

(1961) 12 OHC CK 0009
In the Orissa High Court
Case No : First Appeal No. 42 of 1958

Janab Jahada Begum Sahib and Others	APPELLANT
Vs	
The State of Orissa	RESPONDENT

Date of Decision : 22-12-1961

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 31
Evidence Act, 1872 — Section 35
Government Grants Act, 1895 — Section 2
Land Acquisition Act, 1894 — Section 4(1)
Orissa Tenancy Act, 1913 — Section 3, 3(2), 6, 6(1), 6(2)
Transfer of Property Act, 1882 — Section 107, 111

Citation : (1962) 28 CLT 209

Hon'ble Judges : Narasimham, C.J; R.K. Das, J

Bench : Division Bench

Advocate : L.D. Das Gupta, for the Appellant; Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—This is an appeal by the Defendants against the judgment of the Additional Subordinate Judge of Cuttack, directing the Plaintiff's suit for eviction of the Defendants from a plot of land bearing Current Settlement Plot No. 523, appertaining to Khata No. 1426 and having an area of Ac. 7.724, situated within Cuttack town, under Cuttack Khasmahal. The plot consists of a residential house with its appurtenant compound in the possession of the Defendants.

2. The Plaintiff's case was that the Defendants were mere pattadars (leaseholders) who held the land in accordance with the terms of a written lease (ext. 1) dated 18-8-1951 and that the lease was determined by a valid notice (ext. 8) served on the Defendants on 6-2-1953. Defendant No. 1 is the wife, and Defendants Nos. 2 to 7 are the children of one Mr. Mohammed Abdul Ahad, a retired Deputy Collector. According to the Plaintiff, the Defendants had no other

rights in the plot apart from the rights recognized in the lease (ext. 1). The former lessees were some Ray Choudurys who had sold their lease-hold right to Mr. Ahad by a sale deed (Ext. F) dated 22-5-1929. Mr. Abad's name was recorded as a pattadar in the Current Settlement Khatian (ext. 21) finally published on 10-3-1932. Mr. Ahad entered into a fresh lease with the Khasmahal sometime in 1932, the counter part of which is the Kabuliyat (ext. 20) dated 29-2-1932 executed by him in favour of the Khasmahal. The Kabuliyat is in the usual printed form used by Cuttack Khasmahal authorities in respect of building leases in Cuttack town. That Kabuliyat shows that the lease was for a period of 15 years only, with a right of renewal by one or more leases, at intervals of 30 years, the rent being liable to enhancement at each such renewal. Clause 13 of the Kabuliyat is as follows:

13. If the Collector at any time before the expiry of the lease gives me/us notice in writing that the Government desires for any public purpose, to refine my/our holding or any part thereof, I/we shall vacate the holding or part thereof required, within three months from such notice on receipt of compensation for any buildings erected or (sic) improvements that I/we might have made with the written consent of the Collector. In case of disagreement as to the amount of compensation the matter shall be referred to the Commissioner whose decision shall be final.

It will be noticed that by virtue of this clause if Government desire to resume the lease-hold property for any public purpose, the lessee shall be entitled to compensation only for the buildings standing on the land. He was not entitled to any compensation for the lease-hold interest in the land itself.

3. In 1949 Mr. Ahad made a settlement of the property in favour of the Defendants (ext. A dated 9-9-1949). In pursuance of that deed of settlement Defendant No. 1 on behalf of herself and on behalf of other Defendants-some of whom were then minors-executed a fresh deed of lease (Ext. 1 dated 18-8-1951) in favour of the Khasmahal. That lease also is in the usual printed form and its terms are almost identical with those of the kabuliyat ext. 20 executed by Mr. Ahad in 1932 (the slight variations in language are not material for our purpose). Here also the right of resumption of the lease-hold property was provided in Clause 12 in the following terms:

12: If the Collector at any time before the expiry of the lease gives the lessee notice in writing that the Government desires for any public purpose to the holding or part thereof, he shall vacate the holding or part thereof as required, within three months from such notice, on receipt of compensation for any building erected, or other improvements that he might have made with the written consent of the Collector. In case of disagreement as to the amount of compensation, the matter shall be referred to the Commissioner whose decision shall be final and binding on the parties. The lease shall be deemed to have been determined on the expiration of the term of notice issued under this clause.

The aforesaid Clause 12 is identical with Clause 13 of the Kabuliyat (ext. 20), except for the addition of the last sentence underlined.

4. Adjacent to the disputed property lies an educational institution known as "Shailabala Women's College". The State Government wanted to extend the College by including the disputed property within its compound. At first they thought of acquiring the property under the provisions of the Land Acquisition Act, and issued a notice u/s 4(1) of that Act--(vide Ext. G)-on 14-2-1950. But subsequently, however on 25-9-1952, Government decided to resume the leasehold property in accordance with the terms of the aforesaid Clause 12 of the lease (ext. 1) and the Collector of Cuttack was directed by ext. 10 to take steps for such resumption and to estimate the amount of compensation payable for the buildings erected thereon. In pursuance of this direction the Collector issued a notice (Ext. 8) saying that the disputed property was required for a public purpose namely extension of the buildings and compound of Shilabala Women's College. The value of the buildings and structures standing on the site was ultimately estimated by the Member, Board of Revenue, at Rs. 18938/- (see ext. 7) by his order dated 15-10-1954. The Defendants, however, refused to accept this amount and refused to vacate the premises. Thereupon Government brought the suit (out of which this appeal arises) for eviction, alleging that the lease was determined by a valid notice, issued under Clause 12 of the lease (Ext. 1) and that the Defendants became trespassers from the date of the expiry of the notice i.e. from 17-10-1954. Government were ready and willing to pay the compensation for the building as finally decided by the Member, Board of Revenue.

5. Though several objections were raised by the Defendants in the lower court and also in the grounds of appeal, the only point urged on their behalf by Mr. L.K. Das Gupta before this Court was that the leasehold property was not liable to resumption and that it was a permanent, heritable and transferable interest and that if Government wanted to acquire the same for a public purpose, they should have proceeded in accordance with the provisions of the Land Acquisition Act. It was further contended that though the Defendants and their predecessor in title, namely Mr. Ahad, executed leases and kabuliyats agreeing to take the leasehold property subject to the right of the Government to resume the plot and determine the lease, if the plot was required for a public purpose (in accordance with Clause 12 of ext. 1 and Clause 13 of ext. 20), nevertheless their permanent, heritable and transferable right could not be extinguished by any such agreement. The aforesaid clauses which provided for extinguishment of the leasehold interest without compensation, were also attacked as unconstitutional as offending the fundamental rights guaranteed by the Constitution in Article 31.

6. Thus the main questions for decision in this appeal are:

(i) whether the Defendants have a permanent, heritable and transferable right in the leasehold property which cannot be extinguished by any resumption proceeding under Clause 12 of the lease Ext. 1; and

(ii) whether Clause 12 of the lease (Ext. 1) is unconstitutional inasmuch as it does not provide for any compensation for the acquisition of lease-hold interest in the suit plot and thereby contravenes Article 31 of the Constitution.

7. In the title deed of Mr. Ahad obtained by him from the Ray Choudhury in 1929 (ext. F) the property was described as "Raiyati Patta Satwa" (lease-hold raiyati interest) and in Mr. Ahad's Kabuliyat executed in 1932 (ext. 20) he admitted his interest in the property to be that of a mere lessee holding a building lease-with of course a right of renewal as provided in the lease itself. In the Current Settlement Khatian also (ext. 21) his right was entered as "pattadari". Similarly, in his deed of settlement in favour of the Defendants (Ext. A) he described his interest in the property as "pattadari satwa". In the lease deed of 1951 also (Ext. 1) no other right was claimed by the Defendants except the rights of a lessee in accordance with the terms of the lease. It is admitted that rent was paid to the Khashmahal in accordance with the terms of the lease all along. Thus, the presumption of correctness of the Settlement entry is practically confirmed by the reiteration of the same right in Mr. Ahad's settlement deed of 1949 (Ext. A) and in the fresh lease deed taken by the Defendants (ext. 1) on 18-8-1951, and the interest of the Defendants in the lease-hold property must accordingly be taken to be that of mere lessees holding a building lease with a right of renewal subject to certain conditions mentioned in the lease deed itself. One of the important conditions is the right of the lessor to determine the lease by a proper notice if the lease-hold property was required for a public purpose, the only right remaining with the lessee on such determination being the right to receive compensation for the buildings and structures standing thereon.

8. Mr. Das Gupta rested his entire case on some entries in Ext. C. dated 7-9-1894 which is the finally attested report of the Khatian signed by the Attestation Officer during the Provincial settlement (known as Maddox Settlement). In this document the name of the tenant was noted as one "Lakshmi Narayan Ray Choudhury son of Durga Charan Ray Choudhury". The said Lakshmi Narayan Roy Choudhury has been further described as "Pattadarar Warish" (heir of the Pattadar). In column 10(a) of this document his status was noted as "pattadar" but in the column dealing with "Special Incidents" it was noted as "Pu" (Purba) "La" (Lakharaj) Bijyaptidar (former Lakhiraj Bajyaptidar). There was no final publication of the Provincial Settlement Record of Rights so far as Cuttack Khashmahal was concerned, and no presumption of correctness attaches to that Settlement entry, u/s 103B(5) of the Bengal Tenancy Act. But in paragraph 2 of the Report of Babu Raj Kishore Das, regarding the Settlement of Cuttack town Khashmahal dated the 4th July 1896, the following reasons are given as to why there was no final publication in respect of Cuttack Khashmahal during the Provincial Settlement:

The survey and preparation of the record of rights were made along with those of the whole Province now in progress under the supervision of the Settlement Officer of Orissa; but it was considered advisable to have the work of assessment

done under the supervision of the Collector. The record of rights was therefore prepared by the Settlement Officer and was made over to the Collector after final attestation on 5-1-1895 and sanction for the necessary establishment having been obtained in Board's letter No. 1378-A dated 16-10-1895, work was commenced on 15-12-1895.

It is thus clear that after final attestation during the Provincial Settlement, the record of rights were handed over to the Collector under whose directions Sri Raj Kishore Das as the Special Deputy Collector settled the rents payable in respect of Cuttack Khasmahal. Thus, though Ext. C has no presumptive evidence of correctness because there was no final publication under the Bengal Tenancy Act, nevertheless it has considerable evidentiary value u/s 35 of the Evidence Act. Mr. Das Gupta contended that the aforesaid entry in Ext. C under the Special Incidents column, to the effect that the disputed property was "Purba Lakhiraj Bajyapti" was itself sufficient to show that the property was originally Bajyapti and that once it was Bajyapti it became permanent, heritable and transable and that right can never be extinguished by any subsequent erroneous description in the Settlement records, or even in the agreement between the parties.

9. It is therefore necessary to trace the history dealing with the recognition of Bajyapti tenures in Orissa-especially in Cuttack Khasmahal. For this purpose I am relying mainly on Bengal Regulation No. XII of 1805 (Cuttack Land Revenue Regulation 1809), Bengal Regulation No. 11 of 1919 (Bengal Land Revenue Assessment (Resumed Lands) Regulation 1819), Bengal Regulation No. IX of 1825 (Bengal Land Revenue-free Lands Regulations, 1825), some passages in Maddox's Settlement Report, in Sri Raj Kishore Das's Settlement Report of Cuttack Khasmahal of the year 1896, in Mr. Dilawar Ali's Settlement Report of Cuttack Khasmahal of 1914 and in Mr. Dalziel's Current Settlement Report of 1932.

10. Cuttack Khasmahal was known as "Bazar-Hai-Bilde Town Cuttack" when it was in the Khas possession of the Maharatta Government prior to the conquest of Orissa by the British in 1803. Thereafter it came under the Khas possession of the British Government. Soon after the conquest the British were faced with the problem as to how far lands held formerly revenue-free under grants made by the previous Rulers should be either recognised or resumed. The statutory provisions for such recognition or resumption, of revenue-free lands as the case may be, were contained in Cuttack Land Revenue Regulation, 1805, Bengal Land Revenue Assessment (Resumed Lands) Regulations, 1819 and Bengal Land Revenue free Lands Regulations, 1825 the aforesaid three Regulations. Claims were invited from persons who claimed to hold lands revenue-free. The actual investigation of these claims took place sometime between 1837 and 1841 (see Maddox's Settlement Reports pages 212, 213 and 214-paragraphs 312, 313 and 314). These grants which were confirmed became Lakhiraj, Bahel and those which were resumed were known as Lakhiraj. Bajyapti. These Bajyapti tenures which exceeded 75 acres in area were carved out into separate estates, but small

Bajyapti holdings were included in the revenue paying estates and assessed at half or full rates, as the case may be-(see Ext. D). In paragraph 314 (page 213) of Maddox's Settlement Report it is pointed out:

Further it seems certain that were the period of Settlement now about to be made has expired, all distinction between resumed Lakhiraj and common ralyati lands will be lost.

In paragraph 315 of the same report (at page 214) it is further observed that:

Resumed jagirs which had been held by men of the cultivating and artisan castes have to a great extent merged in the general body of raiyati land.

Thus, from the mere fact that in ext. C the disputed property is recorded as "Purba Lakhiraj Bajyapti" under the Special Incidents column, all that the Defendants can reasonably contend is that the disputed land was originally granted revenue free by some persons during pre-British period and that in the subsequent resumption proceedings of 1837-41 it was resumed and thus became Lakhiraj Bajyatpti. As the Robkari of this period is not available, one cannot say as to who was the Bajyaptidar at that time. One is also in the dark as to what was the nature of his rights in the property, i.e., whether it was permanent, heritable and transferable. During the resumption proceedings the authorities were concerned solely with the question as to whether revenue free status should be conferred on those tenures not, and Government were not interested in deciding whether the holder has a permanent, heritable or transferable right. On the other hand, clauses fourth, fifth and sixth of Section 19 of Bengal Regulation XII of 1805 clearly recognise the existence of some pre-British revenue-free grants which were intended to be life grants only and some which were either heritable or transferable. Hence, in deciding as to what was the right of the Bajyaptidar in the land in 1841, one has to see the terms of the original grant and in the absence of any evidence as to those terms, merely because the land was described as Bajyapti in the resumption proceedings of 1841 the Defendant cannot say that we must assume it to be heritable, permanent and transferable.

11. Bengal Regulation No. VII of 1822 made statutory provisions for the preparation of record of rights and Lord William Bentinck in his famous Minutes of 1833 (see paragraph 250 of Maddox's Settlement Report) directed a detailed enquiry into the private rights and interests of tenants as enjoined by the said Regulation. But he also made it clear that:

All parties to be secured in the enjoyment of whatever rights and privileges they may be in possession of, or establish a claim to, subject to the limitations above noted, but no new rights to be created and all cultivator; who hold as mere tenants at will, to be left to make their own bargains as heretofore....

It was in pursuance of these directions that the first Orissa Settlement of 1834-43 known as Bhowrian Settlement took place (see paragraphs 251-257 of

Maddox's Settlement Report). This settlement continued while the resumption of Lakhiraj tenures was going on. We have no evidence as to how the disputed property was recorded in the Bhowrian Settlement. In any case, in view of the aforesaid minutes it would seem that no new rights were recognised and the rights of a Bajyaptidar were in not in any way enlarged but were the same as those contained in the terms of the original grant itself.

12. Then came the Bengal Rent Act of 1859 in which provisions were made for raiyats and under tenants but there was no provision dealing with Bajyaptidars. u/s 6 of that Act every raiyat who cultivated the lands for a period of 12 years was conferred the right of occupancy. In Section 19 there was also a provision for relinquishment of the rights of a raiyat. There is no evidence in this case as to who was in possession of the disputed land after the coming into force of that Act i.e. whether it was the Bajyaptidar who was recorded in the resumption proceedings of 1841, or any other person who, either by transfer from that Bajyaptidar or by extinguishment of his right and conferment of a new right, came into possession.

13. From Mr. Raj Kishore Das's Settlement Report we find that a fresh survey and settlement of lands in Cuttack Khasmahal estate was undertaken in 1873. There is also no evidence as to how and in whose name the land was recorded in that Settlement. From ext. C we only get the information that Lakshmi Narayan Ray Choudhury was recorded as a Pattadar in 1894 and that he was the son and heir of the previous pattadar, Durga Charan Ray Choudhury. Thus the earliest information about the ownership of the disputed property which can be ascertained from the documents proved in the case is that one Durga Charn Ray Choudhury, father of Lakshmi Narayan Ray Choudhury was the pattadar prior to 1894. But there is no information as to who the Bajyaptidar recognised in 1841 was and how Durga Charan Ray Choudhury came into possession of the lands either as his successor-in-interest or otherwise. If the Bajyapti right was really heritable, permanent and transferable and if Durga Charan Ray Choudhury was really the successor-in-interest of the original Bajyaptidar, he would also have been described as a Bajyaptidar and not as a "pattadar". Similarly in ext. C the Attestation Officer would have described Lakshmi Narayan Ray Choudhury also as a Bajyaptidar and not as the heir of a Pattadar (Pattadarara Warish). On this point some light is thrown by the following observations in paragraph 7 of Mr. Raj Kishore Das's report:

A considerable portion-more than half-of the assessable area is no doubt resumed Lakhiraj but no distinction has been made between it and ordinary raiyati lands. In fact such a distinction had ceased to exist from the time of the last settlement whom resumed Lakhiraj lands were assessed at full raiyati rates. No doubt at a late stage of the proceedings orders were received to assess resumed Lakhiraj lands "one rate lower" but although it was reported on paper that such a reduction had been made, so far as I could gather from the records no such thing appears to have been done. The Settlement Deputy Collector found

in this a very plausible explanation when his rent iron fell short of his absurdly high estimate of Rs. 15,000/- but the raiyats do not appear to have derived the least benefit from these orders of reduction. However that may be, no such reduced rates were ordered for resumed Lakhiraj lands at the present settlement, and I have treated both resumed Lakhiraj and ordinary lands without distinction and referred them to one scale of rates.

From the aforesaid extract it would appear that in the Cuttack Settlement of 1873 no distinction was made between resumed Lakhiraj (Bajyapti) on the one hand, and ordinary raiyati lands on the other, and they were assessed to the same rate. But even so, the holder of the tenure was not "described either as a "raiyat" or as a "Bajyaptidar" but only as a pattadar. The reasonable inference therefore is that the Bajyapti rights, if any, were extinguished long before and Durga Charan Ray Choudhury became a lessee (pattadar) under the Khasmahal. In the absence of further materials one cannot speculate as to how these rights were extinguished. Whatever that may be, if the Defendants want to assert that their predecessor-in-interest had a subsisting Bajyapti interest in the land in 1894 they must show how that interest devolved on Durga Charan Ray Choudhury from the original Bajyaptidar of 1841. In the absence of any evidence as to the terms of the original grant, as to how Durga Charan Ray Choudhury obtained the property no inference that the Bajyapti right continued up to 1894 can be made.

14. The reasonable inference therefore is that the entry in Ext. C under the column "special incidents" has only a historical interest and will not show that in 1894 the property continued to retain its character as Bajyapti. If it was Bajyapti then, the attestation officer would have described the status of the holder as Bajyaptidar instead of as pattadar. In fact during the Provincial Settlement many tenures in Orissa were described as Bajyapti and it was in respect of such tenures that in Maddox's Settlement Report, in paragraph 317 (at page 213) it was noted that they were heritable, transferable and divisible. But in ext. C this property had been described as pattadari and the predecessor in interest was also described as a pattadar and hence it must be held that the property lost its character as Bajyapti sometime between 1841 and 1873 for reasons not known.

15. In respect of these Bajyapti properties, when Cuttack Khasmahal settlement was again taken up in 1913 the then Settlement Officer Mr. Syed Dilawar Ali observed as follows at page 72 of his report:

Bajyapti pattadars: The second point is regarding resumed lakhiraj bajyapti holdings. In the previous settlement the holders of such land were entered as lakhiraj bajyapti pattadars. The ordinary tenants are entered as pattadars simply and at first sight the differentiation would suggest some significance. In substance no such distinction exists or was intended. When these holdings were first treated as ordinary raiyati lands in 1876, it was the intention of the authorities to assess them at a rate lower than the ordinary rate. This direction was ignored and the holdings were assessed at full rates, no distinction being,

made except in denomination. The terms of the kabuliyats were the same as those imposed upon the ordinary pattadars. The same treatment was accorded to them in the Settlement of 1896. The distinction only exists in name while in the matter of assessment of rents confirmed, rights and liabilities, they stood but on a par with ordinary pattadars...Having regard to the fact that no distinction practically exists between these two classes of tenants and that these so called bajyaptidars having long acquiesced in the ordinary raiyati status given to them in two successive settlements as is evident from the kabuliyats executed by them, I propose that the word bajyaptidar before pattadar may be done away with as superfluous and mischievous.

This extract shows that those tenants who were described as "lakhiraj Bajyapti pattadars" in the P.S. were in no way distinguishable from ordinary tenants recorded as "pattadars" and that their rights were the same. But here, as already shown, even in the Provincial Settlement Lakshminarayan Ray Choudhury's status was described as only that of a "pattadar" though in the special incidents column the words "Purba Lakhraj Bajyapti" occur. Hence, apart from the observations in Dilwar Ali's Khasmahal Settlement Report of 1913, on a mere interpretation of the attestation record of the Provincial Settlement (Ext. C) it must be held that the disputed property ceased to be bajyapti long ago.

16. The Orissa Tenancy Act came into force in 1913. In that Act for the first time the expression "bajyaptidar" was defined in Section 3(2) and in Section 6 a bajyaptidar was included amongst various classes of tenants to whom that Act was intended to apply. Sections 6(1) and (2) may be quoted:

6. Notwithstanding anything hereinbefore contained (i) every bajyaptiar who is recorded in any record of rights finally published under Chapter XI, or under any other law for the time being in force, as a bajyaptidar tenure-holder, and his successors-in-interest shall be deemed to be a tenure holder for all the purposes of this Act; (ii) every bajyaptidar who recorded in any such record of rights as a bajyaptidar raiyat and his successors in interest, shall be deemed to be a raiyat for the purposes of this Act....

This section implied the entire position by saying that if, in any record of rights finally published either under Chapter XI of that Act or under any "other law for the time being in force" a bajyaptidar was recorded as a tenure-holder he and his successors-in-interest shall be recognised as tenure-holders for the purposes of the Orissa Tenancy Act, and if he was recorded as a bajyapti raiyat, he shall be deemed to be a raiyat for the purpose of the Act. This definition made it unnecessary to investigate the terms of the original grant, made to the bajyaptidar or his predecessor-in-interest during pre-British period. One has only to see the nature of the entry in any finally published record of rights either under the provisions of the Orissa Tenancy Act or under the provisions of any other law for the time being in force. Hence if the Defendants could show that their predecessor-in-interest namely the Ray Choudhurys were recorded as bajyaptidar raiyats in the finally published record of rights of the Provincial

Settlement they would be undoubtedly entitled to the benefit of Section 6 of the Orissa Tenancy Act. But as already shown there was no final publication during the Provincial Settlement of Cuttack Khasmahal and the Attestation Officers' record of rights were merely as pattadars. It is true that in 1841 record of rights were prepared under Bengal Regulation VII of 1822 (Section 9), but as that Regulation did not provide for final publication any record of rights prepared under that Regulation will not be "a finally published record of rights under the law for the time being in force", within the meaning of Section 6 of the Orissa Tenancy Act. Thus, it must be held that Section 6 of the Orissa Tenancy Act cannot be availed of by the Defendants.

17. Mr. Das Gupta then contended that even if Section 6 of the Orissa Tenancy Act may not be applicable nevertheless the Defendants could rely on the definition of Bajyaptidar given in Clause (2) of Section 3 of that Act which is as follows:

3(2).-"bajyaptidar" means a person holding lands the title to hold which upon special terms was declared invalid by the Cuttack Land Revenue Regulation, 1805, the Bengal Land-Revenue-Assessment (Resumed Lands) Regulation, 1819, or the Bengal Revenue-free Lands Regulation, 1825, and which have been assessed, in the course of a settlement of land-revenue, at a rent fixed for the terms of that settlement; and includes also the successors-in-interest of such a person.

If the Defendants could show from the evidence on record that they come within the aforesaid definition, they may claim Bajyapti status in the land whatever that may be. But in my opinion they have failed to show that they come within the said definition. I have already shown that the land must have been recorded as Bajyapti in 1841. Otherwise in Ext. C it would not have been shown purba Lakhiraj Bajyapti. But in order to attract the definition it is not sufficient to show that it was Bajyapti in 1841. The Defendants must further show that they were the successors-in-interest of the original Bajyaptidar. This however they have failed to do for reasons fully discussed above. They can at best only claim to be the successors-in-interest of Durga Charan Ray Choudhury but the connecting link between Durga Charan Ray Choudhury and the original Bajyaptidar of 1841 is missing. Hence the said definition given in Clause (2) of Section 3 of Orissa Tenancy Act will not help the Defendants.

18. During the Current Settlement also the Settlement officer Mr. Dalziel dealt with this question, in paragraph 119, of his report in the following manner:

Bajyaptidars in Cuttack town:

The term bajyapti is found in the status of many holdings at Provincial Settlement. The question whether these holdings are real bajyapti according to the definition in the Tenancy Act had to be decided after considering the evidence available. The result was that 678 holdings were recorded as bajyapti shtitiban and 75 tenures as bajyapti Madhya satwadhi kari. The status of the bajyaptidar

was not recorded at all in the town khasmahal and was only given to a few tenure-holders in the Enactment khasmahal. The expression *purba lakhiraj bajyapti* is found in the Provincial Settlement record of some holdings, but in the khasmahal settlement of 1913 this status was deleted...At this settlement no tenant claimed *bajyapti* status in the town khasmahal.

As pointed out by Mr. Dalziel in the aforesaid passage the status of a *Bajyaptidar* was not recorded at all in the Town khasmahal of Cuttack for any tenant. He further observed that at this Settlement no tenant claimed *Bajyapti* status in Cuttack Khasmahal. Mr. Ahad obtained the disputed property from the Ray Choudhurys in 1929-when the Cut tack Current Settlement operations were going on--and the final publication of the record of rights took place only on 10-3-1932 (see ext. 21). Mr. Ahad may be presumed to have knowledge of the revenue laws of the State as he was then serving as a Deputy Collector in the old Province of Bihar and Orissa. If really this property was *Bajyapti* and not mere lease-hold property (*pattadari*) one would have expected him to press this point before the Settlement authorities and to get the property recorded as *bajyapti* in C.S On the contrary, Mr. Ahad's conduct in executing a *Kabuliyat* (Ext. 20) in 1932 in favour of Government, his own subsequent description of his right in the property as "*Pattadari Satwa*" in his deed of settlement (Ext. A) dated 9-9-1949 in favour of the Defendants must all lead to a reasonable inference that neither the Defendants nor their predecessors in interest ever had *bajyapti* status in respect of this property, and their rights were simply those of lessees as described in the lease itself.

19. I may now refer to an old Privy Council decision reported in *R.C. Dull v. J.C. Dull* 19 S.W.R. (Civil) 353 where it was held that a *patta* may be a confirmatory grant only and that there is nothing in accepting such a grant, inconsistent with the presumption that a prior title existed., Mr. Das Gupta relied on this decision and also on a later decision of the Calcutta High Court in AIR 1936 Cal 7742 and urged that once the status of the Defendants predecessor-in-title as *bajyaptigar* is established, the mere fact that subsequently leases were executed in favour of the Khasmahal would not extinguish the *bajyapti* right. In my opinion, these two decisions are distinguishable and have no application to the facts of the instant case. Here the Defendants have failed to establish that their predecessor-in-title had any *bajyapti* right at all. Though the land was *Bajyapti* in 1841, no evidence has been given to show that Durga Charana Ray Choudhury was the successor-in-interest of the original *Bajyaptidar*.

20. An alternative agreement was advanced to the effect that the status of the Defendants, was that of *rai-yats* and that their interest can be extinguished only in accordance with the terms of the Orissa Tenancy Act. In support of this argument reliance was placed mainly on some passages in the sale deed of the Ray Choudhurys in favour of Mr. Ahad. (Ext. F) to the effect that the holding was originally more than 16 acres in extent and that it contained not only a residential house but a fairly big compound in which agriculture and horticulture

were being carried on. Some reliance was also placed on the description of the status of the vendors in that documents as ryoti pattadars, But much importance cannot be attached to this description because, as pointed out in "Bidhu Mukhi v. Gobinda 42 C.L.J. 78 sometimes the expression "raiya" is inaccurately used to mean a "tenant" in general. If the status of the Ray Choudhury was that of raiyas there was no reason why they were not described as such in the attestation report (Ext. C) in Maddox Settlement. Raiyas as a class of tenants have been recognised as early as 1859 by the Bengal Rent Act and if Durga Charan Ray Choudhury was in fact a raiya he would have been so described and not as a Pattadar in ext. C. Moreover the disputed plot is situated in the heart of Cuttack town and unless some evidence is led to show that the predecessors-in-interest of the Defendants had acquired the right to hold the land for the purpose of cultivation raiya status cannot be claimed. The mere fact that the extent of the land was formerly 16 acres cannot lead to any such presumption. Moreover there are some observations in Mr. Raj Kishore Das's report of 1896 to show that holdings in Cuttack Khasmahal had even then become purely non agricultural holdings. I refer to the following passage in paragraph 3 of his report.

Being situated in the heart of an old and populous town nearly the whole of the land comprised in the estate is highly fit for building sites. Only a small area is low on which water gathers during the rains and dries up during the summer months. This latter is not however quite unproductive as it yields a handsome fishery rent while there is water on it. There is only one agricultural holding within the whole estate measuring only about an acre or two.

Thus as early as 1896 in the whole of Cuttack Khasmahal there was only one agricultural holding. In Dilwar Ali's report also, of the year 1931 the same aspect was established in the following tenant pages 67 and 68:

The lands constituting the estate are wholly occupied by building or building sites with the exception of a few agricultural plots in Sutahat and Pathuriasahi...The area under re-settlement of the Estate is mainly nonagricultural and is situated within the limits of an old municipal town. Consequently the provisions of the Bengal Tenancy Act do not apply to it...The position of Government is that of a proprietor and the fixing of rents a matter of agreement between Government and its tenants, the former being entitled to eject any tenants who after reasonable notice would not agree to pay such enhanced rents, as may be fair and equitable.

In the current settlement khatian (Ext. 21) also Mr. Ahad's status was not described as that of a raiya. In view of all these facts and circumstances, and in the absence of any evidence to show who the original tenant was, and the purpose for which the tenancy was first created, I must reject the contention of Mr. Das Gupta that the Defendants can claim raiya status in the disputed plot.

21. It must accordingly be held that the interest of the Defendants in the property was that of mere lease-holders, regulated by the terms of the lease

(ext. 1) between them and the landlord namely the Khasmahal. They will therefore be governed by the provisions of the Transfer of Property Act as pointed out in a Division Bench decision of this Court reported in Batakrushna Sahu and Ors. v. Kunja Behari and Ors. 20 C.L.T. 373 and the lease will be determined if the terms of Clause 12 are satisfied. It is not challenged that a valid, notice, as required by that clause, was served on the parties and compensation for the building was also determined in accordance with the requirements of that clause by the appropriate authority namely the Revenue Commissioner.

22. I may now dispose of a few technical points raised by Mr. Das Gupta before taking up the main constitutional question. Mr. Das Gupta urged that the Kabuliyat of Mr. Ahad (ext. 20 dated 29-2-1932) could not create any relationship of lessor and lessee between him and the Khasmahal inasmuch as it was not signed both by the lessor and the lessee, as required by Section 107 of the Transfer of Property Act. The obvious answer to this argument is found in Section 2 of the Government Grants Act 1895. As the lessor is the Government, the provisions of the Transfer of Property Act cannot over-ride the terms of the document.

23. It was next contended that in the lease (ext. 1) executed by Defendant No. 1 in favour of the Khasmahal one of the executants, namely Mohd Hamid Ahad was a minor and his mother as his guardian executed the lease deed on his behalf.

Mr. Ahad the father of the minor is still alive and under the Muslim Law, during the lifetime of the father the mother cannot be the guardian of her minor son, though she may act as a de facto guardian. Mr. Das Gupta relied on the Privy Council decision reported in XLV I.A. 735 (at 86) and urged that while as de facto guardian she may enter into contracts for the "benefit of the minor, she could not impose any obligations on him. According to Mr. Das Gupta though most of the terms of the lease (Ext. 1) were for the benefit of the minor and as such may be unexceptionable, Clause 12 was in the nature of a burden inasmuch as it permitted the extinguishment of the lease-hold right of the minor without payment of compensation. He accordingly urged that Clause 12 would be void so far as the interests of the minor (Defendant No. 2) were concerned. This argument, though ingenious, cannot bear scrutiny. The lease-hold property was not acquired for the first time by Defendant No. 1 in 1951. On the contrary it had been acquired in 1929 by Mr. Ahad, the father of the minor from the Ray Chaudhurys. He later on settled the property on his wife and children in 1949 (by Ext. A). From the date of acquisition till the date of settlement this condition in the lease-hold property was subsisting and when he transferred that interest, including the burden imposed by the said clause, to his wife and Children, it must be held that they took the property subject to the limitations and restrictions imposed by that clause in the original lease itself. The lease of 1951 was merely a renewal of the original lease. The de facto guardian, namely the mother of Defendant No. 2 did not therefore "create" any "new" burden adverse to the

interests of the minor but merely prolonged a right (subject to that burden) which has been in existence from before.

24. I now take up the constitution question as to how far Clause 12 of the lease deed (Ext. 1) offends Article 31 of the Constitution. It was urged by Mr. Das Gupta that lease-hold interest is "immovable property" and as Clause 12 provides for compulsory acquisition of that property without payment of compensation, it would offend Article 31 and as such would be void. The question is undoubtedly of considerable importance inasmuch as in all Khasmahal leases in Cuttack town where lessees have constructed valuable buildings, a similar term has been inserted in the lease and the State claims the right to determine such leases and take possession of the lands, when the land is required for a public purpose. The lessee is not entitled to any compensation for the extinction of his lease-hold interest though he is entitled to compensation for the buildings erected on the land. Mr. Das Gupta further contended that the mere fact that the Defendants voluntarily agreed to take the lease on such terms would not be sufficient to deprive them of the fundamental right guaranteed by Article 31. He also invited our attention to AIR 1959 S.C. 1496 where the question as to how far a fundamental right can be waived by a citizen was considered. Though the majority of the learned Judges held that the fundamental right guaranteed by Article 14 of the Constitution can never be waived, there was a difference of opinion as to whether the other fundamental rights such as those guaranteed by Articles 19 and 31 could be waived. Two of the Judges, namely, Justice Bhagwati and Justice Subba Rao held that it was not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution, whereas Justice Section K. Das held that as such rights were guaranteed to an individual only for his benefit they may be waived under certain conditions. The other two Judges, Chief Justice of India and Justice Kapur did not think it necessary to express any opinion on the subject as it was not necessary for the purposes of that case. Hence the question as to whether a citizen can waive the fundamental rights guaranteed under Article 31 cannot be said to have been finally decided by the Supreme Court.

25. Mr. Mohanty for the Respondent contended that Article 31 was not at all attracted here because at the time of its acquisition for a public purpose the Defendants had no subsisting interest in the land, inasmuch as the leasehold interest had been determined in accordance with Clause 12 of the lease by a valid notice, and their possession was only that of trespassers. This argument seems to be convincing. None can rely on a fundamental right guaranteed under Article 31 unless he can show that at the time of the acquisition of the property for a public purpose he had any interest in the property in question. It is true that the Defendants had a lease-hold interest in the disputed land and such a lease-hold interest was immovable property. But once, in accordance with the terms of the lease the lessor determined, the lease by a valid notice, the leasehold interest is extinguished and there can be no question of any subsisting interest remaining with the Defendants so as to require Government to pay

compensation for the acquisition of that interest. As between a private lessor and a private lessee there may be terms defining the terms and conditions under which a lease may be determined on the happening of a contingency and then, by virtue of Section 111 (b) of the Transfer of Property Act the lease itself comes to an end on the happening of that contingency. Thus nobody would question the constitutional validity of a term of a lease as between a private landlord and his tenant authorising the landlord to determine the lease if the leasehold property was required by him for his own purpose. There is no reason why such a right should be denied to Government if they happen to be the landlord. Here by determining the lease and thereby extinguishing the lease-hold interest of the Defendants Government are acting merely as the lessor in accordance with the terms of the lease and not as Government exercising their powers of eminent domain. Hence, in my opinion the question of contravening the fundamental rights does not arise.

26. This view is strengthened by the observations of the Rajasthan High Court in *Amar Singh Madho Singh and Others Vs. State of Rajasthan*, and of the Calcutta High Court in *Dhirendra Kumar v. State of West Bengal* A.I.R 1956 Cal. 437. In the Rajasthan case their Lordships pointed out that the resumption of a jagir would ordinarily mean taking back by the person who granted the land and that there can be no question of any liability to pay compensation when the taking back takes place, because of a breach of one of the grant. In that particular case however they held that the impugned provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act did not provide for mere resumption for breach of a condition of the grant, but was in substance a provision for acquisition and consequently compensation was payable. Thus, though the facts of that case differ from the present case nevertheless the principle laid down therein that where there is a mere resumption of the land by a grantor under the terms of the grant, there was no acquisition and hence no question of compensation, arose is equally applicable here. Similarly in the Calcutta case it was pointed out (at page 442 of the report) that where the State is the owner of the property it has a right, like any other citizen to "hold" property as provided in Article 19. One of the rights of the owner of property is to grant lease of the same reserving to himself the right to determine the lease under specified conditions. Hence when he grants a lease as owner and also determines the lease as lessor he is exercising his rights under Article 19 and Article 31 has no application. I may quote the following passage:

Article 19 grants rights to a citizen and not to the State. But this does not preclude the State from holding property and when the state holds property it exercises all rights relating thereto as are given by law. In such a case, the provisions of Article 31 do not come to be considered.

For the aforesaid reasons the judgment and decree of the lower court are upheld and this appeal is dismissed with costs.

R.K. Das, J.

27. I agree.