

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.213 of 2010

Dina Nath Choudhary son of Late Dukhan Choudhary, Resident of village Bideshi Tola, Thawe, P.O. + P.S. Thawe, District Gopalganj.

....Defendants/Appellants/Appellant

Versus

- 1.Bishwanath Choudhary
- 2.Ramdeo Choudhary Both sons of late Dukhan Choudhary.
- 3.Mostt. Anupi W/o Late Shyamdeo Choudhary
- 4.Hiralal choudhary
- 5.Hridaya Lal Choudhary
- 6.Achaylal Choudhary
- 7.Harilal Choudhary
- All sons of Shyamdeo Choudhary.
- 8.Rita Devi, w/o Birendra Yadav, d/o Late Shyamdeo Choudhary
- 9.Gita Devi d/o Late Shyamdeo Choudhary.
- 10.Mukhan Choudhary, son of Dina Nath Choudhary.
- 11(i)Nagina Choudhary s/o Late Ram Chandra Choudhary r/o Bideshi Tola Thawe, Po +PS. Thawe, Gopalganj.
- 11(ii) Fulmati Devi r/o Santpur, District Gopalgang.
- All are resident of village Bidesi Tola Thawe, P.O. +P.S. Thawe, District Gopalganj.

.... Respondent/s

Appearance :
For the Appellant/s : MR. RANJEET KUMAR, ADV &
MR. KUNDAN KUMAR, ADV
For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT
Date: 05-10-2016

Heard learned counsel for the appellant and learned counsel for the contesting respondents.

The defendant No. 1 in the suit is the appellant in this appeal questioning the legal sustainability of the impugned judgment and decree passed by the appellate court affirming the judgment and decree of part partition of the suit property.

The plaintiff filed the suit for partition claiming 1/4th share in the suit property. The genealogy given in the plaint by the plaintiff was accepted by the contesting defendants. According to the case of the plaintiff, based upon the said genealogy, there was partition between two brothers Jitan Ahir and Mahabir Ahir. Jitan Ahir had a son Dukhan Ahir, and after the death of Jitan Ahir, Dukhan Ahir inherited his property as his son. Dukhan Ahir had four sons namely Dinanath Chaudhary, Bishwnath Chaudhary, Ramdeo Chaudhary and Shyamdeo Chaudhary. Bishwnath Chaudhary was the plaintiff in the suit whereas Dinanath Chaudhary was the Defendant No. 1. The Defendant No. 2 was Ramdeo Chaudhary and Defendant No. 3 to 9 were descendants of Shyamdeo Chaudhary. It would be pertinent to mention here that Defendant Nos. 3 to 9 substantially supported the case of the



plaintiff in their written statement and did not turn up to depose in the suit which was mainly contested by the Defendant No. 1 Dinanath Chaudhary and his son Defendant No. 10 Mokhtar Chaudhary who filed their separate written statements. The contesting defendants came out with the case that there had been partition of the joint family property between the parties in the year 1965 and thereafter the properties were acquired by the members of the family in their own names out of their separate share. It was also the case of the contesting Defendant No. 1 that his son Mokhtar Chaudhary (Defendant No. 10) and his daughter Ramawati Devi separated from him in the year 1978 and had gone in collusion with the plaintiff and Defendant No. 2.

Both the courts below on scrutiny of evidence have recorded the concurrent finding of fact that there is unity of title and unity of possession with regard to the ancestral properties mentioned in Schedule-2 and 3 of the plaint as well as those lands mentioned in Schedule-1 which were acquired before 1978. The suit was accordingly decreed in part. In appeal by the Defendant No. 1, the appellate court on reappraisal of evidence has affirmed the part decree in favour of the plaintiff.

The learned counsel for the appellant has submitted that both the courts below have erred in law in failing to consider that



there was no pleading or proof by the plaintiff that the joint family had nucleus which was sufficient for acquisition of the properties. It has been contended that according to the settled principles of law, a member of a joint family is entitled to acquire separate property even in the status of jointness and other members of the family would have no share in the same. It has been also submitted that both the courts below have made out a third case of separation between the parties in the year 1978 though the same has not been pleaded either by the plaintiff or the contesting defendants. It has also been argued that the judgment of both the courts below are vitiated for non-consideration and misinterpretation of the material evidence on record.

After considering the submissions and the perusal of judgments of both the courts below, it is evident that after accepting the genealogy as pleaded by the plaintiff, the defendant-appellant has come out with the case of partition in the year 1965. Both the courts below after elaborate analysis of the evidence have come to the conclusion that the defendant-appellant has failed to establish his case of partition in the family in the year 1965. While recording this finding the learned courts below, after considering the deposition of other witnesses, have also taken into notice the statement made by the Defendant No. 1, examined as PW-8, that at the time of partition



in the year 1965 he was outside the village. This statement becomes relevant in view of the fact that Defendant No. 1 has not denied the assertion of the plaintiff that after the death of the senior members of the family, he became karta of the family. The property described in Schedule-2 and 3 of the plaint are ancestral properties of the parties with regard to which no serious assertion has been made on behalf of the appellant during the course of submission and the main assertion has been confined to the property mentioned in Schedule-1 which are the properties acquired in the name of the Defendant No. 1-appellant and other members of the family. The trial court after minute scrutiny of the oral and documentary evidence came to the conclusion that before the year 1978 most of the properties mentioned in Schedule-1 of the plaint have been acquired in the joint names of the family members or in the exclusive name of the Defendant No. 1-appellant and on that basis it was concluded that the properties acquired by the family before 1978 were acquired out of the joint family fund. The trial court thus held that the plaintiff was entitled to his 1/4th share in those properties. The appellate court below has also undertaken elaborate scrutiny of the oral and documentary evidence and thereafter has come to affirm the aforesaid conclusion by the trial court. The appellate court below has also found that there was nucleus in the family to support



acquisition of the properties before 1978. These findings of fact have been recorded on the basis of evidence which were acceptable and could have been relied upon. This Court has not been persuaded to find perversity or unreasonableness in any manner in the findings by the courts below. The fact of jointness in the family before 1978 has emerged and found by both the courts below on the basis of evidence adduced by the parties and the said finding of fact cannot be overturned solely on the basis of the plea that it was a third case made out by the court.

For the aforesaid reasons and discussions, this Court does not find that any substantial question of law arises for consideration in this appeal, which is, accordingly, dismissed.

(V. Nath, J)

Ranjan/-

AFR/NAFR	NAFR
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