

PATNA HIGH COURT

Jayanti Devi

Vs

Srichand Mal

A.F.A.D. No. 470 of 1977

(Prabha Shanker Mishra, J.)

22.02.1984

JUDGEMENT

Prabha Shanker Mishra, J.

1. This appeal has been placed for hearing before me on the difference of opinion between Nagendra Prasad Singh, J. and S.Ali Ahmad, J. Nagendra Prasad Singh, J. has allowed the appeal, set aside the judgment and decree passed by the Second Additional District Judge, Gaya, (the court of appeal below) and remitted the case back to be heard afresh in accordance with law in the light of the observations made by him. S.Ali Ahmad, J. has dismissed the appeal. Nagendra Prasad Singh, J. has held that it appears from the judgment of the court of appeal below that after having held that the plaintiff did not acquire any title by virtue of the court sale it has purported to consider the question of possession saying that the plaintiff having failed to prove title, now it was to be considered whether she acquired title by adverse possession; and held :-

"In my view once the finding on the question of title is held to be invalid then the judgment of the Court of appeal below cannot be sustained on the grounds that there is a finding that the plaintiff never came in possession after the court sale and the defendants have continued in possession over the disputed Land."

Proceeding further to consider as to whether the court of appeal below considered all the materials and circumstances which had been referred to by the trial court while reversing its findings on the question of possession, Nagendra Prasad Singh, J. has noticed.

"The trial court has discussed this question in detail and has recorded a categorical finding that the defense of defendant 9 was incorrect and, perhaps, he was in collusion with the other defendants. The appellate court has reversed that part of the finding in few lines in para 10 of its judgment by saying that defendant 9 as D. W. 1 has denied his possession over the plots and had also filed an affidavit (Ext.A). On the question of possession the appellate court has referred to some documents including rent receipts, but has not

referred to other materials which are relevant for the consideration of the question discussed in the judgment of the trial court."

S.Ali Ahmad, J. on the other hand has recorded in his judgment as extracted.

"One of the defense advanced by the contesting defendants was that the mortgage, mortgage suit and delivery of possession were all collusive and, as such, conveyed no title to the plaintiff. In case, the defendants want to succeed on the point, they undoubtedly had to prove the same but no definite finding has been recorded by the court of appeal below on that issue. It is, therefore, not possible to unsuit the plaintiff on that account. The matter however, does not rest there. The plaintiff claimed to have come in possession in the year 1943 on the basis of the delivery of possession. The defence on that point was that the plaintiff never came in possession. The suit giving rise to this appeal was filed in the year 1967. In case the defendant's case was true that the plaintiff never came in possession since 1943, then the period of 12 years had already lapsed prior to the institution of the suit and the fact that the suit was filed in the year 1967 will not shift the onus on the defendants to prove that they acquired title by remaining in adverse possession for 12 years. By virtue of Sections 29 and 31 of the Limitation Act, the suit will have to be dismissed if it is found that the plaintiff from the year 1943 did not come in possession for 12 years. This aspect has been considered by the lower appellate court in paras 10 and 11 of the judgment.

The finding, therefore, that the plaintiff never came in possession of the suit land is a pure finding of fact and I do not see my way to interfere with that."

S.Ali Ahmad, J. has further said:-

"Admittedly, the new Limitation Act came into force on 1-1-1964 and the suit was filed in the year 1967. Therefore, apparently, Article 65 may be attracted. But Section 31 of the new Limitation Act provides that nothing in this Act shall enable any suit, appeal or application to be instituted, preferred or made for which the period of limitation prescribed by Limitation Act, 1908 expired before the commencement of this Act. That means, if a suit already became barred prior to the enforcement of the new Limitation Act, then notwithstanding the fact that the period of limitation has been extended under it or the onus has been shifted to the defendants, the suit will not be maintainable. That is exactly the position here. The plaintiff on the findings I have just referred to above was already out of possession for more than 12 years prior to the enforcement of the new Limitation Act. Her suit under the new Limitation Act will, therefore, be barred."

S. Ali Ahmad, J.

further considered the arguments that the court below while upsetting the finding, regarding possession, did not consider the reasonings given by the trial court and some errors committed by

the court of appeal below. In not considering all the evidence on the record on the question of possession and/or misreading some documents and held that non- consideration of the reasonings given by the trial court was not such a strong reason or material that would vitiate the finding of possession and the documents/materials relied upon by the appellant were not such which merit interference with the judgment of the court of appeal below.

2. Before difference of opinion on the points of law are spelled out and the contentions raised on behalf of the parties are considered, I may indicate the relevant facts. The plaintiff is the appellant before this Court. According to her survey plot No. 156 under Khata No. 347 measuring 1 acre, survey plot No. 157 under khata No. 169 measuring 0.23 acre and Survey plot No. 152 under khata No. 310 measuring 0.38 acre had been mortgaged in her favour by Gopi Dusadh, father of defendant 5 and Nathuni Dusadh (defendant 6) under a registered mortgage bond dt. 6-1-1928. As the mortgage dues were not paid, a mortgage Suit No. 151 of 1938 was filed on behalf of the plaintiff against Gopi Dusadh and Nathuni Dusadh (defendant 6) and his sons (who are defendants 7 and 8 in the present suit). That suit was decreed *ex parte*. The decree was put in execution giving rise to Execution case No. 620 of 1941. On 4-2-1942 lands which were subject matter of the mortgage were put on auction sale and were purchased by her (the plaintiff). The sale was confirmed. In the mortgage bond as well as in the above said title suit there has been a mistake in mentioning the correct plot number of one of the plots in, dispute inasmuch as instead of plot No. 156 of Khata No. 347 it was mentioned plot No. 159 of Khata No. 343. Similarly, the Khata of plot No. 157 was mentioned as 69 instead of 169. The area of all the three plots was correctly mentioned in the mortgage bond as well as in the plaint of the earlier suit. Delivery of possession, however, was effected on 26-11-1943 upon the plots, in question. Since then she, the plaintiff remained in possession. She executed an usufructuary mortgage bond in favour of defendant 9 on 30-9-1943 in respect of plot Nos. 152 and 156 but possession was given to him after 26-11-1943 and he (defendant 9) continued to be in possession of those plots as mortgagee. On 10-9-1962 defendant 5, son of Gopi Dusadh, executed two sale deeds (Exts.H and H/1) in respect of portions of plot No. 157 in favour of defendants 3 and 4. On 9-10-1966, defendants 5 and 6 executed yet another sale deed (Ext.H/2) in respect of a portion of plot No. 157 and the entire plot Nos. 152 and 156 in favour of defendants 1 and 2. Defendants 1 and 2 raised a dispute claiming under the sale deed executed by defendants 5 and 6 in their favour resulting in a proceeding under Section 144 of the Criminal P. C. This proceeding went against the plaintiff. Defendant 9, as alleged by the plaintiff, in collusion with other defendants refused to deliver possession of the lands mortgaged with him. The plaintiff accordingly filed the instant suit seeking a declaration of her title over the aforesaid 3 plots and confirmation of possession or in the alternative recovery of possession.

3. Defendants 1 to 4 who contested the suit maintained that the mortgage bond of the year 1928 and the suit filed earlier by the plaintiff were collusive. The mortgage bond was never to be acted upon and in fact it was not acted upon. The suit and the *ex parte* decree passed in the suit being collusive no title was acquired by the plaintiff. Their respective vendors were in possession of the lands purchased by them and ever since the execution of the sale deeds they were/are in possession of the lands in dispute.

4. The learned Subordinate Judge who held the trial of the suit, on a consideration of the materials on the record, came to the conclusion that the plaintiff did prove her title and possession and accordingly confirmed the possession of the plaintiff over plot No. 156 of Khata

No. 347 and directed her to deposit the mortgage money in favour of defendant 9 and thereafter to take delivery of possession of the lands mortgaged in favour of defendant 9 on 30-9-1943. On appeal by defendants 1 to 4 which was heard by the learned Second Additional District Judge, Gaya, the judgment and decree of the trial court was reversed. The learned Judge came to the conclusion that as in the mortgage bond of the year 1928, as well as in the plaint of the suit, filed in the year 1930, some different plot number had been mentioned, the plaintiff on the basis of that court sale had not acquired title in respect of the plots which are the subject matter of the present suit. Defendants remained in possession of the plots in dispute. The plaintiff had/has neither title over the said plots nor she was/is in possession thereof. He also held that defendant 9 was not in collusion with defendants 1 to 8 as alleged by the plaintiffs. The appeal was accordingly allowed, judgment and decree of the trial court was set aside and suit of the plaintiff was dismissed by him.

U. C. Sharma, J.

5. (as he then was) heard the appeal and entertained some additional grounds. On 1-4-1980, U.C. Sharma, J referred the appeal to a Division Bench. Nagendra Prasad Singh and S.Ali Ahmad, JJ. who heard the appeal as stated above, have differed in their conclusions. This appeal has accordingly, been placed before me for hearing.

6. Mr. R.S. Chatterjee has raised a preliminary objection that since the points of law upon which the Hon'ble Judges have differed, have not been stated by the Bench, hearing the appeal as required under the proviso to sub-section (2) of Section 98 of the Civil Procedure Code the reference to the third Judge itself is illegal. There is no majority opinion of the Judges reversing the decree of the court below and the same should be deemed to be confirmed. This appeal should accordingly be dismissed. I propose to dispose of this objection first.

7. Section 98 of the Civil Procedure Code after 1978 amendment provides :-

"98. Decision where appeal heard by two or more Judges- (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed:

Provided that where the Bench hearing the appeal is (composed of two or other even number of Judges belonging to a Court consisting of more Judges than those constituting the Bench) and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who heard the appeal, including those who first heard it.

(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court."

Mr. Chatterjee has referred to Rule 2 of Chapter X of the Patna High Court Rules also and

contended that read with the proviso to sub-section 2 of Section 98 of the Civil Procedure Code it is necessary that the Judges composing the Bench should state the point of law or points of law upon which they differ. As there is no such point of law which can be decided by the 3rd Judge so as to constitute a majority of the Judges for the disposal of the appeal according to their views on such point or points of law and as the 3rd Judge is required under the proviso to hear the appeal only on that point or points upon which the Judges constituting the Bench differ it will not be competent for the 3rd Judge to go to the merits of the appeal or to notice the difference of opinion in their respective judgments and decide the appeal on the issues of facts and law other than the point or points of difference of opinion.

8. I would have paused to ponder into the contention of Mr. Chatterjee but for the express language of sub-section (3) of Section 98 of the Civil Procedure Code which unequivocally declares that the provisions under Section 98 of the said Code shall not be deemed to alter or otherwise affect any provision of the Letters Patent of the High Court. The relevant Clause 28 of the Letters Patent of the High Court reads as follows :-

" . and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the Majority of the Judges, if there be a majority, but if the Judges be equally divided, they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the cases including those who first heard it."

It may be seen that the Letter Patent of the Court has not confined the hearing of the appeal by a 3rd Judge on the questions of law upon which the Judges hearing the appeal differ. Such a difference of opinion can be on a question of fact also. That the Judges should record expressly in a joint order what their differences are may be desirable. But there is no imperative prescription that the difference of opinion has to be formulated by a joint order. If such difference or differences is expressly enumerated in a joint order, it may serve better and the 3rd Judge hearing the appeal may not be required to investigate into their respective judgments to discover the difference or differences of opinion. Still absence of a joint order specifying the difference as envisaged under the proviso to sub-section (2) of Section 98 of the Code cannot be taken to vitiate the reference or the hearing of the appeal by a third Judge. This view is supported by a judgment by Lalit Mohan Sharma, J. in *Rulia Devi v. Raghunath Prasad*¹, I am in respectful and complete agreement with the views expressed in Rulia's case and find no substance in the preliminary objection of Mr. Chatterjee in this regard. Mr. Chatterjee's further contention that there being no majority, and the reference being invalid, the judgment and decree of the court below

should be deemed to be confirmed, is also devoid of any merit. Any majority that may conclude the judgment can be noticed only after the disposal of the appeal by the third Judge and not before that. Such a conclusion can be arrived at only if my views do not agree with the views of the Hon'ble Judge taking the view that the judgment and decree should be reversed. The preliminary objection is accordingly disposed of.

9. The main question of law upon which N.P. Singh, J. and S.Ali Ahmad, J. have differed is the

question whether the plaintiff in the instant case, will be required to prove not only title but also her possession within 12 years of the institution of the suit or it will be necessary for the defendants to prove that they had perfected their title by adverse possession irrespective of the title alleged or proved by the plaintiff. In other words N.P. Singh, J. and S.Ali Ahmad, J. have differed on the question as to whether the instant case will be governed by Article 65 of the Limitation Act, 1963 or Article 142 of the Limitation Act, 1908. S. Ali Ahmad, J. has rightly noticed that the new Limitation Act came into force on 1-1-1964 and the suit, in question, was filed in the year 1967. He has, however, referred to the language of Section 31 of the 1963 Act in which it has been stated that nothing provided in the 1963 Act, shall enable any suit, appeal or application to be instituted, preferred or made for which period of limitation prescribed by 1908 Act expired before the commencement of the 1963 Act. Ahmad, J. has thus found that the present suit had become barred prior to the enforcement of the new Limitation Act and whether the period of limitation stood extended under the new Limitation Act or the onus had been shifted to the defendants notwithstanding, the instant suit is not maintainable. On the one hand N.P. Singh, J. has applied Article 63 of the new Limitation Act, although he has not referred to it. S. Ali Ahmad, J. has held that the instant suit had become barred under the then existing law of limitation after the expiry of 12 years of the alleged auction sale when the plaintiff failed to take actual delivery of possession.

10. Both Mr. Ghose, appearing for the appellant and Mr. Chatterjee, appearing for the respondents have taken me through the various provisions of the Limitation Act. While Mr. Ghose has maintained that the view taken by N.P. Singh, J., is valid in law, Mr. Chaterjee has maintained that the view taken by Ali Ahmad, J., is proper and valid. For appreciating the legal position I propose to examine the relevant provisions of the Limitation Act, 1908 and the Limitation Act, 1963. Article 142 of the Limitation Act, 1908, upon which Mr. Chatterjee has placed strong reliance, provides :

"142. For possession of immovable property-when the plaintiff while in possession of the property had been dispossessed or had discontinued the possession - 12 years - the date of the dispossession or its continuance."

The other relevant provision under the said Limitation Act is Article 144 thereof which says:

"144. For possession of immovable or any interest therein not hereby otherwise specially provided for 12 years - when the possession of the defendants becomes adverse to the plaintiff".

Article 65 of the Limitation Act, 1963 which has replaced both Articles 142 and 144 of the 1908 Act runs as follows :

"65. For possession of immovable property or any interest therein based on title - 12 years - when the possession of the defendant becomes adverse to the plaintiff.

Expln. For the purposes of this article -

xx xx xx xx

(c) Where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a

representative of the judgment-debtor who was out of possession."

The instant suit was filed in the year 1967. Apparently, therefore, Article 65 of the 1963 Act was enforced when the suit was instituted and is attracted at once. To exclude, however the application of Article 65 of the 1963 Act. S. Ali Ahmad. J., has referred to Section 31 of the 1963 Act. Section 31 states :

"31. Provisions as to barred or pending suits, etc.,

Nothing in this Act shall:-

(a) enable any suit, appeal or application to be instituted, preferred or made, for which the period of limitation prescribed by the Indian Limitation Act, 1908, expired before the commencement of this Act, or,

(b) affect any suit, appeal or application instituted, preferred or made before, and pending at, such commencement."

Section 31 deals with the case where the period of limitation prescribed by the 1963 Act is longer than the one under the Act of 1908. If the suit, appeal or application is already barred by limitation at the time of coming into force of the 1963 Act, the provision of a longer period under it will not revive the expired cause of action. But if the suit or application is not barred at the commencement of the Act the party will be entitled to the longer period of limitation prescribed by it. In *Rama Shah v. Lal Chand*², The privy council and in *Baleshwar Prasad v. Latafat Karim*³, and *Jagdish Prasad Singh v. Saligram Lal*⁴, this Court has held that the law of limitation being a law of procedure, is retrospective in operation but the law of limitation which governs an action is the law which prevails on the date when the suit is instituted or when the appeal or application is filed. Under Section 3 of the Limitation Act of 1963 or under the same section of Limitation Act, 1908, every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. In other words if the remedy was barred by the expiry of period of limitation prescribed under the old Act a larger period prescribed under the new Act will not revive the remedy which was barred. But subject to that, if the filing of the suit, appeal or application is not barred under the new Act on the day it is filed, it is simply not barred. If, however, it is barred on the day when it is filed under Section 3 of the new Act but it was not so barred under the period of limitation prescribed by the Limitation Act of 1908, then Section 30 comes into play in order to

find out as to whether, it can be held that the suit, appeal or application filed on a particular day is not barred by limitation. It is difficult, however, to read in the words of Section 31 of the 1963 Act that it shall import principles or doctrines which were applied in terms of some of the provisions of the Limitation Act of 1908, except the prescriptions as to the period of limitation whether a suit is barred by limitation or not is determined with reference to the pleadings. Omission of the words, "When the plaintiff while in possession of the property had been dispossessed or had discontinued the possession", which were in Article 142 of the old Act from Article 65 of the new Act and instead the use of the expressions, "or interest therein based on title" and omission of the words "the date of the dispossession or its continuance" and its replacement by the words "when the possession of the defendant becomes adverse to the plaintiff" are significant. In the case of *Ram Swaroop Singh v. Badri Narain Singh*⁵, a Division Bench has held that unlike the cases falling under Section 142 of the old Limitation Act, in a case

falling under Section 65 of the 1963 Act, the plaintiff is required only to prove title and thereby shifting the onus on the defendants to establish adverse possession. Under Article 142 of the old Act the plaintiff was required to prove title as well as possession within 12 years of the institution of the suit whereas under Article 65 of the new Act the plaintiff is required to prove only title. If the defendant wants to rely upon his 12 years' possession to defeat the plaintiff's title, he is required to plead so and prove by cogent evidence. The law of limitation of instituting a suit within 12 years when the possession of the defendant becomes adverse to the plaintiff, is almost the same as it was under the 1908 Act. The difference, however, lies in its application inasmuch as under the old Limitation Act plaintiff could not succeed without showing that he had been in possession within 12 years of the institution of the suit. In my considered view, Section 31 of the Limitation Act, 1963, is not applicable in a case where a suit is instituted for possession of immovable property based on title alleging that the defendant has interfered with his possession any time within 12 years of the filing of the suit.

Only because onus now lies upon the defendant to prove adverse possession for more than 12 years in place of the onus upon the plaintiff to prove possession within 12 years of the filing of the suit and/or dispossession within 12 years by the defendant, the old Limitation Act cannot be revived.

11. Adverting to the facts of this case it is noticeable that the plaintiff has claimed title by virtue of the auction purchase, confirmation of sale and delivery of possession of the suit property and alleged that she has been in possession either personally or through the mortgagee and the cause to file the suit arose when the defendants 5 and 6 started executing sale deeds in favour of each other and the defendant 9 refused to deliver possession of the land mortgaged with him. All these hostile acts are well within 12 years of the institution of the suit. The plea that the plaintiff never came in possession is that of the defendants. I am in agreement with the view taken by N.P. Singh, J. that the finding recorded by the Court of appeal below on the question of title of the plaintiff is not in accordance with law and that even the finding on the question of possession has been vitiated because the Court of appeal below while reversing the finding of possession of the trial Court has not considered the different circumstances and the materials, referred to by the trial Court. I am also in agreement with the view that the present suit having been filed after the new Limitation Act

came into force, once it is held that the finding on title recorded by the Court of appeal below is not in accordance with law, the judgment of the Court of appeal below has to be set aside and the case should be remitted back for a fresh finding on the question of title and to consider whether the defendants have perfected their title by adverse possession or not.

12. Ali Ahmad, J., has taken the view that the plaintiff never came in possession of the suit land recorded by the Court of appeal below, is a pure finding of fact. This conclusion has furnished the basis for his holding that the plaintiff was already out of possession for more than 12 years prior to the enforcement of the new Limitation Act. This approach, however, has got intrinsic infirmity. The trial Court has found that the plaintiff did prove her title and subsisting possession but the Court of appeal below has reversed the said finding primarily on the ground that in the mortgage deed of the year 1928 as well as in the plaint of the suit filed in the year 1928 some different plot Nos. had been mentioned and as such the plaintiff on the basis of the Court sale had not acquired title upon the plots in question. But the identity of the lands are not in doubt N.P. Singh, J., has found that in the earlier suit of the year 1938 out of the three plots, number of one of them was wrongly mentioned but the area and khata Nos. were correct. The mistake in

mentioning plot No. 159 instead of plot No. 156 has been specifically alleged in the plaint. This plea that the subject matter of the instant suit and the subject matter of the mortgage deed of the year 1982 as also the subject matter of the suit of the year 1938 are the same, was never challenged by the contesting defendants either in the written statement or during the trial. Their primary defense is that the mortgage, the earlier suit and the decree and Court sale were all collusive. The Court of appeal below travelled beyond the pleadings and committed an apparent error of record in holding that the lands for which auction sale and delivery of possession were held and taken were different from the lands in dispute.

13. It is an admitted position that the vendors of the contesting defendants were party to the earlier suit. No application for setting aside the *ex parte* decree was filed by them or any other person claiming through them. I doubt if the contesting defendants can collaterally challenge the validity of the mortgage deed, the *ex parte* decree, the auction sale and the delivery of possession, I am in respectful agreement with the view expressed by N.P. Singh, J., in this regard that the Court of appeal below should have considered the question as to whether it was open to the defendants to challenge the validity of the judgment and decree of the earlier suit on the ground that it was collusive in nature and if the Court of appeal below was of the view that they are entitled to do so, it had to consider the materials on record for the purposes of recording categorical finding in this regard.

14. N.P. Singh, J., has proposed to remit the case back for reconsideration of the materials on record in accordance with law. It seems he has refrained from making any observation on the evidence on record for this reason. S. Ali Ahmad, J., has, however, briefly discussed some evidence and upon that opined that the materials brought to his notice are not such upon which it can be said that the Court of appeal below has taken an erroneous view. Consideration of evidence to accord sanctity to the findings of the Court of appeal below by the second appellate Court will be dangerous and, therefore, I shall also not like to comment upon the evidence. Once the legal possession is accepted that the plaintiff is required to establish her title to shift the onus to prove the factum of adverse possession upon the defendants, the entire approach of consideration of evidence shall change. Both Mr. Ghose and Mr. Chatterjee have addressed me at length with reference to the evidence on record, principles to be followed in appreciating the evidence and invited me to dilate into the question as to whether defendants had proved their title by adverse possession. But I prefer to refrain than commit as I see wisdom in remanding the case for a fresh consideration of the materials on the record in accordance with law.

15. Since I am in agreement with the view taken by N.P. Singh, J., I record my respectful disagreement with the view expressed by S. Ali Ahmad, J. This appeal has to succeed.

16. In the result this appeal is allowed. The judgment and decree passed by the Court of appeal below is set aside and the case is remanded back to the Court of appeal below to be heard afresh in accordance with law in the light of the observations made above and the observations made in the judgment of N.P. Singh, J. There shall be no order as to costs.
Appeal allowed.

Cases Referred.

¹1999 BBCJ (HC) 49

²AIR 1940 PC 63

³ AIR 1945 Pat 368

⁴ AIR 1946 Pat 60

⁵1982 BBCJ (HC) 320