

(2012) 08 PAT CK 0061

In the Patna High Court

Case No : Second Appeal No. 332 of 2000

Zainul Abdin @ Zainul Abedin and Others

APPELLANT

Vs

Sheo Kumar Mukherjee and Others

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 3, Order 9 Rule 8, 11

Citation : (2012) 08 PAT CK 0061

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Advocate : J.S. Arora in Both, Mr. Firoz Ahmad in Both, for the Appellant; Abbas Haidar, Advocate In Both, Mr. Sushanta Kr. Das, Advocate In Both, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Mungeshwar Sahoo, J.—The Second Appeal No. 332 of 2000 has been filed by the defendants appellants appellants against the judgment and decree dated 30.5.2000 passed by Sri Arun Kumar Verma, 2nd Additional District Judge, Purnea in Title Appeal No. 103 of 1998/ 3 of 2000 dismissing the appeal and confirming the judgment and decree dated 11.8.1998 passed by Sri Mahendra Jha, Sub Judge-2nd, Kishanganj in Title Suit No. 12 of 1991/ 42 of 1998 decreeing the plaintiffs respondents" suit. Second Appeal No. 333 of 2000 has been filed by the plaintiff appellant appellant against the judgment and decree dated 30.5.2000 passed by Sri Arun Kumar Verma, 2nd Additional District Judge, Purnea in Title Appeal No. 104 of 1998/ 2 of 2000 dismissing the appeal and confirming the judgment and decree dated 11.8.1998 passed by Mahendra Jha, Sub Judge-II, Kishanganj in Title Suit No. 4 of 1992/ 40 of 1998.

2. It may be mentioned here that case of Zainul Abedin and others who are defendants in Title Suit No. 12 of 1991/ 42 of 1998 is the same in the plaint of

Zainul Abedin who was plaintiff in Title Suit No. 4 of 1992/ 40 of 1998. Likewise, the case of the respondents as plaintiff in Title Suit No. 12 of 1991/ 42 of 1998 is the same in Title Suit No. 4 of 1992/ 40 of 1998 as defendants. Therefore, in one case the plaint is equal to written statement in other case. Further, the result of one case is dependent upon the result of the other case, therefore, as agreed by the parties both the second appeals are heard together and are disposed of by this common judgment.

3. Second Appeal 332 of 2000 was admitted on 10.7.2008 and the following substantial questions of law were framed :

(1) Whether the learned courts below erred in holding that Most. Mehtarain having lost Title Suit No. 123 of 1968, the defendants who claimed through her cannot contend that the suit land belonged to Most. Mehtarain although the suit was dismissed under Order 9 Rule 3 of the CPC vide order dated 16.1.1974 (Ext. B) ?

(2) Whether the lower appellate court erred in dismissing the suit without considering any of the defendants' witnesses in view of the rejection of the evidence of D.Ws. 1, 2, 3, 4 and 5 on the ground that the evidence has been challenged by the plaintiffs and also in non-consideration of the evidence of D.W. 8, when it was all the more necessary to scrutinize the evidence of D.Ws. 1 to 5 and failure to do so has resulted in failure of justice ?

(3) Whether the findings recorded by the learned courts below are contradictory because on the one hand they found that Most. Mehtarain had no right, title and interest and on the other hand they held that her sons had right to convey good title to the plaintiffs ?

4. The Second Appeal No. 333 of 2000 was admitted on 4.4.2007 and the following substantial questions of law were formulated:

(i) Whether the learned courts below were justified in affirming the sale deeds executed by Md. Hanif and Safirul Haque in favour of defendant first party during the life time of their mother Mostt. Mehtarain when there was no material at all to support that the said vendors had any right or title in the said properties during the life time of their mother ?

(ii) Whether the learned courts below were legally justified in assuming that there was no chit of paper to show that there was no chit of paper to show that the suit lands of C.S. Khata No. 62 belonged to Doman Ali father of Most. Mehtarain although there were a number of documents including Ext. F series, the certified copies of Khatiyan etc. to prove the right and title of Most. Mehtarain which were completely ignored by the learned courts below ?

(iii) Whether the earlier Title Suit No. 123 of 1968 filed by Most. Mehtarain having been dismissed for default in the absence of both the parties can be legally held to be a ground for non-consideration of the claim of the plaintiff who is the grand-son of Mostt. Mehtarain ?

5. It appears that the substantial questions of law formulated also are interlinked. During course of hearing of both the second appeals a common substantial question of law was formulated on being satisfied on 29.6.2012, which is as follows:

Whether the judgments of both the courts below are vitiated on account of the fact that both the courts below passed the judgments and decrees without considering the documentary evidences of both the parties such as Ext. L, Ext. 20 in their right perspective and on account of fact that instead of investigating right of the vendors of respondents in both the second appeals, the case of appellant in both the second appeals were investigated particularly, when the respondents are not claiming their right through Mostt. Mehtarain and once it is held that Mostt. Mehtarain was the real owner, whether the purchasers respondents have got any locus standi to challenge the inheritance by appellant from Mehtarain either by Amalnama or by any other means ?

6. Now let us consider the case relating to Second Appeal No. 332 of 2000 arising out of Title Suit No. 12 of 1991/ 42 of 1998. This Title Suit No. 12 of 1991/ 42 of 1998 was filed by the plaintiffs respondents for declaration of title and confirmation of possession and permanent injunction with respect to the suit property and also for declaration that the decree passed in Title Suit No. 56 of 1983 is illegal, null and void and without jurisdiction and it is not binding on the plaintiffs and it does not affect the title and possession of the plaintiffs over the suit property. It may be mentioned here that the suit property in both the title suit are same.

7. The plaintiffs respondents claimed the aforesaid relief alleging that the plaintiffs are the exclusive owner of 16 anas of the suit property by virtue of purchase through registered sale deed dated 18.3.1963, 4.9.1960 executed by Safirul Haque and Mohd. Hanif, both brothers having 8 anas share each. After purchase they came in possession and their names have been mutated in the municipal survey. The defendants appellants who are heirs of Safirul Haque have no right, title and possession. The defendants in collusion with late Safirul Haque filed false Title Suit No. 56 of 1983 against late Safirul Haque and the plaintiff and having a league with the peon and officials of the Court, managed to get a false report of service, illegally filed a petition of compromise and got a decree behind the back of the plaintiffs in the aforesaid Title Suit No. 56 of 1983. The plaintiffs have no knowledge about aforesaid Title Suit No. 56 of 1983. During his life time Mohd. Hanif and his brother Safirul Haque with bad intention got a collusive Title Suit No. 123 of 1968 filed by their mother Most. Mehtarain which was dismissed on 16.1.1974. Misc. Case No. 9 of 1977 was also dismissed on 14.9.1981 and thereafter Bibi Mehtarain preferred M.A. No. 286 of 1981 before the High Court, Patna which was also dismissed on 6.1.1983.

8. The defendants appellants' case is that the suit property belonged to Most. Mahtarain and her name was recorded in the cadastral survey record of right. C.S. khata No. 65 and 86 was obtained by her by virtue of Kabuliyat. C.S. khata

No. 62 by virtue of inheritance and oral gift from her sister and C.S. khata No. 56 by oral settlement. During her life time her two sons Mohd. Hanif and Safirul had no right to transfer the suit property and, therefore, the plaintiffs who are purchasers have got no right, title or possession over the suit property. In fact Most. Mahtarain inducted Zainul Abedin her grand-son i.e. son of Late Safirul Haque as under Raiyat through Amalnama on a rental of Rs. 76 and cess of Rs. 9/- and Zainul Abedin came in possession of the suit property. After death of Most. Mehtarain a dispute arose for realization of rent from Zainul Abedin. Therefore, he filed Title Suit No. 56 of 1983 against the plaintiff and heirs of Most. Mehtarain and in spite of notice the plaintiffs did not appear. Thereafter compromise petition was filed and then on the basis of the said compromise the suit was decreed. The plaintiffs did not raise any objection against the said title suit.

9. The trial court decreed the plaintiffs' suit holding that Most. Mehtarain was not the owner of the suit property. The appeal filed by the appellants was dismissed.

10. The Title Suit No. 4 of 1992/ 40 of 1998 was filed by Zainul Abedin pleading the same case as pleaded in the written statement of Title Suit No. 12 of 1991/ 42 of 1998. The defence of respondents is the same as pleaded by them in the plaint of Title Suit No. 12 of 1991/ 42 of 1998.

11. The learned counsel Mr. J.S. Arora submitted that so for title suit filed by the respondents i.e. Title Suit No. 12 of 1991/ 42 of 1998 is concerned, it is for the plaintiff to establish their title on the suit property on the basis of the sale deeds. Both the courts below instead of investigating the title of the vendors of the plaintiffs investigated the title of Zainul Abedin and held that since defendant failed to prove that Most. Mahtarain was the owner the plaintiffs' title is automatically proved. This is wrong approach. According to the learned counsel in the C.S. khatiyan the name of Most. Mahtarain is recorded with respect to C.S. khatiyan out of which the municipal survey plot have been carved out. If she was not the owner of the properties how her sons could have sold the properties conveying good title on the plaintiffs. Therefore, the findings of both the courts below that Most. Mehtarain was not the owner is contrary to the finding that her sons conveyed good title to the plaintiffs. None of the courts below have recorded findings that how Mohd. Hanif and Safirul got the suit property or how they were owner of the same. The learned counsel further submitted that the plaintiffs are not claiming their title through Most. Mehtarain therefore, both the courts below should have investigated the title of their vendors as to whether Mohd. Hanif and Safirul Haque were the real owner or not but the approach of both the courts below to the effect that Most. Mahtarain was not the owner which is the case of Zainul Abedin, the title of plaintiffs is proved is entirely untenable.

12. The learned counsel further submitted that both the courts below recorded the finding that Most. Mehtarain was not the owner on the ground that she had filed Title Suit No. 123 of 1968 which was dismissed for default therefore, implied res judicata will apply. According to the learned counsel since the suit was

dismissed for default no issue was decided on merit therefore, there is no question of application of Section 11 C.P.C. arises. On this score also the judgments of both the courts below are vitiated. The learned counsel next submitted that even if the defendant appellant Zainul Abedin failed to prove his case then also on that ground the plaintiffs' suit could not have been decreed without recording a finding as to how their vendors acquired title on the suit property.

13. The learned counsel next submitted that whether there was valid service or no service in Title Suit No. 56 of 1983 cannot be the subject matter of the present suit and moreover if there was no service at all the plaintiffs could have filed application under Order 9 Rule 13 C.P.C. but certainly this present suit was not maintainable being barred by law of limitation as the suit was decreed on 11.1.1985 on the basis of compromise whereas the present suit has been filed in the year 1991. Moreover, none of the courts below have recorded a finding that no notice was served on the plaintiffs in that suit. Ext.L/1 is the C.S. khatiyan filed by the defendant appellant to show that the suit properties which have been carved out from the C.S. khatiyan 56, 62, 65 and 86 was recorded in the name of Mostt. Mehtarain but both the courts below did not consider this document which was vital. Likewise, the courts below have not considered even the plaintiffs' document Ext.20 which is judgment of Munsif-2nd, Kishanganj in Title Suit No. 50 of 1995 in its right prospective. According to the learned counsel in the said suit filed by the present plaintiffs they have admitted that suit khata No. 62 belonged to Mostt. Mehtarain. Likewise, the decree has been filed as Ext.21 by the plaintiffs themselves which has also not been considered.

14. On the other hand, the learned counsel appearing on behalf of the respondents submitted that title suit filed by Mostt. Mahtarain i.e. Title Suit No. 123 of 1968 was dismissed under Order 9 Rule 8 and, therefore, the suit is barred. In such circumstances, the courts below have rightly debarred the appellants from raising the same question which was raised by Mostt. Mehtarain in the aforesaid title suit. The learned counsel further submitted that the other Exts. 6, 12, 13 clearly proves that the plaintiffs are the owner of the property. So far C.S. khatiyan is concerned the learned counsel submitted that in the recent municipal survey the names of the appellants have been mutated. The courts below have considered that Zainul Abedin failed to prove that the suit property belonged to Mostt. Mahtarain therefore, they accepted the case of the plaintiffs. The learned counsel further submitted that Ext.12 is judgment wherein Zainul Abedin admitted that property belong to his father. Both the courts below have considered Ext.12 also. When no notice was served in Title Suit No. 56 of 1983 it will not be binding on the plaintiffs. On these grounds, the learned counsel submitted that this second appeal is liable to be dismissed.

15. As stated above the case of the appellants is same and similar in other title suit giving rise to Second Appeal No. 333 of 2000. The same arguments have been advanced and, therefore, it is not repeated here.

16. From perusal of the judgments of both the courts below it appears that both the courts below instead of investigating the title of the respondents who are claiming title on the basis of purchase from Mohd. Hanif and Safirul both the courts below decided the question as to whether the properties belong to Most. Mehtarain. In such view of the matter, even if it is held that Most. Mehtarain was not the owner then also in such circumstances whether automatically the plaintiffs' suit for declaration of title can be decreed without investigating the question as to how sons of Most. Mehtarain became the owner of the property. While considering the case of Zainul Abedin both the courts below held that the Title Suit No. 123 of 1968 was dismissed and Misc. Appeal filed by Most. Mahtarain was also dismissed therefore, it will operate as *res judicata*. It is settled principles of law that when the suit is dismissed for default it will never operate as *res judicata* because none of the issues raised by the parties was decided in the suit and moreover the purchaser plaintiffs are not claiming their title through Most. Mahtarain. The learned counsel for the respondents submitted that the suit was dismissed under Order 9 Rule 8 C.P.C. So far this submission is concerned, from perusal of Ext.6 *prima facie* it appears that the suit was dismissed under Order 9 Rule 3 of the CPC as when the case was called out for hearing none of the parties appeared. In such circumstances, only on the basis of the fact that it has been recorded in the order passed in Misc. Appeal that the suit was dismissed under Order 9 Rule 8 C.P.C. which appears to be a mistake only it cannot be said that it was dismissed under Order 9 Rule 8 C.P.C. The original order has been produced as Ext.6. Both the courts below have not considered this aspect of the matter.

17. The other aspect of the matter is that there is no case made out by the purchasers as to how both the brothers acquired title on the suit property. They simply claimed that they have purchased the suit property from both the brothers therefore, they are the real owner of the property. In such circumstances, unless it is found that Mohd. Hanif and Mohd. Sariful were the real owner no finding could have been recorded that they conveyed title to the purchases. It appears that both the courts below held that Most. Mehtarain was never owner of the suit land by virtue of *Kabuliyat*, inheritance and oral gift and oral settlement by the ex-landlord as such transfer made by her in favour of the defendant No. 1 (Zainul Abedin) by executing *Amalnama* is forged fabricated and sham transaction thus, it is *suo motu* proved that vendors of the plaintiffs were really the owners of the suit lands. This approach of both the courts below appears to be wrong approach. Even if the defendants' case is disbelieved then also automatically the vendors or the purchasers will not acquired title of the suit property.

18. From perusal of the judgment of both the courts below it appears that Ext.L/1 which is C.S. Khatiyani standing in the name of Most. Mahtarain has not been considered. Ext.20 is the judgment in which the plaintiffs filed the suit admitting that in one Khatiyani which was recorded in the name of Most. Mahtarain in C.S. belong to Most. Mahtarain. There is nothing in the judgments

of both the courts below about this admission. If out of 4 khatiyans ownership is admitted by the plaintiffs with respect to one khata how she was not the owner of other khatas. There is no explanation nor consideration by both the courts below.

19. From perusal of the judgments of both the courts below it appears that it has only been mentioned that no summons were served in Title Suit No. 56 of 1983 without considering any evidence on this point. The courts below have also not considered as to whether this suit was at all maintainable for declaration that no summons were served on them in Title Suit No. 56 of 1983. Further admittedly, Most. Mehtarain died in the year 1983 and the sale deeds have been executed by her sons in favour of the plaintiffs during her life time.

20. In view of my above discussion, it appears that both the courts below have not considered the acquisition of title by Most. Mehtarain on one of the grounds that Title Suit No. 123 of 1968 was dismissed which will operate as res judicata as wrong approach. Both the courts below have held that when Most. Mehtarain was not the owner therefore, the case of the plaintiffs who are purchasers from two sons of Most. Mehtarain is suo motu proved is also wrong approach. While recording the finding that Most. Mehtarain is not the owner both the courts below have not considered Ext.L, L/1 and 20 in their right prospective and legal effect thereof. Further it appears that none of the courts below have considered the other oral as well as documentary evidence produced by the appellants. Thus, it appears that both the courts below approached the case entirely in wrong angle. Further it appears that the finding of the courts below that Most. Mehtarain was not the owner of the suit land but on the other hand both the courts below held that her sons have right to convey good title appears to be contrary. When Most. Mehtarain was not the owner how her sons became the owner has not been investigated at all. In the sale deeds of the plaintiffs there is nothing mentioned about how they became the owner and they sold the property.

21. So far the Second Appeal No. 333 of 2000 is concerned even if it is held that Zainul Abedin is failed to prove his title then also automatically the property will not go to the purchaser from Hanif and Safirul because Most. Mehtarain was alive till 1983. Even if it is held that Most. Mehtarain was not the owner then also the title of the vendors of the purchasers i.e. title of the Hanif and Safirul should have been enquired into by the courts below but none of the courts below enquired the same. It has been recorded that because the plaintiff Zainul Abedin failed to prove that Most. Mehtarain was the owner automatically the defendants' case stand proved. As stated above this is wrong approach. Since both the cases are interrelated and issues are same and parties are same and the properties are also same no further separate discussion with regard to Second Appeal No. 333 of 2000 is necessary. It may be mentioned here that even property is held to be the property by Most. Mehtarain then automatically her sons will have no right to transfer the property during her life time. If it is held that she is not the owner then also it is necessary to investigate the title of

Mohd. Hanif and Safirul because automatically it will not be held that they are the real owner, which both the courts below failed to consider. As stated above the oral evidences and the documentary evidence mentioned above have not been considered. Therefore, above discussion covers all the substantial questions of law formulated in these second appeals which are answered in favour of the appellants. Therefore, both the second appeals are allowed. The judgments and decrees of lower appellate court of both the second appeals are set aside and both the cases are remanded to the lower appellate court for deciding afresh considering the materials available on record according to law. No orders as to costs.