

Mostt.Gonauri Devi. Vs. Daulat Devi.

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Court : Patna

Decided On : Oct-04-2010

Judge : Mungeshwar Sahoo, J.

Acts : Bihar Consolidation and Prevention of Fragmentation Act - Section 3

Appeal No. : FIRST APPEAL No. 197 OF 1987

Appellant : Mostt.Gonauri Devi.

Respondent : Daulat Devi.

Advocate for Def. : Mr. Rajendra Kishore Prasad, Adv.

Advocate for Pet/Ap. : Mr. Amarnath Gupta, Adv.

Judgement :

(1) The plaintiff-appellants have filed this First Appeal against the Judgment dated 27.02.1987 and the decree following thereupon signed on 24.03.1987 by Sri Subhash Kumar Singh, the learned Subordinate Judge IVth Vaishali at Hajipur dismissing the plaintiff suit for partition.

(2) The plaintiff-appellants filed the partition suit No.147 of 1983 alleging that both the parties had a common ancestor Raghunandan Bhagat. The said Raghunandan Bhagat had 4 sons, namely, Ram Khelawan Bhagat, Parmeshwar Bhagat, the defendant No.1, Rameshwar Bhagat, the plaintiff No.1 and Gorakh Bhagat, the plaintiff No.2. Ram Khelawan Bhagat died in 1947 leaving behind 2

sons, Brahmdeo Bhagat and Jagdeo Bhagat. The widow of Brahmdeo Bhagat and his two sons Chandrika Bhagat and Surajdeo Bhagat are plaintiff No.3, 4 and 5. The second son of Ram Khelawan Bhagat, namely, Jagdeo Bhagat is plaintiff No.6 and his 4 sons are plaintiff Nos.7 to 10. Parmeshwar Bhagat has two sons, Jai Narayan Bhagat and Vishwanath Prasad Chauhan. Parmeshwar Bhagat is defendant No.1 and his two sons are defendant No.2 and 3. The two sons of Rameshwar Bhagat, namely, Goginder Bhagat and Harinder Bhagat are plaintiff No.11 and 12. The 5 sons of Gorakh Bhagat are plaintiff No. 13 to plaintiff No.17.

(3) According to the plaintiff, Raghunandan Bhagat died 60 years ago and Ram Khelawan Bhagat died in 1947 and since then defendant No.1, i.e., Parmeshwar Bhagat became the Karta of the joint family. Some of the members of the joint family joined Govt. service and, therefore, although they separated their establishment but the mess and business at Hajipur was joint. For convenience, the parties also separated their cultivation and mess in 1978 but there is no partition by metes and bonds. Defendant No.1, Parmeshwar Bhagat was employee in the Health Deptt. of State Govt. and was posted at Hajipur. The joint family acquired by registered deed of lease Schedule II land on 04.04.1950 out of the joint family income and fund. The family is Mali by caste which is a good source of the joint family income which was used to be deposited with the defendant No.1. Out of the joint family funds, bricks were manufactured and houses, pacca well and temples were constructed. The acquisitions in the family were made by plaintiff No.1, 2 and 6 and the husband of plaintiff No.3 and defendant No.1. Therefore, they each have got 1/5th share in the joint family property acquired after the year 1950 which has been described in detail in Schedule II of the plaint. Each branch of sons of Raghunandan Bhagat has got 1/4th share in the ancestral properties detailed in Schedule I of the plaint. There has been no partition by metes and bonds between the parties. The plaintiffs demanded for partition which was refused. Hence the suit was filed.

(4) The defendant No.1 filed a contesting written statement. Besides taking various legal pleas, the defendant No.1 mainly contended that after the death of Raghunandan Bhagat, all his sons separated themselves, so defendant No.1 was never karta of the alleged joint family. He was in service since 1948. The

properties acquired under registered deed of lease dated 04.04.1950 is his self-acquired properties. He acquired the same from the savings of his salaries in the state of separation. The plaintiffs have got no concern as the plaintiff never paid single paise to the defendant No.1 for acquisition of the said property. No property has been acquired by the plaintiff Nos.1,2, 6 and husband of plaintiff No.3 with defendant No.1 as such the claim of 4/5th share in Schedule II properties is wrong. However, so far Schedule I properties are concerned, the defendants admitted that the said property may be partitioned since it is joint family property.

(5) The learned Court below framed as many as 7 issues. The main issues relating to partition regarding Schedule I and Schedule II properties are Issue No.4, 5 and 6 which are as follows:

Issue No.4 Is the plaintiff entitled to a decree for partition as claimed?

Issue No.5 - Is the suit hit by provisions of the Consolidation Act?

Issue No.6 Is the Schedule II land is the self acquired properties of defendant No.1?

(6) The other issues are formal issues.

(7) After trial, the learned Court below came to the conclusion that except the house on plot No.1865 and 1870 of Schedule I land and plot No.1856 of Khata No.469 of Schedule II properties, the other properties mentioned in Schedule I and Schedule II are outside purview of the suit because of the fact that the consolidation has started in the same village. In this connection, Notification under Section 3 of the Bihar Consolidation and Prevention of Fragmentation Act was published on 10.09.1975. The learned Court below so far Schedule I property which were not covered by the notification held that there has been previous partition. So far Schedule II properties which is not affected by consolidation proceeding held that it is self-acquired property of defendant No.1. Accordingly, the suit is dismissed.

(8) The learned counsel for the appellants submitted that the learned Court below has wrongly dismissed the plaintiff suit, although the defendants admitted that so

far Schedule I properties are concerned, it is joint family property and they have got no objection for partition. The learned counsel further submitted that the finding of the learned Court below regarding Schedule II property is concerned is also based on no evidence and that the learned Court below has wrongly found that Schedule II property is self-acquired property of defendant No.1. According to the learned counsel, the parties admitted that they separated in the year 1957 according to Ext.3 and, therefore, admittedly prior to 1957, the family was joint and any acquisition prior to 1957 will be presumed to be the acquisition of the joint family. It is admitted fact that Schedule II property was acquired by registered deed of lease in the name of defendant No.1 in 1950, i.e., prior to separation between the parties in 1957 but the learned Court below has wrongly found this against the plaintiff and dismissed the suit. On these grounds, the learned counsel submitted that the impugned Judgment and Decree are liable to be set aside.

(9) On the other hand, the learned counsel for the respondent submitted that there is no illegality in the impugned Judgment and Decree. After considering the evidences, the learned Court below has rightly dismissed the plaintiff suit for partition. (10) In view of the above contentions of the parties, the following points arise for considered in this Appeal:

(i) Whether the plaintiff-appellants have got unity of title and possession over Schedule I property?

(ii) Whether the Schedule II properties is joint family properties and the plaintiffs have got unity of title and possession over the same or whether Schedule II property is self-acquired property of defendant No.1 as claimed by him ?

(iii) Whether the impugned Judgment and Decree are sustainable in the eye of law.

(11) So far Schedule I property is concerned, it is the case of the plaintiff that according to the convenience, the parties were separated by mess and cultivation but there had been no partition by metes and bonds. They were also in separate possession of the house constructed by joint family. It may be mentioned here that except the houses, the other agricultural lands and properties were affected by the

consolidation proceeding. Both the parties admitted to this fact that the consolidation proceeding is still going on. So far the houses property of Schedule I standing on plot No.1865 and 1870 are concerned, it is the case of the defendant that they have got no objection if the properties of Schedule I are partitioned. Therefore, it is the case of the plaintiff that the properties are joint and there has been no partition by metes and bonds. The defence of the defendant regarding Schedule I properties is that he has no objection if Schedule I property is partitioned. In such view of the matter, the learned Court below should have decreed the suit for partition so far Schedule I properties are concerned. From perusal of the impugned Judgment at paragraph 8 also, it appears that the learned Court below considering Ext. F/1 and F/2, i.e., the Khatiyani, came to the finding that the parties have unity of title and possession over Schedule I land. At paragraph 6 of the impugned Judgment, the learned Court below came to the conclusion that consolidation proceeding will not affect the houses on plot No.1865 and 1870 of Schedule I land. In such view of the matter when there is no dispute between the parties regarding partition of Schedule I property on plot No.1865 and 1870 and in view of the fact that the Court below himself found that the parties have got unity of title and possession over the same, in my opinion, the Court below could not have dismissed the plaintiff suit regarding the above two plots of Schedule I. Therefore, the plaintiff are entitled to 1/4th share for each branch of sons of Raghunandan Bhagat.

(12) So far Schedule II property is concerned, the plaintiff's case is that it is the joint family property acquired by the defendant No.1 in the capacity of Karta out of joint family fund. The defendant's case is that the said property is the self-acquired property of the defendant No.1 out of savings from his salaries. To prove the respective cases, the parties have adduced evidences in this regard. The learned counsel for the appellants submitted that some of the plaintiff member was also in service and they were sending money to the defendant No.1 and further said that the family had their ancestral business of decoration. Out of the income of the family, business and the salary money, the defendant No.1 acquired the said property. On the contrary, it is submitted that the other family members in the branch of plaintiff joined their service in 1951 and in fact there was no such family business and the defendant No.1 had acquired the property mentioned in

Schedule II out of his own savings from his salary in his own name.

(13) The plaintiff has examined 13 witnesses. It may be mentioned here that now the purview of this case is very limited, i.e., whether Schedule II property is self-acquired property or joint family property. P.W.1 is formal. P.W.2 has stated that the family separated themselves 26-27 years ago. Their caste profession was Mali. The income from that profession was cloth, utensil etc. and the income was always with defendant No.1. Out of the said income, some lands were acquired and the parties also constructed houses. Therefore, from perusal of the evidences of this witness, it appears that in general term, he has stated about the caste profession. P.W.3 is formal. The evidences of P.W.4 are also in the same line as that of P.W.2. P.W.5 is formal. P.W.6 is plaintiff No.2. At paragraph 17 of his cross-examination, he has clearly admitted the fact that there was no savings out of the income of the joint family lands and whatever the savings was there it was out of the salary and the land was acquired out of the said savings. Now, therefore, the plaintiff admitted that the property described in Schedule II was acquired out of the savings of salary. It may be mentioned here that he joined the service in 1951; it is admitted case that defendant No.1 joined the service in 1948 and he was posted at Hajipur. P.W. 7 to 9 is formal. The other witnesses are on the point of jointness.

(14) From the above discussions of evidences of the plaintiff, it appears that there is no evidence regarding nucleolus or joint family fund. Except the general evidence that the parties were giving money to the defendant No.1 and that the family have income from caste profession, there is no other evidence. What was the income from caste profession and what was the savings out of that income is also not specified. Admittedly, the property stands in the name of defendant No.1. The registered deed of lease dated 04.04.1950, i.e., Ext.'F' is in the name of defendant No.1. In such circumstances to render the property joint the plaintiff's duty was to adduce evidence that the family was possessed of some property with the income of which the property could have been acquired. Since the document is in favour of the defendant, there can be no legal presumption that the property is joint family property. It can only be proved by evidences that the family possessed some joint property which from its nature and relevant value may have formed the

nucleolus from which the property in question may have been acquired. If it is proved so then the burden will shift to the party to prove that it is self-acquisition acquired without the aid of the joint family. In the present case as discussed above, except the general statement and evidences, there is no evidence to prove either existence of joint family nucleolus or found. On the contrary, the plaintiff himself admitted that there was no savings from the joint family property and the property was acquired out of the savings from salary. It is admitted case that except defendant no.1, nobody was in service in 1950.

(15) In view of the above discussion, I find that the plaintiffs have failed to prove that Schedule II property is joint family property. On the contrary, I find that the defendant has been able to prove that the said property is his self-acquired property. I, therefore, find that so far Schedule II property is concerned, the plaintiff have got no unity of title and possession. The finding of the learned Court below on this point is, therefore, confirmed.

(16) In the result, the Appeal is allowed in part. The impugned Judgment and Decree are modified to the extent that the plaintiff suit is decreed so far Schedule I property is concerned and dismissed so far Schedule II property is concerned. In the facts and circumstances of the case, the parties shall bear their own costs.

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