

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.458 of 1994

1. Arjun Singh, son of Late Dulli Singh.
2. Laddu Devi, widow of Late Dulli Singh (expunged).
3. Radha Devi.
4. Sudama Devi.
5. Sibganga Devi.
6. Tuntun Devi, No. 3 to 6 are daughters of Late Dulli Singh.
All residents of Village and P.O. Bhadas, P.S.- Sub-Division Munshafi,
District Khagaria.

... Plaintiffs... Appellant/s

Versus

1. Kamla Singh.
2. Naresh Singh.
3. Ramashish Singh.
4. Gopal Singh, No. 1 to 4 sons of Late Brij Bihari Singh.
5. Madan Singh, son of Late Dulli Singh, All residents of Village and P.O.-
Bhadas, P.S.- Sub-Division Munshafi, District- Khagaria.

... Respondent/s

Appearance :

For the Appellant/s	:	Mr. Dronacharya, Advocate. Mr. Rajiv Ranjan Sinha, Advocate.
For the Respondent/s	:	Mr. Amar Nath Gupta, Advocate.

**CORAM: HONOURABLE MR. JUSTICE RAJENDRA KUMAR
MISHRA**

CAV JUDGMENT

Date : 12 -09-2018

The plaintiffs have filed this First Appeal against the Judgment and decree dated 30.05.1994 passed by the learned Sub-Judge-I, Khagaria, in Title Suit No. 47 of 1991, dismissing the plaintiffs' suit for partition.

2. The plaintiffs-appellants filed the aforesaid suit for partition of their $\frac{1}{2}$ share in the suit property, as detailed in Schedule I of the plaint. The case of plaintiffs-appellants is that



late Brij Bihari @ Bijo Singh died in the year 1955, leaving behind his two sons, namely, Dulli Singh and Kamla Singh (defendant-appellant no.1). Dulli Singh also died in the year 1978, leaving behind his widow, Laddu Devi (original plaintiff-appellant no. 2) and two sons, namely, Arjun Singh (plaintiff-appellant no. 1) and Madan Singh (defendant-respondent no. 5). Madan Singh (defendant-respondent no. 5), is traceless since 1981. Late Brij Bihari Singh, common ancestor of the parties, had one more son, namely, Mahabir Singh, who died in the year 1941 issueless, leaving behind his widow, Deoki Kumari, who also died in the year 1985. Late Brij Bihari Singh died leaving his property, as detailed in Schedule I of the plaint, besides other properties, which have been sold by plaintiff no.1, his brother Madan Singh (defendant no. 5) and Kamla Singh (defendant no.1). As such, the properties, as sold by plaintiff no.1, his brother Madan Singh and Kamla Singh have not been included in Schedule-I of the plaint. Further case of the plaintiffs is that family of the plaintiffs and the defendants are still joint and there is no partition by metes and bounds and Kamla Singh (defendant no.1) is the *Karta* of the joint family. The plaintiffs have $\frac{1}{2}$ share in the joint family property, as detailed in Schedule-I of the plaint. Kamla Singh (defendant no.1) being *Karta* of the joint family became dishonest and he was not



giving correct account of the produce of lands, due to that reason, quarrel started amongst the female members, then the plaintiffs made demand of partition of their half share. While the plaintiffs asked to defendant no. 1 for partition of the suit property in cordial atmosphere but defendant no. 1, lastly, refused on 05.11.1991 for partition of property, as detailed in Schedule-I of the plaint.

3. The defendant nos. 1 to 4, namely, Kamla Singh, Naresh Singh, Ramashish Singh and Gopal Singh appeared on notice and filed the contesting written statement by taking several usual defence with contention that late Brij Bihari Singh died in the month of February, 1953, leaving behind his three sons, namely, Mahabir Singh, Dulli Singh and Kamla Singh (defendant no.1). Mahabir Singh, died in the month of December, 1956 leaving behind his wife, Deoki Kumari and Dulli Singh died in the year 1978, leaving behind his widow, Laddu Devi and two sons, namely, Arjun Singh (plaintiff no.1) and Madan Singh (defendant no.5). It is not correct that Madan Singh is traceless for the last 10, in fact Madan Singh used to reside at Delhi and he is in regular contact with the plaintiffs. Since Madan Singh opposed the dishonest intention of the plaintiffs, due to that reason, he was ignored with false explanation. Further case of contesting defendant nos. 1 to 4 is that property of late Brij Bihari Singh was



partitioned amongst his three sons equally and each son of Brij Bihari Singh got 1/3rd share before 1958. After death of Mahabir Singh, his widow Deoki Singh, executed the sale deed on 23.12.1958 in favour of Rakha Krishna Kumar and Awadhesh Kumar with respect to land of her husband's share for payment of loan and other purposes. After partition, Arjun Singh (plaintiff no. 1) and his brother Madan Singh (defendant no.5) are also separate. Arjun Singh (Plaintiff no. 1), Kamla Singh (defendant no. 1) have also sold the land of their share to meet out necessity. It is not true that the land were sold by plaintiff no. 1, answering defendant no.1, Kamla Singh, defendant no. 5 Madan Singh jointly.

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

- I. Is the suit, as framed, maintainable?
- II. Have the plaintiffs got valid cause of action or right to sue?
- III. Is the suit barred by law of limitation, estoppel and acquiescence?
- IV. Does the suit suffer from non-joinder of necessary parties?
- V. Was any partition affected between the plaintiffs and the defendants before 1958 in respect of joint family



property?

VI. Are the suit properties still joint family property of the plaintiffs and the defendants?

VII. Are the plaintiffs entitled to their share in the suit properties as claimed?

VIII. To what other relief or reliefs the plaintiffs are entitled.

The learned trial court, on the basis of evidence and materials available on the record, decided the main issue nos. 1, 4, 5 and 6 against the plaintiffs and in favour of contesting defendant nos. 1 to 4 arriving at conclusion the suit is non-maintainable, suffers from non-joinder of necessary parties and there is no unity of title and possession between the parties, accordingly, dismissed the suit for partition of the suit land.

5. Learned counsel for the plaintiffs-appellants submits that it would appear from the record that the lands, as sold by Arjun Singh (plaintiff-appellant no. 1), Madan Singh (defendant-respondent no.5) and Kamla Singh (defendant-respondent no.1), are not included in the Schedule-I of the plaint, regarding which, the plaintiffs' seek the partition, therefore, no question arises to make the purchasers as parties in the suit, but the learned trial court illegally held that the suit is suffers from non-joinder of the



necessary parties, as the purchasers have not been made parties. Further submission is that there is presumption of jointness in Hindu Mitakshara Family and no any document was brought on record in evidence by contesting defendants-respondents to show that the property of late Brij Bihari Singh was partitioned by metes and bounds amongst his three sons but the learned trial court illegally held that the parties are not joint in respect of the suit land.

6. On the other hand, learned counsel appearing for the defendants-respondents argued that it would appear from bare perusal of the plaint that it is detailed in the plaint that Arjun Singh (plaintiff no.1), and his brother Madan Singh (defendant no.5) sold the joint family property to several persons but the purchasers were not made parties in the suit, while according to Clause 2 of Article 332 of Mulla's Hindu Law purchaser's of plaintiffs' share are necessary parties in partition suit. As such, the learned trial court has rightly arrived at conclusion that the suit suffers from non-joinder of necessary parties due to non-impleading the purchasers in the suit as defendants. He, further, argued that the sale deeds executed by Arjun Singh (plaintiff no. 1) and Madan Singh (defendant no. 5) were brought on record in evidence which clearly indicate that both have sold the land claiming that the lands



have come in their share in partition and it has also come in the evidence that parties are separate in mess and residencae. As such, the learned trial court has rightly arrived at conclusion that the parties are not joint in respect of the suit property and, accordingly, dismissed the suit. Learned counsel for the defendants-respondent nos. 1 to 4 further argued that in the present case, the plaintiffs-appellants, claimed $\frac{1}{2}$ share in the suit property, as detailed in Schedule I of the property. The plaintiffs-appellants, who are claiming partition, are third generation of common ancestors, therefore, the presumption of jointness of family weakens as time passed specially when the defendants-respondents claimed about previous partition much earlier. In the said circumstance, it is burden upon the plaintiffs to prove that in spite of separation in mess and residence since long and selling the property separately, the parties are still joint and there is no partition by metes and bounds. According to the learned counsel for the defendants, it is not believable that the family will remain joint till third generation from the common ancestor.

7. In view of the submissions of the parties, the following points arise for consideration in this First Appeal;

(I) Whether the purchasers of land from the appellant-plaintiff no. 1, who are in possession of their purchased land, are



necessary parties in the suit for partition and non-joining of them in suit of partition, the suit for partition suffers from non-joinder of necessary parties and the suit is liable to be dismissed.

(II) Whether there is unity of title and possession in between the parties as claimed by the plaintiffs-appellants or there had already been previous partition, as claimed by the defendant-respondent nos. 1 to 4.

8. Point No. 1- The plaintiffs-appellants have filed the suit for partition claiming their $\frac{1}{2}$ share in the suit land, as detailed in Schedule I of the plaint, with contention that the ancestral joint property is been partitioned by metes and bounds. Kamal Singh (defendant no. 1), who is the *Karta* of joint family, become dishonest in furnishing the account of the produce of the suit land, due to that reasons, quarrel started in females of the family due to that reason the appellant-plaintiff no.1 asked for partition of land, as detailed in Schedule I of the plaint, which remains after selling through different sale deeds by defendant nos. 1, 5 and plaintiff no.1.

Ext. A, Ext. A/1, Ext. A/7, Ext. A/9, Ext. A/11, Ext. A/12, Ext. A/14, Ext. A/16, Ext. A/17, Ext. A/18 and Ext. A/20 are the certified copies of the sale deeds executed by plaintiff-appellant no.1, Arjun Singh, on 27.07.1990 in favour of Upendra



Narayan Patel, on 23.01.1989 in favour of Most. Kaushalya Devi, on 01.05.1979 in favour of Chinta Devi, on 07.08.1979 in favour of Bindo Sah, on 13.07.1979 in favour of Bindo Sah, on 03.05.1979 in favour of Juveshwar Mahto, on 07.11.1991 in favour of Sri Ram Sah, on 28.02.1987 in favour of Most. Pavitri Devi, on 28.02.1987 in favour of Smt. Usha Devi, on 14.11.1978 in favour of Smt. Phula Devi and on 10.10.1990 in favour of Smt. Panchi Devi.

The aforesaid certified copy of sale deeds show the transfer of lands on several occasions by the plaintiff-appellant no.1 but the aforesaid purchasers were not made parties in the suit for partition of $\frac{1}{2}$ share in the suit land.

9. Clause II of Article 332 of the Mulla's Hindu Law speaks that the plaintiff in a partition suit should plead as defendants;

- (i) the heads of all branches;
- (ii) females who are entitled to a share on partition;
- (iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener.
- (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.



The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed. The entire joint family must be represented either expressly or implicitly. Reference may be made to Section 6 of the Hindu Successions Act, 1956, and particularly to the proviso to that Section. According to Clause II of Article 332 of the Mulla's Hindu Law, the purchasers have not been made parties in the suit, who are to be made necessary party. As such, the suit suffers from the defects of non-joinder of necessary parties and this ground alone is liable to be dismissed.

Eventually, the aforesaid sale deeds clearly indicate that the plaintiff-appellant no.1 has transferred the land of joint family in favour of strangers. In such situation, the purchasers from plaintiff-appellant no.1 were to be made parties to the suit but they have not been pleaded as parties in the suit. As such, the suit suffers to the defect of non-joinder of necessary parties and on this ground, the suit is liable to be dismissed.

10. Point No. II – The plaintiffs-appellants have filed this suit for partition of their $\frac{1}{2}$ share in the suit land with specific case that defendant no.1, Kamla Singh, who is the *Karta* of the joint family, became dishonest and stopped to give correct account of produce of the agriculture, due to that reason, quarrel started in



amongst the ladies in the family. Thereafter, defendant no. 1, Kamla Singh, was asked for partition of remaining joint family property, as detailed in Schedule I of the plaint, as the property was not partitioned in between the parties by metes and bounds. On the other hand, the case of the defendants-respondent nos. 1 to 4 is that after death of Birj Bihari Singh, common ancestral of parties, in the year 1953, partition took place in between his three sons, Mahabir Singh, Dulli Singh and Kamla Singh (defendant no.1) before 1958. After the death of Mahabir Singh, his widow Deoki Devi sold 1/3rd share of her husband to Radha Krishna Kumar and Awadhesh Kumar on 23.12.1958. Plaintiff no.1, Arjun Singh, is also separate to his brother defendant no.1, Madan Singh, and both used to deal their property independently and they have sold the property to several persons after partition.

Ext. A/4 is the certified copy of the sale deed dated 23.12.1958 executed by Most. Deoki Devi, wife of late Mahabir Singh, in favour of Radha Krishna Kumar and Awadhesh Kumar, wherein, it is detailed that the land under the sale deed is allocated in partition to her husband. Ext. A/5 is the certified copy of the sale deed executed by Radha Krishna Kumar and Awadhesh Kumar in favour of Smt. Fulo Devi, wife of Kamla Singh (defendant- respondent no.1) in respect of some land, as



purchased by them from Most. Deoki Kumari, widow of late Mahabir Singh.

Ext. D/4 is the certified copy of Sudbharna, executed by Dulli Singh, father of Arjun Singh (plaintiff-appellant no.1) and Madan Singh (defendant-respondent no.5) on his behalf and on behalf of his both sons as they were minor in favour of Rameshwar Singh on 05.02.1964, in respect of 1 bigha 18 katha 19 dhur, Khasra No. 2935 of Khata No. 334 of Village Mahas. In the said deed, in the east of boundary of land the name of Kamla Singh (defendant-respondent no.1) is shown. It is also detailed in the deed that 5 bigha 16 katha and 17 dhur, land was purchased by his father, Brij Bihari Singh from Babu Balendra Rai. Ext. A, Ext. A/1, Ext. A/7, Ext. A/9, Ext. A/11, Ext. A/12, Ext. A/14, Ext. A/16, Ext. A/17, Ext. A/18 and Ext. A/20 are the certified copy of sale deeds executed by Arjun Singh (plaintiff-appellant no.1) to different persons, claiming the ownership on the basis of allotment in his share on partition. Ext. 1/H is the certified copy of sale deed dated 15.11.1978 executed by Arjun Singh (plaintiff-appellant no.1) and his brother, Madan Singh (defendant no.5) in favoaur of Fula Devi in respect of Plot No. 4343 of Khata No. 1144 and Plot No. 1871 of Khata No. 280 of Village Badas, measuring 17 katha 14.5 dhur claiming the land of their own share. Ext. 1/F and Ext.



1/G are certified copy of sale deeds dated 19.06.1978 and 09.06.1978 executed by Madan Mohan Singh (defendant-respondent no.5), respectively, in favour of Sita Ram Jha and Chamru Prasad Singh claiming the land of his own share.

11. P.W.1, Arjun Singh, who is the plaintiff-appellant no. 1, has stated in his evidence at para 4 of his cross-examination that his house is situated to the north of the house Kamla Singh (defendant-respondent no.1) and in between both houses, there is a wall up to height of 4 feet and both houses are constructed after demolishing the old house. He has one cow and Kamla Singh has also one cow and both cows are maintained by them separately. He has further deposed at para 6 of his cross-examination that he has sold 5-6 bighas land and his brother, Madan Singh (defendant no. 5), has also sold 9 bighas land.

12. D.W. 12, Kamla Singh who is defendant-respondent no.1, has deposed at para 6 in his examination-in-chief that partition took place before 39 years, but he is not in memory about the year of the partition. At the time of partition, Mahabir Singh was alive and his wife, Deoki Devi, was much interested in the partition. He further stated that ancestral land was partitioned in three shares and after partition, all the three co-sharers started looking after the land allotted in their shares. D.W.4, Pokai



Sharma, who is co-villager of the parties, has stated that Kamla Singh and his two brothers, namely, Mahabir Singh and Dulli Singh are separate since before 40 years. He further stated in his cross-examination that about 60 bighas land was partitioned in between Kamla Singh, Mahabir Singh and Dulli Singh. D.W.6, Gudal Pandit, co-villager of the parties, has also stated that Kamla Singh and his brother, Dulli Singh, are separate for about 35 years. D.W.7, Siyaram Paswan, co-villager of the parties, has also stated that his neighbours Dulli Singh and Kamla Singh are separate in mess, cultivation and their cattle house are separate. D.W.8, Jai Prakash Gupta, who is also co-villager of the parties, has stated that cultivation of Kamla Singh and Dulli Singh are separate and both have separate house, demarcated with wall. D.W.10, Mohan Mahto, also stated in his evidence that Kamla Singh, Dulli Singh and Mahabir Singh are separate. After three years of partition, Mahabir Singh died and thereafter, his wife sold the land of her husband's share to Radha Babu. D.W.11, Akchaya Lal Paswan, has stated in his evidence that Kamla Singh and Dulli Singh are his co-villager and both have separate house and both are the *Karta* of their families.

13. Under the Hindu Law, there is presumption of jointness of family, but said presumption weakens as time passed



and Such presumption is also rebuttable one, where the defendants alleges, that the land had been partition amongst the co-sharers long back. Direct evidence of partition may not be available but under such situation, the court may draw an inference of partition amongst co-sharers from the conduct of the parties, taking into consideration, as to whether they were having separate mess, separate residence, separate cultivation and separate transaction.

Ext. D/4, the certified copy of deed shows that Dulli Singh, father of Arjun Singh (plaintiff-appellant no.1) and Madan Singh (defendant no. 4), had executed Sudhbharna in favour of Rameshwar Singh on 05.02.1964, showing the name of Kamla Singh (defendant-respondent no.1) in east of boundary of the land. Ext. A, Ext. A/1, Ext. A/7, Ext. A/9, Ext. A/11, Ext. A/12, Ext. A/14, Ext. A/16, Ext. A/17, Ext. A/18 and Ext. A/20 are the certified copy of deeds which indicate that Arjun Singh has sold the land claiming the land of his own share. Similarly, Madan Singh (defendant no.5), brother of Arjun Singh (plaintiff no.1), has also sold the land as appears from Ext. 1/F and Ext. 1/G to Sita Ram and Chamru Prasad Singh, claiming the land of his own share. Ext. A/4 the certified copy of sale deed dated 23.12.1958 shows that Most. Deoki Devi, wife of Mahabir Singh, who is also one co-sharer, has also sold the land in favour of Radha Krishna



Kumar and Awadhesh Kumar on 23.12.1958 stating therein that the land, detailed in the sale deed, is allocated in share of her husband in partition.

14. From the oral and documentary evidence, as discussed above, it is apparent that the plaintiffs' are separate in mess, residence and also transferred/sold the land to different persons claiming the title and ownership on partition which leads to irresistible conclusion that there had already been partition between the parties, as claimed as defendant nos. 1 to 4.

On perusal of the impugned Judgment of the trial court, it appears that the trial court on considering the evidence available on the record arrived at conclusion that there had already been partition between the parties, I find no reason to interfere in the finding of the trial court on this point. Accordingly, I find and hold that defendant-appellant nos. 1 to 4 have been able to prove that there had already been previous partition between the parties much prior to filing the suit and there is no unity of title and possession in between the parties. As such, point no. II is answered against the plaintiffs-appellants and in favour of the defendant-respondents.



15. In the result, I find no merit in this First Appeal and, accordingly, this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

(Rajendra Kumar Mishra, J)

Bhardwaj/-

AFR/NAFR	NAFR
CAV DATE	27.08.2018
Uploading Date	12.09.2018
Transmission Date	N.A.

