

(2013) 09 PAT CK 0052

In the Patna High Court

Case No : Second Appeal No. 402 of 1986

Keshawar Bhagat and Others

APPELLANT

Vs

Most. Jasiya Kuer and Others

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2013) 09 PAT CK 0052

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Advocate : Vijay Kumar Bhagat, for the Appellant; Anish Chandra Sinha, Advocate and Mr. Kamlesh Kumar, for the Respondent

Final Decision : Allowed

Judgement

Mungeshwar Sahoo, J.—This Second Appeal has been filed by the Sahoo, J. defendants against the judgment and decree dated 21.03.1986 passed by the learned 3rd Additional District Judge, Vaishali at Hajipur in Title Appeal No. 45 of 1982 whereby the learned Lower Appellate Court allowed the appeal and set aside the judgment and decree of the trial court dated 17.08.1982 passed by the learned Additional Munsif 1st Court, Hajipur in Title Suit No. 144 of 1974/94 of 1976. The plaintiffs-respondents filed the aforesaid suit praying for declaration of title and recovery of possession with respect to suit land i.e. 7 kathas 2 dhurs of land. They claimed the aforesaid reliefs alleging that the suit property was recorded in the name of Ramlal Mali as tenant at the time of cadastral survey. The said plot was in actual possession of Mahadeo Mahto and Dashrath Mahto who were in possession as Sikmidar. Sikmi Khata No. 122 was prepared at the time of cadastral survey. There were Mango and lichi trees on the said land. Mahadeo Mahto had a son, Ghanshyam. The name of his wife was Mauli. Likewise, the wife of Ghanshyam was Jaleshwari. On the death of Mahadeo and Ghanshyam, both the widows came in possession of the disputed land and they sold the land to the plaintiffs-respondents by registered sale deed dated

20.01.1921 and put the purchaser in possession of the same. The plaintiffs are the descendants of the said purchaser, Lakshman Mahto and Ayodhya Mahto. Ramlal Mali, the recorded tenant died issueless, therefore, Sikmidars were upgraded to be the Kastkar and the Sikmidar after the death of Ramlal used to divide the fruits of the trees of orchard to the proprietor namely the family of Ramnarayan Sah, Malik. They became the Bataidar of the landlord as such, they occupied the status of Kastkar. The plaintiffs further alleged that the defendants on 15 Sawan 1977 dispossessed the plaintiffs. It appears that the suit was filed initially in the year 1974 for declaration of title and confirmation of possession. Subsequently, after amendment, the prayer for recovery of possession was added.

2. The defendants filed contesting written statement admitting the case of the plaintiffs that Mahadeo and Dashrath were the Sikmidars of the disputed land but according to them, when their branches extinct, the disputed land came in khas possession of Ramlal, the recorded tenant and his heirs. The defendants denied the genuineness of the sale deed on the ground that the Sikmidar had no right to transfer and, therefore, the plaintiffs did not acquire any title. The Malik obtained rent decree and auction purchased the disputed plot and thereafter the Malik settled the disputed land on 02.11.1951 to Ramdewan Paswan and Ram Charan Paswan, the ancestors of the defendant.

3. The trial court dismissed the plaintiffs suit. The plaintiffs thereafter filed the title appeal. The Lower Appellate Court decreed the plaintiffs suit finding that the defendants failed to prove the settlement in their favour by the Malik.

4. At the time of admission on 21.08.1989, the following substantial question of law was formulated:

Whether the court below erred in law in decreeing the suit filed by the plaintiffs-respondents without recording a positive finding that the plaintiffs have been able to prove custom regarding transferability of Sikmi rights in the village?

5. The learned counsel, Mr. Bhagat appearing on behalf of the appellants submitted that it is admitted case of the plaintiffs that the recorded tenant was one Ramlal Mali. Mahadeo Mahto and Dashrath Mahto were the Sikmidars on the suit land, therefore, the Sikmidars cannot transfer the ownership right to the plaintiffs. Moreover, the said Sikmidars died and the widows have sold the property to the plaintiffs. The learned counsel, therefore, submitted that the Sikmidars have no transferable right. Even if the transfer was made by them, they transferred the right of Sikmidar and they cannot transfer the land as owner of the property. In such view of the matter, even after the transfer, the plaintiffs became the Sikmidar and he cannot claim title on the property. However, it is not the case of any party that the plaintiffs purchased the Sikmi right. Regarding the question as to whether Sikmidar's right is transferable or not, the learned counsel relied upon *Mita Dusadh and Others Vs. Anup Mahto, D.B.* On the strength of this decision, the learned counsel submitted that merely saying that

the Sikmidars were upgraded as occupancy raiyat, the long possession only will not convert the Sikmidar to an occupancy holder.

6. The learned counsel further submitted that if the vendor had no title to transfer the property then the purchaser has taken a risk in purchasing the same, in such circumstances, it cannot be said that he has purchased the property in good faith. In support of his contention, the learned counsel relied upon Gurbaksh Singh Vs. Nikka Singh, . According to the learned counsel, in the present case, the further substantial question of law involved in this appeal is as to whether the plaintiffs acquired valid title on the basis of the purchase made by the registered sale deed and whether the vendor of the plaintiffs had the right and title to transfer the same.

7. On the other hand, the learned counsel, Mr. Anish Chandra Sinha appearing on behalf of the respondents submitted that the vendors of the plaintiffs were in possession of the property since long and because of their long possession, they became the occupancy raiyat as such, they had the right to transfer the property and rightly they transferred the property in the year 1921 and since then the plaintiffs are coming in possession of the property. The Lower Appellate Court has discussed all the evidences oral and documentary and then recorded that the defendants have failed to prove the settlement made by the landlord in their favour and, therefore, the judgment of the Lower Appellate Court cannot be interfered with in exercise of jurisdiction u/s 100 of the Code of Civil Procedure. In support of his contention, the learned counsel relied upon 1963 BLJR 90 (Munilal Mandal and others v. Babuji Mandal and others). The learned counsel further submitted that the plaintiffs have also produced the documentary evidences before the Lower Appellate Court in support of the fact that a custom in the concerned village that the Bataidari right is transferable. In such circumstances, the plaintiffs have acquired valid right, title and interest and possession over the suit property.

8. Admittedly, the case of the plaintiffs is that Mahadeo and Dashrath were the Sikmidars. The plaintiffs pleaded that the status of the said Sikmidars was upgraded on the death of the recorded tenant and they became the Bataidar of the landlord. Therefore, they have purchased the property from the widows of the said Sikmidar/Bataidar. On the contrary, according to the defendants-appellants, on the death of the Sikmidar, the ex-landlord came in possession of the property exclusively and thereafter the ex-landlord settled the land in the year 1951 in favour of the defendant's ancestor by registered patta i.e. Exhibit E and since then they are coming in possession of the property. The question formulated at the time of admission is with regard to the transferability of Sikmi rights. The question is whether the Sikmidar acquired occupancy right as Raiyat or not.

9. In the case of Mita Dusadh & Others v. Anu Mahto (supra), this court has held that "moreover, an unfounded claim to be an occupancy raiyat would not by lapse of time convert him into one, however long it is persisted." In the said

decision, it has also been held that "it is well known even in the case of zirat and the fact that an occupancy right by one cultivator has been acquired but has ceased to exist, does not make it any easier for a future cultivator of the land to secure a right of occupancy therein."

10. So far the decision relied upon by the learned counsel appearing on behalf of the respondents i.e. case of Munilal Mandal is concerned, this decision is by Single Bench and while delivering the judgment, the Single Judge has not noticed the Division Bench of the High Court reported in Shrikishun Lal Vs. Harihar Sah and Another, wherein it has been held that under-raiyat cannot unless there is custom transfer interest even he has occupancy status. Subsequently, in the case of Ramadhar Upadhya and Another Vs. Baldeo Ahir and Others, this court held that "there is no provision in the Tenancy Act under which an under-raiyat can transfer his interest. If an under-raiyat acquires occupancy rights, the occupancy holdings can be sold in execution proceeding. But in view of the definition of "holding" in S. 3(9) only a raiyat can have an occupancy holding. And "raiyat" does not and cannot include "under-raiyat". Therefore the occupancy rights of under-raiyat cannot be sold away in execution proceeding as they are not transferable. Section 48C should also be read along with the provisions contained in S. 48-D of the Act. Section 48-D limits the rights of under-raiyat." In this decision, this court at paragraph 4 considered decision of Munilal case and did not follow that because of the fact that the Division Bench of Patna High Court, Shrikishun Lal Vs. Harihar Sah and Another, was not taken into consideration.

11. Again, in Bibi Jalgosan Vs. Bhulai Baitha and Others,), this court considering the decision of that 1963 BLJR 90(Munilal Mandal and others v. Babuji Mandal and others) held that the under tenancy right cannot be transferred even if the under tenant acquires a right of occupancy. In this case also, the decision in 1963 BLJR 90 (Munilal Mandal and others v. Babuji Mandal and others) was not followed.

12. The learned counsel for the respondents submitted that because the plaintiffs remained in possession for more than 12 years after purchase, therefore, they have acquired occupancy right after amendment of the Bihar Tenancy Act in the year 1938 because they continued in possession for more than 12 years. Therefore also, they have acquired the right, title and possession over the said property. So far this question is concerned, in the case of Suryabansh Upadhyay Vs. Awadhesh Choudhary and Others this court has held at paragraph 10 and 11 as follows:

10. From a combined reading of Sections 48C and 48D it is clear that a person by efflux of time on expiry of period of twelve years acquires occupancy right as well as raiyats" rights, subject to declaration as such by the prescribed authority u/s 48D. It is noteworthy that Section 48C does not contemplate any proceeding. The person concerned acquires occupancy right by legal fiction by efflux of time on expiry of the prescribed period. Any enquiry in this regard as to whether he has in fact acquired occupancy rights in terms of Section 48C, that is to say,

whether requisite conditions contemplated by that Section are satisfied or not, can be made only u/s 48D.

11. The acquisition of occupancy and raiyati rights by an under raiyat is thus conferred by the statute, i.e. the Bihar Tenancy Act. Such a right is not available to him under the general law of the land. The Act also provides for remedy and forum. Therefore, in my opinion, it is the forum created by the Act which alone is competent to declare the status of the person as an occupancy under raiyat or raiyat within meaning of Sections 48C and 48D. The present suit seeking declaration that the plaintiffs acquired status of occupancy under raiyat (and consequently, status of full-fledged raiyat), therefore, does not seem to be maintainable. As a matter of fact the plaintiffs had already sought a declaration that they be held to be raiyat u/s 48D which was rejected on finding that they are not under raiyat.

13. In the present case at our hand also, the plaintiffs claimed that his under-raiyati right became the raiyati right because of efflux of time. In view of this decision, the right which the plaintiff is claiming is not available to him in general law. In the said decision, this court relied upon the decision of the Hon''ble Supreme Court in the case of Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, wherein the Hon''ble Supreme Court has held that where a particular Act creates a right and also provides a forum for enforcement of such right, the jurisdiction of the Civil Court is ousted. The same view has been taken by the Hon''ble Supreme Court in the case of Saraswati and Others Vs. Lachanna (Dead) through Lrs.,

14. In view of the above facts and circumstances of the case, the claim of the plaintiffs is that either the vendor of the plaintiffs had acquired occupancy right or that he became the raiyat of the property and after his death, their widows sold the properties is concerned, that right is available to the plaintiffs before the forum created under the Bihar Tenancy Act. So far the claim of the plaintiffs that even after purchase he completed more than 12 years, therefore, he became the raiyat is concerned, also that can be declared in the forum created under the said Act.

15. In view of the above facts and circumstances of the case, it appears that none of the courts below have considered this aspect of the matter and only on the basis of possession or the failure of the defendants to prove the settlement in the year 1951 decreed the plaintiffs suit without considering as to whether the plaintiffs should seek declaration of his title or has acquired right with respect to the property.

16. In view of my above discussion, the substantial question of law formulated at the time of admission is answered in favour of the appellants and against the plaintiffs-respondents. In the result, this Second Appeal is allowed. The impugned judgment and decree of the Lower Appellate Court is set aside. The plaintiffs suit is thus, dismissed. In the facts and circumstances of the case, no

order as to cost.