

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.383 of 2018

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Shailendra Kumar Pandey, Son of Sri Kedar Pandey, resident of Village at Siwan Town, Mohalla-Dakhin Tola, P.S. Siwan Town, P.O. & District-Siwan

... .. Defendant-Appellant-Appellant.

Versus

Ashok Tiwari, Son of Bali Ram Tiwari, resident of Village-Siwan Town, Mohalla- Nirala Nagar (Near-Adda No. 1), P.S. Siwan Town, P.O. & District-Siwan.

... .. Plaintiff-Respondent-Respondent.

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Appearance :

For the Appellant	:	Mr. Umesh Prasad Singh, Sr. Advocate, Mr. Mithilesh Kumar Rai, Advocate, Mr. Lakshman Lal Pandey, Advocate, Mrs. Ruchhi Singh, Advocate, Mr. Abhishek Kumar, Advocate and Mrs. Vandana Kishore, Advocate.
For the Respondent	:	M/S. Chandra Kant and Navin Kumar, Advocates.

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
CAV ORDER

6 10-01-2020 Heard Sri Umesh Prasad Singh, senior counsel for the appellant and Mr. Chandra Kant, learned counsel for the respondent, under Order- 41 Rule-11 of the Code of Civil Procedure.

2. The present appeal has been filed by the defendant/appellant/appellant against the judgment and decree dated 04.06.2018 and 14.06.2018, passed by the learned Additional District & Sessions Judge-IV, Siwan, in Title Appeal No. 37 of 2017, dismissing the appeal and confirming the judgment and decree dated 16.03.2017 and 22.03.2017 respectively passed by the Sub Judge-X, Siwan, in Title Suit No. 288 of 2007 whereby the suit was decreed in favour of the



plaintiff/respondent.

3. The plaintiff/respondent has filed suit for a decree of specific performance of contract on the basis of a registered deed of agreement for sale dated 15.06.2005 with further direction to the defendant to receive the remaining amount and execute deed of sale in favour of the plaintiff and has also prayed for recovery of possession over the land in question and any other reliefs.

4. It was further case of the plaintiff that the defendant having need to repayment of loan and accordingly after negotiation entered into an agreement for sale of 1 Katha of land detailed given in the foot of the plaint on the consideration amount of Rs. 80,000/- and accordingly the plaintiff has paid a sum of Rs. 9,350/- as an advance with undertaking that the remaining amount will be paid at the time of execution of Deed of Sale but despite of notice and demand the defendant has not executed the Sale Deed and lastly when the defendant refused to execute Sale Deed notice was sent and plaintiff has filed the Title Suit.

5. The defendant/appellant appeared in the Title Suit filed written statement denying case of the plaintiff but has not denied the signature and thumb impression of the alleged deed



of agreement for sale but on the other hand has taken plea that the signature was obtained under influence, secondly has taken a plea that since the property is in jointness the agreement for sale is not executable, and lastly has taken plea that he is suffering from some sort of mental problem.

6. After framing of issue both parties have adduced oral and documentary evidence in support of their case and according the learned court below after considering oral and documentary evidence of both parties has decreed the suit in favour of the plaintiff/respondent.

7. The defendant/appellant preferred Title Appeal No. 37 of 2017 against the judgment and decree of the Trial Court which was also dismissed hence this appeal is being filed.

8. The learned senior counsel appearing on behalf of the appellant has raised following substantial questions of law assailing the judgment and decree of the both court below which are as follows:-

(i) Whether the contract of sale of a joint Hindu property by a junior member during lifetime of manager/karta of the joint Hindu family is legal, valid and or a



wagering contract dependent on future right to the property of such junior member?

(ii) Whether the contract of sale of land which is subject matter of partition suit and execution of sale deed without authority of the court in respect of said land during pendency of such suit or appeal is hit by principle of lispendence under Section 52 of the Transfer of Property Act, 1972 ?

(iii) Whether the judgment of Lower Appellate Court is vitiated in law because of none consideration of document Exts. A and B, C and E and also oral evidence of D.Ws. 2, 3 and 4 and as such the judgment and decree is fit to be set aside ?

9. From perusal of the judgment of both court below, it appears that the plea taken by the defendant/appellant has been well considered by both court blow whereas so far the plea



taken by the appellant that since the property is in jointness the alleged deed of agreement for sale is not executable being coparcener property. It is settled by the Supreme Court in a case of Gajara Vishnu Gosavi Vs. Prakash Nanasahed Kamle and others reported in 2009 (4)P.L.J.R.225 (SC) that undivided share of a coparcener can be subject matter of sale/transfer therefore the question raised by the learned counsel for the defendant/appellant that the coparcener cannot transfer is concerned has got no force in the eye of law.

10. So far the question of law formulated by the learned senior counsel that whether the subject matter of suit property is hit by principle of lispendence due to pendency of partition suit and in support of its contention has relied upon the judgment A.I.R. 1956 SC 593 (Nagu Bai Ammal and others Vs. B. Shama Rao and others) but from perusal of judgment, it appears that in a case relied by the learned senior counsel in that case there was a charges of maintenance upon the suit property and accordingly the subject matter of the sale was held to be hit by lispendence but in the present case it appears that the learned Trial Court has categorically discussed and held after considering Ext. A and B that the subject matter of the suit is not subject matter of the partition suit and as such in my opinion



the judgment relied by the learned senior counsel is not supported the contention and is not applicable in the present case and it is held that when the subject matter of the present suit was not included in a partition suit the principle of lispendence will not be applicable and as such the question raised by the learned senior counsel is answered negative.

11. So far third question formulated by the learned senior counsel that whether the judgment and decree passed by the both court below is vitiated for none consideration of document Exts. A and B and also for none consideration of Exts. C and E as well as oral evidence of D.Ws. 2, 3 and 4 is concerned, in my opinion, it appears from the judgment of both court below that the Exts. A and B has been well considered and so far appreciation of Exts. A, B, C and E have been well considered and there is concurrent view of both court below but so far the re-appreciation of evidence of D.Ws. 2, 3 and 4 is concerned, the same cannot be re-appreciated in second appeal.

12. So far the other plea taken by the defendant/appellant, it appears that the defendant has not produced any document with regard to the mental disorder or its treatment though it was onus cast upon the defendant to prove the same. On the other hand, from perusal of the Trial Court and



Appellate Court's judgment, it appears that the Ext. 1 has been well considered and its execution part which was especially quoted by the Appellate Court in its judgment, it appears that the defendant/appellant was fully aware of the execution part and was mentally sound and on the other hand it further appears that the defendant has also admitted in his cross-examination that signature and thumb impression upon the alleged deed of agreement for sale is of defendant and as such the same cannot be denied and I found that both the Court below has fully considered the plea of the defendant.

13. In view of the facts and circumstances, perusal of judgment of both court below and point raised by the appellant it appears that no substantial question is involved and as such the appeal is dismissed at the admission stage itself.

(Sudhir Singh, J)

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