
(1989) 02 PAT CK 0002
In the Patna High Court
Case No : A.F.A.D. No. 120 of 1981 (R)

Biga Pahan and Others

APPELLANT

Vs

Adolf Xitain @ Adolf Tirkey and Pramila Tirkey

RESPONDENT

Date of Decision : 06-02-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145

Citation : (1991) 1 BLJR 114

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This second appeal is directed against a judgment and decree dated 5.6.1981 passed by Srimati Rajendra Kumari VIIIth Additional Sub-Judge Ranchi in Title Appeal No. 2214 of 1980-81 whereby and whereunder the said learned court reversed the judgment and decree dated 22.12.1979 passed by Shri Mohan Lal Das, 1st Additional Munsiff, Ranchi in Title Suit No. 72/6 of 1977-79 decreeing the plaintiff-appellants' suit.

2. The facts of the case lie in a very narrow compass.

3. The plaintiffs-appellant filed the aforementioned suit for declaration of title in respect of the properties in suit as also for a decree for recovery of possession thereof.

4. The plaintiff's case in short that the suit land was recorded in the name of their grand father as Bhunihari Pahnai land and the plaintiff No. 1 was at the time of institution of the suit holding the office of Pahan. It was also alleged in the plaint that there had been a dispute with regard to possession by and between the plaintiffs and the defendants resulting in initiation of a proceeding u/s 145, Cr.P.C. which was decided against the plaintiffs.

5. The case of the defendants is that the suit land was obtained in settlement by

their predecessors-in-interest more than a century back and in the cadestral survey settlement record of rights, the same was recorded in the name of Phimon Oraon and Banu Oraon ancestors of the defendants who had all along remained in possession thereof and upon their death the defendants had been in possession of the land in question.

6. The learned trial court decreed the plaintiffs-appellants's suit holding inter alia therein that the land being Bhunihari Pahani land, the same was inalienable. It was further held that the nature of the land was Bhut Kheta and as such the same belonged to the entire village community. The learned trial court further held that the plaintiffs have subsisting title and possession in and over the lands in question and the entries of the name of the predecessor-in-interest of the defendants in the records of rights were incorrect.

7. On appeal, the learned lower appellate court affirmed the findings of the trial court to the effect that the nature of the land was Bhut Khetta and appertained to a Bhunihari Pahani tenure. The learned lower appellate court, however, held that in view of the fact that in the revisional survey settlement record of rights the name of the predecessors of the defendants were recorded as Kaimi raiyat, a presumption of correctness of the said entry arises and in the facts and circumstances of the case the plaintiffs have not been able to rebut the said presumption of correctness arising out of the entry in the said record of rights.

8. The learned lower appellate court further held that in view of the aforementioned entry in the record of rights the defendants and/or their predecessors-in-interest must be held to be the raiyats having acquired occupancy right in and over the land in suit and thus they cannot be evicted by the plaintiffs.

9. By an order dated 23.8.1983 the following substantial question of law was formulated.

Whether the lower appellate court is correct in holding that the occupancy right can be acquired in Bhut Khetta land the subject matter of the suit?

10. Mr. N.K. Prasad, the learned Counsel appearing on behalf of the appellants firstly submitted that a Bhut Kheta land which appertained to a Bhuinhani Pahani tenure is wholly inalienable and in this view of the matter the defendants could not have acquired a right of occupancy therein as has been by the learned trial court. The learned Counsel further submitted that in the cadestral survey settlement record of rights (Ext. E) it was clearly mentioned that the predecessor-in-interest of the defendants-appellants were "Gair Dakhalkars" in respect of the lands in question and as such the question of their acquiring any occupancy right in relation thereto does not and cannot arise in absence of any case that by lapse of time they acquired an occupancy right therein or such a right accrued to them by operation of law. The learned Counsel further submitted that by reason of the fact that the nature of the lands in suit is Bhut Khetta, the same belong to the entire village community and a Pahan was merely a trustee in relation thereto. It

was further submitted that in view of the fact that by reason of the prevailing custom and usage the lands were inalienable, the predecessors of the plaintiffs could not have settled the land in question to the ancestors of the defendants and thus the defendants and/or their predecessors-in-interest were not "raiya" within the meaning of Section 6 of the Chotanagpur Tenancy Act (hereinafter referred to as the Act) and thus the question their acquiring any occupancy right in and over the suit lands did not arise and could not arise.

11. The learned Counsel further submitted that the status of the predecessor-in-interest was that of a trespasser and they could not have acquired title by prescription inasmuch as they have been paying rent the rent to the successive Pahans and as such their title could not have been denied by the defendants.

12. Mr. Prasad in support of his contention has taken me through paragraph Nos. 65, 66, 67, 69, 71, 72 and 76 of the Final Report Revisional Survey and Settlement Operation in the District of Ranchi by and Yaylor and also relied upon a Division Bench decision of this Court in Shaikh Bande Vs. Jethua Pahan and Others, .

13. The learned Counsel further submitted that in view of the fact that in the cadastral survey settlement record of rights and defendants' predecessor-in-interest was described as Gair Dakhaldar and thus therein status being that of an occupancy raiyat the question of their acquiring of occupancy right therein did not and could not arise and in that view of the matter the entry of the names of the defendants as "Kaimi raiyat" in the Revisional Survey Settlement record of rights (Ext. 1) must be held to be wrong and thus fit to be ignored. In this connection the learned Counsel has relied upon a decision of this court in Paran Munda and Another Vs. Santosh Mahto and Others, .

14. Mr N.N. Tiwary, the learned Counsel appearing on behalf of the respondents, on the other hand, submitted that in the instant case in view of the fact that the names of the predecessors-in-interest of the defendants were recorded in the cadastral survey settlement record of rights which was finally published in the year 1910 it must be presumed that the original settlement made by then Pahan was made in favour of their predecessor prior to the coming into force of the Chotanagpur Tenancy Act, 1908 and in view of the fact that there had been no statutory bar in, transferring a Bhunihari tenure which includes a Bhunihari Pahan tenure prior to the 1st January, 1908 the defendants and/or their predecessor-in-interest have acquired an occupancy right therein. The learned Counsel further submitted that by reason of the provisions contained in Section 17 of the Chotanagpur Tenancy Act 1908 any raiyat who remains in possession of the agricultural holdings for a period of more than 12 years becomes a settled raiyat of the village and in terms of Section 19 of the Chotanagpur Tenancy Act any settled raiyat of the village acquired a right of occupancy in relation thereto Mr Tiwary further submitted that there is nothing in the F.E.A. Taylor's report to suggest that Bhunihari Pahan lands are wholly inalienable in nature and as the defendants-respondents had been in possession thereof for a long time, they

have acquired the status of occupancy raiwats and as such cannot be ejected by the plaintiffs. The learned Counsel in this connection has relied upon a Division Bench decision of this Court in *Sajib-Main v. Lango Uraon and Anr.* reported in AIR 1946 Patna 207 and a decision of the Board of Revenue in *S.K. Sahoo Ali v. Nandu Pahan and Ors.* reported in 8 Bihar Reports 223. The learned Counsel further submitted that assuming that the then Pahan of the village had no right to make a permanent settlement the defendants having been in possession of the land in question for a long period they have acquired an occupancy right therein by adverse possession. The learned Counsel in this connection has drawn my attention to a Division Bench decision of this Court in *Dukhu Mahtha Vs. Nandlal Tewari and Others*, .

15. Although in the facts and circumstances of this case the first and foremost question that arises for consideration in this case is as to whether a Bhut Khewat land appertaining to Bhunihari Pahan is alienable or not or in other words the question that arises for consideration is as to whether a raiyati settlement can be granted in respect of such land or not. The same question, however, in my opinion is not necessary to be decided, in the instant appeal.

16. From a perusal of the plaint it appears that the plaintiffs have not pleaded of any existing custom to the effect that the lands in question were inalienable.

True it is that the plaintiffs have stated that according to the land was village custom and usages service tenure meant for the purpose of utilising its usufruct for performing the Bhut Puja in accordance with the religion of the "Kols". The plaintiffs in the plaint although purported to have challenged the correctness of the entry made in the Revisional Settlement Record of Rights but they did not challenge the entries in the names of the predecessors-in-interest of the defendants in the cadastral survey settlement record of rights (Ext. 2) is the record of rights in relation to the Revisional Survey settlement record of rights and (Ext. E) is the record of rights of the cadastral survey. In (Ext. 2) the land was recorded in the names of Phillmon Tirkey and Silbanus Tirkey as Kaimi raiyats.

As indicated hereinbefore, the defendants in their written statement categorically stated that the lands in question were taken in settlement by their predecessor-in-interest and the same had been in their possession for more than a century.

It appears from the final report on the survey and settlement operation by J. Reid that the said operation commenced in the district of Ranchi in 1902 of the records of right were finally published in the year, 1910.

17. From the judgment of the learned courts below it is evident that the lands in question were "Bhut Kheta" and they appertaining to a Bhunihari Pahan tenure.

17. It is further evident that prior to coming into force of the Chotanagpur Tenancy Act, 1908 there was no restriction in transferring of a Bhunihari land in favour of any person, which embargo was brought in for the first time by reason

of Section 48 of the said Act. It is also admitted that the incomes arising out of Bhut Khetta land are meant to be spent for religion purposes. It further stands admitted that Pahan of a village is a village preist and entrusted with the duty of performing Puja for driving away the evil spirits.

18. There is nothing on the record to show as and when the lands were taken in settlement by the predecessor-in-interest of the defendants. However as indicated hereinbefore, it is evident that the defendants had pleaded that they and their predecessors had been in possession of the lands in question for more than a century. There also does not appear to be any document showing settlement but the possession of the predecessor-in-interest of the defendants is evident from the entry made in the cadestral survey settlement record-of-rights (Ext. E).

19. It is amitted that Chotanagpur Tenures Act, 1869 (Act No. 11/69) provide for different types tenures including Bhunihari Pahanai tenure. Bhuinhari Pahanai holdings consists of such lands which is under the official cultivation of the Pahan or village priest. This would also appear from paragraph 66 of the Taylor's report.

20. In the said report it has been noticed that there had been many transfers in Bhuinhari lands. However, it has clearly been mentioned that there was no restriction in making a transfer Bhuinhari land before January 1, 1908. For the purpose of disposal of this appeal it is not necessary to consider the other statements appearing in the Taylor's report or in the Reid's report.

21. In this case although no direct evidence has come on record but it appears from the trend of the pleadings of the parties as also the material on record that the plaintiff No. 1 and his predecessor-in-interest were the Pahan of the village. The very fact that the defendants-respondents have pleaded that their predecessor-in-interest had been in possession of the lands in question for more than a century and further in view of the evidence on record it can safely be presumed that the settlement of the lands in favour of the defendants-respondents was made prior to January 1, 1908.

22. In this case the capacity of the Pahan to grant permanent settlement is in question. It may be that regard being had to the mature of the land the same was inalienable even prior to the coming into force of the Chotanagpur Tenancy Act but it is now well settled that if rent has been accepted from a permanent settle by the landlord, the settle would become a tenant from year to year, in the event the settlement is found to be illegal or otherwise invalid. However, as indicated hereinbefore the submission of Mr. Prasad is not that the transfer became an illegal by reason of the provision contained in Section 40 of the Chotanagpur Tenancy Act as accordingly to him the lands being Bhut Kheta in nature were wholly inalienable by village custom and usage. As noticed hereinbefore the plaintiffs-appellants merely contended that the entry made in the name of predecessor-in-interest of the defendant in the Revisional Survey Settlement Record of rights was wrong. Apparently they did not challenge the

entry made in the names of the predecessor-in-interest of the defendants in the cadastral survey settlement record of rights.

23. In this situation the entry made in the two record of rights i.e. cadastral survey settlement record of rights and revisional survey settlement record of rights must be viewed with reference to the respective cases of the parties.

24. It is well settled principles of law which has also been engrafted in Section 84(3) of the Chotanagpur Tenancy Act, 1908 that an entry made in the final publication record of rights shall be presumed to be correct unless the said presumption is rebutted in a suit or in other proceedings.

25. Chotanagpur Tenancy Act contains detailed procedure as to how and in what manner the record of rights are to be prepared and finally published. In terms of the said provisions a person objecting to the entry made in the draft publication as also in the final publication may avail various opportunities and is also entitled to institute a suit. The decision rendered in such a suit would be subject to appeal as provided for in the Chotanagpur Tenancy Act.

26. Prior to filing of the suit the plaintiffs-appellants did not challenge the entries made in the record of rights. In this view of the matter the factual of possession of the predecessor-in-interest of the defendants-respondents on the dates of final publication of record of rights has to be presumed.

27. If the defendants-appellants had been in possession of the land in question prior to 1st January, 1908 by reason of a settlement made by a Pahan, in my opinion, there is absolutely no doubt that they had acquired a right of occupancy by reason of the provision contained in Section 17 and Section 19 of Chotanagpur Act which read as follows:

17. Definition of "Settled raiyat"--Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village.

(2) A person shall be deemed, for the purposes of this section, to have continuously held land in a village notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed, for the purpose of this section, to have held as a raiyat any land held as a raiyat by a person whose heir he is.

(4) Land held by two or more co-sharers as a raiyati holding shall be deemed, for the purpose of this section, to have been held as a raiyat by each such co-sharer.

(5) A person shall continue to be a settled raiyat of a village as long as he holds land as a raiyat in that village and for three years thereafter.

(6) If a raiyat recovers possession of land u/s 71, or by suit, he shall be deemed

to have continued to be a settled raiyat, notwithstanding his having been out of possession for more than three years.

(7) If in any suit or proceeding it is provided or admitted that a person holds any land as a raiyat, it shall as between him and the landlord under who, he holds the land be presumed for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a raiyat.

19. Settled raiyats to have occupancy rights--Every person who is a settled raiyat of a village within the meaning of Section 17 or Section 18 shall (subject to provisions of Section 43) have a right of occupancy in all land for the time being held by him as a raiyat in that village.

28. The bar in acquisition of a right of occupancy in Bhuinhari lands was created for the first time in 1938 by Chotanagpur Tenancy (Amendment) Act 1938 whereby and whereunder Section 48(6) was inserted.

29. It is, therefore, clear that if prior to coming into force of the said Amending Act 1938 the predecessor-in-interest of defendants-respondents were in possession for a period of more than 12 years then there was no bar in acquisition of a right of occupancy therein.

30. For coming to the aforementioned conclusion notice of the entries made in the Revisional Survey Settlement Record of Rights may be taken wherein the names of the predecessor-in-interest of the defendant. Respondents have been shown as Kaimi raiyats. From the glossory appended to the Taylor's report it appears that the words "Kaimi raiyat" means a settled raiyat. Reference in this connection may also be made to Jimaia Mahto Sheikh Bankey Ali reported in 1920 (1) PLT 690.

31. The defendants have also pleaded in the written statement that they were settled raiyats of the village.

True it is that the word "Gair Dakhalkar" means non-occupancy raiyat status but as indicated hereinbefore such a status was acquired by the predecessor-in-interest of the defendants by reason of operation of law as contained in Section 17 of the Chotanagpur Tenancy Act. It is not the case plaintiffs-respondents that no occupancy raiyat status could be conferred upon the predecessor-in-interest of defendants-respondents by reason of any village custom or usage or in other words there was prevailing usage and custom contrary to the provision contained in Section 17 of the Chotanagpur Tenancy Act.

32. In terms of the provision contained in Section 17 of the Chotanagpur Tenancy Act a person acquires the status of a settled raiyat if he continuously holds the raiyati lands whether under a lease or otherwise for a period of 12 years. A legal fiction has been created in terms of the aforementioned provision which must be given its full play.

33. It is true that a Pahan being merely a village priest and thus being a trustee of the entire village community may not have any right to make any transfer in excess of his interest. In this view of the matter any settlement granted by such Pahan would be limited to the period till he holds the office of pahan but in the instant case it has been found by the learned lower appellate court which finding of fact is not under challenge in this appeal that the predecessor-in-interest of the defendants-appellants had been in continuous possession of the land in question for a long time. There cannot, therefore, be any doubt that they had been in possession thereof for long time.

34. In almost in similar set of facts this Court held in *Sajib Mian v. Lango Uraon and Anr.* reported in AIR 1946 Patna 207 as follow:

In my opinion the true position seems to be that the lands in question originally belonged to the village community. They were made over to the family of the Pahan, who may have been once of the founders of the village, as reward for their service in the past also as a remuneration for services to be rendered in the future as village priest. The property vest in the family for the time being holding the position of the Pahan, and, therefore, holding the lands as such. As already indicated, there is no allegation, nor any evidence on the record to show that each successive Pahan is either elected or nominated by the village community. It appears that some member of the family, usually "the eldest member, takes upon himself the execution of the duty of the village Pahan and remunerates himself and his family by the usufruct of the lands; but no person outside the family can claim to be the village Pahan. So long as the family continues to have some member ready and willing to perform the duties of village Pahan, neither the village community as such, nor any member of the community, can interfere with the position of the Pahan.

35. In the aforementioned decision it has categorically been held that there is nothing in the Taylor's report to show that a Bhunihari Pahani lands were absolutely inalienable.

36. The Division Bench in *Dhuma Manda's* case unfortunately has not noticed the earlier Division Bench decision. There, however, appears to be direct conflict in the two Division Bench decisions. But as at present advised, in my opinion in this case it is not necessary to get the conflict resolved by referring this appeal to a larger bench.

37. The right of raiyat to hold the land for agricultural purpose does not only accrue by reason of valid permanent settlement but also by reason of the act to the parties. As held hereinbefore the predecessor-in-interest of the respondents even if treated to be year to year tenants, still in view of the finding that they have been paying rent to the Pahan of the village regularly, they would be deemed to have acquired the status of settled raiyat by remaining in possession of the lands a period of more than twelve years in terms of Section 17 of the Chotanagpur Tenancy Act. In view of the fact that the predecessor-in-interest of

the defendants had been in occupation of the land in question by cultivating the same there was no reason to hold that they did not acquire right to hold the suit land primarily for cultivating purposes. Once it is so held Section 17 of the Chotanagpur Tenancy Act would come into play and by reason thereof a raiyat in occupation of his agricultural holding would automatically acquire the status of a settled raiyat and thus would also acquire a right of occupancy therein.

38. However assuming that a Pahan had no right to make any settlement in respect of such a land, the settlee being a trespasser in the eye of law within possession of the land as a trespasser as against the entire village community. Thus by reason of such possession for a period of more than 12 years may acquire interest in the said land by prescription against the whole village. However the matter may be different, as in the instant case, where a settlee by reason of his attornment to the original Pahan or the subsequent Pahans as his landlord may not acquire any title as against him but in terms of the provision of Section 17 of the Chotanagpur Tenancy Act. There is absolutely no doubt that he would acquire the right of settled raiyat. If the predecessor-in-interest of the defendants had been in possession of the land in question for a period of 12 years prior to coming into force of Chotanagpur Tenancy (Amendment) Act, 1938 they would be deemed to have acquired a right of occupancy therein. The very fact that in the Revisional Survey settlement record of rights the names of the predecessor-in-interest of the defendants have been shown as Kaimi raiyat which means that they were settled raiyat of the village, there cannot, by any doubt that by the time the said Revisional Survey Settlement record of rights was published finally an occupancy accrued to the original settlee or his successors by operation of statutes. Such might not have been the position at the time of final publication of the Cadestral Survey settlement record of rights wherein the predecessor in interest of the defendants were shown as "Gair Dakhalkar".

39. The learned lower appellate court, therefore, has correctly come to the conclusion that the entries in the Revisional Survey Settlement Record-of-Rights must be presumed to be correct, and in that view of the matter it must be held that at the point of time when Revisional Survey Settlement record of rights were finally published, the predecessor-in-interest of the defendants had already become a settled raiyat of the village and thus had acquired in occupancy status in respect of the land in question.

40. In this connection reference may also be made to Section 76 of the Chotanagpur Tenancy Act, Even assuming that custom and usage to the contrary was existing, as was contended by Sri Prasad to the effect that a settlee in respect of Bhunihari land will not acquire the status of an occupancy raiyat but upon coming into force of the said Act, such a right having been expressly conferred by reason of Section 17 thereof, the name by necessary implication, would be deemed to have been modified or abolished by the aforementioned provision and in that view of the matter if a raiyat remained in possession from the date of coming into force of the C.N.T. Act and thus having completed a

period of 12 years prior to coming into force of Chotanagpur Tenancy (Amendment) Act, 1938 irrespecting of any existing custom, usage or any customary right to the contrary he would acquire a right of occupancy in view of the statutory provision contained in Sections 17 and 19 of the Chotanagpur Tenancy Act. In any event assuming that the defendants and/or their predecessor-in-interest did not acquire any right of occupancy there cannot be any doubt that be reason their being on continued in possession of the land in question, they become raiyats in respect of the lands in queestion.

41. In this view of the matter, the predecessor-in-interest acquired a right at lease to hold the land on payment of such rent as has been agreed upon by and between them and the original Pahan and/or his sucessor.

42. A non-occupancy raiyat can be ejected only if one or the other ground mentioned in Section 41 of the C.N.T. Act is exists.

43. A suit for ejectment of a non-occupancy raiyat by a landlord has to be brought in the court of the Dy. Commissioner in terms of the provision contained in Section 139 of the C.N.T. Act.

44. It has not been suggested that any of the grounds as mentioned in Section 41 of the C.N.T. Act had been existing for eviction of the defendants. Even if one or the other grounds as mentioned therein was existing as indicated hereinbefore, such a suit was required to be filed in the court of Dy. Commissioner only.

45. In this view of the matter taking into consideration this case from all its ramifications I am of the view that the judgment and decree passed by the learned lower appellate court is in accordance with law and as such there being no merit in this appeal, the same must be dismissed. However, on the facts and in the circumstances of the case there will be no order as to costs.