

(2016) 07 JH CK 0032

JHARKHAND HIGH COURT

Case No: S.A. No. 210 of 2007 [Against the judgment dated 31st July, 2007 and decree dated 16th August, 2007 passed by District Judge, Saraikella-Kharsawan in Title Appeal No. 2 of 2005]

Smt. Punam Sinha

APPELLANT

Vs

Smt. Urmila Sinha

RESPONDENT

Date of Decision: July 22, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 6A

Citation: (2017) 173 AIC 347 : (2016) 4 AIRJharR 345 : (2016) 3 JBCJ 496 : (2017) 1 JCR 579 : (2016) 4 JLJR 325

Hon'ble Judges: Mr. D.N. Upadhyay, J.

Bench: Single Bench

Advocate: M/s. L.K. Lal and A.K. Sahani, Advocates, for the Appellants; Mr. Rajiv Ranjan, Senior Advocate, for the Respondents

Final Decision: Dismissed

Judgement

Mr. D.N. Upadhyay, J.—This appeal has been preferred by the plaintiffs/appellants against the judgment dated 31st July, 2007 and decree dated 16th August, 2007 passed and signed by learned District Judge, Saraikella-Kharsawan in connection with Title Appeal No.02 of 2005, whereby judgment dated 21st July, 2005 and decree dated 1st August, 2005 passed and signed by learned Sub Judge, Saraikella in connection with Title Suit No.08 of 1999, have been affirmed and the appeal preferred by the appellants stood dismissed.

2. For convenience, the appellants shall be referred as plaintiffs and the respondents shall be referred as defendants.

3. This second appeal was admitted on 9th February, 2009 to decide the following substantial questions of law:-

(a) Whether both the courts have committed grave error of law in decreeing the counter claim without complying the mandatory requirements of law?

(b) Whether a decree for recovery of possession passed in a counter claim against the suit for mere injunction is justified?

4. The fact, in brief, is that one Surendra Prasad Sinha filed Title Suit No.8 of 1999 against the defendants for decree of injunction, restraining them from interfering with occupation of the plaintiff against the suit property, cost of the suit and for any other relief or reliefs to which the plaintiff is found to be entitled.

During pendency of the suit, Surendra Prasad Sinha died. Thereafter, the present appellants/plaintiffs were substituted as his legal representatives to pursue the suit.

5. According to the averments made in the plaint, the plaintiffs and defendants are members of Joint Hindu Family and they are permanent residents of Sasaram District, where they are having their joint ancestral properties. It is disclosed that a suit for partition at Sasaram has also been pending between the parties for the last 25 years. The suit property, which is subject matter of Title Suit No. 8 of 1999, was acquired from the joint family fund, but Defendant No.2 by playing tricks managed to get the property allotted in the name of Defendant No.1 from the Housing Board. It is averred that the plaintiffs since the time of their father have been in occupation and in peaceful uninterrupted possession of the suit property. They have been regularly paying instalment to the Housing Board against the said property. It is further stated that the Defendant No.2, who is husband of Defendant No. 1, is an engineer and has settled in U.S.A. Since the defendants have started giving threats to the plaintiff to evict from the suit premises, the plaintiff filed said title suit for injunction, restraining the defendants from interfering with the peaceful occupation and possession of the plaintiff. It is further stated that the suit property was not included in the partition suit filed at Sasaram.

6. On the other hand, the defendants filed their written statement with counter claim through their lawful attorney. The specific plea of the defendants is that the suit property was not purchased from the fund of Joint Hindu Family. Since long the parties have been living separately having their independent income and there was no jointness between the parties. It is true that the parties are residents of Sasaram where they are having their ancestral properties in which other co-sharers are also there. It is further asserted that the suit for partition filed at Sasaram with respect to ancestral properties has been disposed of and Defendant No.1 was never a party to that suit. It is contended that the suit property has been acquired independently by Defendant No.1 and it is her self acquired property. It is incorrect to say that the defendants never paid instalments to the Housing Board against suit property. No document is lying in their name. As a matter of fact, the defendants came in possession over the suit property in the month of May, 1969 as a tenant under Bihar State Housing Board, but subsequently the Housing Board decided to settle/allot

the premises on ownership basis to respective occupants/tenants on payment of consideration amount fixed for the property concerned. On the principle decided by the Housing Board, the defendants made a request to the Board and agreed to pay the required consideration amount against suit property and, accordingly, the Board agreed to settle the suit property in the name of Defendant No.1 on the consideration amount of Rs.57,400/-. It was also decided that the amount which the occupier had already paid by way of rent will be adjusted in the consideration amount and, thus, the defendants were to pay a sum of Rs. 31,162/- and to that effect Letter no.4524 dated 12th June, 1981 was issued and subsequently on 22nd June, 1981 Hire Purchase Agreement, bearing No.2632, was executed by the Housing Board in favour of Defendant No.1 with respect to said suit property i.e. Qr. No.M/27, Adityapur, Old Housing Colony, P.O. & P.S. Adityapur, District Singhbhum West. It is further contended that the original plaintiff being close relative of the defendants was permitted to occupy the suit premises as a licensee-cum-care taker under Defendant No.1. The plaintiff has got no right, title, interest and possession over the suit property and the suit brought by him is neither maintainable nor the plaintiff is entitled for the relief sought for.

7. When the dispute arose between the parties and criminal cases were instituted, the original plaintiff was directed to vacate the suit premises, but to grab the property he had filed title suit with false averments seeking injunction. The defendants not only filed written statement against the suit brought by the plaintiff but they have also placed their counter claim in the same suit. The plaintiff also filed counter written statement against counter claim made by the defendants. In the counter written statement, the plaintiff has subsequently asserted that counter claim is neither maintainable in eye of law nor it is duly verified. The counter claim filed by the defendants through their lawful attorney, namely, Baleshwar Prasad Sinha is not legal and acceptable. It is contended that the defendants have acquired citizenship of USA and for more than 12 years they have been continuously residing over there and, therefore, they are not having possession over the suit property. The major portion of the consideration amount through instalments was paid by Late Surendra Prasad Sinha and said Surendra Prasad Sinha was in possession of the suit property and he was residing therein with his family, including the plaintiffs. The Defendant No. 1 never possessed nor came in possession continuously for 12 years prior to filing of the suit and, therefore, the plaintiff has also acquired title by way of long possession i.e. more than 12 years openly and adversely against Defendant No.1.

The market value of the suit property is not less than Rs.5.00 lacs and since it is a suit for injunction brought by the plaintiff, the relief sought for by the defendants for recovery of possession cannot be claimed.

8. On the basis of pleadings of the parties, following issues were framed:-

(i) Is the suit maintainable?

(ii) Is there any cause of action for this suit against the defendants?

(iii) Is the suit property is joint family property of the parties or self acquired property of the defendants?

(iv) Are the plaintiffs entitled for permanent injunction?

(v) Are the defendants entitled to recovery of possession of the suit premises?

(vi) To what relief the parties are entitled?

In support of their claim and contentions, the plaintiffs have examined three witnesses, whereas the defendants have examined seven witnesses and proved documents as per exhibit list.

9. The appellants/plaintiffs in support of their contentions have relied upon the following judgments:-

(i) (2012) 5 SCC 370

(ii) AIR 2006 Karnataka 231

(iii) AIR 1981 SC 2235

(iv) (2006) 5 SCC 545

The respondents/defendants in support of their case have placed following judgments:-

(i) AIR 1950 Allahabad 201

(ii) AIR 1971 Madras 215

(iii) AIR 1996 (2) SC 2222

(iv) AIR 2005 SC 439

(v) AIR 2004 SC 1478

(vi) AIR 1997 SC 53

10. Before giving final verdict on substantial questions of law framed by this Court, I feel it desirable to refer Order 8, Rule 6A of the Code of Civil Procedure, which has been inserted by Act 104 of 1976. Order 8, Rule 6A reads as under:-

"6A. Counter-claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

11. Now coming to the facts, evidences and findings of the courts below, I find that the Trial Court has framed Issue No. 3 i.e. "Is the suit property is joint property of the parties or self acquired property of the defendants?"

The plaintiffs have given oral evidence that they have been occupying the suit premises for more than 12 years and the property was purchased from the fund of Joint Hindu Family. It was also contended that the plaintiff had paid instalments to the Housing Board against value of the property, but no such documents have been brought on record. It was also contended that the plaintiffs have perfected their title by occupying the premises for more than 12 years. The defendants did not step in the witness box to support their claim and contention made in the pleading. The attorney has not been given power to depose on behalf of the defendants and the deposition made by him is not acceptable in view of the judgment reported in **AIR 2005 SC 439 Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors.** In the suit in which the plaintiff has sought for injunction against defendants, decree has been passed in favour of the defendants giving them right to recovery of possession against the plaintiff. The Courts below have committed grave error by not deciding the points raised by the plaintiffs and the suit has been decided one sided in favour of the defendants.

12. I have gone through the case records from which it appears that the parties are related to each other. Defendant No.2 happens to be uncle-in-law of the present Appellant No.1-Punam Sinha. The defendants have also not denied that they are having their ancestral properties at Sasaram. So far as this suit is concerned, in the written statement it is very specific that the suit property was acquired by the defendants as tenant under Bihar State Housing Board. Later, under the scheme introduced by the Board, the property has been settled in favour of Defendant No.1 on payment of consideration amount fixed for the property concerned.

To support the averments, the defendants have proved the following documents which have been marked as exhibits:-

(i) Ext. X Allotment letter

(ii) Ext. B series Money receipts

(iii) Ext. Y Letter No.4714 dated 19.6.1981

(iv) Ext. C No dues certificate

(v) Ext. C/1 Letter no. 3246 dated 31.10.1994 issued by the Executive Engineer in favour of Defendant No. 1

(vi) Ext. C/2 Letter No. 4524 dated 12.6.1989 issued in favour of Defendant No.1

(vii) Ext. C/3 Letter No. 4714 dated 19.6.1989

(viii) Ext. D Tax receipt dated 8.9.1982

(ix) Ext.D/1 Tax receipt dated 8.8.1982

All these documents go to show that Qr. No. M/27, Adityapur Old Housing Colony, Adityapur was allotted and settled in favour of Defendant No.1. Contrary to that neither the original plaintiff nor the plaintiffs, who have been substituted, have ever placed any document to show that aforesaid Qr. No.M/27 was allotted or settled in their name. In support of the contention of the plaintiffs that aforesaid property was purchased from the fund of Joint Hindu Family, no chit of paper has been proved. The plaintiff has filed the suit only for seeking injunction against defendants and even after filing of the counter claim which is deemed to be a cross suit, as indicated under Order 8, Rule 6A CPC, he has filed counter written statement but did not amend his plaint to any extent.

At one point of time, it is contended that the plaintiffs have perfected their title by enjoying peaceful possession over the same, but this pleading is not substantiated by any evidence. From the facts and evidences available on record, it is clear that the possession of the plaintiffs over the suit property was that of permissive one and it was not hostile to the original landlord. I do not find, either the Trial Court or the First Appellate Court have committed any error in deciding that the suit property is self acquired property of the Defendant No.1 and the plaintiff has not been able to prove either the property was purchased from fund of Joint Hindu Family or the plaintiff had paid any amount to the Housing Board against the said property.

13. Further question which the learned counsel has raised is that the defendants never stepped in the witness box to support the contention made in the written statement or in the counter claim. It was the attorney-Balenshwar Prasad Sinha, who was examined as Witness No.4, had substantiated the pleadings on behalf of the defendants. The evidence given by the attorney is not acceptable but the courts below placing reliance on the same have committed gross error. In this context, the judgment rendered in the case of Janki Vashdeo Bhojwani (Supra) was referred. In reply to that, counsel for the defendants have referred a judgment rendered in the case of **Bhimappa & Ors. v. Allisab & Ors. AIR 2006 Karnataka 231** and submitted that the facts appearing in the case of Janki Vashdeo Bhojwani (Supra) have been

discussed and distinguished. In the said judgment, the fact was different and considering the same it was held that the facts brought on record was required to be brought by the party himself, because it was supposed to be performed by the party concerned from personal knowledge. In such situation, the deposition made by the attorney on behalf of the party concerned was not accepted. The relevant provision of Evidence Act i.e. Section 118 and Order 3, Rule 1 of the Code of Civil Procedure, the Powers-of-Attorney Act, 1882 Section 18A have been discussed in the judgment rendered in the case of Bhimappa (Supra). I do agree with the view taken by his Lordship in the aforesaid judgment of Karnataka High Court. There is no impediment in examining the attorney on behalf of the plaintiff or defendant if valid power of attorney is executed in his favour. Simultaneously, I do agree that executant of the power of attorney shall suffer if the attorney either fails to perform his duty as entrusted to him or if he unable to bring on record the required facts. Here in the case at hand, I find that general power of attorney was executed in favour of Baleshwar Prasad Sinha, Witness No.4, and he was the person to file written statement, counter claim on behalf of the defendants and power of attorney so executed has been proved as Ext.-A.

It appears from the pleadings and evidences of Baleshwar Prasad Sinha that he was fully acquainted with the facts of the present case and he was competent enough to meet out the question put to him during his cross-examination.

Considering aforesaid aspect of the mater, I am of the firm opinion that evidence brought on record by the attorney on behalf of the defendants cannot be discarded. It was contended that the attorney was not authorised to depose on behalf of the defendants, but I find that attorney was well authorised to file suits, affidavits, engage lawyers and all the deeds and things, which were required to be done to protect the interest of the defendants in respect of the suit property. His deposition was on affidavit and for his cross-examination he was called in the dock and he has answered all the questions put to him by the counsel for the plaintiff. I find from the judgments of the courts below that all these points have well been discussed while deciding Issue No.3.

14. The plaintiff had filed a suit for injunction against the defendants in respect of suit property. The averments made in the plaint clearly indicate that he was apprehending his dispossession from the suit property and that was the cause of action for bringing the suit. After having noticed, the defendants put their appearance through their attorney. Since the cause of action so alleged by the plaintiff was attracting the interest of the defendants they brought a counter claim, praying therein eviction of the plaintiff from the suit premises because Defendant No.1 is having her right, title, interest and possession over the suit property. In view of the findings given in the preceding paragraphs and the findings of the courts below, it goes without saying that Defendant No.1 has proved her right, title and interest over the suit property. It was averred that being family members, original

plaintiff and his family members were permitted to occupy the suit premises and they were having permissive possession. When they started causing hindrance and filed suit for injunction against defendants, the defendants were having right to protect their interest instead of filing separate suit, counter claim was filed to avoid multiplicity of litigation and it was well permitted as per Order 8, Rule 6A of the Code of Civil Procedure.

Since counter claim filed by the Defendant No.1 stood substantiated, both the courts below have given findings in her favour, the counter claim has rightly been decreed in the same suit brought by the plaintiff and it is not at all illegal.

15. Learned counsel for the appellants has also raised a point that without filing of court fee counter claim was admitted and the defendants were permitted to adduce evidence. I do not agree to accept such argument because filing of court fee is a matter between the court and the party. I find from the record that direction was given to the defendants to file required court fee and that has been done. Therefore, required court fee was filed and it was not an issue. The leave to file court fee later on is the discretion of the Court. Needless to mention, before preparation of decree, court fee can be accepted.

16. In view of the discussions made above, I have come to the conclusion that the courts below have not committed error in decreeing the counter claim and no mandatory requirement of law has been violated. The plaintiff had brought the suit for injunction, but the cause of action indicated and the claim made in the plaint were attracting the interest of defendants and, therefore, they brought the counter claim seeking decree for recovery of possession. In view of Order 8, Rule 6A of the Code of Civil Procedure, I do not find that any illegality has been committed by courts below. The plaintiff was given opportunity to file counter affidavit against counter claim brought by the defendants and he exercised the opportunity by filing counter written statement. The interest of the parties was involved in the same suit and, therefore, the relief sought for by the defendants by way of counter claim has rightly been allowed.

17. The facts and circumstances which have been considered by their Lordships in the judgments cited by the appellants are quite different. Those facts are not available to the plaintiffs in the case at hand. It is reiterated that the plaintiff had brought the suit only for injunction and he did not adduce either oral or documentary evidence to support his claim and contention either made in the plaint or in the counter written statement. On the other hand, the points taken by the respondents/defendants find support from the ratio decided by their Lordships in the judgments cited by counsel for the respondents.

18. In view of the discussions made above, I do not find any merit in this appeal. The judgment and decree passed by the learned courts below are hereby upheld and the appeal, accordingly, stands dismissed.