

(1941) 08 PAT CK 0028
In the Patna High Court

Jado Singh and Another

APPELLANT

Vs

Bishunath Lal Kanedia Marwari and Another

RESPONDENT

Date of Decision : 29-08-1941

Acts Referred:

Bengal Tenancy Act, 1885 — Section 48

Citation : AIR 1942 Patna 71

Hon'ble Judges : Manohar Lall, J

Bench : Division Bench

Judgement

Manohar Lall, J.—This is an appeal by the plaintiffs who are aggrieved by the appellate decision by which they have been given a decree for rent against the defendants for an amount less than what they claimed in the plaint, overruling the decision of the learned Munsif, who had decreed the suit of the plaintiffs for the full amount claimed, although at a reduced rate of interest. The sole question for determination in the appeal is whether the provisions of the Bengal Tenancy Act or of the Transfer of Property Act apply to regulate the relationship of the parties in the circumstances narrated below. The facts are no longer in controversy. On 14th November 1918, the defendant entered into possession of the land for which the rent is claimed on the basis of a registered patta agreeing to pay annual rental of Rs. 82. The land consists of a number of plots which belonged at one time to Mithu Singh, who executed a will on 10th January 1980 in favour of his aunt, Biko Kuer, who in her turn executed a deed of gift in favour of the plaintiffs on 7th December 1930. Mithu Singh had settled the land with defendant 1 who was formerly the manager of the Gausala institution; defendant 2 is the present manager. On these allegations the plaintiffs instituted the present suit on 12th September 1938, for recovery of the arrears of rent for the years 1340 to 1845 Fasli.

2. The defence to the action was that the plaintiffs had no right to maintain the suit, because the will by Mithu Singh in favour of his aunt had never been admitted to probate; secondly, that the plaintiff being himself an occupancy

raiyat had no right to recover rent at a rate higher than that provided by Section 48, Ben. Ten. Act; and lastly, that the claim for the years 1340 and 1841 Fasli was barred by limitation. The Courts below have concurrently held that the plaintiffs have a right to maintain the action, because notwithstanding the fact that the will has not been admitted to probate the plaintiffs are the heirs of Mithu Singh, who died without leaving any son. This finding was not challenged before us. The serious question which was argued before us was that the defendant is estopped from going behind the recitals in the lease of November 1918, and therefore, it must be held as between the plaintiffs and the defendant, that the plaintiffs let the land in their capacity as cosharers landlords of village Mokameh; in other words, the argument was that Section 48, Ben. Ten. Act, has no application and the suit must be governed by the provisions of the Transfer of Property Act. The defendants on the other hand contend that when it has been found as a fact that the plaintiffs' predecessor was in possession of the suit land as a raiyat of an occupancy holding, the provisions of Section 48, Ben. Ten. Act, apply. They also assert that estoppel was never pleaded in the Courts below and to the parties fought out the case upon the issue as to whether the disputed land was the occupancy holding of Mithu Singh or was his bakasht land as a cosharer landlord.

3. Our attention was drawn to a large number of cases where apparently contradictory views have been taken in the Calcutta High Court. The earlier case upon the point is *Bamandas Bhattacharjee v. Nimadhab Saha* AIR 1917 Cal. 515 which was doubted in *Chandi Charan Nath v. Somla Bibi* AIR 1918 Cal. 917. *Ashutosh Mukherjee, J.* was a party to both these decisions. But there is no question that it has now been authoritatively settled that the provisions of the Bengal Tenancy Act apply if the lease is for agricultural purposes and not because the land is agricultural, or, as has been stated in a number of cases, the applicability of the Bengal Tenancy Act depends upon the nature of the original tenancy and not on the character of the parcels which go to compose the land forming the tenancy. If this rule is applied it is obvious that though on the findings of fact of the Courts below the object of the tenancy created in 1918 was not for agricultural purposes, but the nature of the original tenancy was undoubtedly agricultural.

4. I do not think it is necessary to decide as to which is the correct view, namely whether the principle enunciated in *Bamandas Bhattacharjee v. Nimadhab Saha* AIR 1917 Cal. 515 should be preferred to the doubting decision of *Beachcroft, J.* in *Chandi Charan Nath v. Somla Bibi* AIR 1918 Cal. 917, but I am, inclined to agree with the view taken by *Beachcroft J.* that in order to avail of the doctrine of estoppel, estoppel must be pleaded at the trial so that the parties may be able to show that there is no room for the applicability of the doctrine of estoppel in the particular case. As that has not been done and the parties went to trial upon the plain issue as to whether Mithu Singh was originally an occupancy raiyat, we should not allow the question of estoppel to be raised for the first time in appeal. It is true that the recitals in the permanent lease of 1918 described Mithu Singh

as by profession zamindar and cultivator and co-sharer malik of village Mokameh and the recitals begin with the statement that he is settling 16 kathas of khudkasht land at an annual rental of Rs. 32 for building a house and that the patta is a mokarrari dauami patta, but in the Courts below these recitals in the document were merely treated as pieces of evidence which had to be considered by the Courts of fact along with the other evidence adduced.

5. What then are the findings of fact in this case? It is the admitted case of both the parties that the land in dispute was the occupancy holding of Mithu Singh and that Mithu Singh was the occupancy raiyat of the plots in question. It has also been established that at the time when this land was given in lease, the holding out of which the tenancy was so carved out was an agricultural holding and so it follows that the case is governed by the provisions of the Bihar Tenancy Act. For these reasons, I agree with the decision of the learned Subordinate Judge that defendant 2 is an under-raiyat under the plaintiffs and is liable to pay rent at an annual jama of Rs. 6-11-5 dams and not at the jama of Rs. 82. The appeal fails and is dismissed with costs. The cross-objection was not pressed and is dismissed.