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Ct. No. 02

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S.A.T. 332 of 2019
CAN 1 of 2019 (Old no. CAN 11305 of 2019)

Bikash Chandra Ghosh
Vs.
Indian Iron Steel Company Limited & Anr.

Mr. Debasish Sur.
... for the appellant.

The present appeal arises from a judgement and decree passed by the 1st Appellate Court, i.e. the learned Civil Judge (Senior Division), 2nd Court, Asansol on 29th June, 2019 in Title Appeal No. 07 of 2018 affirming the judgement and decree dated 30th January, 2018 passed by the learned Civil Judge (Junior Division), 3rd Court, Asansol in Title Suit No. 100 of 2004.

The suit filed by the plaintiff/appellant stood dismissed by the learned Trial Court and such judgement and decree was carried to 1st Appellate Court, who also refused to interfere it.

Admittedly the property measuring about 0.16 acres situated in Mouza – Narsingbandh and recorded in C. S. Khatian no. 302 originally belonged to Harmukh Marwari, Haripada Marwari and others. Subsequently there was a settlement amongst the co-owners and the suit property was allotted to Harmukh Marwari and his son, namely Narayan Das Marwari acquired the right, title and interest upon the death of Harmukh Marwari. Thereafter, the said Narayan Das Marwari transferred the said property to Mr. Basudev Prasad Shaw by executing a registered deed of patta on 19th August, 1955 and the present plaintiff/appellant acquired the title through a registered deed in the year 2003.

It is further alleged in the plaint that the defendants have interfered with the possession and title on the basis of incorrect and erroneous recording in the R.S. Record of Rights and, therefore, they are entitled to the relief against the defendants relating to a title based upon the registered deed of patta executed by the said Narayan Das Marwari in favour of Basudev Prasad Shaw, who in turn executed another registered deed in favour of the plaintiff in the year 2003.

On the other hand, the defendant no. 1 contested the said suit and a specific plea was taken that the Narayan Das Marwari raised cloud over the title and the possession which constrained it to file a suit being Title Suit No. 59 of 1952. Subsequently the said suit was decreed against the said Narayan Das Marwari, who carried the same to the 1st Appellate Court and upon being unsuccessful carried the same to this Hon'ble Court in a Second Appeal, which was ultimately dismissed on 20th April, 1972.

It was the specific case of the said defendant that after getting the decree not only in relation to declaration of title but also recovery of possession, obtained the possession and laid down pipeline beneath the suit land. It is also alleged that the plaintiff is nothing but an illegal occupant shown in the Record of Rights, which is not correct.

On the conspectus of the aforesaid fact the parties were directed to lead evidence and the relevant deeds relied upon by them were duly executed including the judgements of the Courts delivered in connection with the litigation filed by the defendant no. 1. However, an argument was advanced by the plaintiff/appellant before the Trial Court as well as the 1st Appellate Court that since

the possession was not taken in execution of the decree obtained by the defendant no. 1, such possession becomes adverse to it and, therefore, they have perfected the right, title and interest.

Both the Courts disbelieved such story and same point has been projected before us by the learned Advocate appearing for the plaintiff/appellant. It is submitted that once a person in wrongful possession has perfected the tile by way of adverse possession, such previous possession would pass on to the subsequent purchaser and he will be entitled to claim such right against the true owner and relied upon a judgement of the Apex Court in case of *Yeshwantrao Laxmanrao Ghatge and Anr. vs. Baburao Bala Yadav & Ors.*, reported in (1978) 1 SCC 669. It is further submitted that the moment a person is to be found in settled possession, such possession cannot be disturbed without recourse to law and relied upon a judgement of the Apex Court in case of *Poona Ram vs. Moti Ram (Dead) Through Legal Representatives & Ors.*, reported in (2019) 11 SCC 309.

At the very outset, this Court must record that the point, which is canvassed before us, cannot be permitted to be taken in absence of any pleading in this regard. The plaint is silent over the story of adverse possession as the right, title and interest was based upon the registered deed of patta executed by Narayan Das Marwari in favour of Basudev Prasad Shaw, which later on passed on to the plaintiff through the registered deed. If the plaintiff has not made out any case nor made any averments in the plaint, he cannot be permitted to agitate such point provided such point being a pure question of law.

We are not oblivion of the settled proposition of

law that the point of law can be agitated for the first time before the highest Court provided the facts required to determine such point is already pleaded in the pleading and no further corroboration is required. The position would have been different, when the point of law based upon the fact is projected for the first time without having any foundation in the pleading. The plea of adverse possession is a mixed question of fact and law. Mere possession, how long it may be, cannot be said to be adverse to the true owner, as the other element pertaining to the ouster of the true owner is required to be pleaded and proved. The possession should not only be open, continuous and hostile, but true to the knowledge of the owner, who despite having such knowledge failed and neglected to take steps for removal of wrongful encroacher or the person in wrongful possession of his property.

The importance of pleading a fact is well-known, as the adversary must be aware what he is to meet the facts to defend his title and should not be taken on surprise at the stage of argument. There is no foundational fact pleaded in the pleading and, therefore, it would be purely an academic discussion to deal with the judgement cited by the plaintiff/appellant on the concept of adverse possession. There is no quarrel to the proposition that a person in settled possession cannot be dispossessed without due process of law as held in *Poona Ram* (supra).

The possession is the ninth principle of title provided the ingredients and modalities of proving the same has been satisfied by the person claiming perfection of title by adverse possession.

There appears to be a serious dispute of

possession. The plaintiff raised presumption over the possession on the strength of the entry into the Record of Rights; on the other hand, had challenged such entry branding it as wrong and erroneous, which would be evident from the relief claimed in the plaint that a declaration should be made over such wrong and erroneous entry in the R.S. Record of Rights. On the other hand, the defendant no. 1 has asserted that they are in possession after an unsuccessful battle by the predecessor of the present plaintiff and, in fact, there is a pipeline laid beneath the said property.

Both the Courts have found that the possession remained with the defendant no. 1 and did not find that the possession was ever retained by the plaintiff.

We thus do not find that there is any substantial question of law involved in the instant appeal.

The appeal is thus dismissed.

Since the appeal is dismissed at the stage of admission under Order XLI Rule 11 of the Code of Civil Procedure, the connected application has become infructuous and is accordingly dismissed.

(Harish Tandon, J.)

(Kausik Chanda, J.)

