

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.9 of 2006

1. Shyam Sunder Keshari
2. Shailendra Pd. Keshari
3. Arun Prasad Keshari

All sons of Late Ramji Prasad Keshari, all residents of Mohalla Madhubani, P.S. K.Hat, District Purnea. Appellant/s

Versus

1. Most.Kaushalaya Devi, wife of Late Shiv Pujan Ram Keshri
 2. Suresh Prasad Keshari
 3. Ramesh Prasad Keshari
 4. Rajesh Prasad Keshari
 5. Rakesh Prasad Keshari
- All sons of Late Shiv Pujan Ram Keshari.
6. Most. Leela Devi, wife of Late Ram Nath Pd. Keshari.
 7. Smt. Nirmala Devi, wife of Om Prakash Keshari.
- Both daughters of Late Shiv Pujan Ram Keshari.
8. Most. Sunaina Devi, daughter of Late Shiv Pujan Ram Keshari
 9. Smt. Ranju Devi, wife of Prem Prasad Keshari and daughter of Late Shiv Pujan Ram Keshari
 10. Smt. Nitu Devi, wife of Om Prakash Keshari and daughter of Late Shiv Pujan Ram Keshari.
 11. Nilu Kumari
 12. Mamta Kumari
- Both daughter of Late Shiv Pujan Ram Keshari
- All residents of Mohalla Madhubani, P.S.K Hath, District Purnea
13. Paras Nath Keshari, son of Late Ramji Pd. Keshari resident in the house of Bhangalu Ram Keshari at Bibigram Ghospara, P.O. Malda, District Malda (West Bengal)
- (Defendant / Respondent 2nd party in the courts below)
14. Dhananjay Kr.
 15. Bablu Kr. Both sons of Krishna Nand Mandal
 16. Raman Raj
 17. Prabhat Kr. Both sons of Braj Kishore Mandal
 18. Birbal Kr. Mandal
 19. Gopal Kr. Mandal both sons of Arjun Mandal
 20. Smt. Arti Devi
 21. Smt. Pinki Devi
 22. Smt. Durga Devi, wife of Bhopal Pd. Keshari. Respondents

Appearance :

For the Appellant/s	:	Mr.Kumar Uday Singh, Advocate
For the Respondent/s	:	Mr. Shashi Shekhar Dwivedi, Sr. Advocate
		Mr. Parth Gaurav, Advocate
		Mr. Rajiv Shankar Dwivedi, Advocate
		Mr. Praveen, Advocate
		Mr. Ashutosh Kumar Pandey, Advocate
		Mrs. Shilpa, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT

Date : 15-09-2022

1. Heard the learned Counsel appearing on behalf of the



appellants as well as the respondents.

2. This Second Appeal, under Section 100 of the Code of Civil Procedure, has been directed against the judgment and decree dated 28.10.2005 passed by Shri Syed Jafar Hussain, the Additional District Judge-II, Purnea, in Title Appeal No. 81 of 1994 confirming the judgment and decree dated 30.08.1994 and 13.09.1994 respectively passed by Shri Prakash Chandra Agrawal, Munsif, Sadar, Purnia in Title Suit No. 109 of 1991 which was decreed in favour of plaintiff.

3. The facts leading up to the Second Appeal now in dispute may be briefly set out. The original plaintiff Sri Shiv Pujan Ram Keshari (died during the pendency of appeal represented by his legal heirs) filed the suit bearing Title Suit No. 109 of 1991 for declaration that the plaintiff is the absolute owner of the suit land as fully mentioned in Schedule A of the plaint. He has got full right, title and interest as well as possession over the suit land and the defendants had got no any right, title and possession over the same on the basis of wrong entry in M.S. Record of right. As per the plaintiff, late Jai Sah had landed property and he had two sons, namely, Shiv Pujan Ram Keshri and Late Ramji Pd. Keshri father of defendant No. 1 to 4 and husband of defendant No. 5. Late Jai Sah, during his life time,



divided his property by the registered deed of partition dated 07.12.1961 and had put his both sons in separate possession of the land allotted to their shares and had also kept 1/3rd share for himself and his wife. He disposed of many landed property allotted to his share. Land of Mouja Madhubani, P. S-K.Hat, District Purnia bearing old Khata No. 40 Ka, plot No. 1900 measuring 1.53 Acres and plot No. 1897 measuring 0.88 Acres remained undisposed of which was equally divided between two sons after death of their parent.

The future case of the plaintiff is that Late Ramji Prasad Keshri executed a registered sale deed (his 8 Aana Share) in favour of the plaintiff, (in which attesting witnesses were defendant nos. 2, 3 and 4) on 22.09.1979 with respect to the land of old Khata No. 40 Ka bearing old plot No. 1900 measuring an area of 0.76 ½ acres and plot No. 1897 measuring an area of 0.44 Acres for a valuable consideration of Rs. 3,000/- and put the plaintiff in exclusive possession of the said land and the plaintiff is coming in exclusive possession of the same. Municipal survey started in Purnea town from 1977-1978 and M.S. Plot No. 778 have been carved out from C.S. Plot No. 1900 and M.S. Plot Nos. 768, 776 and 1064 were carved out from C.S. Plot No. 1897 under M.S. Khata. It is stated that under M.S. Khata Nos.



446 and 610 of Ward No. 15 of Purnea Municipality there is wrong entry in the joint name of plaintiff and Late Ramji Prasad Keshri which should have been exclusively recorded in the name of plaintiff.

4. In a written statement it is admitted that Jai Sah during his life time partitioned the landed property by registered deed dated 07.12.1961 and in the said deed of partition Jai Sah got the lands of Khata No. 40 KA plot No. 1900 and 1847 of Mauza Madhubani in his share besides other properties but the claim of the plaintiff that after the death of Jai Sah the plaintiff Shiv Pujan Ram Keshari and Ramji Prasad Keshari equally divided the land left behind Jai Sah is not admitted. It is denied that Ramji Prasad Keshari had sold his share under the lands of Khata No. 40 Ka which is a co-parcenary Hindu joint family property of Ramji Prasad Keshari and his sons and without the consent of other co-parcener the sale deed dated 22.09.1979 is void. It is also stated that Ramji Prasad Keshari executed power of attorney on 22.09.1979 in favour of plaintiff to look after the Municipal survey operation of Khata No. 40 Ka and other defendants No. 2, 3 and 4 also signed on the same presuming that it is the power of attorney. They are coming in continuous possession of suit property and the survey authority recorded the



suit land in the Joint name of both plaintiff and Ramji Prasad Singh which is correct and valid. The plaintiff was incharge of all the documents and looking after the properties and so he was paying rent of the suit lands. It is also claimed that the common ancestor Jai Sah left behind not only his two sons but left behind three daughters as legal heirs. Defendants have also taken the technical plea of non-maintainability of the suit, lack of cause of action, barred by law of limitation as well as by principle of estoppel, waiver and acquiescence.

5. The Trial Court framed ten issues on the basis of rival pleadings of the parties, which are as follows :-

(i) Whether the suit as framed is maintainable or not?

(ii) Whether the plaintiff has got any valid cause of action for the suit or not?

(iii) Whether the valuation given by the plaintiff and the court fee paid there on is sufficient or not?

(iv) Whether the suit of plaintiff is barred by principle of estoppel, waiver and acquiescence or not?

(v) Whether the plaintiff is an absolute owner of the suit land and has full right, title, interest and possession over the suit land by virtue of the registered sale deed dated 22.09.1979 executed by



father of the defendants in favour of the plaintiff or not?

(vi) Whether the intention of executing the registered deed dated 22.09.1979 of the vendor i.e. Ramji Pd. Keshri in favour of the plaintiff regarding the suit land was to execute registered sale deed or power of attorney?

(vii) Whether defendants father was alone competent to execute registered sale deed dated 22.09.1979 in favour of the plaintiff without consent of his sons or not?

(viii) Whether the contention of the defendants that plaintiff represented his father i.e. late Ramji Pd. Keshri and defendant Nos. 2, 3 and 4 and showed them necessity of executing a power of attorney with a view to look after the municipal survey operation and on the basis of the aforesaid defendant nos. 2, 3 and 4 as well as their father put their signature over the deed without reading the contents treating it as a power of attorney is valid, genuine and bona fide contention or false frivolous and concocted?

(ix) Whether the municipal survey entry in the record of rights the name of the plaintiff as well as the defendants have been rightly entered or not?

(x) Whether the plaintiff is entitled any relief of reliefs or not?



6. One of the core issues, which the courts below had proceeded to decide was as to whether the plaintiff is an absolute owner of the suit land and has full right, title, interest and possession over the suit land by virtue of the registered sale deed dated 22.09.1979 executed by father of defendants in favour of plaintiff. Learned Trial court decided all issues in favour of plaintiff and against the defendants and held that the plaintiff is the absolute owner of the suit land and has full right and title over the suit land by virtue of deed dated 22.09.1979. It was further, held that the said deed dated 22.09.1979 is a sale deed and not a power of attorney. Accordingly, suit of the plaintiff was decreed on contest without cost.

7. In appeal the first Appellate Court had formulated points for determination, which are as follows:-

(1) Whether the suit land of Khata No. 40 Ka, old Plot No. 1900 and 1897 situated in Mauza Madhubani P.S. K. Hat, Thana No. 107, Ward No. 15 of Purnia Municipality, fully described in Schedule-A of the plaint was ancestral property of Jai Sah or was self acquired by him.

(2) The intention in execution of deed dated 22.09.1979 (Ext.1) of the vendor Ramji Prasad Keshri



was for sale deed or Power of Attorney?

8. After having examined the grounds taken to question the correctness of the decisions of the trial court and appreciating the evidence on record, by the impugned judgment the learned First Appellate Court below affirming the findings of the learned Trial Court decided both the points against the appellants and in favour of the respondents and accordingly the appeal was dismissed.

By order dated 20.11. 2008, following substantial question of law was framed by this Court for consideration in this appeal.

(i) Whether on the specific claim of the plaintiff in his plaint that the original owner was Jai Sah, who left behind two sons, Shiv Pujan Ram Keshari (Plaintiff) and Ramji Prasad Keshari (predecessor of defendant Nos. 1 to 5) it was incumbent upon the plaintiff to implead the three ladies, who were admittedly daughters of Jai Sah and their non-joinder should have failed the Suit itself?

(ii) Whether the learned Court of appeal below should have entertained the petition filed by the daughter without being prejudiced by the fact that a similar petition filed by her was rejected by the trial court?

9. Answer to second substantial questions of law lie in the



answer to the substantial question No. 1 which is the main question.

Learned counsel appearing on behalf of the appellants has submitted that finding of the learned courts below that the suit was maintainable and the suit does not suffer from non-joinder of parties is wholly unsustainable in law in view of the fact that daughters of Jai Sah are necessary party. It is further submitted that the sale deed dated 22.09.1979 (Exhibit-1) executed by Ramji Prasad Keshri transferring half of the suit land to his brother (the original plaintiff) is illegal and void. It is next submitted after the death of Jai Sah his share was partitioned between his two sons are not admitted and being the daughters of late Jai Sah they are necessary and proper, party and due to non-joinder of them the suit is not maintainable and despite the application for impleadment under Order 1 Rule 10(2) the learned trial court not impleaded her a party and learned First Appellate Court also failed to appreciate that daughters of Jai Sah are necessary and proper party.

10. On the other hand learned counsel for respondents submits that learned courts below has after going through the pleading of the parties and oral as well as documentary evidence decreed the suit which has been confirmed by the First



Appellate Court. There is a concurrent finding of the fact by learned courts below and no substantial questions of law as framed arise in their case and this appeal is liable to be dismissed having no merit. According to him, there is no perversity in the concurrent findings of the facts recorded by the courts below in judgment and decrees under challenge, which would have required this Court's interference in the present second appeal under Section 100 of Civil Procedure Code. On the point of non-joinder of three daughters of Jai Sah, it is submitted that suit was not for partition and daughters are not necessary parties in this suit and the courts below rightly held that they are not necessary or proper parties.

11. Before proceeding further, it is to be pointed out that a petition had been filed on behalf of the Most. Chandri Devi, wife of Late Laxmi Sah under Order 1 Rule 10 (2) and Section 151 of the Code of Civil Procedure stating the fact that she may be impleaded as a defendant in this case on the ground that the property involved in suit is exclusive property of her father Late Jai Sah which have been unlawfully partitioned in between the son of Jai Sah ignoring her legal claim. It was further contended that Jai Sah had got two sons and three daughters and under Mitakshra School of Hindu Law a daughter is a share holder in



the property of her father and the property involved in this case has been coming in her possession as per Will of Jai Sah, father of the said petitioners.

12. The learned Trial Court after hearing both the parties and on perusal of entire materials on record held that the instant suit is meant for declaring the plaintiff as an absolute owner of the suit land and also to declare that defendants have got no right at all over the same on the basis of wrong entry in M.S records of right.

13. The present suit is not for effecting partition in between the heirs of Jai Sah but a declaration of the plaintiff's title over the land in question which appeared to have been put under clouds following the entry made in the M.S. records of right. The said petition was rejected with the observation that a suit for partition may be filed by the petitioner if she likes and thinks that her right in her father's property is jeopardized.

14. The plaint proceeded on the basis of purchase of suit property through sale deed. When a plea is put forward that a suit has to fail for non-joinder of necessary parties, it would be for the defendant who set up this plea to make out that the persons not impleaded are necessary parties, and that there



non-joinder would be fatal to the suit.

15. The plaintiff is the dominus litis, who cannot be forced to add parties against whom, he does not want to fight unless it is a compulsion of the rule of the law. In **Gurmit Singh Bhatia Vs. Kiran Kant Robinson: (2020) 13 SCC 773**, the Hon'ble Supreme Court observed that a third party or a stranger cannot be added so as to convert a suit of one character into a suit of different character.

16. Two tests are to be satisfied for determining the question who is a necessary party. The tests are (1) there must be a right to some relief against such party in respect of the controversies involved in the proceeding; (2) No effective decree can be passed in the absence of such party. The parties claiming independent title is not proper party and if such party is impleaded in the suit, the scope of the suit for declaration shall be enlarged to suit for title or partition which is impermissible.

17. A necessary party is an indispensable person to a suit. An effective order cannot be passed without his presence as the relief would affect the rights of such a person. A proper party is a person in whose absence an effective order can be passed,



but his presence as a party would assist and help the court to adjudicate effectively and completely. Where a person, who is a necessary or a proper party to a suit has not been joined as party to such suit, it is a case of non-joinder. It is well settled principle consistent with natural justice that if some person are likely to be affected on account of a decision in the absence of such person such decision should be passed after hearing that person.

18. The very object of the 'doctrine of necessary and proper' parties is to include all such parties as would be necessary for grant of an effective relief for issues that are pendente lite in the matter of hand. The mere fact that a fresh litigation could be avoided is no ground to invoke the power under Rule 10 of Order 1 CPC.

19. Order 1 Rule 9 of CPC provides that no suit shall be defeated by reason of the misjoinder or non-joinder of the parties, but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is sound to be fatal. Even in cases, the Court can under Order 1 Rule 10, sub-Rule (2) direct the necessary parties to be joined.

20. In a suit for partition, all the sharers are necessary



parties and suit is liable to be dismissed for non-joinder of any one of the parties. In the absence of sharers no proper and final adjudication could be made as to the rights of the parties. But in the present case the suit is for declaration of title not the suit for partition between the co-sharer.

21. Learned First Appellate Court in paragraph 21 discussed with respect to point of not making daughters of Jai Sah as party in the suit. It is observed that defendants in their entire written statement maintained a culture of silence by not mentioning the name of the daughters of Jai Sah and their addresses. It is also pointed out that one daughter Most. Chandrai Devi, wife of Late Laxmi Sah ventured to appear in the case and filed a partition in the Court of learned Munsif, Purnea seeking partition which was rejected vide order dated 29.06.1992 on the ground that she may file partition suit seeking her right in the property of her father. The said order remained final and no revision or appeal was filed by any of the daughters of Jai Sah.

22. The Appellate Court below held that the suit property was self acquired property of Jai Sah and sale deed dated 22.09.1979 was duly executed by Ramji Prasad Keshri and the plaintiff got his name mutated and is paying rent to the State of



Bihar. Since the plaintiff Shiv Pujan Keshri is absolute owner of the entire suit property, the name of plaintiff and defendants jointly included in M.S. record of right is legally not tenable.

23. In the back-ground of nature of pleading put forth by the parties before the court below and the evidences laid on their behalf which have been duly considered and appreciated by the learned trial court and the first appellate court, the findings of the court being concurrent, I do not find any infirmity or error in the impugned judgment and decree requiring this Court's interference in exercise of power under Section 100 of Civil Procedure Code. Both the substantial questions of law formulated are answered against the appellants.

24. The substantial questions of law having been answered in aforesaid terms, in my opinion the present appeal fails and is accordingly dismissed. The interlocutory application, if any, stood disposed of. There shall be no order as to costs.

(Sunil Dutta Mishra, J)

saaurabhkr/-

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