

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.20 of 1977

Against the Judgment and Decree dated 31.08.1976 passed by IIIrd Addl. Subordinate Judge, Siwan in Partition Suit No.111 of 1967/66 of 1975.

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Dhurpatia Devi & Ors. .

.....Defendant No.1 - appellants
Versus

Smt. Genia & Ors.

.....Plaintiffs - Respondents

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Appearance :

For the Appellant/s :- Mr. P. N. Roy, Sr. Advocate

For the Plaintiff Respondent :- Mr. Dhruv Narain Sr. Advocate

For Respondent Nos.6 :- Mr. Shailendran Kumar Singh, Advocate

For Respondent NO.58 series :- Ms. Madhuri Lata, Advocate

Mr. Randhir Kumar, Advocate

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Dated : 23rd day of July, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. This First Appeal has been filed by the defendant No.1 against the Judgment and Decree dated 31.08.1976 passed by learned IIIrd. Addl. Subordinate Judge, Siwan in Title Suit No.111 of 1967 / 66 of 1975 whereby the Court below has decreed the plaintiff respondent's suit in part with respect to some of the suit plots only to the extent of 1/4th share in plot No.167/266 of Khata No.148, 1/6th share in the lands

of khata No.352, i.e., schedule No.II and $1/8^{\text{th}}$ share in plot Nos.1/2632, 1/2693 and 1/ 2694 of R.S. Khata No.169 and with respect to their $1/4^{\text{th}}$ share in R.S. plot No.147 of Khata No.176.

2. The plaintiff respondent had filed the aforesaid suit claiming partition to the extent of 6 anas in schedule 1, 7 anas 3 pie in schedule 1/ka, $1/6^{\text{th}}$ share in schedule 2 and $1/8^{\text{th}}$ share in schedule No.3, 3 anas in schedule No.4, 8 anas in plot No.142, 5 anas 4 pie in plot No.147.

3. The plaintiffs claimed the aforesaid different shares in different properties described in detail in 6 schedules alleging that the plaintiff and defendant No.1 and 34 to 39 are descendents of common ancestor, Radhey Bind. Radhey Bind died leaving behind sons, namely, Pritam Bind, Janak Bind, Balwant Bind and Hargun Bind. They all separated from each other in such a way that Pritam Bind and Janak Bind remained joined and likewise Balwant Bind and Hargun Bind remain joint. Janak Bind died issueless. Pritam Bind had two sons, Charittar Bind and Fakir Bind. Charittar Bind was looking after Janak Bind so Janak Bind gave his lands to Charittar Bind and his sons and accordingly they came in possession of land of Janak Bind. Charittar Bind had a son namely, Mohan Bind. The plaintiff Nos.2 to 8 are the heirs of Mohan Bind and Mohan Bind is the plaintiff No.1. The second son of Pritam Bind, namely, Fakir Bind died leaving behind only one



son, Bala Bind whose heirs are defendant No.36 to 39. The heirs of Bala Bind were previously plaintiffs Nos.9 to 12. But subsequently they were transposed as defendant No.36 to 39. Since Haricharan Bind and Mostt. Reshmi died during pendency of the suit. Their heirs have been substituted.

4. The third son of Radhey Bind, namely, Balwant Bind had three sons. The heirs of Balwant are defendants No.34 and 35. The entire land of Balwant was sold in auction before revisional survey and one Raj Kumar Lal purchased the same but again two sons of Balwant, namely, Sundar Bind and Gurdhani Bind again purchased the said land. Therefore, only their names were recorded in revisional survey record. The daughter of Sundar Bind and Raghu Bind sold their shares to defendants No.2 to 14.

5. According to the plaintiff's case, the scheduled IV property were acquired by the plaintiff and defendant No.36 to 39 and 15 to 19 as such they all have got equal shares. The land of Khata No.288 were acquired by plaintiff along with Loch Bind, ancestor of defendant No.1 and descendant, Hargun Bind along with defendant No.25 to 33. The lands comprised in plot No.142 and 147 are homestead lands of plaintiffs and defendants No.36 to 39 and defendant No.1. Accordingly, the plaintiff has got 8 anas share in plot No.142 and 5



anas 4 pie share in plot No.147. These are schedule V property. In schedule I land under Khata No.148, the plaintiff has got 6 anas and in the lands of schedule 1/ ka, the plaintiff No.1 to 8 have got 7 anas 3 pie and likewise the plaintiff has explained his share in different lands. Subsequently, by amendment new schedule was added describing plot No.146 in the schedule and the plaintiff claimed 8 anas share. According to the plaintiffs, they are in joint possession of the lands according to the shares and there has been no partition. The parties are cultivating the lands according to their convenience. When the defendant did not agree for partition, the suit was filed.

6. The plaintiffs No.9 to 12 who were transposed as defendant No.36 to 39 filed contesting written statement. They in fact supported the plaintiff's case except the case pleaded by the plaintiff that land was given to Charittar Bind by Janak Bind. Their case is that Charittar Bind and Fakir Bind both used to serve Janak Bind, therefore, Janak Bind gave his lands to both of them and they both came in possession of the lands. However, Charittar Bind fraudulently, got recorded only his name in survey record. In fact Charittar Bind and Fakir Bind both were in possession of the lands and they have got equal share with the plaintiff.

7. The defendant No.1 also filed contesting written statement.



His main case is that all the four sons were separate from each other.. He denied the partition in the manner claimed by the plaintiff. The further case is that Janak Bind died leaving behind his daughter, Sarali who has a son Ganesh Bind who is alive. The defendant No.1 also denied that Janak Bind ever gifted his lands to Charittar Bind or Fakir Bind. According to this defendant, the share of plaintiff and defendant No.36 to 39 is only 4 anas, Sunder Bind and Gurdhani Bind (branch of Balwant) have got 4 anas share, Ganesh Bind, grand son of Janak Bind has got 4 anas share and rest 4 anas is of defendant No.1 who is heir of Hargun Bind. This defendant has purchased lands from Ramnath Bind, grand son of Rajman Bind by registered sale deed dated 18th March, 1955. Charittar Bind fraudulently got his name recorded, therefore, the entry is incorrect. The further case is that this defendant has purchased one katha 7 dhur land in plot No.146 of khata No.176 which was in possession of Rajman Bind alone so the defendant No.1 is in possession of entire plot. The entire lands were partitioned by metes and bonds according to the share of the parties as such, there is no unity of title and possession.

8. The further case is that Hargun Bind was the maternal grand father of Loch Bind. The defendant No.1 is in possession of the land of Hargun Bind. If it is found that there had been no partition, the

property may be partitioned according to the shares and in that case, this defendant has got no objection.

9. The defendant No.34 and 35 also contested the suit. The case of these defendants is that all the four sons of Radhey Bind were joint. First Hargun Bind died issueless and after him, Janak Bind died leaving behind Mostt. Sarli, his daughter. On the death of Radhey Bind, half share devolved on Pritam Bind and half share on Balwant Bind. Balwant Bind died in jointness with his three sons. The daughters of Sunder Bind and Gurdhani Bind did not acquire any title, interest and possession over the lands of Sunder Bind and Gurdhani Bind as they died in jointness. These defendants are in possession of the entire land of Sundar Bind and Gurdhani Bind. They had purchased 3 kahta 11.5 dhur land from Unhiya, wife of Damari Bind by registered sale deed dated 21.01.1950. They claimed half share in schedule Nos.1 to 4.

10. The purchasers defendant No.3 to 4, 5 to 10, 20 to 22 and 40 have also filed written statement alleging that there is unity of title and possession between the party. Defendant No.40 contended that he has purchased 7 katha 7 dhur land from Pala Bind, ancestor of defendant Nos.30 to 39 by registered sale deed dated 16.06.1938.

11. On the basis of the aforesaid pleadings of the parties, the

learned Court below framed the following issues :-

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- (i) As the suit, as framed, maintainable?
 - (ii) Have the plaintiffs got any cause of action and right to sue?
 - (iii) Is the suit barred by limitation?
 - (iv) Is there any unity of title and possession between the plaintiffs and the defendants with respect to the suit lands?
 - (v) Are the plaintiffs entitled to get a decree for partition and of so to what extent?
 - (vi) To what other relief, if any, are the plaintiffs entitled?

12. After trial, the learned Court below decreed the plaintiff's suit in part according to the share mentioned above recording a finding that there is unity of title and possession between the parties with respect to the plots in joint possession of the parties.

13. The learned senior counsel appearing for the defendant No.1-appellant submitted that the Court below has wrongly decreed the plaintiff's suit although there had already been partition, as such there was no question of any unity of title and possession arises. The Court below wrongly held that the plot No.1/2692, 1/2693 and plot No.1/2694 of Khata No.169 are also liable for partition as the plaintiff have got no



share in the said property. The further submission of the learned counsel is that all the four brothers were separate, therefore, on the death of Janak Bind, his property will go to other three brothers also equally but no share has been given to the appellant. Moreover, the case pleaded by the plaintiff that Pritam and Janak Bind were joint together and the other two brothers remained joint is wrong and, therefore, the property of Janak is liable to be partitioned between the heirs of the remaining three brothers. However, the Court below has wrongly given shares to the extent of $\frac{1}{4}^{\text{th}}$ in some of the property to the plaintiff although they are entitled to only $\frac{1}{8}^{\text{th}}$. The heirs of Pritam together are entitled to $\frac{1}{4}^{\text{th}}$ share whereas the Court below has granted $\frac{1}{4}^{\text{th}}$ share to the plaintiff.

14. On the other hand, the learned senior counsel for the plaintiff respondents submitted that the appeal filed by the defendant No.1 alone is not maintainable at all because he is not claiming any share in the suit property. His case is that there had already been partition between the four sons of Radhey Bind and he is in possession of the property of Hargun. Therefore, whether two brothers remained joint at one place and the other two brothers remained joint in another place has got no concern to this defendant No.1 because he claims that there had already been partition. It is also not his case that his properties were also



partitioned. The learned senior counsel, Mr. Dhruv Narain for the plaintiff-respondent submitted that in the written statement, the defendant No.1 never pleaded that after the death of Janak Bind, his property devolved on the remaining three brothers. In fact Hargun died first between the four brothers. If Hargun died first then on the death of Janak Bind, his property will never go to the branch of Hargun because Hargun died leaving behind his daughter Sahuti. The learned counsel further submitted that the Court below has decreed the plaintiff's suit granting decree with respect to some of the suit plots which were recorded jointly and dismissed claim of the plaintiff with respect to other plots. In such circumstances, the appeal has got no merit and thus is liable to be dismissed.

15. The learned counsel appearing on behalf of respondent Nos.58 series submitted that the Court below has wrongly not accepted the case of the defendant No.34 and 35. According to them Hargun Bind died first issueless and thereafter Janak Bind died leaving behind Mostt. Sarli and accordingly half property of Radhey Bind devolved on Pritam and half property devolved on Balwant. The land of plot No.142 comprised within khata No.176 was the homestead land belonging to the ancestor, namely, Gurdhani Bind, Sunder Bind and Fulel Bind and they were in possession over the same. When their

ancestral house felled down, the ancestors constructed house on it and they were residing thereon and after them, these defendants are residing.

16. The learned counsel for respondent No.61 submitted that the appeal filed by the defendant No.1-appellant is not maintainable as his case is that there had already been partition and he is in possession of the land of Hargun. He is also not a coparcener because he is grand son of daughter of Hargun Bind. He never claimed any share in the property of Janak, therefore, his mere argument before the High Court claiming $1/3^{\text{rd}}$ share or partition of property of Janak Bind in three part cannot be accepted. On these grounds, the learned counsels for the respondents submitted that the First Appeal is liable to be dismissed.

17. In view of the above submissions of learned counsel for the parties, the points arises for consideration in this First Appeal is as to whether the Appeal filed by defendant No.1 claiming $1/3^{\text{rd}}$ share in the property of Janak is maintainable and whether the impugned Judgment and decree passed by the Court below is sustainable in the eye of law or not.

18. The main case of the plaintiff respondent is that there was partition between the four sons of Radhey Bind in such a manner that



Pritam Bind and Janak Bind remained joint together whereas the other two sons, Balwant Bind and Hargun Bind remained joint together. There had been no partition between the parties. The defendant No.1 appellant who died during the pendency of this Appeal had filed written statement alleging that the manner of partition pleaded by the plaintiff is incorrect. There was partition between the four brothers and they came in exclusive possession of their respective 1/4th share and this defendant No.1 is coming in possession of the property of Hargun Bind being the grand son of daughter of Hargun Bind. In view of the above pleadings of this defendant No.1, now, even if it is held that there was partition in the manner pleaded by the plaintiff is correct then also the defendant No.1 is not entitled to any share in the land of Janak Bind because the defendant No.1 never claimed that after the death of Janak Bind, his property will go in the share of defendant No.1 also. His pleading is that Janak Bind died leaving Sarli Devi, daughter, and Sarli Devi had a son Naresh. It may be mentioned here that neither Sarli nor Naresh are party. Now, even if it is held that there had been partition as pleaded by defendant No.1 then also he will not be entitled to any share in the suit property because his case is that there had already been partition.

19. The learned senior counsel for the appellant submitted that on



the death of Janak Bind, his property will devolve on the three brothers equally because according to the plaintiffs and transposed plaintiff-defendant, the property was given by Janak to them but no documents have been produced as to how the property were given to them by Janak. So far this submission is concerned, it may be reiterated here that the defendant No.1 is not claiming any property of Janak Bind or a share in the property. There is no pleading as such nor any evidence has been adduced by defendant No.1-appellant. Now, therefore, the dispute is between branch of Balwant and Pritam only according to the pleading of the defendant No.1. Moreover, it is the specific pleading of the defendants, i.e. Balwant branch that first Hargun died. There are no contrary pleadings or evidence. Accordingly, it can safely be held that first Hargun died. Therefore, on the death of Janak Bind, the property will never go to daughter of Hargun Bind.

20. From perusal of the C.S. Khatiyan, ext.'D-3' and the R.S. Khatiyan, ext.'E-3', it will be evident that R.S. Khata No.148 correspond to C.S. khata No.117, R.S. khata No.200 correspond to C.S. Khata No.165. Likewise the plots mentioned in this Khatiyan correspond in various Khata of C.S. Khatiyan. These properties have been described in schedule 1 and 1/ka. The possession of Pritam Bind and Sunder Bind is recorded against all the plots. Plot No.179 is



recorded as joint. This clearly indicates that except plot No.179, the other plots were partitioned. The names of any other persons is not recorded. Likewise with respect to khata No.148 except plot No.167/266, all the plots were recorded in separate possession of the parties. The above plot number 167/266 measuring 5 katha 2 dhur is recorded in joint possession. This is the case with respect to R.S. Khata No.200 corresponding to C.S. Khata No.165. These entries indicates that there was partition between the parties with respect to all the properties except the plots mentioned in joint possession. This is the case of the defendant appellant also. From perusal of the impugned Judgment also, I find that the argument was advanced before the trial Court also.

21. With respect to these lands of schedule 1 and 1/ka, the plaintiff No.3 has been examined as P.W.3 who in his evidence clearly admitted that they are cultivating the lands separately and the entries were recorded according to their possession and share except the plots which are shown as joint. Further, it would be evident from ext.'3' series that the parties were dealing with the properties by mortgaging the properties in their share and possession. Ext.'4' series are the redemption note.

22. It further appears that the appellant himself has filed



registered sale deed executed by Ramnath Bind in favour of Ram Sevak Bind, P.W.9. He had also filed mortgage deed executed by him ext. 'B/1' and the exhibit 'C/1' is the redemption note on it. Ext. 'C/2 series' are six mortgage deeds produced by defendant No.37 and 39. Further, it is the case pleaded by the plaintiff that daughters of Sunder Bind and Gurdhani Bind had sold properties of their share to outsiders who are in possession of the properties. It will not be out of place to mention here that the daughters of Sunder Bind and Gurdhani are not made parties. These facts clearly shows that there was partition by metes and bonds with respect to all the lands except the plot No.167/266 measuring 5 katha 2 dhur. This plot is mentioned as Baswadi and is shown in joint possession. Although the plaintiffs have claimed 6 anas share in the land on the ground that the property were given by Janak Bind only to Charittar Bind, no reliable evidence had been produced, therefore, this case cannot be accepted. The Court below came to the conclusion that the property will go equally to the branch of Fakir Bind also. I find no reason to interfere with this finding because the plaintiff-respondent is not challenging this finding. So far defendant No.1 is concerned, also he is not claiming that he has got share in these properties because according to him, there had already been partition and he is in possession of 1/4th share of Hargun. Name of Hargun or his heirs are also recorded. It may be mentioned here that



the plaintiff had examined witnesses to say that widow of Janak Bind was living with Charittar as properties were gifted by Janak Bind. But no gift deed had been produced. No oral gift can be made. Since the plaintiff is not challenging the finding, it is not necessary to deal with the evidences. Therefore, the Court below has rightly held that the plaintiffs are entitled to 4 anas share only.

23. The plaintiffs have claimed $1/6^{\text{th}}$ share in schedule II land. This land of khata No.352 correspond to C.S. Khata No.331. In R.S. Khata, it is recorded that Charittar Bind, Fakir Bind, Sunder Bind and Murdhani Bind and Mehar bind, Shalin Bind having equal share. According to the plaintiff, this land is not the ancestral property. Therefore, the plaintiff have got $1/6^{\text{th}}$ share in the same. So far this finding is concerned, I do not find any reason to interfere with the share of the plaintiff. The defendant No.1-appellant has got no connection with this land.

24. So far Schedule III property is concerned, in the Khatian, it is recorded in the name of Sunder Bind and Gurdhani Bind, son of Balwant, Guljar, son of Shiv Tahal and Buddhan, son of Ujjagir and Charittar, son of Pritam and others mentioned therein and it is recorded that they are in possession according to their share. Only plot No.1/2692, 1/2693 and 1/2694 are recorded in joint possession of the

parties, therefore, according to the entry recorded in the Khatian, the plaintiffs are entitled to $1/8^{\text{th}}$ share. The learned Court below right held so. There is no challenge to this finding by the appellant. Moreover, the appellant is not claiming that he is entitled to any share in this land because the name of his ancestor also was not recorded.

25. So far the land of khata No.176, plot No.147 is concerned, the defendant No.1-appellant claimed the same to have purchased from Ramnath Bind. The defendant No.1 has produced the registered sale deed ext. 'A-1'. The plaintiff claimed half share in this land. The Court below has negated the claim of the plaintiff. The plaintiff had not filed appeal or cross objection against this part of the decree. Likewise the Court below also negated the claim of the plaintiff with respect to plot No.142.

26. So far land of plot No.147 Khata No.176 is concerned, it is homestead land which are in possession of heirs of Charittar and Fakir Bind son of Pritam Bind and Loch Bind in equal share. Therefore, the trial Court has rightly granted $1/4^{\text{th}}$ share in the aforesaid property.

27. The learned counsel appearing on behalf of respondent No.58 series who are the heirs of defendant No.34 submitted that the learned court below has wrongly granted the decree in favour of the plaintiff.



The defendant No.34 in the written statement clearly pleaded that half property of Radhey Bind devolved on Pritam Bind and half devolved on Balwant Bind, therefore, heirs of Balwant have got half share in the suit property but the learned Court below has not granted any share to these defendant No.34 and 35. So far this submission of the learned counsel is concerned, it may be mentioned here that these respondents had not filed any appeal against that part of the decree by which they have not been granted half share in the property of Radhey Bind. This decree was appealable. These respondents also never filed cross objection in this present appeal. Now, therefore, they cannot be permitted to challenge that part of the decree which is against them. Here, it will not be out of place to mention that the defendant No.1 has only challenged the decree passed by the Court below. I, therefore find no force in the submission of the learned counsels for these respondents.

28. In view of the above facts, it becomes now clear that the defendant No.1 appellant pleaded that there had already been partition and he is in possession of the property of Hargun Bind. He himself produced registered sale deed ext. 'A-1' in support of the fact that he has purchased lands, as such it is his self acquired property whereas the plaintiff claimed half share. The claim of this defendant No.1 was allowed and the plaintiff's case was rejected. So far the other lands are

concerned wherein the Court below had granted decree in favour of the plaintiff, the defendant appellant never claimed any relief or he never claimed any share. His consistent case is that there had already been partition. Before this Court also, the appellant is unable to show that which property of Hargun which is in his possession has been included in partition suit. Now, therefore, the appellant cannot be allowed to argue the case before this Court contrary to the case pleaded by him in the written statement, particularly when he has neither pleaded nor adduced any evidence.

29. In view of my above discussion, the point formulated is answered against the appellant and the findings recorded by the Court below are hereby confirmed.

30. In the result, I find no merit in this First Appeal. Accordingly, 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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