
(1963) 02 PAT CK 0011
In the Patna High Court
Case No : A.F.A.D. No. 1255 of 1958

Johan Uraon (Ekka) and Another

APPELLANT

Vs

Sitaram Sao (Bhagat) and Others

RESPONDENT

Date of Decision : 14-02-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 3
Limitation Act, 1908 — Article 144

Citation : AIR 1964 Patna 31

Hon'ble Judges : Ramratna Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : B.C. De and A.K. Chatterjee, for the Appellant; L.K. Choudhary and S.K. Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiya Singh, J.—This is defendants' second appeal. Their father Nirbandh Oraon was recorded in the last revisional survey and settlement records, which were finally published in 1935, as a sikmi raiyat (under-raiyat) in respect of plot No. 240, the sikmi khata being khata No. 20 under the raiyati khata No. 77 in village Naro. The plaintiffs are admittedly the occupancy raiyats of khata No. 77. Nirbandh Oraon died in 1945. The plaintiffs served defendants with a notice to quit and demanded possession. On their refusal to give up possession, the present suit was brought for their eviction on the grounds that they were mere tenants-at-will and that their tenancy had been determined and, therefore, they had no right to remain upon the land and the plaintiffs were legally entitled to re-enter.

2. The defendants contested the suit and denied that they were tenants-at-will. They asserted that they had acquired permanent occupancy right in the disputed land, i.e., in plot No. 240 and that they had inherited this land from their father, Nirbandh Oraon, and they were not liable to eviction.

3. The learned Munsif held that Nirbandh Oraon was an under-raiyat and had not

acquired permanent occupancy right He alternatively held that, even if Nirbandh had acquired occupancy right, this right did not devolve on his death on the defendants since such a right was not heritable except by custom and that no such custom had been established. He held, therefore, that the defendants were mere trespassers and granted the plaintiffs a decree for possession.

4. The defendants went in appeal being Title Appeal No. 106 of 1952. This appeal was allowed by the learned Subordinate Judge, Ranchi, and the suit was dismissed.

5. The plaintiffs preferred second appeal in the High Court against the decree of the learned Subordinate Judge which was numbered as second Appeal 585 of 1953. In this connection, I may state that the plaintiffs were 4 in number, namely, Sitaram Sao (Bhagat), Ganesh Sao (Bhagat), Most. Dukhan and Manga Sao (Bhagat). During the pendency of this appeal (S.A. 585 of 1953), Manga Sao (Bhagat) died and his heirs were not substituted. There is no dispute about that. Eventually, this appeal was heard and disposed of by this Court on 16-12-57. The appeal was remanded for fresh hearing. After remand, T.A. 106/52 was heard again by another Subordinate Judge, Mr. M.A. Rahman. He came to a conclusion different from the one of his predecessor-in- office. He held that Nirbandh Oraon had acquired the right of a dar raiyat (under-raiyat) by prescription and that he had further acquired the status of an under-raiyat with occupancy right. He further held that the occupancy right which Nirbandh had acquired by prescription was not heritable and accordingly the defendants, his sons, had acquired no interest in the disputed land and were mere trespassers liable to be ejected. He accordingly affirmed the decree of the learned Munsif and dismissed the appeal. Now the defendants have come up in second appeal.

6. On merits, there is very little to be said and, in fact, no serious argument was advanced. There is the concurrent finding of fact that Nirbandh Oraon had acquired a dar-raiyati interest in the disputed land by adverse possession for over 12 years and that he had also acquired the status of an occupancy raiyat. This right he acquired long before the sikmi khatian was prepared in his name in 1935. There is no dispute that Nirbandh Oraon died in 1945 and the present suit was brought within 12 years of his death on 4-4-51, unless, therefore, the defendants had inherited the right of Nirbandh Oraon, they could not successfully resist the suit because, before they could perfect their title by adverse possession for 12 years, the present suit was brought. So the only material question is whether or not the occupancy dar-raiyati interest which Nirbandh Oraon possessed devolved on his death on his sons, namely, the defendants. Now, it has been held by this Court that the dar-raiyati interest even with occupancy status is not heritable. In the case of Muchi Ram Bagal Vs. Balaram Bhumij, their Lordships have laid down as follows:

"Heritability is a right which has been attached by legislation to the tenure of an occupancy raiyat in Bengal, Bihar and Orissa, but it is not a necessary condition attaching to the enjoyment of an occupancy right for life. The question of

whether an under-raiyat who acquires occupancy right acquires also the rights of an occupancy raiyat as defined by the Tenancy Acts depends entirely on local custom. It is only by the operation of local custom that an under-raiyat can acquire a right of occupancy for life; and In order to ascertain what are the incidents attaching to that right of occupancy, it is necessary to ascertain what is that local custom on the point."

This view was further affirmed in the case of Jugesh Chandra Bose Vs. Maqbul Hussain, , It is well settled that the interest of an under-raiyat with occupancy status is not heritable under the law. It may be heritable by custom. In this case, the plaintiffs specifically pleaded that the dar raiyati interest in the locality lasts till the life time of the dar raiyat and not further. On the other hand, the defendants controverted this allegation and alleged that the right of a dar-raiyat is heritable by custom of the village. Both the parties adduced evidence and both the Courts below have concurrently held that the custom of heritability has not been established. It must be held, therefore, that the dar-raiyati interest with occupancy right is not heritable in the village in question. That being so, the defendants acquired no interest in the disputed land because the right which Nirbandh Oraon had acquired terminated on his death. The status of the defendants is (nothing more than that of a trespasser. In this view of the matter, the defendants are manifestly liable to be ejected, and the decrees of the Courts below must be affirmed.

7. Mr. B.C. De appearing for the appellants contended that this appeal had abated in toto and the judgment of the Subordinate Judge, who first heard Title Appeal 106/52, dismissing the plaintiffs' suit must be affirmed. His contention is that, during the pendency of Second Appeal 585/53 in this Court, Manga Sao (Bhagat) died. Since his heirs were not brought on, the record, the entire second appeal abated with the result that the order of remand was vitiated and had no, legal effect and consequently the subsequent order of the Subordinate Judge, Mr. M.A. Rahman, dated the 26th June, 1958, was also invalid. He accordingly urged that the order of remand and the order of the Subordinate Judge after remand must be set aside and the judgment of the Subordinate Judge, Mr. S.S. Hussain, dated the 30th March, 1953 must be confirmed.

This contention, in my opinion, has no substance, it is true that Manga Sao (Bhagat), one of the plaintiffs, died during the pendency of S.A. 585/53 and his heirs and legal representatives were not substituted in his place. Nonetheless, the effect of the death of Manga Sao (Bhagat) was not to cause the abatement of the entire Second Appeal No. 585 of 1953. As will appear from the above, the defendants were mere trespassers and the plaintiffs were co-owners of the disputed land, to be more precise, co-raiyats of the disputed land. It is settled beyond dispute that the possession of a trespasser is good against the whole world except the rightful owner. In other words, a person having better title is entitled in law to obtain khas possession of a land by evicting a trespasser. The plaintiffs had a better claim to the disputed land than the defendants. The only

question is whether only one of the joint owners of the land can maintain a suit for possession against a trespasser. There is a decision of this Court In Sambhu Gosain and Another Vs. Piyari Mian, which lays down that one of the several co-owners is entitled to maintain an action for ejectment against a trespasser without joining the other co-owners as party to the action. This view was later affirmed by a Bench of this Court in Second Appeal No. 2203 of 1949 Dassain Nonia v. Ramdeo Prasad, D/- 25-9-1956: (AIR-1957 Pat 692). There is, therefore, no manner of doubt that a suit by one of joint owners to obtain possession by ejecting a trespasser is maintainable even though the other joint owners have not been impleaded as parties to the action. When, therefore, one of the plaintiffs, who were joint owners, died, the right to sue, in fact, survived to the other plaintiffs or other appellants or respondents, as the case may be, and in such a case it cannot be said that the right to sue did not survive. Their Lordships of the Supreme Court have recently pointed out in the case or The State of Punjab Vs. Nathu Ram, that the provisions of Order I rule 9 C.P.C. show that

"if the Court can deal with the matter in controversy so far as regards the rights and Interests of the appellant and the respondents other than the deceased respondent It has to proceed with the appeal and decide it".

They have further held that it

"is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it."

In a case of this nature, therefore, the Court can proceed with the suit or appeal even when one of the joint owners dies and his heirs are not brought on the record. In the circumstances of this case, therefore, there is absolutely no question of abatement of the entire appeal and despite the death of Manga Sao (Bhagat) the appeal was in order and had not abated, as contended by learned Counsel. Therefore, this contention must be overruled.

8. The next argument advanced by Mr. B.C. De was that the defendants also had acquired occupancy right independent of their father, Nirbandh Oraon. His contention proceeds in this way. Nirbandh Oraon was in possession of the disputed land adversely to the plaintiffs and on his death the defendants continued in possession, In these circumstances, the defendants were entitled to tack their possession with that of their father and thereafter they had acquired the right by adverse possession. It is true, as laid down by this Court in Jatu Das and Another Vs. Mt. Sulochana Mundain and Another, that the expression "the possession of the defendant in Article 144 includes also the possession of the person from or through whom the defendant derived his liability to be sued and as such the defendant is entitled to tack his possession with that of his predecessor-in-interest for the purpose of computing the statutory period of limitation for determining whether or not a perfected right has been acquired. In this case, the question of tacking, the possession of two trespassers does not

arise at all. As found by the Courts below and as is apparent from the facts of this case, the adverse possession of Nirbandh Oraon commenced sometime in 1922 and, therefore, by the time the revisional survey and settlement operation took place, he had already acquired a perfected dar-raiyati interest by prescription. In other words, his possession in 1935, when the khatian was finally prepared and published, was not that of a trespasser but that of an under-raiyat. He died 10 years later. The possession of Nirbandh Oraon, therefore, cannot be said to be that of a trespasser. In order to resist the suit successfully, the defendants must independently acquire their title perfected by prescription or must inherit the right which Nirbandh Oraon had acquired, and both these questions have been and must be decided against the defendants. Therefore, this contention has no force in the context of this case.

9. It follows, therefore, that here is no merit in this appeal which must be dismissed. In the circumstances of the case, however, there will be no order for cost of this appeal.

Ramratna Singh, J.

10. I agree.