
(1970) 09 PAT CK 0009

In the Patna High Court

Case No : A.F.A.D. No's. 659 and 660 of 1963

Kedar Das Mohta and Others

APPELLANT

Vs

Nand Lal Poddar and Others

RESPONDENT

Date of Decision : 10-09-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Contract Act, 1872 — Section 10, 2
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 111, 112

Citation : AIR 1971 Patna 253

Hon'ble Judges : Shambhu Prasad Singh, J;B.D. Singh, J

Bench : Division Bench

Advocate : Lal Narain Sinha, General and S.K. Sarkar, for the Appellant; J.C. Sinha and B.P. Rajgarhia, for the Respondent

Final Decision : Dismissed

Judgement

Shambhu Prasad Singh, J.—Questions arising for decision in these two appeals being common, they have been heard together and are being disposed of by this judgment. The respondents in the two appeals are also common; Nos. 1 to 5 are the plaintiffs and Nos. 6 and 7 are two of the defendants, adopted son and widow of Charmanlal Khedia. The appellants in two appeals are not common. They are other defendants of the two suits and claimed title to the properties in dispute on the basis of purchases from respondent No. 6. Title Suit No 10 of 1957 was filed in the court of the Subordinate Judge at Chaibassa. Second Appeal No. 659 of 1963 arises out of this suit. The other suit was originally filed before the Munsif at Chaibassa, but, It appears subsequently this also came before the Subordinate Judge at Chaibassa and was numbered as Title Suit No. 7 of 1959 of that Court. Second Appeal No. 600 of 1963 arises out of this suit.

2. Briefly stated, the case of the plaintiff- respondents in both the suits was that the properties in dispute as described in schedule A to the plaint belonged to Saligram (father of Chaman Lal Khedia) and others and stood recorded in their

names in the record of revisional settlement of Porahat. In the year 1934, there was a partition suit No. 86 of 1934 of the court of the Subordinate Judge at Purulia between Saligram and his co-sharers. The dispute was referred to arbitration and according to the award of the arbitrators, which was ultimately made a decree of the court the property was allotted exclusively to the share of Saliaram. According to the award, Salig-ram was also to discharge the debts of the joint family firms Tularam Nathuram and Teipal Madangopal. The aforesaid firms were indebted to the firm Ganga-sahay Rameshwar of Rameshwar (the original plaintiff), ancestor of plaintiff-respondents, and in discharge of those debts Saligram agreed to transfer the property in dispute to the firm Gangasahay Rameshwar. The terms of the transfer were incorporated in a letter of the year 1936 and Rameshwar as proprietor of the said firm came in possession of the property. He continued in exclusive and peaceful possession of the properties in dispute openly and uninterruptedly as well as adversely to the interest of Salig-ram and his descendants for over 12 years.

In 1936, Dwarka Das (original defendant No. 1). adoptive father of appellant No. 1 and husband of appellant No. 2 oJf Second Appeal No. 659 of 1963 and both the appellants of the other appeal were in possession, of the pro per Lies described in Schedule B to the plaints (i.e.. shop Nos. 10 and 11 in Second Appeal 659/63 and shop No. 7 in the other appeal) as tenants under Saligram. They attorned as tenants to Rameshwar and started paying ants to him. The firm Gangasahay Rame-shwar owed some money to Dwarka Das and, therefore, they agreed that the rent payable by him would be adjusted as against that debt and it was so adjusted and satisfied by Jeth Sudi 15, Sambat 2000. After that Dwarka Das started paving rent in cash to Rameshwar. In 1956, there was some dispute between Dwarka Das and Rameshwar on tthe question of electric installation in the portion of the house in occupation of the former. Rameshwar insisted that he would install electricity only it rent was enhanced. Being annoyed, Dwarka Das directly applied for electric installation denying his tenancy under Rameshwar and setting up tenancy under respondent No, 6. Dwarka Das also stopped paying rent from that time. He also got filed a collusive and fraudulent application by respondent No. 6 in the Chakradbarpur Municipality challenging the mutation in the name of Rameshwar, but they could not succeed.

Dwarka Das and respondent No. 6 also set themselves to the task of winning over some of the tenants of the plaintiff-respondents including the appellants in the other appeal i.e.. Second Appeal No. 660 of 1963. Ramesbwar then filed an application before the Circle Officer, Cha-kradharpur, praying for mutation of his name in respect of schedule A properties which was registered as a mutation case and ultimately allowed on 28-8-1.957. During the progress of this mutation proceeding, there was a talk of amicable settlement between Rameshwar and respondent. No. 6 and ultimately the latter agreed to execute two registered sale deeds in acknowledgement of the title of Rameshwar as full owner of Schedule A properties and the other for transferring western portion of plot No. 1142 which had also been in possession of Rameshwar for over 12 years, in fact, be and his

adoptive mother, respondent No. 7, executed the two registered sale deeds, as agreed upon, on the 26th of August, 1957. At that time, Rameshwar came to know of two sale deed :-- dated 29-7-1957 and 21-8-1957 executed by them selling portions of schedule A property to appellant No. 2 of Second Appeal 659 of 1963 and to the appellants of the other appeal respectively. At the instruction of respondent No. 6 the fact of the execution of the aforesaid sale deeds was also incorporated by the scribe in the sale deeds in favour of Rameshwar in spite of the vehement objection by one of the plaintiff-respondents. It is asserted that neither the sale deeds in favour of the appellants of the two appeals nor the recitals aforesaid in the two sale deeds in favour of Rameshwar have affected the title of the plaintiff-respondants. The appellants of the two appeals having defaulted in payment of rent for ever two months in respect of Schedule B properties and on account of the fact that they were denying the title of the plaintiff-respondents made themselves liable for eviction.

3. On the averments ay stated in the preceding paragraph, the plaintiff-respondents claimed the following reliefs:

(a) Declaration of their right title and interest to the properties described in Schedules B and C to the plaints and also a declaration that such right, title and interest were not averted by the sole deed in favour of the appellants of either of the appeals.

(It may be stated here that in Sche-dule C to each of the plaints one more room was added to the property describ-ed in Schedule B, in respect of which, according to the plaintiff-respondents, they were also tenants).

(b) For recovery of khas possession of the lands and house described in schedule B to the plaints.

(c) Decree for arrears of rent upto the date of the institution of the suit.

(d) Confirmation of possession over schedule C lands.

4. For the purposes of the decision of the appeals it is not necessary to set out the case of the defendants-appellants or respondents, in detail. The defendant-appellants of both the suit, denied the title of the plaintiff-respondents on the basis of the arrangement of the year 1936, by adverse possession or by attornment by them as tenants. They also denied that the sale deeds in their favour executed by respondent No. 6 were fraudulent and collusive and claimed to have acquired valid title by them.

5. The courts below have concur-rently found that the plaintiff--respond-tints have acquired good title by adverse possession and that the appellants of both the appeals attorned to them as tenants.

6. Mr. Lal Naravan Sinha did not challenge the aforesaid findings of the courts below, but submitted that whatever title the plaintiff-respondents might have acquired by adverse possession or by attornment of the appellants of the two

appeals as tenants to them was lost by the alleged settlement of the year 1957 between them and respondent No. 6, According to him, now the plaintiff-respondents can claim title only on the basis of the sale deeds dated 23-8-1957 in their favour in which the title of the appellants of both the appeals was admitted and as such they could not succeed against them. He further submitted that no decree for eviction could be passed against the appellants as it had neither been alleged nor proved that the tenancy was determined by a notice under Section 106 of the Transfer of Property Act.

7. There is no substance in the first contention of Mr. Lal Narayan Sinha.. Really he did not elaborate it which indicates that he himself was not convinced of the merit of this contention. The sale deeds in favour of the appellants of the two appeals are of dates prior to the execution of the sale deeds in favour of Rameshwar. Mr. Lal Narayan Sinha conceded that recitals in the sale deeds in favour of Rameshwar would not bind the appellants in the two appeals. Obviously, therefore, the appellants cannot take any advantage of the recitals in the sale deeds in favour of Rameshwar against the plaintiff-respondents. An agreement cannot be enforced at the instance of a person who himself is not bound by it. In other words, there must be reciprocity as to the binding nature of the agreement between the person who wants to enforce it and the person against whom it is sought to be enforced. Mr. Lal Narayan Sinha faintly suggested that the alleged settlement between Rameshwar and respondent No. 6 might have been arrived at before the execution of the sale deeds in favour of the appellants of the two appeals. There is no averment in the pleadings of either party as to the actual date of the alleged settlement. The settlement could have been arrived at even after the execution of the sale deeds in favour of the appellants of the two appeals and before the execution of the sale deeds in favour of Rameshwar. The appellants not having raised this point in the courts below cannot now be allowed to raise it in this Court at the second appellate stage on the assumption that the settlement might have been arrived at before the execution of the sale deeds in favour of the appellants of the two appeals. Even if the settlement which was oral was arrived at before the execution of the sale deeds in favour of the appellants of the two appeals, the appellants cannot enforce terms thereof as against the plaintiff-respondents for the reason aforesaid, i.e.. want of reciprocity. They do not admit that they had notice of the settlement before the execution of the sale deeds in their favour and, therefore, it would bind them. They cannot be allowed to say, in the circumstances, that the settlement binds the plaintiff-respondents and they (the appellants) can rely on it against them (plaintiff-respondents). Further, the title acquired by the plaintiff-respondents by adverse possession could not be relinquished by an oral settlement of the nature alleged in the plaints. Such a right could be relinquished or transferred only by a registered instrument as it is nobody's case that the value of the property was less than Rs. 100/-.

8. In support of his second contention. Mr. Lal Narayan Sinha relied on a Full Bench decision of this Court in *Niranjan Pal and Another Vs. Chaitanyalal Ghosh*

and Another, . It has been held in that case that a suit for eviction from a house u/s 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act cannot be maintained unless the lease is determined by a notice u/s 106 of the Transfer of Property Act and it is for the plaintiff to mention in his plaint the fact of determination of the lease as one of the facts constituting the cause of action as he is required to give under Order 1. Rule 7 of the Code of Civil Procedure. It has further been held in that case that such a point can be taken for the first time in second appeal.

9. Mr. J. C. Sinha appearing for the plaintiff-respondents, in reply to the second contention of Mr. Lal Narayan Sinha, has relied on two Bench decisions of this Court in Abdul Rahim Vs. Md. Azimuddin, and Deo-saran Sahu v. Ram Das Sahu, 1967 BLJR 574. A distinction has been drawn in these decisions between a notice required by last portion of Clause (g) and a notice required by Clause (h) of Section 111 read with Section 106 of the Transfer of Property Act. It has been observed that while notice required by last portion of Clause (g) of Section 111 is a mere condition precedent, the notice required by Clause (h) of that section is a part of the cause of action for a suit for eviction. Because of this distinction it has been held in these two cases that the absence of the notice required by Clause (g) of Section 111 of the Act does not go to the root of jurisdiction so as to make the suit non-maintainable due to absence of cause of action. Mr. J. C. Sinha has drawn our attention to the plaints of both the suits wherein it has been specifically stated that the defendant-appellants were denying and interested in denying the title of the plaintiff-respondents to the suit properties. According to him, therefore, the case before us was a case of absence of the notice required by Clause (g) of Section 111 of the Transfer of Property Act and not of Clause (h) of that section as was the case in Niranjana Pal and Another Vs. Chaitanyalal Ghosh and Another, . Mr. Lal Narayan Sinha contended that as it was not expressly stated in the plaints that the appellants had forfeited their tenancy on account of the denial of the title of the plaintiff-respondents, the present case cannot be a case under Clause (g) of Section 111 of the Transfer of Property Act. It is common knowledge that in this country specially in mofussil courts plaints are inartistically drafted and. in my opinion, it cannot be said that because in the plaint after the statement that the defendant-appellants were denying the title of the plaintiff-respondents it is not further stated that they have forfeited the tenancy, the case will not be governed by Clause (g) of Section 111 of the Transfer of Property Act. I am, therefore, of the opinion that these cases being cases of forfeiture of tenancy under Clause (g) of Section 111 of the Transfer of Property Act, notice was a mere condition precedent and not part of the cause of action for the suits and they cannot be defeated on the ground that the plaints contained no averment that such notices were served on the defendant-appellants. The appellants having failed to raise this point in either of the courts below cannot be allowed to raise it for the first time at the second appellate stage.

10. Mr. Lal Narayan Sinha then contended that even if there was forfeiture of the

tenancy on account of the fact that the appellants denied the title of the plaintiff-respondents, the forfeiture was waived on account of the fact that the plaintiff-respondents claimed rent for the period after the alleged forfeiture and before the institution of the suits. In support of this contention he relied on Section 112 of the Transfer of Property Act which runs as follows :--

"A forfeiture u/s 111, Clause (g) is waived by acceptance of rent which has become due since the forfeiture or by distress for such rent, or by any other act on the part of the lessor showing an intention to treat the lease as subsisting:

Provided that the lessor is aware that the forfeiture has been incurred:

Provided also that, where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such acceptance is not a waiver."

According to Mr. Lal Narayan Sinha, claim for the rent in suit is covered by clause "any other act on the part of the lessor showing an intention to treat the lease as subsisting". He relied on a decision in Jogeshuri Chowdhrair v. Mohammed Ebrahim ILR (1887) Cal 33. According to Section 22 of the Rent Act (Bengal Act 8 of 1869) if the ryot was in arrears of rent for a period of one year he made himself liable to be ejected from the land. The landlord instituted the suit for the arrears of rent for the whole of one year and a portion of next year and also for ejectment. It was held that he was not entitled to a decree for ejectment as he had claimed rent for the portion of the next year and thereby waived his right to get the ryot ejected which had accrued to him on account of the fact that the ryot was in arrears of rent for one year.

11. On the other hand, Mr. J. C. Sinha relied on the decision in Padmanabhaya v. Ranga ILR (1911) Mad 161. In that case the lessees had denied the title of the landlord by a notice. The landlord then instituted a suit for eviction of the lessees on the ground of forfeiture and also sued for rent subsequent to the date of the forfeiture. It was held that a claim for rent in the suit for ejectment would not amount to a waiver of the forfeiture as the election to forfeit was complete and irrevocable when the suit for ejectment was instituted. This Bench decision of the Madras High Court was also followed by a Single Judge of that Court in Koragalva Vs. Jakri Beary and Others, . The Madras cases were decided with reference to the provisions of the Transfer of Property Act whereas the Calcutta case was decided with reference to the provisions of Rent Act of 1869. Now, the second proviso to Section 112 expressly says that where rent is accepted after the institution of the suit to eject the lessee on ground of forfeiture, such acceptance is not a waiver. The rent claimed for the period subsequent to the forfeiture in a suit for eviction on the ground of forfeiture can be accepted by the landlord only after the institution of the suit. If the acceptance itself does not amount to waiver, in my opinion, the mere claim acceptance in respect whereof can take place only after the institution of the suit cannot be said to be under the mischief of the clause "any other act on the part of the lessor showing an intention to treat the lease as subsisting" in Section 112 of the Transfer of Property Act. Once

the election to forfeit is complete and irrevocable by institution of the suit, claim for rent in that suit cannot be taken as a waiver of the forfeiture. The act which may constitute waiver must be antecedent to the election and not an act simultaneous with the election or subsequent thereto. I would prefer to follow the Madras view in preference to Calcutta view and hold that there has been no waiver of the forfeiture in either of the two cases before us by the plaintiff-respondents. Further, a Bench of this Court in Commissioner of Hazaribagh Municipality Vs. Fulchand Agarwala, has held that ordinarily plea of waiver cannot be allowed to be raised if it is not pleaded in the written statement. Thus, there appears no merit in the second contention of Mr. Lal Narayan Sinha either.

12. In the result, both the appeals fail and are dismissed with costs.

B.D. Singh, J.

13. I agree.