

(1951) 11 PAT CK 0011
In the Patna High Court
Case No : A.F.A.D. No. 2090 of 1948

Ramlal Ganjhee and Others

APPELLANT

Vs

Lodha Munda and Others

RESPONDENT

Date of Decision : 28-11-1951

Acts Referred:

Evidence Act, 1872 — Section 35
General Clauses Act, 1897 — Section 3(25)
Limitation Act, 1908 — Article 142, 144

Citation : AIR 1952 Patna 201

Hon'ble Judges : Lakshmikanta Jha, C.J.; Chatterji, J

Bench : Division Bench

Advocate : L.K. Choudhury, for the Appellant;

Final Decision : Allowed

Judgement

Chatterji, J.—This is an appeal by the defendants 1-7 in a suit brought by the plaintiffs for a declaration that the plaintiffs and defendant No. 10 have the right to rear and appropriate lac from one half of the lac bearing trees standing on the jungle plots in village Jam, district Ranchi, bearing C. S., Nos. 1, 51, 63, 231, 32, 98 and 142 and for permanent injunction restraining the defendants 1-9 from obstructing the plaintiffs and defendant No. 10 in the exercise of their said right.

2. The jungle plots in question are recorded in the survey as gair-niazrua-malik. The defendants 1-7 are the landlords of the village Jam and defendants 8 and 9 are said to have acquired interest therein by virtue of transfers from defendants 1-7.

3. The plaintiffs' case briefly is that their ancestors as well as the ancestor of defendant No. 10 had the right to rear and appropriate lac from one half of the lac-bearing trees in the aforesaid jungle plots and this right was exercised by them from time immemorial and that the plaintiffs and defendant No. 10 have been similarly enjoying that right, but on the 30th September, 1945, defendants 1-7 denied their right. The suit was instituted on 4th October, 1945.

4. The written statements were filed, one by defendants 1-7 and the other by defendant No. 8. They took various pleas of which those that are material to this appeal are that the plaintiffs never had nor have any right to rear and appropriate lac from the lac-bearing trees in the jungle plots in question and that their suit is barred by limitation.

5. The learned Munsif who tried the suit held that the plaintiffs have no right to rear or appropriate lac from the lac bearing trees in the jungle plots in question and also that the suit is barred by limitation. He accordingly dismissed the suit.

6. On appeal, the learned Additional Subordinate Judge who heard it formulated the following points for determination;

"1. Whether the suit is entertainable by the civil Court.

2. Whether the plaintiffs have got right to rear, harvest and appropriate lac from half the lac bearing trees in the disputed plots?

3. Whether the suit is barred by limitation?

4. Whether the plaintiffs are entitled to relief for permanent injunction?"

He decided all these points in favour of the plaintiffs and allowed the appeal in these terms: "It is declared that the plaintiffs and defendant No. 10 have got the right to rear, harvest and appropriate the lac from half the lac bearing trees on C. S., plot Nos. 1, 51, 63, 239, 32, 98 and 142. Defendant Nos. 1 to 9 are permanently enjoined from obstructing the plaintiffs and defendant No. 10 in the enjoyment of the aforesaid right. The judgment and the decree of the lower Court are hereby set aside." Being dissatisfied with this decree, the defendants 1-7 have preferred this second appeal.

7. Mr. L.K. Choudhury on behalf of the appellants has pressed the appeal only on two points, namely (1) whether the plaintiffs have got right to rear and appropriate lac from half of the lac bearing trees in the plots in question and (2) whether the suit is barred by limitation.

8. On the first point it is argued that the decision of the learned Subordinate Judge is erroneous in law in as much as he threw the onus on the defendants to prove that the entry in the C. S. record, published in 1908, in which the ancestors of the plaintiffs and defendant No. 10 were recorded to be in enjoyment of the right in question on payment of Rs. 16/- as rent, was incorrect. It is said that in the R. S. record, which was finally published in 1932, the jungle plots are recorded as gair-mazrua-malik without any mention of the plaintiffs' alleged right and that this raises a presumption of correctness in favour of the defendants which the learned Judge altogether overlooked.

9. It has been held by this Court in "ABHIRAM v. CHINTAMANI 8 Pat. LT 121; "RAJRIKH PANDEY v. SHAM SHANKER" 12 Pat LT 280; "NAURANGI v. KANHAIYA" 12 Pat LT 283 and "MATUKDEO NARAIN v. SADBUSAEEAN" 12 Pat L T 304 that where there are two Records of Rights prepared at different times, entries in

both of them will be presumed to be correct entries of the state of things existing at the time when the entries were made; and there is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record; and that as the later entry records the existing state of things, preference must in the absence of evidence be given to it. Again in "TEN-GAROO SUKUL v. CHATTU BHAR" 10 Pat LT 569 a Full Bench of this Court has held that mere production of a contrary entry in the earlier Cadastral Survey Record-of-Rights would not in law rebut the presumption arising out of the subsequent entry in the Revisional Survey Record of Rights.

10. The effect of these decisions is that the entry in the later Record-of-rights will prevail and the party who challenges it is to prove that it is incorrect. The earlier entry is not enough to prove that the later one is incorrect. But the learned Subordinate Judge here has gone just the other way. He says:

"The onus accordingly was on the defendants to show that the entry in the C. S. regarding the right of the plaintiffs was incorrect. The defendants have not discharged this onus."

This is obviously wrong. The learned Judge thinks that the mere fact that the plaintiffs' alleged right recorded in the C. S. has not been recorded in the R. S. is not sufficient to disprove the existence of the plaintiffs' right. In the R. S. the plots are recorded as gair-mazrua-malik without any mention of the plaintiffs' alleged right. This entry raises a presumption in favour of the defendants and against the plaintiffs. The onus, therefore, lies on the plaintiffs to rebut this presumption. The finding of the learned Judge is based entirely on the assumption that the plaintiffs' alleged right is proved by the entry in the C. S. which the defendants ought to have proved, but failed to prove, to be incorrect. This finding is obviously erroneous in law and cannot be accepted as binding in second appeal. The case, therefore, must go back.

11. On the question of limitation, Mr. Choudhury argues that the suit will be governed by Art. 142 of the first schedule to the Indian Limitation Act and the concurrent finding being that the plaintiffs failed to prove that they exercised the right in question within 12 years from the date of the suit, the suit should be dismissed on the ground of limitation. The learned Additional Subordinate Judge has held that neither Article 142 nor Article 144 of the Limitation Act applies, because the right in question is not immovable property. In his view the suit will be governed by Article 120 of the first Schedule to the Limitation Act. This is the residuary article applicable to "suit for which no period of limitation is provided elsewhere in this schedule"; the limitation is 6 years from "when the right to sue accrues". The learned Judge has held that the right to sue accrued on 30th September 1945, as alleged in paragraph 8 of the plaint. The reason given by him is this:

"The allegation in para 8 of the plaint is that the defendant No. 1 to 7 denied plaintiffs' right and asserted that they would not allow the plaintiffs to harvest

standing lac on 30-9-45. These allegations have not been specifically challenged in the written statements. Accordingly I take 30-9-45 as the starting point for the purpose of limitation."

Paragraph 8 of the plaint runs as follows:

"That the cause of action arose on 30-9-45 when the defendants Nos. 1 to 7 denied the plaintiffs' right in suit and asserted that they will not allow them to harvest the standing lac and also during the period from the year 1940 up-to-date. That the defendants Nos. 8 and 9 are interested in denying the plaintiffs' rights."

This is traversed in paragraph 14 of the written statement of defendants 1-7 as follows; Para. 8 of the plaint: The allegations regarding the accrual of cause of action are false."

In the face of this denial in the written statement, it is difficult to understand how the learned Judge could take the allegation in paragraph 8 of the plaint to be un-controverted and, therefore, correct. Besides, P. W. 1, one of the plaintiffs, admits in his examination-in-chief "Defendants 1 to 7 have dispossessed us from the trees for the last 3 years". This admission, though relied upon by the learned Munsif, appears to have been altogether ignored by the learned Subordinate Judge. The evidence was recorded in February 1947 and, therefore, 3 years from that date would take us to February 1944. On no account, therefore, 30th September, 1945, could be taken to be the date when the plaintiffs' right to sue accrued. Consequently the finding of the learned Judge that the suit is not time-barred cannot be accepted as binding in second appeal.

12. Mr. Choudhury contends that the right to rear and appropriate lac from lac bearing trees is immovable property, as defined in the General Clauses Act and the present suit being in substance for possession of this right, Article 142 will apply. According to the definition in Section 3(25) of the General Clauses Act (Act X of 1897),

"immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

It is argued that the right to rear and appropriate lac is a benefit to arise out of land. In "KATWARU CHAMAB v. RAM ADHIN" 17 Ind Cas 910 it was held by a single Judge of the Allahabad High Court that the trees which bear fruits or other forest produce are considered as immovable property. Lac bearing trees may be taken to be immovable property. But the right to rear and appropriate lac from the trees does not, in my opinion, come within the definition of immovable property in the General Clauses Act. It is a benefit to arise out of the trees and not out of the land. If the trees be immovable property, the right to rear and appropriate lac from the trees is an interest in immovable property.

13. There are various reported cases in which the question as to whether the

right of fishery is immovable property or interest in immovable property has been considered. In "FADU JHALA v. GOUR MOHUN JHALA" 19 Cal 544 .four of the five Judges who composed the Full Bench agreed that a right of fishery is immovable property within the definition in the General Clauses Act, though the Full Bench by a majority of three to two held it is not immovable property, as contemplated by Section 9 of the Specific Belief Act. One of them expressly held that it is an interest in immovable property. In "BHUNDAL PANDA v. PAN-DOL POS PATIL" 12 Bom 221 the right of fishery was held to immovable property. In "BAM GOPAL v. NUBUMUDDIN" 20 Cal 446 the same view was taken. In a latter case, "LOKENATH BIDYADHAB v. JAHANIA BIBI" 14 C L J 572 the Calcutta High Court, however, took the view that a right of fishery is not immovable property for all purposes, but it is an interest in immovable property. Mookerjee J. who delivered the judgment to which Carnduff J. agreed observed:

"As at present advised, we find it difficult to hold, notwithstanding the decision in "BAM GOPAL v. NUBUMUDDIN" 20 Cal 446 which apparently does not accurately state the effect of the opinion of the majority of the Pull Bench in "FADU JHALA v. GOUR MOHUN" 19 Cal 544 FB that a right to extraterritorial fishery is immovable property for all purposes. But, in our opinion, there is no room for reasonable doubt that a right of this description relates to an interest in immovable property."

This case was quoted with approval in "HILL CO. v. SHEBAJ RAI" 1 Pat 674 in which Sir Dawson Miller C. J. who delivered the judgment to which Mullick J. agreed held that an exclusive right of fishery is an interest in immovable property. Following this decision, the Madras High Court in Secy. of State Vs. Dist. Board of Tanjore, has held that an exclusive right of fishery is an interest in immovable property.

14. If a right of fishing is an interest in immovable property, it may be said with greater force that a right to rear and appropriate lac from lac bearing trees is an interest in immovable property. In "FARMANAND v. BIBKHU" 1 Ind Cas 903 it has been held by the Judicial Commissioner's Court at Nagpur that a right to take out lac from trees standing on a jungle is an interest in immovable property, as defined in Section 3 of the Indian Registration Act. The definition of immovable property in the Registration Act is substantially the same as in the General Clauses Act. Mr. Choudhury relies on AIR 1938 289 (Nagpur) in which it was held that a lease of lac bearing trees is a lease of immovable property. The reason for the decision was that the trees were immovable property. Consequently, the lease of the trees was certainly a lease of immovable property. But the right to rear and appropriate lac is distant from the trees themselves. In my opinion, the right to rear and appropriate lac from lac bearing trees is not immovable property but an interest in immovable property.

15. The question then arises as to which is the proper article of the Limitation Act applicable to this suit. The suit, as framed, is for a declaration and for a permanent injunction. In terms, it is not a suit for possession. The right to rear

and appropriate lac, though it is an interest in immovable property, is an incorporeal right. The right of fishing is also an incorporeal right. In the above-cited Bombay case "BHUNDAL PANDA v. PANDOL POS PATIL" 12 Bom 221, which related to a right of fishing Sargent C. J. observed: "A man is said to be in possession of a right when he can exercise it, and he recovers possession of an incorporeal right when the obstruction which intertered with its exercise is removed. The form of the order by which possession is restored must depend upon the nature of the right and the circumstances of the case." In the aforesaid Patna Case "1 Patna, 674" it was held that an exclusive right of fishery can be acquired by adverse possession and the right of the owner of the water would be extinguished by operation of Section 28 of the Limitation Act. In "LOKENATH v. JAHANIA BIBI" 14.Cal L J 572, it was definitely held that a suit in ejectment in respect of a fishery would lie. It is, therefore, clear that a suit for possession of an incorporeal right, which is an interest in immovable property, does lie. The present suit, though in terms it is for declaration and permanent injunction, is in substance for possession of an interest in immovable property. Article 142 will not apply, because that article refers to suit for possession of "immovable property" and not of "an interest in immovable property". Suit for possession of an "interest in immovable property" is covered by Article 144. Consequently this suit Will be governed by Article 144. In Harish Chandra Saha Vs. Pran Nath Chakraverty and Others, it was held that a suit for a declaration that a certain pathway is a public pathway and for an injunction to remove certain obstruction would be governed by Article 144.

16. It is to be observed that the defendants in their written statement did not specifically plead adverse possession. But it was definitely pleaded that the suit was barred by limitation and in paragraph 16 of the written statement it was asserted :

"That these defendants Nos. 1 to 7 are the landlords of the village. The jungle has been recorded in their names. The lac on the lac bearing trees are reared by them. As usual this year also lac was reared by them."

If really the lac was reared and appropriated by the defendants, as alleged by them, their possession would prima facie be adverse to the plaintiffs. The plaintiffs themselves did not frame the suit as one for possession, and having regard to the nature of the riggt claimed by them, it will hardly be reasonable to preclude the defendants from showing that the suit is barred by limitation under Article 144 merely because they did not in their written statement specifically plead that they were in adverse possession. Articles 142 and 144 are both rules of limitation, the only difference being that in the case of Article 142, the onus lies on the plaintiff to prove his possession within 12 years, while in the case of Ait. 144, it is for the defendant to prove when his possession became adverse. In a suit for possession of an interest in immovable property the question when the possession of the defendant becomes adverse to the plaintiff depends on the nature of the interest, particularly when it is an incorporeal right. The lower

appellate Court will consider the evidence in the case from this point of view and will decide whether the suit is barred by limitation.

17. A further point is taken by Mr. Choudhury, namely, that the appeal in the lower Court abated because the appellants Nos. 2 and 3 died during the pendency of the appeal and no substitution was made within the prescribed period. As the case is going back, the lower appellate Court will consider this question and if there has been abatement, it will give an opportunity to the appellants to apply to have the abatement set aside.

18. In the result I would allow the appeal, set aside the decision of the Court of appeal below and send back the case to that Court for disposal according to law in the light of the observations made above. Costs will abide the result, but it is to be made clear that as there was no appearance on behalf of the respondents in this Court the appellants will not be entitled to any hearing fee in this Court.

Lakshmikanta Jha, C.J.

19. I agree.