IN THE COURT OF THE ADDL.DISTRICT JUDGE, BHUBANESWAR

Present:

Shri A.C.Behera, LL.B.,
Addl. District Judge,
Bhubaneswar.

R.F.A NO.17/19/58 of 2013/2009/07

(Arising out of Judgment and decree dtd. 28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned 2nd Addl.Civil Judge, (Sr.Divn), Bhubaneswar).

Dated, this the 31st day of January, 2015

Nidhi Behera, aged about 52 years,
D/o.Late Madan Behera, resident of
At-Laxmisagar, P.O.Budheswari,
P.S.Laxmisagar, Bhubaneswar,
Dist.Khurda

..... Appellant.

-Versus-

1. Kanduri Behera, aged about 62 years,
S/o.Late Madan Behera, resident of
At-Laxmisagar, P.O.Budheswari,
P.S.Laxmisagar, Bhubaneswar,
Dist.Khurda.

2. Rabindra Behera, aged about 54 years,
S/o.Late Guna Behera, resident of
At-Laxmisagar, P.O.Budheswari,
P.S.Laxmisagar, Bhubaneswar,
Dist.Khurda

..... Respondents

Counsel for the Appellant :Sri P.K.Pattnaik and his associates, Advs.BBSR

Counsel for the Respondents : Sri P.K.Das and his associates, Advs.BBSR

Date of Hearing : 16.01.2015
Date of Judgment : 31.01.2015

J U D G M E N T

This is an appeal U/s.96 r/w. O.41, R.1 of the Civil Procedure Code, 1908, which has been preferred by the appellant against the judgment and decree dtd.28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned 2nd Addl.Civil Judge, (Sr.Divn), Bhubaneswar, wherein the suit of the plaintiff was dismissed on contest against the defendants without cost.

2. The appellant and respondents of this appeal were the plaintiff and defendants respectively before the learned court below in T.S.No.71/42 of 2004/1998.

3. The case of the plaintiff/appellant before the learned court below against the defendants/respondents as per the averments made in her plaint in nutshell was that, plaintiff and defendant No.1 are both sister and brother respectively because Madan Behera was their father. The further case of the plaintiff was that, the suit lands were originally belonged to her father Madan Behera. The said Madan Behera died in the year 1962 leaving behind her (plaintiff) and a son i.e. defendant No.1(Kanduri Behera). So, after the death

of Madan Behera in the year 1962, the suit land left by him had devolved upon her (plaintiff) and defendant No.1 and accordingly she (plaintiff) and defendant No.1 became the joint owner over the suit land having equal share each. The suit land described in Schedule-A of the plaint has been recorded jointly in the name of plaintiff and defendant No.1 both and they both are residing in their ancestral house constructed thereon by their late father Madan Behera. The suit land described in Schedule-B is a piece of homestead land and the same was recorded exclusively in the name of their father Madan Behera in Sabik settlement. The same has been wrongly recorded in the Hal settlement in the name of defendant No.1. But, the said schedule-B property like schedule-A is their joint family properly, in which, the plaintiff and defendant No.1 both have equal share. Though, plaintiff and defendant No.1 both are in possession over the suit properties according to their convenience in respect of specific portion thereof, but the same has not been partitioned between them through metes and bound. Even after the marriage of the plaintiff, she (plaintiff) has been running her business within Bhubaneswar Municipality by staying over the suit land. But, by taking the advantage of the joint-ness of the suit land of the defendant No.1 with the plaintiff, he (defendant No.1) tried to alienate the suit land defeating the interest of the plaintiff therein, for which, the plaintiff requested the defendant No.1 first on dtd.15.12.1997 for metes and bound partition of the suit land, to which, he (defendant No.1) delayed and then again, she (plaintiff) requested him for such partition on dtd.21.01.1998 to which, he

(defendant No.1) denied. So, without getting any way, the plaintiff approached the learned court below by filing the suit against the defendants vide T.S.No.42/98 praying for partition of her half share from both the schedule of properties along with other relief(s) to which, she (plaintiff) is entitled for as per law and equity.

4. Having been noticed from the court, the defendants contested the case of the plaintiff by filing their written statements separately.

5. According to the stand of the defendant No.1 as per his written statement, the suit of the plaintiff is not maintainable. The plaintiff has no cause of action to bring the suit. The suit is bad for non-joinder of necessary party i.e. Hara Dei (one daughter of Madan Behera). The further stand of the defendant No.1 was that, his father died in the year 1953 i.e. prior to the coming into force of Hindu Succession Act, 1956. So at that time plaintiff had no right of succession, for which he (defendant No.1) had succeeded to the entire suit land left by his father Madan Behera. The suit land were recorded in the name of their father Madan Behera in revisional settlement.

Then on its next settlement, the same were recorded in the name of the defendant No.1 and his younger brother Nabin Behera jointly under Khata No.389 and 27. Subsequent thereto Nabin had changed his surname from Behera to Das. Then Nabin Behera @ Das had sold his 50% share from the suit Khata No.389 to defendant No.1 through R.S.D.No.651 dtd.27.01.1976. For which

the defendant No.1 became the exclusive owner over the suit land. The plaintiff has no manner of right, title interest and possession over the suit land. She (plaintiff) has managed to record her name in respect of the Schedule-A through manipulation and wrongly. As, the plaintiff has no right, title and interest as per law over the suit land. She has no locus-standi to file the suit for partition. The averments made by the plaintiff in her plaint that, she has interest over the suit land and that, her father died in the year 1962 and that, she is in possession over the suit land are not at all correct. So, the plaintiff is not entitled for any relief. For which, the suit filed by her (plaintiff) is liable to be dismissed with costs.

6. The pleadings of the defendant No.2 as it appears from the Para-4 of the impugned judgment was that, the father of the plaintiff and defendant No.1 i.e. Madan Behera died on dtd.15.06.1955 i.e. before coming into force of the Hindu Succession Act, 1956. According to him, (defendant No.2), Madan Behera had two wives. Defendant No.1 is the son of his first wife. Nabin and Nidhi (plaintiff) are the son and daughter of his second wife. So, after the death of Madan in the year 1955, Kanduri (defendant No.1) and Nabin had succeeded to the suit properties left by Madan. So, the plaintiff has no right, title and interest over the suit land. That apart, by the time of death of Madan, Nidhi (plaintiff) had already married and she was residing in her husband's house with her husband. But, subsequent thereto, she (plaintiff), her husband and children came to Bhubaneswar and they are staying in a Govt. land at Laxmisagar, wherein they are

carrying milk business. His further case is that, after purchasing the share of Nabin, defendant No.1 has become the exclusive owner over the suit land. For which, the suit of the plaintiff is not maintainable under law. The same is liable to be dismissed with cost. That apart, he (defendant No.2) is not a necessary party to the suit.

7. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether five numbers of issues were framed by the learned court below and the said issues are :-

I S S U E S

(i) Whether the suit is maintainable ?

(ii) Whether the suit is hit by non joinder and mis-joinder of necessary party ?

(iii) Whether the suit is under valued ?

(iv) Whether the plaintiff is entitled ½ share out of the Schedule-A and B properties as daughter of Madan Behera ?

(v) To what other relief, the plaintiff is entitled ?

8. In order to substantiate the case of the plaintiff, the plaintiff had examined two witnesses from her side including herself as P.W.1 and has proved six documents on her behalf starting from Ext.1 to 6.

But, whereas, her counterparts i.e. the defendants have examined four witnesses from their side including defendant Nos. 1 and 2 as D.W.1 and 3 and they have proved series of documents

on their behalf starting from Ext.A to AG.

9. After conclusion of trial and on perusal of the materials and evidence available in the record, the learned court below answered all the issues against the plaintiff and in favour of the defendants and finally dismissed the suit of the plaintiff vide T.S.No.71/42 of 2004/1998 on contest against the defendants without cost vide his judgment and decree dtd.28.07.2007 and 17.08.2007 respectively.

10. On being aggrieved with the aforesaid judgment and decree dtd.28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned 2nd Addl.Civil Judge (Sr.Divn), Bhubaneswar, in dismissing the suit of the plaintiff, she (plaintiff) has challenged the same by preferring this appeal after taking several grounds in her appeal memo.

11. I have already heard from the learned counsels of the parties and so also have perused the materials and evidence available in the record.

12. Basing upon the pleadings and matters in controversies between of the parties, findings made by the learned court below in the impugned judgment, the grounds taken by the appellant in her appeal memo and rival submissions of the learned counsels of the parties, the crux of this appeal are :-

(i) Whether Madan Behera (father of the plaintiff) had expired prior to 1956 or after 1956 ?

(ii) Whether the suit filed by the plaintiff is maintainable under law ?

(iii) Whether the impugned judgment and decree dtd.28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned court below dismissing the suit of the plaintiff is sustainable under law ?

13. In order to have a better appreciation and so also for just decision of the appeal, the above three points fixed for determination are required to be discussed and analyzed serially and chronologically one after another by taking into account the material and evidence available in the record for ascertaining the sustainability and justifiability of the impugned judgment and decree passed by the learned court below.

14. So far the first point i.e. whether Madan Behera (father of the plaintiff) had expired prior to 1956 or after 1956 is concerned ;

In order to substantiate the pleadings of the defendants and to establish the death of Madan Behera prior to 1956, the defendants have proved the death certificate of Madan Behera as Ext.A issued U/s.17 of the Registration of Births and Deaths Act, 1969. It appears from the contents of Ext.A that, the date of death of that Madan behera is 15.06.1955 and the date of registration of his death is 27.06.1955.

The above undisputed public document vide Ext.A provides a rebuttable presumption that, the date of death of Madan Behera

was 15.06.1955, because the registration of his death was made on dtd.27.06.1955, which is much prior to the arising of cause of action of the present suit of the plaintiff. There is no sufficient materials in the record either through the oral or through documentary evidence on behalf of the plaintiff or through cross examination to the witnesses of the defendants to rebut the above presumption, which is available in favour of the defendants as per Ext.A regarding the date of death of Madan Behera as 15.06.1955. The above document vide Ext.A (death certificate of Madan Behera) has become acceptable/reliable, because the said document has come into existence much prior to the rising of cause of action of this suit. As, the date of registration of death of Madan Behera in Ext.A is 27.06.1955 and the cause of action of the suit at hand is 21.01.1998.

The above propositions of law regarding the reliability/acceptability of Ext.A (death certificate) finds support from the ratio of the following decision :-

114(2012) C.L.T-Page-799

2012(11) C.L.R- Page-358- Sanjukta Mallick (v) Bharati Sethi. (Para-8)

Evidence- Appreciation- While appreciating the evidence, the court must give importance to those materials, which had come into existence prior to the rising of cause of action – A document, which has come into existence after the cause of action arose, then such document shall be viewed with suspicion. Such documents have farless probative value then

the materials which had come into existence much prior to the time, when the cause of action arose in the case.

15. Here in this case at hand, as the registration of death of Madan Behera has been made on dtd.27.06.1955 as per Ext.A, which is much prior to the rising of the cause of action of the present suit at hand, for which, the said document vide Ext.A can not be viewed with suspicion, but instead of which, much reliance can be placed on it in view of the principles of law enunciated in the ratio of the decision cited above. So by placing reliance on the document vide Ext.A for the reasons stated above, it is held that, Madan Behera (father of the plaintiff) had died on 15.06.1955, which is prior to the year 1956.

16. So far the second point i.e. whether the suit filed by the plaintiff in respect of the suit land is maintainable under law is concerned ;

according to plaintiff, she has claimed partition over the suit properties stating the same as her ancestral properties. She (plaintiff) stated in her plaint that, as her father died in the year 1962 i.e. after the coming into force of the Hindu succession Act, 1956, the suit properties left by her father has devolved upon her and her brother simultaneously.

But, as per the observations made in the forgoing Point No.1, it has already been held that, the date of death of Madan Behera was 15.06.1955, which is prior to the coming into force of Hindu Succession Act, 1956. So, soon after the death of Madan Behera

i.e. on dtd.15.06.1955, the properties including the suit properties left by Madan Behera had devolved upon his son i.e. defendant No.1, because by that time i.e. on dtd.15.06.1955, no Hindu daughter like plaintiff had any right of succession in her father's property. Because, the right of succession in favour of a Hindu daughter like the plaintiff was created for the first time in the Hindu succession Act, 1956.

17. It is the well settled propositions of law that, the properties once vested with someone, can not be divested.

As, on dtd.15.06.1955 i.e. immediately after the death of Madan Behera, the suit lands were vested on defendant No.1 without creating any interest in favour of plaintiff, then even after coming after into force of Hindu Succession Act, 1956, no interest therein shall be created in respect of the suit land in favour of plaintiff.

When, for the reasons stated above, the plaintiff has no interest over the suit land, so the suit filed by her for partition in respect of the suit properties against the defendants including her brother (defendant No.1) is held not maintainable being fully agreed with the findings of the learned court below in the impugned judgment on that aspect.

18. So far the third and last point i.e. whether the impugned judgment and decree dtd.28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned court below dismissing the suit is sustainable under law is concerned ;

when as per the discussions made in the forgoing point No.2, it has already been held that, the suit filed by the plaintiff is not maintainable under law, as she has no interest at all over the suit properties, for which, it can not at all be held that, the impugned judgment and decree dtd.28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned court below dismissing the suit of the plaintiff is not sustainable.

19. On analysis of the facts and circumstances of the case as per the discussions and observations made above, when it is held that, the impugned judgment and decree of the learned court below is not unsustainable, for which, there is no justification under law to interfere with the same in this appeal filed by the appellant. So, the appeal filed by the appellant must fail. Hence ordered :-

O R D E R

The appeal filed by the appellant is dismissed on contest against the respondents but under the circumstances without cost.

The impugned judgment and decree dtd.28.07.2007 and 17.08.2007 respectively passed in T.S.No.71/42 of 2004/1998 by the learned Second Addl.Civil Judge (Sr.Divn), Bhubaneswar is hereby confirmed.

Pronounced the judgment in the open court today, this the 31st day of January, 2015 under my seal and signature.

Dictated & corrected by me.

Addl.Dist.Judge.,BBSR. Addl.Dist. Judge.,BBSR.