

(1917) 02 PAT CK 0032

In the Patna High Court

Shaikh Haji Mutsaddi and Others

APPELLANT

Vs

Habib Mian and Others

RESPONDENT

Date of Decision : 16-02-1917

Acts Referred:

Citation : AIR 1917 Patna 320 : 39 Ind. Cas. 579

Hon'ble Judges : Atkinson, J

Bench : Single Bench

Judgement

Atkinson, J.—This second appeal comes before me from the decision of the Subordinate Judge of Chapra reversing the order made by the Munsif, in this action dismissing the plaintiff's claim. The action was brought by the plaintiff for a declaration that he is the tenant of the lands in suit and that the decree that was obtained by defendants Nos. 1 and 2 against defendant No. 3 is not binding upon him. One Jumrati was a tenant of a holding in Mauza Khurmabad containing 2 bighas 8 kottahs 14 dhurs of kasht land at the yearly rent of Rs. 24. He was a Muhammadan and died leaving him surviving his widow without issue. Thus the widow became entitled upon the death of her husband Jumrati as heir to a two-annas share in the property left by her husband; and the balance of his property became divisible among his other heirs, namely, defendants Nos. 4 and 3. Defendant No. 3 is the nephew of Jumrati and defendant No. 4 Musammat Dhidhoria is the alleged daughter of Jumrati. Defendants Nos. 1 and 2 represent fractional co-sharers of the malik interest in the holding previously the property of Jumrati. Upon the death of Jumrati his widow entered into possession of the holding, partly in her capacity as co-sharer, to the extent of two annas, and as to the balance it is alleged as a creditor in respect of her dower. Jumrati died many many years ago; the exact date of his death cannot be fixed; but beyond dispute is the fact that Sundari his widow entered into possession of the entire property which formerly belonged to Jumrati; and that thereafter she continued in sole possession of the property down to the date of her death, which took place more than twelve years before action was brought. In 1900 she took the necessary steps to have herself recorded in the Record of Rights as the tenant of the

holding; and up to this very date Musammat Sundari appears in the Record of Rights as the occupying tenant of the holding in question. The plaintiff, claims as heir of Sundari to inherit the property which, he says, Sundari acquired, and which by inheritance is now his as her brother. The learned Munsif disposed of the case on the ground that the plaintiff was not the brother of Sundari; and, therefore, he was not entitled to succeed as her male heir. The learned Subordinate Judge reversed the finding of fact and found as a fact that the plaintiff was the brother of Sundari. In my view there was evidence on the record to support that finding of fact; and, therefore, it is not within my province to question the accuracy of that finding of fact. During the occupancy of Sundari, this holding was mortgaged under two zarpeshgi leases from time to time. Admittedly one of the zerpeshgi mortgages has been redeemed by the plaintiff and the other zarpeshgi mortgagee is still in possession and occupation of the lands. The plaintiff claims to be in possession through this zarpeshgi mortgagee; and asserts that the liability to pay rent is upon him and not upon defendant No. 3. Defendants Nos. 1 and 2 are, as I have said, fractional co-sharer maliks who have acquired some interest by purchase in the property in suit within recent years; and they obtained a decree for rent against defendant No. 3. It is suggested that this decree was procured by the plaintiffs as a fraudulent device on their part to defeat the right of the plaintiff as the heir of Sundari. The decree was obtained by compromise; and certainly it would appear that defendant No. 3 is one of the heirs and defendant No. 4 another heir, both of whom were entitled to a share in the property left by Jumrati on his death.

2. No doubt Sundari entered into possession of the property as a Muhammadan widow; and I take it, on the authorities, that she entered in respect of a portion as heir, and in respect of the rest in her capacity as a claimant of the marriage dower owing to her; subject to a liability on her part to render accounts to her co-sharers so that they might ascertain the period of time at which her dower became discharged. Thus Sundari became a co-sharer with the other heirs of Jumrati; but the heirs of Jumrati never made any claim whatsoever on Sundari to account to them in respect of the profits she had received in discharge of her arrears of dower. The question is whether no claim to account having been made by the other co-sharers of Jumrati, Sundari has, by lapse of time, acquired an absolute interest in the entire holding in suit, by adverse possession as against the other heirs of Jumrati, and if this be so, whether upon her death the entire interest in the holding in suit has devolved upon the plaintiff as her heir. It is perfectly true to say in this country that the possession of one co-sharer is not inconsistent with the right to possession of the other co-sharers and in the case reported as *Ujalbi Bibi v. Umakanta Karmokar* 31 C. 970 ; 9 C.W.N. 32 this principle is laid down. At page 973 their Lordships say: "Consequently sole occupation by one tenant in common is prima facie not inconsistent with the right of any other tenant in common, and in such a case there is no custer or adverse possession, until there has been a disclaimer by the assertion of a hostile title and notice thereof to the owner, either direct or to be inferred from

notorious acts and circumstances." In my opinion Musammat Sundari went into possession of the lands in suit; she was never called upon to account during her possession; and that subsequently she in the year 1900 took the open and notorious step of having herself recorded in the Record of Rights as the tenant of the holding, thereby asserting a hostile title as against the other co-sharers who would be entitled to possession as heirs of her husband. From that time onwards no challenge was ever made to impeach the correctness of the Record of Rights and it is not even now sought to be impeached. This suit was instituted by the plaintiff as heir of Sundari on the 10th of June 1914 more than twelve years after the notorious act took place by which, in my opinion, Musammat Sundari asserted a hostile title as against her co-sharers. Consequently, in my opinion, by adverse possession Sundari, and her heir in succession, have become absolute owners of the raiyati interest in the lands in suit. This view of the law is consistent with the authority of an unreported decision in a case decided in the Calcutta High Court in Appeal from Original Decree No. 265 of 1891, which decision was given on the 12th of June 1891. I have had the advantage of reading their Lordships' judgment in that case; and their decision is consistent with the views which I have expressed. Mr. Mustafa Khan contends that Musammat Sundari having gone into possession of the 14-annas share in her capacity as a creditor, she remained a creditor throughout and could not change her status from that of a creditor to that of an owner. He relies strongly upon the case reported as *Khiarajmal v. Daim* 32 C. 296 ; 1 C.L.J. 584 ; 32 I.A. 23 ; 8 Sar. P.C.J. 734 ; 9 C.W.N. 201 ; 2 A.L.J. 71 ; 7 B L.R. 1 (P.C.), where their Lordships held that a person having entered into possession in the capacity of a mortgagee remained a mortgagee throughout. In the present case, however, there is nothing on the record to show that Musammat Sundari went into possession of 14 annas of the property in suit in her capacity as creditor. This argument has been based upon the assumption that she, being a Muhammadan widow and entitled to two-annas share of her husband's property, must have gone into possession of the balance, 14 annas, in her capacity as creditor in respect of her dower. However, I do not base my decision on that ground alone; but I base it on the ground that this Muhammadan lady entered into possession without having ever been called upon to render account and that she further proceeded openly to assert her hostile right as owner of the property as against her other co-sharers, and got herself recorded in the Record of Rights as tenant of the entire holding; and from that onwards she remained on in possession and no challenge was ever made by the other co-sharers as to her right within the period of twelve years from the date of the hostile assertion of her title; and thus in point of law, I hold, she acquired a right hostile to that of the other co-sharers and became absolutely entitled as tenant of the lands in suit, and that the plaintiff as Sundari's heir is now entitled to the tenant's interest in this holding and to the declaration he seeks in his plaint, and that the decree obtained by defendants Nos. 1 and 2 against defendant No. 3 is not binding on him. Accordingly I disallow this appeal and confirm the order of the lower Appellate Court. The plaintiff will receive his costs in all the Courts from the defendant.