

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.455 of 1976

(Against the judgment and decree dated 15.04.1976 passed by Subordinate Judge, Madhubani in Partition Suit No.57 of 1971/172 of 1973).

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Jadu Nandan Jha & Ors

.... Plaintiffs-Appellants

Versus

Udit Narayan Jha & Ors

.... Defendants-Respondents

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Appearance :

For the Appellant/s : Mr. Lala Sachindra Kumar, Advocate
Mr. Ashok Kumar Sinha No.2, Advocate

For the Respondent/s : None.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 30-09-2015

1. The plaintiffs-appellants have filed this First Appeal against the judgment and decree dated 15.04.1976 passed by the learned Subordinate Judge, Madhubani in Partition Suit No.57 of 1971/172 of 1973 whereby the learned court below dismissed the plaintiff's suit for partition.

2. The plaintiffs-appellants filed the aforesaid suit claiming 1/4th share in the suit land measuring 3 kathas only comprised within plot No.322 and 49. According to the plaintiffs, one Bacha Jha had four sons namely Hriday Nath Jha, Abha Jha, Banwali Jha and Banshi



Jha. Banwali died before survey whereas Hriday Nath Jha died leaving a son, Gonar Jha who also died leaving his widow, Mst. Umarawati. The plaintiffs are heirs of Abha Jha whereas the defendants 1st set are descendants of Banshi Jha. The properties in suit are joint family properties although, in khatian, some are recorded in the name of one branch and some are recorded in the name of the other branch. The properties are joint and there had been no partition by metes and bounds. The suit land is a Bhinda land i.e. ridge portion of a pond. This suit land is cultivated by the parties according to their convenience but not according to their share. The plaintiffs demanded partition of 1/4th share but the defendants refused.

3. The purchasers-defendants 2nd sets have filed a separate written statement. According to them, there had already been partition before 60 years between the parties and the parties are dealing separately with the properties and are also acquiring separately. They have purchased 3 kathas of plot No.670, khata No.22 from the sons of deceased, Kumar Lal Jha by registered sale deed on 18.01.1971. The defendant No.31, who is vendor of the aforesaid purchasers, has also filed contesting written statement. The main defence is that the sons of Bacha Jha has separated before the cadastral survey and since then one branch of son of Bacha Jha has got no concern with the other branch. The sons of Kumar Lal Jha

were allotted 5 kathas 14 dhurs of land in plot No.670 through private partition and out of that land, the defendant Nos.30, 31 and 38 have sold 3 kathas land to the defendants 2nd set. On these grounds, the defendants prayed for dismissal of the suit.

4. 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 any right or cause of action to bring the suit?
- III. Are the suit lands liable for partition as claimed by the plaintiffs?
- IV. Is the story of prior partition as set up by the defendants correct?
- V. To what relief or reliefs, if any, are the plaintiffs entitled?

5. After trial, the learned court below recorded the finding that there had already been partition between the parties and accordingly, dismissed the plaintiff's suit.

6. The learned counsel, Mr. Lala Sachindra Kumar submitted only one point that while dismissing the plaintiff's suit for partition, the learned court below has not considered the presumption under Hindu law to the effect that Hindu Mitakshara family is presumed to be joint unless the contrary is proved. Here, plaintiff's specific case is that they are cultivating the Bhinda land according to their convenience. Since the presumption is in favour of the plaintiffs, the onus was on the defendants to prove that in fact, there had been partition of the suit land but nothing has been brought on record to

show that there had been partition but the learned court below wrongly recorded the finding that there had been partition between the parties. The learned counsel further submitted that the court below has misread the plaintiff's evidences. Except this, no other point is raised by the learned counsel for the appellants.

7. Nobody appeared on behalf of the respondents.

8. In view of the submission of the learned counsel for the appellants the only point arises for consideration in this First Appeal is as to "whether there is unity of title with respect to the suit property or there had already been partition between the parties as alleged by the defendants?"

9. The plaintiffs filed the simple suit for partition claiming 1/4th share in the suit property measuring 3 kathas only. The defendants filed the written statement alleging that there had already been partition between the parties. The parties have adduced evidences in support of their respective cases. P.W.2 who has been examined on behalf of the plaintiffs clearly stated that the lands of the plaintiffs and defendants are separate and likewise, plaintiff No.1, who has been examined as P.W.10, clearly stated that there had been partition with respect to the other lands. He also admitted that the rent receipts are obtained by the parties according to the partition effected by the ancestors vide paragraph 5 of his cross-examination. He also



stated that the parties are in separate possession of the lands of khata No.96 and also that the parties are in separate possession of the lands of other khatas. P.W.6 clearly admitted that there had been partition between the parties. The defendants have produced Exhibit B to show that the lands of khata No.68 was recorded in the joint name of the parties but the same has not been included in the suit which clearly indicates that there was partition between the parties.

10. In view of the above position and evidences whereby the plaintiffs themselves admitted previous partition with respect to the other properties, the presumption which was available in favour of the plaintiffs will not be available now. It is not the case of the plaintiffs that although, there was partition with respect to other properties, the parties have decided to left this suit property joint. There is no explanation as to why in the suit, the other properties were not included for partition. As would be evident from the depositions of P.W.2, 6 and 10, it is clear that except this 3 kathas land which is the subject matter of the suit, there were other lands of the parties and these witnesses have stated that there had been partition with respect to those lands. The plaintiffs have also produced separate rent receipts which have been marked Exhibit 1 series.

11. The learned counsel for the appellants submitted that since there was no partition with respect to Bhinda lands, the court

below should have granted partition with respect to this property. So far this submission is concerned, the defendants have examined D.W.1, 4, 6 and 7 who all have deposed that the suit properties were also partitioned and the defendants 1st set have sold the same to defendants 2nd set.

12. From the discussion made above, it becomes now clear that the plaintiffs approached the Court with unclean hand alleging that the suit property is joint and there had been no partition. On the contrary, the defendants adduced evidences to show that there had been partition between the parties with respect to the suit land also. The plaintiff's witnesses as discussed above including plaintiff No.1 have all admitted that there had been partition with respect to other properties. Now, therefore, the presumption is not available to the plaintiffs. It is for the plaintiffs to prove that in fact this suit property was left joint although, the other properties were partitioned between the parties but no such case is made out by the plaintiffs.

13. In view of my above discussion, I find that the plaintiffs failed to prove that there is unity of title and possession between the parties with respect to the suit land. On the contrary, the defendants have been able to show that there had already been partition between the parties. Accordingly, the finding of the court below on this point is hereby confirmed.

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

(Mungeshwar Sahoo, J)

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