

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.285 of 2013



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1. Prabhunath Puri.
 2. Ram Lakhan Puri.
 3. Dashrath Puri.
 4. Om Prakash Puri.
 5. Raj Kumar Puri.
 6. Kalawati Puri.
 7. Shakuntala Devi.
 8. Gandhi Devi, all are sons and daughters of Late Kapildeo Puri, resident of village-Machhager Jagdish, P.S.-Mirganj, P.O. Hathwa, District-Gopalganj.
 9. Banka Puri.
 10. Smt. Rugadi.
 11. Smt. Kusumi Devi, all son and daughters of late Paramhans Puri.
 12. Ram Bihari Puri, son of late Nagina Puri, all are residents of village-Machhager Jagdish, P.S.-Mirganj, P.O. Hathwa, District-Gopalganj.

.... Appellant/s

Versus

1. Tota Puri.
2. Sudarshan Puri.
3. Paspatti Puri.
4. Chandeshwar Puri.
5. Subash Puri, son of late Ambika Puri, all are resident of village-Machhager Jagdish, P.S.-Mirganj, P.O. Hathwa, District-Gopalganj.
6. Smt. Prabhawati Devi, wife of late Persuram Puri and daughter of late Ambika Puri, resident of village-Chintawanpur, P.S.-Dhurawandha, District-Siwan.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ranjan Kumar Dubey, Adv.
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL ORDER

7 15-12-2015

Heard Mr. Ranjan Kumar Dubey, the learned counsel for the appellants.

This appeal has been filed both by the plaintiff-appellants as well as the defendant-appellants 2nd set in the suit assailing the judgment and decree of reversal by the appellate court below. The learned counsel for the appellants has prayed for adjournment to file petition for deleting the names of the appellants second set stating that they have been wrongly impleaded as appellants and instead should have been arrayed as respondents. However, in view of the fact that this second appeal has been pending since 2013 and has not been heard under Order 41 Rule 11 C.P.C. even after condonation of delay long back in the year 2014, this Court is not inclined to grant adjournment at this stage, as prayed. The prayer is, accordingly, rejected and the matter has been heard on merits.

The plaintiffs filed the suit for partition. It was the case of the plaintiffs that there had been earlier partition in the family in the year 1962 but the suit property was left joint for which a decree for partition was prayed. The defendants resisted the claim of the plaintiffs and asserted that the suit property was the self acquired property of the defendant Ambika Puri and there was no unity of title and possession between the parties for the

same. The material note of discord between plaintiffs and the defendants therefore was the nature of the suit property either to be joint family property or the self acquired property of one of the co-sharers namely Ambika Puri.

The trial court decreed the suit returning the finding that the suit property was joint family property of the plaintiffs and the defendants. In appeal, by the defendant Ambika Puri (since deceased through L.R.), the appellate court below on reappraisal of pleadings and evidence, has overturned the findings of the trial court, allowed the appeal and dismissed the suit. It has been held by the appellate court below that the plaintiffs have failed to plead and establish that the suit property, though acquired in the name of the defendant Ambika Puri, was acquired out of the joint family property/fund.

Mr. Dubey, the learned counsel for the appellants has firstly contended that even though there was no pleading that the suit property was acquired out of joint family fund or there was sufficient nucleus in the family out of which the suit property could have been acquired but if the parties were aware of this issue arising between them and had led evidence then the absence/lack of pleading would pale into insignificance. It has been next contended by the learned counsel that the established



facts that the plaintiffs and the defendants were residing in the suit property and after the death of Nagina Puri, his brother Ambika Puri became the karta of the family as the father Jagdeo Puri was a man of weak intellect are sufficient indicators to the nature of the suit property being joint family property. The learned counsel has also submitted that the appellate court below has not properly considered the evidence of the parties as well as the aforesaid facts established by evidence and, therefore, the impugned judgment is vulnerable,

From the perusal of the judgments of both the courts below and after considering the submissions, it is pellucid that the suit properties admittedly stand in the name of the defendant Ambika Puri. The fact has not been disputed that there is no pleading in the plaint that the joint family of the parties had sufficient nucleus yielding adequate income during the period the suit properties had been acquired in the name of the defendant Ambika Puri. During the course of submission on behalf of the appellants, no part of the deposition of the plaintiffs' witnesses has been pointed out where the existence of joint family fund in the family has been asserted with further definite assertion that the suit properties were acquired out of the said fund in the name of the defendant Ambika Puri. To the contrary, it transpires that the

plaintiff Kapildeo Puri has accepted in the deposition that the defendant Ambika Puri was in service and the plaintiff also was in service and further that the plaintiff has constructed his new house on plot no. 873; defendant no. 2 and 3 have house on plot no. 121 and the defendant no. 1 Ambika Puri has his house on plot no. 1026 (suit property).

When examining the submission on behalf of the appellants with regard to absence of pleading regarding nucleus in the joint family for purchase of the suit property, it is apparent that there is no evidence at all on behalf of the plaintiffs in this regard nor there was any such issue which could be said to have covered such plea. As laid down by the Apex Court in the case of **Bachhaj Nahar Vs. Nilima Mandal, A.I.R. 2009 SC 1103**, it is only in exceptional cases that the deficiency in or absence of pleading can be ignored when the court is satisfied that the parties know that the plea, though not specifically made, was involved in the trial and had led evidence accordingly. From the perusal of judgments of both the courts below and the scrutiny of evidence made therein this Court is unable to align with the submission on behalf of the appellants that this case is one of such exceptional cases.

The next submission on behalf of the appellants is based upon the finding recorded by the trial court that the

plaintiffs and other defendants have been residing in the suit property along with the contesting defendant no. 1. It has also been argued that the joint residence would lead to the inference that the suit property, even though acquired by the defendant no. 1, was thrown in the joint stock and acquired the character of joint family property. The Apex Court in **D.S. Lakshmaiah Vs. L. Balasubramanyam, A.I.R. 2003 S.C. 3800** has ruled as follows:-

“.....Another contention urged for the respondents was that assuming Item no. 1 property to be self-acquired property of appellant no. 1, he blended the said property with the joint family property and, therefore, it has become the joint family property. Assuming the respondents can be permitted to raise such a plea without evidence in support thereof, the law on the aspect of blending is well settled that property separate or self-acquired of a member of joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the

income of the separate property was utilized out of generosity to support persons whom the holder was not bound to support or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not ordinarily be regarded as an admission of a legal obligation. {see Lakkireddi Chinna Venkata Reddy Vs. Lakkireddi Lakshamama [1964 (2) SCR 172] and K.V. Narayanan v. K.V. Ranganathan and others (1977) 1 SCC 244)}.”

In view of the dictum abovesaid relied upon by the appellate court below also, this Court does not find substance in the submissions on behalf of the appellants. The findings of facts and reasonings assigned by the appellate court do not appear to be perverse in any manner.

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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