

(1971) 10 PAT CK 0011
In the Patna High Court
Case No : A.F.A.D. No. 546 of 1968

Gauri Shankar Tiwary

APPELLANT

Vs

Maharani Durgeshwari Sani and Others

RESPONDENT

Date of Decision : 28-10-1971

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 2, 6(1)
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : AIR 1973 Patna 69

Hon'ble Judges : B.D. Singh, J

Bench : Single Bench

Advocate : R.S. Chatterjee and Baijnath Sahay, for the Appellant; Lakshman Saran Sinha and Ramanand Prasad Yadav, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Singh, J.—This appeal by the defendant is directed against the judgment and decree of the appellate Court affirming those of the trial Court. The respondents had filed title suit No. 69 of 1960 for declaration of title and recovery of possession of the orchard land measuring 4 bighas 13 kathas and 1 dhur bearing plot No. 473 (old 48) situate in village Anandpur. P.S. Mirganj, in the district of Saran with mesne profits.

2. In order to appreciate the points involved in this appeal it will be necessary to state briefly the facts- The respondents, who are the plaintiffs, are the present proprietress and the proprietors of Hathwa Raj. In 1901 rent suit was brought by then proprietors of the Hathwa Raj against the ancestors of the defendant-appellant. The "suit was decreed in favour of the then landlord who purchased the holding in the auction sale. The said holding consisted of plot No. 473 which is the subject-matter of the present dispute along with the two other plots, namely, plot No. 38 fold 34) and 472 fold 344). It seems that no physical possession was obtained in the execution proceeding after the said purchase by the landlord. Therefore, the then Maharaja of Hathwa Raj filed title suit No. 990

of 1913 against the ancestor of the present defendant for khas possession of the land contained under three plots with wasilat (mesne profits), after evicting the defendants therefrom. The said suit was decreed in part holding that the Maharaja of Hathwa was entitled to recover only plot No. 344. With regard to plot Nos. 34 and 48 it was held on the contention of the then defendants that they (defendants) were not in possession over the same.

3. The present suit land, i.e., plot No. 473, was recorded in revisional survey bearing khewat No. 2 as "orchard" and according to the plaintiffs, they remained in khas possession till the Zamindari of the Hathwa Raj vested in the State under the Bihar Land Reforms Act in May. 1952. On 13-10-1954 the defendant-appellant cut and removed a dried up mango tree from the suit land, which gave rise to a criminal case, instituted by the Raj against the defendant. The defendant was convicted by the trial court in the said criminal case, but he was acquitted by the appellate court. During the pendency of the criminal case the defendant sowed Til and Bazra in the disputed land. Since he was acquitted by the appellate court, he became emboldened and dispossessed the plaintiffs from the suit land. In June. 1958, the defendant further cut and appropriated two dried up mango trees from the suit land. Thereafter the plaintiffs instituted this suit on the 8th March 1960.

4. The suit was contested by the defendant. The chief defence was that the defendant's ancestors were recorded as raiyats in the suit land. There was no delivery of possession over the land in favour of Hathwa Raj. Hathwa Raj never came in possession over this land on the basis of the rent suit. The defendant was in continuous possession over it. The entry in the revisional survey khatian in favour of Hathwa Raj was incorrect.

5. The trial court as mentioned above, decreed the suit in favour of the plaintiffs and the appellate court upheld the judgment and the decree of the trial court.

6. Mr. R.S. Chatterjee, learned counsel on behalf of the plaintiffs has assailed the judgment and the decrees of the courts below and has raised the following points for consideration by this court: (1) Since the court below has not given any finding regarding khas possession over the suit land by the plaintiffs, at the time of vesting of the estate of tile plaintiffs under the Land Reforms Act, the plaintiffs cannot have any title over the suit land nor they are entitled to recovery of possession of the same and (ii) the present suit of the plaintiffs was barred under the provisions of Order 2, Rule 2 of the CPC because the earlier suit by the holder of Hathwa Raj regarding plot Nos. 34 and 43 was dismissed. Thus the present suit, learned counsel submitted, was barred also u/s 11 of the Code on the principles of res judicata. Learned counsel for the appellant conceded that these points were not raised before the courts below and as such there is no finding with regard to these by them. In the very beginning therefore he submitted that the case should be remanded for giving a fresh finding with regard to khas possession and with regard to the question regarding res judicata.

7. I will take up for consideration point No. (1) first. Learned counsel drew my attention to Section 2 (k) of the Bihar Land Reforms Act, 1950 (hereinafter referred to as "the Act"), which reads as:

"Khas possession used with reference to the possession of a proprietor or tenure-holder of any land used for agricultural or horticultural purposes means the possession of such proprietor or tenure-holder by cultivating such land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock".

He also drew my attention to the relevant provisions contained u/s 6 (1) (b) of the Act, which is to this effect:--

"On and from the date of vesting all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, including:--

(b) lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lessee of an estate or tenure and cultivated by himself with his own stock or by his own servants or by hired labour or with hired stock."

On the basis of these provisions he urged that unless it is established by the plaintiffs that the suit land was in their khas possession within the meaning of Section 2 (k) of the Act, on the date of vesting in the instant case it was in the year 1952), they were left with no title to the land as it had already vested under the Act. In support of his contention he relied on *Surajnath Ahir and Others Vs. Prithinath Singh and Others*, wherein their Lordships of the Supreme Court, while dealing with the provisions contained u/s 6 of the Act and the definition of "khas possession" u/s 2 (k) of the Act, observed at page 5 that the definition of "khas possession" means possession of a proprietor or tenure-holder either by cultivating such land himself with his own stock or by his own servants or by hired labour or with hired stock. The mere fact that a proprietor had a subsisting title to possession over certain land on the date of vesting would not make that land under his "khas possession". Their Lordships further held that the land in suit cannot be deemed to be settled with the outgoing intermediaries by the State in accordance with the provisions of Section 6 of the Act. In the absence of such settlement no rights over the land in suit remained with the outgoing intermediaries after the date of vesting, all their rights having vested in the State by virtue of Sub-section (1) of Section 3 of the Act. Those intermediaries lost their right to recover possession from the persons even if they were trespassers, on their estate vesting in the State, by virtue of Section 3 or 4 of the Act and that therefore, thereafter, they had no subsisting right to recover possession from the person concerned.

8. In my opinion, the above observations of their Lordships are of no avail to the appellant in the instant case. The findings of fact in the two cases are different. In that case only subsisting title was found in favour of the plaintiff as the land, mortgaged to the defendants, was redeemed in 1943. Although there was

redemption the defendants had not given up possession, and they were "holding the land as trespassers at the time of its vesting under the Act. The plaintiffs were found not in possession over the suit land at that time. In that circumstance it was held in that case that the plaintiffs were not entitled to possession and the right to possession vested in the State. In the present case from paragraph 8 of the appellate court judgment it is clear that the specific point was raised regarding khas possession of the plaintiffs so far as the suit land is concerned. P. W. 2, an employee of the Hathwa Raj, had stated in his evidence that the Raj was always exercising possession over the suit land for the period before 1965. The appellate court after considering other evidence on record agreed with the findings of the trial court that the plaintiffs were in khas possession over the suit land up to the year 1955, when they were dispossessed by the defendant (vide paragraphs 20 and 22 of the Judgment). It may be recalled that in the instant case the Estate of Hathwa Raj had vested under the Land Reforms Act in the year 1952. Obviously, therefore, the plaintiffs were in khas possession over the suit land on the date of vesting. In my view the finding of the court below regarding khas possession is in accordance with the requirements of Section 2 (k) and Section 6 of the Act. In that view of the matter, there is no merit in the contention of the learned counsel for the appellant under this point.

9. Now I will advert to the consideration of point No. (ii). Learned counsel for the appellant has emphasised that in title suit No. 990 of 1913 the ancestor of the present plaintiffs got decree only with regard to plot No. 344 and the claim of the plaintiff of that suit with regard to plot Nos. 34 and 48 (new 473) was dismissed on merit. He submitted that it is true that possession over plot Nos. 34 and 48 was not found with the ancestors of the present defendants. But it is equally true that possession was also not found with the ancestor of the present plaintiffs as the lands covered by plot Nos. 34 and 48 were parti lands. In that view of the matter the suit of the then plaintiffs was decreed in part only. On that basis learned counsel argued that the present suit for the same plot No. 48 (new 473) was not maintainable and was barred u/s 11 of the CPC on the principle of constructive res judicata and also under Order 2, Rule 2 of the Code. Learned counsel urged that it is no doubt true that the question of res judicata was not raised by the appellant in the Court below, yet this is a question of law, which can be raised even in second appeal by the appellant for its decision if there is some material on the record. In order to substantiate his contention he relied on State of Punjab Vs. Bua Das Kaushal, where their Lordships at page 1677 in paragraph 5 observed:

"The only point which remains for disposal is whether the principle of res judicata could be waived and was actually waived in the present case. In AIR 1948 3 (Privy Council) their Lordships observed ".....there was no issue on this point and the question of res judicata has to be specially pleaded. The record shows that this question was not argued before the High Court and before the trial Court respondent's pleader argued exactly the contrary of his present argument,

namely, that the decision in the previous suit could not operate as *res judicata*. That was obviously because two of the findings in that suit were in favour of the alienees. Their Lordships are therefore unable to accept this argument. The position in the present case is entirely different. Although no specific plea was taken in the written statement nor was any issue framed before the trial Court but the necessary facts were present to the mind of the parties and were gone into by the Court....."

On the basis of the above observation he urged that in paragraph 11 the appellate Court has specifically mentioned that the then plaintiff was entitled only to pos-session of plot No. 344 and, therefore, title suit No. 990 of 1913 was decreed only in part. From that it can safely be inferred that the claim of the plaintiff regarding recovery of possession of plot Nos. 34 and 48 was rejected on merit. Therefore, the present suit of the plaintiffs with regard to plot No. 48 (new 473) is barred on the principle of *res judicata*.

10. In my opinion, this contention of the learned counsel also is not acceptable on the facts and circumstances of the case. It may be noticed that in title suit No. 990 of 1913 plot Nos. 34 and 48 were not found in possession of the defendants. It is no doubt true that the possession of the plaintiffs also on those plots was not found and the lands were *parti* then. But subsequent to the judgment in that suit in revisional survey khatian plot No. 473 was recorded under khata No. 2 as "bakasht malik" of Hathwa Raj which finds mention in paragraph 14 of the appellate Court Judgment. The Court below has rightly observed that there would be presumption of correctness of the Khatian entries and there was nothing on the side of the defendant-appellant to rebut that presumption of correctness. I have already discussed above that the Court below has found possession of the plaintiffs over the suit land since the date of the entry in the revisional survey khatian up to the year 1955 when the plaintiffs were dispossessed by the present defendant. There is nothing improbable that subsequent to the decision in title suit No. 990 of 1913, the ancestor of the plaintiffs acquired possession over plot Nos. 34 and 48 and the same were recorded in the name of Hathwa Raj in the revisional survey and the Raj continued in possession till 1955 when the defendant dispossessed the present plaintiffs, which gave rise to fresh cause of action. In that circumstance, the findings in title suit No. 990 of 1913 regarding plot Nos. 34 and 48 would not operate as *res judicata*, nor the provisions contained under Order 2, Rule 2 of the Code would be attracted. This point also, therefore, has no merit.

11. In the result, the appeal is dismissed with costs and the Judgment and the decree of the Court below are upheld.