

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1263 of 2001

IN

First Appeal No. 555 of 1975

Chandeshwar Sah @ Chandeshwar Prasad(since dead), substituted by (1)Shiv Shankar Prasad, S/o Late Chandeshwar Prasad (2) Kaushalya Devi, Widow of Late Sheo Shankar Prasad, residents of village-Sursand, P.S. Sursand, District-Sitamarhi.(3) Shyama Devi, w/o Sri Narendra Prasad, resident of behind Central School, P.S. Samastipur Town, District-Samastipur(4) Krishna Kumar, W/o Sri Gopal Prasad, residing at Mohalla-Tumaria Tola, P.S. Raxaul, District-Motihar (5) Binita Devi, W/o Sri Bishwanath Prasad, residing at Mohalla- Kulamgaon, P.O. S. Raurkela, District-Sndergarh, Odisha, (3 to 5) are daughters of Late Sheo Shankar Prasad

.... Appellant/s

Versus

- 1.Yogendra Sah, son of Late Brij Lal Sah
2. Udai Chand Sah, son of Yogendra Sah
3. Radha Devi, wife of Late Baijnath Prasad, resident of Maruadih, Bahertawa Road, P.S. Marwadih, District-Varanasi(U.P)
4. Laxmania Devi, wife of late Ramji Prasad, resident of village-Janakpur Dham, P.S. Janakpur, District Mohalri(Nepal), at present resident of village Diwari, P.S. Sursand, District-Sitamarhi.
5. Phuljhari Devi, widow of late Brij Lal Sah
6. Parmeshwar Sah, son of late Brij Lal Sah
7. Ram Narain Sah, son of Parmeshwar Sah, all are residents of village Sursand, P.S. Sursand, District-Sitamarhi.

.... Respondent/s

Appearance :

For the Appellant/s : M/S. Devendra Kumar Sinha, Sr.Adv., Abhinay Raj & Kamal Kumar Sinha, Advocates

For the respondent nos.1& 2: :Mr. Purnendu Singh, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE SUDHIR SINGH

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 27-04-2015

This Letters Patent Appeal under clause 10 of the Letters Patent is preferred against the judgment and decree dated 20th September, 2001, passed by the learned single Judge of this Court in



First Appeal no. 555 of 1975. The First Appeal arose out of preliminary decree dated 12-8-1975 passed by the 2nd Additional Subordinate Judge, Sitamarhi, in Partition Suit No. 160 of 1973/47 of 1975. Defendant no.4, who filed this Letters Patent Appeal, has since died and his estate is represented by appellant nos.1 to 5. For the sake of convenience the parties are referred to, as arrayed in the suit.

2. Defendant nos. 3 and 4 i.e., Parmeshwar Sah and Chandreshwar Sah are sons of Brijlal Sah(defendant no.1) through his first wife, by name Gayatri. During the childhood of defendant nos. 3 and 4, their mother Gayatri died in or about 1950. Thereafter 1st defendant married Phuljhari Devi (defendant no.2) and through her he has begotten 1st plaintiff Jogindra Sah Uday Chandra Sah, 2nd plaintiff, is the son of 1st plaintiff.

3. The plaintiffs filed the suit for partition of separate portion of the property into five shares, and allotment of one share to them. It was pleaded that the grand-father of the 1st plaintiff and defendant nos. 3 and 4, by name, Nirsu Sah left behind him, the properties in two villages by name Sursand and Banauli of Sitamarhi District. It was mentioned that after the 1st defendant married the 2nd defendant, both of them migrated to Dibari village, where certain properties were purchased by the maternal uncle of the 1st plaintiff. It was urged that taking advantage of the absence of defendant nos. 1 and 2, at the

ancestral home defendant nos. 3 and 4, and in particular defendant no.4 has got the entries in the revenue records as regards the lands held by the joint family, in their favour. It was alleged that in spite of repeated demands the partition was not effected.

4. The contest in the suit was by the 4th defendant alone. He pleaded that the partition of the joint family properties, most of which are the lands left by Nirsu Sah, was effected in 1951 before the birth of the plaintiffs and one share each were allotted to his father (1st defendant), his brother (3rd defendant) and to himself, and ever since then, they are enjoying their respective shares. He further pleaded that the entries in the revenue records were made soon after the partition, and though at one stage the 1st defendant raised objection as regards the entries, they were overruled by the concerned authority of the Revenue Department.

5. The trial court passed a preliminary decree by taking the view that the plea of partition raised by the 4th defendant cannot be accepted.

6. The 4th defendant filed First Appeal No. 555 of 1975 before this Court. The learned single Judge dismissed the same through the judgment, which is under appeal.

7. Mr. Devendra Kumar Sinha, learned senior counsel for the 4th defendant submits that there is absolutely no basis for the trial



court to pass preliminary decree. He contends that the plea of prior partition taken by 4th defendant was proved through oral and documentary evidence, and without taking this aspect in account, the trial court has simply proceeded on assumption that no prior partition has taken place. He contends that the fact that the lands in different villages enjoyed by defendant nos. 1, 3 and 4 was totally ignored by the trial court and the preliminary decree was passed.

8. The learned senior counsel further submits that the judgment in the appeal is contrary to the very letter and spirit of Rule 31 of Order 41 of the Code of Civil Procedure, and except making an observation that the trial court has taken correct view of the matter, the learned single Judge did not discuss any aspect, much less did he frame points for consideration. He contends that not only the plea of prior partition taken by 4th defendant was established, but also the plaintiffs failed to make out a case for partition of properties.

9. Sri Purnendu Singh, learned counsel for the plaintiffs, on the other hand, submits that whenever a plea of prior partition is raised in a suit, the burden to prove that, rests squarely on the person, who raises it, and that in the instant case the 4th defendant has failed to discharge such burden. He pointed out that the 4th defendant raised a specific plea to the effect that the result of partition was effected in a memorandum of Panchanama, but the same was not made part of



record. He submits that the entries in the revenue records by themselves, do not determine the rights of coparcener, and the trial court and this Court in appeal, have taken the correct view of the matter. He placed reliance on the judgments of the Supreme Court and this Court, particularly in Raghavamma Vs. Chenchamma [AIR 1964 Supreme Court 136] in support of his contention.

10. The relationship among the parties is not in dispute. The 1st defendant had two sons i.e., defendant nos. 3 and 4 through his first wife Gayatri and the 1st plaintiffs through his second wife Phuljhari Devi (defendant no.2). In the suit for partition filed by the plaintiffs, the 4th defendant raised the plea of prior partition.

11. On the basis of the pleadings the trial court framed the following issues:-

- “1. Is the suit as framed maintainable?
2. Have the plaintiffs got any cause of action for the suit?
3. Is the suit barred by limitation, estoppel, waiver and acquiescence?
4. Is the suit bad for defect of parties?
5. Is there any unity of title or possession between the parties?
6. Is the genealogical table given by the plaintiffs complete and Correct?
7. Are the plaintiffs entitled to a decree of partition as claimed?
8. Two what relief or reliefs, if any are the plaintiffs entitled?”

12. On behalf of the plaintiffs, P.Ws. 1 to 6 were examined and certain documents were filed. On behalf of the

defendants, D.Ws 1 to 13 were examined and defendant no.4 filed certain documents. Almost all the issues were answered by the trial court in favour of the plaintiffs. In F.A. No. 555 of 1975 filed by the 4th defendant the learned single Judge did not frame any points, and agreed with the findings recorded by the trial court on all the issues.

13. In view of the extensive arguments advanced by the learned counsel for the parties before us, we find that the following points arise for consideration:-

- (a) Whether the judgment and decree passed by the learned single Judge in F.A.No. 555 of 1975 accords by the requirements of law?
- (b) Whether the plea of the 4th defendant that there was prior partition in the family, was proved by him?
- (c) Whether the preliminary decree passed by the trial court can be sustained in law?

14. The first point is about the legality and correctness of the judgment rendered by the learned single Judge in F.A. No. 555 of 1975 that gave rise to this L.P.A.. In the suit, several important questions of fact and law arose for consideration. The questions of law for example are (a) whether the partition in a joint family can take place at a stage when the Karta has still the possibility of begetting children; and (b) whether the partition, if it has taken place

at such stage would bind the children of the Karta born after partition. The questions of fact were (a) whether the family partition had taken place in the year 1951; and (b) whether the plea of the plaintiffs that they there were living separately for decades together, the family remained joint? These are just illustrative.

15. These and other allied aspects are required to be discussed and analyzed by the first appellate court. The reason is that it happens to be the final court on facts and is empowered to take its view, independent of the conclusions arrived at by the trial court. Obviously, because of that, Rule 31 of Order 41 of the Code of Civil Procedure requires that the first appellate court must not only state the points for determination in the appeal, but also shall assign reasons, in support of its decision. The provision reads as under:

“31. Contents, date and signature of judgment-The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled; and shall at the time that it is pronounced be signed and dated by the judge or by the Judges concurring therein.”



16. Hon'ble Supreme Court held on several occasions that the judgment of the first appellate court cannot be sustained in law if it does not satisfy the requirements of Order 41, Rule 31 C.P.C. One concession given in this regard, however, is that if the first appellate court has dealt with every issues that arise for consideration in the suit, the mere failure to frame points will not be fatal. Therefore, it needs to be seen as to whether the judgment in F.A. No. 555 of 1975 satisfies the requirement under law.

17. We have carefully gone through each and every line of the judgment in F.A., in view of the serious objection, raised by the learned counsel for the appellants. We find that except concurring with the conclusions arrived at by the trial court, the learned single Judge did not undertake any discussion worth its name, on any aspect whatever . He did not even make reference to the issues framed by the trial court, much less did he frame points in the appeal. Upto paragraph no.5, the judgment contains the facts or the gist of the argument of the parties. It was only in paragraph no.6 that a semblance of discussion, that too not a pointed one, was undertaken. At more places than one, in the said paragraph reference was made to the conclusions by the trial court and the appeal was ultimately dismissed.

18. For example, in the first portion of the paragraph no.6,



the learned single Judge observed “The trial court, on the basis of evidence adduced by the defendants had come to a definite finding that the defendants had failed to prove partition in the year 1951, as alleged by them.” A few lines thereafter it was observed “The lower court had examined all the witnesses examined as regards this partition in the year 1951 and it came to the conclusion that the evidence of the defendants was discrepant and unworthy of reliance and totally deficient in order to prove partition, as alleged.”

19. At the end of that paragraph the learned single Judge observed “I am of the opinion that the judgment of the trial court does not suffer from any illegality or irregularity”. The learned single Judge did not feel it necessary to analyse the evidence and the same is evident, when observed: “It is not necessary to discuss oral evidence threadbare by referring to the evidence of each and every witness”

20. From the above it becomes clear that the exercise undertaken while hearing and disposing of the appeal was not one, expected of a first appellate court. Even if we ignore the fact that no points were framed in the appeal, the judgment rendered in appeal can be sustained in law; once it emerges that the discussion was undertaken with reference to each and every issue with reference to the pleadings and evidence, there is no way. We, therefore, answer the point in favour of defendant no.4.



21. Normally, whenever the judgment of a first appellate court is found to be not in accordance with law, the matter is remanded to the very court for consideration and disposal. However, we do not find that to be a better option in this case. The reason is that the suit was filed way back in the year 1973 and more than four decades have elapsed. Remanding of the matter at this stage would bring the matter to square one. Instead, we have chosen to treat the present L.P.A. as though the First Appeal and then to examine whether the preliminary decree passed by the trial court can be sustained in law. With this objective we framed point nos. (b) and (c).

22. Coming to point no. (b) it has already been mentioned that the relationship between the parties is not disputed. The Karta of the family is 1st defendant. He had two wives. Through first wife he had defendant nos. 3 and 4, and from the second wife the 1st plaintiff. The resistance to the suit for partition was mainly by the 4th defendant by raising the plea of prior partition. According to him, soon after the death of his mother, 1st defendant contracted a second marriage and obviously to protect the interests of minors i.e. defendants 3 and 4, the 1st defendant effected partition in 1951 at the instance of well wishers. Since defendant nos. 3 and 4 were children of tender age at that time, the question of their demanding partition of the property does not arise. If it has taken place, it would be on the own accord of



1st defendant or at the instance of some well-wishers of the family. The reason for effecting the partition appears to be the 2nd marriage on the one hand and at the same time to protect the interest of two minor children i.e., defendant nos. 3 and 4 who lost their mother even while paving the way for the 2nd marriage of their father. Such arrangements are not unknown in the families of this nature.

23. Though the second point appears to be simple in its purport, it has several facets, and each of them will be dealt with the required amount of attention. Fortunately for us, the judgment of the Supreme Court in Raghavamma's case (supra) provides an answer to many such intricate questions of law.

24. One such facet is as to whether a partition can be effected, when the father of some of the coparceners, or for that matter his wife, is in a position to beget children in addition to the children they already had. After dealing with, in which manner the partition in a joint family can be brought into existence, their Lordships devoted considerable attention to this intricate question of law. The same becomes relevant to the present case. The reason is that by 1951 the 1st defendant who fathered defendant nos. 3 and 4 was not only in a position to beget further children, but also intended to marry another woman. That became true when he married the second defendant and the 1st plaintiff was born out of that wedlock. The discussion

undertaken in paragraph no.27 of the judgment is apt for the purpose of this case which reads as under:

“27. The main question of law that arises is whether a member of a joint Hindu family becomes separated from the other members of the family by mere declaration of his unequivocal intention to divide from the family without bringing the same to the knowledge of the other member of the family. In this context a reference to Hindu law texts would be appropriate, for they are the sources from which Courts evolved the doctrine by a pragmatic approach to problems that arose from time to time. The evolution of the doctrine can be studied in two parts, namely, (1) the declaration of the intention, and (2) communication of it to others affected thereby. On the first part the following texts would throw considerable light. They are collated and translated by Viswanatha Sastri, J., who has a deep and abiding knowledge of the sources of Hindu law in *Adiyalath Katheesumma v. Adiyalath Beechu*¹³; and we accept his translations as correct and indeed learned counsel on both sides proceeded on that basis. *Yajnavalkya, Chapter II, Section 121*. “In land, corrody (annuity, etc.), or wealth received from the grandfather, the ownership of the father and the son is only equal.” Vijnaneswara commenting on the said sloka says:

“...And thus though the mother is having menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place.” (*Setlur's Mitakshara*, pp. 646-48).

Saraswati Vilase, placitum 28. “From this it is known that without any speech (or explanation) even by means of a determination (or resolution) only, partition is effected, just as an appointed daughter is constituted by mere intention without speech.”

Viramitrodaya of Hitra Misra (Chapter II, Pl. 23).

“Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will of a single

coparcener).

Vyavahara Mayukha of Nilakantabhatta: (Chapter IV, Section iii-I).

“Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration “I am separate from thee” because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this mental state (or condition).”

The Sanskrit expressions “sankalpa” (resolution) in Saraswati Vilas, “akechchaya” (will of single coparcener) in Viramitrodaya “budhivishesha” (particular state or condition of the mind) in Vyavahara Mayukha, bring out the idea that the severance of joint status is a matter of individual direction. The Hindu law texts, therefore, support the proposition that severance in status is brought about by unilateral exercise of discretion.”

25. Though the discussion was about the nature of expression of intention; effect of the unpreparedness of the father to effect partition on account of his being able to beget further children was also taken note of. It was held that such a factual position does not make much of difference. In the instant case, the record discloses that the 1st defendant himself effected partition.

26. One of the arguments advanced by the learned counsel for the plaintiffs is that there could not have been any effective demand for partition by defendant nos. 2 and 3 and they were undisputedly minors in 1951. Factually that may be true. However, if the 1st defendant himself effected the partition, obviously to pave the way for his proposed marriage with the 2nd

defendant, the partition does not become inoperative. The partition that had taken place in the year 1951 does not suffer from any infirmity or illegality on account of the subsequent marriage of the 1st defendant with 2nd defendant and the birth of 1st plaintiff out of that wedlock.

27. Now the question is as to whether the partition took place in 1951 at all. This is purely a question of fact. Much would depend on the oral and documentary evidence which the parties, particularly 4th defendant, who pleaded partition, have adduced.

28. He not only deposed as witness but also examined other witnesses, who have stated in one voice that the partition in the family took place in 1951. The consistent case was that the family had lands in three villages and defendant nos. 3 and 4 were allotted the lands of first two villages Sursand and Banauli, whereas the first defendant was allotted the land in Dibari village.

29. Though at one stage the 4th defendant stated that the Panchanama evidencing the partition was prepared, in the next line stated that the copy of the Panchanama was not given to him and that it was retained by the Panches. Assuming that the 4th defendant failed to bring the Panchanama on record, the other facts pleaded by him need to be taken into account. He has placed before the Court the Khatian prepared in 1951 and certain

revenue records that were prepared few years after the alleged partition. In all of them, the names of defendant nos. 3 and 4 were shown as absolute owners.

30. Ext-C is the copy of the order passed by the authority under section 103 of the Bihar Tenancy Act. The first defendant raised some objection for the entries being made in favour of defendant nos. 3 and 4 in respect of the lands in those two villages. On 1-11-1962 the authority passed the following orders:

“ 1-11-1962. Parties are present. Dispute relates to Khesra nos.1209 and 4497. Rameshar Sah r/o Sursand states that objector Brijlal Sah has left the village and lives in another village named Dewari, Goodan Sah and Ramdeo Sah, r/o Sursand also state that the objector has now got no concern with the lands of Sursand and he lives in Dewani for over ten years and that he never visits this village. The objector fails to produce any evidence.

Order Objector's case is dismissed.”

This was not challenged by the plaintiffs or defendant no.1 and the order speaks for itself. Unless there was severance and partition in the family, there was no occasion for this order to be passed. There are other revenue records which reflect the exclusive ownership of the land in Sursand and

Banauli villages in defendant nos. 3 and 4.

31. We are conscious of the fact that the mere entries in the revenue records by themselves do not confer ownership. However, such entries can be taken into account, to know the nature of the enjoyment of the properties. The observation of the Supreme Court in Raghavamma (supra) in paragraph no.20 reads as follows:

“20. Now coming to the documentary evidence, as we have already indicated, all the relevant documents admitted to have been in existence have not been placed before the Court and as adverse inference has, therefore, to be drawn against the appellant. Even the documentary evidence filed in the case does not help the appellant. The family property is situated in three Villages, Paruchur, Upputur and Bodapadu. If there was a partition inter se between the four brothers, in the ryotwari settlement effected in 1906 the name of the brothers should have been entered separately in the revenue accounts; but the relevant register pertaining to that settlement has not been filed. Even in the later accounts of the year 1918 the name of Venkayya was entered only in respect of some lands in Village Paruchur, but no such entries are found in respect of the other villages. Those entries were made on a representation made by Chimpirayya and no one was interested to object to the entries. Even these accounts show that in the earlier register Pitcchayya's name was not entered. Though they have some probative value of possession, they do not show that the said lands shown against Venkayya fell to the share of Pitchayya at the partition in the year 1895. In *Bangala Chenu* alleged to have been given to Veeranna with a condition that after his death the four sons should take it in equal shares,



Venkayya did not get his share as he should if Pitchayya was divided from Chimpirayya and if he was adopted to Pitchayya. PW 2 admits that Chimpirayya had two acres in *Bangala Chenu* and Punnayya had the other two acres. This admission belies the statement that there was a partition inter se among the four brothers, for if the said partition was true, one acre should have fallen to Pitchayya's branch. PW 3 also says that Chimpirayya was in enjoyment of the said two acres.”

32. The facts in the present case are just in the reverse order. In the case before the Supreme Court the plea of partition was not accepted on the ground that though the lands were situate in three different villages and the statutory exercise of settlement of rights in land was undertaken, the names of the respective shares were not reflected in the records. In other words, had the names been reflected in such exercise, the partition could have been inferred. In the instant case the statutory exercise referable to the concerned villages took place in the year 1962 and the rights of defendant nos. 3 and 4 were accepted. Thus, the plea of prior partition by defendant no.4 is got strengthened. Thus, they have discharged their burden to prove prior partition.

33. The third aspect of this point is about the conduct of the parties. The plaintiffs themselves have stated in their plaint that defendant nos. 3 and 4 were separate for about 20 years prior



to the institution of the suit. It is not a mere case having different mess, by some coparceners of the joint family. It is permissible in law for the coparceners to have separate mess without disrupting the nature of jointness of the family. In such a case the return or proceeds of the joint family properties are held together, and they are enjoyed or distributed amongst the coparceners though not with mathematical precision, to the extent of their share. In other words, each and every item of property would be held by the members jointly, and the management of item by a particular member shall be, for and on behalf of the entire family. To buttress such a typical and complex situation, one has to lead evidence.

34. Obviously, in the present suit the burden is on the plaintiff to demonstrate that though they have separate mess, the family remained joint. This would have been possible if they proved that the yield from the lands in Dibari, were shared with defendant nos. 3 and 4 and the yield from the land of Sursand and Banauli or the sale proceeds of ten crores were shared by them, with defendant nos. 3 and 4. Not a whisper was made about this, much less any evidence was adduced.

35. More importantly, the Karta of the joint family i.e., 1st defendant owes an explanation as to how the properties



which he inherited from Nirsu Sah can be recorded in the exclusive names of various coparceners. The evidence of the 1st defendant does not at all command acceptability or respectability. His unqualified sympathy or favour towards the 1st plaintiff i.e., his son through second wife, and his animosity towards his two sons through first wife is glaring and evident from each and every word spoken to by him. He has no regard for truth. At one stage he has stated that the properties were purchased by him in the name of his father, but he did not substantiate the same. At another stage he stated that he purchased some properties which were under mortgage and he did not give any share of those properties to defendant nos. 3 and 4. In another sentence he stated that he handed over the property to his vendor. When such is the evidence of Karta of the family it is difficult to accept the same as the last word on the issue.

36. From the discussions undertaken above, we find that the oral and documentary evidence proves the factum of prior partition in the year 1951. Once that is so, the properties were not liable to partition once again at the instance of the plaintiffs. We answer point no.2 in favour of defendant no.4.

37. The 3rd point virtually stands answered with the finding on point no.2. Once it is accepted that there was prior

partition in the year 1951, and defendant nos. 1, 3 and 4 were enjoying their respective shares to the exclusion of others, there is no occasion or basis for effecting the partition once again. At the most, the plaintiffs may work out their remedies against the 1st defendant. On his part the 4th defendant has stated that he has not claimed any interest in the properties at Diwari. Serious objection was raised by him stating that the Schedule itself was misleading and incomplete. That was not even dealt with by the trial court or the learned single Judge.

38. Though the learned counsel for the plaintiffs placed reliance on some other judgments, we do not feel the necessity to deal with the same in detail in view of the conclusions reached by us on the points framed.

39. We, therefore, allow the L.P.A and set aside the judgment and decree in F.A. No. 555 of 1975 and set aside the preliminary decree passed by the trial court

(L. Narasimha Reddy, CJ)

(Sudhir Singh, J)

B.Roy/Singh AFR

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