

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.89 of 2016

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Awadhesh Mishra Son of late Sahdeo Mishra Resident of Village- Parta,
Police Station- Kutumba, District Aurangabad.

... .. Appellant/s

Versus

1. Sidheshwar Mishra Son of late Sahdeo Mishra Resident of Village- Parta,
Police Station- Kutumba, District Aurangabad.
2. Rajeshwar Mishra Son of late Sahdeo Mishra
3. Kamleshwar Mishra Son of late Sahdeo Mishra
4. Sushil Kumar Mishra@Ravindra Kumar Son of late Sahdeo Mishra
Respondent no. 2 to 4 are Resident of Village- Parta, Police Station -
Kutumba, District Aurangabad.
5. Bimla Devi Wife of Gauri Shankar Mishra Resident of Village- Nadiyain,
Post Office- Nadiyain, Police station- Sherghati, District Gaya. Daughter of
Late Sahdeo Mishra Resident of Village and PO Parta Police Station
Kutumba, District Aurangabad.
6. Abhimannu Pathak Son of Sri Arjun Pathak Resident of Village- Bharan
Pathak Bigha, Post Office and Police Station- Sherghati , District Gaya, Son
of Krishnawati, Grandson (Nati) of late Sahdeo Mishra, Resident of Village
and P.O. Parta, Police station Kutumba, District Aurangabad.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Sunil Kumar Singh No-10
For the Respondent/s : Mr.

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**CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

ORAL JUDGMENT & ORDER

6 23-01-2019 The appeal has been taken up for hearing under Order

41 Rule 11 of the Code of Civil Procedure, 1908. The sole
appellant has put to challenge the judgment and decree dated
28.11.2015, passed in Appeal No.33 of 2010/18 of 2012 by
learned Additional District Judge-IV, Aurangabad, whereby and
whereunder he has affirmed the judgment and decree dated
04.09.2010, passed in Partition Suit No. 105 of 2003 by learned
Sub-Judge-I, Aurangabad.



2. The appellant is the defendant of the said title suit.

The suit was filed by respondent No.1 seeking partition and claiming 8/42 share of the suit property. This is not in dispute that the parties to the suit are descendants of common ancestor Rameshwar Mishra and further that they belong to the branch of Sahdeo Mishra. The plaintiff is admittedly five brothers. It is the plaintiff's case that after Sahdeo Mishra, the appellant/defendant no.1 became the karta of the family. The plaintiff remained out of the village for considerable period of time because of his employment and after retirement, when he returned back to his village, he claimed his share and demanded partition of the joint family property to the extent of 8/42. The Defendant No.1 in his written statement did not deny that the plaintiff was his full brother. According to him, the ancestral property was partitioned by his father during his life time amongst his sons and there was no joint family property which could be partitioned. The partition, according to the defendant no.1 had taken place in the year 1980 itself. He also asserted that his ancestor Mukund Mishra had two sons, namely, Rameshwar Mishra and Baleshwar Mishra. Rameshwar Mishra had three sons, namely, Ramanand Mishra, Jagpat Mishra and Ganpat Mishra. Ramanand Mishra had two sons Chandra



Shekhar and Kuldip Mishra. Jagpat Mishra had one daughter, namely, Maharani Kuer. Ganpat Mishra died issueless. Chandra Shekhar Mishra had one son, namely, Sukhdeo Mishra and Kuldeep Mishra had three sons, namely Sahdeo Mishra, Suryanand Mishra and Basant Mishra. Kuldip Mishra is admittedly the grandfather of the plaintiff and defendants. It was his further case that Maharani Kuer had gifted her entire share to Janki Devi, the mother of the plaintiff and defendants on 12.04.1947, through a registered deed of gift. The wife of the appellant being only lady to look after Janki Devi, her mother-in-law, she on being pleased with the services of Sushila Devi gifted her property to Sushila Devi and it was accordingly the case of defendant No.1 that the said property gifted by Janki Devi to Sushila Devi could not be the subject matter of the partition. He denied that he was the *karta* of the joint family. Based on the rival pleadings of the contesting parties, the trial Court framed nine issues including issues No. (v) and (vi), which issues are at the core of controversy and are accordingly being extracted herein below:-

“V. Whether there had been partition between the father of the plaintiff and defendants and uncles long long ago?



VI. Whether there had been prior partition in between the plaintiff and defendant No.1-4 in the year 1980?"

3. Based on rival pleadings and issues framed, the parties adduced their evidence, both oral and documentary. The trial Court decided both the issues in favour of the plaintiff and decreed the suit in favour of the plaintiff. The first appellate Court in the impugned judgment and decree, it is easily noticeable, has considered and re-appreciated the documentary and oral evidence adduced by the parties before affirming the findings recorded by the learned trial Court.

4. Learned counsel appearing on behalf of the appellant has made extensive argument to make out his point that the present second appeal involves a substantial question of law and that the findings recorded by the Courts below are untenable being perverse. He has submitted that though the appellate Court has recorded that the stand of the appellant was inconsistent in respect of his prior partition and his exclusive title, he has not given reason as to how the stand of the appellant was inconsistent. Same submission has been in respect of the observation made by the appellate Court below that Exhibit-3 series and 5 series are the documents to show that the land



belong to the joint family having property as well as proprietary and derived title. He has also argued that the appellate Court below failed to take note of the *proviso* to Section 49 of the Indian Registration Act, which provides that unregistered documents may be used for collateral purposes, before holding that the unregistered gift deed executed by Janki Devi in favour of Sushila Devi was inadmissible.

5. I have carefully examined the judgments and decree under challenge of the Courts below. From the materials on record and submission advanced on behalf of the appellant, I find that the only resistance which was put forth by the appellant before the trial Court against the relief seeking partition of decree was that there was an earlier partition already effected by the father of the parties in the year 1980. This factum of partition has not been supported by rest of the defendants in their oral evidence. Other witnesses were examined who appeared to have supported the case of the plaintiff regarding jointness of the suit property. It is well settled law that there is presumption of jointness in a Hindu family unless it is proved otherwise by the contesting parties who claims otherwise. I do not find any perversity in the findings recorded by the Court below to the effect that



defendant No.1 failed to establish that there was a partition in joint family in the year 1980 amongst the sons of Sahdeo Mishra. The second resistance of defendant No.1/appellant was that a portion of the suit property could not be the subject matter of partition, the same having been acquired by the appellant's wife through deed of gift executed by mother of the appellant. The Courts below have rightly refused to accept this story of the appellant /defendant No.1 since the deed of gift was admittedly unregistered. No title could be said to have passed to the wife of appellant No.1 on the basis of the said deed of gift.

6. In my view, therefore, this second appeal does not involve any questions of law much less substantial question of law for determination by this Court.

7. This appeal has no merit and it is, accordingly, dismissed.

(Chakradhari Sharan Singh, J)

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