
(1946) 10 OHC CK 0001
In the Orissa High Court
Case No : A.F.A.D. No. 201 of 1946

Nilā Padhan and Others

APPELLANT

Vs

Gokulananda Padhi and Others

RESPONDENT

Date of Decision : 10-10-1946

Acts Referred:

Central Provinces Tenancy Act, 1898 — Section 69
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1952 Ori 118

Hon'ble Judges : Ray, C.J.; Jagannadhadas, J

Bench : Division Bench

Advocate : B. Mohapatra, for the Appellant; P.C. Chatterji, for the Respondent

Judgement

Ray, C.J.—The short synopsis of facts giving rise to this litigation are that the disputed lands were Bhogra lands within the proprietary right of one Bida Babu. The said right has now been acquired by the plff. & on the strength of the proprietary right he sues for possession of the lands in ejectment of the defts. It is deft. 4 alone who is interested in the controversy. He demurs to the plff's. suit on the plea that the lands had been demised on a permanent lease to his father (Kumuda) in the year 1915, & that since then his father & after him he himself have been in continuous possession. The only break, if any, in the continuity, as is put by the deft, consisted in one "Lambardar" occupying it on his behalf. The plff. in the year 1939, brought a suit in ejectment against "Lambardar & obtained a decree for possession. He put the decree into execution & got writ of delivery of possession executed. Whether, as a result of such execution, he got actual possession is a matter, in dispute.

2. The said "Lambardar" was sued because he happened to have been recorded in Hamid's Settlement Record as a tenant in respect of the disputed lands. In the Remarks Column of the Settlement entry, it was mentioned "permanent right on the strength of a lease dated 30-1-1915," This date is identical with the date of the lease on which deft. 4 relies. The lease is Ex. A in the case. The plff. mainly

bases his case on the decree in ejectment obtained against "Lambardar" & the delivery of possession through Ct. in execution of that decree.

3. The deft, contested the suit on contentions which are also reiterated before us, namely, that the lease, though unregistered, will entitle him to resist the plff's, suit for possession u/s 53A, T.P. Act, the decree & the execution proceedings not being binding against him. The plff. repels these contentions on the grounds (i) that "Lambardar"s possession having been for a period more than 12 years & adverse to the deft, or to his predecessor-in-interest or to both, the plea of doctrine of part performance is no longer available to him, & (ii) that the lands covered by the lease (Ex. A) are not the disputed lands. The lease deed describes the lease-properties by reference to Dewar's Settlement plots while the Settlement Record, the decree in ejectment suit & the present plaint refer to the properties, in dispute in this litigation, by reference to Hamid's Settlement plot. The deft, in the Ct. below, had filed an appln. for issue of a commission for the purpose of verifying the identity of these two sets of plots but did not press for it.

4. The learned trial Ct. decreed the suit on the finding, "inter alia", (i) that the lease deed was a genuine one; (ii) that the lands covered by the lease are identical with the disputed lands in respect of when Lambardar stood recorded in the settlement & in respect of which the plff. obtained a decree in ejectment; (iii) that the plff. never got actual possession as a result of the execution of the decree against "Lambardar"; (iv) that "Lambardar"s" possession, if any, was on behalf of deft. 4; & (v) that the deft. 4 & before him his father were all along in possession on the strength of the lease deed.

5. The learned lower appellate Court, however, decreed the suit finding (i) that the decree in ejectment obtained against "Lambardar" entitled him to the relief of possession: (ii) that the deft, had not established that he was all along in possession; (iii) that "Lambardar" was in possession in his own right since sometime before the final publication of the record of rights till he was evicted through writ of Ct. & lastly (iv) that the lease deed, though genuine, did not relate to the disputed lands, the identity not having been established.

6. It appears, however, that the findings recorded by the learned lower appellate Ct. are not adequate to dispose of this appeal in the light of the contentions of law raised in this Ct. Under the circumstances, we are constrained to remand the case to the lower appellate Ct. for rehearing & disposal in the light of the direction that follows herein below.

7. In order to avail himself of the doctrine of part performance u/s 53A, T.P. Act, the deft, has to establish not only that there was a transfer but also that there was delivery of possession in pursuance thereto. In this view, on the fact of possession, the Cts. below should have been more accurate than they are. The learned appellate Ct. therefore, at the time of rehearing, should engage himself to find out not only that the lease is genuine but that the possession was taken

under the lease & further that the present possession that the deft, claims & which has been found in his favour is one which can be availed of for the purpose of feeding the doctrine of part performance. Whether "Lambardar"s" possession was for a period more than the statutory period & was adverse so as to extinguish the title claimed by deft. 4, has not also been properly looked into. In considering this question, it has to be seen when & how the possession of "Lambardar" began, that is, whether it began during the life time of deft. 4's father or after his death. In case it began during the minority of deft. 4 whether it continued till more than three years after he attained his majority inasmuch as mere could otherwise be no acquisition of title by "Lambardar" as against deft. 4 by adverse possession.

8. It has further to be seen whether "Lambardar"s" possession can be considered in the circumstances of this case to be at an adverse being possession in his own right to the exclusion of deft. 4 or his father, as the case may be, or was on behalf of deft. 4 during his minority, both being very close & near relations. The learned Ct. of Appeal below should not attach too much importance to the decree in ejectment against "Lambardar." The decree & the other relevant documents connected therewith & appertaining to the suit may be evidence in favour of the plff. but are not in the least binding against the deft, so as to conclude his case. I should further say as evidence it is not of a very strong character. It has lastly been argued by Mr. P.C. Chatterji that in view of the provision of Section 69, C. P. Tenancy Act (Act XI (11) of 1898), the plff. would be entitled to a decree in ejectment against the deft notwithstanding the contract set up by him. He relies upon the opening words of the section:

"Notwithstanding any contract to the contrary or any provision of a record of rights, an ordinary tenant shall not be ejected from his holding by his landlord as such, except"

Though the section has been expressed in the negative form, Mr. Chatterji's contention amounts to saying that a positive form of legislation is deducible therefrom as a necessary corollary. He wants to put it in this form that no tenant can save himself from a decree in ejectment in a suit brought by the landlord notwithstanding any contract by the latter in his favour. In his argument, he wants to support himself by an unreported decision of the Patna H. Ct. (Cuttack Circuit) passed on 10-3-1943 by Agarwala, J., (as he then was) in the case of "Gautam Padhan v. Gokulananda", S. A. No. 20 of 1941. With great respect for the learned Judge, I cannot persuade myself to accept that the section can bear such a construction. In fact, the decision of Agarwala, J., (as he then was) is contrary to a D. B. decision of the Patna H. Ct. in the case of "Aditya Prasad v. Paramananda Patel", 4 Pat L J 505, where Sir Dawson-Miller, C. J., observed at p. 510:

"... .Where a suit is brought to eject a tenant of "bhogra" land there is nothing in Section 69, Tenancy Act which would bar the deft, from setting up a lease granted by the proprietor himself."

9. Section 69, as it appears quite plain to me, does not enlarge nor curtail the rights of either the landlord or the tenant in respect of the "Bhogra" lands. There are abundant provisions in the Act which entitle the proprietor to enter into a binding contract in derogation to his own rights in respect of his "Bhogra" lands. There is no provision in the Act which offends against the tenant's acquisition of permanent right of tenancy in "Bhogra" lands by virtue of a legally binding ft valid contract. In this context, Section 69 can only be understood to mean that an ordinary tenant, by any contract whatsoever, cannot bargain himself out of the statutory rights assigned to his status as such. Suppose, an ordinary tenant contracts with the landlord that the latter can eject without obtaining a decree in ejectment in a suit. Such ft contract is invalidated by the provisions of Section 69. It is enacted for protection of an ordinary tenant with regard to his common law rights or the statutory rights conferred upon him in the Act. This contention, therefore, has no force. It should, however, be made plain to the learned lower appellate Ct. that the genuineness of the lease having been found by a concurrent finding of both the Cts. below is not available to be reopened at the rehearing. The deft, if he chooses, must be given an opportunity to take out a commission in order to verify the identity of the lands covered by the lease with the lands in dispute with reference to their survey numbers.

10. In the result, the appeal is allowed, the suit is remanded to the learned lower appellate Ct. for disposal. Costs to abide the result. Cost to be incurred by the deft, for the purpose of verification of the identity of the lands shall be borne by him independently of his success or failure, as the case may be.

Jagannadhadas, J.

11. I agree.