

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.143 of 1996

Against the judgment and decree dated 16.12.1995 passed by Sub-Judge-I, Bhabua in Title Suit No.149 of 1993

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Bhola Nath Mishra & Ors.

.... Plaintiffs-Appellants

Versus

Most. Dhari Devi & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellants : Mr. T.N. Maitin, Sr. Advocate.
Ms. Mallika Mazumdar, Advocate.
Mr. Prem Kumar, Advocate.
For the Respondents : Mr. Chandrakant, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 06-07-2017

The plaintiffs-appellants have filed this first appeal against the judgment and decree dated 16.12.1995 passed by the learned Sub-Judge-I, Bhabua in Title Suit No.149 of 1993 whereby the learned trial court dismissed the plaintiffs' suit for partition.

2. The plaintiffs-appellants filed the aforesaid suit claiming 1/3rd share in the suit property. The simple case of the plaintiffs is that Nageshwar Mishra, the common ancestor, had four sons, namely, Late Harihar Mishra, Late Nand Kishor Mishra, Late Badri Nath Mishra and Late Ram Kishor Mishra. The plaintiffs are the descendents of Late Badri Nath Mishra. All the properties of



Nageshwar Mishra were partitioned by registered deed of partition dated 02.01.1990 between the four branches. In this partition the share of four branches were defined to the extent of $\frac{1}{4}^{\text{th}}$ in the property of Nageshwar Mishra. Out of four branches, Praduman Mishra, son of Late Nand Kishor Mishra took away his $\frac{1}{4}^{\text{th}}$ share by partitioning the properties by metes and bounds. The rest three branches remained joint. There had been no partition between them. If defendants have created any document, it is forged and fabricated document is not binding on the plaintiffs. The plaintiffs have got $\frac{1}{3}^{\text{rd}}$ share in immovable properties described in Schedule-‘Ka’ and $\frac{1}{3}^{\text{rd}}$ share in movable properties described in Schedule-‘Kha’.

3. The defendant nos.1 to 3 on being noticed appeared and filed contesting written statement. They admitted the registered partition dated 02.01.1990. They also admitted separation of Praduman. The main defence is that after the registered partition there was oral partition between the three branches and memorandum of partition was prepared on 13.08.1991 and since then the parties are separate by metes and bounds and there is no unity of title and possession between the parties. The parties have acted according to this partition between the three branches and the parties have sold many properties by registered sale deeds. Plaintiff no.2 has also sold land to Dularmani Devi, wife of Satendra Kumar Mishra. Plaintiff



no.3 also sold lands to others wherein they referred the partition of the year 1990. Since the house at Varanasi was joint family property, it was allotted in favour of plaintiffs as the plaintiffs were residing at Varanasi which was indicated in schedule of the *Yadast* partition.

4. The defendant no.6 filed separate written statement supporting the case of defendant nos.1 to 3.

5. On the basis of the aforesaid pleadings of the parties the learned trial court framed the following issues:-

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiffs got any valid cause of action for the suit?
- (iii) Is the suit barred by law of limitation, waiver, acquiescence and principle of estoppel?
- (iv) Whether there is any unity of title and possession between the parties?
- (v) Whether the memorandum of partition dated 13.08.1991 is legal, valid and genuine?
- (vi) Whether the plaintiffs are entitled to get the suit property be partitioned?
- (vii) Any other relief or reliefs for which the plaintiffs are entitled?

6. After hearing the parties, the learned trial court came to the conclusion that there had already been previous partition by metes and bounds between the three branches also and, accordingly, dismissed the plaintiffs' suit.

7. The learned Senior Counsel Mr. T.N. Maitin appearing for the appellants submitted that Ext.A, the so-called memorandum of partition, in fact a partition deed, therefore, it requires registration and



for non-registration thereof it is inadmissible in evidence. According to the learned Senior Counsel, Ext.A is not signed by plaintiff no.2 and, therefore, it is not a valid document. In fact the document is fabricated and created document which could not have been relied upon by the trial court, as such, the judgment of the trial court is vitiated. The learned Senior Counsel further submitted that the references made in the registered sale deed refer to the registered partition dated 02.01.1990. Moreover, in the registered partition deed the house at Varanasi was not included in partition but in subsequent so-called partition the house at Varanasi was included. According to the learned Senior Counsel, the said house was not included for partition between the four branches in registered partition deed because that property at Varanasi is the self-acquired property of plaintiffs' father, Badri Nath Mishra. In support of the fact of self acquisition, the plaintiffs also adduced sufficient evidences oral as well as documentary but the learned court below discarded the evidences, as such judgment is vitiated. The learned trial court misappropriated the evidence and gave wrong finding regarding previous partition. Except Ext.A there is no reliable evidence of previous partition between the three branches and in fact Ext.A is inadmissible in evidence, as such, the first appeal be decreed and judgment and decree be set aside.



8. On the other hand, the learned counsel Mr. Chandrakant appearing on behalf of the respondents submitted that there is no pleading regarding self acquisition of Varanasi property by the plaintiffs. The plaintiffs also never sought for any declaration with respect to Ext.A. The only pleading in the plaint is that if any document is created by the defendants, it will not be binding on the plaintiffs. This is not sufficient pleading with regard to Ext.A. The plaintiffs, who have signed Ext.A, were never examined to deny their signature and moreover it is not the case of the plaintiffs that they had no knowledge about the existence of Ext.A. The genuineness of Ext.A was never challenged. There cannot be any presumptive invalidity of the document particularly when it is signed by the parties. So far partition deed is concerned, according to the learned counsel in fact Ext.A is a memorandum of partition and not a partition deed because in the memorandum of partition there is reference of previous oral partition, therefore, it is not required to be registered. Since it is not under challenge, it is valid document and is direct proof of partition between the three braches. Therefore, there is no question of reopening of partition arises.

9. The learned counsel further submitted that both the parties acted on this partition and there has been inter-se transaction between them which again supports strongly the previous partition



between the parties. According to the learned counsel, Ext.A is a family arrangement between the three branches and only because Varanasi property was not included in previous partition, there cannot be any presumption that it is self acquired property of the plaintiffs. The plaintiffs never prayed for such declaration, therefore, in this simple suit for partition how it can be declared that Varanasi property is the self acquired property particularly when the said property is not the subject matter of the present suit. On this ground, the learned counsel submitted that the first appeal be dismissed.

10. In view of the above rival contentions of the parties, the only point arises for consideration in this first appeal is whether there is unity of title and unity of possession between the parties regarding the suit property or there had been previous partition as claimed by the defendants.

11. The plaintiffs-appellants filed simple suit for partition alleging that there had been no partition by metes and bounds between the three branches. On the contrary, the case of the contesting defendants is that there had already been oral partition between the three branches and the said oral partition was reduced to writing in memorandum of partition which has been marked as Ext.A. In support of their respective cases, the parties have adduced oral as well as documentary evidences.



12. It is admitted by the parties that each branch has got 1/4th share in the property of Nageshwar Mishra. Out of four branches one branch had already separated taking his 1/4th share. Now admittedly the suit property is to be partitioned if not already partitioned between the three branches. Therefore, each branch has got 1/3rd share in the suit property. The registered partition deed has been produced by the plaintiffs which has been marked Ext.3/A which is dated 02.01.1990. This document clearly indicates that the share of four branches were defined i.e. 1/4th share in the property mentioned therein. Admittedly Varanasi property was not mentioned in this partition deed. Since it is admitted by the parties that the three branches were joint after registered partition dated 02.01.1990, it is for the defendants to prove the fact that after that registered partition dated 02.01.1990 there had already been partition between the remaining three branches by metes and bounds. Now let us consider the evidences produced by the parties.

13. D.Ws.2, 3 and 4 have stated that there was oral partition between the three branches in their presence and a memorandum of partition was prepared on 13.08.1991 wherein also these witnesses have signed. The defendants also examined D.Ws.7, 8 and 9 who have fully supported the partition between the three branches. According to D.W.7 the parties are cultivating their lands



separately. On the contrary, the plaintiffs have examined four witnesses. Out of them P.W.3 is a formal witness and P.W.4 is the plaintiff no.1. It may be mentioned here that P.W.4 is Birendra Nath Mishra who has not signed Ext.A. The plaintiff who signed Ext.A i.e. Bhola Nath Mishra has not been examined as witness to deny his signature on Ext.A. This Bhola Nath Mishra is admittedly karta of plaintiffs' family who signed Ext.A in the said capacity. P.W.4 in his deposition stated that he will not examine Bhola Nath Mishra as witness. Likewise the other brothers, namely, Vijay Narayan Mishra and Venkatesh Mishra who had signed Ext.A were also not examined as witness on behalf of the plaintiffs. The witnesses examined by the plaintiffs are on the question of self acquisition of Varanasi property and that on the point of no partition.

14. The plaintiffs have produced two letters which are dated 17.12.1994 and 24.12.1994 which are Ext.1 and Ext.1/A. These two letters were written by Maheshwar Prasad Singh to Bhola Nath Mishra. This Maheshwar Prasad Singh has been examined as D.W.3. So far these letters are concerned, it can very well be said that D.W.3 is not a party to the suit. Whatever statements made by him in these letters are not admissible against the defendants with regard to partition or no partition.

15. Ext.2 is the photocopy of declaration of *panchnama*. It



is not very relevant with regard to partition or no partition. Ext.3 is registered sale deed executed by Nand Kishor Mishra in favour of Bhagwan Dutt Mishra which is dated 02.03.1964. It is not relevant for deciding the question of partition of 1990 between the parties. Exts.4, 5, 6, 6/A are with respect to the self acquisition of Varanasi property.

16. On the other hand, the defendants have produced Ext.A, the memorandum of partition, which is dated 13.08.1991. From perusal of this Ext.A, there is clear mention that there was oral partition between the three branches on 06.08.1990 in presence of the panches. The learned Senior Counsel Mr. Maitin gave much emphasis on the point that this document is a partition deed. However, from going through the document, it is clearly evident that the document records the previous oral partition and the partition is not affected by this document, therefore, this document Ext.A is a memorandum of partition, as such it is not required to be registered and it is admissible in evidence. This document clearly proves that there had been partition between the three branches.

17. It may be mentioned here that the plaintiffs never sought for any declaration with regard to this Ext.A. Even after pleading by the defendants the plaintiffs never prayed for amending the plaint or prayer portion and never sought any relief challenging Ext.A. It is further apparent that the other brothers of plaintiff no.2 i.e.



plaintiff no.1 and others have also signed this Ext.A. Bholu Nath Mishra, the eldest brother of plaintiff no.2, signed as karta. Now, therefore, competent person has signed memorandum of partition. The act of karta is binding on the members of the family. It is not case of the plaintiffs that they had no knowledge about this Ext.A or that any right has been adversely affected by this document rather there is no reference at all in the plaint regarding this document.

18. The Hon'ble Supreme Court in the case of **Md. Nurul Hoda Vs. Bibi Raifunissa, (1996) 7 Supreme Court Cases 767** has held that when the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and that decree, instrument or contract cancelled, or set aside or rescinded. In the present case, no such relief has been claimed by the plaintiffs, therefore, unless this document is held to be forged and fabricated document for which no prayer has been made nor any relief has been claimed, how the partition can be reopened?

19. The defendants have also produced Ext.C/1 which is registered sale deed executed by plaintiff no.3 to defendant no.3 and also wife of defendant no.2. In this sale deed there is mention of oral partition dated 06.08.1990 which is the date mentioned in the Ext.A.



Moreover, this Ext.C/1 is an inter-se transaction between the parties referring to the partition claimed by the defendants in Ext.A.

20. A Division Bench of this Court in **A.I.R. 1977 Patna 59 (Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwari and others)** has held that inter-se transaction between the parties is a strong piece of evidence of partition between the parties. If there had been no partition then how one party could have transferred particular property to the other party when both are co-sharers and have got equal ownership.

21. Ext.C is again a registered sale deed dated 04.06.1991 whereby plaintiff no.4 and plaintiff no.5 sold the property allotted in their share wherein defendant no.1 is a witness.

22. The important evidence is Ext.D which is power of attorney executed by plaintiff no.1 in favour of defendant no.1 authorizing defendant no.1 to sell plaintiff's land. Had there been no partition, where is question of land of plaintiff no.1 arises. Why and how this power of attorney was executed by him authorizing defendant no.1 to sell his property. There is no explanation at all.

23. So far self acquired property at Varanasi is concerned, there is no pleading with regard to that and moreover Varanasi property is not the subject matter of partition in this partition suit. Therefore, whatever evidence has been adduced by the plaintiffs to



prove the fact that Varanasi property is self acquired property is just liable to be ignored.

24. An interlocutory application being I.A. No.3344 of 2017 has been filed by the appellants seeking permission to adduce additional evidence under Order 41 Rule 27 CPC. It is submitted by the learned senior counsel that important documents could not be produced in support of the fact that Varanasi property is the self acquired property of Badri Narayan Mishra and, therefore, the documents annexed with the interlocutory application should be considered as additional evidence. As stated above, we are not investigating as to whether Varanasi property is the self acquired property or not. It is not the subject matter of present suit. No such declaration has been sought for and could not have been sought for because that property is not the subject matter. Therefore, this interlocutory application is devoid of any merit. There is no pleading regarding the documents nor there any pleading regarding self acquisition. Thus, this interlocutory application is rejected.

25. The Supreme Court in the case of **Union of India Vs. Ibrahim Uddin & Anr., 2013 (1) PLJR 48 SC** at paragraph 69 clause (vii) has held that “**the court cannot travel beyond the pleadings as no party can lead the evidence on an issue/point not raised in the pleadings and in case, such evidence has been**



adduced or a finding of fact has been recorded by the Court, it is just to be ignored. Though it may be a different case where in spite of specific pleadings, a particular issue is not framed and parties having full knowledge of the issue in controversy lead the evidence and the court records a finding on it.”

26. In the present case, as stated above, neither there is any pleading with regard to self acquisition of Varanasi property nor any declaration has been sought for regarding that property. No case has been made out by the plaintiffs that Varanasi property is the self acquired property, therefore, would not have been included in Ext.A. Only arguments are advanced on the basis of evidences adduced. Therefore, the evidences are liable to be ignored and no finding regarding Varanasi Property is to be given in this simple suit for partition particularly when the Varanasi property is not the subject matter of the present partition suit.

27. In view of my above discussion I find that there had already been previous partition between the parties. As such, there is no unity of title and unity of possession between the parties. The defendants have successfully proved the previous partition between the parties. Thus, the finding of the trial court on this point is hereby confirmed.

28. In the result, I find no merit in this first appeal and



accordingly, this first appeal is dismissed. In the facts and circumstances of the case, no order as to cost.

(Mungeshwar Sahoo, J)

Harish/-

AFR/NAFR	NAFR
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