

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 16890 of 2010

KISHORI PRASAD SINGH @ WAKIL SINGH S/O Late Bisho Singh R/O
Vill.- Kapasia Tola, Nauraga Pregana Malki, P.O. P.S. Distt.- Begusarai.

... ... Defendants No.1 ... Petitioner

Versus

1. AKIL DEO PRASAD SINGH @ JAGDISH SINGH S/O Late Biso Singh
R/O Vill.- Kaparia, Post Thana Sub-Division Distt.- Begusarai
2. Nitia Kumar (Minor) S/O Akildeo Pd. Singh R/O Vill.- Kaparia, Post Thana
Sub-Division Distt.- Begusarai
3. Adarsh Kumar (Minor) S/O Akildeo Pd. Singh R/O Vill.- Kaparia, Post
Thana Sub-Division Distt.- Begusarai.

... ... Plaintiffs ... Opposite Party 1st Set

4. Most. Tara Devi Widow of Late Bisho Singh R/O Vill.- Kaparia Tola,
Nauranga Pargana Malki, Post P.S. Sub-Division, Distt.- Begusarai
5. Smt. Neelam Devi Widow of Amrendra Singh R/O Vill.- Mirjapur Chand,
P.S.- Barauni, Distt.- Begusarai.

... ... Defendants ... Opposite Party 2nd Set

6. Sheo Dulari Devi W/o Ram Kishun Choudhary R/O Vill.- Mehan, P.S.Sub-
Division- Balia, Distt.- Begusarai.

... ... Defendant ... Opposite Party 3rd Set

... ... Respondent/s

Appearance:

For the Petitioner/s	:	Mr. M.N. Parvat, Sr. Advocate Mr. Sanjiv Sharan, Advocate Mr. Sanjay Kumar Mishra, Advocate
For the Respondent/s	:	Mr. Sanjeet Kumar, Advocate Mr. D.N. Singh, Advocate

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

Date:03.04.2023

The present writ petition has been filed for
setting aside the order dated 19.08.2010 passed



by the learned Sub-Judge-III, Begusarai in Title Suit No. 163 of 2002, whereby and whereunder the petition filed by the plaintiff i.e. the opposite parties 1st set herein under Order 18 Rule 1 read with Section 151 of the Code of Civil Procedure, 1908 has been allowed and the defendant no. 1 i.e. the petitioner herein has been directed to adduce the evidence first.

2. The brief facts of the case are that the plaintiffs-opposite parties 1st set are stated to have filed a title partition suit bearing Title Suit No. 163 of 2002, before the learned Court of Sub-Judge-III, Begusarai *inter alia* praying therein for passing a preliminary decree for partition of 1/4th share of the plaintiff in the Schedule-B property of the plaint as also for carving out separate *patti* of the plaintiff whereupon preliminary decree be made final and the plaintiff be put in possession of the suit property by the process of the Court. The defendant No.1- petitioner herein and others had appeared in the aforesaid suit and filed their written statement, controverting the facts



stated/alleged in the plaint and after settlement of the issues, the case was fixed for adducing evidence, however, it is the case of the petitioner herein that the plaintiffs-opposite parties 1st set took several adjournments for adducing evidence but failed to do so and finally after a lapse of about eight years filed a petition on 19.03.2010, under Order 18 Rule 1 read with Section 151 of the Code of Civil Procedure, 1908, *inter alia* praying therein to direct the defendants to adduce evidence first. The petitioner had filed a rejoinder to the said petition dt. 19.03.2010, stating therein that the provisions contained in Order 18 Rule 1 of the Code of Civil Procedure is not attracted in the facts and circumstances of the present case on account of the defendant-petitioner and others having not admitted the averments and allegations made in the plaint by the plaintiffs, however, the Ld. Court of Sub-Judge-III, Begusarai by the impugned order dated 19.08.2010 has allowed the aforesaid petition filed by plaintiffs-opposite parties 1st set & has directed the defendant-petitioner & others to



adduce evidence first.

3. The learned senior counsel for the petitioner has referred to the plaint, more particularly paragraphs no. 3 to 5, which are reproduced herein below:-

“3. That there was registered partition dated 1.8.1987 between Baidyanath Singh and his sons on the first part and Late Bisu Singh and his sons on the other part by which registered partition all the ancestral property as also the lands purchased by Baidyanath Singh and late Bisu Singh were partitioned and separate and exclusive pattis of the two branches were carved out by which Schedule-I of the partition deed was allotted to the share of Baidyanath Singh and Schedule-B of the partition dated 01.08.1987 was allotted to Bisu Singh the late father of the plaintiff and defendant no.1 which Schedule-B of the partition deed also described in Schedule-B of the plaint is the subject matter of the partition in this suit and since this suit is for partition of the share of the property of Late Bisu Singh, therefore arraying of parties of the heirs of Baidyanath Singh and his properties is not at all necessary to give in this suit.



4. That it is relevant to mention that some properties exclusively purchased by Late Biso Singh from his own income in the names of his two sons who were then minors whose alias names were mentioned in two sale deeds dt. 22.1.1974 and 10.8.71 over which properties Late Biso Singh remained in exclusive possession along with his two sons the plaintiff and defendant no.1 which is described as item no. 2 in Schedule-B property of the plaint, that being the joint family property of the parties and over all the Schedule-B properties, the plaintiff have 1/4th share and defendant no. 1 has 1/4th share and defendant no. 4 has 1/4th share.

5. That since some time passed the attitude of the defendant no. 1 has become somewhat different and not congenial, he being the elder brother of the plaintiff who has not been agreeing to the genuine and proper demand of the plaintiff to have the Schedule-B properties partitioned and soon after the death of late Biso Singh the father, there was trouble for partition of homestead land for which an arbitration was held in 1998 by the panches who directed by an award dated 25.3.1998 both the plaintiff and defendant no.1 to have share in the homestead as per their award dated 25.3.1998 both the plaintiff



and defendant no.1 to have share in the homestead as per their award but that was thwarted out by defendant no 1 and the defendant no.1 did not agree to the award given as aforementioned and the defendant no. 1 in spite of several demands made by the plaintiffs for partition of Schedule-B properties of the plaint has not agreed to it and has started making construction of house over survey plot no. 29 under khata no. 24 at Begusarai Mirganj, hence the necessity of this suit for partition arose. The defendant no. 1 sold 2 kathas land of joint family property to defendant 2nd party hence she made party to the suit and her purchased land should be adjusted in the share of the defendant no.1.”

4. The Ld. senior counsel for the petitioner has submitted that the aforesaid averments have categorically been rebutted by the defendant no.1- the petitioner herein as would be apparent from paragraphs no. 9 to 18 of the written statement, which are reproduced herein below:-

“9. That all the allegations raised in the plaint by the plaintiff are denied in its entirety save and except those which are specifically admitted in this written statement.



10. That the allegations in para no. 1 and the genealogical table has not been correctly but, hence that is denied, this fact is true that Biso Singh died leaving behind two sons out of whom Kishori Singh alias Okil Singh alias Jagdish Singh is the elder son and Akildeo Singh having only name is the younger son Akil Deo Singh having no alias name as Jagdish Singh.

11. That the allegations in para no.2 in the plaint has not been correctly put, hence that is denied.

12. That the allegations raised in para no. 3 is also denied as they were not been put correctly. It may be submitted here, that there was Registered partition dated 1.8.1987 between Baidyanath Singh and his sons on the one side and Late Bisho Singh and his son the other side and both the son of Sital Singh got partitioned their ancestral property, but the land of survey plot no. 291 were not made subject to that partitioned deed, with respect to the plot purchased from the income of gift articles of defendant no.1. It may be submitted that defendant no. 1 is the elder son of late Bisho Singh who was born in the year 1969 and as Late Bisho Singh was leading business man and after a good lapse of marriage, 1st son born on the occasion of



First Chhathi, so many gift articles were presented to defendant no.1, by all the businessmen and that gift articles and the Asharfi presented by Nanas and others, and as Bisho Singh was a leading businessman so he used the income of the gift articles in business and after a good earning Late Bisho Singh purchased land in Mouja-Mirganj and Navranga in the name of defendant no.1 and also in the name of Tara Devi, and as their lands were purchased by Bisho Singh from the gift articles presented by all the business men to this defendant no.1 when he was a little chap hence the land fully detailed Mouja-Mirganj and Nauranga cannot be subject matter of partitioned and that land is out of presumption of jointness and that property shall be deemed to be the exclusive property of the defendant no.1 This was the main cause that the property of Nauranga and Mirganj were not added in the partition deed of dated 1.8.1987.

13. That as the lands purchased in the name of defendant no. 1 and his mother from the income of gift articles present to the defendant no.1 came in existence prior to the Registered partition of 1987 and if there would have been otherwise matter the land should not have been excluded from the



partition deed.

14. That the allegations raised in para no. 4 of the plaint are quite false and baseless hence they are denied. It may be submitted here that the sale deed dated 22.1.1974 and 10.1.1971, both the deeds are in the name of defendant no.1, but not in the name of two sons and it also may be mentioned here that Late Bisho Singh has purchased some land from his personal income out of Mouja-Mirganj and Nauranga and the plots of Mouja-Nouranga is the exclusive property of the defendant no.1 and that has been purchased from the sale proceed which were invested in business by Late Bisho Singh and outcomes of that investment in business. The land of Mouja-Nauranga and Mirganj were purchased and accordingly Late Bisho Singh during his life time handed over land and house standing over Mouja- Mirganj and Nauranga to defendant no.1 and since 1990 defendant no.1 is doing business their exclusively and as such had given those portion of the house and land of Mouja-Nauranga and Mirganj is in possession of defendant no.1 as a rightful owner in the knowledge of the plaintiff and also defendant no.4 and 5 as during the life time of Late Bisho Singh the plaintiff and Tara Devi was ousted from the land of Mouja-



Nauranga and Mirganj so any right over these portion of land as aforesaid the plaintiff or defendant no.4 and 5 cannot claim and that claim cannot be considered legally. And there is no joint property of house over survey plot no. 291 and there is no joint family property specially in Mouja-Mirganj and Nauranga any claim of partitioned over those plots cannot be mentioned in any of the ways and the claim of partitioned by plaintiff is forged and fabricated.

*15. That the allegations in para no.5 are quite false and baseless hence those allegations are denied in toto. It may be submitted here that even after the death of his father, the defendant no.1 tried to improve the condition of plaintiff by giving them some money, and all the dues and debts of his Late father was paid by defendant no.1 having intention to improve his younger brother and also was helping to his sister defendant no. 5, who were given the lands by his late father, so that she cannot claim after the death of Bisho Singh and over those portion, **(sic)** when defendant no. 5 began to construct house this defendant no. 1 gave her Rs. 50,000/- to the defendant no. 5 and as the financial condition of defendant no.1 became weak and he was unable to discharge **(sic)** debt of his father,*



so he sold 2 kathas of land, and by that amount defendant no. 1 paid the debt of his father, and also paid to his sister and younger brother and mother. This helping attitude of defendant no.1 was wrongly considered by the plaintiff and they coming in collusion to one together got plan to harm defendant no.1 this suit on false ground has been filed with mischievous intention. It may be submitted here again that all the property which was acquired by the late father of plaintiff and defendant no.1 and also defendant no. 5 and husband of defendant no. 4 from his personal acquisition has already been divided between the plaintiff and defendant no.1, defendant no.4 has already been given her share during the life time of her father, so they are stopped to claim to any share in the paternal property and the land and house standing over survey plot no. 291 is the gifted property as aforesaid. So the specific plot cannot be the subject matter of partition.

16. That it may be submitted that the allegation of para no. 5 about the award of the Arbitrators dt. 25.3.1998 is not in the knowledge of this defendant no.1 and the plaintiff put their strict proof thereof about the award although it is clear that prior to the death of Late Bisho Singh the property were divided in two



parts save and except the residential house as all were residing there, and the house and shop standing on survey plot no.291, and as that land was purchased with the outcomes of earnings during the first "Chhathi" of defendant no.1, hence the same is the exclusive property of defendant no. 1.

*17. That it may be submitted here that there is 1 katha 10 dhurs and 10 dhurkies of land which were purchased by Late Bisho Singh and has also been divided among the two brothers half and half and in this way the defendant no.1 had been allotted 1 katha 11 dhurs 15 dhurkies of land and plaintiff has got only 6 dhurs and 13 dhurkies only, and other lands save and except Mouja-Mirganj and Nauranga were divided half and half during the life time of Bisho Singh and that time Tara Devi had no claim, and she was leaving with her elder son defendant no.1, and the money which was deposited in her name by defendant no.1 as such the amount in fix deposit is also the personal amount of defendant no.1, hence that cannot be withdrawn or claim by any one without the consent of defendant no. 1 can **(sic)** it will also be relevant to mention here that due to the sudden illness of his father defendant no. 1 took his father in Indira Gandhi Medical*



Institute on 13.8.1997 and getting the absence of the defendant no.1 the plaintiff brought money from Ratan Oil Mill having his Head Branch 'Delhi amounting to Rupees near about 27000/- which was the personal property of defendant no.1 and defendant no.1 also sold 120 bags of Andi amounting to Rupees 74958/- and that was grabbed by the plaintiff and when defendant no.1 demanded sale amount of 120 Bags of Andi which was the personal acquisition of his father and also the half debt of his father which was paid by the defendant no.1 except the consideration amount of 2 kathas of land, then in that case the suit has been filed only to give harm to the defendant no.1. It may be also mention that no portion of the land has been purchased in the name of plaintiff no.1.

18. That the claim of partition and also the cause of action thereof are all false and baseless hence that are denied in toto."

5. The Ld. senior counsel for the petitioner has submitted that the claim put forth by the plaintiffs-opposite parties 1st set have been denied by the defendant no. 1-plaintiff in his written statement, as aforesaid, hence there was no occasion for the learned court below to have passed the impugned



order dated 19.08.2010, directing defendant no. 1 to adduce evidence first. In this regard, the learned senior counsel for the petitioner has referred to a judgment rendered by a coordinate Bench of this Court in the case of **Mohammad Jahangir vs. Sajda Khatoon & Ors.**, reported in **2007 (4) PLJR 100**, paragraphs no. 3 to 6 whereof are reproduced herein below:-

“3. At this stage, the plaintiff filed an application in terms of Order XVIII Rule 1 of CPC which is reproduced as under:-

Right to begin:- The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

4. On behalf of plaintiff-petitioner, it is submitted that as the defendants had pleaded to non-suit the petitioner, the defendants must begin. In my view, the view, as canvassed with reference to Order XVIII Rule 1, is misconceived.

5. The general rule as to plead and prove is that one who pleads must prove the exception being where the pleading of one is



admitted by the adversary. In such an event, the person pleading the fact is relieved of his obligation to prove the pleading as it is admitted. The rationale of Order XVIII Rule 1 is based on these two principles put together. It is to be seen that once the defendant admits the facts as pleaded by the plaintiff then the plaintiff is relieved of proving his case. The obligation would then normally travel to the defendant to plead his case first. The requirement of Order XVIII Rule 1 is first that there should be an admission of facts by the defendant as pleaded by the plaintiff which facts in spite of admission would not entitle the plaintiff to any relief or would disentitle the plaintiff to any relief on a separate set of facts pleaded by the defendant. Primarily, there has to be first admission of facts by defendant. Secondly, it would be seen that this provision only gives a right to the defendant to begin whether he exercises that right or not the option is his. If Order XVIII Rule 1 made it obligatory on part of the defendant to begin then the section would be worded otherwise. The section is only conferring a right on the defendant but does not make it obligatory, for if it was to operate as an obligatory responsibility then it can simply be drafted as 'defendant shall proceed' and not



*"that the defendant has the right to begin".
The words would be "that the defendant had
the duty to begin".*

*6. In the present facts, it would be seen that
the defendants have made no admission to
the pleadings of the plaintiff. Defendants
have disputed the factum of the properties
being unpartitioned ancestral properties,
therefore, the plaintiff has to begin. In view of
the aforesaid, I find no infirmity in the
impugned order and this revision is, thus,
liable to be and is dismissed."*

6. Per contra, the Ld. counsel appearing for the plaintiffs-respondents has submitted that the petitioner herein has admitted the factum of partition amongst the parties in paragraph no. 16 of the written statement filed in the aforesaid suit, hence the defendant has the right to begin. In this regard, the petitioner has referred to various judgments rendered by various High Courts, which are enumerated herein below:-

(i) 2018 AIR CC 59, rendered by the Hon'ble High Court of Orissa at Cuttack.

(ii) Judgment dated 18.07.2022 passed by a learned Single Judge of the Hon'ble Delhi High Court in CS(OS) 587 of 2017.



(iii) 2016 (1) PLJR 319.

7. I have heard the learned counsel for the parties and gone through the materials on record as also perused the impugned order dated 19.08.2010. This Court finds from a bare perusal of the plaint and written statement filed in the aforesaid Title Suit No. 163 of 2002 that the defendant no.1-petitioner has not only disputed the award of the Arbitrator dated 25.03.1998, regarding both the plaintiff and the defendant no. 1 having share in the homestead land but has also disputed the factum of the suit properties being unpartitioned ancestral properties, as is apparent from the averments made in the written statement, which have been reproduced herein above in the preceding paragraphs. Thus, the requirement of Order 18 Rule 1 of the Code of Civil Procedure, to the effect that there should be admission of facts by the defendant, as alleged/pleaded by the plaintiff, which facts in spite of admission would not entitle the plaintiff to any relief or would disentitle the plaintiff to any



relief on a separate set of facts pleaded by the defendant, is not fulfilled in the present case and moreover, this provision of Law only confers a right on the defendant but does not make it obligatory, inasmuch as if this Section had made it obligatory on the part of the defendant to begin, then the Section would have been worded otherwise. The present case is squarely covered by the judgment rendered by a coordinate Bench of this Court in the case of Mohammad Jahangir (supra). Thus, this Court finds that the impugned order dated 19.08.2010 passed by the Sub-Judge-III, Begusarai in Title Suit No. 163 of 2002, directing the defendant no. 1 i.e. the petitioner herein to adduce evidence first, suffers from legal infirmity and is contrary to the requirements of Order 18 Rule 1 of the Code of Civil Procedure, hence is fit to be quashed.

8. At this juncture, it would be relevant to refer to the judgments referred to by the learned counsel for the plaintiffs- opposite parties 1st set, as have been noted herein below in the preceding paragraphs, to



only state that the same are distinguishable in the facts and circumstances of the present case.

9. Having regard to the facts and circumstances of the case and for the reasons mentioned herein above, I deem it fit and proper to set aside the order dated 19.08.2010, passed by the learned Sub-Judge-III, Begusarai in Title Suit No. 163 of 2002.

10. The writ petition stands allowed.

(Mohit Kumar Shah, J)

S.Sb/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	24.08.2023
Transmission Date	N/A

