

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.426 of 1978

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Jitendra Singh & others through their legal representatives

.... Appellant/s

Versus

Ram Naresh Singh & others through their legal representatives

.... Respondent/s

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Appearance :

For the Appellant/s :

Mr. Ranjan Kumar Dubey-Advocate

Mr. Rakesh Chandra-Advocate

Mr. Sangeeta Sharma-Advocate

Mr. Satendra Shukla-Advocate

Mr. Parth Gaurav-Advocate

For the Respondent/s :

Mr. T. N. Maitin- Sr. Advocate

Mr. Bishwanath Choudhary-Advocate

Mr. Ajay Kumar Singh-Advocate

Mr. Shubh Narain Singh-Advocate

Mr. Raghav Prasad-Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 10 -11-2015

Defendant-appellants no.2, 3, 4 have filed instant appeal against the judgment dated 29.03.1978, preliminary decree dated 11.04.1978 passed by the Second Additional Sub-Judge, Siwan in connection with Partition Suit No.66 of 1973/ 39 of 1976 decreeing the suit on contest, identifying 1/6th share of plaintiff-respondent 1st set with regard to properties Scheduled under 1 to 4 of the plaint, however, no order over cost.

2. Plaintiff-respondent 1st set filed Partition Suit asking for relief of declaring 02 Anna, 08 Pai share in the properties detailed under Schedule 1 to 4 of the plaint, cost of the suit, any other relief or

reliefs which the plaintiffs are found entitled for and for that furnished a genealogical table wherefrom it is evident that Ram Sahai Rai was the common ancestor, who had two sons Hiranman Ram and Dalsingar Rai. Hiranman Rai had two sons Tilak Rai and Kuer Rai.

3. Dalsingar Rai had five sons Saudagar Singh, Shiva Govind Singh, Jai Govind Singh, Sajiwan Singh and Ram Nath Singh. Saudagar Singh had a son Dashrath Rai @ Bharat Rai. Shiva Govind had five sons Sitaram, Manbodh, Ganesh, Saryug, Chandeshwar. Sitaram had two sons Basdeo and Rambilas @ Rambilas. Saryug Rai had one son Ram Naresh, daughters Sundri and Sushila. Chandeshwar, Ganesh, Manbodh happens to be issueless.

4. It has further been disclosed that even after death of Ram Sahai, his both sons as well as grandsons namely Tilak, Kuer, Dashrath, Shiva Govind, Jai Govind, Sajiwan and Ram Nath remained joint and in state of jointness, Hiranman, Dalsingar, Saudagar, Kuer (unmarried) died before the revisional survey and on account thereof, during course of survey operation, the lands were recorded in name of Tilak, Shiv Govind, Jai Govind, Sajiwan, Ram Nath, Dashrath @ Bharat. After revisional survey, Tilak, who was unmarried, Sanjiwan also died and accordingly, the shares of the branches of Hiranman Rai devolved upon remaining survivors namely Shiva Govind, Jai Govind, Ram Nath and Dashrath.



5. It has further been pleaded that in due course of time, there was partition in the family whereunder, Dashrath @ Bharat and Ram Nath remained joint while Shiva Govind and Jai Govind remained joint. Ram Nath Rai did in jointness with Dashrath @ Bharat and on account thereof, Dashrath @ Bharat Rai inherited the property allotted to the share of Ram Nath.

6. It has further been pleaded that Jai Govind died issueless in jointness with Shiva Govind and on account thereof, the properties having allotted to Jai Govind devolved upon Shiva Govind and, Shiva Govind and his five sons possessed the same continuing joint family. Shiva Govind and Sitaram died in jointness. After death of Shiva Govind and Sitaram, the properties came under possession of sons of Sitaram, wife of Sitaram, Manbodh, Ganesh, Saryug, Chandeshwar. It has further been stated that in state of jointness, Manboth, Saryug and Ganesh died and on account thereof, properties devolved upon their remaining heirs. It has further been disclosed that 12 Biggha, 13 Kattha, 08 Dhoor lands detailed under Schedule-1 of the plaint happen to be ancestral property while Khata No.77 detailed under Schedule-2 of the plaint happens to be homestead land. Schedule-3 of the plaint contains the details of Sikami Lands possessed by joint family. Schedule-4 contains the detail of the land purchased by their forefathers.



7. It has further been disclosed that defendant Dashrath @ Bharat Rai has got 08 Anna share while defendant nos.2 to 4 have got 02 Anna, 08 Pai share and in likewise manner, happens to be a share of plaintiffs as well as Defendant No.5. It has further been disclosed that considering the conduct of the defendants hostile to the interest of plaintiffs, they asked for partition, which has been declined by them and on account thereof, cause of action arose for filing instant suit for partition. After completing other formalities, accordingly, suit has been filed.

8. Written Statement has been filed on behalf of respective sets of defendants/ respondents, out of whom, defendant no.1 Dashrath @ Bharat Rai as well as defendant no.5 Mosmat Janki Kuer, wife of Chandeshwar-Respondent 2nd set have had supported the plea of the plaintiff and are supportive defendants.

9. The branches of Sitaram, defendant/ appellants controverted the pleading made on behalf of plaintiffs and on account thereof, they happen to be the contesting defendants.

10. As per pleading, apart from raising ornamental objection and further, challenging the contention made on behalf of plaintiffs by way of denying the unity of title as well as unity of possession and further, controverting the manner of partition as pleaded by the plaintiffs, admitted the genealogical table furnished by

the plaintiffs.

11. With regard to event up to the revisional survey operation has been admitted. Thereafter, it has been submitted that Sajiwan Singh had not died in jointness rather during life time of Sajiwan Singh, there was disruption of joint family as a result of which partition took place whereunder, Sajiwan, Jai Govind, Shiva Govind, Ram Nath, Dashrath @ Bharat became separate identifying their individual identity. Accordingly, controverted the pleading of the plaintiffs that during course of partition, Ram Nath remained joint with Dashrath @ Bharat and after death of Ram Nath, Dashrath @ Bharat inherited the property left by Ram Nath. Contrary to it, it has been submitted that after death of Ram Nath, the property devolved upon his remaining brothers Jai Govind and Shiva Govind, however, taking pity over Dashrath @ Bharat, 1/3rd share was allotted to Dashrath @ Bharat and accordingly, challenged the assertion that Dashrath @ Bharat possessed 1/2th share.

12. In likewise manner, the pleading of the plaintiffs has also been challenged relating to status of Shiva Govind and Jai Govind. It has been submitted that Shiva Govind and Jai Govind never remained joint nor after death of Jai Govind, being issueless, the land possessed by him devolved upon Shiva Govind enhancing his share to the extent of 1/2th. Contrary to it, it has been submitted that



Jai Govind had gifted the property possessed by him to Sitaram Singh, father of these defendants vide registered deed of gift dated 20.09.1947 and since thereafter, the land is coming under their exclusive possession. To support the same, it has been submitted that Sitaram became separate from his father as well as brothers in the year 1930 and he died maintaining such status. Accordingly, these defendants have inherited independently the property left by Sitaram Singh (deceased).

13. Furthermore, it has also been pleaded that plaintiffs have wrongly pleaded that Manbodh and Ganesh died in jointness rather all the brothers were separate. First of all, Sitaram died followed by Saryug, Chandeshwar, Ganesh and Manbodh. It has further been submitted that Manbodh Singh gifted his property vide deed of gift dated 18.11.1972 and since thereafter, are coming over the land exclusively without having any concern with the other family members. It has further been pleaded that acquisition of the land detailed under Schedule-4 of the plaint was not from joint family funds rather it was purchased independently by the respective purchasers and on account thereof, happens to be the self-acquisition of their forefathers.

14. Taking into account the rival pleading of the parties, the learned lower Court had framed following issues:-

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1. *Is the suit as framed maintainable?*
 2. *Have the plaintiffs got any cause of action for the suit?*
 3. *Whether the sons of Shiva Govind Singh were separate?*
 4. *Whether Ram Nath Singh died in state of separation or jointness ?*
 5. *Whether the deed of gift dated 20.09.47 executed by Jai Govind Singh in favour of Sitaram Singh father of defendant 3 and the deed of gift dated 18.11.72 executed by Manboth Singh in favour of defendant 3 are valid and genuine?*
 6. *Whether the properties detailed in Schedule 4 of the plaint are self acquired properties of the persons in whose name the documents stand?*
 7. *Have the properties in suit been partitioned?*
 8. *Is the story of family arrangement correct?*
 9. *Are the plaintiffs entitled to a decree for partition? If so to what extent?*
 10. *To what relief, if any, are the plaintiffs entitled?*

And decided the issues in favour of plaintiffs against the defendants, decreeing the suit, identifying share of plaintiffs as

claimed, hence, this appeal.

15. Learned counsel for the appellants while assailing the judgment and decree impugned submitted that the same happens to be illegal as well as on account of non-application of mind, hence, is fit to be set aside. The first and foremost point raised on behalf of learned counsel for the appellants is that inspite of having been specifically pleaded in the written statement that Jai Govind had executed deed of gift in the year 1947 in favour of defendant-appellants as well as Manbodh having gifted the property to the defendant-appellants in the year 1972 and since thereafter, the defendant-appellants are exclusively over the land, no amendment has been made in the plaint challenging the aforesaid two documents coupled with asking for possession with regard to the lands having incorporated therein by paying proper court fee. On account of deficiency having at the end of plaintiff-respondents on that very score extricate the aforesaid two documents out of purview of instant partition suit coupled with application of Limitation Act. But the learned lower Court on its own taken note of and declared the aforesaid two documents to be invalid, inoperative as well as sham transaction and also drew the lands detailed therein within the ambit of instant proceeding. In its continuity, it has also been argued that learned lower Court was wrong in framing issue no.5 on this very

score in absence of pleading at the end of the plaintiff-respondents first set.

16. It has further been submitted that whenever there happens to be evidence of previous partition, then in that event, the subsequent suit for partition is legally non-permissible. In order to substantiate the story of previous partition the learned counsel, referred relevant paragraph of the plaint and submitted that there happens to be specific case of the plaintiff-respondents that after death of Sajiwan, the family partitioned in a way that Shiva Govind and Jai Govind represented one set while Ram Nath and Saudagar other set. At the other end, defendant-appellants pleaded that Shiva Govind, Jai Govind, Sajiwan, Ram Nath, Saudagar partitioned amongst themselves and each became absolute owner of their share. Though, subsequent averment has been made regarding execution of deed of gift by Jai Govind in favour of defendant-appellants as early as in the year 1947. However, from the pleading of the respective parties, it is evident that they have pleaded disruption of joint family, identification of share, allotment of land. Shiva Govind died leaving behind his sons, Sitaram, Manbodh, Ganesh, Saryug and Chandeshwar and again there happens to be specific story propounded at the end of defendant-appellants that all got separated and properties were duly partitioned in connection with their share out of whom,



Manbodh had executed deed of gift in the year 1972 in favour of defendant-appellants. There happens to be no case of re-union, then in that event, acknowledging the half share of Dashrath @ Bharat in the property so detailed under Schedule 1 to 4 and further, claiming 1/6th share by the plaintiff-respondents and in likewise manner, the other defendant-respondents including that of defendant-appellants is non-maintainable.

17. It has also been submitted that from the document, executed by respective parties duly brought up on record under Exhibit-A series as well as Exhibit-B series, it is apparent that parties were dealing their interest independently which corroborated as well as affirmed disruption of joint family consisting plaintiffs as well as defendants.

18. It has also been submitted that Schedule-1 and 2 happen to be the details of ancestral land while Schedule-4 has been detailed relating to acquisition made by the ancestor, but from the record, it is evident that the plaintiffs had not brought up a single chit in support thereof. In likewise manner, it has also been submitted that Schedule-3 contains the details of Sikami Lands. Although, no specific denial has been made on behalf of defendant-appellants, but the fact remains as burden lies upon the plaintiff-defendants, it would have been obligatory on the part of the plaintiff-respondents to have



substantiated the same. Because of the fact that plaintiff-respondents failed on that very score, and further, from the judgment impugned, it is apparent that learned lower Court had not properly scrutinized the evidence of the respective parties on the above score as well as appreciated the same in its right perspective. Hence, the findings, so recorded, did not justify its prevalence.

19. It has also been submitted that suit has not been properly framed. In order to support the same, it has been submitted that once the plaintiff-respondents themselves admitted that there was disruption amongst the sons of Dalsingar whereunder Shiva Govind and Jai Govind remained joint at one end while Ram Nath and Dashrath @ Bharat at other end, then in that event, the lands having been in share of Ram Nath and Dashrath @ Bharat would not have been dragged in the present proceeding. In likewise manner, the properties even describing the story of gift in favour of defendant/appellants, suit would have been filed relating to the properties possessed by Shiva Govind and Jai Govind and only those properties would have been taken up for the purpose of partition. It is evident from the conduct of the parties that they were knowing since before regarding separation having effected in the family by metes and bounds, having gift executed by Jai Govind and Manbodh in favour of defendant-appellants and only to shadow the aforesaid legal, valid

document, instant suit has been filed. So, submitted that the judgment and decree impugned is fit to be set aside.

20. On the other hand, the learned counsel representing plaintiff-respondents first party supported the finding recorded by the learned lower Court and submitted that all the disputed points have been taken into consideration by the learned lower Court under the issues, so framed and decided the same in accordance with the evidences available on the record adduced on behalf of respective parties in consonance with correct legal approach, therefore, did not attract interference.

21. It has further been submitted that there was disruption in the family, but the partition was not in terms of by metes and bounds rather, it was for convenience sake and under such situation, the family sailed up-till-now. Therefore, impleading all the heirs as well as putting all the immovable properties under the instant partition suit was in accordance with law. Furthermore, it has been submitted that there happens to be no objection on behalf of any of the defendants much less defendant-appellants regarding identification of land possessed by joint family so detailed under Schedule-1, 2, 3 and 4. Hence, raising dispute over proper identification of land including the lands detailed under Schedule-3 raised on behalf of defendant-appellants is not tenable in the eye of law.



22. It has further been submitted that while the family remains joint, a coparcener is forbidden to execute a gift unless there happens to be consent of other coparcener. The defendant-appellants had not pleaded nor asserted that while executing deed of gift, Jai Govind and Manbodh had taken consent from other co-sharer. Furthermore, the event of aforesaid document have never surfaced on ground, because of the fact that the lands, so detailed therein, are under peaceful possession of all the heirs whereupon one could safely infer that neither there was individual status nor it was acted upon. It was mere a paper transaction and that being so, rightly been taken into consideration by the learned lower Court and found it a sham transaction. It has further been submitted that because of the fact that these documents happen to be malversation in origin and as, it was never acted upon on account thereof, there was no need for amendment in the plaint asking for declaration of nullity of the aforesaid documents as well as claiming for possession. Hence, the finding of the learned lower Court on this score is correct, legal and is fit to be appreciated.

23. It has further been submitted that separation in the family though not by metes and bounds has been averred in clear tone on account thereof, the parties dealt with the properties on their own risk as, during pattibandi, those lands are bound to go to the share of



respective parties regarding which certain exhibits have been brought up on record at the end of defendant-appellants, however, these documents did not specify with regard to partition having effected in the family by metes and bounds nor could be informed. On account thereof, the assertion of the defendant-appellants that there was previous partition in the family and on account thereof, subsequent partition is found legally barred has got no stand in the eye of law.

24. Consequent thereupon, suit is maintainable. The learned lower Court had appraised the materials ingenuously placed on behalf of respective parties, and decided the issue, decreeing the suit. As such, appeal is fit to be dismissed.

25. Before coming to adjudicate upon the controversial points, on a cursory glance of the lower court's record, it is evident that altogether six PWs have been examined on behalf of plaintiff-respondents, out of whom, PW-1 is Dinesh Pathak, PW-2 Lal Babu Pathak, PW-3 Jibodh Singh, PW-4 Radha Mohan Sharma, PW-5 Mahabir Rai, PW-6 Ram Naresh Singh and at the end of defendant no.1, five witnesses have been examined, out of whom, DW-1 is Ganesh Mishra, DW-2 Samtulahi, DW-3 Sudama Rai, DW-4 Fulwari Khan @ Azimula Khan, DW-5 Dashrath Singh. One DW has been examined on behalf of DW-5 as DW-6 Janki Kuer (party herself) while on behalf of contesting defendant-appellants remaining



witnesses have been examined as DW-7 Dharmdeo Mishra, DW-8 Bipin Bihari Prasad, DW-9 Laddu Choudhary, DW-10 Md. Wakil, DW-11 Sadhu Sharan Prasad, DW-12 Jabbar Mian, DW-13 Deep Narayan Mistri, DW-14 Chandradeo Prasad, DW-15 Rama Prasad, DW-16 Vishwanath Pandey, DW-17 Ram Bilas Singh, DW-18 Safi Ahmad. The following documents have been exhibited on behalf of respective parties. Ext.A-Original Deed in name of Manbodh, Ext.B-Original Deed in name of Dinesh Upadhayay, Ext.B/1-Original Deed in name of Manbodh, Ext.B/2-Original in name of Ganesh Jee, Ext.A/1-Original Deed in name of Jai Govind Singh, Ext.C-Original Deed in name of Sitaram Singh, Ext.D-Original Deed in name of Jugeshar Mistry, Ext.E-Original affidavit of Rambilash Singh, Ext.C/1-Certified copy of Zarpeshgi in name of Dashrath Singh, Ext.B/3-Original Deed in name of Bharat Singh @ Dashrath Singh, Ext.B/4-Original Deed in name of Ambika Sao, Ext.C/2-Original Deed, Ext.F-Original Deed in name of Shiva Govind, Ext.D/1-Original Deed in name of Sufai Thakur. One document has also been exhibited by defendant-respondents as Ext.A/1, which is Certified copy of Jarpesgi in name of Ramnath Singh.

26. Considering the submission made on behalf of rival parties as well as taking into account curio nature of controversy, sole point is framed A) whether the judgment and decree impugned passed

by the learned lower Court is sustainable.

27. From the plaint, it is apparent that plaintiff-respondents first party inspite of having disclosure made by the defendant-appellants in their written statement regarding presence of two documents relating to gift one executed by Jai Govind in the year 1947 and another executed by Manbodh in the year 1972 in their favour, the reason best known to the plaintiff-respondents, they did not opt to amend the plaint and to bring the aforesaid document within the ambit of instant suit. In terms of Order-VI, Rule-2 as well as Order-VII, Rule-1, it is incumbent that pleading must state material facts on which the party bases his claim. Because of the fact that no such pleading was there on account of lapses on the part of the plaintiff-respondents, therefore, constitution of issue no.5 on that very score, admitting the evidence and further, deciding the issue under Paras-12 and 13 of the judgment happen to be bad in law.

28. In ***Rajgopal (Dead) by Legal Representatives-Appellants vs. Kishan Gopal and another-.Respondents reported in A.I.R. 2003 (SC) 4319***, it has been held under:-

“9. Thus, we proceed to consider the question whether the finding recorded by the first appellate court that Goverdhan Das was given in adoption by his natural father Moti Lal suffered from any legal infirmity. At this stage, it may be relevant to state that

as Goverdhan Das was given in adoption much before the coming into force of the Hindu Adoptions and Maintenance Act, 1956, the parties will be governed by the law which was in force at the time of adoption. According to paragraph 474 of Mulla's Hindu Law, 18th Edn., "the only persons who can lawfully give a boy in adoption are his father and his mother". This shows that Goverdhan Das could have been given in adoption by his father Moti Lal and not his brother Kishan Lal. From the pleadings, it becomes clear that the plaintiffs had nowhere averred in the plaint that Goverdhan Das was not given in adoption by his father Moti Lal but by his brother Kishan Lal. It was simply pleaded that the adoption was in "dwyamushyayana" form. As such a case was never pleaded in the plaint, there was no occasion for the defendants to plead in the written statement as to who gave Goverdhan Das in adoption and accordingly, the defendants in the written statement only denied that adoption was in "dwyamushyayana" form and according to them, the same was in ordinary form. In the absence of any pleading whatsoever on the question as to whether Goverdhan Das was given in adoption by his father Moti Lal or brother Kishan Lal, there was no lis between the parties on this question, as such courts could not have gone into the same even if some evidence was adduced and the lower appellate court rightly decided this question



against the plaintiffs. Reference in this connection may be made to a decision of the Privy Council in the case of Siddik Mahomed Shah v. Mt. Saran¹ in which it was held (AIR p. 57) that “where a claim has been never made in the defence presented no amount of evidence can be looked into upon a plea which was never put forward”. The said case has been referred to by this Court with approval in the case of Bhagat Singh v. Jaswant Singh². In that case, some evidence was led but the High Court refused to go into the question observing that where no plea was taken, it cannot be said that there was any lis between the parties thereon. This Court upheld the decision of the High Court observing that the same was supported by a decision of the Judicial Committee in the case of Siddik Mahomed Shah¹. Thus we do not find any error in the findings recorded by the first appellate court on this point.”

29. Now, coming to other aspect, on perusal of the plaint, it is evident, more particularly from Para-5 that there was disruption in the joint family whereunder Ram Nath and Dashrath @ Bharat remained joint at one side while Shiva Govind and Jai Govind remained joint at other side. The collusive defendant-respondents have supported the aforesaid averment that means to say, the matter of partition as disclosed under Para-5 of the plaint. Partition has also been admitted by the defendant-appellants, but in different mode



whereunder they pleaded that all the brothers got partitioned and exercised their right independently. During course of evidence, plaintiff-respondent has been examined as PW-6, who examination-in-chief at Para-3 had reiterated the contents of the plaint on the score of partition as narrated in Para-5 thereof, and had further supported it during cross-examination at Paras-7, 8 and 9. Neither the plaint nor the evidence of any of the plaintiff's witnesses including plaintiff himself had deposed that aforesaid partition was effected for convenience sake and no definite share in consonance with allotment of land by metes and bounds has been made rather they have specifically deposed that there was disruption of joint family by way of partition and further, its mode of partition has been illustrated whereunder Ram Nath and Dashrath @ Bharat has been shown to remain joint at one occasion while Shiva Govind and Jai Govind at other. In the aforesaid background, it was incumbent upon the plaintiff-respondents to have identified the lands falling under the share of Dashrath @ Bharat and thereafter, excluded the same from the present lis because of the fact that admittedly plaintiffs and remaining defendants except Dashrath @ Bharat happens to be descendants of Shiva Govind. Therefore, they are entitled to have their share properly identified with regard to the family of common ancestor Shiva Govind and further, would be entitled to claim out of

the properties having allotted to Shiva Govind. Furthermore, there happens to be complete absence of story of reunion.

30. It is apparent from the record of lower court, the aforesaid event has been brought up in issue no.8 and same has been decided under Paras-6 to 11 of the judgment. After going through the same, it is evident that learned lower Court had not taken into consideration, the relevant documents having been adduced and exhibited on behalf of defendant-appellants, more particularly, Exhibit-B/4 executed by one Amika Sah in favour of Sitaram Singh, son of Shiva Govind Singh, Jai Govind, Ram Nath Singh, sons of Dalsingar Singh, Bharat Singh, son of Saudagar Singh, which is of dated 08.05.1926. The other documents happens to be Exhibit-B/3 executed by Bharat @ Dashrath, son of Saudagar, Manbodh, Ganesh, Chandeshwar sons of Shiva Govind, Mosmat Kedla Kuer, wife of Saryug Singh on her behalf as well as being natural guardian of Ram Naresh Singh, Ram Bilas Singh son of Sitaram Singh (deceased), Ramrati Kuer, wife of Sitaram Singh wherein also apart from having disclosure of the deed of gift executed by Jai Govind in favour of Sitaram Singh, the continuing of family in jointness has also become doubtful. The aforesaid document happens to be of the year 1960. The other document falling under Exhibit-B series as well as Exhibit-C series suggest that the parties are dealing independently with regard to

land falling under their share and that being so, the finding recorded by the learned lower Court negativating such plea without adjudicating upon the relevancy of the documents, which has duly been exhibited, give a clear cut impression of non-application of mind.

31. Where there happens to be theme of previous partition, then in that event, whether there happens to be any scope left for re-partition of property. In ***Manno Choudhary and another-Appellants vs. Munshi Chaudhary-Respondent reported in A.I.R. 1918, Patna 320***, it has been held:-

“As a point of law we take it that where it is shown that the parties have acquiesced in the result of a partition, it must be presumed that they or their predecessors-in-interest were parties to the original partition. We cannot allow share-holders in an estate to go on year after year giving the other side occasion to believe that they accepted the arrangements made, and then when the other side has made improvements in that part of the property which has fallen to its share, to claim the benefits of the improvements on the ground that there is no documentary evidence that they acquiesced in the original arrangements.”



“We are satisfied upon the evidence on the record that from time immemorial the parties have been holding these estate in separate shares, and the fact that the original partition proceedings have been lost in antiquity is not in our view a reason for disturbing divisions which have existed for so long a period. We agree with the learned Subordinate Judge that the existence of a private partition is a bar to the repartition of property, and are satisfied that the plaintiff is entitled to a decree he has obtained.”

32. In ***Radhamoni Bhuiyanin and others-appellants vs. Dibakar Bhuiya and others-Respondents reported in 1991 Patna 95,*** it has been held:-

“25. As noticed hereinbefore, the circumstances of partition are in favour of the defendants. In Ramjhari Kuer v. Deyanand Singh, reported in AIR 1946 Patna 278 it has been held by the Division Bench of this Court as follows (at page 281):

“ It is true that the fact that a member’s share in a revenue paying estate has been separately defined in the collectorate land registration records and the record of rights, is by itself not conclusive proof of separation but is only a



relevant evidence which may be taken into consideration on the question of separation. But where the extent of such member's interest in the estate is not merely specified in the record of rights but such member is also recorded to be in separate possession over certain plots, the entries in the record of rights are of considerable importance indicating separation in the sense of not only definition of shares but also separate possession. Separate possession over properties is a strong piece of evidence to rebut the ordinary presumption of jointness of Hindu family governed by Mitakshara School of Hindu Law."

To the similar effect, there is a decision of an another Division Bench of this Court, reported in AIR 1971 Patna 215 (Arjun Mahto v. Monda Mahatain). In the said decision it was held by this Court as follows (at page 217):-

"In this case, admittedly, there is no formal document of partition. Still, the partition can be proved by the intention of the parties manifested by their subsequent conduct by their sole and independent enjoyment of the properties (See: Budha Mal v. Bhagwan Das (1891 ILR 18 Cal 302 (PC))."



The said decision is again an authority for the proposition that an unequal division of the lands at the time of partition cannot always be reopened. This aspect of the matter has been considered in the aforementioned decision in the following terms (at page 220):-

“The plaintiffs have not given evidence to show that the inequality in the division of lands between the ancestors of the plaintiffs and the defendants of the plaintiffs and the defendants was such which may be taken to be shocking to the conscience.

The principle of Hindu law is equality of division, but inequality of division in acreage of the lands does not invariably lead to the conclusion that there was unequal division of the lands at the time of their partition. The case of Siromani v. Hemkumar, 1968 BLJR 969: (AIR 1968 SC 1299) is an authority for the proposition that the document of Jethansi or Jeshtbhagam is now obsolete. For the sake of argument, even if I accept that there was an unequal division of the landed properties of mauza Berasi, still to my mind there is no explanation by the plaintiffs as to why it was not objected to by Sonaram, who, according to



Mr. Mitra, was present at the time of survey settlement operations. The two sons of Kitu Mahto, Jogu Mahto and Sonaram Mahto, and their descendants could not have occupied less area of lands in mauza Berasi for the last eight years, had there been no partition as alleged by the defendants.”

In the decision it has further been held that separation in food and residence for a long time among the brothers of a Hindu family, independent transactions of property, separate possession and enjoyment of properties, are by themselves not conclusive proof of partition, but the cumulative effect of such facts may show that there had been partition between the brothers during their lifetime

“26. In the instant case, as noticed herein before, not only from before the cadastral survey settlement operation the parties are in separate possession, separate mess, separate residence and separate cultivating possession of the lands in question. Exhibit A as noticed hereinbefore also shows that there had also been separate dealings of the properties amongst the plaintiffs inter se.”

33. In ***Ramnagina Sah and others, Appellants v.***

Harihar Sah and others- Respondents reported in A.I.R. 1966 Patna 179, it has been held:-

“8. The plaintiffs had alleged in paragraph 6 of their plaint that they and the defendants separated in mess and property long ago but the property in suit was left joint. Plaintiff No.1 (P. W. 1) deposed about two partitions. The first one was between his father Lalji Sah and uncle Gopal Sah of all the properties excepting the property in suit, garden and tank of village Nonihathwari and the tank of Sugarpahri. The second partition was in the year 1343 BS after the death of his father between himself, defendant No.1 and defendant No.2 in equal shares, but the property in suit was left undivided in that partition as well. There is no doubt about the proposition that when a partition is admitted or proved, the presumption is that all the properties were divided and a person alleging that family property in the exclusive possession of one of the members after the partition, is joint and is liable to be partitioned, has to prove his case. Accordingly, the plaintiffs had to prove in the present case that in spite of the first partition or

the second partition alleged by them the property in suit continued to be joint.

The learned Additional Subordinate Judge dealt with the case of the plaintiffs in this respect and observed that no evidence had been led on behalf of the plaintiffs to show that at the time of the alleged partition between his father and uncle or even at the time of the alleged partition between the three brothers (Plaintiff No.1 and defendants 1 and 2) the suit house was excluded from partition and plaintiff No.1 was unable to say as to when the said partition between his father and uncle had taken place or whether the same was effected orally or in writing. The evidence of P.W.1 was not at all up to the mark for proving the case set up by him. P.W.2 came to depose about the possession of the plaintiffs and defendants in respect of the property in suit. The evidence of the other witnesses (P.Ws. 3, 4, 5 and 6) for the plaintiffs is not at all relevant on the question of partition and leaving the property in suit joint, either in the first partition or in the second partition. In this state of evidence, the learned Subordinate Judge rightly came to the conclusion that the plaintiffs had failed to

prove that the property in suit was left undivided in the partitions alleged by them. Learned counsel for the appellants could not seriously challenge this finding but he commented upon the evidence of the contesting defendants regarding their exclusive title and the allotment of the property in suit to their share by the alleged partition on 5th Bhado 1337 B. S. and assailed the finding of the court below in that respect.”

34. ***In Mst. Rukhmabai-Appellent vs. Lala Laxminarayan and others-Respondents reported in A.I.R. 1960 (SC) 335, it has been held:-***

“5. There is a presumption in Hindu law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called “division in status”, or an actual division among them by allotment of specific property to each one of them which is described as “division by metes and bounds”. A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the



status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property.”

35. Consequent thereupon, the judgment and decree

recorded by the learned lower Court is found non-sustainable in the eye of law and is accordingly, set aside. Appeal is allowed. However, in the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-10.11.2015
Vikash/-

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