

(1980) 12 PAT CK 0022
In the Patna High Court
Case No : S.A. No. 309 of 1972

Chekhuri Mallah and Others

APPELLANT

Vs

Bhabhuti Mallah and Others

RESPONDENT

Date of Decision : 22-12-1980

Acts Referred:

Citation : (1981) 29 BLJR 642

Hon'ble Judges : Sia Saran Sinha, J

Bench : Single Bench

Judgement

Sia Saran Sinha, J.

1.This is a plaintiffs" second appeal against the judgment of affirmance passed by the learned Additional Subordinate Judge in appeal arising out of a suit for partition, pure and simple.

2. Certain facts are undisputed and they are these. One Ramjiwan had two sons, called Dhanai and Thanai. Dhanai had two sons, Nema and Chowa. Thanai had no issue and he died leaving his widow Mostt. Akhaji, who is also dead. The plaintiffs are the descendants of Nema, whereas defendants first party are descendants of Chowa. The other defendants impleaded are purchasers of a portion of the properties sought to be partitioned from the defendants of Chowa.

3. The plaintiffs alleged that although separate possession of the descendants of Nema and Chowa as also Mostt. Akhaji were recorded in the cadestral survey settlement operation, which undisputedly took place some time near about 1912, the properties which once belonged to Ramjiwan and which are undisputedly the lands which are sought to be partitioned, were never partitioned between the parties by metes and bounds. The plaintiffs felt difficulty in cultivation of the lands. They demanded partition which was refused. This led the plaintiffs to institute the instant suit for partition.

4. The suit was contested by some of the members of the defendants first party.

The defence set up was that prior to the cadastral survey operation, there was a partition between Dhanai and Thanai, in which partition all the joint family properties were partitioned by metes and bounds. This was followed by another partition between the descendants of Nema and Chowa, this too prior to the cadastral survey operation. In this partition also the properties, which had fallen to the share of Dhanai in the earlier partition, were partitioned by metes and bounds between the two branches and they were coming in possession of the lands that had fallen to their share.

5. The further defence set up was that before cadastral survey operation, there was a re-union between the descendants of Chowa and Mostt. Akhaji, presumably because the latter had no issue and the lands falling to the share of Mostt. Akhaji began to be looked after by the former. Subsequently after the death of Akhaji, the descendants of Chowa came in exclusive possession of all the lands of Mostt. Akhaji to the entire exclusion of the plaintiffs. They got their names mutated with respect to those lands of Mostt. Akhaji and dealt with some of them.

6. Among other issues, one of the issues framed was regarding the suit being barred by limitation. Paragraph 9 of the judgment of the trial Court shows that this issue of limitation was not pressed at the time of hearing. On a consideration of the evidence adduced, the trial Court found that there was separation between Dhanai and Thanai and subsequently between the descendants of Nema and Chowa. The trial Court also found that there was re-union between Mostt. Akhaji, and the descendants of Chowa and the descendants of Chowa were coming in exclusive possession of the lands that had fallen to the share of Mostt. Akhaji, since after her death which took place long back. On these findings, amongst others, the trial Court dismissed the suit.

7. On appeal by the plaintiffs, the lower appellate Court found that there was partition by metes and bounds of the joint family properties between Dhanai and Thanai and subsequently another partition by metes and bounds between the descendants of Nema and Chowa and that both these two partitions took place prior to the cadastral survey operation in 1912.

8. According to the lower appellate Court there had been re-union between the descendants of Chowa and Thanai, as there can be no re-union in law between Mostt. Akhaji and Ghowa. The further finding of the lower appellate Court was that the descendants of Chowa remained in exclusive possession of the properties left by Mostt. Akhanji, who, as further found by it, died before 1927 and they dealt with those properties to the exclusion and ouster of the plaintiffs by remaining in adverse possession and as such the suit was barred by limitation. The result was that the appeal was dismissed.

9. The plaintiffs have now come up to this Court in second appeal.

10. Two points were formulated by the learned single Judge of this Court, while admitting the second appeal. They are mentioned in order No. 9 dated

6.11.1979. One of the substantial question of law formulated is "whether the Court of appeal below failed to appreciate that in any event, on the death of Mostt. Akhaji, the plaintiffs and the defendants both inherited the properties left behind by her and the suit for partition was, therefore, maintainable atleast for these properties" The second point formulated was "whether in absence of proof of ouster by defendants the plaintiffs" claim to the properties left behind by Mostt. Akhaji would be held to be barred by limitation".

11. The submission of learned Counsel for the appellants was that in the facts and circumstances of this case, the plaintiffs" suit should have been decreed. The contention raised by the learned Counsel for the appellants was challenged by learned Counsel for the respondents, the further submission on behalf of learned Counsel for the respondents being that Chekhuri Mallah, plaintiff No. 1 son of Nema Mallah having died some time in December. 1972 and his three daughters not having been substituted in his place, the appeal had abated as a whole.

12. Undisputedly Chekhuri Mallah died some time in the year 1972 leaving behind one major son Sheshnath Mallah, impleaded as plaintiff No. 3 and his three daughters. The submission of learned Counsel for the appellants was that the major son of Chekhuri Mallah, namely, plaintiff No. 3 being already on the record, the estate of Nema Mallah including the interest of his three daughters were fully represented by plaintiff No. 3. The further submission was that the three daughters of Chekhuri Mallah had no special case of their own, nor their interest was in any way adverse to the interest of plaintiff No. 3, Sheshnath Mallah. As a matter of fact, a petition supported by an affidavit, was filed by all three daughters, statirig that plaintiff No. 3, their brother, represented the estate of the deceased. But in view of the objection raised by the defendants, they were prepared to be added as appellants. As submitted, the three daughters of Chekhuri Mallah came into picture on account of the provisions of the Hindu Succession Act, which escaped the notice of the appellants and by oversight the three daughters could not be added as appellants earlier. In a situation like the one existing in the case, there could be no question of the abatement of the suit and the appeal; and the learned Counsel for the appellants rightly relied, in this connection, on a decision of the Supreme Court in Harihar Prasad Singh and Others Vs. Balmiki Prasad Singh and Others, . The submission of learned Counsel for the respondents was that the question of the entire estate of the deceased being represented by one of the co-sharers cannot arise in a partition suit. The case of the appellants is that the three daughters have no special case and that the real dispute between the parties, is about the property left by Mostt. Akhaji. In the facts and circumstances of this case, it will not be proper to draw a line of demarcation between a partition suit and other suits of civil nature. The submission of learned Counsel for the respondents, is, therefore, negatived and it is held that the suit or the appeal has not abated. However, as prayed for, the three daughters of Chekhuri Mallah are permitted to be added as appellants. Necessary amendment be, therefore, made in the memo of the second appeal.

13. Coming to the two substantial questions of law formulated in this case, learned Counsel for the appellants did not challenge the findings of fact by the lower appellate court that there had been partition by metes and bounds of all the properties of Ramjiwan between Dhanai and Thanai and subsequently another partition by metes and bounds between the descendants of Nema and Chowa, both before the cadastral survey operation in 1912. The lower appellate Court has given cogent reason in support of this finding of fact and I, therefore, see absolutely no reason to take a different view.

14. Learned Counsel for the appellants, however, raised two grievances against the finding of the lower appellate Court. The first was that the defendants having made out a case of re-union between the descendants of Chowa and Mostt. Akhaji in the written statement, the lower appellate court was wrong in finding out a third case, namely, re-union between the sons of Chowa and Nema. The trial Court observed that long possession of the heirs of Chowa over the lands of Mostt. Akhaji went to prove that there had been re-union between Mostt. Akhaji and the heirs of Chowa. This re-union, according to the lower appellate Court, cannot have legal effect, as they were not parties to the original partition. Be that as it may, the finding of the lower appellate Court that there had been re-union between the descendant of Chowa and Thanai is not Consistent with the case of the defendants as made out in the written statement. The only circumstance for coming to this conclusion was that the entries in the Khatian of the names of Akhaji and the sons of Chowa were jointly made. It is true that direct evidence regarding facts said to have taken place long long back may not always be available and relevant circumstances may be considered. But such circumstances must be cogent, leading to one and only one conclusion. Thus the criticism levelled by learned Counsel for the appellants that the above finding of the lower appellate Court about re-union is not quite supportable in law is not without force.

15. The other grievance was about the finding of the lower appellate Court on the point of adverse possession. The defendants first party set up a case of limitation in the written statement, but no specific case of adverse possession was set up therein. No issue about acquisition of title by adverse possession was, framed by the trial Court, nor any clear finding on this point was given by it. In spite of these the lower appellate Court found that the principal defendants remained in adverse possession of the lands in suit. The submission of learned Counsel for the appellants is, that this finding was not based on pleadings or any evidence. Relying on a decision of Madhya Pradesh High Court in Ishak Ali Vs. Mst. Unnasbi Porthahin and Others, , learned Counsel for the respondents submitted that long possession and dealings with the properties as far back as 194S may be sufficient to support the case of adverse possession. In that case the plea of adverse possession was not made in so many words, but all the facts necessary thereto were pleaded by the defendants. The parties went to trial with the full realisation of what the case was and the trial with the full realisation of what the case was and the plaintiffs, who had a burden initially on them, knew

full well that they had been kept out of possession for 32 years by the defendants. There was a denial of the maternity itself to obliterate any claim of title by the plaintiffs. The facts of this case is distinguishable from the facts of the instant case. In the facts and circumstances of this case, the criticism of learned Counsel for the appellants that this finding of the lower appellate Court is not quite supportable in law cannot be said to be without substance.

16. Be that as it may, the prime question that arises for consideration in the instant case is, whether the plaintiffs' suit for partition can be decreed even with respect to the interest of Mostt. Akhaji in the suit properties. According to the plaintiffs there was never any partition between Dhanai and Thanai or between Nema and Chowa, This was disbelieved by the two Courts below. The finding of fact, duly recorded, which is binding on this Court, is that there was partition by metes and bounds between Dhanai and Thanai prior to the survey operation, in which undisputedly the entire joint family property formed the subject matter of partition. The further finding is that there was another partition by metes and bounds between Nema and Chowa, this partition too embracing the entire joint family property falling in the share of Dhanai in the earlier partition. As further found these two partitions too took place prior to the cadastral survey operation. Under the Hindu law, partition is made only once. There are some exceptions to the rule. They are enumerated in Article 337 and 339 of the Mulla's Hindu Law, Thirteenth Edition by Sunderlal T. Desai, which circumstances do not exist in the instant case. The effect of the partition is to dissolve the coparcenary, with the result that the separating members thenceforth hold their respective shares as their separate property and the share of each member will pass on his death to his heirs. In view of the concurrent findings of fact, learned Counsel for the appellants conceded that the question of partition of the properties falling in the share of Nema and Chowa cannot arise. His submission, however, was that since the plaintiffs are entitled to eight annas interest in the properties falling in the share of Thanai on the death of Mostt. Akhaji to avoid multiplicity of the suits, the plaintiffs' suit should be decreed to that extent. It is difficult to accept this contention. The limited scope of a suit for partition is well known. It is one of the requirements of a suit for partition that the properties sought to be partitioned must be specified. The properties sought to be partitioned are those which once belonged to Ramjiwan, the common ancestor. It is not known which of these properties or which portion thereof fell into the share of Thanai in the partition between Dhanai and Thanai. We are again in dark as to which of the properties or which portion thereof fell into the share of the descendants of Nema and Chowa in the subsequent partition by metes and bounds. Thus, apart from the legal difficulties, we are faced with practical difficulties as well in ordering any such partition. If the plaintiffs feel that they are entitled to half of the properties that fell into the share of Thanai in spite of these properties being in exclusive possession of the defendant since long and are so advised, they can file an appropriate civil suit for declaration of title and for partition after recovery of possession. If such a suit is filed, the findings of facts recorded by the Courts

below about re-union, adverse possession and limitation, in view of the infirmities pointed out above, will not operate as res. judicata against the plaintiffs and the parties shall have the right to have their say in the matter and will be entitled to a decision in accordance with law.

17. Subject to these observations, this second appeal is dismissed. In the facts and circumstances of this case, however, the parties are directed to bear their own costs of the second appeal.