

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.821 of 1979

(Against the judgment and decree dated 24.07.1979 passed by 1st Subordinate Judge, Muzaffarpur in Partition Suit No.120 of 1969).

Prabhakar Thakur

.... Defendant No.1-Appellant

Versus

Sitaram Thakur & Ors

.... Plaintiffs-Respondents

With

First Appeal No.305 of 1985

Prabhakar Thakur

.... Defendant No.1-Appellant

Versus

Sitaram Thakur & Ors

.... Plaintiffs-Respondents

Appearance :

For the Appellant/s :
(In both Appeals)

Mr. Ram Suresh Roy, Sr. Advocate
Mr. Vijay Kumar @ V.K. Singh, Advocate with him.

For the Respondent/s :
(In both Appeals)

Mr. Manojeshwar Prasad Sinha, Advocate
Mr. Ratan Kr.Sinha, Advocate

For the Respondent No.21:
(In both Appeals)

Mr. Arun Kumar Prasad, Advocate
Mr. Madhukar Pandey, Advocate

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
C.A.V. JUDGMENT

Date: 07-04-2016

1. This First Appeal has been filed by the defendant No.1 against the judgment and decree dated 24.07.1979 passed by the learned 1st Subordinate Judge, Muzaffarpur in Partition Suit No.120 of 1969 whereby the Court below decreed the plaintiff's suit for

partition.

2. So far First Appeal No.305 of 1985 is concerned, this First Appeal has been filed against the final decree pursuant to the preliminary decree which is the subject matter of First Appeal No.821 of 1979. The Pleader Commissioner's report was confirmed by the Court below on 15.06.1984 and accordingly final decree was prepared.

3. The plaintiffs filed the aforesaid suit claiming half share out of Schedule I and II properties alleging that the common ancestor was Bahadur Thakur who had two wives. He had a son named Bulaki Thakur and from second wife, he had two sons, Baleshwar Thakur and Baijnath Thakur. The plaintiff No.1 is widow of Bulaki Thakur and the other plaintiff Nos.2, 3 are the sons of plaintiff No.1. One daughter, Chandrawati Devi is defendant No.8. The third son of Bahadur Thakur namely Baijnath Thakur from the second wife died issueless. Baleshwar Thakur had also two wives. From first wife, he had a son, Prabhakar Thakur who is defendant No.1-appellant. The second wife is defendant No.2, Laxmi Devi and her sons are defendant Nos.3 to 6. The further case of the plaintiff is that Baleshwar Thakur died on 25.02.1969. The joint family has got 20 bighas of land in different villages. The parties have also acquired different properties out of the surplus income of the joint family

properties and the joint family properties stands in the name of different members of the joint family which are described in Schedule I and II. The further case is that the defendants 2nd party are the purchasers of joint family property from Baleshwar Thakur, therefore, they are made party defendant.

4. The defendant No.1 filed contesting written statement alleging that during the kartaship of Bulaki Thakur, the defendant's father, Baleshwar Thakur had separate source of income as motor mechanic, motor repairing workshop with leather machine etc. All these articles in item Nos.21 to 24 of Schedule II are his personal property. On the death of Bulaki Thakur, the defendant's father became the karta and he became the Municipal Commissioner. Since there was no surplus income from the joint family property, there was amicable partition between the parties and in lieu of share, the defendant provided Rs.35,000 to the plaintiff for starting their new business and in turn, the plaintiff relinquished their share in the suit property. This partition took place in the year 1960 and all the acquisitions made after this partition are the exclusive property of the defendants purchased out of self-earning. After amendment of the plaint, whereby some properties were added and area of some plots were increased, the additional written statement was filed by the defendant alleging that the properties which are sought to be



partitioned are the self-acquired property of the defendant and/father of defendant and many properties are standing in the name of Laxmi Devi, second wife of Baleshwar Thakur. Those properties are not liable for partition. The defendants also pleaded about separate source of income of Baleshwar Thakur who was homoeopath practitioner. The defendants also pleaded in detail about the plots which are acquired in the name of defendants exclusively out of their self-earning and claimed self-acquisition.

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 any cause of action or right to suit?
- III. Is the suit properly valued and court fees paid sufficient?
- IV. Has there been a partition of the lands in question in the year 1960 as alleged by the defendant 1st party?
- V. Have the plaintiff nos.2 and 3 relinquished their share in favour of defendant 1st party?
- VI. Is the suit bad for misjoinder of parties?
- VII. Are the plaintiffs entitled to a decree for partition if so, with respect to which share and what property?
- VIII. To what other relief or reliefs, if any, are the plaintiffs entitled?

6. The trial court considered issue Nos.4, 5 and 7 together and recorded finding that there was no partition of the lands in question in the year 1960 as alleged by the defendant. The plaintiffs

are therefore, entitled to get decree for partition in respect of Schedule I property but the plaintiffs are not entitled to get any partition of Schedule II property which are movable properties.

7. The learned senior counsel, Mr. R.S.Roy for the appellant submitted that there is no pleading about the nucleus of the joint family but the Court below presumed that the properties which are standing in the name of the ancestor of the defendant and mother of the defendant and in the name of the defendant No.1 are the joint family property although, the plaintiff himself in his evidence stated that joint family had no sufficient income. The property standing in the name of Laxmi Devi purchased by registered sale deed by her have also been held to be joint family property although, there is no declaration as such prayed for by the plaintiff in the suit. The plaintiff simply prayed for partition of the suit property. Laxmi Devi is not a coparcener but the said property has been held to be available for partition by the Court below. The Court below also did not consider the conduct of the parties that both the parties were transferring the property independently and even there is inter se transaction. In support of the case that the properties which have been purchased in the name of either Laxmi Devi or Baleshwar Thakur or defendant No.1 are their self-acquired property, the appellant produced several documents and evidence to show that they have sufficient earning



enabling them to purchase the properties which are their self-acquired property. Relying on the same, the Court below also recorded finding that the Schedule II properties belonged to defendant No.1, therefore, it is not available for partition but at the same time held that the plaintiff is entitled for partition to the extent of half share in Schedule I property. The learned senior counsel further submitted that various registered sale deeds were produced before the Court below with respect to the self-acquisition of the defendant but the implication of the sale deeds were not considered by the Court below. According to the learned senior counsel, the onus is on the plaintiff to prove that joint family property must be, such as, with its aid the property in question could have been acquired. It is only after the proof of possession of adequate nucleus, the onus will shift on the defendant to affirmatively make out and prove the case that the property was acquired without any aid from the joint family estate. In the present case, the plaintiff himself admitted that there was no sufficient income and moreover according to the plaintiff, the deposit in Bank is only Rs.5,000 and odd. When the plaintiff himself failed to prove that there was sufficient nucleus of the joint family property, how the court could have allowed the suit for partition of the property which are admittedly purchased by registered sale deeds by either defendant No.1 or Laxmi Devi. The Court below wrongly appreciated the

evidences of the parties and approached the case in wrong angle and wrongly decided the issues in favour of the plaintiffs. On these grounds, the learned senior counsel submitted that the appeal be allowed and the plaintiff's suit for partition be dismissed. The written argument also has been filed by the appellant.

8. On the contrary, the learned counsel, Mr. Manojeshwar Prasad Sinha for the respondents submitted that there is no pleading at all in the original written statement that the properties are self-acquired properties of the defendants. After amendment of the plaintiff, additional written statement was filed wherein the plea was raised regarding self-acquisition. According to the learned counsel, since there was no pleading in the original written statement, the plea raised in the additional written statement cannot be looked into and any evidence produced in support of the same should be discarded. In the additional written statement, new facts were pleaded by the defendant and on the basis of the new facts, pleaded in the written statement, the appellant is arguing the case which cannot be accepted. Since after amendment of the plaint by which certain plots were added in Schedule I and also the area of some plots were increased, the additional written statement was filed, therefore, the additional written statement should be confined to the portion of the amendment only but in the present case, in the garb of additional written statement, the

defendant brought new case about self-acquisition. In view of the above factual position, the First Appeal itself is liable to be dismissed.

9. The learned counsel further submitted that it is specifically pleaded in the plaint that out of the surplus income from the joint family property, the property has been purchased by the karta in the name of different defendants and also in the name of Laxmi Devi. There was 20 bighas land of the joint family and, therefore, the landed property was sufficient for acquisition of the properties and the Court below has rightly held that the properties are the joint family properties. An absurd story has been put forth by the defendant-appellant to the effect that there was partition in the year 1960 and in the said partition, Rs.35,000 was given to the plaintiff in lieu of his share. Since there is no registered document, therefore, merely because Rs.35,000 has been paid, it cannot be said that the title of the plaintiff extinguished in the joint family property or that the title of the plaintiff was transferred to the defendants. The learned counsel for the respondents has also filed a written argument on behalf of the respondents wherein different points have been raised and the relevant decisions have also been cited. The same may be considered later on. On these grounds, the learned counsel submitted that the First Appeal be dismissed.

10. It appears that in the present case, the original



plaintiff-respondent and other defendants have already compromised and compromise applications have been filed which are I.A. No.5409 of 2015 and 6649 of 2015. Although, earlier the First Appeal was filed by only defendant No.1 but subsequently without hearing him he was transposed as respondent and the respondent Nos.4 and 5 were transposed as appellant. They filed the compromise application which was between them and the other respondents except defendant No.1. Subsequently, application was filed by defendant No.1 to transpose him as appellant and thereafter hearing the parties, the appellants who have compromised with the other respondents were transposed as respondents and the defendant No.1 who was the sole appellant again was transposed as the sole appellant. Now, therefore, the position is defendant No.1 is the sole appellant. The compromise is between the respondents inter se, therefore, on the basis of the compromise even if it is recorded, the First Appeal cannot be disposed of. The question regarding the validity of the judgment and decree passed by the trial court allowing the plaintiff-respondent's suit for partition is involved which is challenged by the defendant No.1. In my opinion, therefore, the recording of compromise between the respondents inter se here before this first appellate court will make no difference. Therefore, I heard the appeal on merit. The compromise between the respondents i.e. the two I.As. referred to above are accordingly disposed of and it

is held that it will be binding on the respondents themselves without affecting the right, title and interest of the appellant and it will not affect the merit of the First Appeal nor the said compromise can form part of the decree as the compromise herein are the contracts between the respondents themselves.

11. In view of the above rival contentions of the parties and the submissions, the points arises for consideration in this First Appeal is as to “whether the plaintiff has been able to prove unity of title and possession with respect to Schedule I property also” or “whether the properties purchased in the name of defendant’s ancestor or in the name of Laxmi Devi or defendant No.1 are their self-acquired property or joint family property?”

12. It may be mentioned here that the trial court has held that Schedule II properties are the self-acquired properties of the defendant No.1 which is not available for partition. No cross-objection has been filed against this part of the decree. Now, therefore, it becomes admitted fact that Baleshwar Thakur had separate income who is the father of defendants including defendant No.1. Schedule II shows that it includes silver gold showcase, Bank deposit and various household articles. At paragraph 26, the Court below also clearly recorded finding that Baleshwar Thakur has also the income out of his homoeopath practice. Now, let us see the



plaintiff's case regarding the acquisition of the properties by joint family. In the plaint, it is only pleaded that the joint family property consists of 20 bighas of land in various villages in the District of Muzaffarpur and both the parties have made new acquisition out of the surplus income of the joint family and those properties are included in the ancestral property which are standing in the name of different members of joint family. Except this, there is no other pleading.

13. P.W.2 has stated that the joint family had about 20 bighas of land which were fertile. There were leeches, mango, orchard also and from there also, there was earning. Out of the said earning, properties were acquired and still there has been no partition. The evidence of P.W.5 is on the same line. P.W.6 has come to deny about the plaintiff had any separate shop. Such is the evidence of P.W.7. P.W.8 has denied the separate earning of Baleshwar Thakur.

14. P.W.9 has stated that Bahadur Thakur had 15-16 bighas of land and out of that 8 bighas was the ancestral land and rest were purchased lands. P.W.21 is the plaintiff No.2. He has supported the case pleaded in the plaint. At paragraph 4 of his evidence, he has stated that the ancestor Bahadur Thakur had about 16 bighas land and the lands were fertile lands. After expense, there was saving and out of that saving, the lands have been purchased. The other witnesses are



not on this point. It may be mentioned here that in the plaint, there is pleading about 20 bighas of land whereas in the evidence, P.W.21 has stated that there was 16 bighas of land. General statements have been made that there was saving after expenses of the joint family. There is no evidence or paper to show that what was the extent of the income and what was the saving because from the genealogy itself, it appears that the family was very big family. Since this is the point for consideration, the Court of law will not rely on mere statement that too for the purpose of filling of the requirement of law.

15. The Hon'ble Supreme Court in the case of **Mudigowda Gowdappa Sankh and others v. Ramchandra Revgowda Sankh**, AIR 1969 Supreme Court 1076 has held at paragraph 6 as follows:

“The case of the appellants was that these lands were self-acquisition of Goudappa, but the respondents contended that they were joint family properties. The law on this aspect of the case is well settled. Of course there is no presumption that a Hindu family merely because it is joint, possesses any joint property. The burden of proving that any particular property is joint family property, is, therefore, in the first instance upon the person who claims it as coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presume to be joint family property. This is however subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession

of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate.”

16. In the present case, except the bald statement of the witnesses of the plaintiffs that there was either 15 or 16 bighas of land, nothing has been produced before the Court nor anything has been explained about the nucleus.

17. P.W.21 who is plaintiff No.2 has also only stated in his evidence that the lands were fertile and out of the savings from the income, the properties have been purchased. Except this statement and pleading, nothing is there on record. On the contrary, the defendants have proved that their ancestor, Baleshwar Thakur and then Prabhakar Thakur, defendant No.1-appellant had separate source of income. The Court below has also relied upon this evidence and clearly recorded finding that Schedule II properties are the self-acquired properties of the defendant. This clearly shows that the defendants had separate source of income. In the cross-examination at paragraph 15, P.W.21-plaintiff No.2 has stated clearly that there is no proof to show separate savings out of the income of joint family. He is also unable to say in which year, for the first time, out of the savings i.e. nucleus which property was purchased and in whose name, the property was purchased. He has also admitted that after death of

Bahadur Thakur in the year 1960, 8 kita lands have been purchased and these registered deeds are in the name of Baleshwar Thakur, Sitaram Thakur, Prabhakar Thakur and Laxmi Devi etc. He has also detailed in whose name the sale deeds stand and further said that in his presence all these sale deeds were obtained.

18. The learned counsel, Mr. Manojeshwar Prasad Sinha appearing on behalf of the respondents submitted that there is no case made out in the written statement that the properties were self-acquired properties. In the original written statement, the defendant No.1 never claimed regarding self-acquisition but in the garb of filing additional written statement to the amended plaint subsequently pleaded that the property detailed in the written statement are self-acquired property. Therefore, the subsequent pleading cannot be taken into consideration. So far this submission of the learned counsel for the respondents is concerned, it may be mentioned here that admittedly many of the properties are either purchased in the name of defendant No.1 or in the name of Laxmi Devi or in the name of Baleshwar Thakur. Unless the plaintiff shows that there was sufficient nucleus from which these properties could have been acquired, the onus will not shift on the defendant. Here, the onus is on the plaintiff to prove the adequacy and sufficiency of the nucleus. As stated above, there is no evidence except mere statement.



19. Further, it may be stated that from perusal of the plaint, it appears that the original Schedule I properties were deleted by way of amendment and thereafter the defendant filed additional written statement pursuant to the amendment. Many other properties had been added in Schedule I. In such view of the matter, the defendant in the additional written statement raised all these details claimed stating the properties are the self-acquired properties. It is settled principles of law that the pleadings are made by the parties to indicate that in what line evidence will be adduced in support of the pleading i.e. in support of the statements made in the pleading. In the written statement, a case was put forth by the defendant that this property and that property detailed in the written statement are the self-acquired property. Therefore, the plaintiff was knowing this fact pleaded by the defendant and then in that light, evidences were adduced. The plaintiff never objected to it. It cannot be said that plaintiff was surprised for the first time when the evidences were adduced. Now, therefore, the plaintiff was knowing the case of the defendant and both the parties adduced their evidences and then on the basis of the evidences, the Court below recorded the finding, can it be said that the Court should not considered those part of the statements in the written statement made by defendant No.1. In my opinion, this is only technical objection. Here, it may be stated that it



is not the case of the plaintiff that there is no pleading, therefore, the evidence should not be considered. It is also not his case that there is no evidence, therefore, the pleading cannot be considered. Had it been the case, the matter would have been otherwise. But here, the fact is that there is pleading and the evidences have been produced in support of the pleading and the Court below also considered these aspects of the matter. This Court, therefore, on this objection that the statements made in the additional written statement should not be looked into, cannot be accepted. Reference may be made in this matter to the decision of the Hon'ble Supreme Court, **AIR 1987 Supreme Court 1242.**

20. It is admitted fact that many of the sale deeds are in the name of Laxmi Devi i.e. second wife of Baleshwar Thakur. It is admitted fact that she was not the coparcener. Therefore, unless the declaration is sought for by the plaintiff with regard to the property covered by the sale deeds which are in the name of Laxmi Devi to the effect that Laxmi Devi was the benamidar of the coparcenary family the simple suit for partition could not have been allowed. In the evidence, as discussed above, only statements have been made that the properties have been purchased out of the savings in the name of defendant No.1, defendant No.2, Baleshwar Thakur etc. and etc.

21. The defendants have produced Exhibit A which is



a sudhbharna deed of the year 1958 i.e. dated 03.06.1958 to show that this sudhbharna deed was executed by Baleshwar Thakur and Sitaram Thakur jointly. Sitaram Thakur is plaintiff No.2. If the case of the plaintiff is believed that after death of Bulaki Thakur, the father of plaintiff No.2, Baleshwar Thakur became the karta and he was purchasing the lands as karta, then the question arises as to why the deed was not executed by the karta only. Why Sitaram Thakur, plaintiff No.2 joined with karta in Exhibit A that too in the year 1958. There is no explanation to this. Exhibit 'U', U/3 and Exhibit 'V' are the registered sale deeds which are standing in the name of Laxmi Devi, the defendant No.2 only who is the second wife of Baleshwar Thakur. There is no reason as to why the joint family will purchase the land in the name of lady member particularly when there were many other coparceners. No reason has been assigned.

22. Exhibit U/1 is a registered sale deed dated 05.08.1960 which is also in the name of Laxmi Devi. Likewise, the registered sale deed dated 18.06.1963 is Exhibit U/2 in the name of Laxmi Devi. These exhibits show that the lady member of the family was acquiring properties in her own name. Except the statement of the plaintiff to the effect that it is purchased out of the joint family income, there is nothing on record to show that those are purchased out of the joint family. No reason has been assigned as to why only

the sale deeds were taken in the name of Laxmi Devi and why at that time no objection was raised. No declaration has been sought for by the plaintiff with regard to these properties that she is the benamidar of the coparcenary family.

23. Exhibit U/4 and U/5 are the registered sale deeds dated 10.02.1954 and 05.02.1957 which are in the name of Prabhakar Thakur, the defendant No.1-appellant. Exhibit U/6, U/7 and U/8 are the registered sale deeds dated 15.11.1966 which are in the name of Baleshwar Thakur. Likewise, Exhibit U/14 is the registered sale deed dated 01.09.1947 which is in the name of Baleshwar Thakur. It may be mentioned here that it is admitted case as pleaded by the plaintiff also that Bulaki Thakur was the karta till his lifetime. He died in the year 1949. It means that he was karta in the year 1947. He was the first son from first wife and he has himself four children including two daughters and also a widow plaintiff No.1, Rukha Devi. There is no reason as to why he would have purchased the property in the name of Baleshwar Thakur who is his stepbrother. Therefore, the only presumption will be that Baleshwar Thakur was also acquiring land in his own name during the lifetime of Bulaki Thakur, the karta. The Court below also recorded this finding that Baleshwar Thakur had independent income.

24. Exhibit U/13 is registered sale deed dated

25.12.1950 which is in the name of Prabhakar Thakur, the appellant.

All these documentary evidences which are registered sale deeds or mortgage deeds show that the defendants were acquiring the properties right from the year 1947 regularly till the year 1972. The Court below only held that there was no partition, therefore, these properties are the joint family property.

25. In the present case, it may be mentioned here that the defendants in the written statement pleaded that there was partition in the year 1960 and in lieu of share, the plaintiffs relinquished after taking Rs.35,000 and they started business. So far this case of the defendant in short is concerned, it may be mentioned here that this cannot be relied upon as it is settled principles of law that by relinquishment, title will never pass. Admittedly, in the present case, no registered documents have been produced.

26. The Hon'ble Supreme Court in the case of **Yellapu Uma Maheswari & Anr. v. Buddha Jugadheeswararao & Ors., 2015(4) PLJR 494(SC)** has held that if there is a relinquishment of right in respect of immovable property through the document in question which is compulsorily registerable document and if the same are not registered becomes inadmissible in evidence for proving the factum of partition between the parties. Therefore, no doubt in the present case, the defendants have failed to prove previous partition as



claimed by the defendants but merely because the defendants failed to prove their previous partition, the other part of the defendant's case that the properties which are acquired by the defendant are their self-acquired property cannot be disbelieved. For that, the plaintiff has to discharge his onus first but here as discussed above, the plaintiff failed to show that the joint family had any sufficient adequate nucleus from which the properties could have been acquired.

27. From perusal of the judgment of the Court below, it appears that Court below has recorded finding that the defendants failed to prove previous partition. There is no reason to differ with the aforesaid finding. Accordingly, I confirmed this finding.

28. In view of my above discussion, I find that the defendants failed to prove that there was partition in the year 1960 as pleaded by the defendants. I also find that the plaintiffs failed to prove that the properties which are standing in the name of either Baleshwar Thakur or in the name of Prabhakar Thakur or in the name of Laxmi Devi are the joint family property acquired out of joint family nucleus. On the contrary, the defendants have been able to prove that the properties covered under the aforesaid registered sale deeds mentioned above are their self-acquired properties out of their own income.

29. It appears that before this Court, two I.As. have



been filed being I.A. No.5409 of 2015 and 6649 of 2015 which are compromise application. These compromise applications are between the respondents inter se. It appears that the plaintiffs and the descendants of Laxmi Devi have compromised their disputes and have filed the compromise application. The defendant No.1, who is only son from the first wife of Baleshwar Thakur, has not compromised. However, since the appeal is filed by the defendant No.1 only, as on today, the compromise inter se between the respondents will not affect the right of the appellant. The contract between the respondents inter se i.e. the compromise even if recorded then also it will not affect the merit of the First Appeal and, therefore, instead of recording the compromise, I proceed to decide the appeal itself. The compromise may be between the respondents and it may be binding between them but no decree can be passed on the basis of compromise.

30. From perusal of the impugned judgment, it appears that the Court below merely referred the sale deeds which are in the name of the defendants. The Court below also wrongly held that because the defendants failed to prove previous partition, the properties are joint family properties assuming that there was sufficient nucleus without there being any pleading. Accordingly, the finding of the Court below is hereby reversed.

31. In the result, this First Appeal is allowed in part.

The judgment and decree passed by the Court below is hereby modified to the extent that the properties which are standing in the name of the defendant No.1, defendant No.2 and Baleshwar Thakur are not joint family property nor those properties are acquired out of the joint family nucleus. Those properties are self-acquired properties i.e. the properties covered under the registered sale deeds mentioned in detail above in the judgment which are not available for partition and the plaintiff is not entitled for a share in those properties. In the facts and circumstances of the case, there shall be no order as to costs.

32. So far the First Appeal No.305 of 1985 is concerned, it arises out of final decree and since final decree have been modified automatically the final decree stands cancelled. Therefore, the First Appeal No.305 of 1985 is hereby allowed. The final decree is set aside. The Court below shall prepare a fresh final decree according to the preliminary decree which has been modified by this Judgment. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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