

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.333 of 1978

Against the Judgment and Decree dated 20th March, 1978 passed by 2nd Addl. Sub Judge, Darbhanga in Partition Suit No.223 of 1973.

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Thako Sahni & Ors.

.....Interveners-defendants-appellants.
Versus

Laxman Baitha & Ors.

.....Plaintiffs-Respondent/s

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Appearance :

For the Appellant/s :-

Mr. S. S. Dwivedi, Sr. Advocate
Mr. Rakesh Chandra, Advocate with him.

For the Plaintiff -Respondent :-

Mr. Arun Kumar Prasad, Advocate
Mr. Subhash Kishore Verma, Advocate.

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Dated : 28th day of January, 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. The interveners defendants 3rd party have filed this First Appeal against a part of the Judgment and Decree dated 20.03.1978 passed by learned 2nd Addl. Subordinate Judge, Dharbanga in partition suit No.223 of 1973 whereby the partition suit has been decreed with respect to three plots, i.e., plot No.27941, 27942 and 422.



2. The plaintiff filed the aforesaid partition suit praying for partition of the suit property alleging that the suit properties are joint family property. A genealogical table has been given at the foot of the plaint describing the descendents on Kanchaniya. According to the plaintiff, Kanchania is the daughter of Baiju, s/o of Bacchran. Kanchaniya had a son named, Amrit and the parties are descendents of the said Amrit. The defendants filed written statement denying the case of the plaintiff and stated that there had already been partition between the parties and there is no unity of title and possession. It may be mentioned here that so far this genealogy given by the plaintiff is not material for decision in this appeal because the intervener defendants filed application for being added as party in the suit claiming title over two plots, i.e, plot No.27941 and 27942 on the ground that the said plots measuring 1 katha 3 dhurs and 82 dhurkis had been purchased by them by registered sale deed of the year 1956 from Ramji who was son-in-law of Chattu.

3. These intervener appellants filed written statement giving genealogy to the effect that Hiranman @ Bacchran had a son named Baiju. Baiju had a son Chattu who had only a daughter Sakli who was married with Ramji Dhobi. Ramji Bhobi had a daughter Bilti who had two sons, Sheoji and Bhola. The further case is that Chattu sold 12.5 dhur to Ramji Dhobi, i.e., son-in-law by registered sale deed



dated 6.1.1927 out of both plots, i.e., portion of plot No.27941 and 27942. Because there was no municipal record at that time, in the sale deed only boundary was mentioned. Again 8.25 dhur was sold by him to Bihari Dhobi orally. Bihari Dhobi sold to Ramji, son-in-law of Chattua orally on 15.4.1934. Subsequently, this Ramji, son-in-law of Chattu and Bilti for self and on behalf of their minor son Sheoji and Bhola, sold the property by registered sale deed dated 14.12.1956 in favour of the intervener appellants. So far plot No.422 is concerned, according to these defendants, the said land is public land, and therefore, it is not available for partition because it is in use of the parties, i.e., the plaintiff as well as defendants and public at large.

4. It may be mentioned here that after the written statement filed by the intervener defendants, the plaintiff filed amendment application wherein a genealogy was given at paragraph 1(c). It is stated that Hiranman had a son Baiju who had a son Chattu and Chattu had a daughter Sakli who was married with Ramji Dhobi. This family of Baiju, son of Hiranman is a different family not connected with family of the parties to the suit.

5. On the basis of the aforesaid pleadings of the parties, the learned Court below framed various issues. However, all the issues are not quoted herein because for the nature of claim made by the

intervener appellants is with respect to three plots only. The Court below framed issue No.10 which is as follows :-

Issue No.10. - Did the defendants No.13 to 16 acquired valid title with respect to municipal plot No.27941 and 27942 by virtue of sale deed dated 14.12.1956?

6. The issue No.10 was decided by the Court below on the basis of the evidence available on record and ultimately it is held at paragraph 26 that Baiju, son of Hiranman and Baiju son of Bacchran were two different persons. The Court below also held that it is crystal clear that defendant have failed to prove that any title has passed to them by virtue of this Kewala, ext. E-2/1, i.e., registered sale deed dated 14.12.1956. So far plot No.422 is concerned, the Court below held that in 145 proceeding, the Executive Magistrate found the possession of the plaintiffs, therefore, the said plot is available for partition as the plaintiffs are in possession for more than 50 years. On these finding, the learned Court below decreed the plaintiff's suit for partition with respect to the three plots also.

7. The learned senior counsel, Mr. Dwivedi, submitted that the Court below approached the case in wrong angle. The dispute between parties was whether Hiranman @ Bacchran is the name of one person or Hiranman and Bacchran were two separate persons. According to the plaintiff, Hiranman is different person who had a son



Baiju. This is the specific case made out by the plaintiff after amendment in paragraph 1(c) of the plaint. Therefore, it was the burden on the plaintiff to prove this positive assertion made by the plaintiff. However, the Court below from paragraph 25 onwards dealt with the evidences and recorded the finding that the defendants failed to prove that Baiju, son of Hiranman and Baiju, son of Bacchran are one and same and according to the learned counsel, the plaintiff is claiming partition with respect to these two plots, i.e., plot No.27941 and 27942 on the ground that there were two Baiju, one son of Hiranman and other is son of Bacchran, it was for them to prove these assertion and they cannot taken advantage of the weakness of the defendant's case. The Court below, therefore wrongly placed the onus on the defendant interveners to prove these facts.

8. The learned counsel further submitted that in support of the fact that Hiranman and Bacchran is the name of one person i.e., father of Baiju, the defendant third party intervener have produced documentary evidences in support of the fact. According to the learned counsel, Chattu, son of Baiji, executed two registered sale deeds on 6.1.1927, i.e., ext. E-2/3 and ext. E-2/4. ext. E-2/4 is with respect to these plots which is recorded in the name of Baiju, son of Bacchran whereas the other sale deed, ext. ext. E-2/3, is with respect to khata No.93 plot No.268 recorded in the name of Baiju, son of



Hiraman. Therefore, son of Baiju executed two registered sale deeds with respect to two properties which is recorded in the name of Baiju, son of Bacchran and Baiju, son of Hiranman. It is not possible, if Hiranman's son Baiju and Bacchran's son Baiju are two different person, it clearly indicates that the son of Baiju sold the property whose name was recorded with respect to both properties but in one property, his father name has been described as Hiranman i.e., with respect to khata No.93 and his father named is described as Bacchran with respect to the two disputed plots. The plaintiff never challenged these two registered sale deeds. The defendants appellant produced ext. E-2/5 i.e., registered sale deed dated 24.7.1934 executed by one Rafik with respect to two adjacent plots, i.e., plot No.27933 and 27934 and in the sale deed in the southern boundary, the name of Chattu Dhobi has been described. Therefore, the outsiders were also admitting the possession of Chattu Dhobi with respect to the two suit plots. Further ext. 'G' the map has been produced by the defendants in support of the fact that the two plots in dispute are adjacent to these plots sold by Rafik. However, the Court below has not at all considered all these material evidences and without considering the fact that there is no evidence in support of the case pleaded by the plaintiff regarding family of Baiju, son of Hiranman is of different family decreed the plaintiff's suit with respect to these plots also.



9. The learned counsel further submitted that except this statement in the pleading, no evidences have been produced. The Court below has placed the wrong onus. Ext. 'A' has been produced by the defendant in support of the fact that in the gift deed executed by grand father of plaintiff, i.e., Amrit, in favour of Sona Dhobi ancestor of defendant third party in which in the boundary, the name of Ramji Dhobi, husband of Sakli has been described. That is the possession of the vendor with respect to the plots in question has been admitted by the grand father of defendant, i.e, Amrit.

10. So far plot No.422 is concerned, the learned counsel submitted that it is the public property and the plaintiffs never claimed for declaration of their title with respect to plot No.422 . In the suit, no State authorities have been made party and the Court below without considering this aspect has granted the decree on the ground that in 145 cr. P.C. proceeding, the plaintiffs have been found to be in possession of the property which is illegal. On these grounds, the learned counsel submitted that the impugned Judgment and decree be set aside with respect to these three plots and it may be held that these plots are not available for partition.

11. On the other hand, the learned counsel, Mr. Arun Prasad, appearing on behalf of the plaintiff respondents submitted that the



specific case of the plaintiff is that the son of Hiranman, i.e. Baiju who had a son Chattu is of different family. Therefore, Chattu had no right to deal with the property which is the property of the parties to the partition suit inherited from Baiju, son of Bacharan because Kanchaniya is the only daughter of Baiju. When the defendants-intervener-appellants came with specific case that Baiju, son of Hiranman and Baiju, son of Bacchran is same person then the defendants have to prove this assertion made by them because it is specifically stated by the plaintiff that those were two different persons. The Court below on the basis of the evidences came to the conclusion that the defendants failed to prove that Baiju, son of Hiranman and Baiju, son of Bacchran are the same person. Unless this fact is proved by them, they have got no title to the property as vendors of the appellants had no title to the property which belong to Kanchania, daughter of Baiju. The learned counsel further submitted that the defendants appellants did not dispute the genealogy given by the plaintiff in 144 Cr.P.C. proceeding and also in mutation proceeding. For the first time, they in the written statement filed in the year 1976 raised this genealogy that Baiju, son of Hiranman and Baiju, son of Bacchran are the one and same person. Therefore, the learned Court below has rightly relying on the decision passed by the Executive Magistrate in 144 Cr.P.C. proceeding, order passed in the



mutation proceeding held that the defendants failed to prove that Baiju, son of Hiranman and Baiju, son of Bacchran were same person. In such circumstances, the Judgment with respect to the two plots cannot be interfered with. So far plot No.422 is concerned, the learned counsel submitted that in 145 Cr.P.C. proceeding, the possession of the plaintiffs have been found, therefore, the Court below has rightly decreed the suit for partition with respect to this plot also. On these grounds, the learned counsel submitted that the First Appeal be dismissed with cost.

12. On the basis of the rival contentions of both the parties, the points arises for consideration in this Appeal is as to whether the plaintiffs are entitled for partition of the property in dispute, i.e. plot No.27941, 27942 and 422 and the Judgment and Decree passed by the Court below is sustainable in the eye of law or not.

13. The specific case of the plaintiff as pleaded in the plaint is that the suit property belonged to Amrit which was inherited by him from material grand father Baiju. Amrit died in the year 1946 leaving behind the original parties to the partition suit. Subsequently, by amendment, another genealogy has been given in paragraph 1(c) of the plaint wherein they described Baiju, son of Hiranman and stated that he was different person. It may be mentioned here that according



to their genealogy also Kanchania was daughter of Baiju and father of Baiju was Bacchran whereas according to the interveners-appellants, the father's name of Baiju was Hiranman @ Bacchran. In view of these pleadings of the parties, the plaintiffs clearly asserted that Baiju, son of Hiranman is different person whereas son of Bacchran is different person. Now, therefore the burden to prove this fact is on the plaintiff.

14. The Hon'ble Supreme Court in the case of *Rangammal Vs. Kuppuswami 2011 (4) BBCJ 133 SC* has held at paragraph 14 that **'Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down 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. Until such burden is discharged, the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.'** At paragraph 31 in same



Judgment, the Supreme Court has held that **‘it hardly needs to be highlighted that in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else’s property meaning thereby disputed property is included in the schedule of the suit for partition and the same is contested by a third party who is allowed to be impleaded by order of the trial Court, obviously, it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family.’**

15. In this case, the plaintiffs have examined P.W.41 and P.W.42 who are the plaintiffs themselves. These two witnesses in their evidences have only stated that the sale deed executed by son of Baiju are without consideration and that no title passed to the purchasers. So far the evidence of these witnesses are concerned, nowhere they have stated that Hiranman had a son Baiju and Bacchran had also a son Baiju who were two different persons, although it was their pleading in the plaint after amendment in paragraph 1 (c). Further, the defendants have produced the registered sale deeds of the year 1927 and thereafter, the registered sale deeds of the year 1956, i.e., dated 14.12.1956 which is in favour of the intervener defendants

appellants. These are registered documents whereby the suit plots have been sold in favour of the defendants appellants. It may be mentioned here that with respect to these sale deeds, the plaintiffs have not sought for any declaration.

16. The Hon'ble Supreme Court in the case of *Prem Singh Vs. Birbal* 2006 (5) SCC 353, has held at paragraph 28 that **'there is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof thus would be on a person who leads evidence to rebut the presumption.'** The Hon'ble Supreme Court again reiterated this view in the case of *Vimal Chand Ghevar Chand Jain and others vs. Ramakant Eknath Jadoo* 2009 (5) SCC 713.

17. Admittedly, no relief has been sought for as stated above with respect to these sale deeds. It is admitted fact that the sale deeds have been executed by son of Baiju with respect to two types of property, i.e., one khata No.993 recorded in the name of Baiju, son of Hiranman and the disputed plots which was recorded in the name of Baiju, son of Bacchran. It is not the case of the plaintiff that this registered sale deed of the year 1927 executed and registered by son of Baiju i.e., Chattu had no title with respect to these two plots because his father was the son of Hiranman who is a different person.



18. In the case of **Noorul Hoda Vs. Bibi Raifunnisa 1996 (7) SCC 767**, the Hon'ble Supreme Court has held that **'when the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise bind him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded as provided under Section 31 of the Specific Relief Act.'**

19. In the present case, although defendants filed the written statement alleging this fact and produced the registered sale deeds which have been marked ext. E-2/4 and E-2/3 and E-2/1, the plaintiffs never sought for any declaration, and therefore, unless these sale deeds are declared illegal or void, the Court below could not have granted the decree. However, the Court below without their being any relief claimed by the plaintiff has held that these sale deeds are illegal sale deeds and by the sale deeds, no title passed to the defendants interveners. From perusal of the Judgment of the Court below, it appears that the Court below has not at all considered the registered sale deeds produced by the plaintiff which are of the year 1927, 1956 registered sale deed dated 30.10.1933. The Court below also did not consider that in the boundary of ext.4, gift deed executed by Amrit in

favour of son in which in the boundary in the eastern portion, Ramji Dhobi possession has been mentioned. This Ramji Dhobi is purchaser from Chattu by registered sale deed dated 6.1.1927.

20. It further appears that while deciding issue No.10, the Court below considered and relied upon the order passed under Section 144 Cr.P.C. and the mutation orders and held that for the first time, they are disclosing this genealogy in the written statement filed in the year 1976. In my opinion, the Court below has gravely erred in relying on the orders passed by Executive Magistrate in 144 cr. proceeding or the mutation proceeding. On the basis of the orders passed by the executive authorities, no finding can be recorded regarding the title of the parties or possession of the parties. The parties came before the Court with their respective specific case, and therefore, the Court is required to consider and record a clear finding with respect to the case pleaded by the parties.

21. It may be mentioned here that D.W.50 who has been examined on behalf of the appellant has clearly proved the case pleaded by the interveners regarding genealogy at great length. In the cross-examination also, he has stated the same thing as pleaded in the written statement. Even to this witness, no suggestion has been given by the plaintiffs regarding the existence to Baiju, one son of Hiranman

and one other son of Bacchran. Therefore, the plaintiffs failed to prove that Baiju, son of Bachharan is different person than Baiju, son of Hiranman.

22. In view of the overwhelming evidence, documentary and oral, I find that the plaintiffs failed to prove that these two plots, i.e., plot No.27941 and plot No.27942 was inherited by Amrit after death of his mother Kanchania and is a joint family property of the original parties. I also find that Hiranman was alias name of Bachharan.

23. So far plot No.422 is concerned, it is the case of the plaintiff that it is the joint family property. Their case is only that they are in possession of the property whereas according to these intervenor appellants, it is public land. It is not disputed by the plaintiff that it is not the public land. Their case is that they have been found possession of this land. From perusal of the Judgment of the Court below, I find that the Court below has also granted the decree of partition with respect to this plot on the ground that in 145 cr. Proceeding, they have been found in possession without declaring the title with respect to this plot No.422. It may be mentioned here that the plaintiff did not even add any of the public authority or State. Therefore, the Court below has gravely erred in decreeing the suit with respect to this plot also. Unless the plaintiff's title is declared

with respect to this property, no decree could have been passed.

24. In view of my above findings, the point formulated is answered in favour of the appellants and against the plaintiff respondent. Thus, this First Appeal is allowed and impugned part of the Judgment and Decree with respect to these three disputed plots, i.e., plot No.27941 and 27942 and plot No.422 are hereby set aside and it is held that the plaintiffs are not entitled to claim any partition with respect to these properties. Thus, this First Appeal is allowed. In the facts and circumstances there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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