

(1936) 07 PAT CK 0016
In the Patna High Court

Bajjnath Sahu and Another		APPELLANT
	Vs	
Jaimangal Prasad Singh and Others		RESPONDENT

Date of Decision : 31-07-1936

Acts Referred:

Evidence Act, 1872 — Section 167, 35

Citation : AIR 1937 Patna 56

Hon'ble Judges : Rowland, J;James, J

Bench : Full Bench

Judgement

James, J.—The suit out of which this appeal arises was instituted on the following allegations: Nannu Sahu had two sons. Bajjnath Sahu by his first wife and Bundi Sahu by his second. After Nannu Sahu's death Bajjnath Sahu and Bundi Sahu entered jointly into possession of his property, but shortly after his death and before 1927 the two brothers amicably separated without partition of property, so that they ceased to be members of a joint family, and they held the inheritance of Nannu Sahu as tenants-in-common. On 27th July 1927, Bundi Sahu sold his hall share in a little over half an acre of land and three-houses to the plaintiffs. The plaintiffs instituted this suit for partition. The suit was contested by Bajjnath Sahu who denied that Bundi Sahu was his brother and denied that Bundi Sahu had any right in the property which he had purported to convey by the sale. He further objected that Bundi had not been in possession of the property within 12 years of the suit, so that any claim of Bundi Sahu or the plaintiffs would be barred by limitation.

2. The Subordinate Judge found that Bajjnath Sahu and Bundi Sahu were sons of Nannu Sahu, but that they had separated and that it had not been proved that this separation had taken place within 12 years of the suit. He found that the plaintiffs had proved the execution of the sale-deed and passing of consideration, but as no possession on the part of their vendor had been proved within 12 years of the date of the suit, he held that the suit was barred by limitation and that it must be dismissed. On appeal the District Judge confirmed the finding of the

Subordinate Judge that Bundi Sahu was the son of Nannu Sahu, but on the question of limitation he held that as no definite act of ouster had been proved, the possession of one tenant-in-common could not be treated as adverse to the other, and that therefore the suit could not be properly regarded as barred by limitation. He set aside the decree of the Subordinate Judge and decreed the suit.

3. In discussing the question of the relationship of Baijnath Sahu and Bundi Sahu each of the Courts below gave consideration to the judgment in a suit of 1927. One Ramlal Gop had given land in usufructuary mortgage to Nannu Sahu. Dipa Gop, as the heir of Ramlal Gop, sued Baijnath and Bundi as sons of Nannu Sahu for redemption of the mortgage. Baijnath objected that there had been misjoinder of parties because Bundi Sahu was not his brother. An issue was framed on this question, on which the decision of the Court was that Baijnath and Bundi were both sons of Nannu Sahu; but the suit was dismissed on the ground that the plaintiff, Dipa Gop was not the heir of Ramlal Gop, and so he was not entitled to sue for redemption. The Subordinate Judge treated this judgment as evidence of the fact that the claim was asserted at that time by Bundi Sahu. He also referred to admissions made by witnesses which were mentioned in the course of that judgment and of another judgment as evidence of the fact of relationship. The District Judge treated the judgment as binding on Baijnath Sahu: but he criticised the Subordinate Judge for his reference to the statement of the witness taken from that judgment. The District Judge remarked that it was open to the Subordinate Judge to record that in a previous litigation between defendant 1 and defendant 3 it was held that defendant 3 was a son of Nannu.

4. Mr. Manohar Lal, on behalf of the appellant, Baijnath Sahu, argues that the judgment should have been regarded as inadmissible in evidence. It is not quite clear whether the learned District Judge regarded the finding in that judgment as amounting to *res judicata* between Baijnath and Bundi; but if he did so regard it, he was in error because a finding adverse to a defendant in a suit cannot be treated as *res judicata* if the suit be dismissed. The finding was in fact not necessary for the determination of the suit, because if the plaintiff was not entitled to sue for redemption of the mortgage it made no difference for the determination of the suit whether he had impleaded the true heirs of Nannu Sahu or whether he had not. But the finding of the learned District Judge on this question of relationship did not (rest?) exclusively on this judgment of 1928. He apparently regarded the position established by the previous litigation as a point of law; and he then went on to discuss the question of fact whether the relationship had been proved by evidence in the present proceeding. He remarked that a Cart Register of the Barh Municipality showed that Bundi was the son of Nannu Sahu. This Ex. 3 consisted of the two extracts from the register of vehicles maintained by the Barh Municipality u/s 146, Municipal Act.

5. u/s 35, Evidence Act, it was admissible as evidence if it proved any relevant fact. Mr. Manohar Lal argued that it should not be regarded as admissible in evidence at all, because no independent proof was given of who made the entry

or of who furnished the information on which the entry was based. The entry proves no more than that two persons Baijnath. Sahu and Bundi Sahu described as sons of Nannu Sahu were jointly assessed for tax on a bullock cart in two different years. We cannot presume that the description of the ownership of the cart was correctly given or that the information on which the entry was based was furnished by Baijnath Sahu. The entry without independent evidence of how it came to be made, would indeed have very little corroborative value. We know that Bundi Sahu was setting up a claim to be the son of Nannu Sahu and brother of Baijnath, so that unless this entry was made on information furnished by Baijnath, it would have little or no value as evidence of the paternity of Bundi. The learned District Judge then proceeded to accept the discussion of the oral evidence which was made by the Subordinate Judge. The learned Subordinate Judge has discussed the oral evidence of the witnesses for the plaintiffs and the defendants in some detail, giving specific reasons for trusting the evidence of the witnesses Mangru Mia, Babulal Halwai, Bachai Ganreri and Nemchand Teli for the plaintiffs, and taking no account of the plaintiffs' witness Shambehari Sahai, so far as he professes to know anything of the affairs of Baijnath and Bundi. He criticises severely the evidence of the witnesses for the defendants, and gives his reasons for regarding their evidence as untrue. The learned Subordinate Judge concludes this discussion by, saying:

Under all these circumstances I cannot but believe the evidence adduced by the plaintiffs' witnesses, and hold that defendant 3 is also a son of Nannu Sahu.

6. The learned District Judge has accepted the view of the evidence of these witnesses taken by the learned Subordinate Judge and in view of the provisions of Section 167, Evidence Act, it would not be proper to remand the case for a decision on facts merely because the learned District Judge took an erroneous view of the legal effect of the judgment of 1928, or rated too highly the value of the evidence of the entry in the Municipal Cart Registers.

7. Mr. Manohar Lal further argues that the suit should be treated as barred by limitation, since no possession of Bundi Sahu within 12 years of the suit had been proved. The learned District Judge found that Baijnath and Bundi were brothers who were joint at the time of the death of Nannu Sahu. It was alleged by the plaintiffs' witnesses that there had been a separation in mess, but not formal partition of the property at some time after Nannu's death. The learned District Judge held that as no definite act of ouster had been proved, the possession of one of the tenants in common must be treated as possession on behalf of both and could not be, in the circumstances, treated as adverse. Mr. Mahohar Lal argues that there is no evidence of formal partition between the brothers; but there is sufficient evidence of the fact that they were not joint in mess in the technical sense of the word. It was alleged in the plaint that there had been a separation but not formal partition of property and that the appellants were tenants-in-common. This allegation was not specifically denied in the written statement and indeed the form of defence which Baijnath put

forward, made it impossible for him to deny specifically that there had been separation of any kind; because his case was that, so far from having ever been joint, there had never been any connexion at all between himself and Bundi Sahu. When he failed to establish this defence, the averment of the plaintiffs was left uncontradicted, that there had been separation but without division of the property. That being so, the learned District Judge was right in holding that since there was no definite proof of ouster, the defendant Baijnath Sahu could not establish adverse possession against his co-tenant: *Mt. Bibi Zainab and Others Vs. Muhammad Ayub and Others*, . The defendant Baijnath ought to have pleaded a definite act of ouster; but since a definite act of ouster has not been pleaded, the co-tenant must be regarded as having been in possession of his share of the property.

8. Lastly Mr. Manohar Lal argues that the Court below should have treated the alienation as invalid from the beginning on the ground that Bundi was joint with Baijnath Sahu at the time when it was made. This point, as Mr. S.M. Mullick objects, was not raised at any stage of the litigation, and it was not taken in the grounds of appeal. It is enough to say that for the establishment of this point Mr. Manohar Lal would rely on the evidence of the plaintiffs' witness Shambhari Sahai whom the learned Subordinate Judge pointedly omitted when he was discussing the evidence of the witnesses regarding relationship, thereby implying that he placed no reliance upon his evidence. I would affirm the decree of the lower appellate Court and dismiss this appeal with costs.

Rowland, J.

9. I agree.