

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.589 of 2011

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Rajeev Kumar Barnwal @ Raju S/O Sri Laxmi Narayan Darnwal By Faith- Hindu
By Profession- Cultivation, Resident Of Village- Chandan, P.O & P.S- Chandan,
District- Banka.

.... Appellant

Versus

Smt. Sharda Devi W/O Sri Laxmi Barnawal Resident Of Village- Chanda, P.O &
P.S- Chandan, District- Banka By Cast- Hindu By Profession, Cultivation.

.... Respondent

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Appearance :

For the Appellant/s : Mr. Ray Shiva Jee Nath, Sr. Adv.
Mr. Sanjeev Kumar Jha, Adv.

For the Respondent/s : Mr. Rajendra Narayan Sr. Adv.
Mr. Bharat Lal, Adv.

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CORAM: HONOURABLE MR. JUSTICE V. NATH

ORAL JUDGMENT

Date: 30-08-2016

Heard Mr. Ray Shivajee Nath, learned senior
counsel appearing for the appellant and Mr. Rajendra Narain, learned
senior counsel appearing for the respondent.

The defendant in the suit for eviction is the
appellant in this second appeal against the judgment and decree of
reversal by the appellate court below granting the decree for eviction
to the plaintiff as prayed.

The factual exposes' relevant in the context of
the present appeal are that the suit premises as described in Schedule-
B of the plaint consisting of one room , one kitchen, one varandah,
and one shop with varandah is part of the building standing over the
land fully described in Schedule-A of the plaint. The plaintiff is



admittedly the purchaser of the Schedule-A land through sale deed dated 28.05.1978. The plaintiff claimed to have constructed the building over Schedule-A land after purchase and it was her case that she let out the suit premises to the defendant who was her eldest son on monthly rent of Rs.500/- from January, 2001. The plaintiff had alleged that the defendant stopped paying rent from January 2004 and started laying claim over the suit premises which led the plaintiff to send a pleader's notice on 16.07.2004 in reply to which the defendant falsely claimed to have paid a sum of Rs.90,000/- to the plaintiff as advance towards the accruing rent. The suit was filed for eviction on the ground of default in payment of rent and also for arrears of rent as mentioned in Schedule-C of the plaint.

The defendant contested the case of the plaintiff and denied the relationship of landlord and tenant claiming the suit premises as belonging to the Hindu divided family and not the exclusive property of the plaintiff. It was the defendant's case that he had been living in the suit premises as son of the plaintiff and there had never been any relationship of landlord and tenant with the plaintiff and he never paid any rent to the plaintiff. The defendant also claimed that there had been partition of the building by way of family arrangement in which the suit premises was allotted to him.

The trial court decided the material issue

relating to the relationship of landlord and tenant between the parties against the plaintiff and sequentially also decided the other issues against the plaintiff and dismissed the suit. In appeal by the plaintiff, however, the appellate court below on reappraisal of evidence has reversed the findings of the trial court and allowed the appeal granting the decree for eviction against the defendant by the impugned judgment and decree.

This appeal has been admitted for hearing on 28.02.2013 on the following substantial questions of law:

(i) Whether the finding of the learned First appellate Court that the Schedule A property was exclusive stridhan property of the plaintiff/respondent on the basis of the judgment and decree passed in Title Suit No. 28 of 1995 (Exhibit-3 and Exhibit 4) is perverse and contrary to the evidence available on record?

(ii) Whether mere claim of the appellant to have paid 90,000/- to respondent which was denied by the respondent in her pleadings could be said to be evidence to prove relationship of landlord and tenant between the appellant and the respondent, they being son and mother?

When the hearing of this appeal was taken up on 30.10.2015, learned senior counsel for the appellant pointed out that the interlocutory application (I.A.No. 8701/2015) had been filed



under Order 41 Rule 27 C.P.C. on behalf of the appellant for adducing additional evidence emphasizing that the judgment passed by this Court in F.A.No.126/1998 on 21.04.2011 and the final decree passed in the T.S. No. 28 of 1995 were necessary to be taken on record for just decision in this case.. The hearing was adjourned on the prayer of the learned senior counsel for the respondent to seek instruction and file counter affidavit. Accordingly a reply to this interlocutory application has been filed on behalf of the respondent on 05.11.2015.

Criticizing the impugned judgment as passed by the appellate court below, learned senior counsel for the appellant has submitted that the finding recorded by the appellate court below that the suit premises is the exclusive property of the plaintiff-respondent is against the weight of the evidence on record. It has been contended that the judgment and decree (Exts.3 and 4) passed in T.S.No.28/1995 clearly demonstrate that Schedule-A property over which the suit premises stands was purchased by the grandfather of the defendant and as such the said property cannot be said to be the self-acquired property of the plaintiff. Referring to the judgment passed in F.A.No.126/1998, sought to be adduced as additional evidence, it has been further contended that even the said judgment and decree passed in T.S.No.28/1995 has now been reversed by this Court and as such any finding recorded therein by the appellate court



below on that basis falls apart. It has also been argued that the defendant was not a party in T.S.No.28/1995 or F.A.No.126/1998 and therefore any finding recorded by the appellate court below on that basis, again, would not be binding upon the defendant. It has been next contended that the statement made in reply (Ext.2) to the legal notice cannot be taken to be admission by the defendant regarding the relationship of landlord and tenant, as the said statement has been categorically denied by the plaintiff in her deposition as not true. It has been canvassed that the admission in order to be binding must be clear and unambiguous and must be read as a whole. Learned senior counsel has also put emphasis on the fact that admittedly the defendant is son of the plaintiff and therefore the case of the plaintiff that he is in occupation of the suit premises as tenant of the plaintiff is not believable and has rightly been decided to be so by the trial court. The argument has also been made on behalf of the appellant alternatively that the defendant was entitled to adjustment of the advance rent paid by him and he could not be held a defaulter but this issue has not been considered by the appellate court below.

Mr. Narain, learned senior counsel appearing on behalf of the respondent, while refuting the submissions on behalf of the appellant, has contended that even in view of the case of the defendant that the suit property is joint family property and he is in

possession over the same not as a tenant but as a cosharer, the judgment and decree passed in T.S.No.28/1995 which was a suit for general partition filed by one of the co-sharers would be binding upon the defendant as his father and mother through whom only his claim can subsist were admittedly parties in the said suit, and this is more so when it is not the case of the defendant that he has taken any step for setting aside the said judgment and decree or raised objection at any stage or even at the stage when the F.A.No.126/1998 was pending to his knowledge. It has been further argued that in any view of the matter there is a categorical finding in T.S.No.28/1995 that the plaintiff has the exclusive title over the land and building in which the suit premises is situate and that finding has not been reversed in the F.A. No. 126 of 1998 and as such the judgment passed in the said appeal is not at all relevant. It has been next submitted that though the defendant has accepted to have sent the reply (Ext. 2) to the legal notice but he has failed to explain away the statement regarding the payment of Rs.90,000/- by way of advance during his deposition as D.W.7 in the suit. It has been finally submitted that the findings by the appellate court below is based upon the scrutiny of evidence and no perversity in the same could have been shown or established on behalf of the appellant and as such those findings cannot be interfered at the second appellate stage. The learned senior counsel has also submitted

that the suit filed in accordance with law must reach to its conclusion according to law and not on sentiments or other extraneous consideration which were made the basis of its judgment by the trial court but reversed by the appellate court below on that score as well.

From the facts appearing from the materials on record as well as the submissions on behalf of the parties, it is manifest that the suit has been filed by the plaintiff claiming herself to be the owner landlord of the suit premises for eviction of the defendant on the ground of default in payment of rent. The claim of the defendant in this regard is that the suit premises is the part of the building which is the joint family property and he is in occupation of the same not as a tenant as claimed by the plaintiff but in his own right as a co-sharer. It is, however, not disputed that the said building situated over Schedule-A land was subject matter of Title (Partition) Suit No.28/1995 between the family members of the plaintiff and the defendant wherein the plaintiff was impleaded as defendant no.5 and the father of the present defendant was impleaded as defendant no.4. In that suit while resisting the claim of partition, the defendant no.5 (plaintiff-respondent in the present appeal) claimed her exclusive title over the said property. By judgment and decree (Exts.3 and 4) in the said Title (Partition) Suit No.28/1995, it has been held that the defendant no.5 Sharda Devi is the exclusive owner of the

said property i.e. land and house over 8 decimals of Survey Plot No.575/805 under Khata No.220/5 (Schedule A in the present suit). It would be apt to notice the finding in this regard as recorded in the judgment (Ext.3) as follows:

“...I further find and hold that though the land of Khata No.220/5 S.P.No. 575/859 Area 8 decimals was purchased by Badri Modi defendant no.1 and had constructed the house over the same but the same for the benefit of his daughter-in-law Sharda Devi defendant no.5 and the said house standing over an area of 8 decimals of S.P.No.575 /859 under Khata No.220/5 is exclusively belonging to Sharda Devi defendant no.5....”.

It is also manifest from the decree (Ext.4) of that suit that there has been direction for allotment of the aforesaid land and house over 8 decimals of Survey Plot No.575/859 under Khata No.220/5 to defendant no.5 alone. Much emphasis has been laid by learned senior counsel for the appellant on the fact that the aforesaid judgment and decree (Exts.3 and 4) was challenged in F.A.No.126/1998 before this Court and the said appeal has been allowed on 21.04.2011 setting aside the said judgment and decree.

The interlocutory application (I.A.No. 8701/2015) under Order 41 Rule 27 C.P.C. has therefore been filed on behalf of the appellant, praying for taking the judgment of the F.A.No.126/98 as well as the final decree prepared in the suit in T.S.No.28/1995 as additional evidence in this appeal. However, from the perusal of the judgment dated 21.04.2011 passed in F.A.No.126/1998 as annexed with the I.A.No.8701/2015 it transpires that the said appeal was filed by the plaintiff of T.S.No.28/1995 challenging only the part of the judgment and decree passed in the said suit by which the decree for partition as prayed was refused with regard to the properties standing in the name of the defendant no.1 Badri Modi on the ground that those properties were his self acquired properties. In view of the submissions on behalf of the parties in F.A.No.126/1998 , the court, after taking notice of the fact of death of defendant no.1 Badri Modi during the pendency of the appeal, has come to the conclusion that those self-acquired properties of the defendant no.1 Badri Modi would now devolve upon his heirs who are parties to the suit and appeal and accordingly only that part of the judgment and decree pertaining to the refusal of the claim for partition of the self-acquired property of the defendant no.1 Badri Modi has been reversed. There is nothing in the said judgment of F.A.No.126/1998 to show that the other findings with regard to the remaining properties as recorded in the judgment and decree of Title

(Partition) Suit No. 28/1995 (Exts.3 and 4) have been overturned. This is further also corroborated by the fact which finds mention in the judgment of the F.A.No.126/1998 that the said appeal was preferred only against a part of the judgment and decree passed in T.S.No.28/1995.

It is thus demonstrably clear that the finding in favour of the defendant no.5 Sharda Devi of that suit who is the plaintiff in the present suit with regard to her exclusive title over the land and house in question has so far remained unassailed and undisturbed. This Court therefore comes to the conclusion that the judgment passed in F.A.No.126/1998 is not relevant for the purpose of deciding the issues arising in the present suit and similarly the final decree prepared in the said suit Title (Partition) Suit No.28/1995 which has apparently lost its validity in view of the judgment and decree of F.A.No.126/1998 requiring another final decree accordingly is also not relevant in this appeal. The prayer on behalf of the appellant for adducing these documents by way of additional evidence in this appeal is thus rejected and the interlocutory application (I.A.No.8701/2015) is accordingly dismissed.

It is not the case of the appellant nor there is evidence that the finding regarding the exclusive title of the plaintiff over the building of which the suit premises is a part as found in the

T.S.No.28/1995 has ever been questioned by the appellant. Though a plea has been raised on behalf of the appellant that the said finding could not be binding upon the appellant as he was not a party in the said suit but no cogent material or reason has been furnished on behalf of the appellant in support of his entitlement to a share in the land and building which admittedly stand exclusively in the name of the plaintiff Sharda Devi. It will be apt here to notice that the defendant in his deposition as D.W.7 has admitted that the sale deed of Schedule-A land stands in the exclusive name of the plaintiff and further that the construction of the building on the said land was done when he was 13 years old. The conclusion therefore is inevitable that even though the plaintiff is the mother of the defendant-appellant but by that reason alone the defendant-appellant would not get a share in her exclusive property during her life time. The appellate court below has also scrutinized the evidence with regard to the further claim of the defendant-appellant that suit premises was allotted to him in family partition in presence of Panches but has found that no cogent evidence in this regard has been led on behalf of the appellant and even the deed of partition which was claimed to have been prepared has also not been produced in evidence by the defendant in order to substantiate this plea. In this backdrop, this Court finds substance in the submission on behalf of the plaintiff-respondent that the defendant

appellant even though he is son of the plaintiff cannot claim legal entitlement to continue in possession over the suit premises on that basis alone. The appellate court below, therefore, on the basis of scrutiny of oral and documentary evidence has rightly negated the claim as put forward by the defendant-appellant to be in occupation of the suit premises in his own rights either as a co-sharer of the same or as son of the plaintiff.

On the issue of relationship of landlord and tenant between the parties, learned senior counsel for the appellant has seriously questioned the reliance on Ext.2 which is the reply to the legal notice sent by the plaintiff. From the perusal of the Ext.2, it transpires that it was sent on behalf of the defendant and contained a statement regarding the payment of Rs.90,000/-as advance towards the accruing rent. The defendant-appellant who was examined as D.W.7 in the suit has significantly omitted to furnish any explanation to this statement. He has even omitted to disown the same. Even though it has been argued on behalf of the appellant that this statement cannot qualify in law to be admission by the appellant of the fact in issue but the learned senior counsel for the appellant has failed to furnish cogent reason on the basis of which this statement which has remained unexplained could have been ignored or overlooked. It is also significant to note that none of the witnesses



examined on behalf of the defendant has furnished any explanation to this statement made in the reply (Ext.2) to the notice. The appellate court below has adopted the right approach in considering this statement as well as other oral and documentary evidence adduced on behalf of the parties before coming to the conclusion that the plaintiff has successfully proved the relationship of landlord and tenant in between her and the defendant. The appellate court below has elaborately scrutinized the depositions of the witnesses examined on behalf of the plaintiff and the defendant and has found the preponderance of probability in favour of the plaintiff. This Court, therefore, is not persuaded to align with the submission on behalf of the appellant that it is the statement made in the reply (Ext. 2) alone which has been the basis of the finding by the appellate court below on the issue of relationship of landlord and tenant. Otherwise also the findings have been recorded by the appellate court on the basis of the evidence which are acceptable and could have been relied and as such there is no perversity in any manner in the same.

For the aforesaid reasons and discussions, the substantial questions of law as framed in this appeal are answered against the appellant.

Accordingly, this appeal, sans merit, is dismissed and the judgment and decree passed by the appellate court

below is hereby affirmed. In the facts and circumstances of the case
there shall be no orders as to costs.

Nitesh/-

(V. Nath, J)

AFR/NAFR	NAFR
CAV DATE	NA
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