

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.99 of 1981

(Against the judgment and decree dated 06.12.1980 passed by Sub Judge, Jamui in title suit No.29 of 1979).

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Dhanpat Sao & Ors.

.... Plaintiffs-Appellants

Versus

Tulsi Sao & Ors

.... Defendants-Respondents

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Appearance :

For the Appellant/s : Dr. Arun Kumar, Advocate

For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 19-01-2015

1. The plaintiffs-appellants have filed this First Appeal against the judgment and decree dated 06.12.1980 passed by the learned Subordinate Judge, Jamui in title suit No.29 of 1979 dismissing the plaintiff's suit for partition.

2. The plaintiffs filed the aforesaid suit for partition claiming 1/6th share in Schedule II and III properties alleging that one, Bhiko Sao had two sons namely, Maktu Sao and Sona Sao. The defendants 1st set are the descendants of Maktu Sao. Sona Sao had three sons namely, Huro, Bhatu and Badri. Badri is the plaintiff no.1 and his two sons, Dhanpat and Madan and grandsons are the other plaintiffs. The brothers and descendants of brothers of Badri are the defendants 2nd set and 3rd set. The plaintiffs further alleged that after death of Bhiko Sao, his two sons came in joint possession over the



suit lands situated in Chakai, Heth Chakai, Ramchand Dih and Bhogan. Their names were also recorded in survey khatian. Both brothers died in the state of jointness and on their death, their descendants came in joint possession of the suit properties. There had been no partition between the parties and since last year, the parties are separate in mess and cultivation. There has been no partition by metes and bounds. Further case is that the land which is cultivated by one party, in one year, is cultivated by the other party, in the next year and vice-versa.

3. The defendant no.3 only appeared and filed written statement. The main defence of the defendant no.3 is that there had already been partition between two brothers in the year 1915 and the Schedule II lands were allotted in the share of Maktu Sao whereas the lands of Shankari in Dumka were allotted in the share of Sona Sao and since then the parties have got no connection with each other. So far Schedule III property is concerned, it was purchased by plaintiff no.1 and defendant no.1 jointly and thereafter, it was also partitioned between them in 1944. On these grounds, the defendants stated that the partition suit be dismissed.

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

I. Whether the plaintiffs have any cause of action for the suit?

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- II. Whether the suit is defective due to non-joinder of any necessary party?
 - III. Whether the suit has been properly valued?
 - IV. Whether the plaintiffs are required to pay advalorem court fee?
 - V. Whether Makthu Sao and Sona Sao had separated and partitioned their joint family properties in 1915?
 - VI. Whether the lands situated at village Sankari were acquired by the joint family of both the aforesaid brothers?
 - VII. To what relief or reliefs, if any, the plaintiffs are entitled?

5. The learned court below after trial recorded the finding that the defendant failed to prove that the property of Shankari in Dumka was the joint family property and also failed to prove partition in the manner alleged by him. However, the court below recorded a finding that there had already been partition between the parties which is being admitted by the plaintiff. Accordingly, the trial court dismissed the suit.

6. The learned counsel for the appellants, Dr. Arun Kumar assailed the judgment of the trial court on the ground that the trial court clearly recorded a finding that the defendant no.3 who had only appeared and filed written statement failed to prove his case of previous partition in the year 1915, therefore, the learned court below could not have dismissed the plaintiff's suit for partition. According to the learned counsel, the Hindu family is presumed to be joint unless



the contrary to the effect that there had been partition is proved by the other side who asserts the previous partition. In the present case, the defendant no.3 asserted that there was previous partition but according to the finding of the court below, he failed to prove this previous partition. In such circumstances, the court below should have decreed the plaintiff's suit for partition.

7. The learned counsel further submitted that the case of the defendant no.3 that the property at Shankari in Dumka district is also joint family property is without any basis and in support of this case, the defendant no.3 has not produced any chit of paper or reliable evidence, therefore, the learned trial court has rightly held that the property at Shankari in Dumka is not the joint family property and the case of the defendant no.3 that there was partition in 1915 and the property of Shankari in Dumka fell in the share of Sona Sao has got no basis. The learned court below, therefore, rightly recorded this finding. In such circumstances, in fact the case of the plaintiffs that there has been no partition by metes and bounds between the parties with respect to the suit properties is in fact, uncontroverted and no other evidence has been adduced by the other side, the learned court below, however, wrongly recorded the finding that there had been previous partition without there being any satisfactory evidence.

8. In this case, although, the names of the learned

counsels appearing on behalf of the respondents are printed in the daily cause list, nobody is appearing on behalf of the respondents. This First Appeal was heard in part on 12.01.2015 and on the prayer of the appellants, it was adjourned for today but today also, nobody appeared on behalf of the respondents.

9. In view of the above submission of the learned counsel for the appellants, the point arises for consideration in this First Appeal is as to “whether there is unity of title and possession between the parties as alleged by the plaintiffs or there had been partition as alleged by the defendant no.3?”

10. From the pleadings of the parties, it is clear that the plaintiff has filed this simple suit for partition alleging that the suit properties described in Schedule II and III are the joint family properties. Originally, the property belonged to one Bhiko Sao. He had two sons. The defendants are the descendants of first son whereas the plaintiffs and defendants 2nd and 3rd sets are the descendants of second son. On the contrary, the case of the defendant no.3 is that there had already been partition in the year 1915 and in that partition, land of Dumka district was allotted in the share of plaintiff's branch. In support of their respective cases, the parties have adduced evidences.

11. So far the case of the defendant no.3 that the



property of Dumka district i.e. Mauja Shankari is also the ancestral joint family property is concerned, no reliable evidence has been produced by the defendant no.3. Only statements have been made in the evidence. Defendant no.3 has been examined as D.W.4. He has stated that Maktu Sao and Sona Sao had acquired jointly at Mauja Shankari which is in Santhal Pargana, Jasidih. There had been partition between them in the year 1915 and in that partition, the property of village Shankari was allotted in the share of Sona Sao. Except this evidence of D.W.4, there is nothing on record in support of the fact that the property at Shankari is the joint family property.

12. It may be mentioned here that the present suit has not been filed for partition of the property of village Shankari in Dumka district. Admittedly, the plaintiffs and the defendants are third generation. Therefore, the contesting defendants i.e. descendants of Maktu Sao are the third cousins of plaintiff. It is settled principles of law that the normal state of every Hindu family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption. The presumption is stronger in the case of brothers than in the case of cousins and the farther you go from the founder of the family, the presumption become weaker and weaker. The reason is that brothers are for the most part undivided, second cousins are generally separated and third cousins are for most part

separated. In view of this settled principles of Hindu law, now let us examine the case of the parties in the present case.

13. So far the defendant's case of previous partition in the year 1915 cannot be relied upon in view of the fact that the defendant no.3 failed to prove that the property of Shankari is also joint family property. As stated above, the suit has been filed for partition of the properties of Mauja Chakai tola, Bhogan 1.47 acres, tola Ramchand Dih 1.96 acres, tola Heth Chakai 0.69 acres described in Schedule II total 4 acres 27 decimals and 22 decimals of Mauja Khas Chakai described in Schedule III. Therefore, the total area of the suit land described in Schedule II and III is 4.49 acres. Since the parties are third cousins in the present case, the presumption is very weak. Therefore, on the basis of presumption only, the plaintiff's suit cannot be decreed. Now let us consider the case of the plaintiffs.

14. P.W.1 is the plaintiff no.1 himself. In paragraph 7, he has stated that he and Munshi Sao had purchased 22 decimals land in Khas Chakai. This property is described in Schedule III. Although, in examination-in-chief, he has stated that since last 10-12 years, their residence and mess is separate and they are karta of their respective families, in the cross-examination, at paragraph 10, he admitted that at Bhogan, the ancestral land is 15 decimals at Khas Chakai near about 1 bigha land. Out of that, 74 decimals is Bhit land



and on 6 decimals, a house is there. 66 decimals is cultivable land. At Heth Chakai, 63 decimals land is there. At Ramchand Dih, there is 18 kathas land and 1 bigha tand. At Ramchand Dih, he cultivates 18-19 decimals land and at Heth Chakai, 10-12 decimals land. At Bhogan, he cultivates 2 decimals land and he is cultivating these lands separately since his "Hosh". This plaintiff was aged about 75 years in the year 1980 when he was examined. Now, therefore, he is cultivating the lands separately since more than half century. He also admitted that he is cultivating the lands according to his share in each Mauja. At paragraph 11, he has stated that he retired from the service in 1966. He had purchased lands in the name of his sons and constructed house there in the year 1956 where he is residing. According to his evidence, he was sending the money to his sons who were purchasing the land.

15. This witness again in paragraph 15 regarding Schedule III property stated that he and Munshi purchased the land measuring 22 decimals in the year 1963 and out of that, he is cultivating 11 decimals land and Munshi is cultivating 11 decimals land. P.W.2 is the formal witness. P.W.3 in examination-in-chief has stated that there has been no partition by metes and bounds by measurement. In the cross-examination, at paragraph 5, he has stated that three brothers of Munshi Sao are separate and he is seeing them

separate since his “Hosh”. It may be mentioned that this witness is aged about 55 years in the year 1980. This witness, therefore, has admitted that even the defendants 1st set i.e. descendants of Maktu Sao are also separate since long. P.W.4 has also in cross-examination at paragraph 7 stated that three brothers of Munshi are separate.

16. In view of the above evidences of the plaintiffs, it appears that the plaintiffs admitted that the plaintiff is in separate cultivation of the land according to his share since more than half century. As discussed above, in the evidence, the plaintiffs also admitted that separate lands were acquired by the parties independently. Separate houses are constructed by them. Plaintiff no.1 himself retired in the year 1966. He also admitted the partition between the heirs of Maktu. If there was no partition then where is the question of partition between the heirs of one branch.

17. A Division Bench in the case of **Arjun Mahto and others v. Monda Mahatain and others, A.I.R. 1971 Patna 215** has held that “if the parties have independent management of properties for a long time no doubt not conclusive but the cumulative effect of such facts may show that there had been partition between the brothers during their lifetime.” This Division Bench decision has been followed again in **A.I.R. 1991 Patna 1(Ganesh Sahu and another v. Dwarika Sao and others)**.

18. In the present case, as stated above, the plaintiff no.1 himself who is the karta of his family admitted that since his “Hosh” he is cultivating the lands according to his share in all Maujas. He also admitted that separate properties are being acquired. The parties are constructing separate houses since long. He also admitted that the joint properties purchased by him with Munshi i.e. Schedule III properties has been cultivated by him half i.e. 11 decimals. Now, therefore, if he is cultivating the lands according to his share since more than half century without any objection, can it be said that there had been no partition. It is not his case that he is in possession less than his share or that the share/area of the land allotted in favour of the parties or the area of the land in his possession is unconscionably disproportionate to his share.

19. In view of the above facts and circumstances of the case and my discussion, I came to the conclusion that there is no unity of title and possession between the parties and, therefore, the plaintiff is not entitled for any decree. The learned court below has rightly dismissed the plaintiff’s suit.

20. In the result, 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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