

(1945) 03 PAT CK 0012

In the Patna High Court

Raja Mohan Bikram Shah @ Ram Raja

APPELLANT

Vs

Deonarain Mahto and Others

RESPONDENT

Date of Decision : 22-03-1945

Acts Referred:

Bihar Tenancy Act, 1885 — Section 58

Criminal Procedure Code, 1898 (CrPC) — Section 144, 145

Citation : AIR 1945 Patna 453

Hon'ble Judges : Fazl Ali, C.J.;Sinha, J

Bench : Full Bench

Judgement

Sinha, J.—This is a plaintiff's second appeal from the decision of the learned Additional District Judge of Muzaffarpur, reversing that of the Subordinate Judge of Motihari in a suit in ejectment. The plaintiff is the proprietor of village Lachmipur, tauzi No. 729. The lands in dispute, said to be 6 bighas 6 kathas and odd in area, are claimed as the proprietor's zeraib or bakasht lands. During the Revisional Survey, when the village was in the possession of a thikadar, the disputed lands were recorded as "bakasht thikadar". The thika expired in 1921. The plaintiff claims that, after the expiry of the thika lease, the lands in dispute, along with other lands in the village, came in direct possession of the proprietor. It is also said in the plaint that the plaintiff continued in possession of the bakasht lands in the village, including the disputed lands, until he was dispossessed as a result of a proceeding u/s 145, Criminal P. C, which was decided against him on 30th September 1939. The present suit was instituted in November 1940. The plaintiff alleges that, as a result of the kisan movement, the defendants, who are turbulent persons, began to claim possession of the disputed lands, with the result that a proceeding u/s 144, Criminal P. C, was started in the Court of the Sub-divisional Officer at Bettiah in the year 1936. Mr. Ekka, a Sub-Deputy Magistrate, was deputed to make a local inquiry into the dispute. He made the inquiry, and submitted his report in June 1936, to the effect that the plaintiff was in possession of the lands, and not the defendants. The notice u/s 144, therefore, was made absolute against the defendants who

were restrained from going upon the lands. But, it is alleged, they persisted in their efforts to create trouble, and the result was a proceeding u/s 145., Criminal P. C, already referred to. On these allegations, the plaintiff sued for recovery of khas possession after a declaration that the lands were his zeraif or bakasht, and that the defendants had no raiyati or any other right in the lands. Claim for mesne profits, both antecedent and pendente lite, was also made.

2. The suit was contested by a joint written statement filed by all the defendants who alleged, inter alia, that the disputed lands were not zeraif or bakasht of the proprietor, but that the defendants possessed these lands as their raiyati on manhunda rent on temporary leases thirty years ago during the time of the thikadar, and that, when the village came in khas possession of the plaintiff, he settled the lands with them seventeen or eighteen years ago at hunda rents of fifteen or twenty maunds per bigha, with the result that the defendants, being settled raiyats of the village, had acquired occupancy rights in those lands. In the written statement, the defendants gave a schedule, showing the names of the defendants and the plot numbers with their respective areas which were in possession of different sets of defendants. It is only necessary to state that defendant 7 claimed survey plot No. 33 with an area of 11 kathas, and defendant 16 claimed 11 kathas in two plots, 34 and 35. Similarly, other defendants are shown as raiyats in respect of other plots with the specified areas. The defendants, therefore, claimed that the plaintiff had no right to eject them, but only to realise hunda rents according to the contract between the parties. The defendants further alleged that the plaintiff never granted any receipts to tenants, holding lands on hunda basis, and that on their complaint to the revenue authorities, the plaintiff's manager was fined Rs. 650 u/s 58, Bihar Tenancy Act. That was the reason why, according to the defendants, the plaintiff was trying illegally to dispossess the defendants. The defendants further alleged that, in spite of the several criminal cases fought between the parties, they continued in possession, and that the decision by the Magistrate in their favour in the 145 proceedings was entirely correct.

3. Hence, the chief point in controversy between the parties was whether the defendants were occupancy tenants in respect of the lands in dispute. The other issues joined between the parties were of a more or less, formal nature. The learned Subordinate Judge, who tried the suit, came to the conclusion that the defendants had failed to make out their case of tenancy, and that they had. no connexion with the lands prior to the year 1936. The learned Subordinate Judge relied mostly on the report of Mr. Ekka, referred to above, as also on the canal papers, showing that canal rates had been paid on behalf of the proprietor. Accordingly, he decreed the suit for possession and mesne profits, as claimed by the plaintiff.

4. There was an appeal filed by all the defendants except defendants 7 and 16. The learned Additional District Judge, who heard the appeal, reversed the decision of the learned Subordinate Judge in a judgment which is not only

exhaustive but exhausting. He has gone into minute details, and the result is that he has written an inordinately long judgment. His judgment could easily have been compressed to less than half its present length without in any way detracting from its utility as a judgment of the final Court of fact. The learned Judge in the lower appellate Court recorded the findings that the lands in dispute were not in khas possession of the proprietor within 12 years of the suit; and that the defendants had been in possession thereof as raiyats on manhunda rent, as claimed by them. In the result, he decreed the appeal and dismissed the suit in its entirety with costs in favour of the defendants. Hence this second appeal by the plaintiff.

5. Mr. P.R. Das has raised substantially four points in support of the appeal, namely, (1) that the learned appellate Judge has misplaced the onus on the plaintiff to prove that the lands were his zarait or bakasht, when really the onus lay on the defendants to prove the tenancy right claimed by them; (2) that Mr. Ekka's report had wrongly been excluded from consideration by the lower appellate Court as irrelevant; (3) that the canal papers were evidence of possession in favour of the plaintiff and the lower appellate Court had erred in rejecting those papers as such evidence and (i) that, in any view of the case, the suit as against defendants 7 and 16 should not have been dismissed, as no appeal had been preferred by those defendants, and, therefore, the decree of the trial Court as against them had become final.

6. On the question of onus of proof, it may be said at once that the learned Judge in the appellate Court has discussed the entire evidence in great details, and, in that view of the matter, the question of onus of proof is wholly academic. Even assuming that the lower appellate Court has placed the onus of proof on the plaintiff, in my opinion, it has not misdirected itself in doing so. The plaintiff is suing in ejectment. He has, therefore, to make out his title and his possession within 12 years of the suit. His title as proprietor was not in issue in this case, inasmuch as the defendants all the time asserted their tenancies under the plaintiff as the proprietor. Hence, the onus lay on the plaintiff to prove his title in the limited sense of title to khas possession. Mr. Das relied upon the decision of their Lordships of the Judicial Committee in *Jagdeo Narain Singh v. Baldeo Singh* A. I. R. 1922 P. C. 272, and on the passage at p. 49 which their Lordships quoted from the decision in *Rajah Sahib Perhlad Sein v. Doorga-pershaud Tewarree* (67) 12 M. I. A. 286:

The appellant is the zamindar, as such he has a prima facie title, to the gross collections from all the mouzahs within his zamindary. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure.

7. In *Jagdeo Narain Singh v. Baldeo Singh* A. I. R. 1922 P. C. 272 the dispute, related only to the question of whether the defendants had established their title as tenants to hold the lands free of rent. Their tenancy was not in dispute. Therefore, their Lordships of the Privy Council held that it lay upon the tenants to prove exemption from their liability to pay rent to the plaintiff who was

admittedly the proprietor of the estate in which their tenancy lay. Hence, the question in controversy in the present case did not arise in that case. In the earlier case in *Rajah Sahib Perhlad Sein v. Doorga-pershaud Tewarree* (67) 12 M. I. A. 286, the plaintiff was the Raja or zamindar of Ramnuggur, and he claimed khas possession of certain villages in possession of the defendants. The defendants claimed permanent mukarrari interest in those villages on the basis of certain deeds, said to have been executed by the zamindar. The Courts in India had dismissed the suit on the ground of limitation, without recording any finding as to the genuineness of the deed which was the basis of the defendants' appeal. Their Lordships in those circumstances reversed the decision of the Courts in India, and remitted the case back for a decision on the question of whether the deed relied upon by the defendants was genuine, and was effective to confer title upon the defendants. The following sentence in their Lordships' judgment, coming immediately after the passage quoted above, explains their Lordships' decision in the case:

In their Lordships' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right or interest in these villages beyond, at most, the life-time of Muddun Mohun Tewarree.

8. It will be noticed that their Lordships proceeded in that case on the footing that the defendants, who were claiming a permanent and hereditary tenure in entire villages as against the proprietor, had to prove the genuineness of the deed evidencing the grant. In the present case also, if the defendants had put in any documents of title as the basis of their claim, certainly the burden of proof would lie on them to prove to the satisfaction of the Court the genuineness and validity of their document of title. In the present case the defendants pleaded the case of oral settlement, and of payment of rent in kind without any grant of rent receipts. Naturally, therefore, the Court had to depend mostly on oral evidence in support of the defendants' claim by virtue of settlements said to have been made by the plaintiff himself. Certainly, it lay on the defendants to prove their tenancy, and the finding recorded by the learned Judge on appeal is to the effect that the defendants had proved their tenancy, and that the plaintiff had failed to prove that the lands were in his direct possession since after 1921, when the alleged settlements were made by him in favour of the defendants. If the defendants had failed to prove their tenancy, their position, on the finding of the learned Additional District Judge, would be that of trespassers, and in that case they would have indefeasible title not by virtue of the settlements but by adverse possession. But that is too the position in this case on the findings. Mr. Das next contended that Mr. Ekka's report in the proceedings u/s 144, Criminal P. C., was evidence not only of the fact that he had been deputed by the learned Sub-divisional Magistrate to make an inquiry at the spot, and that he held that inquiry and made a report in favour of the landlord, but also of the fact that the landlord was in khas possession of the disputed lands. Mr. Das relied upon the decision of their Lordships of the Allahabad High Court in the case in *Baldeo Das v. Gobind Das* A. I. R. 1914 All. 59. In that case the dispute was as regards the ownership

of a certain temple, which, the plaintiff alleged, was the property of the Ajaigarh State, and of the competence of the State to appoint and dismiss the mahanth of the temple. The defendant, on the other hand, claimed the temple as belonging to a certain sect of sadhus. In proof of the plaintiff's claim of ownership to the temple, he adduced in evidence the report of the kotwal dated 1840, who had made an inquiry about the ownership and possession of the temple in question, and had made a report in favour of the State. In the High Court it was urged on behalf of the appellant that the kotwal's report, made about 70 years before the dispute arose, was not admissible in evidence, as it was based on hearsay, evidence. Their Lordships, without discussing the question as to under which provision of the Evidence Act, the report was admissible, merely stated as their opinion that it was evidence, because it was a public record of a public inquiry. Though it is not clear with reference to the arguments at the Bar or to the actual decision of their Lordships, it may be that the report was admissible in evidence u/s 32 read with Section 13, Evidence Act. But Mr. Das contended that the report of Mr. Ekka was admissible in evidence u/s 35, Evidence Act. In this connection he relied particularly upon the decision of their Lordships of the Madras High Court in *Raman v. Secy. of State* (01) 24 Mad. 427. In that case their Lordships held that a single document may be a public record within the meaning of Section 35, Evidence Act, and that a report made by a District Officer in the discharge of his duty as such officer is accordingly admissible in evidence. In the course of their judgment, their Lordships made the following observations:

The plaintiff himself having caused it to be produced and filed as an exhibit on his behalf, it is difficult to see how he can now object to its being used by the other side. Apart from this, it is clearly a public record, containing evidence relevant to the case and therefore admissible in evidence under Section 35, Evidence Act.

9. We are not aware of the nature of that document as also under what provisions of the law that public record was made. Reliance was also placed upon the decision of their Lordships of the Judicial Committee in AIR 1934 157 (Privy Council). In that case, their Lordships had to decide whether statements in judgments and decrees are admissible u/s 13 read with Section 43, Evidence Act. That is not a decision on the scope and applicability of Section 35 of the Act, upon which Mr. Das strenuously relied. Hence, that case is not of any assistance to him. On the other hand, it is the settled law, so far as this Court is concerned, that the judgment of a Magistrate u/s 144, Criminal P. C., is not evidence of possession of the party in whose favour the proceeding may have terminated, even though the Magistrate may have restrained the opposite party from going upon the land as a result of his decision that the other party was in possession. If the judgment itself in such a proceeding is not evidence of possession in favour of the party obtaining judgment from the Magistrate, it is a little difficult to appreciate how the report of a Subordinate Magistrate, deputed by the Court to make a local inquiry, can be evidence of possession, even though the inquiring Magistrate may have reported that, in his opinion, that party was in possession,

and his opinion may have been accepted, and the opposite party restrained from going upon the land. In my opinion, the report of the Magistrate is only evidence of the fact that the Magistrate had been deputed to make the "inquiry, and that, on his inquiry, he came to the conclusion that a certain party was in possession. But it can-not be said that the report itself is evidence of possession. It is a mere expression of opinion of the inquiring officer, based on the statements of certain witnesses examined by him. The position would be a little different where the inquiring Magistrate may have seen things which led him to the inference of possession in favour of the party who may call him to prove those facts by refreshing his memory with reference to the report. That is entirely a different question beyond the purview of Section 35, Evidence Act. In this connexion, reference may also be made to the observations of their Lordships of the Judicial Committee in *Dinomoni Chowdhurani v. Brojo Mohini Chowdhurani* (02) 29 Cal. 187 where their Lordships have discussed the admissibility of a Magistrate's judgment u/s 145, Criminal P. C. In the course of their judgment, their. Lordships have made these observations which are relevant to the present purpose:

Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession : 2 Tay. Ev. Section 517. See 1 Taylor, Section 622 (Edn. 9). But they are not otherwise admissible unless they are made so by Section 13, Evidence Act.

10. There is no indication in their Lordships' judgment that such a report as is now under discussion is admissible in evidence u/s 35, Evidence Act. In my opinion, the learned Additional District Judge was perfectly right in holding that the report by itself is not evidence of possession in favour of the plaintiff. But the learned Judge does not stop there. He has devoted several pages to the discussion of the question as to whether the Magistrate's opinion on the question of possession could be correct, and he has shown that that conclusion was not well founded. Hence, it cannot be said that the learned Judge has misdirected himself on the question of law.

11. On the question of the admissibility of the canal papers in proof of possession, it cannot be denied that they are admissible in evidence; but the value of that evidence is entirely a matter for the Court of fact : see in this connexion the observations of this Court in *Mathura Singh v. Rama Rudra Prashad* AIR 1936 Pat. 231 to the effect that the obvious object of the irrigation map and the khasra prepared by the canal department was to have a detailed record of the villages to be irrigated from the Government canals and the names of the holders of land who take water and pay the canal rates. In the present case, the learned Judge below did not rule out the canal khasras and parchas altogether from his consideration as irrelevant. What he said in his judgment is that the learned trial Judge had assumed that, because the plaintiff was shown as the person paying the canal rate, he was in actual physical possession of the lands. The learned Judge on appeal has pointed out that it may or may not be so : its evidentiary value must vary with the circumstances of each case. And

then he has devoted a number of pages to showing that the canal parchas and khasras in favour of the plaintiff did not prove plaintiff's case for the reasons given in detail in his judgment. If the learned Judge had excluded the canal papers from his consideration, the appellant may have had good reasons for interference in second appeal; but the learned Judge has discussed the evidentiary value of those canal papers, and, on such a consideration, has come to the conclusion that they did not help the plaintiff. This is a decision on a question of fact, and not of law.

12. It was lastly contended on behalf of the appellant that the learned Judge below has erred in law in drawing an inference against the plaintiff from the non-production of certain papers which may have been maintained in his office. It is contended that those papers have not been produced, because they could not be of any assistance to the plaintiff, but that, if the defendants wanted the Court to draw an adverse inference from their non-production, they should have called upon the plaintiff to produce those documents : only if the plaintiff did not produce those documents after being called upon to do so, the Court would be justified in drawing an adverse inference against him. Reliance in this connexion has been placed upon the decision of their Lordships of the Judicial Committee in 42 I. A. 2028. That is so. But the decision of the learned Judge below is not based only on that consideration. He has given so many other reasons for his conclusions in favour of the defendants that his judgment could stand even though these observations were excluded from his judgment. Hence, it cannot be said that his judgment has been vitiated by these considerations.

13. The last contention raised on behalf of the appellant is the most substantial one. This is not a case of a block of land being forcibly possessed by a number of persons who had conspired to defeat the plaintiff's just rights. The defendants themselves in the written statement had claimed specific plots with certain specified areas as in possession of certain of the defendants named in the schedule to their written statement. Defendants 7 and 16 likewise had claimed the plots mentioned in the beginning of this judgment as their raiyati lands. The trial Court decreed the suit as against all the defendants, including those defendants. All of them, except the two defendants aforesaid, went up in appeal. The lower appellate Court has reversed the decision of the trial Judge on the merits. But he could not, in law, have decreed the claim of those defendants who did not choose to prefer an appeal against the decision of the trial Judge. They were satisfied with that judgment, and, therefore, took the consequences of not appealing against that. Hence, in my opinion, the lower appellate Court was not entitled, in law, to dismiss the entire suit. This is not a case of the entire claim of the defendants succeeding or failing as a whole. It was not a case of one settlement, but of creation of different tenancies in favour of different tenants. Each case of settlement must stand or fall on its own merits. Hence, it must be held that the judgment and decree of the learned appellate Judge are bad in so far as he has reversed the decision of the trial Court in respect of the lands claimed by defendants 7 and 16.

14. The appeal must, therefore, be allowed as against the defendants 7 and 16 who are respondents in this Court but have not chosen to appear in this Court either. The judgment and decree of the trial Court as against those defendants will, therefore, be restored, but without costs in this Court. But the judgment and decree of the lower appellate Court in favour of the other defendant-respondents must be confirmed, and the appeal as against them dismissed with costs. It was brought to our notice by counsel for the respondents that the learned Registrar exacted court-fee from them in respect of the lands claimed by defendants 7 and 16 on the ground that they should have paid the full court-fee in the lower appellate Court. In my judgment, the learned Registrar was wrong in demanding that court-fee from the respondents who are not interested in those lands. As a matter of fact, there was no appeal in the lower appellate Court in so far as the lands claimed by defendants 7 and 16 were concerned. The judgment and decree of the trial Court as against those defendants have become final, as already held. Hence, the prayer of the respondents that they should be given a certificate for refund of the court fee wrongly realised from them by the Registrar should be allowed. It is directed that the Registrar will issue the necessary certificate for the refund of the court-fee to the respondents, who were wrongly made to pay the same.

Fazl Ali, C.J.

15. I agree.