

---

**(2009) 04 PAT CK 0085**

**In the Patna High Court**

**Case No :** Appeal from the Appellate Decree No. 82 of 1997

Sri Ram Khelawan Sah

APPELLANT

Vs

Anathalaya Ashram

RESPONDENT

---

**Date of Decision :** 13-04-2009

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 41 Rule 11, Order 41 Rule 33

**Citation :** (2009) 57 BLJR 2535 : (2009) 4 PLJR 12

**Hon'ble Judges :** S.N. Hussain, J

**Bench :** Single Bench

**Advocate :** Praween Kumar Jaipuriyar and Anshuman Jaipuriyar, for the Appellant; None, for the Respondent

**Final Decision :** Dismissed

---

## Judgement

S.N. Hussain, J.—This second appeal has been filed by the sole plaintiff-appellant-appellant challenging the judgments and decree of both the learned courts below.

2. The matter arises out of Title Suit No. 103 of 1987 which was filed by the plaintiff-appellant with respect to the suit land measuring 1 katha 11 dhurs by pole of 41/2 cubits of C.S. Plot No. 1558 (part) now M.S. Plot No. 367 Kha (Part) appertaining to C.S. Khata No. 129 now M.S. Khata No. 257 of Ward No. 6 of Katihar Municipality, Touzi No. 1239 within Thana No. 328 in Mouza Mirchai under Katihar Police Station in the District of Katihar for the following reliefs:

(a) Declaration of Plaintiff's right, title, interest and possession over Schedule A of the plaint.

(b) Declaration that defendants had no right, title, interest or possession over the suit land and that Municipal Town Survey Entry of suit land in the name of defendant No. 1 is wrong.

(c) Confirmation of plaintiff's possession.

(d) Permanent injunction against defendants.

(e) Recovery of possession if dispossessed pending title suit.

(f) Cost and/or any other reliefs.

3. The claim of the plaintiff was that he purchased 2 katha of the plot in question for Rs. 98 only from its owner Narbada Prasad Sinha by virtue of an unregistered sale deed dated 12.07.1960, but by mistake the unit of measurement was mentioned as pole of 61/2 cubits in the sale deed, although it should have been pole of 41/2 cubits. It is also claimed by the plaintiff that his vendor put him in possession of the purchased land without scientific measurement and hence the plaintiff came in possession of a bit lesser area of 1 khata 11 dhurs about which the plaintiff learnt later when he got the land measured. It is also claimed by the plaintiff that after the said purchase he constructed a house with tiled roof and started residing with his family and also got his name mutated in Katihar Municipality with respect to suit land and since then he is paying taxes to the municipality. It is also claimed that during the municipal survey operation the suit land was wrongly recorded in the name of defendant No. 1 Anathalaya Ashram, Katihar, after wrongly amalgamating it with M.S. Plot No. 367 Kha under M.S. Khata No. 257, although defendant No. 1 had no concern with the suit land. It is further claimed that plaintiff had perfected his title upon the suit land by bona fide purchase and also by adverse possession, but due to wrong entry in the municipal survey khata, a cloud has been cast over the title and possession of the plaintiff and hence the aforesaid suit was being filed.

4. Although notices were sent and were duly served upon the defendants under the provision of Order V of the Code of Civil Procedure, but when none of them appeared, procedure of substituted service was taken and summons were put in the District Gazette of Katihar dated 16.08.1989, but even then none of the defendants appeared and the suit proceeded ex parte.

5. After considering the pleadings of the plaintiff and the specific points raised by him with respect to his grievance and reliefs sought for, the learned trial court formulated the following issues to be decided in the suit:

(i) Whether plaintiff has got subsisting right, title and interest upon the suit land?

(ii) Whether plaintiff is entitled to get decree regarding confirmation of his possession upon the suit land ?

(iii) Whether the municipal survey khatian in respect of the suit land is wrong or not?

6. The learned Additional Munsif, II, Katihar, after hearing the arguments of the plaintiff and after considering the evidence adduced in the case, both oral and documentary, dismissed Title Suit No. 103 of 1987 ex parte vide his judgment and decree dated 24.9.1990 after arriving at the following findings:

(a) Suit is filed well within the period of limitation.

(b) It is established from ex parte evidence that plaintiff is in possession of the suit land since after his purchase in the year 1960.

(c) Sarva Sadharan was necessary party in the suit but it has not been impleaded although it was required as per khatian, so suit is barred under Order 1 Rule 8 of the Code of Civil Procedure.

(d) From Municipal Khatian (Ext.5) it is clear that suit land was recorded in the name of Anathalaya Ashram, Anabad Sarv Sadharan.

(e) Plaintiff has been able to prove his continuous possession over the suit land from the date of his purchase, i.e. 12.7.1960.

(f) Hence due to non-joinder of necessary party, plaintiff is not entitled to any relief.

7. Against the aforesaid judgment and decree of the trial court, the plaintiff filed Title Appeal No. 28 of 1990 (12/1996) in which notices were issued to the defendants-respondents, but even after repeated notices, duly served upon them, they did not appear to contest the appeal and hence the title appeal was also heard ex parte. After considering the pleadings of the plaintiff as well as his evidence and the points raised against the judgment and decree of the trial court in the title appeal, the learned court of appeal below formulated the following point for deciding the title appeal:

Whether the impugned judgment and decree are sustainable or not?

8. The learned Additional District Judge, II, Katihar, after hearing the plaintiff-appellant and after considering the evidence adduced by him and also after considering the judgment and decree of the trial court, dismissed Title Appeal No. 28 of 1990 vide his judgment and decree dated 24.01.1997 after arriving at the following findings:

(a) State of Bihar or Sarva Sadharan being essential party was not the point for determination before the trial court and therefore on this score suit should not have been dismissed.

(b) Plaintiff claimed that he purchased suit land in 1960 from Narbada Prasad Sinha by unregistered written sale deed but it was never produced.

(c) Plaintiff claimed that he got his name mutated in 1976, but order of mutation has not been produced.

(d) Only oral evidence was produced for proving purchase. P.Ws. 1, 2, 6 and 7 are formal witnesses- P.Ws. 3, 4 and 5 are on the point of purchase and possession out of whom plaintiff was P.W.4.

(e) Plaintiff has also not produced any Trust deed in favour of the Anathalaya to ascertain which land was given to it.

(f) From P.Ws. 3, 4, and 5 and Ext.5 (Khatian) Column 7 it is shown that plaintiff

was in some sort of possession over some land which is either 367 Kha or 367 Ka of Khata No. 257.

(g) 367 Kha is described to be pucca building of Anathalaya over which plaintiff does not lay any claim.

(h) Survey Khatian was finally published in 1985 and only two years thereafter title suit was filed.

(i) Plaintiff miserably failed to prove his possession over the suit land to be open claiming title hostile to Anathalaya.

(j) There is nothing to show plaintiff's possession over any part of suit land, hence he also failed to prove his adverse possession.

9. Against the aforesaid judgments and decree of both the learned courts below, the plaintiff filed the instant second appeal which was heard under Order XLI Rule 11 of the CPC on 10.02.1998 and notices were directed to be issued to the respondents after formulating substantial question of law and hence the second appeal was deemed to be admitted for final hearing. The said substantial question of law was clarified by order dated 05.03.2009 which are as follows:

(i) Whether the trial court having dismissed the title suit only on the ground of non-joinder of necessary parties, hence, when the lower appellate court reversed the said finding, there was any occasion for rejecting the plaintiff's suit or claim?

(ii) Whether trial court having arrived at the finding that the plaintiff had title over the suit land strengthened by adverse possession which was never challenged by the defendants, the learned court of appeal below was justified in reversing that finding?

10. Furthermore, at the time of hearing on 05.03.2009, learned Counsel for the appellant raised another question claiming it to be substantial question of law, considering which this Court held that the said substantial question of law be also considered, which is as follows:

(iii) Whether the finding of trial court regarding continuous possession of the plaintiff over the suit land having become final as the same has not been reversed by the lower appellate court, the plaintiff's suit should have been decreed?

11. In the instant second appeal several notices were issued to the defendants-respondents vide orders dated 10.02.1998 and 13.07.1999, but in spite of that no one appeared for the defendants-respondents and hence the case was listed for hearing ex parte.

12. It may be pointed out in this regard that respondent No. 3 died during the pendency of this second appeal in the year 1997 and I.A. No. 9517 of 1999 was filed by the appellant for expunging his name as the Anathalaya Ashram was duly represented through respondents No. 1 and 2 who are its manager. Hence, vide

order dated 06.09.1999, the name of deceased respondent No. 3 was expunged subject to any objection raised in future by any one, but since then no objection has been raised by any one and, thus, this case was listed for final hearing.

13. So far substantial questions of law No. (i) and (ii) are concerned they are inter connected and hence they are taken up together. The claim of the plaintiff was based upon an unregistered sale deed dated 12.07.1960 said to have been executed by the alleged owner Narbada Prasad Sinha, but the said sale deed was never produced by the plaintiff either in the trial court or in the lower appellate court. Furthermore, the oral evidence with regard to title and possession was confined to only three witnesses, namely P.Ws, 3, 4 and 5, out of whom the plaintiff himself was P.W.4, whereas P.Ws.3 and 5 did not give any specific evidence regarding the purchase and admitted that they had not seen the sale deed, nor did they know when and from whom the plaintiff had purchased the suit land, hence in the absence of any valid, legal and proper evidence, the learned courts below were justified in coming to the conclusion that the plaintiff miserably failed to prove his title over the suit land.

14. Since the finding of the lower appellate court reversing the finding of the learned trial court with regard to non-joinder of necessary parties has not been challenged in the instant second appeal, the said finding of the lower appellate court stands affirmed, but the said finding of the lower appellate court does not mean that the claim of the plaintiff had to be accepted on other issues also. Hence, the learned court of appeal below was quite justified in considering the other issues of title and possession which were the main issues for deciding the matter. Furthermore, since the finding of possession given by the trial court was not based on any valid and reliable evidence, the learned court of appeal below was quite justified in considering the said issue in the light of the specific evidence on record, both oral and documentary. Moreover, the learned court of appeal below had full power to pass any decree and make any order which ought to have been passed or pass such further decree as the case may require and this power had to be exercised by that court notwithstanding that the appeal was as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection in that regard. Reference in this regard may be made to Rule 33 of Order XLI of the Code of Civil Procedure. Hence, the learned court of appeal below was quite within its jurisdiction while passing its impugned judgment and decree.

15. So far substantial question of law No. (iii) is concerned, although the learned trial court had found that plaintiff had established his possession by his evidence that he was in possession since 1960, but the learned court of appeal below discarded the said finding clearly because in the event of failing to prove his purchase in the year 1960, the onus was squarely upon the plaintiff to prove that he was in possession since 1960. From the evidence on record, it is quite apparent that the plaintiff produced as many as seven witnesses, out of whom

P.W.s 1, 2, 6 and 7 were formal witnesses, whereas P.Ws. 3, 4 and 5 gave statements with regard to possession, out of whom, the plaintiff was P.W.4 himself. So far P.W.3 is concerned, he could not state any date on which the plaintiff came in possession over the suit land and only stated in his deposition dated 16.06.1990 that the plaintiff was in possession since more than 20-25 years on the basis of his purchase, but he admitted that he did not know anything about the Kebala of the plaintiff. Furthermore, P.W.5 also did not state the date and month on which the plaintiff came in possession of the suit land and merely stated the year 1960 admitting that he had no knowledge about the details of Kebala of 1960. None of the said witnesses gave any detail of possession and thus the said witnesses could not validly or satisfactorily prove the possession of the plaintiff specially in the absence of any documentary evidence to show plaintiff's possession since 1960. The only document which shows his possession was the municipal survey khatian of 1985, Ext.-5.

16. Exts.-1 and 1/A are municipal receipts of 1981 and 1990. Ext.-2 is the trace map without the seal of any authority. Ext.-3 is Jamabandi No. 339 which is not in the name of the plaintiff and some corrections appear to have been made vide orders much subsequent to 1976. Ext.-4 is the rent cess also of much subsequent period, whereas Ex.-5 is the Municipal Survey Khatiyani of 1985 with regard to suit land specifically in the name of Anathalaya Ashram Anabad Sarbsadharan, Katihar and the learned court of appeal below had found that in Column 7 thereof plaintiff has been shown in some sort of possession. In the said circumstances, it is quite clear that in absence of any document of title and also in absence of any material whatsoever to support the plaintiff's claim of his continuous, open and unobstructed possession over the suit land as a title holder since 1960 or even for more than 12 years, the learned court of appeal below was justified in coming to the conclusion that the plaintiff had failed to prove his possession as exclusive owner of the suit land or any part thereof. Furthermore the finding of plaintiff's continuous possession by the trial court has been clearly reversed by the learned court of appeal below in paragraphs 12 and 13 of its judgment after considering the entire pleadings and evidence of the plaintiff and after arriving at the correct conclusion.

17. In the aforesaid facts and circumstances, it is hereby found that the aforesaid questions raised by the plaintiff-appellant were not validly substantiated by his pleading and evidence although onus was squarely upon him to prove his claim by legal and valid evidence. Furthermore, this Court does not find any illegality in the impugned judgments and decree of the learned court of appeal below, nor does it find any reason to interfere with the aforesaid judgments and decree which are found to be legal, valid and proper. Accordingly, this second appeal is dismissed, but in the facts and circumstances of this case, there will be no order as to cost.