

(2011) 11 PAT CK 0107
In the Patna High Court
Case No : Second Appeal No. 284 of 2008

Jawahar Singh and Others

APPELLANT

Vs

Suraj Narain Singh and Others

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Citation : (2011) 11 PAT CK 0107

Final Decision : Dismissed

Judgement

Mungeshwar Sahoo, J.—The plaintiffs have filed this Second Appeal against the judgment and decree dated 4th of August, 2008 passed by Additional District Judge, F.T.C. I, Bhojpur, Ara in title appeal no.32 of 2007 whereby the First Appellate Court allowed the appeal and thereby set aside the trial court judgment and decree dated 26.03.2007 passed by Sub Judge II, Bhojpur, Ara in title suit no.60 of 1996.

2. The Second Appeal has been admitted by terms of order dated 16.02.2010 and the following substantial questions were framed:

(i) Whether the learned court of appeal below, while reversing the judgment and decree of the trial court, was justified in assuming previous partition only on the basis of rent receipts?

(ii) Whether the learned lower appellate court was justified in allowing the appeal on the ground of separate possession ignoring the specific claim of the plaintiffs regarding cultivation of the lands separately as per convenience and also failing to appreciate that the defendants had failed to prove earlier partition by metes and bounds and had even failed to give any date of earlier partition although onus was squarely upon them to do so?

(iii) Whether the learned court of appeal below committed an error of record by assuming Baldeo to be son of Chaman as per Ext. C/1 although the said document clearly shows that Baldeo was the son of Khelawan?

(iv) Whether the learned court of appeal below was justified in holding that Exts. C/2 to C/5 were with respect to self acquired properties of the purchasers although the said purchasers did not contest the suit nor led any evidence in their support and the said suit was decreed ex parte and their application filed under Order 9 Rule 13 of the CPC bearing Misc. Case No.08 of 2007 was already rejected?

3. At the time of hearing of the appeal, the learned counsel for the appellants submitted that in addition to the above four substantial question of law, another substantial question of law may be formulated. He formulated the substantial question of law and served a copy of the same on the learned counsel appearing on behalf of the respondents and then with the consent of the parties, the parties were heard on this newly raised substantial question of law which is as follows:

Whether the devolution by survivorship regarding the properties of Baldeo, having gone into by the parties and the question having been decided by the Courts below, the finding of Appellate Court regarding the death of Ram Chandra in 1949, in the teeth of Ext. C/1, is vitiated in law?

4. For the decision on the above substantial question of law formulated, the short facts of the case may be stated hereunder. The plaintiffs-appellants filed the aforesaid title suit no.60 of 1996 claiming partition to the extent of 2/3rd share in the suit property detailed in Schedule-1 of the plaint.

5. The plaintiffs claimed the said 2/3rd share alleging that one Kishun Yadav had three sons namely Chaman Yadav, Raman Yadav and Bhagirath Yadav. All the three sons and Sri Kishun died before cadastral survey. The two sons of Raman Yadav namely Pragash Yadav and Khelawan Yadav also died before cadastral survey. On their death, the son of Chaman Yadav namely Baldeo Yadav, son of Pragash Yadav namely Moti Yadav, Ram Chandra Yadav son of Khelawan Yadav and Chunni Yadav son of Bhagirath Yadav came in joint possession of the entire suit property. The further case of the plaintiffs is that before cadastral survey, the three sons of Sri Kishun were cultivating the lands separately for convenience but there was no partition by metes and bounds. The status of joint family remained joint. Thereafter, Baldeo Yadav son of Chaman Yadav who was issueless reunited with Chunni Yadav whereas Moti Yadav and Ram Chandra Yadav sons of Pragash and Khelawan were separate. Baldeo Yadav died issueless in jointness with Chunni Yadav, therefore, the share of Baldeo Yadav devolved on Chunni Yadav. The plaintiffs are the descendent of Chunni Yadav so they claimed 2/3rd share. The further case is that after death of Moti and Chunni, Ram Chandra became "Sadhu" so their shares came in possession of the defendants. Jagnarain, son of Moti, Mukhlal, Siyaram and Raghunandan, sons of Ram Chandra and Budhan, son of Chunni died and then Sohrai, son of Chunni became "Sadhu" so their sons came in joint possession of the property according to their share.

6. The plaintiffs further pleaded that the lands were very productive and there was good income and from the said income, several properties were acquired

which are also the joint family properties as such are included in the suit for partition.

7. The defendant nos.1,8,9,10 and 12 appeared and filed contesting written statement. Besides taking various legal and ornamental pleas, their main contention is that Sri Kishun had three sons namely Gharbharan Yadav, Patu Yadav and Bhagirath Yadav. They separated from each other before cadastral survey in all respect. Gharbharan died before cadastral survey leaving behind his son, Chaman Yadav and a grandson Baldeo. All other genealogy given by the plaintiffs is admitted except the name of Raman Yadav to be Patu Yadav. Therefore, according to the defendants, Baldeo Yadav is grandson of Gharbharan. Chaman Yadav was not the son of Sri Kishun but the son of Gharbharan. The further case is that the three branches were separated in all respect and, therefore, they were recorded in the cadastral survey according to their shares and thereafter, they were dealing with the lands exclusively as owner thereof. Baldeo Yadav son of Chaman Yadav reunited with branch of Ram Chandra Yadav and then he died. Ram Chandra was in service as Rajshahi now in Bangladesh so he appointed Baldeo Yadav as his power of attorney holder and executed a registered general power of attorney on 29.01.1918 for managing his entire property. Chunni Yadav was separate and he had no concern with the lands of Baldeo and these defendants. Baldeo and Mukhlal jointly executed Rehan deed on 30.06.1929 in favour of Sheodhyan Singh. Ram Chandra and Baldeo were joint and so the properties have been jointly recorded in their names. Baldeo died in the year 1947 issueless. Ram Chandra died in 1949, Sohrai died in 1945 and Chunni died in 1940. Likewise, Budhan died in the year 1943. After death of Baldeo, the defendants have inherited the properties and are dealing the properties as exclusive owner thereof. The plaintiff's grandfather Sohrai and Budhan had sold their lands which were in their share in the year 1942 to Somaru Mahto.

8. The further defence is that the plaintiffs cunningly included the lands of Mauja Milki being C.S. Plot No.2041, 2042 and 2044 and also Plot No.2166 of Khata No.338 measuring 26.5 decimals of village Bhilain which are the purchased properties of Jamunia Devi, widow of late Jagnarain Singh, father-in-law of Gulabia Devi, defendant no.2. After death of Jamunia Devi, the properties devolved on Gulabi Devi and Rampravesh Yadav. Further, Jagnarain Singh had purchased 8 decimals of village Anite being Plot No.548 of Khata No.175 by registered sale deed 23.03.1971 out of his personal income. The ancestor of this defendant namely Mukhlal Singh, Siyaram Singh and Raghunandan Singh have purchased lands on 01.06.1969 from their own income. Therefore, the plaintiffs have no unity of title and possession as these properties are self-acquired properties of these defendants who are in possession thereof. The plaintiffs have not included their lands in the suit, therefore, the suit is bad for partial partition.

9. The trial court after trial came to the conclusion that the case of the plaintiffs is on better footing than that of contesting defendants and there is jointness of

possession and unity of title over the disputed land. The trial court also found that the defendants failed to establish that actual partition had taken place or acted upon and also failed to establish that the property claimed by them as their self-acquired property had independently been purchased by them and not from the joint family fund and, therefore, the plaintiffs are entitled for a decree of partition of the suit property to the extent of 2/3rd share vide paragraph 19 and 20.

10. The defendants filed First Appeal i.e. title appeal no.32 of 2007. The Appellate Court at paragraph 5 framed as many as 6 points and after hearing the parties disbelieved the story of reunion of Baldeo with Chunni. The Appellate Court at paragraph 13 held that the plaintiffs at the time of hearing of the appeal waived this plea of reunion. Thereafter, considering the evidences oral as well as documentary came to the conclusion that the Sub Judge has committed error in scrutinizing the evidences of the plaintiffs and their witnesses and ultimately found that plaintiffs-respondents have failed to prove the unity of title and jointness of possession over the suit properties. The First Appellate Court also found that property of Baldeo devolved on Ram Chandra and thereafter to his branch and that the property purchased in the year 1969 and 1971 through the sale deeds Exhibit C/2 to C/5 are self-acquired properties of the purchasers. The Appellate Court also found that the plaintiffs-respondents sold his some property. The First Appellate Court also found that the plaintiffs have not included Plot Nos.263 and 276 of Khata No.125 area 40 decimals which are owned by them and, therefore, the suit is bad for partial partition. At paragraph 13, the Appellate Court disbelieved the case of reunion of Baldeo with Chunni. The Appellate Court at paragraph 14 rel 1940 Oudh 269 held that there had already been partition between the parties. On these findings, the Appellate Court allowed the appeal and set aside the trial court judgment and decree.

11. Now let us consider the substantial question of law formulated at the time of hearing. As stated above, the plaintiff's simple case is that Sri Kishun Yadav and his three sons died before cadastral survey and they were separate from before cadastral survey and were cultivating the lands according to their convenience. Admittedly, cadastral survey took place in the year 1910-11. In other words, much prior to cadastral survey, they were in separate cultivation of the properties. The only case pleaded by the plaintiff is that this separate cultivation was according to convenience. There was no partition by metes and bounds. In the cadastral survey record of right, the names of Baldeo representing first son of Sri Kishun, Pragash and Khelawan representing the second son of Sri Kishun and Chunni representing third son of Sri Kishun is recorded in separate possession. The further pleading is that Baldeo reunited with Chunni. The third pleading is that properties purchased by the defendants in the year 1969 and 1971 are the joint family property purchased from the income of joint family property.

12. So far substantial question nos.1 and 2 are concerned, those are

interconnected. Therefore, both are taken together. The learned counsel for the appellants submitted that the Hindu joint family is always presumed to be joint unless the contrary is proved. Mere separate entry in record of right or mere separation in status, there can be no presumption of partition unless it is proved specifically that joint family property has been partitioned by metes and bounds. In the instant case, the trial court after considering the evidences came to the conclusion that the parties are cultivating the lands separately according to their convenience but there is no partition between the parties but the learned lower appellate court without considering this fact that the parties are cultivating the lands according to convenience and the fact that the defendant failed to prove earlier partition by metes and bounds and even failed to give any date of earlier partition held that there had been partition between the parties relying on the decision of the Oudh High Court. The substantial question nos.1 and 2 relate with this point. The learned counsel in support of his contentions relied upon 1999 (2) PLJR 397 (Tulsi Sao vs. Tribhuwan Sao), Chunia Mahatani and Others Vs. Sobha Mahto and Others, Chinthamani Ammal Vs. Nandagopal Gounder and Another, Bhagwant P. Sulakhe Vs. Digambar Gopal Sulakhe and Others, , Smt. Savitri Devi Vs. Jiwan Chaudhary and Others, and Deoki Mallah Vs. Surji Mallahain and Others, On the strength of these decisions, the learned senior counsel Mr. Duivedi submitted that the character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. Separate mess and separate cultivation amongst the co-sharers do not mean that there was partition by metes and bounds.

13. From perusal of the said decisions referred to above relied upon by the appellants, it appears that the facts of those cases are entirely different than the present case. So far the laws laid down by the aforesaid decisions are concerned, there is no dispute at all. Those are well settled principles of Hindu law. Here the case is different. According to the plaintiffs themselves, the three branches were separate 100 years ago i.e. prior to cadastral survey and since then the branches were cultivating their lands separately. There is no case made out by the plaintiffs that the ancestors of the plaintiffs were cultivating only a small area than the area which were being cultivated by the other two branches. This partition suit has been filed in the year 1996. As has been stated above and held by the above decisions relied upon by the plaintiffs, the presumption of jointness is presumed unless the contrary is proved. It is also well settled principles that this presumption is therefore, rebuttable. The presumption is stronger in the case of brothers then in the case of cousins and the further you go from the founder of the family, the presumption becomes weaker and weaker. The reason is that brothers are for the most part undivided, second causing are generally separated and third causing are for the most part separated. In the present case, from the genealogy it appears that Sri Kishun is the founder of the family. Taking into consideration, Sri Kishun Yadav to be the founder of the family the plaintiff

no.1, Jawahar Singh will be the sixth generation and likewise, defendant nos.3 to 7 are seventh generation of Sri Kishun Yadav. Therefore, this presumption of law is very very weak in the present case. According to the defendants, there had already been partition between the three brothers prior to cadastral survey in all respect and they were dealing the properties as their exclusive property and had sold some of the properties.

14. In *Bhagwan Dayal Vs. Mst. Reoti Devi*, the Apex Court has held that the general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time. In the present case, as stated above, it is the case of the plaintiff that the three branches were separate before cadastral survey whereas according to the defendants there had been partition between the three brothers. Admittedly, there is no documentary evidence of partition. Admittedly, nobody is alive who could have deposed regarding partition giving the date and manner of partition. In such circumstances, when there is no contemporaneous document and the participants in the said transaction i.e. partition have passed away the reasonable inferences can be drawn from the course of conduct of the parties. Here the course of conduct is that the plaintiffs remained cultivating the same lands for 100 years agitating no grievance for about a century.

15. A Division Bench of this Court in the case of *Arjun Mahto and Others Vs. Monda Mahatain and Others*, relying on the case of Apex Court AIR 1962 S C 287 (supra) held that when no contemporaneous documents are available the question whether the parties remained united or separate is to be decided on the facts of each case. The partition in such a case can be proved by the intention of the parties manifested by their subsequent conduct, by their sole and independent enjoyment of the properties. Separation in food and residence for a long time among the brothers of a Hindu family, independent transactions of property, separate possession and enjoyment of properties are by themselves, no doubt, not conclusive but the cumulative effect of such facts may show that there had been a partition between the brothers during their lifetime. In this present case at our hand what to speak of brothers the parties are either sixth generation or seventh generation. Considering these facts, the Appellate Court has given a finding that there had been partition between the parties. So far this finding is concerned, is based on the well settled principles of the Apex Court as well as Division Bench of this Court referred to above. Further the said decisions have again been followed in the *Ganesh Sahu and Another Vs. Dwarika Sao and Others*, *Pata Sahu and Another Vs. Hiru Sahu and Others* The trial court has not at all considered these settled principles of law. Moreover, this is a pure finding

on facts.

16. In view of the pleadings of the plaintiffs themselves coupled with the discussion made above and the settled laws laid down by the Apex Court as well as this Court, these two substantial questions of law does not arise at all for consideration. Moreover, the substantial question of law relates to finding of fact and, therefore, the sufficiency or otherwise of the evidence or materials cannot be gone into in Second Appeal.

17. So far substantial question no.3 is concerned, it has got no bearing on the merit of the case. The case of the plaintiffs itself is that Baldeo was the son of Chaman. It is not the case of any party that Baldeo was son of Khelawan. Therefore, this substantial question of law does not arise for decision in this Second Appeal.

18. So far substantial question no.4 is concerned, it relates to the acquisition of property by the defendants through Exhibit C/2 to C/5. Admittedly, these properties have been acquired in the year 1969 and 1971 in the name of the ancestors of the defendants. The learned counsel for the appellants submitted that the descendants of the persons in whose name the property stands did not appear and contest the suit and their application under Order 9 Rule 13 CPC being Misc. Case No.8 of 2007 was rejected. Therefore, there was no contest to the case of the plaintiff that the said properties were acquired out of joint family fund. The other defendants who filed the written statement have never acquired the property but the learned Lower Appellate Court held wrongly that it is self-acquired property of the defendants i.e. Jagnarain's branch. So far this submission is concerned, it may be mentioned here that according to the plaintiffs themselves, the three sons of Sri Kishun were separate in cultivation and mess prior to cadastral survey. They were cultivating the lands separately according to their convenience. From the course of conduct, as stated above, this position continued till the filing of the suit and thereafter also. When the branches were cultivating the lands separately from generation to generation there is no question of joint family or joint family fund arises. Moreover, the lower Appellate Court has found that except the pleading and oral evidence that the properties are joint family properties, there is nothing on record. Moreover, in considering the oral evidences and documentary evidences which are admissible, the Appellate Court came to the conclusion that these properties are self-acquired properties.

19. In Narendra Gopal Vidyarthi Vs. Rajat Vidyarthi, the Apex Court has held that a finding of fact arrived at by the First Appellate Court is ordinarily final. Its correctness can be questioned if, inter alia the same was based upon no evidence or is otherwise perverse or that correct legal principles were not applied. Whether the property in dispute is a joint Hindu family property or not is not a substantial question of law. Here the learned Court below has given the finding based on evidences oral as well as documentary. Therefore, only because the branch of Jagnarain did not contest the suit, no finding can be recorded that the

purchased property are the joint family property particularly when it has been found that there had already been partition between the three brothers prior to cadastral survey. Therefore, this substantial question also does not arise for decision as the finding of fact recorded by the Court of appeal cannot be interfered with in Second appeal particularly when the finding of fact is based on admissible evidences.

20. So far the substantial question law formulated at the time of hearing is concerned also, does not arise for decision in the case because even if it is answered in favour of the appellants then also the property of Baldeo will not devolve on the plaintiffs. The First Appellate Court has given a clear finding that after partition, Baldeo reunited with the defendants branch. So far this finding is concerned, i.e. Baldeo reunited with defendants branch is finding of fact. This finding of fact cannot be questioned in Second Appeal. The plaintiffs never claimed that the property devolved on the plaintiff's branch by survivorship. It is well settled that the Court has to find out the case pleaded by the parties. According to the plaintiff, Baldeo reunited with Chunni whereas according to defendant, Baldeo reunited with defendant's branch. The Appellate Court disbelieved the case of the plaintiffs. Now, therefore, the plaintiffs cannot be allowed to claim partition on the point of survivorship which was never his case pleaded. No doubt, it appears that at the time of argument this case was argued. As stated above the finding of the Appellate Court that Baldeo reunited with the plaintiff's branch, there is no question of inheritance of survivorship by the plaintiffs arises.

21. In view of my above discussion, I find no merit in this Second Appeal and accordingly, this Second Appeal is dismissed.