

(1983) 02 PAT CK 0033

In the Patna High Court

Case No : Appeal From Appellate Decree No. 70 of 1977 (R)

Bhagirath Sharma and Others

APPELLANT

Vs

Jiblal Prasad and Others

RESPONDENT

Date of Decision : 21-02-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 47
Criminal Procedure Code, 1973 (CrPC) — Section 144
Evidence Act, 1872 — Section 116
Transfer of Property Act, 1882 — Section 106, 108

Citation : (1983) 31 BLJR 476

Hon'ble Judges : Satyeshwar Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Satyeshwar Roy, J.—Plaintiff No. 1 is appellate No. 1. The suit was filed for declaration of his title for confirmation of his possession. Further the plaintiffs prayed for a decree that the respondent Nos. 1 to 5 had forfeited their right to continue as lessee of the suit property. Prayer was also made for permanent injunction restraining respondent Nos. 1 to 5 from ejecting appellant No. 1 and realising any rent from him. The respondent Nos. 2 to 8 were made plaintiffs but no relief was prayed on their behalf.

2. The trial Court, on the basis of the evidence led by the parties, decreed the suit. Respondent Nos. 1 to 5 filed an appeal before the Court below. The Court below allowed the same and dismissed the suit.

3. The admitted facts are that Khata No. 21 plot No. 6/648, total area measuring 0.82, acres was recorded in the survey in the name of Nazir Ali Nazir Ali made various transfers of different areas of this plot to different persons. According to the plaint, Balgovind Singh took six kathas of land out of this plot in the name of SaloTurin. However the trial Court has found that the settlement was taken by Salo Turin. Facts which are not disputed are that on 10-10-1928 Salo Turin had

transferred her interest to Matnta Prasad. On 25-4-1932 Kampta Prasad sold his interest to Bibi Kadiran. On 5-1-1946 Bibi Kadiran sold her interest to Bassantilal Halwai. On 5-1-1953 Basantilal Halwai transferred his interest to his wife Parvati Devi. On 2-5-1953 there was a proceeding u/s 144 of the Code of Criminal Procedure between Basantilal Halwai and the descendants of Nazir Ali with regard to the suit properties which was ultimately dropped. On 1-4-1961 Parvati Devi leased out the suit properties to appellant No. 1 on monthly rent of Rs. 10. On 14-4-1961 appellant No. 1 complained to Parvati Devi that she had not put him in possession of the properties. Parvati Devi assured that he would be put in possession but the rent was enhanced to Rs. 30. On 29-11-1961 Parvati Devi issued a notice terminating the tenancy of appellant No. 1. When appellant No. 1 did not vacate the property she filed a suit for his eviction which was registered as title suit No. 51 of 1962 in the Court of Munsif Giridih. Immediately after the notice 29-11-1962 by which Parvati Devi had terminated the tenancy to appellant and the descendants of Nazir Ali, namely, Sarfuddin and others sold suit land to appellant on 2-12-1961. On 20-3-1962 Parvati filed the title suit in Court of Munsif, Giridih, for the eviction of appellant No. 1, The suit was decreed by the trial Court. Appellant No. 1 filed an appeal challenging the decree of the trial Court, but the same was dismissed. The appeal filed by appellant No. 1 in this Court was also dismissed. However, in that suit, the trial Court and the appellate Court held that the question of paramount title to the suit property by the heirs of Nazir Ali was not before the Court in that suit. The High Court confirmed that finding of the trial Court as well as of the appellate Court. It may be mentioned that in that suit, appellant No. 1 claimed his title by virtue of the transfer made by the defendants of Nazir Ali to him on 2-12-1961 but as the heirs of Nazir Ali were not party to that suit, the Court did not go into the question of paramount title as stated in the judgments of the trial Court, appellate Court and also the High Court in that suit.

4. Learned Counsel appearing on behalf of appellant No. 1 Mr. S.B. Sinha, challenged the correctness of the finding of the Court below that in view of Section 116 of the evidence act appellant No. 1 who had held to be tenant of Parvati Devi, the legal representatives of whom, are now before this Court, cannot claim title to himself unless he restored the possession of the property to the lessor. He also contended that the finding earlier suit which has merged in the judgment and decree of this Court passed on S. A. 459 of 1968, cannot separate as res judicata. It was also urged that Parvati Devi stepped into the shoes to Salo Turin and she being a lessee of Nazir Ali. Parvati Devi cannot claim a title better than Salo Turin. Appellant No. 1 having purchased the right title and interest of Nazir Ali, the respondent Nos. 1 to 5 were estopped from challenging his title.

5. Admittedly the property belonged to Nazir Ali and Salo Turin was inducted on the property of Nazir Ali. The defence was that the induction of Salo Turin was by a Hukumnama, but the same being unregistered was not permissible in evidence. It was contended on behalf of the appellant that in the absence of any registered

instrument,, Salo Turin should be deemed to be a tenant from month to month and as Parvati Devi was claiming through Salo Turin, she was also a tenant from month to month in respect of the suit property. In reply it was contended on behalf of respondent Nos. 1 to 5 by Mr. N.K. Prasad that a lease shall be decided to be lease from month to month only in absence of contract or local law or usage to the contrary and no inference can be drawn that a lease is from month to month. u/s 106 of the Transfer of Property Act (in short" the I.P. Act). A lease of immovable property other than for agricultural or manufacturing purposes, shall, in absence of a contractor or local law or usage to the contrary, be deemed to be a lease from month to month. No evidence had been brought on the record by respondent Nos. 1 to 5 regarding the terms of contract on the basis of which Nazir Ali gave on lease the property to Salo Turin neither any local law any usage to the contrary has been pleaded or proved by respondents 1 to 5 to show that the lease of Sole Turin should not be deemed to be a lease from month to month. In such a situation it must be held that the lease of Salso Turin which ultimately devolved on Parvati Devi was a lease from month to month.

6. The Court below has, however, found that although Basantilal Halwai had paid the rent to the descendants of Nazir Ali his transferee, namely Parvati Devi, never paid any rent to the descendants of Nazir Ali after the property was transferred by Basantilal Halwai to Parvati Devi, The sale-deed dated 5-1-1953 by which Basantilal Halwai transferred his interest to Parvati Devi is Ext. 3/2. The Court below had held that though from 5-1-1953 Parvati Devi began prescribing against the descendants of Nazir Ali., as appellant No. 1 was claiming the rough them, she was entitled to tag the period of her adverse possession before the property was transferred by descendants of Nazir Ali to appellate No. 1 and 2-12-1961. The present suit was filed on 15-12-1971. If the period from 5-1-1953 to 15-12-1971 is calculated, certainly the suit was filed much more than 12 years beyond the date when Basantilal Halwai transferred his interest to Parvati Devi. The question is whether the non-payment of rent by Parvati Devi to the descendants of Nazir Ali will amount to adverse possession by her.

7. Section 108(j) of the T.P. Act provides that in the absence of a contract or local usage to the contrary, the lessee may transfer absolutely his interest in the lease hold property, but the lessee shall not by reason only of such transfer cease to be subject of any of the liabilities attaching to the lease. In this case we are not concerned with the latter part of Section 108(j). Which I have not noticed neither any contract or any local usage had been brought on the record to show that the lessee had no right to transfer absolutely his right in the property. The suit was filed against Parvati Devi and Basantilal Halwai as defendants. The transfer by the original lessor Salo Turin or the Transfer by the transferees from Salo Turin was not void in the eye of law. That being the position, the lessor, who had let out the property to Basantilal Halwai, was entitled to sue for evidence of Parvati Devi.

8. There is no dispute that Basantilal Halwai paid rent to his lessor, but Parvati

Devi did not. In the suit both of them were partner. The transfer of his interest by Basantlal Halwai to Parvati Devi being not void, Basantlal Halwai and persons claiming through him shall be liable to all the liabilities attaching to the lease one such liability was that the lessee could be evicted. It appears that during the pendency of the suit, Parvati Devi died and during the pendency of the appeal in the Court below, Basantlal Halwai died. Their legal representatives are respondent Nos. 1 to 5. In view of Section 108(J) of the T.P. Act and in view of Section 116 of the Evidence Act, in my opinion, the lessor was entitled to file a suit for eviction against Basantlal Halwai and his transferee, Parvati Devi.

9. The trial Court has found that by virtue of Ext. 5 appellant No. 1 had acquired valid and good title in the suit property. The Court below has found that the descendants of Nazir Ali, the vendors mentioned in Ext. 5. We are never in possession for the suit property and by remaining in adverse possession for more than 12 years. Parvati Devi had perfected her title before the suit was filed by appellant No. 1. The Court below has further held that in view of Section 116 of the Evidence Act appellant No. 1 was not entitled to get a decree unless he restored possession of the property to his lessor respondent Nos. 1 to 5. Learned Counsel appearing on behalf of the appellant has challenged their findings of the Court below. It was contended that Parvati Devi was claiming through Salo Turin, the lessee of Nazir Ali. Parvati could not have claimed title to herself by adverse possession unless she restored the property to the lessor. Learned Counsel appearing on behalf of respondent Nos. 1 to 5 when added by me fairly conceded the descendants of Nazir Ali had a right to transfer their interest, to appellant No. 1 proved their interest was then subsisting. Basantlal never claimed nor could have claimed adversely to his lessor, That being the position, he could not set up somebody, in this case Parvati Devi, to claim adversely to the lessor. The possession of Basantlal Halwai and the persons claiming through him cannot be treated to be adverse to the title of the lessor. That being the position, the descendants of Nazir Ali never lost their title and they had right to transfer their right, title and interest to appellant No. 1 by Ext. 5.

10. A question was raised in this appeal on behalf of respondents 1 to 5 regarding the maintainability of the suit in view of the provisions of Section 47 of the CPC (in short "the CPC"). It was contended that in effect the prayer of appellant No. 1 is regarding the executability of the decree passed in the earlier suit. The submission was that appellant No. 1 by virtue of Ext. 5 claimed to acquire superior title to the property and, therefore, respondent Nos. 1 to 5, who are the decree holders in the earlier suits, cannot now execute the decree. In view of the fact that Section 47 of CPC specifically provides that all question arising between the parties to the suit relating to the executability of the decree of the earlier suit shall be determined by the executing Court and by a separate suit, this suit was not maintainable. There is no dispute that respondent Nos. 1 to 5 obtained a decree in the earlier suit and the execution could have been filed u/s 47 of CPC by appellant as all the parties of this suit were not parties in that suit. Admittedly, in the earlier suit appellants 2 to 8 were not parties. They were

the rightful owner of the property and the lessee of Basantilal Halwai. They were neither, as proper nor necessary parties in that suit because the suit was by a lessee fore fiction of her tenant and whether the appellant Nos. 2 to 8 has superior title than the lessor of that suit, the Courts were not required to decide that question in that suit. In that suit it was clearly stated that a question of paramount title was left open (the words "Paramount title" perhaps was loosely used in the judgment of that suit in place of superior title. That being the position, in my opinion, Section 47 of the CPC was no bar of this suit.

11. Mr. Sinha submitted that this suit was not barred by the principles of res-judicata, Mr. N.K. Prasad submitted that the Court below has not held that the suit was barred by the principles of res judicata, but it has held that the judgment of earlier suit was a bar to the appellant No. 1 for claiming possession over the suit land in any manner. According to him, the Court below has held that appellant Nos. 1 to 5. From the plain reading of the language used by the Court below, to mind, it held that the decision of the earlier suit was a bar to the maintainability of the present suit in view of Section 11 of the CPC It was submitted on behalf of appellant that the earlier decision cannot be held as res judicata in this suit and the finding of Court below cannot be sustained.

12. The earlier suit was be a lessor to evict the tenant. That lessor was a lessee in relation to another person. That another person, i. e" the person holding superior title has filed the present suit. The issue in this suit could not have been an issue either directly or substantially in the earlier suit. Section 11 of the CPC has, therefore, no application to this case. In view of these findings, it must be held that appellant No. 1 acquired the title of Nazir Ali and was entitled to file suit for eviction of the persons claiming through Salo Turin including the descendants of Basantilal Halwai and Parvati Devi.

13. Mr. N.K. Prasad submitted that if respondent Nos. 1 to 5 are held to be tenants of the descendants of Nazir Ali namely, appellant Nos. 2 to 8, whose interest the appellant No. 1 has purchased, no decree for eviction of respondent Nos. 1 to 5 can be passed as there was no cause of action for the filing of the suit. According to Mr. N.K. Prasad, appellant No. I was bound to give a notice u/s 106 of the T.P. Act, terminating the tenancy of respondent Nos. 4 to 5 and that having been not done, no decree for eviction can be passed against those respondents. It was contended that in the relief portion, appellant No. 1 has prayed for a declaration that respondent Nos. 1 to 5 have no right, whatsoever, over the suit land. That being the position, it was urged that as no notice u/s 106 of the T.P. Act was given, there was no cause of action for filing the suit

14. It is true that there is no averment in the plaint that notice as contemplated u/s 106 of the T.P. Act was given on behalf of appellant No. 1. From the averments made in the plaint, it appears that appellant No. 1 prayed for the relief on the ground that by their conduct the respondent Nos. I to 5 forfeited the tenancy and they have now no right over the suit property. In my opinion, it the suit is filed on the ground of forfeiture of tenancy, no notice determining the

tenancy as provided u/s 106 of the T.P. Act will be required to be given. That being the position, non-service of notice u/s 106 of the T.P. Act was not fatal for the filing of the Suit. The suit, therefore, was maintainable.

15. in the result, the appeal is allowed with costs, assessed at Rs. 300.