

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.163 of 1977

Against the Judgment and Decree dated 27.11.1976 passed by 4th Addl. Subordinate Judge, Samastipur in partition Suit No.1101 of 1972 / 1 of 1976.

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Krishna Deo Nr. Singh

.....Plaintiff-Appellants

Versus

Smt. Kunti Devi & Ors.

.....Defendants-Respondents

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Appearance :

For the Appellant/s : Mr. Madan Mohan, Advocate
Mr. Ujjawal Kumar Sinha, Advocate

For the Respondent/s : Mr. Anshay Bahadur Mathur, Advocate

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Dated : 8th day of April, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL J U D G M E N T

1. This First Appeal has been filed by the plaintiff appellant against the Judgment and Decree dated 27.11.1976 passed by learned 4th Addl. Subordinate Judge, Samastipur in Partition Suit No.1101 of 1972 / 1 of 1976 whereby the learned trial Court dismissed the plaintiff appellant's suit.

2. The plaintiff appellant had filed aforesaid suit for

declaration that the plaintiff vendor had got $2/3^{\text{rd}}$ share which came to the plaintiff from the south in the suit property and further prayed for partition of the property if the previous partition is not relied upon. The plaintiff also claimed arrears of rent to the extent of Rs.377.40/-.

3. The plaintiff claimed the aforesaid relief on allegation that Biltu Singh had purchased the suit land and had constructed a building thereon. He died leaving behind Ram Nihora Singh, the defendant No.1 and Ram Shankar Singh, defendant No.10 and widow, Parwati Devi, the defendant No.9. Biltu Singh died in the year 1944. After the death of Biltu Singh, his all the properties were partitioned amongst the heirs and each of them got $1/3^{\text{rd}}$ share. In the said partition, the defendant first party got $1/3^{\text{rd}}$ share in the suit property, $1/3^{\text{rd}}$ share was allotted to defendant No.9 and $1/3^{\text{rd}}$ share to defendant No.10. The defendant No.10, i.e., Ram Shankar Singh took in exchange half share of his mother Parwati Devi in the suit property and he sold half of the suit property to the plaintiff by registered sale deed dated 3.8.1966 and gave possession thereof. Since then the plaintiff is coming in possession of the purchased land. Subsequently, Parwati Devi also sold her share in favour of the plaintiff by registered sale deed dated 28.5.1971. Thereafter, the plaintiff was realizing rents from the tenants as the suit property consist of three shops. Since there was no document of partition, there was trouble in

realizing the half rent with respect to the middle room, therefore, he requested the defendant No.1 to partition the property but the defendant No.1 refused, as such the suit was filed.

4. The defendant first set, i.e., Ram Nihora Singh and his heirs appeared and filed contesting written statement. The defendant No.9 and 10, i.e, the vendor of the plaintiff, Ram Shankar Singh and Parwati Devi filed written statement supporting the plaintiff's case but they were not examined as witness in support of their case pleaded in the written statement. The main defence of the contesting defendant is that in fact the suit property was purchased by Biltu Singh but the house has been constructed thereon by the defendant, Ram Nihora Singh after partition of the property. On the death of Biltu Singh in the year 1944, the properties of Biltu Singh were inherited by his two widows and two sons, namely, Moriya Devi and her son Ram Nihora Singh and Parwati Devi and her son Ram Shankar Singh. Thereafter, there was partition of all the properties of Biltu Singh including the suit property. In that partition, the suit property was allotted exclusively in the share of the defendant No.1. Subsequently to memorise this partition, a memorandum of partition was prepared on 5.2.1963 by the Panches. After partition, the defendant No.1 is coming in possession of the suit property. The plaintiff never came in possession of the property after purchase nor the plaintiff obtained

any title because the sale deed executed by the defendant No.9 and 10 are forged, fabricated and fraudulent documents.

5. On the basis of the aforesaid pleadings of the parties, the learned trial Court framed the following issues :-

- (i) Is the suit as framed maintainable?
- (ii) Whether the plaintiff has got valid cause of action for the suit?
- (iii) Whether the suit is bared by law of limitation as well as by the principles of estoppel, waiver and acquiescence?
- (iv) Whether there is unity of title and possession between the parties?
- (v) Whether the plaintiff is entitled to share in the suit land and building as claimed?
- (vi) Whether the plaintiff is entitled any rent from the defendants Ist party?
- (vii) Whether the plaintiff is entitled to relief or reliefs as prayed?

6. The learned trial Court dismissed the suit finding that in partition, the suit property fell in the share of defendant No.1.

7. The learned counsel, Mr. Madan Mohan, appearing on behalf of the appellant submitted that admittedly the property was the property of Biltu Singh. Therefore, his son and widow including Parwati Devi and Ram Shankar Singh had 1/3rd share in the suit property. In the partition, after the death of Biltu Singh, the suit property was also partitioned and each of them got 1/3rd share. The defendant No.9 and 10 subsequently sold the suit property to the



extent of their 2/3rd share by two registered sale deeds dated 3.8.1966 ext.3 and 28.5.1971 ext. 3A. Since after purchase, the plaintiff is coming in possession of the property and realizing the rent. In support of this case, the plaintiff produced oral as well as documentary evidences. Ext.1 is the mortgage deed of the year 1964 which were executed by Ram Shankar Singh with respect to the suit property in favour of one Kedar Singh. The said Kedar Singh, mortgagee sold the mortgage bond to another person from whom the plaintiff redeemed and then came in possession of the entire property. In this ext.1, Ram Nihora Singh had signed, therefore, the case of the contesting defendant that there was partition and in that partition, the entire suit property was allotted in favour of the defendant Ram Nihora Singh is falsified. It is not expected that a person would sign the document by which his property was mortgaged by a person who has no title. Therefore, the evidences produced by the defendant to show that the property was also partitioned as alleged by them is not reliable. This ext.1 clearly proves the fact that the suit property was in possession of Ram Shankar Singh who subsequently sold the suit property by the registered sale deed and likewise his mother also sold all the properties, therefore, because of the fact that the vendor of the plaintiff had the title, interest and possession over the same, the title and possession passed on to the plaintiff who came in possession but

the learned Court below on flimsy grounds and untenable grounds disbelieved ext.1 and held that on the basis of this document, no such finding can be recorded.

8. The learned counsel further submitted that the witnesses examined on behalf of the defendant including D.W.21 have admitted that there was no previous partition although the parties were living separately and the property was partitioned in the year 1963. In such circumstances, ext. 'E' dated 5.2.1963 which has been produced by the defendant in support of the fact that the suit property was allotted in the share of Ram Nihora Singh cannot be looked into because of the fact that ext. 'E' by which the partition was affected compulsorily registerable. Since Ext. 'E' is not registered document, therefore, it was inadmissible. The plaintiffs have examined many witnesses in support of the fact that the plaintiff is in possession of the suit property and is realizing rents from the tenants. In support of this case, the tenants have been examined by the plaintiff who have deposed before the Court to the effect that they are paying rent to plaintiff so far one shop room is concerned and so far the shop room in the medical is concerned, the tenant is paying half rent to the plaintiff and half rent to Ram Nihora Singh. The Court below has not considered all these evidences properly. Therefore, the Judgment and

decree are liable to be set aside and the plaintiff's suit be decreed.

9. On the other hand, the learned counsel, Mr. Anshay Bahadur Mathur, appearing on behalf of the defendants respondent submitted that it is the specific case of the plaintiff that there had been partition of the property of Biltu and in that partition 1/3rd share was allotted in favour of Parwati Devi and 1/3rd share was allotted in favour of Ram Shankar Singh and 1/3rd share was allotted in favour of mother of Ram Shankar Singh and 1/3rd share has been allotted in favour of Ram Nihora Singh in the suit property. Therefore, the burden is on the plaintiff to prove this fact by leading cogent evidence. On the basis of ext.1 which was executed by Ram Shankar Singh alone, it cannot be said that the property was divided in three parts. According to the plaintiff himself, the property was divided in three parts then how the entire property was mortgaged by Rama Shankar Singh, there is no explanation to this fact. The learned counsel further submitted that merely because Ram Nihora Singh has signed this ext.1, there can be no presumption that he knew that the property was divided and that he had got share only to the extent of 1/3rd share being mortgaged by his brother. The learned counsel further submitted that Ram Nihora Singh signed as a witness and, therefore, any statement made in the sale deed between the mortgagor and mortgagee will never bind the witness nor it will affect the title of



Ram Nihora Singh. Since the plaintiff's title is dependent on the proof of the fact that in the partition, Parwati and Ram Shankar Singh got 2/3rd share in the suit property, it is for them to prove the same but in the present case except the plaintiff who has been examined as P.W.22, no other witness has been examined in support of this fact. No documents has been produced in support of this case. So far ext.'E' is concerned, the learned counsel submitted that only the schedules have been prepared. The defendants in the written statement clearly pleaded that there had been previous partition and subsequently to remember the previous partition, Yadasta Batwara paper was prepared by the Panches on 5.2.1963 and the paper have been signed by both the brothers, i.e., Ram Nihora Singh Ram Shankar Singh and the Panches has also signed. The Panches have been examined on behalf of the defendant. One of the Panches, P.W.21, is the father-in-law of the Ram Shankar Singh who has clearly stated that the paper was prepared on 5.2.1963 by the Panches and the brothers signed the document. According to the learned counsel because of the fact that this Yadasta Batwara paper ext.'E' records the previous partition does not require to be compulsory registered under Section 17 of the Indian Registration Act, therefore, the learned Court below has rightly relied upon this ext.'E' which falsify the case of the plaintiff. The learned counsel further submitted



that D.W.20 D.W.21 D.W.22 who are either brother-in-law or father-in-law of the defendant No.9 have also deposed against the defendant No.9 and have stated that the suit property was allotted exclusively in the share of Ram Nihora Singh who was doing business at Samastipur. The learned Court below after considering all these aspects of the matter has rightly recorded the finding that there had already been partition between the parties with respect to all the properties of Biltu and in that partition, the suit property was allotted in favour of Ram Nihora Singh. Therefore, defendant No.9 and 10 had no right to transfer the property. In such circumstances in First Appeal, the impugned Judgment and Decree cannot be interfered with. Accordingly, the learned counsel prayed that the First Appeal be dismissed with cost.

10. In view of the above contentions of the parties, the points arises for consideration in this First Appeal is as to whether there had been partition between the parties with respect to all the properties of Biltu and in that partition whether the suit property was partitioned according to the claim of the plaintiff or it was partitioned as claimed by the defendant and whether the impugned Judgment and Decree are sustainable in the eye of law.

11. From perusal of the plaint at page 6, it appears that the



plaintiff pleaded that when there was separation with respect to all the properties of Biltu, the suit property at Samsastipur was also partitioned. At paragraph 7, it is pleaded that in the northern side, 1/3rd share was allotted in favour of defendant Ist set and 2/3rd share was allotted in favour of defendant No.9 and 10 - 1/3rd each. At paragraph 8, the pleading is to the effect that after this partition, the parties came in possession according to their share. The defendant Ist set in the written statement controverted the case of the plaintiff and pleaded to the effect that there was partition and in that partition, the entire suit property fell in the share of the defendant No.1, Ram Nihora Singh and his mother. At paragraph 11, clear pleading is that after death of Biltu Singh, the property was partitioned and on 5.2.1963 to memorise this partition, Yadasta paper was prepared on which both the parties have signed. Now, therefore here both the parties admitted that there had been partition with respect to all the properties of Biltu Singh, it is not the case of any party that there was no partition by metes and bounds or that some properties were joint. According to the plaintiffs, the suit property was partitioned in three parts whereas according to the defendants, the suit property was allotted entirely in favour of the defendant No.1. It may be mentioned here that the suit land comprised within plot No.130, 131, and 134 measures only one katha one dhur. It is admitted fact that there were



other properties of Biltu Singh measuring more than 16 biggha situated at difference places. In support of the fact that the suit property was divided in three parts. The only evidence is that of P.W.22 who is the plaintiff himself. Except his bald statement either in the plaint or in his evidence, there is no other materials or circumstances to show that that the suit property was divided in three parties. However, it appears that after the sale deed, the plaintiff has taken many steps either for separation or for mutation etc. but those matters cannot be considered for deciding as to whether the partition was affected according to the claim of the plaintiff. On the contrary, the defendants have produced many witnesses who have approved the partition in the manner claimed by the contesting defendant first set. D.W.20 claimed himself to be brother-in-law of defendant No.9 and defendant No.1. D.W.21 is the father-in-law of defendant No.9, Ram Shankar Singh. Likewise D.W.22 is also brother-in-law of Ram Shankar Singh. All of them have stated that in the partition, the suit property was allotted in the share of Ram Nihora Singh.

12. The learned counsel for the appellant submitted that this ext. 'E' is inadmissible evidence because it is unregistered document and by this document, the partition was affected. So far this submission is concerned, from perusal of the written statement at paragraph 11, as stated earlier, it is the specific pleading of the



defendant that there was partition earlier and according to that partition, Yadasta was prepared on 5.2.1963. From perusal of ext. 'E', it appears that the heading of this document is also Yadasta Batwara. It only contains the schedules of the property which was allotted in the share of each party. From this Ext. 'E', it is further clear that the properties of Biltu Singh which was partitioned was more than 16 biggha and in this ext. 'E', the suit property was shown to have been allotted in favour of the contesting defendants.

13. The Hon'ble Supreme Court in the case of *Roshan Singh Vs. Zile Singh AIR 1988 SC 881* vide paragraph 9 has held that **'the essence of the matter is whether the deed is a part of the partition transaction or contains merely an incidental recital of a previously completed transaction. The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well-settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration.** In view of the above settled proposition of law laid down by the Hon'ble Supreme Court, this ext. 'E' which only contains the chains of the property, i.e., list of the properties cannot be said to be the document of partition and, therefore, it is not compulsorily registerable.



14. Now, the question is which version is to be relied upon. In one hand, the plaintiff is only stating orally but on the other hand the defendant is producing cogent evidence in support of the fact that there had been partition and according to that partition Yadasta was prepared, ext. 'E' which is being supported by the Panches who are nonelse than the close relation of the defendant No.9. In my opinion, therefore, there had been partition between the parties earlier and according to that partition, the Yadasta was prepared which has been marked as ext. 'E'. In this ext. 'E', the property in suit was allotted in the share of the contesting defendants.

15. The learned counsel for the appellant submitted that the Yadasta Batwara was never signed by Parwati Devi. So far this contention is concerned, it may be mentioned here that Parwati Devi is not praying for any declaration with respect to ext. 'E'. This is a document showing partition between the parties. Therefore, whether there had been earlier partition between the parties is not dependant on signing of Parwati Devi. This document only shows that there had been partition between the parties and not that by this document, the partition was affected, in my opinion, therefore signing or no signing of Parwati Devi has got no role to play with respect to the partition between the parties.



16. The learned counsel for the appellant submitted that if in fact, the suit property was allotted in favour of the defendant No.1 then it was not accepted that defendant No.1 would have signed ext.1 which was executed in the year 1964. So far this submission of the learned counsel is concerned, it may be mentioned here that I have recorded the finding that there was previous partition and the suit property was allotted in favour of defendant No.1. Now, the question is only because Ram Nihora Singh signed the mortgage deed in the year 1964, whatever right, title and interest he got in the suit property will be divested? Can it be said that because he has signed ext. '1' as witness he was not in possession of the property. It may be mentioned here that according to the plaintiff's case itself, Ram Nihora Singh had got 1/3rd share. Parwati Devi had got 1/3rd share and Ram Shankar Singh had got 1/3rd share. How the entire suit property was mortgaged by Ram Shankar Singh only. There is no explanation at all. Therefore, merely because a subsequent document has been executed in favour of third person by Ram Shankar Singh, the right, title, interest and possession of defendant No.1 cannot be divested or it cannot be said that because the ext.1 was executed which was signed by Ram Nihora Singh, there had been no previous partition and ext. 'E' is falsified by this ext. '1'.

17. As stated above, it is for the plaintiff to prove that the suit

property was partitioned in three parts as claimed by him. There must be positive evidence on this point. On the basis of circumstantial evidence, this fact cannot be interfered, particularly when from the other side ext. 'E' has been produced.

18. The Hon'ble Supreme Court in the case of *Rangammal Vs. Kuppuswami 2011 (4) BBCJ 133 SC* has held that **'whosoever desires any Court to give Judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exists. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving the fact always lies upon the person who asserts.'** Here in the present case at our hand, the plaintiff is praying for declaration of his title deriving from the vendors on assertion that the suit property was divided in three parts. Therefore, the burden is on the plaintiff to prove the existence of this fact. Unless he proves this fact, no relief can be granted to the plaintiff. As stated earlier, except the bald statement, there is no other evidence. The witnesses examined on behalf of the plaintiffs who are either tenant or other persons have only stated regarding possession of the plaintiff with respect to half of the suit property. In view of the above facts, the question is whether on the basis of mere possession, the title of the



plaintiff can be declared particularly when it has already been found that the suit property was allotted in favour of the contesting defendant, i.e., Ram Nihora Singh. If it was allotted in favour of Ram Nihora, then there is no question of transfer of Parwati Devi or Ram Shankar Singh arises because they had no title to the suit property. Since they had no title or possession, there is no question of transferring title or possession to the plaintiff arises. The defendants witnesses, D.W.4 to 6, 8, 9, 11, 12 to 14 16, 20 to 22 etc. have all stated that Ram Nihora Singh is in possession of the suit property. Further as stated earlier, it is admitted fact that there was more than 16 biggha of land. Can it be relied upon that when 16 biggha of land was partitioned plot wise, the suit plot which measures only one kahta one dhur was divided in three parts. This story propounded by the plaintiff is also appears to be not reliable.

19. In view of my above discussion, I find that the plaintiff has failed to prove his case of partition of the suit property into three parts as pleaded by him. He also failed to prove that vendors had any title over the suit property which the plaintiff has purchased through, ext. 3 and 3/A. On the contrary, the defendants have been able to prove that there had already been previous partition and in that previous partition the suit property was allotted entirely in favour of Ram Nihora Singh.

20. It appears that in this case, there is dispute between the parties as to who has constructed the house on the suit property. So far this dispute is concerned, it is irrelevant for deciding the question as to whether there have been partition between the parties and in whose share the suit property fell. According to the claim of the plaintiff, the suit property was constructed by Biltu Singh whereas according to the defendant, it was constructed by Ram Nihora Singh out of his own earning and had constructed the same after there was partition between them.

21. From perusal of the Judgment and Decree of the Court below, it appears that the learned Court below has discussed all the materials available on record and then has recorded the finding. Therefore in view of my above finding, I do not find any reason to interfere with the impugned Judgment and Decree. Accordingly, the findings of the trial Court is hereby confirmed.

22. In the result, I find no merit in this First Appeal and thus this it is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

Sanjeev/-

(Mungeshwar Sahoo, J)

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