

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 530 of 1960

**Mukesh Sheikh, Since deceased, his heirs and legal representative
Nawaj Sheikh & Ors.**

Vs.

Kalu Mondal & Ors..

For the Appellants : Mr. Amal Krishna Saha
Mr. Debnath Mahata

For the Respondents : Mr. Animesh Mukherjee
Md. Ali Hasan

Heard on : 01.08.2023

Judgment on : 03.10.2023

Ajoy Kumar Mukherjee, J.

1. This second appeal has been preferred before this court in 1960 against the judgment and decree passed by the First Appellate court in Title Appeal No. 131 of 1957 arising out of Title Suit No. 41 of 1955. Plaintiff in Title Suit No. 41 of 1955 prayed for declaration of his 4 annas share in the suit tank and it's bank property and for recovery of fish selling price, to the extent of plaintiff's 4 annas share.

2. Plaintiffs case in a nutshell is that one Nehal Sekh predecessor in Interest of proforma defendant nos. 18, 19, 20 had 8 annas share in the suit tank with it's banks corresponding to C.S Plot number 1144 under C.S. Khatian No. 98 of Madhaipur Mouza and late Khosbar Sk. had the

remaining 8 annas share in the said tank and they possessed said land and tank of that jote in equal share and accordingly their names were recorded in the C.S. Record of Rights. After the death of said Nehal sk., the proforma defendant nos. 18, 19, 20 have inherited his interest and Khosbar Sk died leaving behind him plaintiffs and defendant no. 1 and 2 as his legal heirs to the remaining 8 annas share in the disputed tank and jote. According to plaint case plaintiff no. 1 to 5 got four annas share from eight annas share of Khosbar. Plaintiffs further case is that on 22nd Jaistha 1361 B.S., plaintiffs learnt that the defendant nos. 1 to 17 had caught huge amount of fishes from the suit tank but they had not given plaintiffs 4 annas share worth Rs 240/- and as such plaintiff had prayed for declaration of his 4 annas share as well as fish selling price. At first plaintiffs filed a case in Small Causes Court for recovery of price of the fish in their share and subsequently the plaint was returned and plaintiffs filed the aforesaid suit for confirmation of their right title interest in respect of 4 annas share in the suit tank in addition to their claim for price of fish which were caught from suit tank.

3. The defendant no. 3, 6 to 9 and 12 to 15 contested the suit by filing a consolidated defence and they denied *inter alia* plaintiffs' title to the suit property. The defence contention is that the paddy land and the disputed tank of the jote mentioned in the schedule to the plaint originally belonged to Imami Sk. and Nehal Sk. and the rent of that jote having fallen in arrears, the landlords Gopal Chandra Roy and Bibhuti Bhusan Roy instituted the Rent Suit being No. R.S 222 of 1931 in the 1st court of Munsif, Rampurhat against Nehal Sk. and obtained a decree in that suit. The decree was put to

execution in Rent Execution case no. 366 of 1933 and in that case the jote under C.S. khatian no. 98 of Madhaipur Mouza, including the disputed tank was sold in auction and the landlords purchased the same from auction sale on 19.06.1933. After purchase the auction purchasers took delivery of possession of the land and tank of suit holding in khas in the month of Ashar 1341 B.S. for the first time. Thereafter the plaintiffs and the defendants 1,2,16 and 17 and proforma defendants no. 18 to 20 did not possess the disputed tank and other lands of the jote. Thereafter the defendant no. 2 took settlement of 63 acres paddy lands of the disputed jote at annual jama in the name of his wife Ajimunnasha Bibi on 30th Ashar 1341 B.S. The defendant no. 1 also took settlement of 43 acres of paddy land of the disputed jote on annual rental basis on the selfsame date. Further case of the defendant is that Nehal Sk., the father of the proforma defendant no. 18 to 20 took settlement of 37 acres of land of the disputed jote on 12th Ashar, 1341 B.S. and thereafter proforma defendant no 18 Allarakha himself took 20 acres of land of the said jote in the month Ashar 1341 B.S. from the land lords and since then they are in possession of the paddy lands of the disputed jote by paying rent to the land lord/auction purchasers for a period, long over 12 years. The auction purchasers however continued to possess the tank in question in khas together with the banks. But in the year 1345 B.S. the defendant no. 3 took settlement of 1 bigha 9 cottahs of the eastern bank of the disputed tank in the name of his wife. In 1356 B.S Nurbaksh Sk. and others took settlement of 8 annas share of the watery portion of the disputed tank and some portion of the southern bank measuring 2 bigha 15 cottahs. Thereafter in 1358 B.S, the defendant no. 3,

6 to 9 and 12 to 15 took settlement of the remaining 8 annas share of the suit tank and 1 cottah land of the western bank and since then they have been possessing the disputed tank and its bank to the exclusion of the plaintiffs and other defendants by catching fishes of the tank and by making cultivation in the banks of the tank. The defendant also denied that they have caught huge amount of fishes from the tank as alleged. The plaintiff no. 1 also took settlement of 54 acres of land of the dispute jote in the name of his wife from auction purchasers/landlords after the auction sale in Rent Execution case no. 366 of 1933. Defendants further contended that the suit is barred by limitation and also barred for non-joinder of the necessary parties.

4. Learned Trial Court framed several issues which includes as to whether plaintiffs have any right title interest in the suit property and whether the suit is barred by limitation. After contested hearing the Trial Court decreed the suit on 26.06.1957 in part on contest against the contesting defendant no. 3, 6 to 9 and 12 to 15 and exparte against the rest. Plaintiffs' title to the disputed tank and its bank to the extent of 4 annas share was declared and their possession was also confirmed. Being aggrieved by the judgment and decree, the Defendants/appellants preferred the first appeal before the learned District Judge, Birbhum, and learned District Judge, Birbhum by the impugned judgment and decree dated 30.01.1959 allowed the appeal and set aside the judgment passed by the Trial Court.

5. Following substantial questions as raised by the parties during hearing of the Appeal are required to be answered in the present context.

- (i) Whether the court below has erred in observing that the sale arising out of Execution case no. 366 of 1933 was a rent sale and not a money sale when plaintiffs specific case is that in the said suit Khosbar Sk. was not made a party.
- (ii) Whether the court below was justified in observing that the khosbar's right title interest if any in the suit property had been extinguished by aforesaid sale, when it is the specific case of the plaintiffs that they were not defaulter in paying rent in respect of the suit property and they were not made party in the said rent suit proceeding.
- (iii) whether court below was justified in observing that the plaintiffs or their predecessor Khosbar have or had no possession in the land of the jote of the disputed tank since Ashar 1341 B.S, when plaintiffs specifically contended that they have all along paid rent and taxes and the documents in support of possession are lying in the custody of their brothers namely defendant no. 1 & 2.
- (iv) Whether court below was justified in observing that the suit is barred by Limitation when plaintiffs' specific case is that being a co-sharer of the property they are in possession through other co-sharers and as such suit cannot be declared as barred under the law of Limitation.

DECISION

6. Admittedly C.S. Record of Rights is the oldest document available in this case which is marked as exhibit 1 in connection with the

suit plot being C.S. Khatian no. 98 of Madhaipur mouza comprising of 5.08 acres of land which was an occupancy jote recorded in the name of Nehal Sk. and also in the name of Khosbar Sk. (as purchaser from the original tenant Imani Sk.) in equal share. It has been strenuously argued by appellant/plaintiff that in the Rent Execution case no. 366 of 1933 arising out of Rent suit no. 222/1931, Khosbar was not made a party and as such the order passed in the said rent suit is not binding upon Khosbar who was admittedly in possession at least till Execution case. Though the contesting defendants pleaded that before the Rent Execution case Imani having died and Nehal being sole heir of Imani inherited 16 annas share, but defendants witness DW-2 who was appointed as gomostha (officer of landlord) admitted Nehal and Khosbar were in possession till rent execution case. Defendant's case is as per entry in C.S. record, even if it is presumed that Khosbar purchased occupancy right of Imani, then also under the law prevailing at that point of time land lords were not bound to recognize the purchaser of an occupancy holding. On the contrary plaintiffs contention is entry in CS Record of Rights by itself shows that superior landlords recognized such sale by not challenging entry in the Record of Rights and Rent Suit was filed long after preparation of CS Record and as such decree passed in Rent Suit without making Khosbar as a party, is not binding upon Khosbar or his successors.

7. According to the plaintiffs, landlords, even if purchased property from said Execution Case had obtained sale certificate marked as exhibit

H, they purchased only 8 annas share of Nehal and not the share of Khosbar.

8. Accordingly the crucial point that arises in this context is whether the sale made in aforesaid Execution Case was a rent sale or a money sale. Plaintiff nowhere pleaded in the plaint or in the evidence that it was a money sale. On the contrary transactions like rent receipts marked as exhibit-“C” series showing payment of rent of the land of CS Khatian No. 98 and some counter foil exhibits marked as “A” series, certain Kharchas marked exhibit “E” series and one registered Kobala executed by Nehal Sk. in favour of one Berash Sk. show that the property within the disputed jote was settled afresh after Rent Execution sale to different persons as pleaded in the written statement. Trial court did not believe the documents marked exhibit and evidence adduced by the defendants’ witnesses on the ground that they are shaky and full of contradictions. But on careful consideration it appears that Trial court laid much importance upon some minor contradiction in the evidence adduced by the defence witnesses who are basically village rustic people but even then such discrepancies could not shaken defence case in view of documents marked exhibit as above which were produced on behalf of the defendants and on the contrary plaintiff beside the recording in the CS record, which was prepared prior to 1928, do not have any document to show that after Rent Execution case, the plaintiffs ever possessed suit property or paid rent to anybody. The excuse raised by the plaintiff that such documents are lying under the custody of their brother/ defendants does not give much credence nor inspire confidence in view of the fact

that he could have made attempt to prove such documents calling the original one. Furthermore subsequent RS & LR Recording also does not speak about plaintiffs possession. There is no cogent reason as to why Trial Court disbelieved fresh settlement made by Nehal in respect of the paddy field and suit tank in connection with the disputed Jote.

9. In fact there is no basis of trial courts finding that it is difficult to hold that Kudrat sk possesses 6 cottahs of land of the paddy field of the disputed jote under the fresh settlement from the landlords/auction purchasers because he filed only one rent receipt. The trial court unnecessarily came to a finding that kudrat sk has been set up as a tenant by the contesting defendants.

10. The learned Trial Court firmly opined that even if Nehal possessed suit tank, he possessed to the extent of 8 annas share because there is nothing to show that auction purchasers took delivery of possession of the auction purchased property including the suit tank. Plaintiffs miserably failed to produce a single scrap of paper that either Khosbar or any of the plaintiffs or Nehals's heirs ever paid rent for the suit jama since the sale in 1340 B.S. In fact contesting defendants in support of settlers' exclusive possession in the suit property examined some witnesses including some officers who had exhibited the documents in support of settlers' exclusive possession and there is no reason to believe that land lords or their officers had collusion with the defendants to disprove plaintiffs' case of possession, in the absence of any enmity in between the plaintiffs and such officers/witnesses. Even if it is the case of plaintiff as stated by PW1 that the rent receipts are in the

custody of his brothers i.e. defendant no. 1&2 then plaintiffs ought to have called upon and produce such rent receipts to support his possession. In the facts and circumstances of the cases, it is not believable that plaintiffs have any enmity with defendants no. 1-2, in view of the fact that the defendant no. 1-2 have taken settlement of some of the lands of the jama in the name of their respective wives and plaintiff no. 1 has admitted in his evidence that these women possess a portion of the lands and the defendant no. 1-2 also did not contest the suit against plaintiffs for the purpose of defending their wives interest in the land.

11. Accordingly court below rightly came to a finding that even if the delivery of possession after aforesaid sale has not been established by documentary evidence, but the contesting defendants managed to get possession of the land of the jama by ousting the persons then in possession namely Nehal and khosbar and since then khosbar or his successor in interest had no possession in the tank in dispute. Since plaintiffs wants to plead and prove that such sale was a money sale so burden heavily lies upon plaintiff to prove the same, which plaintiffs did not discharge. It is not logical to conclude, since there are some minor contradictions in the evidence of defence witnesses in respect of possession, so conversely plaintiffs possession in the suit property automatically established. It is well settled that in order to succeed in the suit, plaintiff will have to prove his own case of possession at least after Rent Execution sale on his own strength and not on the basis of any weakness in the defence evidence. The Trial Court in this context

committed error in disbelieving the defendants' witnesses in respect of the possession, solely on the ground of some minor contradictions.

12. Plaintiff heavily relied upon the DW-2, D. N. Chakraborty's evidence who said that khosbar and Nehal were in possession of suit tank but it is reflected from the judgment of trial court that said DW-2 admitted that he did not go to the site of the disputed tank and he cannot say about the actual possession of the disputed tank. The learned Trial Court observed that DW-2 stated that there were Joma kharij accounts containing the statements as to the realization of the rent from the different lessees concerning the lands of the disputed jote and he made over those accounts lists of khas land of the land lords and the written authority he got from landlords during annual accounts. The Trial Court held that the important documents have not been secured though available as appearing from the statements of DW-2 and DW-3. Since such documents have not been filed so Trial court observed that such documents have no existence at all. At the costs of repetition, it can be said that plaintiff will have to succeed by the strength of his own case showing possession and not on the weakness of defence evidence. Even then admittedly contesting defendants and their witnesses produced certain documents to prove their khas possession and it is not understandable why the court below held that such documents were created for the purposes of the suit and in order to do that the witnesses DW-2, DW-3 and DW-8 and contesting defendants have joined hands. Such observation is without any basis and it is also not understandable why the Trial court had called them as interested witness and paid

persons of the landlord/auction purchasers. It is also to be mentioned Khosbar or his heirs never challenged the rent sale.

13. On the contrary exhibit-G to some extent is a document in support of taking delivery of possession of the lands of the disputed jote after auction purchase by the land lords in khas by making entry in the diary of the pleader Sri Bholā Prasanna Mukherjee marked as exhibit G in support of possession and such evidence had not been demolished by plaintiff by bringing any counter evidence. Though plaintiff tried to establish that plaintiffs are co-sharers in respect of the disputed tank and its bank and if any other person or persons possesses the disputed tank and its bank as heirs of Khosbar or through the landlord/auction purchasers their possession shall be deemed as possession by co-sharers and that possession can never be adverse against the plaintiffs who are also co-sharers, whatever may be the length of such possession.

14. I do not find any substance in such contention in view of fact that plaintiff miserably failed to plead and prove that such sale was a money sale. Accordingly as said sale appears to be a rent sale as correctly held by the court below, khosbar's interest if any in the property got extinguished with the rent sale and khosbar cannot have any co-sharership rights after rent sale. The court below rightly relied upon the defendants' contention that in the rent suit khosbar was not required to be made a party, because he purchased Imani's share before amendment of 1928 of the Bengal Tenancy Act. Plaintiffs have not proved Khosbar's purchase. Admittedly the disputed jote relates to occupancy right. Such holding was not transferrable at that time. Since Imani's name appearing

in CS Record of Rights, so there is sufficient reason to believe that superior landlords did not recognize such sale in favour of khosbar. If they recognized such sale, only khosbar's name would have appeared in the CS Record of Rights marked exhibit-1. This is also evident from the fact that khoshbar or his successors failed to produce any rent receipt to show that superior landlord ever accepted any rent from them accepting them as purchaser. Simply because Khoshbar was not made a party in rent suit so it cannot be presumed on that ground alone that the sale was a money sale and not a rent sale. Accordingly there is reason to believe that before the rent suit, Nehal became absolute owner in view of the undisputed fact that Imani died before rent suit leaving behind Nehal as his only legal heir. As Nehal alone represented tenancy, there is also reasons to believe that for that reason rent suit was filed against Nehal alone. The fact that Khosbar had no possession is also strengthened from the fact that by kobala marked Exhibit-D Nehal sold a portion of CS plot No. 1063 which is appertaining to dispute Joma to another person in 1943, wherein the joma for this plot was standing in the name of Nehal alone. This also supports the contesting defendants case that Nehal had taken settlement of the plot from the landlords after the rent sale as is also evident from Exhibit A-1. Exhibit-A-1 is dated 12th Ashar 1341 B.S. and accordingly it can be said that plaintiff or their predecessor Khoshabr had or have no possession in the land of the disputed jote including disputed tank at least since Ashar 1341 B.S. correspondence to 1934 and Khosbar's right if any, had extinguished since then.

15. In view of the aforesaid finding that the plaintiffs or their predecessor Khosbar did not have any possession in the suit property since Asar 1341 B.S., the plaintiff's suit is also hopelessly bared by limitation.

16. In such view of the matter I find that the ultimate finding made by the court below does not call for any interference. Accordingly the judgment and decree passed in Title Appeal No. 131 of 1957 dated 30th January, 1959 by the District Judge, Birbhum is hereby affirmed.

17. SA 530 of 1960 therefore stands dismissed.

There will be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)