
(1961) 02 GAU CK 0005
In the Gauhati High Court

Dhananjoy Sen and Mahesh Ch. Sen and Another	APPELLANT
Vs	
Smt. Chandra Bashi Sen	RESPONDENT

Date of Decision : 16-02-1961

Acts Referred:

Penal Code, 1860 (IPC) — Section 23, 24, 379

Citation : (1961) CriLJ 435

Hon'ble Judges : T.N.R. Tirumalpad, J

Bench : Single Bench

Judgement

T.N.R. Tirumalpad, J.—This is an instance in which a clew ease of civil dispute about title and possession of a certain piece of land between two parties has been sought to be decided through the Criminal Court by one of the parties by accusing the other party of theft of crops u/s 379 I.P.C.

2. Four brothers, Mahim, Prasanna, Baikuntha and Mahesh came over from Pakistan to India in, 1952 and settled down in mouza Monoharpur. Mahim died in 1955. The respondent-complainant Chandra Bashi Sen is his widow. Mahesh. another brother was the first accused in the case. He died after his conviction and sentence by the Magistrate. Dhananjoy, the second accused who is the first petitioner herein is the son of Mahesh and Harimohan, the second petitioner is the son of another brother Baikuntha who is also dead. The other brother Prasanna has also died leaving his widow Mukta Bashi Sen.

3. The ease set up by the complainant was that Mahim after his coming over to Monoharpur in 1952 entered into an agreement of exchange of his lands in Pakistan with one Rahaman Mulla regarding the latter's lands in the villages Monoharpur, Pandavpur and Barasat and got possession of the lands in Monoharpur including jote No. 198 which is 2 kanis 5 gandas in extent. The formal documents of exchange were not however executed between the two parties and Mahim died in 1955.

Then Chandra Bashi Sen. his widow is said to have continued in possession of the

lands in Monoharpur including jote No. 198 and enjoyed the same through borgadars. One Nibaran was said to have been a borgadar of the lands for 3 years and then subsequently one Jogesh was the borgadar and this Jogesh was said to have raised paddy in about 10 to 12 gandas in jote No. 198. The case against the 3 accused was that on 15-11-1957 they entered the land and removed the crops causing Chandra Bashi Sen a loss to the tune of Rs. 60/-.

4. The defence of the accused was that the land in jote No. 198 belonged to Mukta Bashi Sen, the widow of Prasanna by purchase from Rahaman Mulla by a registered sale deed Ext. D-1 dated 28-11-1956 that the said Mukta Bashi was living with the accused and the accused were looking after the land for her and then removed the crops from the land which was in the possession of Mukta Bashi Sen.

5. The accused were charged u/s 379 I.P.C. Chandra Bashi's case being that the accused had dishonestly taken away the crops raised by her borgadar Jogesh from the land in her possession. The prosecution had to establish not merely that the land was in the possession of Chandra Bashi through her borgadar and that the said borgadar had raised the crops thereon. The most important thing to establish in a case of theft u/s 379 was that the accused did so dishonestly.

In order to prove that, Chandra Bashi had to prove her allegation in her complaint that the accused did so with the intention of causing wrongful loss to her or in other words that the loss was intended to be caused to her of property to which she was legally entitled. This is clear from Sections 23 and 24 I.P.C. I have dealt with this question in detail in my decision Dojakhai, Chief of Ningthiching Vs. Khamjathang Gangte and Another, as Judicial" Commissioner, Manipur.

6. A perusal of the judgment of the Magistrate as well as the order of the Sessions Judge in the revision filed before him showed that the lower Courts considered only the question of possession of the property jote No. 198 by Chandra Bashi and the question whether it was Chandra Bashi's borgadar Jogesh who had raised the crops in the land. Neither the Magistrate nor the Sessions Judge considered the further question whether the accused persons had any dishonest intention in removing the crops. It is not a case where the dishonest intention can be presumed from the fact that the land was in the possession of Chandra Bashi and that the crops had been raised by Jogesh, in the light of the defence set up by the accused.

7. The accused persons did not deny that they removed the crops. According to them, they were in possession and management of the property on behalf of Mukta Bashi Sen and had raised the crops. The defence, as I said, produced Ext. D-1 the sale deed of jote No. 198 in the name of Mukta Bashi from the very Rahaman Mulla through whom Chandra Bashi also was claiming the property. But this document of sale was dismissed by the Magistrate by saying that the prosecution had proved through the evidence of P. Ws. 1-5 that the possession of

the land was clearly with Chandra Bashi and that knowing this fact full well the accused persons got the sale deed from Rahaman Mulla in order to deprive her of her possession and that therefore the case was proved against them.

The learned Sessions Judge also agreed with the Magistrate that the conduct of the accused persons was not in any way bona fide in taking the sale deed as the possession of Chandra Bashi was clearly proved. I shall deal with the question of possession later. But even granting that possession was with Chandra Bashi, it was not sufficient to rush to the conclusion that the case of dishonest intention on the part of the accused has been proved.

8. In a case where the complainant alleges that the accused persons had caused wrongful loss to her, she has to prove that the loss was of property to which she was legally entitled, It is not enough if she proves mere possession of the property. This important matter has been lost sight of by both the lower Courts. The question arises whether Chandra Bashi had proved that she was legally entitled to the property. The property in this case consisted of the crops on the land. It is not enough if she proved that the crops were raised by her borgadar. Since the crops were on the land, she has to prove that she was legally entitled to raise the crops on the land through her borgadar. Otherwise the position will be that any person can trespass on another man's land and entrust it to a borgadar to raise crops and say that he was entitled to the crops.

9. It was the duty of the lower Courts therefore to have seen whether Chandra Bashi proved that she was legally entitled to raise the crops on the land. Chandra Bashi never attempted to prove this. She relied on an agreement of exchange with Rahaman Mulla entered into by her late husband in 1952. Even this agreement of exchange was not produced in the Magistrate's Court. It was said to have been produced in another criminal case between this very Chandra Bashi and some of the accused with reference to another piece of land which was also said to have been included in the agreement of exchange.

A mere agreement of exchange will not give title to immovable property, nor the right to raise crops on such immovable property so as to become entitled to the crops. When therefore the very same Rahaman Mulla with whom the agreement of exchange was said to have been entered into which was not completed by taking a regular registered exchange deed or sale deed, had subsequently sold the property to another person, the complainant cannot, without even producing the agreement of exchange into Court, say that she became entitled to the immovable property by the said agreement.

It is clearly a case where Chandra Bashi had to establish her title to the land and the right to raise crops in the land as against Rahaman Mulla and his vendee Mukta Bashi in a Civil Court. The attempt on the part of Chandra Bashi to short-circuit this by rushing to a criminal Court should not have been allowed to succeed. It was mentioned at the bar that such a suit has now been filed by Chandra Bashi.

10. Even on the question of possession of Chandra Bashi, one fails to see how the lower Courts were satisfied from the evidence that the question of possession of the land and the raising of the crops by Chandra Bashi has been established beyond any shadow of doubt. Neither Nibaran nor Jogesh who were said to have been her borgadars were examined to prove Chandra Bashi's possession. Out of the 5 witnesses, 2 are P. Ws. 1 and 4 Chandra Bashi and her son-in-law who was looking after Chandra Bashi's property. Their evidence was clearly interested.

It also turned out from the evidence of P. W. 4 that the accused persons were in possession of some of the other properties included in the same agreement of exchange and that they were living in a land included in the said agreement. It may be mentioned here that the suggestion for the accused was that the agreement was entered into by Mahim on behalf of himself and his 3 brothers.

11. A third witness was P. W. 3 Nagendra Sen, the brother-in-law of Jogesh who said that he helped Jogesh in cultivating the land. But this Nagendra Sen, it was admitted, was also a party to the agreement of exchange with Rahaman Mulla along with Mahim and thus he was also interested in supporting Chandra Bashi as against the accused. Thus the only other witness who may be called disinterested was P. W. 2 a neighbour who spoke of Chandra Bashi getting the paddy grown on the land by Jogesh on barga system.

But this witness admitted that the agreement of exchange with Rahaman Mulla was by Mahim " and the accused persons. He also admitted that both parties to the criminal case lived in the house of Rahaman Mulla after the exchange. P. W. 5 was examined to prove a rent receipt in the name of P. W- 4. P. W. 5 is the Assistant Tahasildar of the superior landlord. But he said that Touzi No. 198 was in the names of Mahim, Mahesh first accused, Harakumar Sen and P. W. 3 and that from the Touzi it was seen that the land in jote No. 198 was in the possession of the said 4 persons.

12. Thus even the oral evidence did not prove the exclusive possession of Chandra Bashi. On the other hand it threw considerable doubt as to the right of Chandra Bashi to the land. It is in the light of this that the sale deed Ext. D-1 produced by the defence had to be taken. It is clear therefore that there was a bona fide dispute as to the ownership and possession of the land from which the crops were removed by the accused. There is no doubt that the Magistrate has erred in convicting and sentencing the accused persons to fine of Rs. 20/- each.

13. The revision petition is allowed and the conviction and sentence of the petitioners are set aside and they are acquitted. Mahesh Sen who was the first accused before the Magistrate and who was the second petitioner before the Sessions-Judge died before the revision petition was disposed of by the Sessions Judge, Hence he is not a petitioner in this revision petition. But the sentence of fine passed against him will affect his property even after his death.

Now that the whole matter is before me and the entire records have been examined in revision, it is necessary that the mistake committed by the

Magistrate in punishing Mahesh Sen with a sentence of fine should also be corrected. The case against Mahesh Sen is the same as the case against the petitioners. The sentence of fine against Mahesh Sen is also therefore set aside.