

(1923) 02 PAT CK 0004
In the Patna High Court

Gobind Singh and Others

APPELLANT

Vs

Jaigopal Singhn and Others

RESPONDENT

Date of Decision : 06-02-1923

Acts Referred:

Citation : AIR 1924 Patna 322

Hon'ble Judges : Foster, J

Bench : Division Bench

Judgement

Foster, J.—The plaintiffs and the defendants 2nd party are co-sharers in one of the five Touzi estates comprised in Mahal Naula, namely Touzi estate No. 1003; and the defendants first party are the proprietors of an adjacent estate also within Mahal Naula, namely Touzi No. 1061. The plaintiffs sued for a declaration of their title and for confirmation of possession in respect of their right of fishery in a tract having an area of 18 bighas 7 cottahs 12 dhurs. Admittedly, this land lies within Touzi estate No. 1003. The cause of action was stated to have been a criminal case in June 1919 concerning this fishery. The defendants who are proprietors of Touzi No. 1061, that is, the defendants 1st party have contested the suit as defendants in the original Court and appellants in the Appellate Court. Some of the plaintiff's co-sharers, defendants 2nd party, appeared and filed written statements supporting the defendants first party., In the written statements it was asserted that the possession of the plaintiffs and defendants 2nd party of lands within Touzi estate No. 1003 had been altered since the institution of the suit by Civil Court partition, and it was asserted that the area of 18 bighas and odd had fallen within the patti of the plaintiffs' co-sharers. It was also asserted that the right of fishery in this area belonged to the proprietors of Touzi estate No. 1061 by right of prescription. I should mention here that the parties are agreed that this area of 18 bighas and odd consists of land which is cultivated for part of the year but during the rains goes under water and becomes one part of a long stretch of water called the sorhni jalkar. The question whether the proprietors of other Touzi estates than estate No. 1003 had acquired any prescriptive rights to fish in the disputed land was directly raised between

the parties in Issue No. 1 and was decided against them and the learned Munsif held that the plaintiffs and the defendants 2nd party as proprietors of Touzi estate No. 1003 had the right to fish on the disputed land. It was also held that the proprietors of other Touzi estates were not necessary parties. Then the learned Munsif proceeded to decide which of the plots scheduled in the plaint and comprised in the land in dispute have fallen into the plaintiffs' patti by partition. He found that only plot No. 7448 of Khata No. 51 did not appear to have fallen into the co-sharers' patti. His order was that "the suit be decreed in part; let the title of the plaintiffs be declared in respect of the disputed land with reference to plot No. 7448 only and let them be confirmed in possession thereof. Let it also be declared that the defendants have no right in the disputed jalkar and that the order passed in the criminal proceeding dated the 15th June 1916 is illegal and inoperative."

2. The plaintiffs did not appear but the defendants 1st party brought an appeal against the declaration decreed. The first point taken before the learned Subordinate Judge who heard the appeal was that the Court of first instance, having found that all the plots but No. 7448 had fallen in patti of the co-sharers, and there being no evidence that this plot No. 7448 had fallen in the plaintiffs' patti, the suit should have been dismissed. The learned Subordinate Judge examined the partition papers and came to the conclusion that, whilst there was some evidence that some other plots had fallen into the plaintiffs' patti, there was no evidence at all to show in what patti plot No. 7448 had fallen. The learned Subordinate Judge acceded to one plea of the appellants-defendants, namely, that the lower Court should not have made so wide a negative declaration against the defendants. The order of the Subordinate Judge was as follows. "The appeal, therefore, practically fails. But the decree of the lower Court will be modified in this way. In place of the declaration made by the lower Court it will be declared that the plaintiffs have the fishery right over such of the plots mentioned in the plaint as have fallen into their patti by Civil Court partition and that the defendants 1st party have got no fishery right over the said plots of the plaintiffs.", Against this decision in the first appeal the defendants 1st party have made a second appeal. Four points have been raised of which two can be disposed of at once. It was first urged that the decree of the lower Appellate Court went beyond the pleadings, but this is obviously a mistake on the part of the learned Vakil and the point was withdrawn. The second point which I propose to dispose of at once is the contention that the suit was not maintainable unless the plaintiffs had established a right of easement. It is obvious that a person cannot have an easement in the land he owns and that the plaintiffs are suing only as proprietors of the lands in suit. Two other points have been argued at length. It is contended that the decision of the lower Court was beyond the jurisdiction of an appellate Court in so far as it interfered with the decree to which the plaintiffs had submitted by not appealing. The argument had reference to the terms of Order XLI, Rule 33, and the case *Rangamlal v. Jhandu* [1912] 34 All. 32 was cited. In connection with this contention there was a

subsidiary argument that the plaintiffs were not at all entitled to plot No. 7448.

3. Now, looking at the decision of the two Courts it seems to me that they were both moving on the same line and were both guided by the same principle in coming to their decisions. Both Courts appear to me to have held in that the plaintiffs were entitled to a declaration of their rights in fishery in respect of those puts which fell within their patti. No doubt, it would have been better if all discussion of the proprietary rights acquired by partition (sic) excluded, and if the plaint had been followed and a declaration, granted in respect of the whole of the 18 (sic) lying within the whole Touzi estate No. 1003 subject to any subsequent modifications made in the title of the parties by Civil Court partition. But as it was, each Court not only decided that the plaintiffs must have a declaration in respect of the land of which the plaintiffs were proprietors, but also referred to the partition papers to ascertain what those lands were. In this process the two Courts seem to have disagreed and the Appellate Court intended to solve the difficulty by making a general decree of the nature of that appealed against. Now, the defendants-appellants who are proprietors of Touzi estate No. 1061, and whom I must in this second appeal regard as having no interest in the lands in suit, ask me to set aside the whole decree. I am not disposed to do this, because, in my opinion, it would be doing a great injustice to the plaintiffs, who would in the result be deprived of what they have been found entitled to. I am quoting as literally as possible the words of an Allahabad judgment reported as *Jawahar Bono v. Shujaat Hunain Beg* [1921] 43 All. 85 in which the case which I have quoted above from *Rangamlal v. Jhandu* [1912] 34 All. 32 was distinguished. In my opinion the learned Subordinate Judge did not exceed the powers given him as Appellate Court by Order 41, Rule 33. He adopted the principle on which the decision of the First Court, was based and he made an order which he considered ought to have been made on the basis of that principle. I, therefore, find no error of law in this respect.

4. As to the question whether plot No. 7448 falls within or without the plaintiffs' khasara, the form of the Appellate Court's decree leaves the question open. It is urged that the decree in itself is indefinite, and Order 2, Rule 9 was invoked. In my opinion the lands affected by the declaration are clearly indicated and there is no chance of mistake. The description is sufficient for the purpose of identification of plots when the question arises. For this reason I dismiss the appeal with costs.