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**(2012) 08 PAT CK 0043**  
**In the Patna High Court**  
**Case No : First Appeal No. 118 of 1985**

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| Ram Pd. Tamoli             | Vs | APPELLANT  |
| Hari Pd. Khetan and Others |    | RESPONDENT |

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**Date of Decision :** 17-08-2012

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 6, Order 21 Rule 90, 11  
Evidence Act, 1872 — Section 47, 50, 60

**Citation :** (2013) 1 PLJR 503

**Hon'ble Judges :** V. Nath, J

**Bench :** Single Bench

**Advocate :** Ray Shivaji Nath, with Mr. Anil Singh, Mr. Ray Saurabh Nath and Mr. Amit Anurag, for the Appellant; Ajay Kumar Singh, for the Respondent

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## Judgement

V. Nath, J.—This appeal has been filed by the plaintiff-appellant against the judgment and decree dated 09.04.1982 by Additional Sub Judge II, Bhagalpur in T.S.No.40/73/12/82 dismissing the suit for partition and for declaration of the auction sales and delivery of possession of the suit property in the execution cases as fraudulent and paper transaction and not binding upon the plaintiff. Filtering the unnecessary details, the plaintiff's case is that he is the grand son of Pago Tamoli who had two brothers Banarsi Tamoli and Chirkut Tamoli. The grand father of the plaintiff was separate from his brothers and had two sons namely Laxmi Tamoli and Ganesh Tamoli. The plaintiff is son of Laxmi Tamoli who has been impleaded as defendant no.11 and plaintiff's uncle Ganesh Tamoli has been impleaded as defendant no.12 in the suit. The plaintiff has further pleaded that the predecessor-in-interest of defendant no.1 and 2(defendant 1st set) had obtained money decrees in three money suits and the suit properties were auction sold in execution of the said three money decrees. However, it is the case of the plaintiff that the money decree in the M.S.No.418/56, M.S.No.201/58 and M.S.No.202/58 and the sequential proceedings of auction sales and delivery of possession in the Execution Case No. 131/58, Execution Case No.180/59 and Execution Case No. 66/60 were all fraudulent and paper transactions and did not

affect the interest of the plaintiff who was not a party in the said suit or proceedings, and the plaintiff or the defendant nos.11 and 12 were never dispossessed from the suit land. The plaintiff has claimed to be in possession over the suit land and has further claimed that after attaining majority on 10.05.1972, he is filing the present suit within three years of the attainment of majority. It has also been pleaded that defendant nos.11 and 12, father and uncle of the plaintiff are in collusion with the defendant 1st set and are bent upon to grab the share of the plaintiff in the suit land and therefore the suit has been filed for partition and for declaration that the decree in the three money suits and the orders passed in the execution proceedings thereof are not binding upon the plaintiff.

2. The suit has been mainly contested by the defendant no.1 who has filed his written statement denying the status of the plaintiff as son of Laxmi Tamoli and asserting that the plaintiff has no concern with the family of the defendant nos. 11 and 12(defendant 5th set). The defendant no.1 has further stated that three money suits were filed for realization of money borrowed by Laxmi Tamoli in the capacity of Karta of his family for the benefit of the family members and all the members of his family had benefited by the said loan. It has been further stated that the proceedings of the three money suits and the auction sales and delivery of possession over the auction sold properties had all been done in accordance with law and the same are binding upon all the family members of the Laxmi Tamoli. The defendant no.1 has claimed to have come in possession over the suit property after his purchase in the auction sales, through the process of the Court and has claimed to have been dealing with the same by transactions of sale and gift.

3. In view of the rival pleadings of the parties, the learned court below has framed altogether 14 issues. The issue no. 8 pertains to the status of the plaintiff as son of Laxmi Tamoli and the learned court below after considering the evidence of the parties has come to the finding that the plaintiff is not the son of Laxmi Tamoli. With regard to issue no.7 relating to the validity of the money decrees and the execution proceedings, the learned court below has concluded that the decree of the three money suits and the proceedings of the three execution cases, which followed thereafter, were all valid and legal and the defendant 1st party has acquired valid title and possession on the said basis over the suit properties except the house in H.No.70 of Ward No.3 within Colgong municipality and the land of Plot No.19,72,61 and 69 of Village-Mahasumunda which were not the subject matter of the auction sales. On the basis of findings on the material issues against the plaintiff, the suit has been dismissed.

4. Heard Mr. Ray Shivaji Nath, learned senior counsel on behalf of the appellant and Mr.Ajay Kumar Singh, Learned Counsel for the respondent 1st set.

5. When the hearing of this appeal was taken up, the learned senior counsel for the appellant pointed out that the I.A.No.4166/12 has been filed on behalf of the appellant for adducing some documents as additional evidence and made

submissions in support of his prayer to accept those documents as evidence for the plaintiff and consider the same. However, the Learned Counsel for the respondent 1st set opposed the prayer by pointing out that the documents sought to be adduced as additional evidence are not at all reliable documents and also not relevant for decision of this appeal on merits. It has also been urged that these documents are self-serving documents created during the pendency of the appeal by the appellant and should not, therefore, be taken as additional evidence. Appropriate order shall be passed on the prayer for adducing additional evidence, later on, while considering the merits of the appeal.

6. Questioning the legal pregnability of the impugned judgment, Mr. Ray Shivaji Nath, the learned senior counsel appearing for the appellant, has firstly submitted that there are ample evidence on record to establish that the plaintiff is son of Laxmi Tamoli but the learned court below has misread the evidence of the plaintiff and has wrongly held that the plaintiff is not the son of Laxmi Tamoli. It has been urged that besides adducing oral evidence, the plaintiff has also brought on record the certificates issued by the Bihar School Examination Board(Ext.3 and 3/A) which show that the plaintiff is son of Laxmi Tamoli and was born on 10.05.1954. It has also been pointed out that the plaintiff has become entitled to a decree on the basis of admission, under Order 12 Rule 6 C.P.C., when after the death of respondent no.11 Laxmi Tamoli during the pendency of this appeal, a substitution petition (I.A.No.783/12) was filed by the plaintiff-appellant stating therein that he was son of the deceased respondent no.11 and the said statement had not been denied by the respondent 1st party. As such this fact must be taken to have been admitted by the respondent 1st party. It has been further canvassed that the decrees in the three money suits and the auction sales and delivery of possession in the execution cases thereafter could not be binding upon the plaintiff as he was then a minor and his guardian did not protect his interest and colluded with the plaintiff of those suits. Placing the depositions of the plaintiff's witnesses, it has been further pointed out that the parentage of the plaintiff and his possession over the suit land have been fully corroborated but the learned court below has misconstrued and ignored the material evidence of the plaintiff.

7. Per contra, Mr. Ajay Kumar Singh, the Learned Counsel appearing on behalf of the respondent 2nd set has firstly submitted that the entire suit is based upon the assertion of the plaintiff that he is son of Laxmi Tamoli and in fact this issue is the main issue in the suit and appeal between the parties. It has been urged that the order passed in the substitution matter in this appeal after the death of respondent no.11 Laxmi Tamoli, who did not appear in the suit to support the plaintiff, cannot enure for the benefit of the plaintiff and can never amount to admission of that issue. The Learned Counsel has submitted that the admission as envisaged in Rule 6 of Order 12 C.P.C. must be very specific and there is no scope for implied admission or deemed admission and a decree in present facts cannot be based on such admission in view of the issues arising between the parties in this suit. It has been further submitted that the plaintiff has failed to

bring on record the school register or school leaving certificate to corroborate the entries made on that basis in the certificates granted by the Board and as such the said two certificates are not reliable documents for the purpose of establishing the parentage of the plaintiff. It has been pointed out that the documentary evidence adduced by the defendant 1st set clearly reveals that the son of Laxmi Tamoli was Chango Sao and not Ram Prasad Tamoli and it is nowhere the case of the plaintiff that he has another name Chango Sao. The next contention of the Learned Counsel pertains to the legality and propriety of the decree passed in three money suits and auction sales in execution whereof, and it has been contended that in all the three money suits the defendant no.11 and 12 and their mother (widow of Pago Tamoli) were impleaded as parties and the proceedings were decided after full contest by them. The Learned Counsel has put emphasis that the proceedings of the money suit as well as the execution cases thereafter are in any view of the matter fully binding on the plaintiff whose interest would be deemed to have been represented by his father in those proceedings, and the learned court below has rightly dismissed the suit after scrutinizing the evidence on record.

8. In view of the rival contentions on behalf of the appellant and respondent 1st set, the points which emanate for determination in this appeal are as follows:-

(i) Whether the plaintiff has succeeded in establishing that he is son of Laxmi Tamoli?

(ii) Whether the decree passed in the three money suits and the sequential auction sales followed by delivery of possession in execution proceedings in favour of the defendant 1st set are legal and valid and binding on the plaintiff?

(iii) Whether the impugned judgment and decree passed by the learned court below are sustainable in law as well as on facts?

9. Point No.(1):- The plaintiff has mentioned the genealogy of the family of Bansi Tamoli and has stated that Bansi Tamoli had three sons namely Pago Tamoli, Banarsi Tamoli and Chirkut Tamoli. The plaintiff has claimed himself to be son of Laxmi Tamoli who was son of Pago Tamoli. The defendant 1st set has denied the said fact and has categorically stated in the written statement that Laxmi Tamoli had only one son named Changu Sao and the plaintiff is not the son of Laxmi Tamoli. Learned senior counsel for the appellant has relied upon the two certificates granted by the Bihar School Examination Board, Patna which have been marked as Ext.3 and 3/A. In Ext.3, it has been mentioned that Ram Prasad Tamoli, Son of Laxmi Prasad Tamoli had passed the Elementary Examination Board from Sharda Pathshala Higher Secondary School, Kahalgaon. Ext.3/A shows that Ram Prasad Tamoli, Son of Laxmi Prasad Tamoli had passed Secondary School Examination from Sharda Pathshala Higher Secondary School, Kahalgaon. In both these certificates, the date of birth of Ram Prasad Tamoli has been mentioned as 10.05.1954 and his father's name has been mentioned as Laxmi Prasad Tamoli. Much emphasis has been laid by the learned senior counsel

for the appellants on these two certificates by submitting that normally the certificates issued by the Bihar Secondary School Examination Board are accepted to be valid. However, in face of the categorical challenge to the parentage of the plaintiff by the defendant 1st set, alleging him to be an imposter set up by the defendant no. 11 and 12, the entries in the Board certificates will not alone clinch the issue. This becomes all the more apparent, in view of the statement made by Laxmi Tamoli in his written statement (Ext.H) filed in Money Suit No. 418/56 on 24.01.1956 wherein he had stated that his son was Chango Sao and claimed him to be a necessary party to that suit. Similarly in the sale deed (marked "Z" for identification) dated 08.01.1960 executed by Laxmi Tamoli alongwith his mother and the brother Ganesh Tamoli, the statement has been made by Laxmi Tamoli that he was executing the sale deed for self and on behalf of his minor son Chango Sao. It is nowhere the case of the plaintiff that he has also another name or alias as Chango Sao or he has another brother known as Chango Sao. It is also not the case of the plaintiff that his father Laxmi Tamoli wrongly made those statements rather he has stated in his deposition that the difference with his father arose only 5-6 years prior to filing of the suit when he solemnized his marriage by his own choice. In his deposition as P.W. 32, in cross examination, the plaintiff has accepted that his father was the Karta of the family but has nowhere stated that his father was inimical to him from the beginning and therefore has made wrong statement in Ext.H and the sale deed dated 08.01.60. The absence of relevant pleading or statement/explanation in his deposition by the plaintiff in this regard is, thus, conspicuous.

10. The plaintiff has also not produced his school leaving certificate or made prayer to call for the admission register from the school to corroborate the entries in the Board certificates (Ext.3 and 3/A). There is no other documentary evidence on behalf of the plaintiff to establish his parentage and thus the entries in the certificate (Ext. 3 and 3/A) have remained unsupported.

11. The reliance on behalf of the plaintiff has been placed upon the depositions of P.W. 3, P.W. 5 and P.W. 11 to establish his parentage. P.W. 3 Shivnarayan Mandal, has not disclosed having special means of knowledge about the fact that the plaintiff is son of Laxmi Tamoli. He has deposed that he has come to know about the parentage of the plaintiff and his date of birth on the basis of school leaving certificate. P.W. 5 Ramdhani Sao has claimed to have his house at 200 yards of the plaintiff's house. He has also not disclosed having special means of knowledge regarding the parentage of the plaintiff rather from his deposition it appears that he has no definite information regarding the family members of Late Bansi Tamoli. He has also deposed that Laxmi Tamoli has no son known as Changu Sao which fact, however, is not consistent with the statement of Laxmi Tamoli himself as mentioned above which has remained unassailed. P.W. 11 Kailash Gope has also claimed himself to be a neighbour of the plaintiff. He has also not disclosed any special means of knowledge nor has stated about the behaviour or conduct of either Ram Prasad Tamoli or Laxmi Tamoli from which he gathered the impression that Ram Prasad Tamoli is the son of Laxmi Tamoli.

12. Although the plaintiff has examined altogether 34 witnesses including himself but it is very peculiar that none of his witnesses is his family member or a close relative. Even otherwise also, the evidence of the witnesses of the plaintiff do not qualify the requirements of Section 50 the Evidence Act to have become relevant. It will be worth noting that the defendant no.11 who is father of the plaintiff and defendant no.12 who is his uncle have not appeared in the suit and have also not come to support the case of the plaintiff.

13. The provisions of Section 50 and Section 60 of the Evidence Act together prescribe the fascicules of law of evidence in a case where a court has to form an opinion on relationship of one person with another. It is discernible from these provisions that the relevancy of the statement of a person holding a general belief as a resident of the same village or locality without special means of knowledge of such relationship has been ruled out and the fact which has been made relevant is the opinion, expressed by conduct, as to the existence of such relationship, of a person having special means of knowledge as a member of the family or otherwise of such relationship. The underlying principle has been succinctly laid down by their lordships in *Dolgobinda Paricha Vs. Nimai Charan Misra and Others*, as follows:-

On a plain reading of the section it is quite clear that it deals with relevancy of a particular fact. It states in effect that when the Court has to form an opinion as to the relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who has special means of knowledge on the subject of that relationship is a relevant fact. The two illustrations appended to the section clearly bring out the true scope and effect of the section. It appears to us that the essential requirements of the section are-(1) there must be a case where the Court has to form an opinion as to the relationship of one person to another,(2)in such a case, the opinion expressed by conduct as to the existence of such relationship is a relevant fact;(3) but the person whose opinion expressed by conduct is relevant must be a person who as a member of the family or otherwise has special means of knowledge on the particular subject of relationship; in other words, the person must fulfill the condition laid down in the later part of the section.

14. Applying this test to the depositions of the witnesses of the plaintiff, it is manifest that none of them has disclosed any special means of knowledge of the relationship of the plaintiff with Laxmi Tamoli and their testimony is not based upon "opinion expressed by conduct". They are mostly the persons of neighbourhood and their testimonies on this issue appear to be based upon general reputation or hearsay and no reliance, therefrom, can be placed upon the same.

15. As aforementioned the plaintiff-appellant has filed an interlocutory application praying to adduce additional evidence and has produced three documents to be taken as additional evidence. The first document is a photo copy purporting to be a death report and has been annexed as Annexure P to the

interlocutory application. This document has been issued by one Dilip Kumar Singh and his address has been given as "Lakri Depot Cremation Ghat Kahalgaon". This document contains statement under its various columns from which it appears that Laxmi Prasad Tamoli S/o Late Pago Tamoli died on 29.11.2011 in the night at 12.05 and his cremation was done by his son Ram Prasad Tamoli also described as "Karta" in the document. But there is nothing in this document to show under which provision of law it has been issued or under what authority Mr. Dilip Kumar Singh had issued this report. Emphasis has, however, been put on the writings in this document at the top left hand side, where register number and serial number has been mentioned but during the submission their correlation with any register statutorily required to be maintained, could not be established. There is also no statement in the interlocutory application disclosing existence of such register on the basis of which the "death report" has been issued. As such this document does not appear to be worth reliance for the purpose of establishing the parentage of the plaintiff. The second document, annexed as Annexure Q, is the death certificate of Laxmi Tamoli which has been issued under the provisions of the Registration of Births and Deaths Act, 1969. However, in this document there is no mention that the plaintiff Ram Prasad Tamoli is son of Laxmi Prasad Tamoli. As such this document has also got no relevance on the point in issue. The third document, annexed as Annexure-R, is a photo copy of Ration Card issued in the name of Laxmi Tamoli. In this Ration Card, the name of Ram Prasad Tamoli has been mentioned as son of Laxmi Tamoli. However, peculiarly enough this Ration card appears to have been issued with regard to total 17 units for 7 adults and 3 children but from the list of persons as mentioned therein, for whom the said card has been issued it appears that there were only 4 adult members and 3 minor members in the family. This inconsistency in the entries could not be explained on behalf of the appellant during course of argument. On the face of it, the contents of this Ration Card do not appear to be correct as there is error or inconsistency in the material entries. There is also no averment in the interlocutory application to explain away the incorrect entries. As such this document also loses its credit as an evidence for determination of the issue in hand.

16. In view of aforesaid facts, the futility of admitting the three proposed documents as additional evidence is glaring. The prayer by the plaintiff-appellant to bring these documents as additional evidence appears to be only a fugacious attempt to dilate the litigation. Accordingly, the prayer for adducing additional evidence as made in I.A.No. 4166/2012 is rejected.

17. So far as the submission on behalf of the appellant regarding the passing of the decree under Order 12 Rule 6 C.P.C. is concerned, it appears to be misconceived in the facts and circumstances of the case. The parentage of the plaintiff-appellant is the primal issue in the suit as well as in the appeal. The deceased respondent no. 11, whom the plaintiff has claimed to be his father, had not appeared and had not filed his written statement. After his death during the

pendency of the appeal, the plaintiff-appellant filed the substitution petition wherein he reiterated his stand that he was son of the deceased respondent no. 11. Absence of a counter affidavit denying this statement by the respondent 1st set cannot be taken to be admission of this fact by the respondent 1st set warranting a decree under Order 12 Rule 6 C.P.C. straightway in the facts of this case.

18. For the foregoing reasons and discussions, it is held that the plaintiff has failed to establish by evidence that he is son of Laxmi Tamoli. This point is, accordingly, decided against the plaintiff-appellant.

19. Point No. 2:- After the decision of the aforesaid point regarding the parentage of the plaintiff, there is no need for deciding this point. However, as the learned court below has given a finding on the issue and the Learned Counsel for the parties have also made their submissions in this regard, this point is also taken up for decision.

20. Suffice it will be to mention here that in the plaint it is nowhere the case of the plaintiff that his father as his guardian did not protect his interest in the three money suits and in the execution proceedings thereafter. It is also not his case that the money decrees and the auction sales in the execution proceedings were obtained by the defendant 1st set in collusion with the father, uncle and grand mother of the plaintiff as they were inimical to his interest. To the contrary, the tenor of the averments in the plaint and the reliefs claimed therein suggest that the plaintiff seeks to assail the money decrees and the proceedings in execution as not binding upon himself only but also not binding upon his father and uncle as well. It is the specific case of the plaintiff in the plaint that the proceedings of the three money suits were fraudulent and only paper transactions and the plaintiff as well as the defendant no.11 and 12 were never dispossessed from the suit property. But, the plaintiff has failed to give the details of the fraud which had been perpetrated against him in the said proceedings. It would be apposite here to notice the admission of the plaintiff in his deposition in this suit wherein he has accepted that his father Laxmi Tamoli was the Karta of the family. He has further also accepted that the difference between him and Laxmi Tamoli cropped up only 5 to 6 years before the filing of the suit. In absence of any statement that his interest had not been protected by his father as his guardian, who was also the Karta of the family, in those suits and the proceedings, the plaintiff shall be bound by the decrees passed in the three money suits and auction sales of the suit property including the delivery of possession thereafter. It is not the case of the plaintiff he has not benefited from the loan taken by the Laxmi Tamoli as Karta of his family of which the plaintiff was also the member. Further from the evidence on record adduced on behalf of the defendant 1st set it appears that Laxmi Tamoli had contested the money suits and had also filed objections (Ext. I/1) u/s 47 C.P.C., Order 21 Rule 90 C.P.C. and Section 13 of the Money Lender's Act in the execution proceedings where the auction sales of the suit property had taken place. All these facts only



give credence to the case of the defendant 1st set that the plaintiff has been set up by the defendant nos. 11 and 12 to start a fresh vista of litigation only to harass the defendant 1st set. It would be condign to refer to the decision of the Privy Council in the case of Lingangowda Vs. Basangowda, where their Lordships have laid down the principle as follows:

...In the case of a Hindu family where all have rights, it is impossible to allow each member of the family to litigate the same point over and over again, and each infant to wait till he becomes of age, and then bring an action or bring an action by his guardian before; and in each of these cases, therefore, the court looks to the explanation 6 to Section 11 of the CPC to see whether or not the leading member of the family has been acting either on behalf of the minors in their interest, or if they are majors with the assent of the majors....

21. Tested on the anvil of this principle, the conclusion is inescapable that the plaintiff is not entitled to assail the decrees of the three money suits and auction sales including the delivery of possession thereafter even as a son of Laxmi Tamoli. This point is, accordingly, decided against the plaintiff-appellant.

22. Point No. 3- The perusal of the impugned judgment reveals that the learned court below has meticulously scrutinized the pleadings and evidence of the parties and has come to the right conclusion that the plaintiff is not son of Laxmi Tamoli, and even otherwise also, the decrees in the three money suits and the proceedings of the execution case in pursuance thereto are legal and valid and binding upon the plaintiff. No interference in it, therefore, is required. In view of the aforesaid premised reasons, it is held that this appeal has got no merits and is, accordingly, dismissed. The impugned judgment and decree passed by the learned court below are hereby upheld. In the facts and circumstances, there would be no order as to costs.