

(1974) 11 PAT CK 0002
In the Patna High Court
Case No : A.F.A.D. No. 588 of 1969

Hussaini Mistri and Others

APPELLANT

Vs

Zahiruddin and Others

RESPONDENT

Date of Decision : 26-11-1974

Acts Referred:

Trusts Act, 1882 — Section 88, 90

Citation : AIR 1975 Patna 175

Hon'ble Judges : S.N.P. Singh, C.J;S.K. Jha, J

Bench : Division Bench

Advocate : K.D. De, for the Appellant; Muhammed Mazhar Hussain, Baijnath Prasad and A. Shahabuddin, for the Respondent

Final Decision : Allowed

Judgement

S.K. Jha, J.—The plaintiffs have come up in second appeal against a judgment of reversal passed by the lower appellate Court. Their suit had been decreed by the trial Court but has been dismissed by the decree of the lower appellate Court. When the case was originally placed for hearing before a learned Single Judge of this Court, the appeal was directed to be placed before a Division Bench, because in his view some questions of law of considerable importance were involved. Hence this appeal before us.

2. The facts relating to the case can be summed up in a narrow compass -- there is no controversy with regard to them. The appellants' case, in brief, was that Nazir Mian who was the owner of the house in question died in the year 1938, leaving behind a son named Najbul Hussain and a daughter Masihan Bibi. Both Najbul and Masihan came in possession of the house after the death of their father. A few years after the death of Nazir Mian aforesaid Masihan Bibi died leaving behind the plaintiffs as her heirs, and thereafter, Najbul Hussain also died leaving the vendors of defendant No. 1 respondent No. 1 as his heirs. Masihan Bibi having confidence in her brother had left the task of payment of rent, etc., in the hands of her brother, and she used to pay her quota of the rent and taxes to

him, and after the death of her brother the payment of taxes, etc., used to be made by the sons of Najbul Hussain. Jafar Mian and other heirs of Najbul Hussain sold away their two-thirds interest in the property in suit to defendant No. 1 (respondent No. 1) and the remaining one-third share continued in possession of the appellants jointly with the heirs of Najbul Hussain and after the purchase by defendant No. 1, jointly with him. Due to the purchase of the portion of the house by defendant No. 1, who is a stranger to the family, difficulty and inconvenience was being felt by the appellants, and hence this suit for partition, being partition Suit No. 63 of 1963, was instituted for decreeing the appellants' suit for partition to the extent of their one-third share in the house, bearing municipal holding No. 78, Ward No. 9, in the town of Daltonganj, duly described in Schedule A at the foot of the plaint.

3. The defence of respondent No. 1 was that the appellants had no cause of action for the suit; the suit was barred by limitation and adverse possession; the appellants could have neither any title nor any possession over the house in question; Masihan Bibi died during the lifetime of her father Nazir Mian and, therefore, had not inherited any share in that house. The further defence case was that only Najbul Hussain inherited the house as the exclusive owner and plaintiff No. 1 with his family members used to live in a different house altogether which was sold away by plaintiff No. 1 sometime in the year 1954. Thereafter, some quarrel arose between plaintiff No. 1 and his sons, and plaintiff No. 1 was deserted by his sons. He had thereafter to take shelter in the house in suit and subsequently defendant No. 1 purchased the house and plaintiff No. 1 was merely allowed to occupy a portion of the house as a monthly tenant of defendant No. 1 at a rental of Rs. 5/- per month. The entire house, according to the defence case, had been purchased by defendant No. 1 from the heirs of Najbul Hussain and he in his own right had been paying all the taxes and other dues throughout. All the allegations of the appellants to the contrary were dubbed as being false and baseless.

4. It would thus be seen that the bone of contention between the parties was as to whether the appellants and defendant No. 1 respondent No. 1 were co-sharers living in the house in question or whether plaintiff No. 1 was merely a monthly tenant under defendant No. 1 at a monthly rental of Rs. 5/-. Both the Courts of fact below have recorded concurrent findings to this effect: Masihan Bibi died after the death of her father Nazir Mian and she and after her death her heirs came in joint possession of their one-third share in the house as owners thereof. The payment of taxes and rent by Najibul Hussain and his heirs was made jointly on their behalf and on behalf of Masihan Bibi afore-mentioned and her heirs, and the allegations of defendant No. 1 respondent No. 1 to the contrary were all false. The further finding is that it was also false to suggest that the appellants were the tenants of respondent No. 1. On these findings the learned Munsif had decreed the suit for partition of the appellants' one-third share in the house property in question. The lower appellate Court formulated the following two questions for determination in the appeal before it:

(1) "Whether Masihan Bibi wife of plaintiff No. 1 died after the death of her father or before his death and, whether she and her heirs acquired interest in the property to the extent of 1/3rd share in the disputed house?.

(2) Whether the right, title and interest of Masihan Bibi and her heirs i.e. the plaintiffs, in the house property in question subsisted in spite of the facts that rent and taxes were paid by Najbul Hussain and his heirs and town lease was executed by them and defendant No. 1 from time to time?"

On an appraisal of the evidence on record the lower appellate Court, agreeing with the finding of the trial Court, held that Masihan Bibi died after the death of her father Nazir Mian and had acquired one-third interest under the Muhammedan Law in the house in question and she and after her death her heirs have been continuing in possession of a portion of the house throughout under that claim and not as a tenant from defendant No. 1. The lower appellate Court further found that the defendant's allegation of plaintiff No. 1 being a monthly tenant under defendant No. 1 at a monthly rental of Rupees 5/- had not at all been substantiated and defendant No. 1's further case of seeking protection under the provisions of Section 41 of the Transfer of Property Act could not be upheld. This is for the reason that plaintiff No. 1 was the son-in-law of Nazir Mian and he was living in the house at the time of the purchase and thorough enquiry was necessary by the defendant at the time of his purchase from his vendor in order to attract the provisions of Section 41 of the Transfer of Property Act with regard to transfer from an ostensible owner.

5. Although all the findings of fact were recorded in favour of the appellants, the lower appellate Court thought that the execution of town lease by Zahiruddin (respondent No. 1), who was a purchaser from Sheikh Jafar Hussain and Mosommat Zubaida Bibi by virtue of sale deeds dated 21-4-1962 and 14-9-1962, respectively, and after his purchase there having been execution of a fresh town lease for 30 years between him and the Deputy Commissioner, Palamau, for and on behalf of the Governor of Bihar dated 22-5-1963, amounted to determination or extinguishment of the rights of the appellants under the old lease of the 14th February, 1947 which was also for a period of 30 years and, the term of which had not expired. Although it was held that the appellants had a subsisting title as cosharers lessees in respect of the property in question on the date when the town lease was executed in favour of defendant No. 1 on 22-5-1963, yet placing reliance upon an unreported. decision of the Supreme Court in Smt. Lokmani Devi v. Sagarmal Seth (dead) and others (Civil Appeal No. 998 of 1964) decided on 23-8-1967 (SC) the lower appellate Court held that the appellants' rights as co-sharers in respect of the building in question in which they were residing were completely wiped out. I am afraid, the learned Additional District Judge has not correctly appreciated the ratio decidendi of the Supreme Court decision in Smt. Lokmani Devi's case. The facts of that case were entirely distinct and distinguishable from the facts of the instant case. In that case on July 7, 1924 the Secretary of State for India granted to one Rewat Lal a lease for 30 years in

respect of plot No. 241 forming part of the Palamau Estate in the town of Daltonganj at an annual rental of Rs. 3/- Rewat Lal constructed a residential house on that plot of land. There was revenue survey in 1926 and the rents in the Palamau Estate were revised, the rent of the plot held by Rewat Lal having been revised to Rs. 12/- per annum, Rewat Lal declined to pay the enhanced rent and remained in possession of the plot and the house constructed thereon as a tenant at sufferance. In December 1930 Rewat Lal having died his surviving widow Shilwanti Kuer continued to remain in possession thereof. The land continued to stand recorded in the Jamabandi in the name of Rewat Lal and his widow was not disturbed in her possession. On the 18th March, 1943 Shilwanti sold the house together with her interest in the plot of land (which she had none) to one Murlidhar and delivered possession of the property to the vendee. Murlidhar executed a lease in favour of the Secretary of State for India for a period of 30 years at a rental of Rs. 6/- per annum on July 19, 1944. On these facts and in these circumstances their Lordships of the Supreme Court held that at the date when the lease was executed in favour of Murlidhar by the Secretary of State there was no subsisting lease in favour of any one and that when he executed a lease not for the unexpired period of the original lease, but a fresh lease for 30 years, an inference could be easily drawn that the original relationship of landlord and tenant had been duly determined, and a fresh relationship of lessor and lessee was brought into existence in the year 1944 in favour of Murlidhar. In the present case it will be seen on the findings of both the Courts below that on the date defendant No. 1 is said to have executed a town lease in favour of the Deputy Commissioner of Palamau he was merely a co-sharer representing the interest of all the cosharers. The period of lease in favour of the joint co-owners was still subsisting, there had been no determination or extinction of the subsisting lease which enured to the advantage of the appellants also. On the finding that defendant No. 1 was not in exclusive possession but was merely a cosharer paying rent and taxes not in his own behalf but on behalf of all the cosharers, there is no reason why the provision of Section 90 of the Indian Trusts Act be not applicable to the facts of the present case. As was held by a Bench decision of the Calcutta High Court in Suraj Ratan Thirani v. Azamabad Tea Co. Ltd AIR 1955(Cal) 2867 where a lease by Crown stands in the name of A, prima facie the title rests solely in A. But where it was found that the lease was renewal of an old lease, interest in which at the date of expiry of the old lease was vested in A and other heirs of the last lessee, and it was also found that A had taken the renewal in his name alone in breach of the trust, the lease, even though in the name of A would enure for the benefit of all those in respect of whom he was in the position of a trustee. Reliance in this connection was placed on a decision of the Judicial Committee of the Privy Council in Deo Nandan Prashad v. Janki Singh AIR 1916 PC 227. The aforesaid judgment of Calcutta High Court went up to the Supreme Court. On the facts of that case in the case of Suraj Ratan Thirani and Others Vs. The Azamabad Tea Co. and Others, at page 301 it was observed by Ayyangar, J., who delivered the judgment on behalf of the Court, approving the principle laid down by the

Calcutta High Court, thus:

"Closely analysed the material allegations to found the cause of action on which reliefs were claimed in the present suit were (1) That the Tea Estate was originally the property of Azam Ali. When he died his estate was inherited by his 8 sons, his 3 widows and a daughter. That the registration of the estate in the name of Md. Ismail was as a cosharer, the property belonging beneficially to all the heirs. This position was not altered by the termination of the first lease and its renewal in 1928 for a further period of 30 years. All the co-heirs lived as a joint family with a common mess and hence there was no question of any adverse possession by Md. Ismail whose possession was not as sole proprietor or exclusive."

The principle enunciated as aforesaid is fully applicable to the facts of the present case. Mr. Mazhar Hussain, learned counsel for the contesting respondents, mildly urged that the question with regard to the applicability of either Section 88 or Section 90 of the Indian Trusts Act being a mixed question of fact and law, this Court should not take notice of the provisions aforesaid, as the point was not canvassed before the Courts below. This submission has to be stated merely to be rejected. On the concurrent findings of fact recorded by both the Courts below, the question of law squarely covers the point and I fail to see as to how any further investigation of facts would be necessary in order to attract the provisions with regard to the rights of beneficial co-owners.

6. For the reasons stated above, in view, the judgment of the lower appellate Court is not based upon an appreciation of the correct principles of law involved and is liable to be set aside. This appeal, accordingly succeeds and is allowed with costs, the judgment and decree of the lower appellate Court is set aside and those of the trial Court restored.

S.N.P. Singh, C.J.

I agree.