

IN THE HIGH COURT OF JUDICATURE AT PATNA

Appeal against the judgment dated 18.12.1993 and decree dated 05.01.1994 passed by Sri Manohar Prasad, the learned 1st Additional District Judge, Bhagalpur in Title Appeal No. 04 of 1985 reversing the judgment dated 27.11.1984 and decree dated 12.12.1984 passed by Sri Gauri Shankar Poddar, the learned Additional Munsif, Bhagalpur in Title Suit No. 24 of 1980

Second Appeal No. 106 of 1994

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Kur Kur Rai

.... Appellant

Versus

Hari Bans Tiwari & Ors

.... Respondents

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Appearance :

For the Appellant : Mr. Amarendra Kumar Jha, Advocate

For the Respondents : Mr. Ranjit Sahay, Advocate

Mr. S. M. Ashraf, Advocate

Mr. Rajesh Pd. Choudhary, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

CAV JUDGMENT

Date: 24-07-2018

This appeal, under Section 100 of the Code of Civil Procedure, has been preferred against the judgment and decree dated 18.12.1993 and 05.01.1994 respectively passed by the learned 1st Additional District Judge, Bhagalpur in Title Appeal No. 04 of 1985 whereby the learned lower appellate court has reversed the judgment and decree of the learned trial court dated 27th November, 1984 passed in Title Suit No. 24 of 1980.

2. The sole plaintiff-appellant had brought Title Suit No. 24 of 1980 against the respondents for declaration of his right, title and interest, on Schedule-A land of the plaintiff which is fully referred in the judgments of



the courts below, as well as for declaration that name of the defendants has wrongly and illegally been entered in the Khatiyani in respect of the suit land.

3. The plaintiff pleaded that Kali Rai, the father of the sole plaintiff, had purchased the suit land through registered sale deed dated 13.07.1933 (Ext.4) from one Hito Rai and thereafter he came in possession of the same. At the time of purchase, Kali Rai was separate from his father Prayag Rai. After death of the father of the plaintiff-appellant, name of the full-brother of the plaintiff-appellant, namely, Bhulo Rai was mutated in the government records vide AD Case No. 574 of the year 1949-50 as elder brother was major at that time and the plaintiff-appellant was a minor. Subsequently, the elder brother of the plaintiff died issueless and the property came in possession of the appellant. At the time of vesting of the Jamindari, the ex-landlord filed return in the name of Bhulo Rai the elder brother of the appellant. It is further asserted that there is a house standing on the suit plot and the family members of the appellant are still residing therein.

The plaintiff contended that though the defendants have no right, title and interest in the suit property. They got their name mutated in the government records and on inquiry it revealed that Prayag Rai the grandfather of the appellant had executed a registered sale deed dated 03.09.1951 in respect of the suit land in favour of Ram Janam Tiwari



vide Ext. B/2. Subsequently, Raja Ram Tiwari, son of Ram Janam Tiwari sold the same land to defendant no. 1 Lakho Devi vide Ext. B/1 and finally Lakho Devi sold the same land to defendant no. 2 (who was impleaded as party defendant during pendency of the suit) through registered sale deed dated 06.07.1979 vide Ext. B. According to the plaintiff, the entire transactions between Prayag Rai and the defendant-respondent were a showy transaction without any authority to dispose of the suit land.

4. The defendant no. 1 Lakho Devi filed her written statement and subsequently did not contest the suit for the reason that she had already sold the suit land in favour of defendant no. 2, therefore, defendant no. 2 in his written statement adopted the written statement of Lakho Devi for the apparent reason that defendant no. 2 had entered into the sales of Lakho Devi.

5. Defendant Lakho Devi in her written statement challenged the maintainability of the suit on different grounds and claimed that the suit property was purchased by Prayag Rai from joint family fund in the name of his son, namely, Kali Rai and, as such, he was competent to transfer the same by sale. Moreover, he was head and manager of the family, therefore, he had transferred the suit land vide Ext. B/2 for family necessity and to pay the family debt. The family including the appellant benefited from the transaction. According to the defendants, in the year



1951 itself, after sale of the suit land by Prayag Rai, the vendors of the defendants came in possession and after purchase by the defendants from their vendor, they came in possession, as such, the plaintiff-appellant had no possession from 1951 onwards, therefore, the defendants completed their title over suit land by adverse possession also and the suit is barred by limitation. The defendants contended that no decree could be awarded in favour of the plaintiff-appellant for the reason that there is no prayer for recovery of possession and, admittedly, the appellants are dispossessed of the suit land. The defendants further contended that one Lilawati Devi (during evidence revealed that she was wife of Prayag Rai) contested the transfer in favour of Ram Janam Tiwari on behalf of the minor sons of Kali Tiwari and she lost at different level. The defendants were recorded in the government records on the basis of finding of possession of the defendants on the suit land.

6. The learned trial court framed altogether 8 issues for consideration and decided all the issues in favour of the plaintiff-appellant for the reason of decision in respect of issue no. 5 and 6 which were jointly decided. These issues are as follows:-

(5) Is the sale deed dated 03.09.1951 executed by Prayag Rai for self and on behalf of the minor grand sons valid and operative document?



(6) Is the story of possession and dispossession as set up by the plaintiff correct?

7. The learned trial court concluded that the plaintiff has proved by oral and documentary evidences that Prayag Rai was separate from his son Kali Rai. Prayag Rai had no transferable right on self acquired property of Kali Rai. The plaintiff-appellant was not required to seek relief for possession in view of the nature of the suit and evidence coming on the record. Learned trial court further concluded that mother and elder brother of the plaintiff-appellant were alive on the date of death of the father of the appellant. Hence, grandfather was not a natural guardian and there is no case that the grandfather was appointed as guardian of the appellant by the court. In the circumstances, the sale deed executed by Prayag Rai was itself devoid of any transferable title and, as such, was inoperative.

8. The learned lower appellate court could not state the point for determination in the appeal, however, decided the issues framed by the learned trial Judge afresh. The learned lower appellate court concluded that the family of Prayag Rai and Kali Rai was a joint Hindu Mitakshara family and no partition has been proved, hence, Prayag Rai had valid transferable right which he validly transferred on his own behalf and on behalf of the minor grand sons, therefore, entire transaction of transfer of movable property between Prayag Rai and the vendor of the defendants



as well as between the vendor of the defendants and the defendants and defendants inter se are valid transaction; as such valid title has passed in favour of the defendants and their vendors. For the aforesaid reason, the suit was barred by limitation as it was filed much beyond 12 years from the date of dispossession and, accordingly, the judgment and decree of the learned trial Judge was reversed.

9. While admitting this appeal for hearing on 21.12.1995, this Court recorded following substantial question of law involved for adjudication;

(a) Whether the lower appellate court was justified in dismissing the suit of the plaintiff without reversing the finding of the learned trial court?

(b) Whether the sale deed (Ext. B 2) executed by Prayag Rai grandfather of the appellant/guardian was legal and valid particularly when no prior permission of the District Judge was obtained?

10. Learned counsel for the appellant submits that the learned lower appellate court has ignored the evidence on record as well as finding of the learned trial court that mother of the appellant was alive in the year 1951 as asserted by the appellant in the plaint and not denied by the respondents in the written statement as well as supported by some oral



evidences of the plaintiff-appellant, as such, Prayag Rai the grandfather was not the natural guardian of the appellant.

11. Learned counsel further contends that it was burden of the defendants to prove that a property purchased in the name of an individual, may be a coparcener, is joint family property for the reason that a coparcener can acquire self property even if being a member of the joint Hindu Mitakshara family. Reference was made to Section 220 of the Mulla's Hindu Law 21st Edition. Learned counsel contends that the defendants have miserably failed to prove that joint family had nucleus to purchase property and the property was purchased in the name of individual coparcener from the joint family fund. According to learned counsel, the presumption of separate property of the father of the appellant is stronger in the present case for the reason that after death of the father of the appellant, name of appellant's brother was mutated by order dated 28.07.1950 passed in AD Case No. 574 of 1949-50 vide Ext. 1. At that time, no one appeared including Prayag Rai to put any objection. The purchaser from Prayag Rai was conscious on the date of purchase i.e. on 03.09.1951 that in the government records the property is not recorded in the name of Prayag Rai, rather in the name of son of Kali Rai. Learned counsel next contends that while reversing the finding of learned trial court, the learned lower appellate court was duty bound to meet with the reasons of the learned trial court and dispel the same on



the basis of cogent evidence available on the record and it was bound to deal with all the issues and evidences laid by the parties before recording its finding. Learned counsel has drawn attention of the Court towards the lower appellate court's judgment for his contention that even oral and documentary evidences discussed by the learned trial Judge have not been considered by the lower appellate court. Learned counsel has placed reliance on the case of **Laliteswar Prasad Singh and Others Vs. S.P. Srivastava** through LRS reported in **2017(1) PLJR SC 151**.

12. On the other hand, learned counsel for the respondents contends that while exercising the power of second appellate court, this Court is to confine to the substantial question of law raised to be decided and if the lower appellate court has recorded its independent finding which is supported by the evidence on the record, it cannot be contended that the lower appellate court was bound to go through each and every small details referred in the trial court judgment. The judgment of the lower appellate court is supported by sound reasons, hence, requires no interference. Learned counsel for the respondents contended that transfer of property by a Manager of the joint Hindu family even without legal necessity is voidable and not void. Likewise, transfer of property by a guardian is voidable and not void. In the circumstances, the plaintiff-appellant should have sought for relief of cancellation of the sale deeds executed by Prayag Rai or the subsequent sale deeds by the transferee of



Prayag Rai. In absence of prayer for cancellation, the suit cannot be decreed. Learned counsel for the respondents placed reliance on case of **Vishwambhar and others v. Laxminarayana** (Dead) through **L.Rs.** and **another** reported in **AIR 2001 SC 2607** and **Raghubanchmani Prasad Narain Singh v. Ambica Prasad Singh (dead) by his Legal representatives and others** reported in **AIR 1971 SC 776**.

Findings:-

Substantial Question (b)

13. There is no dispute that Kali Rai, the father of the sole plaintiff-appellant had purchased the suit land from one Hito Rai through registered sale deed dated 13.07.1933 vide Ext. 4. After death of Kali Rai, the name of Bhulo Rai one of his sons was mutated in government records vide Ext. 1. The learned trial court held that since Kali Rai was separate from Prayag Rai and the suit property was self acquired property of Kali Rai, Prayag Rai had no transferable right or interest in the suit property.

The learned lower appellate court on consideration of evidence held that Prayag Rai was joint with Kali Rai and after death of Kali Rai he was guardian of the plaintiff and his minor brother, therefore, he was competent to transfer the suit land.



14. For the moment, it is assumed that on the date of execution of the sale deed vide Ext. B/2 Prayag Rai was in joint family with Kali Rai and after death of Kali Rai, he continued in jointness with the plaintiff. However, the learned lower appellate court overlooked the legal issue that though there is presumption of Joint Hindu Mitakshara Family, however, there is no presumption that joint family possesses joint property. Section 231(2) of the Mulla's Hindu Law 21st Edition provides that there is no presumption that a family, because it is joint, possesses joint property or any property. When in a suit for partition, a party claims that any particular item of the property is joint family property, or when in a suit for a mortgage, a party contends that the property mortgaged is joint family property, the burden of proving it rests on the party asserting it. Section 220 of the same Edition stipulates that a Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other member of the coparcenary, not even his male issue, acquires any interest in it by birth. He may sale it, or he may make a gift of it or bequeath it by Will, to any person he likes. It is not liable to partition, and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners.

15. It is, thus, an established concept that the mere existence of a joint family cannot raise a presumption that such family owns property



jointly. Likewise, a person asserting existence of joint family property has to prove nucleus with which such property could be acquired. It is only then that such property could be presumed to be joint. In the present case, the burden has not been discharged by the vendors of the defendants-respondents Prayag Rai or by the defendants-respondents either by pleading or by evidence that in fact the joint family had nucleus to purchase the suit property and the same was purchased in the name of Kali Rai from the joint family fund. Since the aforesaid burden was not discharged, the apparent and available material leads to only conclusion that the property was self acquired property of the father of the appellant, hence, during his lifetime no one has any interest in that and after his death, the property was succeeded by his sons only as class-I heir under the Hindu Succession Act. The learned lower appellate court has committed error of law in not appreciating the aforesaid law correctly and coming to the conclusion that the evidence on the record shows that since family was joint and partition was not proved, hence, the burden was on the plaintiff-appellant to prove partition and separate possession of the suit land.

16. For the aforesaid reason, this Court holds that Prayag Rai had no right, title or interest in the suit property to transfer the same to anyone. As such, the sale deed executed by him vide Ext. B/2 or other sale deeds vide Ext. B and B/1 executed by the purchasers from Prayag Rai did not



pass any title to the purchaser as the vendors themselves lacked transferable title. The law is well settled that no one can transfer a better title than he himself possess.

17. The issue can be examined from another angle also. The plaintiff has specifically pleaded that on the date of execution of sale deed by Prayag Rai mother of the plaintiff was alive. The defendants did not deny the aforesaid fact in their pleading. P.W. 2 Kishun Sah and P.W. 3 Tejan Rai specifically deposed that mother of the plaintiff was alive in the year 1951. P.W. 3 Tejan Rai was not even suggested in the cross-examination that mother of the plaintiff was dead. The aforesaid facts clearly shows that natural guardian of the plaintiff was alive on the date when a person (Prayag Rai) transferred the interest of the plaintiff showing himself as guardian, though he was neither a natural guardian nor a guardian appointed by the court nor had taken permission of the court for transfer of the property of the minor. For this reason, also the sale deed Ext. B/2 dated 03.09.1951 executed by Prayag Rai himself and on behalf of the minors including the appellant was invalid one. Accordingly, this question of law is decided in favour of the plaintiff-appellant and contrary finding of the learned lower appellate court is set aside. I find that plaintiff's suit is fit to be decreed on this ground alone.



Substantial Question (a)

18. The learned trial court while considering Issue no. 5 and 6 discussed the oral and documentary evidences on the record and came to the conclusion that Prayag Rai was separate from his son Kali Rai. The suit property was self acquired property of Kali Rai, hence, Prayag Rai had no transferable right. The learned trial court further held that the plaintiff specifically pleaded that he had got title over the suit land and was in possession till date of filing of the suit, hence, plaintiff was not required to seek relief for possession only on the basis of some admission of the plaintiff witnesses that the subsequent purchasers are in possession of the suit land. The learned lower appellate court came to the conclusion on the basis of some evidences that family of Prayag Rai and Kali Rai was joint and there was no partition, hence, Prayag Rai had transferable right, especially, in view of the admission of plaintiff witnesses that mother of the plaintiff died long back. Learned lower appellate court further considered the documentary evidences of mutation etc. to come to the conclusion that transaction of suit property by Prayag Rai and subsequent transactions of transfer of property were, in fact, acted upon and they were operative.

19. In **Santosh Hazari Versus Purushottam Tiwari (Deceased) By LRS.** reported in **2001(3)SCC 179** referred in Laliteswar Prasad Singh's Case (**supra**), the Hon'ble Supreme Court held that the appellate court



has jurisdiction to reverse the finding of the trial court. However, while reversing the finding of fact, the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. He should satisfy the court hearing further appeal that the first appellate court has discharged the duty expected of it.

20. In the present case, the lower appellate court has not met with the evidences and reasons assigned by the trial court for coming to a contrary conclusion, though has looked into some other evidences and came to its own finding. Therefore, the finding of the lower appellate court is against the law for the reason that it has not come into close quarters with the reasoning assigned by the learned trial court. As such, the judgment of the lower appellate court is not sustainable on this score also. Accordingly, this question is answered in favour of the plaintiff-appellant.

21. Learned counsel for the respondents has relied on case of Vishwambhar (**supra**) for his submission that sale deed executed by a guardian without permission of the court is voidable and not void ab initio, hence, prayer should be there in the suit for setting aside the sale deeds. In this case, there is no such prayer.



22. In my view, the aforesaid case was decided in a different context and is not applicable in the present facts and circumstances of this case because Prayag Rai was not guardian of the appellant nor he had any transferable interest in the self acquired property of the father of the appellant. Therefore, transfer by Prayag Rai vide Ext. B/2 was void ab initio. There was no need for prayer in the plaint to cancel the sale deeds executed by Prayag Rai or by any of his subsequent purchasers.

23. Learned counsel for the respondents has next placed reliance on case of Raghubanchmani Prasad Narain Singh (**supra**) for his contention that alienation by Manager of joint family even without any legal necessity is voidable and not void. The aforesaid proposition is not helping in the present facts and circumstances of this case because the respondents have not discharged their burden to dispel the presumption of self acquisition of property by a coparcener. As such, the suit property was not a joint family property nor Prayag Rai was Manager of the suit property.

24. In view of the aforesaid conclusions while considering the two substantial questions of law, this appeal is bound to succeed, accordingly, the judgment and decree of the lower appellate court stands set aside and the judgment and decree of the trial court stands affirmed, if the plaintiff-appellant could be found dispossessed from the suit land



on the basis of above referred sham transfers, he would be entitled for recovery of possession.

25. The appeal stands allowed, accordingly.

26. The parties shall bear their own cost in the facts and circumstances of this case.

(Birendra Kumar, J)

Kundan/-

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