
(1963) 11 PAT CK 0004
In the Patna High Court
Case No : A.F.O.D. No. 340 of 1960

Raghunath Rai and Others

APPELLANT

Vs

Shri Ram Janki Jugal Sarkar

RESPONDENT

Date of Decision : 28-11-1963

Acts Referred:

Contract Act, 1872 — Section 16
Evidence Act, 1872 — Section 111

Citation : AIR 1964 Patna 284

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

Bench : Single Bench

Advocate : K.K. Sinha, R.P. Srivastava and Tarakant Jha, for the Appellant;
Harinarain Prasad and Bishwanath Prasad, for the Respondent

Final Decision : Dismissed

Judgement

U.N. Sinha, J.—The defendants are the appellants in this appeal. It arises out of a suit instituted, in forma pauperis, by a deity named Shri Ram Janki Jugal Sarkar, through Its Mutwali named Mohant Harisaran Das alias Ramanand Das. The suit was for declaration of title to and recovery of possession of an area of 17 kathas 10 1/2 dhurs of land to plots 894, 895, 896 and 898 mentioned in schedule 5 of the plaint. The plaintiff also claimed Rs. 3257/- as the price of certain articles, including ornaments, said to have been removed by the defendants. Mesne profits were also claimed by the plaintiff from the 8th of Bhado 1365 Fasli, on which date the deity was said to have been dispossessed by the defendants. The suit has been substantially decreed and the plaintiff has succeeded, except with respect to the price of articles said to have been removed by the defendants. It may be mentioned that a cross-objection had been filed by the plaintiff-respondent which now stands dismissed.

2. The respective cases of the parties are as follows: --

The plaintiff alleged that Dulhin Laljhari Kuer, widow of one Babu Ram Prasad, got a temple built in mouza Paiga in 1917 in which the "plaintiff deity had been

duly installed. Subsequently on the 15th of September 1946, Laljhari Kuer dedicated some properties to the deity, mentioned in schedule 1 of the plaint. The plaintiff was put in possession of those properties and Harisaran Das was appointed Mutwali. Since this deed of dedication, Harisaran Das was doing the worship of the deity and was managing its properties.

It was mentioned in the plaint that before the deed of dedication of the year 1946, Laljhari Kuer had executed another wakfnama, in February 1924, in favour of the same deity, but the same had never been acted upon. That deed of dedication of the year 1924 had remained ineffective and inoperative and Laljhari Kuer had continued to remain in possession and occupation of the properties mentioned in that wakfnama until 1946. " The deity had never entered into possession and occupation of any of the properties mentioned in the wakfnama of the year 1924. men, it was alleged that the Mutwali of the plaintiff had SCIG 6 kathas of land from plots 896 and 825, specified in schedule 2 of the plaint to Hakim Mahmad Hamt. After the vesting of the zamindary interest of the plaintiff in the State, the plaintiff was in possession of the properties mentioned in schedule 3 of the plaint. Out of the properties mentioned in schedule 3, Laljhari Kuer had built a bungalow on behalf of the deity on 11 kathas of land in plot No. 896. The plaintiff's Mutwali had, however, allowed one Keshwar Sah to live therein for some time. Later, on, Keshwar Sah refused to vacate the Bungalow and the Mutwali had been compelled to institute Title suit No. 157 of 1955 which was decreed by the trial court and the decree was upheld in the court of appeal. The plaintiff was, however, in possession of the moveable and Immoveable properties mentioned in schedule 5 of the plaint.

It was alleged that the defendants were friends and helpers of Keshwar Sah. They held out threats to the plaintiff, during the pendency of the title suit mentioned above, and the mutwali had filed a petition in the court of the Sub-divisional Officer at Chapra. A wrong and collusive report was, however, filed by the local police and the mutwali's petition was ultimately filed. After the adjudication of the appeal arising out of Title Suit No. 157 of 1955, defendant No. 1 had asked the plaintiffs mutwali to compromise with Keshwar Sah. As the Mutwali had not agreed, the defendants were very much annoyed. They dispossessed the plaintiff, by expelling the Mutwali from the temple, on the 8th of Bhado 1365 Fasli. It was alleged that the defendants took possession of the moveable and Immoveable properties mentioned in schedule 5 of the plaint. Hence this suit.

3. A joint written statement was filed by defendants 1 to 5. The substance of the defendants' case was to the effect that the plaintiff deity had not been properly represented in the suit, because Harisaran Das was not Mutwali of the deity. It was contended that one Kamcharan Das was the previous Mutwali of the deity, and he had remained the Mutwali and Pujari of the deity as long as he was alive. Harisaran Das was said to be a servant or Ramacharan Das, while Ramacharan Das was living in Sita-marhi Math, from where he had come, to the temple of the

plaintiff deity. It was alleged that after Ramcharan's death, Gauri Shanker Tewari (D. W.3), who was Laljharj Kuer Purohit, became the plaintiff's Pujarj, and he was still continuing in the same capacity. Harisaran Das used to come occasionally to the temple of the plaintiff deity. In course of time he had picked up acquaintance with Laljhari Kuer, and at the time of the execution of we deed of dedication of 1946, Harisaran Das had come there by chance.

By practising fraud on Laljhari Kuer and on deceiving her, Harisaran Das got his name entered in the deed or dedication as Mutwali, in place of Laljhari Kuer. me latter had no knowledge of this at that time, one was then aged about 80 years and she was hard of hearing and her eye-sight had also dimmed. Taking advantage of this Harisaran Das colluded with the scribe and, without taljhari's knowledge, got his name entered as Mutwali. me deed of dedication was not read over and explained to ialjhari. Thereafter, Harisaran Das never performed Puja in the temple, and as a matter of fact, Gauri Shanker Tewari was the Pujari. The plaintiffs case about the execution of a sale deed in favour of Matimad Hanif was controverted as false.

With respect to the facts in connection with Title Suit No. 157 of 1955, it was alleged that the defendants were not parties to that suit and they were not concerned with the result thereof. The defendants contended that a bun-galow of Laljhari Kuer stood on an area of 1 khata 10 dhurs of plot no. 896, and as the remaining area of 6 kathas 11 dhurs remained vacant, Wat was settled by Laljhari Kuer with defendant No. 1. Laljhari Kuer further settled with him 9 Kathas 2 1/2 dhurs out of plots 529, 825 and 726. She also settled 7 Kathas 10 3/4 dhurs out of plot No. 120 with defendant No. 1. Similarly, 8 katrias 1 1/2 dhurs was settled out of plot NO. 295 also. Six kathas out of plot No. 895 was also settled with him. Thus, a total area of 1 bigha 10 kathas 14 1/2 dhurs was settled with defendant No. 1 on nazrana of Rs. 75/-. Actually this amount was not paid in cash, but it was ad-justed, as Rs. 75/- was found due from Laljhari Kuer, on account of milk, curd etc.

The defendants further took Sikmi batai settlement of 2 bights 15 kathas 8 dhurs of kasht land in plots 894, 896 and 898. After this settlement, at the request of detendant No. 1, Laljhari Kuer had granted a hukumnama on the 5th of June, 1940. Defendant No. 1 had, however, been put in possession at the time of the actual settlement, which is now said to be in 1346 Hasli. It was alleged that on the 24th May 1956, Harisaran Das had got a false information lodged through Rampati Rai reporting an apprehension of breach of peace and the police had made an enquiry and had found the defendants to be in possession a report to that effect had been submitted. The case was dismissed by the Subdivisional Officer, and when Harisaran filed a show cause on "the 29th May 1956, his petition was rejected. It was contended that the plaintiff's case or dispossession in Bhado 1365 Fasli was false. Substantially upon these allegations, the defendants contended that the plaintiff was not entitled to any relief.

4. On the pleadings of the parties, the following issues were framed by the

learned trial Judge:

- "1. Is the suit as framed maintainable?
2. Is the suit barred by the law of limitation?
3. Has the plaintiff right and title to recover possession over the suit properties?
4. To what relief, if any, is the plaintiff entitled?"

The principal issues, issues 2 and 3, have been considered by the learned trial judge, together, and he has answered them in favour of the plaintiff and against the contentions raised by the defendants. The learned Judge has mentioned that the principal matter agitated before him was whether Harisaran Das was or was not the Mutwali of the plaintiff deity. Thereupon, after a consideration of the oral and documentary evidence on record, the learned Judge has concluded that Harisaran was residing in the village in which the temple was situated for about 14 years from before the execution or the deed of dedication of 1946, and that after that, he was living in this village and acting as the Mutwali and Hujari of the plaintiff deity. The defendant's case that Harisaran Das was only a servant of Ramcharan Das, the previous Mutwali, has been negated.

Then, the learned Judge has considered the question as to whether the plaintiff was entitled to recover the moveable and Immoveable properties mentioned in schedule 5 of the plaint or not. The plaintiff's claim for the money equivalent of the moveable properties said to have been removed has not been accepted. The plaintiff's claim for recovery of the Immoveable properties through the Mutwali has, however, succeeded. The case of the defendants regarding the settlement in favour of defendant no. 1 has been considered in detail and has been rejected. It appears that the defendant relied upon Ext. C series, some rent receipts, and Ext. D, the Hukumnama dated the 5th June, 1940. These documents have not been accepted as genuine. The oral evidence of settlement adduced by the defendants to prove their settlement has been considered and rejected.

In the result, the learned Judge has decreed the suit, to the extent mentioned above, with mesne profits, from the 8th of Bhado 1365 Fasli. Although at one place the learned Judge has mentioned that the plaintiff's evidence regarding its possession and dispossession was not "good evidence", ultimately, the learned Judge has held that the plaintiff had a right to recover possession of the Immoveable properties mentioned in schedule 5 of the plaint on the ground of its dispossession. This has been held, mainly because the defendants claimed an interest under the qurri and because the defendants failed to prove their case of settlement in 1345 Fasli.

5. Of the several points urged by learned Counsel for the defendants appellants, the principal point agitated in this appeal is as follows. It is argued that Harisaran Das was a Mukhtar of Laljhari Kuer and he was in a position to dominate the will of the lady and, therefore, the onus was on Harisaran Das to prove that the deed of dedication (Ext. 1) of the year 1946 had been executed by Laljhari Kuer,

without any undue influence having been exerted by Harisaran. It is contended that Harisaran must prove to the hilt that Laljhari had executed Ext. 1 after understanding the implication of the document and after obtaining independent advice it is urged that Laljhan was without any doubt, very old at the time when Ext. 1 had been executed and Harisaran stood in a position of active confidence, with relation to Laljhari. It is, therefore, argued that the burden of proving good faith of the deed of dedication was on Harisaran in this case. Learned Counsel for the appellants has relied upon Section 111 of the Indian Evidence Act and Section 16 of the Indian Contract Act in this context. Learned Counsel had also relied upon the case of *Bhola Ram Lieri and Others Vs. Peari Devi and Others*, .

In reply to the contentions raised by learned Counsel for the appellants, learned Counsel for the respondent has drawn my attention to the case made out by the defendants in the written statement, and he has urged that an entirely new case is being urged in this Court. According to learned Counsel for the respondent, the defendants' case in the trial court was, as indicated above, that Harisaran Das had got his name mentioned in Ext. 1, as the Mutwan, in place of Laljhari Kuer, fraudulently, after colluding with the scribe. Having heard learned counsel for the parties in this context, and having considered the materials on record, it appears to me that an entirely new case is being urged in this Court by learned Counsel for the appellants, in arguing that the onus was on Harisaran Das to prove that Laljhari had executed Ext. 1 after obtaining independent advice, inasmuch as, Harisaran was a Mukhtar of the lady. The Mukhtarnama relied upon by learned counsel was brought on the record on behalf of the plaintiff (Ext. 3), dated 22nd February, 1940, to meet the defendant's case that Harisaran Das was merely a servant of Ramcharan and that he had no connection with Laljhari it may be noticed that this Mukhtarnama was not a general power of attorney but was a special power for a specific purpose. The Mukhtarnama has been described as "Mukhtarnama khas". Therefore, there is no material on the record, even if this point requires investigation in the light of the submissions made by learned Counsel for the appellants to show that, Harisaran Das was in a position of active confidence, so that the ingredients of Section 111 of the Indian Evidence Act are attracted.

The facts of the case reported in AIR 1962 Pat 166 are entirely distinguishable from the facts of the present case. In which Laljhari had executed a document dedicating her properties to a deity. It is not as if her properties have been given to Harisaran Das personally. It is not a case of alienation by Laljhari to some one connected with Harisaran Das, so that the latter can be said to have any beneficial interest in the property, the true principle appears from the decision of their Lordships of the Privy Council in the case of 89 Ind. Cas. 649 (Privy Council) . Their Lordships have stated that in the case of wakfthama, independent legal advice is not in itself essential, and the real point is to consider whether the disposition had been substantially understood by the dedicator. An enquiry will have to be directed to find out whether the dedication was really the

mental act of the dedicator, as much as it was a physical act of the person who made it. On the facts of the instant case, it is clear that Laljhari was a literate person. She signed Ext. 3, the Mukhtarnama. She has admittedly signed Ext. 1 and made an endorsement on it in her own pen, which has been marked as Ext. 5. The evidence of Harisaran Das (P. W. 6) and the attesting witness named Saryug Mahton (P. W. 2) makes it quite clear that Ext. 1 had been read over to the lady, the document was ultimately registered and the registering authority has endorsed on it that he had examined Laljhari and the lady had admitted the execution of the document. It may be that she was behind the pardah then and that she was, in a sense a pardanashin lady, but when she wrote on Ext. 1 that she got the deed read over and explained to her by the scribe and she herself read it and the evidence now given by the attesting witness is to the effect that the document had been read over to the lady, it is difficult to accept the contentions raised on behalf of the appellants that such influence was exercised on the lady by Harisaran Das that her hand and mind did not act together.

I may mention here that learned Counsel for the appellants has abandoned the point of fraud and collusion with the scribe. Learned Counsel for the appellants has criticised the evidence of the attesting witness (P.W. 2) on the ground that the witness could not give the details of the deed of dedication, and he admitted that he did not know its contents. It is urged that if this witness did not know of the contents and if he could not understand all the terms noted in it, the lady could not have understood the document at the time of its execution. I am not prepared to accept this argument. According to Harihar Tewari (D.W. 5), he had seen Laljhari writing 5 to 10 times. She could write letters. She was an average writer. The whole endorsement marked as Ext. 5 on the deed of dedication was admitted by this witness to be in the hand-writing of Laljhari Kuer. If Laljhari Kuer had asked for her gumasta (P.W. 2) to be present at the time of the execution of the deed and if according to P.W. 2, Laljhari Kuer had executed the document after it was read over to her by the scribe, it must be taken that the lady had executed the document fully knowing the contents thereof. In any event, the defendants never made out a case that Harisaran Das was so connected with the lady that he was in her active confidence and had dominated her will. On the contrary, their case was that Harisaran was accidentally present at the time of the execution and registration of the document, and he had got his name mentioned as mutwali, after colluding with the scribe. The first points raised by learned Counsel for the appellants, therefore, fail.

6. It is then urged on behalf of the appellants that the deed of dedication of 1946 (Ext. 1) was ineffective and, in any event, it was not operative, even if it be assumed that Laljhari Kuer had executed Ext. 1. This contention is primarily based on the fact that in paragraph 3 of the plaint it was mentioned that there had been an earlier deed of dedication in February 1924. It is, thus, argued that in view of the earlier deed of dedication, the later deed was ineffective in law. It may be mentioned here that an application filed by the defendants for taking the deed of dedication of the year 1924, as additional evidence in this appeal has

already been rejected. In any case, this contention is a new one raised at this stage and the statement in paragraph 3 of the plaint, that the earner deed of dedication has remained ineffective and inoperative, was not controverted in the written statement. No evidence has been adduced to prove that the earlier deed remained operative. Therefore, the deed of dedication of 1945 cannot be held to be ineffective and inoperative, merely on the ground of an earlier deed of dedication.

According to learned counsel for the appellants, further, Laljhari had remained in possession of the dedicated properties even after 1946, and Ext. 1 was in the custody of the father of S.N. Sinha (P.W. 1) and, therefore, Ext. 1 had really remained inoperative as a deed of dedication. My attention has been drawn to the evidence of P. W. 1, where he has deposed that Laljhari kuer was in possession over the disputed lands till she died. Reliance is also placed on similar evidence of Vakil Mian (P.W. 3) where he has deposed that Laljhari was in possession over 3 to 3 1/2 bighas of land when she died, and the disputed land was a part of the larger area, in my opinion, these statements of the plaintiffs witnesses elicited in cross-examination must be rejected in view of the evidence given by Harisaran Das (P.W. 6), supported by documentary evidence. According to P.W. 6, the plaintiff deity was recorded over the milkia share; through Harisaran as its shebait, and the disputed lands were in possession of the deity till the dispossession in 1365 Fasli. In support of this evidence, the plaintiff has produced a copy of Register D (Ext b) showing the entry of the deity's name through Harisaran Das. The plaintiff also brought on the record certain rent receipts which are Ext. 4 series. Of these rent receipts, Ext. 4/b was for the year 1356, that is to say, for a year before Laljhari's death. The last three exhibits in this series, namely, Exts. 4/c, 4/d and 4/e, were for 1362 fasli. All these three exhibits mention the name of the deity, Ram Janki. I am, therefore, not prepared to accept the contention that Ext. 1 was not operative, as Laljhari had not divested herself of the possession of the dedicated properties.

Then, it has been elicited from P.W. 1 in cross-examination, that at one stage he had seen Ext. 1, when his father had custody of the document. He did not know from whom his father had taken it. His father died in 1954. It is contended that the custody of Ext 1 with the father of P. W. 1 indicates that the document had not been acted upon. I fail to see any significance of the custody of Ext. 1 with the father of P.W. 1 in favour of the defendants at all. On the contrary, this may indicate that the document was a genuine document and it was not hidden from the view of all and sundry. It may be remembered that P.W. 1 was related to Laljhari, in the way that his grandmother was Laljhari's sister. Laljhari had four sisters, from one of whom P.W. 1 had descended. Therefore, the custody of Ext. 1 with the father of P.W. 1 indicates that the family was aware of this dedication. It is not possible to accept the contention that Ext 1 had never been acted upon.

7. Learned Counsel for the appellants has also urged that the plaintiff's case of possession must be false, inasmuch as the plaintiff's case of dispossession is not

supported by the evidence on record and has not been accepted by the learned trial Judge. My attention has been drawn to some conclusion of the learned judge in paragraph 24 of his judgment, where the learned Judge has mentioned thus:

"It is true that the plaintiff also failed to prance good evidence of possession and dispossession but the position cannot be lost sight of that the deity's possession as a landlord is admitted on the defendants' behalf and the defendants have failed to establish their possession as tenants."

According to learned Counsel, the evidence of S.N. Sinha (P.W. 1) and Saryug Manton (P.W. 2) go to show that the learned Judge's conclusion is correct, to the effect, that the plaintiff's evidence of dispossession is wholly unacceptable. The following evidence of P.Ws. 1 and 2 have been relied upon. P.W. 1 has admitted towards the end of his cross-examination that defendant No. 1 had not come in possession of the disputed property in his presence. Then, P.W. 2 has also admitted that he was not present when Harisaran was dispossessed. He had only heard about it. Comparing the evidence of these two witnesses with that of Mahanjad Hanif (P.W. 5) where he has deposed that Harisaran had been dispossessed in his presence, and in the presence of P.W.'s 2 and 3.

It is argued that the entire case of dispossession, set up by the plaintiff must be false. I am, however, not inclined to accept the argument in this context. No doubt, the learned trial Judge has stated that the plaintiff has failed to produce good evidence of possession and dispossession, but, in my opinion, the evidence of dispossession given by Harisaran Das (P.W. 6) ought to be accepted on the facts and circumstances of this case. I have already held that the plaintiff's case of possession must be accepted on the evidence of this witness, corroborated as it is by the documentary evidence on record, I do not find any reason to reject the evidence of P. W. 6 on the question of dispossession either. According to P.W. 6, we defendants had taken forcible possession of the disputed land in spite of his protest. As I will indicate presently, the defendants have failed to prove their case of settlement in 1346, followed by the so-called hukumnama or the year 1940, and, therefore, the evidence of dispossession given by P.W. 6 ought to be accepted as true evidence. Some reference was made by learned Counsel or the appellants to Ext. A, a report submitted by D.W. 2. on the 26th May, 1956, and the ordersheet Ext. 11. My attention was also drawn to Ext. E, a petition dated the 29th May 1956. but, in my opinion, nothing turns on these documents in view of the clear and cogent evidence on dispossession of the deity, given by P.W. 6. This contention raised on behalf of the appellants must also fail.

8. Coming now to the evidence of settlement claimed by the defendants, the learned trial Judge has examined this aspect of the case in great detail, and I am of the opinion that the learned Judge's conclusions are correct. The oral evidence adduced by the defendants are discrepant, and no conclusion in their favour can be arrived at accepting the settlement in favour of the defendants in 1346 fasli. Defendant No. 1 (D.W. 9) has made such contradictory statements that his evidence must be rejected as wholly unsatisfactory. In examination-in-chief he

has deposed that he had paid Rs. 75/- as salami of the bakasht and gairmazrua land. This was, of course, set off because this amount of money was due to him from Laljhari. In-cross-examination it was elicited from him, that he had paid Laljhari Rs. 55/- in cash 4 or 5 months before the settlement. The balance, that is to say, Rs. 20/- was due for the price of milk, curd etc. Then D.W. 9 has deposed that the Hukumnama (Ext D) had included an the lands, which had been settled with him earlier. But Ext. D is concerned with 2 bighas and odd of land, whereas the earlier settlement was of 4 bignas and odd of land, with respect to the documents evidencing the settlement, D.W. 9 has deposed that he had got a letter written from the other cosharer, which was lost. In this connection, Parmeshwar Tewari (D.W. 7) has deposed that in proof of the settlement, four letters had been written by Girja, in the name of defendant No. 1. These were hukumnamas.

Then, according to D.W. 9, Laljhari used to look after her sister's properties, and he conducted the talk, for settlement only with Laljharj. Girja was the Amla or Laljhari only. Harihar Tewari (D.W. 5) has deposed that the bakasht land was given by all the four sisters, in shikmi batai to the defendants. For the reasons mentioned above, it appears to me that the appraisal of the evidence of the defendants' witnesses by the learned trial judge was 3 correct one. The learned Judge has further held that (Exts. C and D produced by the defendants were not above suspicion. Here also, I am in agreement with the conclusion of the learned trial Judge. According to the defendants' case, Khata No. 54, plots 898, 894 and 896 covered by Ext. D, the hukumnama had also been settled with defendant No. 1. But Exts. C, C1 and C2 do not mention khata No. 54 at all. Various other ingredients have been shown by the learned trial Judge in paragraph 24 of his judgment for the conclusion that Exts. C and D are not genuine documents, and I fully concur in this conclusion. In the result, it must be held that the defendants' case of settlement by Laljhari in 1346 fasli, followed by a hukumnama given on the 5th of June 1940, must be rejected.

9. As the plaintiff deity has proved the dedication in its favour in 1946 and as it has proved possession and dispossession as alleged, the plaintiff's suit has been rightly decreed, to the extent of which it has been decreed, my appeal is without any merit and it is dismissed with costs. The plaintiff will be entitled to recover possession of the Immovable properties, as described, with mesne profits, as decreed, from the date of dispossession till the date of recovery of possession or the expiration of three years from the date of the decree of this Court, whichever event first occurs.