IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.149 of 1978

(Against a part of the Judgment and Decree dated 17.12.1977 passed by 3rd Additional Subordinate Judge, Bhagalpur in Title Suit No.51 of 1972).

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Asha Devi & Ors

..................Defendants-Appellant/s

Versus

Smt. Sanwali Devi & Ors

..............Plaintiffs-Respondent/s

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Appearance :

For the Appellant/s : Mr. Shashi Shekhar Dvivedi, Sr.Advocate
Mr. Anil Kumar Tiwary, Advocate with him

For the Respondent No.2, 3 5 & 6 : Mr. Baidnath Thakur, Advocate
Mr. Shankar Kumar Thakur, Advocate.

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Dated : 16th day of May, 2017

P R E S E N T

CORAM : HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

1. The defendants have filed this First Appeal against a part of the judgment and decree dated 17.12.1977 passed by learned 3rd Additional Sub Judge, Bhagalpur in Title Suit No.51 of 1972.

2. The plaintiffs-respondents filed title suit No.51 of 1972 praying for partition of his 1/4th share in Schedule III property.

3. The plaintiffs claimed 1/4th share alleging that the common ancestor, Masudan Sah had four sons namely Budhu Sah,

Sahdeo Sah, Jaddu Sah and Ram Sah. Budhu Sah and his two sons are the plaintiffs. Sahdeo Sah and his sons are defendants 1st set. Likewise, Jaddu Sah and his sons are defendants 2nd party whereas the heirs and descendants of Ram Sah are the defendants 3rd party. The common ancestor, Masudan Sah and his son Ram Sah have already died. According to the plaintiffs, the family is joint and all are residing in the house described in Schedule I of the plaint. Because there was quarrel between the female members, Sahdeo Sah and his sons went to reside in the house described in Schedule III of the plaint which is also joint family property. After sometimes, the plaintiff, Budhu Sah went to reside in the house acquired by his wife. Masudan Sah was residing sometimes with Jaddu Sah and sometimes with Ram Sah and also sometimes with Budhu Sah. Further case is that in the year 1957, Masudan Sah filed a partition suit because of ill behaviour of defendant No.1, Sahdeo Sah. The said suit was dismissed for default on 06.10.1958. In 1969, Masudan Sah died. Still there has been no partition.

4. By way of amendment, the plaintiffs claimed that the parti land of item no.I of Schedule A of the written statement was acquired by his wife, Genda Devi out of her own fund and the fund obtained from her mother. She acquired the same in the name of her daughter, Indira Devi. In the said property, she installed flour mill and

hauler. Out of the income from flour mill and hauler, pucca house was constructed. The said property was not purchased with the aid of joint family fund nor it is joint property. The defendants 2nd party looks after the flour mill i.e. the joint family business situated at Bonshi Road, Kajichak house. He was not maintaining any account. Partition was demanded but the defendants refused.

5. The defendant, Sahdeo Sah, Jaddu Sah and heirs of Ram Sah filed contesting written statement. However, the genealogy given by the plaintiff and the share was not disputed. The main defence is that after Durga Puja, in the year 1956, all the four brothers separated in mess and residence and went to khaparposh joint house at Gudarganj. This Gudarganj khaparposh house was acquired out of the joint family fund. Now, a pucca house has been constructed wherein hauler and flour mill has been installed. Masudan Sah and then Budhu Sah were the karta. They were keeping the ornaments, money and other valuable movable properties. Still there has been no partition and all of them are residing in separate houses according to their convenience. The plaintiff intentionally has not included the Gudarganj property although, it is joint family property which is described in Schedule A of the written statement.

6. The further case of the defendant is that the flour

mill and the hauler described in Schedule III property by the plaintiffs is not the joint family property. In fact, the flour mill and the hauler is the self-acquired property of wife of Sadho Sah namely Jhabo Devi. The defendant claimed partition of property described in Schedule A of the written statement by counter-claim. It appears that ad valorem court fee has been paid by the defendant.

7. On the basis of the above pleadings of the parties, the learned trial court framed the issues that :

I. The suit as framed is maintainable?

II. Whether the parties have got cause of action for the suit?

III. Which of the properties are available for partition in this suit?

IV. Whether parties are entitled to any other relief and if so, to what extent?

8. The learned trial court while dealing with issue no.3 held that Gudarganj property is not the joint family property and likewise, the flour mill mentioned in Schedule III property is also not the joint family property. Therefore, these properties are not available for partition. Since the properties described in Schedule I, II and the house of Schedule III property are joint family property, as admitted by the parties, which is still joint, therefore, Schedule I, II and III except flour mill in Schedule III are available for partition and each branch has got 1/4th share.

9. Against a part of the judgment whereby the Gudarganj Property was excluded from partition, the present appeal has been filed.

10. The learned senior counsel, Mr. S.S.Dvivedi submitted that the learned trial court has not properly appreciated the evidences and wrongly held that the Gudarganj property is not the joint family property. In fact, the property is acquired out of the joint family fund by the karta. Defendant No.1 was not pooling well with his father Masudan, therefore, earlier partition suit was filed by Masudan wherein the defendant No.1 was also defendant. This suit was filed in the year 1957 at the instance of the present plaintiff No.1. Therefore, there was enmity between the father, Masudan and the present plaintiff No.1 with the other three brothers of plaintiff No.1. The father and plaintiff No.1 being the karta of the joint family purchased the Gudarganj property in the name of Indira Devi out of the income of the joint family only with a view to deprive the other three sons of Masudan because Masudan, the father who was karta, was in collusion with the present plaintiff No.1, Budhu Sah. Budhu Sah or Masudan Sah had no separate source of income. The allegation that wife of Budhu Sah namely Genda Devi @ Gena Devi had purchased the Gudarganj property in the name of her daughter, Indira Devi is entirely false and in fact, said Genda Devi had no income at

all. Moreover, no satisfactory evidence has been adduced by the plaintiff to show that Gudarganj property was the self-acquired property of Genda Devi which was purchased by her in the name of her daughter.

11. According to the learned senior counsel, in fact, the defendants-appellants have specifically pleaded about the joint family fund which was in the hand of Masudan but the learned court below ignoring all these facts and also ignoring the contradictory and unreliable evidence of Genda Devi recorded finding that Gudarganj property is the self-acquired property of Genda Devi in the name of her daughter, Indira Devi.

12. The learned senior counsel placed the evidence of P.W.1 and pointed out various discrepancies and submitted that the evidence of P.W.1 is not reliable at all. The quarrel between the parties i.e. Budhu Sah, Masudan Sah and the defendant was since 1950 and, therefore, because of this enmity, the karta purchased the property in the name of Indira Devi. In other words, the plaintiff No.1 got the property purchased in the name of his daughter with the aid of joint family fund. The learned senior counsel submitted that in paragraph 7 and 8 of the written statement, there is specific pleading of joint family fund. On these grounds, the learned senior counsel

submitted that the finding of the court below on the point of acquisition of Gudarganj property be set aside and it be held that it is joint family property and is liable for partition and thus, the counter-claim filed by the defendants-appellants be allowed.

13. On the other hand, the learned counsel, Mr. Baidnath Thakur appearing on behalf of the plaintiffs-respondents submitted that the learned trial court has considered each and every evidence and thereafter, recorded finding that Gudarganj property is acquired by Genda Devi. The evidence produced by the plaintiff is sufficient enough to show that Genda Devi got the money from her naihar and she purchased the same in the name of her daughter. Therefore, it is incorrect to say that Gudarganj property is the joint family property acquired out of joint family fund. The learned counsel further submitted that in fact, there was no joint family fund nor any nucleus with the aid of which, Gudarganj property could have been acquired. Since Gudarganj property was admittedly in the name of Indira Devi, after her death, the property devolved on Genda Devi alone and moreover, Genda Devi was the real owner. The sale deed has been produced by the plaintiff and that the name of Genda Devi has also been mutated since long without there being any objection. Because the appellants are claiming the property as joint family property, it is for the appellants to prove and discharge their burden of

proving the fact that Gudarganj property was acquired with the aid of joint family fund but they failed to prove this fact. Only because there was no partition by metes and bounds, there cannot be any presumption that a property acquired in the name of minor female is the joint family property. This fact has to be proved by cogent and reliable evidence but the defendants-appellants failed to prove this fact. Therefore, the trial court has rightly held that Gudarganj property is the self-acquired property of Genda Devi. Thus, this appeal has got no merit and accordingly, the same be dismissed with cost.

14. In view of the above contentions of the learned counsels for the parties, the only point arises for consideration in this first appeal is “whether the Gudarganj property is the self-acquired property of Genda Devi in the name of her daughter Indira Devi or the said property is the joint family property acquired out of the joint family fund/nucleus” and “whether the impugned judgment and decree are sustainable in the eye of law?

15. The plaintiff-respondent’s suit for partition has been decreed partly. The counter-claim filed by the appellants is with respect to Schedule A of the written statement which is described as Gudarganj property by the parties. After disposal of the title suit, this property is only in dispute between the parties. So far other part of the

judgment and decree with respect to other properties are concerned, no dispute is raised before this court, therefore, this point formulated is only required to be answered.

16. It appears that originally the plaintiff did not include Gudarganj property as self-acquired property. Only assertion was made that plaintiff shifted to the house acquired by his wife. Thereafter, the defendant filed the written statement-cum-counter-claim with respect to this Gudarganj property which is described in Schedule A of the written statement. Admittedly, this Gudarganj property was acquired in the name of Indira Devi, daughter of plaintiff No.1 and Genda Devi. Ext. 1 is the registered sale deed dated 16.02.1954 which is in the name of Indira Devi. P.W.13 is Genda Devi. She has stated that from the Muslims, she has purchased 2 katha parti land in Mohalla Gudarganj for Rs.2,300. She has brought Rs.2,000 from naihar. Rs.100 was paid at the time of Jarbaiyana. After purchase, she got constructed a hut and started living therein and in that house, flour mill and hauler was installed. She has further stated that she purchased the above flour mill from Masudan Sah for Rs.2,000. For purchasing this mill, she brought Rs.1,000 from naihar and Rs.1,000 from Pramod Sao of Barkhi tola on credit. She has returned the amount to Pramod Sao. Her husband and his brothers have got their joint property at Bhagalpur. In the cross-examination,

she has stated that when she came to in-laws house after marriage, she found that her father-in-law had no property at all. Thereafter, the properties were acquired out of joint income of her husband, her father-in-law and devars.

17. The learned senior counsel placed the entire cross-examination part and pointed out that she at some places stated that except the registered sale deed she has no other paper regarding acquisition and that the house was constructed by the income of her husband and devars.

18. Now let us consider the other evidences. P.W.1 is the plaintiff No.1. He has admitted that his father has filed Partition Suit No.9 of 1957. His father died in 1959 and still there had been no partition of the joint family properties. The amount, which his father received as compensation for acquisition of land, was distributed between them all. Gudarganj property is the property acquired by his wife in the name of her daughter, Indira Devi. In the cross-examination, he has stated that in the house of his wife, there is flour mill and hauler which also belonged to his wife. Earlier it belongs to Basant Kumar Banerjee, Narendra Kumar Banerjee and Renu Devi and from them, Masudan and Satyanarain(plaintiff No.2) had purchased in 1951. Genda Devi purchased the same four mill and

hauler from them in the year 1955 for Rs.2,000. He has denied the suggestion that Gudarganj property was purchased out of the joint family fund.

19. P.W.8 is the brother of Genda Devi. He also has stated about giving of money to his sister, Genda Devi. First, she took Rs.2,000 for purchasing land from mother and after one year again, she took Rs.1,000. In the cross-examination, he has reiterated the fact that money was given by selling crops and also there were some money in the house and also by taking loan. P.W.11 has proved the Jarbaiyana which was written by Munshi Ram Sao.

20. From the above evidences, now it becomes clear that admittedly the property was purchased in the name of Indira Devi by Ext. 1 in the year 1954. It is admitted fact that there was quarrel between the parties since 1950. The plaintiff has produced evidences about the payment of consideration amount and the source from where Genda Devi got the consideration amount. It is also admitted fact that Genda Devi or Indira Devi were/are not the coparcerner. In other words, Gudarganj property is not in the name of a coparcener. It is also admitted fact that the defendants-appellants never prayed for any declaration with respect to Ext. 1, the registered sale deed. In this partition suit, the defendants-appellants claimed that the property is

purchased by the karta in the name of Indira Devi out of the joint family property. Now therefore, in view of this defence, particularly when the plaintiffs produced evidence regarding source of consideration amount, the defendant has to produce cogent and reliable evidence.

21. From perusal of the written statement, it appears that the defendant's pleading is that Rs.5,400 was received from Land Acquisition Department and Rs.4,000, the value of jewelleries and valuable movables which were in possession of the plaintiffs. So far this case of the defendants is concerned, it is the evidence of the plaintiff that the same has already been distributed between them much earlier. Moreover, the defendants in general term at paragraph 6 has pleaded that Gudarganj property was acquired out of the joint family fund by Masudan and Budhu Sah. There is no specific pleading regarding what was the nucleus of the joint family and what was the extent of joint family fund.

22. D.W.1, who is defendant No.1, at paragraph 4 has stated that Gudarganj property was purchased out of the amount of Rs.5,400 received from Land Acquisition Department and Rs.4,300, the price of ornaments and valuables. In the cross-examination, suggestion has been given regarding distribution of the amount but he

stated that he cannot say whether amount of Rs.800 was given to Jaddu Sah and Rs.800 to his mother. D.W.2 has stated that the consideration amount of Rs.2200 was paid by Masudan Sao which is not the pleading of the defendant. D.W.3 has stated that the negotiation to purchase Gudarganj property for Rs.2300 was finalized in presence of this witness and Rs.100 was paid by Masudan Sao. This is also not the pleading in the written statement that any negotiation was held by Masudan regarding purchase of Gudarganj property.

23. So far the submission of the learned senior counsel, Mr. S.S. Dvivedi that Genda Devi has admitted the case of the defendant is concerned, it may be mentioned here that during cross-examination, no doubt, there are some statements made by this P.W.13 that house was constructed out of income of husband and devar, there cannot be any presumption that it was the property acquired out of joint family fund. Likewise, there are some discrepancies which are pointed out by the learned senior counsel but on these discrepancies, no categorical finding can be recorded that in fact, the property was the property acquired by Masudan Sah. As stated above, there is no pleading that any negotiation was made by Masudan with regard to purchase of this Gudarganj property. However, in the evidence, the defendants adduced evidence to this

effect which cannot be relied upon. The document produced by the plaintiff clearly shows that it is in the name of Indira Devi. The learned senior counsel, during course of argument, admitted the fact that the dispute between the parties is since 1950. In such circumstances, had the property been the joint family property, the defendants should have objected it but no objection was raised ever.

24. Argument was advanced to the effect that the property was treated as joint family property but when the parties were in dispute since 1950, how this property acquired in the year 1954 and thereafter, constructions were made and it was treated as joint family property is not clear. It is admitted by the appellants in the written statement and in the evidence that the parties are separate since 1956. Admittedly, the property is standing in the name of Genda Devi after death of Indira Devi in the year 1954 itself but no objection was raised by the defendants-appellants. If the party separated in the year 1956, then also there is no explanation as to why they did not claim this property as joint family property. For the first time, in the year 1972, by way of counter-claim, they prayed for partition of this property also.

25. According to the plaintiffs, it is the self-acquired property of Genda Devi whereas according to the defendants, it is the

joint family property. So far source of income is concerned, we have discussed the evidences of both the parties. The defendants have also not prayed for any declaration about the nature of the document, Ext. 1. In such circumstances, unless it is declared that Ext. 1 is a benami transaction and the purchaser Indira Devi is the benamidar of the coparcener, it cannot be said that property is partible. However, the sale deed has been produced by the plaintiff, evidence has been adduced to show source of consideration amount, the conduct of the parties shows that it is mutated in the name of heirs of Indira Devi, the plaintiffs are in possession since 1954. Genda Devi was necessary party but she was not made party. She claimed to be the owner of Gudarganj property which she purchased in the name of her daughter. She was only examined as witness.

26. This court in the case of **Sushil Kumar Parsuram Puriya v. Smt. Shanti Devi, 2010(2) PLJR 436** has held that property of female Hindu cannot be blended with joint family property for any partition.

27. Therefore, considering overall the effect of these matters and the evidences, I find that the appellants have failed to prove that Gudarganj property is joint family property acquired out of joint family fund. On the contrary, the plaintiffs-respondents have

been able to prove that it is the self-acquired property of Genda Devi which she purchased in the name of her minor daughter. The finding of the trial court on this point is therefore, hereby confirmed.

28. In the result, I find no merit in this First Appeal and accordingly, this First Appeal is dismissed. In the facts and circumstances of the case, no order as to cost.

(Mungeshwar Sahoo, J)

Saurabh/-

AFR/NAFR	NAFR
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