

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.263 of 1977

**Against the judgment and decree dated 24.11.1976 passed by Subordinate Judge,
Siwan in Partition Suit No.197 of 1973**

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Shri Ram Prasad

.... Defendant-Appellant

Versus

Bidyabhushan Prasad & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellant : Mr. S. S. Dwivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey, Advocate with him.
For the Respondents : None

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 07-04-2017

The defendant has filed this first appeal against the judgment and decree dated 24.11.1976 passed by the learned Subordinate Judge, Siwan in Partition Suit No.197 of 1973.

2. The plaintiff-respondent filed the suit for partition for carving out his 1/3rd separate share in the suit property. The plaintiff claimed 1/3rd share alleging that the suit property was acquired by Bishun Ram. He died leaving behind his son Sri Ram, who is defendant no.1, his wife Most. Radhika Devi, defendant no.2 and one daughter Chandrawati Devi, defendant no.3, therefore, they all



inherited equal share. They came in joint possession. The plaintiff then purchased 1/3rd share of Chandrawati, defendant no.3, out of the suit land by registered sale deed dated 14.08.1973 and he came in joint possession along with defendant nos.1 and 2 and 4 to 6. These defendant nos.4 to 6 are also purchasers out of the suit property from defendant nos.1 and 2 i.e. son and widow of Bishun Ram. The purchasers are coming in joint possession and there has been no partition. The defendant nos.4 to 6 are very powerful persons and they refused claim of partition. Therefore, the suit for partition is filed.

3. The defendant nos.1 and 4 to 6 contested the suit. The defendant no.1 filed separate written statement and defendant nos.4 to 6 have filed separate written statement. Their defence is on same footing. Besides taking various ornamental and legal pleas the defendants mainly contended that there is no unity of title and possession and the plaintiff never came in possession. The defendants-purchasers have purchased western portion area 3 katha 16 dhoors over which they are in exclusive possession. The sale deed on the basis of which plaintiff is claiming title is fraudulent and fabricated. Chandrawati was not the daughter of Bishun Ram. Bishun Ram died leaving behind only a son and widow who inherited the entire property including the suit land. The purchasers



have purchased separate property from defendant nos.1 and 2 and, therefore, there is no question of unity of title and possession between the parties arises. In fact these defendants have amalgamated their purchased lands with their own lands over which they were in possession.

4. The further case is that the property was not self-acquired property of Bishun Ram rather it was the joint family property. The plaintiff never acquired any title on the basis of sale deed executed by Chandrawati as Chandrawati was not the daughter of Bishun Ram.

5. The defendant no.1 specifically pleaded that Chandrawati is not his sister rather she is daughter of one Lutawan. The other defence is same.

6. On the basis of the pleadings of the parties the learned court below framed the following issues:-

- (i) Is the suit as framed maintainable?
- (ii) Has the plaintiff got any valid cause of action for the suit?
- (iii) Is defendant no.3 Chandrawati, the daughter of Bishun Ram as alleged by the plaintiff?
- (iv) Is the plaintiff entitled to a decree for partition as claimed, if so, to what extent?
- (v) To what relief or reliefs if any is the plaintiff entitled to?

7. The learned trial court after hearing the parties recorded finding that Chandrawati is the daughter of Bishun Ram.



The learned trial court also recorded the finding that there had already been partition between the three heirs of Bishun Ram and, therefore, the plaintiff is not entitled to reopen partition. Accordingly, the suit was dismissed.

8. The learned Senior Counsel for the appellant submitted that all findings are recorded in favour of the plaintiff but dismissed the plaintiff's suit for partition only on the ground that there had already been partition. Whatever relief claimed by the plaintiff has already been granted to the plaintiff by recording finding. The plaintiff prayed for partition alleging that there has been no partition. The court below made out a third case and held that there had been partition between the three heirs of Bishun Ram which was not the case of any party. There was no such pleading. Likewise the plaintiff never claimed exclusive separate possession of the property purchased by him but the trial court making a third case that there had been partition and Chandrawati after selling the property delivered possession thereof to the plaintiff. This is not the case of the plaintiff. Therefore, the learned court below indirectly declared the title of the plaintiff with respect to the suit property and also confirmed the possession of the plaintiff over the property purchased by him. In such circumstances, the plaintiff got his title and possession on the basis of the judgment and decree which he



never prayed for but then the trial court dismissed the partition suit granting all the relief which could have been granted after final decree. According to the learned Senior Counsel, the judgment and decree has been skillfully drafted and although the suit has been dismissed technically, all the reliefs have been granted to the plaintiff. Therefore, the rights of the appellant are affected by the findings. Moreover, it appears that the trial court although dismissed the partition suit but in fact has decreed finally the partition suit. Therefore, this first appeal is maintainable at the instance of the defendant although the partition suit has been dismissed.

9. The learned Senior Counsel further submitted that the trial court misread the evidence and on surmises and conjectures recorded wrong finding that Chandrawati is the daughter of Bishun Ram.

10. Nobody appeared on behalf of the respondents.

11. In view of the above facts and circumstances of the case the points arise for consideration in this first appeal is whether this first appeal is maintainable against the findings only and if maintainable then whether the findings of the court below are sustainable in the eye of law and whether the plaintiff-respondent is entitled for 1/3rd share in the suit property being purchaser from Chandrawati Devi and whether Chandrawati Devi is daughter of



Bishun Ram or not.

12. Admittedly plaintiff-respondent's suit has been dismissed. The court below recorded findings against the defendant. According to the learned Senior Counsel for the appellant, the findings recorded by the trial court are contrary to the pleadings and it will operate as res-judicata, if any future litigation will be there and further this finding also will affect the right of the appellant with respect to the other properties of Bishun Ram. In such circumstances the first appellate court can examine the legality or otherwise of the judgment and decree in exercise of revisional jurisdiction or even under Article 227 of the Constitution of India, if first appeal is not maintainable. However, in the present case since the finding will operate as res-judicata in future litigation with respect to the property, first appeal will be maintainable.

13. So far this submission is concerned, prima facie it appears that the court below recorded all findings in favour of the plaintiff-respondent. Now, therefore, only because in the last portion of the judgment and the decree suit has been dismissed in straight way, it cannot be said that the appeal is not maintainable. The learned trial court granted more reliefs than the plaintiff claimed. The plaintiff prayed for partition of the property. Partition Suit concludes after final decree is made. In this case everything has been



given to the plaintiff by recording finding that there had been partition and the plaintiff is coming in possession, although it is not the case of any party. In such circumstances, it appears that the judgment has been skillfully drafted and granting all reliefs to the plaintiff, which he could have got after final decree, the court below dismissed the plaintiff's suit.

14. In view of the above facts, prima facie it appears that the findings recorded by the court below is decree against the defendant-appellant although the suit has been dismissed. The interpretation of the finding recorded in judgment and decree depends on the facts of each case. If there is formal finding of fact, it does not affect the rights of the parties and if it will not operate as res-judicata, the appeal may not be maintainable but in the present case whatever relief claimed by the plaintiff has been given by recording these findings in favour of the plaintiff but then the suit has been dismissed. Now, if it is held that the first appeal is not maintainable then the defendant-appellant has got no other remedy at all because against the said findings only, no revision will be maintainable nor appeal under Order 43 CPC will be maintainable. The plaintiff prayed for partition and carving out his share by final decree. The court below granted this decree while dismissing the suit. The plaintiff claimed said relief of partition on the ground that



he purchased the land from Chandrawati, daughter of Bishun Ram. The court below recorded finding on this issue in favour of the plaintiff. In such circumstances, the plaintiff got everything. Now, if first appeal is not maintainable, revision is not maintainable and miscellaneous appeal is also not maintainable then there is no other forum for the defendant to challenge the legality or otherwise of these findings whereby the suit has been indirectly decreed in favour of the plaintiff but by the judgment and decree the plaintiff's suit has been dismissed.

15. The Hon'ble Supreme Court in **A.I.R. 1971 Supreme Court 442 paragraph 13 (Gangappa Gurupadappa Gugwad Vs. Rachawwa and others)** has held that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point, each of which by itself would be sufficient for the ultimate decision, the decision on each of these points operates as res-judicata between the parties. In view of the above discussion and the peculiar facts and circumstances of this case, this appeal is maintainable before High Court.

16. The next question is whether the finding regarding parentage recorded by the court below is correct. The plaintiff has produced oral evidences in support of the parentage of Chandrawati



Devi. P.W.3, the villager and neighbour of Bishun Ram has stated that Chandrawati is the daughter of Bishun Ram. In paragraph 3 he has clearly stated in terms of Section 50 of the Evidence Act. This is his direct evidence and also on the conduct of the father and daughter. P.W.4 is also one of the neighbours and his evidence is direct evidence regarding parentage. P.W.5 is the Pandit Jee, who has also proved that Chandrawati is the daughter of Bishun Ram. P.W.6 is Chandrawati herself and P.W.7 is the husband of Chandrawati. P.W.12 is the plaintiff himself. The evidences of these witnesses are either direct evidences or the evidences are admissible under Section 50 of the Evidence Act in view of the decision of the Supreme Court **A.I.R. 1959 Supreme Court 914**.

17. So far the evidences of the defendant-appellant are concerned, those are negative evidences. The negative needs no proof. Denial is sufficient and once the defendant denied the parentage then the onus shifts on the plaintiff to prove positively the parentage and for that evidence has been adduced.

18. Much emphasis has been given by the appellant on the evidence of Radhika Devi, D.W.11. Learned Senior Counsel stated that she has stated that Chandrawati is not her daughter. She has only one son, Sri Ram.

19. From perusal of the evidence of this witness, it



appears that she said that she does not know Chandrawati Devi. She although admitted that she knows Panna Lal but denied the knowledge about Chandrawati. Although in examination-in-chief she stated that she does not know Chandrawati but in paragraph 4 she admitted that Chandrawati is the wife of Panna Lal. Again in paragraph 10 she says that she had not heard the name of Chandrawati. Again in paragraph 16 she said that she does not know Panna Lal. In view of this statement and the fact that now she has been remarried no reliance can be placed on the evidence of this witness.

20. The defendant came with case that Chandrawati is the daughter of Lutawan. The witnesses, D.W.5 and D.W. 6 have stated that they know Lutawan, who died leaving behind daughter Chandrawati. D.W.7 is defendant no.1. He has only stated that he is only issue of his father, Bishun Ram. He is not saying about the parentage of Chandrawati Devi.

21. From discussion of the evidences, as stated above, I find that the plaintiff has been able to prove that Chandrawati is the daughter of Bishun Ram. The learned Senior Counsel for the appellant submitted that the suit property has been acquired by Bishun Ram out of the income of his ancestral business. So far this case pleaded by the purchaser-defendant is concerned, except the



pleadings and bald statements of the witnesses there is no sufficient evidence produced by the appellant to prove that the property was acquired by Bishun Ram out of joint family nucleus/fund. The acquisition by Bishun Ram is admitted. In such circumstances, after the death of Bishun Ram the property will equally devolve on his son, daughter and widow $\frac{1}{3}^{\text{rd}}$ each.

22. In view of the above facts now it becomes clear that Chandrawati had sold $\frac{1}{3}^{\text{rd}}$ share, whereas the defendants-purchasers have purchased the entire property from widow and son of Bishun Ram. In such circumstances, the plaintiff is entitled to share as claimed by him.

23. The plaintiff filed the suit praying for $\frac{1}{3}^{\text{rd}}$ share as it is not the case of any party that there was partition between the three heirs of Bishun Ram. However, the court below made out a third case to the effect that there had already been partition between the three heirs. In my opinion the Court is required to find out the case pleaded by the parties. The Court cannot make a third case. Here, when the plaintiff is saying that there had been no partition and likewise it is not the case of the defendant that there had been partition, therefore, the issue between the parties is only whether Chandrawati is the daughter of Bishun Ram or not. Once it is held that she is daughter then her $\frac{1}{3}^{\text{rd}}$ share will go to the plaintiff and



this is the relief claimed by the plaintiff. The court below, therefore, should have preliminarily decreed the plaintiff's suit. The court below should have determined the rights of the parties. So far the property which is to be allotted in partition by final decree is concerned, it is to be determined by following the principles of partition considering the convenience of the parties.

24. In my opinion, therefore, the finding recorded by the court below that there had already been partition is contrary to the case pleaded by the plaintiff and likewise the finding of the trial court that plaintiff came in possession of 1/3rd share of Chandrawati, which is also contrary to the pleading and evidence of the plaintiff, the said findings are unsustainable in the eye of law. Accordingly, both the findings of the trial court are hereby set aside and it is held that the plaintiff is entitled to 1/3rd share out of the suit property.

25. In view of my above discussion, in my opinion, this is an appropriate case where this Court should exercise power under Order 41 Rule 33 CPC and accordingly, in exercise thereof I hereby modify the judgment and decree passed by the trial court and decree the plaintiff's suit for partition to the extent of 1/3rd share. Let a final decree be prepared accordingly.

26. In the result, this first appeal is disposed of. The impugned judgment and decree is modified as indicated above. In



the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

Harish/-

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