

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.250 of 1976

(Against the judgment and decree dated 02.04.1976 passed by 3rd Additional Sub Judge, Biharsharif, Nalanda in Title Suit No.81 of 1971/2 of 1976).

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Sabitri Devi & Ors.

Plaintiffs-Appellants

Versus

Sri Lakhan @ Ramjiwan Prasad & Ors.

Defendants-respondents

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Appearance :

For the Appellant/s : Mr. J.S.Arora, Sr. Advocate
Mr. Prateek Kumar Sinha, Advocate
Mr. Ram Swaroop Prasad, Advocate

For the Respondent/s : None.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
C.A.V. JUDGMENT

Date: 06-02-2017

(1) The plaintiffs-appellants have filed this First Appeal against the judgment and decree dated 02.04.1976 passed by the learned 3rd Additional Subordinate Judge, Biharsharif, Nalanda in Title Suit No.81 of 1971/2 of 1976 whereby the plaintiff's suit has been dismissed.

(2) The original plaintiff had filed the aforesaid suit claiming for partition of his half share in the suit property. The original plaintiff-appellant has died during the pendency of this First Appeal and his legal representatives have been substituted. The plaintiffs claimed half share alleging that Punit Mahto had three sons namely



Bandhu Mahto, Laldas Mahto and Gyan Chand Mahto who all have died. Laldas died unmarried and plaintiff is the son of Bandhu Mahto who died in 1969. The defendants are the branch of Gyan Chand Mahto who died in the year 1958-59 whereas Laldas died in 1971. Only 2.67 acres ancestral land was in possession of the joint family. Subsequently, 3 acres 15 $\frac{3}{4}$ decimals was acquired by the joint family out of joint family fund and therefore, the joint family was in possession of 5 acres 82 $\frac{3}{4}$ decimals. Although, the acquired properties are in the name of different members but the lands were acquired out of joint family fund. Three months prior to death of Laldas, he had lost his memories and was not in good estate of mind to carry on his day to day routine work. The properties are joint but the defendant refused to partition the property. The plaintiff has acquired some property out of his own income which has been described in Schedule IV which is not the joint family property and is not available for partition.

(3) The defendant Nos.1 and 2 contested the suit by filing joint written statement. Besides taking various legal pleas, they mainly contended that there had already been partition between the parties and Dajbandi was prepared during the lifetime of Laldas who died in June, 1971 and not in May, 1971, as claimed by the plaintiff. Laldas was separate after partition on 29.06.1970 who came in



possession of the land allotted to him by Dajbandi. The property was divided at three places. One share to the heirs of Gyan Chand, second share to the plaintiff and third share was to Laldas. L.T.I. and signature of plaintiff and Laldas were on Dajbandi. Laldas executed a deed of gift on 27.05.1971 in favour of defendant Nos.1 and 2 and put the defendants in possession of gifted property. The plaintiff had not acquired any land and in fact, the Schedule IV land was also joint family property and that Schedule IV land was acquired as exchange land and all these lands were partitioned on 29.06.1970 and Dajbandi was prepared.

(4) The further case of the defendant is that in fact, the plaintiff has purchased 25 ½ decimals land from these defendants but he is not willing for takabjul badlain.

(5) In view of the aforesaid pleading of the parties, the learned court below framed the following issues:

- I. Is the suit as framed maintainable?
- II. Have the plaintiffs got any cause of action?
- III. Is the date of death of Laldas and Gyan Chand alleged by the plaintiffs correct?
- IV. Has Laldas executed registered deed of gift on 23.03.1971 in favour of Defendant No.1 and 2?
- V. Is there unity of title and possession between the parties and is the plaintiff entitled to partition?
- VI. Is Schedule IV property a self-acquired property of the plaintiff?



VII. Are the plaintiffs entitled for the reliefs as claimed for?

VIII. To what relief or reliefs, if any, the plaintiff is entitled?

(6) After hearing the parties, the learned court below came to the conclusion that the parties had separated and three Dajbandi had been prepared according to the case of the defendants, therefore, there is no unity of title and possession between the parties, while deciding issue no. 5 vide paragraph 57 of the judgment. The court below also came to the conclusion that Laldas had executed the gift deed in question with full understanding and accordingly, dismissed the plaintiff's suit.

(7) The learned senior counsel, Mr. J.S.Arora for the appellants submitted that the learned court below has wrongly recorded the finding that there was previous partition and three Dajbandes was prepared by mis-appreciating the documents i.e. Dajbandi. According to the learned senior counsel, these Dajbandies are not memorandum of partition. From perusal of these Dajbandies, it will be clear that these are partition deed. Therefore, for want of registration, these documents are inadmissible in evidence. All the witnesses examined by the plaintiff-respondent are on the point of partition by these Dajbandies. This is the case of the defendants also in the written statement. Therefore, if these Dajbandies are ignored, as those are inadmissible in evidence, as such not required to be



considered, then there is no evidence at all to show that there was partition between the parties by any other means on any other date. Further, the previous partition is to be proved by the defendant. Both parties adduced evidences but the court below mis-appreciated the evidences.

(8) The learned senior counsel further submitted that the court below also recorded wrong finding about the date of death of Laldas and held that gift deed is executed by Laldas in favour of defendant Nos.1 and 2. According to the learned senior counsel, since there had been no partition between the parties and the family was coparcenary family, the gift deed executed by one coparcener without the consent of other coparcener will be void gift deed. According to the learned counsel, the plaintiff has produced overwhelming evidences to show the date of death of Laldas in the month of May, 1971. The defendants have not adduced reliable evidences and have failed to prove the previous partition.

(9) The learned senior counsel further submitted that to create evidence the defendants falsely pleaded that the plaintiff had purchased 25 ½ decimals land from the defendant but he is not willing to exchange the receipt i.e. takabjul badlain. According to the learned counsel, if in fact, the plaintiff had purchased the land on payment of consideration amount it is not believable that he will not exchange the



receipt and get the sale deed. In fact, the plaintiff never purchased any land from the defendant and the defendant only with a view to create inter se transaction, the sale deed was executed by them and they produced the same. This document is self-serving document and will not bind the plaintiff. On these grounds, the learned senior counsel submitted that the first appeal be allowed after setting aside the judgment and decree.

(10) As stated above, nobody appeared on behalf of the respondents.

(11) In view of the contention raised by the learned counsel for the appellants, only point arises for consideration in this First Appeal is “whether there is unity of title and unity of possession as alleged by the plaintiff or there had been previous partition as alleged by the defendant” and “whether the gift deed executed by Laldas is legal and valid?”

(12) The plaintiff filed the simple suit for partition claiming half share in the suit property. The defendant’s case is that there had been partition between the parties on 29.06.1970 during the lifetime of Laldas. So far genealogy is concerned, there is no dispute. According to Hindu law, the family will be presumed to be joint unless it is proved that there was partition. Since the presumption is in favour of the plaintiff, it is for the defendants to adduce reliable



evidence in support of their case that there had been partition between the parties by metes and bounds. Both the parties have adduced their respective evidences in support of their cases.

(13) From perusal of paragraph 5 & 6 of the written statement filed by defendant Nos.1 and 2, it appears that the only defence of the defendant is that there was partition on 29.06.1970 and in that partition, the properties were divided at three places.

(14) D.W.2 has stated that there had been partition between the parties including Laldas. This witness has also stated that the parties are in separate possession of the lands in suit. This is the evidence of D.W.3, 6, 7, 11 and 12. The evidences of these witnesses are regarding separate possession and previous partition. They are not witness to the actual partition between the parties. The other witness, D.W.8 claimed to have scribed Dajbandi. This witness has stated the case of the defendant regarding Dajbandi and putting of L.T.Is. by the parties on it. D.W.14 and 15 are the defendant Nos.1 and 2 respectively. From perusal of the impugned judgment and decree, it appears that the trial court considered the evidence of these witnesses and three Dajbandies which have been marked as Exhibit F series and has recorded the finding regarding partition on 29.06.1970.

(15) It may be mentioned here that the plaintiff's case is that the Dajbandi produced by the defendant is forged and in fact, there



was no partition on 29.06.1970. Further, except this pleading of partition on 29.06.1970, no other case has been pleaded by the defendant. According to the defendants themselves, by Dajbandi, partition was effected. Therefore, when the document itself is available, it is no so very relevant to scrutinize the oral evidences because the contents of the document cannot be interpreted on the basis of oral evidence i.e. the statements made by the witnesses.

(16) The Hon'ble Supreme Court in **AIR 1963 Supreme Court 890** has given the golden principles of interpretation of a document. For that purpose the document itself is required to be gone into minutely giving its clear and simple meaning.

(17) Now let us consider these documentary evidences. In the Dajbandi, it is recited that the parties by the following Dajbandi i.e. separate takhta came in possession and they are entitled to get their names mutated. Therefore, this Dajbandi clearly speaks that partition was effected by separating the lands by Dajbandi and the parties came in possession and this document is evidencing this Dajbandi i.e. partition. It is not the case of the defendants that there was partition earlier and for the purpose of memory, subsequently these Dajbandies were prepared. The documents show that on the same very date, there was partition by Dajbandi i.e. by preparing separate Schedule. Since not only Schedules have been prepared but recital is also to that effect



that by this Dajbandi, the parties got their separate possession and are entitled to mutate their names, it cannot in any way be termed as memorandum of partition rather it is a partition deed and by this deed i.e. Dajbandi, the partition was effected by metes and bounds. This is the pleading of the defendants and also the evidence of the defendants and also the document says. It is settled principle of law that a document by which partition is effected is compulsorily registerable and if it is not registered then it is inadmissible in evidence.

(18) It may be mentioned here that since no other case has been made out by the defendants regarding previous partition, it cannot be said that for collateral purpose, this document can be looked into. The court cannot make a third case. Plaintiff's simple case is that there had been no partition whereas according to the defendants partition took place on 29.06.1970 by Dajbandi and the document is produced. Now therefore, the court is to see whether there was no partition as claimed by the plaintiff or there was partition on 29.06.1970 as claimed by the defendants. Regarding partition on 29.06.1970, the mode of partition pleaded by the defendant is Dajbandi. If this Dajbandi Ext. F series is inadmissible and cannot be relied upon or looked into then, there is no other mode of partition claimed by the defendant.

(19) The Hon'ble Supreme Court in **AIR 2009 SCW 979**



has held that unregistered deed of sale is not admissible in evidence in terms of Section 35 of the Stamp Act. The said document would not also be admissible for collateral purpose.

(20) In view of this settled proposition of law when unregistered sale deed is inadmissible then unregistered partition deed will also be inadmissible in evidence for the purpose of proof of the partition.

(21) Now, if this Dajbandi i.e. documentary evidence adduced by the defendants goes i.e. inadmissible and, therefore, cannot be looked into nor can be considered, there is no other evidence to prove that there had been previous partition. Moreover, as stated above, no other mode of partition has been pleaded by the defendant.

(22) In this case, the defendants have pleaded that the plaintiff has purchased land from the defendants and the sale deed was produced to show that there is inter se transaction. It may be mentioned here that the plaintiff is denying to have purchased the land. Earlier, the purchaser was not required to be present before the Registrar. In such circumstances, it was for the defendant to have adduced reliable evidence to show why the plaintiff is not receiving the registered sale deed. Therefore, whatever statements made by the defendants in the sale deed is the statements made by the defendants which is binding on them only and will not bind the plaintiff. The



document is a self-serving document not signed by the plaintiff, as such, cannot be read against the plaintiff.

(23) From perusal of the impugned judgment and decree, much emphasis has been given by the court below that the original Dajbandi was misplaced by the plaintiff or it was manipulated or that the defendant had the fortune that copy of Dajbandi was given to Laldas who at the time of execution of gift deed handed over to the defendant and that the scribe has been examined are concerned, not relevant for consideration as Dajbandi is inadmissible in evidence irrespective of the fact that whether it is duplicate or original or it was misplaced or manipulated.

(24) In view of my above discussion, I come to the conclusion that the learned court below wrongly recorded the finding of previous partition by Dajbandi without considering that Dajbandi document produced by the defendant is a deed of partition and is compulsorily registerable. Since it is not registered, it is inadmissible and cannot be relied. Thus, I find that the defendants have failed to prove partition as claimed by them, therefore, there is unity of title and unity of possession between the parties.

(25) So far the gift deed is concerned, the defendants claimed that the gift deed was executed by Laldas in their favour in May, 1971 and then he died in June, 1971. On the contrary, plaintiff's case is that



Laldas died in the month of May, 1971. It may be mentioned here that the defendants have not claimed any counter claim for declaration of the gift deed as valid. No issue was framed on this question but the trial court recorded a finding that gift deed is a valid, legal and genuine document. I have already held above that there had been no partition between the parties and there is unity of title and possession, so, the coparcener cannot transfer by way of gift his share without the consent of other coparcener.

(26) The Hon'ble Supreme Court in **AIR 1987 Supreme Court 1775** has held that gift by a coparcener of undivided share is a void transaction. Since there was unity of title and possession between the parties and there had been no partition, the so called gift deed, even if executed by Laldas, is a void document and no valid title, interest and possession will pass on the defendants.

(27) The court below has not considered these aspects of the matter which I have discussed and merely giving much emphasis on Dajbandi has recorded the finding. Thus, the findings recorded by the court below on both accounts are hereby reversed.

(28) In the result, this First Appeal is allowed. The impugned judgment and decree is set aside. The plaintiff-appellant's suit for partition is decreed in its entirety as claimed by the plaintiffs with cost of Rs.10,000/- to be paid by the defendants-respondents to



the plaintiffs-appellants in the court below within two months failing which the plaintiffs-appellants shall be at liberty to realize the cost through the process of the court.

(Mungeshwar Sahoo, J)

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