

Singhasami Devi and ors Vs. Rameshwar Pd.and ors

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Court : Patna

Decided On : Aug-29-2013

Appellant : Singhasami Devi and ors

Respondent : Rameshwar Pd.and ors

Judgement :

IN THE HIGH COURT OF JUDICATURE AT PATNA Second Appeal No.82 of 1990

===== 1.
Singhasami Devi, Wife of Algu Sharma.

2. Neela Devi, Daughter of Algu Sharma, Wife of Vishwakarma Sharma.

3. Paras Nath Sharma.

4. Sheoji Sharma.

5. Shankar Sharma. All Residents of village-Baghara, P.S.-Siwan, District-Siwan.
.... Appellants. Versus 1. Rameshwar Prasad, Son of Sheo Prasad, Resident of
- Siwan Town, Pergana Bara, P.O.- Siwan, District-Siwan.

2. Rama Nand Tiwari, Son of Inder Tiwari, Resident of village-Sipaha, P.S.-
Gopalganj, District- Gopalganj.

3. Saida Khatoon, Wife of Mansoor Alam, Resident of village- Mohidinpur, P.S.- Siwan, Muffasil, District-Siwan ---- Respondents-Defendants.

4. Badamo Devi, Wife of Late Nand Keshwar Sharma.

5. Madan Sharma.

6. Bijay Sharma. Both Sons of Late Nand Keshwar Sharma.

7. Purnima Devi, Daughter of Late Nand Keshwar Sharma. All are residents of village-Baghra, P.O.-Jiyay, District-Siwan. Defendants-Appellants-Respondents.

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Appearance : For the Appellants/s : Mr. Shashi Shekhar Dwivedi, Sr.Adv. Mr. Ranjan Kumar Dubey, Adv. For the Respondent/s : Mr. Binod Kumar Singh, Adv. Mr. Raushan Prakash, Adv.

=====
CORAM: HONOURABLE MR. JUSTICE V. NATH CAV

JUDGMENT

Date:

29. -08-2013 V. Nath, J.

The plaintiffs are the appellants in this appeal against the judgment and decree dated 19.12.1989. passed by the Additional District Judge VI, Siwan in T.A.No.75/87 whereby the decree for partition in favour of the plaintiffs in Title Partition Suit No.190/1973 by Sub Judge IV, Siwan has been reversed.

2. The plaintiffs and defendants admittedly belong to one family Patna High Court SA No.82 of 1990 dt.29-08-2013 2 and the genealogy has not been disputed. From the genealogy mentioned in Paragraph Nos. 1 and 2 of the plaint, it is clear that Bujhawan Sharma had two sons namely Potan Sharma and Chedhari Sharma. The plaintiffs belong to the branch of Chedhari Sharma and the defendants belong to the branch of Potan Sharma.

3. The plaintiffs filed the suit for partition of their half share in the suit properties mentioned in the Schedule I to VI of the plaint claiming unity of title and

possession over the same with the defendants. It has been stated that some time before the filing of the suit, the parties have separated in mess and business. For the properties mentioned in Schedule V of the plaint it is case of the plaintiffs that earlier they were the joint family properties which had been auction sold in execution of a money decree but later on purchased by the defendant no.1 as Karkoon (Karta) of the joint family of the plaintiff and defendants, in the name of his wife (defendant no.4) from the auction purchaser. The plaintiffs subsequently also added Schedule VI properties in the plaint, by amendment, as suit properties and although no averment in the plaint with regard to this property has been made but in the petition for amendment it was alleged that this was also part of the joint family property which had been earlier auction sold in execution of money decree and purchased by the defendant no.1 as Karta of the joint family in the name of his son who is defendant no.2. Patna High Court SA No.82 of 1990 dt.29-08-201

4. The defendants filed written statement contesting the claim of the plaintiffs. It has been asserted by the defendants that the suit properties are not the joint family properties, and the plaintiff no.1 has been separate from the defendants since last 23-24 years. It has been claimed that the properties mentioned in Schedule V is the separate and self acquired property of the defendant no.4 which she acquired from her own money. It has further been also stated that the properties in Schedule VI of the plaint has been purchased from the auction purchaser Ramanand Tiwary by the registered sale deed in the name of defendant no.2 and the said properties are the exclusive properties of the defendants.

5. After considering the pleadings and evidence of the parties, the trial court decreed the suit holding that there was unity of title and jointness of possession between the parties with regard to the suit properties and the plaintiffs were entitled to a decree for partition of their half share in the suit properties. In appeal, however, the appellate court, on reappraisal of pleadings and evidence of the parties, reversed the finding of the trial court in part, holding that the properties mentioned in Schedule V,VI and R.S.Plot No.1553 of Schedule IV were not joint family properties and further held that only the properties mentioned in Schedule II & IV(except plot no.1553), and R.S.Plot No.1785 out of Schedule I properties were joint family Patna High Court SA No.82 of 1990 dt.29-08-2013 4 properties over

which the plaintiff and defendants have got half share each. Accordingly, the appeal was allowed in part by the impugned judgment and decree.

6. By order dated 07.08.1990 this appeal was admitted for hearing and in the said order, it was mentioned that the the substantial question of law involved in this appeal would be as contained under Item not I under the heading the substantial question of law as mentioned in the memo of appeal. Of course the appellants shall be at liberty to raise other points also as mentioned in this memo of appeal. It transpires from the memo of appeal that under Item No.1 under the heading of the substantial question of law in the memo of appeal, the following question has been framed: Whether the judgment and decree of the appellate court are without jurisdiction inasmuch as the value of the appeal being Rs. 11,000/- and appeal lay before the Honble High Court.

7. Mr S.S.Dwivedi, the learned senior counsel appearing for the appellants has, at the outset, submitted that this appeal is being confined to the relief for partition only with regard to the properties mentioned in the Schedule V & VI of the plaint. Mr. Binod Kumar Singh, the learned counsel appearing on behalf of respondent no.1 in this appeal has submitted that the respondent no.1 is not concerned with the properties mentioned in Schedule V & VI of the plaint and Patna High Court SA No.82 of 1990 dt.29-08-2013 5 therefore he has no submission to make on the merits of the appeal.

8. No body has appeared on behalf of the other respondents when this appeal has been taken up for hearing.

9. Mr Dwivedi, the learned senior counsel for the appellants, has further submitted that the appellants be given permission to raise additional substantial questions of law in this appeal as the learned appellate court below has made out a case of separation between the parties in the year 1953 on the basis of assumption and contrary to the pleadings and has based its findings on the said assumption. It has been urged that at the time of admission of this appeal, the liberty has been granted by this court to the appellants to raise other points also and as the proposed questions go to the root of the matter, the additional substantial questions of law as proposed be framed and this appeal be heard on the

additional substantial questions of law alone. It has also been stated that the substantial question of law as framed, in the facts and circumstances of the case, is not sufficient to comprehend the core questions arising in this appeal.

10. After considering the facts and submissions it appears that the issue of the unity of title and jointness of possession between the parties with regard to the suit properties is the singular crucial issue between the parties, and therefore, the additional substantial questions of law, as proposed on behalf of the appellants, arise for consideration in this appeal. As such, the Patna High Court SA No.82 of 1990 dt.29-08-2013 6 following additional substantial questions of law are framed for consideration in this appeal: Whether the lower appellate court was justified in assuming and making out a case of separation in 1953 contrary to pleadings and basing all his findings on that very assumption? And Whether the appellate court below was legally justified in reversing the finding of the trial court, without assigning reasons for the same and misreading the evidence particularly Ext.F-1.

11. Criticizing the impugned judgment, Mr Dwivedi has submitted that there is no pleading that there had been complete partition between the parties in the year 1953, and it is well settled that the separation in status between the members of a joint family cannot lead to the inference of complete partition. It has been urged that there is absolutely no evidence on record to suggest that there had been partition between the parties and the joint family status stood disrupted. It has been contended that the reliance on Ext. F-1, in fact, has been, wrongly placed by the appellate court below as the basis for deducing partition of the properties between the parties. It has been canvassed that there is a strong presumption of jointness in a Hindu family and the direct substantial evidence is required to rebut the said Patna High Court SA No.82 of 1990 dt.29-08-2013 7 presumption. It has been further submitted that the defendant no.4 who is wife of the defendant no.1 had no separate source of income and similarly the defendant no.2 who is son of defendant no.1 had also no separate source of income to acquire the properties mentioned in the Schedule V & VI of the plaint by purchase, and the dishonest intention of the defendant no.1, who was acting as Karkoon(Karta) of the family as the plaintiff no.1 remained out in Calcutta in connection with his business, is more than apparent when those properties had been acquired in their names and not in

the names of the plaintiff no.1 and defendant no.1. Elaborating his submissions, the learned counsel has pointed out that the properties mentioned in Schedule I to IV of the plaint formed sufficient nucleus out of the income of which the properties in Schedule V & VI could be deemed to have been acquired but the learned court below has also ignored this aspect and has wrongly come to the conclusion that there had been separation in between the parties in the year 1953 itself and the acquisition of the Schedule V & VI properties later on by the sale deeds were the separate self acquired properties of the defendant nos. 4 and 2 respectively. The learned senior counsel has emphasized that in absence of substantial pleading and proof of partition in the year 1953, the finding by the learned appellate court below of partition in the year 1953 is vitiated by the element of perversity. Patna High Court SA No.82 of 1990 dt.29-08-201

12. The admitted facts are that the plaintiff no.1 and defendant no.1 are descendants of a common ancestor. The suit properties have been described in the plaint in six different schedules. It has been averred that the properties mentioned in Schedule I are the ancestral properties of the parties. With regard to the properties in Schedule II, it has been mentioned that these are the ancestral house and Sahan of the parties. The Schedule III properties have been described as the ancestral purchased lands of the parties, and the Schedule IV properties have been described as the properties purchased by the plaintiff no.1 and the defendant no.1 jointly. Further from the perusal of the properties described in Schedule V of the plaint, it is apparent that all the properties mentioned in Schedule V are the properties mentioned in Schedule I and Schedule III of the plaint, and to be more precise, the Schedule V includes the entire properties of Schedule III and also the entire properties of Schedule I except Plot No.1785 of the said Schedule. The properties described in Schedule VI of the plaint however do not find mention in Schedule I to IV and there is also no averment in the plaint with regard to those properties although the same have been added subsequently by amendment in the category of the suit properties. The plaintiffs claim for partition of the suit properties has been decreed by both the courts below with regard to R.S.Plot No.1785 of Schedule I, the entire property of Schedule II and Patna High Court SA No.82 of 1990 dt.29-08-2013 9 the entire property of schedule IV except Plot No.1553 and the claim for partition of the properties of

Schedule V and Schedule VI has been refused holding the same to be the exclusive properties of defendant no.4 and defendant no.2 respectively.

13. It is the case of the plaintiffs that the properties mentioned in Schedule V had earlier been auction sold in execution of money decree and purchased by Ramjash Tiwary but those properties were later on purchased back by the plaintiff no.1 and defendant no.1 from Ramjash Tiwary. The plaintiffs have, however, alleged that although the said properties had been purchased back, out of the joint family fund and also from the fund provided by the plaintiff no.1 but the defendant no.1 has deceitfully obtained the sale deed in the name of his wife (defendant no.4). There is no averment in the plaint for the properties mentioned in Schedule VI. The plaintiffs have stated that there had been separation in mess and business in the family some time before the filing of the suit but there has been no partition of the family properties between them. The contesting defendants have denied the assertion of the plaintiffs regarding jointness and have stated that plaintiff no.1 had been separate from the defendant no.1 since 23-24 years, and thereafter, there had been no concern between them. It has been further asserted that the properties described in Schedule V & Schedule VI of the plaint are the self acquired properties of the Patna High Court SA No.82 of 1990 dt.29-08-2013 10 defendant no.4, defendant no.2 which they have acquired out of their own income.

14. From the rival pleadings, it is thus apparent that both the plaintiffs and the defendants have accepted separation in between them with only difference that the plaintiffs have claimed separation in mess and business some time before the filing of the suit whereas the defendants have stated that there had been separation 23-24 years back. There is no direct documentary evidence of partition between the parties nor a definite date and year of partition has been mentioned by the either party. However, the defendants who have claimed partition 23-24 years back brought on record documentary evidence to establish their case of partition. The learned appellate court below while screening those documentary evidence has put them in two categories i.e. the documents executed and registered prior to 1952 and those executed and registered after 1952. The documents in the first category i.e. the documents prior to 1952 have been found to have been executed by the plaintiff no.1 and defendant no.1 jointly. These

documents are the three sale deeds Ext.A-1/4 dated 30.03.1946, Ext.1- 1/7 dated 29.06.1942 and Ext.6 dated 27.06.1940. In the second category of the documents i.e. documents executed after the year 1952 are the documents executed exclusively by the plaintiff no.1 and defendant no.1 or stand exclusively in their favour. These documents Patna High Court SA No.82 of 1990 dt.29-08-2013 11 are Ext.A-1/5 which is the sale deed dated 11.05.1953 in the exclusive name of the defendant no.1 and significantly the properties mentioned in this sale deed have not been included as the suit properties by the plaintiffs; the mortgage deed dated 25.07.1953 (Ext.E-1) which has been executed by the plaintiff no.1 alone with respect to the properties which he claimed to be his own properties. Similarly Ext.4 dated 16.03.1955 is another mortgage executed exclusively by the plaintiff no.1. The appellate court below has found that these two mortgage deeds were with respect to the joint family properties whereby the plaintiff no.1 had mortgaged his half share in those properties. Ext. F-1 is another document filed by the defendants to establish their case of separation. This document has been executed on 09.11.1952 by the plaintiff no.1 and the defendant no.1 and in the recitals of this document it had been stated that there had been difference persisting between the parties since long back and therefore they had decided to partition their properties situated in the district of Saran and one shop in Bettiah through Panches whose names were mentioned in the said document. It appears from the recitals that this document is in the nature of reference by the parties of their dispute to the Panches. It has been strongly submitted by the Learned Senior Counsel for the appellants that this document has been wrongly relied upon by the appellate court below to infer partition whereas in fact Patna High Court SA No.82 of 1990 dt.29-08-2013 12 there is no evidence that this document was acted upon and the partition had been effected on the basis of this document. However, it appears from the impugned judgment of the appellate court below that this document has been relied for the collateral purpose of gathering the intention of the parties to separate and not as a document of partition. In view of the fact that the execution of this document by the plaintiff no.1 was not denied, there was no impediment before the appellate court below in looking into the contents of this document as corroborative evidence indicating separate status of the plaintiff no.1 and the defendant no.1. The legal nodous in this regard, sought to be raised on

behalf of the appellants, is also not supported by the dictum laid down by the Apex Court in the case of *Puttarangamma Vs M.S.Ranganna* AIR 196.SC 101.as follows: It is now a settled doctrine of Hindu Law that a member of a joint Hindu family can bring about his separation in status by a definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. It is not necessary that there should be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not Patna High Court SA No.82 of 1990 dt.29-08-2013 13 Their Lordships have further observed: The correct legal position, therefore, is that in a case of a joint Hindu family subject to Mitakshra law, severance of status is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold the share separately. It is, however, necessary that the member of the joint Hindu family seeking to separate himself must make known his intention to other members of the family from whom he seeks to separate. The process of communication may, however, vary in the circumstances of each particular case In a later decision in the case of *Kallyani Vs Narayanan*, AIR 198.SC 1173.a three judge bench of the Apex Court has reiterated the same principle as follows:- Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint family status and a coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal Patna High Court SA No.82 of 1990 dt.29-08-2013 14 intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant- in-common A disruption of joint family status by definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject matter. This may at any time, be claimed by virtue of the separate right

15. The recitals in the document (Ext.F/1) clearly show that the parties thereto had accepted long continuing difference between them and had therefore expressed their intention to separate and hold their shares in the joint properties in severalty. They had further agreed to get the actual partition done through the Panches. The action taken by the Panches thereafter becomes immaterial as the disruption of the joint status had clearly taken place. I, therefore, do not find any illegality when the appellate court has put reliance on this document for the limited purpose to gather the intention and the status of the parties and used it as a corroborative piece of evidence.

16. On analysis of the documentary evidence of the parties, Patna High Court SA No.82 of 1990 dt.29-08-2013 15 the appellate court has found the emerging factual scenario that the plaintiff no.1 and defendant no.1 were dealing with the properties jointly prior to the year 1952 but thereafter they started their separate dealings with the properties. The non-inclusion of the properties acquired by the defendant no.1 after 1952 as suit properties also pronouncedly reveals the separation in status between the plaintiff no.1 and defendant no.1. The oral evidence of the parties have also been evaluated by the appellate court below and thereafter the finding has been recorded that the parties separated some time before 1953. At this juncture it would be pertinent to take into notice the principle laid down by a Division Bench of this Court in the case of Arjun Mahto Vs Monda Mahatain AIR 197.Patna 215 where their Lordships have laid down that in absence of a formal document of partition, the same can be proved by the intention of the parties manifested by their subsequent conduct by their sole and independent enjoyment of the properties. It has been laid down as follows:- 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, no doubt, not conclusive but the cumulative effect of such facts may show that there had been a partition Patna High Court SA No.82 of 1990 dt.29-08-2013 16 between the brothers during their lifetime

17. Tested on the anvil of the aforesaid principles and in the backdrop of the discussion of oral and documentary evidence by the appellate court below, I find no substance in the submission on behalf of the appellants that the appellate court

below has recorded the finding of partition on assumptions alone. The inference drawn by the appellate court below on the basis of the oral and documentary evidence, as discussed by it, is not unreasonable or perverse as propounded on behalf of the appellants.

18. Admittedly, the sale deeds(Ext.A-1/1 and Ext.A-1/2) for the properties mentioned in Schedule V are in the name of defendant no.4 and the sale deed (Ext.A-1) for the properties mentioned in the Schedule VI is in the name of defendant no.2 and the legal presumption would be that those properties are their exclusive properties. The plaintiffs, in order to rebut the said presumption, were required to plead and prove that those properties were acquired out of joint family fund or at least the joint family possessed substantial properties forming the nucleus, at the time when those properties had been acquired, generating sufficient income and savings for the acquisition of those properties. There is no such pleading by the plaintiffs and the only relevant pleading in this regard is that Schedule V properties were acquired with the aid of the money sent by the Patna High Court SA No.82 of 1990 dt.29-08-2013 17 plaintiff no.1 from Calcutta. There is even no such averment with regard to Schedule VI properties. The appellate court has found that there is no evidence by the plaintiffs to establish the fact that the Schedule V properties were acquired with the aid of the earnings of the plaintiff no.1, and on analysis of the evidence it has been found that the plaintiffs have failed to establish that the plaintiff no.1 ever gave his earnings to the defendant no.1 for acquisition of the Schedule V properties. It has also been found by the appellate court below that the most of the family properties either had been auction sold or were under mortgages. This fact is also apparent when the ancestral joint family properties mentioned in Schedule I and Schedule III of the plaint have been included in the Schedule V which admittedly are the properties earlier auction sold in execution of money decree and purchased by Ramjas Tiwary. On behalf of the appellants no pleading or evidence could be pointed out to establish the existence of sufficient nucleus in the family for the acquisition of the properties in Schedule V and Schedule VI. As such, I do not find that the findings by the appellate court that the properties mentioned in Schedule V and Schedule VI of the plaint are the self-acquired properties of the defendant nos.4 and 2 respectively, is in any manner vulnerable.

19. It is well settled by now that the findings of fact by the appellate court below can be interfered in second appeal only when the Patna High Court SA No.82 of 1990 dt.29-08-2013 18 same are established to be perverse in any manner. There is no scope for interference with the findings of fact in the second appellate jurisdiction solely because another view on the basis of appreciation of evidence may also possible. It would be fruitful to recapitulate the observations made by the Apex Court in the case of Gurdev Vs. kaki AIR 200.SC 197.as follows:- The language used in the amended section specifically incorporates the words as substantial question of law which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become third trial on facts or one more dice in the gamble

20. In view of the aforesaid premised reasons and discussions, the additional substantial questions of law are answered against the appellants. This second appeal is, accordingly, dismissed. The impugned judgment and decree of the appellate court below is affirmed. (V. Nath, J) Nitesh/-

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