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**(1999) 05 PAT CK 0060**

**In the Patna High Court**

**Case No :** Appeal from Original Decree No. 57 of 1981 (R)

Narain Mahto and Others

APPELLANT

Vs

Rupchand Mahto and Others

RESPONDENT

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**Date of Decision :** 21-05-1999

**Acts Referred:**

**Citation :** (2000) 1 BLJR 308

**Hon'ble Judges :** D.N. Prasad, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## **Judgement**

D.N. Prasad, J.—This appeal has arisen out of judgment and decree passed by 4th Additional Sub-Judge, Palamau in Partition Suit No. 74 of 1976, whereby and whereunder the learned Sub-Judge decreed the suit.

2. The case of the plaintiff/respondent as claimed that the plaintiff and defendant Nos. 1 to 29 are coming from the time of Gurudeyal Mahto who was the son of Dukhi Mahto. Gurudeyal Mahto had one son namely Shiv Shyam Mahto, who had four sons namely Hari Mahto, Kali Mahto, Ramdeyal Mahto and Dasrath Mahto and the lands appertaining to khata No. 33 was recorded in the name of Hari Mahto, Ramdeyal Mahto, Ramdeni Mahto, Meghnath Mahto, Shiva Mahto and Ganpat Mahto. The lands of khata No. 34 was acquired by Gurudeyal Mahto and Tulsi Mahto and the said lands were recorded in the name of Hari Mahto, Ganpat Mahto, Ramdeyal Mahto, Ramdeni Mahto, Meghnath Mahto and Shiva Mahto representing the branch of Gurudeyal Mahto and also in the names of Bishwanath Mahto, Bigan Mahto and Deven Mahto representing the branch of Tulsi Mahto. Since both branches of Gurudeyal and Tulsi Mahto have no joint possession in the lands of Khata No. 33 and as such two Partition suits one in respect of lands of Khatas No. 33 and another in respect of khata No. 34 have been filed and the instant suit is in respect of lands of khata No. 33. At the time of last survey operation, separate possession over some plots were mentioned and some plots were shown as joint. The parties were in possession over the said

lands for the sake of convenience. There has also been transactions with regard to the joint lands by different sets of parties as defendant Nos. 30 to 44 and 50 to 55 have purchased fractional areas from the plaintiff. Defendant No. 45 purchased some lands from defendant No. 19 whereas defendant No. 46 purchased some lands from defendant No. 1. Defendant No. 47 purchased lands from late Ramdeni Mahto, father of defendant No. 23 and defendant No. 48 purchased some lands from late Shiva Mahto father of defendant Nos. 27 to 29. Likewise, defendant Nos. 56 and 57 purchased some lands from defendant No. 26 whereas defendant No. 58 and defendant No. 26 whereas defendant No. 58 and defendant No. 26 have purchased from the plaintiff and defendant No. 49. The plaintiff is the descendant of Ramdeyal Mahto having 1/4th share in the lands in the suit whereas defendant Nos. 1 to 18 are the descendants in the branch of Hari Mahto. The lands in suit are in joint possession of parties and the plaintiff also requested for partition of the lands which was refused, hence the suit.

3. The defendant Nos. 26(1) , 28(2), 29 filed the joint written statement claiming therein that separate suit has already been filed in the lands of khata No. 34 and as such this suit is riot maintainable against these defendants. After survey even the joint recorded lands have been partitioned between the parties by metes and bounds and parties are in separate in mess and cultivation and also have been dealing with the lands separately and exclusively. There is also no clear description of the lands in suit. There is no unity of title and possession between the parties and the entire lands have already been partitioned by metes and bounds. All the parties in suit have been cultivating their lands separately and their names have already been shresta of Government of Bihar and as such the plaintiff has got no cause of action of the suit and it is fit to be dismissed.

Other defendant Nos. 31, 31(a), 32, 32 (a), 33, 34, 40, 41, 42, 43, 46, 50, 51, 52, 53, 54 and 56 have also filed joint written statement alleging therein that all the purchasers who have purchased the lands from plaintiff and other defendants are coming in exclusive possession over the lands. As per the survey entries, the father of the plaintiff continued his cultivating possession and after his death, the plaintiff also continued his cultivating possession over the lands belonging to his father and all the members in the suit are coming in separate cultivation possession over the lands since long and so the question of jointness of the lands does not arise. The defendant Nos. 31, 31(a) and 31 (b) have also purchased lands from the plaintiff Roopchand Mahto for valuable consideration of Rs. 1.000/- by registered sale-deed executed as back as in the year 1960 and they are coming in peaceful possession over the said land. The defendant Nos. 33 and 34 also purchased the lands from plaintiff by registered sale-deed executed on 22-4-1971 and their names have also been mutated in the Shresta of Government of Bihar. Defendant No. 54, Keshwar Mahto also purchased lands from plaintiff through registered sale-deed dated 18-8-1975 and he has been in possession over the suit lands. The plaintiff again sold 15 decimals of land under khata No. 33 in plot No. 1149 by registered sale-deed dated 13-1-1977. The

defendant No. 26 also sold his 17 decimals of land out of 51 decimals by registered sale-deed dated 17-4-1976, and all the purchasers who have purchased the lands either from the plaintiff or from the members of defendants are in exclusive possession over the land and so the question of re-partition does not arise.

The defendant No. 19 also filed written statement claiming therein thus that all the parties are separate since long and there is no jointness between the parties in respect of land in question. The share of the recorded tenant under khata No. 33 has already been mentioned in the survey Khatian and accordingly all the members recorded in Khatian are in separate possession over the lands. Some lands were recorded as Ijmal which have already been partitioned by metes and bounds between the parties and all the parties are cultivating the lands accordingly. All the members of the suit also constructed separate house and accordingly they are residing separately dealing with lands separately as being the owner and so the question of partition of the suit lands does not arise and the suit is fit to be dismissed.

Newly purchasers namely Keshwar Mahto, Udeswar Mahto, Pramila Devi, Chandmuni Devi and Niyam Dhari Mistri also filed their written statement claiming therein that they had purchased the lands from plaintiff and other members of the suit for valuable consideration by registered sale-deed. Udeswar Mahto, Pramila Devi and Chandmuni Devi have purchased the suit lands being plot No. 1097, 1098, 1167 of khata No. 33 from the plaintiff Roopchand Mahto by registered sale-deed dated 10-12-1980 for valuable consideration of Rs. 3,000/- and all the purchasers are coming into peaceful possession over the suit land.

The defendant Nos. 20, 21 and 23 also filed written statement claiming therein that Gurudeyal Mahto, son of Dukhan Mahto was granted settlement of a block of land and the said lands subsequently came to be recorded as Raiyati khata No. 33. Gurudeyal Mahto started reclaiming the land improving the same. After the death of Gurudeyal his only son Shiv Sahay Mahto came in possession over the said land. Shiv Sahay Mahto had through his first wife two sons, Dasrath and Kali Mahto, while through his second wife had two sons namely, Hari and Ramdihal Mahto and there was differences between the four sons and as such Shiv Sahay Mahto partitioned the lands between his four sons and he had given the some more lands to the eldest son Dasrath Mahto as being Jethans. It is further claimed that the raiyats or settlees had not right either by custom or law to transfer his right at the time of surrendering the lands to the landlord. During the life time of Ramdihal Mahto, there was no objection about incorrect entries in the record of rights. There was partition already held and other brothers of Dasrath also made Korkar on their respective separate lands. The defendant No. 20 has got no interest in the suit land. Ramdeni who died in 1975 continued in possession of the amicable partitioned land and the entire share of Ramdeni have been inherited by the defendant No. 23, the only daughter. The plaintiff has got

no cause of action in the suit and the suit is fit to be dismissed.

Bhagwat Mahto also filed written statement claiming therein that Roopchand Mahto, the plaintiff already sold lands by registered sale-deed by dealing the land exclusively and the purchasers are already in possession of the said lands and so there is no question of partition.

4. Both parties adduced evidence in the lower Court and after considering the pleadings of both parties, the learned Court below framed as many as nine issues, which are as follows:

1. Is the suit as framed maintainable ?
2. Has the plaintiff got any cause of action for the suit ?
3. Is the plaintiff entitled to a decree for partition, if so to what extent and in which properties ?
4. Whether there is unity of title and possession amounts the parties with regard to the lands regarding which the partition is claimed ?
5. Whether the lands have been partitioned by metes and bounds as alleged by the contesting defendants ?
6. Whether the land of khata No. 33 are ancestral properties of the parties or not ?
7. Whether Ramdihal Mahto gave half of his properties to Hari Mahto in lieu of arrears of rent as alleged by the defendant Nos. 20, 21 and 23?
8. Whether the entries in the record of rights in respect of the lands of khata No. 33 is incorrect.
9. To what relief or reliefs, if any, is the plaintiff entitled to ?

5. Learned Counsel appearing on behalf of the appellants submitted at the very outset that the learned Court below committed grave error on passing the decree without appreciating the evidence on record as all the parties in suit are themselves dealing with the land exclusively as being the owner as well as plaintiff already sold his land in favour of other purchasers by registered sale-deed and both parties are dealing the lands exclusively and so there was no unity of possession between the parties.

It is further submitted that mutation transaction between the parties itself goes to establish that both parties, since long, are separate and so the partition cannot be re-opened which was executed much earlier, which finds support from the record of right itself. The learned Counsel also relied upon a case reported in Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwari and Others, , and it is submitted that the mutual transaction between the parties is strong evidence of separation.

6. None appeared from the side of the respondents.

7. At the very outset, I would like to deal with about the admitted position in this appeal.

The plaintiff/respondent admitted in para-4 of the plaint that since both the branches of Gurudeyal Mahto and Tulsi Mahto have no joint possession in the land of khata No. 33 (suit land) so the partition suits, one in respect of land of khata No. 33 and another in respect of lands of khata No. 34 are being filed. It is also an admitted fact that the plaintiff/ respondent had already sold his land in favour of different persons including the members of the suit by various registered sale-deeds. The defendant No. 31, 31(a) and 31(b) purchased the land jointly from the plaintiff by registered sale-deed dated 5-3-1960 being plot Nos. 355 and 107 of khata No. 33. Likewise, defendant Nos. 33 and 34 also purchased the lands of plot No. 1126 and 658 of khata No. 33 from the plaintiff for valuable consideration of Rs. 1,000/- by registered sale-deed dated 22-4-1971 and the said lands being sold by the plaintiff are admittedly coming in exclusive possession of the purchasers. Defendant No. 26, Jaishree Mahto also sold the lands of khata No. 33 by registered sale-deed dated 17-4-1976. The plaintiff again sold the lands of khata No. 33 by registered sale-deed dated 15-2-1978 whereas the instant suit has been filed in the year 1976 and as such, it is apparent that the plaintiff/respondent has been dealing with and transacting the land in suit even after institution of the suit.

8. Both parties also adduced oral evidence in the lower Court and only two witnesses have been examined on behalf of the plaintiff/respondent. P.W. 1, Keshwar Mahto stated that Shiv Sahay Mahto had four sons, namely, Hari Mahto, Dasrath Mahto, Kali Mahto and Ramdihal Mahto, but all of them died. He further deposed that some of the lands are being cultivated separately but he admitted in his cross-examination that he had also purchased the land of plaintiff and he has been in cultivating possession over the said land. P.W.-2, Rupchand Mahto, the plaintiff/respondent admitted in para-3 that he had sold his lands in favour of Ram Charita(sic). He also admitted in his cross-examination that he executed as many as five Kewals of his land in favour of Bhagwat Mahto and all the lands purchased by them are in their possession. He further admitted that he had not seen the survey khatian.

Admittedly, the khatian either cadastral or revisional has not been filed in the case. He also admitted that he sold his land even till today and the purchasers are coming in peaceful possession over the same. His father died about 40 years ago and he cannot say as to whether his father raised any objection in respect of entry in the Khatian or not.

9. On the other hand, three witnesses have been examined on behalf of the defendant/appellant. D.W.-1, Ram Gulam Mahto stated that the partition was already taken place much earlier and all the members are cultivating the lands separately. He further stated that Nemdhari Mistry, Madheshwar Mahto, Siddeshwari Mahto, Rameshwar Mahto, Dineshwar Mahto, Bhuneshwar Mahto, Randeo Mahto, etc. have purchased the land and all the members of the family

are dealing and transacting the land of their own share exclusively. He further deposed that Tapeswar had purchased the land in his own name and in his son's name from the plaintiff Rupchand Mahto. According to him, he was not born at the time of survey settlement. D.W.-2, Nathuni Mahto also stated that all the members are cultivating the lands separately and there is no unity of possession over the lands. According to him, there is no share of four anna of the plaintiff over the suit lands.

D.W.-3 Bhuneshwar Mahto, one of the defendants also stated that Shiv Sahay Mahto already partitioners the land in his life time amongst his sons. He further stated that all the members are cultivating the land separately.

10. It is true that there is no document coming forward to show about the partition, but it is also a fact that all the members are dealing and transacting the lands of their own share exclusively since long and even the plaintiff has been selling the land of his own share after institution of the suit i.e. in 1976, 1977 and 1978. It has also come in evidence that all the four sons of Shiv Sahay Mahto already died wince long ago.

11. It has been held in the case reported in Radhamoni Bhuiyanin and Others Vs. Dibakar Bhuiya and Others . that it is now well settled that although there is a presumption of jointness in 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.

12. In the instant appeal, it is clear that the parties are not the full brothers and admittedly all the parties are dealing the lands separately and exclusively. I have already discussed above that no khatian has been produced to show about the story of jointness, nor any other document to this effect has been filed.

It has also been held in the case reported in Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwari and Others, . that separate transactions by members of joint family may not by themselves establish separation, but mutual transactions between two members of a family stand on an entirely different footing and they furnish a very strong evidence of separation. In order to prove partition, it must be established that the parties altered and intended to alter their title to the property and that there was a definite and unambiguous indication by the members of the family to separate and to enjoy their respective shares in severalty.

13. In the instant appeal, there was definite and unambiguous indication of the fact that the parties of both sides are dealing with the land of their own share exclusively, which is the strong evidence in respect of separation. Moreover, the plaintiff himself admitted to have sold lands to the other members of the suit even after the institution of the suit.

14. Thus, I do not think there is much controversy involved in the present appeal

when admittedly the plaintiff and other members of the suit are transacting the lands each other exclusively proving to be separate itself.

From the discussions made hereinbefore, it is clear that both parties are dealing the lands separately for long and there is no cogent document coming forward to indicate about the fact of jointness between the parties who are admittedly of distant relations.

15. In this view of the matter, I am of the view that the parties are separate and they are dealing with their lands accordingly in the separate being owner.

Taking thus into consideration of all the facts and materials on record, I am of the view that the learned Court below committed grave error in decreeing the suit, which requires interference. Hence, the judgment and decree passed by the learned Court below cannot be sustained and are accordingly set aside.

16. In the result, this appeal is allowed. However, in the facts and circumstances of the case, there will be no order as to costs.