
(1946) 02 PAT CK 0002

In the Patna High Court

Sudarsan Prasad Sinha and Others

APPELLANT

Vs

Jadunandan Tewary and Another

RESPONDENT

Date of Decision : 26-02-1946

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 1947 Patna 42

Hon'ble Judges : Reuben, J; Manohar Lall, J

Bench : Full Bench

Judgement

Reuben, J.—This is an appeal by the decree-holders against an order of the Additional District Judge of Muzaffarpur, reversing a decision of the Munsif of Hajipur rejecting an application u/s 47, Civil P.C. The decree under execution is one for mesne profits in which there is a number of judgment-debtors. The execution has been filed for the whole decretal amount against some of the judgment-debtors. Two objections u/s 47 were filed by different judgment-debtors raising the point that they should not be held liable under the decree for the whole amount, but only for the amount of mesne profits corresponding to the portion of the suit land in their separate possession. There were other contentions but we are not concerned with them in the present case. Both the objections were rejected by the Munsif, but only one set of applicants pursued the matter, with the result that the application was allowed in appeal by the Additional District Judge.

2. The decree under execution has not been printed, and the copy of the decree, which was on the record of the Courts below, has been returned to the party concerned. Both the Courts below are definite, however, that the decree, in its form, is a joint and several decree against the judgment-debtors, and the correctness of this has not been challenged before us. The Additional District Judge says:

It is quite true that the decree was joint and several against all the nine judgment-debtors and that there was nothing illegal in the respondents

executing it against the appellant alone. There have, however, been cases where on enquiry it has been held that in such cases it is only fair that the judgment-debtors should be made liable for the mesne profits in proportion to the profits actually enjoyed by them.

3. In allowing the appeal, the Additional District Judge relied on *Sheobalak Singh v. Achutanand Singh* AIR 1943 Pat. 81 which itself relied on *Gurudas Kundu v. Hemendra Kumar* AIR 1929 P.C. 300. The case before the Privy Council related to land which had disappeared under the Ganges, and had reappeared after a considerable period of years in juxtaposition to some property held by the Government. The Government assumed the land to be an accretion to their property and put tenants upon it. The property, however, really belonged to 3 sets of zamindars the Kundus, the Mukherjees and the Roys. The Roys and the Kundus applied to the Collector claiming the land, but the Roys did not persevere. The Kundus persisted and subsequently the land was released in their favour, and they were put in possession. The Government during their possession of the land, let it in patni to a person of the name of Srish. When the Kundu family got possession they let Srish to continue as patnidar. After this the Mukherjees and the Roys, who were entitled to 10 annas share of the land, the Kundus being entitled to only 6 annas, sued the Kundus, the Government and Srish for recovery of possession and for mesne profits. The decree in the suit was as follows:

It is ordered that the claim of this suit be decreed with costs and mesne profits and interests against the principal defendants and the defendants subsequently added.... The amount of mesne profits to be ascertained in execution.

4. The question that went before their Lordships of the Privy Council arose when the amount of mesne profits had to be ascertained in execution. The High Court by its judgment reported in *Raja Promode Nath Roy and Others Vs. Secretary of State for India and Others*, held that the zamindar defendants, appellants before the Privy Council, were liable jointly and severally with those in actual possession, and were joint tort-feasors with them. It was argued before their Lordships of the Privy Council that as judgment was given against the defendants upon the theory that these people were all trespassers, and as the decree was for joint and several liability, the mesne profits should be taken upon the calculation of what Srish got out of the land, and there should be a decree against all the other judgment-debtors for that amount. Dealing with this argument their Lordships said:

Their Lordships have great difficulty in looking upon Srish as a trespasser, or, for that matter, in one sense, even the Kundus as trespassers, because they were in possession of the land and on the only legal title to it which existed namely, the lease from the Government. It is quite true in one sense that they were in wrongful possession because they were taking the whole profits whereas they were only entitled to 6 annas of the profits and not to 16 annas of the profits. Be that however as it may their Lordships cannot accept this argument. They do not

view the decree as a proper joint and several decree. They think it is to be construed *applicando singula singulis*.

It is to be noticed that in that case the question was raised at the stage of the ascertainment of mesne profits, and that their Lordships found themselves unable to regard the judgment-debtors as trespassers, and further, that their Lordships treated the case as one for the construction of the decree.

5. The case of Sheobalak Singh AIR 1943 Pat. 80 was also one relating to reformed land and, as in AIR 1929 P.C. 300 the decree was in form a joint and several decree. The judgment-debtors were "co-sharers maliks who claimed the right to settle this land." Apparently, therefore, their Lordships did not regard the judgment-debtors as ordinary trespassers and Harries C.J., Dhavle J. concurring, said:

In my opinion, on a true construction of the decree, it is not a joint and several decree, but a decree against the defendants for their respective share of the mesne profits.

6. Here, again, the question was regarded as a question of construction. The facts of the present case are distinguishable from both the above cases. This also, we are given to understand, is a case of diara land but on the finding of facts in the suit the defendants knowingly took wrongful possession of it, and then fraudulently claimed that the land had been settled with them by the plaintiffs landlords, and produced a forged patta and forged rent receipts in support of this claim. They were, therefore, clearly trespassers. After considering these facts, the Court of first instance said:

I think the mesne profits should be recoverable from all the defendants because according to the allegation in the plaint all of them are in wrongful possession of the lands, and the defendants who are absent have not come forward to deny that they are in possession. Further, according to the evidence adduced on the side of the plaintiffs all the defendants are in wrongful possession, and there is no evidence on the side of the defendants to prove satisfactorily that any of the defendants is not in possession.

7. The suit was accordingly decreed against the defendants with a direction that the amount of mesne profits should be determined in a separate proceeding. The appeal against this decree was dismissed by the District Judge. The mesne profits were subsequently assessed by a Civil Court Commissioner, and no attempt appears to have been made at that stage to get them ascertained severally as against each set of defendants in separate possession of the suit land. It is only at the stage of the execution of the decree after the ascertainment of mesne profits that the question has been raised. It is now too late, when the mesne profits have been ascertained and decreed in one lump, to ask that the decree should be considered not to be a joint and several decree. In AIR 1943 Pat. 80 the question seems to have been raised at the stage of the execution, but in that case the judgment-debtors were co-sharers landlords with

definite shares, so that a separate ascertainment of mesne profits in respect of each set of judgment-debtors was not necessary. Here, on the contrary, the judgment-debtors are different sets of cultivators who claim to be in possession of separate portions of the land, and the ascertainment of mesne profits realisable in respect of the separate portions would necessitate a further proceeding in ascertainment, which under the Civil P.C. of 1908 cannot be done by the executing Court, see *Bhatu Ram Modi v. Fogal Ram* AIR 1926 Pat. 141 and *Raghubir Singh Vs. Secretary of State*, .

8. In *Kunni Kurumbah v. Parambil Lakshmi* AIR 1928 Mad. 387 the question arose in second appeal against the decree itself and the High Court indicated that the mesne profits should be assessed severally against different parties in possession of different items of property. Further, there were

special circumstances in this case, namely, that by the very decrees passed by the lower appellate Court the defendants who are the parties in possession have been declared to be entitled to be paid to them by the plaintiffs seeking to eject them the value of improvements.

and it was

the case of a defendant to whom according to the judgment of Court a sum is liable to be awarded as for improvements bona fide made by him on property in the belief that he was entitled to the same.

9. In *Raja Bhupendra Narain Sinha Bahadur Vs. Rajeswar Prosad Bhakat and Others*, , the question arose in proceedings for the ascertainment of mesne profits. In *Kalidas Rakshit Vs. Keshablal Majumdar*, , their Lordships relying on AIR 1929 P.C. 300 directed the ascertainment of mesne profits severally against separate sets of defendants in possession of different interests in the land. The facts of that case do not appear from the report, but the direction was given in an appeal against the decree itself. None of these cases, therefore, is inconsistent with the conclusion which I have reached above. It is true that in *Raja Bhupendra Narain Sinha Bahadur Vs. Rajeswar Prosad Bhakat and Others*, their Lordships said that the effect of the decision in AIR 1929 P.C. 300 is that the general law about the liability of joint tortfeasors for mesne profits must be taken to have been modified by the special provisions of the Civil Procedure Code. It is not necessary, in the present case, to enter upon the discussion of this very difficult question upon which various opinions have been expressed, *Bireshur Dutt v. Baroda Prosad* (11) 11 I. C. 504 . *Kamala Prosad Sukul Vs. Chandra Nath Pramanik and Others*, , *Ramratan Kapali v. Aswini Kumar Dutt* (10) 37 Cal. 559 and *Sashi Kantha Acharjee and Others Vs. Promode Chandra Roy and Others*, .

10. On the above grounds, I would allow the appeal, set aside the order of the Additional District Judge and restore the order of the Munsif. The appellants will get their costs in this Court and in the Court of the Additional District Judge.

Manohar Lall, J.

11. I agree. The judgment-debtors should have taken objection at the stage when mesne profits were being ascertained. Not having done so, they cannot ask the executing Court to split the decree into so many parts. We have no materials to find out in these proceedings the amount of mesne profits that should be allocated to the lands wrongfully in possession of the judgment-debtors.