
(1950) 09 PAT CK 0002
In the Patna High Court
Case No : A.F.A.D. No. 685 of 1948

Hitlal Mahton

APPELLANT

Vs

Kameshwar Singh Bahadur and Others

RESPONDENT

Date of Decision : 14-09-1950

Acts Referred:

Bihar Tenancy Act, 1885 — Article 3, 148, 26A

Citation : AIR 1951 Patna 6

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

Bench : Division Bench

Advocate : B.C. De and M.K. Mukherji, for the Appellant; S.N. Dutta, S.P. Srivastava, Baidyanath Jha and Bhagirathi Rai, for the Respondent

Final Decision : Dismissed

Judgement

Rai, J.—This is an appeal by the plaintiff against the Judgment and decree of the Additional District Judge of Purnea confirming those of the Munsif of the same place. The plaintiff filed the suit for a declaration that his title in respect of the holding in suit had remained unaffected by the execution sale and subsequent delivery of possession, and re-settlement of the same by the defendant 1st party. He also prayed for recovery of possession.

2. The facts leading to the present litigation are the following: There was a holding of 13 bighas, 8 kathas, 2 dhurs bearing a rental of Rs. 21-11-9. It had been mortgaged to the plaintiff and the defendants 3rd party. The mortgagees brought an action on the mortgage, obtained a decree and in execution of that decree they put to sale the said holding and purchased it themselves on 10-4-1929. On 22-2-1930, the sale was confirmed and on 29-3-1930, delivery of possession was given to the mortgagee auction-purchasers. There was subsequently a partition in the family of the plaintiff and the defendants 3rd party in which the holding in question fell to the share of the plaintiff. In the year 1930 the proprietor of the Darbhanga Raj filed Rent Suit No. 1709 of 1930 in respect of the holding in question against the original tenant, Srichand Mahton.

In that suit for rent, the mortgagee auction purchasers were not impleaded as party-defendants. The rent suit was decreed, and in execution of that decree the landlord-decree-holder purchased it on 9-2-1934. On 28-10-1934, delivery of possession was given to the landlord auction purchaser. In 1937 the proprietor of the Darbhanga Raj settled it with one Ramjivan Singh who subsequently, in the year 1944, sold it to the defendants 2nd party. The present suit was filed on 17-10-1945.

3. The plaintiff's case was that the sale in execution of the decree for rent only conveyed the right, title and interest of the Judgment-debtor in the holding to the auction-purchaser. According to him, the holding being transferable, the mortgagee auction-purchasers had become really the raiyats of the holding, and, as they had not been impleaded in the rent suit, the execution sale had the effect of a sale in execution of a money decree only. On this basis it was claimed that the right of the plaintiff was not affected by the sale and he was entitled to recovery of possession.

4. The suit was contested by defendant 1 as well as by the settlee-defendants who contended that the holding was not transferable by custom, that the auction sale dated 9-2-1934, would be deemed to have passed the entire holding to the landlord auction-purchaser and it had not the effect of a sale in execution of a money decree only. The proprietor of the Darbhanga Raj was justified in bringing the rent suit against the original recorded tenant, Srichand Mahton, and the decree passed against him had the effect of a rent decree. The defendants contended that the right of the mortgagee auction-purchasers, if any, had been lost by the auction sale in execution of that rent decree. The defendants further contended that the suit of the plaintiff was barred by general and special law of limitation.

5. The trial Court dismissed the suit. The decree of the trial Court was affirmed by the lower appellate Court also. Hence this second appeal.

6. The lower appellate Court, after considering the various evidence on record, has come to the finding that the custom of transferability of occupancy holdings exists in Mohammadpur Sadik where the suit lands are situated. It also held that after the auction-purchase and delivery of possession in execution of the mortgage decree the mortgagee auction-purchasers came in possession of the holding. On the question of the right of the present plaintiff being affected by the auction-sale of 9-2-1934, the lower appellate Court was of opinion that as the mortgagee auction purchasers had not given notice to the landlord about their having purchased the holding in question the latter had every right to file the rent suit against the recorded tenant and the decree passed in such a suit had the effect of a rent decree. In this view of the matter, the entire holding had passed and the right of the mortgagee auction-purchasers had come to an end by that sale. On the question of limitation, the lower appellate Court held that if the sale in execution of the decree for rent be taken to have the effect of a sale in execution of a money decree, then the plaintiff's suit would be barred by

limitation, as held by a Division Bench of this Court in the case of Mt. Deorati Kuer v. Dasarath Dubey 21 P. L. T. 374: AIR (27) 1940 Pat. 476).

7. Mr. De on behalf of the appellant submitted that once it has been found that there was a custom of transferability of occupancy holding in the village, the right of the mortgagee auction purchasers was complete on 10-4-1929, and non-mutation of their names in the sherista of the landlord would not affect their title. He stressed that the title of a purchaser of a transferable occupancy holding does not depend on the recognition by the landlord. In support of his contention he referred to an unreported decision of a Division Bench of this Court in Santilal Mahto v. Raj Darbhanga, Second Appeal 558 of 1947. It was a Judgment between the family of the plaintiff and the present landlord defendant. In that decision it was held that in case of occupancy holdings transferable by custom the title of the purchaser cannot be affected by his failure to apply for mutation of his name in the landlord's sherista. In this connection, Mr. De also referred to the case of Ashok Bhuiyan v. Karim Bepari, 9 C.W.N. 843. In that case it was held :

"There is no law rendering it obligatory on the tenants to get their names recorded in the landlord's sherista for the purpose of perfecting their title."

He also relied upon the case of Hargouri Prasad v. Raghunath Singh 16 Pat. 239: AIR (24) 1937 Pat. 314), a Division Bench case of this Court. In that case, their Lordships, while discussing the rights of the transferees under the various clauses of the new amended Section 26, Bihar Tenancy Act, held as follows :

"Now, as I have already stated, both these provisions apply to transfers made after the passing of the Bihar Tenancy (Amendment) Act. These sections have obviously no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect, even though the landlord may not have consented to the transfer."

8. He also relied upon the decision in the case of Chamatkari Dasi Vs. Triguna Nath Sardar and others in support of his contention that in absence of the mortgagee auction-purchasers the decree passed in the rent suit would have the effect of a money decree. In my opinion, there is much force in the contention of the learned counsel for the appellant.

9. Mr. Dutt, the learned counsel for the respondents, in reply, submitted that the decree obtained by the landlord against the recorded tenants would have the effect of a rent decree. In this connection he referred to the provisions of the old Section 73, Bengal Tenancy Act, as it stood in the years 1930 and 1934. He contended that both transferor and transferee would be jointly and severally liable for the rent in absence of a notice as contemplated by -that section. I do not think that this section can help the contention of the respondents. It appears to deal with voluntary transfers and it provides for the liability of the transferor and the transferee. It does not provide that the decree for rent against the

transferor only will have the effect of a rent decree or the sale in execution of such decree will extinguish the right of the transferee as well. Mr. Dutt further relied upon the decision in the case of Azgar Ali Vs. Asaboddin Kazi and Others . He specifically relied upon the following passage in the Judgment of that case :

"Now it is settled beyond the possibility of dispute that when a landlord obtains a decree for rent against his registered tenant, the defaulting holding may be sold in execution of such a decree, although it may have previously passed into the hands of persons other than the Judgment-debtor and such unrecorded transferees would be bound by the sale."

But the facts of that case are distinguishable. It does not appear that the holding under consideration in that case was a holding transferable by custom. Besides in that case the transfer was of a portion of the holding. The learned Judges in that case were considering the right of the transferee to file an objection u/s 244, Civil P. C. as it then stood, and while considering the provisions of that section, they held that the transferee in that case was bound by the decree. Mr. Dutt further relied on the decision in the case of Rameshwar Singh v. Mt. Rajo Chowdhrair 7 P. L. T. 625 : AIR (13) 1926 Pat. 210), but this case also is of no assistance to the respondents. In that case their Lordships were considering the propriety of the order passed by the Court below in an application filed under Order 21, Rule 58, Civil P. C. The application had been filed by a transferee of a portion of the holding whose name had not been recorded in the landlord's sherista. Their Lordships held that the application was not maintainable. They were not considering the right of a transferee of the entire holding transferable by custom. In my Judgment, the auction sale in execution of the decree for rent did not extinguish the title of the mortgagee auction-purchasers, which subsequently vested in the plaintiff alone by virtue of a partition in his family.

10. But this alone will not help the plaintiff-appellant. The Court of appeal below has found and I think justly, that the present suit is barred by limitation. In the plaint, the plaintiff has mentioned his cause of action to have arisen on 28-10-1934, when delivery of possession was given to the landlord auction-purchaser. The lower appellate Court has held that the present plaintiff was dispossessed from this date by the landlord and the present suit having been instituted on 17-10-1945, was barred by limitation under the provisions of Schedule III, Article 3, Bihar Tenancy Act, which runs as follows :

Description of suit. Period of Time from which Limitation, period begins to run. "3, To recover possession- Two years. The date of dispossession of land session." claimed by the plaintiff as a raiyat or an under-raiyat.

11. Mr. De, the learned counsel for the appellant, relied upon the decision of a Special Bench of this Court in the case of Gajadhar Rai v. Ram Charan Gope 9 Pat. 788 : AIR (17) 1930 Pat. 256 S.B.). He contended that when the dispossession is by the landlord auction-purchaser by taking delivery of possession through the help of Court, it is not a dispossession by the landlord.

He referred to the following passage from the Judgment:

"It follows, therefore, that the weight of authority is clearly in favour of the view that Article 3 of Schedule III, Bengal Tenancy Act, does not apply if the dispossession is by the landlord as an auction-purchaser of the holding."

But this decision can be of no assistance to the appellant. In this case the sale was in execution of a rent decree and the entire holding had passed by the sale. The Judgment-debtor was the real raiyat, and hence it was held there that he was "dispossessed through the instrumentality of the Court. In the present case, the plaintiff was not a party to the execution proceedings and he cannot in law be deemed to have been dispossessed by any process of the Court. While dealing with the case of *Mt. Deorati Kuer v. Dasrath Dubey* 21 P. L. T. 374 : A. I. R. (27) 1940 Pat. 476), which had been relied upon by the Court below, Mr. De submitted that in that case the dispossession was some time after the delivery of possession and hence the decision that Article 3, Schedule III, Bihar Tenancy Act applies to a case where the landlord auction-purchaser gets possession in execution of a money decree, is really obiter. But apart from this decision, on the case of the plaintiff himself it was a case of dispossession by the landlord. The present plaintiff was not a Judgment-debtor and his dispossession on 28-10-1934, was really the dispossession by the landlord not through the process of Court because the Court had no jurisdiction to dispossess the present plaintiff who was not a Judgment-debtor.

12. In my opinion, the Judgment of the Court of appeal below was correct when it held that the suit of the plaintiff was barred by limitation.

13. The result is that the decree passed by the Court of appeal below is upheld. The appeal fails and is hereby dismissed with costs.

Imam, J.

14. I agree that the appeal be dismissed, but would like to make a few observations of my own. Two principal questions have arisen in this case which require to be decided. The first one is as to whether the decree which the landlord obtained in Rent Suit No. 1709 of 1930 and the auction sale which followed its execution had the effect of a money decree and a money sale, or they had the effect of a rent decree and a rent sale. In the rent suit, the mortgagees of the holding had not been impleaded as defendants. The question for consideration is whether it was necessary to have impleaded them as defendants in the said rent suit in order that the decree in the said rent suit should have the effect of a rent decree and the auction sale which followed should have the effect of a rent sale. It has been found as a fact that there is a custom in the village, where the holding is situated, to the effect that a transfer of an occupancy holding can take place without the consent of the landlord. The custom pleaded and proved, however, does not show that the landlord must have notice of the transfer in order to make it effective and valid. At the time when the decree for rent was obtained by the landlord, there was no provision under

the Bihar Tenancy Act which required that notice of the transfer should be given to the landlord in order to make it an effective and a valid transfer. It follows from this that when a transfer of an occupancy holding takes place in the village, where there is a custom of transferability, it is a valid transfer without notice of it to the landlord and it is effective from the moment it takes place. In the present case, the mortgagees of the, who had obtained a decree and in execution of it had auction purchased the holding, were the real tenants and not the original tenant Srichand Mahto. The mortgagees not having been impleaded as defendants in the suit for rent brought by the landlord, the said suit for rent was brought against a person who was no longer a tenant of the holding. Between that person and the landlord, at the time the rent suit was decreed, there subsisted not relationship of landlord and tenant. The decree obtained in the said suit, therefore, must have the effect of a money decree and not a rent decree, and the auction sale which took place in execution of the said decree must be regarded as a money sale and not a rent sale.

15. The second question to be decided is as to whether the general law of limitation or the special law of limitation under the Bihar Tenancy Act is applicable to the facts of the present case. There can be, in my opinion, no doubt on the decision of this Court in *Gajadhar Rai v. Ram Charan Gope* 9 Pat.. 788 : A. I. R. (17) 1930 Pat 256 S. B) that if the holding had been sold in execution of the decree for rent obtained by the landlord and not merely the light, title and interest of the Judgment-debtor, then the Special law of limitation under the Bihar Tenancy Act would not be applicable. I am, however, of the opinion that the holding in the present case was not sold in execution of the decree for rent obtained by the landlord, because the tenant to whom the holding belonged at the time had not been impleaded in the rent suit as a defendant and there was no relationship of landlord and tenant between the Judgment debtor of the rent suit and the decree holder. The dispossession of the mortgagees, which took place after the decree holder had auction purchased, was by the landlord as the relationship of landlord and tenant subsisted at the time between them and the decree holder. The order of the executing Court was to dispossess the Judgment debtor, who was at the time not in possession, and not the tenant of the landlord. When the mortgagees were dispossessed, it could hardly be said that they were dispossessed at the instance of the Court and not by the landlord. In the circumstances, in my opinion, the provisions of Article 3, Schedule III, Bihar Tenancy Act, apply and the suit was barred.