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**(1964) 01 OHC CK 0010**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 349 of 1962**

Mohan Naiko and Others

APPELLANT

Vs

Sri Sri Sri Balaji Mahaprabhu

RESPONDENT

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**Date of Decision :** 14-01-1964

**Acts Referred:**

**Citation :** (1965) 31 CLT 168

**Hon'ble Judges :** Barman, J

**Bench :** Single Bench

**Advocate :** D. Mohanty and P.V. Ramdas, for the Appellant; R.C. Misra, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Barman, J.—The unsuccessful Defendants in the courts below are the Appellants. This appeal arises out of a suit filed by the Plaintiff for recovery of possession and mesne profits in respect of suit land in Khata No. 33, (Faisala Inam), area about 10 acres in Village Patrapur, Chikati Estate, District Ganjam.

2. The Plaintiff's case is this The Plaintiff, a deity is the owner of the suit land. On March 4, 1947 the Plaintiff gave the suit land in usufructuary mortgage to Defendant No. 1's father Basu Naik under a registered mortgage bond ext. 1/b for a consideration of Rs. 400/-. On March 9, 1952 the Plaintiff redeemed the mortgage by paying up the amount and endorsed on the mortgage bond (ext. 1/a) that the mortgage had been redeemed and that possession had been given back to the Plaintiff. The Plaintiff had in fact leased out the suit land to other tenants and could not get possession of the Suit land. The Defendants laid wrongful claim on the suit land as occupancy tenants. In 1953 the Plaintiff filed T.S. No. 263 of 1953 against Defendants for a declaration that the Defendants have no occupancy right and for permanent injunction against Defendants restraining them from not going over the suit land. The said T.S. No. 263 of 1953 was found not maintainable and was dismissed. Then in 1957 the Plaintiff filed another suit T.S. No. 221 of 1957 for possession and mesne profits. In the said

suit it was found that the mortgage bond ext. 1/b was not a mortgage but a lease. The court found therein that it had no pecuniary jurisdiction and accordingly the plaint was returned. On April 18, 1960 the Plaintiff filed the present suit for possession and mesne profits as aforesaid.

3. The defence case is this The Defendants are illiterate Harijans. Their father Basu Naik was a Bhag tenant under the deity. The Mahant as trustee of the deity borrowed Rs. 400/- from Basu Naik and executed the usufructuary mortgage bond. The mortgage was invalid because it was without permission of the Endowment commissioner. Then the Plaintiff granted a lease. In the said lease there was an agreement that Basu Naik will execute a Muchilika. It was further agreed that he would cultivate and pay half of the produce as Raj Bhag. The endorsement about the Plaintiff having got back possession is fraudulent. Basu Naik was thus a Bhagchasi. Accordingly the civil court has no jurisdiction. It is also the defence case that the present suit is barred by res judicata by reason of the previous T.S. No. 263 of 1953.

4. The concurrent findings of the courts below are that the document dated March 4, 1947 ext. 1/b was a mortgage and not a lease; that although Basu Naik was in possession yet after his death his sons are trespassers; that the civil court has jurisdiction; that the suit is not barred by res judicata and accordingly the Plaintiff's suit was decreed in his favour. Hence this second appeal.

5. The points urged on behalf of the Defendants-Appellants are these. The document dated March 4, 1947 ext. 1/b is not a mortgage but a lease. Before mortgage of 1947 the Defendant's father Basu Naik was a Bhag tenant and therefore he and, after his death, the Defendants are protected by the Orissa Tenants Relief Act or the Orissa Tenants Protection Act. The Defendants' point is that both the courts were wrong in proceedings the basis that there is no evidence that the Defendants were tenants before 1947. In support of the defence case that Basu Naik was a tenant before 1947 the Defendants relied on two rent receipts one dated February 9, 1938 and the other dated February 22, 1941, that is to say, both before 1947. These rent receipts were not exhibited before the courts below. The Defendants had filed a petition before the lower appellate court for taking these two documents as additional evidence. The learned lower appellate court did not pass any order on the said application for additional evidence. Indeed, these documents were exhibited in the two earlier suits in that they were tendered as exts. Y and Y/1 in T.S. No. 263 of 1953 and as ext. E and ext. E/1 in T.S. No. 221 of 1957. Thus it cannot be that these two documents could have been fabricated. In these circumstances the Defendants submit that this case should be sent back on remand for consideration of the case in the light of these documents as additional evidence.

6. In my opinion, assuming that these rent receipts are admitted as additional evidence, even then, they do not help the Defendants. The reasons are these These rent receipts only show that Basu Naik was a Bhagchasi during his life time. After Basu Naik's death his sons have no heritable right and thus are not

entitled to protection either under the Relief Act or the Protection Act. The right which Basu Naik had during his life time as tenant, was purely of personal character; it was neither heritable nor transferable. Such a right is undoubtedly a personal privilege given to the tenant himself Tadeipalli Sivaramayya and Anr. v. Bhoroito Porida and Anr. 26 C.L.T. 245. It was this aspect which mainly weighed with the learned lower appellate court in coming to the conclusion that the Defendants cannot claim any protection under either of the said two Acts. The reasoning on which he came to this conclusion, broadly stated, is this the right of a Bhag tenant under the said Acts is not heritable. Therefore, the Bhag tenants' right, if any, was extinguished on the death of Basu Naik. Even if it is held that Basu Naik continued to remain as a Bhag tenant after the redemption of the mortgage, the Bhag tenancy right, if any, terminated with his death. The Defendants as the sons and legal representative of Basu Naik cannot claim any heritable right so as to enjoy the land on Bhag after the death of their father. If they want to claim their right as Bhag tenants under the Plaintiff, they must prove a fresh contract with the Plaintiff by virtue of which they were inducted as tenants to the suit lands. There is no evidence on this point. So the Defendants cannot claim any relief or protection under either of the said two Acts.

7. In view of this position, no useful purpose will be served by sending the case back on remand. The court below rightly found in favour of the Plaintiff and did not accept the defence conventions.

8. The decision of the court below is therefore upheld. This appeal is dismissed with costs.