

(1960) 03 PAT CK 0007
In the Patna High Court
Case No : A.F.O.D. No. 52 of 1954

Paresh Nath Mahanty

APPELLANT

Vs

Ghasiram Mahanty and Others

RESPONDENT

Date of Decision : 01-03-1960

Acts Referred:

Evidence Act, 1872 — Section 17

Citation : AIR 1960 Patna 407

Hon'ble Judges : Mahapatra, J;K. Ahmad, J

Bench : Division Bench

Advocate : G.P. Das and S.N. Banerji, for the Appellant; Syed Amin Ahmed, for the Respondent

Final Decision : Allowed

Judgement

Mahapatra, J.—This is an appeal by defendant No. 1 in a partition suit in which the plaintiffs claimed that each one of them had one-fourth share in the properties given in the schedules of the plaint. They admitted that defendant No. 1 was entitled to one such share also. Plaintiffs 1 to 3 are the full brothers and plaintiff No. 4 is their mother. Defendant No. 1 is the step brother of plaintiffs 1 to 3 from the first wife of their father,

2. The plaintiffs' case is, that the Immovable properties described in Schedules B, C and D came to the exclusive share of their father, Raghunath, in a partition with his brothers, and these properties remained in his possession till his death in 1949. Thereafter disputes arose between the parties, and the plaintiffs wanted to partition the family properties out, as the defendant No. 1 did not agree to that, they were forced to bring the suit. The other defendants originally impleaded as pro forma defendants represented the branches, of the four brothers of Raghunath's father. They were subsequently expunged as admittedly they had no interest in the litigation. The common ancestor Baidyanath Mahanti, left five sons of whom Brojmohan was the eldest. Brojmohan had four sons of whom Raghunath, the plaintiff's father, was the eldest. Schedule F of the plaint

described the moveable properties with which we are not concerned in this appeal. Schedule E was subsequently omitted, and, therefore, that is no longer the subject of dispute.

3. The main defence pleaded by the present defendant appellant was that Baidyanath, the great grand-father of plaintiffs 1 to 3 and the defendant, got the suit properties mentioned in Schedules B(i), C and D as Chakran lands on the express condition that he would attend upon the Ruling Chief, and that, according to the custom prevalent in the State as well as in the family, the rule of primogeniture prevailed in regard to the suit properties, and the eldest son performs the service of the Ruler and enjoys the lands. After Baidyanath, his eldest son Brojmohan came in possession of the properties and, after Brojmohan, Raghunath, father of plaintiffs 1 to 3 and the defendant, succeeded to the properties as the Chakrandar and remained in enjoyment of the same. In regard to the items of the property given in Schedules B(ii) and B (iii), the defendant claimed that they were his exclusive properties as he had acquired the same by reclamation by his own labour after he had separated from his father.

4. On these pleadings, six issues were framed in which issue No. 3 was whether the properties in Schedules B(i), C and D were Chakran properties and whether they exclusively belonged to defendant No. 1 as such. The issue raised about the other properties mentioned in Schedule B is no longer necessary to be considered as the appellant before us has given up his claim as exclusive properties to them. They would, therefore, be liable to partition as prayed for by the plaintiffs. The present appeal is only confined to item No. (i) of Schedule B and items (i) and (ii) of Schedule D lands.

The property described in Schedule C of the plaint was also given up during the argument on behalf of the appellant. Thus the plaintiffs' claim of partition in regard to items (ii) and (iii) of Schedule B and items (i) and (ii) of Schedule C is to be allowed as prayed for. The only contest is now about Schedule D and Schedule B(i) properties, and it is to be decided whether these lands are impartible in nature, and whether defendant No. 1 is alone entitled to the same to the exclusion of the plaintiffs according to the custom prevalent in the state and in the family, as pleaded by the defendant.

5. The learned Subordinate Judge of Chaibasa, before whom the suit came for trial, decreed the plaintiffs' suit holding that the properties mentioned in Schedules B, C and D were ancestral properties of the parties to the suit, liable to partition. He did not accept the defence plea that Raghunath or the defendant himself was to render any service to the Ruler for holding the suit lands, and that the defendant came in possession of the lands by the rule of primogeniture. There is no doubt that the onus was on the defendant to rebut the presumption in law that the properties in possession or the family were the joint family properties.

The defendant had pleaded in his written statement that the land was Chakran

service tenure, and that was subject to the rule of primogeniture. In support of this, reliance was placed on exhibit C, an order sheet in Miscellaneous Case No. 508/1932-33 in which Raghunath had applied for mutation of his name in place of his father Brojmohan in regard to the lands in mauza Buri Topa, mauza Chhoti Amda and Jilingda. By the order passed therein on May 10, 1933, the Ruling Chief clearly stated:--

"According to the custom of the state, the eldest son gets the nokran lands, according to the rule of primogeniture. The order of the commissioner I. Dalton, dated 7-5-1863 Confirms that it is the duty of the nokrandar to remain in attendance upon the Ruling Chief and to work according to his orders. It appears from the patta dated 29 Sangh 1264 granted to Baidyanath Mohanti, the grandfather of the applicant, that the nokarandar will have to stay at Kharsawan Garh and remain in attendance upon the Ruling Chief and do his works.

Therefore, when the applicant Raghunath Mahanti shall execute and file according to the stipulations of the patta a kabuliat undertaking to stay at Kharsawan Garh and to render services to the Ruling Chief according to his orders and rules within 15 days as usual, the previous nokran lands of mauza Burhitopa and the land of Khewat No. 2 of Chhota Amda will be mutated in the name of Raghunath Mahanti alone".

As far as the land in mauza Jilingda is concerned, the Ruling Chief did not find any patta in support of the applicant's claim, and, therefore, directed that that mauza was to be mutated in the names of Raghunath Mahanti together with his other brothers, as, it appeared then that in the previous survey settlement that mauza had been recorded in the joint names of the deceased Brojmohan Mahanti (Raghunath's father and his brothers). The learned Counsel for the appellant contended that this observation of the Ruling Chief in 1932-33 clearly proves that the suit lands were Naukran lands, and that the rule of primogeniture applied to them.

This contention is correct, but if the Naukran lands in mauza Burhi Topa and Chhota Amda were treated as partible in the family from generation to generation and were actually partitioned in the past, the mere fact that it was intended by the original grantor to be impartible will not be enough to clothe the present defendant with the exclusive right to the property. Whether the successor-in-interest of the original grantor will have a right to resume the land on account of a breach of the original condition of the grant is not a matter to be decided in the present suit. We are only concerned to see if the parties including the plaintiffs can claim a share in the properties in suit, in other words, if the defendant can resist the partibility of the land."

6. The initial onus that was on the defendant in this case to rebut the presumption of the joint family character of the property was discharged by proof of the order of the Ruling Chief as quoted above. Thereafter it was for the plaintiffs to prove that, though the land was impartible in character at the time of

the grant and was subject to the rule of primogeniture, yet the family treated the property as partible, and in fact, partitioned the same between the different branches from generation to generation. This was undoubtedly the case of the plaintiffs as disclosed in paragraphs 4, 5 and 6 of the plaint which was denied by the defendant in his written statement.

The plaintiffs have not examined any witness other than the plaintiff No. 1. He did not state in this evidence that the Naukran lands of the two mauzas, Burhi Topa and Chhota Amda, were ever divided between the members of the family on partition. His statement that the plaintiffs were in possession of some of the homestead lands in the two villages is not inconsistent with the defendant's case, because, it appears from the Dewan's note dated the 20th January, 1933, as found in the ordersheet (exhibit C), that there are Non-Naukran lands in the other four khewats in mauza Amda Khewat No. 2 alone haying lands described as Naukran.

It is, therefore, quite possible that the plaintiffs 1 to 3 could be in possession of some such lands not known as Naukran lands in that mauza, which must have come to the share and possession of their father Raghunath on partition from Ms brothers. Though this witness said that he had filed rent receipts to show that the plaintiffs were paying the rent for the Schedules C and D lands, no such receipt was either filed or proved by him. He went further in his deposition to completely deny that the lands were ever given: for rendering service to the Raj, and that there was a custom that such lands were to go only to the eldest son of the last holder.

This is in direct conflict with what the Ruler had stated in his order dated the 10th May 1933, long before the present dispute arose. That the plaintiff No. 1 was trying to bolster up a case is quite evident from this. Judging from the evidence of P. W. 1, the only witness examined on the side of the plaintiffs, it has to be said that he failed completely to discharge any part of the onus that lay upon the plaintiffs to establish that the Naukran lands in these two mauzas were ever treated as partible in the family.

7. It is next to be seen if the plaintiffs could get any admission to that effect from the witnesses on the side of the defendant. The trial court has referred to the evidence of D. Ws. 5 and 6 in, this connection. D. W. 5 is the defendant No. 7 belonging to the branch of one of the brothers of the plaintiffs' grandfather Brojmohan. He stated that he has a house and lands in Sam Amda (same as Chota Amda) which were their ancestral property and which he got on partition among his brothers, and that in the survey khewat his name and the names of his three brothers were prepared in respect of those lands.

From this the learned Subordinate Judge thought that the Naukran lands in mauza Chhota Amda were partitioned in the family in the past. This, in my view, is wholly incorrect. Nowhere this witness stated that his house and lands in Chota Amda belonged to the Naukran block, namely khewat No. 2. It is not

disputed and it is confirmed by the note of the Dewan in exhibit C. that, besides khewat No. 2 which alone was the Naukran land in Chhota Amda, there were other khewats which were not Naukran lands and which had been recorded in the names of the brothers, the cosharers of Brojmohan (plaintiffs' grandfather).

D. W. 5 admitted that the survey khewat containing his house and lands in Chhota Amda were recorded in the names of his brothers and himself. This is exactly what the Dewan reported. His note shows that khewat Nos. 3, 4, 5 and 6 in that mauza were recorded in the names of Brojmohan's brothers, and, as I have stated before, D. W. 5 belongs to the line of one of such brothers. The trial court appears to have fallen into the error of thinking that all the lands in Chhota Amda were Naukran lands, and under that erroneous impression he read the evidence of D. W. 5 to mean that the Naukran lands had been partitioned before; D. W. 6 belongs to mauza Burhi Topa and is aged 38 years only.

He said in evidence that he did not know the extent of the Chakran lauds in village Burhi Topa and Chhota Amda. The lands other than those cultivated by the defendant were used to be cultivated by Raghunath, and after him by the plaintiffs. This has been used by the trial court as an admission of the fact that the Naukaran lands were partitioned in the family before. If this part of the evidence of the witness is taken to refer to the Naukaran lands in those two mauzas, then there will be no inconsistency with the defendant's case.

Raghunath in any case would have been in cultivating possession of these lands being the eldest son of his father according to the, original conditions of the grant. He died in 1949, and if after his death the plaintiffs have come into possession of any portion of them, they would not derive any title from such possession for a period of hardly two years as the present suit was filed on March 1, 1951. Nowhere it has been elicited from this witness that the Naukaran lands had been ever partitioned between Raghunath and his brothers or prior to that, between Brojmohan and his cosharers.

Further, his evidence may be taken to mean also, in absence of any clarification on the point, the lands other than the Naukaran lands. Before any statement can be used as an admission, it must be shown to be unambiguous and clear on the point at issue. In any view, the two statements made by D. W. 5 and D. W. 6, as referred to by the trial court cannot be taken to be an admission of the fact that the Naukaran lands were partitioned in the family at any time before the present suit. On the other hand, D. W. 1 emphatically denied in his cross-examination that there was ever any partition of the Naukaran lands among Brojmohan and his brothers or among Raghunath and his brothers.

D. W. 3 stated that Raghunath held the Naukaran lands for doing the Ruler's service. That Raghunath and in his absence, the defendant was actually rendering service to the Ruler in pursuance of the terms of the grant is borne out by D. W. 8 and exhibit C (1) and exhibit A. In the year 1947 he was fined Rs. 5/- as he had failed to turn up on a particular day when the Ruler was returning to

the headquarters. Exhibits B and B(1) are two rent receipts in respect of jamabandi No. 83 in mauza Burhi Topa which shows that the defendant was the recorded tenant in respect thereof.

This jamabandi number tallies with the description of Schedule 2 (Chhota Amda) of the plaint. Taking the evidence as a whole, it appears to me that the plaintiffs have failed to establish that the Naukaran lands in mauzas Buri Topa and Chhota Amda were ever partitioned in the family after they were given as a grant by the Ruling Chief, to their ancestor Baidyanath in September, 1857, There is no doubt, as clearly appears from the Ruling Chief's order dated the 10th May, 1933 that at the origin these lands were impartible, and they were to be governed by the rule of primogeniture subject, however, to the condition that the holder would render service to the Ruling Chief.

8. From exhibit G it further appears that in 1933, while the Ruler sanctioned the mutation of the Naukaran lands in the two mauzas to be mutated in the name of Raghunath, he was asked to execute a kabuliat to the effect that he would render service to the Ruler. At that time Raghunath put in a memorandum of partition and asked that the lands in mauza Chhota Amda should be recorded jointly in the names of himself and his brothers. This was disallowed by the Ruling Chief as he held that without consent of the State no Naukaran could partition or transfer the Naukaran lands in any way.

It was vehemently argued by the learned counsel for the plaintiffs-respondents that this is a clear admission by Raghunath which would prove that the land was treated as partible in the family. There is some force in this contention. Whether the ruler accepted that or not is really immaterial. That Raghunath wanted to partition, the Naukaran lands between his brothers is clear, but the question is whether in fact, after the Ruler refused to give his sanction to this partition, it was really given effect to namely, whether there was in fact any partition of the Naukaran lands in Chhota Amda between Raghunath and his brothers.

There is a clear denial to this by D. W. 1 and D. W. 3, as I have pointed out before. There is no evidence on the side of the plaintiffs to assert that there was in fact any such partition. On the other hand, the two rent receipts, exhibits B and B(1), go against the allegation of any such partition. In absence of any direct evidence and in view of the denial of partition of the Naukaran lands in mauza Chhota Amda after 1933, it cannot be said that the admission purported to have been made by Raghunath in his petition, before the Ruler in the mutation case was acted upon. The defendant's witnesses have asserted that it was not given effect to, and there is no reason why it shall not be accepted, particularly, in view that the plaintiffs did not choose to adduce any evidence on that point.

9. Next, it was urged on behalf of the respondents that though Raghunath was directed to execute a kabuliat by the Ruling Chief in the mutation case of 1933, the order-sheet shows that he did not do so, and that the order of the Ruling Chief dated the 10th May, 1933, was cancelled on that account. Absence of

kabuliat will not prove absence of Raghunath's title to the lands. Whether for failure of execution of a kabuliat, the grant was liable to resumption is not for us to decide here.

The very fact that rent was accepted in respect of these Naukaran lands for the years 1947 and 1948, and thereafter, goes to show that the absence of kabuliat did not deprive Raghunath or his successors of the land. The observations of the Ruling Chief about the origin, nature and conditions of the grant cannot be whittled down by the failure on the part of Raghunath, if any, to execute the kabuliat at a subsequent stage.

10. For the reasons stated above, I am of the view that the defendant's case that the Naukaran lands in these two mauzas are, not partible as ancestral properties, and that they are governed by the rule of primogeniture, and that the defendant who is rendering service to the Ruler is only entitled to them exclusively, has been established. The plaintiffs' claim for partition, according to the shares alleged by them, will be decreed in respect of Schedule C and Schedule B items (ii) and (iii). In respect of the properties mentioned in Schedule D and in item (i) of Schedule B, the plaintiffs' suit will stand dismissed. The decree passed by the court below will be modified accordingly.

11. In the result, the appeal is allowed in part, but in view of the circumstances of the case, the parties will bear their own costs of this Court.

Ahmad, J.

12. I must confess that originally I was of the view that this case being one, which may easily be classified in the group of border cases depending mainly for their decision on a proper appraisal of the evidence, the findings given by the trial court, which, as a rule, has certain advantage in assessing oral evidence, should be respected. But because of the strong conviction expressed by my learned Brother that the judgment under appeal is not one given in accordance with law, I had to consider what I thought about it earlier.

The opinion expressed by my learned Brother is based on a two-fold reasoning, first that in appraising the evidence, the trial court has committed a few errors here and there, and secondly, that in its approach to the case, the rule of onus, as it should have been applied, has not been applied. Unfortunately even now I am not very definite about it, but at the same time I am not in a position to say that this reasoning is without any force. Therefore, I have decided to change my view and agree with what my learned Brother has found and held.