

**IN THE COURT OF THE ADDL. DISTRICT JUDGE - CUM-
SPECIAL JUDGE, CBI-II: BHUBANESWAR.**

PRESENT:-

Dr. A.K. Mishra, LL.M.,
Addl. District Judge-cum-
Special Judge, C.B.I-II, Bhubaneswar.

R.F.A. No. 15/73 of 2016/2015

(Arising out of Judgment in C.S No. 1904/2013
by the learned Civil Judge, (Sr. Division),
Bhubaneswar on 7.8.2015 and decree dtd.
14.8.2015)

Devendra Ku. Panda, age – 52 years,
S/o- Late Ratnakar Panda, Vill-Saripur,
P.S – Baliana, Dist _ Khurda,
At present – Plot No. 2569, Hatiasuni lane,
Tankapani Road, Bhubaneswar,
Po- BJB Nagar, P.S-Badagada, Dist – Khurda

.....Appellant.

Versus-

1. Pravakar Panda, age – 67 years, S/o- Late Ratgnakara Panda, At- Saripur, P.S- Balipatana, Dist – Khurda,
2. Harihar Panda, age- 62 years, S/o-Late Ratnakara Panda, At- Saripur, P.S- Balipatana, Dist – Khurda, At present Plot No. 181/2259, Kedagour Vihar, P.S – Badagada, BBSR-14, Khurda
3. Rabindra Ku. Panda, age – 57, S/o- Ratnakar Panda, at – Saripur, P.S- Baliaptana, Dist -Khurda,
4. Smt. Basanta Manjari Panda, age – 72 years, W/o- Laxmidhar Panda, at – Anadiahahi, PO- Nimapara, Dist – Puri,
5. Subhranshu Panda, age- 24 years, S/o- Rabindra Ku. Panda,
6. Bhagirathi Panda, age – 86 years, S/o- Late Udayanath Panda

7. Damodar Panda, age- 44 years,
S/o- Late Kailash Ch. Panda,a
8. Smt. Manorama Panda, age – 67 years,
W/o- Late Daitari Panda,
9. Bahagrahi Panda, age – 50 years,
S/o- Late Daitari Padna,
10. Lamodara Panda age- 34 years,
S/o- Late Daitary Panda,.
11. Pitambar Panda-aged 34 years
S/o Late Daitary Panda
Sl. No. 5 to 11 are of Resident of
village Saripur, PO/PS- Balipatana, Dist –Khurda.

.....**Respondents.**

COUNSELS

For the appellant : Mr. A.K. Patra and associates.

For the Respondents 2 and 4 : Mr. M.K.Das

For the Respondents nos. 1, 3, 5 to 11: None.

Date of argument 29.03.2016

Date of Judgment 31.03.2016

JUDGEMENT

The plaintiff as appellant has assailed the judgment and preliminary decree dtd. 7.8.15 in a suit for partition i.e C.S No. 1904/2013 by learned Civil Judge (Sr. Division), Bhubaneswar in this appeal. All the defendants are respondents in the order of their description in the plaint.

02. The facts necessary for the disposal of the appeal may be recapitulated referring the ranks of the parties in the suit. Ratnakar Panda has four sons and one daughter who are plaintiff and Def. No.1 to Def. No. 4. Plaintiff claims his share

from the joint family properties left by Ratnakar Panda. The said immovable properties are described in the plaint "A" schedule property consisting of 4 lots while movables are described in "C" schedule. Def.No. 7 and Def. No. 8 to 11 being the legal heirs of Kailash and Daitary, a different branch, are impleaded as they have interest in respect of Lot No.2 and 3 properties which are not disputed.

03. Defendant No. 5, the sons of defendant No. 3, coming in the branch of plaintiffs, is impleaded because a plot under khata no.424/132 in lot number 4 was purchased in his name but is now claimed to be the joint family property. Similarly the land appertaining to the plot No. 865 under Khata No. 317 in the said lot though purchased in the name of defendant No.3 is stated to be the joint family property for being purchased out of joint family nucleus. The plaintiff claims $1/5$, $2/5^{\text{th}}$, $1/10^{\text{th}}$, and $1/5^{\text{th}}$ share in properties described in lot No.1, 2, 3 and 4 of "A" schedule respectively. In respect of movable property described in "C" schedule, Plaintiff also claims $1/5^{\text{th}}$ share. The specific case of the plaintiff is that after death of father and mother, their sons and daughter succeeded to their movable and immovable property having equal share but defendant No. 1 having refused to give effect partition on demand on 14.11.13, he was constrained to file this suit for partition on 27.11.13.

4. The Def. No. 2 and Def. No. 4 filed written statement separately supporting the plaintiff.

Defendant No.1, 3 and 5 together filed a written statement admitting the genealogy. they have admitted the share of Def. No. 6 to 11 who belong to other branch but found

to have their ancestor's name with Ratnakar Panda in respect of lot No. 2 and 3. With regard to the Plot No. 865 in lot No.4 of "A" schedule property, it is pleaded that it is the self acquired property of Def. No.3. In respect of plot No. 746 in the said lot it is pleaded that it was also the self acquired property of Def. No. 5 purchased out of income of his father, Def. No. 3, through his elder father guardian Def. No. 1. Accordingly, disputing the partible status of only two khata's i.e 317 and 424/132 in lot No.4, these contesting defendants have admitted the plaintiff's case as far as immovable properties are concerned. With regard to moveable property described in schedule "C", these defendants have denied the existence of gold ornaments worth 160 grams but stated that only two numbers of Honda (big cooking pot), one Gara (big water carrier) and one Dhala (small water carrier) made of brass used by their father Ratnakara were left in the custody of Def. No.1.

In the suit, the Def. No. 7 to Def. No. 11 were set ex-parte.

05. Learned lower court framed as many as 5 numbers of issues including issue No.3 as to whether two plots covered under lot No.4 were the self acquired property of Def. No.3 and 5.

06. Plaintiff is the sole witness examined on his side while his supporter Def. No. 2 is examined as D.W.1. On behalf of the contesting defendants, Def. No.1 and Def. No. 3 are examined as D.W.2 and D.W. 3 respectively. On behalf of the plaintiff certified copy of ROR, and information received are marked as Ext.1 to Ext.10 while on behalf of the Def. No.2. Certified copy of ROR of Khata No. 316 is marked as Ext. A. On

behalf of the contesting defendants 1, 3 and 5 two registered sale deeds in the name of Def. No. 3, dtd. 6.11.78 and Def. No.5 dtd. 30.10.98 are marked Ext.A-1 and B-1 along with rent receipts.

07. Learned lower court on analysis of the evidence and law, passed the preliminary decree in the following words:-

" The property covered under lot No.4 bearing khata No. 317 and 424/132 are not partible being the self-acquired property of the defendant No.3 and 5. But the properties covered under Lot nO.1, 2, 3 and the property in Lot NO.4 vide Khata No.205 are partible. The plaintiff is hereby entitled to get 1/5th share from lot No.1 and khata No. 205 of Lot No.4. 2/15th share from Lot NO.2 and 1/10th share from Lot No.3 and the property described in schedule-C regarding gold ornaments, necessary order has already been passed as per the discussion in the judgment made supra. The parties are directed to effect partition of the suit properties vide Lot No.1 to 4 as above by metes and bounds within three months hence, failing which any party to the suit can approach the court to effect partition by Civil Court Commissioner."

08. Learned counsel for the appellant submitted that learned lower court has committed error in not accepting the plaintiff's contention that property described in lot No. 4 of "A" schedule property in the name of defendant No. 3 and 5 were the joint family properties and partible in nature. It is further submitted that when defendant No.1 has admitted in written statement that two numbers of Honda, one Gara and one Dhala

were available, Learned lower court should have declared the share of the plaintiff over the same. Lastly, it is argued by the learned counsel for the appellant that the property vide lot No.4, Khata No. 205, standing in the name of Def.Nos.1 to 3 and plaintiff being joint family property, the daughter ,Def. No. 4, is entitled to equal share with her brothers. Learned counsel for Respondent No. 2 and 4 supported the contention of learned counsel for the appellant obviously for the filing of written statement in the lower court admitting the plaint.

09. The contesting Respondents No. 1, 3 and 5 and other respondent nos. 6 to 11 were set ex-parte on 29.03.16 in this appeal.

10. Challenge to the impugned judgment in this appeal being confined to the nature of the properties described in lot No. 4 of plaint A-schedule as well as moveable properties described in plaint C-schedule, the points for determination are-

- (i) Whether properties described in lot No.4 of "A" schedule property are joint family properties?
- (ii) Whether the plaintiff has any share in the plaint "C"- Schedule moveable properties?

10. ANSWER TO POINT NO.1:

There is no presumption of a joint Hindu family possessing joint family property .In order to bring to the hotchpotch a porticular item of property standing in the name of a member of joint family , it is to be established on evidence that the same was acquired out of joint family nucleus. If the initial burden is discharged by the person who claims joint Hindu family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was

acquired without the aid of the joint family property by cogent and necessary evidence. The law in this regard is well analysed by learned lower court in the impugned judgment and this judgment need not be burdened further with such authorities.

While considering the nucleus, it is to be established and such existence cannot be normally presumed or assumed on probabilities. The existence of property, the income from the property, the normal liability with which such income would have charged and surplus reserved out of such joint family properties do enter into computation for the purpose of assessing such nucleus. Only bare allegation without any substantial proof cannot stamp a self acquired property to be joint family property.

There is no dispute that land appertaining to Khata No. 317 in lot No.4 was purchased in the name of Def.No. 3 on 6.11.78 under Ext.A-1 and land appertaining to Khata No. 424/132 was purchased in the name of Def. No.5 in the sale deed dtd. 20.10.98. There is no dispute that joint family was in existence then. Plaintiff has admitted in cross-examination para-4 that he has no detail knowledge about the cultivation of agricultural land in 1998. The defendant No. 3 was serving then. In cross-examination para- 6 he has admitted that he has no proof about accumulation of fund out of the surplus income from agriculture. D.W.1, who is none else than Def. No. 2 has admitted in cross-examination that their father died in the year, 2013 and in para-6 that a piece of land was purchased in the name of his wife in Bhubaneswar. It proves that a member of joint family has acquired separate property during jointness.

There is no iota of evidence revealing the income and expenditure of joint family and surplus in the hand of manager

which could have used to provide consideration for the land purchased in the name of Def. No. 3 and 5 . On this evidence from side of the plaintiff and his supporter Def. No. 2, it cannot be said that plaintiff has discharged his initial burden in proving joint family nucleus. In the year, 1998, the defendant no.3, the father of defendant no.5, was an earning member . Even if the consideration amount was provided by his elder brother Def. No.1, it cannot be said that the land was purchased out of joint family nucleus.

The contention of learned counsel for the appellant that there is no specific pleading in the written statement with regard to the self acquisition does not merit in the back drop of fact that plaintiff has not discharged it's burden by clear and cogent evidence. The learned lower court has analysed the evidence in this regard properly and no fault can be found in it's findings. The same is hereby affirmed.

11. ANSWER TO POINT NO. 2

It is true that in the written statement Def. No. 1 has admitted in para-6 that only two numbers of Hondas, one Gara and one Dhala used by Ratnakar Panda were left with him but there is no evidence that those were the joint family properties. Pleading is not evidence, far less proof. Plaintiff as P.W.1 has not whispered a single word in this regard. So question of ascertaining the share of plaintiff over the same does not arise.

Defendant No. 4 is the daughter of Ratnakar. She supports the plaintiff but has not filed any appeal against the impugned judgment. So to the extent of her claim, the impugned judgment is final.

12. On the fresh analysis of the evidence on record, in the back drop of point urged in this appeal, no infirmity is found in the findings recorded by learned lower court. The learned lower court has not committed any mistake in appreciating the evidence. Since the court below has taken the correct decision, no interference is warranted in this appeal. Hence, it is ordered.

ORDER

The appeal be and the same is dismissed on contest against the Respondent No.2 and 4 but on ex parte against other respondents. There shall be no order as to cost in the peculiar facts and circumstances of the case.

Addl. District Judge -Cum-Special
Judge, (CBI-II) , Bhubaneswar.

Dictated and corrected by me.

Addl. District Judge-Cum-
Special Judge(CBI-II),Bhubaneswar.