

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.442 of 1976

**Against the Judgment and Decree dated 20.04.1976 passed by
VIth Subordinate Judge, Champaran Motihari in Partition suit
No.10 of 1969 / 11 of 1976.**

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Dhrub Ojha & Ors.

.....Defendants -appellants

Versus

Chamela Devi & Ors.

.....Plaintiffs - Respondents

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Appearance :

For the Appellant/s (both the F..A.) :-

Mr. Kamala Pd. Roy, Adv.

Mr. Satya Ranjan Sinha, Advocate

For the Respondent

:-

Mr. Prabhu Nath Roy, Sr. Advocate

Mr. Mritunjay Pd. Singh, Advocate with him.

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Dated : 26th day of April, 2016

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. The defendants have filed this First Appeal against the Judgment and Decree dated 20.04.1976 passed by the learned VIth Addl. Subordinate Judge, Champaran at Motihari in Partition Suit No.10 of 1960 / 11 of 1976 whereby the Court below had decreed the plaintiff's suit for partition to the extent of half share.



2. The plaintiff respondent filed the aforesaid suit claiming half share alleging that after partition between the four sons of Devi Thakur, they came in separate possession prior to revisional survey. Rajdhari Thakur and Ram Charan Thakur remained joint and were cultivating lands jointly. Few years prior to revisional survey, Rajdhari Thakur died in jointness with his brother Ram Charan Thakur leaving a son Mukhlal Thakur. Subsequently, Ram Charan Thakur and Mukhlal Thakur separated their mess and started cultivating separately without there being any partition. Some lands remained joint. Mukhlal Thakur died in the year 1914 leaving his widow Rupa Kuer and a daughter Chamela Devi who is plaintiff No.1. The other sons of Devi Thakur have got nothing to do with the suit property. Both the parties have sold some of the properties, therefore, the said properties may be allotted respectively in the share of the vendor.

3. The defendants jointly filed contesting written statement. Their main defence is that there is no unity of title and possession between the parties. There had already been complete partition between the four sons of Devi Thakur. Devi Thakur had another son, namely, Jai Govind Thakur who was also allotted a share. After his death, his properties were also partitioned between the four brothers. After the death of Rajdhari Thakur and Mukhlal Thakur, the property

came in possession of Rupa Thakur and she was continuing in possession. On 07.03.1933, Rupa Kuer executed a deed of gift in favour of her daughter Chamela Devi of all the lands leaving few and Chamela Devi came in possession. The other allegations made by the plaintiff are denied by the defendants.

4. The defendant No.4 who is purchaser has also filed written statement.

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

- (i) Is the suit as framed maintainable?
 - (ii) Have the plaintiffs got cause of action and right to sue?
 - (iii) Whether the plaintiffs have unity of title and possession with the defendants Ist party and they are entitled to get a decree for partition to the extent of half share of the lands in question?
 - (iv) Whether the story of partition in between the co-sharer as claimed by the defendants Ist party in their written statement, is correct?
 - (v) To what relief or relief, the plaintiffs are entitled.
6. After hearing the parties and considering the evidences, the

Court below found that there has been no partition and thus granted decree in favour of the plaintiff.

7. The learned counsel, Mr. Kamla Prasad Roy, for the appellant raised a short question of law and submitted that for deciding this First Appeal, evidences is not at all required to be gone into. Since it is a pure question of law, it can be raised at any stage as there can be no estoppel against statute. According to the learned counsel, it is the plaintiffs' case itself that Mukhlal Thakur died in the year 1914 leaving behind his widow Rupa Kuer and daughter Chamla Devi. Rupa Kuer is not the plaintiff. Chamela Devi is the plaintiff along with her son in favour of whom Rupa Kuer had gifted the half property. The learned counsel submitted that in the year 2014, neither the widow nor the daughters were heirs, therefore, on the death of Mukhlal, the property will not go to Rupa Kuer but will devolve on the surviving coparcener or co-sharer. Rupa Kuer was only entitled for maintenance and she had no right to transfer but she transferred the property by gift in 1933 in favour of present plaintiff, therefore, the present plaintiff had no right to claim partition nor they acquired any title on the basis of the gift deed. On this score alone, the title suit should have been dismissed, therefore, the impugned Judgment and Decree be set aside and the First Appeal be allowed.



8. On the other hand, the learned senior counsel, Mr. Prabhu Nath Roy, submitted that it is not the case of the defendant in the written statement. The only case pleaded is that there had already been partition and the Court below on the basis of evidences recorded clear finding that there was no partition and the properties are still joint. Now, before this appellate Court for the first time, the plaintiff's right have been challenged as such the same cannot be entertained. Moreover, after coming into force of Hindu Women Right to Property Act, Rupa Kuer inherited the property of her husband, Mukhlal Thakur, and she continued in possession and has rightly gifted the entire property to the present plaintiff in the year 1933. After coming into force of the Hindu Succession Act, the right became absolute right as such the plaintiffs filed the suit for partition as there was no partition. Therefore, the First Appeal be dismissed.

9. In view of the above contentions of the parties, the only point arises for consideration in this First Appeal is whether the plaintiffs have been able to prove unity of title and unity of possession as such are entitled for partition to the extent of half share.

10. So far decision of this question of law is concerned, it is pure question of law and is not dependent on any evidence. The plaintiff in the plaint itself pleaded that Mukhlal died in the year 1914



and this is the oral evidence also. So far death of Mukhlal in the year 1914 is concerned, there is no dispute between the parties. According to the plaintiffs, there was no partition therefore, partition suit has been filed. It may be mentioned here that Rupa Kuer, i.e., the widow is not the plaintiff. The plaintiffs are the daughter and grand sons of Rupa i.e., plaintiff No.1 Chamela Devi is daughter and other plaintiffs are sons of Chamela. The question arises is whether Rupa had any right to transfer the property by gift deed. In the year 1914, the widow was not the heir of husband. On the death of husband, the widow was not entitled to inherit the property. She had only right of maintenance.

11. The widow has been given right to inherit, the husband's property after 14th April, 1937, i.e., after coming into force of the Hindu Women Right to Property Act, 1937. Therefore, the question is whether on the death of Mukhlal in the year 1914, the share of Mukhlal will devolve on his widow or not. Prior to 1937, the only sapindas who were succeeding the interest of the deceased were son, grand son and great grand son. After 14th April, 1937, the widow, Pre-deceased sons' widow and pre-deceased sons pre-deceased sons' widow were recognized to inherit the share. Till then daughters were not recognized as an heir. In the Hindu Women Right to property Act which was amended by Act No.II of 1938, the widow was given right



to inherit the share of the husband in coparcenary property as a son as provided under Section 3 of the Act No.23 of 1937. Prior to 1937, no right was conferred on the widow. Section 4 of 1937 Act provides that nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

12. In view of this position, when Mukhlal died in the year 1914, the property devolved on the coparcener and his widow did not even take limited interest which is commonly known as widow estate in the estate of her husband as the Act of 1937 is not applicable in the present case according to Section 4 of the said Act.

13. It is the plaintiff's case that widow of Mukhlal gifted the property to the plaintiff No.1 and her sons in the year 1933. When widow of Mukhlal herself had not inherited the property, she had no title to transfer the same to the plaintiffs.

14. The learned senior counsel for the respondent submitted that the transferee, i.e., the plaintiff came in possession of the property in 1933 and continued as such till the commencement of Hindu Succession Act 1956. Therefore, the plaintiff became the absolute owner of the gifted property in view of Section 14 of the Hindu Succession Act. So far this submission is concerned, it may be mentioned here that the Hon'ble Supreme Court in the case of

Kalawati Bai Vs. Soirya Bai & Ors, reported in AIR 1991 SC 1581

has held that ‘**a female Hindu possessed of the property on the date of Hindu Succession Act came into force can become absolute owner only if she was a limited owner.**’ Admittedly, in the present case, widow of Mukhlal was not a limited owner and the present plaintiff is only a transferee through gift deed. In such circumstances, there is no question of application of Section 14 of Hindu Succession Act arises. The plaintiff is not entitled to protection of Section 14 of the Hindu Succession Act. Since widow of Mukhlal was not a limited owner and when the Act of the year 1937 is not applicable, there is no question of transferring the right of Mukhlal by his widow to the plaintiff arises. In other words, the plaintiffs did not derive any title on the basis of the gift deed said to have been executed in the year 1933 by widow of Mukhlal.

15. In view of the above settled proposition of law on the death of Mukhlal in the year 1914, his property devolved on the coparceners according to survivorship and the ownership vested on them. Therefore, this vesting of the ownership of the property will not be divested because of the enactment of 1937 Act or 1956 Act. This aspect of the matter was never considered by the Court below. This is pure question of law. The Court below has approached the case in wrong angle and not according to law and, therefore, the findings are

unsustainable. Since the plaintiffs have not acquired any title on the basis of gift deeds executed by widow of Mukhlal, there is no question of partitioning their gifted property arises.

16. In view of my above discussion, I find that the plaintiffs have failed to prove their unity of title and unity of possession over the suit property. Therefore, they have got no cause of action for filing the suit nor they are entitled for any decree of partition.

17. In the result, this First Appeal is allowed. The impugned Judgment and Decree is set aside and the plaintiff's suit for partition is hereby dismissed. In the facts and circumstances, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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