Sanatan Das and Others Vs Ahalya Dei and Others

Court: Orissa High Court

Date of Decision: Jan. 28, 2015

Acts Referred: Civil Procedure Code, 1908 (CPC) - Section 100
Evidence Act, 1872 - Section 13, 18, 32(5), 50, 60

Citation: (2015) 120 CLT 978 : (2015) 1 ILR Ori 849

Hon'ble Judges: Amitava Roy, C.J. Dr., J.; Akshaya Kumar Rath, J.

Bench: Division Bench

Advocate: G. Mukharjee, for the Appellant; G.D. Kar, Advocates for the Respondent

Final Decision: Dismissed

Judgement

Dr. Akshaya Kumar Rath, J.
This Letters Patent Appeal is directed against the judgment dated 24.3.1999 passed by the learned Single

Judge in First Appeal No. 267 of 1988 partly allowing the judgment and decree dated 17.8.1988 and 31.8.1988 respectively passed by the

learned Subordinate Judge, Bhadrak in Title Suit No. 131 of 1978-I in a suit for partition.

2. From the undisputed genealogy, it appears that one Champati Das had three sons, namely, Kalandi, Mali and Padan. Kalandi had two sons,

namely, Bholanath and Binod. Jema wife of Bholanath died in the year 1962. Rambha was the daughter of Bholanath. Defendant No. 2 was the

son of Mali. He expired during pendency of the suit, whereafter his legal representatives have been impleaded as defendants 24 to 29. Padan had

two sons, late Panchu and Gangadhar (defendant No. 5). Defendant No. 4 is the widow of Panchu and defendant No. 3 is the son. From the

evidence on record, it appears that Bholanath had two sisters, namely, Ajodhya and Hara. Defendants 6 and 23 are the sons of Ajodhya. Both of

them claim in their separate written statement that defendant No. 23 is the adopted son of Binod. Ajodhya had two other sons, who were not

impleaded as parties in the trial court. An application for impleading them as parties has been filed by the plaintiff-respondent No. 1 during

pendency of first appeal. Similarly, Hara had three sons, who had not been impleaded as parties, but they have filed applications to be added as

parties. Defendants 7 to 9, who are the sons of defendant No. 23, are alienees from Binod in respect of certain properties. Defendant No. 16 has

been jointly recorded with Bholanath in respect of ''Gha'' schedule property. The other defendants are the alienees from other parties. Plaintiff

claims that she and defendant No. 1 are the daughters of Rambha and they are entitled to succeed to the properties of Bholanath, who admittedly

died in the year 1972.

3. Respondent No. 1 as plaintiff laid a suit for partition in respect of ""Ka, Kha, Ga, Gha, and Una"" of the suit schedule properties in the Court of

the learned Subordinate Judge, Bhadrak, which was registered as T.S. No. 131 of 1978-I. The case of the plaintiff is that Bholanath, Binod,

Maguni, Panchu and Gangadhar became separated in the year 1942. ''Ka'' schedule lands have been recorded in the names of Bholanath, Maguni,

Panchu and Gangadhar. Binod had no interest in the said property. Thus, the plaintiff and defendant No. 1 are entitled to 1/3rd interest of ''Ka''

schedule property. ''Kha'' schedule properties have been recorded in the names of Bholanath, Binod, Maguni, Panchu and Gangadhar. The three

branches had equal share in the properties and as such, plaintiff and defendants 1 and 2 are entitled to a share of 1/12 in such property. ''Ga''

schedule property is the exclusive property of Bholanath and Binod and the other two branches did not have any interest in the same. Thus, the

plaintiff and defendant No. 1 are entitled to 1/4th share each in ''Ga'' schedule property. ''Gha'' schedule properties have been recorded in the

names of Bholanath and Sashika (defendant No. 16). The plaintiff and defendant No. 1 are entitled to half share in the said property. Lot No. 1 of

schedule ''Una'' property was purchased by Jema in 1945 out of her own funds and as such plaintiff and defendant No. 1 are entitled to succeed to

such property to the exclusion of others. Lot Nos. 2 to 7 of ''Una'' schedule property are the self acquired property of Bholanath and the plaintiff

and defendant No. 1 claim the entire property. The alienations of Binod in favour of defendants 7 to 9 have been challenged.

4. Defendant No. 2 expired during pendency of the suit and his heirs, defendants 24 to 29 made an application for impletion in the suit and the

same was allowed. Defendant Nos. 3 to 5 and 24 to 29 filed a joint written statement. They do not deny the status of the plaintiff and defendant

No. 1. They claimed that plaintiff and defendant No. 1 are not entitled to any share and all the properties purchased by Bholanath or Jema are the

joint family properties. Their specific case is that Lot No. 1 properties in ''Una'' schedule had been purchased in the name of Jema from the joint

family nucleus of the family property. The other properties were acquired with the aid of joint family nucleus in the name of Bholanath and the same

were the joint family properties. While not disputing the genealogy, it is stated that since Rambha had expired in 1956, the plaintiff and defendant

No. 1 cannot succeed to the properties. Defendant No. 6 filed a separate written statement. He did not dispute the genealogy, but then claimed the

properties of Bholanath on the basis of a Will dated 9.6.1971. Be it noted that his application for grant of probate had been dismissed. Defendant

Nos. 7 to 9 claim the properties on the basis of alienations made by plaintiff and defendant No. 1.

5. Defendant No. 23 filed a separate written statement. The case of defendant No. 23 is that the three branches had been separated in mess and

property since 1940 and were in separate possession of various joint family properties. But then Bholanath and Binod were in joint mess and

property. Bholanath was the Karta of the joint family. The properties purchased by Bholanath or Jema are the joint family properties having been

purchased by utilizing the surplus from joint family nucleus. The specific case of defendant No. 23 is that the plaintiff and defendant No. 1 are not

the daughters of Rambha, but the daughters of Ananta Nayak, the husband of Rambha through his second wife Suma Dei. It is further stated that

he is the adopted son of Binod and as such succeeded to the properties of Bholanath.

6. On the basis of inter se pleadings of the parties, the learned trial court struck seven issues, out of which, issue Nos. 3 and 4 are vital for deciding

the lis, which are as follows:-

Issue No. 3.

Is Sanatan Das adopted son of Binod Das and if so, whether it is valid or not?

Issue No. 4.

Are plaintiff, Ahalya and defendant No. 1, Padma the daughters of Rambha?

7. The trial court, after marshalling on facts and scrutiny of evidence on record, concluded that defendant No. 23 is not the adopted son of Binod

and plaintiff and defendant No. 1 are the daughters of Rambha.

8. Aggrieved by and dissatisfied with the judgment and decree passed by the trial court, defendant No. 23 and defendant Nos. 7 to 9 filed F.A.

No. 267 of 1988 before this Court. The learned Single Judge confirmed the finding of the learned trial court to the effect that plaintiff and

defendant No. 1 are daughters of Rambha and are entitled to succeed to the properties of Bholanath and Jema, but reversed the finding of the trial

court in respect of issue No. 3 holding inter alia that Sanatana is the adopted son of Binod.

9. Still aggrieved, defendant Nos. 23 and 7 to 9 filed this Letters Patent Appeal.

10. We have heard Mr. G. Mukharjee, learned counsel for the appellants and Mr. G.D. Kar, learned counsel for the respondents.

11. In course of hearing, Mr. G.D. Kar, learned counsel for the respondents submitted that he does not challenge the finding of the learned Single

Judge in respect of Issue No. 3. Thus, the only issue, which survives for our consideration, is as to whether plaintiff and defendant No. 1 are the

daughters of Rambha.

12. Mr. Mukharjee, learned counsel for the appellants relying on the decision of the Supreme Court in the case of Dolgobinda Paricha Vs. Nimai

Charan Misra and Others, argued with vehemence that the oral evidence on record does not satisfy the requirements of Section 50 of the Evidence

Act and as such the evidence of P.Ws.1 and 4 is inadmissible. Once the evidence is inadmissible, corroboration of such evidence would not render

them relevant and admissible. He further submitted that the learned Single Judge came to hold that most of the oral evidence on record falls short

of the requirement of Section 50 of the Evidence Act. Having held so, the learned Single Judge committed wrong in relying on the evidence of

witnesses to come to a conclusion that plaintiff and defendant No. 1 are the daughters of Rambha. He further submitted that in the Probate case

initiated by the defendant No. 6, defendant No. 23 did not appear. The probate case was filed during pendency of the suit, wherein defendant No.

23 claimed to be the adopted son of Binod. Defendant No. 6 is the brother of defendant No. 23 and both are not pulling on well. Defendant No.

23 had no knowledge about the Will propounded by defendant No. 6 in respect of the properties of Bholanath genuine or not. Hence, defendant

No. 23 did not consider it proper to appear in the Probate case. The said case was dismissed. He further submitted that finding of the learned

Single Judge that admission of defendant No. 6 as well as defendant Nos. 3 to 4 and defendant Nos. 24 to 26 in their respective written statement

that plaintiff and defendant No. 1 are the daughters of Rambha is wholly untenable in law and do not constitute admission of defendant No. 23 in

view of Section 18 of the Evidence Act. He further submitted that the learned Single Judge committed an error relying on the Record of Rights

since the entry does not indicate the relationship of plaintiff and defendant No. 1 with Rambha. He further submitted that the learned Single Judge

was not right in coming to the conclusion that the observations made in the Probate Proceedings regarding the relationship are admissible under

Section 13 of the Evidence Act. To buttress his submission, Mr. Mukharjee relied on the decision of the Supreme Court in the case of State of

Bihar Vs. Radha Krishna Singh and Others, .

13. The law regarding the scope and ambit of the Letters Patent Appeal against the judgment of the learned Single Judge passed in a first appeal is

no more integra. We may also mention that a five-judges Bench of the Supreme Court in Alapati Kasi Viswanatham v. A Sivarama Krishnayya,

C.A. No. 232 of 1961 D/-11-1-1963 (SC) an unreported judgment-had dealt directly with this question. Wanchoo, J., speaking for the Court

observed:

The first contention urged before us on behalf of the appellant is that the Letters Patent Bench was not authorized in law to reverse the concurrent

findings of fact of the Subordinate Judge and the learned Single Judge of the High Court. It is submitted that a Letters Patent Appeal stands on the

same footing as a second appeal and it was therefore not open to the Letters Patent Bench to reverse the concurrent findings of fact of the two

courts below. We are of opinion that this contention is not correct. A Letters Patent appeal from the judgment of a learned Single Judge in a first

appeal to the High Court is not exactly equivalent to a second appeal under S. 100 of the Code of Civil Procedure, and therefore it cannot be held

that a Letters Patent Appeal of this kind can only lie on a question of law and not otherwise. The matter would have been different if the Letters

Patent Appeal was from a decision of a learned Single Judge in a second appeal to the High Court. In these circumstances it will be open to the

High Court to review even findings of fact in a Letters Patent Appeal from a first appeal heard by a learned Single Judge, though generally

speaking the Letters Patent Bench would be slow to disturb concurrent findings of fact of the two courts below. But there is no doubt that in an

appropriate case a Letters Patent Bench hearing an appeal from a learned Single Judge of the High Court in a first appeal heard by him is entitled

to review even findings of fact. The contention of the appellant therefore that the Letters Patent Bench was not in law entitled to reverse the

concurrent findings of fact must be negatived.

14. In Jagabandhu Senapati and Others Vs. Bhagu Senapati and Others, , this Court held that sitting in appeal over the judgment of the learned

Single Judge in First Appeal, the Division Bench is competent fully to go into the question of facts and law and the jurisdiction is not restricted in

any manner.

15. Bearing in mind the enunciation of law laid down by the Supreme Court as well as this Court in the decisions cited supra, we have meticulously

and carefully scanned the pleadings of the parties and evidence adduced by them.

16. Learned Single Judge relied on evidence of P.W.1, P.W.4 and D.W.10 to come to a conclusion that plaintiff and defendant No. 1 are the

daughters of Rambha. According to Mr. Mukharjee, the evidence of D.W.10 falls short of requirement of Section 50 of the Evidence Act. Section

50 of the Evidence Act is quoted hereunder:-

50. Opinion on relationship, when relevant. - When the Court has to form an opinion as to the relationship of one person to another, the opinion,

expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of

knowledge on the subject, is a relevant fact"".

17. The scope of Section 50 of the Evidence Act has been succinctly stated by the Supreme Court in Dolgobinda Paricha Vs. Nimai Charan

Misra and Others, . Interpreting Section 50 of the Evidence Act, the Supreme Court held:-

On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form

an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person

who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring

out the true scope and effect of the section. It appears to us that the essential requirements of the section are - (1) there must be a case where the

court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the

existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a

member of the family or otherwise has special means of knowledge on the particular subject of relationship; in the other words, the person must

fulfill the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by

conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction

resulting from what one things on a particular question. Now, the ""belief" or conviction may manifest itself in conduct or behaviour which indicates

the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant

and may, therefore, be proved. We are of the view that the true scope and effect of section 50 of the Evidence Act has been correctly and

succinctly put in the following observations made in Chandu Lal Agarwalla, Karta of joint family and of firm named Hanutram Lekram Agarwalla

and Another Vs. Bibi Khatemonnessa and Others,

It is only "opinion as expressed by conduct" which is made relevant. This is how the conduct comes in. The offered item of evidence is "the

conduct", but what is made admissible in evidence is "the opinion", the opinion as expressed by such conduct. The offered item of evidence thus

only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any ''opinion'' of

the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer ''the opinion'', the conduct must be

of a tenor which cannot well be supposed to have been willed without the inner existence of the ''opinion''.

When the conduct is of such a tenor the Court only gets to a relevant piece of evidence, namely, ''the opinion of a person''. It still remains for the

Court to weigh such evidence and come to its own opinion as to the ''factum probandum''- as to the relationship in question.

We also accept as correct the view that S. 50 does not make evidence of mere general reputation (without conduct) admissible as proof of

relationship: Rokkam Lakshmi Reddi and Another vs. Rokkam Venkata ReddiAIR 1937 201 (Privy Council) .

It was further held:-

7.....If we remember that the offered item of evidence under Section 50 is conduct in the sense explained is conduct in the sense explained

above, then there is no difficulty in holding that such conduct or outward behaviour must be proved in the manner laid down in Section 60; if the

conduct relates to something which can be seen, it must be proved by the person who saw it; if it is something which can be heard, then it must be

proved by the person who heard it; and so on. The conduct must be of the person who fulfils the essential conditions of Section 50, and it must be

proved in the manner laid down in the provisions relating to proof. It appears to us that that portion of Section 60 which provides that the person

who holds an opinion must be called to prove his opinion does not necessarily delimit the scope of Section 50 in the sense that opinion expressed

by conduct must be proved only by the person whose conduct expresses the opinion. Conduct, as an external perceptible fact, maybe proved

either by the testimony of the person himself whose opinion is evidence under Section 50 or by some other person acquainted with such facts, the

testimony is in each case direct within the meaning of Section 60. This, in our opinion, is the true inter-relation between Section 50 and Section 60

of the Evidence Act.

18. Applying the same tests, it can be safely concluded that evidence of D.W.10 is not admissible evidence being not in conformity with Section 50

of the evidence Act.

19. After discarding the evidence of D.W.2, we find that there is ample evidence on record to sustain the finding of the learned Single Judge

regarding relationship of Ahalya and Padma with Rambha.

20. P.W.1 is the plaintiff. She claims that she and Padma are the daughters of Rambha. There is no dispute or denial to the fact that Ahalya and

Padma are the daughters of Ananta, who is husband of Rambha. There is no dispute that Ananta married for the second time to Suma during the

life time of Rambha. Defendant No. 23 claims that Ahalya and Padma are not the daughters of Rambha, but they are the daughters of Suma, the

second wife of Ananta. Suma has been examined as P.W.4. She stated that by the time of her marriage with Ananta, Ahalya and Padma were nine

years and six years respectively. The evidence of P.W.4 is criticized on the ground that she is the mother of the Ahalya and Padma and as such she

would gain, if Ahalya and Padma succeed to the property left by Bholanath. The evidence of plaintiff and P.W.4 has received ample corroboration

from certain other facts and circumstances and documentary evidence on record.

21. Defendant No. 6 is the own brother of defendant No. 23. He filed an application for grant of probate of Will said to have been executed by

Bholanath in his favour. In the said proceeding, Ahalya and Padma were impleaded as daughters of Rambha. Exhibit No. 1 is the judgment in the

probate proceeding. There is a finding that Ahalya and Padma are the daughters of Rambha. But then, Mr. Mukharjee submitted that defendant

No. 23 was not a part to the said proceeding and as such not bound by the same.

22. It is settled principle of law that a judgment in rem like judgments passed in probate, insolvency, matrimonial or guardianship or other similar

proceedings, is admissible in all cases whether such judgments are inter partes or not.

23. Further defendant No. 23 claims to be the adopted son of Binod in the absence of any other heir of Bholanath. Defendant No. 23 would have

succeeded the property of Bholanath being the nearest legal representative in case the Will in favour of defendant No. 6 failed and relationship of

Ahalya and Padma with Bholanath was not accepted. Defendant No. 23 could have appeared in the probate case when a general citation was

issued, but he had chosen not to do so. The same is indicative of the fact that he was not claiming to be the nearest heir of Bholanath. Defendant

No. 6 in his written statement categorically admitted that Ahalya and Padma as daughters of Rambha. Similarly defendants 3 to 5 and 24 to 26

have not denied the relationship with plaintiff and defendant No. 1. True it is, defendant No. 6 was not examined in the suit, but then his previous

statement in the probate proceeding, vide Annexure-10 can be considered to be an admission. The same is a substantive piece of evidence.

Similarly the admission made by defendant No. 24 in the probate case, vide Exhibit 12 that the plaintiff and defendant No. 1 are the daughters of

Rambha is also admissible.

24. The decision in the case of Sri Radha Krishna Singh and others (Supra) does not support the contention of Mr. Mukharjee. In Radha Krishna

Singh, there was a dispute of genealogy between the parties. The Supreme Court held that the plaint genealogy is the very fabric and foundation of

the edifice on which is built the plaintiff''s case. This is the starting point of the case of the plaintiff which has been hotly contested by the appellant.

In such cases, as there is a tendency on the part of an interested person or a party in order to garb, establish or prove an alleged claim, to concoct,

fabricate or procure false genealogy to suit their ends, the courts in relying on the genealogy put forward must guard themselves against failing into

the trap laid by a series of documents or a labyrinth of seemingly old genealogies to support their rival claims.

25. Having held so, the Supreme Court in paragraph-19 of the report summarized the principles. The same are quoted hereunder:-

(1) Genealogies admitted or proved to be old and relied on in previous cases are doubtless relevant and in some cases may even be conclusive of

the facts proved but there are several considerations which must be kept in mind by the courts before accepting or relying on the genealogies:

(a) Source of the genealogy and its dependability.

(b) Admissibility of the genealogy under the Evidence Act.

(c) A proper use of the said genealogies in decisions or judgments on which reliance is placed.

(d) Age of genealogies.

(e) Litigations where such genealogies have been accepted or rejected.

(2) On the question of admissibility the following tests must be adopted:

(a) the genealogies of the families concerned must fall within the four corners of S. 32(5) or S. 13 of the Evidence Act.

(b) They must not be hit by the doctrine of post litem motam.

(c) The genealogies or the claims cannot be provided by recitals, depositions or facts narrated in the judgment which have been held by a long

course of decisions to be inadmissible.

(d) where genealogy is proved by oral evidence, the said evidence must clearly show special means of knowledge disclosing the exact source, time

and the circumstances under which the knowledge is acquired, and this must be clearly and conclusively proved.

26. It is further held that judgment in rem like judgment passed in probate is admissible in all cases where such judgments are inter partes or not. In

view of the same, the learned Single Judge is right in relying on the judgment in probate case and admission of defendant Nos. 6 and 24 in probate

case. The observation in the probate proceeding regarding relationship is admissible under Section 13 of the Evidence Act.

27. Except bald denial made by defendant No. 23 in the written statement and evidence, there is no contrary material. The learned trial court as

well as the learned Single Judge on a threadbare analysis of the pleadings of the parties and evidence on record came to hold that plaintiff and

defendant No. 1 are the daughters of Rambha. We affirm the finding of the learned Single Judge in respect of Issue No. 4.

28. The learned Single Judge has decided the rights of the parties and issued directions so far as respective shares of the parties. We see no reason

to differ with the same and concur with the said view.

29. On taking a holistic view of the matter, we are on ad idem that the appeal, sans any merit, is liable to be dismissed. Accordingly, the appeal is

dismissed. No Costs.

Amitava Roy, C.J.

I agree.