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Court : Patna

Decided On : Oct-12-2006

Judge : Syed Md. Mahfooz Alam, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 144 and 145; Code of Civil Procedure (CPC) - Sections 100

Appeal No. : Appeal from Appellate Decree No. 80 of 1989

Appellant : Sarifa Devi (Substituted) and ors.

Respondent : Anna Khatoon and ors.

Advocate for Def. : Pushkar Narain Shahi, Pankaj Kumar Singh, Rishi Raj Sinha, Veer Vikram Chakravarty, Ritesh Kumar No. 1 and Rakesh Kumar, Advs.

Advocate for Pet/Ap. : Jai Shankar Barnwal, Krishna Murari Prasad and Sanjay Kumar, Advs.

Disposition : Appeal dismissed

Prior history : S.M.M. Alam, J. 1. This second appeal has been preferred by the defendants-appellants against the judgment and decree dated 6.1.1989 passed by Sri B.N.P. Singh, 3rd Additional District Judge, Nawadah in Title Appeal No. 86 of 1973/2 of 1987 upholding the judgment and decree dated 28.4.1973 passed by Sri Kailash Bihari Verma, Munsif III, Gaya in Title Suit No. 65 of 1967 whereby the learned Munsif had decreed the suit of the plaintiffs-respondents in part. 2. The

brief facts of the case are as

Judgement :

S.M.M. Alam, J.

1. This second appeal has been preferred by the defendants-appellants against the judgment and decree dated 6.1.1989 passed by Sri B.N.P. Singh, 3rd Additional District Judge, Nawadah in Title Appeal No. 86 of 1973/2 of 1987 upholding the judgment and decree dated 28.4.1973 passed by Sri Kailash Bihari Verma, Munsif III, Gaya in Title Suit No. 65 of 1967 whereby the learned Munsif had decreed the suit of the plaintiffs-respondents in part.

2. The brief facts of the case are as follows:

The plaintiffs-respondents instituted Title Suit No. 65 of 1967 in the court of Munsif, Gaya for declaration of their title and recovery of possession of the suit land together with decree for mesne profit. The said suit was decreed in part by judgment dated 28th April, 1973 delivered by the Munsif III, Gaya. Against the said judgment, the defendants-appellants preferred appeal which was numbered as Title Appeal No. 86 of 1973 / 2 of 1987. The appeal was finally heard by Sri B.N.P. Singh, the then 3rd Additional District Judge, Nawadah, who, by his judgment dated 6.1.1989, dismissed the appeal filed by the defendants-appellants and then they preferred this second appeal against the concurrent findings of the courts below.

3. The plaintiffs' case, in brief, is that the suit premises, as described in schedule of the plaint, belonged to one Harkhu Kahar, ancestor of defendant Nos. 1 and 2. The said Harkhu Kahar sold the suit plot with the house standing thereon to one Ghujan Sao in the year, 1921 by virtue of the oral sale accompanied by delivery of possession for a consideration of Rs. 25/-. The said oral sale was also evidenced by a sada sale deed. After purchase of the suit property, the said Ghujan Sao subsequently sold it to one Halkhori Sao through a registered sale deed (Ext.5) for a consideration of Rs. 100/- and put him (Halkhori Sao) in possession. After the said sale sometime in the year, 1931 a dispute cropped up between the original

tenant Harkhu Kahar and purchaser Halkhori Sao in respect of the use of Kaneta (common wall of the house). However, the controversy was set at rest and thereafter a sada Ekrarnama (Ext.2) was executed between the parties in the year, 1947. Thereafter Halkhori Sao, the purchaser of the suit premises, mortgaged the suit property to one Hari Lal Sao and thereafter a deed of Kirayanama of the suit property (Ext.4) was executed by the mortgagor in favour of the mortgagee. After termination of period of lease Halkhori Sao vacated the suit premises and then mortgagee Hari Lal Sao inducted some other tenants in the suit premises. After lapse of time the suit property became unfit for habitation and. then Ganesh, who was the son of Halkhori Sao, sold the suit premises to the plaintiffs through a registered sale deed (Ext. 5/A) dated 16.2.1966 and thereafter the plaintiffs being the purchaser of the suit plot came in possession of the suit premises. It is stated that due to mistake of scribe, in place of plot No. 1604 which is the suit property, plot No. 1605 was inadvertenently mentioned in the mortgage deed although the correct boundary of plot No. 1604 was mentioned and the same mistake again cropped up in the future deeds. Further case is that the defendants were also intending purchasers but when they failed to get the suit premises, they in collusion with the police got a collusive report submitted whereupon a proceeding under Section 144 of the Code of Criminal Procedure was started. The plaintiffs had no knowledge of the said proceeding and in the meantime, the defendants opened a door in the western wall of the house on plot No. 1603 leading to the room of the suit house. The plaintiffs came in possession of the suit house but on 11.4.1966 the defendants made preparation for taking forcible possession of the suit house whereupon the plaintiffs moved a petition before the S.D.O., Nawadah whereupon a proceeding under Section 144 of the Cr.P.C. was started and it was later on converted into a proceeding under Section 145 Cr.P.C. and the said proceeding was decided against the plaintiffs on 29.8.1967. Further case is that being emboldened by the abovementioned order, the defendants dispossessed the plaintiffs from the suit premises on 29.8.1967 and hence, this suit was filed.

4. The case of the defendants is that the entire story of different transfers made in the years, 1921, 1926, 1947 and 1966 either by sale or mortgage is false and concocted and any such document of mortgage or sale is forged and fabricated and manufactured document. The true fact is that the plaintiffs and their vendors

had never come in possession of the suit house. The defendants and their ancestors were in possession of the suit house and have been coming in possession of the same and it is altogether false to say that by virtue of the abovementioned sale deeds/mortgage, the plaintiffs and their predecessors-in-interest had ever come in possession of the suit house. The entire story of sale, mortgage or giving suit house on rent to different persons by the mortgagee is denied by the defendants. The defendants have also asserted that their possession was rightly found and confirmed by the Executive Magistrate in the proceeding under Section 145 of the Cr.P.C. on the basis of the enquiry report submitted by the police after local inspection and the proceeding under Section 145 of the Cr.P.C. was rightly decided in favour of the defendants confirming their possession over the suit land. The defendants have also pleaded that the suit, as framed, is not maintainable, the plaintiffs had got no cause of action for the suit, the suit is barred by law of limitation and adverse possession and the same is liable to be dismissed.

5. From perusal of the judgment of the trial court it appears that the learned trial court had framed altogether five issues in the suit for determination which are as follows:

(1) Is the suit as framed maintainable ?

(2) Whether the plaintiffs have got cause of action for the suit ?

(3) Whether the suit is barred by law of limitation and adverse possession ?

(4) Whether the plaintiffs have got right, title and interest over the suit house and whether the various transfers alleged by the plaintiffs in respect of the suit house are valid and genuine ?

(5) To what relief or reliefs, if any, the plaintiffs are entitled ?

6. From perusal of the judgment of the trial court it appears that the trial court on consideration of the evidence adduced on behalf of both the parties disbelieved and rejected the contentions raised by the defendants-appellants and accepted the story of oral sale of the suit property by Harkhu Kahar to Ghujan Sao and on

that basis, the trial court placed implicit reliance on subsequent transactions that flowed from the oral sale held in the year 1921 and on that basis the trial court held that the plaintiffs have succeeded in proving their title to the suit land and accordingly, the trial court decreed the suit of the plaintiffs in part refusing the relief of mesne profit.

7. It appears from perusal of the record that against the said finding of the trial court, the defendants preferred appeal which was allowed and then against the said judgment of reversal, the plaintiffs preferred second appeal. The said second appeal was allowed and the suit was remanded back to the first appellate court with certain observations and then the first appeal was heard by Sri B.N.P. Singh, the then 3rd Additional District Judge, Nawadah who delivered judgment in the appeal on 6.1.1989 and by the said judgment he dismissed the appeal filed by the defendants-appellants and affirmed the judgment of the trial court. Against the said judgment and decree, this second appeal has been preferred by the defendants-appellants and thus, this appeal has come before this Court second time.

8. From perusal of the ordersheet of this Court it appears that on 13.8.1990 at the time of admission of this appeal only one substantial question of law was formulated by this Court to be decided in this appeal. The substantial question of law as framed is as follows:

Whether the court below has erred in law while relying upon Exhibits 2, 3, 4, 5 and 5/A for holding that boundary will prevail over plot when the appellants were not party to these documents?

9. It has been pointed out by the learned Advocate of the respondents that this is the second appeal and the defendants-appellants have come in appeal against the concurrent findings of the courts below. The learned Advocate of the respondents submitted that under Section 100 of the Code of Civil Procedure (hereinafter to be called 'C.P.C.'), the second appeal cannot be entertained against the concurrent findings of the courts below unless the court is satisfied that some substantial questions of law are involved in the case. He further submitted that if the court finds that in this appeal no substantial question of law is involved then in second appeal this Court is not empowered to reverse the judgment of the courts below

after re-appreciation of the evidence of the parties which is not permissible under Section 100 of the C.P.C. In support of his argument, the learned Advocate of the respondents has placed reliance upon the following decisions reported in : [1999]2SCR728 and 2005 (2) BBCJ -(IV) Page 420. I have gone through both the decisions and I would like to refer some paragraphs from both the decisions.

10. In the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors. : [1999]2SCR728 , following observations have been made by the Apex Court.

The right of appeal is neither a natural or an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add or to enlarge those grounds. The Second Appeal can not be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous can not be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact.

In 2005 (2) BBCJ - IV - Page 420 while making discussion on the scope of Section 100 C.P.C., the Apex Court has made following observations:

In second appeal existence of substantial question of law is sine quo non for exercise of jurisdiction and the High Court cannot proceed to hear a second appeal without formulating the substantial questions of law.

Para - 17 of the decision runs as follows:

This judgment was followed by this Court in Civil Appeal No. 2292 of 1999 Govindaraju v. Marriamman : AIR 2005 SC1008 . In Govindaraju's case (supra) it has been held that the High Curt while exercising the power under Section 100 of the Code of Civil Procedure on re-appreciation of the evidence cannot set aside the findings of the fact recorded by the first appellate court unless the High Court comes to the conclusion that the findings recorded by the first appellate court were perverse i.e. based on misreading of evidence or based on no evidence.

11. From the decisions cited above, it is clear that under Section 100 of the Code of Civil Procedure, it is not permissible for this Court to reappreciate the evidence of the parties without coming to the conclusion that a substantial question of law is involved in the appeal. It should be kept in mind that the substantial question of law is different from the substantial question of fact and the law does not permit this Court to decide substantial question of facts in the garb of substantial question of law. Let me see - whether substantial question of law formulated in this case is really a substantial question of law or substantial question of fact. The substantial question of law as framed in this appeal has been formulated in the following words:

Whether the court below has erred in law while relying upon Exhibits 2, 3, 4, 5 and 5/A for holding that boundary will prevail over plot when the appellants were not party to these documents?

Apparently, the substantial question of law, as formulated above, involves scrutiny of the evidence relied upon by the two courts below with regard to Exhibits 2, 3, 4, 5 and 5/A which establishes beyond doubt that for deciding this substantial question of law, reappreciation of evidence adduced on behalf of the parties with regard to Exhibits 2, 3, 4 and 5/A will be required but it is not permissible for this Court under Section 100 of the C.P.C. This clearly establishes that the substantial question of law as formulated in this appeal is really a substantial question of fact in the garb of substantial question of law and as such, in second appeal this Court is not empowered to reappreciate the evidence of the parties on facts. In this regard, the learned Advocate of the respondents has placed reliance upon the decision of the Apex Court given in the case of Thiagarajan and Ors. appellants v. Sri Venugopalaswamy B. Koil and Ors. respondents reported in : AIR 2004 SC1913 . The learned Advocate referred paragraphs 24, 25 and 26 of the said decision. All these paragraphs are quoted below:

24. In the present case, the lower appellate Court fairly appreciated the evidence and arrived at a conclusion that the appellants suit was to be decreed and that the appellants are entitled to the relief as prayed for. Even assuming that another view is possible on a reappreciation of the same evidence, that should not have been

done by the High Court as it cannot be said that the view taken by the first appellate Court was based on no material.

25. To say the least the approach of the High Court was not proper. It is the obligation of the Courts of law to further the clear intentment of the legislature and not frustrate it by excluding the same. This Court in a catena of decisions held that where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

26. We, therefore, hold that the High Court has exceeded its jurisdiction in interfering with the findings of the final Court of fact.

The learned Advocate of the respondents has also placed reliance upon another decision of the Apex Curt given in the case of Veerayee Ammal, Appellant v. Seeni Ammal, Respondent reported in : AIR 2001 SC2920 . He placed reliance upon paragraph 10 of the said decision which runs as follows:

The question of law formulated as substantial question of law in the instant case cannot, in any way, be termed to be a question of law much less as substantial question of law. The question formulated in fact is a question of fact. Merely because of appreciation of evidence another view is also possible would not clothe the High Court to assume the jurisdiction by terming the question as substantial question of law. In this case Issue No. 1, as framed by the trial Court, was, admittedly, an issue of fact which was concurrently held in favour of the appellant-plaintiff and did not justify the High Court to disturb the same by substituting its own finding from the findings of the Courts below, arrived at on appreciation of evidence.

12. Thus, on going through the decisions referred above, I have come to the conclusion that where the lower appellate court has fairly appreciated the evidence of the parties and after scrutinising the evidence - both oral and documentary, has arrived at a particular conclusion, the High Court in second appeal cannot interfere with the conclusion and finding of the first appellate court by substituting its own findings on reappreciation of the evidence merely on the ground that another view

is also possible. So far as this case is concerned, I find that there is concurrent findings of the two courts below that the plaintiffs have succeeded in proving their title to the suit land and on that basis both the courts below have decreed the suit of the plaintiffs. It further transpires that both the courts below before coming to the above findings have elaborately discussed the oral as well as the documentary evidence of both the parties and as such it cannot be said that the findings of the courts below are based on no evidence and the same is perverse. I am also of the opinion that on the basis of materials available on record no other view which is different from the view taken by the trial court as well as first appellate court can be taken in this second appeal. However, I would like to mention this fact that the learned Advocate of the appellants while arguing this appeal has raised contention that the courts below have erred in holding that the plaintiff has succeeded in establishing the identity of the suit land. His further argument was that the two courts below have established the identity of the suit land on the basis of Exts. 2, 3, 4, 5 and 5/A but the appellants are not parties to these documents and as such, the documents referred to above can not be used against the appellants for coming to the conclusion that actually the plaintiffs had purchased plot No. 1604 and not plot No. 1605. I am of the view that this argument of the learned Advocate of the appellants is misconceived as the identity of the land can also be established from its boundary besides plot numbers mentioned in the deeds.

13. In the result, I do not find any merit in this appeal and as such, the same is hereby dismissed on contest with cost. The judgments and decree of both the courts below are hereby confirmed.

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