

(1999) 06 PAT CK 0037
Patna High Court
Case No: L.P.A. No. 129 of 1991

Barhu Ram and
Others

APPELLANT

Vs

Butai Ram and
Another

RESPONDENT

Date of Decision: June 24, 1999

Citation: (1999) 3 BLJR 1713 : (1999) 3 PLJR 52

Hon'ble Judges: I.P. Singh, J; B.P. Singh, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

B.P. Singh, J.

This Letters Patent Appeal has been preferred by the defendants who are aggrieved by the judgment and order of a learned Judge of this Court dated 1-11-1991 in First Appeal No. 257 of 1977 affirming the Judgment and decree dated 12-1-1977 passed by the 2nd Sub-Judge, Patna in Title Suit No. 22 of 1974. The judgment and decree passed by the trial Court decreeing the suit for partition filed by the respondents has, therefore, been affirmed by a learned Judge of this Court and it has been concurrently held that the property in question, namely, the house at Lohanipur, Patna is not a joint family property available for partition between the coparceners.

2. The facts of the case are that one Chaitu Ram had seven sons. Two of his sons died issueless during his life time. Etwari, another son died leaving behind a son Kamla Ram, plaintiff No. 2. Chaitu Ram died some time between the years 1972 and 1974 leaving behind four sons, namely, Butai Ram, plaintiff No. 1 and Barhu, Girdhari and Raghuni (defendants 1 to 3) apart from a grand son Kamla Ram, Plaintiff No. 2.

3. Title Suit No. 22 of 1974 which was a suit for partition of joint family properties was filed by Butai Ram, the eldest son of Chaitu Ram, and Kamla Ram, son of Etwari

Ram, nephew of plaintiff No. 1 against the three brothers of plaintiff No. 1, namely, Barhu Ram, Girdhari Ram and Raghuni Ram. The case of the plaintiffs was that two sons of Chaitu Ram, namely, Laxmi Ram and Giral Ram had died issueless in a state of jointness. After the death of Chaitu Ram, Barhu Ram became the Karta and Manager of the joint family since he was considered to be wise and clever. Barhu, defendant No. 1, started misappropriating joint family funds and utilising the joint family fund and usufruct for his own use and comfort. In view of the attitude of defendant No. 1, the plaintiffs requested the defendants many times to amicably partition the suit properties, but they did not pay any heed to the request of the plaintiffs, and therefore, it had become necessary to file a suit for partition. The plaintiffs, therefore, prayed for 2/5th share in the joint family properties as described in Schedules II and III of the plaint. Schedule II of the plaint related to ancestral property which included a house and three bighas of land at Manner and also Khata No. 65 plot No. 635 measuring 1.81 acres. Schedule III related to cattle owner by the family valued at Rs. 6,000. (rupees six thousand only).

4. The defendants filed a written statement and opposed the suit for partition. One of the objections taken in the written statement was that the suit was bad as it was a suit filed for partial partition since the joint family house at Lohanipur, Patna had not been included in the Schedules relating to joint family properties. It was also stated that three of the sons of Chaitu Ram had pre-deceased him and Chaitu Ram also died in the year 1972. It was further stated that even during the life time of Chaitu Ram, Butai Ram (plaintiff No. 1) had become the Karta of the family being the eldest son and being the cleverest amongst the surviving brothers. The brothers of plaintiff No. 1 deposited with him whatever they could save, since the plaintiff No. 1 had become the defecto Karta of the family even during the life time of his father. It was denied that Barhu Ram became the Karta of the joint family, though it was admitted that he continued to look after the cultivation along with his father and whatever was produced through cultivation was always supplied to all the brothers at Patna according to their needs. The allegation that defendant No. 1 Barhu was misappropriating the joint family funds was denied, and on the other hand, it was alleged that plaintiff No. 1 himself turned dishonest. A small house was purchased from the joint family fund in the year 1962 under registered sale-deed dated 27-10-1962 in the name of plaintiff No. 1, he being the eldest brother. After the purchase, all the brothers were contributing to the extent they could, and some fund was raised by mortgaging the ancestral land at village home for the construction of a house at Lohanipur. All the members of the family used to live in that house till the year 1972, i.e. during the life time of their father Chaitu Ram. However, after the death of their father, plaintiff No. 1 turned dishonest and started claiming the house at Lohanipur to be his personal acquisition and had brought plaintiff No. 2 in collusion. The plaintiffs had, therefore, dishonestly excluded from the suit schedule properties the house at Lohanipur which belonged to the joint family. The defendants never objected, and were read for partition if the joint family

house at Lohanipur was also included in the partition suit.

5. From the pleadings of the parties, it would be apparent that the existence of a co-parcenary was not disputed, and it was not disputed that the ancestral properties were available for partition between the coparceners. The sole dispute was whether the house at Lohanipur was joint family property or was the separate property of plaintiff No. 1 purchased by him in his individual capacity.

6. Plaintiff No, 1 Butai Ram examined himself as P.W. 1. In his deposition, he stated that he was working as a Peon in the Secretariat at Patna since the last 18 years i.e. since about the year 1959. He had purchased the house at Lohanipur from his own earnings and his brothers had not contributed any money for the purchase of the land. Later in the year 1971, he had sold that house to his wife since he needed money, and the name of wife was entered in the Municipal Records. His father died about three years ago, i.e. in or about the year 1974. Barhu Ram, defendant No. 1 joined service 3-4 years after he had joined service. Raghuni Ram, defendant No. 3 also joined service one or two years earlier or later. Girdhari, defendant No. 2 also joined service two-three years after the plaintiff had joined service. His other brother Etwari used to look after cultivation of land. He denied the suggestion that he became the Karta of the family after father's death or that he was looking after the family affairs even during his life time. When he was employed, he was initially getting a salary of Rs. 45/- per month. At the time of his appointment, he was married. He had taken a house on rent at Lohanipur where he used to pay Rs. 15/- per month by way of rent. That house was next to the land purchased by him later. He had purchased the house 3-4 years after he joined service and he had paid a sum of Rs. 500/- by way of consideration. Two rooms and a varandah had been constructed on the one Katha land purchased by him. It was not correct to suggest that at the time of purchase there was already a constructed house on the plot. He also denied the suggestion that his brothers had been paying him money and that the Lohanipur house was purchased with the money given to him by his brothers. He also denied the suggestion that a sum of Rs. 1,500/- was raised by mortgaging 10 kathas of village land with a view to construct the house at Lohanipur. In fact, that sum had been raised and utilised for repairing the house at village home which had collapsed during the floods. The house at Lohanipur had been sold by him to his wife by sale-deed dated 10-10-1971.

7. The wife of plaintiff No. 1, Dhanwanti, was examined as P.W. 2. She deposed that the house at Lohanipur was purchased by her husband and later she purchased that house from him. She was an employee of the Municipal Corporation and had been working for the last about 20 years. She had purchased the property from her own savings and got her name recorded in the Municipal Corporation records. She stated that the house at Lohanipur was the self-acquired property of her husband and her father-in-law or her brothers-in-law did not contribute for the purchase of that house. Her father-in-law had not taken any loan for the repair of the house at

Lohanipur.

It appears from her deposition that she had later separated from her husband on account of differences with him. She stated that the family owned lands and a house in the village. During his life time, her father-in-law never came to Patna nor did her husband's brothers come to the Patna house. She denied that during his life time, her father-in-law stayed in the Lohanipur house at Patna. She also denied that some land in the village was mortgaged with a view to construct the house at Lohanipur, Patna. She stated that the house in the village and collapsed during the floods and thereafter, some lands were mortgaged and the amount received was utilised for repairing the house in the village.

8. Ismail, P.W. 3 is the son of the vendor of Butai Ram, Plaintiff No. 1, He stated that the Lohanipur land belonged to his father and uncle and they had sold the land to Butai Ram. Butai Ram had paid the price of the land in the office of the Registrar, and this witness was then present.

9. Plaintiff No. 2 was examined as P.W. 4. He also deposed to the effect that the property at Lohanipur belongs to his uncle Butai, Plaintiff No. 1, and the other brothers had no claim to that property. They had not helped Butai Ram in the purchase of that property. This witness stated that when he was about 12-13 years old, he came to Patna and lived with Butai Ram, Plaintiff No. 1 for about 5 years. Thereafter, he got employed and started living separately. Butai used to live in Lohanipur in a house which was to the north of the house purchased by him and this witness also used to live with him in the rented premises. He knew that his grandfather had mortgaged some lands in the village, but he did not know in what connection those lands were mortgaged.

10. On behalf of the defendants, Manki Prasad Paswan was examined as P.W. 1. He being a neighbour of the parties knew them. According to him, Chaitu Ram had become old before he died and, therefore, during his life time, plaintiff No. 1 Butai Ram, used to look after the family affairs. Chaitu Ram had mortgaged some land and received Rs. 1,500/- which he had given to Butai Ram, Plaintiff No. 1 for construction of the house at Patna. He denied that that money was utilised for repairing the house in the village. According to this witness, Chaitu Ram died 4-5 years ago, i.e. some time in or about the years 1972-1973. This witness claims that he was a witness to the mortgage-deed and after receiving Rs. 1,500/- Chaitu Ram had given that amount to Butai in the office of the Registrar itself. At the time, when the mortgage-deed was executed, all the children of Chaitu Ram used to stay in the village home along with their family members and they were maintained out of the income from farming, Butai, however, had been living in Patna for many years for about 12 to 14 years.

11. Barhu Ram, defendant No. 1 was examined as D.W. 2. According to him, Butai Ram was the eldest brother and during the life time of his father, he had become

the Malik. The remaining four brothers used to earn and entrust, their savings to Butai Ram. The land at Lohanipur, Patna was purchased in the year 1962. This land was purchased by Butai in consultation with other brothers and money of all the brothers had been invested. For constructing the house, money was brought from village after mortgaging village land for Rs. 1,500/-. Before filing of the partition suit, all of them used to stay in the Lohanipur house in which all the brothers had a share. According to this witness, his father died about seven years ago, i.e. in or about a year 1970. His father had executed a mortgage-deed one year before his death. This witness had not gone to the office of the Registrar and his father had not given the money to Butai in his presence. According to his witness, he used to pay to Butai Rs. 50 to 100/- each month. He had been working for seven to eight years, i.e. since the year 1970. The house was purchased from the amount that he had been giving to his brother. According to this witness, his other brothers used to pay Rs. 50 to 100/- per month to Butai.

12. D.W. 3 Santu Ram deposed that Chaitu Ram was his maternal uncle. He used to visit his maternal uncle's house. He could not say whether the house was constructed with the amount that was received after mortgaging the land. He had come to know later that the eldest son of his maternal uncle had purchased a plot of land at Patna, and from his brothers, he had come to know that they had together purchased a plot of land at Patna. Plaintiff Butai Ram was the eldest brother, but he could not say whether he was employed for the 1st 15 to 20 years. He had come to know only 4-5 years ago that Butai had purchased a house at Patna. He had come to know from some people that Butaira had purchased the land. He had not visited the house at Lohanipur, Patna. He admitted that his maternal uncle's house at village was affected by flood, but added that it was not correct to say that that house at village home was destroyed by floods. He could not say to whom Chaitu Ram had given the money which he had received after the mortgage deed was executed. All his sons were in the office of the registrar.

13. Girdhari Ram, defendant No. 2, was examined as D.W. 4. According to him, his eldest brother Butai Ram, Plaintiff No. 1, was looking after the family affairs during the life time of his father. The land purchased at Lohanipur was purchased with the co-operation of all the brothers and was not the self-acquired property of Butai Ram, The joint family funds had been utilised for the construction of the house. His father had mortgaged some land in the village and the sum of Rs. 1.500/- so received, were given to Butai for construction of the house at Patna.

In cross-examination, he stated that he was working and was in employment since the age of 16. Butai Ram was in service at Patna for the last 20 years. The wife of Butai was working in the Municipal Corporation for about 10 years. He claimed that he was working in the State Bank for the last 10 years, i.e. since about the year 1967. He then stated that he was working for the last 20 years. The son of Itwar, namely, Kamla Plaintiff No. 2 was also employed for the last 15 years, while Barhu was

employed for the last 10-11- years. Raghuni, defendant No. 3 was employed for the last 15 years. Earlier all of them lived together along with their family members in the house at Lohanipur, but after the dispute, they started living separately and the house at Lohanipur was thereafter occupied by Butai and his family members. The house at Lohanipur was constructed 5-6 years ago during the life time of his father. Earlier, there was a hut on that plot and all the brothers with their family members started living in that hut. There was no document to show that his father had given the sum of Rs. 1500/-, which he had received after mortgaging some land, to Butai. His father died in January, 1972, but one year before that, the amount had been paid to Butai. Municipal taxes, etc. were being paid in the name of Butai. He denied that his village was overflowed.

14. On the basis of the evidence on record, the trial Court held that it was not proved that the plot of land at Lohanipur and the house constructed thereon was joint family property as it was not established that joint family funds were invested for the purchase of the land or construction of the house. On this finding, the suit for partition was decreed excluding the house at Lohanipur which was found to be the self-acquired property of Butai. The same finding has been affirmed by a learned Judge of this Court in appeal,

15. Counsel for the appellants submitted in a letters Patent Appeal, it is open to this Court not only to consider questions of law, but also to go into questions of fact and in this appeal, it is open to this Court to set aside the findings of fact recorded by the trial Court and the appellate Court. While it is true that the special jurisdiction of this Court under Letters Patent does not inhibit the Court from going into questions of Act as well as questions of law, it is equally well settled that findings of fact may be set aside by this Court only if there are good reasons to do so. The appellants must be able to demonstrate before this Court that the findings of fact are either perverse or palpably unreasonable and, therefore, unsustainable. If the trial Court and the appellate Court have correctly appreciated the evidence on record and recorded findings which can be said to be reasonable, there will be no justification for setting aside such findings of fact. We have, therefore, noticed broadly the evidence on record with a view to satisfy ourselves as to whether the findings of fact recorded by the trial Court and the appellate Court are either perverse, unreasonable or are based on no evidence or are vitiated for any other reason.

16. Having considered all aspects of the matter, we are of the view that the interference is called for in this appeal.

17. The case of the plaintiff No. 1 is that he joined service in or about the year 1959. Thereafter, he started living at Patna. He was living in a house at Lohanipur just next to the plot of land purchased by him. He was married at the time when he secured an employment, and if his wife Dhanwanti, P.W. 2 is to be believed, she had also been working in the Municipal Corporation. It is not clear when she secured that employment but her evidence is that for the last 20 years or so she has been

working. She was deposing in the year 1977 and, therefore, it takes us back in the year 1957. On the other hand, though it is not disputed by the defendants that she has been working in the the Municipal Corporation, according to D.W. 4, she had been working for the last about 10 years which means she had been working since the year 1967. The witnesses have not stated the exact date and, therefore, it is not possible to record a categoric finding as to whether the wife of plaintiff No. 1 was also working in the year 1962, when he had purchased the land at Lohanipur. It is, however, not in dispute that the plot of land was purchased in the year 1962 and the same was purchased in the name of Butai, Plaintiff No, 1. There is no satisfactory evidence on record to establish that before purchase of plot of land any amount was paid to Butai by the other members with a view to purchase the plot of land at Patna. Butai was the eldest member of the family and he was the first amongst the brothers to secure an employment at Patna. He started living at Patna after he secured an employment. There is general statement by some of the defence witnesses that they were paying Rs. 50 to Rs. 100/- per month to Butai, Plaintiff No. 1., but there is no clear evidence on record as to whether such payments were made before the purchase of land in the year 1962. The defence witnesses have referred to the purchase of land only and D.W. 4 Girdhari has stated that there was originally a hut on that plot. It was only later that a house was constructed over the plot in question.

18. The case of the defendants is that all of them with their family members as also their father started living in the hut on the plot in question and they continued to do so till a house was constructed thereon and till a dispute arose between them as to the ownership of the house. The story that all of them lived together appears to be highly improbable because in a small hut, it was not possible for four or five brothers to live together with their family members and their father. It is in evidence that even the structure raised on the land consists of only two rooms with a Varandah which could hardly be sufficient to accommodate so many family members. On the other hand, it appears more probable that plaintiff No. 1 Butai having secured an employment at Patna decided to purchase a plot of land at Patna for his own use. He was an earning member of the family and had separate income apart from his share in the joint family properties. There is, therefore, nothing to show that any amount was made available to plaintiff Butai by other members of his family to purchase a plot of land at Patna in or before the year 1962 when the plot of land was purchased. On the other hand, the plaintiff has successfully established that he had his own separate income and was working at Patna where he purchased a plot of land for his own use and occupation from his own earnings.

19. It is sought to be urged on behalf of the defendants that in the year 1970, their father had mortgaged 10 kathas of land with a view to raise a sum of Rs. 1.500/- which he handed over to Butai for constructing the house at Patna. This has been denied by the plaintiffs. While D.W. 1 states that the sum of Rs. 1,500 was immediately paid to Butai, in the office of the Registrar on 12-2-1970, the date of

registration of the deed, according to D.W. 4 the amount was paid to plaintiff No. 1 Butai one year before the death of his father, which according to him took place in January 1972. The payment was, therefore, made in the year 1971 according to D.W. 4. Counsel for the defendants submitted that the mortgage-deed dated 12-2-70 itself mentions the fact that their father needed money for repair of a house. It is not clear from the recitals in the mortgage-deed as to whether the amount was required in connection with repair of a house in the village or whether it was required in connection with the repair of the house at Patna. Counsel for the plaintiffs submitted that the house in the village had been damaged by floods and therefore, this amount was raised with a view to repair the ancestral house in the village. Even though, D.W. 4 has denied that his village was ever flooded, his own witnesses D.W. 1 and D.W. 3 admit the fact that in the Maner area, there were floods. D.W. 1 stated that in that area, there were floods 6 or 7 years ago, and again 4 or 5 years ago and again two years ago. D.W. 3 has also stated that the flood water enters his maternal uncle's village. Moreover, there is no house on the plot of land at Patna and there was only a hut. Since in the deed of mortgage, there is a recital of the purpose for which money was being raised, the father of the plaintiffs and the defendants could have clearly mentioned that the amount was needed for the construction of a house, and not that the amount was required for the repair of a house. It was, therefore, submitted on behalf of the respondents that the recital in the mortgage-deed supports the case of the plaintiff that the amount was raised with a view to get the house in the village repaired which had been ravaged by floods.

20. The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved. There is, however, no presumption that a Hindu family is also possessed of property. It is well settled that property acquired with the aid of joint family property is necessarily the joint family property, but the burden is on the party who alleges them to be an accretion to the ancestral property to establish nexus between the acquisition and the income of the ancestral property. The mere fact that the person making acquisition had in his hand surplus income with which he made the subsequent acquisition by itself cannot make the acquisition accretion impressed with the character of ancestral estate. The test of self-acquisition is that it should be without detriment to the family property i.e. without the aid or assistance of joint family property. The Counsel for the appellant is, therefore, not correct in submitting that it was for the plaintiffs to prove that the property at Lohanipur, Patna was not joint family property. It was indeed for the defendants to prove that it was an accretion to the joint family property since the defendants pleaded that the property was joint family property. In view of the fact that the parties have led evidence on this question, the technical rule of onus of proof may not be of much significance, but the fact remains that on the basis of evidence on record, the case of the plaintiffs appears to be more probable. The property at Patna was purchased in the name of Plaintiff No. 1. Plaintiff No. 1 Butai

was residing at Patna since the year 1959 and had a separate source of income. There is, therefore, nothing unnatural in his acquiring a small plot of land at Patna for his own use and occupation. There is no clear evidence on record to prove that before the purchase of the land there was any contribution from the brothers for purchase of a plot of land at Patna. The mortgage-deed on which heavy reliance is placed by the defendants does not establish that the loan was raised for constructing a house. The purpose recited in the mortgage-deed, in fact, probabalises the case of the plaintiffs that the money was required for the repair of the village house which had been ravaged by floods. The evidence regarding the actual payment of Rs. 1,500/- to Butai, Plaintiff No. 1, is also not consistent. The case of the defendants that all of them along with plaintiff No. 1 and their father lived in the house at Lohanipur does not appear to be true because there was hardly space for so many persons to live together with all their family members. Admittedly, the house was constructed on the plot in question some time in the year 1972 i.e. almost 10 years after purchase of the plot of land. During this period, plaintiff No. 1 was gainfully employed at Patna and so was his wife. They had, therefore, necessary resources to construct a house at Patna. We have found that there is no clear evidence to establish that the plot of land had been purchased with the aid of joint family funds. The general statement that all the brothers used to give Rs. 50 to 100 per month to Butai, Plaintiff No. 1 has not been accepted, and rightly so. It, therefore, follows that if the land was purchased by Butai, Plaintiff No. 1, the structure raised thereon must also have been raised by Butai.

21. Having regard to all these facts and circumstances, we are satisfied that the finding recorded by the trial Court and affirmed by the learned Judge in appeal is reasonable and deserves no interference. On an appraisal of the evidence on record, we are also inclined to take the same view and hold that the plot of land at Patna purchased in the year 1962 and the structure raised thereon was not an accretion to family property, rather the said property was the self-acquired of plaintiff No, 1 in which his brothers had no share.

22. In this view of the matter, we find no merit in this appeal and the same is accordingly dismissed, but without any order as to cost.

B.P. Singh, J.

23. I agree.