

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.528 of 1985

Against the judgment and decree dated 16.07.1985 passed by 2nd Subordinate Judge-Chapra in Partition Suit No.118 of 1980.

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Shivji Singh

.... Plaintiff-Appellant

Versus

Sila Devi & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellant : Mr. Ganpati Trivedi, Sr. Advocate.

For the Respondents : Mr. Birendra Kumar, Sr. Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 19-05-2015

This first appeal has been filed by the plaintiff-appellant against the judgment and decree dated 16.07.1985 passed by learned 2nd Subordinate Judge-Chapra in Partition Suit No.118 of 1980 whereby the court below dismissed the plaintiff's suit for partition.

2. The plaintiff-appellant filed the aforesaid suit claiming partition of his half share in the suit property mentioned in Schedule-1 and 2. According to the plaintiff, Mohan Raut died leaving behind two sons, namely, Kardhan Raut and Ramdhani Raut. Mohan Raut and Kardhan Raut were recorded in C.S. Khatian. After C.S., Kardhan Raut died leaving behind his only son Lalu Raut and his brother Ramdhani in the state of jointness. The names of Ramdhani and Lalu were recorded in R.S. Khatian. Just thereafter Ramdhani and Lalu



separated themselves in the year 1924. The movable properties were partitioned and the share of both the parties was defined in respect to immovable property. They were cultivating some property separately and some property jointly according to their convenience. Ramdhani died in the year 1925-26 in the state of separation leaving behind his only son Keshwar Raut. Keshwar Raut also died in the year 1939 leaving behind his widow and a daughter Marachiya. The widow came in possession of the property and after her death in the year 1942 the sole daughter Marachiya came in possession of the property. Marachiya had a daughter Panpati. On the death of Marachiya in the year 1951 her daughter Panpati inherited the entire property of Keshwar and came in possession. Panpati is defendant 2nd set, who has got half share. She sold half share to the plaintiff on 04.02.1990 by registered sale deed. Possession was delivered and the plaintiff is coming in joint possession along with defendant 1st set.

3. The defendant 1st set contested the suit by filing contesting written statement. According to the defence, there is no unity of title and possession and that Ramdhani and Lalu Raut never separated among themselves. In fact Ramdhani died in the year 1919 in the state of jointness with Lalu Raut leaving behind his son Keshwar Raut. Therefore, there is no question of separation between Lalu and Ramdhani in the year 1924 arises. At the time of *shradh* of

Ramdhani, a *chittha* was prepared. The wife of Keshwar Raut predeceased. She died in the year 1333 fassali = 1938 in the month of Falgun.

4. The further defence is that Marachiya is not the daughter of Keshwar Raut and in fact Keshwar Raut died issueless in the state of jointness with defendant 1st set, therefore, the entire property was inherited by defendant 1st set by the principles of survivorship. Panpati is not the daughter's daughter of Keshwar Raut, therefore, she has no concern with Keshwar Raut or his property. She has no right to execute any sale deed in favour of plaintiff. The sale deed is forged, fabricated and the same was brought into existence with the help of a fictitious lady. Panpati never executed any sale deed in favour of plaintiff. No consideration passed nor the plaintiff came in possession of the disputed land. During lifetime Keshwar Raut had filed suit for realization of rent wherein he himself admitted that he and the defendant 1st set were members of joint family and he is the *karta*. He also dealt with the landed properties for himself and on behalf of the guardian of defendant, who was minor at that time. Some properties were acquired by the State of Bihar. The award was prepared and the defendant 1st set contested the case upto the High Court. In 1979 encroachment case was filed against Narsingh Sah. The plaintiff is the advocate clerk and is making pairvi on behalf of

Narsingh Sah.

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

- (i) Whether the plaintiff has got a valid cause of action for the suit?
- (ii) Whether the suit as framed is maintainable?
- (iii) Whether the court fee paid is insufficient?
- (iv) Whether there is unity of title and possession in between the parties with respect to the land in suit?
- (v) Whether the plaintiff is entitled to get the disputed land partition, if so, what is his share?
- (vi) To what relief or reliefs, if any, is the plaintiff entitled to?

6. On the basis of materials the learned trial court came to the conclusion that the testimony of plaintiff's witnesses furnishing separation is contrary to the pleading and as such their testimony regarding separation cannot be looked into. Thus the plaintiff failed to prove that Ramdhani and Lalu had ever separated among themselves in the year 1924. The learned court below also recorded the finding that the plaintiff has failed to prove the question of daughtership of Marachiya that she is daughter of Keshwar and accordingly dismissed the plaintiff's suit.

7. The learned senior counsel Mr. Ganpati Trivedi appearing on behalf of the appellant submitted that it is the specific case of the plaintiff that there was separation between two branches in the year 1924. No doubt in the pleading it is pleaded that Ramdhani

and Lalu separated but evidence was adduced by the plaintiff to the effect that two branches were separate. The learned court below without considering the substance of the pleading wrongly held that the evidences of the witnesses are contrary to the pleading. According to the learned counsel, the dispute between both parties was as to whether there was separation between them as alleged by the plaintiff or both the parties were joint as alleged by the defendant and who separated from whom, was not the question to be decided in the suit. The separation between both the branches relates back to the year 1924, therefore, no direct evidence will be available in the case. However, almost all the witnesses examined by the plaintiff have supported the fact that both the parties were separate. The defendants also admitted in the written statement that the plaintiff is not in possession of any part of the suit property, which means that the cultivation is done by the defendants. It is not their case that there was partition by metes and bounds. The defendants' main defence is that there was no severance of status. The court below, therefore, gravely erred in holding that the plaintiff failed to prove separation between Lalu and Ramdhani. The witnesses examined clearly proved that there was separation between both the branches since long, which clearly proves that there was no existence of coparcenary family, therefore, share was defined. In such circumstances the property of Keshwar

Raut will be inherited by the widow and then the daughter.

8. The learned senior counsel Mr. Trivedi secondly submitted that there are overwhelming evidence oral and documentary adduced by the plaintiff in support of the fact that Marachiya was the daughter of Keshwar Raut. Exts.5 and 6 are the public document wherein also Marachiya has been described as daughter of Keshwar Raut but the court below not only discarded these public documents but also disbelieved the statements of witnesses examined by the plaintiff and wrongly held that the plaintiff failed to prove that Marachiya was daughter of Keshwar. Likewise without considering the fact that the evidences adduced by the defendants are only to the effect that Keshwar died issueless and there is no mention about who is Marachiya Devi. The defendants 1st set with a view to grab the property of plaintiff merely denied the case of the plaintiff without any rhyme and reason. In such circumstances, the court below should have considered the conduct of the defendants. The court below has, therefore, approached the case in wrong angle and the judgment and decree as such is vitiated. On these grounds, the learned counsel submitted that the first appeal be allowed after setting aside the impugned judgment and decree and the plaintiff's suit be decreed.

9. The learned senior counsel on behalf of the respondents submitted that the plaintiff approached the Court with a



definite case that Lalu separated from Ramdhani. In view of this pleading the plaintiff will succeed only if he proves this fact. The court below has rightly considered the witnesses and come to the conclusion that the witnesses have not supported this pleading of the plaintiff rather all of them stated that Lalu and Keshwar were separate, whereas this was not the pleading of the plaintiff. The learned court below has rightly on the basis of the above facts held that plaintiff failed to prove separation as pleaded by the plaintiff. Secondly, the learned senior counsel submitted that even if the plaintiff succeeded to prove separation then also the suit cannot be decreed unless the plaintiff proves the fact that Keshwar had a daughter Marachiya Devi. Keshwar himself has admitted the fact that he had no issue and that he is Karta of the joint family. In such circumstances the court below has rightly held that the plaintiff failed to prove that Marachiya is daughter of Keshwar. Since this finding recorded by the court below is based on evidence, the finding cannot be interfered with. On these grounds the learned senior counsel submitted that the first appeal is liable to be dismissed with cost.

10. In view of the above contentions of the parties, the following points arise for consideration in this first appeal:

- (i) Whether the plaintiff-appellant has been able to prove the case pleaded in the plaint regarding separation and whether the finding recorded by the court below on this question is sustainable in the

eye of law?

- (ii) Whether the plaintiff has been able to prove that Marachiya Devi is daughter of Keshwar Raut or not and the finding of the court below on this question is sustainable in the eye of law or not?

11. **Point No.(i)** :- In the plaint, it is pleaded that Ramdhani and Kardhan Raut were joint. Sometime after survey Kardhan Raut died in jointness with Ramdhani Raut leaving behind a son Lalu Raut. In the C.S., Ramdhani and Lalu Raut were recorded jointly. After sometime of the survey Ramdhani and Lalu separated and divided the movable property. So far immovable property is concerned, their shares were defined and they started cultivating some of the property separately and some of the property jointly according to their convenience. Ramdhani died in 1925-1926 leaving behind only one son Keshwar Raut.

12. On the contrary, according to the defendants there was no separation between the two branches and Ramdhani never separated from Lalu. Ramdhani died in jointness with Lalu and likewise Keshwar also died in jointness with Lalu. Marachiya is not the daughter of Keshwar.

13. It may be mentioned here that it is admitted fact that Keshwar died in the year 1939 leaving behind widow. Because of the Hindu Women's Right to Property Act, 1937 she got the interest of her husband in the joint property. The pleading in the plaint is that



there was no partition of the joint family property. In other words, the property was the coparcenary property. The plaintiff in support of the fact that Ramdhani and Lalu separated themselves in the year 1924 examined many witnesses. Almost all the witnesses examined by the plaintiff have only stated that Keshwar Raut was separate from Lalu at the time of his death. There is no pleading to this effect in the plaint. None of the witnesses examined by the plaintiff have stated that there was separation of Lalu and Ramdhani in the year 1924. Therefore, the pleading of the plaintiff is not supported by the evidence and likewise the evidence of the plaintiff has got no basis of pleading in the plaint. Moreover, it is not the case of the plaintiff that there was partition of the suit property between two branches.

14. The learned senior counsel Mr. Trivedi submitted that the substance of pleading should be looked into and not the form of the pleading. The substantial pleading of the plaintiff is that there was severance of status of coparceners and the witnesses examined have stated that Keshwar was separate from Lalu at the time of his death which means that there was separation between two branches. No doubt in so many words the witnesses have not stated that there was separation between Ramdhani and Lalu but the meaning is the same. The defendants' defence is that there was no separation between two branches and in fact the family was joint. The court

below should have considered these principles and should have decided the same as to whether there was separation between two branches or were joint but wrongly held that the pleading is not supported by evidence. So far this submission of learned senior counsel for the appellant is concerned, as stated above it is his case that there was no partition by metes and bounds and the parties were cultivating land according to their convenience.

15. The Hon'ble Supreme Court in the case of **Girijanandini Devi and others Vs. Bijendra Narain Choudhary, A.I.R. 1967 SC 1124** has held at paragraph 6 and 7 as follows:

6. **"In a Hindu undivided family governed by the Mitakshara law, no individual member of that family, while it remains undivided, can predicate that he has a certain definite share in the property of the family. The rights of the coparceners are defined when there is partition. Partition consists in defining the shares of the coparceners in the joint property, actual division of the property by metes and bounds is not necessary to constitute partition. Once the shares are defined, whether by agreement between the parties or otherwise, partition is complete. The parties may thereafter choose to divide the property by metes and bounds, or may continue to live together and enjoy the property in common as before. If they live together, the mode of enjoyment alone remains joint, but not the tenure of the property."**
7. **"Partition may ordinarily be effected by institution of a suit, by submitting the dispute as to division of the properties to arbitrators, by a demand for a share in the properties, or by conduct which evinces an intention to sever the**

joint family : it may also be effected by agreement to divide the property. But in each case the conduct must evidence unequivocally intention to sever the joint family status. Merely because one member of a family severs his relation, there is no presumption that there is severance between the other members: the question whether there is severance between the other members is one of fact to be determined on a review of all the attendant circumstances.”

16. In the present case, except the statement by the witnesses that Keshwar was separate from Lalu at the time of his death, there is nothing on record in support of the fact that there was any intention of any coparcener to sever the joint family nor there is any material to show that any suit was filed seeking division of the property nor the matter was referred to Arbitrator or there is any conduct of any coparcener to show unequivocal intention or there was any agreement between the parties regarding severance i.e. to divide the property. All these requirements of law are only pleaded in the plaint.

17. On the contrary, the defendants proved Ext.E i.e. plaint of Title Suit No.519 of 1926. The original plaint was called for from the court concerned and it was exhibited. This plaint was filed by Keshwar in the capacity of Karta of the joint family for self and on behalf of the defendants, who were minor then. The suit was filed against the tenant. It appears that in the plaint Keshwar supported the



genealogy of this case and stated that the family was joint and is still joint and that he is Karta of joint family. According to the plaintiff, the separation took place in the year 1924. This case of separation in the year 1924 is falsified by this Ext.E, which is the admission of Keshwar. Now the question is if in the year 1926 the family was joint and Keshwar was the Karta then when there was partition in the family? So far this question is concerned, there is no explanation at all. It is not the case of the plaintiff that after 1926 there was any partition or separation. It is settled principles of law that the court has to investigate the case pleaded by the parties. If the plaintiff approached the Court which is clear case of separation in the year 1924, it is for the plaintiff to prove this assertion by adducing cogent, legal, admissible and reliable evidence. Here, Keshwar in unequivocal term admitted that the family was joint and he was Karta. According to the Hindu Law the family is presumed to be joint till the contrary is proved. As stated above the presumption of jointness is supported by this Ext.E. Further the defendants have filed Ext.G (deed of assignment). It was accepted by Keshwar wherein also Keshwar has executed the document for self and on behalf of the minor defendants and clearly stated that the family is joint.

18. The defendants have also examined D.Ws.2 to 4, 9, 12, 13 and 31 who have all stated that there was no separation

between the two family. Now, therefore, in view of the admission of Keshwar in the documents Exts.E and G at the time when there was no dispute between the family, can the oral evidence of the plaintiff that there was separation be relied upon? The answer is 'no'. It is very easy to plead that there was separation and the share was defined and to say the same thing in the evidence but there must be some material in support of the same, particularly the occurrence took place according to the plaintiff in the year 1924 and further the documentary evidences have been produced by the defendants contrary to the plaintiff's case.

19. In view of the above discussion I come to the conclusion that the plaintiff failed to prove separation between the two branches or partition between to branches and that the share of the two branches was defined. The admission is the best evidence. Here, the plaintiff is claiming through Keshwar and, therefore, the admission of Keshwar is binding on him, even if it is held that Marachiya is daughter of Keshwar. Therefore, in view of my above discussion, the finding of the Court below is hereby confirmed on this point.

20. In view of the above finding, now the matter can be looked into in other way. According to section 3 of the Hindu Women's Right to Property Act, 1937 the widow of Keshwar got the

interest of her husband only. The interest she got is the limited interest known as Hindu Women's Estate under Section 3 (3) of 1937 Act. The right which the widow got in this Section is a statutory right. Had the widow asked for partition of the joint family, the property would have devolved on her husband's share but in the present case admittedly she never filed any suit for partition nor ever claimed any partition.

21. A Full Bench of this Court in **A.I.R. 1964 Patna 261**

(*Mt. Khatrani Kuer Vs. Smt. Tapeshwari Kuer*) at paragraphs 31, and 37 has held as follows:

31. ".....a Hindu widow, when she gets the interest of her husband under S. 3(2) of the Hindu Women's Rights to Property Act (1937) does not become the coparcener in the joint family since under the Hindu Law it is only male members who can become one such, and he obtains this status by the mere circumstance of birth in a Mitakshara Hindu joint family. What the section gives to a widow is her husband's interest in the joint property and not his status or position in the joint family. Further the interest she gets is the limited interest known as Hindu Women's estate under Section 3 sub Section 3 of the 1937 Act. The interest in the joint family property taken by a widow under Section 3 Sub Section 2 is not taken by her by survivorship nor by inheritance. The right which the widow gets under this Section is a statutory right based on the fixation that half the body of the deceased husband survived in her. Section 3 sub Section 2, however, does not confer on her all the rights of her deceased husband though the interest she gets



in the joint property is the same as that of her husband. This means that so long as she does not claim partition, her interest is liable to fluctuate, i.e., to increase or decrease on the death or birth of a coparcener because though she does not become a coparcener in the family, she become a family member with especial statutory rights. Further if the widow asks for a partition, the joint family become disrupted and whatever share is given to her, on her death would pass on to her husband's heir but if she dies without asking for partition of her share and coparcener of her husband are living, the interest held by her would pass to those coparcener by survivorship, the reason being that during the life time of the widow, statutorily inheriting her husband interest right of survivorship of her husband's coparcener is only kept in abeyance. If there is no coparcener living at the time of death of the widow, the property held by her would again pass to her husband's heir."

37. "....the interest acquired by widow under Section 3 (2) is subject to the restriction on alienation which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, as a male owner may. If the widow after being introduced into family to which her husband belong does not seek partition on the termination of her estate, her interest will merge into the coparcenary property. But if she claims partition, she is savored from the other members and her interest become a define interest in the coparcenary property and the right of the other coparcener to get that interest by survivorship will stand extinguished. If she died after partition or her estate is otherwise determine, the interest in coparcenary property which has vested in her will devolve upon the heirs of her husband."

In the present case at our hand, as stated above, Ram Kumari never claimed any partition, therefore, her share was never defined. In such circumstances, if there was no partition then her interest will devolve on the coparcener.”

22. In view of the aforesaid settled principles of law that the property remained joint and on the death of widow in the year 1942 devolved on the coparcener. It will never go to the heirs of Keshwar Raut.

23. **Point No.(ii)** :- In view of my above findings, now this point is not necessary to be gone into because of the fact that even if Marachiya Devi is held to be a daughter of Keshwar Raut then also she will not be entitled to claim for partition in the suit property. If she is not entitled to and no right, then there is no question of transfer by her daughter arises. In other words, no title passed to the plaintiff, who purchased the property from the daughter of Marachiya.

24. In view of my above findings ultimately I come to the conclusion that the plaintiff has not derived any title through the sale deed said to have been executed by daughter of Marachiya nor he came in joint possession of the property and, therefore, he is not entitled to any share in the suit property. The transfer in his favour is made by a person who has no right, title, interest and possession.

25. 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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