

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No.72 of 2013

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1. Syed Mokhtar Ahmad S/O Late Syed Iftexhar Ahmad Resident Of Mohalla- Mitan Ghat, Patna City, P.S- Khajekalan, Town And District- Patna.
 2. Syed Mohammad Musa S/O Late Syed Iftexhar Ahmad Resident Of Mohalla- Mitan Ghat, Patna City, P.S- Khajekalan, Town And District- Patna.
 3. Syed Mohammad Isa S/O Late Syed Iftexhar Ahmad Resident Of Mohalla- Mitan Ghat, Patna City, P.S- Khajekalan, Town And District- Patna.
- **Appellants.**

Versus

1. Syed Naqui Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.
2. Syed Md. Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.
3. Syed Ali Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.
4. Syed Hassan Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.
5. Mrs. Murtaza Kazim W/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.
6. Syed Abrar Ahmad S/O Late Syed Iftexhar Ahmad R/O Mohalla Mitanghat, Patna City, P.S- Khajekalan, Town And District- Patna.

.... **Respondents**

with

Second Appeal No.81 of 2013

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Syed Abrar Ahmad S/O Late Syed Iftexhar Ahmad R/O Mohalla Mitanghat,

P.S- Khajekalan, Town And District- Patna.

... **Appellant.**

Versus

1. Syed Naqui Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.

2. Syed Mohammad Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.

3. Syed Ali Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.

4. Syed Hassan Kazim S/O Late Dr. Syed Murtaza Kazim Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Muzaffarpur, District- Muzaffarpur.

5. Bibi Aziz Sohara, W/o Dr.Syed Murtaza Kazim, Resident Of Mohalla- Chandwara, Town Muzaffarpur, P.O And P.S- Town Mufasil, Muzaffarpur East, District- Muzaffarpur.-**Plaintiffs/Appellants/Respondents 1st set.**

6. Syed Mokhtar Ahmad S/O Late Syed Iftexhar Ahmad Resident Of Mohalla- Mitani Ghat, Patna City, P.S- Khajekalan, Town And District- Patna.

7. Syed Md. Musa S/O Late Syed Iftexhar Ahmad Resident Of Mohalla- Mitani Ghat, Patna City, P.S- Khajekalan, Town And District- Patna.

8. Syed Md. Isa S/O Late Syed Iftexhar Ahmad Resident Of Mohalla- Mitani Ghat, Patna City, P.S- Khajekalan, Town And District- Patna.

-Defendants-Appellants-Respondents 2nd set.

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Appearance :

(In SA No.72 of 2013)

For the Appellant/s : Mr. Abbas Haider, Adv with Ranjay Kumar Singh, Adv.

For the Respondent/s : Mr. T.N.Matin, Sr.Adv. with Syed Firoz Raza, Adv.

(In SA No.81 of 2013)

For the Appellant/s : Mr. Syed Arshad Alam, Adv with Fakhruddin Ali Ahmad, Adv.

For the Respondent/s : Mr. T..N. Matin, Sr.Adv with Syed Firoz Raza, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH
ORAL JUDGMENT

10 27-08-2015

Heard Mr. Abbas Haider, the learned counsel appearing on behalf of the appellants in S.A.No. 72/2013, Mr.Syed Arshad Alam, the learned counsel for the appellants in S.A.No. 81/2013 and also Mr.T.N.Maitin, the learned senior counsel for the respondents in both the appeals.

The learned counsel for the parties have jointly submitted that the identical issues of facts and law are involved in both the appeals and therefore the two appeals should be heard together. As such, both the appeals are taken up for hearing together.

In both the appeals, the defendants are the appellants against the judgment and decree of affirmance.

The plaintiff has filed the suit for declaration of his title over the suit property and for eviction of the plaintiffs. In short, the case of the plaintiff is that his father was the owner of the suit property and he permitted the father of the defendants to reside in the suit premises. It is further case of the plaintiff that his father died in the year 1978 and he, after returning permanently from abroad has required the suit premises for his own purposes and has therefore filed the suit for the aforesaid reliefs against the defendants.



The defendants in their written statement have accepted that the father of the plaintiff was the owner of the suit premises. They have also further accepted that the father of the plaintiff permitted the father of the defendants in the year 1954 to reside in the suit premises. In the earlier written statement the defendants have resisted the claim of the plaintiff on the ground that the irrevocable licence was granted by the father of the plaintiffs with regard to the suit premises. Later on, the additional written statement has been filed wherein the defendants have come out with the case that the father of the plaintiff created a Wakf with regard to the suit premises effacing his title over the same and his name was also recorded in the assessment register of the municipality as Mutwali of the said Wakf. In this manner the defendants have questioned the right of the plaintiff to maintain the suit for declaration of his title and seeking the relief for eviction of the defendants.

The trial court returned the finding that the case of irreparable licence as set up by the defendants could not be established. However, the trial court even though concluded that the father of the plaintiff created a Wakf with regard to the suit premises but negated the claim of the defendants to remain in

possession of the suit property and decreed the suit. The plaintiff as well as the respondents filed their respective appeals against the judgment and decree of the trial court. The appellate court after reappraisal of evidence of the parties, has overturned the finding of the trial court on the issue that the original owner (father of the plaintiff) created a Wakf with regard to the suit premises and after concluding the other issues also against the defendants has dismissed the appeal filed by the defendants and allowed the appeal filed by the plaintiff.

Mr. Abbas Haider, the learned counsel for the appellants has made two submissions. The first submission is that the finding by the appellate court below discarding the case of the defendants that the original owner had created a Wakf with regard to the suit premises as recorded by the trial court cannot be sustained as it has been recorded after misconstruing and misinterpreting the evidence on record particularly the municipal assessment register (Ext-J). It has been next submitted that the appellate court below has wrongly held that the suit filed by the plaintiff was not barred by limitation.

Mr. Syed Arshad Alam, the learned counsel for the appellants in S.A.No.81/2013 has adopted the submissions made by the learned counsel for the appellants in

S.A.No.72/2013 and has submitted that the judgment and decree passed by the appellate court below is not sustainable in law.

From the perusal of the judgments of both the courts below and after considering the submissions, the fact manifestly stands admitted that the suit premises belonged to the father of the plaintiffs. The defendants have also accepted that the father of the plaintiff, in the year 1954, permitted the father of the defendants to reside in the suit premises. The defendants, however, have asserted in their written statement that the grant of permission to the father to reside in the suit premises was, in fact, in the nature of irrevocable licence and after the death of their father, the right under the said irrevocable licence has devolved upon the defendants entitling them to continue in possession over the suit premises as such.

Both the courts below, after elaborate scrutiny of the oral and documentary evidence of the parties, have disbelieved the case of grant of irrevocable licence as pleaded by the defendants. This court has not been persuaded to find unreasonableness or perversity in any manner in this finding, and in fact the submissions on behalf of the appellants in this regard has centered around reappreciation of evidence which cannot be done at the second appellate stage in order to interdict a concurrent

finding of fact unless the perversity is shown and established.

After disbelieving the case of the defendants with regard to grant of irrevocable licence, the another limb of their defence that the father of the plaintiff created a wakf with regard to the suit premises has also been considered by both the courts below. Though, the trial court accepted the case of the defendants that a Wakf with regard to the suit premises was created by the father of the plaintiff but even then it did not find the defendants to be entitled in any manner to legally continue in possession over the suit property. In appeal, by the plaintiff, the appellate court below, after reappraisal of evidence, has further disbelieved this case of the defendants also and has come to the conclusion that no such Wakf was created by the father of the plaintiff with regard to the suit premises. Before coming to this conclusion, the appellate court below has made detailed analysis of the evidence on record including the municipal assessment register (Ext. J) and thereafter has reversed the finding by the trial court in this regard. During the course of submissions on behalf of the appellants it could not be established that this finding is not based upon the evidence on record or is unreasonable in any manner.

At this juncture, it would be apposite to notice

that the defendants though in their additional written statement have introduced the case of creation of Wakf by the father of the plaintiff with regard to the suit premises but the same appears to have been done only for the purpose to show that the plaintiff has no title over the suit premises as there is no further plea on behalf of the defendants which could have legally entitled them to continue in possession of the suit premises. The defendants have accepted in the written statement that permissive possession of the suit premises was given by the father of the plaintiff to the father of the defendants. It has nowhere been disclosed by the defendants as to when the alleged Wakf with regard to the suit premises was created by the father of the plaintiff, any right was granted to the defendants' father to reside in the suit premises. Though, it is the case of the defendants that the father of the plaintiff after creation of the Wakf for the suit premises, himself became the Mutawali but it is nowhere the case that their father was in any manner associated with the said Wakf. The municipal assessment register (Ext. J) which has been strongly relied upon by the learned counsel for the appellants in support of the case of the creation of the Wakf for the suit premises only mentions the name of the father of the defendants as occupant while mentioning the name of the father of the defendants as Mutawali.

The appellate court below has extensively scanned the evidence including the deposition of the defendant no. 1 as D.W. 12, the tax receipts (Ext. B to B/24) and the tax receipts (Ext. B/25 & B/26) and has come to the conclusion that the name of the father of the plaintiff was entered in the municipal assessment register (Ext. J) without notice and knowledge to the father of the plaintiff and thereafter again even during the life time of the father of the plaintiff but without notice to him, the name of the father of the defendants was mutated in respect of the suit premises in the Patna municipal corporation on the basis of his claim as heir of the father of the plaintiff which fact has been found to be borne out from the Ext. 3, Ext.7, Ext. 4/A and Ext. 5. It has further also been found on the basis of Ext. B/25 and B/26 that the defendants after the death of their father have got their names mutated in the municipal records as owner of the suit premises. It will be significant to notice that no evidence has been adduced on behalf of the defendants not it is their pleading that the entry in the municipal assessment register (Ext.J) or the mutation of the name of the father of the defendants or the defendants after the death of their father were done after the notice to the father of the plaintiff or to the plaintiff. It is not in dispute that the father of the plaintiff died in the year 1978 and the father of the defendants died in the



year 1983. The suit has been filed in the year 1986 by the plaintiff for the relief of eviction/recovery of possession of the suit premises from the defendants on the basis of assertion of the title after sending legal notice (Ext. 1) on 04.01.1986 to the defendant for vacating the suit premises. The appellate court below has therefore rightly held that the suit filed by the plaintiff would not be barred by limitation either in view of Article 113 of the Limitation Act which prescribes a period of three years from the date when the right to sue accrues or in any view, under Article 65 of the Limitation Act which prescribes a period of 12 years for a suit to recover possession of immovable property on the basis of title from the date when the possession of the defendant becomes adverse. This court therefore does not find substance in the submission on behalf of the appellants that the issue of limitation has been wrongly decided by the courts below.

Examining the submission on behalf of the appellants from another angle also, it becomes lucid in view of the admitted case of the defendants that their father was allowed permissive possession as licensee over the suit premises. In such a case, the “estoppel by entry into possession” would operate against the defendants and they cannot be allowed to deny the title of the landlord so long as they have not openly restored

possession of the suit premises to the landlord. The principle in this regard has been laid down by a Bench of this Court in the case of ***Jaikaran Singh Vs. Sita Ram Agarwalla, A.I.R. 1974 Patna 364*** where their lordships have laid down that the provision of estoppel as contained in Section 116 of the Evidence Act is not exhaustive and does not deal or profess to deal with all kinds of estoppel or occasions of estoppel arising between the landlord and tenant and one of the kind of such estoppel is 'estoppel by entry into possession'. Their Lordships have laid down as follows:-

“....the consensus of judicial opinion, both of the Courts of India as well as those of English Courts, is that before surrendering or solemnly renouncing possession the tenant shall not be permitted to set up a title in a third person, or Jus tertii. By so doing he would be challenging the title of the lessor on the date of the demise to settle for such time as the tenancy had not been determined. As the tenant in such cases has been inducted on the leasehold premises by the lessor on the strength of such a title enabling him to enter

into a contract of tenancy, the tenant shall not be permitted to challenge such title before surrendering possession. In that sense, the principle underlying S. 116 of the Evidence Act may, also be said to be attracted. It has, therefore, been repeatedly held that possession must be surrendered before any such defect in the lessor's title is allowed to be proved.....”

Though, the aforesaid dictum was rendered with regard to the landlord and tenant but in view of Section 116 of the Evidence Act and the settled position in law the same principle will be attracted in case of a licensee in possession over the immovable property.

For the aforesaid reasons and discussions, this Court comes to the conclusion that there is no substantial question of law arising for consideration in both the appeals, which are, accordingly, dismissed.

(V. Nath, J)

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