

(1962) 01 PAT CK 0016

In the Patna High Court

Case No : Letters Patent Appeal No. 139 of 1958

Lakhan Sahu and Others

APPELLANT

Vs

Mt. Surji Telin and Others

RESPONDENT

Date of Decision : 30-01-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1962 Patna 341

Hon'ble Judges : S.N.P. Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Advocate : S.N. Dutta and P.P. Sinha, for the Appellant; Ramkishore Singh and Devendra Prasad Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Kanhaiya Singh, J.—Plot No. 1644 measuring 1 Katha 2 dhurs and containing one brick-built house with a tiled roof, and plot No. 1645, having an area of about 1 Katha with a Gola house thereon, both contiguous and situate in village Mohamadpur Baro, belonged to one Bansu Sah father of plaintiff No. 1 and maternal grand-father of plaintiffs Nos. 2 and 3, which, on Bansu's death, went into the plaintiff's possession. The plaintiffs sold plot No. 1645 with the Gola house to Fucho Sah, defendant No. 1 and subsequently mortgaged the other plot, No. 1644, together with the brick-built house to Mt. Kamli, who was the wife of Fucho Sah. The plaintiffs obtained a decree against Mt. Kamli for redemption of the mortgage and for possession with mesne profits. In execution of the said decree in Execution Case No. 42 of 1949, a pleader commissioner was appointed to measure the land and deliver possession of plot No. 1644. After measurement, the commissioner found that Fucho Sah and his wife had encroached upon an area of 6 dhurs out of plot. No. 1644 and had amalgamated the same with the adjacent plot No. 1645, by extending the construction on the latter plot over the former. The plaintiff demanded removal of the encroachment, but they declined. Thereafter, the plaintiffs instituted the Present suit for

recovery of possession of the said 6 dhurs of land out of plot No. 1644 and also claimed damages to the extent of Rs. 650 on account of the bricks and building materials lying from before on plot No. 1644 and misappropriated by them with mesne profits, impleading Fucho and his wife as defendants.

2. The defendants denied encroachment on plot No. 1644 and claimed the alleged encroached portion as part of their plot No. 1645. They denied further that there was a brick-built house on plot No. 1644. They also denied the removal and misappropriation of the building materials.

3. Fucho and his wife died one after another during pendency of the suit, and their heirs and legal representatives, the appellants before us, were substituted in their place, and they adopted the written statement filed by Fucho and his wife.

4. The learned Munsif held that the defendants had encroached upon plot No. 1644. He also found that the defendants had removed the building materials. He was, however, of the opinion that Section 47 and Order 21, Rule 97 of the CPC barred the suit so far as it related to the removal of the encroachment and possession of the encroached portion. Accordingly, he decreed the suit in part for damages to the extent of Rs. 650/-. On appeal, the learned Subordinate Judge held that there was encroachment on plot No 1644 to the extent of 4 dhurs and 10 1/2 dhurkis and it had been amalgamated with the contiguous plot No. 1645, and that this encroachment was made in 1948, and not 16 years prior to the institution of the suit, as asserted by the defendants. He further held that the suit was maintainable and Section 47 and Order 21, Rule 97 of the CPC had no application. He accordingly granted the plaintiffs a decree for possession of 4 dhurs and 12 1/2 dhurkis out of plot No. 1644 in addition to the affirmance of the Munsifs decree for Rs. 650 on account of damages, but disallowed mesne profits. Against that decree the defendants preferred a Second Appeal, which was heard by a Single Judge of this Court. Before the learned Single Judge, the only point taken was that Section 47 of the Code barred the suit. The contention raised by learned counsel for the defendants was that the decree for redemption was in effect a decree for possession of the mortgaged property, and, therefore, the question as to whether delivery of possession of the entire area decreed had been given or not was a question which arose between the parties to the suit and related to the execution, discharge and satisfaction of the decree. Accordingly, it was pointed out that the proper course for the plaintiffs to follow was to apply before the executing Court u/s 47 of the Code and not to seek relief by a separate suit. The learned Single Judge overruled this contention. He affirmed the decree of the learned Subordinate Judge and dismissed the appeal. It is against the judgment of the learned Single Judge that this appeal has been filed under Clause 10 of the Letters Patent, with his leave.

3. The point taken before the learned Judge has been reiterated before us. I do not think this contention is valid and substantial. It is well to remember that the redemption suit had been filed against Mt. Kamli alone. Her husband, Fucho, was not a party. She was the sole mortgagee, and the suit was decreed against her.

Her husband was not a party to this decree. The learned Judge has held that the encroachment had been made and the plaintiffs had been dispossessed by Fucho. To this observation of the learned Judge, no exception can be taken. Mst. Kamli was his wife, and plot No. 1645 belonged to him. The encroachment was made by extending the building standing on plot No. 1645 on the disputed portion of plot No. 1644, and for this Fucho and Fucho alone can be held responsible. There is no evidence that both Fucho and his wife made the encroachment. Apart from this, Section 47 of the Code has absolutely no application because the parties to the redemption suit and the parties to this suit in element are not the same. The redemption suit had been filed only against Mst. Kamli, whereas the present suit was instituted against Fucho and Mst. Kamli. Section 47 provides that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree, and not by a separate suit. Two essential ingredients of Section 47 are, first, that the questions must arise between the parties to the suit, in which the decree was passed, and, second, that those questions must relate to the execution, discharge or satisfaction of the decree. The questions involved in the present action are not questions between the parties to the suit for which the decree for redemption was passed. Fucho was not a party to the redemption decree, and the most prominent figure in the instant case is Fucho. In the redemption suit, it was never pleaded that Fucho was a necessary party. It follows that Mst. Kamli was the sole mortgagee in her own right. The questions arising between Mt. Kamli and the plaintiffs with regard to the decree for redemption must be determined by the executing Court, and not by a separate suit. Here, the dispute is between the plaintiffs on one side and the judgment-debtor in the redemption suit and a stranger, viz., Fucho Sah, on the other. Learned counsel for the appellants appreciated this difficulty and he suggested that, so far as Mt. Kamli is concerned, the plaintiffs should have filed a petition u/s 47, and as against Fucho a regular suit for ejectment should have been filed. I do not think.

Section 47 contemplates such circuitous and anomalous remedies. The very suggestion implies that Fucho has no interest in the decree for redemption and he is not bound by it. That being so, the provisions of Section 47 cannot, therefore, be invoked in the instant case, because the questions involved are not questions arising between the parties to the redemption suit. Learned counsel for the appellants relied upon a decision of a Single Judge of this Court in *Bhagwat Singh v. Kamakhya Narain Singh* AIR 1935 Pat 222. That case is clearly distinguishable. In that case, an action was brought by the plaintiff for possession of a village which was the subject-matter of a thika lease. A judgment was obtained by the plaintiff and the decree for delivery of possession was not put into execution. Again a suit was brought by the plaintiff of the former action for ejectment of some of the defendant from the bakashat land and a decree was again obtained. A third suit was then brought with regard to a plot of land

admittedly in the same village, upon which a bhandar stood. The defendant raised the plea that as the land in the three suits was a part of the village the possession of which was decreed in the first suit, having regard to the claim made by the plaintiff in this action and in the former action (that is to say the second action) any relief which he wished to obtain should have been obtained in the executing court and not by way of a separate suit. In the last suit another person was also joined as defendant, and it was urged that since he was not a party to the former action, Section 47 had no application. Overruling this objection, His Lordship has held that the plaintiff having got a decree for possession of the disputed land, any grievance he may have with regard to that matter, including the demolition of the building standing thereon from before he got the decree, must be made in the executing court and not by way of a separate suit and that the impleading of another person as a defendant to the action did not take the case out of the purview of Section 47, because that person was the son of the original trespasser and the plaintiff had no separate cause of action against him. This case is clearly distinguishable and has no application in the instant case. In that case the plaintiff had a right to have the building demolished and he could make that claim in the former suit for possession. No such prayer could possibly have been made, because the suit for redemption, i.e. Title Suit No 159 of 1947, was brought in 1947 and the encroachment was made in 1948 at or about the time when the decree dated 7-7-1948 was passed. The plaintiffs, therefore, could not have prayed for a decree for possession by demolition of the building standing on the encroached portion and removal of the encroachment. Again, in that suit the other person impleaded as a defendant in the third suit was the son of the original trespasser and not a necessary party, and, consequently, the plaintiff had no separate cause of action against him. Those considerations do not apply to Fucho San, who had been impleaded as the main defendant in the present action. It cannot be said that he was not a necessary party to the ejectment suit, nor can it be reasonably urged that the present plaintiffs had no separate cause of action against him. In effect and in essence, their cause of action was solely against Fucho Sah who was not a party to the redemption suit. On the analogy of the case of Bhagwat Singh aforesaid, therefore, Section 47 cannot be applied to the present action. For these reasons, I agree with the learned Single Judge that Section 47 of the Code of Civil Procedure does not bar the present suit.

6. In the result this, appeal is dismissed with costs.

S.N.P. Singh, J.

7. I agree.