

(1913) 07 CAL CK 0059
In the Calcutta High Court

Jagannath Marwari

APPELLANT

Vs

Raj Kumar Thakur Giridhari Singha and Others, Biswa Nath
Goria and Others, Surendra Mohan Ghose and Others

RESPONDENT

Date of Decision : 08-07-1913

Acts Referred:

Chota Nagpur Encumbered Estates Act, 1876 — Section 3

Citation : 29 Ind. Cas. 429

Hon'ble Judges : Teunon, J;Chitty, J

Bench : Division Bench

Judgement

1. In Appeals Nos. 120 and 183 of 1911.

2. The two suits out of which these two appeals arise (Suits Nos. 331 and 932 of 1909) relate to 650 bighas of coal lands in Mouza Barora appertaining to Pergannah Nawagarh, Kismat No. 3. The zemindari Nawagarh, Kismat No. 3, belongs to Giridhari Singh Thakur, defendant No. 5, he having succeeded to that estate was the eldest son of Joy Nandan Singh Thakur. It appears that many years ago Pergannah Nawagarh was divided into four kismats, each of which formed a separate estate, and each of which appears to have descended, according to the rule of primogeniture, on the eldest sons. The accompanying genealogical table will show the relationships in the family of the zemindars. The family is governed by the Mitkashara School of Hindu Law. 8 annas of Mouza Barora was vested in Chhatradhari Singh, Nagar Singh, Dukhit Singh and Amrita Kumari as kho poshdars. What their precise interests in the land were, we will discuss later. By a mourusi mokarari patta, dated 23rd March 1895, these four persons settled the sub-soil rights in 500 bighas of land comprised in the 8 annas share of Mouza Barora with Surendra Mohan Ghose, defendant No. 1, and by a similar patta of even date, they settled another 150 bighas comprised in the same 8 anna share of the mouza with defendant No. 2, Jogmaya Debi, wife of Nilmadhab Bajpai. By a lease dated 19th May 1901, the defendant No. 1 made a dar-mokarari settlement of the sub-soil rights in the 500 bighas with defendant

No. 36, Dina Nath Gorain, and, by a similar lease dated 14th January 1901, the defendant No. 2 made a dar-mokarari settlement of the sub-soil rights in the 50 bighas with the same person. In the mourusi mokarari pattas, the property is described as "our long-possessed 8 anrias share in Mouza Barora". The salatinis paid by the defendants Nos. 1 and 2 were Rs. 1,250 and Rs. 312-8-0 respectively, the rents for the 500 and 150 bighas being Rs. 562-8-0 and Rs. 140-10-0. By his dar-mokarari patta the defendant No. 1 took from Dina Nath Gorain a salami of Rs. 6,500, reserving an annual rent of Rs.3,000, while the defendant No. 2 by her dar-mokarari patta took a salami of Rs. 1,800 and reserved an annual rent of Rs. 900. The salamis under the dar-mokarari pattas were duly paid; but it does not appear that the lessee even received actual possession of any of the lands demised. Plaintiffs claim to be entitled to the benefits of these dar-mokarari pattas as members of the Gorain family, Dinanath having taken the leases and paid the salami as benamidar of the whole family. This is not now disputed and the Gorain family is here represented by the plaintiffs on the one side and defendant No. 36 and the sons of defendant No. 37 on the other. On 29th December 1895, Giridhari Singh, defendant No. 5, purported to execute in favour of defendant No. 1 a chhar sanad, admitting all terms of the patta which had been granted in favour of defendant No. 1 in respect of the 500 bighas of land. For this he received Rs. 500; on the following day, 30th December 1895, he executed a deed of release in favour of Nagar Singh, Chhatradhari Singh, Dukhit Singh and Amrita Kumari, whereby he purported to release to them the absolute right in 8 annas of Mouza Barora, stating that it was their "ancestral lakhiraj matratan property." On 15th April 1902, defendant No. 5 executed a mourusi mokarari patta in favour of his eldest son, Ram Bahadur Singh, defendant No. 6, of the surface and sub-soil rights of the whole Mouza Barora; and the defendant No. 6 thereupon, by several leases, let out the underground rights to different persons; among others, he made a lease in favour of defendant No. 35 of 919 bighas. That lease is dated 28th January 1908 and was given in the name of Gopi Nath Gorain, the eldest son of Nanda Lal. Among other persons claiming to be lessees of this property was Jagan-nath Marwari, defendant No. 34, who brought two suits which are the subjects of appeals Nos. 51 and 121 of 1910 with which we shall presently deal. It should be stated that, though the total area leased out to the Gorains was said to be 650 bighas, the entire area of Barora, as measured, is only 1,113 bighas, so that, in any case, the plaintiffs would not be entitled to the sub-soil rights in more than 556 1/2 bighas. As defendant No. 5 and also defendant No. 35 had, according to the plaintiffs, infringed their rights, the plaintiffs brought these two suits to have it declared that they were entitled to a 10-anna 5-gunda share in the 650 bighas of Mouza Barora and that possession might be given to them by demarcation by metes and bounds jointly with the defendant No. 35. They asked, in the alternative, that, if it were found that the defendants Nos. 1 and 2 had no title to the sub-soil beneath any portion of the 650 bigha?, a decree might be passed for reduction of the rent in proportion to the area to which they might be found to have no title and for a refund of a proportionate amount of the

salami. They claimed Tehas possession of such of the lands as might fall to their share and asked for mesne profits. As a further alternative, they asked that if it were found that defendants Nos. 1 and 2 had no title whatever to the sub-soil in the 650 biglias, a decree might be passed against defendants Nos. 1 and 2 for a return of the salami which they (plaintiffs) had paid and any rent which had been recovered against them, such amounts to, be refunded with interest.

3. On the suits coming on for hearing, the learned Subordinate Judge found that the lessors of defendants Nos. 1 and 2 were khorposhdars of the property, that they held under a maintenance grant made to their ancestor Kurnar Bishnu Singh, such grant being heritable in the male line and determinable only with the failure of male issue. He decided, however, that the defendant No. 5 was estopped from denying the right of defendants Nos. 1 and 2 and the plaintiffs as conferred by the leases in question. He accordingly decided that the plaintiffs were entitled to a decree for partition of the sub-soil of Mouza Barora and separate possession of the coal lands falling to their shares. The decrees, in the form in which they have been passed, cannot be supported and, moreover, are not acceptable to any of the parties except defendants Nos. 1 and 2. The plaintiffs have appealed and their appeal is supported by the other members of the Gorain family, who are represented by defendant No. 36 and the sons of defendant No. 37. The respondents, who oppose the appeal, are defendants Nos. 1 and 2 who are anxious to have the decrees of the Subordinate Judge in these two cases maintained. There is, third party in this case who may be described as the Mahato defendants. They are in possession by virtue of certain leases and if no relief is given to the plaintiffs by way of possession they do not desire to contest the matter. If, however, the plaintiffs are given anything by way of possession, the Mahato defendants object, and desire to press the cross-objections which they have filed.

4. In this Court the plaintiffs have maintained that the decrees of the Subordinate Judge are based on a wrong assumption of law and, to some extent, of fact. They, therefore, now desire to give up their claim for possession of the coal lands in Mouza Barora and to fall back upon their alternative claim for a return of the salami and the rents which they have paid to defendants Nos. 1 and 2.

5. The first question to be considered is, what were the precise rights of Nagar Singh, Chhatradhari Singh, Dukhit Singh, and Amrita Kumari in the lands which they purported to lease out to defendants Nos. 1 and 2? The evidence on this point is somewhat meagre, but we think that it is sufficiently clear that the several kismats of Nawagarh descended, by the rule of primogeniture, on the eldest sons, maintenance grants being made to the younger branches of the family. Each kismat was, to all intents and purposes, regarded as an impartible estate. Kismat No. III, for instance, has descended to the eldest sons since the time of Bishnu Singh on no less than four occasions; and Giridhari Singh, defendant No. 5, now holds it on those terms. With regard to the character of the

khorphosh grants, we think that the learned Subordinate Judge has correctly found that these grants were made for the maintenance of the junior branches and were heritable in the male line and ended only with the failure of male heirs. Though Nagar Singh in his evidence has declined to admit it, there can be no doubt that that is the nature of the grant. We have an instance of resumption on the death of Bhowani Singh, the great uncle of Giridhari without heirs. There is one instance of a sanad granted to Nagar Singh by Giridhari Singh 011 19th March 1868. That merely states that the grantor executes the khorphosh sanad to the grantee, his sons and grandsons, moghali rent of lie. 1 having been paid in respect of a 4-anna share in Mouza Barora thus granted. The most important document in this connection is Exhibit D9, a decree in Suit No. 62 of 1852 dated 24th July 1852. From that the history of these khorphosh grants clearly appears. There are other documents (Exhibit D to D3 and D5 to D7) also indicating the nature of these grants. These purport to be sales but are rather leases of khorphosh lands, two by Nagar Singh and five by Bhimlal Singh to the Mahatos, and were executed on various dates from 4th December 1867 to 2nd April 1876. They were clearly granted for purposes of cultivation, and in several of them that is expressly stated. We must hold in the evidence before us that these khorphosh grants were to the grantee and his descendants in the male line, terminable with the failure of such descendants. That the khorphosh-dars did not possess the sub-soil rights in the lands granted to them is conceded by all the parties other than defendants Nos. 1 and 2, and they did not very strenuously contest the point. The interest of a khorphoshdar though more than an interest for one life was nevertheless a limited interest, liable to be defeated at any time by the failure of heirs, and thereupon resumable by the proprietor for the time being. This would not be an interest sufficient to carry with it the sub-soil rights. We hold, therefore, that Nagar Singh and his co-sharers had no right to make the settlements of the sub-soil rights with defendants Nos. 1 and 2, which they purported to make.

6. For defendants Nos. 1 and 2 it was argued, first, that the plaintiffs having been granted decrees could not prefer these appeals against them. There is, however, no provision of law to prevent them. It was open to them, as they had claimed alternative reliefs, to say that the relief granted was not in accordance with law and that they would prefer the other. It is of the less importance in this case, as there are cross-objections by the Gorain defendants in which the whole matter would be open to review. Moreover, Order XLI, Rule 33, confers on the Appellate Court the power to pass such decree as ought to have been passed or to pass such further or other decree as the case may require.

7. The next argument for defendants Nos. 1 and 2 was that defendant No. 5 was in some way estopped from disputing the title which Nagar Singh and his co-sharers had purported to confer on defendants Nos. 1 and 2. It was said that the chhar sanad of 29th December 1895 and the releases of the following day debarred him. No question, however, of estoppel really arises as between the plaintiffs and defendant No. 5. The sole question is: had Nagar Singh and his co-

sharers a title to the sub-soil rights in 8 annas of Mouza Barora as khorposhdars or otherwise, which they could pass on to defendants Nos. 1 and 2? As khorposhdars they clearly had no such title. The chhar sanad and releases could not perfect any such title in them, for the simple reason that from 20th November 1876 until 1st July 1901 the estate of Giridhari Singh was being managed for him under the Chota Nagpur Encumbered Estates Act, VI of 1876. By Section 3 of that Act during the period mentioned and, therefore, at the date of the deeds in question, Giridhari Singh was wholly incompetent to make any such disposition of his property, It was not a case of a merely voidable agreement as the Subordinate Judge appears to think The chhar sanad does not purport to effect an alienation, but as an admission it could not in any way bind the estate to that end. The learned Pleader for defendants. Nos. 1 and 2 laid much stress on the letters, Exhibits A15, A13, and A14 said to have been written by Giridhari Singh to defendant No. 1 on 3rd and 22nd February and 10th March 1902. The Subordinate Judge has found these letters to be genuine. We have doubts as to the correctness of that finding, but even if they be genuine in the sense that Giridhari Singh wrote or had them written, they do not carry the case much further. They were evidently written with a purpose to make out that he, at any rate, was not putting obstacles in the way of the Gorains getting possession. As an assertion of that fact they are palpably false, as the other evidence shows. It follows then that the plaintiffs' lessors having had no title whatever to the sub-soil and being incapable of conferring such a title on the plaintiffs, the suit so far as it claimed possession in any form must necessarily fail. We have then to consider the alternative claim for refund of the salami and the rents paid. They do not stand on precisely the same footing. So far as the refund of salami is concerned, the plaintiffs' claim is, in our opinion, barred by limitation. This is not a case of there having been a consideration for the contract which afterwards failed. If it were, Article 97 of Schedule II of the Limitation Act, 1877, would apply and the period would be three years from the date when the consideration failed. Here there was never any title in defendants Nos. 1 and 2 and the plaintiffs were never put in possession. There was never any consideration at all for the contract. In that view of the case the Article applicable is Article 62 and the period is three years from the dates when the money was paid, i.e., on 19th May 1901 and 14th January 1901 respectively. As these suits were not filed until 13th August 1901, the claim for refund of the salami is clearly barred. The claim for refund of the rents paid appears to us to be equally unsustainable though on somewhat different grounds. It appears that in respect of the 500 Irighas three suits were filed against the plaintiffs and their co-sharers by defendant No. 1 and decrees obtained on 18th March 1905 for rent for 1309 and 1310, on 12th September 1906 for rent for 1311 and 1312 and on 15th January 1909 for rent for 1813 and 1314. In the case of the first decree the claim is barred by limitation. The other two are within three years before suit filed. Similarly in respect of the 150 bighas defendant No. 2 filed two Suits No. 37 of 1905 and No. 32 of 1907 and obtained decrees. These amounts, even if paid within the period of limitation, cannot be recovered, being moneys paid by compulsion of legal

proceedings. The principle laid down in *Marriott v. Hampton* 6 C. 394 : 7 C.L.R. 529 : 7 I.A. 240 : 4 Shome L.R. 7 : 4 Sar. P.C.J. 199 : 3 Suth. P.C.J. 816 : 4 Ind. Jur. 530 is applicable to this country. The plaintiffs had an opportunity of reasoning this question in those suits, and not having done so they cannot successfully maintain this action for refund on the very same ground. Moreover, the facts of the case point to the conclusion that defendants Nos. 1 and 2 were fully aware of their lessors' want of title, and entered into the leases with their eyes open.

8. The result is that except for a declaration that they are no longer liable to pay rent under the leases of 19th May 1901 and 14th January 1901 to defendants Nos. 1 and 2 respectively, the plaintiffs' suit must fail. We accordingly modify the decree of the Subordinate Judge and confine it to the declaration just mentioned. The cross-objections both of the Gorrains and of the Mahatos have become unnecessary and are dismissed. Under the circumstances we leave the several parties to bear their own costs in both the Courts.

9. In Appeal No. 51 of 1910.

10. This appeal arises out of Suit No. 365 of 1908 which was decided by the Subordinate Judge of Purulia just a year before he decided Suits Nos. 331 and 332 of 1909, with which we have dealt in Appeals Nos. 120 and 183 of 1911. The plaintiff in this suit, which has been dismissed by the Subordinate Judge, is Jagannath Marwari, defendant No. 34 in the two later suits. He filed this suit to establish his title to and recover possession of the sub-soil rights in 500 bighas out of a moiety of Mouza Barora by virtue of two leases for 551 years executed in his favour, one on 24th September 1904 by Nagoar Singh and the other on 2nd December 1904 by Chhatradhari Singh, each for 250 bighas. The plaintiff in this case further claimed under a lease for 999 years, dated 17th February 1908 and granted to him by defendants Nos. 19 to 21, the successors-in-interest of Bhagi Mahato, who, the plaintiff alleged, had on 27th May 1884 purchased from Nagaor Singh a one-anna share of the said mouza and certain land called "Dhab". The Subordinate Judge in this case held that Nagaor Singh and Chatradhari had no right to the sub-soil in Mouza Barora; that they were khorposhdars, the grants, for maintenance being tenable for the life of the grantee only, and that the plaintiff had accordingly taken nothing by the pattas of 1904 or 1908. The suit was dismissed and the plaintiff has appealed. In order to avoid the expense and trouble of printing a number of papers and a mass of evidence, the plaintiff applied to this Court to dispense with such printing and obtained an order to that effect on his undertaking to accept and be bound by the findings of fact of the Subordinate Judge. The appeal has proceeded 011 that, footing.

11. This appeal is analogous to Appeals Nos. 120 and 183 of 1911 and this judgment should be read with reference to our judgment in those appeals.

12. It was argued for the appellant that the findings should at least be consistent

in all the cases. The same Subordinate Judge has in this suit held that the khorposh grants were only for the lives of the grantees. In the other two suits he held that they were heritable in the male line and determinable only on the failure of male heirs. The second view is, in our opinion, the correct one. It does not materially affect this case, inasmuch as in neither view would the khorposhdars possess the sub-soil rights or have the power to alienate them. Then it was urged that Nagnor Singh and Ohhat-tradhari both being alive at the date of suit, the suit could not be dismissed as regards their interest. The leases to the plaintiff, however, were only of sub-soil rights, the surface rights being expressly reserved to lessors. The leases, therefore, conveyed nothing whatever to the plaintiff. For the reasons given in our other judgment no question of estoppel arises which can assist the plaintiff. The plaintiff having taken nothing by his leases whether directly from Nagoar Singh and Chhatradhari or indirectly through the defendants Nos. 19 to 21, is not entitled to any relief in this suit. The appeal is accordingly dismissed with costs, one set to be divided between the defendants-respondents who have appeared. The rights of the various defendants as between themselves will not be affected by this judgment.

13. In Appeal No. 121 of 1910.

14. The Suit No. 366 of 1908 out of which this appeal arises relates to certain coal lands in Mouza Pipratarh and Mouza Attalis. The plaintiff-appellant is the same as in Appeal No. 51 of 1910 and he has given a similar undertaking in this case to be bound by the findings of fact of the Subordinate Judge. As the finding in this case is that the title-deed on which the plaintiff's suit is based is a forgery, it follows that the plaintiff's suit must necessarily fail. The appeal is accordingly dismissed with costs, one set to be divided between the defendants-respondents who appeared.