

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**First Appeal No.629 of 1976**

**Against the judgment and decree dated 07.08.1976 passed by the learned Additional Subordinate Judge, Begusarai in Title Suit No.17 of 1974/37 of 1976.**

=====

Rambadan Singh & Ors

.... .. Plaintiffs-Appellants

Versus

Jalo Singh & Ors.

.... .. Defendants-Respondents

=====

**Appearance :**

For the Appellants : Mr. Ram Suresh Roy, Sr. Advocate.  
Mr. Ravindra Kumar Rai, Advocate with him  
For the Respondents : None.

=====

**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO**

**C.A.V. JUDGMENT**

**Date: 21-03-2017**

The plaintiffs have filed this first appeal against a part of the judgment and decree dated 07.08.1976 passed by the learned Additional Subordinate Judge, Begusarai in Title Suit No.17 of 1974/37 of 1976 whereby the learned trial court dismissed the suit for partition in part.

2. It may be mentioned here that by the other part of the impugned judgment and decree the plaintiffs' suit for partition with respect to some properties have been decreed. The defendants have filed First Appeal No.688 of 1976. Since both the first appeals were



arising from same judgment and decree, both the first appeals were directed to be heard analogously. However, during the course of hearing of both the first appeals nobody appeared on behalf of the appellants of First Appeal No.688 of 1976, accordingly, the first appeal was dismissed for default. Since the appellants of First Appeal No.688 of 1976 are the respondents in the present first appeal, nobody appeared on their behalf in this first appeal also.

3. The plaintiffs-appellants filed the aforesaid suit claiming partition of the suit lands total measuring 24 bigha 10 katha 6 dhoor and odd. They claimed that Choua Singh had five sons, who had separated after the death of Choua Singh. One of the sons, namely, Babu Lal Singh had two wives. The plaintiff, Damodar Singh is son from first wife whereas defendant nos.1 to 4 are sons from his second wife i.e. defendant no.5. The defendant nos.10 and 11 are his two daughters. Babu Hukum Narayan Singh, the brother of Babu Lal Singh, had no issue, therefore, he adopted the plaintiff no.1 as his *kritrim putra*. Accordingly, he inherited the property of Hukum Narayan Singh. Babu Lal Singh died in the year 1969 leaving behind the properties. Because there was some problem, the plaintiff asked for partition claiming 9/40 share but the defendants refused. Hence the suit.

4. The defendants-respondents filed contesting written



statement. The defendants admitted that Choua Singh had five sons. However, they contended that plaintiff no.1 Damodar Singh is the son of Hukum Narayan Singh and not Babu Lal Singh nor he is *kritrim putra* of Hukum Narayan Singh. Further it is alleged that partition among five sons of Choua Singh took place 55 years ago. Babu Choua Singh was possessed of 11 bigha ancestral land. On partition the said property became the ancestral land between the five sons, who came in possession thereof. Babu Lal Singh had only four sons. The allegation of *kritrim putra* was denied. According to the contesting defendants, the properties mentioned in the suit except 2 bigha 1 katha are the personal self-acquired properties of defendant nos.1 to 4 from their own labour and skill.

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

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiffs any right or cause of action for the suit?
- (iii) Is the suit barred by law of limitation?
- (iv) Are the plaintiffs entitled to a decree as claimed?
- (v) Is the plaintiff no.1 son of Babu Lal Singh as claimed?
- (vi) To what other relief or reliefs are the plaintiffs entitled to?

6. The trial court after considering the evidences and materials available on record came to the conclusion that the plaintiff no.1 is *kritrim putra* of Hukum Narayan Singh, therefore, he is



entitled to a share in the property of Babu Lal Singh being one of his son. However, the learned trial court held that the defendants acquired lands by 22 registered sale deeds are not the joint family properties rather those are their self-acquired properties and accordingly held that plaintiff no.1 is not entitled to any share. Thus, the suit was decreed in part.

7. The learned Senior Counsel, Mr. Ram Suresh Roy for the appellants submitted that since the learned trial court had recorded finding that the parties are joint and there had been no partition, the acquisition by 22 transactions should have been held to be joint family property because the father was also hostile to plaintiff no.1. The defendants are so much so hostile that they even denied the parentage of plaintiff no.1. Since father was *karta*, the court below should have presumed that all the properties, which are standing in the name of one member or the other member of the family, are all joint properties acquired out of the joint family nucleus. When the defendants have admitted the existence of nucleus, it is for them to prove that they acquired the property without the aid of joint family nucleus.

8. The learned Senior Counsel further submitted that the defendants have not disclosed their source of income nor have adduced reliable evidence in support of their case of self-acquisition. The learned trial court did not frame any issue regarding self-



acquisition but recorded a finding that the lands acquired by 22 transactions are self-acquired properties of the defendants. The learned Senior Counsel further submitted that since there was no issue regarding self-acquisition, the court below should not have allowed the defendants to adduce evidence on that point. However, the court below made a third case and recorded a finding that those properties are the self acquired property. On these grounds, the learned Senior Counsel submitted that the appeal be allowed after reversing the finding of the trial court regarding self-acquisition and the plaintiffs' suit should be decreed in toto.

9. As stated above nobody appeared on behalf of the respondents, who are the appellants in First Appeal No.688 of 1976.

10. In view of the above submission of the learned Senior Counsel the only point arises for consideration in this first appeal is as to whether the properties acquired by 22 transactions are the joint family properties or are the self-acquired properties of the defendants and whether the plaintiffs-appellants are entitled to their share with respect to these properties.

11. So far the finding as to whether plaintiff no.1 is *kritrim putra* of Hukum Narayan Singh and is a son of Babu Lal Singh is concerned, it is not under challenge in this first appeal. Although this is challenged in the first appeal filed by the defendants being First



Appeal No.688 of 1976, the said first appeal has been dismissed. Therefore, this finding that plaintiff no.1 is son of Babu Lal Singh is final. Accordingly, the only point is as formulated above for consideration.

12. It is the plaintiffs' case that the five sons of Choua Singh had separated. The defendants specifically pleaded that Choua Singh had only 11 bighas of land. Therefore, this 11 bigha land was the ancestral land, which was divided among the five sons of Choua Singh. The share of one son will be near about 2 bigha and odds. Babu Lal Singh died in 1969 and the suit has been filed in the year 1974. From perusal of the plaint, it appears that there is no pleading that the joint family acquired the suit property out of the joint family fund or nucleus. Only the properties have been described in the schedule of the plaint. It is also not the case of the plaintiffs that out of the joint family fund the *karta* or the joint family acquired any property in the name of one member or the other member of the joint family. On the contrary, from perusal of the written statement, it appears that there is clear pleading at paragraph 16 to the effect that Babu Lal Singh was allotted 1 bigha land at village Pansaila and 1 bigha 1 katha in Plot No.577 at village Kutlupur in partition among five sons of Choua Singh and this is the ancestral land. The other lands described in Schedule 'kha' of the plaint are the personal



acquisition of defendant nos.1 to 4 from their own labour and skill.

13. So far the questions of joint family fund or nucleus or acquisition in the name of the defendants are concerned, although the plaintiffs have examined 30 witnesses, no evidence has been adduced and moreover there is no question of adducing evidence on this point arises because there is no pleading in plaint. P.W.30 is the plaintiff no.1 himself. At paragraph 4 he has stated that the properties are the joint family property and not self acquired property of defendants. The defendants had no separate income. This is the only evidence adduced by the plaintiff.

14. The defendants have also examined 52 witnesses. D.W.52 is the defendant no.1. At paragraph 3 he has clearly stated that there was no sufficient income from the joint family fund and he has denied that the properties have been acquired out of the joint family fund. All the purchased properties by registered sale deeds, which have been filed, are the properties acquired by four brothers out of their own labor. The other witnesses are not so relevant with respect to this question of self acquisition. The other witnesses examined by the plaintiffs and the defendants are on the question of *kritrim putra* of Hukum Narayan Singh or real *putra* of Babu Lal Singh. Therefore, those evidences are not considered. Admittedly the defendants have filed 22 registered sale deeds, which have been



marked as Ext.A series and all those Ext.A series are in the name of defendants.

15. Auricle 233 (2) of Hindu Law by Mulla 16<sup>th</sup> Edition provides that there is no presumption that a family, because it is joint, possesses joint property or any property. When in a suit for partition, a party claims that any particular item of the property is joint family property, the burden of proving that it so rests on the party asserting it. To render the property joint the plaintiff must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is joint family property or that it was purchased with joint family funds, such as the proceeds of sale of ancestral property or by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a Court in the same way as any other fact, namely, by evidence. However, where it is established or admitted that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self acquisition to establish affirmatively that the property was acquired without the aid of the joint family. But no such presumption



would arise, if the nucleus is such that with its help the property claimed to be joint could not have been acquired. Whether the evidence adduced by a party is sufficient to shift the burden which initially rested on him of establishing that there was adequate nucleus out of which the acquisition could have been made is one of fact depending on the nature and extent of the nucleus.

16. The Hon'ble Supreme Court in **A.I.R. 1954 Supreme Court 379 (Srinivas Krishnarao Kango Vs. Narayan Devji Kango and others)** has held that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint and the burden rests upon anyone asserting that any item of property was joint to establish the fact. It appears that the finding of the Hon'ble Supreme Court is quoted in Article 233 of Hindu Law by Mulla stated above. This is the leading decision on this point and this decision has been followed subsequently by the Supreme Court and various other High Courts. In the present case, at our hand, except the statement that the defendants had no separate income, the plaintiffs have not adduced any evidence regarding the joint family fund, income or nucleus. In view of the decision quoted above the plaintiffs have to prove not only existence of nucleus but also the adequacy of the nucleus out of which the properties could have been acquired. In the present case, no such evidence has been



produced.

17. Further there is no dispute between the parties that in partition between the five brothers Babu Lal Singh had got only 2 bigha 1 katha land, which is the ancestral land. Babu Lal Singh had two wives and five sons in view of the finding of the trial court. The question is what was the nature of the land and the extent of its produce and whether such a big family was being maintained out of income of 2 bigha only. Nothing has been produced by the plaintiffs. Unless these are explained as to the extent of produce and to the extent of savings after expenditure towards maintaining the family, there cannot be any presumption that the nucleus was adequate.

18. In view of the above position merely on the ground that father was hostile to the plaintiff or that the defendants are so hostile that they even denied the plaintiff no.1 to be son of Babu Lal Singh, there cannot be any presumption that the properties, which are standing in the name of defendant nos.1 to 4, are the joint family property acquired either by Babu Lal Singh, the *karta* or the joint family out of joint family nucleus.

19. So far the submission of the learned Senior Counsel for the appellants that no issue was framed on this material question of fact is concerned, it may be mentioned here that both the parties entered into trial knowing the case of each other and also they



adduced evidences, no prejudice is caused to the plaintiffs. It is not the case of the plaintiffs that the plaintiffs did not know the case pleaded by the defendants regarding self-acquisition. In the evidence plaintiff denied the self-acquisition and asserted that the lands are joint family land. Therefore, the plaintiff knew the case pleaded by the defendants and entered into trial with eyes open. In such circumstances, he is not prejudiced at all nor the judgment can be said to have been vitiated for non framing of issue. In this matter reference may be made to the decision of the Supreme Court A.I.R. 1963 Supreme Court 884. In my opinion, therefore, for non-framing of issue neither the plaintiff is prejudiced nor the judgment is vitiated.

20. In view of my above discussion I find that plaintiffs failed to prove that the properties acquired by the defendants have been acquired by either the *karta* or the joint family in the name of the defendants. The plaintiffs failed to prove joint family fund and nucleus. On the contrary, the defendants have been able to prove that the properties covered under 22 sale deeds, Ext.A series, are their self acquired property. Since all these sale deeds are in their names, the presumption will be that the properties are their self-acquired property. Therefore, the finding of the trial court on this point is hereby confirmed.



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

(Mungeshwar Sahoo, J)

Harish/-

|                   |            |
|-------------------|------------|
| AFR/NAFR          | NAFR       |
| CAV DATE          | 28.01.2017 |
| Uploading Date    | 22.03.2017 |
| Transmission Date |            |

