

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6560 of 2013

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1. Bhagwat Prasad @ Sheonandan Prasad S/O Late Gokhul Mahto Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
 2. Sri Chand Prasad Singh S/O Late Gokhul Mahto Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
 3. Arun Kumar S/O Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda.

.... Petitioner/s

Versus

1. Most. Muneshwari Devi W/O Late Karamchand Mahto @ Karamchand Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
2. Golu Kumar Minor Son Of Arun Kumar Aforesaid Under Guardianship Of His Mother Namely Kumari Bibha, W/O Arun Kumar Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
3. Bholu Kumar Minor Son Of Arun Kumar Aforesaid Under Guardianship Of His Mother Namely Kumari Bibha, W/O Arun Kumar Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
4. Shonu Kumar Minor Son Of Arun Kumar Aforesaid Under Guardianship Of His Mother Namely Kumari Bibha, W/O Arun Kumar Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
5. Chhote Kumar Minor Son Of Arun Kumar Aforesaid Under Guardianship Of His Mother Namely Kumari Bibha, W/O Arun Kumar Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
6. Saroj Devi Daughter Of Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
7. Savitri Devi Daughter Of Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
8. Sunaina Devi Daughter Of Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
9. Ahilya Devi Daughter Of Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
10. Usha Devi Daughter Of Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda
11. Shobha Devi Daughter Of Bhagwat Prasad @ Sheonandan Prasad Resident Of Mauza - Dharhara, P.O. - Barnausa, P.S. - Silao, Distt. - Nalanda.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sidhendra Narayan Singh -Advocate
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL ORDER

6 20-05-2016

Interlocutory Application No. 3851/2016 has been filed to delete the name of petitioner no.2 who died on 01.02.2015 leaving behind heirs who are already on record as petitioners no.1 and 3. His wife pre-deceased him and that event is found further supported with Interlocutory Application No. 4538/2016 wherein delay has been prayed to be condoned.

2. In the aforesaid facts and circumstances of the case, prayer of the petitioner is found entertainable and is, accordingly, ordered so.

3. That being the position, Interlocutory Applications No. 3851/2016 as well as 4538/2016 are allowed.

4. Heard learned counsel for the petitioner.

5. Gone through the order impugned.

6. Although WS has not been annexed with the instant petition, however, at the request of the Court learned counsel for the petitioner has furnished the WS and after going through the same, it is evident from para-11 that petitioner/defendant has set up a case of oral partition which took place in presence of witnesses so named therein. Apart from this, it has also been pleaded that in token thereof, memorandum of partition has also been prepared bearing signature/LTI of the coparceners.

7. Jointness of the Hindu Family is a presumption.

Petitioner/defendant has pleaded contrary to the presumption and on account thereof, he has been directed by the learned lower court to lead evidence first by the order impugned which happens to under challenge.

8. Learned counsel for the petitioner has submitted that in the background of Section 101 onward of the Evidence Act, the burden lies upon the party who has come up before the Court for having a finding in his favour. To procure such finding, it is expected at the end of the said party to lead evidence first and then, the adversary is to rebut as onus is shifted upon him. Furthermore, to substantiate such plea, learned counsel for the petitioner also referred **1991 PLJR (2) 666 (Chandradeo Singh v. Moti Devi)**.

9. Learned counsel for the petitioner referred relevant paragraphs of the aforesaid judgment from where it is apparent that the defendant of that case had pleaded the theme of ouster and so, the direction of the learned lower court to lead the evidence first to the defendant was set aside.

10. Here is different situation. There happens to be presumption of jointness of Hindu Family. Defendant had advanced his plea contrary to the plea of the plaintiff that previous

partition had already taken place. If that evidence is considered to be substantiated, then in that event, the present partition suit would not be maintainable.

11. At the present juncture, it would be relevant to incorporate Rule-1 of Order XVIII of the CPC which speaks like so:-

- (i) Right to begin— The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

12. As observed above, in case, defendant succeeds to substantiate the factum of previous partition, then in that event, the instant partition suit filed by the plaintiff would not survive. That being so, the learned lower court had rightly, by the order impugned, directed the petitioner/defendant to begin first.

13. On account thereof, no infirmity is found in the order impugned. Petition is rejected.

(Aditya Kumar Trivedi, J)

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