
(2006) 01 PAT CK 0076
In the Patna High Court
Case No : A.F.A.D. No. 129 of 1990

Chandeshwar Gope and Others

APPELLANT

Vs

Tejan Gope (deemed by L.Rs.) and Others

RESPONDENT

Date of Decision : 06-01-2006

Acts Referred:

Citation : (2006) 01 PAT CK 0076

Final Decision : Dismissed

Judgement

Syed Md. Mahfooz Alam, J.—This second appeal has been preferred against the judgement and decree dated 26-2-1990 passed by Sri Raja Ram Singh, Additional District Judge XIII, Patna in Title Appeal No. 101 of h 1984 whereby he has affirmed the judgment a: and decree dated 29-6-1984 passed by Sri Kali Dayal Mishra, Additional Munsif II, Patna in Title Suit No. 53 of 1980.

2. Being aggrieved by and dissatisfied with the said judgment and decree, the defendants - appellants have preferred this appeal.

3. The brief facts of the case are as follows:

The plaintiffs - respondents brought a title suit for declaration of title and confirmation of possession or in the alternative, for recovery of possession in respect of the suit land being a portion of S.P. No. 258 fully described in Schedule I of the plaint and shown by the sketch map. The claim of the plaintiffs is that they are members of the joint family of which plaintiff No. 1 is the Karta. The defendants were also members of the joint family but sometime back they were separated. Survey plot No. 231 which is situated north of the land of the suit plot is the ancestral land of the plaintiffs which was acquired by the ancestor of the plaintiffs in exchange of S.P. No. 345 and since then the plaintiffs have been coming in possession of the said land. The suit plot i.e. S.P. No. 258 is recorded as Gairmazrua Aam Alang but the portion adjoining south of the village was useless and, therefore, the people of the village encroached upon the same on different portions in front of their respective houses long ago. After acquiring

S.P. No. 231 in exchange of S.P. No. 345, the ancestors of the plaintiffs constructed a house as Janani Kita over the same and also encroached upon the land in suit. It happened about more than 55 years ago. The ancestors of the plaintiffs after encroaching upon the suit land levelled the ground, constructed a Jhopra for keeping cattle and put up several Nads and Khuta over the same, fenced it from the west and kept exclusive control over the land in suit to the ouster of the public including the defendants since over 55 years and thereby the plaintiffs have perfected their title by way of adverse possession. The defendants had or have no concern with the said land. Further case is that the defendants - first party have their house on survey plot No. 299 which is west of the suit land. They had their Kikas towards the west in the Gali and they used to keep and feed their cattle towards west of plot No. 299. Further case is that since old Kacha wall of the plaintiffs on the western side of the suit land had fallen down in rainy season in the year 1975, as such the plaintiffs started constructing another brick-wall on that place and raised the wall upto 6 feet high when the defendants - first party after forming a mob came upon the suit land and started assaulting the plaintiffs for which the plaintiffs lodged a criminal case and the defendants also lodged a counter case. Both the cases ended in conviction of both the parties. Further case is that just before the occurrence of assault, the defendants first party opened a new door in the wall of their house towards east and south of the disputed land and started making false claim over the suit land although the fact is that the land in question has been coming in exclusive possession of the plaintiffs for over 50 years and neither the defendants first party nor any member of the village ever objected or interfered with the possession of the plaintiffs. Further case is that the defendants - first party are being assisted by one Narayan Yadav, Mukhiya and under the influence of the said Mukhiya, the police in collusion of the defendants first party gave a false report that by constructing the wall upon the suit land the plaintiffs were obstructing the flow of Nali of the defendants -first party. The fact is that defendant Chandeshwar Gope had one Nali of his house in the west but he illegally and forcibly opened a new Nali towards the east to join in the Nali of the plaintiffs. Further case is that on the basis of the police report, a proceeding u/s 144 of the Code of Criminal Procedure was started between the parties which was converted into Section 145 Cr. P.C. proceeding and in the said proceeding, the order was passed on 4-11-1973 by which the possession of the defendants first party was declared over the suit plot. It is said that the said order is quite perverse and against the materials brought on record. Further case is that in spite of declaring the possession of the defendant 1st party by the learned Executive Magistrate over the suit land the plaintiffs' possession was not disturbed and the plaintiffs remained in physical possession of" the suit land but since a cloud had been cast on the title of the plaintiffs by the said order and hence, necessity of filing of the suit arose. It is said that although the members of the village have got no interest in the land in suit but even then the Gram Panchayat has been impleaded as defendant second party inasmuch as all the public lands of the village have been vested in the Gram Panchayat.

3A. The suit was contested by the defendant Nos. 1 to 11 but before this Court only four persons of the defendants first party are appellants. According to the writ- ten statement, the case of the defendants - appellants is that the suit is bad for mis-joinder and nonjoinder of the parties and the suit land which is a portion of S.P. No. 258 is recorded in the survey as a public land which was being used as public path i.e. Alang. Further case is that the ancestors of the defendants had their residential house on S.P. No. 299 and the house was facing east which had opening over a portion of S.P. No. 258. The ancestors of the defendants levelled the suit land and amalgamated it with the residential house standing over plot No. 299 and raised structures thereon with walls and used it as Baithka and cattle shed. The ancestors of the defendants also constructed a few pucca Nads over the said land. It is false to say that the plaintiffs, were using the suit land having cattle shed thereon. The fact is that since 1920 the ancestors of the defendants were coming in possession of the suit land exclusively, continuously, adversely and openly to the knowledge of the public and the entire villagers and thereby the defendants and their ancestors had perfected their title over the suit land. Further case is that the plaintiffs have their house partly over plot No. 297 and partly in the western stretch of plot No. 231 which is at some distance from suit plot No. 258. Only a portion of plot No. 231 is homestead land of recent origin and the bulk is agricultural piece of land. The defendants have got their Baithka and cattle sheds over the suit land since 1920 and it is false to say that the plaintiffs had Kachha wall over the suit land which had fallen down in the rainy reason. The fact is that the wall said to have been constructed over the land upto 6 feet height had been built by the defendants. The plaintiffs had never constructed the same and as such, the plaintiffs are not entitled to any relief.

4. On the basis of the pleadings of both the parties, the learned trial Court framed seven issues which are as follows:

1. Is the suit as framed maintainable ?
2. Have the plaintiffs got valid cause of action for the suit ?
3. Is the Court-fee paid sufficient?
4. Is the suit barred by limitation ?
5. Is the suit bad for non-joinder of the parties?
6. Are the plaintiffs entitled to a decree as claimed in the plaint?
7. To what relief or reliefs, if any, are the plaintiffs entitled?

5. From perusal of the judgment of the trial Court it appears that issue No. 6 was considered as the main issue and as such the trial Court after making full discussion on the issue held that the plaintiffs are entitled to a decree as claimed in the plaint. On issue No. 5, the learned trial Court held that the suit is not bad for non-joinder of necessary party i.e. the State of Bihar. As abovementioned two issues were considered by the trial Court as main issues to be determined in the

suit, as such on the basis of the findings on two issues, the trial Court decreed the suit of the plaintiffs.

6. From perusal of the judgment of the appellate Court it appears that on the basis of the argument advanced by the respective parties, the appellate Court framed three questions for determination in the appeal which are as follows:

(1) Is the suit maintainable for non-compliance of the provisions of Order 1 Rule 8 C.P.C.?

(2) Have the plaintiffs got title to the suit land or possession thereof? If so, are the appellants entitled to any relief? If so, was the suit rightly decreed?

(3) Are the appellants entitled to any relief in this appeal?

7. It appears from the judgment of the appellate Court that on making full discussion on point Nos. 2 and 3, the appellate Court upheld all the findings of the trial Court regarding the title and possession of the plaintiffs over the suit land and held that the plaintiffs' suit was rightly decreed. On the point of maintainability of the suit and regarding non-compliance of the provisions of Order 1 Rule 8 of the Code of Civil Procedure, the appellate Court while discussing point No. 1 held that under the Panchayati Raj Act, Gram Panchayat has been given the control and administration and it has been made responsible for the management and care of Gairmazura Aam land. The Court has further held that in the suit summons have been served on the Gram Panchayat but no step has been taken on behalf of the defendant (Gram Panchayat). The Court further held that even in evidence both the parties claim this land to be private one and according to the case of both the parties, only persons interested in the suit land are either the plaintiff-respondent or defendants-appellant and no others and as such, the learned first appellate Court held that there was no occasion to file the representative suit under Order 1 Rule 8 C.P.C. and so there was no defect in the suit on this score. Accordingly, the first appellate Court decided all the three points in favour of the plaintiffs and dismissed the appeal filed by the defendants - appellants.

8. From perusal of the record of this second appeal, it appears that at the time of admission of this second appeal, following substantial questions of law were framed for consideration which are as follows:

(i) Whether the suit was maintainable without the State of Bihar being a party since the Court has found the disputed land to be Gairmazura Aam land upon which plaintiffs-respondents claim adverse possession?

(ii) Whether the judgment of the appellate Court is in accordance with law for non-consideration of the oral and documentary evidence of the defendants-appellants?

(iii) Whether Ext. 8 is admissible in law and the judgment of the appellate Court is vitiated for reliance on the said evidence?

(iv) Whether the nature of evidence led by the plaintiffs at all fulfil the requirement of the kind of possession required to prescribe right, title and interest against the real owner?

Substantial Question of Law No. 1

9. On behalf of the appellants it was contended that the suit was not maintainable without the State of Bihar being impleaded as party since the nature of the land was Gairmazrui Aam (Alang) and the plaintiffs-respondents have claimed title over the suit land by virtue of the adverse possession. The contention of the learned Advocate of the appellants was that the State of Bihar is the owner of all Gairmazrui Aam land after vesting of Zamindari and since the plaintiffs-respondents have not impleaded the State of Bihar as party, as such no decree can be passed in favour of the plaintiffs-respondents in absence of necessary party. On the other hand, the contention of the learned advocate of the respondents was that in view of the pleadings of both the parties, the State of Bihar was not necessary party to the suit as both the parties have claimed in their pleadings that the suit land has lost its original character and at present its character is not of Gairmazrui Aam. He further submitted that the plaintiffs-respondents have claimed that about 50 years ago they had amalgamated the suit plot with their raiyati plot and since then they have been coming in peaceful possession of the same and general public has no concern or claim over the suit land. Likewise, the defendants-appellants have also stated in their written statement that they had amalgamated the suit land with their raiyati land and for the last more than 55 years they have been coming in peaceful possession of the suit land without any hindrance from any member of the public. He submitted that the pleadings of both the parties establish beyond doubt that the character of the suit land has completely changed and at present it is not Gairmazrui Aam land and as such, the State of Bihar was not a necessary party and the learned Courts below have rightly passed decree in favour of the plaintiff-respondent even in absence of the State of Bihar.

10. Before giving any finding on the points in issue, I would like to see what was the respective case of the parties. As per the plaint, the case of the plaintiffs-respondents is that the suit land described in Schedule 1 of the plaint is a portion of S.P. No. 258. In the north of the suit plot, S.P. No. 231 lies and S.P. No. 231 was the ancestral land of the plaintiffs which was acquired in exchange of S.P. No. 345. S.P. No. 258 (suit plot) was recorded as Gairmazrui Aam land (Alang) but the people of the village had encroached upon the said land on different portions in front of their respective houses long long ago. After acquiring S.P. No. 231 after survey the ancestors of the plaintiffs constructed a Janani house over the same and also encroached upon the land in suit more than 55 years ago and amalgamated the same with S.P. No. 231, constructed a Jhopra for cattle and also put several Nads over the same and fenced the same from the west and kept exclusive control over the land in suit to the ouster of the public and the defendants. It has further been contended that since over 55 years ago the

plaintiffs have been coming in exclusive possession over the land in suit peacefully, continuously, openly and to the ouster and to the knowledge of the defendants as well as the entire members of the public and thereby the plaintiffs perfected title by way of adverse possession. The above pleading of the plaintiffs-respondents clearly establishes that the plaintiffs have pleaded in their plaint that although the suit land was Gairmazura Aam (Alang) land but the same had lost its character about 55 years ago.

11. Let me see what is the case of the defendants. As per the written statement, the case of the defendants-appellants is that the suit land was a public land but the ancestors of the defendants had their residential house in S.P. No. 299 facing east of the suit plot and had its opening in S.P. No. 258 (suit land). During course of time, the ancestors of the defendants levelled the suit land and amalgamated it with the residential house in plot No. 299 and raised structures thereon with walls and used it as Baithka and cattle sheds. The ancestors of the defendants constructed a few pacca Nads thereon. It has further been stated that all these things happened long long ago and since 1920 the defendants-appellants have been coming in possession of the suit land exclusively, continuously, adversely and openly to the knowledge of the public and the entire villagers and thereby the ancestors of the defendants had perfected title over the suit land by way of adverse possession.

12. From the pleadings referred above of both the parties, it is established beyond doubt that both the parties have claimed in their respective pleadings that the suit land although originally it was a Gairmazrue Aam (Alang) land, had lost its character and now it is never a Gairmazrue Aam land. The question is as to when both the parties have claimed in their respective pleadings that at present the suit land is not a public land then in that situation can it be held that the plaintiffs' suit is not maintainable because of the fact that the State of Bihar was not made party to the suit ? I am of the view that the answer is in the negative and when both the parties have claimed that the suit land has lost its original character and now the suit land is not a public land then in that situation the State is not necessary party to the suit. I therefore, hold that the plaintiffs' suit was maintainable without the State of Bihar being impleaded as party in the suit and accordingly, this substantial question of law is decided.

Second and fourth substantial Question of Law.

13. These two substantial questions of law relate to findings of fact and cannot be decided without doing re-appreciation of the evidence, oral as well as documentary, available on record. The question is whether such re-appreciation of the evidence is permissible under law when there are concurrent findings of the two Courts below that the plaintiffs have acquired title to the suit land by adverse possession and the plaintiffs are entitled for decree for declaration of their title over the suit land. I am of the opinion that the answer is in negative and to support my view I rely upon the following decisions : (1) AIR 159 SC 57 (Placitum-1) : Mithilesh Kumar and Another Vs. Prem Behari Khare, Manicka

Poosali (Dead) by LRs. and Others Vs. Anjalai Ammal and Another, .

In AIR 1959 SC 57 while interpreting the provision of Section 100 CPC the Apex Court made following observations:

The provisions of Section 100 are clear and unambiguous. There is no jurisdiction to entertain a second appeal on the ground of erroneous finding of fact, however, gross the error may seem to be. Nor does the fact that the finding of the first appellate Court is based upon some documentary evidence make it any the less a finding of fact. A Judge of the High Court, has, therefore, no jurisdiction to interfere in second appeal with the findings of fact given by the first appellate Court based upon a re-appreciation of the relevant evidence.

In Mithilesh Kumar and Another Vs. Prem Behari Khare, the Hon"ble Supreme Court has held that "where there are concurrent findings of fact the Court should not interfere if finding is based on reasonable appreciation of evidence on record and is in no way perverse or unreasonable".

In Manicka Poosali (Dead) by LRs. and Others Vs. Anjalai Ammal and Another, while making discussion on the scope of Section 100 CPC the Apex Court made following observations:

In second appeal existence of substantial question of law is sine quo non for exercise of jurisdiction and the High Court cannot proceed to hear a second appeal without formulating the substantial questions of law.

Para 17 of the decision runs as follows:?

This judgment was followed by this Court in Civil Appeal No. 2292 of 1999 Govindaraju Vs. Mariamman, . In Govindaraju's case (supra) it has been held that the High Court while exercising the power u/s 100 of the CPC on re-appreciation of the evidence cannot set aside the findings of the fact recorded by the first appellate Court unless the High Court comes to the conclusion that the findings recorded by the first appellate Court were perverse i.e. based on misreading of evidence or based on no evidence.

Thus, the abovementioned decisions fully establish that in second appeal where there is concurrent findings of the Courts below on a particular point the Court has no jurisdiction to interfere with the findings of the fact given by the Courts below on re-appreciation of the oral as well as documentary evidence available on record unless this Court finds that the findings of fact recorded by the Courts below are perverse. Since there is no material before me to hold that the findings of the Courts below are perverse or erroneous based on misreading of evidence, as such I hold that on re-appreciation of evidence this Court cannot hold that the judgment of the appellate Court is not in accordance with law for non-consideration of the oral and documentary evidence of the defendant-appellant and that nature of the evidence led by the plaintiff does not fulfil the requirement of the kind of possession required to prescribe right, title and interest against the real owner. Accordingly, these two substantial questions of law are answered.

Third Substantial Question of Law

14. It has been argued by the learned advocate of the appellant that both the Courts below have placed reliance upon Ext. 8 which is the statement of Lai Das Gope (defendant No. 1) made in G.R. Case No. 4827 of 1975 but the document cannot be legally used against the defendant as Lai Das Gope (defendant No. 1) was not confronted with his previous statement. It appears from the judgment of the Courts below that although Lai Das Gope was defendant No. 1 in this suit but he intentionally did not depose in the case and due to that the plaintiff could not get opportunity to confront him with his previous statement and so, in this background the learned trial Court as well as the 1st appellate Court both have held that Ext. 8 is admissible in evidence and can be used against the maker of the statement i.e. defendant No. 1. I am of the view that the view taken by the Courts below on Ext. 8 is correct. Accordingly, I hold that in the background of the case when the maker of the statement (Ext. 8) was intentionally withheld from deposing in the suit his previous statement (Ext. 8) can be legally used against him being his admission in another case with regard to the subject matter of the suit. Thus, I hold that Ext. 8 is admissible in law and the judgment of the appellate Court is not vitiated for reliance on the said evidence. Accordingly, this substantial question of law is decided.

15. In the result, I find no merit in this appeal and as such, this second appeal is hereby dismissed with cost and the judgment and the decree of both the Courts below are hereby upheld.