(1995) 01 OHC CK 0013

Orissa High Court

Case No: Second Appeal No. 7 of 1985

Harish Chandra Sahu and Another		APPELLANT
	Vs	
Dibyasingha Mohapatra and Others		RESPONDENT

Date of Decision: Jan. 1, 1995

Citation: (1995) 1 OLR 510

Hon'ble Judges: A. Pasayat, J

Bench: Single Bench

Advocate: G.H. Panda and Sanju Panda, for the Appellant; D. Bhuyan and B.K. Samal, for respondents 1 and 2, for the Respondent

Final Decision: Dismissed

Judgement

A. Pasayat, J.
The only point involved in this appeal u/s 100 of the Code of Civil Procedure, 1908 (in short. "CPC") is whether the conclusion of the Courts below that the suit property was the self-acquired property of Gandharb Sahu, defendant-respondent No. 3 is proper.

2. Factual position is almost undisputed, and a brief reference to it would suffice.

Appellants as plaintiffs brought the suit for a declaration that the suit property is their joint family property, and the sale deed executed by defendant-respondent No. 3 Gandharb Sahu in favour of Dibyasingha Mohapatra (defendant-respondent No.(1) is invalid, and for permanent Injunction restraining the aforesaid Dibyasingha Mohapatra, and Batakrushna Das (defendant-respondent No. 2) from interfering with their possession. According to the plaintiffs, they along with Gandharb and Krupasindhu (defendant-respondent No. 4) are four sons of late Madhusudan Sahu, and were members of a Joint Hindu Mitakshara family. Gandharb being eldest brother was the karta and managing member of the joint family after death of

Madhusudan. The suit property was acquired out of the joint family funds in the name of the karta but the possession was joint. Four rooms were constructed on the suit property and one was let out on rent. Taking advantage of recording in his name, Gandharb illegally alienated the suit property In favour of. Dibyasingha Mohapatra by a registered sale deed dated 6 9 1977. The sale deed is collusive. illegal and without any consideration, and the plaintiffs and defendant No. 4 are in continuous possession of the same along with Gandharb , There was no legal necessity for sale of the property. The son of defendant No. was a Sub-Assistant Engineer under whom Gandharb was a contractor, and therefore, defendant No. 3, son of defendant No. 1, and defendant No. 1 himself colluded to execute a nominal sale deed under which no title passed Subsequently, defendant No. 1 executed a registered lease deed at the instance of defendant No. 3 in favour of defendant No. 2 in respect of the suit property on 18-11-1977. When defendant No. 2 attempted to dispossess the plaintiffs, and defendant No. 4 from the suit property on the basis of alleged lease deed, cause of action for filing of the suit arose.

3. Defendant Nos. 3 and 4 were set ex parte. A joint written statement was filed by defendant Nos.1 and 2. They denied the plaint allegations, and pleaded that the suit property belonged to defendant No. 3 exclusively, and for legal necessity he sold the property by a registered sale deed in favour of defendant No. 1on receipt of due consideration and possession of the property was delivered. They denied the allegation that the deed in question was a nominal one, and it was stated that defendant No. 2 had applied for permission to run a rice huller on the suit land after completion of the house thereon, and there was an agreement for construction of two rooms at the expenses of defendant No. 2 and the cost of construction Would be adjusted from the monthly rent.

4. The learned Second Munsif, Cuttack held that the suit property was self-acquired property of defendant No. 3 who transferred ''the same in favour of defendant No. 1 for consideration and defendant No. 1 being the owner in possession of the suit property by virtue of the sale deed was competent to lease'' out the same in favour of defendant No. 2. Accordingly the suit was dismissed. The conclusions of the learned second Munsif were confirmed by the learned Second Addl. '' District Judge, Cuttack. He took note of the fact that the stand of the plaintiffs as regards acquisition of property was not consistent. The pleadings in the plaint were to the effect that the property was acquired out on joint family funds, but during trial that plea was given a go by, and a plea was taken that the father of plaintiffs and defendants 3 and 4 purchased the land in the name of defendant No. 3. This was considered to be untenable and inconsistent plea. It was observed that the sale deed which the property was acquired was not tendered in evidence, and no reason was assigned as to why the same was not brought on record. It was also concluded that there was no material to show existence at any joint family funds out of which the property could have been originally acquired in the name of defendant No. 3.

5. Miss Sanju Panda, learned counsel appearing for the appellants, submitted that the approach of the Courts below is erroneous. According to her, the burden was wrongly placed on the plaintiff to establish that the property was joint family property and not self-acquired property of defendant No. 3. It was further submitted that there being material to show jointness of the members of family, presumption was available to be drawn to the property in question was joint family property.

The learned counsel for the respondents on the other hand submitted that the-onus is on the person who claims the property to be joint family property, and in view of the circumstances highlighted by the Courts below the conclusions cannot be faulted, and while -exercising jurisdiction u/s 100, CPC scope for interference with the conclusions of fact is very limited and unless the conclusions are perverse, unreasonable or are against the weight of materials on record, there is no scope for interference. It is submitted that the materials have been analysed in their proper perspective by the Courts below and therefore, there is no merit in the appeal.

6. Existence of a joint family does not lead to the presumption that the property held by any member of the family is joint and the burden rests upon any one asserting that any item of property was joint, to establish the fact. Where it is established or admitted that the family possessed some joint property which from, its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the pasty alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family. Whether the evidence adduced by a party is sufficient to shift the burden which initially jested on him of establishing that there was adequate nucleus out of which the acquisitions could have been made is one of facts depending on the nature and extent of the Nucleus. An important element for consideration is the income which the nucleus yielded. A Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary not even his male issue, acquires any interest in it by birth. He may sell it, or he may make a gift of it, or be would it by Will, to any person he likes. It is not liable to partition, and, on his death intestate, it passes by succession to his heirs,. and not by survivorship to the surviving coparceners. Where the property is acquired with the aid of joint family property, it becomes joint family property. If the property so acquired is acquired without the aid of joint family property, the presumption is that it is the joint property of the joint acquires, but this presumption may be rebutted by proof that the persons constituting the joint family acquired the property not as members of a joint family, but as members of an ordinary made partnership resting on contract, in which case the property will be deemed to be partnership property. So long as a family remains an undivided family, two or more members of it, whether they are members of different branches or of one and the same branch of the family can have no legal existence as a separate independent unit; but all the members of a

branch or of a sub-branch, can form a distinct and separate corporate unit within the larger corporate family and hold property as such. Generally speaking the normal state of every Hindu family is joint. Presumble every such family is joint in food, worship, and estate. In the essence of proof of division, such is the legal presumption. In other words, given a joint Hindu family, the legal presumption. In other on words, given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. The presumption is, until the contrary is proved, that the family continues joint. The presumption that a Hindu family continues to be joint is mainly available when the question arises whether a specific property which was admittedly joint at one time has continued to be joint or it has ceased to be joint by virtue of a separation. If a joint family possessed property which was admittedly joint, the presumption would be that the property which was admittedly joint, the presumption would be that the property- continues to be joint, and the burden would lie upon the member who claims it as his separate property to prove that there was a partition and that he got it on such partition. There is in presumption that a family, because it is joint, possesses joint property or any property.

As indicated above, to render the property joint the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired, or from which the presumption could be drawn that all the property possessed by the family is joint family property, or that it was purchased with joint family funds, such as the proceeds of sate of ancestral property, or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a Court in the same way as any other fact, namely, by evidence. As indicated above, the sufficiency of evidence to be adduced to shift the onus which initially rests upon plaintiff of showing adequate nucleus from which acquisitions could have been made is essentially a question of fact that depends upon the nature and extent of the nucleus. If the Court is not satisfied that the joint family nucleus is sufficient to buy an additional property, the acquired property would be held to be self-acquired.

7. Case of the plaintiffs-appellants is that there was material to show that the plaintiffs and defendants 3 and 4 were members of joint family. An important element for consideration it income which the nucleus yielded These are not abstract questions of law but questions of fact to be determined on the evidence in each case. The wide proposition that once the ancestral nucleus is proved or admitted, the onus on a member to prove that the property acquired was his self-acquisition cannot be accepted as correct. The existence of some nucleus is not the sole criterion to impress the subsequent acquisitions with family character. What is to be shown is that the family had as a result of the nucleus sufficient surplus income from which the subsequent acquisitions could be made. This may be shown from the nature and relative value pf the nucleus itself. This is the second phase in the onus of proof which lies on the person who sets up the family character

of the property.

8. No material whatsoever has been brought on record to show existence of a nucleus from which the suit property could have . been acquired, Stands of the plaintiffs have been varying from stage to stage. At one point it was indicated to be acquisition by joint contribution or out of joint family funds. But subsequently that and was abandoned, and it was pleaded that the father of plaintiffs and defendants 3 and 4, had purchased the property in the name of his eldest son. The two stands are inconsistent, as has been rightly observed by the Courts below. Courts below referred to materials which established that defendant No .3 had income of his own. In the context, the conclusions of the Courts below cannot be faulted. Inevitable result is dismissal of the appeal, which direct. However, I make no order as to costs.