

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9773 of 2012

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1. HIRA LAL VISHWAKARMA @ HIRA LAL MISTRY S/O LATE GARBHU MISTRY.
 2. MANJU DEVI WIFE OF SRI SHANKAR SHARMA AND DAUGHTER OF HIRLAL VISHWAKARMA ALIAS HIRA LAL MISTRY.
 3. AMRITA SHARMA.
 4. ARNIKA KUMARI (MINOR).
 5. AMIT KUMAR (MINOR).
- PETITIONER NO.4 IS DAUGHTER AND PETITIONER NO.5 IS SON OF SRI KAMESHWAR SHARMA (PRESENTLY TRACELESS) MINOR PETITIONER NOS.4 & 5 UNDER THE GUARDIANSHIP OF THEIR ELDER SISTER OF AMRITA SHARMA WHO IS THEIR WELL WISHER, NEXT FRIEND AND GUARDIAN.
- ALL RESIDENTS OF MOHALLA YARPUR, BEHIND BACK OF JHUNJHUN MAHAL JANTA ROAD, HOUSE NO. NY/86 A.P.S. GARDANIBAGH, DISTT.- PATNA.

.... PETITIONER/S

VERSUS

1. INDRADEO VISHWAKARMA S/O LATE GARBHU MISTRY
 2. MOSTT. CHINTA DEVI WIDOW OF LATE RAJENDRA VISHWAKARMA
 3. AJEET KUMAR SON OF LATE RAJENDRA VISHWAKARMA
 4. MITHILESH KUMAR SON OF LATE RAJENDRA VISHWAKARMA
 5. AMITA KUMARI MINOR DAUGHTER OF LATE RAJENDRA VISHWAKARMA AND UNDER THE GUARDIANSHIP OF HER MOTHER MOSTT. CHINTA DEVI WHO IS MOTHER AND WELL WISHER. RESIDENT OF MOHALLA YARPUR, BEHIND BACK OF JHUNJHUN MAHAL JANTA ROAD, HOUSE NO. NY/86 A.P.S. GARDANIBAGH, DISTT.- PATNA.
 6. SMT. RAKHI DEVI WIFE OF PRAMOD KUMAR VISHWAKARMA AND DAUGHTER OF LATE RAJENDRA VISHWAKARMA RESIDENT OF VILLAGE SHERPUR, P.O.- SHERPUR, P.S. MANER, DISTT.- PATNA.
 7. BRAHMDEO MISTRY ALIAS BRAHMDEO VISHWAKARMA S/O LATE GARBHU MISTRY.
 8. OM PRAKASH
 9. SATYA PRAKASH
 10. RAM PRAKASH
 11. GYAN PRAKASH
 12. JAY PRAKASH
- R. NOS.8 TO 12 ARE SONS OF SRI BRAHMDEO MISTRY ALIAS BRAHMDEO VISHWAKARMA. RESIDENTS OF MOHALLA YARPUR, BEHIND BACK OF JHUNJHUN MAHAL JANTA ROAD, HOUSE NO. NY/86 A.P.S. GARDANIBAGH, DISTT.- PATNA
13. SURESH VISHWAKARMA S/O LATE RAJENDRA VISHWAKARMA R/O AADILPUR, P.S. KHUSHRUPUR, DISTRICT- PATNA
 14. MOSTT. SHARDA DEVI W/O LATE PARMESHWAR PRASAD VISHWAKARMA RESIDENT OF MOHALLA GHASIYARI GALI, TARANI PRASAD LANE, PACHHIM DARBAJA, PATNCITY, P.S. KHAJEKALAN DISTRICT- PATNA.

.... RESPONDENT/S

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Appearance:

For the Petitioner/s : Mr. Jitendra Kishore Verma, Adv.
Mr. Anjani Kumar, Adv.
For the Respondent/s : Mr. Kalikant Jha, Adv.
Mr. Abhay Kumar Thakur, Adv.
Mr. Manish Jha, Adv.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT
Date: 22-12-2015

Petitioners/defendants being aggrieved by and dissatisfied with the order dated 26.03.2012 passed by Sub-judge-X, Patna in Title Partition Suit No.159 of 2005 whereby and whereunder petitioners/defendants have been directed to lead evidence first under the guise of Order-XVIII Rule-1 CPC, have filed instant petition.

2. Shorn of unnecessary details, it is evident that with regard to identification of 1/4th share in the property so detailed under Schedule of the plaint and further having ancillary relief in terms thereof, brought up Title Partition Suit No.159 of 2005 whereupon petitioners/defendants appeared and filed their W.S. wherein apart from pleading previous partition having effected in the family, they have also pleaded self-acquisition regarding the properties under dispute. Having variance in the respective pleadings, as is evident from the order impugned, Issue No.7 as well as Issue No.9 have been framed by the learned lower court on this score.

3. It is needless to say that burden lies upon the parties who comes to court to have finding recorded in his favour. Section 101 to 103 of the Evidence Act prescribes such obligation and once it is

discharged, then onus shift upon the adversary.

4. It is also duly acknowledgeable that even constituting joint family, a coparcener can acquire the property by way of self-acquisition which could be his self acquired property and it remains till time, the property is thrown in common hotchpotch.

5. In *D.S. Lakshmaiah and another v. L. Balasubramanyam and another* reported in AIR 2003 SC 3800 the matter has been considered and culminated under para-18 thereof.

“18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.”

There happens to be specific disclosure at the end of the plaintiff regarding existence of document in favour of forefather of petitioners/defendants and pleaded that aforesaid acquisition was made from joint Hindu family nucleus on account thereof, it was obligatory on his part to substantiate the same to enable him to have 1/4th share in the property as pleaded as well as relief so sought for relating to the same. The plea of defendants with regard to self-

acquisition comes subsequently.

6. For better appreciation it looks desirable to quote Order-XVIII Rule-1 CPC.

“1. Right to begin.- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.”

7. Because of the fact that under Hindu Law self-acquisition even constituting joint Hindu family is permissible on account thereof, the responsibility lies upon those who comes forward to plead that the property inspite of having in name of particular individual, is not his self-acquisition rather it happens to be the acquisition by joint family nucleus.

8. The aforesaid issue has elaborately been dealt with in *Chandradeo Singh and others vs. Moti Devi and others* reported in *1991 (2) PLJR 666* wherein after considering the relevant legal provisions as well as the judicial pronouncement on this very score has been held that directing defendant to adduce evidence first happens to be bad in law and further, setting aside the order directed the plaintiff to proceed first. Same view has been taken in *Mohammad Jahagir @ Mohammad Jahagir Alam vs. Sajda Khatoon & Ors.* Reported in *2007 (4) PLJR 100*.

9. Learned counsel for the respondents referred PLR 1995

Pat. 38 and further submitted that principle laid down therein has been relied upon by the learned lower court while directing the defendant to adduce evidence first in the background of putting reliance over deed of gift in favour of wife of defendant no.1 by Keshwar Singh as well as Somuran Singh and in the background of aforesaid factual aspect, the court had considered settled principle of law that a person who seeks to disbelieve the actual succession to the property has to begin with the evidence, is found not applicable in the facts and circumstances of this case, wherein there happens to be permissibility of self-acquisition, which was not the issue in the aforesaid case.

10. That being so, the order impugned is set aside. Petition is allowed. Plaintiff is directed to adduce evidence first.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 22nd day of Dec.,2015
Prakash Narayan

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