

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.620 of 1978

(Against the judgment and decree dated 23.05.1978 passed by 1st Additional Subordinate Judge, East Champaran, Motihari in title suit No.112 of 1974/138 of 1976).

Most. Rajkali Devi & Ors

.... Defendants 1st Party-Appellants
Versus

Shiv Shankar Tiwari & Ors

.... Plaintiffs-Respondents

Appearance :

For the Appellant/s : Mr. Vikash Kumar Sharma, Advocate
Mr. Nand Kishore Singh, Advocate.

For the Respondent/s : Mr. Vijay Shankar Shrivastava, Advocate.

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
C.A.V. JUDGMENT

Date:24-06-2015

1. The defendants 1st party have filed this First Appeal against the judgment and decree dated 23.05.1978 passed by the learned 1st Additional Subordinate Judge, Motihari in title suit No.112 of 1974/138 of 1976 whereby the learned trial court decreed the plaintiff's suit for declaration of title over the suit property.

2. The plaintiffs-respondents filed the aforesaid suit praying for declaration of plaintiff's title over 2 bighas 17 kathas and 12 dhurs land described in detail in the schedule of the plaint and also for recovery of possession and mesne profit alleging that DharichhanTiwari was the karta of the joint family of the plaintiffs and the suit land was the Lakhraj Brit of the ancestors of the defendants 1st party members. In Khewat No.22, the land was

recorded in the names of the ancestors. In Khata No.586, in which the suit land is recorded, it was recorded as kayami land of defendants 2nd party and the members of defendants 1st party were entitled to get the produce rent of the land from the ancestors of the defendants 2nd party. The wife of defendant No.7 was ill, therefore, he entered into an agreement to sell the suit land for sum of Rs.500 and an agreement was executed on 19.11.1957 by defendant No.7 in favour of Dharichhan Tiwari. Advance of Rs.200 was paid. This agreement was executed in presence of the defendants 1st party. After this Mahadanama/agreement, the intention of the defendants became bad so the defendant No.7 executed a Ladavinama on 21.11.1957 in favour of defendants 1st party reciting therein that defendants 2nd party had no concern with the suit land and the survey entry in respect of the suit land was wrongly recorded in the names of the defendants 2nd party and that the suit land was in possession of defendants 1st party. These recitals in the Ladavi are wrong. In fact, defendants 2nd party were in possession of the land. At the instance of the defendants 1st party, the defendants 2nd party evaded to execute the sale deed, therefore, DharichhanTiwari filed title suit No.158 of 1958 for specific performance of the agreement making the defendants 1st party and defendants 2nd party as defendants in the suit. The defendants 2nd party accepted the agreement and accordingly, the said suit was



decreed. Dharichhan Tiwari deposited the balance amount of Rs.300. The appeal filed by the defendants 1st party herein being title appeal No.95 of 1962 was disposed of upholding the judgment and decree of the trial court but the question of title was left open. In Execution Case No.34 of 1966, the plaintiffs obtained possession of the suit land. In execution case objection was filed by defendants 1st party which was dismissed. However, on appeal, the appellate court set aside the delivery of possession and directed the plaintiffs to get their title declared. This order of the appellate court was confirmed by the High Court in Second Appeal No.325 of 1970 by judgment and order dated 07.08.1973. Therefore, it has now become essential for the plaintiffs to file the suit for declaration of title and recovery of possession.

3. The defendants 1st party appeared and filed contesting written statement. They admitted that the suit land was the Brit Lakhraj land of the ancestors of the defendants 1st party. The suit land was wrongly recorded in Khata No.586 in the name of the ancestors of the defendants 2nd party but Girja Sah, the father of defendants 2nd party was never in possession over the land nor they had any concern with the land of Khata No.586. The defendants 2nd party was never the kayami raiyat of Mauja Madhuban. The defendants 2nd party was never the bataidar of defendants 1st party nor



they ever cultivated the suit land as bataidar. The suit land was always in khas possession of the defendants 1st party and their ancestors in spite of wrong entry in the name of ancestor of defendants 2nd party. The defendants 2nd party had no title over the suit land, therefore, there was no question of entering into agreement to sell arises. The agreement dated 19.11.1957 is forged and fabricated document. It has rightly been submitted in the Ekrarnama dated 21.11.1957 that the members of defendants 1st party are the owner and in possession of the suit land and defendants 2nd party have got no concern. Earlier the father of defendants 2nd party namely Sukhlal Sah had executed a Ladavinama on 11.04.1951 in favour of defendants 1st party admitting the wrong entry in the name of defendants 2nd party. Subsequently, a registered Ekrarnama was executed by defendants 2nd party on 21.11.1957 wherein it is admitted that khatian entry in respect of Khata No.586 is wrong and the defendants 1st party members have got the title and possession over the suit land. Dharichhan Tiwari fabricated antedated Mahadanama in his favour. In title suit No.158 of 1958, it was decided that the suit land belonged to Munni Lal Sah who is in possession and the survey entry is wrong, therefore, the suit filed by the present plaintiff is barred by the principles of resjudicata. If any sale deed has been executed and registered, it is not binding on defendants 1st party. On



the objection of the defendants 1st party, the delivery of possession was set aside and the plaintiffs were directed to take fresh delivery of possession and the plaintiffs challenged the same before the High Court but the appeal was dismissed. In title suit No.158 of 1958, the plaintiffs had challenged the title of Girja Sah in respect of suit land and also challenged his possession, therefore, the plaintiffs should have filed the suit for declaration of title and recovery of possession within twelve years but the suit has been filed after long period, therefore, the suit is barred by law of limitation.

4. The further case of the defendants 1st party is that the members of the defendants 2nd party though were recorded in Khata No.586 but they were never in possession. The defendants 1st party are in possession of the suit property. At the time of vesting of zamindari, return was filed showing these defendants in khas possession of the suit land and Girja Sah never made any objection. On the basis of return, the rent has been assessed in the name of defendants 1st party and they are paying rent to the State of Bihar against the grant of rent receipt. The suit land has been divided between Sukhlal Bantilal and Ramprit Sah but the suit land was not included in the said partition which indicate that the second party had no concern with the suit land otherwise in partition the suit property also should have been partitioned. The defendants 2nd party have left

the village and Girja Sah has no house in the village, therefore, there is no question of their possession over the suit land arises.

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

- I. Is the suit as framed maintainable?
- II. Have the plaintiffs got any cause of action or right to sue?
- III. In the suit properly valued and the court fee paid sufficient?
- IV. Is the suit barred by limitation?
- V. Is the deed of ladavi, dated 21.11.57 executed by defendants second party in favour of defendants first party valid and genuine?
- VI. Is the Ladavinama dated 11.04.51 in favour of Munni Sah defendant No.2 valid and proper?
- VII. Whether the plaintiffs have got title to the suit properties and whether they are entitled to recover its possession & mesne profits?
- VIII. To what other relief or reliefs, if any, are the plaintiffs entitled?

6. On the basis of the evidences and materials available on record, the trial court recorded the finding that Ladavinama dated 11.04.1951 executed by Sukhlal Sah in favour of Munni Lal Sah is not valid and proper document and since registered Ladavinama dated 21.11.1957 was executed two days after Mahadanama executed by the defendants 2nd party in favour of the plaintiff's ancestor so, it cannot be deemed to be creating any right or



title in favour of defendants 1st party members. The defendants 2nd party being kayami raiyats in respect of the suit land and the entry in respect of the suit lands having not been held to be wrong, the defendants 2nd party had every right to dispose of the suit land to the plaintiff's ancestor and hence, the sale deed dated 20.07.1962 is valid document creating title to the suit property in favour of the plaintiffs and, therefore, the plaintiffs are entitled to recover possession. Accordingly, the court below decreed the plaintiff's suit.

7. The learned counsel, Mr. Vikash Kumar Sharma appearing on behalf of the appellants submitted that it is the plaintiff's case itself that the suit property is the Lakhraj Brit land of the defendant's 1st party and the defendant's 2nd party were the kayami raiyat i.e. bataidar of the defendants 1st party. Defendants 1st party were realizing the produce rent from the defendants 2nd party. Therefore, it is admitted case that the defendants 1st party were the owner of the property. At the time of vesting also, return was filed showing the defendants 1st party's ancestor in possession of the suit land and on the basis of the return, jamabandi was created and the appellants are paying rent to the State of Bihar but the court below drew adverse inference against the appellants stating that the return is not exhibited in this case without considering the fact that the return was filed before the appropriate authority for fixation of rent and in



the ordersheet itself, clearly mentioned that in the return, the appellants have been shown in possession and on the basis of the return, the rent was fixed. Therefore, the court below wrongly drew adverse inference against the appellants. The learned trial court also failed to appreciate the fact that earlier in the year 1951, the father of the present defendants 2nd party had executed Ladavinama admitting that the defendants 1st party are in possession of the property and the suit property is wrongly recorded in the name of the defendants 2nd party. Since it was in sada paper, subsequently in the year 1957, registered Ekrarnama was executed by the present defendants 2nd party wherein also, he has admitted that the suit land is wrongly recorded in Khata No.586 in the name of defendants 2nd party and the defendants 2nd party have got no concern with the same. The defendants 1st party are the owners of the property and are in possession of the same. This being the registered document, the court below should have relied on the same because this registered document was never challenged by any of the party. The presumption is that this document is genuine and unless it is set aside, the plaintiffs cannot get his title declared but the court below wrongly held that because this registered Ekrarnama was executed two days after the agreement in favour of Dharichhan Tiwari, it will not create any title. According to the learned counsel, the defendants 1st party are not



claiming title through this Ekrarnama. This Ekrarnama only shows that the defendants 2nd party admitted the fact that the entry in record of right is wrong and they have got no concern with the suit land. This is admission of the defendants 2nd party and in the present suit, this is the main dispute which is to be decided. The court below, therefore, wrongly approached the case and has wrongly decided against the appellants.

8. The learned counsel further submitted that the defendants 2nd party were never even bataidar of the defendants 1st party and the entry as bataidar is wrong, therefore, the defendants 2nd party had no title to transfer the property. If a person entered into agreement to sell a property of which he is not an owner, there is no question of transferring the title arises. In such circumstances, even if decree has been passed for specific performance of contract in title suit No.158 of 1958, it will not affect the right, title and possession of the defendants 1st party-appellants but the court below wrongly decreed the plaintiff's suit. Even if it is held that the defendants 2nd party were bataidar then also the bataidar has no title to transfer the property. The ownership always remained with the defendants 1st party. According to the learned counsel, the learned trial court has not properly appreciated the oral and documentary evidences and came to wrong conclusion. On these grounds, the learned counsel submitted

that the appeal be allowed and the impugned judgment and decree be set aside and the plaintiff's suit be dismissed with cost.

9. On the other hand, the learned counsel, Mr. Vijay Shankar Shrivastava appearing on behalf of the respondents submitted that there is no illegality in the impugned judgment. The court below has rightly held that by registered Ekrarnama, the title will not be created in favour of the defendants 1st party. Admittedly, the suit land is recorded in the name of the defendants 2nd party as kayami raiyat i.e. bataidar. The defendants 2nd party were in possession of the property, therefore, they had right to sell the property and, therefore, they entered into agreement with the ancestor of the plaintiffs-respondents and subsequently, the property was sold by registered sale deed. Only with a view to defeat the title of the ancestor of the plaintiffs-respondents, a registered Ekrarnama was created just two days after the agreement, therefore, the court below has rightly held that by this registered document, no title is created. Although, the appellants claimed that the return was submitted showing them in khas possession over the suit property on the date of vesting but the return was never filed and exhibited in the present case. This return was most important and vital document which was withheld by the defendants 1st party-appellants, therefore, the court below has rightly drew adverse inference against the appellants. The court below has

dealt with each and every evidences either oral or documentary and then recorded the finding unambiguously, therefore, it needs no interference in the First Appeal. On these grounds, the learned counsel submitted that the First Appeal be dismissed with cost.

10. In view of the above rival contentions of the parties, the points arises for consideration are as to “whether the plaintiffs have been able to prove their title in the suit property and are entitled for recovery of possession or not” and “whether the impugned judgment and decree are sustainable in the eye of law or not?”

11. The case of the plaintiffs itself is that the suit property was the Lakhraj Brit land of the appellants. The defendants 2nd party were bataidar i.e. they were giving half produce to the defendants 1st party. On the other hand, the defendants-appellants specific case is that the entry in the revisional survey record of right in the name of the ancestor of the defendants 2nd party is wrong entry. They have got no relation with the property nor they were kayami raiyat or were giving half produce to the appellants. In support of their respective cases, the parties have adduced oral as well as documentary evidences.

12. Exhibit 10 series are the khatian of Mauja in question. Khata No.586, the suit land is recorded in the name of Sukhlal who is father of defendants 2nd party. It is recorded as his



kayami land. The khatiyani further shows that the malik i.e. proprietor of the suit land was Maharani Janki Kuer and the ancestor of the defendants 1st party i.e. Khewatdar was Gopal Sah under Khewat No.22. The appellants have also filed khatiyani which has been marked as Exhibit 'K'. The khewat has been marked Exhibit 11 and this Khewat No.22 admittedly stands in the name of Gopal Sah. Again in this Khewat, the zamindar is shown as Maharani Janki Kuer. The plaintiff's case is based on this entry in the revisional survey record of right. No doubt, there is a presumption of correctness of the entry but then it is rebuttable. To rebut this presumption, the appellants have produced Exhibit A and Exhibit A/1. Exhibit A dated 11.04.1951 is a Ladavinama i.e. relinquishment deed which is executed by Sukhlal Sah whose name is recorded in the revisional survey record of right. Although, this deed turned as Ladavinama but from the recital of the same, it appears that there is no relinquishment of the title or interest by Sukhlal Sah in favour of the ancestor of the appellants. The only recital has been made to the effect that in spite of the entry of the name of Sukhlal Sah in the name of record of right, the ancestor of the defendants 1st party are in possession of the land who are the owner of the land. Since it was executed on sada paper subsequently in the year 1957, the son of Sukhlal Sah i.e. defendant No.7 again executed another Ekrarnama i.e. agreement admitting here

that they have got no concern with the suit land and it is wrongly recorded in the name of Sukhlal Sah in revisional survey. The appellant's ancestor was the owner of the property. This is Exhibit A/1 which is a registered document.

13. It may be mentioned here that there is a presumption of correctness of the registered document unless it is proved to be contrary. It is not the case of the plaintiffs that the defendants 2nd party had got no knowledge about either Exhibit A or Exhibit A/1. Moreover, Exhibit A/1 is a registered document but still today, none have challenged its genuineness. Now, therefore, the ancestor of the defendants and even the defendant No.7 himself has admitted by executing a registered agreement to the effect that the appellants were in possession and are in possession and they are the owner of the property and the suit property has wrongly been recorded in the name of Sukhlal Sah but they have got no concern with the suit property. There is no explanation at all by the plaintiffs or the defendants 2nd party regarding this admission. Now, therefore, since the plaintiff is claiming title through the defendant No.7, the admission made by the defendant No.7 in registered document of the year 1957 is binding on the plaintiffs. In other words, it can be safely said that admission is the best evidence and is admissible in evidence and is binding on parties unless it is explained properly.



14. The learned court below has given much emphasis on the date of execution of the Mahadanama and stated that just two days after the Mahadanama, this Exhibit A/1 was registered, therefore, by this Exhibit A/1, title will not be created in favour of the appellants. So far this observation is concerned, it may be stated here that the appellants are not claiming title on the basis of this Exhibit A/1. In other words, they are not deriving title by this Exhibit. It is the admitted case of the parties that Gopal Sah was the Khewatdar i.e. the ex-intermediary. The defendant No.7 admitted that he was the owner of the suit property and was in possession of the same. The defendants 2nd party have got no concern with the property nor they are in possession. Therefore, this admission made by defendant No.7 is binding on defendant No.7 and the person who is claiming title through defendant No.7 as there is no explanation as to why this admission was made. It is not their case that they relinquished their title in favour of the appellants. They only admitted the real position. Now, therefore, unless this document is set aside, it will remain as hurdle in the way of the title of the plaintiffs.

15. The Hon'ble Supreme Court in the case of **Prem Singh v. Birbal, (2006) 5 Supreme Court Cases 353** has held that there is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law.

The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the present case, as stated above, none have challenged this registered document, Exhibit A/1. Therefore, the presumption is that it is validly executed and is valid in the eye of law.

16. The Supreme Court again in the case of **Md. Noorul Hoda v. Bibi Raifunnisa and others, (1996) 7 Supreme Court Cases 767** has held that “when the plaintiff seeks to establish his title to the property which cannot be established without avoiding the decree or an instrument that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party, the plaintiff necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded.”

17. In the present case, no steps have been taken either by the defendants 2nd party or by the plaintiffs. Therefore, in my view, the court below has wrongly observed that by this document, title was not created in favour of the defendants 1st party-appellants or their ancestor. The appellants are claiming title independently and not through this Exhibit A/1. Therefore, so far this observation of the court below is concerned, it is not sustainable.

18. So far the possession of the property is concerned also, the defendant No.7 admitted in this Exhibit A/1. The other glaring fact of this case is that admittedly, the suit land is Lakhraj Brit



land of the appellants. They were the ex-intermediary. How this land was settled in which year and what manner in favour of the defendants 2nd party is not mentioned anywhere by the plaintiffs or the defendants 2nd party. Although, plaintiffs specifically pleaded that the defendants 1st party were entitled for crop sharing or that defendants 2nd party were giving share in the crop but there is no evidence at all in support of this pleading. It is settled law that mere pleading is not a proof of the fact. Now, there is no evidence how the defendants 2nd party came in possession as kayami raiyat and in what manner and whether they were sharing the crop or not is not proved. The only basis of the plaintiff's case is the entry in the record of right. As discussed above, the documents produced by the appellants i.e. the Ladavinama and the Ekrarnama Exhibit A and A/1 are sufficient enough to rebut the presumption of correctness of the entry in the name of defendants 2nd party. Over and above the documents, the appellants have also adduced oral evidences and other documentary evidences. The plaintiff's witnesses i.e. P.W.1(ka), PW.2, 7, 8, 10 and 12 have stated that the plaintiffs have taken delivery of possession of the suit property and are continuing in possession. On the contrary, the defendant's witnesses, D.W.1, 4, 5 to 8, 11, 13, 15, 16 and 17 have all stated that the suit properties are coming in possession of the appellants and they have in fact, amalgamated the suit land with their



other land. It may be mentioned here that although, the suit for specific performance filed by the plaintiffs was decreed, the delivery of possession was objected by the appellants and the appellate court directed that the plaintiffs may take redelivery of possession of the suit property and the title with respect to the property was left open. In the present case, the plaintiff himself has prayed for recovery of possession of the suit property. The judgment of title suit No.158 of 1958 is Exhibit J. The appellate judgment is Exhibit J/1. The delivery of possession obtained by the plaintiff was set aside by the appellate court and against that order, the plaintiff filed appeal before the High Court being Appeal No.325 of 1970. The judgment of the High Court is Exhibit J/2.

19. The appellants have also produced Exhibit C, a partition deed which was executed by Sukhlal Sah himself in the year 1949 which shows that there was partition in the family of defendants 2nd party but the suit land was not included in that partition. This document was produced by the appellants to show that this suit property did not belong to the defendants 2nd party, therefore, it was never partitioned by them and they were not even in possession of the same. So far this document is concerned, the learned trial court accepted the submission of the plaintiffs that the suit property might have been the self-acquired property of Sukhlal, therefore, it was not

partitioned. This submission of the plaintiffs itself was baseless. There is no such mention in Exhibit C i.e. partition deed. Therefore, what is not mentioned in the document itself could not be justified by the argument only. I, therefore, do not accept the reasoning of the trial court.

20. From perusal of the judgment, I find that the trial court considered various other documents executed by other parties i.e. Exhibit 4 series which are sale deeds, Waibulwafa dated 29.01.1952, Exhibit 2, Mortgage Deed, Exhibit 9 dated 13.05.1951 and held that in those documents in the boundary, the suit plot is situated and the name of Sukhlal Sah has been mentioned which shows that Sukhlal Sah was in possession of the property. In my opinion, this approach of the court below is also not acceptable because in these documents, the appellants were not party. Moreover, on the basis of the entry in the record of right, the names of the person in the boundary are mentioned. Therefore, on the basis of this mentioning by third person, possession or title cannot be decided. In my opinion, it is not admissible at all against the appellants.

21. Exhibit P/1 is the ordersheet filed by the appellants which shows that a rent fixation case No.5/1957-58 was registered in the name of the ancestor of the appellants. From perusal of this ordersheet, it appears that the ex-intermediary, Munni Lal Sah had

filed the return under the provision of Section 3B of the Bihar Land Reforms Act, 1950 showing the appellants themselves as in khas possession of the suit plot. On the basis of this return, this rent fixation case was initiated and the rent has been fixed. It is specifically mentioned in this ordersheet that return was filed.

22. From perusal of the impugned judgment, it appears that the court below has drawn adverse inference against the appellants for non-production of the return holding that it is most important document which has been withheld by the appellants. From perusal of the judgment, it further appears that the court below nowhere has mentioned the effect of filing of return in the rent fixation case. There is no dispute raised by either plaintiff or defendants 2nd party that the authority before whom the rent fixation case was initiated has wrongly mentioned that return was filed. There is no contrary evidence from the other side to falsify the case that return was filed by the appellant's ancestor showing the appellants themselves to be in khas possession of the property at the time of vesting rather it was filed in the name of any other person i.e. in the name of the defendants 2nd party. This document clearly proves that on the date of vesting of zamindari, the return was filed showing the ancestor of the appellants/appellants in possession of the suit property. Rent has been fixed in their names and now they are deemed to be the

raiyat under the State of Bihar. There is no contrary evidence to the effect that any other person was in possession of the property on the date of vesting.

23. Now, in view of the above discussion, the defendants 2nd party admitted the ownership of defendants 1st party, possession of defendants 1st party, wrong entry in the name of defendants 2nd party and khas possession of the appellants on the date of vesting. Therefore, the defendant No.7 had no title to the property nor he was in possession of the same. In such circumstances, he could not have transferred better title and possession to the plaintiffs. Even if the sale deed has been executed and registered on the basis of the decree of specific performance of contract, it will not confer title on the plaintiffs.

24. The other documentary evidences produced by the plaintiffs or the evidences of the experts relates to the genuineness or otherwise Exhibit A, the Ladavinama of the year 1951. It is not so very relevant in the present case because of the fact that subsequently in the year 1957, registered document has been executed whereby the defendants 2nd party admitted everything as discussed above. Moreover, this Exhibit A/1 corroborates Exhibit A. It appears that the learned court below has decided the case by approaching the same in wrong angle. Therefore, I have already held that the reason assigned

by the trial court is not acceptable.

25. The defendants-appellants have also produced the Pleader Commissioner's report, Exhibit H and Pleader Commissioner has been examined as D.W.20 who has reported that he measured and found the suit land amalgamated with other lands of defendants 1st set-appellants.

26. In view of the above discussion of the evidences, I find that the plaintiffs failed to prove his title over the suit property on the basis of Exhibit 4, the sale deed executed by defendant No.7. Since he failed to prove title, there is no question of delivery of possession in his favour arises. The finding of the court below on this question is, therefore, hereby reversed. The point formulated is answered in favour of the appellants and against the plaintiffs-respondents.

27. In the result, this First Appeal is allowed. The impugned judgment and decree are set aside. The plaintiff's suit is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

(Mungeshwar Sahoo, J)

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