

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.154 of 1985

1. Sarv Narayan Yadav Son of Late Ayodhi Yadav Resident of Village Fulwan @ Devipur, P.S. Manigachhi, District- Darbhanga.
2. Satya Narayan Yadav Son of Late Ayodhi Yadav Resident of Village - Fulwan @ Devipur, P.S. Manigachhi, District- Darbhanga.

... .. Appellant/s

Versus

Ram Phal Yadav Son of Bishun Yadav Resident of Village - Fulwan @ Devipur, P.S. Manigachhi, District- Darbhanga.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Vishwanath Prasad Singh, Sr. Advocate Mr. Ajit Kr.Singh, Advocate Mr. Rajesh Kumar, Advocate
For the Respondent/s	:	Mr. Hamendra Prasad Singh, Sr. Advocate Mr. Md. Sufiyan, Advocate Mr. Thakur Brajesh Singh, Advocate Mr. Farooque Ahmad Khan, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
ORAL JUDGMENT

Date : 16-12-2021

Heard Mr. Vishwanath Prasad Singh, learned

Senior Advocate for the appellant/plaintiffs and Mr.

Hemendra Prasad Singh for the respondent first set.

The suit was not contested by defendant second and third party.

This appeal is directed against the judgment and decree dated 31.08.1978 and 16.09.1978 respectively passed by the learned Munsif, Darbhanga in Title Suit No. 21 of 1971, whereby the suit of the appellants/plaintiffs



was decreed in part as well as against the judgment and decree passed by the learned 2nd Additional Sub-Judge, Darbhanga in Title Appeal No. 89 of 1978/9 of 1984 dated 12th of January, 1984, whereby the appeal against the judgment and decree referred to above has been dismissed and the cross appeal by respondent-defendant-first set has been allowed.

The short question involved in this case is whether the appellants/plaintiffs were successful in establishing that the suit land was purchased by them in the name of their Benamidar/defendant second party from defendant third party, viz. Mst. Sarobati Devi and whether they were in possession of the lands which they had acquired on the basis of sale deeds of 1940, 1945, 1957 and 1958.

The learned trial court framed the following issues:

(a) Is the suit maintainable and whether the plaintiffs got cause of action to sue?



(b) Is the suit barred by law of limitation or the principles of waiver, estoppel and acquiescence?

(c) Has the suit property been under valued and the court-fee paid thereon is insufficient?

(d) Whether the suit is bad for non-joinder of parties?

(e) Whether the defendant second party is the Benamidar of the plaintiff no. 1?

(f) Whether the plaintiffs have got subsisting right, title and interest in the suit land on the basis of the four kebalas dated 28.03.1945, 19.10.1958, 12.11.1957 and 26.12.1940 as well as the sale deed dated 30.04.65?

(g) Whether the suit lands are in possession of the plaintiffs or the contesting defendants?

(h) Whether the plaintiffs are entitled to any relief or reliefs?

It has been held that the plaintiff/appellants could not prove that the defendant second party is a Benamidar of the appellants/plaintiffs and that the appellants had no



subsisting right, title and interest in the suit land on the basis of four sale deeds dated 28.03.1945, 19.10.1958, 12.11.1957 and 26.12.1940 as also of the sale deed dated 30.04.1965. The appellants/plaintiffs were but found to be in possession of 1 katha, 10 decimals and 12 kanmas in plot no. 164 and an area of 11 decimals of plot no. 528 and 1 kattha, 14 dhurs of plot no. 326. The possession of the appellants/plaintiffs over these plots were confirmed.

Hence, the suit which was filed for declaration of title and confirmation of possession with respect to the suit land mentioned in Schedule 1 and 2 of the plaint and permanent injunction restraining the respondent first party from interfering in their possession and in the alternative, recovery of possession if the appellants/plaintiffs are thrown out of possession during the pendency of the suit, was only decreed in part with issue having been decided in the manner referred to above.



As against the aforesaid judgment and decree of the trial court, the appellants and the respondent first party preferred appeal and cross-appeal respectively.

The Appellate Court *vide* its judgement and decree dated 12.01.1985 and 28.01.1985 respectively agreed with the findings of the trial court over all the issues except issue no. 7 and held that the trial court had wrongly decreed the suit in part by holding the possession of the appellants over certain plots of land.

Hence, this second appeal.

The substantial questions of law framed in this appeal are as hereunder:

(i) Whether the learned Sub-ordinate Judge and in rejecting the plaintiffs' claim based on the sale deeds of 1940, 1945, 1957, 1958 and 12.04.1965 on the basis of Ext. 2(A) especially after rejecting the plaintiffs' case of Benami purchase under Ext. 2(1), 2(E), 2(H), 2(E) again and 2(D).



(ii) Whether the lower appellate court erred in law in not appreciating that the plaintiffs were entitled to a decree even on the alternative ground of continuous long possession and in that view, the Pleader Commissioner's report was a good piece of evidence to have been relied upon.

(iii) Whether the court below failed to appreciate that the plaintiffs' case of acquisition of title under Ext. 2A could not have been rejected as the Benamidar *viz.* Anant Yadav did not challenge the same.

(iv) And lastly, whether the findings of fact recorded by the court below are erroneous in law.

The case of the appellants/plaintiffs is that they had purchased the land detailed in Schedule 1 and 2 from one Amirti Devi, who was the widow of Mithu Yadav. It would be relevant here to state that the appellants/plaintiffs and the respondent-defendant first party come from the same stock of family and respondents no. 1 and 2 are the grand-sons of Late Mithu Yadav,



whose widow is said to have executed four sale deeds. The 5th sale deed of 1965 (Ext. 2A) was allegedly executed by the daughter of aforesaid Amirti Devi *viz.* Sarobati Devi.

The aforesaid lands were purchased *vide* four sale deeds, all executed by Mst. Amriti Devi in favour of Late Ajodhi Yadav, who was the plaintiff no. 1 in the title suit. Since the date of the purchase of the respective lands, the appellants/plaintiffs were coming in continuous possession over the same.

When the 5th sale deed was about to be executed on 12.04.1965 (Ext.2A), the appellants came to learn that the land which was sought to be sold to them had already been bequeathed by Mst. Amirti to her daughter Mst. Sarobati (respondent third party) *vide* a deed of gift dated 03.07.1974. Since Mst. Sarobati (defendant no. 3) was reluctant to register the sale-deed, it was compulsorily registered on 07.01.1966 in Registration Case No. 44 of 1965.



Finding that the property in question had cloud over it, then, to be of the safer side, the appellants/plaintiffs wanted to purchase all the property previously purchased by plaintiff no. 1 from Mst. Sarobati as all the lands in question fell in the gift deed executed by Amirti Devi in favour of her daughter Mst. Sarobati.

For the aforesaid purpose, a Benamidar *viz.* Anant Yadav, who is stated to be the cousin of plaintiff no. 1 (since deceased) was brought forth and the sale deed was executed in his name.

The appellants/plaintiffs have further contended that their Benamidar, with an evil motive, executed two sale deeds dated 24.02.1971 in favour of defendant first party, notwithstanding the fact that he did not have any right to transfer the suit land.

The suit was contested only by the respondent/defendant first set by stating that Amirti Devi had executed the deed of gift in the name of her daughter Mst. Sarobati Devi on 03.07.1944, which fact was known



to the appellants/plaintiffs all along as they were staying in the same courtyard.

It was thus contended on their behalf that the plea of the aforesaid deed of gift not becoming operative any time was incorrect.

The respondent-defendant first party have also raised the plea that all the four sale deeds by virtue of which the appellants/plaintiffs claimed possession of land described in Schedule 1 and 2 were forged and fabricated documents. Even the fact of the Benamidar not being in any manner related to the appellants could not be proved.

The claim of the appellants that they had paid the consideration money for the sale deed (Ext.2A) was incorrect. The land in question was purchased from defendant second party by the defendant first party by virtue of two sale deeds (Ext. B & B1).

The aforesaid lands were purchased by the respondent-defendant first party for a consideration of Rs. 4000/-. The hand-notes were paid by the defendant



second party which stood in the name of one Nasib Lal Yadav. The papers regarding the execution of sale deed always remained with the so-called Benamidar but later, with the relationship between the defendant first party and second party deteriorating over some issue, all the documents were given to the appellants/plaintiffs which actually goaded them to stake their claim over the land so purchased by the defendant second party from defendant third party.

Prior to the sale of such land, defendant no. 3 was in continuous possession of the same and after its sale, Anant Yadav (defendant second party) came in possession.

The trial court on finding that the appellants/plaintiffs could not prove the motive for the Benami purchase found that the claim of the appellants/plaintiffs that the defendant second party is the Benamidar, was rejected.

The trial court however found the existing relationship between the appellants and defendant second



party but refused to accept defendant second party as the Benamidar of the appellants/plaintiffs only on the ground of their custody of the documents relating to compulsory registration and of the sale deeds.

With the documentary evidence furnished on behalf of the contesting parties, the trial court was positively of the view that defendant second party was not the Benamidar of the appellants/plaintiffs.

With respect to the hand-note, one of the documentary evidence brought forth by the appellants/plaintiffs which stood in the name of Nasib Lal Yadav, aforesaid Nasib Lal Yadav, who has been examined as P.W. 23 has stated that defendant third party had borrowed money from him and had executed one hand-note in his favour.

The trial court found that if plaintiff no. 1 (late Ajodhi Yadav) would have had paid money, the name of Ajodhi Yadav would have been mentioned in the hand-note.



With respect to the appellants/plaintiffs' possession over the said plot of land, the trial court was of the view that some part of the land detailed in Schedule 1 and 2 was in their possession.

This finding of fact was actually arrived at by the trial court on the basis of Survey Knowing Pleader Commissioner's report that some part of the land had got amalgamated with the land of the appellants/plaintiffs.

The trial court accepted such report and therefore decreed the suit in part by holding that the appellants/plaintiffs are in possession of 3 kathas, 15 dhurs of land.

The appellate court has agreed with the Trial court's finding of the defendant second party not being the Benamidar of the appellants/plaintiffs and that the appellants/plaintiffs were in possession of the suit land.

The appellate court has relied upon the logic ascribed by the trial court that there was no reason for the appellants/plaintiffs to have purchased a land in the name



of Benamidar from defendant third party, when they were in possession of the suit land (Schedule 1 and 2) from before by virtue of sale deeds executed by the mother of defendant third party.

If at all the appellants/plaintiffs had managed to get those lands sold to the Benamidar, it only raised a presumption that the appellants/plaintiffs were not in possession of the said land and the defendant third party was actually in possession of the said land by virtue of the deed of gift now.

With this background fact, the plea of the appellants/plaintiffs that the deed of gift was a forged document cannot succeed as no party can be allowed to blow hot and cold in the same breath. The plea taken by the appellants/plaintiffs is contradictory and the acceptance of one excludes the possibility of the other and vice-versa.

With respect to possession of the appellants/plaintiffs over the suit land, the appellate court has partly agreed with the findings of the trial court but



has found the findings about the possession of appellants/plaintiffs over 3 katthas, 15 dhurs of land, to be erroneous.

The appellants had filed Ext. 2G of the year 1940 to show that they are in possession of 1 kattha, 10 dhurs of land in plot no. 174. But such assertion could not succeed as the appellants/plaintiffs never took any steps to examine the scribe or the attesting witnesses of that sale deed. No explanation also has been furnished for their non-examination. It was not even a registered document.

On the contrary, the respondent-defendant first party have relied upon Ext. B and B1, the sale deeds executed by defendant second party in their favour. To prove that, they have examined D.Ws. 2, 13 and 19. Those witnesses have, in unison, stated that the land in question was sold for Rs. 4000/- and they have also proved the receipt of Rs. 4000/- Ext. A(1) to be in the handwriting of defendant second party.



With respect to the part possession of the appellants/plaintiffs as decreed by the trial court, the appellate court has held that it was not correct for the trial court to have relied on the report dated 21.09.1976 of the Survey Knowing Pleader Commissioner as the appellants/plaintiffs, in the first instance, had failed to prove their title with respect to the entire suit land and that the issue of amalgamation was not an issue in the title suit.

The appellate court, therefore, was rightly of the view that such evidence cannot be relied upon or taken into consideration which is beyond the pleadings. The cross-appeal therefore was allowed by the appellate court and the appeal preferred by the appellants herein was dismissed with cost.

The findings of fact by the appellate court is based on evidence on record.

The lower appellate court rightly set aside the part decree by the trial court on the ground of same



having been based on evidence which was beyond the pleadings.

The claim of the appellants which was largely based on the four sale deeds and the compulsorily registered sale deed of 12.04.1965 in the name of defendant second party, could not have been accepted in view of definite finding of the defendant second party not being a Benamidar of the appellants/plaintiffs.

Since the appellants were not found to be in continuous long possession of the suit land, merely because of a report of the Survey Knowing Pleader Commissioner that the land stood amalgamated and therefore, it would be presumed that the appellants/plaintiffs were in possession of the said land, was incorrect.

The defendant second party has chosen not to contest the suit as well as appeal is no ground for allowing the claim of the appellants/plaintiffs. The contest obviously is between the appellants/plaintiffs who claim possession of



the said land and the respondent-defendant first party who claim to have purchased the property from defendant third party and also claim to be in possession thereof.

Merely because there was no contest on the part of defendant second party, the part findings arrived at by the trial court and the judgment and decree of the appellate court cannot be faulted with.

Thus, there is no merit in this second appeal and the same is therefore dismissed.

(Ashutosh Kumar, J)

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CAV DATE	NA
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