

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.50 OF 2007

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 Additional District Judge, Phulbani, in Title Appeal No.04 of 201998 by confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Phulbani in Title Suit No.28 of 1993.

Nakula Pradhan :: *Appellant*

-versus-

Smt. Anjana Pradhan & Others :: *Respondents*

(Appeared in this case by Video Conferencing Mode):

For Appellant - M/s.Rai Charan Mohapatra,
S. Debdas, M. Basu, B.K. Jena,
B. Bhuyan, Advocates.

For Respondents - M/s. D.K. Mishra, B. Behera,
Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 25.04.2022, DATE OF JUDGMENT:: 04.05.2022

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 decree passed by the learned District Judge, Phulbani in Title Appeal No.04 of 1998.

By the same, the Appeal filed by the present Appellant as the unsuccessful Plaintiff before the Court of learned Civil Judge (Senior Division), Phulbani in Title Suit No.28 of 1993 under Section-96 of the

Code has been dismissed and thereby the judgment and decree passed by the Trial Court have been confirmed and the Appellant (Plaintiff) has been non-suited in the suit that he had filed against the Respondent arraigning them.

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. Plaintiff's case is that the suit land described in Schedule-A of the plaint under 23 plots appertaining to Khata No.166 of mouza Kurumungia was owned by one Baya Pradhan. Baya Pradhan had a brother namely, Ranja. Rama and Japa are the two sons of Baya and Sangara is the son of Rama; whereas Radasingh is the son of Japa. Both Radasingh and Sangara have no sons.

It is stated that Dasamati, wife of Radasingh and Defendant Nos. 1 and 2 are the daughters of Dasamati and Radasingh, both are married. Maharani is the wife of Sangara, who had no issue. The other brother of Ranja had one son namely, Kagera, who had four sons. It is further stated that after death of Radasingh and Sangara, their wives Maharani and Dasamali possessed the suit land jointly and they had adopted the Plaintiff when he was 5 to 7 years of age and brought him up. They also got the Plaintiff married and accordingly, the Plaintiff was looking after

cultivation of the suit land. On 03.03.1986, Maharani and Dasamali out of their free will voluntarily executed a registered Will in favour of the Plaintiff bequeathing the entire suit property to him. The Plaintiff performed funeral and sudhikriyas of both Maharani and Dasamali. Dasamali died on 16.11.1986 and Maharani died on 23.10.1992.

The parties are Kandha by caste and as such they are members of the Scheduled Tribe community. So, Hindu Succession Act, 1956 (for short 'the H.S. Act') has no applicability for them. The Plaintiffs therefore, basing upon the Will after the death of Maharani and Dasamali filed the application before the Tahasildar for mutation and the land under that Will. The mutation application being numbered as Mutation Case No.728 of 1992 came to be rejected. The Plaintiff, therefore, having no other alternative filed the suit for declaration of his right, title and interest over the suit land and confirmation of possession as well as permanent injunction.

4. The Defendants except Defendant No.1 filed their joint written statement. Traversing averments taken in the plaint, although it is stated that Baya and Ranja are not the brothers; the genealogy of Baya as given by the Plaintiff is not disputed. However they have denied that the Plaintiff is the adopted son of Dasamali and Maharani. It is also stated that the Plaintiff was never brought up by them and he was working

under them as a field servant for which he was allowed to stay in the house. It is stated that widows had given him a house for his living for the service that he has rendered. The Will being executed by the two widows has been denied and said to be completely without their knowledge. They state that the Plaintiff has manufactured the same in order to stake his claim over the suit land.

5. The Trial Court on the rival pleadings having framed eight issues has answered all those against the Plaintiff in finally dismissing the suit. The Plaintiff being aggrieved by the judgment and decree passed by the Trial Court having challenged it in the First Appeal has again failed and hence the present Appeal at his instance.

6. Learned Counsel for the Appellant (Plaintiff) placing the rival case projected by the parties and inviting the attention of this Court to the finding of both Courts on each of the issues framed submitted that in the Appeal, the following substantial questions of law are required to be answered:-

- (i) Whether the persons belonging to the Scheduled Tribe Community were/are Hindus and governed by the provision of the H.S. Act?
- (ii) Whether a female who is a member of Scheduled Tribe community is competent to execute a Will as it has been done by the two widows namely, Maharani and Dasamali

(vide Ext.4) in favour of the Plaintiff bequeathing the suit land?

- (iii) Whether it is necessary to obtain a probate with the Will annexed under the provisions of Indian Succession Act, 1925 so as to claim title basing upon the same?
- (iv) Whether the Will, Ext.4 being a registered one when has faced the challenge in the suit was required to be proved as like a Will as being in a probate proceeding?

7. Mr. D.K. Mishra, learned Counsel for the Respondent assisting the Court in the matter of admission hearing submitted that the Appeal does not merit admission as no such substantial questions of law is surfacing. He submitted that the first question of law as advanced by the learned Counsel for the Appellant is not a substantial question of law within the meaning of section-100 of the Code since the position is so clear that the answer to the same is readily available. He submitted that when the answer to the first question of law is given that as the parties are not governed by the provisions of the H.S. Act; the very concept of testamentary disposition stands totally foreign to the principles of old Hindu Law, which prevails to govern members of the Scheduled Tribes in the Scheduled Areas of the State who are certainly Hindus. He submitted that when the very foundation of the claim of the Plaintiff over the suit land does not hold water, the Plaintiff is liable to be non-

suited and the Courts below have rightly done so. According to him, the claim of the Plaintiff as piloted in the suit claim, the reliefs stands cleanly cut at its root.

8. Keeping in view the submissions made and I have carefully read the judgments passed by the Courts below. Admittedly the parties are Kandha by caste and residents of the district of Kandhamal, a Scheduled Area. Thus, they are the members of the Scheduled Tribe as so find mentioned in the Presidential notification in respect of the State of Odisha.

9. The parties who are the permanent residents of the district of Kandhamal, a Scheduled Area have not pleaded that they are not Hindus.

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 on the subject. 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 squarely apply to them and govern the field of succession.

10. The provisions of H.S. Act although confers absolute right over the immovable property inherited by the widow in respect of the interest of her husband in the coparcenary property as coparcener which then gives the right to the widow to bequeath such property by executing the Will; the same is not the case in so far as these parties are concerned. Women belonging to Scheduled Tribe community who are governed by old Hindu law with the introduction of Hindu woman Right to Property Act, 1937 got conferred with only the a limited right and so also the widow inheriting the property of her husband in respect of the interest that he had over the coparcenary as coparcener. When the widow has the limited right which is here in the given case, the question of that limited owner bequeathing the said property in favour of any one by a Will so as to clothe him/ her with absolute right does not at all arise, as said bequeath comes into play only upon the death of the testatrix and the right of the widow stands extinguished on her death. Then the property in her hands held as limited owner, upon her death reverts back to hands of reversioners who are the heirs of the last male owner i.e. husband of the widow as would be determined at the time of death of the widow as if the death of her husband has taken place on the day, the

widow died until when by fiction of law, the death of the husband remains in abeyance or suspended animation.

The decision in case of *Phulmani Dibya Vrs. State of Orissa*; AIR 1974 Orissa 135 (FB) relied upon by the learned Counsel for the Appellant has been rendered on completely different factual settings in answering altogether a different legal issue. Therefore, the same does not come to the aid of the Plaintiff in sustaining his claim over the suit property and the reliance placed thereon for the purpose is misconceived.

11. For the aforesaid discussion, the submissions of learned Counsel for the Appellant stands repelled and it is held that no such substantial question of law surfaces in the case for being answered by admitting this Appeal.

12. In the result, the Appeal stands dismissed. However, there shall be no order as to cost.

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