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Court : Patna

Decided On : Nov-12-2001

Judge : S.N. Pathak, J.

Appeal No. : Appeal from Appellate Decree No. 65 of 1986

Appellant : Most. Ghughuni Devi and ors.

Respondent : Suraj Singh and ors.

Disposition : Appeal Allowed

Judgement :

S.N. Pathak, J.

1. This second appeal is directed against the judgment and decree dated 28th September, 1985 and 12th October, 1985 respectively passed by Sri M.M. Verma, 5th Additional District Judge, Siwan, passed in Title Appeal No. 112/23 of 1980/1985. The first appellate Court confirmed the judgment and decree dated 29th September, 1980 and 13th October, 1980 respectively passed by Munsif-I, Siwan, in Title Suit No. 441 of 1969. The plaintiffs of that suit are the appellants herein.

2. The admitted facts from the pleadings of the parties are to the effect that there was one Mahesh Barhai who left behind two sons Huias and Lakhan who were

recorded in the Survey as tenants. The suit land came to be owned and possessed by Phuleshwari Devi, widow of Lakhan Barhai. To this extent, the parties in the Court below were in agreement. However, the plaintiff-appellant's case in the Court below was that Phuleshwari sold the suit land to one Bishundeo Sharma of village Badsandi by registered sale-deed dated 21st April, 1951 for a consideration of Rs. 1,000/-(one thousand only). Subsequently, the plaintiffs purchased the suit land by two separate sale-deeds dated 29th July, 1968 for the total consideration of Rs. 4,000/-(four thousand) from the wife and sons of Bishundeo Sharma. The plaintiffs came in possession of suit land. However, the defendants in order to grab the suit land, got a proceeding under Section 144 Cr.

P.C. initiated and the S.D.M., Siwan decided this proceeding in favour of the defendant-respondents. Then, the suit was filed for declaration of title of plaintiff-appellants and for confirmation of their possession and, in the alternative, for recovery of possession.

3. The defendants' case was that they had purchased the suit land in the name of Bishundeo Sharma who was their servant, they paid the consideration money and took out the sale-deed from the Registration Office and came in possession of the suit land and remained and continued in possession thereof throughout. The sale-deed executed by the wife of Bishundeo Sharma and his sons in favour of plaintiffs was invalid and the plaintiffs never came in possession thereof. The proceedings under Section 144 Cr. P.C. was rightly decided in their favour.

4. The two lower Courts decided that the suit land was purchased by the defendant-respondents in the name of Bishundeo Sharma, their servant and the real purchasers were the defendants, who were in possession of the suit land and the suit was accordingly, dismissed by the trial Court and the appellate Court also dismissed the appeal upholding the judgment of the trial Court.

5. In this second appeal, a plea was taken by the plaintiff-appellants that the trial Court as also the appellate Court failed to consider the evidence of possession on behalf of appellants and they also erroneously decided the issue relating to Benami transaction of the suit land. I find that, of course, neither the trial Court nor the appellate Court fully and properly analysed the oral evidence, and the

documentary evidence has not been considered in its proper legal perspective. The trial Court catalogued the evidence, but failed to analyse the same in order to come to a just finding. The appellate Court also referred to oral evidence, but did not analyse it in proof or disproof of cases of the parties. So, I am of the opinion that this Court is entitled to interfere with the findings of the two Courts below. In this connection, I shall first refer to the main issue in the suit filed by the plaintiffs and the manner in which both the lower Courts below took up the issue and gave their findings. In view of the fact that the suit land belonged to Phgleshwari Devi, widow of Lakhan Barhai which was an admitted fact and the fact that she had sold the suit land by registered sale-deed in the name of one Bishundeo Sharma from whose heirs the plaintiff-appellants had purchased the suit-land, it was the onus of the defendants responsible to prove that Bishundeo Sharma was simply a name-lender and not the real purchaser. So the main issue was whether Bishundeo Sharma was ostensible purchaser or the real purchaser. The title of the plaintiff-appellants shall be deemed to be valid, unless the defendant-respondents discharge their onus to prove the Benami nature of the sale-deed in, favour of Bishundeo Sharma, of the year 1951.

6. In this connection, the first ingredient of Benami Transaction was the motive for purchasing the suit land by the defendants in the name of their so-called servant. Both the lower Courts have noted that there was no motive for the defendant-respondents to purchase the suit land in the name of Bishundeo Sharma. In this connection, their pleading was that they had confidence in Bishundeo Sharma Because he was their servant. Whether Bishundeo Sharma was their servant was, therefore, the first fact to be proved by the defendant-respondents. In this connection, there was no documentary evidence. The two lower Courts depended on the oral evidence of D.W. 1 and D.W. 4 only D.W. 1 was Shivjee Singh, one of the defendants himself. So, his evidence was to be viewed with circumspection. This witness at Paragraph 16 admitted that he had no documentary evidence to prove that Bishundeo Sharma was his servant. This witness further admitted this very paragraph that he did not remember as to from what period and to what time Bishundeo Sharma worked, as a servant for 10-12 years. D.W. 4 was one of the plaintiffs, namely, Diplal Singh. This witness was one of the plaintiffs of the suit and he had admittedly entered into compromise with the defendants. So

admittedly, he was in collusion with the defendants. His evidence was, therefore, also not above board and above suspicion.

This witness also admitted that he was unable to say as to how long and from what period to what period Bishundeo Sharrna remained the servant of the defendant-respondents. He has further admitted at Paragraph 2 that he had no knowledge whether his son had filed a case under Section 107, Cr. P.C. against the plaintiffs. The aforesaid statement of D.W. 1 and D.W. 4 indicated that neither of these two witnesses was competent to speak about the services being rendered by Bishundeo Sharma to the defendant-respondents nor they were reliable to prove this fact. In such a circumstance findings recorded by the two lower Courts in this connection was not at all warranted by the evidence on the record. The appellate Court has, rather, noted in this connection that since Bishundeo Sharma was a man of different village at a distance of 18 miles from village Kaithi in which was situated the suit land, it was a bit improbable that Bishundeo Sharma would purchase a piece of land in village Kaithi. This opinion of the appellate Court is also not warranted by the evidence on the record. There cannot be a facile presumption that a person of another village will purchase land at a distance of 18 miles in another village. If this opinion of the appellate Court is taken into consideration, in that case also, it is a bit improbable that a villager of Kaithi would engage a man of another village to work as servant in his own village and if the case of defendants is accepted in this connection, in that case, the purchase of the suit-land by Bishundeo Sharma where he was working as a servant of the defendants, independently, cannot be ruled out nor the Benami transaction of the suit land can be accepted simply on the ground that Bishundeo Sharma was a man of another village. The defendants, therefore, had to prove other ingredients of Benami transaction and they could not depend for this proof only on the ground that Bishundeo Sharma was their servant.

7. The next ingredient of Benami Transaction was payment of consideration money. The pleading of the defendant's was that out of the consideration money of Rs. 1,000/-, Rs. 150/- was paid to Phuleshwari Devi in case and Rs, 150/- was adjusted towards loan taken by her from the defendants. The rest of the consideration money of Rs. 700/- was adjusted towards the loan taken by

Phuleshwari on the basis of hand notes. Now the question is as to from whom Phuleshwari had taken loan, i.e., whether from the defendants or from the other persons. The W.S. filed by defendant Nos. 2 and 3 in this connection is not clear and specific. The appellate Court has stated in its judgments that Phuleshwari had taken loan

from other persons on the basis of two hand notes and the defendants had paid the loans back and discharged the handnotes and these amounts of loan were adjusted towards the rest of the consideration money. In this connection, there should have been clear and positive evidence, but the evidence on this point is rendered only by D.W. 1 and D.W. 4. D.W. 1 was Shivjee Singh, one of the defendants whose evidence on this point could not be wholly relied upon he being one of the parties to the suit, and the evidence of D.W. 4 was also unreliable because he had become hostile to the plaintiffs and because of the fact that this son had filed a case against the plaintiffs, which I have already referred to. Moreover, although D.W. 4 said that the consideration money was paid by the defendants, he has said in the closing lines of Chief that he did not know about the sale-deed executed by Phuleshwari in the name of Bishundeo Sharma. D.W. 4 also did not give the details of the manner, of payment of consideration money by the defendants. So on the record, there was no sufficient and conclusive evidence, rather a reliable evidence, regarding payment of consideration money by the defendants to Phuleshwari Devi.

8. The 3rd ingredient of Benami transaction is the possession of the deeds in question and possession of the vended land. In this connection, pleading of the plaintiff-appellants was that Surjee, wife of Bishundeo Sharma had executed mortgage deed in favour of one Guljaria and the defendants who had gone to take this deed any how came to possess the sale-deed of Bishundeo and so it was in their possession. The appellate Court examined the evidence of the son (P.W. 9) of Bishundeo who said that he had kept the sale-deed of his father with Suraj Singh when his village was flooded, and Suraj Singh did not return the same. The appellate Court opined that since this evidence was against the pleading, it was unreliable and admittedly sale-deed of Bishundeo Sharma was filed in Court by the defendants and so the defendants were deemed to be in possession of the

sale-deed. However, in this connection, the pleading of the defendant-respondents also attracts notice. The defendants have pleaded that when they came to know that Surjee executed a deed of mortgage in favour of Guljaria, they threatened both that they were to be embroiled in litigation and on account of this threat, Guljaria handed over the mortgage deed to the defendants and there the matter, ended. From this averment in the W.S., it transpires that, of course, Surjee had created a deed of mortgage in favour of Guljarai and so the change of sale-deed of Bishundeo being given to Guljaria cannot be ruled out, rather it became very much probable. In such a circumstance, probability of defendants laying their hands upon the sale-deed of Bishundeo Sharma also gains importance and it cannot be completely ruled out. Not only this certain documents were filed by the plaintiff-appellants in order to show probability of the defendants coming in possession of the sale-deed in question. In this connection, there was one deed of assignment taken by Suraj Singh from one Bhajan Singh who was mortgagee of part of the sale-deed from Surjee wife of Bishundeo Sharma. This question was put to D.W. 1 and, he denied knowledge about this fact, but the certified copy of this deed was filed by the plaintiff-appellants (Ext.4). This D.W. 1 also said in his evidence at Para-37 that he will not examine Surajbabu, one of the defendants who was an elder brother of the family. At Para-22, he denied the knowledge whether the plaintiff-appellants had given notice to the defendants to produce the original deed of assignment. So it appears that there was, perhaps, a notice served by the plaintiffs on the defendants to. produce the original deed of assignment and when this was not complied by the latter, the certified copy (Ext.4) was filed. Another document in this connection was deposition of Suraj Singh in Title Suit (Ext. 6/C) where where he admitted at Para-12 that Guljaria was his aunt. From the aforesaid facts, it is further apparent that Guljaria, the so-called Jarpeshgidar of Surajee was a clear relation of Suraj Singh, one of the defendants. So from all circumstances on the record, it was apparent that chance of the defendants coming in possession of the sale-deed of Bishundeo Sharma from Guljaria or from Bhajan Singh could not be ruled out. When two parties make pleading on the same point, the onus to prove this fact shifts, and in that case the Court has to decide a particular point in the light of the total effect of the evidence on the record and any evidence adduced by any of the parties, including the

plaintiffs, in derogation of the pleading can be easily ignored, I am, therefore, of the opinion that the possession of the sale-deed by the defendants in the manner they alleged, was not proved. That means, they had failed to prove that they came in possession of the sale-deed in question after taking the same from the Registration Office in the usual course of business. There was no satisfactory evidence in this connection on behalf of defendants, either oral or documentary.

9. So far as possession of the suit land by the defendants is concerned, I find that six witnesses were examined on their behalf out of whom. D.W. 1 was one of the defendants himself, D.W. 4 was one of the plaintiffs and about whose reliability, I have already mentioned above. D.W, 2 and D.W, 3 were formal witnesses and brought on the record receipts (Ext. A, A/1, A/2 and A/3). D.W. 6 was also a formal witness who brought on the record a receipt.(Ext. 4). D.W. 6 also spoke on the possession of the suit land by the defendants. However, the evidence of this witness is tainted by the fact that he had filed a case against Ambika and his other family members, one of the plaintiffs of the suit, under Section 107, Cr. P.C. He had also deposed in favour of defendants in a title suit (T.S. No. 415 of 1969). So he was a man of the defendants and inimical to one of the plaintiffs. So far as possession of the defendants is concerned, this witness admitted at Paragraph 4 that Shivjee and Sribhagwan (defendants) cultivated their lands by themselves. Some times, they also engaged labours. He has named the labourers in which name of Bishundeo does not figure. He never said that Bishundeo was at any point of time servant of defendants. D.W. 5 was another witness on the point of possession of the defendants. He is a man of different village. This witness also admitted at Para-2 that he had deposed in favour of defendants in some other cases also. He admitted at Paragraph-3 that he had no connection with village Kaithi. He further admitted at Paragraph 4 that he cannot say what were the lands purchased by defendants and what were their ancestral lands. In such a circumstance, his evidence that defendants were in possession of the suit land was totally unreliable, especially when he was a man of a village other than village Kaithi in which the suit-land was situated. So the oral evidence on behalf of defendants was also highly deficient. The appellate Court relied on certain receipts filed by the defendants to prove that they were in possession. The appellate Court has noted that two of the receipts were in the name of Phuleshwari and the other

two receipts were in the name of defendant, Sri Bhagwan Singh. However, I find that out of the receipts exhibited, Exts. A, A/1 and A/2 are in the name of Phuleshwari. Name of

Phuleshwari is quite natural as she was owner of the suit land. 4th receipt (Ext. A/3) contains the name of Phuleshwari as also Bhagwan Singh of the year 1953 and the 5th receipt is in the name of Bhagwan Singh and it is dated 19th March, 1961. Now the question is whether these receipts can be relied upon as conclusive evidence to prove the possession of the defendants. It was the pleading by the defendants that they had got their names mutated but no mutation paper was filed. The established principle of law relating to rent receipt is that the receipts are neither proof of title nor of possession. Some sanctity does attach to the mutation paper in favour of a particular person regarding proof of his possession, because such orders are passed after due notice to the interested persons or after a general notice and after enquiry into the factum of possession. But, even the mutation order is not proof of title of a particular person. So far as receipts are concerned, they cannot be deemed to be proof of possession unless supported and corroborated by any other reliable piece of evidence, I have already discussed the oral evidence of the defendants regarding their possession. So simply because the defendants filed certain receipts in the name of Sri Bhagwan Singh, one of the defendants, I do not think this will be conclusive proof of their possession right from the year of their purchase (1951) till filing of the suit. It is not understandable as to why they failed to file the mutation order in their favour, if they had set up such a pleading. The appellate Court stated that since the receipts were filed by the defendants, it was to be presumed that their names were mutated, but this finding of the appellate Court is not warranted by either circumstances of the case or by any legal validity. Rent receipts can be obtained by the parties just for the sake of creating evidence without any basis for issuance of the receipts. Moreover, I find that the appellate Court referred to the witnesses examined on behalf of plaintiffs, but it failed to discuss the same as opposed to or in juxtaposition with the evidence of the defendants to come to a definite finding as to which of the parties was in actual physical possession of the suit land. The appellate Court at Para 15 of the judgment stated that P.Ws. 3, 7, 8, 9, 14 and 16 stated about the possession of the plaintiffs and their vendors (wrongly shown as

vendees) but since no document was filed, their evidence was disbelieved. I have already stated above that the evidence of these witnesses was not discussed. The appellate Court further disbelieved this evidence without discussing the same. I have already stated above, and I am of the opinion that the appellate Court's finding and for that matter, the finding of the trial Court regarding possession of the defendants on the basis of their claim of Benami transaction of the suit land was neither properly discussed nor analysed. Besides the same, because of the non-consideration of the plaintiff's evidence of possession, the judgment of the two lower Courts suffer from non-consideration of vital evidence.

10. From the aforesaid facts and circumstances and the discussion thereon, it transpires that the defendant-respondents had failed to prove that they were in possession of the suit land right from the date of their purchase and through-out so much so that they could establish the Benami nature of the sale-deed executed by Phuleshwari Devi in favour of Bishundeo Sharma. In the aforesaid circumstances, the sale-deeds in favour of plaintiffs executed by the heirs of Bishundeo Sharma would be deemed to be valid and the plaintiffs would be acquiring valid title on the basis of the same.

11. In the result, this appeal is allowed and the judgments and decrees passed by the Courts below are hereby set aside. The suit of the plaintiff-appellants shall stand decreed, as claimed by them. There shall be no order as to costs.