
(1999) 04 PAT CK 0030
In the Patna High Court
Case No : C.W.J.C. No. 4973 of 1997

Smt. Manju Devi and Another	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 06-04-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (1999) 2 BLJR 1226

Hon'ble Judges : Aftab Alam, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Aftab Alam, J.—The facts of this case are both distressing and disturbing, distressing because it shows that at least for some persons the judicial process is no longer the natural choice for the enforcement of legal right or for the redressal of grievance and disturbing because in order to bye-pass and cut short the delay in the judicial process resort is not only made to illegal means but attempts are also made to find abettors and allies in the Police force.

2. The two petitioners in this case, who are wife and husband, allege that they were unlawfully and forcibly elected from the tenanted premises by the landlords with the aid and assistance of some police officials. The landlords (respondents 6 and 7) on the other hand state that the petitioners, having occupied the premises without payment of any rent for several years, finally "abandoned" it with a view to escape payment of the rental dues and the police on being apprised of the situation let them (the landlords) resume possession of the premises.

3. The disputed premises is a shop on the ground floor of a building bearing Municipal holding No. 649-B/395-B, circle No. 6, ward No. 11 and situated at Exhibition Road under Gandhi Maidan P.S. in the town of Patna. The aforesaid holding is a part of a Waqf Alal-aulad of which respondent No. 6, Bibi Roshan Ara

is the mutwallia. It is, however, her son respondent No. 7 who on the basis of a Power of Attorney executed in his favour looks after the management of the was property on behalf of his mother. It is an admitted position that the petitioners were inducted into the shop, the subject-matter of dispute in this case, on the basis of a lease deed executed in favour of petitioner No. 1 by respondent No. 7 acting as the attorney and on behalf of respondent No. 6. The lease was for a period of seven years beginning from March 1, 1988 and coming to end on February 28, 1995. According to the terms of the lease, the lessee was to occupy the leased out. premises on payment of monthly rental a Rs. 400- for the period of lease at the end of which he was required to deliver the has and vacant possession of the leased premises, in good condition, to the lessor. After the expiry of that lease, it was open to the parties to re-enter into a fresh agreement on mutually agreed terms and conditions and on the basis of fresh and separate documentation.

4. This is about all in this case on which the disputing parties are in agreement and regarding the rest of the case the respective stands taken by the two sides are highly divergent which can be stated as follows:

5. It is the case of the petitioners that after the expiry of the lease on 28.2.1995 though no fresh deed of lease was executed, they made advance payment of the monthly rent up to December, 1997 for the tenanted premises to the landlords. Counsel for the petitioners claimed that by payment of advance rent, after the expiry of the lease the petitioners became month to month tenant. It is further the case of the petitioners that in the tenanted premises they carried on different kinds of business from time to time ; during the years 1988-91, they had the business of sale and purchase of old scooters ; in 1991 they took up the business of travel agency under the name and style of Multi purpose Travel Agency and at the time of their ejectment in April 1997, they were trying to open a public telephone booth in the tenanted shop and to that and were persuing their application in the department of telecommunications.

6. Further, according to the petitioners on 28.4.1997, they went to their village home. Till that date the shop was fully under their possession and the petitioners sent away after locking up the shop as usual. On returning from the village on 9.5.1997, petitioner No. 2 went to the shop and found to his surprise that the lock put by him on the collapsable shutters was removed and was replaced by three new locks; a Collapsable shutter on the northern side of the shop was also removed and in its place a brick wall was constructed. It is alleged that while he was making enquiries, he was picked up by a mobile police van and was taken to the Gandhi Maidan P.S. There he was shown an application filed by respondent No. 7 in which it was stated that he had abandoned the shop and left it unlocked. He was also shown a seizure list dated 2.5.1997 in which some articles lying in the shop on that date were listed as having been seized. He told the Police officials that the allegation of abandonment of the shop was false and tried to show them the keys of the shop and other documents concerning it. But the

Police officials at the Gandhi Maidan P.S. did not take down fully and correctly his statement concerning his ejectment from the shop and he was released from the P.S. only after executing a P.R. Bond. He then sent a report to the Sr. Superintendent of Police and the Town Superintendent of Police, Patna by registered post regarding their unlawful ejectment from the shop.

7. The petitioners then filed this writ petition in this Court on 22.5.1997 impleading the Officer-in-charge Gandhi Maidan P.S. as respondent No. 4 and one Anil Kumar who at the material time was posted as Sub-Inspector of Police in that P.S. as respondent No. 5. The petitioners alleged that they were personally in collusion with the landlords and they assisted in the petitioners' ejectment from the shop.

8. Also impleaded as Respondent No. 8 was one Mohan Lai who was inducted into the disputed Shop as a lessee after the petitioners were ejected from there.

9. In the writ petition, it was also stated that on 2.5.1997 after allowing the landlords to resume possession of the disputed shop, the Gandhi Maidan P.S. had sent a report to the Sub-divisional Officer, on the basis of which a proceeding u/s 144 of the Code of Criminal Procedure was initiated against both the landlords and the tenants. That proceeding was pending at the time of filing of this writ petition but during its pendency before this Court and even before it was listed for admission the Sub-divisional Magistrate passed an order dated 30.6.1997 observing that from the police report it appeared that it was a landlord-tenant dispute. It was further observed that the landlord was clearly trying to get the premises vacated in a manner not sanctioned by law and the Police had no right to interfere in this matter which pertained to the jurisdiction of a Civil Court. The Police was accordingly directed to hand over the key of the lock to the petitioners who were the tenants in the disputed premises. The order passed by the Sub-divisional Magistrate did not bring any material relief to the petitioners and they brought that order on the records of this case by filing a supplementary-affidavit.

10. According to respondents 6 and 7, the landlords the petitioners after being inducted in the shop paid the monthly rent only up to December, 1992. They stopped payment of rent from January 1993. Further, according to the petitioners, they never used the shop for any business purpose and from the very beginning kept it in a state of disuse. At the time of expiry of the lease on February 28, 1995, a large amount had accumulated against the petitioners as arrears of rent. They were given notices to vacate the shop and to make payment of the arrears of rent but they neither paid rent nor handed over the shop to the landlords. The shop was kept closed practically all the time. It was not occupied by the petitioners and no business activity was carried on there. It thus became evident to the landlords that the petitioners had "abandoned" the shop. Then on 2.5.1997 finding the shop in an unlocked and unclaimed state, they went to the Gandhi Maidan P.S. and reported the matter by lodging a sanaha there. Thereupon, respondent No. 5 came to the shop with them and finding that the premises was without any claimant allowed them (the landlords)

to resume its possession.

11. Respondents 4 and 5 (the Officer Incharge of the Gandhi Maidan Police Station and a Sub-Inspector posted there respectively) support the case of the landlords, respondent 6 and 7, to a certain extent. According to them on 2.5.1997 at 2.10 p.m. respondent No. 7 came to the police station and submitted a written report in which it was stated that the disputed shop had been "abandoned" by its tenants, the petitioners. It was further stated that the shop was lying without any lock in an unclaimed state. On the basis of the report submitted, respondent No. 4 made Station Diary Entry No. 59 and assign the matter for investigation to respondent No. 5. He along with a police constable came to the disputed shop and found that the shop was lying unlocked, unclaimed and unprotected. They make a search for the tenants but no one came forward claiming the shop as its tenant. Thereupon, they prepared an inventory of the articles lying in the shop and seized them under the seizure list. They then put a lock on the shop and gave the key to respondent No. 7, the landlord. On coming back to the police station at 6 p.m., respondent No. 5 verbally apprised respondent No. 4 about the steps taken by him, in that matter who sent a report to the Sub-divisional Officer, Patna for proper direction. It is further stated that on 9.5.1997 at about 10 a.m. while respondent No. 4 was on mobile duty, he received a wireless message at 11 a.m. that someone was trying to break open the lock of the disputed shop and a crowd had gathered around him. He then went to the disputed shop and picked up petitioner No. 2 from there. He brought him to the police station where petitioner No. 2 told him that the disputed shop was under his lawful occupation as a tenant and the land lords falsely alleged that he had "abandoned" the shop. On further enquiry it appeared to respondent No. 4 that it was a disputed between the landlord and the tenant and he accordingly drew up a report being Non-F.I.R. No. 4/ 1997 and sent it to the Sub-divisional Officer, Sadar, Patna for starting a proceeding against both the parties. It was further stated that on that date he searched for respondent No. 7 in order to take the keys of the shop and to hand it over to petitioner No. 2 but he was unable to find him (respondent No. 7) on that date. Later, on the same day he released petitioner No. 2 on his executing a F.R. bond.

12. Before concluding the respective cases of the parties, it may be noted that another twist is sought to be given to this dispute by the introduction of respondent No. 8, the new lessee. According to respondent No. 8, he was given possession of the disputed shop on 5.5.1997 on the basis of a deed of lease executed by the lessor, respondent No. 7 on that date. The lease was for a period of ten years commencing from 5.5.1997 and coming to an end on 4.5.2006. The lease stipulated payment of monthly rent of Rs. 500/- by the lessee. It was produced for registration on Ob 1997. It is the case of respondent No. 8 that on the basis of the aforesaid lease, he came to occupy the disputed shop on 5.5.1997 and opened an air conditioned hair cutting saloon there under the name of "Top & Top". For opening a high class saloon, he made an investment of more than Rs. 5.5 lacs. He was conducting his business in the disputed shop

when he was evicted from there on the basis of an interim order passed by this Court on 23.7.1997 directing the Superintendent of Police to take possession of the disputed premises until further orders of this Court.

13. Mr. Ganpati Trivedi, learned Counsel appearing for respondent No. 8 was understandable quite resentful over the turn of events. He submitted that a large investment made by respondent No. 8 was completely blocked for more than a year and half and repeatedly made the prayer that let this case be finally decided at an early date so that his client may be able to know his exact position and in case he was to be finally evicted from the disputed shop, he might be given an opportunity to take away at least the removable equipment, appliances and articles installed there by him at considerable expenses.

14. This writ petition was filed in this Court on 22.5.1997 and on notice being issued the three sets of respondents appeared and filed their respective counter-affidavits. From the pleadings of the parties, it was evident that the basic facts were in dispute. According to the petitioners, they were in occupation of the shop as tenant on payment of monthly rent and they were illegally evicted from there by the landlords, respondents 6 and 7, with the aid and assistance of Respondents 4 and 5 of the police force.

15. The respondents on the other hand maintained that after a large amount due fallen due against the petitioners as arrears of rent, they "Abandon" the shop and its possession was simply resumed by the landlords.

16. Having Regard to the contradictory stands taken by the parties, a learned Single Judge of this Court by order dated 6.8.1997 directed for an inquiry to be held in the matter. The inquiry was entrusted to the Additional District judge, Patna who was asked to submit a report after giving opportunity of adducing oral and documentary evidence to all the parties. In pursuance of this Court's direction all the parties appeared before the Additional District judge and led evidences in support of their respective claims. On a consideration of all the materials produced before him the Additional District Judge prepared a thorough and detailed inquiry report dated 3.1.1998 and submitted it to this Court.

17. In his report the learned Additional Judge disbelieved the case of the petitioners that on the expiry of the lease on 25.2.1995 they had paid in advance rent up to December, 1997 to the landlords. The learned Judge held that:

It cannot be believed that rents were paid by the petitioners and they had also paid a huge amount in advance without any receipt being granted.

18. The learned Judge also found, as was the case of the landlord, that the documents filed by the petitioners did not show that they were actually doing any business in the shop premises ; that, rather it was case from the documents that they had applied for being appointed as Railway Travellers Service Agent or were trying to obtain a licence from the Telephone Department for starting a STD/ ISD Pay Phone booth the there was no document to show that they were actually

engaged in the business of Travel Agency or previous to that carried the business of sale and purchase of old scooters (Para-33 of the report).

19. However, on the most crucial point of possession, the learned Judge found that the shop was never abandoned by the petitioners and on 2.5.1997, it was forcibly occupied by the landlord with the help of the Police (Para-25 of the report.) and further that though the materials produced before him did not show any business activity being carried on by the petitioners in the shop premises, the fact remained that they were in possession of it on the material date and had no intention of giving up its possession. The learned Judge also noted that respondent No. 7 had given a legal notice to petitioner No. 2 on 14.3.1995 asking him to vacate the shop and to hand over its vacant possession to him. The learned Judge further observed that on the petitioner's failure to vacate the shop it was open to the landlords to take recourse to legal remedies but instead of taking the lawful course they got the petitioners evicted from the disputed shop with the help of the police.

20. Before proceeding further, it may be noted that Mr. Tara Kant Jha, learned Sr. Counsel appearing for the landlords respondents 6 and 7 weakly tried to assail the findings recorded in the inquiry report on the ground that in the inquiry before the Additional Judge the parties were not allowed to cross-examine the witnesses examined on behalf of the other side. Learned Counsel submitted that denial of the right to cross-examine had completely vitiated the inquiry report and no reliance could, therefore, be placed on its findings.

21. In my view the objection raised against the inquiry report is fit to be rejected on two grounds; first, because the denial of cross-examination has caused no prejudice to the landlords inasmuch as for arriving at the finding that the petitioners were in possession of the disputed shop on the material date the learned Judge has relied upon the statement made by a witness examined by the landlords themselves. Secondly before commencing the enquiry, the procedure to be followed in holding the inquiry was determined by the learned Judge with the consent of all concerned. It was made clear at that stage itself that having regard to the large number of witnesses proposed to be examined in behalf of the contesting parties, no party would be allowed to cross-examine the witnesses of the other side and the Inquiry Officer would himself conduct the cross-examination of witnesses. None of the parties, including the landlords, raised any objection to the procedure suggested by the learned Judge at that time. This statement is to be found in the petitioners' reply to the objection petition filed against the inquiry report by respondents 6 and 7.

22. For the aforesaid reasons, I am not inclined to entertain the objection to the enquiry report raised by Mr. Tara Kant Jha and I am plainly of the view that this case has now to be decided in the light of the findings recorded in the inquiry report.

23. Mr. Tara Kant Jha next submitted that there were several facts and

circumstances in this case, either admitted or found by the Enquiry Officer on the basis of which the only reasonable inference would be that the tenants had abandoned the disputed premises and they were not forcibly evicted from there. He stated that the lease granted to the petitioners expired on 25.2.1995 was an admitted fact; further that the petitioners had defaulted in the payment of rent and they were not using the shop premises for any business purpose and were keeping it closed practically all the time, were findings recorded in the inquiry report. According to him, these facts and circumstances were quite sufficient for holding that the petitioners had abandoned the shop premises and it was therefore lawful for the landlords to resume its possession.

24. I am simply unable to accept the submission and in my view no finding of abandonment can be arrived at on the basis of the facts and circumstances relied upon by Mr. Jha. Abandonment would require some thing for more definite and positive, showing intentional and voluntary relinquishment of a known right absolutely and unconditionally.

25. In *W.H. King Vs. Republic of India and Another*, , the tenant, on payment of a certain sum of money handed over the possession of the tenanted flat to a third party instead of the land lady. He was charged u/s 18(1) of the Bombay Rents, Hostels and Lodging House Rates (Control) Act, 1947 for receiving a "pugree" as the condition for relinquishment of his tenancy. He was convicted by the trial Court and his appeal before the High Court was summarily dismissed. The Supreme Court allowed the appeal holding that it was a case of assignment and not of relinquishment which was made an offence under the Bombay Act. It will be useful to take note of the following passage from Paragraph 9 of the judgment:

The distinction between an assignment on the one hand and relinquishment or surrender on the other is too plain to be ignored. In the case of an assignment, the assignor continues to be liable to the land lord for the performance of his obligations under the tenancy and this liability is contractual while the assignee becomes liable by reason of privity of estate. The consent of the landlord to an assignment is not necessary, in the absence of a contract or local usage to the contrary. But in the case of relinquishment, it cannot be a unilateral transaction, it can only be in favour of the lessor by mutual agreement between them. The relinquishment of possession must be to the lessor or one who holds his interest. In fact, a Surrender or relinquishment terminates the lessee's rights and lets in the lessor.

26. In *Kanhiya Shankar v. Mohabata Sedhu and Ors.* AIR 1960 Pun 494, a Division Bench of the Punjab High Court elaborately dealt with the concept of abandonment. Although this case arose from a dispute of title the following observations from the judgment can be profitably used for our present purpose:

7. The Courts do not presume in favour of abandonment and the onus rests on the party asserting abandonment. It is, therefore, incumbent upon the party

pleading abandonment to establish his plea. In this case, defendant No. 1, the appellants before us, who set up abandonment, have to prove the same by unequivocal and decisive evidence. Abandonment" means the act of intentionally relinquishing a known right absolutely and unconditionally and without reference to any particular person or persons. In this case it has to be a voluntary relinquishment of possession of the property by its owners with the intention of terminating their ownership but without vesting it in any other person.

A person abandoning his property gives up all hope, expectation or intention of recovering his property.

8. There are two primary elements of abandonment, namely the intention to abandon and the external act by which effect is given to the intention and both these elements must concur. A person abandoning permanently divests himself of his title. The act of abandonment from its very nature has to be voluntary, absolute and unconditional, excluding element of coercion, and pressure of any kind.

In order to see that the plea of abandonment is proved in a particular case, the Courts have to ascertain the existence of affirmative and unmistakable evidence leading to the exclusive inference of intentional relinquishment of property and repudiation of one's ownership. Mere non-user over a long period unaccompanied by any other evidence showing clear intention, will not be held sufficient to constitute an abandonment. By itself, therefore, an absence from land for a long time will not amount to an abandonment though this circumstance may have a considerable probative force.

Abandonment of immovable property necessarily implies non-user, but non-user per se does not create abandonment, no matter how long it continues. A non-user must, therefore, be accompanied with an intention on the part of the owner to give up the property and for good. The Courts may, however, turn to surrounding circumstances in order to find out whether the renunciation was voluntary and intentional and the external act evidencing abandonment was motivated by the intention to abandon.

Thus a mere failure to occupy land for an indefinite time does not necessarily constitute an abandonment of title or possession, unless there is evidence sufficient to sustain a finding that the property was left without any intention to repossess it and the person abandoning was indifferent as to what may become of it in the future and who may take possession of it or claim title to it. When the expression "abandonment" is used in relation to property, it signifies the complete relinquishment of title, possession or claim, virtually indicating that the property is being thrown away. Abandonment is not equivalent to inaction. A person abandons property when he forsakes it entirely, renounces it utterly and gives it up permanently; with an intent never again to claim any right or interest therein.

27. In the light of the above quoted observations it may be noted that in this

case the petitioners were found to be in possession of the disputed shop before the landlords took it over in the afternoon of 2.5.1997. Further, that petitioner No. 2 on his return on 9.5.1997 finding that he was evicted from the shop made such a noisy protest that a Mobile police party had to come to the spot and take him to the Police Station. In these facts and circumstances, I find it impossible to hold that the petitioners had abandoned the disputed premises and it was in that situation that the landlords simply took it back under their possession.

28. Mr. Jha finally contended that this writ Court should refuse to interfere in this matter in favour of the petitioners on the ground of equity and submitted that equity lay strongly on the side of his clients, the landlords. Learned Counsel submitted that here was a tenant occupying the disputed shop uselessly, without doing any business there and without making payment of monthly rent to its owners for a long time. According to him under those circumstances the petitioners had no right to continue to be in possession of the disputed shop and a direction by this Court to restore their possession would amount to protecting a defaulter and violater of the covenant. Any interference by this Court would, therefore, lead to highly inequitable consequences and would give an upper hand to the petitioners who had come to this Court with completely unclean hands.

29. In support of his submission, Mr. Jha relied upon an observation made in a Division Bench judgment of this Court in *Nasiruddin v. State of Bihar and Ors.* 1971 P.L.J.R. 383. The observation relied upon by Mr. Jha is as follows:

It has been contended by learned Counsel for the petitioner that if his client was ever in possession of the market and he was thereafter dispossessed he is entitled to be put in possession, even if he was at one time in possession without any title. This argument cannot be accepted in an application under Article 226 of the Constitution as the petitioner must prove at this stage as to his title or right or interest under which he is entitled to be put in possession.

In my view, the facts of the case in *Nasiruddin* were entirely different and that judgment is of no help to respondents 6 and 7 in this case. The petitioner in *Nasiruddin* was given the right to collect Mahsul or Chungi on the basis of an auction held for the settlement of the market. However, before an agreement was executed in favour of the settlee it was found that the auction was held in contravention of the relevant provisions. The State Government accordingly directed for the cancellation of the auction and for holding a fresh bid. In that circumstance, the petitioner of that case came to this Court for quashing of the Government orders. Though he claimed that before the issuance of the Government order for cancelling the auction he was given possession of the market, according to the State of Bihar, it was not admitted that the petitioner had been given possession of the market by the Municipality. In fact the Gaya Municipality which had also filed a show, cause petition in denied the petitioner's claim of possession. It was further stated in the Municipality's show cause that the petitioner had not been put in possession of the market as an agreement was yet to be executed. There was no finding in that case, unlike the present one that

the petitioner was in possession of the market and was dispossessed by illegal means. The decision in the case of Nasiruddin is, therefore, of on help to respondents 6 and 7 of this case.

30. Moreover, the submission made by Mr. Jha on equitable considerations completely overlooks the point that the principle of rule of law, the very basis of our constitutional system cannot be scarified on any equitable consideration. Here I would venture to say that this Court has the least sympathy for the petitioners in this case concerning whom the Additional District Judge has found that they were defaulters in payment of monthly rent and were in occupation of the disputed shop after the expiry of the lease and in violation of several terms and conditions of the tenancy. But, this Court is unable to condone or overlook the fact that respondents 6 and 7 in trying to get rid of the petitioners defied the system of administration of justice under the laws of the land. In doing so they were from the very beginning destined to loose before a Court of law because supporting the petitioners action would mean negating the rule of law and acting contrary to the very purpose and object of the Courts.

31. It must be emphasised here that it is not a case where respondents 6 and 7 were remedyless. It was perfectly open to them to seek the petitioners" ejectment and a decree for the realisation of the arrears of rent from them by approaching a competent Court of civil jurisdiction. They, however, preferred an illegal means presumably because the remedy before a Court of law would take time. In fact, Mr. Jha in course of submissions protested that in the facts and circumstances of the case it would be quite unfair to ask the landlords to go to a Civil Court and to spend 25 years in litigation thereto. I am only reminded of a proverb in the elementary book of Persian:

RAHE RAAST BERAU GAR-CHE DOOR AST

(Take the straight path no matter that it is long)

32. For the reasons discussed above, I have no hesitation in holding that the petitioners were unlawfully ejected from the disputed premises on May 2, 1997. The logical corollary of this finding would be that their possession of the disputed shop must be restored.

33. At this stage, I would like to observe that the prayer made by Mr. Ganpati Trivedi appearing for respondent No. 8 for an opportunity to take away his removable appliances, equipment and articles from the disputed shop is quite reasonable and fit to be allowed. I accordingly direct the Superintendent of Police (who is at present in possession of the shop by virtue of the order passed by this Court on 23.7.1997) to allow 15 days" time, from the date of receipt/production of a copy of this order, to respondent No. 8 for taking away such of the appliances, equipment, articles and fittings in the shop which can be removed without causing any serious damage to the structure. At the expiry of the period of 15 days from the date of receipt/production of a copy of this order, he would hand over the key of the disputed shop to the petitioners and ensure its

occupation by them.

34. As regards respondents 4 and 5, 1 would only wish to observe that they rushed like fools where persons with better discretion would have feared to tread. I, however, do not propose to take any action against them in the hope that in future they would be guided by better judgment.

35. It would be open to respondent No. 8 to settle his claim(s) with respondents 6 and 7 either on the basis of mutual agreement or by any legal means.

36. It will be also open to respondents 6 and 7 to bring an action against the petitioners for their eviction from the suit premises and for recovery of the rental dues in accordance with law.

37. In case such an action is brought the petitioners resignation of possession of the disputed shop or any observations or remarks made in this judgment will not come in the way of respondents 6 and 7 and such an action would be decided on its own merit and in accordance with law.

38. In the result, this writ petition is allowed with the aforesaid observations and directions.