

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.521 of 2013

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1. Bishuni Harijan @ Bishuni Ram
 2. Ram Kishun Harijan, both sons of late Gulhar Harijan, resident of Village Sihorawan, P.O. Panchphera, Police Station Mirganj, District Gopalganj.

.... Appellant/s

Versus

1. Nayak Ram @ Nayak Harijan, son of late Sheodhar Harijan
2. Ram Jiwan Ram
3. Jaleshwar Ram, sons of late Bhagrasan Ram
4. Sharda Devi, daughter of Bhagrasan Ram and wife of Moti Lal Ram
5. Sobha Devi, daughter of Bhagrasan Ram and wife of Subhas Ram
6. Sheo Mangal Ram @ Sheo Mangal Harijan
7. Sheonath Ram @ Sheonath Harijan, both sons of Bhev Sagar Harijan, all resident of Village Sihorawan, P.O. Panchphera, P.S. Mirganj, District Gopalganj.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. MADHUKAR PANDEY

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 10.11.2015

Heard the parties.

2. In the present appeal the appellants are challenging the judgment and order dated 5.3.2013 passed by the Adhoc Additional District Judge-IV, Gopalganj in Title Appeal No.20 of 1996/100 of 2009 by which the appellate court has set aside the judgment and preliminary decree dated 23.5.1995 passed by Sub Judge III, Gopalganj in Title Suit No.320 of 1986 making half and half share between the plaintiffs and defendants.

3. A title suit was filed by the plaintiffs-appellants against the defendants-respondents claiming to half and half share with

respect to the land in question involved in T.S. No.320 of 1986.

4. Before entering into the merit of the claim of the parties it will be relevant to consider the genealogical table furnished by the parties. Mewar alias Dukhi Chamar is the common ancestor. Dukhi Chamar has two sons, namely, Mahesh Chamar and Ragunath Chamar and Mahesh Chamar has two sons, namely, Bjajhu Chamar and Shivam Chamar. Bhajhu Chamar has two sons, namely, Shidhari and Chal Bidhar. Sons of Shivdhari and Chal Bidhar are defendants in the suit. Shivam has one son namely Lal Chand. Raghunath Chamar has one son, namely, Bigu Chamar and Bigu Chamar has two sons namely, Guljar Chamar and Mangaru Chamar. The heirs and successors of Guljar Chamar and Mangaru Chamar are plaintiffs of this case. They have claimed that the land was not partitioned by metes and bounds. Claim has been made for half share in the scheduled land and stated that they have wrongly been given one third share when they are entitled to half share in the scheduled land. It has been claimed that there was separation in between heirs and successors of Mahesh Chamar and Raghunath Chamar prior to revisional survey, but having no partition, by metes and bound, rather as it where is basis. It has been claimed that Revisional Survey entry with respect to

the land is correct but to the column of possession has wrongly been recorded.

5. Defendants appeared and took the plea that Mewar Chamar has no alias name Dukhi. Dukhi has two sons, namely, Mahesh Chamar and Raghunath Chamar also having daughter Runia married with another Raghunath who is son-in-law. In this way there are two Raghunath. One is son and another is son-in-law. The defendants have claimed that father name of Raghunath (son-in-law) is Mewar and as such Mewar and Dukhi are two different distinct persons. Dukhi is father of Mahesh and Ragunath (son) and Mewar is the father of Ragunath (son-in-law). Raghunath was very poor. It is very difficult for him to carry family life so Dukhi kept his son-in-law and daughter Rumia with him, gave them one third share in the property. Before his death Dukhi directed his son Mahesh and Ragunath that they would not disturb their sister and brother-in-law after his death and accordingly the name of Raghunath was recorded in R.S. Khatian. Mahesh and Raghunath (son) were dead. Bhajhu and Sivam were minor, Raghunath (son-in-law) taking advantage of the situation got his name entered in column 2 of R.S. Khatian to the extent of half share but the authority found the possession of Raghunath

(son-in-law) of one third share. Accordingly in the possession column it has been recorded as two third share with respect to the defendants and one third to the plaintiffs.

6. So the issue was involved whether the said Raghunath Chamar is son or son-in-law of Dukhi Chamar and also whether Dukhi Chamar looking to the poverty of Raghunath (son-in-law) kept the daughter and son-in-law and gave one third share. So it was an important point about the relationship of Raghunath with Runia. Whole case moves around the relationship of Raghunath and Runia with Dukhi. Is Raghunath is son-inlaw married with Runia, as claimed by defendant to be daughter of Dukhi. In R.S. Khatiyani half and half share has been recorded with respect to the plaintiffs and defendants but possession has been given one third and two third. Unity of title and unity of possession is also important point for consideration for a partition as both of them have been shown having share and possession, not compatible to each other as per the entry made in the R.S. Khatiyani itself. The relationship of father and daughter with Dukhi to Runia and father-in-law and son-in-law of Dukhi and Raghunath will be decided only after the evidence in terms of Section 50 of the Evidence Act. Only entry made in the revenue record and some other documents cannot be a basis

for deciding the relationship. The relationship has to be established on the basis of the oral evidence including the documentary evidence then the question would arise whether there is unity of title and unity of possession.

7. The trial court has framed the issue specifically “whether Raghunath Chamar and ancestor of the plaintiffs was Dukhi Chamar or he was son-in-law of Mewar Chamar but he has not framed an issue with regard to unity of title and unity of possession. The trial court on the basis of entries made in the revenue record declare that Raghunath Chamar was son of Dukhi Chamar but the test and requisites for establishing the relationship in terms of Section 50 of the Evidence Act is lacking and straightway after declaring the relationship directed for half and half share in the property rather it has to be decided about unity of title and unity of possession.

8. The appellate court has set aside the judgment and decree on the premise that trial court has not investigated the issue of unity of title and unity of possession which is a core issue before declaring the share of parties in the property in question.

9. Learned counsel for the appellants has submitted that plaintiffs and defendants as it apparent from the relevant



pleading and evidence that they were well familiar and knowing with the existence of the area of dispute and issues. They have not only pleaded but also led evidence, in such situation want of framing the issue did not cause any prejudice nor the proceeding vitiated and it was not proper for the appellate court to remand back the case. He has placed reliance on the judgment in the case of Nedunuri Kameswaramma v. Sampati Subba Rao, reported in AIR 1963 SC 884, Sayeda Akhtar V. Abdul Ahad, reported in (2003) 7 SCC 52, Smt. Gayatri Devi vs. Ram Balak Singh & Ors. Reported in 2014(1) PLJR 356, paragraph 9 and Laxmi Mahto & Ors. Vs. Leela Devi @ Bindeshwari Devi & Ors. Reported in 2014(1) PLJR 358. On the strength he submits that in stead of remanding back the matter the appellate court ought to have decided the case on its merit.

10. On the contrary, learned counsel for the respondent justified the order of the appellant court having not committed any error of law in remanding back the matter. Before reaching to finality, relevant to examine the judgment relied upon by the parties. In the case of Nedunuri Kameswaramma (supra) the suit was filed for ejectment of the respondent from Jeroyti land. Challenge was made that the land was not Jeroyti land but was



part of a Dharmila inam land. Two issues were under consideration (a) whether the suit should be dismissed on the ground of want of proper pleas by the appellant in answer to written statement, (b) whether the decision that this was not a Karnikam service inam is proper in the circumstances of this case. Claim was made that the land was a Karnikam service inam and whether there was a valid resumption and a valid re-grant were not framed. The trial court and appellate court allowed the suit but at the second appellate stage the High Court has dismissed the suit itself. One of the questions was framed whether the suit has been dismissed on the ground of want of proper pleas by the plaintiff, in answer to the written statement. The appellant has already pleaded that this was a Jeroyti land in which a patta in favour of her predecessors existed. Respondent has claimed that it was a Dharmila inam land not Jeroyti land. The Hon'ble Supreme Court said that no issue was framed, and the one, which was framed, could have been more elaborate but the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case or that there was that mis-trial which vitiates proceedings. It

will be relevant to quote relevant portion of paragraph 5 of the aforesaid judgment:

“....No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings. We are, therefore, of opinion that the suit could not be dismissed on this narrow ground, and also that there is no need for a remit, as the evidence which has been led in the case is sufficient to reach the right conclusion. Neither party claimed before us that it had any further evidence to offer. We, therefore, proceed to consider the central point in the case, to which we have amply referred already.”

11. Same judgment has been referred in the case of Sayeda Akhtar (supra).

12. In the present case the appellate court though has held that issue with regard to unity of title and unity of possession has not been framed but nowhere recorded a finding that evidences are not available on record to examine the issue and record a finding. If the evidences are already on record merely absence of an issue framed by the trial court will not compel the appellate court to remand back the matter for fresh trial. The appeal is a continuation of the trial as per Section 107 of the Code of Civil Procedure. So much so order 41 Rule 24 of the



Code of Civil Procedure makes it abundantly clear that in case the evidences are available in such circumstances the court in stead of remanding back the matter can itself frame the issue and investigate the facts of case and record a finding. Only in the event the evidences are not available on record added with the situation for non-framing of the issue in that circumstance the appellate court would be justified in remanding back the matter but relationship has to be tested on the anvil of Section 50 of the Evidence Act not merely only on the basis of some entries in the revenue record.

13. In such view of the matter, the order dated 5.3.2013 passed by the appellate court is set aside and matter is remanded back to the appellate court to decide the case in accordance with law.

14. Accordingly this appeal is allowed.

(Shivaji Pandey, J)

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