
(1972) 12 PAT CK 0009
In the Patna High Court
Case No : S.A. No. 626 of 1968

Choudhary Kailash Singh and Others

APPELLANT

Vs

Pandit Mahabir Pandey

RESPONDENT

Date of Decision : 18-12-1972

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1973) 6 PLJR 182

Hon'ble Judges : Shambhu Prasad Singh, J;A.N. Mukharji, J

Bench : Division Bench

Advocate : Thakur Prasad and Akhauri Satyendra Nath Sinha, for the Appellant;
Jaleshwar Prasad and Bishwa Mohan Bahadur, for the Respondent

Final Decision : Allowed

Judgement

Shambhu Prasad Singh and A.N. Mukharji, JJ.—This second appeal by the plaintiffs antes out of a suit in which they claimed a decree for mesne profits of Rs. 5,526"50 paise (including interest) for the period 26th of December, 1958 to 15th of December, 1959 in two Fasli years 1366 and 1367. In order to appreciate the points raised before us by Learned Counsel for the parties it may be necessary to state the facts in somewhat details. There was a proceeding u/s 145 of the Code of Criminal Procedure in respect of the suit lands measuring 4 bighas 4 kathas and 7 dhurs of plot Nos. 53,79,261 and 991 in village Sugapipar in the district of Champaran. That proceeding was decided against the appellants and in favour of the respondents on 29th of June, 1951. The appellants then instituted Title Suit No. 142 of 1951 in the court of Subordinate Judge at Motihari. Main reliefs claimed therein were declaration of title, recovery of possession and mesne profits, past, pendente lite and future. The suit was decreed by the trial court on 19th of December, 1953. Appeal against that decree was dismissed by the lower appellate court on the 20th of August 1955, A second appeal was filed in this Court which was numbered as 1410 of 1955, and that too was dismissed on 25th of November, 1958. It may be stated here that decree for

future mesne profits was not passed in that suit and question of title between the appellants, i.e. the plaintiffs, and the State of Bihar was left open. During the pendency of that litigation the appellants took delivery of possession on 18th of September, 1955. However, that delivery of possession was cancelled and set aside on 20th of December, 1955. After that another proceeding u/s 145 of the Code of Criminal Procedure was started on 29th of March, 1957. An order attaching the property in dispute was also passed. On 24th of January, 1960 the appellants again took delivery of possession. On 6th of December, 1960 the proceeding u/s 145 of the Code of Criminal Procedure was dropped on the ground that the proceeding had not been signed by the Magistrate who had initiated it.

2. The case of the appellants was that the defendants respondents were in wrongful possession during the period in respect of which the mesne profits were claimed in the present suit and thus they were liable to the claim. The defence of the respondent was that the land was in custodia legis during the period for which the claim has been made and as a matter of fact he was not in possession thereof and, therefore, no decree for mesne profits could be passed. It was further pleaded by him that in view of the fact that in Title Suit No. 142 of 1951 relief for future mesne profits was not granted the suit was not maintainable.

3. The trial court held that the suit was not maintainable on the ground that the relief for future mesne profits was not granted in the earlier suit. It further held that the property was in custodia legis and the respondent was not in possession. It accordingly dismissed the suit. The lower appellate court has reversed the finding of the trial court on the question of maintainability of the suit. In its opinion the suit which was in respect of a period subsequent to the institution of the previous suit was maintainable. It has, however, held that the property in dispute was in custodia legis on account of attachment u/s 145 of the Code of Criminal Procedure and, therefore, the respondent could not be in possession thereof. Thus, the lower appellate court has also dismissed the suit confirming the judgment and decree of the trial court.

4. Mr. Thakur Prasad appearing on behalf of the appellants has urged that the proceeding u/s 145 of the Code of Criminal Procedure must be treated as non-existent in law as it was not signed by a Magistrate and, therefore, there could not be and was not any attachment in law. He has further urged that as no order restraining the parties from going to the land in dispute was made when the order of attachment was passed and there is nothing to show that attachment was served on the land, the property cannot be said to be in custodia legis and hence the respondent was liable for mesne profits. We do not consider it necessary to go into the question whether the proceeding u/s 145 of the Code of Criminal Procedure which was drawn up on the 29th of March, 1957 should be treated as non-existent in law on the ground that it was not signed by the Magistrate inasmuch as we are of the view that Mr. Prasad is right in his second submission that there was no legal attachment and the property, therefore, was

not in custodia legis as held by the two courts below. In support of his contention Mr. Prasad has relied on the decision in (1) State of Vindhya Pradesh V. Ram Lakhan and others AIR 1953 VH 25, (2) Attar Khan V. The State AIR 1960 Ass 109 and (3) Mukhdeo Singh and others V. State of Bihar 1962 Bih LJR 405). All these decisions are of single Judges. In (3) Mukhdeo Singh's case Anant Singh, J., following the aforesaid two decisions of Vindhya Pradesh and Assam High Courts and also some other decisions held that mere order of attachment made by the Magistrate on the order sheet is not sufficient to assume that the land in fact has been attached in the sense that the property has become custodia legis. He further held that the land in dispute had to be taken in possession of either by taking actual possession or at least by making an explicit order prohibiting the parties from going upon the land we respectfully agree with the view taken by the learned Judge. As observed earlier, in the instant case also there is no order passed by the Magistrate restraining the parties from going to the lands in dispute nor there is anything on the record to show that possession of the lands was taken either by the service of the attachment at the spot or by delivering the possession to a receiver appointed by the Court. The courts below, therefore, in our opinion wrongly held that the suit lands were in custodia legis during the period for which mesne profits have been claimed.

5. Mr. Jaleshwar Prasad appearing for the respondent has, however, contended that the appeal must fail because the courts below found that the respondent was not in possession of the suit lands during the period for which the claim has been made. He has further submitted that even though attachment order may not be legal and the property may not be custodia legis, if the respondent under the belief that there was an order of attachment did not cultivate the land he cannot be made liable for mesne profits. Lastly, he has submitted that as the appellants on their own case were not in possession on the date of vesting they have got no title and cannot get a decree. We propose to deal with his last submission first. The judgment of the High Court in Second Appeal 1410 of 1955 was passed in November, 1958 after the vesting and it confirmed the findings of the court below, that the plaintiffs had title and could get a decree for declaration of title and recovery of possession as claimed by them. That decree was passed not in ignorance of the Bihar Land Reforms Act, rather it was on account of that Act coming into force and vesting having taken place under that Act that the question of title between the appellants (of the present appeal) and the State was left open. Mr. Jaleshwar Prasad has relied on a decision of the Supreme Court in (4) Haji Sk. Subhan V. Madhoro AIR 1962 SC in 1230) where a decree passed in 8 suit in which the plaintiff's claim was based on his proprietary right, after the coming into force of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, was held non-executable on the ground of want of title in the decree-holder. As appears from the facts of the case there the decree was passed in ignorance of the said Madhya Pradesh Act. In the case before us, as observed earlier, the Judgment of the High Court was not passed in ignorance of the Bihar Land Reforms Act. Therefore, that decision is of

no help to the respondent. The decree in Title suit No. 142 of 1951 which was confirmed by this Court after the vesting of the estate of the appellants and not in ignorance of that fact is conclusive between the parties on the question of title and it is not open to respondent to challenge the title of the appellants in the present suit. The fact that question of title between the appellants and the State of Bihar was left open is also of no help to the respondent. That question was left open because State of Bihar was not made a party to that suit originally and had no opportunity to defend it in the lower courts.

6. In our opinion, there is no substance in the other two contentions of Mr. Jaleshwar Prasad. We do not think that the finding of the lower appellate court on the question of possession is a finding of fact which cannot be interfered by us at the second appellate stage. A perusal of the judgment of the lower appellate court makes it clear that it was too much obsessed by the fact that the property was custodia legis and it cannot be said that it could have come to the same finding if it had taken the correct view that the property was not custodia legis. For considering the second contention of Mr. Jaleshwar Prasad, namely, whether the respondent abstained from remaining in possession on account of the order of attachment it is also necessary to find whether he was really in possession or not and the question has to be decided with reference to evidence on the record, oral and documentary. The court of appeal below must now re-apply itself to the question of possession with reference to evidence on the record, both oral and documentary, and then decide whether the appellants are entitled to mesne profits or not as claimed by them. In the result, the appeal is allowed, the judgment and decree of the court of appeal below is set aside and the case is sent back to it for rehearing of the appeal before it and deciding it in accordance with law and in the light of the observations made above. If that court comes to a finding that the appellants are entitled to a decree for mesne profits then it should also go into the question of the quantum of mesne profits. The costs of this Court will abide the result of the judgment of the court of appeal below after remand.