

(2007) 05 PAT CK 0026

In the Patna High Court

Case No : Appeal from Appellate Decree No. 213 of 1990

Madhusudan Prasad and Others

APPELLANT

Vs

Maheshwar Nath Prasad and Others

RESPONDENT

Date of Decision : 18-05-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2007) 3 PLJR 602

Hon'ble Judges : Syed Md. Mahfooz Alam, J

Bench : Single Bench

Advocate : S.K. Majumdar, Suman Kumar, Arun Kumar Prasad, Amar Nath Singh and Harendra Mohan Mishra, for the Appellant;

Final Decision : Dismissed

Judgement

Syed Md. Mahfooz Alam, J.—This Second Appeal has been preferred by the plaintiffs-appellants against the judgment and decree dated 12.2.1990 passed by Sri Shashi Kumar Chaudhary, 3rd Additional District Judge, East Champaran at Motihari in Title Appeal No. 60 of 1986 / 28 of 1989 affirming the judgment and decree dated 28.6.1986 passed by Sri Baikunth Nath Sahi, 4th Additional Subordinate Judge, Motihari in Title Suit No. 82 of 1979/11 of 1985. The plaintiffs-appellants had filed suit which was numbered as Title Suit No. 82 of 1979 for declaration of their title over the suit premises and for eviction of the defendants therefrom besides claim for arrears of rent from July, 1976 to March 1979 amounting to Rs. 165/- and also for mesne profits. The suit was contested by the defendants-respondents and on contest the suit was dismissed by the trial court by judgment dated 28th June, 1986. Against the said judgment of dismissal of the suit, the plaintiffs preferred appeal before the learned District Judge, Motihari which was numbered as Title Appeal No. 60 of 1986. In the said appeal the judgment was delivered on 12th February, 1990 by 3rd Additional District Judge, East Champaran at Motihari whereby he also dismissed the appeal filed by the plain tiffs-appellants. Against the said judgment, this Second Appeal

has been preferred.

2. Before making discussion on the findings of the appellate court, I would like to state the case of the respective parties.

3. Mostt. Kuari was the wife of Bantilal Sah. The said Bantilal Sah had two sons, namely, Lakshmi Prasad and Thakur Prasad Sah. Bantilal Sah originally belonged to village Latihanwa under Adapur Police Station. He was married to Mostt Kuari, daughter of Kali Charan Sah, resident of Mohalla Baniapatti within Motihari town. Jalo Kuer was the wife of Kali Charan Sah. The said Kali Charan Sah died leaving behind him his widow Jalo Kuer and his daughter Mostt. Kuari and two maternal grandsons, namely, Lakshmai Prasad Sah and Thakur Prasad Sah. C.S. Municipal Khesra No. 1060 belonged to Late Kali Charan Sah as his homestead land. Subsequently, he (Kali Charan Sah) purchased C.S. plot No. 1059 through registered sale deed dated 16.1.1903 executed by Sudhan Sah, Budhan Sah and Jhapsi Sah and thereafter he amalgamated both the plots and remained in possession of the same. After the death of Kali Charan Sah, Bantilal Sah had been looking after the affairs of Jalo Kuer and in this connection he was mostly residing at Motihari. The said Mostt Jalo Kuer executed a registered deed of gift in favour of her daughter Mostt. Kuan and her maternal grandson Thakur Sah on 6.5.1908. Younger brother of Thakur Prasad Sah, namely, Lakshmi Sah was born after execution of the said gift deed. Thakur Prasad Sah, his mother and his brother Lakshmi Prasad Sah formed a joint Hindu Mitakshara family. In the year 1920 Thakur Prasad Sah died leaving behind him his maternal grand-mother Jalo Kuer his mother Mostt. Kuari, his brother Lakshmi Prasad Sah, his widow Mostt. Tapeshari Kuer and his daughter Girja Devi. Mostt. Jalo Kuer, Mostt. Kuari and Girja Devi also died leaving behind Lakshmi Prasad Sah as their sole surviving heir in the family. Tapeshari Kuer, the widow of Thakur Sah is said to have married another husband, namely, Dharichhan Sah of village Latihanwa and thereby she was divested with the estate left by her husband. Lakshmi Sah died in the year 1964 leaving behind him the plaintiffs as his heirs.

Further case of the plaintiffs-appellants is that C.S. Plot Nos. 1059 and 1060 were numbered as R.S. Plot Nos. 2390 and 2391 in the revisional survey in the names of Thakur Sah and Lakshmi Sah. After amalgamation of both the plots two houses comprising eastern block and western block were constructed for the purpose of letting out the same to the tenants. The eastern block was let out to Nathuni Sah, father of the defendants, on monthly rental of Rs. 5/-. The said Nathuni Sah and thereafter the defendants-respondents used to pay the rent of the houses regularly to the plaintiffs-appellants but from the month of July, 1976 and onwards the defendants stopped payment of rent inspite of the repeated demands. Then the plaintiffs requested the defendants to vacate the house but the defendants avoided to do so. Thereafter the plaintiffs served legal notice dated 28.6.1978 upon the defendants asking them to vacate the suit premises detailed in Schedule 1 of the plaint and also to pay the arrears of rent. The defendants gave reply of the said notice on 14.7.1978 denying the relationship of

the landlord and tenant and asserting their title over the suit houses by disclosing that they were paying municipal tax of the suit premises. After receipt of the reply of the notice, the plaintiffs applied to the Municipality for correction of the assessment register on the basis of which Mutation Case No. 73 of 1978-79 was initiated. In that proceeding the defendants-respondents appeared and filed rejoinder on 8.2.1979 in which they described themselves to be the great grandson of Thakur Sah denying relationship of landlord and tenant between the plaintiffs and defendants. It has been stated that the defendants-respondents have no other status than that of tenants of the plaintiffs-appellants and by repudiating the tenancy they have made themselves liable to be evicted from the suit premises and also to pay damages pendent lite and future and thus, the necessity of filing of the suit arose.

4. Respondent No. 1 Maheswhar Nath Prasad, who was defendant No. 1, appeared in the suit and contested the suit by filing written statement. According to the written statement filed by defendant No. 1 the defendant's case is that Thakur Sah and Lakshmi Sah were own brothers and they had joint interest in Municipal Khesra Nos. 1959 and 1960. The said Thakur Sah died in the year 1921 in the state of jointness with his brother Lakshmi Prasad Sah, his maternal grand-mother Jalo Kuer, his mother Mostt. Kuari and his widow Tapeshari Devi. At the time of death of Thakur Sah, his widow Tapeshari Devi was pregnant. She gave birth to a male child, namely, Anant Sah, after the death of Thakur Sah who inherited the interest of his father along with his uncle Lakshmi Sah. The defendants-respondents have also denied this fact that Thakur Sah's widow Tapeshari Devi had married to another husband after the death of Thakur Sah. The defendants-respondents claimed that they are the grand-sons of Anant Sah, who was the son of Thakur Sah. According to the defendants-respondents, Anant Sah separated from Lakshmi Sah and on separation 6 dhurs of Municipal plot No. 2390 and 4 dhurs of plot No. 2391 towards east with the house standing thereon was allotted to him whereas the ancestors of the plaintiffs, namely, Lakshmi Sah got his share towards west with the house standing thereon. The said arrangement had taken place during the lifetime of Bantilal Sah. At that time Anant Sah was minor and he was residing in the suit house with his widow mother. After the said partition/ family arrangement a separate Jamabandi was also created in the Municipality and since then the defendants have been separately paying Holding Tax to the Municipality and obtaining rent receipts. Likewise, separate Jamabandi was also created under Bettiah estate and after vesting of the Zamindari, separate Jamabandi was created in the Saristha of State of Bihar with respect to the suit land. The defendants-respondents have denied the relationship of landlord and tenant between the plaintiffs and themselves, The defendants-respondents have further claimed that they have been continuously coming in possession of the suit premises since the time of his great grand-father for the last more than 50 years openly and adversely to the knowledge of the plaintiffs and without any interruption from anybody including the plaintiffs and thereby they have acquired title by adverse possession over the

suit premises and so the plaintiff's suit is barred by limitation. According to the defendants-respondents, the plaintiffs-appellants have never paid any municipal tax in respect of the suit premises and never raised any objection before any authority with regard to the title of the defendants-respondents. It has also been stated that the defendants-respondents had also mortgaged a portion of the suit premises. It has been stated that the above facts established that the defendants-respondents have been coming in continuous possession of the suit house for the last several years adversely to the interest of the plaintiffs and thereby the defendants-respondents have perfected their title by way of adverse possession.

5. From perusal of the judgment of the trial court it appears that on the basis of the pleading of both the parties, the trial court framed as many as seven issues for adjudication in the suit. Those issues are as follows:--

- (i) Is the suit, as framed, maintainable ?
- (ii) Have the plaintiffs got valid cause of action for the suit ?
- (iii) Has there been any relationship of landlord and tenant between the plaintiffs on the one hand and the defendants on the other and are the former entitled to evict the latter from the suit premises and to claim arrears of rent as also the mesne profits, as claimed for?
- (iv) Are the defendants including defendant No. 1 entitled to claim the suit premises on the basis of inheritance from late Thakur Sah as being their great grand-father ?
- (v) Have the defendants been able to prove their claim of adverse possession and ouster of the plaintiffs for over many 12 years to the filing of the present suit ?
- (vi) Are the plaintiffs entitled to the decree as claimed for ?
- (vii) To what relief or reliefs, if any, are the plaintiffs entitled ?

6. It further transpires that while deciding issue No. (iii), the trial court held that there is no relationship of landlord and tenant between the plaintiffs on the one hand and the defendants on the other and as such, the plaintiffs are not entitled to evict the defendants from the suit premises or to claim arrears of rent as well as mesne profits from the defendants. On issue No. (iv), the trial court held that the contesting defendant/defendants are not the heirs of late Thakur Sah as Thakur Sah had no male issue and, therefore, the defendants are not entitled to claim the suit premises on the basis of inheritance but on issue No. (v), the trial court held that the defendants have successfully proved that they have perfected their title over the suit premises by way of adverse possession and on that basis, the trial court dismissed the suit of the plaintiffs.

7. It appears that against the said judgment, the plaintiffs preferred appeal but the same was also dismissed by the first appellate court and the findings of the

trial court were confirmed. Against the said dismissal, this Second Appeal has been preferred by the plaintiffs-appellants.

8. It appears that at the time of admission of this appeal, only one substantial question of law was formulated for determination in this appeal. The substantial question of law as formulated on 1.5.1992 is as follows:--

"Whether the inference drawn by the court below that the suit was barred by adverse possession can be sustained in law"?

9. Before making discussion on the substantial question of law, I would like to mention this fact that this is the second appeal which has been preferred against the concurrent findings of the courts below and as such, as per law, this Court is not empowered to interfere with the concurrent findings of the courts below on facts. u/s 100 of the Code of Civil Procedure, the jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with the pure questions of fact while exercising jurisdiction u/s 100 of the Code of Civil Procedure. Thus, Section 100 of the C.P.C. restricts the jurisdiction of the High Court to hear a second appeal only on substantial question of law involved in the case. The High Court must be satisfied that a substantial question of law is involved in the case and there is need to give the findings on such question/questions formulated by the High Court. In the background of provision of law that this Court is not empowered to interfere with concurrent findings of the courts below on facts and can only interfere with the findings when there is substantial question of law involved in the appeal, I would like to see - whether the finding of the courts below that the plaintiffs' suit was barred by adverse possession, was according to law.

10. Before coming to the point, I would like to go through the meaning of adverse possession and its interpretation. Although there is no statutory definition of adverse possession but it has been variously described in the following manner.

(i) it is the temporary and abnormal separation of the enjoyment of property from the title to it-when a man holds property innocently against all the world but wrongfully against the true owner;

(ii) it is possession inconsistent with the title of the true owner;

(iii) it is possession -

(a) which, if continued for the statutory period limited for making re-entry or bringing an action, extinguishes the right or title, of the true owner, which cannot, afterwards, be reviewed either by re-entry or by subsequent acknowledgement;

(b) which extinguishes the right and title of the dispossessed owner, and

(c) which leaves the occupant with a title gained by the fact of possession and

resting on the infirmity of the right of the owner to eject the dispossessor.

(iv) it is an actual and exclusive appropriation of property, commenced and continued under a claim of right, either?

(a) by an openly avowed claim, or

(b) by a constructive claim, arising from the facts and circumstances attending the appropriation, to hold the property against him who was in possession,

(v) it is possession adverse to the competitor, which is adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor.

11. From the above definition or interpretation of the terms "adverse possession", it is clear that the doctrine of adverse possession applies only when the party has set up his own adverse title, disclaiming the title of the owner and establishing that he remained exclusively in possession to the knowledge of the owner, hostile to his title and the owner had acquiesced to the same. In other words, the person claiming adverse possession should not merely exclusively possess the property but should so possess it in exercise of his own readable declared claim to own property over statutory period of 12 years continuously with clear impression that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. Let me see whether the requirements of law for coming to the conclusion that the defendants-respondents have perfected their title to the suit property by way of adverse possession, have been fully satisfied or not.

12. From perusal of the plaint it appears that plaintiffs' assertion was that the defendants-respondents were in possession of the suit property as tenants under them but this case of the plaintiffs was negated by both the courts below and both the courts below found the defendants in possession of the suit property for more than several 12 years. According to the courts below, the possession of the defendants was adverse and for coming to such conclusion the courts below have placed reliance upon several documentary evidence besides oral evidence. For better appreciation of point in issue, I would like to make mention of some of the documents in my judgment also.

13. Ext. C series (Ext. C to C/14) are receipts for payment of holding tax issued in the name of Anant Sah, grandfather of the defendants. From perusal of the receipts it appears that the earliest receipt was issued in the year 1928 in the name of Anant Sah and the last one was issued on 18.2.1936. Ext. C/15 to C/43 are municipal rent receipts in respect of the suit property in the name of Nathuni Sah, father of the defendants. These rents receipts ranges from 1944 to 1971 showing that Nathuni Sah was regularly paying the municipal tax with respect to the suit property to the Motihari Municipality and was getting rent receipts. Ext. C/44 to C 51 are the municipal rent receipts with respect to the suit premises showing payment of municipal tax by defendant No. 1 from 1971 to 1979 till the filing of the suit. Ext. D series are the demand notices issued u/s 123 of the

Bihar & Orissa Municipal Act in the name of Nathuni Sah and Anant Sah, showing that for realisation of arrears of Municipal tax of the suit premises notices were issued in the name of father and grand-father of the defendants. Ext. E to E/2 are rent receipts granted by the ex-landlord in the name of Ananth Sah showing that the name of Anant Sah, grand father of the defendants stood recorded in the Sherishta of ex-landlord with respect to the suit land Ext. G and G/1 are the proof of payment of arrears of tax by Nathuni Sah, father of defendants in execution of S.C.C. Case Nos. 2289 of 1964 and 289 of 1964. Ext. H is the notice issued by the court of Munsif, Motihari along with the copy of the plaint of S.C.C. Case No. 289/64 in the name of Nathuni Sah. Ext. I is the certified copy of suit register of M.S. No. 289/163 of 1964 which was filed by Motihari Municipality against Nathuni Sah, father of the defendants for realisation of arrears of taxes with respect to the suit house. The above-mentioned documents fully establish this fact that the defendants have been coming in possession of the suit property since the year 1928 and their possession was hostile against the title of the real owner and so, there is no reasonable ground for me to come to the conclusion that the finding of the trial court as well as that of the first appellate court that the defendants have acquired title to the suit property by adverse possession is perverse.

14. It has been argued by the learned Advocate of the appellants that the finding of the courts below that the suit was barred by adverse possession is not sustainable under law. His argument was that the defendants have taken inconsistent pleas in the written statement. The first contention of the defendants was that they being the great grand-sons of Thakur Prasad Sah had inherited the suit property which goes to show that the defendants' claim of title was based on inheritance and so, at the same time, the defendants cannot take shelter that they had perfected their title by way of adverse possession. Both the pleas are inconsistent with each other and as such, the trial court as well as the appellate court both have committed illegality in holding that the plea of adverse possession was available to the defendants inspite of the fact that their claim of title was based on inheritance. In support of his argument, the learned Advocate of the appellants has placed reliance upon the following decisions (i) 2004(3) PLJR (SC), 245 (Karnataka Board of Wakf, appellant vs. Government of India and Others, respondents) and (ii) AIR 1996 SC 910 (Mohan Lal (deceased) through his LRs. Kachru and others, appellants vs. Mira Abdul Gaffar and Another, Respondents). The learned Advocate of the appellants has referred paragraph 12 of the decision reported in 2004(3) PLJR (SC), 245. The relevant lines of the said paragraph are quoted below:--

"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."

The learned Advocate of the appellants has again referred paragraph 4 of the

decision reported in AIR 1996 SC 910. The relevant paragraph of the said decision is quoted below:--

"As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right there under and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., upto completing the period of his title by prescription *nee vi nee clam nec precario*. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby the plea of adverse possession is not available to the appellant."

15. The learned Advocate of the appellants armed with the above observations of the Apex Court argued that the plea of adverse possession was not available to the respondents in view of the fact that they have made out a case that they had acquired title to the suit land through inheritance which plea was inconsistent with the plea of adverse possession and as such, both the courts below have committed illegality by accepting the plea of the defendants-respondents with regard to the adverse possession.

16. It is true that adverse possession always means possession adverse to the real owner and it begins when the party has set up his own adverse title disclaiming the title of the owner and establishing that he remained exclusively in possession to the knowledge of the owner, hostile to his title. Thus, a party, who has based his claim on the basis of title, cannot at the same time take plea that he has also acquired his title by adverse possession. Both the pleas are inconsistent with each other but I am of the view that the said principle will not apply in this case as the plea of the defendants-respondents that they had acquired title to the suit land through inheritance was found totally false meaning thereby that their claim of title to the suit land on the basis of inheritance was not lawful and, therefore, it could not be held that the possession of the defendants to the suit property relates to lawful title. On the other hand, the judgments of the courts below show that the plaintiffs title to the suit property through inheritance was established. Under such circumstances, the plea of adverse possession by the defendants-respondents cannot be said to be inconsistent with his plea of title which was not lawful. In such a situation, I am of the view that the finding of the courts below that the suit was barred by adverse possession is sustainable under law. Accordingly, this substantial question of law is decided in favour of the respondents and against the appellants. In the result, I do not find any merit in this second appeal and the same is hereby dismissed. The judgment and decree of the courts below are confirmed. However, there will be no order as to costs.