

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.510 of 1990

**(Against the Judgment and Decree dated 31.08.1990 passed by 2nd
Subordinate Judge, Munger in Title Suit No.55 of 1987).**

Gita Devi & Ors.Defendants- Appellants

Vs.

Kameshwar Chaudhary & Ors.Plaintiffs- respondents

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For the appellant: - Mr. J.S. Arora, Sr. Advocate
Mr. Shailendra Kumar Dwivedi, Advocate with him.

For the respondent: - Mr. Ranjan Kumar Dubey, Advocate

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

Date: 18-07-2017

1. The sole appellant, Saryug Chaudhary had filed this First Appeal against the judgment and decree dated 31.08.1990 passed by the learned 2nd Subordinate Judge, Munger in Title Suit No.55 of 1987 whereby the plaintiff-respondent's suit has been decreed.
2. The sole appellant died and his legal representatives have already been substituted.
3. The plaintiffs-respondents filed the aforesaid Title Suit No.55 of 1987 praying for declaration of his title and possession and further for declaration that the Will dated 01.03.1963 executed in favour of Jhalo Devi and the gift deed dated 30.04.1984 executed by Jhalo Devi and the registered sale deed dated 04.03.1987 executed by Saryug Chaudhary are void, illegal and inoperative.
4. The plaintiffs-respondents claimed the said relief alleging



that Puna Pasi died long ago leaving behind four daughters namely, Ajhola Devi, Jhalo Devi, Medhwa Devi and Kawa Devi and also one son, Chamru Chaudhary and his widow, Sukni Devi. Chamru Chaudhary died leaving behind the plaintiff, Kameshwar Pasi and his widow but the widow of Chamru married in Sagai form with another man and went away. Sukni handed over the plaintiff to Jhalo Devi to look after him. Sukni died on 27.03.1961. Thereafter, Jhalo Devi had greedy eyes on the property of Kameshwar Chaudhary, the plaintiff, so, she got a Will executed by some other lady impersonating Sukni on 01.03.1963 in her favour along with the plaintiff, Kameshwar Chaudhary. On 30.04.1984, Jhalo Devi gifted half property to her son, Saryug Choudhary, defendant No.2. The defendant No.2 in turn sold 37 ½ decimals land to the defendants 2nd set by registered sale deed dated 04.03.1987.

5. The further case of the plaintiffs-respondents is that in 1985, the plaintiff came to know about the Will and the gift deed. According to the plaintiff, Jhalo Devi had no right to gift the property. The Will and the gift deed are illegal, void, inoperative and the defendants did not get title or possession on the basis of the Will, gift deed and the sale deed.

6. On being noticed, the defendants-appellants filed contesting written statement alleging that Puna Pasi died in the year



1959 leaving behind only three daughters. The suit properties were the self-acquired properties of Puna Pasi. Out of three daughters, Ajhola Devi and Kawa Devi died issueless. Chamru Pasi died one year prior to death of Puna Pasi. At the time of death of Chamru Chaudhary, the plaintiff was aged about 7-8 years. Sukni Devi died in the year 1976 leaving behind the plaintiff No.1 and her daughter, Jhalo Devi. After her death, there was partition between plaintiff and Jhalo Devi in the year 1977. Thereafter, Jhalo Devi executed the gift deed in favour of her son in the year 1984. The defendants 1st set are in possession of the properties allotted in their share.

7. The defendants 2nd set, who are purchasers, had filed written statement supporting the case of the defendants 1st set.

8. On the basis of the aforesaid pleadings of the parties, the learned court below framed various issues including the issue regarding year of death of Puna Pasi i.e. issue no. (ga) which reads as to whether Puna Pasi died in 1959 or 1934 and whether Chamru Pasi died prior to death of Puna and whether Most. Sukni died in 1961 or 1976. The learned trial court also framed other issues relating to acquisition of title by Jhalo Devi through Will and acquisition of title by Saryug Chaudhary through the gift deed of the year 1984 executed by Jhalo Devi and acquisition of title and possession by the purchasers through registered sale deed dated 04.03.1987. The trial



court also framed the issue regarding as to whether there was partition between Jhalo Devi and plaintiff or not. The learned trial court also framed issue regarding the parentage of Medhwa Devi.

9. After hearing the parties and considering the evidences, the learned trial court recorded clear finding that Medhwa Devi, P.W.3 is the daughter of Puna Pasi. The Will dated 01.03.1963 is not probated. Jhalo Devi did not acquire title through this Will on 37 ½ decimals land and she had no right to execute gift deed so, the gift deed dated 30.03.1984 did not confer title and possession on Saryug Chaudhary. Saryug Chaudhary had no title and possession to sell 37 decimals land by registered sale deed dated 04.03.1987 in favour of defendants 2nd set as such, defendants 2nd set did not acquire any title or possession. The trial court also recorded finding that Puna Pasi died in 1934 in the year of earthquake. Chamru Pasi died after death of Puna Pasi. Sukni Devi died in the year 1964-65. The defendants failed to prove that there was partition between Kameshwar Chaudhary and Jhalo Devi regarding the suit property. The defendant No.2 never came in possession over the disputed land nor acquired title by adverse possession. Accordingly, the suit was decreed.

10. The learned senior counsel, Mr. J.S.Arora appearing on behalf of the appellants submitted that the learned trial court approached the case in wrong angle, as such, the judgment and decree



is vitiated. The learned trial court recorded the finding regarding the death of Puna Pasi in the year 1934 without there being any such pleading in the plaint and moreover, the evidences produced by the plaintiff regarding the year of death of Puna Pasi is contrary to the pleading but the learned court below making out a third case recorded the finding wrongly although, it is not the case of any party that Puna Pasi died in the year 1934. According to the learned senior counsel, this issue regarding death of Puna Pasi is the most crucial and important issue and on the basis of finding on this issue, the fate of the plaintiff's suit is dependent. The learned trial court recorded the finding most perfunctorily without appreciating the evidences adduced by the plaintiff and the defendants properly.

11. The learned senior counsel further submitted that Jhalo Devi, defendant No.1 is admittedly the daughter of Puna Pasi and according to the defendants-appellants, Puna Pasi died in 1959, therefore, the properties which are his self-acquired properties devolved on his heirs including Jhalo Devi and defendant No.2, Saryug Chaudhary, the son of Jhalo Devi. The property of Puna Pasi will therefore, go to his widow, son and all the daughters including defendant No.1. When Jhalo Devi also has a share in the property, how the gift deed executed by her will be illegal deed. The defendants-appellants clearly pleaded and have also adduced reliable



evidence in support of the death of Puna Pasi in the year 1959 and there is no contrary case pleaded by the plaintiff.

12. The learned senior counsel further submitted that when the daughters of Puna Pasi were alive and son of Jhalo Devi is alive, who was defendant No.2, how can the title of plaintiff, Kameshwar Chaudhary be declared on the suit property. Even if title will not pass by a Will, then also Jhalo Devi being the daughter of Puna Pasi has a right to inherit a share which can be decided in partition suit. Admittedly, she had executed a gift deed with respect to her half share only and after her death in fact, half share has been inherited by defendant No.2, Saryug Chaudhary, the only appellant, who has died. The learned trial court did not consider these aspects of the matter. Moreover, the other daughter of Puna Pasi, as claimed by the plaintiff, Medhwa Devi who has been examined as P.W.3 is also necessary party. In such view of the matter, the plaintiff, Kameshwar Chaudhary has got no exclusive right, title, interest and possession over the suit property but the learned court below decreed the plaintiff's suit.

13. The learned senior counsel, Mr. Arora further submitted that except the pleading and bald statement of the plaintiff and plaintiff's witnesses, no reliable evidence has been produced by the plaintiff but the learned trial court by misappreciating the oral



evidences recorded wrong finding. On these grounds, the learned senior counsel submitted that the first appeal be allowed and after setting aside the impugned judgment and decree, the plaintiff's suit be dismissed.

14. On the other hand, the learned counsel, Mr. Ranjan Kumar Dubey appearing on behalf of the plaintiffs-respondents submitted that in the plaint, there is clear pleading that Puna Pasi died long ago and in support of that pleading, the plaintiffs adduced evidence that he died in the year 1934, therefore, there is no discrepancy in the pleading and evidence. In view of this, the finding recorded by the trial court is correct finding. When Puna Pasi died in the year 1934, the property will not be inherited by his daughters. Accordingly, the plaintiff has not made the daughters of Puna Pasi as defendant in the suit. The property of Puna Pasi devolved on his son, Chamru and widow, Sukni. Sukni died in the year 1961, therefore, how she could have executed the Will in the year 1963. In fact, the defendant No.1 got the Will executed by impersonating Sukni Devi, so, the Will is forged and fabricated. In the gift deed, Jhalo Devi, the defendant No.1 stated that she acquired title through the Will. Had she inherited the property, there was no question of acquiring title through Will arises. This statement made by her in the gift deed clearly shows that in fact, she did not inherit the property of Puna.



15. The learned counsel further submitted that P.W.3, who is one of the daughters of Puna Pasi, has clearly stated that her father Puna Pasi died in the year 1934. Her statement cannot be discarded as she is most important and competent witness regarding the year of death. The learned trial court therefore, has rightly relied on evidence of P.W.3. The learned court below also, after appreciating the evidences, recorded finding that P.W.3 is the daughter of Puna Pasi and the defendants failed to prove partition between Jhalo Devi and the plaintiff. Therefore, there is no irregularity or illegality in the impugned judgment and decree as such, needs no interference. Thus, the first appeal be dismissed with cost.

16. In view of the submission of the parties, it appears that the most important point is the year of death of Puna Pasi. If he died after coming into force of Hindu Succession Act, in the year 1956, then the daughter will also be entitled to a share. Admittedly, defendant No.1 is daughter of Puna Pasi so, she will also had a share in the property i.e. self-acquired property of Puna Pasi. She had made the gift to her son. In such circumstances, so far the share of Jhalo Devi defendant No.1 is concerned, the plaintiff's title cannot be declared. If Puna Pasi died prior to 1956 then naturally the daughter will not inherit the property of Puna Pasi. It will go to his widow and the son Kameshwar Chaudhary, plaintiff No.1. In such



circumstances, the question will arise as to whether Sukni Devi, mother of Jhalo Devi has the right to execute the Will. In view of the above fact, the following points arise for consideration in this first appeal:

- a. Whether Puna Pasi died in the year 1934 as recorded by the trial court or in the year 1959 as claimed by the defendants-appellants and whether the plaintiff is entitled for decree for declaration of his title and possession over the suit property and other reliefs regarding the Will, gift deed and sale deed?
- b. Whether Sukni Devi had the right to execute the Will in favour of plaintiff No.1 as well as defendant No.1 or she had died prior to 1963?

Point No.(a)

17. This is the most important point for consideration and the result of the suit will depend on this point. The plaintiff, Kameshwar Chaudhary, in the plaint, at paragraph 2, pleaded that his father, Chamru Chaudhary died many years ago leaving behind his widow and plaintiff no.1. At that time, plaintiff no.1 was 8-9 months. Puna Pasi also died leaving behind widow, Sukni Devi, four daughters and grandson, plaintiff no.1. By amendment, the plaintiff amended the plaint by inserting the name of his father, Chamru Chaudhary. According to this pleading, the earlier case pleaded by the plaintiff was Puna Pasi died leaving widow, four daughters and the plaintiff only. It appears that written statement was



filed by the defendants in the year 1987 itself wherein it was pleaded at paragraph 9 that one year prior to death of Puna Pasi in the year 1959, Chamru Chaudhary has died. Thereafter, amendment application was filed which was allowed in the year 1990 wherein the name of Chamru Chaudhary inserted to show that Chamru Chaudhary was alive on the date of death of Puna Pasi.

18. At paragraph 2, further it is pleaded that because plaintiff no.1 was infant, he cannot say when Chamru Chaudhary and Puna Pasi died. He even enquired this fact but he could not learn about this fact, therefore, he is not pleading the year of death of Chamru Chaudhary and Puna Pasi.

19. Except this pleading regarding year of death of Puna Pasi and Chamru Chaudhary no other pleading is there. Therefore, it is the case of the plaintiff himself that long ago both of them died. The suit has been filed in the year 1987. On the contrary, according to the defendant's pleading, Puna Pasi died in the year 1959 and one year prior to him, his son, Chamru Chaudhary had died. There is direct case pleaded by the defendant.

20. Now let us see the evidences. P.W. 1 is the plaintiff No.1. Nowhere in his evidence he has said about the year of death of either Puna Pasi or his father, Chamru Chaudhary. According to him at the time of death of his father, he was about 8-9 months old



infant. He has been examined in the year 1990 and according to his age, estimated by the court, he was 35 years old. If this age is calculated then his father died in or about the year 1955-56 and according to the pleading, his father died many years ago. P.W.1 nowhere stated that whether his father died prior to Puna Pasi or after death of Puna Pasi. There is absolutely no evidence on this point.

21. P.W.2 has stated that Puna Pasi died after the earthquake in the year 1934. He claimed to be the neighbour of plaintiff No.1, Kameshwar Chaudhary. As stated above, there is no pleading made by the plaintiff that Puna Pasi died in the year 1934 after earthquake. On the contrary, the pleading is that on enquiry also, the plaintiff could not learn about the year of death of either his father or Puna Pasi. The question is whether he had not enquired from this P.W.2, who is his neighbour. There is no explanation at all. This evidence of this P.W.2 is without there being any pleading.

22. The Hon'ble Supreme Court in the case of **Union of India v. Ibrahimuddin, 2013(1) PLJR 48(SC)** at paragraph 69 clause (vii) has held that the court cannot travel beyond the pleadings and any evidence and finding recorded on the basis of the evidence beyond pleading is just to be ignored. Therefore, this evidence of P.W.2 is liable to be ignored.

23. In the cross-examination at paragraph 2, this



P.W.2 has clearly stated that at the time of death of Puna Pasi, Kameshwar Chaudhary had already born. According to this evidence, when Puna Pasi died Kameshwar Chaudhary was there. Then how Puna Pasi died in the year 1934 because plaintiff, P.W.1 claimed to be 35 years when he was examined in the year 1990. There is no explanation at all.

24. P.W.3, Medhwa Devi claimed to be the daughter of Puna Pasi. She is aged about 55 years in the year 1990. She has stated that Kawa Devi was born in the year of earthquake and Puna Pasi died within one year. It is admitted fact that earthquake took place in 1934. At paragraph 4, this witness has stated that at the time of death of Chamru, the plaintiff was aged about 16-17 years. Therefore, her evidence regarding year of death of Puna Pasi also liable to be ignored in view of the decision of the Supreme Court. The plaintiff nowhere stated that he had not enquired about the year of death with this P.W.3. In view of the pleading at paragraph 2, the plaintiff enquired the year of death from the persons who were close relations and P.W.3 according to plaintiff and also according to P.W.3 herself is “*phua*” of plaintiff. If she had not informed the plaintiff about the year of death prior to filing the suit then how she came to know the year of death after filing the suit. In my opinion, in view of the pleading at paragraph 2 and the law laid down by Supreme Court



her evidence is also just to be ignored and no reliance can be placed on it. The plaintiffs have examined only these three witnesses on this point.

25. The defendants have also examined many witnesses. D.W.1 is the defendant No.1, Saryug Chaudhary. He has stated that Puna Pasi was his nana(maternal grandfather). At paragraph 3, he has again stated that he had seen his nana who died 31 years ago at Jainagar Kawaiya. Mukhagni was given to his nana by plaintiff no.1, Kameshwar and at that time Kameshwar was aged about 8 years. From perusal of the cross-examination on this question no cross-examination is made to this witness nor any suggestion has been given that he has wrongly stated about the year of death. In view of this evidence of D.W.1, it appears that he has fully supported the case of the defendants pleaded in the written statement about the year of death of Puna Pasi which is not denied in the cross-examination.

26. D.W.2, 3, 4 are formal witnesses.

27. D.W.5 is claimed to be the neighbour of Puna Pasi. Puna Pasi died 30 years ago and at the time of his death, Jhalo Devi, Kameshwar Chaudhary, grandmother of Kameshwar and Saryug were there. At the time of death of Puna Pasi, plaintiff no.1 was aged about 7-8 years. Such is the evidence of D.W. 7 who is also neighbour of both the parties. No cross-examination has been made by



the plaintiff about the year of death of Puna Pasi. The evidences of these witnesses fully corroborated and supported the pleading of contesting defendants-appellants.

28. From perusal of the impugned judgment, it appears that the learned trial court formally considered the evidences and on the basis of evidence of P.W.2 and 3 recorded the finding about the year of death of Puna Pasi without considering the pleading and the law laid down by the Supreme Court. It further appears that issue has been framed to the effect that whether Puna Pasi died in the year 1934 or in the year 1959. When there is no pleading, how the trial court framed this issue no.(ga) wherefrom the year 1934 was found by the court because it is stated at paragraph 5 of the judgment that on the basis of the pleadings of the parties the issues are framed. There is no explanation as to wherefrom the year 1934 was found by the court and this issue was framed. It is not the case that after evidence the issue was recasted.

29. In view of the above discussion of the evidences, it appears that the trial court has made a third case regarding the death of Puna Pasi and wrongly came to the conclusion that Puna Pasi died in the year 1934 which is perverse based on inadmissible evidence. Likewise, the learned trial court on flimsy grounds discarded the evidence of the defendants. I therefore, find that



Puna Pasi died in the year 1959. In fact, there is no contrary case pleaded by the other party. The finding of the trial court on this point is reversed.

30. In view of my above finding, now defendant No.1, being the daughter of Puna Pasi, also inherited the property. Defendant No.2, Saryug Chaudhary who was the original appellant being the maternal grandson of Puna Pasi will inherit the property of Jhalo Devi, defendant No.1. In such view of the matter, how the exclusive title of the plaintiff be declared with respect to the property. It may be mentioned here that this is not a partition suit. Therefore, we are not required to find out what is the share of Jhalo Devi or plaintiff or Sukni Devi or other daughter of Puna Pasi, all are not party in the suit. P.W.3 in her evidence clearly admitted that other daughters died leaving behind sons and daughters and she has given the names of those persons.

31. Since the plaintiff is praying for declaration of his title, the burden is on him to prove his title. The plaintiff cannot take advantage of the weakness of the defendant's case. Reference may be made on this point to the decision of the Supreme Court reported in **2014(2) Supreme Court Cases 269**. Here, in view of this above discussion, I find that plaintiff failed to prove his exclusive title and possession. The plaintiff nowhere denied that the other daughters



of Puna Pasi have no heirs. In such view of the matter, the plaintiff is not entitled for declaration of his exclusive title and possession over the suit property as all the other co-owners have not been made party and the defendant Nos.1 and 2 are also co-owners. Thus, the point no.(a) is answered in favour of the appellants and against the plaintiffs-respondents.

Point no.(b):

32. This point is become now academic only. Even if it is held that Sukni Devi had no right to execute Will or that Will is forged and fabricated then also the right to inherit the self-acquired property of Puna Pasi by Jhalo Devi will be there and she will have a share in the property. In such view of the matter, when a co-sharer i.e. defendant No.1 has executed a gift deed in favour of her son cannot be challenged by a third person. Moreover, even if this gift deed is invalid gift deed then also the son of Jhalo Devi will be entitled to inherit the share of Jhalo Devi. In such view of the matter also, the plaintiff is not entitled for declaration of his exclusive title over the suit property. In view of this above fact, whether Will is illegal or void or is fabricated is not decided here as it is not necessary for consideration for deciding the rights of the parties in the present case. So far the sale deed executed by defendant No.2 is concerned, those are the registered sale deeds. I have already held that Jhalo Devi



was a co-sharer. She has died. Therefore, her share will go to her son, Saryug Chaudhary, defendant No.1, who has sold some of the property. In such circumstances, he had the right to execute the sale deed.

33. The learned counsel, Mr. Ranjan Kumar Dubey submitted that the learned trial court has recorded clear finding that there had been no partition between Jhalo Devi and Kameshwar Chaudhary, therefore, defendant No.2 could not have sold the property nor Jhalo Devi could have executed the gift deed. So far this question is concerned, as I have already held that Jhalo Devi is a co-sharer of the plaintiff, she has right to gift her property to her son and moreover, now Jhalo Devi has died, therefore, defendant No.2, Saryug Chaudhary will inherit the property of Jhalo Devi even if there is no gift deed and he has the right to sell the property even if there was no partition in view of Section 30 of the Hindu Succession Act.

34. The learned counsel, Mr. Dubey submitted that Jhalo Devi in the gift deed stated that she derived title through the Will and she is not claiming title by inheritance. So far this submission is concerned, it may be mentioned here that the right of inheritance of Jhalo Devi will not go away on the statement made in the gift deed. The defendants have explained that because plaintiff's mother remarried, there was fear in the mind of Sukni Devi and Jhalo



Devi that Sukni Devi may sell the property, therefore, Will was executed. That does not mean that the defendants have no right to claim inheritance or the right of inheritance of defendants ceased. Their right to inherit property of Puna is dependent on the year of death of Puna Pasi. In view of my above discussion, this point is accordingly disposed of.

35. In the result, this first appeal is allowed. The impugned judgment and decree is set aside and the plaintiff's suit is hereby dismissed. In the facts and circumstances of the case, the parties shall bear their own costs.

(Mungeshwar Sahoo, J)

Saurabh/-

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