
(1951) 02 PAT CK 0013
In the Patna High Court
Case No : A.F.A.D. No. 1332 of 1948

Dukhu Mahtha

APPELLANT

Vs

Nandlal Tewari and Others

RESPONDENT

Date of Decision : 05-02-1951

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 46, 46(1)
Limitation Act, 1908 — Article 144

Citation : AIR 1952 Patna 293

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

Bench : Division Bench

Advocate : G.C. Mukharji and S.K. Sarkar, for the Appellant; R.S. Chatterji, for the Respondent

Final Decision : Dismissed

Judgement

Ramaswami, J.—The question to be determined in this appeal is whether the claim of the plaintiff is barred by adverse possession under Article 144 of the Indian Limitation Act.

2. To enable this question to be considered it is necessary to state the material facts. It is the admitted case that the plaintiff is the occupancy tenant of "khata" Nos. 36 and 37 of village Silphore, that Thakkan Tewari and his brother Kali Tewari were "khorfa" tenants with respect to a part of the land comprised in the two "khatas" and they used to pay annual rent of Rs. 3 to the plaintiff. In the record of rights prepared in 1922 Thakkan Tewari and Kali Tewari are shown as under-raiyats paying rent to the plaintiff. In 1924 Thakkan Tewari and Kali Tewari died. The plaintiff alleged that he obtained "khas" possession of the land soon after; but in 1944 he was dispossessed by the defendants. The plaintiff therefore brought the suit for ejecting the defendants.

The main ground of defence was that the plaintiff never obtained possession of the land after the death of Thakkan Tewari and Kali Tewari. The defendants asserted that they continued in possession as heirs of Thakkan and Kali Tewari,

that they were permanent tenants of the land and were not liable to be ejected. The learned Subordinate Judge accepted the case of the plaintiff and decreed the suit in his favour. In appeal the decree of the Subordinate Judge has been reversed by the District Judge of Purulia, who held that the defendants had established that they were in adverse possession for a period of more than twelve years and the suit was barred by time.

3. In support of this appeal Mr. G. C. Mukharji addressed the argument that Section 46 of the Chotanagpore Tenancy Act was a complete bar to a permanent transfer by a "ryot" of his right in a holding or any portion thereof and the learned District Judge was erroneous to hold that the defendants had established adverse possession of an interest which is proscribed by statute. Section 46 of the Chotanagpore Tenancy Act states:

"(1) No transfer by a "raiyat" of his right in his holding or any portion thereof,

(a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement, shall be valid to any extent.

Provided that a "raiyat" may enter into a "bhugut bandha" mortgage of his holding or any portion thereof for any period not exceeding seven years.

* * * * * 3. No transfer in contravention of Sub-section (1) shall be registered, or shall be in any way recognised as valid by any Court, whether in the exercise of civil, criminal or revenue jurisdiction."

In support of his argument learned counsel placed reliance upon "MADHAVRAO WAMAN v. RAGHUNATH VENKATESH" 47 Bom 798 in which "watandars" had brought a suit for ejectment of the defendants from service "watan" lands in mouza Bhivashi in the district of Belgaum. The defendants were not "watandars" but they alleged in the written statement that they had acquired by adverse possession a right to hold the land as permanent tenants. Section 5 of Bombay Act III (3) of 1874 which applied to the land in question prohibited alienation by a watandar. That section is as follows:

"No "watandar" shall, without the sanction of Government sell, mortgage, or otherwise alienate or assign any "watan" or part thereof or interest therein to any person not a "watandar" of the same watan."

Upon the facts proved the Subordinate Judge gave the plaintiffs a decree for six years' rent taut otherwise dismissed the suit with costs. From that decree the plaintiffs appealed to the High Court and the only question argued in the appeal was whether the defendants can claim to have established a right of a permanent tenancy by adverse possession. The High Court held that there had been two breaks in the alleged adverse possession within 12 years of the death of Venkatrao and the defendants cannot upon the evidence contend that there has been any continuous adverse possession for 12 years until the plaintiffs'

father's death in 1902, which would entitle them to claim to occupy the land as permanent tenants. The High Court accordingly set aside the decree of the lower Court and passed a decree in favour of the plaintiffs for possession and for mesne profits of the land in occupation of the defendants. From this decree an appeal was preferred to the Judicial Committee who dismissed it holding that persons who were tenants of service "watan" lands cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watandars from whom they hold. At page 809 Sir John Edge states:

"In the present case the defence of 12 years" adverse possession as permanent tenants is set up by persons who and their predecessors in title, always claimed to be and were tenants of service "watan" land, and in the opinion of their Lordships neither the defendants nor their predecessors in title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the "watandars" from whom they held the lands."

4. The authority of this case is not of much assistance to the appellant for it is, in my opinion, impossible to find in the case any trace of the underlying principle or "ratio decidendi" as contended by Mr. G. C. Mukharji. It is manifest that the decision is confined to the case of a permanent tenancy claimed by a person who was the tenant of the "watan" land. The true "ratio" of the case is that a person who lawfully came into possession of land as a tenant from year to year or for a term of years cannot by setting up during the continuance of such relation any title adverse to that of the landlord inconsistent with the legal relation between them, acquire by the operation of the law of limitation title as owner or any other title inconsistent with that under which he was let in possession. But a person coming into possession of land under a lease which is void or invalid as against the person seeking to eject him is really a trespasser, and there is no reason why he should not acquire by prescription the right of a permanent tenant after the expiration of the period prescribed by Article 144 of the Limitation Act.

5. Mr. G. C. Mukharji also relied upon "NAINAPILLAI MARAKAYAR v. RAMANATHAN CHETTIAR" 47 Mad 337 in which the trustees of a Hindu temple brought two suits to eject the defendants who were tenants in the "inam" village of Mangal, which formed part of the endowed property of the temple. The defence was that under the Madras Act I (1) of 1908 the defendants had a permanent right of occupancy and further that the defendants had that right apart from the Act. The Judicial Committee held that having regard to the documents the grant to the temple included both the "kudivaram" and the "melvaram" of the whole village, and that therefore it was not an "estate" within the definition in Section 3 of the Madras Act I (1) of 1908 and that the defendants had not acquired permanent right of occupancy. A grant of a permanent right by the "shebait" or trustees would have been in breach of duty, and therefore could not be presumed and the defendants being tenants could not obtain the right by prescription.

But this decision is based upon facts which are sufficient to distinguish it from

the present case. It was not disputed that the defendants were "tenants" of the temple of lands to which the suits related, and it was held that a tenant of land in India cannot obtain as such any right to a permanent tenancy by prescription against his landlord from whom he holds the land. But in the present case the material facts are different. The lower appellate Court has found that the defendants' father and uncle had died more than 20 years back, that afterwards the defendants had been in continuous possession without paying any "khorf" or rent to the plaintiff. As it is not admitted or established that there was any relationship of landlord and tenant between the parties the "ratio" of the two Privy Council decisions will not be applicable.

6. On the contrary I am of opinion that the defendants have acquired a valid title by prescription against the plaintiff by adverse possession for more than twelve years; for defendants came into possession of land not as tenants under plaintiff but as trespassers and as such after the statutory period of twelve years they acquired by prescription the right of permanent tenant which they had asserted. This view is supported by "RADHA-BAI v. ANANTRAV BHAGVANT" 9 Bom 198 in which the material question for decision was whether in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service "watan" lands was a bar to succeeding holders. The lands in question were service "watan" lands, to which Section 20 of Regulation XVI (16) of 1827 applied.

The plaintiff sued for the possession of service "watan" lands and for mesne profits. The defendants claimed to be in possession of the lands under a grant of 1838 made by the plaintiffs' grandfather, who was, at the time of the grant, the "watandar", and they pleaded limitation by adverse possession; the adverse possession relied upon by the defendants being apparently their having continued ID undisturbed possession for a period of twelve years after the death of the grantor. The plaintiff's case was that his grandfather the grantor had no power to make a grant of the lands except for his lifetime and that the plaintiff's father had no authority to allow the lands to continue in possession of the defendants.

Sargent, C. J, and Haridas J. referred the question to the Full Bench, viz., whether adverse possession for 12 years during the lifetime of one holder is a bar to succeeding holders. The Full Bench decided that in the absence of fraud and collusion the question should be answered in the affirmative. It should be noticed that in this case the grant was beyond doubt an alienation which was prohibited by Section 20 of Regulation XVI (16) of 1827, but even so the Full Bench decided that a stranger to the "watan", who had got possession of service "watan" lands by an absolute assignment to him by a grantor, could successfully defend a suit for possession of those lands by a subsequent "watandar" by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of twelve years.

The principle has been similarly enunciated in "GNANASAMBANDHA v. VELU

PANDHARAM" 27 Ind App 69 (P C) in which the suit was brought by the respondent to establish Ms right to the management of a temple ana to the possession of lands forming the endowment. It was proved that the hereditary trustees of the endowment had sold their hereditary right of management and transferred the endowed properties to the appellant. The High Court decreed the suit, but on appeal the Judicial Committee reversed the decree of the High Court, holding that the sales were null and void and that the possession taken by the purchaser was adverse to the vendors and those claiming under them, and that the suit was barred by limitation. At page 76, Sir Richard Couch states:

"The law of limitation applicable to the case is Article 124 of the 2nd Schedule to the Act XV (15) of 1877, which says that in a suit for possession of an hereditary office the period of limitation is twelve years, which begins to run when the defendant takes possession of the office adversely to the plaintiff or any person from or through whom he derives his right to sue. Chockalinga attained majority in 1880, and had by Article 44 of the Act three years for suing to set aside the sale by his guardian. He did not do so, and by Section 20 of the Limitation Act his right became extinguished. Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other; but if there is, Article 144 of the same schedule is applicable to the property. That bars the suit after twelve years" adverse possession."

The law is similarly expounded in "KAMAKHYA NARAIN SINGH v. RAM RAKSHNA SINGH", 7 Pat 649 in which the plaintiff had sued several defendants to recover possession of villages included in "mukarrari instimrari" grants made by his predecessor-in-title. It was not contested before the Judicial Committee that the grants expired on the deaths of the respective grantees. The plaintiff alleged that after the grantees' deaths the defendants, who were heirs or assignees of the grantees and persons claiming under them, became yearly tenants, and that the tenancies had been determined by notice. The defendants denied that they were yearly tenants, and pleaded that they had acquired a permanent, heritable and transferable interest by adverse possession, and that the suits were barred under Article 144 of the Indian Limitation Act.

The High Court dismissed the suits and in appeal the decision of the High Court was affirmed by the Judicial Committee who held that upon the death of the grantee of a "mukarrari istimrari patta", which upon its true construction was for life only, his heirs or assignees who remained in possession claiming contrary to the contention of the grantor that the "patta" is permanent and heritable, did not become tenants from year to year either u/s 116 of the Transfer of Property Act, or otherwise by operation of law. The possession of the heirs or assignees, and of those claiming from them, was adverse to the grantor for the purpose of the Indian Limitation Act, unless the grantor had recognised the existence of a tenancy so that the relationship of landlord and tenant was created. Upon the evidence in the case the Judicial Committee held that the plaintiff failed to prove

that the relationship of landlord and tenant on which he relied was in existence within twelve years prior to the institution of the suit and therefore the plaintiff's suit for possession was barred by the Limitation Act.

7. To a similar effect is the decision of a single Judge in "ABDUL JABBAR KHAN v. GULAB KHAN" 14 Pat L T 294, in which there was a mortgage of a "raiya" holding in Chotanagpore for the maximum period of five years or until repayment of the advance. It was held that the mortgage was not valid to any extent and the "mortgagee" begins to prescribe from the date of the "mortgage" and if he held adverse possession as such for the statutory period, the "raiya" could only recover possession by redeeming him. The same view has been adopted in Kala Devi and Others Vs. Khelu Rai and Others, , in which the plaintiffs' predecessor granted a "kurfa" settlement to the defendants of a holding in respect of which no right of transfer by lease was recorded in the record of rights. The defendants held the land in open assertion of permanent tenancy right therein for a period of more than twelve years and had been paying rent during this time.

The plaintiffs brought a suit for declaration of title to and recovery of possession of the holding. It was held by the High Court that the "kurfa" lease was invalid u/s 27(1) of the Santhal Parganag Settlement Regulation of 1872, which provided that no transfer by a "raiya" of his right in his holding or any portion thereof, by sale, gift, mortgage, lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the record of rights and then only to the extent to which such right is so recorded. There was no evidence on the record as to whether there was any note of a right of transfer in the Settlement Record. The High Court held that the "kurfa" lease was invalid u/s 27(1), that the defendants were in the position of trespassers from the beginning and having held it for a period of twelve years in open assertion of permanent tenancy rights therein, had acquired those rights by prescription and could not be ejected.

8. Applying the "ratio" of these authorities it must be held in the present case that the defendants were in adverse possession of the land for more than twelve years and the suit instituted by the plaintiff is barred under Article 144 of the Indian Limitation Act.

9. Upon these grounds I should affirm the decree of the lower appellate Court and dismiss this appeal with costs.

Rai, J.

10. I agree.