

(1948) 05 PRI CK 0001

In the Privy Council

Case No : Privy Council Appeal No. 19 of 1947

Bhan Kumar Chand and another

APPELLANT

Vs

Mohan Lal and others

RESPONDENT

Date of Decision : 11-05-1948

Acts Referred:

Citation : (1948) AIR(PC) 180

Hon'ble Judges : Madhavan Nair, Lord Morton of Henryton, Lord Simonds, JJ.

Advocate : Hy S.L. Polak and Co., Douglas Grant and Co., Dingal Foot, A.G.P. Pullan, for the Appearing Parties.

Judgement

Sir Madhavan Nair, J.

The appeal arises out of proceedings in execution of the decree in Suit No. 177 of 1924 (remanded), made by the Subordinate Judge of Arrah on 17 - 5 - 1930, which was modified by the High Court of Judicature at Patna in P. A. No. 130/1930, on 9 - 1 - 1935.

2 The order of the High Court in pursuance of which execution proceedings had been taken runs as follows:

"In the execution there must be an enquiry as to the respective areas of Balbhadarpur and Darihat as they existed at the time of the defendant's mortgages irrespective of the cadastral survey."

3 The order now appealed against was passed by the High Court on 29 - 1 - 1944, setting aside the order in execution proceedings of the Additional Subordinate Judge of Arrah dated 18 - 11 - 1942, passed in pursuance of the High Court's order in F. A. No. 130/1930 (quoted above), and dismissing the said execution proceedings.

4 The question for decision in this appeal is whether the appellants (decree - holders) are entitled to get in execution proceedings an order for possession of the village Darihat which had been decreed to them, the boundaries and area of

which cannot be ascertained and which they are unable to identify.

5 To appreciate the arguments, the facts and circumstances which led to the passing of the High Court's order in P. A. 130/1930 must first be mentioned. These are as follows :

"Jamalpur, Tajpur, Darihat and Balbbadarpur were four villages of the mahal Balbhadarapur, also known as Balbhadrpur Darihat, which consisted of 15 villages. The mahal belonged to two brothers. A village called Arjunbigba had been constituted out of portions of Jamalpur, Tajpur and Darihat.

On 15 - 7 - 1889, a usufructuary mortgage had been executed by the mortgagors in respect of the village Arjunbigba in favour of the respondents" (judgment debtors") predecessors - in - interest. On the next day a simple mortgage was executed in their favour in respect of village Balbhadrpur."

6 At the time of the above mortgages, a partition was proceeding in respect of the whole mahal, by which the mahal was divided into two estates and each brother was given one estate. In spite of this partition the two brothers executed on 10 - 2 - 1896, a simple mortgage of the entire mahal in favour of the appellants" predecessor - in - interest.

7 Soon after the execution of mortgages litigation began. The predecessors - in - interest of the parties to this appeal instituted suits on their respective mortgages and obtained decrees which were ultimately confirmed by the Privy Council: see 22 CWN 505.1 Both decree - holders took out execution of their respective decrees and purchased the mortgaged properties. Though the appellants purported to purchase the entire mahal, it is clear that they had no title to that part of it which consisted of the villages of Arjunbigba and Balbhadarapur, in respect of which title vested in the respondents.

8 The respondents having been put in possession of both Balbhadarapur and Arjunbigba, proceedings were taken in the Land Registration Court by the appellants but they were resisted by the respondents who had forestalled them in the matter of registration; whereupon the appellants instituted Suit No. 177 for possession of some of the villages in mahal Balbhadarapur excluding the principal village Balbhadarapur. The respondents (defendants to that suit) contended that by the year 1889 when they had taken their mortgages Balbhadarapur had become enlarged by the inclusion in it of the three villages Jamalpur, Tajpur and Darihat and the villages had lost their identity. Ultimately, the appellants were given a decree for the villages of Jamalpur, Tajpur and Darihat.

9 In FA No. 130/1930, the above decree was modified and the plaintiffs in the suit now represented by the appellants were given a decree only for Darihat. It was found as a fact that by the year 1889, when the mortgages had been executed, Balbhadarapur had become enlarged by the merger in it of the three

villages Jamalpur, Tajpur and Darihat. The learned Judges (Wort and Varma JJ.) held that the plaintiffs are entitled to

"a portion of those villages, the portion which by the usufructuary mortgage deed was described as Darihat, the defendants being entitled under the zarpeshgi to that portion called Arjunbigha and to that portion known as Balbhadarapur under the simple mortgage." The area of the village Arjunbigha was definitely known as 464 bighas. The area of Balbhadarapur was not clear from, the record. It was for these reasons that the learned Judge ordered that the respective areas of Darihat and Balbhadarapur should be inquired into in execution, so that the village of Darihat might be given to the appellants.

10 Their Lordships have narrated above the circumstances which led to the decretal order passed by the Court in P. A. No. 130 of 1930. As already stated, the orders, passed by the Courts in India in execution of this order form the subject - matter of the present appeal.

11 The appellants took out execution twice. Though their Lordships are concerned only with the proceedings that took place in connection with the second execution, it will be useful to make a brief reference to the proceedings in the first execution. The judgment - debtors (respondents) objected to the proceedings, stating that the particulars of the land which the appellants desired to be given to them had not been furnished, and that it was not the business of the respondents to identify the village in question. In response to the interrogatories served on them the appellants gave the description of the entire mahal and alleged that they should be given the possession of the entire mahal after deducting from it the area of Arjunbigha, and also the area of Balbhadarapur. It was obvious that this statement was not specific enough for the execution to be proceeded with, and as further particulars asked for were not supplied, the petition was dismissed. On appeal, the dismissal was confirmed by Wort and Rowland, JJ., Wort, J., observing that it was the duty of the appellants "to supply a description of the property sufficient to identify it discarding the name of Darihat. . ."

12 Soon after, the appellants made the second application for execution stating that the entire area of the mahal was 2039 bighas, of which 223 bighas was the area of Balbhadarapur proper, and that the rest of the area appertained to Darihat. The Subordinate Judge held that there was no reliable evidence to support this assertion. He disbelieved the oral evidence of the appellants' witnesses, and the report of the Commissioner who had not been appointed by the Court, relied on by the appellants. It may be stated here that this body of evidence was disbelieved by the High Court also, and has not been pressed before the Board. In the circumstances the Subordinate Judge observed as follows :

".....It is not only difficult but rather an impossible task to ascertain the respective areas of Balbhadarapur and Darihat as they existed in 1889 with

precision and accuracy. So I have chalked out another means of determining their respective areas though the same has to be based on surmises."

13 Working on the basis of the figures given in the papers of the decennial settlement of 1790, he decreed that the appellants should get joint possession of the area in the proportion of 1019/2089 bighas in touzi No. 7062 which they might get partitioned subsequently. This amounted to passing a fresh decree for joint possession which the executing Court was obviously not competent to do.

14 On appeal by the present respondents, the above decision was set aside as "entirely conjectural". It was urged before the High Court that the burden lay on the respondents- the judgment - debtors- to show which plots constituted their village Balbhadarpur or village Arjunbigha, and that the decree - holders were entitled to all the rest of the lands as theirs as forming part of the village Darihat. This contention was rightly rejected by the learned Judges. They stated that the position of both parties was the same and neither party was able to identify its respective area. To the question who should fail in such circumstances, they gave the answer-the party on whom the onus lies must fail. Sinha J., with whom Beevor J., concurred, gave the following explanation of the difficulty experienced by the parties in identifying their respective areas :

"It appears to me on a review of all the circumstances of the case that before the judgment - debtors took their mortgages aforesaid the lands of the villages Balbhadarpur, Jamalpur, Tajpur, Darihat - Mirzapur - Sultan, as also the newly formed village Arjunbigha, had got so inextricably mixed together that after the lapse of more than half a century, it is impossible to find out with reference to any contemporaneous records, as to what lands constituted village Balbhadarpur proper, or Village Darihat proper."

15 In the result, the appeal was allowed and the application for execution was dismissed.

16. In view of the findings of fact arrived at by the Courts in India, which their Lordships accept, they are unable to give a judicial decision in favour of the appellants. The burden of

Mr. Pullan's argument was that the respondents are in possession of lands to which they are not legally entitled. This may be so, but learned counsel has not been able to prove the area or the identity of the village which he claims in the execution proceedings. The truth of the matter is that by the time the mortgages of the year 1689 were taken, the areas of the three villages and Balbhadarpur had got so mixed up that it is now impossible to say exactly which was the village Balbhadarpur and which the village Darihat at that time. The various learned Judges who have dealt with the question are in complete agreement on this point, and their Lordships after going through the records are not in a position to differ from their opinion. In the circumstances there is no alternative hut to dismiss this appeal. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.