

Budhe Ram Vs. Hira and ors.

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Court : Himachal Pradesh

Decided On : Dec-26-1952

Reported in : AIR1953HP52

Judge : Chowdhry, J.C.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 and 101 - Order 7, Rules 14 and 18; ;[Evidence Act, 1872](#) - Sections 21, 65 and 89

Appeal No. : Second Appeal No. 15 of 1952

Appellant : Budhe Ram

Respondent : Hira and ors.

Advocate for Def. : Thakur Prasad, Adv.

Advocate for Pet/Ap. : Hira Lal, Adv.

Disposition : Appeal dismissed

Judgement :

Chowdhry, J.C.

(1) This is a second appeal by the defendant Budhe Ram. One Bhagi had two sons, Dile Ram and Mani Ram. The appellant is the only son of Dile Ram, and the plaintiffs and 'pro forma' defendant belong to the branch of Mani Ram. Budhe Ram

applied to the revenue authorities for partition of land in three villages Balaun, Thach & Bahndi. The plaintiffs put in objections that a private partition had already taken place. On their being so directed by the revenue authorities, the plaintiffs filed the present suit for a declaration that by reason of the joint family property having already been partitioned about 25 years previously, the defendant-appellant was not entitled to have it repartitioned.

Both the Courts below have decreed the plaintiffs' suit, and now Budhe Ram defendant has filed this second appeal. It may be stated 'in limine' that the only point for determination in this appeal is whether the plaintiffs' allegation of private partition is correct. It is not necessary to hold further as to whether the properties were allotted between the two branches as alleged in the plaint. The reason is that this is not a suit for partition but merely for a declaration that, a partition having already taken place, the defendant-appellant was not entitled to have it repartitioned.

(2) It appears that during the pendency of the suit in the trial Court the plaintiffs applied that at the time of partition a partition-deed was executed by the parties and the same had been handed over to the defendant-appellant, and that he be required to file the same. The Court gave notice to the defendant to produce the document or show cause against it. The defendant replied that he had no such document, and in fact no such document had been effected. The trial Court allowed secondary evidence to be produced to prove the contents of the partition-deed.

It was argued by the learned counsel for the defendant-appellant that as there was no partition no such deed was ever executed, and that the trial Court should not have allowed secondary evidence to be produced unless it had first arrived at the conclusion that, the original was or appeared to be in the possession or power of the defendant-appellant, as required by Section 65, Evidence Act. He further argued that the plaintiffs-respondents had also to prove that the document was duly stamped before they could prove its contents by secondary evidence. The testimony of the witnesses Bholu and Premu produced by the plaintiffs as two of the four Panchas who effected the partition and attested the partition-deed was

criticised as inadmissible since they were illiterate and could not, therefore, be persons who had themselves seen the document, as required by Section 63 (5), Evidence Act. The learned counsel for the defendant-appellant further referred to various circumstances negating the theory of partition set up by the plaintiffs. These were that no mutation in the revenue records was ever made in accordance with the alleged allotment of shares, and that there was great disparity in the shares according to the plaintiffs' case, the area of land allotted to the plaintiffs' branch being greatly in excess of that allotted to the defendant.

(3) The last two circumstances are explicable, and the explanation actually offered by the plaintiffs does not, appear to have been improperly accepted by the Courts below. The plaintiffs' witnesses have stated that allotment of land was made on the basis of areas actually under cultivation and not on the basis of the total acreage. They have further stated that the defendant was compensated by the allotment of a 'gharat'. It is noteworthy that the defendant had not the courage to go into the witness-box and deny these facts. This omission on the part of the defendant-appellant to come into the witness-box is an important circumstance in this case, and I shall advert to it presently.

As regards the contention that the alleged partition was not followed by any mutation in the revenue records, it is not an unprecedented phenomenon. In my opinion, the most important fact to be considered in the present case is whether or not a deed of partition was effected, for if the plaintiffs' allegation in that behalf be correct, non-production of the document by the defendant raises a strong presumption against the defence contention and in favour of the plaintiffs' case. I, therefore, proceed to take up this important point.

(4) It was strenuously argued by the learned counsel for the defendant-appellant that no mention of the partition-deed was made in the plaint, and that the plaintiffs did not file along with the plaint a list mentioning the partition-deed as a document, whether in their possession or power or not, on which they relied as evidence in support of their claim, as required by Order 7, Rule 14, Civil P. C. There can be no doubt about these omissions on the part of the plaintiffs, taut the mere fact that compliance with the provisions of Order 7, Rule 14 was not made did not totally

debar the production of the document or its secondary evidence. The Court had the power to allow the production of such a document or secondary evidence relating thereto under Rule 18 of the said Order despite the omission.

And the record shows that when the plaintiffs applied to the Court for an order to the defendant to produce, the document, the trial Court passed an order directing the defendant to file the deed or show cause against it after hearing arguments on both sides. The order is a detailed one and dated 26-9-1950. It is noteworthy that no objection was at that stage taken on behalf of the defendant under Order 7, Rule 14. Moreover, any objection based on the provision just mentioned is too late at this stage. For the same reason it is now too late for the defendant-appellant to contend that the trial Court should have first recorded a finding that the original deed did exist and was in possession of the defendant and only then permitted the plaintiffs to produce secondary evidence as to the contents of the document.

The parties have produced evidence on the point, and both the Courts below have accepted the evidence produced by the plaintiffs as correct. All that this Court has, therefore, to see is whether the Courts below were right in doing so. That is a privilege, be it noted, which is open to the present defendant-appellant on account of the peculiar provisions of para. 32, Himachal Pradesh (Courts) Order, 1948, for otherwise the concurrent finding of fact of the 2 Courts below would have been conclusive against the appellant.

(5) The two witnesses, Bholu and Premu, produced by the plaintiffs profess to have been amongst the Panches who brought about the partition. The other two 'Panches', according to them, were Prema and Tara, both of whom have since died. Tara is said to have scribed the deed. They have further stated that the deed was handed over to the defendant. True, Bholu at first stated that the deed was handed over to the defendant because he was senior to Maya Ram plaintiff, but he later corrected himself and stated that of the two Maya Ram was the older. The other witness Premu as well as Hira plaintiff have stated that the document was handed over to the defendant because he was the manager of the family.

There is no doubt some force in the argument of the learned counsel for the defendant-appellant that partition-deeds are generally effected in duplicate, each

party retaining one copy. It is important to note, however, that the defendant has not come into the witness-box to rebut the statements of the plaintiff Hira and the plaintiffs' witnesses Bholu and Premu. The plaintiffs' case ever since they applied for notice to the defendant to file the partition-deed was that the document was in his possession. Nothing, therefore, could have been easier for the defendant than to come into the witness-box and deny the allegation and in particular the statements of the two witnesses Bholu and Premu who profess to have acted as 'Panches' in bringing about the partition.

If the defendant had come forward and stated that no partition ever took place and no deed of partition was effected, it would have been open to the defendant-appellant to take advantage of the aforesaid circumstances. I mean the circumstances that partition-deeds are generally effected in duplicate, that no mutation pursuant to the partition had been made and that there was apparent disparity in the shares allotted on account of a larger area having gone to the plaintiffs than to the defendant. The non-appearance of the defendant in the witness-box, and that without any explanation whatsoever, however, raises a strong presumption against him, and I would agree with the finding of the Courts below that a deed of partition was in fact effected and that it was in possession of the defendant.

(6) Once it is held that a partition-deed was effected, and that it was in possession of the defendant, there is an end to the matter so far as the present case is concerned. As already stated, it is not necessary in this case to find out what the contents of the partition deed were, for this is not a suit for partition. In order to defeat the defendant-appellant's application for partition before the revenue authorities it is sufficient for the plaintiffs to show that there had already been a partition between the parties. That being so, the argument of the learned counsel for the defendant-appellant that the evidence of the said two witnesses for the plaintiffs, Bholu and Premu, with regard to the contents of the deed of partition being inadmissible under Section 63 (5), Evidence Act, is beside the point. The testimony of those witnesses is in any case not inadmissible for the purpose of proving the factum of partition.

(7) For the same reason, it is quite beside the point to contend, as the learned counsel for the defendant-appellant has done, that secondary evidence could have been offered by the plaintiffs in regard to the contents of the partition-deed only when they proved that the primary evidence itself is admissible by showing that the partition-deed was on a proper stamp. As already stated, it is not necessary at all in this case to go into the question of what the contents of the partition-deed were. Furthermore, under Section 89, Evidence Act, the Court shall presume that the partition-deed called for and not produced by the defendant-appellant after notice to produce was stamped in the manner required by law.

Of course, the presumption is rebuttable, but it cannot be said to have been rebutted by any direct or circumstantial evidence in the present case. For reasons already recorded, I have held that the plaintiffs' allegation about a partition-deed having been effected and about its being in possession of the defendant is correct. Without producing the deed, therefore, it is not open to the defendant to contend that it was not stamped according to law. A number of rulings were cited by the learned counsel for the defendant-appellant in this connection. One was -- 'Md. Ayub v. Rahim Bakhsh', AIR, 1922 Lah 401 (2).

In that case it was admitted that the primary evidence was unstamped. That being so, no presumption could in that case arise under Section 89, Evidence Act, and secondary evidence was clearly inadmissible. The same remarks apply to -- 'Mohd. Din v. Alladitta', 95 Ind Cas. 444 (Lah) and to -- 'Ladha Ram v. Hari Chand', AIR 1938 Lah 90. The argument on behalf of the original partition-deed not being stamped according to law is, therefore, irrelevant and not open to the defendant-appellant. (8) Before I conclude I may as well refer to a few circumstances. One is that the defendant's 'Mukhtar-e-am' admitted in the partition proceedings that a private family partition had already taken place between the parties. True, that partition was stated by him to have taken place only 5 years ago, whereas according to the plaintiffs it was effected about 25 years previously. But in view of the fact that the partition-deed has been suppressed by the defendant the plaintiffs' version of the matter must be accepted as correct. It was argued by the learned counsel for the defendant-appellant that this admission could not be used because it had not been put to the party against whom it was sought to be utilised.

In support of this argument he relied upon -- 'Shafiquddin v. Mahbub Elahi', AIR 1930 Lah 714, where it was laid down that admissions cannot be used against a party unless they are put to him and an opportunity is afforded to him to explain them if they are capable of explanation. A certified copy of the statement in question was, however, filed by the plaintiffs soon after the institution of the suit. The suit was instituted on 21-2-1949 and the document was filed on 8-3-1949. The suit took 2 years and 4 months in the trial Court. There was, therefore, ample opportunity afforded to the defendant to explain the admission, but neither the defendant himself came into the witness-box nor did he produce the 'Mukhtar-e-am' in question. This admission by the defendant's own 'Mukhtar-e-am' during partition proceedings as to a previous family partition having already taken place is, there-fore, an important circumstance in favour of the plaintiffs' case.

Another circumstance worthy of notice is that the plaintiffs have built a number of houses in village Balaun, where according to them land fell exclusively to their share, and the defendant has likewise built a house of his own in village Thach, where according to the plaintiffs' case land was allotted wholly to the defendant. This is more in consonance with the plaintiffs' version of the case than with that of the defendant. From all the facts and circumstances I agree with the finding concurrently arrived at by the two Courts below. Accordingly, the appeal is dismissed with costs and the judgment and decree of the lower appellate Court are affirmed.

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