

(1949) 09 PAT CK 0012
In the Patna High Court
Case No : A.F.A.D. No. 472 of 1948

Ram Pearilal Khandelwal

APPELLANT

Vs

Surajmal Khandelwal and Others

RESPONDENT

Date of Decision : 07-09-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1

Citation : AIR 1952 Patna 84

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : S.C. Majumdar, for the Appellant; Kesarnath Sahay and Ray Parasnath, for the Respondent

Final Decision : Allowed

Judgement

Das, J.—This is a second appeal by the plaintiff from a decision of the learned Subordinate Judge of Dhanabad, dated the 23rd of January, 1948, affirming a decision of the learned Munsif of Dhanbad, dated the 26th of April, 1947, in a suit for ejectment of a tenant of on a notice to quit. The suit was framed as one u/s 7, Clause (XI) (cc) of the Court-fees Act, and Court-fees were paid on the annual rental plus the amount of arrears claimed. The case of the appellant was that his father had purchased a house in Dhanbad from the father of defendants 1 to 3 and two other persons by a registered sale deed dated the 9th of October, 1922. It was alleged that defendants 1 to 3 and their father took the house as monthly tenants on a rent of Rs. 16/- per month. Defendants 1 to 3 did not pay rent in spite of demand, and on the 6th of January, 1945 a notice to quit was served on defendants 1 to 3. The appellant then brought the suit for ejectment and for recovery of arrears of rent for 35 months plus interest. The total claim was laid at Rs. 600/- and Court-fees were paid on that claim plus the annual rental of the house. The defence of defendants 1 to 3 was a denial of the appellant's title. It was alleged that the father of defendants 1 to 3 and his two nephews used to carry on business jointly and had business transactions with the

appellant's father. As the father of defendants 1 to 3 and his nephews were heavily indebted a bogus or benami sale deed was executed in the name of the appellant's father in order to save the house from creditors. It was further alleged that defendants 1 to 3 always remained in possession as owners and never parted with possession. On separation the house fell to the share of defendants 1 to 3 who alleged that they were full owners of the house.

2. The learned Munsif who dealt with the suit in the first instance decided only one issue, namely, the issue as to the alleged "benami" nature of the sale deed of the 9th of October, 1922. The learned Munsif found that the sale deed was benami and without consideration. On that finding he dismissed the suit. The learned Subordinate Judge, on appeal, affirmed that finding, and held that there was no relationship of landlord and tenant between the appellant on one side and defendants 1 to 3 on the other.

3. Learned Counsel for the appellant has raised several points before me. His principal point is that the learned Munsif, in whose Court the suit was filed, had no jurisdiction to decide the question of title. Therefore, permission should be given to the appellant to withdraw from the suit with liberty to bring a properly constituted suit for a declaration of title and recovery of possession. Learned Counsel has placed reliance on the decision in *Promotha Nath Ganguly and Another Vs. Amiraddi Sheikh and Others*, where a similar course was adopted. It was there pointed out as follows:

"As for the other two defendants, it has been found that there was no relationship of landlord and tenant between them and the plaintiff. The suit, therefore, cannot proceed without a prayer for declaration of title and the suit is not framed accordingly. In these circumstances, the learned pleader for the appellant applies for permission to withdraw the suit so far as the defendants Nos. 2 and 3 are concerned with liberty to bring a fresh suit. The plaintiffs are accordingly permitted to withdraw from the suit with liberty to bring a fresh suit with respect to the same subject matter as against defendants Nos. 2 and 3."

Learned Counsel for the respondents has relied on two decisions "*Govind Kumav v. Mohini Mohan*", 33 Cal W N 769 and "*Balasidhantam v. Perumal Chetti*", 27 Mad L J 475. In Madras case it was observed that in a suit brought u/s 7, Clause (XI) (cc) of the Court-fees Act, the question of the title of the plaintiff need not be gone into, in the Calcutta case it was observed that in a suit brought u/s 7, Clause (XI) (cc), a Court cannot enter into the question of title and give a decree on the basis thereof; what the Court is entitled to do under that clause is to find if there was relationship of landlord and tenant between the plaintiff and the defendant and if the defendant's tenancy has been validly terminated. It is observed that if the Court finds any of these elements non-existent, the suit must be dismissed, and if any question of title is raised in the suit, it can only be gone into for the purpose of determining the main question in the suit about the relationship between the plaintiff and the defendant. The difficulty in the case before me is that the learned Munsif would have no pecuniary jurisdiction to

decide the question of title between the parties, the house having been purchased for Rs. 5000/-. The Courts below were right in dismissing the action when there was no relationship of landlord and tenant; but in the peculiar circumstances of this case, the question of title can be more satisfactorily decided in a properly constituted suit before a competent Court. The appellant was ill-advised in framing the suit u/s 7, Clause (XI) (cc) of the Court-fees Act, probably with a view to save Court-fees. In the circumstances of this case, I would accept the prayer of the appellant, and allow him to withdraw from the suit with permission to bring a properly constituted suit in a Court of competent jurisdiction for the adjudication of his title to the house. But such permission is conditional on the appellant paying the entire costs of defendants 1 to 3 in all Courts including this Court.

4. In view of the above permission, it is unnecessary to discuss the other points raised. It has been contended before me that the Courts below did not consider carefully the elements of a "benami" transaction, and that the onus of proving the payment of consideration was wrongly thrown on the appellant. It was also contended that the Court of Appeal below wrongly held that exhibits 2 and 2(b) were inadmissible in evidence. I do not think these points need any consideration in view of the permission given to withdraw the suit.