

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.251 of 1977

**Against the Judgment and Decree dated 06.12.1976
passed by 2nd Addl. Subordinate Judge, Chapra in
Partition Suit No.178 of 1971.**

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Md. Saheed Hussain & Ors

.....Defendants-Appellant/s

Versus

Bibi Husna Khatoon & Ors

.....Plaintiffs-

Respondents

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Appearance :

For the Appellant/s : Mr. Akashdeep, Advocate
For the Respondent/s : None.

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Dated : 27th day of April, 2017

P R E S E N T

CORAM : HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. This First Appeal was filed by the sole appellant, Md. Yasin, defendant No.1 against the judgment and decree dated 06.12.1976 passed by learned 2nd Subordinate Judge, Chapra in Partition Suit No.178 of 1971 whereby the learned Court below decreed the plaintiffs respondents' suit for partition. The sole appellant-defendant No.1 died during the pendency of the appeal and his legal representatives have been substituted. Likewise, the



plaintiff-respondent No.1 and 2 have also died and their names have been expunged.

2. The plaintiffs-respondents filed the aforesaid partition suit No.178 of 1971 claiming half share in the property described in Schedule II and III of the plaint. According to the plaintiff one Malang Mian had four sons, namely, Hasim Miann, Kasim Mian, Juman Mian and Nasir Mian. It is pleaded that there had been partition between the four brothers. The Juman Mian had two sons, namely, Ishaque Mian and Mohamaddin Mian. Ishaque Mian had two daughters Bibi Jumratan and Bibi Ashma Khatoon. Husband and sons and daughters of Bibi Jumratan and Bibi Ashma Khatoon are the plaintiff Nos.1 to 5 whereas the widow and sons of Mohamaddin Mian are the defendant No.1 and 2. The further case of the plaintiff is that there had been no partition between the two branches, i.e., two sons of Juman Mian. The properties allotted in the share of Juman Mian in partition between his brothers are detailed in Schedule II of the plaint. The properties gifted to Ishaque Mian by his aunt Mostt. Saloniya wife of Nad Ali by registered deed of gift dated 07.09.1908 is described in Schedule III of the plaint. Since the plaintiffs were in possession of these properties and have given the Schedule III properties to the defendants to manage and since the plaintiffs are unable to pay the Court fee, they made the Schedule III properties as subject matter of the suit.

3. The defendant No.1 after notice filed contesting written statement calling that Ishaque Mian is unmarried as he was a deceased person, he did not marry throughout life. After his death Mohamaddin Mian was the only



heir of Ishaque Mian who inherited the entire properties of Ishaque Mian. Jumratan and Bibi Ashma are not the daughters of Ishaque Mian. In fact plaintiff No.1 was married with daughter of one Rahmatullah Mian and not with Jumratan. Likewise Bibi Ashma is daughter of Abdullah Mian @ Noor Mohammad Mian. The wife of plaintiff No.1 was Motiya Khatoon who died issueless. The defendants have got enmity with Md. Alam and Mahfooz Alam and plaintiff No.1 is Fufa of said Md. Alam. So, they got the story cooked up and filed the suit. The defendant also claimed title on the basis of adverse possession.

4. On the basis of the above pleadings of the parties, the learned trial Court framed the following issues :-

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiffs got a valid cause of action for the suit?
- (iii) Whether Bibi Jumratan and Bibi Ashama Khatoon are daughters of Ishaque Mian?
- (iv) Whether the suit is barred by adverse possession and ouster?
- (v) Whether there is unity of title and possession between the parties?
- (vi) Whether the plaintiffs are entitled to partition and if so, in respect of which of the properties and to what extent?
- (vii) Are the plaintiffs entitled to any other relief or reliefs?



5. After considering the evidences and materials available on record, the learned trial Court recorded finding that Bibi Jumratan was daughter of Ishaque Mian and plaintiff No.1 married Jumratan and further plaintiff No.2 to four are sons and daughters of Jumratan. The learned trial Court further held that Bibi Ashma Khatoon was also the daughter of Ishaque Mian. The learned trial Court also recorded finding that the defendant failed to prove title by adverse possession and accordingly decreed the plaintiff's suit.

6. The learned counsel appearing on behalf of the appellant submitted that the learned trial Court has wrongly recorded findings regarding parentage of Jumratan Khatoon and Ashma Khatoon by mis-appreciating the evidences of the witnesses. The defendant adduced sufficient evidences in support of the case that Ishaque Mian died unmarried as he was suffering from diseases. He did not marry any one throughout his life but the learned Court below wrongly discarded the evidences. The learned Court below likewise wrongly recorded the finding that plaintiff No.1 is the husband of Bibi Jumratan. The defendant appellants adduced evidences in support of the fact that plaintiff No.1 was married with one Motiya Khatoon. Since Ishaque Mian died issueless without marriage, all his properties were inherited by the defendant No.1 but the learned Court below wrongly discarded the evidences of the defendant appellant and has decreed the plaintiff's suit. The learned counsel, therefore, submitted that the impugned judgment and decree be set aside and the plaintiff's suit for partition be dismissed.



7. It may be mentioned here that the learned counsel on behalf of the respondent, namely, Mr. Ranjeet Kumar, appeared and submitted that he has got no instruction to defend this First Appeal, and therefore, no argument was advanced by him on behalf of the respondent.

8. In view of the above contention of the learned counsel for the appellant, the only point to be decided in this Appeal is whether Ishaque Mian died unmarried, issueless or he died leaving behind two daughters and whether the judgment and decree passed by the Court below is sustainable in the eye of law.

9. The plaintiff filed simple suit for partition claiming half share on the ground that Jumman Mian had two sons. Plaintiffs represent branch of first son, Ishaque Mian whereas defendant represents branch of second son Mohamaddin Mian, there had been no partition between the parties.

10. On the contrary the defendant's simple case is that Ishaque Mian did not marry throughout his life as he was a diseased person, therefore, Bibi Jumratan and Bibi Ashma are not his daughter. In view of the case of the parties, if it is held that Bibi Jumratan and Bibi Ashma are the two daughters of Ishaque Mian then only the plaintiff will get share in the suit property otherwise not. So far the point raised by defendant appellant that plaintiff No.1 was married with one Motiya Khatoon is concerned, it is immaterial because once it is held that Ishaque Mian had two daughters then naturally his share will go to his heirs and not to the defendants, i.e., heirs of Mohamaddin Mian. What is the name of wife of plaintiff No.1 and who are his sons and



daughters are not required to be gone into as there is no dispute between the two daughters of Ishaque Mian.

11. Now, let us see the evidences produced by the parties. P.W.5 is Ashma Khatoon herself who claimed herself to be the son of Ishaque Mian. It appears that she has fully supported in her evidence the case pleaded in the plaint. She has also stated that she herself and Jumratan were calling Ishaque Mian as 'Baba' and Ishaque Mian was calling them as 'bahuni'. From perusal of her evidence, I find no discrepancies. At the time of argument, no such vital statement in her evidence was pointed out by the appellant which escaped the notice of the Court so as to discredit or discard her evidence.

12. P.W.2 has stated that he performed Nikah of daughter of Ishaque Mian with plaintiff No.1. P.W.3 is also supported the point of Nikah of plaintiff No.1. P.W.3 also supports the evidences of P.W.2. Moreover this P.W.3 is the elder brother of plaintiff No.1. P.W.4 is also on the point of marriage of Jumratan with plaintiff No.1. P.W.1 is the plaintiff No.1. These are the evidences produced by the plaintiff in support of parentage of Jumratan and Ashma Khatoon. The evidences are direct evidence and also showing conduct of the parties which are admissible under Section 50 and 60 of the Indian Evidence Act as the witnesses are closely related and also directly related to Issac Mian.

13. The plaintiff also produced ext.'1' the gift deed dated 07.09.1908 executed by Salonia, aunt of Ishaque Mian in favour of Ishaque Mian. Ext.



‘2’ and ‘2/A’ are raiyati parcha. These exhibits relates to Schedule III property.

14. D.W.8 is the defendant No.1 himself. He denied the relationship of Ishaque with the plaintiffs. Likewise D.W.1, 2, 4 and 6 have also stated in one voice that Ishaque Mian did not .marry.

15. D.W.6 has stated that Ishaque was suffering from splin diseases. So did not marry. However, except the bald statement of the witnesses, nothing has been brought on record on behalf of the defendant regarding treatment of Ishaque Mian and the extent of diseases. From the evidences produced on behalf of the defendant, it appears that the only ground raised by the defendant is that Ishaque Mian was ill so he did not marry but in support of the illness or the any kind of diseases, no paper prescription or even purchase of medicine has been produced.

16. The defendant have produced ext.‘G’, the suit register of Title Suit No.103 of 1965 to prove enmity of Halim Mian because according to the defendant, this Halim Mian out of enmity got instituted this false suit. So far this document is concerned, it is neither here nor there. Even if there was enmity but then this has got nothing to do with the issue of parentage of Jumratan and Ashma Khatoon with Ishaquec Mian.

17. We have discussed above that the plaintiff produced positive evidences which are admissible under Section 50 and 60 of the Indian



Evidence Act in view of the decision of the Hon'ble Supreme Court reported in ***AIR 1959 SC 914***.

18. In view of my above discussion, I find that the plaintiffs have been able to prove that Bibi Jumraatan and Ashma Khatoon were the two daughters of Ishaque Mian. Since admittedly there had been no partition, the plaintiff have got half share in the property. Therefore, the finding of the trial Court on this point is hereby confirmed.

19. The learned counsel for the appellants submitted that the plaintiff admitted that the defendants are in possession, therefore, when the plaintiff themselves admitted possession of defendant, the defendant have acquired title by adverse possession and that is the case pleaded by the defendant appellant. So far this submission of the learned counsel for the appellant is concerned, except the pleading, no reliable evidences have been produced.

20. On the other hand, it is the specific case of the defendant that after death of Ishaque, all his properties were inherited by the defendant. Therefore, the defendants claimed title over the property by inheritance on the ground that Ishaque Mian had no issue. Adverse possession pre-supposes that title is on some other person which is being denied by the person claiming title by adverse possession. Here, the defendants is claiming title by virtue of inheritance, therefore, there is no question of denying title of other arises. It is settled law that the claim of title and claim of adverse possession are mutually inconsistent. Reference may be made to the decision of the Hon'ble Supreme Court in the case of ***Karnataka Board of Wakf Vs. Govt. of India and Ors.***



2004(3) PLJR 245 SC. In the present case, except one line pleading regarding adverse possession, no evidence has been produced as to from which date, the defendant started denying the title of true owners. I, therefore, find that there is no animous possidendy and there is no sufficient evidence. Moreover, I have already held that Ishaque Mian had two daughters, therefore, possession of one co-tenant is possession of other co-tenant. I, therefore, find that the defendant failed to prove acquisition of title by adverse possession. The finding of trial Court on this issue is thus confirmed.

21. In view of my above discussion, I find no merit in this First Appeal and accordingly, the impugned judgment and decree passed by the trial Court is hereby affirmed.

22. In the result, this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J.)

Sanjeev/-

AFR/NAFR	
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