

(1984) 04 PAT CK 0026
In the Patna High Court
Case No : A.F.A.D. No. 504 of 1980

Janki Dhobi and Others

APPELLANT

Vs

Sitaram Singh and Others

RESPONDENT

Date of Decision : 27-04-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : AIR 1985 Patna 140 : (1984) PLJR 938

Hon'ble Judges : Prabha Shanker Mishra, J

Bench : Single Bench

Advocate : Sudhir Chandra Ghose, Sukumar Sinha and Chandrasen Pd. Singh, for the Appellant; Sreenath Singh and Pashupati Nath Jha, for the Respondent

Final Decision : Allowed

Judgement

Prabha Shanker Mishra, J.—Plaintiffs in Title Suit No. 43 of 1973 of the Court of Subordinate Judge, Barh, have moved this Court in appeal against the judgment and decree in Title Appeal No. 12 of 1977/5 of 1977 of the Court of 4th Additional District Judge, Patna. The suit was decreed on contest against defendants 1 and 2 and ex parte against the rest. Learned Additional District Judge has, however, reversed the trial Court's judgment and decreed (dismissed?) the suit with costs.

2. The dispute relates to 36 decimals of land in plot No. 5231 under khata No. 2297 of village Pandarak, Police Station Barh in the district of Patna. According to the plaintiffs the said plot of land was wrongly recorded as 6 decimals instead of 36 decimals in the khatian. It is under khewat No. 33 Tauzi Nos. 8391 and 9392. The land was Jagir Khidmati and it was recorded in the names of Bhattu Mali and Chhotu Mali sons of Chaman Mali, and sons of pro forma defendants 3 to 7. Most. Bibi Soghra along with some other co-tenants was the landlady of the khewat. The grant was absolute and the tenancy in their favour was permanent. Most. Bibi Soghra once suffered from small pox and Bhattu Mali and Chhotu Mali served her in a manner that she awarded them the grant by granting a

permanent tenancy. Bhattu Mali and Chhotu Mali remained in possession of the entire 36 decimals of land. They were succeeded by Somar Mali who transferred 21/4 kathas of land to Jaimangal Dhobi/father of plaintiffs Nos. 1 and 2 and plaintiff No. 3 by a registered sale deed dated 13-8-1956. Bachan Mali, Nandlal Mali, Nand Kishore Mali and Kamleshwar Mali, grandsons of Chhotu Mali sold two kathas of the land to plaintiffs Nos. 1 and 2 by another registered sale deed dt. 3-12-1956. Plaintiffs accordingly came in possession of and acquired title in 41/2 kathas out of 36 decimals of the land of plot No. 5231. Plaintiffs since their purchase enjoyed possession by amalgamating a portion of the same with the land in plot No. 5232 belonging to them and constructing a boundry wall and planting trees etc. Since the defendants created disturbances and interfered with the plaintiffs' possession a proceeding u/s 144 of the Cr. P.C. was started which was subsequently converted into a proceeding u/s 145 of the Cr. P.C. This proceeding was decided against the plaintiffs on 7-11-1970. According to the plaintiffs, being emboldened by the order u/s 145 of the Cr. P.C. in their favour the defendants dispossessed them.

3. Defendants Nos. 1 and 2 in their written statement stated that Bibi Soghra was not 16 annas' landlady of the tauzi in question but had only 2/3rd share therein and 1/3rd share belonged to one Girija Kuer. The tenancy which was Jagir Khidmati was not absolute because it was in lieu of the service that the tenants were required to render and when they failed to perform as required by the landlord, Soghara estate resumed possession and the tenancy stood terminated. Defendants 1 and 2 thereafter took settlement of 28 decimals of land from Most. Bibi Soghra representing her 2/3rd share in the name of defendant No. 2 and came in possession as tenants. They paid rent to the ex-landlord and thereafter to the State. Their names were mutated in the revenue records by virtue of their title and possession. They disputed the plaintiffs' claim about purchase by them and exercise of possession upon the land in question and denied the allegation that they interfered with the possession of the plaintiffs.

4. In answer to the case pleaded by defendants 1 and 2 the plaintiffs asserted that it was wrong to say that Most. Bibi Soghra resumed possession of the land in question. They also disputed the grant of Hukumnama by Most. Bibi Soghara to the defendants and asserted that there could be no such grant made by her or on her behalf.

5. The learned Subordinate Judge who tried the suit recorded a finding of subsisting title in favour of the plaintiffs and rejected the case of the defendants, thus, granting a decree in favour of the plaintiffs. Learned Additional District Judge, however, accepted the case of the defendants and held that the plaintiffs failed to prove their title and possession and, thus, dismissed the suit.

6. Mr. S. C. Ghose, learned counsel appearing for the appellants has raised four contentions. He has submitted that the learned Additional District Judge has committed error of law in stating that the plaintiffs were required not only to prove their title but were also required to prove their possession within 12 years

of the institution of the suit. This according to Mr. Ghose is an error going to the root of the controversy. Mr. Ghose has developed his argument by drawing my attention to the provisions of Article 65 of the Limitation Act under which according to him in the event of the plaintiffs proving their title onus is placed upon the defendants to establish that they acquired title by adverse possession. According to Mr. Ghose yet another error committed by the learned District Judge is that he has held that Soghra estate resumed possession of the Jagir Khidntati granted in favour of the ancestors of the plaintiffs' vendors. Such a finding, according to Mr. Ghose, is not possible on the state of evidence on the record and without finding that the tenant was not permanent. He has drawn my attention to the conclusions of the learned Additional District Judge on the question as to whether the grant was absolute and permanent in favour of the ancestors of the vendors of the plaintiffs or not, and has submitted, to hold that Soghra estate resumed possession without determining the nature of the tenancy, is to commit to a non-existent fact Similarly according to Mr. Ghose a serious error of law has been committed by the learned Additional District Judge in accepting Ext. C as the document of title. Ext. C is an unregistered Hukumnama executed in the names, of ex-intermediaries by their agent. According to Mr. Ghose such a document can be looked into for collateral purpose only and not for the purpose of title. In addition to this according to Mr. Ghose the learned Additional District Judge has committed error in accepting the Mutawalli of Soghra estate as a person competent to grant a permanent lease in favour of the defendants.

7. A mere glance or the judgment of the Court of appeal below is sufficient to agree with what Mr. Ghose has contended. There is an apparent error of law in the judgment of the learned Additional District Judge that the plaintiffs can succeed only by proving that they were in possession within 12 years of the institution of the suit besides proving their title. Similarly on the question of the nature of the grant of the tenancy in favour of the ancestors of the vendor of the plaintiffs learned Additional District Judge has proceeded upon presumptions which appear to be contrary to the materials on the record. Entry of the record of the right as Jagir Khidmati has been used by the learned Additional District Judge as the evidence of a tenancy conterminous with the services rendered by the tenants to the ex-intermediary. There is no evidence on the record that the recorded tenants or their heirs gave up their respective services. Any thing held without any evidence whatsoever, like that Soghra estate resumed possession shall be without jurisdiction. The learned Additional District Judge has committed yet another error of law in holding that the defendants derived title by virtue of Hukumnama (Ext. C) which is an unregistered document. Had there been any evidence of delivery of possession on record to show that defendants became tenants of the land in question as evidenced by the grant of Hukumnama (Ext. C) by the Mutawalli and other documents showing that they exercised possession, possibly the defendants could raise a plea that they were holding the land in question by virtue of a settlement by the Soghra estate. They could also claim

that irrespective of any defect in the title since they had been in possession for more than 12 years they had acquired title by adverse possession. There is no such case pleaded by the defendants and if there is any, there is no discussion of any such evidence by the learned Additional District Judge, for a conclusion that the defendants derived title by virtue of their possession. There has been an issue framed by the trial Court as to whether the defendants acquired title by adverse possession or not and the trial Court answered this question against the defendants. The learned Additional District Judge has reversed the said finding only on the basis of the unregistered Hukumnama.

8. The question as to whether the Mutawalli who allegedly executed the Hukumnama (Ext. C) in favour of the defendants was competent to do so or not has also been only casually adverted to by the learned Additional District Judge. It seems obvious that learned Additional District Judge has decided even this question in favour of the defendants on the basis that the Soghra estate resumed possession and thereafter vendors of the plaintiffs had no title which they could transfer to the plaintiffs.

9. Mr. Sreenath Singh, learned counsel appearing for the respondents, has not questioned the correctness of the contentions of Mr. Ghose but has submitted that all such errors aside since the learned Additional District Judge has found that defendants Nos. 1 and 2 were in possession over the suit land and they were in possession for more than 12 years quoting words from the judgment of the learned Additional District Judge "under such circumstances, admittedly, the appellants had perfected their title by way of adverse possession which was known to all including the plaintiff-respondents. So the plaintiff-respondents cannot take advantage of the position that Mutawalli had exceeded the right given under the law to make settlement of land," the plaintiffs' suit must fail. The trial Court considered the evidence on the question of title and possession and noticed that the defendants claimed to have come in possession by virtue of the Hukumnama (Ext. C). The learned Additional District Judge approached the question of adverse possession along with the question as to whether the defendants had acquired any title or not by virtue of the alleged Hukumnama. While considering the question of possession, true, the learned Additional District Judge referred to the oral evidence of the defendants' witnesses who deposed at the trial court that the defendants were in possession for more than 12 years before the institution of the suit. His conclusion that the defendants were in possession for more than 12 years is, however, based on the finding that they came in possession by virtue of their title created by the Hukumnama (Ext. C). Once the Hukumnama is excluded and as conceded by Mr. Sreenath Singh the question of title is accepted to have been wrongly decided by the learned Additional District Judge, basis for reckoning the period of adverse possession vanishes. Mr. Sreenath has vehemently argued before me that it is only a finding of fact that the defendants were in possession for more than 12 years and acquired title by adverse possession. I am of the opinion that such a finding cannot be said to be one arrived at in accordance with law unless there is a

reckoning date for computing the period of possession. Such a date would be available in the instant case if the defendants' case would be accepted that by virtue of Ext. C the land was settled in their favour and they were put in possession. Once their case is not accepted, there is no reckoning date available. Without there being any such basis available, accepting the finding that the defendants acquired title by adverse possession will amount to accepting something which is recorded without any basis.

10. Mr. Sreenath Singh emphasised on the word admittedly used in this regard in the judgment of the learned Additional District Judge who has stated :

"It was for the lessee and Mutawalli to question as to whether he was competent to grant such lease but the plaintiffs-respondents cannot take advantage of it because they had to prove their subsisting title and possession over the suit land irrespective of any weakness of claim of title and possession of the appellants. This apart, the documents show that such permanent settlement in the name of the appellants was made by a competent person namely Mutawalli of Bibi Soghra Estate. So if the lease was invalid it means that the appellants were in possession over the disputed land as a trespasser from the year 1944 till the dispute arose in the year 1969, Under such circumstances admittedly, the appellants had perfected their title by way of adverse possession which was known to all including the plaintiffs-respondents."

I have no doubt that the learned Additional District Judge has recorded such finding inferentially. If the document under which the Mutawalli is said to have transferred the land in favour of the defendants is excluded from consideration there is nothing available on the record to conclude as the learned Additional District Judge has done, that the defendants 1 and 2 were in possession over the disputed land as trespassers or in any other capacity from the year, 1944 till the dispute arose in the year 1969. The word admittedly used in this context is on the basis of a fact presumed that the defendants 1 and 2 came in possession in the year, 1944. I have no manner of doubt that this finding is erroneous in law and the error is substantial in nature.

11. I have already indicated that a finding of fact recorded inferentially and without any basis in my opinion, shall be a finding recorded by committing an error of law. But Mr. Singh has further argued that Section 100 of the CPC shall permit interference only when a substantial error of law is committed. Section 100 of the CPC has been re-enacted by the CPC Amended Act (No. 104 of 1976). The amended provision says that an appeal shall lie to the High Court if the High Court is satisfied that the case involves a substantial question of law. The Joint Committee which drafted the amendment undoubtedly intended that the number of cases coming by way of the second appeals to the High Court would be reduced. In dealing with the second appeals the High Courts now are required not only to see that there is an error of law but also to see that the question of law involved is a substantial one. Mr. Sreenath Singh has, however, placed reliance upon the case of Mahindra and Mahindra Ltd. v. Union of India AIR 1979

SC 798. Mahindra's case was one in which an appeal was taken to the Supreme Court u/s 55 of the Monopolies and Restrictive Trade Practices Act, 1969. The question raised before the Supreme Court was as to what is the true scope and ambit of an appeal u/s 55 of the said Act. The Court noticed that u/s 100 of the C.P.C., as it existed on the date Section 55 of the said Act was enacted, three grounds were specified on which second appeal could be brought to the High Court and one of the grounds was that the decision appealed against was contrary to law. Section 55 of the said Act provides inter alia that any person aggrieved by an order made by the Commission u/s 13, may prefer an appeal to the Supreme Court on one or more of the grounds specified in Section 100 of the Code of Civil Procedure. Speaking for the Court Bhagwati, J. said:

"It was sufficient u/s 100 as it stood then that there should be a question of law in order to attract the jurisdiction of the High Court in second appeal and, therefore, if the reference in Section 55 were to the grounds set out in the then existing section 100, there can be no doubt that an appeal would lie to this Court u/s 55 on a question of law. But subsequent to the enactment of Section 55, Section 100 of the C.P.C. was substituted by a new section by Section 37 of the CPC (Amendment) Act 1976 with effect from 1st February, 1977 and the new section 100 provides that a second appeal shall lie to the High Court only if the High Court is satisfied that the case involves a substantial question of law. The three grounds on which a second appeal could lie under the former Section 100 were abrogated and in their place only one ground was substituted which was highly stringent ground, namely, that there should be a substantial question of law. This was the new Section 100 which was in force on the date when the present appeal was preferred by the appellants and the argument of the respondent was that the maintainability of the appeal was therefore, required to be judged by reference to the ground specified in the new section 100 and the appeal could be entertained only if there was a substantial question of law."

Applying the rule of construction that, where a statute is incorporated by reference to a second statute the repeal of the 1st statute by a 3rd statute does not affect the second, the Court held : --

"It is obvious that the legislature did not want to confer an unlimited right of appeal, but wanted to restrict it and turning to Section 100, it found that the grounds there set out were appropriate for restricting the right of appeal and hence it incorporated them in Section 55. The right of appeal was clearly intended to be limited to the grounds set out in the then existing Section 100. Those were the grounds which were before the Legislature and to which the Legislature could have applied its mind and it is reasonable to assume that it was with reference to those specific and known grounds that the Legislature intended to restrict the right of appeal. The Legislature could never have intended to limit the right of appeal to any ground or grounds which might from time to time find place in Section 300 without knowing what those grounds were. The grounds specified in Section 100 might be changed from time to time having regard to

the legislative policy relating to second appeals and it is difficult to see any valid reason why the Legislature should have thought it necessary that these changes should also be reflected in Section 55 which deals with the right of appeal in a totally different context. We fail to appreciate what relevance the legislative policy in regard to second appeals has to the right of appeal u/s 55 so that Section 55 should be inseparably linked or yoked to Section 100 and whatever changes take place in Section 100 must be automatically read into Section 55."

It is obvious, therefore, that the Supreme Court was not deciding in *Mahindra and Mahindra's* case AIR 1979 SC 798 as to what a substantial question of law is. This Court in the case of *Sabitri Thakurain Vs. Suraj Mohan Thakur and Others*, , even before the amendment of Section 100, has taken the view that in a second appeal the appellant must show that some substantial question of law, as opposed to substantive question of fact, is involved for decision and said that a question of law does not become substantial simply because the judges have stated and examined it in that way in order to show that it has no substance. In *Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.*, the Supreme Court has pointed out that the proper test for determining whether a question of law is a substantial question or not is to see whether it is of general public importance or whether it directly or substantially affects the rights of the parties, and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views; if the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is some question of law wrongly answered, such a question would not be a substantial question of law. In *Nathoo Lal Vs. Durga Prasad*, the Supreme Court has said that the question whether a testamentary disposition by a Hindu in favour of a female heir confers on her only a limited estate, in the absence of evidence that he intended to confer on her an absolute interest in the property, is a substantial question of law. Misconstruing of evidence, acting without evidence, applicability or non-applicability of a particular law have been in varying circumstances held to be substantial questions of law by different Courts. One can refer to several authorities to support this approach. See *Bibhabati Devi Vs. Kumar Ramendra Narayan Roy and Others*, . In *Gurbaksh Singh Vs. Nikka Singh*, the Supreme Court has held that a finding recorded by the District Judge that the appellant was bona fide purchaser in good faith which was not based, on the evidence in the case but was ipse dixit and it was arrived at without applying the correct principles of law could be interfered with in a second appeal. In *Sonawati and Others Vs. Sri Ram and Another*, the Supreme Court has held that a finding of fact recorded without considering some important pieces of evidence is an error of law warranting interference u/s 100 of the Civil Procedure Code.

12. In *Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain and Others*, the Supreme Court overruled a preliminary objection that there was no substantial question of law for grant of a certificate u/

s 110 of the Code of Civil Procedure, 1908 (Article 133 of the Constitution of India) saying that the ground on which the appeal was dismissed by the High Court raised a question of law of importance to the parties and that being so the appellant was entitled to a certificate u/s 110, C.P.C.

13. I have my preference for the principle and interpretation that shall make the law real and living. A mistake of law going to the root of the controversy, ignorance of law exhibited by the Court perverting its adjudication, a court of law acting without judicial discipline and committing error of judgment in regard to the issues involved in a case, if allowed to stand, would make the law and the Court incompetent and illegitimate. Such questions may be mixed questions of fact and law like cases in which a conclusion of fact is recorded without considering the case in certain important aspects and/or without considering important evidence. A question of law which is not dependent upon examination of the evidence and requires no fresh investigation of facts, a finding based on evidence but perverse in the, sense that no normal person could arrive at that finding, a finding based on no legal evidence or without judicial consideration of the facts in issue and the evidence on the record, in my view, are substantial questions of law, depending of course on "the effect caused by them on the adjudication of the issues between the parties.

14. In the instant case to allow the judgment of the court of appeal below to stand in view of the errors as found by me and conceded by Mr. Sreenath Singh will mean sanctioning a decree which is contrary to law. I am satisfied that the errors committed by the learned Additional District Judge are substantial errors of law and are such that they have rendered the judgment delivered by him perverse, such judgment and decree if allowed to exist, shall result in grave miscarriage of justice.

15. In the result this appeal is allowed, the judgment and decree passed by the 4th Additional District Judge, Patna, in Title Appeal No. 2 of 1977 are set aside and that of 5 of 1977 the learned Subordinate Judge, Barh, in Title Suit No. 48 of 1973 are hereby confirmed. On the facts and in the circumstances of this case defendants 1 and 2 are liable to pay costs of this proceeding to the plaintiff-appellants. Hearing fee Rs. 350/-