

(2012) 10 PAT CK 0060

In the Patna High Court

Case No : Second Appeal No. 320 of 1995

Jai Narain Mahton and Others

APPELLANT

Vs

Gopal Rai and Others

RESPONDENT

Date of Decision : 04-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3A, 100, 11
Evidence Act, 1872 — Section 50

Citation : (2012) 4 PLJR 791

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Advocate : S.K. Majumdar, Mr. Achhaiber Singh, Ms. Mallika Mazumdar, Mr. Priya Verma and Mr. Prem Kumar, for the Appellant; Kamal Nayan Chaubey, Mr. Ravi Kumar, Advocate and Mr. Rajesh Kumar, for the Respondent

Judgement

Mungeshwar Sahoo, J.—The plaintiffs-appellants appellants have filed this second appeal against the Judgment and Decree dated 22.09.1995 passed by Sri Surendra kumar Sinha, the learned second Addl. District Judge, Bhabua in title appeal No. 68 of 1983/27 of 1992 whereby the lower appellate Court dismissed the appeal and confirmed the trial Court Judgment and Decree dated 14.11.1983 passed by the learned Sub Judge, Bhabua in title suit No. 330 of 1974. The plaintiff-appellant filed the aforesaid suit for declaration that the decree passed in title suit No. 15 of 1950 by Addl. Sub Judge, Sasaram and the Decree passed in title appeal No. 420 of 1954 by Hon'ble High Court are fraudulent and not binding on the plaintiff and liable to be set aside. The plaintiffs further prayed for declaration of title and possession over land of Schedule "E" and "F" and in the alternative for recovery of possession.

2. The plaintiff's case in short is that the land detailed in Schedule "A" of the plaint was under cultivating, possession of Swaroop Mahton and Mostt. Udesia till their death. Swaroop Mahton and Ramdhari Mahton were full brothers. Ramdhari died issueless leaving behind his widow Udesia. Swaroop Mahton died leaving behind the plaintiff No. 1 Harkaliya and her sister Bhagwania. Bhagwania was

married to Sumiran Mahton during life time of Swaroop Mahton. Plaintiff No. 1, Harkalia was married with Deo Narayan Mahton the defendant No. 23 after the death of her father. Defendant No. 25 is the nephew of Swaroop Mahton in agnatic relation who was in possession of Schedule "B" land. Swaroop Mahton had no son so he kept his son-in-law Sumiran and Deo Narain with him. After the death of Swaroop, his two daughters Harkalia and Bhagmania inherited the properties and came in cultivating possession thereof. The defendant No. 1 in collusion with defendant No. 2 to 7 filed title suit No. 15 of 1950/47 of 1953 in the Court of Ist Addl. Sub Judge, Sasaram with respect to the Schedule "A" and "B" land giving wrong facts. In the said suit, the plaintiffs were not made party rather only Deo Narain, the husband of Harkalia was made party who was unintelligent man. The decree was obtained fraudulently by defendant No. 1 keeping the Court in darkness. The defendant No. 23, Deo Narain, was claiming Schedule "C" land which was Baskast land of defendant No. 1. Schedule "D" land belonged to defendant No. 2 to 7 who were other Malik and were claiming in title suit No. 15 of 1950. The defendant No. 1 by playing fraud got the appeal filed before the High Court wherein the plaintiff No. 2 and 3 who were minor were added as appellant. The defendant No. 1 got a compromise application filed on 24.2.1959. On the basis of the compromise decree, the defendant is trying to dispossess the plaintiff. According to the plaintiff, the case stated in title suit No. 15 of 1950 regarding surrender by Swaroop and Bechu in the year 1924 and 1926 are imaginary and incorrect. The deed were forged and fabricated.

3. The defendants-respondents filed contesting written statement. According to them after the death of Mostt. Udesia, Swaroop Mahton surrendered his lands, i.e., the suit lands by executing a Sada deed of surrender as he had neither any son nor any daughter. Bechu also surrendered his lands. Therefore, according to the defendants Schedule "A" and Schedule "B" lands were surrendered to the ex-landlord and since then she ceased to have any concern with the property. Deo Narain was leading defendant and he was quite intelligent to protect his interest. Harkalia, the plaintiff No. 1 has no concern with the said suit. After surrender, the ex-landlord, the father of defendant No. 1 came in possession of the property. In the compromise, the appellants i.e., Deo Narain and others got 9 acres 37 decimal of lands and the rest was given to the respondent. Delivery of possession was affected accordingly. No fraud was played. Defendant No. 1 (ka) is purchaser from defendant No. 1.

4. After trial, the trial Court recorded the finding that the plaintiffs are not the heir of Swaroop, vide paragraph 20, the trial Court also recorded the finding that plaintiffs have got no right to file the present suit. The suit is barred by principle of constructive res judicata and the suit is barred by law of limitation. The plaintiff then filed appeal before the lower appellate Court. The lower appellate Court recorded the finding that Harkaliya is not the daughter of Swaroop. The suit is barred by principle of constructive res judicata and also barred by law of limitation. On the basis of these findings, the appellate Court dismissed the appeal.

5. On 20.3.1997, the following substantial question of law were formulated :-

Whether the provision of the Limitation Act has been properly considered by the lower appellate Court?

6. During the course of hearing, it appears to this Court that another substantial question of law is also involved, therefore, on being satisfied, another substantial question of law was formulated on 3.9.2012 in the following term :-

Whether the findings of both the Courts below that Harkalia Devi was not the daughter of Ram Swaroop Mahton is perverse being based on inadmissible evidence or misreading the evidences of the parties and, therefore, unsustainable in the eye of law?

7. The learned senior counsel, Mr. Majumdar submitted that in terms of Section 50 of the Evidence Act, the plaintiffs examined the witnesses who were villagers and also direct evidences were produced. The deposition of one of the witness in earlier title suit No. 15 of 1950 was also produced before the Court but without considering as to whether the evidences of P.Ws particularly the evidence of Harkalia as P.W. 4, the neighbour P.W. 5, the son of Harkalia Ram Gopal as P.W. 7, are admissible u/s 50 of the Evidence Act or not, the lower appellate Court rejected the evidences only on untenable grounds. According to the Learned Counsel, the evidences of these witnesses are very much admissible which fulfils requirement of the provisions as contained in Section 50 of the Evidence Act but those evidences were discarded on flimsy grounds, therefore, the Judgment is perverse. Ext. 5/A, the deposition of a witnesses in title suit No. 15 of 1950 was filed but the lower appellate Court discarded the said evidence recording the finding that it was not even relied upon by the trial Court in title suit No. 15 of 1950. According to the Learned Counsel, the parentage of Harkalia was neither directly nor substantially in issue in the earlier suit and, therefore, the lower appellate Court approached the case in wrong angle. According to the Learned Counsel, since Harkalia was not party to the earlier suit, the Judgment will never bind her and there cannot be any implied res judicata nor it can be said that the suit is barred by law of limitation but the lower appellate Court wrongly decided the appeal, therefore, the Judgment is perverse.

8. On the other hand, the Learned Counsel, Mr. Kamal Nayan Chaubey submitted that the lower appellate Court has discussed the evidences and then discarded the same, therefore, it cannot be said that the Judgment is perverse. It can very well be said that the reason assigned by the appellate Court may not be good ground but that cannot be a substantial question of law because this Court being the second appellate Court cannot re-appreciate the evidence and substitute its own finding of fact. The Learned Counsel in support of his contention relied upon a decision of the Apex Court reported in Vishwanath Agrawal Vs. Sau. Sarla Vishwanath Agrawal, . On the basis of this decision, the Learned Counsel submitted that the finding recorded by the Courts below regarding parentage of Harkalia is not perverse. The Learned Counsel next submitted that in view of

Order 23 Rule 3A C.P.C., the suit itself was barred which was filed for setting aside the compromise decree passed in the First Appeal. P.W. 4, Harkalia in her evidence admitted that she had knowledge about the earlier suit, therefore, the Courts below have rightly held that the suit is barred by law of limitation.

9. So far the decision relied upon by the learned senior counsel appearing on behalf of the respondent is concerned, the Apex Court has held that the High Court in a Second Appeal should not disturb concurrent finding of fact unless it is shown that the findings recorded by the Courts below are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion. Solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction u/s 100 of the Code of Civil Procedure. So far this proposition of law laid down by the Apex Court is concerned, there is no dispute about it. The submission of the Learned Counsel of the appellant is that the Courts below discarded the admissible evidence on untenable grounds. Therefore, it is also perverse.

10. In the case of Municipal Committee, Hoshiarpur Vs. Punjab State Electricity Board and Others, , the Apex Court has held that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from a vice irrationality incurring the blame of being perverse then the finding is rendered infirm in the eye of law. In the present case according to the Learned Counsel for the appellant, the appellants produced direct evidences regarding parentage of Harkalia. Harkalia herself was examined. The neighbors were examined whose evidence were admissible u/s 50 of the Evidence Act but the same were discarded on one ground or the other which are entirely untenable grounds without considering the provision as contained in Section 50 of the Evidence Act. So far the submission that lower appellate Court has considered the evidence is concerned, it may be mentioned that consideration means it must be judicial consideration according to manner prescribed by law and not perfunctorily. The reason should be reasonable and acceptable for rejecting the evidence. The Court is required to appreciate the evidence as a whole and not one line from here and one line from there for the purpose of rejecting the same.

11. It is settled principle of law that if the findings recorded by the Courts below are perverse then the High Court can interfere with the finding of fact and in exceptional circumstances, the High Court can also re-appreciate the evidence available on record to find out as to whether the lower appellate Court has rightly ignored the same on flimsy ground. In this matter, reference may be made to the case of D.R. Rathna Murthy Vs. Ramappa, . I, therefore, perused the evidences of P.W. 4 Harkalia, P.W. 5 Sakichandra neighbour of Swaroop, P.W. 7 Ram Gopal the son of Harkalia and one of the plaintiff. Their evidence are according to Section 50 of the Evidence Act. Ext. 5(A) is also deposition of one of the witness who was examined in title suit No. 15 of 1950 who has died, therefore, his

evidence has been marked as ext. 5/A in the present case but the same was also discarded on the ground that he was not relied on in the earlier suit. It may be mentioned here that this issue as to whether Harkalia is daughter of Swraoop or not was never in issue in the earlier suit. Therefore, there was no question of not relying on the evidence of this witness arises. The Court below could not have discarded this evidence on the only ground that the witness was not relied on in title suit No. 15 of 1950. From perusal of the evidence of P.W. 4, P.W. 7, P.W. 5, it appears that none of the witnesses were cross-examined by the respondent on the question of parentage of Harkalia, although they specifically stated in their examination-in-Chief that Harkalia is the daughter of Swaroop. Without considering these aspects of the matter, the Courts below ignored the evidences and, therefore, in my opinion, in view of the decision of the Apex Court in the case of Municipal Committee Hosiarpur (Supra), the Courts below have ignored and excluded the relevant materials as such the findings are perverse. On this score alone, the impugned Judgment and Decree are liable to be set aside.

12. So far the objection of the respondent that in view of Order 23 Rule 3A C.P.C. the suit itself is not maintainable is concerned also, I do not agree with the submission of the Learned Counsel because the present suit was filed originally in the year 1965 being title suit No. 78 of 1965 which was returned for proper presentation and thereafter ultimately after rejection of proper application, the present suit was filed in the year 1974 whereas this order 23 Rule 3A was added by the C.P.C. Amendment Act with effect from 1st February, 1977. Therefore, on the date of institution of the suit, this provision was not there in C.P.C. and, therefore, it appears that rightly this issue was never raised in the Courts below. So far finding of both the Courts below that principle of constructive res judicata is applicable is concerned also is not sustainable because Harkalia is not claiming any title through either Deo Narain or her son. According to her on the death of her father, the property devolved on her. If it is held that she is the daughter of Swaroop, then any decision against her husband will not be binding on her. In my opinion, therefore, neither Section 11 C.P.C. nor explanation 4 thereof is applicable. Likewise, once it is held that she is daughter of Swaroop then the compromise between Deo Narayan and Others will not be binding on her because she was not party to the suit. It is settled principle of law that any decision in any proceeding will not be binding on the person who was not party in the proceeding. From perusal of the Judgment in the earlier title suit No. 15 of 1950 which is exhibited in the present suit, it appears that in the written statement Deo Narain specifically pleaded that on the death of Swaroop, Harkalia is daughter who inherited the property. In spite of that defence, the defendants did not make her party in the suit. These aspects of the matter has not been considered by the Courts below.

13. According to the defendant-respondent compromise was arrived at and above 10 acres of land was given to Deo Narain is concerned, surprisingly, in the one hand the defendants are saying that Harkalia had no concern, i.e., she was not daughter of Swaroop then who was Deo Narain? How, he was claiming the

land to be the owner and why he entered into compromise and the present respondent agreed to gift about 10 acres land to Deo Narayan? There is no explanation at all. It may be mentioned here that if Deo Narain was nobody and not related to Swaroop then by compromise decree, no title will be created in favor of Deo Narain because admittedly the compromise decree is not registered. This aspect of the matter has not been considered by the appellate Court.

14. From perusal of the lower appellate Court Judgment, it appears that the lower appellate Court has swayed away with the Judgment passed in the earlier suit and observed that this issue relating to parentage that Harkalia was directly and substantially in issue in the earlier suit. On the contrary from perusal of the Judgment of the earlier suit passed by the trial Court which is exhibited, I do not find such issue was framed nor any evidence was adduced in that case and moreover in absence of Harkalia, the said issue could not have been decided in the earlier suit and, therefore that finding is not binding on Harkalia who is plaintiff here in the present suit. This aspect of the matter has also not been considered by the appellate Court. It further appears that the lower appellate Court has disbelieved the case of surrender made by Swaroop as propounded by the defendant-respondent vide paragraph 39 of the appellate Court Judgment.

15. So far first substantial question of law is concerned, it appears that there is no categorical finding recorded by the appellate Court as to why the suit will be barred by law of limitation, particularly when Harkalia was not made party in the earlier suit and her present suit is for declaration of her title. If it is held that she is not daughter then she has got no *locustandi* to file the suit. Once it is held that she is the daughter then the property of Swaroop will devolve on her on the death of Swaroop and the compromise decree, if any, between Deo Narayan and others will be null and void itself because the property of Harkalia cannot be compromised by any other person, particularly when the appellate Court recorded the finding that the surrender document is not genuine document. In view of my above discussion, both the substantial question of law formulated in this second appeal are answered in favour of the appellant. The Judgment and Decree of the lower appellate Court is set aside and the matter is remanded back to the lower appellate Court for a fresh decision according to law considering all these aspects of the matter independently without being influenced by any observation made by me in this Judgment. Since the matter is very old, the parties are directed to appear before the lower appellate Court within one month from today and get a date fixed for hearing of the appeal and the lower appellate Court shall fix the date for hearing and after hearing shall decide the appeal as early as possible. Since the parties are present here before this Court, no further notice be issued to them.