

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.117 of 2002

1. Jai Babu Sao son of Late Gouri Shankar Sao
2. Smt. Kanti Devi wife of Jai Babu Sao
both R/o mohalla- Manik Chand Ka Talab, P.O.- Anishabad, P.S.-
Gardanibagh, District- Patna

.....Plaintiffs..... Appellants

Versus

1. Shri Laxami Narain Sao son of Late Gouri Shankar Sao
2. Smt. Maniya Devi wife of Laxmi Narain Sao
3. Dhiraj Kumar son of Laxami Narain Sao
4. Niraj Kumar son of Laxami Narain Sao
5. Aman Anand son of Laxami Narain Sao
all R/o mohalla- Manik Chand Ka Talab, P.O.- Anishabad, P.S.- Gardanibagh,
District- Patna.....Defendants Ist set.....Respondents Ist Set
6. Sri Uday Prakash @ Uday Prakash Gupta son of late Awadh Bihari Sao
7. Sri Rajesh Prasad Gupta @ Badhu Sao, son of Late Awadh Bihari Sao,
both R/o mohalla- Anishabad By-pass Road, Manik Chand Ka Talab, P.O.-
Anishabad, P.S.- Gardanibagh, District- Patna

...Defendants 2nd Set..... Respondents 2nd Set

Appearance :

For the Appellant/s	:	Mr. S. Kumar, Advocate Mr. Birendra Kumar, Advocate
For the Respondent/s	:	Mr. Shashi Kant Singh, Advocate
For the Respondenets 6 & 7:	:	Mr. Raghwendra Kumar Prasad, Advocate

CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

C.A.V. JUDGMENT

Date : 09-04-2018

The instant appeal has been filed against the judgment dated 15.03.2002 and decree dated 22.03.2002 passed by Shri Avinash Kumar Sinha, the then Subordinate Judge VIII, Patna in Title Partition Suit No. 434 of 1994 / 43 of 1999 whereby and whereunder the suit was decreed and it was ordered that the plaintiff is entitled to 1/3rd share in the suit property, defendants no. 1 to 4 are entitled to 1/3rd share and defendants no. 6 and 7 are also entitled to 1/3rd share in the suit property and accordingly, the



preliminary decree was prepared. The plaintiffs are the appellants and defendants are the respondents.

2. The aforesaid Title Partition Suit was filed by the plaintiffs for partition of the suit properties detailed in schedule 1 to 4 of the plaint by carving out half share of the plaintiffs in the suit property by appointing survey knowing pleader commissioner to the extent of the plaintiffs share and for the cost of the suit.

3. Briefly stated, the case of the plaintiffs is that Late Gauri Shankar Sao was common ancestor of the parties who died in the year 1971 leaving behind his widow Parwati Devi and two sons namely, Jai Babu Sao plaintiff no. 1 and Laxmi Narain Sao the defendant no. 1 in the state of jointness. The parties are governed by Mitakshara School of Hindu Law. After the death of Gauri Shankar Sao the plaintiff no. 1 being the eldest son became the Karta of the family and he with the advice and consent of his mother and his brother (defendant no. 1) has been managing the joint family. Gauri Shankar Sao died leaving behind movable and immovable properties including houses mentioned in schedules of the plaint. The plaintiff no. 1 and the defendant no. 1 have also jointly acquired immovable properties in their names and in the names of their wives who are plaintiff no. 2 and defendant no. 2. After the death of Most Parwati Devi, the mother of the plaintiff



no. 1 and defendant no. 1, the dispute arose in the joint family and it became very difficult for the plaintiff no. 1 to manage the joint family. The plaintiff no. 1 asked the defendants to partition the joint family properties amicably but the defendants refused to partition. There is unity of title and unity of possession between the plaintiff no. 1 and defendant no. 1 with respect to the suit properties and therefore, the plaintiffs brought this suit for partition.

4. The defendants no. 1 and 2 filed the written statement and during course of trial, it was revealed that plaintiff no. 1 and defendant no. 2 had a sister also who died leaving behind two sons namely, Uday Prakash and Badhu Sao @ Rajesh Prasad Gupta and then they were also made parties as defendants no. 6 and 7. Earlier to that on the petition the defendants no. 3 to 5 were also made parties who are the sons of defendants no. 1 and 2.

5. Defendants no. 1 and 2 in the written statement made general allegations against the plaintiffs stating that after the death of father, the plaintiff no. 1 became the karta and he alienated movable and immovable properties without consent of the defendant no. 1 as he is a dishonest man and present suit has been filed to grab the properties. The plaintiffs have concealed many landed properties by not including in the plaint. As a matter of fact



in the family there are three buildings in joint possession between the plaintiff no. 1 and defendant no. 1. Two buildings are at Anishabad near Manik Chand Talab within Patna district and one building is at village Motipur within the district of Muzaffarpur, the details of which has been given in paragraph 11 of the written statement. The plaintiff no. 1 never took consent of defendant no. 1 in management of the joint family property. He never demanded for partition and the present suit was filed without any knowledge of this defendant, though they are living in one and in the same house. The plaintiff fraudulently and dishonestly withdrew Rs. 3,34,981.31/- in the name of defendant no. 1 in connection with L. A. Case No. 27 of 1982 and deposited the same amount in a forged account purported to be in the name of defendant no. 1 and thereafter, he withdrew that amount from the said account on 19.05.1996. These defendants have admitted that there is unity of title and unity of possession in between the parties and the plaintiffs are entitled to 8 annas share and the remaining 8 anna share belongs to these defendants but has prayed for dismissal of the suit. These defendants have given details of the suit properties in schedule 1 to 4 of the written statement.

6. The defendants no. 6 and 7 have also filed their written statement and they have supported the case of the



plaintiffs. They have stated that the statements made in paragraph 1 to 5 and of the plaint are true and not denied. The defendant no. 1 is wasting the joint family property and therefore, the plaintiff no. 1 became annoyed and hence, the suit for partition was filed. These defendants have stated that they have no concern with the suit property and they do not want any share in the suit properties.

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

(i) Is the suit framed maintainable ?

(ii) Is there valid cause of action to the plaintiffs ?

(iii) Is there unity of title and unity of possession between the parties with respect to the suit property ?

(iv) Are the plaintiffs entitled to half share in the suit properties as prayed for ?

(v) Are the plaintiffs entitled to other relief or reliefs ?

8. The learned Sub-judge took up the issues no. iii and iv and held that there is unity of title and unity of possession between the parties with respect to the suit land as it is an admitted fact and further held that as admittedly, the defendants no. 6 and 7 are the sons of the sister of plaintiffs no. 1 and 2 and as such the plaintiffs are not entitled to half share rather they are entitled to 1/3rd share and the defendants are entitled to 1/3rd share and



defendants no. 6 and 7 are also entitled to get 1/3rd share. Thereafter, the issue no. i, ii and v were taken and it was held that the suit as framed is maintainable. The plaintiffs have valid cause of action for the suit and the plaintiffs are entitled for 1/3rd share in the suit property.

9. The plaintiffs being aggrieved and dissatisfied with the judgment and decree have preferred this appeal challenging the maintainability of the same. The learned counsel for the appellants arguing in this appeal has submitted that it is an admitted fact that the plaintiff no. 1 and defendant no. 1 with the joint efforts have acquired properties in the name of their wives who are plaintiff no. 2 and defendant no. 2 wherein the defendants no. 6 and 7 have no share. Learned court below has not considered the written statement of defendants no. 6 and 7 wherein they have clearly stated that these defendants have no concern with the suit property and they do not want any share in the suit properties. The defendants no. 6 and 7 have admitted the case of the plaintiffs in toto but in spite of that the learned court below held that the plaintiffs are entitled to 1/3rd share and defendants no. 6 and 7 are also entitled to 1/3rd share which is against the pleadings. Further the defendants no. 6 and 7 have not come in the witness box in spite of full knowledge of the suit. They in their written statement



have categorically stated that they have no concern with the suit property and they do not want any share in the suit property and as such the judgment and decree being illegal, arbitrary and perverse are fit to be set aside. Learned counsel has further stated that the mother of defendants no. 6 and 7 was the defendants no. 7 in Title Suit No. 29 of 1977 Munsif II, Patna wherein she has filed written statement stating that she has got no interest in the suit property, she is not even necessary party in the present suit, she is the sister of plaintiff no. 1 and 2. By a family arrangement she was compensated by her brothers with the land bearing plot no. 690 and 691 wherein she has been living with her family members. The photostat copy of the judgment of Title Suit No. 29 of 1977 has been filed as annexure2 in the reply filed on behalf of appellants to I. A. No. 8268 of 2013. Paragraph 9 of the said judgment has been referred. Further it has been argued that the defendants no. 6 and 7 have also sworn affidavit that they have no concern with the title partition suit no. 434 of 1994 vide annexure-4 to the reply. Further they have disclaimed any share in the suit properties duly written on stamp paper in presence of the witnesses vide annexure-5 to the said reply.

10. The learned counsel for the respondents no. 1 to 5 have supported the argument of learned counsel for the appellants.



Whereas learned counsel for the respondents no. 6 and 7 have submitted that the judgment and decree passed by the learned court below is quite correct and proper and there is no need of any interference. Photostat copy of the judgment of Title Suit No. 29 of 1977 cannot be considered as the same has not been brought on the record. Similarly the alleged disclaimer made by defendants no. 6 and 7 on stamp paper also cannot be looked into and they are the acts of plaintiff no. 1.

11. The only point for consideration in this appeal is as to whether the defendants no. 6 and 7 are also entitled to 1/3rd share as like plaintiffs and defendants no. 1 to 5.

FINDINGS:-

12. The contention of the learned counsel for the respondents no. 6 and 7 that photostat copy of judgment of Title Suit No. 29 of 1977 Munsif IInd, Patna and photostat copy of disclaimer made by defendants no. 6 and 7 on stamp paper cannot be looked into as those papers have not been brought legally on the record and they are not exhibits is correct. But the defendants no. 6 and 7 have filed their written statement dated 11.02.2002 which is on the record and this written statement is supported with affidavit of defendant no. 7/respondent no. 7 which is also part of the record. In the written statement the defendants 6 and 7 have fully



supported the case of the plaintiffs in toto and further in paragraph 10 of the written statement the respondents no. 6 and 7 / defendants no. 6 and 7 have stated that they have no concern with the suit property in suit and these defendants do not want any share in the suit property. In paragraph 11 it is stated that the suit be decreed as prayed for by the plaintiffs. Contrary to the pleadings of defendants no. 6 and 7 nothing has been brought on the record to infer otherwise. The finding of the learned trial judge that the plaintiffs are entitled for 1/3rd share, the defendants no. 1 to 5 are entitled to 1/3rd share and defendants no. 6 and 7 are entitled to 1/3rd share appears illegal, perverse and against the pleadings of the defendants no. 6 and 7. In the result, the judgment and decree passed by the learned Subordinate Judge VIII, Patna are hereby set aside and it is held that the plaintiffs are entitled to half share in the suit properties and defendants no. 1 to 4 are also entitled to half share. Let a preliminary decree be prepared accordingly.

13. In the result, this appeal stands allowed but under the circumstances without cost.

(Jitendra Mohan Sharma, J)

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