

(1935) 01 CAL CK 0015
In the Calcutta High Court

Lalit Mohan Mukhopadhyaya

APPELLANT

Vs

Hara Mohan Banikya Chowdhury and Others

RESPONDENT

Date of Decision : 21-01-1935

Acts Referred:

Citation : AIR 1935 Cal 813 : 159 Ind. Cas. 1016

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—This appeal is on behalf of the plaintiff whose suit for khas possession has been dismissed by the lower appellate Court. The plaintiff claims the suit land, which is in village Kurasi, as appertaining to his estate No. 5642 of the Faridpore Collectorate (formerly numbered as No. 631 of the Dacca Collectorate). There is no dispute now that the plaintiff is the proprietor of the said estate, although it was at one stage of the suit contended by defendant 1, that he had no beneficial interest therein. The said estate was sold for arrears of revenue on 29th June 1881 and purchased by Girish Chandra Sen and others, hereinafter called the Sens, from whom the plaintiff has derived his title. Shortly after their purchase the Sens applied for measurement of the lands appertaining to their estate u/s 38, Act 8 of 1869 (B.C.) and proceedings started under the said section were duly completed on 19th March 1885. The application is not on the record, but the Robakari of the Deputy Collector and the Jaripi chitta prepared by him are on the record. They are Exs. 5 and 6 respectively. The Jaripi chitta records defendant 8 as tenant under the proprietors of estate No. 5642 holding at a rent which works out at Rs. 3. As the contentions of the parties to this suit depend on the said documents it will be necessary to deal with them in detail hereafter. The plaintiffs case is that defendant 8 and 9 held the lands in suit, which is recorded as Dag No. 241 of the Cadastral survey of the aforesaid village, as ordinary occupancy raiyats at a rental of Rs. 3 with no right of transfer. His further case is that the said plot which corresponds to plots Nos. 32 and 33 of the aforesaid Jaripi chitta, was purchased by one Radhagovinda Manikya, the father of the principal defendants, in execution of a mortgage decree. Hence he

sues for khas possession on the basis of abandonment. Of the principal defendants, defendant 1 alone contested the suit. He admitted that defendants 8 and 9 mortgaged the lands in suit to his father and that his father purchased them in execution of his mortgage decree. He sought to defeat the plaintiff's claim on two grounds, namely (1) that the lands in suit do not appertain to the plaintiff's estate and that defendants 8 and 9 were not his tenants. He made a positive statement that they appertain to Estates No. 392 and 393 of the Dacca Collectorate and that defendants 8 and 9 held immediately under the proprietors of the said estates. (2) His further defence was that the tenancy of defendants 8 and 9 was not an occupancy holding but a permanent mirasi tenure held at a rental of Rs. 2. The record-of-rights prepared under Ch. 10, Ben. Ten. Act, regards the lands in suit as permanent mirasi tenure held under the proprietors of Estates Nos. 392 and 393 at a rental of Rs. 2. Both the Courts below have held that they appertain to the plaintiff's estate. The lower appellate Court has further held that the lands are the lands of the tenancy recorded as plots 32 and 33 of the Jaripi Chitta (Ex. 6). The first Court held that defendants 8 and 9 held the lands as ordinary occupancy raiyats and the sale of the entire holding had amounted to an abandonment of the holding on the part of defendants 8 and 9.

2. The lower appellate Court has held that there is no evidence at all to rebut the entry in the record-of-rights that the lands in suit constitute a permanent mirasi tenure. The suit was accordingly dismissed. Dr. Basak who appears for the plaintiff-appellant contends that the proceedings taken u/s 38 of Act 8 of 1869 are conclusive and preclude the defendants from contending that defendants 8 and 9 were other than ordinary occupancy raiyats. He further contends that in any event Exs. 5 and 6 are cogent evidence to prove his client's assertion that the tenancy is an occupancy holding and that the learned Subordinate Judge has entirely overlooked this evidence in holding otherwise. Mr. Bose for the respondents contends that those documents are not even relevant and that the Subordinate Judge was right in saying that there was no evidence to rebut the particular entry of the record-of rights. To decide the points raised in the appeal it is necessary to examine the precise scope of Sections 38 and 39 of Act 8 of 1869 (B. C) and the contents of the robakary Ex 5. These sections are reproductions of Section 10 of Act 6 of 1862 (B.C.), which it replaced with a little change which is not material to this case, the difference being that whereas under Act 6 the Collector initiates the proceedings on the application of the owner of the estate or tenure and carries the proceedings to an end, under Act 8, the proceedings begin with an order of a civil Court, the measurement and investigations are made by the Collector on reference from the civil Court, and the proceedings terminate with the records of the Collector being filed in the civil Court. I deal with the relevant provisions of Act 8. u/s 25 the proprietor of an estate or tenure has the right to make a general survey and measurement of the lands comprised in his estate or tenure unless restrained by express engagements with the occupants of the lands. If he is opposed he has the right to apply to the civil Court having jurisdiction under S 37, which has to adjudicate

on his right to make measurements, and if his right is established the Court is to enjoin or excuse the attendance of the "under tenant or raiyat" at the measurement.

3. If a proprietor of an estate or tenure however is unable to measure the lands of his estate or tenure and so fails to ascertain who are the persons liable to pay him rent he has the remedy prescribed in Section 38. He can set in motion the civil Court by an application and if the civil Court is satisfied that he was unable to measure by his own agency the civil Court has to grant the application and the further proceedings are continued by the Collector. That section however contemplates two classes of applications, which for brevity's sake, I will call the general and special application. The scope of the proceedings are determined by the nature of the application. If an order is passed by the civil Court in favour of such a proprietor on a general application the Collector's power is limited to two matters and two matters only. (1) He is to measure the lands and (2) to record the names of the actual occupants of the lands. These occupants may be persons between whom there may have been at the time of the Collector's measurement no relationship of landlord and tenant in respect of the lands occupied by them or not; but the Collector has not to ascertain whether there is such relationship or not. Proceedings on such an application will ordinarily be beneficial to the proprietor when his case is that either his tenants have encroached upon his khas or unsettled lands or have taken possession of alluvial formations or when he wants to ascertain the names of persons in occupation and the quantity and particulars thereof with a view to assess rent. Where his object is to ascertain the names of persons who are his tenants, the particulars of the land in their occupation, the amount of rent payable by them with a view to realise rent already assessed, the special application provided for in the section is the appropriate remedy. The scope of the Collector's investigation is then enlarged. He has then not only to do what he is required when a general application is made, but has to ascertain the persons liable to pay rent and the amount of rent payable by them: *W.G. Crowdy v. Poorum Singh* (1874) 22 WR 480, The Collector has no right to determine what the rent ought to be but simply to find out what the existing rent is. A special application under the section would not ordinarily be made by an old proprietor of an estate, because his record would be sufficient to enable him to realise rent and a proceeding under this part of the section would ordinarily be to him a costly luxury. But such a proceeding would be very useful to a purchaser at a revenue sale, who has no collection papers to go upon. (I exclude those special cases where a purchaser at a revenue sale is able to secure from the defaulting proprietor or his amlas the collection papers). Such a purchaser may for his benefit require the names and particulars of all tenants holding directly under him and who are to pay him rent, whether they be patnidars, tenure holders or raiyats or he may require only the names and particulars of raiyats directly holding under him, trusting for getting information as to the particulars of patnidars and tenure-holders who are to pay him rent to other sources.

4. These principles furnish in my opinion a clue to the interpretation of the robakary (Ex. 5), and the solution of the points in controversy in this appeal. The robakary after reciting the purchase of the Sens at a revenue sale and the details of the mehal proceeds on to say that the applicants not having been able to ascertain the names of all the tenants of the estate, had applied for measurement of the lands of the estate according to the Thak map, and for ascertainment of the names of all cultivating and homestead tenants (chasi and basati praja), the area of lands in the possession of each one of such tenants and the rent payable in respect of the different classes of lands held by them. The robakary then gives the details of measurement and states that in respect of some mauzahs objection had been preferred by proprietors of other estates and by persons claiming lakhiraj rights but simply records their objections with a statement that the applicants had not prayed for recording patnis, shikmi miras or lakhiraj tenures. In respect of mauza Kurasi however no objection was preferred by anyone. The robakary then states that the Deputy Collector on local enquiry had found the rates of rent paid in respect of different kinds of land of the several villages of the estate. For mauza Kurasi the rate per Kani is recorded thus:

Rs. 12 for homestead land,
Rs. 10 for abandoned bastu,
Rs. 14 for garden lands,
Rs. 8 for lands adjoining homesteads,
Rs. 5 for paddy lands.

5. In the chitta Ex. 6 the lands in suit are recorded in Dags Nos. 32 and 33 as "Jote Ambika Charan Dey, the lands as paddy lands and ditch, area 11 1/2 gds odd and rate of rent Rs. 5 per kani." Reading the robakary and having regard to the statements made therein I come to the conclusion that a special application u/s 38 of Act 8 of 1869 (B.C.) had been made before the civil Court by Gris Chandra Sen and others, the purchasers at the revenue sale, but they applied to have the particulars as to Tent, etc., payable by cultivating and homestead tenants (chasi and basati praja) and not also of middle men, or tenure-holders. The robakary and the Jaripi Chitta being filed and recorded in the civil Court under the provisions of Section 39 of Act 8 the matter intra vires the Collector have become final and conclusive. These matters are, that in respect of Dags Nos. 32 and 33 of the Jaripi Chitta Ambika Dey was the tenant and that his rent was at the rate of Rs. 5 a kani: Meerjah Janand v. Krishto Chander (1884) 10 Cal 507. The Collector proceeding u/s 38 of Act 8 has no jurisdiction to determine to which class a tenant belongs, or to determine the incidents of a tenancy, or to determine what the fair rent ought to be: JP Wise v, Lakhoo Khan (1871) 16 WR 50. I am therefore unable to give effect to the first contention of Dr. Basak that the Jaripi Chita and the robakary conclude the matter between the parties and preclude the defendants from asserting that defendants 8 and 9 were permanent

tenure-holders and not occupancy raiyats. But in my judgment there is great force in his second contention. As I have stated the Sens made a special application u/s 38 of Act 8 but of a limited character. They only wanted to ascertain the particulars of holdings and not of tenures. In the Jaripi Chitta the lands are recorded as being in the possession of the tenant defendant 8. This must be on the footing that he was himself in possession by cultivation. No objection was preferred by him that he was not a cultivating tenant and that the Collector could not record the particulars of his land as being beyond the scope of the proprietors' application. I accordingly hold that Exs. 5 and 6 are relevant on the question of the status of defendants 8 and 9 as tenants under the plaintiffs. The learned Subordinate Judge was not therefore right in ignoring Exs. 5 and 6 in arriving at his finding that the subject matter of the suit was a permanent tenure. I accordingly set aside the decree of the learned Subordinate Judge and remand the case to the lower appellate Court so that the question of the status of defendants 8 and 9 under the plaintiffs may be reconsidered. All other findings of the lower appellate Court must stand.

6. The appeal is accordingly allowed and the case remanded to the lower appellate Court. Cost to abide the result. There is no substance in the cross-objection which is dismissed but without costs. Leave to appeal under the Letters Patent asked for is refused.