

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.359 of 1988

(Against the judgment and decree dated 21.07.1988 passed by the
Sub-Ordinate Judge, 6th, Patna in Title Suit No. 31 of 1970/203 of
1986.)

Dharam Nath Mishra

.... Defendant-Appellant

Versus

Smt. Malti Devi & Ors.

.... Plaintiffs-Respondents.

Rajendra Singh & Ors.

.... Defendants-Respondents

Appearance :

For the Appellant/s : Mr. Rajesh Kumar Sinha, Advocate
For the Respondent/s : Mr. Dronacharya, Advocate

CORAM : HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT

Date: 30th August, 2016

The son of defendant No.4 has filed this first appeal against the judgment and decree dated 21.07.1988 passed by the learned Sub-Ordinate Judge-VI, Patna in Title Suit No. 31 of 1970/203 of 1986, whereby the learned court below dismissed the plaintiff's suit for partition.

2. The plaintiffs filed the suit claiming half share in the suit premises alleging that original-plaintiff, Kalwati Devi and defendant No.1, Chandra Keshaw Singh are daughter and son of late Bhagwan Rai @ Singh. The plaintiff was married with Sri

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Niwas Singh. Father of the original-plaintiff, namely, Bhagwan Rai, died on 06.09.1963 leaving behind the suit properties and, therefore, the plaintiff has got half share in the suit property. Partition was demanded but the brother of the plaintiff i.e. defendant No. 1 refused to partition. Hence, the suit for partition was filed.

3. The original plaintiff, Kalawati Devi, died during the pendency of the suit and her two daughters have been substituted.

4. The original suit was decreed *ex-parte* on 07.05.1971. Defendant Nos. 1 and 2 filed application under Order 9 Rule 13 C.P.C. being Miscellaneous Case No. 20 of 1972, which was allowed on 15.03.1978. During this period, a gift deed was executed by original plaintiff, Kalawati Devi, in favour of Triloki Nath Mishra, defendant No.4, on 10.12.1977. Thereafter, Triloki Nath Mishra was added as defendant No.4 in the suit.

5. Defendant Nos. 1 and 2 filed joint written statement. Defendant No.3, Bharat Devi, widow of Bhagwan Rai, also filed separate written statement. Defendant No.4, Triloki Nath Mishra, also filed separate written statement supporting the case of the plaintiffs. According to his case, in fact, Bhagwan Rai had orally gifted the property covered under the gift deed during his life time and when after the death of Bhagwan Rai, gift deed was not

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executed by defendant No.1, the plaintiff executed the gift deed in his favour and since then, he is in possession of the gifted property.

6. The main contesting defendant Nos. 1, 2 and 3 alleged that Jagjivan Rai, the common ancestor, had two sons, namely, Bhagwan Rai and Ramji Rai. Bhagwan Rai died leaving behind his widow, only one son, namely, Chandra Keshaw Singh, defendant No.1 and defendant No.2, who is son of defendant No.1. Ramji Rai had a daughter, Kalawati Devi, who is the original plaintiff. Jagjivan Rai died soon after the survey leaving behind his two sons, Bhagwan Rai, father of defendant No.1 and Ramji Rai, father of the original plaintiff-Kalawati Devi. On the death of Jagjivan Rai, Bhagwan Rai became the '*Karta*'. However, subsequently, Ramjee Rai also died in the year 1935-36, therefore, the only survivor, coparcener, Bhagwan Rai came in possession of entire property by rule of survivorship. The widow of Ramji Rai also died 9 years after the death of Ramjee Rai. Since the plaintiff Kalawati Devi was minor, she was brought up and was married at the expenses of the joint family with Sri Niwas Singh, who is a lawyer practicing in Civil Court Patna. Father of Sri Niwas Singh was also an Advocate. Since he was an Advocate, he was conducting the litigations of the family of the defendants and during that period, he came in custody of some documents. Because Kalawati Devi was daughter of Ramji

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Rai and not the daughter of Bhagwan Rai, she has no right to claim partition.

7. The further case is that Bhagwan Rai died in the year 1963 leaving behind his widow, Bharat Devi, defendant No.3 and only son, namely, Chandra Keshaw Singh, defendant No.1 and great grand son, who came in possession of the suit property according to Hindu Succession Act. Defendant No.3, Bharat Devi, has got 8 Ana share and defendant No.1 has got 8 Ana share in the property. Defendant No.3 out of love and affection gifted her 8 Ana share on 23.07.1979 in favour of her daughter-in-law, Smt. Dulari Devi. The plaintiff has got no interest in the property.

8. On the basis of these pleadings of the parties, the learned court below framed the following issues;

- “(i) *Is the suit as framed maintainable ?*
- (ii) *Have the plaintiffs got cause of action for the suit ?*
- (iii) *Is the suit barred by principle of estoppel, acquiescence, waiver, law of limitation and adverse possession ?*
- (iv) *Whether Jagjiwan Rai had another son namely Ramji Rai as alleged by contesting defendants ?*
- (v) *Whether Kalawati Devi original plaintiff No.1 was the daughter of alleged Ramji Rai or was she the daughter of Bhagwan Rai ?*
- (vi) *Whether Bharat Devi was the widow of Bhagwan Rai ?*
- (vii) *Whether deed of gift executed by original plaintiff No.1 is in favour of Triloki Nath Mishra dated 10.12.1977 is a valid and genuine document and binding on the defendant No.1 to 3 ?*
- (viii) *Whether deed of gift executed by Smt. Bharat*

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Devi, defendant No.3 in favour of Dulari Devi, wife of defendant No.1 is a valid and genuine document ?

(ix) Is the plaintiff entitled to a decree for partition of the suit properties, if so for what share and in respect of which properties ?

(x) To what relief or reliefs, if any, is the plaintiff entitled?"

9. The court below dismissed the suit recording finding that Kalawati Devi was the daughter of Ramji Rai and not the daughter of Bhagwan Rai.

10. The learned counsel for the appellant submitted that the court below has not properly appreciated the evidences available on record and has wrongly recorded the finding that Kalawati Devi was the daughter of Ramji Rai and not the daughter of Bhagwan Rai. According to learned counsel, the name of mother of plaintiff- Kalawati Devi was Sharda Devi and Sharda Devi was the widow of Bhagwan Rai but the learned court below did not rely on this fact. In fact, the defendants themselves admitted the fact that Kalawati Devi was brought up and got married by the defendants, which clearly indicates that she is the daughter of Bhagwan Rai. Jagjivan Rai had only one son, which is the specific case of the plaintiff. The defendants only to deprive the plaintiff made a false case that Ramji Rai was also the second son of Jagjivan Rai. In the registered gift deed, the plaintiff, Kalawati

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Devi clearly asserted that she is the daughter of Bhagwan Rai and she delivered possession of the gifted property to defendant No.4 and the present appellant is the son of defendant No. 4. After death of defendant No. 4, the present appellant is coming in possession of the suit property. If Kalawati Devi was not the daughter of Bhagwan Rai, she could not have delivered possession to the donee. In support of possession, these defendants-appellants produced unimpeachable evidences but by mis-appreciating the evidences, the trial court dismissed the plaintiff's suit.

11. Learned counsel further submitted that defendants never raised any objection nor they have challenged the registered gift deed, which is of the year, 1979. At the time of hearing of the first appeal, the learned counsel placed the evidences in support of the case. On these grounds, the learned counsel for the appellant prayed for setting aside the impugned judgment and decree and to decree the plaintiffs' suit for partition to the extent of half share.

12. On the other hand, learned counsel for the respondents submitted that the plaintiff did not plead nor any case has been made out that the name of wife of Bhagawan Rai was Sharda Devi and the plaintiff is the daughter of Sharda Devi. No case has been pleaded that Bharat Devi is not the wife of Bhagwan Rai rather she admitted Bharat Devi to be the wife of Bhagwan Rai before the

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court below. The original plaintiff claimed that she is the daughter of Bhagwan Rai but at the same time, she discloses that the name of her mother is Sharda Devi. The defendants adduced evidences, documentary and oral, to show that, in fact, she (Kalawati Devi) is the daughter of Ramji Rai, who was the second son of Jagjivan Rai. The defendants have clearly proved that Jagjivan Rai had second son, namely, Ramji Rai and on the death of Ramji Rai, the original plaintiff, Kalawati Devi was brought up by Bhagwan Rai and she was married. According to learned counsel for the defendants not a single witness has been examined by the plaintiff according to Section 50/60 of the Evidence Act in support of the case that the original plaintiff was the daughter of Bhagwan Rai. The witnesses examined by the plaintiff to prove the relationship of Kalawati Devi with Bhagwan Rai are inadmissible in evidence in view of Section 50/60 of the Evidence Act. On the contrary, the defendants have examined witnesses in support of the second son of Jagjivan Rai and the evidences are admissible and, therefore, the court below, rightly relying on the evidences, has held that the plaintiff, Kalawati Devi was the daughter of Ramji Rai. In such circumstances, this first appeal be dismissed with costs.

13. In view of the above rival contentions of the parties, the point, arises for consideration in this first appeal, is whether, the

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original plaintiff has been able to prove that she was the daughter of Bhagwan Rai and is entitled to half share in the property or whether, the defendants have been able to prove that she was the daughter of Ramji Rai. As such, she is not entitled to any share as Ramji Rai died in the year 1935-36.

14. The plaintiffs clearly pleaded that Jagjivan Rai had only son, namely, Bhagwan Rai and plaintiff No.1, Kalawati Devi was the daughter of Bhagwan Rai, who had one son, who is defendant No.1. On the contrary, the defendant's case is that Jagjivan Rai had another son, namely, Ramji Rai. Ramjee Rai died in the year 1935-36 leaving behind her daughter, Kalawati Devi, who is plaintiff No.1. At the relevant point of time, she was minor, therefore, she was brought up by the father of defendant No.1, Bhagwan Rai and she was married. Since Ramji Rai died in jointness with his brother Bhagwan Rai, the plaintiff, Kalawati Devi has got no share in the property. In view of these pleadings of the parties, unless the plaintiff proves that she is daughter of Bhagwan Rai, she will not be entitled to a share in the property. If she is held to be the daughter of Ramji Rai then, because Ramji Rai died in the year 1935-36 and at that time, his daughter was not an heir and, therefore, she is not entitled to inherit the property of her father. Now, therefore, the main point is whether she is the

daughter of Bhagwan Rai or not. In support of their respective cases, the parties have adduced evidences.

15. It appears that earlier the suit was decreed *ex-parte* in the year 1971. The defendants appeared and filed Miscellaneous Case No. 20 of 1972 under Order 9 Rule 13 C.P.C. After hearing both the parties, the said miscellaneous case was allowed on 15.03.1978 and the *ex-parte* judgment and decree was set aside. During the pendency of this miscellaneous case, the original plaintiff, Kalawati Devi executed a registered gift deed dated 10.12.1977 in favour of Triloki Nath Mishra, defendant No.4 and the present appellant is the son of Triloki Nath Mishra. Therefore, if it is held that Kalawati Devi was the daughter of Bhagwan Rai then the appellant, who is the donee, will get title with respect to the property gifted by Kalawati Devi, but, it is held that Kalawati Devi is the daughter of Ramji Rai then naturally the gift deed will be a void deed and it will not confer any title of the appellant. Now, let us consider the evidences on the point formulated.

15.1 P.W.-1 is Kalwati Devi herself. She has stated in her evidence as pleaded in the plaint. She further stated that the name of her mother was Sharda Devi. It may be noted here that no such case is pleaded in the plaint. P.W.-3 is her husband and he also stated that the name of mother of Kalawati Devi was Sharda Devi.

Kalawati Devi, in her evidence, stated that the funeral ceremony of Sharda Devi was performed at the bank of *Sone* river in village Chhitnawa, whereas according to P.W.-3, the funeral ceremony was performed at Bansh Ghat, Patna.

15.2. P.W.-2 no doubt has supported the pleading of the plaintiff regarding her parentage but, at the same time, he expressed his ignorance about the second son of Jagjivan Rai. He is unable to give the names of either brother-in-law of Bhagwarn Rai or father-in-law or even the in-laws village of Bhagawan Rai nor he is able to say the name of sons of Jagjivan Rai and Bhagwan Rai. Therefore, in no case, his evidence is admissible under Section 50 of the Evidence Act.

15.3 Likewise, from perusal of the evidence of P.W.-4, 6 and 7, I find that their evidence are also trustworthy to come to a conclusion that Kalawati Devi was the daughter of Bhagwan Rai. P.W.-6, in his evidence, has stated that Kalawati Devi herself plough the suit lands. This exaggerate statement has been made by this witness to show that she was in possession of the suit property. P.W.-7 clearly stated, in his evidence, that he cannot say how many sons Jagjivan Rai had? The plaintiff's husband, P.W.-3 has, in his evidence, clearly admitted that he was doing *Pairvi* in the cases of the family of Bhagwan Rai. Now, therefore, it cannot be ruled out

that the Exhibits- 1 and 2 came in his possession.

16. It will not be out of place to mention here that the plaintiffs have not produced any documentary evidence in support of the fact that Kalawati Devi was the daughter of Bhagwan Rai. So the documents, Exhibit-1(series), the rent receipts and Exhibit-2 is survey khatiyani are concerned, these documents have nothing to do with the parentage of Kalawati Devi.

17. As stated above, in the miscellaneous case filed under Order 9 Rule 13 C.P.C., Bharat Devi, defendant No.3 in the suit and mother of defendant No.1 was examined as witness as A.W.-4. Her evidence has been marked as Exhibit-J in the suit. In this Exhibit-J, Bharat Devi has specifically deposed that defendant No.1, Chandra Keshaw Singh is her only issue. She has also, specifically, stated that Kalawati Devi is the daughter of her *Gotni* and she had no daughter. In the cross-examination, she, specifically, stated that Ramji Rai was the brother of her husband, Bhagwan Rai and Kalawati Devi is the daughter of Ramji Rai. In the cross-examination by the plaintiff herself suggestion was given to Bharat Devi, A.W.-4 in miscellaneous case to the effect that Kalawati Devi is her own daughter to which Bharat Devi, categorically, denied. It may be mentioned here that in the evidence P.W.-1 and P.W.-3, as discussed above, stated that that the name of

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mother of Kalawati Devi was Sharda Devi. So far this case is concerned, there is no pleading nor this case was suggested to Bharat Devi, who was examined in the miscellaneous case. Therefore, at the stage of miscellaneous case, filed under Order 9 Rule 13 C.P.C., the plaintiff case was that she is the own daughter of Bharat Devi but, now, after restoration of suit, case has been developed and a new case has been made that the name of mother of plaintiff is Sharda Devi. It was not the case of any party that Bharat Devi is Sharda Devi. This is also not pleaded by the plaintiffs that the name of wife of Bhagwan Rai is Sharda Devi and not Bharat Devi. It is also not the case of the plaintiffs that Bhagwan Rai had two wives, Bharat Devi and Sharda Devi. Who is this Sharda Devi, there is no clarification. The Plaintiff-P.W.-1, in her evidence, at paragraph-7, has deposed that Bharat Devi was not the wife of Bhagwan Rai. This is the conduct of the plaintiff. At one place, she is saying that she is daughter of Bharat Devi, defendant No.3, but, in her evidence, in the suit, she is saying that Bharat Devi is not the wife of Bhagwan Rai. If this case is accepted then, how she is daughter of Bhagwan Rai as it is nowhere pleaded by the plaintiff that Bhagwan Rai had only one wife Sharda Devi and Bharat Devi is not his wife.

18. D.W.-1 is the ploughman of Bhagwan Rai. He has

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fully supported the case of the defendants that Jagjivan Rai had two sons Bhagwan Rai and Ramji Rai. Kalawati Devi is the daughter of Ramji Rai.

19. D.W.-2 and 5 are the villagers, who have also stated the same thing. In view of this evidence of the co-villagers, who have got special means of knowledge, being the co-villagers, their evidence is admissible under Section 50 of the Evidence Act. Reference may be made in this respect to the decision of the Supreme Court reported in *AIR 1959 SC Page 914*.

20. D.W.-7 is the defendant No.1. He has fully supported his case pleaded in the written statement. D.W.-8 is the *Fufa* of defendant No.1, brother-in-law of Bhagwan Rai and Ramji Rai, as such, he is closely related to plaintiff, Kalawati Devi and defendant No.1 and defendant No.3 also. He has also fully supported the case of the defendants that Kalawati Devi is the daughter of Ramji Rai.

21. In view of my discussion, I find that the plaintiff failed to prove that she was the daughter of Bhagwan Rai. I also find that the defendants have been able to prove that original plaintiff-Kalawati Devi was daughter of Ramji Rai, second son of Jagjivan Rai. Therefore, finding of the learned court below, on these points, is, hereby, confirmed. Ultimately, I, therefore, find that there is no unity of title and possession and, in fact, being the daughter of

Ramji Rai, Kalawati Devi had no right, title, interest and possession over the suit property. Therefore, she could not have transferred better title than what she had in the suit property. In fact, she had no title, therefore, could not have transferred title to the donee. Accordingly, the registered gift deed, executed by her, is void document, being executed by a person, who has got no title to the property.

22. In the result, this first appeal is, hereby, dismissed with costs of Rs. 10,000/- (Ten thousand rupees) to be paid by the appellant to the respondents within two months from the date of the judgment, failing which, the respondents are at liberty to realize the same through the process of Court.

Brajesh/-

A.F.R./N.A.F.R	
Uploading Date	02.09.2016
Transmission Date	NA

(Mungeshwar Sahoo, J.)