

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

# R.S.A. NO.265 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, Khurda at Bhubaneswar, in RFA No. 14 of 2007 confirming the judgment and decree passed by the learned Additional Civil Judge (Senior Division) IInd Court, Bhubaneswar in OS No.255 of 2004 (122 of 1990-I).

*Debraj @ Debaraj Swain & Another*

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***Appellants***

*-versus-*

### *Benu Swain & Others*

## Respondents

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

## *For Appellants*

M/s. Banamali Sahoo-1,  
P.K. Khuntia, Advocates.

### *For Respondents -*

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**CORAM:**

**MR. JUSTICE D.DASH**

**DATE OF HEARING::21.11.2022, DATE OF JUDGMENT:: 25.11.2022**

These Appellants in 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, Khurda at Bhubaneswar, in RFA No. 14 of 2007.

By the same, the Appeal filed by the Appellants (Plaintiffs) being aggrieved by the judgment and preliminary decree passed by the learned Additional Civil Judge (Senior Division) IInd Court, Bhubaneswar in OS No.255 of 2004 (122 of 1990-I) under section-96 of the Code has been dismissed. Thereby the judgment and preliminary decree passed by the Trial Court in the suit filed by this Appellants as the Plaintiffs arraigning the Respondents as the Defendants declaring the half share of these Appellants(Plaintiffs) with their six sisters as against their claim of two third share and allotting half share to the Respondents (Defendants) instead of one third as stated by these Appellants (Plaintiffs) 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. Plaintiffs case is that one Bisuni Swain had three sons namely, Ananta, Basu and Kashi. Pravakar was the son of Basu and was the original Plaintiff in the suit and on his death, the present Plaintiffs have come to pursue the suit as the grandson of late Basu through his son Pravakar. Ananta died leaving behind two sons namely, Udi and Bana. Udi died leaving behind Defendant Nos. 1 to 5, 7 and 8. Defendant no.6 is Bana. It is stated that Defendant No.6 had relinquished all his

rights in favour elder brother Udi, who happens to be the father of Defendant Nos. 1 to 5, 7 and 8. The suit property as described in Schedule-B of the plaint is stated to be the joint family property of the parties. Kashi died leaving behind his wife Radhi. It is stated that she had alienated her 1/3<sup>rd</sup> share over the suit property to the Plaintiffs vide registered sale-deed dated 21.04.1952. So the Plaintiffs claim that they have got 2/3<sup>rd</sup> share over the suit property which they are enjoying despite the joint recording of the suit land in the record of right of the year 1962. It is further stated that the suit plots are recorded in the hal settlement in the year 1988 with the note of possession of the Defendants in respect of the suit property as are being enjoyed by the Plaintiffs. They further state that a private passage having the width of nine (9) cubits is adjoining the eastern side of the suit plot Nos. 478 & 479 from south to north and that passage joins village path for their entry and exit. The settlement authority have played mischief in not carving out that passage and that is said to have been so done at the instance of the Defendants. It is also stated that there is a wrong note of possession in favour of the Defendants in respect of hal plot no.479. In view of such wrong settlement entries, the Defendants when refused to accept the demand of the Plaintiffs for partition of the property in metes and bounds, the Plaintiffs were compelled to file the suit.

4. The Defendant Nos. 1 to 5, 7 and 8 in the joint written statement while traversing the plaint averments have stated that Ananta had four sons namely, Udi, Bana, Budhi and Dwijabara. Budhi died issueless, Dwijabara has gone on adoption to another family, Kasi died in the year 1930 being issueless.

According to the case of the Defendants, Kasi having died prior to the year 1930; Radhi was a widow prior to the coming into force of the Hindu Women Right to Property Act, 1937. So, it is stated that Radhi had no right over the joint family property in respect of 1/3<sup>rd</sup> share of Kasi. It is further stated that in the year 1952 Radhi had no right to alienate the undivided interest of her husband as by then they were in joint mess and estate. Thus, Radhi having no alienable right over the property, the sale-deed of the year 1952 as claimed to have been in existence in favour of the Plaintiffs is stated to be void. The Plaintiffs are thus stated to have not got 2/3<sup>rd</sup> share over the suit property as they claim. It is further stated that there being no partition in metes and bounds and also there being no amicable family arrangements, the Plaintiffs cannot claim the property on the basis of possession as noted in the remark column of the record of right. They also state that Defendant No.6 has not relinquished his share in respect of the suit property in favour of the Defendants. They have also denied

the existence of any such passage adjoining the house of the parties and therefore, the Settlement Authority did commit no mistake in not carving out that passage. It is their case that the Defendants had asked the Plaintiffs on 11.05.1990 to make partition and that was denied by them. So, the Defendants had filed Title Suit No.124 of 1990. The Defendants state that they do not have any objection for partition but they oppose the claim of the Plaintiff to be having two third share which according to them is unjust and untenable. They state that the Plaintiffs with their sisters are entitled to half share over the suit property.

5. The Defendant No.6 having died during the suit, the suit has abated as against him.

6. The Trial Court on the above rival pleadings has framed in total four(4) issues. As regards the claim of the Plaintiffs to be having 2/3<sup>rd</sup> share of the suit property, which is refuted by the Defendants; on examination of evidence and their evaluation as also in the backdrop of the position of law, the answer has been returned against the Plaintiffs. That has practically led the Trial Court to decree the suit preliminarily, allotting the shares to the parties as stated in the foregoing paragraph.

7. The Plaintiffs being aggrieved by the judgment and preliminary decree passed by the Trial Court refusing to allot two third share over

the suit property to them; having filed the First Appeal have failed in that move.

8. Learned Counsel for the Appellants submitted that the Courts below are not correct in coming to a conclusion that the Kasi, the husband of Radhi had died in the year 1930 and as such Radhi is Pre-Act-widow. According to him, when there is no evidence on that score, such a finding is vulnerable. He further submitted that the Courts below are absolutely incorrect in concluding that the registered sale-deed dated 21.04.1952 executed by Radhi has never been acted upon, when its execution and registration have been proved. He further submitted that the Courts below ought not to have accepted the stray statement of the witnesses examined from the side of the Defendants with regard to the year of death of Kasi in giving a finding on that score. He thus urged for admission of this Appeal to answer the above as the substantial question of law.

9. Keeping in view the submission made, I have carefully read the judgments passed by the Courts below.

10. Admittedly, the property is the joint family property. Here both the Courts below upon detail examination of the evidence and their

evaluation, have concurrently found that the Kasi died in the year 1930 leaving behind his widow Radhi.

On going through the relevant paragraphs of both the judgments, this Court finds all the justifications to say that the approach in the matter of appreciation of evidence is in the right direction. The Courts below having analyzed the evidence from every possible angles, when have arrived at the conclusion that Kasi died in the year 1930, this Court does not notice anything to say that such a finding suffers from the vice of perversity. That being so when the finding stands that Kasi died in the year 1930 and the Radhi was a Pre-Act-widow, the sale-deed executed by her is of no value in the eye of law so as to confer the right, title and interest in respect of the interest of her husband over the joint family property in favour of the vendors.

11. Even now accepting for the sake of argument that Radhi was not a Pre-Act -widow and she had sold the interest of her husband in the joint family property in the year 1952, which is prior to the coming into force of Hindu Succession Act, 1956 when that Radhi in terms of the provisions of Hindu Women's Right to Property Act, 1937 was having the limited right over the interest of her husband in the joint family property. For that, by the sale, the Plaintiffs were not conferred

with absolute right over the purchased property would also not confer any as by then Radhi could be said to be at least having the limited right over the interest of her husband in the joint family property and the purchasers thus could legally enjoy that limited right. Here it is not the case of the Plaintiffs nor they have proved that the sale was for legal necessity of that Radhi, the limited owner if we so say. Therefore, when we say that Radhi died after coming into force of Hindu Succession Act 1956; there being no re-transfer of the land from the Plaintiff to that Radhi and then Radhi having not further transferred the land to the Plaintiffs, these Plaintiffs at best can be said to be having the right over the said property only during the life time of Radhi to enjoy the same and not thereafter.

Thus, no substance being found in the submission of the learned Counsel for the Appellants; it is concluded that this Appeal does not merit admission as there arises no such substantial question of law for being answered.

**12.** The Appeal is accordingly dismissed. However, in the peculiar facts and circumstances, no order as to cost is passed.

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

*Narayan*