IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.103 of 1985

Against the judgment and decree dated 22.01.1985 passed by 3rd Additional Subordinate Judge, Muzaffarpur in Title Suit No.62 of 1981.

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Raj Kishore Chowdhary & Anr.

.... Defendants-Appellants

Versus

Most.Gulabji Devi & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellants : Mr. Prabhunath Roy, Sr. Advocate.
Mr. Uday Shankar Sharan Singh, Advocate.

For the Respondents : None.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 05-01-2016

The defendants have filed this First Appeal against the judgment and decree dated 22.01.1985 passed by the learned 3rd Additional Subordinate Judge, Muzaffarpur in Title Suit No.62 of 1981 whereby the court below decreed the suit filed by the plaintiffs-respondents under section 77 of the Indian Registration Act.

2. The plaintiffs-respondents filed the aforesaid Title Suit No.62 of 1981 under section 77 of the Indian Registration Act praying for a relief for directing the sale deed alleged to have been executed by Late Tepu Mishra on 10.11.1978 be registered.

3. The plaintiffs claimed the aforesaid relief alleging that

the suit property measuring 4 acres 4 decimals belonged to Tepu Mishra. Tepu Mishra died unmarried. His only sister Shyam Sundari was residing at her husband's house and sometimes she used to come to her brother Tepu Mishra and used to look after him. Tepu Mishra had obtained some loan for treatment, therefore, he negotiated with the plaintiffs to sell the suit property. Rs.4,000/- as earnest money was paid to him and a *mahadanama* was executed on 28.07.1978. Tepu Mishra promised to execute the sale deed within six months and put the plaintiffs in possession of the suit property. Since he was ill and was getting weaker and weaker, his sister Shyam Sundari Devi requested him to pay substantial part of consideration amount to her. Tepu Mishra asked the plaintiffs to advance Rs.6,000/- and accordingly plaintiffs paid the same out of the consideration. Tepu Mishra then granted a receipt on 10.11.1978 at 10.00 a.m. in token of payment of Rs.6,000/-. The sale deed was also scribed on 10.11.1978. Tepu Mishra put his L.T.I. after understanding the contents of the sale deed. The witnesses also signed and attested the sale deed. Because Tepu Mishra was unable to go to the Registry Office on account of his weakness, therefore, it was decided to register the documents on commission. The balance consideration amount of Rs.2,000/- was also paid to Tepu Mishra and he handed over the sale deed to the plaintiff no.1 for presentation before the Sub-Registrar. On commission the Sub-Registrar was called and plaintiff no.1 presented the sale deed before Sub-Registrar on 11.11.1978. However, by the time Sub-Registrar reached the house of Tepu Mishra, he had already died suddenly because of heart failure. Therefore, the Sub-Registrar, Sakra made an endorsement to that effect and returned.

4. The plaintiff filed an application under section 35 of the Indian Registration Act praying for direction to Most. Shyam Sundari to admit the sale deed as she was the only heir of Tepu Mishra. However, in spite of service she did not appear before the Sub-Registrar but the Sub-Registrar refused to register the sale deed. Appeal was filed but the said appeal was also dismissed, thereafter the plaintiff had filed the suit. According to the plaintiff, the receipt, *mahadanama* and sale deed were executed by Tepu Mishra while he was in sound state of mind and body.

5. The original defendant, Shyam Sundari Devi appeared and filed a contesting written statement denying all the allegations. She died and then interveners-defendants filed application and then they also filed written statement adopting the stand taken by Shyam Sundari Devi in her written statement. Their main defence is that Shyam Sundari was residing with her brother Tepu Mishra and was

looking after him. Tepu Mishra did not take any loan or debt nor there was occasion for the same. He never negotiated with the plaintiff for sale of land mentioned in the sale deed nor ever he received any amount of consideration from the plaintiff much less the earnest amount of Rs.4,000/-, Rs.6,000/- and Rs.2,000/- nor ever he executed *mahadanama* nor he put his L.T.I. on the sale deed or the receipt or the *mahadanama*. All the allegations made by plaintiff regarding negotiation, execution of sale deed, *mahadanama* and also granting of money receipts are denied.

6. Further the defence is that Tepu Mishra in fact died on 10.11.1978 in the morning and ten days prior to his death he was ill and was unable to understand things and was senseless before couple of days of his death. All other allegations were denied by the defendants. It is further stated that all the documents are forged and fabricated documents made by plaintiffs with a view to grab the property of Tepu Mishra. The witnesses and the identifier of the sale deed are all family members of the plaintiffs. The death certificate granted by the Sub-Registrar of gram panchayat is forged. The interveners are the husband and son of Ganga Devi, who was the daughter of Shyam Sundari. According to them, on the death of Shyam Sundari they are coming in possession of the property.

7. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues:

(i) Is the suit as framed maintainable?
(ii) Is the suit barred by the law of limitation waiver, estoppel and acquiescence?
(iii) Have the plaintiffs got any cause of action or right to sue?
(iv) Is the genealogical table given by the intervener defendants wrong?
(v) Are the disputed deeds namely mahadnama, receipt and sale deed dated 28.07.1978, 10.11.1978 and 10.11.1978 respectively said to have been executed by the deceased Tepu Mishra valid genuine, legal and for consideration?
(vi) Have the plaintiffs or the defendants acquired title and possession in respect of the lands in question on the basis of the disputed sale deed dated 10.11.1978 or the deed of gift dated 06.11.1982 respectively?
(vii) Are the plaintiffs entitled to decree as claimed for?
(viii) To what other relief or reliefs, if any, are the plaintiffs entitled?

8. After trial the learned court below on the basis of the evidences came to the conclusion that the money receipt, *mahadanama* and sale deeds are genuine documents executed by Tepu Mishra and consideration amount has already been paid and that he died on 11.11.1978. Accordingly, decreed the plaintiffs' suit.

9. Learned senior counsel Mr. Roy appearing on behalf of the appellants submitted that the finding of the court below regarding date of death of Tepu Mishra is based on inadmissible

evidence as such is liable to be set aside. The plaintiffs filed death certificate, which has been marked as Ext.7, although it was inadmissible in evidence without examination of the person, who granted the said certificate. This Ext.7 is not the certified copy of Birth and Death Register nor the original Birth and Death Register was called by the Court. The court below wrongly held that Ext.7 is the public document. Likewise the endorsement made by Sub-Registrar in the sale deed sought to be registered has also been held to be public document and on the basis of these evidences the court below wrongly recorded the finding that Tepu Mishra died not on 10.11.1978 but on 11.11.1978.

10. The learned senior counsel further submitted that the appellants produced the certificate of death granted by the doctor, which has been marked as Ext.D and the doctor has been examined as D.W.7, who proved the fact that Tepu Mishra died on 10.11.1978 but the court below discarded these evidences on surmises and conjectures. Likewise the court below observed that on the basis of interestedness the plaintiffs' witnesses cannot be discarded but at the same time on the same ground discarded the evidences of the witnesses examined by the defendants-appellants thereby the court below adopted double standard of appreciation of evidence. The defendants specifically denied the L.T.I. of Tepu

Mishra on all the documents but the court below held that the documents are genuine and L.T.I has been given by Tepu Mishra on money receipt, *mahadanama* and sale deed without there being any supporting evidence and without examination of expert of thumb impression.

11. The learned senior counsel further submitted that there is no evidence of payment of either Rs.4,000/- or Rs.6,000/- or Rs.2,000/- but the court below wrongly recorded the finding that consideration amount has already been paid. The learned senior counsel further submitted that the plaintiffs have not given time of death of Tepu Mishra. According to the plaintiffs, the sale deed was executed on 10.11.1978 then when they applied for commission and when it was approved by the Sub-Registrar and when the Sub-Registrar visited the house of Tepu Mishra because admittedly the Sub-Registrar made endorsement only on 11.11.1978 to the effect that Tepu Mishra had died. There is no explanation at all but the court below held that Sub-Registrar is a government official and it is not expected from him that he would have made false endorsement and since the endorsement is made by him, it is public document which is contrary to law and based on surmises and conjectures. On these grounds the learned senior counsel submitted that the first appeal be allowed and the impugned judgment and

decree be set aside.

12. Nobody appeared on behalf of the respondents.

13. In view of the above contentions of the learned senior counsel for the appellants the following points arise for consideration in this First Appeal:

(A) Whether Tepu Mishra died on 11.11.1978 as claimed by the plaintiffs or he died on 10.11.1978 as claimed by the defendants?
(B) Whether the sale deed (Ext.2), the money receipt (Ext.3) and the *mahadanama* are genuine and executed by Tepu Mishra after receiving the full consideration amount and whether the impugned judgment and decree are sustainable in the eye of law?

14. **Point no.(A)** : Admittedly the suit property consists of 4 acres 4 decimals, which is the exclusive property of Tepu Mishra. According to the plaintiffs, he entered into an agreement to sell the property and *mahadanama* was executed on 28.07.1978. Rs.4,000/- was paid as earnest money. Again after receipt of Rs.6,000/- a money receipt was granted on 10.11.1978 at about 10.00 a.m. and a sale deed was also scribed on 10.11.1978 and this sale deed is sought to be registered. According to the appellants, the said *mahadanama*, the money receipt and the sale deed were never executed by Tepu Mishra nor he ever put his L.T.I. on the said documents. In fact Tepu Mishra died on 10.11.1978.

15. In support of their cases the parties have adduced

evidences. The plaintiffs produced death certificate granted by the Registrar-cum-Panchayat Sewak, which has been marked as Ext.7. It appears that this Ext.7 and other documents produced by the plaintiffs have been received back by the plaintiffs in the court below itself and nobody appeared on behalf of the plaintiffs-respondents, as such these documents are not available on the record but from perusal of the impugned judgment, it appears that this Ext.7 is the certificate of death granted by the Registrar-cum-Panchayat Sewak. This is the submission of the learned senior counsel for the appellants also and the grounds taken in the memo of appeal are also the same. In the impugned judgment at paragraph 14 the court below has observed that this document has been issued by the Registrar-cum-Panchayat Sewak. Now, therefore, admitted position is that it is a certificate granted by Panchayat Sewak and Ext.7 is not the certified copy of Birth and Death Register. This Birth & Death Register is maintained in the panchayat according to the Birth & Death Registration Act, 1969. Therefore, this register is a public document but here the plaintiffs have not filed the certified copy of the said register nor they ever took any step to call for the register from the panchayat office but a certificate has been filed, which was granted by Panchayat Sewak. Therefore, this certificate cannot be termed as a public document. Since it is not a public document and is only a certificate issued by Panchayat Sewak, it was incumbent on the plaintiffs to have examined the Panchayat Sewak, who granted the certificate but the Panchayat Sewak has also not been examined as witness. In my opinion, therefore, this Ext.7 is inadmissible in evidence as it is not a public document and merely a certificate.

16. The plaintiffs also produced Ext.2, the sale deed and proved the endorsement of Sub-Registrar on the back of the sale deed in support of the date of death of Tepu Mishra. It may be mentioned here that Ext.2, the alleged sale deed, is not a registered sale deed. This suit itself has been filed by the plaintiffs for registering this Ext.2. Here, according to the plaintiffs' case, the receipt was granted on 10.11.1978 at about 10.00 a.m. and then sale deed was scribed. Further on 11.11.1978 the Sub-Registrar went to the house of Tepu Mishra and found him dead, therefore, endorsement has been made by him. So far this endorsement is concerned, also it may be mentioned here that the Sub-Registrar was not examined as witness in support of his endorsement. Ext.2 is not a public document and likewise the endorsement is also not a public document. In such circumstances, it was the duty of the plaintiffs to have examined the Sub-Registrar in support of the fact that in fact he found Tepu Mishra died on 11.11.1978. No time has

been mentioned as to when Tepu Mishra died.

17. P.W.1, who is one of the plaintiffs, has stated that the sale deed was scribed at the house of Tepu Mishra. On that day itself he granted receipt of Rs.6,000/- after execution of the sale deed and after receiving Rs.6,000/-. Subsequently balance Rs.2,000/- was also paid and then steps were taken for registering the sale deed on commission. On 11.11.1978 the Sub-Registrar came but before he reached the house of Tepu, Tepu Mishra had already died.

18. P.W.2 is plaintiff No.2. His evidence is in the same line as that of P.W.1. However at paragraph 5, PW.1 has stated that at the time of scribing the sale deed Rs.6,000/- was paid and receipt was granted by Tepu Mishra whereas P.W.2 at paragraph 3 has stated that in the morning Rs.6,000/- was paid to Tepu Mishra and after scribing the sale deed Rs.2,000/- was paid. P.Ws.3 , 4 and 5 all have stated the same thing. However as stated above there are contradictions regarding payment of Rs.2,000/-. There is no explanation as to why Rs.2,000/- was paid after scribing the sale deed although it was not presented for registration on 10.11.1978. If it was not presented on 10.11.1978 why separate receipt for Rs.2,000/- was not obtained by the plaintiffs from Tepu Mishra because Rs.6,000/- was also paid at the time of scribing the

document Ext.2 for which he obtained receipt but for Rs.2,000/- no receipt has been obtained.

19. Further although the witnesses examined as discussed above have stated that steps were taken for registering the deed on commission but nothing has been produced by the plaintiffs as to when they took steps for commission. According to the plaintiffs themselves, the sale deed was scribed on 10.11.1978 and on 11.11.1978 Sub-Registrar went to the house of Tepu Mishra but no time is mentioned. No order of Sub-Registrar allowing the application for registration on commission has been produced. Only orally the witnesses, who are either the parties or closely related and deeply interested in the suit, have deposed that Sub-Registrar came but by that time Tepu had died. It is admitted fact that the deceased Tepu was very weak because of old age and his condition was such that he died but according to the plaintiffs, he died on 11.11.1978 whereas according to the defendants, he died on 10.11.1978.

20. Now if the plaintiffs' case is relied then what was the condition of Tepu Mishra on 10.11.1978 has not been explained anywhere either in the pleading or in the evidence, whereas it is the evidence of the defendants that the deceased Tepu was seriously ill and even senseless prior to his death because of old age. In such

view of the matter, can it be relied upon by the Court of justice that his mental condition was good on 10.11.1978 and he executed the sale deed after receiving the balance consideration amount? No doubt, the plaintiffs' witnesses have deposed to this effect but no reliable evidence has been produced regarding the date of death. The documentary evidences produced are not admissible nor reliable documents. The oral evidences are also shaky. None of the witnesses have explained as to when Tepu Mishra died and when any application was filed for registration of Ext.2 on commission and what was the order and when Sub-Registrar reached the house of Tepu Mishra and prior to that when Tepu died.

21. So far the endorsement made by Sub-Registrar is concerned, he cannot be said to be a competent person to make any endorsement regarding the time and date of death of Tepu Mishra. He has not been examined, therefore, his endorsement cannot be read in evidence against the defendants. It is not the endorsement that when he reached in the house of Tepu Mishra, Tepu was alive and then in his presence Tepu Mishra died.

22. On the other hand, the defendants have produced Ext.D, the certificate granted by the doctor who was treating Tepu Mishra, who has been examined as D.W.7. He has fully supported that Tepu was under his treatment and he died on 10.11.1978. The

evidence of this witness has been discarded by the Court on the ground that he is an Ayurvedic doctor and he is unable to say the boundary of his clinic. Ext.C is the prescription granted by this doctor, D.w.7. The court below observed that in the prescription the address is different whereas in the evidence the address of his clinic has been mentioned differently and, therefore, he did not rely on the prescription or the death certificate granted by D.W.7. In my opinion, the approach of the court below and the reason assigned for disbelieving these evidences are not tenable at all. D.W.4 has also stated that ten days prior to death Tepu Mishra was seriously ill. In his evidence he has stated that the doctor did not visit him. The court below compared the statement of doctor and the statement of this witness and held that when according to D.W.4 the doctor did not visit Tepu Mishra, the documentary evidences produced by the defendants cannot be relied upon. In my opinion, this reason assigned by the court below is not tenable. It may be mentioned here that the doctor might not have visited Tepi Mishra in presence of D.W.4 but then can it be said that the prescription and the certificate granted by D.W.7, who is admittedly a doctor, is forged one. From perusal of evidence of D.W.7 at paragraph 2, it appears that he has stated that he was treating Tepu Mishra by visiting him in his house and on the date of death he had gone there for his treatment but he found him dead and then granted the certificate. This is his statement in cross-examination at paragraph 7 also. I, therefore, find that the learned court below wrongly discarded the evidence of this witness, D.W.7 and wrongly relied upon Ext.7 and endorsement in the back of Ext.2.

23. In view of my above discussion, I find that the learned court below has wrongly relied upon on the inadmissible evidences and discarded admissible evidence and has wrongly recorded the finding that Tepu Mishra died on 11.11.1978. In fact, I find that Tepu died on 10.11.1978 itself. Accordingly, Point No.(A) is answered in favour of the appellants.

24. **Point No.(B)** : So far this point is concerned, while deciding Point No.(A) I have already discussed the evidences on this point also, therefore, it is not repeated herein.

25. I, therefore, on the basis of the discussed evidence discussed above find that there is no reliable evidence in support of the fact of payment of Rs.2,000/- to Tepu Mishra prior to his death.

26. It appears that the court below found that since it is the case of the defendants that Tepu Mishra was seriously ill ten days prior to his death, the execution of *mahadanama*, Ext.1, is not disputed. So far this observation is concerned, I find that it is nothing but wrong approach because that is clearly denied by the

defendants that *mahadanama* was not executed by Tepu. It further appears that one expert was examined, who compared L.T.I. of Tepu Mishra on *mahadanama* (Ext.1) with the disputed L.T.I. on Exts.2 and 3. The court below relied upon this opinion of the expert, which was filed in the registration case before Registrar, and held that it is the L.T.I. of Tepu Mshra. In my opinion, this approach is also wrong because it is the specific case of the defendants that none of these documents were executed by Tepu and L.T.I. of Tepu is not on these documents. Therefore, the expert even if appointed in Registration case has compared the disputed L.T.I. inter-se, which is not relevant. Moreover, in the present case, the expert has not been examined as witness, therefore, also the report of the expert is inadmissible in evidence but the learned court below has wrongly relied upon the report. It further appears that the said report was filed by the plaintiffs in the registration case after obtaining the report of the expert and in fact the expert was not appointed by the Registrar for comparison.

27. In view of the above facts and circumstances I find that the plaintiffs failed to prove the payment of full consideration amount and also failed to prove that *mahadanama* (Ext.1), the sale deed (Ext.2), and the money receipt (Ext.3) have been executed by Tepu Mishra and these documents bear the L.T.I. of Tepu Mishra.

The finding of the court below on this point also is hereby reversed and it is held that these documents are not genuine documents. Therefore, the plaintiffs are not entitled for the grant of decree for directing registration of Ext.2, the sale deed.

28. In the result, this First Appeal is allowed. The impugned judgment and decree are set aside and the plaintiffs' 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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