

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.401 of 1974

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Bhikhari Rai & Ors

.... Appellant/s

Versus

Chani Lall Rai & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. MATHURA NATH ROY
Mr. Prabhat Kumar(Roy)

For the Respondent/s : Mr. ARUN BIHARI MATHUR
Mr. R.C.Thakur
Mr. Jogesh Ch.Verma
Mr. S.N.Ali
Mr. Jitendra Kr.Sinha
Mr. Dhananjay Kumar Upadhyay

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR
CAV JUDGMENT

Date: 12 -09-2018

This is an appeal filed by the plaintiffs against the judgment dated 15.02.1974 and decree dated 01.03.1974 passed by Subordinate Judge, Motihari in Partition Suit No.228 of 1968 whereby and whereunder the suit of plaintiffs was dismissed on contest.

2. The admitted facts are that the grandfather of plaintiffs Dilchand Rai and Julum Rai were full brothers and they were married in the same family with the daughters of Dasai Rai. Both the brother inherited the property of their father-in-law in equal share and the same were recorded in survey Khatiyani in their names. The descendants of both the brothers continued joint constituting joint family. The descendants of elder brother are appellants (plaintiffs) and descendants of younger brother are respondents (defendants).



3. The plaintiffs filed the aforesaid suit for partition and separate possession of half share in the property mentioned in schedule-2 and 2 (Ka) of the plaint. Their case inter-alia is that out of the income of the Khatiani land, some land was purchased in the name of members of family of both branches during jointness which have been mentioned in schedule-2 (ka) of the plaint. The land inherited by their ancestors from their father-in-law were recorded in survey Khatian in the joint name of Dilchand Rai and Julum Rai and the same have been mentioned in schedule-2 of the plaint. The share of plaintiffs in both the schedule is to the extent of half.

4. The defendants who are descendants of younger brother Julum Rai jointly filed written statement. They have admitted their relationship and also the case of plaintiffs as regards inheritance of schedule-2 land from the father-in-law. The defendants however have denied the case of plaintiffs as regards acquisition of schedule 2(ka) land from the income of ancestral land mentioned in schedule-2 of the plaint. They have asserted that their ancestor Julum Rai (younger brother) was 'Gumasta' of Madhuban Estate and he had good income from the said service and he acquired the land of schedule-2 (ka) out of his personal income. Their further case is that there had been a complete partition in the family about 25 to 30 years ago in which Parmeshwar Rai, son of Dilchand Rai got half share in schedule-2 and



1/4th share in schedule 2(ka) property. The younger brother Julum Rai and his three sons got half share in schedule 2 and 3/4th share in schedule-2 (ka) of the plaint and accordingly both the branches started cultivating the land of their share. It is stated that as Parmeshwar Rai was nephew of Julum Rai and so irrespective of the fact that the land of schedule-2(ka) was the self acquired land of Julum Rai, he gave him 1/4th share in the same.

5. Their further case is that the plaintiffs at the instigation of some of their enemies started claiming land in schedule-2(ka) of the plaint for which a Panchayati was convened. The Panches confirmed the previous partition and allotment of share in the properties. The details of land given to the defendants have been mentioned in schedule given at foot of the written statement. They have further stated that some of the lands have not been included in the schedule given in the plaint and so the suit is bad for partial partition. The defendants on the aforesaid pleadings prayed for dismissal of the suit.

6. On the basis of the pleadings of both the parties, the court below framed following issues.

- (i) How the plaintiffs got any cause of action for the suit?
- (ii) Is the suit bad for partial partition?
- (iii) Is the story of previous partition as set up by the defendants correct?
- (iv) Are the plaintiffs entitled to a decree for partition? If



- so far what share and in respect of what properties?
(v) To what relief, if any, the plaintiffs are entitled?

7. The plaintiffs in support of their case have examined 15 witnesses. Out of them PW-15 Bhikhari Rai is plaintiff no.1 and PW1 to 13 are their villagers and have been examined on the point of joint cultivation of both the parties. PW-14 is a formal witness and he has proved the rent receipts as Ext-1 to 1/K.

8. As against this the defendants have examined 14 witnesses. PW-10 Ram Lakhan Rai is defendant no.8 and DWs-1 to 7 and 9 are either villagers of defendants or residents of adjoining village. DW-8 is formal witness and he has proved registered sale deed dated 20.08.1948 executed by Parmeshwar Raut in favour Bhabhichhan Raut as Ext-A. PW-13 has proved rent receipts as Ext-B series. They have produced certified copy of Khatian which has been marked as Ext-C.

9. The learned trial court after appreciating the evidence of both the parties decided the issue nos.2 and 3 against the plaintiffs and held that the defendants have succeeded in establishing their case of previous partition and also that the suit is bad for partial partition. The court below in view of findings given under issue nos.2 and 3 held that the plaintiffs were not entitled to decree for partition and accordingly dismissed the suit.



10. In view of submission of both the parties, the point arises for consideration as to whether the findings of court below that the defendants have succeeded in establishing their case of previous partition and that the suit is bad for partial partition are correct or it requires any interference.

11. The defendants in their written statement have stated that both the brothers Dilchand Rai and Julum Rai were joint before revisional survey and all the joint family properties were accordingly recorded in their joint names having equal share. After survey operation, Julum Rai acquired land in the name of his three sons and nephew Parmeshwar Rai out of his personal earning and savings. Their further case is that after few years, both the families partitioned the entire land mutually and each branch got half share in the ancestral land. The son of Dilchand Rai got 4 anna and three sons of Julum Rai got 12 anna share in the purchased land irrespective of sale deeds standing in the name of different persons. After few days, difference cropped among the family members for which a Panchayati consisting of eleven members was convened. In said Panchayat, the Panches confirmed the earlier mutual partition and an award was also prepared under the signature of eleven panches and witnesses. The plaintiffs had also filed a complaint before Gram Panchayat which was dismissed in view of earlier partition. The defendants have given



details of land which were given in their share in schedule given at the foot of written statement. Thus, in view of pleadings of the defendant as regards previous partition the court below shifted the onus of proving the case of previous partition on the defendants.

12. The defendants in order to prove their case have examined altogether 13 witnesses in support of their case of previous partition. The witnesses are DW-1 Satya Narain Singh, DW-2 Jayshri Lal Rai, DW-3 Ram Krit Mahto, DW-4 Ramashish Sah, DW-5 Mahraj Rai, DW-6 Chhatradhari Mahto, DW-7 Butai Mahto, DW-8 Bhabhichan Rai, DW-11 Keshwar Rai and DW-13 Sahdeo Mahto. These witnesses are villagers of the parties and they have deposed on the point of partition and separate cultivation by both the parties. DW-10 Ram Lakhan Rai and DW-12 Chanilal Rai are defendant nos.8 and 1 respectively. DW-9 Badri Narain Prasad is a formal witness and he has proved a registered sale deed as Ext-A. The defendants have exhibited rent receipts as Ext-B to B/17 and Khatians as Ext-C.

13. As against this the plaintiffs have examined fifteen witness. PW-1 Bhikhari Baitha, PW-2 Ramashish Sahni, PW-3 Amichand Mahto, PW-4 Nathuni Bhagat, PW-5 Badri Sahni, PW-6 Bilat Sah, PW-7 Rawan Rai, PW-8 Suryadeo Giri, PW-9 Ram Sewak Rai, PW-10 Raushan Sahni, PW-11 Isar Sah, PW-12 Methar Hajra and PW-13 Heera Rai are witnesses on the point of jointness of both



the parties. PW-15 Bhikhari Rai is plaintiff no.1 and PW-14 Shatrughan Jha is a formal witness and he has proved rent receipts as Ext-1 to 1/f.

14. The trial court on appreciation of the entire evidence had concluded that the defendants have succeeded in establishing their case of previous partition and further that the suit is bad for partial partition. On the point of partition, the defendants specific case at para-9 of written statement is that both parties mutually partitioned their property immediately after revisional survey. In the said partition, entire ancestral as well as acquired landed properties were partitioned. The branch of defendants got three share and Parmeshwar Rai who was father of plaintiffs got one share. The defendants have pleaded at para-10 of their written statement that at the instigation of some of the enemies, Parmeshwar Rai started creating trouble for partition, for which a Panchayati was convened and as per decision of Panches, Parmeshwar Rai was given half share in ancestral and 1/4th share in the acquired property of Julum Rai. The decision of Panches was reduced on paper and the parties and witnesses put their signature /thumb impression on the said decision.

15. In view of specific case of previous partition as set up by the defendants, they are required to prove the same by oral and documentary evidence. DW-6 at para-5 of his evidence has stated that



the decision was given in writing. DW-11 at para-1 of his evidence has stated that both parties had partitioned their property on paper and he was one of the Panch and he had also put his signature on the award. The said Panchayati had taken place in the month of April-May 1948. DW-12 is defendant no.1 and he has also stated that the award was prepared and one copy was given to the defendants also but the said award has got misplaced. DWs-11 and 14 have been examined on the point of Panchayati. Both have stated that they had decided the dispute of parties and an award was prepared under their signatures. Thus, I find that the defendants' witnesses have categorically stated about the manner of partition between the parties which took place in or about 1950. There is absolutely no cross examination or any suggestion to any of the witness to this effect that no such partition had taken place.

16. The witnesses examined on behalf of plaintiffs in their cross-examination have admitted that both parties were/are cultivating their land and reside separately since long. PW-8 and 9 have further stated that both the parties have partitioned their 'Khatiani' land and dispute is only to partition the purchased land.

17. So far documentary evidence is concerned, the defendants have filed rent receipts Ext-1 to 1/K which relate to year 1966-67 to 1971-72 standing in the name of defendants. The plaintiff



no.1 Bhikhari Rai in his evidence has admitted that the rent receipts were being granted with respect to ancestral and purchased land in the name of his father and before that in the name of his grand father. The oral and documentary evidence thus show that the lands were separately mutated in the name of both parties and they were paying rent since last 25 to 30 years before the filing of the suit.

18. On the point of partial partition, the defendants have asserted that the land which are mentioned in schedule given at the foot of their written statement were given in the share of defendants. This fact has not been denied by the plaintiffs in their evidence. The learned court below at para-29 of the judgment has mentioned that the land of Khata no.473, 924, 292, 264 do not find mentioned either in schedule-2 or 2(ka) of the plaint. These lands were also belonging to the joint family of both the parties and were given in the share of defendants but the plaintiffs have not sought partition of these lands. The plaintiffs have not given any explanation for not including the same in the plaint for partition.

19. The document Ext-A is registered sale deed executed by Parmeshwar Rai father of plaintiff nos.1 to 3 in favour of Bhabhichhan Rai (DW-8) with respect to 2 katha (14 decimal) land of plot no.7356. The total area of 7356 as per Ext-C (khatian) is 12 Katha 2 dhurs (57 decimals). The plaintiffs have sought partition for



only 10 Katha 2 dhurs after excluding the said 2 kathas which was already sold by their father as per Ext-A. The defendants have asserted that they got 6 kathas 1 dhur in the said plot from east which is mentioned in schedule given in their written statement. The vendor of sale deed Ext-A has mentioned the name of Chunni Lal Rai son of Julum Rai (defendant no.1) in the eastern and western boundary of plot no.7356 and his own name (Khas) in southern boundary. The documents, Ext-B series show that the defendants are paying rent since the year 1966-67. Thus, I find that the oral and documentary evidence proves the case of earlier partition among the parties.

20. The trial court on appreciation of oral and documentary evidence on record has concluded that the defendants have succeeded in proves the case of earlier partition. I also find that there is neither unity or title nor possession among the parties and the claim for partition has rightly been refused by the learned court below.

21. In the result, this appeal fails and is accordingly, dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

Brajesh Kr./-

AFR/NAFR	NAFR
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(Sanjay Kumar, J)

