

(2006) 05 PAT CK 0045

In the Patna High Court

Case No : Appeal From Appellate Decree No. 724 of 1986

Dehal Mahton

APPELLANT

Vs

Nathuni Ram Marwari and Others
 Nathuni Ram
Marwari and Others Vs Dehal Mahton

RESPONDENT

Date of Decision : 05-05-2006

Acts Referred:

Citation : (2006) 05 PAT CK 0045

Final Decision : Dismissed

Judgement

Syed Md. Mahfooz Alam, J.—This second appeal has been preferred by the defendant-appellant against the judgment and decree dated 22.7.1986 passed by Sri M.K. Verma, 3rd Additional District Judge, Munger in Title appeal No. 105 of 1978 whereby he has been pleased to set aside the judgment and decree dated 28.9.1978 passed by Sri Braj Nandan Sahay, Munsif 2nd, Munger in Title Suit No. 163 of 1969 and dismissed the suit of the plaintiff.

2. The brief facts of the case are as follows:

Plaintiff-respondent, Nathuni Ram Marwari, filed title suit in the court of the Munsif 2nd, Munger which was numbered as Title Suit No. 163 of 1969 for declaration of his title and confirmation of possession over the suit land and in the alternative, for recovery of possession if he is found dispossessed during the pendency of the suit. The suit was contested by defendant Dehal Mahto and others. On 28.9.1978 the judgment was delivered in the suit by the Munsif 2nd, Munger and by the said judgment, the plaintiff's suit was dismissed. An appeal was preferred by the plaintiff, Nathuni Ram Marwari, against the said judgment which was numbered as Title Appeal No. 105 of 1978. The appeal was disposed of on 22nd July, 1986 by Sri M.K. Verma, 3rd Additional District Judge, Munger, who allowed the appeal and decreed the suit of the plaintiff. The defendants, being aggrieved by the said judgment in appeal, have preferred this second appeal.

3. The case of the plaintiff-respondent, in brief, is that he is a representative and Karta of Joint Hindu Family governed by Mitakshara School. The suit land described in Schedule I of the plaint was owned and possessed by him and he has been coming in possession thereof. During the survey which was finally published on 20.12.1939, the suit land was recorded in the name of Manu Lal Marwari, son of Bansi Lal Marwari, resident of Mohalla Khalifabag, Bhagalpur. The name of Siya Mahton, the father of defendant No. 1, was recorded as non-occupancy under-raiyat only for a temporary period of two years during the survey proceeding and accordingly, a Sikami Khata was opened in the name of Siya Mahton, father of defendant No. 1. The said Manulal Marwari was shown as landlord of Siya Mahton for the said Sikami Khata. Further case of the plaintiff is that the said Siya Mahton lost all concern from the suit land immediately after 20.12.1939. Manu Lal Marwari, the recorded tenant, died leaving behind a widow Mostt. Manbhari Devi and two minor sons, namely, Basudeo Sah and Banwari Sao. The widow of Manu Lal Marwari, namely, Mostt. Manbhari Devi executed a registered sale deed with respect to the suit land as well as some other lands in favour of the plaintiff on her behalf and on behalf of the two minor sons and by virtue of the said sale deed, the plaintiff came in possession over the suit land and acquired valid title. The plaintiff has been paying rent all along and getting rent receipts for the same. Siya Mahton or his heirs had no concern with the suit land and they were never in possession except for two years at the time of survey proceedings but immediately after the survey proceeding was over, Siya Mahto surrendered and gave up the possession of the suit land to Manu Lal Marwari and after the said surrender there had been no relationship of the tenant and under-tenant between the plaintiff on the one hand and Siya Mahton or his other heirs on the other hand. Further case of the plaintiff-respondent is that during the survey proceeding, defendant No. 1 and others filed objection before the Assistant Settlement Officer, Munger on that basis Case No. 114 (VIII) of 1967-68 was started and ultimately, on 7.9.68, the Assistant Settlement Officer passed order in the case that the defendant-appellant is entitled to continue as Sikamidar over the suit land. It has been stated that the said order of the Assistant Settlement officer is based on misconception of law and the Assistant Settlement Officer had ignored this fact that during the survey proceeding Dehal Mahto and others were not found in possession of the suit land rather the plaintiff was found in possession of the same. It is further said that the defendants, being emboldened on the basis of the order of the Settlement Officer, began to threaten the plaintiff to dispossess him from the suit land and hence, the necessity of filing of the suit arose.

4. According to the case of the defendants-appellants, it has been admitted that Manu Lal Marwari was the tenant in whose name the Khatian of the suit land was prepared. It was also accepted that the name of Siya Mahton was recorded as non-occupancy raiyat during the survey proceeding and was shown as Sikamidar and as such, a Sikami khata was opened in the name of Siya Mahton. The defendants have denied this fact that Siya Mahton was shown as Sikamdar only

for two years. They have also denied this fact that Siya Mahton had surrendered his Sikami right immediately after the publication of the final survey operation i.e. 20.12.1939. It has been asserted by the defendants that Siya Mahton continued in peaceful possession over the suit land and after his death, the defendants have been coming in continuous and peaceful possession over the suit land till now without any intervention. It has been asserted that even after the purchase of the suit land, the plaintiff has not come in possession of the suit land even for a minute and it is false to say that the survey authority found possession of the plaintiff and had recommended the name of the plaintiff to be recorded in Survey khatian with respect to the suit land. It has been stated that the Assistant Settlement Officer has rightly declared that the defendant is entitled to continue as Sikamidar over the suit land. It has further been stated that the defendants are coming in possession of the suit land and the question of giving threat to the plaintiff for dispossession from the suit land does not arise. On the basis of above pleadings, the defendants have prayed to dismiss the suit.

5. From perusal of the judgment of the trial court it appears that on the basis of the pleadings of both the parties, the trial court framed the following issues for determination:

- (1) Is the suit as framed maintainable?
- (2) Was the ancestor of the defendants temporary Sikamidar as described in the plaint?
- (3) Are the defendants in actual possession of the suit land?
- (4) Whether the plaintiff is entitled for declaration of his possession over the suit land and in the alternative, for recovery of possession and confirmation of possession over the suit land?
- (5) Has the plaintiff any cause of action for the suit?
- (6) To what relief or reliefs, if any, is the plaintiff entitled to?

6. From perusal of the judgment of the trial court it appears that the trial court discussed issue Nos. 2 and 3 simultaneously and after making discussion on the abovementioned issues, came to the conclusion that the ancestor of the defendants was sikmidar with respect to the land described in the plaint and that the ancestor of the defendants, namely, Siya Mahton was in cultivating possession of the suit land prior to 1934 and his heirs are still in cultivating possession of the suit land and thus, the learned trial court decided both these issues in favour of the defendant-appellant and on that basis the trial court held that the plaintiff-respondent is not entitled for declaration of his possession over the suit land nor he is entitled to recovery and confirmation of possession for the same.

7. Against the said judgment of the trial court, the plaintiff-respondent filed Title Appeal No. 105 of 1978 which was disposed of by 3rd Additional District Judge,

Munger who, by his judgment dated 22nd July, 1986, reversed the findings of the trial court and held that the paramount title of the plaintiff is admitted and the defendant has failed to prove his possession, more so, in continuous possession for a period of 12 years. He has further held that the statements of the plaintiff are supported with documents and even the defendant himself could not show - whether he ever cultivated the land. He has also held that as per the case law, if the land is under water it will be deemed to be in possession of the real owner and not in possession of any claimant. It further transpires that after making discussion on the points involved in the appeal, the learned first appellate court came to the conclusion that the plaintiff having title over the suit land is entitled for confirmation possession of the same. Against the said finding of the first appellate court, the defendant-appellant has preferred this second appeal.

8. From perusal of the record of this second appeal it appears that following substantial questions of law were formulated on recast vide order dated 2.2.2006. These substantial questions of law are as follows:

(1) Whether the defendant - appellant acquired raiyati right according to the provisions as laid down under B.T. Act and on the basis of sikmi khata opened in favour of the defendant in 1939 and confirmed by Ext. B, the order dated 7.9.1968 passed by the Assistant Settlement Officer?

(2) Whether the finding of the appellate court that sikimi right is neither heritable nor transferable is in accordance with law?

Substantial Question of Law No. 1

9. According to the plaintiff-respondent, one Manulal Marwari was the recorded tenant of the suit land and the name of Siya Mahton, father of defendant No. 1, was recorded as non-occupancy raiyat only for a period of two years under sikmi khata No. 33 but the said Siya Mahton lost all concern from the suit land immediately after 20.12.1939 i.e. immediately after publication of survey record of right. Said Manulal Marwari died leaving behind his widow Manbhari Devi and his two sons and the said Manbhari Devi executed a registered sale deed in favour of the plaintiff-respondent with respect to the suit land in the year, 1949 and since then the plaintiff has been coming in possession of the suit land.

10. The case of the defendant-appellant is that although it is true that Manulal Marwari was the raiyat in respect of the suit land but Siya Mahton was under-raiyat under the said Manulal Marwari as sikmidar and in the survey record of rights which was published on 20.12.1939, the said Siya Mahton was shown as sikamidar and as such a sikmi khata bearing Sikmi Khata No. 33 was also opened in the name of Siya Mahton. Further case is that the said Siya Mahton has been coming in possession of the suit land and it is not a fact that Siya Mahton had surrendered and gave up the possession of the suit land to Manulal Marwari. Thus, Siya Mahton had acquired occupancy right in the suit land.

11. Admittedly, Manulal Marwari was the recorded tenant of the suit land and

Manbhari Devi was the widow of Manulal Marwari, as such, there is no dispute between the parties on the point that Manbhari Devi had no right to execute the sale deed and, therefore, there appears no dispute between the parties that by virtue of the sale deed dated 21.12.1949 (Ext.1), the plaintiff-respondent Nathuni Ram Marwari did not acquire any right with respect to the suit land and as such, I am of the view that the learned first appellate court has rightly held that the paramount title of the plaintiff is admitted. It is also admitted that in the record of rights (Ext.A) which was published on 20.12.1939, the ancestor of the defendant, namely, Siya Mahton was shown as sikmidar and accordingly, sikmi khata bearing Sikmi Khata No. 33 (Ext. A/1) was opened in the name of Siya Mahton. This fact goes to establish that Siya Mahton, the ancestor of the defendant, was under-raiyat under the recorded tenant Manulal Marwari. Therefore, the moot question is - whether Siya Mahton or his heir (present appellant) acquired occupancy right in the suit land or not. According to the finding of the trial court, Siya Mahton and the present appellant acquired occupancy right in the suit land as they were found in possession of the suit land as sikmidars for continuous period of more than 12 years but according to the findings of the first appellate court, neither Siya Mahton nor the present defendant-appellant was found in continuous physical possession of the suit land for a continuous period of 12 years and as such, according to the first appellate court, the defendant did not acquire any occupancy right in the suit land.

12. Before coming to the conclusion that the finding of the first appellate court is correct or not, I would like to refer certain provisions of the Bihar Tenancy Act (hereinafter called as "B.T. Act") as well as relevant entries in the record of rights which was published on 20.12.1939 Ext.A is the survey record of right which was published on 20.12.1939. According to the entry in the record of right, Manulal Marwari was the recorded tenant with respect to the suit plot bearing plot No. 1373 appertaining to Khata No. 578. The entry further indicates that Siya Mahton, the ancestor of the defendant, was sikmidar over the suit land and Sikmi Khata No. 33 was opened in the name of Siya Mahton, The khatian of Sikmi Khata No. 33 is Ext. A/1. From the endorsement in the remarks column of Ext.A it appears that the following endorsements were made by the survey authority in remarks column of the khatian which was published on 20.12.39. The entries are as follows:

(I) DIARA, GAIR DAKHILKAR TWO YEARS

(II) BAZARIYE MUKADAMA NO. 2 OF 1935-36

(III) KHATA HAZA KE BALU ARAZI KA LAGAN KAM KIYA GAYA HAI, WO PANI ARAZI KA LAGAN BIBFAIL MULTAVI KIYA GAYA HAI. ARAZI HAZA MEIN MITTI PARH JANE SE MUNASIB LAGAN KAYAM KIYA JAYEGA.

The abovementioned entries made in the remarks column of the record of rights are very important in order to decide the substantial questions of law involved in this appeal.

13. First, of all, I would like to see - what is the meaning of the word "Gair Dakhilkar for two years" incorporated in the remarks column of the khatian under the B.T. Act. In the opening Chapter of the B.T. Act, Survey Glossary has been appended according to which the word "Dakhilkar" indicates "occupancy raiyat" whereas the word "Gair Dakhilkar" indicates "non-occupancy raiyat" and as per the Survey Glossary, the survey authority while mentioning non-occupancy raiyat usually mentions the number of the years for which he has held the land. It further transpires that Survey Glossary defines "sikmi" as "under-raiyat" and if sikmi is found added "Dakhilkar", the under-raiyat has occupancy rights in respect of the holding. Now, I would like to interpret the meaning of the words "Gair Dhakhilkar" used in the remarks column of the survey khatian (Ext. A). Admittedly, as per the entry in the khatian the ancestor of the defendant, namely, Siya Mahton was sikmidar. Ext. A/1 also confirms that sikmi khata No. 33 was opened in his name. The word "sikmi" indicates "under-raiyat" meaning thereby that Siya Mahton was under-raiyat under the recorded tenant Manulal Marwari. He has been shown as "Gair Dhakhilkar for two years" meaning thereby that Siya Mahton was a non-occupancy raiyat with respect to the suit land and was holding the land for two years and as such, on the basis of the entries made in the record of rights (Exts. A and A/1), I do not find any difficulty in holding that at the time when the survey khatian was published on 20.12.39, Siya Mahton, the ancestor of the defendant, had no occupancy right in the suit property. Therefore, I am of the view that the burden lies upon the defendant to prove that by efflux of time Siya Mahton or the defendants themselves acquired occupancy right in the suit land. In this regard, I place reliance upon the decision of the Division Bench of this Court given in the case of Jageshwar Mandal and Others Vs. Mostt. Safia and Others, Reliance can also be placed upon the Full Bench decision in the case of Jaldhari Mahto and Ors., appellants v. Rajendra Singh and Ors., respondents reported in 1958 Bihar Law Journal Reports Volume VI Page 258. The entry in the remarks column of Ext. A shows that the suit land was Diara land and at the time of survey the land was not found cultivable because some portions of the land were filled with sand and some portions of the land were submerged under water as a result of which rent of the land over which sand had come, was reduced and of the portion of the land which was submerged under water, the payment of rent was postponed till the land comes out of water.

14. The question of possession of occupancy raiyat as well as non-occupancy raiyat with respect to Diara land has come up for decision before the High Court on several occasions and the Hon'ble Judges have come to the conclusion that the land which remains submerged under water making cultivation impossible during those periods, the possession of the real owner revives and the possession of under-raiyat is interrupted for those periods and therefore the continuity of the statutory period of 12 years for acquiring occupancy rights automatically breaks and under such circumstance it cannot be held that under-raiyat was in continuous physical possession of the land for 12 years and thus,

acquired occupancy right. In this regard, I would like to place reliance upon the decision given in the case of Secretary of State Vs. Ram Bachan Lal and Another, . The relevant paragraph of the said decision is quoted below:

In the suit by P for possession of a tract of land formed by the alluvial action of the river which constituted the northern boundary of his property, D set up the plea of adverse possession. The tract which was an accretion to P's land remained submerged during July, August and September of each year making cultivation impossible during those months and deprived D of the use and occupation of it as agricultural land during those three months.

The Court held that as D could not be said to be in effective possession of the reformed tract during the three months the possession of the true owner revived and therefore D had not been in possession of the land continuously for twelve years before the suit was brought. Each year his possession was effectively interrupted for a period of three months during which P must be regarded as having been in possession and consequently the plea of adverse possession was untenable. There was no difference in principle between seasonal submersion and one which continued for a length of time.

15. The principle enunciated in the abovementioned decision applies in this case also as admittedly, the suit land is Diara land and the entry in the remarks column of the khatian (Ext.A) shows that at the time of survey a considerable portion of the land was submerged under water. The evidence on record shows that the land remained under water for a considerable long time. Therefore, under law the period during which the suit land remained submerged under water, the plaintiff's vendor who was the real owner will be deemed to be in possession of the suit land and under law, it cannot be held that the ancestor of the defendant, namely, Siya Mahton was in possession of the suit land during the period in which the suit land remained under water. Thus, the law is against the defendant and unless the defendant succeeds in proving that even after 1939 he or his ancestor remained in continuous possession of the suit land for a continuous period of 12 years, it cannot be held that u/s 48C of the B.T. Act, the defendant had acquired occupancy right, I find that the evidence on record is also not in favour of the defendant and it appears that Dihal Mahton, who has been examined as D.W.1, has himself admitted in paragraph 4 of his deposition that in the year 1939-40 the suit land was covered with sand and water. He has further deposed that in the year 1951-52 the land submerged into water and till date the land was under water. However, he modified his statement by saying that about eight years ago the suit land has come out of water. Thus, the evidence of the defendant (D.W.1) itself corroborates the entries of the khatian (Ext.A) that during the survey operation, part of the land was covered with sand and part of the land was submerged under water. There is no clear-cut evidence of the defendant that after 1939-40 when did the suit land come from water and when again the defendant or his ancestor came in possession of the suit land, I am therefore, of the view that the evidence of the defendant (D.W.1), Dihal

Mahton establishes beyond doubt that he has failed to prove his case that after 1939-40 he or his ancestor again came in possession of the suit land. So far as the finding of the appellate court on this point is concerned, I find that the learned first appellate court has discussed this point elaborately and while discussing this point, he has dealt with the evidence of both the parties.

16. It is settled principle of law that in second appeal this Court is not empowered to re-appreciate the evidence of the parties unless the Court finds that the finding of the appellate court is perverse. In this regard I place reliance upon the decision reported in 2005 (2) BBCJ 420. While making discussion on the scope of Section 100 CPC, the Apex Court made following observations:

In second appeal existence of substantial question of law is sine quo non for exercise of jurisdiction and the High Court cannot proceed to hear a second appeal without formulating the substantial question of law.

Para - 17 of the decision runs as follows:

This judgment was followed by this Court in Civil Appeal No. 2292 of 1999 Govindaraju Vs. Mariamman, In Govindaraju's case (*supra*) it has been held that the High Court while exercising the power u/s 100 of the CPC on re-appreciation of the evidence cannot set aside the findings of the fact recorded by the first appellate court unless the High Court comes to the conclusion that the findings recorded by the first appellate court were perverse i.e. based on misreading of evidence or based on no evidence.

Since it is established from the scrutiny of the above facts that the findings of the first appellate court are not perverse, as such, I am of the view that there is no need of re-appreciation of the evidence available on record.

17. As regards the order of the Settlement Officer dated 7.9.1967 (Ext. B) whereby he has held that Dihal Mahton is entitled to continue as sikmidar is concerned, I am to say that this order is not in accordance with law as the same is based on the assumption that since the name of the father of Dihal Mahton was recorded as sikmidar, as such the defendant being the heirs of Dihal Mahton is entitled to continue as sikmidar over the suit land. But it appears that the learned Settlement Officer while passing the said order did not consider the entries recorded in the khatian in the remarks column with regard to the nature of land and the fact that the land in question was under sand and water at the time of survey operation due to which the possession of the under raiyat Shikmidar remained interrupted for a considerable long time and continuity for statutory period of 12 years for acquiring occupancy right was broken as a result of which the under raiyat (Shikmidar) could not acquire occupancy right in the suit land. I, therefore, hold that on the basis of this Ext. B it cannot be held that the defendant had acquired occupancy right over the suit land. In the circumstance, I find and hold that on the basis of the sikmi khata opened in the year 1939 and confirmed by Ext.B, the order dated 7.9.1968 passed by the Assistant Settlement Officer, the defendant-appellant did not acquire raiyati

rights according to the provisions of the B.T. Act. Accordingly, this substantial question of law is decided.

Substantial Question of Law No. 2

18. It has been submitted by the learned Advocate of the appellant that at para - 12 of the judgment, the learned, first appellate court relying upon the decision reported in 1963 B.L.J.R. 623 (Johan Uraon (Ekka) and Anr. appellants v. Sitaram Sao (Bhagat) and Ors., respondents) held that the interest of an under-raiyat with occupancy status is not heritable under law. His contention is that this finding of the first appellate court is not in accordance with law. His further contention is that at para - 14 of the judgment the learned first appellate court while referring the order of the Assistant Settlement Officer in which he had held that since the right of sikmidar is transferable and heritable, the prayer of the petitioner Dehal Mahton is accepted and he is entitled to continue as sikmidar in his land because he and his father never surrendered the right of sikmi in this land", the learned first appellate court did not agree with the observation of the Assistant Settlement Officer. According to him, the observation of the Assistant Settlement Officer that the right of sikmidar was transferable and heritable, is not according to law. The contention of the learned Advocate of the appellant is that the sikmi right is heritable and transferable and since the first appellate court was of the opinion that the sikmi right was neither heritable nor transferable, as such the learned first appellate court has arrived at wrong conclusion that after the death of Siva Mahton his son Dehal Mahton did not inherit sikmi right in the suit land. In support of the argument that the sikmi right is heritable, the learned Advocate of the appellant has placed reliance upon the decision reported in 1987 BLJ 636 (Padarath Chaudhury and Ors. appellants v. Mostt. Jogtia and Ors. respondents). He has also placed reliance upon the decision reported in 1963 B.L.J.R. 623 (Johan Uraon (Ekka) and Anr. v. Sitaram Sao (Bhagat) and Ors. (supra) but the said case is not under the Bihar Tenancy Act rather it is under the provisions of Chota Nagpur Tenancy Act and as such, the same cannot be applicable in this case. On the basis of the decision reported in 1987 BLJ 636 (Padarath Chaudhury and Ors. v. Mostt. Jogtia and Ors. (supra), I have come to the conclusion that the right of the under raiyat i.e. sikmi right is heritable but it is not correct to say that the right of the under-rayat is transferable and in this regard I place reliance upon the decision reported in 1981 B.B.C.J. 466 (Bibi Jaloosan, appellant v. Bhulai Baitha and Ors. respondents) and 1987 BLJ 636 (Padarath Chaudhury and Ors. appellants v. Mostt. Jogtia and Ors. respondents) relied by the appellant himself. The relevant observation made at para - 10 of the decision is quoted as below:

In view of the discussions made above it becomes clear that the under raiyat having occupancy right by dint of his continuous possession for more than twelve years can have rights to succession etc. but cannot have the right to transfer.

19. Thus, on the basis of the decisions referred above. I have no hesitation to hold that the under--raiyat having occupancy right by dint of his continuous

possession for more than 12 years can have rights to succession but he cannot have right to transfer. The question - is whether this principle of law applies in this case or not. I have already held above that the defendant has failed to prove that he had acquired occupancy right in the suit land by dint of his continuous possession for more than 12 years and, therefore, so far as this case is concerned, the question of rights to succession of under-raiyat does not arise. I, therefore, hold that although the skimi right is heritable and not transferable but so far as this case is concerned, the defendant did not acquire any right to succession as he failed to prove continuous possession of his ancestor, namely, Siya Mahton, for statutory period of 12 years. Accordingly, this substantial question of law is also decided against the appellant.

20. In the result, I do not find any merit in this second appeal and as such, the same is hereby dismissed and the judgment and decree of the first appellate court are hereby confirmed. However, there will be no order for cost.