

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.797 of 1978

Against the judgment and preliminary decree dated 21.08.1978 passed by 1st Additional Subordinate Judge, Hajipur (Vaishali) in Title (P) Suit No.85 of 1966/04 of 1975.

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Haribansh Narayan Singh & Ors

.... Plaintiffs-Appellants

Versus

Kishori Singh & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellants :

Mr. Srinandan Prasad Singh, Advocate.

Mr. Manish Kumar, Advocate.

Mr. Ashok Kumar, Advocate.

For the Respondents :

Mr. Keshav Srivastava, Sr. Advocate.

Mr. Bhubneshwar Prasad, Advocate with him.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 15-04-2015

The sole plaintiff, Satya Narain Sinha, who was the sole appellant (since substituted by L.Rs.) had filed this first appeal against the impugned judgment and preliminary decree dated 21.08.1978 passed by learned 1st Additional Subordinate Judge, Hajipur (Vaishali) in Title (P) Suit No.85 of 1966/04 of 1975 whereby the court below dismissed the plaintiff-appellant's suit for partition claiming half share in the suit property.

2. The plaintiff-appellant filed the aforesaid suit for claiming partition of half share in the Schedule-I property alleging that the property admittedly belonged to one Bishundeo Singh. He



was unmarried. He had two sisters, namely, Sanmukho Kuer and Makho Kuer. Makho Kuer was married with Udit Narayan Singh son of Butan Singh. The defendant no.1 is son of Sanmukho Kuer. When Udit Narayan Singh died, Makho Kuer became widow and started living with Bishundeo Singh. Thereafter Bishundeo gifted Schedule-1 property in favour of defendant no.1 and Makho Kuer by registered gift deed dated 09.06.1924. Since then the defendant no.1 and Makho Kuer continued in joint possession. Makho Kuer died in 1966, therefore, the property of Makho Kuer was inherited by Satya Narayan Sinha, the plaintiff, as husband of Makho, namely, Udit Narayan Singh died in jointness with his full brother Ramdhari Singh. The plaintiff is son of Ramdhari Singh. The partition was demanded but the defendant refused.

3. The sole defendant filed contesting written statement. Besides taking various legal and ornamental pleas mainly it was contended by him that the suit is bad for non-joinder of necessary party, namely, Jamadar son of Butan Singh from his first wife. The registered gift deed was farji transaction and it was never acted upon. Bishundeo Singh, the owner continued in possession. The donee never came in possession of the property and the landlord recognized Bishundeo Singh as real tenant. Some of the gifted properties were sold in auction in execution of the rent decree. The properties were



purchased by landlord and after obtaining delivery possession the landlord Babu Sri Ram settled these lands with Sanmukho, the mother of defendant no.1 and since then the mother was coming in possession of the property and the remaining property of Bishundeo Singh was inherited by defendant no.1. The defendant further contended that some plots mentioned in the plaint are not mentioned in the deed of gift and likewise the total plot and total area as mentioned in gift is not mentioned in the plaint and, therefore, the suit is bad for vagueness of the suit property and is bad for partition.

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 valid cause of action for the suit?
- (iii) Is the suit bad for non-joinder of parties?
- (iv) Is there any unity of title and unity of possession in between the parties in respect of the properties in suit?
- (v) Is the plaintiff entitled for a decree for partition, if so, in respect of what property and as to what share?
- (vi) What relief as reliefs if any, is the plaintiff entitled to?

5. The learned trial court after hearing the parties recorded a finding that the suit has not been properly proved and the plaint has not been properly drafted. It is really very difficult to grant any relief of partition to the plaintiff as the suit is bad for partial partition and as



framed the suit is not maintainable vide paragraph-13. The learned trial court also recorded the finding that the plaintiff has sold some property to P.W.9 and P.W.11 but they were not made party, who were necessary party. Likewise Jamadar, the half brother of plaintiff, was also necessary party but he has not been made party in the suit, therefore, the suit is bad for non-joinder of necessary party. The court below also recorded a finding at paragraph-43 that it cannot be doubted that Makho had half share in the suit property and the plaintiff is undisputedly her heir and he is certainly entitled to claim partition and allotment of the share of Makho in his favour but the suit was dismissed because of partial partition and vague description of the disputed land and non-joinder of parties vide paragraph 47.

6. The learned counsel Mr. Srinandan Prasad Singh for the appellants submitted that on the ground of partial partition the suit cannot be dismissed. It is always open to the parties to partition some property and leave some other property for future partition. Moreover in the present case the plaintiff specifically pleaded that the suit properties are the gifted property. The defendants did not deny that the properties are not gifted. The defence is that some properties have been left and some properties have been added and likewise area also varies. Therefore, according to the defence, the suit property has not been properly described. This question is a matter to be considered in



the final decree but in the preliminary decree the only right of the plaintiff is to be determined. The court below compared the description of the property mentioned in Ext.5, the registered gift deed of the year 1924 with the description of the suit property mentioned in the plaint and found some variation and, therefore, wrongly held that the suit is not properly proved and is bad for partial partition. According to the learned counsel, on the ground of misdescription or wrong description of the suit property the plaintiff could not have been non suited. In support of his contention the learned counsel relied upon a decision of the Hon'ble Supreme Court in the case of **Kashinathsa Yamosa Kabadi, etc. Vs. Narsingsa Bhaskarsa Kabadi, A.I.R. 1961 Supreme Court 1077.**

7. The learned counsel further submitted that the court below has wrongly dismissed the plaintiff's suit on the ground of non-joinder of necessary party holding that Jamadar has also interest in the property and the plaintiff has not made the purchasers as party defendant. According to the learned counsel, Jamadar was the grand son of Butan Singh from the first wife, whereas Udit Narayan Singh was full brother of Ramdhari Singh, from the second wife of Butan Singh. Therefore, on the death of Makho on 06.07.1966 her property will be inherited by the plaintiff and will not go to Jamadar. Moreover, Jamadar or his heirs are not claiming to have any interest

in the property. The learned court below, therefore, has wrongly held that Jamadar is necessary party.

8. The learned counsel further submitted that the two purchasers have been examined as witnesses in this case and they are purchasers from the plaintiff, therefore, whatever share the plaintiff will get will go to the purchasers. In other words, the purchasers are deriving their right and title through the plaintiff. In such circumstances the court below has wrongly held that the suit is bad for non-joinder of the necessary party, i.e. the purchasers from the plaintiff.

9. The learned counsel further submitted that the court below wrongly dismissed the plaintiff's suit after recording the finding that Makho had half share in the gifted property and on her death the plaintiff became the heir, who is entitled to claim share of Makho. On these grounds, the learned counsel prayed that the first appeal be allowed after setting aside the judgment and decree of the trial court and plaintiff's suit be decreed.

10. On the other hand, the learned senior counsel Mr. Keshav Srivastava appearing on behalf of the respondents submitted that the plaintiff's claim is based on the gift deed which was a farji transaction and in fact after gift also, the owner of the property Bishundeo Singh continued as owner thereof. The gift deed

was never acted upon, therefore, the plaintiff has got no case. Moreover, the court below has found that there are discrepancies in the plot numbers and area mentioned in the gift deed and in the plaint, therefore, because of vague description of the suit property, the court below rightly dismissed the plaintiff's suit.

11. The learned senior counsel further submitted that Jamadar was the grand son of Butan Singh whereas the plaintiff is also grand son of Butan Singh. On the death of Makho in the year 1966 the property will revert back to the parental family and, therefore, also the plaintiff is not entitled to any share. Moreover, if it will not revert back then also on the death of Makho the property will be inherited by the heirs of her husband and Jamadar being the brother's son of husband of Makho had equal share as that the plaintiff, who is also brother's son of husband of Makho. Therefore, Jamadar was a necessary party. On this ground alone the plaintiff's suit for partition was liable to be dismissed and the court below has rightly dismissed the same.

12. Further learned senior counsel submitted that admittedly the plaintiff has sold some portion of the suit property to different persons. After purchase, the purchasers became the co-sharer. In such circumstances in their absence the partition suit is not maintainable. On this score also the suit is liable to be dismissed and

the court below has rightly dismissed the suit on this ground also. In view of the facts, the plaintiff's appeal is liable to be dismissed with cost.

13. In view of the above rival contentions of the parties, the point arises for consideration is that as to whether the plaintiff is entitled for a decree for partition to the extent of his half share or whether the purchasers from the plaintiff and Jamadar are necessary party to the suit and their non-joinder and for vague description of the suit property, the plaintiff's suit is liable to be dismissed?

14. In view of the nature of the claim of the parties and the points on which the plaintiff's suit has been dismissed, in my opinion, the evidences are not at all required to be discussed meticulously. All the questions raised by the parties and the findings recorded by the court below can be decided without referring to the evidences. I, therefore, proceed to decide the point one by another.

15. The first question regarding vague description of the suit property is concerned, it appears that there are some discrepancies in the description of the suit property. Likewise there are some discrepancies in the area of the suit property mentioned in the plaint and mentioned in the gift deed. The gift deed is Ext.5. According to the learned counsel for the appellants, the property might have been sold, therefore, there are discrepancies in the area but in the suit for



partition the right of the parties is to be declared, which property will be allotted in favour of whom is a matter to be seen at the time of final decree. It may be misdescription in the gift deed, therefore, it might have been correctly described in the plaint. Therefore, on the ground of misdescription the plaintiff's suit for partition could not have been dismissed.

16. From perusal of the pleading of the defendant, it appears that it is not the case of the defendant that the suit properties were not gifted by Bishundeo Singh. On the contrary it is an admitted case of the parties that the suit properties belonged to Bishundeo Singh. He gifted the property by registered gift deed in favour of defendant no.1 and Makho Kuer. The suit has been filed by the plaintiff for half share in the property. The question is whether the plaintiff has got half share in the gifted property or not this question is to be answered. The defendant never denied that the suit properties are not the gifted property. It is only stated that there are some plots which are not covered by deed of gift. The defendant also claimed that some property, which has been purchased by him, has also been included in the suit. So far this case of the defendant is concerned, it appears that the defendant claimed plot nos.438, 105 and 449 to be his exclusive property, which he had purchased and plot nos.105 and 449 were settled with his mother. The court below held that these three



plots be excluded from partition. Now, therefore, the properties, which were not included in gift deed or that properties which were claimed by the defendant, have been held to be his exclusive property. So far remaining properties are concerned, the court below clearly recorded the finding that there is unity of title and possession between the parties. The court below also recorded a clear finding that the registered gift deed is valid and genuine and it was acted upon. The names of donees were recorded in the revisional survey Khatian (Exts.16 and 16A). The question is whether in view of this clear finding that there is unity of title and possession, the plaintiff would have been non-suited on the ground of midescription of the suit property? In my opinion, the answer is no.

17. The other aspect of the matter is that in one hand the defendant is claiming that the gift deed was farji transaction and it was not acted upon. On the other hand, again he is pleading that the description of the suit property mentioned in the plaint does not tally with the description of the property mentioned in the gift deed. It will not be out of place to reiterate the case that it is not the case of defendant that the properties are not gifted property. Therefore, whether the area or plot number described in the plaint exist at the spot or not is a matter to be examined in the final decree. So far preliminary decree is concerned, the plaintiff has the right to claim for

partition of half share of the gifted property. If there are some mistakes in the description of the property, the defendant could have provided the correct description of the suit property but on that ground plaintiff's suit could not have been dismissed.

18. So far partial partition is concerned, also on this ground the suit cannot be dismissed. Article 328 of the Principles of Hindu Law by Mulla, 16th Edition provides that a partition between coparceners may be partially either in respect of the properties or in respect of the persons making it. The Hon'ble Supreme Court in the case of **Kashinathsa Yamosa Kabadi, etc. Vs. Narsingsa Bhaskarsa Kabadi, A.I.R. 1961 Supreme Court 1077** has held so.

19. So far Ext.5, the registered gift deed is concerned, it is of the year 1924. It is settled principles of law that a registered deed is presumed to be correct and genuine. The burden to prove that it is sham transaction or farji transaction is on the person, who asserts the same. It is also settled principles of law for declaration with respect to a registered document, the limitation provided under Article 59 is three years to file the suit. So far Ext.5 is concerned, the defendant never took any action. Only as defence in this partition suit he is raising the question that it was farji transaction. Except this nothing has been brought on record, which can be relied upon and a finding can be recorded that in fact it was a farji transaction. Therefore, the

learned court below has rightly held that the gift deed is genuine gift deed.

20. In view of this finding the half property of Bishundeo Singh was gifted to Makho. Her husband predeceased her. She died in the year 1966, therefore, on her death the plaintiff will inherit the property of Makho because the plaintiff's father was the full brother of husband of Makho. The half brother of the plaintiff's father i.e. Devdhari will never inherit in presence of Satya Narayan Singh, the plaintiff. For better reference it may be mentioned here that Butan Singh had two wives. From the first wife he had two sons Jang Bahadur and Devdhari and from the second wife he had two sons Ramdhari and Udit Narayan Singh. Jamadar is the son of Devdhari. The plaintiff is the son of Ramdhari and Udit Narayan Singh is the husband of Makho. Therefore, on 06.07.1966 when Makho died the property will go to the heir of her husband Udit Narayan Singh and plaintiff being the son of full brother of Udit Narayan Singh will inherit the property. In such circumstances the learned trial court has rightly held that plaintiff is the heir of Makho Kuer. In view of this finding how can it be said that Jamadar is also a necessary party. The other aspect of the matter is that Jamadar never claimed any share in the property. Even if he has got the share in the property then also he will get from the share of plaintiff. In other words, the plaintiff and



Jamadar will inherit half of the gifted property jointly and the dispute as to whether Jamadar will be given any share or not is in between Jamadar and the plaintiff. The defendant no.1 has got no role to play. He will have only half share in the property, but on the ground that Jamadar should have been added as party, the plaintiff's suit could not have been dismissed. In view of the above facts, in my opinion, in absence of Jamadar also the controversy between the plaintiff and defendant can effectively be decided by the Court. So far the question that Jamadar is a necessary party is concerned, this will be a dispute between the plaintiff and Jamadar and not related to the defendant. I, therefore, firstly, find that Jamadar is not at all a necessary party. Secondly the plaintiff's suit on the ground of non-joinder of Jamadar cannot be dismissed. The learned court below, therefore, wrongly held that the suit is bad for non-joinder of Jamadar.

21. So far non-joinder of two purchasers are concerned, also the plaintiff's suit cannot be dismissed because the dispute regarding the share of the purchasers is between plaintiff and the purchasers. The defendant cannot say that the plaintiff is required to add all those persons, who will be the joint owner along with plaintiff then only the plaintiff's suit for half share will be maintainable. This dispute, which is being raised and argued by the learned senior counsel for the respondents, is the inter-se dispute between the

plaintiff and the purchasers. Moreover the purchasers are claiming their title through the plaintiff. In other words, their property purchased will be adjusted in half share of the plaintiff. How the defendant is concerned with that dispute? The plaintiff's right to claim half share cannot be defeated on this ground but the learned court below has wrongly dismissed the plaintiff's suit on this ground also. In my opinion, the purchasers are not at all necessary party in the suit for partition.

22. In view of my above discussion, I find that the learned court below has wrongly dismissed the plaintiff's suit for partition. Therefore, the impugned judgment and decree are not sustainable in the eye of law and are liable to be set aside. Point formulated is answered in favour of plaintiff-appellant.

23. In the result, this first appeal is allowed and the impugned judgment and decree are set aside. The plaintiff's suit for partition is hereby decreed. In the facts and circumstances of the case, there shall be no order as to costs.

(Mungeshwar Sahoo, J)

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