

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.407 of 1994

1. Mostt. Gauri Devi, widow of Late Natho Sao, resident of Pipra Maraiya, P.S. Parbatta, District-Khagaria. (expunged).
2. Rambati Devi, wife of Chaturi Sao and daughter of Late Natho Sao, resident of village-Narayan, P.S. Prempur, District-Katihar, at present residing at village-Pipra Maraiya, P.S. Parbatta, District-Khagaria.

.....Plainttis... .. Appellants.

Versus

1. Rameshwar Sao, son of Late Kapuri Sao, Residents of village-Pipra Maraiya, P.O. Pipra Latif, P.S. Parbatta, District-Khagaria. (expunged).
 - 1(a). Kaushalya Devi, widow of the deceased-respondent no.1 Rameshwar Sao.
 - 1(b). Kumari Rani, daughter of Rameshwar Sao.
All residents of village-Pipra Maraiya, P.S. Parbatta, P.O. Pipra, District-Khagaria.
 - 1(c). America Devi, wife of Garib Sah and daughter of the deceased-respondent no.1 Rameshwar Sao, resident of village-Garudwar Road, Mahbood KhanTola, P.S., P.O. and District-Purnea.
 - 1(d). Asha Devi, wife of Sri Siya Ram Sah and daughter of the deceased-respondent no.1 Rameshwar Sao, resident of village and P.O. Bharat Khand, P.S. Parbatta, District-Khagaria.
 - 1(e). Bhawani Devi, wife of Sri Chhotan Sah and daughter of the deceased-respondent no.1 Rameshwar Sao, resident of village Pipra, P.S. Parbatta, District-Khagaria.
 - 1(f). Lilam Devi, wife of Dilip Sah and daughter of the deceased-respondent no.1 Rameshwar Sao, resident of village-Purani Bazar, P.S. Kursela, District-Katihar.
 2. Ramdeo Sao, son of Rameshwar Sao, residents of village-Pipra Maraiya, P.O. Pipra Latif, P.S. Parbatta, District-Khagaria.
-Defendants Ist Party-Respondent II Party.
3. Ramesh Chandra Sao alias Shib Shankar Sao.
 4. Ramjee Sao.
Both sons of Late Anandi Sao.
 5. Baijnath Sao.
 6. Gajadhar Sao,
Sons of Late Turanti Sao.
Residents of village-Pipra Maraiya, P.S. Parbatta, P.O. Pipralatif, District-Khagaria.

....Defendants 2nd Party... .. Respondents 2nd Party.

Appearance :

For the Appellants	:	Mr. Anshay Bahadur Mathur, Advocate. Mr. Poddar Suresh Gandhi, Advocate.
For the Respondent Nos.1 and 2	:	Mr. Anil Kumar Sinha, Advocate.

CORAM: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

CAV JUDGMENT

Date : 30-08-2018

This First Appeal has been preferred against the



Judgment dated 19.04.1994 and Decree dated 02.05.1994 passed in Title Suit No.28 of 1987 by the court of the Sub Judge-I, Khagaria, whereunder the Sub Judge-I, Khagaria, dismissed the plaintiffs'/appellants' suit for partition of their half share in the property, as detailed in Schedule-II of the plaint.

2. The plaintiffs filed Title Suit No.28 of 1987 with the contention that Bhangi Sao, the common ancestor of the parties, died long ago, leaving behind his four sons, namely, Banke Sao, Kapuri Sao, Anandi Sao and Turanti Sao. Banke Sao died in the year 1945 and his wife also died in the year 1953, without any legal heir in the jointness with Kapuri Sao, Anandi Sao and Turanti Sao. Kapuri Sao also died in jointness with his brother Anandi Sao and Turanti Sao, leaving behind his two sons, Natho Sao and Rameswar Sao. Natho Sao died in the year 1976, leaving behind him his widow Most. Gauri Devi (plaintiff/deceased appellant no.1) and the daughter Rambati Devi (plaintiff/appellant no.2). The defendan no.2 Ramdeo Sao is the son of Rameshwar Sao (the defendant no.1). Anandi Sao also died, leaving behind him his two sons Rameshchandra Sao alias Shibshankar Sao (defendant no.3) and Ramjee Sao (defendant no.4). Turanti Sao also died, leaving behind his two sons, Baijnath Sao and Gajadhar Sao (defendant nos.5 and 6



respectively). In the year 1971, there was metes and bounds partition in between the branches of Kapuri Sao, Anandi Sao and Turanti Sao. Thereafter, Natho Sao and Rameshwar Sao, both sons of Kapuri Sao, constituted a separate Joint Hindu Mitakshra Family and Natho Sao became Karta and Manager and started looking after the property, as detailed in Schedule-II of the plaint, but he died after one year and his brother Rameshwar Sao became Karta and Manager of the joint family and he is still Karta and Manager of the family. After passing over times, Rameshwar Sao became dishonest and left to take care of the plaintiffs. Therefore, the plaintiffs requested Rameshwar Sao several times for partition of the property, as detailed in Schedule-II of the plaint, orally and amicably, in which the plaintiffs have half share but he was not ready for partition and, lastly, on 13.05.1987, refused to give any inch of land of Schedule-II property to the plaintiffs. The defendant no.3 Ramesh Chandra Sao alias Shib Shankar Sao, defendant no.4 Ramjee Sao, defendant no.5 Baijnath Sao and defendant no.6 Gajadhar Sao are Karta and Manager of their separate joint Hindu families after partition of ancestral property in the year 1971, due to that reason they have been impleaded in the suit as Karta of their respective families. As such, cause of action for



this suit arose on 13.05.1987, when the defendant no.1 Rameshwar Sao refused for partition of plaintiffs' half share in the property, as detailed in Schedule-II of the plaint.

3. After service of the notice, the defendant Ist Set and the defendant nos.5 and 6 appeared in the suit and filed their separate written statements and admitted the genealogical table as given by the plaintiffs in Schedule-I of the plaint. The defendant-1st set raised several usual defence about non-joinder of the parties and also that the plaintiffs have no cause of action. The further case of the defendants Ist set is that the partition took place in the year 1965 in between Kapuri Sao, Anandi Sao and Turanti Sao, sons of Bhangi Sao, but due to grudge, the defendants IInd set started to tease and harass the answering defendant and Natho Sao, the husband and father of the plaintiff no.1 and the plaintiff no.2 and the litigation also started. Ultimately, the answering defendant Rameshwar Sao and Natho Sao succeeded in the litigation and Anandi Sao, the father of the defendant nos.3 and 4 asked to exchange the land. Thereafter, the answering defendant Rameshwar Sao and his brother Natho Sao executed the sale deed in favour of Anandi Sao in respect of some land allotted in their share and Anandi Sao also executed the sale deed in favour of the answering defendant Rameshwar



Sao and his brother Natho Sao in respect of 17 Katha 15 dhurs land of Plot No.853 and 12 Katha 10 dhurs land of Plot No.1807 situated in village-Kolwara. Thereafter, the partition took place in between the answering defendant no.1 Rameshwar Sao and his brother Nahto Sao, the husband and father of the plaintiff nos.1 and 2, in presence of the of the Panches in which it was decided that the land situated in village-Pipra Latif will be in the share of the answering defendant no.1 and the land situated in village-Kolwara will be in the share of Natho Sao as he has only one daughter Rambati Devi (plaintiff no.2), whose sasural is situated near village-Kolwara. Thereafter, since the month of Asadh, 1971, the answering defendant no.1 and Natho Sao used to cultivate their land allotted in their share in the partition but at the instance of the defendants IInd set, the plaintiffs have filed the present suit without any cause only to harass, which is liable to be dismissed.

The defendant nos.5 and 6, Baijnath Sao and Gajadhar Sao in their separate written statement also raised usual defence with the submission that, in fact, in between Kapuri Sao, Anandi Sao and Turanti Sao ancestral property was partitioned according to convenience and private adjustment but there was no partition by metes and bounds. It is incorrect that



the property, as detailed in Schedule-II of the plaint, was allotted in the share of the defendant Ist Set and Natho Sao, the husband and father of the plaintiff nos.1 and 2. As such, the plaintiffs have only 1/6th share in the joint family property, left by Bhaugi Sahu, the common ancestor of the parties.

4. On the pleadings of the parties, the learned trial court framed the following issues:

- I. Whether the suit as framed is maintainable?
- II. Does there any cause of action arise to suit?
- III. Whether the plaintiffs are liable to pay advororum Court Fee.
- IV. Whether there is division by metes and bounds between plaintiffs and defendant first party?
- V. Whether the plaintiffs are entitled for reliefs as prayed for?
- VI. To what other relief and reliefs the plaintiffs are entitled?

On hearing the parties and perusing the evidences, available on the record, the learned Sub Judge-I, Khagaria, decided all the issues against the plaintiffs and dismissed the partition suit through the impugned Judgment and decree.

5. Learned counsel appearing for the appellants submits that after filing of the partition suit, Plaintiff/appellant no.2 Rambati Devi was in the need of money for the treatment



of her mother, the plaintiff/appellant no.1 Mostt. Gauri Devi (deceased), due to that reason, she executed the sale deed of 12 Katha 10 Dhur of Khesra No.1807 of Khata No.170 of village -Kolwara on the advice of the defendant/respondent no.1 but, thereafter, the defendant/respondent no.1, who was examined as D.W.8, took the plea in his evidence that the plaintiff/appellant no.2 has also sold 12 Katha 10 Dhur land, situated in village-Kolwara after partition. The learned trial court overlooked the oral evidence, adduced by the parties that the land, as detailed in Schedule-II of the plaint, are joint family property and illegally held that plaintiffs and defendant Ist set are not the members of the joint Hindu Family and they are separate in all respect, only taking into consideration the Ext.A/2, the certified copy of the sale deed dated 14.03.1989, which is not admissible in the eye of law in evidence. He further submitted that mere selling of the land allocated in the partition for the sake of convenience of cultivation by the plaintiff/appellant no.2, presumption could not be drawn that the partition has already taken place between the plaintiffs and the defendants Ist set but the learned trial court illegally held otherwise as claimed by the defendants/respondents Ist set.

6. On the other hand, learned counsel appearing



for the defendants/respondents Ist set argued that there is no pleading in the plaint of the plaintiffs/appellants that there was partition of the Schedule-II property for the sake of the convenience of cultivation in between the plaintiffs/appellants and the defendants/respondents Ist set, as such, there is no substance in the submissions of the learned counsel appearing for the plaintiffs/appellants that the land, as sold by the plaintiff/appellant no.2, was in the cultivation on partition for convenience of cultivation. Learned counsel appearing for the defendants/respondents Ist set further argued that there is no doubt that the certified copy of the sale deed dated 14.03.1989 relating to execution of the sale deed by the plaintiff/appellant no.2 Rambati Devi in favour of Abhay Kumar Tiwary, in respect to the land situated in village-Kolwara, has been marked as Ext.A/2 during the course of hearing of the suit and the same is considered by the trial court but the plaintiff/appellant no.2, who has been examined as P.W.8, also admitted in her cross examination at paragraph-6 that she has sold 12½ land of village-Kolwari, as such, there is no illegality on relying the certified copy of the sale deed dated 14.03.1989 (Ext.A/2) by the trial court. Learned counsel appearing for the defendants/respondents Ist set further argued that the



plaintiff/appellant no.2 executed the sale deed (Ext.A/2) in respect of 12 Katha 10 Dhur land of Plot No.1807 of Khata No.170 of village-Kolwara on 14.03.1989 and, thereafter, amendment petition was filed for amendment of plaint in the trial court on 02.04.1991 for inserting some facts and correction of typing error but she did not disclose about execution of sale deed (Ext.A/2), nor she prayed for adding to vendee Abhay Kumar Tiwary, son of Nawal Kishore Tiwary, as party, while plot no.1807 is detailed in Schedule-II of the plaint. As such, the suit is also barred for non-joinder of necessary party due to non impleading to vendee Abhay Kumar Tiwary as defendant.

7. In view of the rival contentions of the parties, the following points arise for consideration in this appeal:

- I. Whether there is unity of title and possession between the plaintiffs/appellants and defendants/respondents Ist set, as claimed by the plaintiffs/appellants, or there had already been previous partition, as claimed by the defendants/respondents Ist set?
- II. Whether the suit is barred by misjoinder of necessary party?

8. Since both points are related to each other, therefore, both the points are taking together for discussions:

The case of the plaintiffs/appellants is that Bhangi



Sao, the common ancestor of the parties, died long ago, leaving behind him, his four sons, namely, Banke Sao, Kapuri Sao, Anandi Sao and Turanti Sao. Banke Sao died issue-less in the year 1945 and his wife died in the year 1953 in jointness. Thereafter, in the year 1971, the partition took place in between Kapuri Sao, Anandi Sao and Turanti Sao by metes and bounds and Schedule-II property came in the share of Natho Sao and Rameshwar Sao, both sons of Late Anandi Sao, and Natho Sao, being the elder son of Late Anandi Sao, became Karta of the joint family but he died after one year, leaving his wife and daughter/plaintiff/appellant no.1 and plaintiff appellant no.2 respectively. After the death of Natho Sao, his brother Rameshwar Sao became the Karta of the joint family. But after sometime Rameshwar Sao left to take care of the plaintiffs/appellants, then the plaintiffs/appellants made several request for partition of the property of Schedule-II orally and amicably for cultivation but he was rigid and, lastly, he refused to partition of the property, as detailed in Schedule-II of the plaint, on 13.05.1987.

The case of the defendants is that, in fact, the partition took place in the year 1965 in between Kapuri Sao, Anandi Sao and Turanti Sao, all three sons of Bhangi Sao, nor in



the year 1971, as claimed by the plaintiffs. Natho Sao was the Karta of the family of the branch of Kapuri Sao, after partition, being the elder son of Kapuri Sao. Later on, property, as detailed in Schedule-II of the plaint, was also partitioned in between him and Natho Sao in the month of Asadh 1976 and, accordingly, the land of village-Kolwara was allocated in the share of Natho Sao and the land situated in village-Pipra Latif was allocated in the share of answering defendants and, thereafter, Natho Sao died. As such, there is no unity of title and possession in between the plaintiffs and the defendants Ist set.

9. P.W.8 Rambati Devi, who is plaintiff/appellant no.2 in the suit, has deposed in her evidence that the partition had taken place before 25 years in respect to the ancestral property in between Kapuri Sao, Anandi Sao and Turanti Sao, all sons of Late Bhangi Sao. Natho Sao being the elder son of Kapuri Sao became the Karta of the joint family but after five years, he died. Thereafter, Rameshwar Sao, became the Karta of the joint family. It is not true that in between her father Natho Sao and Rameshwar Sao, the partition had taken place. She has further stated in paragraph-6 of her cross examination that she has sold 12½ Katha land of village-Kolwara on receiving the consideration amount of Rs.24000/- but it is not



true that she has purchased the land from Ramjee Sao (P.W.3) from the said money. She further stated that the shop of her mother Mostt. Gauri Devi (plaintiff/appellant no.1) is separate to the shop of Rameshwar Sao (defendant no.1) and there is no lane in between the house of her mother and house of Rameshwar Sao, the mess and residence is also separate.

P.W.2 Uchit Singh has stated in paragraph-3 of his cross examination that Rambati Devi (plaintiff/appellant no.2), daughter of Natho Sao, had sold the land of village-Kolwara and, thereafter, she purchased the land by the said money from Ramjee Sao (P.W.3). He has further stated in his cross examination that the house of Mostt. Gauri Devi (plaintiff/appellant no.1) is in the west of the house of Ramehswar Sao (defendant/respondent no.1) and the kitchen of both are separate.

P.W.3 Ramjee Sao, who is defendant no.4, while has stated in his written statement that there was no partition in between the sons of Bhangi Sao but he has admitted in his evidence that his father Anandi Sao was separate and other sons of Bhangi Sao were also separate. He has further stated in paragraph-4 of his cross examination that he had no knowledge about selling the land of village-Kolwara by Rambati Devi but



he had sold the purchased land to Rambati Devi.

P.W.4 Bishun Deo Sao has also stated in paragraph-4 of his cross examination that Rameshwar Sao (defendant/respondent no.1) and Mostt. Gauri Devi (plaintiff/appellant no.1) are separate in the work and business.

P.W.6 Baidyanath Sao, who is defendant no.5, while has denied the partition in between Kapuri Sao, Anandi Sao and Turanti Sao, all three sons of Bhangi Sao, by metes and bounds in the written statement but he clearly admitted in his evidence that the partition had taken place in 1965 in between Kapuri Sao, Anandi Sao and Turanti Sao and, accordingly, the sale deeds were executed in between the Pattidars regarding some land, which was fallen in the share of others. He has further stated in his cross examination that the shop of Mostt. Gauri Devi and the shop of Rameshwar Sao are separate, which is adjacent to each other, and both are living separate and in between their houses, there is lane and there is no jointness in between them.

10. From the evidence of the aforesaid witnesses, it is apparent that the plaintiffs/appellants and the defendants/respondents Ist set are separate in mess and business. The plaintiff/appellant no.2 Rambati Devi also sold the land of



village-Kolwara and she also purchased the land from defendant no.4 Ramjee Sao (P.W.3).

Ext.A/2 is the certified copy of the sale deed dated 14.03.1989 executed by Rambati Devi (plaintiff/appellant no.2) in favour of Abhay Kumar Tiwary, son of Nawal Kishore Tiwary, resident of village-Kulharia, P.S. Parbatta, District-Khagaria, in respect of 12 Katha 10 Dhur land of Khesara No.1807 of Khata No.170 of village-Kolwara, which is detailed in Schedule-II of the plaint as joint property. Recital of Ext.A/2 shows that Rambati Devi (plaintiff/appellant no.2) has sold 12 ½ Katha land of Khesara No.1807 of Khata No.170 of village-Kolwara, claiming the same of her own, allotted in her share, and the same is free of dispute. Ext.A/3 is the certified copy of the sale deed dated 27.03.1989 executed by the defendant no.4 Ramjee Sao (P.W.3) in favour of Rambati Devi (plaintiff/appellant no.2) in respect to 8 Katha 15 Dhur land of Plot No.775 of Khata No.18 of village-Pipra Latif.

11. D.W.8 Rameshwar Sao has stated in his examination-in-chief that the property of Bhangi Sao in between his three sons was partitioned in the year 1965 in which 1/3rd share of property was given in the share of his father Kapuri Sao, which was being looked after by his elder brother Natho



Sao being the Karta of the family but the same was also partitioned in the year 1971 in presence of the Panches, accordingly, the land situated in village Kolwara was allotted in the share of Natho Sao and the land situated in village-Pipra Latif was allotted in his share and since then both are separate and are cultivating the land separately. Thereafter, in the year 1976, his brother died and the property of his share was being looking after by his widow Mostt. Gauri Devi. He has also stated that his niece had also sold the land of Kolwara and from the said consideration amount, she purchased the land of Ramjee Sao (defendant no.4). He has further stated in his cross examination in paragraph-8 that in the year 1970, property, as detailed in Schedule-II, was joint.

12. From the evidence, as discussed above, it is apparent that the plaintiffs/appellants are separate with the defendants/respondents Ist set in mess and business before filing of the suit. The plaintiff/appellant no.2 Rambati Devi, after filing of the suit, also sold 12 Katha 10 Dhur land of Plot No.1807 of Khata No.170 of village-Kolwara in favour of Abhay Kumar Tiwary through sale deed dated 14.03.1989, certified copy of which has been exhibited as Ext.A/2, in which she claimed that the said plot is in her share and she is exclusive



owner of the said land. While Rambati Devi (plaintiff/appellant no.2) denied about purchasing the land of defendant no.4 Ramjee Sao (P.W.3) but the defendant no.4 Ramjee Sao, who is examined as P.W.3, specifically stated that he had sold his purchased land to Rambati Devi. Ext.A/3, certified copy of the sale deed dated 27.03.1989, also shows that Rambati purchased 8 Katha 15 Dhur land of Plot No.2872 of Khata No.18 of village-Pipra Latif from Ramjee Sao on 27.03.1989 within a fortnight of selling the land of Plot No.1807 of Khata No.170 of village-Kolwara. There is no doubt that Ext.A/2 and Ext.A/3 are the certified copies of the sale deeds, which are not primary evidence, but the execution of the sale deed dated 14.03.1989 in favour of Abhay Kumar Tiwary has been admitted by Rambati Devi in her evidence and defendant no.4 Ramjee Sao (P.W.3) has also admitted in his evidence that he had sold his purchased land in favour of Rambati Devi. As such, both, Ext.A/2 and Ext.A/3 can be safely taken into consideration as evidence.

13. It is true that under Hindu Law existence of a joint family would be presumed but the said presumption weakens, as time passed, is a rebuttable one. In a case where, the defendant alleges that there had been a partition amongst the co-sharers a long time back, direct evidence of partition may not



be available and, thus, in such a situation, the court may draw an inference of partition amongst the co-sharers from the conduct of the parties, taking into consideration as to whether they were having separate mess, business and property and separate transaction etc.

14. From the evidence, as discussed above, it is apparent that the plaintiff/appellant no.2 and defendant/respondent Ist set are separate in mess and business and the plaintiff/appellant no.2 also sold the land through sale deed dated 14.03.1989 (Ext.A/2) regarding 12 Katha 10 Dhur land of Khesara No.1807 of Khata No.170 of village-Kolwara, claiming to be of her own, allotted in her share and, just there after, she purchased the land through sale deed (Ext.A/3) from the defendant no.4 Ramjee Sao (P.W.3), which is indicative of the fact that she was dealing with the property independently and there was partition in between the plaintiff/appellant no.2 and the defendant/respondent Ist set. Moreover, while the plaintiff/appellant no.2 sold the land to Abhay Kumar Tiwary on 14.03.1989 and, thereafter, she filed amendment petition for incorporating some facts in the plaint and making some correction in typographical error but she did not bring on the record the fact of the transaction of the land, nor she made party



to Abhay Kumar Tiwary, who was necessary party, in the partition suit as the sold land is covered in Schedule-II of the plaint. As such, the suit also appears to be barred by non-joinder of the necessary party. Accordingly, both points are decided against the plaintiffs/appellants and in favour of the defendants/respondents Ist set.

15. In the result, I find no merit in this first appeal and, accordingly, this first appeal is dismissed. There shall be no order as to cost.

(Rajendra Kumar Mishra, J)

Pradeep Srivastava/-

AFR/NAFR	NAFR
CAV DATE	07.08.2018.
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