

Item-19. 16-12-2022

sg

Ct. 8

SAT 358 of 2008

Amar Pal & Ors.
Versus
Samiran Ghosh & Ors.

The matter appeared in the warning list on 29th November, 2022 and thereafter transferred to the regular list on 5th December, 2022. There was a clear indication in the list that the matter shall be transferred to the daily cause list on 5th December, 2022 and since then the appeal is appearing in the list.

The appellants are not represented nor any accommodation is prayed for on behalf of the appellants. The appeal is of the year 2008.

It appears from the record that on 22nd May, 2009, a coordinate Bench noticing the defects directed the matter to go out of list with liberty to mention after the defects are removed. But no attempt has been made by the learned Advocate representing the appellants to remove the defects. The appeal is pending since 2009 for admission.

The appellate decree dated 16th May, 2008 confirming the judgment and decree dated 19th January, 2007 in a suit for declaration of title and permanent injunction is the subject matter of challenge in this second appeal.

Since the certified copy of the judgment and decree the Trial Court are not on record, we proceed with the order passed by the learned First Appellate Court and consider whether any substantial question of law is involved upon taking into consideration the memorandum of appeal.

Briefly stated; the plaintiffs/appellants on 22-04-96 filed this suit praying for declaration of their title and permanent injunction against the defendants on the grounds that the suit property originally belonged to one Haradhan Pal, s/o Ramratan Pal and that Ram Ratam Pal and Mathan Pal were two brothers who are the legal heirs of Uday Pal. According to the plaintiffs Haradhan Pal purchased the suit property by virtue of several deeds of purchase from different persons and he expired in the year, 1977 leaving behind his only heir Mathan Pal who was the brother of his father and while owning and possessing the suit property the said Mathan Pal expired in the year, 1978 leaving behind his two sons namely Nabani Pal @ Doman and Rampada Pal and two daughters who inherited $\frac{1}{4}^{\text{th}}$ share each in the suit property. Between the said two daughters the elder Satubala Dasi a widow died issueless and the 2nd daughter Kuturabala Dasi died leaving behind one son Dosti Mondal and one daughter-Kuntala Mondal who are plaintiff nos. 6 and 7 in this case. Between the two sons Nabani Pal died leaving behind his two sons Amar and Samar and the 2nd son, Rampada Pal of Mathan Pal died leaving behind three sons namely, Santi, Kanti and Mantri and all of them are plaintiff nos. 1 to 5. According to the plaintiffs, plaintiff nos. 1 and 2 have $\frac{1}{3}^{\text{rd}}$ share in the suit property while plaintiff nos. 3, 4 and 5 have $\frac{1}{3}^{\text{rd}}$ share and plaintiff nos. 6 and 7 have $\frac{2}{3}^{\text{rd}}$ share in the suit property. According to them the defendants have no right, title and interest over the suit property and on account of the connections of defendant no.1 LR record has been wrongly recorded in her favour. They further alleged that neither Haradhan Pal nor his heirs sold any portion of the property to the defendants. Under

such circumstances, the plaintiffs filed this suit praying for the relief as mentioned in the plaint.

The defendant no. 1 on 23-12-98 filed written statement against the aforesaid plaint case wherein she alleged that the plaintiffs have no right, title and interest in the suit property. The plaintiffs being out of possession of the suit property the suit is bad under section 34 of the Specific Relief Act. She accepted that the suit property originally belonged to Haradhan Pal. But denied that they inherited the suit property in the manner stated by them in the plaint. Accordingly to her the LR record has been correctly prepared. According to defendant no.1 she is owning and possessing the suit property as the sole heirs of Haradhan Pal. According to her Ramratan Pal had one son, Haradhan Pal and one daughter Bhanumoti Pal. Bhanumoti Pal got married to one Dhajadhari Mondal of Thobgram and after death of Ramratan Pal, Haradhan Pal used to reside in the house of her sister, Bhanumoti Pal and his sister and brother in law settled him in Thobgram and during his staying in the said village he acquired the suit properties. The defendant no.1 is the only daughter of said Bhanumoti Mondal and after the death of Haradhan Pal she (Saraswati) inherited the suit property according to Hindu Successions act.

After the death of Swaraswati Pal her legal heirs namely, Sonali Ghosh, Samiran Ghosh, and Niranjana Ghosh on 15-06-04 filed a written statement which is more or less similar to the written statement filed by their mother. The other defendants namely Sandhya Dom, Gasto Dom and Uday Dom also filed a written statement on 14-09-06 wherein they denied that the

plaintiffs have any right, title and interest over the suit land and according to them Swaraswati Ghosh used to possess the purchased property of Haradhan Pal and the plaintiffs never possessed the properties of Haradhan Pal at any point of time. According to them after the death of Haradhan, Swaraswati Ghosh alone used to possess his property and used to pay Govt. rents and the plaintiffs being greedy people are taking advantage of innocent Swaraswati Ghosh and trying to grab the property.

The issue that came up for consideration before the Trial Court as well as the Appellate Court as to whether Haradhan Pal had any real sister by the name of Bhanumoti Pal, who died leaving behind her only daughter Saraswati. This issue is important as if the existence of such real sister is established, there would be no question of inheritance of the suit property by the plaintiffs as heirs of Mathan Pal. It is elementary that the acquisition of title can be through testamentary, dispossession of gift deed, purchase deed or by way of inheritance. The Trial Court relying upon the decision of the coordinate Bench in *Smt. Katyabala Dasi Vs. Nilmoni Pakhira & Ors.* Reported in *AIR 1987, Calcutta 248*, in which it was held that when the parties go to the trial with full knowledge of each others case and had the opportunities to establish their respective cases and in the absence of any prejudice being caused to the parties, the case may not be required to be remanded for determination of lis after framing of the issue. The First Appellate Court proceeded to decide the plaintiffs' right, title and interest in the suit property on the basis of the evidence adduced by the parties with regard to such relationship.

Before the First Appellate Court, it was argued that the findings in the previously instituted suit between the parties are relevant and the defendants ought to have raised such issue before the Trial Court. The First Appellate Court had noticed that insofar as the previously instituted suit is concerned, the second appeal is pending and relying upon the decision of the Bombay High Court in the case of *Nanatukram Jaikar vs. Sonabai* reported in *AIR 1982, Bombay 437* in which it was held that there is no finality attached to the decree as the second appeal is pending and, therefore, there cannot be any question of res judicata. The First Appellate Court proceeded to decide the matter on the basis of the documentary and oral evidence.

The defendants in their pleadings specifically stated that Bhanumoti Pal was the sister of Haradhan Pal and that Saraswati Ghosh was her only daughter who inherited the suit property as an heir. In the light of aforesaid specific pleadings of the defendants, in view of the provisions of section 102 of the Evidence Act, plaintiffs' case would fail if no evidenced at all were given on either side as the sister of the deceased original owner of the suit property has preferential right to inherit the suit property belonging to Haradhan Pal compared to the plaintiffs who are distant relatives of the deceased. Therefore, heavy onus lay upon the plaintiffs to show who was defendant no.1, Saraswati Dasi as impleaded by them in the suit in order to save their own right, title and interest, if any, in the suit property. Had the deceased Bhaumoti Pal not the sister of Haradhan Pal and the daughter of Ramratan Pal, this fact could easily have been established by the plaintiffs/appellants by showing that she is actually the daughter

of some other person and not that of Ramratan Pal as claimed by the defendants. Unfortunately, the plaintiffs miserably failed to perform their part of the duty as enjoined upon them under section 102 of the Evidence Act. On the contrary, the defendants have produced all cogent and reliable evidence which includes direct evidence of witnesses, documentary evidence and circumstantial evidence to prove that Bhanumoti Pal was the sister of Haradhan Pal and the daughter of Ramratan Pal and Saraswati Ghosh was the daughter of said Bhanumoti Pal. Even PW-2 who deposed in favour of the plaintiffs in his examination in chief stated:

“After the death of Haradhan this suit property was possessed by one Saraswati Ghosh, W/o Nishakar Ghosh”

This witness in his cross-examination admitted:

“I cannot tell the birth place of Haradhan nor I can tell about the forefathers of Haradhan.”

The learned Trial Judge relying upon the evidence of PW-2, who admitted that Saraswati Ghosh called Haradhan as MAMA. The evidence of DW-1, Samiran Ghosh, who has clearly stated that “the suit property previously belonged to one Haradhan Pal which he acquired by way of purchase. Haradhan Pal hails from Barulgram under PS Jamuria, Dist-Burdwan. His father’s name was Ramratan Pal. Ramratan Pal was the s/o Uday Pal. Ramratan Pal had no full brother. He had one son and one daughter namely, Haradhan Pal and Bhanumoti Pal respectively.”

The First Appellate Court disbelieved the case of the plaintiffs with regard to such relationship as claimed by the plaintiffs in a suit. Moreover, DW-2, Dhiren Ghosh, who is the

brother's son of the deceased Dhajadhari Ghosh with whom Bhanumoti was married. In his evidence he clearly stated that he had seen Dhajadhari living in a joint family and Bhanumoti had only one brother namely, Haradhan Pal (full brother). This was supported by Bisnupada @ Madhu Ghosh being the DW-3, one of the recorded bargadar who deposed as follows:

“I have been cultivating the suit property since the time of Haradhan Pal. Haradhan Pal had his original house in Barul village within the district of Burdwan. Haradhan had only one sister namely, Bhanumoti. Ramratan Pal was their father. After the death of Ramratan, Haradhan Pal used to reside in the house of his sister, Bhanumoti at Thobgram and later on he became the permanent resident of Thobgram. The funeral works of Haradhan was performed by Saraswati and Bhanumoti. I used to deliver the share of crops in respect of suit property to Saraswati after the death of Haradhan Pal.”

The statement of DW-3 was corroborated by one Jagabandhu Ghosh, DW-4. DW-6, Renubala Garai, a woman aged about 75 years, resident of Village Barul also stated that as follows:

“Ramratan Pal had one son and one daughter namely, Haradhan Pal and Bhanumoti Pal. DW-7, Chandi Ghosh, DW-8, Sk. Mahiuddin, DW-9, Sridhan Chandra Adhikari all aged between 60 to 80 years and of the same village came forward to depose that Bhanumoti Pal was the sister of Haradhan Pal and I see no reason to why the evidence of these elderly people which could not be demolished in their cross-examination should be disbelieved. There is oral evidence of many other persons

supporting the claim of the defendants that Bhanumoti was the sister of Haradhan Pal but I feel that on the face of the evidence already discussed it would be redundant to discuss their evidence one by one.”

Insofar as the documentary evidence is concerned, the Trial Court as well as the First Appellate Court had relied upon an Exhibit ‘K’ a Deed No. 3305 dated 22-06-1977 executed by Saraswati Ghosh, wife of Nishakar Ghosh whereby she sold some portion of the lands as mentioned in the schedule belonging to Haradhan Pal as heir of Haradhan Pal and in the recital of deed it is mentioned that the properties were acquired by her from her maternal uncle (Mamathakur), Haradhan Pal and she inherited the same as the sole heir of said Haradhan Pal. This deed was registered on 17-01-1978 and this suit was filed on 22-04-1996 almost 19 years thereafter.

In other words the claim of Saraswati Ghosh that she inherited the properties as sole heir of the deceased Haradhan Pal remained unchallenged for long 19 years. This registered sale deed executed by Saraswati Ghosh is deemed to be a notice the plaintiffs under section 3 of the T.P. Act, 1882. The plaintiffs remaining inactive in spite of such sale by Saraswati Ghosh for such a long period makes their claim regarding right, title and interest over the suit property miserably barred by law of limitation.

The plaintiffs could not lead any satisfactory evidence in rebuttal to dislodge the claim of the defendants. The plaintiffs in any event, have to prove their claim. On the basis of the oral and documentary evidence, the views taken by the learned Trial Court

as well as the learned First Appellate Court is probable and possible. Civil matter is required to be decided on the standard of preponderance of probabilities. The conclusion arrived at by both the courts is probable and possible. We have gone through the grounds of the appeal. In our view, none of the ground requires any substantial question of law, on the basis of which this second appeal can be admitted.

With the above observation, the second appeal stands dismissed at the admission stage. However, there shall be no order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)