

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.60 of 2009

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1. Siromani Devi wife of Late Arun Kumar Sah
2. Amit Kumar Sah, son of Late Arun Kumar Sah
3. Aditya Kumari @ Aditi Kumari, wife of Late Arun Kumar Sah
4. Arjun Kumar Sah, son of Banarsi Sah
5. Renui Devi daughter of Banarsi Sah
All resident of Mandroja, P.S.- Kotwali, District-Bhagalpur. Except Appellant
No. 1, who is resident of village-Kursela, P.S. Kursela, District-Katihar.

.....Defendant no.3 to 5/Respondent no.2 to 6/Appellant

Versus

1. Prakash Sah.
2. Heera Sah
3. Ajay Kumar Sah
All respondent no. 2 to 4 are sons of Banarsi Sah
4. Beena Devi daughter of Shri Banarsi Sah
all resident of Mandroja, P.S. Kotiwali, District-Bhagalpur.

.....Plaintiffs/Appellants/Respondent 1st set

5. Bimla Devi daughter of Late Sobran Sah, Wife of Ram Chandra Sah,
Resident of Mohalla-Mandroja, P.S.-Kotwali, District-Bhagalpur.

.....Defendant No.2/Respondent No.1/Respondent 2nd set

with

Second Appeal No. 59 of 2009

=====

Bimla Devi daughter of Late Sobran Sah, Wife of Ram Chandra Sah,
Resident of Mohalla-Mandroja, P.S.-Kotwali, District-Bhagalpur.

.....Defendant No.2/Respondent No.1/Appellant

Versus

1. Prakash Sah
2. Heera Sah
3. Ajay Kumar Sah
All respondent no. 2 to 4 are sons of Banarsi Sah
4. Beena Devi daughter of Shri Banarsi Sah
All resident of Mandroja, P.S. Kotwali, District-Bhagalpur.

.....Plaintiffs/Appellants/Respondent 1st set

5. Siromani Devi wife of Late Arun Kumar Sah,
6. Amit Kumar Sah son of Late Arun Kumar Sah,
7. Aditya Kumari daughter Late Arun Kumar Sah
8. Arjun Kumar Sah son of Banarsi Sah,
9. Renui Devi daughter of Banarsi Sah
All resident of Kurshela, P.S. Kurshela, District-Katihar.



.....Defendant no.3 to 5/Respondent no.2 to 6/Respondent 2nd set

Appearance :

(In Second Appeal No. 60 of 2009)

For the Appellant/s : Mr. Sanjay Kumar 'Ghosarvey'

For the Respondent/s : Mr. Krishna Mohan

(In Second Appeal No. 59 of 2009)

For the Appellant/s : Mr. Ganpati Trivedi

Mr. R.K.Sinha No.2

For the Respondent/s : Mr. S.S. Dwivedi

Mr. Sanjay Kumar Pandey

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

CAV JUDGMENT

Date : 03-12-2018

The judgment and decree dated 23.12.2008, passed by Additional District Judge, Fast Track Court No.5, Bhagalpur, in Title Appeal No.58 of 1993, whereby the learned first appellate court has reversed the judgment and decree dated 30.07.1993, passed by the learned Sub Judge-6th, Bhagalpur, in Title (Partition) Suit No. 379 of 1986, has been put to challenge in the present two second appeals filed under section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code').

2. Defendant no.2 of Title (Partition) Suit No. 379 of 1986 is the appellant in S.A.No. 59 of 2009, whereas defendant nos. 4 and 5 and heirs of defendant no.3 are the appellants in S.A. No. 60 of 2009.

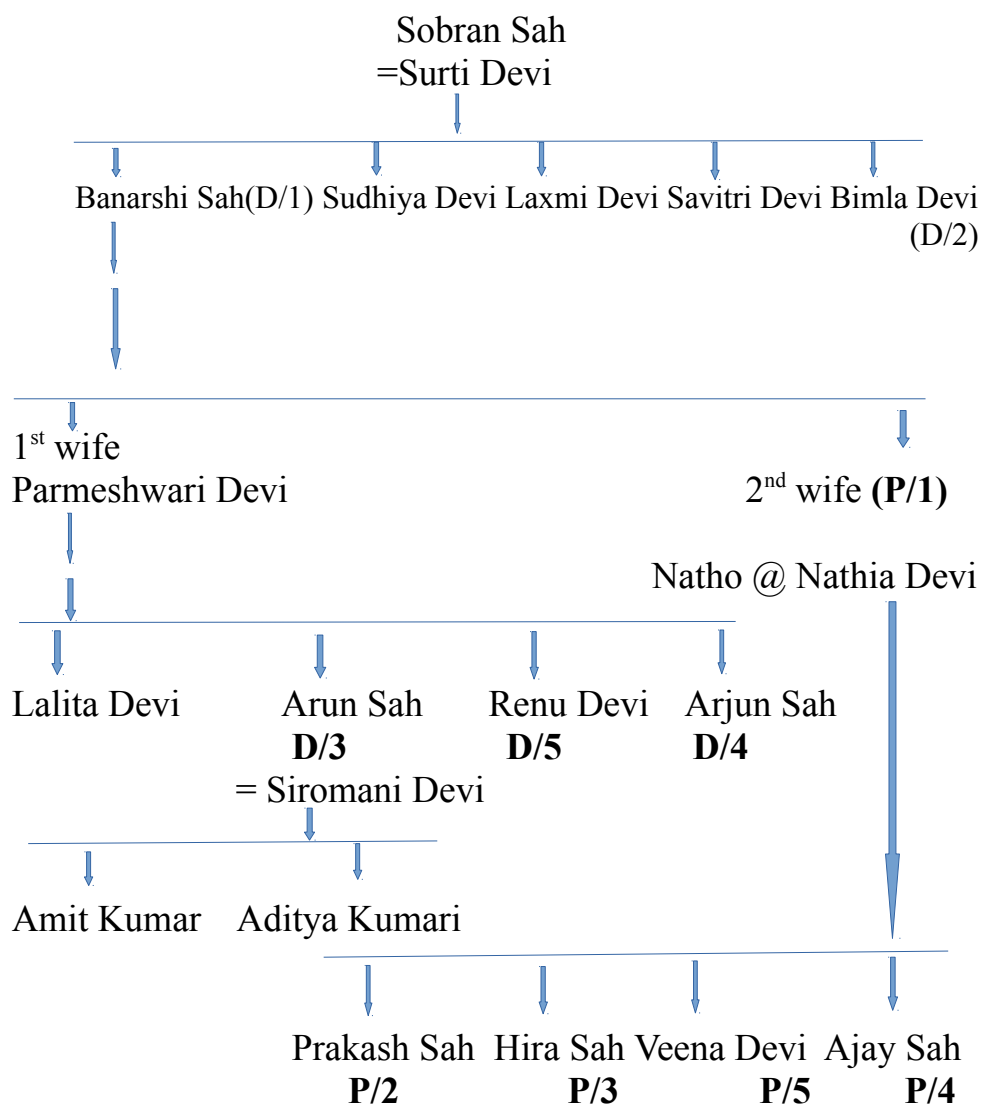
3. I have heard Mr. Ganpati Trivedi, learned Senior Counsel, assisted by Mr. R.K.Sinha No.2 on behalf of the appellants in both the cases and Mr. Shashi Shekhar Dwivedi,



learned Senior Counsel, assisted by Mr. Sanjay Kumar Pandey, learned counsel, appearing on behalf of the respondents in both the cases.

4. Written notes of arguments have also been filed on behalf of the parties, which are there on record and have been exchanged between the learned counsel representing the parties.

5. So as to appreciate the controversy between the parties, which is at the core, it would be apt to mention the admitted genealogical table, which runs as under:-



5. The parties to the partition suit are admittedly the members of a joint family, governed by Mitakshara School of Hindu Law.

6. It has been the case of the plaintiffs that Banarsi Sah (defendant no.1) had married Parmeshwari Devi and out of this marriage, they had two sons (defendant nos. 3 and 4) and one daughter, namely, Renu Devi (defendant no.5). After the death of Parmeshwari Devi in or about 1953, the said Banarsi Sah married Natho Devi @ Nathia Devi. Prakash Sah, Hira Sah and Ajay Kumar Sah are the sons and Beena Devi, the only daughter born of the marriage between Banarsi Sah and Natho Devi @ Nathia Devi, are the plaintiff nos. 2 to 5, whereas Natho Devi @ Nathia Devi is plaintiff no.1. The joint family of Banarsi Sah had acquired the properties as described in Schedule-A and Schedule-B partly by dint of his personal labour and partly by inheritance and contribution made by the said plaintiffs. The suit property was thrown into the joint hotch-potch to constitute a joint family property. Banarsi Sah, however, with ulterior motive, executed a sale deed in favour of his sister Bimla Devi (defendant no.2), solely for the purpose of depriving the plaintiffs of their right and title in the suit property. Though the registered sale deed was executed on 08.07.1972, the plaintiffs



were unaware of such transaction until an effort was made in 1986 to dispossess them on the basis of an *ex parte* decree fraudulently obtained by Bimla Devi (defendant no.2). The dispute led to the filing of several criminal proceedings between the parties, but with the intervention of the well-wishers, an amicable agreement was reached and reduced to writing and the award thus was made, duly accepted by the parties. Since as per the said agreement, neither the payments were made nor the articles were returned, feeling inconvenienced, the plaintiffs filed the partition suit.

7. Two sets of written statements were filed before the trial court on behalf of the defendants. A common written statement was filed on behalf of defendant nos. 1,3,4 and 5, whereas defendant no.2 (Bimla Devi) filed a separate written statement. The defendants first set asserted that Parmeshwari Devi had died in the year 1967 and not in 1953, as asserted in the plaint. Questioning the maintainability of the partition suit, the defendants asserted that it was, in fact, a suit for setting aside the sale deed executed in favour of Bimla Devi, without paying the *ad valorem* court fee. They alleged that defendant no.1, during the lifetime of Parmeshwari Devi, was in keeping of some other person, whom she had abandoned whereafter she



had started to remain in keeping of defendant no.1(Banarshi Sah). They accordingly asserted that the children of plaintiff no.1 cannot be said to be the legitimate children of defendant no.1 nor are they offshoots of defendant no.1 and plaintiff no.1. According to the defendants, the Schedule-A property exclusively belongs to them and since the Schedule-B property was self-acquired property of defendant no.1, without any contribution by the plaintiffs, Banarsi Sah had exclusive right, title and interest over the Schedule-B property. Plaintiff no.1 was living in a part of Schedule-A property consisting of two rooms with her children as tenant of defendant no.2 (Bimla Devi) and that the plaintiffs were aware of the sale deed executed by defendant no.1 in favour of defendant no.2 and about the possession of defendant no.2 over the Schedule-B property. It was also asserted that Schedule-A property, being ancestral property of defendant no.1, the plaintiffs had got no interest and the plaintiffs were evicted from Schedule- A property on the basis of the decree passed in the eviction suit and they were dispossessed through the process of the court. In respect of Schedule-B property, it was asserted that the same belonged to 3rd party namely Bibi Rabia Khatoon and no partition could be sought against a Mohammedan lady.



8. Defendant no.2, in her written statement, asserted that she had purchased Schedule-A property through a registered sale deed whereupon she came in exclusive possession thereof. Plaintiff no.1 was inducted as a tenant of two rooms in Schedule-A property on a monthly rental of Rs. 50/-, where she remained till her execution in Case No. 75 of 1985. The said transfer of Schedule-A property in favour of defendant no.2 was accepted by plaintiff no.1 in a subsequent *Panchayati*.

9. Based on a rival pleading, the learned trial court framed altogether 11 issues, including issue nos. 6,7,8 and 9, which are relevant for the present adjudication and are being reproduced hereinbelow:-

“6. Whether plaintiff no.1 is the legally married wife of defendant no.1 and other plaintiffs are their sons and daughters?

7. Whether the plaintiffs and defendants except plaintiff no.5 and defendant no.2 are the members of Mitakshra joint Hindu family?

8. Whether the joint family property exists or not and whether there is unity of possession and ownership and enjoyment?

9. Whether the agreement cum award dated 15.7.86 is binding upon defendant no.2?”



10. The parties adduced their evidence, both oral and documentary, and advanced their submissions in support of their respective case. The learned trial court dealt with, at the very outset, issue nos. 6 and 7 together. Upon appreciation of evidence, both oral and documentary, after elaborately discussing the evidence so adduced, recorded his finding that it was manifest from the attending circumstances that Natho Devi (plaintiff no.1) was the second wife of defendant no.1 Banarsi Sah and other plaintiffs were the legitimate children out of the wedlock of Natho Devi (plaintiff no.1) with Banarshi Sah (defendant no.1). The trial court, thus, decided the issue nos. 6 and 7 in favour of the plaintiffs and against the defendants. The trial court thereafter took up issue no.8 and, upon extensive consideration of oral and documentary evidence available on record, as is manifest from the judgment of the trial court, recorded that the plaintiffs were dispossessed from Schedule-A property through the process of the court and, therefore, it could not be said that there was unity of possession and ownership and enjoyment at the time of filing of the suit. The learned trial court observed, without ruling out the possibility of obtaining the *ex parte* decree passed and its execution done *Bala-Bala*, that so long as the decree and its execution existed,



the plaintiffs could not claim partition in Schedule-A property. The trial court noted that there was no relief sought for setting aside the said decree, after declaring the same to be void and not binding upon the plaintiffs and held that in the partition suit, the *ex parte* decree could not be set aside nor the same could be declared void and, therefore, not binding on the parties. The trial court further recorded that as the plaintiffs sought for a relief for setting aside the *ex parte* decree, they would have had to pay the requisite court fee, which they did not do. Coming to Schedule-B property, the trial court held that in view of vagueness of description it could not be partitioned. Conclusively, the trial court held that there was no joint family property in existence and there was no unity of possession and ownership and enjoyment. Issue no.8 was, thus, decided against the plaintiffs and in favour of the defendants. The trial court thereafter took up issue no.9 on the question as to whether the agreement-cum-award dated 15.07.1987 could be said to be binding upon the defendant no.2. On the ground that defendant no.2 was not a party to Exts. 2 and 3, which were, respectively, the agreement and award dated 15.07.1987, the trial court held that the same were not binding upon defendant no.2. The issue no. 9 was accordingly decided against the plaintiffs and in



favour of the defendants. Resultantly, the trial court having decided issue nos. 8 and 9 against the plaintiff, dismissed the suit without cost by judgment and decree dated 30.07.1993.

11. Being aggrieved, the plaintiffs filed a first appeal giving rise to Title Appeal No. 58 of 1993. The learned first appellate court dealt with issue nos. 8,9,10 & 11, which were decided against the plaintiff. Learned appellate court looked into the *ex parte* order dated 05.07.1985, passed in Title Suit No.76 of 1984 (Bimla Devi Vs. Natho Devi) and recorded that the said *ex parte* decree could not be treated to be a decree of eviction against Natho Devi, wife of Banarsi Sah, rather the said decree was against Natho Devi, wife of Kali Singh. Since the trial court had specifically held that Natho Devi was the wife of Banarsi Sah, it ought not to have considered the *ex parte* decree of the court in T.S. No 76 of 1984, a basis for recording his finding that there was no unity of possession and title as on the date of filing of the suit. The learned appellate court held that the *ex parte* decree dated 05.07.1985 passed in T.S. No. 76 of 1984 was not binding upon plaintiff no.1 i.e. Natho Devi, wife of Banarshi Sah, the said decree being against Natho Devi, wife of Kali Singh. The first appellate court held that there would have been no question of dispossession of the plaintiffs from



Schedule-A property, in view of the fact that defendant had submitted that they had been living in the said property jointly with the plaintiff(s). The learned appellate court further held that the court below failed to appreciate the fact that the sale deed executed by Banarsi Sah on 08.07.1972 was a fictitious transaction to deprive the plaintiffs of their right in respect of the Schedule-A property. The first appellate court also held that the trial court failed to appreciate that all the documents in respect of the sale deed dated 08.07.1972 had been manufactured by the defendants for their unfair gain to utter detriment of the interest of the plaintiffs.

12. Based on the above findings, as arrived at by the first appellate court, the learned Additional District Judge, Fast Track Court No.5, Bhagalpur, by the impugned judgment and decree dated 23.12.2008, set aside the findings of the learned trial court in respect of the issue nos. 8 to 11 and, thus, all the issues framed by the learned trial court having been decided in favour of the plaintiffs, the appellate court after setting aside the judgment of the trial court, allowed the appeal by a judgment and decree dated 23.12.2008.

13. This is the background in which the present two appeals have been preferred by defendant no.2 and heirs of



defendant no.3 and defendant nos. 4 and 5 being S.A.No.59 of 2009 and S.A. No.60 of 2009, respectively, against the judgment and decree dated 23.12.2008, passed by Additional District Judge, Fast Track Court No.5, Bhagalpur.

14. S.A. No. 60 of 2009 was admitted for hearing by order dated 27.11.2003, passed by this Court, framing the following substantial question of law, which in the Court's opinion, the second appeal involved:-

“(1) Whether the judgment of the lower appellate court is vitiated because of the fact that although this is a partition suit and no relief for declaration regarding void or voidability of the Judgment and Decree passed in Eviction Suit N0. 76 of 1984, the lower appellate court without meeting the reasonings of the trial court held that the Judgment and Decree is void *ab initio*?

15. Subsequently, S.A.No. 59 of 2009 was heard under Orde 41 Rule 11 of the Code and taking note of admission of S.A.No. 60 of 2009, which arose out of the same judgment and decree, while admitting it, directed the same to be listed along with the said S.A. No. 60 of 2009. It is evident from the order dated 24.01.2014, passed in S.A. No. 59 of 2009 that this Court



found the requirement of hearing of the appeal on the following substantial questions of law:-

“Whether the plaintiffs while seeking relief for partition, are required to seek specific relief against the earlier transfer made in favour of the defendant no.2-appellant by the defendant no.1 of the part of the family property?

And

Whether the possession of the purchased property, claimed by the defendant no.2 through the process of the court would be binding upon the plaintiffs?”

16. It is thus clear that this Court has found the second appeals to be involving three substantial questions of law in two different orders, as have been noted above.

17. Mr. Ganpati Trivedi, learned Senior Counsel, appearing on behalf of the appellants, in both the appeals, has submitted that in addition to the substantial questions of law, as framed by this Court in two orders, as noted above, these appeals, in addition, involve the following substantial question of law:-

“1. Whether the plaintiffs having acquired the knowledge of the sale deed



dated 08.07.1972 executed by Banarshi Sah (Defendant No.1) and Sukhi Devi in favour of Bimla Devi (Defendant No.2) can seek partition with respect to the suit property unless and until the said sale deed is set aside, which having not been challenged till date, is barred by law of limitation?.

18. Mr. Ganpati Trivedi, learned Senior Counsel for the appellants would argue that the fact that the plaintiffs got the knowledge about the registered sale deed 08.07.1972, executed by defendant no.1 and Sukhi/Surti Devi in favour of Bimla Devi (defendant no.2) is evident from paragraph 9 of the plaint itself and, in that background, the plaintiffs could not seek partition in respect of the suit property unless the said sale deed was set aside. He contends, referring to the sale deed dated 08.07.1972 (Ext.F) that the property, in question, had been sold by Most. Sukhi/Surti Devi, the mother of defendant no.1, Banarsi Sah himself and the minor sons and a daughter for liquidating the debt of the family. Admittedly, defendant no.1 had been the *Karta* of the family and in view of the stand of the plaintiffs themselves that the suit property had been acquired by defendant no.1, execution of the sale deed dated 08.07.1972 by defendant no.1, his mother, sons and a daughter,



cannot be said to be void document by any stretch of imagination. Relying on a Supreme Court's decision in the case of **Prem Singh Vs. Birbal (2006) 5 SCC 353**, with special reference to paragraph 27, he submits that the said sale deed dated 08.07.1972, being a registered document, has a presumption of correctness attached to it unless and until it is rebutted by the cogent evidence to be led by the plaintiffs. He has also relied on a decision of this Court reported in **(2012) 2 PLJR 190 (Sita Sharan Prasad Vs. Manorma Devi)** and referring to paragraph 14, he has contended that Ext. F cannot be said to be void *ab initio*, as there cannot be presumptive invalidity attached to such a transaction.

19. Placing reliance on the Supreme Court's decision in the case of **Md. Noorul Hoda Vs. Bibi Rafiunnisa & another**, reported in **(1996) 7 SCC 767**, he would argue that the plaintiffs are under obligation, in law, to bring a suit for cancellation of Ext. F or seek at least necessary declaration in order to avoid its legal effect. Reliance has also been placed on the case of **Indrajeet Singh Greval Vs. State of Punjab & others**, reported in **(2011) 12 SCC 588** in support of the plea that even if a decree is void *ab initio*, a declaration to that effect has to be obtained by the person aggrieved from the competent court



and such a declaration cannot be obtained in a collateral proceeding. He has been emphatic in his submission that though the plaintiffs pleaded that the *ex parte* decree was fraudulent, they did not seek any relief for such a declaration and, in that background, the appellate court below erred in holding that the *ex parte* decree passed in T.S. no. 76 of 1984 and the order passed in Title Execution Case No. 754 of 1985 were not binding upon the plaintiffs. He goes on to contend that the lower appellate court erred while holding that the registered sale deed dated 08.07.1972 (Ext. F) was a fictitious transaction and the documents filed in support thereof were manufactured by the defendants, in the background of the clear finding by the learned trial court in paragraph 25 and 26 of the judgment, considering the genuineness of the said sale deed, referring to Ext.G (certified copy of the Khatiyani in the name of Bimla Devi), Ext.O, the assessment made in favour of Bimla Devi(defendant no.2) by Bhagalpur Municipal Corporation and Ext.B series which was the Municipal Corporation Tax Receipts.

20. Mr. Shashi Shekhar Dwivedi, learned Senior Counsel, appearing on behalf of the plaintiffs/respondents, while defending the correctness of the judgment of the first appellate



court below has argued that the so-called *ex parte* eviction decree and the execution thereof were issued against Natho Devi, wife of Kalicharan of Kolkata and in view of concluded finding of fact that Natho Devi was the wife of Banarsi Sah (defendant no.1), the said decree could not be treated to be a decree against plaintiff no.1, being wife of defendant no.1. In that background, he contends that there was no question of seeking any relief for a declaration regarding void or voidability of the judgment and decree passed in Eviction Suit No. 76 of 1984. He has submitted that substantial question of law, as framed by this Court dated 27.11.2013, passed in S.A. No.60 of 2009 does not, therefore, arise. He has also submitted that the appellate court has rightly noticed this aspect of the matter which could not be appropriately noticed by the learned trial court. Referring to Ext.F, which is the sale deed dated 08.07.1972, executed by Banarshi Sah in favour of Bimla Devi (defendant no.2), he has contended that it is eivincible from the sale deed itself that the same has not been executed by Banarsi Sah (defendant no.1) as *Karta* of the family and had that been so, there would have been no need of defendant nos.3 to 5 and his mother Surti Devi appearing as co-vendors along with defendant no.1(Banarsi Sah). He, thus, contends that the



plaintiffs were not required to challenge the sale deed expressly. Refuting the submissions made on behalf of the appellants with reference to the Supreme Court's decision in the case of **Md. Noorul Hoda** (supra), Mr. Dwivedi has contended that the decision does not have any application, in the facts and circumstances of the case. He has submitted that the facts of the present case(s) are entirely different where no declaration about the instrument to be void or voidable was required for the simple reason that the plaintiffs were not the signatories of the impugned sale deed and they were, therefore, not bound by the same.

21. In addition to the above noted submissions, he has canvassed that there are other circumstances which go to suggest that the sale deed is *Farzi* and fictitious. The family had the said house as the only property, which was ancestral from the time of Sobran Sah, on whose death Bimal Devi also had an interest in the property. In that background, the purchase of the said house, without mentioning her (defendant no.2's), is indicative of the document of sale being *Farzi* and fictitious. As a matter of fact, under a well-hatched up scheme to oust plaintiff no.1 from the house, the defendant no.1 and other, in collusion, prepared the sale deed. The suit was subsequently filed against



Natho Devi , wife of Kalicharan Singh of Kolkata to evict from the house, whereas she (the plaintiff) was living as a member of the family in her capacity as wife of Banarsi Sah. Banarsi Sah and Bimla Devi were the crucial witnesses on the point of sale, he contends, who were not examined as witnesses which amounts to withholding the material evidence for which adverse inference needs to be drawn against the parties withholding such evidence. Reliance has been placed on a Supreme Court's decision in the case of **Gopal Krishnaji Ketkar Vs Md. Haji Latif and others (AIR 1968 SC 1413)** and in the case of **V. K. Saklecha Vs. Jagjivan and others (AIR 1974 SC 1957)** to bolster the said contention. According to him, non-examination of these witnesses raises a natural suspicion in respect of the intention of the parties and natural presumption that had they been examined, they would have supported the case of the plaintiffs that the sale deed dated 08.07.1972 was *Farzi* and fictitious document. He has next referred to the evidence of D.W.4, who deposed in his evidence that Banarsi Sah was still living in the same house which is said to have been sold and Natho Devi was also living in the house in the year 1989-90. The evidence of this witness, according to him, clears the myth that Natho Devi was either a tenant in the house or that she



was evicted out of it by the decree in an *ex parte* eviction suit and execution thereof. Having made these submissions, he asserts that the absence of a challenge to the sale deed (Ext.F) would not have been an obstacle in granting the plaintiffs a decree of partition and the learned appellate court below has rightly held the plaintiffs to be entitled to 4/7th share out of the joint family property. In respect of the *Panchayati* award between the parties, Mr. Dwivedi, relying on a Supreme Court's decision in the case of **Satish Kumar and others Vs. Surendra Kumar and others (AIR 1970 SC 833)**, has argued that the said award is not binding, the same being not a registered document. He accordingly contends that it was not necessary for the plaintiffs to have prayed for cancellation of the sale deed (Ext.F).

22. Submissions have been made by Mr. Ganpati Trivedi, learned Senior Counsel for the appellants, in reply, supporting his contention that in the absence of seeking specific relief for a declaration by the court that the sale deed (Ext.F) was a *Farzi* document, no relief could have been granted. He has further argued that even Natho Devi (P.W.9) admitted in her evidence, when she was examined on 29.01.1993 before the court below that she learnt about the execution of the sale deed



nearly seven years before the date of her examination. He has drawn my attention to the contents of the sale deed to satisfy this Court that it discloses, in clear terms, the purpose of sale in favour of defendant no.2 and that plaintiff no.1 had executed the sale deed as *Karta* of the family. He has referred to the evidence of plaintiff no.1 (Natho Devi) in paragraph 3 of her examination-in-chief, to submit that even plaintiff no.1 accepted defendant no.1 to be the *Karta* of the family. In this background, he argues that the sale deed dated 08.07.1972 (Ext.F) can, at the maximum, be said to be a voidable document and it was incumbent upon the plaintiffs to seek a declaration to the said effect if they wanted to avoid the said sale deed. He has relied on a Supreme Court's decision in the case of **Raghubanchmani Prasad Narain Vs. Ambika Prasad Singh (AIR 1971 SC 776)** with special reference to paragraph 5 and decision of this Court dated 17.05.2016 in FA. No.46 of 1968 with F.A. No. 47 of 1968 (**Most. Parvati Devi and others Vs. Munshi Sao and others**). He has also relied on a decision of the Supreme Court in the case of **Subodh Kumar Vs. Bhagwat Nandoo Rao Mehetre**, reported in (2007) 10 SCC 571, to contend that even if the transaction made by the *Karta* of the family is imprudent, the alienation can be treated to be



voidable to the extent of undivided share of the non-consenting coparceners. Reliance has also been placed on a decision of this court in the case of **Ram Kishun Vs. Smt. Nero Devi (AIR 1965 Patna 486; para 5)**, to submit that a voidable document and decree is good until it is set aside. He has also dealt with the submissions made on behalf of the plaintiffs-respondents on the question of non-examination of the defendant no.2 by referring to the averments made in the plaint itself, wherein her impleadment as defendant no.2 has been described as formal, for the limited purpose of partition. Since no relief was sought against Bimla Devi, her non-examination would not adversely affect the case of the appellants, he contends. Further, the husband of Bimla Devi was examined as a defendant witness, who deposed that he was looking after the entire affairs of his wife and that the evidence, which he was giving before the court, was on behalf of his wife Bimla Devi also. He has, thus, submitted that there is no question of drawing an adverse inference for non-examination of Bimla Devi, since such question would have arisen only if there was no other evidence available on record and the party did not chose to appear in court, who was the only person and a particular fact was within his/her knowledge. Reliance has been placed on a decision of



this Court in the case of **Rajendra Poddar Vs. Smt. Shakuntala Devi (2012 (2) PLJR 859)**. He has countered the submissions of Mr. Dwivedi on the point of execution arising out of Eviction Suit No. 76 of 1984 and has submitted, referring to Ext.H that the delivery of possession was given to Bimla Devi through the process of the court as proved in the depositions of the process servers (D.W.8 & D.W. 10) to the effect that the delivery of possession was effected by the Nazir of the civil court in their presence. Reference has also been made to the deposition of plaintiff no.2 Om Prakash Sao, the son of plaintiff no.1, Natho devi, who was examined as P.W. 8 and in his deposition he specifically accepted the factum of delivery of possession. Based on the aforesaid submissions, Mr Dwivedi contends that the judgment of the first appellate court below needs interference.

23. In the background of extensive submissions, advanced on behalf of the parties which have been noticed above and materials available on record, I will proceed first to answer the three substantial questions of law, which have been framed by two orders in the present two appeals, as have been mentioned above. It has to be kept in mind, while proceeding to answer the aforesaid substantial questions of law that there is no



dispute in respect of the following aspects:-

(i) Plaintiff no.1 is the legally married wife of defendant no.1 (Banarsi Sah) and rest of the plaintiffs are the legitimate children of Banarsi Sah. There is a finding of fact recorded by the learned trial court to this effect which has attained finality in the absence of any challenge.

The appellants had questioned the status of Natho Devi as legally married wife of Banarsi Sah, who according to them, was earlier married to one Kalicharan Singh.

(ii) There is a registered sale deed executed on 08.07.1972 by Banarsi Sah and Surti Devi, in respect of the suit property in favour of defendant no.2 Bimla Devi, who is the sister of defendant no.1 and there is no relief seeking a declaration of the said sale deed to be voidable.

(iii) There is an *ex parte* decree passed in eviction suit filed by Bimla Devi for eviction of Natho Devi, describing her to be the wife of Kalicharan Singh. The Execution Case No. 74 of 1985 was instituted for execution of the *ex parte* decree of eviction in favour of Bimla Devi.

24. The plaintiff no.1 is said to have learnt about the *ex parte* decree only after steps were taken for her deposition



through the process of the court in Execution Case No 74 of 1985.

25. Evidently, there were two obstacles before the plaintiffs which they were required to overcome in order to successfully claim partition in the property by filing partition suit, namely, (i) the said sale deed 08.07.1972 executed in favour of Bimla Devi by Banarsi Sah and another and (ii) the *ex parte* decree in Eviction Suit No. 76 of 1984 in favour of Bimla Devi. The most fundamental question, which is required to be answered in the present second appeal(s) is, as to whether the plaintiffs could successfully avoid these two aspects on the plea of the same being *Farzi*, fictitious and fraudulently obtained in a partition suit, without seeking specific relief against the said sale deed and the *ex parte* decree. In my opinion, it was incumbent upon the plaintiffs to seek a declaration against the registered sale deed dated 08.07.1972, if they wanted to avoid it. It can be no one's case that the registered sale deed dated 08.07.1972 was completely a void document, since it is an admitted fact that Banarsi Sah was the *Karta* of the family, which has been admitted by the plaintiff no.1 herself in paragraph 3 of her examination-in-chief as P.W.9. The argument that since other members of the family were also signatories of the said sale



deed dated 08.07.1972 and, therefore, the same cannot be said to have been executed by defendant no.1 as *Karta* of the family and, therefore, there was no need to challenge the said sale deed, does not convince me at all. An alienation by the Manager of the joint Hindu family of the joint family property cannot be termed as void, though such alienation can be challenged, in the facts and circumstances of the case, on the ground of the same being voidable, as has been held by the Supreme Court in the case of **Raghubanchmani Prasad Narain Vs. Ambika Prasad Singh** (supra). Similar view has been taken in the case of **Subodh Kumar and others Vs. Bhagwant NamDeoRao Mehetre** (supra), wherein the Supreme Court has stated the law in paragraph 11 as follows:-

“.....when the Karta, however, conveys by way of imprudent transaction, the alienation is voidable to the extent of the undivided share of the non-consenting coparcener.....”

26. Mr. Ganpati Trivedi, learned Senior Counsel for the appellants, in that background, has rightly placed reliance on the decision of this Court in the case of **Ram Kishun Mahto and others Vs. Nero Devi and others** (supra) which lays down that a voidable document and decree is good until it is set aside



and, therefore, it requires a declaration in true sense. Relying on an earlier decision of this Court in the case of **Rambharosa Lal Vs. Smt. Binda Devi (1956 Patna 2003)**, this Court in the case of **Ram Kishun Vs. Smt. Nero Devi** (supra) has lucidly enunciated the law that if a document or a decree was voidable, the same needs to be set aside in order to clear the ground for giving relief to the plaintiffs. Same view has been taken by this Court in the case of **Most. Parvati Devi and others Vs. Munshi Sao and others** (decision dated 17.05.2016 in F.A.Nos. 46 and 47 of 1968), in which case dealing with almost identical situation and relying on the Supreme Court's decision in the case of **Prem Singh Vs. Birbal**, reported in **(2006) 5 SCC 353**, has opined that there is a presumption that a registered document is validly executed and, therefore, such a registered document, *prima facie*, would be valid in law and the onus of proof would be on a person who leads evidence to rebut the presumption. In the case of **Sita Sharan Prasad Vs. Manorma Devi** (supra), this Court has held that a registered sale deed is presumed to have been validly executed with all its legal consequences. I do not find any hesitation in following the view taken in the case of **Sita Sharan Prasad Vs. Manorma Devi** (supra) that there cannot be any presumption of invalidity



attached to such a transaction. Such documents remain valid on the accepted principles that apparent state of affairs is the real state of affairs, until the facts invalidating the same are established.

27. The trial court, on examination of the evidence on record, has recorded a finding that the plaintiffs were dispossessed from the Schedule-A property through the process of the court, though it was the specific case of the plaintiffs that they did not have any knowledge of either the eviction suit or the execution case and delivery of possession; every thing was prepared merely on papers. It is noticeable that plaintiff no.2, in his deposition as P.W.8, has admitted the aspect of delivery of possession in execution case filed by Bimla Devi. The defendants proved the delivery of possession by the process servers on 06.07.1986 in the presence of the daughter of plaintiff no.1. These facts are the basis for the appellants to contend that as on the date of filing of the partition suit, there was no unity of possession in respect of the suit property. The learned appellate court below has, however, held that the decree in eviction suit cannot be treated to be a decree against plaintiff no.1 because of her description as the wife of Kalicharan Singh. The evidence on record, however, suggest that the defendants



were able to prove dispossession of the plaintiffs based on the documentary evidence pertaining to Execution Case No. 74 of 1985, supported by oral evidence of the process servers, who deposed that the Nazir of the court had effected the delivery of possession of the suit property in favour of defendant no.2. As has been noticed, at the outset, it has been the specific case of the plaintiffs themselves that in view of several disputes arising between the parties, with the intervention of the well-wishers, an agreement was reached and reduced in writing. It is the case of the plaintiffs that since the payments in terms of the agreement were not made and articles not returned, the partition suit was filed. The plaintiffs themselves proved the said agreement as Ext.2, which discloses that certain articles of plaintiff no.1 were lying in the holding of Bimla Devi which was to be returned to the plaintiffs. Without entering into the question of enforceability of the said agreement, it is manifest that certain articles of Natho Devi were lying on the date of agreement, in the holding of Bimla Devi. Considering the conspectus all these aspects in totality, the finding recorded by the first appellate court below that the validity of the decree in eviction case and delivery of possession in the execution case could be avoided by the plaintiffs, without challenging the same,



in my view, cannot be said to be a correct approach.

28. Non-examination of defendant no.2 Bimla Devi, in my view, would have certainly not been detrimental to the case of the defendants in the partition suit keeping in mind the fact that Bimla Devi was made defendant only because of execution of the sale deed dated 08.07.1972 in her favour and subsequent grant of decree in the eviction suit and the processes in execution case. In any view of the matter, her husband was examined as D.W.12. There would have been no question of drawing an adverse inference for non-examination of Bimla Devi as her non-examination does not amount to withholding any evidence.

29. The appellate court below, thus, in my opinion, erred while reversing the trial court's finding that without seeking any relief to set aside the *ex parte* decree and the process of the execution, the plaintiffs could not successfully claim a decree of partition.

30. The three substantial questions of law, as framed in the present second appeals, as noticed above, are being answered accordingly in view of the abovenoted discussion in the following terms:-

(i) The judgment of the lower appellate court



below is vitiated because in a partition suit, without claiming any relief for a declaration regarding void or voidability of the judgment and decree passed in Eviction Suit No.76 of 1984, the lower appellate court could not have held the said judgment and decree as void *ab initio*, without meeting the reasonings of the trial court.

(ii) It was incumbent upon the plaintiffs to have sought for a relief against the registered sale deed dated 08.07.1972, executed in favour of defendant no.2 by defendant no.1 to claim partition.

(iii) The defendants proved, based on the proceedings of the Execution Case No. 74 of 1985 that plaintiff no.1 was dispossessed through the process of the court. The dispossession, indisputably, relates to the same property in which the plaintiffs claimed to be residing. The finding, to this effect, recorded by the trial court has not even been discussed by the first appellate court. Since



the execution of the decree in Execution Case No. 74 of 1985 pertains to the same suit property, the possession of the purchased property, as claimed by defendant no.2, would be binding on the plaintiffs.

31. Having answered the substantial questions of law, I am of the considered view that the impugned judgment and decree of the first appellate court below dated 23.12.2008, passed by the learned Additional District Judge, Fast Track Court No.5, Bhagalpur, in Title Appeal No. 58 of 1993, deserves interference in the present second appellate jurisdiction, which is accordingly set aside.

32. The judgment and decree of the trial court stands restored.

33. These appeals are accordingly allowed.

34. There shall be no order as to cost(s).

(Chakradhari Sharan Singh, J)

HR/-

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