

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.46 of 1968

With

F.A.47 of 1968

F.A. No.46 of 1968 is against the Judgment and Decree dated 25.09.1967 passed by First Addl, Subordinate Judge, Gaya in Partition Suit No.1 of 1966 / 47 of 1962 whereas F.A. No.47 of 1968 is against the Judgment and Decree dt.25.09.1967 passed by Ist Addl. Sub Judge Gaya in partition suit No.2 of 1966 / 54 of 1961.

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Mostt. Parwati Devi & Ors.

.....Defendants -appellants in both the Appeals

Versus

Munsi Sao & Ors.

.....Plaintiffs – Respondents in F.A. No.46 of 1968

Bhagwan Das & Ors

.....Plaintiff- respondent in F.A. No.47 of 1968.

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Appearance :

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For the Appellant/s (both the F..A.) :- Mr. J.S. Arora Arora, Advocate

For the Respondent No.1 and 2. :- Mr. Sanjay Kumar Griyaghy, Advocate

For Respondent No.9 and 10 :- Mr. Murari Sao, Advocate

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Dated : 17th day of May, 2016

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 defendants purchasers have filed both the First Appeals against the common Judgment and Decree dated 25.09.1967 passed by the learned Ist Addl. Subordinate Judge, Gaya in partition suit No.1 of 1966 / 47 of 1962 and 2 of 1966 / 54 of 1961.

2. For better appreciation of the fact, the short genealogy is required to be given. Beni Sao had five sons, namely, Gangoo, Jako, Jharo, Darbari and Amrit. Beni Sao died before cadastral survey operation and shortly thereafter Gangoo and Jako also died. Only three brothers were left, namely, Jharo, Darbari and Amrit. Two partition suits were filed being partition suit No.54 of 1961 which was filed by branch of Jharo against the branch of other two brothers whereas partition suit No.47 of 1962 was filed by the branch of Darbari Sao against the branch of other two brothers.

3. The case of the plaintiffs of partition suit No.54 of 1961 in short is that Beni Sao died in jointness and likewise Gangoo and Jako also died in jointness with the parties. Therefore, the branches of remaining three brothers were recorded jointly with regard to ancestral properties of village Marui. Nago Sao, son of Gangoo died leaving his widow who remarried. Mauzi Sao, son of Jako died issueless and his widow is defendant No.12 in the partition suit. Therefore, according to the plaintiff, the ancestral property devolved

on Jharo, Darbari and Amrit only and each of them have got $1/3^{\text{rd}}$ share.

4. The further case is that in course of time, some lands under Khata No.139 in Mohalla Mirzapur, Jagjiwan, Nawada were acquired along with one Ved Narayan Sao and a Gola shops was constructed thereon. Subsequently, in the year 1924, in the month of March, they amicably partitioned with Ved Narayan Sao and the properties described in Schedule '1(a)' of the pliant came in possession of the parties. The said properties were acquired out of joint family fund. The family had also a shop at Marui which was started out of joint family fund. One Kirana shop, one cloth shop were also started at Nawada out of joint family fund which are in joint possession of the parties. All the members of the family have been sharing the entire income of the family. For the last four years, the defendants No.1 to 8 started separate messing from defendant No.9 and 10. The plaintiff demanded for amicable partition which was refused therefore, this partition suit was filed. The plaintiffs have got $2/8$ pies, defendant No.1 to 8 have $5/4$ pies and defendant No.9 and 10 have got $5/4$ pies whereas the remaining $12/8$ pies belong to defendant No.11. In other words, each branch has got $1/3^{\text{rd}}$ share in the suit property.

5. The case of the plaintiff in partition suit No.47 of 1962 in



short is that Beni Sao had only 41 decimal of land and house thereon which was inherited by the parties. The usufruct of the land was insufficient and inadequate to maintain the large family of three branches, therefore, there was disruption in the joint family status. Darbari Sao and Amrit Sao came to Nawada in search of their livelihood and they jointly acquired land at Nawada with Ved Narayan Sao from their own joint income and earning. They gradually constructed two houses out of their own fund. They started three shops room out of their own earning. One is Kirana shop and the second is cloth shop and the third is Manihari shop and the other rooms were let out to the tenants by both the brothers on rent. Darbari Sao died in 1960 leaving behind the plaintiff as only heir. The plaintiff has got 1/3rd share in the ancestral property described in Schedule '2' situated in Marui and has got half share in Schedule '3' property of Nawada and the remaining half share is of Amrit Sao.

6. The further case is that Amrit Sao executed three sale deeds on 15.05.1961 purported to be *karta* to the sasurali relations, namely, Gangdhar Sao, Parshuram Sao and Gauri Shanker Sao (all of them are the appellants in both the Appeals) with respect to joint family property described in Schedule IV, IV(a) and IV (b) of the plaint. The transaction are void, fictitious and farzi transaction.



7. Written statement was filed by the defendant No.1 to 8(a) in both the partition suits who are the branch of Amrit Sao. Their main claim is that the Nawada property was purchased by Amrit Sao and Darbari Sao both jointly. Both jointly constructed residential house and shops premises out of their funds. Darbari died in 1960 and the branches of both the brothers are coming in joint possession of the property. Therefore, plaintiff of partition suit No.54 of 1961, i.e., branch of Jharo Sao has no share in the property at Nawada. The branch of Darbari and branch of Amrit had got half share.

8. Written statement was filed by son of Darbari who is plaintiff of partition suit No.47 of 1962 and defendant No.13 in partition suit No.54 of 1961 and according to him also, the property acquired at Nawada is the joint property of branch of Darbari and Amrit Sao and the plaintiff of partition suit No.54 of 1961, i.e., branch of Jharo has got no interest at all in the property at Nawada.

9. According to the defendant No.1 to 8(a), the parties had no interest in the property sold to the defendant No.9 to 11 (who are the appellants in both these appeals). The properties sold to them have been described in Schedule IV, IV(a), IV(b) of item No.2 of schedule III. Various other please taken by the plaintiffs regarding joint family fund etc. were denied. On the basis of the pleadings of the parties, the

learned Court below framed the following issues:-

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- (a) Are there the causes of action (as alleged) for these suits?
 - (b) Did the descendants of Beni Sao form joint Hindu family till four years prior to 1961?
 - (c) Are the properties No.2 and 3 of schedule is of the plaint of Title suit No.54 of 1961 and 2 of 1966 joint acquisitions of all the descendants of Beni Sao?
 - (d) Are the items No.2 and 3 of Schedule is of the plaint of Title Suit No.54 of 1961 and 2 of 1966 acquisitions from out of a joint nucleus of the joint family of the descendants of Beni Sao or are these properties the separate acquisitions of Darbari Sao and Amrit Sao?
 - (e) What are the respective shares, if any, of each party in the suit properties?
 - (f) Are the sale deeds in question executed by Amrit Sao Farzi documents?
 - (g) Did Amrit Sao and Darbari Sao reunite?
 - (h) To what relief, if any are the plaintiffs in these suits entitled?

10. The trial Court recorded finding that the three sale deeds executed by Amrit Sao in favour of the appellants are farzi and sham. The Court below also recorded finding that the family had ancestral trade / business and from trading, they have sufficient income and all the properties are joint family properties. Accordingly, decreed the plaintiff's suit for 1/3rd share in the suit property including the Nawada property.

11. Against the Judgment and decree whereby it was held that the Nawada property is joint family property and 1/3rd share was



granted to the plaintiff, the branch of Darbari and Amrit Sao filed First Appeals but their First Appeals were dismissed for default. The present appellants have filed the Appeal against the decree which affected them whereby it has been held that the property of Nawada is joint family property and the sale deed executed by Amrit Sao in their favour are farzi and sham. As stated above, both these Appeals are heard together. In view of this fact, the present appellants are not concerned with the other properties of the families and they are concerned with the properties which they have purchased by three registered sale deeds.

12. The learned counsel, Mr. J.S. Arora, for the appellants submitted that in the plaint filed by branch of Jharo Sao, there is no pleading regarding nucleus and there was no evidence also to that effect but the Court below wrongly held that the parties have trade business and sufficient income was there. According to the learned counsel, the Court below concluded on the presumption that the parties belonged to business community and they had sufficient income from business without their being any evidence or proof thereof. Likewise the learned Court below wrongly declared the three sale deeds as sham, farzi, void, inoperative and not binding on the plaintiff although no such relief was claimed by the plaintiff of partition suit No.54 of 1961 or partition suit No.47 of 1962. In

absence of any relief with regard to the sale deeds of the appellants suo motu without their being any evidence adduced by the plaintiffs, the Court below could not have declared the sale deeds as *farzi* and sham sale deeds.

13. The learned counsel further submitted that the sale deeds executed by *karta*, i.e., Amrit Sao is not a void document rather it is voidable, therefore, the plaintiffs should have avoided the sale deed but no such relief was claimed. On the contrary, the defendants had adduced overwhelming evidences to show that loan was raised by Darbari and Amrit and for repayment of the loan and for other family benefits, the properties were sold for legal necessity but the Court below wrongly held that the sale deeds are *farzi* and sham. The vendors of the sale deed never challenged the sale deeds. Further in view of the Judgment and Decree, the plaintiffs have got only 1/3rd share. In such circumstances, they are entitled to have their share separated as it is not their case that their share has also been transferred by Amrit Sao. In view of the fact that the appeals have been dismissed, the share of the parties became final. Now, therefore, unless a relief is claimed regarding the sale deeds and recovery of possession is prayed for, the plaintiffs will get nothing as the vendor is not challenging the sale deed and the plaintiffs who are claiming partition also never challenged the sale deed nor they claimed that

they are in possession of the properties purchased by the appellants.



14. The learned counsels further submitted that although the Judgment has been passed disposing of the partition suit No.54 of 1961 and 47 of 1962 by common judgment but in fact the Court below considered the materials and pleadings with regard to partition suit No.54 of 1961 only. In partition suit No.47 of 1962, the plaintiffs claimed 8 ana share in the properties of Nawada appertaining to Khata No.139. However, the trial Court granted only 1/3rd share. As such the claim of the plaintiff of 47 of 1962 was disallowed. Now, no appeal or cross objection is pending against that part of the decree. The learned counsel further submitted that there were overwhelming evidences in support of the fact that there was disruption in the family and then properties at Nawada were acquired by both the brothers only but the Court below without there being any materials disbelieved the same and on presumption only held that the properties are joint. On these grounds, the learned counsel submitted that the impugned Judgment and Decree whereby the appellants' three sale deeds have been held to be *farzi* and sham is liable to be set aside and the appeal be allowed with cost.

15. On the other hand, the learned counsel, Mr. Griyaghy, submitted that the Court below has rightly passed the impugned

Judgment and Decree. According to the learned counsel, also the properties of Nawada is the joint property of Darbari and Amrit as such, the plaintiffs of partition suit No.54 of 1961 have got no share in the property of Nawada.

16. It may be mentioned that so far the plaintiffs of partition suit No. 47 of 1962 is concerned, the decree has been passed against them granting only $1/3^{\text{rd}}$ share. In the suit, they have claimed half share in the Nawada property. That has been negated by the Court below and only $1/3^{\text{rd}}$ share had been granted. At present there is no First Appeal nor cross objection against that part of the decree which was not granted to the plaintiff in Nawada property. In such circumstances, that part of the decree whereby the plaintiff has not been granted 8 ana share has become final. The plaintiffs of Partition Suit No.47 of 1962 will get only $1/3^{\text{rd}}$ share in Nawada property. These plaintiffs are appearing in this First Appeal as respondents.

17. In view of the above facts and circumstance of the case and submissions of the parties, the following points arise for consideration in this First Appeal :-

- (i) Whether the property at Nawada is joint family property or the property acquired by Darbari Sao and Amrit Sao only jointly.

- (ii) Whether the sale deeds of the appellants executed by Amrit Sao are *farzi* and sham transaction.

18. *Point No.(i) :-* The plaintiff of partition suit No.47 of 1962, i.e., branch of Darbari and defendants Nos.1 to 8(a) in both the Partition suit claimed that Nawada property was acquired by Darbari Sao and Amrit Sao jointly. That is their self acquired property. As such the plaintiff of partition suit No.54 of 1961, i.e., branch of Jharo have got no share in the property.

19. From perusal of the plaint of partition suit No.54 of 1961, it is only pleaded that in course of time, the family of the parties acquired out of joint family funds some lands under khata No.139 at Mohalla Mirzapur Jagjiwan Nawada with Ved Narayan Sao and constructions were made. There was partition between them with Ved Narayan Sao in 1924. Since then the parties are in joint possession. The plaintiffs have examined witnesses in support of this case. It is admitted fact that the title deeds stands in the name of Darbari and Amrit only. It is also admitted fact that there was only 41 decimal of land and house thereon in village Marui which is the ancestral property of the parties.

20. Plaintiff No.1 of Partition suit No.54 of 1961, Bhagwan Das Sao has been examined as P.W.19. He has in his evidence only stated



that Amrit was the *karta* after death of Darbari. The shop and house at Nawada was purchased out of the profit of joint ancestral shop at Marui. Except this statement, nothing has been stated by the plaintiff himself. In the cross-examination, he expressed his inability to say in whose name, the property of Nawada has been purchased. He is also unable to say what was the income of ancestral shop and what was the expenses and since when the shop at Marui is running, therefore, this witnesses has not stated about any nucleus. Just for the sake of pleading, it was pleaded that properties were acquired out of joint family fund.

21. P.W.5 has admitted that Beni had only five-seven decimal land and one kachha house at Marui. Except that there was nothing with him. Except these evidences, there is absolutely no evidence regarding the income, the expenditure and the nucleus. It is the settled principle of law that the burden is on the party who alleges that properties acquired is a joint property to prove that the property was acquired out of the joint family fund and where the nucleus is admitted, the nucleus must be such that the properties could have been acquired out of the said nucleus. In this connection, reference may be made to the decision of the Hon'ble Supreme Court in the case *AIR 1954 SC 379 and AIR 1969 SC 1076*.



22. Although it is stated by the plaintiff No.1, P.W.19, that out of joint family business, the properties had been acquired, there is no evidence to that effect. On the contrary, the evidence of P.W.5 and P.W.19, there cannot be any presumption that the property of Nawada could have been acquired out of the joint family. The Hon'ble Supreme Court in the case of *Marabasappa Vs. Ningappa (2011)9 SCC 451* has held that **'no presumption can be made of joint family property in absence of any evidence in proof of it.'**

23. As stated above, there was only 41 decimal ancestral land.. Therefore, there is no presumption of any nucleous. No evidence has been adduced regarding nucleous. There is absolutely no evidence regarding joint family ancestral shop. Moreover there is no pleading to this effect. The trial Court also at paragraph 13 held that the agricultural land was not sufficient and adequate to sustain large families of three branches but without there being any evidence, presumed the joint family nucleous on the ground that the parties are Teli by caste and are of business community, therefore, there was sufficient income. This presumption of the Court below is unsustainable in the eye of law. The Court cannot presume a fact which is required to be proved by evidence by the party ascertaining in his favour the existence of the fact. Therefore, this part of the

finding is unsustainable.

24. The defendants have produced documentary evidences and also examined many witnesses in support of the case that the property of Nawada is acquired by Darbari and Amrit jointly. D.W.20, 21, 24, 25, 26, 29, 34 have deposed regarding raising of loan in cash by Darbari and Amrit Sao jointly on hand notes and these hand notes have been marked as Ext.G-2 to G-2/10. The repayment of the said loan has been done by the appellants which have been marked as exhibit 'E-2/i to E-2/x. The hand notes on which payment was made have been marked as ext. 'H' series. Ext. J/2 to J/2(9) are the exhibits which shows the business transaction. These documents clearly proves the fact that Darbari and Amrit from time to time raised loans from different individuals as and when required for repayment of antecedent debts and other purposes. If there was sufficient income as claimed by the plaintiff of partition suit No.54 of 1961 then why these loans were raised by only these two brothers on different dates from different individuals? There is absolutely no explanation on behalf of the plaintiff. The Court below also in the Judgment nowhere considered these evidences in their right perspective.

25. From perusal of the evidences and pleadings, I find that there is absolutely no evidence to show that Beni Sao had any

business and trade at village Marui and out of the income and saving of that trade or business, the property of Nawada was acquired. Therefore, merely plaintiff is saying it cannot be accepted as gospel truth. The same has to be proved according to the settled principle of law laid down by the Hon'ble Supreme Court which is the law of the land.

26. I, therefore, find that the plaintiff of Partition suit No.54 of 1961 failed to prove that there was any joint family fund or nucleus out of which the property of Nawada was purchased. The findings of the trial Court on this point is, therefore, hereby reversed. It is held that the property at Nawada was acquired by Darbari and Amrit Sao jointly.

27. Point No.(ii) :- The simple suit for partition has been filed by the plaintiffs of partition suit No.54 of 1961 and partition suit No.47 of 1962. No relief has been prayed for by them with regard to the sale deeds of the appellants dated 15.05.1961 executed by Amrit Sao who was the *karta*. It is settled principle of law that the sale deed executed by *karta* is not a void document rather it is voidable. In this connection, reference may be made to the decision of the Hon'ble Supreme Court reported in **AIR 1971 SC 776**. Further these three sale deeds were executed for payment of antecedent debts and for the

benefit of the family. Therefore, unless the contrary is proved, the sale deed cannot be set aside.

28. The Hon'ble Supreme Court in the case of *Md. Nurul Hoda Vs. Bibi Raifunisha* (1996)7 SCC 767 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 had that decree, instrument or contract cancelled, or set aside or rescinded.'**

29. In view of the above settled law, unless the plaintiffs seek for annulment of the three sale deeds, the plaintiff cannot establish title over these properties covered by these three sale deeds. The sale deed should have been avoided on the ground available to the plaintiff which was never done by them.

30. The Hon'ble Supreme Court in *Abdul Rahim Vs. Abdul Jabbar* AIR 2010 SC 211 has held that **'a suit for cancellation of transaction whether on the ground of being void or voidable would be governed by Article 59 of the Limitation Act. Therefore, the suit can be filed within three years for declaring the sale deed as void or voidable.'**

31. The Hon'ble Supreme Court further in the case of *Prem Singh Vs. Birbal* 2006 (5) SCC 353 has held 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.'

32. This Court also in the case of *Seeta Saran Prasad Vs. Manorama Devi* 2012 (2) BLJ 165 has held that 'a registered sale deed is presumed to have been validly executed with all its legal consequences. Such documents cannot be said to be void ab initio. There cannot be presumptive in validity attached to such a transaction. Such documents remains valid on principles that apparent state of affairs is real state of affairs, until facts invalidating the same are established.'

33. In the present case, three sale deeds are registered sale deeds executed by admitted *karta* for legal necessity. There is no challenge to these three sale deeds in any of the partition suit. Except the word that the sale deeds are sham and *farzi* pleaded by the plaintiffs, nothing have been brought on record to show how the sale deeds are sham and *farzi*. Branch of Amrit Sao are not disputing the execution of the sale deeds. The plaintiffs are also not disputing the



execution of the sale deeds. Only it is pleaded that it is sham and farzi. By mere pleading the presumption cannot be rebutted. No evidence has been produced. However, the Court below without their being any relief claimed against the three sale deeds held that the sale deeds are farzi and sham transaction without considering the fact that the appellants are claiming to be in possession of the purchased property. In my opinion, therefore, the Court below could not have presumed the invalidity of the three sale deeds when no evidence was produced by the plaintiffs in support of invalidity thereof. The plaintiffs also never prayed for recovery of the possession of the suit property. Therefore, when the purchasers appellants got the title on the basis of the sale deeds dated 15.05.1961 and came in possession thereof, their lands cannot be partitioned in the present suit for partition unless their sale deeds are set aside, however, no relief had been claimed against the sale deeds. In such circumstances, their title cannot be divested only on saying that their sale deeds are farzi and sham.

34. In view of my above discussion, I find that the Court below has wrongly recorded the finding that the sale deeds are *farzi* and sham on presumption only without considering the legal position. Therefore, the findings of the Court below are hereby reversed.

35. In view of my discussion, both the points formulated are answered in favour of the appellants.

36. In the result, both the First Appeal are hereby allowed. The part of the impugned judgment and decree whereby the sale deeds of the appellants have been held to be *farzi* and sham is hereby set aside and it is held that the purchased properties of these appellants are not liable for partition. Therefore, these properties should be excluded from both the partition suit. In the facts and circumstances of the case, no order as to cost.

(Mungeshwar Sahoo, J)

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