

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.98 of 2015

1. Manvendra Nath Rai
2. Kedrnath Rai @ Kedar Rai
3. Sunil kumar Rai @ Sheomani Rai
4. Rajeev Ranjan Rai @ Mithlesh Rai
All sons of late Saryu Rai, Resident of Village- Kaithi, P.S Sanjahauli, district Rohtas.

... .. Appellant/s

Versus

1. Akhilesh Kumar Rai, son of late Mahesh Rai
2. Kamlesh Rai, Son of late Lal Saran Rai
Both Resident of Village - Kaithi, P.s -Sanjahauli, District- Rohtas.
3. Ramdeo Rai, Son of Late Keshari Rai Resident of Village - Kaithi, P.S -Sanjahauli, District- Rohtas.
4. Devendra kunwar, Son of late Deenanath Rai
5. Radhika kunwar, wife of late Vishwanath Rai
6. Arvind kumar
7. Chitranjan kumar
8. Manoranjan kumar
9. Ashmanjush kumar
All sons of late Vishwanath Rai Resident of Village - Kaithi, P.S -Sanjahauli, District- Rohtas.
10. Haridwar Rai, Son of Late Jamuna Rai, Resident of Village - Kaithi, P.S -Sanjahauli, District- Rohtas.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. J. S. Arora, Sr Advocate with Mr. Rakesh Kumar, Advocate Mr. Manoj Kumar, Advocate Mr. Himanshu Shekhar, Advocate Ms. Supriya, Advocate
For the Respondent/s	:	Mr. Jitendra Kishore Verma, Advocate Mr. Anjani Kumar, Advocate Mr. Ravi Raj, Advocate Mr. Shreyash Goyal, Advocate Mr. Shweta Raj, Advocate Mr. Abhishek Kumar Srivastava, Advocate Mr. Abhay Nath, Advocate Mr. Shreya, Advocate Mr. Achyut Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA



CAV ORDER

12 26-05-2025 Heard Mr. J. S. Arora, learned senior counsel assisted by Mr. Rakesh Kumar, learned counsel for the appellants and Mr. Jitendra Kishore Verma, learned counsel appearing on behalf of the respondents.

2. This Second Appeal has been filed against the judgment of affirmance dated 04.05.2015 passed in Title Appeal No. 61 of 2013 by learned Additional District Judge-IX, Sasaram, Rohtas, whereby the learned appellate court has upheld the judgment and decree dated 04.06.2013 passed in Title Suit No. 118 of 1992 by learned Additional Munsif-2, Bikramganj, Rohtas.

3. The defendants are the appellants in the instant Second Appeal.

4. The plaintiffs/respondents filed Title Suit No. 118 of 1992 for declaration of title over the Schedule-Kha property as well as for removal of encroachment by the defendants, if any found and further for restoration of possession. The plaintiffs have also sought relief alternatively that if partition between the parties is not found with regard to the Schedule- Ka property, then the plaintiffs be given 1/4th share by metes and bounds and also for cost of the suit.

5. The suit, in question, was filed alleging that the



Late Rameshwar Rai had six sons, namely, Ramchandra Rai, Ramkishun Rai, Ramjeet Rai, Rajgovind Rai, Ramsewak Rai and Bachacha Rai, who remained joint with Rameshwar Rai and entire property was joint and it was in the joint possession of all. It is further case of the plaintiffs that Ramkishun Rai died issueless in the state of jointness and his share devolved upon the rest five brothers by the rule of survivorship. Initially, only Raj Govind Rai separated in 1951 with his sharers and so his branch is not arrayed as party to the suit. The remaining estate of deceased Rameshwar Rai was jointly inherited by branches of remaining four sons, namely, Ramchandra Rai, Ramjeet Rai, Ramsewak Rai and Bachacha Rai. After the death of Ramchandra Rai, his son Saryu Rai became the Karta of the joint family and being Karta of the joint family dealt with property of the joint family. Being a Karta of the family, Saryu Rai purchased 86 decimals land in the year 1957 in his own name, and another 86 decimals in favour of Kesari Rai, son of Ramjeet Rai and another 54 decimals in his own name. These purchased plots also finds mention in the Revisional Survey Khatian with its corresponding new khata and plot numbers. It is further pleaded that Kesari Rai separated in the year 1960, so the heirs of remaining three branches i.e. the plaintiffs and



defendants 1st set and 3rd set remained in jointness with the remaining suit lands of C.S.P. No. 986 of C.S. Khata No. 19. It is further case of the plaintiffs that remaining three branches also mutually partitioned in 1966, each receiving 13.5 decimal as their 1/3rd share, with Saryu in North followed by (defendant 1st set), then the defendant 3rd set and then the plaintiffs, as shown in the map at the foot of the plaint. It is contended that Saryu died in the year 1970-71. After the death of Saryu Rai, his sons started encroaching the suit land, as mentioned above, and on 05.09.1992 started making constructions over it giving cause for the suit.

6. On summon, the defendant 3rd set appeared and filed their written statement and had supported the case and cause of the plaintiffs.

7. The defendant 1st set also appeared and filed their written statement. They raised the objections with regard to maintainability of the suit and further pleaded that there is no unity of title and jointness of possession in between the plaintiffs and defendants. It is further contended that there was a full and complete partition among all the sons of Rameshwar Rai in the year 1951 itself and categorically denied that no further partition thereafter ever took place in 1960 and 1966 as



stated in the plaint. It has been further stated that their father Saryu Rai was an Anchal Karmchari and had purchased the suit plot no. 986 (Exhibit-1/f) out of his personal income and not from the joint funds of the joint family as stated by the plaintiffs. It is further contended that the Khatiyans (Exhibit-4 & Exhibit-3/f) are wrongly prepared and they had not encroached part share of the plaintiffs as alleged as their two *kuccha kothris* were already existing over there and upon naturally having got dilapidated and fallen, they had only rebuilt it making it pucca. Even otherwise defendants had long standing possession over the suit land since father's lifetime and therefore, they have title by adverse possession.

8. The learned trial court after considering the pleadings, evidence adduced by the parties and materials on record has held that the disputed plot was joint and was acquired by joint family funds. It was further held that the sale deeds of disputed plot which has been marked Exhibit-1/f and wherein "service" is written after the name of Saryu Rai but that does not help, because it is unbelievable to imagine a government servant without any salary or pension. As per the evidence of Manvendra Nath Rai, D.W.-3 in para 82 adduced on behalf of the defendants, Saryu Rai was not receiving any salary. It is



bounden duty on the defendant 1st set to establish the source of purchase of disputed plots. The defendant 1st set has failed to rebut the presumption of correctness of entry in Khatian. It was also held that the D.W.-3 has stated during his cross-examination that total ancestral land in the family of Rameshwar Rai was 116 Bigha. He has further stated that he does not know about the area of purchased land in the family of Rameshwar Rai. From the admission of defendant 1st Set (D.W.-3), it is abundantly clear that lands measuring 116 bighas is sufficient enough to generate the nucleus for payment of Rs. 4,000/- consideration money. It is held that the plaintiffs have discharged the initial burden of proving the nucleus. The disputed plot was not acquired with the aid of the joint family nucleus. Hence, the trial court held that the defendant 1st set has failed to discharge the burden to prove that the disputed plot was acquired without the aid of joint nucleus. It was further held that all the sons of Rameshwar Rai did not partition the property in the year 1951 and that the disputed property was not purchased from the personal income of Saryu Rai rather it was purchased from the joint family funds. Lastly, it was held that the plaintiffs are entitled to relief no. 1 claimed in the plaint. The title of the plaintiffs of Schedule- Kha land is declared and decreed the suit.



9. Aggrieved by the judgment and decree dated 04.06.2013 passed in Title Suit No. 118 of 1992 by the learned Additional Munsif-2, Bikramganj, Rohtas, the defendants/appellants/appellants preferred Title Appeal No. 61 of 2013. After hearing the parties and considering the materials on record, the learned Additional District Judge-IX, Sasaram, Rohtas affirmed the judgment and decree of the learned trial court and dismissed the appeal vide judgment and decree dated 04.05.2015. The learned lower appellate court has framed the point for determination on the basis of pleadings of the plaintiffs and the grounds preferred in appeal. Further, the appellate court recast certain issues and have dealt with the issues. The learned appellate court dealt with the facts in issues noted therein that the dispute relates only with lands as purchased by Saryu Rai vide registered sale deed dated 22.02.1958 (Exhibit-1/f) bearing C.S. Khata No. 19, C.S. Plot No. 986 admeasuring 54 decimals land. Its R.S. Khata No. is 103 (with R.S. Plot No. 2028) and R.S. Khata No. 724 (with R.S. Plot No. 2029). The disputes relates to a portion of Revisional Survery Plot No. 2029 falling in the 1/3rd share of plaintiffs which lies in the extreme south of the said plot having a total of area 54 decimals. Both the contesting parties are the common descendants of deceased



Rameshwar Rai. The dispute is between the great grandsons in the branch of late Ramsewak Rai and Ramchandra Rai. The plaintiffs are representing Ramsewak Rai through their father Late Mahesh Rai & Late Lal Sharan and contesting defendants are representing Ramchandra Rai through their father Saryu Rai. The genealogical table and particulars of the suit plot is admitted. Admittedly, one son of Rameshwar Rai, namely, Ram Kishun Rai had died issueless in jointness with his other five brothers and his father. The main contention is whether Saryu Rai purchased the suit plot in individual capacity as a Karta of the joint family. On this score, the defendants' specific pleadings is that there had been a full and complete partition among all the five sons of Rameshwar Rai in 1951. So, the property purchased in 1958 by his father Saryu Rai was self-acquired property of his father to the exclusion of others.

10. Per contra, the pleadings of the plaintiffs is that the sons of deceased Rameshwar Rai partitioned the property phasewise; firstly in 1951 when only one son Raj Govind separated. Then in 1960, when another son Kesari Rai separated and lastly in 1966, when remaining three sons separated. As per the pleadings of the plaintiffs, the suit property had been purchased by Saryu Rai in the estate of jointness in 1958 out of



joint family funds.

11. The learned appellate court clearly stated that there is no documentary evidence of proof of any of the said partitions allegedly taken place in the family of deceased Rameshwar Rai. Both the parties admitted during evidence that partition occurred orally and no third person other than the family members, had witnessed it. Even there is no documentary or direct evidence of Saryu Rai being the 'Karta' of a joint family or that he purchased the suit land from joint family fund. After scrutinising the oral evidence of all the parties on record, the learned appellate court referred to the admission of the contesting defendant/appellants, Manvendra Nath Rai (D.W.-3), who has deposed in para 113 of his cross-examination and admitted that only one son Raj Govind separated in 1951 and remaining four sons resided and worked/ did business jointly. Other family member, namely, Ramdeo Rai, son of Kesari Rai had examined himself as D.W.-1. In his cross-examination, this witness had deposed that among four brothers living in jointness, Kesari separated in 1960 and remaining three brothers, namely, Bachcha Rai, Mahesh Rai, Saryu Rai separated in 1966. This witness was present and witnessed the partition in the year 1960 when his father Kesari Rai along with



his brothers Saryu Rai, Bachcha Rai and Mahesh Rai entered into partition. In paragraph 32 of his cross-examination, he named the family members who were present in 1966 partition. Another family member Dinanath Rai (son of Yamuna Rai) was examined on behalf of the defendant 3rd set as D.W.-1, who deposed about three partitions. The partition took place in the year 1960 at his *Darwaza* where Saryu Rai, Mahesh Rai and Bachcha Rai were present. Further, this witness had deposed that he was present at the time of partition in the year 1966. Moreover, the plaintiffs had categorically adduced evidence about the above three partitions of 1951, 1960 & 1966.

12. Learned lower appellate court also considered the documentary evidence in the form of various sale deeds (Exhibit-1 series) which reveals that various purchases were made in the family of deceased Rameshwar Rai during the period of 1955-58. The properties purchased in the name of family/descendants of deceased Rameshwar Rai between the period of 1955-57 are not in dispute. Learned lower appellate court after scrutinizing the sale deeds (Exhibit-1 series) brought on record held that it reveal that the property belonging to one Bachkalo Kuer was purchased by grandsons of Late Rameshwar Rai between the period 1955-57. The said purchase had been



made in individual name of the descendants of the deceased Rameshwar Rai. The sale deed of 1955 was executed in favour of Saryu Rai (Exhibit-1/a) and Kesari Rai (Exhibit-1/b) in the respective branch of Late Ramchandra Rai and Ram Jeet Rai on the same date 06.07.1955. In 1956, it was purchased in the name of Yamuna Rai (Exhibit-1) and the plaintiff, Mahesh Rai (Exhibit-1/c) in the branch of Late Bachcha Rai and Ramsewak Rai respectively on the same day 27.07.1956 and in the year 1957, the land was again purchased in the name of Saryu Rai (Exhibit-1/d) and Kesari Rai (Exhibit-1/e) falling in the branch of Late Ramchandra Rai and Ramjeet Rai on the same date 31.05.1957. The learned appellate court has held that no sell-purchase was made of Bachkalo's property in the name of Raj Govind or his descendants which implies that excepting him all other four brothers formed a bloc within which Bachkalo sold her property between 1955-57 at different interval of time. The sale deed of 1956 existed in the name of Mahesh Rai (Exhibit-1/c) and Yamuna Rai (Exhibit-1) yet its revisional khatiyani stands recorded in the name of all four branches, each having equal shares. Further, Plot no. 106 was purchased in the name of Kesari Rai, yet its khatiyani was prepared in the name of the heirs of every four branches in equal shares. All the other sale



deeds of this period and its respective khatiyans were also prepared in the name of the heirs of four branches. The Revisional Survey operation started in the year 1960-61 and Revisional Khatiyans were prepared around 1970-71. The entries in the Khatiyans reveal that the aforesaid bloc of 4 remained in jointness at least till 1960-61. The property purchased during 1955-57 were purchased from a common / joint family funds and not from the personal earnings of individual vendees in whose name the property was purchased. This fact strongly indicates that the bloc of 4 branches of Rameshwar Rai, Ramjeet, Ramsewak, Bachcha Rai and Ramchandra Rai were not separated but they remained in jointness after 1951. The contesting defendant/appellant D.W.-3 has admitted in his deposition that properties purchased in the year 1955 in exclusive name of his father Saryu Rai were also recorded jointly in the names of all the four branches in the Khatiyans and therefore, Revisional Khatiyans had been correctly prepared. It is further stated in his deposition that there is not a single purchase before 1960 which may find Khatiyans prepared in the name of single individual. This fact indicates jointness among the aforesaid bloc of 4 branches before 1960. In the aforesaid facts, the learned trial court held that there was no complete partition



among all the five sons of the deceased Rameshwar Rai in 1951 and that only a partial partition took place whereby only one son of Rameshwar Rai, namely, Raj Govind separated from other four brothers in 1951. In the year 1960, Kesari Rai separated followed by third partition when remaining three branches comprising of Bachcha Rai, Saryu Rai (sons of Ramchandra Rai) and the plaintiffs also separated. So far question of independent earning of Saryu Rai is concerned, the contesting defendant/appellant himself categorically deposed that his father Saryu did not receive any salary or pension which is essential feature of any employee. Therefore, the earning of Saryu Rai as a government employee stands not proved.

13. The learned lower appellate court further held that the properties during the purchase years of 1955-58 were purchased while they remained in jointness and the consideration amount of the said purchases were paid from the joint family funds. D.W.-1, Deenanath Rai in paragraph 36 and witness Ramdeo Rai have clearly stated that consideration money for the aforesaid purchases were paid from joint family funds. In paragraph 38 to 40, this witness had further deposed seeing of giving consideration amount in presence of Kesari Rai, Bachcha Rai and Saryu Rai when Bachcha Rai placed the



money in the hands of Saryu Rai for payment. The said purchase was being made out of joint family funds, finds support from evidences discussed which prevails. It was further held that Exhibit-3/f, Revisional Survey Plot No. 2028 belongs exclusively to Kesari Rai whereas Exhibit-4 Revisional Survey Plot No. 2029 belong to Saryu Rai, Bachcha Rai and plaintiff in equal share. In the aforesaid fact, the plaintiffs/respondents have right, title, interest over Revisional Survey Plot No. 2029. It has come into oral evidence that Revisional Plot No. 2029 was partitioned in the year 1966 among the remaining three branches as aforesaid whereby adjacent South to Kesari's Plot No. 2028, it was Saryu Rai who received his 1/3rd share followed by Bachcha Rai and then the plaintiffs in the Southern portion of Revisional Survey Plot no. 2029 each having equal 1/3rd share. The plaintiffs' bloc is represented by KBCL in the map given at page 21 of the plaint described in Schedule-kha of the plaint. In view of the above evidences together with the findings of the other issues, the learned appellate court held that the plaintiffs have exclusive right, title and interest over the suit- bloc KBCL.

14. So far claim of adverse possession as made in paragraph no. 18 of the written statement stands vitiated on his own pleadings made in paragraph no. 14. It is not sustainable in



the eye of law and consequently, held that the defendant/appellants are the unauthorized occupants over the suit plot as described at the foot of the plaint. The plaintiffs are entitled to recover the same from them, and accordingly held that the plaintiff/respondents are entitled to decree for relief no. 1 as claimed and appellant/defendant 1st set are directed to remove their construction from Schedule-Kha of the plaint which belongs to the plaintiffs/respondents exclusively and in addition to, the appellant/defendants shall also be liable to compensate the plaintiff/respondents at the rate of Rs. 500/- per month from the date of filing of the suit till the date of handing over to the plaintiff/respondents.

15. Against the aforesaid judgment and decree of the learned court of appeal below, the instant Second Appeal has been filed by the defendants/appellants/appellants.

16. Learned senior counsel for the appellants submitted that both the courts below have committed jurisdictional error by not appreciating that when both the parties admitted that partition in the family took place in 1951, then the burden was on the plaintiffs to prove that in the said partition out of five surviving brothers, only one brother separated and rest continued in jointness of each other, since



there is a presumption of complete partition when once partition takes place in the family. It is further contended that both the courts below failed to appreciate that Saryu Rai was not the elder male member in the joint family and not being a Karta of the said family when the successor of Saryu Rai have denied the same and more particularly when there is presumption that elder male member of the family shall be Karta of the family unless proved to be otherwise. The learned senior counsel for the appellants further submitted that in view of the pleadings of the parties framing of issues regarding Karta of the joint family and regarding existing and use of joint family funds in acquisition of the property in suit was a necessary issue which was neither framed nor decided though the lower appellate court accepted and framed those issues in appeal. Learned counsel for the appellant further submitted that the lower appellate court wrongly granted mesne profit at the rate of Rs. 500/- per month from the date of filing of the suit till the date of handing over the land to the plaintiffs.

17. Per contra, learned counsel for the respondents submitted that the plaintiffs/appellants filed suit in which the main relief was declaration of title and removal of encroachment. The suit was decreed. The ancestral properties of



the parties were partitioned in three stages. In the evidence of the contesting defendants, D.W.-3 admitted in his evidence that only one brother Raj Govind separated in 1951 and remaining four brothers resided and worked/ did business jointly. Another witness Ramdeo Rai, son of Kesari Rai also admitted that four brothers living in jointness, Kesari separated in 1960 and remaining three brothers separated in 1966. At the time of partition, his father and Saryu Rai, Bachcha Rai, Mahesh Rai were present. He had witnessed the partition of the year 1960. Another family members Dinanath Rai, son of Yamuna Rai for the defendant 3rd set, also admitted in his deposition that three times partition took place in the family of deceased Rameshwar Rai; firstly in 1951, secondly in 1960 and lastly in 1966. This witness had deposed that he was present at the time of 1966 partition whereas the plaintiffs have proved about the aforesaid three partition. It is further submitted that the property purchased in the name of descendants of the deceased Rameshwar Rai between the period 1955-57 are not in dispute. The sale deeds were executed in favour of the individual family members (Exhibit-1 series) but entry in the Revisional Survey in the name of all four branches each have equal share. This shows that the properties were joint. As such, these entries in the



Khatiyani itself shows that the aforesaid four brothers remained in jointness at least till 1960-61. The properties during 1955-58 were purchased and the consideration amount of the said purchases were paid from joint family funds. D.W.-1, who is member of the family has deposed that the consideration money for the aforesaid purchases were given from joint family funds and the said consideration money was given by Bachcha Rai, who placed the money in the hands of Saryu Rai for payment.

18. All the purchases were from self earning as claimed by the defendants has not been proved by the defendants/appellants. Moreover, the defendants claim title by adverse possession. Therefore, the defendants admitted the title of the other family members. Hence, the learned appellate court rightly dismissed the appeal filed by the defendants/appellants.

19. After hearing the submissions made on behalf of the parties and after perusal of materials on record including the judgments of the courts' below, it appears that the learned court of appeal below which is the final court of facts, after considering the pleadings of the parties, and the evidence adduced by them came to clear findings that contesting defendant / appellant (D.W.-3) admitted in his cross-examination that only one son of Rameshwar Rai, namely, Raj



Govind separated in 1951 and remaining four sons resided and worked / did business jointly. Another family member, son of Kesari Rai (D.W.-1) has also deposed that among these four brothers living in jointness, Kesari separated in 1960 and remaining three separated in 1966. He witnessed the 1960 partition. When his father and three other brothers were present for partition. He also named the family members who were present at the time of 1966 partition. Another witness, D.W.-1 adduced on behalf of the defendant 3rd set also admitted that three phases of partition took place in the family of deceased Rameshwar Rai. He was also present at the time of 1966 partition. Sale deeds (Exhibit 1 series) were purchased in the name of individuals but entry in the Survey Khatian stands recorded in the name of all four branches each having equal share. The property purchased during 1955 to 1957 were purchased from common/joint family funds and not from the personal earnings of individual vendees in whose name the property was purchased, and further held that the bloc of four branches of Late Rameshwar Rai, i.e., Ramjeet Rai, Ramsewak Rai, Bachcha Rai and Ramchandra Rai were not separated but they remained in jointness after 1951. The claim with regard to purchase of disputed plot in 1958 out of his personal income,



the burden lies upon the defendants/appellants to prove that their father purchased the said land out of his personal income irrespective of the jointness with his brothers, but the defendants/appellants has failed to discharge their burden. The affairs of all the four branches were being managed in jointness under a Karta. The properties purchased during 1955-58 were purchased while remaining jointness and the necessary aspect is that consideration amount of the said purchase were paid from the joint family funds. The plaintiffs have proved their case with regard to the purchase being made out of joint family funds. Both the courts below have concurrently held that the plaintiffs/respondents proved their case .

20. On the other hand, the defendants/appellants have failed to demolish the case of unity of title and possession till 1966. The defendants' witnesses as well as plaintiffs' witnesses clearly proved that the properties of family of Rameshwar Rai had been partitioned in three phases. The plaintiffs have been allotted portion of the suit land through partition in the year 1966. The courts below have concurrently held that the defendants are being encroacher.

21. Considering the aforesaid facts of the case as well as materials on records, it is quite apparent that the impugned



judgments and decree of the courts below are covered by findings of facts and no question of law, much less substantial questions of law, arises for consideration in the instant Second Appeal.

22. Accordingly, this Second Appeal is dismissed at the stage of hearing under Order XLI Rule 11 of the Code of Civil Procedure.

(Khatim Reza, J)

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