
(1925) 03 PAT CK 0027
In the Patna High Court

Debi Dayal Singh and Others

APPELLANT

Vs

Mt. Gango Kuer and Others

RESPONDENT

Date of Decision : 25-03-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 102(h), 103(b), 148A

Citation : AIR 1926 Patna 68

Hon'ble Judges : Kulwant Sahay, J

Bench : Division Bench

Judgement

Kulwant Sahay, J.—These two appeals by defendants 1 to 3 arise out of the same suit. The suit was for a declaration that two survey plots Nos. 900 and 901 recorded in khata No. 13 in Mouza Ukarmha Salem, which contains 1.18 acres of orchard land covered with a large number of trees, formed the bhaoli holding of defendants 1 to 3 and that the plaintiffs and defendant 4 were entitled to appropriate one-half share of the fruits and the wood of the trees standing on the land and that the entry of kabil lagan in the survey papers was wrong. There was a further prayer that if the Court be of opinion that the plaintiffs could not get the price of their share of the fruits from defendants 1 to 3, then a decree might be passed against the said defendants for the price of the entire landlord's share of the fruits. There was an alternative prayer in the plaint that if the Court was of opinion that the entry of kabil lagan in the Record of Rights was correct, then a proper rent might be assessed by the Court. Defendants 1 to 3 filed a written statement in which they denied the title of the plaintiffs and alleged that the suit was bad for defect of parties. They further alleged that the orchard was held by them as belagan or rent-free and no rent was payable therefor, and that the plaintiffs or the other landlords, were not entitled to a half share of the fruits or the wood of the trees.

2. The learned Munsif found that the plaintiffs had established their title, and that the land was held by the defendants as bhaoli, but he dismissed the suit on a finding that the 16-annas landlords were not made parties to the suit and that

the suit was bad u/s 148-A, Ben. Ten. Act. He held that the trees were ijmal amongst all the 16-annas proprietors of the village and all those proprietors were necessary parties to the suit.

3. There were two appeals before the Subordinate Judge against this decree--one by the plaintiffs and the other by the defendants 1 to 3. The learned Subordinate Judge decreed the plaintiffs' appeal and directed that the defendant 4 be added as co-plaintiff and the amount of the bhaoli rent to which the plaintiffs are entitled be determined by the Munsif, As regards the defendants' appeal the learned Subordinate Judge found that the land was held by defendants 1 to 3 as bhaoli and that the landlords were entitled to one half share of the fruits and the wood of the trees. He accordingly dismissed the defendants' appeal.

4. Defendants 1 to 3 have, therefore, preferred the present two appeals to this Court, and it has been contended on their behalf that upon the findings arrived at by the Munsif as well as by the Subordinate Judge himself, the suit was not maintainable on account of defect of parties. Secondly, it has been argued that the learned Subordinate Judge was wrong in holding that the land was bhaoli and not belagan. As regards the first point, it appears from the allegations of the plaintiffs themselves in their plaint that Mauza Ukarmha Salem was partitioned by the civil Court into seven takhtas. The plaintiffs and the defendant 4 were allotted one of these takhtas to the extent of their original share of 2 annas 8 dams 17 kauris 9 bauris. This new takhta of the plaintiffs and the defendant 4 is known as Takhta Sheikh Rahim Baksh and is now treated as one of 16 annas. The plaintiffs alleged in the plaint that since the partition which was effected in 1898, the proprietor of one takhta has no connexion with the takhtas of the other proprietors with the exception of the lands and trees left joint under the said partition. It has been held by the learned Munsif that the trees standing on survey plots Nos. 900 and 901 were left ijmal amongst the proprietors of the entire 16-annas of the village and were not partitioned amongst them. This finding does not appear to have been disturbed by the learned Subordinate Judge, as in dealing with the appeal of the defendants, he says that no raibandi was fixed in the partition for the trees in dispute because they were left ijmal amongst the proprietors. If that is so, then the plaintiffs and defendant 4 did not form the entire body of landlords who are entitled to the rent of the orchard in dispute.

5. In dealing with the plaintiffs' appeal the learned Subordinate Judge has lost sight of this fact. He has treated the plaintiffs as well as the defendant 4 as the 16 annas proprietors entitled to the rent of the orchard in dispute. He has not come to any specific finding as to whether or not the trees in dispute were partitioned in the civil Court partition and allotted to the takhta of the plaintiffs and defendant 4, or were left ijmal amongst the entire body of proprietors of the whole village. The observation about the trees being left ijmal made by the learned Subordinate Judge when dealing with the appeal of the defendants is not

a specific finding upon this point. He was there considering the question as to whether the land was bhaoli or rent-free and he met the argument of the defendants that no raibandi had been fixed for the trees by observing that this only meant either that the trees did not belong to the maliks but to the tenants or that they were left ijmal. I am of opinion that having regard to the fact that the Munsif had dismissed the suit, not only on the ground that it was bad u/s 148-A Ben. Ten. Act, so far as the defendant 4 was concerned, but also because the other proprietors of the entire village had not been impleaded as parties, the learned Subordinate Judge ought to have come to a specific finding as to whether or not the other proprietors are necessary parties in the present suit. His decree, therefore, passed in the appeal of the plaintiffs must be set aside and the case remanded to him for a finding as to whether the trees on the plots in dispute were left ijmal amongst the proprietors of the entire village in the civil Court partition and as to whether the present suit could proceed in their absence.

6. Second Appeal No. 339 is, accordingly, allowed and the case remanded to the Court of Appeal below for disposal according to law. Costs will abide the result.

7. As regards the appeal of defendants 1 to 3, the finding of the learned Subordinate Judge that the land was bhaoli and that the landlords were entitled to have the fruits and the wood of the trees is a finding of fact which cannot be interfered with in second appeal. The learned Counsel for the appellants has, however, argued that the entry in the Record of Rights as regards the fruits and timber of the trees, in dispute is kul-haq-raiyat which shows that the tenant defendants are entitled to appropriate all the fruits and timber of the trees and that the landlords are not entitled to anything. The learned Subordinate Judge is right when he holds that this entry in the Record of Rights does not carry a presumption of correctness u/s 103(b), Ben. Ten. Act. The ordinary law that the tenant has a right to cut the trees and that the landlord has the right to appropriate the wood is accepted by the learned Counsel for the appellants, but he argues that the question as to whether the tenant is entitled to appropriate the timber is one of the incidents of the tenancy which the Revenue Officer preparing the Record of Rights was entitled to record u/s 102(h), Ben. Ten. Act. The learned Subordinate Judge is of opinion that it is not one of the incidents of the tenancy, but it amounts to a custom or usage varying the common law and that the Revenue Officer in preparing the Record of Rights had no power to record the existence of and such custom, and that the entry of kul-haq-raiyat in the Record of Rights is not an entry which carries with it the presumption of Section 103(b). This opinion of the learned Subordinate Judge is supported by the decision of this Court in Suresh Chandra Rai v. Sitaram Singh AIR 1920 Bom 12 and the entry of kul-haq-raiyat in the Record of Rights is only a piece of evidence admissible u/s 35, Evidence Act, which the learned Judge has taken into consideration as such.

8. As regards the plaintiffs' claim of half share of the fruits, the learned Judge has believed the plaintiffs' witnesses and has held that the orchard was bhaoli

and the landlords were entitled to recover a half share of the fruits. These findings being based upon a consideration of the evidence in the case are conclusive and the Second Appeal No. 338 is, therefore, dismissed with costs.