

Ram Ekbal Rai and Others

Vs

Jaldhari Pandey

Criminal Appeal No. 74 of 1969

(H. R. Khanna. J. M. Shelat JJ)

16.02.1972

JUDGMENT

SHELAT, J. -

1. This appeal is by special leave and is directed against the dismissal by the High Court of Patna of a Criminal Revision Application by the appellants against their conviction under Sections 379 and 143 of the Penal Code ordered by the Trial Magistrate and confirmed by the First Additional Sessions Judge, Arrah.
2. The respondent (complainant) was the purchaser of plot No. 811 in village Chakni, District Shahabad, at an auction sale held in 1954 in execution proceedings arising from a rent suit filed by Dumraon Raj against its tenant, Ram Dheyant Teli. Ram Dheyant died leaving him surviving two widows, Mst. Rekhia and Mst. Sita Devi. The respondent claimed that in pursuance of the said auction sale he applied to the court for possession and physical possession was delivered to him through the court's bailiff on September 24, 1954. According to him, he remained in possession of the said plot till the date of the incident in question, that is, March 24, 1962. A day prior to that day, i.e., on March 23, 1962, he had applied to the police that he expected trouble from the appellants, and therefore, the police officer had stationed in the said plot two persons, Kesho Prasad (P.W. 3) and Sheo Lakhan Ahir (P.W. 2) to watch the crop sown by him. The respondent's case was that early in the morning on March 24, 1962, the appellants together with a large number of persons differently armed, came to the field and notwithstanding protests by P.W. 3 and his said companion, forcibly harvested the standing crop worth about Rs. 500/- and took it away.
3. On these allegations the appellants were tried under Sections 379 and 143 of the Penal Code. The Trial Magistrate held (a) that the plot was in possession of the respondent on the date of the incident, (b) that he had sown the said crop, and (c) that the appellants forcibly took away the said crop. On these findings he convicted the appellants under Sections 379 and 143. These findings were confirmed by the Additional Sessions Judge in an appeal by the appellants, who also upheld the said order of conviction and sentence. The High Court dismissed the revision application filed by the appellants simply on the ground that it could not interfere with concurrent findings of fact given by the Trial Magistrate and agreed to by the Additional Sessions Judge.
4. In arriving at the aforesaid findings, both the Trial Court as also the Additional Sessions Judge appear to have been impressed by the evidence of the respondent and Kesho Prasad (P.W. 3) that the respondent was in actual possession of the field on the day of the incident. This conclusion in turn was arrived at from the writ of possession issued in the execution proceedings taken out by Dumraon Raj after its suit had been decreed, the report of the bailiff on the said writ that he had

delivered possession of the plot in question to the respondent, the respondent's endorsement thereon acknowledging delivery of possession to him, and lastly, production by the respondent in the Trial Court of certain rent receipts from which it was deduced that those receipts must have been handed over to the respondent at the time when possession of plot No. 811 was delivered to him.

5. Ordinarily, this Court in an appeal under Article 136 of the Constitution is reluctant to reopening concurrent findings of fact arrived at by the Trial Court and the appellate Court. In this particular case, however, we have come to the conclusion after having been taken through certain court proceedings and other documentary evidence that attention properly due to that evidence was not paid, resulting in the misjudgment of the respective positions of the parties.

6. The appellants' case all throughout was that although the plot in question was auction-sold in pursuance of the decree in the aforesaid rent suit, the second widow of the said Ram Dheyani Teli, Mst. Sita Devi, had consistently asserted right from the beginning that the said decree was not binding upon her as she had not been joined as a party to the suit after the death of her husband, that although a writ for possession was issued in execution proceedings following the said decree, only symbolic, as against actual possession was delivered to the respondent, and that the said plot all throughout remained in her possession and the appellants had been cultivating the said plot as her sikmidars. The appellants having thus made a claim to the possession of the plot and the crop said to have been harvested by them as having been cultivated by them, there was no question of their having stolen the said crop or of their being guilty under Section 379 of the Penal Code. It is impossible to say, as we shall presently point out, that their case was without any basis.

7. Soon after the said plot was put to court auction and the respondent had been declared the purchaser of it, Mst. Rekhia, the widow of Ram Dheyani filed an objection petition No. 115 of 1955 under Section 47 of the Code of Civil Procedure for setting aside the said auction sale. One of the grounds taken in support of her application was that Mst. Sita Devi, the other widow of Ram Dheyani, was not made a party to the said rent suit and that even though she, Mst. Rekhia, was impleaded the decreeholder had managed by "suppressing" the summons to obtain an ex parte decree. In his reply to this application, dated February 4, 1956, the respondent impliedly admitted that Mst. Sita Devi had not been made a party either to the said rent suit or the execution proceedings which followed the passing of the decree therein by averring in Para (6) of his said reply that "only the name of the applicant (Mst. Rekhia) stood recorded in the Shirista (Office) of the Proprietor", that is Dumraon Raj. It would thus appear that in the absence of Mst. Sita Devi having been impleaded as a party to the said suit, the decree passed therein prima facie was not valid and binding upon her.

8. The writ possession issued in execution case No. 60 of 1954, dated September 13, 1954, undoubtedly shows that the court had issued an order upon the bailiff to deliver possession of the said plot to the respondent. The return of service made by the said bailiff, dated September 19, 1954, contained an endorsement by the respondent to the effect that he had been given delivery of possession by the bailiff after a proclamation had been made. But these documents would not conclusively show that physical possession was given to the respondent or that the respondent had then got into and continued to remain in possession thereafter. This appears especially to be so because the respondent could produce only one receipt in his name for the year 1955. For the subsequent years he does not seem to have paid the rent and so receipts for the following years do not appear to have been issued in his name. Subsequently, the respondent filed an application for mutating his name in the revenue records. That application was resisted by Mst. Sita Devi who claimed to have been in possession all throughout. In these mutation proceedings, the Tehsildar

called for a report from the Karamchari. In his report the Karamchari stated that on an enquiry made by him he found that Mst. Sita Devi was in actual possession of the plot. On the basis that report the Tehsildar recorded on July 17, 1961 that even when the said rent suit was filed by Dumraon Raj, the land in question was "completely under water due to deluvial action of the river Ganges", and that it remained submerged under water until 1959 when the river changed its course and that since then it was Mst. Sita Devi, and not respondent, who had been actual possession. The mutation proceedings that went before the Circle Officer, Bhagalpur, who by his order, dated February 20, 1964 rejected the respondent's application and allowed mutation to be made in the name of Mst. Sita Devi. The respondent then filed an appeal against the order of the Circle Officer before the Deputy Collector. By his order, dated October 19, 1965, the Deputy Collector rejected the appeal and upheld the order of the Circle Officer and directed that possession of the said plot having been continuously with Mst. Sita Devi, the only course open to the respondent was to file a regular suit to establish his title. It would seem that the respondent did not file any regular suit to establish his title as director by the Deputy Collector.

9. In 1963, the respondent appears to have taken out proceedings under Sections 144 and 145 of the Code of Criminal Procedure against Mst. Sita Devi and certain other persons. On September 19, 1966, the Magistrate, who heard those proceedings, passed the following order :

"In view of the foregoing discussion I am fully convinced that Mst. Sita Devi along with her Sikmidars are in possession of the land in dispute."

He, therefore, directed that she should be allowed to remain in possession and forbade any interference with such possession until an order of eviction was passed by a competent court declaring title in favour of the respondent.

10. Besides these orders, there were rent receipts on record for the years 1961, 1963 and 1964 showing Mst. Sita Devi having paid rents and not the respondent.

11. All these documents clearly indicate (1) that Mst. Sita Devi had from the inception challenged the said decree as not being binding upon her, (2) that the said land remained under the river water from 1954 to 1959 when the river changed its course and the land once more re-emerged, (3) that since 1959 it was Mst. Sita Devi who was in actual possession and (4) that she has opposed must mutation proceedings lodged by the respondent and the revenue authorities on such opposition and had refused to mutate the land in the name of the respondent.

12. It is true that some of these orders, as remarked by the High Court, were passed very much after the date of the incident in question and even after the order of conviction passed the Trial Magistrate. But that fact would not seem to make difference. The principal question before the Trial Magistrate was whether the respondent was in actual possession of the land in question on the date of the incident, and whether there was any dispute with regard to his title and possession of the said land. The documents referred to above would indicate that there was from the very inception a dispute going on between the respondent and Mst. Sita Devi, and further that he could not have been in actual possession since 1954 as alleged by him, firstly, because possession delivered to him in that year appears to have been mere symbolic possession, and secondly, because the land remained submerged under water from 1954 until 1959. Whether the said decree passed in the said rent suit and the execution proceedings following it were valid and binding against Mst. Sita Devi or not is a question in which we need not at present enter into. But the fact remains that she had disputed all along the title of the respondent and his right to be in possession of the said land. The findings given

both in the mutation proceedings as well as proceedings under Sections 144 and 145 of the Code of Criminal Procedure would also indicate that Mst. Sita Devi and through her Sikmidars had remained in physical possession of the land, at any rate since 1959. The rent receipts for the years 1961, 1963 and 1964, all in the favour of Mst. Sita Devi, would seem to corroborate the stand taken by the appellants that respondent had not been in actual possession of the said plot. It is, thus, impossible to say that the appellants were not any rate under a bona fide belief that they were entitled to the possession and that being so there was no question of their having trespassed into the said land or formed an unlawful assembly for committing theft of the standing crop therein or of their having committed theft of the said crop. In any event, the stand of the respondent that he had cultivated the land, and therefore, the crop was his was a matter of considerable doubt. The dispute between the parties was such that a civil court would have more appropriately decided it, particularly in view of the decisions given by another Magistrate and the Deputy Collector in the procedure under Section 145 of the Code of Criminal Procedure, as also in the said mutation proceedings. The entire question of possession and even title was thus in an extremely fluid state and therefore the question of the respondent's possession on the date of the incident in question was not beyond controversy. The Trial Magistrate in these circumstances ought not to have and could not have, on a mere a partial view of the evidence, come to the conclusion that the appellants had formed an unlawful assembly and that as members of such unlawful assembly had been guilty of stealing the said crop. In these circumstances, it is difficult to uphold the order of conviction passed by the Trial Magistrate and upheld by the Additional Sessions Judge and the High Court. The appeal is accordingly allowed and the order of the conviction and sentence passed against the appellants is set aside.

</html