

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.522 of 1990

1. Aditya Singh Son of Ramlal Singh Resident of Village- Ghostawan Pargana, Samai, Police Station and District- Nawadah.
2. Upendra Singh @ Pundip Singh, Son of Aditya Singh Resident of Village- Ghostawan Pargana, Samai, Police Station and District- Nawadah.
3. Siya Saran Singh, Son of Aditya Singh Resident of Village- Ghostawan Pargana, Samai, Police Station and District- Nawadah.
4. Ramratan Singh, Son of Aditya Singh Resident of Village- Ghostawan Pargana, Samai, Police Station and District- Nawadah.
5. Jatan Kumar, Son of Aditya Singh Resident of Village- Ghostawan Pargana, Samai, Police Station and District- Nawadah.

... .. Appellant/s

Versus

1. Kesar Singh Son of Bisesar Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
2. Sadhu Saran Singh, Son of Kesar Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
3. Arjun Singh, Son of Kesar Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
4. Mostt. Rajiv Muniya Devi, Widow of Late Duryodhan Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
5. Sarvesh Kumar, Minor, Son of Late Duryodhan Singh Minor son of Late Duryodhan Singh aforesaid, under the guardianship of his mother and next friend namely Rajiv Muniya Devi, resident of Village- Ghostawan, Police Station and District- Nawadah.
6. Manju Kumari, Minor, Daughter of Late Duryodhan Singh Minor daughter of Late Duryodhan Singh aforesaid, under the guardianship of his mother and next friend namely Rajiv Muniya Devi, resident of Village- Ghostawan, Police Station and District- Nawadah.
7. Chunchun, Minor, Son of Sadhu Saran Singh aforesaid under the guardianship of Sadhu Saran Singh his father, well wishor and next friend resident of Village- Ghostawan, Police Station and District- Nawadah.
8. Mantu, Minor, Son of Sadhu Saran Singh aforesaid under the guardianship of Sadhu Saran Singh his father, well wishor and next friend resident of Village- Ghostawan, Police Station and District- Nawadah.
9. Name not known, Minor, Son of and under the guardianship of Duryodhan Singh aforesaid, Resident of Village- Ghostawan, Police Station and District- Nawadah.
10. Name not known, Minor, Son of and under the guardianship of Arjun Singh aforesaid, Resident of Village- Ghostawan, Police Station and District- Nawadah.



11. Ramadhin Singh, Son of Harkhu Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
12. Ram Bilash Singh, Son of Harkhu Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
13. Name not known, Minor, Son and under the guardianship of Ramadhin Singh aforesaid, Resident of Village- Ghostawan, Police Station and District- Nawadah.
14. Subash Chandra Singh, S/o Karu Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.
15. Bhaskar Pd. Singh, S/o Lakhav Singh Resident of Village- Ghostawan, Police Station and District- Nawadah.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.M.P.Sinha
For the Respondent/s : Mr.Sunil Kr. Pd. Singh

**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

CAV JUDGMENT

Date : 08-05-2024

I have already heard the learned counsel for the appellants.

2. None appeared on behalf of the respondents.

3. Being aggrieved and dissatisfied with the judgment and decree dated 30.07.1990 passed in Partition Suit No. 18 of 1988/85 of 1985, the appellants/plaintiffs had preferred this appeal.

4. Partition Suit No. 18 of 1988/85 of 1985 was filed for partition of one-half share of the appellants/plaintiffs in Schedule-A of the property. Defendant nos.2, 10 and 11 jointly filed their written



statement and admitted the claim of the appellants/plaintiffs. Defendant nos.1 and 3 to 5 denied the claim of the appellants/plaintiffs and contested the suit. They also took the plea that the property in question was already partitioned in the year 1940. It was also the claim of the contesting defendants that in the year 1970-71 the properties between the non-contesting defendants and contesting defendants was partitioned. On the basis of the pleadings of the parties, the learned court below settled the following issues:-

- “1. Is the suit, as framed, maintainable?
2. Have the plaintiffs any cause of action or right to sue?
3. Is the suit property valued and the court fee paid sufficient?
4. Is the suit bad for non-joinder of necessary party?
5. Is there any unity of title and possession between the parties?
6. Does the suit land include any self acquired property of defendant No.1 Keshar Singh?
7. Does the suit abate for non-substitution of the sons of defendant No.4?
8. Are the plaintiffs entitled for any reliefs claimed? If so to what extent?”

5. All the issues, except issue no.7, were decided



in favour of the appellants/plaintiffs. The presumption of jointness of the family was found to be true by the learned court below, but issue no.7 was decided against the appellants/plaintiffs and the suit has been declared as abated for non-substitution of one of the legal heirs of the defendant no.4

6. As this issue was decided against the appellants/ plaintiffs, this appeal has been preferred by them.

7. The learned counsel for the appellants/plaintiffs submitted that on 14.03.1989, an application was filed on behalf of contesting defendants with the averment that out of two sons of defendant no.4, one was not made party. However, according to the rejoinder filed by the plaintiffs, the second son of the deceased defendant no.4 is a posthumous child. It was also averred in that application dated 14.03.1989 that one Sarvesh Singh was made party, as son of the deceased defendant no.4., but, in fact, Sarvesh Singh is not his son, rather his son's name is Anil. The appellants/plaintiffs filed rejoinder to that application on 15.03.1990, in which it has been mentioned that the deceased defendant no.4 had two



sons and the second one was a posthumous child. At the time of filing of the suit, the posthumous child was growing in the womb of his mother. The learned counsel for the appellants submitted further that it is absolutely true that a child who was growing in the womb of his mother, on the day of institution of the suit, should also be substituted after his birth, but merely because of his non- substitution, the suit cannot abate. The mother of the posthumous child was already substituted after the death of her husband, and she was enough to look after the interest of the posthumous child. The learned counsel for the appellants, after relying upon a decision, reported in *AIR 1982 Patna 172 (Ramdeo Jha and others Vs. Chandar Thakur and others)*, submitted that in this case it has been held that if some of the heirs and legal representatives of the deceased are on record, the suit shall not abate.

8. It is undisputed fact that the mother of the posthumous child was already on the record and she was enough to look after the interest of the posthumous child, as such, the suit shall not abate due to non-substitution of the posthumous child.

9. On the basis of above-mentioned



observation, the finding of the learned court below on issue no.7 is hereby altered, as indicated above, and it is decided in favour of the appellants/plaintiffs.

10. It is also made clear that the posthumous child shall also be entitled for his share.

11. With the observations aforesaid, the appeal stands allowed.

(Nawneet Kumar Pandey, J)

HR/-

AFR/NAFR	NAFR
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