

(1972) 08 GAU CK 0012
In the Gauhati High Court
Case No : Second Appeal No. 103 of 1970

Bhagya Namasudrani and another

APPELLANT

Vs

Bimal Chandra Chakravarty

RESPONDENT

Date of Decision : 21-08-1972

Acts Referred:

Easements Act, 1882 — Section 2(1), 52, 56
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1973 Guw 23

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : P. Choudhary and K.L. Jain, for the Appellant; N.M. Dam and S.K. Horn Choudhary, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—The land involved in this second appeal measures 2 Bighas, 8 Kathas 8 Chataks and it forms the eastern part of dag No. 32 of Second R. S. Patta No. 9, Mouza Bishnupur, Pargana Barnaipur. District Cachar. It was originally the ownership of Lakhindra Mohan Chakravarty. According to the plaintiff-respondent, Bimal Chandra Chakravarty, he had purchased this land from Lakhindra Mohan Chakravarty on 6-1-53 by a registered deed marked Ext. 1. At that time, according to the case of the plaintiff, the land was in the possession of Guna Namasudra, the father of defendant No. 2 Gopendra Namasudra, on bhagi terms, and since no bhaginama had been executed by Guna Namasudra for the year 1953-54 Lakhindra Mohan Chakravarty secured the bhaginama Ext. 2 dated 15-4-53, from him and made it over to the plaintiff. Guna Namasudra undertook to give 8 maunds of paddy respecting the year 1953-54 and he actually delivered that much paddy to the plaintiff. Thereafter although no fresh bhaginama was executed by Guna Namasudra, he continued to deliver 8 maunds of "chukti" paddy from year to year until his death sometime in February, 1965. Immediately after the death of Guna Namasudra, the plaintiff pleaded, his son Gopendra Namasudra, the defendant No. 2, was asked to

deliver possession to the plaintiff, but he failed to do so. Instead, that defendant in company with the defendant No. 1 Bhagya Namasudrani, his aunt, demolished the ridge (called ail in local dialect) separating the eastern land in dispute from the western part of dag No. 32 and made it a part of the latter land which had been purchased by them from Lakhindra Mohan Chakravarty. That development left no alternative to the plaintiff but to file a suit for khas possession of the land on declaration of his title thereto.

2. The suit was resisted by the two defendants who put in a joint written statement. Their defence in substance was that they held the land on jote rights under the owner Lakhindra Mohan Chakravarty and that by the date of the suit they had acquired rights of occupancy therein. It was resolutely denied that Guna Namasudra had ever possessed the land as an Adhiar either Under the plaintiff or his predecessor.

3. Although a number of issues were settled by the trial Court but the real contest centred around the point whether Guna Namasudra had held the land as an Adhiar or as an occupancy tenant. The trial Court readied the conclusion that bhaginama Ext. 2 was a genuine document executed by Guna Namasudra, that the latter had been in possession of the land firstly under Lakhindra Mohan Chakravarty and subsequently under the plaintiff as an Adhiar and that the defendants had failed to prove that they were in occupation of the land as occupancy tenants. In consequence of these findings the suit was decreed with costs in the manner prayed for.

4. The defendant's appeal in the Court of the Assistant District Judge proved abortive, he having affirmed the various finding of the Munsif on which the latter had founded his decree and having held, in addition, that the rights of an Adhiar are not heritable. Having felt aggrieved, the defendants have come up in second appeal to this Court.

5. During the course of arguments in this Court the appellant's counsel seriously challenged the finding of the Assistant District Judge that the rights of an Adhiar are not heritable. The basic premise on which the appellant's counsel rested his submission that such rights are heritable was that those rights are identical with the tenancy rights and the tenancy rights are heritable beyond dispute. The decision in Shiv Nath, minor under guardian Sahu Girdhar Lal Vs. Shri Ram Bharosey Lal, , was cited to support the contention that the interest of a tenant is heritable. Sri Dam, who appeared for the plaintiff-respondent, did not join issue with Sri P. Choudhury, the appellant's counsel, on the point that the tenancy rights are heritable, but he seriously contested the proposition that the rights of an Adhiar are identical with those of a tenant or that the Adhi rights are heritable. The parties' counsel stated at the bar that the question whether or not Adhiar's rights are heritable is res integra. This statement appears to be correct in the sense that there is no decision of this High Court in that respect. But there are two decisions of the Calcutta High Court wherein it was held that burgadar is generally a servant who enters into a profit-sharing arrangement to cultivate the

land, gives a share of the profits to the owner and keeps the remainder as his remuneration and that unless the terms of the contract show an intention to create an interest in the land, he cannot arrogate for himself the status of a tenant. The authorities are reported in 50 Ind Cas 285 = (AIR 1919 Cal 264), Sheikh Pokhan v. Rajani Kamal, and 58 Ind Cas 859 = (AIR 1910 Cal 548), Brahnamoyee v. Sheikh Mansur. According to the glossary appended to Mullah's Transfer of Property Act, 5th Edn., burgadar means "A person Who cultivates the land and gives a share of the profits to the owner. He is not necessarily a lessee." This description of the true nature of burgadar is based on the decision in Brahnamoyee's case (supra).

6. The expression "Adhiar" is defined in Section 2 (1) of the Assam Adhiars Protection and Regulation Act, 1948, hereinafter called the Act, as under:

"Adhiar" means a person who under the system generally known, as Adhi (whether Guchiadhi or Guti-adhi), barga, chukti, bhag or chukani cultivates the land of another person on condition of delivering a share or quantity of the produce of such land to that person.

This definition almost exactly corresponds with the definition of burgadar given in Brahnamoyee's case, 58 Ind Cas 859 = (AIR 1920 Cal 548) and the word "barga" used in defining Adhiar is clearly indicative of the conclusion that Adhiar and burgadar are interchangeable terms. Therefore, the status and the rights of Adhiar appear to be identical with those of burgadar, and the corollary that follows is that an Adhiar has no right in the land cultivated by him, that he is not a tenant, and that his rights in the land terminate with his death.

7. According to Section 105 of the Transfer of Property Act a lease of immovable property is a transfer of a right to enjoy such property in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of Value, to be rendered periodically or on specified occasions to the transferor by the transferee. The transferor is called the lessor and the transferee the lessee. It is not in dispute that the expression "tenant" borrowed from the English law corresponds With the expression "lessee" used in Section 105 of the Transfer of Property Act. An essential feature of lease as defined in Section 105 is that there "is a transfer of a right to enjoy an immoveable property" by the lessor to the lessee. However, a plain reading of the definition of Adhiar will show that no right in the land is transferred to the Adhiar by the owner of the property concerned. As such, the analogy of the rights enjoyed by the tenant would appear clearly inappropriate to the rights of an Adhiar. The tenancy rights, speaking in general, are both heritable and assignable. As an instance, Section 18 of the Assam (Temporarily Settled Districts) Tenancy Act, 1935, clearly provides that if a raiyat dies intestate in respect of a right of occupancy, that right shall, subject to any custom to the contrary, Descend in the manner as other immoveable property. The defendants, it may be emphasised, had not pleaded in their written statement as an alternative case, that if Guna Namasudra was held to be an Adhiar and not an occupancy tenant, then his rights as an Adhiar had been

inherited by his son Gopendra. If such rights were heritable either under the general principles of law or by custom, such a plea must have been taken by the defendants. Sri Choudhury did not rely on any custom in support of his submission that Adhiar rights are heritable and he, as discussed already, based the proposition that such rights are heritable on the analogy of the tenancy rights. However, as discussed above, there is a basic and fundamental difference between the rights enjoyed by a tenant and those vesting in Adhiars. Therefore the proposition propounded by Sri Choudhury cannot be sustained on the principle on which it was sought to be supported.

8. The rights of an Adhiar, in my opinion, are more akin to those of a licensee rather than those enjoyed by a tenant. A licence is defined in Section 52 of the Indian Easements Act, 1882, as follows:-

"Where one person grants to another or to a definite number of other persons a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license." Obviously, a licence does not create any estate or interest in the property to which it relates unlike a lease. Section 56 of the Easements Act enacts that a licence is not assignable. The Supreme Court held in the case of *Sohan Lal Naraindas Vs. Laxmidas Raghunath Gadit*, that the crucial test for distinguishing a lease from licence is "whether the instrument is intended to create or not to create an interest in the property the subject matter of the agreement", and that "If it is in fact intended to create an interest in the property, it is a lease", and "If it does not it is a licence". The Supreme Court observed further that in determining whether an agreement creates a lease or a licence, "the test of exclusive possession though not decisive is of significance." Exclusiveness of possession indeed cannot be the determining factor in each case. A domestic servant occupying a room in the house of his employer would surely be a licensee and not a lessee if such occupation is in course of his employment and subservient to and necessary for his service. Likewise, a lodger in a house, or an inmate of a boarding house, or a guest in an inn occupies the apartments at their disposal as licensees and not as tenants, though it may be that the lodger and the one putting up in an inn pay some money for use of the apartments. Like a burgadar, an Adhiar shares the produce of the land which he cultivates with the owner without any interest in the land having been transferred to him, and so I feel clear that he is not a tenant nor a lessee but only a licensee. As such, the rights vesting in the Adhiar are neither assignable nor heritable. Such rights consequently do not survive the demise of the Adhiar, and if he happens to assign them they shall stand terminated and the status of assignee would be that of a trespasser vis-a-vis the owner.

9. Sri Choudhury invited this Court's attention to the preamble of the Act to reinforce his submission that an Adhiar is a tenant and not a licensee. Undoubtedly it is stated in the preamble of the Act that the Act is being enacted

"to provide for the protection of tenants of agricultural lands paying rent in kind in the Province of Assam". However that preamble is preceded by the words "An Act to provide for the protection and regulation of Adhiars in Assam". The two sets of language used in the opening part of the Act are apparently difficult to reconcile especially in the background of definition of "Adhial" given in Section 2 (1) of the Act. But the title of the Act, which is the Assam Adhiars Protection and Regulation Act, makes it abundantly clear that the Act was placed on the statute book of the State to protect the Adhiars and the expression Adhial as defined in Section 2 (1) makes it unequivocally clear that an Adhial is not a tenant. His real status, as discussed above, is that of a burgadar or a licensee. The title of an Act beyond doubt forms a very important part of the Act, and where the language of the Act is ambiguous the title can be usefully referred to. Likewise, the preamble of an Act is meant to indicate, in general terms, the object and the intention of the Legislature in passing an enactment. However, neither the title of an Act nor its preamble can be availed of to control the provisions of the enactment so as to restrict or widen the import of the express terms of a section when such terms are clear and unambiguous. The reason behind this rule of interpretation is that so far as an enactment deals specifically with a point it must be deemed to be exhaustive and the law must be ascertained with reference to its provisions, which, when clear and unambiguous, must always prevail both against the title and the preamble. It is only when the language of a particular section is ambiguous or doubtful, or where there is nothing in the provisions of the Act to the contrary, the preamble and the title may be taken into consideration in interpreting the enactment. In this background of the legal concept of the title and the preamble of an Act, there can be no manner of doubt that the expression Adhial is to be interpreted on the plain language used in Section 2 (1) of the Act to define it and not with the aid of its preamble. Therefore nothing turns on the language used in the preamble of the Act for the obvious reason that the language of Section 2 (1) is altogether unambiguous and admits of no equivocation. This definition clause of the Act is very vocal on the point that the owner makes no transfer of the land which he gives to the Adhial for the purpose of cultivation on the basis of sharing of the crops produced by the Adhial. Assuming, however, that "Adhial" is a specie of the genus called "tenant" in non-technical sense of the term, I am satisfied that Adhial is not a tenant whose rights are either heritable or assignable. Therefore, the defendants cannot claim the status of Adhiars on the basis that they are the heirs of the deceased Guna Namasudra who undeniably, according to the plaintiff, was an Adhial in respect of the suit land.

10. The next point urged for the appellants was that according to the recitals in the receipts Ext. A to Ext. A (38), the rent paid to the owner Lakhindra Mohan Chakravarty was in cash and so it was wrong for the plaintiff-respondent to urge that Guna Namasudra had been only sharing the produce of the land with the owner. If cash rent was being paid to the owner of the land, the counsel for the appellants urged further, Guna Namasudra must be taken to have held that land

as a tenant, and since his possession had continued for a long number of years he must be considered to have acquired rights of occupancy. Sri Dam urged on the other hand that none of the receipts had been properly proved and that at any rate there was no evidence to establish that those receipts pertain to the land in dispute. It was not denied at the bar that the only person who deposed about the receipts was Lakhindra Mohan Chakravarty and that he happened to affirm that he had no knowledge to which land these receipts related. However, the appellants' counsel wanted that statement of the owner to be ignored and urged this Court to take the recitals in the receipts at their face value. Assuming, without conceding, that this approach is available to the appellants, I cannot spell out from the recitals in the receipts that cash rent had ever been paid in respect of the suit land. The parties were not at issue on the point that the suit land is the eastern part of dag No. 32 of second R. S. Patta No. 9 and that the western part of that dag is in occupation of the defendants. Therefore, even if it is stated in the receipts that the rent paid in cash relates to, amongst others, dag No. 32, that would obviously mean the western part of dag No. 32. The genuineness of bhaginama Ext. 2 having been established by the concurrent finding of the Courts below, the defendants-appellants cannot be heard to say that Guna Namasudra was paying produce as well as cash rent in respect of the eastern part of dag No. 32. Therefore, the receipts do not constitute evidence in support of the defence plea that the suit land was held by Guna Namasudra as a tenant against payment of cash rent.

11. The last point urged on behalf of the appellants was that even if Guna Namasudra was in possession of the land as an Adhiar, his rights as such had been inherited by his son defendant No. 2 Gopendra Namasudra inasmuch as the bhaginama Ext. 2 states that the terms and conditions of the agreement shall be binding on his successors. The argument of the opposite counsel was that the defendants having not pleaded in their written statement that in case they failed to establish their rights of occupancy in the suit land, they would alternatively be entitled to Adhiar rights, it is not open to them now to claim rights as Adhiars. To buttress this stand, Sri Dam cited Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, , wherein it was held that when the defendant in his written statement sets up title to the disputed land as the nearest reversioner, the Court cannot, on failure of the defendant to prove his case, make out a new case for him which is not only not made in the written statement but which is wholly inconsistent with the title set up by the defendant. The decision clearly interdicts the defendant making out a case different from the one which he had set out in his written statement and on the basis of which alone he had gone to the trial. The reason for the rule enunciated by the Supreme Court is manifest, it being that the Court cannot permit the defendant to stage a somersault in the matter of his defence to the complete surprise of the plaintiff. To be fair to the plaintiff, it must be made known to him on what basis the claim set up by him in the plaint is resisted by the defendant to enable him to lead appropriate evidence to refute the defence plea. Therefore, the defendants of this case cannot be permitted to

claim right of possession to the land as Adhiars on their failure to establish that they are occupancy tenants thereof. On merits too, this new defence has not much to commend itself to the Court. The relevant words in the bhaginama are: "These terms and conditions shall be binding on the successors on my death". These words follow the undertaking by Guna Namasudra that he shall pay 8 maunds of paddy to the owner of the land, and that if he happened to cultivate any other land of the owner adjoining the suit land he shall also pay the owner half of the produce of that land, and that on his failure to discharge those obligations the owner shall realise from him the price of the paddy together with costs and compensation. All these terms, when read together, yield the conclusion that Guna Namasudra had bound himself and his successors in the matter of delivery of the produce of the land to the owner and not that the owner had agreed that on the death of Guna Namasudra the Adhi rights held by him would devolve on his heirs. Consequently I overrule the last submission made on behalf of the appellants.

12. No other point was urged in rapport of the appeal.

13. In the result, the appeal fails and is dismissed with costs.