

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.280 of 1984

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Late Kishun Sah through LR

.... Appellant/s

Versus

Late Nagendra Singh through LRs and Ors.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. M/S H.N. Sinha, Advocate
Mr./ Mrs R.Prasad, Advocate
Mr. Mahendra Prasad Bharrtee, Advocate
Mr. Surj Nath Tiwary, Advocate
Mr. Dhananjay Kumar Tiwary, Advocate
Mr. Shanti Kumar, Advocate

For the Respondent/s : Mr. M/S J.PD. Singh, Advocate
Mr. Arun Kr. Singh, Advocate

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(Appeal against the judgment and decree dated 29.03.1984 passed in Title Appeal No. 140 of 1976 by Sri Aditya Sharan, 2nd Additional Sub-Judge, Saran, affirming the Judgment and decree dated 20.09.1976 passed in Title Suit No. 16 of 1969 by Sri Brijnandan Prasad Singh, Munsif, 4th, Chapra.)

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR

CAV JUDGMENT

Date: 12-09-2017

Heard learned counsel for the appellant. However, no one appears on behalf of the respondents inspite of personal service of notices on the substituted heirs of deceased respondent.

2. This Court while admitting this appeal filed under Section 100 of the Code of Civil Procedure formulated the following substantial questions of law for adjudication.

I. Whether the Courts below have erred in-law in holding that the plaintiff appellant was co-sharers of Binda Sah, after



holding that he had not acquired title by virtue of deed of gift executed in his favour by Masomat Ram Dasiya.

II. Whether the Courts-below have erred in law in holding that the plaintiff-appellant had not perfected his title by adverse possession of lands mentioned in Schedule-1 of the plaint.

3. The sole original appellant Kishun Sah had filed Title Suit No.16 of 1969 pleading therein that one Ramdasia, wife of late Bharosa Sah, and Binda Sah were co-sharers of the properties fully detailed in Schedule-1 of the plaint. Bharosa Sah was full brother of Binda Sah, however, Bharosa Sah died prior to cadastral survey and name of Ramdasia and Binda Sah was recorded as joint tenant in the survey records. The suit property situates in village Aranda Khurd within Police Station of Masrakh in the District of Saran fully detailed in plaint Schedule-1. The appellant further pleaded that Binda Sah had left the village five years prior to execution of the registered deed of gift dated 06.02.1932 executed by Ramdasia in favour of the appellant vide Annexure-5. Ramdasia had gifted her half share in all the plots mentioned in Schedule-1 of the plaint to the appellant and Binda Sah and other co-sharers left the village without making any arrangement for management of his share and payment of rent. In the circumstances, the plaintiff had to pay the rent of entire area of



land as such the plaintiff took possession of entire area of land that includes the property gifted by Ramdasia and the share of Binda Sah. The plaintiff-appellant claims that the possession was hostile to Binda Sah and his legal heirs and was to the knowledge of others as the plaintiff-appellant had dealt with the said property inasmuch as had executed mortgage deed (Jarpesgi) in favour of different persons and had redeemed the same or had redeemed mortgages created by Binda Sah.

4. When the sons of Binda Sah came to know about the deed of gift executed by Ramdasia as well as possession of the plaintiff-appellant over entire area of the lands, they came and protested and unsuccessfully attempted to take possession and subsequently through registered sale deed dated 03.01.1969 Mathura and other sons of Binda Sah transferred a portion of the land in favour of the original respondents though they were conscious that they had no right title to transfer the land of Binda Sah as the plaintiff-appellant had already acquired title by adverse possession long back. Plaintiff asserted that in assertion of his hostile title, he has executed several sale-deeds in favour of different persons named in paragraph-11 of the plaint. The plaintiff-appellant prayed for adjudication and declaration of his title and possession over Schedule-1 land and for confirmation of possession or in the alternative for recovery of possession on



Schedule-5 land.

5. It is worth to mention that in Schedule-2 there is description of the properties gifted by Ramdasia in favour of the appellant in Schedule-3 of the plaint. There is description of the property which were sold by the sons of Binda Das in favour of defendant-respondents. In Schedule-4 there is list of immovable property sold by the appellant to different persons and in Schedule-5 there is list of immovable property on which the plaintiff-appellant claims confirmation of possession and in the alternative recovery of possession.

6. The defence of the defendant-respondent, as pleaded in the written statement, is that Binda Sah never abandoned his property nor left his village or sifted anywhere. Binda and his sons were throughout in joint possession of the suit land with Ramdasia, the Bhabhi of Binda Sah. The appellants never came in possession of the entire area of the land; rather the matter was of joint possession as after deed of gift the appellant entered into the shoes of the donee and continued in the joint possession with Binda Sah and his legal heirs. The plaintiff-appellant never redeemed any mortgage nor executed any mortgage in respect of the land of Binda Sah; rather he created some documents being Karpardaz (Manager of the family of Binda Sah). In fact, Binda Sah had sold plot No.3561 through registered sale deed dated 20.05.1926 to Masomat



Chameliya, the step mother of the plaintiff-appellant and had executed another mortgage deed in her favour and other mortgage deed executed by Binda Sah in favour of Jamuna Sah, the step brother of the plaintiff in the year 1960. Therefore, claim of the plaintiff-appellant is not acceptable that Binda Sah and his legal heirs left to exercise their title and possession over the suit land; rather the suit land was never partitioned between the two referred cosharers by metes and bounds and jointly rent was being paid and receipts were being received. They further asserted that Mathura Sah and Shivnandan Sah sons of Binda Sah along with grand-son of Binda Sah executed sale-deed in favour of the respondents on 28.09.1959 and the purchasers came in possession were mutated in the government records and they are paying and getting the receipts.

7. The learned trial-court concluded that the plaintiff failed to prove the ouster of Binda Sah (the cosharer of donor of the plaintiff) and a case of adverse possession over the land falling in the share of Binda Sah. The lower appellate Court affirmed the aforesaid finding by the impugned judgment and decree.

QUESTION NO. II: Whether the Courts-below have erred in law in holding that the plaintiff-appellant had not perfected his title by adverse possession of lands mentioned in Schedule-1 of the plaint.

8. Learned counsel for the appellant submits that both



the Courts-below have erred in holding that the plaintiffs have failed to prove a case of adverse possession. His contention is that the plaintiff was dealing with the property of the vendor of the defendants since the date of registered deed of gift executed by Ramdasia Devi, the cosharer of the vendor of the defendant, inasmuch as the plaintiff was paying the rent to the ex-landholder and after vesting of the *Jamindari* to the State and was getting the receipts. The plaintiff had sold some of the lands in exercise of his own right title and possession and in open denial of the right title and possession of the vendor of the defendants. Learned counsel further submits that there is documentary evidence that the plaintiff had mortgaged the suit property and redeemed the same in exercise of his own right title and possession hostile to the title of the real owner. Learned counsel for the appellant submits that the defendants have evasively denied; rather admitted in the pleading that if the plaintiff was dealing with the suit property that was a sham and fictitious transaction as well as in the capacity of *Karpardaz* (Manager of the vendor of the defendants). Learned counsel for the appellant asserts that once the defendants admit the dealing with the suit property by the plaintiff, the burden shifts on the defendants to prove that the transaction of the plaintiff was in the capacity of Manager of the vendor of the defendants and if they failed to prove this, as in the present case, the plaintiff should not



have been non-suited by the Courts-below.

9. The law is well settled that claim of acquisition of title by adverse possession is a weak claim and requires specific pleading and proof. Further possession of property by a co-sharer is deemed to be possession on behalf of other co-sharers unless there is a clear ouster by denying title of other co-sharers. Mere long and continuous possession by parties is not enough. Reference may be made to the judgment of the Hon'ble Supreme Court in the case of **Mohammad Ali (Dead) By LRS. V. Jagadish Kalita & Ors.** reported in (2004) 1 Supreme Court Cases 271. In the case of **Karnataka Board of Wakf V. Government of India & Ors.** reported in (2004) 10 Supreme Court Cases 779, in paragraph 11 of the judgment the Hon'ble Apex Court held as follows:

“11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a



party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in



his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

10. Learned counsel for the appellant has relied on the case of **M. Durai V. Muthu & Ors.** reported in **(2007) 3 Supreme Court Cases 114**. In that case also the burden of proof of claim of title by adverse possession was on the person who asserted it. Hence, the same is not in support of the case of the plaintiff-appellant.

11. In the present case the plaintiff-appellant acquired, by registered deed of gift, half of Schedule-1 property vide Ext.5 from co-sharer Ramdasia Devi. The plaintiff claims that since the remaining co-sharers had sifted to some other place the plaintiffs came in possession of the entire suit property to the ouster of the real owner. Further the plaintiff was exercising his right over the said property in the hostile claim of the real owner and in assertion of his own right. The learned trial Judge has categorically dealt in paragraphs 10 to 14 of the judgment the documentary evidences produced on behalf of the plaintiff. The learned trial Judge found that the rent receipts Ext-1 series were in the name of both the co-sharers. Hence, does not prove the claim of ouster and adverse possession of the plaintiff.



Exhibit-2 series are registered sale-deeds executed by the plaintiff to different persons. But they were either within the limits of land gifted by Ramdasia Devi or to the extreme excess to the land falling in share of both the co-sharers, i.e., Ramdasia Devi and Jamun Sah, as such those documents are not documents of ouster of the vendor of the defendants to their knowledge as they were not party to the sale documents. It is a fact that certain mortgaged deeds executed by Ramdasia Devi and Jamun Sah were redeemed by the plaintiff-appellant though technically the redemption had not been proved as held by the learned trial Judge. However, since the mortgaged documents were produced from the custody of the appellant, it would be deemed that the same were redeemed by the appellant. The redemption deeds vide Exhibits 3 and 4 series are also no document of assertion of title hostile to the real owner because a co-sharer cannot redeem only half of the property in view of the provisions of Section 60 of the Transfer of Property Act. Hence, the appellant was bound to redeem the entire mortgaged property because the appellant had entered into the shoes of his donor Ramdasia, who was co-sharer of the vendor of the defendants. It is worth to mention that Exhibit-L is the judgment dated 30.03.1972 passed in Title Suit No.57 of 1966 in between the appellant Kishun Sah and Jamun Sah, the co-sharer of the donor of the appellant. In that suit also similar claim of adverse possession of



the property of the same joint family was non-suited by the learned trial Judge. The documents produced on behalf of the respondents and fully discussed in paragraph-15 to 17 of the learned trial-court judgment would reveal that the respondents were never ousted and were asserting their rights on their share. The finding of the learned trial Court on the respective documents has not been challenged in this appeal as perverse one. It is also well settled that documentary evidence cannot be defeated by the oral evidence. Hence, this Court is not going into the details of the oral evidence brought on the record.

12. There is no merit in the submission of the learned counsel for the appellant that since the respondents evasively denied about the genuineness of the transaction entered into by the appellant in respect of the suit land with the third party and further put forward a case that the same was done in the capacity of *Karpardaz*, hence, the burden sifted on the respondents to prove that the transaction entered into by the appellant in respect of the suit land was in the capacity of *Karpardaz*.

13. The law is very clear that the burden sifts but the onus never sifts. It is onus of the plaintiff-appellant to prove that his possession along with co-sharer Jamun Sah was not a joint possession; rather adverse possession in denial of the title of the co-sharers.



14. As has been noticed above, the plaintiff has failed to prove a case of ouster of the real co-sharers by denying their title. By merely entering into transfer, transaction by a co-sharer would not give rise to a case of ouster of real owner unless the real owner was aware of the transaction with specific notice that his land was also being transferred by the co-sharer. Since, the plaintiff-appellants has failed to prove a case of ouster of the co-sharer to his knowledge, I do not find that the learned Courts-below have erred in holding that the plaintiff-appellant has not perfected the title by adverse possession.

QUESTION NO. I: Whether the Courts below have erred in-law in holding that the plaintiff appellant was co-sharers of Binda Sah, after holding that he had not acquired title by virtue of deed of gift executed in his favour by Masomat Ram Dasiya.

15. The defendants-respondents did not challenge, in the suit, the validity of the deed of gift executed in the year 1932 as well as competency of the executor of the deed of gift Masomat Ramdasia. Therefore, point No.I has not been raised for adjudication because it was not questioned before the learned Courts-below whether the plaintiff-appellant had acquired title by virtue of deed of gift executed in his favour by Masomat Ramdasia. The Courts-below have not recorded finding that the plaintiff-



appellant did not acquire title in respect of the land gifted by Masomat Ramdasia. Accordingly, this is not to be adjudicated whether the Courts-below eared in holding that the plaintiff-appellant was co-sharer of Binda Sah. Since Binda Sah and Ramdasia Devi were jointly recorded in the records of right they were impliedly co-sharers.

16. In view of the decision of point No.II above, this appeal is bound to fail. Accordingly, it stands dismissed without cost.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	AFR
CAV DATE	02.08.2017
Uploading Date	13.09.2017
Transmission Date	

