
(1956) 09 PAT CK 0010
In the Patna High Court
Case No : A.F.A.D. No. 2203 of 1949

Dassain Nonia and Another	Vs	APPELLANT
Ramdeo Prasad Patwa and Others		RESPONDENT

Date of Decision : 25-09-1956

Acts Referred:

Transfer of Property Act, 1882 — Section 105, 107

Citation : AIR 1957 Patna 692

Hon'ble Judges : Rai, J;Choudhary, J

Bench : Division Bench

Advocate : Prem Lall and S.C. Mukherji, for the Appellant; Kailash Ray, N.P. Agarwala, N.L. Untwalia and Bindeshwari Prasad Sinha, for the Respondent

Final Decision : Dismissed

Judgement

Rai, J.—This appeal by defendants 1 and 2 is directed against the judgment and decree of the 1st Additional Subordinate Judge, Muzaffarpur, reversing those of the 4th Additional Munsif of the same place.

2. The plaintiff instituted the present suit originally against defendants 1 and 2, - namely, Dasain Nonia and his son Chaturbhuj Nonia for declaration of his title to the lands in suit and for confirmation of possession of the same. The case of the plaintiff was that the land in suit appertained to the patti of Khan Saheb Mir Mehdi Hussain, Mutawalli of Waqf Estate, and the plaintiff took permanent settlement of the same at an annual rental of Rs. 5-10-0 under a registered kabuliat dated the 8th December, 1937. According to him, the landlord granted him a rent receipt as proof of the above settlement". After the settlement the plaintiff was put in possession of the same by the Malik by fixing four boundary stone pillars.

After coming in possession of the area settled, the plaintiff filled up a portion of it and constructed a tatti house on it and reared fish in the remaining area settled with him. He sublet the tatti house to one Saudagar Nonia. In the year 1944

defendant No. 1, Dasain Nonia, filed Small Cause Court suit No. 378 of 1944 against Saudagar for arrears of rent of the hut which had been originally constructed by the plaintiff on the allegation that the hut belonged to him, and that he had let out the same to Saudagar on a monthly rental. On the 19th December, 1944, the Small cause court suit was decreed. If, therefore, became necessary for the plaintiff to institute the present suit which was filed on the 27th March, 1945.

3. After about a year of the institution of the present suit the plaintiff got the plaint amended by impleading defendants 3 to 5 on the allegation that on the 23rd July, 1946, defendants 1 and 2 had executed a registered sale deed in favour of Lachhman Thakur and others in respect of 2 kathas of land out of plot Nos. 2788 and 2789, and the purchasers had forcibly constructed a hut on a portion of the suit land. The plaintiff got the relief portion of the plaint also amended to the effect that he be granted a decree for recovery of possession in case he be found to have been dispossessed during the pendency of the suit.

4. The suit was contested by defendants 1 and 2 who filed one set of written statement. They pleaded, inter alia, that defendant No. 1 had purchased the suit land from Ramkhelawan Nonia under a sale deed dated the 11th May, 1933, and since then he had been coming in possession of the same. According to the contesting defendants, the suit land did not form part of the waqf estate of Mir Mehdi Hussain Saheb but was really in the patti of Syed Mohsin, Nawab of Patna. The defendants further pleaded that the plaintiff had acquired no title by the alleged settlement in his favour.

5. Another written statement was filed on behalf of defendants 4 and 5 who pleaded that they were coming in possession of the suit land after having purchased it from defendant No. 1. According to them, defendant No. 1 had purchased the entire plot in suit from Ramkhelawan Nonia in the year 1953. They also asserted that the lands in suit did not form part of the estate of Mehdi Hussain but it belonged to the estate of Fazle Nawab which after his death had passed into the hands of his sons Mohsin Nawab and Syed Amaran Nawab of Patna. They also asserted that the plaintiff had acquired no title by the alleged settlement in his favour.

6. The learned Munsif, who heard the suit, came to the conclusion that as the settlement in favour of the plaintiff was for building purposes, the kabuliat executed by him did not confer any valid title on him. He was further of opinion that the area in suit had, at the time of the Collectorate partition, fallen to the share of a number of co-sharers including the settlor of the plaintiff (vide exhibits 7 and 9) and, as such, the plaintiff being a settlee from only one of the co-sharers had not acquired any valid title to the area settled. He further held that the defendants had, failed to prove their title to the lands in suit. He, however, dismissed the suit on the ground that no valid title had passed to the plaintiff.

7. The plaintiff thereafter went in appeal which was heard by Mr. K. S. Pandey,

1st Additional Subordinate Judge, Muzaffarpur. The learned Subordinate Judge disagreed with the learned Munsif and held that the settlement by a co-sharer landlord of a piece of land which was in his exclusive possession was not void. According to him, it may not be binding on the other co-sharer landlords if it falls to their share as bakasht after partition, but as long as it is not objected by other co-sharers, the settlee would be entitled to remain in possession of the same by virtue of the settlement by one of the co-sharer landlords.

The learned Subordinate Judge further held on the authority of the decision in the case of Ram Keshwar Mahton and Others Vs. Hari Charan Mahton and Others, that the plaintiff would be entitled to get back possession from the defendants who had no title at all even if it be held that the registered Kabuliat (Exhibit 2) had not conferred any valid title on the plaintiff because of the provisions of Section 107, Transfer of Property Act. The learned Subordinate Judge further held that the lessor of the plaintiff was in exclusive possession of the area in suit. He also agreed with the learned Munsif that the defendants had failed to prove their title to the lands in suit. With respect to the question of possession the learned Subordinate Judge recorded the following finding:

"On a careful consideration of the oral and documentary evidence on record I hold that the plaintiff has proved his title to the suit land and his case of possession and dispossession over the suit land, whereas the defendants have not been able to prove that they were in possession over the suit land prior to the decree obtained by defendant No. 1 against Saudagar in Small Cause Court Suit No. 378 of 1944".

8. On these findings the appeal was allowed and the suit was decreed. Defendants 1 and 2 thereafter came up in second appeal before this Court.

9. Mr. Prem Lall, who appeared for the appellants, contended that the settlement in favour of the plaintiff being for non-agricultural purposes the registered kabuliat executed by him did not confer any title on him. In this connection he drew our attention to the following passage from the evidence of the plaintiff: "I took this land on settlement for constructing house thereon". In support of his contention Mr. Prem Lall referred to the provisions of Section 107, Transfer of Property Act. In my view, there is no force in the contention of Mr. Prem Lall. From the Kabuliat (exhibit 2) and the rent receipts granted by the landlord (exhibit 3 series) it is quite clear that the settlement was made for agricultural purposes. I would better quote the following English rendering of a portion of the kabuliat which was scribed in Urdu:

"It is requisite that I, the executant, shall properly cultivate the said lands and appropriate the produce thereof."

From the above expression in the kabuliat it is quite clear that the settlement was taken for agricultural purposes. This inference is further strengthened by the nature of receipts granted by the landlord to the plaintiff at the time of settlement and during the subsequent years. These receipts were granted on

forms printed in accordance with the provisions of the Bihar Tenancy Act.

In my view, the deposition of the plaintiff to the effect: "I took this land on settlement for constructing house thereon" may indicate that in future he intended to build a house on it, but at the time of the execution of the kabuliat both the parties understood that the area was being settled for agricultural purposes, and as such there was no necessity to execute a document in accordance with the provisions of Section 107, Transfer of Property Act. I, therefore, hold that the settlement in favour of the plaintiff had conferred a valid title on him to maintain the present suit.

10. Mr. Prem Lall thereafter urged that settlement by one of the co-sharer cannot confer any occupancy right on the plaintiff. In support of his contention he relied on the decision in the case of Bibi Kaniz Fatma Vs. Sk. Hossainuddin Ahmad and Others, . In my opinion, this case also cannot stand in the way of the plaintiff to get the relief sought in the present suit as against the defendants. The court of appeal below has held that the lessor of the plaintiff was in exclusive possession of the lands settled by him. On this finding the court of appeal below was, in my opinion, justified in holding that the plaintiff would be entitled to remain on the lands settled until the other co-sharers raise any objection to that effect. The view taken by the court below docs not appear to be contrary to the view taken by their Lordships of the Full Bench in Bibi Kaniz Fatma Vs. Sk. Hossainuddin Ahmad and Others, , mentioned above.

In that case just before the beginning of a Collectorate partition one of the co-sharer proprietors had settled one bigha of Bakasht land which was in his exclusive possession after taking a salami of Rs. 700/-. At the time of partition that land was, in spite of the settlement treated as Bakasht and allotted to the share of another proprietor, namely, Fazlur Rahman. The widow of Fazlur Rahman instituted the suit for possession of the above-mentioned settled land from the settlee who pleaded, inter alia, that he had acquired a right of occupancy in the land and could not be evicted therefrom. The dispute came up before this court in Second Appeal No. 955 of 1939: Bibi Kaniz Fatma Vs. Sk. Hossainuddin Ahmad and Others, , which was ultimately decided by a Full Bench. Their "Lordships of the Full Bench held that a person who is inducted upon a land belonging to a number of co-sharers by one co-sharer without the consent or authority express or implied of all the co-sharers is not a raiyat in respect of the entire land and he cannot acquire a right of occupancy by remaining in possession for 12 years or upwards. In the present case, however, the claim of the plaintiff to remain in possession is not opposed by any of the other co-sharer landlords but is being opposed by the defendants who, on the findings of the courts below, have no title whatsoever. In my opinion, the decision in the case of Bibi Kaniz Fatma cannot be a bar to the plaintiff being granted the relief sought in the present suit.

11. Mr. Prem Lall thereafter contended on the authority of the decision in the case of Abdul Kabir and Others Vs. Mt. Jamila Khatoon and Others, , that the plaintiff can at best, get a decree for joint possession with the defendants. The

facts of that case were as follows:

Holdings Nos. 221 and 224-A within the Giridih Municipality belonged at some time to Bulaki Mian, After his death his two sons Ishaq (dedendant No. 4) and Jabbar (defendant No. 5) sold 3 kathas out of holding No. 224A to Mohammad Qasim who in his turn sold it to defendant No. 2 in the farzi name of defendant No. 3. The relationship of the various defendants of that suit will" appear from the following genealogy of their family:

MOHAN MIAN _____|_____ | | Bulaki Mian Mt. Bibban |
(D. 3) | | | Muhiuddin Ahmad | alias | Guldasta mohammad | (D. 2) _____|
_____ | | | | Ishaq Jabbar Mt. Jamila Mt.
Hasiba (D. 4) (D.5) (D. 1) (D.6)

On the 16th February, 1938, the plaintiffs of that suit purchased from Ishaq and Jabbar the entire holding No. 221. The plaintiffs thereafter instituted Title suit No. 144 of 1943 for declaration of their title to the lands shown in schedule Kha of that suit. They further prayed for recovery of direct possession after dispossessing defendants 1 to 6 from the suit lands. The case of the plaintiffs was that none of the defendants had any title to the lands shown under schedule Kha. It was further alleged by them that while constructing a house on the portion of holding No. 224A purchased by defendants 2 and 3 from Md. Qasim they had encroached upon a portion of holding No. 221.

12. The suit was contested by defendants 1, 2 and 3. They denied the title of the plaintiffs to the entire holding No. 221. It was also pleaded by the contesting defendants that the plaintiffs had wrongly shown the extent of the holding No. 221 under schedule Kha of the plaint

13. The trial court held that the plaintiffs had acquired no valid title to the share of Mt. Jamila (defendant No. 1) and Mt. Hasiba (defendant No. 6) by virtue of the sale deed dated the 16th February. 1938. The learned Subordinate Judge held that the share of defendants 1 and 6 was one-third in the holding No. 221. It was further held by the trial court that the entire one-third share of Ishaq, defendant No. 4, had not passed to the plaintiffs, and that they had acquired a valid title to the extent of 9 annas 4 pies share only in the municipal holding No. 221 by virtue of the sale deed dated the 16th February, 1938. The learned Subordinate Judge also held that the plaintiffs had failed to prove the correct area of holding No. 221 and the extent of a encroachment alleged to have been made by defendants 2 and 3 over a portion of holding No. 221. The trial court ultimately came to the following conclusion:

"The plaintiffs have got a cause of action for this suit inasmuch as they are entitled to a declaration of their title to the extent of 9 annas 4 pies in holding No. 221. Of course, they are not entitled to eject Mt. Jamila defendant No. 1, because she is a co-owner of holding No. 221. The plaintiffs also cannot eject defendants 2 and 3 because they have not proved the extent of encroachment and also because the plaintiffs have not impleaded Mt. Hajra, Israil, Mikael and

Israfeel, the co-owners of holding No. 221 as party to the present suit."

14. The plaintiffs thereafter came up in appeal before this Court in First Appeal No. 387 of 1946, where it was held that the plaintiffs were entitled to a 12 annas share of the area in dispute as described in schedule Kha of the plaint. The plaintiffs were held entitled to a decree for joint possession of their 12 annas share with defendants 1, 2 and 3 of the land in dispute. Mr. Prem Lal relied upon the following passage in the judgment of that case:--

"On behalf of the respondents the argument was stressed that since Mt. Hajra, Israil, Mikael and Israfeel have not been impleaded, the plaintiffs cannot get a decree for ejectment. But this argument is not tenable. Although a co-sharer by himself cannot get, against a trespasser, a decree for ejectment from the whole of the land, he can get a decree for joint possession to the extent of his share. He has to work out his further rights by means of a suit for partition. Vide *Huldhur Sein v. Gooroo Das Roy* 20 W. R. 126 (D); *Kadha Proshad v. Esuf* ILR 7 Cal. 414: 9 Cal LR 76 (E), and *Naresh Chandra Basu Vs. Hayder Sheikh Khan and Others*,

In my view, the above observation in the judgment of that case cannot be considered detached from the facts and circumstances of that case. As has been said above, defendant No. 1 of that suit was found to have a share in holding No. 221. On this finding the plaintiffs of that suit could not get exclusive possession of the (entire holding No. 221. Defendant No. 1 had not so far objected to the encroachment made by defendants 2 and 3 over a portion of holding no, 221. In that view of the matter, the court had rightly not given a decree for khas possession of the entire holding No. 221 to the plaintiffs who were held to have purchased only 12 annas share in it.

15. In 20 Suth. W. R. 126 (D) the co-sharers other than the plaintiffs of that suit were supporting the possession of the trespassers. In ILR 7 Cal 414 (E), the pro forma defendants, who were the remaining co-sharers of the plaintiffs of that suit, were also supporting the title and possession of the trespassers and were desirous that the trespassers should remain on the land. It appears that in view of the support given to the trespassers by the co-sharers of the plaintiffs of those suits, it was held that they were entitled only to joint possession with the trespassers who were holding possession on behalf of some of the co-sharer landlords.

In *Naresh Chandra Basu Vs. Hayder Sheikh Khan and Others*, the plaintiff who was held to have purchased in execution of a money decree wanted to eject some of the heirs of the recorded tenants who were not party to the rent suit or the execution proceedings. In those circumstances it was held that the plaintiff having purchased only the right, title and interest of some of the co-sharer tenants was entitled to joint possession with the remaining tenants of the land. It was not case of rank trespasser as we find in the present suit. The facts of the present case are, however, different. The entire area was settled with the plaintiff

by Mir Mehdi Hussain Who was in exclusive possession of the same.

From exhibit 9 it appears that one set of co-sharer proprietors Including the lessor of the plaintiff were given a large number of Ghairmazrua plots in their share. There may be some understanding amongst them for exclusive possession of a particular Ghairmazrua plot by a particular co-sharer. It may be due to this that no other co-sharer landlord has made any objection to the settlement in favour of the plaintiff. In my view, the plaintiff was entitled to khas possession of the lands in suit. I fail to understand how a suit for partition Will lie against the defendants of this suit.

If any of the co-sharers of Mir Mehdi Hussain had objected to the exclusive possession of the lessor or the lessee over the area in suit there may have been a necessity for bringing a suit for partition, but in absence of any interference by them, there can be no occasion for the plaintiff to bring a suit for partition. In my view, the present case is governed by the decision of a Division Bench of the Calcutta High Court in the case of Currimbhoy and Co. Ltd. Vs. L.A. Creet and Others, , and also by a decision of this Court in the case of Sambhu Gosain and Another Vs. Piyari Mian, , where it was held that one of several co-owners is entitled to maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action.

16. The result is that the appeal fails and is dismissed with costs.

Choudhary, J.

17. I agree.