

(1965) 08 OHC CK 0006
In the Orissa High Court
Case No : Second Appeal No. 427 of 1963

Khema Padhan

APPELLANT

Vs

Guna Sahu and Others

RESPONDENT

Date of Decision : 10-08-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 100(1), 100(6), 103
Evidence Act, 1872 — Section 91
Registration Act, 1908 — Section 17, 17(1), 49

Citation : (1966) 32 CLT 478

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : R.N. Sinha and S.N. Sinha, for the Appellant; R.C. Misra, for the Respondent

Judgement

Misra, J.—One Rajib Gountia had six sons-Jadab (Defendant No. 1), Benudhar (husband of Defendant No. 11), Luxman (father of Defendant No. 6 and grand father of Defendant No. 7), Gopal (father of Haribar and grand-father of Defendant No. 8), Baijanath and landarpa (father of Defendant No. 9 and grandfather of Defendant No. 10). Raghunath, son of Baijanath, died issueless. Defendants 2 to) are the sons of Defendant No. 1. Plaintiff's suit was for declaration of title and recovery of possession of 1.77 acres of land in plot No. 2606 in mouza Kumbhari. His case is that his father Nilamani acquired the disputed land by an unregistered lease-deed (ext. 1) dated 9-10-1925 executed by Benudhar, Raghunath, Harihar, Gangadhar (Defendant No. 7), Bidyadhar (Defendant No. 6) and Jadab, and that ever since then Plaintiff's father was in possession on payment of rent to the Defendants who were the gountias themselves. After the death of the Plaintiff's father, Defendants 2 to 5 forcibly trespassed into the disputed land on 12-7-1959.

Only Defendants 3 to 5 contested. The other Defendants were ex parte. The case of the contesting Defendants was that disputed land fell to the share of Baijanath and Raghunath in a family partition. After Rathunath's death, Defendants 3 to 5

are in possession of the disputed land. A plea was also taken that the Civil Court had no jurisdiction to try the suit. The Courts below rejected this plea and the point has not been pressed here.

2. The trial Court decreed the suit finding ext. 1 to be genuine, and the Plaintiff's father, and after him, the Plaintiff to be in possession of the disputed property on payment of rent till the date of dispossession.

The lower appellate Court dismissed the suit on the following findings:

(i) Ext. 1/B constituting a portion of ext. 1 is an interpolation. It is a material alteration in the document and rendered ext. 1 unenforceable.

(ii) Ext. 1 is a permanent lease. Being unregistered it is inadmissible in evidence as a document of title and no reference can be made to it to ascertain the identity of the leasehold property.

(iii) The entries in the rent-receipt books (ext. 2 series) have not been properly proved and do not relate to the disputed land.

(iv) Plaintiff claimed possession of Moulimal land. The disputed land is Telurimal land. Plaintiff has failed to prove title in the disputed land and possession within 12 years of the suit.

3. It is not disputed before me that ext. 1 is genuine. The dispute is confined to the genuineness of ext. 1/B.

Against the appellate decree the Plaintiff has filed the second appeal.

4. Mr. Sinha advanced the following contentions:

(I)(a) The concurrent finding of the Courts below that ext. 1/B is an interpolation is based purely on surmise and no such conclusion is possible on the materials on record.

(b) Even if ext. 1/B is an interpolation it is not a material alteration in the document. The lower appellate Court was wrong in holding that the entire document (ext. 1) is unenforceable in law.

(II) Ext. 1 is admissible for the collateral purpose of proving that the Plaintiff's father was attorned to possession of the disputed land under the lease. It is also admissible to prove the identity of the disputed land and the rate of rent fixed thereunder.

(III)(a) Ext. 2 series were marked as exhibits without objection. The lower appellate Court acted contrary to law in holding that they were not properly proved. Objection cannot be taken to the mode of proof at the appellate stage. The finding of the lower appellate Court that ext. 2 series do not relate to the disputed land is based on exclusion of material pieces of evidence and the finding is thus contrary to law.

(b) The rent-receipts relate to the disputed land. The last of such receipts is ext. 2/R dated 11-12-1958. The landlords having received rent in respect of the disputed land, accepted the title of the Plaintiff. The relationship of landlord and tenant is thereby established and the Plaintiff is entitled to declaration of title and recovery of possession on this ground alone.

(IV) Plaintiff has successfully established that ever since 1925, his father, and after him, he himself were in continuous possession of the disputed land until dispossession.

These contentions require careful examination.

5. The question of interpolation of ext. 1/B may be first taken up. As already stated, the genuineness of ext. 1 is not disputed. Ext. 1/B may be quoted:

It may be noted that the plot number of the transferred land is 2606 with an area of 1.77 acres.

The learned trial Court accepted the plea of interpolation on the following reasoning:

To an ordinary eye ext. 1/B is written in different ink. The Plaintiff admits that the document was all along in 1/B possession and was only given to the Sarpanch very recently. As I have observed before that ext. 1/B was written in a different ink, I cannot but hold that ext. 1/B was written subsequently.

Thus the sole basis for the trial Court's finding is that to an ordinary eye it looks like being written in a different ink.

The learned lower appellate Court gives its reason thus:

To the naked eye it appears that there has been subsequent interpolation in respect of the description of the plot number and the area of the leasehold property. The words "Paraksh thouki Yehi Bikrinama Jaminara number 2606 area A. 1.77 decimal Act" have been inserted in different ink. It means that it may be stated that the plot number covered under this sale deed (referring to the lease deed) is 2606 with an area of 1.77 decimals. P.w.2 the attesting witness has stated:

I do not remember if the scribe corrected or added anything after the content of the document was read over and explained. I do not remember if ext. 1/B was subsequently written in different ink.

So in face of this statement of p.w.2, it cannot be said that the endorsement ext. 1/B was written by the scribe at the time of the execution of the lease ext. 1. The plain tiff (p.w.1) has offered no explanation as to how and when endorsement ext. 1/B was inserted in the lease deed ext. 1. The original lease deed did not make any reference to the plot number. It only describes the lease-hold property as Maulimal Upper Bhag, having seed capacity of 7 Khandis. The boundaries have also been described. On a reference to the parcha ext. A the suit plot No.

2606 is locally known as Telirmal. So it goes without saying that the endorsement ext. 1/B amounts to a material alteration in the document, and as such, renders the document unenforceable in a court of law.

The finding of the lower appellate Court on the question of interpolation is a pure finding of fact and is not ordinarily assailable in second appeal. Mr. Sinha, however, contends that the Courts below committed a substantial error or defect in the procedure inasmuch as they ignored to consider two important pieces of evidence which has produced an error in the decision of the case upon merits, and the finding is vulnerable u/s 100(1)(c), CPC Code. There is considerable force in this contention. One important piece of circumstance, which has not been taken into consideration in arriving at the aforesaid finding, is the non-examination of some of the Defendants, who are themselves executants of ext. 1. Amongst the executants, Defendant No. 1 (father of the contenting Defendants 3 to 5), Defendant No. 6 and Defendant No. 9 are alive. At the time of execution, Defendant No. 1 was 42 years old. His present age is 77. The contesting Defendants could have examined at least their father if no Defendants 6 and 9, in support of their case that ext. 1/B was not a part of ext. 1 at the time of its execution. Not only the contesting Defendants have not examined themselves, but no explanation is forthcoming as to why the three of the executants, who are alive, were not examined to assert that ext. 1/B was not there at the time of execution. Non-consideration of this important feature is of considerable importance.

The next feature is that the evidence of the attesor (p.w.2) has not been taken into consideration as a whole. Only two sentences have been picked up bereft of their context.

Relevant evidence of the attesor p.w.2 on the question of interpolation may be quoted:

Premraj Desh scribed the Patta. I was present at the time of execution of the stamp. Ext. I is the stamp. Ext. II A. is my signature. The scribe after scribing the document read over and explained the contents to all present there. The executants after fully understanding the contents signed in the stamp after receiving a consideration of Rs. 50/ -

I can't say if the Parcha of the suit land was shown to the scribe. Again says, the Pancha of the suit land was shown to the scribe before scribing the sale deed. The plot no of the land was given at the time of the scribe (?) (scribing). The local names of the land was also written in the Patta. I do not remember if the scribe corrected or added anything after the contents of the document was read over and explained. I do not remember if ext. 1/B was subsequently written in 7 different ink. It is not a fact that ext. 1/B is not written by the scribe of ext. 1. It is not a fact that ext. 1/B is written recently.

The learned lower appellate Court extracted only the bracketed portion and failed to notice the residue of the relevant evidence. If the evidence is considered as a

whole, the learned Judge's conclusion is not acceptable. p.w.2's evidence unequivocally shows that ext. I/B was a part of ext. 1 before it was read over and explained to the executants who signed thereafter. Thus the positive evidence of the attestor (p.w.2) and the non-examination of anyone of the three executants of whom one is the father the contesting Defendants lead to the irresistible conclusion that ext. I/B is genuine and not an interpolation. The fact that it appears to have been written in a different ink is by itself not of much significance to outweigh the aforesaid strong pieces of evidence. The findings of the Courts below suffer from a substantial defect in the procedure. The defect lay in their not considering all the available evidence and in overlooking and ignoring material evidence. As a result of this error or defect their decision on merits has been vitiated. This Court can, therefore, set aside the finding of fact u/s 100(1) (c), CPC Code. u/s 103, CPC Code, the High Court in Second Appeal may determine any issue of fact which has been wrongly determined by the lower appellate Court by reason of any error or defect such as is referred to in Sub-section (1) of Section 100. I have discussed the entire evidence on record and come to the unequivocal conclusion that ext. I/B is not an interpolation.

In AIR 1940 160 (Privy Council) , their Lordships held that the English rule of law relating to the effect of material alteration in a deed applies to India. The material alteration may be by interlineation, addition, erasure, drawing up a pen through a line or through the midst of any material word. In this case, the material alteration is alleged to be by way of addition of a sentence. In view of my finding that there is no alteration, it is unnecessary to examine whether the alleged alteration is material or not. The conclusion of the learned lower appellate Court that ext. 1 is unenforceable in law on account of a material alteration cannot be supported.

6. Ext. 1 purports to be a permanent lease. u/s 17(1)(d) of the Indian Registration Act, leases of immoveable property from year to year, or for any term exceeding one year, or reserving an yearly rent are compulsorily registrable. Ext. 1 is unregistered. u/s 49 of the Registration Act, no document required by Section 17 to be registered shall affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property. Ext. 1 cannot, therefore, be the basis of any title. By the proviso to this section, an unregistered document may be received as evidence of any collateral transaction not required to be affected by registered instrument. A collateral purpose must be any purpose other than that of creating, declaring, assigning, limiting or extinguishing any right to immoveable property.

The lease purported to grant permanent tenancy at an yearly rent of Rs. 18 with a Bheti of one plough and a sickle in respect of plot 2606 also describe by boundaries. The question for consideration is whether any of these terms would come within the meaning of collateral purpose. Clearly the term conferring permanent tenancy cannot be proved. It cannot be contended that the duration of the tenancy is not a term of the contract of tenancy. If the document is looked

into to show that the Defendants entered into possession and held the property as permanent tenants, indirectly it becomes admissible in evidence to prove the duration of the tenancy, That would be in direct contravention of the prohibition in Section 49(a) and (c) of the Registration Act. It is unnecessary to refer to a large catena of authorities on this point. AIR 1949 265 (Nagpur) is a direct authority on the question. In AIR 1936 Nag 174, Bose, J. observed.

She sues for possession on the ground that the lease has terminated and so wants to show the period for which lease was granted. She also sues for a rent payable under it. Therefore the document is not receivable for these purposes. With respect I accept the reasoning therein hying the correct law. The rent fixed in ext. I is Re. 18 with the Bheti of a plough and a sickle per annum. The document being unregistered is inadmissible to prove this term which is not a collate purpose. The lease is not admissible to prove that the lessors had agreed to certain amount of rent-See AIR 1916 Mad 534.

This does not, however, mean that the fact of the Plaintiff's father being inducted into possession under ext. I is wholly inadmissible. The nature and character of possession come within the purview of a collateral purpose. It is admissible to this limited extent that from the date of the lease, Plaintiff's father came into possession of the land as a lessee. The nature character of possession showing the existence of the relationship of landlord and tenant is admissible. But it is not admissible for the further proof that the possession was under a permanent lease. The leading authority on the point is 46 Ind. App. 285. Their Lordships said.

Although the petitions of 1895 and the change of names made in the register in consequence of those are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani.

The inadmissibility of the document for certain purposes does not, however, preclude parties to prove by other evidence apart from the document the subsequent dealings consistent with those rights which the document purported to confer-See (Maharani) Janki Kuer Vs. Birj Bhikhan Ojha and Others, . In 46 Ind. App. 285 itself it was expressed thus:

Although the petitions and the order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of a donee and owner of the land.

This decision was followed in Mst. Kirpal Kaur Vs. Bachan Singh and Others, does not purport to lay down any contrary view though it is distinguishable on facts.

Ext. I embodies a description of the leasehold by plot number and with boundaries. At the bottom of the document, it is described as Maulimal Upper Bhag with an area of 7 khandia seed capacity. The boundaries are Govt. Road on the north, leads of Jagannath Mohaprabhu on the south, land of Benudhar

Gountia on the east and Govt. Dharsa (village path) on the west. The plot is 2606 with an area 1.77 acres. Question is whether these terms in Ext. I can be led into evidence. The nature and character of possession of the land attorned to the Plaintiff's father are admissible in evidence for a collateral purposes. As to what land was given possession by way of attornment, the description of the land given in ext. I must looked into, otherwise admission of the nature and character of possession would be wholly useless. Both the features are interrelated. Possession must refer to a particular land denoted either by boundaries or by plot number with a particular area. This is the basic reason why the description of the land is admissible not to show that the title in respect of such land passed under the document, but merely to show that such a land was given possession under the document. A Bench of this Court in *Purusottam v. S.M. Desouza* ILR 1950 Cutt 50, held - To determine the character of the possession, the quantum of interest under which possession is purported to have been taken has to be ascertained by reference to the document itself. That quantum is necessarily defined and limited by the terms of the document. It does not offend against Sections 17 and 49 of the Indian Registration Act or Section 91 of the Indian Evidence Act. The attempt to use the document to prove the quantum of interest and the character of the possession thereunder is not the use of the document for the purpose of inforcing the mortgage itself under the document.

The aforesaid passage brings out the correct position of law to hold relief. When an ambiguity is created by the two types of description given in the document, how it is to be resolved different question. For instance, in this case plot No. 2606 is Telurimal land as shown in the settlement khatian of the year 1934 (ext. 3) and is not Maulimal Upper Bhag land. Which of the two descriptions is accurate, when prima facie they do not relate to the same subject matter, is to be answered in light of relevant sections of the Evidence Act. But the point for discussion at this stage is whether the description of the land recited in Ext. 1 is admissible for any purpose. The answer is that it is admissible for the limited purpose of connecting the nature and character of possession, either attorned or delivered under the deed, to the particular land.

To sum up ext. 1 is not admissible to prove that a permanent tenancy was conferred under it or to prove the rate of rent fixed under it. But it is, however, admissible to prove the description of the land.

7. The learned lower appellate Court rejected the rent- receipts (ext. 2 series) as not being genuine. It also held that there was no proof that finding of fact binding in second appeal. Here also the learned Judge acted contrary to Section 100(1)(6). CPC in arriving at his conclusion ignoring material pieces of evidence and circumstances. To appreciate this, it would be worthwhile to quote the entire reasoning of learned Judge:

The Plaintiff has produced the rent receipt book ext. 2 to prove that rent was being paid in respect of the suit plot. The rent receipt book does not show the plot number or the area in respect of which the rent was paid. The entries ext. 2

series have not been properly proved. The Plaintiff (p.w.1) has simply stated that ext. 2-A to 2-B are the rent receipts issued but he does not say in whose handwriting the entries appear. No doubt the entries have been marked without objection. But all the same when the entries do not clearly relate to any particular land it cannot be said with certainty that they were issued in respect of the such plot when from the khatian ext. 2 it appears that the rent was assessed at Rs. 20/ -.

Plain tiff (p.w.1) was cross-examined with regard to rent-receipts. Despite it, however, the rent-receipts were allowed to be marked as exhibits without objection. In AIR 1943 83 (Privy Council) , their Lordships observed:

Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. A strictly formal proof might or might not have been forthcoming had it been insisted on at the trial.

The learned lower appellate Court should not have allowed any argument at the appellate stage that the rent-receipts were not properly proved. When they have been marked without objection, they must be held to have been duly proved. The rent receipt book (ext. 2) stands in the name of the father of the Plaintiff. It shows payment of rent at the rate of Rs. 18 per annum from 1932 onwards. Acceptance of rent is under the signature of different persons from the family of the Defendants exhibits 2/C to 2/G relating to the years 1937 to 1939 and ext. 2/p of the year 1954.55 are under the signature of Defendant No. 9. Some of those receipts are under signature of Defendant No. 6. They have not come forward to deny that these rent receipts were not granted by them. There is absolutely no evidence or proof in this case that Defendants 6 or 9 were colluding with the Plaintiff. Obviously there cannot be any such collusion. Though the contesting Defendants advanced a case in the written statement that the disputed land fell to the share of deceased Raghunath and thereafter they are in possession, such case has been established. That is a joint property belonging to the family and that if Plaintiff fails, the property would not come exclusively to the contenting Defendants. They have not established also that the title of the other co-sharers has been extinguished by ouster and prescription. Plaintiff's categorical statement in the evidence is that the rent-receipts relate to the disputed land. The material circumstance of the case on examination of the Defendants, who have granted rent-receipts and are alive, has not at all been taken into consideration by the learned Judge. The learned Judge also should not have discarded the rent-receipts on the ground that the rent fixed in the Khatian (ext. 3) being Rs. 2-, negatives the case that Re. 18 is the rent for the disputed land. The rent fixed in the Khatian was prior to the date of the lease. It is no evidence of the payment of rent subsequent to the settlement under ext. 1I do not

express any final opinion at this stage whether the rent-receipts (ext. 2 series) appertain to the suit land. But the finding of the learned subordinate Judge that the rent-receipts are not genuine and have not been properly proved cannot be supported on the aforesaid reasoning.

Once the rent-receipts are held to be genuine and properly proved, two other questions arise, namely (1) do they relate to suit land? and (ii) if they relate to the suit land, can the title of the Plaintiff be declared on the basis of the rent receipts establishing the relationship of landlord and tenant?

The second question may be answered first. The latest rent-receipt (ext. 2R) is of the year 1958. The suit was filed in 1960. If the rent-receipts relate to the suit land, then by acceptance of rent, relationship of landlord and tenant is created. Even if the Plaintiff is not in possession of the disputed land, the suit for declaration of title and recovery of possession is to succeed on the acceptance of the title of the tenant by the landlord within the statutory period of 12 years. This matter was fully examined in *Bhikari v. Kashinath* ILR 1961 Cutt 289.

There is much controversy as to whether the rent receipt relate to the disputed land. The schedule in the plaint describes the suit property as plot No. 2606 with an area of 1.77 acres. In the unregistered lease deed (ext. 1) the land has been described as plot No. 2606 with an area of 1.77 acres. In the unregistered lease deed (ext. 1) the land has been described as plot No. 2606 with an area of 1'77 acres. There is another description that it is MAULIMALARA UPPER BRAG with a seed capacity of 7 khandis. In the Sambalpur district the area is sometime given in terms of seed capacity and khandis seed capacity is equivalent to an area, of about 1.77 acres. In the settlement Parcha and Khatian (exts. A and B) plot No. 2606 I has been described as Telurimal. A number of plots have been described under the same caption as Telurimal. So also another number of plots have been described as Moulimal. For instance, plot Nos. 2600, 2601, 2602, 2603, and 2606 have been described as Telurimal while plot ones. 2626, 2632 and 2634 have been described as Maulimal. As plot No. 2606 is Telurimal but yet it has been described as Maulimalara Upper Bhag in ext. 1, a mistake is apparent. Either the description that it is Maulinrat land is correct or the alternative description that it is 2606 is correct. It shall have to be determined which of them is correct. The land covered by ext. I was in the prior possession of the father of the Plaintiff. There is a recital to that effect in ext. 1. That recital is admissible in evidence as it is not hit by Section 49 of the Indian Registration Act. Such a recital does not affect the immovable property comprised therein and is not being received as an evidence of transaction affecting such property. On a reference to the Khatian (ext. B) it appears that Nila Padha, father of the Plaintiff, was in possession of plot No. 2606. Thus taking the note of possession in the remarks column against plot No. 2606 in ext. B and the recital in ext. I that Plaintiff's father was attorned to possession in respect of the very land which he was in prior possession, it is manifest that the possession of plot No. 2606 was attorned in his favour. Obviously the description Moulimalara Upper

Bhag must be incorrect. It has been so given possibly because Moulimal land Telurimal lands are adjacent lands. Plaintiff's assertion that he claims Moulimalara Upper Bhag land and not Telurimalland, conflicts with the aforesaid conclusion of mine. The apparent conflict can only be explained by the fact that the Plaintiff is naming plot No. 2606 as 1"mulimalara Upper Bhag though it has been described as Telurimal in the Khatian. I am, however, satisfied that plot No. 2606, which was in the prior possession of the father of the Plaintiff prior to ext. 1, was attorned in his favour in ext. 1 and that is the disputed land. Plaintiff's position would have been very difficult if any of the Defendants could have pledged their testimony on oath that the Plaintiff's father was in possession of another piece of land of theirs which was Moulimalara Upper Bhag covered by some other plot number. There are discrepancies in the boundaries given by the witnesses. But these discrepancies are of not much significance in face of the absence of the Defendants from the box to avoid the inconvenient position in which they would land themselves in the cross-examination as to the particular land in which Plaintiff's father was in possession at the time of the settlement. Plaintiff asserts that in respect of the land in which his father was in previous possession, his father, and after him he, was paying rent. The rent-receipt book has been signed by various members of the Defendant's family of whom some are alive. They do not come forward to deny the statement of the Plaintiff that the rent paid is not in respect of the suit land. The learned Subordinate Judge failed to attach importance to the non-examination of the Defendants connecting the rent-receipts to the suit Land. In 1963 S.C.D. 179, their Lordships observed that the failure of the first Defendant to go into the box would have been sufficient to shift the burden of proving that he was not the manager on to him. His omission to consider the effect of non-examination of the contesting Defendants is a substantial defect of procedure which has materially affected his decision upon the merits. His finding is not accordingly binding on me in second appeal u/s 100(1)(c), CPC Code. On the evidence on record this Court is entitled to record its own finding u/s 103, CPC Code.

8. For convenience, all the findings may be summarised.

(i) Ext. 1 is genuine and has not been tampered with. It is admissible for certain collateral purpose as referred to in the judgment.

(ii) The Plaintiff has successfully established that his father, and after him, he himself is the tenant in respect of the suit land. This conclusion arises out of the fact that the land lords have accepted rent from them within 12 years of the time in recognition of the tenancy. Even if the Plaintiff has failed to establish his possession by satisfactory evidence, he acquires title by recognition of tenancy by the landlords within 12 years of the suit and is entitled to a declaration of title and recovery of possession. The nature of the tenancy whether it is permanent or not need not be determined and is kept open.

(iii) The rent-receipts are genuine and have been paid in respect of the disputed land which is plot No. 2606.

9. On the aforesaid findings Plaintiff's suit must be decreed. In the result, the second appeal is allowed, the judgment of the lower appellate Court is set aside and the Plaintiff's suit is decreed with costs throughout.