

indu Singh and ors. Vs. Awadh Kishore Singh and ors.

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Court : Patna

Decided On : Aug-17-2011

Judge : Mungeshwar Sahoo, J.

Acts : Code of Civil Procedure (CPC) - Section 35(2)

Appeal No. : FIRST APPEAL No. 172 OF 2008

Appellant : indu Singh and ors.

Respondent : Awadh Kishore Singh and ors.

Advocate for Def. : Mr. Ganpati Trivedi, Adv.

Advocate for Pet/Ap. : Mr. S.S. Dwivedi; Mrs. Sangita Sharma, Adv.

Judgement :

(1) Mungeshwar This First Appeal has been filed by the plaintiffs-appellants Sahoo, J. against the judgment and decree dated 10.07.2008 passed by Sri K.K.Mahtha, the learned Subordinate Judge I, Jamui in Eviction Suit No.1 of 1997 whereby the learned Court below dismissed the plaintiff's suit for declaration of right, title and interest of Schedule-1 premises and for eviction of defendant nos.1 and 2 from room no.6 and 10 mentioned in the sketch map in the Schedule-2 of the plaint.

(2) The plaintiff's filed the aforesaid suit alleging that Pitambar Singh had four sons namely Kamla Prasad Singh, Bindeshwari Prasad Singh, Triveni Singh and Saryug Singh. The plaintiffs and the defendants, first set belonged to branch of Saryug Singh. The defendants, second set belonged to the branch of Bindeshwari Prasad Singh. Saryug Singh died leaving behind Tripurari Prasad Singh, Brij Bihari Singh and Awadh Kishore Singh. The plaintiffs are the heirs of late Tripurari Prasad Singh who died in 1988. In the year 1958, there was partition between the four sons of Pitambar Singh. In that partition, the lands measuring 3.01 acres comprised within plot no.377 was divided between the four brothers in such a way that Saryug Singh, Bindeshwari Singh and Triveni Singh got 93 decimals whereas Kamla Prasad Singh got 22 decimals. A sketch map showing the division has been given in the plaint. According to the plaintiff's case, 93 decimals of Saryug Singh and 93 decimals of Bindeshwari Prasad Singh were in the middle of the plot no.377 and were contiguous to each other. In the year 1965, Saryug Singh partitioned this 93 decimals of plot no.377 among his three sons with other properties and in that partition, the entire 93 decimals of plot no.377 fell in the share of Tripurari Prasad Singh. In lieu thereof, the other two sons of Saryug Singh were given more lands in other villages. After this partition, Tripurari Prasad Singh came in possession of 93 decimals and in 1970, he exchanged two plots of Village Nardih with Kailash Prasad Singh who in turn gave 93 decimals of his share in plot no.377 to Tripurari Prasad Singh which was adjacent south to the 93 decimals of Tripurari Prasad Singh. However, Kailash Prasad Singh did not execute registered deed of exchange but he never objected the possession of Tripurari Prasad Singh and, therefore, the plaintiffs continued uninterrupted and continuous possession for several 12 years to the knowledge of all, as such, they have acquired title by adverse possession. Kailash Prasad Singh sold the exchanged land of village Nardih. Tripurari Prasad Singh was M.L.A., Minister and also Speaker from the year 1967 till his death. In 1970, he constructed a pucca house in the middle of 93 decimals which he got in exchange from Kailash Prasad Singh (this portion of land has been shown as C,D,H and I in the sketch map). After completion of the construction, the plaintiff no.1, Indu Singh has been assessed with respect to the said 93 decimals. Nobody raised any objection. Well had been dug for irrigation and also electric motor pump had also installed. One room was

let out to an Engineer for Rs.150 rent per month till 1978. Thereafter, 3 rooms were let out to Soil Conservation Department of Govt. of Bihar since 1978 for Rs. 330 as rent per month. When ancestral Dalan fell down, the defendants, first set who was living with his family members allowed to stay temporarily in the house constructed by the husband of plaintiff no.1. Therefore, the defendants, first set came in permissive possession in room no.6 and 10. When the plaintiff's husband requested the defendants, first set to vacate the house, he refused and filed title suit no.29 of 1980 for partition. In that suit, Kailash Prasad Singh was examined as D.W.4 who admitted the exchange of 93 decimals with Tripurari Prasad Singh and also admitted construction of house of Tripurari Prasad Singh over the same land. The said suit was partly decreed and it has been held that the plaintiffs of that suit who are defendants, first set in this suit have got share in 93 decimals of land of Saryug Singh and so far 93 decimals of Kailash Prasad Singh is concerned, they have no right to partition. Therefore, in that suit, 93 decimals of plot no.377 was excluded from partition. On the basis of these findings of the Court below in title suit no.29 of 1980, the plaintiffs have filed this suit for declaration of their title over the 93 decimals of plot no.377 alleged to have been exchanged from Kailash Prasad Singh and further prayed for eviction of the defendants, first set from room no.6 and 10.

(3) The defendants, first set appeared and filed contesting written statement. Besides taking various pleas, mainly it was contended by the defendants, first set that Saryug Singh was allotted 1.86 acres of land in plot no.377 and no land was allotted to either Kailash Prasad Singh or his father, Bindeshwari Prasad Singh in plot no.377. The trial court in title suit no.29 of 1980 held that there had been no partition between the three sons of Saryug Singh in the year 1965 as alleged by the plaintiffs of this suit who were defendants in title suit no.29 of 1980. However, while decreeing partly, the learned Court below held that 93 decimals of plot no.377 belonged to Kailash Prasad Singh and, therefore, the said property was excluded from partition. Against that part of the decree, the plaintiffs have filed F.A. No.553 of 1996 before the High Court. In such view of the matter, the finding of the trial court in earlier suit is sub-judiced before the High Court, therefore, the said issue cannot be decided again in this suit being barred by principles of res-judicata. The defendants, first set further alleged that they are co-sharer and are

residing in the house as rightful owner. The house is joint family property. The present suit has been filed collusively by the plaintiffs against the defendants, second set for declaration of title on the basis of adverse possession and consequently, prayed for eviction of these defendants. The house was constructed out of joint family fund and Tripurari Prasad Singh was karta of the family. It is alleged that the defendants, first set are in joint occupation of the suit premises and not in permissive possession.

(4) The defendants, second set filed supporting written statement.

(5) In view of the above pleadings of the parties, the learned Court below framed the following issues:

(i) Whether the suit as framed is maintainable?

(ii) Have the plaintiffs got cause of action for the suit?

(iii) Whether the suit is barred under the provision of Bihar Building (Lease, Rent and Eviction) Control Act?

(iv) Whether the plaintiffs have perfect, right, title and interest over the suit premises mentioned in Schedule No. I including the premises mentioned in Schedule No. II of the plaint?

(v) Whether the defendant no.1 and 2 or the defendant 1st set have got any interest or tile to the premises shown as room no.6 and 10 of the sketch map described in Schedule No. II of the plaint and they are liable to be evicted from the same by an order and decree of the court?

(vi) Are the plaintiffs entitled to a decree as sought for in the plaint?

(6) Before going to the merit of the case, it may be mentioned here that I have heard both the First Appeals i.e. F.A. No.553 of 1996 arising out of title suit no.29 of 1980 and this First Appeal No. 172 of 2008 arising out of Eviction Suit No.1 of 1997 simultaneously one after other and the judgments of both the appeals are being delivered today one after the other.

(7) After trial, the learned Court below considering the materials available on record came to the conclusion that the partition between the four sons of Pitambar Singh was not done according to the plaintiff's case rather plot no.377 was partitioned only in three shares. As alleged by the defendants, first set only 93 decimals was allotted to Triveni Singh and 1.86 acres was allotted to Saryug Singh and rest 22 decimals was allotted to Kamla Prasad Singh. No share was given to father of Kailash Prasad Singh in plot no.377 vide page 19 of the judgment. The learned Court below also found that in title suit no.29 of 1980, the case of partition between the three sons of Saryug Singh in the year 1965 alleged by Tripurari Prasad Singh i.e. the ancestor of plaintiffs of this case has been disbelieved. Therefore, there was no partition. The learned Court below also found that plot no.325 of khata no.86 measuring 86 decimals and plot no.414 measuring 11 decimals of village Nardih never fell in the share of Tripurari Prasad Singh because there was no partition between the three sons of Saryug Singh in the year 1965. Since there was no partition, no question arises for exchange of that two plots by Tripurari Prasad Singh. The learned Court below also found that the said two plot nos.325 and 414 of Mauja Nardih fell in the share of Kailash Prasad Singh who had sold the same. The learned Court below found that the plaintiffs have failed to prove that lands of plot no.377 fell in the share of Kailash Prasad Singh and plot no. 325 and 414 fell in the share of Tripurari Prasad Singh or Saryug Singh and, therefore, the learned Court below disbelieved the story of exchange. The learned Court below also found that in title suit no.29 of 1980, it was found that the disputed property is joint property of the sons of Saryug Babu and against this decision, the plaintiffs have not filed either cross-objection or cross appeal and, therefore, they are estopped to say that there had been partition in 1965. The learned Court below also found that the story of partition in the year 1965 and exchange, as pleaded by the plaintiffs have been disbelieved in title suit no.29 of 1980, there is no question of adverse possession arises.

(8) The learned senior counsel, Mr. S.S. Dwivedi submitted that the learned Court below has wrongly dismissed the suit holding that it is joint family property. This finding of the Court below is contrary to the finding arrived at in title suit no.29 of 1980. In that suit, it was held that only 93 decimals land belonged to Saryug Singh and the other 93 decimals belonged to Kailash Prasad Singh but since there was

no registered deed of exchange, the exchange was held as illegal and void. In view of this finding of the Court below, the present suit has been filed for declaration of title against Kailash Prasad Singh. The learned Court below had no jurisdiction to give a contrary finding on an issue which has already been decided in title suit no.29 of 1980 i.e. regarding allotment of 93 decimals of land of plot no.377 in the share of Kailash Prasad Singh. The learned counsel further submitted that in view of the finding in title suit no.29 of 1980, the plaintiffs are in possession exclusively over 93 decimals of land which belonged to Kailash Prasad Singh which has been admitted by Kailash Prasad Singh. The defendants, first set cannot be allowed to say again that the said property belonged to Saryug Singh but the learned Court below wrongly held that the said 93 decimals property alleged to have been exchanged belonged to Saryug Singh as 1 acre 86 decimals of plot no.377 was allotted to Saryug Singh in the partition between his four brothers i.e. sons of Pitambar Singh. The husband of plaintiff no.1, late Tripurari Prasad Singh had constructed said house out of his personal income and income of plaintiff no.1 and the defendants, first set are in permissive possession in the two rooms in that house. Therefore, the plaintiffs are entitled for declaration of title and a decree for eviction against the defendants, first set. On these grounds, the learned counsel submitted that the impugned judgment and decree are liable to be set aside and the First Appeal be allowed.

(9) On the contrary, the learned counsel, Mr. Ganpati Trivedi submitted that in title suit no.29 of 1980, it has specifically been held that there was no partition in the year 1965. When there were no partition in

1965, no question arises about allotment of plot no.325 and 414 of Nardih in favour of late Tripurari Prasad Singh. When there was neither partition nor allotment of two plots of Nardih in favour of late Tripurari Prasad Singh, there is no question of exchange arises. The learned Court, in title suit no.29 of 1980 has held that the exchange alleged by the present plaintiff is illegal and void. According to the learned counsel, the respondents have adduced sufficient documentary evidence in support of the fact that in partition between the four sons of Pitambar Singh, plot no.325 and 414 fell in the share of Bindeshwari Prasad Singh, father of Kailash Prasad Singh. Therefore, the learned Court below has rightly found that

when these two plots were allotted to Bindeshwari or his son, Kailash, how the said property was exchanged by late Tripurari Prasad Singh. So far declaration of title is concerned, the plaintiffs have prayed for declaration of title merely on the ground of adverse possession said to have been prescribed against Kailash Prasad Singh. In the present case, no such relief can be granted to the plaintiffs in view of the finding recorded in title suit no.29 of 1980. If in fact, the property was exchanged and Kailash Prasad Singh who was examined as D.W.4 in title suit no.29 of 1980, why the appellants are feeling shy to get a registered document executed by Kailash Prasad Singh. Here also, the heirs of Kailash Prasad Singh are supporting the plaintiff's case. In earlier suit also, Kailash Prasad Singh supported the present plaintiffs who were defendants in that suit. In such circumstances, where is the bar and why they are not executing and registering deed of exchange. Only reason is the property was never allotted in the share of father of Kailash Prasad Singh. The learned Court below has rightly held that the property is joint property and the defendants, first set are co-owner with respect to the property. The house was constructed out of joint family fund in the year 1970 when Saryug Singh was alive and because of old age in fact, Tripurari Prasad Singh was acting as karta. On these grounds, the learned counsel submitted that the First Appeal is liable to be dismissed with cost.

(10) In view of the above facts and rival contentions of the parties, the point arises for consideration is as to "whether the plaintiffs have been able to prove their exclusive title over the suit property" and "whether they are entitled to evict the defendants, first set from the possession of the suit property?"

(11) As stated above, I have heard both the First Appeals one after the other. The plaintiffs of this suit were the defendants of title suit no.29 of 1980. Their defence in earlier suit is substantially the same in the present eviction suit as plaintiff. Mainly their present case depends on the finding of the earlier suit regarding as to whether Saryug Singh was allotted 1.86 acres of land in plot no.377 or only 93 decimals in that plot. The next question will be whether there had been partition between the three sons of Saryug Singh in the year 1965 as alleged by present plaintiffs and the next question will be as to whether in the partition between the sons of Pitambar Singh, plot no.325 and 414 of village Nardih was allotted to

Saryug Singh and further, 93 decimals of plot no.377 was allotted to Bindeshwari Prasad Singh and/or his son, Kailash Singh.

(12) I have already found in the judgment of First Appeal No.553 of 1996 arising out of title suit no.29 of 1980 which is being delivered today along with this judgment that the part decree of the plaintiffs of that suit is based on the finding of the Court below that there had been no partition between the three sons of Saryug Singh in the year 1965 as alleged by the defendants of that suit and they did not challenge that part of the decree either by filing appeal or by filing cross-objection in First Appeal No.553 of 1996. Therefore, the finding of the Court below about the partition pleaded by the defendants of that suit attained finality. In other words, there had been no partition between the sons of Saryug Singh in the year 1965. When there is no partition in 1965, there is no question of exchange of plot no. 325 and 414 of village Nardih with Kailash Prasad Singh arises. I have further found that Exhibit-11/D, Register-2 in title suit no.29 of 1980 has been opened in the name of Saryug Singh regarding 1.86 acres land of plot no.377. I have also found that the learned Court below wrongly held that 93 decimals of land was allotted in the share of Kailash Prasad Singh and, therefore, the said 93 decimals of land belonged to Kailash Prasad Singh. This finding has been reversed. Now, therefore, in view of the aforesaid finding in First Appeal No.553 of 1996, the facts which emerge are that there had been no partition between three sons of Saryug Singh in the year 1965 as alleged by the present plaintiffs who were defendants in title suit no.29 of 1980 and that Saryug Singh was allotted 1 acre 86 decimals of land in plot no.377. When there was no partition between three sons of Saryug Singh, there is no question of allotment of two plots of Nardih in the share of Tripurari Singh arises. Therefore, 1 acre 86 decimals land belonged to Saryug Singh over which his three sons have got 1/3rd share. In view of these findings arrived at in the said First Appeal, it is not desirable to examine the said question again in the present suit. Therefore, in the light of the aforesaid finding, now let us examine as to whether the plaintiffs have been able to prove that plot no. 325 and 414 of village Nardih was allotted in the share of Saryug Singh in the partition between four sons of Pitambar Singh. In addition to oral evidences, the defendants have produced Register-2 in the name of Saryug Singh which is marked Exhibit-E/1. It may be mentioned here that this Exhibit-E/1 corresponds to Exhibit-11/D of

title suit no.29 of 1980. Register-2 in the name of Kamla Prasad Singh has been marked as Exhibit-E. The defendants have also proved report of Halka Karamchari and Circle Inspector which has been marked as Exhibit-G. From perusal of the said Exhibit-G, which is application filed by the brothers of Saryug Singh mentioning therein that they had partitioned their lands amicably but due to non-separation of Jamabandi, they felt difficulty in payment of land, therefore, separate Jamabandi be created in their names with respect to their properties. This matter was verified and report was submitted which is Exhibit-G. Thereafter, by terms of order dated 19.02.1966 passed by Circle Officer, mutation was allowed and correction slip was issued. In the said correction slip, the details of land of Kailash Prasad Singh, Kamla Prasad Singh, Saryug Singh and Triveni Prasad Singh have been mentioned vide Exhibit-H. These Exhibits G and H have been obtained as far back as on 20.11.1967. From perusal of these Exhibits coupled with Exhibit-E/1, it is clear that Kailash Prasad Singh was not allotted any share in plot no.377 and plot no.414 and 325 of village Nardih was allotted to Kailash Prasad Singh and not in the share of Saryug Singh. Further, it is clear that 1 acre 86 decimals of land in plot no.377 was allotted in the share of Saryug Singh. Against these documentary evidences, no documents have been produced by the plaintiffs-appellants. I, therefore, find that the plaintiffs have miserably failed to prove that in partition between the four sons of Pitambar Singh, plot no.325 and 414 of village Nardih fell in the share of Saryug Singh. I find that the same fell in the share of Kailash Prasad Singh. In view of the above finding, it becomes clear that when the said two plots were allotted to Kailash Prasad Singh himself, how the plaintiffs or their ancestor Tripurari Prasad Singh could have exchanged those two plots with Kailash Prasad Singh particularly when no land of plot no.377 was allotted to Kailash Prasad Singh in the said partition between the sons of Pitambar Singh. The other findings recorded in First Appeal No.553 of 1996 arising out of tile suit no.29 of 1980 will operate as res-judicata in the present suit. I have found that the house is also joint family property and plaintiffs of title suit no.29 of 1980 have 1/3rd share in it.

(13) I, therefore, ultimately find that the plaintiffs have failed to prove their exclusive title over the suit properties and, therefore, they are not entitled to a decree for eviction of the defendants, first set. Therefore, the findings recorded by

the learned trial court are hereby confirmed.

(14) In (2005)6 Supreme Court Cases 344(Salem Advocate Bar Association vs. Union of India), the Hon'ble Supreme Court has held at paragraph 37 that "Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) CPC. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor."

(15) In view of the above facts and circumstances of the case and in view of the law laid down by the Apex Court, in my opinion, in this case, the plaintiffs-appellants are liable to pay cost to the defendants, first set, respondents as this suit could have been avoided because First Appeal No.553 of 1996 was pending against the judgment and decree passed in title suit no.29 of 1980 challenging the finding on the basis of which the subsequent(present) suit was filed.

(16) In the result, this First Appeal is dismissed with cost of Rs.10,000 to be paid by the appellants to the defendants within one month from today failing which the defendants-respondents, first set are entitled to realize the same through process of law.

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