

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.601 of 1986

[Against the judgment and decree dated 14.08.1986 passed by the 7th Additional Sub-ordinate Judge, Patna in T.S. No. 236 of 1982/Trial No. 11 of 1984.]

Harak Nath Yadav & Ors

.... Plaintiffs- Appellants

Versus

Mosmat Meena Devi & Ors

.... Defendants-Respondent/s

Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Advocate.

For the Respondent/s : Mr. Jitendra Kishore Verma, Advocate.
: Mr. Neeraj Kumar Sinha, Advocate.
: Mr. Anjani Kumar, Advocate.
: Mr. Abhishek Anand, Advocate.

CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT

Dated: 04th, October, 2016

The plaintiffs have filed this first appeal against the judgment and decree dated 14.08.1986 passed by the learned 7th Additional Sub-ordinate Judge, Patna in T.S. No. 236 of 1982/Trial No. 11 of 1984, whereby the learned court below dismissed the plaintiffs-appellants' suit.

2. The plaintiffs-appellants filed the aforesaid Title Suit No. 236 of 1982 for declaration of title and confirmation of possession over the Schedule-II and Schedule-III lands mentioned in the plaint. The plaintiffs further prayed for declaration that they be declared as settled *raiyat* in respect of the Schedule-III lands and for

permanent injunction.

3. The plaintiffs claimed the aforesaid reliefs alleging that Hazari Yadav son of Mahadeo Yadav was recorded tenant, who is the ancestor of the plaintiffs. The plaintiffs and their ancestor had one forth share over the Schedule-II properties and, accordingly, they are coming in possession of the properties. They were paying rent to the ex-landlord and then State. Canal *Parcha* and Water Tax receipts are in their name.

4. So far Schedule -III properties are concerned, according to the plaintiffs, they are the *Bataidars* of the defendants since last several 12 years and are cultivating the lands. Earlier, the ancestors were cultivating the lands as *Bataidar*. Because of the cultivation for several 12 years, the plaintiffs acquired occupancy right, as such, they have amalgamated the Schedule-III lands with the other lands of the plaintiffs. Ex-proprietor of Schedule-III lands was residing at long distance, as such, there was no arrangement for cultivation so he gave the Schedule-III lands to the plaintiffs to cultivate on *Batai* system 50 years ago and since then the ancestor and then the plaintiffs have been in cultivating possession of Schedule-III properties.

5. According to the plaintiffs, they are in possession of Schedule-II lands as settled *raiyyat* of the same by operation of law



and the other co-sharers of the recorded tenants for 3/4 share, who are also in cultivating possession of their shares. However, the defendants got a sale deed on 08.10.1964, which is collusive, inoperative, sham and without consideration. The sale deed was executed by Mahanth Sri Madhusudan Das. The sale deed is fake and is for nominal consideration. The executant of the sale deed was annoyed with the plaintiffs so executed bogus sale deed to harass the plaintiffs. The defendants, in a proceeding under Section 144 Cr.P.C., relied upon a forged and fabricated order of delivery of possession in favour of Mahanth Goswami Bhairwa Nand Ramji, which was in connection with Execution Case No. 2205 of 1934. In fact, the plaintiffs have no knowledge about any suit or decree passed against them as no delivery of possession was affected and the document showing delivery of possession is forged and fabricated.

6. On being noticed, the defendants filed contesting written statement. Their main defence was that Mahanth of Rajipur and Masaurha Math was the proprietor of the land and Hazari Gope, ancestor of the plaintiffs, was one of their recorded tenant. Mahanth had filed the suit for recovery of due rent against said Hajari Gope which was decreed and Execution Case No. 2205 of 1934 was filed. In the said execution case, the lands mentioned in Schedule-II were



auction sold. Mahanth purchased the Schedule -II lands in auction and delivery of possession was affected on 31.08.1935. Since thereafter the recorded tenant or the plaintiffs lost their all interest and possession and Mhanth, proprietor, directly came in possession of the Schedule-II lands. Ultimately after vesting of Zamindari, Mahanth's name was entered in Register-II and Mahanth became the tenant under the State of Bihar. Likewise, Schedule-III property was also in possession of Mahanth, who became raiyat after vesting and he continued in exclusive possession of the same. On 08.10.1964, Mahanth executed a registered sale deed in favour of defendant No.1, who was *Karta* of the joint family whereby for Rs. 11,000/- land measuring 4 acres 65 and 1/4 decimal of Schedule-II and III was sold. Defendant No.1 then came in possession and his name had been entered in Register-II. The Defendants continued in exclusive possession and are cultivating the lands. The plaintiffs were never the *Bataidars* of Schedule-III lands. The Mahanth of Schedule-III lands never gave the lands in *Batai* to the plaintiffs. The plaintiffs have been dispossessed completely in Execution Case No. 2205 of 1934.

7. On the basis of the aforesaid pleadings of the parties, the learned court below framed following issues;

- “1. *Is the suit as framed maintainable?*
2. *Have the plaintiffs got any cause of action or right to sue?*

3. *Is the suit barred by law of limitation?*
4. *Is the suit barred by principles of waiver, acquiescence and estoppel ?*
5. *Has the suit property been grossly under valued and the court fee paid sufficient ?*
6. *Have the plaintiffs title and possession over the suit land as alleged in the plaint?*
7. *Are the plaintiffs entitled to relief sought for?"*

8. After hearing the parties and on consideration of the evidences, documentary and oral, the learned trial court recorded finding that the plaintiffs failed to prove that they are the *Bataidars* of Schedule-III lands and that they are in continuing possession thereof. The trial court also came to the conclusion that in auction sale, Schedule-II property was purchased by Mahanth and since then the plaintiffs' ancestor lost the interest and possession. Accordingly, the plaintiffs' suit was dismissed.

9. Learned counsel, Mr. Binod Kumar Singh, appearing for the appellants submitted that the court below mis-appreciated the evidences produced by the plaintiffs in support of the fact that they are in exclusive possession of the Schedule-II property. They are dealing with the property even after vesting but the court below wrongly discarded the documentary evidences. The learned counsel further submitted that the documents produced by the defendants showing delivery of possession were forged and fabricated documents. The plaintiffs were never dispossessed from Schedule-II property. The trial court, relying on the forged and fabricated

documents of delivery of possession, wrongly held that the defendants came in possession. According to the learned counsel, many witnesses have been examined who all deposed in favour of the plaintiffs regarding their possession.

10. So far Schedule-III property is concerned, the learned counsel submitted that plaintiffs' ancestors were cultivating Schedule-III lands as *Bataidars* of the proprietor but after completion of cultivation for more than many 12 years, the plaintiffs' ancestors acquired occupancy *raiya*ti right over Schedule-III property and since they were in possession of the property when it vested in the State of Bihar, the plaintiffs became settled *raiya*t by operation of law i.e ***Bihar Land Reforms Act, 1955***. The learned trial court did not consider this aspect of the matter.

11. According to the learned counsel, the learned court below wrongly placed reliance on exhibits-H and I, which are forged and created documents and wrongly discarded the exhibits-7 and 7(A), which are mortgaged deeds executed by the plaintiffs regarding the suit property and out of that exhibit-7 is the redemption note of the year 1957 which clearly approves the fact that the plaintiffs were in possession of the property and were dealing with the same.

12. Learned counsel further submitted that the court below



wrongly discarded exhibit-5, which is a notice issued by the Advocate of Mahanth Goswami Kapil Deo Ramji. According to learned counsel, in this notice, farther of the plaintiff No.2 was asked to handover possession of Schedule-II lands, which also clearly shows that the plaintiffs were in possession of Schedule-II property. Learned counsel further submitted that, in fact, there was no any rent suit nor any delivery of possession was affected. The plaintiffs have no knowledge about the same.

13. With respect to exhibit-5-A, which is a notice sent by Revenue Officer to the plaintiffs inviting objection, if any, on the commutation of rent, the learned court below has wrongly discarded this documentary evidence also. The learned counsel for the appellants further submitted that the exhibits- H and I are not reliable documents at all but wrongly the court below has relied on it. According to the learned counsel, these documents could not have been admitted to evidence but it has wrongly been admitted in evidence. On these grounds, the learned counsel for the appellants submitted that the impugned judgment and decree be set aside.

14. On the other hand, the learned counsel, Mr. J.K. Verma appearing for the respondents, submitted that the present suit has been filed for declaration of title and recovery of possession. No relief has been claimed with regard to decree and auction sale in the



rent suit of the year 1934. Therefore, unless the decree and auction sale is set aside, the plaintiffs are not entitled to any decree. The learned counsel further submitted that since exhibits- H and I have been marked without objection, the appellants cannot be permitted to object the admissibility of the said documents. So far exhibit-5 is concerned, which is a notice, according to learned counsel, it relates to Schedule-II property only and not Schedule-III property. So far schedule-III property is concerned, there is absolutely no evidence to show that the plaintiffs' ancestors were the *Bataidars* and, as such, they continued for more than 12 years and have acquired occupancy rights. Moreover, if, in fact, they had occupied occupancy right, this relief would have been claimed by them under the ***Bihar Tenancy Act***. The burden to prove that the plaintiffs were the *Bataidars* of Schedule-III lands was on the plaintiffs but in support of their claim, not a single document has been produced. So for exhibits-H and I are concerned, these documents are admitted by the plaintiffs in their pleadings. They pleaded that these documents are forged and fabricated but neither they produced the original nor they adduced any evidence. The defendants produced the documents, which were marked as exhibits without objection. Now, therefore, on mere technical grounds, the said documents cannot be discarded. Moreover, the documents are the certified copies obtained from the

Court and presumption is in favour of the defendants unless the contrary is proved by the plaintiffs. In support of his contention, learned counsel relied upon various decisions of the Supreme Court on each point, which I shall consider one after other at the time of consideration of these points. On these grounds, learned counsel for the appellants submitted that the first appeal is liable to be dismissed with costs.

15. In view of the above contentions of the parties, the points, arise for consideration in this first appeal, are whether the plaintiffs have been able to prove their case i.e. their title and possession over the Schedule-II and Schedule-III land and whether the impugned judgment and decree passed by the court below is sustainable in the eye of law or not?

16. According to the plaintiffs' case so far Schedule-II properties are concerned, their ancestors were the recorded tenant but in 144 Cr.P.C. proceeding, the defendants claimed Schedule-II lands on the basis of forged and fabricated documents showing delivery of possession in connection with Execution Case No. 2205 of 1934. There was no such case nor there was any auction sale nor the plaintiffs have got knowledge about the delivery of possession. The plaintiffs continued in possession of the property. This is the case regarding Scheduled-II property.

17. On the other hand, according to the defendants, no doubt, Schedule-II lands were the property of ancestor of the plaintiffs, who was recorded tenant but the proprietor was one Mahanth of Rajipur and Masauraha Math. To realize the arrears of rent, said Mahant filed rent suit which was decreed and the decree was put in execution and in the execution, the Mahanth purchased the property and obtained delivery of possession in the year 1935.

18. So far Schedule-III property is concerned, according to the plaintiffs, the ancestors of the plaintiffs were *Bataidars* of the property for more than 12 years and they acquired occupancy right over the same prior to the vesting. After vesting, they became tenant of the State of Bihar and were paying rent. On the contrary, according to the defendants, the plaintiffs' ancestors were never the *Bataidars* nor ever they came in possession.

19. In support of their respective cases, both the parties have adduced their evidences, oral and documentary. Now, let us consider the evidences one by one;

20. P.W.-4 one of the plaintiffs has stated the same thing as pleaded in the plaint. Therefore, it is not necessary to repeat his deposition. P.Ws.-5, 7 to 9 have supported the possession of the plaintiffs in general term i.e. according to them, the plaintiffs are in possession of the suit properties and Mahanth was never in



possession. However, in cross-examination, they failed to give any detail regarding the suit property. P.W.-5 is not even able to disclose the area of the lands or boundary of lands. Likewise, P.W.-7 although claimed that the plaintiffs cultivate on *Bataidari*, he is unable to give details as to what was the amount of crops. It may be mentioned here that he claimed that division of crops took place in his presence. These are the material witnesses in support of the plaintiffs' case.

21. The plaintiffs have filed exhibits-7 and 7-A, the mortgaged deeds. These documents have been produced to show that the suit lands were mortgaged by them and subsequently, they redeemed. Exhibit-7 is dated 15.06.1928. Therefore, this document is not relevant as the auction took place in the year 1935 and delivery of possession was affected in favour of Mahanth. P.W.-9 has endorsed in the mortgaged deed on 13.07.1957. Much emphasis is given on this endorsement and it is submitted that this clearly shows that the plaintiffs were dealing with the property and they even redeemed the property and came in possession. So far this is concerned, it may be mentioned here that the defendants are not party to this redemption note. It was not made in presence of the defendants. It can very well be said that this mortgaged deed and the endorsement, thereon, exhibit-3 are self serving documents. On the

basis of these documents, one cannot presume that, in fact, the plaintiffs continued in possession in spite of delivery of possession affected in the execution case in the year 1935.

22. At the time of hearing of the first appeal, much emphasis was given on Exhibit-8, which is certified copy of the deposition of one of the defendant. In this deposition, Siddhanath Prasad has stated that he has got no concern with Mahanth Ji nor he had any concern with his land. It was argued that this document clearly shows that the defendants admitted that the defendant had nothing to do with Mahanth or his land. In my opinion, so far this document and the submission of the learned counsel for the appellants is concerned, it is neither here nor there. It neither proves the possession of the plaintiffs nor it proves the fact that the defendants have got no right over the property in question. Moreover, when the defendant was examined as witness, this portion of his evidence, in Exhibit-8, was not confronted to the witness. Now, therefore, this part of the deposition, in Exhibit-8, cannot be read as an admission against the defendants in view of the decision of the Supreme Court reported in ***AIR 1977 SC 1712***.

23. So far the notice, exhibit-5 is concerned, it is a notice issued by Mahanth Goswami Kapildeo Ramji to Chandradip Gope, who is the plaintiffs' father. It appears that by this notice, the father



of the plaintiffs was directed to hand over possession of the Schedule-II lands. This notice shows that Mahanth got the notice issued for handing over the possession as he was the owner of the property. It is not the case of the plaintiffs that in spite of this notice in the year 1950, they continued in possession. The court below held that it may be that the property might have been mortgaged by Mahanth and even if it is believed that the plaintiffs were in possession, their possession was only possession of lessee under the Mahanth.

24. Exhibit-5-A is another notice issued by Revenue Officer inviting objection in commutation of rent. Except this notice, nothing has been brought on record to show as to when, any order was passed commuting the rent. Exhibit-1 series are the payment of rent. Likewise, exhibit-2 series are Water Tax Receipts and likewise exhibit-4 series are also Water Tax Receipts and exhibit-6 is the *Parcha*.

25. So far the evidences produced by the defendants are concerned, exhibit-H is the delivery of possession of Schedule-II land, which was effected in favour of Mahanth Goswami Madhwa Mani Ramji and auction certificate is exhibit-I. The learned counsel for the appellants assailed both the documents on the ground that these documents could not have been admitted in evidence as the



documents are not the certified copies. According to learned counsel for the appellants, the relevant order sheets have not been filed in connection with the said exhibits-H and exhibit-I and since the said documents are copy of the certified copy, those are not reliable. So far this objection of the plaintiffs-appellants is concerned, it may be mentioned here that on 21.07.1986, exhibits-H and I were marked as exhibits without objection of the plaintiffs. Moreover, in paragraph-8 of the plaint, the plaintiffs clearly pleaded that the defendants were producing fabricated order of delivery of possession in favour of Mahanth Goswami Bhairwa Nand Ramji in Execution Case No. 2205 of 1934. In view of these pleadings, the defendants admitted the existence of the exhibit-H. Since the plaintiffs are claiming that the documents are forged and fabricated, the burden is on them to prove how it is forged. Their case is that they have no knowledge about the rent suit or the auction sale or the delivery of possession. Accordingly, it becomes clear now that except this pleading, nothing has been brought on record to show as to how the documents are forged. Further, no relief has been claimed by the plaintiffs with respect to these documents, which are issued by the Court. Moreover, exhibit-H is a certified copy issued by the Court concerned. Therefore, it is a public document. It clearly establishes auction sale.



26. In view of this position, the validity or otherwise of the auction sale pursuant to the decree can not be incidentally gone into. No relief has been claimed regarding the auction sale or the delivery of possession affected pursuant to the decree. The Hon'ble Supreme Court in the case of *Inderjit Singh Grewal Vs. State of Punjab & Anr.* 2012 (1) BLJ 42 SC has held that even if an order is void or voidable, same requires to be set aside by competent Court. Even if a decree is void, *ab initio*, declaration to that effect has to be obtained from competent Court. Such declaration cannot be obtained in collateral proceedings.

27. As stated above, these documents have been marked exhibits without any objection. The Hon'ble Supreme Court in the case of *P.C. Purusothama Reddiar Vs. S. Perumal*, reported in AIR 1972 (2) SC 608 has held that it is not open to a party to object to the admissibility of documents, which are marked as exhibit without any objection from such party.

28. The Hon'ble Supreme Court in the case of *Union of India Vs. Vasavi Coop. Housing Society Ltd.* reported in 2014(2) SCC 269 has held that in a suit for declaration of title, the burden of proof is always on the plaintiff to make out and establish a clear case for granting such declaration and the weaknesses, if any, of the case set up by the defendants would not be a ground to grant any relief to



the plaintiff. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession would succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. Even if, the title set up by the defendants is found against them, in the absence of establishment of plaintiff's title, the plaintiff must be non- suited.

29. In the present case, in our hand, the plaintiffs came with a specific pleading to the effect that the documents produced by the defendants claiming their title are forged documents. The defendants claimed that they purchased the Schedule-II lands in auction sale and the documents showing delivery of possession and rent certificate issued by the Courts were produced. The plaintiffs admitted the existence of these documents but the plaintiffs' case is that these documents are forged documents. Except these pleadings, nothing has been brought on record in support of their pleading. No relief has been claimed regarding the decree or the auction sale or any relief for setting aside the auction sale or any with respect to exhibit-H and exhibit-I. From the trend of the argument advanced before the trial court and before this Court, it appears that the plaintiffs tried their best to demolish the case of the defendants on



the grounds mentioned above that the documents are forged and fabricated. In view of the settled proposition of law by the Supreme Court, quoted above, it is for the plaintiffs to prove their case. The certified copy has been produced which shows that delivery of possession was affected regarding Schedule-II property in favour of the vendor of the defendants and this delivery of possession is of the year 1935. Since there is no declaration sought for regarding the decree or the auction sale, the same became final and now after such a long period, incidentally, in the present suit, the validity or otherwise of the decree or the auction sale cannot be gone into, particularly, when no relief has been claimed.

30. So far Schedule-III property is concerned, there is absolutely no evidence at all produced by the plaintiffs in support of the case that they were *Bataidars* and they have acquired occupancy *raiyati* right prior to vesting of *Zamindari* and after vesting they became *raiyat* of the State of Bihar. The defendants specifically denied that the plaintiffs or plaintiffs' ancestor have come in possession as *Bataidars*. The burden was on the plaintiffs to prove the fact that in fact they were in possession as *Bataidars*. The documents produced by the plaintiffs relate to Schedule- II property i.e exhibit-5, 5A,7-A etc. Moreover the nature of interest with regard to Schedule-III lands is claimed under the ***Bihar Tenancy Act***. If



they have acquired any right under the *Bihar Tenancy Act*, the adjudication should have been made before the authority under the Bihar Tenancy Act. This Court in the case of *Awadhesh Chaudhary Vs. Suryabansh Upadhyay* reported in *1999 (2) PLJR 173* has held that a person acquires occupancy right by legal eviction by efflux of time on expiry of the prescribed period. However, the inquiry to the acquisition of occupancy right in terms of Section 48(c) can be made only under Section 48(d). Since such a right is not available under general law, the forum created under the tenancy Act is alone competent to declare the status of a person as an occupancy under raiyat or raiyat with in the meaning of Section 48(c) and 48(d). It cannot be decided in a suit.

31. The Hon'ble Supreme Court in the case of *Shiv Kumar Chadha Etc. vs. Municipal Corporation Of Delhi & Ors..* reported in *1993 (3) SCC 161* has held that where a particular act creates a right and also provides a forum for enforcement of such right, the jurisdiction of the Civil Court is ousted.

32. Moreover, as discussed above, except the oral statements and the rent receipts that in fact, the plaintiffs are in possession of the Schedule-III lands and are paying rent, nothing has been brought on record to substantiate their case.

33. In view of the above discussion, I find that the

plaintiffs-appellants failed to prove their title, possession over the suit properties describe in Schedule- II and III. Finding of the learned trial court on this point is, therefore, hereby, confirmed.

34. The Hon’ble Supreme Court in the case of *Salem Advocate Bar ... vs. Union Of India* reported in *2005 (6) SCC 344* and again in *2011 (8) SCC 249* has held that cost should be awarded under Section 35 in favour of successful party considering the provision under Section 35 Sub-Section 2 C.P.C. When no cost is awarded then reason must be assigned. In the present case, considering the above facts and circumstances of the case, I find that the plaintiffs approached the Court with unclean hand and dragged the respondents up to this Court. Therefore, the appellants are liable to pay cost.

35. In the result, this first appeal is dismissed with cost of Rs. 10,000/- to be paid by the appellants to the respondents within two months from the date of this judgment. If no cost is paid within the aforesaid period, the defendants-respondents may realize the same through the process of the Court.

Brajesh/-

AFR/NAFR	AFR
DATE	04.10.2016
Uploading Date	05.10.2016
Transmission Date	

(Mungeshwar Sahoo, J.)