

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.9 of 1977

(Against the judgment and decree dated 16.09.1976 passed by 3rd Additional Subordinate Judge, Purnea in Title Suit No.315 of 1973).

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Dilip Kumar Thakur & Ors.

.... Defendant 1st party-Appellants
Versus

Bimla Devi & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. Prem Nath Singh, Advocate

For the Respondent No.1/cross-objector/s : Mr. Anil Kumar Jha, Sr. Advocate
Mr. Satyendra Narain Singh,
Advocate with him.

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

Date: 18-04-2017

1. The original defendant No.1(since deceased and substituted) had filed this First Appeal against the judgment and decree dated 16.09.1976 passed by the learned 3rd Additional Subordinate Judge, Purnea in Title Suit No.315 of 1973 whereby the suit filed by the plaintiffs for partition has been decreed in part. The plaintiffs-respondents claimed half share whereas the decree has been passed to the extent of 1/4th share only. The defendant has filed this appeal by which the property of defendant No.1 has also been held to be partitioned.

2. The plaintiff-respondent No.1(since deceased and substituted) has filed cross-objection against that part of the decree whereby his claim of half share has been denied.



3. The plaintiffs alleged that Jay Narayan Thakur had four sons namely Surya Narayan Thakur(original plaintiff), Kalanand Thakur(original defendant No.1), Baidyanath Thakur and Badrinath Thakur. Defendant No.3, Baidyanath Thakur died during the pendency of this partition suit and substituted by legal representatives. All these four brothers were joint till 1944 and had acquired properties at Banmankhi out of the joint family fund in their names. The defendants were earning a lot from contract business. The defendant No.1 was the karta. The defendant Nos.2 and 3 were living at Purnea whereas the plaintiff and defendant No.1 were living at Banmankhi. In 1944, defendant No.3, Baidyanath Thakur and defendant No.4, Badrinath Thakur separated from the plaintiff and defendant No.1 by dividing the joint family properties. In that partition, the properties at Banmankhi fell in the share of plaintiff and defendant No.1 jointly. Defendant No.3 and 4 did not take any share in landed property and house. The contract business and some money fell in the share of Badrinath Thakur and Baidyanath Thakur. After 1944, they started acquiring separate properties at Purnea out of their separate fund and business. The plaintiff and defendant No.1 ceased to have any interest and concern of both the defendant Nos.3 and 4. In the partition of 1944, the plaintiff and defendant No.1 remained joint and defendant No.1 was the karta. However, defendant No.1 dishonestly got his own



name recorded with respect to Banmankhi properties in revisional survey although, the properties were acquired out of the joint family fund, as such, plaintiff and defendant No.1 both have got half share. Accordingly, half share is claimed in the suit property by the plaintiffs.

4. The defendant No.1 contested the suit by filing separate written statement. The defendant 2nd set i.e. heirs of Baidyanath Thakur and defendant No.4, Badrinath Thakur filed separate written statement and contested the suit. According to defendant No.1, four brothers were joint previously. However, he denies acquisition of all the properties of Banmankhi during jointness. There was oral partition in the year 1937 and not in 1944. The defendant No.1 also pleaded that it is wrong to say that the house and properties of Banmankhi fell in the share of plaintiff and this defendant No.1. This defendant also denied jointness with the plaintiff. The specific case of the defendant No.1 is that during jointness of four brothers, the property at Bishanpur Dutta, Chakla, Banmankhi and Hanumannagar were acquired and in 1937 partition, these lands were allotted to plaintiff and defendant No.1 and after 1937, all the properties were separate.

5. The further case is that the lands of Rampur Pharsahy, Radhanagar and Chakla thana have been acquired by this defendant out of his separate fund and they are never joint family properties of



the parties. This defendant is separate from the plaintiff since after partition.

6. The defendant 2nd set i.e. heirs of Baidyanath Thakur and also Badrinath Thakur have filed separate written statement. Their main contention is that all of them have acquired the properties jointly out of the joint family fund in the name of one or the other members of joint family and they are still joint. No partition ever took place either in the year 1944 or in the year 1937. The contract business of Badrinath Thakur and Baidyanath Thakur was not the joint family business rather it was separate business started and carried by the aforesaid Badrinath Thakur and Baidyanath Thakur started out of their own fund. All the four brothers were living at Banmankhi but because of ill treatment of Kalanand Thakur and his wife, Badrinath Thakur left Banmankhi unmarried sometime in the year 1940 and came to Parora to his Mama's hosue(maternal uncle's house), the father of defendant 3rd party, Medni Choudhary. Badrinath Thakur started business of contract in partnership with Rajkaran Singh and after earning money, he started his separate business which gradually flourished and he acquired landed properties in village Parora and constructed house there out of his own earning. Baidyanath Thakur also left Banmankhi in 1950 and came to Parora and remained for sometime with maternal uncle and started Homoeopathy practice and



thereafter he started contract business in Purnia District Board and out of his separate earning acquired landed properties at Parora and constructed separate house. What he acquired, is his self-acquired property. These defendants also denied previous partition in the year 1944 or 1937. The allegation of partition alleged by plaintiff is also denied. The contract business was not joint family business. The property acquired at Parora is their self-acquired property. So far the property at Banmankhi is concerned, they have got 1/4th share each. These defendants pleaded that they have no objection if property at Banmankhi is partitioned and if partition is effected they may be allotted their separate share.

7. The defendant 3rd party, Medni Choudhary has filed separate written statement. His case is Plot No.137, 138, 140, 181 and 182 of Mauja Chakla P.S. Banmankhi is exclusively owned and possessed by this defendant who has purchased these plots along with other lands from Puky Ram by registered sale deed but during revisional survey, Badrinath fraudulently got his half share recorded with respect to the suit plots.

8. On the basis of the aforesaid pleading of the parties, the learned court below framed the following issues:

- I. Whether the suit as framed is maintainable?
- II. Whether the plaintiff has cause of action and right to sue?
- III. Whether the plaintiff is entitled to a decree as claimed?



IV. To what relief, or reliefs, the plaintiff is entitled?

9. The learned court below on the basis of the materials came to the conclusion that all the lands except half of Khata No.51 and whole of Plot No.713 and 714 of Khata No.127 are the joint family properties of all the four brothers of the plaintiff in which plaintiff has got 1/4th share and not half as has been claimed. The learned court below also recorded finding that the lands of Exhibit B/1 belonged to Medni Choudhary and he is in possession and is not the benamidar of either Kalanand Thakur or anybody in the record. 1 Acre 98 decimals of Khata No.51 belonged to defendant 3rd party, Medni Choudhary and rest of Khata No.51 and whole of Khata No.50 belonged to the plaintiff and his three brothers in equal share. The trial court excluded half of Khata No.51 from partition. Accordingly, the plaintiff's suit was decreed in part.

10. The learned counsel for the appellants submitted that the trial court has wrongly placed the onus on the plaintiffs and defendant No.1(this appellant) to prove that there was partition. The learned court below should have held that the contract business was of the joint family business started out of joint family fund and in the year 1937 partition, defendant Nos.3 and 4 got that family contract business and Rs.7,000/- and the defendant No.1 and plaintiff got the property at Banmankhi and Hanumannagar. According to the learned



counsel, the court below should have also recorded finding that after partition between the plaintiff and defendant No.1, they are living separately. The appellants started Homoeopathy practice at Banmankhi and out of that income, he financed the contract business which was started in the year 1931, therefore, it is wrong to say that the contract business was not of the joint family. The appellant had sufficient money earned from the Homoeopathy practice and he had purchased land of Ramnagar Pharsahy, Radhanagar and Chakla Thana No.69 and these are his self-acquired properties but the learned court below recorded finding against the appellants. The learned counsel further submitted that the learned court below has not properly appreciated the evidences either oral or documentary and wrongly granted share to the defendant Nos.3 and 4.

11.The further submission is that there was no ancestral property and, therefore, father did not get any share in the partition of the year 1937 but the court below strongly relying on this fact as to why father was not granted any share disbelieved the case of defendants-appellants regarding partition in the year 1937. According to the learned counsel, it is wrongly held by the trial court that the lands of Exhibit B/1 belonged to Medni Choudhary. He was not benamidar of this appellant or any body on the record and that 1.98 acres of Khata No.51 belonged to Medni Choudhary and rest of Khata



No.51 and whole of Khata No.50 belonged to the plaintiff and his three brothers. The learned court below should also have held that Plot Nos.1806 and 1782 are the self-acquired property of the appellant which he purchased out of his own personal fund. Lastly, the learned counsel submitted that the learned court below should have also partitioned the property which were acquired by Badrinath Thakur and Baidyanath Thakur at Parora when the court below disbelieved the case of partition in the year 1937 pleaded by the appellants. On these grounds, the learned counsel submitted that the impugned judgment and decree be set aside. The plaintiff's suit be dismissed in its entirety.

12. In this case, the plaintiffs-respondents have filed cross-objection against the other part of the decree whereby the claim of the plaintiffs to the extent of half share has been rejected. The learned senior counsel, Mr. Anil Kumar Jha for the plaintiffs-respondents submitted that the lower court has wrongly refused to grant half share in the suit property claimed by the plaintiffs and the court below wrongly found that the defendants 2nd party i.e. Badrinath and Baidyanath are also entitled to a share in the suit property although, the specific case of the plaintiffs-respondents is that there had been partition in the year 1944 wherein the suit properties i.e. landed properties of Banmankhi were allotted in favour of plaintiffs and



defendant No.1 and the properties of Parora and the family contract business was given in lieu of half share to the defendant 2nd party i.e. Badrinath and Baidyanath. According to the learned counsel, there was no joint family property. All the properties were acquired by four brothers. However, in partition, two brothers were given the entire properties at Banmankhi and two brothers Badrinath and Baidyanath were given the property at Parora. The learned court below wrongly refused to grant half share. According to the learned counsel, all the properties which are standing in the name of one member or the other member of the family all belonged to the joint family as those properties were acquired out of the joint family fund. The learned senior counsel further submitted that the court below should have held that Plot No.713 and 714 are the joint family property. On these grounds, the learned counsel submitted that the cross-objection be allowed and the plaintiffs be granted half share in the suit property and it may be held that defendant Nos.2 and 3 have got no share in the properties of Banmankhi. Further, if there will be any partition between the parties then the properties of Parora be also partitioned at four places. On these grounds, the learned senior counsel submitted that the cross-objection filed by the plaintiff-respondent No.1 be allowed.

13. In view of the above contentions of the parties, the



points arise for consideration in this First Appeal and the counter-claim are:

- I. Whether the plaintiffs-respondents are entitled to half share in the suit properties and whether the contract business was the family business or not?
- II. Whether the defendant Nos.2 and 3 are also entitled to a share in the joint family properties situated at Banmankhi and whether the property at Parora is self-acquired property of the defendant Nos.2 and 3?

14. Since both the points formulated hereinabove are interlinked with each other those points are discussed and decided together.

15. The simple case of the plaintiff, Surya Narayan Thakur as pleaded in the plaint is that Schedule A of the plaint are the suit lands. The four brothers remained joint till 1944 and while joint they purchased many properties at Banmankhi. While joint, the plaintiff and the defendant No.1 were doing contract business and earned a lot of money. In the year 1944, defendant Nos.2 and 3 separated from the plaintiff and defendant No.1 and divided the joint family properties. In this partition, the properties at Banmankhi and the house fell in the joint share of plaintiff and defendant No.1. Defendant Nos.2 and 3 did not take any share in the property rather the contract business and some money fell in the share of defendant Nos.2 and 3. Defendant Nos.2 and 3 started living at Parora with the said contract business



and after 1944, the defendant Nos.2 and 3 began to acquire properties separately from their own separate fund and separate karbar vide paragraph 4. On the contrary, the case of the defendant Nos.2 and 3 is that there had been no partition and in fact, the defendant Nos.2 and 3 went to Parora and out of their own earning they purchased landed property there. Therefore, the defendant Nos.2 and 3 have also got share in the suit property. The defendant No.1-appellant also made a case that all the properties at Banmankhi are not the joint family properties. The partition took place in the year 1937 and defendant No.1 has purchased some properties in his name which are liable to be excluded from partition.

16. In support of their respective cases, the parties have adduced evidences. The plaintiff has been examined as P.W.10 who admitted that Kalanand Thakur i.e. defendant No.1-appellant was in jail custody. Exhibit 2 has been produced which is certificate of Purnia jail which shows that Kalanand Thakur was given death sentence on 11.11.1942 and subsequently he was released on bail on 30.01.1947. This evidence of P.W.10 is sufficient enough to say that during the year 1944, Kalanand Thakur, the defendant No.1 was in the jail custody. The plaintiffs clearly pleaded in the plaint that there was partition between the four brothers in the year 1944. In view of the above fact that when one brother was in jail custody, how that



partition alleged by the plaintiff took place. Therefore, on this ground alone, the case pleaded by the plaintiff regarding partition in the year 1944 cannot be relied upon. From perusal of the evidence of this P.W.10 in the cross-examination, he clearly stated that he has no knowledge regarding acquisition of the properties by Baidyanath Thakur and Badrinath Thakur at Parora. However, he has stated that in the partition in the year 1944, Baidyanath Thakur and Badrinath Thakur got 40-45 bighas land at Parora. It may be mentioned here that this is not the case of the plaintiff in the plaint. As stated above, his case is that all the properties at Parora have been acquired by the defendant Nos.2 and 3, Baidyanath and Badrinath. In fact, these properties are also not the subject matter of the suit.

17. At the time of hearing of this First Appeal, the learned senior counsel submitted that by subsequent amendment, these properties were added as suit properties. However, from perusal of the original plaint, which is on record, I do not find any such amendment. Except Schedule A, no other properties of Parora have been added either in Schedule A or by separate schedule. Further even if the property is added then also the specific case of the plaintiff is that those properties at Parora are the self-acquired properties of defendant Nos.2 and 3. Therefore, in no case, the plaintiff can claim partition with respect to those properties.



18. So far the evidence of P.W.10 to the effect that in partition, properties at Parora were given to Badrinath Thakur and Baidyanath Thakur is concerned, it is without pleading and also contrary to the pleading. Therefore, this evidence is liable to be ignored.

19. So far this case of the plaintiff i.e. in partition the property at Parora was allotted to defendant Nos.2 and 3 is concerned, the defendant No.1-appellant also supported in the written statement. The dispute between the plaintiff and defendant No.1 is with respect to the year of partition. According to plaintiff, partition took place in 1944 whereas according to defendant No.1, partition took place in the year 1937.

20. So far property at Parora is concerned, the defendant No.1 has also not stated that those properties are also the joint family property. The only case pleaded by this defendant No.1 at paragraph 16 of his written statement is that in the partition in 1937, the lands in Schedule A were allotted in the share of the plaintiff and defendant No.1 each having 8 Anna share.

21. Now therefore, in view of the above factual position, the property acquired by defendant Nos.2 and 3 are their self-acquired properties. This fact is clearly admitted in the plaint. Therefore, any evidence contrary to the pleading cannot be relied upon. The next



question is whether the case of the plaintiff regarding partition in the year 1944 can be believed. We have seen above Exhibit 2, the certificate and admission of P.W.10 that defendant No.1 was in jail custody. This fact is not denied by defendant No.1 who was examined as D.W.1. Therefore, there cannot be any partition between four brothers when one was in jail custody. Therefore, the story of partition in the year 1944 pleaded by the plaintiff is not trustworthy. I, therefore, find that the plaintiff failed to prove his case that there was partition as alleged by the plaintiff in the year 1944.

22. The contrary case pleaded by the defendant Nos.2 and 3 is that the parties are still joint and there had been no partition. So far the case pleaded by defendant No.1 that there had been partition in the year 1937 is concerned, except the mere statement of defendant No.1, no reliable evidence has been produced. There is no pleading by this defendant No.1 to the effect that in the partition, the defendant Nos.2 and 3 did not take any share and that some money was given to them and also took the contract business. There is no pleading in the written statement of the defendant No.1 that there was any joint family contract business. Moreover, the contract business which is being run at one place, if shifted to other place, then there cannot be any presumption that the joint family business was taken by the defendant. According to the plaintiff, the plaintiff and defendant No.1



were doing contract business. Now, if the defendant Nos.2 and 3 went to Parora and they started the contract business there, then under law, there cannot be presumption that they inherited the contract business of the joint family or that they got it in their share. Moreover, the case pleaded by the plaintiff has already been disbelieved, now therefore, so far partition of the year 1937 pleaded by defendant No.1 and whether there was no partition pleaded by defendant Nos.2 and 3 will become the inter se dispute between the defendants and defendants.

23. On the contrary, the defendants 2nd party in the written statement pleaded that there was no family contract business. In the deposition also, the defendant No.4 has clearly stated that there was no family contract business. Exhibit G proves the fact that contract business was carried on by the defendant 2nd party. In the evidence, he has stated that prior to 1940, the defendant No.4 was giving money to Kalanand Thakur, the defendant No.1 as he was the karta. The parties have produced their revisional survey record of right but it is settled principles of law that the revenue records neither create title nor extinguish title. Therefore, even if some properties are recorded in the name of one party or the other, no conclusive finding can be recorded that the parties are the owner of the property exclusively recorded in the name. However, the same has to be found out on the facts and circumstances of the case. On the basis of this revenue records i.e.



Exhibit F series i.e. Choukidari receipt, partition between the parties cannot be presumed particularly when the case of the plaintiff pleaded is not reliable.

24. In view of my above discussion, I find that there had been no partition between the parties with respect to Schedule A property.

25. The defendant No.1 has claimed that he has acquired some property separately. According to the plaintiffs, all the properties are joint family properties. So far lands of Khata No.51 and 52, according to defendant No.1, both are his exclusive property. According to the defendants 2nd party, Badrinath and Baidyanath, half of the properties of Khata No.51 and 52 belonged to defendants 3rd party, Medni Choudhary and half properties are the joint family property liable for partition between the four brothers. The defendant No.3, Medni Choudhary has claimed that these lands of Khata No.51 and 52 are exclusive property. Exhibit B/1 is the sale deed dated 09.06.1942 which clearly shows that the lands of Khata No.50 and 51 measuring 1.98 acres is in the name of Medni Choudhary. However, the total area of land of both khata is 4.32 acres and out of that, khata No.15 is exclusively recorded in the name of Badrinath Thakur and Khata No.51 is recorded in the joint name of Badrinath Thakur and Medni Choudhary. The area of Khata No.50 is only 16 decimals.



26. In view of the above facts, it cannot be said that the property is the joint family property as alleged by the plaintiff. So far defendant No.1-appellant is concerned, it is not his case. It is not the case that either plaintiff No.1 or defendant No.1 purchased the half portion of the properties in the benami name of Medni Choudhary. Therefore, the finding of the court below on this point is hereby confirmed.

27. The defendant-appellant claimed that Plot No.1281 and 1259 are his self-acquired property. It may be mentioned here that except the pleading, the defendant No.1-appellant never produced any document to show that the lands have been acquired by him out of his own earning. No source of income has been shown. We have seen above that the case of partition has been disbelieved. There is no documentary evidence produced by the defendant to show that these properties have been acquired in his name. He has not adduced satisfactory evidence to show that he had got separate source of income. When the parties were joint and the defendant No.1 had no separate source of income, the presumption will be that the properties will be joint family properties. Kalanand Thakur was the karta being the eldest member. Admittedly, there was no ancestral property. The four brothers acquired the property of Schedule A. Out of this Schedule A, the defendant No.1 is claiming that this property and that



property is his self-acquired property. Therefore, he has to prove this fact by leading cogent evidence because the nucleus of the joint family is now admitted that there was about more than 30 bighas of land. It is for the defendant No.1 to show that he purchased the property out of his separate earning without the aid of the joint family nucleus. Reference may be made to the decision of the Supreme Court, **AIR 1954 Supreme Court 379**. Therefore, I find that the defendant No.1-appellant failed to prove that these two plots are his self-acquired properties. The finding of the trial court on this point is therefore, upheld.

28. The learned senior counsel, Mr. Anil Kumar Jha submitted that no separate issue was framed by the trial court on the question as to whether there was partition in the year 1944 or in the year 1937. So far this argument is concerned, it may be mentioned here that when both the parties entered into trial knowing the case of each other non-framing of issues will never prejudice anybody nor the judgment will be vitiated on account of non-framing of the issue. Reference may be made to the decision of the Supreme Court in **AIR 1963 Supreme Court 884**.

29. The learned senior counsel submitted that there is some mistake in the pleading. The plaintiffs should have pleaded that the property at Parora was also joint family property but for this minor



defect why the plaintiff be deprived of his share in the property at Parora. So far this submission is concerned, it can be said that the court cannot make a third case. It is not the case of the plaintiff nor the case of the defendant that the properties at Parora are also the joint family property acquired out of the joint family fund. Admittedly, those properties have been acquired after 1937 or 1944. The specific case of plaintiff is that there was partition in 1944 and according to defendant No.1, there was partition in 1937. When there was partition claimed by both of them, how can it be presumed that the properties acquired thereafter are also joint family property without there being any pleading. As stated above, without there being any pleading, if any evidence is adduced, that cannot be looked into.

30. In view of my above discussion, I find no merit in this First Appeal and also no merit in the cross-objection.

31. In the result, this First Appeal and the cross-objection both are hereby dismissed. The judgment and decree passed by the learned trial court are hereby confirmed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

Saurabh/-

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