

(1910) 08 CAL CK 0006
In the Calcutta High Court

Langat Singh

APPELLANT

Vs

Rai Radha Kishen Bahadur and Others

RESPONDENT

Date of Decision : 23-08-1910

Acts Referred:

Citation : 7 Ind. Cas. 781

Hon'ble Judges : Vincent, J; Brett, J

Bench : Division Bench

Judgement

1. The village of Raju Paker, Pergannah Basera, in the district of Mozafferpur appears to have been originally held in three shares, two of which aggregating 12 annas were held by Baboo Nonit Lal and a four anna share by the plaintiffs. The defendant, Langat Singh, took a thicca of an eight anna share from Baboo Nonit Lai and afterwards purchased the remaining 4 anna share in the village excluding the share of the plaintiffs. It appears that his intrusion into the village as a part proprietor was resented by the plaintiffs and that he had considerable difficulty in realising the rent, both of the 8 anna share which he held as thiccadar and of the 4 anna share which he held as proprietor. In consequence, he had to bring many suits against the tenants to recover arrears of rent for these two shares and they were contested by the tenants and the co-sharers on the ground that he had no right of separate collection. In the end, he obtained decrees, on the 30th June 1900 after contest, for recovery of his 12 anna share of the rent, 8 annas as thiccadar and 4 annas as proprietor. In March 1901, in execution of the decrees, he went to attach the lands of the tenants judgment-debtors and, in those execution proceedings, 36 claims were put in by one Chandadthur Misser and 14 by one Sheo Nandan Pattak, each of them claiming to have purchased the rights of the tenants defendants before Langat Singh instituted his 50 suits. It is to be observed that the dates of the kobalas, executed in favour of Sheo Nandan Pattak, were in June 1899 and of those executed in favour of Chandadthur Misser were in April 1899. These claims were allowed by the executing Court on the 11th May 1901 and the Munsif dismissed the plaintiff's (the present defendants") applications for execution. Thereupon,

on the 14th April 1902, Langat Singh filed 50 regular suits alleging that Chandadhur Misser and Sheo Nandan Pattak were the servants and creatures of the other co-sharers, the plaintiffs in the present suit, and were, in fact, their benamdars and also that there was no real transfer to them of the rights of the tenants. In all those suits, he made the present plaintiffs defendants 3rd. party; and the plaintiffs filed written statements in which they supported the defence of the claimant defendants Chandadhur, Misser and Sheo Nandan Pattak, and alleged that those two persons were bona fide purchasers of the holdings in Raja Paker. On the 3rd April 1903, he obtained decrees in all the suits and those decrees were upheld on appeal by the District Judge on the 25th July 1904. On the 18th September, Langat Singh purchased the holdings of all the fifty tenants in execution of his rent decrees and obtained possession on the 26th and 27th August 1904.

2. A suit was then brought by the plaintiffs, the other proprietors of the village Raja Paker, for partition of the village and, on the 6th December 1905, the partition was completed and allotments of the shares of the different co-sharers in the lands in the village were made. Within the allotment made to the present plaintiffs were included some of the holdings which had been purchased by Langat Singh in execution of his rent decrees and Langat Singh refused to give up possession of those holding"s to the plaintiffs alleging that he had purchased the tenants" rights in them. In consequence, the present suit was instituted on the 22nd July 1907 by the plaintiffs in order to obtain a declaration of their title as proprietors of these lands and to recover khas possession of the same from the defendant Langat Singh with mesne profits. The area covered by these holdings comprises 108 bighas 1 cotta 11 dhurs of land.

3. The main ground, on which the plaintiffs based their claim, was that there was no custom in the village of transferring occupancy rights without the consent of the landlord and that, therefore, the defendant Langat Singh, having as a part proprietor of the village purchased the holdings in" execution of decrees for recovery of his share only of the rent, acquired no title to the holdings by his purchase. The defence taken by the defendant Langat Singh was that he had purchased the lands in execution of decrees for arrears of rent, that he had obtained possession through the Court and that, therefore, he was entitled to hold them as kasht lands. It was also contended that the suit of the plaintiffs was barred by the doctrine of res judicata and that the plaintiffs were estopped from bringing the present suit by reason of the judgments in the suits brought by Langat Singh in April 1902 to which suits the plaintiffs were parties and also by reason of their conduct in the course of those suits.

4. The Subordinate Judge held that the suit was not barred by the doctrine of res judicata and that the defendant Langat Singh had failed to prove the existence of any custom in the village by which ryoti rights were transferable by sale without the consent of the landlord, and, therefore, he came to the conclusion that the defendant Langat Singh acquired no right as a tenant to the land by his

purchase. The Subordinate Judge also held that the plaintiffs were entitled to a decree for khas possession and he gave them such a decree with mesne profits from the 6th December 1905, the date when the partition was carried out and the allotments were made to the different co-sharers. The defendant Langat Singh has appealed and, in support of his appeal, it" has been argued, first, that the Subordinate Judge's decision that the present suit was not barred by the doctrine of res judicata and that the plaintiffs were not estopped from bringing the present suit, is erroneous and, secondly, that the Subordinate Judge erred in holding that the defendant had failed to prove the existence of the custom in the village of transferring occupancy rights without the consent of the landlord.

5. After hearing the learned pleaders on both sides, we are of opinion that, even if, on the circumstances of the present case, it be held that the plaintiffs are not barred by the doctrine of res judicata from raising the question whether the custom of transferability of occupancy holdings without the consent of the landlord obtains in the village, still they cannot be allowed in the present suit to raise that contention after their conduct in the litigations between the defendant and the tenants in 1902 to which they were parties. The judgments of the Court of first instance and of the Court of appeal in the 50 suits brought by Langat Singh in 1902 leave, in our minds, no doubt whatever that Chandadhur Misser and Sheo Nandan Pattak, the two persons who claimed to be the purchasers of the holdings from the tenants, were the servants and creatures of the present plaintiffs and that they were acting on behalf of the present plaintiffs in order to prevent the defendant Langat Singh from obtaining possession of a 12 anna share in the village which he had acquired as thiccadar and as proprietor and also to prevent him from realising rents from the tenants. It is true that, in those suits, no distinct issue was raised as to the transferability of the holdings, but the defence then set up by the defendants and in the written statements filed by the present plaintiffs, who were defendants third party in those suits, was absolutely inconsistent with the existence of any such custom. The defence was that the tenants had sold their rights in the holdings to Chandadhur Misser and Sheo Nandan Pattak. It was not suggested and could not have been suggested in those suits that the sales were effected with the consent of all the landlords as Langat Singh who was the plaintiff was a proprietor of 4 annas in the village and a thiccadar at the same time of another 8 annas. The defence set up in those suits could not, therefore, have been based on the allegation that the holdings, though not transferable by custom without the, landlord's consent, were sold with the consent of the landlord. In those suits too, Langat Singh, who was the plaintiff, sought for a declaration that the holdings were saleable in execution of his decrees for recovery of arrears of rent. No defence was set up in the Court of first instance that the holdings could not be sold in execution of the decrees obtained by a part proprietor on the ground that they were not transferable by custom without the landlord's consent. Such a defence would have been a complete answer to the suits brought by Langat Singh, if it had been substantiated and, though it seems that, at the last stage in the appellate Court,

it was suggested that the suits should be sent back in order that an issue on this point might be framed, the Judge of the appellate Court very properly refused to do so as that defence had never been set up during the trial of the suits.

6. The present plaintiffs, having failed in those suits to prevent Langat Singh from realising his rents from the tenants on the ground that the holdings had been transferred by purchase to other persons, cannot, in our opinion, now be allowed to set up in support of the present suit an absolutely inconsistent case in which they allege that no right passed to Langat Singh under the sales. In support of this view, reliance has been placed on the decision of this Court in the case of *Lilabati Masrain v. Bishun Chobey* 6 C.L.J. 621. The Judges of this Court who decided that case, relying on the decisions in certain English cases, remarked :-- A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered, but where it recognizes or sustains his theory or claim, it estops him from afterwards taking a different position in litigation with the same opponent." The mere omission in the previous proceedings to have a distinct issue framed on the point whether an occupancy right was transferable by custom or not, is, in our opinion, not sufficient to save the plaintiff's from being estopped in the present suit, when the defence which they took and supported in the previous suits was absolutely inconsistent with the existence of such a custom and when the existence of such custom, if it had been pleaded in those suits and maintained, would have been a sufficient answer to the claim then put forward by Langat Singh. In our opinion, therefore, the plaintiffs in the present suit were not entitled to raise the question whether the holdings were transferable by custom or not.

7. On the second point, we are of opinion that the grounds given by the learned Subordinate Judge for holding that the defendant had failed to prove the existence of the custom are not all of them sound. He rejected the kobalas on which the defendant relied as proof of the existence of the custom because some of them appeared to have been executed before the date of the plaintiffs' purchase and the others subsequent to the date of the purchase; and he held that those documents were of no value to prove the custom existing at the time of the purchase. We are of opinion that the view taken by the learned Subordinate Judge is wrong and that the deeds of sale executed before and after the date of the plaintiff's purchase would certainly be valuable as evidence to prove the existence of the custom. It is true, that, in many of the sales on which the defendant Langat Singh relied to prove the existence of the custom, the property sold was a portion only of the holdings and not the entire holdings; but the learned Subordinate Judge, in dealing with this evidence of the existence of the custom, entirely ignored the documents which were put forward on behalf of the defendants in the suits brought by Langat Singh, who are clearly the servants and creatures of the present plaintiffs. Those documents clearly show that the custom was in existence and that such transfers were regarded as valid.. In our opinion, the evidence adduced by the defendant in the present case to

prove the existence of the custom, coupled with the conduct of the plaintiffs in the previous suits, in which they practically admitted the existence of the custom, was sufficient to support the defence set up by the defendant Langat Singh. We accordingly hold that the judgment and decree of the lower Court cannot be maintained. Disagreeing, therefore, with the findings of the Subordinate Judge, we set them aside and, in lieu thereof, find that the plaintiffs are estopped from bringing the present suit and that the defendant has sufficiently established the existence of the custom of transferability of occupancy rights in the village without the consent of the landlord. The result, therefore, is that the plaintiffs are not entitled to the reliefs sought, either to recover khas possession of the holdings or to recover mesne-profits from the date of the partition. We accordingly decree the appeal and dismiss the plaintiffs' suit with costs in both the Courts.

8. In view of the fact that the size of the paper-book was in this case very greatly enhanced by printing in full a number of documents of which abstracts might have been included in a list and, in consequence, the costs of the paper-book were very greatly increased, we direct that the appellant in the present appeal be only entitled to recover half the costs of paper-book, from the respondent, the other half being borne by himself.