

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.64 of 1992
in
First Appeal No.232 of 76**

- =====
1. Ram Bilas Rai @ Ram Bilas Singh, s/o Nawalal Rai
 2. Kanahai Rai
 - 3(a) Siyapati Devi, widow of late Ajablal Rai @ Ajab Rai
 - 3(b) Ram Chandra Rai
 - 3(c) Sanjay Rai
 - 3(d) Ranjay Rai

All sons of Ajablal Rai @ Ajab Rai

- 3(e) Pinku Kumari, daughter of late Ajablal Rai @ Ajab Rai

4. Mostt. Bhagwatia, wife of Nebu Rai

All resident of village- Saraipur, P.S. Hajipur, District- Vaishali

.... Appellants

Versus

1. Devendra Rai , minor son of Sukul Rai under guardianship of his father Sukul Rai
2. Sukul Rai, son of Nokhi Rai
Both resident of village- Saraipur, P.S. Hajipur, District, Vaishali
3. Rohani Devi, daughter of Nokhi Rai and wife of Pursutam Rai, resident of village- Hematpur, P.S. Raghobpur, P.O. Jafrabad, District, Vaishali
4. Jhabu Rai, son of Khakhan Rai

.....Defendants-Respondents-Respondents

5. Suraj Devi, daughter of Jamun Rai
- 6(a). Parmeshwar Rai, husband of Sukhia Devi
- 6(b). Nabab Rai
- 6(c). Kapal Rai

Both sons of Parmeshwar Rai

- 6(d). Lila Devi, daughter of Parmeshwar Rai
- 6(e). Dipia Devi, daughter of Parmeshwar Rai

All residents of Village- Nawa Nagar, P.S. Bidupur, District, Vaishal

7. Dhanwanti Devi, daughter of Jamun Rai
8. Bhikhari Rai, son of Jaun Rai @ Jamun Rai



9. Kapildeo Rai, son of Gambhira Rai

All resident of village- Saraipur, P.S. Hajipur, District, Vaishali

10(a). Most. Fulia Devi widow of late Ram Ruch Rai

10(b). Bir Chandra Rai

10(c). Sheo Kumar Rai

10(d). Upendra Rai

10(e). Birendra Rai

All sons of late Ram Ruch Rai

All resident of village- Dewan Tok, P.S. Ganga Bridge, District, Vaishali

10(f). Anandi Devi, wife of Ayodhya Rai, daughter of late Ram Ruch Rai

Resident of village, Jalapur, P.S. Doriganj, District- Saran

10(g). Sumitra Devi, wife of Birendra Rai, Daughter of late Ram Ruch Rai

Resident of village- Asainia, P.S. Marhuara, District, Saran

10(h). Kunta Devi, wife of Shashi Bhushan Rai, daughter of late Ram Ruch Rai

Resident of village- Lal Pokhar, P.S. Hajipur Sadar, District, Vaishali

10(i). Nirmala Devi, wife of Sheo Kumar Rai, daughter of late Ram Ruch Rai

Resident of village- Sondho, P.S. Goraul, District, Vaishali

11. Gena Lal Rai

12. Gandhi Rai

13. Hari Charan Rai

All sons of Mostt. Rampatia Devi, deceased

14. Shiva Devi, wife of Banwari Rai

15. Jankiya Devi, wife of Sakaldeo Rai

16. Nainwa Devi, wife of Gawandeo Rai

17. Jhimi Devi, wife of Gobardhan Singh

18. Lila Devi, wife of Bishundeo Rai, deceased

All residents of village- Saraipur Diwan Tok, P.O. & P.S. Hajipur, District, Vaishali

19. Rinku Devi, daughter of Ajablal Rai @ Ajab Rai wife of Satyendra Rai

Resident of village Dhanwa, P.S. Barh, District Patna

Defendants-Respondents-Respondents

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Appearance :

For the Appellants :

Dr. Uma Shankar Prasad, Sr. Advocate,
M/s. Naresh Chandra Verma
Kamla Kant Tiwary,



For the Respondents : Archana Kumari
Lakshmi Kant Tiwari, Advocates
Mr. Shashi Shekhar Dwivedi, Sr. Advocate
Mr. Ranjan Kr. Dubey, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE DR. JUSTICE RAVI RANJAN

C.A.V. JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date: 21-12-2016

Heard parties.

This appeal has been preferred by the defendants-respondents-appellants assailing the judgment and decree dated 28.4.1992 passed by a learned Single Judge of this Court in F.A. No. 232 of 1976 reversing the judgment and decree dated 22.12.1975 passed by the Subordinate Judge, Hajipur, in Partition Suit Case No. 372/73.

Partition Suit No. 372/73 was brought by one Nokhe Rai, who died during the pendency of the suit and his heirs and legal representatives were substituted who were the appellants in the F.A. No. 232 of 1976. The plaintiff sought relief for partition of properties described in Schedule I and Schedule II of the plaint which he alleged to be joint family properties of the plaintiffs and the defendants. There is no dispute regarding the genealogy in the plaint as it is admitted by the defendants-respondents-appellants also that the plaintiffs and the respondents are from one common ancestor Bhajju Rai who had two sons, Nokhi Rai, who was the original



plaintiff (since deceased) and Khakhan Rai, who died even before institution of the suit. Khakhan Rai had three sons, namely, Newalal Rai (respondent no. 1), Jhabbu Lal Rai (respondent no.2) and Nabu Rai, who had even pre-deceased Khakhan Rai. His two sons, namely, Kanhai Lal and Ajab Lal Rai and his widow Mosst. Bhagwatia stood impleaded as defendant Nos. 3, 4 and 5 respectively. According to the plaint, the joint family properties were spread over various plots mostly of villages Saraipur, Govindpur Terasiya and few plots of village Nawada Khurd.

According to the plaint, the aforesaid properties described in Schedule I and II were joint family properties either being ancestral or acquired out of the income therefrom. It is further stated in the plaint that for the sake of convenience the joint family members became separate in mess and started cultivating the land separately but no partition by metes and bounds was ever effected. As per the allegation in the plaint, the original plaintiff Nokhi Rai used to regularly visit State of Assam in connection with his business and Khakhan Rai was managing the entire property being the Karta of the joint family. Nokhi Rai also used to pay some part of the earning to him. It is further alleged that after the death of Khakhan Rai, his son Newalal Rai (defendant no. 1) became the Karta of the family. It is alleged in the plaint that at the time of revisional survey in the



year 1960-61, deliberately, some manoeuvring was done by the defendants' side for taking undue advantage and, as such, several properties were recorded solely in the name of the defendants though there was never any partition by metes and bounds in the family. Looking to that and feeling other inconveniences, demand of partition was made which was evaded by the respondents and eventually it was refused. Hence, the partition suit was instituted.

A joint written statement was filed by the defendant nos. 1, 3, 4 and 5 whereas defendant no. 2, Jhabhu Rai, did not file any written statement. A plea was taken in the written statement that there had already been a private partition in the month of Baisakh in the year 1959 which was effected with the help of relative and entire joint family property was partitioned and separate possession was delivered accordingly. According to the defendants, the property mentioned in Scheduled 'Ka' of the written statement was allotted to Nokhi Rai and the property mentioned in Scheduled 'Kha' to the descendants of Khakhan Rai. It is further stated that, in view of the fact that the defendants were having family of larger number, i.e., numbers of the family members were much more in comparison to the plaintiffs' family and also considering the fact that Khakhan Rai had contributed in earning some properties out of the joint family property and some contribution had been made by Newalal Rai also,



who had earned money by dealing in milk, the defendants' branch were allotted $2/3^{\text{rd}}$ of the joint family properties, whereas, the plaintiffs were allotted $1/3^{\text{rd}}$. It is claimed in the written statement that, subsequently, there had been further partitions in the branch of Khakhan Rai.

However, with respect to plot no. 1057 of village Saraipur, it is stated that the same was a ditch and was coming in joint possession. The defendants did not object to partition of that part, if done in the ratio of $2/3^{\text{rd}}$ for the defendants and $1/3^{\text{rd}}$ for the appellants. About the lands of revisional survey no. 290 and 293 appertaining to khata no. 262 of village Nawada Khurd, a stand has been taken by the defendants that this was self acquired property of Newalal Rai which he had taken as settlement in the year 1946 from one Mangal Prasad Pandey and, though it is his exclusive property, in the revisional survey record of rights, possession of other defendants have wrongly been recorded. Similarly, 13 decimals of RS plot no. 2212 of village Govindpur Terasiya are also claimed to be exclusive property of Newalal Rai who acquired title over it by adverse possession. Thus, a stand was taken that the aforesaid plots, being exclusive properties of defendant no. 1 Newalal Rai, can not be subjected to partition. The defendants claimed that the parties had been dealing separately with their respective properties allotted to



them in partition by executing sale deeds and mortgage deeds which supports the claim of the defendants regarding previous partition.

The trial court, on the basis of pleadings of parties, framed as many as eight issues. However, main issue nos. 5, 6 and 7 have been dealt with by the first appellate court and are extracted as under:

- “(5) Has there been a partition of the suit properties except R.S. Plot No. 1057 of mauza Saraipur as alleged by the defendants or the entire suit properties are joint as alleged by the plaintiffs?
- (6). Whether the suit lands of Mazua Nawada Khurd and R.S. Plot No. 2212 of Muza Govindpur Terasia are the self acquired property of Newalal Rai, defendant no. 1 as alleged by the defendants or are joint family properties as alleged by the plaintiffs?
- (7) Are the plaintiffs entitled to get a decree for partition. If so, to which of the properties and to what extent?

The trial court recorded a finding with respect to the issue no. 6 that the plots of Mauza Nawada Khurd and Govindpur Terasiya are joint family properties and not self acquired one of Newalal Rai as claimed.

On issue no. 5, the trial court has come to the conclusion that there was already partition between Khakhan Rai and Nokhi Rai



in the manner of share of $\frac{2}{3}^{\text{rd}}$ for the defendants branch and $\frac{1}{3}^{\text{rd}}$ to the plaintiff and, as such, the branch of plaintiffs have no unity of title save and except on plot no. 1057, plot nos. 290 and 291 of village Nawada Khurd and R.S. plot no. 2212 of village Govindpur Terasiya. Thus, the suit was decreed in part allowing $\frac{1}{2}$ share to the appellants in respect to the plot no. 1057 which was admittedly joint and plot nos. 290 and 291 of village Nawada Khurd and plot no. 2212 of village Govindpur Terasiya which were held to be joint and not exclusive property of Newalal Rai.

The appeal was preferred by the plaintiffs-appellants-respondents challenging the judgment and decree in part by which partition was not allowed. Cross objection was also filed by the defendants – respondents – appellants. However, the cross objection filed against the part of the judgment and decree by which the plots of Govindpur Terasiya and Nawada Khurd were declared to be joint family properties was not pressed at time of hearing.

In view of the contentions raised in the appeal and after hearing the parties, the first appellate court formulated following points for decision in the appeal:

“Whether or not the finding of the learned court below holding that the properties in suit (except three items, referred to above) had already been partitioned as claimed by the respondents is correct on



the basis of the evidence brought on the record and whether the learned court below was right in dismissing the suit so far as those properties are concerned.”

After hearing the parties and perusing the records including the oral evidence as well as documentary evidence led by the parties, the first appellate court has come to the conclusion that theory of private partition propounded by the defendants seems to be unbelievable, unreasonable and unconscionable as much larger share was allotted to one branch and small share to the other branch on the ground of existence of larger number of family members in one branch and greater labour by some members in acquiring some of the joint family properties which normally should not have been done as it was found that difference in numbers of family members was also not that large and, since the properties were largely ancestral, there would be no question of greater labour being exerted by defendants in acquiring the same. It has been held that the trial court has committed serious error as the evidence led by defendants do not generate faith on the theory that there was partition in such unreasonable manner. Thus, it has been held that the suit properties ought to have partitioned in its entirety and not with respect to part of the properties. Hence, this appeal has been preferred.



It has been urged on behalf of the defendants-respondents – appellants that the first appellate court committed error in holding that the documents such as sale deeds and mortgage deeds executed by the different parties with respect to their piece of land, in some cases, the other parties having signed or given thumb impression as a witness, would be not enough to hold that by conduct also the partition in the family is apparent. It also failed to appreciate that, since larger number of family members are there in the defendants branch and Newalal Rai had laboured hard in acquiring the properties in the name of joint family, a compensation was given by other side by allotting them lion's share in the properties.

Learned counsel appearing for the appellants had drawn attention of this Court towards oral evidence of several of the DWs including DWs. 9, 13, 14, 15, 17 and 26 (who is Newalal Rai, i.e., the defendant no. 1 himself).

Per contra, learned counsel appearing for the plaintiffs-appellants-respondents has submitted that even the defendants do not talk about complete partition and the trial court has also found that three plots, namely, plot nos. 290 and 291 of village Nawada Khurd and 2212 of Govindpur Terasiya and plot no. 1057 of village Seraipur were never partitioned. It has been contended on behalf of the respondents that there cannot be a partial partition in such an



unreasonable manner. In fact, taking advantage of being karta and Manager, Khakhan Rai and, thereafter, his son Newalal Rai manoevered entries in the revisional survey records of rights but in fact there was no partition. The sale deed was also questioned in which allegedly Nokhelal Rai has appeared as witness as it was contended that even the recitals of sale deeds would go to show that there was no question of transfer of the lands without payment of rest of the consideration amount of Rs. 500/- and on payment of such amount only the sale deed, which was presented for a registration, could have been handed over to the concerned parties. It is claimed that this was the reason why the original sale deed was never produced and the sale was not complete. However, the plaintiff had denied such sale deed having been executed in such a manner. Similarly, regarding mortgage deeds, it is stated that they do not show that there was partition by metes and bounds in the family as some of the lands being mortgaged by one of the coparceners cannot indicate partition in the family as that can easily be done with the consent of other coparceners.

However, it is also to be taken in account that the appellants did not press their cross objection with respect to the lands of the Govindpur Terasiya and Nawada Khurd which were held not be exclusive property of Newalal Rai rather the same was



held to be joint family properties by the trial court. Thus, the appellate court was not required to record any finding over that.

On appreciation of rival contentions, following points emerge for determination by this Court:

(I). Whether the findings of the first appellate court that the alleged theory of partition propounded by the defendants-respondents-appellants in the written statement allowing $2/3^{\text{rd}}$ share in favour of the defendants and $1/3^{\text{rd}}$ share in favour of the plaintiff is unreasonable, unbelievable and unconceivable is worth being upheld?

(II). Whether partial partition is permitted specially in the manner which has been described in the written statement ?

Both the issues, being intertwined, have been taken up together for consideration.

The first appellate court has appreciated the evidence led by the parties in detail. The DW 9 Hirday Prasad Singh, DW 13 Jhimilal Rai, DW 14 Dhodha Rai, DW 15 Ram Jatan Rai, DW 17 Bunilal Rai, DW 18 Dihurai and defendant no. 1 Newalal Rai as DW 26 appear to have given oral evidence on the point of partition. However, the first appellate court has come to the conclusion that



none of the witnesses generate faith on the issue. The DW 9 had deposed that he knew about two pieces of land one of which was of an area of 10 ½ Bigha and other had an area of 2 ¼ Bigha and both, according to him, were partitioned in his presence. Newalal Rai got one and a half Bigha from north while Nokhi Rai got three Bigha from the western side and the six Bigha remaining out of nine Bigha was also given to Newalal Rai and his branch. However, though he has stated that Jhimilal Rai, Teka Bhagar and Dhodha Rai were appointed as the Panches, two of the aforesaid witnesses who have been examined as DWs 13 and 14 have not supported that. That apart, even the defendant no. 1 himself, while being examined as DW 26, has not supported the aforesaid fact. That apart, DW 9 is a teacher of the same school in which one of the sons of Newalal, namely, Ram Bilas Rai is a teacher, therefore, there is also a possibility that he was deposing at the instance of Ram Bilas Rai.

Similarly, DW 13, Jhimilal Rai has stated that at the time of partition in the aforesaid manner, ridges were erected and according to him, it continued till the day he deposed, i.e., August 1975 but the case of the defendants is that subsequently there were at least two further partitions in the family of the defendants then how the ridges could have remained intact is not answered and, as such, it is not at all conceivable. That apart, this witness belongs to Nawada



Khurd and not to village Govindpur Tarasiya and Saraipur where most of the properties lie and he has not given particulars about the lands which were partitioned between the parties though he claims to be present at relevant point of time.

The DW 14 also belongs to different village, namely, Chogera and has not given any details regarding the partition as to which area was allotted to which party. Similarly DWs 15, 17 and 18 also could not generate faith of the first appellate court. DW 17 has been held to be hearsay witness. So far DW 26 Newalal Rai (defendant no. 1) is concerned, he has stated that defendants having large number of members than the branch of Nokhe Rai and since the defendants' side contribution was greater in acquisition of some of the joint family properties, the partition was effected in such a manner. However, it was not found at all convincing rather according to the first appellate court it was absurd when the witness himself has stated that the lands of Govindpur Terasiya, Nawada Khurd were self acquired properties but that was disbelieved by the trial court, whereas, properties of Saraipur was acquired 55-56 years back. When the properties were acquired 55-56 years back it cannot be said that such factors could be taken into consideration as to whether there was any greater contribution by one of the family members or not. Numbers of a branch in the



family is hardly taken into consideration when the partition is done between different branches. Upon appreciation of the entire evidence, the first appellate court has come to the conclusion that the theory is not at believable.

Learned counsel appearing on behalf of the respondents have submitted that there cannot be partial partition in the manner which was stated in the written statement by the defendants as they themselves admit that there was no partition over plot no. 1057 and their claim that plots of Govindpur Tarasiya and Nawad Khurd were self acquired properties of defendant no. 1, has been disbelieved by the court below itself and the cross objection has not been pressed by the defendants-respondents-appellants which would amount to their acceptance that such properties belonged to the joint family.

Per contra, it has been urged on behalf of the appellants that there can be partial partition and it has been accepted by the Apex Court long back. In support of his submission, learned counsel has placed reliance upon a decision of the Apex Court rendered in **Kashinathsa Yamosa Kabadi Vs. Narsinga Bhaskarsa Kabadi [AIR 1961 Sc 1077]**. The Apex Court has held that it is always open to the members of a joint Hindu family to divide some of the properties of the family and to keep the remaining undivided. By the



reference to the punches, the parties in that case were held to be ceased to be members of the joint Hindu family. If some of the assets of the family were divided and that division was accepted by the parties, the properties received by the parties to their possession must be deemed to be individual ownership of the parties to whom they were allotted and the remaining properties as of their tenancy – in – common.

However, in our view, the present case would hardly be covered by the aforesaid decision as, according to the defendants, the entire property was partitioned in the manner $1/3^{\text{rd}}$ and $2/3^{\text{rd}}$ share allotted to the plaintiffs and the defendants, except plot no. 1057 which was ditch and could not be partitioned. The other properties of village Nawada Khurd and Govindpur Terasiya were claimed as exclusive properties of the defendants which were disbelieved, therefore, it cannot be held that the partial partition was a result of the will of the members of the joint family to divide some of the properties of the family and keep remaining as tenancy – in – common. Another decision upon which a reliance has been placed by the appellants is of the Apex Court rendered in **Apoorva Shantilal Shah vs Commissioner of Income Tax [AIR 1983 SC 409]**. In the aforesaid case, it has been held that partial partition of properties brought about by the father between himself and his minor



sons cannot be said to be invalid under the Hindu Law and must be held to be valid. However, it was clarified that this right of father to effect a partial partition in joint family members between himself and his minor son whether in exercise of his superior right as father, i.e., in exercise of right as *patri potestas* has necessarily to be exercised bona fide by the father and is subject to the right of the sons to challenge the partition, if that is not fair and just. In our view, this decision would also not come to the help of the appellants as that was with respect to father exercising his rights *patri potestas* effecting partial partition and further this has also been held that he has to exercise his right bona fide and partition should not be unfair and unjust, whereas, in the case in hand, it is not a partition brought by the father along with his minor son and appearance of the partition is that it is not just and fair. Another decision rendered by a Single Judge Bench of this Court in **Barhu Ram and Ors. Vs. Butai Ram and Anr. [1999(3) BLJR 1713]** would also not be applicable in the present case. It has been held therein that general principle undoubtedly is that a Hindu Family is presumed to be joint but there is no presumption that the Hindu family is also possessed of property. It has been further held that the test of self acquisition is that it should be without detriment to the family property, i.e., because the aid or assistance of joint family



properties. However, this issue was decided by the trial court against the appellants holding that the properties of village Nawada Khurd and Govindpur Terasiya are not self acquired properties rather are joint family property and the cross objection by the appellants were not pressed before the first appellate court. Thus, the issue does not remain alive for the appellants to be raised before this Court.

So far documentary evidences are concerned, we are in full agreement with the first appellate court that for the reason that the original document could not be brought on record and the recital thereof reveals that original was to be delivered after final payment completed with the fact that plaintiff has shown unawareness regarding execution of such document, the contention that transfer of 5 katha of land would clinch the issue in favour of the defendants that there was previous partition giving him unduly large share would not be conceivable. The mortgage deed exhibited D/1 was allegedly executed by Nokhe Rai for an area of 15 katha of plot no.915 and Newalal Rai had identified Nokhe Rai and had also attested this deed would also not prove partition by meets and bounds in the aforesaid manner as this document merely indicates separate possession of the parties and it cannot lead to an inference that there was alleged partition in such a manner. Similarly, the entire exhibit D series or



even Exhibit 1 would not show that it has to be deemed that other parties were aware of the same and there was a partition in the manner as described by the defendants. The separate possession may be there for the sake of convenience but not necessarily due to partition.

So far the entries in the revisional survey records of rights are concerned, it is well settled that such entries neither create nor extinguish any right, title and interest. They are not proof of partition. They may be proof of possession. They may be a document corroborating the theory of partition but unless the partition by meets and bounds is proved, this document itself would not clinch the issue as it is alleged in the plaint that the Kakhan Rai and Newalal Rai being 'Karta' had managed to get such entries in the survey records of right at the time of revisional survey and defendants are trying to take advantage of that.

In our view, such partition in the manner of $\frac{2}{3}$ rd awarding to one branch and $\frac{1}{3}$ rd to another branch cannot be held to be just and fair and since the manner could not be proved by the defendants, the entire theory of previous partition falls flat. Thus, in our considered view, the first appellate court has rightly held that entire property should have been held to be joint family property and should have been partitioned half and half between the branches of



Nokhe Rai and Newalal Rai.

As a result, this appeal, having no merit, fails and is,
accordingly, dismissed.

(Dr. Ravi Ranjan, J)

Ramesh Kumar Datta, J: I agree.

(Ramesh Kumar Datta, J)

Spd/-/ Sanjay

AFR/NAFR	NAFR
CAV DATE	27.09.2016
Uploading Date	21.12.2016
Transmission Date	NA

