

Harendra Rai and ors. Vs. Chandrawati Devi and ors.

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Court : Patna

Decided On : Nov-17-2006

Judge : Rekha Kumari, J.

Appellant : Harendra Rai and ors.

Respondent : Chandrawati Devi and ors.

Disposition : Appeal dismissed

Judgement :

Rekha Kumari, J.

1. This is an appeal against the judgment and decree dated 12.12.1975 passed by 3rd Addl. Sub Judge, Arrah in T.S.No. 44 of 1968/163 of 1974 whereunder he has dismissed the suit on contest with costs to the contesting defendants. The original appellant/plaintiff Shree Rai had filed the suit against the defendant 1st and 2nd sets and against the proforma defendant No. 11 Harinandan Rai for declaration of his title and recovery of possession as well as for partition of the suit property mentioned in Schedule I of the plaint to the extent of half share in the property, measuring 56 acres consisting of several plots of Khata Nos. 10. 284. 347, 194 of Mauza Situhari, P.S. Sahar, District Arrah (Bhojpur). There was also prayer for declaration that the deed of gift dated 20.12.1955, which is described by the defendants 1st set as a deed of surrender, executed by Rajbanshi Kuer in their favour, who are sons, daughters etc. of Bhagrasna and Phul Kuer with respect to

the suit property, is not binding on him and that it is not a valid document.

2. The case of the appellant-plaintiff in the plaint is that one Nand Rai was the common ancestor of the appellant-plaintiff and defendant No. 11 Harinandan Rai. Nand Rai had four sons- Madhu Rai, Ram Sewak Rai, Prem Rai and Basawan Rai. Basawan Rai had two sons- Ritu Rai and Bakhori Rai. Ritu Rai had three sons- Sheodayal Rai, Mahabal Rai and Bishun Dayal Rai and among them Mahabal Rai died issueless. Sheodayal Rai had three sons- Ayodhya Rai, Pragash Rai and Dwarika Rai. Pragash Rai and Dwarika Rai died issueless. Ayodhya Rai had two sons- Baghamber Rai and Swamber Rai. Swamber Rai died issueless. Baghamber Rai had two sons Jageshwar Rai. the father of the original appellant-plaintiff Shree Rai, and Bisheshwar Rai, the father of the original defendant No. 11 Harinandan Rai. Jageshwar Rai had four sons Satyanarain Rai, Ramdeo Rai, Ramjanam Rai and Shree Rai. The branch of Satyanarain Rai became extinct. The sons and the grand sons of Ramdo Rai are joint with the appellant -plaintiff and the sons of Ramjanam Rai are separate from him.

3. It is further said that Bishundayal Rai (son of Ritu Rai) had three sons- Bhikhari Rai, Raj Kumar Raj and Pran Rai, among whom Bhikhari Rai and Pran Rai died issueless. Raj Kumar Rai had two sons Sahdeo Rai and Mahadeo Rai. Mostt. Bhikhmania was the widow of Raj Kumar Rai. Mahadeo Rai had two sons- Jainarain Rai and Raghunath Rai. Jainarain Rai died leaving behind his widow Mostt. Rajbanshi Kuer and only son Ram Chandra Rai. Raghunath Rai had only two daughters- Bhagrashna Kuer and Phul Kuer. Sahdeo Rai had two wives and he had a son Mahabir Rai through the first wife and Mahabir Rai died issueless. Rajwanti Kuer was the second wife of Mahabir Rai.

4. It is further said that Bakhori Rai (brother of Ritu Rai) had three sons- Jaipal Rai, Mohit Rai and Mahipat Rai. Among them Mohit Rai and Mahipat Rai died issueless. Jaipal Rai had two sons Tengari Rai and Ramyad Rai, but their branches also became extinct.

5. It is further said that one Makuni Rai was the last male holder of the branch of Prem Rai, Son of Nand Rai. The widow Yasoda Kuer of Prem Rai also died issueless and hence the branch of Prem Rai also became extinct. Then, so far as

the branch of Ram Sewak Rai, another son of Nand Rai, Sukhdeo Rai and Rambaran Rai were sons of Ram Sewak Rai. Similarly, Parsuram Rai, Achhaibar Rai, Sheo Saran Rai and Achyuta Rai were in the branch of Madhu Rai, son of Nand Rai. The above persons in the branch of Ram Sewak Rai and Madhu Rai were alive at the time of old cadestral survey but subsequently the branches of Ram Sewak Rai and Madhu Rai became extinct.

6. It is further alleged that although partition had taken place among the four sons of Nand Rai prior to old cadestral survey, two Mahua trees standing on plot No. 175 of Khata No. 120 were joint among them and recorded as such in that survey.

7. The further case of the appellant-plaintiff is that after the death of three sons of Bishundayal Rai, two sons of Raj Kumar Rai, (son of Bishundayal Rai) namely, Sahdeo Rai and Mahadeo Rai also become separate and the entire property of Bishundayal Rai acquired by them were divided equally between them, but there was no partition by metes and bounds. Mahabir Rai the only son of Sahdeo Rai and the first wife of Sahdeo Rai died during life time of Sahdeo Rai. Sahdeo Rai thus was the last male holder of his branch and he died living behind his second wife Rajwanti Kuer as his heir. Rajwanti Kuer came in possession of the entire property left by Sahdeo Rai. As Rajwanti Kuer had no issue, she was living with the members of the branch of Mahadeo Rai and her cultivation was also joint with them. Raghunath Rai, Son of Mahadeo Rai died in jointness with his brother Jainarain Rai and after his death Jai Narain also died. After the death of Jainarain Rai, his only son Ramchandra Rai also died. Thus, after the death of Ramchandra Rai his mother Rajbanshi Kuer came in possession of the entire property left by Mahadeo Rai as a limited owner.

8. It is then alleged that about 26 years prior to institution of the suit, there were some differences between Rajwanti Kuer and Rajbanshi Kuer as Rajbanshi Kuer started denying right, title and interest of Rajwanti Kuer with respect to the property of her husband Sahdeo Rai. There was Panchayati and Panches Rave half share of the property of the branch of Bishundayal Rai to Rajwanti Kuer in lieu of maintenance although no partition was affected by metes and bounds. Both ladies started cultivating their lands separately. Rajwanti Kuer was living with the

plaintiff in her old age. She died on 22.11.1967.

9. The case of the appellant-plaintiff is that after the death of Rajbanti Kuer he came in possession of the property of Rajbanti Kuer as her legal heir. It is also said that Rajbanshi Kuer died in 1961 and the defendant respondent 1st set were coming in possession of the property of the share of Rajbanshi Kuer. As Rajwanti Kuer died after passing of the Hindu Succession Act 1956, she had absolute right over the property held by her at the time of her death and the appellant has got title over the entire property left by Rajwanti Kuer as her legal heir and therefore, he has got half share in the suit property and the respondents 1st set have got the remaining half. It is also said that after the death of Rajwanti Kuer there was difference between the plaintiff-appellant and Harinandan Rai, defendant No. 11 with respect to her property and there was family arrangement between them according to which defendant No. 11 agreed not to claim any interest in the property of Mostt. Rajwanti Kuer. Thus, by virtue of family arrangement the appellant-plaintiff became the sole owner of the property of Rajwanti Kuer.

10. Defendants No. 1 to 3. 8 and 9 (respondents 1st set) contested the suit by filing a joint written statement. All possible legal objections were taken by them in their written statement. Their case is that the geneology given by the appellant-plaintiff is not correct, Sheo Dayal Rai was not the son of Ritu Rai and he had no concern with Mahabal Rai and Bishundayal Rai. According to them, Sheo Dayal Rai was the son of Manraj Rai and grand son of Madhu Rai. Ritu Rai and Bakhori Rai were full brothers who were sons of one Jobraj Rai and not of Basawan Rai as alleged in the plaint. There was no one named Basawan Rai in any of the branches of Nand Raj. The said Bakhori Rai had also only two sons Mahipat Rai and Mohit Rai. Bakhori Rai had no son named Jaipal Rai. Jaipal Rai is the son of Mahipat Rai, who died issueless and So far they knew, Tengari Rai was the son of Mohit Rai, who also died issueless. Tengari Rai and Ramyad Rai were not the sons of Jaipal Rai. Nand Rai was also not the common ancestor of the plaintiff-appellant, Mahabal Rai, Bishundayal Rai and Harinandan Rai (defendant No. 11). These respondents have denied that Madhu Rai, Ram Sewak Rai, Prem Rai and Basawan Rai all were sons of Nand Rai and their case is that the plaintiff-appellant has no concern with the family of Bishundayal Rai or of Mahabal Rai or of Bakhori

Rai. The case of these respondents, hence, is that there is no unity of title and possession between them and the appellant with respect to the suit property.

11. Their case further is that Bhagrasna Kuer and Phul Kuer were daughters of Jainarain Rai and not of Raghunath Rai as alleged. Ram Chandra Rai was not the son of Jainarain Rai. Jainarain Rai had only two daughters. They have denied the title of Raiwanti Kuer in respect of the property of the branch of Bishundayal Rai or Raj Kumar Rai. It is further said that the plaintiff-appellant is not the next reversioner of Bishundayal Rai or Mahadeo Rai or Jainarain Rai nor ever came in possession of the suit property. He has no concern with the branch of Bishundaval Rai. These respondents have further denied that there had been a partition among the four sons of Nand Rai prior to old cadestral survey as alleged and that two Mahua trees were joint among them. According to the respondents, two Mahua trees had been acquired by purchase and so there was no question of recording their possession over the same in the cadestral survey khatiyani of all the co-sharers. They have also denied any separation in the family of Mahadeo Rai and Sahdeo Rai and have stated that no partition ever took place in the branch of Bishundayal Rai and that Mahadeo Rai, Sahdeo Rai always remained joint alongwith Raj Kumar Rai and Jainarain Rai and they died one after the other in the state of jointness.

12. The further case of the respondents is that Jainarain Rai was the last male holder in the branch of Bishundayal Rai and after his death his widow Rajbanshi Kuer and her two daughters Bhagrasana Kuer and Phul Kuer came in possession of the entire property. After the death of Sahdeo Rai, his widow Raibanti Kuer was getting only maintenance from Jainarain Rai and after the death of Jainarain Rai, Rajwanti Kuer was being maintained by Rajbanshi Kuer. She was jointly living with Rajbanshi Kuer. These respondents have denied that Rajbanti Kuer had acquired possession over any of the suit property as alleged in the plaint. They have also denied that Sahdeo Rai and Mahadeo Rai were separate from each other. These respondents have further stated that Rajbanshi Kuer and Phul Kuer jointly executed a deed of surrender on 20.12.1955 with respect to the entire suit property in their favour and they are coming in possession of the same since then. They have also claimed their title with respect to the suit property by adverse

possession.

13. The respondents have denied that Raghunath Rai was the full brother of Jainarain Rai and had asserted that Raghunath Rai is a fictitious person. They have also denied that there was any Panchayati in which certain properties were given to Mostt. Rajwanti Kuer as maintenance. Their case also is that there was no man named Mahabir Rai in the branch of Bishundayal Rai and that Sahdeo Rai died issueless and no son was ever born to him.

14. They have further stated that Jageshwar Rai , the father of the appellant and Bishunde Rai, the father of defendant No. 11 had filed T.S. No. 315 of 1922 in the court of 1st Sub Judge, Arrah against Rajbanshi Kuer and Rajbanti Kuer in which it was held by the appellate court that Jageshwar Rai and Bisheshwar Rai were not the next reversioners and they were not agnates of descendents of Bishundaval Rai and others. It was further held therein that Bhagrasana Kuer and Phul Kuer were the daughters of Jainarain Rai and not of Raghunath Rai. Apart from this, defendant No. 11 Harinandan Rai had executed a sale deed on 22.6.1942 in respect of his land measuring 3.60 acres in favour of one Ram Chandra Singh and others in which he has stated that the respondents were the daughters' sons of Jainarain Rai and that Bhagrasana Kuer and Phul Kuer were daughters of Jainarain Rai. Hence, according to these respondents, they are also the legal heirs of Jainarain Rai and Rajbanshi Kuer. Therefore, the appellant is not entitled to get any of the reliefs sought for and the suit is liable to be dismissed.

15. The case of the respondents also is that there was no family arrangement between the appellant and Harinandan Rai that Harinandan Rai would not claim any share in the suit property. There was no occasion for such family arrangement and that Harinandan Rai is in collusion of the appellant.

16. A formal written statement was also filed by the GAL on behalf of defendants No. 4, 5, 6 who minors.

17. The defendant No. 11 (respondent 3rd set) also filed a written statement supporting the case of the plaintiff -appellant against the contesting respondents. He had however, asserted that he is also a legal heir of Sahdeo Rai and Rajbanti

Kuer alongwith the plaintiff -appellant and that there was no family arrangement between him and the appellant as alleged by the plaintiff -appellant. He never relinquished his legal right, title and interest in the suit property. As such, he has also 1/4th share in the suit property.

18. On the pleadings of the parties the following issues were framed by the trial court for determination:

1. Is the suit as framed maintainable?
2. Has the plaintiff got any valid cause of action for the suit?
3. Is the valuation given by the plaintiff in the plaint correct and is the court fee paid sufficient?
4. Is the suit barred by law of limitation, waiver, estoppel and acquiescence as well as by adverse possession?
5. Is the suit barred by the principles of res judicata?
6. Is there any unity of title and possession with respect to the suit properties in between the plaintiff and the defendants 1st set and is the plaintiff entitled to get declaration of his title and recovery of possession and a decree for partition with respect to the suit property as claimed by him?
7. Had there been any family arrangement between the plaintiff and defendant No. 11 to the effect that defendant No. 11 would not claim any interest in the suit property and that he would also not. contribute any amount towards the expenses to be incurred in contesting the present suit and if so, whether such family arrangement is valid and binding upon defendant No. 11?
8. Is defendant No. 11 also entitled to get 1/4th share in the suit property as claimed by him?
9. To what relief or reliefs, if any, is the plaintiff entitled?

19. The learned Sub Judge after considering the evidence adduced by the parties decided issue Nos. 4 and 5 in favour of the plaintiff/appellant but he decided issue Nos. 6, 7 and 8 against him. So, while deciding issue Nos. 1, 2,9 he held that the suit is not maintainable and that the plaintiff has got no valid cause of action and is entitled to no relief.

20. The points that have been urged in the appeal are (i) whether the suit is barred by resjudicata, (ii) whether there is any unity of title and possession between the appellant and the contesting respondents with respect to the. suit property and whether the appellants are entitled to any share in the suit property and the reliefs claimed for.

21. Point No. 1:

Learned counsel for the contesting respondents submitted that the suit is barred by the principles of resjudicata in view of the judgment passed in T.A. No. 56 of 1924/12 of 1926 (Ext.Z-1) and that the finding of the. learned trial court on this issue is wrong.

22. Learned Counsel for the appellants, on the other hand, submitted that the issue was decided against the respondents in the trial court but they have not filed any cross objection and hence, they cannot assail the finding of the trial court on this issue. He further submitted that the suit is not barred by resjudicata as the previous suit had been brought in a different capacity.

23. As regards the cross objection, the relevant portion of Order 41 Rule 22 C.P.C. is as follows:

Any respondent though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal.

Therefore, it is clear that in this appeal the respondents though supporting the decree, can challenge the finding of the trial court on point of the issue of

resjudicata decided against them.

24. Now, the judgment of Title Appeal No. 56 of 1924/ 17 of 1926 passed by the Addl. District Judge, Sahabad (Ext.Z-1) and the judgment (Ext.16) of Title Suit No. 315 of 1922 against which the appeal was filed show that the suit was filed by Bisheshwar Rai, father of defendant No. 11 and Jageshwar Rai, father of the plaintiff-appellant against Mostt. Rajbanshi Kuer and others, through whom the contesting respondents claim the suit-land, for a declaration that that Rehan deeds executed on 13.4.1922 by Rajbanshi Kuer in favour of the defendants of the suit was invalid being without legal necessity and thus, was not binding on them. The judgments also show that the suit was filed by the plaintiffs of that suit as reversioners of Jainarain Rai and the property involved was in possession of Rajbanshi Kuer and the points decided in appeal was whether the respondents (i.e. the appellants in that suit) were next reversioners of Jainarain Rai.

25. In the present suit the parties of course, are laying claim on the suit property through the parties of former suit No. 315 of 1922 but the appellant has filed the present suit in respect of the property of Rajwanti Kuer and under a different title as heir of Rajwanti Kuer.

26. Section 11 C.P.C. Resjudicata reads thus:

No court shall try any suit or issue in which the matter has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court.

27. Therefore, in order to attract the bar under Section 11 C.P.C. not only that the parties in both the suits must be same or the parties under whom they or any of them claim, but they must litigate under the same title and the matter in issue in both the suits must be same. But I have already mentioned that the issue decided in the former suit was whether the plaintiffs were reversioners of Jai Narain. but in this case the issue is whether the appellants are heirs of Rajwanti Kuer. The property involved is also different.

28. So, though the respondents have right to challenge the findings of the trial court on this issue in appeal, the trial court has rightly decided that the suit is not barred by resjudicata.

29. Point No. 2

This is the main issue in the suit. The appellants have given a geneology in the plaint to prove his claim over the suit property. The respondents have challenged the geneology.

30. According to the appellants, one Nand Rai was the ancestor of the appellants and Hari Nandan Rai and he had four sons- Basawan Rai, Prem Rai, Ram Sewak Rai and Madhu Rai. The case of the respondents, on the other hand, is that there was no man named Baswan Rai in the branch of Nand Rai. The case of the appellants also is that though there was separation among the sons of Nand Rai there were three Mahua trees in Plot No. 175 which were joint among them.

31. The appellants have proved the entry of cadestral survey of 1909-1910 (Ext.14C) to prove the above geneology. This document shows that Mostt. Yasoda Kuer, widow of Prem Rai, Rambaran Rai, Sukhdeo Rai of the branch of Ram Sewak, were co-sharers in Plot No. 175. But as the document is mutilated. from this document it is not clear that Basawan Rai had also any share in it. Therefore, this document, as filed in court does not prove that Basawan Rai was the son of Nand Rai. The plaintiff has also filed the plaint of T.S.No. 19/1930 (Ext.9) The judgment of the suit (Ext.16A) to prove that the same geneology was Riven by the plaintiffs of that suit who descendents of Ram Sewak Rai. But the respondents were not parties in that suit. Therefore, these documents are not relevant to prove the geneology.

32. It is, however, not so important in this suit as to whether Nand Rai had four sons and whether Basawan Rai was the son of Nand Rai, as the question whether Sheodayal Rai and Bishundayal Rai were sons of Ritu Rai. For the sake of convenience, the part of the geneology which relates to the descendents of Ritu Rai as Riven in the plaint, is noted below:

Ritu Rai

/

///

Sheodayal Mahabal Bishundayal

Rai Rai(issueless) Rai

()/

()///

() Bakhori Rajkumar Pran Rai

() Rai(issueless) Rai (issueless)

()/

()//

() Sahdeo Rai Mahadeo Rai

()//

() Mahabir Rai = //

() Rajwanti Jainarain Raghunath

() (2nd wife) Rai Rai

() Rajbanshi Kuer /

/

() Ramchandra //

() Rai Bhagrasana Phul

() Kuer

///

Ayodhya Pragash Dwarika Rai(issueless)

Rai Rai(issueless)

/

//

Bashamber Swamber Rai

Rai (issueless)

/

//

Jageshar Bishesar

Rai Rai

() /

() Harnandan Rai

()

()

////

Satyanarain Ramjanam Ramdeo Shree Rai

Rai Rai Rai

//

Bisram Rai ///

Paras Baleshwar Janardan

Rai Rai Rai

//()

Harendra //()

Rai Subodh Prabodh ()

Kumar Kumar ()

()

Kamlesh Nr.

33. The appellants have filed entries Khesra registers of 1860 (Ext.21) and 1889 (Ext.21/A) of the village, the entries of Khatiyani (Ext.14) and Ext.22 (maps) and has examined P.W.29, a Pleader Commissioner, who had prepared maps showing comparative views of cadastral survey map of 1909-10 of village Situhari with Khesra maps of the years 1860 and 1818 to show that plot No. 1249 of 1860 recorded in the name of Mahabal Rai, was recorded as plot Nos. 688, 689 in 1880 in the name of Bagamber Rai, grant father of the plaintiff, and that out of portions of plot No. 689. of 1880. plot Nos. 183, 184, 175, 177 were carved out in the cadastral survey in which plot No. 183 is recorded in the name of Bhikhmania. wife of Raj Kumar and plot No. 175 is recorded in the names of Yasoda, Rambaran and Sukhdeo and others as already mentioned (vide Ext.14/C). Similarly, plot Nos. 1255, 1256 recorded in the name of Raj Kumar in 1860 and plot No. 1251 recorded in the name of Mahabal in 1860 and. plot No. 1297 recorded in 1860 were recorded as plot No. 186 in the cadastral survey and this C.S. plot No. 186 was carved out of plot No. 685 of 1880 recorded in the name of Raj Kumar. Then, plot No. 1257 and 1298 recorded in the name of Ramyad Rai in 1860 were measured as plot No. 687 in 1880 in the names of Raj Kumar Rai and Sheodayal Rai and out of Khesra plot No. 1298, C.S.Plot Nos. 173 and 174 were prepared and were recorded in the names of Bhikhmania and Jageshwar Rai.

34. Though from the cadastral survey Khatiyani independently, it does not appear that there was any connection in between the descendents of Bishundayal and Sheodayal, the comparison of map of Khesra plots of 1860 and 1880 show that there was connection in between descendants of Bishundayal and Sheodayal inasmuch as the names of Baghamber was recorded in 1880 against a plot recorded in 1860 in the name of Mahabal Rai and the names of Raj Kumar and Baghamber were recorded jointly against plot Nos. 687 of 1880 which included plot No. 1257 of 1860 recorded in the name of Ramyad Rai.

35. Learned Counsel for the appellants submitted that the entries in the survey records of rights has presumption of correctness and therefore the entries in Khesra registers of 1860 and 1880 must be presumed to be correct and on the basis of entries it has to be held that Baghamber Rai, Mahabal Rai, Raj Kumar Rai and Ramyad Rai are agnates and as according to the case of the appellants, Sheodayal Rai was the grand father of Baghamber Rai; and Raj Kumar Rai admittedly is the son of Bishundayal Rai; and Mahabal Rai admittedly is the brother of Bishundayal Rai, it has to be held that Sheodayal Rai, Mahabal Rai and Bishundayal Rai were brothers. He also submitted that Thakbast maps prepared after 1852 are accurate. In support of presumption of correctness of record of rights he has relied on the decision of Patna High Court reported in AIR 1936 Pat. 142 (Nitai Lal Dutta v. Covinda Bhushan Sen) AIR 1942 Pat. 346 (Maharaja Bahadur Ramran Vijay Prasad Singh v. Naubat Rai) and : AIR1954 Pat481 (Saleber Mahto and Ors. v. Smt. Malti Maharani). But these decisions are not applicable in this case as they do not relate to Thakbast survey.

36. The trial court in the impugned judgment has observed that Khesra registers and the maps do not show under what authority they were prepared and so no presumption of correctness may be attached to the entries of Khesra registers and the maps (Exts. 21, 21/A, 22 and 22/A).

37. Section 83 of the Indian Evidence Act provides that the court shall presume that the maps or plans purporting to be made by the authority of the Central Government or any State Government were so made and are accurate but maps and plans made for any other cause must be proved to be accurate.

38. In this case there is nothing to show that the maps were prepared under the authority of any Government. So, no presumption of accuracy can be attached to them. There is no other evidence that the maps were accurate. The map (Ext.22) appears to be in mutilated condition and the map (Ext.22/A) bears the signature of Hiyabal Das, who according to the evidence of P.W.32 was Patwari of the appellants and as such, was interested in the appellants.

39. In the case of Jagdeo Narain Singh and Ors. v. Baldeo Singh and Ors. AIR 1922 page 272 (relied on by the learned Counsel for the respondents), the Privy Council has held that the entries in Thakbast map and Khesra have no evidentiary value. In another case in Smt. Bibi Jarao Kumari v. Rani Lalonmani and Anr. Indian Appeals 145 (L.R. Vol. XVII of 1890) the Privy Council has held that Section 83 of the Indian Evidence Act does not make ex-parte statements of the proprietors or tenants at such survey, evidence as to the character of holding.

40. Hence, in view of the above decisions, it does not appear that the Thakbast Khesras and maps filed by the appellants are sufficient to prove that Baghamber Rai, Raj Kumar Rai and Mahabal Rai were agnates. The Khesras filed also do not appear to be certified copies of the original and are in loose sheets. Therefore, on this ground also no authenticity can be attached to the entries of the Khesras.

41. Learned Counsel for the appellants also referred to Exts. 14, certified copies of Khatiyani and Ext.15 (maps) and submitted that they would show that the lands and the houses of the descendants of Nand Rai are side by side and this also proves the relationship between Sheodayal Rai and Bishundayal Rai. But I do not think this can be a ground to prove the above relationship.

42. The appellants have also filed Rehan deeds (Exts. 19 series) to prove the genealogy and relationship, Ext.19 is a Rehan deed executed by Baghamber Rai in favour of one Natya Lal on 21.7.1979. Ext.19(a) is a Makphula executed by Swamber Rai and Jageshwar Rai in favour of one Gajadhar Singh on 30th Jyestha 1299 F.S. Ext.19(b) is a Rehan deed executed by Baghamber Rai in favour of Suba Rai in the year 1882.

43. But these three mortgage deeds do not show any connection with the descendants of Sheodayal Rai and Bishundayal Rai and hence, are not of any importance in this suit.

44. Ext.19(c) is a Rehan deed executed by Ramyad Rai and Tengari Rai who are said to be of the branch of Bakhori Rai in favour of Lacche Ahir in 1267 F.S.= 1860. Ext.19(d) is a Rehan deed executed by Tengari Rai and Ramyad Rai in favour of Durjan Upadhyaya.

45. The endorsement on the back of Ext.19(c) is that Raj Kumar Rai and Swamber Rai had redeemed it. Similarly the endorsement of payment (Ext.6) on Ext.19(d) shows that the mortgage was redeemed by Baghamber Rai and Raj Kumar Rai.

46. But though there are endorsements of payment on the back of the mortgage deeds, the signature of the mortgagee is nowhere on the documents as a proof of discharge of mortgage money or as a token of return of the documents. Of course, a mortgage may be redeemed only by the delivery of mortgage deed, but when an endorsement of redemption has been made, the signature of the mortgagee should have been there and absence of it casts doubt about the endorsements and the entire documents. In Ext.19D the endorsement (Ext.6) of course bears the signature of one Banwari Lal but he was not the mortgagee. P.W.20 has proved the endorsement and the signature to be in the pen of Banwari Lal. But he has admitted that except the above endorsement he has not seen any handwriting of Banwsari Lal. He has also not claimed that the document was written in his presence. So, on the basis of the evidence of this witness it cannot also be said that the endorsement was written or signed by Banwari Lal.

47. Then, according to the endorsement on Ext.19C, the mortgage is purported to have been redeemed by Raj Kumar Rai and Swamber Rai and according to Ext. 6 the mortgage was purported to have been redeemed by Baghamber Rai and Raj Kumar Rai. Baghamber Rai is admittedly the father and Swamber Rai is uncle of the plaintiff. But when Raj Kumar was also with them in redeeming the mortgages, the plaintiff was also required to show that how the two rehan deeds came in his possession. But no evidence has been led in this regard. So, no presumption of genuineness can be attached to these deeds under Section 90 of the Indian

Evidence Act, though they have been proved being of 30 years old document.

48. Hence, from the above two Rehan deeds also it is not proved that the mortgage bonds executed by Tengari and Ramyad were redeemed by Dighamber, Swamber and Raj Kumar and indicating thereby that they were agnates inter-se.

49. The appellants have also examined P.Ws. 5, 17, 24, 25 and 32 who is nephew of the original plaintiff - appellant to prove the geneology given in the plaint. D.W.4 the original defendant No. 11 had also come to support the geneology. But as already shown there is no reliable documentary evidence to corroborate their evidence that Sheodayal was the brother of Bishundayal. The learned trial court has also given . valid reasons for not accepting the oral evidence of the above witnesses. The plaintiff himself did not come to depose in court in support of his case.

50. D.W.36 Sheo Bharosa Singh, a contesting defendant, has denied that Bishundayal Rai and Sheodayal Rai were brothers. No documentary evidence, however, has been furnished by the respondents to corroborate his oral evidence. But the onus to prove the geneology given by the appellants was on them and they cannot derive benefit from the weakness in the respondents' case.

51. The most important question in this appeal. however, is whether Sahdeo and Mahadeo were separate and Rajwanti. the widow of Sahdeo, was in possession of the suit property because the appellants claim the share in the suit property as the nearest agnatie heir of Mostt. Rajbanti Kuer.

52. Under the Hindu Law there is presumption of jointness of the Hindu family. So. it was necessary for the appellants to prove the separation. P.W.32, one of the appellants, in his evidence has stated that they possess documents of separation. But no such document has been filed by them. It is also pot mentioned in the plaint as to in which year the separation took place.

53. The appellants, however, have filed Ext.11, a draft of the petition said to be executed by Rajbanshi Kuer on 7.12.1017 for mutating her name in respect of the property of her husband Jainarain after his death. They have also filed a certified

copy of deposition dated 21.2.1918 (Ext.12) of one Ram Lakhan Singh in that mutation case in which he has stated that Rajbanshi Kuer was only heir of Jainarain Rai and she had no issue.

54. The learned trial court has observed that there is no explanation as to how the draft petition (Ext.11) came in possession of the plaintiffs. The document was also not produced in the earlier suit. Therefore, he has held that no sanctity can be attached to Ext.11. I agree with his view. As regards Ext.12 though P.W.33 has stated that Ramlakhan is dead, there is nothing in it that the deponent had any special means of knowledge. The respondents had also no opportunity to cross-examine him. So, no reliance can be placed on this document also.

55. The appellants have also filed a compromise petition (Ext.23) dated 9.7.1909 filed in mutation Case No. 24 of 1909 between Jainarain Rai son of Mahadeo Rai and two widows of Sahdeo Rai, namely. Sahodara Kuer and Rajwanti Kuer. The case was filed in respect of Tauzi No. 3767 of Mauza Hirapur Lasarhi which is not in suit. According to the compromise petition the names of Sahodara and Raiwanti were allowed to be mutated. Ext. 20 certified copy of Register D shows that it stands recorded in 'the name of Rajwanti Kuer for property of Hirapur.

56. Learned Counsel for the appellants has led great emphasis on these documents. These documents, indeed, are important piece of evidence in favour of the appellants. But Ext.23 shows that the widows were Riven only right of maintenance from income i.e. without any right to transfer. Ext.D, the deed of surrender, shows that Rajwanti Kuer herself has given reference of the compromise in that deed and has stated that Jainarain was in possession of the entire joint family property and she was getting maintenance. She has also stated that Mahadeo and Sahdeo were joint. The statements made in this document hence belie the case of the appellants. Ext. 20A is copy of Register D of Mauza Situhani in the name of Rajbanshi Kuer and others. But this document is also not sufficient to prove the separation between the two brothers.

57. The appellants have filed Chaukidari receipts (Ext.5) in the name of Rajwanti Kuer. But as observed by the learned trial court, there is overwriting in the name. So, this document cannot be relied upon and on that basis it cannot be said that

Rajwanti Kuer had separate house.

58. They have also filed rent receipts (Ext. 1 series) to show separate possession of Rajwanti Kuer. But no Jamabandi number is mentioned on them. The trial court has also observed that they appear to be freshly issued. So, no reliance hence can be placed on them.

59. As against the above evidence of the appellants, the respondents have relied on the plaint of Title Suit No. 315 of 1922 filed by Jageshwar Rai, the father of the original plaintiff and Bisheshwar Rai, against Rajbanshi Kuer, Rajwanti Kuer and others (Ext.Q) in which they have stated that Mahadeo Rai, Sahdeo Rai died in jointness. They had special means of knowledge of relationship and the statement was made before the controversy arose. Therefore, this document is admissible under Section 32(5) of the Evidence Act. Ext.U which is the deposition of Jageshwar Rai in that suit, also shows that he has stated therein that Mahadeo and Sahdeo died in jointness. P.W. 25 in his evidence in court has admitted in his examination-in-chief that there was no partition between Mahadeo and Sahdeo Rai and they died in jointness. In Ext.D, the registered deed of surrender dated 20.12.1955 executed by Rajwanti Kuer, before the dispute arose, there is a recital that Sahdeo and Mahadeo died in jointness and after their death Jainarain came in possession of their land.

60. In view of the above reliable documents of the respondents proving that Sahdeo and Mahadeo died in jointness, on the basis of the above documents of the appellants, it cannot be said that there was separation between the two brothers.

61. P.W.17 has stated that Mahadeo and Sahdeo were separate. But he has admitted that in his Zamindari both Rajbanti and Rajbanshi were raiyats but their Jamabandi was same. P.W.32 has also stated that they were separate. But, as already stated he has not Riven any document of separation. D.Ws. 2, 4 examined on behalf of defendant No. 11 have also deposed as regards separation. But in view of the above documentary evidence of the respondents. I do not think that the oral evidence of these witnesses can be accepted.

62. D.Ws. 17, 26, 36 have stated that Mahadeo and Sahdeo died in jointness. Their evidence is corroborated by the documentary evidence mentioned above.

63. The case of the appellants is that as Sahdeo and Mahadeo were separate, Rajwanti Kuer came in possession of the property left by Sahdeo Rai and after her death they came in possession. Whereas as already mentioned the case of the respondents is that Sahdeo and Mahadeo died in jointness and after their death, Jainarain came in possession of the property and after the death of Jainarain, Rajbanshi came in possession and after the execution of deed of surrender they came in possession.

64. As already mentioned, the appellants have filed rent receipts (Ext.1 series). They have also filed some canal purchas (Ext.3 series) and water rent receipts (Ext. 2 series) in support of possession of Rajwanti Kuer over the suit property. But no Jamabandi return has been produced by the appellants to show that Rajwanti Kuer had any possession over the suit lands. The respondents, on the other hand, have filed Jamabandi return of Mauza Situhari (Ext.P series) to show that the returns in respect of the suit land were filed in the name of Rajbanshi Kuer. They have also filed rent receipts (Ext.A series) to show that in respect of the suit land continuously from the cadestral survey, at first rent was paid in the name of Raj Kumar, Bhikhmania, Jainarain and then rent was paid in the name of Rajbanshi Kuer and thereafter they are paying rent. They have also filed survey Purchas (Ext. 0 series) in respect of the suit land which are in the names of Ramadhar Singh (defendant No. 1) and other sons of Bhagrasana Kuer and Phul Kuer. Ext.D Bazidawanama dated 20.12.1955 also shows that Rajwanti Kuer had stated therein that after the death of Mahadeo and Sahdeo, Jainarain came in possession of the entire suit property and she was living with him and getting maintenance.

65. P.W.17 has stated that after the death of Sahdeo, Rajwanti came in possession of his property. P.Ws. 21, 25 have stated that the suit land was in possession of Rajwanti Kuer and after her death the appellants came in possession. P.W.32 has stated that after the death of Sahdeo, Rajwanti came in possession of the property of Sahdeo and she remained in possession till her life

time and after her death Sri Rai and Harinandan Singh came in possession as her nearest heir. D.W.2 has stated that after the death of Rajwanti, the plaintiffs came in possession of her land. D.W.4 has stated that Rajwanti and Rajbanshi lived separately but there was no partition of property and after the death of Rajwanti, he and Shree Rai have been cultivating half of the suit land and the remaining half is in possession of the respondents.

66. I have already shown there is no reliable documentary evidence of possession of Rajwanti over any portion of the suit land, There is also no reliable evidence of partition between the two brothers, Sahdeo and Mahadeo. On the other hand, the documentary evidence filed by the respondents in this respect are more reliable. Hence, it is not proved that Rajwanti Kuer or the original plaintiff or defendant No. 11 ever came in possession over the suit property.

67. D.Ws. 17, 18, 19, 26, 36 have been examined by the contesting defendants in support of possession of Rajbanshi Kuer and the defendants over the suit land. D.W.26 has also stated that Rajwanti used to Live with Rajbanshi, who used to maintain her and that Mahadeo, Sahdeo and Raj Kumar died in jointness with Jainarain who was the last male holder, and after his death Rajbanshi came in possession. P.W.36 has also stated that Jainarain V.MS the last male holder in the family. Their evidence finds support from the documentary evidence discussed above.

68. The case of the appellants also is that as there was some difference between Rajwanti Kuer and Rajbanshi Kuer in respect of the suit land, there was Panchayati and in that Panchayati the Panches derided that both of them would Ret equal shares. P.W.25 on recall by the plaintiff, has stated that he was one of the Panches. He has further stated that after Panchayati they started cultivating the lands separately. P.W.36 has also deposed to this effect. But P.W.26 has not been able to say as to in which month or year the Panchayati had taken place. He has also not been able to say as to whether there is any witness of Panchayati. P.W.36 was not a competent witness on Panchayati as according to his deposition he was born in the year the alleged Panchayati had taken place. There is also no document in support of the above Panchayati.

69. Therefore, it is not proved that Sahdeo and Mahadeo had separated in their life time and after the death of Sahdeo. Rajwanti came in possession of his share and after her death the appellants came in possession. The evidence on the other hand proves that Sahdeo and Mahadeo died in jointness and after their death Jainarain and then Rajbanshi came in possession of the suit property and after the deed of surrender. the respondents have been coming in possession.

70. Then the case of the appellants is that Mahadeo Rai had two sons Jainarain and Raghunath and Jainarain had a son Ramchandra; and Raghunath had two daughters Bhagrasana and Phul Kuer, whereas according to the respondents Mahadeo had only one son Jainarain and Jainarain had no son Ramchandra. and Bhagrasana and Phul Kuer were daughters of Jainarain and Rajbanshi Kuer.

71. P.Ws. 17, 24, 25. 32 have come to support the above geneology.

72. But the respondents have proved the mortgage deed (Ext.W) dated 1.4.1922 executed by Rajbanshi Kuer in favour of Nanhak Singh and the mortgage deed (Ext.W/1) executed by Rajbanshi Kuer in favour of Sakaldip Rai on 1.4.1922, and in both the deeds Rajbanshi Kuer had stated that Bhagrasana, wife of Kameslwar Prasad Singh and Phul Kuer, wife of Lakshmi Narain Singh were her daughters. They have also filed registered sale deed (Ext.V) dated 22.6.1942 executed by Hari Nandan Rai (defendant No. 11) in which he has described Bhagrasana and Phul Kuer as the daughters of Jainarain.

73. Hari Nandan Rai (D.W.4) has denied that he executed the above sale deed. His L.T.I. on the sale deed, hence, was compared with his L.T.I. taken in court and the report of the handwriting expert (Ext.14) is that both the handwritings were of the same person. Hence, defendant No. 11 has admitted in the sale deed that Bhagrasana Kuer and Phul Kuer were the daughters of Jainarain.

74. D.Ws. 6, 20, 22 have also stated that Jainarain had only two daughters. D.W.17 has stated that Sahdeo Rai had no issue and Mahadeo Rai had only one son Jai Narain. He has denied that Mahadeo had any son, namely Raghunath. He has also stated that Jai Narain had no son named Ramchandra. He has further stated that Bhagrasana Kuer and Phul Kuer were daughters of Jai Narain, D.W.26

has also stated that Jai Narain had two daughters, Bhagrasana married to Kameshwar Singh and Phul Kuer married to Laxmi Narain, and he had no son. He has denied that Jai Narain had any brother named Raghunath and that Bhagrasana Kuer and Phul Kuer were the daughters of Raghunath. He has also denied that Sahdeo had any son Mahabir Rai. D.W.36 has also deposed to the same- effect. In view of the above documents I do not find reason to disbelieve their evidence.

75. Ext.U/1 the deposition of Rajwanti Kuer and Ext U/2, the deposition of Rajbanshi Kuer in Title Suit No. 315 of 1922 between the parties, also show that they have supported the above geneology given by the defendants and the judgment of the appellate court in the above suit (Ext.Z-1) also shows that this part was decided in favour of the respondents.

76. The case of the appellants also is that the deed of surrender dated 20.12.1955 executed by Rajbanshi Kuer and Phul Kuer in favour of Ramadhar Singh and others, the sons of Bhagrasana is not a valid document and is not binding on them.

77. The deed (Ext.C) shows that Rajbanshi Kuer and Phul Kuer had executed the deed of surrendernama on 20.12.1955 in respect of the suit land and the house in favour of Ramadhar Singh and others sons of Kameshwar Prasad Singh husband of Bhagrasana Kuer and Sheo Bhikhan Singh and others sons of Laxmi Narain Singh, husband of Phul Kuer. Ram Ballav Singh (D.W.6), the attesting witness of this deed, has deposed that Rajbanshi Kuer and Phul Kuer had executed the deed in his presence after knowing and understanding the contents of the deed. The deed is also registered. The witness has also proved the Bazidawa (Ext.D) executed on the same date by Rajwanti Kuer of her interest in Mauja Hirapur Lasari in favour of Ramadhar Singh and others. He has stated that Rajbanti Kuer had put her L.T.I. in his presence after understanding the contents.

78. Therefore, there cannot be any doubt about the genuineness of the deeds. The deed in question (Ext.c). of course, was executed before passing of the Hindu Succession Act of 1956, when a widow or other limited heir had limited power of disposal of immovable property. But according to Mulla's Hindu Law, she could

alienate the suit property for legal necessity as well as by surrender of her whole interest in whole of the estate in favour of nearest reversioner or reversioners at the time of such alienation.

79. It has already been discussed that the appellants have failed to prove that Sheodayal was brother of Bishundayal. It has already been shown that Mahadeo and Sahdeo died in jointness with Jai Narain and that Sahdeo died issueless and Mahadeo had no son Raghunath and Bhagrasan and Phul Kuer were the daughters of Jai Narain and that Ramadhar Singh and others were sons of daughters of Rajbanshi Kuer. Therefore, Rajbanshi Kuer, Phul Kuer, could legally alienate. their whole interest in favour of Ramadhar Singh and others, who were the next reversioners. Hence, it cannot be said that the deed of surrender (Ext.C) is not a valid document and is not binding on the appellants.

80. Thus. I find that the appellants were not the legal heirs of Rajwanti Kuer and Rajwanti also had no possession over the suit property and after the death of Mahadeo and Sahdeo, Jai Narain held the properties as owner and was in possession and after his death his widow Rajbanshi came in possession and on 20.12.1922 she legally surrendered her interest in favour of the contesting defendants who were the next reversioners. Therefore, there is no unity of title and possession between the appellants and the respondents in respect of the suit land and they are entitled to no relief.

81. In the result, the appeal is dismissed on contest with costs.

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