

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.253 of 1975

Against the judgment and decree dated 20.02.1975 passed by Subordinate Judge, Muzaffarpur in Partition Suit No.105 of 1968/66 of 1973

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Most. Parmila Devi and Ors.			Plaintiffs-Appellants
Versus			
Smt. Jehar Devi & Ors			
			
			Defendants-Respondents

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Appearance :

For the Appellants	:	Mr. Binod Kumar Singh, Advocate. Ms. Vagisha Pragya Vacaknavi, Advocate.
For the Respondents	:	Mr. Yogendra Mishra, Advocate. Mr. Uma Kant Tiwary, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:16-05-2017

The plaintiffs have filed this first appeal against the judgment and decree dated 20.02.1975 passed by learned Subordinate Judge, Muzaffarpur in Partition Suit No.105 of 1968/66 of 1973 dismissing the plaintiffs-appellants' suit for partition.

2. The plaintiffs-appellants filed the aforesaid partition suit claiming for half share in the suit property alleging that the common ancestor of the parties was Hanshraj Singh, who had two sons, namely, Ramlal Singh and Shiv Narayan Singh. Ramlal Singh had a son Jairudal Singh. Plaintiff no.1, Radhakant is the son of Jairudal Singh and plaintiff no.2 Kaushalya Devi is the mother of



plaintiff no.1.

3. The other son of Hanshraj Singh i.e. Shiv Narayan Singh had two sons, Amir Singh and Nandipat Singh. This Nandipat Singh is defendant no.1 and his sons and grandsons are defendant nos.2 to 9. Amir Singh's sons and grandsons are the defendant nos.10 to 18.

4. The further case of the plaintiffs is that Ramlal died before cadastral survey in jointness. All the properties of Hanshraj Singh were recorded in cadastral survey in the name of Shiv Narayan Singh and Jairudal Singh and one Narsingh Singh, although Narsingh Singh had no title or concern with the family of Hanshraj Singh. The father of the plaintiff was physically and mentally weak so he was taking care of the cattle. Shiv Narayan Singh, Amir Singh and Nandipat remained as karta of the family. Many properties were purchased out of income from produce derived from agriculture and also income from money lending business. However, the sale deeds were obtained in the name of different members of the family but all the properties are joint family properties. The defendants' family increased in numbers as a result of which there was quarrel and then all of them separated in mess in the year 1960 but then there had been no partition by metes and bounds.



5. The further case of the plaintiffs is that taking the mental and physical weakness of Jairudal Singh the defendants in collusion with survey amin got lesser area of land recorded in possession of the plaintiff's father and the defendants got recorded all other large area of land. Partition was demanded but they refused. Therefore, this suit for partition was filed.

6. The defendant nos.1 to 5 filed contesting written statement jointly. The defendant nos.10, 12 and 14 filed contesting written statement separately. The minor defendants filed written statement through G.A.L. The defendant no.19, the intervener who is son of Narsingh Singh also filed separate contesting written statement.

7. The stand of defendant nos.1 to 5 is that the name of Narsingh Singh was rightly recorded in cadastral survey record of right along with the parties to the suit with respect to the property of Khata Nos.93, 105, 132 and 133. The allegation of mental and physical weakness of Jairudal Singh is denied by these defendants. According to them, there was no money lending business nor there was any surplus income from joint family lands. The further defence is that after survey Jairudal Singh separated from Shiv Narayan Singh in the year 1899. The lands which were partitioned between them to the extent of half and half are mentioned in detail in Schedule I of the



written statement. A korra was prepared which was signed by Shiv Narayan Singh and Jairudal Singh. The properties of Schedule II of written statement were given in the share of Jairudal Singh and the lands mentioned in Schedule III of the written statement were given to Shiv Narayan Singh and since the said partition the parties are coming in exclusive possession. They also dealt with the properties allotted to them in their share. Shiv Narayan Singh took loan by executing mortgage deed on 25.04.1899. In the written statement the defendants have given the details of the land acquired by the plaintiff after partition which are mentioned in Schedule IV of the written statement. The defendants claimed the lands of Schedule VI(ka) of written statement as self acquired property of defendant no.1 after partition. Schedule VI (kha) of the written statement which are self acquired property of wife of defendant no.1 Phool Kumari Devi out of her kaushal money which were acquired in benami name of Surjug Singh, the maternal uncle of defendant no.1 who executed laddavi deed in favour of defendant nos.2 to 4.

8. The further defence is that after death of Shiv Narayan Singh partition took place between Nandipat, defendant no.1 on one side and his brother Amir Singh on the other side in the year 1936. In this partition the self acquired land of defendant no.1 and his



wife were excluded from partition. The Schedule VII of written statement and Schedule VIII of the written statement were allotted to him in partition respectively. The revisional survey record was prepared according to the lands which were held exclusively by the parties. All other allegations made by the plaintiffs have been denied by the defendants. After the death of Narsingh Singh, his son (defendant no.19) claimed the land of four khatas and 145 Cr.P.C. proceeding was initiated which was decided in favour of the defendants.

9. The defendant nos.10, 12 and 14 contested the suit by filing contesting written statements which is similar to that of defendant nos.1 to 5.

10. The defendant no.19 besides taking various legal pleas mainly pleaded that he had got half share in the lands of four khatas being khata nos.93, 105, 132 and 133. According to him, the landed properties have been acquired jointly by the ancestor of the parties and the ancestor of defendant no.19. Therefore, it is jointly recorded in their names.

11. On the basis of the pleadings of the parties the learned trial court framed the following issues:-

- (i) Is the suit as framed maintainable?



- (ii) Have the plaintiffs got any cause of action?
- (iii) Is the suit barred by the law of limitation, estoppel, acquiescence, waiver, ouster and adverse possession?
- (iv) Is the story of previous separation and partition, as alleged by the defendant, correct?
- (v) Whether the acquisitions made in the names of different descendents of Sheonarain were acquisitions made by the joint family?
- (vi) Are the plaintiffs entitled to a decree for partition? If so, in respect of which of the properties and with respect of what share?
- (vii) Whether the lands of khata nos.93, 105,132 and 133 of village Prahladpur were the joint family property and whether Narsingh Singh had half share in it?
- (viii) Whether the defendants acquired right, title and interest of Narsingh Singh in lands of khata no.93, 105, 132 and 133 of Prahladpur by virtue of oral sale?
- (ix) To what other relief or reliefs are the plaintiffs entitled?

12. From the above issues it appears that the main issues are Issue Nos.(iv) (v) and (vi).

13. The learned trial court on the basis of evidences and materials available on record came to the conclusion that the plaintiffs have included the self acquired land of defendant which have already been sold long ago and the transferees who are necessary party have not been made party in the suit. There was no jointness between the parties. The parties were separated since long and the plaintiffs have failed to prove that the acquisitions in the name of



different defendants are joint property. Therefore, the plaintiffs are not entitled to a decree for partition. Accordingly, the suit was dismissed.

14. The learned counsel Mr. Binod Kumar Singh for the appellants submitted that the judgment and decree passed by the court below is unsustainable in the eye of law because the court below recorded the finding on surmises and conjectures without considering the fact that the defendants have not produced any reliable evidence to show that there had been partition by metes and bounds between the parties. Only on presumption the court below has recorded the finding. Jairudal Singh and father of plaintiff no.1 were first cousin of defendant no.1, therefore, there is presumption of jointness between Jairudal and Nandipat till 1960 when the parties separated in mess but the court below wrongly held that the presumption in this case does not exist.

15. The learned counsel further submitted that the court below wrongly placed onus on the plaintiffs to prove that the parties were joint till 1960 and the acquisitions were made out of the joint family income. The court below also wrongly placed onus on the plaintiffs to prove that there had been no partition by metes and bounds. According to the learned counsel, the law is that the person who asserts that there had been previous partition has to prove the fact



as the presumption is jointness of the joint Hindu family which is in favour of the plaintiffs. The learned counsel further submitted that the court below has wrongly come to the conclusion that there was no sufficient nucleus out of which the acquisitions could have been made. On the contrary, the agricultural land belonging to the parties is admitted, therefore, the onus was on the defendants to prove that the properties were purchased without the aid of the joint family fund or nucleus. The family possessed of 14-15 bigha agricultural land and subsequent acquisition by the family shows that there was sufficient nucleus but the learned court below wrongly discarded the same.

16. The learned counsel further submitted that the presumption that the properties acquired in the name of the joint family members are the joint family property but the court below failed to appreciate this position of law. The learned counsel further submitted that when the trial court disbelieved the alleged korra produced by the defendants in support of partition, the learned trial court should have decreed the plaintiffs' suit for partition. The allegation made by defendants that there had been partition in 1899 cannot be believed as during that period the plaintiff's father Jairudal Singh was an infant. The learned court below has wrongly held that the transferees had not been made party who are necessary party



without noticing the fact that transfers have been made by the plaintiff. The learned trial court had wrongly recorded the finding that all the lands acquired through Ext.D series are self-acquired property of defendant nos.10 to 12 in the names of their wives. On these grounds the learned counsel submitted the impugned judgment and decree be set aside and the first appeal be allowed and the plaintiffs-appellants' suit for partition be decreed.

17. On the other hand, the learned counsel Mr. Yogendra Mishra appearing on behalf of the respondents submitted that there is no illegality or irregularity in the impugned judgment. The learned trial court has appreciated all the materials and important evidences and then came to the conclusion that there had already been partition. In the present case, according to the defendants the partition was prior to 1899, therefore, there is no direct evidence of partition but the subsequent conduct of the parties clearly proves previous partition. The properties have been recorded separately in the cadastral survey record of right and also in the revisional survey record of right. After this partition the plaintiffs also acquired separate property and the defendants also acquired separate property. The parties have also sold many properties and possession has already been given to the purchasers. These dealings by the parties are not



recent dealings but since long and moreover there are some inter-se transactions between the parties. Therefore, the parties are separate since long, they have got separate residence and separate mess since long, the properties are acquired separately and also sold by them exclusively treating those properties as their property without any hindrances and objections since long. Therefore, taking into consideration the cumulative effect of these conducts of the parties it can safely be held that there had already been partition by metes and bounds between the parties.

18. In the present case, the plaintiff, who is claiming partition, is fourth generation from the common ancestor, therefore, the presumption of jointness is so weak that simple denial of jointness by the defendants is sufficient enough to non-suit the plaintiff unless the plaintiff proves the fact that although the parties are messing separately since long, residing separately since long, acquiring properties separately since long, selling properties separately treating the properties as their exclusive property since long, then also the parties are still joint or that there had been no partition by metes and bounds because according to Hindu Law, the presumption is stronger in the case of the brothers than in the case of cousins and the farther you go from the founder of the family the presumption becomes



weaker and weaker. The reason is that brothers are for the most part undivided while the second cousins are generally separated and the third cousins are for the most part separated. According to the learned counsel, therefore, it is not believable that the family will remain joint upto fourth generation from the founder.

19. The learned counsel further submitted that many sale deeds have been produced by the defendants which are in the name of female members, who are not coparceners. The plaintiff never sought for any declaration that the properties have been acquired by the joint family fund in the name of females who are not coparceners. The females have got no share in the joint family properties then why the properties have been acquired in the name of female members, who have got no concern with the joint family property. No explanation has been submitted by the plaintiff. Even if there was less area of land allotted in the share of plaintiff's ancestor then also on that ground the partition cannot be reopened after more than half century. The defendants never prayed for declaration that the female members are the benamidars of the coparceners. Considering all these aspects of the matters the learned trial court has rightly dismissed the plaintiffs' suit, therefore, the first appeal be dismissed with cost.



20. In view of the above submissions of the parties ,the following points arise for consideration in this first appeal:-

- (a) Whether there is unity of title and possession between the parties as claimed by the plaintiffs or there had already been previous partition as claimed by the defendants?
- (b) Whether the purchasers who are in possession of their purchased properties are necessary party in this suit for partition and for non-addition of them this partition suit is liable to be dismissed?
- (c) Whether the properties acquired in the names of the female members and in the names of defendants are joint family properties or are self-acquired properties of the defendants?

21. **Point No.(a):**

The plaintiffs-appellants have filed this simple suit for partition making simple case that there had been no partition by metes and bounds. It is the specific case of the plaintiffs that Ramlal Singh died prior to cadastral survey and in the cadastral survey the names of Jairudal Singh and Shiv Narayan Singh have been recorded. It clearly proves that Hanshraj, the common ancestor had also died prior to cadastral survey. This cadastral survey took place in the year 1900-1902. According to the defendants, there had already been partition between the parties in the year 1899. In support of their respective cases both the parties have adduced evidences. Admittedly there is no document to prove that there had been partition in the year 1899. However, when there is no direct evidence, the subsequent conduct of



the parties may be considered to arrive at a conclusion. The defendants have produced several documents.

22. P.W.s.2 and 3 have admitted the fact that Nandipat had left the ancestral house and went to Gangapur and he has acquired lands there and has also constructed house. The defendants have also produced Ext.A/15 to show that plaintiff's father has acquired milkiyat interest in the year 1913 in tauzi no.10825. In Collectorate partition he was allotted separate tauzi and the plaintiff's father was mutated in Register D which has been marked as Ext.O. These documents show that since 1913 Jairudal Singh was acquiring land in his name who has also been separately mutated. This fact destroys the case of the plaintiff that his father was mentally and physically weak.

23. Ext.B/9 has been produced by the defendants to show that Shiv Narayan Singh obtained some land by mortgage from Janki Kurmi in the year 1918. It appears that the same land was again mortgaged by Ext.B/13 on 29.07.1927 in favour of the plaintiff's father Jairudal Singh who redeemed the mortgage of Shiv Narayan Singh by paying the mortgage money. The question is if the parties were joint then how one brother was paying the mortgage money to the other brother and same property is being taken by him in mortgage. This payment of money inter-se shows that both of them



were separate since then.

24. Ext.D-1/2 is a registered sale deed dated 21.06.1951 which shows that plaintiff himself has acquired land with defendant no.10 which he sold by Ext.-D-1/1 on 23.06.1959 to the wife of Deep Narayan Singh. Again Ext.A/10 dated 03.07.1940 shows that plaintiff acquired some lands with Ramautar. The plaintiff as P.W.7 in his evidence has admitted this fact. P.W.1 has been examined who has stated that plaintiff has sold property to father of P.W.1 and he is in possession of the same.

25. The defendants have also produced various documents to show that Nandipat had also acquired many properties independently long ago. Ext.A/16 is dated 19.05.1908, Ext.A/14 is dated 10.05.1909, Ext.A/15 is dated 24.09.1913, Ext.A/12 is dated 29.11.1929 and likewise the other documents i.e. Exts.A series are from the year 1908 to 1959. These properties are in the name of Nandipat or his sons.

26. Ext.D series i.e. D-1/1 to D-1/6 are of the year 1951 to 1960 which have been acquired either by sale or *bharna* by defendants. Ext.A series and Ext.B series are various registered sale deeds. Ext.B/8 is of the year 1899 which shows the separate dealings of the properties by the defendants. The defendant nos.10 to 12 have



also purchased land by Ext.D-1/3 of the year 1954 from Nandipat and Ext.D-1 dated 19.01.1955 from Ramautar Singh, defendant no.2 and Ext.D-1/1 dated 23.06.1959 from the plaintiff himself and the sale deed Ext.A/5 is dated 12.05.1953 which is in the name of wife of defendant no.10. These deeds are the inter-se transactions between the parties. If there had been no partition, how these properties were transferred by one joint family member to other joint family member.

27. A Division Bench of this Court in **A.I.R. 1977 Patna 59 (Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwari and others)** has held that the inter-se transaction is strong circumstance to prove partition between the parties.

28. It appears that after vesting of zamindari the parties were awarded compensation separately which would be evident from Ext.T/3 and Ext.T/5. Ext.G series show that the rent receipts are also separate in the name of different persons. Ext.F series show that the lands are also separately recorded in the names of the parties. P.W.2 in his evidence at paragraph 10 has admitted the fact that there was partition among the defendant nos.1 to 18. This proves the fact that there has been partition between the defendants themselves who are the branch of Shiv Narayan Singh. Now the question is if there had been no partition between the two branch i.e. Ramlal Singh and Shiv



Narayan Singh, how the partition took place between the descendents of Shiv Narayan Singh alone. This has not been explained by the plaintiffs.

29. Over and above these facts, another important fact is that Exts.P, P/1 and Ext.Q show that in Execution Case No.162 of 1923 one Ruccha Choudhary had purchased substantial part of the suit land in auction sale and thereafter he sold the property by registered sale deed dated 07.04.1931 (Ext.I) in favour of Shiv Narayan Singh, Raj Narayan Singh and Binda Singh and thereafter there has been series of transactions with respect to the said land by Ext.K and Ext.P/1. The other witnesses examined on behalf of the plaintiffs as well as the defendants are on the question of possession of land which are not relevant.

30. In view of the above facts and materials, it becomes clear that the parties are messing separately, residing separately, acquiring properties separately, selling properties separately since more than 60 years. The properties are separately recorded in the cadastral survey record of right which took place in the year 1900 to 1902.

31. The Hon'ble Supreme Court in **A.I.R. 1962 Supreme Court 287 (Bhagwan Dayal and another Vs. Mst. Reoti**



Devi) has held that the general principle is that every Hindu family is presumed to be joint unless the contrary is proved, but this presumption can be rebutted by direct evidence or by course of conduct. In the case of old transactions when no contemporaneous documents are mentioned and when most of the active participants in the transaction have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time. Admittedly in this case the case of the defendants is that there had been partition prior to cadastral survey in the year 1899. No document is available nor any person who participated in the said transaction is alive. The parties are either fourth generation or fifth generation from the founder of the joint family i.e. Hanshraj Singh, who admittedly died much prior to cadastral survey.

32. A Division Bench of this Court in the case of **Arjun Mahto Vs. Monda Mahatain & Ors. (A.I.R. 1971 Patna 215)** relying on the decision of the Supreme Court in the case of **Bhagwan Dayal** (Supra) has held that the partition can be proved by the intention of the parties manifested by their subsequent conduct, by their sole and independent enjoyment of the properties. Separation in



food and residence for a long time among the brothers of a Hindu family, independent transactions of property, separate possession and enjoyment of properties are by themselves, no doubt, not conclusive but the cumulative effect of such fact may show that there had been a partition between the brothers during their lifetime. In the present case at our hand, the fact as stated above clearly fits in with this decision.

33. In **A.I.R. 1991 Patna 1 (Ganesh Sahu and another Vs. Dwarika Sao and others)** it has been held by this Court at paragraph 50 that there has been a disruption in the joint family. The said fact coupled with other evidence regarding separate possession both in respect of agricultural land and residence, are on record and, in this view of the matter, there cannot be any doubt that there had been a previous partition in respect of the properties in suit.

34. The above views have been repeated again in the decisions of this Court in **Radhamoni Bhuiyanin and others Vs. Dibakar Bhuiya and others (A.I.R. 1991 Patna 95)** and in **Pata Sahu and another Vs. Hiru Sahu and others (A.I.R. 1991 Patna 276)**. From perusal of this decision, it appears that in that case also the High Court found that the parties were having separate mess and residence, lands were cultivated by parties separately, separate transactions were entered into regarding suit property with third party.



Considering these facts it has been held that there had been partition.

35. In **A.I.R. 2013 Patna 131 (Kripa Devi & Ors. Vs. Poonam Devi & Ors.)** this court again has taken the same view.

36. In the present case, there is inter-se transaction also between the parties as discussed above. Therefore, the cumulative effect of these facts coupled with the law laid down by the Supreme Court, Division Bench of this court and Single Bench of this Court, it leads to irresistible conclusion that there had already been previous partition between the parties. The submission of the learned counsel for the appellants that the court below only on the presumption has recorded the finding is not acceptable. From perusal of the judgment of the trial court, it appears that the trial court has considered all the documents which are relevant and also the oral evidences and then considering the position of law held that there had been partition. I find no reason to interfere with the finding of the court below on this point. Accordingly, I find that the defendants have been able to prove that there had already been previous partition between the parties much prior to filing of the suit. Therefore, there is no unity of title and possession between the parties. Thus finding of the trial court on this point is hereby confirmed. Accordingly, Point No.(a) is answered against the appellants and in favour of the respondents.



37. **Point No.(b):**

It is admitted fact that the purchasers are in possession of some of the suit properties which have been purchased by them but the said purchasers have not been made party in the partition suit. In other words, the properties of the strangers have also been included in the partition suit without making the strangers party defendants. On this point also the plaintiffs' suit for partition is liable to be dismissed i.e. for non-joinder of necessary party, the plaintiffs' suit is liable to be dismissed.

38. **Point No.(c):**

It is admitted fact that some of the properties are standing in the name of wives of defendants as mentioned above. However, the female members have not been made party defendants. Therefore, also the suit is bad for non-joinder of necessary party. Moreover, I have already recorded finding above that there has been previous partition between the parties before cadastral survey or after cadastral survey as claimed by the defendants, therefore, there is no question of joint family fund arises. The parties were cultivating lands separately and acquiring lands separately out of their own income, as stated above. Even they were transferring the property to each other. In such circumstances, when there had already been partition, in no



case it can be said that the defendants acquired the properties out of the joint family fund as such are joint family properties. I have seen above that huge properties have been acquired by the defendants through many documents. It is not a case of one transaction or two transactions. There had been no objection at all. The acquisition ranges from the year 1908 to 1960. I, therefore, find that all the properties which are standing in the name of defendants or their family members are not the joint family property rather those properties are the self-acquired properties of the defendants. The plaintiffs failed to prove that those properties are the joint family property. Thus, the finding of the trial court on this point is hereby confirmed. This point is answered against the appellants and in favour of the defendants-respondents.

39. In the result, I find no merit in this first appeal and, accordingly, this first appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

Harish/-

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