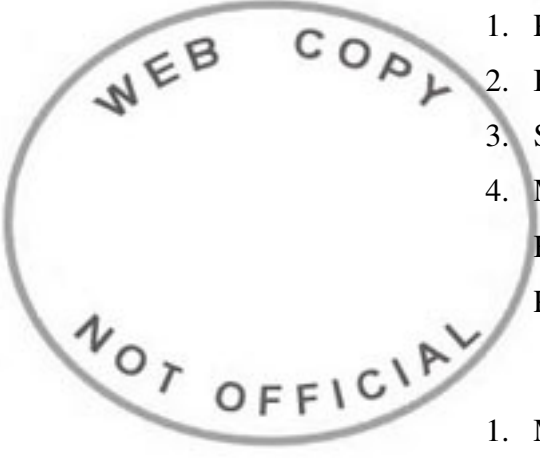


IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.509 of 2012

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1. Prabhu Nath Das, son of late Baij Nath Das.
 2. Bishwa Nath Das, son of late Baij Nath Das.
 3. Sulochana Devi, Daughter of late Baij Nath Das.
 4. Mahadeo Singh @ Popat Lal son of late Kashi Nath Das, all by caste Hindu, by occupation service and cultivation, resident of Sabour, P.O. and P.S. Sabour, Dist. Bhagalpur.

.... Appellant/s

Versus

1. Mostt. Sakuni Devi, wife of late Mahabir Das.
2. Binu Das, son of late Mahabir Das.
3. Rajesh Das, son of late Mahabir Das.
4. Gopal Das, son of late Mahabir Das.
5. Bishnu Das, son of late Mahabir Das all by caste Hindu, by occupation service and cultivation, resident of village-Sabour, P.O. and P.S. Sabour, Dist. Bhagalpur.
6. Jyoti Kumari, daughter of late Mahabir Das, resident of village Sabour, P.O. and P.S. Sabour, Dist. Bhagalpur at present wife of Krishnandan Das, residing at c/o Ramji Das Mali, D.s. College Campus, Katihar, P.O. Head Post Office, Dist-Katihar.
7. Manju Devi, wife of Baramhadeo Haijan, C.T.T.I.2, N.F. Railways, Katihar, Railway Quarter no. 73/F old Hospita, Para, P.O. Head Post Office, Dist. Katihar.
8. Muni Devi, wife of Sri Sahdeo das, resident of village-Barahari, P.O. Badaluchak, District-Bhagalpur-813110.
9. Mala Devi, wife of Sri Binod Das, resident of village-Panjwara Harijan Tola, P.O. Panjwara, District-Banka-813110.
10. Upendra Das, son of late Pango Das (husband of late mamta Devi)
11. Pankaj Das, Minor son of Upendra Das.
12. Chandan Das, Minor son of Upendra Das.
13. Sandeep Das, Minor son of Upendra Das.
14. Chotu Das, Minor son of Upendra Das.
15. Jeevan Das, Minor son of Upendra Das.
16. Hira Das, Minor son of Upendra Das.

17. Anuradha Kumari, Minor daughter of Upendra Das, no. 11 to 17 all minors under the guardianship of their father and natural guardian Upendra Das who has no interest adverse to the minors. No. 10 to 17 all resident of village Gopalpur, P.O. Bahadurpur, P.S. Zeromile, District-Bhagapur.

18. Jagdish Das.

19. Parshadi Das.

20. Badri Das.

21. Mahendra Das.

22. Patel Das, no. 11 to 15 son of late Dhanni Das, by caste Hindu, by occupation service and cultivation, resident of village Sabour, P.O. and P.S. Sabour, District-Bhagalpur.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr.

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL ORDER

7 22-06-2015

Heard Mr. Ray Saurabh Nath, the learned counsel

for the appellants in support of this appeal.

The defendants are the appellants in this appeal against the judgment and decree of affirmance.

The plaintiff filed the partition suit praying for partition of his 1/3rd share in the properties described in schedule-A and half share in the properties described in schedule-B of the plaint. The plaintiff's case, in short, is that there had earlier been partition in the family of the plaintiff and the defendants in the year 1960 but there was no partition by



metes and bonds for the properties described in schedule-A and B of the plaint although the shares were defined in those properties and parties were enjoying the usufruct in accordance with their shares. With regard to schedule-B property, it has been the specific case of the plaintiff that the share in the said property have been divided only between the plaintiff and the defendant 1st set to the extent of half and half and the defendant 2nd set has not been allotted any share therein as another land was allotted to them in lieu thereof.

The suit has been contested only by the defendant 1st set. In the written statement, the defendant 1st set has pleaded that the property described in schedule-A of the plaint is his self acquired property and he has been in exclusive cultivating possession of the same. It has been further case of the contesting defendant that though in the partition of the year 1960 half share was allotted in schedule-B properties to this defendant but subsequently by mutual adjustment the entire schedule-B property came in his exclusive possession.

The defendant 2nd set has filed the written statement supporting the case of the plaintiff.

The trial court, after scrutiny of the pleadings and evidence, returned the finding that the contesting defendant

failed to prove the case of self acquisition of schedule-A property and also his exclusive title over schedule-B property by mutual adjustment, as pleaded. The suit was accordingly decreed passing preliminary decree of partition in favour of the plaintiff. In appeal by the contesting defendant, the appellate court, on reappraisal of evidence, has concurred with the findings of the trial court and dismissed the appeal by the impugned judgment and decree.

Mr. Nath, the learned counsel for the appellants has submitted that both the courts below have erred in law in discarding the statement made in the deed of partition (Ext.-1) showing that schedule-A land was the self acquired property of the defendant 1st set. It has been further submitted that once after the partition of the joint family properties in the year 1960 has been accepted, the present suit for partition is not maintainable unless the re-union is pleaded and proved. It has also been canvassed that both the courts below have erred in law in not considering the bar of Section 37 of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956.

After perusal of the judgments of both the courts below and considering the submissions, it is pellucid that the suit has been filed for partition of schedule-A and B properties of the



plaint to the extent of $\frac{1}{3}^{\text{rd}}$ and $\frac{1}{2}$ share of the plaintiff in the same. Both the parties have admitted that there was partition in the year 1960. It is, however, the case of the plaintiff that in the said partition only the shares of the parties in schedule-A and B properties were defined but no partition by metes and bonds was made. On the other hand, it is the case of the defendants that the schedule-A properties were not the subject matter of partition as it has been his self acquired property. The unregistered deed of partition in the year 1960 has been brought on record in evidence by the plaintiff as Ext. 1 and by the contesting defendant as Ext.-B. On perusal of this deed of partition (Ext.-1 and Ext.-B), both the courts below have found that the schedule-A property has been allotted to the three branches i.e. the plaintiff, the defendant 1st set and the defendant 2nd set in equal shares to the extent of 1 bigha, 12 katha and 5 dhur each but without specifying the plots. With regard to the recital in the said deeds to the effect that the land of Barhari Mauza bearing plot no. 294 khata no. 34 was the self acquired property of Baij Nath Das (defendant 1st set in the present suit) and other co-sharers had no share in the same, it has been found by both the courts below after scrutiny of Ext.-1 and Ext.-B that the said recital has been inserted by making interpolations. It has been further found by both the courts below



that there was sufficient nucleus in the joint family for acquisition of the schedule-A property and the defendant 1st set has failed to adduce cogent evidence to establish his self acquisition. The case of the defendant 1st set that he was in service since 1942 at the age of 17 years has been disbelieved by the courts and in sequel, the acquisition of schedule-A property in the year 1944 by him at the age of 19 years has also been disbelieved. These findings have been recorded by the courts below after analysis of the oral and documentary evidence and this Court has not been persuaded to find unreasonableness or perversity in any manner in the same.

The submission on behalf of the appellants that the suit was bad for partial partition has also no substance in view of the denial by the contesting defendant of any partition of the suit property in Schedule-A earlier and also in view of the recitals in the deed of partition (Ext.-1 and Ext.-B) showing that only the shares were defined but no partition was done. Similar is the position with regard to schedule-B property for which the contesting defendant has failed to establish his exclusive title by mutual adjustment as claimed by leading cogent evidence.

It has also been argued that the suit was barred under Section 37 of the Bihar Consolidation of Holdings and

Prevention of Fragmentation Act, 1956. It has been pointed out on behalf of the appellants that the record of right in the consolidation proceeding for the suit property has been prepared in the name of the appellants and, therefore, the jurisdiction of the civil court to take a decision contrary to the same is clearly ousted. Manifestly, the suit has been filed for partition of the properties mentioned in schedule-A and B of the plaint and there is no relief to vary or set aside any order passed under the aforesaid Consolidation Act. As held by the Apex Court in the case of **Achyutanand Choudhary Vs. Luxman Mahto A.I.R. 2012 SC (supp) 142** even a certificate issued to a Raiyat under Section 15 of the said Act only embodies a Rule of evidence and does not create a bar to the jurisdiction of the civil court. As such, this Court does find any substance in this submission.

Ex consequenti, there is no substantial question of law arising for consideration in this appeal, which is, accordingly, dismissed.

(V. Nath, J.)

Devendra/-

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