

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.68 OF 2015

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, Jajpur, in RFA No. 27 of 2005 by confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Jajpur in Title Suit No.186 of 1994.

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Prafulla @ Prafulla Kumar Dalai & Others :::: ***Appellants***

-versus-

Braja Kishore Dalai & Others :::: ***Respondents***

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

For Appellants :::: M/s. A.R. Dash, A. Mahanta,
S.K. Nanda-1, B. Mohapatra,
L.D. Achari, N. Swain, K.S.
Sahu, Advocates.

For Respondents :::: M/s. N.K. Sahu, B, Swain,
Advocates.
:::: M/s. T.K. Mishra,
S. Mohanty, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 21.09.2022, DATE OF JUDGMENT::20.10.2022

These Appellants in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, ‘the Code’) have assailed the judgment and preliminary decree passed by the learned District Judge, Jaipur, in RFA No. 27 of 2005.

By the same, the Appeal filed by the present Appellants under Section-96 of the Code in challenging the judgment and preliminary decree passed by the learned Civil Judge (Senior Division), Jajpur in Title Suit No.186 of 1994 has been dismissed and thereby the judgment and preliminary decree passed by the Trial Court have been confirmed.

It may be stated here that one Nabakishore and Abhiram had filed the suit for partition of the properties described in Schedule-A and B of the plaint in claiming their $\frac{1}{3}$ rd share and half share respectively. The suit stood decreed by the Trial Court as under:-

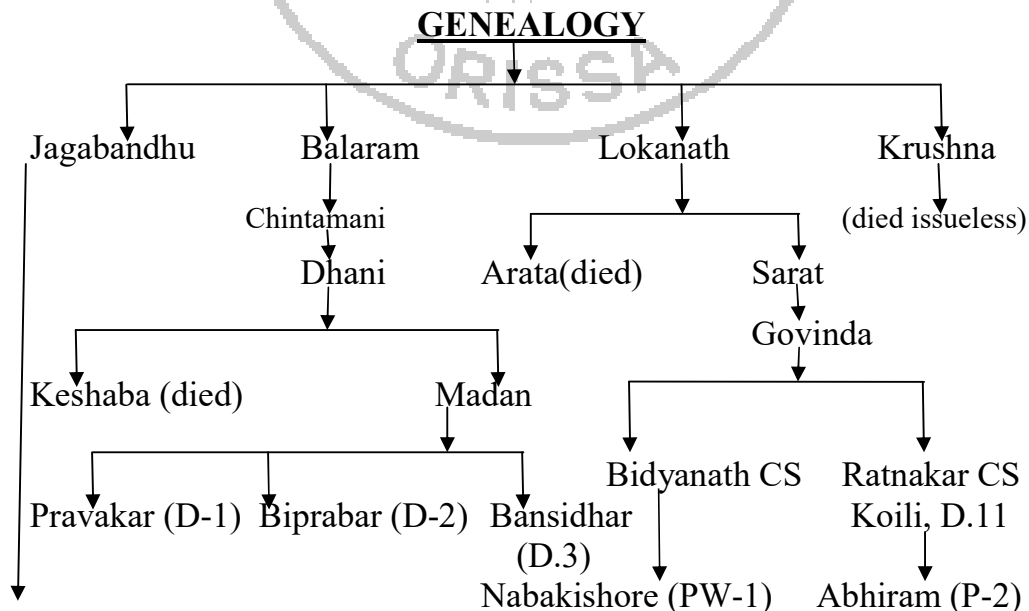
“The suit is decreed preliminarily in part on contest against the Deft. Nos. 4, 5, 6 to 11 and expunge against the rest defendants without cost. The Plaintiffs are entitled to get $\frac{1}{6}$ th share from ‘A’ Schedule property and $\frac{1}{4}$ th share from ‘B’ Schedule properties. So also, Deft. No.11 is entitled to get $\frac{1}{6}$ th share from ‘A’ Schedule properties and $\frac{1}{4}$ th share from ‘B’ Schedule properties. Defendant Nos. 1, 2 and 3 together are entitled to get $\frac{1}{3}$ rd share from ‘A’ Schedule properties. Defendant Nos. 4 and 5 together are entitled to get $\frac{1}{12}$ th share from ‘A’ Schedule properties and $\frac{1}{8}$ th share from ‘B’ Schedule properties. Similarly, Deft. Nos. 6 and 7 together are entitled to get $\frac{1}{12}$ th share from ‘A’ Schedule properties and $\frac{1}{8}$ th share from ‘B’ Schedule properties. The Defendant Nos. 8, 9 and 10 together are entitled to get $\frac{1}{6}$ th share from ‘A’ Schedule properties and $\frac{1}{4}$ th share from ‘B’ Schedule properties. The parties are directed

to effect mutual partition of the suit properties as per the definement of shares indicated above within three months hence, failing which, either party is at liberty to apply to Court for deputation of Civil Court Amin Commissioner for effecting partition and to make the decree final. While effecting partition the possession of the properties by the co-sharers is to be respected as far as practicable. If any transfer has been made by any of the co-sharers, the same should be adjusted from his share. Pleader's fee at the contested scale."

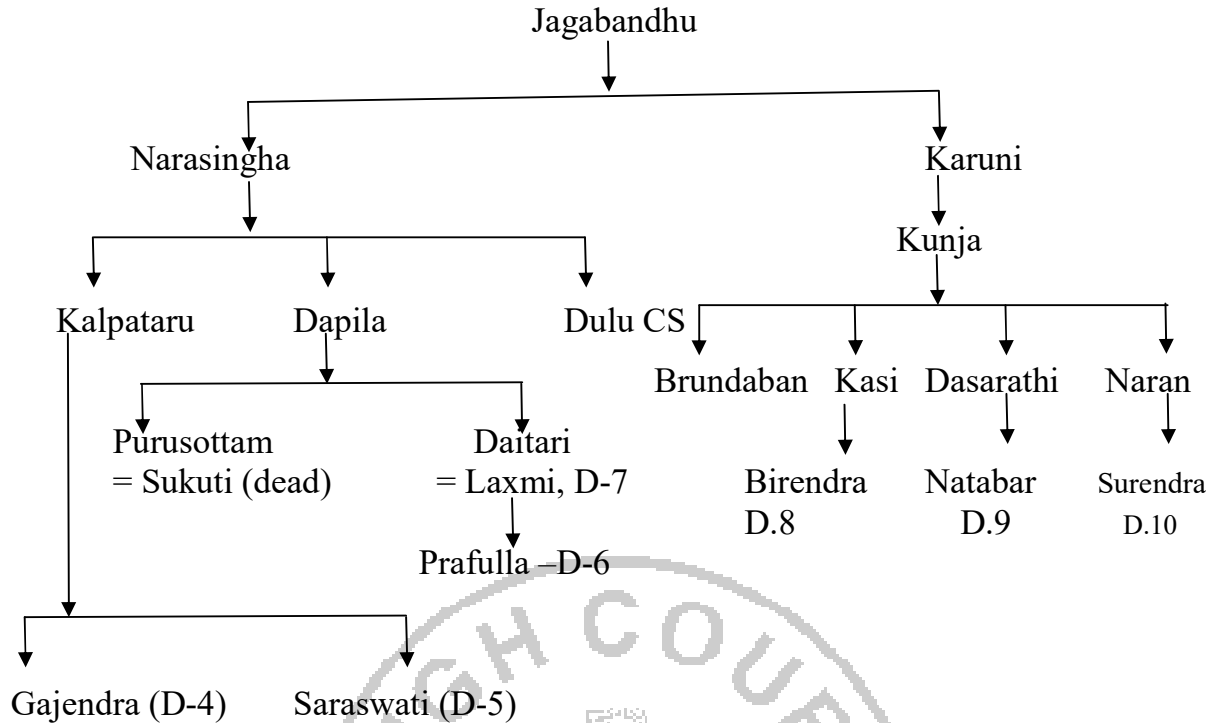
The present Appellants being the aggrieved Defendant Nos. 6 to 8 and 10 and the Defendant Nos. 9 (since dead) had carried the first Appeal, which has yielded no fruitful purpose for them.

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. The genealogy given by the Plaintiffs runs as under:-



Shown in the next page



According to the Plaintiffs, Schedule-A properties are the ancestral property and Jagabandhu, Balaram, Lokanath and Krushna. Krushna having died issueless, they claim that the same be equally divided amongst the branches of Jagabandhu, Balaram and Lokanath having 1/3rd share.

The properties described in Schedule-B of the plaint when is standing recorded in the C.S. ROR in the name of successors of Jagabandhu branch and Lokanath branch; they claim that as being the members of Jagabandhu branch they are having half share over the same. It is stated that there was no partition of the properties in metes and bounds and as their claim for partition was not paid any heed to, the suit has been filed.

4. The Defendant Nos. 1, 4 and 6 in their written statement had admitted the genealogy given by the Plaintiffs. The Defendant Nos. 1, 4 and 5 in their written statement as well as the Defendant No.6 to 10 in their written statement have admitted the genealogy given in the plaint. They have also admitted the share as claimed by the Plaintiffs.

5. The Defendant Nos. 4 & 5 have however pleaded that Subudhi is the daughter of Purusottam and not the wife of Pitambar as stated by the Plaintiffs. Except challenging this part of the genealogy, they have practically admitted the case of the Plaintiffs and all other factual settings.

6. The Defendant Nos. 6 to 10 are the contesting Defendants, they have stated that Abhiram, Plaintiff No.2 is not the son of Ratnakar. According to them, Abhiram is the son of Plaintiff No.1 i.e. Nabakishore. They further state that there was prior partition in metes and bounds between three branches i.e. Jagabandhu, Balaram and Lokanath long prior to the current settlement operation, which had taken place in the year 1928-29. According to them, the branch of Jagabandhu got 7 annas of share; Lokanath branch had got 5 annas of share; whereas branch of Balaram 4 annas of share. It is also pleaded that pursuant to the said partition, parties were separately possessing and in enjoyment of the properties. They further plead that there was

also partition of Schedule-B properties between the two branches i.e. Jagabandhu and Lokanath equally and accordingly, they are possessing the respective portions which had fallen to their shares and therefore separate record of rights have been issued in the settlement of the year 1928-29. It has been further pleaded that Dhani Dalei of Balaram branch filed Title Suit No.48 of 1930 in the Court of Sub-Ordinate Judge, Cuttack, which was dismissed for default on 05.11.1930. Thereafter, he wanted to file a fresh suit for partition and then the gentlemen of the locality intervened to settle the dispute amongst the co-sharers and as per previous partition, and provision as to 7 annas of share of Jagabandhu branch, 5 annas of share to Lokanath branch and 4 annas of share to Balaram branch, the registered deed of partition came into being on 16.06.1931. The Defendants rely on the said deed of partition and they claim their share as per definement therein. They however do not dispute the half interest of Lokanath branch over Schedule-B properties by giving the other half to the Jagabandhu. They state that Plaintiff No.1 had executed a sale-deed jointly with Defendant No.9 i.e. Natabara, selling the part of Schedule-A land to an outsider; wherein he has admitted Partition of the parties in metes and bounds between three branches through that very Partition Deed dated 16.06.1931.

7. It may be stated here that after filing above written statement, the Plaintiff has made amendment in the plaint in providing some explanation that sale-deed executed by Plaintiff No.1 and Defendant No.9 jointly was without the knowledge of the Plaintiff No.1 and he had put the signatures on the dotted line in the said sale-deed being so directed by Defendant No.9 on whom he had great confidence and reliance.

8. The suit in the first round was disposed of on 19.08.1997 by passing the preliminary decree for partition allotting shares to the parties. The Defendant Nos. 6 to 10 having preferred First Appeal, the First Appellate Court remanded the suit to be tried afresh after amendment of issue no.4 by providing and opportunities to the parties. So, on the second round, the Trial Court has disposed of the suit by the order as already indicated in the foregoing paragraph and now the First Appeal filed by the aggrieved Defendant Nos. 6 to 10 has been dismissed.

9. The present Appeal has been admitted to answer the following substantial questions of law:-

- “1) Whether under the admitted position as revealed from the documentary evidence starting from C.S. Record of Rights, Exts. D to D/15, E to E/15, which are the rent receipts and Exts. F to F/31, which are draft Record of

Rights, which are in support of the previous partition, the learned Courts below are correct in not accepting the defence plea of previous partition and allowing the Plaintiffs' relief for partition?

- 2) Whether on the basis of the evidence on record giving rise to presumption of previous partition in the family which have been acted upon as revealed from the conduct of the parties, seeking relief of partition in respect of the properties already partitioned could be held to be available to the party so seeking?"

10. Learned Counsel for the Appellant submitted that the finding of the Courts below that there was no partition of the properties amongst the members of the family consisting of three branches prior to current settlement operation which had taken place in the year 1928-29 had completely contrary to the weight of evidence on record and the presumptions as per law flowing therefrom have not at all been taken into account. He further submitted that the Courts below have not taken into consideration by bestowing due attention upon the documents, Ext.C along with the document, Ext.W in their proper perspective. According to him, these two documents admitted in evidence being cumulatively viewed, the Courts below ought to have held that there was partition between the heirs of three branches of Jagabandhu, Lokanath and Balaram before current settlement operation. He also submitted that series of record of rights, Ext.D to

D/15, Ext. E to E/15 and rent receipts Ext.F to F/31, providing support the factum of prior partition have been unreasonably and without any reason and justification eschewed from consideration.

11. Learned Counsel for the Respondent Nos. 1 and 2 submitted that the findings of the Courts below that there was no previous partition of the family properties amongst the heirs of the three branches namely, Jagabandhu, Lokanath and Balaram being concurrent, it is impermissible for this Court in seisin of Second Appeal to reverse the same as there surfaces, no such perversity therein and is not so pointed out. He submitted that simply because another view is possible to be taken on the obtained evidence on the factum of partition or no partition, when the Trial Court as well as the First Appellate Court have recorded the finding in one way, it should not be interfered with even on the ground that the same is erroneous. He further submitted that here in the case, the base document relied upon by the Defendants is Ext.3, the so called deed of partition has been rightly rejected by the Courts below and by assigning very good reasons and the subsequent sale-deed Ext.W has been rightly said to be of no avail to establish a case of previous partition. He further submitted that documents relied upon by the Defendants i.e. Record of Right and the rent receipts on being carefully examined, keeping in view the settled principle of law

holding the field, the Courts below have rightly arrived at a conclusion that those are not sufficient to hold that there was prior partition almost the heirs of the three branches before the current settlement operation in the year 1928-29.

12. Learned Counsel for the Respondent Nos. 12 and 13 giving a go bye to the original challenge as to the status of Subudhi being not the wife of Pitambar but the daughter of Purusottam, which they had stated in the written statement submitted in favour of the finding returned by the Courts below and the final order passed by those Courts. He reiterated the submissions advanced by the learned Counsel for the Respondent Nos. 1 and 2.

13. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the written plaint and written statements. The oral and documentary evidence have also been perused.

14. In view of the case and counter case of the parties, when the Plaintiffs had pleaded for partition of the ancestral properties in Schedule-A and the contesting Defendants have taken the plea of previous partition amongst the members of the branches of Jagabandhu, Lokanath and Balaram prior to the current settlement operation taking place in the year 1928-29, rightly the burden of proof

has been placed upon the contesting Defendants to establish their case of prior partition. Ext. 1, 2 and 3 are the Record of Rights in respect of Schedule-A properties whereas Ext.3 and Ext.W/7 are the Record of Right in respect of the Schedule-B properties. The stand of the contesting Defendants is that there was prior partition between the members of the three branches prior to the current settlement in the year 1928 is based upon the fact that there was note of possession in respect of the plots in favour of the co-shares and that there is mention of share concerning the Schedule-A land. In the subsequent written statement, their specific case is that there was a partition on 16.06.1931 by registered document which has been marked as Ext.C. It is stated that in that partition allotment of lands have been made also in the name of Baidyanath and Ratnakar. But the fact remains that Baidyanath and Ratnakar have not signed on the document and that is stated to be by way of mistake.

Be that as it may, they claim that the said partition and allotment of the properties have been accepted by the parties. Thus, it appears that the contesting Defendants have once taken the stand that there was partition prior to 1928-29 and then again the stand that the partition took place on 16.06.1931, which is by way of registered deed, Ext.C. However, the fact stands that in both the written statements, the month

and year of partition is not stated. Ext.C, the registered sale-deed of partition also does not reveal that prior to that document coming into being, there was a partition. Rather the recital of Ext.C reveals that Dhani Dalei had filed a suit for partition in the Court of Sub-Ordinate Court, Cuttack claiming 1/3rd share in the suit land which was in the year 1930 numbered as Title Suit No.48 of 1930 and that stood dismissed. It further reveals that the document came into being due to the intervention of the gentlemen, when Dhani was contemplating to file another partition suit after dismissal of the earlier partition suit for default. The current settlement record, Ext.2 shows the shares of the branches, but the other two records of rights Exts. 1 & 4 in respect of the suit land do not so disclose regarding the noting of share in respect of three branches of Jagabandhu, Lokanath and Balaram. Thus, the Courts below had rightly concluded that these documents do not lead to conclusively hold in favour of a prior partition as asserted by the Defendants to have taken place before the year 1928-29. When they have stated that the partition took place by the registered document dated 16.06.1931, the fact remains that Baidyanath and Ratnakar who are necessary parties to the partition are not signatories to that document. It is simply stated that they had not signed by mistake and for that reason, it is stated that they have later on accepted that

allotment which per se is not acceptable. The Courts below also rightly assigning good reasons have refused to accept that registered deed, Ext.C to be a deed of settlement. In such state of affairs in the evidence, having carefully gone through the discussion made by the Trial Court, the ultimate conclusion that there was no partition between the heirs of the three branches of Jagabandhu, Lokanath and Balaram is not seen to be suffering from the vice of perversity.

The factum of separate possession of the properties of the parties have been well explained by the Courts below by discussing the evidence and so also the other documents proved from the side of the Defendants have been rightly held to be not sufficient to record a finding of prior partition of the parties as pleaded by the Defendants. The Courts below are also found to have rightly discarded the documents, Ext.W, the certified copy of the sale-deed executed by Nabakishore and Natabara. Merely because, the deed contains the recital and reference about that partition deed dated 16.06.1931, when all the parties were not the signatories to that document; which is the mandate of law and that apart when noting is shown that those who are non-signatories have subsequently ratified/affirmed the same and have scrupulously so followed it, the said deed has been rightly found to be no avail to the case of the Defendants. The Courts below are therefore

justified in disbelieve the plea of prior partition. The substantial questions of law thus are answered accordingly which leads in favour of confirmation of the judgment and preliminary decrees passed by the Trial Court which have been accepted by the First Appellate Court.

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

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

Narayan

