

Ananta Kumar Pal and ors. Vs. Markanda Charan @ Chandra Pal and ors.

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Court : Orissa

Decided On : Jan-09-2002

Reported in : 93(2002)CLT153

Judge : P.K. Balasubramanyan, C.J. and ;A.S. Naidu, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 96

Appeal No. : First Appeal No. 387 of 1977

Appellant : Ananta Kumar Pal and ors.

Respondent : Markanda Charan @ Chandra Pal and ors.

Advocate for Def. : Sujata Dash, ;Banabehari Ray and ;R.K. Prusty, Advs.

Advocate for Pet/Ap. : R.K. Mohapatra, Sr. Adv., ;B. Routray, ;K.B. Kar, ;S.K. Nayak and ;P.K. Jena, Advs.

Disposition : Appeal dismissed

Judgement :

P. K. Balasubramanyan, C.J.

1. Plaintiffs are the appellants. The suit was one for partition. The suit was dismissed by the trial court. Hence, this appeal by the plaintiffs.

2. Plaintiff No. 11 is the younger brother of defendant No. 1. Plaintiffs 1 to 10 are the children of plaintiff No. 11. According to the plaint, plaintiff No.11 was mentally unsound. The plaint proceeds on the basis that there were certain ancestral properties; that plaintiff No. 11 and defendant No. 1 were having a joint trade; that there was a partition between them, but in that partition the elder brother did not give, any share in the income of the joint business to the younger brother; that defendant No. 1 acquired certain properties out of the income of the joint family business, and that the said properties were also available for partition. The properties are shown in Schedule 'Kha' and 'Ga'.

3. The first defendant and his vendees resisted the suit. The first defendant pleaded that there was already a partition of joint family properties between himself and plaintiff No. 11, and that the suit filed for partition was not maintainable. He contended that the properties included in 'Kha' schedule were ancestral properties and had already been divided. According to him the 'Ga' Schedule properties were acquired by him out of his own income from business, and plaintiff No. 11 or his descendants did not have any claim or right over the same.

4. It is to be noted that the male children of defendant No. 1 were not impleaded in the suit.

5. The trial court held that there was a partition between the brothers - defendant No. 1 and plaintiff No. 11 sometime in the year 1942. This was held on the basis of admission of P.W. 1, the wife of plaintiff No. 11, who categorically stated that a list of allotment of properties was prepared at the time of partition and that she was in possession of the list which showed the properties allotted to her husband, plaintiff No. 11 and that she had sold away some of the ancestral lands allotted to her husband on his behalf. The said list was not produced. There was also no explanation for its non-production. Thus, the common case was that there was already a partition between the brothers and the trial court in that situation accepted the evidence on the side of the first defendant to come to the conclusion that there was in fact a partition sometime before 1942. In the light of the pleadings in the plaint, the admission of P.W. 1 and the evidence of D.W. 3, the

trial court is seen to be perfectly justified in its finding and the same calls for no interference in this appeal.

6. Once we uphold the finding that there was already a partition between the brothers, then the plaintiffs cannot have a claim for fresh partition, unless a case is specifically pleaded and established in that behalf. Once the properties are divided, the right of the plaintiffs, if any, is to recover possession of the properties and not to seek a fresh partition. The main case which is attempted to be put forward before us by learned counsel for the plaintiffs-appellants is that there was a joint business in which the first defendant and plaintiff No. 11 were involved, and the evidence shows that the income of that business had not been divided and since the first defendant had no other source of income of his own, it must be presumed that the properties acquired by the first defendant were out of the income of the joint business. The evidence of D.W. 3 is relied on in this context. But on going through the evidence of D. W. 3, we find that he had stated that there was a partition sometime in the year 1941 between the two brothers; that after the cyclone of 1942 he had started a business of his own and got a good income, and that he had acquired some properties, and also sold some properties out of the same and they are his self acquired properties. The plaintiffs never had any sort of possession of the said properties. There is no such admission by D.W. 3 basing upon which a decree could be granted to the plaintiffs on the facts, and in the circumstances of the case.

7. Case of the plaintiffs was that plaintiff No. 11 was the younger brother and was in a weak state of mind and hence did not know what was being done while the partition was being effected and what was his share in the business. D.W. 3 in his evidence has stated that when the partition was effected, the income of the business was also divided. In the circumstances of the case, there is no reason not to accept the evidence of D.W. 3. The said evidence is probalised by the circumstances established in the case. Plaintiff No. 11 was not attempted to be examined and no other competent evidence was also attempted to be adduced to speak to the relevant aspects. No attempt was also made by the plaintiffs to show that plaintiff No. 11 was in weak state of mind for a long time or that it was possible for the first defendant to have deprived the plaintiff No. 11 of his share in the

manner suggested in the plaint and in the evidence of P.W. 1. Thus on the whole, it has to be held that the plaintiffs have not succeeded in establishing a case for partition or in establishing that the first defendant had acquired some properties out of the income from the joint family business or joint properties. In that situation, we are in agreement with the trial court that the plaintiffs have not been able to make out a case for partition.

8. Hence, we confirm the dismissal of suit by the trial court and dismiss this appeal. Considering the relationship between the parties and the circumstances of the case, we direct the parties to bear their respective costs both here and in the trial court.

A. S. Naidu, J.

9. I agree.

10. Appeal dismissed.

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