

(2015) 08 PAT CK 0038

Patna High Court

Case No: First Appeal No. 200 of 1976

Sandhya Devi and Others

APPELLANT

Vs

Kedar Pandey and Others

RESPONDENT

Date of Decision: Aug. 12, 2015

Hon'ble Judges: Mungeshwar Sahoo, J

Bench: Single Bench

Advocate: Sushmita Mishra, for the Appellant

Final Decision: Allowed

Judgement

Mungeshwar Sahoo, J

The original plaintiff-appellant had filed this First Appeal against the judgment and decree dated 07.01.1976 passed by the learned 1st Additional Subordinate Judge, Motihari in Title Suit No. 11 of 1973/26 of 1974 whereby the learned court below dismissed the plaintiff's suit for declaration of title.

2. The plaintiff-appellant since after his death substituted had filed the aforesaid suit for declaration of his title over the properties described in Schedule V of the suit. According to the plaintiffs, one Laljee Pandey had two sons namely Ramnath Pandey and Ramsarup Pandey. The son of Ramsarup Pandey is the plaintiff. Ramsarup Pandey died in 1962. The first son, Ramnath died leaving behind his daughter, defendant No. 1 and widowed daughter-in-law, defendant No. 2. Ramnath died in the year 1970. The further case of the plaintiffs is that Ramnath Pandey and Ramsarup Pandey had divided their properties by metes and bounds prior to Partition Suit No. 82 of 1938. In Partition Suit No. 82 of 1938, they compromised and the suit properties were allotted in the share of the plaintiffs and compromise decree was passed. After the compromise decree, the parties continued in possession of the lands allotted in their share. However, since the wife and son of Ramnath Pandey died and the defendant No. 1 wanted to reside in her Naihar with father and the house of Ramnath fell down, he approached the father of plaintiff to give permission to reside in outer room of his house in suit plot No. 2516. The father

of the plaintiff gave permission and the defendants shifted in the outer room described in Schedule VI of the plaint. The house on plot No. 2516 was constructed exclusively by Ramsarup Pandey.

3. The further case of the plaintiffs is that the defendant No. 1 with her husband persuaded anyhow to Ramnath Pandey and obtained gift deed from him on 28.08.1963 in her name wherein they fraudulently got included 2 kathas 8 kanwas of suit plot No. 2516 and 1 katha 7 1/2 dhurs of suit plot No. 2431 as gifted properties without the knowledge of the plaintiff. Subsequently, they filed Title Suit No. 300 of 1964 against the plaintiffs claiming half share in plot No. 2516 and 2431 and also for recovery of possession. However, on 23.02.1965, the defendant withdrew the suit. Thereafter, the defendant No. 2 filed Partition Suit No. 63 of 1965 against defendant No. 1 and her father claiming her 8 Annas share in the properties allotted in favour of Ramnath Pandey in Partition Suit No. 82 of 1938. In this suit, the plot No. 2516 and 2431 were not included as both the plots were not allotted to the share of Ramnath Pandey either in private partition or in the Partition Suit No. 82 of 1938. Thereafter, the defendant No. 1 instigated her father to shift to Motihari and tried to construct on plot No. 2516 for which 144 Cr.P.C. proceeding was started between the parties. Then defendant No. 1 executed a Jarpesgi bond on 05.06.1969 in favour of defendant No. 3 with respect to 2 kathas 1/2 dhur of suit plot No. 2509 for a period of five years falsely alleging that she got the said land on exchange from the plaintiff i.e. 1 katha 7 1/2 dhurs land of plot No. 2431. Subsequently, the defendant No. 1 sold by registered sale deed dated 30.11.1972 with respect to 2 kathas 1/2 dhur from south of plot No. 2516. The defendant No. 3 threatened to dispossess. All the details of the lands have been described in Schedule I, II, III and IV respectively. Therefore, the plaintiffs filed the suit for declaration of title of the property described in Schedule V of the plaint and for eviction of the defendant from the outer room of suit plot No. 2516 described in Schedule VI.

4. The defendant Nos. 3 and 4 only contested the suit by filing written statement. The defendant Nos. 1 and 2 did not contest. According to the contesting defendants, Rambilash Pandey i.e. son of Ramnath Pandey died in the year 1934, therefore, his widow, defendant No. 2 had no title in the suit property. The alleged partition suit filed by her i.e. Title Suit No. 63 of 1965 was a collusive suit. In fact, Ramnath Pandey and Ramsarup Pandey both brothers had only separated from each other but no partition by metes and bounds had taken place in the year 1938. The compromise application does not contain any description of properties allotted in the share of the parties. The parties continued in separate possession of the lands according to their convenience and same continued even after disposal of partition suit. Ramnath Pandey then constructed a pucca house on suit plot No. 2516 and was living with his family in this house. The plaintiffs branch was living in the ancestral house on plot No. 2431 and still they are living there. The southern portion of suit plot No. 2431 besides the house in the northern half portion of suit plot No. 2516 had fallen to the share of Ramnath Pandey and the rest portion had fallen to the share of Ramsarup

Pandey and the parties continued as such. The disputed house was never constructed by Ramsarup Pandey. The defendants denied any knowledge regarding Title Suit No. 300 of 1964. The gift deed executed by Ramnath Pandey in favour of his daughter is valid, genuine and the Jarpesgi deed with regard to suit plot No. 2509 and portion of suit plot No. 2516 is for valuable consideration and accordingly, in terms of the Jarpesgi, the sale deed dated 30.11.1972 was executed by defendant No. 1 in favour of them. Accordingly, the defendants prayed for dismissal of the suit.

5. On the basis of the aforesaid pleadings of the parties, the learned court below framed the following issues:

I. Is the suit as framed maintainable?

II. Have the plaintiffs got valid cause of action and right to sue?

III. Is the suit bad for defect of parties?

IV. Is the plaintiff entitled to a decree for declaration of title and eviction of the defendant from the suit premises described in Schedule VI of the plaint?

V. To what relief or reliefs, if any is the plaintiff entitled?

6. After trial, the learned court below came to the conclusion that there is vague description of land in earlier compromise suit and it was not acted upon and that there was no partition as alleged by plaintiff. The court below also came to the conclusion that it is not believable that the entire house and homestead land would have been allotted in favour of Ramnath Pandey. The court below also came to the conclusion that the house on suit plot No. 2516 was constructed by Ramnath Pandey. Ultimately, the court below recorded finding that the plaintiff failed to prove his title and thus, dismissed the suit.

7. The learned counsel, Ms. Sushmita Mishra raised a short question of law and fact and submitted that the entire evidence is not required to be gone into in this case because the compromise decree in earlier Partition Suit No. 82 of 1938 is Exhibit 11 in this case. The court below has wrongly held that there is vague description or no description of the lands which were allotted in whose share. The learned counsel submitted that Exhibit 11 fully describes the lands which were allotted in favour of which party. There is no contrary documentary evidence to this compromise decree. The defendants never prayed for any declaration either to declare it as not acted upon or for declaration that it was fraudulent or that it is liable to be set aside. Now, therefore, in this collateral suit which is based on the above compromise decree, the validity or otherwise of the said compromise decree cannot be decided. According to the learned counsel, the entire Schedule V properties were allotted in the takhta of the father of the plaintiff. The court below misread and stated that there is no description of land and wrongly held that it was not acted upon and the parties continued in possession of the properties and also wrongly held that there was no partition by metes and bounds and the parties were in possession according to

convenience. On these grounds, the learned counsel submitted that the impugned judgment and decree are liable to be set aside and the plaintiffs suit be decreed.

8. It appears that on the earlier date, on the prayer of the learned counsel for the respondents, the case was adjourned after hearing the appellants but on the next date, nobody appeared for the respondents.

9. In view of the above submission of the learned counsel for the appellants, the only point arises for consideration is as to "whether the suit properties were allotted in the share of Ramsarup Pandey in Partition Suit No. 82 of 1938 or not?"

10. The specific case of the plaintiffs is that the Schedule V properties were allotted in the share of Ramsarup Pandey, father of the plaintiff in Partition Suit No. 82 of 1938. It is pleaded in the plaint that prior to this partition suit, there was private partition between both the brothers i.e. Ramnath Pandey and Ramsarup Pandey. The same partition continued as compromise application was filed in the Partition Suit No. 82 of 1938 and on the basis of compromise, said partition suit was decreed. On the contrary, the defendant's case is that there was no partition and that there is no description of properties in the compromise application in Partition Suit No. 82 of 1938. Now, therefore, if it is held that the suit properties were allotted in the share of Ramsarup Pandey in Partition Suit No. 82 of 1938 then Ramnath Pandey had no right, title and interest to execute either gift deed or his daughter had any right, title and interest to mortgage or sale the property in suit.

11. It may be mentioned here that above partition suit was filed in the year 1938 and it was disposed of on the basis of compromise. The defendants never prayed for setting aside the above compromise decree nor sought for any declaration relating to the said decree. It is settled principles of law that the decree is to be set aside or any declaration is to be sought for within three years from the date of decree as provided in Article 58/59 of the Limitation Act. Still today, there was no relief claimed by the defendant with regard to the said decree. Therefore, the said decree attained finality. Reference may be made to the decision of the Hon'ble Supreme Court in the case of [Abdul Rahim and Others Vs. SK. Abdul Zabar and Others](#), AIR 2010 SC 211 : (2009) 3 JT 569 : (2009) 5 SCALE 43 : (2009) 6 SCC 160 : (2009) 4 SCR 32 : (2009) 3 UJ 1067 and in the case of [Md. Noorul Hoda Vs. Bibi Raifunnisa and Others](#), (1995) 9 JT 256 : (1995) 7 SCALE 326 : (1996) 7 SCC 767 : (1995) 6 SCR 110 Supp . It is also settled principles of law that the partition suit is concluded after passing final decree. In preliminary decree, the rights of the parties are defined whereas in the final decree, according to the rights of the parties, the particular properties were allotted in their respective shares. So far compromise in partition decree is concerned, there may be two situations. Firstly, that the parties may resolve their dispute regarding share by compromise and leave the actual partition of property by final decree. Secondly, the parties when share is admitted may actually divide the properties by preparing Schedules and allotting the lands in the share of respective parties and that will be the final decree. After recording the compromise on the basis of compromise

application, there is no further necessity of any final decree proceedings arises.

12. In the present case, it is the case of the plaintiffs that the earlier Partition Suit No. 82 of 1938 was compromised between two brothers and the properties were partitioned. The defendants denied this fact. From perusal of the impugned judgment, it appears that the court below no doubt has considered this controversy between the parties but has observed that there is no evidence to prove the plaintiffs title over the disputed 2 kathas 1/2 dhur land of plot No. 2516 whereas title of defendant is well established. The entire story of plaintiffs basing title over this area has been found to be quite unnatural, unfounded and unacceptable, vide paragraph 18. So far Exhibit 10 and 11 are concerned, the learned court below observed that it is quite unnatural that the entire residential house and also the total area which could have been used as homestead fell to the share of one brother and the other brother opted to shift to a different village, vide paragraph 16. The court below also observed that this compromise petition does not contain any Schedule of properties which parties got in their share. Hence, on this basis, the plaintiffs title over this disputed 2 kathas 1/2 dhur of northern portion of suit plot No. 2516 is not established, vide paragraph 8. So far these observations are concerned, it is not disputed either in the pleading in the court below or in the evidence or at the time of argument that suit plot No. 2516 only measures 4 kathas 1 dhur. According to the plaintiffs, this entire plot with other two plots was allotted in the share of the father of the plaintiff. Whether these suit plots were allotted or not is now becomes the matter of record. Exhibit 11 is the decree in Partition Suit No. 82 of 1938. It is certified copies. Schedule I(a) provides that "description of the properties Kasht Thica situate in Mauja Chakia, Tapa Harihara Pg. Mehasi, Thana Chakia, Registration Office Kesariya, District Champaran which by private partition fell in the share of plaintiffs and is in the possession of plaintiffs value Rs. 900/-." The plaintiff was Ramnath Pandey, the father of defendant No. 1 in the present suit. The defendant No. 1, Ramsarup Pandey of that suit was the father of plaintiff herein. According to this Schedule, the lands described therein were allotted in the private partition in favour of plaintiff, Ramnath Pandey of that suit. Schedule I(b) is the Schedule where list of lands have been described which were allotted and in possession of defendants. From perusal of this Schedule I(b), it is clear that the suit plots were allotted in the share of Ramsarup Pandey. Exhibit 10 is the order sheet of Partition Suit No. 82 of 1938. From perusal of the order-sheet dated 08.03.1939, it appears that the parties filed compromise petition. The order recorded that the parties have compromised the suit between themselves.

13. It further appears that on 27.03.1939, this compromise application was accepted and recorded on 15.04.1939. Decree was prepared and the decree is Exhibit 11. This compromise decree clearly shows that the suit lands were allotted in the share of the father of the plaintiff. The court below did not rely on this on the ground that in the compromise application, the description has not been given. It may be mentioned here that it is not the case of any party that the decree contains wrong

description of the land or that anybody has introduced fraudulently these Schedules subsequently. Wherefrom these Schedules in the decree came, there is no explanation at all. Therefore, this compromise decree is an act of the Court which is presumed to have been correctly done unless the otherwise fact is proved but here nobody is challenging this fact.

14. So far the finding of the court below that the house in question was constructed by father of defendant is concerned, it may be mentioned here that it is the case of the plaintiff that he allowed to stay in his house. Now, even if it is held that defendant constructed house then also the question is whether by mere construction, the title of the plaintiff ceased. The answer will be no. Now, in view of the facts that if the father of defendant No. 1 had no title to the property, he could not have gifted the same to the defendant No. 1 because a person cannot transfer valid title of a property on which he himself had no title. Therefore, the defendant No. 1 did not derive any title through the gift deed executed by her father in her favour. If she had no title derived from the gift deed, there is no question of either selling the property or mortgaging the property arises. From perusal of the impugned judgment and decree, it appears that the court below have not at all considered all these aspects of the matter and had approached the case in wrong angle and has dismissed the plaintiffs suit.

15. In view of my above discussion, I find that the plaintiffs have been able to prove his title on the basis of the decree passed in Partition Suit No. 82 of 1938. The finding of the court below on this point is hereby reversed and the point formulated is answered in favour of the plaintiffs-appellants.

16. In the result, this First Appeal is allowed. The impugned judgment and decree are set aside and the plaintiffs suit is decreed. In the facts and circumstances of the case, there shall be no order as to costs.