

IN THE HIGH COURT OF JHARKHAND AT RANCHI

S. A. No. 251 of 2004

Parsuram Ojha & Ors. Appellant(s)

Versus

Satyabhama Devi & Ors. Respondent(s)

CORAM :HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

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For the Appellant (s) : Mr. Rohit Roy, Advocate

Mr. Tarun Kr. Mahato, Advocate

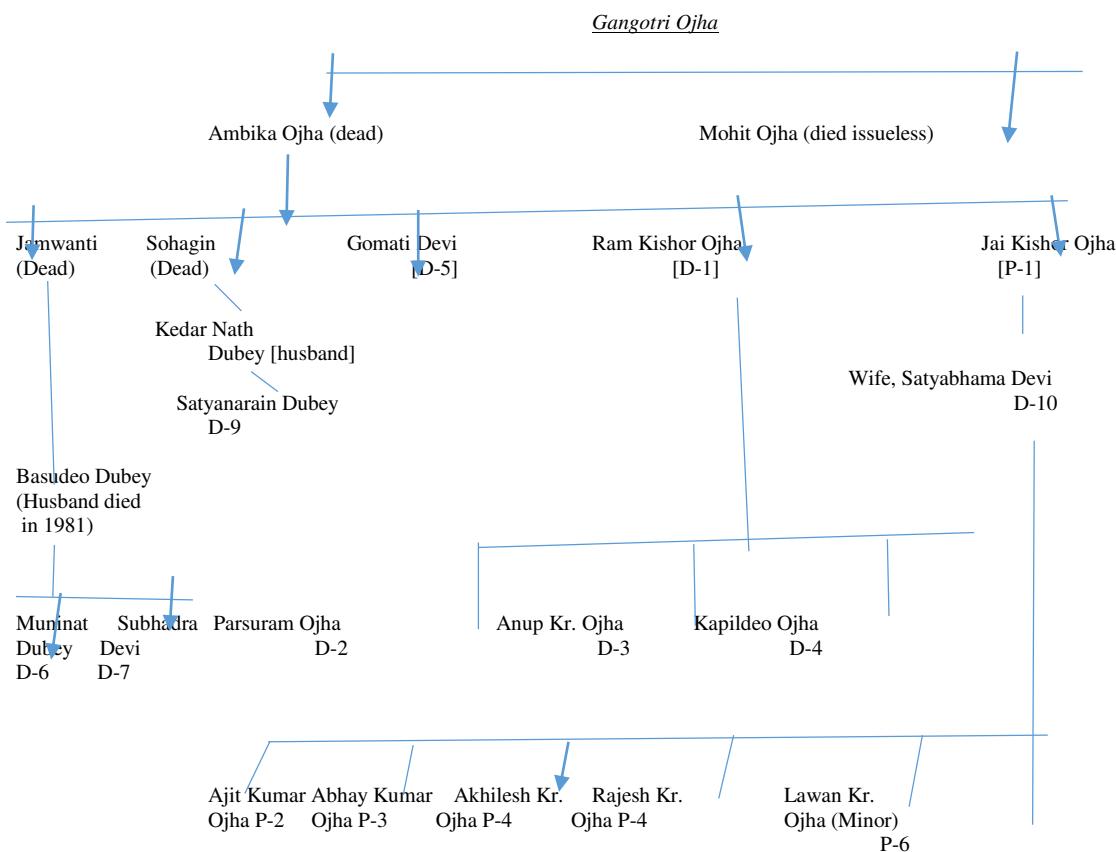
For the Respondents : Mr. Ramavtar Choubey, Advocate
Mr. B. K. Pandey, Advocate

C.A. V. on 02.05.2024.

Pronounced on 16.05.2024.

Heard, learned counsel for the parties.

1. This Second Appeal has been preferred against the judgment and decree passed in Title Appeal No.42 of 1994 whereby the judgment and decree passed by learned Subordinate Judge-IVth, Hazaribagh, in Partition Suit No.60 of 1982 has been reversed.
2. Parties will be referred by their original placement in the suit and will include the legal representative who have been substituted during the pendency of the suit or appeal.
3. Appellants are defendants and the suit for partition was dismissed by the trial Court and reversed in appeal.
4. As per the case of the plaintiff(s) and defendant(s), the Genealogy Table as set out in Schedule of the Plaintiff is not in dispute which is as under :-



5. As per the case of the Plaintiffs both plaintiff(s) and defendant(s) are heirs and descendants of common ancestor, **Gangotri Ojha**. The land was partitioned between Ambika Ojha and Mohit Ojha in the year 1961 and said Mohit Ojha died issueless in the same year and after his death, Ambika Ojha became the absolute owner of the entire property and his two daughters died leaving their husbands and children in the life time of Ambika Ojha. Said Ambika Ojha died in the year 1972 leaving his two sons, Plaintiff no.1 and defendant no.1 and a daughter (Gomati Devi- D.5). The plaintiff/ defendant no.1 and defendant no.5 came in possession of the entire property. Plaintiff no.1 used to manage the cultivation work of Gomati Devi who was living six miles away from Nawadih. She sold her interest in the suit property to the wife of plaintiff no.1 on 12.07.1980 for a consideration amount of Rs.4,000/- who came in cultivating possession of it.
6. Defendant no.1 as well as their ancestors transferred some portion of land of Khata Nos.35 and 53 to different persons. Dispute arose in enjoyment of the joint family property and leading to filing of the Partition Suit.
7. Defendant no.4 (minor) filed a formal written statement through GIA Advocate.
8. Defendant no.10 [Smt. Satyabhama Devi] also filed separate written statement and claimed to have purchased the land from Gomati Devi vide Deed No.8773 on 12.07. 1980 (Exhibit-B).
9. Defendant Nos.1 to 3 filed their joint written statement on the ground that plaintiff (s) had suppressed the property inherited in Village-Barabandi Dumri, P.S. Chatra which was the joint family property measuring area of 4 acres of Khata Nos.15 & 18. Both the sides were entitled to have half - half share acquired by Ambika OJha and Mohit Ojha except the properties as contained in Schedule-C of the plaint which was given to defendant no.1 for his services rendered to his father and Mohit Ojha was not in inclusive possession.
10. The sons of Ambika OJha partitioned the land in the year 1961 after the death of Mohit Ojha and during the life time of Ambika Ojha. Further, daughters of Ambika Ojha declined to take any share in the joint family property. Ambika Ojha also declined to take any share in the property on account of his old age. The sale deed executed by Gomati Devi in favour of Defendant No.1 was a false document and without any consideration and Defendant no.1 had no knowledge about the execution of the sale deed.
11. On the basis of the pleadings of the parties, the following main issues were framed :-

- (iii) *Is the suit bad for non inclusion of other joint family property?*
 - (iv) *Whether there was any previous partition?*
 - (v) *Whether there is any unity of title and unity of possession at the parties in the suit properties?*
12. The learned Trial Court dismissed the suit on contest by recording a finding of previous partition and non-inclusion of all the parties in the plaint in the schedule of the plaint for partition. It held that the suit properties were partitioned during the life time of Ambika Ojha in two equal shares between plaintiff no.1 and defendant no.1. The father and sister did not claim any share in the suit property.
13. The First Appellate Court reversed the judgment of dismissal and decreed the suit for partition, since plea of previous partition was not taken in the written statement originally filed and the defendants had failed to discharge the onus of previous partition. It was also held that there was no infirmity in the form of the suit by not including the property of Village Barabagi Dumari as it was not the ancestral property, but had been derived from the maternal side. The appeal was allowed on the following grounds:

Firstly, defendant no.1 had changed his stand time and again with regard to the status of unity of title and possession. In the original written statement, plea of previous partition was not taken. Subsequently, when the amendment was made in the year 1991, then they had taken the plea of previous partition. Petition for amendment of written statement filed on 16.09.1991 was dismissed by the learned trial Court on 28.09.1991, and affirmed on Civil Revision No.196/92(R). The additional written statement filed on 27.04.1974, cannot therefore be looked into.

Secondly, there was no collateral documentary evidence in support of previous partition and no paper was prepared.

Thirdly, the evidence on previous partition was beyond the pleading and deposition of the interested witnesses, cannot be accepted on this point.

Fourthly, execution of the sale deed dated 22.11.1971 was jointly executed by both the brothers which showed that there was no partition between the two brothers, otherwise, it would have been executed by defendant no.1, as he was claiming the entire lands of Village Nawadih.

Fifthly, in the original written statement, it has been pleaded that excluding the lands of Schedule C, both brothers were entitled to half and half share. Defendant no.1 (DW 10) has stated in para 27 that all the witnesses to the partition, were dead, whereas DW 14 has deposed that one of the witness namely Bireshwar Upadhyay was not dead, but alive. Defendant no.1 has admitted that lands of Village Barabagi Dumari were settled by his maternal uncle in favour of Jai

Kishor Ojha (plaintiff no.1). The property derived by the plaintiff cannot be said to be from the maternal side as held by Hon'ble Supreme Court in 1999 SAR Civil 231 (Subbaramani Reddy Versus Venkat Subbaramai).

Sixthly, in view of admission in pleadings by the defendant that defendants were entitled to half share of the property, pleading cannot be excluded by oral evidence that partition had only taken place.

14. The instant Second Appeal has been admitted to be heard on the following substantial question of law:-

“Whether the learned lower appellate court failed to assign the valid and cogent reasons for reversing the finding arrived at by the learned trial court?

15. It is argued by the learned counsel on behalf of the appellants that property situated at Barbagi Dumari was not included in the Schedule of properties. Plaintiff no.1 claimed the said property which was gifted to him by his maternal uncle through an oral Hukumnama in the year 1952. Plaintiff no.1, [who was examined as PW 12] has admitted in his cross examination in para 11 that the property gifted by his maternal uncle was joint family property before the year 1960. Reliance is placed on (1994) 2 SCC 294 whereby a suit for partial partition in absence of inclusion of other joint family properties, is not maintainable.

16. It is also argued that plaintiff no.1 (PW 12) has admitted in para 11 that parties were joint till 1960. PW 2, Jai Govind Ojha in para 5 of his cross examination has deposed that there was partition between plaintiff no.1 and defendant no.1 in the year 1961. PWs. 1, 4 and 8 have also admitted in their cross-examination that there was previous partition. In Exhibit B which is the sale deed executed by defendant no.5 in favour of defendant no.10 i.e. wife of defendant no.1, wherein it has been stated that there was previous partition.

17. Having considered the arguments advanced on behalf of both sides and the judgments delivered by both the learned Courts below, it is apparent that learned first appellate Court has extensively dealt with the pleadings as well as the evidence on record and has assigned sufficient reasons while setting aside the judgment of the trial Court.

I do not find any infirmity in the Judgment of the appellate Court to warrant interference in second appeal. Substantial question of law is accordingly answered in favour of the Plaintiff(s)/respondents.

The second appeal is accordingly dismissed.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi.

Dated 16.05.2024

Sandeep/Uploaded.