

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.343 of 1987

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1. Ram Charan Mistry
 2. Ram Khelawan Mistry @ Ram Khewlwan Mistry
 3. Ramroop Mistry (name expunged), all sons of Late Bishun Mistry
 4. Birendra Kumar Sharma
 5. Surendra Kumar Sharma
 6. Upendra Kumar Sharma
 7. Jitendra Kumar Sharma, all sons of Ram Charan Mistry
 8. Sudama Sharma @ Sudama Mistry
 9. Krishna Sharma, sons of Ram Khelawan Mistry
 10. Durpal Sharma @ Dwarpal Sharma
 11. Govind Sharma, sons of Ramroop Mistry, all residents of Village Chandan, P.S. Sabour, District Bhagalpur
 12. Smt. Tabha Devi @ Dhabha Devi, daughter of Jagdish Mistry (name expunged)
 13. Smt. Mabha Devi, daughter of Karti Mistry (name expunged)
 14. Smt. Gulabiu Devi, wife of Balram Mistry (name expunged)
 15. Smt. Khokhiya Devi, wife of Sabir Mistry
 16. Smt. Nirmala Devi, wife of Madho Mistry, resident of Village Nirhat, P.S. Sultanganj, District Bhagalpur Plaintiffs Appellants

.... Appellants

Versus

1. Shib Sharma, son of Pairoo Mistry
2. Ganesh Sharma
3. Smt. Yasoda Devi, daughter of Pairoo Mistry
4. Sikandar Mistry, son of Late Naresh Mistry resident of Village Chandheri, P.S. Sabour, District Bhagalpur Defendants Respondents

.... Respondents

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Appearance :

For the Appellant/s : Mr. T.N.Maitin, Sr. Advocate
Mr. Bishwa Nath Choudhary

For the Respondent/s : Mr. Uday Shankar Sharan Singh
Mr. Swapnil Kumar Singh

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 06-05-2016

Heard Mr. T.N.Maitin, learned Senior Counsel appearing for the appellants and Mr. Uday Shankar Sharan Singh, Advocate, appearing on behalf of the respondents.

2. The plaintiffs are the appellants in this appeal against the judgment and decree of affirmance, dismissing the suit filed by the

plaintiffs. The suit was filed by the plaintiffs for declaration of title and confirmation of possession over the suit land described fully in the schedule of the plaint.

3. The genealogy of the family of one Bhukhan Mistry is admitted and it is also admitted that Bhukhan Mistry had two sons namely Bishun Mistry and Pairoo Mistry. The descendants of Bishun Mistry are the plaintiffs in the suit and the descendants of Pairoo Mistry are the defendants in the suit. It is the case of the plaintiffs that Bhukhan Mistry did not have much property except the residential house and the *bari* land and after his death the said property was partitioned between his two sons namely Bishun Mistry and Pairoo Mistry and thereafter Bishun Mistry who was a carpenter went to Kolkata to earn his livelihood and from his own earned money he acquired land measuring 1.9 Acres by a registered sale deed as well as oral sale. It is also the case of the plaintiffs that Bishun Mistry dealt with the said property by mortgaging the same which mortgages were later on also redeemed. It has, however, been alleged by the plaintiffs that taking benefit of absence of Bishun Mistry, his brother Pairoo Mistry got his own name entered in the consolidation records which was started during pendency of the survey proceeding. It is also the case of the plaintiffs that later on the dispute between the two brothers were reconciled through a compromise petition filed before the Gram Panchayat. The plaintiffs have stated that the cause of action for the suit arose when the widow of Pairoo Mistry got her name mutated in the revenue records and the objection by the plaintiffs was rejected.

4. The defendants, on the other hand, have come out with the case that 1.9 Acres of land was acquired by Bhukhan Mistry along with



Kharju Mistry in which the share of kharju Mistry was $2/3^{\text{rd}}$ i.e. 10 annas and the share of Bhukhan Mistry was $1/3^{\text{rd}}$ i.e. 6 annas. It has, however, been also pleaded in the written statement that subsequently Bishun Mistry as the Karta of the family acquired 1.9 Acres of land from Kharju Mistry. The defendants have further averred that there was a partition between the two brothers in the year 1947 in which Pairoo Mistry got 46 decimals of land which was the suit land and accordingly the name of Pairoo Mistry was recorded in the revenue records and the name of wife of Pairoo Mistry was mutated. The defendants have also stated that they have all along been in possession of the suit land and have also perfected their title by adverse possession. The defendants, however, have denied that Pairoo Mistry filed any petition for compromise before the Gram Panchayat and the mortgages executed by Bishun Mistry were all forged and fabricated.

5. In view of the pleadings of the parties, the trial court returned the findings on all the issues against the plaintiffs and dismissed the suit. The appellate court below in appeal by the plaintiffs concurred the findings of the trial court and dismissed the appeal by the impugned judgment and decree.

6. This second appeal has been admitted for hearing by order dated 30.4.1988 on the following substantial question of law:-

“Whether the court of appeal below erred in law in dismissing the suit on the ground that the defendants have acquired title by adverse possession.?”

7. Mr. Maitin, learned Senior Counsel appearing on behalf of the appellants, at the out set has submitted that two other substantial questions of law also arise for consideration in this appeal in the facts



and circumstances of the case relating to the legal sustainability of the judgment by the appellate court below without recording any finding on title and possession of the plaintiffs over the suit land and the material irregularity committed by the appellate court below in not granting the decree to the plaintiffs on the basis of sale deed (Ext. 8) which is admittedly in the name of Bishun Mistry, who was the predecessor of the plaintiffs when the defendants have failed to prove that the acquisition of the property by the said sale deed was a joint family acquisition. In support of these proposed substantial questions of law, the learned Senior Counsel has referred to the averments made in the plaint and the written statement as well as the findings by the appellate court below. This Court after considering the submissions finds it appropriate that two substantial questions of law as proposed by the learned Senior Counsel for the appellants be also framed for consideration in this appeal. Accordingly the following two additional substantial questions of law are formulated for consideration in this appeal:-

i). Whether the lower appellate court erred in law in dismissing the appeal of the plaintiffs without giving any finding on title and possession of the plaintiffs over the suit land?

ii). Whether the courts below erred in law in not decreeing the suit of the plaintiffs as admittedly the sale deed (Ext. 8) was in the name of Bishun Mistry, ancestor of the plaintiffs, and the defendants have failed to prove that the suit property was acquired out of the joint family fund?

8. Mr. Maitin, at the out set has made a frontal attack upon the



manner in which the appellate court below has passed the impugned judgment and decree dismissing the appeal of the plaintiffs without recording any categorical finding on the title and possession of the plaintiffs. It has been canvassed that the suit has been filed by the plaintiffs for declaration of title and confirmation of possession and, therefore, the issue of title of the plaintiffs was the spinal issue in the suit as well as the appeal. It has been contended that even after dismissal of the suit by the trial court, the principle of law and procedure still enjoined the appellate court below to record its own independent finding at least on the material issue arising between the parties upon reassessment of the evidence on record. It has also been argued that even the point which has been formulated by the appellate court below is also not in accordance with the provisions of Order 41 Rule 31 CPC which require the specific points to be formulated instead of formulation of points for determination in general and casual manner. It has been pointed out that though the appellate court below has considered the genuineness of Exts. 4 and 5 as well as the evidence with regard to the partition between Bishun Mistry and Pairoo Mistry in the year 1953 as well as the purchase of suit land by Bishun Mistry but the crucial fact that the sale deed was standing in the name of Bishun Mistry was glaring and the defendants have neither pleaded nor proved existence of nucleus in the joint family out of which the suit property could have been acquired and therefore the omission by the appellate court below to record a finding in regard to the issue of title of the plaintiffs becomes a material dent and the impugned judgment and decree cannot be sustained for the said reason. It has been lastly submitted that in the background of these facts it would be just and appropriate to remand the matter back to the

appellate court below to consider this aspect in accordance with law. The learned Counsel has relied upon a number of decisions in support of his submission.

9. Mr. Uday Shankar Sharan Singh, the learned Counsel who has appeared for the respondents has accepted that the impugned judgment passed by the appellate court below is not in accordance with law as there is no finding recorded by the appellate court below on the main issue pertaining to the title of the plaintiffs over the suit land. The learned Counsel has raised no objection to the prayer made on behalf of the appellants to remand the matter back to the appellate court below for a fresh decision in accordance with law.

10. After considering the aforesaid submissions and the categorical stand of the learned Counsel on behalf of the respondents supporting the contentions raised on behalf of the appellants, the scope of consideration of the substantial question of law becomes limited. It is apparent from the records that the suit has been filed by the plaintiffs for declaration of title and possession over the suit land. The basis of the claim of the plaintiffs over the suit land is the sale deed dated 2.3.1945 (Ext. 8) which admittedly stands in the name of Bishun Mistry. By the said sale deed an area measuring 1.91 Acres of land has been purchased by Bishun Mistry. There is no dispute that the suit land consisting of the area of 46 decimals is part of the land acquired by the sale deed dated 2.3.1945. The plaintiffs have claimed the said property to be exclusively owned by their predecessor Bishun Mistry, whereas the defendants have claimed the said property to be a joint acquisition by the karta of the joint family admeasuring an area of 46 decimals claiming that the same was allotted in the share of Pairoo Mistry, the predecessor



of the defendants in partition in the year 1956. It is manifest from the judgment of the appellate court below that no separate point has been formulated for determination with regard to the title of the plaintiffs over the suit land. Instead the point which has been formulated is general in nature with regard to the decision in the suit to be proper and on the basis of evidence on record. It also does not appear from the latter part of the judgment that the appellate court below has at all adverted to the issue of acquisition of the exclusive title by Bishun Mistry on the basis of sale deed (Ext. 8). Mr. Maitin has rightly relied upon the decision of the Apex Court in the case of ***H. Siddiqui v. A. Ramalingam, AIR 2011 SC 1492***, where their Lordships have made the following observations in the context of Order 41 Rule 31 CPC as well as the procedure to be followed by the appellate court below in appeal:-

“18.The said provisions provide guidelines for the appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate court that the court has properly appreciated the facts/evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance with the said provisions if the appellate court’s judgment is based on the independent assessment of the relevant evidence on all important aspects of the matter and the findings of the appellate court are well founded and quite convincing. It is mandatory for the appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first appellate court must not record mere general expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory

provisions.

Their Lordships further have also taken into notice the decision in the case of B.V.Nagesh v. H.V.Sreenivasa Murthy, as follows:-

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

11. Mr. Maitin thereafter has relied upon the two decisions of this Court in the case of **Smt. Parbatila Devi vs. Most. Sakuntala Devi, AIR 1986 Patna 1 and Chandar Sah vs. Most. Godhani AIR 1981 Patna 43** in support of the submission that a member of a joint family can acquire separate property out of his own earning even in state of jointness and the said acquisition shall deemed to be his self acquisition until adequate nucleus in the hands of the joint family is proved or shown to be existing which could have been sufficient for acquisition of the said property.

12. As mentioned above, Mr. Uday Shankar Sharan Singh, the learned Counsel appearing for the defendant-respondents has not controverted the aforesaid submission on behalf of the appellants and has further submitted that the impugned judgment of the appellate court below cannot be legally sustained as it suffers from lacunae going to the

root of the matter and the appeal requires reconsideration by the appellate court below.

13. In view of the aforesaid discussions and submissions, this Court answers the additional substantial question of law no. (i) pertaining to absence of finding by the appellate court below on the issue of title and possession of the plaintiff over the suit land in affirmative and finds it fit and proper to remand the matter back to the appellate court below for fresh consideration. This Court, therefore, refrains from determining other substantial questions of law as framed in this appeal.

14. In the result, this appeal is allowed and the impugned judgment passed by the appellate court below is set aside. The appeal is remanded back to the appellate court below for a fresh decision in accordance with law.

15. In the facts and circumstances of the case, there shall be no order as to cost.

Snkumar/-

(V. Nath, J.)

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