

(1989) 02 PAT CK 0025

In the Patna High Court

Case No : Appeal from Original Decree No. 95 of 1978(R)

Radhamoni Bhuiyanin and Others

APPELLANT

Vs

Dibakar Bhuiya and Others

RESPONDENT

Date of Decision : 03-02-1989

Acts Referred:

Citation : (1989) 02 PAT CK 0025

Final Decision : Allowed

Judgement

Satya Brata Sinha, J.—This First Appeal arises out of a judgment and decree dated 30th September, 1978 passed by Shri V. Topno, Subordinate Judge, Chaibasa in Title (Partition) Suit No. 12 of 1977, whereby and whereunder, the said learned court decreed the plaintiff-respondents' suit.

2. The facts of the case lie in a very narrow compass.

3. The plaintiffs filed the aforementioned suit claiming, inter alia, half share in the properties described in Schedule B of the plaint.

4. For appreciating the case of the parties, it is necessary to look into the genealogical table.

Manohar	_____			Suku
Bono	_____ _____			Gohan
Ketab Kalipada pardesh	_____ _____			
Srimati Dibakar Durga Ram	Jadu Lakhan		Bhushan	
_____	_____			Lakhinder
_____	_____			Rab

Muto Angad Jhuni Shanti Ashu

5. The genealogy is not disputed. According to the plaintiffs-respondents, they had been in joint possession of the lands in question along with the defendants and their share being half in respect of the properties in suit, they are entitled to the said share and obtain a decree for partition.

6. According to the defendants, all the lands described in Schedule B of the plaint

were not the ancestral lands of the parties. The defendants' contention was that the lands which were described in Schedule appended at the foot of the written statement were acquired by Suku and Bono which took place more than seventy years ago.

7. For the purpose of disposal of this appeal, other facts are not relevant to and as such are not required to be noticed as the facts of the case have been dealt with in detail in the impugned judgment.

8. The teamed trial court framed as many as nine issues in the aforementioned suit which are as follows:

"(i) Have the plaintiffs any cause of action or right to sue?

(ii) Is the suit barred by limitation?

(iii) Is the suit barred by the principles of estoppel, waiver and acquiescence?

(iv) Is the suit as framed maintainable?

(v) Is there unity of title and possession of the parties in respect of the suit properties?

(vi) Are all the lands in schedule B ancestral lands of the parties?

(vii) Was there any partition between Suku and Bano in respect of the lands in suit?

(viii) Was there ouster of Bono and/or his descendants from the lands over which Suku was and thereafter his descendants are in possession?

(ix) To what relief or reliefs, if any, are the plaintiffs entitled?"

9. The learned trial court took up all the relevant issues, namely, issue Nos. 5, 6, 7 and 8 together and came to the conclusion that there having been no partition by metes and bounds, the plaintiffs are entitled to a decree for partition.

10. Mr. Bhaiya Yogendra Kishore, the learned counsel appearing on behalf of the appellants raised a short question.

11. According to the learned counsel not only the defendants' witnesses categorically stated about the partition but the said fact was also admitted by the witnesses examined on behalf of the plaintiffs-respondents.

12. From the judgment of the learned trial court itself, it appears that the plaintiffs admitted that the parties are separate in mess and cultivation. These facts were also proved from the survey khatian Exhibits C and C/1 wherein the separate possession of the parties were noticed.

13. It may be mentioned here that Exhibit C is a khatian in respect of Cadestral survey settlement operation, which took place in the year 1911.

14. It further appears that by reason of Exhibit A, a sale-deed, plaintiffs Jadu

Bhuiya and Lakhan Bhuiya sold the lands covered by the said sale deed to Ramchandra. It appears that the defendants called for the original sale deeds from the plaintiffs but in spite thereof the same was not produced. In that view of the matter, the certified copy was filed and proved.

15. Mr. N. K. Prasad, learned counsel appearing on behalf of the respondents, however, submitted that the aforementioned sale deed was a forged document which allegedly has been admitted by P. W. 1 in paragraph 20 of his deposition.

16. However, from a perusal of the evidence of P.W. 1 in its entirety it is evident that the said witness did not state that it was a forged document and as such he mended (sic) to be a document which was not binding upon him. From the statement made by the said witness in paragraph 20 of his deposition itself that he did not challenge the said deed as being forged. Further, as noticed hereinbefore, the defendants proved the said document after calling for the same from the office of the sub-registrar. A registered document carries with its sanctity of correctness. The execution of the document having been proved before a competent authority coupled with the fact that its authority was not challenged in the plaint there cannot be any doubt that the said sale deed was genuine. The learned trial court also considered the document to be genuine.

17. It appears that the learned trial court proceeded on the basis that there is a presumption of jointness in respect of a Hindu family. The learned trial court, however, proceeded on the basis that the lands allotted to the share of the plaintiffs were of inferior quality and the lands allotted to the defendants are of superior quality. The learned trial Court, therefore, held that such disparity in the possession of the parties is against the entries of column No. 2 of the khatian and the same cannot be reconciled.

18. In my opinion, the approach of the learned court below is not correct. It is true that even in a case where a partition has taken place and if the share allotted to one of the parties is unconsciously disproportionate it is open to the court in a given case to reopen partition but in such a case the partition is admitted and is reopened at the instance of the plaintiff. The learned trial court appears to have, in this connection, placed strong reliance upon a decision of the Calcutta High Court in *Jolfa Bibi Vs. Ajaladdin and Others*, .

19. Unfortunately, the learned court below had lost sight of the fact that the plaintiffs in the plaint proceeded on the basis (a) that there had been no partition by metes and bounds, (b) Kalipada father of defendant Nos. 2 to 7 being an influential man got possession of the lands in his name incorrectly recorded in the record of rights, and (c) after the death of Kalipada and Srimati, the defendants are in joint possession. Nowhere in the plaint any whisper has been made by the plaintiffs that there had been a partition and in that partition their predecessors-in-interest have been allotted to any share which is unconsciously disproportionate. As stated therein before, the plaintiffs proceeded on the basis that there had been no partition whatsoever. It is also worth noting that the

separate possession of the lands of the parties have not only been mentioned in the revisional survey in respect whereof mala fide has been attributed as against Kalipada but such possession was recorded even in the khatian prepared in the cadestral survey settlement operation. The plaintiffs except their oral statement, have not brought out anything to show that the parties have been possessing the lands jointly. On the other hand, P.W. 3 Kalipada in paragraphs 5 and 7 categorically admitted that the parties have been in separate mess, residence and cultivating possession from the time he attained his Hosh. Thus, the plaintiffs admitted separation of the two families for a long time at least since the cadestral survey settlement operation.

20. True it is as suggested by Mr. N. K. Prasad that there has been no direct evidence of partition and the two defendants who examined themselves as D.Ws. 3 and 4, could not have been the witness of the actual partition. However, in the instant case, not only the parties are in separate possession for a long long time i.e. for a period of seventy years but they are also in separate mess and having separate residences for more than seventy years.

21. The learned trial court itself had come to the conclusion that there has been a partition of the properties inter se amongst the plaintiffs.

22. It is now well settled that although there is a presumption of jointness in a 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. From a perusal of the Khatian, Exhibits C and C/1, it appears that no plot, whatsoever, has been shown to be joint.

23. In *Nageshar Baksh Singh v. Mt. Ganesha*, reported in AIR 1920 PC 46 it has been held as follows (at page 51):

"The broad question of partition of rights or separation of interest is not dealt with in Settlement Records and the inference of such a transaction from such records may be weak or may be strong according to circumstances. Even one or two names may be inserted as representatives of a community of ownership, the details of which need not be minutely recorded.

Records of this character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice and afford temptation to the manipulation of records or even of the materials for the first entry."

24. It is, therefore, clear that although the parties have been recorded jointly in

the khatian, such an entry has to be viewed on the touchstone of the circumstantial evidence and other oral evidences.

25. As noticed hereinbefore, the circumstances of partition are in favour of the defendants. In *Mt. Ramjhari Kuer and Others Vs. Deyanand Singh and Others*, it has been held by the Division Bench of this Court as follows (at page 281):

"It is true that the fact that a member's share in a revenue paying estate has been separately defined in the collectorate land registration records and the record of rights, is by itself not conclusive proof of separation but is only a relevant evidence which may be taken into consideration on the question of separation. But where the extent of such member's interest in the estate is not merely specified in the record of rights but such member is also recorded to be in separate possession over certain plots, the entries in the record of rights are of considerable importance indicating separation in the sense of not only definition of shares but also separate possession. Separate possession over properties is a strong piece of evidence to rebut the ordinary presumption of jointness of Hindu family governed by Mitakshara school of Hindu Law."

To the similar effect, there is a decision of another Division Bench of this Court, reported in *Mt. Ramjhari Kuer and Others Vs. Deyanand Singh and Others*, . In the said decision it was held by this Court as follows (at page 217):--

"In this case, admittedly, there is no formal document of partition. Still, the partition can be proved by the intention of the parties manifested by their subsequent conduct by their sole and independent enjoyment of the properties (See : *Budha Mal v. Bhagwan Das* (ILR 1891 Cal 302 (PC)))."

The said decision is again an authority for the proposition that an unequal division of the lands at the time of partition cannot always be reopened. This aspect of the matter has been considered in the aforementioned decision in the following terms (at page 220) :--

"The plaintiffs have not given evidence to show that the inequality in the division of lands between the ancestors of the plaintiffs and the defendants of the plaintiffs and the defendants was such which may be taken to be shocking to the conscience.

The principle of Hindu law is equality of division, but inequality of division in acreage of the lands does not invariably lead to the conclusion that there was unequal division of the lands at the time of their partition. The case of *Shiromani and Others Vs. Hem Kumar and Others*, is an authority for the proposition that the document of Jethansi or Jeshtbhagam is now obsolete. For the sake of argument, even if I accept that there was an unequal division of the landed properties of mauza Berasi, still to my mind there is no explanation by the plaintiffs as to why it was not objected to by Sonaram, who, according to Mr. Mitra, was present at the time of survey settlement operations. The two sons of Kitu Mahto, Jogu Mahto and Sonaram Mahto, and their descendants could not

have occupied less area of lands in mauza Berasi for the last eighty years, had there been no partition as alleged by the defendants."

In that decision it has further been held that 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 not conclusive proof of partition, but the cumulative effect of such facts may show that there had been partition between the brothers during their lifetime.

26. In the instant case, as noticed hereinbefore, not only from before the cadestral survey settlement operation the parties are in separate possession, separate mess, separate residence and separate cultivating possession of the lands in question. Exhibit A as noticed hereinbefore also shows that there had also been separate dealings of the properties amongst the plaintiffs inter se.

27. From a perusal of the said document it is evident that recital has been made therein that the lands in question were recorded in the record of rights in the names of the vendors in their own share. By reason of the said documents specific properties have been sold. In the said document the plaintiffs have also admitted about an oral partition. In this situation, in my opinion, there is no doubt that the defendants have been able to show that there had been a previous partition amongst the sons of Manohar and if such a previous partition is accepted, in such an event it has also to be held that any acquisitions made thereafter by the parties in their own names would be their self-acquired properties and not their joint family properties.

28. Taking thus into consideration of all the facts and the circumstances of this case, I am of the view that the judgment and decree passed by the learned trial Court cannot be sustained which is accordingly set aside.

29. In the result, this appeal is allowed. It is however, directed that the parties shall bear their own costs throughout.