

(1972) 09 PAT CK 0018
In the Patna High Court
Case No : A.F.A.D. No. 55 of 1970

Ram Pukar Singh and Others

APPELLANT

Vs

Sita Ram Mahton and Others

RESPONDENT

Date of Decision : 11-09-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Criminal Procedure Code, 1898 (CrPC) — Section 145
Evidence Act, 1872 — Section 18

Citation : AIR 1973 Patna 310

Hon'ble Judges : B.D. Singh, J

Bench : Single Bench

Advocate : Kailash Rai, Devi Prasad Sharma and Nawal Kishore Sharma, for the Appellant; Jaleshwar Prasad, R.S. Sinha and S.M. Siddique, for the Respondent

Final Decision : Dismissed

Judgement

B.D. Singh, J.—This second appeal by the plaintiffs is directed against the judgment and the decree of the lower appellate Court reversing the judgment and the decree of the trial Court in title suit No. 66/69 of 1960/62.

2. In order to appreciate the point involved in this appeal it will be necessary to state briefly the facts. The plaintiffs had instituted the suit for declaration of title and recovery of possession with mesne profits with respect to 15 kathas 1 dhur of land comprised in revisional survey plot No. 196 khata No. 80 corresponding to cadastral survey plot No. 123 (whole) and plot No. 124 (part) bearing khata Nos. 43 and 44. situate in village Pakbaha in the district of Saran.

3. The plaintiffs' case in brief was that the land was bakasht land of the plaintiffs and their ancestors and it was so recorded in the cadastral survey. The ancestors of the plaintiffs gave the suit land in Jagir to Sheo Sharan Mahto, father of Jhagaroo Mahto alias Jhagru Prasad (defendant No. 61 and Ram Narayan Mahto (defendant No. 7) Ramrup Mahto, father of Sitaram Mahto (defendant No. 1). Lachhuman Mahto (defendant No. 2). and Ramlagan Mahto (defendant No. 3) in

lieu of the service of Barahil only with right of enjoyment of the usufruct and subject to the right of the grantor to resume khas possession in case the grantee ceased to do service. About 26 years prior to the institution of the suit Sheo Sharan Mahto was found to have been misappropriating the rent collected by him in the capacity of being Barahil. Hence his service as well as the services of the other three persons, named above, were terminated, and the possession of the land was resumed by the grantor. Subsequently, the suit land bearing revisional survey plot No. 196 was amalgamated with the plaintiffs' plot No. 195. After vesting of the Zamindari in the State of Bihar on the 1st January, 1956, the plaintiffs filed return to the authorities of the State of Bihar and showed the suit land as bakasht land of the plaintiffs. Taking advantage of the certificate entry the defendants began laying claim to the suit land, which led to the proceedings under Sections 144 and 145 of the Code of Criminal Procedure in which an order was passed against the plaintiffs. Subsequently, the plaintiffs were dispossessed from the suit land which necessitated to the filing of the present suit on the 2nd April. 1960.

4. Defendants 1, 2, 3 and 7 filed a joint written statement and they were really contesting the suit. Their case in brief was that the suit land was Permanently settled with Sheo Sharan Mahto. Ramrup Mahto, Lachhuman Mahto and Ramlagan Mahto for the services already rendered by them as Barahil to the plaintiffs and their ancestors. Therefore, the suit land was not resumable. The land continued to be in possession of the defendants ever since the settlement and the same was never resumed by the plaintiffs or their ancestors. The plaintiffs were never in possession of the suit land. According to them, the suit was barred by limitation and adverse possession. Lastly, their defence was that defendant No. 6 was in collusion with the plaintiffs.

5. On the pleadings of the parties, the following issues were framed by the trial Court.

1. Is the suit as framed maintainable?
2. Have the plaintiffs got any cause of action for the suit?
3. Is the suit time barred?
4. Is the suit properly valued?
5. Is the court-fee paid sufficient?
6. Have the plaintiffs got any subsisting title over the suit land? If so, are they entitled to recovery of possession?
7. To what relief or reliefs, if any, are the plaintiffs entitled to?

6. After considering the evidence adduced by the parties the trial Court held: (a) Jhagru (defendant No. 6) was Dagarua son (from former husband of his mother) of Sheo Sharan Mahto: (b) plots Nos. 196 and 195 were amalgamated; (c) the plaintiffs removed the defendants and their ancestors from the suit land about 17

years after the revisional survey and took possession thereof and were in possession over it as bakasht until the 4th April, 1959, when the defendants dispossessed them after the order in a proceeding u/s 145 of the Code of Criminal Procedure; (d) the suit was not barred by limitation and (e) the plaintiffs were entitled for mesne profits.

7. On appeal by the contesting

defendants the previous appellate Court affirmed the findings of the trial Court and dismissed the appeal. Defendants preferred a second appeal, being S. A. No. 176 of 1967, in this Court, heard by Mahapatra, J., who set aside the judgment and the decree of the appellate Court and remanded it to the appellate Court for disposal in accordance with law. On remand, the lower appellate Court held that: (i) the suit land was service tenure as Jagirdars were required to function as Barahils and were not liable to pay rent; (ii) the plaintiffs failed to prove their case of resumption and possession and (iii) there was no question of limitation.

8. Mr. Kailash Rai, learned counsel appearing on behalf of the appellants, has challenged the judgment and the decree of the appellate Court passed on remand, particularly regarding finding No. (ii) which is not in accordance with law, and raised the following points for consideration by this Court. (1) It has not at all considered the admission of defendant No. 6 regarding resumption, contained in Ext. 17, which is a certified copy of the previous deposition of the defendant; (2) it has erred in holding that Ext. 10 (Barwarda) prepared in Collectorate partition between the plaintiffs and the co-sharer landlords, is not admissible in evidence in absence of formal proof; (3) it has also committed error of record while holding that (a) the nature of service of the defendants is not given in the plaint although in fact it is stated so in paragraph 5 of the plaint; (b) the plaintiffs had not set out the terms and conditions of Jagir in the plaint although they have done so therein; (4) it has erred in brushing aside the report and the evidence of P. W. 1. Amin Commissioner, on the point of amalgamation of plots Nos. 195 and 196. It has similarly erred in ignoring the evidence of P.Ws. 4, 5, 6, 7 and 8 on that point of amalgamation; (5) it has erred in holding that the order passed in the proceeding under Sections 144 and 145 of the Code of Criminal Procedure has got evidentiary value on the point of possession until that decision is reversed by the competent civil Court. (6) It erred in interpreting the deed of gift dated the 16th November, 1950 (Ext. 7) executed by Sheo Sharan in favour of defendants 6 and 7 which lend support to the plaintiffs' case of resumption of the suit land; and (7) the oral evidence regarding resumption and possession were not considered by the appellate Court in accordance with law.

9. On the above grounds learned counsel submitted that it is a fit case for remanding the case again to the appellate Court for reconsideration. On the other hand, Mr. Jaleshwar Prasad, learned counsel appearing on behalf of the defendant-respondents Nos. 1, 2, 3 and 7 as well as on behalf of Nageshwar Mahto and Kauleshwar Mahto, respondents 4 and 5, who are sons of respondent No. 2, and Bachu Mahta respondent No. 8, son of respondent No. 3 urged that

the lower appellate Court has committed no error of law and it has followed the direction given by Mahapatra, J. in the aforesaid second appeal. According to him, the findings of the lower appellate Court do not call for any interference. Reference to the judgment dated the 14th March, 1969, in Second Appeal No. 167 of 1967 reveals that the case was remanded (i) to find out if the plaintiffs had resumed possession of the suit land from the defendants in 1934 or near about that time and (ii) whether the plaintiffs were in possession of the suit land within 12 years of the institution of the suit, particularly when there was a finding in regard to the possession in favour of the defendants in a proceeding u/s 145 of the Code of Criminal Procedure. Mr. Jaleshwar Prasad submitted that the appellate Court on direction No. (i) came to the finding that the plaintiffs had not proved that they resumed the suit land from the Jagirdar. On direction No. (ii) it came to the conclusion that the plaintiffs' case of possession and dispossession was not correct. Mr. Rai, however, submitted that the appellate Court has not carried out the direction given in the said judgment by this Court. There is acute controversy on this point between the counsel of the parties. It will be relevant to mention here that none has appeared on behalf of Jhagru Mahto, respondent No. 6, who was defendant No. 6 in the trial Court. Therefore, in order to dispose of the present second appeal it will be necessary to examine various points urged by Mr. Rai. I will take up for consideration point No. (2) first, learned counsel has referred to paragraph 11 of the appellate Court judgment wherein it observed that Barwarda ought not to have been exhibited as no witness was examined to prove the same. Mr. Rai contended that the Barwarda (Ext. 10) was admissible on two grounds; firstly, because it was more than 30 years old, it came into existence before 1908, as it appears from Ext. 12, order sheet of the Collector dated the 7th January, 1908; and secondly, because it is a public document admissible u/s 35 of the Evidence Act.

In order to substantiate his contention he referred to Babu Triloke Prasad Singh Vs. Lala Umanand Lal and Others, , and Sheojee Tiwary and Another Vs. Prema Kuer and Others, . Mr. Prasad fairly conceded that Barwarda was admissible in evidence, but the same is of no consequence, because it related to the period prior to the publication of the revisional survey khatian (Ext. C), which was published on the 6th January, 1919, wherein the suit land is recorded in the name of the defendants. In the remark column it is mentioned "waste kam barahil ke mila hai". Therefore, Mr. Prasad submitted that even if the lower appellate Court has erred in holding that it was not admissible since Barwarda was not an important piece of document to establish the case of the plaintiffs, it would not be necessary to remand the case to the appellate Court on that account. In my view, the submission of Mr. Prasad is well founded. I see no reason to interfere with the findings of the appellate Court due to the flaw which it has committed in holding that Barwarda was not admissible.

10. Now I take UP for consideration point No. (3) wherein it is contended by Mr. Rai that the appellate Court has committed errors of record while holding that the nature of the service of the defendants and the terms of Jagir, given to them,

were not mentioned in the plaint. He drew my attention to paragraphs 4 and 5 of the plaint to show that in those paragraphs it was clearly mentioned that Sheo Sharan Mahto, Ramrup Mahto, Lachhuman Mahto and defendants 2 and 3 used to perform the duties of Barahil to the ancestors of the plaintiffs. The Bara-hils were not given salary for their work but in lieu of the salary they were given the usufruct of the land measuring 15 kathas 1 dhur comprising of the present plot No. 196. It is also mentioned therein that so long they would work as Barahil, they would enjoy the usufruct of the land. Besides that they had no claim over the land. Learned counsel referred to paragraph 8 of the appellate Court judgment, which is to this effect:--

"Thus, it is evident from the cases of the plaintiffs disclosed above that the plaintiffs have not disclosed the definite date on which the above named Jagirdars who were Barahils of plaintiff No. 1 and, his ancestor have been allowed to possess the suit land. There is no definite case regarding the duties and function of these persons as Barahils excepting disclosure of the fact that it has been resumed 26 years back for misappropriation of collected rent by Sheosaran after disallowing the aforesaid Jagirdars to work as Barahils."

11. In my opinion, from the above observation it is clear that the appellate Court had laid emphasis upon the question as to when the plaintiffs resumed possession of the suit land and whether plaintiffs retained possession after its resumption. Whether the defendants or their ancestors worked as Barahil or not and what were the functions of the Barahil were not material points for consideration by the lower appellate Court. As mentioned earlier. it had to give the finding only on the two points as indicated by this Court in S. A. No. 176 of 1967 (Pat). Therefore, in my view, even if it failed to observe regarding the duties of Barahil as disclosed in paragraph 4 of the plaint, it cannot be considered as a grave error of record committed by it necessitating remand of the case. Point No. (3), therefore, has no merit.

12. It will be convenient now to take points Nos. (1) and (6) together, which the learned counsel for the appellants advocated with great force. In this connection he referred to Exts. 17 and 7, which, according to him, fully corroborate the plaintiffs' case regarding resumption of the suit land. Ext. 17 is the deposition of Jhagru (defendant No. 6) dated the 24th August 1950, in title suit No. 42 of 1949. The relevant portion thereof is quoted in the judgment of the trial Court and it reads

"I left my service and my Jagir was resumed by the Malik more than 12 years ago, XX-examined. My Jagir was ,at vill. Pakwalia. The area of the Jagir was 18 kathas. It was given to me to work as Karinda. I do not know in whose name the khatian of my Jagir land stood. I do not know if Jagir was hereditary. It was resumed by the Malik within my hosh. Originally the Jagir had been granted to one Pattidar but subsequently it belonged to three Pattidars....."

Mr. Rai contended that the lower appellate Court in paragraph 20 of its judgment

erred in holding that the statement made by defendant No. 6 in the said title suit was not adverse to him and it was not binding on the defendants. He also drew my attention to the observation made by the appellate Court, wherein it held that Jhagru was not the Jagirdar, as shown in the khatian Ext. C nor any portion of the Jagir was gifted to Jhagru through Ext. 7 Mr. Rai submitted that in Second Appeal No. 176 of 1967 Mahapatra, J. had already held that the statement of Jhagru was against his interest with regard to the resumption of Jagir land. Therefore, his statement in Ext. 17 was admissible in evidence. In my view, this submission of Mr. Rai is well founded. It is true that the admissibility of Ext. 17 cannot be challenged now. Mr. Prasad has fairly conceded that it was admissible, but he submitted that It had no evidentiary value. In the second appeal also Mahapatra. J. had observed that what would be its evidentiary value would be a different question. In my view, the lower appellate Court has also considered Ext. 17 on the point of its evidentiary value and has given reasons why it did not place much reliance on it. It has clearly mentioned that defendant No. 6 had no idea of the suit land or Jagir land or its nature or its area, as stated by Jhagru in cross-examination, the relevant portion of which has been quoted above. It may be noticed that the Jagir land consists of 15 kathas 1 dhur only whereas in cross-examination Jhagru stated it to be 18 kathas. In my view, it has given adequate reasons for not relying on Ext. 17. Therefore, in second appeal I am not inclined to interfere with it on that score.

12A. Mr. Rai however, submitted that the admission of defendant No. 6 in Ext. 17 was binding on others. In support of his contention he had relied on Mt. Ramjhari Kuer and Others Vs. Deyanand Singh and Others, where Fazl Alt C. J. and Pandey, J. observed that when several persons are jointly interested in the subject-matter of the suit an admission of any one of these persons is receivable not only against himself but also against other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and is made by the defendant in his character of a person jointly interested with the party against whom the evidence is tendered. Their Lordships further held that the requirement of the identity in legal interest between the joint owners is of fundamental importance. No one doubts the dictum of their Lordships which is firmly established. In the present case, however, since the appellate Court has held on scrutiny of the previous evidence of defendant No. 6 in Ext. 17 that it has no evidentiary value, the question whether his admission would bind the other defendants is of little importance. It becomes merely an academic question.

13. Now I turn to consider Ext. 7, which is a deed of gift dated the 16th November, 1950, executed by Sheo Sharan Mahto in favour of defendants 6 and 7. Learned counsel for the appellants contended that the recital in Ext. 7 establishes that (i) the defendant No. 6 was Dagarua son of Sheo Sharan, (ii) Sheo Sharan made no gift of his Jagir land. That clearly indicated, learned counsel submitted, that the Jagir land, which was given to Sheo Sharan, was resumed by the plaintiffs by that time and the plaintiffs were in possession over

the jagir Land, and the defendants" case regarding possession over the suit land was completely falsified. If the plaintiffs would not have resumed the suit land. Sheo Sharan must have included the same in Ext. 7. He further contended that it also amounts to admission of Sheo Sharan to the effect that he had no land other than the land mentioned in Ext. 7. According to him, Ext. 7 is the best evidence against Sheo Sharan and defendants 6 and 7. It also fully corroborates oral and other evidence adduced by the plaintiffs regarding resumption and possession of the suit land.

Mr. Rai urged that the lower appellate Court has erred in interpreting Ext. 7. According to him. If it would have considered Ext. 7 in accordance with, law, Ext. 7 would have, tilted the entire evidence on the record in favour of the plaintiffs. He submitted that wrong construction of document is a question of law which entitles this Court to interfere in second appeal. He referred to Radha Nath Seal (dead) by his legal representatives Vs. Haripada Jana and Others, . He drew my attention to paragraph 4 at page 1050. In that case it was urged by the other side that u/s 100 of the CPC it was not open to the High Court to interfere with the questions of fact. The High Court had pointed out that certain material evidence in the shape of documents was not considered by the first appellate Court and a good deal of assumptions of fact were made. Their Lordships held that the High Court in that case could interfere in a second appeal In my opinion, the above observations of their Lordships do not apply in the instant case as the lower appellate Court has in fact considered Ext. 7 and has come to its own finding. He also referred to Sonawati and Others Vs. Sri Ram and Another, and drew my attention to paragraph 5 of the said judgment. In my view, "that judgment also is of no avail to the appellants as it may be seen that in that case also the first appellate Court did not refer to some important piece of evidence. Therefore, in conclusion, it was held that it was not binding on the High Court in second appeal. Learned counsel also referred to an unreported judgment of the Supreme Court in Civil Appeal No. 146 of 1966 (Jagdamba Prasad v. Brighu Nath Dixit), D/- 11-12-1968 (SC) and relied on a portion of the judgment, which is to this effect:

"The appellants relied on the decision in R. Ramachandran Ayyar Vs. Ramalingam Chettiar, and argued that in view of Section 100 of the CPC the High Court had no jurisdiction to interfere in second appeal with the findings of the appellate Court. We are unable to accept this contention. Ext. A-34 on the face of it did not amount to an admission that Kunta was Ram Harakh's daughter. Nevertheless the appellate Court acting upon the erroneous assumption that Ext. A-34 amounted to such an admission wrongly placed the onus on the plaintiff to prove that the admission was incorrect. This wrong approach was a substantial error or defect in procedure in dealing with the vital question of fact, and led to an erroneous decision in the merits. In R. Ramachandran Ayyar Vs. Ramalingam Chettiar, . Gajendra-gadkar, J. speaking for the Court observed -- "If in dealing with a question of fact, the lower Court has placed the onus on the wrong party and its findings of fact is the result substantially of this wrong approach that may

be regarded as a defect in procedure." We are, therefore, satisfied that in the present case, the High Court, in second appeal, had jurisdiction to interfere with the decision of the appellate Court u/s 100(1)(c) of the Code of Civil Procedure."

In my opinion, their Lordships had not laid down a general principle of law. It depends upon the facts and circumstances of each case. Here question of onus is not in issue. On perusal of Ext. 7 one cannot come to a definite conclusion that the same amounted to admission of Sheo Sharan that he had no land other than those mentioned in Ext. 7 and the Jagir land was already resumed by the plaintiffs. The view which the lower appellate Court has taken presumably in the light of the provisions of Section 181 of the Bihar Tenancy Act, is plausible. The section provides inter alia for continuance of non-transferable character of service tenure. Since the grant which was made to Sheo Sharan could not have been bequeathed or transferred in accordance with law, he possibly on that account did not include the same in Ext. 7. Therefore, two views are possible. In *Pareesh Nath Mahanty Vs. Ghasiram Mahanty and Others*, K. Ahmad and, Mahapatra, JJ., while dealing with the provisions contained in Section 17 of the Evidence Act, observed at page 409 that before any statement can be used as an admission, it must be shown to be unambiguous and clear on the point at issue. In AIR 1934 112 (Privy Council) it was observed by the Privy Council that u/s 100. Code of Civil Procedure, the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law. Rule is equally applicable in cases in which the findings are based, wholly or partly, on inferences drawn from the documents, which are not instrument of title or otherwise the direct foundations of rights. In that view of the matter I am not inclined to interfere with the findings of the appellate Court in respect of Ext. 7.

14. Now I proceed to consider point No. (4). Mr. Rai submitted that the lower appellate Court had erred in brushing aside the report and the evidence of Sukh Dev Prasad (P. W. 1) Amin Commissioner, on the point of amalgamation of plots Nos. 195 and 196. It may be noticed that during the proceedings under Sections 144 and 145 of the Code of Criminal Procedure. P. W. 1 was appointed Commissioner for making local inspection and the report One Kashi Nath Sinha. Advocate. (D. W. 7) had also made local inspection during the said proceedings. Both of them submitted their report The lower appellate Court after due consideration of the evidence on the point of amalgamation in paragraphs 22 and 23 of its judgment preferred the evidence and the report of D. W. 7. On this point hardly there is any reason for interference in second appeal.

15. Now I proceed to consider point No. (5). Under this point learned counsel for the appellants has made a grievance that the lower appellate Court had treated the order passed in the proceedings under Sections 144 and 145 of the Code of Criminal Procedure as substantive evidence. He referred to paragraphs 29 and 30 of its judgment wherein it observed that the findings of the officers in Sections 144 and 145 proceedings could not be taken to be a decision on the question of

title to the parties and their right to possess but nevertheless their decision had got evidentiary value on point of possession till their decision was reversed by the competent Civil Court. In my opinion, the grievance made by the learned counsel is not justified. It has not considered their decision as substantive evidence nor has it used the same nor does it use them as corroboration of the evidence on the record adduced by the defendants. Even in Second Appeal No. 176 of 1967 (Pat) (supra) Mahapatra J. observed that when there was a finding in regard to the possession in favour of the defendants in the proceeding u/s 145, they could only be deprived of such possession by a clear finding in regard to the title of the plaintiffs. In *Bhinka and Others Vs. Charan Singh*, , while dealing with the provisions u/s 145(6) of the Code of Criminal Procedure their Lordships observed that the life of the order passed u/s 145 is conterminous with the passing of decree by a Civil Court and the moment a Civil Court makes an order of eviction, it displaces the order of the Criminal Court. In that view of the matter. I do not find any flaw in the observation of the appellate Court in paragraphs 29 and 30. Therefore, this point also fails,

16. Now I advert to consider the last point No. (7). Learned counsel for the appellants under this point submitted that the oral evidence adduced on behalf of the plaintiffs regarding resumption and possession was not considered by the lower appellate Court in accordance with law. He drew my attention to paragraph 15 of its judgment. While dealing with the evidence of P. W. 5, who is plaintiff No. 1, it observed that according to the evidence of P. W. 5 the resumption took place either in 1936 or 1937. It commented that that statement of P. W. 5 was contrary to his assertion made in paragraph 5 of the plaint. Learned counsel submitted that the plaint was filed on the 2nd April 1960. In paragraph 5 therefore the plaintiffs stated that about 26 years prior resumption had taken place. By that he meant near about 1934. In the evidence also he stated 1936 or 1937. Therefore, it was not any material difference in the two statements and that should not have been a ground for disbelieving him. In my opinion, that is not the only ground for not relying on him. It is well established that he being the plaintiff is highly interested. It has given various other reasons for not relying on the oral testimony of the other witnesses adduced on behalf of the plaintiffs and has given cogent reasons for preferring the evidence adduced on behalf of the defendants. It is equally established that in second appeal non-appreciation of the evidence by the lower appellate Court is hardly a ground for any interference by the High Court. This Court does not interfere with the findings of fact recorded by the lower appellate Court merely because the judgment of the lower appellate Court is not as elaborate as that of the trial Judge or because some of the reasons given by the trial Judge have not been expressly reversed by the lower appellate Court. Hence. I do not find any ground for interference with the findings of the lower appellate Court on the ground of not correct appreciation of the evidence adduced on behalf of the plaintiffs. In this point also I do not find any merit.

17. On a careful consideration of the various points urged by the counsel of the

parties, I do not see any reason to interfere with the decision of the lower appellate Court.

18. In the result, the appeal fails and is dismissed with costs and the judgment and the decree of the lower appellate Court are affirmed.