

(1918) 05 PAT CK 0013

In the Patna High Court

Chowdhury Rameswar Misser and Another

APPELLANT

Vs

Choudhury Sureshwar Misser and Others

RESPONDENT

Date of Decision : 17-05-1918

Acts Referred:

Citation : AIR 1918 Patna 564 : 46 Ind. Cas. 252

Hon'ble Judges : Roe, J; Coutts, J

Bench : Division Bench

Judgement

Roe, J.—The plaintiffs in this case are sons of Madhab Missir, who was the son of Bisseswari Dutt Missir by his second wife; the defendants are the sons of Keshab Missir. He and Damodar Missir were the sons of the same Bisseswari Dutt by his first wife. In 1879 Madhab Missir instituted a suit for partition of the family property. Joined with him were his mother and an unmarried sister. The defendants to the suit were Damodar and Keshab and their mother. A decree was finally made for partition, whereby Madhab and his mother took one share equal to 2/5ths of the property and Damodar Missir, Keshab Missir and their mother took another share equal to 3/5ths of the property. In course of time Keshab Missir died leaving two sons who are the defendants. It is admitted by the plaintiffs that they were joint with Damodar Missir at the time of his death. Damodar Missir died childless leaving a widow, the third defendant. Madhab Missir was then alive. The plaintiffs claim that their father Madhab Missir was preferential heir of Damodar Missir and that, therefore, they are entitled for various reasons to succeed to his estate. It is, however, conceded at the Bar that if it be found that there was never any separation between Keshab Missir and Damodar Missir, the case of the plaintiffs must fail. The learned Subordinate Judge has found as a fact that there was no such separation and has, therefore, dismissed the plaintiffs' suit.

2. We may concede for the purpose of argument that where there is a disruption of a joint family status as a whole, the burden of proof is on those members who allege that they elected at the time of the disruption to remain unaffected by it.

We do not go so far as to state definitely that this is the law, but for the purposes of this case) we may accept it as a proposition, for we are of opinion that the weight of proof adduced by the defendants is sufficient to support the contention that Keshab and Damodar elected to remain joint. Our chief reason for coming to this conclusion lies in paragraphs 10 and 11 of the plaint itself, which run as follows:

That the plaintiffs respectfully submit that the effect of the said partition decreed was a disruption of the entire joint family and a separation of the same into five different units, holding separate possession of the specific, distinct and divided lands as regards some properties and as regards other properties not capable of such partition in defined and specific share.

That the plaintiffs have been informed and believe that thereafter Damodar Missir, Keshab Missir and Bilasbati Missrain continued in joint mess as before and soon after partition Damodar Missir and Bilasbati Missrain for their own selves and on behalf of Keshab Missir re-united and held possession and enjoyed their properties as reunited co-parceners.

3. The oral evidence given on the plaintiffs' side is that this period of separation lasted from the date of the visit of the Amin to make the partition which had been decreed by the Subordinate Judge to the date of his second visit to amend that partition in accordance with the decree made by the High Court. Keshab Missir was at the time a minor. It is admitted that he remained joint throughout in mess with his brother. It is not suggested that he drew separately any profits from the property or that his mother drew separately any profits from the property. These three, the mother and the two sons, were eating together, living together and treating the property allotted to them as one undivided share.

4. We are asked, however, to say that the mere fact that statements were made in pleadings and in the decrees of the Courts to the effect that the individual members of this family were entitled to specific shares in the property to be divided, destroyed the whole basis of the Hindu joint family, which is that each member of it regards himself as owning not a specific share in the property but an undefined share. This was precisely the suggestion made by the learned Judicial Commissioner of the Hyderabad Assigned Districts in a case which came before their Lordships of the Judicial Committee, *Palabux v. Rukhmabai* 30 C. 725 : 7 C.W.N. 642 : 5 Bom. L.R. 469 : 30 I.A. 130 : 8 Sar. P.C.J. 470 (P.C.). The learned Judicial Commissioner's words were: "For defendant it is argued, and authorities are shown to prove that it has been determined, if one out of several brothers (co-parceners) be separated from the rest, it is virtual separation of all." This Lord Davey discarded as a complete fallacy. He said: In many cases it may be necessary in order to ascertain the share of the out-going member to fix the shares which the other co-parceners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all." Throughout the decision of the Judicial Committee it is clear that the mere specification of shares among members of a joint family does not amount to an assertion that

the family has ceased to be joint, The first case to this effect is Appovier v. Rama Subba Aiyar 11 M.I.A. 75 : 8 W.R.P.C. 1 : 1 Suth. P.C.J. 657 : 2 Sar. P.C.J. 218 : 39 E.R. 30 quoted with approval in the case of Baboo Doorga Pershad v. Musammatt Kundun Koowar 1 A. 55 : 13 B.L.R. 235 : 21 W.R. 214 : 3 Sar. P.C.J. 341 and invariably followed. In order to ascertain whether there has been a separation or not, the whole circumstances of each particular case must be investigated and the intention of the parties ascertained. The learned Subordinate Judge has rejected with contempt the evidence given that there was any division by the Amin beyond that which he was told to make, that is to say, a separation of the property of the family into two shares. Reliance is placed upon a petition filed by Damodar Missir, Exhibit 13; it is suggested that in this petition itself there is an admission that the said property was divided into five parts. Such an interpretation could only be put on this partition by a deliberate misreading of it, for he particularly says that when he talks of the property being divided into five parts he means that two parts were allotted to Madhab Missir and three parts to his own party, indicating clearly that the division was into two parts and not into five parts. There has never been any division as between Damodar, Keshab and their mother. They have messed together, kept house together and held their property together. They remained throughout joint. The sons of Keshab Missir were, therefore, entitled to succeed to Madhab Missir's property by survivorship and the plaintiff has no cause of action. The appeal is dismissed with costs.

Coutts, J.

5. I concur.