

(1951) 02 PAT CK 0012
In the Patna High Court
Case No : A.F.A.D. No. 1051 of 1949

Yusuf Mian and Others

APPELLANT

Vs

Gafoor Mian and Others

RESPONDENT

Date of Decision : 09-02-1951

Acts Referred:

Limitation Act, 1908 — Article 144

Citation : AIR 1952 Patna 123

Hon'ble Judges : Sinha, J; Rai, J

Bench : Division Bench

Advocate : Qazi Nazrul Hassan, for the Appellant; R.S. Chatterji, Syad Hassan and J.P. Chaudhury, for the Respondent

Final Decision : Dismissed

Judgement

Sinha, J.—This is a defendants' second appeal from the decision of the learned Additional Subordinate Judge of Motihari, dated the 7th May 1949, reversing that of the Munsiff of Bettiah, dated the 3rd of March, 1948, in a suit in ejectment.

2. In so far as it is necessary for the determination of this appeal, the facts may be stated as follows: One Magali Mian died in 1913 after having married thrice. By his first wife he had three daughters, plaintiffs 1 and 2, and plaintiffs 4 to 10, who are the heirs of the third daughter. By his second wife he had a daughter who figures as the third plaintiff. On Magali's death his third wife inherited his properties to the extent of a two annas share, the remaining fourteen annas being divisible amongst the several daughters aforesaid by the first two wives. Mt. Bandhui, who is the third wife of Magali Mian, came into possession of the entire estate of her husband, and, according to the plaintiffs' case, she thus came into possession partly as a co-sharer, and in respect of the rest of the estate, in lieu of her dower debt of Rs. 400. Her husband had left her "raiya" interests in two "khatas" in two villages, the total area of the estate being 4.17 acres. Mt. Bandhui died sometime in 1944, and on her death, the present suit was commenced in March, 1946, for recovery of possession in respect of the

plaintiffs" share in the property. Before her death Mt. Bandhui had executed two sale-deeds on the 17th of April, 1919, namely, one in respect of 1 bigha 4 kathas and 12 dhurs for the sum of Rs. 260 to defendant No. 9, and the second in respect of 4 kathas and 3 dhurs in favour of the tenth defendant for the sum of Rs. 26. The defendant No. 10 is said to have built a house and constructed a well on the plot sold to him. These two transactions were in respect of "khata" No. 448. The other "khata", namely, "khata" No. 64, with an area of 3 bighas 9 kathas and 8 dhurs, was sold to the defendant No. 8 on the 10th of October 1934, for the sum of Rs. 698. Hence at the death of Mt. Bandhui the entire estate left by her husband had passed into the hands of the transferees aforesaid. The suit was contested by the defendants 8 to 10, that is to say, the transferees, chiefly on the ground that after the death of Mt. Bandhui's husband she came into exclusive possession of the entire estate to the knowledge of the other heirs and adversely to them. They, therefore, contended that the Mt. herself, and, after the transfers in their favour, they, were in exclusive adverse possession of the estate, with the result that the plaintiffs' claim for possession was barred by limitation.

3. The learned Munsiff decreed the suit in part and dismissed it in respect of the rest, holding that the Mt. though she was in possession of part of the estate in lieu of her dower debt, had acquired title at least in respect of a portion of the estate by adverse possession. On appeal by the plaintiffs, in respect of the portion for which the suit had been dismissed, the lower appellate Court has passed a decree for the entire claim of the plaintiffs subject to certain directions as to the way in which the property should be held so as to protect the interest of some of the transferees who, according to the lower appellate Court, had acquired a good title to that portion of the estate which could legally come into the hands of Mt. Bandhui as one of the heiress to her husband. Hence this second appeal by defendants 8 to 10.

4. The learned Advocate on behalf of the appellants vehemently argued that soon after the death of her husband Mt. Bandhui got herself recorded in the records-of-rights in the year 1913 as the only tenant in respect of the two "khatas" aforesaid, and that this conduct of hers was sufficient notice to her co-heirs that she was asserting a hostile title to the entire estate of her husband in complete denial of the plaintiffs' title. In my opinion, there is no substance in this contention for the simple reason that it is a well-established principle of law that where possession can be referable to a good title the Courts will not too readily attribute to such a possession the character of adverse possession. The Mt. was one of the heiresses to her husband, and it is open to one of the heirs of a deceased person to take possession of the entire estate, and so long as that co-sharer does not bring it to the notice of the other co-sharers that he was claiming the estate adversely to them, no question of adverse possession can arise. Added to that consideration is the further fact that it has been concurrently held by both the Courts below that the Mt. had her claim to the dower debt owing from her husband, and she could, in law, retain possession of the entire

estate of her husband so long as her claims to dower debt had not been satisfied. Hence in this case, when the Mt. took possession of the entire estate of her husband, whether there was a "panchayat" or not her possession could be attributed to her legal title partly as a co-sharer in the estate and, in respect of the rest of the estate, as one who had a charge on the property for her unpaid, dower debt. Hence, in respect of the entire estate left by her husband, the Mt. could legally continue in possession of the estate so long as the other heirs had not paid off the unsatisfied portion of that debt, or so long as the debt had not been satisfied out of the usufruct of the property.

5. It has further been urged on behalf of the appellants that not only did the Mt. get herself exclusively recorded in the record-of-rights, but she laid an unequivocal claim to the entire estate by executing the two sale-deeds in the year 1919, as aforesaid, in favour of defendants 9 and 10 in respect of a portion of her husband's estate claiming the property as her own. The two sale-deeds of the year 1919 are, therefore, claimed to have been executed in exercise of her rights as the only heiress to her husband, who was absolutely entitled to the property, to the exclusion of the other co-sharers. It was further contended that the heirs never claimed any account from the Mt., and, as the area was more than 4 acres, it should be presumed that the dower debt of Rs. 400 would have been satisfied many years ago, and that, therefore, the Mt. was holding the estate not in lieu of her dower debt, but as an absolute owner. Reliance was placed upon the decision of a single Judge of this Court in the case of "Haji Mutsaddi v. Habib Mian", 39 Ind Gas 579 (Pat) where the learned Judge has made the following relevant observations:

"..... but I base it (my decision) 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....."

In my opinion, the observations quoted above made by the learned single Judge of this Court are of very doubtful authority. In that case, in my opinion, with all due respect to the learned Judge, enough consideration was not given to the principles referred to above, namely, that the possession of a co-sharer is not adverse until those co-sharers have been told in unequivocal terms that the co-sharer was asserting a title hostile to them; and secondly, the principle that where possession can be referred to a legal title, the Courts do not give effect to the claim that the possession, was hostile to the true owner.

6. It was next contended that in any view of the matter the suit, in so far as it

related to the lands sold to defendants 9 and 10 in the year 1919, must be held to be barred by limitation as the transferees held the estate adversely not only to the Mt. herself but to the plaintiffs also. This argument is attractive enough, but does not bear scrutiny and, in view of the decisions of a Division Bench of this Court in the case of "Abdur Rahman v. Wali Mohammad", 2 Pat 75, must be negated. In that case, their Lordships have held that a transfer of property by a widow who has been holding the property in lieu of her dower debt is valid during her life-time, and that the limitation against the true owners would begin only upon her death. Hence the limitation in the present case would begin to run against the plaintiffs only after the death of Mt. Bandhui. As that event happened very much within twelve years of the suit, it must be held that no question of limitation arises in this case. The other transfer in favour of the eighth defendant was made in October 1934, and, as the suit was commenced in March 1946, it is manifest that that transaction also is within the period of limitation.

7. As the points of law urged in this appeal all fail, it must be dismissed; but, in the circumstances of this case, there will be no order as to costs.

Rai, J.—I agree.