

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.113 of 2005

Israel Gaddi, son of Late Ismael Gaddi, Bhabhua Ward No. 11, Police Station
Bhabhua, District – Kaimur (Bhabhua) Appellant/s

Versus

1. Karuna Dutta Mishra, son of Late Bhagwan Dutta Mishra
2. Most. Devi Ji, wife of Late Bhagwan Dutta Mishra
3. Pushpa Devi, daughter of Late Bhagwan Dutta Mishra
All resident of village Umapur, Police Station Bhagwanpur, District Kaimur
at present ward No. 11, Bhabhua Police Station Bhabhua, District Kaimur
(Bhabhua).

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Ashok Kumar, Advocate
For the Respondent/s : Mr. K.K.Mishra, Advocate

CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
CAV JUDGMENT

Date : 24-01-2023

Heard learned counsel for the parties.

2. This Second Appeal has been filed by the appellant against the judgment and decree dated 25.02.2005 passed by learned Additional District Judge, F.T.C – II, Kaimur at Bhabhua in T.A. No. 39/98 (40/04) affirming the judgment and decree dated 09.02.1998 passed by learned Sub-Judge -I, Bhabhua in T.S. No. 87/1994 whereby the suit filed on behalf of Appellant / Plaintiff was dismissed on contest.

3. The appellant was plaintiff in the suit. The plaintiff-appellant had filed the suit for declaration of his right and title over the suit land and that the original defendant (now represented through his heirs / respondents) has no concern with



the suit land and that the defendant's interference in the suit land is illegal.

4. The case of appellant / plaintiff in brief is that Khata No. 159, plot No. 2222 and 2223 belongs to the father of plaintiff which were bifurcated in two parts by Surara Canal which passes through these plots. The father of the plaintiff sold lands to many persons and only 12 Decimal of sahan land adjacent east to canal was left to him out of which he sold $6\frac{3}{4}$ Decimal of lands towards east to the defendant on 23-11-1959 and plaintiff remained in possession of the rest land of $5\frac{1}{4}$ Decimal adjacent east to the canal which is the suit property. It is alleged that defendant is very clever who got revisional survey prepared wrongly in respect of entire 12 decimal of lands in his name in R.S Khata No. 671 R.S. Plot No. 3204, so $5\frac{1}{4}$ decimal of land belonging to the plaintiff was also wrongly mapped in R.S Plot No. 3204 of which sketch map is given in the plaint and the defendant also disclosed that khatian has been prepared of 12 decimal of land in their name. Then plaintiff obtained the certified copy of sale deed executed in favour of defendant and came to know for the first time that the western boundary of the sale deed had wrongly inserted as Nahar. The father of the plaintiff died in the year 1991 and the



plaintiff is in possession of the suit land. On 01.02.1994 defendants wanted to grab the disputed land and threatened to dispossess the plaintiff from the disputed land. Hence, the Plaintiff / Appellant filed the aforesaid suit.

5. The case of the respondent / original defendant is that defendant had purchased 9 decimal (not 6 $\frac{3}{4}$ decimal) lands by the sale deed and after execution of sale deed they have been coming in possession of 9 decimal of land. The land purchased by the defendant was not measured prior to the execution of the sale deed due to unmeasurable condition of that land. After selling the land to defendant, the plaintiff has got no land there. The father of the plaintiff had never claimed the suit land in his lifetime who had full knowledge of the entry of the R.S. Khatiyan. The description of the suit land as mentioned in the plaint is not in existence. The suit land was never demarcated. On the purchased 9 decimal land defendant has constructed his house and had sold 2 decimal of land to Chirkut Lohar and Bhola Lohar. Diwakar Chaubey was already in possession of 3 decimal of land in the same plot prior to execution of sale deed to the defendant. The defendant raised the objection that the suit is time barred, the plaintiff has got no valid cause of action for the suit, the area of canal which passes through the suit land has



not been given and the location of the suit land has not been properly demarcated and explained in the plaint.

6. The defendant No. 1 died on 01.09.1995 during the pendency of the suit and the petition of the plaintiff under Order XXII Rule 4(4) of C.P.C. for exemption from bringing on record the heirs of defendant No. 1 was allowed by the learned trial Court.

7. The learned trial Court framed following five issues for decision:

1. Whether the suit is maintainable?
2. Whether the plaintiff has got valid cause of action for the suit?
3. Whether the suit is barred by limitation?
4. Whether the plaintiff has got title and possession over the suit land and whether he is entitled to get a decree?
5. Whether the plaintiff is entitled to get any relief or reliefs, if so, to what extent?

8. On the basis of pleading and evidence the learned trial Court given specific finding that the plaintiff is not in possession of the suit land and the suit land is in possession of the defendant and the suit is liable to be dismissed and the plaintiff is not entitled to get a decree. The trial Court also held that the suit is barred by Law of Limitation also. In view of the said finding, the trial Court also held that the suit is not



maintainable and the plaintiff has got no valid cause of action for the suit. The trial Court found that the plaintiff has no knowledge of the suit land. He never measured the suit land and he has no knowledge about the area and boundary of the suit land. No description whatsoever of the suit land has been given in the plaint. It shows that plaintiff is not in possession of the suit land and in the circumstances it will be deemed that whatever may be area and nature of suit land that is in possession of the defendant.

9. The learned trial Court further held that the plaintiff filed the suit on the basis of the entry made in R.S. Khatiyan which was published in the year 1970 and the plaintiff has filed the suit in the year 1994. The defendant is in possession of the suit land since year 1959 and the plaintiff has no knowledge of the suit land even on the date of his examination in Court. Accordingly, suit is barred by law of limitation also. In view of the aforesaid findings, the learned trial Court dismissed the suit.

10. Being dissatisfied with the aforesaid judgment and decree the plaintiff preferred first appeal and the first appellate Court, re-appreciating the evidence on record and considering the submissions raised at bar, came to hold that the plaintiff / appellant failed to prove his case and accordingly the appellate



Court in appeal also affirmed the finding of the trial Court and dismissed the appeal vide impugned Judgment dated 25.02.2005.

11 . The appellant preferred this second appeal before this Court under Section 100 of C.P.C. This second appeal was admitted by this Court vide order dated 29.07.2009 and formulated following substantial questions of law for consideration in this appeal:

(1) Whether the findings by both the courts below that the suit is barred by limitation because it has been filed much after publication of survey khatian can be sustained in law in view of the well established principle that the survey entry neither creates nor extinguishes right to property?

(2) Whether the appellate court has erroneously held that the suit is bad for non substitution of the heirs of the defendant no.1 in view of the fact that he did not file the written statement by signing and verifying the same and did not contest the suit and the exemption for substitution was granted by the trial court on 22.03.1996 under Order 22 Rule 4(4) C.P.C.?

(3) Whether the defendant can raise the plea of adverse possession when it is his case that he has purchased 9 decimals of land although the sale deed mentioned only 6 $\frac{3}{4}$ decimals in view of the settled principle that no one can claim adverse



possession over his own land?

(4) Whether the claim regarding purchase of 9 decimals by registered sale deed is maintainable in view of the bar of Section 91 and 92 of the Evidence Act because the sale deed shows only 6¾ decimals land?

12. With respect to first substantial question of law formulated in this second appeal with respect to the issue whether suit is barred by limitation, learned counsel for the appellant submits that the finding of the Courts below that the suit is barred by limitation is not correct and the finding is perverse. He has submitted that law is well settled that the survey entry neither creates nor extinguishes right to property. Further, he has submitted that the plaintiff had no knowledge about the wrong entry in R.S. Khatiyani as well as the wrong description of boundary in the sale deed in favour of the defendant. He next submitted that the plaintiff is in possession of the suit land, mere adverse entry in the revenue record will not give rise to cause of action and the cause of action to file suit arise on the date of which plaintiff's possession was threatened over the land in suit.

13. Learned counsel for the respondent has submitted that the plaintiff has claimed his right on the basis of area of land stated in sale deed in favour of defendant and also claiming



his right on the basis of entry of R.S. Khatiyani. The suit property is in continuous possession of the defendant for which father of the plaintiff or plaintiff never objected. It is further submitted that there is presumption of correctness with regard to entry in Khatiyani in the name of defendant subject to rebuttal but after publication of R.S. Khatiyani with respect to suit land, it remain unrebutted. The plaintiff has also not challenged the boundary of sale deed which he is disputing within period of limitation. Accordingly, the suit is barred by limitation also.

14. The law is well settled that entry in the records of rights/ Revenue Records does not create or confer any title in favour of any person whose name is appearing in the records of right and the presumption of correctness of entry could be displaced. It is consistent view of the Hon'ble Supreme Court that entries in the revenue Records do not confer a title. Such entry only serve fiscal purpose i.e. payment of land Revenue. No ownership is conferred on the basis of such entries.

15. The fundamental policy behind limitation is that if a person does not pursue his remedy within the specified time frame, the right to sue get extinguished. The period of limitation prescribed under Article 58 of the Limitation Act, 1963 is three years, which commences from the date when the right to sue



first accrues that is, if there are successive violations of the right, it would not give rise to a fresh cause of action, and the suit will be liable to be dismissed, if it is beyond the period of limitation counted from the date when the right to sue first accrued.

16. In **Daya Singh and another vs. Gurudev Singh (Dead) by LRS & Ors.** reported in **(2010) 2 SCC 194** the S.C. in respect of starting point of limitation has observed taking the notice of the view of earlier decision in **C. Mohammad Yunus vs. Syed Unissa** (AIR 1961 SC 808) that the cause of action for the purpose of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry into the revenue record cannot give rise to cause of action.

17. A three Judge Bench of Hon'ble Supreme Court in **State of Punjab Vs. Gurudev Singh** reported in **1991 SCR (3) 663; AIR 1991 SC 2219** held that the Court must examine the plaint and determine when the right to sue first accrued to the plaintiff and whether on the assumed facts, the plaint is within time. The words "right to sue" means the right to seek relief by means of legal proceedings. The right to sue accrues



only when the cause of action arises. The suit must be instituted when the right asserted in the suit is infringed, or when there is a clear and unequivocal threat to infringe such right by the defendant against whom the suit is instituted.

18. The Hon'ble Supreme Court in the case of **Dahiben Versus Arvindbhai Kalyanji Bhanusali (Gajra) (D) THR LRS & ORS. Reported in 2020 (7) SCC 366** on the point of limitation has held that the Limitation Act, 1963 prescribes a time limit for the institution of all suits, appeals and applications. Section 2(j) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suits, appeals or applications. Section 3 lays down that every suit instituted after the prescribed period, shall be dismissed even though limitation may not have been set up as a defence. If a suit is not covered by any specific article, then it would fall within the residuary article. Articles 58 and 59 of the Schedule to the 1963 Act, prescribe the period of limitation for filing a suit where a declaration is sought, or cancellation of an instrument, or rescission of a contract.

19. Once the Court has given categorical finding that the suit property is in possession of defendant since the execution of sale deed and the plaintiff failed to establish his



right on the suit land and claiming his right on the basis of entry and area given in R.S. Khatiyani and also claiming mentioning of wrong boundary in the registered sale deed dated 23.11.1959 in favour of defendant, the courts below rightly held that suit is barred by limitation.

20. On second substantial question of law with respect to non-substitution of heirs of deceased defendant No. 1, learned counsel for the appellant has submitted that the finding of the appellate Court that suit was also bad for non-substitution of the heirs of defendant No. 1 is not correct as defendant No. 1 did not file the written statement by signing and verifying the same and not contested the suit. Learned counsel for the respondents has submitted that although the written statement was jointly filed by defendants but defendant No. 2 had only signed and verified the written statement. He has further submitted that since on application of plaintiff / Appellant, the court granted exemption from bringing on record the heirs of defendant No. 1, the question of abatement does not arise and the finding of learned trial Court on this point is correct.

21. The trial Court in paragraph 3 of the judgment only stated the fact that written statement has been filed on behalf of both the defendants but defendant No. 1 died during



the pendency of the suit. As such upon the petition of the plaintiff, his name was expunged and no legal heir was substituted. When the trial Court has, admittedly, passed the order dated 22.03.1996 for exemption from bringing heirs of defendant No. 1 on the application dated 08.02.1996 of plaintiff / appellant under Order 22 Rule 4(4) C.P.C. there is no question of any abatement arise.

22. The object of the sub-rule 4 of Rule 4 of Order XXII C.P.C. is to avoid unnecessary delay. It confers the discretion on the Court to dispense with the necessity of substituting legal representatives of a defendant (i) who has failed to file a written statement or (ii) who having filed it has failed to appear and contest the suit. The Judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and have the same force and effect as if it has been pronounced before death took place.

23. The Hon'ble Supreme Court in **T. Gnanvel Vs. T.S. Kanagraj & Anr. (A.I.R. 2009 SC 2367)** explained to the effect that the exemption under Order 22 Rule 4(4) of the Code from substituting legal representatives of the defendant, must be obtained before the pronouncement of Judgment.

24. In the present case it is admitted fact that exemption



was obtained by the plaintiff from bringing on record the heirs and legal representatives of defendant No. 1 in the trial Court during the trial and the effect of such death would be taken as if the decree was pronounced before the said death had taken place.

25. The finding of the appellate Court that the suit was bad also for not substitution of legal heirs of the defendant No. 1 is not correct and the finding of the learned trial Court is correct. However, both the parties submitted that this was not the issue before the Courts below for their decision.

26. With respect to third substantial question of law regarding the claim of defendant of Adverse Possession, learned counsel for the appellant has submitted that the defence taken by the defendant as owner of the suit property and also in alternative adverse possession of the suit property cannot be tenable. Learned counsel for the respondent on the other hand submitted that the plaintiff cannot take advantage of the weakness of the defendant. The plaintiff has to prove his case on its own leg and in this case he has failed to prove his ownership and possession on the suit land. Moreover, he failed to describe even the suit property. The defendant has claimed the suit property as owner and no issue was framed with respect to



adverse possession in the trial Court and the same was neither pressed nor decided by the Courts below.

27. The plea of adverse possession in alternative has been taken by the respondent. The learned appellate Court rightly noted that burden of proof always lies on the plaintiff. Case must stand or fall on own pleadings and proof of plaintiff's case. The plaintiff cannot take benefit of weakness of the defendant. The trial Court also noted that defendants has also taken the plea of adverse possession but the case of plaintiff is going on its own demerit in the plaint itself. So, it will be futile to discuss in detail about the case of defendant.

28. The principle with respect to adverse possession has been elaborated in catena of judgments of the Hon'ble Supreme Court. In **P. Periasami Vs. P. Periathambi (1995) 6 SCC 523** the Hon'ble Supreme Court held that " 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.

29. In **Tribhuwanshankar vs. Amrutlal (2014) 2 SCC 788**, the Hon'ble Apex Court observed that the conception of adverse possession fundamentally contemplates a hostile



possession by which there is a denial of title of the true owner. By virtue of remaining in possession the possessor takes an adverse stance to the title of the true owner. In fact, he disputes the same. A mere possession or user or permissive possession does not remotely come near the spectrum of adverse possession. Possession to the adverse has to be actual, open, notorious, exclusive and continuous for the requisite frame of time as provided in law so that the possessor perfects his title by adverse possession.

30. It has been held in **Secy. Of State for India in Council V. Devendra Lal Khan (A.I.R. 1934 PC 23)** that the ordinary classical requirement of adverse possession is that it should be *nec vi, nec clam, nec precario*.

31. In **S. M. Karim Vs. Most. Bibi Sakina, (A.I.R. 1964 S.C. 1254)** it has been held that:

“5. ... Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.”

32. The Hon'ble Supreme Court in **Karnataka Board of Wakf Vs. Govt of India & Ors. (2004 (10) SCC 779)** held that Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is



a well settled principle that a party claiming adverse possession must prove that his possession is '*nec vi, nec clam, nec precario*', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

33. It is further held that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (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 party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has not equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

34. In the present case, there was no issue before the trial Court with respect to adverse possession of defendant accordingly there is no finding on this point and the case has not



been decided on this point. The plaintiff / appellant failed to prove his case that he is owner and in possession of suit property accordingly defence of adverse possession taken by defendant is not much significant in this second appeal.

35. With respect to fourth question of law regarding exclusion of oral or documentary evidence (Section 91 and 92 of Indian Evidence Act, 1872) learned counsel for the appellant has submitted that the sale deed in favour of defendant shows only $6 \frac{3}{4}$ decimal as such he cannot claims 9 decimals land purchased by him in view of the bar of Section 91 & 92 of the Evidence Act. The learned counsel for the respondents on the other hand submitted that the original defendants had purchased the land by describing the boundaries accordingly boundaries as stated in the sale deed must prevail as against the measurement.

36. When the terms of the contract disposition of a property or any matter required to be writing under the law, is proved by the document, then the oral evidence is not required to contradict it. After a document has been produced to prove its terms under Section 91, the provision of Section 92 of the Indian Evidence Act, 1872 come and exclude evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtraction from its terms. Oral proof



cannot be substituted in place of written documents where the written documents exist in evidence of certain transaction. Such evidence is more certain and more reliable than oral evidence. Section 91 and 92 of the Indian Evidence Act, 1872 supplement each other. It is based on best evidence Rule. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act consists of statement made by a witness or contained in a document. The burden of proof is on the party who makes a factual averment.

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or points in issue.

37. The Hon'ble Supreme Court in the case of **Tulsi & Ors. Vs. Chandrika Prasad & Ors. (AIR 2006 SC 3359)** observed that :

“Section 91 of the Evidence Act mainly forbids proving of the contents of a writing otherwise than by writing itself and merely lays down the best Evidence Rule. It is, however, does not prohibit to parties to adduce evidence in a case, the deed is capable of being construed differently to show how they understood the same.”

38. The area conveyed to the plaintiff was somewhat



greater than that described in the sale deed. The general principle is that the description by boundaries should prevail where the boundaries are exact and where the area is approximate. Where length and breadth measurements are clearly given the actual length and breadth measurements should be held to prevail and boundaries do not acquire significance.

But in the present case certain specific circumstances have to be given weight. The property sold on 23.11.1959 by the father of the appellant is part of a definite survey number. Once the property sold is described as a survey number, its boundaries can be clearly localised with reference to the survey plan. This is a clear case of precise and accurate description in a document of the property sold by its boundaries. The property was circumscribed by the limits and then described also by area. The measurement by area should therefore be considered only approximate.

39. Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against measurement.



40. It is well settled that the concurrent findings of fact by the Courts below are binding upon the second appellate court unless the findings are shown or established to be perverse. Elaborating the concept of perversity in context of a finding of fact, the apex court in the case of **Damodar Lal Vs. Sohan Devi & Ors.** (2016) 2 S.C.C. 262 has ruled as follows:-

“Even if the finding of fact is wrong, that by itself will not constitute the question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man’s inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.”

41. It would also be fruitful to notice, in the context of the scope of the second appellate jurisdiction, the observation by their Lordships in the case of **S.R. Tewari vs. Union of India & Anr.** MANU/SC/0566/2013 : (2013) 6 S.C.C. 602 that ‘if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with.’

42. It is also well settled by now that a second appeal is not a ‘third trial’ on facts and the possibility of another view



on the same set of evidence would not be sufficient for interference in the finding of fact as recorded by the courts below.

43. This Court finds in the present case that both the courts below have elaborately scrutinized the evidence and materials on record on the issue of title and possession over the suit land.

44. After going through the judgments of both the courts below, this Court is of the considered view that the findings by both the courts below are in accordance with law and there is no unreasonableness or perversity in any manner in the same.

45. On the above premises, the substantial question of law, as framed, are answered against the appellant. The second appeal is, accordingly, dismissed affirming the impugned judgment and decree passed by the appellate court below.

46. In the facts and circumstances of the case, there would be, however, no order as to cost.

(Sunil Dutta Mishra, J)

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AFR/NAFR	NAFR
CAV DATE	21.09.2022
Uploading Date	24.01.2023
Transmission Date	

