
(2009) 05 PAT CK 0043

In the Patna High Court

Case No : Appeal from Appellate Decree No. 355 of 2001

Dukhan Pandey and Others

APPELLANT

Vs

Sanjay Panday and Others
 Rameshwar Pandey and
Others Vs Smt. Malti Devi

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Citation : (2009) 05 PAT CK 0043

Final Decision : Allowed

Judgement

S.N. Hussain, J.—This second appeal has been filed by the defendants-respondents-appellants challenging the judgment and decree of the learned court of appeal below.

2. The matter arises out of Title Suit No. 61 of 1988 which was filed by the plaintiff-appellant-respondent No. 1 with respect to holding No. 18 (New 20), new survey plot No. 13 situated in Mohalla Khara Kuan, Gaighat within Alamganj Police Station in the district of Patna for the following reliefs:

(a) Declaration that deed of gift executed on 11.05.1985 (Ext.4) by defendant No. 3 in favour of defendant No. 2 is illegal, fraudulent, collusive and null and void document and not binding upon the plaintiff.

(b) Order of injunction restraining defendant No. 2 from mutating his name in the office of Patna City Municipal Corporation or any other office in place of plaintiff's name on the basis of the said gift dated 11.5.1985.

(c) Cost of suit.

(d) Any other relief or reliefs which the court thinks fit and proper.

3. Defendant 1st Party appeared and contested the suit and on the basis of pleadings of the parties, the learned trial court framed the following issues for deciding the suit:

- (i) Whether the suit is maintainable?
- (ii) Whether the plaintiff has got valid and legal cause of action for filing the suit?
- (iii) Whether defendant No. 3 has acquired valid right and title in the suit premises and whether he was entitled to execute the deed of gift?
- (iv) Whether plaintiff is entitled to get the decree as required?
- (v) Any other reliefs to which the plaintiff is entitled.

4. After hearing the arguments of the parties and considering the evidence on record, the learned Additional Munsif, Patna City, dismissed the suit on contest vide his judgment and decree dated 19.02.1998 after arriving at the following findings:

- (a) It transpires from the facts and materials that the plaintiff on the basis of Ext.-22 wanted to get her right and title declared in the instant suit.
- (b) From Ext.-18, it appears that it has been copied after keeping 2-3 documents together as there are many cuttings in the writings and signatures and it is not reliable.
- (c) The decree of Title Partition Suit No. 49 of 1975 is also binding upon the plaintiff as on its basis the defendant Kundan Pandey got right and title over the suit property.
- (d) On the basis of Ext.-22, the plaintiff could not acquire any title.
- (e) The deed of gift Ext.4 is legal and valid document.
- (f) The suit is not maintainable and the plaintiff has got no cause of action for the suit.
- (g) The plaintiff is not entitled to any relief claimed for.

5. Against the aforesaid judgment and decree of the trial court, the plaintiff filed Title Appeal No. 21 of 1998. After considering the pleadings of the parties, the learned court of appeal below formulated the following points for consideration in the title appeal:

- (i) Whether the deed of gift dated 11.5.1985 executed by defendant No. 3 Kundan Pandey in favour of defendant No. 2 Rameshwar Pandey in respect of the disputed property described in Schedule A of the plaint is genuine and valid deed or it is forged, fabricated and collusive deed?
- (ii) Whether the findings of the learned trial court was legally justified or not from the materials available on the record?

6. After hearing the arguments of the parties and after perusing the materials on record, the learned 6th Additional District Judge allowed the (sic) appeal on contest vide his judgment and decree dated 03.09.2001 setting (sic) judgment

and decree of the trial court and allowing the claim of the (sic) arriving at the following findings:

(a) Admittedly Hem Narain Pandey was the common ancestor of the parties who had four sons, namely Satyadeo Pandey, Sheo Kumar Pandey, Sheo Swaroop Pandey and Sheo Bhajan Pandey.

(b) Contesting defendants No. 1 and 2 are claiming title and possession over the suit property on the basis of deed of gift executed by defendant No. 3 namely Kundan Pandey.

(c) Mahua registry office has no jurisdiction to register the deed of gift executed by Kundan Pandey in respect of the suit property which situates within the jurisdiction of Patna registry office and Kundan Pandey playing fraud upon Mahua registry office got registered the deed of gift in Mahua registry kachahri which is not valid according to law prescribed in the Registration Act.

(d) Defendant No. 3 claims 1/4th share in the disputed holding, but he has executed deed of gift in respect of the entire holding in favour of defendant No. 2 and on this ground also deed of gift does not appear to be genuine and valid.

(e) By non-examination of attesting witness, the deed of gift cannot be said to be invalid, but the main thing is as to whether the executant Kundan Pandey was the owner and in possession of the disputed holding and was competent to execute deed of gift in favour of defendant No. 2.

(f) In his petition for mutation dated 21.4.1986 (Ext.-21), defendant No. 3 had claimed only 1/4 share and hence he had no objection if Rameshwar Pandey was mutated over 1/4 share in the suit holding.

(g) From the materials on the record, it appears that disputed deed of gift is not genuine gift, rather it is invalid and collusive deed executed by Kundan Pandey who had no right to execute deed of gift and by playing fraud deed of gift was registered in Mahua registry kachahri and a fictitious land of plot No. 177 of village Harsekh in the district Vaishali has been shown in the disputed deed of gift just to involve the jurisdiction of Mahua registry office for the purpose of registration.

(h) The defendant himself admitted that Plot No. 177 of village Harsekh was noted by mistake and from the khatian (Ext.19), it appears that it belonged to Surya Narain Tiwary and others and not to Kundan Pandey.

(i) The deed of gift cannot be executed in respect of undivided land and hence on this score also the deed of gift does not appear to be a genuine and valid document.

(j) The finding of learned trial court that the deed of gift is genuine and valid appears to be wrong.

(k) From the evidence of the parties as well as admission made by the defendant

Kundan Pandey, it appears that the plaintiff-appellant has been able to prove the fact that partition amongst the branches of four sons of Late Hem Narain Pandey had taken place in the year 1971 and all the properties left by Hem Narain Pandey were partitioned amongst the four branches of his sons and a memo of partition was also executed on 18.1.1971 which was signed by all the four branches.

(l) It is admitted fact that in Eviction Suit No. 50 of 1979, decree of eviction was passed against defendant No. 2 Rameshwar Pandey and his father defendant No. 1 Nunu Pandey with the finding that the defendants are in occupation of the building in the capacity of tenant and not as owner of the disputed holding and the eviction decree was confirmed in appeal also.

(m) I find that the learned trial court has arrived at a wrong finding that the (sic) deed executed in favour of the plaintiff-appellant by Brahmdeo Pandey is not genuine and legal.

(n) The impugned deed of gift dated 10.5.1985 executed by defendant No. 3 Kundan Pandey in favour of defendant No. 2 Rameshwar Pandey and deed of rectification executed by defendant No. 3 are not valid, genuine and legal documents, rather they are illegal, collusive and fraudulent deeds and they did not confer any right, title and interest upon defendant No. 2 or his heirs.

(o) Since the execution of the deed of gift has created a cloud on the title of the plaintiff-appellant, it is declared that plaintiff has got valid cause of action for filing of the suit and the suit is maintainable.

7. Against the aforesaid judgment and decree of the learned court of appeal below, the contesting defendants filed this second appeal which was admitted by a Bench of this Court on 30.4.2003 after formulating the following substantial questions of law:

(i) Whether the courts below had committed error in not considering the question of maintainability of the suit as being hit u/s 43 of the Specific Relief Act read with Order II Rule 2 of the Code of Civil Procedure?

(ii) Whether the appellate court had committed error in holding the plaintiff's title on the basis of the decree of the eviction suit wherein only the relationship of landlord and tenant had been considered and not the title and being clarified on that point by the High Court?

(iii) Whether the appellate court had committed error in putting reliance on the memorandum of so called partition of 1971 giving go-by to the partition suit of 1975?

8. It is not in dispute that the suit land along with other lands belonged to Hem Narain Pandey who left behind four sons, namely Satyadeo Pandey, Sheo Kumar Pandey, Sheo Swaroop Pandey and Sheo Bachan Pandey. Plaintiff Malti Devi was the daughter of Satyadeo Pandey, whereas defendant No. 3 Kundan Pandey was

the son of Sheo Bachan Pandey. The said Kundan Pandey (defendant No. 3) executed a deed of gift dated 11.05.1985 (Ext.-4) with respect to the suit property in favour of defendant No. 2 Rameshwar Pandey.

9. The claim of the plaintiff-respondent No. 1 was that suit land was part of the ancestral property of Hem Narain Pandey and in the family partition dated 18.01.1971 (Ext.-18), the entire ancestral property was partitioned among the heirs of the said Hem Narain Pandey in which the suit land was allotted to the share of Brahmdeo Pandey son of Satyadeo Pandey, whereas the other properties were allotted to the shares of other heirs. It was also claimed by the plaintiff-respondent No. 1 that by registered sale deed dated 20.06.1975 (Ext.-22), the said Brahmdeo Pandey sold the suit land to his sister Malti Devi and after the judgment and decree of Title Suit No. 61 of 1988 passed in her favour. Malti Devi sold the suit land to respondents No. 7 to 10 by registered deed dated 03.12.2001. It is also claimed by Malti Devi that she filed Eviction Suit No. 50 of 1979 for eviction of Kundan Pandey (Defendant No. 3) which was decreed whereafter Kundan Pandey filed Title Appeal No. 114 of 1999 which was dismissed and even Second Appeal No. 64 of 1993 filed by him was dismissed by this Court vide order dated 02.09.2007, but in spite of that the said Kundan Pandey (defendant No. 3) executed a deed of gift dated 11.05.1985 (Ext.4) in favour of the defendant No. 2 Rameshwar Pandey and hence within three years, the plaintiff Malti Devi Challenged the said deed of gift in Title Suit No. 61 of 1988 which was filed on 04.05.1988 out of which the instant second appeal has arisen.

10. On the other hand, the claim of defendant Nos. 2 and 3-appellants was that defendant No. 3 got the suit property in Partition Suit No. 49 of 1975 which was decreed on 26.05.1979 (Ext.-D) in which vendor of plaintiff, namely Brahmdeo Pandey son of Satyadeo Pandey was party and filed his written statement also and hence on the basis of the aforesaid partition, defendant No. 3 gifted his partitioned suit property to defendant No. 2 by registered deed dated 11.05.1985 (Ext.-4) and hence Brahmdeo Pandey had no right and title in the suit property to sell it to his sister Malti Devi, namely the plaintiff by registered deed dated 20.06.1975 (Ext.-22) on the basis of which the plaintiff acquired no right, title or interest at all. It is claimed by the said defendants-appellants that the suit of the plaintiff only for declaring deed of gift dated 11.05.1985 (Ext.4) executed by defendant No. 3 in favour of defendant No. 2 as illegal is not maintainable without claiming and proving her right and title over the said property and accordingly, the instant title suit was hit by the provisions of Order II Rule 2 of the CPC as well as the provision of Section 34 of the Specific Relief Act. It was further claimed by defendants-appellants that Eviction Suit No. 50 of 1959 was filed by the plaintiff for their eviction from the suit property and she succeeded up to the High Court in Title Appeal No. 114 of 1979 and Second Appeal No. 64 of 1993 and thus the plaintiff was not in possession till the disposal of Second Appeal by order dated 02.09.1997 in which it was specifically mentioned that observations or findings, if any, on the title of the parties over the suit house

would not operate as res judicata in a regular suit for title between the parties for the said house.

11. Learned Counsel for defendants No. 2 & 3-appellants further claimed that Ext.-18 is a photo copy of an unregistered memorandum of partition dated 18.01.1971 and neither the original sada copy was produced nor the signatures of the executants were proved. It is claimed that the said Ext.-18 shows that it is not a yadast, rather partition was to be done by it and hence it was sought to be a deed of partition for which registration was definitely required as per the provision of Section 17(2)(vi) as well as Section 49 of the Registration Act, 1908. In that regard, learned Counsel for the defendants-appellants relied upon a decision of this Court in case of Dilip Gupta and Another Vs. Debashish Palit and Others and submits that the said photo copy, Ext.18, was neither reliable, nor admissible in evidence especially in view of the partition by metes and bounds between the co-sharers vide judgment and decree dated 26.05.1979 (Ext.-D series) passed by the Civil Court in Partition Suit No. 49 of 1975 which was never challenged rather it was fully supported by P.W.3. In this connection, learned Counsel for the defendants-appellants relies upon another decision of this Court in case of Rameshwar Pandey and Another Vs. Suresh Pandey .

12. Respondents No. 7 to 10 are children of Brahmdeo Pandey who was the full brother and vendor of the plaintiff Malti Devi and they were added in the instant second appeal on the order of this Court dated 28.07.2006. They fully supported the claim of Malti Devi, plaintiff-respondent No. 1, who had also executed a registered sale deed dated 03.12.2001 in their favour.

13. Respondents No. 11 and 12 are sons of Sheo Swaroop Pandey and are first cousins of both plaintiff and defendant No. 3 and they were added in the instant second appeal on the orders of a Bench of this Court dated 28.07.2006. They fully supported the claim of defendants No. 2 and 3 (appellants) and added that the ex parte decree of partition dated 26.05.1979 (Ext.-D) passed in Partition Suit No. 49 of 1975 was challenged by Chandradeep Pandey son of Sheo Kumar Pandey, one of the co-sharers, in Misc. Case No. 96 of 1980 which was dismissed on 09.09.1981 by the learned Subordinate Judge, Patna holding that he had no jurisdiction to hear the Miscellaneous Case as it should have been filed before the learned Subordinate Judge, Muzaffarpur who had passed the aforesaid decree dated 26.05.1979, but thereafter no step was taken either by the said Chandradeep Pandey or by any one else, including the plaintiff and her vendor. It was also claimed by them that according to the plaintiff's claim her brother Brahmdeo Pandey, who was her vendor, executed the sale deed dated 20.06.1975 (Ext.22) for the suit land measuring four kathas situated in Mohalla Gaighat, Patna for only Rs. 5,000.00 and subsequently in the year 2001, the plaintiff sold it back to the children of her brother Brahmdeo Pandey, who was her vendor, which clearly shows that the said deeds were collusive and the alleged partition of 1971 had neither taken place, nor was ever acted upon.

14. So far substantial question of law No. (iii) is concerned, the same is with

respect to validity or otherwise of the sada document regarding partition dated 18.01.1971 (Ext.-18) and the judgment and decree of partition dated 26.05.1979 (Ext.-D) passed by a civil court in Partition Suit No. 49 of 1975. From the perusal of Ext.-18, it is quite apparent that it is not a memorandum of partition, nor it is an original document, rather it is merely a photo copy of two page paper of partition purported to be between Sheo Kumar Pandey, Sheo Swaroop Pandey, Brahmdeo Pandey and Kundan Pandey, but the signatures of the said excutantees have not been proved. The original copy of the said document was not produced in the court and it was claimed that it was with Gyan Chand Pandey who was the cousin of the plaintiff and her vendor, but no step was taken by the plaintiff for production of the said document in court. Admittedly, there were several other heirs of Hem Narain Pandey alive and they were co-sharers in the joint family property, but none of them had executed the said document which makes any partition of deed absolutely ineffective, illegal and non est. The said document of alleged partition dated 18.01.1971 (Ext.-18) cannot be a yaddasht, rather a plain reading of the document shows that partition was sought to be done by the said document. Section 17(1) of the Registration Act, 1908 specifically enumerated the documents which compulsorily required registration including non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property, whereas Sub-section (2)(vi) of Section 17 of the Act provides that nothing in the said clause of Sub-section (1) of the said Section will apply to any decree or order of a court except a decree or order express to be made on compromise and compromising immovable property other than that which is the subject matter of the suit or the proceeding. The consequence and effect of non-registration of such documents has been especially provided in Section 49 of the Act. Reference in this regard may be made to a decision of this Court in case of Dilip Gupta (Supra) and a decision of the Supreme Court in the case of Bhoop Singh Vs. Ram Singh Major and others, . It is thus apparent that the said document of alleged partition dated 18.01.1971 (Ext.-18) was not admissible in evidence, apart from being highly unreliable and the claim of the plaintiff cannot be legally allowed on its basis.

15. On the other hand, Partition Suit No. 49 of 1975 was filed by Sheo Swaroop Pandey and others against Sheo Kumar Pandey and others and in that suit all the coparceners of the family, including the vendor of the plaintiff, were parties. The said suit was filed for partition of the ancestral properties, including the suit property and the stud suit was decreed by the learned Subordinate Judge. Muzaffarpur vide his judgment and decree dated 26.05.1979 (Ext.-D and Ext.-D/1), according to which the suit property fell in the share of defendant No. 3 Kundan Pandey. The said judgment and decree of the partition suit was not challenged by any one before the appellate authority and only Misc. Case No. 96 of 1980 was filed under the provision of Order IX of the CPC by one of the co-sharers, namely Chandradeep Pandey before the learned Subordinate Judge,

Patna for setting aside the said ex parte judgment and decree dated 26.05.1979 passed in Partition Suit No. 49 of 1975, but the said Misc. Case was dismissed on 09.09.1981 holding that the said court had no jurisdiction to hear the Misc. Case as it should have been filed before the Subordinate Judge, Muzaffarpur who had passed the ex parte decree. Thereafter no step was taken by any one and hence the said judgment and decree of partition dated 26.05.1979 (Ext.D and Ext.D/1) attained finality.

16. In the said circumstances, there was no occasion for the learned court of appeal below to discard the judgment and decree of the partition suit (Ext.D and D/1) produced by defendants No. 2 and 3 and rely upon a sada document of partition (Ext.-18) which was produced on behalf of the plaintiff. The learned court of appeal below committed another serious error of record by assuming that the partition of 1971 was admitted by defendant No. 3 Kundan Pandey in his pleadings, but from paragraph 11 of the written statement filed by defendant No. 3 Kundan Pandey, it becomes quite apparent that he had specifically stated that there was no partition between the members of the family with respect to the ancestral property in the year 1971. In this regard reference may be made to a decision of the Supreme Court in case of Bajranglal Shivchandrai Ruia Vs. Shashikant N. Ruia and Others, . Hence, substantial question of law No. (iii) raised by the defendants-appellants has been fully substantiated and it is proved that the learned court of appeal below had not only committed error of record, but also ignored the specific provisions of law.

17. So far substantial question of law No. (i) is concerned, it is with regard to maintainability of the suit in view of Section 34 of the Specific Relief Act and Order II Rule 2 of the Code of Civil Procedure. From the aforesaid discussions, it is quite apparent that Ext.-18 dated 18.01.1971, the alleged document of partition, has been found to be illegal, unreliable and inadmissible in evidence, whereas the judgment and decree dated 26.05.1979 (Ext.-D and Ext.-D/1) passed by the learned Subordinate Judge, I, Muzaffarpur in Partition Suit No. 49 of 1975 have been found to have attained finality, according to which the suit property was allotted to the share of Kundan Pandey (defendant No. 3). In the said circumstances, Brahmdeo Pandey, the vendor of the plaintiff, had no right, title and interest in the suit property for selling it to the plaintiff by registered deed of sale dated 20.06.1975 (Ext.-22), whereas defendant No. 3 having been allotted the suit property by a civil court in a suit for partition was fully entitled to transfer his partitioned property to defendant No. 2 by registered deed of gift dated 11.05.1985 (Ext.-4). Hence, in view of the above mentioned judgment and decree of partition (Exts.-D and D/1), right and title of the plaintiff was seriously under challenge. Furthermore, the plaintiff herself had filed Eviction Suit No. 50 of 1979 for eviction of defendants No. 2 and 3 and others which was decreed, whereafter the defendants of that suit filed Title Appeal No. 114 of 1979 which was dismissed in 1993 and thereafter Second Appeal No. 64 of 1993 was also dismissed by a Bench of this Court vide judgment dated 02.09.1997 (Ext.-E) and in that judgment it was specifically mentioned that any observation or findings

with respect to title of the parties over the suit house would not operate as res judicata in a regular suit for title between them for the suit house. It is thus quite apparent that when the instant title suit out of which this second appeal has arisen was filed in the year 1988, the eviction suit was (sic) and the said defendants were in possession of the suit premises and the plaintiff was admittedly not in possession thereof.

18. In the aforesaid circumstances, it was incumbent upon the plaintiff to first claim title and possession over the suit property and only thereafter to raise any other claim challenging the deed of gift which was ancillary to the above reliefs as without claiming or proving their title and possession over the suit property, the plaintiff cannot claim that the deed of gift in question be declared illegal and void. The plaintiff has to prove his right and title over the suit property and only then she could have challenged the title of defendant No. 2 on the basis of gift by defendant No. 3. In the said circumstances, the reliefs claimed in Title Suit No. 61 of 1988 out of which this second appeal has arisen is clearly hit by the provision of Order II Rule 2 of the Code of Civil Procedure. Section 34 of the Specific Relief Act, 1963 also provides that no court shall make any such declaration where plaintiff, being able to seek further relief than a mere declaration, omits to do so. Thus, the learned court of appeal below committed a serious legal error in not considering the aforesaid aspect of the matter.

19. So far substantial question of law No. (ii) is concerned, the judgment of this Court dated 02.09.1997 passed in Second Appeal No. 64 of 1993 arising out of the eviction suit, is quite clear as it was held therein "that observations and / or findings, if any, on the title of parties over the suit house are not to operate as res judicata in a regular suit for title between them for the said house". Furthermore, Eviction suit No. 50 of 1979 which continued up to Second Appeal No. 64 of 1993 having been filed by the plaintiff for eviction of the defendants, admittedly the plaintiff was not in possession of the suit premises on the date of filing of her Title Suit No. 61 of 1988 and even thereafter there is no material to show that she ever came in possession of the suit premises after the decree in the eviction suit and its appeals. In the said circumstances, the learned court of appeal below further committed a very substantial mistake in allowing the claim of the plaintiff relying upon the decree passed in the eviction suit.

20. from a perusal of the judgment and decree passed in Title Suit No. 61 of 1988 it becomes quite apparent that the learned trial court had considered the entire matter in detail, including the validity or otherwise of the documents in question in view of the evidence on record, the provisions of law and the respective pleadings of the parties and had rightly dismissed the suit of the plaintiff, but the learned lower appellate court wrongly reversed the judgment and decree of the trial court and allowed Title Appeal No. 21 of 1998 filed by the plaintiff completely misconstruing and ignoring the provisions of law, respective pleadings of the parties, as well as the materials on record, including the respective documents of the parties as discussed above.

21. Furthermore, the defendants-appellants have fully substantiated the questions of law raised by them as have been considered in detail above and accordingly, this second appeal is allowed, the judgment and decree of the learned Additional District Judge VI, Patna dated 03.09.2001 passed in Title Appeal No. 21 of 1998 is hereby set aside, whereas the judgment and decree passed by learned Additional Munsif, Patna dated 19.02.1998 in Title Suit No. 61 of 1988 is affirmed and the claim and suit of the plaintiff-respondent No. 1 are hereby rejected. However, in the facts and circumstances of this case, there will be no order as to cost.