Plaintiff and Defendant No.2. It being the certified copy prepared by a public servant in course of discharge of his duty which had been admitted in evidence without any objection, the First Appellate Court under the circumstances is not right in saying that the original Amin report having not been proved, it is not permissible to say from Ext.9 that possession of any portion of the suit schedule land by any particular person cannot be so viewed especially when the Defendant Nos.1 and 3 do not say that such position as reflected in that Ext.9 had never been so in the field. The Defendant Nos. 1 and 3 even after publication of the record of right in the Hal Settlement Operation way back in the year 1977 have not raised their disagreement with the same at any given point of time and it is impeached only in the present suit which has been filed against them.

In view of all the aforesaid, this Court is of the considered view that the First Appellate Court is not right in holding that the Schedule-B property is not liable for partition. The finding of the Trial Court that Schedule-B property was voluntarily blended by Defendant Nos. 1 and 3 with the common stock thus ought not to

have been set at naught. The substantial question of law is accordingly answered which leads to restore the judgment and preliminary decree passed by the Trial Court in respect of both Schedule –A and B properties.

15. In the result, the Appeal stands allowed. The judgment and preliminary decree passed by the First Appellate Court are hereby set aside and the judgment and preliminary decree passed by the learned Civil Judge (Senior Division), Sundargarh in Title Suit No.131 of 1996 stand restored. No order as to cost.

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

Narayan

