
(1971) 06 SHI CK 0013

In the High Court Of Himachal Pradesh

Case No : Letters Patent Appeal No. 2 of 1969

Hukum Chand and Others

APPELLANT

Vs

Sansar Chand and Others

RESPONDENT

Date of Decision : 01-06-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Easements Act, 1882 — Section 60
Punjab Tenancy Act, 1887 — Section 4(1), 77
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1972 HP 11

Hon'ble Judges : M.H. Beg, C.J;D.B. Lal, J

Bench : Division Bench

Advocate : Romesh Chand, for the Appellant; Chhabil Dass, for the Respondent

Final Decision : Dismissed

Judgement

M.H. Beg, C.J.—This is an appeal against the judgment of a learned Judge of the Delhi High Court (Himachal Bench). Tatachari, J., allowing a second appeal setting aside the judgments and decrees of the Courts below and decreeing the plaintiffs' suit by granting a declaration in the following terms:--

"that the plaintiffs are permanent tenants in the sense that they cannot be evicted so long as they pay the rent in cash of Rs. 2/- per annum in respect of Khasra No. 141 and Rs. 3/- per annum in respect of Khasra No. 146 and also rent in kind, namely, the supply of earthen wares as may be required by respondents 1 to 3 (defendants 1 to 3) throughout the year for the use of their family."

2. Diwana (since deceased and now represented by Sansar Chand, respondent No. 1), and Murli Dhar, respondent No. 2, sons of Chaudhary had brought their suit for declaration of their rights in respect of Khasra Nos. 141 and 146 by reason of their alleged continuous possession over these plots since the time of their ancestors and the construction of a house in plot No. 141 and kiln in plot

No. 146. The plaintiffs had set up rights of ownership on the ground that they did not recognize the rights of any landlord by either ever paying any rent or rendering any service since the time of their ancestors, and in the alternative, they had claimed permanent tenancy rights. The defendants appellants had resisted the claim on the ground that the plaintiffs were merely tenants-at-will liable to pay rent in cash and also in kind and to be evicted at will. It appears, from the judgment of the first appellate Court, that the learned counsel for both sides had admitted that the findings of the trial Court, that the plaintiffs were owners of the construction but not of the site or land, were correct. This means that the plaintiffs gave up the case of ownership and adopted the alternative case of permanent tenancy which, however, was repelled by the trial and the first appellate Courts on the ground that facts proved were not sufficient to warrant such an inference.

3. As the question whether, on facts found, a tenancy can be found to be permanent in nature is a question of law, as held in *Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose, Tatachari J.*, went into the question whether facts found raised an inference of permanent tenancy in favour of the plaintiffs respondents and concluded that a presumption of such a tenancy, which had not been rebutted, arose from the following facts:--

Firstly, although the origin of the lease or grant was not known, it was clear that the grant was made in the tune of the forefathers of the plaintiffs.

Secondly, the land in dispute had devolved from generation to generation in the family of the plaintiffs by inheritance without any attempt to evict the plaintiffs or their ancestors (the unrebutted evidence of the plaintiffs had established succession at least thrice).

Thirdly, as was stated in paragraph 5 of the written-statement, a house was constructed in or about 1905 by the plaintiffs or by their predecessors-in-interest, but, it was substituted by a hut when it fell down in an earthquake. The structure shown to be now existing according to the plaintiffs' evidence, was a double-storeyed thatch-roofed house on Khasra No. 141.

Fourthly, there has been, from the time of the forefathers of the plaintiffs, a kiln on Khasra No. 146.

Fifthly, the defendants' own witnesses had given evidence that the plaintiffs were Opahu tenants on payment of Rs. 5/-per annum together with earthen wares manufactured by the plaintiffs as rent in kind.

4. The learned Judge had disposed of the question whether the plaintiffs were Opahu tenants or not by observing that this was immaterial. Tatachari J. held that what was important to consider was whether the tenancy was permanent or not. An Opahu tenant was, according to Sir James Lyall's Settlement Report (paragraphs 51 to 56), distinguishable from a Basiku Opahu. It seems that both could build upon land without an express agreement or deed but in the case of a

Basiku Opahu, the tenant could build as an incident of farming or cultivation carried on by him and he could remain in occupation "ta qasur" (that is, till he violated a term of his tenancy), but an Opahu was settled on land on which he could build although he did not cultivate. Apparently. Opahu tenants included those who were given abadi sites and allowed to build because they rendered some service in return. In the case of an Opahu tenant, it could be presumed, by a parity of reasoning, that the tenure continued so long as its conditions were observed.

5. Although Tatachari, J., held the question whether the plaintiffs were Opahu tenants to be immaterial, it will be noticed that the declaration given by the learned Judge to the plaintiffs was in a form which makes their tenure substantially a service tenure. The plaintiffs respondents were held entitled to remain in possession only so long as they continued to render services and to pay rent. The plaintiffs-respondents have not come up in appeal. This means that they do not now claim any rights higher than those granted to them under the declaration quoted above. The defendants-appellants have also not set up the plea that the plaintiffs had broken any condition of their tenancy. On the other hand, the defendants-appellants alleged that the plaintiffs were merely tenants-at-will liable to continue paying rent in cash and kind and to be ejected at will. The real question in dispute, therefore, was:

Are the plaintiff-respondents entitled to continue so long as they carry out the terms of the tenancy they were entitled to enjoy, or, were they tenants who had the lesser rights set up by the defendants-appellants?

Learned counsel for the defendants-appellants has assailed the findings of the learned single Judge on various grounds which will be dealt with seriatim.

6. The first submission of the learned counsel for defendants-appellants is that the case is governed by the provisions of the Punjab Tenancy Act. 1887, so that the jurisdiction of the Civil Courts to grant the declaration obtained by the plaintiffs was barred.

7. It is apparent to us that the land in dispute is not used for purposes of cultivation. It is evident from the findings of the Courts below, as already indicated, that plot No. 141 contains a building whereas plot No. 146 contains a kiln. A suit under the provisions of Section 77 of the Punjab Tenancy Act can only be filed with respect to land as defined in this Act. If the subject-matter of the suit is not land, as defined in the Act, the jurisdiction of the civil Courts cannot be barred. The claim here is not for occupancy rights which can arise only in respect of "land" defined as follows in Section 4 (1) of the Punjab Tenancy Act:--

"4 (1), "land" means land which is not occupied as the site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes the sites of buildings and other structures on such land."

8. As it is clear to us that the constructions made by the plaintiffs-respondents are not subservient to purposes of agriculture or grazing cattle, their sites are excluded from the purview of, "land". The first submission must, therefore, fail.

9. The second contention is that the finding of Tatachari. J., that the origin of the lease was not known, was incorrect because it was shown that it originated as a tenancy-at-will. It was argued that Jamabandis since 1916 (Ex. P. 1 and Exs. D-1 to D-3) proved that the land was given in lieu of service of making earthen ware as well as for a small rent. We do not think that the mere fact that Jamabandis since 1916 indicate that the tenancy was a service tenure proves that the origin of the tenancy was known. The only words used in the Jamabandies which could be relied upon by the defendants-appellants consisted of the term "Ghair Mauroosi". Such entries, in so far as they could indicate that the tenure was non-heritable, were in conflict with the actual proof of succession for at least three generations. In addition, the presumption, flowing from the existence of constructions of the nature put up by the plaintiffs-respondents, could be that of an irrevocable licence u/s 60 (b) of the Easements Act, as held in Sitara Shahjahan Begam and Another Vs. Munna and Another, We do not think that Tatachari, J., had erred in holding that the entries relating to land, with the constructions made thereon, should be interpreted as importing a service tenure. Hence, the second contention also fails.

10. The third argument was that Tatachari. J, had not correctly interpreted paragraph 5 of the written-statement We think that the Question of a correct interpretation of paragraph 5 of the written-statement is unimportant in view of the unassailable finding that there is a double-storeyed thatch-roofed house on Khasra No. 141 and a kiln on Khasra No. 146. In paragraph 4 of the written-statement the defendants had asserted that there is an ordinary house valued by the defendants at Rs. 100/- in Khasra No. 141, and that in Khasra No. 146 there is what is described as Awa or kiln for baking of earthen ware. Thereafter it has been stated in paragraph 4 that for the purpose of the kiln the plaintiffs had constructed a house in Khasra No. 141 after the earthquake.

In paragraph 5 of the written-statement, the defendants had merely denied the existence of abadi on plots Nos. 145 and 146. Thereafter, the defendants had asserted that there were two houses on plot No. 145, one of which was a cattle-shed. But, we are not concerned with plot No. 145 at all in this case. In paragraph 10 of the written-statement, however, the defendants had admitted that the plaintiffs were the owners of the Malba of the house on plot No. 141. Although, the observations of Tatachari. J., about the meaning of paragraph 5 of the written-statement may not be accurate yet, the findings of the learned Judge that there was a double-storeyed thatch-roofed house in Khasra No. 141 and kiln on Khasra No. 146, were based on evidence on record. Both the Courts below had hold that there was a kiln on plot No. 146 and a house in plot No. 141. This was the really material part of the finding of Tatachari. J.

11. The fourth submission of the learned counsel for the defendants- appellants

was that the evidence in the case did not establish that the plaintiffs had any rights higher than those of a tenant-at-will and that, in any case, the plaintiffs had failed to prove their case of a permanent tenancy. Here, we may consider the cases cited on the question of the correct inference from proved facts relating to a claim for permanent tenancy.

12. Learned counsel for the appellants relies upon *Secretary of State Vs. Babu Beni Prasad Sahu*, which dealt with a provision of a Tenancy Act of Chota Nagpur. The only relevancy of this case could be that, when a claim for a permanent right is set up variations in rent and the existence of a permanent structure could be taken into account. It was held here that, in view of the provisions of the Chota Nagpur Tenancy Act the mere fact that a permanent structure was made on the land in dispute could not raise a presumption of a permanent tenancy because the construction was entirely subordinate to the purpose of cultivation. In our view this case has not much bearing on the case before us.

13. The respondents relied upon *Padamlochan Mahapatra Vs. Budhram Christian and Others*, which was a case dealing with a tenure burdened with service of a personal nature. It was held there, relying on AIR 1931 157 (Privy Council) that land could not be resumed so long the services were performed.

14. Learned counsel for both sides, however, relied upon *Bejoy Gopal Mukherji Vs. Pratul Chandra Ghose*, where it was held that decisions in cases relating to permanent tenancy have to be "read in the light of the facts of these particular cases." It was observed there: "Mere possession for generations at a uniform rent or construction of permanent structure by itself may not be conclusive proof of a permanent right as held in *Kamal Kumar Datta and Another Vs. Nandalal Dubey*, but the cumulative effect of such facts coupled with several other facts may lead to the inference of a permanent tenancy as indicated even in the case of *Rai Satyendra Nath Bhadra Bahadur and Another Vs. Charu Sankar Roy Chowdhuri and Others*, on which *Shri H.C. Chatterjee* relies." On the strength of the facts of that particular case, the Supreme Court had held that an inference of permanent tenancy was irresistible.

15. It seems to us that the question as to whether the tenancy is permanent or not must necessarily depend upon the cumulative effect of the whole set of facts in a case. We are satisfied, on the series of facts found here, set out in the judgment of *Tatachari. J.*, that the view is correct that a tenancy of a permanent nature, in the sense that it could not be revoked so long as the plaintiffs paid rent in cash or kind, should be inferred. This inference was arrived at in the light of facts which establish: firstly, the existence of structures on the two plots in dispute of the nature indicated above, since at least 1905, from which a presumption of permissive constructions could be raised; secondly succession to the tenancy rights for three generations: and, thirdly, relying upon the *Jamabandis*, the intention that the tenancy was burdened with the obligation to pay rent in cash or kind. Hence, the tenancy could continue so long as the conditions were observed. This was precisely what *Tatachari, J.* had held. We

respectfully concur with his view.

16. The fifth and the last contention of the learned counsel for the appellants was that the plaintiffs should not be allowed to succeed on a new case of permanent tenancy of the kind declared by Tatachari, J., as they had themselves set up ownership and denied either Payment of rent in cash or kind or performance of any service to the defendants-appellants. This objection can be answered in terms of what was laid down by this Court in Atma Ram v. Paras Ram Second Appeal No. 367 of 1967. D/- 23-3-1971 (Him LR Vol. 1. Part V. 1971 D. 137) (AIR 1971 Him Pra 11) where it was held:

"It is true that when a party had admitted something against itself in the course of its pleadings, the admission may be treated as conclusive and debar it from going outside its pleadings to take up an inconsistent case. But, where a party has taken two inconsistent positions in the course of its pleadings, the pleadings of that party ought to be examined as a whole in order to determine their real meaning before determining the effect of the pleas. Moreover, such Inconsistent pleas will have to be considered in the context of the whole evidence in the case including the admissions and pleadings of the other side."

17. In the instant case, the plaintiffs had given up the higher claim of ownership, as already indicated, and had chosen to adopt the lower one of a permanent tenure in the sense that it continued so long as its conditions were fulfilled. A fortiori, in such a case, the plaintiffs could rely upon the alternative case set up after abandoning a higher claim. They could not be compelled to abandon the lower footing as well. The mere fact that the permanent tenancy was recognized subject to proved conditions of the tenure does not amount to making out any new case. The declaratory relief, which the Court could grant, had necessarily to be moulded and confined to proved facts. The last contention has also, therefore, to be rejected.

18. The result is that this appeal is dismissed with costs.

D.B. Lal, J.

19. I agree.