(1940) 09 PAT CK 0015

In the Patna High Court

Raj Ranjan Prasad Sinha and Others APPELLANT

Vs

Khobhari Lal and Others RESPONDENT

Date of Decision : 03-09-1940

Acts Referred:

Bengal Tenancy Act, 1885 — Section 69
Criminal Procedure Code, 1898 (CrPC) — Section 144

Citation : AIR 1941 Patna 90

Hon'ble Judges : Harries, C.J;Harries, J;Dhavle, J

Bench : Full Bench

Judgement

Dhavle, J.—These are appeals by defendants 1 to 5, the contesting defendants in the two suits out of which they have arisen.

2. Plaintiffs were the five anna proprietors of two tauzis in mauzas Ramdhanpur and Chakia, and the defendants proprietors of nine annas in those touzis, while the proprietor of the remaining two annas was joined as a pro forma defendant. The suits were brought for recovery of the plaintiffs'' proportionate share of the neb produce of certain lands by way of compensation on the allegation that the lands were bakhast and had been cultivated by the contesting defendants to the exclusion of the plaintiffs. The substantial defence was that the lands had been cultivated not by or for these defendants but by defendant 6 as a tenant of the sixteen annas proprietors. The trial Court rejected this plea and held that defendant 6 was the ziratia of these defendants. It found the produce claimed to be excessive, and decreed the suits in part. Defendants 1 to 5 appealed, and there was a cross-objection by the plaintiffs. The lower appellate Court agreed with the trial Court as regards how the lands were used by defendants 1 to 5 to the exclusion of their cosharers, the plaintiffs, but saw no reason to reduce the produce claimed by the plaintiffs in the manner adopted by the trial Court.

3. It was contended before us on behalf of, the apellants that there was no allegation of the plaintiffs'' ouster in the plaints, and that, therefore, they should not have been allowed to make out such a case in the evidence, and that it

should have been held on the case set up in the plaints that the plaintiffs were entitled to no compensation at all.

4. This point was agitated in the lower Courts, where Shiva Narain v. Chandra Sekhar AIR 1933 Pat. 616, and Mt. Dulnin were relied on in support of the proposition that a cosharer who is in separate possession of the common land (irrespective of what his share of such land would be upon partition) without ouster or exclusion of, or without objection from, the other cosharers is under no obligation either to account or to pay compensation to them in respect of the profits earned by him by his own industry. The lower Courts accepted this proposition as correct, but held that it had no application to the facts of these suits; and the lower appellate Court in particular, after expressly conceding that no specific case of ouster had been made in the plaints, found that the allegations in the plaint amounted to "an allegation of defiance of the plaintiffs" so as to entitle them to compensation. Manohar Lall J. before whom these appeals came in the first instance, referred the matter to a larger.

5. Bench on the ground that the decisions in Shiva Narain v. Chandra Sekhar AIR 1933 Pat. 616 and Mt. Dulhin Shyam Sunder Koer Vs. Mt. Sheorachan Kuer, were decisions of Judges sitting singly. But the proposition of law which is to be clearly gathered from them and is based on Chandra Kishore Chakravarty Vs. Biseswar Pal and Sachindra Kumar Goswami, executor to the estate of Bashiram Pal and Another, has not been controverted before us at all and seems well-established by high authority. The liability of a cosharer to pay compensation was decided by their Lordships of the Judicial Committee in Watson & Co v. Ramchund Dutt (91) 18 Cal. 10 as a matter of "justice, equity and good conscience" in the following circumstances: The company, a cosharer of the plaintiffs, was in actual occupation of a part of the lands held in common, cultivating it as if it had been its separate property, and when the plaintiffs attempted to enter upon the same land, in order to carry on operations thereof inconsistent with the work already being carried on by itself, resisted and prevented this attempted entry. Their Lordships held that the resistance, being made by the company in occupation simply with the object of protecting itself in the profitable use of the land, in good husbandry, and not in denial of the plaintiffs'' title as cosharers, did not amount to ouster, nor entitle the cosharers so excluded to a decree for joint possession or damages or an injunction, but only to compensation in respect of the exclusive use and benefit of the land by the company.

6. This was reaffirmed by the Judicial Committee in Midnapur Zamindary Co. v. Naresh Narayan Roy AIR 1924 P.C. 144 Midnapur Zamindary Co. v. Naresh Narayan Roy AIR 1924 P.C. 144 and AIR 1925 93 (Privy Council) (the report in Midnapur Zamindary Co. v. Naresh Narayan Roy AIR 1924 P.C. 144 is in the result inaccurate), in which Sir John Edge said:

Where lands in India are held in common by cosharers, each cosharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his cosharers, but he is liable to pay to his cosharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by cosharer is not an ouster of his cosharers from the proprietary right as cosharers in the lands.

7. Having regard to the context and the decision of the Judicial Committee in Lachmeswar Singh v. Manowfar Hossain (92) 19 Cal. 253 in which Lord Hobhouse had distinguished 18 Cal 10 as a case of exclusion of the plaintiff cosharers, I agree with the view taken in Chandra Kishore Chakravarty Vs. Biseswar Pal and Sachindra Kumar Goswami, executor to the estate of Bashiram Pal and Another, that this passage could not have been intended to lay down a cosharer''s liability to compensation, whether or not ho had resisted his cosharers or acted in defiance of a claim to joint possession made by them. It was on the ground of the absence of such resistance that James J. declined in the case in Shiva Narain v. Chandra Sekhar AIR 1933 Pat. 616 to hold the defendant liable when the plaintiff, instead of taking his share in the cultivation, had chosen to sit still and do nothing, and then, after the land had been cultivated by another cosharer, had made what was practically a claim for an account.

8. In the other Patna case referred to by the lower Courts, Khwaja Muhammad Noor J., upheld the view of the lower Court that the defendant was liable because the evidence showed that he had cultivated the land in spite of the demand of the plaintiff''s men for her share of it, thus excluding her from it. It seems to me impossible, after the Privy Council decision in Lachmeswar Singh v. Manowfar Hossain (92) 19 Cal. 253 to take the passage in Midnapur Zamindary Co. v. Naresh Narayan Roy AIR 1924 P.C. 144 apart from the facts of the case and to hold that our plaintiffs would have been entitled to compensation even if they had never objected to the defendants'' exclusive use and occupation of these bakasht lands. As to the case made out in the plaints, the learned advocate for the appellants has placed before us the plaint relating to Ramdhanpur, and reading this as a whole, and having regard in particular to paras. 6 to 8, it seems clear that the allegations did substantially amount to plaintiffs'' deliberate and continued exclusion from thoir share of the bakasht lands. Plaintiffs were therefore entitled to adduce evidence of how the defendants have acted in defiance of their rights. The first point raised on behalf of the appellants thus fails.

9. It was also urged on behalf of the appellants, though somewhat faintly, that the suits were governed by Art 109, Limitation Act. They were instituted in 1935, and the claims were in respect of the years 1337 to 1340 Fasli. If Article 109 applied, about half the claims would be barred, for, this article prescribes a period of three years from the time "when the profits are received" for suits "for the profits of immovable property belonging to the plaintiff which have been wrongly received by the defendant."

10. The lower Courts have held that the limitation applicable is six years under Article 120 which was applied in Robert Watson & Co. Ltd. v. Ramchund Dutt (96)

23 Cal. 799 and AIR 1925 93 (Privy Council) . (The report of this Midnapur Zamindary case in AIR 1925 93 (Privy Council) does not bring out the point of limitation, which was considered by their Lordships of the Judicial Committee on an application for rectification of the Order in Council.)

11. Much the same view was taken by Mullick J. in Kishun Deyal Singh v. Keshun Deo Jha AIR 1916 Pat. 384. The learned advocate for the respondents has also brought to our notice Siddaling Gowd v. Bhimana Gowd AIR 1935 Mad. 731, where again the question was considered by the Madras High Court, and it was pointed out that Article 109 cannot apply to cases between co-owners

because in such a case the property cannot be said to belong to the plaintiffs alone, nor could the profits received by the other co-owners be held to have been wrongly received by them.

12. The lower Courts therefore were clearly right in holding that the limitation applicable to these cases is that under Article 120. It was further urged on behalf of the appellants that the compensation should have been calculated on a rental basis and not on the basis of the produce of the lands in the years in suit. But compensation in such cases is a matter of justice, equity and good conscience, see Watson & Co v. Ramchund Dutt (91) 18 Cal. 10, and is to be moulded according to the justice of each particular case, as Lord Hobhouse said of mesne profits in Grish v. Shoshi (1900) 27 Cal. 951. The lower Courts have found that the appellants cultivated the bakasht lands not through tenants but by their own ziratia, and did so not in the open exercise of their right as cosharers but after procuring an order against them u/s 144, Criminal P.C., and a collusive proceeding u/s 69, Ben. Ten. Act, which was unsuccessfully resisted by the plaintiffs. The defendants themselves had moreover obtained from the plaintiffs compensation for some bakasht land for 1926 on the basis of the net produce, and for the years 1334 to 1336 had themselves had to pay compensation for the lands in suit on the same basis.

13. The learned advocate has referred to Din Dayal and Another Vs. Tarak Nath and Another, , a case in which the liability for excess cultivation of khudkast land was taken at the fair rata of rent, and it was said that this is usually calculated on the rent of non-occupancy tenants. But that was a suit for profits under the Agra Tenancy Act with its special provisions. I can see no sufficient reason, in the particular circumstances of these cases, to place the appellants'' liability to pay compensation on a rental basis, instead of the basis adopted inter partes from 1926 onwards.

14. As regards the produce, exception was taken on behalf of the appellants, when we first heard these appeals, to the finding of the lower appellate Court on the ground that it had not taken into account the notorious fall in the prices of agricultural produce which was judicially noticed by a Full Bench of this Court in Nathuni Thakur v. Ramasaran Singh AIR 1932 Pat. 225. We therefore remanded the case for a fresh finding on the point, and the finding is against the

appellants. The learned advocate has assailed it as incorrect in an arithmetical sense; but in the first place, he has not been able to collect all the necessary figures, and secondly, the proper place to argue on these figures was the final Court of fact. The finding of the lower appellate Court is essentially one of fact and cannot, in my opinion, be properly [challenged in these second appeals.

15. I now come to the only other point urged before us, and urged most strenuously, viz., that the plaintiffs are not entitled to any interest on the compensation year by year as claimed by them and included in full in the decree of the lower appellate Court.

16. In Inglis v. Sarju Prasad AIR 1924 Pat.633 it was expressly ruled by this Court that interest was awardable on compensation which the defendant co-sharer in a partition suit had been held liable to pay for appropriating the profits of the joint property for a number of years. This was done on what Mullick J., called equitable grounds, after examining the Interest Act, Article 32 of 1839, and various decisions including Hurropersaud Roy v. Shamaperrsaud Roy (78) 3 Cal. 654. The learned advocate for the appellants has contended that this can no longer be treated as good law in view of the recent decision of their Lordships of the Judicial Committee in AIR 1938 67 (Privy Council) , in which Sir Shadi Lai pointed out that there was

neither usage nor any contract, express or implied to justify the award of interest. Nor is interest payable by virtue of any provision of the law governing the case. Under the Interest Article 32 of 1839, the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument. But it is conceded that the amount claimed in this case was not a sum certain. The Interest Act however contains a proviso that ''interest shall be payble in all cases in which it is now payable by law.'' The proviso applies to cases in which the Court of Equity exercises jurisdiction to allow interest. As observed by Lord Tomlin in Main and New Brunswick Eletrical Power Co. v. Hart AIR 1929 P.C. 185. "In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance." The present case does not, however, attract the equitable jurisdiction of the Court and cannot come within the purview of the proviso.

17. This was, however, said in a suit for recovery of the price of work done by a contractor, and the earlier decision of the Judicial Committee, Hurropersaud Roy v. Shamaperrsaud Roy (78) 3 Cal. 654, would seem to be more in point in the cases before us because there the question of interest on wasilat was expressly considered by their Lordships of the Judicial Committee. Sir Robert Collier referred to the Interest Act and the proviso that "interest shall be payable in all cases in which it is now payable by law," and said:

And that refers their Lordships to the state of the law and the practice in India independently of the statute. They have taken some pains to ascertain what that law and practice has been.... Their Lordships find that this resolution (a resolution come to in 1850 at a sitting of all the Judges of the Sudder Court at Calcutta) has been, to a great degree, acted upon in subsequent cases; indeed there have been subsequent cases in which interest has been given at a date prior to the institution of a suit, and their Lordships are far from saying that such cases have been wrongly decided.

18. It has not been suggested before us that there is anything in the recent decision of the Judicial Committee in AIR 1938 67 (Privy Council) to weaken the authority of the express decision in Hurropersaud Roy v. Shamaperrsaud Roy (78) 3 Cal. 654, but it has been pointed out that this latter was a case of mesne profits, while the claims that we are dealing with are claims for compensation. But the difference between mesne profits and compensation in the case of cosharers tends on occasion to be very fine indeed, so much so that in J.H. Pattinson v. Srimati Bindhya Debi AIR 1933 Pat. 196 Wort J., who elaborately examined the Interest Act and a number of reported decisions including Hurropersaud Roy v. Shamaperrsaud Roy (78) 3 Cal. 654 and the case in Inglis v. Sarju Prasad AIR 1924 Pat.633, expressly distinguished the latter as a case of mesne profits. There was no statutory definition of mesne profits in 1850, nor is one to be found in the CPC of 1859. The Code of 1877 gave by way of an explanation to Section 211 a definition of mesne profits without however including interest. It was in the Code of 1882 that interest was included in the definition for the first time, the definition in the present Code being even more elaborate. It will thus be seen how the definition of mesne profits has been gradually evolved, while the Courts have been holding for a very long time that interest may be awarded on mesne profits. And though the liability of a cosharer to pay compensation rather than mesne profits for the exclusive use of land held in common was decided by their Lordships of the Judicial Committee in 1890 18 Cal 10 cases have occurred since in which the distinction between compensation and mesne profits was far from clear.

19. Thus, in Inglis v. Sarju Prasad AIR 1924 Pat.633 the trial Court had decreed partition and mesne profits, but on appeal it was held by the Calcutta High Court (P.A. No. 438 of 1911, decided by Fletcher and Richardson JJ. on 10th June 1915) that the plaintiffs were entitled not to mesne profits but to ordinary accounts as between co-owners in a partition suit; and it was thus that arose the compensation which was dealt with in the case from Inglis v. Sarju Prasad AIR 1924 Pat. 633, compensation from a cosharer proprietor who after the expiry of his leases of the plaintiffs'' undivided shares, had retained possession of the entire bakasht on a claim of occupancy right which he failed to make out.

20. In a somewhat similar case, AIR 1930 82 (Privy Council) , however, which was taken up to the Privy Council at a later stage on the question of how the mesne profits were to be calculated, see AIR 1930 82 (Privy Council) , it appears from the record of F.A. 62 of 1918 (decided by Ross and Das JJ. on 20th April

1921) that the trial Court had given a decree for joint possession, with mesne profits of an undivided share in a zamindari. This was in a suit for partition brought after the expiry of a lease taken by the principal defendant who subsequently obtained a fresh lease from plaintiffs'' cosharers. This Court upheld the decree for mesne profits so far as it was challenged in appeal, viz., in respect of plaintiffs'' share of the bakasht land which had been claimed by the contesting defendant as his raiyati holding. It does not seem easy to appreciate the difference between the compensation awarded in Inglis v. Sarju Prasad AIR 1924 Pat. 633 and the mesne profits in AIR 1930 82 (Privy Council) after his fresh lease from the cosharer defendant

21. Again in Gurdas v. Hemendra AIR 1929 P.C. 300, three families of zamindars were entitled to certain shares to land of which on re-formation after diluvion, the Government took possession and gave a patni lease. One of the three families, the Kundus, then recovered the land from the Government and continued the patnidar in possession. Subsequently the other two families sued the Government, the Kundus, and the patnidar, claiming possession of their shares and mesne profits; and the suits were decreed by the trial Court and finally by the Privy Council: see Basanta v. Secy. of State AIR 1917 P.C. 18. The case again went up to the Privy Council on the question whether the decrees were not for joint and several liability of the various defendants for the mesne profits. In holding that the decrees were to be construed applicando singula singulis, Lord Dunedin said:

Their Lordships have great difficulty in looking upon Sriah (the patnidar) as a trespasser, or, for that matter, in one sense, even the Kundus as trespassers, because they were in possession of the land and on the only legal title to it which existed, viz., the lease from the Government. It is quite true in one sense that they were in wrongful possession because they had taken the whole profits whereas they were only entitled to six annas of the profits and not to sixteen annas of the profits.

22. It may be observed that out of the other two families one had not applied to the Collector at all, while the other had done so like the Kundus but had taken no steps to establish their right to the lands as a re-formation in situ. It does not appear that the Kundus had claimed more than their six-anna title to the land before the Collector or denied, at that stage at any rate, the ten-anna title of their cosharers. They had an undoubted right to be on the land as six-anna proprietors, but they apparently rendered themselves liable to mesne profits, even without any denial of the title of their cosharers, by reason that their possession was wrongful sub modo.

23. But be this as it may, mesne profits and compensation as between cosharers are both] in the nature of damages for exclusion from common property; and this fundamental identity is brought out very clearly in AIR 1931 209 (Privy Council) , a case in which there was originally a decree for joint possession and mesne profits. On appeal, there was a remand, and the new decree gave

compensation instead of mesne profits and in respect of a smaller area. There was a fresh appeal which was compromised, the respondent, agreeing to pay Rs. 900 over and above what had been ordered by the lower Court. Then arose the question whether the compensation was or was not to be assessed like mesne profits until possession given. As regards mesne profits, Order 20, Rule 12, Civil P.C., empowers the Court to pass a decree for mesne profits not only up to the institution of the suit but also up to the delivery of possession to the decree-holder or the expiration of three years from the date of the decree, whichever event first occurs. There being no such provision as regards compensation, this Court declined to hold that compensation had been or could be awarded for any period subsequent to the institution of the suit, for no Court has in general any jurisdiction to pass a decree in respect of a cause of action that has not accrued to the plaintiff at the date of institution of his suit: see Khub Lal Singh v. Raghubahs Narayan Singh AIR 1928 Pat. 565.

24. On appeal to the Judicial Committee the identity of the compensation with mesne profits in this respect was, as Lord Blanes-burgh said, "confirmed by reference to Robert Watson & Co. Ltd. v. Ramchund Dutt (96) 23 Cal. 799, where, as a matter of equity and good conscience, the payment of compensation was in point of duration brought into accord with the principles of Order 20, Rule 12."

25. It seems to me very difficult, not to say impossible, after all this, to make any distinction between mesne profits as defined in our CPC and the compensation that was established in Watson & Co v. Ramchund Dutt (91) 18 Cal. 10, even as regards interest which was held payable on mesne profits irrespective of the Interest Act and also irrespective of any statutory definition of that term as including interest. Having regard to what I have ventured to call the fundamental identity of mesne profits and compensation, I would accordingly hold that interest is payable by law, within the meaning of the proviso in the Interest Act, on compensation from a cosharer no less than on mesne profits strictly so called (even apart from their statutory definition as including interest), and that interest was therefore rightly awarded on the compensation in Inglis v. Sarju Prasad AIR 1924 Pat. 633, though for rather different reasons than those on which Mullick J., based his judgment. The result is that I would dismiss these appeals with costs.

Harries C. J.

I agree.

