

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.529 of 2016

Kaushlendra @ Indradeo Prasad, Son of Late Chhotu Mahto, Resident of Village-Gaurav Nagar, P.S. Parwalpur, District- Nalanda.

... .. Appellant/s

Versus

1. Ram Payari Kumari, W/o Chandeshwar Prasad, Resident of Village Dharampur, P.S. Hilsa, District -Nalanda.
2. Urmila Kuamri Wife of Krishna Prasad, Resident of Village Chhotiaut, P.S. Nalanda District -Nalanda.
3. Raj Kumari Devi, W/o Birmani Prasad, Resident of Village Gaura Par, P.S. Chandi District -Nalanda.
4. Sunaina Devi, W/o Sidheshwar Prasad, Resident of Village Janaraw, P.S. Silao, District - Nalanda.
5. Manju Kuamri, W/o Anil Kumar, Resident of Village Dariyapur, P.S. Chandi District-Nalanda at present Shakuntala Niwas Mohalla M Lakshmanpur, Kwyari Tola, Shershar Road, P.S. Sultanganj, District Patna.
6. Most. Sakuntala Kumari, W/o Sidheshwar Prasad, Resident of Sakuntala Niwas Mohalla M. Lakshman Pur Ekyari Tola, Shershad Road, P.S. Sultanganj, District -Patna, Patna 7.
7. Raj Lakshmi, D/o late Sidheshwar Prasad, Resident of Sakuntala Niwas Mohalla M. Lakshman Pur Ekyari Tola, Shershad Road, P.S. Sultanganj, District -Patna, Patna 7.
8. Pappu Kumar, (Minor) Son of late Sidheshwar Prasad, Under the guardianship of their mother Sakuntala, Resident of Sakuntala Niwas Mohalla M. Lakshman Pur Ekyari Tola, Shershad Road, P.S. Sultanganj, District Patna, Patna 7.
9. Guddu Kumar, (Minor) Son of Late Sudheshwar Prasad, Under the guardianship of their mother Sakuntala, Resident of Sakuntala Niwas Mohalla M. Lakshman Pur Ekyari Tola, Shershad Road, P.S. Sultanganj, District -Patna, Patna 7.
10. Smt. Shyama Devi, Wife of Late Jageshwar Prasad, Resident of Village Alipur P.S. Hilsa, District- Nalanda.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Rohitashwa Kumar, Advocate
Mr. Sanjay Sinha, Advocate
For the Respondent/s :

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV ORDER

11 11-03-2026

Heard learned counsel for the appellants.

2. This Second Appeal has been preferred against the



judgment and decree dated 23.06.2016 passed by the Learned Additional District Judge-Ist, Nalanda at Biharsharif, in Title Appeal No. 64 of 2006 whereby the lower Appellate Court reversed the judgment and decree dated 23.07.1998 passed by the learned Sub-Judge-II, Hilsa, Nalanda in Title Suit No. 21 of 1991.

3. The appellant herein was the defendant before the learned Trial Court and the respondents herein, were the plaintiffs in Title Suit No. 21 of 1991. The plaintiffs-respondents-1st set filed Title Suit (Partition) for partition of their half share in the suit property and for carving out the aforesaid share by appointing a survey knowing Pleader Commissioner.

4. In order to determine the matter in its perspective, it is necessary to briefly re-state the case of the parties.

5. The defendant-appellant, (the plaintiffs-respondents-1st set) and defendants-respondents-2nd set are the descendants of the common ancestor, namely, Kewal Mahto and are related to each other. The genealogy has been admitted by both the sides. It is also admitted fact that Chhotu Mahto, Srichand Mahto and Ganauri Mahto were full brothers; all being the sons of Kewal Mahto. It is also admitted fact that Ganauri



Mahto died unmarried in the year 1982.

6. The case of the plaintiffs is with regard to partition between the three brothers, which took place in the year 1987 only for the sake of convenience in cultivation of the land. After the death of one co-sharer Late Ganauri Mahto, in the state of jointness, his property was inherited by Chhotu Mahto and Srichand Mahto jointly. The *chakbandi khatian* was prepared in the joint name of Chhotu Mahto, Srichand Mahto and Ganauri Mahto. It is further pleaded that after the death of Ganauri Mahto some problems and difficulties were being felt to run the joint family and due to which quarrel started between the plaintiffs and defendant nos. 1 to 4. Subsequently, the plaintiffs asked for partition from the defendants in the year 1987 but they were evading the same. Consequently, both the parties remained in possession of joint property and once, the parties divided themselves and ridge (Daj) was also carved out and in accordance with that, mutation application was filed before the concerned Circle Officer but defendant raised objection resultantly the mutation case was rejected. The application for mutation went up to the court of Additional Collector, Nalanda but from there also, it was dismissed. It is further contended that the plaintiffs again requested the



defendant to partition the suit property by metes and bounds but they kept evading, hence, this suit.

7. On summons, defendant nos. 1 to 4 appeared and filed their written statement jointly. Apart from ornamental objection against the pleading of the plaintiffs respondent-1st set, the defendant nos. 1 to 4 pleaded that *chak khatiyar* was prepared in the name of Chhotu Mahto, Srichand Mahto and Ganauri Mahto, all sons of Kewal Mahto in respect of 5.96 acres land of Village-*Gaurav Nagar* in *Mahal Shankar Dih*. Thereafter, partition was held by metes and bounds in the year 1980 in the manner that Chhotu Mahto, Ganauri Mahto remained joint and the plaintiff Srichand Mahto became separate wherein the land of Village-*Gaurav Nagar* and the land of Mirzapur in respect of 1.87 acres and area of 0.73 ½ acre land of Village-Shankar Dih, total area 2.60 ½ acre was allotted to Srichand Mahto and the remaining area 5.22 ½ acre was allotted to Chhotu Mahto (father of defendant nos. 1 and 4) and Ganauri Mahto. All the co-sharers came in possession of the allotted shares. After partition, Ganauri Mahto died in the year 1982 and Chhotu Mahto came in possession of the share of Ganauri Mahto, who was joint with him. It is further pleaded that after partition the entire land of Village- *Mirzapur* was sold by the



plaintiffs through various deeds in which he has clearly stated that partition had already been held and he was selling the property according to his share. As such, the averment of the plaintiffs regarding jointness of the property cannot be believed. The defendants have also stated about the various transaction in the form of sale or exchange made by the plaintiffs in accordance with their share allotted in the partition. Chhotu Mahto died in the year 1984 and after 1980, there was no joint family nor Chhotu Mahto was the Karta of the joint family. There is no joint family property which was left to be partitioned. Some properties are the personal acquisition of defendant no. 4 Kauslendra @ Indradeo Prasad in the year 1972, 1974 and 1976. The joint family has got no concern with the same nor got possession, rather, it has come alone in the possession of defendant no. 4. Holding No.132 A, Ward No. 18 New- 24, area 15 dhurs never remained to be joint family property, rather, it is personal acquisition of Smt. Sakuntala Devi, widow of Sideshwar Prasad through registered deed of 1975 and hence, there is no unity of title between the parties.

8. The learned Trial Court after considering the pleadings, evidence adduced by the parties and materials on record, held that there is no unity of title and possession



between the parties, thus, there could not be partition which has already been partitioned, therefore, the plaintiffs cannot get the suit land to be partitioned.

9. Being aggrieved by the judgment and decree of learned Trial Court, the plaintiffs filed Title Appeal and after hearing the parties and considering the materials on record, the learned Additional District Judge-Ist, Nalanda reversed the judgment and decree of the Trial Court and decreed the suit partly. The learned Appellate Court has held that some documents filed on behalf of the plaintiffs show the joint transaction made by the plaintiffs after the alleged year of partition 1980, whereas some documents adduced on behalf of the defendants show that the plaintiffs have sold away some properties after 1987 by reciting therein that the said properties were allotted in their share in *Khangi* partition. Both the parties did not file any documents to establish the partition by metes and bounds amongst three brothers (co-sharers) on the specific date and month of the year. There was no document to show as to how much property was allotted in whose share in the partition as alleged by the parties. There is no any document executed by 3rd co-sharer, namely, Ganauri Mahto which could suggest and support any partition between the parties. The said



Ganauri Mahto died unmarried in the year 1982. There is complete lack of any document showing the share allotted to him (Ganauri Mahto). In the facts and circumstances, the onus lies upon the defendants to prove the partition of the suit property by metes and bounds because they have specifically pleaded that earlier there was partition by metes and bounds.

10. The learned Appellate Court after analyzing the evidence adduced on behalf of the parties and oral evidence adduced by the defendant-appellant Kauslendra @ Indradeo Prasad (DW-5) has found that the defendant-appellant has deposed in his evidence that Srichand Mahto and Ganauri Mahto were his uncles and partition took place in the year 1980 amongst his father and uncles. He has deposed that Chhotu Mahto and Ganauri Mahto remained joint. The learned First Appellate Court has further found that in his evidence he has not deposed that what was the specific date and month of the year 1980 when the said partition took place. He has also not stated that how much share was denied and allotted in whose specific share. However, he has deposed about the share allotted only to Srichand Mahto. On the basis of such version of the defendant-appellant it cannot be legally believed that the partition took place in the year 1980 by metes and bounds. DW-1 has also



deposed in his evidence that no partition took place by giving any 'ridge' or 'alang' in presence of him nor any measurement was made. He was neither involved in the said partition of the year 1980 nor he was 'panch' of the said partition and no any paper was prepared in his presence. Likewise, DW-2 and DW-3 also deposed that neither they were '*panch*' nor had joined in any partition nor any paper of partition was prepared before them. The learned First Appellate Court after considering the testimony of the aforesaid witnesses of the defendants on the point of earlier partition held that the defendant-appellant have failed to establish the partition in the year 1980 as alleged by them by any cogent evidence. On the contrary to this, the plaintiffs have proved the jointness of the properties by adducing documentary as well as oral evidence. Presumption also lies in favour of jointness of property according to the Hindu law. The learned Appellate Court held that the suit property with respect to Khata No. 210, Thana No. 146 mentioned in Schedule-II of the plaint has not been partitioned by metes and bounds earlier between the co-sharers. The plaintiffs have also sought for partition with respect to other three plots mentioned in Schedule-II. In this regard, there is specific pleading of the defendants that the said properties are



not joint family properties, rather, it is self-acquired properties of Kauslendra @ Indradeo Prasad and Sakuntala Devi. Thus, the onus was upon the plaintiffs to prove the fact that there was nucleus in the joint family and from that income it was purchased in the name of the defendants but the plaintiffs have not stated any facts regarding nucleus and income of the joint family at the time of purchase of the said property. The four properties including the house at Patna cannot be said to be joint family property because the plaintiffs have failed to prove the nucleus and income of the joint family from which the said properties were purchased. Therefore, the learned First Appellate Court held that the plaintiffs and the defendant i.e., heirs of Chhotu Mahto both are found entitled to get half and half share in the suit property mentioned in Schedule-II of the plaint except Plot Nos. 3142, 3227, 3145 and house of Patna. The properties of Khata Nos. 160 and 161 of Village-*Mirzapur* as detailed in Schedule-III of written statement of the defendant will also be partitioned in two shares. It was further directed that the suit property or any part thereof sold by any party, earlier will be adjusted in their respective share and set aside the judgment of the Trial Court and allowed the appeal in respect of the part of the suit property as mentioned above.



11. Having considered the submissions made on behalf of the appellant and after perusal of materials on record including the judgment of the learned courts below, it appears that the learned courts of appeal below, which is the final court of facts, after considering the pleadings of the parties and evidence adduced by them came to a clear finding that the defendants could not prove earlier partition between the three brothers, namely, Chhotu Mahto, Srichand Mahto and Ganauri Mahto. Ganauri Mahto died intestate as unmarried and issueless. So being the brother of Ganauri Mahto, Srichand Mahto and Chhotu Mahto will jointly succeed the share of Late Ganauri Mahto, being the full brother of Late Ganauri Mahto, as his Class-II heirs, the share of Ganauri Mahto will be divided between Srichand Mahto and Chhotu Mahto half and half. The property in Khata nos. 160 and 161 of Village-*Mirzapur* as mentioned in Schedule-III of written statement is divided among Chhotu Mahto or his successor and Srichand Mahto or his successor and they will get half and half share of the said property. The property of Ganauri Mahto will devolve upon the two brothers, namely, Srichand Mahto and Chhotu Mahto half and half.

12. The legal position is well settled and the Hon'ble



Supreme Court in the case of **M.L. Subbaraya Setty (Dead) By Lrs. vs. M.L. Nagappa Setty (Dead) By Lrs.** reported in **(2002) 4 SCC 743** has held that “*on mere severance of status of joint family, the character of any joint family property does not change with such severance. It retains the character of joint family property till partition*”. Further, in the case of **Deoki Mallah vs. Surji Mallahain and Ors.** reported in **(1999) 1 PLJR 199** it has been decided that “*Separate in mess and separate cultivation among the co-sharers do not mean that there was partition by metes and bounds or separation of one of the coparcener from the ancestral property.*”

13. The defendants’ witness also did not adduce any evidence with regard to earlier partition. The defendants have not deposed that what was the specific date and month of the year 1980 of partition as claimed in 1980 by the defendants. When the said partition took place, how much share was denied and allotted in whose specific share. DW-1 specifically deposed in his evidence that no partition took place by giving any ‘ridge’ or ‘alang’ in presence of him nor any measurement was made. Neither he was involved in the said partition of the year 1980 nor he was ‘*panch*’ of the said partition nor any paper was prepared in his presence. Having regard to the aforesaid, the



learned court of appeal below was quite justified in arriving at the finding with regard to the suit property in respect of Khata No. 210 under Thana No. 146 mentioned in Schedule-II of the plaint that the same has not been partitioned by metes and bounds earlier between the co- sharer and the defendant have failed to establish the partition in the year 1980 as claimed by them by any cogent evidence.

14. In the aforesaid facts and circumstances, this Court does not find any illegality in the impugned judgment and decree of the learned court of appeal below nor does it find any substantial question of law involved in the instant Second Appeal.

15. Accordingly, the Second Appeal is dismissed at the stage of admission under “Order XLI Rule 11 C.P.C”.

(Khatim Reza, J)

prabhat/-

U			
---	--	--	--

