

Kitun Bibi and ors. Vs. Bibi Rojni and ors.

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Court : Jharkhand

Decided On : Apr-15-2004

Reported in : [2004(2)JCR457b(Jhr)]

Judge : Vishnudeo Narayan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 23, Rule 1(4)

Appeal No. : A.F.A.D. No. 81 of 1998 (R)

Appellant : Kitun Bibi and ors.

Respondent : Bibi Rojni and ors.

Advocate for Def. : Satyendra Singh and; R. Satyendra, Advs.

Advocate for Pet/Ap. : P. Gangopadhyay and; Shailendra Kumar Singh, Advs.

Disposition : Appeal allowed

Judgement :

Vishnudeo Narayan, J.

1. This appeal at the instance of the defendants appellant has been preferred against the impugned judgment and decree dated 24.02.1988 and 29.2.1988, respectively passed in Title Appeal No. 53 of 1985 by Shri Baleshwar Prasad Singh, 1st Additional District Judge, Giridih whereby and whereunder the appeal

was allowed and the impugned judgment and decree passed in Title Suit No. 18 of 1982/2 of 1985 by Shri Ranjit Prasad Singh, 3rd Additional sub-Judge, Giridih were set aside and the suit of the plaintiffs respondent was decreed and title of the plaintiffs respondent and proforma defendant Nos. 15 to 21 was declared and their possession over the same was confirmed.

2. The plaintiffs respondent have filed the said suit for declaration of their title along with proforma defendant Nos. 15 to 21 and confirmation of their possession and in the alternative for recovery of possession in respect of the suit plot Nos. 33, 35, 36, 38 and 39 appertaining to dar-raiyat khata No. 4 under raiyati khata No. 6 situate in Village Bamandiha, P.S. Gande, District Hazaribagh now Giridih.

3. The case of the plaintiffs respondent, in brief, is that the suit plots aforesaid appertain to raiyati khata No. 6 which stands recorded in the name of Gangu Mian, their ancestors and khata No. 4 in respect of the aforesaid plots is the dar-raiyati khata recorded in the name of Lalu Mian and Jairam Mian having equal rights under raiyati khata No. 6 and the defendant appellant are the descendants of Jairam Mian aforesaid Lalu Mian aforesaid has died issueless without any heirs and after his death his half interest in respect of the suit plots under the dar-raiyati khata No. 4 came in direct possession of Gangu Mian, the recorded tenant of khata No. 6 and he continued in possession over the same and, therefore, Jairam Mian due to his inability to pay the rent regarding his share in the suit plots orally surrendered the said plots in favour of Gangu Mian who resumed possession over the suit plots and became the absolute owner of the entire suit plots and he paid the rent of the entire suit plots to the then landlord till his life and got rent receipts and remained in possession there on peacefully openly continuously, adversely and as of right and he exercise various acts of possession over the same and after the death of Gangu Mian his only son Ramjan Mian succeeded the suit plots and continued in possession over the same exclusively openly, continuously peacefully and as of right and he paid the rent to the then landlord and got rent receipts and after the vesting of the estate, he paid rent to the State and got the rent receipts in respect of the suit plots. After the death of Ramjan Mian his heirs, i.e. plaintiffs respondent succeeded the suit plots besides other plot of khata No. 6 and came in possession over the same and they have converted Partikadim plot No. 36 into 1st

class paddy field and Dhani land Nos. 3 and 2 of plot No. 38 and 35 respectively into class I paddy field by their hard labour and huge expenses about 30 years ago and Ramjan Mian in his life time had also converted and land of suit plot Nos. 39 and 33 into class I paddy field and the descendants of Ramjan Mian remained in possession of all the suit plots continuously, openly, peacefully as of right and to the knowledge of the defendants appellant and to the knowledge of the whole world and they have also perfected their title by adverse possession and they have also paid rent to the State of Bihar and got the rent receipts Parmali Mian one of the sons of Ramjan Mian had sold the land of his share of khata No. 6 by virtue of a registered sale deed dated 18.2.1965, in favour of Mangru Mian and Khalil Mian and the vendees aforesaid came in possession over the same and they stand mutated over the same and they are paying rent in respect thereof and getting rent receipts and after the death of the vendees their descendants are In possession of the said land. The further case of the plaintiffs-respondent is that Wazir Mian, the other son of Ramjan Mian aforesaid, has transferred his interest in the suit land in favour of proforma defendant respondent Bibi Lal Banu In lieu of her dower debt by virtue of a registered deed dated 2.3.1976, and said Bibi Lal Banu also stands mutated in respect thereof paying rent to the State of Bihar and getting rent receipts. It is also alleged that dar-raiyati right is neither heritable nor transferable under the provisions of the Chottanagpur Tenancy Act and there is also no custom in village Bamandiha or in the neighbouring villages of the said village to the effect that after the death of the recorded dar-raiyati his interest shall devolve upon his heirs and legal representatives and thus the descendants of Jairam Mian aforesaid did not acquire any right and title in the dar-raiyati suit plots. There was a proceeding under Section 144 of the Code of Criminal Procedure at the instance of original defendant appellant No. 1 Ashim Mian (who has died during the pendency of this appeal) between the parties and said proceeding has terminated in favour of the of the defendants appellant and against the plaintiffs respondent and proforma defendants respondent and a clog has been cast on the title of the plaintiffs respondent and hence this suit.

4. The case of the defendants appellant, inter alia, is that the suit plots stands recorded in the name of Lalu Mian and Jairam Mian in dar-raiyati khata No. 4 under raiyati khata No. 6 and Lalu Mian aforesaid died few years after the

cadastral survey settlement operation in jointness with Jairam Mian who being a co-sharer came in cultivating possession over the entire share of Lalu Mian and began to cultivate all the suit plots recorded under the dar-raiyati khata No. 4 and he continued in cultivating possession over the same openly peacefully without any let or hindrance from any corner to the knowledge of the whole world including Gangu Mian and as of his right and he used to pay rent to Gangu Mian and got rent receipts and he has perfected his right and title over the same for being in possession for more than 12 years and it is false to say that Gangu Mian, the recorded tenant of khata No. 6 had come in possession of half of the land of the aforesaid suit plots after the death of Lalu Mian. It is also false to say that Jairam Mian had surrendered his share in the suit plots at any point of time to Gangu Mian and the case of possession of Gangu Mian as set up by the plaintiffs respondent is totally false. It is alleged that after the death of Jairam Mian his descendants are in cultivating possession of all the suit plots. Their further case is that as per the custom prevalent in village Bamandiha and the surrounding villages, the dar-raiyati interest in the lands of dar-raiyat is heritable and as such the descendants of Jairam Mian came in possession over dar-raiyati suit plots of khata No. 4 and they also remained in cultivating possession over the suit plots openly, peacefully, continuously to the knowledge of the whole world including the plaintiffs respondent and as of their own rights and they have perfected their title in respect thereof any they have paid rent to Gangu Mian and after the vesting they are paying rent to the State and getting rent receipts. Their case further is that the recorded dar-raiyats in their life time have reclaimed the lands of suit plot Nos. 36,39,33 and 38 after investing a huge amount and labour and the heirs of Jairam Mian after his death completed the work of reclamation by dint of their labour at the expense of huge amount and have converted these plots into paddy growing lands and thus they have acquired raiyatt kaiyami kodkar rights also in respect thereof. Their further case is that the sale deed dated 18.2.1965, and registered deed of Dan Mohar dated 2.3.1967, are simply paper transactions and the transferees are not in possession over the suit plots under the aforesaid deeds. The further case of the defendants appellant is that the suit is barred by law of limitation, adverse possession ouster, acquiescence and res judicata and the suit of the plaintiffs respondent is one in the series of the coercive measures which the

plaintiffs respondent have been adopting in the time of their predecessors since last 36 years and in all such litigations they have failed in their attempt and the defendants appellant are in peaceful possession over the suit plots and prior to them their ancestors were in possession over the same, lastly it has been contended that the proceeding under Section 144 of the Cr PC was initiated at the instance of the plaintiffs respondent which has been decided in favour of the defendants appellant.

5. In view of the pleadings of the parties the learned Trial Court has framed the following issues for adjudication in this case :

- (1) Is the suit maintainable in the present form?
- (2) Have the plaintiffs cause of action for the suit?
- (3) Is the barred by limitation, adverse possession as well as ouster?
- (4) Is the suit bad for non-joinder and mis-joinder of parties?
- (5) Is the suit hit by provision of Section 7(ii)C of the Court Fees Act?
- (6) Is there the custom the dar-raiyatt right being inheritable and transferable in the suit village as well the neighbouring village?
- (7) Are the plaintiffs entitled to relief claimed in the suit?

6. In view of the oral and documentary evidence on the record while deciding issue Nos. (3) and (6) the learned Trial Court has held that the right of under raiyat is neither heritable nor transferable unless there is a custom or usages contrary to that and in this case the defendants appellant have failed to prove by cogent evidence the prevailing custom under which under raiyat inherit the right of their deceased predecessor and thus the defendants appellant cannot be said to have inherited the suit plots. It has further been held that the defendants appellant and prior to them their predecessors have always been coming in possession of the suit plots and the plaintiffs respondent and their ancestor did not come in possession over the suit plots for any period of time and since 1938 or 1939 the possession of the defendants appellant and their predecessors has become

adverse to the title of the plaintiffs respondent and their predecessor and as such the defendants appellant have acquired title of raiyat over the suit plots by adverse possession and further this suit is also barred by limitation. It has also been held that after the death of recorded dor-raiyati Lalu Mian in the year 1938 a suit ought to have been brought by the heirs of the recorded tenant and in fact a suit was brought in the year 1945 but dismissed and thus adverse pos-session of the defendant or their predecessor in interest is clearly supported from the year 1939 or 1940. In view of the findings above the learned Trial Court dismissed the suit of the plaintiffs.

7. Aggrieved by the judgment and decree of the Trial Court the plaintiffs preferred Title Appeal No. 53 of 1985. The lower appellate Court on re-appraisal and re-appreciation of the evidence oral and documentary on the record allowed the appeal and set aside the judgment of the Trial Court. The learned appellate Court has held that there is no dispute on the legal position that dor-roiyati interest is neither heritable nor transferable except by custom and the defendants have felled to establish that there is custom like that in that village and the possession of the defendants over the suit plots was permissive one and in such a case the defendants cannot claim adverse possession perfecting their title and Ext. C is a suspicious document and Ext. F the order passed in Title Suit No. 46 of 1945, does not evidence the fact that the said title suit was in respect of the suit plots in the absence of the plaint of the said suit having been admitted into evidence due to the latch on the part of the defendants and furthermore they have also not given a definite date as to from which date they are claiming adverse possession and in this view of the matter their plea of adverse possession cannot be accepted. It has also been held that the plaintiffs have got right title and interest over the suit land and they are coming in possession over the same whereas the defendants are not in possession over the sum and they have also not acquired any title over the plots by adverse possession.

8. This Court while admitting the appeal for hearing formulated substantial question which runs thus :

'In view of the fact that in the earlier suit, the predecessor in interest of the respondents had pleaded illegal possession by the predecessor in interest of the appellants from 1945. Whether the Court below could have held that the suit was barred by limitation?'

9. Assailing the impugned judgment it has been submitted by the learned counsel for the defendants appellant that the learned appellate Court below has committed a manifest error in rejecting the case of defendants appellant perfecting their title over the suit plots by adverse possession since the death of Lalu Mian and Jairam Mian the recorded under raiyats and has not properly construed Ext. C and Ext. F read with the averments made In para 9 of the written statement specially when the plaintiffs respondent have not controverted in clear terms in his evidence regarding the existence of earlier Title Suit No. 49 of 1945 in respect of the suit plots filed by Ramjan Mian for declaration of their title and recovery of possession in respect thereof and the said suit has been dismissed as withdrawn with a liberty to file a fresh suit but Ramjan Mian the ancestor of the plaintiffs respondent did not file any fresh suit in respect thereof and the admission of the possession so the defendants appellant over the suit plots continuously peacefully without let or hindrance to the knowledge of all including the plaintiffs respondent and his predecessors in interest with hostile title clearly established the fact that the defendants appellant have perfected their title by way of adverse possession in respect of the suit-plots and thus the suit in hand of the plaintiffs respondent is barred by limitation and also under Order XXIII, Rule a (4) of the Code of Civil Procedure. It has also been submitted that the learned appellate Court has also erred in construing the ratio of the case of Johan Uraon (Ekka) and Anr. v. Sitaram Sao (Bhagat) and Ors., 1963 (2) BLJR 623, relied upon by the plaintiffs respondent before him in which It has been observed that:

'.....It is well settled that the interest of an under raiyati with occupancy status is not heritable under the law. It may be heritable by custom. The custom of heritability has not been established. That being so, the defendants who are heirs of dar-raiyat acquired no interest in the disputed land because the right which the dar-raiyat had acquired terminated on his death. The status of the defendant is nothing more than that of a trespasser.'

It has further been contended that the possession of the defendants appellant over the suit plots since the death of Jairam Mian and Lalu Mian was that of a trespasser and by continuing in possession over the same for several 12 years they have perfected their title by adverse possession and a suit filed by Ramjan Mian for their ejectment in the year 1945 having been dismissed as withdrawn further established the fact of the possession of the defendants appellant over the suit plots since the death of Lalu Mian who has died about 5 or 6 years prior to the institution of the said suit and thus the finding of the learned appellate Court regarding the possession of the plaintiffs respondent or their predecessor interest over the suit plots is erroneous based on misreading of the evidence on the record and thus the impugned judgment is unsustainable.

10. In contra, it has been submitted that Lalu Mian and Jairam Mian are under raiyat regarding the suit plots recorded in dar-raiyati khata No. 4 under raiyati khata No. 6 recorded in the name of Gangu Mian, the ancestor of the plaintiffs respondents and after the death of Lalu Mian and also on surrender by Jairam Mian of the suit plots said Gangu Mian resumes possession over the son (sic) descendants are in possession of the suit land as per their rights and the dar-raiyati interest is neither heritable nor transferable except by custom and both the Court below have concurrently held that the defendants appellant have failed to prove the existence of any custom contrary to the said settled principle of law and since then Gangu Mian and his descendants were in continuous uninterrupted possession over the suit plots and when a clog was cast upon their title by virtue of an adverse order in a proceeding under Section 144 of the Code of Criminal Procedure they have come before the Court for declaration of their title and confirmation of possession over the suit plots and in the alternative for recovery of possession and in this view of the matter the suit of the plaintiffs respondent cannot be said to be barred by law of limitation and question of perfecting title by adverse possession by the defendants appellant also does not arise in this case and thus there is no illegality in the impugned judgment. In support of his contention reliance has been placed upon the ratio of the cases of Chandrika Prasada v. Bombay Baroda and Central India Ry. Co., AIR 1935 PC 59; Amru v. Santa and Ors., AIR 1935 Lahore 441; Johan Uraon (Ekka) and Anr. v. Sitaram Sao (Bhagat) and Ors., 1963 (2) BLJR 623; State of Rajasthan v. Harphool Singh,

(2000) 5 SCC 652; Marwari Kumhar and Ors. v. Bhagwanpuri Guru Ganeshpuri and Anr., (2000) 6 SCC 735, and Sandhya Rani Devi and Ors. v. Gour Chandra Panda and Ors., 2004 (1) JCR 98 (Jhr).

11. It will admit of no doubt that the suit plots appertain to dar-raiyati khata No. 4 recorded jointly in the name of Lalu Mian and Jairam Mian having half share each under raiyati khata No. 6 which stands recorded in the name of Gangu Mian for which a reference is made to Ext. D and Ext. 5 the cadastral Survey Records of Right. Admittedly Lalu Mian had died issueless. The defendants appellant are the descendants of Jairam Mian aforesaid. The defendants appellant claim to have come in possession over the suit plots after their demise. It has been observed in the case of Sandhya Rani Devi and others (supra), that the right of a under raiyat is neither transferable nor heritable unless there is a custom or usage contrary to that. The right of a under raiyat survives till his life and it extinguishes on his death. In the case of Johan Uraon (Ekka) and another, (supra), it has been observed that :

'.....it is well settled that the interest of an under raiyat with occupancy status is not heritable under the law. It may be heritable by custom. The custom of heritability has not been established. It must be held, therefore, that the dar-raiyati interest with occupancy right is not heritable. That being so the defendants who are heirs of dar-raiyat acquired no interest in the disputed land because the right which the raiyat had acquired terminated on his death. The status of the defendants is nothing more than of a trespasser.'

Both the Courts below have also held that a dar-raiyati interest is neither heritable nor transferable except by custom and the defendants appellants have failed to establish this fact that there is custom like that in their village. Therefore, this fact stands finally concluded. The possession of the defendants appellant over the suit plots recorded under the dar-raiyati khata No. 4 shall be deemed to be to that of a trespasser. There is averment in para 9 of the written statement of the defendants appellant

which runs thus :

'.....that the suit is also barred by res judicata. The present suit is one in the series of coercive measures which the plaintiffs have been adopting in the time of their predecessors since last 36 years and in all such litigations they have failed in their attempts and on the contrary the defendants are in peaceful possession over the lands in dispute and prior to these defendants their ancestors were in possession.'

Plaintiffs respondent No. 9 who has taken oath as PW 1 in this case has not at all controverted in his evidence the averments made in para 9 of the written statement referred to above. The suit at hand has been filed in the year 1982 and the averments made in para 9 of the written statement referred to above that the plaintiffs have been adopting coercive measures from the time of their predecessors since last 36 years and in all such litigations they have failed in their attempts clearly shows that dispute between the parties had arisen in the year 1945-46 Ext. F is the certified copy of the order dated 14.3.1946 passed in Title Suit No. 40 of 1945 by Munsif Giridih Ramjan Mian and six Ors. v. Karmali Mian and four Ors., whereby the petition of the plaintiff to withdraw the said suit with permission to file a fresh one was allowed. The order passed therein runs thus :

'.....I am satisfied that suit shall fail on account of formal defects. Hence the plaintiffs are permitted to withdraw from the suit with liberty to bring a fresh one in the same subject asked on condition of their being costs to the contesting defendants at the ex-parte scale by 14.7.1946 falling in which the suit shall stand dismissed.'

The certified copy of the plaint and the petition dated 14.5.1946, for withdrawal of the said suit have been brought on the record on behalf of the defendants appellant but these documents could not be admitted into evidence to their behalf in spite of the order of the Trial Court which was subsequently recalled due to the latch on the part of the defendants appellant. However, Ext. C is the notice dated 21.2.1945, sent to the defendants of Title Suit No. 40 of 1945 aforesaid before its institution by the Advocate on behalf of Ramjan Mian calling upon them to deliver possession of suit plot Nos. 36, 38, 39, 33 and 35 appertaining to khata No. 6. This notice was filed in the said title suit and it bears the seal of the Court of

Munsif, Giridih and it shows that this notice was filed in the month of December, 1946 in the said suit. In view of the seal the Court of Munsif, Giridih this document cannot be said to be a suspicious document. It, therefore, appears that the defendants appellant were in unlawful possession as trespasser over the suit plots in the year 1945 when Title Suit No. 40 of 1945 was filed. Even after withdrawal of the said suit with liberty to file a fresh suit the plaintiffs respondent have not filed a fresh suit in respect thereof. Order XXIII, Rule 1(4) is relevant which is quoted below:

'1(4) Where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdrawn from a suit or part of a claim without the permission referred to in Sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from institution any fresh suit in respect of such subject matter or such part of the claim.'

The plaintiffs respondent, not having filed a fresh suit in view of the order contained in Ext. F, stand precluded from instituting a suit subsequently after a lapse of several decades in respect of such subject matter or such part of the claim and, therefore, the suit at hand filed by the plaintiffs respondent is barred under the said provision. The plea of bar under Order XXIII, Rule 1(4) is a pure question of law and that can be debated at any stage of suit including appeal and affects the jurisdiction of the Court as it goes to the root of the matter and can be put forward at any stage of the suit or appeal. It further appears from Ext. C read with Ext. F that the defendants appellant were in unlawful possession of the suit property may be as trespasser when Title Suit No. 40 of 1945 was filed. There is no evidence on the record to show that at any point of time, therefore, the plaintiffs respondent have got back or resumed the possession over the suit plots and it shall be presumed that the defendants appellant continued in possession over the suit plots since they came in possession thereon as trespasser continuously, peacefully uninterruptedly and without any let or hindrance to the

knowledge of all including-the plaintiffs respondent with hostile title. Therefore, the finding, of the learned appellate Court below that the plaintiffs respondent continued in possession over the suit plots does not hold good is equally erroneous. It has been observed in the case of Chandrika Prasad, (supra), that where, after the expiry of the period fixed in a lease the tenant continued in possession as tenant on same terms expressed in the lease he cannot claim adverse possession and the lessor can recover the property back. Here the suit at hand there is no jural relationship between the parties as lessor and lessee I have already stated above that the possession of the descendants of a dar-raiyat over dar-raiyati land after the demise of the recorded under raiyat is that of a trespasser. Therefore, the ratio of this case is of no help to the defendants respondent. In the case of Amru, (supra), it has been observed that possession which is permissive at its inception cannot be converted into adverse possession unless some overt acts have been done by the tenant which would have the effect of their denying the title of the landlord. Here in the case at hand the possession of the defendants appellant over the suit plots is of a trespasser after the death of the under raiyat. The possession of the defendants appellant, therefore, cannot be termed as permissive possession. The learned appellate Court below has, therefore, erred in relying upon the ratio of the case in coming to the finding regarding the possession of the plaintiffs respondent over the suit plots. The said ratio also does not apply in this case. I have already stated above that after the withdrawal of Title Suit No. 40 of 1945 no fresh suit has been filed within the statutory period by the plaintiffs respondent or their predecessor in interest for the ejectment of the defendants appellant from the suit plots and since then the defendants appellant continued in possession over the suit plots and there is concrete proof of open hostile and continuous possession of the defendants appellant over the suit plots on the record which substantiates the claim of perfection of title of the defendants appellant by adverse possession. The learned Trial Court has elaborately dealt with the evidence of possession of the defendants appellant in respect of the suit plots. The reasonings assigned by the appellate Trial Court disbelieving the said evidence are not tenable and equally devoid of substance and in this view of the matter the ratio of the case of State of Rajasthan, (supra), and Marwari Kumhar, (supra), also have no relevancy in the facts and

circumstances of this case. The learned appellate Court below has committed a manifest error in declaring the right, title and Interest of the plaintiffs respondent over the suit land as well as their possession thereon. Thus, the impugned judgment suffers with illegality.

12. The defendants appellant have perfected their title in respect of the suit plots by adverse possession and the suit of the plaintiffs respondent is barred by limitation and also under Order XXIII, Rule 1(4) of the Code of Civil Procedure Viewed thus the plaintiffs respondent are not entitled to get any relief in the suit.

13. There is merit in the appeal and it succeeds. The impugned judgment and decree of the learned appellate Court below are hereby set aside. The appeal so allowed. The judgment and decree of the Trial Court are hereby restored. No order as to costs in the facts and circumstances of this case.

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