

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.95 of 1985

Against the Judgment and Decree dated 29.09.1984 passed by 2nd Addl. District Judge, Ara in Title Appeal No.77 of 1969 reversing the trial Court Judgment and Decree dated 10.06.1969 passed by Execution Munsif, Ara in Title Suit No.52 of 1964 / 58 of 1966.

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Ram Chandra Tiwary & Ors

.....Defendants-respondents-Appellant/s

Versus

Smt. Chandrajota Devi & Ors

.....Plaintiffs-appellants-Respondent/s

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Appearance :

For the Appellant/s : Mr. Dharmendra Kumar Sinha, Advocate

For the Respondent/s : None.

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Dated : the 7th day of December, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL J U D G M E N T

1. This Second Appeal has been filed by the defendants against the Judgment and Decree dated 29.09.1984 passed by learned 2nd Addl. District Judge, Ara in Title Appeal No.77 of 1969 whereby the Court blow reversed the trial Court Judgment and Decree dated

10th June, 1969 passed by the learned Execution Munsif, Ara in Title Suit No.52 of 1964/58 of 1966.

2. For the purpose of deciding this Second Appeal, the facts which are required to be noticed are as follows :-

(i) The plaintiffs filed the aforesaid suit for declaration of title and confirmation of possession over 5 decimal of disputed land alleging that in fact the father of the three plaintiffs had taken settlement of 3.5 katha land, i.e., 11 decimal in the year 1916 from the ex.landlord and a deed of settlement was executed on 18th Kartik 1323 Fasli corresponding to 1916. The defendants were also settled with 8 decimal of land. However, in the revisional survey record of right, out of the 11 decimal of the plaintiff settled land, 5 decimal of land was shown in possession of the defendants thereby the defendants were shown in possession of more than their settled land.

(ii) The defendants filed written statement denying the settlement claimed by the plaintiffs and in turn, they claimed their settlement.

3. The trial Court after evidences on the basis of materials available on record recorded a finding that the plaintiff failed to prove



the identify of the suit land and accordingly dismissed the plaintiff's suit. On appeal filed by the plaintiffs, the lower appellate Court reversed the finding of the trial Court recording findings that the plaintiffs have been able to prove the identity of land as it is specifically described in the schedule of the plaint as well as in the settlement deed, ext.4. The appellate Court also recorded finding that the Court below did not even consider the pleader commissioner report. Accordingly, the plaintiff's suit was decreed.

4. At the time of admission of this Second Appeal on 10.07.2008, the following substantial question of law was formulated :-

“Whether the impugned Judgment and Decree of the lower appellate Court can be sustained in law in view of the fact that it was passed against a dead person, namely, Ram Nandan Ojha, who was appellant No.3 and had died during the pendency of the title appeal but neither the other appellants or the heirs of the said Ram Nandan Ojha took any step for substitution of his heirs?”

5. The learned counsel for the appellant relying on the decision of the Hon'ble Supreme Court in the case of ***Budha Ram Vs. Bansi 2011 (1) PLJR 91 SC*** submitted that every co-sharer has a right

to possession of the suit property equally to that of the other co-sharer.

In the present case, since the appellant No.3 died and no substitution was filed, therefore, the appeal abated against the deceased appellant No.3. In such circumstances, the whole appeal become incompetent to proceed but the Court below without considering these settled principle of law has reversed the Judgment of the trial Court instead of dismissing the appeal as abated as a whole.

6. Nobody appeared on behalf of the respondent.

7. Perused the Judgment of the trial Court as well as Judgment of the lower appellate Court. From perusal of the Judgment of the lower appellate Court, it appears that the lower appellate Court clearly recorded the finding that the plaintiffs have been able to prove their title and possession and accordingly had decreed the plaintiff's suit. The plaintiff No.1 and 2 claimed that their father and the father of the plaintiff No.3 jointly took settlement of 3.5 katha equal to 11 decimal of land in the year 1916. This suit of the plaintiff was dismissed by the trial Court. Although it is not the case of the defendant in the written statement that the disputed land measuring 5 decimal is not identifiable at the spot or that the defendants did not even adduce any evidence in support of the fact that the land in dispute cannot be identified, the trial Court dismissed the same. The appellate Court



considering all these aspects of the matter has recorded the finding. Against the trial Court Judgment, all the plaintiffs including Ram Nandan Ojha had filed the appeal before the lower appellate Court challenging the Judgment and Decree of the trial Court. Now, therefore, on the death of appellant No.3, the right to sue survive, therefore, appellant No.1 and 2 continued the appeal. Moreover, the impugned Judgment and decree passed by the lower appellate Court is not against dead person but it is in favour of the deed person. The heirs of the deceased appellant No.3 or the other appellants are not challenging the impugned Judgment and Decree passed by the lower appellate Court. The defendants are challenging on the ground that the appeal had abated, although admittedly, it is the plaintiff's case that they jointly got the settlement of 11 decimal land.

8. In view of the decision relied upon by the learned counsel for the appellant itself, it is clear that every co-sharer, i.e. the appellant No.1 and 2 are entitled to the possession of the property as that of the other co-sharer. In such circumstances, particularly when the Judgment and Decree has been passed in favour of the deceased persons at the instance of the defendants, the Judgment of the lower appellate Court cannot be interfered with. In my opinion, therefore, the substantial question of law formulated at the time of admission is

answered in favour of the respondents and against the appellants.

9. In the result, this Second Appeal is dismissed.

(Mungeshwar Sahoo, J)

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