
(1959) 01 PAT CK 0016
In the Patna High Court
Case No : A.F.A.D. No. 1329 of 1954

Brijnandan Roy and Others	Vs	APPELLANT
Jadunandan Singh and Others		RESPONDENT

Date of Decision : 21-01-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, Order 41 Rule 24, Order 41 Rule 25, 100, 151

Citation : AIR 1960 Patna 41

Hon'ble Judges : S.C. Prasad, J

Bench : Single Bench

Advocate : Ashwini Kumar Sinha, for the Appellant; M.P. Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.C. Prasad, J.—By an order dated 2-5-1958, this Court had remanded the case to the lower appellate Court to record its finding on issue No. 3 framed by the learned Munsif in this case. The learned Subordinate Judge has submitted his finding that the entire story of possession and dispossession as alleged by the plaintiff was incorrect and, therefore, he had failed to prove that he was in possession of the land within 12 years of the suit and had, therefore, no subsisting title to it.

2. The suit was for declaration of title to and recovery of possession of 17 kathas 12 1/2 dhurs of land of survey plot No. 1341 situated in village Bishunpur Ratwara. There were other reliefs with which I am not concerned in this appeal. The plaintiff's case was that defendants 1st party were co-sharer proprietors of Tauzi No. 10747. In this tauzi one Lila Mandal had raiyati Kasht lands about 1 bigha 11 kathas and odd dhurs contiguous south of which one Zulum Roy had 7 kathas of raiyati land but in the survey record of rights, finally published in the year 1897, the area of plot No. 1341 was recorded at 11 kathas 18 dhurs; though its correct area was 1 bigha 11 kathas 5 dhurs. Corresponding mistake

appeared to have been committed in respect of the area of survey plot No. 1342 which had been recorded as 1 bigha 6 kathas 7 dhurs instead of 7 kathas.

In spite of these mistakes it was alleged that Lila Mandal and Zulum Roy had continued to remain in possession of the actual areas of the plots in question. In 1901 these two plots, 1341 and 1342 were allotted to the putti of Ramraji Roy, father of defendants 1 and 2, by a Collectorate partition. There had been an objection on behalf of Lila Mandal about the mistakes in respect of the areas with regard to the aforesaid two plots during the batwara proceedings and on admission of Zulum Roy that objection had been decided in favour of Lila Mandal and the areas of these two plots had been corrected. Lila Mandal died leaving behind three sons, Chuni, Abilash and Malahu, who separated and partitioned their lands privately, each of them getting one third share out of 1 bigha 11 kathas 5 dhurs of land of survey plot No. 1341. Chuni died leaving behind a widow, Musammat Kanchania and daughter of Pilua.

Musammat Pilua died leaving a daughter, Musammat Sukalia, married at Madhuban. Musammat Kanchania also died later on, Abilash, one of the sons of Lila, died leaving one daughter and no sons Bela Mandal was the daughter's son of Abilash. The third son of Lila, Malahu, has his great grandson Rambilash alive. Musammat Kanchania and Musammat Sukhalia, the widow and the grand daughter of Chuni, the first son of Lila, sold 10 kathas 12 1/2 dhurs of land of plot No. 1341 and another land of village Madhuban to the plaintiff by a registered sale deed dated 24-3-1945 putting the plaintiff in possession of the land. One Bhuneshwar, one of the grandsons of Malahu, the third son of Lila, and the widow of Tapeswar, his second grandson, named Musammat Manubati for self and as guardian of Rambilash, great grandson of Lila, sold 7 kathas of land of survey plot No. 1341 to the plaintiff by a registered sale deed dated 21-7-1945 and put him in possession.

It was further alleged, by the plaintiff that by mistake although the plaintiff had purchased the lands of plot No. 1341 only, but the other plot 1342 came also to be mentioned in the above two sale deeds. Defendant No. 1, purchased 4 kathas of land from the daughter-in-law of Malahu, Musammat Manubati in the name of his son, defendant No. 3. In this sale deed also, it was alleged by the plaintiff, by mistake plot No. 1342 was entered. The further case of the plaintiff was that subsequently defendants 1 and 2 had taken a collusive sale deed from Zulum Roy, defendant No. 18, in respect of 19 kathas 2 dhurs reciting that this was the area of plot No. 1342, but according to the plaintiff they never came in possession of this land. As regards another registered kebala dated 4-8-1944, executed by Bela Mandal, grandson of Abhilash, son of Lila, in respect of 10 kathas 19 1/4 dhurs, of survey plot No. 1341, the plaintiff's case was that defendants 1 and 2 had taken this sale deed in the names of their relations, defendants 10 and 11, but actually Belli was entitled to and in possession of one third share which came to 10 kathas 8 1/4 dhurs and in this sale deed also plot No. 1342 had wrongly been mentioned.

Defendants 1 and 2 were alleged to have taken another sale deed dated 16-9-1949 from Zulum Roy in the name of defendant No. 3 for 7 1/4 kathas of land of plot No. 1342. The cause of action for the suit, as alleged by the plaintiff, was that the defendants 1st party had on the basis of these sale deeds, dispossessed him on the 15th Baisakh, 1357 Fasli from 17 kathas 12 1/2 dhurs of land of survey plot No. 1341, which the plaintiff had purchased from the "heirs of Lila Mandal by virtue of the two sale deeds dated 24-3-1945 and 21-7-1945.

3. The suit was mainly contested by defendants 1 to 5 of the first party. Their case was that Zulum Roy was in possession of 1 bigha 6 kathas 7 dhurs of land and Lila Mandal was in possession of 11 kathas 18 dhurs of land and the survey authorities had correctly prepared the record of rights. The allegation that Zulum had admitted the title and possession of Lila in the Batwara proceeding was denied and it was alleged by the defendants that the areas mentioned in the Batwara proceedings contrary to the areas mentioned in the khatian, were not "binding on them and they asserted that in spite of these wrong entries, Lila and Zulum had continued to be in possession as before according to the entries of the record of rights. They also denied the allegations made by the plaintiff that the defendants 2nd party were their relations and maintained that defendants 2nd party had themselves purchased certain lands on their own account and were in possession of those lands.

4. The learned Munsif found that the plaintiff had failed to rebut the presumption attached to the survey entries and that it was Zulum who was in possession of 1 bigha 6 kathas 7 dhurs of land of plot No. 1342 and Lila was in possession of only 11 kathas 18 dhurs as entered in the survey record of rights at the time when those records were prepared .

5. On the point of possession, the learned Munsif disbelieved the evidence of the plaintiff and held that he was not in possession of the land and that it was Zulum who was in possession of 1 bigha 6 kathas 7 dhurs and had title to it and that Lila was in possession of 11 kathas 18 dhurs only and was owner of that area of land only. He further found that the plaintiff had acquired no title to plot No. .1342 and his story of possession and dispossession was entirely incorrect. Accordingly the learned Munsif dismissed the suit.

6. The learned Subordinate Judge, who heard the appeal, held that the presumption of correctness attached to the record of rights had been rebutted by the subsequent Batwara proceedings and, therefore, in his opinion, in 1901 Lila was in possession of plot No. 1341 with an area of 1 bigha 11 kathas 4 dhurs and Zulum Rai was in possession of plot No. 1342 measuring 7 kathas. He further observed :

"It having been established that the parties are bound by the batwara barawarda and the batwara proceedings which were carried on in their presence, Julura Rai cannot claim that the area of plot No. 1342 is more than 7 kathas and that being so, if he transfers 19 kathas 2 dhurs by means of Ext. A1-II that will not confer a

valid title on the purchasers as the former had no title himself over more than 7 kathas of land in plot No. 1342."

Further on, the learned Subordinate Judge has observed taking all facts and circumstances into consideration :

"I have no doubt in my mind that the heirs of Lila have dealt with the plot No. 1341 as having an area of 1 bigha 11 1/4 kathas and the defendants also are a party to that."

Thereafter the learned Subordinate Judge proceeded to consider the validity of Exhibit 5, the kebala in favour of the plaintiff and recorded the finding that he did not agree with the finding of the learned Munsif, and held that this document was invalid. After that he proceeded to consider the rent receipts produced by the defendants to prove their possession and found that they were not reliable, and observed as follows :

"Taking all the documentary and oral evidence on record and having considered them with the circumstances and probabilities of the case I come to this irresistible conclusion that the appellant has succeeded in proving that the khatian entry with respect to plots Nos. 1341 and 1342 is wrong, that the parties have been dealing in accordance with the area given in the Barawarda and demarcated on the Batwara map, and that Julum Rai had no right to execute the sale deed with respect to more than 7 kathas of land and he was never in possession of more than that area and the defendants were not in possession of the disputed land before the alleged date of dispossession. As a matter of fact the question of possession and dispossession is immaterial as the sale deeds of the defendants is of the year 1943 and that of the plaintiff is of the year 1945 and the suit has been instituted in 1952 which is well within 12 years. The judgment and decree of the learned trial Court are fit to be set aside, in so far as they deal with the points discussed above."

When this appeal came to me for hearing on the 2nd May, 1958, it was found that the lower appellate court had not entered into the question of consideration of the evidence on the record on the point of possession and dispossession as alleged by the plaintiff, and with the agreement of the parties it was ordered that the case should go back to the lower appellate court to record its finding on the above point on the evidence already on the record, and then after receipt of the finding of that court this appeal would be heard by this Court, The last portion of that order is as follows:

"The judgment and the decree of the lower appellate court are, therefore, set aside, the case is remanded to it to record its finding on issue No. 3 framed by the learned Munsif. It should submit its finding to this Court within a month from the date of the receipt of the record by it, after which this appeal shall come up for hearing. Costs will abide the result."

7. As already stated in the beginning of the judgment, the learned Subordinate

Judge has submitted his finding against the plaintiff.

8. Ordinarily after the receipt of this finding and no objection having been raised to it, on merit, this appeal should have been dismissed on the score of the collusiveness of the finding of fact, but the learned Advocate for the plaintiff has raised a point that the subsequent finding arrived at by the learned Subordinate Judge after remand is of no value and should not be given effect to, because the remand was under Order 41 Rule 25 of the CPC which did not authorise a remand of this nature when the lower appellate court had actually given its finding on issue No. 3 arising in the suit. It was urged that the appeal should be disposed of on the findings" already given by the learned Subordinate Judge before this remand. The learned Counsel for the plaintiff cited one unreported Bench decision of this Court in the case of Karoo Mahto v. Ram Keshwar Mahto, being Second Appeal No. 524 of 1951, decided by this Court on the 18th December, 1957.

In this case a single Judge of this Court had on the 17th April, 1956, passed an order directing the lower appellate court to record its finding on a certain point, namely, as to whether the plaintiff had succeeded in establishing their possession within twelve years of the suit, on the ground that the court of appeal below had not discussed the evidence adduced on the point by the parties and come to any finding with regard to the plaintiffs" possession within 12 years of the suit. The suit went back and the finding was recorded, but it was decided in the case that as there was already a complete and categorical finding of the lower appellate court on this point, that was binding on the Court, and the subsequent contrary finding in the case recorded after remand, was ignored, following the decision of the Calcutta High Court in the case of Upendra Lal Gupta and Others Vs. Jogesh Chandra Roy, .

9. It may, however, be pointed out that in this case the single Judge, who had remanded the suit to the lower appellate Court, had not set aside the finding of that court by his order of remand when he had called for a finding by that court. That is not the case here. From the quotations already made above, it is clear that the finding was, in effect, set aside by this court when this case was remanded. It is true that this fact had not been expressed in clear and definite terms, but the observation made by this Court that judgment and decree of the lower appellate court are set aside, cannot in the context of this case mean anything other than this that the finding of the court below had been set aside. Of course, it would have been better if instead of saying that the judgment and decree of the lower appellate court are set aside it would have been said that the finding is set aside, but, in effect, the position remains the same,

10. I am also not in agreement with the contention of the learned Counsel for the plaintiff that the present remand was a remand under Order 41 Rule 25 of the Code of Civil Procedure. That Rule contemplates a remand when the court below has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit

upon the merits. As argued by the learned Counsel in this particular case the court below has not done any of these things. What was found was that that court had failed to consider the evidence properly in coming to its finding on the point of possession and dispossession as alleged by the plaintiff. A remand in these circumstances cannot be said to be a remand under Order 41 Rule 25 of the Code of Civil Procedure, nor can it be said that it was a remand under Order 41 Rules 23 and 24 of the CPC which contemplate different sets of circumstances.

It was not contested before me that this Court had inherent power, apart from these provisions of the Code of Civil Procedure, *ex debito justitiae*, to remand a case to the lower appellate court and this power is wide enough to cover a case where instead of remanding the whole case this Court directs the lower court to consider the evidence on a particular issue and then to submit its finding to this Court for the final disposal of the appeal. Such an inherent power is exercisable by this Court where the justice of the case requires it and I have no doubt in my mind that in this particular case justice demanded this step having regard to the way in which the learned Subordinate Judge had dealt with this important issue in his judgment, which will appear from the quotations which I have made from it showing that he completely ignored the evidence of the plaintiff on the point of possession and did not consider it and so far as the oral evidence was concerned, no attention at all appears to have been paid to it, for the purpose of deciding this important matter.

On the contrary, on a very exhaustive consideration of the evidence, the same court has, after, remand, come to an altogether different and contrary finding holding clearly that the plaintiff had failed to prove the story of possession and dispossession and that he had not been in possession of the land within 12 years of the suit and had thereby lost title to it. I do not, therefore, find any force in the contention of the learned Counsel for the respondents that the fresh finding arrived at by the court below contrary to the previous finding of the same court should be ignored and the appeal should be decided on the previous finding.

11. It follows, therefore, that there being no objection as to the correctness of the finding subsequently arrived at by the learned Subordinate Judge to the effect that the plaintiff had failed to prove his story of possession and dispossession within 12 years of the suit and this being a case undisputedly governed by Article 142 of the Indian Limitation Act, the appeal must succeed. It is accordingly allowed and the judgment and the decree of the lower appellate court are set aside and the suit of the plaintiff is dismissed with costs throughout.