

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.575 of 1977

(Against the judgment and decree dated 08.07.1977 passed by 1st Additional Subordinate Judge, Samastipur in Partition Suit No.150 of 1969/2 of 1975).

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Ram Padarath Singh & Ors.

.... .. Defendants-Appellants

Versus

Sangyan Devi & Ors.

.... .. Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. Jitendra Kishore Verma, Advocate

For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 22-06-2016

1. The defendants have filed this First Appeal against the judgment and decree dated 08.07.1977 passed by the learned 1st Additional Subordinate Judge, Samastipur in Partition Suit No.150 of 1969/2 of 1975 whereby the plaintiff-respondent's suit for partition was decreed.

2. The plaintiff-respondent filed the suit for partition alleging that one Jhaman Singh was the common ancestor. He had two sons namely, Jiblal Singh and Bhairo Singh. Jiblal Singh had four sons, Ram Sahai Singh, Shiv Sahai Singh, Makhan Singh @ Nunu Singh and Lalji Singh. Plaintiff is the grandson of Makhan @ Nunu whereas the defendant No.1 is grandson of Shiv Sahai Singh being the son of Botal Singh. The sons of Lalji Singh are defendant Nos.2 and

3. During survey operation, he and the defendants, Shiblal Singh,



Lalji Singh, Makhan Singh @ Nunu Singh, Ram Kaleb Singh(defendant No.1) were alive. In the survey record of right, half share of Ram Khelawan Singh and half share of Shiv Sahai Singh, Ramji Singh and Ram Kaleb Singh were entered. At the time of last survey, all the members of three branches were joint. In the khatiyani, Lalji Singh, Shiv Sahai Singh and Ram Kaleb Singh were shown as having half share. Some properties were acquired by Jiblal Singh in the state of separation in village Deodha. The family of Bhairo Singh had no concern with the property. Name of Ram Khelawan Singh, son of Bhairo Singh was not entered in the khatiyani for the said land. Jiblal Singh acquired sufficient land in village Marthua. After his death and death of Ram Sahai Singh, Lalji Singh and Khelawan Singh used to cultivate jointly at Marthua. During last survey, Makhan Singh died and the properties were wrongly recorded only in the name of Lalji Singh and Nunu Singh. The wife and minor son of Makhan Singh were not recorded. The lands of village Deodha, Nayanagar and Kharahiya were recorded in the name of Shiv Sahai Singh, Lalji Singh and Ram Kaleb Singh jointly in the survey. According to the plaintiff, lands of village Marthua are the family properties. Jiblal Singh has Bakast and Kastkari land at village Deodha, Sujapur, Kasraon, Sambhnochak, Dhudhpura, Kharnia and Dayanagar and Mahal Mohammadipur. The self-acquired property of Jiblal Singh was



recorded in his name and his three branches. There has been no partition between the members of the family. Some properties have been acquired in village Hasimuddinpur in the name of the joint family members out of joint family fund. The branch of Jiblal Singh including the plaintiff and defendant Nos.1 to 3 were joint in all respect till 1949-50 and Lali Singh was looking after all the affairs. However, on the death of Jiblal Singh, all the branches separated in cultivation. The crops and cash income were distributed. The further case of the plaintiff is that the parties have also sold some properties to several persons.

3. The defendants filed contesting written statement. According to defendant Nos.8 to 11, they are the purchasers of 5 bighas and 4 dhurs of land from the plaintiff under 4 registered sale deeds dated 10.03.1970. The main contesting defendant 1st party-appellants filed contesting written statement denying all the averments made by the plaintiff in the plaint. Their main defence is that Makhan Singh has no alias name as Nunu Singh rather in fact, the alias name of Shiv Sahai Singh is Nunu Singh. Their further case is that Makhan Singh predeceased his father before survey operation started. Ram Kaleb Singh was aged about 17 years. The ancestral properties had been partitioned between the parties several years ago before the survey. Jiblal Singh left all connection with the world and gave his



properties to his three sons, Shiv Sahai Singh, Lalji Singh and Makhan Singh. Later on, three sons of Jiblal separated in mess although they remained joint in cultivation and they used to divide the crops. They have also sold many properties and many properties have been transferred between themselves i.e. inter se transaction. Since last 30 years, there is no joint family property, the plaintiff got only wrong entries made in the survey record of right. Long before 1949-50, the three branches had separated in all respect. The lands of Marthua are self-acquired property of Shiv Sahai Singh and Lalji Singh only. The branch of Makhan Singh had no concern with the said land. The lands of village Marthua has already been divided between the three branches of Shiv Sahai Singh and Lalji Singh. Suraj Shekhar Singh, Kari Singh and Palakdhari Singh had already sold their lands to different persons and for that, a separate suit was filed. All other averments made in the plaint were denied.

4. On the basis of the aforesaid pleadings, the learned Court below framed the following issues:

- I. Is the suit as maintainable?
- II. Whether the plaintiff has right to sue?
- III. Whether the suit suffers from defect of parties?
- IV. Whether the G.T., as given in the plaint is correct?
- V. Whether the inheritance and possession as set up by the plaintiff is correct?
- VI. Whether the sale deeds of the plaintiffs are valid and

genuine?

VII. Whether the plaintiff is entitled to partition as claimed?

VIII. To what relief or reliefs, if any, is the plaintiff entitled?

5. The learned Court below on the basis of the discussion of the evidences and other materials came to the conclusion that the plaintiffs succeeded in proving his possession and inheritance vide paragraph 18 of the judgment while deciding issue No.5. Accordingly, the learned Court below held that the plaintiff has got 1/6th share in the Kast and Bakast land of Jhaman Singh and 1/3rd interest out of 4 Anna interest of his branch in the land of Phulhara and Basiuddinnagar and further held that he has 1/3rd share in the lands of Sujapur and Keshvan and decreed the suit.

6. The learned counsel, Mr. J.K.Verma for the appellants submitted that the lands of Marthua was self-acquired property of Shiv Sahai Singh and Lalji Singh and so far Schedule II and III properties are concerned, those properties had already been partitioned previously between the parties, therefore, the plaintiff was required to prove that the alias name of Makhan Singh is Nunu Singh. According to the learned counsel, no sufficient opportunity was granted to the appellants for adducing evidence. After amendment some properties were added but the copy of the amended plaint was not served on the defendants. Moreover, since the plaintiff is claiming the share in the suit property on the ground that he is son of Nunu



Singh, which is the alias name of Makhan Singh, it is for him to prove the same but he did not adduce any evidence to that effect nor any finding has been recorded by the Court below to this effect. On the contrary, while deciding an application under Order 40 Rule 1 C.P.C., the trial court had held categorically that Nunu Singh was the alias name of Shiv Sahai Singh. Admittedly, the properties are recorded in the name of Nunu Singh and Lalji Singh. Unless the plaintiff proved his title or that Nunu Singh was the alias name of plaintiff's grandfather, Makhan Singh, he cannot succeed in the suit. Except the pleading, nothing has been brought on record in support of the fact regarding alias name of Makhan Singh and further, no documents have been produced in support of claim of title in the property and that the properties are the joint family property. Since the properties of Marthua are recorded only in the name of Lalji Singh and Nunu Singh, the plaintiff will not succeed if he failed to prove that the property was acquired out of the joint family fund. Except the pleading, there is no reliable evidence produced by the plaintiff. Moreover, the Court below only recorded the finding on the basis of oral evidence.

7. The learned counsel further submitted that on 24.06.1977, P.W.24 was examined as witness and since nobody turned up on behalf of the defendant to cross-examine, the Court



below without giving any opportunity to the defendant to adduce evidence, heard the plaintiffs and the case was posted for judgment on 05.07.1977. On 01.07.1977, application was filed by the defendant-appellant to recall the order and to give opportunity for filing additional written statement to the amended portion of the plaint but the Court below passed the impugned judgment and decree on 08.07.1977 and in the judgment held that since the case was fixed for judgment, the order cannot be recalled and accordingly, rejected the application. According to the learned counsel, for the ends of justice, the Court should have granted opportunity to the defendant to adduce evidence and/or to file additional written statement but on erroneous ground, the Court below did not exercise the jurisdiction, therefore, the judgment is vitiated.

8. The learned counsel further submitted that by amendment, various properties were added, therefore, it was the duty of the Court to have given opportunity to file additional written statement with respect to the properties subsequently added. Although, the defendant-appellant was not given opportunity but then in ex parte proceeding also, it is the duty of the plaintiff to prove its case pleaded particularly when from the pleading itself, it is evident that the facts are not clear and there is no documentary evidences regarding acquisition of the property nor any evidences were

produced regarding existence of any joint family nucleus.

9. The learned counsel further submitted that for the ends of justice, when the Court below has not granted sufficient opportunity in the facts and circumstances of the case, an application under Order 41 Rule 27 C.P.C. being I.A. No.1981 of 2016 has been filed by the appellants before this Court which is required to be allowed for the ends of justice otherwise it will occasion failure of justice. Further, according to the plaintiff himself, since Shiv Sahai Singh was absent during preparation of khatian, the properties were recorded in the name of Lalji Singh and Nunu Singh and if he failed to prove this fact, he cannot be allowed to say that his grandfather, Makhan Singh was absent, as such, his name was not recorded as it is not his case. In the present case, the plaintiff is the 5th generation from the founder of the family i.e. Jhaman Singh, the common ancestor, therefore, the presumption of jointness is very very weak and on the basis of presumption only, no decree for partition can be granted moreso, when there are inter se transactions which are evident by the documentary evidences annexed with the I.A. filed under Order 41 Rule 27 C.P.C. On these grounds, the learned counsel submitted that the impugned judgment and decree be set aside and the plaintiff's suit be dismissed.

10. Nobody appeared on behalf of the respondents.

Although, on the prayer of the learned counsel for the respondents on 02.03.2016, the First Appeal was adjourned but on subsequent dates even on the date when the judgment was reserved, none appeared. Thereafter also, no steps were taken by the respondents.

11. In view of the above contentions of the learned counsel for the appellants, the points arises for consideration in this First Appeal are as follows:

- I. Whether the judgment and decree passed by the Court below is vitiated because of not granting time and/or not giving sufficient opportunity to the appellant to file additional written statement and lead evidence and erroneously rejected the recall application filed prior to delivering the judgment, as such, the impugned judgment and decree are liable to be set aside?
- II. Whether the plaintiff is entitled for a decree for partition as claimed by him. In other words, whether the plaintiff has been able to prove unity of title and unity of possession?

Point No.I & II

12. Both the points are taken together for convenience. The plaintiff has filed this suit for partition. From the genealogy mentioned by the plaintiff, it is clear that the plaintiff is the 5th generation from the founder. So far title is concerned, it is admitted fact that no title documents have been produced by the plaintiff. Khatiyans were produced which show only recording the names of the parties. However, the properties in suit are not recorded in the name of



Makhan Singh. The plaintiff's case is that Nunu Singh is the alias name of Makhan Singh whereas according to the defendants, Nunu Singh is the alias name of Shiv Sahai Singh. Therefore, according to pleading, the plaintiff is tracing his title alleging that since the property of Marthua is recorded in the name of Nunu Singh, the plaintiff has a share as Nunu Singh was his grandfather. If this fact is not proved, then no other case has been pleaded by the plaintiff, as such, he will not be entitled to a share in the property recorded in the name of Shiv Sahai Singh and Lalji Singh.

13. It may be mentioned here that during the trial, the plaintiff filed application under Order 40 Rule 1 C.P.C. for appointment of receiver. The defendants objected on the ground that there is no unity of title and possession firstly, alleging that there had already been partitioned by metes and bounds long long ago and secondly, that the plaintiff has got no right, title or interest in Schedule I land i.e. of village Marthua as the lands are the self-acquired property of Lalji Singh and Shiv Sahai Singh. It was never recorded in the name of Jiblal Singh. While hearing this receivership application, the Court below by terms of order dated 18.01.1974 clearly recorded a finding that in support of the case that alias name of Shiv Sahai Singh was Nunu Singh, the defendants have filed mortgage bond of 1896 and 1905 which clearly shows that Nunu



Singh is entered in the khatian of village Marthua land which relates to grandfather of defendant No.1. This finding of the Court below is based on evidences i.e. documentary evidences produced by both the parties. Now, it becomes clear that the property of Marthua was recorded in the name of Nunu Singh and Lalji Singh. The Court below on the basis of mortgage bond of the year 1896 and 1905 came to the conclusion that Nunu Singh is the alias name of Shiv Sahai Singh. In such circumstances, when the properties are admittedly recorded in the name of Nunu Singh(Shiv Sahai Singh) and Lalji Singh, how the plaintiff got any share or interest in the said property is not clear. No documents have been produced to show that it was recorded in the name of ancestor of the plaintiff. In the impugned judgment and decree, the Court below has not recorded any finding regarding the alias name. Moreover, it is settled principles of law that an order passed in the suit after hearing the parties, on the basis of materials, on an issue, shall operate as resjudicata in subsequent stage of the suit itself. In view of the above factual position and the legal position, the order passed by the trial court dated 18.01.1974 became final and there is no challenge to the said order.

14. It appears that after conclusion of hearing, the Court below on 24.06.1977 fixed the case for judgment on 08.07.1977. Prior to passing of the judgment, the appellants filed



application on 01.07.1977 for recall of the order dated 24.06.1977 and prayed for granting opportunity to cross-examine P.W.24 who was examined on the said date itself. The Court below, in the judgment, has rejected this application saying that the order cannot be recalled as the same has been fixed for judgment. In my opinion, this finding of the Court below in the judgment itself greatly prejudiced the appellant. The Court has the jurisdiction to recall the order even after fixing the case for judgment considering the facts and circumstances of the case before amendment and even after amendment of C.P.C.. Reference may be made to the decision of the Supreme Court in this matter in the case of **K.K.Velusamy v. N. Palanisamy, (2011) 11 Supreme Court Cases 275.**

15. Further, on 02.06.1977, amendment application filed by the plaintiff-respondent was allowed and thereafter, the plaintiff was examined as P.W.24 on 24.06.1977. It appears that no opportunity was granted to file additional written statement. The appellants were also not granted opportunity to cross-examine. In the judgment, the Court below also did not consider the order dated 18.01.1974 whereby finding was recorded that plaintiff failed to prove that alias name of his grandfather Makhan Singh was Nunu Singh.

16. From perusal of the aforesaid order, it further appears that the Court below also found that there was inter se



transaction between the parties and while recording this finding, the Court below found that the defendants filed documents separately executed by Shiv Sahai Singh and also Lalji Singh, those are simple mortgage bonds of the year 1907 and 1900. The father of plaintiff himself also executed mortgage bond in the year 1932 in the name of defendant No.1. Defendant Nos.2 and 3 had also executed mortgage bond in favour of defendant No.1 in the year 1929. Register D was also filed from which it was found that the name of mother of defendant No.1 is separately recorded. Defendant No.2 also separately recorded. Grandson of Khakhri is also separately recorded. Rent receipts were also produced which are in the separate names of the parties. Therefore, the Court below found that there is no unity of title and possession. Recording these findings, the receivership application was rejected.

17. It may be mentioned here that since no opportunity was granted to the appellants and their application for recall was rejected in the judgment, the appellants had no opportunity to challenge the order refusing to recall the order and granting opportunity to them. In view of Section 105 C.P.C., the appellants can challenge this order in the appeal itself and herein the order has been challenged. In my opinion, therefore, the Court below in view of the above facts and circumstances of the case has wrongly refused to

recall the order and wrongly did not grant opportunity to the appellants thereby the order occasioned failure of justice.

18. It is settled principles of law that even if the suit is proceeding ex parte, the plaintiff cannot be absolved of his responsibility to prove his case to the satisfaction of the Court. In the present case, when the facts are so controversial, the duty of the Court was also to look into the case of the plaintiff but from perusal of the impugned judgment, it appears that the Court below only on the basis of oral evidence without recording any finding regarding alias name decreed the plaintiff's suit.

19. It is settled principles of Hindu law that there is presumption that every Hindu family is joint. However, this presumption is stronger in the case of brothers than in the case of cousins and the farther you 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. As stated above, in the present case, the plaintiff is the 5th generation. Therefore, the presumption in this case is very very weak.

20. The documents which were filed in the Court below and which were considered by the Court below while disposing of the receivership application has been filed before this Court under

Order 41 Rule 27 C.P.C. seeking permission to adduce additional evidence taking the grounds that sufficient opportunity was not granted thereby the appellants were prejudiced and these documents are necessary for just decision of the controversies between the parties.

21. The Hon'ble Supreme Court in various decisions has held that a party as a matter of right cannot be allowed to adduce additional evidence at the appellate stage. The appellate court can allow for adducing additional evidence only and only the grounds mentioned in Order 41 Rule 27 C.P.C. exists. Reference may be made to the decision of the Supreme Court **2013(1) PLJR 48(SC) (Union of India v. Ibrahimuddin)**. When it is necessary in the facts and circumstances of the case for the Court to receive additional evidence for pronouncing satisfactory judgment, the Court has the jurisdiction to allow the same. In the present case, I have already narrated the special circumstances showing how the appellants were prejudiced and how the order rejecting their applications caused failure of justice. From perusal of the impugned judgment and decree, I find that the Court below on the basis of oral evidence only has decreed the plaintiff's suit without considering aforesaid order. Therefore, in my opinion, in this present appeal, these documents which are filed along with the I.A. are very necessary for just decision of the controversies



between the parties and the Court for pronouncing satisfactory judgment required the same otherwise it will occasion failure of justice. These documents which are produced as additional evidence are admitted documents or public documents. There is no denial regarding the genuineness of the said documents. From perusal of the order dated 18.01.1974 passed by the trial court, it appears that these documents were produced and the Court below found that the defendants filed the mortgage bond of the year 1896 and 1905 in support of their case that alias name of Shiv Sahai Singh was Nunu Singh. These documents are filed as additional evidence along with the I.A. It further appears from the aforesaid order that the mortgage bonds executed by father of the plaintiffs in favour of defendant No.1 and also executed by Shiv Sahai Singh and Lalji Singh. The defendant Nos.2 and 3 had also executed a bond in favour of defendant No.1 in the year 1929. This document was also filed. Register D has also been filed showing the name of mother of defendant No.1 which was recorded separately. Defendant No.2 was recorded separately. In the I.A., the defendants have filed these documents and are seeking permission to adduce additional evidence.

22. In view of the above facts and circumstances of the case, discussed in detail, and the law laid down by the Supreme Court, I hereby allow the I.A. filed by the appellants under Order 41 Rule 27

C.P.C. Since the documents were produced in the Court below and once it was also discussed by the Court below while dealing an application under Order 40 Rule 1 C.P.C., it was within the knowledge of the respondents and they are not denying the existence or genuineness of the said documents.

23. From perusal of the documents i.e. mortgage bond of the year 1896 and 1905, it becomes clear that the alias name of Shiv Sahai Singh was Nunu Singh. This is the finding of the trial court also in the order dated 18.01.1974. This finding with respect to the alias name is not set aside by any higher court. Now, therefore, it will operate as resjudicata in the subsequent stage in the same suit but the learned Court below neither referred to this finding nor considered the said order nor recorded any finding about the alias name and has passed the impugned judgment and decree.

24. The mortgage bond of the year 1900, 1907, 1929 and 1932 show that there is inter se transaction between the parties. A Division Bench of this Court in **AIR 1977 Patna 59(Ram Bahadur Nath Tiwary v. Kedar Nath Tiwari and others)** has held that inter se transaction between the parties is a strong circumstance to show that there had already been partition between the parties.

25. In view of the above facts, it becomes clear that the parties are executing mortgage bonds independently from the year



as far back as in 1896. There are even inter se mortgages of the properties. The parties are recorded separately which is evident from Register D. It indicates that the parties are messing separately, residing separately and cultivating separately. The Hon'ble Supreme Court in the case of **Bhagwan Dayal v. Reoti Devi, AIR 1962 Supreme Court 287** has held as follows:

“The general principle is that every Hindu family is presumed to be joint unless the contrary is proved, but this presumption can be rebutted by direct evidence or by course of conduct.”

26. The Hon'ble Supreme Court further 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 than in a case where the evidence is not obliterated by passage of time.”**

27. In the present case, the conduct of the parties from the year 1896 shows that they are living separately, dealing the property separately treating the same as their exclusive property.

28. A Division Bench of this Court in the case of **Arjun Mahto and others v. Monda Mahatain and others, AIR**



1971 Patna 215 has held that separate messing, separate dealing with the property and separate cultivation and separate acquisition for a long time by themselves are not conclusive proof of partition but cumulative effect of the same may show that there had already been partition between the parties. Here, the transaction is since long i.e. more than half century, there are inter se transactions, the parties are living separately, residing separately in separate villages etc. Therefore, taking cumulative effect of these facts clearly show that there had already been partition between the parties and accordingly, the names are recorded separately. The plaintiff claimed partition on the ground that the grandfather of the plaintiff Nunu Singh is recorded in the land of Marthua. It may be mentioned here that the plaintiff has not produced any document in support of his title to the property. The parties have only produced the record of right which is admitted. Admittedly, the properties are recorded in the name of Nunu Singh and Lalji Singh. Once it is held that Nunu Singh is not the alias name of plaintiff's grandfather namely Makhan Singh, which has been held so, then the plaintiff has no title or interest with respect to the property recorded in the name of Nunu Singh and Lalji Singh. From perusal of the impugned judgment and decree, it appears that the Court below has not at all considered these aspects of the matter. The Court below only on the basis of the oral evidence who have stated that the parties



are in joint possession and there had been no partition has decreed the suit. The Court below also held that the witnesses of the plaintiff have not been cross-examined by the defendants. The Court below also noticed the statements of the witnesses in examination-in-chief that there was distribution or that parties are in possession has decreed the suit without recording any finding regarding the title of the plaintiff.

29. The Hon'ble Supreme Court in the case of **Maya Devi v. Lalta Prasad, (2015) 5 Supreme Court Cases 588** has held that **“the absence of the defendant casts a greater responsibility and onerous obligation on the trial court as well as the executing court to be fully satisfied that the claim has been proved and substantiated to the hilt by the plaintiff. The failure to file a written statement, thereby bringing Order 8 Rule 10 C.P.C. into operation, or the factum of the defendant having been set ex parte, does not invite a punishment in the form of an automatic decree. Both under Order 8 Rule 10 C.P.C. and on the invocation of Order 9 C.P.C., the court is nevertheless duty-bound to diligently ensure that the plaint stands proved and the prayers therein are worthy of being granted.”** In the present case, this principle laid down by the Supreme Court has not been followed by the trial court.

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

Court below has wrongly passed the order refusing to recall the order fixing the case for judgment on the ground that he has no jurisdiction and as such refused to give sufficient opportunity to the defendant thereby occasioned failure of justice, as such, the judgment is vitiated on this account. I also find that there had already been partition between the parties. I also find that plaintiff failed to prove unity of title and possession and also failed to prove that the alias name of his grandfather, Makhan Singh is Nunu Singh, as such, the plaintiffs failed to prove any title or interest with respect to the property recorded in the name of Nunu Singh and Lalji Singh. Therefore, the plaintiff is not entitled for a decree for partition. Accordingly, the finding of the Court below is hereby reversed. Both the points are answered in favour of the appellants and against the plaintiffs-respondents.

31. In the result, this First Appeal is allowed. The impugned judgment and decree passed by the trial court is hereby set aside. The plaintiff-respondent's suit for partition is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

(Mungeshwar Sahoo, J)

Saurabh/-

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