

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.812 of 1978

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1. Sheobachan Mahto Son of Algu Mahto, Resident of Rajapur, P.S. Mirganj, District – Gopalganj.(Appeal abated against him on his death)
 - 2.1. Birbal Singh S/o Late Sheobachan Mahto, Resident of Village - Rajapur Police Station - Uchchkagaon, District - Gopalganj.

... .. Appellant/s

Versus

- 1.1. Ram Dhayan Mahto Son of Late Deo Narayan Mahto, Resident of Rajapur, P.S. Barkagaon, P.O. Saathi, District - Gopalganj.
- 1.2. Mt. Kailashia Devi (Daughter) W/o Gurucharan Mahto, Resident of Sauahan Hatta, P.S. - Mirganj, P.O. - Mirganj, Dist. - Gopalganj.
2. Ujjagar Mahto Son of Chattardhari Mahto, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
- 3.1. Most. Janki Devi (deleted vide order dated 8.1.2016) W/o Late Shrikishun Mahto
- 3.2. Sudama Mahto, S/O Late Shrikishun Mahto
4. Ganesh Mahto Son of Radhe Mahto, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
5. Mostt. Sonia widow of Agam Mahto, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
6. Indal Mahto Son of Agam Mahto, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
8. Hardeo Mahto son of Agam Mahto, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
9. Ramswarup Lohar son of Parsadi Lohar, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
10. Ramai Sah Son of Mangal Sah, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
11. Dharian Singh Son of Bharos Singh, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
12. Parsuram Singh Son of Bharos Singh, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.
13. Jagarnath Lal Son of Dhanukdhari Lall, Resident of Rajapur, P.S. Mirganj, Dist. Gopalganj.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Naresh Chandra Verma, Advocate Mr. Milind Kumar Mishra, Advocate Mr. Yogendra Tiwari, Advocate
For the Respondent/s	:	None



CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA

C.A.V. JUDGMENT

Date : 13-09-2024

It appears from the record that appellant no.1 Sheobachan Mahto died on 15.10.2012, however, substitution petition for substitution of legal representative of deceased appellant no.1 was rejected vide order dated 21.10.2016. Vide order dated 10.11.2016, it was held that on account of dismissal of first appeal against appellant no.1, the whole appeal will not abate and the first appeal shall proceed according to law. Appellant no.2.1 Birbal Singh, the heir and legal representative of deceased appellant nos.2 and 3 (mother of appellant nos.1 and 2), has been substituted vide order dated 06.07.2017.

2. The instant appeal has been preferred by the plaintiffs/appellants against the judgment and decree dated 08.08.1978 passed in Title Suit No.581 of 1974/140 of 1976 by learned 3rd Additional Subordinate Judge, Gopalganj whereby the suit filed by the plaintiffs for partition of the suit properties described in Schedule 1 and 2 of the plaint, and to carve their half share out of the same, was dismissed on contest with cost against defendant nos.1 to 4 and *ex-parte* without cost against the rest.

3. For the sake of convenience, the parties are being



referred to as plaintiffs-appellants or defendants-respondents.

4. Cross-objection on behalf of defendant nos.1 and 2/respondent nos.1 and 2 under Order 41 Rule 22 of CPC has also been filed being aggrieved by and dissatisfied with a part of the judgment and decree dated 8th August, 1978 with prayer to hold that the case of defendant nos.1 and 2 is true to the full extent and these defendants own and possess 3/4th share already partitioned and carried out in properties of Dhanpat Mahto and further that defendant no.3 holds absolutely no interest in the lands of Schedule 1 of the plaint.

5. None appeared on behalf of respondents/cross appellants, nor defects pointed out by the office have been removed by the cross-appellants despite given sufficient time. Hence the cross-objection filed on behalf of respondent nos.1 and 2 is dismissed for non-prosecution.

6. According to the plaintiffs, Bechan Mahto was the common ancestor of the plaintiffs and defendant nos.1 to 6. Bachan Mahto had three sons, namely, Ramsaran Mahto, Lahaur Mahto and Dhanpat Mahto. Lahaur Mahto died before the Revisional Survey Operation in jointness with his brothers Ramsaran Mahto and Dhanpat Mahto leaving behind him a son Tapsi Mahto (father of original plaintiff Algu Mahto). Thereafter



Dhanpat Mahto died in jointness with Ramsaran Mahto leaving behind him his five sons Bhekha Mahto, Doma Mahto, Bharat Mahto, Chhatradhari Mahto and Sheobaran Mahto. Defendant no.1 is the son of Doma Mahto and defendant no.2 is the son of Chhatradhari Mahto. Defendant no.3 is the son of Sheobaran Mahto. Rakshha Mahto was the son of Bharat Mahto. Defendant nos.4 to 6 are the sons of Rakshha Mahto. Ramsaran Mahto died issueless in jointness with his nephews. Tapsi Mahto was the son of Lahaur Mahto and Algu Mahto (original plaintiff) was the son of Tapsi Mahto. Original appellants were legal representatives of Algu Mahto (original plaintiff).

7. The further case of the plaintiffs is that Bechan Mahto had a brother Ghur Mahto who was separated from Bechan Mahto before the R.S. Operation. Both the brothers partitioned the properties, Ghur Mahto died leaving behind his only son Horil Mahto before the R.S. Operation. As Horil Mahto had no issue so his Bhaginas (sons of his sister) Khub Lal Mahto and Bhajan Mahto began to live with him. Bhajan Mahto predeceased Khub Lal Mahto. Thereafter Khub Lal Mahto also died leaving behind his widow Mostt. Tilesara. The property described in Schedule 2 of the plaint was recorded in the R.S. *Khatian* in the name of Horil Mahto. He also got the name of



Mostt. Tilesara (his Bhagina's wife) entered in the R.S. Khatian along with him for her consolation but Mostt. Tilesara had no title over the property of Ghur Mahto. After the R.S. Operation, Mostt. Tilesara and Horil Mahto died one after another and Mostt. Surjee (the widow of Horil Mahto) came in possession of her husband's property. She also died in 1925 and when she died, in the branch of Bechan Mahto; Ramsaran, Dhanpat and Tapsi had already died so the property of Ghur Mahto came in possession of original plaintiff Algu Mahto (father of appellant nos.1 and 2) to the extent of half share and the remaining half share went to Doma, Chhatradhari and Sheobaran. That property was not partitioned between the parties of the suit or their ancestors.

8. Further case of plaintiffs is that the properties described in Schedule 1 and 2 of the plaint were never partitioned by metes and bounds between the parties to the suit and their ancestors. Some of the lands were in joint possession and some of them are in separate possession of the parties according to their convenience. Although, there was separation in the family but immovable properties were not partitioned by metes and bounds. The parties had dealt with the properties separately according to their shares and the defendant nos.7 to 9 are their



transferees. The original plaintiff filed the suit for partition of suit property as defendants did not agree to partition.

9. Defendant nos.1 and 2 in their joint contesting written statement denied the claim of plaintiffs stating that there was no unity of title and possession over the suit properties between the parties. It is claimed that the suit of the plaintiffs, as framed, was not maintainable having got no valid cause of action for the suit and the same was barred by law of limitation and also the suit was not valued properly and the court fee paid thereon was not sufficient.

10. It is stated that after death of Bechan Mahto, his son Lahaur Mahto separated (1/3rd share) from his brothers, namely, Ramsaran Mahto and Dhanpat Mahto who remained joint (2/3rd share). The major portion of the properties were partitioned by metes and bounds between them. Some property including homestead land which had not been partitioned was recorded jointly in the R.S. Khatian. The property which had been allotted to the share of Lahaur Mahto was recorded in the R.S. Khatian in the name of his son Tapsi Mahto because Lahaur Mahto had died before the R.S. Operation. The properties which had been allotted to Ramsaran and Dhanpat on partition were recorded in R.S. Khatian were also in their possession. The



properties which had been recorded jointly in the names of Tapsi, Ramsaran and Dhanpat in the R.S. Khatian were also partitioned after some time of the R.S. Operation. The parties have constructed their houses separately. It is further stated that Ramsaran Mahto died issueless during the life time of Dhanpat Mahto and his properties went to Dhanpat Mahto which remained in his possession till his life time.

11. Horil Mahto had no issue and so he and his wife Mostt. Surjee adopted Sheobaran Mahto who was son of Dhanpat Mahto. Sheobaran Mahto came in possession of the property of Horil Mahto and Mostt. Surjee after their death. He had no connection with the property of Dhanpat Mahto after he was adopted by Horil Mahto. Defendant no.3 (Shrikishun Mahto), who was the son of Sheobaran Mahto, has also no concern with the property of Dhanpat Mahto.

12. After the death of Dhanpat Mahto, his four sons only viz. Bhekha Mahto, Doma Mahto, Bharat Mahto and Chhatradhari Mahto came in possession of his property. Later on they separated among themselves. Thereafter Bharat Mahto died leaving his son Rakshha Mahto and Rakshha Mahto came in possession of his property to the extent of 1/4th. Thereafter Bhekha Mahto died issueless leaving behind him, his brothers



Doma and Chhatradhari who came in possession of his property. Later on the properties were partitioned between Doma, Chhatradhari and Rakshha Mahto. Defendant nos.1 and 2 have got 3/4th share and the heirs of Rakshha Mahto are in possession of the property to the extent of 1/4th. It is denied that Bharat Mahto had been adopted by Ramsaran Mahto rather the entire property of Ramsaran Mahto after his death came in possession of Dhanpat Mahto. It was denied that Sheobaran Mahto was karta of the joint family.

13. The case of defendant no.3 (Shrikishun Mahto) is that after the death of Bechan Mahto, all his three sons separated among themselves before the R.S. Operation in this way that Lahaur Mahto separated and Dhanpat Mahto and Ramsaran Mahto remained joint. The immovable properties were partitioned. The land to the extent of 1/3rd was allotted to Lahaur Mahto and the remaining 2/3rd of land was allotted to Dhanpat Mahto and Ramsaran Mahto. Accordingly, their possession was recorded in the R.S. Khatian. At the time of R.S. Operation, Lahaur Mahto had died and so in the R.S. Khatian in his place, his son Tapsi Mahto was recorded. Some time after the revisional survey, Dhanpat Mahto and Ramsaran also separated among themselves. Tapsi Mahto had predeceased



Ramsaran Mahto. Dhanpat Mahto and Ramsaran Mahto partitioned the land and came in possession, as Ramsaran Mahto had no issue so he adopted Bharat Mahto (one of the sons of Dhanpat Mahto). After the death of Ramsaran Mahto, Bharat Mahto came in possession of his property. The heirs of Bharat Mahto are still in possession of the property of Ramsaran Mahto. They have dealt with that property exclusively. Some land including homestead land which had not been partitioned between the three sons of Bechan Mahto was partitioned after R.S. Operation between Ramsaran Mahto, Tapsi Mahto and Dhanpat Mahto in equal share. They came in separate possession of the same.

14. It is not correct that Ramsaran Mahto died in jointness with Tapsi Mahto. It is also not correct that Sheobaran Mahto was the karta of the joint family. It is also not correct that the plaintiffs have got $\frac{1}{2}$ share in the suit property. No property is joint between the plaintiffs and the defendants. The remaining four sons of Dhanpat Mahto also separated among themselves as Bharat Mahto inherited the property of Ramsaran Mahto on the basis of adoption so he did not get any share in the property of Dhanpat Mahto. The parties have dealt with the properties separately. After the death of Bhekha Mahto, his properties were



divided equally between Sheobaran Mahto, Doma Mahto and Chhatradhari Mahto.

15. Further case of defendant no.3 is that Ghur Mahto was not the brother of Bechan Mahto and one had no connection with the other. The land described in Schedule 2 of the plaint has been recorded in the C.S. Khatian in the name of Horil Mahto. In the year 1910, Horil Mahto executed a sale deed in respect to his entire property in favour of his Bhaginas Bhagirathi @ Bhajan and Khub Lal and delivered possession of the same to them. Therefore, in the R.S. Khatian that property has wrongly been recorded in the name of Horil Mahto.

16. Ghur Mahto had a son Horil Mahto. Horil Mahto had no issue. Horil's Bhagina Bhagirath and Khub Lal were in service in Bengal and so their wives some times were living at Rajapur with Horil Mahto. At the time of R.S. Operation, Mostt. Tilesari (wife of Khub Lal) was residing at village Rajapur with Horil Mahto and by mistake the name of Mostt. Tilesari was recorded along with Horil Mahto in the R.S. Khatian. In spite of that the property had been coming in possession of Bhajan and Khub Lal Mahto. Khub Lal Mahto died issueless and after the death of Khub Lal Mahto and his wife Mostt. Tilesari, Bhajan Mahto came in possession of the entire property.



17. Bhagirath Mahto @ Bhajan Mahto took Rs.1,500/- from the father of defendant no.3 and executed a deed with respect to the property of Horil Mahto in his favour and delivered possession of the same to him to save court fee and registration cost. Bhagirath Mahto instead of executing a sale deed executed *Ekrarnama ladavi* in favour of the father of defendant no.3 with respect to that property without his knowledge. Sheobaran Mahto, father of defendant no.3, had been coming in possession of that property and had got his name mutated over the same. He used to pay rent for that land. Since after his death, defendant no.3 has been coming in possession of that land. He pays rent for the same. He has also dealt with that property. The plaintiffs and the other defendants have got no concern with the property of Horil Mahto.

18. The father of defendant no.3 constructed a house much earlier on 1 *kattha* and 7 *dhurs* of land of R.S. Plot No.2112 appertaining to Khata no.143 and since then he was living with his family. This defendant demolished that house and constructed a *pucca* house thereon at a cost of Rs.40,000/- in which he is living with his family. Hence, the suit was fit to be dismissed with cost to the defendants.

19. The case of defendant no.4 Ganesh Mahto is that



Lahaur Mahto died in state of separation from his brothers. After the death of Bechan Mahto, his sons separated before the R.S. Operation in such a way that Lahaur Mahto separated from his two brothers and the two brothers Dhanpat and Ramsaran remained joint. They partitioned almost the entire property by metes and bounds except the homestead plot and one or 2 plots. The land to the extent of 1/3rd share was allotted to Lahaur Mahto and the land to the extent of 2/3rd share was allotted to Dhanpat Mahto and Ramsaran Mahto and, accordingly, they were coming in possession of the same separately. The R.S. Khatian was prepared according to the partition aforesaid. Their possession was recorded separately. Some plots and homestead land which had remained joint were recorded jointly in their possession in the R.S. Khatian.

20. Lahaur Mahto was the eldest brother. After the Revisional Survey, those lands which had not been partitioned were also partitioned. Both the parties have constructed their houses separately. Ramsaran Mahto died in 1934 in jointness with his brother Dhanpat Mahto. Dhanpat Mahto died leaving behind him, his five sons. Bhekha Mahto died in jointness with his four brothers. Later on, Bharat Mahto and Sheobaran also died. The defendants also separated among themselves and had



partitioned their properties separately. Ramsaran Mahto had no issue and so he adopted Bharat Mahto. So the entire property of Ramsaran Mahto came in possession of Bharat Mahto after his death. The lands which have been recorded in possession of Tapsi Mahto in the R.S. *Khatian* belong to the plaintiffs and the remaining lands belong to the defendants. No property is joint between the parties and so the suit was fit to be dismissed with cost to the defendants.

21. Having perused the contents of the plaint and the written statements, on 09.01.1978 the learned trial Court recast the following issues for determination:-

- (i) Is the suit as framed, maintainable?
- (ii) Have the plaintiffs got any valid cause of action for the suit?
- (iii) Is the suit barred by the law of limitation?
- (iv) Has the suit been properly valued and is the court fee paid sufficient?
- (v) Is the suit bad for the defect of the parties?
- (vi) Whether there was separation between the sons of Bechan Mahto before the R.S. Operation and whether they had partitioned the properties?
- (vii) Whether Dhanpat Mahto and Tapsi Mahto had predeceased Ramsaran Mahto?
- (viii) Whether Bharat Mahto was adopted by Ramsaran Mahto and Sheobaran Mahto by Horil Mahto?
- (ix) Was Ghur Mahto, the brother of Bechan Mahto?
- (x) Is there any unity of title and possession between the parties over the suit properties?
- (xi) Are the plaintiffs entitled to a decree for partition, if so, to what extent and with respect to what property?
- (xii) To what relief or reliefs, if any, are the plaintiffs entitled?



22. After hearing the parties and upon consideration of oral and documentary evidence, the trial court dismissed the suit filed by the plaintiffs by holding that Lahaur Mahto predeceased Ramsaran Mahto and Dhanpat Mahto. Ramsaran Mahto predeceased his brother Dhanpat Mahto. It has not been established that Bharat Mahto (grand father of defendant no.4) had been adopted by Ramsaran Mahto as claimed by defendant no.4 and that Sheobaran Mahto had been adopted by Horil Mahto as claimed by defendant nos.1 and 2. The learned trial court has held that the plaintiffs have failed to prove that Ghur Mahto was brother of Bechan Mahto. The plaintiffs have also failed to prove that they have got unity of title and unity of possession over the properties described in Schedule Nos.1 and 2 of the plaint and so they cannot get a decree for partition of those properties. According to both parties, the heirs of Khub Lal and Bhajan had no interest in the property described in Schedule 2 property of the plaint, therefore, the suit is not bad for the parties. The trial court found that the suit is not maintainable, the plaintiffs have got no valid cause of action and they are not entitled to the reliefs claimed by them.

23. The plaintiffs/appellants aggrieved by the aforesaid judgment/decreed filed the instant appeal.



24. Learned counsel for the appellants has submitted that the learned trial court was wrong in holding that there was no unity of title and possession of the plaintiffs over Schedule 1 and 2 lands. Merely because in the R.S. *Khatian*, Tapsi Mahto's name is recorded having equal share and such lands were shown in possession of each person does not prove that they were not joint. The trial court was wrong to hold that prior to R.S. Operation there was partition of some properties and partition of rest of the properties after revisional survey. The trial court should have held that the share of Ramsaran Mahto was devolved by Rules of Survivorship to the two brothers of Lahaur and Dhanpat. The trial court was wrong in holding that the plaintiffs failed to prove that Ghur Mahto was brother of Bechan Mahto and plaintiffs have got no share in Schedule 2 property and entire rent of Schedule 2 land was being paid by defendant no.3, Shrikishun Mahto. The trial court was wrong in stating that plaintiffs and other defendants (except defendant no.3) had no interest in Schedule 2 property and that property is in the possession of defendant no.3 for more than 12 years. The trial court was wrong in holding that Ramsaran Mahto died before Dhanpat Mahto. It should have held that Tapsi was alive when Ramsaran died and as such plaintiffs succeeded to the properties



of Ramsaran Mahto. The trial court misconstrued the entry in R.S. *Khatian* with respect to suit land.

25. It has further been contended by learned counsel for the appellants that three sons of Bechan Mahto were joint among themselves so long Sheobaran Mahto was alive. All the descendants of Bechan Mahto were joint among themselves and Sheobaran Mahto was the karta of the joint family. After his death, there was separation in the family but the properties were not partitioned by metes and bounds. Both the parties have dealt with their properties.

26. Despite given several opportunities and even the direct notices were issued to contesting respondent nos.1 to 3, no one appeared on behalf of respondents since 27.06.2023. It appears from the record that the contention on behalf of the defendants in trial court was that before the Revisional Survey Operation and after the death of Bechan Mahto there was separation between the sons of Bechan Mahto in such a way that Lahaur Mahto (the great grandfather of plaintiffs) separated from brothers Ramsaran Mahto and Dhanpat Mahto, who remained joint among themselves. The properties except one to two plots and homestead property were partitioned by metes and bounds between them and they were in separate possession of



the same. The properties which had been partitioned between themselves recorded in their separate possession in R.S. *Khatian*. The R.S. *Khatian* of Khata nos.102, 103 and 143 of village Rajapur has been marked as Ext.E-3(a). The land of Khata no.102 has been recorded in the names of Ramsaran, Dhanpat and Tapsi having equal share which shows that Lahaur Mahto died before R.S. Operation so his son was recorded in R.S. *Khatian* along with Ramsaran and Dhanpat.

27. The *Khatian* of Khata no.103 of village Rajapur has been recorded in exclusive name of Ramsaran Mahto. The homestead land bearing Khata no.143 has been recorded in the joint possession of Ramsaran Mahto, Dhanpat Mahto and Tapsi Mahto which shows that homestead land had not been partitioned between them. The case of the defendants is that soon after the R.S. Operation these lands were also partitioned and the parties constructed their houses separately.

28. In view of the above submissions on behalf of the appellants and contention of respondents as appear from record, the following points arise for consideration in this first appeal:-

- (i) whether the plaintiffs are entitled to a decree for partition and whether there is any unity of title and possession between the parties over the suit properties; and



(ii) whether the judgment and decree passed by learned trial court are sustainable in the eye of law?

29. In support of their respective cases, the parties have adduced oral as well as documentary evidence. It is well settled principle of law that a joint Hindu family continues to be joint unless the contrary is proved. In the present case, according to plaintiffs themselves, the parties are separate in mess, residence and earning. So, there is severance in coparcenary status of joint family. Only the question is whether there had been partition between the parties with regard to suit property.

30. It is well settled that in a Hindu family governed by Mitakshara School of Hindu Law, there is normal presumption of jointness; joint in food, worship and estate but the strength of presumption necessarily varies in each case. The presumption of jointness is stronger in a case of brothers than in a case of cousins and further one goes from founder of family, the presumption becomes weaker and weaker. The evidence in each case has to be reviewed in the light of such a well established principle of Hindu Law. It is also well settled that separation can be proved by the conduct of the family and attending circumstances.

Point No.(i)

31. The plaintiffs examined 12 witnesses in all on their



behalf; out of them PWs-1 to 6, 8, and 10 to 11 are formal witnesses who proved rent receipts which were marked as Exts.1 to 1(v) and chaukidari receipts which were marked as Exts.2 and 2(a).

31.1. PW-7 Ishwari Singh has stated that Ghur Mahto was brother of Bechan Mahto and had a son Horil Mahto and no one is alive from the family of Ghur Mahto and his property is in possession of the family of his brother. He further stated that partition had not been taken place in his presence between the parties. Thereafter he said that no partition had been taken place between the parties. In his cross-examination, he has admitted that he had not seen Horil Mahto or his wife. There is no documentary evidence to show that Ghur Mahto and Bechan Mahto were brothers and he cannot say the name of father of Ghur Mahto and Bechan Mahto. PW-9 Sahdeo Bhagat has not stated anything about the property described in Schedule 1 of the plaint. He has stated that Ghur Mahto and Bechan Mahto were brother. After death of Horil Mahto, his wife had got possession and after death of his wife Surjee, Algu, Doma, Chhatradhari and Sheobaran came in possession on his property. In his cross-examination, he has admitted that his father and uncle had taken land in exchange from Surjee. He again said



that he had taken land from Surjee, Algu, Doma, Chhatradhari on which his father and uncle constructed house. PW-12 Sheobachan Mahto (plaintiff no.1) although supported his claim, however, in his cross-examination he has admitted that Doma, Bharat, Chhatradhari and Sheobaran came in possession of the property of Ramsaran Mahto. It appears from the evidence of plaintiffs that the plaintiffs or their ancestors had not come in possession of the property of Ramsaran Mahto after his death. In para 10 of his evidence, he has stated that the defendants have been cultivating half of the land for the last 40 to 45 years which clearly shows that separation and partition of the properties had taken place long back.

31.2. The plaintiffs have exhibited documentary evidence in their favour which are Exts.1 to 1(v) (*lagan* receipts), Exts.2 to 2/a (*chaukidari* receipts) and Exts.3 to 3/b (R.S. *Khatian* of Mauza Rajapur).

31.3. When defendants raised the plea that there had already been partition, the burden is on the defendants to prove previous partition, therefore, they had adduced the evidence in support of the fact of previous partition.

31.4. On behalf of the defendants as many as 37 witnesses have been examined. DWs.1, 2 and 10 to 20 have been



examined on behalf of defendant nos.1 and 2 whereas DWs.3 to 9 have been examined on behalf of defendant no.4 and DWs.21 to 37 have been examined on behalf of defendant no.3. Out of the said witnesses, DWs.5, 8, 13, 14, 17, 18, 20, 22, 23, 36 and 37 are formal witnesses.

31.5. DW.3 has stated that he has purchased some land from Ganesh Mahto (defendant no.4) over which he is in possession. DW.4 has stated that both the parties are separate among themselves. They cultivate their land separately and their houses are also separate. The properties had been partitioned before his sense. In his cross-examination, he has admitted that he also purchased some portion of the suit land from Agam Mahto original defendant no.5 (now represented through his legal representative respondent nos.5 to 8) and is in possession thereof. The property of Horil Mahto is in possession of Shrikishun. DW.9 Ganesh Mahto who is defendant no.4 stated that Lahaur Mahto had separated from his brothers and had partitioned the property. The suit property had been partitioned. The sons of Dhanpat Mahto also partitioned the properties between them inherited from their father Dhanpat Mahto. He has admitted that Shrikishun Mahto is in possession of the property of Horil Mahto who had purchased the property of



Horil Mahto.

31.6. DWs.1 & 2 have stated that the houses of plaintiffs and defendants are separate and their cultivation is also separate and they have partitioned the property. DW.10 has stated that the suit property has already been partitioned. DW.11, who has got land on the boundary of some of the suit land, stated that both the parties have been cultivating the land separately before his *hosh* (sense). DW.12 has stated that the suit property has already been partitioned and the houses of the parties are also separate. DW.15 has also stated the same as stated by other DWs. DW.19 Deonaryan Mahto who is defendant no.1 fully supported his case made out in the written statement. According to him, there was separation between the sons of Bechan Mahto. They have also partitioned the property. On partition, Lahaur Mahto was allotted 1/3rd share of the property. The separation and partition had been taken place before the R.S. Operation and the properties which had remained joint were partitioned after the R.S. Operation. Out of Dhanpat and Ramsaran, Ramsaran died earlier and his property was kept in possession of Dhanpat.

31.7. DW.21 has stated that when he attained *hosh* (sense), Ramsaran, Dhanpat and Algu were separate. DW.24 has also stated the same as stated by DW.21. DW.25 Shrikishun



Mahto who is defendant no.3 stated that his father got share in the property of Dhanpat Mahto and was paying rent for the same and since his death, he has been coming in possession thereof and also pays rent for that land.

31.8 DW.26 in his evidence stated that on the land of Horil Mahto, Sheobaran Mahto is in possession since 35 years and on his death, Shrikishun Mahto came in possession and no other persons have any possession on the land of Horil Mahto. DWs.29, 31 and 32 also deposed in the same line as deposed by DW.26. DW.33 who was ex-employee of Hatwa Estate also supported in his evidence that the land of Horil Mahto came in possession of Bhagirathi @ Bhajan Mahto who sold the same to Sheobaran Mahto.

31.9. Furthermore, DWs-4, 9, 10 and 19 (defendant no.1) stated that there was separation between the sons of Bechan Mahto.

32. When the witnesses examined by the plaintiffs and defendants have supported respective cases of the parties, in such circumstances, the documentary evidences have got much importance in the present case.

33. The defendants in support of partition have produced R.S. *Khatian* of Khata No.102, 103 and 143 of Rajapur village



marked as Ext.E-3(a). From perusal of this document, it appears that land of Khata No.102 has been recorded in the name of Ramsaran, Dhanpat and Tapsi having equal share, *Khatian* of Khata no.103 of village Rajapur shows in the exclusive name of Ramsaran Mahto and homestead land bearing Khata no.143 recorded in joint name of Ramsaran, Dhanpat and Tapsi which shows that homestead land was not partitioned at the time of R.S. Operation.

34. Mortgage deed executed by widow of Tapsi (Ext.E-3) shows that she dealt the property separately.

35. Rent receipts filed on behalf of parties show that they had been paying rent separately. The rent receipts do not indicate that the plaintiffs and their ancestors have been paying rent with respect to the half share in the property described in Schedule 1 of the plaint. They have paid rent with respect to the land allotted to their share. With respect to chaukidari receipt, there is no dispute that parties are residing in separate house.

36. Admittedly, the property described in Schedule 1 of the plaint originally belongs to Ramsaran Mahto, Lahaur Mahto and Dhanpat Mahto who were sons of Bechan Mahto. Before R.S. Operation, Lahaur Mahto died and in his place, his son Tapsi Mahto was recorded in the R.S. *Khatian*.



37. The genealogical table attached with the plaint shows that plaintiffs and defendants are remote from the common ancestor Bechan Mahto and, therefore, the notion of jointness amongst the heirs of Bechan Mahto has become very weak due to the remoteness of relationship with the common ancestor and due to lapse of now more than 100 years during which period the heirs of Bechan Mahto have admittedly separated in mess, residence and business. In this background, if the evidence adduced on behalf of parties are scrutinized then the only conclusion will be that the heirs of Bechan Mahto had separated long ago. As per the general rule, once a partition is made it cannot be reopened because a share can be divided only once. Partition is only adjustment of shares between or among persons who are entitled to share in the property. A share, which was undefined and indistinct, becomes definite when partition takes place. It is the case of plaintiffs that Bechan Mahto and Ghur Mahto had been separated from each other before Revisional Survey Operation then question of partition of his separate property (Schedule 2 property) does not arise. The plaintiffs are remote in degree. The learned trial court after discussing the evidence has given finding that the plaintiffs failed to prove that Ghur Mahto was brother of Bechan Mahto. Except defendant



no.3, who claims that the Schedule 2 property of Horil Mahto was purchased by his father, no other defendants claimed any interest in Schedule 2 property. There is no document produced on behalf of the plaintiffs/appellants to show that they have got any share in Schedule 2 property. The conduct of the parties also shows that partition between them has taken place long ago.

38. Thus, the above analysis of the evidence and the materials brought on record establishes that all the branches of the family of Late Bechan Mahto had separated long long ago and there is no unity of title and possession between the parties with respect to suit properties and accordingly, the plaintiffs/appellants are not entitled to a decree for partition. Hence, the Point No.(i) is decided against the appellants and in favour of the respondents.

Point No.(ii)

39. The learned trial court after appreciating the facts and evidences available on record and after hearing the parties, has rightly decided the issue involved in the suit giving the reasons while recording the impugned judgment, which are summarized as follows:

- (i) If three sons of Bechan Mahto were joint among themselves then there was no question of recording



separate possession over those properties in the R.S. *Khatian*.

(ii) Mortgage deed dated 23.06.1922 (Ext.E-3) filed on behalf of defendant no.3 (widow of Tapsi Mahto) shows that plaintiffs dealt with the property separately. On the boundary of some of plots, names of Ramsaran Mahto and Tapsi Mahto have been written in the said mortgage deed which shows that there had been separation between the sons of Bechan Mahto and they had partitioned their properties by metes and bounds and according to partition they had been coming in separation possession of the same.

(iii) The plaintiffs and defendants have filed rent receipts which show that they have been paying rent separately.

(iv) The R.S. *Khatian* was finally published in 1917. Admittedly, Lahaur Mahto had died prior to R.S. Operation. The mortgage deed (Ext.E-3) executed by Most. Bhuilli in favour of Mahesh Bhagat shows that Tapsi Mahto died prior to 1922. It is clear that Tapsi Mahto predeceased Dhanpat Mahto and Ramsaran Mahto.

(v) PW-12 (plaintiff no.1) stated that all the properties of Ramsaran Mahto came in possession of Doma Mahto, Bharat, Chhtradhari and Sheosharan who were sons of Dhanpat Mahto. If Dhanpat Mahto had died before Ramsaran Mahto, sons of Dhanpat Mahto would not have inherited and came in possession of the properties after the death of Ramsaran Mahto.

40. The learned trial court has also taken into consideration the admitted fact of construction of houses separately by co-sharers and they were coming in exclusive possession thereof. This conduct of the parties allowing each other to construct houses without specific allotment of lands



also speaks a volume against the plaintiffs’ case.

41. The learned counsel for the appellants has not succeeded to convince this Court that the impugned judgment and decree passed by the learned trial court is not sustainable in the eye of law. The learned trial court has rightly decided the issues and findings given by the learned trial court are quite correct and proper which require no interference by this Court. It is, accordingly, held that the impugned judgment and decree passed by the learned trial court are fit to be affirmed. Hence, Point No.(ii) is also decided against the appellants and in favour of the respondents.

42. For all the reasons, this Court hereby confirms the decree and judgment dated 08.08.1978 passed in Title Suit No.581 of 1974/140 of 1976 by learned 3rd Additional Subordinate Judge, Gopalganj, resultantly, finding no merit in this first appeal, the same fails and it is **dismissed**. No costs. Accordingly, connected interlocutory petitions are closed.

(Sunil Dutta Mishra, J)

Harish/-

AFR/NAFR	NAFR
CAV DATE	25.06.2024
Uploading Date	13.09.2024
Transmission Date	

