

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.590 of 1973

Against the judgment and decree dated 21.09.1973 passed by Subordinate Judge-II, Gaya in Partition Suit No.111 of 1968.

Parwati Devi & Ors

.... Defendants-Appellants

Versus

Basanti Devi

.... Plaintiff-Respondent

Appearance :

For the Appellants : Mr. Gopal Jee, Advocate.

For the Respondent : None.

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 14-07-2015

This first appeal has been filed by the defendants-appellants against the judgment and decree dated 21.09.1973 passed by learned Subordinate Judge-II, Gaya in Partition Suit No.111 of 1968 whereby the court below decreed the plaintiff's suit for partition to the extent of half share in the suit property.

2. The plaintiff-respondent filed the aforesaid suit for partition originally claiming $\frac{1}{3}^{\text{rd}}$ share in the suit property alleging that the suit property belonged to Ganga Vishun Vaidya. He died leaving behind his widow and two daughters. Appellant no.1 and plaintiff-respondent are two daughters. The widow was defendant in the court below. Therefore, the plaintiff-respondent filed the aforesaid suit claiming $\frac{1}{3}^{\text{rd}}$ share. The widow i.e. mother of plaintiff-

respondent died during the pendency of the suit, therefore, the plaintiff-respondent claimed half share in the suit property. Now, therefore, the dispute was between two daughters of Ganga Vishun Vaidya i.e. plaintiff-respondent and defendant-appellant no.1, who are own sisters. The other two appellants are the sons of appellant no.1. According to the plaintiff, Ganga Vishun Vaidya had purchased the land measuring 2.60 acres by registered sale deed dated 28th July, 1936 in the name of his wife, who was a benamidar. The father of the plaintiff was the real owner and was in actual possession. The mother had no source of income, therefore, by sale made by her mother in favour of defendant-appellant no.1 did not convey any title to defendant-appellant no.1.

3. The defendants filed contesting written statement alleging that the widow of Ganga Vishun Vaidya had purchased 2.60 acres out of the suit land in the year 1936 by registered sale deed dated 28th July, 1936 for consideration of Rs.275/-, therefore, the said property was her personal property. She sold the said property to defendant-appellant no.1 by registered sale deed dated 15.12.1966 and as such the said property is not available for partition. So far the movable properties i.e. pump set etc. are concerned, according to the defendants those are the properties of defendant-appellant no.1 installed by her for irrigation of her land.

4. On the basis of the aforesaid pleadings of the parties the learned court below framed the following issues:-

- (i) Is the suit as framed maintainable?
- (ii) Has the plaintiff got any cause of action for the suit?
- (iii) Is the suit bad for misjoinder of defendant nos.3 and 4?
- (iv) Whether the suit is bad for multifariousness?
- (v) Is the court fee paid sufficient?
- (vi) Whether 2 acres land of plot no.13 under khata no.126 and 60 decimals out of 2.24 acres under plot no.62 of the said khata out of the lands belonged to Ganga Vishun Vaidya and whether he was in possession over it as an owner?
- (vii) Whether the lands in suit are liable to be partitioned? If so, to what extent?
- (viii) Whether the list of movable given in the schedule B of the plaint is correct?
- (ix) What is the plaintiff's share?
- (x) To what relief or reliefs, the plaintiff is entitled?

5. After trial the learned court below recorded the finding that in fact the properties measuring 2.60 acres standing in the name of wife of Ganga Vishun Vaidya was the property of Ganga Vishun Vaidya purchased by him in the name of his wife. The wife is only a benamidar. The movable properties are also the joint family properties. There has been no partition. Accordingly, decreed the plaintiff's suit.

6. The learned counsel for the appellants submitted that the learned court below has misread the evidences and has wrongly approached the case and wrongly held that the property standing in the name of mother of the plaintiff is the property purchased by



Ganga Vishun Vaidya. The court below has also wrongly held that the mother of the plaintiff was a benamidar. According to the learned counsel, defendant-appellant no.1 had already mortgaged the property purchased by her and in fact she had paid the entire consideration amount to her mother. The sale deeds were also produced from her custody. The court below without considering these vital aspect of the matter about payment of consideration by defendant-appellant no.1 and production of the sale deeds from her custody has wrongly held that the property is the property of Ganga Vishun Vaidya. On these grounds the learned counsel submitted that the impugned judgment and decree be set aside and the first appeal be allowed.

7. The learned counsel in support of his contention relied upon **A.I.R. 1980 SC 1040 (Gapadibai Vs. The State of M.P.)**.

8. Nobody appeared on behalf of the plaintiff-respondent.

9. In view of the submission of the learned counsel for the appellants the point arises for consideration in this first appeal is as to whether the property which the defendant-appellant no.1 purchased from her mother was the property of Ganga Vishun Vaidya or his wife and mother of the plaintiff was only a benamidar or not and whether the impugned judgment and decree are sustainable in the eye of law.

10. In support of their respective cases the parties have



adduced the evidences. According to the plaintiff, her mother had no source of income. P.W.1 has stated that the suit property belonged to Ganga Vishun Vaidya. Ganga Vishun Vaidya had purchased lands measuring 4 bighas from Darban Mahto and Chhedi Mahto for a consideration of Rs.275/-. This witness claimed that he was present at the time of execution of the deed. He also stated that the consideration amount was paid by Ganga Vishun Vaidya. He also speaks about the possession of Ganga Vishun Vaidya. P.W.2 has also stated that his father and uncle had sold the said property to Ganga Vishun Vaidya in presence of this witness. Consideration was paid by Ganga Vishun Vaidya. P.W.3 also claimed to be present at the time of execution and payment of consideration by Ganga Vishun Vaidya. P.W.4 has stated about possession of Ganga Vishun Vaidya. Such is the evidence of P.W.5. P.W.7 has denied the possession of defendants-appellants. P.W.8 claimed to be present at the time of payment of the consideration amount by Ganga Vishun Vaidya. P.W.10 is the plaintiff herself. She has fully supported her case.

11. On the contrary, the defendants have also adduced the evidences to show that in fact consideration was paid by Janaki Devi, the widow of Ganga Vishun Vaidya. D.W.5 claimed to be the witness of payment of consideration by Janaki Devi. D.W.6 is the chowkidar, who has stated about the possession of defendants. D.W.8 claimed to

be the caretaker of the land of Janaki Devi. This witness has been examined in support of the fact of possession of Janaki Devi separately. D.W.10 has stated in the same line as that of D.W.8. D.W.11 speaks about movable property. D.W.14 is the defendant no.1 herself.

12. From perusal of the evidences as discussed above, it appears that none of the witnesses examined on behalf of the defendants have disclosed about the source of income of the mother of plaintiff. From where she got consideration amount is not clear. The plaintiff has produced the rent receipts, which have been marked Ext.1 series granted by ex-landlord in the name of Ganga Vishun Vaidya.

13. The plaintiff has also produced two sale deeds, Exts.2 and 2/A, which are dated 26.05.1966 and 21.01.1966 executed by Ganga Vishun Vaidya in the name of Bali Mahto. The plaintiff has also produced Exts.3 and 3/A i.e. rehan deed dated 12.12.1966 executed by Ganga Vishun Vaidya in favour of Kuleshwar Mahto and Kesho Prasad respectively. It may be mentioned here that the purchasers and the mortgagee are outsiders. The sale deed produced by defendant no.1 is of the year 1936, which stands in the name of mother of defendant no.1. As discussed above, there is no evidence to show the source of income of mother of defendant no.1. It was for the



defendant to prove that wherefrom the consideration amount was paid by her mother to the executant of the sale deed. On the contrary, from the above sale deeds and the mortgage deeds executed by Ganga Vishun Vaidya in the year 1966 clearly show that he was dealing with the property as his own property. The mother of defendant no1. i.e. mother of plaintiff-respondent also never objected to either selling the property or keeping the property in mortgage. It further indicates that even the purchaser and the mortgagee were knowing the father i.e. Ganga Vishun Vaidya as the owner of the property otherwise they would not have purchased the property from Ganga Vishun Vaidya. This clearly falsifies the case of the defendant that the suit property was purchased by Janaki Devi out of her own money. The learned counsel for the defendants-appellants submitted that the sale deeds (Ext.C series) have been produced from the custody of defendant-appellant no.1.

14. According to the learned counsel, the Hon'ble Supreme Court in various decisions including **A.I.R.1980 SC 1040 (Japadibi Bai Vs. State of M.P.)** has held that in order to prove the benami nature of a transaction, evidence must be led to show (1) that defendant husband paid the consideration (2) that he had the custody of the sale deed, (3) that he was in possession of the property, and (4) the motive for the transaction.

15. The learned counsel further relied upon **A.I.R. 1977 SC 796 (Krishnanand Agnihotri Vs. State of M.P)** and submitted that the burden of showing that a particular transaction is benami and the owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The learned counsel submitted that since the sale deeds were produced from the custody of defendant no.1, therefore, the presumption is that the wife of Ganga Vishun Vaidya was the real owner of the property measuring 2.60 acres. So far these submissions and the details are concerned, it may be mentioned here that in the present case as discussed above positive evidence has been produced by the plaintiff to show that in fact the consideration amount was paid by Ganga Vishun Vaidya. To show possession of the property the plaintiff has produced the sale deeds and rehan deeds of the year 1966. So far production of documents from custody of the appellants is concerned, it is admitted fact that the plaintiff and defendant no.1 are own sisters. The husbands of both the sisters are also own brothers. Naturally, therefore, after Ganga Vishun Vaidya the sale deed came in possession of the mother Janaki Devi. In such circumstances, it cannot be overruled that she might have given

possession of those documents to defendant no.1 but only because the sale deeds have been produced from the custody, it cannot be said that Janaki Devi was not the benamidar in view of the evidences and the documents produced by the plaintiff which are sufficient to rebut the presumption. The Hon'ble Supreme Court in the case of **Krishnanand Agnihotri** (supra) at paragraph 26 has held as follows:-

“.....The burden of showing that a particular transaction is benami and the owner is not the real owner always rests on the person asserting it to be so and this burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of benami is the intention of the parties and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises as a substitute for proof. It is not enough merely to show circumstances which might create suspicion, because the court cannot decide on the basis of suspicion. It has to act on legal grounds established by evidence.”

16. The Hon'ble Supreme Court on this point has followed the earlier decision A.I.R.1974 SC 171. In the present case, at our hand, here the plaintiff has produced legal evidence as discussed above which includes the oral as well as documentary evidence. The sale deeds are registered sale deeds, which were never questioned by the mother of the plaintiff and defendant no.1 or even by the defendant no.1. Therefore, in view of my above discussion it cannot

be said that the evidences produced by the plaintiff merely show circumstances or create suspicion rather the evidences are direct, legal, cogent and reliable. It is further admitted fact that both the plaintiff and defendant no.1 being the daughters were living in the same house i.e. the house of their father.

17. From perusal of the judgment of the courts below, it appears that the court below has considered and discussed all the evidences elaborately and accepted the evidences of the plaintiff. I, therefore, find no reason to interfere with the findings of the court below.

18. In view of my above discussion I find that in fact the suit property belonged to Ganga Vishun Vaidya, who purchased the same in the year 1936 in the name of his wife, Janaki Devi and she was merely benamidar. The finding of the court below on this point is, therefore, hereby confirmed.

19. In the result, I find no merit in this first appeal and accordingly, this first appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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