

## **PRIVY COUNCIL**

Adyanath Ghatak

Vs.

Krishna Prasad Singh

P.C.A.No.74 of 1946

(Lords Uthwatt, Morton of Henryton, Reid Sir Madhavan Nair and Sir John Beaumont JJ.)

07.12.1948

### **JUDGMENT**

#### **SIR JOHN BEAUMONT J.**

1. This is an appeal from a judgment and decree dated 21st April 1943, of the High Court of Judicature at Patna, which reversed a judgment and decree dated 27th May 1940, of the Subordinate Judge, Dhanbad, Bihar.
2. The suit out of which this appeal arises was commenced on 11th January 1939, in the Court of the Subordinate Judge, Dhanbad, Bihar, by respondent 1, who will hereafter be referred to as "the plaintiff," against the appellant, who will hereafter be referred to as "defendant 1," and respondent 2, who will hereafter be referred to as "defendant 2." The plaintiff claimed a declaration of his title to the land in suit and a decree for possession against defendant 1, and other relief which is not material to the present appeal. The property in suit was a plot No. 2192, with buildings thereon, situate in the district of Manbhum, Pargana Jharia.
3. The claim of the plaintiff against defendant 1 was based on the contention that defendant 1 was his tenant and estopped from disputing his title to the land in suit. The learned Subordinate Judge, whilst not questioning the general proposition of law, embodied in India in section 116. Evidence Act, which precludes a tenant of immovable property during the continuance of the tenancy from denying that his landlord had at the beginning of the tenancy a title to such property, considered that the estoppel had been terminated by the eviction of the plaintiff and defendant 1 by title paramount. In appeal, the High Court agreed that eviction by title paramount would terminate the estoppel, but considered that there had been no such eviction, and

that defendant 1 was estopped from disputing the title of the plaintiff. Accordingly the High Court decreed the plaintiff's suit against defendant 1. It is apparent that the difference between the Courts in India arose upon the facts proved and the inferences to be drawn from them, and this is the matter which falls for determination in the present appeal.

4. Prior to the commencement of the suit the plaintiff claimed to be titled to the property in suit which formed part of the Jharia Raj estate. Defendant 2 in Suit No. 43 of 1919, which originated in the Subordinate Court of Alipore and was finally decided in appeal by His Majesty in Council, had established his title as proprietor of the Jharia Raj estate including the property in suit. Notwithstanding this the plaintiff had got his name recorded as the owner in possession of the property, plot No. 2192, in the local Record of Rights on 26th January 1925.

5. On 19th August 1925, defendant 2 filed Suit No. 57 of 1925 (hereinafter referred to as "the 1925 suit") in the Court of the Subordinate Judge of Dhanbad, Bihar, against the plaintiff and other parties praying for a declaration of his title to (inter alia) plot No. 2192, for vacant possession of such plot and other plots, and for cancellation of the entry of the plaintiff's name in the Record of Rights. On 14th September 1926, judgment was given in the 1925 suit, ex parte as against the plaintiff who did not appear at the hearing. The learned Judge made a declaration that defendant 2 was entitled to the property in suit and to get vacant possession of the same. Thereafter, the plaintiff applied under the provisions of the Code of Civil Procedure to set aside the ex parte decree made against him in the 1925 suit. This application was dismissed on 3rd May 1927, and an appeal from the order of dismissal was dismissed on 24th July 1928,

6. On a date which has not been definitely determined but which was between the passing of the ex parte decree of 14th September 1926, and the dismissal of the application by the plaintiff to set aside such decree, the plaintiff granted to defendant 1 an oral monthly tenancy of the property in suit, plot No. 2192, at a rent of Rs. 30 per month.

7. Some time in 1927, a receiver of the property was appointed by the High Court at Calcutta, and the receiver was substituted as a decree-holder for defendant 2 in the 1925 suit. On 29th November 1927 the receiver applied to the Court to execute the decree of 14th September 1926, The petition for execution prayed for getting symbolical possession of various plots including plot No. 2192.

8. On 24th February 1928, the Court issued a writ of execution to the Court bailiff directing him to put the receiver in possession of the properties covered by the decree and authorising him to remove any person bound by the decree who might refuse to vacate the property. On 27th February 1928, the bailiff gave symbolical possession intimating the contents of the writ by beat of drum. In his report to the Court, the bailiff stated that on certain plots, including plot No. 2192, people were residing and as the outer doors were closed he could not give delivery of possession by having the houses vacated. On the same day, the employees of the decree-holder on his behalf signed a receipt for delivery of possession of plot no. 2192. As defendant 1 was in occupation of plot No. 2192 as a tenant of the judgment-debtor, their Lordships think that the Court bailiff was justified in giving symbolical possession under Order 21, Rule 86, and that thereby the possession of the plaintiff and defendant 1 was effectively terminated on 27th February 1928: See *Thakur Sri Radha Krishna, Chanderji v. Ram Bahadur*,<sup>1</sup>

9. The main difficulty in the case lies in determining what happened after that date and what legal position resulted. In his evidence defendant 1 stated that on the day after delivery was made as aforesaid he approached defendant 2 who permitted him to remain in occupation of the house in suit and said that he would see to it later on. Defendant 1 says that he also approached the office of the receiver who also permitted him to occupy the house. He admits that after 27th February 1928, he continued to pay the sum of Rs. 30 per month to the plaintiff, but his case is that he paid that sum, not as rent, but out of fear of the plaintiff. The learned Subordinate Judge believed this story, but the High Court rejected it, and held that the Rs. 30 per month were paid as rent, and that accordingly defendant 1 remained the tenant of the plaintiff. On 28th December 1937, defendant 2 granted to defendant 1 a permanent lease, exhibit G, of the plot no. 2192 at an annual rent of Rs. 51. Thereafter defendant 1 remained in occupation of the property, and ceased to pay the sum of Rs. 30 per month to the plaintiff. The learned Judges of the High Court considered that the taking of this lease amounted only to a voluntary attornment to defendant 2, and did not constitute eviction by title paramount. The difficulty in ascertaining the facts is enhanced by the attitude adopted by defendant 2 who put in a written statement in which he admitted the claim of the plaintiff against defendant 1, and alleged that the lease, Ex. G, was obtained by undue influence and fraud on the part of defendant 1. Defendant 2 did not give evidence, and the suit was dismissed against him as also was the appeal to the High Court. He has not appeared on this appeal.

10. In their Lordships' view the position is this. The original tenancy between the plaintiff and defendant 1 was determined on 27th February 1928, by execution of the decree of 14th September 1926. Their Lordships see no reason to reject the story of defendant 1 that immediately after this date he got permission from defendant 2 and from an official in the office of the receiver to remain in occupation of the property in suit, a story which was not contradicted by defendant 2 or the receiver, and was believed by the trial Judge. If this story be accepted then defendant 1, after 27th February 1928, was in occupation of the property as licensee of defendant 2 or the receiver. The payment of Rs. 30 per month to the plaintiff no doubt creates a difficulty. If this transaction stood alone, it would justify an inference that defendant 1 was a monthly tenant of the plaintiff, and, since the old tenancy had been determined by eviction by title paramount, a fresh tenancy would have to be inferred commencing after 27th February 1928. In their Lordships' opinion however any such inference would be inconsistent with the facts proved. After the execution of the decree of 14th September 1926, both parties knew that the plaintiff had no interest in the property, and defendant 1 had obtained a right to occupy from the true owner. Defendant 1 may well have been ready to continue to pay the amount of his former rent to the plaintiff in order to keep him quiet and prevent him from attempting to interfere with the grant of the lease which defendant 1 hoped to obtain from defendant 2. The fact that in this suit defendant 2 is siding with the plaintiff against defendant 1 suggests that the latter's fear of the influence of the plaintiff may not have been without justification. At any rate, whatever the reason for the payment, their Lordships are satisfied that after 27th February 1928, the payment of the sum Rs. 30 by defendant 1 to the plaintiff was not a payment of rent, that defendant 1 was in occupation as licensee of defendant 2 or the receiver until 1937 when the lease, Ex. G, was granted under which defendant 1 remained in occupation. On this view of the facts, no question of defendant 1 being estopped from disputing the title of the plaintiff as his landlord arises since the plaintiff was not his landlord at any time after 27th February 1928, when the original tenancy was determined.

11. In the case of the plaintiff, as respondent 1 delivered in this appeal, he claimed that even if he was not entitled to possession of the property in suit, he was nevertheless entitled to remove the materials with which the house on the property had been constructed. Assuming that the house in question was erected by the plaintiff at his own expense, any right which he had to remove the house or the materials of which it was constructed should have been claimed in the 1925 suit as against defendant 2. The decree in that suit drew no distinction between the land and the house erected thereon,

and symbolical possession was given in execution of the decree of the whole plot. Whatever right the plaintiff may have had originally, the claim to remove the materials with which the house was erected has long since lapsed.

12. For these reasons, their Lordships will humbly advise His Majesty that this appeal be allowed, that the decree of the High Court of Judicature at Patna dated 21st April 1943, be set aside, and that the decree dated 27th May 1940, of the Subordinate Judge, Dhanbad, Bihar, be restored. Respondent 1 must pay the costs of the appellant in the appeal to the High Court and the costs of this appeal to His Majesty.

Appeal allowed.

Cases Referred.

1. 22 CWN 330 : (AIR 1917 PC 197).

2.