

S.K. Jabbar and ors Vs. Wazda Khatoon and ors

S.K. Jabbar and ors Vs. Wazda Khatoon and ors

SooperKanoon Citation : sooperkanoon.com/1028521

Court : Patna

Decided On : Aug-29-2013

Appellant : S.K. Jabbar and ors

Respondent : Wazda Khatoon and ors

Judgement :

Patna High Court SA No.371 of 1983 dt.29-08-2013 1 IN THE HIGH COURT OF JUDICATURE AT PATNA Second Appeal No.371 of 1983 (Against the judgment and decree dated 03.08.1983 passed by the Additional Sub Judge, Chapra in Title Appeal No.157 of 1981 reversing the judgment of the trial court dated 24.08.1981 passed by the learned Munsif II, Court Chapra in Title Suit No.2 of 1969/42 of 1979).

=====

Sheikh Shamim & Ors Plaintiffs-Respondents-Appellants Versus Syed Hussain Abbas & Ors Defendants-Appellants-Respondents

=====

Appearance : For the Appellant/s : Mr. Mahesh Narayan Parbat, Advocate For the Respondent/s : None

=====

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO ORAL

JUDGMENT

Date:

29. 08-2013 Mungeshwar (1) The plaintiffs-respondents-appellants have filed this Sahoo, J.

Second Appeal against the judgment and decree dated 03.08.1983 passed by the learned Additional Sub Judge, Chapra in Title Appeal No.157 of 1981 whereby the learned Lower Appellate Court allowed the appeal and set aside the judgment and decree of the trial court dated 24.08.1981 passed by the learned Munsif II, Chapra in Title Suit No.2 of 1969/42 of 1979. (2) The plaintiffs-appellants filed the aforesaid suit for declaration that the suit land is the Sikmi Kast land of the plaintiffs and defendants have got no title over it. Further, prayer has been made for declaration that the order passed under Section 145 Cr.P.C. Patna High Court SA No.371 of 1983 dt.29-08-2013 2 is not maintainable and further prayed for confirmation of possession and in the alternative, for recovery of possession. (3) The plaintiffs claimed the aforesaid reliefs on the facts inter alia that their ancestor, Sheikh Khudi was Sikmidar with his brother, Sheikh Ali with respect to the suit property. They continued in possession of the property on payment of rent to the landlord. However, no rent receipts were granted to them. On the death of the said Sikmidars, their descendants who are the plaintiffs are coming in possession as such, they have got title over the suit land. The Raiyat, Auliyad Hussain and Mohd. Hussain both died issueless. The son of Mohd. Razi went to Pakistan. Only Raiyat Kastkar, Abdul Gafur remained who also died 10 years prior to the filing of the suit. The defendant no.1 is a litigant man who is claiming title on the basis of purchase through sale deed dated 01.09.1958 from Abdul Gafur. The purchase is false and on the basis of purchase, the defendant never came in possession of the property. However, 145 Cr.P.C. proceeding was decided against the defendant. The sale deed is void and without consideration. (4) The defendant filed contesting written statement alleging that Gafur was owner of the land and he has sold the property on 01.09.1958 to the defendant no.2, widow of Gulam Sabbir. The defendants are related to Gafur and entire property of Gafur devolved Patna High Court SA No.371 of 1983 dt.29-08-2013 3 on them after his death. The case of the Sikmi right of the plaintiff was denied. Payment of rent was also denied. They claimed continuous possession over the suit land. (5) The trial court held that the plaintiffs being the descendants of Sheikh Khudi, the Sikmidar are entitled to recovery of possession over the suit land as they have got right, title and interest over the suit

land. Accordingly, the plaintiffs suit was decreed. (6) The defendants filed appeal before the Lower Appellate Court. The Lower Appellate Court held that the suit is barred by law of limitation, there is no evidence on record to show that the plaintiffs are Sikmidar and continued in possession after the survey khatian. The khatian is not a document of title. The suit is also barred under the provision of Tenancy Act. Accordingly, allowed the appeal and reversed the judgment of the trial court. (7) On 29.07.1985, the following substantial question of law was formulated: Whether the judgment and decree passed by the court of appeal below can be sustained although, Phul Jahan, respondent no.7 in the court below was dead before the hearing of this appeal commenced? (8) The learned counsel, Mr. Mahesh Narayan Parbat appearing on behalf of the appellant at the very outset submitted that Patna High Court SA No.371 of 1983 dt.29-08-2013 4 another substantial question of law is also involved in this Second Appeal for decision which is as follows: Whether the Lower Appellate Courts judgment is vitiated because of the fact that he has misconstrued the provision of Bihar Tenancy Act, Section 48, 183 and 184 and thus, held that the plaintiffs had the remedy before the Collector for getting the relief claimed in this suit. (9) In support of the substantial question of law formulated at the time of admission, the learned counsel submitted that it is settled principles of law that the judgment against a dead person is a nullity and on this score alone, the judgment of the Lower Appellate Court can be set aside. The respondent no.7 in the Lower Appellate Court namely Phool Jahan died on 26.07.1983 but the defendants who were the appellants before the Lower Appellate Court did not take any steps to bring on record the legal representatives of the deceased respondent no.7, Phool Jahan and, therefore, the judgment passed by the Lower Appellate Court against the dead person i.e. Phool Jahan is a nullity. (10) So far the substantial question of law raised during the hearing of this Second Appeal is concerned, the learned counsel submitted that the relief which the plaintiff has claimed in the present suit is not barred by any provision of the Bihar Tenancy Act. In the Patna High Court SA No.371 of 1983 dt.29-08-2013 5 survey record of right, the ancestor of the plaintiff namely Sheikh Khudi is recorded as Sikmidar, therefore, they are in possession of the property after the death of Sheikh Khudi continuously as such, they have acquired under Raiyati right in the suit land. This relief can be granted

by the Civil Court but the Lower Appellate Court misconstrued the provision of the Bihar Tenancy Act, Section 48, 183 and 184 and wrongly held that the relief can be granted by the Collector under the Bihar Tenancy Act, therefore, the judgment of the Lower Appellate Court is vitiated. (11) As stated above, nobody appeared on behalf of the respondents when the appeal is being heard. (12) So far the substantial question of law formulated at the time of admission is concerned, it appears that a submission was made to the effect that prior to conclusion of the hearing of appeal in the Lower Appellate Court, the respondent no.7, Phool Jahan died but no steps for substitution was made. That is why, in the substantial question of law, the same has been formulated to the effect that the respondent no.7 in the court below was dead before the hearing of the appeal commenced. From perusal of the memo of appeal filed before the Lower Appellate Court, it appears that in fact, this is not the correct position. (13) From perusal of the ordersheet of the Lower Patna High Court SA No.371 of 1983 dt.29-08-2013 6 Appellate Court record, it appears that the hearing was concluded on 22.07.1983 and according to the appellant, Phool Jahan died on 26.07.1983. Therefore, after conclusion of the hearing of the case, the respondent no.7, Phool Jahan died. The judgment was delivered on 3rd of August, 1983. (14) In view of the above facts, it appears that the substantial question of law formulated is not at all involved in this Second Appeal. It is settled law that only a ratio of the judgment which becomes precedent and is binding and has the force of binding precedent. Regarding the death of one of the parties to the suit or appeal dieing during the pendency of the proceeding, the matter is regulated by the provision as contained in Order XXII of the C.P.C. The consequences are mainly dependent on the facts of each case. It is also to be noticed here that if an appeal has already been heard by the court and arguments are being concluded, the judgment is pronounced later, during which period the parties died, it will not have any bearing on such judgment. (15) In similarly situated case in AIR 200.Karnataka 385, M. R. Laxmana (Dead by L.Rs.) and others v. Govindappa, the same view has been taken by the Karnataka High Court. (16) Here, as stated above, on 22.07.1983, the hearing was concluded and the date was fixed for judgment on 03.08.1983. Patna High Court SA No.371 of 1983 dt.29-08-2013 7 During this period, the respondent no.7 died. Therefore, the death of respondent no.7 will have no effect on the judgment and it cannot be

said that the appeal had already abated. Therefore, on the ground that it is passed against dead person, the judgment and decree cannot be set aside. Thus, the substantial question of law formulated is answered against the appellants. (17) So far the substantial question of law raised during the course of hearing of this Second Appeal is concerned, it may be mentioned here that the plaintiffs have filed the suit for declaration of their Sikmi right over the suit property. It may be mentioned here that this right as Sikmi Raiyat is conferred by the statute i.e. Bihar Tenancy Act. Such a right is not available to him under the general law of the land. The Act also provides for remedy and forum. Therefore, it is the forum created by the Act which alone is competent to declare the status of the person as an occupancy under Raiyat or Raiyat within the meaning of Section 48 (C) and 48(D). The Honble Supreme Court in the case of Shiv Kumar Chadha vs. Municipal Corporation of Delhi and others, (1993) 3 Supreme Court Cases 161 and Saraswati and others vs. Lachanna(Dead) through LRs., (1994) 1 Supreme Court Cases 611 has held that where a particular Act creates a right and also provides a forum for enforcement of such right, the jurisdiction of the Civil Court is ousted. These decisions of Patna High Court SA No.371 of 1983 dt.29-08-2013 & the Honble Supreme Court have been followed by this Court in the case of Suryabansh Upadhyay vs. Awadhesh Choudhary & Ors., 1999(2) PLJR 173 So far the substantial question of law raised during the course of hearing is concerned, has already been answered in the above decisions therefore, it needs no further decision in this Second Appeal. The Lower Appellate Court has considered this legal position of the case and has held that the remedy was available to the plaintiffs before the Collector i.e. the authority under the Bihar Tenancy Act. Accordingly, I answered this substantial question of law against the appellants. (18) In the result, this Second Appeal is dismissed. (Mungeshwar Sahoo, J) Saurabh/-