

**(2008) 11 JH CK 0023**

**Jharkhand High Court**

**Case No:** None

Smt. Sulo Devi

APPELLANT

Vs

Sitanath Mahto and Others

RESPONDENT

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**Date of Decision:** Nov. 26, 2008

**Acts Referred:**

- Transfer of Property Act, 1882 - Section 48

**Citation:** (2009) 2 JCR 274

**Hon'ble Judges:** R.K. Merathia, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

Ramesh Kumar Merathia, J.

This second appeal has been filed against the judgment and decree dated 26.7.1999 passed by learned IInd Additional Judicial Commissioner, Khunti in Title Appeal No. 89 of 1996 dismissing the appeal filed by the appellant, and also the judgment and decree dated 17.10.1996 passed by learned Munsif, Khunti, Ranchi in Partition Suit No. 4 of 1987.

2. On 27.4.2001, the following substantial question of law was formulated:

Whether in absence of any finding that Exhibit 1 was invalid and was not acted upon, plaintiff could have been denied her claim for partition in the suit property?

3. Mr. V.K. Prasad, learned Counsel appearing for the plaintiff-appellant argued on the said question of law. He submitted that it was admitted case of the parties that Tileshwari Devi (Defendant No. 21) had 1/4th share in Schedules A and B property and, therefore, the appellant being purchaser from Tileshwari Devi was entitled to maintain the suit for partition against the other co-sharers. The appellant was claiming partition on the basis of the sale-deed dated 26.3.1981 (Exhibit 1), therefore, in the absence of any findings that Exhibit 1 was invalid and was not acted

upon; the plaintiff could not have been denied her claim for partition. He further contended that the sale-deed dated 23.6.1981 (Exhibit D) executed by Tileshwari Devi in favour of some of the contesting defendants, proved that Tileshwari Devi was competent to sell lands out of her 1/4th share. It is further contended that Exhibit 1 was executed by Tileshwari Devi in favour of the appellant at a prior date, and therefore, in view of Section 48 of the Transfer of Property Act, it was not necessary for the appellant to challenge Exhibit D executed by her in favour of the contesting defendants-respondents. Therefore the trial Court wrongly held that in the present suit for partition it cannot be decided as to which of the sale-deed Exhibit 1 or Exhibit D was legally valid and acted upon, unless the aggrieved party(s) brings suit challenging one or the other sale-deed.

4. On the other hand Mr. R.R. Tiwary, learned Counsel appearing for the contesting defendants-respondents supported the judgments under appeal. He submitted that no such question of law arises in this second appeal at all. He further submitted that Tileshwari Devi was the original plaintiff No. 1 and the appellant was plaintiff No. 2. Tileshwari Devi got herself transposed as defendant No. 21 on her request, during pendency of the suit, leaving the appellant as the sole plaintiff. Then Tileshwari Devi filed her written statement denying and disputing the claim of the appellant based on the sale-deed (Exhibit 1) that she never executed sale-deed in favour of the appellant, rather the same was got executed by the appellant and her husband by practicing fraud, as she was given to understand that she was executing only a mortgage deed. She affirmed the sale made in favour of the contesting defendants. In such position, it was absolutely necessary for the appellant to amend her plaint if she wanted " to make out a case of partition of her share on the basis of Exhibit 1 by clearly stating and proving that she derived title by Exhibit 1 and it was acted upon. He further submitted that for this reason the trial Court had to say that it was not possible to decide the validity of Exhibit 1 in the present suit in the absence of necessary pleadings and evidences from the side of the appellant. He also submitted that the lower appellate Court has gone to the extent that issue No. ix i.e., whether Exhibit 1 was legal, genuine and binding on the defendants; should not have been framed at all by the trial Court in the absence of pleadings and evidences. He further submitted that it is pertinent to note that defendant No. 1 Sitanath Mahto is husband of the appellant.

5. It appears from the plaint that in paragraphs 1 to 7, the original plaintiff No. 1 Tileshwari Devi (transposed as defendant No. 21) set out her case for partition. In paragraph 8 only the appellant (plaintiff) stated about her title as follows:

That the defendant No. 21 to meet his legal necessities have transferred a portion of her share of lands to the plaintiff and she is in possession of the lands transferred to her and in the event of partition, the purchaser may be equitably adjusted in the share of the defendant No. 21. The lands transferred to the plaintiff should be allotted to her out of the share of defendant No. 21.

6. It is not disputed that Tileshwari Devi had 1/4th share in the Schedules A and B properties. According to the appellant, out of her undemarcated share, she sold some properties under the said registered sale-deed (Exhibit-1).

Admittedly, the suit land belonged to the ancestor of the defendant Nos. 1 to 21, Lobin Mahto which was divided in between his three sons and Tileshwari Devi being the only daughter of his deceased 4th son Ram Kisto Mahto, and that all the three sons and Tileshwari Devi had 1/4th share each in the lands of Lobin Mahto described in the Schedules A and B of the plaint. Defendant No. 1 Sitanath Mahto is the husband of plaintiff-appellant Sulo Devi who was one of the sons of Chandra Nath Mahto, son of Lobin Mahto. Other sons and daughters of Chandra Nath Mahto are defendant Nos. 2 to 6. Defendant Nos. 1 to 6 have supported the case of the appellant. Other defendants have contested the case of the appellant. Thus, admittedly the appellant was not the co-sharer, rather she was claiming 1.60 1/2 acres of land on the basis of the registered sale-deed dated 26.3.1981 (Exhibit 1) allegedly executed in her favour by Tileshwari Devi. Similarly, some of the contesting defendants who were the co-sharers also, claimed purchase of 1.89 acres of land from Tileshwari Devi by virtue of the registered sale-deed dated 23.6.1981 (Exhibit D). Lands under Schedules A and B both are involved in the aforesaid sale-deeds. It also appears that the lands purported to have been sold by Tileshwari Devi by the registered sale-deed-Exhibit 1 was also purportedly sold by her under the registered sale-deed to the contesting defendants-Exhibit D. The appellant did not challenge the validity of Exhibit D in the suit. In that situation, the trial Court rightly held that in the suit as framed i.e., for partition of undemarcated 1/4th share of Tileshwari Devi on the basis of the sale-deed (Exhibit 1), it is not possible to decide the validity of the sale-deeds relied by the parties, and the aggrieved parties were free to file suit in that regard.

The trial Court also rightly held that there was no unity of title and possession between the parties which was necessary for the partition suit. The appellant claimed as the purchaser from co-sharer. The lower appellate Court affirmed the findings of the trial Court. With regard to issue No. ix i.e., whether Exhibit 1 was legal, genuine and binding on the contesting defendants, the lower appellate Court rightly observed that such issue was not required to be framed by the trial Court in the absence of the pleadings and evidences on such questions. There is no dispute that a purchaser of undemarcated share of a co-sharer can maintain a suit for partition, but it became necessary for the appellant to amend her plaint, if she wanted to rely on the sale-deed (Exhibit 1), as the same was denied and disputed by Tileshwari Devi, the alleged executor of the sale-deed. Then the appellant was required to prove by evidence that the sale-deed (Exhibit 1) was legal, genuine, was acted upon and was binding on Tileshwari Devi and other contesting defendants, who claimed to have purchased the same lands, under a subsequent sale-deed (Exhibit D) executed in their favour by Tileshwari Devi. She could also take defence u/s 48 of the Transfer of Property Act. But she failed to do all this. It is settled

position that the plaintiff is required to plead and prove its case and the suit should stand on its own feet or fall.

7. In my view the learned Courts below rightly held that in the absence of pleadings and evidences with regard to the validity of Exhibit 1 and/or Exhibit D, it is not possible to record any finding on the same, and thus rightly dismissed the suit. Therefore, in my opinion, the aforesaid question of law framed on 27.8.2001 does not arise for consideration in this second appeal. No other question of law was argued by Mr. Prasad, appearing for the appellant.

8. In the circumstances, this second appeal is dismissed. However, no costs. S.A. dismissed.