

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.184 of 1978

(Against the Judgment and Decree dated 31.01.1978 passed by 4th Additional Subordinate Judge, Ara in Title Suit No.192 of 1971/80 of 1977).

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Kamala Tiwari

.....Defendant No.4 - Appellant

Versus

Suraj Kumar Tiwary

.....Defendant-Respondent

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Appearance :

For the Appellant/s : Mr. Arun Kumar Singh No.4, Advocate

For the Respondent/s : None.

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Dated : 16th day of May, 2017

CORAM : HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

1. The defendant No.4 has filed this First Appeal against the judgment and decree dated 31.01.1978 passed by the learned 4th Additional Subordinate Judge, Ara in Title Suit No.192 of 1971/80 of 1977 decreeing the plaintiff's partition suit.

2. The sole plaintiff-respondent No.1 filed aforesaid title suit praying for partition of the suit properties to the extent of his half share.

3. For the purpose of disposal of this First Appeal, the facts



which are necessary only are stated as pleaded by the plaintiff that Lakshman Tiwari had three sons namely Nawjadik Tiwari, Darshu Tiwari and Jivrakhan Tiwari. The two sons of Lakshman Tiwari namely Darshu Tiwari and Jivrakhan Tiwari died issueless in jointness. Nawjadik Tiwari died leaving behind only son Parma Tiwari who had two sons i.e. plaintiff and the defendant No.1. Therefore, the plaintiff claimed half share. The defendant No.1 had two sons, Hira Tiwari, Awadh Bihari Tiwari who are defendant Nos.2 and 3. Defendant No.4, the appellant is one of the sons of defendant No.2.

4. This defendant No.4 only contested the suit and claimed that he was adopted by Jivrakhan Tiwari. Darshu Tiwari and Jivrakhan Tiwari were living separately from Nawjadik Tiwari. On the death of Darshu Tiwari, his $\frac{1}{3}^{\text{rd}}$ share devolved on Jivrakhan Tiwari, therefore, Jivrakhan Tiwari had $\frac{2}{3}^{\text{rd}}$ share whereas Nawjadik had only $\frac{1}{3}^{\text{rd}}$ share. Accordingly, this $\frac{1}{3}^{\text{rd}}$ share of Nawjadik devolved on his son, Parma Tiwari which is to be divided between the plaintiff and defendant No.1. Because the defendant No.4 was adopted son of Jivrakhan Tiwari, he became the owner of $\frac{2}{3}^{\text{rd}}$ share i.e. $\frac{1}{3}^{\text{rd}}$ share of Darshu Tiwari and $\frac{1}{3}^{\text{rd}}$ share of Jivrakhan Tiwari.

5. The learned trial court framed the following issues:



- I. Is the suit, as framed maintainable?
- II. Has the plaintiff got a valid cause of action for the suit?
- III. Is the plaintiff entitled to claim partition to the extent of $\frac{1}{2}$ share in the entire disputed properties?
- IV. Is the defendant no.4 the adopted son of Jivrakhan Tiwari and is he entitled to a share to the extent of $\frac{2}{3}$ in the entire disputed properties?
- V. What relief or reliefs if any, is the plaintiff entitled to?

6. While deciding issue no.4, the trial court recorded finding that the defendant No.4 failed to prove adoption and accordingly, the defendant No.4 is not the adopted son of Jivrakhan Tiwari. The trial court thus decreed the plaintiff's suit for partition to the extent of his half share.

7. It may be mentioned here that the defendant Nos.3, 4, 5 and 6 died during the pendency of the appeal. Because they had not filed any written statement nor contested the suit, the appellant was exempted from substituting the legal representatives of the deceased defendant Nos.3, 4, 5 and 6. It further appears that the respondent-defendant No.2 also died and names of the respondent Nos.2 to 6 have already been deleted. It further appears that the name of respondent No.7 was also expunged.

8. From perusal of the record, it appears that by terms of order dated 10.01.1984, it was directed that because of expunging the name of respondent No.7, whether the appeal has become



incompetent or not shall be considered at the time of hearing of the appeal.

9. The sole plaintiff-respondent No.1, Sheo Lakhan Tiwari also died during the pendency of this appeal and by terms of order dated 18.09.1987, his name has also been deleted on the ground that his legal representatives are on record. It may be mentioned here that all the defendants are the heirs of defendant No.1. After the death of the sole plaintiff who is respondent No.1, there is nobody to defend the present First Appeal. The judgment and decree has been passed by the trial court in favour of plaintiff-respondent No.1 and the defendant No.4-appellant has been held that he is not the adopted son of Jivrakhan Tiwari. Now, so far this finding is concerned, the same neither can be altered nor can be modified nor can be set aside without the hearing of the heirs of plaintiff-respondent No.1 who inherited the property. According to the appellant, the plaintiff-respondent No.1 died issueless. The question is who inherited the property of plaintiff? That person is a necessary party.

10. It appears that appellant No.2 was transposed as respondent No.8 and this respondent No.8 is the son of the appellant who are sailing in the same boat.

11. In view of the above factual aspect of the matter, when



nobody is representing the plaintiff-respondent No.1 i.e., the estate of respondent No.1 is not represented by anyone, this appeal has become incompetent to proceed and requires no final decision on merit. Whatever dispute remains in this First appeal is between the defendants inter se which cannot be decided in this First Appeal.

12. In the result, this First Appeal is dismissed.

(Mungeshwar Sahoo, J)

Saurabh/-

AFR/NAFR	NAFR
CAV DATE	23.03.2017
Uploading Date	16.05.2017
Transmission Date	17.05.2017

