

IN THE HIGH COURT OF JUDICATURE AT PATNA
Second Appeal No. 215 of 1991

Appeal against the judgment dated 23.01.1991 and decree dated 16.02.1991 passed by Shri Someshwar Nath Pathak, 8th Additional District Judge, Gaya in Title Appeal No. 02 of 1980/19 of 1990 affirming the judgment dated 26.09.1979 and decree dated 10.11.1979 passed by Shri Shamsheer Bahadur Singh, Subordinate Judge-I, Gaya in Title Suit No. 34 of 1977

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Sugiya Devi & Ors

.... Appellants

Versus

Kailash Yadav & Others

.... Respondents

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Appearance :

For the Appellants : Mr. Ray Shivaji Nath, Sr. Advocate
Mr. Ray Saurabh Nath, Advocate

For the Respondents : Mr. Alok Kumar Sinha, Sr. Advocate
Mr. Bhola Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT
Date:30-08-2017

Heard learned Senior Counsels for the parties.

2. This Court while admitting this appeal for hearing on 13.08.1991 ordered that the appeal would be heard on the following substantial question of law;

“Whether the judgment of the appellate court is unsustainable in law on account of the fact that the appellate court has not considered independently the evidence on record before affirming the judgment of the trial court”.

3. The plaintiff-appellant had brought Title Suit No. 34 of 1977 for declaration of title and confirmation of possession as



well as for recovery of possession in the event of dispossession from Schedule 1 land of the plaint, against the defendant-respondents. The case and claim of the plaintiff was that survey recorded tenant Mahar Gope died leaving behind his son Jiwan Gope. Subsequently, Jiwan Gope died leaving behind his widow Sundari Devi and only daughter Perwa Devi. Later on, Sundari Devi died leaving behind her daughter Perwa Devi, the sole plaintiff of the suit and appellant herein. The plaintiff-appellant came in possession of the suit land. She was mutated in the government records and was paying the rent and getting the receipt. Later on, the defendants in collusion with the revenue authorities got their name mutated in respect of the suit land which caused threat to the title of the appellant.

4. Defendant no. 1 Sri Shiva Gopa and defendant no. 3 Tejal Gope jointly filed their written statement refuting and disputing the case and claim of the plaintiff-appellant. Other defendants did not contest the suit. The defendants asserted that after death of Jiwan Gope, his widow Sundari Devi left for her Naihar as her only daughter was already married and happy in Sasural abandoning the properties left by her husband. Thereafter, the defendants, who are agnates, came in possession of the same. They were mutated in the government records and were coming in possession as owner of the lands mentioned in plaint Schedule No.



1. They further asserted that when the plaintiff returned to the village to put her wrongful claim over the land, the defendants executed sale deed in favour of the plaintiff-appellant in respect of a portion of the suit land and the plaintiff-appellant came in possession of only the purchased land.

5. The learned trial court partly decreed the suit in favour of the plaintiff-appellant to the extent of her purchased land and dismissed the suit with respect to the remaining portion of the land on the ground of long possession of the defendants-respondents.

6. The lower appellate court affirmed the judgment of the learned trial court.

7. Submission of the learned counsel for the appellant is that the first appellate court is final court of facts, hence, the law requires that it should independently apply its mind to each and every points raised for consideration. Furthermore, the finding of the learned first appellate court should be based on reasons on independent appreciation of evidence which has not been done by the lower appellate court. Therefore, the impugned judgment and decree is not sustainable in law and the matter is fit to be remitted back to the lower appellate court.

8. After some argument, learned counsel for the



respondents concedes that the lower appellate court has not noted the points for consideration, has not referred the submissions of the parties nor has independently considered the evidences available on the record nor recorded reason for the conclusion thereof.

9. Paragraph 10 of the judgment of the learned lower appellate court which is relevant for this purpose is being reproduced below:-

“10. The learned Sub Judge has decided issued no. (v) at Para 5 and in subsequent paras and he has come to a definite conclusion after perusing the documentary as well as oral evidence that the evidence on behalf of the defendants was far superior to that of the plaintiff and it was more reliable. The D.Ws. examined on behalf of the defendants were of the same village Kusumhar and they inspired great confidence on account of their age as also their knowledge with respect to the suit lands. During the course of argument, the appellant’s lawyer could not address me to any vital discrepancy into the evidence of the D.Ws. on the basis of which the finding of the learned Sub Judge could be assailed. The plaintiff has produced some Jamindari receipts as also state receipts. The learned Sub Judge held that these receipts related to an area of 1.14 acres only and the name of Parmeshwar Mahto, son of the plaintiff, figured on the receipts. Some receipts, especially, Exts. 1/J and 1/K were in the names of the plaintiff herself and these receipts were of the same year i.e. 1361 Fasli. The learned Sub Judge has remarked that it was not understandable why two receipts were issued for



the same year and that it was also surprising that the name of the plaintiff appeared on those receipts, when, as pleaded by the plaintiff, Sundari Devi was still alive up to the year 1960. There was no pleading that Sundari Devi had got the name of her daughter mutated in her place. With respect to Chaukidari receipts (Ext. 2 series), the learned Sub Judge remarked that the Chaukidari receipts are in the name of Dasrath Mahto, the husband of the plaintiff Perwa Devi. The case of the plaintiff was that after the death of her mother she came in possession of the house of Sundari Devi and she was paying rent chaukidari as also revenue. The name of Dasrath should not have figured in those receipts, especially, during the life time of Sundari Devi, the mother of the plaintiff. The learned Sub Judge, therefore, placed no reliance on the receipts produced by the plaintiff. The defendants' case in this connection was that the plaintiff came over to Kusumhar in the year 1957 and after the intervention of Panches secured some lands from the defendants and then a petition was filed before the Circle Officer for mutation. This petition was filed by Parmeshwar Mahto, plaintiff's son. The certified copy of this petition was exhibited in the lower court and on the basis of that document some receipts in the name of Parmeshwar Mahto were filed by the plaintiff herself. The learned Sub Judge has referred to the fact that petition appears to be genuine because the receipts filed by the plaintiff being in the name of Parmeshwar Mahto lent colour of genuineness to the alleged petition by the plaintiff's son. Though the plaintiff herself denied to have got filed any such petition in her evidence in



court. To me it also appears that the case of the plaintiff with respect the defendants' assertion that the plaintiff came in the year 1957 to village Kusimhar and got some lands and secured mutation appears to have validity, otherwise there is no reason why some receipts in the name of Parmeshwar Mahto, the plaintiff's son, were filed in the lower court by the plaintiff herself. The chaukidari receipts filed by the plaintiff in themselves did not refer to the ancestral house itself. So, Chaukidari receipts were also not to prove the plaintiff's claim that she was coming in possession of her ancestral house after her mother's death. The plaintiff's pleading also is to the effect that if she is found out of possession, her possession be restored. It indicates that she was not sure that she was in possession of entire suit lands, as claimed by her. As against this, the defendants have filed Zamindari as well as state receipt dated much back to the year 1957 in which year they had admitted, the plaintiff came back to Kusumhar and secured some lands from the defendants. The learned Sub Judge has referred to the receipts on behalf of the defendants and on the basis of those receipts, it was concluded that the defendants had proved the fact of possession for several years after the death of Jivan Gope. I have already pointed out that the oral evidence on behalf of the defendants in the opinion of the learned Sub Judge was more convincing and more positive. No defect in the findings of the learned Sub Judge in this connection was pointed out during the course of hearing of this appeal. The appellant's lawyer rather harped on the theme of the case on the ground of non-framing of



the certain issue relating to plaintiff's claim of title and interest which remained undefeated on account of the claim of adverse possession by the defendants."

10. On careful perusal of the judgment of the lower appellate court, I find that the court below has not mentioned the points raised for consideration in the appeal against the impugned judgment and decree passed by the learned trial court nor the lower appellate court has discussed independently the evidences available on the record nor has assigned any reason for independent conclusion. Rather the lower appellate court has referred to the finding of the learned trial court and has referred the only evidences considered by the learned trial court and simply recorded that the learned lower appellate court goes with the finding of the learned trial court.

11. The Hon'ble Apex Court recently in **Laliteshwar Prasad Singh Ors. vs. S.P. Srivastava** (deceased) through L. Rs. reported in **2017(1) PLJR (SC) 151** considered the precedents on the point of duty of the first appellate court including the case of **Santosh Hazari vs. Purushottam Tiwari** reported in **(2001)3 SCC 179** and reproduced paragraph 15 of the judgment of **Santosh Hazari's** case which is as follows:-

"15 ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. 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 the reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court has discharged the duty expected of it.”

12. In **H.K.N. Swami vs. Irshad Basith** reported in **(2005)10 SCC 243**, the Hon’ble Apex Court held in paragraph 3 of the judgment stated as follows:-

“3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.”

13. The judgment of the first appellate court does



not reflect independent application of mind by the court supported by appreciation of evidence and recording of reasons. Though Order 41, Rule 31 of the Code of Civil Procedure requires statement regarding the “points for determination”, however, non-recording of such statement may not be fatal in each and every case provided the first appellate court records findings supported by reasons on appreciation of the evidence on the record on each and every point for determination raised before it.

14. The learned court below has lacked in compliance of the aforesaid requirements, hence, the impugned judgment and decree passed by the learned first appellate court is not sustainable in law. Accordingly, the same stands set aside and the matter is remitted back to the first appellate court to pass necessary judgment in this matter according to law within four months of the receipt of a copy of this judgment.

15. Accordingly, this appeal stands allowed without cost.

(Birendra Kumar, J)

Kundan/-

AFR/NAFR	A.F.R.
CAV DATE	22.08.2017
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