
(1949) 03 PAT CK 0011
In the Patna High Court

Net Lal Sah

APPELLANT

Vs

Ucheshwar Jha

RESPONDENT

Date of Decision : 02-03-1949

Acts Referred:

Bihar Tenancy Act, 1885 — Section 171A

Citation : AIR 1949 Patna 497

Hon'ble Judges : Manohar Lall, J; Mahabir Prasad, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This appeal by the defendant arises out of a suit instituted by the plaintiff to recover the amount which he deposited in a proceeding u/s 171-A, Bihar Tenancy Act, in the circumstances about to be narrated. The appeal has been argued with great ability by Mr. Sarkar, but, having considered the matter in all the aspects, I do not find that the appellant is entitled to any substantial relief.

2. The undisputed facts are that one Harihar Mandal executed two usufructuary mortgages on 27th February 1923 in favour of certain persons. One was for Rs. 5,000 and the land given in security was 37.55 acres of a holding in khata No. 88 (ka) (which has an area of 46.83 acres with an annual rental of RS. 228-4-3 including cess, and this rental included the rental for two other khatas also), and the mortgagees had to pay Rs. 185-6-0 as the rent due to the landlord out of the annual rental of Rs. 228-4-3. By the second mortgage for Rs. 1,000, the remaining 8.78 acres of land was given in security, and the mortgagees had to pay the balance of Rs. 42-14-8 as rent due to the landlord. The mortgagees remained in possession for about thirteen years, when, on 21st April 1936, Harihar executed another usufructuary mortgage in respect of a part of the holding in khata No. 88 (ka), that is to say, 44.29 acres, in favour of the plaintiff for a sum of Rs. 7,000, the plaintiff agreeing to pay under the contract Rs. 211-11-0 as rent to the landlord. Out of Rs. 7,000, Rs. 1,000 was paid to Harihar in cash and the balance was retained by the plaintiff to redeem the two earlier

usufructuary mortgages of 1923. On 5th May 1936, the plaintiff redeemed one of the mortgages, namely, that for Rs. 5,000, and came in possession of 37.65 acres of land. Before the plaintiff redeemed the second mortgage for Rs. 1,000, the landlord filed a rent suit in September 1987, to recover arrears of rent for 1341 to 1344 Fasli, which had not been paid to him either by the-mortgagor or by the mortgagees, and the rent suit covered the period when the plaintiff was in " possession of the 37.55 acres of land.

3. On 11th January 1910, the plaintiff redeemed the second remaining mortgage for Rs. 1,000, but, instead of paying the zarpeshgi amount he adjusted the amount due to the mortgagees against the amount that the mortgagees had-agreed to pay as rent to the landlord. We are informed that, in the result of the accounting, Rs. 33 was received by the plaintiff, By this transaction, the plaintiff undertook to pay the arrears of rent due to the landlord. On 8th April 1940, the defendant-appellant purchased the entire holding from Harihar. In the same year, the landlord started execution of his rent decree, and the holding was advertised for sale on 6th November. At this stage, the appellant made an application to deposit the decretal amount and costs advertised in the sale proclamation, and was allowed to make a deposit on 22nd November 1940 and on his application, the delivery of possession of the entire holding was actually ordered to be given to him in November of that year. We are informed that the defendant actually took delivery of possession. Thereupon, the plaintiff on 2nd December filed art-application objecting to the delivery of possession, and on 17th December, he made a prayer that he may be allowed to deposit the entire decretal amount together with fifty per cent, compensation, so that the possession which had been delivered to the defendant may be re-delivered to him. He also prayed that the amount which he would deposit should not be allowed to be withdrawn by the defendant before the plaintiff's objection as to the right of the defendant had been decided. This application was allowed, and, on 21st December 1940, the Court decided summarily that the defendant was entitled to make a deposit and to get some compensation. But the amount of compensation would be determined later. On 23rd December, the plaintiff agreed that the possession should be given to him and the defendant should be allowed to withdraw the entire amount, but "the size of the compensation" payable to the defendant, to adopt the language of the learned Munsif, would be decided later. It is regrettable to find that three years had been allowed to elapse before the question as to how much compensation was to be paid to the defendant could; be considered by the successor of the Munsif who had passed the previous orders. On 5th June 1943, the learned Munsif thinking it was a very complicated matter, referred the parties to-the civil Court. Hence, the plaintiff instituted a suit on 6th May 1944, for the recovery of the amount of compensation which the defendant had withdrawn, that is to say, Rs. 551-14-0. He also claimed interest on that sum together with two other items.

4. The case of the defendant is that the plaintiff has no right to maintain the suit, as the question, as to the right of the defendants to receive compensation was

already decided on 21st December 1940, and the only question that remained was regarding "the size of the compensation." Secondly, it was pleaded that the defendant was entitled in law on the facts established to receive the compensation.

5. The Courts below have concurrently decreed the plaintiff's suit for compensation and interest, but, have disallowed his claim for two sums of Rs. 76-1-0 and Rs. 100 claimed as damages. Hence, the second appeal to this Court.

6. The first objection that the suit was not maintainable does not appeal to us. I have already summarised the nature of the orders passed by the Munsif. I do not find that he has decided the question that the defendant is entitled to compensation, because, on 5th June 1948, when the final order had to be passed, the Court expressly refrained from deciding the question and referred the parties to the civil Court. An interim order cannot be held to decide the ultimate liabilities of the parties. Apart from this, it is difficult to see how summary orders passed in a proceeding u/s 171-A, Bihar Tenancy Act, will at all put a bar to the maintainability of the suit to determine the rights of the parties. The first objection must, therefore, be overruled.

7. With regard to the second objection, namely, that the provisions of Section 171-A, Bihar Tenancy Act, applied in the present case, I am of the opinion that the law has been accurately laid down in *Ucheswar Jha v. Netlal Shaw* 1944 P.W.N. 97, where I pointed out that the provisions of the section can only apply where the mortgagee alone is in default, and not where the mortgagor is also in default. Having heard further arguments, I am satisfied that the view taken in that case was correct. By applying that authority to the facts of the present case, it will be clear from the facts stated above that, on the date of the proposed sale by the landlord or even on the date of the rent decree obtained by the landlord, the plaintiff was not at all liable to pay the entire arrears of rent but only for the year September 1936 to September 1937, and on that date the earlier mortgagees who were liable to pay had been redeemed and were no longer in possession. To meet this difficulty, Mr. Sarkar urged that, as on 11th January 1940, the plaintiff agreed with the earlier usufructuary mortgagees to pay off the arrears of rental to the landlord, this must be deemed to be a contract made between the defendant-appellant and the mortgagees, and the plaintiff. This argument is unfounded, firstly, because, on that date, the defendant was not in the picture at all as he became the purchaser only in April 1940. How can he derive the benefit of a contract to which he is not a party? Moreover, there is no evidence that Harihar Mandal was also a party to this supposed contract between the earlier mortgagees and the plaintiff.

8. The plain reading of the relevant provisions of Section 171-A, Bihar Tenancy Act, satisfies me that before the provisions of that section can apply it must be found that (1) there is a contract between the person who makes the deposit and the mortgagees that the mortgagees have to pay the arrears of rent for which the rent decree was obtained and (2) the mortgagor must not be in default, but

the default must be of the mortgagee alone. If these two conditions are satisfied, then and then alone can the tenant mortgagor be allowed to make the deposit in Court, and, after making the deposit, be entitled to fifty per cent, of the amount by way of compensation from the mortgagee. In the present case, the question is: who was the mortgagee with whom the contract of the payment of arrears of rent in question was actually made? The arrears of rent for three years were due from the two mortgagees of 1923, and they had made the contract with Harihar Mandal to pay the arrears of rent. Those mortgagees were not in possession on the date when the holding was advertised for sale, the plaintiff also was not in possession of the entire holding and was not liable to pay the entire dues of the landlord, and, therefore, the conditions of this section are not satisfied. That is to say, the plaintiff was not the mortgagee in default. The mortgagees, who were in default, were not in possession, and there was no contract between the defendant and the mortgagee in possession of a part of the holding to pay off the rent for which the landlord had obtained the rent decree under execution. In the circumstances, I am satisfied that the Courts below have taken the correct view of the matter. It should, however, be stated that the Courts below have also passed a decree for interest to the plaintiff. I do not find any circumstance in which the plaintiff can be allowed any interest, because there is no contract between the parties that the defendant will pay interest to the plaintiff for the amount which he deposited in December 1940., the decree of the Courts below so far as interest is concerned must be set aside.

9. The result is that the appeal is allowed in part, and the amount of interest allowed by the Courts below will be struck out from the decree. The plaintiff will get his costs of the first Court only in proportion to his success, in other Courts the parties will bear their own costs.

Mahabir Prasad J.

I agree.