

## **Chandra Kant Missir And Ors. vs Balakrishna Missir And Ors. on 6 March, 1970**

**Equivalent citations: AIR1970SC1536, (1970)3SCC446, AIR 1970 SUPREME COURT 1536**

**Author: J.C. Shah**

**Bench: A.N. Grover, J.C. Shah, K.S. Hegde**

### **JUDGMENT**

J.C. Shah, J.

1. This is an appeal filed with certificate granted by the High Court of Patna under Article 133(1)(a) of the Constitution, and that appears to be the only justification for the appeal to be on the file of this Court.

2. One Bideyanath Misir died many years ago leaving him surviving five sons - Makund, Mohan Lal, Basudeo, Ranu and Bouku. Mohan Lal relinquished his interest in the property of the joint family. Ranu died on November 9, 1913, leaving him surviving his wife Alikrani and no lineal descendants. After the death of Makund and Basudeo, Bouku and his sons and grandsons instituted, in the Court of the Subordinate Judge, Darbhanga, an action for partition and separate possession of their share in the properties described in the Schedule to the plaint on the plea that the properties were of the joint ownership of the parties. The plaintiffs claimed a half share in the properties on alleging that they were entitled to a fourth share in the right of Bouku and another fourth share of Ranu which had after the death of Ranu been entered in the name of Bouku, and Income whereof was appropriated by him. The suit was defended by the sons of Makund and Basudeo. They contended that the claim was barred as res judicata, in that a suit was instituted in the Civil Court in 1914 by Basudeo for partition and separate possession of his share in the properties and that the arbitrators who were appointed with the consent of the parties made an award allowing to Makund a six anna share, to Basudeo a five anna share and to Bouku the remaining five anna share, and the property of Ranu was to remain in the possession of his widow Alikrani and on her death it was to be divided in the same proportion between Makund, Basudeo and Bouku. The defendants submitted that pursuant to this award, the property was divided and the parties entered into separate possession of their respective shares. The claim of the plaintiff that Bouku was in possession of Ranu's share was denied.

3. The Trial Court decreed the suit holding that notwithstanding the award of the arbitrators the suit filed by Basudeo being dismissed for non payment of Commissioner's fee, the parties must be

deemed relegated to the original status as members of the Joint Hindu family. In appeal the High Court of Patna set aside the decree passed by the Trial Court and dismissed the suit filed by the plaintiffs. With certificate, Bouku and his descendants have filed this appeal.

4. On the evidence it is clear that there was severance of the joint family status and the members of the family were divided in 1914 and their respective shares were since then separately enjoyed and possessed by them thereafter and were entered in the revenue records in their names. That the three members of the family - Makund, Basudeo and Bouku - were in possession of their separate shares in the property of the joint family is established by a mass of evidence and the admissions made by Bouku and his sons and grandsons. In paragraph 13 of the plaint it is averred:

...for the sake of their convenience and meeting their expenses, some properties are in possession of their parties...x x Although several parties to this suit have at times, mortgaged or even sold some land in the possession in time of. their personal need, yet defendant No. 1 (Balkrishna son of Makund) since the death of Makund Misser, has been keeping with him the produce of considerable lands held in jointness, without dividing the proportionate share of the parties, for the expenses of the joint family x x In paragraph 14 it is averred that Ranu Misser had appointed Rangi son of Bouku as adopted son and that Ranu thereafter lived with him and on his death Rangi performed the obsequial ceremonies and entered into possession and occupation of his entire estate as legal heir and had been appropriating the produce thereof since that day. These averments clearly show that the three branches were in separate possession of their respective shares.

5. Pursuant to the award made by the arbitrators and the decree passed by the Court the Commissioner appointed by the Court had made a memorandum of partition setting out the shares of the three branches between whom the properties were divided. Again after this suit was instituted for partition by Bouku in 1949 a Commissioner was appointed to inspect the lands in respect of which the share was claimed by Bouku and his descendants. It was found that each disputed plot of land in the villages Saurath and Pokhrauni was found divided into three parts. Apparently these lands were found entered in the names of the parties in the revenue records. The Zamindar treated the three brothers as holders of the land jointly under him but that did not alter the true relation inter se between them. It is also not disputed by the plaintiffs that they and the other branches had sold some parts of the land as their exclusive property and had mortgaged some others and had been collecting rents and profits In respect of those properties.

6. Plaintiff and other members of the family have been dealing since 1914 with the joint family properties in their possession. For instance, Ext. A series are sudbharana bonds of different dates executed by different members of the family including the plaintiff Bouku. Then there is a document Ext. B of June 1929 which is a deed executed by Bouku to one Hitlal, whereby 5 kathias 10 dhurs were exchanged by Bouku out of Khasra No. 1643 for another land. There are again two documents Exts. C and C-1, Ext. C being a sale deed by Jaibodh son of Basudeo and Ext. C-1 by Basudeo under which lands which fell to the share of Basudeo had been sold. These documents clearly indicate that parts of the land 'which were in the possession of Basu deo and his sons were transferred by them.

Exhibit C/2 is a sale deed executed by one Subans Pasban and others to Maneshwar Jha and in that document there was a recital stating that "out of three landlords, Balkrishna Missir (son of Makund) was the landlord to the extent of 6 annas, Bouku Missir was to the extent of 5 annas and Jaibodh (son of Basudeo) to the extent of remaining 5 annas.

7. These transactions are referable to the title arising under the award made in the suit filed by Basudeo being suit No. 187 of 1914 in the Court of the Subordinate Judge, Darbhanga. Suit No. 187 of 1914 was filed by Basudeo against Makund and Bouku and two others. On September 14, 1914 the Subordinate Judge ordered that a preliminary decree be passed in terms of the arbitrators' award and that a Commissioner be appointed to effect partition according to the award of the arbitrators. The terms of the award were:

We have heard the parties and their witnesses. It appears to us that they had settled amongst themselves before the arbitrators of the suit that the plaintiff (Basudeo) should be given 5 annas share, that Bouku should be given 5 annas and Makund should get six annas share in all the properties, movable and immovable. We are also of opinion that the settlement is a fair one inasmuch as Makund was the earning member of the family and by his exertion above the bulk of the properties was acquired. Therefore, we give effect to this settlement and hold that the plaintiff will get 5 annas, Bouku will get 5 annas and Makund will get 6 annas. We also hold that all the properties are joint and hence they should be divided in proportion to the above shares. The property which has been given to the widow of the deceased Ranu under will of September 8, 1913 will remain in her possession during her lifetime, without any power of alienation and on her death it will devolve upon the three brothers or their heirs and representatives in proportion to the said shares. We are also satisfied that Makund's son Toonai has performed the Sradh of Ranu. Hence he should be given one hundred rupees from joint fund....

XX XX XX Be it noted that the properties to be divided are the lands, houses and ponds only. The claim for rest of the (movable properties is disallowed.

8. It appears that after this preliminary decree was passed by the Court, a Commissioner was appointed. But ultimately the suit was dismissed on the ground that the Commissioner's fee was not paid. But the dismissal of the suit cannot operate to wipe out the preliminary decree.

9. Counsel for the plaintiffs sought to raise two contentions before us in support of the plea that the decree was not binding upon the plaintiffs: (1) that Bouku was not served as a party in the suit; and (2) that the arbitrators had acted improperly in giving to Makund 6 annas share, whereas he was entitled to only -/5/4 (five annas four pies) share. There is no substance in either contention.

10. But, pursuant to the division made in 1914 the shares of the three branches were demarcated by the Commissioner and the three branches remained in separate possession of the properties allotted to them under that partition. The record of the suit No. 187 of 1914 was it was reported destroyed. But that fact will not enable the plaintiff to get any advantage because the subsequent conduct of

Bouku clearly shows that he had taken possession of the properties pursuant to the award and had acted upon the award as being effective. It would be reasonable to infer that a decree binding a person would not be made unless he was duly served with the writ of summons from the Court.

11. The ground that the arbitrators had awarded to Makund a larger share cannot also invalidate the award. It appears that the division was made by agreement between the parties, and Makund was given 6 annas share. Apparently Makund claimed that he was the eldest member and that some of the properties claimed by Basudeo to be joint family properties were acquired by him by his own exertion. The arbitrators apparently accepted that contention and the parties agreed to the award, 35 years after that date and after the terms of the award were carried out, it was not open to one of the parties to raise a contention that the arbitrators had acted improperly in awarding to Makund a larger share than what was awardable to him under the Hindu Law relating to partition.

12. The claim to a half anna share in the properties on the footing that Ranu's share had devolved upon Bouku is futile. The award in terms provides that Ranu's share was to remain in the possession of Alikrani and on her death to be divided between the three branches in the same proportion in which the joint family property was divided. Alikrani died in 1946. Ranu could obviously not make a will of his undivided share in the properties. But the parties agreed that the share of Ranu should be held by his widow, Alikrani for her life and after her death it should be divided according to the shares in the joint property. Under the terms of the award Bouku gets no interest in the property and his claim that his son Rangī was adopted, and that he Bouku had by adverse possession acquired title to Ranu's share is not supported by any evidence.

13. The appeal fails and is dismissed with costs.