

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.3 of 2005

=====

Phulpati Devi W/o Rajdeo Sah

... .. Appellant/s

Versus

1. Champa Devi
2. Raj Narayan Sah
3. Raj Deo Sah
4. Birendra Sah
5. Rakesh Sah
6. Nand Kumari Devi
7. Indu Devi
8. Indrawati Devi
9. Gayatri Devi

... .. Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Ranjeet Kumar
For the Respondent/s : Mr.

=====

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA
ORAL JUDGMENT

Date : 24-01-2019

Heard Mr. Shasi Shekhar Dwivedi, the learned senior counsel for the appellant.

The appellant is the plaintiff. The appellant filed this Second Appeal against the judgement and decree dated 16.05.1995 passed by learned Subordinate Judge-III, Siwan in Title Suit No. 210 of 1984 and the judgement and decree dated 13.09.2004 passed by learned Additional District Judge-VI, Siwan in Title Appeal No. 46 of 1995 whereby the learned appellate court confirmed the judgement and decree dated 16.05.1995 passed by the learned 3rd Subordinate Judge, Siwan in Title Suit No. 210 of 1984.

The plaintiff/ appellant filed the suit for partition of the suit property claiming half share in the suit



property. Most. Gangajali Devi, mother of the plaintiff, was the sole defendant. During the pendency of the suit the plaintiff by way of amendment brought new facts that defendant No.2, Asharfi Sah, who was later on impleaded in the suit, fraudulently got executed sale deed with regard to six dhurs of land from defendant No. 1 in his favour on 17.12.1979. The plaintiff further sought relief, after amendment, that sale deed dated 17.12.1979 executed by Most. Gangajali Devi, defendant No.1, in favour of defendant No.2, Asharfi Sah, be declared as fabricated, inoperative and without consideration. Defendant No.1 is mother of the plaintiff. The learned Subordinate Judge partly allowed the suit and held that the plaintiff is entitled to get $\frac{1}{2}$ share in the property and $\frac{1}{2}$ share will go to her mother as only daughter and mother are legal heirs of Raghunath Sah, father of the plaintiff, but held that sale deed executed by Gangajali Devi in favour of Asharfi Sah, defendant No.2, on 17.12.1979 is valid, legal and on proper consideration vide judgement and decree dated 16.05.1995. The learned appellate court confirmed the finding of learned Subordinate Judge. Being aggrieved by the aforesaid judgements, the appellant filed this Second Appeal.

The learned senior counsel for the appellant submits that Gangajali Devi (now deceased), defendant No.1, mother of plaintiff, of course, deposed in Title Suit No. 84 of 1974 and admitted execution of sale deed by her but deposition of defendant No.1 cannot be taken as admitted because previous suit is still pending and in subsequent suit such deposition cannot be taken as conclusive admission of the defendant No.1. It is further submitted that sale deed was executed during the pendency of the suit for right of easement, being Title Suit No. 84 of 1974, but the sale deed cannot be a valid document in view of the fact that the



attesting witness and identifier of executant of the sale deed were not examined and the executant of the sale deed also denied to have executed the sale deed. It is submitted that this substantial question of law is involved in this appeal. It is further submitted that from perusal of judgement and decree passed by both the courts below, it would appear that the appellate court has not passed the judgement and decree in accordance with the provision as contained in Order 41 Rule 31 of the Code of Civil Procedure and, therefore, the judgement and decree passed by the appellate court is not sustainable. The learned senior counsel for the appellant has placed reliance on the judgement of this court in the case of *Most. Kanti Devi v. Narain Khawas* reported in **2010 (1) PLJR 940**.

Having considered the submissions and on perusal of the judgements, I find that the learned trial court found the appellant entitled to $\frac{1}{2}$ share in the suit land and preliminarily decreed the suit accordingly. The sale deed dated 17.12.1979 executed by Most. Gangajali in favour of Asharfi Sah, defendant No.2, is concerned, the learned trial court has very categorically discussed the evidence and the deposition of Most. Gangajali, defendant No.1 (now deceased) that defendant No.1 deposed in the Title Suit No. 84 of 1974 and disclosed that she executed the sale deed with regard to $\frac{1}{2}$ share of the suit land in favour of defendant No.2. The defendant No.1, mother of the appellant, filed first written statement in the present suit and disclosed that she sold the property in favour of defendant No.2 to meet the expenses and the loan incurred in performing Shradh Ceremony of her husband and in performing marriage of plaintiff but later on when defendant No.2, vendor of defendant No.1, appeared she filed another written statement. The learned trial court very categorically held, after



considering the entire evidence on record and on the evidence of Most. Gangajali, that she voluntarily executed the sale deed in favour of defendant No.2, after having received consideration of Rs. 9,000/- on 17.12.1979, and found the sale deed genuine operative and on proper consideration. The appellate court also reappraised the evidence and concluded the finding on issue No.8 that Most. Gangajali, mother of the plaintiff, out of her freewill to meet the expenses and the loan incurred by her to perform the marriage of her daughter and Shradh ceremony of her husband executed the sale deed and,thus, the sale deed executed by her on 17.12.1979 is genuine, binding and operative. It is apparent from perusal of the judgement and decree of the appellate court that the learned appellate court has discussed the evidence on issue wise and recorded the finding on all issues raised by the appellant. Therefore, I find no substance in the submission of learned senior counsel for the appellant that the judgement was not delivered in accordance with provision as contained in Order 41 Rule 31 of the Code of Civil Procedure.

Having considered the facts aforesaid, I find that no substantial question of law is involved in the present Second Appeal and, accordingly, the same is dismissed.

(Prabhat Kumar Jha, J)

BKS/-

AFR/NAFR	NAFR
CAV DATE	N.A
Uploading Date	05/02/2019
Transmission Date	N.A

