

(1965) 10 PAT CK 0016
In the Patna High Court
Case No : A.F.O.O. No. 214 of 1963

Prithwinath Singh and Others

APPELLANT

Vs

Suraj Ahir and Others

RESPONDENT

Date of Decision : 18-10-1965

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 4
Civil Procedure Code, 1908 (CPC) — Section 144

Citation : AIR 1966 Patna 254

Hon'ble Judges : K. Sahai, J; A.B.N. Sinha, J

Bench : Division Bench

Advocate : Lalnarayan Sinha, General, Kailash Roy and Sheo Kumar, for the Appellant; Muhammad Mazhar Hussain, S.S. Asghar Hussain and Muhammad Khaleel for Respondents Nos. 1 to 8 and Addl. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Sahai, J.—This appeal by the plaintiffs is directed against an order passed u/s 144 of the Code of Civil Procedure.

2. The facts of the case may be shortly stated. The plaintiffs instituted a suit on the 18th November, 1946, for declaration of their title to, and recovery of possession over, 10.24 acres of lands along with mesne profits. Their allegation was that the defendants were mortgagees of the lands, and the plaintiffs had redeemed the mortgage. The trial Court dismissed the suit on the 8th March, 1948, and thereupon the plaintiffs filed First Appeal No. 143 of 1948 in this Court. Admittedly, the estate, which included the lands in suit, vested in the State of Bihar on the 1st January, 1956. This Court heard First Appeal No. 143, and, by a judgment dated the 28th January, 1958, allowed the appeal. The suit was thus decreed not only for declaration of title and recovery of possession but also for mesne profits. The defendants filed Civil Appeal No. 533 of 1960 in the Supreme Court. On the 6th May, 1959, the plaintiffs took delivery of possession of the lands in dispute. By a judgment dated the 4th May, 1962, the Supreme

Court, while upholding the findings of the High Court that the lands in question were bakasht lands and the suit was not barred by limitation, allowed the appeal, holding that the plaintiffs had, by, reason of the estate, having vested in the State of Bihar and also by reason of the fact that the lands could not be deemed to have been settled with the plaintiffs u/s 6 of the Bihar Land Reforms Act, 1950 (hereinafter to be referred to as the Act) as they were not in Khas possession on the date of vesting, lost the right to recover possession. The suit was thus dismissed. The decision of the Supreme Court is reported in Surajnath Ahir and Others Vs. Prithinath Singh and Others, .

3. The plaintiffs filed an application for review of judgment before the Supreme Court; but, by an order dated the 10th December, 1962, that Court dismissed the review application. That decision is reported in Prithi Nath Singh and Others Vs. Suraj Ahir and Others, .

4. On the 25th June, 1962, the defendants filed an application u/s 144 of the CPC for (1) redelivery of possession of the lands in suit to them, (2) mesne profits for the period of the plaintiffs' possession, i.e., from the 6th May, 1959, upto the date of delivery of possession, and (3) refund of the costs of the litigation realised by the plaintiffs from the defendants. The learned Advocate General, who has appeared on behalf of the plaintiffs-appellants, has stated that the plaintiffs do not resist the claim for refund of the costs but they object to the other two prayers of the defendants. By an order dated the 24th July, 1963, the Court below allowed restitution and also allowed the defendants' prayer for mesne profits. The plaintiffs then preferred the present miscellaneous appeal in this Court on the 5th August, 1963. Their prayer for stay of operation of the order of restitution passed by the 1st Subordinate Judge at Arrah in Miscellaneous Case No. 110 of 1962 was refused by that Court. This Court, however, granted interim stay on the plaintiffs-appellants' prayer. By an order dated the 30th September 1963, the stay order was made absolute subject to the condition that the appellants furnished security to the satisfaction of the Court below for a sum of Rs. 1,000 every year during the pendency of the miscellaneous appeal in this Court. The appellants have been furnishing security in accordance with this order, and the operation of the order of the 1st Subordinate Judge of Arrah has, accordingly, remained stayed all this time. The result has been that the plaintiffs have been in possession of the lands in question.

5. On the 17th July, 1965, a Bench of this Court passed an order with the consent of the parties that the appeal should be listed for final hearing on the 17th August, 1965. On the 31st August, 1965, the hearing of the appeal was postponed for a week on the prayer of the Advocate General. On the 6th September, 1965, it was again postponed for a week, as prayed for by the Advocate General.

6. In the meantime, however, the plaintiffs filed, on the 13th September, 1965, in this Court an affidavit sworn on the 26th August. In paragraph 4 of this

affidavit, they stated that the State of Bihar had taken physical occupation of the lands in question. They did not disclose the date. On the 13th September, 1965, the miscellaneous appeal was put up for hearing before a Bench consisting of myself and Tarkeshwar Nath, J. The Additional Government Pleader was present before us on behalf of the State, and, after hearing him and the other parties, we directed notice to issue to the State u/s 4(ee) of the Act. In response to this notice, the State filed an application in this Court on the 20th September, 1965, praying that it should be added as a party. In paragraph 4 of this application, it is stated that the appellant of this appeal, "who was illegally in possession of the property aforesaid, has delivered possession of the property to the petitioner State of Bihar on 22-8-1965". The affidavit in support of this application has been sworn by one Shri Ram Lakhan Singh, Circle Inspector of Anchal Sahar, district Shahabad. He has stated that the facts stated in the petition are true to his knowledge "as derived from the records of the case". He has nowhere stated that the fact of delivery of possession by the plaintiffs to the State is true to his personal knowledge. Hence, the affidavit as to delivery of possession cannot be accepted as true.

7. The State's application was placed before us on the 14th October, 1965. On that date, we allowed this application, and directed that the State be added as a party. The State has, accordingly, been added.

8. The point which the learned Advocate General has argued is that the State of Bihar is the rightful party who is entitled to take possession of the lands in question, and, since the plaintiffs-appellants have already delivered possession of those lands to the rightful owner, no question of restitution by redelivery of the lands to the defendants arises. His contention is that the Court, in exercising jurisdiction u/s 144 of the Code, has first to decide whether the applicant is entitled to any benefit by way of restitution. In this connection, I may read Sub-section (1) of Section 144:

"(1) Where and in so far as a decree or an order is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

The learned Advocate General has urged that the State of Bihar is, and the defendants are not, entitled to possess the lands in question, and hence it cannot be held that the defendants are "entitled to any benefit by way of restitution or otherwise". On this basis, he has contended that the defendants are not entitled to redelivery of possession of the lands in question to them. The Additional Government Pleader, Mr. Sarwar Ali, has argued that the estate, including the lands in question, vested in the State of Bihar on the 1st January, 1956; that, in

view of Section 4(f) of the Act, the Collector "must be deemed to have taken charge of the estate or tenure and of all interests vested in the State under this section and that, therefore, the State, which has already come in possession rightfully of the lands in question, cannot now be deprived of possession by redelivery of the lands to the defendants.

On the other hand, Mr. Mazhar Hussain, who has appeared on behalf of the defendants, has argued that the Supreme Court or, for the matter of that, any other Court has not yet decided the rights as between the State and the defendants. The mortgage executed by the plaintiffs was redeemed on the 5th April, 1943. The defendants started prescribing from that date for their raiyati interest in the lands. Whatever may be said about the bar of limitation relating to the right of the plaintiffs to recover possession in case the Act had not come into effect, the defendants were in possession of the lands as raiyats for more than twelve years before the State got a right on the 1st January, 1956, to take possession of intermediary interests. If the defendants can be held to have acquired raiyati interest in those lands before the 1st January, 1956, that interest would not vest in the State of Bihar under the Act. His argument, therefore, is that the right of the State to take possession of the lands is not yet settled, and that since the defendants were deprived of possession by act of Court in pursuance of a decree, which has later been reversed, they are perfectly entitled to get back possession.

9. I entirely agree that the Court must decide whether a party is entitled to any benefit by way of restitution or otherwise before it can order the parties to a litigation to be placed in the position which they would have occupied but for the decree which was later reversed. It seems to me, however, that, as between the plaintiffs and the defendants, there is really no serious question in dispute. Delivery of possession in respect of the lands was made by the court to the plaintiffs in pursuance of the decree of this Court, and, since that decree has been reversed by the Supreme Court, the defendants are entitled to get back possession. The learned Advocate General has argued that the defendants cannot be held to be so entitled because the Supreme Court has held that they are trespassers.

I do not think that the Supreme Court has come to any such final conclusion. Raghubat Dayal, J., who has delivered the judgment of the Court, has observed in paragraph 20 at p. 458 of the report, that the possession of the defendants, who were the appellants before that Court "may have been as trespassers or in any other capacity". It is to be kept in mind that their Lordships were deciding a case between the plaintiffs and the defendants, and not between the defendants and the State. What they have held is that the plaintiffs are not entitled to recover possession. Indeed, it has been said in the last paragraph that the respondents lost their right to recover possession from the appellants, even if they were trespassers, on their estate vesting in the State by virtue of Sections 3 and 4 of the Act and that therefore, thereafter, they had no subsisting right to

recover possession from the appellants". In view of this conclusion, the plaintiffs lost their suit, and they certainly have no right to retain possession of the subject-matter of the suit. Indeed, the Advocate General has not claimed any such right on their behalf.

10. The only question which really arises is whether the possession should now be re-delivered to the defendants, when the State says that the plaintiffs have already delivered the same to it. In this connection, a point which I wish to mention is that the conduct of the plaintiffs almost amounts to fraud upon the Court. They have been in possession of the lands from the 6th May, 1959, and they have been in such possession for about three years even after the 4th May, 1962, when the Supreme Court decided that the decree in their favour by the High Court was wrong, and that they were not entitled to recover possession. They took no action to return the property to the defendants or to make it over to the State even after the 1st Subordinate Judge of Arrah allowed the application for restitution, but they took an order of stay of operation of that order from this Court.

Since then also, they have been furnishing security for a sum of Rs. 1,000 every year. It is only after a Bench passed an order that the appeal should now be set down for hearing that they say that they made over possession of the property to the State. Whatever may be the fights between the defendants and the State. I do not think that the plaintiffs should have taken upon, themselves the responsibility to decide the rights as between them and to make over possession of the property to the State without any information to, or permission from, this Court. They cannot, possibly, claim to be arbiter of the rights as between the State and the defendants.

11. So far as the State is concerned I must point out in the first instance, as I have already indicated, the person who has sworn the affidavit to the effect that the appellants have made over possession to the State does not claim to have personal knowledge in this connection. In the second place, the State has not placed any material before us to the effect that the Collector or any other authority took any proceeding in accordance with law to establish or to exercise the State's right to take possession. I may refer to Clause (g) of Section 4 of the Act which reads:

"(g) Where by reason of the vesting of any estate or tenure or any part thereof in the State under the provision of this Act, the Collector is of opinion that the State is entitled to the direct possession of any property he shall, by an order in writing served in the prescribed manner on the person in possession of such property, require him to deliver possession thereof to the State or show cause, if any, against the order within a time to be specified therein and if such person fails to deliver possession or show cause or if the Collector rejects any cause shown by such person after giving him a reasonable opportunity of being heard, the Collector shall, for reasons to be recorded, take or cause to be taken such steps or use or cause to be used such force as, in his opinion, may be necessary

for securing compliance with the order or preventing a breach of the peace" (I have omitted the proviso because I am not concerned at this stage with it).

There is no material to show that the Collector took any action under this clause. It is significant that Clause (f) states that the Collector is to be deemed to have taken charge but Clause (g) provides that the Collector can take action under that clause if he is "of opinion that the State is entitled to the direct possession of any properly" If, therefore, the Collector is of any such opinion, he may take action under Clause (g). If, however, the State is advised that it should take any other proceeding for taking possession of the lands in question, it can initiate such a proceeding. The learned Additional Government Pleader has not been able to point out that any appropriate proceeding has been taken. He has, however, referred to some observations of Raghubar Dayal, J. in the judgment by which the suit has been dismissed. He has drawn our attention to the observation in paragraph 15 at p 457 of the report, which is as follows:

"This makes it absolutely clear that after the vesting of the estate, no interest other than that expressly saved by it under the provisions of the Act remained in the respondents (which means the plaintiffs) The right to recover possession from the trespasser also got vested in the State."

In my judgment this does not help the State; it only means that the plaintiffs, who had, previous to the vesting of the estate, the right to recover possession of the lands in suit, lost that right, and thereafter it was only the State which could exercise the right to recover possession. This observation cannot be held to mean that their Lordships actually decided that the State had in the facts and circumstances of this case, a right to recover possession of the lands from the defendants. I may repeat that the State of Bihar was not a party to the appeal in the Supreme Court and hence their Lordships could not give any finding in favour of the State which could be binding upon the defendants in a litigation between the two. This is particularly borne out by the fact that there is a procedure provided in Clause (g) of Section 4 for notice to the party against whom the proceeding is directed and for grant of an opportunity to him to be heard before a final order is passed.

Their Lordships could not have meant that, irrespective of whatever objections the defendants might take in an appropriate proceeding, the State must be held to have the right to recover possession. I may mention as an instance that, in an appropriate proceeding, the defendants might advance an argument, which Mr. Mazhar Hussain has advanced before us, that the defendants had already acquired raiyati right in the lands, and that, under the Act, raiyati interest does not vest in the State of Bihar. The appropriate authority may hold in favour of the State or may hold, on the basis of this or any other argument, that the State of Bihar has no right to recover possession.

12. In the circumstances, mentioned above, I overrule the objection raised on behalf of the State, and I hold that the defendants are entitled to recover

possession of the property which was delivered to the plaintiffs under the decree of this Court. I must, however, make it clear that it will be open to the State of Bihar to take such proceeding as it is advised to take to recover possession of the lands from the defendants.

13. The next question is whether the defendants are entitled to mesne profits. There is no doubt that the plaintiffs have been in possession of the property from the 6th May, 1959. They have stated that they made over possession to the State, and it has been stated on behalf of the State that it took possession, on the 22nd August, 1965. As I have said, this is not supported by a proper affidavit. However, Mr. Mazhar Hussain says that the defendants will be satisfied if mesne profits are ordered to be payable to them by the plaintiffs from the 6th May, 1959, to the 22nd August, 1965. In view of the fact that the defendants are now entitled to possession of the lands in question and also in view of the fact that I am directing redelivery of possession of those lands to them, I think that justice demands that the plaintiffs must pay mesne profits to the defendants for the period during which they were in possession under a decree which has since been reversed. I, therefore, direct that mesne (sic) profits for that period would be determined by the Court in a separate proceeding as ordered by the Court below, and, after the mesne profits have been determined, the plaintiffs would be liable to pay the amount fixed to the defendants. The plaintiffs would also refund the costs realised by them as mentioned above.

14. The appeal is, accordingly, dismissed with the slight modification as to the date to which mesne profits are payable. In the circumstances of this case, the parties will bear their own costs.

A.B.N. Sinha, J.

15. I entirely agree.