

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.53 of 1978

Against the Judgment and Decree dated 15.10.1977 passed by 3rd Addl. Subordinate Judge, Munger in Title suit No.11 of 1971 / 9 of 1977.

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Satish Chandra Thakur & Ors. .

.....Plaintiffs -appellants

Versus

Sri Shyman Sunder Tibrewal & Ors.

.....Defendants-Respondent/s

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Appearance :

For the Appellant/s :-

Mr. Ganapathy Trivedi, Sr. Advocate

Mr. R. K. Singh No.2, Advocate

Mr. Manoj Kumar, Advocate

For the Respondent No.1, :-

Mr. Gopaljee, Advocate

Fro Respondent No.2,

Mr. Raghib Ahsan, Sr. Advocate

Mr. Kameshwar Pd. Gupta, Advocate with him.

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Dated : 10th day of February, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. The plaintiffs have filed this First Appeal against the Judgment and Decree dated 15.10.1977 passed by learned 3rd Addl. Subordinate Judge, Munger, in Title Suit No.11 of 1971 / 9 of 1977 whereby the Court below dismissed the plaintiff's suit.

2. The plaintiffs appellants filed the aforesaid suit for

declaration of title and further for declaration that the defendant Ist party did not acquire any right and interest in the said property by virtue of sale deed dt.15.12.1970.

3. The plaintiff claimed the aforesaid relief alleging that Chandi Saha died leaving behind his two sons, Bhagwan Sah and Jagdish Pd. Sah. Bhagwan Sah died in jointness with his brother twenty years ago leaving behind a daughter and wife. All the properties were inherited by Jagdish Pd. Sah, the defendant No.2. After some time Jagdish Pd. Sah shifted to Giridih where he was running his business. The plaintiffs were tenants of Jagdish Pd. Sah in the suit premises. Jagdish Pd. Sah needed financial support for his business, therefore, he agreed to sell the suit property to plaintiff. A zarbeyana deed was executed on 22.09.1970. The consideration was fixed at Rs.14,000/-. Rs.1500/- was paid as earnest money. Subsequently, said Jagdish Pd. Sah sold the suit property by registered sale deed dt.3.12.1970 on payment of the consideration. The registration receipt was given to the plaintiff who withdrew the sale deed from Registration office.

4. The further case is that the defendant No.1 got a nominal invalid and inoperative sale deed in respect of the suit property from defendant No.3 an imposter. The defendant No.3, Mostt. Kailee Devi was not wife of Chandi Sah. She was wife of Bhikho Rai from whom



she had a son. She was a characterless women and there was rumor that she was the kept of Chandi Sah. Therefore, she had no right to execute sale deed in favour of defendant No.1, therefore, no title was acquired by the defendant over the suit property. Jagdish Pd. Sah subsequently, cancelled the sale deed by registered cancellation deed dated 30-12-1970 and this deed was executed at the instance of defendant No.1.

5. The defendants filed contesting written statement. However, the main contesting defendant is the defendant No.1 who is purchaser from Mostt. Kailee Devi, the defendant No.3. During the pendency of the suit, Mostt. Kailee Devi expired and her name was expunged. Jagdish Pd. Sah did not appear and contest. According to this contesting defendant, the main defence is that Chandi Sah died leaving behind Kailee Devi and three sons, namely, Jagdish Sah, Bhagwan Sah and Buddhu Sah. Bhagwan Sah died in jointness and the entire property of Chandi Sah was inherited by Mostt. Kailee Devi, Budhoo Sah and Jagdish Sah. There was a partition between them in the year 1957. In that partition, Jagdish agreed to take Rs.1000/- only in cash and did not take any share in the suit property. The defendant No.1 was negotiating to purchase the suit property from Mostt. Kailee. Subsequently, she sold the property by executing registered sale deed on 15.12.1070. The sale deed in favour of the

plaintiff is without any consideration and void deed, therefore, subsequently, it was cancelled by defendant No.2.

6. The further case of the defendant No.1 is that after the death of first wife, Chandi Sah married Mostt. Kailee Devi from whom a son Budhoo Sah was born. In fact she was not a kept of Chandi Sah. In the year 1968, Budhoo expired and after his death, Kailee Devi became the sole owner.

7. On the basis of the aforesaid pleadings of the parties, the following issues were framed by the trial Court :-

- (a) Whether the suit as framed maintainable?
- (b) Whether the suit is barred by law of limitation?
- (c) Whether the plaintiff has got any cause of action and right to sue?
- (d) Whether the plaintiff acquired any right and title to the land by virtue of the registered sale deed dated 3.12.1970?
- (e) Whether Most. Kailee Devi was the legally wedded wife of Chandi Sah and Budhan Sah was his son from Most Kailee Devi?
- (f) To what other relief or reliefs, if any, is the plaintiff entitled?

8. After trial, the learned Court below recorded a finding that Kailee Devi was the wife of Chandi Sah. There was partition. No title or interest was conveyed to the plaintiff by sale deed dt.3.12.1970. Plaintiff purchased plot No.481 and 485 and the dispute is regarding plot No.482 which has been purchased by the defendant

No.1 Accordingly, the plaintiff's suit was dismissed.

9. The learned senior counsel, Mr. Ganapathy Trivedi, for the appellant submitted that the trial Court approached the case in wrong angle and wrongly dismissed the plaintiff's suit. The trial Court also did not appreciate the evidence properly. Admittedly, the sale deed of the plaintiff is prior to the sale deed of the defendant, therefore, unless the sale deed of the plaintiff is cancelled, no title will be conveyed to the defendant. There is nothing on record to show that there was partition between Jagdish and Kailee. Jagdish Pd. Sah being the son had equal share with that of Kailee Devi even if she was wife of Chandi. However, the plaintiff has produced the evidence in support of the fact that Kailee Devi was not the legally wedded wife of Chandi Sah, therefore, she has no right, title or interest on the suit property. The learned counsel further submitted that without there being any satisfactory evidence, the Court below wrongly held that there was partition. Further, according to the defendant, Rs.1000/- was taken by Jagdish Pd. Sah in lieu of his share in the suit property. This case of the defendant is not acceptable as according to law unless a registered deed of conveyance is made, title will not pass.

10. The learned senior counsel, Mr. Trivedi, further submitted that the plaintiff produced the sale deed from his custody, therefore, there is a presumption that consideration amount was paid to Jagdish



Pd. Sah. On the date of cancellation of sale deed, Jagdish Pd. Sah was not the owner of property because as soon as consideration was paid and the sale deed was registered, title passed to the plaintiff. In such circumstances, unilaterally, Jagdish Pd. Sah could not have cancelled the valid sale deed by executing and registering another cancellation deed. If, in fact, no consideration was paid then Jagdish Pd. Sah should have filed the suit either for cancellation of the deed or for payment of balance consideration amount but he had no right to cancel unilaterally. In such circumstance, the cancellation deed is not binding on the plaintiff.

11. The learned counsel further submitted that two plots are the purchased plots, i.e. plot No.481 and 485. In fact the plaintiff has purchased plot No.482 and 485 but in the sale deed of the plaintiff, wrongly plot No.481 has been mentioned. However, the boundary of the plot fully tallies with that of the boundary of plot No.482. According to the learned counsel, the boundary of the land will prevail and not the plot number. It is nothing but a mis-description of the plot number but the learned Court below wrongly held that plaintiffs have purchased plot No.481 which is not the disputed plot. So far the other plot, i.e., 485 is concerned, the Court below has not recorded any finding. The learned Court below wrongly placed the onus on the plaintiff to prove the payment of consideration amount

although in law, there is a presumption that a registered document is validly executed. Moreover, the vendor did not challenge the passing of consideration. The defendant being the third party of the sale deed has not locustandi to challenge the passing of consideration.

12. In support of his submission that boundary will prevail, the learned counsel, relied a decision of the Supreme Court reported in ***AIR 1963 SC 1879***. Further in support of his submission that unilaterally, the registered sale deed cannot be cancelled, the learned counsel relief upon the decision of the Supreme Court reported in ***2010 (15) SCC 207*** and this Court in ***2007 (1) PLJR 572***. So far the submission that a purchaser cannot challenge passing of consideration, the learned counsel relied upon ***2014 (1) BBCJ 23***. On these grounds, the learned counsel submitted that the impugned Judgment and Decree be set aside and the plaintiff's suit be decreed.

13. On the other hand, the learned counsel, Mr. Gopalji, appearing on behalf of the defendant respondent No.1 submitted that on the basis of the evidences, the trial Court recorded the finding that Mostt. Kailee Devi was wife of Chandi Sah. Since Jagdish Sah was doing his business at Giridih, he took Rs.1000/- instead of taking share in the suit property and went to Giridih. Therefore, in this family arrangement, the entire property came in the hand of Mostt. Kailee Devi who sold the property to the defendant No.1. The learned



counsel further submitted that the suit house is on plot No.482 which is never purchased by the plaintiff. No case has been made out in the plaint that he purchased plot No.482 but wrongly plot No.481 has been mentioned in the sale deed but the boundary is same. He filed the suit for declaration of title with respect to plot No.481. If in fact he had purchased plot No.482, he could have rectified the sale deed. According to the learned counsel, the decision relied upon by the appellant, i.e., ***A.I.R. 1963 SC 1879*** is not applicable in the present case. Since in the partition, the property fell in the share of Kailee Devi, the defendant No.2 had no authority to sell the property in favour of the plaintiff. Therefore, the learned trial Court has rightly held that by the sale deed, no title passed to the plaintiff. On these ground, the learned counsel submitted that the First Appeal be dismissed.

14. The learned senior counsel, Mr. Raghiv Ahsan, for the respondent No.2 submitted that in fact the suit had abated because of non-substitution of Sumitra Devi on her death. In the suit, no notice was served on Jagdish Pd. Sah. The Court below has observed that Jagdish Pd. Sah died. According to the learned senior counsel, the plaintiffs instead of serving the notice produced evidence in the Court below stating that Jagdish Pd. Sah died. This is entirely false statement made by the plaintiff. In fact he died on 31.12.1990. On



his death, only heir Sumitra Devi was substituted who also died on 20.04.2010. The appellant instead of substituting the legal representative of Sumitra Devi got her name expunged, therefore, the son of Sumitra Devi namely, Vijay Kumar had filed the application for his addition as party which has been allowed. According to the learned counsel, the sale deed in favour of plaintiff by Jagdish Pd. Sah is bogus and void sale deed. Mostt Kailee Devi was not the wife of Chandi Sah, therefore, she had no right to transfer the land in favour of defendant No.1. Therefore, the seal deed in favour of defendant No.1 by her is also illegal and void sale deed. The finding recorded by the Court below to the effect that Kailee Devi was wife of Chandi Sah is without any evidence. Therefore, the finding is liable to be set aside and the plaintiff's suit be dismissed.

15. In view of the submissions of the learned counsels for the parties, the points arises for consideration is as to whether the plaintiff is entitled for the relief claimed by him over the suit land and whether the impugned Judgment and Decree is sustainable in the eye of law.

16. The simple case of the plaintiff is that Chandi Sah died leaving behind his son Jagdish and Bhagwan Sah. Bhagwan Sah died 20 years ago in jointness with Jagdish, therefore, all the properties of Chandi was inherited by his son Jagdish Pd. Saha, who is defendant No.2. On the contrary, according to the contesting defendant, Kailee

Devi was the widow of Chandi Pd. Sah. There was partition in the year 1957 wherein Jagdish Pd. Sah took Rs.1000/- and shifted to Giridih.

17. In view of the above pleading of the parties, the question is whether Kailee Devi was wife of Chandi Sah or not. If she was not the wife of Chandi Sah then automatically the defendant will not derive any title through the sale deed executed by Kailee. Likewise if it is held that Kailee Devi is wife of Chandi then the question will arise as to whether there was partition as alleged by the defendant and in that partition, Jagdish took only Rs.1000/-. If this fact is proved then the plaintiff will not derive any title though the sale deed executed by Jagdish because Jagdish had no title after partition.

18. In support of their respect cases, the parties have adduced evidences. Now, let us consider the evidences of the parties. The plaintiff in the plaint itself admitted that Kailee Devi was kept of Chandi Sah. The pleading is that there is rumour in the village that Kailee is kept of Chandi Sah. P.W.8 claimed to be closely related with Kailee Devi. He has stated that Kailee Devi had started living with Chandi Sah. Now, therefore, the plaintiff witness had also admitted that she was living with Chandi Sah. In the cross examination, he again has stated that Kailee Devi was out casted because of the fact that she developed illicit connection with Chandi



Sah. P.W.9 has stated the same thing. Now, according to the evidence of the witnesses, it becomes clear that Kailee Devi was living with Chandi Sah. The defendant had proved a verna bound dt.28.06.1954 wherein Jagdish Sah and Budhoo Sah have been shown as son of Chandi Sah. It is the case of the defendant that Budhoo Sah was born out of wedlock of Chandi with Kailee. This document is of the year 1954 when there was no dispute between the parties. This is ext. E/1. Subsequently, the executant of this Verna Bound ext.E/1 sold the property to one Haricharan Mistri. From perusal of the redemption note, it appears that Rs.300/- was received by Jagdish Pd. Sah and Rs.150/- was received by Kailee Devi in the year 1971. This clearly shows that both were separated and also indicate that Kailee was wife of Chandi otherwise how she received this amount on behalf of Budhoo. It may be mentioned here that at that time, Budhoo was not alive. The identifying witness Satyanarayan Pd. Keshri, P.W.10, identified Kailee Devi as mother of Budhoo Sah. The endorsement has been marked as ext. 'G' and 'G/1'. No doubt P.W.10 has stated that signature are forged but his evidence is not reliable as according to him Jagdish was not present but according to the plaintiff evidence Jagdish used to come village Ichari where he had some landed property. Another verna bound ext. 'E /2' has been proved which is of the year 1932 which finds reference in ext. 'E/1'. From perusal of the

trial Court Judgment, it appears that this P.W. 10 is a debtor of the plaintiff and always used to depose in favour of the plaintiff.

19. The defendant has produced ext. 'E' a Makfula deed dated 8.7.1958 which was executed by Mostt. Kailee and Budhoo in favour of Ram Niwas Tibriwal. In this deed also, they are described as wife and son of Chandi Sah. From perusal of the sale deed of the defendant, i.e., ext.'F', it appears that in the sale deed also, there is reference of this Makfula deed. Now, therefore, right from the year 1954 till the sale deed is executed Kailee Devi is treated as wife of Chandi and Budhoo was treated as son of Chandi. The joint living of Kailee with Chandi is admitted by the plaintiff. The only dispute raised by the plaintiff is that she is a kept of Chandi. This long treatment and residing together give rise to presumption that Kailee Devi was the wife of Chandi. To rebut this presumption, the plaintiff had not produced any reliable evidence except the bald statement. On the contrary, from the documentary evidence produced by the defendant, it is clear that Budhoo was the son of Chandi through Kailee Devi.

20. Further in ext. 'A' series which are entry made in assessment register, Buddhoo has been described as Halwai, son of Chandi Halwai. Ext. B and B/1 are certified copies of union tax

which clearly show that Budhoo was paying tax.

21. Over and above the documentary evidences, the defendants have also examined D.W.4, the barber, D.W.5 the Brahmin, in support of marriage between Chandi and Kailee Devi. D.W.8 claimed to be the person who was present in the marriage.

22. In view of my above discussion, I find the Kailee Devi was the wedded wife of Chandi Halwai.

23. The plaintiff is praying for declaration of title on the basis of the sale deed executed by Jagdish dt.3.12.1970. On the contrary the defendant's case is that Jagdish was separate from Kailee and in partition, he took Rs.1000/- in lieu of his share and went to his business place. After considering the oral evidences of the witnesses, the Court below recorded the finding regarding partition between them. It may be mentioned here that there is no documentary evidences for partition. His finding has been recorded by the trial Court on the basis of the oral evidences. Therefore, this Court being the first appellate Court should not lightly interfere with the finding of fact arrived at by the trial Court on the basis of oral evidence only. In this matter, reference may be made to the decision of the Hon'ble Supreme Court in the case of **Madhusudan Das Vs. Smt. Narayani Bai AIR 1983 SC 114 and AIR 1951 SC 120.**



24. So far the submission of the learned counsel for the appellant that without any registered document, no property can be relinquished, therefore, Jagdish could not have relinquished his share orally after taking Rs.1000/- is concerned, it may be mentioned here that it is a family arrangement between the members of the family. It is not that Kailee had no interest at all in the property. According to the family arrangement, Jagdish agreed to receive Rs.1000/-. It is admitted fact that Jagdish was residing at Giridih in connection with his business. Therefore, it is not improbable that he did not take any share in the property. In such circumstances, here there is no question of relinquishment arises. Because Jagdish was doing his business at Giridih he did not take share in the property.

25. It is well settled principle of law that the family arrangement arrived at by the parties should not be interfered with lightly by the courts. In the present case, the Court below has recorded the finding that there was partition and in that partition Jagdish did not take any share. Now, therefore, if Jagdish did not take any share in the property and in lieu thereof, he received Rs.1000/- then Kailee became the sole owner of the property. In such circumstances, the vendor of the plaintiff Jagdish had no title to execute the registered sale deed in favour of the plaintiff. Thus, the plaintiff did not derive any title through sale deed executed by



Jagdish Pd. Sah. Moreover in the present case, the suit has been filed for declaration with respect to plot No.481 and 485. During trial, the plaintiff claimed that he has purchased plot No.481 and 485. But no such case has been made out in the plaint. The defendant purchased plot No.482 and 485. There is no evidence of plaintiff that the boundary of land purchase tally with boundary of plot No.482, therefore, the argument of learned counsel for appellant is not acceptable.

26. The learned counsel for the appellant placed reliance on the decision of the Supreme Court in the case of *Thota Ganga Laxmi Vs. Governemtn of Andhra Pradesh 2010 (15) SCC 207* and submitted that unilaterally the registered sale deed could not have been cancelled by Jagdish Pd. Sah. If at all he was desirous of cancelling the sale deed he should have filed a suit for cancellation of the deed. No doubt, it is settled Principe of law as laid down by the Hon'ble Supreme Court that the registered sale deed can be set aside by decree of Court but in the present case, I have already recorded a finding that there was partition between Jagidsh Pd. Sah and Kailee and Jagidh Pd. Sah was living at Giridih in connection with his business and he did not take any share in the suit property. Therefore, he seized to have any right in the suit property. In such circumstances, he had no title to the property. Therefore, he could not have transferred better title then

him on the transferee.

27. The learned counsel for the appellant relied upon a decision of this Court in the case of *Smt. Sudama Devi Vs. Bibi Salma Khatoon 2007 (1) PLJR 573*. This decision speaks about passing of title by registered sale deed when part payment is made. Therefore, in the facts and circumstance of the present case, this decision is not applicable as Jagdish had no title to the property.

28. So far the added respondent is concerned, the learned senior counsel, Mr. Raghib Ahsan, relied upon a decision of the Supreme Court in the case of *Mata Pd. Mathur Vs. Jwala Pd. Mathur 2013 (14) SCC 722* and submitted that because of non-substitution of the legal representative of the deceased respondent No.2, Smt. Sumitra Devi, the whole appeal has abated. So far this submission is concerned, it may be mentioned here that Jagidsh was defendant in the court below but he did not file written statement nor contested the suit. He was respondent No.2 in this Appeal. He died during the pendency of the appeal and his daughter, Sumitra Devi, was substituted although in view of order 22 Rule 4 sub Rule 4 C.P.C. it was not necessary for substitution because Jagidsh Pd. Sah never contested the suit. Thereafter, Sumitra Devi died and the son of Smitra had filed the application for being added as party in the appeal. In view of the above fact, it becomes clear that the newly added

respondent is claiming title through Jagidh Pd. Sah who never contested the suit. There is no pleading on behalf of Jagdish. Moreover, I have already found that Jagdish had no title to the property and by registered sale deed, he did not convey any title to the plaintiff. Thus, the appeal will not abate for non-substitution of the heirs of Sumitra Devi.

29. In view of my above discussion, I find that the plaintiff did not derive any title through the registered sale deed executed by Jagidh Pd. Sah. The findings of the Court below on this question is thus confirmed. The point formulated is answered against the appellant.

30. In the result, this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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