

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.281 of 1977

Against the judgment and decree dated 23.06.1976 passed by 1st
Additional Sub-Judge, Purnea in Title Suit No.323 of 1972

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Pancha Devi & Ors

.... Defendants-Appellants

Versus

Rameshwar Pandey & Ors

.... Plaintiffs-Respondents

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Appearance :

For the Appellants : Mr. Kundan Bahadur Singh, Advocate.

For the Respondents : Mr. P.N.Shahi, Sr. Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 20-06-2016

The plaintiff-respondent no.1 filed Title Suit No. 323 of 1972 praying for partition to the extent of 1/6th share of the plaintiff in the suit land after declaring right, title, interest and possession of the plaintiff alleging that the plaintiff and defendants are members of joint family. Their common ancestor was one Ram Sundar Pandey. He died long ago leaving behind two sons, namely, Ram Chandra Pandey and Chandradeep Pandey. Ram Chandra Pandey died in 1951 leaving behind his widow Ram Sakho Devi whereas Chandradeep Pandey is defendant no.5. Defendant nos.1, 2 and 3 are sons of defendant no.4 and defendant no.6 is brother of plaintiff being the

son of defendant no.2. The suit properties are joint family properties. Ram Chandra Pandey even during life time of Ram Sundar Pandey was the karta. After his death Chandradeep Pandey became the karta but in fact defendant no.1 being the eldest son became karta. Few years ago without partition they started cultivating the lands separately according to their convenience. Partition was demanded but defendant refused. Hence, the suit was filed for partition.

2. It appears that by way of amendment in the year 1974 paragraph 7(A) was added in the plaint to the effect that the defendant 1st party playing fraud upon defendant no.5 have managed to get a sale deed from defendant no.5 in the name of defendant no.4 with respect to the lands described in Schedule-B. The sale deed is without consideration. It is fabricated document having no legal value and is fit to be thrown into the worst paper basket. Even after sale deed the defendant no.4 never came in possession exclusively and not derived title rather the plaintiff and defendants are in joint possession of the lands.

3. Written statement was filed by the defendants-appellants alleging that there are many purchasers of the suit lands, which are strangers to the family, as such they are necessary party. The defendants admitted the genealogy. The common ancestor had left only the property of U.P. as ancestral property. All the properties



of district Purnea were acquired by Ram Chandra Pandey while he was in service of Raj Darbhanga, therefore, the properties are his self-acquired properties. He acquired the land either in his name or in the name of his brother. After death of Ram Chandra Pandey there had been partition between the two branches. After partition the defendant no.5 being karta of his branch sold the disputed land by registered sale deed dated 04.09.1961 being his half share in 28 plots only to these defendants and the sale deed was executed in the name of mother, defendant no.4. Total consideration amount was paid. Plaintiff was one of the attesting witnesses in the sale deed dated 04.09.1961. The purchased properties of the defendants are not liable for partition. Chandradeep Pandey, the defendant no.5, also sold many properties for legal necessities to Ram Udgar Thakur, Bishundeo Yadav, Kishundeo Yadav and also to Kalanand Yadav of different village on receiving consideration amount. Singheshwar Pandey, defendant no.1 also sold many lands by registered sale deeds to Bir Narayan Yadav and Sumrit Yadav. Chandradeep Pandey and his sons jointly sold many lands to Lakhan Yadav, Srichand Mahto, Kari Tatma and Sahdeo Tatma. The purchasers are coming in possession of the properties. The defendant no.1 also sold half share in khata no.1039 to the defendant no.5, Chandradeep Pandey (father of the plaintiff) but the said land has not been included in the

partition suit. In partition the lands of U.P., which were allotted in the share of the plaintiff and defendant nos.5 and 6, have also not been included in the partition suit. The lands of these defendants, which have been allotted in partition, have only been included in the partition suit.

4. An additional written statement was filed after amendment introducing paragraph 7(A) of the plaint. In the additional written statement it is stated that the sale deed is valid transaction for valuable consideration and after sale deed these defendants are coming in exclusive possession of the entire suit lands purchased by them described in Schedule-B of the plaint. The plaintiff is not entitled to the relief for partition as the sale deed cannot be avoided now after the period prescribed in Article 59 of the Limitation Act. The defendant no.5 has also purchased from these defendants the half share in plot no.1376 khata no.787 by registered sale deed dated 22.04.1966. The sale deed was executed by defendant no.1. After institution of the suit the plaintiff's father and the plaintiff sold the entire plot no.1376 by registered sale deed dated 23.09.1974 wherein defendant no.6 is an attesting witness. On these grounds the defendants prayed that the partition suit be dismissed.

5. The learned trial court framed the following issues:-

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- (i) Is the suit as framed maintainable?
 - (ii) Has the plaintiff got any cause of action for the suit?
 - (iii) Is the suit barred by limitation, estoppel, waiver and acquiescence?
 - (iv) Is the suit bad for defects of parties?
 - (v) Is the suit properly valued and C.Fee paid is sufficient?
 - (vi) Has the plaintiff subsisting right, title, interest and possession over the lands measuring 20.27 acres appertaining to 28 plots under khata no.794 of village Madhuban fully described in Schedule B of the plaint?
 - (vii) Is the plaintiff entitled to get a decree of partition of 1/6th share over the suit lands described in Schedule A and B of the plaint?
 - (viii) To what relief or reliefs, is the plaintiff entitled to get?

6. After evidence while deciding Issue no.(vi) the learned court below held that the defendant no.1 did not examine his mother, defendant no.4 in support of his case that consideration amount was paid. At the time of execution of sale deed Chandradeep Pandey had no free and open mind. Plaintiff was born on 02.04.1948 and he passed matriculation examination in February, 1964, therefore he was aged about 16 years in the year 1961, as such the sale deed became defective in absence of a competent attesting witness. The court below also held that the consideration of Rs.1,500/- for 10.13 acres of land is shockingly below the market rate. The court below also held that there was no legal necessity and accordingly ultimately found that there was no partition between the parties and the sale

deed was executed without payment of any consideration and without legal necessity. Therefore, the sale deed neither created right, title and interest on defendant nos.1 to 4 nor they came in exclusive possession and the plaintiff's right, title and interest and possession is still subsisting. Accordingly, decreed the plaintiff's suit.

7. The learned counsel Mr. Kundan Bahadur Singh submitted for the appellants that the plaintiff filed simple suit for partition. Nowhere any relief for declaration of the sale deed in question either void or voidable was sought by the plaintiff. There cannot be any presumptive invalidity of the registered sale deed of the year 1961, which was validly executed by defendant no.5. The defendant no.5 never challenged the validity, genuineness or receiving consideration for the sale deed and even in the present suit he has never been examined as witness. Defendant no.5 was the karta and he executed the sale deed. Although the plaintiff never claimed any relief, the court below investigated the validity or otherwise of the sale deed, which could not have been done by the trial court and moreover the court below without there being any pleading regarding the age of the plaintiff recorded the finding that he was aged about 16 years in the year 1961 although it is not his case in the plaint. The plaintiff's case is that the sale deed is fraudulent sale deed and no consideration was paid but there is no

pleading with regard to fraud and the court below found that consideration is inadequate, which is contrary to the pleading.

8. There is no undue influence pleaded by the plaintiff but the court below recorded the finding that the defendant no.5 was influenced which is a third case made by the court. The court below for proving payment of consideration placed wrongly onus on the defendants-appellants. The learned counsel further submitted that there are inter-se transactions between the plaintiff and the defendants' family which clearly indicate that there was partition between the parties. The documents were produced, which have been marked as Ext.Ka/3 and this is the sale deed executed by Singheswar, defendant no.1 to Chandradeep, defendant no.5 and the sale deed is dated 22.04.1966. The parties have also admittedly sold many properties. According to the learned counsel, on the ground of inadequacy of consideration amount the sale deed cannot be set aside that too after limitation. On these grounds the learned counsel submitted that the first appeal be allowed and the impugned judgment and decree be set aside.

9. On the other hand, learned Senior Counsel Mr. P.N. Shahi for the respondents submitted that there is no illegality in the impugned judgment and the court below passed the judgment after considering the evidences available on record, which



were produced by the parties. In Ext.2 i.e. ladavinama the defendant no.1 admitted that the parties are joint, therefore, the court below has disbelieved the case of partition as pleaded by the defendants. For determining the age of the plaintiff the court below rightly relied upon the matriculation certificate. The court below also found that the consideration amount mentioned in the sale deed is inadequate. As such the court below has rightly held that the sale deed is not a valid document. Although no prayer has been made in the pleading but after amendment paragraph 7(A) was added wherein it is clearly mentioned by the plaintiff that the sale deed is without consideration, fabricated and not acted upon, therefore, the impugned judgment and decree cannot be interfered with in this first appeal.

10. The learned Senior Counsel further submitted that if substances of pleading are there and both parties proceeded to trial no prejudice is caused by non-skillful drafting of the pleading. The parties here went to trial knowing the case pleaded by the plaintiff that the sale deed is without consideration, fabricated and not acted upon and also produced evidences to that effect. In such circumstances because no issue has been framed regarding the validity of the sale deed, the judgment will not be vitiated. In support of his contention the learned counsel relied upon the decision of the Supreme Court as well as the High Court such as **A.I.R. 1952**



Supreme Court 47 (Kedar Lal Seal and another Vs. Hari Lal Seal), AIR 1966 Supreme Court 735 (Bhagwati Prasad Vs. Chandramaul), AIR 1987 Supreme Court 1242 (Ram Sarup Gupta Vs. Bishun Narain Inter College and others), AIR 1963 Supreme Court 884 (Nedunuri Kameswaramma Vs. Sampati Subba Rao) and 1995 (2) PLJR 563 (Bhaskar Ganguly & Anr. Vs. Sujit Kumar Gupta).

11. According to the learned Senior Counsel since the plaintiff was minor on the date of execution of sale deed, the suit could have been filed within 12 years of execution of sale deed or within 3 years from the date of attaining majority. The suit has been filed within 12 years as such the suit is not barred by law of limitation. In support to of his contention the learned Senior Counsel relied upon the decision of the Supreme Court i.e. **(2006) 5 Supreme Court Cases 353 (Prem Singh Vs. Birbal)**. The learned Senior Counsel further submitted that here in the present case Articles 64 and 65 of the Limitation Act would apply. Over and above the oral submissions, written arguments have been filed elaborating the points and the decisions.

12. In view of the above rival contentions of the parties the points arise for consideration in this first appeal are as follows:

- (i) Whether the plaintiff is entitled for a decree of partition including the properties covered by the sale

deed executed by defendant no.5 in the name of defendant no.4 without seeking any relief regarding the sale deed dated 04.09.1961?

(ii) Whether the suit is barred by law of limitation?

13. Since both the points formulated above are interlinked, both are decided together.

14. From perusal of the plaint, it appears that the only pleading of the plaintiff is that the suit properties are joint family properties and the plaintiff filed the suit. By way of amendment paragraph 7(A) was added wherein also it is only pleaded that defendant 1st party by playing fraud upon the defendant no.5 managed to get a sale deed in the name of defendant no.4 which is without consideration and fabricated document having no legal value. Nowhere even in the body of the plaint or in the relief portion the date of the registered sale deed has been mentioned.

15. According to Order 6 Rule 4 of the Code of Civil Procedure the plaintiff is required to plead particulars of fraud but in the present case except the word “fraud” pleaded in paragraph 7(A) nothing has been pleaded. Admittedly the sale deed is of the year 1961 and the suit has been filed in the year 1972. No relief has been claimed regarding the registered sale deed dated 04.09.1961. It is settled principles of law as has been held by the Supreme Court in the case of **Prem Singh Vs. Birbal, (2006) 5 Supreme Court Cases**



353 that there is a presumption that a registered document is validly executed, therefore, prima facie it would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption vide paragraph 27 and 28. This is the consistent view of the Supreme Court. Same view has been taken in **(2009) 5 Supreme Court Cases 713(Vimal Chand Ghevarchand Jain and others Vs. Ramakant Eknath Jadoo)**. It has been held that registered deed of sale carries presumption that the transaction was genuine one. If execution is proved then onus is on the other side to prove that the deed was not executed and it was sham transaction. In the present case, the plaintiff admitted the execution of the sale deed and its registration. Therefore, when he is claiming partition of this property he is to rebut the presumption. As stated above, in the present case, the plaintiff is not challenging the validity or otherwise of the sale deed as he has not claimed any relief according to Section 31 of the Specific Relief Act. Merely because the plaintiff has stated that the sale deed is fraudulently obtained, the presumption will not be rebutted.

16. The Hon'ble Supreme Court in the case of **Noorul Hoda Vs. Bibi Raifunnisa and ors., (1996) 7 Supreme Court Cases 767** has held as follows:

“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. Section 31 of the Specific Relief Act 1963 regulates suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or voidable and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or voidable and the court may in its discretion so adjudge it and order it to be delivered or cancelled”.

17. In the present case, admittedly the karta had executed the sale deed. The Hon’ble Supreme Court in **A.I.R. 1971 Supreme Court 776 (Raghubanchmani Prasad Narain Singh Vs. Ambica Prasad Singh)** has held that a transfer made by the karta or the manager is not a void transaction. Therefore, the plaintiff should first avoid the sale deed. As stated above, this is a simple suit for partition and no declaration has been sought for regarding the sale deed.

18. The Hon’ble Supreme Court in the case of **Abdul Rahim Vs. Abdul Zabar, A.I.R. 2010 Supreme Court 211** has held as follows:

“A suit for cancellation of transaction whether on the grounds of being void, voidable would be governed by Article 59 of the Limitation Act. Therefore, the suit should be filed within a period of three years from the date of the knowledge of the fact that the transaction which according to the plaintiff was void or voidable had taken place”.



19. In the present case, it is not the case of the plaintiff that he had no knowledge about the sale deed or that the sale deed is liable to be set aside or cancelled because of any grounds recorded by the trial court. In view of Article 59 the suit for cancellation can be filed within three years. In the plaint nowhere the plaintiff alleged that because he attained majority on such and such date the suit is within time according to Article 59 of the Limitation Act. The learned Senior Counsel Mr. Shahi relied upon the decision of the Supreme Court in the case of **Prem Singh & Ors. Vs. Birbal & Ors, (2006) 5 Supreme Court Cases 353** and submitted that the plaintiff has two options i.e. firstly, in case of minor he could either file a suit within 12 years of the deed or within three years of attaining the majority. So far this submission is concerned, it may be mentioned here that in that case the Hon'ble Supreme Court clearly held if the transaction is voidable transaction then Article 59 of the Limitation Act will be applicable. So far filing of suit within 12 years is concerned, the Supreme Court has held that if the plaintiff is in possession of the property, he may file suit for declaration that the deed is not binding on him. According to the plaintiff, he has alleged that he is still in possession of the property and by way of amendment he has sought the relief for confirmation of possession



and no relief has been sought for. It appears that in the case before the Supreme Court in the decision relied upon the plaintiff was minor, who executed the sale deed which was held to be void document. In such circumstances, the Supreme Court held that if plaintiff is not in possession, he may file suit within 12 years for recovery of possession from the date of execution of the sale deed and if he is in possession then he may file suit within three years from attainment of majority for declaration that the sale deed is not binding on him. The fact of the present case, in our hand, is entirely different. The father of the plaintiff executed the sale deed in the year 1961. The plaintiff signed the sale deed as witness. The plaintiff never pleaded that in the year 1961 he was minor. Even if it is held that he was minor in 1961 then also according to Article 59 of the Limitation Act the suit for cancellation or for setting aside the sale deed or for declaring the sale deed as fraudulent etc. etc. could have been filed within three years from the date of attainment of his majority. Since the burden is on the plaintiff to rebut the presumption of validity of registered sale deed is on the plaintiff, it is for him to plead and prove that when he attained majority and how the suit is within time. It may be reiterated here that there is no pleading at all regarding these facts.

20. In my opinion, therefore, in the present case, firstly



there is no relief claimed by the plaintiff with respect to the sale deed of the year 1961. According to the Supreme Court, the transaction is voidable transaction. The plaintiff never prayed for avoiding the sale deed. Accordingly, there is no question of limitation arises. The simple suit for partition has been filed. When the plaintiff is not avoiding the sale deed the Court cannot grant partition of the property which is transferred by the father of the plaintiff through the registered sale deed. Secondly, even if the paragraph 7(A) of the plaint is treated as a relief then also it will be barred by law of limitation in view of Article 59 of the Limitation Act.

21. Now let's examine in another way i.e. third way. According to the plaintiff, the sale deed is obtained by playing fraud on defendant no.5, the father of the plaintiff and the sale deed is without any consideration and fabricated document. So far fraud is concerned, no particulars have been pleaded. So far passing of consideration is concerned, the father, defendant no.5, is not denying passing of consideration. Further no evidence has been adduced that not a single farthing was paid towards consideration. On the contrary, evidence was produced by the plaintiff to the effect that inadequate consideration was paid. Again this case was not pleaded. Therefore, it becomes clear that with regard to sale deed there is



only pleading to the effect that sale deed is fraudulently obtained, sale deed is fabricated, sale deed is without consideration. The evidences have been produced contrary to the pleadings. The Hon'ble Supreme Court in the case of **Bachhaj Nahar Vs. Nilima Mandal and Ors, (2008) 17 Supreme Court Cases 491 = A.I.R. 2009 Supreme Court 1103 (Bachhaj Nahar Vs. Nilima Mandal and Ors)** has held as follows:-

“The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly define and to prevent cases being expanded or grounds being shifted during trial. The object of issues is to identify from the pleadings the questions or points required to be decided by the Courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not founded in the plaint, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim for relief.”

22. In the present case, there is no pleading regarding either age of the plaintiff or inadequacy of the consideration or the particulars of fraud. There is also no pleading about undue influence or its particulars but the trial court recorded the finding that sale deed was obtained by playing undue influence. Therefore, the Court has made a third case.

23. In the aforesaid decision **Bachhaj Nahar** (supra) itself the Supreme Court has held as follows:



“No amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief. Only in exceptional cases, can this general rule be deviated from, if the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issues. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. Again where neither party puts forth such a contention, the court cannot make out such a case not pleaded, suo motu”.

24. In view of this decision the Court cannot make a third case. In the present case, as stated above, neither there is pleading nor any issue was framed with regard to fraud, undue influence, passing of consideration, age of plaintiff, inadequacy of consideration. However, evidences were produced and findings have been recorded by the court below.

25. The Hon’ble Supreme Court in the case of **Union of India Vs. Ibrahim Uddin & Anr., 2013 (1) PLJR 48 (SC)** considering all the earlier decisions of the Supreme Court at paragraph 69 (vii) held as follows:-

“(vii)- The court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings 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.”

26. The learned Senior Counsel, Mr. P.N. Shahi relied upon the decision of Hon'ble Supreme Court, **A.I.R. 1987 Supreme Court 1242 (Ram Sarup Gupta Vs. Bishun Narain Inter College and others)**. In the said decision also it is held as follows:-

“It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the parties in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the parties should stake the essential material facts so that the other party may be taken by surprise. The pleadings however, should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities”.

27. In the present case, at out hand, when there is no particulars of fraud or undue influence and no pleading as stated above, there is no question of liberal construction or pedantic approach arises. Here, the fact is entirely different.

28. So far the decisions relied upon by the respondents mentioned above i.e. **A.I.R. 1963 Supreme Court 884 (Nedunuri Kameswaramma Vs. Sampati Subba Rao)** and **1995 (2) PLJR 563 (Bhaskar Ganguly & Anr. Vs. Sujit Kumar Gupta)** are concerned, it may be mentioned here that those decisions speak

about non-framing of issue which will not vitiate the judgment if the parties entered into trial knowing the case of both parties. Here, since there is no pleading, there is no question of knowledge to the other side arises. Further neither there is pleading nor there is issue, therefore, both the decisions are not applicable.

29. So far the other decisions i.e. **A.I.R. 1952 Supreme Court 47 (Kedar Lal Seal and another Vs. Hari Lal Seal)** and **A.I.R. 1966 Supreme Court 735 (Bhagwati Prasad Vs. Chandramaul)** are concerned, also it has been held that if substances of pleadings are there and both parties proceeded for trial knowing the stand of either side, no prejudice could be said to have been caused by non-skillful drafting of the pleading. Here, there is total absence of pleading, as such there is no question of knowing of the stand of the plaintiff by the defendant arises. For example, only “fraud” word has been used but no particulars have been pleaded then how the defendant will know the case of the plaintiff. It is pleaded that no consideration was paid but in the evidence the plaintiff adduced evidence showing that consideration amount is inadequate, which was not the stand of the plaintiff. Regarding “undue influence” neither there is pleading nor evidence but the Court recorded the finding. So far age of the plaintiff is concerned, there is no pleading nor issue. How the defendant will know the

stand of the plaintiff?

30. The admitted case of the parties is that both the parties have executed many sale deeds in favour of third persons treating the properties to be their own properties. The defendant no.5 has purchased some joint family property from Singheshwar by Ext.Ka/3, registered sale deed dated 22.04.1966. This sale deed is inter-se transaction. If there was no partition between the parties and the properties were joint then how one co-sharer will sell portion of the joint property to the other co-sharer. The defendant no.5 himself sold the property by registered sale deed to defendant no.4 in the year 1961 by registered sale deed, which is disputed by the plaintiff. This sale deed is also inter-se transaction. The present suit has been filed in the year 1972.

31. A Division Bench of this Court in **A.I.R. 1977 Patna 59 (Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwari and others)** has held that inter-se transaction between the parties is strong piece of evidence to prove partition. Here, since long the parties are selling the property to third person by executing many registered sale deeds, there is also inter-se transaction. These facts clearly indicate that there had already been partition between the parties. The court below did not consider these aspects of the matter and only on the basis of oral evidence to the effect that there had



been no partition came to the conclusion that the plaintiff has proved his subsisting title. In my opinion, so far this finding is concerned, is unsustainable in the eye of law. As the court below came to this conclusion on the basis of its finding that the plaintiff was minor on the date of execution of the sale deed although it is not pleaded by the plaintiff nor issue was framed, the sale deed is bad for undue influence although there is no pleading or issue on this point, that the sale deed is bad for inadequacy of consideration although it was neither pleaded nor issue was framed, and the court below further placed a wrong onus on the defendant to prove passing of consideration without considering the settled principles of law laid down by the supreme Court discussed above that the burden was on the plaintiff to prove contrary. Further the plaintiff never prayed for avoiding the sale deed.

32. The witness examined by the plaintiff (P.W.17) is the plaintiff himself. P.W.17 has only stated that there had been no partition. It is settled principles of law that there is presumption that the Hindu family is joint unless the contrary is proved. Therefore, it is for the defendant to prove previous partition. As stated above, inter-se transactions have been produced by the defendants-appellants. The witnesses examined by the defendants D.W.4, and D.W.16 have stated that there had been partition between the parties.

From perusal of the evidences of the witnesses of the plaintiff, it appears that the witnesses have deposed regarding the age of the plaintiff on the date of execution of the sale deed and possession of the property.

33. Ext.P/11 is the sale deed in question wherein there is clear recital that consideration amount was paid. During trial defendant no.5 although filed written statement but in support of his pleading in the written statement he was never examined. The plaintiff in his evidence admitted that he never asked his father to come to Court for his examination as witness. Now, therefore, there is no denial by the person who executed the sale deed about receiving the consideration amount. In such circumstances, in presence of the vendor of the appellant a third person may be the son of vendor cannot be allowed to challenge passing of consideration amount. His only pleading is that the sale deeds is without consideration. So far inadequacy of consideration is concerned, I have already held that neither there is pleading nor there is issue.

34. In view of my above discussions I find that the defendants have been able to prove that there had already been partition between the parties. The plaintiff failed to prove that there is unity of title and possession, as such he is not entitled for partition of the suit property. The plaintiff has not prayed for any relief

regarding the sale deed executed by his father in favour of defendant no.4, as such he is not entitled for partition of the property covered under the sale deed. The court below without there being any pleading and evidence and issue made a third case and wrongly decreed the plaintiff's suit. Therefore, the finding of the court below is hereby reversed. Both points are answered in favour of appellants.

35. In the result, this first appeal is allowed. The impugned judgment and decree are hereby set aside. The plaintiff's suit 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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