

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.161 of 1974

Against the Judgment and Decree dated 19.12.1973 passed by IIIrd Addl. Subordinate Judge, Ara in Title Suit No.72 of 1967 / 41 of 1970.

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Ram Narayan Dubey & Ors. .

.....Plaintiffs-appellants

Versus

Baijnath Dubey & Ors.

.....Defendants- Respondent/s

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Appearance :

For the Appellant/s

:- Mr. K. N. Choubey, Sr. Advocate
Mr. Ambuj Nayan Choubey, Advocate
Mr. Ashok Kumar Garg, Advocate
Mr. Dineshwar Pandey, Advocate

For the Respondent

:- None.

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Dated : 24th day of Sept., 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. This First Appeal has been filed by the plaintiffs-appellants against the Judgment and Decree dated 19.12.1973 passed by the learned IIIrd Addl. Subordinate Judge, Ara in Title Suit No.72 of 1967 / 41 of 1970 whereby the learned Court below dismissed the plaintiff's suit for partition.

2. The plaintiffs appellants filed the aforesaid suit for partition of the suit property to the extent of 1/3rd share in Khata Nos.136, 141, 3, and 140.

3. The plaintiffs claimed the aforesaid relief alleging that one Pran Dubey had five sons, namely, Rupa Dubey, Bala Dubey, Raushan Dubey, Ram Charan Dubey and Tahlul Dubey. Tahlul Dubey died leaving behind his widow Jamuni Devi after old survey. Ram Charan Dubey had a son, namely, Manbahal Dubey whose heirs are the plaintiffs. Raushan Dubey had two sons, Pragash Dubey and Shivpujan Dubey. The grand son of Pragash Dubey is the defendant No.1, namely, Sochharan Dubey. The other son of Raushan, namely, Sheopujan Dubey had only two daughters who died one year prior to filing the suit leaving behind their sons who are defendants No.8, 9, and 10. The second son of Pran Dubey, namely, Bala Dubey had a son Nand Kishore Dubey who died leaving his widow, Jhanjo and a daughter Mostt. Bachkalo who is defendant No.7. The first son of Pran Dubey, namely, Rupa Dubey had only a son, Saoukhi Dubey who died issueless. The further case is that the five sons of Pran Dubey had already divided their ancestral property. Only some properties remained joint.

4. The further case is that after the death of Saoukhi, son of



Rupa Dubey, 36-37 years ago, his property was inherited by Nand Kishore, Manbahal and Sheopujan only as Pragash Dubey had pre-deceased Saukhi. The widow of Tahlu, namely, Jamuni also died just after the survey, therefore, the property of Tahlu was also inherited by Nandkihsore Dubey, Pragash Dubey and Manbahal Dubey. After death of Nand Kishore Dubey, his widow Janjho gave her entire property to her daughter Bachkalo. Pragash and Sheopujan died in jointness with the plaintiff and likewise Manbahal also died in jointness with the plaintiff. Ram Kawal died leaving behind the plaintiff No.5 as his widow. The defendants refused to partition on demand, therefore, the suit was filed.

5. The defendant Nos.1 to 4, 7 and 8 filed contesting written statement challenging the genealogy. Their case in short is that Pran Dubey had only three sons, Rupa Dubey, Bala Dubey and Rouushan Dubey. Ram Charan Dubey was the son of Singar Dubey @ Dalsinger Dubey and he had got no concern with the family of the defendants and Tahlu Dubey. Tahlu Dubey was the son of Ram Sahay Dubey who was brother of Pran Dubey, therefore, on the death of Tahlu Dubey, his property was inherited by the defendants and not the plaintiff. The defendants also stated the correct name of different defendants and also pointed out the defective genealogy which are not required to be stated here because the main contention is that Ram

Charan Dubey was not related in any way with the family of defendants.

6. The further case is that so far Khata No.141 is concerned, it was Gair Majrui Malik land. The five persons reclaimed the land with permission of Malik and they planted their respective trees. However, since there was no demarcation line, it was only recorded jointly in the name of five persons showing their possession in the remarks column. The defendants also pleaded that some of the defendants have also sold some properties and the purchasers are in possession. There is no unity of title and possession. So far Khata No.141 is concerned, according to the defendants, it was reclaimed separately but since there was no demarcation, it was shown in joint possession.

7. On the basis of the aforesaid pleadings of the parties, the learned Court below framed the following issues :-

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiffs got valid cause of action?
- (iii) Is the suit bad for defect of parties?
- (iv) Whether Ram Charan Dubey and Tahlu Dubey were the sons of Pran Dubey? And is there any unity of title and

jointness of possession between the parties over the suit land except over the lands appertaining to Khata No.141?

(v) Are the plaintiffs entitled to a decree for partition, if so, to what extent?

(vi) To what relief, if any, are the plaintiffs entitled?

8. The trial Court on the basis of the materials and the evidences recorded the finding that the plaintiff failed to prove the genealogy given by him that Ram Charan Dubey was son of Pran Dubey and likewise Ram Tahal Dubey was son of Pran Dubey. The Court below also held that since Khata No.141 is recorded in the name of ancestor of plaintiff also, the plaintiffs may have got 1/5th share but it is not their case that they are in possession of less than their share. The Court below also found that Tahlu Dubey was son of Ram Sahay Dubey, brother of Pran Dubey. Accordingly, plaintiff suit was dismissed.

9. The learned senior counsel, Mr. K.N. Chaubey, submitted that the Court below wrongly recorded the finding that Ram Charan was not the son of Pran Dubey and that Tahlu was also not the son of Pran Dubey. The trial Court has misread the evidences. However, the learned counsel further submitted that although the Court below came to the conclusion that the plaintiff might have got 1/5th share in Khata

No.141 land but instead of granting decree of partition of land dismissed the plaintiff's suit. Except these points, no other points were pressed before this Court by the appellant.

10. At the time of hearing of the first Appeal, nobody appeared on behalf of the respondent.

11. In view of the above contentions of the learned senior counsel, the only points arises for consideration is as to whether the plaintiff's are entitled to a decree for partition to the extent of 1/3rd share in the suit property and whether the Court below should have granted decree to the extent of 1/5th share even in Khata No.141.

12. According to the plaintiff, Ram Charan Dubey, their ancestor was the son of Pran Dubey and Tahlul Dubey was also son of Pran Dubey, therefore, according to the plaintiffs, Pran Dubey have five sons. On the contrary, according to the defendants, Pran Dubey had only three sons. Ram Charan Dubey was son of Singar Dubey and Tahlul Dubey was son of Ram Sahay Dubey who was brother of Pran Dubey. It will not be out of place to mention here that it is the plaintiffs' case that there had already been partition between the five sons of Pran Dubey. Some properties were left joint. Therefore, the plaintiff approached the Court with a definite case that there had already been partition between Rupa Dubey, Bala Dubey, Roushan



Dubey, Ram Charan Dubey and Tahlu Dubey. It is not his case that Khata No.141 was not partitioned and it remained joint. The case is that after partition, the share of Saukhi Dubey and Tahlu Dubey were inherited by the other three branches, therefore, the plaintiff claimed for partition of the interest of these two branches. From the facts pleaded in the plaint, now it becomes clear that this partition suit was only with respect to the property of Saukhi Dubey and Tahlu Dubey as according to the plaintiff, there had already been partition between the above five persons.

13. In view of the above facts, the plaintiff will succeed if the plaintiff will prove that Pran Dubey had five sons. In support of their respective cases, the parties have adduced evidences oral and documentary. The plaintiff has only examined plaintiff No.3 as P.W.6, P.W.8 and P.W.9 on the point of parentage of Ram Charan Dubey and Tehlu Dubey. Except these three witnesses, no documentary evidences had been produced. These witnesses have stated that Pran Dubey had five sons including Ram Charan and Tahlu Dubey. Except this bald statement, there is nothing on record in support of the plaintiff's case. I also find that these witnesses have stated that they never enquired about the genealogy of the family. Therefore, their evidences are inadmissible under Section 50 of the Evidence Act. The only argument advanced is that name of Manbahal

Dubey son of Ram Charan Dubey and Jamuni Devi widow of Tahlu Dubey were recorded with the defendant's branch in Khata No.141 which indicate that they were sons of Pran Dubey cannot be accepted as on the basis of presumption the relationship / parentage cannot be decided.

14. The Hon'ble Supreme Court in the case of *State of Bihar Vs. Sri Radha Krishna Singh AIR 1983 SC 684* has held that '**as there is a tendency on the part of an interested person or a party in order to grab, establish or prove an alleged claim, to concoct, fabricate or procure false genealogy to suit their ends, the courts in relying on the genealogy put forward must guard themselves against falling into the trap laid by a series of documents or a labyrinth of seemingly old genealogies to support their rival claims.**' In the said decision, the Hon'ble Supreme Court has laid down some principal for consideration in such cases. '**At Clause (d),, it has been stated that where genealogy is proved by oral evidence, the said evidence must clearly show special means of knowledge disclosing the exact source, time and the circumstances under which the knowledge is acquired, and this must be clearly and conclusively proved.**

15. In view of the above settled proposition of law here the



evidences on behalf of the plaintiff are not sufficient to prove the parentage of Ram Charan Dubey and Tahlul Dubey. From perusal of the trial Court Judgment, also I find that in the Court below it was conceded by the plaintiff that there is no reliable evidence on behalf of the plaintiffs to prove the parentage of Ram Charan Dubey and Tahlul Dubey.

16. On the contrary, the defendants have not only examined witnesses but also have produced documentary evidences. Ext. 'C' which is boundary survey of the year 1817 shows that Pran Dubey had only three sons, Bala Dubey, Rupa and Roshan Dubey who have been described as son of Pran Dubey. In the said ext. 'C', Ram Charan Dubey has been described as son of Singar Dubey @ Dalsingar Dubey. This document is very old, i.e., of the year 1870 when there was no dispute between the parties regarding the parentage. There is no explanation on behalf of the plaintiff as to how the father's name of Ram Charan Dubey had been shown as Singar Dubey.

17. Ext. 'D' is the plaint of Title Suit No.33 of 1930 which has been produced by the plaintiff. This suit was filed by Sochharan Dubey for partition. In this plaint, genealogy were given wherein it is shown that one Shanker Dubey had two sons, namely, Pran Dubey



and Ram Sahay Dubey and Ram Sahay Dubey had son, named, Tahlu Dubey whose wife was Jamuni. This document is also of the year 1930. The defendants also have examined D.W.5, 16, 20, who have stated regarding the parentage of Ram Charan Dubey as well as Tahlu Dubey and also stated that Pran Dubey had only three sons. From perusal of the evidences of D.W.5 and D.w.16 and also D.W.20, it appears that they have disclosed their special means of knowledge about the genealogy. Therefore, in view of these oral evidences and in view of the old documentary evidences, I find that Pran Dubey had only three sons. I also find that Ram Charan Dubey was son of Singar Dubey and Tahlu Dubey was son of Ram Sahay Dubey, brother of Pran Dubey. Thus, the findings of the Court below on this point is hereby confirmed.

18. The learned counsel for the appellant submitted that so far Khata No.141 is concerned, it is recorded in the name of ancestors of these plaintiffs and the Court below also found 1/5th share. So far this submission is concerned, I may reiterate here that the specific case is that there had been partition between the five persons. There is no specific case that this land comprised within khata No.141 has not been partitioned. In view of the above findings now it becomes clear that plaintiffs are of different family, therefore, there is no presumption of jointness arises. To the contrary, P.W.8 in his



evidence had admitted the fact that the plaintiffs are in possession of their share separately. There is no specific pleadings of the plaintiff that this Khata No.141 was jointly acquired by five person and it was not partitioned till the filing of the suit. From perusal of the Judgment of the Court below, it appears that the Court below only has mentioned the plaintiff may have got only 1/5th share in this Khata because it is admitted fact that it is recorded in the name of Manbahal Dubey also. That does not mean that there had been no partition. The plaintiff came to the Court with specific case that there had already been partition but after death of Saukhi and Tahlul, the plaintiffs also inherited their share and, therefore, they claimed share in the property of Saukhi and Tahlul. I have already negatived this case of the plaintiff. Now, therefore, unless the plaintiff proved that there had been no partition of Khata No.141 land, he is not entitled for any partition because admittedly since acquisition, the plaintiffs are in possession of their share. The Court below also found the same. Therefore, I find no reason to interfere with the above findings. On these grounds, I do not find any merit in the submission of the learned counsel for the appellant.

19. In view of my above finding, the point formulated is answered against the appellants and in favour of the defendants

respondents.

20. In the result, I find no merit in this First Appeal. Accordingly this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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