

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.668 of 1993

**Against the Judgment and Decree dated 26.06.1993
passed by 4th Suburbanite Judge, Siwan in Partition Suit
No.289 of 1981.**

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Most.Pana Devi & Ors

.....Plaintiffs-Appellant/s

Versus

Ayodhaya Prasad & Ors

.....Defendants-

Respondent/s

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Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Advocate
Ms. Vagisa Pragya Vacaknavi, Advocate

For the Respondent No.1 : Mr. Nityanand Mishra, Advocate.
Mr. Alok Kumar, Advocate
Mrs. Priya Gupta, Advocate

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Dated : 19th day of July, 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. The plaintiffs have filed this First Appeal against the impugned judgment and decree dated 26.06.1993 passed by the learned 4th Subordinate Judge, Siwan in Partition Suit No.289 of 1981



whereby the learned trial Court decreed the plaintiff's suit in part.

2. The plaintiff appellants filed the aforesaid partition suit claiming that 1/5th share in Schedule I land and 3/5th share in Schedule II and Schedule III land. According to the plaintiffs, the plaintiff No.1 is the widow of late Satya Narain Prasad whereas the plaintiff No.2 and 3 are her daughter and the defendant No.1 and 2 are her sons. Schedule I property are the ancestral property of Satya Narain Prasad. There was no sufficient income from ancestral property, therefore, Satya Narain Prasad by his own labour earned money and purchased land and constructed a shop thereon at Notan Bazar wherein he started a Kirana business and this property is described in Schedule II. Thereafter, Satya Narain Prasad out of his own income purchased the Schedule III property by registered sale deed dated 12.12.1933. Therefore, Schedule II and Schedule III property are the self acquired property of Satya Narain. The plaintiffs being the widow and two daughters have got 1/5th share in Schedule I land and they have got 3/5th share in schedule II and Schedule III land. There had been no partition between them. The defendants are trying to grab the lands of the plaintiffs. Hence the suit.

3. The defendants on being noticed appeared and filed contesting written statement alleging that the plaintiffs have no cause



of action for the suit. Shyamlal Prasad who is owner of half land described in Schedule I of the plaint is a necessary party who was brother of Satya Narain Prasad. He died leaving behind widow and daughters who are necessary party, therefore, the suit is bad for non-joinder of necessary party and as such is liable to be dismissed.

4. The defendants further alleged that Satya Narain Prasad never earned money nor he purchased land and constructed shop nor started business nor he had any relation with Schedule II property. Schedule III property is purchased out of the income of joint family property and is in joint possession of the parties. In fact Schedule II property is the self acquired property of defendant No.1 and 2. The plaintiffs were never in possession of any property jointly. After the death of Satya Narain Prasad, the plaintiffs have relinquished their share and interest in favour of the defendants. As such the defendants came in possession of the entire property. Satya Narain Prasad had died 15 years prior to the filing of the suit as such the defendants continued in possession since then exclusively and have acquired title by adverse possession also.

5. The defendant No.3 to 6 have filed separate written statement. Their written statement is in the same line as that of defendant No.1 and 2. These defendants are purchasers from



defendant No.1 and 2. They purchased part of Schedule III property and they claimed that they came in possession thereof.

6. In view of the above pleadings of the parties, the learned trial Court framed many issues. Issue No.4 relates to Schedule II property and the issue is whether the Schedule II land is self acquired property of defendant No.1 and 2 or it is the self acquired property of Satya Narain Prasad. Issue No.5 is whether Schedule III property is self acquired property of Satya Narain Prasad or he acquired the property out of the income from the ancestral land. Issue No.6 is whether the plaintiffs have relinquished their right, title, in favour of the defendants. These are the main issues framed by the Court below.

7. After hearing the parties and considering the evidences, the trial Court came to the conclusion that Schedule II property is not the self acquired property of Satya Narain Prasad rather it is purchased out of income from the ancestral property. The learned trial Court also came to the conclusion that Schedule III property is also the property purchased by Satya Narain out of the income from the ancestral land. So far relinquishment is concerned, the trial Court held that the plaintiff did not relinquish their right, title and interest in the suit property. Accordingly, the learned trial Court decreed the plaintiff's suit but held that the plaintiff have got 1/5th share in



Schedule II and III. So far Schedule I is concerned, the suit abated in view of Section 4 of Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956.

8. The learned counsel, Mr. Binod Kumar Singh, for the appellant submitted that the learned trial Court has wrongly held that Schedule II and Schedule III are the joint family property. So far Schedule II is concerned, according to the learned counsel, it was the self acquired property of Satya Narain Prasad as the learned trial Court came to the conclusion that when this property was acquired, the defendant No.1 and 2 were not so old enough to earn money. However, the Court below has negatived the claim of the defendant regarding Schedule II property, therefore, this part of the decree is against the defendant No.1 and 2. Against this part of the decree, the defendant No.1 and 2 could have filed separate appeal but they neither filed appeal nor filed cross-objection in this First Appeal. So, the finding of the trial Court that the property is acquired by Satya Narain Prasad out of income from joint family property becomes final.

9. The learned counsel further submitted that so far Schedule III property is concerned, it is purchased by Satya Narain Prasad in the year 1933 out of his own income. The plaintiffs have adduced evidences in support of the fact that the ancestral property have no



sufficient income. However, the learned trial Court wrongly held that it is the property acquired out of the income from the joint family ancestral property without there being any sufficient reliable evidence adduced by the defendants. Moreover, even if it is held Schedule III property is joint family property then also the plaintiffs are entitled to $1/4^{\text{th}} + 3/16^{\text{th}} = 7/16^{\text{th}}$ as for ascertaining the share of the widow, there will be a notional partition regarding the coparcenary property in view of the decision of the Hon'ble Supreme Court in the case of **Gurupad Khandappa Magdum Vs. Hirabai Khandappa Magdum 1978 (3) SCC 383 = AIR 1978 S.C. 1239**. In such circumstances, the learned trial Court has granted less share to the plaintiffs although they are entitled for more share. On these grounds, the learned counsel for the appellant submitted that the impugned judgment and decree be modified and the share of the plaintiffs be increased in Schedule II as well as in Schedule III.

10. On the other hand, the learned counsel, Mr. Nityanand Mishra and Mr. Alok Kumar, submitted that the learned trial Court considering each and every evidences produced by the parties recorded the finding, therefore, neither there is illegality nor there is irregularities in the impugned judgment and decree. The plaintiffs have failed to prove that Satya Narain Prasad had any separate source



of income enabling him to either purchase Schedule II property or Schedule III property out of his own income. On the other hand, the ancestral property was sufficient enough to provide the fund for purchasing the property and in fact Satya Narain Prasad purchased Schedule II and Schedule III property out of the income from the joint family property, as such the learned trial Court has rightly held that the Schedule II and III property are the joint family property.

11. So far share of the parties are concerned, the learned counsel submitted that the Court below has rightly granted the share. Therefore, it needs no interference in this First Appeal. Moreover, the plaintiffs were never in possession any of the property and in fact the defendant No.1 and 2 were in possession of the property as such they acquired title because of adverse possession and ouster but the learned Court below wrongly recorded the finding against the defendants. On these grounds, the learned counsel for the respondent submitted that the First Appeal be dismissed.

12. In view the above contentions of the parties, the following points arises for consideration in this First Appeal is :-

- (i) What is the share of the plaintiff in Schedule II property in view of the finding of the trial Court that it is the joint family property and Whether Schedule III property is self



acquired property of Satya Narain Prasad or is the joint family property acquired out of the income from joint family property and what is the share of the parties in this property?

Point No.(i)

13. So far Schedule II property is concerned, it is the finding of the trial Court that Satya Narain Prasad acquired this property out of the income from the ancestral property. The claim of the defendant No.1 and 2 that it was their self acquired property has been negated. Therefore, this is a decree against the defendant No.1 and 2, therefore, they could have challenged the same by filing separate appeal or by filing cross-objection in this First Appeal but they have not done so. Now, therefore, the finding of the trial Court on this question cannot be gone into in this First Appeal because it is not challenged by the defendants respondents

14. Now, therefore, when this property is joint family property acquired by Satya Narain Prasad out of the income from joint family what will be the share of plaintiffs is the important point. The trial Court has granted only 1/5th share.

15. So far Schedule III property is concerned, the learned trial Court after considering the oral evidences of the witnesses of the



plaintiffs clearly recorded the finding that the plaintiffs have failed to prove the fact that prior to purchase of Schedule II property when he started business and till which period he continued the business and what was the savings, no evidence were produced. The plaintiffs also did not produce any reliable evidence. Now, therefore, when Satya Narain Prasad had no separate source of income and it has been held that Schedule II is the joint family property which is not challenged by either party, how it can be said that Schedule III is the self acquired property of Satya Narain Prasad because it is the case of the plaintiff that Satya Narain Prasad out of the income from this shop business has purchased the property, Schedule III. Thus, it becomes clear that the Schedule III property which is purchased by Satya Narain Prasad out of the income of the joint family shop will be also a joint family property. In other words, Schedule II property has been held undisputedly to be the joint family property, therefore, the property acquired out of the income from the shop will also be the joint family property. That is the finding of the trial Court also.

16. This finding has been recorded by the trial Court on the basis of the oral evidences only regarding the source of income. It is settled law that while finding of fact has been recorded by the trial Court on the basis of oral evidence only, the First Appellate Court



should not interfere with the finding lightly unless the appellate Court finds that while recording the finding of fact the learned trial Court escaped noticing any vital statement made by witness which relates to credulity of the witness and had the trial Court considered this vital statement the result would have been otherwise. Reference may be made to the decision of the Hon'ble Supreme Court reported in ***AIR 1951 SC 120, AIR 1983 SC 114 and 2001 (3) SCC 179***. In such view of the matter, no such vital statements made by the witness have been pointed out by the appellant at the time of hearing of the appeal. So the finding of the trial Court cannot be interfered with so lightly, particularly when it is admitted by the plaintiffs that out of the Schedule II property and business thereof, Schedule III has been purchased.

17. From perusal of paragraph 4 of the plaint, it appears that the plaintiff also pleaded that except this shop business, Satya Narain Prasad had also self earning. However, except this pleading and bald statement by the witness, no reliable evidence have been produced by the plaintiffs in support of separate source of income. Thus, I find that Schedule III property is also the joint family property. Thus, the finding of the trial Court on this point is also hereby confirmed.

18. At the time of hearing of this First Appeal, mainly it was



argued on behalf of the appellant that this Appeal has been filed for increasing the share of the plaintiff. The learned counsel, Mr. Binod Kumar Singh, submitted that the Court below has wrongly granted only 1/5th share in both the Schedule. The learned counsel submitted that even if the property is joint family property then also the plaintiffs are entitled to for more share. In support of his contention the learned counsel relied upon **AIR 1978 SC 1239 Gurupad Khandappa (Supra)**.

19. In the decision, the Hon'ble Supreme Court has held that when a male Hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshra School of copersenary property, his interest in the property shall devolve by survivorship upon the surviving members of the copercenary and not in accordance with this Act provided that, if the deceased had left him surviving a female lady specified in Class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshra School of copercenary property shall devolve by testamentary or intested succession as the case may be under this Act and not by survivorship. Explanation I to the Section provides : for the purpose of this Section, the interest of a Hindu Mitakshra copercenar shall be deemed to be the share in the



property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

20. Now, let us consider the present case at our hand. Satya Narain died leaving behind two sons, widow and two daughters. Therefore, had there been a partition prior to death of Satya Narain. Satya Narain would have got $\frac{1}{4}^{\text{th}}$ share. His wife, Panna Devi, would have got $\frac{1}{4}^{\text{th}}$ share and two sons each $\frac{1}{4}^{\text{th}}$ share. On the death of Satya Narain Prasad, his $\frac{1}{4}^{\text{th}}$ share devolve on his widow, two sons and two daughters equally, i.e., each will get $\frac{1}{5}^{\text{th}}$ of $\frac{1}{4}^{\text{th}}$, i.e., $\frac{1}{20}^{\text{th}}$. Therefore, the share of Panna Devi, the widow will be $\frac{1}{4}^{\text{th}} + \frac{1}{20}^{\text{th}}$ and the two daughters share will be $\frac{1}{20}^{\text{th}}$ and $\frac{1}{20}^{\text{th}}$ each. Since the plaintiffs are widow and two daughters, their share will be $\frac{1}{4}^{\text{th}} + \frac{1}{20}^{\text{th}} + \frac{1}{20}^{\text{th}} + \frac{1}{20}^{\text{th}} = \frac{2}{5}^{\text{th}}$. The learned trial Court has not considered the share of the parties in the light of the decision of Hon'ble Supreme Court and according to law. Therefore, the finding of the trial Court on the point of share is hereby reversed and it is held that the plaintiffs are entitled to $\frac{2}{5}^{\text{th}}$ share jointly.

21. In the result, this First Appeal is allowed in part and the Judgment and Decree of the trial Court is modified to the extent that the plaintiff's suit is decreed and it is held that the plaintiffs



are entitled to get 2/5th share in Schedule II and III and the defendant No.1 and 2 will get 3/5th share. In the facts and circumstances of the case, the parties shall bear their own cost.

(Mungeshwar Sahoo, J)

Sanjeev/-

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