

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.127 of 2009

Against the judgment and decree dated 03.01.2009 passed by A.D.J. (F.T.C. IV) Ara, Bhojpur in Title Appeal No.11 of 1994 reversing the trial court judgment and decree.

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Rajiv Kumar Gupta @ Raju Prasad Gupta & Ors

.... Plaintiffs-Respondents-Appellants
Versus

Adeya Prasad Singh & Ors

.... Defendants-Appellants-Respondents
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Appearance :

For the Appellants : Mr. S.Shekhar Dvivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey, Advocate
Mr. Satyendra Nath Shukla, Advocate
Mr. Parth Gaurav, Advocate

For the Respondents : Ms. Asha Verma, Advocate
Mr. Ashok Kumar, Advocate
Mr. Amrendra Kr. Singh, Advocate
Mr. Sushil Kr. Ojha, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 01-07-2016

The plaintiffs have filed this Second Appeal against the judgment and decree dated 03.01.2009 passed by the learned Additional District Judge, Fast Track Court No.IV, Ara (Bhojpur) in Title Appeal No.11 of 1994 whereby the lower appellate court reversed the judgment and decree of the trial court dated 18.12.1993 passed by Additional Munsif-II, Ara in Title Suit No.31 of 1986.

2. The plaintiffs-appellants had filed the suit for declaration that the plaintiffs have got title over Schedule-I

described in the plaint and they are in possession of the same. They also prayed for injunction for restraining the defendants to come on rasta by breaking the wall at two places and injunction directing them to close the broken wall and also prayed for delivery of possession, if they are found dispossessed.

3. The plaintiffs claimed the aforesaid reliefs alleging that they have got title and interest in plot no.2975 and 2986 comprised within khata no.688. They have house over the same and in front of the house towards south there are stairs, sock pit of latrine. The plaintiffs have only passage for coming to Nawada Road towards south, which is 6 kari wide and by the order of the High Court they have acquired easementary right over the same passage. In the northern and southern portion of plot no.2985 there was land of Satya Nand and Bideshwari Singh, which is purchased by the plaintiffs on 15.02.1986. They have also purchased plot no.2984. Now the defendants are trying to grab the said rasta by blocking the rasta by making construction over it and have put dirty things. The plaintiffs are in possession of sock pit for more than 40 years and are growing vegetables on the land of Schedule-I. The defendants have obstructed from going through rasta by keeping bricks on it and on sock pit also, which is on plot no.2975 and 2986.

4. The defendant nos.2 to 3 have filed written statement



denying the claim of the plaintiffs. According to them, the plaintiffs have no interest on the land of plot no.2896. They have no vacant land in 1975 and have got no rasta towards south. High Court has not decided any such rasta in any case. Further plot no.2986 is of the defendants and there was a pacca well over it from which they used to water the field but it was closed by the plaintiffs. The plaintiffs have not purchased the land of part of plot nos.2985 and 2984. Therefore there is no question of their possession arises. The defendants have not broken the wall at two places nor they made any obstruction. In fact the plaintiffs have constructed the latrine, sock pit very recently.

5. On the basis of the aforesaid pleadings the learned court below framed various issues. Thereafter the trial court on the basis of the documentary evidences and other materials recorded finding that plot nos.2975 and 2986 are the property of the plaintiffs and defendants failed to show anything in support of their claim of their title. So far right of easement on the rasta is concerned, the trial court recorded finding that the defendants have broken the wall at two places, therefore, the trial court held that defendants have made encroachment on the passage i.e. Schedule-II by making wall which causes obstruction to the plaintiffs and accordingly decreed the plaintiffs' suit.

6. The defendants then filed title appeal before the lower appellate court. The lower appellate court has dismissed the appeal. Against the said judgment and decree the plaintiffs have filed this second appeal.

7. The second appeal was admitted on 10.04.2012 and following substantial questions of law were formulated:-

- (i) Whether the judgment of the lower appellate court is perverse inasmuch as while rejecting the findings of trial court by scathing comments, he has not even touched any of the questions in issue for consideration by himself, thus abdicating his statutory duties?
- (ii) Whether the judgment of the lower appellate court is vitiated on account his absolute non-consideration of the evidence of plaintiffs, oral as well as documentary, while setting aside findings in his favour by simply criticizing trial court judgment?
- (iii) Whether the learned court below has misread and misconstrued the vital documents of the plaintiffs, particularly the judgment and decree in Title Suit No.27 of 1975 Ext.13 and 14, Ext.3, Ext.4, Ext.6, Ext.11 as well as the plaint itself?

8. During the pendency of the appeal injunction application was filed by the appellants being I.A. No.2712 of 2009. This court by order dated 12.05.2009 granted interim injunction restraining the respondents while issuing notice in injunction matters. The defendants-respondents after appearance filed I.A. No.7819 of 2009 for vacating the injunction order. Both the applications are still pending. The appellants have also filed I.A.

No.2397 of 2010 which is also still pending. Therefore, I heard the parties on these applications also. In this I.A. No.2397 of 2010 the appellants prayed for mandatory injunction to remove the construction shown in the photograph and thereby the door of the appellants in the southern side may be made clear and prayed also for initiating proceeding for punishment because of willful disobedience of the injunction order.

9. The learned Senior Counsel for the appellants submitted that the lower appellate court without meeting the reasonings of the trial court and without considering the evidences which are produced by the plaintiffs wrongly held that the plaintiffs have not produced any evidence in support of their title and has set aside the finding of the trial court. In the judgment the lower appellate court only made comments on the judgment of the trial court but he himself did not consider any of the evidences independently and has not recorded any finding of its own. Since the lower appellate court has not considered either oral or documentary evidences, the judgment of the lower appellate court is perverse and on that ground alone the judgment of the lower appellate court is liable to be set aside. The lower appellate court also misconstrued the documentary evidences, Exts.3, 4, 6, 11, 13 and 14 which are vital documents for the just decision of the case of the parties. The



learned Senior Counsel further submitted that the evidences are available on record, therefore, instead of remanding the appeal if at all the judgment will be set aside, this Court should appreciate the evidences on record and the second appeal be disposed of on the basis of materials as the suit is of the year 1986 and if at this stage the appeal will be remanded, it will be punishment to the appellants and cannot be said that justice has been done to the appellants. According to the learned Senior Counsel it is the fault on the part of the lower appellate court, therefore, for that reason why the appellants shall suffer. On these grounds the learned Senior Counsel submitted that all the substantial questions of law formulated be answered in favour of the appellants and the second appeal be allowed after setting aside judgment and decree of the lower appellate court and this court may confirm the judgment and decree of the trial court.

10. On the other hand, the learned counsel Ms. Asha Verma appearing on behalf of the respondents submitted that none of the substantial questions of law formulated at the time of admission of the appeal arise for consideration in this second appeal. The plaintiffs dishonestly have filed the present suit by misrepresenting the facts. In the previous suit, which was filed by the plaintiffs for easementary right, they clearly pleaded that just

south to the house of the plaintiffs the defendants' land is there. It is admitted fact that the house of the plaintiffs is on plot no.2975 and according to the previous pleadings just south of the house the defendants' land is there but in the present suit the plaintiffs are claiming title over plot no.2986 dishonestly. In fact this plot no.2986 is the land of the defendants, which has been admitted by the plaintiffs in previous suit.

11. The learned counsel further submitted that the lower appellate court rightly held that no document has been produced in support of the title, which is correct. On the basis of mere entry in khatian no declaration of title can be made. So far sock pit or murgi khana is concerned, in fact the defendants had a well there and recently the plaintiffs closed the well and have made sock pit and thereby causing nuisance. The lower appellate court has considered that there is no satisfactory evidence produced by the plaintiffs and therefore, rightly held that the plaintiffs failed to prove title and the learned trial court has wrongly granted the decree. Since the lower appellate court has considered some of the evidences, it cannot be said that the judgment of the lower appellate court is perverse. The lower appellate court has rightly held that while giving finding on issue no.(v) the learned trial court has not properly appreciated the evidences. On these grounds the learned counsel submitted that the

second appeal be dismissed.

12. Perused the judgment of the lower appellate court. The lower appellate court upto paragraph 6 only narrated the case of the parties and catalogued the evidences. Consideration part started from paragraph 7 with respect to issue no.(iv). Issue no.(iv) is “whether the plaintiffs have acquired absolute right of passage described in Schedule II” and the lower appellate court recorded the finding that the trial court has not discussed in any way the documentary evidences. Likewise so far issue no.(v) is concerned, which is regarding encroachment of Schedule II land i.e. Rasta, the lower appellate court held that the trial court has not discussed in any way the documentary evidences of the case before giving any positive finding. So far issue no.(iii) i.e. whether the plaintiffs are entitled to a decree for the suit land described in Schedule I, the lower appellate court held that “from the record it appears that plaintiffs have failed to show that plot no.2986 is part of the ancestral land of the plaintiffs. There is no chit of paper on record to prove that plot no.2986 is the plaintiffs’ land”.

13. On these findings the lower appellate court allowed the appeal and the judgment and decree of the trial court was set aside.

14. Now let us consider substantial question no.(i). From



perusal of the judgment of the lower appellate court as mentioned above, it is clear that the lower appellate court has only criticized the judgment of the trial court on issue nos.(iv) and (v) but did not consider any of the evidences produced by the plaintiffs independently nor the lower appellate court recorded his own independent finding. Likewise so far issue no.(iii) is concerned, only stated that no chit of paper has been produced by the plaintiffs. In my opinion, therefore, the lower appellate court has failed to perform his statutory duties. The lower appellate court being the final court of fact is required to appreciate the evidences and the case of both the parties independently and on the points formulated according to Order 41 Rule 31 CPC give decision of its own on the points so formulated with the reasons. In the present case, the lower appellate court has not formulated any separate points, which arise for consideration in the appeal. No doubt, he has discussed issue-wise but then no independent finding has been recorded of its own. Thus, substantial question no.(i) is answered in favour of the appellants.

15. So far substantial question no.(ii) is concerned, from perusal of the judgment it is clear that the lower appellate court has not considered either oral or documentary evidences but has set aside the finding of the trial court after criticizing the trial court

judgment which is evident from the judgment. Therefore, this substantial question of law is also answered in favour of the appellants.

16. So far substantial question no.(iii) is concerned, it may be mentioned here that the plaintiffs produced various documentary evidences in support of his claim of title with respect to plot no.2986. However, the lower appellate court mentioned only that not a chit of paper has been produced. No documentary evidence has been considered at all. Thus, this substantial question of law is also answered in favour of the appellants.

17. Now, in view of the fact that all the three substantial questions of law have been answered in favour of the appellants, the judgment and decree is to be set aside. The Hon'ble Supreme Court in the case of **D.R. Rathna Murthy Vs. Ramappa, (2011) 1 Supreme Court Cases 158** has held that undoubtedly the High Court can interfere with the findings of fact even in the second appeal, provided the findings recorded by the courts below are found to be perverse i.e. not being based on the evidence or contrary to the evidence on record or reasoning is based on surmises and misreading of the evidence on record or where the core issue is not decided. There is no absolute bar on the re-appreciation of evidence in those proceedings. However, such a course is permissible in

exceptional circumstances.

18. Again the Hon'ble Supreme Court in the case of **Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and others, (2010) 13 Supreme Court Cases 216** at paragraph 28 has held that if a finding of fact is arrived by ignoring or excluding relevant material or by taking into consideration irrelevant materials or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law. If the findings of the Court are based on no evidence or evidence which is thoroughly unreliable or evidence that suffers from the vice of procedural irregularity or the findings are such that no reasonable person would have arrived at those findings, then the findings may be said to be perverse. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non-application of mind and thus stands vitiated.

19. Both the above judgments fully apply in the present second appeal considering the judgment in the manner written by the lower appellate court. The findings of the lower appellate court is based on no evidence and the lower appellate court has not discussed the material evidences nor even fully conversant to the pleadings of

the parties but has set aside the judgment of the trial court. In my opinion, therefore, the judgment of the lower appellate court is perverse and is vitiated. The proceeding is very old, therefore, instead of remanding the matter to lower appellate court I proceed to discuss the evidences to see whether the trial court judgment is sustainable or not.

20. The plaintiffs have filed the suit for declaration of title with respect to Schedule I. The trial court recorded finding that plot no.2986 is the ancestral land of the plaintiffs which appears from the khatian. So far possession is concerned, the trial court also relied upon the evidence of the Pleader Commissioner's Report and evidences of the plaintiffs. This finding of the trial court has been reversed by the lower appellate court in one line saying that no chit of paper has been produced. From perusal of the old khatian (Ext.11) I find that plot no.2929 measuring 63 decimals is recorded in the name of Raghunandan, the ancestor of the plaintiffs and from this old plot no.2929 the plot nos.2975 and 2986 have been carved out which is evident from Ext.6 which is also new khatian recorded in the name of Raghunandan, ancestor of the plaintiffs. Plot no.2975 measures 57 decimals and plot no.2986 measures 6 decimals = 63 decimals. The area correspondence with the old khatian (Ext.11).

21. From perusal of the gift deeds dated 15.03.1962

(Ext.9) and 02.02.1962 (Ext.9/a) whereby some plots have been gifted to the respondents, it appears that plot no.2986 which is the disputed plot was never gifted to the respondents.

22. The plaintiffs-appellants have also produced Ext.1 series which are the rent receipts.

23. These evidences show that the plaintiffs have produced many documents in support of their claim of title over plot no.2986. The lower appellate court did not consider these documents in the impugned judgment and decree and mentioned in one line that no chit of paper has been produced. The lower appellate court did not also consider that the trial court after considering the khatian recorded finding that the disputed plot no.2986 is the ancestral property. Therefore, while the lower appellate court reversed the finding of the trial court it was the bounded duty of the lower appellate court to have considered the documents on this issue which was considered by the trial court. It may be mentioned here that except the statement made by the defendants that plot no.2986 is their land as it is part of plot no.2931, they have not produced any documentary evidences. Be that as it may, the plaintiffs will not be benefited because of failure of proving their case by the defendants. The plaintiffs will stand or fall on their case as the plaintiffs have to prove their case then they would be entitled for the relief.



24. In view of the above discussion I find that the finding recorded by the court below is not based on evidence. In fact the lower appellate court himself has not independently discussed any of the evidence and recorded any finding. Thus the judgment and decree can very well be termed as perverse because the judgment is passed by the lower appellate court ignoring and excluding relevant materials available on record and considered by the trial court and further the lower appellate court considered irrelevant matters i.e. surmises and conjectures. Therefore, on this point regarding Schedule-I the finding of the lower appellate court is hereby reversed and the finding of the trial court is hereby confirmed.

25. So far Schedule-II i.e. rasta is concerned, it may be mentioned here that easementary right has already been granted to the appellants by Ext.E i.e. the judgment of the High Court. Now, therefore, admittedly it was found by both the courts below that except the easementary right the appellants have not been granted exclusive right. The case of the appellants is that the defendants are putting of obstruction by encroachment and have also broken the boundary wall for using the said rasta. So far this case is concerned, it is admitted fact that a person who has got easementary right cannot deny the title of the other and cannot say that he has acquired exclusive right to use and no others have got any right to use. It was

argued by before me that in the gift deed this right to use has not been given to the defendants. In my opinion, this is not the case of the plaintiffs.

26. So far encroachment of rasta is concerned, during the pendency of the first appeal injunction application was filed being I.A. No.2712 of 2009. This Court while issuing notice to the respondents in injunction matter passed the order to the effect that it is quite apparent that some construction has already been made. In the said circumstances any construction already made or is being made shall be at the risk of respondents subject to the final decision of this second appeal. A stay vacating application being I.A. No.7819 of 2009 has been filed by the respondents, which is still pending. Thereafter I.A. No.2397 of 2010 has been filed by the appellants for mandatory injunction to remove the construction as shown in the photographs because of the fact that by the said construction the doors of the appellants have been closed, prayer has been made for clearing the door after removal of construction. At the time of hearing of the second appeal it was contended that these constructions have been made over plot no.2986 i.e. on the plaintiffs-appellants' land and considering this fact that new constructions were being made, this court earlier held that the construction will be subject to result of the second appeal.

27. In the application for vacating injunction it is stated that no new constructions have been made nor they have encroached. So far this dispute is concerned, it is purely a disputed question of fact but from the order sheet and the photographs prima facie I find that new constructions have been made and thereby encroachments have been made over the land i.e. the passage of plaintiffs-appellants. The trial court also recorded finding that the defendants have made encroachment over the rasta and thereby are putting obstructions. As stated above the lower appellate court nowhere recorded any finding independently.

28. In view of my above discussion I find that the judgment of the lower appellate court is perverse and is liable to be set aside on this score alone. Further I have already answered the substantial questions of law in favour of appellants.

29. In the result, this second appeal is allowed. The impugned judgment and decree of the lower appellate court is hereby set aside and the judgment and decree of the trial court is hereby confirmed. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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