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**(2002) 07 PAT CK 0083**

**In the Patna High Court**

**Case No : Second Appeal No. 132 of 1999**

Abdul Jabbar Ansari and Others

APPELLANT

Vs

Bhola Tiwari and Others

RESPONDENT

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**Date of Decision : 23-07-2002**

**Acts Referred:**

**Citation : (2002) 07 PAT CK 0083**

**Final Decision : Dismissed**

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## **Judgement**

Radha Mohan Prasad, J.—This appeal, at the instance of the defendant 1st party, is directed against the judgment of affirmance passed in Title Appeal No. 12/6 of 1998/1998 by the 6th Additional District Judge, Motihari.

2. The plaintiffs filed the suit for declaration that they are the rightful owner of the suit land which they got in an oral partition and was in their possession and the defendants had/ have no right title therein and the possession of the defendant 1st set (appellants herein) over the suit land is of a trespasser. The plaintiffs also sought for a declaration that the order dated 9.12.1987 passed u/s 145, Cr.P.C. is bad in law and, further, for recovery of possession and mesne profits, besides decree of cost and other necessary reliefs. The suit was decreed and the appeal filed by the defendant 1st set has also been dismissed, on contest, and the judgment and decree passed by the Trial Court has been affirmed.

3. The case of the plaintiffs, in short, is that one Satya Narayan Tiwari, the common ancestor of the plaintiffs and defendant No. 5, purchased an area of 2 bighas 16 kathas 8 dhurs of land, including the suit land, by a registered sale-deed dated 3.6.1959 from Bishambhar Jha and Murat Jha in the name of his minor grandson Yamuna Tiwari (defendant No. 5) and came in possession of the same. After the death of Satya Narayan Tiwari, his family members separated and partitioned the family property and on 25th Baisakh, 1977 a memorandum of partition was prepared. In the said partition, Yamuna Tiwari got 16 kathas 1.6 dhurs of lands of Plot No. 21/2, which was purchased by Satya Narayan Tiwari in

his name from Motihari Mill and the suit property has been allotted to the plaintiffs. Yamuna Tiwari sold his said land to Usman Mian and in this way he ceased to have any interest, yet, as alleged, he sold the suit land to Sitaram Sah, father of defendant 2nd set. Later on, Bhola Sah, son of Sitaram Sah executed a Baibul wafa (conditional sale) to Appellant No. 1 and subsequently on 1.12.1986 executed sale-deeds in his favour.

Thereafter, a proceeding u/s 144, Cr.P.C. was initiated at the instance of defendant 1st set (appellants) and defendant 2nd set, which was later converted into one u/s 145, Cr.P.C. It is alleged that the defendant 1st set managed to get a favourable order and being emboldened by the said order, they dispossessed the plaintiffs from the suit land. It is alleged that defendant No. 5 Yamuna Tiwari, who is addicted to liquor and Ganja, is in collusion with defendant 1st set and defendant 2nd set and all such things have been done with the sole purpose to harass the plaintiffs. Thus, according to the plaintiffs, the possession of the defendants over the suit land is illegal and is of a trespasser.

4. The defendant 1st set filed a joint written statement and other defendants have neither appeared nor contested the suit. The defendants have categorically denied the entire allegations with respect to acquisition of title and possession as well as the story of dispossession pleaded by the plaintiffs except with respect to the genealogy of the family and partially the fact of acquisition of suit land along with other lands in 1959 in the name of Yamuna Tiwari from Bishambhar Jha and others. Their case is that sons of Satya Narayan Tiwari were separated and partition took place during the life-time of Satya Narayan Tiwari. In the state of separation, Yamuna Tiwari (defendant No. 5) acquired the suit land in the year 1959 from his own fund and income and came in possession thereof as purchaser. By sale-deeds dated 26.7.1972 and 3.9.1980 Yamuna Tiwari sold the suit land and other lands to Sita Ram Sah, father of defendant No. 4 Bhola Sah and on the death of Sita Ram Sah, his son Bhola Sah became the owner in possession and executed Baibul wafa on 14.7.1986 at Rs. 6,000/- to defendant No. 1-appellant No. 1 and delivered possession thereof. Later, on 1.12.1986, Bhola Sah sold the same to defendant 1st set-appellants at Rs. 30,000/- wherein the amount of mortgage was adjusted. It is alleged that the plaintiffs wanted to purchase the suit land, but could not succeed which created annoyance and thereafter they began to put false and illegal claim over the suit land. According to them, the order passed u/s 145, Cr.P.C. proceeding in their favour was after due consideration.

5. The Trial Court on consideration of the evidence adduced, oral and documentary, decreed the suit on contest, which has been affirmed by the lower Appellate Court in the title appeal.

6. The only contention on behalf of the appellants raised in the present appeal is that the suit is barred under the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as "the Act"). Learned Counsel for the appellants has contended that the suit was filed on 18.6.1988 and the Act came into force on

19.5.1988. The property in dispute was purchased in the name of Yamuna Tiwari and, thus, in view of the provisions contained in Sections 3 and 4 of the Act, the purchaser shall be presumed to be the real owner. Thus, according to him, the suit itself was not maintainable and the lower Appellate Court erred in dismissing the appeal and affirming the judgment of the Trial Court on mere assumption that the property was purchased from the joint family fund and thus the case comes within the exceptions of Section 4 of the Act. Learned Counsel has placed reliance on the decisions of the Apex Court in the case of Lakkireddi Chinna Venkata Reddi Vs. Lakkireddi Lakshmama, , and of the Mysore High Court in the case of T. Mahalaxmiamma v. N.S. Radhakrishna Rao, AIR 1968 Mysore 229.

7. I am unable to accept the said contention of the learned Counsel for the appellants. The lower Appellate Court, in paragraph 13 of the impugned judgment on detailed consideration on the question as to whether the story of partition propounded by the plaintiff is correct and if so, whether the memo of partition dated 25th Baisakh, 1977 is legal and valid document, has come to the conclusion that the plaintiffs have failed to prove the story of partition as made in the plaintiff and answered the said question in favour of the appellants.

8. While dealing with the question whether the suit land was acquired by Satya Narayan Tiwari in the name of his minor grandson Yamuna Tiwari in 1959 or the suit land was acquired by Yamuna Tiwari from his personal fund/income, the lower Appellate Court in paragraph-12 of the impugned judgment on detailed consideration has come to the conclusion that Ext. 8 gives a clear picture that the suit land was thrown into common stock for the purpose of utilisation by joint family and, therefore, the nature of the acquisition and its utilisation became changed from personal to common and thus agreeing with the finding of the Trial Court held that the suit lands became the joint family property wherein all the members of the family of Satya Narayan Tiwari have rights as the families are governed by Mitakshara School of Hindu Law. Accordingly, the lower Appellate Court in paragraph-17 of the impugned judgment rightly declined the contention advanced on behalf of the appellants on the question that the suit was barred under the Act in view of exceptions in Section 4 of the Act which exclude the said interpretation of law and application of law, when the property was acquired by and for the joint family or with respect to the coparcenery property. The decisions relied upon by the learned Counsel for the appellants have no application to the present case in view of the detailed consideration and finding based on evidence recorded by the lower Appellate Court in paragraphs 12 and 13 of the impugned judgment.

9. Accordingly, I do not find any substance in the submission of the learned Counsel for the appellants that the suit itself was barred under the Act. Thus, there is no merit in the appeal and the same is summarily dismissed.