
(1922) 02 PAT CK 0025
In the Patna High Court

Tara Prasad Jha Baliasey and Others

APPELLANT

Vs

Maya Debya and Others

RESPONDENT

Date of Decision : 10-02-1922

Acts Referred:

Citation : AIR 1922 Patna 30 : 65 Ind. Cas. 687

Hon'ble Judges : Ross, J; Coutts, J

Bench : Division Bench

Judgement

Coutts, J.—This suit was brought for a declaration of the plaintiffs' title by survivorship to certain properties specified in the schedule to the plaint and for possession. The suit has been dismissed and the plaintiffs drive appealed.

2. Both the plaintiffs and defendant are descendants of one Jugal Kishore Jha. Jugal Kishore had two sons. Tribani and Kali Prasad. Tribani married Maya Debi and by her had two daughters, Rama Debi and Bhagbatti Debi, Maya Debi, Rama Debi and Bhagbatti Debi are defendants in the suit. The second son of Jugal Kishore, Kali Prasad, had two sons, Tara Prasad and Baidya Nath Prasad. Baidya Nath died without issue but Tara Prasad had two sons, Som Nath and Tung Nath. Tara, Som Nath and Nung Nath are the plaintiffs. There is some discrepancy in the evidence as to the dates on which Jugal Kishore, Tribani and Kali Prasad died, but in opening his case the learned Vakil for the appellants stated that Jugal Kishore died in 1906, Tribeni in 1911 and Kali Prasad in 1901 and as these dates are not objected to by the other side I will accept them as correct.

3. It appears that about 25 years before the institution of the suit, when Jugal Kishore's wife died, he left his ancestral home and went and lived with a mistress; Tribeni, who was then some 12 or 15 years of age, went to live with his uncle Bipro Charan Duari; and Kali, who was an infant, went with his father and was looked after by the mistress. After living with Bipro Charan for a few years Tribeni went and lived with a married sister, he was married from her house and afterwards went and lived with his father-in-law. Kali Prasad, after being with his father for a few years, went to Bipro Charan's house and lived there until his

marriage when he also went and stayed in his father-in-law's house till his death in 1904, Tribeni after living in his father-in-law's house for some time bought back the ancestral house which had been previously sold in execution of a decree against Jugal Kishore. On the death of Kali Prasad he took his two sons, Tara Prasad and Baidya Nath, who were children, into his house. He kept them there for a short time and then rented a house next door for them. Tara Prasad afterwards purchased this house and there he and his children have remained, Tribeni died in 1911 but before his death he executed a Will by which he bequeathed the properties in suit to his widow and his daughters. After his death they took possession of the properties and the plaintiffs' case is that the family was a joint family, the properties were joint family properties and consequently they were entitled to succeed by survivorship. The defendants, on the other hand, who, as I have already said, are widow and daughters of Tribeni, alleged that there was a disruption of the family after the death of Jugal Kishore's wife when he went to live with his mistress, that the properties in suit were self acquired properties of Tribeni and as such they were entitled to them under the Will.

4. The main questions for consideration in the case were, (1) whether the family was a joint family, and (2) whether the properties in suit were Tribeni's self acquired properties or whether they were joint family properties; and these are the only points on which we have been addressed in this appeal. The learned Subordinate Judge has found against the plaintiffs on both points.

5. The first contention of the learned Vakil for the appellants is, that the learned Subordinate Judge has wrongly placed the onus on the plaintiffs. What he has said is, that "the presumption in Hindu Law of the jointness of a Hindu family must give way to the general principle that the one who makes a claim must prove it in a case like this where prima facie from the History of the family and the facts and circumstances that have been admitted the family was not a joint family." Now, there can be no doubts that there is in the case of a Hindu Mitakshara family a presumption of jointness and that any one who pleads disruption must prove it: and it might seem at first sight as if the learned Subordinate Judge had taken a wrong view of the case, but a consideration of the whole of his judgment makes it clear that this is not so. He has clearly realised that the presumption is in favour of jointness but he finds that the facts of this case show that the family was separate. I do not think, therefore, that the onus has been wrongly placed on the plaintiffs but the question remains whether separation has been proved. Now, at the outset it must be admitted that the defendants have not been able to establish exactly when disruption took place. In the plaint they put it at the time of the death of Jugal Kishore's wife when he went off to live with his mistress, but some of the witnesses have said that the separation took place at a later date. Very great stress has been laid on this point by the learned Vakil for the appellants and it has been urged that this of itself is sufficient to destroy the defendants' case. It is certainly a circumstance which must be taken into consideration, but in my opinion this fact is of itself not

sufficient to show that the defendants' allegation that the family was separate is a false one. It may be and it often is difficult to say exactly at what point of time a family became separate and if the contention were correct it would be almost impossible to establish separation. We must examine the circumstances of the family. The circumstances from which separation may be deduced have been very clearly stated by Trevelyan, in his Hindu Law, at page 349--"Separation may be proved by acts or declarations which show an agreement and intention to separate, such as cesses of commensality, separate occupation of portions of the property, separate enjoyment of distinct shares of the profits, separate definement of shares in the Revenue Records, agreement to divide the proceeds in definite shares or other acts which are inconsistent with the family remaining joint, such as separate transactions between themselves or with others. Mere cesser of commensality or of co-worship, division of the income, definement of shares in the revenue or land registration records, separate occupation of portions of the property or separate collections of rents, or separate dealings, are not conclusive, unless there is an intention to separate. They are all evidence of separation, and may lead to the inference that there was a separation," Applying these principles to the present case we find, in the first place, that since the death of Jugal Kishore's wife and since he went to live with his mistress there has been no commensality in the family. Jugal Kishore lived with his mistress. Tribeni lived with his uncle, afterwards he lived in his father-in-law's house and subsequently by himself in the ancestral house after he had purchased it. Kali Prasad, when his mother died, was an infant, he lived for a short time with Jugal Kishore's mistress, afterwards he went to live with his uncle and after his marriage he lived in his father in law's house until his death. It is true that Tribeni, after the death of Kali Prasad, took his children, Tara Prasad and Baidaya Nath, into his own house and subsequently rented another house close by for them, he also appears to have invested them with the sacred thread and to have arranged their marriages, but this is not inconsistent with his position as a separate member, *Deoki Singh v. Musummat Anupa* 10 C.W.N. 338 : 1 M.L.T. 96 : 16 M.L.J. 109 (P.C.), and it is clear that there has been no commensality in the family since the death of Jugal Kishore's wife, nor does there appear to have been community of worship.

6. I now come to dealings by Tribeni and Tara Prasad: if the family had been a joint family Jugal Kishore would ordinarily have been the karta until his death. Now, as I have said, he died in 1906, yet in 1895 Tribeni purchased the ancestral house (Exhibit A): in 1896 he mortgaged a brick kiln which he describes as "my brick kiln" to one Udai Chand (Exhibit D); in 1899 he borrowed Rs. 50 from Parbati Charan Jha Duari for household expenses and the cost of building a pacca house (Exhibit F) and in 1900 he took the lease of a house from one Kalanand Barbai (Exhibit 4). All these transactions took place before the death of Jugal Kishore and they appear to indicate clearly that Jugal Kishore was not the karta of the family and, if this be so, they are very strong indications that the family was not a joint family. Subsequent to Jugal Kishore's death there are a number

of transactions of Tribeni separately; namely, purchase of part of property No. 3 in the schedule to the plaint, in 1905 (Exhibit K); purchase of a portion of property No. 3 in 1905 (Exhibit C); purchase of lakheraj property in execution of a money-decree in 1908 (Exhibit S); purchase of property in execution of another money-decree in 1909 (Exhibit R) and, finally, the Will executed by Tribeni by virtue of which the defendants have taken possession of the properties. All these are, in my opinion, strong evidence that there had been separation and in support of this view I may refer to the case of *Girja Bai v. Sadashiv Dhundiraj* 37 Ind. Cas. 321: 43 C. 1031: 20 C.W.N. 1085 : 14 A.L.J. 822 : 20 M.L.T. 78 : 12 N.L.R. 113 : (1916) 2 M.W.N. 65 : 18 Bom. L.R. 621 : 4 L.W. 114 : Cri.L.J. 207 : 31 M.L.J. 455 : 43 I.A. 151 (P.C.) where their Lordships of the Privy Council remarked: "The intention to separate may be evinced in different ways, either by explicit declaration or by conduct. If it is an inference derivable from conduct it will be for the Court to determine whether it was unequivocal and explicit. In *Joy Narain Giri Girish Chunder Myti* their Lordships regarded the conduct of one of the co-sharers who constituted the joint family "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separately from his cousin," and treated "the fact of his borrowing money for his maintenance, as well as making a Will, as indicating, at all events, that he himself considered that a separation had taken place." The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party." In addition to the separate transactions of Tribeni, we have also separate transactions by Tara Prasad. In 1906 he purchased a house, the House in which he subsequently lived. This would appear from the evidence of the plaintiffs' own witness, Bipro Charan Duari, who says: "Tara Prasad is in a separate house purchased separately;" and also from the evidence of the defendants' witness, No. 1 Sambhu Charan Jha, who says: "Tara Prasad purchased a house with his own money." Again, in 1911, a mortgage was executed in favour of Tara Prasad (Exhibit 10). It is clear then that Tara Prasad also had separate transactions. Another piece of evidence which tends to show separation is the fact that different members of the family are shown in the Revenue Records as holding separate shares (Exhibit B). This Exhibit is a certified copy of a Khewat which shows "Tribeni Panda, son of Jugal Kishore Panda, 1 share. Tara Panda and Bhayya Ram Panda, sons of Kahka Panda, 1 share in equal shares."

7. I now come to the matter of the division of the income, There was possibly a very small income from certain ancestral property but this is practically negligible. Jugal Kishore's income was derived from Jajmani. He was a priest and his income was from fees paid to him by Jajmans. It is contended that this was ancestral property and that it has never been divided. Now, the facts with regard to these Jajmans appear to be that Jugal Kishore and after him Tribeni attempted to keep all the fees paid by the Jajmans, but there is evidence, and it is not disputed, that on two occasions at least there was a dispute as to the division of

these fees, which was settled by a Panchayat and the fees were divided. It is strongly urged that this indicates that there was no separation. I am unable to accept the contention. It appears to me rather to indicate that the family was separate and that the different members were quarrelling as to the division of these fees; but, apart from this, the fees were not, in my opinion, ancestral property. In Gour's Hindu Code, at page 472, in paragraph 1054, he says: "Both the Mitakshara and the Dayabhaga devote a chapter each to the subject of self acquisition. Their substance is to exempt all acquisitions made without detriment to the joint estate. The rest is merely illustrative and most of the illustrations refer to occupations now no longer pursued. Thus the Dayabhaga gives the following list as constituting the gains of science:"

(3) Fee for officiating as a priest.

8. It may be that the Jajmans were ancestral in the sense that Jugal Kishore, and his father before him, had acted as priests for the Jajmans and their fathers, but the fees were not joint family property, they were the self-acquisition of the member of the family to whom they were paid.

9. We have, thus, in the present case no commensality, no co worship, separate transactions and separate definement of shares in Revenue Records and in my opinion the circumstances are such as to lead to the irresistible conclusion that the family was separate although there had been no regular partition.

10. I shall now deal with the different portions of property claimed in the plaint. The first of these is the ancestral house. Admittedly, this was purchased by Tribeni. It was, as I have already said, purchased in 1893 when Jugal Kishore was still alive, there was no joint fund out of which it could have been purchased and it was clearly Tribeni's self acquisition. The next item is a pucca house in the town of Deoghar Jhasa Gari. This was apparently ancestral property and all that Tribeni was entitled to was his share. The plaintiffs are, therefore, entitled to a share of this property. The next items (3) and (4) are on the same footing; both are lakheraj properties in the town of Deoghar purchased by Tribeni. Here, again, there was no joint fund out of which they could have been purchased and the circumstances indicate clearly that the defendants' case, that these were Tribeni's self acquisition, is true. The next item is a 10-pies share in Taluk Marwa. This was admittedly ancestral property and as such Tribeni could only be entitled to his own share. The next items of property are the Jajmans and with regard to these I have already said that, in my opinion, the fees are self acquired property. The plaintiffs are, therefore, not entitled to any share in these. The next item is a milkiat in Arrah, this is ancestral property and stands on the same footing as the Marwa property, The last item is a mango garden in village Ramgarh, Taluk Rohini, which was purchased by Tribeni himself and, for the reasons I have already given in respect of the other properties purchased by him, is his self-acquired property.

11. In the result, then, I see no reason to interfere with the decision of the

learned Subordinate Judge except in regard to Jhasa Gari, Marwa and Arrah properties in which the plaintiffs are entitled to a declaration of their right to their own share. They can, however, get no separate possession because there has been no prayer for partition. The respondents are entitled to their costs of this appeal.

Ross, J.

12. I agree.