

## **Jugal Kishore Mandal And Ors. vs Fani Bhushan Kundu And Ors. on 4 May, 1973**

**Equivalent citations: AIR1973SC2341, (1973)2SCC221, 1973(5)UJ739(SC)**

**Bench: A. Alagiriswami, D.G. Palekar**

### **JUDGMENT**

Palekar, J.

1. This is an appeal by special leave from the judgment and decree passed in second appeal by the High Court at Calcutta. The appeal arises out of a suit filed by the original plaintiff Aswini Kumar Mandal for declaration of his title and for possession. The property involved is 10 Cottahs in extent recorded as plot No. 571 of Khatian No. 649 of Mouza Belgachia Kismat in the District of Howrah.

2. The said property formed part of one holding. The other part comprised plot No. 570 Khatian No. 558 with which we are not immediately concerned. The holding originally belonged to the Bagchis who sold it to one Purshottam Sonar on 21-9-1927 for a consideration of Rs. 800/-. On August 28, 1928 Purshottam Sonar mortgaged the property to a firm named Shewpujan Rai Indrashankar Rai. Shewpujan enforced the mortgage and a preliminary decree for sale was passed in his favour on June 21, 1931. The decree was made final the same year and in execution of the decree the holding was purchased in court auction by Shewpujan on January 11, 1932. Possession was supposed to be taken on March 3, 1932. Aswini Kumar Mandal purchased the holding from Shewpujan on 9-8-1949. That is the title on which the plaintiff filed the suit.

3. It would appear from the records of the case that the holding was surveyed under the Bengal Tenancy Act sometime in 1939 and so far as the present suit is concerned plot No. 571 of Khatian No. 649 was shown to be in the possession of Purshottam Sonar. Objections had been raised to the entries made in the records of rights at the time of the survey on behalf of Shewpujan but the objections were rejected and the name of Purshottam Sonar was confirmed in the records of rights as being in possession. The High Court agreeing with the finding of the First Appellate Court has held that inspite of the property being purchased in auction by Shewpujan in 1932 the possession of this plot continued to be with Purshottam Sonar. The landlords were Sarat Kumar Roy and another and though the record of rights shows that Purshottam Sonar was recorded as 'Dhakalkar' paying a rent of Rs. 2/2/- per annum it does not appear that any rent was paid. So the landlords brought rent suit No. 351 of 1945 against Purshottam Sonar for recovery of rent and obtained an ex-parte decree. In execution of the decree the property was sold in court auction and was purchased by defendant No. 1, Fani Bhushan Kundu. The court put him in possession on December 13, 1946. Shewpujan and Purshottam Sonar filed applications under Section 174 of the Bengal Tenancy Act for setting aside the sale. Ultimately the applications were rejected. In the meantime defendant No. 1 Fani Bhushan

found that one Hossaini Bux was in possession of about half a Cottah out of the plot. Fani Bhushan filed a suit against Hossaini Bux and got possession of the whole plot. Thus when Fani Bhushan was in possession, plaintiff Aswani Kumar purported to purchase the property from Shewpujan in 1949.

4. Aswini Kumar sought to disturb Fani Bhushan's possession and thereupon proceedings were started under Section 145 Criminal Procedure Code. In the summary proceedings the Magistrate found that Fani Bhushan was in possession and hence on July 24, 1960 orders were passed restoring possession to Fani Bhushan. Thereupon Aswini Kumar filed the suit which was originally numbered as Suit No. 307 of 1950 but was subsequently tried as Title Suit No. 2 of 1955 of the Munsif court at Howrah. The suit was for a declaration of plaintiff Aswini Kumar's title and for a injunction or, in the alternative, for possession.

5. The High Court agreeing with the Appellate Court held that neither Aswini Kumar nor his predecessor in title. Shewpujan had obtained possession of the property at any time. The possession was that of Purshottam Kumar inspite of his interest in the property being sold in the court auction in 1932. It was further held that the land was revenue paying agricultural land to which the Bengal Tenancy Act applied. Since Purushottam Sonar who was in possession, failed to pay the rent, the landlords, who were made parties to the suit, were held to be entitled to file rent suit against Purushottam Sonar and take out the plot for sale in execution of the decree against him. It was true that Shewpujan had purchased the interest of Purushottam Sonar in 1932 but since Shewpujan, the purchaser, had not made any attempt to mutate the firm's name in the landlord's Sherista and the name of Purushottam Sonar continued in the records, the landlords were entitled to file the suit against Purushottam as representing the holding. The auction purchased by Fani Bhushan in the court sale in execution of the rent decree against Purushottam Sonar gave title in respect of the plot to Fani Bhushan. In any case, it was further held that Purushottam Sonar had perfected his title by adverse possession at the time of the court auction in 1946 and that way too Fani Bhushan obtained a good title to the property. The subsequent purchase by Aswini Kumar from Shewpujan did not pass any title to him. Even assuming that Aswini Kumar obtained title by reason of the sale deed in his favour by Shewpujan his suit was barred by limitation as neither he nor his predecessor Shewpujan was in possession within 12 years before the suit.

6. Mr. Sarjoo Prasad appearing on behalf of the appellants, who are the representatives of the original plaintiff Aswini Kumar, contended that the plot in suit was not agricultural or raiyati land but 'Niskar' home stead land. Therefore, it was submitted, the Bengal Tenancy Act did not apply to the land and, if that Act did not apply, the rent suit filed by the landlords in 1945 against Purushottam Sonar alone and the subsequent auction sale in favour of Fani Bhushan in that proceeding would convey no title to Fani Bhushan because Purushottam Sonar had none having lost it as far back as in 1932 when Shewpujan purchased the property in court auction. Mr. Sarjoo Prasad does not dispute that if the land is held to be agricultural land to which the Bengal Tenancy Act applied, Purushottam Sonar would properly represent the holding in 1945 and the subsequent proceedings in the rent suit would be sufficient to legally transfer the interest in the holding in favour of Fani Bhushan. So the real question involved in the suit was whether the land was agricultural land for which rent had to be paid to the landlords and to which the Bengal Tenancy Act applied. The First Appellate Court and the High Court have come to the conclusion that it was

raiya land and not Niskar land and since Shewpujan had failed to get his name mutated in place of Purushottam Sonar in the landlord's Sherista it was open to the landlord to consider Purushottam Sonar alone as representing the holding and the suit against him in 1945 was perfectly in order.

7. We are satisfied that there is no force in Mr. Sarjoo Prasad's argument that the plot was not agricultural land to which the Bengal Tenancy Act applied. We have already pointed out that survey was introduced sometime before 1939 and in the record of rights prepared at that time by the Survey Officer the plot was shown in the name of Purushottam Sonar as the Dakhalkar. The record further shows that the landlords were Sarat Kumar Roy and Sarat Kumar Mukhopadhyaya and the amount of rent payable was Rs. 2/2/-. It was shown as Dag No. 71 in Khatian No. 649 and below the column "class of land" the land was classified as 'Danga Paratan Patit'. In the absence of any satisfactory evidence to the contrary the record of rights will have presumptive value. It appears that when the land was being surveyed an objection had been raised on behalf of Shewpujan with regard to the possession of Purushottam Sonar but the same was over ruled. No further action seems to have been taken by Shewpujan in this respect. 'Danga Paratan Patit' means "high arable land which was fellow since olden days." That clearly shows that the land was agricultural land. We have already noted that both Shewpujan and Purushottam Sonar had applied in 1947 to the court for setting aside the auction sale in favour of Fani Bhusan but without success. Those applications were under the Bengal Tenancy Act. Even in the plaint Aswini Kumar did not allege that the land was not governed by the Bengal Tenancy Act nor was any issue claimed in that respect. It would thus appear that the land was agricultural land to which the Bengal Tenancy Act applied. Reference was made to the sale certificate in favour of Shewpujan in which the land was shown as Niskar' or rent free land. But that was a little significance. In Bagchis' sale deed in favour of Purushottam Sonar it was mentioned that the land was in possession of the Bagchis in Mokerari Mourashi right which means a heritable right on payment of fixed lump sum rent. The land was not land in fee simple. On the other hand, in the deed obtained by Aswini Kumar from Shewpujan in 1949 the land was described as belonging to Jamai land of Purushottam Sonar bearing a rental of Rs. 2/2/-. The things are therefore clear. One is that the land was agricultural land and that the same was held on a sub-tenure under a superior holder. In these circumstances the mention in the sale certificate that it was Niskar land is of little value.

8. Being agricultural land to which the Bengal Tenancy Act applied neither Shewpujan nor his vendee Aswini Kumar could object to the auction sale of the property in execution of the rent decree against Purushottam Sonar in 1945. The landlord could not have recognized Shewpujan as the tenant as he had failed to mutate the tenancy in his own name in the landlord's Sherista under Section 13 read with 18A of the Bengal Tenancy Act. The High Court agreeing with the first appellants court held that inspite of the auction sale in 1932 in favour of Shewpujan, Purushottam Sonar had continued to be in possession throughout till respondent No. 1 Fani Bhusan obtained possession of the land through court in December, 1946. Thereafter Fani Bhusan filed a suit to eject Hossaini Box who has a hut in a small portion of the land and Fani Bhusan got complete possession of the land in suit. It was, thereafter in 1949 that Aswini Kumar purchased from Shewpujan which was nothing but a purchase of litigation. Aswini Kumar created trouble for Fani Bhusan and there was a proceeding under Section 145 Criminal Procedure Code. The Magistrate directed that possession should be restored to Fani Bhusan and at that stage Aswini Kumar filed the present suit

in 1950. It is obvious that Aswini Kumar had not obtained possession under his sale deed and neither he nor his predecessor in title was in possession within 12 years of the suit. The title had already passed in favour of Fani Bhusan as a result of the auction sale in the rent execution proceedings. Aswini Kumar, therefore, obtained neither title nor possession within 12 years of the suit and hence it was lightly dismissed.

9. The appeal is dismissed with costs. Liberty to Respondent No. 1 to withdraw the amount deposited by the appellants in this Court.