

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.396 of 2016

1. Shiomuni Kumhar
2. Narad Kumhar
3. Surendra Kumhar All son of Late Yadunandan Kumhar
4. Chandan Prasad
5. Dhanraj Prasad
6. Manish Prasad All major son of Narad Kumhar represented through father natural guardian and next friend
7. Basant Kumhar
8. Sarju Kumhar
9. Kameshwar Kumhar All sons of Late Sheo Nandan Kumhar
10. Most. Phulmati Keur Wife of Late Janardan Kumhar All Resident of Vill- Takanpura, PO-- Kusumhara, PS- Bikramganj, District Rohtas
11. Bindeshwarui Kumar Son of Basant Kumhar
12. Binod Kumhar Resident of Vill- Takanpura, PO-- Kusumhara, PS- Bikramganj, District Rohtas
13. Brajesh Prasad Major son of Basant Kumhar represented through father natural guardian and next friend null
14. Ramu Kumhar
15. Awadhesh Kumhar Major son of Sarju Kumhar represented through father natural guardian and next friend null
16. Sanjay Prasad
17. Ravindra Prasad Both major sons of Kameshwar Kumhar represented through father natural guardian and next friend
18. Raju Kumhar
19. Rajdhari Kumhar Minor son of Late Janardan Kumhar represented through father natural guardian and next friend
20. Srimati Jamotara Devi Wife of Bhikhari Kumhar Resident of Village Itimha, PS- Karma, PS- Nasariganj, District - Rohtas

... .. Appellant/s

Versus

1. Kanhaiya Kumhar
2. Minto Kumhar Both Son of Late Rajnath Kumhar
3. Umesh Kumhar
4. Gudri Kumhar Minor son of Kumhar Kumhar
5. Ravi Shanker Kumhar Minor son of Late Chathu Kumar represented through Sonajhari Kunwar moher Natural guardian and next
6. Sonakhari Kunwar Wife of Late Chathu Kumhar



7. Jhabhu Kumhar
8. Manoj Kumhar Minor son of Mintoo Kumhar represented through father natural guardian and next friend All Resident of Vill- Takanpura, PO-- Kusumhara, PS- Bikramganj, District Rohtas
9. Smt. Tetra Devi Wife of Late Hari Prasad, Resident of Village- Babuganj English, PO- Bisi Kala, PS- Sakrauluk, District Buxar
10. Smt. Puna Devi Wife of Srinath Prasad Resident of VillPO- Ekwari, PS- Sahar, District- Bhojpur
11. Smt. Keshra Devi Wife of Ram Pravesh Prasad Resident of Village PO- Bali Sonebarsa, PS- Bali Sonebarsa, District- Buxar

... ... Respondent/s

Appearance :

For the Appellant/s : Mr. Raghunandan Kumar Singh, Adv.
For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL ORDER

7 27-08-2024 This Second Appeal has been filed by the defendants/appellants against the judgment and decree of affirmance. Title Suit No. 95 of 1993 was filed by the plaintiffs/respondent-1st set for partition of half share in the suit land described in Schedule-'K' of the plaint along with other reliefs. The suit was decreed by learned Additional Munsif-II, Bikramganj, Rohtas by judgment and decree dated 26.05.2011 against which the defendant/appellant filed Title Appeal No. 71 of 2011 which was dismissed by the learned Additional District Judge-III, Rohtas, Sasaram by its judgment and decree dated 28.05.2016 which is under challenge in the instant Second Appeal.

2. The case of the plaintiffs, is that Late Laxman



Kumhar was common ancestor of the parties. Nine decimals of Old Plot No. 332 Khata No. 16 was in his name and its partition was not made by meets and bounds among the descendants of Laxman Kumhar. The said Laxman Kumhar had three branches Bhajan Kumhar, Dawar Kumhar and Bharosa Kahar. Dawar and his wife Laxminia died issueless, therefore, the property of nine decimals will incumbent upon only two branches, namely, Bhajan Kumhar and Bharosa Kumhar. The plaintiffs are descendants of branch of Bhajan Kumhar and defendants/appellants are descendants from Bharosa Kumhar. Late Bharosa had one son Thug Kumhar, who had two sons Late Yadunandan and Shivnandan. The defendants are heirs of two deceased persons Yadunandan and Shivnandan. The ancestral property of Late Laxman Kumhar mentioned in Old Khata No. 16 in the name of son of Bhajan Kumhar and Old Khata No. 14 in the name of Thug Kumhar son of Bharosa Kumhar, Old Khata No. 22 in the name of Buddhan and Sahdev Kumar son of Jhuthan Kumhar, Old Khata No. 38 in the name of Mosst. Laxminia wife of Dawar Kumhar and Old Khata No. 39 Plot No. 366 and Areas 5 decimals recorded in the name of Laxminia Kuar and Thug Kumhar. It is also pleaded that Khata No. 39 Plot No. 366 were recorded in the name of Shivnandan and



Yadunandan in Revisional Survey Khatian bearing New Plot No. 611 Area 5 decimals. It is further pleaded that defendant left Old Plot No. 370 Area 4 decimals for ancestor of the plaintiff which was recorded in the Revisional Survey Khatian in the name of Rajnath Kumhar bearing Khata No. 74 Plot No. 531 Area 4 decimals. It is also pleaded that after the death of Dawari Kumhar and his wife Ginia his share was devolved upon half share of Rajnath Kumhar and half share of Mukund Kumhar and Teju Kumhar. Likewise, Teju Kumhar and Rajnath Kumhar both died issueless. Mukund executed gift deed of his share of Plot No. 332 to Yadunandan and Shivnandan through registered deed of gift on 20.09.1958. In the aforesaid gift deed half area of Plot No. 332 i.e. 4 ½ decimals. Mukund Kumhar executed in favour of Yadunandan and Shivnandan while in boundary of the deed Rajnath Kumhar is shown in each side, thus, it is clear that 4 ½ decimals is at the eastern side. No partition of Old Plot No. 332 Khata No. 16 Area decimals done by meets and bounds. It is further contended that without any partition the said property was transferred in favour of Yadunandan and Shivnandan. In Revisional Survey out of Old Plot No. 332, three new plots were carved out, these are Plot Nos. 536, 538 and 539. Due to mistake of Survey Authority New Plot No. 539, New Khata No.



73 Area 3 decimals recorded in the name of Rajnath Kumhar while New Plot Nos. 538 and 536 Area 6 decimals were recorded in the name of Yadunandan and Shivnandan which is also wrong because they have got 4 ½ decimals by registered deed of gift.

3. On summons, defendant nos. 1 to 5 and 9 to 12 filed their written statement and stated that Mukund Kumhar never executed any deed of absolute sale in favour of Yadunandan and Shivnandan on 20.09.1958. While it was only a gift deed and this gift deed is also not in the knowledge of defendants. A partition was made by meets and bounds of Plot No. 332 Area 9 decimals between Mukund and Rajnath Kumhar. Mukund Kumhar never executed any sale deed. Plot Nos. 536, 538 and 539 are made up of three decimals each and no khatian was of five decimals. Defendants in their share of Plot No. 366 have already made a pucca house. Old Plot No. 370 Khata No. 46 Areas 4 decimals in Old Cadestral Survey was recorded in the name of Buddhan Kumhar, Dawari Kumhar and Thug Kumhar as gairmajurua malik in which Yadunandan and Shivnandan had 1/3rd share. Before the Revisional Survey, Rajanth Kumar and Yadunandan coupled with Shivnandan exchanged their lands orally according to their convenience.



Thus, in Old Plot No. 370 Yadhunandan and Shivnandan gave 1/3 decimals to Rajnath Kumhar and Rajnath Kumhar gave 1 ½ decimals to Yadunandan and Shivnandan. New Plot No. 531 of Old Plot No. 370 Area four decimals was prepared in the name of Rajnath only while 1 ½ decimals of Old Plot No. 332 was given by Rajnath Kumhar after amalgamation with New Plot No. 536 recorded in the name of Yadunandan and Shivnandan and they were in peaceful possession of their share.

4. The learned Trial Court after perusing the materials on record and evidences adduced by the parties has held that there is unity of point. The plaintiff is entitled to half share in the suit land described in Schedule-'K'. So far point of limitation is concerned, the suit is not barred by law of limitation. The cause of action will be counted from 10.09.1993 and decreed the suit.

5. On appeal filed by the defendant/appellant, the learned Appellate Court dismissed the appeal and has held that defendant/appellant failed to prove earlier partition by meets and bounds and also held that there is no document to prove any partition between Rajanth Kumhar, Mukund Kumhar and Teju Kumhar. It is also held that Teju Kumhar and Mukund Kumhar had no issue as both had died in jointness of the plaintiff. Plot



No. 539 Area 3 decimals wrongly recorded in the name of Rajnath Kumhar and also New Plot No. 536 and 538 Area 6 decimals wrongly recorded in the name of Yadunandan and Shivnandan, while Shivnandan and Yadunandan got 4 ½ decimals land in his share. There is denial of story of exchange by the plaintiff. The Plaintiff is entitled to half share of the suit property.

6. After hearing, the submissions made on behalf of the parties and upon perusal of materials on record, including the judgment of the lower Courts' below, it appears that learned court of appeal below which is final court of facts after considering the pleadings of the parties and the evidences adduced by them came to a clear finding that the defendants/appellants have failed to prove earlier partition in the family. Defendants have failed to prove the factum of earlier partition with regard to any evidence such as date of earlier partition or any oral family partition or any memorandum of partition between the parties. The claim of defendants/appellants is based upon the entry in the Revisional Survey Khatian. It is settled law that revisional or municipal survey entry neither creates nor extinguishes title and as such, they have no documents of title rather they are claiming title on the basis of



entry in the Municipal Survey Khatiyān.

7. In the case of ***Bhagwant P. Sulakhe Vs. Digambak Gopal Sulakh*** reported in ***AIR 1986 SC 79***, the Hon'ble Apex Court has held that *"The character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family-character so long as the joint family property is in existence and is not partitioned amongst co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property."*

8. The question as to whether there had been a previous partition or not, being a pure question of fact, this court in Second Appeal against concurrent findings could not have entered into evidences adduced by the parties to hold that predecessor in-interest of the parties had partitioned the properties.

9. It is also apparent from the impugned judgment that descendants got 4 ½ decimals through registered deed of gift dated 20.09.1958 (ext. B) in favour of Yadunandan and Shivnandan while Revisional Survey Khatiyān prepared in their name with regard to 6 decimals out of 9 decimals of the ancestral property. It is well settled law that Revisional Survey



or municipal survey entry neither creates nor extinguishes title. The perception of correctness of entries are rebuttable. This issue has been examined several times by different Courts such as *Narshing Mishra & Another Vs. Rajendra Mishra & Ors* reported in *(2009) 2 PLJR 1028* as well as in the Case of *Smt. Shashikala Vs. the State of Bihar & Anr* reported in *(2019) 1 BLJ PHC 597* in which the Hon'ble Court has held that the entry in khatiyan is always rebuttable in nature and mere entry in survey khatiyan does not extinguish the title of the rightful owner. This issue has also been considered by the Hon'ble Supreme Court in the case of *Suraj Bhan & others Vs. Financial Commissioner & others* reported in *(2007) 6 SCC 186*, wherein the Hon'ble Apex Court has held that an entry in revenue record does not confer title on a person whose name appears in records of rights. Entry in the revenue records or jamabandi have only "fiscal purpose" i.e. payment of land revenue and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is concerned, it can only be decided by a competent civil court.

10. The issue with regard to limitation is concerned, the appellants have also raised an issue that the suit is barred by



limitation and the plaintiff had no cause of action to file the suit as the Revisional Survey Khatian was published in the year 1970 and the suit was filed on 14.09.1993. It is well settled that the cause of action arises on the date when plaintiff feels any disturbance in the peaceful possession not on the date when the entry in Khatian is mentioned so the time will be counted from 10.09.1993 i.e. date of disturbance.

11. Reliance has been placed in the case of ***Daya Singh and another vs. Gurdev Singh (Dead) by LRS and others*** reported in ***(2010) 2 SCC 194*** and paragraph nos. 14 to 16 of the said judgment reads as follows:-

“14. In support of the contention that the suit was filed within the period of limitation, the learned Senior Counsel appearing for the appellant-plaintiffs before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned Senior Counsel strongly relied on a decision of the Privy Council in Bolo v. Koklan [(1929-30) 57 IA 325 : AIR 1930 PC 270]. In this decision their Lordships of the Privy Council observed as follows: (IA p. 331)

“...There can be no ‘right to sue’ until



there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.”

15. A similar view was reiterated in C. Mohammad Yunus v. Syed Unnissa [AIR 1961 SC 808] in which this Court observed: (AIR p. 810, para 7)

“7. ...The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right.”

In C. Mohammad Yunus [AIR 1961 SC 808] , this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry in the revenue records cannot give rise to cause of action.

16. Keeping these principles in mind, let us consider the admitted facts of the case. In Para 16 of the plaint, it has been clearly averred that the right to sue accrued when such right was infringed by the defendants about a week back when the plaintiffs had for the first time come to know about the wrong entries in the record-of-rights and when



the defendants had refused to admit the claim of the plaintiffs. Admittedly, the suit was filed on 21-8-1990. According to the averments made by the plaintiffs in their plaint, as noted hereinabove, if this statement is accepted, the question of holding that the suit was barred by limitation could not arise at all. Accordingly, we are of the view that the right to sue accrued when a clear and unequivocal threat to infringe that right by the defendants when they refused to admit the claim of the appellants i.e. only seven days before filing of the suit. Therefore, we are of the view that within three years from the date of infringement as noted in Para 16 of the plaint, the suit was filed. Therefore, the suit which was filed for declaration on 21-8-1990, in our view, cannot be held to be barred by limitation.”

12. The right to suit accrues when there was clear and unequivocal threat to infringe that right by the defendants as also when they refused to admit the claim of the plaintiffs.

13. From the above discussions, it is apparent from the records that within three years from the date of infringement as noted in the plaint, the suit was filed. Both the courts have rightly held that the suit is not barred by limitation.

14. Considering the aforesaid facts and circumstances as well as the materials available on record, it is quite apparent that judgment and decree of the Courts' below are covered by



findings of fact and no question of law, much less substantial questions of law arises for consideration in the instant Second Appeal, which is, accordingly, dismissed at the stage of hearing under Order 41 Rule 11 CPC.

(Khatim Reza, J)

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