

**Against the
Subordinate
1977.**

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Chadradeep

Laldas Sahu

Against the Judgment and Decree dated 31.07.1978 passed by Subordinate Judge, Aurangabad in Title Partition Suit No.47 of 1977.

.....Defendants-appellants

Laldas Sahu & Ors.

.....Plaintiffs - Respondent/s

For the Appellant/s :- Mr. Aakashdeep, Advocate
Mr. Shyameshwar Kr. Singh, Advocate

For the Respondent :- None.

PRESENT

CAV J U D G M E N T

1. This First Appeal has been filed by the defendants appellants against the Judgment and Decree dated 31.07.1978 passed by the learned Subordinate Judge, Aurangabad in Title Partition Suit No.47 of 1977 decreeing the plaintiff respondent's suit for partition.
2. The plaintiff respondent filed the aforesaid suit for partition

claiming $1/3^{\text{rd}}$ share in Schedule A, B. and C property and half share in Schedule 'B' property and in the alternative, he claimed that if Schedule 'B' property is found to be acquired from the joint family fund, he may be granted $1/3^{\text{rd}}$ share in it also.

3. The plaintiffs claimed the aforesaid relief alleging that Kauleshwar Sahu had four sons, namely, Ram Pirit Sao, Ram Sewak Sao, Laldas Sao and Chandradeep Sao. The Schedule 'A' property belonged to Kauleshwar Sahu. After his death, there had been partition in the year 1960 and in that partition, Ram Sewak Sahu separated from his three brothers. A registered partition deed was prepared. Ram Sewak got his $1/4^{\text{th}}$ share and the remaining $3/4^{\text{th}}$ share were jointly allotted to the three brothers. The three brothers joint family had business of ropes and defendant No.1 was looking after the business as *karta*. Plaintiff No.1, defendant No.1 and defendant No.8 are the brothers whereas the others are descendents of these three brothers. The joint family had also a flour mill at Gordiha which was managed by plaintiff No.1. However, the same was closed two years ago. Schedule 'B' is the list of property stocked in business at Rafiganj. Schedule 'C' is the list of property purchased by plaintiff and defendant from their joint family fund. Schedule 'D' is the purchased property of plaintiff No.1 and defendant No.1 from their separate and exclusive fund. Schedule 'E' is the list of movable



properties. According to the plaintiff, he has got 8 anas share in Schedule 'D' property whereas the defendant No.1 has got 8 anas share in the said Schedule 'E' property. Lastly, the plaintiff prayed for 1/3rd share in Schedule 'D' property alleging that if it is found to belong to all the three brothers.

4. After notice, the defendant No.8 filed contesting written statement. So far Schedule 'D' property is concerned, he claimed that it is his self acquired property. He was Government servant, therefore, he purchased the Schedule 'D' property in the name of his two brothers plaintiff No.1 and defendant No.1. In fact both are benamidar and the real owner is defendant No.8. The further case of this defendant is that the other schedule property are vague but the properties mentioned in Schedule 'B' and 'C' of the written statement which have not been included in partition are partitioned, the defendant has got no objection.

5. The defendant No.1 also filed contesting written statement. His main case is that there had already been partition between the three brothers few years after the partition of the year 1960. The defendant No.1 was allotted the house at Rafigang and defendant No.8 along with defendant No.1 whereas the flour mill was allotted to the plaintiff. So far land of Gordiha and house is concerned, it remained joint and they have got 1/3rd share each. The defendant



No.8 after separation also started carrying on his business. So far Schedule 'D' property is concerned, it is self acquired property of defendant No.8 and the plaintiff No.1 had got no share in it. Likewise, in the property allotted in favour of defendant No.1, the defendant No.8 and plaintiff No.1 had got no concern. The defendant No.8 paid the consideration amount for purchasing Schedule 'D' property. Since he was in Government servant, he told the plaintiff No.1 and defendant No.1 to purchase the property in their names, although they have got no concern with the said property. However, the defendant No.1 also alleged that if partition is affected, each of the party have got 1/3rd share in the rest schedule property.

6. On the basis of the aforesaid pleadings of the parties, the following issues were settled by the Court below for decision in the suit :-

- (i) Is the suit maintainable?
- (ii) Have the plaintiffs got valid cause of action for the suit?
- (iii) Is the suit bad for partial partition?
- (iv) Have the plaintiff got unity of title and possession with the defendants?
- (v) Was there a previous partition in the family between the plaintiff No.1, defendant No.1 and defendant No.8?

(vi) Are the plaintiffs entitled to a decree for partition and if so, to what extent and in respect of what properties?

(vii) To what relief or reliefs, if any, are the plaintiff entitled?

7. The learned Court below decreed the plaintiff's suit granting him 1/3rd share in all the properties including Schedule 'D' property recording a finding that Schedule 'D' property is also acquired out of joint family fund.

8. The learned counsel for the appellant submitted that it is the specific case of the plaintiff No.1 that the Schedule 'D' property was acquired by plaintiff No.1 and defendant No.1 whereas the defendant's case is that it is the self acquired property of defendant No.8. The plaintiff No.1 and defendant No.1 are benamidar only. There was no case either by the plaintiff or by the defendant that Schedule 'D' property was acquired out of joint family fund. According to the learned counsel, at the time of hearing, amendment was sought for by the plaintiff whereby a relief was claimed to the effect that if the Court finds that the lands mentioned in Schedule 'D'; of the plaint have been acquired with the joint family fund, partition decree for 1/3rd share therein be granted to the plaintiff. But there is no case pleaded in the plaint. The learned trial Court made a third case and recorded a finding that it is the joint family land. Therefore, the

finding is liable to be set aside.

9. The learned counsel for the appellant further submitted that the property mentioned in Schedule 'D', no doubt, is purchased in the name of plaintiff No.1 and defendant No.1 but the defendant No.1 who has got no interest in the property as that of the plaintiff No.1 admitted against his interest to the effect that he has got no share in the property because it is self acquisition of defendant No.8 who has paid the consideration amount, because he was in Government service, he purchased in the name of his two brothers, therefore, defendant No.8 is the real owner. In support of his case, the defendant No.8 also produced pass book to show payment of consideration amount and also he produced the sale deed from his custody. In such circumstances, the admission of defendant No.1 coupled with evidence to show payment of consideration amount and the production of sale deeds from his custody is sufficient enough to prove that the defendant No.1 and plaintiff No.1 are the benamidar only but the Court below discarded the evidence on untenable grounds and made a third case and rejected the claim of the defendant No.8. On these grounds, the learned counsel submitted that the Appeal be allowed and the impugned Judgment and Decree insofar as it relates to Schedule 'D' property be set aside and it be held that Schedule 'D' property belong to defendant No.8 which is not partable as the

defendant No.1 and plaintiff No.1 are benamidar.

10. Nobody appeared on behalf of the respondents.

11. In view of the above submission of the learned counsel for the appellant, the only point arises for consideration in this First Appeal is as to whether the Schedule 'D' property is self acquired property of defendant No.8 and the plaintiff No.1 and defendant No.1 are only the banamidar or whether the plaintiff is entitled to half share or 1/3rd share in this Schedule 'D' property.

12. It is admitted fact that there are many schedules in the suit property. The plaintiff's suit had been decreed to the extent of 1/3rd share in all the suit property including Schedule 'D'. The appellant No.1 who was defendant No.8 and his descendants is challenging that part of the Judgment and Decree by which the plaintiff had been granted 1/3rd share in Schedule 'D' property recording a finding that it is acquired out of joint family fund. The other part of the decree is not under challenge. Therefore, only the point with respect to Schedule 'D' property is required to be seen.

13. So far genealogy is concerned, there is no dispute. It is also not disputed that Schedule 'D' property is purchased in the name of defendant No.1 and plaintiff No.1.

14. At paragraph 6 of the plaint, the plaintiff specifically



pleaded that 'Schedule 'D' of the plaint had been purchased by plaintiff No.1 and defendant No.1 from their separate and exclusive fund and it is treated as their separate and exclusive property over which they are jointly in possession in equal share.' This is the only case pleaded in the plaint with respect to Schedule 'D' property i.e.. about the acquisition thereof. However, by amendment dated 28.07.1978, the plaintiff amended and added one more relief to the effect that 'if the Court finds that the lands mentioned in Schedule 'D' of the plaint have been acquired with the joint family fund of the plaintiffs and defendants then partition decree for 1/3rd share therein be granted to the plaintiff.'

15. Except the above pleading and relief, no case had been made out in the plaint that the properties of Schedule 'D' have been acquired out of the joint family fund, therefore, the Schedule 'D' property belong to the three brothers, as such the plaintiff is entitled to 1/3rd share. In the contrary, the defendants, i.e., defendant No.1 and defendant No.8 in their written statement pleaded that Schedule 'D' property is the self acquired property of defendant No.8. From perusal of the impugned Judgment, I find that the Court below did not consider these aspects of the matter. One case was pleaded by the plaintiff and the other case is pleaded by the defendants. The question was whether it is the property acquired by the plaintiff No.1 and



defendant No.1 as pleaded by the plaintiff in paragraph 6 of the plaint or whether it is the self acquired property of defendant No.8 and the plaintiff No.1 and defendant No.1 are the benamidar only. This question was never decided by the Court below. Instead of deciding this dispute between the parties, the Court below made a third case, i.e., the property is acquired by the joint family fund as such is a joint family property.

16. The Hon'ble Supreme Court in the case *Bachhaj Nahar Vs. Nilima Mandal & Ors. AIR 2009 SC 1103 = 2008 (17) SCC 491* has held that **'a Court cannot make out a case not pleaded by the parties. The Court should confine its decision to the question raised in the pleadings.'** Here, the finding of the Court below with regard to Schedule 'D' property is contrary to the settled principle of law laid down by the Hon'ble Supreme Court.

17. Here, the prayer had only been made by amendment claiming 1/3rd share but for this prayer, there is no factual basis or there is no pleading at all. If there is no pleading, either by the plaintiff or by the defendant that it is joint family acquisition, how the Court will record this finding without there being any pleading and if there is no pleading, there is no question of consideration of any evidence to that effect arises. If Court cannot make a third case, cannot consider any evidence without pleading then there is no

question granting any relief prayed for by the plaintiff arises. Therefore, the finding of the Court below regarding Schedule 'D' property that it is acquired out of joint family fund without there being any basis, i.e., pleading and the evidence is neither here nor there and is liable to be set aside and thus it is hereby set aside.

18. Now, let us consider the claim of the parties. The plaintiff claimed that Schedule 'D' property is self acquired property of plaintiff No.1 and defendant No.1. The defendant No.1 denied this fact and pleaded that plaintiff No.1 and defendant No.1 are benamidar and the real owner is defendant No.8. The defendant No.8 also claimed that he has purchased the property. Now, therefore, the defendant No.1 who has got joint interest as claimed by the plaintiff in Schedule 'D' property in such circumstance, his admission is admissible against the plaintiff No.1. The circumstances is that the defendant No.1 is also admitting against his interest in the suit property. This Court in the case of *Ramjhari Kuer and Others Vs. Dayanad Singh AIR 1946 Patna page 278* has held that **'the principle is that when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these person is receivable not only against himself but also against the other defendants whether they be all jointly suing or sued provided that the admission relates to the subject matter in dispute and is made**

by the defendant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirement of the identity in legal interest between the joint owners is fundamental importance.

19. Again this Court in the case of *Ambika Devi Vs. Balmukund Pandey*, AIR 1981 Patna page 111 has held that “where several persons are jointly interested in the subject-matter of the suit the general rule is that the admission of any one of these persons are receivable against himself and fellows, whether they be all jointly suing or sued or whether an action be brought in favour of or against one or more of them separately, provided the admission relates to the subject-matter in dispute, and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.’

20. The same view has been taken again by this Court in the case of *Yogendra Prasad Vs. Samrendra Nath Gupta* 2012 (2) PLJR 198.

21. In view of these settled principle of law, the admission made by the defendant No.1 is not only admissible against him but also admissible against the plaintiff No.1. Over and above the same, here the defendant No.8 has produced the evidences in support of the payment of consideration amount. Admittedly, he was in government



service. Exhibit A/1 is the sale deed which has been produced by the defendant No.8. In his evidence as D.W.3 he has stated that he also paid rent for the land. The learned trial Court discarded his evidence on the ground that he has not produced the rent receipts to prove that he was paying the rent for Schedule 'D' land. It may be mentioned here that there is no contrary evidence produced by the other side. The defendant No.8 has produced his passbook to show that he withdrew Rs.2400/- from the Bank in June, 1965 and the property has been purchased on 7.7.1965 (Ext. A/1). It is admitted that he was in service since 1957 as has been stated by him as D.W.3. There is no denial to this fact. His monthly earning was Rs.200/- . There is no contrary evidence on this point also. D.W. 3 in his evidence clearly stated that he has paid Rs.6000/- to defendant No.1 Ram Pirit Sao for purchasing the land in question and he has also stated he had paid Rs.200/- to the vendor as advance money. From perusal of evidence of D.W.3, he has vividly described how he collected the amount of consideration of Rs.6000/-. From perusal of the Judgment impugned, it appears that the Court below discarded the evidence regarding the collection of the consideration amount by defendant No.1 and payment thereof on the ground that the defendant in the written statement had not pleaded that how he withdrew and from where he arranged the money. In my opinion, the Court below had wrongly



discarded the evidence without considering the provision as contained in Order VI Rule 2 which provides that the pleadings shall contain only statement in a concise form of a material fact on which the party pleaded relies for his claim or defendant as the case may be, but not the evidence by which they are to be proved. Here the defendant No.8 categorically, pleaded that he purchased the Schedule 'D' property out of his own money. As he was in service, he purchased the same in the name of plaintiff No.1 and defendant No.1. This is the fact which required to be pleaded and to prove this fact, the defendant No.8 produced the evidence. In my opinion, the evidence on which the fact is to be proved is not required to be pleaded.

22. On the contrary, there is no evidence produced by the plaintiff in support of the fact that in fact the consideration was paid even by defendant No.1 or that the property was acquired out of the joint family fund. In view of the above evidences and the circumstances that although the sale deed dated 07.07.1965 ext. 'A/1' stands in the name of plaintiff No.1 and defendant No.1, it was produced from the custody of defendant No.8. The defendant No.8 also proved source of income and payment of consideration amount to the vendor which is supported by defendant No.1 and the passbook produced by him ext. 'B'. The learned Court below while considering the production of sale deed from custody of defendant No.8 held that

it cannot be ruled out that defendant No.1 with dishonest intention might have handed over the sale deed to defendant No.8. In my opinion, this observation of the Court below is nothing but surmises and conjectures. There is no reliable evidence.

23. In view of my above discussion, it appears that the plaintiff was in service since 1957 and he paid the consideration amount to the vendor for purchasing schedule 'D' property and he has produced from his custody of the sale deeds. He also examined D.W.1 and D.W.2 in support of the fact that they are cultivating the land of defendant No.8 separately. The Court below has wrongly discarded the evidence of D.W.1 and D.W.2. Their evidence shows the exclusive possession of the defendant No.8.

24. It appears that the Appeal has been dismissed as against respondent No.9 to 11 for non-compliance of the peremptory order. By terms of order dated 09.03.2015, it was directed that incompetency mater shall be considered at the time of hearing of the appeal. From perusal of the memo of appeal and the decree in the suit, it appears that the respondent No.9 to 11 were defendants in the Court below and they are the descendent of Ram Pirit Sahu, the brother of plaintiff No.1. They are supporting the appellant, and, therefore, for dismissal of the appeal against them, the appeal will not become incompetent.

25. An application under order 41 Rule 27 was filed by the



appellant in the year 1979 for permission to adduce additional evidence. The learned counsel for the appellant submitted that the Court below has rejected the plea that the appellants were paying rent on the ground that no rent receipts have been produced, therefore, the appellants seeks permission to adduce additional evidence by producing the rent receipts. So far this application is concerned, it was directed that it shall be considered at the time of final hearing. It is settled principle of law that appellate Court may permit additional evidence only and only if the conditions laid down in order 41 Rule 27 CPC are found to exist. Parties are not entitled as of right to the admission of such evidence when on the basis of evidence on record, the appellate Court can pronounce a satisfactory Judgment, the provision of Order 41 Rule 27 will not apply. In this matter, reference may be made to the decision of Hon'ble Supreme Court in the case of ***Union of India Vs. Ibrahim Uddin 2013 (1) PLJR 48 SC***. In view of this decision, I do not find any merit in this application under Order 41 Rule 27 because it is not the case of the appellant that on the basis of the evidence available on record, no satisfactory Judgment can be pronounced. Moreover, none of the clauses under Order 41 Rule 27 is applicable here. Therefore, this application Under Order 41 Rule 27 is hereby rejected.

26. In view of my above discussion, I find that the defendant

No.8-appellant has been able to prove that in fact defendant No.8, appellant No.1 had purchased the schedule ‘D’ property in the name of defendant No.1 and plaintiff No1. The plaintiff No.1 and defendant No.1 are the benamidar of defendant No.8. As such are not entitled to any share in Schedule ‘D’ property. The defendant No.8 appellants are exclusive owner of the Schedule ‘D’ property which cannot be partitioned in this partition suit. Accordingly, the findings of the trial Court on this point is set aside.

27. In the result, this First Appeal is allowed. The Judgment and Decree of the Court below is modified to the extent that the plaintiff is not entitled to any share in schedule ‘D’ property as the schedule ‘D’ property is exclusive property of defendant No.8. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahu, J)

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