

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.423 of 1993

Against the Judgment and Decree dated 31.03.1993 passed by Vth Subordinate Judge, Gopalganj in Partition Suit No.119 of 1984 / 26 of 1991.

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Sheoji Sah & Ors.

....Plaintiffs- Appellant/s

Versus

Mukh Narain Sah & Ors

.... ...Defendants-Respondent/s

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Appearance :

For the Appellant/s : Mr. Dhanjay Kumar, Advocate
Mr. Sunil Prasad, Advocate

For the Respondent No.1 : Mr. Yogendra Prasad Sinha, Advocate

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Dated : 5th 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 Judgment and Decree dated 31.03.1993 passed by Vth Subordinate Judge, Gopalganj in Partition suit No.119 of 1984 / 26 of 1991 whereby the learned trial Court has dismissed the plaintiff appellant's suit for partition.

2. The plaintiffs appellants filed aforesaid partition suit



praying for separation of his share measuring 10 katha 16 ½ dhur out of Schedule I land and ¼ share in Schedule II land (hereinafter referred to as 'suit land').

3. The plaintiff claimed the aforesaid relief alleging that Somari Sah had four sons, namely, Ramdhari Shah, Lakhan Sah, Jhapas Sah and Laxman Sah. The son of Ramdhari Sah, namely, Mukhlal Sah is defendant No.1 and the sons of Jhapas Sah are the plaintiff. Laxman Sah and Lakhan Sah both died leaving behind only one daughter each who are defendant No.2 and defendant No.3 respectively. The defendant No.5 to 8 are daughters of Ramdhari Sah. All the four brothers have died. Defendant No.4 is a purchaser from Lakhan Sah. There had been no partition between the parties and they are still joint. However, they cultivate the lands according to their convenient.

4. The further case of the plaintiff is that Somari Sah had 18 katha 11 dhur kasht land and 1 katha 2 dhurs homestead land which are the suit land. Lakhan Sah sold 3 katha 1 ¾ dhur to defendant No.4 out of his own share and remaining 1 katha 11 dhurs was sold by defendant No.3 to the plaintiff and defendant No.2 sold his entire share under Schedule I to the plaintiff. Taking undue advantage of weakness of the plaintiff, the defendant No.1 is constructing his house



without there being any partition. Hence the suit was filed.

5. Only defendant No.1 filed contesting written statement, whereas defendant No.2 and 3 filed separate written statement supporting the plaintiff's case. Therefore, the main contesting defendant is defendant No.1. His main defence is that there is no unity of title and possession. Somari Sah had two wives and Ramdhari Sah was born from his first wife and the rest three sons were born from his second wife. A partition took place by metes and bonds between the four sons of Somari Sah on 15.06.1960 and Schedule II land was allotted to the share of Jhapas Sah, Ram Lakhan Sah and Laxman Sah only. Ramdhari Sah did not get any share in Schedule II. In Schedule I land 9 katha 5 ½ dhur in the west was allotted to the share of Ramdhari and remaining 9 kahta 5 ½ dhur in the east was allotted to rest three brothers and two koras were prepared and both the parties signed on it and the Panches also signed. Since this partition, the parties are coming in separate possession of their respective shares. Ramdhari Sah had constructed his own house on plot No.327. Therefore, the Panches did not allot him any share in Schedule II.

6. 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 plaintiffs got any cause of action for the suit?
- (iii) Is there unity of title and possession in between the parties?
- (iv) Is the court fee paid sufficient?
- (v) Is the suit is bad for partial partition?
- (vi) Is the story of previous partition as alleged by defendant No.1 correct?
- (vii) Are plaintiffs entitled to the relief, claimed for?

7. After hearing the parties and on the basis of evidences and materials available on record, the learned trial Court recorded clear finding that there had been complete partition between the parties and accordingly dismissed the plaintiff's suit.

8. The learned counsel for the appellant submitted that the learned trial Court mis-appreciated the evidences of the plaintiff and recorded wrong finding. Moreover, the trial Court recorded finding that partition took in or about 1935 which is not the case of any party. According to the learned counsel, the defendants nowhere pleaded in the written statement that when and in what manner, the partition took place but the Court below accepted the version of the witnesses who stated that partition took place 25 years prior to 15.06.1960. The



learned court below did not consider the documentary evidences properly, such as the mortgage deed and the sale deed ext. 'B' and 'C' respectively.

9. The learned counsel for the appellant further submitted that if partition took place 25 years prior to 1960 then what was the reason that the Yadasta Kora was prepared in the year 1960, no reason has been assigned and in fact the Kora ext. 'A' is false, created document. No evidence is there in support of the fact that it bears thumb impression or signature of father of the plaintiff. All the punches who signed on ext. 'A' are dead person. The learned counsel further submitted that the Court below did not consider the ext. '1' and '1/A' the sale deeds whereby the defendant No.2 sold her entire $\frac{1}{4}$ share to the plaintiff and defendant No.3 sold some land out of her $\frac{1}{4}$ th share and thus the plaintiff claimed 10 katha 16 $\frac{1}{2}$ dhur out of Schedule I and. On these ground, the learned counsel submitted that First Appeal be allowed and after setting aside the impugned judgment and decree, the plaintiff's suit be decreed.

10. On the other hand, the learned counsel for the respondent submitted that according to the plaintiff's case itself, there is inter se transaction between the parties and defendant No.2 and 3 themselves sold to the plaintiff. If there had been no partition then how the



defendant No.2 and 3 would have sold lands to the plaintiff. Moreover a Yadasta Batwara is there which is never challenged by either father of the plaintiff or by the plaintiff. Therefore, after expiry of limitation period, the plaintiff now cannot be allowed to say that the document is created document. It is not the case of the plaintiff that we had no knowledge about the Yadasta Batwara paper ext.'A'. Moreover, all the witnesses adduced by the defendants have fully supported the fact of partition between the four branches and the Court below considered each and every evidences of the witness and recorded the finding that there had been previous partition. In such view of the matter, there is no merit in this First Appeal accordingly, the learned counsel submitted that the appeal may be dismissed.

11. In view of the above submission of the learned counsel for the parties, the only point arises for consideration is whether there is unity of title and possession between the parties or there had already been previous partition or not.

12. The simple case of the plaintiff is that there has been no partition between the parties and the defendant No.2 sold her entire share to the plaintiff and likewise defendant No.3 sold 1 katha 11 dhur out of share of Khas to the plaintiff in support of their respective cases.



13. Since the presumption that Hindu Family is presumed to be joint, the onus is on the defendant to prove the fact that there had already been partition. In discharge of this onus the defendant have adduced evidences. The defendant No.1 has been examined as D.W.1 who has fully supported the case pleaded in the written statement. The other witnesses, D.W.2 to 5 are all the co-villagers and all of them have stated that there had already been previous partition between the four branches. Over and above these oral evidences, the defendants have also produced ext. 'A' which is dated 15.06.1960. From perusal of this ext. 'A', it appears that the parties have put their Left thumb impression in it and in this ext. 'A', it is clearly mentioned that there had been previous partition between the parties 25 years ago and now, i.e., in the year 1960, Ramdhari has constructed his house and in connection with construction of this House and preparation of roof, the dispute arose between the parties and so that Panches prepared this ext. 'A'. It may be mentioned here that this ext. 'A' is never challenged by the plaintiff. His father Thapas has put his left thumb impression. No declaration have been sought for with regard to this document. No case is pleaded by the plaintiff that in fact his father had not put his left thumb impression on it. In such circumstances, the validity or otherwise of ext. 'A' cannot be investigated in this case, particularly when there is no challenge to it. No case is made out



that the plaintiff had no knowledge of a existence of this document. This document is of the year 1960 and the suit has been partitioned for partition in the year 1984, i.e., 24 years of this ext. 'A' without seeking any declaration with regard to it. The Limitation Act provides that any declaration with respect of a document or for setting aside limitation is 3 years as provided under Article 58 and 59 of the Limitation Act.

14. Ext. B is a mortgage deed which is dated 10.05.1950 and ext. 'C' is sale deed dt.20.01.1967. These documents shows independent transaction were made by separate branches. By ext. 'C' Lakhan Sah has sold land to Ram Chandra Choudhary wherein he has clearly mentioned that the lands which he is selling was in his possession and he delivered possession to the purchaser. By this sale deed, specific land giving boundary was sold. The question is that there had been no partition between the parties then how Lakhan Sah came in exclusive possession and sold and how he delivered possession to the purchasers. This clearly supports that after the dispute was settled by the Panches through ext.'A', the parties started selling their respective properties. '

15. On the other hand the plaintiff witnesses, P.W.1, 2 and 3 have all stated that 15-16 years ago, all the branches separated from



one another but there had been no partition. Although there is no pleading in the plaint that 15-16 years the parties separated but the witnesses had admitted separation. These are the only oral evidences adduced by the plaintiff. The plaintiff mainly relied on ext. '1' and '1/A' which are sale deeds. From perusal of these sale deeds, it appears that particular property giving boundary were sold by the defendant to the plaintiff. If there was no partition how particular property were shown mentioning in the sale deed that those are the property of the vendors. Moreover, both these sale deeds are inter se transaction between the co-sharer. A Division Bench of this Court in ***AIR 1977 Patna 59*** has held that inter se transaction between the parties is a strong evidence of partition. If there had been no partition between the parties then how one co-sharer will sell a particular property to the other co-sharer.

16. The learned counsel for the plaintiff submitted that shares have been sold. From perusal of the sale deed, I find that there is no such mention that shares are sold but I find that the particular property giving boundary have been shown which clearly indicate partition and exclusive possession of the parties.

17. In view of my discussion, I find that the defendants have been able to prove previous partition between the four branches and,



therefore, there is no unity of title and possession between the parties.

The finding of the trial Court on this point is, therefore, confirmed.

The point is answered against the appellant.

18. In the result, this First Appeal is dismissed. In the facts and circumstances of the case, the parties shall bear their own cost.

(Mungeshwar Sahoo, J)

Sanjeev/-

AFR/NAFR	NAFR
CAV DATE	20.06.2017
Uploading Date	06.07.2017
Transmission Date	06.07.2017

