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**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**First Appeal No.672 of 1970**
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**[Against the judgment and decree dated 11.03.1970 passed by the 3rd Additional Sub-Ordinate Judge, Chapra in Partition Suit No. 76 of 1962]**

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**Prabha Devi & Ors. … …. Plaintiffs-Appellants**

**Versus**

**Mosmat Nagi Kuer & Ors .... .... Defendants-Respondents**

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**Appearance :**

For the Appellants : Mr. Mrityunjay Prasad Singh, Advocate
For the Respondents : Mr. Arun Kumar No.1, Advocate

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO**

**CAV JUDGMENT**

**Date: 27th October, 2016**

The plaintiffs have filed this first appeal against the judgment and decree passed by the learned 3rd Additional Sub-Ordinate Judge, Chapra in Partition Suit No. 76 of 1962 whereby the court below held that lands comprised in Schedule-I of the plaint except 14 khatas 5 dhurs of plot no. 1435 are joint family property of the parties and out of the land of Schedule-II of the plaint except plot no. 258, which has been held to be the joint family property, all the other lands, mentioned in Schedule-II of the plaint, are exclusive property of the defendants barring two khatas 19 dhurs of plot No.

238, which is the plaintiff's property, as such, is not liable for partition and accordingly refused to grant partition decree in favour of the plaintiffs.

**2.** For the purpose of deciding the controversies between the parties in this first appeal, it is not necessary to go into great details of the pleading of the parties. However, the relevant facts for better understanding of the case of the parties are herein set-forth. The plaintiffs filed the suit for partition claiming partition in the suit properties mentioned in various schedules of the plaint i.e. up to Schedule-IV. According to the plaintiffs, all these properties are joint family properties and there had been no partition. Schedule-I land is ancestral property whereas Schedule-II land is acquired by the funds of the joint family in the name of wife of defendant no. 1 as well as son of defendant No. 1. The Schedule-III and IV are the movable articles and zamindari bond. The defendant No.1 is the brother of plaintiff.

**3.** The defendant No.1 contested the suit alleging that there had been partition in the year 1934 itself wherein half share was allotted in favour of plaintiff. The defendant no. 1 purchased plot no. 253 in the name of the mother of the parties who is defendant no.2. The Flour Mill, Dhankutti Mill and Oil Expellors have been purchased by defendant Nos. 3 to 7, which are their self acquired property. The defendants have constructed house over plot Nos. 249, 250 and 243. There was exchange of plot no. 201, 202, 239, wherein the plaintiff represented defendant No.1. All the properties mentioned in Schedule -II of the plaint is the self acquired properties of the defendant. The properties mentioned at Schedule- 'Ga' of the written statement is the property of the plaintiff and the property mentioned in Schedule- 'Cha' of the written statement is the property of defendant No.3, wife of defendant no.1.

**4**. The trial on the basis of the pleadings framed the following issues;

*No.1 Is the suit as framed maintainable ?*
*No. 2 Has plaintiff got any cause of action for the suit ?*
*No.3 Is the suit barred by limitation?*
*No.4 Is the plaintiff entitled to partition as prayed?*
*No. 5 Are the plaintiff and defendants still members of a joint family ?*
*No. 6 Is the court fee paid sufficient ?*
*No. 7 Whether the properties mentioned in Schedule-1 of the plaint have been partitioned?*
*No. 8 Whether the movable properties mentioned in Schedule-3 of the plaint are of the joint family ?*
*No.9 Whether the properties mentioned in schedule-2 of the plaint are self acquired of defendant No.1 or they are joint family property ?*
*No.10Whether the plaintiffs are entitled to a decree for partition? If so, to what extent ?*

**5.** The court below on the basis of the evidences categorically recorded finding that the defendant has failed to prove that there was separation and partition between the parties and plot

Nos. 249, 250, 243, 119, 32, 33, 148 and 179 mentioned in Schedule-1 of the plaint have been partitioned between the parties and, accordingly, decided Issue No.7 in favour of the plaintiff which relates to Schedule- I property. So far Schedule-II properties are concerned i.e. issue No. 9, the court below came to the conclusion that the house has been constructed by defendant No.1 at his cost and not from the joint family fund. The lands purchased by Exhibit-D-series ranging from the year 1936 to 1956 are not the joint family properties and, accordingly, the court below held that the Schedule-II properties are the self acquired properties of the defendants. Against this part of the decree, this first appeal has been filed. It may be mentioned here that the other part of the decree is in favour of the plaintiffs-appellants, against which neither there is any cross objection nor any separate appeal has been filed by the defendants. Therefore, the main question and controversy between the parties is with respect to Schedule-II properties.

**6.** The learned counsel for the appellants submitted that there was sufficient nucleous i.e. about 12 bighas lands which are the joint family property described in schedule 1 of the plaint and the court below held that there has been no partition with respect to the property. In such circumstances, the presumption is that whatever properties acquired have been acquired out of the joint family fund.

The father of the parties, Khublal Shah had sufficient money left as he was getting salary from his service as Head Clerk in Pratapur Sugar Factory. Khublal had also income from side business and there was sufficient income from the ancestral property. There was also income from money lending business of Khublal. He had also income from Zamindari and income from movable property and also he had left Rs. 1900/- provident fund which was withdrawn by the defendant No.1. When these evidences were produced by the plaintiffs to show that there was sufficient nucleous out of which the properties in schedule –II could have been acquired, the court below wrongly held that schedule-II properties are the self acquired properties of the defendants.

**7.** The learned counsel for the respondents submitted that the defendant no.1 was also in service and out of his own income, he has purchased the property either in the name of his wife or in the name of his mother or in his name. The properties, which are in the name of his sons, are their self acquired properties. In fact, there was no sufficient income from the ancestral land. Whatever income was there either from salary of Khublal and Zamindari were not sufficient to maintain the family. Khublal had seven daughters and a lot of expenses were there in marriage ceremonies. There was no cash income. The Zamindari interests were purchased but the consideration were paid by obtaining loan, which were repaid by the defendant No.1 because there was no income from the Zamindari. The Flour Mill, Dhankutti Mill and Oil Expellor belong to defendant Nos. 3 to 7 and the others have no share in it. The defendant No. 1 had advanced them the capital for the business out of his own income and not from the joint family income. In fact, there was no joint family income or nucleous at all. Considering all these aspects of the matter, the trial court clearly held that the properties have been acquired by defendants which are their self acquired properties.

**8.** In view of the above contentions of the parties, the only point arises for decision in this first appeal is as to whether the schedule-II properties as mentioned in detail in the plaint and finding recorded by the trial court, are the self acquired properties of defendants or the joint family properties acquired out of the joint family fund.

**9.** In the present case, the schedule-II properties have been purchased by Exhibit-D-series. Exhibit-D, dated 08.05.1953, is in the name of defendant No. 3, Rajpati Devi, wife of defendant No.1. Exhibit-D/1 dated 08.05.1952 is also in the name of defendant No. 3. Exhibit-D/3 dated 29.10.1941 is also in the name of defendant No. 3. It may be mentioned here that Rajpati Devi defendant No.3 is not a coparcener. Therefore, the properties mentioned in these exhibits are standing in the name of a lady member, who is not a coparcener. In other words, according to the plaintiffs, defendant No.3 is the *Benamidar* of the coparcenary family. However, there is no declaration claimed by the plaintiffs to that effect. In such circumstances, unless a relief is claimed for declaration that the properties are the joint family properties acquired in the name of defendant No.3, simple suit for partition will not be maintainable. In this connection, reference may be made to the case ***Rameshwar Mistry & Anr. Vs. Bebulal Mistry*** reported in ***AIR 1991 Patna Page 53***. All the other Exhibit-D-series are either in the name of defendant No.2 or other defendants and these sale deeds ranges from the year 1926 to 1956.

**10.** Now let us consider the legal position. The Hon'ble Supreme Court in the case of ***Srinivas Krishnarao v. Narayan Devji Kango***, reported in ***AIR 1954 SC 379*** has held that there is no presumption that any property held by a member of the joint family is joint. The burden rests on the person asserting that the property is the joint family property. Where it is established that the joint family possessed some joint family property which from its nature and relative value may have formed nucleous from which the property in question may have been acquired, the burden shifts to the parties alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family property.

**11.** In the light of the decision of the Supreme Court in the present case, it has to be found out as to whether there was any nucleous. It is admitted by the parties that the joint family possessed of 12 bighas and odd land. The question is merely because there was 12 bighas of land, there cannot be any presumption that there was sufficient income from the same. It has to be proved by the cogent and reliable evidences. The law requires that in order to give rise to the presumption, the nucleous must be shown to be such that with its help the property claimed to be joint could have been acquired. Therefore, the plaintiff has to show not only nucleous but sufficient nucleous out of which the property could have been acquired. It is after the possession of adequate nucleous by the joint family is shown then the onus will shift on the person claiming self acquisition to prove affirmatively that he acquired without aid of nucleous. There is no dispute that a member of joint family can make separate acquisition. So far nucleous is concerned, 12 bighas and odd land described in schedule-I cannot be termed to be nucleous. The family was so big as has been admitted by the parties. Khublal had seven daughters. Defendant No.1 has four sons. Plaintiff No. 1 has two sons, plaintiff No.2 and 3. Therefore, substantial part of the income was being spent for maintenance of the family. There is no evidence at all adduced by the plaintiffs to show what was the income nor there is any indication thereof. Likewise, there is no evidence of record to show that what was the expenses in maintaining the family. The savings after expanses will be the nucleous. No doubt, one cannot insist that exact arithmetical calculation must be there but it is expected something from the person asserting possession of nucleous to give an approximate income and approximate expenses so that the court of law and fact may infer the nucleous. In the present case, except the statement that the joint family had 12 bighas and odd land from which there was sufficient income nothing is there.

**12.** P.Ws. 1 to 5 and 7 to 9 and 11 have only stated that the ancestral lands quality was good and produce was also sufficient. Lands were productive. Khublal had savings from income of cultivation. These are the qualities of evidences produced by the plaintiffs and insisting the Court to record a finding that there was sufficient nucleous. In my opinion, mere bald statements of witnesses do not give rise to any presumption that there was much income and less expenses and therefore, there was sufficient savings which constitute nucleous.

**13.** So far the pleading and the submission of the learned counsel for the appellants that Khublal had left sufficient property and had income from side business and had also income from other sources and he had sufficient cash is concerned, from perusal of the plaintiff witnesses including P.W.-11 who is plaintiff No.1, I find that except the statements stated above, nothing is there on record. There is no evidence that he had any money lending business. What was the income from it.

**14.** So far the income from Zamindari is concerned, the only income was admitted to be Rs. 650/- only per year. Out of this amount, Rs. 150/- was paid as revenue and cess and 15 per cent was paid as collection charges to the Tashildar, which is the evidence of D.W.-12. Defendants have produced Exhibit-B series to prove the payment of collection charges, cess etc.

**15.** Exhibit-E is a letter of the year 1929 proved by D.W.-18. This witness had stated that he had advanced loan of Rs. 4000/-. In this letter, Khublal had promised to pay the amount within 15 days. This shows the financial condition of Khublal. D.W.-26 had stated that Zamindari was purchased by taking loan. Substantial part of the loan was paid by defendant No.1. It will not be out of place to mention here that the plaintiff himself admitted in his evidence that zamindari interest was purchased by taking loan. These evidences sufficiently show that Khublal had no sufficient money. Now, if Khublal had no sufficient money, then where is that joint family nucleous. Khublal being the father of the plaintiff No.1 and defendant No.1 was the Karta. If there was sufficient income from the ancestral land and from the Zamindari and from money lending business and from his salary, he should not have obtained loan.

**16.** On the other hand, the defendants' witnesses D.Ws.-3, 12, 16 and 18 have fully supported the separate income of the defendants. It is admitted fact that defendant No.1 was also in service. The payment of consideration amount of the sale deeds by defendant No.1 has been admitted by the vendors of the defendants, who have been examined as D.Ws.- 12 and 22. Over and above these evidences, the most important factor to be considered is that exhibit-D/11 is a registered sale deed of the year 1926 which is in the name of defendant No.1. At that time, Khublal, the father of plaintiff No.1 and defendant No.1 was alive and he was the Karta. Therefore, during the life time of Karta, the defendant No.1 had acquired property in his own name. It is not the case of the plaintiff that in fact, Khublal had purchased the property (exhibit-D/11) in the name of defendant No.1. There is no explanation as to how defendant No.1 purchased the property during the life time of Karta. This clearly indicates that defendant No.1 had separate source of income and since 1926 he was acquiring the property either in his name or in the name of his wife and sons and even mother.

**17.** So far property standing in the name of mother of plaintiff No.1 and defendant No. 1 is concerned, the plaintiff only case pleaded is the property is the acquired out of joint family nucleous. On the contrary, according to the defendant No.1 he has purchased the property in the name of mother (defendant No.2). In other words, according to defendant no.1 although the property stands in the name of defendant No.2, it is the self acquired property of defendant No.1. The defendant No.2 did not dispute this question. Before the Court, there is only two cases. On case i.e. set up by the plaintiff. According to the plaintiff, it is the property acquired out of joint family property income. The other case is of defendant i.e. it is the property acquired by defendant No.1 out of his separate income. In such circumstances, the court is required to find out as to whose version is correct i.e whether the plaintiffs version is correct or the defendants version is correct. The court cannot make a third case and say that it was the property of mother, therefore, after her death, it will devolve half and half to plaintiff No.1 and defendant No.1. So if plaintiff will be able to show that the property in the name of defendant No.2 is the joint family property then only he will be entitled to a share in it otherwise he will not be entitled to any share as in the present case, the defendant has been able to prove that he had separate source of income and was acquiring separate properties in the name of defendants.

**18.** In view of my above discussion, I find that the plaintiffs failed to prove that schedule-II properties, the partition of which has been refused by the trial court, are the joint family properties acquired out of the joint family fund. On the contrary, the defendants- respondents have been able to prove that the properties are their self acquired property. The findings of the trial court on this point are therefore, hereby, confirmed.

**19.** In the result, this first appeal is dismissed. In the facts and circumstances of the case, there shall no order as to costs.

**(Mungeshwar Sahoo, J)**

***Brajesh/-***

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