

**(1932) 03 PAT CK 0004**  
**In the Patna High Court**

Harsamukhi Dasi

APPELLANT

Vs

Parsuram Bidhar and Others

RESPONDENT

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**Date of Decision :** 29-03-1932

**Acts Referred:**

**Citation :** AIR 1933 Patna 74

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

**Bench :** Division Bench

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## **Judgement**

Courtney-Terrell, C.J.—This suit is one of four brought to eject the defendants in each case from the plaintiff's zamindari. The defendants in each case resisted the claim alleging that they are proprietary tenure-holders with permanent hereditary and transferable rights and that these rights are held by them independently of any grant by the plaintiff and that the plaintiff is bound to respect their tenures. The suits were brought in the Court of the Subordinate Judge of Cuttack who tried them together and decided in favour of the contention of the defendants. On account of the valuation in this particular case the appeal lies to this Court whereas in the other cases the appeals are pending in the Court of the District Judge.

2. It is admitted by the plaintiff-appellant that the respondents were during the period of the last Provincial Settlement ending on 7th September 1927, rightly recorded as holding possession as "miadi sarbarakars" and the matter for our determination is as to the nature of this tenure and whether after the termination of the period mentioned the defendants are entitled to continue in possession. Are the defendants' tenures temporary or permanent?

3. The British occupied Orissa in the year 1803 after ousting the Marhattas who had held the country since the middle of the 18th century having won it from the decaying Moghul Empire. Under Mahratta rule the country had been exhausted by extortion. There was no settled system for collecting revenue, and the Moghul system which formed the basis of the British system in Bengal had been thoroughly disorganised. Consequently for some years at the beginning of the

19th century the British were engaged in enquiries into such systems as were still traceable and in experiments in reorganisation and settlement. This experience culminated in the Survey and Settlement which was begun in 1837 and finally completed in the year 1845 and formed a new starting point for all subsequent operations.

4. This settlement was not of a permanent character as in Bengal but was for a period fixed at 30 years only. The great famine in Orissa which took place in 1867 however prevented the organisation of a new settlement and the settlement of 1837 was extended for a further period of 30 years until 1897 when a fresh settlement for a period of ten years was begun in 1890 and completed in 1899. This is known as Mr. Maddox's settlement. A revision for a further period was undertaken between the years 1906 and 1912 by Mr. James and a new settlement was begun in 1927. In this new settlement the defendants have been recorded as "miadi sarbarakars" and the plaintiff has protested stating that the defendant's tenure had come to an end.

5. At this stage it may be convenient to examine the position of the plaintiff. She is the executrix of Raja M.C. Singh Bahadur, O.B.E., deceased zamindar of the Paikpara estate which includes the villages, the subject of the disputed tenures. The predecessors of the deceased had purchased the estate in the year 1809 but had refused to take settlement of the estate from the British authorities in the period which preceded and followed the settlement of 1837 and 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 granted a small proportion called "malikana" of the revenue so collected in recognition of their proprietary right. In the year 1900 in litigation between the then cosharers in the malikana the High Court of Fort William in Bengal appointed Mr. R. Mitter, a distinguished member of the Calcutta Bar, as Receiver of the estate on behalf of the cosharers.

6. This gentleman decided that the period of recusancy which had existed since 1809 ought to be terminated and he therefore on behalf of the proprietors took settlement of the estate from the Collector and signed a kabuliat. (After referring to the terms of the Kabuliat, his Lordship proceeded.) The first contention of the respondents is that the tenure of a miadi sarbarakar is permanent, heritable and transferable, and that their rights were not brought into existence by the kabuliat. They say that upon a true construction of the kabuliat they were merely bound to pay for the exercise of those rights the payments therein specified for the period of the settlement--i.e., from 1306 to 1334 (Christian Era 1897---1927) and that on the expiry of that period they had a right to continue at whatever rate might be fixed for the succeeding settlement.

7. Having regard to the, terms of the kabuliat it is difficult to see how" this construction can be maintained, but the respondents say that it is implied in the term miadi sarbarakar. They do not contend that an implied term in an agreement can override an express term but they argue that the agreement

must be construed as a whole and that the term miadi sarbarakar understood by the parties, as it must have been in its true connotation, makes it clear that the precise period 1306--1334 was intended to refer only to what was to be paid for that period and not to the period for which the rights are to be enjoyed. It becomes necessary in view of this argument and the judgment of the Subordinate Judge to examine the history of the term miadi sarbarakar in order to ascertain its meaning.

8. Now there is no doubt that the literal translation of the word miadi is "temporary" and that it may be contrasted with the word maurusi which means "permanent." But it is argued and has been held by the Subordinate Judge that although the terms miadi sarbarakar and maurusi sarbarakar were originally used with these different significations nevertheless by long custom and usage the former term has lost its original meaning and has acquired a meaning precisely equal to that of the latter. Now to go back to the period between the British occupation in 1803 and the settlement effected, in 1837 I have said it was one of investigation and attempts to bring order out of chaos.

9. During the progress of the settlement much inconsistency had marked the recording of sarbarakari tenures. In some cases the sarbarakars seem to have been found to be mere officers of the governing power appointed ad hoc, in some cases the collection had been held since time immemorial by the same family, in some it had been transferred by sale, in some cases it could not be traced back in the hands of the holder or his predecessor beyond the period of the British occupation but in all cases sarbarakari seems to have been used as a term to describe collection by a person other than the zamindar or person primarily responsible to Government for payment of the revenue so collected. In all cases the sarbarakar claimed the collection as a right of property.

10. (After referring to the correspondence between the Board of Revenue and the Commissioner for Cuttack that took place in 1838, the judgment proceeded.) Now in the case before us the engagement was for the period 1306--1334 and the position is analogous to that created by a lease for a long term of years. It is true that during the period of the lease the lessee has security of tenure and may with the consent of the lessor alienate his interest but his interest and that of his transferees is nonetheless temporary and for the period of the lease only and no amount of transference by contract, succession or inheritance during the period of the lease can create a "custom" to vary the terms of the lease and override the stipulation for a fixed period. There is no suggestion in this case of the creation of a custom in the true sense.

11. The reasoning implied in the passage quoted above and adopted by the learned Subordinate Judge is vitiated by this fallacy. In my opinion therefore a miadi sarbarakar has a temporary tenure and for the period of the settlement only. It is to noted that the seventh rule of the 1837 settlement was as follows:

That no admitted sarbakari tenure, hereditary or temporary, can be alienated or

subdivided without the consent of the zamindar.

Nevertheless the respondents contend that there is no privity of contract between themselves and the plaintiff; that no relationship of landlord and tenant exists between them; that they (the respondents) owe their position as tenure-holders to the Collector and that the plaintiff in any case cannot eject them and that the Collector has already intimated his intention of reappointing them. In short they say that the plaintiff has no cause of action. It is to be noted that the Collector has withdrawn the expression of his intention to re-appoint the respondents pending the decision of this suit. Now it is true that the plaintiff alleges that the relationship of landlord and tenant formerly existed and that the term of the respondents' tenancy came to an end in 1334 (1927) and the suit was valued at the amount of one year's rent and a court-fee was paid on that basis.

12. If it be true, as I think it was, that the kabuliati executed by the predecessors created as between the Receiver and the respondents the position of landlord and tenant then the suit was properly so framed. More strictly one must remember that that kabuliati was executed before the kabuliati under which the Receiver took settlement of the zamindari from the Collector, but it was "executed to the landlord" who at that time was in receipt of malikana, and in any case the terms were adopted and acted upon by the Receiver and his successors in interest after the zamindari settlement and also by the respondents. It is of no relevance that the landlord was bound to accept the sarbarakar proposed by the Collector, nor that the sarbarakar was also bound to the Collector in terms of which a breach might cause him to be ejected by the Collector, nor that the zamindar could not eject the sarbarakar without the leave and co-operation of the Collector.

13. This is an undertenure and though proprietary in a sense it is temporary. In any case when the tenure came to an end and the respondents held on in possession exercising the various rights of sarbarakari, they did so to the detriment of the zamindar's rights, they must be treated as trespassers and a suit lay in ejectment, more particularly when the respondents set up a claim of right.

Now the Collector may in his discretion and at the direction of the higher Revenue authorities grant a further settlement to the respondents of their miadi sarbarakari tenure and he may insist that the zamindari shall accept them for a further period. The Collector is not a party to this suit and we cannot come to any decision which would purport to limit his powers. Some of the Orissa settlement reports would seem to indicate that sarbarakari duties have not been well discharged by the incumbents of the office and that re-appointment is not in many cases desirable.

14. This however is not a matter within our province and I would decide merely that miadi sarbarakars have no claim to re-appointment. In the result I would

allow this appeal and reverse the judgment of the Subordinate Judge with costs here and below. There will be a decree in ejectment with mesne profits from the date of expiry of the last settlement. This decree for ejectment and mesne profits is not to be executed in respect of such further term of appointment as the Collector may see fit to grant to the respondents.

15. Kulwant Sahay, J.--I entirely agree. The suit of the plaintiff is based on the allegation that during the term of the settlement from 1306 to 1334 the relationship between the plaintiff and the defendants was that of landlord and tenant and that after the expiry of the term the defendants had no right to continue in possession and, that therefore the plaintiffs can treat them as trespassers and eject them from the tenure. The defence of the defendants was that their tenure was permanent and heritable and that there was no relationship of landlord and tenant between the plaintiff and themselves as their agreement was with the Collector and not with the plaintiff. It is true that the kabuliat executed by the predecessors in interest of the defendants on 7th May 1899, was before the date of the agreement executed by the receiver of the plaintiff's estate with the Collector; but the second clause of the kabuliat (Ex. 2) clearly recites that although it was executed with the permission of the Government, it was executed in favour of the landlord and the agreement was to pay the jama stated in the kabuliat to the landlord of the estate, tauzi No. 270.

16. It is thus clear that the relationship of landlord and tenant was created by operation of this kabuliat and this position was subsequently accepted by both parties and throughout the period of the lease they acted as if this relationship subsisted between them. If therefore the kabuliat of 7th May 1899, be treated as an ordinary lease then the defendants have no right to remain in possession, after the expiry of the term.

The contention, of the respondents however is that what was granted to them was a "miadi sarbarakari" tenure which implied a permanent and heritable tenure.

17. It is therefore necessary to consider what are the incidents of a "miadi sarbarakari" tenure. It is clear on reference to the history of the tenure as given in Mr. Toynbee's history of Orissa and in the report of Mr. Maddox 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. The tenures were classified into "maurusi sarbarakari" and "miadi sarbarakari" besides other kinds of sarbarakaris. The distinction between "maurusi sarbarakari." and "miadi sarbarakari" consisted only in this that the former had a permanent and heritable interest while the 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 "maurusi 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."

18. Therefore the distinction primarily laid down was that while the "maurusi sarbarakars" had a permanent and heritable interest the "miadi sarbarakari" interest was limited to the period of the settlement. This was the only distinction between these two classes of sarbarakars; in other respects during the period of the settlement there appears to be absolutely no difference between the "miadi sarbarakars" and their "maurusi" brethren. This was the status of the "miadi sarbarakars" during the period of the first Provincial Settlement which was originally for 30 years but was extended to another period of 30 years ending with the year 1897. When fresh settlement began in 1897 the predecessors of the present defendants were recorded as "miadi sarbarakars" and they executed the kabuliat of 7th May 1899.

19. The interest acquired by them by this kabuliat must be the same as that connoted by the term "miadi sarbarakari" in the first Provincial Settlement of 1837. I see no reason to suppose that there was any alteration in the status of a "miadi sarbarakar" by the settlement of 1897.

The Subordinate Judge has found that the defendants have failed to prove that their predecessor in interest held the "miadi sarbarakari" tenure before the settlement of 1897 and the evidence on the record is certainly not sufficient to hold otherwise. It is however contended that the Settlement Officer in 1897 merely recorded the existing state of affairs and did not create a new tenure.

20. It must therefore be presumed from the fact of the settlement with them in the year 1897 that they and their predecessors had been holding the tenure from before that settlement. There is certainly force in this contention, but to my mind it does not improve the position of the defendants. Assuming that their predecessor had been holding the tenure of "miadi sarbarakari" from before the settlement of 1897 their status was the same as defined during the first Provincial Settlement of 1837, and, as the second settlement of 1897 was also that of a "miadi sarbarakari" the status must be held to be the same as before. It is contended on behalf of the defendants and the contention has found favour with the Subordinate Judge, that by custom the "miadi sarbarakars" have acquired the same status as the "maurusi sarbarakars;" but as there have been only two settlements, viz., one in the year 1837 and the other in the year 1897, there was no room for the growth of a custom, and no inference can be drawn in favour of the defendants from the fact that during the term of the settlement there have been instances of succession by death and transfers amongst the tenure-holders therefore agree in holding that the status of a "miadi sarbarakar" is not permanent and heritable.

21. The next question is whether the plaintiff has a right to eject the "miadi sarbarakars" after the expiry of the term of the settlement. As I have found that the relationship between the parties was that of landlord and tenant and as the tenancy was for a term of years, it is clear that the plaintiff would ordinarily have the right to eject the defendants after the expiry of the term; but the estate is a temporarily settled estate. The plaintiff is no doubt the zamindar and is entitled

as of right to a settlement for a fresh term of years after the expiry of her last settlement; but it appears to me that she is bound by the terms which the Collector may impose upon her in making the settlement with her. If for the safety of the Government revenue or as a matter of policy the Collector thinks it fit to impose a condition upon the zamindar that the settlement would be made with her on condition of her recognizing the "miadi sarbarakari" tenure there seems to be no reason for holding that the zamindar may insist as a matter of right that such a tenure should not be created and be binding upon her. Whether the Collector has such a right or not and whether the zamindar can claim it as a matter of right to take the settlement without "sarbarakari" tenure being imposed upon her are questions which cannot be decided in the present litigation, as the Secretary of State or the Collector is not a party to the suit.

22. It appears that in the last settlement of the year 1927 the Collector took a kabuliati from the defendants as "miadi sarbarakars," but on the objection of the plaintiff and having regard to the fact that the present suits were pending he suspended the operation of the kabuliats till the disposal of the present suit. 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.

23. 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. If she gets the settlement without the imposition of a "sarbarakari" tenure she will undoubtedly be entitled to eject the defendants and to recover mesne profits from them, which will be ascertained by the Subordinate Judge. I would therefore decree the appeal in the terms stated above.