

(1955) 08 OHC CK 0007
In the Orissa High Court
Case No : S.A. No. 470 of 1951

Radhu Behera and Others

APPELLANT

Vs

Radhashyam Sahu and Others

RESPONDENT

Date of Decision : 05-08-1955

Acts Referred:

Orissa Tenancy Act, 1913 — Section 235, 236, 236(2), 237, 31A

Citation : (1955) 21 CLT 420

Hon'ble Judges : Panigrahi, C.J.; Rao, J

Bench : Division Bench

Advocate : S.N. Dasgupta, for the Appellant; D. Mohanty and B. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

Panigrahi, C.J.—After having heard learned Counsel for the parties at great length we do not think it necessary to withhold our judgment from the parties.

2. The facts are simple though the point raised presents some difficulty. The suit was brought by the transferee of a Chandandar for ejecting the heirs of a Dar-Chandandar. Defendants 1 to 3 are the sons of one Moni Behera who had been recorded as a Dar-Chandandar as early as 1912 in the maintenance khatian Exts. B. and B-1. The Plaintiffs purchased Chandna plot No. 114 measuring 04 of an acre from the recorded Chandanadar Maguni Moharana and after service of a notice to quit on 27th May 1944 (Ext. 2) the suit was filed on 30th January, 1946. The case has been tossed about from court to court during these nine years. The Plaintiffs came up in S.A. 431 of 1948 against the reversing judgment of the Subordinate Judge dismissing the Plaintiffs' suit. The appeal was heard by me and our learned brother Narasimham J. and we decided to give a further opportunity to the parties to adduce evidence so that the points arising in the case may be effectively dealt with, as we realised that the points in controversy had been misconceived by both the parties.

3. The points in controversy may be formulated as follows-The Plaintiff is a purchaser from the Chandandar and the nature of the right he acquires under the purchase is questioned by the Defendants. Their contention is that a Chandandari holding is non-transferable by custom and the onus is on the Plaintiff to prove the custom of transferability in order that he may maintain the suit. The second point is that, according to the Plaintiff, the heirs of a Darchandandar are not entitled to protection against eviction either under the law or under custom, and whatever protection had been afforded by the amended Sections 236 and 237 of the Orissa Tenancy Act, by the amending Acts of 1946 and 1947, are not available to Dar-Chandandars or their heirs. We therefore formulated the following two issues for consideration by the courts below while remanding the case.

(1) Has the Plaintiff any right to bring the suit?

(2) Are Defendants 1 to 3 liable to eviction from the suit lands?

After remand the Plaintiff obtained the consent of the landlord to the transfer and also proved the endorsement made by the landlord recognising such transfer. He recalled P.Ws. 3 and 4 to prove the existence of the alleged custom. Defendant 2 examined himself and merely asserted that the Dar-Chandandari right is heritable and transferable. The Plaintiff deposed as follows-

"There is no custom of heritability or transferability of Darchandari right in my village". He did not speak a word about the existence of a custom recognising the transferability of a Chandandari right. P.W. 3's knowledge of the custom is confined to the solitary suit transaction evidenced by Ext. 1. P.W. 4 said, a Darchandandari right is in some cases heritable and, in some cases, it is not. He mentioned two instances relating to the transfer of a Dar-Chandandari right. He added however that a Chandandari right is transferable though he did not say that there was a custom in favour of such transferability. On this evidence the courts below were justified in holding that the Plaintiff had failed to prove the existence of a custom recognising the transfer of a Chandana holding, but they nonetheless held that the Plaintiff was entitled to evict the Defendants as the landlord had given his consent to the transfer.

4. I am unable to appreciate this line of reasoning. The landlord's consent to the transfer may be binding between him and his tenant, namely the Chandandar, but the Plaintiff in order to succeed must go further and establish that there is a custom showing that in all cases where the transferee obtains the consent of the landlord, such transfer is valid. In the case of occupancy rights the landlord's consent to the transfer was formerly necessary, but this has been obviated by the amended Section 31-A of the Act. The parties were evidently under a mistaken impression that the incidents of an occupancy holding would attach to a Chandana holding as well. I can find no justification for this view. No provision is made in the Act regulating the incidents of a Chandana holding except in Sections 74 and 75. In the absence of an express provision in the Act, a Chandana

holding is still subject to the law of custom and usage. We have therefore arrived at the conclusion that the Plaintiff has failed to prove that there is a custom recognising the transfer of a Chandna holding and as such he is not entitled to maintain the suit for eviction.

5. It must be remembered that this being a suit for eviction the onus lies primarily on the Plaintiff to prove his right to evict, and he must establish that the heirs of a Dar-Chandandar are liable to eviction either under the terms of the contract or by custom. No evidence has been adduced in proof of either. In fact the origin of the tenancy is unknown and admittedly the Defendants have been in possession for at least 40 years. Our attention was drawn to the amended Section 236 of the Orissa Tenancy Act. Sub-section (2) of the section says that the incidents of tenancy of a Chandandar in respect of that portion of his land which is not the homestead in which he ordinarily resides, shall not be regulated by local custom or usage. The admitted case of the parties is that the Chandandar never resided, nor does he reside, on the suit holding. Consequently, the incidents of his tenancy and his right to evict his sub-tenant are regulated by local custom or usage which must be established.

6. We were also referred to a number of cases a few of which may be noticed now. In *Jahabai Khan v. Sri Krishna Dey* 2 C.L.T. 9, it was held that the landlord's right to eject a Chandandar on grounds other than for arrears of rent, is regulated by local custom or usage, and that he is not entitled to eject him after due service of notice to quit, unless he proves local usage or custom to that effect. In *Abdul Hamid v. Bora Tatayya* ILR 1950 Cutt S.B. we held that a Chandana right is not transferable apart from proof of custom in any particular case, and that there is no general and well recognised custom in this behalf. I went further than my learned brothers in holding that the protection afforded by Sections 235 and 236 extended to the transferee of a Dar-Chandandar also. In *Dina Bhoi v. Jagannath Patajoshi* another Division Bench of this Court held that the benefit of Section 236 of the Orissa Tenancy Act is available to a person to whom the land and the structures thereon had been let out on rent. In a very recent case, *Bhikary Behera v. Jagat Ballav Das, Mohapatro J.* held that the Defendants in that case who were under-ryots were protected against eviction u/s 236 of the Orissa Tenancy Act. It is unnecessary to refer to cases decided under the Bengal Tenancy Act as the very same principle has been adopted in that Act also. We are therefore satisfied that there is a considerable body of authority in favour of the contention raised by the Defendants that a Chandandar should, in the first instance, prove that his right is transferable by custom and that he has consequently the right to evict the Dar Chandandar by custom. As I have already shown above, the Plaintiff has failed to establish either of these propositions and it is unnecessary, in the circumstances, to discuss whether the Defendants have succeeded in affirmatively establishing a custom in their favour. Sections 236 and 237 afford a complete answer in their favour.

7. This appeal must therefore succeed, and the Plaintiff's suit is directed to be

dismissed but in the circumstances we refrain from making any order as to costs.

Rao, J.

8. I agree.