

(1934) 09 PAT CK 0011
In the Patna High Court

Gobinda Chandra Patnaik and Another	APPELLANT
Vs	
Rani Harsa Mukhi Dasi	RESPONDENT

Date of Decision : 04-09-1934

Acts Referred:

Citation : AIR 1934 Patna 632

Hon'ble Judges : Courtney-Terrell, C.J;Varma, J

Bench : Full Bench

Judgement

Varma, J.—The plaintiff-respondent in her capacity as the executrix of the estate of the late Raja M.C. Singh Bahadur, O.B.E., brought a number of suits to recover khas possession of certain lands by ejectment of defendants therefrom and for mesne profits. According to the valuation of the different suits six of them were filed in the Court of the Second Munsif at Puri, while four other suits were filed in the Court of the Subordinate Judge, Cuttack. In both the Courts all the suits were tried together and the plaintiff was unsuccessful in her action throughout. She then preferred two sets of appeals respectively from the decisions of the Munsif and the Subordinate Judge, and in respect of the three appeals with which we are at present concerned the lower appellate Court has reversed the decisions of the trial Courts and decreed the plaintiff's suits.

2. The defendants of these three suits are now the appellants before this Court. Second appeals Nos. 138 of 1932 and 8 of 1933, respectively, arise out of the decision of the

Subordinate Judge in Title Appeals Nos. 147 and 146 arising out of suits Nos. 167 and 208 disposed of by the Munsif; and Second Appeal No. 28 of 1933 arises out of the decision of the District Judge in Title Appeal No. 53 which arose from suit No. 29 disposed of by the Subordinate Judge. It may be noted here that in respect of one out of the four suits tried in the Court of the Subordinate Judge, on account of higher valuation the present plaintiff-respondent had already preferred an appeal to this Court which was heard and disposed of by my Lord the Chief Justice and Kulwant Sahay, J., and their Lordships' decision is reported

in *Harsamukhi Dasi v. Parsuram Bidhan Rai* 1933 Pat 74.

3. The facts of the case are briefly these; The predecessors of the deceased Raja M.C. Singh Bahadur of Paikpara had purchased the villages in dispute in the year 1809, but as they refused to take settlement of the estate from the British authorities in the period which preceded and followed the first settlement of 1837 the estate had been declared recusant. Under the orders then made the collection of the revenue had been placed in the hands of "sarbarakars" by the authorities and the owners were given a small property by way of malikana of the revenue in recognition of their proprietary right. In the year 1900 Mr. R. Mitter, Barrister-at-law, who happened to be the receiver of the estate, decided that the period of recusancy should be terminated and he accordingly took settlement of the estate from the Collector executing a kabuliat.

4. The terms of the kabuliat are to be found in Vol. 2, of Mr. Maddox's Report at p. 267, and some of the conditions are that the signatory or the executant is at liberty to sell, alienate or otherwise transfer the whole or any share of the estate, that he is liable to pay the Government revenue kist by kist according to the kistbandi endorsed; that he is to respect the rights of all tenure-holders raiyats, under-raiyats and other tenants as recorded in the settlement and not to collect from them any higher rents than those recorded in the present settlement proceedings, otherwise than after legal enhancement that he is to realize the amounts due from proprietary tenure-holders and to respect customary rights and special incidents of their tenures, and to pay the whole revenue of the estate whether or not he is successful in collecting any amount of the proprietary tenure-holders; that on the expiry of the period of settlement he or his legal representatives have the right to a renewal of the settlement on the revenue that may be then fixed and on failure to take such settlement will be entitled to receive malikana at the usual rates.

5. In the kabuliat it was stated that the settlement was made in anticipation of the sanction of the higher revenue authorities and a breach of the conditions specified would render the estate liable to be resumed by the Collector under khas management the signatory remaining entitled only to malikana. The kabuliat is dated 1901. The case of the plaintiff was that the defendants who happened to be miadi sarbarakars in these cases have no right to remain on the land after the period of their last lease which was for the period from 1897 to 1927 and as such she claims to recover khas possession of the property on ejecting the defendants.

6. In second appeal No. 138 of 1932 the plaintiff sought to eject the defendants from the "miadi sarbarakari" of village Anjira Keotpad in Tauzi No. 270 of the Puri Collectorate; in Second Appeal No. 8 of 1933 the prayer was to eject the defendants from Taluk Krushna Chandra in mauza Hathia bearing Tauzi No. 269; and in Second Appeal No. 28 of 1933 the property from which the ejectment of the defendants was prayed for is mauza Garh Sanput in Tauzi No. 270 of the Puri Collectorate. The defendants pleaded that although they are described as "miadi

sarbarakars" their interest in the property in the suits was that of a permanent nature and in some of the survey papers they have been mentioned as subproprietors, and therefore the plaintiff had no right to eject them.

7. Indeed the only question for decision in these appeals is whether or not the defendants-appellants are liable to ejectment by the plaintiff-respondent.

The kabuliat of the defendants-appellants giving them the status of "miadi sarbarakars" extended over the period 1897 to 1927. The origin and incidence of the "sarbarakari" rights have been fully considered by my Lord the Chief Justice in dealing with the case which, as stated above, has already been disposed of in *Harsamukhi Dasi v. Parsuram Bidhar Rai* 1933 Pat. 74. It appears from the history of the tenure as given in Mr. Tyabjee's *History of Orissa* and from Mr. Maddox's report that at the time of the first Provincial Settlement which commenced in the year 1837 certain well defined principles were laid down by the Government as regards the recording of such tenures.

8. The tenures were classified into "maurasi sarbarakari" and "miadi sarbarakari" besides other kinds of sarbarakaris. The distinction between "maurasi sarbarakari" and "miadi sarbarakari" consisted only in this: that the former had a permanent and heritable interest while a latter had a temporary tenure during the continuance of the lease. "Sarbarakars" who were found to be in possession of the tenures from generation to generation before 1803 were classified as the "maurasi sarbarakars," while those who could not prove the existence of such a tenure but who had nevertheless been found to be in long possession of the tenures and were in possession at the time of the settlement were recorded as "miadi sarbarakars." Therefore the status of "miadi sarbarakars" under the first Provincial Settlement of 1837 was of a temporary nature during the continuance of the lease.

9. The period of the first settlement was extended by 30 years and continued up to 1897 when a fresh settlement began and wherein the predecessors of the defendants were again recorded as "miadi sarbarakars." The interest acquired by the defendants under the kabuliat of 1897 cannot therefore be other than that connoted by the term "miadi sarbarakar" in the first Provincial Settlement of 1837. There is no reason to suppose that there was any alteration in the status of a "miadi sarbarakar" by the subsequent Settlement of 1897. The lower appellate Court has found that the defendants have failed to prove that their predecessors-in-interest held the "miadi sarbarakari" tenure before the first Provincial Settlement of 1837; but even assuming that the defendants or their predecessors held any such right before 1837 it will not improve their position in any way inasmuch as there is nothing to show that they had any right of a permanent and heritable nature.

10. The British sway extended over Orissa from the beginning of the nineteenth century and the plaintiff's predecessors purchased the villages in dispute in the year 1809. Since the plaintiff's predecessors refused to take settlement from the

British authorities their estate was declared recusant, yet nevertheless they continued to be regarded as the proprietor and used to receive malikana. There is no proof of any permanent right having been created by the Government in respect of the property in dispute to the prejudice of the plaintiff's absolute proprietorship. The defendants kabuliat expired in 1927, and they do not appear to have acquired at any stage any right other than that of a "miadi sarbarakar." From the very nature of their tenure the defendants cannot claim to have acquired a permanent and heritable right in the property in dispute.

11. It has been argued on behalf of the defendant-appellants that during the last settlement operations of 1928 they are described as sub-proprietors in the provincial khewats and khatians, and that the practice of paying rent to the landlord instead of direct to the Government was an arrangement arrived at only for the sake of convenience which did not detract from the position of subproprietors. Under the Orissa Tenancy Act a sub-proprietor means:

A person who, in the course of a settlement of land revenue has executed an engagement for the payment of his land revenue through a proprietor or another sub-proprietor, and includes also (i) persons holding lands the title to hold which for a payment fixed in perpetuity was declared valid by the Cuttack Land Revenue Regulation, 1805, and (ii) the successors in interest of any person as aforesaid.

12. I find it difficult to hold that as "miadi sarbarakars" the defendants can claim any permanent and heritable right by being treated as sub-proprietors. They derived their status under the terms of the kabuliat which conferred on them the rights of a "miadi sarbarakar" and extended only up to 1927. If they have come to be noted as "sub-proprietors" in the survey and settlement records, this fact will not alter their status as conferred on them by the document of their title, viz., their kabuliat. The practice of paying rent to the plaintiff landlord instead of direct to the Government is not without significance and might not have been adopted merely by way of expediency as contended on behalf of the appellants. A reference to the already quoted essential terms of the kabuliat of 1901 which Mr. Mitter as the receiver of the plaintiff's estate entered into with the Government, makes it clear that the plaintiff continued to be regarded as the malik since the purchase by her predecessors in 1809 of the villages in dispute, and the fact of the payment of malikana to the plaintiff's predecessors even during the period of recusancy makes her position still more strong.

13. The learned advocate on behalf of the plaintiff-respondent refers to certain regulations passed from time to time to explain the exact nature of the interest claimed by her. There regulations are Regulation 8 of 1793, Regulation 12 of 1805 and Regulation 7 of 1822 which were apparently promulgated to regulate the settlement and collection of public revenue in Orissa and other places. The learned advocate on behalf of the respondent referred to various rules in these Regulations and contended that Government have consistently recognised the proprietors as the actual owners of land and reserved to themselves only the

right to collect public revenue. In particular he refers to Rules 43 and 48 of the Bengal Decennial Settlement Regulation (8 of 1793). Rule 6 (repealed by the Amending Act 1 of 1903) of Regulation 12 of 1805 and Rules 3, 4 and 14 of the Bengal Land Revenue Settlement Regulation (7 of 1822).

14. A reading of these Regulations and in particular of the provisions of the Rules referred to gives a clear impression that from the earliest time (1793 to 1822) and before the first Provincial Settlement of 1837, although there is no mention of "sabarakars" in these Regulations. Government have recognized the proprietors to be the real owners of land and refrained from interfering with or altering the nature of the private right or privileges of persons occupying land. Under Rule 14 of Regulation 7 of 1822 the Collector was competent to declare the nature and extent of the interest actually possessed by any of them and anybody who felt aggrieved by it could go to the civil Court, but even the civil Court was not to interfere with the decision of the revenue authorities so far as revenue was concerned.

15. As I have already stated the defendants do not appear to have had any right coming on from before the purchase by the plaintiff's predecessors in 1809, and as these regulations purport to maintain the status quo in respect of the rights of the proprietors there is good reason to hold that the defendants-appellants who are found to have come in as "miadi sarbarakars" long after the said purchase, cannot claim to have acquired any right to the prejudice to those of the plaintiff. In fact when the record of rights was finally published in December 1927 and when the plaintiff refused to recognize these sarbarakars a peremptory letter was issued to her by the revenue authorities asking her either to execute a kabuliat or bring a civil suit for ejecting the defendants: and this shows at least that the recognition of the defendants' right did not vest exclusively with the Collector with whom they had entered into their last kabuliat.

16. As regards the contention on behalf of the appellants that they are now protected against the action of the plaintiff-respondent by reason of the fresh settlement made in their favour by the Collector in May 1928, it is to be noted that so far as these cases are concerned the plaintiff is not bound by any transaction which took place after the suits were filed, the defendants not having acquired any permanent and heritable right in the property in dispute and the term of their kabuliat having expired in 1927. It is not necessary for this Court to express any opinion on the subject at this stage.

17. The Collector was not a party to the case which has already been disposed of by this Court, but in the present appeals he has been added as a party in this Court at the instance of the plaintiff respondent. The learned Government Pleader appearing on behalf of the Collector urges that the parties are governed by the kabuliat of 1901 terminating the recusancy whereby the plaintiff was made liable to respect the rights of the existing raiyats in accordance with the third condition thereof. The plaintiff is no doubt bound to act up to the condition; but it must be shown that the defendants-appellants have acquired any

permanent right which does not appear to be the case. On behalf of the appellants it was contended that it is really the Government and not the plaintiff who is the proprietor and that the plaintiff has no claim to the soil, and reference is made to Clause 7 of the kabuliat (Maddox's Report, Vol. 2, p. 268). C1. 7 of the kabuliat runs thus:

I admit that Government has the right to all minerals in my estate, excluding laterite and limestone, and that, in case minerals are found, Government is entitled to them and to right of way, and all other reasonable facilities for working and carrying away such minerals.

18. Under this clause Government reserved to themselves merely a limited sub-soil right and facilities for exercising such right, and it cannot be said that this provision in any way detracts from the position of the proprietor.

In respect of Second Appeal No. 8 of 1932 it was argued on behalf of the appellants that the terms of the kabuliat were different from those of the other kabiats in the case and that they showed that their interest was of a permanent and heritable nature. The contention was based on a certified copy of the kabuliat, but on referring to the original kabuliat the learned Subordinate Judge has found that the certified copy was not quite accurate and that the original kabuliat showed that the terms of the kabuliat were not different from those of the other kabiats in the case. Referring to a passage occurring towards the end of the judgment of Kulwant Sahay, J., in the previous decision of this Court to which I have referred in the early part of this judgment, it is contended that it is open to the Collector to insist upon a recognition by the proprietor of the newly constituted "miadi sarbarakars."

19. The passage relied upon is as follows:

The plaintiff's claim for ejectment and mesne profits must therefore depend on the action that may be taken by the Collector. If, as I have said, he considers it necessary that a "miadi sarbarakari" tenure be created as a condition of the settlement with the plaintiff on the materials before us I am unable to say that he has not the power to do so. Therefore, although the defendants cannot claim that as a matter of right they are entitled to continue as "miadi sarbarakars," the plaintiff cannot as a matter of right claim to eject them if the Collector does not agree to it. The decree for ejectment and mesne profits therefore will be subject to the terms of the settlement that may be made by the Collector with the plaintiff.

As I have just said, we are not called upon on the facts of these cases to deal with the Collector's right in the matter. The learned Government Pleader only relied on the terms of the kabuliat in which however there is nothing to show that the proprietor cannot eject lessees of temporary nature holding under him on the expiry of their leases; and no argument can be founded in favour of the appellants on the above observations made by the learned Judge.

20. All that was said there was that the plaintiff's claim for ejectment was contingent on the action that might be taken by the Collector in regard to the "miadi sarbarakari" tenure as a condition of the settlement with the plaintiff. The Collector was not a party in that suit and that the point was not in issue there. From the observations made in that case it cannot be inferred that Kulwant Sahay, J., came to any definite finding on the point. In these appeals the Collector has been made a party in this Court. The plaintiff has certainly a proprietary right in the villages in dispute. It is found from the Regulation promulgated from time to time that the proprietor's absolute ownership of the lands in his possession has not been disturbed or interfered with by the Government at any time; rather on the contrary he has been deemed entitled to malikana even during the period of recusancy.

21. In these circumstances the Collector's right to insist that the plaintiff should recognize the defendants as "miadi sarbarakars" in the sense of permanent tenure holders is not established. The classification of "sarbarakars" into "maurashi" and "miadi" (which means for a fixed term) must be construed to have been made with a view to protect the rights of the proprietors amongst others. Government reserved to themselves rights in regard to public revenue only. Moreover, Clause 4 of the form of kabuliat for proprietors, a summary of which I have already given, is as follows:

On the expiry of the aforesaid period of settlement, I, or my legal representatives shall have the right to a renewal of the settlement on the revenue that may be then fixed; and if we do not take the settlement on the revenue that may be then fixed, we shall be entitled to receive malikana at the usual rates.

22. It is clear from this clause that the only change contemplated in renewing the kabuliat is in respect of the amount of revenue that is to be realised from the plaintiff and in no other respect. The terms of the kabuliat do not permit of the Collector insisting that the proprietor shall recognize the "miadi sarbarakars."

The various points raised having failed, I would dismiss the three appeals with costs to the plaintiff-respondent.

Courtney-Terrell, C.J.

23. I agree.