

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.582 of 1977

Against the judgment and decree dated 23.04.1977 passed by 3rd Additional Subordinate Judge, Chapra in Title Suit No.173 of 1973/24 of 1976.

Suresh Mahto & Ors.

.... Defendants-Appellants

Versus

Ramesh Mahto & Ors

.... Plaintiffs-Respondents

Appearance :

For the Appellants : Mr. Shashi Shekhar Dwivedi, Sr. Advocate.
Mr. Ranjan Kumar Dubey, Advocate with him.
For the Respondents : Mr. Manoj Kumar No.1, Advocate.
Mr. Rakesh Kumar, Advocate.

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 28-07-2015

The defendants have filed this first appeal against the judgment and decree dated 23.04.1977 passed by learned 3rd Additional Subordinate Judge, Chapra in Title Suit No.173 of 1973/24 of 1976 whereby the court below decreed the plaintiff-respondent's suit for partition.

2. The plaintiff filed the aforesaid partition suit claiming his share in the suit property alleging that one Ujagir Mahto was the common ancestor of the party. He had four sons and a daughter, namely, Anjor Mahto, Khushi Mahto, Kumar Mahto and Dorha Mahto and Mostt. Subhagiya. Out of them Khushi Mahto died issueless in jointness. The plaintiff is the son of Kumar Mahto. There

had been no partition of the suit property. The parties cultivate some land jointly and some land separately. When partition was demanded the defendants refused, therefore, the suit was filed.

3. The defendant nos.1 and 2-appellants filed contesting written statement. Their main defence is that the plaintiff is son of Subhagiya through Rajroop Mahto of village Sadhpur. Rajroop died 5-6 years after marriage leaving behind widow Sonia and plaintiff and thereafter Sonia was re-married with Kumar Mahto. In the marriage Sonia had brought Ramkishun (the plaintiff) with her, therefore, Ramkishun is a dagarua son of Kumar Mahto. When he became adult he went to his village but recently this case has been filed by him claiming himself to be the son of Kumar Mahto.

4. The further defence is that on the death of Ujagir Mahto the four sons of Ujagir separated from each other and they were in separate possession of their lands. According to these defendants, the suit is bad for non-joinder of the widow and daughter of Kumar Mahto. On the basis of these pleadings of the parties, the learned court below framed the following issues:-

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiff got any cause of action for the suit?
- (iii) Is the suit time barred?
- (iv) Is the court fee paid sufficient?
- (v) Is the suit bad for defect of the parties?
- (vi) Is there any unity of title and unity of possession between the parties?
- (vii) Is the plaintiff the son of Kumar Mahto?

- (viii) Are the plaintiffs entitled to a decree for partition? If so to what extent?
(ix) To what relief, if any, are the plaintiffs entitled?

5. The learned court below after trial recorded the finding that the plaintiff is the son of Kumar Mahto. The widow of Kumar Mahto, namely, Mateshari came in possession of the property of Kumar Mahto after death. Therefore, Mateshari is entitled to 1/6th share and sale deed over and above her share is void *ab initio* and accordingly decreed the suit holding that plaintiff is entitled to get 1/2 of 1/4 share i.e. 1/8 share in Schedule-I property.

6. The learned Senior Counsel Mr. S.S. Dwivedi appearing on behalf of the appellants submitted that the impugned judgment and decree is not sustainable at all, as the learned court below failed to consider the fact that the partition suit is not maintainable in absence of co-sharer i.e a person, who is entitled to equal share in the property. Admitted fact is that Kumar Mahto had a widow Mostt. Mateshari and two daughters through Mostt. Mateshari. They were not added as party defendants in the suit. Mateshari has been examined as D.W.14, who completely denied the plaintiff to be the son of Kumar Mahto. Therefore, there was conflicting interest between the plaintiff and Mostt. Mateshari. Over and above the above fact the court in absence of Mostt. Mateshari held that the plaintiff is the son of Kumar Mahto and has given share to Mostt. Mateshari to



the extent of 1/6th instead of dismissing the partition suit for non-joinder of the necessary party. According to the learned Senior Counsel, this controversy regarding the share between the plaintiff and Mostt. Mateshai could not have been decided by the court below in absence of Mostt. Mateshari, who was necessary party. Since Mostt. Mateshari has sold the property of Kumar Mahto to the defendants-appellants, the court below held that the sale deed executed by Mostt. Mateshari in excess of her share will be void although the plaintiff never prayed for this relief and had filed the simple suit for partition. The court below while deciding this simple suit for partition has given a declaration with respect to the sale deed also that too in absence of the executant of the sale deed, who was a necessary party.

7. Secondly, the learned Senior Counsel submitted that the defendants-appellants have adduced cogent, reliable and admissible evidence under Sections 50 and 60 of the Indian Evidence Act in support of the fact that the plaintiff is not the son of Kumar Mahto but he is the son of Rajroop Mahto. The court below misread the evidences and misappreciated the evidences and wrongly recorded the finding that he is the son of Kumar. According to the learned Senior Counsel, the defendants-appellants have examined many witnesses, who are either family members or co-villagers whose evidences are

admissible under Section 50 of the Indian Evidence Act. On the contrary, the plaintiff has not adduced any reliable and admissible evidence in support of his case that the plaintiff is the son of Kumar Mahto but the court below decreed the plaintiff's suit wrongly. On these grounds the learned Senior Counsel submitted that the impugned judgment and decree are unsustainable and are liable to be dismissed.

8. On the other hand, learned counsel Mr. Manoj Kumar for the plaintiffs-respondents submitted that no doubt Mostt. Mateshari was admittedly the widow and is Class-I heir, therefore, the court below considered the same and has rightly held that she being Class-I heir is entitled to a share in the suit property and has given her share to which she is entitled to. In such circumstances it cannot be said that the judgment and decree is vitiated and on that ground the judgment and decree cannot be set aside. The learned counsel further submitted that it is well-known that a person can transfer his title with respect to his property only and he cannot transfer the title of property excess to his share on which he had no title. Therefore, even if any transfer is made in excess of his property or share, the same will be void *ab initio*. The court below, therefore, rightly held that the sale deed executed by Mostt. Mateshari in favour of the defendants in excess of her share will be void.

9. The learned counsel further submitted that the plaintiff

has adduced admissible evidence and the court below considering the evidences has recorded the finding rightly that the plaintiff is the son of Kumar Mahto, therefore, the finding of fact passed on oral evidence could not be interfered with lightly. On these grounds the learned counsel submitted that the first appeal is liable to be dismissed.

10. In view of the contentions of the parties the points arise for consideration in this first appeal are as follows:-

- (i) Whether the plaintiff is son of Kumar Mahto or is dagarua son of Kumar Mahto and whether the impugned judgment and decree are sustainable in the eye of law or not?
- (ii) Whether the plaintiff's suit for partition is bad for non-joinder of Mostt. Mateshari and her daughters and is liable to be dismissed on that ground alone?

11. **Point Nos.1 & 2** : Since both the points are interrelated and interconnected, both are considered and decided together. According to the plaintiff, he is the son of Kumar Mahto. According to the defendants-appellants, the plaintiff is not the son of Kumar Mahto rather he is the dagarua son i.e. Kumar Mahto married mother of plaintiff as second wife and the plaintiff came with his mother to the house of Kumar Mahto.

12. Both the parties have adduced respective evidences.

D.W.3 is nephew of Mateshari, who is admitted widow of Kumar. D.W.4 is of Teotha village. They have supported the case of the defendants-appellants. D.W.3 further stated that plaintiff is not the son of Kumar Mahto. According to D.W.4 Sonia was married with Rajroop of Village Sadhpur. It is the specific case of the appellants that the name of wife of Rajroop was Sonia, who after the death of Rajroop, married in sagai form with Kumar. The plaintiff, who has been examined as P.W.1 has stated the name of his mother as Rojni. Here, the fact remains that mother of plaintiff was married with Rajroop. The only dispute raised is name of mother of plaintiff. So far marriage with Kumar in sagai form is concerned, it is not denied by the plaintiff in his evidence and pleading and also in the evidence of plaintiff's witnesses. In the light of these facts the controversy regarding parentage of plaintiff is to be considered. D.W.7 is a resident of village Kadirpur. D.W.8 is co-villager. D.W.11 is also co-villager. D.W.14 is Mateshari herself. D.W.21 and D.W.22 are co-villagers and neighbours. All these witnesses have stated that the plaintiff is the son of Rajroop. According to D.W.7, he was present in the village Sadhpur at the time of birth of plaintiff. From perusal of the impugned judgment, it appears that the court below discarded the evidence of this witness on the ground that there are contradictions regarding his age. The court below has not at all considered the

admissibility of the evidence of this witness.

13. D.W.10 has stated that he has land dispute with the plaintiff and 144 Cr.P.C. proceeding was there in between him and the plaintiff. This D.W.10 is the agnate of Rajroop Mahto. The court below discarded the evidence of this witness on the ground that he is in inimical term and that the defendants did not file the record of 144 Cr.P.C. proceeding. In my opinion, the court below has wrongly discarded the evidence of this witness. The evidence of this witness shows that he is agnate of Rajroop. If plaintiff is not the son of Rajroop then how there was land dispute and 144 Cr.P.C. proceeding was there. There is no explanation at all. In fact this witness has been examined to show that the plaintiff is the son of Rajroop, who has got land dispute with agnates of Rajroop. In other words, this witness is not related with Kumar Mahto, therefore, he could not have any land dispute either with Kumar or his descendants. D.W.11 has supported the case of the defendants-appellants about sagai form marriage of Kumar with mother of plaintiff and also fully supported that plaintiff is the son of Rajroop but the evidence of this witness has been discarded on the ground of enmity. In my opinion, in civil cases on the ground of enmity the evidence cannot be discarded. The court is required to see as to whether the evidence of the witness regarding the relationship is admissible under Section 50/60 of the Evidence



Act or not. The evidences of D.Ws.13, 21, 22, 27 and 33 are also on the same point. They are co-villagers of Rajroop. D.W.14 is Mateshari herself, the widow of Kumar. Now, from the above evidences it becomes clear that the witnesses examined by the defendants are co-villages, neighbours and even relations of the parties and, therefore, in view of the decision of the Hon'ble Supreme Court in **A.I.R. 1959 SC 914 (Dolgobinda Paricha Vs. Nimai Charan Misra and others)** the witnesses are expected to have special means of knowledge being either the co-villager or the neighbour or the relation. Therefore, their evidences are admissible. The reasons assigned by the court below for discarding the evidences of theses witnesses are neither sound nor tenable.

14. D.W.14 Mateshari herself has clearly stated that Kumar Mahto had only daughters born through her. It is not denied by the plaintiff that D.W.14 is the widow of Kumar Mahto. The learned counsel for the plaintiff-respondent submitted that she has stated in her evidence that she did not know the fact prior to her marriage. In my opinion, on the basis of this alone it cannot be concluded that she cannot say that whether plaintiff is son or not. Her specific evidence is that plaintiff is not the son of Kumar Mahto. The witnesses discussed above have stated that in *sagai form* marriage the plaintiff was bought by his mother, therefore, is dagarua son of

Kumar Mahto.

15. So far plaintiff's witnesses are concerned, only material witnesses are P.W.1, P.W.3, P.W.4 and P.W.7. Out of them P.W.1 is plaintiff. P.W.3 is the *mausi* of the plaintiff. P.W.7 has described the genealogy of maternal grandfather of plaintiff. According to this witness, Rojni is the name of mother of plaintiff who was *fua* of this witness and plaintiff is son of Rojni. It may be mentioned here that none of these witnesses have denied the case of the defendants regarding marriage in sagai form. As stated above the specific case of the defendants is that plaintiff's mother was married in sagai form with Kumar Mahto. Now because of no denial, this case stands proved. There is no denial that plaintiff's mother was not married with Rajroop. The only dispute raised is the name of plaintiff's mother.

16. As discussed above, Mateshari (the widow of Kumar Mahto) was alive and according to her evidence Kumar Mahto had only two daughters through her and no son. This dispute, therefore, is also in between the plaintiff and admitted widow of Kumar Mahto and the two daughters of Kumar Mahto. Admitted fact is that Mateshari or the two daughters of Kumar Mahto are not made party in the partition suit. The question is, can this dispute regarding the parentage be decided in absence of the persons whose right will be

effected? In other words, D.W.14, Mateshari and her two daughters on her death are directly interested and their right will be effected, if this question is decided in this partition suit.

17. From perusal of the impugned judgment, I find that the court below noticed the fact that Mateshari is widow of Kumar Mahto but then granted the decree in favour of the plaintiff recording a finding that the plaintiff is son of Kumar Mahto and also granted share to Mateshari. In my opinion, the approach of the court below is wrong. For deciding the question regarding parentage and the person, who is entitled to inherit the property of Kumar Mahto, Mateshari and/or her daughters are the necessary party.

18. The learned counsel for the plaintiff-respondent submitted that the application was filed in the court below for adding Mateshari as defendant, which was refused and, therefore, it is not the fault of the plaintiff. So far this submission is concerned, admittedly on the date of filing the suit the plaintiff was knowing that Mateshari and her two daughters through Kumar Mahto are there but intentionally he did not make them party. Now, therefore, he cannot take advantage of rejection of his subsequent application. Be that as it may, the fact remains that necessary party was not added as party in the suit. Order I Rule 10 and Section 99 of C.P.C. provide that these provisions will not apply in cases of non-joinder of a necessary party.

In other words, the suit can be dismissed for non-joinder of necessary party and the judgment and decree can be reversed on the ground of non-joinder of necessary party.

19. In view of my above discussion I find that both the points which arisen for consideration in this appeal cannot be decided effectually and completely in absence of either Mateshari and/or her daughters who are necessary party. If the points are decided it will affect the rights of the necessary party. Therefore, the findings of the court below on both the points are set aside and is left open for decision in properly constituted suit.

20. In the result, this first appeal is allowed. The impugned judgment and decree are set aside and the plaintiff's suit 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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