

(1935) 11 PAT CK 0006
In the Patna High Court

Jugesh Chandra Bose

APPELLANT

Vs

Maqbul Hussain

RESPONDENT

Date of Decision : 22-11-1935

Acts Referred:

Citation : AIR 1936 Patna 384

Hon'ble Judges : Dhavle, J

Bench : Division Bench

Judgement

Dhavle, J.—This is an appeal by the plaintiff in a suit for ejectment. That the plaintiff purchased the two plots in suit from the occupancy raiyat to whom they belonged is no longer in dispute, nor is any capital now sought to be made out of the fact that the plaintiff is also the holder of an eight-annas sepatni interest in the mouza. In the record of rights, which was finally published in 1907, Mt. Sabjan, who has been found as a fact to have been the wife of the defendant, was shown as in possession of the two plots in suit in the capacity of a shikmi-dakhalkar tenant, an expression meaning an under-raiyat with occupancy rights. The only point which is now contested is whether Mt. Sabjan's interest was heritable. The lower Courts have concurrently held that the defendant has failed to prove that the interest of an under-raiyat with occupancy rights is heritable either under the law or under any custom in force in the locality and established in the case. They have nevertheless dismissed the suit on what the lower appellate Court calls equitable considerations. The plaintiff contends before me that in doing so the lower Courts were in error, and further that the question whether Mt. Sabjan had a permanent, i.e. heritable, interest is a question of law which can be raised in second appeal notwithstanding the concurrent finding of the lower Courts. That the interest of an under-raiyat with occupancy rights is not heritable under the law is clearly established by *Sudhanya Kumar Das v. Saik Ismail* 1925 Cal 956 in which Greaves, J., and Cuming, J., reversed on a Letters Patent appeal the view to the contrary taken by B.B. Ghose, J. similar view was taken in *Iswar Sant v. Torendra Nath Kuila* 1926 Cal 163. In our own Court, James, J., sitting with Chatterji, J., also took the same view in *Muchi Ram Bagal*

v. Balaram Bhumij 1930 Pat 562, where he observed (the case he dealt with was under the Chota Nagpur Tenancy Act which however does not in this respect differ materially from the Bengal Tenancy Act):

Heritability is a right which has been attached by legislation to the tenure of an occupancy raiyat in Bengal, Bihar and Orissa, but it is not a necessary condition attaching to the enjoyment of an occupancy right for life. The question of whether an under-raiyat who acquires occupancy right acquires also the rights of an occupancy raiyat, as defined by the Tenancy Acts, depends entirely on local custom. It is only by the operation of local custom that an under-raiyat can acquire a right of occupancy for life; and in order to ascertain what are the incidents attaching to that right of occupancy, it is necessary to ascertain what is that local custom on the point.

2. The law therefore is quite clear, and it has not been urged before me on behalf of the respondent that the finding of the lower Courts as regards his failure to prove a local custom making such interest heritable is open to question. Are there then any equitable considerations on which the view of the lower Courts can be supported that Mt. Sabjan's was a heritable interest so as to disentitle the plaintiff to eject her husband and heir, the defendant? It was faintly urged on behalf of the respondent that the finding of permanence by way of heritability was a finding of fact. But as was pointed out by Rankin, C.J., in *Kamal Kumar Datta v. Nanda Lal Dule* 1929 Cal 37, their Lordships of the Judicial Committee held in *Dhanna Mal v. Moti Sagar* 1927 PC 102 that the proper effect of a proved fact being a question of law the question whether a tenancy is permanent or precarious is, in cases of this kind, a legal inference from facts and not itself a question of fact, and that accordingly the Court in second appeal must decide the case for itself on the facts found by the lower appellate Court, instead of saying that the Courts below were at liberty to presume, if they thought fit, that the interest in question was of a permanent character. The only facts found by the lower appellate Court are that the Musammat had a house on the land in suit, built after filling up a ditch, and that she or the defendant had planted 7 or 8 mango trees and also some kathal trees on the land. Upon this the learned Subordinate Judge observes:

It is manifest that the conduct of the raiyats under whom Mt. Sabjan held the land was such that it induced a belief in her mind that she had a permanent right in the land or else she would not have thought of constructing a house after filling up a ditch and would not perhaps have planted trees even. It is also apparent that the raiyats under whom she held stood by and allowed her to construct a structure over it sinking her money in it.

3. The learned advocate for the appellant has had no difficulty in shewing that these observations are based on an erroneous view of the law. In *Beni Ram v. Kundan Lal* (1899) 21 All 496 their Lordships of the Judicial Committee held that the lessor is not restrained by any rule of equity from bringing a suit for eviction merely by reason of the tenant having erected permanent structures on the land

leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it. That was a case of a tenant the term of whose lease has expired, but this makes no substantial difference because in the present case we are dealing not with the under-raiyat with occupancy rights but with her heir. Their Lordships also pointed out that to raise an equitable estoppel against the lessor precluding him from suing for possession on the determination of the tenancy, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. The learned Subordinate Judge merely infers conduct on the part of the Musammat's immediate landlords including the belief in her mind that she had a permanent right, basing the inference on the consideration that she would not otherwise have thought of constructing the house after filling up a ditch and would not perhaps have planted trees over.

4. That plainly is not a legal inference from the fact of the building of the house and the planting of the trees. As Cranworth, L.C. pointed out in (1865), 1 E and Ramsden v. Dyson (1865) 1 E & IA 129, the tenant knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end. The learned Subordinate Judge was aware that there was no pucca structure raised on the land, and says that obviously a pretty good amount had been sunk by the Musammat as she had to fill up the hollow before she raised structure.

5. But even the existence of a pucca structure would not have enabled the tenant to call in aid the equitable estoppel with out giving evidence sufficient to justify a legal inference that the lessor had by plain implication contracted that the tenant's right should be changed into a heritable right. No evidence of this kind has been referred to by either of the lower Courts. The trial Court laid some stress on the fact that in the Record of Rights it was noted that the tenant had acquired a haq-muqa-bazat by 12 years' occupation in accordance with local custom, but there is no warrant for holding (as was done by that Court) that this right implies

some permanent sort of interest in the land which would carry the incidence and right of transmitting that to the heir,

nor was that the view that the learned Subordinate Judge was invited to take. The haq-muqa-bazat was plainly no more than the familiar occupancy right of the Bengal Tenancy Act an occupancy right, be it remembered, acquired in the present instance by an under-raiyat in accordance with local custom. It seems to me perfectly clear that the view of the lower Courts, that Musammat Sabjan had a heritable right in the plots in suit, is erroneous in law. The consequence is that the defendant has no right to continue in occupation and that the plaintiff is entitled to eject. The appeal is accordingly allowed and the suit of the plaintiff decreed with costs in all Courts.