

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.197 of 2013

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1. Punam Devi @ Anjani Devi W/O Late Amrendra Kumar Rai.
 2. Rajesh Kumar Rai @ Jajesh Kumar Rai S/O Late Amrendra Kumar Rai.
 3. Rupesh Kumar Rai S/O Late Amrendra Kuma Rai.
 4. Beauty Kumari D/O Late Amrendra Kumar Rai.
 5. Minni Kumari D/O Late Amrendra Kumar Rai.
 6. Reshmi Kumari @ Simmi Kumari Rai D/O Late Amrendra Kumar Rai.
 7. Anil Kumar Rai S/O Late Chandramani Rai all Resident Of Mohalla- Jagatpur, Ward No. 6, Under Banka Nagar Panchayat, Banka, P.O & P.S- Banka, District- Banka.

.... Appellant/s

Versus

1. Jai Narayan Rai S/O Late Deep Narayan Rai.
2. Ajay Kumar Rai S/O Late Deep Narayan Rai both Resident Of Mohalla- Jagatpur, Ward No. 6, Under Banka Nagar Panchayat, Banka, P.O & P.S- Banka, District- Banka.
3. Sunil Maharaj S/O Late Uma Kant Maharaja.
4. Milton Maharaj S/O Late Uma Kant Maharaja.
5. Nina Devi D/O Late Uma Kant Maharaja all Resident Of Village- Puraini, P.O- Puraini, Ganeshpur, P.S- Puraini, District- Saharsa.
6. Bhawani Devi W/O Panchanand Maharaj D/O Late Chandramani Rai Resident Of Village- Suja, P.O- Suja, P.S & District- Begusarai.
7. Gita Devi W/O Awadhesh Kumar Rai D/O Chandramani Rai Resident Of Village- Manihariya, P.O & P.S- Pothiya, District- Katihar.
8. Mostt. Maya Devi W/O Late Braj Kishore Rai Resident Of Village- Jagatpur, P.O & P.S- Banka, District- Banka.
9. Mostt. Usha Devi D/O Late Braj Kishore Rai And W/O Late Sankar Maharaj Resident Of Village- Ibrahimpur, P.O- Fatehpur, P.S- Sabour, District- Bhagalpur.
10. Ajit Kumar Rai S/O Late Fulchand Rai Executive Engineer, Marketing Board, Muzaffarpur.
11. Abdhesh Bihari Rai S/O Late Fulchand Rai.
12. Bidhan Chandra Rai S/O Late Fulchand Rai.



13. Binod Bihari Rai S/O Late Fulchand Rai all Resident Of Village- Jagatpur, P.O+ P.S- Banka, District- Banka.
14. Mostt. Adya Bhawani W/O Late Fulchand Rai C/O Ajit Kumar Rai, Executive Engineer, Marketing Board, Muzaffarpur.
15. Bhagalpur Prefecture Association Of Registered Societies Through N.M. Thomas, Chancellory Office, Nawab Colony, Tilkamanjhi, P.S- Kotwali, District- Bhagalpur.
16. Gokhla Terresima, Carmelita Registered Societies Through Sister Defnee, Resident Of T.N. Singh Road, Avila Bhawan, Adampur, P.O & P.S- Barari, District- Bhagalpur.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. K.N. Choubey, Sr. Adv.

For the Respondent/s : Mr. S. N. Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 01-07-2017

Heard Mr. K.N. Choubey, learned senior counsel for the appellants and Mr. S.N. Singh, learned counsel for the respondents.

The defendant 4th set in the suit are the appellants in the present appeal against the judgment and decree of reversal.

The plaintiffs filed the suit for partition praying for a preliminary decree of partition with regard to 5 1/3rd annas share over the suit property.

The facts in detail need no notice for the purpose of present second appeal and suffice it to record that the genealogical table is admitted between the parties from which it transpires that one



Kanhaiya Rai had two sons Triloki Rai and Bhothari Rai. Triloki Rai had a son Fulchand Rai whereas Bhothari Rai had three sons namely Chandra Mani Rai, Deep Narayan Rai and Braj Kishore Rai. The original plaintiff was Deep Narayan Rai who filed the suit with regard to the property in the village of Maharpur with specific assertions that there had been partition between the parties for other family properties and the fact of said partition was recorded in the registered deed of memorandum of partition dated 02.07.1968. However, it was the case of the plaintiff that in the deed of memorandum of partition wrong recital at the instance of Fulchand Rai and Chandra Mani Rai was made with regard to the suit property (property of Maharpur village) to the effect that the suit property was the self acquired property of Fulchand Rai and Chandra Mani Rai.

The defendant 4th set contested the suit by filing written statement and leading evidence. It was the case of the defendant 4th set that there had already been a partition in the family with regard to the family property and the suit property was the self acquired property of Fulchand Rai and Chandra Mani Rai which fact was rightly mentioned in the registered deed of memorandum of partition dated 02.07.1968.

It would be apposite to mention that during the pendency of the suit the plaintiff prayed for amendment in the plaint



which was allowed. By the amendment the plaintiff deleted the property of the share of Fulchand Rai from the subject matter of the suit and confined his prayer for partition of the remaining property only.

The trial court framed altogether 11 issues out of which the issue nos. VI, VII and VIII were the material issues pertaining to the dispute with regard to the nature of the suit property being the joint family property or the self acquired property of Fulchand Rai and Chandra Mani Rai. The trial court returned the findings on those issues in favour of the contesting defendants and dismissed the suit. In appeal by the plaintiff (since deceased, through LR), the appellate court below has set aside the judgment and decree passed by the trial court, allowed the appeal and granted the decree for partition as prayed by the plaintiff.

This appeal has been admitted for hearing on the following substantial questions of law:-

- (i) Whether when the plaintiffs have accepted in the plaint the fact of execution of a memorandum of partition dated 02.07.1968 (Ext. B), the appellate court below has the jurisdiction to make out a third case by holding the said



document to be suspicious and not operative document?

- (ii) Whether the appellate court below while reversing the judgment and decree of the trial court has made out a third case and therefore its judgment has become vulnerable?

While criticizing the impugned judgment, Mr. Choubey, learned senior counsel for the appellants has submitted that the appellate court below has passed the impugned judgment after recording the findings in favour of the plaintiff on mere surmises and conjectures. It has been contended that the original plaintiff Deep Narayan Rai was admittedly one of the executants of the deed of memorandum of partition dated 02.07.1968 (Ext. B) and as such, the relief against the said document was required to be sought before seeking the relief for partition of the suit property. Elaborating his submissions, it has been pointed out that the suit has been filed only with regard to the property of village Maharpur with regard to which the specific recital in the deed of memorandum of partition (Ext. B) is that the said property is the self acquired property of Fulchand Rai and Chandra Mani Rai but even after assuming that the said recital was fraudulently got entered in the deed, there is significantly no



averment at all giving reasons for leaving out the suit property from partition while all other properties of the family was made the subject matter of partition. It has been propounded that the fraud is required to be pleaded with all particulars as required under Order 6 Rule 4 C.P.C. but in the present case there is only a bald statement in that regard in paragraph-8 of the plaint. Consequent upon the factual situation where there is no relief against the registered deed of memorandum of partition, it has been propounded that the statement made in the said deed by the original plaintiff would operate as an estoppel by deed and reliance in this regard has been placed upon Halsbury's law of England, IV Edition, Volumn-13, para-57 and para-351 of Volumn-16 of the same edition. Further reliance has also been placed upon a decision of this Court in the case of **Lachman Lal Vs. Munshi Mahton, A.I.R. 1933 Pat. 708**. Learned senior counsel has also relied upon the decision of the privy council in the case of **Martin Cashin Vs. Peter J. Cashin, A.I.R. 1938 Privy Council 103** where their lordships have considered the issue of estoppel on the basis of the averments in the deed of settlement. It has been next submitted on behalf of the appellants that by seeking the amendment in the plaint by which the property of the branch of Fulchand Rai was excluded by the plaintiff from the subject matter of the suit, the entire case as originally pleaded has been mutilated



because there was no reason disclosed by the plaintiff as to on what basis the specific part of the suit property was found by the plaintiff to be belonging to the branch of Fulchand Rai keeping in view the original relief for partition in the suit on the express and specific basis that the suit property was joint family acquisition. It has been also contended that the appellate court below has exceeded in its jurisdiction in adjudicating the legal validity of Ext. B (registered memorandum of partition dated 02.07.1968) which was never under challenge in the suit but even thereafter, no reasoning on the basis of evidence on record has been assigned by the appellate court below in support of its conclusion against the said deed. It has been further contended that the learned appellate court below has again wrongly pondered over the issue of validity of partition deed (Ext.C) to which the plaintiff was not even a party. Concluding the submissions, learned senior counsel for the appellants has argued that the judgment of the appellate court below suffers from perversity and unreasonableness also for the reason that a third case has been made out by the appellate court below ignoring the averments and the reliefs prayed in the plaint.

Mr. Singh, learned counsel for the respondents, however, has supported the impugned judgment but has accepted that there is no consideration of the evidence by the appellate court below



before recording its finding on the legal validity of Ext.B even though the said registered deed of memorandum of partition (Ext. B) was the crucial document for determination of the rights of the parties. It has been next submitted that the plaintiff was not required to make pleadings as required under Order 6 Rule 4 C.P.C. because the plaintiff has also alleged malice against the contesting defendants and therefore under Order 6 rule 10 C.P.C. no particulars were required to be pleaded. It has, however, been emphatically contended that in view of the fact that the appellate court below has failed to discuss evidence or give reasonings before overturning the findings of the trial court, the matter needs remand to the appellate court below for fresh consideration in the interest of justice. It has been propounded on the basis of the provisions of Order 41 Rule 23 A, Rule 25 and Rule 33 C.P.C. that the facts and circumstances of the present case where valuable rights of the parties are involved, the matter deserves to be remanded back for fresh consideration after rehearing the matter by the appellate court below. It has also been argued that this Court in second appeal can pass such an order of remand as laid down by the Apex Court in the case of ***Karedla Parthasaradhi Vs. Gangula Ramanamma, 2015 A.I.R. SCW 377.*** Elucidating the merits of the case, learned counsel for the plaintiff-respondents, however, has accepted that no reason has been assigned



or the basis disclosed by the plaintiff at the time of making the prayer for amendment for removing the specific property of the share of Fulchand Rai from the suit property and further that there is also no reason assigned in the plaint by the plaintiff as to why the suit property of village Maharpur was left out from partition while other properties of the family were partitioned. It has also been accepted on behalf of the respondents that paragraph-8 of the plaint is the sole repository of allegation of fraud. It has been lastly again prayed on behalf of the respondents that in the facts and circumstances of the case, this Court should remand the matter back for fresh consideration by the appellate court below.

After considering the submissions and perusal of the judgments of both the courts below, it is manifest that the plaintiff (since deceased, through L.R.) and the defendants are the descendants of common ancestor Kanhaiya Rai. It is also not in dispute between the parties that there had been partition of the family properties between the parties and the said fact of partition was recorded in the registered deed of memorandum of partition (Ext. B) dated 02.07.1968. The plaintiff has also not denied his execution of the said document which contains a statement that the suit property (property of village Maharpur) was the self acquired property of Fulchand Rai and Chandra Mani Rai. The plaintiff, however, has



alleged that the said recital in the deed (Ext. B) was fraudulently got entered by Chandra Mani Rai and Fulchand Rai who were the literate members of the family. It would be fruitful here to notice the averments made in paragraph 8 of the plaint as follows:

“As said earlier there had been a partial partition of the properties of the said joint family by registered deed of partition dated 2nd July 1968. In this partition deed Fulchand Rai and Chandra Mani Rai in collusion with each other got certain recitals inserted in the deed of partition of 1968 to the effect that Fulchand Rai and Chandra Mani Rai have acquired certain properties in their names and this statement in partition deed was made illegally and dishonestly and fraudulently.”

It is also transparent from the averments in the plaint that there is at all no reason disclosed in the plaint for excluding only the property of village Maharpur from partition when all other family properties were being partitioned. Significantly, it is also not the case of the plaintiff that the disputed recital in the deed (Ext.B) was inserted without his knowledge, and the decision to exclude the suit property from partition was deliberate and conscious decision of all the members of the family. The fact is thus evident that on the one hand the plaintiff has sought to resile from the statement made in the



registered deed of memorandum of partition (Ext. D) regarding the suit property being the self acquired property of Fulchand Rai and Chandra Mani Rai alleging fraud but on the other hand the plaintiff has failed to assign any reason as to why the suit property was left joint when other joint family properties were being partitioned as it is nowhere the case of the plaintiff that any other property except the suit property was also excluded from partition. The circumstance, when the execution of the deed (Ext.B) by the plaintiff and other coshareres stands admitted, has required the plaintiff, in order to raise even a semblance of fraud, to plead and prove that the joint family members had consciously and deliberately decided to retain the suit property as joint property. The law is well settled that once after the partition in the joint family is admitted there is presumption of complete partition and the party, who alleges the fact that a particular property was left out from partition, has to plead and prove that the said property was deliberately left out from partition to be retained as joint family property. In the present fact situation, it is evincible enough that the plaintiff has blown hot and cold together. It would also be significant to note that though the plaintiff does not deny that he has executed the registered deed of memorandum of partition (Ext. b) but no relief has been sought against the said deed which carries the specific recital that the suit property (property of



village Maharpur) is the self acquired property of Fulchand Rai and Chandra Mani Rai and not the joint family property. During the course of submission, learned counsel for the respondents, however, has tried to wriggle out from the legal repercussions by submitting that it was the mistake of the counsel that further averments in the plaint could not be made. But this Court is not inclined to accept such submission at the second appellate stage.

The implications of a statement made in a deed upon the party who made the same has been considered by the privy council in the case of **Martin Cashin Vs. Peter J. Cashin, A.I.R. 1938 Privy Council 103** and it has been ruled as follows:-

“.....In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed because it operates as a conclusive bar against him-not because he has read it or understands it, but because he has chosen to execute it.....”

(emphasis supplied)



In the case of **Lachman Lal Vs. Munshi Mahton, A.I.R. 1933 Pat. 708**, this Court has also considered the effect of a recital made in a deed in view of Section 115 Evidence Act has held as follows:-

“.....There can be no dispute as to what the law is on this point, and it was settled as far back as 1850 when the case of Stroughill v. Buck (5) was decided. Pateson, J., in that case stated the law in these terms:

“When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument.”

In this regard, it would also be fruitful to notice the general effect of recital in a deed as mentioned in Halsbury's law of England, IV edition, Vol.13, para-57 as follows:

“The General Effect:- *By executing a deed in accordance with all the requirements for such execution, the party whose act and deed it is becomes, as a general rule, conclusively bound by what he is stated in the deed to be effecting, undertaking or*



permitting. He is, in general, so bound even though another party has not executed the deed, or he has himself executed it in a false name. He is, as a rule, estopped from averring and proving by extrinsic evidence that the contents of the deed did not in truth express his intentions or did not correctly express them, or that there are reasons why he should not be obliged to give effect to the duty. This is equally the case whether the deed is expressed to operate as a conveyance of property or as a contract or otherwise.....

But to all these general principles there are exceptions, cases, where the deed may be a nullity or may be avoided or corrected’.

The concept of estoppel by deed has also been dealt with in paragraph-954 Volume 16 Halsbury’s Law of England IV edition, as follows:

*“....**Estoppel by deed.** Where there is a statement of fact in a deed made between the parties and verified by their seals, an estoppel results, and is called “estoppel by deed”. If upon the true construction of the deed the statement is that of*



both or all the parties, the estoppel is binding on each party; if otherwise, it is only binding on the party making it...”

As aforementioned there is no relief by the plaintiff in the suit to avoid the deed (Ext.B) nor there is relief that the recital in the said deed requires correction.

The said deed (Ext.B) was admittedly executed by the plaintiff alongwith other co-sharers accepting the fact of partition of the joint family properties. The said deed did not include the suit property of village-Meharpur. The plaintiff has come out with the case that a fraudulent recital was got in the said deed regarding the suit property being the self-acquired property of Fulchand Rai and Chandramani Rai. But even if the said allegation of the plaintiff is accepted, there is no pleading or evidence aliunde that the plaintiff and the other co-sharers knowingly and purposely left out the suit property from partition and therefore it was not made subject matter of partition. The conspicuous absence of such a case by the plaintiff substantially dents the case of fraud as endeavored to be made out. As such, in view of the principles in this regard as mentioned above, there cannot be escape for the plaintiff from the binding effect of the recitals including the disputed recital in the deed (Ext.B) in question.

The appellate court below in the impugned judgment has



elaborately considered the validity of partition of the joint family properties in other villagers and has come to the conclusion that the said partition could not be proved but this finding is definitely contrary to the case pleaded by the plaintiff and even mentioned in paragraph-18 of the judgment of the appellate court below that the lands of other villagers were partitioned vide registered partition deed dated 02.07.1968 (Ext.B) but the lands of Mauza-Meharpur was left. The appellate court has also further come to the conclusion that the partition as recognized by the deed (Ext.B) never became operative but this was never the case of the plaintiff. The conclusion by the appellate court below that the deed dated 02.07.1968 (Ext.B) is fraudulent and manufactured document is definitely a third case made out by the appellate court below.

The appellate court below has also committed illegality in placing the onus upon the contesting defendants to establish the suit property to be their self-acquisition without first coming to the conclusion that the plaintiff has pleaded and proved existence of required nucleus out of which the said property could have been acquired. During course of submission, learned counsel for the plaintiff-respondents has accepted that the controversy between the parties centers around the deed (Ext. B); and the subsequent deed (Ext.C) to which the plaintiff was not a party was not crucial for



determination of the core question. The irresistible conclusion from these aspects is that the appellate court below while passing a decree of reversal has totally misdirected itself and the findings are therefore vulnerable.

The prayer on behalf of the plaintiff-respondents for remand of the matter to the appellate court below for fresh hearing is to be now examined in the background of aforesaid reasons and discussions. It is well settled that the order of remand cannot be passed as a matter of routine. It is not the case on behalf of the plaintiff-respondents that the parties to the suit were not aware of their cases as pleaded and were prevented or precluded from either taking part in the proceeding or from leading evidence on their pleaded cases. It is also not their case that any issue was left undecided. Though learned counsel for the plaintiff-respondents has put much emphasis during course of his arguments that even a second appellate court has got the power to remand the matter back. There is, however, no quarrel to this proposition but the principle is also well settled that the power of remand is not meant to provide fresh opportunity to a litigant. Merely because of the fact that the conclusions by the learned court below are not legally sustainable or the issues have been wrongly decided, the prayer for remitting the matter back for fresh consideration cannot be granted.



In a recent decision by the apex court in ***Lisamma Antony Vs. Karthiyayani, (2015)11 SCC 782*** , it has been observed in identical situation that “*remanding a case for reappraisal of evidence and fresh decision is nothing but harassment of litigant*” It has also been observed that “*unnecessary delay in final disposal of a lis, shakes faith of litigants in court*”.

Another decision in the case of ***Maya Devi Vs. Raj Kumari Batra, (2010)9SCC486*** has also its reflection on the power of remand of an appellate court where their lordships have observed that the power of “*remanding the matter is discretionary with the appellate court and would largely depend upon the nature of the dispute, the nature and extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties*”.

This Court, in view of the above dictum and in the present facts and circumstances, comes to the conclusion that this is not a fit case where the matter requires remand.

For the aforesaid reasons and discussions, the substantial questions of law as framed are decided in favour of the appellants.

In result, this appeal succeeds and the judgment and decree passed by the appellate court below is hereby set aside. In the



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

(V. Nath, J)

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