

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.560 of 1982

**Against the Judgment and Decree dated 31st August, 1982 passed
by Subordinate Judge, Munger in Title Suit No.104 of 1978.**

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Bibi Jamila Khatoon

.....Defendant No.9-appellant

Versus

Gopal Das & Ors

.....Plaintiffs-respondents

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Appearance :

For the Appellant/s : Mr. Satyendra Kumar Sinha, Advocate

For the Respondent/s : None.

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Dated : 6th day of February, 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 defendant No.9 against the Judgment and Decree dated 31.08.1982 passed by Smt. Rekha Kumari, the learned Subordinate Judge, Munger in Title Suit No.104 of 1978 whereby the learned Court below decreed the plaintiff's suit for partition.

2. The plaintiff respondent filed the foresaid title suit No.104 of 1978 praying for partition of the suit property to the extent of half

share.

3. The plaintiff claimed half share alleging that the suit property is the joint property of late Mahabir Sao and Vishwanath Sao, two sons of Mungari Sao and Mungeri Sao died in the year 1939 and the legal heirs are defendants first set. Mahabir Sao died leaving behind the plaintiff alone. There had been no partition between them, therefore, the plaintiff has got half share. The defendant No.7 and 8 are the tenants in the suit premises. Dispute arose about distribution of the rent, therefore, the plaintiff claimed for partition but it was refused so the suit for partition was filed.

4. The heirs of Mahabir Sao appeared and filed supporting written statement. Jamila Khatoon, the appellant was subsequently added as defendant third set in the suit. She filed contesting written statement alleging that in fact the suit property was exclusive property of Mahabir Sao. Bishwanath Sao had no title and interest in the property and moreover he had already left Nimtalla, Munger and went to Jaunpur in U.P. after death of Bishwanath Sao, two years after the death of Mahabir Sao. The defendant has purchased from the heirs of Mahabir Sao in 1977.

5. On the basis of the aforesaid pleadings of the parties, the learned trial Court framed various issues. Out of the said issues, Issue

No.5 was whether the plaintiff is entitled to claim partition to the extent of half share in the suit property.

6. On the basis of the evidences, the learned Court below recorded the findings that the suit property in fact acquired by Mungeri Sao and there was no partition between his two sons. Therefore, decreed the plaintiff's suit.

7. The learned counsel, Mr. Satendra Kumar Sinha, appearing for the appellant submitted that the plaintiff's case as made out in the plaint is that the suit property was the joint property of Mahabir Sao and Bishwanath Sao. There is no pleading of the plaintiff that the property was acquired by Mungeri Sao and on the death of Mungeri Sao, both the sons inherited the suit property. The Court below, therefore, without even considering the pleadings of the plaintiff recorded the finding that the property was acquired by Mungeri Sao. According to the learned counsel, the Court below has made a third case. It was not the case of the plaintiff or the defendant that the property belonged to Mungeri Sao. Therefore, the issue was not that whether it was the acquired property of Mungeri Sao or it was the joint family property. On the contrary, the defendants appellants case is that the property was exclusive property of Mahabir Sao. In support of the said case, the defendants appellants had produced the



lease deed of the year 1935 i.e., (19th August, 1935) entered into between Collector and Mahabir Sao and since then Mahabir Sao was coming in possession of the same exclusively. He died in the year 1939 and then the property was inherited by his heirs, i.e., three sons and two sisters including one widow. Subsequently, the three sons sold the property to the defendant appellant by registered sale deeds in the year 1977. The learned counsel further submitted that prior to the sale, the defendant appellant was residing in the suit premises as a tenant and was paying rent to the heirs of Mahabir Sao. The heirs of Mahabir Sao were in need of money, therefore, they mortgaged the property in favour of the defendant appellant in the year 1968. Subsequently, they sold the property as stated above. The learned counsel further submitted that the learned Court below without considering these aspects of the matter and the evidences in their right perspective recorded the wrong finding which was not the case of any party and wrongly decreed the plaintiff's suit.

8. The learned counsel further submitted that the plaintiff even after coming to know about the registered sale deeds executed by heirs of Mahabir Sao in favour of the defendant appellant did not seek any relief with respect to the sale deeds and simple suit for partition has been filed. According to the learned counsel unless it is declared that the property is the joint family property of two brothers and that



one brother Mahabir had got only half share who could not have sold the entire property, therefore, the registered sale deed is void or voidable, no relief for partition could have been granted by the trial Court. On these grounds, the learned counsel submitted that the impugned Judgment and Decree be set aside and the plaintiff's suit be dismissed.

9. Nobody appeared on behalf of the respondent when this First Appeal was heard.

10. In view of the submission of the learned counsel for the appellant, the point arises for consideration in this First Appeal is as to whether the plaintiff has been able to prove his case pleaded in the plaint and is entitled for partition to the extent of half share and whether the Judgment and Decree passed by the Court below is sustainable in the eye of law.

11. The plaintiff specific case as pleaded in paragraph 2 is that the suit property is the joint property of late Mahabir Sao and Bishwanath, the two sons of late Mungeri Sao in which two brothers had equal share. On the contrary, the appellant's case as made out in the written statement is that it was the exclusive property of Mahabir Sao which he obtained from the State Government in lease on 19.8.1935. In support of these respective cases, the parties have

adduced their evidences.

12. P.W.1 is the plaintiff himself. In his evidence, the plaintiff has stated that he has filed this suit for partition of the ancestral property. The suit property was acquired in the name of Mungeri Sao who was grand father of the plaintiff and, thereafter, he stated about the genealogy and dispute between them. The same statements has been made by the other witnesses examined on behalf of the plaintiff i.e, P.W.2, namely, Jagan Prasad, P.W.3, Dali Kumar, both claimed to be neighbor of the plaintiff. Both of them have also stated that suit property was acquired by Mungeri Sao. Such is the evidence of PW.4, P.W.5 and P.W.6. Almost all the above witnesses have stated the same thing that the property was acquired by Mungeri Sao.

13. The plaintiff in addition to the oral evidences has produced ext.1 which is said to be an application filed by widow of Mungeri Sao claiming that her husband has died, therefore, the suit property be recorded in her name. Ext.2 is the lease deed which is in the name of Mahabir Sao alone. From perusal of this ext.2, it appears that it was settled with Mahabir Sao without receiving any amount. The terms and conditions have been embodied in this ext.2 and this lease deed is with effect from 1st day of April, 1935 for a period of 20 years and yearly rent was fixed at Rs.4 and 13ana. The collector and Mahabir



Sao have signed the document. So far this ext.2 is concerned, it shows that it is exclusively in the name of Mahabir Prasad. So far ext.1 is concerned, it is only an application said to have been filed by widow of Mungeri Sao. From this ext.1, no conclusive finding can be recorded that the property was in fact earlier acquired by Mungeri Sao or that the property was settled in the name of Mungeri Sao. As stated above, ext.2 is clear that the suit property was settled in the name of Mahabir Sao in the year 1935. Since then Mahabir Sao was coming in possession after his death the sons of Mahabir Sao came in possession. It may be mentioned here that the plaintiff never took any step for recording his name after death of Mahabir Prasad.

14. So far the oral evidences are concerned, as discussed above, the plaintiff made out a case to the effect that the property was the property acquired by Mungeri Sao whereas there is no such pleading in the plaint. In the plaint, the specific case is that the property in suit is the property of Bishwanath and Mahabir.

15. The Hon'ble Supreme Court in thecaes of *Bachhaj Nahar Vs. Nilima Mandal* 2008(17) SCC 491 = AIR 2009 SC 1103 has held that **‘the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during**

trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration.

A case not specifically pleaded can be considered by the Court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon.'

16. Recently, the Hon'ble Supreme Court in the case of *Union of India 2013(1) PLJR 48 SC (Supra)* at paragraph 69 (vii) held that 'the Court cannot travel beyond the pleadings as no party can lead the evidence on an issue / point not raised in the pleading and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the Court records a finding on it.'

17. In the present case as stated above, the case made out by the



plaintiff during trial is not the case made out in the plaint. The issue that it was the property acquired by Mungeri was not pleaded at all by the plaintiff. However, from perusal of the Judgment of the Court below, it appears that the Court recorded this finding that the property was acquired by Mungeri Sao. Since, there was no pleading of the plaintiff, there was no question of considering such evidence adduced by the plaintiff arises. When there was no case of either party that the property was in fact acquired by Mungeri Sao or not and this was not the issue before the Court, the Court below could not have made out a third case. It is settled principle of law that the Courts are required to determine the questions, i.e., the real controversy between the parties as pleaded and not to make out a third case.

18. In the present case, the specific case as pleaded by the plaintiff is that property belonged to Bishwanath Sao and Mahabir Sao. Admitted fact is that the property stands in the name of Mahabir Sao vide ext.2. According to Hindu Law, although there is no partition between both the brothers, there cannot be any presumption that a family because it is joint possesses joint property. When in a suit for partition, a party claim that any particular item of the property is joint family property, the burden of providing that is on the party. In the present case as stated above since the plaintiff is claiming that the property is joint family property of Bishwanath and Mahabir Sao,

the burden was on the plaintiff to prove that it was joint property of Mahabir and Bishwanath. In the plaint, no case has been made out that it was ancestral property or that both the sons of Mungeri Sao inherited the property from Mungeri.

19. It is admitted fact that heirs of Mahabir have sold the property in favour of the defendant appellant. As stated above, property stands in the name of Mahabir. The appellant has produced the registered sale deed, ext.D-3/1 & ext.A1. So far the plaintiff is concerned, no declaration has been prayed for regarding these registered sale deeds executed by the heirs of Mahabir.

20. 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 binds 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.'**

21. It is also settled principle of law that a registered sale deed is presumed to have been validly executed with all its legal consequences. Such document cannot be said to be void abe initio.

There cannot be presumptive invalidity attached to such a transaction. Such document remains valid on principle that apparent state of affairs is real state of affairs until facts invalidating the same are established.

22. In the present case, the plaintiff did not adduce any evidence in support of the case pleaded by him that the property was joint property of Bishwanath and Mahabir. Absolutely, there is no evidence in support of this pleading. It is settled principle of law that pleading is not the proof of the fact pleaded. It has to be proved by adducing cogent and reliable evidence. Now, therefore, the fact emerges in this case is that although the plaintiff made out a particular cases in the plaint, no evidence was adduced in support of the fact pleaded. On the contrary, evidence was adduced on a fact which was never pleaded in the plaint.

23. In other words, during trial, a different case was made out without there being any pleading. Further no relief has been claimed by the plaintiff regarding the sale deed in favour of the defendant appellant. Now, therefore, the Court cannot presume that the sale deeds are void or voidable or that Mahabir in whose name, the property stands had no title or that the heirs of Mahabir had no title to transfer the property in favour of the appellant.

24. From perusal of the Judgment of the Court below, it appears that the Court below has approached the case in a different angle. Although there is no pleading, the Court below made out a third case and recorded the finding that it was acquired property of Mungeri Sao and on his death, two sons inherited the property and there has been no partition, therefore, decreed the partition suit.

25. In view of my above discussion, I find that the plaintiff failed to prove that the property in suit was the joint property of Bishwanath Sao and Mahabir Sao. On the contrary, the defendant appellant has been able to prove that the property was the self acquired property of Mahabir Sao which was settled exclusively in his name in the year 1935. Therefore, the property is not available for partition. Accordingly, the findings of the Court below is reversed.

26. **In the result, this First Appeal is allowed. The impugned Judgment and Decree are set aside. The plaintiff's suit for partition 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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