

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.74 of 1974

[Against the judgment and decree dated 21.11.1973 passed by the VIth Additiona Sub-Ordinate Judge, Chapra in Partition Suit No. 120 of 1968/14 of 1973]

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Most. Babi Rani Devi and Others	 Appellant/s
Versus	
Ram Lakhan Rai and Others	 Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Devendra Prasad Sharma, Advocate Mr. Satyendra Kumar Sinha, Advocate
For the Respondent/s	:	Mr. Bamdeo Pandey, Advocate Mr Prithvi Nath Mishra, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT

Date: 12th July, 2016

This first appeal has been filed by the plaintiffs-appellants against the judgment and preliminary decree dated 24.11.1973 passed by the learned VIth Additional Sub-Ordinate Judge, Chapra in Partition Suit No. 120 of 1968/14 of 1973, whereby the learned court below dismissed the plaintiffs-appellants’ suit for partition.

2. The plaintiffs-appellants filed the aforesaid suit claiming for partition of the suit property alleging that Harsahay Rai was common ancestor. Prior to Cadastral Survey Operation, he died leaving behind his five sons namely, Bhim Rai, Arjun Rai, Dashrath



Rai, Ghanshyam Rai and Ramphal Rai. All the brothers were separate in mess and business but the five brothers were recorded in survey record of right with respect to immovable properties, which are still joint. The common ancestor acquired some land at village Mujha by settlement from Hathua Raj. Dashrath Rai had properties at Mujha as also at Barahia Raja Ram. He used to leave at both the places. He had a son namely, Sitaram Rai. During course of Revisional Survey Operation, the lands of Barahia Raja Ram were recorded in the names of Ramdhari Rai, Saryug Rai, Shiv Bhadur Rai, sons of Ghanshyam Rai and Most. Rajeshra Kuer, widow of Bhim Rai as all the five brothers i.e. sons of Harsahay Rai had already died. In the revisional survey record of right, name of Sitaram Rai could not be recorded with respect to Barahia Raja Ram properties as the defendants taking advantage of minority of Sitaram Rai only got their names entered. The plaintiffs are the sons of Sitaram Rai. The plaintiff's father, Sitaram Rai had constructed house on plot Nos. 425 and 426 after exchange of 11 Dhurs of land of plot No. 426 from Gopal Rai. The plaintiffs claimed 1/3rd share in the suit property, which are situated in village Barahia Raja Ram.

3. The defendants-respondents filed contesting written statement. According to them, sometime after Cadastral Survey Operation, all the five sons of Harsahay Rai, partitioned the family properties amicably. Dashrath Rai, father of Sitaram Rai and grand

father of plaintiffs desired to live at village Mujha. In partition, the properties, which were acquired by the joint family at Mujha were allotted exclusively to Dashrath Rai and the properties of village Barahia Raja Ram were allotted to remaining four brothers and accordingly, both the parties continued in possession. Therefore, in revisional survey record of right, the properties of Barahia Raja Ram were recorded only in the name of branches of the other four brothers excluding the name of Sitaram Rai, the father of the plaintiff. Since there had already been partition prior to revisional survey record of right, there is no question of further partition arises. So far construction of house at Barahia Raja Ram by the plaintiffs is concerned, according to the defendant, Gopal Rai offered some properties in exchange for construction of the house as mother-in-law of Jai Narayan Rai was niece of the wife of Dasrath Rai. The share is also disputed by the defendants alleging that at the time of death of Ramphal Rai, only Arjun Rai, Bhim Rai and Ghanshyam Rai were alive. Therefore, properties of Ramphal Rai devolved upon Arjun Rai, Ghanshyam Rai and Bhim Rai by virtue of survivorship. Dashrath Rai had pre-deceased Ramphal Rai. Likewise since Sitaram Rai, pre-deceased Most. Rajeshwar Kuer, the properties of Bhim Rai and Ramphal Rai devolved upon Bhushan Rai, Ramdhari Rai, Saryug Rai and Govind Rai, sons of Ghanshyam Rai, who were nearest agnates. The plaintiffs have neither title nor possession over

the suit property.

4. On the basis of the aforesaid pleadings, the learned court below framed the following issues;

“1. Whether the plaintiffs have got cause of action for the suit?

2. Is the suit as framed maintainable?

3. Is the suit barred by reason of adverse possession and ouster?

4. Whether properties of Mujha are joint acquisition of the parties ?

5. Whether there was any partition by way of family arrangement as alleged by the defendants ?

6. Whether there was unity of title and possession in respect of suit property ?

7. Whether Dasrath Rai died before Ramphal Rai and whether Sitaram Rai died before Most. Rajesara Kuer and whether the plaintiffs are entitled to the share as claimed by them ?

8. To what relief, if any, are the plaintiffs entitled ?”

5. The trial court on the basis of evidence recorded finding that Mujha properties were acquired by joint family fund and there had been partition by family arrangement and there is no unity of title and possession and, accordingly, dismissed the suit.

6. The learned counsel for the appellants submitted that the court below wrongly held that there had already been partition between the parties although no case is made out by the defendants about the year or month or date of partition. No document was produced to show that, in fact, there was partition. In Hindu Law, it is presumed that the family is joint until the contrary is proved. In the present case, the defendants have failed to discharge their onus

and failed to show previous partition. At the time of Revisional Survey Operation, Sitaram Rai was minor and taking advantage of the minority, the respondents got only their names recorded in the lands of Barahia Raja Ram village. In fact, the parties are in joint possession of the same. In the evidence, the plaintiff has clearly stated so but the court below, wrongly rejected the evidence of the plaintiff. The plaintiff has got 1/3rd share in the suit property.

7. Learned counsel for the appellants further submitted that Dasrath Rai was residing at Mujha village, where he was given some land by in-laws and Dasrath Rai acquired land at Mujha by settlement but the court below wrongly held that those lands are the joint family lands and in partition, the same were allotted to Dasrath Rai. This finding of the court below is not supported by any evidence. According to the learned counsel, only on presumption that the parties are separate since long, previous partition has been recorded. In fact, in village Barahia Raja Ram also the plaintiff has his house, which indicates clearly that the parties are in joint possession. On these grounds, the learned counsel submitted that this first appeal be allowed and the impugned judgment and decree be set aside.

8. On the other hand, the learned counsel for the respondents submitted that the plaintiffs have filed the suit for partition. It is the case of the plaintiffs that prior to cadastral survey,



Harsahay Rai died and after cadasteral survey, all the five brothers separated and were living separately in mess and residence. According to the defendants, in fact, there was partition between five brothers. Therefore, their names were separately recorded in the revisional survey record of right. Since the family had joint family property at village Mujha, where Dasrath Rai desired to reside as it was his in-laws village, in partition, the land of village Mujha was allotted in favour of Dasrath Rai including the lands acquired by the parties out of the joint family income. Since Dasrath Rai was residing there with his allotted property after his death, there was no question of recording the name of his son, Sitaram Rai arises. It is clearly false to say that Sitaram Rai was minor and moreover, even if, he was minor for more than half century, he did not take any step, which clearly indicates that there was partition between the parties.

9. Learned counsel further submitted that if there was no partition of the entire joint family property, then the plaintiff should have also included the lands of Mujha but he did not included the lands of Mujha and has sought partition of his 1/3rd share in the land of Barahia Raja Ram village. Considering the materials and these facts and evidences, the learned court below has rightly held that there had already been partition between the parties and in partition, the land of Mujha was allotted to Dasrath Rai. In view of the above, the first appeal be dismissed with costs.

10. In view of the above rival contentions of the parties, the point arises for consideration is, whether the plaintiffs have been able to prove that there is unity of title and possession and, therefore, entitled to partition of 1/3rd share in the suit property and whether the impugned judgment and decree is sustainable in the eye of law or not.

11. The plaintiffs' case itself is that Harsahay Rai died prior to cadastral survey and after cadastral survey, his five sons started living separately and messing separately. There has been no partition with respect to suit property and the property at village Mujha was acquired by Dasrath Rai, the grand father of plaintiff. On the contrary, according to the defendants, there was complete partition between the five brothers. In view of this pleading, it becomes clear that prior to revisional survey and after the cadastral survey, the parties started living separately. The cadastral survey, admittedly, took place in the year 1895-96 and the revisional survey took place between 1913 to 1918. The present suit for partition has been filed by the plaintiffs, who are grand sons of Dasrath Rai in the year 1968. From the founder of the family i.e. Harsahay Rai, the plaintiffs are the 4th generation. According to Hindu Law, the normal estate of every Hindu family is presumed to be joint till the contrary is proved. This presumption is stronger in the case of brothers then in the case of cousins and the father, one should go



from the founder of the family, the presumption becomes weaker and weaker. The reason is that brothers are for the most part undivided, second cousins are generally separated and third cousins are for the most part separated. Therefore, so far the presumption of jointness is concerned, in the present case, it is very weak. The other glaring fact is that according to the plaintiffs, these five brothers were messing and residing separately because there was partition after the cadastral survey and in that partition, land of Mujha was allotted to Dasrath Rai as he desired to live at Mujha. In support of these facts, the parties have produced their evidences.

12. P.W.-8 is the plaintiff himself. He has stated that prior to cadastral survey, five sons of Harsahay Rai had separated vide paragraph-3 of his evidence. There was separate messing and residence. Dashrath Rai started living at Mujha where Dasrath Rai had acquired land.

13. It may be mentioned here that the lower court records of the case has been misplaced and it was being searched by the trial court and by the High Court for a long period but it could not be traced. The learned counsel for the appellants had got copy of the depositions. Therefore, he has filed photocopies of the same and on the consent of both the parties, on the basis of the judgment and these copies of the evidences, the appeal was heard. Photocopies of the evidences are available on the record.



14. In view of the depositions of the plaintiff himself, the five brothers were separated prior to cadastral survey. In his deposition, at paragraph-3, he has used the word "*Purana Survey*". The cadastral survey took place in the year 1895-96. According to the plaintiff, therefore, prior to 1895-96, Harsahay Rai died and his five sons separated in mess and residence. Dasrath Rai started living at Mujha where there was land. This land is claimed by the plaintiff to have been acquired by Dasrath Rai whereas according to the defendants, it was the joint family property. Now, therefore, it will be clear that after separation, the parties were acquiring the lands as has been claimed by the plaintiff himself that Dasrath Rai acquired land at Mujha. Except the pleading and oral statement, nothing has been produced on behalf of the plaintiff in support of acquisition of the property at Mujha by Dasrath Rai. Since the plaintiff is claiming that the property is acquired by Dasrath Rai at Mujha out of his own income, it is for him to prove that Dasrath Rai had separate source of income and there was some saving and out of that he has acquired property.

15. On the contrary the defendants have produced the Khatiyan and it is admitted fact that there were 12 Bighas and odd land at village-Barahia Raja Ram. Now, therefore, the joint family possessed of this much of cultivable land. The plaintiff has not produced anything but admitted the ancestral land measuring more



than 15 Bighas. According to the Hindu Law, presumption is, if it is established or admitted that the family possessed some joint property, which from its nature and relative value may have form the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and burden shifts to the party alleging self acquisition. In the present case the plaintiff failed to discharge his burden. Therefore, it is held that the property acquired at Mujha was the joint family property. The plaintiff himself in his evidence at paragraph No. 25 has admitted the fact that the lands were fertile and the defendants have also acquired lands by sale deeds and mortgaged bonds. It is settled principle of law that after separation, if any, land is acquired by a party, then there will be no presumption that the property acquired by the separated member is the joint family property or it has been acquired out of the joint family income. The plaintiff in his evidence also stated that he was getting his 1/3rd share, then there is no question of joint family fund arises because it was being distributed to the parties according to their shares.

16. From perusal of the record, it appears that the plaintiffs have not produced anything to show that the properties at Mujha were acquired either by Dashrath Rai or Sitaram Rai except the statements.

17. In view of my above discussion, I find that the property



is at Mujha was acquired out of the joint family income. According to the plaintiff's evidence and pleading, the brothers were separated prior to cadastral survey. The further case is that because the father of the plaintiff was minor, the defendants got only their names recorded in the revisional survey record of right. So far this case is concerned, it may be mentioned here that if it was the fact then on attainment of majority, the father should have taken appropriate steps but he never took any step nor the plaintiff ever took any step. The suit has been filed in the year 1968 for the first time. The separation between five brothers in mess and residence is admitted by the plaintiff. The only difference is according to the plaintiff, there had been no partition whereas according to defendants there had already been partition. I have already found that the property at Mujha was acquired by the joint family, as such, it is a joint family property. Admittedly, Dashrath Rai was in possession of the same since the separation as alleged by the plaintiff. This separation according to the plaintiff himself took place more than 70 years ago. According to the defendants there was complete partition. In view of the above position, the main controversy is the separation was only with respect to mess and residence or it was complete partition.

18. We have seen the conduct of the parties that the parties were acquiring the property separately, which has been admitted by the plaintiff himself as P.W.-8 in paragraph-25. His case is also that

some properties were acquired by Dashrath Rai at Mujha. His case is also that there was some exchange at Barahia Raja Ram.

19. The Hon'ble Supreme Court in the case of ***Bhagwan Dayal Versus Most. Reoti Devi*** reported in ***AIR 1962 SCC 287*** has held that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person, who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences. Here admittedly, the parties are residing separately since more than 70 years, mess is separate, residence is separate, properties are acquired separately, the parties are recorded separately in revenue records of rights. The Division Bench of Patna High Court in the case of ***Arjun Mahato & Others Versus Monda Mahatain and Others, AIR 1971 Patna Page 2015*** has held that separate dealing with the property, separate messing and residence for long may not be by themselves prove partition but cumulative effect of those may show that there was partition between the parties.

20. The other aspect of the matter in this case as I have stated above is that the presumption in favour of the plaintiff is very very weak as he is the 4th generation from the founder, who himself admitted separation between the five brothers prior to cadastral survey.

21. In view of my discussion, I find that the defendants have been able to prove that there had already been partition between the parties long long ago as alleged by them, as such, the plaintiff failed to prove the unity of title and possession between the parties. Accordingly, he is not entitled for a partition in the suit property. Thus, the finding of the trial court on this point is, hereby, confirmed.

22. In the result, I find no merit in this first appeal. Accordingly, this first appeal is dismissed. There shall be no order as to costs.

Brajesh/-

(Mungeshwar Sahoo, J.)

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