

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.523 of 2009

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Jai Ram Sah, son of Late Dharichhan Sah, resident of Village Ziradei, Pargana
Pachalakh, PO Ziradei, PS Ziradei, District Siwan
..... Defendant Appellant

.... Appellant

Versus

1. Virendra Singh
2. Raj Kishor Singh
3. Anil Singh, all sons of Late Lakshaman Rai
4. Dharmawati Devi, daughter of Late Lakshaman Rai
5. Laljharti Devi, wife of Late lakshaman Rai Respondent 1st set
6. Ramesh Sah, son of Latge Jai Ram Sah
7. Ram Kalo Devi, wife of late Kashi Rai
8. Bal Mukund Singh, son of Late Kashi Rai
9. Meena Devi
10. Kamala Devi
11. Chinta Devi
12. Manju Devi
13. Shanti Devi
14. Sunita Devi
15. Uma Kumari, all daughters of Late Kashi Rai
16. Sudama Rai, son of Shyambihari Rai
17. Bhagmano Devi, wife of Shabhapati Rai
18. Bhushan Rai
19. Arun Singh
20. Pramod Singh
21. Ashok Singh
22. Sanjay Singh
23. Munna Singh, all sons of Late Shabhapati Rai
24. Ajora Devi
25. Bhagmani Devi, both daughters of Late Shabhapati Rai
26. Prabhu Prasad, son of Late Ganesh Prasad

All residents of Village Ziradei, Parganba Pachalakh, PO Ziradei, PS Ziradei,
District Siwan

..... Defendants Respondents Respondent 2nd set

.... Respondents

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Appearance :

For the Appellant/s : Mr. CHANDRA KANT

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 11-08-2015

Heard learned Counsel for the appellant. Learned Counsel for
the respondents is also present.

2. The defendant in the suit is the appellant in the present appeal against the judgment and decree of affirmance.

3. The suit was filed by the plaintiff praying for declaration of title and recovery of possession over the suit land. The defendant denied the assertion of the plaintiff and came out with a case that he had earlier purchased some land from the plaintiff and thereafter as the area was deficient for construction of a house he took over possession of the suit land. The defendant also claimed to have acquired title on the basis of adverse possession. It was the further case of the defendant that he also applied for grant of parcha under Bihar Privileged Persons Homestead Tenancy Act (hereinafter referred to as 'the Act') and the same was granted.

4. The issues were framed in the suit and one of the issues was the bar of the suit under Section 18 of the Bihar Privileged Persons Homestead Tenancy Act. The trial court after scrutiny of the pleadings and evidence returned the finding that the suit was not barred under Section 18 of the said Act as the parcha which was granted to the defendant was obtained by fraud and without justification. The trial court also recorded the finding of title in favour of the plaintiff and granted the decree as prayed.

5. In appeal, the appellate court after reappraisal of evidence concurred with the findings of the trial court and dismissed the appeal.

6. Learned Counsel for the appellant has made two submissions. It has been firstly canvassed that the courts below have not taken steps for scientific measurement of the suit land and have wrongly relied upon the report of a private Amin (Ext. 6). It has been



urged that there has been discrepancy in the cases of the parties with regard to the area encroached by the defendant and therefore as the suit was essentially a suit for removal of encroachment, the legal requirement was there for appointment of a survey knowing Pleader Commissioner. It has been next submitted that there was no pleading by the plaintiff of fraud played by the defendant in obtaining the parcha under the above said Act and in absence of such pleading of fraud both the courts below have committed error of jurisdiction in making out a third case. It has also been submitted that as the defendant on the basis of the purcha granted in his favour is in possession over the suit land, the plaintiff would be deemed to have constructive notice with regard to the title of the defendant which he was professing. Learned Counsel has relied upon the decisions reported in the case of **Bishundeo Narain & anr vs Seogeni Rai & ors. AIR 1951 SC 280, A.C.Anantha Swary & ors vs. Boraiah (D) by L.Rs. 2005(1) PLJR 20 (SC) and Shanti Budhiya Vesta Patel & ors vs. Nirmkala Jayprakash Tiwari & ors (2010) 5 SCC 104** in order to strengthen his submission that fraud must be specifically pleaded as required under Order 6 Rule 14 CPC. No other submission has been made on behalf of the appellant.

7. After considering the submissions and perusal of the impugned judgment of both the courts below it is limpid that the spinal issue in the suit related to the title of the plaintiff over the suit land and his entitlement for recovery of possession of the same from the defendant. While contesting the said claim of title of the plaintiff, the defendant has come out with the case of his adverse possession over the suit land as well as the grant of parcha in his favour under the

provisions of Bihar Privileged Persons Homestead Tenancy Act.

8. The appellate Court below in its judgment has taken into notice the plea of the defendant – appellant in his written statement that when he found his purchased land to be insufficient for construction of house, he took over the possession of the suit land and amalgamated the same with his purchased land for construction of his house. In his deposition as PW 6, the defendant in paragraph 2 has also admitted that he has encroached upon the suit land. He has further admitted that the suit land belongs to the plaintiff after partition with his brother. But in his further pleadings in the written statement, this defendant has claimed to have title over the suit land on the basis of the Parcha granted under the Bihar Privileged Persons Homestead Tenancy Act(in short, 'the Act').

9. In the backdrop of these materials, the appellate court below has rightly concluded that the case of acquisition of title by adverse possession as pleaded by the defendant is demolished by his own case of obtaining parcha under the act which presupposes 'tenancy' over the homestead land though as a 'privileged tenant' of the landlord and does not apply in case of encroachment or trespass. In sequel, the defendant has also raised the plea of bar of the suit under Section 18 of the Act and a specific issue was framed in the suit in this regard. Both the parties went to trial on this issue as well and led their evidence. The courts below after scrutiny of evidence have come to the concurrent findings that the Parcha was granted to the defendant for the suit land without notice to the plaintiff who was the admitted owner. The appellate court below has considered the depositions of D.W. 7 and D.W. 8 (Amin and Karmchari of the Anchal) as well as the reports by them and also



Parcha (Ext. 'E') and has come to the finding that the plaintiff, who is the admitted owner of the suit land, has nowhere been made party in the Parcha proceeding nor notice was issued. It has further been found on the basis of evidence that the defendant is not a privileged person as defined under the Act as he has other properties as well. It has therefore been held that the Parcha in question is invalid and without jurisdiction and the bar under Section 18 of the Act would not be attracted.

10. In this background, this Court does not find substance in the submission on behalf of the appellant that in absence of the pleading of fraud by the plaintiff, the adjudication by the court regarding invalidity of the parcha in question is vitiated. The legal conundrum, sought to be raised on behalf of the appellant also falls apart in view of the fact that the plea of the bar of the suit has been raised by the defendant himself and specific issue has been framed in that regard and answered against the defendant after appreciation of evidence led by the parties. The decisions relied upon by the learned counsel for the appellant are not relevant in the present setting of facts. To the contrary, the principles laid down by the Constitution Bench of the Apex Court in the case of Bhagwati Prasad vs. Sri Chandramauli (AIR 1966 SC 755) and subsequently reiterated in Ram Swaroop Gupta vs Bishun Narayan (AIR 1987 SC 1242) are diametrically opposite to the proposition by the learned counsel for the appellant. Their Lordship in Ram Swaroop Gupta (Supra) has laid down as follows:-

“..... Whenever the question about lack of pleading is raised the enquiry should not be so much about the



form of pleading, instead the court must find out whether in substance the parties knew the case and the issue upon which they went to trial. Once it is found that in spite of deficiencies in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not open to a party to raise the question of absence of pleadings in appeal”

11. The next submission on behalf of the appellant is with regard to the appointment of a Pleader Commissioner for measurement of encroachment. From the case of the defendant and also during course of argument, it is apparent that the defendant has accepted to have taken possession of the suit land. No dispute regarding the identify of the suit land or vagueness in the description of the suit land has been raised by the defendant. The Parcha (Ext. 'E') relied upon by the defendant must also be containing the description of the suit land. The report of the private Amin (Ext. 6) has been produced by the plaintiff only to establish the allotment of the suit land in his share and it has nothing to do with the encroachments by the defendant over the suit land. In view of these facts and in absence of any case by the defendant that he is in possession of more area or lesser area, there is no scope for the contention that the area in possession of the defendant should have been demarcated by scientific measurement by appointment of a survey knowing pleader Commissioner. Such submission on behalf of the appellant appears to have been made more in desperation than in substance.

12. For the aforesaid reason and discussion, this Court concludes that the findings by the courts below do not suffer from

perversity or unreasonableness in any manner and there is no substantial question of law arising for consideration in this appeal. This appeal is, accordingly, dismissed.

(V. Nath, J.)

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