

(1953) 12 PAT CK 0009
In the Patna High Court
Case No : A.F.A.D. No. 2065 of 1949

Salabat Mahata and Others APPELLANT
Vs
Sm. Malati Mahatani and Another RESPONDENT

Date of Decision : 17-12-1953

Acts Referred:

Bihar Tenancy Act, 1885 — Section 103B
Evidence Act, 1872 — Section 35
Limitation Act, 1908 — Article 144

Citation : AIR 1954 Patna 481 : (1954) 2 BLJR 225

Hon'ble Judges : Choudhary, J

Bench : Single Bench

Advocate : R.S. Chatterji, for the Appellant; S.C. Mazumdar, for the Respondent

Final Decision : Dismissed

Judgement

Choudhary, J.—This appeal by the defendants arises out of a suit brought by the plaintiffs for partition of their half share in the land bearing khata No. 126 situate in village Sukurhutu. One Sufal had two sons, Hariram and Banshi. The plaintiffs are the daughters of Hariram. Banshi had a son, Charan, who died leaving Salabat, defendant 1, and Bhagwat whose sons are defendants 2 and 3.

2. The case of the plaintiffs is that the land in suit belonged to Sufal, and, after his death, it was inherited by his two sons. Hariram and Charan were recorded in the survey record-of-rights as "raiyaats" of the khata in question, each having one half share. After the death of Hariram, the plaintiffs succeeded to his half interest in that khata and are in joint possession of the same along with the defendants. As it was not convenient to remain in joint possession, a suit for partition was brought.

3. The suit was contested by defendants 1 and 2. Their case is that the land in question did not belong to Sufal and that it was the self- acquired property of Charan. According to them, the plaintiffs and their father were never in possession of the land in suit and the entry in the record-of-rights was wrongly

made. They also pleaded the bar of limitation.

4. The trial Court held that the land in question belonged to Sufal, that it was not the self-acquired property of Charan and as such the plaintiffs had one half share in it. It also held that the plaintiffs could not prove possession since after the death of their father Hariram, which took place more than twelve years before the institution of the suit, but as the defendants were in possession of the land in question as co-sharers, their possession could not be adverse to the plaintiffs, as no claim of ouster was ever made on behalf of the defendants. In view of these findings the plaintiffs were held entitled to claim partition, and the trial Court decreed the suit.

5. The defendants preferred an appeal in the lower appellate Court which allowed the appeal, set aside the judgment and decree of the trial Court and dismissed the suit of the plaintiffs. The lower appellate Court, however, did not decide the question of title separately from the question of possession, and without considering as to how the entry in the record-of-rights was made in the names of Hariram and Charan, held that the khatian entry was incorrect and that the suit was barred by limitation.

6. A second appeal was filed by the plaintiffs in this Court which was numbered as Second Appeal No. 1311 of 1947. That second appeal was allowed and the case was remanded to the lower appellate Court for disposal in accordance with law. A direction to the following effect was given to the lower appellate Court by this Court:

"The learned Judge should examine the evidence of title first although he can take in aid the evidence of possession to some extent, but chiefly he must examine the Question of title on the evidence adduced and then come to a decision. Having come to a decision, he should then consider the question of possession bearing in mind that the survey entry is in favour of the plaintiffs. He then must find whether the correctness of the survey entry has been rebutted by the defendants."

7. After remand the lower appellate Court held that the property in question belonged to Sufal, and Hariram and Charan were co-sharers in respect of the same. It also held that the plaintiffs were not in possession of the land for more than twelve years. But, as the possession of one co-sharer was deemed to be the possession of all the co-sharers and the defendants did not put forward a claim of hostile title by adverse possession, it affirmed the decree of the trial Court and dismissed the appeal. The defendants have now come up to this Court in Second appeal.

8. The first contention raised by Mr. R.S. Chatterji on behalf of the appellants is that the Court of appeal below has not followed the directions given in the remand order by this Court. I do not think there is any merit in this contention. There is no documentary evidence in this case to prove as to how the land in question was acquired either by Sufal as alleged by the plaintiffs or by Charan as

alleged by the defendants. The plaintiffs could not even adduce any oral evidence with regard to the acquisition of the land. They, however, relied on the entry in the khatian, and they contended that the name of Hariram could not have been recorded as having one half share in the khata if acquisition had not been made by Sufal. The Court of appeal below considered the oral evidence adduced on behalf of the defendants with regard to the acquisition of the land by Charan and rightly disbelieved it. At the time of the survey Hariram, according to the case of the defendants--themselves, was living in another village and Charan was living in the village in question. The lower appellate Court has taken that fact into consideration and has come to the conclusion that if Hariram had no share in the land in question, his name could not have been recorded in the record-of-rights especially when he was not living in the village. The entry in the khatian was not proved to be incorrect. The case before the lower appellate Court was either that the acquisition was made by Sufal as alleged by the plaintiffs or that it was made by Charan as alleged by the defendants. There was no third case before it. The defendants having failed to prove self-acquisition by Charan, and the entry in the record-of-rights being in the names of Hariram and Charan as having equal shares, which could be consistent only if the land belonged to Sufal, the lower appellate Court held that the property in question belonged to Sufal and that Hariram and Charan were co-sharers in respect of the same. In my opinion, the Court of appeal below has not failed to follow the directions made by this Court in the remand order.

9. The next contention raised by Mr. Chatterji is that the survey record-of-rights is no evidence of title, and in support of his contention he has relied on the cases of -- "Kanhu Lal v. Palu Sahu" AIR 1920 Pat. 1 (A) and -- Bindeshwari Prasad Vs. Shiva Sutt Singh and Others, , which have taken the view that the record-of-rights is not a document of title at all. There is no doubt about the correctness of this contention. In the present case, however, I do not think that the lower appellate Court has treated the record-of-rights as a document of title. Entries made in the survey record-of-rights have got the presumption of correctness, and the Court below was, therefore, perfectly justified in holding on the basis of the entry in the survey khatian that at the time it was made Hariram had an interest in the land. In -- "Harkhu Mahto v. Sahara? Mahto". AIR 3940 Pat 16 (C), a Division Bench case of this Court, the lands which were the subject-matter of dispute in that case, were recorded as "raiya" lands of certain defendants in the record-of-rights which was finally published in the year 1932. Their Lordships held as follows:

"As the law stands, the entry in the record-of-rights gives rise to the presumption that in the year 1822 when it was finally published, defendants were the "raiya" of the disputed plots."

The lower appellate Court, therefore, as already observed, was perfectly entitled to take into consideration the entry in the record-of-rights for coming to the conclusion that Hariram was the "raiya" of the land in question and had one half

share which could only be possible if the land belonged to Sufal, and was inherited by his sons after his death.

10. The last contention raised by Mr. Chatterji is that the plaintiffs not being in possession for over twelve years, the suit should have been held to be barred by limitation. According to him, the period of limitation should begin from the date since when the plaintiffs had ceased to receive the usufruct of the land. In support of his contention he has relied on the case of -- *Tssuridutt Singh v. Ibrahim*", 8 Cal 653 (D). In that case the plaintiffs along with their father were members of a Mitakshara joint family governed by Mithila law. They owned a two-anna and odd share in certain mauzas. In execution of a decree against the father, that share was sold and purchased by the ancestor of the defendants, who forcibly dispossessed the plaintiffs. The plaintiffs thereafter brought a suit for recovery of possession and partition of their share. It was held in that case that limitation would begin to run from the date from which the rents payable to the father ceased to be paid to him. That case has no application to the facts of the present case.

11. Reliance has also been placed on the case of -- AIR 1931 48 (Privy Council) . In that case one Narayan Rao II who was the sole survivor of the senior branch of the family died leaving an infant daughter, but no male issue. Thereupon, Govindrao, plaintiff 1, along with his son, plaintiff 2, representing the junior branch of the family, claimed to have become entitled to the whole of the suit property by survivorship and in 1917 filed a suit against defendant 1, daughter of the aforesaid Narayan Rao II, and defendant 2, a boy who was alleged to have been adopted by his widow. A question of limitation was raised with respect to four villages over which the defendants' predecessor had been in sole possession for more than statutory period. With respect to three of the villages there were revenue proceedings in which the ancestor of the defendants claimed mutation in his sole name and denied that the plaintiffs had any interest in them. As regards the fourth village, though there was no express evidence of the plaintiffs' right having been denied within twelve years of the suit, it was not included in the property handed over to the plaintiffs by their guardian on then attaining majority. On those facts it was held in that case that the suit with respect to them was barred by limitation.

In the present case, no doubt, the plaintiffs have been found out of possession for over twelve years. But, there is no claim of any ouster of the plaintiffs by the defendants or assertion of any hostile title by them. The right of the plaintiffs was never denied. It is established beyond any controversy that possession of a co-sharer is possession on behalf of all the co-sharers, and a co-sharer in possession cannot acquire a title by adverse possession unless he had held the land in question for the statutory period after assertion of hostile title or denial of the plaintiff's right.

12. Two more cases have been cited by Mr. Chatterji, namely. -- "*Vasudeva Padhi v. Maguni Devan Bakshi*" 24 Mad 387 (F) and -- *Punit Mahton and Others Vs.*

Kishundeyal Mahton and Others, . In the first case, the question was whether a particular grant had operated in favour of the donee exclusively or formed part of the joint estate of two members of the joint family. For more than the statutory period the property in question was held jointly by the two members and the defendant who was the son of the donee had discontinued to be in exclusive possession of it. It was held that the claim of exclusive right by the son of the donee was barred by limitation. It was not a case where the possession of one co-sharer had to be deemed to be the possession of all the co-sharers.

In the second case, the facts were as follows. One Nakchhed had five sons and there had been a partition amongst them. Two of his sons, Pubit and Srinam, remained joint, while each of the three others separated. One of those three was Judagi whose son was Ramrekha. Punit and Srinam executed a deed of gift of their share in favour of Ramrekha on 23-5-1919. The descendants of Judagi brought a suit for partition. Punit and his sons contested the suit on various grounds, one of which was that the deed of gift had not been acted on. Both the Courts below rejected the defence case and the suit for partition was decreed. On appeal to the High Court by the defendants-appellants it was argued that the deed of gift was void. The plaintiffs, however, raised the point that they obtained a good title by adverse possession since the deed of gift in 1919. Their Lordships took the view that the possession of the defendants being incompatible with the plaintiffs' claim, must be held to have been adverse.

Mr. Chatterji has relied on this observation of their Lordships for contending that in the present case also the possession of the defendants was incompatible with the plaintiffs' claim of inheritance from Hariram and, therefore, it was adverse from the date of death of Hariram. I am unable to agree with this contention. As already pointed out, there was an overt act in the Patna Case by execution of a deed of gift whereafter the possession of the defendants was in assertion of an exclusive right to hold it as a donee and, therefore, their possession since after the deed of gift was adverse to the plaintiffs. This case, in my opinion, has no application to the facts of the present case.

13. In the result the appeal fails and is dismissed with costs.