

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.447 of 1974

(Against the judgment and decree dated 30.03.1974 passed by 1st Additional Subordinate Judge, Begusarai in Title (Partition) Suit No.44 of 1967/3 of 1974).

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Vijay Kumar Rai & Ors.

--Plaintiffs-Appellants

Versus

Most. Dhano Kumari & Ors.

-- Defendants-Respondents

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Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Advocate
Mr. Shambhu Sharan Kumar, Advocate

For the Respondent/s : Mr. Pramod Singh, Advocate
Mr. Shashi Nath Jha, Advocate

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

Date: 04-04-2017

(1) The plaintiffs have filed this First Appeal against the judgment and decree dated 30.03.1974 passed by the learned 1st Additional Subordinate Judge, Begusarai in Title Suit No.44 of 1967/3 of 1974 dismissing the plaintiff-appellant's suit for partition.

(2) The plaintiffs-appellants filed the aforesaid suit claiming partition of their 1/3rd share in Schedule II, immovable properties and Schedule III, the moveable properties. The plaintiffs claimed the aforesaid relief alleging that one Tahbal Rai had five sons namely Padum Rai, Dalip Rai, Sifu Rai, Ganesh Rai and Neta Rai. The family was joint and the joint family had sufficient income from milk, butter business and also from agricultural lands. Out of the savings thereof,



some properties were acquired in the name of one or the other family members. However, the properties were joint. The record of right in survey settlement was prepared according to the jamabandi maintained by ex-landlords. The family lives in one house. Tahbal Rai was the karta and after his death, Padum Rai became the karta and likewise, after his death, Lalbihari Rai and Sukhdeo Rai. However, junior members and also female members are selling the property without knowing the contents of the sale deeds only just to obey the managing member of the family. The plaintiffs claimed 1/3rd share because out of five sons of Tahbal, the two of them died issueless namely Ganesh Rai and Neta Rai. The plaintiffs are sons and grandsons of Khankhu Rai, the first son of Sifu Rai. The defendant Nos.1 to 25 are heirs of Dalip Rai whereas defendant Nos.27 to 35 are heirs of Padum Rai.

(3) The defendants appeared and filed three sets of contesting written statements. Their defence is same. Besides taking legal pleas mainly they contended that prior to cadastral survey, son of Padum Rai namely Govind Rai, Lal Bihari Rai and Laxman Rai, son of Dalip Rai and Khankhu Rai and Harkhu Rai, son of Sifu Rai had separated amongst themselves in respect of their ancestral properties which were very little. The ancestral properties were divided in five shares and after division, each branch acquired



properties which are their self-acquired properties. Accordingly, the survey records of right were prepared. Some homestead lands, orchards and bhauli lands only remained joint for which a joint khata was opened. After survey, the said joint lands were also separated on the spot as per share defined and these lands were amalgamated with their respective lands. The parties were separate in all respect. All other allegations were denied.

(4) The further case is that the branch of Lal Bihari Rai further partitioned themselves as he had two wives and from each of them he had two sons. This partition took place in or about the year 1903. In this partition, his two sons from first wife took $1/5^{\text{th}}$ each and the remaining $3/5^{\text{th}}$ share remained joint with Lal Bihari and his two sons from second wife. Subsequently, Lal Bihari got further four sons from his second wife. However, Lal Bihari Rai died and ultimately the defendant Nos.2, 5 and 6 came in possession of the remaining $3/5^{\text{th}}$ share. The defendant Nos.12 to 16 are in possession of the property of Jagmohan Rai. Defendant No.17 got the share of Budhan Rai and subsequently, Ram Swarup Rai, son of Jagmohan Rai sold his $1/5^{\text{th}}$ share in plot no.3035 in favour of defendant No.5. Likewise, widow of Budhan Rai, defendant No.17 sold her $1/5^{\text{th}}$ share in plot no.3035 and 3155 to her grandson who in their turn sold it to Bhocho Singh.



(5) The further case is that the family had no sufficient joint nucleus so as to purchase the property nor there were sufficient number of cattles nor there were any milk or butter business. The defendant No.5 has acquired the lands specified in the written statement out of his own income. Husband of Defendant No.17 also purchased lands out of his own income. Defendant No.27 also purchased out of his own income and the properties are their self-acquired properties (plot number and area has been detailed in the written statement).

(6) On the basis of the aforesaid pleadings of the parties, the learned court below has framed the following issues:

- I. Is the suit as framed maintainable?
- II. Have the plaintiffs any right or cause of action to sue?
- III. If the suit is barred by law of limitation?
- IV. Is the suit barred of Section 34 of the Specific Relief Act?
- V. Is the suit barred by principle of estoppel, waiver and acquiescence?
- VI. Is the court fee paid sufficient?
- VII. Is the suit bad for mis-joinder of parties?
- VIII. Did the family of the plaintiffs and the defendants first party constitute a joint Hindu Mitakshara family?

(7) The learned court below by the impugned judgment and decree dismissed the plaintiff's suit holding that there had already been previous partition between the parties and the properties have



been acquired by the parties which are their self-acquired property.

(8) The learned counsel, Mr. Binod Kumar Singh for the appellants submitted that the court below only on surmises and conjectures presumed that there had been partition without there being any evidence in support of previous partition. The defendants-respondents only alleged that there had been previous partition prior to cadastral survey i.e. prior to 1902 and the second partition is alleged after cadastral survey i.e. after 1902. Except these pleadings and oral evidence, there is no documentary evidence produced by the defendants to show previous partition. The learned court below presumed this fact which is required to be proved by cogent evidence. Further, it is argued that according to Hindu law, the Hindu family is presumed to be joint therefore, the onus was on the defendant to prove partition but the learned court below placed wrong onus on the plaintiff to prove joint title and possession, therefore, the judgment under appeal is vitiated.

(9) The learned counsel further submitted that merely because the properties are recorded in the name of separate branches, there cannot be any presumption of partition. Because the parties were in possession of some properties according to their convenience, therefore, when need arose they sold some properties but that by itself is not the proof of partition and likewise separate messing by the



parties is also not a proof of partition. However, the learned court below by misappreciating the evidences wrongly held that there had already been previous partition.

(10) According to the learned counsel, the learned court below wrongly held that there had been partition between the parties by misappreciating exhibit F series i.e. sudhbharna deeds and exhibit C series i.e. sale deeds. It is admitted that some of the properties were acquired in the name of different members of the family but those are joint family properties but the learned court below wrongly held that the properties acquired individually are their self-acquired properties. The plaintiffs-appellants have adduced reliable and cogent evidence in support of their case that the joint family had sufficient nucleus i.e. from agricultural lands and business of milk and ghee. The learned court below should have relied upon the evidences of the plaintiffs. According to the learned counsel, since the transaction between the heirs of Lal Bihari inter se was a sham transaction, the court below should not have placed reliance on the same. Exhibit 1 series and Exhibit 3 series fully support the case of the plaintiffs that rent was paid jointly on behalf of joint family. The learned counsel placed reliance on exhibit 5 which is of the year 1947 and submitted that this sudhbharna bond was executed jointly by Khankhu Singh, Harkhu Singh, Lal Bihari Singh, Laxman Singh, Bhagwat Singh and Borhan



Singh which fully support that the parties were joint having joint possession but the learned court below wrongly dismissed the plaintiff's suit. On these grounds, the learned counsel submitted that the First Appeal be allowed and the judgment and decree be set aside. The plaintiff's suit be decreed with cost.

(11) On the other hand, the learned counsel for the respondents submitted that there is no illegality in the impugned judgment and decree. The trial court considered the documentary evidences which sufficiently prove that the parties were dealing the properties exclusively since long. The parties were also acquiring independently, selling independently and even there are inter se transactions between the parties since long, therefore, on the basis of these evidences, the court below has rightly held that there had already been previous partition. On these grounds, the learned counsel submitted that the first appeal be dismissed with cost.

(12) In view of the above rival contentions of the learned counsel for the parties, the only point arises for consideration in this first appeal is as to "whether the plaintiffs-appellants are entitled to decree of partition to the extent of 1/3rd share in the suit property" and "whether the judgment and decree passed by the trial court is sustainable in the eye of law?"

(13) The question regarding as to whether the plaintiff is



entitled to a decree for partition is dependent on the question as to whether the parties are in joint possession having joint title or whether there had been previous partition. According to the plaintiffs, the parties are still joint and some of the properties have been acquired in the name of one member or the other member of the joint family out of the income from agricultural land and business of milk and ghee whereas according to the defendants, there had already been previous partition between the parties prior to the year 1902 and the property left joint were again partitioned after 1902. In support of their respective cases both the parties have adduced oral as well as documentary evidences.

(14) The genealogy is admitted. The genealogy has been described in schedule I of the plaint. The founder of the family i.e. common ancestor is Tahbal Rai. The plaintiffs are the descendants of Sifu Rai i.e. they are the sons and grandsons of Khankhu Rai. From the genealogy, it is clear that they are fourth and fifth generation from the founder of the family. It is settled principles of Hindu law that a joint family continues to be joint in the absence of proof of division. In Article 233 of Hindu law by Mullah 16th edition, it has been mentioned that the presumption is stronger in the case of 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, the second cousins are generally separated and third cousins are for the most part separated. Admittedly, in view of the genealogy in the present case, the presumption is very very weak as the plaintiffs are either fourth or fifth generation from the founder of the family. Now let us consider the evidences in this light.

(15) It is also admitted fact that in the cadastral survey which took place near about in the year 1902, the properties have been separately recorded in the names of different branches. Khata No.2, consisting of plot no.25 and 26, is recorded in the name of Khankhu Rai and Harkhu Rai, both brothers, branch of Sifu. Khata no.8, plot no.13, 16 and 29, khata no.123 and 241 containing different plots have been recorded in the name of Laxman son of Dalip Rai, brother of Sifu. Defendant No.24 and 25 are descendants of this branch. Likewise, khata no.9 consisting of various plots and khata no.246 is recorded in the name of Lal Bihari Rai, son of Dalip Rai and the descendants of this branch are defendant no.2, 5 and 6. Likewise, again khata no.5, khata no.172 are in the name of Govind Rai, son of Padum Rai who are represented by defendant Nos.27 and 28. These records of right are admitted by the plaintiffs. These records of right have been marked as exhibit G series produced by the defendants which are of different villages i.e. Ramnagar and village Lakho etc..



Khata no.3, plot no.24 is recorded in the name of three branches with defined shares.

(16) From this Exhibit G series, it becomes clear that the different properties have been recorded separately and exclusively in the name of different branches. The only explanation given by the plaintiff is that the properties were recorded separately according to record of right maintained by the ex-landlord. This again supports the case that prior to this record of right also, before the ex-landlord, the properties were recorded separately and exclusively in the name of different branches. The suit has been filed in the year 1967 i.e. about after 65 years.

(17) It is not necessary to deal with the oral evidence of the plaintiffs because the witnesses examined by the plaintiffs have stated that the family was joint and there was income from the cultivation and out of sell of milk and butter. The plaintiff has been examined as P.W.6. This is the pleading of the plaintiff also. Now therefore, according to Hindu law, unless the contrary is proved presumption will be that the family is joint. In such circumstances, the burden is on the defendant to rebut this presumption available in favour of the plaintiff. As stated above, in the present case, the presumption is very very weak presumption.

(18) The defendants have produced the registered sale



deed dated 16.07.1934 which has been marked as Exhibit C-14 whereby Harkhu Rai and widow of Khankhu namely Urhano Kumari sold the land to one Hira Singh. Subsequently, Hira Singh transferred the land to plaintiff Nos.1 and 2 by registered sale deed dated 18.02.1947, Exhibit C-15. In both these sale deeds, in the southern boundary, the owner has been described as Govind Rai, son of Prabhu Rai. Plot no.27 is recorded exclusively in the name of Govind Rai. This indicates that Govind Rai was separate from the plaintiff.

(19) The plaintiff Nos.1 and 2 executed a sudhbharna bond on 22.04.1947, Exhibit F-5. In this sudhbharna bond they recited that they have got khas possession over the land by virtue of purchase, Exhibit C-15. Likewise, Exhibit F-6 is another sudhbharna deed executed by the plaintiff dated 10.09.1948 and in this sudhbharna deed also in the southern boundary name of Govind Rai is mentioned. In the western boundary, the name of Bhagwat Rai, son of Govind Rai is mentioned. Harkhu Rai, son of Sifu Rai and Chamru, son of Khankhu Rai executed sudhbharna bond dated 05.05.1944, Exhibit F-3 with respect to plot no.230 of khata no.41 marked as Exhibit G-8 which is recorded in the name of Khankhu Rai and others. From perusal of this exhibit F-3, it appears that it was executed to pay certain creditors. Subsequently, they sold by registered sale deed dated 17.10.1960 in favour of Shri Ram Rai and others. The property



was sold to pay some dues payable by their family members. The question is if the parties were joint then the liability to pay the dues was on the joint family? Further, how the amount was due for the family of the plaintiffs only?

(20) The other sudhbharna bond is dated 05.08.1935 which is executed by sons of Laxman Rai in respect of some suit lands which has been marked as Exhibit D-11. A registered sale deed dated 13.12.1957 has been marked as Exhibit C-8 whereby defendant No.17, widow of Budhu Rai sold some property in favour of Laxmi Chaudhary which indicates that even she was separate from her father-in-law otherwise she could not have sold the property.

(21) The other sudhbharna is dated 21.04.1955 which is Exhibit F-2. Ragho Singh, son of Laxman Rai and others have executed the sudhbharna bond with respect to property recorded in the name of Laxman Rai, son of Dalip Rai. Exhibit F-9 is dated 25.07.1937 and F-10 is dated 02.05.1941 which are sudhbharna executed by sons of Laxman Rai with respect to their shares. These documents indicate that since long the parties were residing separately, messing separately, acquiring lands separately, selling the properties separately, treating the properties as their exclusive property.

(22) The plaintiff Nos.1 and 2 executed registered sale deed



C-6 dated 05.01.1949. Badan Singh sold some land in favour of defendant No.5 by registered sale deed dated 12.11.1949, Exhibit C-7. Since there were mistakes in Exhibit C-6 and C-7, the plaintiffs corrected the defects by executing a deed of correction dated 14.03.1961 which is Exhibit D in favour of defendant No.5.

(23) Exhibit C-12 is sale deed dated 20.04.1948 by which Borhan Rai, son of Govind Rai acquired some property in village Ramnagar. These are the various documents which show the dealings of different family properties by different family members and the properties appear to be recorded in their names separately in Exhibit G series.

(24) Exhibit G series, the khatian shows that the family possessed about 17 bighas and odd land. The defendants claimed that after partition the properties have been acquired by the different family members out of their own income which are their self-acquired property. Now therefore, if it is proved that there had been partition as claimed by the defendants then the consequences will be that the properties are the self-acquired property of the person who acquired the property in his name out of his income. In the present case, we have seen above the conducts of the parties regarding separate dealing of the properties, acquisition of the properties, separate recording of the properties etc. etc. There is no specification made by the plaintiff



that which is the property acquired out of the joint family fund in the name of either the plaintiff or the defendant. However, sale deeds have been produced which show that plaintiff has also acquired some lands and defendants have acquired some lands. Both parties have also sold properties. Even the female members have also sold some properties. It is the case of the plaintiff that the parties were in separate possession of the lands according to convenience but there was no partition by metes and bounds. Therefore, separation is accepted. When parties were separate and were dealing the properties according to their need, there is no question of joint family fund arises. Moreover, these dealings are more than 30-40 years prior to filing of the suit.

(25) The Hon'ble Supreme Court in **AIR 1962 Supreme Court 287 (Bhagwan Dayal v. Most. 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. There is no presumption that when one member separates from others, the latter remain united; whether the latter remain united or not must be decided on the facts of each case. To these it may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions 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.” In the present case at our hand, the defendants pleaded specifically that the partition took place in the year prior to 1902 and after 1902. Admittedly, no participant of that transaction is there. The defendants have therefore, produced evidences from which the reasonable inferences can be done regarding previous partition which we have discussed above.

(26) A Division Bench of this court in **AIR 1971 Patna 215 (Arjun Mahto and others v. Monda Mahatain and others)** has held that “the general principle is that every Hindu family is presumed to be joint but this presumption can be rebutted by direct evidence or course of conduct. When no contemporaneous documents are available, the partition in such a case 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 facts may show that there had been a partition between the brothers during their lifetime.” In the present



case at our hand, the parties are not brothers but they are either fourth generation or fifth generation and, therefore, the presumption of jointness is very weak.

(27) This Court again following the above decisions in the case of **Ganesh Sahu and another v. Dwarika Sao and others,, AIR 1991 Patna 1** at paragraph 50 has held that “in the instant case, as noticed hereinbefore, it is evident 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 can not be any doubt that there had been a previous partition in respect of properties in suit.”

(28) So far the present case at our hand is concerned, also severance of family is admitted and separate residence, cultivation, food, separate acquisition, separate selling and mortgaging since more than half century is admitted. These matters have already been discussed above and, therefore, I find that the defendants have been able to prove that there had already been previous partition between the parties and according to partition, the properties were recorded in record of rights. Since there had already been partition, there is no question of joint acquisition out of joint family fund arises. Thus, the finding of the learned trial court on this point is hereby confirmed and



it is held that there is no unity of title and possession with respect to the suit properties between the parties.

(29) In the result, this First Appeal is dismissed. In the facts and circumstances of the case, no order as to cost.

(Mungeshwar Sahoo, J)

Saurabh/-

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