

GAHC010028802017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RFA/106/2018

Sri Subrata Deb and 3 others.

.....Appellants

-VERSUS-

Sri Sraban Kumar Bihani & 17 others.

.....Respondents

BEFORE
HON'BLE MR. JUSTICE AJIT BORTHAKUR

For the appellants : Mr. G Saikia, Advocate

For the respondents : Mr. GN Sahewalla, Sr. Advocate

Date of hearing : 05.01.2023

Date of Judgment/ Order : 23.02.2023

JUDGMENT & ORDER

Heard Mr. G Saikia, learned counsel for the defendant/ appellants and Mr. GN Sahewalla, learned Senior Counsel appearing for the plaintiff/respondents.

2. This regular first appeal under Section 96 read with Order XLI of the Civil Procedure Code, 1908 (for short 'CPC') has been preferred against the impugned Judgment and Decree, dated 13.02.2017, passed by the learned Civil Judge, Nagaon, in Title Suit No.82/2012 decreeing the Suit of the plaintiff/respondents herein.

3. The plaintiff/respondents' case, in a nutshell, is that their predecessor-in-interest and proforma defendants, namely Late Kashi Prasad Bihani was the absolute owner and possessor of a plot of land measuring 1 Bigha, covered by Dag No.548/549, Periodic Patta No.274 (old)/275 at Hojai Kisam No.2, Mouza-Hojai Town, described in Schedule-A (First Part) of the plaint. After acquiring the aforesaid property, said Kashi Prasad Bihani started running one Cinema Hall, namely 'Sri Laxmi Talkies' thereon, by forming a partnership firm jointly with his son, the plaintiff No.1/respondent No.1 herein and Smti Kamala Devi Bihani, wife of proforma defendant No. 10 in the original suit, son of Late Kashi Prasad Bihani/proforma respondent No. 14 herein by virtue of a Partnership Deed, dated 11.08.1962.

4. The plaintiff/respondents further contended that after the death of Kashi Prasad Bihani on 24.06.1995, the said partnership firm was reconstituted and the wife of Late Kashi Prasad Bihani, namely Kistoori Devi Bihani (since deceased) was inducted as partner in place of her husband Late Kashi Prasad Bihani jointly with the plaintiff No.1 and said Kamala Devi Bihani/wife of the proforma defendant No.10. Said Kashi Prasad Bihani died intestate and as such, his right, title and interest in respect of the suit property was devolved upon his legal heirs. Accordingly, by virtue of inheritance, all the legal heirs jointly succeeded naturally to the suit property, which included the said cinema hall, namely 'Sri Laxmi Talkies' with each having undivided 1/9th share therein. It has

been stated that after the demise of said Kashi Prasad Bihani, the suit property was looked after by his eldest son, Jagadish Prasad Bihani, the proforma defendant No. 10 in the original suit/proforma respondent No. 14 herein and the entire income accrued therefrom was utilized for the benefit of their joint family. As on 23.09.2010, said Kistoori Devi Bihani expired, her undivided right, title and interest in the said property was devolved upon her sons and daughters. Thereafter, the plaintiff/respondents came to know that the defendant/appellants purchased illegally the undivided suit land by execution of a number of registered sale deeds from their mother Kistoori Devi Bihani (since deceased).

5. In the above backdrop of facts, the plaintiff/respondents instituted the Title Suit No. 82/2012 seeking the following reliefs-

“a) Declaration that the plaintiffs continuing to be the joint owners in respect of 63.40% in respect of the suit property and the proforma defendants are the joint owners of 29.24% share thereof, as fully described in the Second Part of Schedule A hereunder written;

b) Declaration that the defendants being co-owner of a fractional share being 1060 square feet, equivalent to 7.36%, out of the total 14,400 square feet. in respect of the suit property specified in the First Part of Schedule A below, are not entitled to declare themselves to be absolute owners of the suit property;

c) A decree for partition be passed and direct the Revenue authority to issue separate patta in respect of plaintiff share;

d) Plaintiffs be put into possession of their share by evicting the defendants, if they are found in possession in plaintiff share;

e) Permanent injunction restraining the defendants, their men, agents and all servants acting on their behalf and each one of them from dealing with the suit property, including fixtures, fittings machineries and equipments lying therein and/or from selling conveying or transferring and/or from creating any encumbrances or creating third party interests therein and/or dismantling the existing building situated therein and/or from causing any addition or alteration and/or from removing the fixtures, fittings and other machineries and

equipments situated therein in any manner whatsoever;

f) Order of permanent injunction restraining the defendants, their men, agents and all servants acting on their behalf and each one of them from dealing with and/or running the said cinema hall, "Sri Laxmi Talkies" situated in the suit property;

g) Receiver;

h) Attachment;

i) Costs of advocate fees;

j) Such other or further relief which the plaintiffs may be found entitled to."

6. The defendant/appellants herein had contested the suit of the plaintiff/respondents by filing a joint written statement contending, *inter-alia*, that there is no cause of action for filing the suit; that the suit is not maintainable; that the suit is barred by the principles of waiver, estoppels and acquiescence. The defendant/appellants denied the existence of any Cinema Hall on the suit land and they claimed to have purchased the suit land by executing registered sale deeds in the years 2009 and 2010 from Kistoori Devi Bihani (since deceased), wife of Late Kashi Prasad Bihani(the original pattadar) and accordingly, their names were mutated in the land records.

7. Based on the pleadings, the learned Trial Court formulated as many as 8(eight) issues which are as follows:

1. *Whether cause of action arose for the suit?*

2. *Whether suit is maintainable in its present form and manner under the law and provision?*

3. *Whether the suit property fell in the share of late Kishoori Devi Bihani after death of Kashi Prasad Bihani and she with her son Jagadish Prasad Bihani (Proforma defendant) engaged two brokers namely Hanuman Gupta and his son Hrishikesh Agarwala?*

4. *Whether legal heirs of Kashi Prasad Bihani transferred and sold out the*

land to defendant Nos. 1 to 9?

5. *Whether the plaintiffs have 63.40% share and proforma defendants have 29.24/- share in the suit property mentioned in schedule "A"?*

6. *Whether plaintiff is entitled for the partition as prayed for?*

7. *Whether plaintiff is entitled for decree as sought for?*

8. *To what relief/reliefs, the parties are entitled to?"*

8. During the course of trial, the plaintiff/respondents herein examined one witness, namely Sraban Kumar Bihani, the plaintiff/respondent No. 1 herein and exhibited 29 numbers of documents. The defendants' side examined 3 witnesses and exhibited 24 numbers of documents.

9. After conclusion of adjudication, the learned Trial Court decided all the issues in favour of the plaintiff/respondents and accordingly, decreed the suit as prayed for vide the impugned judgment and decree.

10. Being highly aggrieved and dissatisfied with the aforesaid impugned judgment and decree passed by the learned Trial Court, the defendant/appellants have preferred the instant first appeal.

11. Mr. G Saikia, learned counsel for the appellant/defendants, emphatically submitted that all the appellant/defendants are the bonafide purchasers of the suit land vide the registered sale deeds after verifying all the land records and ascertaining the right, title and interest of the seller over the suit land. Mr. Saikia further submits that there are 16 numbers of registered sale deeds indicating title of the defendant/appellants over the suit land, but, the plaintiff/respondents have challenged only 9 numbers of sale deeds without making any specific prayer for cancellation of the same which material irregularity in the suit, the learned Trial Court failed to appreciate to overturn their prayer for the reliefs prayed for.

12. Mr. Saikia contended that after purchase of the suit land, the defendant/appellants herein mutated their names in the records of rights after due process of law. On the other hand, Mr. Saikia submitted that the Deputy Commissioner, Nagaon and the Sub-Registrar of Hojai as well as the wife of the proforma defendant No.10/proforma respondent No. 14 herein, namely Smt. Kamala Devi Bihani were not impleaded in the Title Suit despite being necessary parties for effective adjudication of the issues between the parties.

13. According to Mr. Saikia, the suit is not maintainable as no mandatory notice, required under Section 80 of the CPC, was served for the purpose of filing the suit against the State. Additionally, the learned Trial Court, Mr. Saikia submitted, failed to appreciate the mandate of law as propounded by the Hon'ble Supreme Court in SLP (C) No. 17932/2009 that in a suit for partition or separation of a share, the prayer must be not only for declaration of plaintiff's share in the suit properties, but also division of its share by metes and bounds involving three essential issues vis. 1) Firstly, whether the person seeking division has a share or interest in the suit property; 2) Secondly, whether he is entitled to the relief of division or separate possession; 3) Thirdly, how and in what manner, the property/properties should be divided by metes and bounds. Therefore, Mr. Saikia, the learned counsel for the defendant/appellants, submitted that the impugned judgment and decree passed by the learned Trial Court is liable to be set aside.

14. *Per contra*, Mr. GN Sahewalla, learned Senior Counsel appearing for the plaintiff/respondents, submitted that it is the admitted position that Late Kashi Prasad Bihani was the predecessor-in-interest of the plaintiff/respondents, had right, title and interest over the suit land and after his death, the property devolved on his legal heirs, his wife, namely Kistoori Devi Bihani and their sons

and daughters as their joint undivided property mentioned in Paragraph No. 2 of the plaint.

15. It is the settled law, Mr. Sahewalla, learned Sr. Counsel submitted, that under the Transfer of Property Act an undivided share of property may be a subject matter of sale, but possession thereof cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of Court as has been succinctly held by the Hon'ble Supreme Court in the case of ***Ramdas Vs. Sitabai and Others***, reported in ***(2009) 7SCC 444***. The appellant/defendants having failed to prove the pleaded fact of amicable family partition of the suit property amongst the plaintiff/respondents, who are co-owners of the suit property, could not have purchased, owned and claimed over it. Mr. Sahewalla referring to the ratio of the judgment rendered by the Hon'ble Supreme Court in ***Eureka Builders and Ors. Vs. Gulabchand***, reported in ***(2018) 8 SCC 67*** submitted that whatever interest a person is possessed of in any landed property, he can transfer only that interest to the person and no other interest, which he himself does not possess. Mr. Sahewalla emphatically submitted that the suit property being the undivided joint property of the plaintiff/respondents, their mother Late Kistoori Devi Bihani, the wife of Late Kashi Prasad Bihani could have not transferred her non-exclusive interest over the suit land to the defendant/appellants and on the other hand, the evidence of the defendant's witnesses clearly show that they have not proved the exhibited registered sale deeds in accordance with the Evidence Act and as such, those were fraudulent sale deeds whereon no title accrued in their favour.

16. Mr. Sahewalla submitted that in terms of Section 102 of the Evidence Act, the plaintiff/respondents had discharged their initial burden of proof by leading

evidence showing that the suit property was not partitioned at any point of time till date and so, the burden shifted to the defendant/appellants to prove to the contrary, that is, in support of their plea that the suit property was amicably partitioned among the legal heirs of Late Kashi Prasad Bihani. So, no duty was cast upon the plaintiff/respondents to make a prayer for cancellation of the apparently fraudulent sale deeds exhibited in the suit and all the necessary parties were impleaded for effective adjudication of the suit. Therefore, Mr. Sahewalla submitted that no interference in the well reasoned impugned judgment and decree passed by the learned Trial Court is called for.

17. I have duly considered the above submissions made by the learned counsel of both sides and perused records including the impugned judgment and order as well as the citations referred to above.

18. A perusal of the pleadings of the parties, it is noticed that the above issue Nos. 3, 4 and 5 are most relevant and crucial in deciding the issues between the parties. It is further noticed that the learned Trial Court has decided all the issues in favour of the plaintiff/respondents herein focusing basically on their claim of respective share of the suit land.

19. It is not in dispute that Late Kashi Prasad Bihani, the predecessor-in-interest of the plaintiff/respondents was the absolute owner of the suit land and he expired on 24.06.1995 vide Ext.- 1, the Death Certificate, leaving behind his wife, Kistoori Devi Bihani, two sons and five daughters. After the death of said Kashi Prasad Bihani although the suit land was supposed to be devolved on all his legal heirs as joint owners by inheritance, the name of said Kistoori Devi Bihani was, however, mutated to the exclusion of other legal heirs in the land records vide Ext.-3, the certified copy of the Jamabandi and Ext. 10, the certified copy of the mutation order, dated 20.03.2000.

20. It has come in the evidence of P.W. 1, namely Sraban Kumar Bihani, son of said Kashi Prasad Bihani (father) and Kistoori Devi Bihani (mother), that from the lifetime of Kashi Prasad Bihani one cinema hall was running over the Schedule-A, First Part, land in the name and style of 'Sri Laxmi Talkies' and it was run with a license issued in his name (Sraban Kumar Bihani) vide Ext- 15, the license forming a partnership firm jointly among father (Late Kashi Prasad Bihani), himself (Sraban Kumar Bihani) and Kamala Devi Bihani, wife of proforma defendant No. 10/proforma Respondent No. 14 herein. Thus, they were physically possessing the suit land.

21. His (P.W.1) evidence further shows that after the death of his father on 24.06.1995, his mother Kistoori Devi Bihani (since deceased) was inducted in the aforesaid partnership business of the cinema hall, although all the legal heirs of Late Kashi Prasad Bihani by virtue of inheritance shared 1/9th interest each over the suit land with properties standing thereon. However, the plaintiffs' evidence (P.W.1) reveals that afterwards, the name of said Kistoori Devi Bihani was mutated in the year 2006 vide Ext.-3, the certified copy of Jamabandi on no objection application being filed by the defendant No. 10/ proforma Respondent No. 14 herein, the eldest son, addressed to the Circle Officer, Hojai vide Ext.-5, the certified copy thereof in Mutation Case No. 137/99-2000, dated 27.02.2000 in exclusion to the other heirs of Late Kashi Prasad Bihani.

22. It appears from the evidence of P.W. 1, Sraban Kumar Bihani that in the month of December, 2011, it came to the knowledge of the plaintiff/respondents herein that in December, 2011, the defendants encroached upon the suit property including the cinema hall which Late Kashi Prasad Bihani constructed during his lifetime and was running cinematography business along with others aforementioned on partnership.

23. The plaintiff's evidence (P.W.1) also shows that on having learnt that the suit property was allegedly encroached upon by the defendant/appellants herein he enquired in the Office of the Sub-Registrar, Hojai through an RTI application and came to know that 9 numbers of registered sale deeds were purportedly executed by the vendor, their mother Kistoori Devi Bihani in favour of the defendant/appellants without obtaining prior sale permission from the competent authority and in pursuance thereto, a Magisterial Enquiry was conducted on 27.01.2011 in this regard and after having registered Hojai P.S. Case No. 130/2011 under Section 409 of the IPC, the police seized the sale deeds which were executed in the year 2010 vide Ext.- 4, the reply by the Sub-Registrar, Hojai against the RTI application. It is noticed that 4 certified sale deeds were purportedly executed by Late Kistoori Devi Bihani on 24.12.2009 in favour of the appellant Nos. 1, 2, 3 and respondent Nos. 9, 10, 11 herein vide Ext. Nos. 6, 7, 8 and 9 respectively. For having encroached upon the suit property by the defendant/appellants herein, the respondent No. 1 lodged complaints/FIRs with the Deputy Commissioner, Nagaon on 20.01.2012 vide Ext.-12 and Superintendent of Police, Nagaon through the DIGP(A), Assam vide Ext.- 13 and DGP, Assam, dated 06.01.2012 vide Ext.- 14, praying to make encroachment free of their ancestral suit property along with the cinema hall from the defendant/appellants herein.

24. The defendant/appellants herein, besides admitting that Late Kashi Prasad Bihani was the absolute owner, title holder and possessor of the suit land measuring 1 Bigha shown in the Schedule- A, First Part, constructing a cinema hall and after his death, the said property devolved on his wife Kistoori, their two sons and five daughters. However, after a purported amicable family partition, the suit land with specific boundaries and house thereon fell into the

exclusive share ownership and possession of their mother Kistoori Devi Bihani and accordingly, they purchased the suit property from Kistoori Devi Bihani, without any objection of other family members by executing registered sale deeds.

25. From the evidence of D.W. 1, Ajay Kumar Dey/Defendant appellant No. 4 herein; D.W. 2 Rishi Agarwalla, Son of Late Hanuman Prasad Gupta, the land broker and D.W. 3, Bhupen Kishore Ghosh, scribe of the Deeds, as a whole, it transpires that after the death of said Kashi Prasad Bihani (since deceased) all his legal heirs amicably partitioned their ancestral property as detailed with metes and bounds of each such share in the evidence of D.W. 1 and as per the said amicable family partition, the suit land including the cinema hall fell into the exclusive ownership and possession of their mother Late Kistoori Devi Bihani, which she sold out to the defendant/appellants by executing registered sale deeds vide Exts.- I to X (total 16 numbers of registered sale deeds).

26. Their evidence further show that in the year 2009, Kistoori Devi Bihani and her eldest son Jagadish Prasad Bihani (Proforma defendant No.10/proforma respondent No. 14 herein) made their entire ancestral land into different plots and afterwards, both the sons engaged two land brokers, namely Rishi Agarwalla (D.W.- 2) and his father Hanuman Prasad Gupta (since deceased) for selling out the suit land and accordingly, the negotiations were held for sale at the house of the proforma defendant No.10 (Jagadish Prasad Bihani) situated at Guwahati, in presence of both sons of Late Kashi Prasad Bihani and the price of the land was also fixed with the defendant/appellants herein.

27. According to D.W. 1 (Ajay Kumar Dey), Suresh Gaggar, Plaintiff No. 8 in the original suit/proforma respondent No. 16 herein (son-in-law of Late Kashi Prasad Bihani and Amitabh Bihani, the son of the proforma defendant No.

10/Proforma respondent No. 14 herein were the witnesses in all the said registered sale deeds which were executed at Guwahati through commission. D.W. 2, Rishi Agarwalla in his cross-examination has corroborated those facts and he and D.W. 3, Bhupen Kishore Ghosh, the deed writer stated that all execution of the registered sale deeds were effected at Guwahati through commission. Thereafter, their names were mutated in the land records vide Ext.-B, the certified copy of mutation order, dated 20.03.2000, passed in M.C. Case No.137/2000. He (D.W.1) recognized Ext.-A, the certified copy of Jamabandi of suit patta No. 274; Ext.-C, the certified copy of petition filed by Jagadish Prasad Bihani, the proforma defendant No. 10 in M.C. Case No. 137/2000 and Ext.-D to D (I), the land revenue payment receipts, Ext.- E. In cross-examination of D.W. 1, it has been admitted that before execution of the sale deeds numbering 16, necessary sale permission and non-encumbrance certificate were not obtained from the authority. It further appears that D.W. 1 contradicted deposing in cross-examination that the sale deeds were executed at Hojai (not through commission at Guwahti) and the signatures were obtained by the Sub-Registrar himself. The defendant/appellants have not examined any of the attesting witnesses of the exhibited sale deeds.

28. The aforesaid exhibited respective documents of both sides have been admitted in evidence without any objection as to their admissibility by either side in the suit. However, the plaintiff/respondents herein have challenged the legality of execution of the sale deeds by their mother, Late Kistoori Devi Bihani, *inter-alia*, on the ground that no family partition of their ancestral property had ever taken place and that as their mother Late Kistoori had no exclusive right, title and interest over the suit land, those sale deeds were wrongly/fraudulently executed without proper sanction of law whatsoever.

29. In the case of ***Euraka Builders (supra)***, the Hon'ble Supreme Court held as hereinbelow extracted-

“35. It is a settled principle of law that a person can only transfer to other person a right, title or interest in any tangible property which he is possessed of to transfer it for consideration or otherwise. In other words, whatever interest a person is possessed of in any tangible property, he can transfer only that interest to the other person and no other interest, which he himself does not possess in the tangible property.

36. So, once it is proved that on the date of transfer of any tangible property, the seller of the property did not have any subsisting right, title or interest over it, then a buyer of such property would not get any right, title and interest in the property purchased by him for consideration or otherwise. Such transfer would be an illegal and void transfer.

37. In such eventuality and subject to any terms and conditions, if agreed between the parties, a buyer will have a right to claim refund of sale consideration from his seller, which he paid for purchase of the property under the law of contract. The reason is that the contract to purchase has failed and, therefore, the parties have to be restored back to their original positions, which existed at the time of execution of the contract.

38. This principle of law may apply inter se the original holders (three PATIL) of the land and the intending buyers of the suit land with which we are not concerned in this case because the present litigation does not arise between these parties and nor are we deciding the inter se rights of these parties in these appeals.

39. This principle we have mentioned only to clarify the inter se rights of the parties against each other in relation to the suit land and especially the right of the appellants against the original holders (three PATIL) and not beyond it.”

30. In the case of ***Ramdas(supra)*** the Apex Court observed as under-

“14. We have considered the aforesaid contentions in the light of the relevant records. All the four properties which constitute the suit property belonged to Sukha who was the absolute owner of the said four properties. After the death of Sukha, all the aforesaid four properties were jointly owned and possessed by the plaintiff Sitabai and Defendant 1 Sudam as the natural heirs and legal representatives of the deceased Sukha.

15. It could not also be disputed that all the aforesaid four plots of land which are the suit property were joint property and therefore, the plaintiff Sitabai and Defendant 1 Sudam owned and possessed half undivided share each in all the four properties. Defendant 1 Sudam who is the brother of the plaintiff Sitabai could not have therefore sold the entire Gat No. 19 area admeasuring 2.56 H of Mouza Padoli in favour of Defendant 3 Ramdas (the appellant herein) inasmuch as the aforesaid land was undivided and the plaintiff Sitabai and Defendant 1 Sudam were two co-sharers in the said property. In that view of the matter, the High Court was correct and legally justified in declaring the plaintiff Sitabai as the owner and holder of half of the shares in all the four aforesaid properties which are undivided. Defendant 1 Sudam being a co-sharer could not have sold by a registered sale deed more than his share nor could he have delivered possession till the said property is partitioned by the parties amicably or through the intervention of the court according to their share.

16. It is settled law under the Transfer of Property Act, 1882 that a purchaser cannot have a

better title than what his vender had. The possession which is claimed by Defendant 3 Ramdas (the appellant herein) in respect of the entire land bearing Gat No. 19 area admeasuring 2.56 H of Mouza Padoli was also illegal and without proper sanction of law. So long as the property is joint and not partitioned, Defendant 3 Ramdas (the appellant herein) is not entitled to get possession of the said land. Even otherwise, the appellant herein having purchased the land from Defendant 1 Sudam could be entitled to be declared at the most to the extent of half-share of the said piece of land having stepped into the shoes of his vendor and could not have asked for and claimed ownership and possession over the entire land of Gat No. 19 admeasuring 2.56 H.

17. Without there being any physical formal partition of an undivided landed property, a co-sharer cannot put a vendee in possession although such a co-sharer may have a right to transfer his undivided share. Reliance in this regard may be placed to a decision of this Court in *M.V.S. Manikayala Rao v. M. Narasimhaswami* [AIR 1966 SC 470] wherein this Court stated as follows : (AIR p. 473, para 5)

“5. ... Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased.”

18. It may be mentioned herein that the aforesaid findings and the conclusions were recorded by the Supreme Court by placing reliance upon an earlier judgment of this Court in *Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh* [AIR 1953 SC 487] wherein this Court held as under : (AIR p. 491, para 11)

“11. ... All that [vendee] purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour.”

(emphasis added)

19. In view of the aforesaid position there could be no dispute with regard to the fact that an undivided share of co-sharer may be a subject-matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement or by a decree of the court.

20. Our attention was also drawn to the grounds taken by the appellant in his memorandum of appeal before the High Court wherein the appellant himself got framed a question of law to the following extent:

“Whether the learned first appellate court has not committed perversity in holding that the registered sale deed dated 19-3-1980 (Ext. 248) executed without obtaining the permission of Smt Sitabai, present Respondent 1 (the original plaintiff) and thus null and void in its entirety and not binding on her at least to the extent of the share of executant (deceased Defendant 1)?”

21. Therefore, what the appellant has claimed is only half-share of the said property. The said issue has been considered at length by the High Court in its impugned judgment. The High Court has recorded the statement made by the counsel appearing for Defendant 3 Ramdas (the appellant herein) that the action of the Additional District Judge in declaring that the said sale deed as null and void was not proper to the extent of the shares of plaintiff Sitabai in Gat No. 19 area admeasuring 2.56 H of Mouza Padoli. Therefore, the fact that the plaintiff Sitabai was entitled to her half-share in the aforesaid property is an admitted position and on that basis the

consent decree was passed. Even otherwise, we are of the considered opinion that the appellant herein having purchased only undivided share in the aforesaid property could not have purchased, owned and claimed for more than half-share in the said property nor the appellant could have claimed possession in respect of the entire property.”

31. Again, in ***Anil Rishi Vs. Gurbaksh Singh***, reported in **(2006) 5 SCC 558**, the Hon’ble Supreme Court observed as below-

“8. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:

“101. Burden of proof.—Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

9. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it. The said rule may not be universal in its application and there may be an exception thereto. The learned trial court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

10. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

11. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.”

32. In the case of ***Shub Karan Bubna @Shub Karan Prasad Bubna***, in ***SLP(C) No. 17932/2009***, the Hon’ble Apex Court held as follows (relevant part)-

"4. ‘Partition’ is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty. A partition of a property can be only among those having a 3 share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. ‘Separation of share’ is a species of ‘partition’. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to

remain joint, there is only a separation of the share of one brother. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues: (i) whether the person seeking division has a share or interest in the suit property/properties; (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?

5. In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and 4 whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2)."

33. It may be pointed out that a family partition of ancestral property can be effected orally too. Here is the case where the defendant/appellants have claimed that the ancestral property of the plaintiff/respondents including the suit property was subjected to partition orally which fell to the share of Late Kistoori Devi Bihani, their mother and she sold her share of property to the defendant/appellants by executing registered sale deeds. However, except making claim of such family partition, the defendant/appellants have not adduced any credible evidence to prove it. The learned Trial Court also omitted to frame a specific issue in this regard. Be it mentioned that as held in *Ramdas(supra)*, a purchaser cannot have a better title than his vendor had. An undivided share of co-sharer may be a subject matter of sale but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds amicably and through mutual settlement as has been held by the Hon'ble Apex Court in the said case. This leads to the logical conclusion that undivided share of the suit property could not have been purchased, owned and claimed by the defendant/appellants without having first proved the vendor's exclusive ownership of share by virtue of the purported family partition which

plea, of course, the plaintiff/respondents vehemently denied. Therefore, as per Section 101 of the Evidence Act, the burden of proving the aforesaid facts rests on the defendant/appellants who have asserted the family partition.

34. A perusal of the reliefs sought by the plaintiff/respondents, on the other hand, it is revealed that in the Schedule-A, First Part, which is the entire suit land, of which Second Part is claimed to be their share, does not precisely describe the boundary lines of the aforesaid parcel of ancestral land and more importantly, there is no specific prayer for cancellation of the registered sale deeds in question executed in favour of the defendant/appellants herein for effective adjudication of the issues.

35. The defendant/appellants in their written statement and D.W. 1 in his evidence stated that a commission, if appointed, will make the actual position clear, but same was omitted to be done/asserted to the attention of the learned Trial Court, in the course of trial of the suit.

36. In the premises, in order to settle the basic issues effectively between the parties, it is hereby ordered that the matter be **remanded back** to the learned Trial Court with direction to the plaintiff/respondents herein to amend the plaint suitably in the light of the above observations in accordance with law and the learned Trial Court shall, thereafter, pass an order issuing commission under Order 26 Rule 9 of the CPC for physical inspection, measurement and for ascertaining the existing possessions etc. of the parties concerned with metes and bounds on the suit land. In the event of the amendment of the plaint and issue of commission, both the parties shall have liberty to adduce additional evidence strictly confining to the aforesaid vital aspects only and thereafter, the learned Trial Court shall deliver a fresh judgment on all the issues including the

additional issues, if framed, within a period of 06(six) months from the date of receipt of copy of this judgment and order.

37. Accordingly, **the appeal stands partly allowed** setting aside the impugned judgment and decree passed by the learned Trial Court. Both the parties shall appear before the learned trial Court either personally or through counsel on **3rd of April, 2023** to receive instructions.

The appeal stands disposed of.

Return the LCR.

JUDGE

Comparing Assistant