

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.116 of 1974

Against the Judgment and Decree dated 13.12.1973 passed by Vth Addl. Subordinate Judge, Sasaram in Title suit No.25 of 1969/24 of 1973.

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Ramashish Singh & Ors.

.....Defendants -appellants

Versus

Sunil Singh & Ors.

.....Plaintiffs - Respondents

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Appearance :

For the Appellant/s

:-

Mr. Bhupendra Narain Singh, Advocate
Mr. Shailendra Kumar, Advocate

For the Respondent

:-

None.

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Dated : 16th day of October, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. This First Appeal has been filed by the contesting defendant appellants against the Judgment and Decree dated 13.12.1973 passed by the learned Vth Addl. Subordinate Judge, Sasaram in Title suit No.25 of 1969 / 24 of 1973 whereby the learned Court below decreed the plaintiff respondent's suit.



2. The plaintiff respondent filed the aforesaid suit as forma pauper in the year 1966. The application was allowed and then the suit was registered as Title Suit No.25 of 1969. The original plaintiff claimed the relief that she and defendant No.4 and 5 are the daughters of late Khobhari Rai of village Audani bigha and further prayed for partition of her share to the extent of 1/3rd in the suit property. The plaintiff also prayed for declaration of gift deeds, the danpatras and the sale deed executed in favour of defendant No.3 and the defendant No.6 to 18 is not binding on the plaintiff as the same are void. The plaintiff also prayed for recovery of Rs.300/-.

3. The plaintiff claimed the aforesaid relief contending inter alia that one Pada Rath Rai had one son, namely, Mosafir Rai who had two sons, namely, Aliar Rai and Khobhari Rai. Khobhari Rai died leaving behind his two widows, namely, defendant No.1 and Piaria Kuer. Piaria Kuer also died leaving behind three daughters, i.e., plaintiff and Daulat Devi and Shiv Dulari Devi who are defendants. The second wife Rukmini Kuer is still alive. Aliar Rai died issueless. Aliar Rai died before 1937 so the entire properties devolved on the father of the plaintiff. The widow of Aliar Rai was only a maintenance holder. Subsequently, she also died. Khobhari Rai died in the year 1961 so the entire property devolved on the plaintiff, the defendant No.1 and defendant No.4 and 5 who came in

joint possession. Step mother of the plaintiff, i.e., defendant No.1 was looking after the cultivation and because the three daughters were residing in their Sasural, the crops were being divided by the defendant.

4. The plaintiff further pleaded that the defendant No.1 gifted the entire properties of Khobhari Rai to defendant No.3 who is the brother of defendant No.1 and also executed danpatras with respect to some lands in favour of defendant No.6 to 8. She also alleged that the danpatras and gift deeds were executed at the instance of defendant No.3. The defendant No.3 executed sale deed and disposed of almost all the properties gifted to him. Accordingly, the plaintiff prayed for declaration that the sale deed, danpatras, gift deed are void, inoperative and not binding on the plaintiff.

5. The defendant No.1, 2 and 3 filed the written statement and contested the suit. Besides taking various ornamental and legal please, the contesting defendant mainly contended that Pada Rath Rai had two sons, Devi Rai and Mosafir Rai. Devi Rai had three sons and one of them was Doma Rai. Doma Rai died leaving behind one son, namely, Ram Swaroop Rai and five daughters including plaintiff and defendant No.5. The brother of Doma, namely, Megha died leaving behind a daughter Daulat Kuer who is made defendant No.4. After

the death of Aliar Rai, the properties devolved on Khobhari Rai who died issueless in the year 1961 leaving behind the defendant No.1 his widow only. Accordingly, the plaintiff has got no locustandi to get the declaration regarding the gift deed, sale deed and danpatras as she is not the daughter of Khobhari Rai.

6. The further case is that in title suit No.93 of 1950 between Lakshmian Kuer and Khobhari Rai, the only widow of Khobhari Rai who is defendant No.1 was substituted after the death of Khobhari Rai. In execution case No.23 of 1963 also court fee was realized from the defendant No.1 only. 17 decimal land were acquired by the State Govt. and accepting defendant No.1 as only heir of Khobhari Rai, the entire compensation was paid to her. All other allegations were denied and prayed for dismissal of the suit.

7. The defendant No.12, 14 to 16 also filed the written statement and took the same defence as that of defendant No.1 to 3.

8. On the basis of aforesaid pleadings of the parties, the learned Court below framed the following issues :-

- (i) Is the suit as framed maintainable?
- (ii) Has the plaintiff got a valid cause of action for the suit?
- (iii) Is the suit bared by special or general law of limitation?
- (iv) Is the suit bad for mis-joinder or non-joinder of the parties and mis-joinder of cause of action?
- (v) Is the suit properly valued?

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- (vi) Are the plaintiff and defendant Nos.4 and 5 daughters of Khobhari Rai?
 - (vii) Has the plaintiff got any title to the suit lands?
 - (viii) Is there unity of title and possession over the suit lands?
 - (ix) Is the plaintiff entitled to any relief, if so, to what extent?

9. After trial, the learned Court below came to the conclusion that plaintiff and defendant No.4 and 5 are the daughter of Piyari Devi, second wife of Khobhari Rai, as such plaintiff is entitled for the declaration and partition claimed by her. The sale deed, gift deed, are not valid for more than 1/4th share of defendant No.1 as defendant No.1 had only 1/4th share. Accordingly, the Court below declared that the documents are valid only for 1/4th share of Rukmini Devi. Accordingly, the plaintiff's suit to the extent of 1/4th share was decreed.

10. The learned counsel, Mr. Bhupendra Narain Singh, for the appellant submitted that the Court below had not properly appreciated the oral and documentary evidences. According to the learned counsel, in title suit No.93 of 1950 which was filed by wife of Aliar against Khobhari Rai for partition, after the death of Khobhari Rai his only widow Rukmini was substituted but the Court below did not rely on this document which clearly support of the case of the defendant that Khobhari Rai died leaving behind only one widow, the defendant



No.1. In execution case No.23 of 1963 also only defendant No.1 was substituted and the Court below realized Court fee from her only which again show that she was the only widow and there were no other heirs. The learned counsel further submitted that land acquisition notice, ext. 'G', was issued only in the name of Rukmini Devi as sole heir of Khobhari Rai. Likewise the appellant also produced voter list (Ext.C/ii) published on 1.1.1966 wherein it is specifically mentioned that Piyari Devi was wife of Doma Rai and that is the case of the defendant appellants.. The appellants and four daughters were born to Doma Rai from second wife Piyari Devi. It is for the plaintiff to prove that name of her mother is Piyari Devi. In spite of these evidences, the Court below did not rely on them and wrongly recorded findings that the defendants failed to prove this case that plaintiff is daughter of Doma Rai.

11. During the survey and in the proceeding under section 103 of Bihar Tenancy Act, the plaintiff never claimed any interest in the property of Khobhari Rai and parcha were issued in the name of Rukmini Devi only.

12. The defendant appellant also produced the rent receipt and also mutation orders etc. in support of the fact that after gift and sell, the donee and the purchaser came in possession and they have been



mutated. The learned Court below has not properly appreciated these evidences. According to the learned counsel, the witnesses examined by the appellant have all stated that the Plaintiff is the daughter of Doma Rai through Piyari Devi and that Khobhari Rai died leaving behind his only one widow defendant No.1 and no other widow and daughter but the learned Court below discarded the evidences on untenable grounds applying double standard and at the same time accepted the evidences of the plaintiff.

13. The learned counsel further submitted that the gift deed is of the year 1965 and the suit has been filed in the year 1969 therefore, the suit itself was barred by law of limitation because declaration has been sought in relation to the gift deed. The learned court below did not consider this aspect of the matter which vitiated the Judgment. On these grounds, the learned counsel submitted that the First Appeal be allowed, the impugned Judgment and Decree be set aside and the plaintiff's suit be dismissed.

14. No one appeared on behalf of the respondents.

15. In view of the above submissions of the learned counsel for the appellant, the only point arises for consideration in this First Appeal is as to whether the plaintiff has been able to prove her case regarding parentage and whether she is entitled to the decree claimed

for and whether the impugned judgment and Decree are sustainable in the eye of law.

16. It is the specific case of the plaintiff that Khobhari Rai had two wives, defendant No.1 and Piyari Devi. Since no issue was there from first wife Khobhari Rai married Piyari Devi from whom he had three daughters, i.e., the plaintiff and defendant No.4 and 5. On the contrary, according to the defendants, Khobhari Rai did not marry second wife rather Piyari was the second wife of Doma Rai and from them one son and five daughters were born including the plaintiff and defendant No.5. The defendant No.4 is the daughter of Megha Rai, brother of Doma Rai. In support of their respective cases, the parties have examined witnesses and also produced documentary evidence. Now, let us examine first the oral evidence.

17. To prove second married of Khobhari Rai with Piyari Devi, the plaintiff examined the priest, P.W.4. From perusal of his evidence, it appears that he has clearly described the genealogy and also the second marriage. According to him, he had performed the marriage. This witness is aged about 70 years. P.W.5 and P.W.7 both are relation of Naubat Singh, i.e., father of Piyari Devi. Both of them have stated that *kanyadan* was performed by Naubat Singh in the marriage between Khobhari Rai and Piyari Devi. They also said that

they have three daughters. P.W.10 is the neighbor of Naubat Singh. He has also stated in the same line and P.W.8 is the brother of Piyari Devi herself, i.e., maternal uncle of the plaintiff. P.W.11 is also related to Khobhari Rai who also supported the case pleaded by the plaintiff regarding parentage and marriage. P.W.17 is the plaintiff herself.

18. It appears that the other witnesses examined by the plaintiff are on the question of marriage of daughters of Khobhari Rai . P.W.9 is the *dewar* of plaintiff who claimed that Khobhari Rai performed *kanyadan* in the marriage of plaintiff. It may be mentioned here that these witnesses have been examined to prove the fact that in fact plaintiff is not the daughter of Doma Rai. This witnesses has further stated that Khobhari Rai himself had gone for negotiation of marriage. He has also named the Pujari who performed the marriage and also named the Napit. P.W.13 who also claimed to be related with P.W.9 and stated that he was present at the time of marriage with the plaintiff with Ratan Deo. P.W.15 is also relation, i.e., *gotia* of Ratan Deo and P.W.16 claimed to be the next door neighbor of Ratan Deo. All these witnesses are on the point that plaintiff was married with Ratan Deo and Khobhari Rai performed *kanyadan* and other formalities. So far the admissibility of the evidences of these witnesses are concerned, it appears that their evidence is direct



evidence. As such the same are admissible. Even if it is not direct then also being the relation and next door neighbour, the presumption is that they have got special means of knowledge, therefore, their evidences are admissible to prove the relationship in view of the decision of the Hon'ble Supreme Court in the case of ***Dolgobinda Paricha Vs. Nimani Charan Misra AIR 1959 SC 914.***

19. These are the positive evidences produced by the plaintiff in support of her case. So far the evidences of the defendants are concerned, they have also examined many witnesses. So far the first point that Khobhari Rai did not marry second wife is concerned, those are negative evidence. The witnesses of the defendant, i.e., D.W.1, 2, 4 and 5 have denied that the plaintiff and Daulat Devi are daughter of Khobhari Rai. D.W.3 is one of the defendants. He has also denied the second marriage of plaintiff's father. It is settled principle of law that the negative is not required to be proved. Denial is sufficient and here the defendants are denying the relationship and the second marriage. Therefore, it is for the plaintiff to prove these facts for which we have discussed earlier in the preceding paragraph .

20. The other set of witnesses have been examined by the defendants in support of their case that plaintiff is daughter of Doma Rai. D.W.2 is the defendant No.9 himself. D.W.3 is also one of the



defendant have stated that plaintiff and Sheo Dulari are daughter of Doma Rai @ Singh and the name of their mother is Piyari Devi who is still alive. It may be mentioned here that D.W.2 has admitted that the brother of Piyari Devi is Mosafir Singh. This Mosafir Singh has been examined on behalf of the plaintiff who has stated that his sister was married with Khobhari Rai. D.W.3 also in the cross-examination admitted that plaintiff's father had two marriages and second marriage was performed with Piyari. The learned counsel for the defendant appellant submitted that the witness has stated that plaintiff's father had two marriages that means Doma Rai had two marriages and Piyari Devi is still alive. So far this submission is concerned, it appears that the brother of Piyari Devi has not supported the case of marriage of Piyari with Doma. Moreover, if at all Piyari is alive who is wife of Doma then the defendant should have produced her before the Court. Now, therefore, admitted position as has been admitted by these defendant, i.e., D.W.2 and D.W.3 that Piyari Devi is the name of plaintiff's mother. This is the case of the plaintiff also. The defendants admitted that plaintiff's father had two marriages. This is the case of the plaintiff also. They also admitted that Piyari is still alive but they have not examined her and according to the plaintiff, she has already died. Thus, even if one Piyari Devi is alive, who is wife of Doma then also it will be nothing else then a co-incidence that

the name of wife of Doma is also Piyari and the name of mother of plaintiff is also Piyari.

21. The other witnesses D.W.6, 7, 9, 10, 12 and 14 to 16 have deposed on the same line to the effect that Piyari was married to Doma Rai who was daughter of Naubat Singh. It is not necessary to go into details of the evidence of these witnesses in view of the fact that according to defendants themselves, Piyari Devi is still alive but she has not been examined. However, it will not be out of place to mention here that D.W.6 in his cross-examination has stated that Doma Rai had one son Ram Swaroop and one daughter Tileshwari from first wife of Doma. There is no reason as to why Doma Rai married second wife when he had already son and daughter. None of them have been examined in support of their case.

22. The most important witness is D.W.14 who is defendant No.1. No doubt she has supported the case pleaded in the written statement but in her cross-examination, she admitted that Piyari is her *gotni* but at the same time denied any knowledge about Naubat Singh. Naubat Singh is father of Piyari Devi. This shows the quality of statement of this witness and, therefore, her mere statement regarding marriage of Piyari with Doma cannot be relied upon.

23. The defendants have produced documentary evidences in



support of the case that the name of wife of Doma is Piyari Devi and defendant No.1 is the only heir of Khobhari Rai. Ext.13 is execution case No.23 of 1963. The learned counsel, Mr. Bhupendera Narain Singh, submitted that this execution case was filed against Khobhari Rai for realization of Court fee and on the death of Khobhari, the defendant No.1 was substituted and Court fee amount was recovered from her, therefore, it clearly indicates that defendant No.1 was the only heir otherwise the plaintiff and defendant No.4 and 5 also should have been substituted as daughters. So far this submission is concerned, it may be mentioned here that the order passed by the Courts for substitution are interlocutory in nature and the legal representatives are substituted. All legal representatives are not heirs but all heirs are legal representatives. While passing substitution order, the question of title or relationship is irrelevant. Therefore, on this fact, the Court cannot presume that plaintiff is not the daughter of Khobhari Rai as she was not substituted.

24. Ext.B/1 is the application for substitution and ext.‘F’ is the ordersheet of the said execution case which shows payment of Court fee amount by defendant No.1 in the year 1964. Both of them are related with ext.13.

25. The learned counsel next submitted that the Land



Acquisition Deptt. had issued the notice to defendant No.1 only as heir of Khobhari Rai for acquisition of land and compensation was paid to her only. Ext. 'G' is the notice. So far this submission is concerned, also on this notice alone, the Court cannot presume a fact which requires to be proved according to law, i.e., plaintiff was not the daughter of Khobhari Rai. Again it may be stated that this will be negative presumption. The plaintiffs have categorically examined witnesses as discussed above which are positive in nature.

26. The learned counsel for the appellant gave much emphasis on ext. 'C-II' which is voter list of the year 1966 dt.01.01.1966 and submitted that Piyari Devi has been shown as wife of Doma Rai. So far this submission is concerned, I have already discussed above that according to the defendants Piyari Devi, the second wife of Doma is still alive which is in support of this ext. 'C-II'. It clearly proves that the name of wife of Doma is Piyari Devi but it cannot be said that the mother of plaintiff is this Piyari Devi. I have stated above that it may be a co-incidence that the name of wife of Doma and also name of wife of Khobhari Rai both are Piyari Devi. Further, the plaintiffs have stated that mother of plaintiff was married with Khobhari. In my opinion, therefore, this ext. 'C-II' only shows that the name of wife of Doma Rai is also Piyari but on the basis of this, it cannot be said that

this Piyari Devi is the mother of plaintiff.

27. Ext. 'C' is the deed of gift executed by defendant No.1 and, therefore, it is not relevant as it is under challenged. So far the rent receipt and the proceeding under Section 103 of Bihar Tenancy Act are concerned, the learned counsel submitted that no objection was raised ever by the plaintiff. In my opinion, if no objection was raised, the question will be whether right of the plaintiff will be divested. The answer will be 'No'. Therefore, on the basis of these submissions, the Court cannot presume a negative fact that plaintiff is not the daughter of Khobhari Rai.

28. In view of my above discussion, I find that the plaintiff have been able to prove that plaintiff and defendant No.4 and 5 are the daughters of Khobhari Rai through Piyari Devi. The defendants failed to prove that the plaintiff is daughter of Doma Rai. On the death of Khobhari Rai, his property devolved on three daughter and the widow Rukmini, defendant No.1, therefore, they all have got 1/4th share each. In such circumstances, either sell or gift made by defendant No.1 to the extent of her 1/4th share will be valid only and excess to her share, i.e., more than 1/4th will not be binding on the plaintiff and defendant No.4 and 5. Plaintiff and defendant No.4 and 5 each have got 1/4th share. The findings of the Court below is,

therefore, hereby confirmed.

29. In the result, I find no merit in this First Appeal. Accordingly, this First Appeal is dismissed. No order as to costs.

(Mungeshwar Sahoo, J)

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