

(1937) 04 PAT CK 0009
In the Patna High Court

Rudra Narain Singh and Others

APPELLANT

Vs

Kedar Nath Singh and Others

RESPONDENT

Date of Decision : 01-04-1937

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 115, 145

Citation : AIR 1937 Patna 458 : 170 Ind. Cas. 754

Hon'ble Judges : Madan, J;Agarwala, J

Bench : Division Bench

Judgement

Madan, J.—This is an appeal by the plaintiffs who brought a suit for declaration of their occupancy right and for recovery of possession in respect of 15 bighas 8 kathas 17 dhurs of diara land situated in village Jurawanpore Bararir and re-formed from the bed of the liver; Ganges. A portion of this land formed-part of the former occupancy holding of the plaintiffs or their predecessors-in-interest, as recorded in the cadastral survey of the year 1892, and the remainder; is said to have been acquired by the plains, tiffs by purchase or mortgage after, that, date. The lands are situated in a temporarily settled khasmahal estate which was surveyed by the khasmahal in the year 1921, prior to the granting of a temporary settlement of the estate to the defendants third party in the year 1922. At that time a total area of 19 bighas 13 kathas and 3 dhurs is claimed to have been in possession of the plaintiffs. According to the plaintiffs the suit lands, forming the major portion of this area, diluviated in the year 1926 and re formed in the year 1927; thereupon the defendant second party, who is a servant of the defendants third party, demanded a salami from the plaintiffs, and on their refusal to pay, the defendants third party set up the defendants first party as tenants of the lands. There were proceedings linger Section 145, Criminal Procedure Code which the plaintiffs lost, and then the defendants third party took possession of the lands on April 9, 1928. The defendants first and third party contested the suit. They denied that the suit lands were identical with the lands formerly in possession, of the plaintiffs, and claimed that they diluviated at different times after the year 1921, and that defendants third party

settled them¹ with the defendants first party on their re-appearance in the years 1926 and 1927. They also pleaded that the suit was barred by limitation, as well as by a local usage whereby tenants of the diara lose their rights in lands which diluviate. The trial Court held throughout in favour of the plaintiffs, but the Subordinate Judge on appeal held that the plaintiffs had not established their title to all the lands claimed by them, nor had they proved the identity of those lands with the re-formed lands in possession of the contesting defendants. He also found that the suit was barred by limitation, as well as by the local usage set up by the defendants.

2. In the trial Court a Pleader Commissioner was appointed to inquire whether the plots claimed by the plaintiffs according to the survey of 1921 formed part of the lands found to be in possession of defendants first and third parties in the Section 145 case. He was also asked to report whether the plots had re-formed in situ. The Commissioner's report shows that he measured from permanent fixed points pointed out by the parties, and then prepared a map showing the lands which formed the subject-matter of the Section 145 case, as well as the plots claimed by the plaintiffs both according to the cadastral survey of 1892 and the khasmahal survey of 1921. According to the map and report the lands claimed by the plaintiffs are substantially identical with a portion of the lands covered by the Section 145 proceedings. If the plaintiffs are otherwise entitled to a decree there should be no difficulty in passing a decree on the basis of the Commissioner's report. The learned Subordinate Judge rejected the Commissioner's report on the strength of an observation therein that the lands had not re-formed in situ. A passage quoted by the Subordinate Judge himself from the Commissioner's evidence shows that what the Commissioner meant by this observation was that landmarks such as trees and boundaries had not re-appeared after the re-formation, for which reason he had to re-measure the plots from the fixed points. The learned Subordinate Judge was therefore in error in rejecting the Commissioner's report on this ground and holding that the plaintiffs had failed to identify the suit lands. The Subordinate Judge was also in error in remarking that the Commissioner appointed in the Section 115 case had also failed to identify the plaintiffs land. The report (Ex. E) of that Commissioner shows that the lands claimed by the plaintiffs were found to be part of the recently alluviated land which was the subject-matter of the dispute. It is however unnecessary to remand the case on this issue as the trial Court's judgment shows that the contesting defendants did not challenge the Commissioner's report before it. This issue is dealt with by the learned Munsif as follows:

Issue No. 7. As described in the plaint the lands of khata Nos. 150, 152, 143 and 145 of Ex. 2 form the subject-matter of the present dispute.-From the evidence and report of the Commissioner appointed in this suit it is clear that the said lands in suit have re-formed on their old site. The learned Advocate for the defendants have virtually conceded this point. So this issue is answered in the affirmative.

3. Later on, the Munsif again remarks that the identity of the re-formed lands in suit with the portion of the plaintiffs' original holding had been "established and conceded to by the defendants". In their memorandum of appeal to the Subordinate Judge the defendants denied having conceded the identity of the lands, but they did in effect concede it by not challenging the Commissioner's report. I consider that the Subordinate Judge was bound by the Munsif's finding on this issue and was not in a position to re-open the matter. I find therefore that the lands claimed by the plaintiffs have been identified. The learned Subordinate Judge held that the defendants had established a usage whereby tenants of the diara lose their rights in lands which diluviate and cease to pay rent for those lands. He held that in view of the existence of this usage the plaintiffs must be held to have abandoned the suit lands on their diluvion. The Subordinate Judge based his finding on this issue on certain petitions (Ex. D series) whereby in the year 1921 a large number of tenants of the diara offered to take fresh settlement of certain re-formed lands. None of those tenants claimed the right to reenter on those lands on the strength of their previous tenancy, whereas some of them applied for fresh settlement of the lands which they had previously held. It is said that the father of plaintiff No. 1 was a signatory to one of these petitions (Ex. D-8) which however for some reason was not forwarded to this Court with the record. The defendants also examined some tenants who deposed that they themselves had applied for fresh settlement of their lands as they had lost their tenancy rights on diluvion.

4. The learned Subordinate Judge was of opinion that their evidence proved the usage, but I do not think that the fact that one body of tenants did apply for re-settlement on the assumption that the former holdings had been abandoned, is sufficient to prove it. On the contrary the records show that not merely the plaintiffs, but other tenants also, did strongly assert their claim to their former holdings, with the result that it became necessary to take action under the preventive Sections of the Criminal Procedure Code. It is true that both Courts have found that the plaintiffs have not paid rent for the disputed lands since the year 1921, but mere non-payment of rent in such circumstances is little evidence of abandonment and does not determine the tenancy. Moreover, in the year 1925 defendants third party did sue the defendants fifth party, whom the plaintiffs so are their farzidars, for rent of a portion of one of the holdings covered by the suit, and the rent suit was withdrawn on objection that it was in respect of only part of the holding. The question whether the facts found in any particular case prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal *Kailash Chandra Datta v. Padmakishore Roy* 45 C 285 : 41 Ind. Cas. 959 : AIR 1918 Cal. 979 : 25 CLJ 613 : 21 CWN 972 and in this case I do not find that the usage has been established, still less can the plaintiffs be held to have abandoned their holdings on account of the existence of such a usage. The question of abandonment must be adjudged by the intention of the tenants concerned and in this case the plaintiffs resisted the landlord when they attempted to take

possession of the lands on their again becoming cultivable.

5. I do not, therefore, find that the plaintiffs have lost their rights in the suit lands either by usage or by abandonment. Moreover, in my view, which was also the view taken by the Court, such a usage even if it exists is barred by Section 183, Bengal Tenancy Act, as being expressly or by necessary implication opposed to the provisions of that Act. In the case of an occupancy holding it is clear that a usage whereby a tenant loses his right to reduction of rent on diluvion u/s 52 of the Act, and to re-occupy the land on its re-formation, is a serious derogation of the rights of an occupancy raiyat. I have already observed that part of the land in suit is recorded as in possession of the plaintiffs so long ago as the cadastral survey of the year 1892. Although the record of that survey was not finally published still it is substantial evidence of a long existing occupancy right of the plaintiffs of which they ought not to be deprived.

6. It was pointed out for the defendants third party that the acquisition of occupancy rights in diara land is restricted u/s 180 of the Act. According to this Section occupancy right is not acquired in char or diara land until the tenant has held the land in question for 12 continuous years during which period he remains liable to pay such rent for his holding as may be agreed on between him and his landlord. As has been held in *Sri Newas Prasad Singh v. Ram Raj Tewari* 18 CWN 598 : 22 Ind. Cas. 822 : AIR 1914 Cal. 673 this Section debars an application for reduction of rent u/s 52. It was suggested that a usage that relieves a tenant from payment of rent for the diluviated portion of his holding is of benefit to him and is not inconsistent with the Tenancy Act. Even so, however, serious hardship might arise, if for instance, a tenant having paid 11 years' full rent for his holding were then to lose a substantial portion of it by temporary diluvion, and were debarred from retaining his right to that portion on payment of the rent, to instance was cited in which a usage of the character now set up by the contesting defendants has been held to have been established and to be in accordance with law. In my opinion the usage even if proved to exist, is barred by Section 183, Tenancy Act, and the plaintiff's suit cannot be defeated thereby.

7. On the question of title, and with reference to the plot numbers given in the Cadastral survey of 1892, both Courts have found that plot No. 740 is part of the plaintiffs-original holding which was again recorded in their name in the year 1921. I may observe that the rest of the holding, which measured 19 bighas odd in 1892 is said to have diluviated prior to 1921, and to have re-formed shortly before the suit but not in a fit state for cultivation. These lands are not part of the subject-matter of the present suit. Both Courts have also declared the plaintiffs' title to plots Nos. 741 and 751 of which the plaintiffs claimed possession through a farzidar and by oral purchase. The learned Subordinate Judge held that the plaintiffs had not established their title to plots Nos. 748 and 775. The plaintiffs' case is that they purchased these plots in 1919 in execution of a rent decree of defendant third party, in the farzi name of one Sheopragash. The plaintiffs filed a deed of surrender by Sheopragash, and defendants fifth

party, who are his heirs, admitted their claim. It was in respect of a portion of this holding that defendants third party filed the above-mentioned rent suit against defendants fifth party which was afterwards withdrawn. I consider that the trial Court was right in maintaining the plaintiffs' title to those plots against the contesting defendants on the strength of the admission of the defendants fifth party. All these plots, as set forth in Schedule I of the plaint, are claimed by the plaintiffs as tenants-in-possession. The remaining plots set forth in Schedules II and III of the plaint, are claimed by the plaintiffs as usufructuary mortgagees.

8. As regards plots Nos. 773 and 774 it was conceded before us that the Subordinate Judge's finding that the plaintiffs had not established their title to these plots could not be challenged. Both Courts, however, found that plots Nos. 745, 747, 750 and 752 were in the plaintiffs' possession as usufructuary mortgagees. Out of the above-mentioned plots the Commissioner found that plots Nos. 740, 748 and 751 were substantially equal to plot No. 844 of the 1921 survey. He also found that plots Nos. 741 and 775 correspond to plots Nos. 861, 852 and 863 of the 1921 survey; plot No. 745 corresponds to plot No. 787, and plot No. 747 to plot No. 790. The suit must be decreed in respect of these plots as measured at the survey of 192 L. The plaintiffs claimed that plots Nos. 750 and 752, the remaining plots to which they have been found to have established their title, were equivalent to plot No. 799 of 1921. The Commissioner, however, found that plot No. 799 corresponds to plot No. 749, which is not claimed by the plaintiffs. In the circumstances I do not find it possible to give the plaintiffs a decree in respect of plot No. 799. The suit must also be dismissed with respect to plots Nos. 773 and 774, corresponding to plot No. 850 of the survey of 1921, the plaintiffs having failed to establish their title to those plots.

9. On the issue of limitation the learned Subordinate Judge held that the suit was barred by two years' limitation under the Bengal Tenancy Act. In *Jurawan Singh and Others Vs. Ramsarekh Singh and Others*, it has been held that where a tenant loses land by diluvion and it has been found in Section 145 proceedings that the landlord took possession of the land on its re-appearance, there was no dispossession of the tenant by the landlord, and the suit did not fall under Schedule III, Article 3, Bengal Tenancy Act. The present case is similar, and I find that the suit was not barred. The result is that this appeal is allowed to the extent that the suit is decreed, and the plaintiffs are entitled to recover possession, in respect of plots Nos. 844, 861, 862, 863, 787 and 790 of the plaint. The suit is dismissed in respect of plots Nos. 850 and 799. The plaintiffs are entitled to costs throughout in proportion to their success. The claim for mesne profits may be determined in execution.

Agarwala, J.

10. I agree.