

Guneshwar Tatma Vs Sri Manbodh Sharma and Others

Court: Patna High Court

Date of Decision: Dec. 5, 2002

Citation: (2003) 3 CivCC 263 : (2003) 1 PLJR 305 : (2004) 1 RCR(Civil) 182

Hon'ble Judges: P.K. Deb, J

Bench: Single Bench

Advocate: Ashok Kumar Choudhary, for the Appellant; None, for the Respondent

Final Decision: Allowed

Judgement

P.K. Deb, J.

This appeal has been preferred against the judgment and decree dated 1st February, 1989 passed by the 3rd Additional

Sessions Judge, Purnea in Title Appeal No. 42 of 1987 (17/1986) whereby and whereunder the decree granted in favour of the Plaintiff-

Appellants by the 2nd Additional Munsif, Purnea in Title Suit No. 180 of 1983 has been set aside.

2. The facts of the case travel in a narrow compass.

According to the Plaintiff, his vendor Jhauli Tatma had a brother Bishundeo Tatma and the property appertaining to Plot Nos. 1072 Khata No.

168 had been purchased by three persons conjointly on 5.3.1959 and in that sale deed it was specifically mentioned that in the purchased property

Raghuni Yadav shall have eight annas share while Jhauli Tatma and Bishundeo Tatma hold eight annas share conjointly meaning thereby 4 annas

share each. According to the further case of the Plaintiff there was an amicable partition of all properties of Jhauli and Bishundeo and Bishundeo

was given some other plots in lieu of his share in the suit plot as a result Jhauli became the sole owner in respect of eight anna share in the suit plot

meaning thereby the suit property. Jhauli then sold the whole of the suit land purchased by the previous safe deed dated 5.3.1959 to the Plaintiffs

vide -Exhibit 2/by the registered sale deed dated 31.3.1978 and he came in possession as a whole. In that sale deed Bishundeo had also signed as

an attesting witness to the deed as Plaintiff was not agreeable to purchase when according to the original sale-deed Bishundeo had also a share and

that the arrangement as revealed to him by Jhauli and Bishundeo were only oral. While the Plaintiff was in exclusive possession of the suit property

then on 5.10.1983 Mosomat Bhuthri Devi wife of Bishundeo Tatma, who died in the meantime sold away half of the suit land i.e. four anna share

of Bishundeo in the suit plot to the Defendant and hearing this the Plaintiff became apprehensive that his possession and title may be shrouded and

clouded by such purchase from Bhuthri by the Defendant and, as such, filed the suit being Title Suit No. 180/1983 for the following reliefs:

(i) For declaration of title and confirmation of possession of the Plaintiff over the suit land as a whole.

(ii) Further declaration that the Defendant first party Manbodh Sharma had no right, title to interfere with the possession of the Plaintiff over the suit

land.

(iii) The sale deed executed by Mosomat Bhuthri the other set of Defendant on 5.10.1983 in favour of Defendant first party is collusive and

without consideration and that the Defendant never came in possession of the suit land on the basis of the said deed nor acquired any title over the

property.

(iv) For a permanent injunction restraining the Defendant from interfering with the title and possession of the Plaintiff.

(v) Cost of the suit.

3. The suit was contested by the Defendant first party alone. Their case is that as per the sale deed of 1959 Bishundeo got half share over the

purchased land between the two brothers and all facts regarding amicable partition giving of another plot to Bishundeo in lieu of the suit plot have

been denied. Both parties adduced evidence and the trial court held that the Plaintiff's vendor were in exclusive possession of the suit property and

believing the oral evidence it was held that Bishundeo by arrangement did not get any share in the suit plot and, as such, the suit was decreed as a

whole. On appeal being preferred the first Appellate court held that only because Bishundeo was an attesting witness to the purchase deed Ext-2,

of the Plaintiff it does not take away the right of Bishundeo over the suit plot because as. attesting witness of a sale deed cannot be a party to the

contents of the deed itself rather he only attests the execution of the deed. Similar view was taken in respect of other two sale deeds, namely, Ext.

2/G and Ext.2/H. On analysis of oral evidence and on legal position it was further held by the appellate court that Bishundeo's right over the suit

plot cannot be taken away unless there is a perfect partition or any registered deed showing surrender of the share of Bishundeo by himself

because the right over the immovable property that too, having valued more than Rs. 100/- cannot be taken away by any oral agreement or

surrender but in stead of decreeing the suit in respect of Jhauli's share which has legally been transformed to the Plaintiff, the whole suit has been

dismissed by the appellate court. Hence the present second appeal has been filed.

4. While admitting the second appeal vide order dated 21.1.1991 the following substantial questions of law have been framed by a Bench of this

Court:

(i) Whether the finding of the appellate court to the effect that the Plaintiff is not entitled any relief without any dis-cussion of the evidence on the

point of possession and legal consequences following therefrom is sustainable?

(ii) Mt. Bhutri being an illiterate lady the onus of proving that she had consciously executed the sale deed lies on the vendee in this context whether

the finding of the lower appellate court in respect of this sale deed is sustainable and whether the Plaintiff has been im-properly denied relief in this

regard?

(iii) Any other points of law be raised at the time of hearing.

5. On admission of the appeal notices were sent to the Respondents but even after proper service of notice none appeared to contest the appeal

and, as such, the appeal is heard exparte. Mr. Ashok Kumar Choudhary the learned Counsel appearing on behalf of the Appellant has strenuously

argued that practically the Defendant-Respondents have given up their case as they could not get any possession over the suit property and in that

context this second appeal should be allowed giving full decree in favour of the Plaintiff. Although regarding the legal implication he had conceded

to some extent the findings of the first appellate court with respect to title of the share-holder in immovable property cannot be legalised unless by

surrender or sale or transfer in any way whatsoever by a registered deed and also to the analogy that an attesting witness of a document can in no

case be a party to the contents of the documents or an admission on his part. In the light of the submissions made by the learned Counsel for the

Appellant and also the position and circumstances let me consider the substantial questions of law framed in the present appeal.

6. The second question of law as ramed above is taken up for discussion first. Admittedly the Plaintiff is not a party to the sale deed between

Defendant first party and Mosmot Bhutri. Non passing of the consideration to Bhutri Devi cannot be a question to be decided when such question

has been raised by a third party i.e. the Plaintiff. Bhutri has never challenged that she has not received any consideration so such question of law

framed that only because Mt. Bhutri was an illiterate lady, there is no scope to hold that she has executed the sale deed without any consideration.

The sale deed of the Defendants have been proved by an attesting witness in evidence of formal witness and by cross-examination nothing could

be found out regarding the invalidity of the execution of the sale deed in favour of the Defendant-Respondents. In that way I do not find any force

on the substantial question of law as framed in this appeal under item No. 2.

7. Regarding the first item of the substantial question of law framed, on the face of it the appellate court's judgment requires modification.

Regarding the title being transferred from Jhauli Tatma regarding his share to the Plaintiff has never been questioned by anybody and that title has

definitely been confirmed regarding the share of Jhauli Tatma to the Plaintiff by a sale deed Ext-2. In that way appellate court could not have

dismissed the suit of the Plaintiff as a whole and ought to have decreed the Plaintiff's suit in respect of four anna share of Jhauli Tatma.

8. Now the question comes in regarding the share of Bishundeo. It is the case of the Plaintiff that his vendor Jhauli Tatma was in exclusive

possession over the whole of the suit property including the share of Bishundeo as Bishundeo was never in possession of the suit land as he was

given share elsewhere. By that way if Jhauli Tatma remained in possession since 1959 exclusively by complete ouster of his co-sharer Bishundeo

then Jhauli Tatma might have acquired title by right of adverse possession over the share of his brother Bishundeo also but such sort of pleadings

are not there from the side of the Plaintiff by raising the plea of adverse possession but from the totality of the facts as pleaded it appears that it was

consistently being pleaded that the Plaintiff's vendor Jhauli Tatma remained in exclusive possession of the suit property. If remained in possession

exclusively without raising objection since 1959. then by 1978 i.e. the year of sale to the Plaintiff Jhauli Tatma might have acquired title by adverse

possession but that is a matter to be construed after consideration of the evidence as a whole on record but none of the courts below have

considered that fact at any stage.

9. I am conscious of the position that a second Appellate court cannot make out a third case when such was not the case in the courts below by

pleadings but also I am also conscious of the legal position as enumerated by the Apex Court and the Privy Council that even if a plea of adverse

possession is not being pleaded specifically then also it becomes a burden of the court to consider that point too if the circumstances require so in

the facts of a particular case. In the present case it was the consistent plea of Plaintiff that Jhauli Tatma was in exclusive possession of the suit

property. Now it is to be seen whether Jhauli Tatma remained in exclusive possession to the knowledge of his brother Bishundeo adversely

towards his interest and peacefully for a period of 12 years or not. I do not want to go much deep into it any further as I could feel that this point of

adverse possession requires to be considered in the position and circumstances as it could be found that the Defendant by purchase from Mt.

Bhutri had never come in possession because soon after the sale deed was executed the present suit has been filed and it was ascertained that the

Plaintiff remained in exclusive possession since the days of his vendor. In this way the second appeal is hereby allowed with the following

observations that the Plaintiff has got perfect title in respect of half share of the suit property which he got from Jhauri Tatma and the lower

appellate court has committed mistake in not granting such decree in his favour although finding is there in that light. A further observation is there

that regarding the share of Bishundeo which requires to be decided whether there was a complete ouster of Bishundeo or not from the suit

property or not and whether after such complete ouster the vendor of the Plaintiff had got adverse possession perfecting his title or not. In this

respect after allowing the appeal the matter is sent back to the first appellate court on remand for consideration of the second observation as made

above and passing a formal order in respect of the first observation as made above. It is further made clear that if necessary, for deciding the

factum of adverse possession the learned First Appellate Court may give opportunities to the parties to adduce additional evidence if necessary.

10. Thus, the appeal is allowed but no cost is awarded.