

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.422 of 1985

Against the judgment and decree dated 17.04.1985 passed by 4th Additional Subordinate Judge, East Champaran, Motihari in Partition Suit No.119 of 1980/130 of 1984.

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Khedu Rai & Ors.

.... Defendants-Appellants

Versus

Rajendra Prasad & Ors.

.... Plaintiff-Respondents

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Appearance :

For the Appellants : Mr. Hemendra Prasad Singh, Sr. Advocate.

Mr. Arbind Kumar, Advocate with him.

For the Respondents : Mr. Mahendra Prasad Bhartee, Advocate.

MR. Shailendra Kumar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 29-09-2015

Contesting defendants have filed first appeal against the judgment and decree dated 17.04.1985 passed by the learned 4th Additional Subordinate Judge, East Champaran, Motihari in Partition Suit No.119 of 1980/130 of 1984 whereby the plaintiff-respondent's suit for partition has been decreed with cost.

2. The plaintiff-respondent filed the aforesaid suit for partition claiming 1/25th share in Schedule II of the plaint and 1/5th share in the property described in Schedule II (ka).

3. The plaintiff-respondent claimed the aforesaid relief alleging that one Malhar Rai had five sons, namely, Dayal Rai, Kalyug Rai, Bhagwat Rai, Mathura Rai and Dhanukh Rai. The branch of Dayal Rai is represented by defendant nos.20 to 26. The plaintiff

represent branch of Mathura Rai @ Methur Rai. Methur Rai is defendant no.6 and his two sons are defendant nos.7 and 8. Plaintiff is son of defendant no.7. The other defendants are from the branch of Kalyug Rai, Bhagwat Rai and Dhanukh Rai (for the purpose of deciding this appeal it is not necessary to describe the genealogy given in the plaint in great detail) and the defendant 2nd sets are purchasers. It appears that the court below has described in detail, therefore, it is not dealt with in detail.

4. The plaintiff's further case is that all the suit property is joint family property. The five sons of Malhar Rai only separated in mess, residence and cultivation in the year 1936 but the separate cultivation was according to their convenience. There had been no partition by metes and bounds. However, out of their separate income each branch dealt with separately and acquired properties. The defendant nos.6 to 8 filed Partition Suit No121 of 1963, which was dismissed for default and in fact it was collusive suit.

5. It appears that in the year 1983 amendment application was filed by the plaintiff and added Schedule II (ka) property. This amendment was allowed on 09.02.1983. The plaintiff claimed that this Schedule II (ka) property is the joint family property acquired out of joint family fund.

6. The defendant nos.1 to 5 and 9 to 19 filed supporting written statement claiming 1/5th share for defendant nos.1 to 5, 1/5th

share for defendant nos.9 to 16, 1/5th share for defendant nos.17 to 19 and stated that the plaintiff and defendant nos.6 to 8 are entitled to 1/5th share and the defendant nos.20 to 26 have got 1/5th share. They only disputed the genealogy saying that Malhar Rai had six sons. The name of first son was Dhyani Rai. However, according to him he died prior to 1934.

7. The main contesting defendants are defendant nos.20 to 26 who represent the branch of Dayal Rai. Their case, in short, is that there had already been partition by metes and bounds between the sons of Malhar Rai in the year 1924 and since then the parties were living separately, residing separately after constructing houses and cultivating separately and they have acquired separate lands also. The separation in the year 1936 alleged by the plaintiff is denied. According to them, the properties acquired after partition are the self-acquired property of each branch.

8. On the basis of the aforesaid pleadings of the parties the trial court framed the following issues:

- (i) Is the suit as framed maintainable?
- (ii) Whether the plaintiff has got valid cause of action or right to sue?
- (iii) Whether there is unity of title and unity of possession between the parties with respect to the suit land?
- (iv) Whether the suit is hit by the principle of *resjudicata* and barred by law of limitation and there by liable to be dismissed?
- (v) Whether partition by metes and bound took place in the family in the year 1924?
- (vi) Whether R.S. Plot No.5797 and 6403 are self acquired property of Dayal Rai?

- (vii) Whether the plaintiff is entitled to a decree for partition as claimed?
- (viii) To what relief or reliefs, if any, is the plaintiff entitled?

9. The trial court on the basis of materials and evidences recorded the findings that there had been no partition between the parties as alleged by defendants and accordingly decreed the plaintiff's suit.

10. The learned senior counsel Mr. Hemendra Prasad Singh for the appellants submitted that the court below has wrongly recorded the finding that there had been no partition by metes and bounds. According to the learned senior counsel, the plaintiff himself pleaded separation in the year 1936, therefore, the coparcenary family ceased to exist. In such circumstances, when the plaintiff himself pleaded separation, the presumption of jointness will not arise. Moreover, the presumption is rebuttable always. The plaintiff admitted separate mess, separate residence, separate acquisition and separate cultivation since near about half century i.e. more than four decades as the suit has been filed in the year 1980. During this period many properties have been sold independently by the parties and many properties have been acquired independently by the parties. There are many inter-se transactions also but the learned court below approaching the case in wrong angle held that the defendants failed to prove partition in the year 1924.



11. The learned senior counsel further submitted that the trial court misread the evidence of D.W.9, who is defendant no.20 by placing reliance only on paragraph 25. Further the court below gave much emphasis in the Schedule of the written statement wherein it was shown that in the partition the properties were allotted in the share of each party and in that schedule the properties, which have been acquired by each party, have been shown in their respective schedule. The learned court below disbelieved the case of partition in the year 1924 on the ground that how the properties, which were acquired either in 1957 or 1979, have been shown in these schedules and how it is stated that in partition of the year 1924 these properties were allotted in favour of the parties. The learned senior counsel submitted that it may be a mistake description in the schedule. Moreover, emphasis should not be given in the form of pleading. The intention of the defendants is to show the possession of the parties separately on different lands according to their share and subsequent acquisition. Moreover, because there is mistake description in the schedule, it cannot be recorded a finding that there had been no partition.

12. The learned senior counsel further submitted that the court below although noticed the inter-se transactions between the parties but refrained from giving any finding on this point. The learned senior counsel relied upon Division Bench decision of this Court i.e. **A.I.R. 1977 Patna 59 (Ram Bahadur Nath Tiwari Vs. Kedar Nath**

Tiwari) and 2010 (4) P.L.J.R. 77 (Vijay Kumar Srivastava & Ors. Vs. Anand Mohan Pd. & Ors., paragraph 34.

13. The learned senior counsel on the ground of separate mess, residence, cultivation and dealings of the properties relied upon the decision of this Court in the case of **Arjun Mahto Vs. Monda Mahtain, A.I.R. 1971 Patna 215 (Division Bench)**.

14. So far Schedule II (ka) property is concerned, the learned senior counsel submitted that these properties are self-acquired properties of Bhikhan Raut son of Dayal Rout @ Rai by registered sale deed dated 22.03.1929 (Ext.B-2/8) regarding R.S. Plot No.5797. Plot No.6403 was acquired by Dayal Rai in the year 1927 and he only executed kabuliyat, Ext.B/1 in favour of landlord. The learned court below wrongly held that those properties are joint family properties. On these grounds the learned senior counsel submitted that the impugned judgment and decreed be set aside and the plaintiff's suit be dismissed.

15. On the other hand, learned counsel Mr. Bhartee submitted that there is no defect in the impugned judgment. The parties are members of joint family and according to Hindu Law the presumption is in favour of the plaintiff. The plaintiff only stated that they were cultivating the lands separately according to convenience since 1936 and this case has been admitted by defendant no.20 in his cross-examination at paragraph 25 (D.W.9). Since the defendant



claimed partition by metes and bounds in the year 1924, the onus was on the defendants to prove this partition by producing reliable evidence. D.W.9 in his evidence clearly admitted that there is no paper showing partition nor the partition took place in his presence nor in presence of any other person. Therefore, the learned court below has rightly held that the defendants failed to prove partition in the year 1924. Therefore, whatever property acquired prior to separation in the year 1936 was the joint family property. Schedule II (ka) properties were acquired prior to 1936. Whatever properties were acquired after 1936 were acquired in the state of separation therefore, those properties are self-acquired properties of respective parties.

16. Mr. Bhartee further submitted that if according to the defendants partition took place by metes and bounds in the year 1924 then how the properties, which were acquired much after 1936, have been shown to have been allotted to the plaintiff and defendants in the schedule attached with the written statement. This schedule clearly indicates and proves that the defendants came with a wrong case and unclean hands and, therefore, the court below has rightly held that the defendants failed to prove partition as claimed by them.

17. The learned counsel further submitted that so far inter-se transactions are concerned, admittedly the parties were cultivating lands separately since 1936, therefore, whenever there arose necessity they dealt with those properties which were in their possession. In such

circumstances merely because there was inter-se transaction no finding can be recorded that there has been partition by metes and bounds. The learned court below has considered all these aspects of the matter and has rightly decreed the plaintiff's suit.

18. In view of the above contentions of the parties the points arise for consideration in this first appeal are as follows:

- (i) Whether there had been partition between the parties as alleged by defendants in the year 1924 or only there was separation in the year 1936 as claimed by the plaintiff?
- (ii) Whether the Schedule II (ka) properties are self-acquired properties of the defendants-appellants' branch or it is joint family property and whether the impugned judgment and decree are sustainable in the eye of law or not?

19. **Point No.(i)** : We have seen the case of each party. Plaintiff claimed that there was separation only in the year 1936 according to convenience whereas according to defendants-appellants there was partition by metes and bounds in the year 1924. In view of the above facts pleaded now it becomes clear that the parties are messing separately, residing separately, cultivating the lands separately since long i.e. more than four decades. Now the only dispute/controversy between them is whether there was only separation according to convenience or there was partition. Both the parties have adduced oral evidences. According to the plaintiff's witnesses, there was only separation in 1936 and no partition by metes and bounds. On the contrary, the defendants have examined D.Ws.1 to

6, who are on the point of partition between the parties in the year 1924. D.W.9 is defendant no.20 himself. These oral evidences are oath against oath. It is admitted fact that this occurrence i.e. either separation or partition was effected many decades ago and no contemporaneous documents were available showing partition.

20. The Hon'ble Supreme Court in the case of **Bhagwan Dayal Vs. Reoti Devi, A.I.R. 1962 SC 287** has held at paragraph 16 that **it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transaction have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time.**

21. Here in present case, at out hand, the partition alleged is of the year 1924. Admittedly there is no document and most of the participants have passed away, therefore, the evidences produced by the defendants can be accepted on the basis of reasonable inferences.

22. A division Bench of this Court in the case of **Arjun Mahto Vs. Monda Mahtain, A.I.R. 1971 Patna 215** has held that **the separate management of properties, separate messing, separate residence, separate dealings of the properties, separate acquisition, separate selling the properties by themselves are not sufficient**

separately to prove previous partition but the cumulative effect of these facts may show that there had been a partition between the brothers during their lifetime. This is the consistent view of this Court and this proposition has again been reiterated in the case of **Ganesh Sahu Vs. Dwarika Sao, A.I.R. 1991 Patna 1 and 95 and 276.** Now, therefore, in view of the proposition, in the present case we have seen above, the fact entirely fits in the fact of the above decisions.

23. Over and above the evidences, the defendants have produced Ext.B series i.e. Ext.B-2/4, registered sale deed of the year 1979, Ext.B/2 registered sale deed of the year 1971, Ext.B-2/2 registered sale deed of the year 1981 and registered sale deed of the year 1954 (Ext.B-2/3), which are all inter-se transactions between the parties. The learned court below has also found these dealings to be inter-se dealing at page 13 of the judgment but did not decide the effect thereof.

24. A Division Bench of this Court in **Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwari and others, A.I.R. 1977 Patna 59** and a Single Bench in the case of **Vijay Kumar Srivastava & Ors. Vs. Anand Mohan Pd. & Ors, (2010) 4 P.L.J.R. 77** at paragraph **34** has held that **Separate transaction by members of a joint family may not by themselves establish separation but mutual transaction between members of family stands on an entirely different footing**

and they furnish a very strong evidence of separation.

25. Therefore, these documents i.e. registered sale deeds clearly prove that there was partition between the brothers. In the present case it may be reiterated that the separation is even admitted by the respondents. Only the dispute is regarding the year.

26. The learned counsel for the plaintiffs-respondents submitted that the defendant no.20 in his evidence as D.W.9 at paragraph 25 has stated that the parties are cultivating lands according to convenience. This statement proves the case of the plaintiff. So far this submission is concerned, it is one line statement only in the cross-examination. It is settled principles of law that the evidence has to be read in its entirety and not one line from here or the other line from there. From perusal of the evidence of this D.W.9, I find that he has fully supported his case of partition in the year 1924. Therefore, in what context and in answer to what type of question he gave such statement in his cross-examination is not clear. Moreover, this one line statement shall not wipe away his entire pleading or the examination-in-chief.

27. The learned counsel for the plaintiffs-respondents next submitted that the zamabandi is still joint between the parties. So far this submission is concerned also in my opinion on the basis of joint zamabandi no categorical finding can be recorded that the properties are still joint, particularly when it is the case of the plaintiff also that



there was separation in the year 1936. Now, let us examination in other way. The properties are joint according to the respondents then each and every member of the joint family has a right over each joint family property. In other words, none of the joint family members or the coparceners had any exclusive right over any particular property. If he has no exclusive right over any particular property then how many properties have been sold by one co-owner to the other co-owner and thereby transferred the title. This is the strong circumstance to show that there was partition and the parties were exercising their exclusive right and title on the properties which they got in the partition and in exercise of that right, title have sold the property to the other co-owner.

28. The learned counsel for the plaintiff-respondent next submitted that in the schedule of the written statement the properties which have been acquired after 1950 have also been mentioned and statements have been given in the body of the written statement that in the partition of the year 1924 these properties were allotted. According to the learned counsel in the year 1924 how the properties acquired after 1950 were partitioned. So far this submission is concerned, it can be said that the defects are in the different schedules of the written statements i.e. in the schedules the properties subsequent to partitions have also been mentioned but on this ground alone there cannot be any presumption that no partition took place. Further it is settled principles

of law that the court should not give emphasis to the form of pleading. The court has to find out the intention of the party from the pleading. Reference may be made to the decision of the Hon'ble Supreme Court in the case of **Ram Sarup Gupta Vs. Bishun Narain Inter College and others, A.I.R. 1987 SC 1242.**

29. From perusal of the impugned judgment, it appears that the court below has given much emphasis on the above three points raised by the learned counsel for the plaintiff-respondent. As I have discussed above, it is not necessary to reiterate here it again. It will suffice if I say that on the above grounds the court below could not have discarded or disbelieved the inter-se transactions between the parties themselves. Here, it is not a case of one stray transaction but there are series of sale deeds between the parties. Likewise there are series of acquisition of properties separately in their separate name since long i.e. near about half century. Therefore, the learned court below has wrongly come to the conclusion that there had been no partition and while recording this finding the court below has not considered the settled propositions of law laid down by the Supreme Court as well as High Court.

30. In view of my above discussion I find that there had already been partition between the parties as claimed by the defendants-appellants in the year 1924 and, therefore, the findings of the court below on this point are hereby reversed. Point no.(i) is, thus,

answered in favour of the defendants-appellants.

31. **Point No.(ii)** : The plaintiff claimed that Plot No.5797 and 6403 have been acquired out of the joint family funds, therefore, those are joint family properties. On the other hand, the defendants-appellants claimed that those are self-acquired properties of the appellants. The registered sale deed by which Plot No.5797 was acquired is dated 22.03.1929, Ext.B-2/8. Admittedly this sale deed stands in the name of Bhikham Rai son of Dayal Rai. Plot No.6403 was acquired in the year 1927 in the name of Dayal Rai only by settlement. Dayal Rai had executed the kabuliyat, Ext.B/1 in favour of the landlord. From perusal of the judgment of the court below it appears that the trial court considered the evidences of the supporting defendants and held that since they have admitted the possession of all brothers on these plots those are joint family properties. The learned counsel for the plaintiff-respondent submitted that the settlement was obtained in the name of karta and likewise sale deed was also obtained in the name of karta. So far these submissions are concerned, it may be mentioned here that there is no presumption that if the property stands in the name of karta, it will be presumed to be joint family property. Here in the present case, I have categorically recorded the finding that there had already been partition between the parties in the year 1924. These properties have been acquired after partition that too in the name of Dayal Rai. In such circumstances by no stretch of imagination

it can be said that the properties are joint family properties. I, therefore, find that the plaintiff-respondent failed to prove that Schedule II (ka) are the joint family properties, which were acquired out of joint family fund. The finding of the trial court on this point is hereby reversed.

32. In the result, this first appeal is allowed. The impugned judgment and decree are set aside and the plaintiff-respondent’s suit for partition is hereby dismissed. In the facts and circumstances of the case there shall be no order as to cost.

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(Mungeshwar Sahoo, J)