

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.597 of 1977

(Against the part of the judgment and decree dated 30.06.1977 passed by 1st Additional Subordinate Judge, Motihari in Partition Suit No.64 of 1973/191 of 1976).

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Rukaida Khatoon & Ors.

.... Defendants-Appellants

Versus

Sk. Abuzar & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Advocate

For the Respondent/s : Md. Anish Akhtar, Advocate

Mr. Arif Dovla Siddiqui, Advocate

Mr. Arif Kalim, Advocate

Mr. Mohtab Alam, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 16-09-2015

1. The original sole appellant and the original plaintiff-respondent No.1 have died and legal representatives have been substituted. The defendant No.1-appellant had filed this First Appeal against the part of the judgment and decree dated 30.06.1977 passed by the learned 1st Additional Subordinate Judge, East Champaran, Motihari in Partition Suit No.64 of 1973/191 of 1976 whereby the court below had decreed the plaintiff-respondent's suit for partition with respect to the self-acquired property of the defendant No.1-appellant.

2. The original plaintiff-respondent No.1, Bibi Jamila Khatoon filed the aforesaid suit for partition with respect of the suit



properties described in Schedule I to IV. She claimed 13/126 share in Schedule I, 2/21 share in Schedule II, 1/6 share in Schedule III and 1/3 share in Schedule IV properties. The court below decreed with respect to some properties described in Schedule I to III and IV and also held that some properties are not the family properties. We are not concerned with these properties so far this First Appeal is concerned.

3. The learned counsel, Mr. Binod Kumar Singh for the appellants only raised the ground that while decreeing the plaintiff's suit for partition, the court below has granted the decree with respect to the self-acquired property of defendant No.1-appellant which he had acquired by registered sale deeds Exhibit A, A/2, A/3 and A/4. These properties are described in Schedule IV of the plaint. In view of this submission, it is not necessary to go in detail the genealogical table and also the claim of the plaintiffs and defendants with respect to other properties.

4. The learned counsel for the appellants further submitted that it is admitted fact that plaintiff, Jamila Khatoon is own sister of defendant No.1, Naimuddin being the son and daughter of Sk. Farzand. The only claim of the plaintiffs is that these properties mentioned in Schedule IV are the properties acquired by Sk. Farzand, therefore, she has got 1/3rd share. According to the defendant No.1,

the properties covered under Exhibit A, A/2, A/3 and A/4 are the self-acquired properties of defendant No.1.

5. The learned counsel, Md. Anish Akhtar appearing for the respondents submitted that defendant No.1 was minor when the properties were acquired, therefore, the court below has rightly held that the properties are the properties acquired by Farzand, therefore, the findings cannot be interfered with.

6. In view of the aforesaid submission of the parties, the only point arises for consideration is “whether the properties covered/acquired by Exhibit A, A/2, A/3, A/4 are the properties liable for partition or are the self-acquired properties of defendant No.1?”

7. The defendant No.1 has produced these four sale deeds. Exhibit A is dated 09.09.1952, Exhibit A/2 is dated 16.01.1939, Exhibit A/3 is dated 25.09.1940 and Exhibit A/4 is dated 14.12.1938. All these sale deeds stand exclusively in the name of the defendant No.1. Now, therefore, in view of these registered sale deeds, it is for the plaintiffs to show that in fact, defendant No.1 is the Farzidar of Farzand Ali. From perusal of the pleading, it appears that the only case made out by the plaintiffs is that all the Schedule IV properties have been acquired by Farzand Ali alone thus, plaintiff has got 1/3rd share in it. In the Schedule IV, there are 22 plots. At the time of hearing, the plaintiff in the court below conceded that she had



no concern with plot No.1734 and 3229. However, the court below held that the defendant No.1 has not filed any document to show that it is mortgage property of defendant No.1, therefore, held that on redemption, the plaintiffs will get 1/3rd share in the consideration amount. The learned counsel for the appellants submitted that this is not the case of the plaintiff nor she claimed any relief in the consideration amount. From perusal of the judgment, it appears that the court below held that the plaintiff conceded that she has got no concern, therefore, in my opinion, the court below has wrongly held that the plaintiff is entitled to 1/3rd share in consideration amount. The court below also considered with regard to various other plots and held that some of the plots do not belong to the family of the parties.

8. So far four sale deeds which stand in the name of defendant No.1 are concerned, it appears that no evidence has been produced by the plaintiffs to show that in fact, Farzand Ali paid the consideration amount for purchasing the properties mentioned in the four sale deeds, Exhibit A, A/2, A/3 and A/4. As stated above, only case in general is made out by the plaintiffs that Schedule IV properties are the properties acquired by Sk. Farzand. The court below swayed away with the age of the defendant No.1 mentioned in the affidavit sworn in support of the written statement and held that at the time of acquisition Sk. Naimuddin was a minor. It may be



mentioned here that it is not the case of the plaintiff that on the date of acquisition of the properties through four sale deeds from the year 1938 to 1952, the defendant No.1 was minor. In the sale deed also, the defendant No.1 is not shown as minor. In other words, the defendant No.1 is the purchaser and is not represented through anyone. Therefore, the plaintiffs should have produced reliable and cogent evidence to show that consideration amount was paid by Sk. Farzand for acquisition of the properties. Here, the sale deeds are registered sale deeds, therefore, the presumption is that the sale deed is genuine and is validly executed. The burden was on the plaintiff to show either in capacity of defendant No.1 to purchase or the payment of consideration by Farzand but no such evidence has been produced. The court below made a third case holding that the defendant No.1 was minor although, neither there was any such pleading nor any evidence. On the contrary, in the registered sale deeds, he has acquired the property as major. Merely because in the affidavit, there is different age mentioned, it cannot be held that the defendant No.1 was minor on the date of acquisition of the order and the description of the defendant No.1 in the registered sale deeds as major cannot be held to be wrong and that he was minor. In my opinion, therefore, the court below has, on surmises and conjectures, making a third case wrongly held that defendant No.1 was minor, therefore, the property

has been acquired by Sk. Farzand.

9. From perusal of the impugned judgment, it appears that the court below has not discussed in the light discussed above and on untenable grounds placing wrong onus on the defendant No.1 wrongly held that plaintiff has $1/3^{\text{rd}}$ share in the property covered under Exhibit A, A/2, A/3 and A/4. I, therefore, on the basis of aforementioned discussion hold that the plaintiffs failed to prove that the property covered under these four sale deeds are the joint family properties acquired by Farzand, as such, she has got unity of title and possession over the same. I further hold that these properties covered under these four sale deeds are the self-acquired properties of defendant No.1. The finding of the court below on this point is, therefore, reversed.

10. In the result, this First Appeal is allowed and the impugned judgment and decree are modified and it is held that the plaintiffs are not entitled to any share in the property covered under Exhibit A, A/2, A/3 and A/4 which are self-acquired property of defendants-appellants. In the facts and circumstances of the case, there shall be no order as to costs.

(Mungeshwar Sahoo, J)

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