

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.298 of 2011

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 30.06.2011 and 08.07.2011 respectively passed by the learned Ad hoc Additional District Judge, Sundargarh, in R.F.A. No.36/14 of 2005-10 confirming the judgment and decree dated 19.07.2004 and 27.07.2004 respectively passed by the learned Civil Judge, Senior Division, Sundargarh in T.S. No.94 of 2001.

Dinakanta Patel

....

Appellant.

-versus-

Mukteswar Patel and Others

.....

Respondents.

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

For Appellant - Mr.P.C. Acharya, A.K. Patel
Advocates

For Respondents - Mr.B. Sahoo, B. Mohanty,
P.K. Patel, A. Tripathy
(Advocates For R.1)

Mr.B.C.Jena, S. Chakrabarti,
N.Behuria

(Advocates R.2 to 8 &
10, 11 & 15)

Mr.A.K. Nanda, G.N. Sahu,
H.S. Choudhury,
(Advocates for R.9)
Advocates

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 04.04.2022 :: Date of Judgment:11 .04.2022

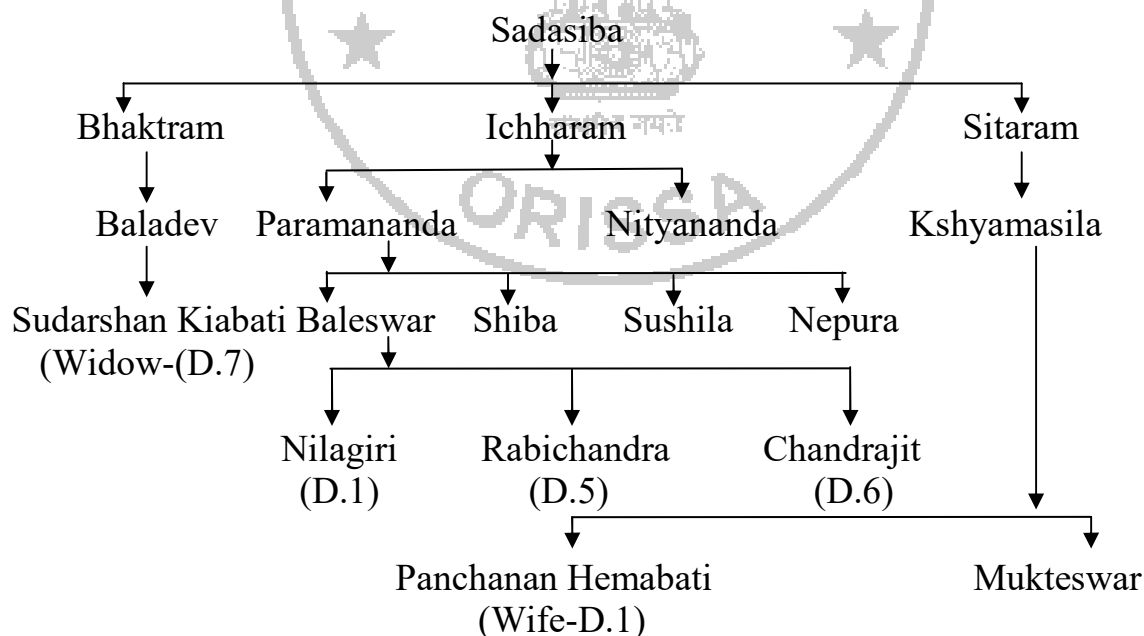
The Appellant by filing this Appeal under Section 100 Civil Procedure Code (for short, 'the Code'), has assailed the judgment and

decree dated 30.06.2011 and 08.07.2011 respectively passed by the learned Ad hoc Additional District Judge, Sundargarh, in R.F.A. No.36/14 of 2005-10

By the same, the Appeal filed by the Appellant (Defendant No.8) under section 96 of the Code has been dismissed and the First Appellate Court has thereby confirmed the judgment and decree dated 19.07.2004 and 27.07.2004 respectively passed by the learned Civil Judge, Senior Division, Sundargarh in T.S. No.94 of 2001.

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 case of the Plaintiff is that one Sadasiva Patel had three sons, namely, Bhaktaram, Ichharam and Sitaram. The family tree, as given in the plaint, runs as under:-



The parties are Hindus and are governed by Mitakshara School of Hindu Law. It is stated that Baladev died in the year 1952 while in jointness leaving behind his son Sudarsan, who died leaving behind his

widow (Defendant No.7). Ichharam died 60 years back leaving behind his two sons, namely, Paramananda and Nityananda. Paramananda died in the year 1951 leaving behind his two sons Baleswar and Siba (Defendant No.3) and two daughters, namely, Sushila & Nepura. Sushila is dead. Baleswar died leaving behind his three sons and they are Niladri (Defendant No.4), Rabichandra (Defendant No.5) and Chandrajit (Defendant No.6). Nityananda died about 50 years back. Sitaram died leaving behind his one son Kshyamasila, who is also dead leaving behind two sons, namely, Panchanan and the Plaintiff. Panchanan died leaving his widow Hemabati (Defendant No.1) and one daughter Suklabati (Defendant No.2). Sushila died leaving behind two sons Krushna & Santosh and three daughters Kshiti, Jayanti & Kunti. Nityananda died leaving one daughter Kamala. Kshyamasila died leaving behind two daughters Nalita and Kanti.

All the three sons of Sadashiva and two sons of Ichharam are dead. It is further stated that the parties have got their joint homestead land as described in Schedule-‘A’ of the plaint over which ancestral house stands. It is their case that there was no partition amongst them although, the parties have been residing separately for convenience. The Plaintiff states to be residing in the house constructing the same over another plot of land which is not a part of suit land. The Plaintiff requested the Defendants for partition and the same having been denied; the suit has come to be filed.

4. The Defendants 1 to 6 have jointly filed their written statement. They state that Baldev had a son and one daughter named Gomati and Gomati died leaving behind her son namely Dinakanta Patel (the present Appellant) who had been later arraigned in the suit as the Defendant No.8. It is stated that the parties have also got ancestral joint family

property of an extent of Ac.7.69 decimals under Hal Khata No.78 of Mouza Rupabahal and those lands have also not been partitioned. It is further stated that Defendant No.3 had relinquished Ac.0.30 decimals of land in Pita Chhaka from out of his share in favour of the father of Defendants 4 and 6. It has been claimed by them that the house of the Plaintiff is existing over plot no.723 under khata no.16. The ancestral house of Defendants 1 and 2 and the Plaintiff was constructed by the father of the Plaintiff, grandfather of Defendant No.2 and father-in-law of Defendant No.1. The Plaintiff gave up his share in the ancestral house situated over khata no.108 of village Suruda in favour of Panchanan Patel, the husband of Defendant No.1 and father of Defendant No.2 in exchange of the ancestral house situated khata no.10 of villate Suruda. In course of time, the Plaintiff as well as Defendants 1 and 2 have improved and renovated their house as per their need and as such, it is asserted that the Plaintiff has no right to claim any share over the homestead house situated under khata no.108. It is also stated that Siba Patel (Defendant No.3) has sold a portion of his ancestral house & bari out of suit plot no.784 and 785 to Baleswar Patel, the father of Defendants 4 to 6 for a consideration of Rs.500/- and executed a plain paper sale deed on 12.02.1983. The remaining portion of house and bari is said to be possessed by Siba Patel then and that has also been given in exchange in favour of Panchanan Patel, the father of Defendant No.2. It is further stated that in lieu of that exchange, the Defendant No.3 has given land in khata no.16 where he has constructed his own house and as such, the Defendant No.3 has got no claim over ancestral house and homestead as shown in Schedule-A of the plaint. It is also said that the share of Defendant No.3 with regard to homestead and house of the suit

plot is to be adjusted towards the share of Defendants 4 to 6 and Defendants 1 & 2.

Simultaneously, it is pleaded that the mango garden over the suit land under plot no.802 is enjoyed and possessed by the parties jointly which needs to be partitioned and the suit plot no.1088 Goda-II extending to Ac.0.11 decimals being possessed by both the parties are also liable to be partitioned.

5. The Defendant No.7, in his written statement, has accepted the plaint averments to be correct; in further asserting that Baladev died in the year 1952 leaving behind his son Sudarsan and daughter Gomati. Then it is said that daughter Gomati had no right and title over the suit land and therefore, she was not given any share.

6. The Defendants 5 and 6, in their written statement, have stated that Baladev had a daughter named Gomati, who died in the year 1972 leaving behind her son Dinakanta Patel, the Defendant No.8. It is their case that the Plaintiff and Defendants have got ancestral joint landed property recorded in khata no.78 of village Rupabahal, which has been recorded in the name of Sudarsan and Kshyamasila, Paramanand and Pratima measuring Ac.7.69 decimals. The said land has not been partitioned. It is again stated that Defendant No.3 had relinquished Ac.0.30 decimals of land in favour of Baleswar Patel, the father of Defendants 4 to 6. They state that the ancestral house and homestead have not been partitioned and the parties are residing as per convenience. The Plaintiff is said to be residing in the house situated over plot no.723 under khata no.16, which is the ancestral house of Defendants 1 and 2 and that has been constructed by the father of the Plaintiff and grandfather of Defendant No.2 and father-in-law of

Defendant No.1. For the sake of convenience, the Plaintiff has given up his share out of the suit ancestral house situated over khata no.108 of village Suruda in favour of Panchanan Patel, the husband of Defendant No.1 and in exchange of that, the Plaintiff took the ancestral house situated over khata no.16 of village Suruda. Accordingly, the Plaintiff and Defendants 1 and 2 as per their need and capacity, have developed the same. It is thus said that the Plaintiff has no right to claim any share from out of the homestead house situated over the land under khata no.108. It is also stated that Siba Patel (Defendant No.3) has sold portion of his ancestral house and homestead out of suit plot nos.784 & 785 to Baleswar Patel, the father of Defendants 4 and 6 for a consideration of Rs.500/- and executed a plain paper sale deed on 12.08.1983. The remaining portion of house and bari possessed by Siba Patel has been given to Panchanan Patel in exchange and in lieu of that, Defendant No.3 has given land under khata no.16 of the suit village where he has constructed his own house and as such Defendant No.3 has got no claim over the ancestral home and homestead as shown in Schedule-A of the plaint. It is their case that the share of Defendant No.3 over the homestead is to be adjusted in the share of Defendants 4 to 6 and Defendant 1 and 2.

With regard to the mango garden situated over plot no.802, it is said to be in the enjoyment and possession of the parties jointly. They also state that the land under plot no.1088 to the extent of 11 decimals is being possessed by both the parties jointly.

7. The Defendants 14 to 17, in their written statement, have pleaded that they have also right, title and interest over the suit land. Schedule-B of the plaint is also the joint family property of the parties. Thus, they state that both the lands in Schedule-A & B are liable to be partitioned.

8. The Defendants 8 to 13 and 15, in their written statement, have stated that Baladev died in the year 1964 and not in the year 1952 as stated in the plaint and he had left behind one son and daughter, namely, Sudarsan and Gomati respectively and Defendant No.8 is the son of said Gomati.

9. On the above rival pleadings, the Trial Court, in total, has framed five issues. Coming to answer the issue with regard to partition of the suit land and allotment of shares to the parties, Defendant No.8 has been declined to be given any share over the suit property as he has been held as not so entitled.

The Trial Court has said that when the Plaintiff has pleaded in the plaint that Baldev died in the year 1952 and that has not been denied by Defendant No.8 and others in the written statement, the same has to be taken to have been admitted and evidence to the contrary let in by the Defendants are not to be looked into. Thus, having held that Baladev died prior to the coming into force of Hindu Succession Act, 1956 (for short, 'the H.S. Act') leaving behind his Sundarsan and daughter Gomati, the Defendant No.8 as son of Gomati is said to have no right over the property as his mother did not have so.

10. The First Appellate Court, being moved by the Defendant No.8, has reiterated the finding of the Trial Court that Gomati had no interest over the suit land as Baladev died prior to the H.S. Act. Having said so, the Defendant No.8 has been held to be having no right over the suit property so as to be entitled to any share therein.

While agreeing with the finding of the Trial Court in that regard, the death certificate of Baladev obtained on 04.07.2005 after the disposal of the suit and during pendency of the First Appeal to establish

the year of death of Baladev Patel being sought to be adduced as an additional evidence by the Defendants has been rejected.

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

““Whether the finding of both the courts below that Baldev died in the year 1952 is vitiated for non-consideration of pleadings of respondent nos.8 to 13 and 15 in their written statement and the evidence of D.W.3 in Court?”

12. Mr. Acharya, learned counsel for the Appellant submitted that the materials available on record being cumulatively viewed, the finding that Baldev died in the year 1952 does not stand to scrutiny. He submitted that when the Trial Court has stated that Defendant No.8 has not denied the pleading made in the plaint with regard to the year of death of Baladev as in the year 1952; that is factually incorrect. He further submitted that merely because the Plaintiff has not been cross-examined on that aspect of death of Baladev, that was not enough to say that Baladev died in the year 1952 as pleaded by the Plaintiff accepting his version as gospel truth. It was his submission that a holistic view being taken on the evidence and appreciated in the backdrop of the pleadings, this Defendant No.8 cannot be held as not entitled to any share over the property in respect of Baladev's share along with Defendant No.7.

He has cited several decisions in support of his claim that the Courts below, on the evidence on record, ought to have recorded the finding that Baldev died in the year 1964 after coming into force of H.S. Act as has been pleaded by Defendant No.8. The decisions are (i)MT. Sukhrajji Bhuj –V- Calcutta State Transport Corporation; AIR 1966 Cal 620; (ii) Smt Dulari Kuer and Others –V- Shivanandan Prasad Singh & Another; (1977) 25 BLJR 280; (iii) C.N. Ramppa

Gowda –V- C.C. Chandregowda (Dead) by LRs and Another; (2012) AIR (SCW) 2510; and (iv) Balraj Taneja & Another –V- Sunil Madan & Another; (1999) AIR (SCW) 3345.

13. Mr. B.Sahoo, learned counsel for the Respondent No.1 submitted all in favour of the findings recorded by the Courts below as regards the date of death of Baladev. He submitted that said well reasoned finding on fact when is free from the vice of perversity; the same is not liable to be interfered with in this Second Appeal.

14. Keeping in view the submissions made, I have read the judgments passed by the Courts below carefully and gone through the rival pleadings in the plaint and written statement as well as the evidence let in by the parties.

15. In order to answer the substantial question of law, there arises the necessity to examine the sustainability of the findings of the Courts below with regard to the year of death of Baladev.

In plaint, it is pleaded that Baladev died in the year 1952 whereas this Defendant No.8's case is that he died in the year 1964. The Plaintiff has been examined as P.W.2. It is his evidence that Baladev died in the year 1952. He had a son Sudarsan and daughter Gomati, who died in the year 1972. The Defendants have not cross-examined this Plaintiff by putting any question whatsoever so as to impeach his evidence on that score of the year of death of Baldev.

Going deep to the evidence of P.W.2, it is seen that in paragraph-1 of his evidence in chief on affidavit, he has stated that Baladev died in the year 1952. The witness has been cross-examined at length. But even no suggestion has been thrown upon him what he was saying about the year of death of Baladev is not correct. When it has been

deposed to by D.W.4 who is none other than Defendant No.8, in his examination in chief on affidavit that Baldev died in the year 1964; the Plaintiff, during cross-examination, has challenged that by suggesting to the witness that the same is not a fact. In that connection also to ascertain the veracity of the evidence tendered by this Defendant No.8 examined as D.W.4, questions being put as regards the death of Paramananda, Nityananda and Iccharam, the sons of Baleswar Patel, he has expressed his inability to say the same. Moreover, when he has stated that the name of her mother Gomati is shown in the current settlement in respect of the suit land (Ext.1), the record of right does not so reveal.

I have carefully gone through the decisions as noted in the foregoing paragraph no.12. The facts and circumstances of the case as narrated in the cited cases are not the same as we are concerned in the given case as those emerge from the pleadings and the evidence on record as discussed.

16. For all the aforesaid, this Court finds no such compelling reason to express its disagreement over the finding of the Courts below as regards the year of death of Baladev. The substantial question of law thus receives its answer in favour of the affirmation of the finding of the Courts below that Baldev having died in the year 1952, the Defendant No.8 as the son of Gomati; the daughter of Baldev is not entitled to any share over the suit land.

17. In the result, the Appeal stands dismissed. There shall however be no order as to cost.

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