

(1969) 01 PAT CK 0021
In the Patna High Court
Case No : S.A. No. 31 of 1965

Most. Bholia and Others

APPELLANT

Vs

Ganpat Mahton and Others

RESPONDENT

Date of Decision : 09-01-1969

Acts Referred:

Evidence Act, 1872 — Section 18, 33
Penal Code, 1860 (IPC) — Section 379

Citation : (1969) PLJR 219

Hon'ble Judges : U.N. Sinha, J

Bench : Single Bench

Advocate : Braj Kishore Pd. No. 2 and Kamal Nayan Choubey, for the Appellant;
S.C. Ghose, for the Respondent

Judgement

U.N. Sinha, J.—This appeal has been filed by some of the defendants, and it arises out of a suit instituted by the plaintiffs respondents for declaration of title to and for recovery of possession with mesne profits of the properties mentioned in Schedule B of the Plaint. The suit was dismissed by the trial court and on appeal by the plaintiffs, the decision has been reversed and the suit has been decreed by the court of appeal below. The relevant facts are as follows. According to the plaintiffs' case one Tipan Mahton was a tenure holder of Mouza Shihodih in the district of Hazaribagh and his name was recorded under Khewat No. 3/5 of which he was in possession till the vesting of Zamindaris. It is said that Tipan Mahton had his bakasht lands in Khata No. 31, given in Schedule A appertaining to the said Khewat. According to the plaintiffs, Tipan Mahton transferred the land of Khata No. 31 of village Shihodih to the plaintiffs for consideration through Kebalas and the plaintiffs had come in possession. One of these Kebalas was executed in the name of Ganpat Mahton, plaintiff no. 1 and one Budhan Ali but it is said that the latter was a mere name lender. According to the plaintiffs, they were agnates of Tipan Mahton, who had died without any issue and the plaintiffs were the tenure holders of the Mouza until the vesting of the intermediaries interests. According to the plaintiffs Tipan Mahton had

alienated undivided portions of his lands through three out of the four Kebalas. The plaintiffs had not however, divided the lands by metes and bounds but they were in separate possession of their lands. According to the plaintiffs defendant no. 1, Jugal Mahton was on inimical terms because of the plaintiffs' purchase, so he was an agnate of the plaintiffs and therefore, on the 30th October, 1958, he with the help of the other defendant had forcibly cut and removed the paddy grown by the plaintiffs over their purchased lands. This had led to a criminal case u/s 379 of the Indian penal Code, but the accused persons were acquitted in the court of the Magistrate in December 1959. Thereby a cloud had been cast over the right, title and possession of the plaintiffs in respect of the lands in dispute in this suit. The substance of the defendants case was, that, the sale deeds relied upon by the plaintiffs were farzi transactions and were without consideration. It was further alleged that Tipan Mahton had settled the lands of Khata no. 31 in favour of defendant No. 1 and Mosstt. Prani through a Hukumnama dated the 5th Phagun 1346 fasli. Mosstt. Prani was Tipan Mahton's wife. Thus, defendant No. 1 and Mosstt. Prani had come in possession over the lands of Khata no. 31 and thereafter, Mosstt. Prani had relinquished her interest in favour of defendant no. 1 with the consent of her husband. Thereafter defendant no. 1 was in exclusive possession of the properties and he had even transferred a portion thereof to one Nabi Mian. According to the defendant Tipan Mahton had submitted a return in which defendant No. 1 had been shown as the raiyat in possession of the lands of khata no. 31. Therefore, the plaintiffs' right, title and interest were denied by the defendants.

2. The learned Munsif, who tried the suit, came to the conclusion that the sale deeds relied upon by the plaintiffs were not genuine and valid and for consideration, nor had they been acted upon. It was held that disputed lands were in possession of the defendants as alleged. The suit was therefore, dismissed. According to the learned Subordinate Judge the plaintiffs had purchased the disputed lands from Tipan Man ton for consideration and the defendants' case of settlement was not correct.

3. For the reasons given below I have come to the conclusion that this is a fit case in which the appeal should be remanded to the court of appeal below for re-consideration. It appears that in accepting the plaintiffs' case, the learned Subordinate Judge has put reliance upon all the facts and circumstances mentioned in the previous evidence given by Tipan Mahton (now dead) in the criminal case mentioned above. A certified copy of the deposition of Tipan Mahton has been brought on the record as Exhibit 4 and that evidence has been referred to by the learned Subordinate Judge extensively in Paragraphs 7 and 8 of his judgment. He has referred to the fact that according to that evidence given by Tipan Mahton, he had sold his lands in Shihodih to Ganpat Mahton for consideration and that he had not executed any Hukumnama in favour of the accused persons of that case. A question has arisen in this appeal as to the relevancy of the previous evidence of Tipan Mahton, as the entire case of the plaintiffs is said to have been supported by the evidence of Tipan Mahton given

in the criminal case. Tipan Mahton being dead, learned counsel for the plaintiff respondents has submitted that his evidence is admissible u/s 33 of the Indian Evidence Act. It, is therefore, contended by the learned counsel that the court of appeal below was fully justified in holding that every aspect of the plaintiffs case was supported by the evidence given by Tipan Mahton in that criminal case. I do not think that this contention is valid to the fullest extent. According to Section 33 of the Evidence Act, the facts stated by Tipan Mahton in the criminal case may be taken to be true in this litigation, provided amongst others the questions in issue in the present litigation are substantially the same as the questions, in issue in the criminal trial within the meaning of the third proviso to Section 33, read with the Explanation. It is clear that the learned Subordinate Judge has not applied his mind to this aspect of the matter. So far as the criminal trial was concerned, the issues therein were certainly as to who had grown the crops said to have been cut away by the accused persons of that case, and, at the most as to who was in possession. But dealing with the evidence given by Tipan Mahton in that case, the learned Subordinate Judge has taken as true every fact that Tipan Mahton had stated including the fact that he had sold the disputed properties to the plaintiffs, who had paid consideration for the same in the sense, that Ganpat Mahton had paid him 1400/- in cash. That is to say, in considering the respective cases of the parties in this litigation, as to whether the sale deeds in favour of the plaintiffs were genuine and for consideration or not, the learned Subordinate Judge had held that the plaintiffs' case must be true as Tipan Mahton had stated in criminal case that Ganpat Mahton had paid him Rs. 1400/- in cash, This matter was not substantially in issue in the criminal trial and the learned Subordinate Judge has not considered whether this was admissible in law under any provision of the Indian Evidence Act or not. A substantial issue in the criminal trial may have been the possession of Ganpat Mahton but the learned Subordinate Judge has taken into consideration the evidence of Tipan Mahton even on the question of his own possession before he is said to have parted with the lands in favour of the present plaintiffs by sale. It is obvious that the real question of admissibility of the previous statements of Tipan Mahton has not been considered in accordance with law. In all probability the learned Subordinate Judge accepted the evidence of Tipan Mahton as true, as the statement of a party from whom the parties to this suit are said to have derived their interest in the subject matter of the present litigation. But then, in this context the provision of Section 18 of the Evidence Act has not been noticed. It will appear from Paragraph 8 of the judgment of the learned Subordinate Judge that some statements were elicited in cross examination from the plaintiffs' witnesses against the plaintiffs' case and they were ignored by the learned Subordinate Judge in view of the contrary statements made by Tipan Mahton in the criminal case. For instance, the learned Judge has referred to the evidence of Daulat Rai (P.W. 5) where he has stated that as long as Tipan Mahton was alive, he had not allowed the plaintiffs to cultivate the lands in suit. This evidence has been met by the learned Subordinate Judge by stating that "To my mind it is absurd in face of the statement made in Ext. 4." The learned Subordinate Judge

has not applied his mind as to how far the evidence given in the present case by the plaintiffs' witnesses can be contradicted by that given by Tipan Mahton in the criminal case. Thus, it is clear that consideration of the evidence given by the plaintiffs' witnesses was substantially vitiated by the way which the learned Subordinate Judge has dealt with the previous deposition of Tipan Mahton.

4. There are other defects in the judgment of the learned Judge also, some of which are mentioned below. In dealing with Exhibit C in Paragraph 12 of his judgment, the learned Subordinate Judge has stated that the fact that it bears cuttings goes to indicate that the entries in Exhibit C were not genuine. It appears from the judgment of the trial court that the cuttings were in the original which had been seen by the learned Munsif, whereas the learned Subordinate Judge has stated this that this original return was not before him. Therefore it is difficult to appreciate how the cuttings have been dealt with by the learned Subordinate Judge against the defendants' case without looking into the nature of the cuttings. In spite of the cuttings, the learned trial Judge had accepted this document in favour of the defendants on the ground that it bore the seal of the Anbal Adhikari and also the left hand thumb impression of Tipan Mahton, The learned Subordinate Judge has not dealt with the effect of the seal and the alleged thumb impression in rejecting this document relied upon on behalf of the defendants. In Paragraph 12 of his judgment the learned Subordinate Judge has held that the suit must abate to the extent of the share of Fagu, one of the alleged purchasers. But, still the suit has been decreed fully. Then in Paragraph 11 of his judgment the learned Subordinate Judge has stated that the Hukumnama (Ext. E), an unregistered document cannot prevail upon the sale deeds (Exhibits 1 series) which are registered documents. Clearly the learned Subordinate Judge has erred in law in this approach. If the lands in dispute had validly been settled with the defendants in 1346 fasli then Exhibits 1 series, though registered documents, could not have affected the previous settlement of 1346 fasli even if the settlement had not been done by any registered document. For these reasons I think the judgment of the learned Subordinate Judge is vitiated and the appeal must be reconsidered by the court of appeal below. The judgment and decree of the learned Subordinate Judge are, therefore, set aside and the appeal is remanded for rehearing. Costs of this Court will abide the result.