

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.353 of 1976

Against the judgment and decree dated 30.04.1976 passed by 2nd Additional Subordinate Judge, Buxar in Title Suit No. 92 of 1966/25 of 1976.

Mostt. Rajeshwari Devi & Ors.

.... Plaintiffs-Appellants

Versus

Dwajdhari Dubey & Ors.

.... Defendants-Respondents

Appearance :

For the Appellants : Mr. Kamal Nayan Choubey, Sr. Advocate.
Mr. Sanjay Kumar Pandey, Advocate.
Mr. Yogendra Kumar Dwivedi, Advocate.
For the Respondents : Mr. Rama Shankar Pradhan, Sr. Advocate.
Mr. Jainendra Kumar, Advocate.
Mr. Amrendra Narain Rai, Advocate.

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 23-09-2015

The plaintiffs have filed this first appeal against the judgment and decree dated 30.04.1976 passed by the learned 2nd Additional Subordinate Judge, Buxar in Title Suit No. 92 of 1966/25 of 1976 whereby the court below dismissed the plaintiffs-appellants' suit for partition.

2. The plaintiffs-appellants filed the aforesaid suit for partition of suit property claiming 12 annas share alleging that land of Khata No.162 is the ancestral property of the plaintiffs and the defendants. There had been no partition. Though the suit lands have been recorded only in the name of Parma Tiwari, the ancestor of the defendant nos.2 to 4 but in fact both the parties are in possession



according to their convenience. Parma Tiwari was representing the estate and then he committed breach of trust and did not pay rent to ex-landlord. Thereafter the ex-landlord filed Rent Suit No.32 of 1910 against Parma Tiwari. Parma Tiwari did not inform the plaintiffs' ancestor and collusive rent decree was passed in the said suit. He also purchased the land in auction sale in the farzi name of Sita Ram Sahu. The plaintiffs' ancestor then filed Title Suit No.78 of 1913 for setting aside the auction sale and for declaration that the suit land was farzi purchase of Parma Tiwari in the name of Sita Ram Sahu. The plaintiffs' ancestor left pairvi on assurance that Sita Ram Sahu was ready to return the suit land. However, to defeat the right of the other co-sharer, Parma Tiwari purchased the lands from Sita Ram Sahu by registered sale deed in the year 1915. The plaintiffs' ancestor also contributed in that purchase though the sale deed was executed only in the name of Parma Tiwari. The plaintiffs are feeling difficulty. When the defendants refused to partition, the suit was filed.

3. The defendants-respondents filed contesting written statement. The defendants besides taking ornamental and legal pleas mainly contended that the suit land no doubt was the joint family property but it was sold in execution case and Sita Ram Sahu purchased the same. Sita Ram Sahu was not a farzidar. Since then the nature of the land ceased to be joint family property and it became the property of Sita Ram Sahu. The ancestor of the plaintiffs filed the



Title Suit No.78 of 1913 for setting aside the auction sale in favour of Sita Ram Sahu and for declaration that Sita Ram Sahu was farzidar of Parma Tiwari. This contention of the ancestor of the plaintiffs was rejected and the court below came to the conclusion that Sita Ram Sahu was not farzidar and it was sold in rent execution case, therefore, it is binding on the plaintiffs' ancestor. The said judgment was never challenged by the ancestor of the plaintiffs or the plaintiffs. This question, therefore, now cannot be decided in this case. Thereafter Parma Tiwari out of his own earning purchased the property by registered sale deed in the year 1915 from Sita Ram Sahu in his exclusive name, therefore, it is the self-acquired property of Parma Tiwari and plaintiffs have no right, title and interest. Since last 50 years the plaintiffs never raised any objection. The part payment of consideration by the ancestor of the plaintiffs was denied. There was strained relationship between the parties, therefore, there is no question of Parma Tiwari representing the family of plaintiffs and defendants. After death of Parma Tiwari, his heirs have even partitioned the property.

4. On the basis of 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 valid cause of action?
- (iii) Is the suit barred by limitation, estoppel, waiver, acquiescence and resjudicata?
- (iv) Has the suit been properly valued and court fee paid sufficient?

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- (v) Is the suit bad for non-joinder and misjoinder of parties?
 - (vi) Is the suit barred by the principle of ouster?
 - (vii) Whether the plaintiff has got unity of title and possession over the suit land?
 - (viii) Whether the plaintiffs and their ancestor contribution in the sale deed of 1915 for the suit land or it was exclusively purchased by Parma Tiwari?
 - (ix) Whether the suit land was auction purchased by Parma Tiwari and plaintiff's ancestor jointly in the farazi name of Sitaram Sahu in rent execution case no.32/1910 and the ancestors of the parties were coming in joint possession of the same?
 - (x) Whether the sale deed of 1915 executed by Sitaram Sahu in favour of Parma Tiwari was for benefit and in confirmation of the right of the plaintiff's ancestors?
 - (xi) Is the plaintiff entitled to a decree for partition and if so, to what extent?
 - (xii) Whether there was previous partition before cadastral survey of the suit land?
 - (xiii) Whether the ancestors of the plaintiff inherited the shares of Parma Tiwari and Gyan Tiwari?
 - (xiv) To what other reliefs, if any, is the plaintiff entitled?

5. After trial the court below recorded the finding that the plaintiffs have got no unity of title and possession over the suit land and their ancestors never contributed in the sale deed of the year 1915 and it was exclusively purchased by Parma Tiwari. The plaintiffs' ancestors were not coming in the joint possession over the same and the sale deed executed by Sita Ram Sahu in favour of Parma Tiwari in the year 1915 validly conferred exclusive title on Parma Tiwari. Accordingly, the plaintiffs' suit was dismissed.

6. The learned senior counsel Mr. K.N. Choubey



submitted that in the earlier suit also there is clear finding that there was no partition between the plaintiffs' ancestor and Parma Tiwari. Therefore, now it becomes admitted fact that the suit properties were joint family properties. Parma Tiwari was looking after the same and was paying rent to the ex-landlord. He collusively with a view to grab the entire property did not pay rent intentionally and, therefore, the ex-landlord filed rent suit. Even after decree the ancestor of the plaintiffs deposited the amount but Parma Tiwari did not pay the amount and allowed the property to be sold in auction and he purchased in the farzi name of Sita Ram Sahu. Therefore, whatever action was taken by Parma Tiwari was on behalf of the joint family. Moreover, the ancestors of the plaintiffs contributed for purchasing the property in the year 1915 but the sale deed was obtained only in the name of Parma Tiwari. The learned court below did not consider the impact of the fact that the property was joint family property prior to auction sale and Parma Tiwari himself filed the written statement that he purchased the land in the name of Sita Ram Sahu who was only a farzidar. Further the plaintiffs' ancestor filed the suit for setting aside the auction sale itself but assurance was given to the plaintiffs' ancestor that Sita Ram Sahu is ready to re-transfer the property to the family, therefore, the plaintiffs' ancestor contributed for purchasing the property and in fact the sale deed was executed only in the name of Parma Tiwari but this purchase was for the entire family. The court

below in the earlier suit rejected the prayer of the plaintiffs to withdraw the suit and also rejected the prayer for examination of more witnesses and passed the judgment on merit. The trial court in the suit did not consider this fact also.

7. The learned senior counsel further submitted that the learned court below wrongly held that the case that Sita Ram Sahu was farzidar cannot be looked into now although the plaintiffs produced the admission made by Parma Tiwari himself to the effect that Sita Ram Sahu was only his farzidar. The plaintiffs also adduced evidences in support of contribution of consideration amount but the court below wrongly dismissed the plaintiffs' suit finding that it was purchased by Parma Tiwari only and Sita Ram Sahu was a bonafide purchaser in auction sale.

8. The learned senior counsel Mr. Choubey further submitted that the collusiveness is apparent from the conduct of Parma Tiwari himself. The lands were more than 33 acres and odd which could not have been allowed to be auction sold for non-payment of rent. Parma Tiwari intentionally did not pay the rent and allowed the sale of the property in execution case and purchased the same in the name of farzidar. Since the plaintiffs' ancestor were kept in dark, they could not take any step. When they came to know they deposited the decretal amount but the auction sale was not set aside, therefore, ultimately they purchased the property by contributing the

consideration amount. Therefore, the sale deed was obtained in the name of Parma Tiwari. The learned court below wrongly dismissed the plaintiffs' suit.

9. On these grounds learned senior counsel submitted that the plaintiffs' suit for partition be decreed after setting aside the impugned judgment and decree.

10. On the other hand learned senior counsel Mr. Rama Shankar Pradhan for the respondents submitted that there is no defect at all in the impugned judgment. According to the admitted fact there was no jointness between the plaintiffs' ancestor and the defendants. There had already been severance and both the parties were in litigating term since 1907. In such circumstances it is not reliable at all that although the plaintiffs' ancestor contributed or paid part consideration to Sita Ram Sahu but they allowed the sale deed to be executed in the name of only Parma Tiwari.

11. So far nature of purchase by Sita Ram Sahu is concerned, in the suit filed by the ancestors of the plaintiffs, there is clear finding that Sita Ram Sahu was a bonafide purchaser and not a farzidar. The ancestor of the plaintiffs or the plaintiffs never challenged the aforesaid judgment and decree before appropriate forum and allowed the same to become final. Therefore, now again the same issue as to whether Sita Ram Sahu was farzidar or bonafide purchaser cannot be decided here in view of the principles of *res-*

judicata provided under Section 11 C.P.C.

12. The learned senior counsel further submitted that this suit has been filed for partition only. No relief has been claimed in the plaint with regard to either the earlier judgment or the sale deed. Therefore, the reason for which the earlier findings were recorded or the correctness or otherwise of the said judgment and decree cannot be decided in this simple suit for partition. Now, therefore, if plaintiffs will be able to show that they contributed for purchasing the property from Sita Ram Sahu then only they are entitled to a share in the property. The learned court below has examined all these aspects of the matter and then finding that it is exclusively purchased by Parma Tiwari, has rightly dismissed the plaintiffs' suit. On these grounds the learned senior counsel submitted that the first appeal be dismissed.

13. In view of the aforesaid contentions of the learned senior counsels for the parties the only point arises for consideration in this first appeal is "whether the plaintiffs have been able to prove unity of title and possession and are entitled to 12 annas share in the suit property as claimed by them or whether it is self-acquired property of Parma Tiwari?"

14. The plaintiffs have filed the simple partition suit alleging that the suit property is their ancestral land and there had been no partition by metes and bounds. According to the defendants, in the Execution Case No.32 of 1910 the suit properties i.e. ancestral

properties were auction sold and one Sita Ram Sahu purchased the property. The plaintiffs' ancestor filed Title Suit No.78 of 1913 for setting aside the auction sale and for declaration that Parma Tiwari had purchased in the farzi name of Sita Ram Sahu. From Sita Ram Sahu, Parma Tiwari purchased the property in the year 1915.

15. The parties have adduced evidence in support of their respective cases. The plaintiffs' witnesses P.Ws.17, 18 and P.W.31, who was plaintiff no.1, all have stated that the plaintiffs had also paid the part consideration amount but the property was purchased in the name of Parma Tiwari only. Ext.8 is the sale deed of the year 1915 which stands exclusively in the name Parma Tiwari. Admittedly there was default in the payment of rent and the rent suit was filed by the ex-landlord wherein Parma Tiwari was only made party. After decree of the rent suit in Execution Case No.32 of 1910 the property was auction sold and thereafter the ancestors of the plaintiffs filed Title Suit No.78 of 1913 for setting aside auction sale and for declaration that Sita Ram Sahu was farzidar of Parma Tiwari. In the present case the defendants have produced the plaint of that suit which has been marked as Ext.A and the certified copy of the judgment of the suit has been marked on behalf of the plaintiffs as Ext.9.

16. From perusal of Ext.9, it appears that the ancestor of the plaintiffs claimed in Title Suit No.78 of 1913 that the rent suit was collusive rent suit and Parma Tiwari, who was only party, allowed the



execution case to proceed without the knowledge of plaintiff of Title Suit No.78 of 1913. The entire lands were sold for Rs.600/- only whereas the value was more than Rs.2,500/-. The defendant no.5 in collusion with defendant no.6 purchased the property for defendant no.1. Thereafter with permission, the plaintiff of that suit deposited the entire decretal amount and on these grounds prayed for setting aside the auction sale. The court below held that the landlord was quite justified in suing the defendant no.1 for rent and the decree is binding on the others as partition between them has not been proved. Ultimately it was concluded by the Court that rent decree is binding on the plaintiffs and the execution proceeding and the sale were not fraudulent. Accordingly the plaintiffs' suit was dismissed. Now, therefore, the case of the plaintiffs that Sita Ram Sahu was farzidar or that they had paid the rent payable by them or deposited the decretal amount with the permission of the Court cannot be re-agitated in the present simple suit for partition as the same plea taken in the earlier suit of the year 1913 has been negatived and their suit was dismissed. Therefore, the rent decree was valid decree. The execution case was not fraudulent and the Court also held that the sale was not fraudulent sale. Therefore, Sita Ram Sahu acquired title by the said auction sale.

17. Here, again the same matter has been raised by the plaintiffs that Sita Ram Sahu was a farzidar. The learned senior counsel Mr. Choubey submitted that in the earlier suit in the written



statement the defendant no.1, Parma Tiwari pleaded that Sita Ram Sahu was his farzidar but now in the present suit they pleaded that Sita Ram Sahu was not farzidar. According to the learned senior counsel the party cannot be allowed to approbate and reprobate. So far this submission is concerned, it may be mentioned here that the pleading will never operate as *res-judicata*. In the earlier suit whatever be the pleading was there but the court below recorded clear finding that it was not a fraudulent sale. This was the specific plea of the plaintiffs in the earlier case. The court below has rejected this case. Now, therefore, this finding recorded in the earlier suit will operate as *res-judicata* in the present suit. Again the same matter cannot be decided here.

18. Admittedly the sale deed, Ext.8 is in the name of Parma Tiwari only and this sale deed is of the year 1915. The plaintiffs have adduced evidences of P.Ws.17, 18 and 31, who had stated that they had also paid consideration amount for purchase of the land from Sita Ram Sahu but it was purchased only in the name of Parma Tiwari.

19. Since the sale deed is in the exclusive name of Parma Tiwari, it is for the plaintiffs to prove the fact that they are also co-purchasers. It will not be out of place to mention here that Title Suit No.380 of 1907 was filed by the ancestor of the present plaintiffs against Parma Tiwari with respect to the lands of Mostt. Rikhia



claiming share in the property. The plaintiffs' ancestor lost the said suit. In view of this admitted position it becomes clear that there was strained relationship. Can it be believed that in such situation although the plaintiffs' ancestor paid the consideration for purchasing the property from Sita Ram Sahu but relying on Parma Tiwari allowed the execution and registration of the deed in the name of only Parma Tiwari. There is no reason as to why they did not insist to insert their names also as co-purchaser. It is not their case that they were not present at the time of execution and registration of the sale deed, Ext.8.

20. In view of this position and the case pleaded by the plaintiffs that their ancestor and Parma Tiwari jointly purchased the property from Sita Ram Sahu they cannot be allowed to say now that Sita Ram Sahu was farzidar. However, it is not believable that they also paid consideration amount. Merely because some of the witnesses baldly stated before the Court that they also contributed the same cannot be relied upon particularly when the document Ext.8 is a registered sale deed and there is presumption that the registered sale deed is validly executed and is a genuine sale deed. Admittedly there was strained relationship and although there was no partition according to the findings of the earlier suit but then they were separate as such Parma Tiwari was not the karta. Since Parma Tiwari was not karta, it cannot be said that the property was purchased by karta on

behalf of joint family.

21. The learned senior counsel Mr.Choubey submitted that in the show-cause filed by Parma Tiwari in Title Suit No.78 of 1913, Ext.5, Parma Tiwari stated that Sita Ram Sahu was farzidar, therefore, Parma Tiwari was in possession.

22. As stated above that on the basis of this alone which has now lost its importance in view of finding recorded in earlier suit and in view of the fact that the plaintiffs themselves claimed that they along with Parma Tiwari purchased the property from Sita Ram Sahu, no finding can be recorded that in fact Sita Ram Sahu was farzidar.

23. It appears that the plaintiffs have examined many witnesses P.Ws.8, 14 to 18 and the plaintiff himself as P.W.31 who have stated that the parties were jointly in possession of the suit property. So far these evidences are concerned, it may be mentioned here that unless the plaintiffs proved their title on the property covered by Ext.8, on the ground of their possession no partition decree can be passed in their favour. The precondition for passing a decree for partition, there must be unity of title and unity of possession. In the present case, so far title is concerned, no satisfactory evidence has been produced by the plaintiffs.

24. As discussed above there was inimical term with the plaintiffs and defendants since 1907. Their case that they also contributed for purchasing the property from Parma Tiwari in the year

1915 cannot be relied upon only on the mere statement of witnesses that too after more than half century.

25. The learned senior counsel submitted that the zamabandi is still joint. This is also no ground for the grant of partition decree. Ext.9/a is a judgment of Cr. Appeal No.83 of 1911. This document was produced to show that in that criminal appeal also Parma Tiwari claimed that he was the real owner and Sita Ram Sahu was farzidar. So far this statement, if any, in a criminal case is not admissible at all in this civil suit. Further since this matter has already been concluded in earlier Title Suit No.78 of 1913, the same cannot be re-opened now. Ext.10 is an order passed under Section 103 A of the B.T. Act wherein also Parma Tiwari was claiming to be the real purchaser. This order also cannot be considered because of the decision in earlier suit.

26. Ext.14 series have been filed by the plaintiffs to show that they had already deposited the decretal amount in the Execution Case No.32 of 1910. It may be reiterated here that this was their case also in Title Suit No.78 of 1913 but then on this ground also the auction sale was not set aside. Now, therefore, again the matter cannot be re-agitated here.

27. In view of my above discussion I find that the plaintiffs-appellants have failed to prove their unity of title and possession over the suit land. The finding of the learned court below

on this point is hereby confirmed.

28. In the result, this first appeal is dismissed. In the facts and circumstances of the case there shall be no order as to cost.

Harish/-

(Mungeshwar Sahoo, J)

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