

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.145 of 2022

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment dated 17.03.2022 passed by the learned Additional District Judge, Sundargarh in R.F.A. No.12/30 of 2018-21 confirming the judgment and decree dated 23.03.2018 and 29.03.2018 respectively passed by the learned Senior Civil Judge, Sundargarh in Civil Suit No.488 of 2015.

Abhayati Kumbhar

....

Appellant

-versus-

Satyabhama Kumbhar & Another

....

Respondents

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

For Appellant - Mr.A.K.Sahoo
(Advocate)

For Respondents -

CORAM:

MR. JUSTICE D.DASH

Date of Hearing :14.11.2022 : 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 dated 17.03.2022 passed by the learned Additional District Judge, Sundargarh in R.F.A. No.12/30 of 2018-21.

By the same, the Appeal filed by the present Appellant being aggrieved by the judgment and preliminary decree dated 23.03.2018 and 29.03.2018 respectively passed by the learned Senior Civil Judge,

Sundargarh in Civil Suit No.488 of 2015, under section 96 of the Code has been dismissed. Thereby, the suit filed by the present Respondents as the Plaintiffs having been preliminarily decreed by the Trial Court declaring that each of the Respondents (Plaintiffs) and the Appellant (Defendant) are entitled to 1/3rd share over the suit scheduled property; the same has been confirmed by the First Appellate Court.

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 one Hadu is the common ancestor of the parties. He got married to Bhagabati for the first time and the Defendant is the daughter born out of the said wedlock. After the death of the first wife, Hadu married Satyabhama, the Plaintiff No.1 and the Plaintiff No.2 is the daughter of Hadu through Satyabhama.

4. It is stated that schedule 'A' and 'B' properties are the ancestral properties on the hands of Hadu and as such exclusively recorded in his name. It is further stated that schedule 'C' property is the self acquired property of Hadu which have been recorded in his name as such.

5. It is stated that the parties are Gonda by Caste and as such members of the Schedule Caste community and they being Hindus are governed by Mitakshara School of Hindu law.

6. According to the case of the Plaintiffs, there has been no partition of the suit scheduled land described in schedule 'A' to 'C' after the death of Hadu and, therefore, each of them is entitled to 1/3rd share over

it. Plaintiff's claim for partition having not been accepted by the Defendant, the suit has come to be filed.

7. The Defendant, in the written statement, while traversing the plaint averment, has admitted the inter se relationship of the parties. It is also admitted that the lands in schedule 'A' to 'C' stand recorded in the name of Hadu. The specific plea of the Defendant No.1 is that her father named Hadu, being satisfied with her service as she had been looking after him, had declared that the Defendant will get the land measuring Ac.0.060 decimals appertaining to Plot No.1106 under Khata No.382/100 of Mouza Amlipali and Ac.0.740 decimals of land under Plot No.243/3199 signed of Khata No.38 of village Chitabhanga. The claim of the Plaintiff for partition was thus refuted.

8. The Trial Court, on the rival pleadings, having framed four issues, on examination of evidence in the backdrop of the rival pleadings and upon their evaluation, has concluded that the suit schedule properties are liable to be partitioned amongst the parties and each one is entitled to 1/3rd share therein being the legal heirs and successors of Hadu.

9. The Defendant, being aggrieved by the said judgment and preliminary decree passed by the Trial Court declaring 1/3rd share each of the parties over the suit land in schedule 'A' to 'C' as described in the plaint, having carried the First Appeal, has been unsuccessful. Hence, the present Second Appeal.

10. Learned Counsel for the Appellant submitted that the Courts below are not right in excluding the oral evidence let in by the Defendant as regards family arrangement arrived between the parties

and separate allotment of the specific properties to the Defendant by her deceased father during his life time. He submitted that such conclusion arrived at by the Courts below, in repelling the claim of the Defendant, is the outcome of perverse appreciation of evidence. According to him, on the face of overwhelming evidence on record, the Courts below have completely erred in returning the finding on that score against the claim/case of the Defendant. He further submitted that when Hadu had two wives and both together are entitled to get one share, the Courts below ought to have held that successors of each wife would be entitled to get their share through their respective mother along with their independent share. He, therefore, urged for admission of this appeal to answer the above as the substantial question of law.

11. Keeping in view the submissions, I have carefully read the judgments passed by the Courts below.

12. Before proceeding to address the submission of the learned counsel for the Appellant to find out as to if there surfaces a substantial question of law meriting admission of the appeal, the admitted position as emerges from the pleadings, need be highlighted.

13. Hadu was the common ancestor of the parties. He had his first wife through whom Defendant No.1 was born. She is the daughter of Hadu through his first wife. On the death of the Defendant's mother (first wife of Hadu); he having married for the second time, the Plaintiff No.2 has been born. The mother of the Plaintiff No.2 is Plaintiff No.1. Admittedly, Hadu having died leaving behind his wife Plaintiff No.1 and two daughters, the Plaintiff No.2 and the Defendant, when the

succession opened on the death of Hadu, these three persons came to succeed as his legal heirs being Class-I heirs finding place in the Schedule of Hindu Succession Act, 1956 which has its applicability to the parties. So, when Hadu died, his both wives were not living and, therefore, the question of the mother of the Defendant succeeding the property of Hadu, in any manner can not at all arise. It is not the law that in case of a person having two wives even upon the death of one wife, her death would remain suspended till the death of that male and it would be deemed that as if she died soon after the death of male after the succession opened and the properties would still notionally devolve upon her on the death of the male owner so as to be succeeded by the children born to the male owner through her.

In view of that, I am afraid to accept the submission of the learned counsel for the Appellant which is misconceived.

14. Coming to the other question with regard to the family arrangement, the Defendant's specific plea is that her father, during his life time, had been satisfied with her service as she was taking all his care and looking after him, and had given the properties measuring Ac.0.060 in Mouza Amlipali and Ac.0.740 decimals in Mouza Chitabhanga. It stands admitted that all these properties in suit which include the above noted landed properties stood recorded in the name of Hadu. Except leading the oral evidence, the Defendant has not proved a single scrap of paper to that effect. Mere oral evidence coming from the lips of the Defendant and her witnesses that her father had given a declaration to that effect that these lands, after his death, would be held by the Defendant as its owner is not enough to conclude that Hadu,

during his life time, had made a family arrangement in that way that the Plaintiffs would be excluded from said part of his properties which would be enjoyed by the Defendant alone to the exclusion of the Plaintiffs. Moreover, when it is said by the Defendant that Hadu had declared said properties to be given to her, whether he had so stated that the Plaintiffs would accordingly be excluded from enjoying those properties, with any such explanation. Such a declaration by the owner even if accepted to have been made during his life time that it would so come to the hands of one to the exclusion of others, the same has no legal force as law does not recognize an oral Will bequeathing the immovable property, The Defendant having led oral evidence on that score, the same has rightly been kept beyond the scope of consideration to answer the contentious issue in accepting the claim of the Defendant. The Courts below thus are right in preliminarily decreeing the suit laid by the Plaintiffs.

For the aforesaid discussion and reasons, the submission of the learned counsel for the Appellant that their surfaces the substantial questions of law to be answered in this Appeal meriting its admission cannot be countenanced with.

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

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