

(2007) 06 JH CK 0024

In the Jharkhand High Court

Case No : Appeal from Appellate Decree No. 47 of 1990

Bishwanath Ram and Others

APPELLANT

Vs

Most. Lawangwas Kuer and Others

RESPONDENT

Date of Decision : 19-06-2007

Acts Referred:

Specific Relief Act, 1963 — Section 34

Citation : (2007) 2 BLJR 2211 : (2007) 3 JCR 638

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : L.K. Lal and A.K. Sinha, for the Appellant; P.K. Prasad, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—This appeal by the plaintiffs/appellants is directed against the judgment and decree dated 11th December, 1989 passed by 4th Additional District Judge, Palamau in Title Appeal No. 32 of 1987 whereby he has dismissed the appeal and confirmed the judgment and decree dated 25th August, 1987 passed by Sub-Judge, Garhwa at Palamau in Title Suit No. 124 of 1981.

2. Plaintiffs filed aforesaid Title Suit No. 124/81 for declaration that the suit land is raiyati land of the plaintiff and the sale deed executed by defendant Nos. 2 and 3 in favour of defendant No. 1 has not affected the right title and interest of the plaintiff in respect of the suit land.

3. It appears from the pleadings of the parties that one Dhautal Kahar was common ancestor of both the plaintiff and the defendants except defendant No. 1. Dhautal Kahar died in 1920 leaving behind three sons Fakira Kahar, Jagira Kahar and Jagan Kahar. Plaintiff is the son of Fakira Kahar, whereas defendant Nos. 2 to 4 are the sons of Jakira Kahar. One of the sons of Jakira Kahar, namely, Monki Kahar died unmarried. Plaintiff's case is that all the landed property of different khatas were held, possessed and jointly recorded in the name of

Dhatal Kahar. Subsequently, in the survey khata Nos. 267 and 337 the suit land was jointly recorded in the name of Fakira Kahar, Jakira Kahar and Jagan Kahar. The lands of Khata Nos. 108, and 120 of village Mangara were recorded in the name of Dhatal Kahar and khata No. 202 was jointly recorded in the names of Chulhan Singh and Dhatal Kahar. Plaintiff's case is that in 1920 Dhatal Kahar died leaving behind the plaintiff and defendants except defendant No. 1, who succeeded the land recorded in the name of Dhatal Kahar jointly. Sons of Dhatal Kahar were separated from each other, which took place before survey settlement operation. It was pleaded that after the death of Jugo Kahar there had been amicable partition in 1925 between Fakira Kahar and Jakira Kahar in respect of the land of khata No. 246, 267, 321, 333 and 337 of village Shilidag and khata Nos. 100, 120, 202 of village Mangara. The land of khata No. 108 of village Mangara remain joined. Plaintiff's case is that by virtue of amicable partition Jakira Kahar was allotted khata No. 321 and 333 with house thereon of village Silidag and portion of khata No. 202 of village Mangara. Similarly, Fakira Kahar was allotted lands of khata No. 246, 267, 337 of village Silidag and other plots of village of Mangara. After amicable partition in 1925 plaintiff and his father alleged to have come in exclusive possession of their share and have been residing in the house and there has been separate cultivation by the plaintiffs and the defendants except defendant No. 1. Fakira Kahar died in 1937 leaving behind plaintiff as his only son. Jakira Kahara died in 1949. It was alleged that defendant No. 3 on 30.10.81 executed a sale deed in respect of the land which was allotted to the plaintiff in favour of defendant No. 1. Similarly, defendant No. 2 on 31.10.80 again sold the land which was allotted to the plaintiff in favour of defendant No. 1. Plaintiff therefore, contended that defendant No. 2 and 3 have no right title and interest over the land allotted in the share of the plaintiff. Hence, the instant suit was filed for declaration that those sale deeds are not binding on the plaintiff.

4. Defendant No. 1 who is purchaser contested the suit by filing written statement stating inter alia that the suit is barred by limitation and also barred under the provision of Special Relief Act. This defendant admitted genealogical table given in the plaint but pleaded that family was joint at all point of time. Various other defenses have been taken by defendant No. 1. Defendant No. 3 filed written statement stating that he has not executed any sale deed in favour of defendant No. 1 and that he is an illiterate person. Defendant No. 2 and 4 did not file any written statement.

5. The trial court framed as many as 8 issues. One of the important issues was issue No. 5 i.e. whether there had been partition with respect to property recorded in the name of Dhatal Kahar amongst his sons in the year 1925. The trial court came to the conclusion that there is no documentary evidence of partition and the events after 1925 does not indicates that the land, which was sold by defendant Nos. 2 and 3, were allotted to the plaintiff by amicable partition of 1925. On the basis of this issue and also other issues the suit was dismissed by the trial court. The appellate court, in appeal filed by the plaintiffs,

affirmed the judgment and decree passed by the trial court and dismissed the appeal.

6. Mr. L.K. Lal, learned Counsel appearing on behalf of the appellants assailed the impugned judgment and decree passed by the Courts below as being illegal and wholly without jurisdiction. Learned Counsel submitted that findings arrived at by both the Courts below are vitiated for non-consideration of important documentary evidences particularly Exts. 2, 2/1 and 2/2. The admission regarding previous partition made in the surrender deed (Ext. 2) is a conclusive proof of partition, Learned Counsel submitted that both the Courts below have failed to consider separate possession of the suit land by the parties for a considerable length of time which raises presumption of partition and the Court of Appeal below, therefore, has committed error of law in drawing adverse inference against the plaintiffs-appellants due to non-examination of the plaintiff. Learned Counsel lastly submitted that the findings recorded by both the Courts below are vitiated in law for non-consideration of material evidences both oral and documentary.

7. Mr. V.K. Prasad, learned Counsel appearing on behalf of the respondents, on the other hand, submitted that both the Courts below, after considering the entire evidence, both oral and documentary, have recorded a finding of fact negativating the case of the plaintiff about previous partition. Learned Counsel, therefore, submitted that this finding of fact recorded by both the Courts below cannot be disturbed in Second Appeal. It was further submitted that non-appearance of defendant No. 2, who is one of the vendors and non-examination of the plaintiff also go to show that the plea of previous partition has not been proved. Learned Counsel further submitted that in any view of the matter, the suit filed by the plaintiff is not maintainable and is barred by provision of Section 34 of the Specific Relief Act.

8. First of all, I would like to discuss the findings recorded by both the Courts below on the issue of previous partition made in the year 1925 as alleged by the plaintiff.

9. The plaintiffs-appellants, in support of their case, proved various documents in the trial Court. The Jamindari receipts, rent-receipts and the Government rent-receipts have been proved and marked as Exts. 1-series. Ext.2 is the certified copy of the deed of surrender executed by Jakira on 12.6.1936, Exts.2/1 and 2/2 are certified copy of the sale deed executed by Jakira in favour of the plaintiff on 7.2.1944, Exts.3 and 3/1 are certified copies of records of rights, Exts.4 to 4/2 are certified copies of Register-II in the name of the plaintiff and Exts.5 to 5/5 are certified copies of order-sheets.

10. At the very outset, the trial Court drew an adverse inference for non-examination of the plaintiff. From perusal of the trial Court judgment, it transpires that he has not discussed the evidence adduced by the parties with regard to separate possession of the parties over the land allegedly allotted to

them by virtue of amicable partition. The trial Court ignored the rent-receipts granted by the ex-landlord in the name of the plaintiffs father, Fakira, on the ground that it does not appear as to regarding which land these rent-receipts were granted. The trial Court also discarded the rent-receipts on the ground that they are forged and fabricated documents without any specific evidence led by the defendants challenging the genuineness of the documents. So far the rent-receipts issued in the name of the plaintiff in respect of the suit land are concerned, the trial Court discarded them holding that they were issued by the State of Bihar without prejudice and, therefore, they cannot be used as a proof of possession. The trial Court further held that since these rent-receipts did not bear the signature of Deputy Commissioner, it will be presumed that they are not genuine. With regard to deed of surrender dated 12.6.1936 (Ext.2) executed by Jakira Kahar, the trial Court held that admission made by the defendants' predecessor-in-interest in the said surrender deed about partition was written under compelling circumstances. The trial Court further held that separate transaction by members of joint family does not by themselves establish separation but it furnish a strong evidence of separation. On these findings, the trial Court held that there had never been partition in the year 1925 as alleged by the plaintiff.

11. The appellate Court while affirming the finding of the trial Court, proceeded on the same line and held that the rent-receipts issued in the name of the plaintiff cannot be used as proof of possession. Regarding Register-II in the name of the plaintiff, the appellate Court found that this is also not in support of the plaintiff about their possession. The appellate Court accordingly affirmed the finding of the trial Court and dismissed the appeal.

12. After giving my anxious consideration on the pleadings of the parties and the evidence adduced by them, I have no doubt in my mind in holding that both the Courts below have taken an erroneous approach of law in deciding the issue with regard to previous partition. I am also of the definite view that both the Courts below have not considered the important documentary evidences in its right perspective.

13. As noticed above, plaintiff's specific case was that there had been partition in 1925 and the parties came in separate possession of their respective lands allotted to them. Plaintiff's further specific case was that the parties are separate in mess and cultivation since 1925. The defendants, who are the co-sharers, have not denied their long separate possession and, cultivation. In support of partition and separate possession, the plaintiff, besides oral evidence, adduced documentary evidences which show that even before vesting of the estates, Jamindari rent-receipts were granted in the name of the plaintiff's father in respect of some of the lands and house. After vesting, rent-receipts have been granted regularly by the State of Bihar to the plaintiff. In Register-II, the name of the plaintiff's father was entered in respect of the land allotted to them by virtue of amicable partition. Both the Courts below have taken an erroneous view

in holding that Register-II and rent-receipts issued by the State of Bihar are forged documents because they do not bear the signature of the Deputy Commissioner when as a matter of fact, rent-receipts are issued by the Karmchari and Register-II is a document maintained by the Circle Officer. These documents are strong evidence of possession. Besides the above, as far back as in the year 1936, in the surrender-deed dated 12.6.1936 executed by defendants' father, namely, Jakira, he has mentioned about previous partition. Not only that, defendants' father Jakira sold a portion of the land in the year 1944 by registered deed of sale dated 7.2.1944 in favour of the plaintiff. Even in 1980, one of the co-sharers, defendant No. 2, sold a portion of the land in favour of the plaintiff. In these two sale-deeds, although there is no recital of previous partition, but the vendors have categorically admitted that the lands, which were sold, have been coming in their separate possession for a long time. It is, approach in appreciating the documentary evidence adduced by the plaintiff which are sufficient to establish their separate possession for a long time. Moreover, since there was no denial by the co-sharers about their separate possession and cultivation for long time, the Courts below have not recorded a finding that the parties have not been in separate possession and cultivation for a long time. The findings recorded by both the Courts below are, therefore, perverse in law and cannot be sustained. Both the Courts below should not have drawn adverse inference for non-examination of the plaintiff for the reason that admittedly the plaintiff was a very old man aged 83 years and his case was fully supported by his son who examined himself as a witness besides other witnesses.

14. In the case of *Mt. Ramjhari Kuer and Others Vs. Deyanand Singh and Others*, , it was held that separate entry in the record of right is by itself not conclusive proof of separation but is only a relevant evidence which may be taken into consideration on the question of separation. Their Lordship held that where the extent of such member's interest in the estate is not merely specified in record of right but such member is also recorded to be in separate possession over certain plots, the entries in the record of rights are of considerable importance indicating separation in the sense of not only definition of share but also separate possession. Separate possession over properties is a strong piece of evidence to rebut the ordinary presumption of joint-ness of Hindu family governed by Mitakshara School of Hindu Law.

15. In the case of *Mukhram Rai and Others Vs. Chandradeep Rai and Others*, . His Lordship Fazl Ali, J. observed that where parties have been in possession of and exercising rights of ownership over separate plots of land for a long time the Court might well presume that these lands have already been divided and rights of parties defined in regard to them in such a manner as to preclude their being re-partitioned. His Lordship further observed:

Both the Court below have held that the parties separated in status many years before the suit and the lower Appellate Court has also disbelieved the defence case that there was a partition about 90 years ago. The decision of the first Court

is that the defendants have succeeded in proving that the plaintiff had been separate from them in family status, in ownership of properties and in possession except in respect of the lands admitted in the written statement to be held by both parties in common tenancy. The learned District Judge affirms these findings but as he has also definitely found that there was no formal partition between the parties, the decree passed by him is assailed on the ground that even co-sharers, though separate in status, may claim partition of the family properties which have not been partitioned by metes and bounds. The facts of the present case, however seem to me to be somewhat similar to the facts of the case of ILR 53 Bom 213(1), which was decided by the Privy Council in 1928. In the present case the parties have been in possession of and have been exercising rights of ownership over separate blocks of land for such a long time and in such a manner that a Court might well presume that these lands have already been divided and the rights of parties defined in regard to them in such a manner as to preclude their being re-partitioned. But in any event the finding of the learned District Judge that the defendants have acquired title to the lands of which they have been in exclusive possession for more than 12 years seems to me to be sufficient to dispose of his appeal.

16. Similar question raised in the case of Radhamoni Bhuiyanin and Others Vs. Dibakar Bhuiya and Others was whether inequality of division of share lead to the conclusion that there had not been partition. His Lordship observed:

It is now well steered that although there is a presumption of jointness in a Hindu family but that presumption is stronger where the parties are full brothers but such presumption gets weaker and weaker as time passes and parties in third or fourth generation are found to be in separate possession of the lands. From a perusal of the khatian, Exhibits C and C/1, it appears that no plot, whatsoever, has been shown to be joint.

Their Lordship further discussed the earlier views of the Supreme Court and other High Courts as under:

As noticed hereinbefore, the circumstances of partition are in favour of the defendants. In Mt. Ramjhari Kuer and Others Vs. Deyanand Singh and Others, it has been held by the Division Bench of this Court as follows:

It is true that the fact that a member's share in a revenue paying estate has been separately defined in the collectorate land registration records and the record of rights, is by itself not conclusive proof of separation but is only relevant evidence which may be taken into consideration on the question of separation. But where the extent of such member's interest in the estate is not merely specified in the record of rights but such member is also recorded to be in separate possession over certain plots, the entries in the record of rights are of considerable importance indicating separation in the sense of not only definition of shares but also separate possession. Separate possession over properties is a strong piece of evidence to rebut the ordinary presumption of jointness of Hindu

family governed by Mitakshara School of Hindu Law.

17. As noticed above, separate possession and cultivation of the parties have not been disproved by the defendants- co-sharers. It can, therefore, be safely held that transfer of land by defendant Nos. 2 and 3, which fell in the share of the plaintiff, does not affect the plaintiff's right, title and interest over the same.

18. Having regard to the fact that the findings recorded by both the Courts below are perverse in law, the judgment and decree passed by both the Courts below are liable to be set aside.

19. For the reasons aforesaid, this appeal is allowed and the judgments and decrees passed by the trial Court and the appellate Court are set aside. Consequently, the suit is decreed. However, in the facts of the case, there would be no order as to costs.