Basiran Bibi Vs Kureshan Bibi

Court: JHARKHAND HIGH COURT

Date of Decision: Sept. 9, 2016

Citation: (2016) 168 AIC 457 : (2017) AIR(Jharkhand) 70 : (2017) 2 AIRJharR 33 : (2017) 2 JCR 598

Hon'ble Judges: Mr. Amitav K. Gupta, J.

Bench: Single Bench

Advocate: M/s. Rohit Roy and Pratik Sen, Advocates, for the Respondents; M/s. Rajeeva Sharma, Senior Advocate, for the Appellant

Final Decision: Dismissed

Judgement

Amitav K. Gupta, J - This second appeal has been preferred against the judgment and decree dated 29.01.2009 and 13.02.2009 passed by

Addl. District Judge, Fast Track Court, Dumka in T.A.NO.12 of 2006 affirming the judgment and decree passed in Title(Partition) Suit no.67 of

1998 by Subordinate Judge-III, Dumka resulting in dismissal of the Title Appeal.

2. The defendants/appellants in this appeal were arrayed as defendants-Ist set in the Title Suit instituted by the respondents-Ist party, who were the

plaintiffs.

3. The plaintiff instituted the suit seeking partition of the suit property and claiming 7/32 share of the suit property described in Schedule A, B and

C of the plaint. It was pleaded that both the parties are Muslim and are governed by Hanafi School of Mohammedan Law. The properties

described in Schedule A were recorded in the name of Lukhu Rai Bhatt and that of Schedule B were recorded in the name of Rajni Rai Bhatt and

Schedule C properties were recorded jointly in the name of Lukhu and Rajni Rai Bhatt from whom both the parties, genealogical table of which

has been given, claimed their share and interest over the said suit properties. That Rajni Bhatt died issueless immediately after conclusion of the last

survey settlement whereupon the entire suit property was inherited by Lukhu and thereafter by his four sons, namely, Maru Rai Bhatt, Jawad Ali

Rai Bhatt, Abad Ali Rai Bhatt, Sahid Rai Bhatt and the daughter, Tahiran Bibi.

The plaintiff"s case is that Shahid Rai Bhatt died in February, 1991 where after the plaintiff, Kuresan Bibi and the defendant-Ist party and her sons

inherited the entire interest of Shahid Rai Bhatt in the suit property and came in joint possession of the same. That Shahid Rai Bhatt had four wives

and his 2nd wife, namely, Laharjan Bibi was the widow of Abad Ali Rai Bhatt, the brother of Shahid Rai Bhatt. It is stated that Kamruddin Bhatt,

father of Hasmuddin Bhatt(defendant no.5, the 2nd party), son of Laharjan Bibi, was treated as a son by Shahid Rai Bhatt, after his marriage with

Laharjan Bibi. Since the plaintiff was facing inconvenience and difficulty in enjoyment of her share, which was in joint possession with the

defendant, hence she requested the defendant Ist party for amicable partition of her share on 30.07.1991, which was declined and as a

consequence thereof, the plaintiff filed the partition suit for 7/32 of her share in all the properties described in Schedule A, B and C and for carving

her share in the property by metes and bound as also the cost of the suit.

4. Defendant Ist party filed their written statement on 22.08.1994, defendant no.2 filed additional written statement on 19.07.1999 and defendant

no.5, Hasmuddin Bhatt also filed his written statement.

5. The defendant Ist party, in their written statement, challenged the maintainability of the suit stating that it was barred by limitation and by the

principles of waiver, estoppel and acquiescence. The defendant''s case is that the plaintiff''s mother, Sajiban Bibi, who has been shown as the Ist

wife of Shahid Rai Bhatt, from whom the plaintiff, Kuresan Bibi was born, is not correct rather the first marriage of Sajiban Bibi was with Jahar Ali

Bhatt of village Basmatia and plaintiff is the daughter of Jahar Ali Bhatt. That Jahar Ali Bhatt divorced Sajiban Bibi where after she was married to

Shahid Rai and plaintiff who was a leghar daughter(step daughter) was brought up in the house of Shahid Rai. It is admitted by the defendants that

Shahid Rai had four wives and Sajiban Bibi was the Ist wife, Laharjan(2nd wife), Jinatan Bibi (3rd wife) and Basiran Bibi, the defendant, was the

4th wife. It is admitted that Lahargan was previously married to Abad Ali Bhatt, Shahid''s brother and after the death of Abad Ali, she was married

to Shahid and she died leaving behind a son, Kamruddin. That Jinatan Bibi was married to Shahid Rai in the lifetime of Sajiban Bibi but she was

subsequently divorced and after the death of Sajiban Bibi, Shahid Rai married the defendant, Bashiran Bibi as his 4th wife.

The defendant''s case is that since the plaintiff, Kuresan Bibi was not the natural daughter of Shahid Rai rather the daughter of Jahar Ali, hence she

never came in joint possession with the defendants over the suit properties and it was only the defendants'' Ist, 3rd, 4th and 5th party who came in

joint possession over the suit property, after the death of Shahid Rai in February, 1991. The defendants have stated that Kamruddin was born out

of the wedlock of Shahid and Laharjan Bibi since her first husband Abad Ali Bhatt died issueless. It is stated that since Kamruddin pre-deceased

his father Shahid, thus the son of Kamruddin namely, Hasmuddin and daughter Noorjehan have got no right, title and interest in the schedule

properties and the plaintiff also does not have any right, title and interest over the suit property. She is not entitled to any relief and the suit is fit to

be dismissed.

6. Defendant no.2, the son of defendant no.1, filed an additional written statement stating that from the wedlock of Laharjan(2nd wife) and Shahid

Rai Bhatt not only a son but a daughter, namely, Intun Bibi was also born and both of them predeceased their father Shahid Rai Bhatt. Thereafter

they did not inherit any property and denied the pleading of the plaintiff that Kamruddin was born from the wedlock of Abad Ali and Laharjan.

Defendant no.2 stated that Kureshan Bibi, the plaintiff, was the leghar(step-daughter)of Shahid Rai. As such she never came in joint possession

with the defendant of the suit property. Therefore, there is no unity of title and possession of the plaintiff and she is not entitled to the relief for

declaration of right, title and interest over the suit property.

7. Defendant no.5, Hasmuddin filed his written statement admitting the facts and the genealogical table mentioned by the plaintiff. He has stated that

Abad Ali died about 40 years ago and his son Kamruddin died about 15 years after the death of Abad Ali and Shahid Rai died 18 years

thereafter. Therefore, on the death of Abad Ali, Kamruddin inherited the interest of his father and after his death, defendant no.5, the son of

Kamruddin succeeded to the interest of Kamruddin. That his grandmother namely, Laharjan Bibi was married to Shahid Rai, after the death of her

Ist husband, i.e., Abad Ali. It is stated that on the death of Jawad Ali, Maithun Bibi got married to Hamid Bhatt, son of Maru and thereafter Maru

and Shahid used to cultivate the suit lands equally on half share basis, as per their convenience. He has denied the genealogy, filed by the defendant

Ist party and stated that Kamruddin was the son of Abad Ali and not Shahid Rai and Kamruddin succeeded to the share of Abad Ali. After the

death of Kamruddin, this defendant has got right, title and interest over the suit land and is entitled to get a separate share over the suit land.

8. On the pleading of the parties, the trial court framed 12 issues. The parties led their evidence and on analysing and weighing the evidence, the

trial court, after elaborately discussing the evidence, held that the plaintiff was the natural born daughter of Shahid Rai Bhatt, born out of the

wedlock of Shahid Rai Bhatt and Sajivan Bibi and not a "legher" daughter(step daughter) of Shahid Rai, as contended by the defendant Ist party.

It also held that Kamruddin was the son of Abad Ali, the brother of Shahid Bhatt and not the son of Shahid Rai Bhatt and accordingly held that

Hasmuddin was entitled to succeed to the interest and title of Kamruddin and the plaintiff, Kureshan Bibi had a unity of title over the possession of

suit property with the defendants and decreed the suit for partitioning of the suit properties.

9. Being aggrieved, the defendants preferred Title Appeal no.12 of 2006 and the lower appellate court, after appreciating the arguments advanced

by the parties, formulated the following points for determination:-

I. Whether Kureshan Bibi was the step daughter or own daughter of Shahid Rai Bhatt and whether she was entitled for share in the suit property

or not.

II. Whether the parties were tenant in common and had common interest in the suit property in the light of their joint possession over the suit

property.

III. Was Kamruddin Ali, the son of Abad Ali Bhatt or Shahid Rai Bhatt.

10. The learned lower appellate court discussed the three issues together and upheld the findings of the trial court that the plaintiff was the natural

daughter of Shahid Rai Bhatt begotten from the marriage of Shahid Rai Bhatt with Sajivan Bibi. It also upheld the finding that Kamruddin was the

son of Abad Ali and Laharjan, the mother of Kamruddin had married Shahid after the death of Abad Ali. After discussing the evidence, the lower

appellate court held that both the parties were tenants in common of the suit property having common interest over the suit property and affirmed

the judgment and decree of partition and allocation of the shares in the name of the respondent/plaintiff and appellants/defendants.

11. This Second Appeal has been preferred against concurrent findings of the court below and the learned counsel for the appellants has assailed

the judgment and decree, contending that the courts below have erred in law inter alia on the grounds:-

Firstly, that the courts situated within the district of Dumka had no jurisdiction to entertain the suit with respect to the properties which fell within

the district of Deoghar and the lower appellate court has committed a grave error in law by rejecting the objection of defendant/appellant

challenging the jurisdiction of the learned trial court for deciding the suit with respect to the properties situated within the jurisdiction of the district

of Deoghar. It is contended that the consent or acquiescence of the parties cannot confer jurisdiction upon a court which had no territorial

jurisdiction to entertain a suit with respect to the properties which were not situated within the jurisdiction of the said court.

It is also argued that the courts below have committed an error on a substantial question of law by recording the findings that it was for the

defendant/appellant to prove their defence by ignoring the settled proposition that the plaintiff has to prove his case and it cannot take the

advantage of the weakness of defendant''s case. It is urged that the courts below have erred in law by holding that Kureshan Bibi(plaintiff) was the

daughter of Shahid Rai Bhatt without considering that there was no pleading by Kureshan Bibi that she was the daughter of Shahid Rai Bhatt. It is

also argued that there is perversity of finding as the trial court has not appreciated the evidence of Noor Jehan Bibi(D.W.1), the daughter of

Kamruddin, who is the own sister of defendant no.5 and who has admitted that she and defendant no.5 are the daughter and son of Shahid Bhatt

and not Abad Ali Bhatt. That the courts below have also committed an error in giving a finding that since Jahar Ali Bhatt has not been examined,

hence the courts below had no option but to accept the pleading that Kureshan Bibi was the daughter of Shahid Rai Bhatt and Sajivan Bibi,

without appreciating the fact that there was no evidence to show that Jahar Ali Bhatt was still alive.

12. The main thrust of the argument of the learned counsel is founded on the contention that the courts below have held that the burden lay on the

defendants to prove or to establish that the plaintiff was not the natural daughter of Shahid Rai Bhatt, born out of the wedlock of Shahid Rai Bhatt

with his first wife Sajivan Bibi, whereas the burden lay on the plaintiff to establish her case. In support of the contention, learned counsel has relied

on the decisions rendered in the case of Mosammat Jasoda Kuer and Anr. v. Dulhin Phul Kue, reported in AIR 1958 Patna 600;

Ramadhin Singh v. Siaram Singh and Anr., reported in AIR 1957 Patna 64 and in the case of Abdul Sami and Anr. v. Mohammad

Noor, reported in AIR 1966 Allahabad 39.

13. Per contra, learned counsel for the respondent has supported the findings of both the courts below and submitted that in view of the findings of

both the trial and first appellate court, the interference with such findings is not required as the findings are based on pure question of facts. It is

submitted that no error whatsoever has been committed and the judgment and decree are based on just and proper appreciation of the facts and

evidence of the parties.

14. For appreciating the arguments advanced by the learned counsel for the appellant it is pertinent to reiterate the settled proposition that the

burden of proof rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue.

In this context it is pertinent to note the observation of the Supreme Court in the case of Anil Rishi v. Gurbaksh Singh, reported in (2006) 5

SCC 558 wherein in para 19, the Supreme Court observed as follows:-

19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The

right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the

question is, which party is to begin. Burden of proof is used in three ways:

(i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later;

(ii) to make that of establishing a proposition as against all counter-evidence; and

(iii) an indiscriminate use in which it may mean either or both of the others.

The elementary rule in Section 101(Evidence Act) is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges

that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would

disentitle the plaintiff to the same.

15. In the case of K.S. Ranji and Co. v. Jatashankar Dossa, reported in AIR 1961 SC 1474 while elaborating and discussing on the concept

of the phrase ""burden of proof"" as a matter of law and pleading, the Supreme Court has observed in para 11:

11.....under the Evidence Act there is an essential distinction between the phrase ""burden of proof"" as a matter of law and pleading and as a

matter of adducing evidence. Under Section 101 of the Evidence Act, the burden in the former sense is upon the party who comes to court to get

a decision on the existence of certain facts which he asserts. The burden is constant throughout the trial; but the burden to prove in the sense of

adducing evidence shifts from time to time having regard to the evidence adduced by one party or the other or the presumption of fact or law

raised in favour of one or the other.....

16. In the aforesaid case it was held that the burden of proof is upon the plaintiff who asserts her right and it may be, in the circumstances of each

case, that the onus of proof may shift to the defendant.

17. In a catena of decisions, the legal proposition has been crystallised that the burden of proof lies upon the person who has to prove a fact but

the onus of proof shifts. The evidence required to shift the burden need not necessarily be direct evidence i.e., oral or documentary evidence or

admissions made by opposite party; it may comprise circumstantial evidence or presumption of law or fact.

18. Having broadly discussed the settled legal position on this aspect and on perusal of the decision relied on by the learned counsel in the case of

Mosammat Jasoda kuer(Supra) it would be relevant to refer to the observation made by the Hon''ble Patna High Court in para 3:-

3.....on the contention raised by the appellant that the plaintiff had to prove by cogent evidence that she is the daughter of Har Prasad and

in doing that she cannot take any advantage of the fact that the defendants have failed to prove that the plaintiff is the daughter of Rajnet Choubey.

It was held and observed by the High Court that as a proposition of law, there can be no two opinions of the submission, but at the same time it

cannot be denied that the trial court had only two versions before it about the parentage of Phula Kuer: the one was, as contended by the plaintiff,

that she was the daughter of Har Prasad, and the other, as contended by the defendants, that she was the daughter of one Rajnet Choubey.

Naturally, therefore, if the evidence given on behalf of the defendants on the point that the plaintiff was the daughter of Rajnet Choubey was

condemned as unworthy of reliance, that was bound to have certain repercussion in the process of appreciating the evidence given by the plaintiff,

though initial onus was always on the plaintiff to establish the same.

19. Thus, the underlying principle of the decision is that once the plaintiff has discharged the onus and the counter case set up by the defendants is

found to be not true then the plaintiff''s case stood fortified. This decision is of no help to the arguments advanced by the counsel for the appellant.

On the contrary, it fortifies the findings of the courts below.

In the decision in the case of Ramadhin Singh v. Siaram Singh and Anr., reported in AIR 1957 Patna 64(Supra), the principle that the

plaintiff cannot obviously take advantage himself of the weakness of the defence and the plaintiff''s case must stand or fall upon the evidence

adduced by him while enunciating the settled legal proposition, the High Court held that the question of onus is of no practical value at all where

both the parties have adduced evidence.

In the said case, the execution of hand note and its content was denied by the defendant and the plaintiff''s suit was decreed but in appeal, the

judgment and decree of the Munsif was set aside and reversed by the Sub-Judge. Thereafter, the appeal was preferred before the Patna High

Court which held that while considering the evidence of both parties, it is not incumbent upon the appellate court to consider each and every

circumstance separately which has been considered by the learned Munsif and it was held that if the appellate court has applied its mind to the

evidence properly and has given cogent reasons sustainable on the basis of the evidence, the judgment of the appellate court cannot be assailed.

20. On going through the decision in the case of Abdul Sami and Anr. v. Mohammad Noor, reported in AIR 1966 Allahabad 39(Supra)

relied upon by the learned counsel for the appellant, it is apparent that the said suit was instituted by the landlord for realisation of the rent and

ejectment of the tenant under the U.P. Control of Rent and Eviction Act. In this case the High Court observed in para 9:-

9. .....the learned appellate judge was of the view that the onus was on the plaintiff to prove that the land was not of accommodation and thus it

was upon him to prove that the land was not governed by the UP Rent Control and Eviction Act. The argument advanced was that the burden of

proof is always on the plaintiff who files a suit for ejectment without the permission of the District Magistrate is barred unless the plaintiff establishes

that his case falls within any of the 7 exceptions mentioned in the Act. But where it is disputed that the Act is applicable, there is no onus on the

plaintiff/landlord to prove that his case is within those exceptions. He is entitled to rely on his ordinary rights as a landlord to eject the tenant and it

is for the latter to prove that the ordinary law does not apply and he is protected by the safeguards against arbitrary ejectment provided

.....Therefore, in a case where the facts, which will establish that the land is accommodation, are in dispute and the tenant relies on them to claim

the protection of Section 3 of the Act, it is for him to prove that it is an accommodation covered by Section 2(a).

21. The legal proposition propounded in the decisions cited by the learned counsel for the appellant do not buttress the argument of the learned

counsel that the onus always lies on the plaintiff. On the contrary, it propounds the settled proposition that the question of onus is of no practical

value at all when both the parties have led and adduced evidence.

22. In the instant case both the trial court and the lower appellate court have considered and appreciated the evidence of both the parties and have

discarded the documentary evidence, i.e., the certificate of the Mukhiya and of the Panchayat, Exts.1, 2 and 3 produced by the

plaintiff/respondent, holding that the certificates were issued during the pendency of the suit.

It is abundantly clear that no documentary evidence was adduced by either of the parties and in the absence of documentary evidence the courts

below have discussed the oral evidence of both the parties and assigned cogent reasons for arriving at the finding that the plaintiff was the natural

daughter of Sahid Rai Bhatt.

It is pertinent to point out that the courts below, while dealing with the evidence of the defendants'' witnesses, have noticed that D.W.1, viz.

Noorjehan, on whose evidence learned counsel for the appellant has laid much emphasis, has deposed that the plaintiff is elder to her and she was

being maintained by Shahid. She could not say as to where and how the plaintiff was born. The courts below have taken note of the fact that

D.W.1, who was arrayed as defendant no.6, did not file her written statement and she has admitted that her husband is the brother of the

contesting defendant viz. Basiran Bibi and she was brought by the son of Basiran to depose in the case. The courts below have rightly held that

D.W.1 has admitted that she had not seen her father, Kamruddin, hence her statement regarding her grand father is doubtful. She has come to

depose against the interest of her own brother, i.e., defendant 2nd party.

23. The trial courts have discussed the evidence of D.W.6, i.e. the contesting defendant No.1, Basiran Bibi who stated that Leharjaan was the first

wife of Shahid whereas in the written statement it is admitted by her that Sajiban Bibi was the first wife of Shahid and Leharjaan was the 2nd wife

of Shahid. The trial courts have disbelieved the evidence of the defendant as she has made contradictory statement in the cross-examination

wherein she has denied that Leharjaan was not the wife of Abad Ali whereas it is admitted case that Leharjaan was earlier married to Abad Ali

and after the death of Abad Ali she was married to Shahid Rai as his second wife. She has stated that Kamruddin and a daughter, Unatan Bibi,

were born from the wedlock of Shahid and Leharjaan and both of them predeceased Shahid. Defendant Nos.5 and 6 were born before her

marriage to Shahid and she does not know who was cultivating the land of Abad Ali. She has admitted that whatever she has stated is as told to

her by her late husband, Shahid. It is admitted by her that when she came to her sasural, Hasmuddin was three years old and she cannot say when

their father Kamruddin died.

The courts below have also discussed the evidence of the witnesses of the plaintiff and considered the fact that defendant has asserted that Sajiban

Bibi i.e. the mother of the plaintiff, was earlier married to Jahar Ali and the plaintiff was born out of the wedlock of Sajiban Bibi and Jahar Ali and

after Jahar Ali divorced Sajiban Bibi, the plaintiff was brought by Sajiban Bibi to the house of Shahid Rai on her marriage with Shahid Rai. The

courts below have taken note of the fact that the defendant has admitted that when she was 15 years old she had gone to the house of Jahar Ali,

who was the son of the cousin of her mother, and Jahar Ali had children from his second marriage but no explanation or reason has been given as

to why the defendant did not produce and examine the second wife of Jahar Ali or the children of Jahar Ali.

The courts below have disbelieved D.W.2 as he deposed that Leharjaan was the first wife of Shahid in contradiction to the admitted case of the

defendant that Sajiban was the first wife and Leharjaan was the second wife of Shahid. D.W.3 deposed that he does not know the name of the

first wife of Shahid and at the same time he has stated that Shahid was the father of Kureshan and he does not know the name of the original father

of Kureshan.

The courts below have elaborately discussed the evidence of plaintiffs'' witness and on analysis and scrutiny of the testimony of both the parties

have arrived at the finding, on being satisfied, that plaintiff''s and defendant''s witnesses have admitted that the plaintiff was residing in the house of

Shahid Rai hence inference can be drawn in the absence of any evidence to the contrary, that the plaintiff was the natural daughter of Shahid Rai,

born out of the wedlock from his first wife, Sajiban Bibi.

It is well settled that the scope of interference in a case of concurrent finding of facts is very limited especially when the Ist appellate court has

comprehensively re-evaluated and re-examined the evidence on record and by a reasoned order upheld the findings of the trial court.

In the considered opinion of this Court there is no perversity in the findings of the court below and any further detailed discussion would amount to

re appreciating of evidence against the settled proposition of law while hearing a second appeal.

The findings are on pure question of facts which have been succinctly discussed by the lower appellate court and they do not require any

interference as it is not vitiated by any irrationality.

24. The argument advanced by the learned counsel that the Dumka courts did not have territorial jurisdiction to hear or adjudicate on the matter

since the suit properties were situated within the jurisdiction of Deoghar district is also not tenable in view of the provisions contained in sub-

Section 1 of Section 21 of the Code of Civil Procedure which reads as under:-

Sec. 21(1) no objection as to the plea of suing shall be allowed by any Appellate or Revisional court unless such objection was taken in the Court

of Ist instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a

consequent failure of justice.

25. The Supreme Court, in the case of Pathumma and others v. Kuntalan Kutty, reported in (1981) 3 SCC 589 has held that the appellate or

revisional court can entertain an objection as to the place of suing on fulfilment of the three essential conditions enunciated in Section 21(1) C.P.C.:

1. The objection was taken in the court of first instance.

2. It was taken at the earliest possible opportunity and in cases where issues are settled, at or before such settlement.

3. There has been a consequent failure of justice.

26. It is evident that in the instant case, the first two conditions were not satisfied and the objection was taken for the first time before the appellate

court. It is evident that the appellant is unable to elicit any material on record to show that there was a failure of justice. Apparently such an

objection has been made as a pretence and the learned counsel has not been able to substantiate that there was failure of justice in the instant case.

27. Therefore, in view of the settled proposition of law and the discussions made above, there is no cogent reason warranting interference with the

concurrent findings of the courts below and no substantial question of law is involved in the present appeal.

28. The appeal is hereby dismissed.