NAGPUR HIGH COURT

Chandulal

Vs

Pushkar Raj

First Appeal No. 63 of 1944

(R. Kaushalendra Rao and Deo, JJ.)

09.07.1951

JUDGMENT

R. Kaushalendra Rao, J.

1. The appeal is by the defendant. The appeal arises out of a suit for setting aside the order of the Sub-divisional Officer, dated the 14th March 1941 and for joint possession to the extent of 0-8-0 of 'mouza' Chichhgaon in Hatta zamindari of which the appellant is the zamindar.

2. The following genealogy will be helpful in understanding the case :

PUSO=MT. BHUGABAI
Mohan
Chunnilal Durga
Jagannath
Brijlal Khemchand Kanhaiyalal
Pushkarraj Tarachand Holke Pd. Hiralal Kawanlal Bhaiyalal

3. According to the respondents, Mt. Bhugabat was the real sister of the father of the appellant. The village was presented by the zamindar to his daughter and her husband. The village was held on a sort of a perpetual lease. After the death of Bhugabai and Mohan 'patel' the village came to be recorded in the name of Chunnilal as representative of the joint family consisting of himself, Durga and their sons.

4. In the year 1897 three persons Churmilal, Durga and Narayan (who is not shown in the genealogy) applied for being recorded as inferior proprietors of the village in suit. The prayer was not granted but one of the applicants, Durga, was recommended for being given the status of a protected 'thekedar.' The recommendation was accepted by the Chief Commissioner. Jagannath, the only son of Durga, was recorded as the protected 'thekedar' after the death of Durga. According to the respondents, Durga and Jagannath were recorded as protected 'thekedars' as representatives of the family of Mohan including the respondents. On the contrary, the appellant

asserted that they were protected 'thekedars' in their individual capacity and that the respondents had no interest in the 'theka' or the lease.

5. In 1937, proceedings were started in the Court of the Deputy Commissioner, Balaghat, against Jagannath for forfeiture of the protected status conferred on him. According to the respondents, though the Deputy Commissioner moved the Commissioner for obtaining the previous sanction for forfeiture of the protected status previously conferred on Jagannath and got the necessary sanction, no order was passed by the Deputy Commissioner declaring that Jagannath 'patel' had forfeited the protected status conferred on him. The appellant, however, treating the report for sanction, dated the 18th August 1938, as an order declaring the forfeiture applied for mutation of the -/16/- of 'mauza' Chichgaon. The Sub-divisional Officer sanctioned the mutation and ordered that the appellant should be placed in possession of the village under Section 49(3) of the Land Revenue Act (vide Exhibit D-3). The appellant was accordingly placed by a warrant in possession on the 27th November 1940 ('vide' Exhibit D-4). Being aggrieved by the delivery of possess on the respondents applied under Section 31(2) of the Land Revenue Act for re-delivery of the possession. The Sub-divisional Officer, however, rejected the application by the order dated the 14th March 1941 ('vide' Exhibit P-1.)

6. The respondents instituted the suit for setting aside the order of the Sub-divisional Officer and for joint possession on the ground that there was no forfeiture under Section 111 of the C. P. Land Revenue Act, and that in any case even if there be an order of forfeiture it had no effect on the rights of the respondents who were not made parties to the proceedings.

7. The appellant denied that the respondents had an eight-anna interest in the village. According to the appellant, the respondents had no interest whatsoever and the claim was barred by limitation as the respondents had not made their claim within 12 years after Darga became the protected 'thekedar' in 1920. The appellant also pleaded Section 220 (1) of the Land Revenue Act as a bar to the jurisdiction of the Court to try the suit.

8. The learned trial Judge decreed the claim for joint possession. He held against the appellant on the pleas of jurisdiction and limitation raised by him. Further it was held that the village had been leased to Bhugabai and her husband in perpetuity. According to the trial Judge, the respondents were co-sharers in the 'theka' and Durga was recorded as the 'thekedar' as their representative. On the point of forfeiture the learned Judge construed Exhibit P-11 dated the 27th November 1939 as a valid declaration of forfeiture. He, however, held that the forfeiture did not affect the rights of the respondents as perpetual lessees.

9. In appeal the appellant pressed again the point of jurisdiction. Further the appellant submitted that the respondents had no rights in the 'theka.' For the respondents it was contended that the learned trial Judge was in error in holding that there was forfeiture of the protection. The learned counsel for the appellant contended that if according to his submission the respondents must be held to have no rights in the 'theka' they could not acquire than because of an illegal forfeiture. The last contention can readily be accepted. But the question is was there forfeiture of the protection?

10. The points that arise for decision are :

(1) Whether the trial of the suit was barred under Section 220 (1) of the Land Revenue Act?
(2) Whether the respondents are co-sharers in 'mauza' Chichgaon along with the recorded protected 'thekedar'?
(3) Whether the protected status conferred on Jagannath was forfeited?

11. We take up the point of jurisdiction. The respondents claimed two reliefs : (1) the setting aside of the order of the Sub-divisional Officer dated the 14h March 1941 (Exhibit P-1) and (2) joint possession. The order passed by the Sub-divisional Officer is on a matter which he was empowered under the Land Revenue Act to decide and dispose of. That order cannot in view of Section 220 be set aside. Accordingly the first ground of claim cannot be granted.

12. The point for consideration, however, is whether the respondents could claim joint possession. The appellant was placed in possession of the property admittedly under Sub-section (3) of Section 49 of the Land Revenue Act. Sub-section (4) of that section is to the effect that any delivery of possession under Sub-section (3) shall not be evidence of title relating to the disputed property or any right therein in any suit in a civil Court.

13. Whether the appellant is entitled for joint possession or not is a matter to be decided by the civil Court. According to the appellant, there has been forfeiture of the 'theka' under Section 111 and any matter relating to the 'thekedar' under Section 111 is excluded from the jurisdiction of the Court by Clause (1) of Section 220. In *'Ramchandra V. Narayan[1]',* relied upon by the appellant it was held that an order of a Revenue Court under Section 111 declaring forfeiture of the protected status cannot be challenged in a civil Court. In that case there was evidently a declaration of forfeiture by the Deputy Commissioner (See p. 16.) But the crucial question in the instant case is whether the Deputy Commissioner did in fact make a declaration of forfeiture. Whether there should be a forfeiture or not is not for the civil Court to decide. But an enquiry whether there has been a forfeiture or not- is in our view not barred by Section 220 (1). The 'thekedar' forfeits the protection conferred on him only from the date of declaration of forfeiture as provided in Section 111. It is necessary therefore to determine whether there was in fact a declaration of forfeiture.

"It is settled law", observed Lord Thankerton
"that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure." *'Secy. Of State V. Mask And Co[2].',*

14. Now we take up the second point for consideration. That the respondents were co-sharers in the 'theka' was admitted by the appellant himself in the civil suit instituted by him against the respondents in 1943 ('Vide Exhibit D-10.) The judgment being 'inter partes' is relevant in so far as it throws light on the conduct of parties and reproduces admissions made by the parties or their ancestors. See *'Gopal Rao V. Sitaram[3]',* In *'Krishnasami Ayyangar V. Rajagopala Ayyangar[4]',* a statement amounting to an admission which was contained in a

judgment was received in evidence under Section 35 as an entry in a record made by a public servant in the course of his duty. Their Lordships of the Privy Council observed in the Gorakhpur case that there is much to be said for the view taken in *'Krishnasami Ayyangar V. Rajagopala Ayyangar', (Cit. Sup.)* See *"Collector Of Gorakhpur V. Ram Sundar Mal[5]',* Exhibit D-10 is admissible in proof of the fact that the respondents were co-sharers in the 'theka' as the grandsons of Chunnilal.

15. According to the learned counsel for the appellant the decision in Exhibit D-10 operates as 'res judicata' against the respondents in so far as it held that the respondents were co-sharers in the 'theka' in the capacity of occupancy tenants and were liable to pay rent. In our view, no plea of 'res judicata' can be founded on the decision in Exhibit D-10. The appeals were against the decisions of the Tahsildar and Extra Sub-Judge, 2nd Class, in rent suits. So the Court that tried those suits was not competent to entertain the suit out of which the present appeal arises. Unless the Court which tried the former suit was competent to try the subsequent suit in its entirety, and not merely the issue raised in the subsequent suit, the rule of 'res judicata' under Section 11 of the Code of Civil Procedure cannot be invoked. See *'Gokul Mandar V. Pudmanund Singh[6]',* '*Kalyan Das V. Sudershan Lal[7]',* and *'Devichand V. Mangilal[8]',* Besides, the decisions in Civil Appeals Nos. 1-C, 2-C, 3-C and 4-C of 1943 (Exhibit D-10), cannot be regarded as final because they have been set aside in our decisions in Second Appeals Nos. 183 to 186 of 1944.

16. The appellant cannot also derive any support from the decision (Exhibit D-5) in Civil Suit No. 2-B of 1940, instituted by him against Jagannath. No doubt, it was observed there that the protected status was granted to Durga alone and none other could claim rights thereunder. The respondents were not parties to that decision and we agree with the learned trial Judge that the decision cannot operate as 'res judicata' as between the parties to the present litigation.

17. It has always been the accepted view that the grant of protected status to a 'thekedar' did not make the 'theka' the exclusive property of the person on whom the protected status is conferred. See *'Fagwa V. Budhram[9]',* That case was concerned with a certificate granted under Section 65-A of the Central Provinces Land Revenue Act in 1891. It was also observed that the amending Act of 1898 which amended Section 65-A did not affect the preexisting right.

18. The nature and incidence of protected 'thekedari' tenure came up for consideration
by their Lordships of the Privy Council in *'Bhagwan Singh V. Darbar Singh[10]',* Their Lordships observed that the Land Revenue Act, 1917, recognizes that the lease-hold interest, though impartible, may nevertheless be the joint property of the 'thekedar' and his family. The 'patta' (Exhibit D-8), granted to Durga on the 21st May 1920, expressly mentions that the lease shall generally be subject to the provisions regarding the protected status contained in the Central Provinces Land Revenue Act (11 (XI) of 1917). The argument that the conferral of the protected status destroyed the pre-existing rights of the other members of the family cannot therefore be accepted.

19. On the 16th January 1897, Chunnilal and Durga along with Narayan made a joint application for being recorded as inferior proprietors on the ground that the 'mouza' had been continuing in the family for about 90 years: Exhibit P-4. It would appear from the report off the Settlement Officer (Exhibit P-19) that the estate was under the management of both Chunnilal and Durga. Chunnilal's name was recommended for conferral of protected status as he was the elder of the

two resident-'thekedars.' Chunnilal, however, died prior to the 12th February 1898 ('Vide' the order-sheet of the Court of the Settlement Officer Exhibit P-20). So Durga came to be recommended for conferral of protected status (Exhibit D-7, dated the 15th February 1898.) The recommendation was accepted by the Chief Commissioner ('Vide Exhibit P-22, dated the 16th March 1898.)

20. Reports made by revenue officers though not regarded as having judicial authority where they express opinions on the private rights of the parties are entitled to great consideration being reports of public officers made in the course of duties in so far as they supply information of official proceedings and historical facts and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them. See *'Raja Muttu Ramalinga Setupati V. Perianayagum Pillai*[11]*',* and *'H. Mathewson V. Secretary Of State'*[12]*,*

21. In 1906, when the father of the present appellant disputed the right of the 'thekedars' to collect 'lac' etc. (Civil Suit No. 3 of 1906) (Exhibit P-17), on the ground that it exclusively belonged to the superior proprietor, both Brijlal (the father of the first two respondents) and Durga were made defendants. The right claimed by the appellant's father was negatived and it was held that the conferral of the protected status on the defendants had not taken away the pre-existing rights. It would appear from the above documents that Durga was recorded as the 'thekedar not in his sole right but on behalf of himself and the heirs of Chunnilal.

22. In 1934, Jagannath, son of Durga, himself successfully claimed contribution towards the losses of management of the village from Kanhaiyalal and the sons of Brijlal on the ground that they were co-sharers in the 'theka.' The claim was in respect of management for the years 1930-31 and 1932-33 ('Vide' Exhibits P-14 and P-15.)

23. The admission of the appellant in Exhibit D-10, taken together with the history of the 'theka' as described above leaves little doubt that the theka' was not the exclusive property of Durga or his son Jagannath alone but that the respondents as descendants
Of Chunnilal are also co-sharers in the 'theka.'

24. On the third point we cannot agree with the learned trial Judge and hold that there was forfeiture. The Sub-divisional Officer reported on the 9th February 1937 to the Deputy Commissioner that the previous sanction of the Commissioner might be obtained for declaring that Jagannath 'patel' had forfeited the protection ('Vide Exhibit D-9.) The Deputy Commissioner moved the Commissioner on the 6th August 1937 soliciting his sanction under Section 111 ('Vide' Exhibit) P-8, dated the 6th August 1937.)

25. On the 6th August 1937, the Commissioner, Raipur Division, gave time to the 'thekedar' to pay up the arrears and the demands up to the 15th June 1938 ('Vide Exhibit P-9.) Jagannath, however, did not take advantage of the order. The arrears remained outstanding and amounted to Rs. 4,605-6-0. So on the 18th August 1938, the Deputy Commissioner again moved the Commissioner for sanctioning the forfeiture of the protection. On the 1st September 1938, the Commissioner accorded the sanction for declaring that Jagannath had forfeited the protection conferred on him ('Vide Exhibit P-12.) The Commissioner also sanctioned reservation to the 'thekedar' and his co-sharers of the rights of an occupancy tenant in all the home-farm lands. In

appeal the Financial Commissioner found no grounds for interfering with the order according sanction to forfeiture of the protected status. The Financial Commissioner, however, directed that the order relating to reservation of the rights of an occupancy tenant in the home-farm lands should be reconsidered and only what might be considered to be a reasonable area sufficient for the maintenance of the 'ex-thekedar' and his co-sharers might be reserved : ('Vide' Exhibit P-13.)

26. The result of the proceedings referred to above is that the Deputy Commissioner secured the sanction of the Commissioner for declaring Jagannath to have forfeited the protection previously conferred on him. But there is nothing on record to show that the Deputy Commissioner did in fact make a declaration of forfeiture. Under Section 111, Land Revenue Act, the Deputy Commissioner may, with the previous sanction of the Commissioner, declare such 'thekedar' to have forfeited the protection previously conferred on him, and such 'thekedar' shall, from the date of such declaration, cease to be protected. Having regard to the words in the provision there can be no escape from the position that a declaration of forfeiture of the protected status must follow the sanction of the Commissioner. Though the Deputy Commissioner made a proposal for forfeiture of the protected status, he never gave effect to it after obtaining the sanction by making a declaration to that effect.

27. The learned trial Judge was right in his view that declaration should be subsequent to the sanction and that there had been no clear declaration subsequent to the sanction. But since there is no prescribed form of declaration under the Act he construed Exhibit P-11 as the declaration. But the construction put by the learned trial Judge upon Exhibit P-11, cannot be justified. Exhibit P-11 is an order passed by the Deputy Commissioner on the 27th November 1939. The material portion of the order runs :

> "My predecessor, with the previous sanction of the Commissioner, forfeited the protection conferred on Jagannath, 'thekedar' of 'mouza' Chichgaon, in the Hatta zamindari. "The order was upheld on the 31st August 1939, by the Financial Commissioner in appeal....."

28. The Deputy Commissioner was obviously under a misapprehension in thinking that his predecessor had forfeited the protection conferred on Jagannath and that 'the order' was upheld by the Financial Commissioner on the 31st August 1939 (Exhibit P-13) What was done by the Financial Commissioner on the 31st August 1939 was not to uphold any declaration of forfeiture but only to maintain the order of the Commissioner (Exhibit P-12), according sanction to the recommendation made by the Deputy Commissioner on the 18th August 1938 ('Vide' Exhibit P-10.) Thus, as a matter of fact, there was no declaration of forfeiture by the Deputy Commissioner under Clause (c) of Section 111. That being so, the appellant was not entitled to be placed in possession of the village, at any rate to the extent of the share of the respondents.

29. It was contended on behalf of the respondents that even if the protection had been forfeited, the 'theka' is not lost to the family and the respondents would continue to have their rights in the 'theka' after forfeiture. This contention cannot be accepted. It has been held in *'Ramchandra V. Narayan*[13]*',* that when protected status is forfeited by an order passed under Section 111, Land Revenue Act, the lease itself is forfeited subject to the two provisos to that section. As observed by Staples, A.J.C., there is no provision, however, for the protected 'thekedar' whose protection has been forfeited, remaining as 'thekedar or continuing to hold the 'theka.' The 'theka' itself is

lost. Such is the view of the revenue authorities as well. See *'Sarat Chandra Rao V. Govind Rao[14]',* Forfeiture of protection affects recorded protected 'thekedar' as well as everyone interested in the 'theka.' Under the second provision to Section 111, the Deputy Commissioner may at the time of declaration invest any co-sharer with all the rights of the 'thekedar' in the village subject to the acceptance of the liabilities of the 'thekedar' for arrears of 'thekajama.' It is evident from Exhibit D-9 (para. 9) and Exhibit P-8 (para. 2) that the co-sharers in the instant case declined to accept the responsibility for the arrears outstanding. So if in fact there had been a declaration of forfeiture, we do not think the respondents could have had any ground of complaint, or that the decision in Civil Suit No. 3 of 1906 (Exhibit P-17) would have availed them to be in possession of the property. The learned trial Judge's view that the forfeiture of the protection does not affect the rights of the respondents as perpetual lessees cannot be accepted. The respondents succeed because there was in fact no forfeiture.

30. No evidence was led by the appellant on Issue No. VIII. The learned trial Judge held that there is nothing to show that the respondents were excluded from possession before 1941. We agree with him. The conclusion is supported by Exhibits P-8, P-6 and P-7. As the appellant could not have been put in possession of the 'mauza' in the absence of a declaration of forfeiture under Section 111 to the detriment of the respondents, their claim cannot be defeated on the ground that Jagannath did not complain against dispossession.

31. On the findings given by us above, the respondents were entitled to joint possession. The decision of the Court below is correct. The decree is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

Cases Referred.

[1]27 Nag Lr 15
[2] I.L.R (1940) Mad 599 At P. 614 (Pc)
[3] AIR 1927 Nag19
[4]18 Mad 73
[5]56 All 468 At P. 490 (Pc)
[6]29 Cal 707 At P. 715 (Pc)
[7] AIR 1937 All 20 At P. 21
[8] AIR 1934 Nag 178 At P. 179
[9]10 Nag Lr 64
[10]24 Nag Lr 179
[11]1 Ind App 209 At P. 238 (Pc)
[12]3 Pat 673 At P. 682
[13]27 Nag Lr 15
[14]1948 Nag Lj 336