(2004) 1 JCR 407

Jharkhand High Court

Case No: AFAD No. 76 of 1988

Jamhir Ansari		APPELLANT
	Vs	
Ketna Organ and Another		RESPONDENT

Date of Decision: Nov. 18, 2003

Acts Referred:

- Chotanagpur Tenancy Act, 1908 - Section 23, 73, 73(2)
- Specific Relief Act, 1963 - Section 34

Citation: (2004) 1 JCR 407

Hon'ble Judges: Vishnudeo Narayan, J

Bench: Single Bench

Advocate: B.P. Tetarbe and Anil Kumar Sinha, for the Appellant; Jaya Roy and Tapas Roy, for the Respondent

Final Decision: Dismissed

Judgement

Vishnudeo Narayan, J.
This appeal at the instance of plaintiff-appellant is directed against the impugned judgment and decree dated 16.3.1988 and 30.3.1988 passed in Title Appeal No. 9 of 1983/14 of 1983 by Shri B.N. Singh, 1st Additional Judicial Commissioner, Ranchi whereby and whereunder the said appeal was dismissed affirming the judgment and decree dated 22.12.1982 and 10.1.1983 passed in Title Suit No. 202 of 1981/62 of 1982 by Shri Ram Nath, Additional Sub-Judge, Ranchi.

2. The original plaintiff-appellant has died during the pendency of this appeal and her heir and legal representative stands substituted in this case.

3. The plaintiff-appellant had filed the aforementioned suit for declaration of her title in respect of the suit plot detailed in the Schedule at the foot of the plaint.

4. The case of the original plaintiff-appellant, in brief, is that the suit plot aforesaid was recorded in the Revisional Survey Records of Right in the name of her father Sheikh Shohabat as "Kaimi Adhbataidar" under Most. Sushila Kuar, the landlord, under khata No. 104 of village Kharta and the said Sheikh Shohabat, being a Kaimi Adhbataidar is a tenant with occupancy rights and is not liable to eviction and after the vesting of the estate, said Sheikh Shohabat became a full fledged raiyat of the said suit plot and he was in peaceful possession thereof since more than 50 years. It is alleged that Sheikh Shohabat died in the year 19.36 leaving behind her only daughter, the original plaintiff-appellant, who inherited the suit plot and she came in possession thereof and continued as such since then. It is further alleged that the plaintiff-appellant lived in the house of her husband in another village and she is cultivating the suit plot through her own cousin Sheikh Bucha as her agent who is holding the suit plot on her behalf and the defendants-respondent without any rhyme or reason started creating disturbances in her peaceful possession over the suit plot on false pretext without any legal right, title or interest therein and he, being a stranger, intends to grab the suit plot taking advantage of her absence. It is also alleged that khata No. 104 consists of three plots including the suit plot and the defendants-respondent is advancing false and mala fide claim over the suit plot only which has cast a clog on her title and hence the necessity of the suit.

5. The case of the defendants-respondent, inter alia, is that Sheikh Shohabat died before 1941 leaving behind no legal heir and his tenancy in respect of the land of khata No. 104 of village Kharta extinguished and the then landlord came in khas possession of all the three plots Including the suit" plot of khata No. 104 and the land of khata No. 104 became the "Bakast" land of the landlord Most. Sushila Kuar and she held and possessed the suit plot as a Bakast land during her life and after her death her descendants, namely, Nawal Kishore Dhar Dubey and others came in khas and exclusive possession of the land of khata No. 104 and in the year 1941 said Nawal Kishore Dhar Dubey and others settled the suit plot with Budhram Oraon, the uncle of the defendants-respondent by virtue of Hukumnama followed by rent receipts and after taking settlement Budhram Oraon came in khas and exclusive possession over the suit plot and he paid rent to the landlord before the vesting of the estate and, thereafter to the State of Bihar. The further case of the defendants-respondent is that Budhram Oraon died issueless and this defendant-respondent No. 1 being his nephew and nearest male agnate inherited the suit plot and came in khas; and exclusive cultivating possession over the same and he is in peaceful continuous possession over the suit plot openly and adversely to all the persons and he also stands mutated in respect thereof and he is paying rent to the State and in the present survey operation he has been recorded in the Survey Records of Right in respect thereof without any objection by the plaintiff-appellant. It is also alleged that the plaintiff-appellant is not the daughter of Sheikh Shohabat and she has not inherited the suit plot and she has never come in cultivating possession over the same and it is false to say that she has cultivated the land through Sheikh Bucha. The further case of the defendants-respondent is that khata No. 104 consists of three plots and none of the plots of the said khata is in possession of the plaintiff-appellant. It is alleged that the suit plot is

in possession of this defendants-respondent and plot No. 1114 is in possession of Sheikh Amir and Sheikh Jambir which they have acquired by registered deed of sale executed by Nawal Kishore Dhar Dubey aforesaid and plot No. 160 of the said khata is in possession of the descendants of the ex-landlord. Lastly it has been contended that the suit of the plaintiff-appellant is barred by law of limitation and adverse possession and ouster as well as u/s 34 of the Specific Relief Act in view of the fact that the suit of the plaintiff-appellant is simplicitor a suit for declaration and no relief for recovery of possession has been sought for,

6. In view of the pleadings of the parties the trial Court framed the following issues for adjudication in this case :

(i) Is the suit maintainable as framed?

(ii) Has the plaintiff got any cause of action for the suit?

(iii) Is the suit barred by adverse possession, limitation and ouster?"

(iv) Is the plaintiff daughter of the recorded tenant sk. Shohabat and rightful owner of the suit land?

(v) Is the plaintiff in possession of the suit land through her agent and relative late Bucha"s son within the statutory period?

(vi) Is the story of resumption by landlord true and made according to legal process and valid?

(vii) Are Nawal Kishore Dhar Dubey and others heir of ex-landlord Most. Sushila Kuar and the settlement of the land in favour of defendant No. 1 valid?

(viii) Is the plaintiff entitled to any relief or reliefs, if any?

7. In view of the oral and documentary evidence on the record the learned trial Court while deciding issue Nos. 4 and 5 has held that the original plaintiff-appellant Sahiman is the daughter of Sheikh Shohabat but she was not in possession over the suit land after the death of her father and the case of the plaintiff-appellant being in possession through her agnate or relative i.e. Sheikh Jambir was also found to be incorrect. The learned Court below has further held regarding issue Nos. 6 and 7 that after the death of Sheikh Shohabat the suit plot became vacant and was resumed by the then landlord who subsequently settled it to Budhram Oraon who came in cultivating possession of the same and subsequently it was inherited by the defendant-respondent No. 1 who is continuing in possession thereon. The learned trial Court also held that the suit is barred by adverse posses-sion, ouster and limitation.

8. Aggrieved by the judgment and decree of the trial Court the plaintiff-appellant preferred Title Appeal No. 9 of 1983. The lower appellate Court on reappraisal and re-appreciation of the evidence, oral and documentary, on the record affirmed the judgment and decree of the trial Court and dismissed the appeal. The plaintiff-appellant preferred this appeal before this Court and while admitting the appeal for hearing this Court formulated the substantial question of law which runs thus :

"Whether in view of the fact that the owner of the property in question left behind a daughter, namely, the appellant who is a Class 1 heir under the Muslim law; in view of the provision as contained in Section 23 of the Chotanagpur Tenancy Act, the landlord had a right to make settlement of the self-same land."

9. Assailing the impugned judgment it has been submitted by the learned counsel for the appellant that the suit plot admittedly stands recorded as Kaimi Adhbataidar in the name of Sheikh Shohabat, the father of the original appellant under khata No. 104 of village Kharta in the Survey Records of Rights and Kaimi Adhbataidar is a tenant having occupancy rights and the status of the Adhbataidar is that of the tenant and not of a hired labourer and it is well settled that an Adhbataidar has to give to the landlord the half produce the land he cultivates as rent and there is a relationship of landlord and tenant between a landlord and his Adhbataidar and Adhbataidar is not liable to be evicted from his tenancy except in accordance with the provisions contained in Section 22 read with Section 73 of the Chotanagpur Tenancy Act (hereinafter referred to as the said Act). It has also been submitted that the original plaintiff-appellant having come in cultivating possession of the suit plot on the death of her father Sheikh Shohabat has not surrendered or abandoned the suit plot at any point of time and in this view of the matter, the case of resumption of the suit plot by the landlord as contended by the defendant-respondent "without observing the provisions of Section 73 of the said Act has no leg to stand and further there is no chit of paper to establish the fact that the landlord before the resumption of the said land had sent a notice to the Deputy Commissioner in the prescribed manner stating therein that he has treated the holding as abandoned and the landlord shall not enter in holding unless and until the objection has been decided in his favour if preferred by the tenant or if no objection is preferred until the expiration of one month from the date of publication of the notice by the Deputy Commissioner and both the Courts below have committed error of law in respect thereof in dismissing the suit as well as the appeal of the plaintiff-appellant. It has further been contended that the case of perfecting title by adverse possession in respect of the suit plot as contended by the defendant-respondent is not tenable in this case in view of the fact that no specific date of taking possession of the suit plot by the landlord or his settlee Budhram Oraon adversely to the plaintiff- appellant has been disclosed in the written statement of the defendant and also no ingredients of perfecting title by adverse possession has been averred therein as mandated under the law and in support of his contention reliance has been placed on the ratio of the case of Parwatabai Vs. Sonabai and others, . It has been contended that the original plaintiff-respondent is the daughter of Sheikh Shohabat, the

recorded Kaimi Adhbataidar of the suit plot and Section 23 of the said Act mandates that if a raiyat died intestate in respect of a right of occupancy, it shall descend in the same manner as other immovable property subject to any local custom to the contrary. It has been contended that it is well settled that the High Courts while considering the matter in exercise of its jurisdiction in second Appeal or Civil Revision would not reverse the finding of fact as recorded by the Courts below. But it is not an absolute proposition. In a case where the finding is recorded without any legal evidence on the record, or on misreading of evidence or suffers from any legal infirmity, which materially prejudices the case of one of the parties or the finding is perverse, it would be open for the High Court to set aside such a finding and to take a different view. Lastly, it has been contended that the learned appellate Court below has committed an error of law in dismissing the said appeal and viewed thus, the impugned judgment is unsustainable.

10. Refuting the contention aforesaid it has been submitted by the learned counsel for the defendant-respondent that the learned Court below on proper appreciation and re-appraisal of the evidence has affirmed the finding of the trial Court and there is concurrent finding of possession of the defendant-respondent on the suit plot and it has now become a conclusive fact and the defendant-respondent has acquired the suit plot by virtue of Hukumnama (Ext. D) executed by the ex-landlord who had resumed the suit plot being abandoned after the death of the recorded tenant Sheikh Shohabat and the settlement has been made by the said Hukumnama in the year 1941 and since then Budhram Oraon and after him his nephew, the defendant-respondent were in possession over the same. It has also been contended that the right of appeal u/s 100 of the CPC is neither a natural nor an inherent right attached to the litigation and it being a substantial statutory right it has to be recorded in accordance with law in force at the relevant time and the conditions mentioned u/s 100 of the CPC must be strictly fulfilled before a Second Appeal is maintained and no Court has the power to add to or enlarge those grounds and the Second Appeal cannot be decided on merely equitable grounds and it is not within the domain of the High Court to Investigate the grounds on which the findings were arrived at, by the last Court of fact, being the first appellate Court. It has also been contended that in a case where from a given set of circumstances two Inferences are possible, one drawn by the lower appellate Court is binding on the High Court in Second Appeal and adopting any other approach is not permissible and the High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. It has been contended that here in this case, the original plaintiff-appellant has admitted that her father had died in the year 1936 and two or three years thereafter the ex-landlord has resumed the suit plot and thereafter the ex-landlord has settled the suit plot by executing a Hukumnama in favour of Budhram Oraon and since then Budhram Oraon and after his death his nephew, the defendant-respondent is in cultivating possession of the said suit plot and in view of the admission aforesaid of the

plaintiff-appellant it has become an established fact that the ex-landlord was in possession of the land and thereafter Budhram Oraon and after him the defendant-respondent came in continuous cultivating possession over the same and this fact has been established by the concurrent finding of both the Courts below. It has been observed by this Court in case of Sumitra Devi and Ors. v. Par-bati Devi 1996 (1) PLJR 294 that in second appeal the High Court"s interference is not required where the Judgment and decree passed by the Courts below are concluded by finding of fact under the provisions of Section 100 of the Code of Civil Procedure. Further reliance has been placed on the ratio of the case of Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, and Smt. Satya Gupta Alias Madhu Gupta Vs. Brijesh Kumar, . It has also been submitted that Section 73 of the said Act is self-contained provision and If there is violation of the aforesaid provision, then the remedy is provided u/s 73 itself and prior permission of the Deputy Commissioner is not mandatory under the provisions of Section 73(2) of the said Act and it is well settled that no notice is necessary to enable the landlord to obtain khas possession of the holding of its being abandoned as it is not the notice which terminates the tenancy but the voluntary abandonment coupled with the acts on the part of the landlord indicating that he considers the tenancy at an end and it is for the Court in such case to determine whether the tenancy has terminated and the landlord is not bound to take any proceeding u/s 73 of the said Act whereas the landlord acquires a good title to the land by virtue of abandonment. In support of his contention reliance has been placed upon the ratio of the case of Safiuddin Vs. Lawrence Somra Kerketta and Another, . Further reference has been placed on the ratio of the case of Sk. Rahimuddin and Ors. v. Lakho Devi. 1998 (1) PLJR 593. Lastly, it has been contended that the plaintiff-appellant has got neither title nor she was ever in possession of the suit land at any time within twelve years of the suit and the absence of the date of coming in possession by the ex-landlord after over the suit plot has no relevancy in this case and the only difference between the landlord who has taken recourse to the requisite proceedings and one who has not done so is that a landlord, who has taken proceedings before the Deputy Commissioner, will have an indefeasible right by virtue of abandonment from the date of order recorded by the Deputy Commissioner treating the land as abandoned. The landlord, however, who has not taken recourse to this proceeding cannot claim indefeasible title and he may be defeated by suit being started by the person entitled to the property within twelve years of the commencement of possession of the landlord and in the present case, however, the suit was filed beyond twelve years from taking over possession by the landlord of the abandoned land and learned Courts below has rightly held that the suit is barred by law of limitation and in this view of the matter, the ratio of the case of Parwatabai, (supra) has no application in this case.

11. It is an admitted case of the parties to the suit that plot No. 1089 of khata No. 104 of village Kharta which is the suit plot stands recorded in the Survey Records of Right in the name of Sheikh Shohabat, the father of the original plaintiff-appellant (since dead) besides two other plots as Kaimi Adhbataidar. Sheikh Shohabat as per the case of the

plaintiff-appellant has died in the year 1936 leaving behind the plaintiff-appellant as his legal heir and prior to his death, the plaintiff-appellant stands married and she was living in her matrimonial home about eight miles away from village Kharta. It is well settled that an Adhbataidar has to give to the landlord, half of the produce of the land he cultivates as rent. The status of an Adhbataidar is that of a tenant and not that of a hired labourer and there is a relationship of landlord and tenant between the landlord and his Adhbataidar and Sheikh Shohabat as per entry in the Survey Records of Right is a Kaimi Adhbataidar and it means that he has occupancy right as Adhbataidar in respect of the suit plot and Sheikh Shohabat has died intestate having the right of occupancy in the suit plot which was inherited by the plaintiff-appellant as per provision of Section 23 of the said Act. The case of the plaintiff-appellant is that after her marriage she was getting the suit plot besides other plots cultivated through her cousin brother Sheikh Bhucha. As per the case of defendant-respondent, the suit plot besides other plots of Khata No. 104 was abandoned after the death of Sheikh Shohabat which was resumed by the then landlord, Shushila Kuar and the same was possessed by the then landlord as her Bakast land and thereafter her descendant settled the land with Budhram Oraon by executing a Hukumnama (Ext. D) followed by rent receipts and since Budhram Oraon and after his death his nephew, the defendant-respondent continued in cultivating possession thereon and had paid rent to the then landlord and after vesting of the estate of the State of Bihar. The Hukumnama (Ext. D) and rent receipts (Ext. C series) are referred to in this connection. In order to construe abandonment within the meaning of Section 73 of the said Act there must co-exist a voluntary abandonment of holding without a notice to the landlord, absence of arrangement for payment of rent and cessation of cultivation of the said holding. The cultivation of land and payment of rent are the two primary duties of tenant and the dereliction of such duties aggravated by voluntary departure from holding is strong evidence of the severance of the relationship of the landlord and tenant and in such a situation it is always open to the landlord to resume the possession of the said abandoned land. PW 1, the defendant-appellant in her evidence has admitted in the most clear and unequivocal terms that after the death of her father, Sushila Kuar, the then landlord of her village resumed the possession of the suit plot and thereafter her descendant Nawal Kishore Dhar Dubey settled the same with Budhram Oraon, the uncle of the present defendant-respondent and PW 3 has also deposed in para 5 of his cross-examination that after the death of Sheikh Shohabat, the ex-landlord came in possession of the disputed plot. There is also admission on the record as per their evidence read with the evidence of PW 4 that Budhram Oraon and after his death, the defendant-respondent has been coming in cultivating possession of the disputed plot. There is also no chit of paper on the record brought by the plaintiff-respondent to give an inkling of the fact that the rent of the suit plot was ever paid to the ex-landlord after the death of Sheikh Shohabat and after the vesting of the estate to the State, And to crown all, PW 8 Sheikh Jahir along with his two brothers has acquired plot No. 1114 of khata No. 104 aforesaid which was recorded as Kaimi Adhbataidari land of Sheikh Shohabat by virtue of sale deed dated 1.11.1961 (Ext. B) executed by Nawal Kishore Dhar Dubey, the descendant of the then landlord Shushila Kuar. PW 8 is the son of Sheikh Bucha, the

cousin brother of the original plaintiff-appellant. Therefore, the finding of the learned Courts below cannot, be said to have been recorded without any legal evidence on the record or on misreading of evidence or the said findings suffers from any legal infirmity which materially prejudices the case of one of the parties and thus the finding recorded by both the Courts below cannot be said to be perverse.

12. For appreciating the rival contentions advanced by the learned counsels for the parties it is necessary to look into the provisions of Section 73 of the said Act, which reads thus :--

"73. Abandonment of land by raiyat.--(1) If a raiyat voluntarily abandons the land held or cultivated by him, without notice to the landlord and ceases either himself or through any other person to cultivate the land and to pay his rent as it falls due, the landlord may, at any time after the expiration of the agricultural year in which the raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take into cultivation himself.

(2) Before a landlord enters under this section, he shall send a notice to the. Deputy Commissioner in the prescribed manner, stating that he has treated the holding as abandoned and is about to enter on it accordingly; and the Deputy Commissioner shall cause a notice of the fact to be published in the prescribed manner and if an objection is preferred to him within one month of the date of publication of the notice shall make a summary inquiry and shall whether the landlord is entitled under Sub-section (1) to enter on the holding. The landlord shall not enter on the holding unless and until much objection has been decided in his favour or if no objection is preferred, until the expiration of one month from the date of publication of the notice.

(3) When a landlord enters under this section, the raiyat shall be entitled to apply to the Deputy Commissioner for the recovery of possession of the land at any time not later than the expiration of three years in the case of an occupancy-raiyat, or in the case of a non-occupancy-raiyat one year, from the date of the publication of the notice; and thereupon the Deputy Commissioner may, on being satisfied that the raiyat did not voluntarily abandon his holding, restore him to possession in the prescribed manner on such terms (if any) with respect to compensation to person injured and payment of arrears of rent as to the Deputy Commissioner may seem just."

From reading of Section 73 of the said Act, it is manifest that the provision aforesaid gives right to the landlord to take possession of abandoned holding without preferring a suit. However, it simply provides for certain steps to be taken by the landlord for his own protection against any subsequent action on the part of the tenant. The object of enactment of this provision has been dealt with in the book "The Chota Nagpur Tenancy, 1908 by J. Reid" giving reference to the decision in the case of Bhagaban Chandra Missir v. Bisseswari Debya (3) CMN 46 which reads thus :

"Aboriginal raiyats in Chota Nagpur frequently desert their holdings in periods of stress, and emigrate to the labour districts, without making any arrangements for the cultivation of the lands comprised within their tenancies, or for the payment of rent. They sometimes return in a year or two, and not un-commonly assert that they have not abandoned their tenancies. The object of the section is to safeguard the legitimate interests of the landlord in these cases, and per contra to protect the raiyats against fraudulent resumption."

Section 73(1) of the said Act mandates that if the land is abandoned by the tenant without notice to the landlord and the tenant ceases to cultivate the said land and to pay rent, the landlord may enter on the holding and let it to another tenant or take into cultivating himself. It, therefore, appears that it is not at all necessary to send a notice to the Deputy Commissioner to enable the landlord to obtain khas possession of the holding abandoned by the tenant. It is not the notice which terminates the tenancy but the voluntary abandonment of the land by the tenant which terminates the tenancy. The said question arose for consideration in the case of Safiuddin, (supra) and it was observed that the landlord is not bound to take any proceeding u/s 73 of the said Act and the landlord acquires a good title to the land by virtue of abandonment. It has further been observed which runs thus :

"The only difference between the landlord who has taken recourse to the requisite proceedings and one who has not done so is that a landlord, who has taken proceedings before the Deputy Commissioner, will have an indefeasible right by virtue of abandonment from the date of order recorded by the Deputy Commissioner treating the land as abandoned. The landlord, however, who has not taken recourse to this proceeding cannot claim indefeasible title and he may be defeated by suit being started by the person entitled to the property within twelve years of the commencement of possession of the landlord."

Section 73(3) of the said Act provides that when a landlord enters into the abandoned holding and resumed possession over it, the tenant has the right to apply to the Deputy Commissioner for the recovery of possession of the land at any time not later than the expiration of three years in the case of an occupancy riayat, or in the case of a non-occupancy raiyat one year, and on such application being filed, the Deputy Commissioner may on being satisfied that the raiyat did not voluntarily abandon his holding, restore him to possession on such terms with respect to compensation to person Injured and payment of arrears of rent as to the Deputy Commissioner may seem just. It is, therefore, clear that if the landlord had entered into the land without following the procedure provided under Sub-section (2) of Section 73 of the said Act, the rule of law of limitation will apply for the tenant to get back the possession of the said land. It, therefore, appears that the provision contained in Section 73 of the said Act is self-contained in itself. Here in this case, as per the evidence on the record, the plaintiff-appellant was residing in her matrimonial home eight miles away from the suit plot and after the death of Sheikh Shohabat, the land was abandoned and the landlord resumed its possession which came in his khas cultivating possession and thereafter in-the year 1941, the

landlord settled the land vide Ext. D with Budhram Oraon, the uncle of the defendant-respondent followed by rent receipts and since then Budhram Oraon and thereafter his nephew, the defendant-respondent came in cultivating possession over the same and continued as such. It, therefore, appears that the defendant-respondent has perfected his right and title in the suit property by remaining in continuous cultivating possession of the suit plot for several years beyond twelve years. The plaintiff-appellant here in this case has filed the suit beyond twelve years from the date of landlord''s possession as well as also beyond twelve years from the settlement of the land by the landlord in favour of Budhram Oraon, the uncle of the defendant-respondent and as such the suit filed by the plaintiff-appellant is definitely barred by limitation. And last but not the least, the plaintiff-appellant has filed the suit simplicitor for declaration of title without any relief of recovery of possession when as per the evidence on the record she stands dispossessed of the suit plot and in this view of the matter also the suit filed by the plaintiff-appellant is equally not maintainable. Both the Courts below have properly construed the evidence on the record and the principle of law involved therein and there is no illegality in the impugned judgment requiring an interference therein.

13. There is no merit in this appeal and it fails. The impugned judgment of the learned Courts below is hereby affirmed. The appeal is hereby dismissed but without costs in the facts and circumstances of this case.