

BRIJ KISHORE PRASAD SINGH AND OTHERS

v.

JALESHWAR PRASAD SINGH AND OTHERS

March 2, 1973

[A. N. GROVER, K. K. MATHEW AND A. K. MUKHERJEA, JJ.]

Code of Civil Procedure, 1908, S. 47.—Partition suit compromised—No decree drawn up or executed—Subsequent suit for possession of property allotted under compromise whether barred.

Bihar Land Reforms Act 1959, s. 5—Constructive possession sufficient to confer right under section.

A partition suit between K and his brothers was compromised on July 4, 1947 and different schedules were prepared for the property allotted to the sharers. However none of the parties to the compromise produced the necessary stamp paper as directed by the Court, and no decree was drawn up by the Court. The present suit was filed by the successors-in-interest of K for possession of certain property which under the aforesaid compromise had fallen to the share of K. Defendants 1 and 2 contended that K while he was alive executed a *hukumnama* in their favour and they were put in possession of the plaintiff property as lessees, and so they were entitled to retain possession. They further contended that the suit was barred by limitation and also by section 47 of the Civil Procedure Code. The Trial Court decreed the suit. The decree was confirmed in appeal. In second appeal the High Court held that the plaintiff should have paid stamp fee and got the decree drawn up in the partition suit and executed it and so the suit was barred by sec. 47 of Civil Procedure Code. The Court further held that since the plaintiff property had vested in the Bihar Government under the Bihar Land Reforms Act, 1959 the plaintiffs were not entitled to maintain the suit. The High Court accordingly allowed the appeal and dismissed the suit. In appeal by special leave to this Court two questions that arose for consideration were: (1) whether the suit was barred by section 47 of the Civil Procedure Code and (2) whether under the provisions of the Reforms Act the plaintiff property had vested in the Government and therefore the plaintiffs were incompetent to maintain the suit.

Allowing the appeal,

HELD: (i) It was clear from the compromise petition that the defendants were permitted to occupy the plaintiff property until the structure which was constructed in the property was removed by them. They no doubt remained in physical possession but that was not with any intention to possess the property for themselves, but because they were permitted to remain in possession until the structure constructed by them was removed. The only right which they claimed in the written statement was that they were tenants under K by virtue of the *hukumnama* executed by him in their favour. At no time they asserted or claimed any right to remain in possession otherwise than as tenant. Their case that K put them in possession was found against them by the Trial as well as the First Appellate Court. But that would not in any way affect the permissive nature of their possession after the compromise. Therefore it must be held that K was in constructive possession of the property after the compromise and the suit for recovery of *khas* possession was not barred by section 47 of the Civil Procedure Code. [565CE]

A (ii) The High Court wrongly took the view that since K was not in possession of the property at the time the property vested in the State he was not entitled to retain possession of the plaint property under s. 5 of the Bihar Land Reforms Act 1959, as a tenant under the State free of rent. There was no dispute that the plaint property answered the description of a homestead in s. 5 of the Act. The constructive possession of K was sufficient to enable him to retain possession as tenant under the section. In other words on the date of vesting of the property in the Government, K was, for the purpose of s. 5 in possession of the plaint property. Whereas s. 6 speaks of *khas* possession section 5 speaks only of possession. On the date of vesting of the plaint property in the State K was in possession for the purpose of s. 5 and he became a tenant under the State free of rent. Accordingly the suit for recovery of possession was maintainable. [565H]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1466 of 1967.

Appeal by special leave from the judgment and decree dated 24th November 1964 of the Patna High Court in appeal from Appellate Decree No. 1029 of 1968.

D *S. C. Agarwala*, and *V. J. Francis*, for the appellants.
D. Goburdhan, for respondent Nos. 1 to 3 & 10.

The Judgment of the Court was delivered by

E MATHEW, J.—This is an appeal, by special leave, by the plaintiffs from a decree passed in appeal by the Patna High Court dismissing their suit for recovery of the plaint property with mesne profits.

F Plaintiffs 1 to 4 are the daughter's sons of one Kishundeo Singh, plaintiffs 5 and 6 are his daughters and plaintiff 7 is his widow. The plaint property together with some other properties belonged to the joint family of which Kishundeo Singh and his brothers were the members. Suit No. 60/34 of 1944-46 was instituted for partition of the properties. That suit was compromised on July 4, 1947 and different schedules were prepared for the property allotted to the shares and sons property was left in the joint possession of all of them. The plaint property fell to the share of Kishundeo Singh under the compromise. It may be mentioned that as none of the parties to the compromise produced the necessary stamp paper as directed by the Court, no decree was drawn up by the Court.

H In the suit for recovery of possession of the plaint property filed by the plaintiffs, defendants 1 and 2 contended that Kishundeo Singh, while he was alive, executed a *hukumnama* in 1354 Fs. in their favour and they were put in possession of the plaint property as lessees and so they were entitled to remain in possession. They further contended that the suit was barred by limitation and also by s. 47 of the Civil Procedure Code.

The Trial Court found that Kishundeo Singh obtained possession of the plaint property on the basis of the compromise, that the case of the defendants 1 and 2 that Kishundeo Singh had executed a *hukumnama* in their favour and that they obtain possession of the plaint property under it was false, that the suit was not barred by limitation or by s. 47 of the Civil Procedure Code and decreed the suit. This decree was confirmed in appeal. It was against this decree that the second appeal was filed by the defendants before the High Court.

The High Court held that the plaintiff should have paid the stamps fee and got the decree drawn up in Suit No. 80/34 of 1944-46 and executed it and so the suit was barred by s. 47 of the Civil Procedure Code. The Court further held that since the plaint property had vested in the Bihar Government under the Bihar Land Reforms Act, 1959, hereinafter referred to as the Act, the plaintiffs were not entitled to maintain the suit. Therefore, the High Court allowed the appeal and dismissed the suit.

The two questions that arise for consideration in this appeal are: whether the suit was barred by s. 47 of the Civil Procedure Code and whether under the provisions of the Act, the plaint property had vested in the Government and, therefore, the plaintiffs were incompetent to maintain the suit.

As the first question, the High Court was of the view that, though none of the parties to the compromise had produced the necessary stamps paper as directed by the Court and no formal decree was drawn up, the plaintiffs could not have instituted a fresh suit for recovery of possession of the plaint property as their only remedy was to execute the decree in suit No. 80/34 of 1944-46. In other words, the High Court held that the plaintiffs should have produced the necessary stamp paper and got the final drawn up and executed it, instead of filing a suit for the relief which they could have obtained by executing the decree and so, the suit was barred by s.47 of the Civil Procedure Code.

The Trial Court had found that Kishundeo Singh obtained possession of the plaint property without the assistance of the Court in pursuance of the compromise but that he allowed the defendants to occupy the same. To put it in other words, the finding of the Trial Court was that the defendants were in permissive occupation. The Trial Court also found that the definite case of the defendants was that they were put in possession of the property under the *hukumnama* and, therefore, their possession was clearly that of lessees under an agricultural lease.

The lower appellate Court held that there was no allegation in the plaint that Kishundeo Singh obtained *khas* possession under the compromise nor was there any evidence to show that he obtained

A *khas* possession but that defendants 1 and 2 continued in as before the compromise.

Before the compromise, Kishundeo Singh and the defendants were in possession as tenants-in-common. The actual possession of the defendants, of the plaint property, was also the constructive possession of Kishundeo Singh. So, when the lower appellate
 B Court said that the defendants continued in possession as before, it can only mean that after the compromise the defendants were in possession acknowledging the title of Kishundeo Singh. That apart, defendants 1 and 2 had no case that they intended to possess the property as their own. It is clear from the compromise petition that the defendants were permitted to occupy the plaint property
 C until the structure which was constructed in the property, was removed by them. They, no doubt, remained in physical possession, but that was not with any intention to possess the property for themselves but because they were permitted to remain in possession until the structure constructed by them was removed. The only right which they claimed in the written statement was
 D that they were tenants under Kishundeo Singh by virtue of the *hukumnama* executed by him in their favour. At no time they asserted or claimed any right to remain in possession otherwise than as tenant. As already stated, their case that Kishundeo Singh put them in possession under the *hukumnama* was found against by the Trial as well as the First Appellate Court. But that would
 E not in any way affect the permissive nature of their possession after the compromise. Therefore, we think that Kishundeo Singh was in constructive possession of the property after the compromise and, the suit for recovery of *khas* possession was not barred by s.47 of the Civil Procedure Code.

The second ground on which the High Court dismissed the
 F suit was that the plaint property had vested in the State of Bihar under the Act and the plaintiffs had, therefore, no right to proceed with the suit and obtain a decree for possession. The suit was instituted on March 7, 1953; the property vested in the State on January 26, 1955, under the Act. There is no dispute that the plaint property answers the description of a homestead in s. 5 of the Act.
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The High Court was of the view that since Kishundeo Singh was not in possession at the time the property vested in the State, he was not entitled to retain possession of the plaint property under s. 5 as a tenant under the State free of rent. We are of the opinion that the constructive possession of Kishundeo Singh was sufficient
 H to enable him to retain possession as a tenant under the section. In other words, on the date of the vesting of the property in the Government, Kishundeo Singh was, for the purpose of s. 5, in possession of the plaint property. In this context, it may be noted
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that the language of s. 5 is in sharp contrast with that of s. 6. The material part of s. 5 states :

"5. *Homesteads of intermediaries to be retained by them as tenants*—(1) With effect from the date of vesting, all homesteads comprised in an estate or tenure and being in the possession of an intermediary on the date of such vesting shall, subject to the provisions of sections 7A and 7B, be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession of the land comprised in such homesteads and to hold it as a tenant under the State free of rent."

The relevant portion of s. 6 is in these terms :

"6. *Certain other lands in khas possession of intermediaries to be retained by them on payment of rent as raiyats having occupancy rights*—(1) On and from the date of vesting all lands used for agricultural or horticultural purposes, which were in *khas* possession of an intermediary on the date of such vesting,” Whereas s. 6 speaks of *khas* possession, s. 5 mentions only possession. We find that on the date of vesting of the plaint property in the State, Kishundeo Singh was in possession for the purpose of s. 5 and that he became a tenant under the State free of rent and that the suit for recovery of possession was maintainable.

In the result we allow the appeal and set aside the decree of the High Court and restore the decree passed by the lower appellate Court, but we make no order as to costs.

G.C.

Appeal allowed.