

IN THE HIGH COURT OF JUDICATURE AT PATNA

FIRST APPEAL No.585 of 1994

(Against the judgment and decree dated 10 August 1994 and 25th August 1994 respectively passed by Sub Judge 2nd Patna in Title Partition Suit no. 344 of 1986)

1. Smt. Somaria Devi wife of Shri Bhagan Rai (dead)

A1 (a) Dip Narain Rai S/o late Bhagan Rai

A1 (b) Shiv Nath Rai S/o late Bhagan Rai

A1 (C) Lal Babu Rai S/o late Bhagan Rai

A1 (d) Bhushan Rai S/o Late Bhagan Rai

All R/o village Khaspur, P.S. Maner, , Dist. Patna and village Changar, P.S Phulwari, Presently Kankarbagh, Dist. Patna

A1 (e) Deventi Devi D/o late Bhagan Rai and W/o Sri Jawahir Ray R/o village Sahalichak P.S. Maner, District Patna.

A1(f) Lalo Devi d/o late Bhagan Rai and W/o sri Sarvesh Rai R/o village Bela Jahare, P.S.Naubatpur, Dist. Patna.

A1(g) Muniya Devi D/o late Bhagan Rai and w/o Sri

4. Mahendri Devi

5. Jhunki Devi

Both R/o village Mauzipur, P.S. and P.O Fatuah, District Patna and village Changar, P.O. Kankarbagh, P.S. Phulwari at present Kankarbagh, Dist. Patna.

(Defendants 1st party in the court below)..respondents 1st party)

6. Shri Janak Gope S/o late Ramphal Gope

7. Shri Chandradip Gope

8. Shri Laxmi Gope

9. Shri Girija Gope

10. Shri Moti Gope

11. Shri Mophil Gope

12. Shri Gopal Gope son of Chandradip Gope

All R/o village Changar P.S. and P.O. Kankarbagh Dist. Patna.

(Defendant 2nd party in the Court below).... respondent 2nd party.

21. Shamdeo Sharma son of Umeshwar Sharma of village Hasanpur Gaya P.S. Tekari District Gaya at present Changar, P.S. and P.O. Kankarbagh, District Patna.
22. Raj Kishore Sharma son of Ram Yatan Singh R/o village Kurtha Tekari Dist. Gaya at present Changar P.O. and P.S.Kankarbagh, Patna.
23. Manorama Devi W/o Sidheshwar Thakur of village Jagdav, Madhepur, Madhubani at present Karanti, Medical Hall Kankarbagh, Patna at present Mohalla Sorampur,P.S.Phulwari at present Kankarbagh, Dist. Patna.
24. Shri Yadunandan Raut son of sri Shiv Shankar Raut R/o of village Jogipur, P.S. Hilsa District Nalanda at present residing at Mohalla Kankarbagh Rental flat no. 18, P.S. Kankarbagh, District Patna.
25. Sri Ram Bilash Pd. Son of sri Bakhori Raut, R/o village Saidanpure, P.S.Hilsa, Distt. Nalanda at present residing at Mohalla MIG 166, Hanuman Nagar P.S. Kankarbagh, Dist. Patna.
- (Defendant 3rd party in the Court below).....Respondents 3rd party.
26. Shankar Kumar son of Bengali Singh
27. Nilu Devi W/o Shankar Kumar
- Both R/o of village J/189, P.C. Colony, Kankarbagh City, P.S. Kankarbagh, Patna.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Jitendra Kishore Verma, Mr. Anjani Kumar with Mr. Abhishek Anand

For the Respondent/s : Mr.Rajendra Kumar Jain, Mr. Manish Kumar, Mr. Madhu Prasun, Mr

Suit no. 344 of 1986, by which the suit filed by the plaintiff has been dismissed on contest with costs.

2. The case of the plaintiff-appellant is that the plaintiff and the defendants 2nd party are the descendants of one Ramphal Gope. Ramphal Gope had four sons, namely, Gulab Gope, Sampat Gope, Nirpat Gope and Janak Gope(Defendant no.7). Most Basmatiya Devi was the wife of Gulab Gope. Punwa Devi, Sheokuri Devi and Somaria Devi (plaintiffs) were daughters of Sampat Gope. Punwa Devi was married to Ram Sevak Gope. Defendant nos. 2 to 4 are the sons of Punwa Devi. The plaintiff Somaria Devi had been married with Bhagat Gope. The plaintiff has got four sons and three daughters. The defendant nos. 8 to 12 are sons of Janak Gope (defendant no.7). Gopal Gope Defendant no.13 is son of Defendant no.8,Ramphal Gope. Ramphal Gope had a brother, named Raghunath Gope. Marni Devi was widow of Raghunath Gope. Ramphal Gope and his four sons were member of joint family. They were in joint possession of the family properties fully described in schedule 1 of the plaint. Gulab Gope son of Ramphal Gope died about 52-53 years ago in the state of jointness leaving behind his widow Most. Basmatiya. Thereafter, his brother Nirpat Gope expired issueless about



40-50 years ago in the state of jointness. Then, Ramphal Gope and his two sons, namely, Sampat Gope and Janak Gope (defendant no.7) came in joint possession of the entire joint family property by survivorship. In course of time out of aforesaid property certain properties were sold. Some of the family properties were acquired by Land Acquisition Department which is detailed in schedule II lot no. 2 of the plaint. Further aforesaid Sampat Gope and Janak Gope sons of Ramphal Gope remained in possession of the properties fully described in schedule III of the plaint. Thereafter, Sampat Gope died sometime about 1941-42 in the state of jointness leaving behind his widow Gharbharni Kuer. Gharbharni Kuer came in possession with her daughter, namely, Punwa Devi, Somaria Devi (plaintiff) and Sheokuri Devi and nearest legal heir of Sampat Gope. Sheokuri Devi expired and thereafter Ramphal Gope also died in 1951 in the state of jointness leaving behind his daughter- in -law Gharbharni Devi and two daughters namely Punwa Devi and Somaria Devi (plaintiff) and his son Janak Gope (defendant no.7) and sons of Janak Gope (defendant nos. 8 to 12). Thus Gharbharni Kuer and defendant 2nd party (defendant nos. 7 to 13) came in possession of the entire joint family properties described in schedule III of the



plaint. Gharbharni Kuer also expired on 17.09.1962 leaving behind her two daughters, namely, Punwa and Somaria Devi (plaintiff) who inherited the properties of Gharbharni Kuer and, thus, they came in possession of the joint family properties along with defendant 2nd party.

3. The plaintiff learnt on 15.10.1986 from one Tek Narain Singh son of Late Bachchu Singh of village Changar, Kekar Bigha, Dist- Patna, that Punwa had filed Title Suit No. 1191 of 1962 in the Court of Sub Judge-II, Patna for partition of joint family properties against defendant 2nd party (defendant nos. 7 to 13) and Most Basmatia Devi widow of Gulab Gope and it was transferred to the Court of Additional Sub Judge, Patna, and the suit was numbered as T.S. No. 119 of 1962/2 of 1965. That suit was decreed and thereafter there was First Appeal No. 278 of 1965 from preliminary decree before the Hon'ble High Court by defendant 2nd party which was dismissed and by appointment of Survey knowing Advocate Commissioner Separate *Takhta* of the land had been allotted and delivery of possession had also been effected on the land allotted to the Punwa Devi by partition in Execution Case No. 01 of 1985 by the Court of Additional Sub Judge-V, Patna. Further, it has been stated that the plaintiff came to learn that



Punwa Devi had concealed the existence of the plaintiff with dishonest intention to have illegal gain. Thereafter, the plaintiff got enquired through her husband Bhagan Ram about the aforesaid suit and got the same inspected on 01.11.1986 and then came to learn about the dishonest and fraudulent act of Punwa Devi. Further, the plaintiff came to know that Punwa Devi had earlier filed suit in the Court of Sub Judge- II, Patna, for partition of joint family property alleging that she was the only daughter of Gharbharni Devi. The witness of Punwa Devi had admitted in evidence that the plaintiff was also the daughter of Gharbharni Devi but, even then she did not implead the plaintiff as party to that suit. That suit was decreed by judgment dated 14.07.1965 and preliminary decree for partition was prepared and thereafter the defendant 2nd party filed F.A. No. 278 of 1965 which was dismissed. Punwa Devi the plaintiff of Title Suit No. 119 of 1962 filed petition for appointment of Advocate Commissioner which was allowed and Takhta was carved out and the properties fully described in Schedule IV of the plaint was allotted to the plaintiff of that suit by partition which she deemed to have taken representing the branch of Sampat Gope. The present plaintiff got inspected the Execution case no. 1 of 1965 of the Court of Additional Sub Judge V,



Patna, on 10.11.1986. Thus, from the above facts, it is quite clear that the plaintiff has got eight *anna* share in the property fully described in schedule -IV of the plaint as possession of one of the co-sharer is possession of all co-sharers. Punwa Devi expired in 1976 and the defendant nos. 1 to 6 were her heirs. The plaint depicts that defendant no.1 Ram Sewak Gope husband of Punwa Devi also expired during pendency of the suit. Further case of the plaintiff is that defendant 1st party are co-sharer of the plaintiff and they got unity of title and possession over schedule IV property in which plaintiff has got half share. Defendants 1st party, in spite of repeated demand, did not agree to give due share to the plaintiff on partition, hence this suit was filed.

4. Further case of the plaintiff is that defendant 1st party have executed fraudulent sale deed in favour of defendant 3rd party (defendant nos. 14 to 26) in respect of a portion of the suit land and hence the purchaser has been impleaded as party. Punwa Devi, during her life time and after her death, her sons and husband sold some portion of the suit land to defendant nos. 14 to 26 and purchasers have dispossessed the plaintiff from the portion of the suit land in the month of January, 1987 after rejection of the petition for injunction of the plaintiff, and,



hence the possession of the purchaser over portion of the suit land is illegal and that of trespasser.

5. The cause of action for the suit arose on various dates when the plaintiffs made demand for partition and lastly on 04.11.1986 when last demand was made by the plaintiff and it was refused by the defendants 1st party and also in January 1987 when the plaintiff was dispossessed from the portion of the suit land..

6. Defendant no.1 Ram Sevak Gope expired during pendency of the suit. Defendant nos. 2 and 6 have filed separate written statement. Defendant no.14 has filed separate written statement. Defendant nos. 25 and 26 have also filed separate written statement. Defendant 2nd set i.e. defendant nos. 7 to 13 did not appear. They did not file written statement. Defendant nos. 15 to 24 also did not appear to contest the suit. Hence, the suit was heard and decided *ex parte* against the absentee defendants.

7. The case of defendant nos. 2 to 6 is that the suit is not maintainable. The suit has been filed for declaration of title and recovery of possession in the garb of Partition Suit. The Genealogy table given at the foot of the plaint is not correct. The contention of the plaintiff that Sampat Gope had



three daughters, namely, Punwa Devi, Somaria Devi (plaintiff) and Sheokuri Devi is wrong. In fact, Punwa Devi had two sisters, named Somaria Devi (plaintiff) and Sheokuri Devi. The plaintiff (Somaria) and Sheokuri Devi have absolutely no concern with the family of Sampat Gope. They are stranger to this family. Sheokuri Devi died issueless. The plaintiff and Sheokuri Devi are the daughters of one Deolal Bhagat of village Changar from his first wife. As he had no son from his first wife, he remarried himself to his second wife from whom also he had only a daughter. Further it has been stated that Punwa Devi had earlier filed Title Partition Suit no. 119 of 1962 against Janak Gope and his sons (defendants 2nd set). She claimed half interest in the property.

8. Janak Gope and his son appeared in that suit and filed written statement. Their defence was that Sampat Gope was not son of Ramphal Gope and Punwa Devi was not the daughter of Sampat Gope. That suit was contested and decreed on 14.07.1965 in the court of Additional Sub Judge, Patna. First Appeal No. 278 of 1965 was filed by Janak Gope and others in Hon'ble High Court against that decree which, ultimately, was dismissed on 08.07.1977. Their prayer for leave to go to Hon'ble Apex Court was also rejected. During this entire



period between 1962 till filing of this suit in 1986, the plaintiff nowhere appeared at any stage of the suit to say that she had also got interest in the property. This fact shows that the plaintiff is not the real share holder. Defendant nos. 7 to 12 (defendant 2nd set) who lost that suit after hot contest became inimical to Most. Punwa Devi. Therefore, they have set up present plaintiff and are fighting this suit for her. The plaintiff is in collusion with them and she has been setup by them. After partition decree the separate *Takhta Bandi* had been done. The plaintiff had never been in possession over the suit land. Further, it has been stated that the plaintiff has neither any title nor possession over any portion of the suit land and her claim for partition is false. Further, it has been stated that the contention of the plaintiff that she and Sheokuri are daughters of Sampat Gope and sister of Punwa Devi is false. The contention of the plaintiff that Ramphal Gope had four sons and they were members of joint family has been admitted. The contention of joint possession of Ramphal Gope, Sampat Gope and Janak Gope has not been denied. It has been stated further that Somaria and Sheokuri never came in possession of the property of Gharbharni Devi. It has been denied that the plaintiff is granddaughter of Ramphal Gope.



9. The plaintiff has given false and concocted story about knowledge of previous suit. The plaintiff did not know about the previous suit because she had no concern with the family. The delivery of possession of the suit property has been made to Punwa Devi in Execution case no. 1 of 1985 which is admitted fact in the case. It has been further stated in the written statement that plaintiff cannot take advantage of any statement of any witness in the previous suit as these defendants (defendant nos. 2 to 6) are not bound by the said statement. The contention of the plaintiff of 8 *annas* share in the Schedule IV property has also been denied as she has got no interest in the suit property as the suit land is exclusive property of defendant 1st set. There is no denial of death of Punwa Devi in 1976. The plaintiff is not co sharer of defendants. The question of joint possession does not arise.

10. After disposal of some lands by the defendant 3rd set which is admitted the purchaser had been delivered possession. It has lastly been stated in the written statement that any statement made by defendant 2nd set may not be used against these defendants. About Tek Narayan, it has been stated that he is a litigant of that area. He is also behind the litigation in this case for unlawful gain. It has lastly been contended in



the written statement that plaintiff has got no cause of action for the suit. She is not entitled to any relief. The suit is fit to be dismissed with cost.

11. Defendant no.14. *Shankar Nagar Sahkari Grih Nirman Samiti* Limited (Patna) has filed separate written statement. This defendant has stated that plaintiff got no cause of action for the suit. Practically, the defendant has also supported the contention of defendant nos. 2 to 6. This defendant has also stated that Sampat Gope had only one daughter, named, Punwa Devi mother of defendant nos. 2 to 6, Sampat Gope had died in 1942-43 leaving behind his widow Gharbharni Devi and only daughter Punwa Devi. Somaria Devi (plaintiff) and Sheokuri Devi are not the daughters of Sampat Gope. They are stranger to the family as they are daughters of Devlal Bhagat @ Devlal Rai. Dev Lal Bhagat has no son from his first wife . Therefore he remarried and from his second wife also he had only daughter, namely, Ramia Devi. It has further been stated in the written statement that Punwa Devi had filed Title Partition suit no. 119 of 1962/ 2 of 1965 against Janak and his sons.

12. Thus, the defendants have practically adopted the contention of defendant nos. 2 to 6.



13. It has further been submitted by the defendant that Janak Gope got a deed of Will manufactured alleged to have been executed by Devlal Rai and his wife Dhanpatia Devi in favour of their daughter Ramia Devi on 06.07.1977 with ulterior motive to harass Punwa Devi. In fact, Dev Lal Rai was in collusion of Janak Gope and therefore, such document has been manufactured. Janak Gope filed SLP No. 130 of 1977 in the Hon'ble High Court for leave to appeal to the Hon'ble Supreme Court against the order passed against him in First Appeal no. 278 of 1965 but, that prayer was refused by the Hon'ble High Court. This defendant is *bonafide* purchaser from defendant 1st set. This defendant purchased 16 kathas of land from defendant 1st set by sale deed dated 01.03.1985 and got possession also. The possession was confirmed on 21.09.1986 when Advocate Commissioner has effected the delivery of possession over 1.31 acres of land in purchased plot no. 42 to the defendant 1st set. This defendant fixed pillars on 21.09.1986 and came in physical possession over the same day. Janak Gope and his sons filed several proceedings U/s 144 Cr.P.C. against defendant 1st set and this defendant and other lost in all proceedings U/s 144 Cr P.C. Therefore, Janak Gope got this suit filed with ulterior motive.



14. The plaintiff was never in possession of the suit land. This defendant has further purchased 6 kathas of land adjoining to the aforesaid land by sale deed dated 14.12.1986. The defendant 1st set transferred 20 ft wide road which was beneath the high tension of electric wire. This defendant carved out road and developed it and allotted sub plot also to its members for construction of residential house. Some of the members have constructed house also and are residing over the same. Defendant 1st set disposed of the remaining area of plot no. 42 to other and purchasers have constructed their houses and are residing therein. The entire contention regarding relationship of plaintiff with Punwa Devi has been denied.

15. The defendant nos. 25 and 26 have also filed separate written statement that they are also purchasers. They have practically supported the contention of defendant 1st set and defendant no.14. They had right over the suit land dependent on the right of the defendant 1st set. They have also prayed for dismissal of the suit in the Court below.

16. On the basis of the pleadings of the parties total 9 issues have been framed by the Court below and the main issues are issue nos. 6, 7 and 8 which have been quoted below

“6. Is the plaintiff daughter of Sampat Bhagat ?

7. Is the plaintiff entitled to a decree for recovery of



possession?

8. Is the plaintiff entitled to a decree for partition and if so, to what share she is entitled for in Schedule IV properties?”

17. The court below has discussed these issues together in paragraph no. 17 of the impugned judgment.

18. The plaintiff has contended that she is also daughter of Sampat Bhagat and Punwa Devi was her full sister. Therefore, the schedule –IV properties which Punwa Devi got in her share in Title Partition Suit no. 119 of 1962 /2/1965 was joint property of the plaintiff and Punwa Devi (since deceased). Hence, the plaintiff is entitled to half share in that property. This suit has been filed for partition of the plaintiff's 8 *anna* share in the Schedule IV properties detailed in the plaint. It has been contended on behalf of the contesting defendant Nos. 2 to 6 that Punwa Devi was their mother and she was only daughter and heir of Sampat Bhagat. Gharbharni Devi was wife of Sampat Bhagat. Janak Gope Defendant no.7 did not want to give share of Sampat Bhagat who was his full brother to Punwa after death of her father Sampat Bhagat and, therefore, Punwa Devi had filed Title suit no. 119/62/2/65. The suit was decreed in her favour and she got delivery of possession. The present plaintiff is not the daughter of Sampat Bhagat and full sister of Punwa



Devi. She is not entitled to any share detailed in schedule IV properties which Punwa Devi had got in the previous suit by virtue of judgment and decree passed in his favour in Title Suit no. 119/62/2/65.

19. The defendant 1st set had denied the genealogy given in the plaint regarding plaintiff and Sheokuri Devi are not the daughter of Sampat Gope. The positive case of defendant 1st set is that both (plaintiff and Sheokuri Devi) are daughter of one Deolal and only Punwa Devi was daughter of Sampat Gope. Sheokuri expired issueless.

20. Therefore, the only point for consideration before the Court below was whether Somaria Devi plaintiff is daughter of Sampat Gope or not?

21. It has been argued on behalf of the defendant 1st set that onus was on the part of the plaintiff-appellant to establish that she is daughter of Sampat Gope since she claims partition in the ancestral family property and recovery of possession on the basis of inheritance .

22. To prove her case that plaintiff is daughter of Sampat Bhagat and full sister of Punwa has relied on certain documents as well as oral evidence. Ext-1 is affidavit dated 15.12.1986 sworn by one Nanhki Devi Dagrane (since deceased)



of village Changar who claimed to have attended the delivery of the plaintiff.

23. The Court below has mentioned in the impugned judgment that this evidence was brought in existence on 15.12.1986 i.e. after filing of the suit. Learned counsel for the contesting defendants-respondents has submitted that the document was procured during pendency of the suit and therefore it has got no value. In support of such argument, the counsel has relied on judgment reported in ***AIR 1983 SC 684 State of Bihar & ors. Vrs. Radha Krishna Singh and others***).

24. The plaintiffs have also filed Ext. 2 which is registered Will dated 6.9.1977 said to be executed by one Deolal and his wife Dhanpati Devi to their daughter Ramia Devi . PW-7 is son of Ramia Devi. He has stated that his Nana Dev Lal had only one daughter, namely Ramia Devi.

25. Learned counsel for the plaintiff-appellant has submitted that defendant has taken plea that plaintiff is daughter of one Deo Lal but, Ext. 2 is of the year 1977 i.e. much before institution of the suit. Ext. 2 shows that Deo Lal had only one daughter, namely Ramia Devi and, therefore the contention of the contesting defendants that Somaria Devi



(plaintiff) is daughter of Deo Lal fails. Hence, no third case can be made out and the court is bound to accept either of the two versions. Learned counsel for the plaintiff- appellant further submits that recitals of Ext. 2 clearly shows that Deo Lal and his wife Dhanpati Devi had only one daughter.

26. It was submitted on behalf of the contesting defendants that there is nothing in Ext. 2 to show that Deo Lal had not married earlier also. Ramia Devi did not appear to give evidence. But, her son Bhagwan Prasad has appeared as PW-7. He has stated in para 2 that his *Nana* had only one marriage with Dhanpati and his mother Ramia Devi was only daughter of his *Nana* and *Nani*. Learned counsel for the contesting defendants has further drawn attention of this Court towards para 20 of PW-7. This witness has stated in para 20 that his mother asked him to tell that her father had only one marriage. PW-7 in para 22 has stated that he had not enquired about marriage of his *Nana*. This witness has specifically stated in para 34 of his evidence that he had no personal knowledge about his *Nana*. There is specific averment in Ext. 2 that Ramia Devi was issue of Deo Lal from his wife Dhanpati. It has further been submitted on behalf of the contesting defendants- respondents that onus is on the plaintiff- appellant first to



establish that she was daughter of Sampat Gope. The plaintiff cannot succeed, even if, the contention of the contesting defendants fail that the plaintiff is daughter of one Deo Lal from his second wife.

27. Learned counsel for the plaintiff-appellant has strongly relied on Ext. 3 of T. S. no. 119/62/2/65. Ext. 3 is deposition of PW-18 Ram Sunder Ram (now dead). This witness had deposed on 28.06.1965 in T.S. no. 119/62/2/65 on behalf of Punwa Devi who was the plaintiff in that suit. It is mentioned in the impugned judgment that this witness had stated in his examination-in-chief that Sampat Gope had expired leaving behind his wife Gharbharni and daughter Punwa Devi. Gharbharni Devi also expired and her daughter was joint with Janak. In cross-examination, in para 11, this witness had said that Punwa Devi was three sisters. The youngest expired. Punwa and Somaria was alive. This witness has stated that Somaria Devi and Sheokuri were daughters of Sampat Gope but, he know only one daughter.

28. The counsel has submitted that the Court below has not relied on the deposition of aforesaid PW-18 Ram Sudar Ram of T. S. No. 119/62/2/65.

29. As per evidence of PW-18 in para 11 he gave



his evidence on the basis of one *Fauti Bahi* which was not produced in the Court. He had deposed on the basis of his knowledge derived from his father.

30. The learned counsel for the defendants-respondents submitted that aforesaid witness PW-18 did not depose truly. The court below did not accept his evidence in T. S no. 119/62/2/65 otherwise the suit would have been dismissed for non-joinder of necessary parties.

31. Learned counsel for the defendants further submits that in that suit defendant was own uncle of Punwa Devi. Therefore, the plea of non-joinder of necessary party would have definitely been taken by Janak in that suit.

32. The plaintiff has appeared to depose as PW-9. She has supported her case in examination- in- chief. She has stated that she learnt about previous suit between Punwa Devi and Janak from Tek Narain about seven years ago and then she made enquiry and filed the instant suit.

33. This court finds from judgment of Court below that court has given finding in the impugned judgment that “it appears surprising that if the plaintiff is sister of Punwa Devi and then also she could not know about litigation between her own sister Punwa Devi with her uncle Janak, although the suit



was filed in 1962 i.e. T.S. 119/62/2/1965”.

34. The plaintiff has filed the instant suit in the year 1986. Tek Narain has not been examined in the Court below during trial of the suit. The plaintiff has stated in para 16 of her deposition that she cannot say whether mess of Janak and his brothers were joint or separate. PW-9 could not name the *Pandit* and *Hajaam* of her marriage. She has further stated in para 17 of her evidence that she used to come to *Naihar* after six month or one year. She could not say when her mother expired. She had not come after death of her mother. She has stated in para 19 of her evidence that she had no dispute with Punwa Devi or Sheokuri Devi. She has further stated that she had no relation with son of Punwa. She could not say as to when Sheokuri expired. She could not even give the details of the land. She has further stated in para 22 of her deposition that she came to learn about previous litigation only six years ago. In same paragraph she has stated that she did not know from whom Punwa was fighting. Lastly, she has stated in the aforesaid paragraph that she did not know whether Punwa was fighting with Janak or not. She has stated in para 24 that she could not say whether Sheokuri was married before her marriage or after her marriage. She has stated in para 28 of her



deposition that Tek Narain had told about previous suit to her son Bhushan and after that, after three months, she came to Court and perused the record. She has deposed in para 31 that she could not say as to when Gharbharni expired. The court below on the basis of the aforesaid evidence of the plaintiff PW-9 has observed “that from her entire evidence it is clear that this witness who is plaintiff of suit has given unbelievable and unreliable evidence. From her evidence alone her case is bound to fail”.

35. Defendants have also adduced evidence. Mahadeo Gope defendant no.2 has been examined as DW-7. This witness is hearsay witness regarding first marriage of Deo Lal. No document has been produced on behalf of the defendant to show that Somaria Devi, the plaintiff, is daughter of Deo Lal.

36. The counsel for the appellant has argued on the basis of aforesaid deposition that main question emerges for consideration is as to whether the previous partition suit bearing T. S.No. 119 of 1962 filed by Punwa Devi daughter of Sampat Gope and full sister of present plaintiff Somaria Devi without impleading her sister Somaria Devi can bind Somaria Devi or operate as *estopple/res judicata* against her to preclude her from



filing the present suit for partition claiming half share in the properties secured by Punwa Devi in the earlier suit filed against the branch of Janak Gope in Title Suit no. 119 of 1962 .Learned counsel for the plaintiff- appellant has submitted that since Somaria Devi was not made party in the previous suit, and as such, there is no question of *res-judicata* operating against her. The counsel for the plaintiff-appellant further submits that there is no such issue framed as to whether Sampat Gope had only one daughter, namely, Punwa Devi or three daughters including the present plaintiff Somaria Devi. This issue has neither been raised by Punwa Devi (the plaintiff of earlier suit being Title Suit no 119 of 1962) nor by the branch of Janak Gope.

37. Reliance has been made on behalf of learned counsel for plaintiff-appellant in a judgment reported in **2015(4) PLJR 362 (SC)(The City Municipal council Bhalki by its Chief Officer vs. Gurappa (D) by LRs & Anr)**. Learned counsel for the plaintiff-appellant further submits that in view of the decision reported in **AIR 1976 SC 1569 (SYED MOHD. SALIE LABBAI (DEAD) BY L.Rs. and OTHERS vs. MOHD. HANIFA (DEAD) BY L.Rs. and OTHERS)** and **AIR 2000 SC 1238 (Sajjadanashin Sayed Md. B.E. Edr.(D) by L.Rs., v.**



Musa Dadabhai Ummer and others) in absence of pleadings of previous suit, *res-judicata* cannot be applied. Learned counsel for the plaintiff-appellant further submits that in the instant suit the specific case of the plaintiff Somaria Devi is that her full sister Punwa Devi secured a partition decree in previous suit vide Title Suit no. 119 of 1962 by suppressing the fact that Punwa Devi had two more full sisters Somaria Devi (plaintiff) and Sheokuri Devi @ Shiroia Devi who had died earlier. The decisions in earlier partition suit and its appeal cannot operate as *res-judicata* as fraud vitiates every decisions either of inferior court or of superior court or of even Hon'ble Apex Court as there was no question of invoking or applying the doctrine of *res judicata* when the judgment has been obtained by playing fraud or suppression before the Court is a nullity and *non est* in the eye of law and does not operate as *res judicata* . Similarly, learned counsel for the plaintiff-appellant has submitted that whether the plaintiff had knowledge of the previous suit or not was required to be pleaded by the defendants as the plaintiff having pleaded and deposed regarding absence of knowledge the onus of proof was on the defendants to prove previous knowledge of the suit to the plaintiff and the plaintiff cannot be expected to prove the negative and defendants failed to



discharge their burden of proof in this regard. Learned counsel for the plaintiff-appellant has further submitted that in view of the fraud and suppression of fact pleaded in the earlier suit the question of limitation does not come into play so long as the fraud is not discovered in view of section 17 of the Limitation Act. The possession of Punwa Devi or her successors will be as a co-sharer for the benefit of the branch of Somaria Devi and her heirs representing their interest also and there is no question of limitation etc.

38. Learned counsel for the plaintiff-appellant further submits that law of pleadings is settled that if the defendants had simply denied the parentage of Somaria Devi the matter would have been different but they came out with a positive case that Somaria Devi is daughter of Deo Lal Rai. The learned counsel for the plaintiff-appellant has further submitted that in view of *Mogha's Law of Pleadings in India Seventeenth Edition page 308* from the discussions under the heading setting up affirmative case it is clear that if the plaintiff fail to prove that Somaria Devi is not the daughter of Deo Lal Rai still the plaintiff can succeed with less strong evidence of the plaintiff as the burden in case of affirmative defence gets shared. The plaintiff can succeed if she proves



herself to be daughter of Sampat Gope or sister of Punwa Devi. She can equally succeed if defendants fails to prove their defence that she is daughter of Deo Lal Rai as there is no third case on which the Court can rely so as to make Somaria Devi daughter of somebody else. She has to be found either to be daughter of Sampat Gope or Deo Lal Rai. There is no third case on the record.

39. The court below has mentioned in the impugned judgment at page 22 that no document has been produced on behalf of the defendant to show that Somaria Devi is daughter of Deo Lal Rai. Even no reliable evidence oral or documentary has been relied in this respect.

40. Learned counsel for the plaintiff-appellant submits that in view of the statement of Deo Lal Rai and Dhanpati Devi in 1977 in their registered Will that they have only one daughter namely Ramia Devi the defence of present defendants that Somaria Devi is daughter of Deo Lal Rai becomes false leaving only one option which lead to the conclusion that Somaria Devi is daughter of Sampat Gope. Ext. 2 is the statement of the alleged father and mother who are now dead and as such their statement is very much material and relevant and has been made prior to litigation in a



registered instruments and is admissible in terms of section 32 sub clause (5)(6) and (7) of the Indian Evidence Act.

41. Learned counsel for the defendants-respondents have contented in reply to the submission advanced on behalf of the plaintiff-appellant that with regard to the same properties which are the subject matter of the present F.A. No. 585 of 1994, Punwa Devi (mother of respondent nos. 1 to 3 in F.A. No. 585 of 1994) had filed Title Suit being Title suit no. 119 of 1962 in the court of sub Judge, 2nd Patna for partition of joint family properties against Janak Gope and his descendants and one Most Basmatia claiming that she was the only daughter of Gharbharni Devi. The said suit was decreed in favour of Punwa Devi on 14.07.1965. Janak Gope and his Branch preferred appeal being Appeal from original Decree No. 278 of 1965 before this Hon'ble Court being aggrieved by the aforesaid judgment and decree dated 14.7.1965 which by order dated 08.07.1977 was dismissed with costs. Janak Gope and another filed an application for leave to appeal before the Hon'ble Supreme Court being SC Appeal no. 130 of 1977 against the order dated 08.07.1977 of this Hon'ble Court which was also dismissed by order dated 17.5.1979.

42. Thereafter, the delivery of possession of



schedule property was effected in Execution case no. 01 of 1985 wherein the Advocate Commissioner was appointed who submitted his report on 05.11.1984 and the same has been affirmed by the 5th Addl. Sub Judge, Patna vide order dated 06.07.1985.

43. Janak Gope and others have preferred First Appeal no. 28 of 1986 before this Hon'ble Court against the order dated 06.07.1985 passed by 5th Addl. Sub Judge Patna which has been dismissed vide order dated 08.04.2010 by this Hon'ble Court with observation that " the impugned order/judgment and final decree cannot be interfered with in this first appeal". After the aforesaid order dated 08.04.2010 passed in F.A. No. 28 of 1986, the partition and allotment of shares to the present respondent nos. 1 to 3 has become absolute. There is no any appeal pending against the aforesaid order dated 08.04.2010. The present appellant has for the first time in the years 1986 filed Title Partition Suit no. 344 of 1986 claiming herself to be sister of Punwa Devi after 24 years of filing Title Partition suit by the said Punwa Devi. In the earlier suit, although being of the same genealogy, Janak Gope never raised question of non-joinder of necessary party. The plaintiff-appellant has been projected as sister of Punwa Devi in a



forged manner after 24 years at the instance of Janak Gope and others after their defeat from all corners for illegal gains and for multiplicity of litigation.

44. This court, after hearing submission of both the parties in detail and looking into the evidence adduced by the plaintiff and the defendants, finds that the plaintiff did not produce any reliable evidence in the court below to substantiate that she is daughter of Sampat Gope. The court below has mentioned in the impugned judgment that from entire evidence of plaintiff (PW-9) herself the entire case of the plaintiff gets falsified. She has stated in her evidence in para 17 that she could not name the *Pandit* and *Hajaam* of her marriage. In the same para she has stated that she used to come to her *naiher* after six months or one year. She could not say when her mother expired. She had not come after death of her mother. She said that after five or six years she used to come to her Naihar after death of her mother. She has stated in para 19 that she had no relation with son of Punwa. She could not say as to when Sheokuri expired. She could not give details of the land. She has stated in para 22 of her evidence that she came to learn about previous litigation only six years ago. She has further stated in the aforesaid paragraph that she did not know from



whom Punwa was fighting. Lastly, she has deposed in this para that she did not know whether Punwa was fighting with Janak or not. In paragraph no. 24 she has said that she could not say whether Sheokuri was married before her marriage or after her marriage. In para 28 she has stated that Tek Narain had told about previous suit to her son Bhushan and after that after three months she came to court and perused the record. She could not say as to when Gharbharni expired as per para 31 of her deposition.

45. This court finds on the basis of such evidence of plaintiff that court has rightly disbelieved her evidence and came to the finding that the plaintiff of the suit has given unbelievable and unreliable evidence. From her own evidence her case is bound to fail.

46. This court further finds that Certified copy of the deposition of PW-18 Ram Sundar Ram (now dead) (Ext.3) in earlier T.S no. 119 of 1962/ 2/65 filed on behalf of Punwa Devi is not of any relevance to the plaintiff in the instant suit. From perusal of Ext. 3, it appears that in examination-in- chief he had said that Sampat Gope had expired leaving behind his wife Gharbharni and daughter Punwa Devi. Further, he had stated that Gharbharni Devi also expired and her daughter was



joint with Janak. In cross- examination in para 11 this witness had stated that Punwa Devi was three sisters. The youngest expired. Punwa and Somaria were alive.

47. The evidence of any witness is to be read as a whole. The evidence of witness is reliable only when his evidence in examination- in -chief and in cross- examination are consistent. From perusal of Ext. 3, it appears that aforesaid witness (PW18) has given inconsistent evidence in his cross-examination vis-a-vis evidence adduced by him in the examination- in- chief. In the examination – in- chief, he has stated that Sampat Gope had expired leaving behind his wife Gharbharni Devi and daughter Punwa Devi but, in cross-examination he has stated that Punwa Devi was three sisters.

48. Therefore, the Court below was right in disbelieving the aforesaid evidence given by PW-18 with respect to the pleading of the plaintiff that Somaria lives with her sister Punwa.

49. It further appears that Punwa Devi had earlier filed Title Suit No. 119/62 /2 /65 against her uncle Janak Gope. In that suit Janak Gope would have surely taken objection that suit is bad for non- joinder of necessary party in the event Somaria Devi was own sister of Punwa Devi. Similarly,



Somaria at no stage of trial of suit appeared to contest the suit.

50. The contention of the counsel for the plaintiff-appellant is that non proving of the pleading by the defendant that Somaria was daughter of Dev Lal will only point out that Somaria was daughter of Sampat Gope as pleaded by the plaintiff. Learned counsel for the appellant has further submitted that there cannot be a third case since Somaria could either be daughter of Sampat Gope or daughter of Dev Lal Rai as contented by the plaintiff in the pleading. This Court does not agree with such submission of the counsel for the appellant.

51. It is well-settled principle of law that plaintiff has to stand on her own leg to prove her case as pleaded in the plaint. The plaintiff cannot get any benefit on account of non-proving of the pleading raised by the defendant in the written statement

52. It was specific case of the plaintiff in the plaint that plaintiff is daughter of Sampat Gope and own sister of Punwa Devi. The plaintiff has failed to prove the aforesaid pleading by cogent evidence as discussed above.

53. In such circumstances, the plaintiff cannot take advantage of non-proving of the pleading made by the



defendant in the written statement that Somaria was daughter of Dev Lal Rai and, as a default, it will be assumed that plaintiff is daughter of Sampat Gope and own sister of Punwa Devi. Non-proving of the pleading by the defendant as raised in the written statement will not give any benefit to the plaintiff to pass decree in her favour. The plaintiff has to prove her case by producing cogent and reliable evidence as onus was on the plaintiff to prove her case as pleaded in the plaint. .

54. The contention of the counsel for appellant that onus is of no relevance in the instant case because defendant has made specific pleading in the written statement that Somaria is daughter of Dev Lal Rai is totally misconceived. The failure on the part of the defendant to prove his pleading as raised in the written statement will not give any gain to the plaintiff to succeed in case even if the plaintiff has failed to prove her case as pleaded in the plaint by reliable and cogent evidence.

55. Therefore, this Court, does find any illegality in the impugned judgment and decree passed by the Court below by which the Court has come to the conclusion that plaintiff has miserably failed to prove that she was daughter of Sampat Gope and sister of Punwa Devi and therefore she is not



entitled to a decree for partition and recovery of possession in schedule IV property. The Court below has accordingly dismissed the suit filed by the plaintiff on contest.

56. This appeal is, accordingly, dismissed on contest with cost and judgment and decree passed by court below is hereby affirmed.

57. The plaintiff is directed to make payment of cost of Rs. 10,000/-(Ten thousand) to the defendants towards cost of litigation within a period of two months from the date of passing of this judgment.

(Sanjay Priya, J)

shyambihari/-

AFR/AFR	AFR
CAV DATE	5.8.2019
Uploading Date	4.9.2019
Transmission Date	

