
(2001) 12 PAT CK 0017

In the Patna High Court

Case No : Appeal From Appellate Decree No. 600 of 1986

Naresh Kumar Verma @ Naresh Nath Verma

APPELLANT

Vs

Smt. Laljhari Devi and Others

RESPONDENT

Date of Decision : 14-12-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10
Specific Relief Act, 1963 — Section 34

Citation : (2002) 1 PLJR 308

Hon'ble Judges : S.N. Pathak, J

Bench : Single Bench

Advocate : S.K. Verma and Kaushal Kumar, for the Appellant; Bhupendra Narayan Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.N. Pathak, J.—This second appeal is directed against the judgment dated 22.5.86 passed by 1st Additional District Judge, Gaya, in title appeal no. 59/78/17/84 whereby the judgment of the trial Court dated 31.3.78 passed by Sub-Judge, 1st Court, Gaya, in title suit No. 31/75 was confirmed. Respondent No. 3(b) of the first appeal, who is the heir of Defendant No. 3 of the suit, is the Appellant here.

2. The case of the Plaintiff Respondent No. 9 of this appeal in the lower Court was that the suit plot Nos. 4689, 4691, 4692 corresponding to new plot Nos. 342, 344 and 345 were the lands of one Md. Hussain Khan who was the owner of the suit land and other lands and he was also recorded in the Municipal survey as such. Md. Hussain Khan died leaving behind his widow Saira Khatoon, who inherited her husband's property. Saira Khatoon died leaving behind her son Badruddin and daughter Khairun Nissa. Badruddin died during the life time of his sister. Khairun Nissa also died in the year 1936. Then her son Nasiruddin inherited the suit land and other lands of Md. Hussain Khan. Nasiruddin orally gifted the suit plots to his son Merajuddin. In the year 1967 Defendant No. 1 was

given on lease some portion of the suit land to make the constructions with tiled roof, but in the year 1974 Defendant No. 1 made a pakka construction on the suit land. When the Plaintiff wanted to evict the Defendant No. 1, he resisted his eviction and set up title in himself on the basis of a sale-deed executed by one Gopalji Upadhaya and others dated 10.2.65 in favour of Defendant No. 2. Moreover, Defendant Nos. 3 and 4 also claimed the suit land by virtue of a sale-deed dated 30.10.42 executed by Jitendra Kumar and others. The Plaintiff, therefore, filed the suit seeking the relief to the "effect that the sale-deeds dated 30.10.42 and 10.2.65 were void and inoperative and he also sought eviction of Defendant Nos. 1 and 2 from the suit land.

3. The case of the Defendant Nos. 1 and 2 through their W.S. was that the suit land did not belong to Md. Hussain Khan, rather Haridas Chatterjee acquired Mokarri interest and proprietary" interest on the basis of sale-deed dated 26.6.1897 from one Abdul Wahab. Subsequently, Haridas Chatterjee sold the suit land among other lands to Balaji Upadhaya under registered sale-deed dated 17.4.1990. Md. Hussain Khan had figured as an attesting witness on this deed of sale. Md. Hussain Khan was later appointed as Mokhtare Aam of Aina Devi and her minor son Gopalji Upadhaya, as after the death of Balaji there was none to look after the affairs of Aina Devi, his widow. Taking advantage of this position, Md. Hussain Khan had fraudulently got his name entered in the Municipal records. However, he was removed from the services of Aina Devi and in the rent suit, Gopalji purchased the suit land and later on sale-deed dated 10.2.65 was executed in favour of Defendant No. 2. These Defendant Nos. 1 and 2, were never tenants of Plaintiff or his father and there was no question of their eviction.

4. Defendant Nos. 3 and 4 filed separate written statement and their case in short, was that Md. Hussain Khan had sold part of his land to Gaya Municipality and the rest of the (and to one Jogendra Kumar, from whose heirs the suit land was purchased by Defendant No. 3 and mother of Defendant No. 4. The suit was also barred u/s 34 of the Specific Relief Act. So, the suit was fit to be dismissed.

5. The trial Court held that Khairun Nisa was not the daughter of Md. Hussain Khan and his wife Saira Khatoon and, therefore, there was no question of inheritance of the property of Md. Hussain Khan by Nasiruddin, the father of the Plaintiff and the subsequent gift of suit property to the Plaintiff Merajuddin. The suit was also barred by Section 34 of the Specific Relief Act. In view of these findings the suit of the Plaintiff was dismissed by the trial Court. Then the Plaintiff filed a first appeal and the first appellate Court concurred with the findings of the trial Court regarding the daughtership of Khairun Nisa and inheritance of the suit property by Nasiruddin and the subsequent gift in favour of Plaintiff. However, the appellate Court proceeded to discuss the evidence regarding claim of title acquired by Defendant Nos. 3 and 4 on the basis of sale-deed dated 30.10.42 and held that they had acquired no title on the basis of the sale-deed. So, this second appeal has been filed by the heir of Defendant No. 3 of the suit and it was submitted before me by the Appellant's lawyer that once

the appellate Court held that the suit of the Plaintiff vis-a-vis (against) all the Defendants was not maintainable nor the Plaintiff was entitled to seek the reliefs as prayed for, there was no necessity for the first appellate Court to discuss the evidence regarding the claims of title and possession between Defendant Nos. 1 and 2 on the one hand and Defendant Nos. 3 and 4 on the other inter se because already there was a title suit No. 64/67. pending between them and the trial Court accepted the petition filed by Defendant Nos. 3 and 4 not to give any finding on the claims and counter claims set up by the Defendants inter se in the title suit No. 64/67. This petition was allowed by order dated 17.3.78 passed by the trial Court and the trial Court also observed that his observation regarding title of the Defendants inter se shall not operate as res judicata. In such a circumstance, the first appellate Court should not have given its finding regarding the claims and counter-claims of the Defendants inter se. It was, therefore submitted before me that this appeal is confined to the prayer of the Appellant that findings of the appellate Court regarding the title of Defendant Nos. 3 and 4 and the case of Defendant Nos. 1 and 2 be declared to be not binding on them and it should further be declared that this finding shall not operate as res judicata for the suit of 1964 and 1967.

6. Admittedly, the Plaintiffs suit was dismissed by both the lower Courts and so the question whether the finding of the trial Court or the appellate Court regarding the claims and counter-claims of the Defendants inter se shall operate as res judicata for the other suit bearing title suit No. 64/67 is the only question before this Court. I find that in spite of the order dated 17.3.78 passed by the trial Court, the latter proceeded to discuss the evidence regarding the title and interest of Md. Hussain Khan even after observing that his finding shall govern the right and interest of the Plaintiff v. the Defendants and not the claim and counter-claim inter se between the Defendants. However, since Defendant Nos. 3 and 4 were claiming their title to the suit land on the basis of their sale from the vendees from Md. Hussain Khan, so, indirectly they were supporting the Plaintiff's case that Md. Hussain Khan had title to the suit land. But the Defendant Nos. 1 and 2 had set up a plea that Md. Hussain Khan was not the title holder of the suit land. In any case, therefore, to decide the issues in the suit, two lower Courts had to give their finding whether Md. Hussain Khan had any title to the suit land and without giving any finding on this issue, the suit could not be decided. The trial Court even after holding that Khairun Nissa was not the daughter of Md. Hussain Khan proceeded to discuss whether Md. Hussain Khan had subsisting title to the suit land. The trial Court, however, observed that its findings and observations shall be only incidental and those shall not operate as res judicata because there was a petition dated 17.3.78 which was allowed. Then the trial Court held on discussion of the evidence on record that Md. Hussain Khan had lost his title to the suit land because he had transferred his right and interest, and the Defendants 3 and 4 had acquired their right and interest from the vendees of Md. Hussain Khan, who in turn, sold the suit land to Defendants 3 and 4. The decree of the trial Court was challenged by the Plaintiffs

in the first appeal and the appellate Court on the basis of evidence and discussion thereon held the sale-deeds of the Defendants 3 and 4 to be invalid because the same did not include the suit lands and the boundary also did not refer to the suit land and on this finding, the appellate Court disagreed with the trial Court's finding which had held that the boundary referred to the suit land. In substance, the appellate Court, perhaps, endorsed the plea of Defendants 1 and 2 regarding the title over the suit land and then its transfer to Defendant No. 2 by sale-deed dated 10.2.65. The appeal before this Court was filed by the heir of Defendant No. 3 of the suit, because the title of Md. Hussain Khan and title of the vendors of Defendant No. 2 was an issue in title suit No. 64/67 and so it was an issue inter se between the two sets of Defendants. Defendant Nos. 1 and 2 were denying the title of Md. Hussain Khan from whose vendees Defendant Nos. 3 and 4 acquired title and against this plea of the Defendants 1 and 2 the plea of the Defendants 3 and 4 was that Md. Hussain Khan had very much his title which he transferred to their (Defendant Nos. 2 and 3) vendors. In this appeal, it has been prayed that since the trial Court had stated in its judgment that finding regarding title of Md. Hussain Khan and the consequent title of Defendants 3 and 4 or for that matter title of the vendors of Defendants 1 and 2 shall not operate as res judicata, it was not wise on the part of the first appellate Court to give independent finding regarding the claims and counter-claims inter se among the Defendants.

7. The appellate Court has held that whether the decision of the first appellate Court will operate as res judicata will be a question to be decided by the Court which was in seisin of title suit No. 64/67. In this connection, I am of the opinion that when title of Md. Hussain Khan was challenged by Defendants 1 and 2 and accepted by Defendants 3 and 4 and this bone of contention between the two set of Defendants was an issue in the title suit No. 64/67, the right course for the trial Court should have been to pass an order u/s 10 CPC to stay the trial of the title suit No. 31/75. That is the normal procedure in order to meet the ends of justice and in order to avoid conflicting decisions over common issues of law and fact. Title suit No. 64/67 was an earlier suit and the suit under appeal was a suit of subsequent year and hence application of Section 10 CPC was very much apt. I have already held above that the trial Court stated that its findings and observations regarding the title of Md. Hussain Khan shall not operate as res judicata, and so the suit between the Plaintiff on the one hand and Defendants could have been decided on the very issue whether the Plaintiff's father was son of Khairun Nissa who was allegedly the daughter of Md. Hussain Khan. Since the appellate Court decided the issue between the Defendants inter-se, and held the title of Defendants 3 and 4 as invalid, the heir of Defendant No. 3 filed this second appeal. Of course, without deciding the title of Md. Hussain Khan, the Plaintiffs suit could not be decided. But as I have already observed above that the right course in the interest of justice was to stay the trial of title suit No. 31/75 and this was not done, I am of the opinion that the prayer of the Appellant before this Court to declare that the findings of the appellate Court regarding the

title of Defendants 3 and 4 of the suit and the same of Defendants 1 and 2 of the suit shall not operate as res judicata is to be accepted, and I think that this declaration shall meet the ends of justice to the parties. The Plaintiff-Respondent No. 9 had been unsuited by both the Courts below and no appeal has been filed by him and so, I am of the opinion that the above declaration will meet the ends of justice.

8. In the result, this appeal is allowed with the sole declaration that the findings of the appellate Court regarding title of the Defendants inter se shall not operate as res judicata. There shall be no order as to cost of his appeal.