
(1940) 04 PAT CK 0013
In the Patna High Court

Shyam Jhulan Prasad Singh and Others APPELLANT
Vs
Satruhan Prasad Sahi and Others RESPONDENT

Date of Decision : 15-04-1940

Acts Referred:

Bihar Tenancy Act, 1885 — Section 188, 25(a)

Citation : AIR 1940 Patna 703

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

Bench : Full Bench

Judgement

Rowland, J.—The plaintiffs-appellants are some of the cosharer landlords of a holding consisting of two plots, Nos. 1120 and 1121, held by the defendants first party as an occupancy raiyati holding. The defendants second party are the other co-sharer landlords. The suit was brought to eject the defendants first party from the holding on the ground referred to in Section 25(a) Bihar Tenancy Act, for having used the land comprised in the holding in a manner rendering it unfit for the purposes of tenancy, that is to say, by constructing three houses, not for agricultural purposes but for subletting, and by digging a ditch. Notice in accordance with Section 155, Sub-section (1) was said to have been served through the Munsif 's Court on behalf of the predecessor of the plaintiffs and defendants second party, who was the 16 annas landlord.

2. The compensation demanded was Rs. 50. The Munsif found that three houses had been constructed and a ditch excavated, and that the construction and excavation had been a misuse of the land in a manner rendering, it unfit for the purposes of the tenancy. He held that the measure of compensation should be Rs.20 and he passed a decree for ejectment unless the defendants first party-paid compensation and restored the land to its original condition within three months by removing the houses and filling up the excavation.

3. On appeal the Subordinate Judge held that the construction of two of. the houses had been for legitimate agricultural purposes and had not been a misuse, but the construction of the third house and excavation of the ditch were a

misuse. He, however, dismissed the suit on two grounds: first, that the notice served on the defendants first party was not in accordance with law and, therefore, the suit was barred by Section 155(1).

4. Secondly, he held that Section 188 required such a suit to be brought by all the landlords as plaintiffs, and the present suit, having been brought by some of the cosharer landlords, was not maintainable. The points arising in second appeal are : first, whether u/s 155 the suit for ejectment was barred, on the ground of failure of the notice, to conform to the requirements of that Section; secondly, whether the suit for ejectment, at the instance of some co-sharers, is not maintainable in face of Section 188; and thirdly, if the plaintiffs are disentitled to the remedy of ejectment, whether the whole suit including the claim for compensation can be dismissed.

5. The notice is required to be served in accordance with Rule 3 of the Government rules under the Act, which can be found at p. 700 of Mr. B.K. Sen's edition of the Bihar Tenancy Act. No defect is shown in the manner of service; but it is said that the notice is invalid, (a) because it is expressed to be a notice from the Court and not from the landlord, (b) because in specifying the particular misuse and demanding compensation, it did not demand, in the alternative, that the defendants should vacate the holding, and (c) because in the notice it is said that the defendants were beginning to build the houses and dig the ditch; but in the suit these misuses are said to be complete.

6. The notice which had been served on the tenants had been issued on behalf of the sixteen annas proprietor Babu Jagat Nandan Prasad Singh, predecessor of the plaintiffs, and pro forma defendants. It was issued through the Court and served in accordance with Rule 3 of the Government Rules under the Bihar Tenancy Act in the manner prescribed for the service of the summons on a defendant under the Code of Civil Procedure. The Subordinate Judge thought it was defective because the notice actually served is headed as being a notice from the Court and not from the landlord; the landlord's name however appears on the heading as the applicant at whose instance the notice is issued.

7. There is nothing in Section 155 to require that the heading of the notice should represent it to be from the landlords direct and not from the Court, at the instance of the landlords and this supposed defect seems to me to be imaginary. It is not necessary to read into the Section words that are not there. There are no words in Section 155 to require that a notice under this Section should demand of the tenant in the alternative that he vacate the holding; but in *Muhammad Yunus v. Kamla Singh* AIR (1980) Pat 624 there is an observation to this effect:

The law requires that the notice must set out the misuse complained of and must ask the defendant to remedy the misuse within a specified time and to pay a reasonable compensation; in default to quit the land.

8. The last words of this observation seem to be obiter as the appeal failed on

the ground that the Subordinate Judge had found as a fact that service of the notice had not been established. I do not think that the statute requires that the notice should contain an express demand to quit the land in order to comply with the requirements of Section 155(1). I shall however have to return later to the effect of a notice in which this demand is absent. I do not think that the notice was defective because at the time it was issued the misuse may have been incomplete whereas at the time of suit it was complete.

9. If there was a misuse before the service of the notice which would entitle the plaintiffs to have compensation and remedy of the misuse, they can hardly lose this right because the misuse is subsequently enlarged. If the plaintiff is entitled to a decree to remedy the partial injury, it will obviously be impossible for the defendant to comply with that decree unless he remedies the whole of the enlarged misuse which has taken place up to the time of the suit. I am therefore of opinion that the grounds on which the Subordinate Judge has held the notice to be defective and unfit to form a foundation for a suit u/s 155 are erroneous.

The next question is whether the suit for ejectment at the instance of some cosharers is not maintainable in face of Section 188, Bihar Tenancy Act.

10. It is settled law that a suit to eject a trespasser is not anything that is required by the Act to be done by the land lord and can be maintained by a cosharer in respect of his own share; but in order to have a cause of action for a suit to eject the defendant as a trespasser, the tenancy must first have been determined and the tenancy must be determined by the sixteen annas landlords". It has been held in *Lachmi Lal v. Ganesh Ohamar* AIR (1932) Pat 259 that when the sixteen annas landlords being raiyats had given their under-raiyat a notice to quit that fact terminated the tenancy and a suit in ejectment could be maintained by some cosharers only. But here we have to see whether the notice which was served had terminated the tenancy before the institution of the suit and there are two difficulties in the way of holding that it could so terminate the tenancy. The first is that in the notice itself there is not contained a demand that the tenant should vacate the land as an alternative to remedying the misuse and paying the compensation demanded; that is to say, there was not an expression in the notice on behalf of the sixteen annas landlord of an intention to terminate the tenancy.

11. It has been held in *Gholam Mohiuddin Hossein v. Khairan* (04) 81 Cal 786 following an earlier decision in *Radha Prasad v. Esuf* (81) 7 Cal 414 that a tenancy must be determined by all the co-sharers before one of them can sue for khas possession in respect of his share. Secondly, the service of a notice u/s 155 has not the same effect as for instance the service of a notice u/s 49. As has been held; in *Bhyam Mandal v. Batinath Banerjee* AIR 1917 Cal 728 the tenancy continues in operation till the failure of the tenant to comply with the decree made u/s 155 within the term prescribed thereby.

12. The contention of the appellants before us that the tenancy came to an end

on the expiry of the time given by the. earlier notice u/s 155 cannot be accepted. That being so, the plaintiffs are not entitled to maintain a suit for ejectment in face of the provisions of Section 155, Bihar Tenancy Act. The question remains whether the suit ought to be entirely dismissed or whether the plaintiffs should get some relief by way of damages. We may get some assistance from the decision in *Gobind Chandra v. Kamijuddi Soyal* (17) 16 CL J 127. This was a suit brought by a cosharer landlord against a raiyat in which there was no prayer for ejectment; but the relief sought was to compel the defendant to fill up a tank which he had dug in the mal lands of the holding and in the alternative for damages. A suit of this nature, it was held, was not one which the whole body of landlords was required or authorized to bring under the Bengal Tenancy Act and it was held that Section 183 was no bar to the maintainability of the suit for the above reliefs.

13. We have then to consider the form of decree that should be passed. Section 155(2i) requires the decree in every suit under the section to declare whether the misuse or breach is, in the opinion of the Court, capable of remedy. As may be seen from the decisions in *Afiladdi v. Satis Chandra* AIR (1919) Cal 722 and *Mt. Sadia Bibi v. Dukhi Gope* AIR (1935) Pat 422 the measure of compensation may be affected by the finding; the judgments of both the Courts below are defective in that there is no specific finding on this point; but it seems to have been assumed that the misuse is capable of remedy and we proceed on that footing, the assumption not having been challenged before us. It would seem then that the plaintiffs ought to have a decree requiring the defendant to remedy the misuse to the extent that misuse has been found by the lower Appellate Court; that is to say by filling up the ditch and removing the third of the three houses which have been erected.

14. The decree must also provide a measure of damages and here the Subordinate Judge has not given us the necessary finding. The Munsif had assessed the damage consisting of erection of three huts and digging of a ditch at Rs. 20, but the Subordinate Judge has not found how much of this damage is referable to the one hut and the ditch. To avoid the inconvenience of a remand the parties have left this matter to the Court and we assess the damage at Rs. 15 of which the plaintiffs as eight annas cosharers are entitled to recover one-half. The time allowed for the defendant for complying with the Court's order and bringing the compensation money into Court will be three months from this day. In default the plaintiffs will be entitled to have the misuse remedied by the Court at the cost of the defendants and to execute the decree for the amount of damages.

15. The plaintiffs will get half their costs of the first Court and the defendants will get half their costs in the lower Appellate Court. Parties will bear their own costs of the second appeal.

Agarwala, J.

16. I agree.