

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.398 of 1976

Against the judgment and decree dated 31.03. 1976 passed by Subordinate Judge, Darbhanga, in partition Suit No. 106 of 1969 (Gauri Kant Pathak and others –v- Rambujhawan Pathak and others) whereby the learned court below decreed the plaintiffs' Suit for partition to the extent of 1/6 share in the Suit property.

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Smt. Usha Devi & Ors

.... Appellant/s

Versus

Gauri Kant Pathak & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Suresh Mishra

For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 30-03-2015

The defendants have filed this First Appeal against the judgment and decree dated 31.03.1976 passed by the learned Subordinate Judge, Darbhanga, in Partition Suit No. 106 of 1969, whereby the learned court below decreed the plaintiffs' Suit for partition to the extent of 1/6th share in the Suit property.

2. The plaintiffs- respondents filed the aforesaid partition suit claiming 1/6th share in the Suit property alleging that Rambujhawan Pathak had two wives. From first wife he had two sons and one daughter, namely, Sita Devi. the name of two sons are Kameshwar Pathak and Gouri Kant Pathak. Gouri Kant Pathak is plaintiff no.1. His son is plaintiff no.2. From second wife, namely, Smt. Kamla Devi, who is defendant no.2, Rambujhawan had two



sons and three daughters, namely, Shashikant Pathak- defendant no.4, Manikant Pathak- defendant no.5, Uma Devi, Baidehi Kumari and Usha Kumari. The plaintiff-defendants are the members of the joint family. The defendant no.1 is the Karta and Manager of the family. The family acquired certain property out of joint ancestral landed property, described in schedule 1 of the plaint. The parties are joint and the properties are also joint. There is unity of title and possession between the parties. The defendant no.1 is being controlled by the second wife and is acting under the dictates of her. Therefore, the plaintiffs demanded partition, which was refused.

3. Only the defendant no.1 i.e. father of the plaintiffs filed contesting written statement. According to defendant no.1, joint family possessed only 6 bighas, 5 kathas and 19 dhurs and out of the above land 5 bighas, 14 kathas and 4 dhurs were mortgaged by the father of defendant no.1 during his life time. His father died in 1935 and then mortgagee filed the Suit for mortgage money. Therefore, the defendant no.1 paid mortgage due. Subsequently, 3 bighas of land were acquired by the government for Madhopatti Training School. The compensation money was utilized in management of the joint family. The family possessed only remaining land measuring 16 kathas, 14 dhurs and, therefore, it was not possible to acquire any land out of the income from this land measuring 15 kathas 14 dhurs.

All the lands were acquired by defendant no.1 after the death of the father of defendant no.1. The further case of the defendant no.1 is that plot nos. 601 and 4792 mentioned in schedule 2 of the plaint were acquired by the defendant no.2 by her own fund. Therefore, none of the parties have any share in the suit property.

4. On the basis of the aforesaid pleadings of the parties, the learned court below framed following issues:

- (i) Is the suit as framed maintainable ?
- (ii) Have plaintiffs cause of action or right to sue ?
- (iii) Is the Suit barred by the general and special law of limitation and principles of estoppel, waiver and acquiescence ?
- (iv) Is the court fee paid sufficient ?
- (v) Whether properties described under schedule 2 of the plaint are ancestral properties.
- (vi) Whether plaintiffs are entitled to their claim ?
- (vii) To what relief or reliefs, if any are the plaintiffs entitled ?

5. The learned trial court on the basis of the materials available on record recorded a finding that the property in Suit has been acquired out of the joint family fund and therefore, decreed the plaintiffs' Suit for partition.

6. So far property standing in the name of defendant no.2 is concerned, the court below found that it was also acquired out of the joint family fund.

7. Mr. Suresh Mishra, learned counsel appearing on behalf of the appellants submitted that now because of the fact that the defendant no.1 has died, even if the properties is self acquired property or from ancestral property, the same will be inherited by the parties. So far properties standing in the name of defendant no.2 i.e. plot nos. 601 and plot no. 4792 are concerned, the same will devolve on the son and daughter of the defendant no.2 only and not on the plaintiff. According to the learned counsel while recording the finding that this property standing in the name of defendant no.2 is joint family property, the learned court below has not examined the fact that there is no evidence in support of any nucleus in the joint family and further that the defendant no.2 was not a coparcener.

8. No body appears on behalf of the respondents.

9. In view of the submissions of the learned counsel for the appellants, the point arises for consideration in this First Appeal is as to whether the plaintiff- appellants are entitled for the partition of the Suit property and if so what will be the extent of their share and whether the judgment and decree passed by the court below are sustainable in the eye of law ?

10. From perusal of the genealogy even at para 27 of the judgment of the learned court below it becomes admitted fact that the plaintiff no.1 is the son from first wife of defendant no.1 whereas the second wife is the defendant no.2 and two sons i.e. Shashikant Pathak and Manikant Pathak are other defendants.

11. According to the plaintiff all the properties are joint family property acquired out of the income from the joint family property, whereas, according to defendant no.1 the properties are self acquired properties of the defendant no.1. Two plots are self acquired property of the defendant no.2 i.e. second wife of defendant no.1.

12. The court below had held that the properties are not self acquired property either of the defendant no.1 or defendant no.2. This finding of the court below was challenged in this First Appeal by the defendant no.1 and 2 and their two sons and daughters, who are the appellants. The defendant no.1 was appellant no.1 and defendant no.2 was appellant no.2. It appears that during the pendency of this First Appeal both the appellants i.e. Rambujhawan Pathak and Smt. Kamla Devi died. Now, therefore, even if it is held that Rambujhawan Pathak has acquired all properties in suit then after the death of Rambujhawan the same will devolve on all his sons and daughters. So far two plots in the name of defendant no.2 is concerned, it will go to her daughters. It is settled principle of law



that the Court can take cognizance of the subsequent event and can grant relief accordingly. Thus the death of Rambujhawan Pathak and Kamla Devi is the subsequent event in this case and because of this subsequent event now the question, which was under challenge prior to their death do not exist. It is the admitted fact that the two plots i.e. plot nos. 601 and 4792 are acquired in the name of defendant no.2 i.e. the registered sale deed is standing in the name of defendant no.2. The plaintiff has filed simple Suit for partition. The plaintiff has never sought for any declaration to the effect that the defendant no.2 is the Benami of the joint family or in fact that the property was acquired by the defendant no.1 out of the joint family, in fact, in the name of defendant no.2. The simple statement has been made that the property was even acquired out of the joint family fund.

13. In view of the above fact and circumstances of the case no evidence to this effect has been produced by the plaintiffs. Property standing in the name of defendant no.2 cannot be presumed to be the joint family property.

14. In AIR 1991 Patna 53 (Rameshwar Mistry and another –v- Bebulal Mistry) it has been held that where an alienation of property in favour of the wife a coparcener was questioned in a suit for partition of a joint family property, the declaration of title should have been sought and the plaintiff should have been paid ad

valorem court fee. It appears that in that case also the defendant no.2 was the wife of defendant no.1 and it was held that the defendant no.2 during the life time of defendant no.1 she cannot also be said to be a member of the joint family.

15. Now therefore, so far part of the judgment whereby the court below has held that the two plots are joint family property is not sustainable. Therefore that part of the judgments is set aside.

16. So far remaining part of the judgment is concerned because of the fact that the father has already died naturally all the parties i.e. sons and daughter from first wife and second wife are entitled to equal share.

17. In view of the subsequent amendment of the Hindu Succession Act, in the year 2005 the Hon'ble Supreme Court in the case of Ganduri Koteshwaramma & anr –v- Chakiri Yanadi & anr. reported in AIR 2012 SC 169 has held in para 15 as follows:

“ The right accrued to a daughter in the property of a Joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before December 20, 2004; and (ii) where testamentary disposition of property has been made before December 20, 2004. Sub-section (5) of Section 6 leaves no room for doubt as it provides that this Section



shall not apply to the partition which has been effected before December 20,2004. For the purposes of new Section 6 it is explained that 'partition' means any partition made by execution of a deed of partition duly registered under the Registration Act., 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the Section, what is relevant is to find out whether the partition has been effected before December 20,2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on March 19, 1999 an amended on September 27, 2003 deprives the appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed."

The question was answered in favour of appellants in that case.

18. In view of the above settled proposition of law the daughters who have even not been made party in the suit for partition are also entitled to share in the suit property because still there has been no partition between the parties and this partition suit is still pending. No final decree has been passed.

19. So far two plots which are standing in the name of defendant no.2 are concerned, in view of the provisions as contained in Section 15 of the Hindu Succession Act, 1956, it will go to the

defendants i.e. sons and daughters of the defendant no.2 and defendant no.1 only.

20. In view of the above facts and circumstances, as discussed above, I find that the plaintiffs have got title and possession with respect to the property except the property standing in the name of defendant no.2. Accordingly, the finding of the court below is modified. However, regarding share it is held that the daughters of defendant no.1 from first wife and second wife are also equally entitled to the share in the suit property. Thus the share of the plaintiffs is modified accordingly.

21. In the result, this First Appeal is allowed in part. The judgment and decree of the trial court is modified to the extent, indicated above. In the facts and circumstances of the case, there shall be no order as to costs.

(Mungeshwar Sahoo, J)

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