IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A No. 577 of 2003

Jagannath Gouda & others .... Appellants

Mr. M. Mishra, Senior Advocate

-Versus-

Surendra Gouda & others .... Respondents

Mr. R.K. Mohanty, Senior Advocate

CORAM:
JUSTICE R.K. PATTANAIK

DATE OF JUDGMENT:20.12.2023

1. Instant appeal under Section 100 of the Code of Civil Procedure, 1908 is filed by the appellants challenging the impugned judgment dated 16th July, 2003 promulgated in Title Appeal No.27/84 of 1998-99 by the learned Additional District Judge, Sonepur, whereby, the appeal was dismissed confirming the decree of learned Civil Judge (Senior Division), Sonepur in Title Suit No.35 of 1994 on the grounds inter alia that the findings and decision are not tenable in law.

2. The plaintiffs instituted the suit in T.S. No.35 of 1994 against the respondents for declaration of right, title and interest in respect of schedule 'A'; schedule 'B' vis-à-vis plaintiff Nos.2 to 5 and proforma defendant No.8 or in the alternative, to partition the entire schedule A, B, 'C' properties into three equal shares with one share each allotted to plaintiff No.1; plaintiff Nos.2 to 5 and proforma defendant No.8; and defendant Nos. 1 and 7. The said suit was contested by defendant No.1 and was finally dismissed by a decree dated 15th April, 1998. The aforesaid decision of the learned Trial court was challenged by the plaintiffs before the learned Lower Appellate Court in Title Appeal

No.27/84 of 1998-99 and as stated earlier, the appeal was also dismissed. Being aggrieved of, the plaintiffs and their successors-in-interest filed the second appeal on the ground that both the learned courts below committed error and illegality in not declaring the title in respect of the suit properties in their favour or to partition it.

3. This Court by order dated 10th December, 2003, formulated the substantial questions of law which are as follows:

> (i)Whether oral family partition subsequently reduced to writing required any registration as per the Registration Act?
> (ii) Whether a document relating to family settlement not stamped properly can be admissible as per Evidence Act?
> (iii) Whether an R.O.R without any cogent evidence is enough to confer the defendants a valid title?

4. Heard Mr. Mishra, learned Senior Advocate appearing for the appellants and Mr. Mohanty, learned Senior Advocate for the respondents.

5. The learned Trial court held that there is no direct evidence in respect of income of the joint nucleus to acquire the suit property. Furthermore, the partition so pleaded by the plaintiffs was not admissible. The learned Lower Appellate Court on the point of partition held that such evidence was unacceptable and also confirmed that the joint family had no sufficient nucleus to pay the consideration money when the suit property was acquired. The contention of the plaintiffs is that the suit land was purchased in the year 1943 in the name of Bhakta Gouda by Keshab Gouda and it was out of the joint nucleus and hence, could not have been recorded exclusively in the name of Bhakta Gouda. The findings of the learned courts below have been challenged on the ground that the same to be erroneous not consistent with the materials on record.

6. Mr. Mishra, learned Senior Advocate appearing for the appellants would submit that the parties had raiyati land of Ac.3.315 decimal and there was a mutual partition in respect of Bhogra lands in three equal shares, as a result of which, schedule 'A', 'B' and 'C' properties were allotted but such partition was disbelieved for no reason on the ground that the evidence is inadmissible. It is further submitted by Mr. Mishra, learned Senior Advocate that the purchase of the suit land in 1943 could not be by Bhakta Gouda alone. With regard to the joint nucleus, it is further submitted that the purchase was made in 1943, whereas, the evidence was received long after, hence, it was difficult to adduce direct evidence. It is contended that where the nucleus to be sufficient to acquire any property even in the name of one of the members of the family, presumption would arise that the acquisition is joint family interest and when admittedly, Ac. 3.315 decimals of landed properties had been with the family, there was sufficient nucleus to acquire the same. With respect to partition, it is contended that the evidence ought to have been accepted and it was supported by a family arrangement. It is also contended that when the suit land was Bhogra in character and converted to raiyati land, each and every member of the family would have an interest. Referring to a decision in the case of **Ganesh Chandra Jew Vrs. Kalia Singh 2018 1 OLR 457** and **Bhramarbar Pradhan Vrs. Kamala Bewa and others MANU/OR/0038/2017**, it is contended that once the Gounti tenancy was abolished, the Bhogra land becomes joint family interest which remained dormant so long as the tenure subsisted and would spring into life as soon as the system is abolished. With the above submission, it is claimed that both the learned courts below failed to examine the aforesaid aspects, while dismissing the suit. It is also contended that when the Bhogra lands were converted to raiyati lands, the same lost its character and every member of the family would be entitled to claim share therein by partition and in support of such

contention, the following decision in the case of **Krushna Ch. Meher and others Vrs. Hrushikesh Meher and others MANU/OR/0159/1060** has been referred to by Mr.Mishra, learned Senior Advocate appearing for the appellants.

7. On the contrary, Mr. Mohanty, learned Senior Advocate appearing for the respondents justified the impugned judgment of learned Lower Appellate Court confirming the dismissal of the suit. As according to Mr. Mohanty, learned Senior Advocate, rightly the title was not declared in respect of the suit land jointly and at the same time, partition was denied. Both the learned courts below, as further submitted, considered the income of the joint family and correctly reached at a conclusion that it was no sufficient to acquire the property in question. It is also contended that earlier partition suit claimed by the plaintiffs was also disbelieved since the evidence was not satisfactory, so therefore, the impugned judgment and decree in Title Appeal No.27/84 of 1998-99 deserves to be confirmed.

8. The learned Trial court framed issues to ascertain whether the lands under Khata No.253/43 of 4th settlement to be the co-parcenery of the joint family interest or separate property of Bhakta Gouda and if there was any partition in respect of Schedule 'A' and 'B' properties with shares being allotted to the plaintiffs. It is settled law that there is no presumption that a joint family possesses property jointly. Article 233(2) of Hindu Law by Mulla lays down the principles that there is no presumption in favour of a family that the property to be joint because it is in jointness and when in a suit for partition, a particular item of property claimed to be of the joint family, the burden of proving the same rests on the party asserting it. As further observed therein that whether it is established or admitted that the family possessed some joint properties which from its nature and relative value may have formed the nucleus from which the property in

question is likely to have been acquired, in that case, the presumption arises that it was joint property and the burden shifts to the parties alleging acquisition to establish affirmatively that the property was acquired without the aid of the joint family. It is also stipulated therein that whether the evidence adduced by a party is sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus, out of which, the acquisition could have been made is one of the fact that depends on the nature and extent of the nucleus. The decision in **Indramani Nayak Vrs. Ainthu Nayak and another 1994 OLR (I) 121** deals with presumption regarding an acquisition claimed to be a joint family interest in juxtaposition to the interest of a co-sharer alleged to be exclusive.

9. In so far as the extent of the property in possession of the joint family is concerned, it is to be considered whether the same was sufficient to generate surplus for purchase of the suit land. The learned courts below guessed the income of joint nucleus as against the purchase made in 1943 and concluded that the evidence adduced from the side of the plaintiffs to be not satisfactory. In other words, the burden of proof which lies with the plaintiffs could not be discharged to show that there was sufficient joint family nucleus to acquire the suit land and other properties in the year 1943. The defendants claimed that there was partition among Bhakta and others prior to 1940 but the plaintiffs stand is that the partition was held after 4th settlement in 1962. By the time, the partition of 1943 took place, considering the evidence on record, it is found that both Banka and Binu were minors, whereas, Bhakta was major and in such circumstances, it cannot be believed that the partition among the brothers really happened. Admittedly, the suit land was acquired by the time the family living jointly. The manner of acquisition of the suit land did not receive any clear evidence disclosing the income of the joint nucleus. An assessment has been made by

both the courts below to determine the income of the joint family.

10. According to the learned Trial court, the income was insufficient to purchase the suit land and other properties, hence, the plea of the plaintiffs was rejected. Applying the law that family since joint carries no presumption that property acquired by any member of the family is the joint interest, both the learned courts below concluded that it had to be held as separate and exclusive interest of Bhakta. The acquisition even if alleged to be by Keshab Gouda but it stands in the name of Bhakta. In view of the purchase so made and acquired exclusively in the name of Bhakta, in absence of sufficient joint nucleus proved and established, a conclusion was drawn that the same to be a separate interest of Bhakta and not a subject of joint family.

11. The documentary evidence revealed that the suit land was settled with Bhakta during Bhogra conversion proceeding. It is a fact that after the Bhogra conversion proceeding, the suit land was settled in the name of Bhakta with occupancy right to the exclusion of his brothers. Apparently, the two brothers of Bhakta being dissatisfied, even though filed no appeal or revision but knocked the doors of the learned Trial court with the suit instituted.

12. The witnesses examined from the side of the plaintiffs hardly could able to divulge the income and expenditure of the joint family property by the year 1942. But it is not expected that evidence of income of a joint family would be able to be brought on record after lapse of considerable time as in the present case. However, the suit land and extent of properties possessed by the joint family of the plaintiffs held not to be sufficient to acquire the suit land, a conclusion arrived at by learned courts below on a general assessment. As it is made to appear from the materials on

record, Bhakta was in his mid 20's by the time the purchase was made in respect of the suit land Bhogra in nature. It is also revealed that evidence is conspicuously absent on partition during the 4th settlement with no separate possession reflected in the remarks column against each plot. Likewise evidence as to partition prior to 1940 is also not clearly established which was most unlikely at a time when Bhakta was young with two of his brothers to be minor. The plea of partition after the 4th settlement was disbelieved by learned courts below which rather appears to be probable which is supported by the testimony of P.W.2, an independent witness an Amin, who measured the suit land with the land schedule and trace map, such as, Ext.3/a and 3/b Ext.3/c and 3/d respectively prepared containing signatures of the allottees thereon marked as Ext. 3/e to 3/g and fortified by Ext.1 and rent receipts (Ext. 4/a to 4/d) in respect of respective shares by the plaintiffs. The finding that the partition sheet needed registration is, in the considered view of the Court, erroneous as in case of a memorandum of family settlement, no registration is necessary unless new interest is created in favour a party to it. The Apex Court in **Ravindra Kaur Grewal and others Vrs. Manjit Kaur and others** in Civil Appeal No.7764 of 2014 decided on 31st July, 2020 held that for a family settlement, registration is not required. Hence, in view of the supporting partition led from the side of the plaintiffs is found to be readily acceptable. Furthermore, additional evidence is sought to be introduced to show possession of respective shares by the parties after amicable settlements and to justify it a decision in the case of **Bishnu Charan Sahu Vrs. Premananda Sahu and others MANU/Or/0146/1993** is placed reliance on by stating that the same is necessary to decide the lis properly and for substantial cause.

13. As to the joint nucleus fund, it is admitted that the family had landed properties by the time of alleged purchase with no

evidence to even remotely suggest any independent income of Bhakta. The guess work by the learned courts below on the probable income of the family is something an exercise difficult to comprehend. In a reading of the decision in **Srinivas krishnarao Kango Vrs. Narayan Devji Kango and others** reported in MANU/SC/0126/1954, it is made to understand that where existence of nucleus is shown and no other source of income is disclosed, the presumption would be in favour of the nucleus was sufficient whereafter the onus shifts to the other side to prove it be a separate acquisition. Since, in the case at hand, evidence comes forth that there was landed properties of the family while in jointness, without adverting to any guess work on income, a presumption should be drawn in favour of sufficient nucleus, which the learned courts below failed to do. As no evidence on separate income of Bhakta is available on record, the inevitable conclusion would be that the suit land to be the joint acquisition of the family. Once it is held that the acquisition to be joint family property, the lands are held to partible with all the members having shares therein. In **Krushna Ch. Meher** (supra), it is held that when the Bhogra land was subsequently converted to raiyati land, it looses the character of being impartible and the ordinary rule of Hindu law on partition would necessarily revive. It is also held in Ganesh **Chandra Jew** (supra) and connected citations that after abolition of Gaunti tenure system, the Bhogra lands become joint family interest which remains dormant so long as it is in existence. So notwithstanding any such order in Bhogra proceeding, when the suit land is held to be a joint acquisition, its impartibility character is extinguished thereby entitling all the members of the family to claim shares therein. Hence, the inescapable conclusion of the Court is that the partition of the suit land is only to be recognized as per schedule 'A', 'B' and 'C'.

14. Hence, it is ordered.

15. In the result, the appeal stands allowed. As a logical sequitur, the impugned judgment dated 16th July, 2003 promulgated in Title Appeal No.27/84 of 1998-99 by the learned Additional District Judge, Sonepur is hereby set aside for the reasons discussed herein above. However, in the circumstances, there is no order as to costs leaving the parties to bear it throughout.

(R.K. Pattanaik)
Judge

Balaram