

Kalindri Devi and ors. Vs. Saro Devi and ors.

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Court : Jharkhand

Decided On : Aug-09-2004

Reported in : [2004(4)JCR152(Jhr)]

Judge : Vikramaditya Prasad, J.

Acts : Hindu Law

Appeal No. : Appeal from Original Decree No. 71 of 1991 (R)

Appellant : Kalindri Devi and ors.

Respondent : Saro Devi and ors.

Advocate for Def. : Debi Prasad, Sr. Adv. and; A.K. Sinha, Adv. for Respondent Nos. 2 to 6 and 8

Advocate for Pet/Ap. : P.K. Prasad, Adv.

Judgement :

Vikramaditya Prasad, J.

1. This appeal has been preferred against the dismissal of the Partition Suit No. 14/1988 on contest with costs. The Genealogical table given in the plaint, which is not disputed by the defendants-respondents, is hereunder :--

GENEALOGY

|

Lodeng Sahu

|||||

Surajnath Sukhdeo Hira Nageswari Rukmini Devi

_____|_____|_____|_____|_____

|||||

Rampril Babulal Bandhu Bigu @ Rabindra Em Narain

According to the plaintiffs, the family of the plaintiffs and defendants are governed by Mitakshra School of Hindu Law read with Hindu Succession Act, 1956. The plaintiffs filed the suit for partition of the properties given in the Schedule A, B, C, D, E, F and G. The Schedule A property, according to the plaintiffs, are situated in the village - Birkera and recorded in the name of Dirpal Sahu, Schedule B properties were purchased by Dirpal Sahu along with Jainarayan Sahu and on partition in Partition Suit No. 36/37 of 1965-67, Dirpal Sahu got this property and thus, according to the plaintiffs, this also formed part of the ancestral property acquired by his father. Schedule C property, according to the plaintiffs, were acquired by Dirpal Sahu out of the joint family funds in the names of one and other members of the coparcenary as karta. Schedule D properties were purchased by Surajnath Sahu in the names of different persons of the family, as he had becomes the Karta of the family, out of the common fund. The property contained in Schedule E are the moveable, which are possessed by the karta and Schedule F is on the cattle heads that belong to the joint family and Schedule G property is the 1000 silver coins of Rs. 1/- given to the karta, Surajnath Sahu, by the father. The case of the plaintiffs-appellants is that Dirpal Sahu had become old, therefore, the eldest son, Surajnath Sahu, had become the karta of the joint family and had taken charge of the common fund and all other things. The defendant No. 2, Sukhdeo Sahu, used to look after the joint family properties at village, Asro, while

the plaintiffs and other members of the joint family were looking after the cultivation of the joint family lands at village Birkera. They were also looking after the cattle, such as cows, buffalos etc. and the defendant No. 1 as the karta used to go to the Registration Office and other places. When Gulpu Sahu and others trespassed upon the ancestral lands of Khata No. 62, plot No. 17/152, in order to avoid litigation, the Joint family took Rs. 3000/- and sold the same to them and the sale proceeds thereof were retained by the karta. it is the case of the appellants that though the parties of the suit, for the purpose of enjoyment, cultivation and convenience, were cultivating and residing separately, but there had been no partition of the joint family lands by metes and bounds and the family was still one and the defendant No. 1, Surajnath Sahu, was the karta. The plaintiffs further pleaded that some lands were purchased in the name of Emnrayain Sahu, son of the plaintiff No. 1, by his father-in-law of the plaintiff No. 1. The cause of action of the suit arose when the plaintiffs demanded rendition of the accounts, which was refused. The prayer made was of a decree of partition allotting 1/3rd share in favour of the plaintiffs in respect of the properties described in the Schedules and also for appointment of a Pleader Commissioner to effect the partition by metes and bounds.

2. The defendants-respondents appeared and contested the suit, denied the unity of the title and possession and raised a plea that the suit was not maintainable for adverse possession. A specific case pleaded by the defendants is that in the year 1970, as the father had become old, he had partitioned the raiyati and purchased lands into three equal shares. The moveable properties were also divided in 3 shares, according to which, the plaintiff Hira Sahu and his brother, Surajnath Sahu, got share in village - Birkera, while Sukhdeo Sahu got shares in village - Asro. The claim of the defendants is that the plaintiffs had not brought all the lands which were decided in favour of Dirpal Sahu in Partition Suit No. 36/37 of 1965. Their further case is that no dispute was raised by the plaintiffs regarding the properties shown in Schedule A, B and C, but one of the properties included in Schedule C. It is admitted that in the lands purchased on 7.5.1957, 4.4.1962, 11.7.1964 as given in Schedule C of the plaint, all the three sons had got equal shares as per the partition in the year 1970, but the plot No. 153 under Khata No. 166 does not figure in the sale deed dated 4.6.1962 and other lands in Schedule C

had been purchased by the defendants with their own savings. Thus, positive case of the defendants is that after 1970, the father did not remain karta, nor the family was joint and all the three sons came in separate possession with separate cultivation, separate living peacefully and exercising their rights over the properties allotted according to the partition a land by Hira Sahu was also denied by the defendants. It was also denied that Surajnath Sahu was ever the karta of the joint family after partition and regarding Schedule B properties, it was pleaded by the defendants that they had purchased the same out of their own source of income and the properties described in Schedule D were purchased with their own saving and accordingly they were in their possession separately out of their own fund. In paragraph 12 of the plaint, the plaintiffs had made out a case that the lands of Khata No. 62, plot No. 17/152 measuring an area of 0.76 acres and plot No. 279 area 0.10 acres of village - Birkera were sold by the joint family to Gulpu Sahu and other at Rs. 3000/- and the sale proceeds were retained by the karta, Surajnath Sahu. This claim was denied by the defendants. It' has also been stated that Bhali Sao and his two brothers had approached to purchase the lands from Hira Sahu and Surajnath Sahu of their shares and as the rent was not bifurcated, the purchasers also asked Sukhdeo Sahu to put his signature in the sale deed and the defendant, Sukhdeo Sahu, had no concern with the land and half consideration had been retained himself by the Hira Sahu and half was received by the defendant, Surajnath Sahu. It was also denied that any land was sold to Gupla Sahu. Thus, according to the defendants, as the partition had taken place in the year 1970 itself, all the parties were in separate possession of the respective shares and subsequently they had purchased land out of their own savings and therefore, the question for further partition did not arise and consequently a prayer was made to dismiss the suit.

3. The learned trial Court framed the following issues ;--

- (i) Is the suit, as framed, maintainable?
- (ii) Have the plaintiffs got any cause of action for the suit?
- (iii) Is the suit bad for misjoinder and non-joinder of parties?

(iv) Is the suit hit by law of adverse possession?

(v) Is there any unity of title and possession between the parties regarding properties?

(vi) Are the suit properties already partitioned by metes and bounds among the three sons of Dirpal Sahu in 1970 as alleged by the contesting defendants?

(vii) Is the suit hit by partial partition?

(viii) Are the plaintiffs entitled to a decree of partition as claimed?

(ix) Is there any discrepancy in area of plot given in Schedules of the plaint?

(x) What other relief, or reliefs if any, are the plaintiffs entitled to?

The trial Court found that there was no joint family status and consequently dismissed the suit.

4. The points for consideration in this appeal are (i) whether in the year 1970, there was a partition of the ancestral and acquired properties of Dirpal Sahu among his three sons and (ii) whether separate, residence, cultivation and separate possession of lands are sufficient to prove the partition and (iii) whether there was a common fund (Nudeus) managed by Surajnath Sahu as karta and (iv) whether properties acquired subsequent to the alleged partition are self-acquired property of the purchasers?

5. Point No. (i) and (ii).--Defendant Nos. 1 and 2 are the brothers of the first plaintiff. Defendants plead 'partition made by the father in 1970. The plaintiffs plead it was for convenience and not partition.' Enough evidence has come in the evidence of PWs that all the brothers have separate possession, separate cultivation, separate ploughs and cattle, besides separate' mess.

The suit for partition was filed in the year 1988. There is strong presumption of jointness between father and sons, than the sons interest, and the presumption weakens with the charge in degree of coparceners.

It is the pleading of the defendants that the father partitioned the properties in 1970, though there is evidence that the father died sometime in 1977. In the circumstances, due to the presumption of jointness among the father and sons, the onus is on the defendants to prove that the partition did take place. Admittedly, there is no document of partition, so the proving of alleged partition has to be found in the oral evidence. As such onus is on the defendants, I first examine the oral evidence adduced on behalf of the defendants.

According to the W.S. Surajnath (defendant No. 1) and plaintiff No. 1 got share at Birkera whereas Sukhdeo (defendant No. 2) got share in Asro, each in equal share Sukhdeo Sahu (DW 9, defendant No. 2 and one of the brothers) is more competent to give a clear picture. In paragraph 13 of his cross-examination, he names the persons in whose presence the alleged partition did take place and these persons are Gundu Ahir, Kaden Ahir, Govind Sahu, Shivtehal Sahu (DW 3), Karan Dayal (DW 1). Panchu, Chelym some of them, Chelym and Panchu are dead according to him. According to the son of defendant No. 1, who is the brother of Sukhdeo, at the time of partition, there were Chamru Sao, Jagdish Baraik, Gandara Gope and Khendu Gope. The presence of the witness Ramprit Sahu (who was the nephew) at the time of partition, has not been stated by Sukhdeo. And this witness adds a few names like that of Shiv Tahal (DW 3) not named by Sukhdeo.

DW 1, Karam Deyal's name as a partition witness comes in the evidence of Sukhdeo but not in the evidence of Ramprit. He says (para-9) that the council for partition had met at Birkera but he had reached there after the partition and he came to know of partition from Surajnath (defendant No. 1, who has not been examined as a witness though alive). From this evidence, it cannot be said that he exactly knew what actually transpired among the coparceners at the time of alleged partition. This witness does not whisper the presence of other witnesses named by Sukhdeo and Ramprit.

DW 3, Shiv Tahal Sahu, is a man from Asro. He says that partition had taken place at Birkera and he was present at that time but he did not know how much land each of the brothers got in partition (para-6). If he actually had been present,

then he could have definitely said as to what was the share allotted and which. Moreover, this witness is highly tutored as he himself admits that what he had stated in the Court was suggested to him by Sukhdeo (para-10). DW 4 is Chaman Sao. His name has not been taken by Sukhdeo as a witness of partition. This witness in his turn does not corroborate the presence of DW 1 or Shiv Tahal (DW 3) and Jagdish Baraik (DW 5) at the time of partition.

DW 5, Jagdish Baraik, says in para-8 of his cross-examination that he sees Sukhdeo (defendant No. 2) in the house at Asro from his hosh (coming to sense). This witness is aged 46 years and was examined in the year 1990. Thus, he was born in or about 1944 then as per this witness he is seeing Sukhdeo since much before the alleged partition in 1970. This is against the defence case. He in his cross-examination, para-9, does not say about the presence of other witnesses (DWs 5 and 4) at the time of partition. DW 7 and DW 9 are defendants and they are highly Interested witnesses.

As it is not a case of very old partition, had these witnesses actually been present they would have been able to say (i) actually what transpired (ii) what share was given to the brothers and (iii) there would have been consistency with respect to the presence of witnesses of partition by all these things are wanting.

6. I now proceed to find other circumstances which existed soon after the alleged partition.

DW 1 says that Dirpal (father) said that he had given 5 acres of land to each of his sons. He says about the partition of land and does not speak of giving separate houses to his two sons at Birkera. Defendant No. 2 (DW 9) says that new and old houses had been built before partition and these were also partitioned (para-16) and utensils etc. were also partitioned by counting each (para-14). DW 7 (defendant) says that he does not know which of the plot was given to whom (para-31). Then even in respect of Birkera land he is unable to say the actual area or plot given to each brother who got share in Birkera. This is also the evidence of PW 1 (para-13).

DW 4 says that he did not see ornaments, money and utensils being partitioned (para-14).

Now, I wish to examine the documents proved in this case to find out what state of affairs is disclosed by such documents after the alleged partition.

(A) Ext. E, E/1, E/2 and E/3 are some Chorkidari receipts. Ext. E was issued in 1986, in respect of Asro property in the name of Sukhdeo (defendant No. 2), Ext. E/1 is in respect of Birkera in the name of Rambrit issued in 1986, E/2 is in respect of Bikera in the name of Rambrit issued in 1990 Ext. E/3 for Asro in 1990 in the name of Sukhdeo. Thus, these receipts do not show that soon after 1970, the parties even paid such rent in respect of the land homes which were allotted to them. And the receipts came only in 1986, some 16 years after the alleged partition.

(B) Ext. 1 the voters' list of Birkera prepared in 1983 shows Surajnath Sahu and Hira Sahu occupying the same house No. 61 at Bikera. As there is evidence that one house was allotted to each and those are at a distance of few plot from each other, then a question arises why this voter list shows both of them occupying the same house and that too, even in the year 1983.

Ext. 1/1 is the voters' list of Asro prepared in 1988 showing defendant No. 2 in house No. 71 of Asro. As against this, there is a voter list of the year 1975 (Ext. 5) proved by the plaintiff showing that in the year 1975, the father and the three brothers were occupying the same house No. 61 at Birkera.

The learned trial Court rejected Ext. 5 and accepted Ext. 1 and 1 /1 on the ground that the separation may not have been communicated to the authority soon after the partition.

Ext. 2/e is a sale deed which shows that Sukhdeo (defendant No. 2) and Rambrit (son of defendant No. 1) purchased land jointly in the year 1983 and in the deed, the address of these purchasers is of Birkera.

It appears that till the year 1983, the situation was that the parties were living at Birkera and were jointly purchasing, as suggested by these documents. Though in

a civil case, the preponderance of evidence is to be considered but preponderance does not mean total want of convincing and reliable evidence not duly corroborated by witness and documents.

Thus, from the evidence - oral and documentary, I find that (i) there is no satisfactory oral evidence regarding partition of land, utensils and money etc. and (ii) the documents aforesaid lean its favour of joint occupation of properties at least till 1983. Thus, I am of the considered view that the strong presumption of jointness between father and sons has not been rebutted by the defendants, on whom such onus lay.

7. Now, a question arises what is the effect of evidence adduced on this point of partition by the plaintiff.

All the facts are admitted - separate living, cultivation etc. and this is not against the pleading of plaintiffs. Plaintiffs never said in plaint that their separate living from 1970. Only one PW 3 (para-3) has said that in Asro Sukhdeo has got his share. But this witness does not claim to be a witness of alleged partition, so his statement is in the spirit that these brothers are enjoying the land half and half at Birkera and Asro. This evidence does not demolish the case of the plaintiffs and aid the claim of the defendants.

8. The learned lower Court, while deciding the issue of unity of the title and possession, relied on AIR 1971 Pat 215. In that suit, the defendant had alleged a partition that took place 80 years ago and since then, they had pleaded separate possession etc. and therefore, the cumulative effect of all these was considered to be a partition. In the case in hand, this claimed partition is of recent origin. Learned counsel for the appellant relied on a decision reported in AIR 1991 Pat 95. In that case, besides separate possession etc. a certified copy of deed of partition was also produced. In the case in hand, no such document is there. The learned trial Court considered the oral evidence at its face value and did not appreciate the evidence properly.

These points are thus, decided against the defendants-respondents.

9. Point No. (iii).--The onus is on the plaintiffs, as they have pleaded that Surajnath was the karta to prove that Surajnath was karta evidence has been led by the plaintiffs that Surajnath represented the family to the outside world, in the society or at legal forums. No evidence has been brought on record that all the three brothers though cultivating separately and living separately handed over their income to Surajnath. It has not been shown by cogent evidence that Surajnath made any transaction on behalf of the family. Thus, the indicia of managership is not in him. As such, the plaintiffs have failed to prove that Surajnath was the karta and he managed to maintain the accounts.

10. There is no evidence that after the death of Dirpal, Surajnath got money or a business. Thus, he had no nucleus and in absence of any augmentation by brothers from their income, the nucleus which did not exist also did not crystallize and swell. Though the plaintiffs pleaded that Surajnath got 1000 silver rupees, cattle, business of ghee and clatter, but there is no proof of all these. Particularly when it is in the evidence from the side of plaintiffs that cattle were also separately owned. Thus, there was neither common fund in the hand of Surajnath, nor he was the karta. This issue is decided accordingly and against the plaintiffs-appellants.

11. Point No. (iv).--These properties indicate and included in Annexure-D and marked by Ext. 2 series and also properties included in Ext. B. All these have been purchased after the year 1983 and have been mutated in the names of respective purchasers (Ext. D series and C series). It is relevant to note here that the properties which were allegedly partitioned in 1970 according to the defendants were not got mutated, whereas subsequent acquisitions were got mutated. It does not appeal to reason that why they did not opt to get the partitioned land, if actually partitioned, mutated while they got the subsequent acquired lands mutated. It leads to an inference that the parties were not supposing the partition, (DW 7, para-33, DW 9, para-17).

12. By now it has been sufficiently proved on evidence that there was no partition but each parties were enjoying separate lands and appropriating, its income individually, no common fund was built and there was no karta therefore, separate

possession becomes a case of allotment by father to three sons and each in his turn never questioned the other regarding income of the acquired properties separately out of the income or saving from these allotments. Thus, these properties were acquired by individual savings and not from a common fund. And, thus, these do become self-acquired properties. In this will also fall the properties covered by Ext. B to the extent of share of plaintiffs Emnarain in it and the properties covered by Ext. 2. Reliance is being placed on AIR 1937 Mad 571 and as the plaintiffs failed to prove joint acquisition out of the common family fund on 1980 PLJR 423 by the trial Court also. Moreover, the plaintiff- appellant has not put the acquisition in his name and he also failed to prove the acquisition in his name by his father-in-law, in hotch-pot therefore he cannot claim partition of these lands AIR 1992 Cal 222. All other documents exhibited by both the parties are admitted and are not being discussed individually,

13. This issue is decided accordingly and it held that the properties included in Schedule D and others discussed above are not the joint family properties and plaintiffs cannot claim partition of these.

14. In the result, it is held that the ancestral and acquired properties by Dirpal Sahu were not partitioned, i.e. the properties acquired during the life time of Dirpal Sahu or purchased before the death of the father in 1977 stand in the individual or joint names of some members of coparceners contained in Schedule A, B and C are required to be partitioned. Thus, in each properties of Schedule A, B, C, E and F, the original plaintiff No. 1, defendant No. 1 and 2 get 6/20th each and defendant No. 7 and 8 (daughters) will get 1/20th each as per the following calculation :--

(i) 1/4th to each of his three sons (plaintiff No. 1, defendant No. 1 and 2), 1/4th to father (per stripe) (survivorship) on notional partition at the time of death of father in 1977.

(ii) On death of father, 1/4th interest will be equally divided among 1 heirs which include plaintiff No. 1, defendant Nos. 1 and 2, two daughters - defendant Nos. 7 and 8 (by succession). Thus, $1/4 \text{ of } 1/5 = 1/20$ each.

Thus, (I) plaintiff No. 1. defendant Nos. 1 and 2 get $\frac{1}{4} + \frac{1}{20} = \frac{5}{20} + \frac{1}{20} = \frac{6}{20}$ each (per stripe).

(II) Defendant Nos. 7 and 8 (daughters) get $\frac{1}{20}$ each (per capita).

The substituted heirs of the original plaintiffs and defendants will take their shares from the aforesaid shares allotted to their father or husband, as the case may be.

Let a preliminary decree be prepared accordingly and after its preparation and signed by this Court, the learned trial Court will appoint a Survey Knowing Pleader Commissioner for dividing by metes and bounds those properties according to the share allotted to the plaintiff No. 1 and defendant Nos. 1 and 2 (per stripe) and defendant Nos. 7 and 8 (per capita). Schedule D properties shall not be partitioned as these do not constitute joint family property.

This appeal is allowed in part. There would be no order as to costs.

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