

Jagat Krishna Das and anr. Vs. Ajit Kumar Das and ors.

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Court : Orissa

Decided On : Nov-06-1963

Reported in : AIR1964Ori75

Judge : S. Barman and ;G.K. Misra, JJ.

Acts : Hindu Law; Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 - Sections 2(4) and 2(6); [Code of Civil Procedure \(CPC\) , 1908](#) - Order 7, Rule 7; [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 18(1)

Appeal No. : First Appeal Nos. 22 and 27 of 1961

Appellant : Jagat Krishna Das and anr.

Respondent : Ajit Kumar Das and ors.

Advocate for Def. : R. Das, ;S.C. Das, ;S. Das, ;S. Mohanty, ;N.C. Mohanty, ;N. Kr. Das and ;B.B. Mohanty, Advs. in F.A. No. 22 of 1961 and ;S. Mohanty, ;R.C. Ram, ;B.B. Mohanty, ;S.C. Das and ;N.C. Mohanty, Advs. in F.A

Advocate for Pet/Ap. : R.C. Ram and ;A.C. Mohanty, Advs. in F.A. No. 22 of 1961 and ;R. Das, ;N. Kr. Das and ;G.N. Misra, Advs. in F.A. No. 27 of 1961

Judgement :

Misra, J.

1. Both these appeals arise out of Title Suit No. 37 of 1955. One Ram Chandra Das (died in 1921) had three sons -- Raghabananda Das (died in 1932), Bhubanananda (original defendant No. 4 and died during the pendency of the suit) and Bichitrananda (defendant No. 5). Suchitra (defendant No. 6) was the widow of Raghabananda and died after the disposal of the suit. On the death of Bhubanananda, his legal representatives were substituted as defendants 4 to 4 (e). Raghabananda had three sons -- Rashakrushna (defendant 3), Bankim Krishna (defendant-2) and Jagat Krishna (defendant-1) Sarojini (plaintiff-2) was admittedly married to defendant-i in 1948. Ajit (plaintiff-1) is the son and Madhuchhanda (plaintiff-3) is the daughter of defendant No. 1 through plaintiff No. 2. Madhuchhanda was born in 1953. The plffs. filed this suit in forma pauperis on 23-8-1954 for partition and for maintenance. They aver that Basanti (defendant-7) is the concubine of defen-dant-1. Defendant-7, Kalyankumar (defendant-8), Sarat Kumar (defendant No. 9) and Asit Kumar (defendant-10) had not been originally impleaded as parties to the suit. By an amendment, they were made parties on 11-3-1960. The plaintiffs' case is that in 1960-61 defendant-1 developed intimacy with defendant-7, who is the daughter of a prostitute. From 1951 onwards defendant-1 lived with defendant-7 and deserted the plaintiffs without either maintaining them or paying any sum towards maintenance. A schedule properties men-tioned in the plaint are the joint family properties. It may be noted that Item No. 1 of Schedule A refers to the residential building at Dagarpara in Cuttack town. B schedule of the plaint is the self acquired property of Raghabananda. Plaintiff-1 is entitled to x/27th share in schedule A and 1/9th share in Sch. B properties. So also plaintiff-2. They claim maintenance of Rs. 3600/- at the rate of Rs. 100/ per month from August 1951 to August 1954. Maintenance also is claimed at the same rate pendente lite till the disposal of the suit. The plaintiffs claim Rs. 25/- per month more for the educational expenses of plaintiff-3 and a maintenance of Rs. 25/- per month for plaintiff-3 from the date of the disposal of the suit till the date of her marriage. They also pray that the properties to be allotted to defendant-1 should be charged for the maintenance, marriage and educational expenses of plaintiff No. 3.

2. Defendants 1 and 7 to 10 took the plea that defendant 7 is the legally married wife of defendant No. 1. The second marriage took place on 15-4-1954. Defendants 8 to 10 are the sons of defendant-1 through defendant-7 during the

continuance of a valid marriage. Defendant-7 is not the daughter of a prostitute. Defendant No. 8 was 3 years in February, 1958; in other words, he was conceived prior to the date of the institution of the suit (para 4 of the written statement of defendants 1 and 6). Defendant No. 1 took the positive stand that plaintiff-i (2 ?) was quarrelsome, ill-treated his mother (defendant 6) and deserted him in March 1953. Despite the desertion, he used to make some payments towards maintenance of the plaintiffs and the plaintiffs are not entitled to any maintenance. So far as the properties in dispute are concerned, it is unnecessary to give the entire defence in detail as, an appeal, the controversy has been focussed only on the residential house in Cuttack town mentioned' in item No. 1 of Schedule A of the plaint.

Defendants 1 and 2 took the stand that the residential house at Dagarpada was the self-acquisition of Raghavananda in which deceased Bhubanananda and defendant-5 have no right, title and interest. Defendant-2 supports the case of marriage between defendants 1 and 7.

Defendant No. 3 in his written statement does not say anything with regard to the nature and character of the residential house at Cuttack town. The absence of any denial in the written statement amounts to acceptance of the averments in the plaint that the residential house at Dagarpada, Cuttack, is a joint family property and is partible amongst 3 branches. He also does not deny the case of evil association between defendants 1 and 7 and the story of concubinage.

Original defendant-4 Bhubanananda claimed the Cuttack property as joint family property. He claimed certain properties as self-acquired, the details of which need not be mentioned as those are not the subject-matter in controversy in appeal.

Defendant-5 claims the Cuttack residential house as joint family property.

3. The learned Subordinate Judge declared some of the properties, involved in the suit, as the self acquisition of different members of the family. His finding in that regard has not been questioned and the details of such finding need not be mentioned in this judgment.

4. The learned Judge found that the residential house in Cuttack Town is a joint family property and liable to partition. This finding is challenged in F. A. 22/1961 by the defendants Nos. 1 and 2. The only point that requires consideration in this appeal is whether the residential house at Dagarpara is a joint family property.

5. The learned Judge found that defendant-7 is the married wife of defendant-1 and that defendants 8 to 10 are the legitimate sons of defendant-1 through defendant-7. While decreeing the relief for partition, he allotted shares to defendants 7 to 10 as a result of which the shares allotted to plaintiffs 1 and 2 were reduced. The relief for maintenance was dismissed. The share of defendant-1 was ordered to be divided into six equal shares out of which defendant-i will get a share, plaintiff-2 and defendant No. 7 are to get one share and plaintiff No. 1 and defendants 8 to 10 would get one share each. The property in schedule C of the plaint and Lot No. 28 of Schedule B were declared the Stridhan properties of defendant-6 who was also granted a maintenance at the rate of Rs. 20/- per month from the share of properties allotted to defendants 1 to 3. Against these findings F. A. 27/1961 has been filed by the plaintiffs. On the death of defendant-6 on 22-2-1961, after the decree of the trial Court, her legal representatives have been joined as respondents 11 to 14 in this appeal. The other legal representatives were already on record.

6. I would first take up R.A. 27/61. Mr. R. Das contends that defendant-7 is a concubine of defendant-1 and is not married to him. The allegation in the plaint that defendant-7 is the daughter of a prostitute has not at all been substantiated and is to be discarded. There is no evidence in support of such a case. Even if defendant-7 were the daughter of a prostitute, there is no legal bar for her marriage with defendant-1. The learned Subordinate Judge gave much importance to a special feature in this case that defendants 2 to 6 do not dispute the factum of marriage between defendants 1 and 7. Defendants 2 and 6 admitted the existence of the marriage in their written statements. The family is very respectable. If defendant-7 had been a concubine defendants 2 and 6 could hardly support a case of marriage. Defendant-2 was present on the occasion of the marriage and his evidence has not in any way been shaken. He is a respectable witness and deposed that defendant-6 till her death mostly resided with defendants 1 and 7. A

respectable old lady would not choose to remain with a concubine. Defendant-7 comes from a Karan family in the ex-State of Tigris. At the time of marriage she was reading in college. There is no legal bar for marriage between defendants 1 and 7. It is difficult to imagine why defendant-7, an educated and respectable girl, would submit to concubinage when there was no obstacle in the path of marriage. Even assuming that the initial relationship between the two was the outcome of love, there is no difficulty to imagine that this must have resulted in a lawful marriage. One Alekh Rath (D. W. 2) claims to be family priest who was present on the occasion. We do not attach much importance to his evidence as he himself is a disrespectable man who had brought from Calcutta a Kayastha woman through whom he has four issues. Such a disreputable brahmin hotel-keeper would hardly be a family priest in a, respectable house. Biswanath Das (D. W. 3) is an agnate of defendant-i. He states that he attended the marriage. The evidence of defendant-1 as D. W. 4 and defendant-7 as D. W. 1 has stood the test of cross-examination. The second marriage was performed while the first wife was alive. The first wife also comes from a respectable family and is a respectable lady having college education. The second marriage would arouse not only strong resentment in plaintiff-2 and the members of her father's family, but also create a social opprobrium. Such a marriage in the natural course of events must be performed within closed doors in the company of a few friends without any pomp and splendour and wide publicity. Possibly during the subsistence of the first marriage defendant No. 1 came in contact with defendant No. 7, developed love and was perhaps forced in the circumstances to take to the second marriage. On the basis of the aforesaid evidence and circumstances, I have absolutely no doubt that the second marriage was performed between defendants 1 and 7 in April 1954 as alleged. Mr. Das very vehemently contended that there was a great discrepancy as to the place where the marriage was performed -- whether in Khatbinsihi or Keutsahi. We are not much impressed by the discrepancy pointed out. The learned subordinate Judge rightly held that there was marriage between defendants 1 and 7.

7. The legitimacy of defendants 8 to 10 has been questioned. Under Section 112 of the Evidence Act, the fact that any person was born during the continuance of a valid marriage between his mother and any man, shall be conclusive proof that he

is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. It is the admitted case of the plaintiffs that defendants 1 and 7 were in intimate association with each other. They had full access. Defendants 8 to 10 were born subsequent to the marriage. Their legitimacy can hardly be questioned.

8. The legitimacy of defendants 8 to 10, however, does not entitle them to claim a share in partition. As was laid down by their Lordships of the Judicial Committee in *Bhagwan Ram v. Ramji Ram*, AIR 1947 PC 140, where in a suit for partition, a share is allotted to the father, a son begotten as well as born after the institution of the partition suit, is not entitled to have the partition reopened and to claim redistribution of shares even if he was born before the completion of the partition by actual division of estate. The institution of a partition suit by a member of a joint family effects severance of the joint status in the family. Admittedly defendants Nos. 9 and 10 were begotten and born after the partition suit and they are not entitled to any share. They are, however, entitled to succeed to the father's share and to his separate or self-acquired property to the exclusion of the divided sons. That, however, is not the subject-matter of the suit. The only question for consideration is whether defendant-8 is entitled to any share. In this regard, defendants Nos. 1 and 7 to 10 did not advance a clear case as to when defendant-8 was conceived and born. In the written statement filed by defendant-1 on 25-2-1958, the age of defendant No. 8 was mentioned as three years. On this calculation, defendant-8 was born in February 1955 and was obviously conceived sometime in May 1954. There is some discrepancy in the evidence in this regard. But taking into consideration the fact that the marriage took place on 15-4-1954, the conception must be sometime after the marriage and the date of conception must also be prior to 23-8-1954, the date of institution of the suit, as a child could hardly live after being borne only for six months in the womb. Though the evidence is not very satisfactory, as it should have been, we are satisfied, after taking the broad circumstances of the facts, that defendant-8 was in the womb on the date the partition suit was filed. He is therefore entitled to a share in the partition.

9. Under Sec. 2 of Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (Act 19 of 1946), a Hindu married woman shall be entitled

to separate residence and maintenance from her husband on one or more of the following grounds :

'(3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish :

(4) if he marries again;

(6) if he keeps a concubine in the house or habitually resides with a concubine; provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for the restitution of conjugal rights. It is conceded that none of the three conditions in the proviso disentitling maintenance exists in this case. Plaintiffs' case under Section 2(6) is to fail on the finding that defendant-7 is a married wife. She is entitled to claim maintenance under Section 2(4) from 15-4-1954, the date of the second marriage. Mr. B. B. Mohanty, however, contends that the claim for maintenance was not based on second marriage and the relief for maintenance should not be granted under Section 2(4). The contention is devoid of any force. Plaintiffs' positive case being one of concubinage, she cannot take to the alternative case of second marriage. But on the finding that there was a second marriage, she is entitled to relief. Order 7, Rule 7, C. P. C. lays down that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it has been asked for. On the finding that defendant-1 married again, plaintiff-2 is entitled to claim maintenance under Section 2(4) of Act 19 of 1946.

10. I shall now examine how far the plaintiffs have established a case of desertion by defendant No. 1 from August 1951. On this score, the evidence of plaintiff-2 (P. W. 1) and her brother (P. W. 2) is available. There is no other independent and reliable evidence. Their evidence is somewhat conflicting. P. W. 1 stated :

'I was in father-in-law's house in 1951 to 1954 and used to go to father's house.'

she stated at a later stage :

'I stayed with brother since 1951 but I used to come to father-in-law's house.'

'I and my sister used to visit defendant No. 1 till 1957.'

The onus is on the plaintiff to establish that defendant-1 deserted them from August 1951. It is unnecessary to further pursue the matter. It would be sufficient to say that there is no satisfactory and reliable evidence of desertion in August 1951 as alleged by the plaintiff.

11. Defendant-1, however, took the plea that plaintiff-2 was quarrelsome, ill-treated his mother and deserted him in March 1953. Excepting the statement of defendant-1, there is no other evidence on record to support his case. He has failed to establish that plaintiff-2 deserted him. On the case of both the parties, however, the common case is that from March 1953 defendant-1 and plaintiff-2 are living separate from each other. Under the Hindu Law, defendant No. 1 is under the legal obligation to maintain the plaintiffs and this obligation is personal in nature and arises from the very existence of the relationship between the parties. This case is governed by the law, as it stood prior to the passing of the [Hindu Adoptions and Maintenance Act, 1956](#) (Act 78 of 1956). Even under the new Act, the obligation continues. Section 18(1) enacts that subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life. So far as this case is concerned, there has been no breach of any of the provisions prescribed in the section. The onus is on defendant-1 to plead and prove that the plaintiffs are not entitled to maintenance from March 1953. He has failed to make out such a case. On the contrary, defendant No. 1 had taken the plea that he Used to make some payments now and then even after March 1953. There is no evidence in support of the plea of payment. The result is that though the plaintiffs have failed to prove a case of desertion from August 1951, defendant-1 has failed to establish that the plaintiffs are not entitled to maintenance from March 1953 or that any payment was made towards maintenance. The case that defendant-1 neglected the plaintiffs from March 1953 is more probable. Defendant No. 1's marriage with defendant No. 7 was in April 1954. Contract between them must have been for

some period earlier than the marriage. It is more likely that defendant-1 neglected the plaintiffs from having come in association with defendant-7 from March 1953. Whatever be the probability, the onus is on the defendant-i to establish that he used to maintain the plaintiffs from March 1953 onwards, or that the Plff-2 by her conduct disentitled herself from getting any maintenance. Plffs. 1, and 3 are always entitled to maintenance. Defendant-1 is therefore liable to pay maintenance to the plaintiffs from March 1953 onwards. For all the plaintiffs a maintenance of Rs. 100/- has been claimed. Defendant-1's pay is Rs. 300/- per month. Besides he has a share in the income of the ancestral properties. There is a further claim of Rs. 25/- per month towards the educational expenses of plff.-3. The claim does not appear to be exorbitant and the plaintiffs are entitled to a maintenance of Rs. 100/- per month from March 1953 onwards till the date of the suit and also to pendente lite maintenance at the same rate. Plff.-3 is entitled to a further maintenance of Rs. 25/- per month from the date of the final decree till the date of her marriage and to a further sum of Rs. 25/- per month towards educational expenses. Plaintiffs also have made a further prayer that specific amount would be set apart towards the marriage expenses of plaintiff-3. No particular amount has been claimed and there is no evidence as to what would be the adequate and proper quantum. It is open to the plaintiffs to make an application in that regard during the final decree proceedings where the parties would be in a position to lead evidence. We express no opinion as to the quantum necessary for the marriage expenses. The amount to be decreed on that head can be made a charge on the properties to be allotted to the share of defendant-i in partition.

12. Defendant-i has one-ninth share in Schedule A and one-third share in Schedule B properties. In a partition between the son and the father, the mother of the son is entitled to a share equal to that of her husband and son Mt. Dular Koeri y. Dwarkanath Misser, ILR 32 Cal 234. Plaintiff-2 and defendant-7 would be each entitled to a share unlike in the case of co-widows who take a share jointly. Thus the properties, falling to the share of defendant-1, would be divided into 5 shares amongst deft.-1, plaintiff-2, defdt.-7 plaintiff No. 1 and defendant-8. Plaintiffs 1 and 2 would be each entitled to one-forty-fifth share in Schedule A and one-fifteenth share in Schedule B properties.

13. The property in Schedule C of the plaint and not No. 28 of Schedule B were declared Stri-dhan properties of defendant-6 who was also granted maintenance at the rate of Rs. 20/- per month from the share of properties allotted to defendants 1 to 3. The parties before us have not supported this finding. Mr. Kaghunath Das contended that on the finding of the learned subordinate Judge that the properties stood in the name of defendant-6 by way of advancement by her husband, these properties were not the Stridhan properties,-and must be divided amongst defendants 1, 2 and. 3. This is not disputed. Plaintiffs 1 and 2 would get their share from these properties in the aforesaid proportion.

14. I will next take up F.A. 22/1961. The-sole point for consideration in this appeal is whether the Cuttack properties are the self-acquired property of Raghabananda or of the joint family of all the three branches. Ramchandra retired in 1897. Raghabananda joined service as Sadar Kanungo and Customs Head Clerk in 1897-98 on a pay of Rs. 60/-. In 1903 he was the Manager of Dompara estate on a pay of Rs. 100/- per month. The disputed land with certain thatched rooms was purchased by Raghabauanda in his own name by a registered Kabala (Ext. J/5) on 16-12-1903 for a consideration of Rs. 273/- . Raghabananda was in a position to pay Rs. 273/- from his earning in 1903. In para 17 of the written statement filed by defendant-5 on 3-4-1956, the plea in this regard may be quoted.

'That the land with the building therein at, Dagarpara, Town Cuttack is joint family property and this defendant from out of his own income has spent a lot in making construction both in the ground floor and in the 1st floor. The defendant No. 4 has spent a huge amount in construction of some parts and thus the shares of this defendant is 1/3rd and that of the defendant No. 4 one third.'

It is remarkable that though defendant-5 is a senior Advocate of this Bar, nothing was mentioned in the written statement as to in what manner the property is claimed to be joint family property though when the Kabala stands in the name of Raghabananda. Mr. S. Mohanty contends that it is joint family property on the ground of existence of nucleus, joint acquisition by all the three branches and blending.

15. The theory that there was sufficient nucleus in the family by 1903 and the disputed property would be presumed to be joint family property does not appear to have any basis. The party, who claims any particular item of property to be joint family property, must establish it. The onus was on defendants 4 and 5 not only to establish the existence of nucleus but to prove that the family had sufficient surplus income from the nucleus from which the acquisition could be made. The nature and value of the nucleus are of importance. The only evidence regarding nucleus is that of defendant-5. In examination-in-chief he stated that at the time of retirement of his father, the family property consisted of about 10 to 15 acres of land. He had also some investment by way of loan advanced to others. The produce was just sufficient to meet the family requirement with a little surplus. The surplus was used for charity and for a little paddy-lending business. In cross-examination he could not give the extent of the landed property acquired by Ramchandra during the period of his service. He could not give the extent of loan that Ramchandra was advancing. He had never seen any account maintained by Ramchandra in regard to the loan he was advancing. Later on he stated that the yield from the land mentioned by him appertained to the period after retirement of his father. At that time they were not selling any paddy. The family was consuming the paddy and some portion was given in charity. This is the only evidence on record from which the surplus income from the nucleus is to be determined. It is clear that he has absolutely no idea of the surplus income. At any rate, on this evidence it cannot be said that there was sufficient income of Ramchandra from which the disputed property could be purchased. Not only the disputed land with thatched rooms had been purchased by Raghabananda in his name but admittedly Raghabananda had spent Rs. 4,000/- out of his own income on the construction of the ground floor in the main block prior to 1911. In 1911 defendant-5 joined the Bar. Defendant-4 had not been in service. Admittedly they were not in a position to make any contribution from their income. There is no evidence of any surplus income of the properties belonging to the father. The conclusion is irresistible that the disputed property was the self-acquired property of Raghabananda and he not only purchased it from his income but also constructed the ground floor on investment of Rs. 4000/- It is also remarkable that defendant 5 does not present a clear case of surplus income from the nucleus in his evidence.

Initially therefore the disputed property was the self-acquired property of Raghabananda.

16. Before examining the case of joint acquisition by all the three branches or the theory of blending, it is necessary to determine as to who constructed the Cuttack house and when. I have already said that the first floor of the main block was constructed by Raghabananda before 1911. Bankim (defendant-2) states that the house was completed by his father in 1907 or 1908. He admits that defendant-5 constructed the cowshed, latrine and the out-houses and carried on petty repairs. The constructions of cowshed, latrine and out-houses were sometimes in 1934-35. Defendant-5 states that he constructed them from his personal earnings from the profession the first floor of the main building in 1922 or 1923. He applied to the Khasmahal and the Municipality for permissions as 'B. N. Das' for 'R. Das'. Ex.D/3, the application, supports his statement. He also received 3 permissions from the Khasmahal and the Municipality (Ext. D. series). In 1924-25 he constructed the ground floor of the office block and rooms to the south-east of the main building consisting of a Hall and two side rooms. In 1929 Bhubanananda constructed the southern extension of the office block consisting of two rooms and the 1st floor of the office block with a sanitary latrine. He states that he spent Rs. 12,000/- to Rs. 15,000/- in all. The existing tube well in the compound was sunk by him in 1948. He deposes that he maintains no account and cannot produce any documentary evidence to show that he spent Rs. 12,000/- to Rs. 15,000/- on constructions. Out of the 2 versions we are inclined to accept the story given by defendant-5 as true. Bankim (defdt.-2) was born in 1916 and defendant -1 in 1922. Bankim cannot have personal knowledge about matters at least before 1926-27.' Raghbananda's account book(Ex.E) does not show any substantial expenditure over house construction from 1922-32. The statement of Bankim that the entire house, as it stands, excepting the latrine and the out-houses, was constructed before 1907 or 1908 by his father is falsified by the permission granted by the Khasmahal and the Municipality in 1922-23 for the construction of the first floor in the main block. So also is the position in respect of the construction of the office rooms. Admittedly Bhubanananda and defendant-5 are occupying this house over since 1911. Defendant-5 is a senior member of the Bai who carries on his practice in this house all through and even now. We are impressed. with the truth of his version.

In fact it is he who made application to Khasmahal and the Municipality on behalf of Raghabananda for construction of the house. The evidence to the contrary given by Bankim has not been established by any acceptable evidence. The statement of defdt.-5 also gets corroboration from the evidence of Gunanidhi Mohanti (D.W.1) who was an intimate friend of defdt.-5 and was in constant touch with him. Substantial constructions were made by defendant-5 in 1922-23, 1924-25 and 1934-35 and by Bhubanananda in 1929-30. Some emphasis was laid on the suggestion made to Bankim on behalf of defendant-5 in cross-examination. The suggestion was :

'It is not a fact that the first floor ofDagarpara house was built by defendant No. 5 in1934-1935.'

The comment is that the suggestion belies the version of defendant-5 that the first floor was constructed in 1922-23. Apparently the recording of 1934-35 is a mistake for 1924-25 as defendant-5 made constructions in 1922-23 and also in 1924-25. We accordingly find that both Bhubanananda and defendant-5 made substantial additions to the house by investing money from their own earnings.

17. The question for consideration is whether Raghabananda threw his self-acquired property into the common stock. The essential characteristic of blending is the existence of a clear intension of abandoning all separate claims upon the separate or self-acquired property. It is not inferred from the mere fact of the owner allowing the other members of the family to use it jointly with himself. Acts of generosity should not be confused with admissions of legal obligation. In *Mallesappa Bandeppa v. Mallappa*, A.I.R. 1961 S.C. 1268 the postulates of the doctrine were clearly enunciated. The basis of the doctrine is the existence of coparcenery and coparcenery property as well as the existence of a separate property of a coparcener.

In this case admittedly the coparcenery continued till 1940. The family had coparcenery property. The Cuttack property was the self acquired property of Raghabananda. Though defendant No. 5 began and continued his practice till 1922, there is no evidence of clear intention on the part of Raghabananda till then to renounce his interest in the property. In 1922-23, however, defendant-5 made

substantial construction in the house at a heavy expense. Raghabananda did not lodge any protest. There is no dispute that Raghabananda had frequent and intimate contact with Bhubana-nanda and defdt.-5. Mr. Ram contended that as Raghabananda had educated Bhubanananda and defendaut-5 and had helped defendant-5 in building up his practice by allowing him to occupy his house and by sending money at times and even by paying his enrolment fee in 1918, out of love and affection defendant-5 might have invested earnings from his own income for the benefit of Raghabananda and that, at any rate, the investment by deftd. No. 5 did not indicate any positive act or intention on the part of Raghabananda to abandon his interest in the Cuttack property. There is no force in this contention. The contesting defendants never advanced a case that the contributions were made by Bhubanananda and defendant No. 5 in the Cuttack property to benefit Raghabananda. This suggestion also does not seem to be otherwise acceptable. By 1922 defendant 5 had already put in 11 years of practice and was admittedly a rising lawyer by then. Admittedly he and Bhubanananda have no other house in Cuttack town. Unless defendant 5 did some construction with a view that it would serve him for his practice, it would be difficult to imagine that he would make such heavy investment in this property and not elsewhere in Cuttack Town by acquiring a piece of land for himself. The argument that non-objection on the part of Raghabananda is a negative act is also not strictly correct. Raghabananda knew of the construction and did not object. That is consistent with the positive intention on his part that the property on which substantial constructions were made by Bhubanananda and defendant 5 was to be treated as joint family property. It is to be noted that Raghabananda had invested in the Cuttack house Rs. 4273/- at the maximum. On the other hand, defendant 5 invested 12 to 15 thousand rupees which is 3 to 4 times the amount invested by Raghabananda. By an intention to abandon his interest in the disputed land and to get a share out of the investment made by defendant No. 5, Raghabananda was definitely a gainer. By abandoning exclusive interest for a more profitable bargain in a joint interest, a clear intention to abandon exclusive right is evinced. So also in the case of investment of Bhubanananda. By 1927 feelings between Bhubanananda and defendant 5 on one hand and Raghabananda on the other were somewhat strained as will appear from letter dated 8-11-1927 (Ex.M) addressed by defendant 5 to

Raghabananda. Against each paragraph of the letter Raghabananda had made caustic remarks. Even then at no time Raghabananda claimed that the Cuttack property was to be treated as his own and not as joint family property. After 1927 Raghabananda could have asked the other two brothers to vacate the Cuttack house. In Ex. A Raghabananda has noted all the properties which he claimed to be his self-acquired properties. Cuttack property does not find place in it. Bankim admitted that the Cuttack property had been recorded in the names of defendant 5, Bhuvananda and the sons of Raghabananda in the Khashmahal papers in 1933 after the death of Raghabananda in 1932. Jama-bandi register has been marked as Ex. H/1 under Order 41, Rule 27, Civil Procedure Code in appeal without objection. The entry supports the admission by defendant 2. Mr. Ram contended that by 1933 defendants 1 and 2 were minors, and that defendant 3, the eldest son being a protégé of Bhuvananda and defendant 5, colluded with them and defendants 1 and 2 are not bound by such entry. It is true that in 1933 defendants 1 and 2 were minors. The onus is on the defendants 1 and 2 to establish that defendant 3 sacrificed the interests of all the three brothers in two-thirds of the title of their valuable property by agreeing to the mutation of the names of Bhuvananda and defendant 5 on account of his collusion with them. No evidence has been brought to our notice in support of such a case. Though defendant 3 works in the Puri Electric Company in which Bhuvananda was a Director, there is nothing to show that for this reason defendant 3 would sacrifice two-thirds interest in the valuable property. Throughout the Khashmahal and Municipal records are being paid by defendant 5 though the Municipal records stood in the name of Raghabananda, and after his death, in the name of Radhakrushna alone.

Ex. D which contains no date, is a protest petition objecting to the recording of the names of Bhuvananda and defendant 5 in Khashmahal papers. The genuineness of this document has not been established by any satisfactory evidence. Mr. Ram, however, does not press this document into service. The record of rights (Ext. A) on 9-3-1932 was in the name of Raghabananda. Raghabananda was the eldest. Originally the Cuttack property was acquired by him and the record of rights rightly stood in his name. The continuance of the record in the name of Raghabananda till his death is not inconsistent with the theory of blending. The Municipal records

of the year 1946-47 and 1951-52, standing in the name of defendant No. 3 alone is explainable as Bhubanananda and defendant 5 were not particularly anxious to effect a change when defendant 5 was paying municipal rents and was in occupation of the house not as a tenant but as a member of the family. By Ex. F/1 dated 26-6-1952 the lease was renewed in favour of defendant 3, defendant 5 and Bhubanananda describing defendants 1 and 2 as minors, who were admittedly major then. Mr. Ram emphasised upon this circumstance as leading to the inference that defendant 5 in collusion with defendant 3 was prepared to make false statement, and the transaction was kept out from the knowledge of defendants 1 and 2 by describing them as minors. Though the argument is not wholly without force, much importance cannot be given to it as no question was put to defendant 5 in cross-examination to explain as to in what circumstances defendants 1 and 2 were described as minors. It appears that in the previous papers in the Khasmahal, after the death of Raghabananda, defendants 1 and 2 had been mutated as minors, and as usual the same description was carried over into the lease document of 1952. To draw adverse inference, defendant 5 should have been confronted with his previous statement in Ex. F/1 under Section 145, Evidence Act. Even if Ex. F/1 is ignored, the conclusion will not be affected. As a result of the discussion of all the evidence and circumstances, we have no doubt in our mind that the Cuttack property was blended with the ancestral property. There is not much force in the criticism that the property with which it was blended was not the coparcenary property but the income of Bhubanananda and defendant 5 from their own profession. It only means that each one of them blended his income with the coparcenary property of the ancestors. Alternatively also, the aforesaid evidence is consistent with the conclusion that the Cuttack property is the outcome of a joint acquisition by all the three branches. The acquisition of Raghabananda was from 1903 to 1911 and that of the other two brothers from 1922 onwards over the same property. We hold that the Cuttack property is joint family property and is liable to partition. F. A. 22/1961 is liable to be dismissed.

18. In the result, F. A. 22 of 1961 is dismissed and First Appeal No. 27 of 1961 is allowed in part as indicated above. The preliminary decree passed by the learned trial Court would be modified in the light of the further reliefs granted in F. A. 27/61.

So far as costs are concerned, parties to bear their own costs in F. A. 22 of 1961. In F. A. 27 of 1961, defendant 1 is to pay the court-fee payable by the pauper appellants and the appeal is allowed in part with costs against defendant 1 alone. In the suit, the court-fee payable by the pauper plaintiffs would be paid by defendant No. 1. On account of varying success, parties to bear their own costs of the suit.

Barman, J.

19. I agree.

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