

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.539 of 1974

(Against the Judgment and decree dated 09.05.1974 passed by the 5th Additional Sub-ordinate Judge, Motihari, in Title Suit No. 182 of 1970/51 of 1973.)

Saraswati Devi and Others Appellant/s

Versus

Sipahi Singh and Others Respondent/s

Appearance :

For the Appellant/s : Mr. Vinod Kumar Singh
: Mr. Lallan Pd. Singh
For the Respondent/s : Mr. Vikash Sharma
: Mr. Shashi Bhushan Pd. Sinha
: Mr. S.N. Vishwakarma
: Mr. Pravin Kumar
: Mr. Gopal Jha

PRESENT

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT

Date: 19th January, 2016

This first appeal has been filed by the defendants-appellants against the judgment and decree dated 09.05.1974 passed by the learned 5th Additional Sub-ordinate Judge, Motihari, in Title Suit No. 182 of 1970/51 of 1973, whereby the court below has decreed the plaintiff-respondent's suit for partition.



2. Deceased-Respondent No.1, Ramdeni, filed the aforesaid partition suit claiming $1/3^{\text{rd}}$ share in the suit property alleging that Pratap Mahto was the common ancestor. He had died leaving one son, namely, Palton Mahto, who also died leaving one son named Mahadeo Mahto. Said Mahadeo Mahto had two wives. From the first wife, he had two sons, namely, Ramdeo Mahto, defendant No.1 and Shiv Balak Mahto. Defendant No. 3 is the wife of Shiv Balak Mahto and defendant No.2 is the son of Shiv Balak Mahto. The name of first wife was Laukeshri Kuer. The plaintiff is the second wife of Mahadeo Mahto from whom, Mahadeo had one son named Lakshman and a daughter named Bachhi, who died during the life time of Mahadeo Mahto in the year, 1957. Mahadeo Mahto also died in the year 1957. Shiv Balak Mahto died in the year 1962. Thereafter, the parties are continuing in joint possession of the suit property. The plaintiff has got $1/3^{\text{rd}}$ share.

3. Defendant Nos. 1, 2 and 3 filed contesting written statement. Their main defence is that Mahadeo Mahto had only one wife named Ramdeni Kuer and after her death, he never married second time. The plaintiff is not the wife of Mahadeo Mahto nor he had any son, namely, Lakshman or a daughter, namely, Bachhi from his second wife. The name of first wife was not Laukeshri Kuer. The plaintiff was never in possession of the property nor she resides in village Gariba. The defendants have mortgaged some property in favour of defendant



Nos. 4 and 8. The plaintiff in order to create evidence executed *Farji* documents in favour of defendant No. 7. The name of plaintiff is only Simrekhiya but she started herself calling as Most. Ramdeni @ Simrekhiya. The Mukhiya and Gram Panchayat Officer are relative of defendant No. 5 and the defendants afraid that they might have got the name of plaintiff entered in the voter list of Gram Panchayat and other documents, which are not binding on these defendants.

4. The further defence is that, in fact, the plaintiff was first married with Nema Mahto of village Ahiraulia, but she was turned out by him because of her loose character and thereafter the plaintiff was married second time with Ram Prasad Bhagat of village Madhubani. Now she is residing in the house of defendant No.5.

5. The other defendant Nos. 5 to 7 and 9 field a joint written statement supporting the plaintiff's case. In addition to the plaintiff's case, they further pleaded that the plaintiff was never married with Nema Mahto or Ram Prasad Bhagat. Ram Prasad Bhagat is father-in-law of defendant No.1, whose wife is still alive and has three sons and daughters from his wife. Nema Mahto is the relative of Prasad Mahto. The plaintiff's have sold the land in favour of them by registered sale deeds in the year 1969-70.

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

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- “(i) Is the suit as framed maintainable ?***
 - (ii) Has the plaintiff got cause of action or right to sue?***
 - (iii) Whether the plaintiff is the widow of Mahadeo Mahto and she was legally married with him?***
 - (iv) Whether plaintiff was married with Nema Mahto and Ramprasad Mahto as alleged by defendant’s first party?***
 - (v) Whether the plaintiff and her vendee have unity of title and possession with the defendants?***
 - (vi) Is the plaintiff entitled a decree for partition and if so for what share?***
 - (vii) To what relief, if any, the plaintiff is entitled ?”***

7. The trial court on the basis of material available on record came to the conclusion that the plaintiff is the wife of Mahadeo Mahto and the defendant failed to prove that she was first married with Nema Mahto and then Ramprasad Mahto. Accordingly, the plaintiff’s suit was decreed.

8. Mr. Vinod Kumar Singh, learned counsel appearing on behalf of the appellants submitted that, in fact, the plaintiff has filed the suit for declaration of her relationship with Mahadeo Mahto first, therefore, the plaintiff was required to pay *advalorem* court fee, but the court below did not consider this aspect of the matter. Mahadeo Mahto died in the year 1957, but the plaintiff claiming herself to be the wife of Mahadeo Mahto has filed this suit in the year 1970 beyond 12 years, therefore, the plaintiff is required to prove her subsisting title but the court below did not consider this aspect of the matter. According to



learned counsel for the appellant, the court below approached the case in wrong angle and has relied upon the created documents by the plaintiff with the help of the Sarpanch and Mukhiya of the Panchayat, as a result of which, the court below has wrongly recorded the finding that the plaintiff is the wife of Mahadeo Mahto, but all the documents produced by the plaintiffs are collusive and created documents for the purposes of the present suit. Further, the plaintiff for creating evidence had executed many sale deeds in favour of the supporting defendants. The transferee-defendants never came in possession of any part of the property, which was sold by the plaintiff, which clearly indicate that the plaintiff was not in possession of any property nor she delivered possession in favour of the transferee, therefore, also the judgment and decree passed by the court below is bad as for grant of partition decree, the plaintiff is required to prove unity of title as well as unity of possession.

9. The learned counsel further submitted that the defendant have adduced overwhelming evidences in support of the fact that the plaintiff was married to Nema Mahto first and thereafter to Ramprasad Mahto, but the court below erroneously discarded the evidences and relied upon some of the evidences of the plaintiffs' witnesses, which are inadmissible under Section 50 of the Indian Evidence Act. Therefore, the finding recorded by the court below is wrong. Further submission is



that the court below has not properly appreciated the oral as well as documentary evidences produced by the defendants-appellants. The defendants also adduced reliable evidence in support of the fact that, in fact, the plaintiff has been set up by the defendant No.5. The court below has not properly appreciated the fact that exhibit-1 was not produced from proper custody and the entries in this exhibit-1, Pariwarik Register, are not genuine. This Pariwarik Register was in custody in the Gram Panchayat and the Mukhiya of Gram Panchayat in collusion with the plaintiff have created this document with a view to grab the property of the defendant. The plaintiff also failed to prove the marriage between her and Mahadeo Mahto. The documents produced by the plaintiff i.e Pariwarik Register, exhibit-1, exhibit-2 series, exhibit-5, exhibit-9 and exhibit-9/A are fabricated documents as they are neither genuine nor reliable but the court below relied upon these inadmissible evidences or fabricated documents and has decreed the plaintiff's suit wrongly. It may be mentioned here that at the time of hearing of the first appeal, the learned counsel placed all the oral evidence of the witnesses of both the sides and submitted that the court below has wrongly relied upon the evidences of the plaintiffs' witnesses and wrongly discarded the evidences of the defendants-appellants' witnesses. On these grounds, the learned counsel submitted that first appeal be allowed and the impugned judgment and decree be set aside

and the plaintiff's suit be dismissed.

10. On the other hand, learned counsel for the defendant submitted that the learned court below has properly appreciated all the evidences adduced by the plaintiff as well as by the defendants and thereafter recorded the finding that the plaintiff is the widow of Mahadeo Mahto being the second wife. The evidences produced by the plaintiff are admissible under Section 50 of the Indian Evidence Act as the witnesses examined are either relations of the plaintiff or are co-villager or next door neighbour of Mahado Mahto. Over and above, the oral evidences, the plaintiff also produced documentary evidences, which are public document in support of the fact that she is the widow of Mahadeo Mahto. The only explanation given by the defendants-appellants with regard to the documentary evidences is that those are fabricated and created documents. Further defence is that the Sarpanch and the Mukhiya in collusion with the plaintiff have created those documents but except the pleading and statement, nothing was brought on record to show that how those documents were created and how the plaintiff collided with Mukhiya and Sarpanch. According to learned counsel, the plaintiff herself has executed many registered documents with respect to the property of Mahadeo Mahto in favour of third persons. But, the defendants-appellants never challenged the aforesaid sale deed or mortgage deeds on the ground that the said documents are



void documents being executed by the plaintiff No.1, who has no title to the property as she is not the widow of Mahadeo Mahto. There is a clear recital in the registered sale deeds to the effect that plaintiff No.1 is the widow of Mahadeo Mahto. Considering all these aspects of the matter, the court below has rightly held that plaintiff No. 1 is the widow of Mahadeo Mahto. On the basis of these grounds, the learned counsel submitted that the first appeal be dismissed with costs.

11. In view of the above rival contentions of the parties, the points arise for consideration are as to whether, the plaintiff has been able to prove that she is the widow of Mahadeo Mahto or whether she was earlier married with Nema Mahto and later on with Ramprasad Mahto and whether the judgment and decree passed by the court below is sustainable in the eye of law.

12. According to the plaintiff, Most. Ramdeni @ Simrekhiya, she is the widow of Mahadeo Mahto, who died in the year, 1957. If she is able to prove this case that is her relationship with Mahadeo Mahto then she will have 1/3rd share in the suit property being the widow of Mahadeo Mahto. On the contrary, the defendant's case is that she was earlier married with Nema Mahto and when she was driven out by Nema Mahto, she was married with Ram Prasad Mahto, but she is not the widow of Mahadeo Mahto. The name of first wife of Mahadeo Mahto was Ramdeni. In support of their respective cases, both the



parties have adduced evidences. Since the plaintiff has filed the suit for partition and her title is being denied by the defendants, the plaintiff is required to prove her positive case that she is the widow of Mahadeo Mahto. So far the case of the defendants is concerned, it is for them to prove the case pleaded by them.

13. Let us consider the evidences produced by the parties. The witnesses examined by the plaintiff on the point of relationship is being taken up first. P.W.-1 is the next door neighbour of the defendant first party. He has clearly stated that the plaintiff is the widow of Mahadeo Mahto. He has also stated that since his *hosh*, he was seeing the plaintiff residing in the house with Mahadeo Mahto. P.W.-8 has only stated that Mahadeo Mahto had two marriages. The first wife died and thereafter plaintiff was married with him. So far this witness is concerned, there is nothing in his evidence to believe his statement because he is resident of another village. Therefore, in my opinion, his evidence and the evidence of P.Ws. 3 and 4 under Section 50 of the Evidence Act, are not admissible.

14. It appears that the plaintiff also examined P.Ws.-6, 14, 17, 18, 20 and 21. These witnesses are disbelieved by the court below on the ground that their evidences are not admissible under Section 50 of the Indian Evidence Act. Therefore, I am not discussing their evidences. The question is whether on the basis of remaining evidences of the



plaintiffs' witnesses, the finding recorded by the court below could have been arrived at or not. P.Ws. 5 and 7 are the co-villagers i.e. they are of Mananpur village, which is *Naihar* of the plaintiff (Simrekhiya). P.W.-24 is the plaintiff herself. The evidence of P.Ws. 5 and 7 being the co-villagers, is the direct evidence and, therefore, their evidence is admissible in view of the decision of the Hon'ble Supreme Court in the case of *Dolgobinda Paricha Vs. Nimani Charan Misra* reported in ***AIR 1959 SC 914***. P.W.-12 is the brother of the plaintiff himself. His evidence is also direct evidence regarding the relationship of plaintiff with Mahadeo Mahto. Over and above the oral evidences the plaintiff has also produced documentary evidences.

15. Exhibit-1 is the Pariwarik Register, maintained in the Gram Panchayat and it is prepared under Panchayat Election Rules. In this Pariwarik Register, the plaintiff has been shown to be the widow of Mahadeo Mahto. Exhibit-9 is the voter list of the year 1966. It is admitted fact that the voter list is a public documents. In this exhibit also Ramdeni, plaintiff has been shown to be the widow of Mahadeo Mahto. In exhibit-9-A, which is also voter list, the plaintiff has been shown to be the widow of Mahadeo Mahto. Exhibit-4 is one receipt produced by the plaintiff issued by the co-operative society, wherein also the plaintiff has been shown to be the widow of Mahadeo Mahto. So far these documentary evidences are concerned, the learned counsel



for the appellants submitted that those documents are created documents and the plaintiff with the help of defendant No.5 got the said documents created in collusion with the Mukhiya and Sarpanch. So far this submission of the learned counsel for the appellants is concerned, it may be mentioned here that except this statement, nothing has been brought on record to show that, in fact, those evidences are created documents or manufactured documents. Admittedly, Mukhiya and Sarpanch are not party to the suit and they have also got not interested in the property nor they are claiming so. Then in such situation, can it be believed that all the public documents are created /manufactured by a widow with the collusion of Sarpanch and Mukhiya. Answer will be **no**.

16. In view of the above discussion, the plaintiff has produced the documentary evidences also, which are reliable and there is no reason as to why all these evidences should be discarded. The only ground is that these documents are created documents. It will not be out of place to mention here that the appellants nowhere made any objection to these documents before the appropriate authority and after such a long period for the purpose of defence, these statements have been made in this present suit. Now, let us consider the evidences produced by the defendants because the other witnesses i.e. P.Ws. 2, 13, 16, 19 and 25 are formal witnesses. The defendant examined D.W.-1 to 4, 6 to 17, 19 to 21, 23, 28 and 30 in support of the case that the plaintiff



was first married with Nema Mahto thereafter with Ramprasad Mahto. In this matter, it may be pointed out here that P.Ws. 12 and 18 and the plaintiff as P.W.-24 have clearly stated in their evidences that Ramprasad Mahto is the Father in law of defendant No.1. This fact is admitted by D.W.-7. D.W.-11, at paragraph No. 3, has clearly admitted that Mahadeo Mahto had three sons. Two sons are alive and one son died. So far this evidence is concerned, it is directly in support of the plaintiff's case that Mahadeo Mahto had three sons. Two are there in the suit whereas one son through the plaintiff has died. D.W.-7 also admitted at paragraph -2 that Mahadeo Mahto had one daughter also. Therefore the witness of defendant D.W.-7 is admitting the plaintiff's case that Mahadeo Mahto had three sons and one daughter. According to the defendants, the plaintiff is not the wife of Mahadeo Mahto and Mahadeo had only two sons. Defendants of D.W.-7 gave a death blow to the case of the defendant.

17. So far the relationship of the plaintiff with Nema Mahto is concerned, the witnesses examined by the defendants are either inadmissible under Section 50 of the Indian Evidence Act or not reliable. D.W.-30 at, paragraph No.4, has admitted that he enquired the name of the plaintiff, her father's name and brother's from the defendant. At paragraph-7, he has stated that he had not talked with Nema Mahto or Ramprasad Mahto regarding their marriage with the



plaintiff. The other witnesses of the defendants have only stated that the plaintiff first married with Nema Mahto and thereafter he was driven out by him and then she was married with Ramprasad Mahto. These are the evidences of the parties. Neither Nema nor Ramprasad was examined.

18. The learned counsel for the respondents submitted that in exhibit-4, the name of the plaintiff has been mentioned as Simrekhiya whereas in exhibit- 9 and 9A, the name of the plaintiff has been mentioned as Ramdeni. It is the defendant's case that the name of first wife of Mahadeo Mahto was Ramdeni. The plaintiff has not pleaded in the plaint that, in fact, her alias name is Ramdeni. So far this submission is concerned, it may be mentioned here that in the cause title of the plaint itself she has described her alias name. Further it is admitted that the first wife of Mahadeo Mahto died in the year 1957. The voter list, Exhibit-9 is of the year, 1966 when the first wife had already died. In such situation, how the first wife's name was carried out in the voter list of the year 1966. It clearly indicates that the voter list relates to the present plaintiff. Therefore, it becomes now clear that the plaintiff has got two names at some places, she has been described as Simrekhiya and in some places, she has been described as Ramdeni but the husband name is Mahadeo Mahto.

19. In view of my above discussion of the oral evidences of the

defendants, I find that their statements are in general as pleaded in the written statement. However, the plaintiff has produced cogent and reliable evidences oral as well as documentary and, therefore, I find that the plaintiff has been able to prove that she is the second wife of Mahadeo Mahto. Therefore, the finding of the trial court on this point is, hereby confirmed. I also find that the defendants failed to prove that the plaintiff was first married with Nema Mahto and thereafter she was married with Ramprasad Mahto. The finding of the court below on this point is also, therefore, confirmed.

20. In the result, this first appeal is dismissed with cost of Rs. 10,000/- (Ten Thousand rupees) to be paid by the appellants to the plaintiffs-respondents within two months from today, failing which, the plaintiffs-respondents are at liberty to realize the same through the process of the court.

Brajesh/-

(Mungeshwar Sahoo, J.)

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