

(1953) 12 OHC CK 0005
In the Orissa High Court
Case No : Second Appeal No. 168 of 1949

Batakrushna Sahu and Another	Vs	APPELLANT
Kunja Behari and Another		RESPONDENT

Date of Decision : 08-12-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Orissa Tenancy Act, 1913 — Section 3(3), 4, 4(3)
Transfer of Property Act, 1882 — Section 108, 117

Citation : AIR 1954 Ori 132 : (1954) 20 CLT 373

Hon'ble Judges : Narasimham, J; Mohapatra, J

Bench : Division Bench

Advocate : B.N. Das and S.C. Chakravarty, for the Appellant; H. Mohapatra and D.N. Sahu, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, J.—This appeal is by defendants 1 and 2 against the appellate judgment of Additional District Judge of Cuttack confirming the judgment of the Munsif of Cuttack decreeing the plaintiff's suit for declaration of title and recovery of possession of a piece of homestead land situated in Cuttack town.

2. In the Current Settlement (See Ext. 4) the disputed property was recorded under Khata No. 846 in the names of Haudi Bewa and Dura Bewa, the two widows of one Natha Behera. The said khata consisted of the following two plots; plot No. 1210 having an area of .035 cents, plot No. 1211 having an area of .004; the first plot was recorded as "gharbari" and the second plot as "dpkan". The nature of right of the said two widows was recorded as that of "Darpattadar". Defendants 1 and 2 are admittedly the Pattadars in respect of the two plots under the Khasmahal who is the superior landlord.

3. The plaintiff's case was that Natha Behera had a permanent tenancy right in the said two plots and that after his death his two widows Haudi and Dura inherited that right. Haudi died subsequently and Dura thus became the sole

surviving heir in respect of the property. On 26-10-1943, she transferred her interest to the plaintiff by a kabala (Ext. 1) for a sum of Rs. 500/-. As defendants 1 and 2 threatened to evict the plaintiff he was compelled to bring the present suit for declaration of title and other consequential reliefs.

4. The main defence of the contesting defendants (Nos. 1 and 2) was that Natha Behera had no permanent tenancy right in the disputed plots; that in any case, after his death his widows abandoned the property and that thereupon the defendants as the immediate landlords obtained possession of the same. They also urged that the suit was barred by limitation.

5. The learned trial Court held that Natha Behera and after him his two widows held a permanent tenancy right in the disputed plots and that in a previous litigation between the defendants and the two widows in T. S. No. 47 of 1932 this question was finally decided against the defendants and as such was affected by the principle of *res judicata*. It further negatived the defendants' contention that the relationship between them and Natha Behera was governed by the provisions of the Orissa Tenancy Act and held that it was governed by the provisions of the Transfer of Property Act. On the question of limitation, it held that the disputed property was abandoned by the widows within about ten years of the date of the institution of the suit and that consequently the suit was not barred under Article 142, Limitation Act. It rejected the defendants' contention that the kabala (Ext. 1) executed by Dura Bewa in favour of the plaintiff was a collusive document representing a sham transaction and held that it was for consideration and that the plaintiff, therefore, became the successor-in-interest of Natha Behera. The learned appellate Court confirmed the findings of the trial Court on all the points.

6. The findings of both the Courts to the effect that the kabala (Ext. 1) obtained by the plaintiff from Dura Bewa was genuine and was for consideration and the further finding that the dispossession of Dura Bewa took place within ten years of the institution of the suit are pure questions of fact and were rightly not pressed in the second appeal. The main points urged by Mr. Das on behalf of the appellants are:

- (i) the provisions of the Orissa Tenancy Act would apply to the present case and not the provisions of the Transfer of Property Act;
- (ii) the decision in T. S. No. 47 of 1932 would not operate as *res judicata* and the Darpattadar's right in the disputed property was that of a tenant-at-will; and
- (iii) both the Courts committed an error of law in assuming that one of the incidents of a permanent tenancy was transferability.

7. The disputed property is situated within Cuttack municipality; but as the said municipality was not excluded from the provisions of the O.T. Act by a notification under Sub-section (3) of Section 1 of that Act it is obvious that the provisions of that Act would apply within the municipality also. But in considering whether the relationship between a lessor and a lessee in respect of a piece of

land situated within Cuttack municipality is governed by the provisions of the T.P. Act or" by the provisions of the O.T. Act the main question for consideration is whether the lessee comes within the class of any of the "tenants" described in Section 4, Orissa Tenancy Act. It was urged that the status of Natha Behera was that of an occupancy raiyat; but no evidence was led to show that when Natha Behera or his ancestors obtained this piece of land from the predecessors-in-interest of defendants 1 and 2 they obtained it for the purpose of cultivation. Similarly, the status of defendants 1 and 2 at the time when they granted lease to Natha Behera's predecessors-in-interest was also not proved by evidence. On the other hand, it was admitted by the defendants' witnesses themselves that there was a house with a pucca well on the disputed land in which Natha and his family members resided for several years. Thus when there is absolutely no evidence to show that the disputed land was let out for agricultural purpose, it is idle to contend that Natha Behera's status was that of an occupancy raiyat.

8. It is true that Chandnaders are also recognised as a class of tenants under the Orissa Tenancy Act even though a chandna tenancy is taken for residential purpose and not for agricultural purpose. But the definition of a Chandnadar as given in Section 3(3), Orissa Tenancy Act, is limited to those persons holding land which has been recorded as chandna in the course of a settlement of land revenue. This definition is very restrictive and whatever might have been the origin of the tenancy if the land is recorded as chandna in the course of a settlement of land revenue the person holding that land would become a Chandnadar and as such a tenant under the Orissa Tenancy Act. But there is clear evidence to show that during the last settlement operations the land was not recorded as chandna. On the other hand, it is admitted that the status of defendants 1 and 2 were recorded as "pattadars" and that of the two widows of Natha Behera as "darpattadars" under them. The circumstances under which the settlement authorities recorded a certain class of non-agricultural tenants situated within Cuttack municipality as pattadars and darpattadars will be clear from, the following extract taken from Dalziel's Settlement Report p. 44:

"A large number of unintelligible statuses were recorded at Provincial Settlement and such terms as pattadar, bajyafti and chandnadar seem to have been used rather loosely and indiscriminately. In this settlement we had to make careful enquiry to determine which tenants were entitled to chandna status under the Tenancy Act and which were holding under terms of a contract subject to the Transfer of Property Act. In the khas mahal areas the tenants hold under written leases & their rents are fixed only for the term of the leases; they are clearly pattadars. A proposal to change their status to that of chandnadars by agreement in order to enable their rents to be settled by Revenue Officers at time of settlement was rejected by Government. In the temporarily settled, area it appeared from enquiry that most of the urban tenants are really chandnadars. Their description in the last settlement khatian, or terij generally includes this term, and they were also found to be so described in the revenue assessment reports. Their rents had been fixed for the period of the settlement. Even leases

granted after last settlement generally show the rents to be liable to alteration only at a new settlement. Such tenants come under the definition of chandna in the Tenancy Act.

"It was generally found that tenants who had taken leases since last settlement had been given permanent right. Those who specially claimed this and proved it were recorded as istimarari chandnadars or pattadars. But the absence of the term istimarari does not necessarily imply that the tenant is holding on a temporary lease.

"A few tenants even in the urban area were found with status sthitiban. Even when in appropriate to the present nature of the holding, this status was maintained, as no action had been taken to cancel it.

"Under-tenants in various degrees are recorded as darpattadar, daradarpattadars, darchandnadar and daradarchandnadar, etc."

A scrutiny of the above extract reveals that the settlement authorities made careful enquiries with a view to determine whether such tenants were entitled to chandna status under the Orissa Tenancy Act or else whether they were merely pattadars holding the land under written leases from the Khasmahal subject to the provisions of the T.P. Act. Under-tenants under the pattadars were recorded as darpattadars. Thus in view of the restricted definition of "Chandnadar" as given in the Orissa Tenancy Act the mere fact that defendants 1 and 2 were not recorded as chandnadars in the last settlement is sufficient to show that they are not chandnadars and consequently they are not tenants of any of the classes described in Section 4, Orissa Tenancy Act.

9. It was, however, urged that the settlement authorities were not concerned with the relationship between a pattadar and his under-tenant (described as a darpattadar) and that consequently the mere fact that the two widows of Natha Behera were shown as darpattadars in the settlement khatian (Ext. 4) would not be presumptive evidence of their status. It is true that the settlement authorities were not concerned with the right of a lessor and a lessee who are governed by the T.P. Act and the mere fact that the two widows of Natha Behera were recorded as darpattadars in the last settlement would not necessarily attract the provisions of Section 117(3), Orissa Tenancy Act, and cast on the defendants the burden of proving that the entry was incorrect. But the settlement authorities were directly concerned with the question as to whether a holding was a chandna holding and if after due enquiry they did not record it as chandna it is decisive on the question that it is not a chandna holding in view of the special definition of "Chandnadar" as given in Section 3(3). For that limited purpose, the settlement authorities were bound to enquire into the status of the lessor and the lessee and consequently the recording of the status of defendants 1 and 2 as pattadars and that of the two widows of Natha Behera as darpattadars would be of great evidentiary value u/s 35, Evidence Act, though such entries may not be presumed to be correct u/s 117(3), Orissa Tenancy Act. There is practically no

evidence worth the name to show that the status of Natha Behera was not that of a lessee under defendants 1 and 2 who themselves admittedly obtained a lease from the Khasmahal. Hence, I would hold that neither defendants 1 and 2 nor the two widows of Natha Behera were tenants as described in the Orissa Tenancy Act land consequently the relationship between them was merely that of a lessor and a lessee governed by the provisions of the C.P. Act.

10. Mr. Das drew my attention to -- Banamali Behera and Others Vs. Padmalabha Misra, , where there are some observations to the effect that persons described as pattadars and darpattadars may, under some circumstances, be governed by the provisions of the Orissa Tenancy Act. But if the facts of the case be carefully scrutinised it will be clear that there was clear evidence to show that the disputed land was let out for the purpose of cultivation. In the present case, however, not only is there no evidence to show that the pattadars (defendants 1 and 2) obtained the lease for the purpose of cultivation or else that they sublet it to Natha Behera for the purpose of cultivation but there is also clear evidence of the defendants themselves to show that Natha Behera had constructed a building and was using the land for residential purpose. Hence, this case is clearly distinguishable from the case cited in -- Banamali Behera and Others Vs. Padmalabha Misra, ". It is true that the mere entry of the status of a person as that of a "pattadar" or "darpattadar" is not conclusive on the question as to whether he will be governed by the provisions of the Orissa Tenancy Act or by those of the T.P. Act and it is always open to a Court on the evidence adduced by the parties to hold that he comes within one of the classes of tenants as defined in Section 4(3) of the Act and is consequently governed by the provisions of that Act. But where there is clear evidence to show that the land was used for residential purpose and not for agricultural purpose and there is no evidence to show that purpose for which the land was originally let out and where during the last settlement the settlement authorities after careful enquiries did not recognise the land as a chandna holding it is idle to contend that the provisions of the Orissa Tenancy Act would apply.

11. Both the Courts were, therefore, right in holding that the present case was not governed by the provisions of the Orissa Tenancy Act and the plaintiff's suit would not be barred by the special rule of limitation laid down in Schedule III, Orissa Tenancy Act, even though the finding was that his predecessor-in-interest was dispossessed within about ten years of the institution of the suit.

12. I now take up the question of res judicata. In 1932 defendants 1 and 2 brought a suit (T.S. No. 47 of 1932) in the Court of the Munsif of Aska for ejecting the two widows of Nutha Behera from the disputed property alleging that they were mere tenants-at-will and that they had been served with a registered notice to quit. The pleadings in that suit were not proved in the present litigation; but from the judgment of the Munsif (Ext. 3) it appears that Dura Bewa contested the suit on the following three grounds : (i) she was a permanent tenant and not a tenant-at-will and was consequently not liable to be

evicted; (ii) no notice to quit was served on her; and (iii) the suit for eviction must, in any case, fail as the permission of the superior landlord, namely, the Khasmahal was not obtained. Three specific issues were framed covering the three grounds, The question as to whether Dura Bewa's status was of a permanent tenant or that of a tenant-at-will was discussed at some length and the Munsif held that she was not a tenant-at-will but a permanent tenant. As regards the service of notice (which was issue No. 2), he came to a finding that the service of notice was not proved. He did not decide the third issue as to whether the permission of the Khasmahal was necessary saying "so I need not give any finding on this issue as the first issue is sufficient to decide the case". The first issue referred to by him was the issue as to whether the defendants were permanent tenants or tenants-at-will.

13. A fair reading of the judgment of the Munsif (which was not taken up in appeal and is thus final) reveals that the main controversy between the parties in that litigation was whether Natha Behera was a permanent tenant or a tenant-at-will. Evidence was led to show that the disputed land was originally let out for residential purpose; there were old pucca houses on it and that subsequently a kutchra house was constructed on the land and occupied by Natha Behera for nearly thirty or forty years and that the annual rent payable was a fixed sum of Rs. 3/8/-. The question as to whether notice to quit was validly served on the defendants was doubtless decided on the assumption that even if the status of the defendants was not of a permanent tenant the plaintiff's suit must in any case fail due to non-service of valid notice to quit. Mr. Das urged that it was issue No. 2 which was the main issue in that litigation & that the question about the permanent status of the defendants was a matter incidentally dealt with, I am, however, unable to accept this argument. In fact, the learned Munsif in the last portion of his judgment refused to decide issue 3 saying that the first issue alone was sufficient for deciding the case thereby making it absolutely clear that in his opinion the issue as to whether the tenancy was permanent or not was the decisive issue in the case.

14. Mr. Das next relied on -- "Midnapur Zamindari Co. Ltd. v. Naresh Narayan", AIR 1922 PC 241 (B); -- Ramaswami Reddi Vs. Talaivasal Marudai Reddi and Others, and -- "Shankarlal v. Hiralal", AIR 1950 PC 80 (D), in support of his argument that the previous decision would not operate as res judicata. His main point seems to be that once the issue on the question of valid service of notice was decided against the plaintiffs in T. S. No. 47 of 1932 there was no point in their taking up the litigation, on appeal, to a higher Court inasmuch as even if they succeeded on the question about the permanency of the tenancy their appeal would fail on the question, of valid service of notice. The question ultimately depends on whether the permanency of the tenancy was a matter directly and substantially at issue in T. S. No. 47 of 1932 and for that purpose in the absence of the pleadings one has to construe the judgment. I have already shown that the judgment indicates that this was the main issue in the case as expressed by the Court itself. The judgment and decree were against the

plaintiffs in that suit (defendants in the present litigation) and they had, therefore, the right of appeal. They, however, did not care to file an appeal against the judgment of the Munsif. The three decisions on which Mr. Das has relied are clearly distinguishable.

In -- "AIR 1922 PC 241 (B)", the previous suit for eviction was contested on two grounds : (i) the defendants had occupancy right; and (ii) the suit was premature. The trial Court held that the suit was premature but that the defendants had not occupancy right. The plaintiff took up the matter on appeal to the High Court and the defendants also filed a cross appeal against the finding of the lower Court to the effect that they did not have a right of occupancy in the land. Both the appeal and the cross appeal were dismissed. But notwithstanding the fact that the defendants filed a cross appeal, their Lordships of the Privy Council held that the finding of the trial Court as regards the absence of an occupancy right of the defendants would not operate as *res judicata*, inasmuch as, once they succeeded on the plea that the suit was premature there was no occasion to go further as to the finding against them.

This decision was followed in -- *Ramaswami Reddi Vs. Talaivasal Marudai Reddi and Others*, ". In that Madras case a suit for eviction was contested by a defendant on two grounds; firstly, that he had a permanent occupancy right in the land and secondly, that there was no valid notice to quit. The trial Court held that the defendant had failed to establish his right of permanent occupancy but that the plaintiff's suit would in any case fail because no notice to quit was given. But as the decree was in favour of the defendant he did not prefer any appeal. But the plaintiff filed an appeal which was dismissed by the District Judge on the ground that no notice to quit was given. The District Judge did not decide the question as to whether the defendant established his claim to right of permanent occupancy. Thus it was clear that the question as to whether the defendant had a permanent right of occupancy though decided by the Munsif was practically left open by the District Judge and also by the High Court in second appeal and the litigation was disposed of on the ground of failure to give proper notice to quit. The question was clearly left open by the superior Courts and was not finally decided so as to operate as *res judicata*.

15. Similarly, -- "AIR 1950 PC 80 (D)", will not be of any material assistance to the appellants. In that decision it was held that when a suit was rejected under Rule 11 of Order 7, C. P. C., as non-maintainable on the preliminary ground that a valid notice u/s 80, C. P. C., had not been issued any observations which the Court might have made regarding the merits of the suit were of an incidental nature and would not operate as *res judicata* in any subsequent suit between the parties. Here the position, however, differs fundamentally. The previous suit was not disposed of on any preliminary ground but was keenly contested and the question as to whether the tenancy was of a permanent nature or not was most important issue in that suit. Hence, the Privy Council decision would not apply.

16. Next it was contended that both the Courts were wrong in assuming that free

transferability was one of the incidents of a permanent tenancy. Both the Courts proceeded on the footing that as Natha Behera was a permanent tenant he had unrestricted right of transfer. This view was, however, challenged. The exact date when Natha Behera or his predecessor in interest obtained lease of the property from the predecessor-in-interest of defendants 1 and 2 is not on record. But the judgment of the Munsif (Ext. 3) in T. S. No. 47 of 1932 seems to be based on the assumption that the lease was prior to the commencement of the T.P. Act. Mr. Das, for the appellants, relied on -- Bansi Singh and Others Vs. Chakradhar Prasad and Others, , in support of his argument that under the general law one of the incidents of such a tenancy was non-transferability and the onus was on the plaintiff to show that the lessee had the right to transfer his interest. But it will be noticed that the said decision was itself based on certain observations in -- "Ambica Prasad Singh v. Baldeo Lal", AIR. 1916 Pat 194 (F), and on several decisions of the Calcutta High Court the latest of which was -- Kamala Mayee Dasi Vs. Nibaran Chandra Pramanik, . In all those decisions, however, it was clearly stated that the general rule that tenancies of homestead lands created prior to the coming into force of the T.P. Act are non-transferable is subject to one important exception, namely, that where there has been an erection of pucca buildings, right of transferability may be assumed. In the present case it is clear from the recitals in the judgment of 1932 (Ext. 3) that there were originally two pucca houses on the disputed land. There was also a pucca well. It is true that subsequently there was a kutch house on the land which was occupied by Natha Behera's family. But where it is clearly established that pucca houses originally stood on the holding and the tenancy is found to be a permanent tenancy, transferability may be assumed in view of the exceptions provided in the aforesaid decisions themselves. Hence, the transfer in favour of the plaintiff cannot be attacked on this ground.

17. It was faintly argued that the permission of the khasmahal was not obtained to the transfer by Dura Bewa in favour of the plaintiff. The lower Court rightly rejected this argument. The terms of the lease between the Khasmahal and the defendants are not on record. There is also no evidence to show that the permission of the Khasmahal was not obtained. No specific issue was raised on this point and as the Khasmahal is not a party to this litigation it is unnecessary to consider how far it will be bound by the transfer.

18. For the aforesaid reasons I would dismiss, the appeal with costs.

Mohapatra, J.

19. I agree.