

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.32 of 1984

Against the judgment and decree dated 16.08.1983 passed by 4th Additional Subordinate Judge, Chapra in Partition Suit No.103 of 1976/25 of 1982.

Sheopujan Ojha & Ors.

.... Defendants-Appellants

Versus

Sonamati Devi & Anr.

.... Plaintiffs-Respondents

Appearance :

For the Appellants : Mr. Mr. Nagendra Rai, Advocate.

For the Respondents : Mr. Shashi Shekhar Dwivedi, Sr. Advocate.
Ms. Sangeeta Sharma, Advocate.
Mr. Ranjan Kumar Dubey, Advocate.
Mr. Rakesh Chandra, Advocate.

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:01-07-2015

The defendants have filed this first appeal against the judgment and decree dated 16.08.1983 passed by learned 4th Additional Subordinate Judge, Chapra in Partition Suit No.103 of 1976/25 of 1982 whereby the learned court below decreed the plaintiff-respondent's suit for partition to the extent of half share in the suit property.

2. The plaintiff-respondent had filed the aforesaid partition suit claiming half share in the suit property alleging that Bahadur Ojha was the common ancestor of the parties, who had three sons, namely, Dharamdeo Ojha, Dwarika Ojha and Brahmdeo Ojha. Dharamdeo Ojha died issueless in the state of jointness and thereafter



Bahadur Ojha also died in the state of jointness. The remaining two sons, namely, Dwarika Ojha and Brahmdeo Ojha came in joint possession of the suit land. Their names were recorded in the cadastral survey. Thereafter there was partition between two brothers half and half. After partition Brahmdeo Ojha died issueless leaving behind his widow Chunni Kuwar. Her name was recorded in the survey along with Dwarika Ojha. She died issueless in the year 1923 and the property of Brahmdeo Ojha came in possession of Dwarika Ojha. Dwarika Ojha also died in 1962 in jointness with the plaintiff and defendant no.1, who were coming in joint possession of the entire property. The plaintiff has two sons and two daughters. The plaintiff separated in 1965 from the defendants and the properties were divided half and half between the plaintiff and defendant but there was no partition by metes and bounds. Dwarika Ojha had executed a sale deed in favour of Ram Snehi Ojha, who came in possession. Ram Snehi Ojha also sold to Dwarika Ojha on 27.06.1949 plot nos.159 and 97 comprised within Khata No.42 measuring 5 kathas. The parties have constructed a new house in survey plot nos.120 and 121 of Khata No.29 wherein they are residing. The plaintiff asked for partition which was denied, hence, the suit was filed for partition.

3. The defendants-appellants filed contesting written statement. Although they admitted the genealogy but according to



them Brahmdeo Ojha died leaving behind his widow and a daughter, namely, Chunni Kuwar and Kaushalya Devi. The property of Brahmdeo devolved on widow and his daughter after death of Brahmdeo and they have constructed house on plot nos.120 and 121. The plaintiff and defendant have got no share in the said house. On the death of Brahmdeo Ojha his property did not devolve on Dwarika Ojha. After death of Kaushalya, her son Hiralal Singh came in possession, who executed registered sale deed in favour of defendant nos.2 to 4 on 16.09.1975 with respect to 3 bighas 10 kathas 18 dhurs and put the defendant nos.2 to 4 in possession. Subsequently Hiralal Singh also sold 1 bigha and 13 kathas of land in favour of defendant nos.2 to 4. The defendants-purchasers came in possession on the purchased land. The remaining lands are in possession of Hiralal Singh.

4. The further case of the defendants is that on the death of Dwarika Ojha in the year 1965 there was partition of the entire land, therefore, there is no unity of title and joint possession. Hiralal Singh was in possession over half share of Brahmdeo Ojha and remaining half share was in possession of plaintiff and defendants having half share each.

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

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- (i) Is the suit as framed maintainable?
 - (ii) Has the plaintiff got cause of action for the suit?
 - (iii) Is the suit bad for defect of parties and time barred?
 - (iv) Is Kaushalya Devi daughter of Brahmdeo Ojha and Hiralal Singh son of Kaushalya Devi?
 - (v) Is there unity of title and possession between the parties with respect to the disputed lands?
 - (vi) Is plaintiff entitled to a decree for partition? If so, to what extent?
 - (vii) To what other relief or reliefs if any, the plaintiff is entitled?

6. While deciding issue no.(iv) regarding parentage of Kaushalya Devi, the learned court below recorded a finding that the defendants have not been able to bring by cogent and reliable evidence that Brahmdeo Ojha had a daughter Kaushalya Devi and accordingly held that Kaushalya Devi is not the daughter of Brahmdeo Ojha. Accordingly, the plaintiff's suit was decreed.

7. It appears that during the pendency of the suit, application was filed for passing an order of abatement of the suit on the ground that consolidation proceeding was going on. The learned court below passed an order of abatement with respect to some of the properties and the judgment and decree was passed with respect to the remaining properties not covered under the notification under Section 3 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act. Before this Court an application was filed by the plaintiff-respondent being I.A. No.508 of 2001 praying that the suit with respect to the lands, which have abated, be also revived and the



matter be remanded for decision under Order 41 Rule 25 CPC. By terms of order dated 20.03.2001 the High Court found that there had already been denotification of the consolidation proceeding, therefore, the trial court was directed to dispose of the remaining suit and then according to the direction of the High Court, the trial court again after hearing the parties passed another judgment dated 30.09.2002 recording the same finding that Kaushalya Devi is not the daughter of Brahmdeo Ojha and accordingly decreed the plaintiff's suit with respect to remaining lands. Against the same finding/judgment the appellants have filed a petition/memo of appeal in this very First Appeal No.32 of 1984 after serving the copy to the other side. This court by terms of order dated 28.03.2003 directed that the objection petition/memo of appeal filed against the judgment and decree dated 30.09.2002 shall be considered at the time of hearing of the appeal. Accordingly, I heard the parties.

8. The learned counsel Mr. Nagendra Rai appearing on behalf of the appellants submitted that there are overwhelming evidences on record adduced by the appellants in support of their case that Brahmdeo Ojha died leaving behind a daughter Kaushalya Devi. The witnesses are either co-villager, relations or the family members of the parties but the court below wrongly interpreted and discarded the evidences of the witnesses and recorded a wrong finding that



Kaushalya Devi is not the daughter of Brahmdeo Ojha. According to the learned counsel for the defendants-appellants, defendant no.1 is none else than own brother of plaintiff, who is admitting the fact that Brahmdeo Ojha died leaving behind a daughter. The plaintiff has adduced negative evidence. The case entirely depends on the finding regarding the parentage of Kaushalya Devi. Since there is no documentary evidence on the parentage of Kaushalya Devi, the finding is to be recorded on appreciation of oral evidence only. The court below has not at all considered the law in right perspective and wrongly applied the decision of the Supreme Court, **A.I.R.1983 SC 684 (State of Bihar and others Vs. Sri Radha Krishna Singh and others)** and not considered the settled principles of law laid down by the Hon'ble Supreme Court in the case of **Dolgobinda Paricha Vs. Nimai Charan Misra, A.I.R. 1959 SC 914**. The learned counsel further submitted that the trial court has wrongly appreciated the evidence and discarded the evidences on untenable grounds. The learned counsel in support of his contention placed the evidences *in extenso*.

9. According to the learned counsel, in civil cases evidences cannot be discarded on grounds of being interested witnesses because in this case the dispute is with regard to parentage of Kaushalya Devi and the evidences of the relations, neighbours and

villagers are admissible under Section 50 of the Indian Evidence Act and their evidences could not have been discarded either on the ground of relation or interested witnesses. In support of his contention the learned counsel relied upon decision of this Court, **2013 (4) P.L.J.R. 414 (Mostt. Albia Khatoon & Ors. Vs. Zamil Azhar & Ors.)**.

10. The learned counsel further submitted that the evidence of witnesses in this country cannot be discarded on the ground of discrepancies as to time and date of matters in respect of which they do depose as the witnesses are mostly illiterate and their evidence as to time and date cannot be expected to be arithmetically correct. On these grounds the learned counsel submitted that both the impugned judgments and decree passed by the courts below be set aside and the plaintiff-respondent's suit be dismissed.

11. On the other hand, the learned senior counsel Mr. S.S. Dwivedi appearing on behalf of the plaintiff-respondent submitted that the court below has considered each and every evidence produced by the parties and then recorded the finding that Kaushalya Devi is not the daughter of Brahmdeo Ojha. After remand also again re-appreciating the evidences the same thing has been recorded. Therefore, this court while sitting in first appellate jurisdiction should not interfere with the finding lightly. According to the learned senior

counsel, the witnesses who deposed on behalf of the defendants are incompetent witnesses. The court below has considered their statements in detail and there is no illegality or irregularity in the judgment so as to warrant interference. On these grounds the learned senior counsel submitted that the first appeal be dismissed with cost.

12. In view of the above submissions of the learned counsels for the parties the only point arises for consideration in this first appeal is as to whether Kaushalya Devi was the daughter of Brahmdeo Ojha and whether the impugned judgments are sustainable in the eye of law?

13. According to the plaintiff, Brahmdeo Ojha died leaving behind only his widow Chunni Kuwar and on her death the entire property devolved on Dwarika Ojha and accordingly, Dwarika Ojha became absolute owner. There had been partition to the extent of half and half between two sons of Dwarika Ojha i.e. plaintiff Raghunath Ojha and defendant no.1, Dharamnath Ojha but there had been no partition by metes and bounds. On the contrary, according to the defendants Brahmdeo Ojha had died leaving behind Kaushalya Devi, his daughter and widow, Chunni Kuwar. After death of Brahmdeo Ojha the property devolved on widow and then to her daughter and then to son of Kaushalya Devi, Hiralal Singh. Admittedly the pleading of the plaintiff is that there had already been



partition between Brahmdeo Ojha and Dwarika Ojha. Now, therefore, the only question is whether Kaushalya Devi was the daughter of Brahmdeo Ojha? If Brahmdeo Ojha died leaving behind a daughter then the property of Brahmdeo Ojha will go to his daughter Kaushalya Devi and on her death it will devolve on her heirs. It is admitted fact that the entire property has been included in the partition suit i.e. the property of Brahmdeo Ojha also. According to the defendants, they have purchased the land from son of Kaushalya Devi by registered sale deeds. Since the defendants-appellants are raising the point that Kaushalya Devi is the daughter of Brahmdeo Ojha, the burden is on them to prove the same by leading cogent evidence. In support of their case the defendants have examined D.Ws.2 to 7, 9 and 10. Out of them D.Ws.2 to 4, 6 are co-villagers and D.Ws.5, 7, 9 and 10 are family members of the parties.

14. Almost all the above witnesses have stated that Brahmdeo Ojha died leaving behind his widow and a daughter, Kaushalya Devi. After death of Brahmdeo Ojha and Chunni Kuwar, Kaushalya Devi came in possession of the land and after her death her son, Hiralal Singh is in possession of the same, who sold the same to the defendants by two registered sale deeds. From perusal of the impugned judgments and decree, former and latter both, it appears that the courts below have discarded the evidences of the witnesses on

the ground of interestedness or that they did not disclose as to when they came to know about the parentage of Kaushalya Devi.

15. The Division Bench of this Court in the case of **Bishwanath Gosain Vs. Dulhin Lalmuni and others, A.I.R. 1968 Patna 481** has held that the evidence of witnesses in this country cannot be discarded on the ground of discrepancies as to time and date of matters in respect of which they do depose. Further it has been held that “the maxim *falsus in uno, falsus in omnibus* is no longer applied unqualifiedly even to criminal cases and it is now well settled that it is the duty of the Court to find out where the truth lies after separating the chaff from the grains. Therefore, if the evidence of a witness on the question of the alleged relationship between the respondent and the testator is found to be otherwise reliable, his testimony cannot be rejected merely because he has wrongly stated that the testator died in some other month.”

16. As stated above the witnesses are either relations or the co-villagers and even the parties to the suit. The Hon’ble Supreme Court in the case of **Dolgobinda Paricha** (supra) has held that the essential requirements of Section 50 of the Evidence Act are (i) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a



relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfil the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. The "belief" or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant and may, therefore, be proved. It appears that in the case before Supreme Court the question was decided as to whether the evidences of one Janardan Misra and Dharnidhar Misra were admissible under Section 50 of the Evidence Act regarding relationship.

17. The Hon'ble Supreme Court at paragraph 9 and 10 considered the fact that both of them were related to the family of Baidyanath Misra and held that because of this relationship the presumption is that they have special means of knowledge about the relationship. In the present case as stated above, D.Ws.5, 7, 9 and 10



are members of the family and also party in the suit, therefore, they have got special means of knowledge. The most important fact is that defendant no.1 is the brother of plaintiff. The other defendants are sons of defendant no.1. They are admitting that Brahmdeo Ojha had a daughter whereas the plaintiff is saying that Brahmdeo Ojha died issueless. The other witnesses, D.Ws.2 to 4, 6 are co-villagers and, therefore, they are also expected to have got special means of knowledge about the parentage. The learned court below discarded the evidences of these witnesses on the ground that some of them are interested and that some of the witnesses failed to point out as to when the relationship was disclosed to them. In my opinion, in view of the Division Bench decision referred to above on these grounds the evidences of these witnesses cannot be discarded. Hiralal Singh himself has been examined. Hiralal Singh has sold the property by two registered sale deeds in favour of the defendants. The plaintiff is not explaining as to how he sold the property and put the same in possession of the purchasers-defendants. If he and his mother were not related to Brahmdeo Ojha then as soon as any sale was made it was expected that the plaintiff should have objected. Moreover, if Kaushalya Devi was not the daughter of Brahmdeo Ojha then why the defendants purchased the land of Brahmdeo Ojha from Hiralal Singh son of Kaushalya Devi. Because on the death of Brahmdeo and

Chunni Kuwar, if Kaushalya was not the daughter, the property could have gone to Dwarika i.e. father of plaintiff and defendant no.1 but the defendant no.1, who is brother of plaintiff, and his sons are admitting the fact that Kaushalya Devi is the daughter of Brahmdeo Ojha.

18. From perusal of the subsequent judgment of the court below, it appears that the learned court below has wrongly applied the decision of the Supreme Court, A.I.R. 1983 SC 684 and held that Kaushalya Devi is not the daughter of Brahmdeo Ojha. The reasons assigned by the court below for discarding the evidences produced by the defendants are not at all acceptable and on the reasons, the admissible evidences could not have been discarded by the court below.

19. The plaintiff has adduced negative evidence. P.W.2 is the plaintiff. P.W.3 is of another village. P.W.5 is son of plaintiff and P.W.6 is daughter of plaintiff. They have stated that Brahmdeo Ojha died issueless. In view of the fact that defendants have adduced cogent and reliable evidences, the evidence produced by the plaintiff, which is in the form of denial, cannot be accepted. P.W.4 is the only villager, who has stated that Brahmdeo died issueless.

20. So far the dispute between the parties regarding construction of house on plot no.120 and construction of Dalan on



plot no.121 is concerned, it is specific case of the defendants that they have constructed the same on both the plots after partition. Partition took place in the month of Baishakh, 1965. In support of this case the defendants examined witnesses. D.Ws.3, 4, 5, 6, 9, 10 and 19 who have all stated that after partition the house and Dalan was constructed by the defendants. D.W.19 claimed himself to be bullock cart owner, who was carrying bricks for construction of house. The defendants in addition to the oral evidences stated above have produced Exts.D and D/1, which show various types of expenses during course of the construction. The court below discarded these evidences on the ground that there is no paper of previous partition and that Ext.D series were not produced at the time of earlier hearing. So far this observation of the court below is concerned, it may be mentioned here that at the time of earlier hearing these plots were not in dispute because order has been passed to the effect that the suit has abated except the four plots i.e. plot nos.82, 247, 461 and 265. In other words, the dispute between the parties at the time of early hearing and judgment with regard to the aforesaid four plots was only resolved. The matter was remanded by this court for deciding the other part of the suit regarding other plots after denotification under the consolidation Act. Therefore, after remand the documents have been produced. In such circumstances, the court below could not have

discarded Ext.D series by observing that those are manufactured documents.

21. It may be mentioned here that the defendants in the written statement pleaded that after death of Dwarika Ojha the partition occurred in the month of Baishakh, 1965 between the plaintiff and defendant no.1 and they separated in mess and business and also began to cultivate the lands separately. After this partition the constructions were made. It is not the case of the plaintiff that constructions were made prior to 1965. The plaintiff's witness P.W.2 Raghunath Ojha, who is plaintiff himself, in cross-examination at paragraph 5 has stated that after death of his father, Dwarika Ojha he was separated in mess and business from the defendant in the year 1965 but was cultivating the lands according to their convenience. Now, therefore, it is admitted case of the parties that there was separation between them in the year 1965. The plaintiff only stated that new constructions were made by the parties. It is not his case that prior to 1965 the constructions were made, whereas according to the defendants constructions were made after 1965. Since it is admitted by the parties that there was separation between them, it is for the plaintiff to prove specifically that the house was constructed jointly but no evidence to that effect was produced. The defendants as stated above have examined witnesses and also produced documents but the

court below wrongly discarded the same. I, therefore, find that the new constructions after 1965 were made by the defendants as claimed by them. The plaintiff failed to prove that the constructions over plot nos.120 and 121 were made by both parties jointly.

22. In view of my above discussion ultimately I find that the defendants have been able to prove that Kaushalya Devi was the daughter of Brahmdeo Ojha. After death of Brahmdeo Ojha the property devolved on his widow and daughter, namely, Chunni Kuwar and Kaushalya Devi respectively and on their death son of Kaushalya Devi, Hiralal Singh came in possession, who sold part of the property to the defendants and put the defendants in possession. The defendants have produced Exts.B and B/1, the two registered sale deeds executed by Hiralal Singh. The plaintiff failed to prove that the constructions over plot nos.120 and 121 were made after 1965 jointly whereas the defendants have been able to prove the fact that the constructions were made by them after separation in the year 1965.

23. From perusal of the written statement, it appears that the defendants categorically stated that except the properties purchased by them from Hiralal Singh, son of Kaushalya Devi and the part of the constructions made by them on plot nos.120 and 121 if partition is effected, they have got no objection. Since the defendants failed to prove categorically that there had already been partition by

metes and bounds, the plaintiff is entitled to half share in the property of Dwarika only. The property belonging to Brahmdeo Ojha, which was purchased by the defendants by Exts.B and B/1 are not available for partition.

24. It will not be out of place to mention here that on the same set of evidence earlier the suit with respect to four plots was decided. The question regarding parentage of Kaushalya Devi was decided elaborately, therefore, subsequently again there was no question of discussing the evidence elaborately arises but the court below discussed the evidences in another angle considering A.I.R. 1983 SC 684. It is settled principles of law that principle of *res judicata* applies in subsequent stages also in the same proceeding, therefore, the finding regarding parentage of Kaushalya Devi recorded in the earlier judgment was binding on the court below subsequently.

25. In the result, this first appeal is allowed in part. The impugned judgment and decree are modified to the extent that the plaintiff is entitled to half share in the property of Dwarika Ojha only. The property purchased by the defendants from Hiralal Singh by Exts.B and B/1, two registered sale deeds, and the property of Brahmdeo Ojha shall be excluded from partition and the new construction made by the defendants on plot nos.120 and 121 shall be considered at the time of final decree according to the principles of

partition if it is not the property of Brahmdeo Ojha. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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