

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.442 of 1986

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Sudin Mistry and others

Versus

.... Appellant/s

Late Baijnath Mistry through LRs and others

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ashutosh Jha, Advocate
Mr. Narendra Pandey, Advocate
Mr. Vijay Kant Mishra, Advocate
Mr. Avinav Kumar, Advocate
Mr. Madhusudan Sharma
For the Respondent/s : Mr. Rajiv Ranjan Singh, Advocate

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(Appeal against the judgment and decree dated 17th of March, 1986 passed in Title Appeal No.135 of 1978 by 5th Additional District Judge, Bhagalpur.)

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT

Date: 11-08-2017

Heard the parties.

2. The sole plaintiff Baijnath Mistry (original respondent No.1 herein) had filed Title Suit No.125 of 1971 for partition of his 1/3rd share in the suit properties. The suit was dismissed by judgment and decree dated 31st August, 1978, by learned 7th Additional Sub-Judge, Bhagalpur, on the ground that the plaintiff failed to prove a case of unity of title and possession over the suit land. The dismissal of the suit was challenged in Title Appeal No.135 of 1978. The learned 5th Additional District Judge,



Bhagalpur, by judgment and decree dated 17th of March, 1986 reversed the finding of the learned trial Judge and held that the plaintiff has proved a case for partition of the joint family property detailed in the plaint schedule and decreed the suit. Hence, this appeal by the defendant Nos.4 to 9 of the suit. Other respondents are either the legal heirs of the co-sharers of the plaintiff or purchaser of the suit property from co-sharers.

3. The only substantial question of law formulated for adjudication in this appeal, under Section 100 of the Code of Civil Procedure, is whether the finding of the lower appellate Court, in its judgment of reversal, regarding jointness of the suit property is sustainable without having given reasons for setting aside the findings of the learned Trial Court and without giving due consideration to Exhibit- A/1 and Exhibit-C/2 (wrongly typed as D/2 in the question formulation order).

4. To consider the aforesaid question it would be apt to look into the case of the parties;

The sole plaintiff Baijnath Mistri brought Title Suit No.125 of 1971 against his full brother Musai Mistri and his sons and daughters as well as against Saro Devi, the widow and sons of third brother late Chando Mistri, as defendant first party for partition of



his 1/3rd share in the joint family property fully detailed in the plaint schedule.

5. The plaintiff asserted that the family is governed by Joint Hindu Mitakshra Law. Though the brothers were separate in mess. However, the immovable properties were still joint and defendant No.1 Musai Mistri was Karta of the family. From the joint family fund some of the properties were purchased in the name of different members of the family and some of the properties were inherited from the ancestors. Most of the acquisitions were in the name of defendant Musai Mistri, who was Karta of the joint family, but there was unity of title and possession of all the co-sharers on all the properties whether ancestral or purchased. Plaintiff further asserted that without knowledge of the plaintiff defendant Musai Mistri had created fraudulent transfer deeds in favour of defendant second set.

6. Defendant Nos.1 to 3 (i.e., Musai Mistry and his two sons) did not file any written statement nor contested the suit. It is worth to mention here that Musai Mistry is full brother of the plaintiff and as such one of the co-sharers.

7. Defendant Nos.4 to 9, who are wife and children of late Chano Mistry, the third brother of the plaintiff filed their separate



written statement refuting and disputing the case and claim of the plaintiff on the ground, inter alia, that there was no unity of title and possession between the co-sharers after amicable partition of the joint family property before 1960. There are details of the manner of partition and allotment of different referred portion of the share to different sharers disclosed in the written statement. These defendants asserted that the coparceners had separate source of income. Hence, they purchased different properties, which are included in the plaint schedule, from their personal income. Moreover, the parties were independently dealing with the property allotted to their share or with their self acquired property in assertion of their own individual right. There is mention of partition amongst defendant Nos.1 to 3 also. The defendant further asserted that in fact there was no ancestral property of father Shivilal Mistry except the residential house. Remaining properties were purchased by the brothers and later on partitioned according to their share.

8. The learned trial Court after consideration of the evidences available on the record especially the documentary evidences came to the conclusion that there was no unity of title and possession between the parties with respect of the suit properties. Hence, the suit for partition was not maintainable.



9. The impugned judgment passed by the learned lower appellate Court would reveal that there is no mention of the points for determination as required under Order XLI Rule-31 of the Code of Civil Procedure. The lower appellate Court has referred the oral and documentary evidences. However, did not discuss the same supported by its reason to come to the conclusion that finding of the learned trial Court is not sustainable in law. Hence, the aforesaid substantial question of law arises for adjudication in this appeal.

10. Learned counsel for the appellant submits that defendant No.9 Saro Devi the widow of Chando Mistry had executed a registered mortgage deed in favour of one Santi Yadav on 10.03.1960 vide Exhibit-A/1 by the said documents defendant No.9 had mortgaged a portion of plot No.3013, which is one of the suit property. The plaintiff Baijnath Mistry is a witness on that document. The boundary of that plot mentioned in the mortgage deed would reveal that in the western side there is mention of share of Musai Mistry. In the plaint schedule also there is mention of Musai Mistry and Khageshwari Devi as boundary people. Khageshwari Devi, the defendant No.10, is none else than the daughter of the plaintiff and purchaser of plot No.3013 from Musai Mistry through registered sale deeds dated 07.05.1968 vide Annexures C-2(a) to C-2(c). On both



the aforesaid documents the plaintiff is a witness and in the eastern boundary of the land there is mention of name of Sudin Mistry, the defendant No.4. The aforesaid documents apparently shows that there was partition of the joint family property much prior to the filing of the suit as co-sharers were selling out and mortgaging the land in presence of the plaintiff without any protest and the purchasers were comfortably paying consideration money to the vendors. According to learned counsel, the plaintiff has not explained the existence of the aforesaid document in the plaint whereas the learned trial Court has categorically discussed the evidentiary value of the aforesaid two documents to come to the conclusion that there is no unity of title and possession between the parties in respect of the suit property. The learned lower appellate Court did not correctly read out the documents causing miscarriage of justice. The lapses on the part of the learned court-below to consider the documents is substantial question of law to be adjudicated at the second appellate stage also.

11. On the other hand, learned counsel for the respondents half heartedly drew attention of the Court towards lower Court's judgment for his submission that the aforesaid Exhibits A/1, C-2(a) to C-2(c) were referred in the lower appellate Court judgment.



Therefore, it cannot be said that the impugned judgment was passed ignoring the reasoning of the learned trial Court based on Exhibits A/1 and C-2(a) to C-2(c).

12. Since the first appellate Court is the final Court of fact the judgment of the lower appellate Court should be on each and every point arising for consideration before the Court with reasons therefore. It is also well settled that when the appellate Court does not take into account all the considerations which weighed with the trial Court, the judgment of the appellate Court is not in accordance with law. Reference may be made to the Division Bench Judgment of this Court in **Rohan Kumar @ Rohan Pandit and Anr. Vrs. Lachhuman Pathak and Ors. Reported in 1976 BBCJ 410**. In **Sk. Bhikan Vrs. Mehamoodabee & Ors. Reported in 2017(2) PLJR (SC) 164**, the Hon'ble Apex Court in paragraph-8 of the judgment observed as followed:

“18. When the Court is called upon to interpret the documents and examine its effect, it involves questions of law. It is, therefore, obligatory upon the High Court to decide such questions on merits.”

13. In the background of the aforesaid principles on consideration of the pleadings and evidences available on the record, I find that the learned trial Court had heavily relied on Exhibit-A/1,



the mortgaged deed (Sudbharna Deed) dated 10.03.1960 executed by defendant Saro Devi, whereby she mortgaged one of the suit property claiming her own right and in that document the plaintiff has not joint as co-mortgagor; rather as a witness. The learned trial Court has recorded that if the suit property was joint property there was no reason that plaintiff knowingly allowed the execution of mortgage deed by one of the co-sharers. Similarly, the learned trial Court has heavily relied on Exhibits-C-2(a) to C-2(c), which are registered sale-deeds executed by defendant No.1 Musai Mistry selling out the major portion of the suit property in favour of Khadeshwari Devi, the daughter of the plaintiff, much prior to the filing of the suit. The plaintiff is a witness of that document. In the boundary of the transferred property there is mention of the name of the one of the co-sharers (appellant Sudin Mistry) which supports the case of the defendants that the suit property was already partitioned amongst the co-sharers. The learned lower appellate Court has not whispered anything regarding finding of the learned trial Court with regard to the aforesaid documents nor has considered or assigned any reason for non-acceptance of the aforesaid documents as documents of exercise of separate right throwing out the claim of jointness.

14. Therefore, the judgment of reversal passed by the



learned lower appellate Court is bad in law. Accordingly, the same is hereby set aside and the judgment and decree of the trial Court is affirmed.

15. This appeal stands allowed accordingly. However, without cost.

(Birendra Kumar, J)

Mkr./-

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