

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.744 of 1986

=====

Late Shanti Devi through L.Rs. And Ors.

... .. Appellant/s

Versus

Raj Kumar Gupta And Anr.

... .. Respondent/s

=====

Appearance :

For the Appellant/s	:	Mr.Rau Shivaji Nath, Advocate Mr. Shantanu Kumar, Advocate Mr. Rajesh Sinha, Advocate Mr. Ray Saurabh Nath, Advocate
For the Respondent/s	:	None

=====

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT
Date : 19-06-2019

This is plaintiffs' appeal, under Section 100 of the Code of Civil Procedure, against the judgment and decree of reversal dated 19.07.1986 passed in Title Appeal No.26 of 1983/20 of 1985 by the learned lower appellant Court whereby the judgment and decree dated 19.07.1983 passed in Title Suit No.44 of 1975 in favour of the plaintiffs has been set aside.

2. Original plaintiffs late Gauri Shankar Prasad Sahu and late Hari Prasad Sahu had brought the suit aforesaid against the defendants-respondents claiming declaration of title on 1 Katha 6 Dhurs of plot No.1284 at Mohalla Nariyal Bazar, Ward No.8 in the town of Madhubani and for recovery of possession from 1 dhur 65 dhurkis of the same plot which was encroached by the defendants to their land situated at the



western boundary of the land of the plaintiffs.

3. The plaintiffs asserted that the aforesaid area of 1 katha 6 dhurs was allotted to the father of plaintiff Gauri Shankar Sahu in a partition suit vide Title Suit No.398 of 1919-20. A copy as Exhibit-4C. Thereafter, in a partition amongst three brothers of plaintiff Gauri Shankar Sahu, the aforesaid suit property came to the share of Gauri Shankar Sahu vide decree dated 12.07.1955 passed in Title Suit No.71 of 1955, a copy as Exhibit-F. The plaintiff asserted that cause of action arose on 25.05.1975 when the defendants attempted to make construction after encroaching upon the aforesaid portion and the suit was filed on 02.06.1975.

4. The defendants-respondents resisted the case and claim of the plaintiffs inter alia on the ground that about 60 years ago the ancestors of the parties had entered into an exchange whereby 7 dhurs of plot No.1284 was given to the defendants and 1 katha 6 dhurs of plot No.1289 of the defendant was given to the plaintiffs and the parties are in respective possession according to the exchange. The defendant asserted that on the said seven dhurs of land the defendants had constructed a room of brick built wall and thatched roof. The defendants contended in the written statement that if the



defendants case of exchange could not be established, the defendants are in possession of 7 dhurs of plot No.1284 since several years to the knowledge of everyone including the plaintiffs. Hence, the defendants have acquired title by adverse possession also.

5. Main issues before the learned trial Court were:

- I. Whether the plaintiffs have got subsisting right, title and interest over the suit land?
- II. Whether the story of possession and dispossession, as set up by the plaintiffs, is true and correct?
- III. Whether the story of exchange of suit land as claimed by the defendants is correct?
- IV. Whether ancestor of the defendants came in possession of suit land in terms of exchange?
- V. Whether the story of acquisition of title by adverse possession as set up by the defendant is correct?

6. The learned trial Court considered all the aforesaid main issues jointly and relied on Exhibit-4C and Exhibit-F for conclusion that the plaintiffs have proved title over the aforesaid area of plot No.1284. The Court further held that



the plaintiffs have been dispossessed from the suit land illegally by the defendants in May 1975 and the story of exchange setup by the defendants is a concoction and claim of adverse possession by the defendants is also not believable and acceptable.

7. The learned lower appellate Court considered following two points:

I. Whether the plaintiffs have got a valid and subsisting right, title and interest over the suit land?

II. Whether the suit is barred by limitation?

8. While reversing the aforesaid finding of the trial Court, the learned lower appellate Court held that the plaintiffs have failed to discharge burden of proof of their title and possession over the suit land and the suit could not have been decreed only on the basis of weakness of the case of the defendants-respondents. The Court considered that since prayer of the plaintiffs for ad interim injunction was finally not granted by the trial-court, weakness of the plaintiffs case is evident from that also. The learned lower appellate Court held that report of the Advocate Commissioners vide Exhibit-2 series and 3 series as well as deposition of PW 4, the Advocate Commissioner, are



not acceptable as evidence for the reason that the Court while issuing Commission did not direct that the parties should be noticed which is mandate of law.

9. According to lower appellate Court some widows of the family had executed a deed of Samarpannama (surrender) in favour of deity on 23.12.1946 vide Exhibit-E; whereby a portion of plot Nos.1284 and 1289 besides other plots were surrendered to the deities. After that surrender no property was left for the plaintiffs. Therefore, Exhibit-4C and Exhibit-F should not have been relied by the learned trial Court.

10. Learned lower appellate Court concluded in para-15 of the judgment as follows:

“It appears that the plaintiff has failed to prove its own case and also subsisting title and possession over the suit land within 12 years of the filing of the suit and the plaintiffs cannot obviously advantage themselves by the weakness of the defendants case and they will have to stand or fall on their own whereas the appellant defendants have been able to prove their possession and title over the suit land by way of exchange and in the alternative on the basis of adverse possession and thus the suit has become barred by limitation.”

11. When this appeal was admitted for hearing on



16.12.1987 following two substantial questions of law were formulated for consideration:

I. Whether the Court of appeal below erred in law in applying Article 142 of the old Limitation Act to a suit, which was filed in the year 1975?

II. Whether the Court of appeal below erred in law in holding that the plaintiffs had no title without recording a positive finding that the story of exchange as put forward by the defendants was correct?

At the time of hearing of this appeal learned counsel for the appellants raised one more question of law for consideration.

III. Whether the findings of the lower appellate Court is vitiated by misreading of documents and mis-application of law?

12. Heard learned counsel for the appellants.

Though the respondents had filed appearance, however, no one appeared when the appellant was heard by a different Bench on 02.09.2016 and the matter was adjourned for hearing of the respondents by way of last indulgence. Thereafter, due to death of some of the parties and substitution



and notice to their substituted heirs, the matter could not be heard and this could be heard only on 17.04.2018, 30.04.2018, 07.05.2018. On 07.05.2018 the appellants completed its argument and the matter was adjourned for argument of the respondents but no one appeared thereafter. Again opportunity was given to the respondents on 18.06.2019. However, no one appeared on behalf of the respondents.

13. Learned counsel for the appellants contends that the learned lower appellate Court misread the documentary evidences available on the record and misapplied the provisions of law while setting aside the judgment of the trial-court. The learned Court-below has wrongly held that the plaintiffs failed to discharge the burden of proof, which always remained with the plaintiffs, who were the seeker of the favour of the Court. Contention is that once the plaintiffs had proved his title; rather title of the plaintiffs was admitted by the defendants while putting forward a case of exchange. Therefore, the burden sifted on the defendants to substantiate the claim of exchange. Further contention is that the claim on suit property by title and simultaneously by adverse possession is not permissible under the law. Title and adverse possession are mutually inconsistent. The claim of adverse possession is based on hostile title to the



real owner; whereas claim of title is based on own title. According to learned counsel, the lower appellate Court has not gone through the reasons assigned by the learned trial-court while coming to the contrary finding.

QUESTION NO.1: Whether the Court of appeal below erred in law in applying Article 142 of the Old Limitation Act to a suit, which was filed in the year 1975?

14. The law is well settled that when both the parties had adduced their evidence, the question of burden of proof pales into insignificance. Reference may be made to the case of **Rebti Devi Vs. Ram Dutt & Anr.** reported in **AIR 1998 SC 310**. It is equally trite law of evidence that the initial burden of proof lies on the party who desires that the Court should believe on existence of a particular fact. In the case, in hand, the plaintiffs established title on the suit property on the basis of decree passed in Title Suit No.398 of 1919-20 vide Exhibit-4C whereby 1 katha 6 dhurs of the suit plot No.1284 was allotted to Anutha Lal, father of plaintiff Gauri Shankar Sah. Thereafter, a partition took place among the brothers of the plaintiff No.1 through decree of the Court in Title Suit No.71 of 1995 at Exhibit-F and in that partition the suit property was allotted to the share of the plaintiffs. If the defendants would



have simply denied the facts of any encroachment on the land of the plaintiffs by the defendants, the plaintiffs would have been carrying further burden of proof to establish encroachment by the defendants. However, in this case the defendants put forward a case of exchange and claimed possession on 7 dhurs of land of plot No.1284 through the said exchange. Hence, the burden sifted on the defendants to establish the factum of exchange.

15. In absence of any pleading or evidence to the contrary the Court would take judicial notice of the fact that the disputed portion of the suit plot was of value of more than hundred rupees as the land situates in a district town. Section 118 of the Transfer of Property Act provides that a transfer of property through an exchange can be made only in the manner provided for the transfer of such property by sale. Section 54 of the Transfer of Property Act besides defining a “sale” provides for how the sale would be made. The relevant portion is as follows:

“Such transfer in the case of tangible immovable property of the value of hundred rupees or upwards or in the case of reversal or other tangible thing can be made only by a registered instrument.”



16. In the case in hand, the exchange was not made by a registered instrument. If the law requires any particular thing to be done in a particular manner it should be done in that manner only and in no other manner. Even if it is assumed for argument sake, though there is no pleading or evidence that the so-called exchange was an oral exchange, there is no subsequent document such as mutation in the government record or grant of rent receipt to substantiate that the said 60 years old exchange was ever acted upon. Oral evidence cannot exclude the documentary evidence nor the fact can be proved by oral evidence if the law requires that a document of the same should be there. Moreover, claimed exchange did not take place in presence of any witness.

17. The learned lower appellate court has deduced an inference that the defendants claim of exchange was a proved claim and in the way committed illegality in ignoring the non-compliance of the provisions of law. Once the defendants put a definite case of exchange and failed to establish it, the learned lower appellate court committed error of law in holding that the burden of proof throughout continued on the plaintiffs and the plaintiffs failed to discharge the burden.

18. The learned lower appellate court relied on the



documents of the defendants vide Exhibits-D & D/1 which are certified copy of continuous Khatiyan for holding that plot No.1289 was of the defendants and a portion of the same was amalgamated with the property of the deity situated by the side of the suit property. Hence, claim of exchange is accepted. It is not the case of the plaintiffs-appellants that plot No.1289 is not of the defendants nor the appellants have put any claim on the said land; rather it is the case of the defendants that a portion of the said land was given to the ancestor of the plaintiff in the transaction of exchange with the suit property, which the defendants could not establish in this case. In para-5 of the judgment, the learned lower appellate Court has held that the plaintiffs failed to prove a case of subsisting title and possession over the suit land within 12 years of the filing of the suit. Apparently, the learned lower appellate court has applied the provisions of Article 142 of the Indian Limitation Act, 1908. Under the said law it was burden of the plaintiffs, in the case of relief for possession based on possessory title to prove the fact that the plaintiff was in possession and was dispossessed within 12 years of the date of suit. Under the old law the plaintiff was burdened to show his possession within 12 years prior to the suit when he claimed recovery of possession. After the new



Limitation Act, 1963, which was applicable on the date of suit the plaintiffs of a suit for recovery of possession based on title is not required to prove his continuous possession within 12 years of the suit. Now the burden is on the party, who claims title by adverse possession to prove that his possession is since last 12 years continuous, open to all and in assertion of claim of own title to the hostility of the real owner having knowledge of this fact. Apparently, the learned lower appellate court has committed error of law in wrongly applying the provisions of Article 142 of the old Limitation Act.

19. It is evident that once the defendants put a case of exchange, the defendants admitted title of the appellants over the suit land. However, asserted their possession over the suit land for continuous several twelve years to the knowledge of everyone including the defendants.

The law is well settled that plea of adverse possession and of title are mutually inconsistent. Reference may be made to the case of **Karnataka Board of Wakf V. Government of India & Others** reported in (2004) 10 Supreme Court Cases 779. In this case the defendants have put a claim on the suit land by title arising out of the exchange transaction. Therefore, the defendants cannot be allowed to put



claim over the suit land by adverse possession. Moreover, a person who claims adverse possession should prove that:

- 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 property;
- D. How long his possession has continued and;
- E. His possession was open and undisturbed.

20. In the present case, there is no documentary evidence to substantiate claim of possession of the defendants on the suit land, either before the institution of the suit or subsequent thereto. Equally there is no evidence of claim of hostile title to the knowledge of the plaintiffs. Mere long and continuous possession by itself could not constitute adverse possession unless it is established by evidence that the claim of the defendants on the suit property was hostile to the claim of the plaintiffs to their knowledge and the plaintiffs deliberately kept mum even after expiry of 12 years from the date of open assertion of title by the defendants. Therefore, there is complete lack of evidence on the record to substantiate the claim of adverse possession by the defendants and the learned lower appellate Court has committed error of law by not



applying the legal principle, prevailing in the field, correctly.

In the result, this question is answered in favour of the appellants.

QUESTION NO.2: Whether the Court of appeal below erred in law in holding that the plaintiffs had no title without recording a positive finding that the story of exchange as put forward by the defendants was correct?

21. On careful consideration of the pleadings and evidence on the record, this Court is satisfied that the learned lower appellate Court has erred in law in holding that the plaintiffs had no title; rather it is a case of admission of title of the plaintiffs over the suit land by the defendants and thereafter the unproved case of exchange of the suit property. The learned appellate Court below erred in holding that in absence of documentary evidence, the story of exchange put forward by the defendants is correct. There is no documentary evidence to substantiate that the so-called exchange was ever acted upon. Neither the ancestors of the plaintiffs nor the plaintiffs took any initiative for mutation over plot No.1289 nor the defendants took any initiative to bring on the public record that the claimed area of plot No.1284 was of the defendants. In absence of documentary evidence which would have been the base and only evidence to prove exchange, the oral witnesses of the defendants should not have been relied upon by the learned



appellate Court below because none of the witnesses are the witnesses of actual transaction of exchange. Accordingly, this question is also answered in favour of the appellants.

QUESTION NO. 3: Whether the findings of the lower appellate Court is vitiated by misreading of documents and mis-application of law?

22. There is no evidence regarding total area of plot No.1284 or 1289 on the record. Exhibit-E is a registered deed of surrender to the deity executed by some females having share in plot No.1289 and plot No.1284. They surrendered their interest in portion of the aforesaid plots in favour of the deity on 23.12.1946. On the basis of the aforesaid Exhibit-E, the learned lower appellate court held that after the said surrender plaintiffs had no property left in plot No.1284; whereas it is not a case of the parties that plot No.1284 is not of the plaintiffs and plot No.1289 is not of the defendants. The lower appellate Court made out a third case against the pleadings of the parties by misreading Exhibit-E. No reason has been assigned by the learned lower appellate Court for not accepting Exhibit-F and Exhibit-4C, which are decrees of the Civil Courts and in both the aforesaid documents plot No.1284 is mentioned which came initially to the father of the plaintiff No.1 and thereafter to the plaintiff No.1 in partition with the brothers.



23. Since the defendants had claimed possession over 7 dhurs of plot No.1284 as such there was no need for appointment of Advocate Commissioner and measurement of the land and ascertainment of the encroached portion. However, both the parties prayed for such appointment and the trial-court appointed as such. Both the Advocate Commissioners submitted their report. The learned lower appellate court held that the order of the trial Court appointing Advocate Commissioner should have clearly mentioned that parties should be noticed but the same does not mention so. Hence, the orders of the trial Court as well as the reports of the Advocate Commissioners are vitiated. Neither Part-III containing Sections 75 to 78 of the Code of Civil Procedure nor Order XXVI of the Code of Civil Procedure, which contains power of the Court to issue commissions and procedure thereof, requires that the Court should order while issuing commission that the parties should be noticed. However, Exhibit-3 and Exhibit-2, which are Commissioners report clearly shows that the parties were noticed and a copy of the notice served on the parties was annexed with the report. Therefore, apparently no injustice has been caused to any of the parties nor there is any non-compliance of mandate of law in the matter of appointment of



Advocate Commissioners. As such, in my view, the learned lower Appellate Court erred in misreading the document and misapplication of law while reversing the finding of the trial-court. This question is answered accordingly.

24. In the result, this second appeal is allowed. The judgment and decree of the lower appellate court is hereby set aside and that of the trial-court is affirmed.

25. However no cost in the facts and circumstances of this case.

(Birendra Kumar, J)

Mkr./-

AFR/NAFR	AFR
CAV DATE	17.07.2018
Uploading Date	20.06.2019
Transmission Date	20.06.2019

