

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.61 of 2015

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1. Radha Yadav @ Raj Kishore Yadav, son of Late Chandradeo Yadav
2. Bimla Devi, wife of Radhe Yadav @ Raj Kishore Yadav
Both resident of Mohalla- Sahebganj (Near Bajrangwali Manndir) P.S.-
Vishwavidyalaya, District-Bhagalpur.

.... Appellant/s

Versus

1. Geeta Devi, daughter of Late Krithnath Jha
2. Arun Kumar Choudhary
3. Rajendra Choudhary No.- 2 & 3 sons of Late Umesh Chandra Choudhary, All
resident of Mohalla- Sahebganj (Church Road), P.O.- Champanagar, P.S.-
Vishwavidyalaya, District-Bhagalpur.
4. Smt. Mohwa Devi wife of Mahadeo Yadav, resident of Mohalla-Sahebganj (Near
Bajrangwali Mandir), P.O- Champanagar, P.S.- Vishwavidyalaya, District-
Bhagalpur.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. G. Trivedi
Mr. Manoj Kumar Jha
For the Respondent nos. : Mr. Pankaj Kumar Sinha
Mr. Rajiv Kumar Singh

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**CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL**
ORAL JUDGMENT
Date: 18-08-2017

Ref: Interlocutory Application no. 1580 of 2015

The defendants-appellants have filed the aforesaid interlocutory application for condonation of delay of 27 days in filing the appeal on the ground that certified copy of the impugned judgment was handed over to them on 17.10.2014, but as the High Court was closed from 23.10.2014 to 31.10.2014 due to Dipawali and Chhath Puja holidays, he came to Patna on 03.11.2014 and handed over the brief to his advocate to file the appeal, but unfortunately, the



own uncle of the counsel for the defendants-appellants fell ill in the week of January, 2014 due to renal failure and he was badly engaged till January, 2015 in his treatment. Thereafter, he drafted the appeal and the same was filed on 06.02.2015, but inadvertently in place of certified copy of the impugned order, photo copy of certified copy of the same was filed then after stamp reporting certified copy of the impugned order was filed on 11.02.2015. Thus, there is no deliberate or willful latches on the part of the defendants-appellants in filing the appeal. The aforesaid delay occurred due to said reasons.

2. The learned counsel for the plaintiffs-respondent 1st set's opposed the said petition and submitted that the defendants-appellants have not filed any certified copy of the impugned judgment and also not filed any document regarding treatment of their counsel's uncle. Hence, the said interlocutory application is liable to be rejected.

3. It is well settled law that the justice should be done after hearing the parties and injustice should not be done by shutting down the hearing merely on technical grounds.

4. Considering the facts and circumstances of the case and in the interest of justice, the aforesaid delay in filing the appeal is condoned and the appeal is admitted for hearing. The aforesaid interlocutory application is allowed accordingly.

5. Heard both sides on this Miscellaneous Appeal and perused the



records.

6. This appeal has been filed against the Judgment dated 13.10.2014 passed by Shri Janardhan Tripathi, the learned 3rd Addl. District Judge Bhagalpur in T.A. no. 144 of 2013 whereby the learned District Judge set aside the judgment dated 10.09.2013 passed by the learned Sub-Judge-II-cum-CJM Bhagalpur in Title Suit no. 228 of 1983 and remitted the matter back to the learned trial court for framing issue on the point of adverse possession and decide the said issue after taking evidence on the same.

7. Factual matrix of the case is that plaintiffs-respondent 1st set's have filed the suit being T.S. no. 228 of 1983 for declaration of title and interest in the property in question and for permanent injunction with the case in succinct that the plaintiffs-respondent 1st set's happen to be owner of 0.014 hectares (1 katha 4 dhurs) of land of survey Khata no. 1509 Khesra no. 3041 bearing holding no. 26 old located at Lower Champanagar Road in Mohalla Sahibganj, Bhagalpur as detailed in the schedule-I of the plaint. Part of the said property was purchased by virtue of sale deed dated 24.1.1953 from the sons and widow of Sastu Nadaf and another part was purchased by virtue of sale deed dated 14.09.1950 from the sons of Basant Rai and their name mutated in the office of the Municipal Corporation, Bhagalpur on the aforesaid property. On the basis of the aforesaid sale deeds,



they are absolute owner and in exclusive possession of the said land. On false plea, Baldeo Yadav initiated proceeding on the suit land under Section 144 of the Cr.P.C. in the court of S.D.O. Bhagalpur which was later on converted into a proceeding under Section 145 of the Cr.P.C against the defendants-appellants. The learned Magistrate referred the matter to Munsif-II Bhagalpur under Section 146 of the Cr.P.C. and Learned Munsif vide order dated 10.08.1964 held the possession of plaintiff-respondent 1st set's and restrained Baldeo Yadav from interfering in the property in question and on that basis, the learned Magistrate declared possession of the plaintiff-respondents 1st set's on the property in question. The plaintiff is in continuous and uninterrupted possession of the entire 5 katha 8 dhur and 13 ½ dhurki homestead land including suit land openly and to the knowledge of all concerned and has acquired title by adverse possession as well. Further case of the plaintiffs-respondents 1st set's is that the defendants-appellants Radhey Yadav and his wife Bimla Devi got their name mutated wrongly in the Municipal Corporation, Bhagalpur on the basis of forged sale deed dated 28.09.1976 and 28.10.1976 executed by Chanchal Yadav. Learning the same, they filed an application for cancellation of the mutation. Further case of the plaintiffs-respondents 1st set's is that their names were mutated in the revenue record over property in question and the draft of survey



khatiyan was prepared in their names. Against which Radhey Yadav filed Objection Case no. 293 of Ward no. 13 before the A.S.O. which was accepted on 21.5.1979 and dissatisfied with the said order, they filed Appeal Case no. 675 of 1979 before Settlement Officer, Bhagalpur which was dismissed arbitrarily without taking any evidence and the final Khatiyan is being prepared in favour of the defendants-appellants over the property in question and the defendants-appellants are making interference in their possession.

8. The defendants-appellants filed the written statement against the plaint filed by the plaintiff-respondents 1st set's with the case that Moulbi Abdul Karim and Bibi Kanijan were owner of the property in question. Bibi Kanijan sold out half portion of the said land to Haro Devi and rest half to Chanchal Gope. Bibi Kanijan filed Title Suit no. 58 of 1946 against her co-sharer in which she was declared owner of 1/4th share. Further case of the defendants-appellants is that Radhey Yadav and Bimla Devi purchased the property in question from Chanchal Yadav and Haro Devi vide sale deed dated 28.9.1976 and dated 8.10.1976 respectively and are in exclusive possession thereof since then. The name of the defendants-appellants were got mutated over the property in question and Khatiyan has also been prepared in their name. They got constructed two rooms over the said property. Later on Radhey Prasad Yadav sold 4 dhur land from the property in



question to Mohba Devi vide registered sale deed dated 26.04.1977.

The plaintiffs-respondents 1st set's are neither owner nor in possession of the property in question.

9. After hearing the parties and perusing the record, the learned lower court allowed the appeal and setting aside the judgment passed by the learned trial court, remitted back the case to the trial court with a direction to frame issue on the adverse possession and decided the same taking evidence of the parties thereon vide impugned Judgment.

10. Being aggrieved and dissatisfied with the aforesaid judgment, the plaintiffs-respondents 1st set has filed the present appeal.

11. It is submitted on behalf of the defendants-appellants that the plaintiffs-respondents 1st set's have claimed title over the land on the basis of purchase. Hence, they cannot claim their title over the same by adverse possession as both the claim cannot co-exist and plaintiffs-respondents 1st set's cannot acquire title by adverse possession on their own land and the learned lower court has committed illegality in remitting the matter back for framing issue on the point of adverse possession and to give a finding thereon after recording evidence. It is further submitted that the learned lower court instead of remitting back the matter to the trial court for framing issue on the adverse possession it ought to have framed the said issue itself and decide the same by taking evidence if not available on record. The learned



lower court has remitted the case back to the trial court merely perusing paragraph 2 of the plaint and without considering the evidence on record. Hence, the judgment passed by the learned lower court is liable to be set aside.

12. On the other hand, it has been submitted on behalf of the plaintiffs-respondents 1st set that after hearing the parties, the learned lower court has set aside the entire judgment of the trial court and directed to decide all the issues framing issue of adverse possession. It is further submitted that before filing this appeal, the defendants-appellants appeared in the trial court and took part in the trial by cross-examining the witnesses of plaintiffs-respondents 1st set. Hence, they are stopped from filing this appeal. The impugned judgment passed by the learned lower court is correct, legal and valid and is liable to be upheld. This appeal has no substance in it and is liable to be dismissed.

13. From the perusal of the record, it appears that plaintiffs-respondent 1st set have claimed their title in the property in question by virtue of sale deeds and claimed themselves to be absolute owner of the property in question. But, besides claiming themselves to be absolute owner of the property in question by virtue of sale deeds, they have also claimed to have acquired title over property in question by way of adverse possession in paragraph no. 2 of the



plaint and on the basis of aforesaid averment, the learned lower court has remitted the case back to the trial court for framing issue on the point of adverse possession and decide the same after taking evidence thereon. But whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property. The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. As the plaintiffs-respondents 1st set claimed themselves to be absolute owner of the property in question by purchasing the same from its previous owner vide sale deeds and continued to remain in possession till date of suit. The plea of adverse possession is not available to them.

14. The plaintiffs-respondents 1st set's plea of adverse possession is inconsistent to his first plea of becoming absolute owner of property in question by purchasing the same from the previous owner. Having become owner and in possession of the property in question on the basis of the sale deed, they must disclaim their right thereunder and plead and prove assertion of their independent hostile adverse possession to the knowledge of its owner. Since claim of the plaintiffs-respondent 1st set's is founded on the basis of sale deed, so they admit by implication that they came into possession of the land lawfully under the sale deed and continued to remain in possession



till the date of the suit. So the plea of adverse possession is not available to them. But, ignoring the aforesaid legal aspect of the case, the learned lower court has wrongly remitted the matter back to the trial court for framing issue on the point of adverse possession and to decide the same after taking evidence of the parties.

15. Moreover, as per Order 41 Rule 24 CPC, wherever the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds and as per Order 41 Rule 25 CPC, where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred and in such case shall direct such Court to take the additional evidence required. But the learned lower court has not discussed about non-availability of evidence regarding adverse possession on record and instead of itself framing issue on the point of adverse possession and deciding the case, has remitted back to the



trial court for framing issue on the adverse possession and decide the case taking evidence thereon.

16. From perusal of the records, it further appears that after passing the impugned judgment, the defendants-appellants appeared before the trial court and sought time for filing the appeal in the High Court against the impugned judgment. In my considered opinion, their said act does not bar them from filing the appeal in the High Court. The record further indicates that the defendants-appellants appearing in the court below also participated in the hearing of the case and cross-examined the plaintiffs-respondents 1st set's witnesses, but in my considered opinion, the said act of the defendants-appellants also does not bar them from prosecuting this appeal. As vide order dated 20.5.2015 passed by this Court in this appeal, this Court has directed the trial court not to pass final order in T.S. no. 228 of 1983. Meaning thereby the trial court was not restrained from taking evidence on the aforesaid issue rather from passing the final order in the case. So, the defendants-appellants were left with no option, but to take part in the trial.

17. From perusal of the impugned judgment, it also appears that the learned lower court has not directed the trial court to decide the case on all issues rather while remitting back the case to the trial court, it has directed the trial court to frame issue on the point of



adverse possession besides other issues and take evidence thereon and decide the case. Moreover, the learned lower court has not discussed the finding of the trial court on all the issues framed and discussed by the trial court warranting setting aside the entire findings of the trial court.

18. Considering the aforesaid facts and circumstances of the case, I find and hold that the impugned judgment passed by the learned lower court is wrong and illegal, hence it is set aside. Accordingly, this appeal is allowed.

(Prakash Chandra Jaiswal, J)

rohit/-

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
Uploading Date	29.08.2017
Transmission Date	N.A.

