
(2006) 03 PAT CK 0061

In the Patna High Court

Case No : Appeal From Appellate Decree No. 183 of 1990

Smt. Savitri Pandey

APPELLANT

Vs

Asharfi Rai and Others

RESPONDENT

Date of Decision : 22-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2006) 2 PLJR 426

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

Bench : Single Bench

Advocate : Raghubansh Pd. Singh, Satyapal Singh, for the Appellant; Nirmal Kumar Sinha, Yogendra Pd. Sinha and Mithilesh Verma, for the Respondent

Final Decision : Allowed

Judgement

Syed Md. Mahfooz Alam, J.—This Second Appeal has been preferred against the judgment dated 24th February, 1990 passed by Sri N.K. Choudhary, 1st Sub-Ordinate Judge, Muzaffarpur, in T.R.A. No. 8 of 1977 whereby he has been pleased to dismiss the appeal filed by appellant Smt. Savitri Pandey against the order dated 16.5.1977 passed by the Charge Officer, Muzaffarpur, in Suit No. 3004 of 1973 u/s 106 of the Bihar Tenancy Act, by which order the learned trial court had allowed the claim of the plaintiffs-respondents. First of all I would like to state the case of the respective parties.

The case of the plaintiffs-respondents, in brief, is that R.S. Plot No. 850 corresponding to C.S. Plot No. 462 appertaining to R.S. Khata No. 110 of Mauza Bhagwanpur fully described in Schedule-A of the plaint stands recorded in the Sirista of State of Bihar as Gair Mazarua Aam Rasta as per the entry in cadestral survey and the same has been coming in peaceful possession of the State of Bihar as Aam Rasta without any hindrance or disruption from any person but during the provisional survey operation the original defendant, Chaitu Rai, fraudulently got his name recorded with respect to 8 decimals of land of Plot No. 850/1369 appertaining to Khata No. 110 in his name by bringing the survey

authority in his collusion and when this fact came to the knowledge of the original plaintiff, Chandu Rai, (father of respondent Nos. 1 to 3), he filed a suit u/s 106 of the B.T. Act which was numbered as Title Suit No. 3004/1973 for removing the name of Chaitu Rai from the revisional Khatiyan.

The case of the present appellant (defendant in the suit) is that she is the purchaser of the suit land from the recorded tenant Chaitu Rai and when she got knowledge that the plaintiffs-respondents had filed a suit u/s 106 of the B.T Act bearing Suit No. 3004/1973, she made appearance in the suit and prayed to implead her as party to the suit and, accordingly, her prayer was allowed. Further case of the contesting defendant is that the original defendant, Chaitu Rai, had acquired 3 Kattha 10 dhuroi land of Cadestral Survey Plot No. 462 appertaining to "C.S. Khata No. 361 through a registered Patta Deed dated 24.11.1945 executed by ex-landlord, namely, Ahmad Khan and Aulaad Khan about ten years before the vesting of the estate in the State of Bihar and thereafter the said Chaitu Rai came in possession of the suit land. He had been paying rent of the suit land to the ex-landlord and was getting rent receipts. After vesting of the estate in the State of Bihar, the said Chaitu Rai was paying rent to the State of Bihar and was getting rent receipts. Out of the abovementioned 3 Kattha 10 dhur of land. Chaitu Rai sold 1 kattha 1 dhuroi land to one Kismatiya Devi wife of Saryu Rai before the revisional survey which was recorded in the name of Kismatiya Devi during the revisional survey and the remaining land was recorded in the name of Chaitu Rai during the revisional survey and accordingly, Khatiyan was prepared in his name in respect of R.S. Plot No. 850/1379 appertaining to R.S. Khata No. 110. On 16.12.74, the said Chaitu Rai sold the land to the defendant-appellant Smt. Savitri Pandey by a registered deed of sale and since the date of purchase the defendant-appellant has been coming in peaceful possession of the said land which is the subject matter of the suit land.

1. From the perusal of the judgment dated 16.5.77 passed by the Charge Officer, in Title Suit No. 3004/1973, it appears that Suit No. 3003/1973 and 3004/1973 were disposed of analogous by the learned Charge Officer and by a common order the learned Charge Officer allowed the claim of the plaintiffs-respondents for correction of record of rights by expunging the name of the vendor of the contesting defendant, namely, Chaitu Rai, whose name was recorded in revisional survey as tenant with respect to the suit plot. Against the said judgment and order, the appellant preferred appeal before the 1st Sub-Ordinate Judge, Muzaffarpur, which was numbered as T.R.A. No. 8 of 1977. The said appeal was finally disposed of on 24th February, 1990 by the Sub-Ordinate Judge, Muzaffarpur, who dismissed the appeal filed by the defendant-appellant. Against the said judgment, the defendant-appellant has preferred this Section Appeal. From the perusal of the record of this Second Appeal, it appears that at the time of admission of this appeal following substantial question of law was formulated to be decided in this case which is as follows:

"Whether the decision in the analogous case will operate as res judicata in the case out of which this appeal arises?"

2. It has been argued on behalf of the learned Advocate of the appellant that para 9 of the judgment of the appellate court will show that the learned Judge has observed that in view of the documentary evidence produced on behalf of the defendant-appellant, the learned lower court should not have disturbed the possession of the defendant-appellant and the order of the trial court cannot be said to be a judicial order and is not at all in accordance with the provisions required under law and the same cannot be termed as a good order in the eye of law but even then the learned first appellate court has dismissed the appeal tied by the appellant on technical ground and held that the appeal is barred by res judicata. The contention of the learned advocate of the appellant is that the judgment of the first appellate court is erroneous in law and cannot be upheld. According to the submission of the learned Advocate of the appellant Suit No. 3003/1973 and Suit No. 3004/1973 were disposed of by a common order passed on 16.5.77 by the Charge Officer, Muzaffarpur. Against the said common order two appeals were filed: T.R.A. No. 9/77 was filed in connection with Suit No. 3003/1973, whereas, T.R.A. No. 8/1977 was filed in connection with Suit No. 3004/1973. This appeal relates to Suit No. 3004/1973. The learned Advocate further submitted that in Suit No. 3003/1973 and in Suit No. 3004/1973, parties were not the same, as such, the order passed in T.R.A. No. 9/1977 which relates to Suit No. 3003/1973 cannot operate as res judicata so far the appeal filed against the order passed in Suit No. 3004/1973 is concerned and, so the judgment of the first appellate court is perverse and illegal.

5. Against the said argument, learned Advocate of the respondents submitted that in Second Appeal where there is concurrent findings of two courts below this court is not empowered to interfere with the concurrent findings of the courts below and, so, he prayed to dismissed this appeal.

6. It is settled principle of law that in Second Appeal this court has no jurisdiction to interfere with the findings of the first appellate court unless this court finds that the finding is perverse and not in accordance with law. Thus, the question before me is that whether the finding of the learned first appellate court that the suit is barred by res judicata is perverse and not in accordance with law?

7. In order to appreciate the correct position of law, I would like to quote Section 11 of the CPC which defines res judicata. Section 11 of the CPC runs as follows:

"Res Judicata.--No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation I.-The expression "former suit" shall denote a suit which has been

decided prior to the suit in question whether or not it was instituted prior thereto."

8. Thus, explanation I of Section 11 of the CPC defines former suit as a suit which has been decided prior to the suit in question and it does not include to suits which was decided by a common order in which parties are different. Admittedly, Suit No. 3003/ 1973 and 3004/1973 were two different suits and in both the suits parties were not the same. It is a different matter that both the suits were decided analogous and by a common order both the suits were disposed of. Therefore, any order passed in a separate appeal filed against the common order can not operate as res judicata in another appeal filed against the common order.

9. I, therefore, hold that the finding of the first appellate court that this appeal is barred by res judicata is erroneous and illegal and cannot be sustained. In such view of the matter, I am of the opinion that it is a fit case for remand so that a fresh findings can be obtained on the basis of the materials as well as oral and documentary evidence available on record which has not been discussed by the learned first appellate court. In the result, this Second Appeal is allowed. The judgment passed by the first appellate court is hereby set aside and the suit is remanded back to the 1st appellate court for giving fresh findings on all the points involved in the appeal on the basis of the materials as well as oral and documentary evidence already available on record.