

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.71 of 2015

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1. Baswa Devi, Daughter of Late Bhagan Ram, Wife of Ram Swaroop Ram, Resident of village- Khudwa, P.O. & P.S.- Obra, District- Aurangabad
 2. Kalbasia Devi, Daughter of Late Bhagan Ram, Wife of Ram Bilash Ram, Resident of village- Englishper, P.S.- Baroon, District- Aurangabad
 3. Peyariya Devi, Daughter of Late Bhagan Ram, Wife of Nihora Ram, Resident of Village- Imloana, P.S.- Obra, District- Aurangabad
 4. Moti Lal Ram @ Motilal
 5. Jagbasia Devi wife of late Hira Lal Ram R/o vill-Kusi, P.S. Aurangabad Muffasil, Dist. Aurangabad.
 6. Shanker Ram
 7. Ram Pravesh Ram
 8. Awadhesh Ram, defendant dts. 4 to 8 are sons of Late Bhagan Ram
 9. Arun Kumar
 10. Barun Kumar
 11. Tarun Kumar, defendant no.s 9 to 11 are minor sons of Moti Lal Ram under the guardianship of their father Moti Lal Ram
 12. Pappu Ram
 13. Kapu Ram, defendant nos. 12 and 13 are minor sons of Hira Lal Ram @ Hira Ram under the guardianship of their father Hira Lal Ram @ Hira Ram
 14. Manu Ram
 15. Chunu Ram
 16. Lallan Ram, defendant no2. 14 to 16 are minors sons of Shanker Ram under the guardianship of their father Shanker Ram. All are residents of village- Kushi, P.S.- Aurangabad (Mufasil), District- Aurangabad

.... Appellant/s

Versus

1. Laxmi Devi, wife of Surat Ram, Resident of village- Mango Chak, P.S. & P.O.- Jamshedpur (Jharkhand)
2. Sushila Devi, wife of Ram Pravesh Ram, Resident of village- Dadhapar, P.S.- Deo, District- Aurangabad
3. Sunana Devi, Wife of Jagdish Ram, Resident of village- Nirpur, P.S.- Goh, District- Aurangabad
4. Suresh Kumar, Son of Tuleshwar Ram,



5. Vinod Kumar
6. Vijay Kumar
7. Ajay Kumar, plaintiff Nos. 5 to 7 are minor sons of Suresh Kumar, under the guardianship of their father Suresh Kumar All are residents of village- Kushi, P.S.- Aurangabad (Mufasil), District- Aurangabad.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sunil Kumar Dubey, Adv.

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 21-04-2017

Heard learned counsel for the appellants.

The defendants in the suit are the appellants in this appeal against the judgment and decree of affirmance granting the decree to the plaintiffs as prayed.

The plaintiffs filed the suit for partition of their share in the suit properties described in detail in the schedule of the plaint. The contesting defendants however claimed the suit properties to be their self acquired properties or at least having exclusive title over the same and denied unity of title and possession over the suit properties between the parties.

Both the courts below have returned the findings on the issues in favour of the plaintiffs. The suit was thus decreed and thereafter the appeal by the defendants has been dismissed by the impugned judgment and decree.



Learned counsel for the appellants has raised two fold submissions. Firstly, it has been contended that the property subject matter of the suit which has been acquired by the defendant no. 1 by settlement through Hukumnama in his own names is the exclusive property of the defendants and therefore, the learned courts below have wrongly granted the decree for partition to the plaintiff. It has been next contended that the defendants have raised the plea of bar of the suit under Section 4 (b) and 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 in the written statement itself but both the courts below have wrongly not considered the said aspect. The learned counsel has placed the portions of the findings by the courts below as well as has invited the attention of the court to the issues framed in the suit by the trial court to substantiate his contention. No other submission has been made on behalf of the appellants.

After considering the submissions and perusal of the judgments of both the courts below, it is manifest that the relationship between the plaintiff and the contesting defendant no. 1 is an admitted fact between the parties. It has been accepted that the plaintiff and the defendant no. 1 are full brothers. The courts below have taken into notice the deposition of the defendant no. 1 where in paragraph-17 and 18 he has accepted that his father was in service outside and



therefore he was managing the affairs of the family. This categorical statement by the contesting defendant supports the case of the plaintiff that the defendant no. 1 was the Karta and manager of the family. The defendant no. 1 has further also admitted that there has been no partition between the plaintiff and the defendants. In the backdrop of these facts, both the courts below have come to the finding that the land acquired by settlement through Hukumnama in the name of the defendant no. 1 is a joint family property in which the plaintiff is entitled to have share. The further plea of the contesting defendant with regard to acquisition of the property by sale deed jointly with the plaintiff on the basis of agreement that the plaintiff would pay back the part of the consideration money to the defendant no. 1 has also been disbelieved by the learned courts below on the basis that there is no cogent and convincing evidence on behalf of the defendants to substantiate the said agreement with the plaintiff with regard to the property acquired by the said sale deed.

Learned counsel for the appellants has strongly and emphatically submitted that the issue relating to the bar of the suit by Section 4 (b) and 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 can be raised even at the second appellate stage and the same is definitely a substantial questions of law arising in the appeal. However, the principle in this



regard has been settled by a Bench decision of this Court in the case of **Jai Prakash Prasad Vs. Rameshwar Prasad, A.I.R. 1986 Pat. 239** where in identical fact situation their lordships have held as follows:-

“3.....It was pinpointed that the deceased father of appellant no. 1 was the plaintiff in the suit and was well aware of the notification during the trial itself. He sought and invited a judgment despite the notification. Not only that, he was able to secure a judgment in his favour. When the matter was carried by the defendants to the first appellate Court, he sat on the fence and invited the Court below to decide the appeal on merits. Now that the case has gone against him, it is on principle impermissible to permit the appellants to raise a question which their predecessor plaintiff could well have raised ten years ago at the stage of the trial of the suit itself. We are of the view that on principle the issue of abatement cannot be permitted to be raised in this context.

“5.....It is thus manifest that these are innumerable issues of fact which must be raised at the very first instance when they become available to the litigant and be adjudicated by the Courts below. This not having been done either deliberately or



negligently, such issues of fact cannot now be raised in second appeal.....For this added consideration also, the question of abatement in this context cannot be permitted to be raised for the first time in second appeal.

9.....To conclude on the main aspect, it must be held that a defaulting litigant cannot be allowed to raise a plea of abatement under Section 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act for the first time in second appeal if he designedly or negligently failed to do so in the trial Court and in the first appellate Court.....”

In the present case, it is evident that though the plea of bar of the suit Section 4 (b) and 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 was raised by the defendant-appellants in the written statement itself but it does not appear from the judgments of both the courts below or from the memo of the present second appeal that such plea was ever pressed by the appellants either before the trial court or the appellate court. On behalf of the appellants, no material on record could be pointed out to show or establish that the defendant-appellants after the judgment in the trial court going against them have raised this issue before the appellate court. The issue of bar of the suit either under Section 4 (b)



and 4 (c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 necessarily is a mixed questions of fact and law as the finding on the basis of the materials on record is required to be recorded regarding the suit land being covered by such notification. Tested on the anvil of the Bench decision in the case of **Jai Prakash Prasad** (supra), this Court does not find substance in the submission on behalf of the appellants that such plea can be allowed to be raised for the first time at the second appellate stage in the present facts of the case.

The findings of facts by both the courts below have been recorded on the basis of evidence which were acceptable and could have been relied upon. This Court does not find any perversity or unreasonableness in the same in any manner.

Ex consequenti, this Court comes to the conclusion that there is no substantial question of law arising for consideration in this appeal which is, accordingly, dismissed.

Devendra/-

(V. Nath, J)

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