

(1962) 07 PAT CK 0005

In the Patna High Court

Case No : A.F.A.D. No's. 183, 184 and 185 of 1961

Kameshwar Pandey and Others

APPELLANT

Vs

Deolal Barhi and Others

RESPONDENT

Date of Decision : 06-07-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Registration Act, 1908 — Section 17

Citation : AIR 1964 Patna 247

Hon'ble Judges : K. Ahmad, J

Bench : Single Bench

Advocate : R.S. Chatterji and Awadh Kishore Pd, for the Appellant; Lakshman Saran Sinha, (in Nos. 183 and 184) and Shamsul Huda, (in No. 185), for the Respondent

Judgement

K. Ahmad, J.—These three appeals arise out of three rent suits instituted by the common plaintiffs, who are the appellants here, against the different tenant-defendants for different holdings. In this Court the case has been argued on the admitted footing that the plaintiffs are the tenants of the holdings in suits and the defendants are the under-raiyats of the same.

2. It appears that the under-raiyats were inducted into these holdings by the plaintiffs sometime before 1939; and till then they had paid, rent to the plaintiffs on the bhaoli basis. But in the year 1939 applications were filed for commutation by the defendants against the plaintiffs. In the course of those proceedings ultimately petitions of compromise between them were filed; and as a result thereof the holdings were commuted on the basis of cash rent as it stated in the compromise petitions which are Exhibits B series-on the record. It is not denied that since the date of that commutation the plaintiffs realised rents from the defendants up to the year 1361 Fasli on the basis of cash rent as agreed upon between the parties. Thereafter, the plaintiffs claimed that the defendants defaulted in payment of rent. Hence the suits for the realisation of arrears for the period from 1362 to 1365 Fasli. Originally, the claim was made on the basis of

Nakdi rent alone.

Subsequently, however, the plaintiffs got the relief portions of the plaints amended; and as a result of that amendment, there was an alternative prayer made that if the Court found that the commutation proceedings were void in law, then a decree for the arrears of rent should be passed on the bhaoli basis. In the two Courts below the main points contested between the parties were two :

1. Whether the plaintiffs were raiyats or tenure-holders and
2. Whether the commutation proceedings were void.

Both the Courts below on these two points have held;

(1) that the plaintiffs are raiyats and not tenure-holders and (2) that the commutation proceedings were void in law as they were hit by the terms of Section 40 of the Bihar Tenancy Act.

3. Accordingly, the trial Court decreed the suits on the bhaoli basis. But in appeal that part of the judgment has been reversed and the lower appellate Court has decreed the suits on cash basis. Hence these appeals by the plaintiffs.

4. The lower appellate Court in decreeing the suits on cash basis has placed reliance, firstly, on the compromise petitions, Exhibits B series and also the fact that in between the period from 1346 to 1361 Fasli rents of these holdings were realised on cash basis though sometimes through Court by means of rent suits and sometimes in the form of direct payment from hand to hand; and secondly also on the principles of res judicata and estoppel.

5. In this Court Mr. Lakshman Sharan Sinha appearing for the defendants-respondents has not supported the judgment under appeal on the footing of res judicata and estoppel and I think rightly. As I have already stated, both the Courts below have concurrently found that the commutation proceedings were void in law; and if that be so, then the decisions given in those proceedings are nullity. Thus the decisions arrived at therein cannot operate as res judicata between the parties, nor can they be relied upon as the basis of any estoppel. This, therefore, disposes of the second ground taken by the lower appellate Court in decreeing the suits on the basis of cash rent.

Then comes the first ground, namely, the petitions of compromise, Exhibit B series; and the admitted fact that in between the period from 1346 to 1361 Fasli rents had been accepted by the plaintiffs either through Court or directly on cash basis. They, in the opinion of the lower appellate Court, constitute a clear proof of the fact that the nature of rent as agreed upon by the parties was cash and not bhaoli. Mr. Chatterji appearing for the plaintiffs appellants has challenged this part of the decision given by the lower appellate Court on the ground that the contract for the change of rent from bhaoli to cash was a void transaction and that for three reasons; and, therefore, that cannot be relied upon by the defendants now in respect of their case in favour of cash rental. The three

grounds given by Mr. Chatterji in support of the submission made by him that the contract of commutation was void are these :

(1) that the document incorporating the contract of commutation should have been got registered u/s 17 of the Registration Act; but as it was not effected by a registered document, the contract was void in law;

(2) that the "contract, even if any, was without consideration; and

(3) that there is no evidence that the contract, even if any, was a contract of a permanent character and not a contract between the parties only for a limited period.

In my opinion, on the facts of these cases, these three points raised by Mr. Chatterji do not arise at all for consideration, firstly, for the reason that none of these points seems to have been raised in either of the two Courts below and secondly for the reason that the defence pleaded by the defendants in support of cash rental is not based on any contract; on the contrary it is firstly based on the averments made in the plaints themselves and on the reliefs herein sought. I have already stated that in the body of the plaints it has been clearly asserted that the nature of rent payable for these holdings to the plaintiffs is cash and then in the relief portion the main prayer sought is for a decree on the basis of cash rent, though it is true that in the alternative there is also a prayer therein that in case that claim is not sustainable in law a decree on the basis of bhaoli rent should be passed. In these circumstances, if the defendants in their pleadings admitted the claim on the basis of the nakdi rental, then the decision given thereon in the light of admission cannot be said to have been rested on any contract and not on the claim as made by the plaintiffs and admitted by the defendants.

Then looked at from other points of view also what has been contended by Mr. Chatterji do not seem to arise on the facts of the present case. The compromise petitions, exhibits B series, are obviously not documents creating any lease but only incorporating the change in the nature of rent from bhaoli to nakdi. That being so, the question arises whether this change in the nature of rent purports to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property, or whether it acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest, as provided in Clauses (b) and (c) of Section 17 of the Indian registration Act.

In my opinion, the answer to his question has to be given in the negative and to support it reliance may be had on the decision in Hara Prasad Das v. Ram Narain Choudhury II Cal LJ 22 and Rani Bhuneshwari Kuer and Another Vs. Babu Sajiwan Prasad Singh and Others, . It is true that the authorities in Rampadarath Singh v. Sohrai Koeri 4 Pat LJ 667 : (AIR 1920 Pat 602) and Raja Srimanthu

Muthu Vija Ragunatha Duraisingam alias Gowri Vallabha Thevar Avergal, Zamindar of Sivaganga, through the Estate Collector Vs. Periasami Pillai and Others, , relied upon by Mr. Chatterji do in a way suggest otherwise, but the decisions, which I have just referred to above, are much more direct and specific on the points raised here, as in Rani Bhuneshwari Kuer and Another Vs. Babu Sajiwan Prasad Singh and Others, . I, therefore, hold that the first ground taken by Mr. Chatterji in support of his contention that the contract was void fails.

In support of the second ground, reliance has been placed by Mr. Chatterji on the decision in Raja Durga Prasad Singh v. Rajendra Narayan Bagchi 19 Cal LJ 95 (PC), AIR 1944 58 (Privy Council) ; and AIR 1928 75 (Privy Council) . In answer to this point, it is enough to say that the defence raised in these cases is not based on any contract but on an admission of a fact as evidenced by the decrees and the rent receipts. In law admission does not require any consideration; secondly, the authorities relied upon by Mr. Chatterji in fact do not bear at all on the facts of the present cases. Therefore, the second ground raised by Mr. Chatterji is also equally without substance.

The last ground taken by Mr. Chatterji in support of his case is to the effect that there is no evidence on the record to prove that the agreement for commutation was for all time to come and not only for a temporary period. I think that this part of his submission is also without" any substance. Section 51 of the Bihar Tenancy Act, which is applicable to a case of under-tenants clearly lays down that if a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same conditions as in the last preceding agricultural year.

In the present case, as already stated, it is not denied that for the period from 1346 to 1361 Fasli rent from the defendants have been all along received on the cash basis and not on the bhaoli basis. Therefore, unless it is established by the plaintiffs that rent paid during those years was not to be held operative for the period subsequent thereto, the fact that rents were paid on cash basis during the period from 1346 to 1361 Fasli is by itself enough to show that the same was also to be paid for the period subsequent thereto. For these reasons, therefore, it has to be held that none of three points raised by Mr. Chatterji in support of his contention that the contract of commutation was void and not binding is sustainable in law.

Ordinarily, this finding alone would have been sufficient to dispose of finally all the second appeals. But there is some difficulty in the case of S. A. 185 of 1961. It appears that in the Court below the defendants of that case including defendant No. 1, namely, Shri Gope, were the appellants; but it is said that while that appeal was still pending in that Court Shri Gope (defendant No. 1) died on the 8th February, 1960, that means before the 17th January, 1961, when judgment in that appeal was delivered.

Thereafter, though an application for substitution was made on behalf of the appellants in that Court, unfortunately that application was left undisposed of with the result that the appeal decreed in that Court was also along with others against a dead person, namely, defendant No. 1. This fact was detected for the first time in this Court, and, accordingly, now, a petition has been filed on behalf of the appellants in S. A. 185 of 1961 for the substitution of the heirs of defendant No. 1. A Division Bench of this Court in *Mrs. Gladys Coutts Vs. Dharkhan Singh and Others*, in similar circumstances held that, where an application for setting aside abatement and substituting the heirs of the dead respondent is made in second appeal, such application must be dealt with by the Court in which abatement occurred and that the proper procedure to follow for the second appellate Court is to set aside the decree of the Court of appeal below on the ground that it was passed in respect of a dead person and to remand the appeal to the Court of appeal below in order to deal with the application for setting aside abatement and substituting the heirs of the dead respondent.

Accordingly, the decree under appeal in S. A. 185 of 1961 is set aside and the case is remanded to the Court of appeal below to deal first with the application for setting aside abatement and substituting the heirs of the dead person and thereafter dispose it of on merit. But so far as the other two appeals, namely, S. A. 183 and 184 of 1961, are concerned, they are, for the reasons given above dismissed. In the circumstances, however, there will be no order for costs.