

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.311 of 2016

1. Dr. Sunil Kumar Sinha, son of Late Kedar Nath Sahay
2. Dr. (Mrs.) Rekha sinha, wife of Dr. Sunil Kumar Sinha
Both resident of mohalla Aliganj, Post Office and Police Station Banka,
District Banka

... .. Appellants

Versus

1. Sri Ashok Kumar Sinha, son of Late Tarni Prasad, resident of mohalla
Aliganj, Post Office and Police Station Banka, District Banka

... .. Respondent

Appearance :

For the Appellant/s : Mr. T. N. Maitin, Sr. Adv.
Mr. Vinod Shankar Modi

For the Respondent/s :

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER
ORAL

Date : 15-02-2018

This is a second appeal, under Section 100 of the Code of Civil Procedure, 1908, wherein the appellants are aggrieved by the judgment and decree, dated 17.06.2016, passed, by learned Additional District Judge IV, Banka, in Title Appeal No. 13 of 2014, whereby and whereunder he has reversed the judgment and decree, dated 06.01.2014, passed, by learned Sub Judge I, Banka, in Title Suit No. 22 of 2001.

2. I have heard Mr. T. N. Maitin, learned Senior Counsel, appearing on behalf of the appellants, who were defendants in the Trial Court.



3. Before I take note of his submissions on behalf of the appellant on the point that the second appeal involves substantial question of law, I must take note of certain basic facts, which I consider essential for the purpose of present adjudication.

4. This is not in dispute that father of the plaintiff (respondent), viz. Tarni Prasad, and father of defendant no. 1, viz. Kedar Nath Sahay, were full brothers, sons of Late Jaldhar Prasad. Late Jaldhar Prasad died in the year 1942.

5. The plaintiff filed the suit for declaration of his title and possession over the suit premises and also for declaration that the defendants had been coming in permissive possession of the suit premises as licensee of the plaintiff. He also sought a decree for ejectment of the defendants from the suit premises, as described in Schedule-I of the plaint and for handing over the vacant possession of the said suit property to the plaintiff. It was his case, set out in his plaint, that the common ancestor, Jaldhar Prasad, had died in the year 1942, leaving behind his widow, Pancha Devi, and the two sons, viz. Kedar Nath Sahay and Tarni Prasad. There was amicable settlement in respect of partition in the family on 01.01.1963, whereafter a deed of memorandum of partition was prepared. Pancha Devi, the widow of the common ancestor, Jaldhar Prasad, died in the year 1966, whereafter the two brothers, namely,



Kedar Nath Sahay and Tarni Prasad, agreed to have an amicable family partition in respect of the whole property, left behind by Late Jaldhar Prasad and, accordingly, a registered partition deed was executed on 23.11.1971. Under the partition deed, the property described in Schedule-I of the plaint fell in the share of the plaintiff, whereafter he came in exclusive possession and ownership of the said suit property. It was his further case that the defendant no. 1, after having completed his medical course, desired to use the suit property for opening a clinic, which was permitted by the plaintiff, in 1983. In view of the expansion in the family, the plaintiff, being in need of the suit premises, for his personal purpose, he asked the defendant no. 1 to vacate the same and to hand it over to the plaintiff, which the defendant no. 1 neglected and since despite notice under registered cover, having been given to the defendant no. 1, he failed to vacate the suit premises, he filed the suit.

6. It was asserted by the plaintiff in the plaint that he also learn that the suit premises as well as several other properties had wrongly been recorded in the name of Subhadra Devi, the mother of the defendant no. 1, and Tulsi Devi, mother of the plaintiff, during municipal survey of Banka Municipality, leading to erroneous preparation of municipal khatian.



7. This is to be noted that the defendant no. 2/appellant no. 2 is the wife of defendant no. 1/appellant no. 1.

8. The defendants, resisting the claim of the plaintiff, filed their written statement, admitting that after the death of Pancha Devi, the two sons of Late Jaldhar Prasad, namely, Kedar Nath Sahay and Tarni Prasad, inherited his entire property. In respect of the family partition made in the year 1963, the defendants though admitted the said partition but asserted that it was merely on paper and was never acted upon and further claimed that the said family arrangement was made only to protect the joint family property in view of the provisions of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, and only to save the surplus land, which was never acted upon by the parties. It was further case of the appellants/defendants that the father of the plaintiff, being in legal profession, had created certain documents fraudulently, which were never acted upon and, thus, both the brothers were in joint possession of the property to the extent of half share each. It was their case that Pancha Devi died in the year 1966, leaving behind five daughters and two sons. The daughters and the sons got one-third share in the suit property. The defendants also pleaded that the partition deed of 1971 was also a fraudulent creation of the father of the plaintiff, namely,



Tarni Prasad, in respect of the Schedule-I property of the plaintiff. The defendants pleaded that the same was allotted to the share of Kedar Nath Sahay. The defendants denied the case of the plaintiff that the defendants were in permissive possession over the suit property and that by virtue of any partition acted upon, the plaintiff acquired any title over the suit property. The defendants also took a plea that a proceeding, under Section 144 of the Code of Criminal Procedure, 1973, was initiated, which also came to be decided in favour of the defendants by an order, dated 24.04.2001, passed by learned Sub Divisional Magistrate, Banka, whereafter the suit came to be filed.

9. Based on the rival pleadings, the learned Trial Court framed five issues, out of which, issue nos. 1, 3 and 5 are formal. The main issues, which was framed by the learned Trial Court is Issue No. 4, which read thus:-

“4. Is the documents deed of memorandum dated 1-1-1963 and registered partition deed dated 23/11/1971 are valid document and have finally separated the two brothers. Tarni Prasad and Kedar Nath Sahai and their heirs and the same have been acted upon and accepted by them and their heirs?”
(sic.)



10. The parties examined and cross-examined witnesses to establish their case. Apart from oral evidence, they also adduced documentary evidence, including *yaddast* partition deed (memorandum of partition), dated 01.01.1963 (Exhibit-1), registered partition deed, dated 23.11.1971 (Exhibit-2), municipal rent receipts (Exhibits-3 to 3/c), certified copy of the registered sale deed, dated 21.05.1980 (Exhibit-2/a), certified copy of the registered sale deed, dated 06.06.2003 (Exhibit-2/b) and the notice sent by the plaintiff to the defendant no. 1 (Exhibit-4).

11. The defendants also led oral evidence and adduced documentary evidence, such as, municipal rent receipts (Exhibit-A to A/2), rent receipt of the State Government (Exhibit-B), khatiyani of Banka Municipality (Exhibit C to C/2), Khatiyani (Exhibit-C/3 to C/4), *Batwaranama* (Exhibit-D) and the order of the Sub Divisional Magistrate, Banka, under Section 144 of the Code of Criminal Procedure, 1973, dated 24.04.2001 (Exhibit-E).

12. This is to be noticed that Exhibit-2, which is the registered partition deed, dated 23.11.1971, is a crucial document, which has been not accepted by the learned Trial Court as a proof to establish partition between sons of Late Jaldhar Prasad, whereas based on the said Exhibit-2 and other oral evidence on record, the



appellate court below has upheld the plaintiff's case of partition between the sons of Late Jaldhar Prasad.

13. As I have already noticed, the main point involved in the present case centres around Issue No. 4 for adjudication of the dispute between the parties. It has been held in respect of Issue No. 4 by the learned Trial Court that the registered partition deed, dated 23.11.1971 (Exhibit-2), was in relation to partition among the wife and sons of Tarni Prasad only and the defendants did not have any concern with the said partition deed. Disbelieving the case of the plaintiff of the partition in the year 1971, the learned Trial Court held, on the basis of the evidence on record, that the property was joint trust, as proved by municipal khatiyani (Exhibits C to C/2). The case of the plaintiff that the defendants were permitted to run a clinic from 1983 was found, by the learned Trial Court, to be incorrect. Learned Trial Court held that the property was a joint family property and both the parties were co-sharers and, therefore, only on the basis of oral submission, that the plaintiff permitted defendant no. 1 to run his clinic, the plaintiff's case could not be accepted.

14. Another issue was framed in respect of non-joinder of Tulsi Devi, the mother of the plaintiff, as party to the suit, which



also has been decided against the plaintiff and it has been held that the suit suffered from the defect of necessary party.

15. The appellate court below, however, has, on the basis of evidence adduced at the trial, held that the memorandum of yaddast partition, dated 01.01.1963 (Exhibit-1) and registered deed of partition, dated 23.11.1971 (Exhibit-2), suggest that there was partition in the family between Kedar Nath Sahay and Tarni Prasad. The appellant court below noticed the conflicting stand of the defendants in respect of the memorandum of yaddast partition, dated 01.01.1963, and the registered deed of partition, dated 23.11.1971, since, on one hand, they claimed it to have been prepared only for evading the consequence of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, whereas, on the other hand, they called the same to be sham and nullity.

16. Mr. T. N. Maitin, learned Senior Counsel, appearing on behalf of the appellants, has submitted, while assailing the impugned decision of the appellant court below, that the appellate court below failed to discharge its duties by not considering each and every evidence adduced at the trial before reversing the findings of the learned Trial court on the question of partition. He has also submitted that the learned Trial Court had failed to frame



issue as to whether the defendants were in permissive possession over the suit property, which, the appellate court below ought to have been taken note of. He has submitted that the findings recorded by the appellate court below are perverse inasmuch as it has failed to take into account the oral evidence as well as the documentary evidence on record.

17. Relying on a decision of this Court, in the case of **Jaideo Yadav v. Raghunath Yadav and Another**, reported in **2009 (3) PLJR 529** (paragraph 21), he has submitted that it was the duty of the appellant court below to have considered each and every evidence on record before reversing the findings of the Trial Court and should have assigned reasons for reversing the findings of the Trial Court.

18. He has also placed reliance on the Supreme Court's decision, in the case of **L. N. Aswathama and Another v. P. Prakash**, reported in **2009 (4) PLJR (SC) 111**, to contend that the appellate court below could not have reversed the findings of the Trial Court without considering the entire evidence. To strengthen his contention, he has also relied on a Supreme Court's decision, in the case of **C. Ventaka Swami v. H. N. Shivanna and Another**, reported in **(2018) 1 SCC 604**. He has very specifically submitted that the appellate court below failed to consider the oral evidence



of the plaintiff and the defendants and the documents exhibited as evidence by the defendants, namely, municipal rent receipts and khatiyan etc.

19. In the background of these submissions, he contends that the present second appeal involves so many substantial questions of law, including:-

(i) Whether it was incumbent upon the appellate court below to have considered the entire evidence on record before reversing the findings of the Trial Court and such failure having occasioned miscarriage of justice, interference is required by this Court, under Section 100 of the Code of Civil Procedure, 1908?

(ii) Whether there was failure on the part of the Trial Court to frame issue in respect of the plaintiff's claim of allowing permissive possession of the suit property in favour of the defendants?

(iii) Whether the appellate court below was required to remand the matter back to the Trial



Court for framing of the issue for just adjudication of the case?

20. I have perused the judgment of the Trial Court and the appellant court below. It is noteworthy that the appellate court below, after having taken into account rival pleadings on record and having mentioned the issues involved, has recorded, in the impugned judgment and decree, that the parties, at the time of argument, confined their case on the correctness and legality of the memorandum of partition, dated 01.01.1963, and the registered deed of partition, dated 23.11.1971.

21. Mr. T. N. Maitin, learned Senior Counsel, has submitted that the appeal having been filed by the plaintiff/respondent, the appellants/defendants did not have any control over the proceedings before the Court below and only such submissions were made on behalf of the appellants before the appellate court below, which were required in reply to the submissions of the appellant before the appellate court below, who is the respondent herein. He has submitted that it was still the duty of the appellate court below to have examined all the evidence on record before reversing the findings of the Trial Court, which could have been done only after recording reasons as to how the findings recorded by the Trial Court were incorrect.



22. Mr. Maitin, learned Senior Counsel, has, however, accepted that the factum of partition in the year 1971 goes to the root of the matter and if it is established that there was such partition between Kedar Nath Sahay and Tarni Prasad, both sons of Late Jaldhar Prasad, in the year 1971, through which the suit property can be said to have fallen in the share of the plaintiff, the appellants/defendants have no case.

23. What I notice from the judgment of the appellate court below that it has considered all the evidence on record in respect of the claim of the plaintiff and denial of the defendants in relation to the partition in the joint family property in the year 1971. The parties have not disputed, as is evident from the two judgments of the Courts below, the correctness of memorandum of partition, dated 01.01.1963 (Exhibit-1). The appellate court below, on examining the said documents, has recorded a finding that the suit property, appertaining to Khesra Nos. 1802 and 1804, under Khata Nos. 203 and 204, was shown in the share of Tarni Prasad, the father of the plaintiff.

24. As has already been noticed, the appellants/defendants had taken plea, without denying the correctness of the said documents, that the said memorandum of partition was never acted upon and the same was prepared only for evading the rigors



of the provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961. Similarly, the appellate court below took note of Exhibit-2, which is the registered partition deed, dated 23.11.1971. This cannot be in dispute that the partition, which the registered partition deed, dated 23.11.1971, deals with partition among Tarni Prasad, his wife and sons. In the said partition deed, the suit property has been shown in the name of plaintiff, which is not in dispute. The said partition deed, dated 23.11.1971 (Exhibit-2), contains the signature, not only of the father of defendant no. 1, namely, Kedar Nath Sahay, but also the defendant no. 1, as witness. Not only this, signatures of the mother of the defendant no. 1, Subhadra Devi, and his brother, Anil Kumar Sinha, were also on the said partition deed, dated 23.11.1971. Mr. Maitin, learned Senior Counsel, contends that the said registered partition deed, dated 23.11.1971 (Exhibit-2), cannot prove partition between the two brothers, namely, Kedar Nath Sahay and Tarni Prasad.

25. It is difficult to accept his plea in view of the admitted fact that the registered partition deed, dated 23.11.1971, bears the signature of Kedar Nath Sahay. However, the facts, as noticed above, go to suggest that the father of the defendant no. 1, Kedar Nath Sahay, the defendant no. 1 himself, the mother of defendant



no. 1 and the brother of defendant no. 1 were knowing about the registered deed of partition, dated 23.11.1971, in which plaintiff's share, in respect of the suit property, was shown. In that background, the appellate court below, upon considering all these materials, which were relevant for determination of the Issue No. 4, recorded his finding, on the basis of independent appreciation of evidence, that the memorandum of partition, dated 01.01.1963 (Exhibit-1) and the registered deed of partition, dated 23.11.1971 (Exhibit-2) were valid documents, on the basis of which the plaintiff/respondent had acquired title over the suit property. It is incorrect to say that the appellate court below has not taken into account other relevant evidence adduced on behalf of the defendants/appellants. In my view, the appellate court below, while dealing Exhibits C series, has rightly recorded that the entries in khatian could not be the basis for declaration of title.

26. In my view, the Supreme Court's decision, in the case of **L. N. Aswathama** (supra) does not help the appellants' case inasmuch as the Supreme Court has held that the appellate court below would not reverse the findings of the Trial Court, which are based on entire evidence '*without analysing the relevant evidence in entirety*'. In my view, the appellate court below has considered



the evidence, which were relevant for adjudication of the main point in issue.

27. This Court's decision, in the case of **Jaideo Yadav** (supra), also is of no avail for the appellants' case since I am of the view that the appellate court below has, in the present case, assigned reasons with reference to the pleadings and evidence of the parties, while reversing the findings of the Trial Court.

28. Since I am of the view that the findings recorded by the appellate court below can neither be said to be perverse nor can it be said that it does not assign reasons for reversing the findings of the Trial Court, the findings of the appellate court below cannot be said to be suffering from perversity.

29. As a matter of fact, the question of non-examination of the issues on the point of permissive possession, according to the plaintiff/respondent given to the defendants/appellants, in my view, it has become irrelevant in view of the discussions above. Even otherwise, the said statement does not have any merit since the parties had gone to the trial fully knowing the rival case and had led all evidence not only in support of their contentions, but in '*refutation of those of the other side*' and, therefore, the same cannot be said to have vitiated the proceedings in any manner. Reference may be made in this regard to the Supreme Court's



decision, in the case of **Nedunuri Kameshwaramma v. Sampati Subba Rao (AIR 1963 SC 884)**.

30. In my view, therefore, the present second appeal does not involve any substantial question of law for consideration. The second appeal does not deserve admission and is, accordingly, dismissed.

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	19-02-2018
Transmission Date	N/A

