

IN THE HIGH COURT OF JHARKHAND AT RANCHI
S.A. No.169 of 2019

1. Jituwa Mahto, S/o Late Pushu Mahto, aged about 60 years
2. Ledwa Mahto, S/o Late Dhanu Mahto, aged about 65 years
3. Paran Mahto, S/o Late Hari Mahto, aged about 70 years
4. Newal Mahto, S/o Late Jhari Mahto, aged about 70 years
5. Panchu Mahto, S/o Late Jhari Mahto, aged about 65 years
6. Ranjeet Mahto, S/o Late Sukar Mahto, aged about 40 years
7. Tirath Nath Mahto, S/o Late Dasso Mahto, aged about 40 years
8. Baju Mahto, S/o Late Dasai Mahto, aged about 55 years
All are resident of Village Chokad, P.O. Maganpur, P.S. Gola, District -Ramgarh (Jharkhand), Present resident of village Sotai, P.O. -Bariatu, P.S. -Gola, District -Ramgarh, (Jharkhand)
9. Sonia Devi, W/o Late Bihari Mahto, aged about 65 years
10. Panko Devi, W/o Bihari Mahto, aged about 42 years
Both are resident of village -Sotai, P.O. -Bariatu, P.S. -Gola, District -Ramgarh (Jharkhand)

.... **Appellants/Appellants/Defendants**
Versus

1. Dinu Mahto, S/o Late Paras Mahto
2. Jhandu Mahto, S/o Late Rameshwar Mahto
3. Fekan Mahto, S/o Late Tula Ram Mahto
All are resident of village -Barki Koya, P.O. -Bariatu, P.S. -Gola, District -Ramgarh (Jharkhand)

.... **Respondents/Respondents/Plaintiffs**

For the Appellants : Mr. Manjul Prasad, Sr. Advocate
: Mr. Kundan Kr. Ambastha, Advocate
: Mr. Arbind Kr. Sinha, Advocate
: Mr. Baban Prasad, Advocate
: Mr. Akhouri Prakhar Sinha, Advocate
: Mr. Aniket Rohan, Advocate

PRESENT
HON'BLE MR. JUSTICE ANIL KUMAR CHOUDHARY

By the Court:- Heard the learned counsel for the appellants.

2. This second appeal has been preferred under Section 100 of Code of Civil Procedure against the judgment and decree of concurrence dated 15.02.2019 passed by the learned District Judge-III, Ramgarh in Civil Appeal No.09 of 2018 whereby and where under, the learned first appellate court has dismissed the appeal on

contest and upheld the judgment and decree passed by the learned trial court being the Civil Judge (Senior Division)-III, Ramgarh in Partition Suit No. 124 of 2008 dated 31.03.2018.

3. The brief fact of the case is that the plaintiff-respondents filed Partition Suit No. 124 of 2008 in the court of Civil Judge (Senior Division)-III, Ramgarh with a prayer for a decree for partition of the plaintiffs 12 Annas share in Khata No. 7, 8 Annas share in Khata No. 5 of Schedule-B from the defendant no. 1 and 12 Annas in one share out of five shares of Schedule -C from all defendants.

4. The case of the plaintiffs in brief is that Kawan Mahto was the common ancestor of the parties to the suit. He has five sons namely Juthan Mahto, Mitar Mahto, Kishun Mahto, Mithan Mahto and Lutan Mahto. The parties to the suit are members of joint Hindu family governed by Mitakshara School of Hindu Law. The plaintiffs are the descendants of Lutan Mahto. The defendant no.1 is also the descendant of Lutan Mahto through his son Jeeva Mahto. Lutan Mahto has two sons Jeeva Mahto and Laljee Mahto. The defendant nos. 2 to 11 are the descendants of the four other sons of Kawan Mahto namely Juthan Mahto, Mitar Mahto, Kishan Mahto and Jogia Mahto. Though there was entry of separate Kabajwari of the brothers and nephew of Juthan Mahto but Jeeva Mahto and Laljee Mahto both sons of Lutan Mahto have been cultivating plot no. 5, 7 & 8 jointly, hence separate *Kabjwari* has been shown in their name in respect of the land mentioned in Schedule -B of the plaint. Jeeva Mahto kept his daughter Lahsania

Devi as Gharjamai to bring up his son Pushwa Mahto. Pushwa Mahto died leaving behind his son Jeetwa Mahto. Lahsania Devi and her sons Rameshwar Mahto, Tularam Mahto and Dinu Mahto used to look after and serve Laljee Mahto, the brother of Jeeva Mahto who was issueless. Jeetwa Mahto son of Pushwa Mahto is unmarried and issueless and suffered from leprosy. Laljee Mahto out of love and affection gave his entire property to Rameshwar Mahto, Tularam Mahto and Dinu Mahto, sons of Lahsania Devi vide registered deed of Will no. 21 dated 14.08.1961. The last rites of Laljee Mahto was performed by the said three sons of Lahsania Devi. The plaintiffs pleaded that no partition by metes and bounds has taken place in respect of the lands of Khata No. 5, 7 & 8. As the plaintiffs were informed that the defendant no.1 was intending to sell and transfer some land illegally to the detriment of the plaintiffs, hence the plaintiffs filed the suit for partition.

5. The defendants in their written statement challenged the maintainability of the suit on various technical grounds. Further, it was pleaded by the defendants that there is no unity of title and possession in respect of the suit land between the plaintiffs and the defendants. The defendants denied that the plaintiffs are the legal representatives and descendants of Jeeva Mahto and Laljee Mahto. The defendants next pleaded that Lahsania Devi in or about the year 1940 went to her Sasural after her marriage and severed all connection with her Naihar (parental house). It is next submitted that the case of the plaintiffs is a cooked-up story and are all false. The Will executed by Laljee Mahto has not been probated. There

has been prior partition between the parties, hence the defendants prayed for dismissal of the suit.

6. On the basis of rival pleadings of the parties, the learned trial court settled the following six issues:-

- (I) *Is the suit maintainable in its present form?*
- (II) *Whether the plaintiffs have got valid cause of action for the suit?*
- (III) *Is the suit barred by Law of Limitation and Adverse Possession?*
- (IV) *Is there any unity of title and possession of the parties over the suit land?*
- (V) *Is there jointness of parties over the suit property and preliminary decree for partition of the plaintiffs 12 annas share in Khata No. 7 and 8 annas share in Khata No.5 of Schedule B land and 12 annas in one share out of five share of Schedule C land be passed?*
- (VI) *To what other relief or reliefs, plaintiffs are entitled for?*

7. In support of his case, the plaintiffs examined altogether four witnesses and proved the documents which have been marked Ext. 1 to Ext.2/c. On the other hand from the side of the defendants, the defendant examined altogether ten witnesses and the defendants also proved the documents which were marked Ext. A to Ext. A/10.

8. The learned trial court first took up issue nos. IV and V together and after considering the evidence in the record came to the conclusion that the plaintiffs have been able to prove that Laljee Mahto executed Will vide deed no. 21 dated 14.08.1961 in favour of Rameshwar Mahto, Tularam Mahto and Dinu Mahto sons of Lahsania Devi out of love and affection. In the process, the learned trial court relied upon the admission made by the D.W.4. who is the defendant no.3 at para-18 of his cross-examination that the sons of Lahsania were looking after Laljee Mahto. The learned trial court also considered para-18 of the cross examination of the

D.W.3 wherein he admitted that no partition took place by metes and bounds. The defendants could not prove their plea that Laljee Mahto died before 1961 i.e. the date of execution and registration of the Will. The Will was marked Exhibit without objection and was not challenged. The learned trial court also held that the plaintiffs have succeeded in establishing that Jeeva Mahto after the death of his wife brought Lahsania Devi and kept her as *Gharjamai* to look after him and his son Pushwa Mahto and went on to hold that the suit property is joint property of the parties and there is unity of title and possession between the parties and thus the plaintiffs are entitled for a preliminary decree of partition as prayed for and answered the issue no. IV and V accordingly. The learned trial court disposed of issue no. III as not pressed. Lastly, the learned trial court took up issue nos. I, II & VI and held that the suit is maintainable in its present form. The plaintiffs have valid cause of action for the suit and that the plaintiffs are entitled to the reliefs claimed by them and decreed the suit.

9. Being aggrieved by the judgment and decree passed by the learned trial court, the defendants filed Civil Appeal No.9 of 2018 in the court of Principal District Judge, Ramgarh which was ultimately heard and disposed of by the learned District Judge-III, Ramgarh by the impugned judgment and decree.

10. The learned first appellate court on the basis of the materials in the record and submissions made before it, formulated the following point for determination:-

"Whether there is unity of title and possession of the parties over the suit land and is there jointness of party over the suit"

property and secondly whether the plaintiffs are entitled for partition with regard to 12 annas of share in Khata no.7 and 8 annas of share in Khata no.5 of schedule B land and 12 annas in one share of five share of schedule C land?"

11. The learned first appellate court made independent appreciation of the evidence in the record and considering the materials available in the record that the plaintiffs and the defendants are of the same family and they have been cultivating the suit property as per their Kabjawari and convenience and no partition has ever been taken place by metes and bounds between them; came to the conclusion that, there is unity of title and possession of the parties in respect of the suit land. The learned first appellate court also came to the finding that Laljee Mahto executed a Will registered vide document no.21 dated 14.08.1961. The learned first appellate court also came to the conclusion that Laljee Mahto died issueless and went on to held that the plaintiffs are entitled for a preliminary decree for partition of the suit land 12 annas share in Khata no.7, 8 annas share in Khata no. 5 from Schedule B and 12 annas in one share out of five share of Schedule C land and concurred with the finding of the learned trial court in respect of issue nos. 4 & 5. The learned first appellate court also concurred with the finding of the learned trial court on the other issues and dismissed the appeal, upholding the judgment and decree passed by the learned trial court.

12. It is submitted by the learned senior counsel for the appellants that both the courts below could not appreciate the evidence in the record in their right perspective and the findings of both the courts below are perverse. It is further submitted by the

learned senior counsel for the appellants that both the courts below failed to consider that the Will having not been probated, the same could not have been relied upon by the courts below for establishing the rights of the plaintiffs through such Will in any court of justice in view of the bar under Section 213 of the Indian Succession Act, 1925. Hence, it is submitted that the Judgment and decree passed by both the courts below set aside and the decree passed by both the courts below be modified by allotting more share to the defendant no.1 as a natural heir of Laljee Mahto also.

13. Having heard the submissions made at the Bar and after carefully going through the materials in the record, it is pertinent to mention here that both the courts below have relied upon the Judgment of Hon'ble Madras High Court in the case of **Lalithammal Vs. T. Mohan Das**, reported in **2007 0 Supreme (Mad) 844** wherein the Hon'ble Madras High Court has considered Section 213 along with Section 57 of the Indian Succession Act, 1925. It is pertinent to refer to Section 213 of the Indian Succession Act, 1955 which reads as under:-

"213. Right as executor or legatee when established. –(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in [India] has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

[(2) This section shall not apply in the case of wills made by Muhammadans 36[or Indian Christians], and shall only apply –

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of classes specified in clauses (a) and (b) of Section 57, and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary 37[original] civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those

limits, in so far as they relate to immovable property situate within those limits.]" (Emphasis supplied)

14. The plain reading of Section 213 of the Indian Succession Act, 1925 makes it abundantly clear that no right as executor or legatee can be established in any court of justice unless a court of competent jurisdiction in India has granted probate of the Will under which right as claimed or has granted letters of administration with the Will or an authenticated copy of the Will annexed. But Section 213 of Indian Succession Act makes it crystal clear that Section 213 is not applicable to Mohammadans or Indian Christians and it shall only apply in case of Wills made by *inter-alia* Hindus where such Wills are of clauses specified in clause (a) and (b) of Section 57. It is relevant to refer to Section 57 of the Indian Succession Act, 1925 which reads as under:-

"[57. Application of certain provisions of Part to a class of wills made by Hindus, etc.—The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits

; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b) :]

Provided that marriage shall not revoke any such will or codicil." (Emphasis supplied)

15. A plain reading of clauses (a) and (b) of Section 57 of the Indian Succession Act, 1925 makes it abundantly clear that the

provisions of part-IV of the Indian Succession Act, 1925 is applicable to (a) all Wills and Codicils made by *inter-alia* Hindu on or first day of September, 1870 within the territories which at the said date was subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Court of Judicature of Madras and Bombay and (b) all such Wills and Codicils made outside those territories and the limits so far as relates to immovable property situate within those territories or limits. So the conjoint reading of Section 213 along with Section 57 of the Indian Succession Act, 1925 makes it abundantly clear that after insertion of sub-rule 2 of Section 213 vide Section 4 of Act 16 of 1962 with effect from 30.03.1962 no Will executed by any Hindu, Buddhist, Sikh or Jaina if they are made outside the territories which on 01.09.1870 was subject to the Lieutenant Governor of Bengal or within the limits of ordinary civil jurisdiction of High Court of Judicature of Madras and Bombay and the Will or Codicils were made not related to immovable properties situated within the territories which was on 01.09.1870 was subject to the Lieutenant Governor of Bengal or within the local limits of ordinary original civil jurisdiction of High Court of Madras and Bombay; such wills are not required to be probated to escape the condition precedent set out in Section 213 of the Indian Succession Act requiring probate of Will etcetera for establishing the right as executor or ligatee in any court of civil jurisdiction.

16. In this respect, the learned senior counsel for the appellants relies upon the Judgment of Hon'ble Supreme Court of India in the

case of **Mrs. Hem Nolini Judah (since deceased) and after her legal representative Mrs. Marlean Wilkinson vs. Mrs. Isolyne Sarojsbashini Bose and Others**, reported in AIR 1962 SC 1471 wherein before amendment of the Indian Succession Act, 1925 as the Judgment in the Civil Appeal No. 273 of 1959 dated 16.02.1962 was delivered before insertion of Sub-section 2 of Section 213 of the Indian Succession Act, 1925, vide Section 4 of Act 16 of 1962 with effect from 30.03.1962, wherein the Hon'ble Supreme Court of India obviously has no occasion to consider Sub-section 2 of Section 213 as it stood amended vide Section 4 of the Act No. 16 of 1962 with effect from 30.03.1962, considering the then prevailing statute, in the facts of that case, the Hon'ble Supreme Court of India has observed that Section 213 creates a bar to the establishment of any right under Will by any executor or any legatee, unless probate or letter of administration of the Will has been obtained.

17. Now coming to the facts of the case, the undisputed fact remains that the Will was executed at Ramgarh and there is no pleadings of the parties that Ramgarh was either on 01.09.1870 within the territory which was subject to the Lieutenant Governor of Bengal on 01.09.1870 or the same was within the local limits of ordinary civil jurisdiction of the High Courts of Judicature of Madras and Bombay but as per the common knowledge, Ramgarh was under an independent Princely State on 01.09.1870. Under such circumstances, this Court is of the considered view that both the courts below have not committed any illegality by allowing the

plaintiffs to establish their right under the Will in question which was marked Ext.1 without objection even though the said Will was not probated, keeping in view that the Partition Suit No. 124 of 2008 was filed on 19.07.2008 that is much after the amendment of Section 213 was made with effect from 30.03.1962.

18. So far as the contention of the appellant regarding the evidence in the record having not been appreciated in its proper perspective is concerned, this Court after going through the materials in the record finds that the concurrent finding of fact of both the courts below is not based on any evidence which were not admissible nor the courts below have excluded any evidence which was admissible nor the finding of fact can be termed as outrageously defying logic incurring the blame of being called perverse. Hence, this Court is of the considered view that there is no perversity committed in the finding of facts by both the courts below and no substantial question of law is involved in this appeal.

19. Accordingly, this appeal being without any merit is dismissed.

20. Let a copy of this Judgment be sent to the court concerned forthwith.

(Anil Kumar Choudhary, J.)

High Court of Jharkhand, Ranchi
Dated the 29th October, 2024
AFR/ Sonu-Gunjan/-