

(1953) 04 PAT CK 0011
In the Patna High Court
Case No : A.F.A.D. No. 133 of 1948

Radha Prasad Rai and Others

APPELLANT

Vs

Lakshmi Kant Tewari and Another

RESPONDENT

Date of Decision : 24-04-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 100

Citation : AIR 1954 Patna 40 : (1953) 1 BLJR 391

Hon'ble Judges : Ramaswami, J;Jamuar, J

Bench : Division Bench

Advocate : Lal Narayan Sinha and Ugra Singh, for the Appellant; A.B.N. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

1. The question which arises in this appeal is whether the suit for ejectment brought by the plaintiff is barred under the provisions of Order 2, Rule 2, Civil P. C.

2. The facts leading up to this question may be shortly stated. The land in dispute covers an area of 31.19 acres comprised in khata No. 88 of village Lodhas and Khata No. 7 of village Hetampur, of which defendant No. 6, the Maharaja of Dumraon, is the sixteen annas landlord. Defendants 1 to 5, who are the tenants, failed to pay arrears of rent, and, in consequence, the landlord instituted a certificate proceeding" against them, for realising the rent. In Certificate Case No. 428 of 1936/37, the land in question was sold by the Certificate Officer and purchased by defendant No. 6. The sale took place on 1-11-1937, and confirmed on 3-1-1938. It is the case of the plaintiff that defendant No. 6 got delivery of possession through process of the certificate Court on 6-4-1938. Later on, defendant No. 6 made settlement of the land in favour of the plaintiff. The date of settlement is 28-10-1940. The plaintiff alleged that there was a dispute u/s 144, Criminal P. C., between him on the one hand and defendants 1 to 5 on the other regarding the possession of the land. The

case was, eventually, decided against the plaintiff by the Criminal Court which found that defendants 1 to 5 were in possession. On 6-12-1944, the plaintiff brought the present suit asking for a declaration of his title and claiming that he should, be restored to the possession of the land.

3. Defendant No. 6, the Maharaja of Dum-raon, filed a written statement, but did not contest the suit. Defendants 1 to 5, however, contested the suit, and their main defence was that the land in question was joint family property, and the Maharaja of Dumraon could not, by virtue of the certificate proceeding, obtain a valid title to the land. It appears that the certificate proceeding was taken out in the name of Isar Dayai Rai & it was contended on behalf of the defendants that the certificate proceeding could not affect the interest of the other members of the joint family.

4. The learned Subordinate Judge held, upon a consideration of the oral and documentary evidence, that defendant No. 1, Isar Dayal Rai represented the interest of all the members of the joint family, and that the certificate sale was binding upon all the defendants, and the Maharaja of Dumraon had obtained a valid title by the certificate sale-He further held that neither the Maharaja of Dumraon nor the plaintiff had obtained possession of the land by virtue of the writ of delivery of possession or by virtue of the settlement made with the plaintiff by the Maharaja of Dumraon. But, as the suit was brought, within twelve years of the date of sale, the Subordinate Judge gave a decree in favour of the plaintiff.

5. An appeal was taken to the District Judge of Shahabad : but the appeal was dismissed, and the findings of the Subordinate Judge were confirmed.

6. In support of this appeal, the main point stressed by Mr. Lalnarayan Sinha is that the suit should have been dismissed by the lower courts, since the provisions of Order 2, Rule 2, Civil P. C. operate as a bar. Counsel pointed out that, in 1939, the Maharaja of Dumraon had instituted a money suit, No. 47 of 1939, claiming mesne profits from defendants 1 to 5 for the period from 1-11-1937, to 6-4-1938. In that suit, defendants 1 to 5 alleged that they were not in possession of the disputed land, and they were not liable to pay mesne profits. This defence was overruled by the Court, and the Maharaja of Dumraon was granted a decree for mesne profits for the period claimed. The contention on behalf of the appellants is that the Maharaja of Dumraon ought to have claimed a decree for ejectment against defendants 1 to 5 in the same suit. In this connection, Counsel referred to the finding of the Subordinate Judge in this case that, in spite of the writ of delivery of possession, the Maharaja of Dumraon did not get actual possession of the land in suit. It appears that this finding of the Subordinate Judge was not challenged by the respondents when the appeal was argued before the District Judge of Shahabad. Upon the basis of this finding Mr. Lalnarayan Sinha advanced the argument that, in the earlier suit brought in the year 1939, the Maharaja of Dumraon ought to have claimed a decree for ejectment against defendants 1 to 5, and the failure of the Maharaja of Dumraon

in this respect would act as a bar to the present suit under the provisions of Order 2, Rule 2, Civil P. C. In our opinion, there are grave difficulties in accepting this argument. The question as to the application of order 2, Rule 2, Civil P. C. was not raised by defendants 1 to 5 in their written statement, nor was an issue framed on the point in the trial Court, No such argument was advanced by the appellants before the District Judge. It is also conceded by Mr. Lalnarayan Sinha that no such ground was taken in the memorandum of appeal to the High Court. It appears that the ground was taken for the first time on behalf of the appellants when the case was heard before Sarjoo Prasad, J., on 3-3-1952. If the question had been a pure question of law, the appellants are, no doubt, entitled to ask the High Court to entertain it for the first time in second appeal. But, in the present case, the position is somewhat different. The question as to the application of Order 2, Rule 2 Civil P. C., is not a question purely of law but is a mixed question of law and fact. It is true that the learned Subordinate Judge found, upon the evidence adduced, that neither the Dumraon Raj nor the plaintiff came in possession of land in question. But the issue on this point is in the following terms :

"Is the story of possession and dispossession as alleged in the plaint correct?"

It was the case of the plaintiff that, on 28-10-1940, the Maharaja of Dumraon made settlement of the land in his favour. After settlement was made, the plaintiff obtained possession of the land; but, in 1942, there arose a dispute u/s 144, Criminal P. C., between the plaintiff and defendants 1 to 5. As the order of the Criminal Court was against the plaintiff, the latter brought the present suit for a declaration of his title and recovery of possession of the land. No specific issue was raised before the learned Subordinate Judge whether, in the year 1939, when the Maharaja of Dumraon brought the money suit, he was in actual possession of the disputed land or otherwise. From the record, it appears that, on 6-4-1938, the Maharaja of Dumraon obtained delivery of possession through the certificate Court. Mr. Lalnarayan Sinha said that the Maharaja of Dumraon did not get actual possession of the land, and the writ of delivery of possession was a mere paper transaction. The attention of the parties was not focussed on the issue as regards the application of Order 2, Rule 2, nor did the parties specifically pay attention to the question whether, in the year 1939 after the delivery of possession through the certificate Court, the Maharaja of Dumraon was in actual possession of the disputed land or not. We cannot, therefore, accept the finding of the learned Subordinate Judge on the question of possession to mean that, in the year 1939, the Maharaja of Dumraon was not in possession of the land, even though he had obtained a writ of delivery of possession through the certificate Court. The argument advanced by Mr. Lalnarayan Sinha would have great force if the necessary facts had been ascertained by the lower courts. In the absence of any specific issue that the Maharaja was out of possession in the year 1939, when he brought Money Suit No. 47 of 1939 claiming mesne profits, we are unable to entertain the argument addressed by learned Counsel on behalf of the appellants that the provisions of Order 2, Rule 2, Civil P. C., apply to this case,

and the plaintiff must fail on the ground that, in the previous money suit, the Maharaia of Dumraon did not include a claim for ejectment of defendants 1 to 5.

7. For these reasons, therefore, we think that this appeal fails, and must be dismissed with costs.