

(1927) 04 PAT CK 0017
In the Patna High Court

Balunki Rout and Others

APPELLANT

Vs

Sri Kunja Behari Deb and Others

RESPONDENT

Date of Decision : 26-04-1927

Acts Referred:

Citation : AIR 1927 Patna 209

Hon'ble Judges : Dawson-Miller, C.J;Mullick, J;Kulwant Sahay, J;Jwala Prasad, J;Das, J

Bench : Full Bench

Judgement

Dawson-Miller, C.J.—These three second appeals came before the Judges at the Circuit Court at Cuttack last year and were referred to a Full Bench for bearing, the learned Judges finding themselves unable to concur with two previous decisions of this Court in which the question then arising for determination had been decided. They arise out of three suits in which the plaintiffs as landlords in each case claim to recover possession of certain holdings by ejectment of the tenants. In each case the plaintiffs claim that they were occupancy raiyats and that the interest of the tenants was that of under-raiyats holding under them. In Appeals No. 45 of 1924 and No. 1 of 1925 the facts are similar and these two appeals can be dealt with together. In Appeal No. 31 of 1923 the cause of action alleged is somewhat different and it will be convenient to deal with that case separately.

2. In Appeals No. 45 of 1924 and No. 1 of 1925 the right of ejectment is based upon the allegation that the defendants being under raiyats of the plaintiffs failed to give up possession after due notice to quit had been served upon them u/s 57 of the Orissa Tenancy Act. The plaintiffs' interest in the land is admittedly that of rafa-tankidars, a form of tenure prevailing in certain parts of Orissa and more particularly in the Khurda estate in which the lands in suit are situate. It is the plaintiffs' case that the status of a rafa-tahkidar is that of an occupancy raiyat and that the tenants holding under him are under-raiyats and therefore liable to ejectment by their landlord on serving due notice to quit u/s 57 of the Act.

3. The defendants, on the other hand, contend that the status of a rafa-tankidar is that of a tenure holder and that the tenants holding immediately under him are raiyats who have acquired, in this case) rights of occupancy in their holdings and cannot be ejected at the will of the landlord but only for the reasons stated in Section 29 of the Orissa Tenancy Act. It is conceded that if the plaintiffs are tenure holders the defendants are occupancy raiyats and cannot be ejected. If, on the other hand, the plaintiffs are occupancy raiyats the defendants are under raiyats and liable to ejectment in those two suits.

4. The lower appellate Courts, from whose decisions these appeals are preferred, held in each case that "the plaintiffs were occupancy raiyats and, therefore, entitled to a decree for ejectment and possession against the defendants who were their under raiyats.

5. In arriving at this decision the Court below considered them selves bound by two decisions of the High Court in which a similar question had been considered and in which it was held that rafa-tankidars in the Khurda estate were occupancy raiyats and not tenure-holders. The first case, *Harayan Patnaik v. Raghunath Patnaik* [1920] 5 Pat. L.J. 373, was decided in 1920 and the second case, *Raghunath Misra v. Ram Behera* AIR 1922 Pat 548, was decided in 1921 and followed the earlier decision. The lower appellate Courts, although the cases cited are in one sense decisions on questions of fact, considered that in so far as they determined the status of rafa-tankidars they were binding upon a Court of subordinate jurisdiction. At the same time it would appear, from the judgment of Mr. Dhavle, the District Judge of Cuttack in the case of *Ananda Das v. Naran Panda* out of which Appeal No. 45 of 1924 arises, that if he had not felt bound by the rulings of the High Court his decision might have been different upon the evidence before him in that case.

6. The question for determination in these two cases is whether a rafa-tankidar is a tenure holder or an occupancy raiyat. The history of the Khurda estate from the beginning of the last century when it was confiscated by the British Government in consequence of the rebellion of the Hindu Raja of Khurda and the subsequent settlement from time to time with rafa-tankidars and others is fully set out in the order of reference of the learned Judges of the Circuit Court, dated the 12th August 1926. It is sufficient to say that various settlements of a temporary nature of portions of this estate were made in 1805, 1806, 1818 and 1820. The latter settlement, made by Mr. Wilkinson, was extended from time to time until 1880 when the cadastral survey of Mr. W.C. Taylor took place. This was followed in 1897 by a settlement of Mr. J. Taylor, his son, under the supervision of Mr. Maddox, the Settlement Officer of Orissa under the Bengal Tenancy Act which was then in operation in Orissa. The last settlement was that of 1912 made by Mr. Sudarsan Das. The origin of these tanki tenures is somewhat obscure. It appears from Hunter's Statistical Account of Bengal, Vol. XIX, which deals with the Puri District, that they were originally revenue free held either as *lakhiraj* or *jagir*, but after the invasion and conquest of Orissa the Rajas of

Khurda began to levy quit rents upon these tenures and some of them were also resumed by the Moghals and the Mahrattas. They were for the greater part grants made to Sasan Brahmins introduced by the Hindu Rajas. They varied in extent, in some cases including whole villages and in others a few bighas of land only. In 1838 during the resumption proceedings by the British Government the nature of these tanki or quit rent tenures or holdings was enquired into. At that time a compromise was entered into between some of the tankidars and the Government to the effect that on condition of their agreeing to pay rent at a certain fixed rate no enquiry would be made as to the liability of their interests to be resumed. The rates so fixed were known as rafa-tanki, or compromise quit rents, and holders of these lands came to be known as rafa-tankidars. It would appear that in many cases rafa-tankidars belonged to the raiyati class but this in itself is not sufficient to show that their interests were necessarily those of raiyats rather than tenure-holders. Two settlement reports of the Khurda estate were made by Mr. W.C. Taylor in the years 1880 and 1886, the former known as the rate report and the latter as the completion report.

7. In Mr. Taylor's report of 1886 there are two passages in which he expresses the view that rafa-tanki lands in Khurda are raiyati holdings. The first passage occurs in paragraph 298 and the second in paragraph 348 of his report. The language is not very scientific as he apparently treats the terms holdings and tenures as synonymous. In the first passage he says:

Rafa-tanki holdings form one of the class of ordinary raiyati tenures and will in future be so rated. Rafa-tankidars will in future be classed as ordinary occupancy raiyats subject to special rules of enhancement.

In the latter passage he says:

But as rafa-tanki lands and baziafti or resumed lakhiraj and tanki tenures are in fact raiyati holdings it is clear that the cultivators of such lands are only sub-raiyats or tenants at will with no rights of occupancy.

8. Mr. Taylor's opinion is no doubt entitled to great respect, but it does not appear that it was ever accepted by the Government or that any record-of-rights was prepared giving effect to the opinion so expressed. The Government resolution following the rate report of 1880 states:

In the case of tankidars or quit-rent holders, the Board anticipate difficulty in deciding whether a cultivator, under such, is a sub-ryot or an occupancy ryot. The decision of this point will depend of course on the question whether the tankidar is himself a tenure-holder or ryot, and in deciding what to record on this head, the Settlement Officer must, no doubt, as the Board say, look to the general character of the tenure. From the correspondence regarding rafa-tanki lands and the manner in which they were assessed at half ryoti rates, it would, however, appear that in most cases the tankidars were of the ryot class. In any case the Settlement Officer would only have to deal, as regards the assessment of revenue, with the quit-rent holder himself. It would be for the sub-tenant to

assert in Court any rights he might conceive himself to possess against the tankidar. The difficulty does not, as far as the Lieutenant-Governor sees, affect the settlement proceedings materially.

9. It would appear, therefore, that the Government; at that, time considered the nature of the interest of tankidars as an open question; nor was it necessary to decide that point as the Government were concerned merely with the revenue to be assessed upon the tankidars whether they were to be regarded as tenure-holders or occupancy raiyats.

10. In order to ascertain the nature of these grants with any precision it would be necessary, I think, to enquire into the origin of the grant itself in each particular case, but the grants in this case are not forthcoming, and I agree with the opinion of my learned brother Jwala Prasad, A.C. J., expressed in the order of reference that the subsequent fixing of rent by compromise would not alter the nature of the tenancy. Mr. Taylor's opinion carries with it no legal presumption of its accuracy. But since the Bengal Tenancy Act of 1885 came into operation the record-of-rights prepared by the settlement officer under Chapter X of that Act must be presumed to be correct until it is proved by evidence to be incorrect and the settlement officer is required to record the nature of the interest of those entered as having an interest in the land. A reference to the Statistical Account of Bengal, Vol. XIX, to the Bengal District Gazetteer, Puri District, and to the subsequent settlement reports of Mr. J.H. Taylor of 1897-1898 and Mr. Sudarsan Das of 1912 will show that the nature of the rafa-tankidari interest was a question for determination in such case and that they could not be classed as a whole either as tenures or as raiyati holdings. In the record-of-rights prepared by Mr. J.H. Taylor and published in 1898 and in that of Mr. Sudarsan Das published in 1912 the plaintiffs in these cases are recorded as tenure-holders, and the tenants under them as occupancy raiyats.

11. The presumption, in favour of the correctness of the record-of-rights enacted by the Bengal Tenancy Act, which was in operation when Mr. J.H. Taylor's settlement was made, and by Section 117(3) of the Orissa Tenancy Act of 1913, which, now applies, supports the view that the interest of the plaintiffs in these suits is that of tenure-holders and not that of occupancy raiyats, and that the defendants are occupancy raiyats holding under them. In the two decisions which have been called in question by the order of reference the Court arrived at the conclusion that the opinion of Mr. W.C. Taylor expressed in his report in 1886 was sufficient to rebut the correctness of the record-of rights prepared at a later date. After a perusal of the documents and records already referred to I am of opinion that the decisions in those cases were wrong and should be overruled. In the present case it is conceded that except for the opinion of Mr. Taylor already referred to there is no evidence to rebut the accuracy of the record-of-rights.

12. The question then arises whether in second appeal the Court is entitled to go behind the findings of the lower appellate Courts. It was contended on behalf of the appellants that questions determining status are themselves questions of law

and that the decision was therefore contrary to law within the meaning of Section 100 of the Civil Procedure Code. On the other hand it was contended on behalf of the respondents that the questions determined were questions of fact. It is, in my opinion, unnecessary to decide this point. Assuming that the point for decision is one of law then it is clear that a second appeal lies u/s 100 of the Code. Assuming, on the other hand, that the question was one of fact then the lower appellate Court should have determined the question upon the evidence before it, and should not have held that it was precluded from so doing by a previous finding of Court of superior jurisdiction upon similar facts in a case between different parties.

13. In this respect I think that the Court committed a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits, and the only question remaining is whether we should send back the case to the lower appellate Court for further consideration on the merits or whether u/s 103 of the Civil Procedure Code, as amended last year, we should determine the question for ourselves. As the whole of the evidence is before us and as I consider that there is no sufficient evidence to rebut the presumption arising from the record-of-rights, I think that this Court is in a position to determine the question without going to the expense and delay of remitting the case to the lower appellate Court. I would, allow the appeals and set aside the decrees of the lower appellate Courts and in lieu thereof pass a decree in favour of the defendants in each case dismissing, the suit with costs throughout.

14. With regard to Appeal No. 31 of 1923 arising out of Suit No. 2047 of 1921, the plaintiffs alleging themselves to be occupancy raiyats sue to recover possession by ejectment of the first three defendants in the suit who had purchased the holding from the Defendant No. 4 the original tenant. The case was that the Defendant No. 4 was a shikrsi tenant holding under the plaintiffs and had no transferable interest in the land and that the first three defendants as transferees were therefore trespassers and liable to ejectment. Alternatively, assuming that the Defendant No. 4, had a transferable interest, they claimed that the transfer to the first three defendants was invalid as the provisions of Section 31 of the Orissa Tenancy Act relating to registration and payment of registration fee had not been complied with and that those defendants were therefore trespassers.

15. The Defendants 1 to 3 contended that the plaintiffs were tenure holders and that the interest purchased by them was the occupancy right of the Defendant No. 4 and that the holding was transferable without the consent of the landlord according to law.

16. In this case also the lower appellate Court held that the plaintiffs were occupancy raiyats and that the Defendants 1 to 3 were trespassers as the Defendant No. 4 being an under riyat had no right to transfer his holding to them. The Court accordingly passed a decree for ejectment. The decision already

come to in the other two appeals must govern this case. This decision, however, does not determine the rights of the parties upon the facts disclosed in the case. Assuming that the plaintiffs are tenure-holders and the Defendant No. 4 is the occupancy raiyat under them, a transfer by sale of the occupancy holding is not valid against the landlord unless the provisions of the section have been complied with or the landlord has consented" to the sale. There has been no consent in this case, and admittedly the provisions of Section 31, Sub-section (1) have not been complied with by the transferees. Under that Sub-section when a transfer of an occupancy holding by private sale takes place the transferee must within a year of the transfer apply to the landlord for registration of the transfer and pay a maximum fee of 25 per cent of the consideration money or six times the annual rent of the holding whichever is greater. The landlord may either accept the fee and consent to the transfer, or he may refuse to accept the fee in which case the transferee may deposit the fee with the Collector who, after giving notice to the landlord to appear and be heard, shall decide whether the latter has any good and sufficient reason to refuse his consent.

17. If he finds that the landlord has no good and sufficient reason to refuse his consent he may then declare that the transfer has been duly registered and pay over the fee to the landlord. Sub-section (4) provides as follows:

Save as provided in this section and Sections 95 and 96, no transfer of an occupancy holding or portion of a holding otherwise than by succession or by sale in execution of a decree for arrears of rent shall be valid against the landlord of the holding unless and until he has consented thereto. Sections 95 and 96 are not applicable.

18. The defendants in this case pleaded I that the holding was transferable according to law without the permission of the landlord and that there was no custom in Orissa for mutation of names by depositing one-quarter of the consideration when an occupancy holding was transferred. This plea, however, is no answer to the suit. It is immaterial that there is no custom in Orissa. The landlord's right to have the transfer registered and the fee paid is based on Section 31 of the Orissa Tenancy Act and not upon custom. The further plea that the holding is transferable according to law without the permission of the plaintiffs, even if substantiated, is no answer to Section 31 of the Act, for no transfer by private sale is valid against the landlord unless he consents thereto or unless the provisions of the section as to registration have been complied with. It is not shown that the landlord consented and it is admitted that the provisions as to registration and payment of fee have not been complied with. It follows that the Defendants 1 to 3 have no valid title and are liable to ejectment as the lower appellate Court decided. The appeal in this case will therefore be dismissed with costs.

19. Before concluding this judgment it should be mentioned that in Appeals 31 of 1923 and 45 of 1924 the area held by the plaintiffs exceeds 33 acres or 100 bighas. The presumption therefore is, u/s 5(5) of the Bengal Tenancy Act and the

same section of the Orissa Tenancy Act, that the plaintiffs' interest is that of tenure holders until the contrary is shown. In the judgment of the lower appellate Court out of which Appeal 31 of 1923 arises the learned Subordinate Judge considered that the presumption would not apply to interests which were created before the Bengal Tenancy Act came into operation.

20. In my opinion this view cannot be supported. The presumption applies to all cases whether the interest was created before or after the Act was passed. In the judgment, the subject of Appeal 45 of 1924, the learned District Judge appears to have held that unless the party relying on the statutory presumption proved not only that the area was more than 33 acres but also that the whole area was held under a single grant the presumption would not apply. In my opinion this was misplacing the burden of proof. Once the area is shown to exceed 33 acres or 100 bighas the presumption arises and it is for the party challenging it to prove the contrary.

21. In Appeal No. 1 of 1925 this question was not raised, or determined in the lower Courts and need not be considered.

Mullick, J.

22. I agree with the learned Chief Justice.

Jwala Prasad, J.

23. (After referring to the history of the teuures as given in the order of reference his Lordship proceeded.) In the course of proceedings under Regulation II of 1819 for the resumption of lands held as Lakhraj or rent free under invalid titles, the Government agreed to a compromise or Rafa with Tankidars or holders of land on quit rents to the effect that on condition of their agreeing to pay rent at certain rates fixed by Government no enquiries would be made into the liability of their holdings to resumption and assessment on full rates. The Government in its Resolution No. 2361, dated the 23rd July 1880 expressly left the question of the status of these Rafa-tankidars to be determined by Courts and the Settlement officer had to concern himself only with the assessment of revenue treating the Rafa-tankidars to be occupancy raiyats in future for the purpose of fixing rents. They were accordingly called Rafa-tankidars as having their tanki rent or revenue fixed by Rafa or compromise. They were assumed or treated as occupancy raiyats only for the purpose of settlement of revenue. Their status was not enquired into; hence the settlement reports cannot be conclusive as to the character of the Rafa-tankis and the status of the Rafa-tankidars. Accordingly the question of status was left to be determined by proper Courts.

24. The decision of the Division Bench of this Court in the case of Harayan Patnaik v. Raghunath Patnaik [1920] 5 Pat. L.J. 373 and Raghunath Misra v. Ram Behera AIR 1922 Pat 548 based only upon the aforesaid settlement report of Mr. W.C. Taylor without taking into account the Government resolution referred to above are obviously erroneous. The subsequent settlement by Mr. J. Taylor under

the supervision of Mr. Maddox of 1897-98 and the Revisional settlement of 1912 confirmed by Government notification, dated the 16th January 1916, were made in accordance with the Tenancy Act and regular records of right were prepared and have been filed in these cases. No record-of-right based upon the settlement report of Mr. W.C. Taylor has been filed nor any such record-of-right seems to have been prepared. Section 117, Clause 3 of the Orissa Tenancy Act (Act II of 1913) makes an entry in a record-of rights prepared and published under the Orissa Tenancy Act (Act 2 of 1913) admissible in evidence and attaches a legal presumption of its correctness. The last revisional settlement record-of-right prevails over the previous settlement record-of-rights and the presumption of its accuracy cannot be rebutted by anything shown to the contrary in the previous original settlement as was wrongly held in one of the aforesaid decisions of this Court. Nor can it be rebutted by an entry in the record-of rights, if any, prepared under the Settlement Report of Mr. W.C. Taylor of 1886. Par less the entries in the latest or revisional finally published record-of-rights of 1916 can be rebutted by anything said or held in the settlement report of Mr. W.C. Taylor of 1886. The report in themselves can be of no legal evidence or value for determining the status of the Rafa-tankidars or for rebutting the entry in the present record-of-rights prepared under the Orissa Tenancy Act.

25. In Appeal No. 31 of 1923 the Court below have held that the entry in the record-of-rights, Ex 2, shows that the plaintiffs have been recorded as holding the entire mouza comprising an area of about 161-980 acres (400 bighas). In Appeal No. 45 of 1924 the Courts below have found that the plaintiff has been recorded as holding 38 acres of land. 1 he Courts below refused to raise the presumption of the plaintiffs being tenure-holders u/s 5, Clause 5 of the Orissa Tenancy Act on the ground that, in the aforesaid decisions of this Court it was held that the status of Rafa-tankidars was that of occupancy raiyats. In the latter case the learned District Judge stated a further ground that it was not shown that all the lands were held under one grant. To my mind both these grounds are erroneous.

26. The presumption arises merely from the area, held by a tenant being over 33 acres or 100 bighas vide *Debendra Nath Das v. Bibudhendra Mansingh* [1918] 45 Cal. 805 and *Kulwant Sahay v. Babu Ram Tiwari* [1917] 5 Pat. L.W. 311. Clause 5 of Section 5 says that.

where the area held by a tenant exceeds 33., acres the tenant shall be presumed to lie a tenure-holder until the contrary is shown.

27. It is for those who want to displace the presumption arising from the area, being over 33 acres, to show that the lands were not held under one grant or to show that the purpose for which the right of tenancy was acquired was not such as would make the tenant a tenure-holder as defined in Clause (1) of Section 5. These having not been shown in the present case, the presumption of the tenants, being tenure-holders u/s 5, Clause 5, would prevail. I would therefore hold that in these two cases the presumption of Section 5, Clause 5, does arise

and the contrary not having been shown the plaintiffs must be held to be tenure-holders. In these cases double presumptions arise one under Clause 5, Section 5 and the other u/s 117, Clause 3, of the Act. In the third case, Appeal No. 1 of 1925, the presumption u/s 117, Clause 3 only would arise. I therefore hold that the plaintiffs in all these appeals are at least tenure-holders if not higher than that such as Taluqdars etc., as the origin of the grants disclosed in the history already set out in my judgment of reference would indicate.

28. The Courts below did not enquire in the matter but displaced the presumption in favour of the plaintiffs being tenure-holders simply relying upon the erroneous decisions of this Court that all the Rafa-tankidars in the Khurda District are Occupancy raiyats. The Courts below therefore committed an error of law and procedure and their findings are thus vitiated by Section 100 of the CPC and must be set aside. There is nothing in the record to rebut the presumption of the entries in the revisional record-of-rights nor is the original grant available. This Court is therefore competent, in second appeal, to determine the issue relating to the status of the plaintiffs in these cases u/s 103 of the CPC and to hold that the plaintiffs are tenure-holders in all the three appeals.

29. Appeals Nos. 45 of 1924 and 1 of 1925 should therefore be decreed and the plaintiffs' suits dismissed with costs throughout. Appeal No. 31 of 1923 must be dismissed and the plaintiffs' suit must be decreed with costs throughout inasmuch as assuming the plaintiffs to be tenure-holders and the Defendant No. 4 an occupancy raiyat, the transfer of the land by him in favour of Defendants Nos. 1 to 3 is invalid; the possession of Defendants Nos. 1 to 3 is that of mere trespassers, Defendant No. 4 having by his transfer abandoned the holding. Thus I agree with the Hon'ble the Chief Justice.

Das, J.

30. I agree with my Lord the Chief Justice.

Kulwant Sahay, J.

31. I agree with my Lord the Chief Justice.