**(1993) 09 OHC CK 0018**

**Orissa High Court**

**Case No:** Second Appeal No. 252 of 1983

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| Debahari Kumbhar and Others | | APPELLANT |
| | Vs | |
| Sribatsa Patra and Another | | RESPONDENT |

**Date of Decision:** Sept. 1, 1993

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10
- Hindu Succession Act, 1956 - Section 15(1)
- Specific Relief Act, 1963 - Section 34
- Transfer of Property Act, 1882 - Section 108

**Citation:** AIR 1994 Ori 86 : (1994) 78 CLT 93 : (1994) 2 DMC 583

**Hon'ble Judges:** P.C. Misra, J

**Bench:** Single Bench

**Advocate:** S.C. Ghose and R.K. Sahoo, for the Appellant; R.K. Mohapatra, K.B. Kar and U.C. Panda, for the Respondent

**Judgement**

P.C. Misra, J.
The defendants in Title Suit No. 33 of 1979 of the Court of Munsif, Sonepur are the appellants against the confirming judgment of the Subordinate Judge, Sonepur in Title Appeal No. 7 of 1981. The suit is one for declaration of plaintiffs" title over the suit house and for recovery of possession of the same by evicting the defendants.

2. The case of the plaintiffs is that one Mr. Bala Patra is the original owner of the suit land who had one son Nilachal and a daughter Draupadi. He died leaving behind his widow who has been described as Mrs. Bala Patra and the aforesaid son and daughter. Plaintiffs 1 and 2 arc the sons of Nilachal. Defendant No. 1 in the suit is the husband.of Draupadi and defendant No. 2 is his second wife whom he had married after the death"of Draupadi. The plaintiffs described the defendants as their tenants since 1970 and later

their possession has been characterised as permissive possession. They filed a proceeding under the House Rent Control Act for eviction of the defendants in which a plea was taken by the defendants that the property has been surrendered in favour of defendant No. 1 by Mrs. Bala Patra. The H.R.C. case did not succeed as the relationship of landlord and tenant between the present plaintiffs and the defendants could not be established before the House Rent Controller for which the present suit has been filed describing the defendants as trespassers as they did not vacate in spite of demands by the plaintiffs.

3. The defendants denied the plaint allegations and asserted that Mr. Bala Patra died in the year 1950 leaving behind his widow Mrs. Bala Patra, son Nilachal and daughter Draupadi. Draupadi died leaving behind some children who were born in that house. The defendants claim to be in possession of the suit property since 1953. They also alleged that the suit property was surrendered in favour of defendant No. 1 by a document dated 15-3-1968 by Mrs. Bala Patra whereafter they have acquired valid title to the suit property. In addition, they have taken a plea in the written statement that Draupadi having died the properties left behind by Mrs. Bala Patra would devolve upon the son and daughters of Draupadi and in their absence the suit suffers from non-joinder of necessary parties. They have also set up a plea of adverse possession saying that their long possession has matured to valid title in respect of the suit property.

4. The learned trial court after considering the evidence adduced by the parties came to the conclusion that there is no documentary evidence in support of the plea of the plaintiffs that the suit house was alienated by Mr. Bala Patra to Mrs. Bala Patra. The court also recorded a finding that the son and daughters of Draupadi would not inherit the property of Mr. Bala Patra as they are Class II heirs. The trial court also found that there could not be a valid surrender by Mrs. Bala Patra in favour of defendant No. 1 who was her son-in-law. The factum of surrender was held not to have been proved. It also found that the deed of surrender relied upon by the defendants 1 and 2 was not genuine. The plea of adverse possession of defendants 1 and 2 was negatived by the learned trial court. Having found the title of the suit property with the plaintiffs, the court declared the title of the plaintiffs and directed eviction of the defendants for putting the plaintiffs in possession.

5. The defendants came up in appeal and the appellate court confirmed all the findings recorded by the trial court. During the pendency of the appeal appellant No. 2 who was defendant No. 2 in the suit died and the children of defendant No. 1 were substituted in her place. The lower appellate court recorded a finding that the defendants having not taken a plea that they had acquired any right by virtue of Section 15(1)(a) of the Hindu Succession Act and no issue having been raised in that behalf, their plea in this respect cannot be entertained. The appellate court therefore, confirmed the decree passed by the trial court. Hence this appeal.

6. The learned counsel for the appellants has assailed all the findings recorded by the courts below. But I do not find any merit as regards the challenge to the findings of the courts below relating to the genuineness of the deed of settlement which has not been marked as an exhibit, but some signatures appearing on the document have been marked as Exhibits ''C'' and ''C/1''. T will also concur with the finding of the learned courts below that defendants 1 and 2 have not acquired title to the suit property by virtue of adverse possession. But one point that emerges out of the materials on record is as to whether the plaintiffs'' title can be declared in the suit in the absence of necessary parties. The plaintiffs in their plaint described Draupadi as the daughter of Mr. Bala Patra and excepting stating that she is dead nothing further was disclosed about her. The plaint proceeded on the footing that Nilachal was the sole successor to the properties left behind by Mr. and Mrs. Bala Patra. In the written statement filed by the defendants they alleged that defendant No. 1 is the husband of Draupadi, the deceased daughter of Mr. Bala Patra and out of their wedlock one son, namely, Ganesh and three daughters, namely, Aneka, Amulya and Atulya were born. They also alleged that the geneology given by the plaintiff is in complete since son and daughters of late Draupadi had been left out. They also contended that the suit is bad for non-joinder of necessary parties as the son of Draupadi has not been im-pleaded in the suit. It is so because they have succeeded to the properties of Mrs. Bala Patra under the provisions of Hindu Succession Act. One of the issues framed by the learned trial Court was if the suit is bad for nonjoinder of necessary parties. This issue was dealt with in paragraph 5 of the judgment of the trial Court where the learned trial Court observed as follows :

"In the present case neither the son and daughters of Draupadi have any right, title or interest during the lifetime of their parents, The suit land is a co-parcenery property, Nilachal and plaintiffs are the sons and grandsons of Mr. Bala as such they are the successors. Nilachal succeeded the property of his father as per the Section 10 of the Hindu Succession Act (wrongly typed as Section 40). On the death of Nilachal, the plaintiffs and mother of plaintiffs Mr. Bala simultaneously succeeded the suit property. The defendants being the sisters of Nilachal come under Class II heirs. When the Class I heirs are available, the question of Class II heirs does not arise which comes next to the right of Class I heirs. As such the suit does not fail for non-joinder of necessary parties."

Each of those observations of the learned trial court is fallacious and based on misconceptions of fact and law. The question for consideration was as to whether the son and daughters of Draupadi succeed to the property of Mrs. Bala Patra who is said to have died in 1970 as their mother had predeceased Mrs. Bala. In other words, the succession opened on the death of Mrs. Bala Patra and the position which requires to be ascertained is as to whether at that point of time the son and daughters of Draupadi would be the legal heirs to succeed to the property along with Vilachal who is admittedly the son of Mrs. Bala Patra. The learned trial court has observed that neither the son nor daugters of Draupadi had any right, title and interest during the lifetime of their parents, which is not a question relevant for consideration. Mr. Bala Patra having died in 1950, Draupadi did not

succeed to the properties in the presence of his widow and son. The question for consideration in the case was as to whether the children of Draupadi would succeed to the interest of Mrs. Bala Patra who died in 1970 and by which time Draupadi had died. Secondly the trial court has further observed that the suit land is a coparcenary property and Nilachal and the plaintiffs are the successors. This question does not arise for consideration as Mr. Bala Patra had died some time in the year 1950 and at that point of time the property had also devolved upon his widow Mrs. Bala Patra and his son Nilachal as the daughter was not an heir prior to the Hindu Succession Act, 1956. It has not been claimed by the defendants that they are the heirs of Mr. Bala Patra. The next observation of the learned trial court is that "defendants being sister of Nilachal comes under Class II heir. This is factually not correct and equally irrelevant. None of the defendants was a sister of Nilachal. Defendant No. 1 is the husband of the sister of Nilachal and defendant No. 2 is his wife. Neither of them can dream of being heir of any of the members of the family of Mr. and Mrs. Bala Patra. From the facts disclosed in the case the position would be that if it is accepted that Draupadi had left behind a son and some daughters they will be entitled to succeed to the properties of Mrs. Bata Patra u/s 15 of the Hindu Succession Act as the property of a Hindu female dying intestate shall devolve upon her sons and daughters including the children of predeceased son or daughter and the husband. At the time of death of Mrs. Bala Patra the property would evidently devolve upon Nilachal, her son and the son and daughters of Draupadi as per Section 15(1) and the distribution thereof shall have to be made u/s 16 of the Hindu Succession Act. In that view of the matter, the son and daughters of Draupadi were necessary parties to the suit. The lower appellate court while dealing with the fact in para 10 of the judgment made a peculiar approach. The said court noted the contention of the defendant-appellants regarding their claim of succession u/s 15(1)(a) of the Hindu Succession Act, but observed as follows :

"On a perusal of the written statement it is clear that the defendants did not take the plea that they had aquired any right by virtue of Section 15(1)(a) of the Hindu Succession Act."

The defendants in the suit are not the children of Draupadi. Defendant No. 1 is the husband of Draupadi and defendant No. 2 is the second wife of defendant No. 1. Thus, they could not claim any right by virtue of Section 15(1) of the Hindu Succession Act. However, their plea thai the suit for declaration of title is incompetent in the absence of the necessary parties who are the son and dught-ers of Draupadi was clearly indicated in the written statement. The appellate court did not deal with the findings of the learned trial Court in issue No. 5. The result became that both the courts decreed the suit of the plaintiffs for declaration of title without keeping in mind that the son and daughters of Draupadi were necessary parties for such a declaration and in their absence the court could not declare the plaintiff"s right,

7. Mr. Mohapatra, learned counsel for the appellants vehemently contended that the defendants have not pleaded that they have derived any title to the property or right to possess the same through any of the children of Draupadi and, therefore, the suit for declaration as against them is maintainable. His further argument is that there is no issue

as to whether Draupadi had left behind a son and some daughters as alleged in the written statement in the absence of which the properties did not have the opportunity of proving the existence of such heirs if left behind by Draupadi. I am unable to persuade myself to accept the aforesaid contentions of Mr. Mohapatra for the reason that as to whether or not Draupadi had left behind the heirs as alleged by the defendants could not be adjudicated in their absence. When the defendants alleged in the written statement that Draupadi had left behind the son and three daughters, the question that arose for consideration under issue No. 5 is as to whether the suit is bad for non-joinder of necessary parties. It necessarily implies that the court was to determine as to whether Draupadi has left behind children as alleged in the written statement by the defendants and whether in their absence of the plaintiffs would be entitled to the reliefs sought for. The trial court did not record a finding that Draupadi died issuless or that the son and daughters of Draupadi were not alive when Mrs. Bala Patra died. But he answered the issue on a misconceived and fallacious proposition which I have already categorised as irrelevant for the purpose. It is, however, strenge that this elementary question escaped the notice of all concerned till this stage of the suit. The plain analysis which follows from the facts proved in the case is that Mrs. Bala Patra died in the year 1950 prior to the enactment of Hindu Succession Act, 1956 leaving behind his widow and a son and adaughter. By virtue of Hindu Women''s Right to Property Act, 1937 Mrs. Bala Patra stepped into the shoes of her deceased husband and was entitled to enjoy moiety interest along with the son, of course with the limitation which a Hindu female was subjected to prior to Hindu Succession Act, 1956. By virtue of Section 14 of the Hindu Succession Act, Mrs. Bala Patra acquired absolute right in respect of the interest she inherited from her husband and, therefore, by the time Mrs. Bala Patra died, the question for consideration is who would be her legal heirs. In the aforesaid context, the question for consideration was as to whether the son and the daughters of Draupadi were entitled to inherit any interest left behind by. Mrs. Bala Patra and if at all they were living at that time, it must be answered in the affirmative. As a matter of fact, I find that Anjana, defendant No. 2 appellant No. 2 died during the pendency of the appeal before the lower appellate court. The son of Draupadi and two of the daughters of Draupadi were substituted in her place. The substitution at least shows that these children of Draupadi were alive when Mrs. Bala Patra died. It also follows that plaintiffs were not the sole title-holders of the property as there were some others. I do not intend to work out their respetive interests in the suit properly for the reason that the same is not the matter for consideration in this appeal. But it, therefore, follows that though it can be said that the defendants had no title whatsoever with respect to the suit property and the plaintiffs had title over the suit property, they are not the sole owners thereof. Therefore, the relief of declaration of title of the plaintiffs alone in the absence of other co-owners is not available to be granted. In the circumstances, it can at best be said that they had better title than that of the defendants as the defendants had no title at all. The manner in which the aforesaid point has been dealt with by the courts below is improper. I would have remitted back the case to the trial court for retrial, but the suit being one of 1979, it would virtually mean de novo trial of the suit and cause further harassment to the parties. I would, therefore, like to

dispose of the suit as is permissible under Order 1, Rule 9 of the C.P.C. i.e. I shall deal with the matter in controversy so far as it relates to the rights of the parties actually before the court.

8. The learned courts below have categorically found and I also agree that the defendants had no title over the said property either by virtue of the alleged deed of surrender or by virtue of adverse possession. They did not claim to have authority to possess pursuant to any authority from any other co-sharer of the suit property, Law is well settled that one of the co-sharers can evict a person having no right to possess which would ensure to the benefit of all the co-sharers. Therefore, 1 do not intend to disturb the ultimate conclusion of the learned courts below that the plaintiffs are entitled to recover possession of the suit property, but it would not mean that the plaintiffs are the sole owners of the suit property.

9. In the result, the second appeal is disposed of with the aforesaid observations. No costs.