

(1984) 11 CAL CK 0002
In the Calcutta High Court
Case No : S.A. No. 652 and 1078 of 1984

Prafulla Kumar Khan and Others

APPELLANT

Vs

Jogendra Nath Mahato and Others

RESPONDENT

Date of Decision : 06-11-1984

Acts Referred:

West Bengal Estates Acquisition Act, 1953 — Section 44(2a), 57B

Citation : 89 CWN 594

Hon'ble Judges : A.K. Sengupta, J

Bench : Single Bench

Advocate : Santimoy Panda, for the Appellant; Rash Behari Mahata, for the Respondent

Final Decision : Allowed

Judgement

Ajit Kumar Sengupta, J.—These two appeals by the defendants are directed against the judgment of the learned Subordinate Judge affirming the decree passed by the learned Munsif in Title Suit No. 2 of 1962 in favour of the plaintiff. The said suit was instituted by the plaintiff against the defendants inter alia for a declaration of his tenancy right in respect of 3.99 acres of land comprising 6 (six) plots of Rayati, Khatian No. 18 of Mauza Sarasbedya, P.S. Salbani, hereinafter referred to as the suit land. The case put forward in the plaint is that Prafulla Kumar Khan, the defendant No. 1, and his brother Late Amulya Kumar Khan, since deceased, the father of the defendant Nos. 2 and 3, were the owners of the suit land in equal share. It is alleged that the defendant No. 1 was the Karta of the Joint Family consisting of himself and the defendant Nos. 2 and 3 and he settled the suit land with the plaintiff in the year 1355 B.S. in "Thika Bhag Jama" at a fixed produce rent of 7 Arrahas of paddy per year. It is alleged that the defendant Nos. 4 to 6 collusively obtained a kobala with regard to half share of the defendant No. 1 of the suit land and also instituted a number of Bhagchas cases before the Bhagchas Board alleging that the plaintiff was a Bargadar under them. It is further alleged that since the defendants threatened to dispossess the

plaintiff from the suit land, the plaintiff had to file the said suit for declaration of his tenancy right in the suit land and for permanent injunction. The defendant No. 1 and the defendant Nos. 4 to 6 jointly contested the suit by filing one written statement. It is the case of the defendant No. 1 in the written statement that he did not settle the suit land with the plaintiff in any form of tenancy and he used to cultivate personally his demarcated half share in the suit land and thereafter sold the same to the defendant Nos. 4 to 6 in Chaitra 1366 B.S. The defendant Nos. 4 to 6 inter alia contended that they made Bhagbilli of those demarcated suit land to the plaintiff only in Baisakh 1367 B.S. But, it is alleged, the plaintiff never delivered any share of the produce to them. The contesting defendants totally denied the plaintiff's status as a tenant and contended that the plaintiff held the suit land as mere Bargadar under the defendants. According to the defendant Nos. 4 to 6 the plaintiff has no title or interest in the suit land.

2. The learned Munsif construed the expression "Thika Bhag Jama" at a fixed produce rent as a tenancy. In coming to the said conclusion he relied on three receipts showing realisation of paddy from the plaintiff by the defendant No. 2 for the years 1366, 1367 and 1368 B.S. According to the learned Munsif, a Bargadar is liable to deliver a share of produce which varies from year to year depending on the quantity of the yield. But since in this case a fixed quantity of produce was to be delivered every year irrespective of the yield, the learned Munsif held that relationship of tenancy existed by and between the plaintiff and the defendants. He held that the status of the plaintiff is that of a tenant and cannot any circumstances be called Bargadar. He, therefore, decreed the suit.

3. Against the said judgment and decree passed by the learned Munsif the defendant Nos. 1 and 4 to 6 preferred an appeal before the learned District Judge, Midnapore. Defendant Nos. 2 and 3 who did not contest the suit also preferred an appeal. The said appeal was heard on transfer by the First Court of the Subordinate Judge, Midnapore. The learned Subordinate Judge considered the question whether the plaintiff is a tenant or Bargadar in respect of the disputed land. He held that the plaintiff's own case is that he, was holding the suit land in "Thika Bhag Jama." But there is no such term in legal parlance. He held that the term "Thika Bhag Jama" by itself should not be considered to be the surest indication of the plaintiff being a tenant or Bargadar but the said term has got to be judged in the context of other facts and circumstances. On the basis of the receipts granted by the defendant No. 1, the learned Subordinate Judge came to the conclusion that a person paying the fixed quantity of produce as distinct from the share of produce will have the status of a tenant. He held that the payment of fixed quantity of produce by the plaintiff can only point to the fact that the plaintiff was holding land not as a Bargadar but as a tenant on payment of a fixed quantity of produce rent. Relying on the judgment of this Court in the case of Raja Rishikesh law vs. Satish Chandra Pal & Ors reported in 35 C.L.J. 90 he held that "Thika" indicates the creation of tenancy. He was in agreement with the learned Munsif that the plaintiff has a tenancy right under the defendants. He, therefore, dismissed the appeals.

4. In this Court, two sets of appeals have been filed against the said judgement of the learned Subordinate Judge one by the defendant No. 1 and 4 to 6 being S. A. No. 652 of 1964, the other by the defendant Nos. 2 and 3 being S.A. No. 1078 of 1984 Mr. Santimay Panda appearing for the appellants in S.A. No. 652 of 1964 assailed the judgements of the. learned Munsif as well as the First Appellate Court on various grounds. He submits that in this case both the Courts below arrived at a finding ignoring the important relevant evidence. The Courts below also misconstrued the documents and came to the finding on erroneous interpretation of the document.

5. Before I deal with the respective contention of the parties it is necessary to consider a preliminary point taken by Shri Rash Behari Mahoto appearing on behalf of the respondents. It is his submission that the concurrent finding of the Courts below is that the plaintiff is a tenant under the defendants and not a Bargadar. This concurrent finding of fact cannot be interfered with by the High Court in Second Appeal. He has relied on a decision in the case of Paras Nath Thakur v. Sm. Mohini Dasi (deceased) & Ors., reported in AIR 1959 SC 1204 where the Supreme Court held that High Court, on Second Appeal, cannot go into the question of fact, however erroneous the finding of fact recorded by the Courts on evidence may be. He also relied on another decision of the Supreme Court in the case of Sri Sinna Ramanuja Jeer and Others Vs. Sri Ranga Ramanuja Jeer and Another, where the Supreme Court held that the High Court has no jurisdiction to entertain a Second Appeal on the ground of erroneous finding of fact, however gross the error may seem to be.

6. On the other hand, Mr. Santimay panda has contended that the High Court can interfere with the finding of fact even in the Second Appeal if such finding is arrived at without considering the material evidence. He also submits that whether on an interpretation of a document a person is a tenant or Bargadar cannot be a pure question of fact. He, therefore, submits that this Court has jurisdiction to go into the point urged by him in the appeal.

7. The contention raised by Mr. Panda has to be accepted. It is now well settled that even in the Second Appeal the Court can interfere if the finding of fact is based upon a misconstruction or misunderstanding of material documents. If the Courts below have misdirected themselves in law in arriving at a finding, e.g. by overlooking or ignoring the crucial fact or document, in such a case the Court can interfere with the finding of fact. The question whether a person is a Bargadar or a tenant is not purely a question of fact inasmuch as the conclusion of the Courts below was based on the interpretation of the documents. It does involve the application of principle of law to determine the status of the person.

8. Mr. Santimoy Panda, appearing for the appellants in S. A. No. 652 of 1964, assailed the findings and conclusion of the learned Munsif and the First Appellate Court. It is his submission that according to the learned Munsif, the plaintiffs case is that they have been cultivating the suit land entirely in Thika Bhag Jama. He himself came to the finding that the meaning of the expression "Thika Bhag"

is temporary Bhag settlement. He proceeded to decide the status of the parties not on the basis of the respective pleadings but on the basis of other extraneous considerations. Mr. Panda further submitted that the lower Appellate Court also came to the finding that the phrase "Thika Bhag Jama" does not connote either tenancy or Bhagchasi but in spite of such finding, the First Appellate Court decided the case on the basis of extraneous considerations. He has submitted that the Courts below failed to appreciate the decision in the case of Raja Rishikesh Law v. Satish Chandra Pal & Ors., reported in 35 C L.J. 90. He has also referred the decision in the case of Manmotha Nath Mitter & Ors. v. Anath Bandhu Pal & Ors., reported in 23 CWN 201. He has further relied on three decisions of the Supreme Court in the cases of Sarupuri Narayanamma and Others Vs. Kadiyala Venkatasubbaiah and Others, , Delhi Development Authority Vs. Durga Chand Kaushish, and Timblo Irmaos Ltd., Margo Vs. Jorge Anibal Matos Sequeira and Another, in support of his contention that the document has to be interpreted on its own term not with the help of any other extraneous consideration.

9. It has been contended by Mr. Rash Bihari Mahato, learned Counsel appearing for the defendants, that the Courts below rightly applied the ratio of the decision in the case of Raja Rishikesh Law (Supra) in holding that "Thika" denotes the creation of a tenancy. According to him, the word "Jama" means rent and rent is an acknowledgement by the tenant to the landlord of his tenure and "Bhag" denotes share of the tenants. He submits that the expression "Thika Bhag" is the adjective of the word rent. According to him, the Courts below arrived at the correct finding as regards the status of the plaintiffs.

10. In the case of Raja Rishikesh Law (supra) the appeal was filed, by the landlord in a proceeding u/s 105 of the Bengal Tenancy Act for enhancement of rent. The tenant pleaded that the rent was fixed in perpetuity and the contention was accepted by both the Courts below. The document which was considered in that case stated that the tenant, the grantee, would pay the Thika Mokra rent. The Court in construing the said expression ""Thika Mokra" observed that the Thika was used to indicate the creation of a tenancy and the word written as Mokra by the Oriya scribe is in reality Mokarari, indicating that the rent was fixed in perpetuity. The Court held that the document taken as a whole indicates that under the contract of tenancy, the rent was fixed in perpetuity. In the case of Manmotha Nath Mitter (supra) the word "Ticca" was considered. It was held that the word "Ticca" tenant as used in relation to the tenancies in dispute in that case means interests which are not permanent. "Ticca Jamas" denoted temporary rights as opposed to permanent rights to the land. It is the case of the plaintiff in the plaint that he was holding the suit land on "Thika Bhag Jama". This expression has not been defined anywhere. The term "Thika" means temporary as has been held in the case of Manmotha Nath Mitter & Ors. (supra). The Court of the first instance and the First Appellate Court relied mainly, if not solely, on the three receipts granted by the defendant No. 2 in favour of the plaintiff. The said documents have not been produced before this Court in spite of

the opportunity given. If appears that the said documents which were tendered in evidence were taken back by the Advocate-on-Record of the plaintiff. Mr. Mahato, appearing for the respondents, has submitted that it is not possible for his client to produce the same. It is not known what was contained in the rent receipts granted by defendant No. 2: But as recorded by the Courts below that in the said receipts it has been stated the share of the produce in "Bhag Dhanya". The use of the expression "Bhag Dhanya" throws some light on the relationship of the parties It is more in consonance with the defendants' case of Bhag Bili or appointment of the plaintiff as Bargadar. Had it been a case of a tenancy, the appropriate word would have been rent or Khapta and not "Bhag Dhanya" as stated in the receipts themselves. Excepting the three rent receipts issued by the defendant No. 2 the plaintiff has not adduced any oral or other documentary evidence. It is true that the said receipts, as recorded by the Courts below, show that the quantity deliverable by the plaintiffs was fixed at 7 Arrah of paddy. According to the Courts below, a Bargadar stands liable to deliver a share of the produce which varies from year to year according to the quantity of the yield and therefore, the delivery of the fixed quantity of produce as distinguished from the share of produce for many years would go to show that status of the person is that of a tenant. This fact cannot be a decisive factor in determining the question of status in absence of any other evidence. On the other hand, there is evidence on record to show that original plaintiff was a Bargadar. I am, therefore, inclined to hold that the plaintiff could not prove the case of his being a tenant under the defendants. That apart, the receipts on which the learned Courts below relied for their finding, were given by the defendant No. 2 in respect of his -[8]- annas shares It is not known now the relationship of, the parties in respect of the entire suit land could be governed by the said receipts pertaining to a portion of land. It is not the case of the parties that the defendant No. 1 had also issued similar or identical receipts. Had it been so then such receipts would have been produced and tendered in evidence. The Courts below fell in error in not construing the documents being the rent receipts on the wordings of the documents themselves. They brought in extraneous consideration in construing the documents. The Courts below should have given due regard to the meaning of the words as used in the documents. Supreme Court in the case of Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and Others, has laid down that the true nature of a grant is a matter to be decided on a construction of the terms of the document and that is, a question of law. Supreme Court further held that no evidence is admissible on a question of construction of a contract or grant, which must be based solely on the terms of the document. The word used in the document has to be interpreted as a part of or in the context of the whole and "Thika Bhag Jama" as used in the rent receipts in the context of this case can only mean that the original plaintiff was a Bargadar under the defendants and not as a tenant as claimed.

11. The next contention of Mr. Panda is that the judgments of the Courts below are vitiated because of non-consideration of material documents. It is his

grievance that although the various documents had been filed and tendered in evidence, the Courts below failed to take into consideration any of such documents having vital and relevant bearing on the issues involved in the suit. The first set of documents, according to Mr. Panda, are Exts. B and B(1) being rent receipts granted by the State Government. He submits that these documents were not at all considered by the Courts below. This contention of Mr. Panda has substance. The Courts below have not discussed these documents. It is not known whether they have at all considered these documents for the purpose of arriving at their conclusion. These rent receipts are of much significance inasmuch as if the case of the plaintiff is correct, then after the West Bengal Estates Acquisition Act 1953 came into force, the plaintiff would have paid rent to the State Government as a tenant. The plaintiff has failed to produce any receipt in this behalf. On the contrary, the defendant No. 1 has produce such rent receipts being Exts. B and B(1) which show that the defendant No. 1 is the tenant under the State. There cannot be a tenant under a tenant after the West Bengal Estates Acquisition Act came into force. The status of the defendant No. 1 is that of a tenant under the State. The plaintiff has failed to establish that he is a tenant under the State.

12. The next document which, according to Mr. Panda, was not considered by the Courts below is the finally published Record of Rights. The Record of Rights goes to show that the defendants are tenants under the State Government and there is no one under them either as Bargadar or as tenant. The entries in the finally published Record of Rights must be presumed to be correct unless contrary is proved. It is surprising that the Courts below came to a finding overlooking the entries therein that the plaintiff was a tenant under the defendants. No evidence was adduced to rebut the presumption raised by the entries in the Record of Rights. In the absence, of any evidence the Courts below could not have come to a finding contrary to the entries in the Record of Rights.

13. Mr. Mahato, learned Advocate for the respondents, has relied on two decisions of this Court in support of his contention that entries in the Record of Rights can be challenged by him in the suit independently and Section 57B of the West Bengal Estate Acquisition Act 1953 would not be a bar to such suit. The first decision is in the case of Ram Krishna Mullick & Ors. v. State of West Bengal & Ors. reported in 1975(1) C.L.J. 154 where P. K. Banerjee J (as his Lordship then was) held that in spite of section 57B a suit will not be barred where the questions of title are involved in the suit. It is also open to any aggrieved party to file a suit, if it is found that the determination of rent or status of a tenant or incidence of tenancy relating to the Record of Rights was made in violation of the principles of natural justice or by an authority having no jurisdiction to deal with such matters. The second decision is in the case of Ayub Ali Sardar & Anr. vs. Derajuddin Mallick & Ors., reported in 1975(2) C.L.J. 305. The Division Bench has held that notwithstanding an entry adverse to the plaintiff's claim, a suit for declaration of title based on an independent cause of action is maintainable in law. Nothing prevents such a plaintiff from getting the relief claimed by him even

without altering or correcting the erroneous entry in the relevant Record of Rights. It is not the case of the defendants here that the suit of the plaintiff was not maintainable in view of the provisions of Section 57B. The contention of the defendants is that the plaintiff has not been able to establish the case made out in the plaint that he was a tenant under the defendants in respect of the disputed land. Thus the decisions cited by the learned Advocate for the plaintiff have no application at all.

14. The next document which, according to Mr. Panda, was not considered by the Courts below is the order in the Bhag Chas case filed against the plaintiff, in the Bhag Chas case the plaintiff was treated as a Bargadar. It appears that the Courts below by passed the said document in considering the status of the plaintiff. It was referred to by the Subordinate Judge in coming to the finding that the plaintiff was in possession of the disputed land under the defendant Nos. 1 to 3 prior to the purchase by defendant Nos. 4 to 6. As a matter of fact, the evidence as contained in the said Bhag Chas order has not been rebutted. The Courts below failed to consider the said document and did not come to any independent finding. It is rather surprising that although the lower, Appellate Court had taken into consideration the order of the Bhag Chas Case No. 146 of 1961 being Ext. 1 in determining the question of possession but the Court had overlooked, the status of the parties indicated therein where the plaintiff has been treated as Bargadar in the said proceeding. The said document was accepted for one purpose, i.e. for the purpose of determining the question of possession of the plaintiff but it was rejected so far as the question of status is concerned. This stand of the lower Appellate Court cannot be sustained. If a document is relied on, it should be relied on, as a whole. The Courts below ought to have considered every fact or evidence for and against the parties with due care. The onus of proving that the plaintiff was a tenant was on the plaintiff. This onus has not been discharged. Any lacuna in the defendants' evidence cannot make up the missing link in the evidence of the plaintiff. The order of the Revenue Officer in the proceeding u/s 44 (2a) of the West Bengal Estate Acquisition Act 1953 was also exhibited on behalf of the defendants but the Courts below have not considered the said exhibit in coming to their finding. The grievance of the appellants that the Courts below only considered the exhibits relied on by the plaintiffs and did not either consider the documentary evidence tendered on behalf of the defendants or ignored the documentary evidence tendered by the defendants is well founded. Thus the findings of both the Courts below are vitiated. In the result, the appeals succeed. The judgment and decree of the Court below are set aside. The suit shall stand dismissed. There will be no order as to costs in this Court.