A

JAHURI SAH & ORS.

v.

DWARKA PRASAD JHUNJHUNWALA & ORS.

April 27, 1966

B

[M. HIDAYATULLAH, J. R. MUDHOLKAR, R. S. BACHAWAT AND J. M. SHELAT, JJ.]

Bihar Buildings (Lease, Rent and Eviction) Control Act 1947 (Bihar Act 3 of 1947)—Co-owner of house agreeing to pay compensation to other co-owner for occupation of house—Relationship of tenant and landlord whether arises—Act whether applicable—Agreement to pay compensation whether enforceable.

C

Adoption—Existence of deed of adoption admitted—Oral evidence whether barred.

Two Hindu undivided families one of them being represented by the appellants and the other by the respondents were co-owners of a house which was purchased by them jointly. The appellants occupied a major portion of the house on an agreed compensation being payable by them to the respondents in respect of the latter's share occupied by them. On the compensation not being paid as agreed, the respondents filed a suit for its recovery, as well as for partition. In the plaint one S was mentioned as having been adopted out of the plaintiff family and for that reason he was not impleaded. The appellants resisted the suit on the grounds that: (i) S had not been impleaded although a co-owner, (ii) the suit was barred by the Bihar Building (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act 3 of 1947), and (iii) the contract for payment of compensation was not enforceable as there was no ouster of the plaintiffs by the respondents. The trial court decided in favour of the appellants but the High Court held against them. They came to this Court by special leave.

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E

HELD: (i) The suit was not incompetent because S was not made a party thereto. The fact of adoption was stated in the plaint and had not been specifically denied by the appellants in their written statements. No specific issue on the question of adoption was raised and it could not be therefore argued that S's adoption had not been established. [284 A-B, F]

F

Oral evidence of the fact of adoption did not become inadmissible merely because the existence of a deed of adoption was admitted. A deed of adoption merely records the fact that an adoption had taken place and nothing more. Such a deed cannot be likened to a document which by its sheer force brings a transaction into existence. [284 D-E]

G

(ii) The mere fact that the defendants agreed to pay compensation to the plaintiffs for their occupation of the plaintiff's share would not bring into existence a relationship of landlord and tenant. By this agreement the parties never intended to constitute a relationship of landlord and tenant between the defendants and their co-owners. Bihar Act 3 of 1947 was therefore inapplicable and the suit could not be said to be barred under its provisions. [285 C]

H

A (iii) Co-owners are legally competent to come to any kind of agreement for the enjoyment of their undivided property and are free to lay down any terms covering the enjoyment of the property. Ouster of a co-owner is not a *sine qua non* for enabling him to claim compensation from the co-owner who is in occupation and enjoyment of common property. [285 E-F]

B CIVIL APPELLATE JURISDICTION: Civil Appeal No. 193 of 1964.

Appeal from the judgment and decree dated May 13, 1960 of the Patna High Court in Appeal from Original Decree No. 132 of 1955 and order dated February 15, 1962 in M. J. C. No. 265 of 1961.

C *Sarjoo Prasad, S. C. Sinha* and *B. P. Jha*, for the appellants.

S. T. Desai and *R. C. Prasad*, for the respondents.

The Judgment of the Court was delivered by

Mudholkar, J. This is an appeal by certificate from a judgment of the Patna High Court reversing that of the trial court
D dismissing the plaintiffs' suit for partition and separate possession of their half share in a house and for payment of compensation from May 2, 1947 to September 11, 1951 at the rate of Rs. 200/- p.m. with interest and for payment of compensation at the same rate from the date of suit till the recovery of possession of their share in the house.

E The facts which are not disputed before us are these: The property in dispute which is situate within the limits of the municipality of Bhagalpur was purchased jointly by five persons, Juri Mal, Gajanand, Ramasahai Sah, Jahuri Sah and Ramgali Sah. The first two of these are father and son (and were members of a joint Hindu family). Both of them are dead. Plaintiffs 1 to 4 are the sons and plaintiff 6 is the widow of Gajanand and plaintiff No. 5 is the widow of Jurimal. Jurimal, Gaja-
F nand (constituted a joint Hindu family) and plaintiffs 1 to 4 constituted a joint Hindu family. Ramsahai, Jahauri Sah and Ramgali were brothers and were members of a joint Hindu family. Jahuri Sah is defendant No. 1 and Ramgali Sah is defendant No. 2. They, along with the remaining defendants, are members of a joint Hindu family of which Jahauri Sah is the *karta*.
G

The property in question was purchased by the two joint families, each family having half interest therein. The date of the transaction was June 26, 1942. At the time of the purchase of the property it was in the possession of Mohanlal Marwari as a tenant. He was evicted therefrom by a decree of the court and
H thereafter it was let out to Government, the compensation having been settled at Rs. 100/- per mensem. The Government vacated the house after some time whereafter the defendants occupied the

house excepting a portion thereof which was in the occupation of Isri Sah and Shib Charan Sah as tenants paying a monthly rent of Rs. 30/-. Half of this rent was being realised by each family.

According to the plaintiffs when the defendants entered into possession of the property they agreed to pay Rs. 200/- per mensem as compensation to the plaintiffs' family with respect to their half share in the property. They, however, did not pay any compensation to the plaintiffs despite the agreement.

On these allegations the plaintiffs instituted their suit. In the plaint they stated that Gajanand had another son named Shankarlal but he was given in adoption to Sreelal, P. W. 6 and he was, therefore, not joined as party to the suit.

The defendants denied the claim and stated that the suit was barred by the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (Bihar Act 3 of 1947) (hereafter referred to as the Act) as well as by the rule of estoppel. They also raised the plea that under the contract entered into between the two families Rs. 50/- p.m. was payable as compensation and not Rs. 200/- p.m. as alleged by the plaintiffs. According to them the suit was barred by the rule of estoppel. They contended that the claim for compensation for a period prior to the expiry of 3 years from the date of suit was barred by time. They also raised some other contentions in the written statement but it is unnecessary to refer to them inasmuch as we must confine ourselves to the points urged before us by Mr. Sarjoo Prasad on their behalf. The points are: (1) that the suit for partition and separate possession was not maintainable; and (2) that the contract under which the plaintiffs claimed compensation is not enforceable. The suit is said to be not maintainable because (a) one of the co-owners of the property was not joined as a party to the suit and (b) also because it was barred by the Act. The contract for payment of compensation was said to be not enforceable as there was no ouster of the plaintiffs by the defendants.

The trial court held that the provisions of the Act applied and by virtue of those provisions the plaintiffs were not entitled to a decree for eviction of the defendants nor were they entitled to a decree for compensation and that the adoption of Shankarlal not having been proved the suit as constituted was not maintainable.

On this point the High Court arrived at different conclusions. The view taken by the High Court was that the provisions of the Act did not apply to this case, that the defendants not having specifically denied the fact of adoption and no issues thereon having been raised the trial court erred in holding that the adoption was not proved and that non-joinder of Shankarlal was not an impediment to the institution of the suit. Further

A according to the High Court the contract to pay compensation at the rate of Rs. 200/- p.m. was duly established and that as it was competent to a civil court to enforce the contract the suit for recovery of arrears of compensation was maintainable. The High Court accepted the defendants' contention that the claim for arrears must be limited to a period of three years prior to the B institution of the suit. It allowed interest on the arrears at 6% p.a. and decreed the claim of the plaintiffs for partition and for arrears of compensation. The plaintiffs then moved the High Court under s. 151 read with O.XX, r. 18, Code of Civil Procedure for granting them appropriate relief with respect to their claim for compensation, for use and occupation of the house from the date of suit till delivery of possession of their share C after passing the final decree. The High Court allowed this application and directed that the plaintiffs shall also be entitled to compensation from the date of institution of the suit until recovery of physical possession of their share after partition or until the expiry of three years from the date of its decree, whichever event first occurs. It also made an appropriate order regarding costs. D

Aggrieved by this decree of the High Court as amended by its subsequent order upon the plaintiffs' application under s. 151 read with O.XX, r. 18, C.P.C. the defendants have come up to this Court.

E In our opinion the High Court was right in holding that the Act is inapplicable to this case. The plaintiffs and defendants were admittedly co-owners of the property. As the property had not been partitioned it was open to either or both the parties to occupy it. The defendants occupied the property except a small portion which was in possession of the tenants. The plaintiffs acquiesced in it because of an agreement between the parties that F the defendants would pay Rs. 200/- p.m. as compensation to them. The defendants did not dispute that there was an agreement about payment of compensation between the parties but their plea was that the amount agreed to was Rs. 50/- p.m. and not Rs. 200/- p.m. Their contention in this behalf was rejected by the High Court which accepted the plaintiffs' contention that the amount was Rs. 200/- p.m. This part of the High Court's judg- G ment is not challenged before us by Mr. Sarjoo Prasad. He, however, challenged the finding of the High Court that the claim to compensation was enforceable. But before we deal with this matter it would be appropriate to deal with the reasons given by him in support of the contention that the suit was not maintainable. He reiterated the argument urged before the trial court H based upon the non-joinder of Shankarlal as a party to the suit. According to him, as Shankarlal's adoption has not been established by the plaintiffs he was also a co-owner of the property

and his non-joinder as a party to the suit rendered the suit incompetent. The High Court has pointed out that the plaintiffs have clearly stated in para 1 of the plaint that Shankarlal had been given in adoption to Sreelal. In neither of the two written statements filed on behalf of the defendants has this assertion of fact by the plaintiffs been specifically denied. Instead, what is stated in both these written statements is that the defendants have *no knowledge* of the allegations made in para 1 of the plaint. Bearing in mind that O.VIII, r. 5, C.P.C. provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted, to say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial. No specific issue on the question of adoption was, therefore, raised. In the circumstances the High Court was right in saying that there was no occasion for the parties to lead any evidence on the point. However, Sreelal who was examined as a witness on behalf of the plaintiffs has spoken about the fact of adoption and his statement can at least be regarded as *prima facie* evidence of adoption. It is true that he admits the existence of a deed of adoption and of its non-production in the court. This admission, however, would not render oral evidence inadmissible because it is not by virtue of a deed of adoption that a change of status of a person can be effected. A deed of adoption merely records the fact that an adoption had taken place and nothing more. Such a deed cannot be likened to a document which by its sheer force brings a transaction into existence. It is no more than a piece of evidence and the failure of a party to produce such a document in a suit does not render oral evidence in proof of adoption inadmissible. We, therefore, agree with the High Court that the plaintiffs' suit for partition of their half share in the property was not incompetent because Shankarlal was not made a party thereto.

We will now deal with the other ground urged by Mr. Sarjoo Prasad in support of his contention that the suit is not maintainable. Under sub-s. (2) of s. 11 of the Act as it stood on the date of the suit a claim for eviction of a tenant or a claim for recovery of possession of a building and claim for rent thereof had to be made before the Rent Controller alone and consequently the jurisdiction of the civil court for the enforcement of such claims was ousted. But, for the provisions of this section to apply, the relationship between the plaintiff and the defendant should be that of a landlord and tenant. If they are co-owners of the property and the property is held by them as tenants-in-common no question of relationship of landlord and tenant comes into being as between them. The common case of the parties is that they are in fact co-owners of the property and the respective

A shares of the two families have not been demarcated. They, therefore, continue to be tenants in common. It is true that the entire property (save a small portion which was in possession of tenants) is in the actual occupation of the defendants which means that they are in occupation not only of their share in the property but also of the plaintiffs' share. That fact, however, would not B make them tenants of the plaintiffs. Under the law each tenant-in-common is entitled to the possession of the entire property, that is, to every part of it though its right to possession is limited to the extent of the share in the property. The mere fact that the defendants agreed to pay compensation to the plaintiffs for their occupation of the entire property (ignoring the portion in possession of the tenants) would not bring into existence a relationship C of landlord and tenant. By this agreement, the parties never intended to constitute a relationship of landlord and tenant between the defendants and their co-owners. The provisions of the Act are, therefore, inapplicable. The second ground urged by Mr. Sarjoo Prasad, therefore, fails.

What we have to consider then is whether the contract for D payment of compensation is not enforceable. It is no doubt true that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, E however, follow that the liability to pay compensation arises only in such a case and no other. Co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property F shall pay to the other co-owners compensation. No authority was cited by learned counsel in support of his contention that ouster of a co-owner is a *sine qua non* for enabling him to claim compensation from the co-owner who is in occupation and enjoyment of common property. We, therefore, reject the contention.

In the circumstances, therefore, we dismiss the appeal with G costs.

Appeal dismissed.