

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.491 of 2012

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1. Nathuni Paswan.

2. Boddu Paswan @ Baddu Dushad both S/O Murat Paswan R/O Village -
Dhanechcha, P.O. and P.S. Durgaati, District – Kaimur.

.... Appellant/s

Versus

1. Bharat Paswan.

2. Krishna Paswan both sons of Shiv Das Paswan.

3. Nathu Ram S/O Chandan Paswan all R/O Village - Mohania, P.O. and P.S.
Mohania, District – Kaimur at Bhagalpur.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Shashi Shekhar Dwivedi, Sr. Adv.

Mr. Subodh Kumar Jha, Adv.

Mr. Pranav Kumar Jha, Adv.

For the Respondent/s : Mr. Durga Nand Jha, Adv.

Mr. (Dr.) Kislay, Adv.

Mr. Jyoti Ranjan Jha, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 15-01-2015

Heard Mr. S.S. Dwivedi, the learned senior counsel
appearing on behalf of the appellants. The learned counsel for the
respondents is also present.

The plaintiffs, in the suit, are the appellants in this second
appeal against the judgment and decree of affirmance.

The factual score need not be exposted in detail. Suffice it
to state that the plaintiffs and the defendants are admittedly the

descendants of one Jageshwar Dushadh who died leaving behind two sons namely Jhimal Dushadh and Timal Dushadh. The two plaintiffs claimed themselves to be the sons of Mulki Devi stating that she was the only daughter of Jhimal Dushadh. The another son Timal Dushadh had two sons Shivdas Dushadh and Budhu Dushadh out of whom the branch of Budhu Dushadh admittedly became extinct. The defendant no. 1 and defendant no. 2 are the sons of Shivdas Dushadh.

The plaintiffs filed T.S. No. 96 of 1997 for declaration of their title and possession over the suit land described in schedule-I of the plaint with the case that the nature of the suit land was 'khidmati Jagir' (burdened with service) and was given to Jageshwar Dushadh in lieu of service and was not heritable. It was pleaded that Jageshwar Dushadh died 70 years ago and his two sons left the service of the ex landlord who resumed the possession of the suit land. It is further case of the plaintiffs that Jhimal Dushadh, who was maternal grand father of the plaintiffs, got the suit land settled with him after payment of Najrana to the ex landlord who granted the rent receipt in recognition of the settlement. Jhimal Dushadh thereafter alienated the suit land to the plaintiff no. 1 Nathuni Dushadh by registered gift deed dated 16.09.1946 who after accepting the gift deed came in possession over the suit land. The plaintiffs further also averred that the two brothers Jhimal Dushadh and Timal Dushadh had separated after the death of



Jageshwar Dushadh, and the widow of Jhimal Dushadh alienated the house which had fallen in the share of Jhimal Dushadh, by registered gift deed dated 07.12.1959 to the plaintiff no. 1 Nathuni Dushadh who accepted the same and came in possession over the same. The plaintiffs have alleged that the father of the defendants collusively got his name entered in the recent survey khatian for the suit land in the year 1996 and on that basis, started making claim over the suit land. It is the case of the plaintiffs that the suit has been filed in view of and after getting knowledge of the wrong entry in the recent survey khatian for the suit land.

The defendants resisted the claim of the plaintiffs with their case in the written statement that the suit land was given to Jageshwar Dushadh for his past services and was not burdened with service and after the death of Jageshwar Dushadh his two sons inherited the suit land and came in joint possession. The defendants specifically denied the assertion of the plaintiffs that the ex landlord resumed the possession of the suit land and had also asserted that there was no partition between Jhimal Dushadh and Timal Dushadh who died in jointness. It was further asserted by the defendants that Mulki Devi (mother of the plaintiffs) was not the sole daughter of Jhimal Dushadh who had another daughter Ramdeyia (mother of the intervener defendant Nathuni Ram), and the daughters including



daughter's son of Jhimal Dushadh inherited the share of Jhimal Dushadh in the joint property after his death. The defendants also denied the legality and validity of the gift deeds dated 16.09.1946 and 07.12.1959. It was their case that the recent survey entry for the suit land had been made after the rejection of the objection by the plaintiffs before the survey authorities on the basis of the two gift deeds.

The trial court, after scrutiny of the pleadings and evidence of the parties, dismissed the suit returning the finding that the suit land was not the 'Khidmati Jagir' (burdened with service) rather its nature as recorded in the cadastral survey khatian was 'Jagir Pakrohi' and was the raiyati land of Jageshwar Dushadh. It was further found that there was no evidence to substantiate the case of the plaintiffs regarding resumption of possession of the suit land by the ex landlord and settlement of the same by the ex landlord with Jhimal Dushadh. The trial court also found that the plaintiff no. 1 raised objection to the survey entry asserting his exclusive title and possession on the basis of gift deed over the suit land but the same was rejected by the survey authorities by the order dated 22.10.1964 wherein the fact of Ramdeyia being another daughter of Jhimal Dushadh was also asserted. On this basis, the trial court further concluded that the suit was barred by limitation as prescribed in Art.

58 of the Limitation Act.

In appeal by the plaintiffs, the appellate court, after reappraisal of evidence, has affirmed the findings of the trial court and dismissed the appeal by the impugned judgment and decree.

Mr. Dwivedi, the learned senior counsel for the appellants has firstly submitted that both the courts below after negating the exclusive title of the plaintiffs over the suit land should not have dismissed the suit in entirety rather ought to have granted the decree to the plaintiffs with regard to their share in the suit land. It has been further propounded that the finding by both the courts below that Ramdeyia was the another daughter of Jhimal Dushadh is clearly vitiated in absence of evidence on record in accordance with Sections 50 and 60 of the Evidence Act. It has further been argued that both the courts below have wrongly held the suit to be barred by limitation as prescribed in Art. 58 of the Limitation Act ignoring the well settled principle that entry in the revenue records cannot be the starting point of limitation. In support of this submission, the learned senior counsel has placed reliance on the decision by the Apex Court in the case of **Daya Singh Vs. Gurdev Singh 2010 (2) SCC 194** and has further relied on the decision by the Full Bench of this Court in the case of **Nand Kumar Rai Vs. The State of Bihar 1974 P.L.J.R. 27** to bolster his submission that the entry in the survey khatian does not



create or extinguish title over the suit land. It has also been submitted that the mention of the shares of the parties in the recent survey khatiyani is itself evidence of partition between them but both the courts below have ignored the said fact before coming to the conclusion of jointness between Jhimal Dushadh and Timal Dusadh. It has thus been finally submitted that substantial questions of law arise for consideration in this appeal.

From the perusal of the judgments of both the courts below, it is limpid that the finding with regard to the bar of the limitation of the suit has been recorded on the basis of the order dated 22.10.1964 (Ext. A) passed in the survey proceeding. Both the courts below have found that the plaintiff no. 1 Nathuni Dushad raised objection before the survey authorities staking his exclusive title and possession over the suit land on the basis of the two gift deeds (Ext. 6 and 6/A). It has further been found that Shivdas Dushadh, the father of the defendants, contested the claim of exclusive title and possession of the plaintiff no. 1 in the said proceeding over the suit property wherein he also disclosed that Ramdeyia was another daughter of Jhimal Dushadh. It has been found that the survey authorities rejected the exclusive claim of the plaintiffs over the suit land on the basis of the two gift deeds and directed the suit land to be recorded in the joint names of the plaintiffs and the defendants. It has also been found that

the plaintiffs did not raise any objection to the status of Ramdeyia as daughter of Jhimal Dushadh during the said proceeding as evident from the order dated 22.10.1964 (Ext. A).

It appears from the impugned judgments of both the courts below as well as from the memo of appeal that existence of the order dated 22.10.1964 (Ext. A) has not been denied by the plaintiff-appellants. Even during the course of submissions also the said fact has not been disputed. It has however been submitted that the entry in the survey records of rights would not be the starting point of limitation as laid down in the case of **Daya Singh** (supra).

Article 58 of the Limitation Act governs a declaratory suit and prescribes a period of three years as limitation for filing of the suit. The starting point for such limitation is when the right to sue first accrue. This provision has fallen for consideration by the Apex Court in the case of **Khatri Hotels (P) Ltd. Vs. Union of India 2011 (9) SCC 126** where their Lordships have ruled as follows:-

“.....While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word “first” has been used between the words “sue” and “accrued”. This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues.

To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued.....”

While considering the issue as to when the right to sue would accrue the judicial committee in **Bolo Vs. Kaklan A.I.R. 1930 P.C. 270** has held as follows:-

“.....There can be no “right to sue” until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted.....”

It is clear from the order dated 22.10.1964 (Ext. A), as discussed in the impugned judgment, that the plaintiffs had asserted their exclusive title over the suit land on the basis of the two gift deeds of the year 1946 and 1959 (Ext. 6 and 6/A). The said claim was rejected by the survey authorities on the objection of the defendants’ predecessor and the order was passed to record the suit land in joint names of the parties. In view of this uncontroverted fact, the conclusion is inevitable that the denial by the defendants of the plaintiffs’ exclusive right over the suit land on the basis of the two gift deeds became first known to the plaintiffs in the year 1964 itself and



when the said order dated 22.10.1964 (Ext. A) was passed, there was a clear and unequivocal threat of infringement of the right claimed by the plaintiffs over the suit land. It is also not in dispute that the survey khatian has been prepared in the joint names of the parties in pursuance to the said order. This survey khatian carries with it the statutory presumption of correctness. The proponent of the learned senior counsel for the appellants on the basis of the decision in the case of **Daya Singh** (supra) that the entry in the revenue records cannot be the starting point of limitation is clearly distinguishable in such a case where the plaintiffs themselves raised the objection before the survey authorities staking their exclusive rights over the suit land and the same was dismissed upholding the objection by the defendants. In **Daya Singh** (supra), the fact was otherwise where the plaintiffs had expressed no knowledge of the survey entry whereas in the present case, the survey entry had been made in the year 1964 rejecting the plaintiffs' claim of exclusive title and possession over the suit land. It is true that an entry in the survey record of rights does not create or extinguish title over the land but this principle will not come to the rescue of the plaintiffs from the bar of limitation when after the contest by the defendants, their claim on the basis of the gift deeds was rejected long back in the year 1964. This Court is, therefore, of the view that the right to 'sue' first accrued to the

plaintiffs on 22.10.1964 itself. The finding by both the courts below that the suit is barred by limitation is therefore indefensible.

The next submission on behalf of the appellants that the learned courts below should not have dismissed the suit in entirety is also devoid of merit inasmuch as the crucial issue before the courts below was the claim of exclusive title by the plaintiffs over the suit land on the basis of the gift deeds (Ext. 6 and 6/A). Moreover, in view of the non-denial by the defendants of the joint title of the plaintiffs over the suit land there was no need by the courts below to grant decree to the plaintiffs over their share in the suit land in absence of such a relief much less a cause of action for such relief in the suit.

Both the courts below have rightly held that the plaintiffs have not led any evidence to establish the parentage of Ramdeyia even when the status of Ramdeyia as another daughter of Jhimal Dushadh was asserted by the defendants in the survey proceeding as mentioned in the order dated 22.10.1964 (Ext. A). As mentioned earlier, the plaintiffs have not disputed the factum of the order dated 22.10.1964 (Ext. A). In this view of the matter, it was for the plaintiffs to lead cogent evidence to dispute the status of Ramdeyia. Moreover, the finding in this regard has been recorded by both the court below on the basis of appreciation of evidence on record and this Court does not find the same to be unreasonable or perverse in any manner. Both

the courts have further found on the basis of the entry in the C.S. khatiyani (Ext. B) that the suit land was the raiyati land of Jageshwar Dushadh and the nature of the same was Jagir Pakrohi meaning thereby that the land was given to Jageshwar Dushadh for Chaukidari of road and it was not in the nature of Khidmati Jagir burdened with service to the ex landlord. Both the courts below further have come to the finding that the plaintiffs have failed to establish their case of resumption of the suit land by the ex landlord and its settlement with Jhimal Dushadh. The rent receipts produced by the plaintiffs have been found to be not reliable by the courts below.

The civil dispute is decided on the parameter of preponderance of probability. The issues of facts arising between the parties now stand determined by concurrent findings of the courts below on the basis of appraisal of evidence of the parties and this Court is not persuaded to find legal infirmity in the same.

In the ultimate eventuate, this Court finds no substantial question of law arising for consideration in this second appeal, which is, accordingly, dismissed.

Devendra/-

(V. Nath, J.)

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