

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.36 of 2013

(Against the judgment and decree dated 08.01.2013 passed by the Subordinate Judge-III, Gopalganj in Title Suit No.112 of 2005)

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Hiralal Pandit & Anr.

.... Plaintiffs-Appellants

Versus

Durgabati Devi & Ors.

.... Defendants-Respondents

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Appearance :

For the Appellants : Mr. Mritunjay Prasad Singh, Advocate.

For the Respondents : Mr. S.S. Dwivedi, Sr. Advocate.

Mr. Shailendra Kumar Dwivedi, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL JUDGMENT

Date: 08-01-2015

This first appeal has been filed by the plaintiffs-appellants against the judgment and decree dated 08.01.2013 passed by the learned Subordinate Judge-III, Gopalganj in Title Suit No.112 of 2005 whereby the learned trial court dismissed the plaintiffs' suit.

2. The plaintiffs-appellants filed the aforesaid suit praying for declaration of their title and for declaration that the sale deed executed by defendant nos.3 and 4 in favour of defendant no.1 is null and void.

3. The plaintiffs claimed the aforesaid relief alleging that the suit Plot No.591 of Khata No.166 belonged to Mr. H.L. Rasal. It was recorded in his name in the khatian. Mr. H.L. Rasal was resident of England. One Sadhu Prasad Sah filed money suit against the said



H.L. Rasal, which was decreed and in the execution the suit land was auction sold. Sadhu Prasad Sah himself purchased the same and came in possession thereof. Thereafter he settled the land with the father of the plaintiffs in the year 1940 after taking najrana of Rs.51/- only and since then the plaintiffs' father and on his death the plaintiffs are coming in possession of the property as owner thereof. The defendant nos.3 and 4, who were the heirs of Sadhu Prasad Sah, illegally sold the property by five registered sale deeds dated 09.02.2005 and 10.02.2005 in favour of defendant no.1. Therefore, the suit has been filed.

4. The defendants-respondents filed contesting written statement including defendant nos.3 and 4, i.e. vendors of defendant no.1. Their main defence is that Sadhu Prasad Sah never settled the land in favour of the father of the plaintiffs. The father of the plaintiffs obtained the land in mortgage in the year 1958 and came in possession, which was subsequently redeemed by the present defendant no.1 and came in possession.

5. On the basis of the aforesaid pleadings of the parties the learned trial court framed various issues and thereafter the court below on the basis of evidences recorded the finding that the plaintiffs failed to prove their title and possession over the suit land and accordingly dismissed the plaintiffs' suit.

6. The learned counsel Mr. Mritunjay Prasad Singh appearing on behalf of the appellants submitted that the learned trial court has passed a cryptic judgment without discussing the evidences adduced by the plaintiffs in support of their case of settlement and possession. The learned counsel submitted that after settlement in the year 1940 the plaintiffs' father came in possession and on his death the plaintiffs are continuing in possession of the suit land after constructing a hut and is doing his cast business. A pleader commissioner was appointed during the pendency of the suit, who submitted a report to the effect that there is old hut standing on the suit land and there were *naad*, *khuta* and tube-well as well as some trees were found, which indicate that the plaintiffs are in possession of the property and they have *naad*, *khuta* over the same. They have also got a tube-well there and planted some trees but the learned court below without considering all these aspects of the matter has wrongly held that the plaintiffs have failed to prove their possession. The plaintiffs examined as many as eight witnesses in support of the case of the plaintiffs that the land was settled by Sadhu Prasad Sah in the year 1940 in favour of the father of the plaintiffs and since then the father and the plaintiffs are continuing in possession thereof but the learned court below in one stroke held that no documentary evidence has been produced in support of the settlement. According to the

learned counsel, because najrana of Rs.51/- was only paid, it was not necessary to register any document. Therefore, in fact the settlement was oral settlement. The learned counsel further submitted that since the land was homestead land, no rent was payable. Subsequently, however, the holding was created with respect to the suit land, which was Holding No.194 and the plaintiffs are paying holding tax.

7. The learned counsel further submitted that the plaintiffs have also acquired title by adverse possession since they are in possession of the suit property since 1940, which is within the knowledge of the defendants and the true owner, i.e. defendant nos.3 and 4, therefore also the plaintiffs' suit should have been decreed by the court below but the court below did not frame any issue nor recorded any finding and dismissed the plaintiffs' suit. On these grounds, the learned counsel submitted that the impugned judgment and decree be set aside and the plaintiffs' suit be decreed.

8. On the other hand, the learned senior counsel Mr. S.S. Dwivedi appearing for the respondents submitted that except the oral statements made by the witnesses examined on behalf of the plaintiffs there is no reliable evidence regarding settlement. Moreover, there is no provision for settlement by a raiyat and, therefore, when the suit property was purchased by Sadhu Prasad Sah in auction sale, he acquired a raiyati right as such became the raiyat under the *malik*. In



such circumstances the raiyat being Sadhu Prasad Sah could not have settled the land in the year 1940. In support of this fact the learned counsel placed Ext.D/1 (Khatian) and submitted that in this Khatian the name of *malik* has been mentioned as Laljhari Sah and others and so far Khata No.166 is concerned, Mr. H.L. Rasal was the raiyat. According to the learned counsel, plot number of the suit plot is 591 under Khata No.166, therefore, the story of settlement made by the plaintiffs is not reliable nor acceptable. The learned counsel further submitted that by Ext.E and Ext./1 the suit plot was given in mortgage half and half to the father of the plaintiffs and one Narayan Thakur in the year 1958. If, in fact, the father of the plaintiffs was the real owner on the basis of the settlement made by Sadhu Prasad Sah in the year 1940 then why and how he obtained the possession of the property through mortgage in the year 1958, which clearly indicate that there was no settlement in the year 1940. For the first time they came in possession over the property on the basis of mortgage in the year 1958 and then they have constructed *palani*, *naad* and *khuta* etc. In the back of the mortgage deed (Ext.E and E/1) the father of the plaintiffs, namely Harihar Pandit has made redemption note to the effect that he received the mortgage money, which was paid by the defendant no.1 and this endorsement was made in the year 1988. So far these exhibits, i.e. Ext.E and Ext./1 are registered mortgage deed.

According to the learned counsel, there is presumption that a registered deed is validly executed and the plaintiffs never challenged or denied the execution and registration of the mortgage deed and the redemption note made by their father.

9. So far the municipal tax receipts are concerned, learned senior counsel placed Ext.D (Khatian), which stands in the name of father of the plaintiffs and submitted that the father of the plaintiffs had a house consisting of five rooms and there is a *sahan* attached to the house also and, therefore, the plaintiffs are paying municipal tax with respect to this house which they have filed in this case. According to the learned counsel, there is nothing on record to show that these municipal tax receipts (Ext.1) are with respect to the suit land, i.e. Plot No.591.

10. So far adverse possession is concerned, the learned senior counsel submitted that the plaintiffs filed the suit claiming title on the basis of the settlement in the year 1940. Now the plaintiffs are praying for declaration of title on the basis of adverse possession. According to the learned counsel, when they came in possession as mortgagee in the year 1958, it is for them to plead and prove that since when they started claiming title adverse to the true owner. Simply they are saying that they are in possession for long period, therefore, they have acquired title by adverse possession. The learned



counsel relying on the decision of the supreme court in the case of **Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil**, reported in A.I.R. 1995 Supreme Court 895 and in the case of **Karnataka Board of Wakf Vs. Govt. of India & Ors.**, reported in 2004 (3) P.L.J.R. 245 (SC) submitted that the pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.

11. The learned counsel further submitted that eight witnesses have been examined on behalf of the defendants and out of the said eight witnesses all the material witnesses including defendant no.1 and one of the vendors of defendant no.1 all have stated that the plaintiffs are not in possession on the suit property and they are in possession on the road side land.

12. So far the ground of the learned counsel for the appellants that the judgment is cryptic and non-consideration of evidences in detail is concerned, the learned counsel submitted that this may be a ground for interference in second appeal but being the first appellate court on this ground the judgment and decree cannot be set aside and this Court is required to go through the evidences and record its own finding, particularly when the evidences are available on record. In support of his contention the learned counsel relied upon a decision of the Supreme Court in the case of **Ashwinkumar K.**

Patel Vs. Upendra J. Patel and others, reported in A.I.R. 1999 Supreme Court 1125. On these grounds the learned counsel submitted that the first appeal is liable to be dismissed with costs.

13. In view of the above rival contentions of the parties the question arises for consideration is as to whether the plaintiffs have been able to prove their title and possession over the suit property and whether the judgment and decree impugned is sustainable in the eye of law or not?

14. The simple case of the plaintiffs is that their father had taken settlement of the suit land in the year 1940 on payment of najrana of Rs.51/- to Sadhu Prasad Sah. On the contrary, the defendants have denied this case. It is admitted fact that so far settlement is concerned, there is no document in support of the settlement. Only the oral evidence has been produced by the plaintiffs. The witnesses examined by the plaintiffs have said that the father of the plaintiffs took settlement in the year 1940 and since then they are coming in possession. It is admitted fact that that is not denied by the defendants even that the property was purchased in auction by Sadhu Prasad Sah. The defendants have produced Ext.D/1 in support of the fact that Mr. H.L. Rasal was not the *malik* of the land nor he was intermediary rather he was only a raiyat. From perusal of this Ext.D/1 I find that the *malik* were Laljhari Sah and others and with respect to



Khata No.166 the owner of Kothi was raiyat and it is said that the owner of Kothi was H.L. Rasal, therefore, he was admittedly a raiyat of Khata no.166 not the *malik*. No provision has been shown to me in support of the fact that a raiyat can also make a settlement. Moreover, in the present case according to the plaintiffs the *malik* has settled the land. This case of the plaintiffs is falsified by this Ext.D/1. When the suit plot was sold in auction in execution of the decree passed in favour of Sadhu Prasad Sah, the raiyati interest of H.L. Rasal was sold which was purchased by the decree-holder Sadhu Prasad Sah.

15. The plaintiff no.1, who has been examined as P.W.1, in his cross-examination clearly stated that he has not seen any paper with respect to the settlement and in support of this settlement he has got no proof. He has stated that he does not know whether father and grand-father was working in the office of Sadhu Prasad Sah. He is also unable to show whether the zamabandi has been opened in the name of his ancestor or not and he never paid malguzari to the State Government.

16. It appears that some municipal tax receipts have been produced by the plaintiffs, which have been marked as Ext.1 series. From perusal of these exhibits, I find that there is nothing to co-relate these municipal tax receipts with the suit plot no.591. Ext.D shows that one house and *sahan* have been recorded in the name of Fakir

Pandit, who is the ancestor of the plaintiffs and, therefore, municipal tax receipts have been filed and it cannot be denied that it might be related to that house and *sahan* belonging to the ancestor of the plaintiffs, Fakir Pandit.

17. Over and above, Ext.E is the most important registered mortgage deed. This registered deed is of the year 1958 with respect to half portion of the suit plot no.591. In this registered mortgage deed the father of the plaintiffs, namely Harihar Pandit has obtained mortgage of half portion of the suit land in the year 1958. Ext.E/1 is another registered mortgage deed by which the other half portion was mortgaged by the plaintiffs' vendors in favour of Narayan Thakur in the year 1958. The question is if plaintiffs' father or grand-father were in possession of the property as owner since 1940 why they took the property in mortgage from the vendors of the defendant no.1? There is no explanation at all. The father of the plaintiffs, namely Harihar Pandit made a redemption note in Ext.E/1 in the year 1988 wherein he has written that he has received Rs.500/- the mortgage amount from husband of defendant no.1. So far this fact, i.e. the endorsement and L.T.I. or the document, Ext.E, is concerned, the plaintiffs neither explained nor have challenged anywhere. On the contrary, the defendants have examined the witnesses including the husband of defendant no.1, the vendors of defendant no.1 and the other material



witnesses, who all have stated that the plaintiffs are not in possession of the property rather they are in possession of the land by the side of the road. It may be mentioned here that there is no cross-examination made by the plaintiffs on this question. Moreover, here as discussed above there are overwhelming documentary evidences in support of the fact that the plaintiffs came in possession as mortgagee in the year 1958 and so far the settlement of the year 1940 is concerned, there is nothing on record except the oral statement that too from a raiyat, who is not capable of making any settlement.

18. So far adverse possession is concerned, the Hon'ble Supreme Court in the decisions relied upon by the learned counsel for the respondents has held that the pleas on title and adverse possession are mutually inconsistent and they cannot stand together. So far adverse possession is concerned, it will not start running until the claim of the plaintiff regarding general title is relinquished. In the present case admittedly the plaintiffs have filed the suit for declaration of title on the basis of settlement. Moreover, when they have failed to prove their possession, there is no question of adverse possession arises.

19. So far the submission of learned counsel for the plaintiffs that the judgment is cryptic and trial court has not discussed any evidence in great detail is concerned, it may be mentioned here



that this Court being the first appellate court exercising jurisdiction under Section 96 of the Code of Civil Procedure has the same power that of the trial court in view of Section 107 of the Code of Civil Procedure. The Hon'ble Supreme Court in the case of **Ashwinkumar K. Patel Vs. Upendra J. Patel and others, reported in A.I.R. 1999 Supreme Court 1125** has held that if evidences are available on record instead of remanding the matter to the trial court, the appellate court should decide itself the issues between the parties because remanding the matter will be a great hardship to the litigants. In view of the settled principles of law, I myself perused the evidences as discussed and came to the conclusion that the plaintiffs have failed to prove either their settlement or their possession. Therefore, the findings of the trial court on these questions are hereby confirmed.

20. It may be mentioned here that Interlocutory Application No.6413 of 2014 has been filed by the respondents praying therein to restrain the appellants from interfering with the peaceful possession of the respondents from the land in dispute. I had directed that this interlocutory application shall be considered at the time of hearing. Since the appeal is being heard and disposed of on merit, no separate order is passed on this interlocutory application. The result of appeal will govern this interlocutory application.

21. In the result, I find no merit in this first appeal and accordingly, this first appeal is dismissed.

(Mungeshwar Sahoo, J)

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