

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.836 of 1979

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Bagar Sah & Ors

.... Appellant/s

Versus

Smt. Nagia Devi & Ors.

.... Respondent/s

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Appearance :

For the Appellant/s : Md. Waliue Rahman, Adv.
Mr. Nishant Kumar Sinha, Adv.
For the Respondent/s : Mr. Arun Kumar Prasad, Adv.
Mr. Ram Shankar Sahay, Adv.

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

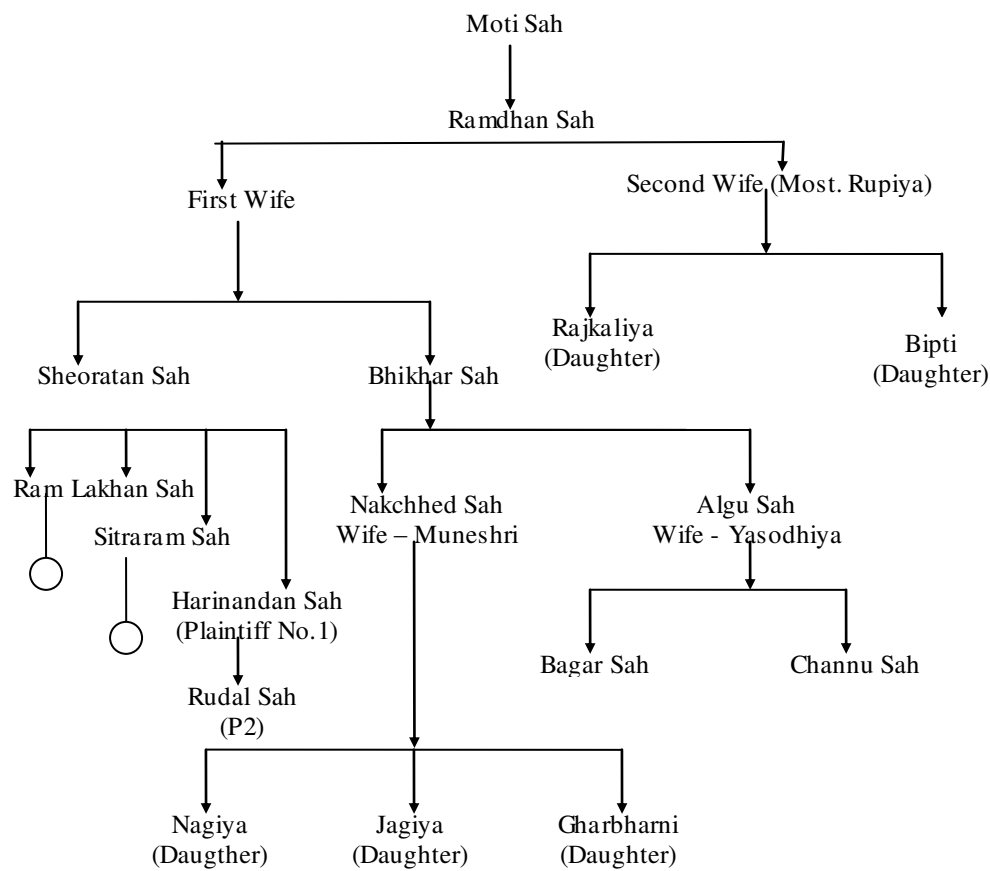
Date: 17 -07-2018

The appellants are the defendants in a partition suit no. 146 of 1975 filed by the respondent Rudal Sah (since dead) and his father as plaintiffs, seeking partition of various properties specifically mentioned in Schedule 2 of the plaint. Out of two plaintiffs, plaintiff no.1 died during trial before the court below. The suit was contested by defendants and it was decreed in favour of sole plaintiff as per judgment and decree dated 16.08.1979 passed by Sri Dinesh Narain Pathak, Sub Judge-I, Bettiah, West Champaran. The sole plaintiff who was arrayed as respondent no. 1 in this appeal died issueless and his name has been expunged as per order dated 26.03.2008.

2. At the outset, the following genealogical table which is appended as Schedule- 1 of the plaint, is being set out to enable a clear and easy understanding of the facts and the findings with regard to the case of the parties that would be arrived at in the course of the deliberations that follows:



2/11
Genealogical Table



3. The partition suit was filed by Harinandan Sah son of Sheoratan Sah and his son Rudal Sah claiming half share in the suit property mentioned in schedule-2 of the plaint.
4. According to the plaintiffs, one Ramdhan Sah who was common ancestor of both the parties had two wives. From the first wife he had two sons namely Sheoratan Sah and Bhikhar Sah and from the second wife he had two daughters namely Raj Kaliya Devi and Bipti. The second wife Most. Rupiya died after revisional survey leaving behind the aforesaid two daughters. The said Ramdhan Sah, his first wife and his elder son Sheoratan Sah had died prior to revisional survey. Sheoratan Sah died leaving behind three sons Ram Lakhan Sah, Sitram Sah and Hari Nandan Sah (Plaintiff No.1) and Bhikhar Sah died after revisional survey leaving behind two sons



Nakchhed Sah and heirs of his second son Algu Sah. Out of three sons of Sheoratan Sah, two namely Ramlakhan Sah and Sitaram Sah died issueless. The plaintiffs have further asserted that Bhikhar Sah died after revisional survey leaving behind two sons. Further case is that one Bhajan Sah, S/o Chuni Sah was a distant relative of Ramdhan Sah. He was living with him and was being maintained by him. This Bhajan Sah used to look after the affairs of Ramdhan in his life time. After the death of Ramdhan Sah and Sheoratan Sah, the name of Bhajan Sah was wrongly and mistakenly entered in revisional survey khatiyani alongwith other family members though Bhajan Sah had no right title or any interest in their ancestral lands. They have alleged that Bhajan Sah died issueless after revisional survey, living with the plaintiffs and his 'Sharadh' was performed by Bihkhar Sah. After the death of Ramdhan Sah and Sheoratan Sah, Bhikhar Sah became 'Karta' of the family and in his life time after death of Bhajan Sah, plaintiff no.1, Ramlakhan Sah and Sitaram Sah on one side and Bhikhar Sah on the other separated amongst them in mess and other affairs though their ancestral land was not partitioned by meets and bounds yet the parties had been cultivating some lands separately according to their convenience and some lands were being cultivated jointly. It is also alleged that the share of the plaintiffs in land mentioned in schedule no.2 is half and remaining half share belongs to defendants first party. The plaintiffs have sought relief to allot the land in the share of defendants 1st party which have been sold by them in favour of defendants 2nd party.

5. The defendants 1st party contested the suit by filing written



statement. The case of defendants *inter-alia* is that the suit as framed is not maintainable and the plaintiffs have got no unity of title and possession. They have alleged that the genealogical table given in the plaint is incomplete as the heirs of Ramlakhan and Sitaram have totally been left out from the same. They have further asserted that Moti Sah and Chuni Sah were full brothers and this fact has been concealed by the plaintiffs. The said Ramdhan Sah and Bajan Sah were living separately though the lands were joint and crops were being divided by them. Bhajan Sah had his separate cloth-shop and money lending business. Their further case is that Ramlakhan and Sitaram died prior to revisional survey and Bhajan died 7-8 years thereafter. After the death of Bhajan Sah, Bhikhar Sah lived with his step mother Rupiya while three sons of Sheoratan Sah lived jointly quite separate from Bhikhar Sah and accordingly in revisional survey Bhajan Sah was given two shares, Bhikhar Sah and Rupiya as one share and three sons of Sheoratan Sah as one share. They have further stated that Bhajan Sah acquired most part of the properties out of his own earnings and that is why he was given two shares in the Survey Khatiyani. All the sharers have been dividing the crops according to the share given in Khatiyani. They have denied that Ramlakhan Sah and Sitaram Sah died issueless. It has been stated that they died leaving behind the daughters who have not been impleaded as party to the suit. They have thus denied the correctness of genealogical table given by the plaintiffs and the allegations that Bhajan Sah had no concern with the family of the parties and that he never looked after the affairs of the family and that the entries in Khatiyani as



incorrect.

6. The defendants have asserted that Bhajan Sah had his share to the extent of 8 annas and that of Ramlakhan Sah & others to the extent of remaining half. They have denied that Bhikhar Sah became Karta of the family after the death of Ramdhan Sah and Sheoratan Sah and also that no separation took place in the life time of Bhikhar Sah after revisional survey rather he had separated from Sheoratan's branch prior to revisional survey. They have admitted the joint cultivation of the suit lands and that the crops were being divided accordingly. They have claimed share in the suit properties to the extent of 12 annas and that of plaintiff, Ramlakhan Sah and Sitaram Sah to the extent remaining 4 annas. The defendants have denied the other allegation also and prayed for dismissal of the suit.

7. On the basis of the pleadings of the parties the court below framed following issues for determination.

- i. Is the suit has framed maintainable?
- ii. Have the plaintiffs got any cause of action or right to sue?
- iii. Have the plaintiffs got unity or title and possession in respect of the suit lands?
- iv. Whether Bhajan Sah had got any right, title and interest in the suit lands and he was separate from Bhikhar and sons of Sheoratan Sah?
- v. Whether Bhikhar was separate from sons of Sheoratan Sah at the time of death of Bhajan Sah?
- vi. Whether the plaintiffs are entitled to get a decree for partition in respect of the suit lands, if so, to what extent and in respect of which lands?
- vii. To what other relief, or reliefs, if any, are the plaintiffs entitled?

8. The plaintiffs in support of their case have examined

PW-1 Shambhu Sharan Prasad, PW-2 Chinta mani Tiwari, PW-3



Suresh Dubey, PW-4 Mohan Das, PW-5 Gopal ji Dubey, PW-6 Doma Sah, PW-7 Ram Briksha Prasad, PW-8 Ganga Sah, PW-9 Thag Sah, PW-10 Chandra Sah, PW-11 Mustakim Mian, PW-12 Kedar Nath Dubey, PW-13 Jagarnath Sah, PW-14 Rudal Sah. Out of them, P.Ws. 1, 2, 3, 5, 7 and 11 are formal witnesses and they have proved rent receipts. The documents produced and exhibited on behalf of plaintiffs are Ext 1 to 1/J; rent receipts; Ext 2 R.S. Khatian of Khata Nos. 444, 445, 446 and 638 of village Ghogha and Ext.3 certified copy of sale deed dated 13.02.1998 executed by Smt. Gharbharni Devi in favour of Sanjay Kumar and Ranjay Kumar.

9. As against this, the defendants have examined 16 witnesses; DW-1 Satyadeo Prasad, DW-2 Jeetan Mahto, DW-3 Kodo Sah, DW-4 Dilip Kumar, DW-5 Md. Jalil, DW-6 Kishundeo Sah, DW-7 Pathal Sah, DW-8 Lakhan Baitha, DW-9 Jhigan Sah, DW-10 Briksha Manjhi, DW-11 Shankar Prasad Sah, DW-12 Md. Salim, DW-13 Tulsi Prasad, DW-14 Satya Narayan Prasad, DW-15 Bagar Sah and DW-16 Chhathu Sah. Out of them, D.Ws.- 1, 4, 5, 11, 12, 13 and 14 are formal witnesses and they have proved rent receipts and some registered documents.

10. The learned trial Court after analyzing the oral and documentary evidence of both the parties decided the issue relating to genealogical table against the plaintiffs and decreed the suit in their favour. The learned court below held that at the time of death of Bhajan Sah, there had been no separation between Bhikhan Sah on one side and sons of Sheoratan on the other and Bhajan remained Karta of their joint family till he was alive.



11. The court below disbelieved the case of plaintiffs that Bhajan Sah had no concern with the family of plaintiff and defendants and on account of being distant relative, he used to look after the affairs of Ramdhan Sah. This issue has been decided against the plaintiffs. The court below decreed the suit holding that Bhajan Sah was related with the parties and he had interest in the suit property which on his death devolved jointly on both the parties. The court below decided issues as regards interest of Bhajan Sah in suit property as against the plaintiffs and decreed the suit for partition as claimed by them, i.e., to the extent of their half share in the suit property. The respondent-plaintiff appeared but he did not file any cross-appeal in order to assail the findings of lower court given against them and so the findings to this effect that Bhajan Sah was co-sharer of both the parties having half share has become final.

12. The appellants have assailed the findings and judgment of learned court below with respect to 1/4th share of plaintiff (respondent) in the suit property. According to appellants Bhikhar Sah inherited the share of Bhajan Sah on his death and on account of being nearest sapinda as per rule of survivorship. The brother of Bhikhar Sah was not alive and so the sons of Sheoratan Sah are excluded from the inheritance of Bhajan Sah.

13. In view of contentions of learned counsel for the appellant only point that arises for consideration is as to whether the plaintiffs who were grand-son and great grand-son of cousin brother of Bhajan Sah will inherit alongwith Bhikhar Sah who was nearer to Bhajan Sah being sons of his cousin brother. It is not in dispute that



Bhajhan Sah died leaving behind Bhikhar Sah who was son of his cousin Ramdhan Sah. The plaintiffs were the grand-son, great grand-son of Ramdhan Sah. It is also not in dispute that Bhikhar Sah being uncle of plaintiff Harinandan Sah was nearest Sapinda of Bhajan Sah. PW-4 at para-5 of his evidence has stated that Bhikhar Sah and his sons were separate from the sons of late Sheoratan Sah. PW-9 is labourer of plaintiffs. He has stated that all the lands belonging to the parties are Khatiani land. PW-10 in his evidence has stated that both parties were separate in mess but joint in cultivation and the said system is still continuing in the family. The evidence of PW-6 is contradictory to the evidence of PW-4. This PW-6 at para-2 has stated that the parties are cultivating their land separately. PW-4 at para-2 has stated that the land has not been partitioned among Bhikhar Sah, Ram Lakhan and Sitaram Sah. The lands were partly joint and partly separate. In cross-examination PW-4 says that Bhikhar along with his son was separate from remaining three brothers. The plaintiff and his witnesses in one tone have stated that the name of Bhajan Sah was wrongly recorded in Khatian along with two ancestors of plaintiffs and defendants and Bhajan Sah had no share in the suit property. The learned Court below disbelieved the case of plaintiffs on this issue and held that Bhajan Sah was cousin of Ramdhan Sah having half share in the suit property. This finding is final as none of the parties has challenged the same.

14. Now the point arises as to which of the parties will inherit the interest of Bhajan Sah in the suit property on his death.

15. As per admitted case of both the parties, Bhajan Sah



died leaving behind Bhikhar Sah, his son and great grandsons of his cousin brother. As per Article 34 of Hindu Law (Mulla), the property of Hindu Male governed by the Mitakshra Law devolves on his death on his coparceners by survivorship with respect to the undivided interest in the coparcenary property. In the case in hand I find that Bhajan Sah was the co-sharer of the ancestors of both the parties. The finding of court below on this point is final as none of the parties has assailed this finding. It is also not in dispute that Bhajan Sah died leaving behind one Bhikhar Sah (grandson of his uncle) and great grandsons (i.e. nephews of Bhikhar Sah). So according to Article 43 (para 9) brother's son succeeds before sons of brother's son's son. Thus the property of Bhajan Sah would devolve upon Bhikhar Sah and the nephews of Bhikhar Sah i.e. sons of his predeceased full brother are excluded.

16. Similar issue has been decided by Allahabad High Court in a case of Sher Singh Vs. Basdeo Singh reported in AIR 1928 Allahabad page 612 where the scheme of succession laid down in the Mitakshra has been discussed. The scheme laid down in the Mitakshra determining the order of succession has been discussed in detail. In part 2, Chap. 2, S, 1, p. 1., it is stated that the order of succession among all on failure of them, is next declared. The passage of Yajnyawalkya gives the order:

Brothers likewise and their sons..... On failure of the first among these, the next in order is indeed heir to the estate.

It is thus clear that brothers' sons come in only on failure of brothers. This is made fully clear in S. 4, ps. 7 and 8, which



provides that “on failure of brothers also, their sons share the heritage..... In case of competition between brothers and nephews, the nephews have no title to the succession ; for their right of inheritance is declared to be on failure of brothers.”

17. In the case of *Buddha Singh v. Laltu Singh* (1) their Lordships of the Privy Council, affirming the view of Allahabad Court held that brothers’ grandsons are included in the expression “brothers’ sons” and that they also are heirs. In that case the point did not arise and it was not decided what the rights inter se are between brothers’ sons and brothers’ grandsons.

Section 4, p. 5, quotes the general rule laid down by Manu. To the nearest sapinda the inheritance next belongs.” It would follow on principle that brothers’ sons would exclude brothers’ grandsons. P. 9., which gives brothers’ sons a title through their deceased father, applies to the case where death occurs before a partition of the estate, and is not applicable to this case.

18. The same principle was laid down by the off....Chief Justice of the Calcutta High Court in the following terms in *Khettur Gopal Vs. Poorna Chandra*(15 W.R. 482):-

“My learned colleague, Mukherjee stated : that which I have always understood to be the rule in such cases, in a clear and concise form by saying that amongst sapindas the nearest excludes those more remote.”

19. Similar is the fact of this case. In the present case Bhikhar Sah is nearest Sapinda and his presence excludes his nephews (sons of his deceased brother Sheoratan Sah). In presence of nearest survivor Bhikhar Sah, his nephews will not get any share in the



property of Bhajan Sah.

20. In view of above preposition of law I find that the court below has erred in holding that after the death of Bhajan Sah, his properties devolved jointly on both the parties to the suit. As the heirs of Sheoratan Sah are excluded, they will not get any share in the property of Bhajan Sah, as held by court below. The half share of Bhajan Sah devolved upon Bhikhar Sah and after his death it devolved upon his heirs. The plaintiffs are entitled to those properties which were left by his father/grandfather. The judgment and findings of court below with respect to share of plaintiff in the entire suit property to the extent of 1/2 is not sustainable and is accordingly set aside. It is held that the plaintiffs are/were entitled to only 1/4th share in the suit property.

21. In the result, the judgment and decree passed by the court below with respect to share of plaintiff is set aside and this appeal is allowed. In the facts and circumstances of the case, there is no order as to costs.

Brajesh Kumar/
S. Katyayan

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(Sanjay Kumar, J)

