

**Dijabara Mallik and ors. Vs. Baidhar Mallik and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/535554](http://sooperkanoon.com/535554)

**Court :** Orissa

**Decided On :** Jun-18-2008

**Reported in :** 106(2008)CLT586

**Judge :** Sanju Panda, J.

**Appellant :** Dijabara Mallik and ors.

**Respondent :** Baidhar Mallik and ors.

**Disposition :** Appeal dismissed

**Judgement :**

**Sanju Panda, J.**

1. This First Appeal has been filed by the Defendants-Appellants against the Judgment and decree dated 27.8.1981 and 10.9.1981 respectively passed by the Learned Sub-Judge, 2nd Court, Cuttack in Title Suit No. 263 of 1977. Respondents as the Plaintiffs had filed the suit for partition of Schedules 'B' and 'C' property.

2. The facts of the case are as follows:

Rahasa Mallik, the common ancestor of the parties had two sons. They are, Abhina Mallik and Babana Mallik. Abina died in the year 1946. His sons are, Achuti and Sankar. Sankar died issueless and Achuti predeceased his father

Abhina. Achuti had three sons, namely, Batakrushna, Dijabara, Birabara and a daughter, Nisi. His widow Radhi Bewa died in 1968 and Batakrushna died leaving behind him his son Defendant No. 4 and daughter Defendant No. 5 and his widow Defendant No. 3. Dijabara and Birabara are Defendant Nos. 1 and 2 respectively. Nisi is Defendant No. 6. Babana died in the year 1940 leaving behind him his three sons, namely, Sanei, Jai and Mahi out of whom Jai and Mahi died unmarried. Sanei died on 12.1.1974 leaving behind him his widow Plaintiff No. 7, sons Plaintiff Nos. 1 to 4 and daughters Plaintiff Nos. 5 and 6. The Plaintiffs described the disputed property in Schedules 'B' and 'C' of the plaint. Those properties were joint family properties and out of the same, the property described in Schedule 'B' has been recorded jointly in the name of both the branches in the Settlement of the year 1929 as well as in the Settlement which was finally published in the year 1970 with the note that both Abhina and Babana have 8 annas share each. Plaintiffs further case was that Achuti was looking after the family property and after his death, Batakrushna looked after it. Though in the Settlement of the year 1970 the note of possession was recorded separately, there was no severance of joint status. Schedule 'C' property was recorded exclusively in the name of Abhina in the Settlement of 1929. Thereafter the same has also been recorded in the name of Batakrushna and Defendants 1 and 2 in the Settlement of the year 1970. The Plaintiffs claimed 8 annas share from the said property as there was common interest in respect of the family property. Alternatively, they claimed that if it is found that the property was acquired by Abhina alone, then also they are entitled to a share since the property was thrown to the joint family properties and blended with the same and both the parties have contributed their labour and energy for development of the said properties. Hence, the Defendants cannot claim exclusive right over the same. Dispute in the joint family arose after the death of Batakrushna for which there was a severance of joint status. The Plaintiffs came to know about the note of separate possession recorded in the ROR and there was no basis for such separate note. Plaintiffs demanded for partition. Defendants refused the same. Therefore, the suit was filed with a prayer that Plaintiffs are entitled to 8 annas share in the family properties.

3. The Defendants filed their written-statement and contended, inter alia, that common ancestor Rahasa died prior to 1913. Abhina died before 1929 and

Batakrushna also died by the time of Settlement of 1929. During the lifetime of Abhina and Babana, two branches had been separated by mutual consent. Since then, they were living in separate mess having their separate residential house. That arrangement continued prior to 1929 and at no point of time Achuti and after his death, Batakrushna looked after the joint family properties. As severance of joint family status was made long before 1929, notes of separate possession was reflected in the ROR in Sabik Settlement. Due to inaction of the parties, the same continued in the Hal Settlement. Schedule 'C' property was acquired by Abhina out of his own resources and he was a Sikkimi tenant and bhagchasi of the said land. He acquired the said property by living in separate mess in the year 1929. It was never treated as joint family property nor was it also thrown to the joint family property or blended with the same. As there was a severance of status between the parties prior to 1913 and the property was acquired thereafter, at no point of time the Plaintiffs were in possession of the said property. The parties are possessing the property separately by amicable family arrangement prior to Sabik Settlement. Therefore, the Plaintiffs' suit for partition is liable to be dismissed, as there was no joint family property.

4. On the aforesaid pleadings, the Learned Sub-Judge framed as many as six issues. Those are as follows:

1. It is the suit maintainable?
2. Has the Plaintiff any cause of action to file the suit?
3. Whether the disputed properties described in Schedule 'B' and 'C' are joint family properties liable for partition or whether the same are separately owned and possessed by the parties by mutual family arrangements from the time of their ancestors?
4. Whether the Schedule 'C' properties are acquired by Abhina without the aid of the joint family nucleus and separately owned and possessed by the Defendants?
5. To what relief if any, the Plaintiffs are entitled to ?

5. Both the parties adduced oral as well documentary evidence in support of their respective pleas. Plaintiffs examined two witnesses in support of their case for partition. Plaintiff No. 1 was examined as P.W.1 and Defendants have examined four witnesses. Defendant Nos. 1 and 4 have examined as D.Ws.2 and 4 respectively. The Learned Subordinate Judge after analyzing the evidence adduced by the parties came to the finding that the properties described in the Schedule 'B' are joint family properties and both the parties have got 8 annas share each, but so far as the property in Khata Nos. 363 and 362 of Schedule 'C' are concerned, those are self-acquired properties of Abhina and the Plaintiffs have no right over it. He further found that the property described in Khata No. 364 in Schedule 'C' is joint family property and the Plaintiffs are entitled to 8 annas share in it. However, with the above findings he decreed the suit.

6. Learned Counsel appearing for the Appellants vehemently submitted that admittedly the parties have separated since long and possess the properties by virtue of an amicable family arrangement since 1929. So far as the property in Khata No. 135 described in Schedule 'C' of the plaint is concerned, the same was exclusively recorded in the names of the Defendants in a Settlement proceeding and the Plaintiffs had contested the said proceeding. Therefore, they are not entitled to 8 annas share from the said properties.

Learned Counsel appearing for the Respondent supported the Judgment and decreed passed by the Court below on the ground that it has separately discussed all the evidence adduced by the parties and after analyzing the same, decreed the suit which was just and proper.

7. With the above pleadings and rival submissions of the parties, the question to be determined in this appeal is, whether the properties described in Khata No. 135 of Schedule 'E' and Khata No. 364 of Schedule 'C' belong to the Defendants exclusively or whether the Plaintiffs are entitled to a share out of the said properties. As per Ext. M, a certified copy of the order passed in R.P. Case No. 3162 of 1976 disposed of on 22.12.1976 in Plot No. 135 of Schedule 'B' property was recorded in the name of the Defendants after due contest between the parties. Since the Plaintiffs failed to substantiate their right in the Settlement

proceedings, the said property should be allotted to share of the Defendants exclusively and the Plaintiffs have no right over the said land.

8. The law is well settled that a record of right does not create a title nor does it extinguish a title. In the present case, the property described in Khata No. 364 of Schedule 'C' was recorded jointly in the names of both the parties in the Settlement of 1929. By that time, there had been severance of status between the families long prior to the Settlement of 1915 and the parties were living separately from each other in mess and properties by an amicable arrangement between them. But, the said property was recorded jointly in 1929 Settlement as there was no partition by metes and bound, the parties are entitled to 8 annas share each out of the said property. Though the said property was recorded exclusively in the name of Defendants in the Settlement of 1970, as there was no partition by metes and bounds, it is liable to be partitioned and both Plaintiffs and Defendants are entitled to 50 per cent share in it and the Plaintiffs have immediately filed the suit for partition after the ROR was published in the year 1970. Though the Settlement proceeding ended in the aforesaid R.P. case, the Civil Court has verified all the oral as well documentary evidence adduced by the parties and come to a finding that the settlement authority's finding is not conclusive and binding in the civil suit. As the Defendants have proved that the properties described in Khata Nos. 362 and 363 in Schedule 'C' of the plaint exclusively belong to them, the Plaintiff are not entitled to any share in the said properties. The rest of the properties are liable to be partitioned and the Plaintiffs are entitled to 8 annas share. This Court accordingly confirms the impugned Judgment and decree passed by the Trial Court.

9. In the result, the appeal is dismissed. No costs.