

Maha Maya Devi and ors. Vs. Kushum Devi and ors.

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Court : Patna

Decided On : Mar-21-2001

Judge : S.N. Pathak, J.

Appeal No. : A.F.A.D. No. 423 of 1986

Appellant : Maha Maya Devi and ors.

Respondent : Kushum Devi and ors.

Disposition : Appeal Allowed

Judgement :

S.N. Pathak, J.

1. This second appeal has been filed seeking reversal of the judgment and decree passed by Sri Bhavesh Kumar Derhgawen, 2nd Additional District Judge, Monghyr in Title Appeal No. 20 of 1976 whereby he had confirmed the judgment and decree passed by Sri Ram Kishore Singh, Additional Sub-Judge, Jamui in Title Suit No. 12-4 of 1965/76. The defendants first set of the title suit No. 12/4 of 1965/76 are the appellants here and they were the appellants before the first appellate Court also.

2. The case of the plaintiff-respondents of the lower Court was that the lands of Khata No. 371 having an area of 12 acres 75 decimals and land of Khata No. 219

having an area of 1 acre 85 decimals was acquired by the joint family of the plaintiffs and some of the defendants. It was the further case of the main plaintiff-respondents. It was the further case of the main plaintiff-respondents that Debi Lal, Jibu Lal and Gajadhar Lal, were the three brothers who owned and possessed the joint family property and in the year 1317, (corresponding to 1910), three brothers separated in their family and property and the lands of Khata No. 371, as described in Schedule-I of the plaintiff, fell to the share of the plaintiff-respondents, including land of Khata No. 219. Gajadhar Lal was a shrewd person and he was in the employment of ex-landlord and so he got his name entered in the Laggit of the ex-landlord and got returns, etc. filed in his name, even though the suit land of Khata No. 371 had fallen to the share of plaintiffs' ancestors. Later, this Gajadhar Lal executed a deed of gift in favour of his daughter and daughter's son who were defendant Nos. 4 to 7 in the suit. This deed of gift was, however, paper transaction and so the plaintiffs' ancestor remained in possession of the suit land. However, subsequently, the donees of the gift executed sale-deed in favour of the defendant Nos. 1 and 3 of the suit. On the death of defendant No. 1, his heirs were substituted who were defendant No. 1 to 1 (d). The suit was mainly contested by the defendant Nos. 1 to 1 (d) and defendant No. 3. The plaintiffs were dispossessed during the pendency of the suit on 3rd January, 1970, from the lands as described in Schedule-IV of the plaint. These lands were the parts of the lands described in Schedule-I of the plaint which had fallen to the share of plaintiffs on partition.

3. The trial Court decreed the suit and the first appellate Court also confirmed the decree against which this second appeal has been preferred. In this second appeal, substantial questions of law formulated were to the effect whether the finding regarding partition arrived at by the Courts below was erroneous in law. The next question of law formulated was whether without any nucleus, the sale in the name of Gajadhar Lal could be held to be the property of the joint family. The third question of law was whether the joint family had purchased part of the suit land in the name of Gajadhar Lal.

4. According to the pleading of the plaintiff-respondents, it was admitted that the lands of Khata No. 371 having an area of 12 acres 75 decimals were acquired by

settlement in the name of Gajadhar Lal. It was also admitted that the lands of Khata No. 219 were also purchased in the name of Gajadhar Lal. This Schedule-VI of the plaint contained lands of Khata No. 371 having an area of 10 acres 98 decimals and there was another land of Khata No. 543 having an area of 3 acres. These were the lands from which the plaintiff-appellants were dispossessed during the pendency of the title suit. The judgment of the trial Court clearly indicated that on the point of partition, there was absolutely no documentary evidence on behalf of plaintiff-respondents. When there was specific pleading of the plaintiffs of the suit that the lands of Khata No. 371 had fallen to the share of the plaintiffs' ancestor in the partition in the year 1910, it was entirely their onus to prove that the suit land fell to their share. Admittedly, there was no documentary evidence and it is also apparent that there was no oral evidence on partition in particular. Admittedly, the lands of Khata No. 371 stood in the name of Gajadhar Lal by way of settlement. So, the plaintiff-respondents had to prove that there was nucleus of family property in order to prove that before acquiring this land by settlement, there was, of course, family property jointly held by three brothers of the plaintiffs ancestor. In this connection also, perhaps, there was no evidence in the Courts below. The trial Court as also the first appellate Court both however, gave a finding in favour of plaintiff-respondents on the basis of certain judgments and other pieces of evidence which I shall hereinbelow discuss.

5. The first document which attracts notice in this connection is a particular deposition of Gajadhar Lal (Ext. 6) in some case. This Exhibit was lost in the lower Court itself and it could not be reconstructed; but some statements in the aforesaid document has been mentioned by the Courts below to give a finding regarding claim of partition in the family. In this deposition, Gajadhar Lal admitted that 12 acres and 75 decimals lands of Khata No. 371 were acquired before partition in the family. On the basis of this admission of Gajadhar Lal, the trial Court held that this land was acquired by the joint family. However, in this deposition, there was no reference to admission of Gajadhar Lal that the suit land of Khata No. 371 had fallen to the share of the plaintiffs' ancestor. So the finding of the lower Court on the basis of this document was apparently erroneous. The next document in this connection was the title suit No. 32 of 1954 (Ext. 2) and the judgment of this suit (Ext. 10-G) and the judgment of the appellate Court (Ext. 10-F). In this suit, plaintiff

Jagdish Prasad had claimed plot No. 3180 of Khata No. 543 and S.P. No. 5104 of Khata No. 371 and the suit was decreed in his favour. Both the lower Courts have held on the basis of the decision of this title suit that the suit land had fallen to the share of plaintiff-respondent; but it has not been mentioned in the judgment of the trial Court that in this suit Gajadhar Lal or his daughter or daughter's son or any of the contesting defendants of the suit, were parties. So, the judgment of the aforesaid title suit, even though confirmed in appeal, is not binding upon the defendants-appellants. Moreover, the decision regarding one of the plots of Khata No. 371 and Khata No. 543 will not amount to the conclusion that all lands of Khata No. 371 or 543 had fallen to the share of plaintiff-defendant on partition. Therefore, I am of the opinion that the decision of both the lower Courts regarding title of the plaintiffs on the basis of judgment of this title suit was once again fallacious. The third document on the basis of which the lower Court decided the issue of title in favour of plaintiff-respondent was a deed of Jarpeshgi, dated 19th April, 1921 (Ext. 5). In the first place, the original deed was not filed and there was no explanation for its non-filing. The certified copy was filed and this deed included 88 decimals of plot No. 5104 of Khata No. 371 and upon this deed, Gajadhar Lal figured as an attesting witness. In the first place, the legal value attaching to an attesting witness is that the witness is not bound by the contents of the deed nor his attestation endorses the recitals of the deed. Moreover, simply because a portion of plot No. 5104 was included in the deed that shall not mean that the entire land of Khata No. 371 had fallen to the share of plaintiff-respondents. The lower Courts have come to the conclusion that since Gajadhar Lal was attesting the Jarpeshgi deed, he would not have been unaware of the lands being mortgaged by the plaintiff, if it belonged to him and in such a situation, it was expected that he would object to the deed. However, I am of the opinion that legal liability of the attesting witness is that he cannot be supposed to peruse the entire recital of a particular deed and inclusion of a part of a particular plot may even be overlooked, even if it is expected that the attesting witness would peruse the contents of the deed. If chance of awareness of the contents of the deed is expected from an attesting witness, probability of inadvertence in overlooking a particular part of the mortgaged lands cannot also be ruled out. So I do not think the Jarpeshgi deed could be interpreted to mean that lands of Khata No. 371 had

fallen to the share of the plaintiff-respondents. Then there was a document relating to the auction purchase of lands of Khata No. 371, by the plaintiffs in the execution case. Perhaps, this was execution case No. 2 of 1956, as referred to in the judgment of the trial Court. The trial Court has stated at paragraph 9 while discussing Issue Nos. 3 & 4 of the suit that the entire holding of Khata No. 371 was purchased by the plaintiffs in the name of Ojha Mahto. So the claim of purchase in the execution case by the plaintiff was also in the name of another person and so this would amount to Benami Purchase. The plaintiff had, therefore, to prove that he had, of course, purchased the suit land of Khata No. 371 in the name of Ojha Mahto, as his Benamidar. Neither any evidence was led to prove this fact nor there was any pleading to this effect. At this stage, it is also pertinent to mention that a piece of evidence which is not pleaded, cannot be allowed to be let in nor this piece of evidence can be considered to prove the title or possession of a particular party to the suit. The specific case of the plaintiff-respondents was that he had obtained the suit land of Khata No. 371 on partition and when he had led alternative evidence to the effect that he purchased the suit land in an execution case, it is not understandable what prevented him from inserting this fact into his pleading. Moreover, it is also relevant to mention that in the trial Court's judgment, there is a reference to an Exhibit (Ext.-12) from which it transpires that Deoki Nandan Prasad had filed a petition under Section 144 of Code of Civil Procedure for restitution of the land, which was rejected. It is also stated in the judgment of the trial Court at Paragraph 14 on the basis of Exhibit 13 that Deoki Nandan Prasad was ousted from the land of Khata No. 371. From this, it would transpire that Deoki Nandan Prasad (respondent No. 7) who was husband of Kapurbati Devi (respondent No. 4) in whose names Gajadhar Lal had created the deed of gift, including respondent Nos. 5 & 6, was in possession of the land before auction-purchase, so the contention of the plaintiff-respondent that the deed of gift created by Gajadhar Lal was not acted upon also does not find supported from the aforesaid circumstances on the record. So if the plaintiff purchased the suit land in the name of Ojha Mahto and the Benami purchase having not been proved, the purchase in the execution case cannot confer any title upon the plaintiff-respondent. The other documents in favour of the plaintiff-respondent to base his title, which was referred to by the trial Court and relied

upon by the appellate Court, is a judgment in a criminal case filed by Gajadhar Lal in which the plaintiffs were acquitted. I am of the firm opinion that a judgment of acquittal will never create title in favour of any party nor it will also be a conclusive proof of the possession of the acquitted accused of that criminal case. The aforesaid discussion has clearly revealed that the plaintiff-respondents had failed to prove that there was any nucleus of the family property, before acquisition of lands of Khata No. 371 which was acquired by Gajadhar Lal on its settlement from the Ex-landlord. The lands of Khata No. 219 admittedly stood in the name of Gajadhar Lal (by sale). So far the lands of Khata No. 543, which is in only one plot, it was claimed by the plaintiff-respondent on the basis of a judgment, which I have already referred to above, in a title suit and which was a suit between the plaintiffs and his co-sharers and which ended in a compromise. I have already stated above that neither Gajadhar Lal nor any of the defendants were party to the suit and, therefore, the judgment of the concerned suit shall not be binding upon them. This judgment, therefore, will also not prove that the plaintiff-respondent had acquired the lands of this Khata in family partition and so this also cannot prove his title. The learned trial Court and the appellate Court also discussed the infirmities in the deed of gift and in the sale-deed of the defendants and held that since they had failed to prove genuineness of the deed of gift or the sale-deeds, the plaintiffs were entitled to secure a decree for their title. I am of the opinion that this approach of the lower Court is highly erroneous and against the settled legal principles. It was pointed out by the trial Court that some of the lands vended to the defendants were not included in the deed of gift and one of the vendors of the defendants admitted in her deposition that no consideration money had passed. I am of the opinion that one of the executants of the sale-deed of the defendants denying passing of the consideration money, that will not negative the statement in the sale-deed itself that consideration money had, of course, passed nor it will bind other executants regarding passing of the consideration money. The executants were the members of the plaintiff's family and, of course, Gajadhar Lal also and so chance of their collusion with the plaintiffs cannot be ruled out. Moreover, I have already stated above that the infirmities in the evidence of the defendants cannot be interpreted to mean that the plaintiffs have proved their title. It is the settled principle of law that the plaintiff of a case has to prove its case in the manner as

set out in the plaint. Moreover, the plaintiff also cannot be allowed to go beyond the pleading and set up a third case.

6. So far as the question of possession is concerned, it was pleaded by the plaintiff-respondents that they were dispossessed from the suit land, as described in Schedule-VI of the plaint, during the pendency of the suit. So, admittedly, the plaintiff-respondents were out of possession. In such a circumstance, the plaintiff-respondents had to prove by positive evidence that they were in possession prior to the filing of the suit and they were ousted during the pendency of the suit. Neither any issue was framed in this connection nor there was any evidence to this effect. So the decree relating to recovery of possession passed by the lower Courts was also based on fallacious propositions and it was not based on the evidence on the record.

7. The discussion of the entire gamut of evidence, especially the documentary evidence has shown that the lower Court's finding regarding the title and possession of the plaintiff-respondents was passed on perverse interpretation of the evidence (oral and documentary) and so this Court can rightly interfere with the judgments of both the lower Courts.

8. Hence, this second appeal is allowed and the judgments of both the lower Courts are set aside. In the circumstances of the case, there shall be no order as to cost of this appeal.