

(2011) 04 PAT CK 0212
In the Patna High Court
Case No : First Appeal No. 127 of 2002

Lalan Dusadh @ Lallan Paswan and Others	APPELLANT
Vs	
Ram Nagina Dusadh and Others	RESPONDENT

Date of Decision : 06-04-2011

Acts Referred:

Citation : (2011) 04 PAT CK 0212

Final Decision : Allowed

Judgement

Mungeshwar Sahoo, J.—The Defendants have filed this First Appeal against the judgment and Decree dated 20.03.2002 passed by Dr. Sayeed Akhuriddin, the learned 6th Subordinate Judge, Sasaram, Rohtas in Title Suit No. 466 of 1999 decreeing the Plaintiff-Respondent's suit for partition.

2. The Plaintiff prayed for half share in the suit property mentioned in Schedule "A" of the plaint. The Plaintiffs claimed the said relief alleging that the parties are descendants of common ancestor Prayag Dusadh who had two sons, namely, Thakur Dusadh and Bechan Dusadh. The Plaintiff represents Bechan Dusadh's branch whereas the Defendants-Appellants represent the branch of Thakur Dusadh. During cadastral survey, only Thakur Dusadh was born and, therefore, his name was recorded with respect to entire land of Prayag Dusadh. Prayag Dusadh died in 1914 and Bechan Dusadh was born in 1913 after finalization of survey Kathiyan so his name could no be recorded. The entire suit land is self-acquired property of Prayag Dusadh. Jagdeo Dusadh was the karta and guardian of the joint family and, therefore, his name was only recorded collusively in the revisional survey khatiyan also. The Plaintiff knew about the wrong entry only on 12.10.1999 and then the suit was filed for partition.

3. On being noticed, the Defendants-Appellants appeared and filed a contesting written statement. Their main defiance is that Prayag had only one son, namely, Thakur Dusadh and Thakur Dusadh had died prior to cadastral survey and, therefore, name of Thakur Dusadh was recorded in the cadastral survey khatiyan. Bechan Dusadh is not the son of Prayag Dusadh rather he is son of

Mukha Dusadh of the same village. Therefore, the Plaintiff have no concern with the suit property.

4. On the basis of the above pleadings of the parties, the following issues were framed:

- (i) Whether the suit is maintainable as framed ?
- (ii) Whether the plff. Had or has any cause of action to file the suit ?
- (iii) Whether the plff. Has locus standee to bring the suit ?
- (iv) Whether the suit is hit by the principle of waiver, estoppel and acquiescence as well as principle of S.R. Act and provisions of order 7 Code of Civil Procedure
- (v) Whether the suit is hit by the non joinder of necessary party ?
- (vi) Whether the Plaintiffs are required to pay advoluram court fee on the proper valuation of the suit land ?
- (vii) Whether the Plaintiffs are descendant of lato Prayag Dusadh of village Burharika ?
- (viii) Whether the suit lands are ancestral property of the plfts. and the plft. have unity of title and possession along with the defts.
- (ix) Whether Jagdeo Dusadh has been karta of the joint family consisting of plfts and defts. or of defts. only ?
- (x) Whether Bechan Dusadh was full brother of Thakur Dusadh son of Prayag Dusadh ?
- (xi) Whether the plfts. are entitled to any other relief's ?

5. After trial, the learned Court below observed that there is no whisper even in the oral evidence of D. Ws that Plaintiffs are descendants of Mukha Dusadh and they had only denied that Plaintiffs are not descendants of Prayag Dusadh. So, it can safely be held that the Plaintiffs are the descendants of late Prayag Dusadh. The learned Court below also observed that considering the status and general conscious level, literacy and backwardness which was found that the parties in question come from the lower status of the society and from the remote area and so they are not conscious people and so in the rural area, such joint ness are even after several descendants have passed and further joint ness in a Hindu family is a presumption and so also the version of Plaintiff is reliable comparatively. The learned Court below also found that Jagdeo Dusadh has been karta of the family, although they are living separately. The learned Court below also observed while deciding Issue No. 6 that if they had not relied upon Jagdeo Dusadh they must have agitated the matter everywhere or in the Chakbandi operation but due to illiteracy, they could not know about the partition and the title paper in view of the fact that they are not only villagers but also rustic and illiterate men. This explanation is plausible. Therefore, the Plaintiffs are entitled

for half share and by this way, the order of this Court is declaratory in the nature and so the title has to be declared and accordingly, Plaintiff is required to pay advelorum court fee. On the above findings, the learned Court below decreed the Plaintiff-Respondent's suit for partition.

6. The learned senior counsel, Mr. Shashi Shekhar Dwivedi appearing on behalf of the Appellant submitted that the learned Court below has wrongly decreed the Plaintiff suit for partition. The learned Counsel further submitted that it is the specific case of the Appellant that Bechan Dusadh was not the son of Prayag Dusadh. It was for the Plaintiff to prove the same by adducing cogent and reliable evidences but in the present case the Plaintiff failed to do so. Whatever evidences oral has been adduced are inadmissible in view of the provision contained in Section 50 of the Indian Evidence Act. The learned Counsel also submitted that the learned Court below has misread the evidences and wrongly relied upon inadmissible evidences and wrongly held that because the Defendants failed to prove their case, the Plaintiff's case is plausible and acceptable and decreed the suit. The learned Counsel further submitted that Bechan Dusadh was never the son of Prayag Dusadh because it is the specific case of the Plaintiff that all the properties were self-acquired property of Prayag Dusadh and Prayag Dusadh had died in 1914. Further the final publication of cadastral survey record of right was made in 1913. This plea of the Plaintiff is inconsistent because the property is recorded in the name of Thakur Dusadh in the cadastral survey record of right. If Prayag Dusadh was alive in 1907-11 when cadastral survey operation was going on, his name should have been recorded as he was alive according to the Plaintiff themselves.

7. The learned Counsel further argued that when Prayag Dusadh was exclusive owner of property during his life time, the name of his son should not have been recorded. The learned Counsel further submitted that the learned Court below has wrongly gave much emphasis on Ext. "5" which was not produced from proper custody. Section 90 of the Evidence Act was not applicable. The learned Counsel further submitted that the presumption of joint ness is no doubt applicable in Hindu family but that presumption is very weak in the case of remote relation. In the present case, about 4 generation of Thakur Dusadh and 4 generation of Bechan Dusadh are party. Therefore, on the basis of presumption of joint ness, no decree can be granted for partition. The learned Counsel further submitted that the learned Court below has not considered Ext. "A" with its right prospective and has discarded the same. The learned Counsel submitted that in many of the paragraphs, the learned Court below disbelieved the Appellant's case only on surmises and conjectures and on presumption. On these grounds, the learned Counsel submitted that the impugned judgment and Decree are not sustainable.

8. On the other hand, the learned Counsel, Mr. Satish Kumar Singh appearing on behalf of the Respondent submitted that there is no illegality in the impugned judgment and Decree and, therefore, it cannot be interfered with in this First

Appeal. According to the learned Counsel for the Respondent, admittedly, the parties are illiterate and because this is a civil case, the parties are not required to prove their case beyond all reasonable doubt as required in criminal cases. The learned Counsel further submitted that Ext.5 is more than 30 years old document and, therefore, the learned Court below has rightly relied upon the said Ext."5". The learned Counsel further submitted that the learned Court below has considered each and every evidences either oral or documentary and has given sound reasons, therefore, no interference is called for. The learned Counsel further submitted that the common relation of the parties have deposed before the Court below disclosing the relationship of Bechan Dusadh with Prayag Dusadh and, therefore, the said witnesses had special knowledge about the relationship as such their evidences are admissible u/s 50 of the Indian Evidence Act. On these grounds, the learned Counsel submitted that the First Appeal is liable to be dismissed.

9. In view of the above contentions of the parties the points arises for consideration in this appeal is as to whether the Plaintiffs-Respondents have been able to prove that Bechan Dusadh is son of Prayag Dusadh and as such they have unity of title and possession over the suit property and whether the impugned judgment and decree are sustainable in the eye of law ?

10. In this case a geological table has been given in the plaint. So far geology is concerned, the only dispute raised by the Defendant is that Prayag Dusadh has only one son, namely, Thakur Dusadh and the Defendant are the decedents of Prayag Dusadh. According to the Plaintiff, Prayag Dusadh had two sons, namely, Thakur Dusadh and Bechan Dusadh. Therefore, according to the Plaintiff, Bechan Dusadh is also son of Prayag Dusadh. Admittedly, the suit property are recorded in the name of Thakur Dusadh in the cadastral survey record of right as well as in the revisional survey record of right. The Plaintiff has stated at paragraph 5 of the plaint that during cadastral survey operation only Thakur Dusadh was born so cadastral survey khatian regarding the entire land of Prayag Dusadh had been prepared in the name of Thakur Dusadh. At paragraph 6, it has been mentioned specifically that Bechan Dusadh was born in 1913 after finalization of the cadastral survey khatian. So, the name of Bechan Dusadh was not recorded. At paragraph 7 further clear statement has been made that Prayag Dusadh died in 1914 and the suit lands were self-acquired properties of late Prayag Dusadh. Ext.6 series are the cadastral survey khatian. From perusal of the Ext.6/A, it appears that it was finally published on 03.09.1913 and the lands are recorded in the name of Thakur Dusadh. Now, let us consider the case of the Plaintiff as pleaded in the aforesaid paragraph of the plaint. It is the case that lands were self-acquired property of Prayag Dusadh. It is not disputed that during life time of Prayag Dusadh, no other had any interest in the property and Prayag Dusadh died in 1914. If this is correct position then during life time of Prayag Dusadh, the name of Thakur should not have been recorded in Ext.6/A, i.e., cadastral survey khatian. The above fact clearly indicate that during the cadastral survey operation, Prayag Dusadh was not alive otherwise his name should have been

recorded. Now, therefore, the question arises that if he died prior to cadastral survey operation, then how Bechan Dusadh who was born after finalization of cadastral survey khatian will be the son of Prayag Dusadh. The Plaintiffs have not explained this suspicion circumstances either in the evidence or during the course of the argument before this Court. The learned Counsel for the Appellant submitted that the parties are rustic villagers and, therefore, there might have some mistake in the year of death and year of birth but on that ground, the whole case of the Plaintiff cannot be disbelieved.

11. Now, let us consider the evidences available on record of this point. Here, the only question is whether Bechan Dusadh is the son of Prayag Dusadh. The other part of the geological table had not been challenged by the Defendant. To prove the relationship of Bechan with Prayag Dusadh, the parties have adduced evidences.

12. P.W.1 and P.W.2 are formal witnesses. P.W.3 has stated that Jagdeo Dusadh is own Mama (maternal uncle) of this witness. Prayag Dusadh is Nana of this witness. Prayag Dusadh had two sons whose names were Bechan Dusadh and Thakur Dusadh. Both of them have died. In the cross-examination at paragraph 2, he has clearly stated that Prayag Dusadh had two daughters, namely, Jagiya and Nagbalia and Prayag Dusadh had only one son, namely, Thakur Dusadh. Therefore, whatever statement he has made in the examination in Chief has been contradicted in his cross-examination. This witness is own brother of P.W.5 Shiwachan Paswan. P.W.5 has stated that Prayag Dusadh is his Parnana (material grand father's father). In his cross-examination, he has stated that Nagina had brought him for giving evidence and he had told him about the evidence of his brother. It may be mentioned that P.W.3 says that Prayag Dusadh is his Nana. In the geological table, nowhere it is mentioned that Prayag Dusadh had any daughter. This P.W.3 again claimed that Jagdeo, i.e., original Defendant No. 1 who is son of Thakur Dusadh is his own Mama. If it is so then he is son of sister of Jagdeo but in the geological table, no daughter of Thakur Dusadh has been shown. As stated above in the cross-examination. P.W.3 says that Prayag Dusadh had two daughters and only one son. Therefore, there is much contradiction in the evidence of P.W.3 and P.W.5. From perusal of the impugned Judgment, it appears that the learned Court below at page 6 of the judgment observed that P.W.3 is independent local witness and P.W.5 is the common relation of the parties and both of them have supported the case of the Plaintiff without considering the above statements of the witnesses. In my opinion, had the learned Court below considered the above statements of these witnesses, no such observation could have been made.

13. In *Dolgobinda Paricha Vs. Nimai Charan Misra and Others*, , the Hon'ble Supreme Court considering Section 50 and 60 of the Indian Evidence Act at paragraph 6 has held as follows:

(6) We proceed to consider the second question first. The Evidence Act states that the expression "facts in issue" means and includes any fact from which

either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follow; "evidence" means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry; and (2) all documents produced for the inspection of the Court. It further states that one fact is said to be relevant to another when the one is connected with the other in any one of the ways referred to in the provisions of the Evidence Act relating to the relevancy of facts. Section 5 of the Evidence Act lays down that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant and of no others. It is in the context of these provisions of the Evidence Act that we have to consider S. 50 which occurs in Chapter II, headed "Of the Relevancy of Facts". Section 50, in so far as it is relevant for our purpose, is in these terms:

Section 50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact.

On a Plain reading of the section, it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are - (1) there must be a case where the court has to form an opinion as to the relationship of one person to another; (2) in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact; (3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfill the condition laid down in the latter part of the section. If the person fulfils that condition, then what is relevant is his opinion expressed by conduct. Opinion means something more than mere retailing of gossip or of hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question. Now, the "belief" or conviction may manifest itself in conduct or behaviour which indicates the existence of the belief or opinion. What the section says is that such conduct or outward behaviour as evidence of the opinion held is relevant & may, therefore, be proved. We are of the view that the true scope and effect of Section 50 of the Evidence Act has been correctly and succinctly put in the following observation made in *Chandu Lal Agarwalla, Karta of joint family and of firm named Hanutram Lekram Agarwalla and Another Vs. Bibi Khatemonnessa and Others*,

It is only "opinion as expressed by conduct? which is made relevant. This is how the conduct comes in. The offered item of evidence is "the conduct?, but what is made admissible in evidence is "the opinion?, the opinion as expressed by such conduct. The offered item of evidence thus only moves the Court to an intermediate decision: its immediate effect is only to move the Court to see if this conduct establishes any "opinion? of the person, whose conduct is in evidence, as to the relationship in question. In order to enable the Court to infer "the opinion?, the conduct must be of a tenor which cannot well be supposed to have been willed without the inner existence of the "opinion.

When the conduct is of such a tenor, the Court only gets to a relevant piece of evidence, namely, "the opinion of a person?. It still remains for the Court to weigh such evidence and come to its own opinion as to the factum probandum - as to the relationship in question.

We also accept as correct the view that Section 50 does not make evidence of mere general reputation (without conduct) admissible as proof of relationship: AIR 1937 201 (Privy Council) .

14. In the light of the decision of the Hon"ble Supreme Court, these witnesses examined on behalf of the Plaintiffs have only deposed in general reputation without conduct. Here, the Court has to form an opinion regarding the relationship of Bechan Dusadh with Prayag Dusadh and, therefore, the opinion expressed by conduct as to the existence of such relationship of a person who as a member of the family or otherwise has special means of knowledge on the subject is a relevant fact. None of the witnesses have disclosed their special means of knowledge. P.W.4, P.W.6 and P.W.7 are formal witnesses. P.W.8 is son of Nagina Paswan and Plaintiff No. 2. P.W.10 is son-in-law of Shahdeo Dusadh son of Bechan Dusadh. P.W.12 is Nagina Dusadh, the Plaintiff himself. As stated above from perusal of the evidences, none of them have disclosed their special means of knowledge about the relationship of Bechan Dusadh with Prayag Dusadh. Therefore, their evidence is not within the four corners of Section 50/60 of the Indian Evidence Act.

15. The Defendant have adduced oral evidences but their evidences are only denied. It is well settled principal of law that negative cannot be proved. It is for the Plaintiff to prove the relationship of Bechan Dusadh with Prayag Dusadh. Now, let us consider the documentary evidences adduced on behalf of the Plaintiffs and the Defendants. Ext.1 is the rent receipts with respect to Khata No. 63. Admittedly, this document do not relate to the suit property. From perusal of the schedule of the plaint, it appears that the lands of only khata No. 65 are the suit property. Ext.2 and 2/A are the notice issued by the consolidation authority to Shahdeo Dusadh, son of Bechan Dusadh. In the back of this notice, Ext.2, Khata No. 63 and 64 and in Ext.2/A, Khata No. 115 has been mentioned. Therefore, these two documents also do not related to the suit property. Moreover here, the notices have been issued to Shahdeo Dusadh, son of Bechan Dusadh. So far this relation of Shahdeo Dusadh with Bechan Dusadh is

concerned, it is not in dispute. Ext.3 is voter list which also proves the names of family members of Shahdeo Dusadh only. Ext.4 is Chaukidari receipts with respect to house No. 3. It is admitted fact that house No. 3 is not the subject matter of suit and it is not the case of any party that the house is joint family property. The Defendant also do not claim that the house belong to them. In such circumstances if Bechan Dusadh had paid Chaukidari tax for his own house, it will not mean that Bechan Dusadh is son of Prayag Dusadh. It can only be said that he is residing in the village in a separate house of his own. The rent receipts etc. proves the fact that Bechan Dusadh had also landed property and he was paying rent.

16. From perusal of Ext.5, the sale deed of the year 1943, it appears that lands of another Khata had been sold by Bechan Dusadh. Admittedly, the lands of that Khata are also not included in the suit. This Ext.5 is registered sale deed executed by Bechan Dusadh, therefore, the registered deed should be in possession of the purchasers because that is the title deeds. How, it remain in possession of Bechan Dusadh and how it has been produced from the custody of the Plaintiff have not been explained either in the pleading or in the evidence by the Plaintiff. Therefore, the sale deed was not produced from proper custody but the learned Court below has marked the sale deed as an Ext. on the ground that it is more than 30 years old. The sale deed was expected to be in possession of the purchasers but it appears that it has been produced from the custody of the Plaintiff which indicate that it was not acted upon. The learned Counsel for the Appellant submitted that had it been acted upon there was no question of producing the same from the custody of Plaintiffs. The learned Counsel further submitted that this fact clearly indicate that the document was showy document and was created for the purpose of evidence only. According to the learned Counsel, here, in Ext.5, Bechan Dusadh descriebd himself to be the son of Prayag Dusadh. The learned Counsel further submitted that since there is dispute between the parties regarding the relationship of Prayag Dusadh and Bechan Dusadh, the self statement made by Bechan Dusadh is not admissible for proving the relationship. The learned Counsel further submitted that admittedly, no property of Prayag Dusadh is recorded in the name of Bechan Dusadh but in the sale deed, it is mentioned that the property is ancestral property. There is no explanation as to how Bechan Dusadh could have sold the property of Prayag Dusadh when he was neither recorded nor he was karta of the joint family. Except this averment in the sale deed, there is no other evidence which conclusively proves the relationship of Prayag Dusadh with Bechan Dusadh. The learned Counsel submitted that this statement in the sale deed appears on the self serving documents and whatever statement made by Bechan Dusadh is not admissible against the Appellant. It may be mentioned here that this exhibit 5 has been marked as an Ext. with objection. As stated above, it was not produced from proper custody. There is no explanation as to how it came in possession of the Respondent.

17. Now, let us consider the documentary evidences adduced on behalf of the

Defendants. Ext.A is the order dated 11.08.1972. It appears that Shubhag Dusadh filed Title Suit No. 304 of 1970 against Shahdeo Dusadh son of Bechan Dusadh u/s 106 of the Bihar Tenancy Act. In that case compromise application was filed. From, perusal of the Ext. "A", it appears that the land of Defendant of this case measuring 6 decimal of khata No. 65 plot No. 189 was wrongly recorded in the name of Shahdeo Dusadh son of Bechan Dusadh in Khata No. 63 plot No. 188. A compromise application was filed which is a part of Ext. "A". In that compromise application, it has been stated that both the parties are resident of the same village and out of their own free will, they have compromised the case. It is also stated that the new Khata No. 65 plot No. 189 has been curved out from old khata No. 50 plot No. 103 measuring 9 decimal but the area has been reduced to only 3 decimal which should be 9 decimal. The Defendant is admitting the claim of Plaintiff and, therefore, 6 decimals from khata No. 63 plot No. 188 may be deducted and it may be added in the khata of the Defendant of this case. On the basis of this compromise, the suit was decreed and it was directed that 6 decimals land be deducted from the khata of Shahdeo Dusadh and it be added in the khata of Subhag Dusadh. This Plaintiff, Subhag Dusadh is grand son of Thakur Dusadh. It may be mentioned here that this plot No. 189 had also been included in this partition suit. If the parties are descendants of Prayag Dusadh and there had been no partition, the Plaintiff-Respondents have got half share out of 9 decimals of the said lands. In such view of the matter, there was no question of filing the said suit No. 304 of 1970. This Ext. "A", therefore, clearly indicates that the land of Appellant's branch was recorded in the name of Respondent. Further, in the compromise application, it is mentioned that the parties are resident of same village. If they are descendant of Prayag Dusadh, there must have been averment to the effect that they are descendant of common ancestor. Further if Bechan Dusadh is son of Prayag Dusadh then Shahdeo Dusadh and his co-sharer had got half share in the said property and therefore, even if 6 decimal was recorded in the name of Shahdeo Dusadh, entire 6 decimals should not have been returned by him to the Plaintiff in that case because admittedly, 4.5 decimals should have been recorded in the name of the Defendant, Shahdeo Dusadh in that case. From this Ext. "A", it is clear that the Plaintiffs-Respondents never claimed themselves to be the descendant of Prayag Dusadh nor they ever claimed that Bechan Dusadh is son of Prayag Dusadh. This Ext. "A" further shows that Shahdeo Dusadh son of Bechan Dusadh was looking after the revisional survey operation. He knew about the lands, the khata number and the plot number which corresponds to new khata number and plot number and on the basis of that compromise application was filed. He never claimed any interest in the said plot. From perusal of the impugned judgment, it appears that the learned Court below has not considered Ext. "A" and its implication. Had it been considered by the learned court below, the finding would have been otherwise. It further appears that the learned court below gave much emphasis on the evidence of P.W.3 and P.W.5. We have seen above the statements made by these two brothers. Their evidence have not been considered in the light of Section 50/60 of the Evidence Act by the learned Court

below and observed that P.W.5 is common relation and P.W.3 is independent witness. Their evidences have not been tested in the light of the decision of the Hon"ble Supreme Court.

18. From perusal of the impugned judgment, it further appears that the learned Court below at page 8 of the impugned judgment held that when the Defendant pleaded with a specific separate case then onus lies on him to prove his case and that there is no whisper in the oral evidence of D. Ws. that Plaintiffs are descendants of Mukha Dusadh and they have only denied that they are not the descendants of Prayag Dusadh. So, it can safely be held that the Plaintiffs are the descendants of late Prayag Dusadh. The learned Court below also observed that Defendant No. 2 who has been examined as D.W.7 and other witnesses have only stated that Plaintiffs have no interest in the khandan of Defendant and D.W.7 specifically accepted that they are not relative nor they are resident of Budharika village but he did not say a single word about his plea taken in the written statement. So far this observation of the learned Court below is concerned, it may be mentioned here that according to Section 102 of the Evidence Act, it was for the Plaintiff to prove his case. The Plaintiff case cannot be decreed on presumption that the Defendants failed to prove their case pleaded in the written statement. The Plaintiff has to stand on his own legs and he cannot be allowed to take advantage of weakness of the Defendants. There was two version before the Court about the parentage of Bechan Dusadh. One was as contended by the Plaintiff that Bechan Dusadh was the son of Prayag Dusadh and the other as contended by the Defendant-Appellant that he was the son of one Mukha Dusadh. Now, the Plaintiffs" case cannot automatically be held to be true on the basis that the Defendant failed to prove his case pleaded in the written statement. Nevertheless the onus will be on the Plaintiff to prove the fact that Bechan Dusadh is son of Prayag Dusadh. A Division Bench of Patna High Court in the case of Raghunath Das v. Shiv Kumar Mishir AIR 1923 Pat 309 has that where the Plaintiff"s right to succeed depends upon his being an agnatic relation of the Defendant the onus is on him to prove that he is so related.

19. A Division Bench of Orissa High Court in the case of Madhabananda Mohapatra and Others Vs. Rabindranath Misra and Others, has held that though the Defendants had not succeeded in establishing their case that the Plaintiff was the daughter of one J, the onus that lay on the Plaintiff to prove that she was the daughter of K could not for that reason be held to have been discharged. It appears that in that case also, the Defendants failed to prove their case pleaded in the written statement. The Division Bench held that for that reason only, it cannot be said that the onus which lay on the Plaintiff has been discharged. Here, in the present case also, we have discussed the oral as well as documentary evidences. As stated above the learned court below gave much emphasis on P.W.3 P.W.5 and Ext. "5". I have discussed much about these evidences. Therefore, instead of repeating the same, here it is sufficient to say that on the basis of these evidences, no conclusive finding can be recorded to the effect that Bechan Dusadh was the son of Prayag Dusadh. The learned court

below has not considered the above facts and circumstances discussed above. Therefore, the reasoning of the trial Court for recording the finding of parentage of Bechan Dusadh is not acceptable. Likewise, the observation of the learned trial court to the effect that because the Defendant failed to establish case pleaded in the written statement, therefore, the Plaintiff's case is held to be proved is also not acceptable. Further, the learned Court below has also not considered the effect of Ext. "A" and Section 50-60 of the Evidence Act. For the reasons stated above, also Ext. "5" is not sufficient to prove the parentage of Bechan Dusadh. I have already held that the said document has not been produced from proper custody.

20. From perusal of the impugned judgment, the learned Court below found that the case of the Plaintiff appears to be true on the ground that they are rustic villagers. This presumption of the learned Court is not sustainable for the simple reason that the Appellants are also rustic villagers. As stated above in this case, 4 generation of Thakur Dusadh and 4 generation of Bechan Dusadh are parties. It appears that the parties are recorded separately with regard to their lands. The lands covered in Ext. "5" shows that it was the ancestral property of Bechan Dusadh. Ext. "a" shows that Shahdeo Dusadh was also recorded with respect to his some land, i.e., plot No. 188. No doubt, there is presumption of joint family but this presumption of joint ness is stronger in the case of brothers than in the case of cousins and the farther you go from the founder of the family, the presumption become weaker and weaker. It is also well settled principal of law that this fact is presumed for the reason that brothers are for the most part remain undivided and second cousins are generally separated and the third cousins are for the most part separated. In the present case according to the Plaintiff, Prayag Dusadh is the founder and, therefore, the parties are fifth generation of Prayag Dusadh which would be evident from the genealogical table given in the plaint. Therefore, in this case the presumption of joint ness is very weak. The Plaintiff has to prove unity of title and possession. Only on the presumption that they are illiterate, rustic villager and belonged to neglected class, whatever stated in the plaint cannot be said to be gospel truth. Here since 1913, the Plaintiffs name is not recorded in the suit property. No suit has been filed for correction of the name. From Ext. "A", it appears that during revision survey operation, Shahdeo Dusadh son of Bechan Dusadh was looking after the survey operation but then in revisional survey also, none of the Plaintiffs have been recorded in the revisional survey record of rights with respect to suit property in the year 1970. These C.S. khatiyans and R.S. Khatiyans have been produced and marked as Ext. "6" series. The Plaintiffs never challenged the correctness of otherwise of the entry in the survey records of rights. As has been discussed above, when some of the property of Defendant Appellant was recorded wrongly in the name of Shahdeo Dusadh, the Appellants filed Title Suit No. 304 of 1970 for correction of the same Ext. "A". For the first time, after many decades, this shit has been filed in the year 1999. During this period commencing from 1913 to 1999, the Plaintiffs never raised the question of

parentage of Bechan Dusdh nor ever they claimed recording of their name in record of right nor they ever challenge the entry in the records of rights.

21. In view of my above discussion, I find that the Plaintiffs have failed to prove that Bechan Dusadh is the son of Prayag Dusadh and likewise failed to prove unity of title and possession over the suit property. For the reasons stated above, the findings of the learned Court below are unsustainable in the eye of law on these points and, therefore, the findings are hereby reversed.

22. In the result, this First Appeal is allowed and the impugned judgment and decree are set aside and the Plaintiffs' suit is dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.