

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.612 of 1977

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Krishna Devi Jaiswal and others

.... Appellant/s

Versus

Hiralal Prasad Jaiswal and others

.... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Kamlapati Prasad Singh Mr. Ram Krishna Singh Mr. Ishwari Singh Mr. Raghunath Singh Mr. Dhaneshwar Pandeya Mr. Sharda Nand Mishra Mr. Dhananjay Kumar Gupta Mr. Ram Krishna Singh
For the Respondent/s	:	Mr. Rewati Raman Saran Mr. Brajesh Nandan Bariar Mr. Rabindra Kumar Sinha Mr. Ashwani Kumar Sinha Mr. Prakash Kumar Mr. Khalid Ahsan Mr. Najeeb Ahmad Mr. Md.Ataul Haqu Mr. Md.Shahid Anwar

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CORAM: HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

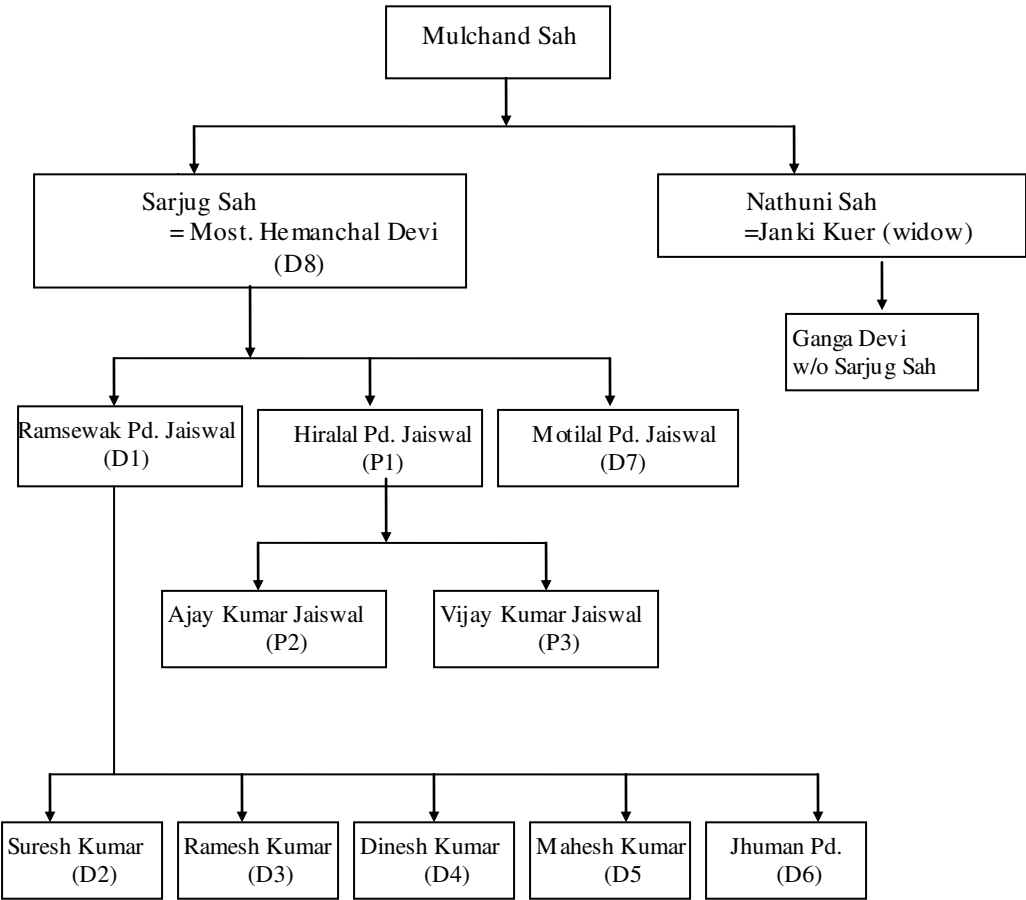
Date: 29-10-2018

1. This appeal on behalf of defendant nos. 1 to 6 is directed against the judgment and decree dated 28th May 1977 passed by the court of 2nd Additional Sub Judge, Motihari in Partition Suit No. 121 of 1974/19 of 1977 whereby the suit filed by the plaintiffs was decreed on contest against the appellants and *ex parte* against defendant no. 8. The plaintiffs and defendant no. 7 were held entitled to get separate Takhtas of their 1/4th share each in the properties mentioned in schedule II and III of the plaint.



2. For the sake of convenience, the parties are referred to as per their status before the trial court.

3. The genealogical table appended at the foot of the plaint is reproduced here to appreciate the facts.



4. The aforesaid genealogical table shows that Mulchand Sah was common ancestor of both parties and he had two sons namely Sarjug Sah and Nathuni Sah who formed a joint Hindu Mitakshra Family. On the death of Mulchand Sah, his two sons namely Sarjug Sah and Nathuni Sah jointly inherited his interest by survivorship. Nathuni Sah died 40 years ago leaving behind a widow



namely Janki Kuer and a daughter Ganga Devi. Sarjug Sah died in the state of jointness leaving behind Ram Sewak Pd. Jaiswal (defendant no. 1), Hiralal Pd. Jaiswal (plaintiff no. 1) and Motilal Pd. Jaiswal (defendant no. 7). The plaintiff no. 1 and defendant no. 7 being minors were under the guardianship of their elder brother Ram Sewak Pd. Jaiswal (defendant no. 1). The said Ram Sewak Pd. Jaiswal being eldest male member in the family became Karta of the joint family and began to manage the joint family properties. Janki Kuer and her daughter Ganga Devi were allotted 2 Bigha land as mentioned in schedule I of the plaint in lieu of their share by a registered deed of family arrangement dated 15.09.1951 and thereafter they ceased to have any claim over the remaining properties. The immovable properties and moveable properties as mentioned in schedule II and III of the plaint are either ancestral or acquired out of the income of joint family and the same are equally owned and possessed by the three sons of late Sarjug Sah. The defendant no. 1 who was Karta of the joint family being under the clutch of his wife and sons began to behave unlike karta and manager of the family and as such the plaintiffs requested the defendant no. 1 to partition schedule II and III properties amicably but the defendants in collusion with each other did not agree and the plaintiffs were compelled to institute the suit for partition. The plaintiffs have further stated that the defendant no. 1



being karta of the joint family was in custody of all the documents and papers relating to the suit properties. On demand for partition the defendant no. 1 began disposing of properties so that the same may not be available for partition. The plaintiffs by filing the suit have claimed 1/3rd share in the suit properties.

5. The defendant nos. 1 to 6 contested the suit by filing a joint written statement. According to them the plaintiffs have no cause of action as the plaintiff no. 1 and defendant nos. 1, 7 and 8 have already partitioned all the moveable and immovable properties in December 1966 and they all came in actual physical possession of the properties allotted as per schedules given in the written statement and since then the parties to the suit have been enjoying the income from their respective properties. Their further case is that at the time of separation and partition, the family was in-debted to the extent of Rs.32,000/- which were all joint family debt for the benefits of all the members and the estate of the joint family. The plaintiff no. 1, defendant nos. 7 and 8 together put the debt on the head of defendant no. 1 for repayment which was accepted by him and in lieu of the same, the plaintiff no. 1, defendant nos. 7 and 8 jointly conceded an area of 5 Bigha 17 Katha 4 dh. as mentioned in schedule B of the written statement to the defendant no. 1. The plaintiff no. 1 in collusion with defendant nos. 7 and 8 under the instigation of the



enemies of these defendants have filed the suit as a misadventure with a view to ruin and harass the family of defendant no. 1. Their further case is that as per partition, the immovable and moveable properties as mentioned in Schedule A, A-I, A-II and A-III were allotted to the defendant no. 1, Plaintiff no. 1, defendant no. 7 and defendant no. 8 respectively. After partition the defendant nos. 1 to 6 acquired separate properties out of their personal funds and by raising loans as detailed in Schedule C of the written statement. On these pleadings the defendant nos. 1 to 6 had prayed to dismiss the suit.

6. The defendant no. 7 filed a separate written statement wherein he virtually supported the case of plaintiffs. He has further stated that the cloth shop known as 'Jaiswal Vestralaya' located at Pipra Kothi is also a joint family property. The plaintiffs have not included the immovable properties as mentioned in Schedule I of his written statement which are also joint family properties and ought to have been included in schedule II of the plaint.

7. On the basis of pleadings of the parties, the trial court framed the following issues:

- (i) In the suit, as framed, maintainable?
- (ii) Have the plaintiffs got any cause of action for the suit?
- (iii) Was there partition by metes and bounds among the parties in December, 1966 in the manner as alleged by defendant nos. 1 to 6?



- (iv) Are the plaintiffs entitled to a decree for partition?
If so, to what extent and in respect of which
Properties ?
- (v) To what other relief or reliefs, if any, are the
plaintiffs entitled to ?

8. The plaintiffs in support of their case have examined altogether 8 witnesses. Out of them P.W. 7 Hiralal Pd. Jaiswal is plaintiff no. 1, P.W. 1 Ram Autar Mahto, P.W. 2 Sk. Kamrul Hoda, P.W. 3 Lal Jee Prasad, P.W. 4 Mangal Singh, P.W. 5 Jugul Sah and P.W. 6 Samsul Haque have been examined on the point of jointness of both the parties.

9. Defendant no. 7 examined 4 witnesses. D.W. 49 Motilal Pd. Jaiswal is defendant no. 7. D.W. 50 Asdullah Khan, D.W. 51 Madan Prasad Gupta and D.W. 52 Anirudh Mistri. All of them have supported the case of jointness of parties and joint cultivation of the suit land. Defendant nos. 1 to 6 examined 48 witnesses. D.W. 1 Satyadeo Prasad, D.W. 2 Chethura Sahni, D.W. 3 Sheo Bachan Mistri, D.W. 4 Basant Rai, D.W. 5 Janak Sah, D.W. 6 Jugul Sahni, D.W. 7 Ram Ashish Sahni, D.W. 8 Krishna Bihari Pandey, D.W. 9 Sadhu Rai, D.W. 10 Jag Mohan Singh, D.W. 11 Banshi Sahni, D.W. 12 Mukhlal Singh, D.W. 13 Bhuar Sahni, D.W. 14 Mahang Ram, D.W. 15 Babulal Prasad, D.W. 16 Ram Awtar Mistri, D.W. 17 Gajendra Rai, D.W. 18 Lalan Pd. Srivastava, D.W. 19 Sahdeo Sahni, D.W. 20 Satya Narayan Chowdhary, D.W. 21 Sukhari Chaudhary,



D.W. 22 Dharohar Rai, D.W. 23 Lal Bihari Sahni, D.W. 24 Hiralal Chowdhary, D.W. 25 Shekh Mahmood, D.W. 26 Zainul Mistri, D.W. 27 Abdul Aziz, D.W. 28 Thag Sahni, D.W. 29 Shekh Farmud, D.W. 30 Vishwanath Rai, D.W. 31 Rajeshwar (Rameshwar) Prasad, D.W. 32 Puran Sahni, D.W. 33 Devnandan Prasad, D.W. 34 Ramchandra Sah, D.W. 35 Mathura Sahni, D.W. 36 Shekh Mahmad, D.W. 37 Badri Sah, D.W. 38 Shambhu Sharan Prasad, D.W. 39 Hanuman Sharma, D.W. 40 Ramdeni Mistri, D.W. 41 Pashupati Narayan Sinha, D.W. 42 Shivnandan Mahto, D.W. 43 Lorik Rai, D.W. 44 Basdeo Thakur, D.W. 45 Ashok Kumar, D.W. 46 Ram Surat Chowdhary, D.W. 47 Jagdev Sah, D.W. 48 Ramsewak Jaiswal (defendant no. 1) , D.W. 49 Motilal Pd. Jaiswal (defendant no. 7), D.W. 50 Asdullah Khan, D.W. 51 Madan Prasad Gupta and D.W. 52 Anirudh Mistri.

10. The learned court below after considering the evidence on record, disbelieved the case of contesting defendants as regards earlier partition allegedly held in December 1966 and decreed the suit holding that the plaintiffs and defendant no. 7 are entitled to get share to the extent of 1/4th each in the properties mentioned in Schedule II and III of the plaint.

11. The appellants have assailed the judgment on several counts but their main contention is that their documents relating to bank loan, separate electric connection and other document showing



their separation in mess, business and cultivation were not considered by the court below. It was submitted that the court below has not considered the fact that the plaintiff no. 1 had purchased the land in his own name and sold it after partition. The land purchased in 1974 and 1975 was exclusive purchased land of the defendants and so the court below has erred in holding that the same were purchased out of the fund of joint family income.

12. The learned counsel for the respondents submitted that there is absolutely no document to prove acquisition of properties after the death of Mulchand Sah. The case of partition allegedly held in December 1966 has not been proved by the defendants. The court below considering the jointness in the family of plaintiffs and defendants has rightly decreed the suit and so the appeal has got no merit and the judgment in question does not require any interference.

13. In view of submissions of both the parties, the point arises for consideration is as to whether the judgment and decree of the trial court is liable to be reversed holding that the properties were already partitioned among the parties?

14. In support of earlier partition, the contesting defendants have examined a large number of witnesses. Out of them the defendant no. 1 has been examined as D.W. 48. He has stated that oral partition was made in a panchaity in which D.Ws. 2, 4, 5, 22, 23,



29, 31, 34 and 47 had participated. D.W. 1 in his evidence has stated that though he was present at the panchaity but was not a panch. D.Ws. 9, 21, 22, 24, 26 and 40 have deposed that partition did not take place in their presence. The defendant no. 1 (D.W. 48) in his evidence has stated that a panchayati was held for partition in which D.Ws. 2, 4, 5, 22, 23, 29, 31, 34 and 47 were panches but, his said statement is contrary to his pleading. In the written statement there is no whisper that for effecting partition any panchayati was held and the aforesaid witnesses were panches rather defendant nos. 1 to 6 have stated about oral partition. Since it is not the case of any of the parties that there was any dispute amongst the plaintiffs and the defendants and as such there could not be any occasion for holding panchayat for effecting partition. In the evidence of defendants' witnesses I find that D.Ws. 2, 8, 20, 24, 29, 31, 34 and 37 have stated that no paper for holding panchayati was prepared. As against this one of the witness namely D.W. 4 at para 2 has stated that a paper for panchayati was prepared which was signed by 5 to 7 panches as well as all the three parties. The defendants have neither filed any paper nor assigned any reason for not producing the same in courts. The D.W. 4 has stated about partition of 27-28 Bigha land whereas other D.Ws including D.W. 48 have stated about partition of 33-34 bigha land. D.W. 22 has stated about partition after taking measurement of land but he is



unable to say about measurement of any of the plots. D.Ws 24 and 31 are brother-in-law of defendant no. 1 who have stated about oral partition but D.W. 24 was not present at the time of partition. D.W. 31 has said that a list of moveable properties was prepared by him but no such list has been produced before the court below.

15. This witness is unable to say about the details of the lands allotted to each of three brothers, i.e. plaintiff no. 1, defendant no.1 and defendant no.7. D.W. 34 says that panchayati for partition continued for two days which is not supported by D.W. 48 and his other witnesses. D.W. 48 has stated that the properties as mentioned in Schedule A, A/1, A/II and A/III were left by his father, the total area whereof comes to 25 bigha 10 katha 4½ dh. although the total area including the acquisition from the nucleus of the joint family comes to more than 33 acres which were also partitioned. The defendants have not filed any document to prove acquisition of properties after the death of Mulchand Sah. As per statement of D.W. 48, a list of properties showing partition among the parties was prepared at the time of partition but no such list has been brought on the record. D.W.48 is unable to say about the amount of compensation paid for the lands acquired by the Government. He did not disclose the area of sahen land allotted to him in front of the house allotted to him. Similarly he was unable to say about the total number of plots



and the area allotted to him, as well as to defendant no. 7 and plaintiff no.1 in village Chand Saraiya and Majharia. Even after 10 years of partition, Jamabandi of the joint family property has not been separated as per statement of D.W. 48. As per case of defendants 1 to 6 as pleaded in their written statement the joint family was indebted to the tune of Rs.32,000/- which as per evidence of D.W. 48, he spent money on sharadh of his father, grandfather, grandmother, aunt, his first wife, marriage of two sisters, two brothers, his own second marriage, Donga ceremonies of his four sisters, marriage and Donga of his daughter, over education of plaintiff no. 1 and Defendant no. 7, spent Rs.500/- for executing agreement of family arrangement dated 15.09.1951, construction of residential house, cost of civil litigation relating to joint family property, purchase of agricultural implements, bullocks, tyre cart etc. The aforesaid expenses, as per D.W. 48 were met partly out of the income from the joint family properties and partly by raising loan. He took loan from co-operative society to the extent of Rs.23,000/- and Rs.8,000/- from Turkaulia Anchal and Rs.1,000/- from other sources. D.Ws. 5, 24, 25, 29, 31, 34, 37 and 47 have stated that for payment of the said loans. 4 bigha land in village Chand Sariya and 2 bigha land in village Majharia were set apart out of the family property but as per pleading of defendants 1 to 6 only 5 bigha 17 katha 4 dhur was set apart for payment of loan. D.W. 1 says



that details of loans were produced by D.W. 48 at the time of partition whereas D.W. 31 (as per para 7 of his deposition) has stated that no details of the loan or expenditure on rite, rituals, marriage or Donga was produced. D.W. 5 says that a detailed list of debts was produced but he cannot say the name of persons from whom loans were taken. D.W. 5 has stated that the names of the creditors from whom loans were taken were produced in writing by Motilal Pd. Jaiswal. D.W. 24 at para 13 says that he had neither any talk about the debts with Ram Sewak Pd. Jaiswal nor he can say about payment of loan amount by him. D.W. 25 has also not given the details of the loan. D.W. 29 said that Ram Sewak Prasad Jaiswal had brought the papers of loan/debt but he does not remember the details thereof. D.W. 34 says that no list of family debt was prepared and he had not seen any paper relating to the loan. D.W. 34 has corroborated the statement of aforesaid D.Ws. As per evidence of D.Ws. 29 and 34, it was agreed between the parties that the brothers making repayment of their share of debt to Ramsewak Pd. Jaiswal would get back their share in the land set apart for payment of loan. D.W. 48 says that his brothers put responsibility upon him to repay the loan money and gave 6 bigha land for repayment of loan. D.Ws. 24, 29, 34 have stated that they were not aware of any loan paid by Ramsewak Pd. Jaiswal. D.W. 48 in his evidence says that he does not remember if he repaid any debt after



partition although at para 46 he has admitted that he has been earning Rs.1500/- to Rs.1750/- per annum from the said 5 bigha 17 katha 4 dhur land which is contrary to the claim made by him in para 29 of his written statement wherein he has stated that these defendants have been paying off the loans which they were burdened at the time of partition. D.W. 48 has filed papers of loan. Ext. A is a notice dated 10.07.76 issued in case no. 1298 by Asstt. Registrar, Co-operative Society, Motihari in the name of Ramsewak Pd. Jaiswal, Chand Saraiya Co-operative Society for realization of Rs.15,000/- and Rs.1411/- as principal and interest amount. Ext. B is a notice dated 13.12.76 issued to defendant no. 1 in another case of recovery of loan. Some of the loans appertains to the year 1967 to 1973 even after December 1966. The documents on record show that D.W. 48 was the Secretary of Sugar Cane Marketing Union, Motihari from 1961 to 1973. The said union comprises of various sugar cane co-operative societies of which D.W. 48 was the Secretary. As stated by him in para 29 and 30, he applied for loan through the society and had forwarded applications of members of the society for loan. He took the loan from the union as the Secretary of the society on behalf of its members and he spent the loan for his own work with the consent of the members of the society but he did not disclose name of any of the members. Even the details of the joint family work over which he



spent the loan money has not been disclosed. The defendants have not produced any register or accounts paper in support of taking loan and payment of any amount. D.W. 48 does not remember the details of loan taken in individual capacity. None of the members for whom loan was taken as Secretary of the Society who consented to spend the loan money for personal use for the joint family work has come to support the version of D.W. 48. On evaluation of above evidence I am of the view that the loans taken by the members of the society through its Secretary (defendant no. 1) cannot be termed as loan for the benefit of joint family.

16. D.W. 48 at para 44 has stated that he fought Assembly election in the year 1967 and 1969 from Sugauli and Motihari constituency respectively but he could not say the name of his election agent and total expenditure met by him. He has not filed any paper to show his election expenses although he had maintained the account of expenses. He has further stated that he as Mukhiya of Chand Saraiya Gram Panchayat was given Rs.6000/- to 6500/- for 9 public schemes but he spent the money for family purposes. Ext. C is details of records of 9 certificate cases filed for realization of Rs.15,000/- principal loan money and interest Rs.12469.85. Ext. A is notice for recovery of loan amount Rs.15000/- and accrued interest given to defendant no. 1 in a certificate proceeding. Ext. R to R/8 are



certificates issued against D.W. 48 as Mukhiya. These documents show that distress warrants were issued against defendant no. 1 (D.W. 48) for recovery of Government money which were given to him for executing the Government schemes i.e. construction of irrigational Bandh, E.I.P. school building, repair of drinking well and construction of bridge. It is thus, manifest that the money were advanced to D.W. 48 for execution of 9 schemes in the capacity of his being Mukhiya for which the joint family cannot be held liable to pay Rs.32,000/-. The learned court below considering the evidence on record has rightly disbelieved the case of contesting defendants as regards payment of family loan by the defendant no. 1.

17. I further find that the defendants 1 to 6 have produced Ext. E series which are entries in the register of electric connection of Electricity Department for consumer nos. 9 and 10 namely Ram Sewak Jaiswal and Motilal Pd. Jaiswal to show that after partition in December 1966, the parties took separate electric connection. Ext. E/1 falsifies the said entries as it shows that the security money of Rs.20% each were deposited on 23.03.1966 even prior to alleged partition. Ext. J is statement of short terms loan recorded in the names of plaintiff no. 1, Defendant no. 1 and Defendant no. 7 for Rs.3403/- 20 paise for the period from 1969-70 to 1975-76. Ext. K to K/7 are order sheets of the said cases. These documents showing loan in the name



of different persons of the family do not prove partition and separation among the family members. The evidence on record shows that the Defendant no. 1 as Karta took the loan in his own name and in the names of his two brothers.

18. The defendants filed Ext. D sale deed dated 09.05.1974 in favour of Ramesh Kumar Jaiswal and Dinesh Kumar Jaiswal, Ext.D/6, sale deed dated 19.07.1971 in favour of Suresh Pd. Jaiswal, D/7 sale deed dated 13.08.74 in favour of Umesh Kumar Jaiswal, Ext.D/8 sale deed dated 25.07.74 in favour of Suresh Kumar Jaiswal, Ext. D/9 dated 16.03.51 in favour of Hiralal Jaiswal Ext. D/10 sale deed dated 19.09.62 in favour of Motilal Pd. Jaiswal to show separate acquisition by different members of the family. But these documents do not support the case of defendants as they have failed to prove their case of earlier partition held in December 1966. As such the lands purchased in the name of family members would be deemed to have been purchased for the benefit of the joint family. The plaintiffs' witnesses as well as D.Ws. 49 and 52 examined on behalf of defendant no. 7 have supported the case of plaintiffs and defendant no. 7 by stating that the suit properties are still joint and no partition as alleged by defendant nos. 1-6 took place in December 1966. Against these appellants defendants have not positively established their case of earlier partition.



19. In view of above discussions, I find that the trial court, after considering the evidence on record has rightly decreed the suit as per their share. This appeal having no merit is accordingly dismissed but without costs. The judgment and decree passed in Partition Suit No. 121 of 1974/19 of 1977 by the trial court are confirmed.

20. Appeal dismissed.

(Sanjay Kumar, J)

Mahesh/-

AFR/NAFR	NAFR
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