
(1936) 01 PAT CK 0008
In the Patna High Court

Rai Brindaban Prasad

APPELLANT

Vs

Rai Banku Bihari Mitra and Others

RESPONDENT

Date of Decision : 23-01-1936

Acts Referred:

Bengal Tenancy Act, 1885 — Section 40
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, 151

Citation : AIR 1936 Patna 595

Hon'ble Judges : Macpherson, J;James, J

Bench : Full Bench

Judgement

Macpherson, J.—This is an application u/s 151 and Order 47, Rule 1, Civil P.C. in respect of our decision in Second Appeal No. 150 of 1932 Brindaban Prasad v. Banku Behari Mitra 1935 Pat 144, which arose out of suit No. 2661 of 1929 instituted by the landlord Rajoi against the applicant Brindaban Prasad, raiyat of khata No. 60, for recovery of bhaoli rent in respect of the years 1335 and 1336 F. The plaint in that suit is signed by Jadunath Majumdar, mukhtar-am on behalf of the plaintiffs, Sailendra Nath Bose, trustee to the estate of Rai Banku Bihari Mitra, and Rai Biman Bihari Mitra. While the suit was pending Rai Banku Bihari Mitra and his wife were substituted for his trustee. The claim is Rs. 1888-7-9 being Rs. 1510-12-6 on account of price of grain forming the landlord's share according to the takhmina (eye-estimate) sheet and Rs. 377-11-3 on account of damages, with costs and interest and other reliefs, and the plaint sets out that "in 1335 and 1336-F the defendant grew paddy and rabi crops specified below on the bhaoli kasht lands" and appropriated the hakimi or landlord's share; that there being no alternative a takhmina of the crops produced was prepared on behalf of the plaintiffs in every year and in every season and the takhmina sheet and a hisab or account of the price of the crops were filed as part of the plaint. The holding was stated to be 57 bighas 5 kathas 10 dhurs held on the bhaoli batai system and to produce paddy and rabi. The takhmina papers show 23 bighas 12 kathas 8 dhurs in 19 plots as producing paddy at varying rates with, a total of 390 maunda 12? seers in 1335 and the same area in 20 plots (No. 935

being introduced in different ink) as producing 512 maunds odd in 1336 and are signed by Sheobhajanlal mohurrir, Nandkumar Singh jamadar and Deoki Singh gomasta, while those for rabi are similarly signed and show an aggregate area of 33 bighas 13 kathas 2 dhurs yielding a crop of 207 maunds odd in 1335 and 256 maunds in 1336. The hisabs are signed by Sheobhajanlal and Deoki Singh.

2. The defence was substantially payment in full and that the suit had been maliciously brought because the raiyat had refused to pay nakdi rent at Rs. 10 per bigha and was ready to apply for commutation of the rent u/s 40, Ben. Ten. Act. It was urged that the takhmina papers were forged and that paddy was produced at 4 or 5 maunds kham and rabi at 2? maunds kham per bigha and that the paddy lands produced only one crop and rabi only was produced in the rabi lands. The defendant also complained that a commissioner had been sent to the lands at the instance of the plaintiff without his knowledge. Further points were taken later in an additional written statement filed after the amendment of the plaint, among them that the substituted landlords were not entitled to the land as their name was not registered under the Land Registration Act. To give evidence of the quantity of produce the defendant had, on 4th and on 22nd July 1930, called for the production of the village papers from the beginning of 1922 to 1337 F. receipt books, siahas both produce and money rent, khasra batai, jamabandi, jamakharch and sudkars of Rajoi. An excuse was given on behalf of the plaintiffs that the papers were not available as they had been sent to the trustees in Chapra (which could not possibly have been true in respect of most of them) and the Court did not insist upon production. The only witness examined on behalf of the plaintiffs was Deoki Singh who admitted that the batai khasras of his time were at the kachahri of the plaintiffs. He further deposed that he was gomasta from 1335 and rents were due for 1335 and 1336, that the takhmina of the produce was made by himself and Sheobhajanlal who wrote the takhmina and hisabs and danabandi papers filed by the plaintiffs which the witness proved, that no payment had been made and that receipts were granted on payment of rent, and he further stated that no tenant had divided the produce to him in 1335 and 1336. Three witnesses were examined in support of the defence case and in particular one of them deposed that he had gone to fetch the receipts for the produce divided in 1335 and for that divided in 1336 which had been delayed by the gomasta on the excuse that the receipt book had not come from the head office at Sundarganj and he was twice put off,

3. The Munsif held that in the absence of receipts payment had not been proved and that the demand for commutation at Rs. 10 per bigha had not been established. As to the produce he did not rely upon the pleader commissioner but taking the rates shown in receipts of previous years, he allowed paddy at 10 maunds kachha and rabi at 2? maunds kachha per bigha with the deduction for wages and the addition for cess and with damages at 12? per cent. The appeal by the defendants was dismissed, but in the plaintiff's appeal the Subordinate Judge enhanced the rates to 13 maunds per bigha of paddy and to 5 maunds of rabi with 1 maund of linseed per bigha of rabi on the basis of the commissioner's

report without considering the defence evidence that no notice had ever been given to the defence of his crop-cutting experiment. A second appeal was preferred but it could only be argued on the question whether by reason of the provisions of Section 78, Land Registration Act, 1876, the Court was precluded from passing a decree in favour of the plaintiff and it was dismissed. After the dismissal of the second appeal the defendant brought to the notice of this Court that he had argued before the Subordinate Judge that the papers of the plaintiffs which he had called for and which were not produced, would have shown the quantity of the crops and division of them, and he claimed that his statement, as to the quantity of produce should be accepted as in his memorandum of second appeal to the High Court he had set out the grounds(3) and (5):

(3) For that the lower appellate Court has erred in law in fixing an average rate of produce on surmise, particularly when the village papers have been kept back and the decree if any could be passed according to the defendant's admission.

(5) For that the Court below ought to have drawn an adverse inference against the plaintiffs on the non-production of their village papers, especially when they were not the recorded proprietors and when even the real patwari was not examined by them.

4. He further set out that after the disposal of the appeal he had secured new and important evidence on the above points which owing to the conduct of the plaintiffs could not in spite of due diligence be available to him at the trial, namely a copy of the actual batai khasra for 1335 and danabandi papers for the rabi crop of 1335 and for both crops of 1336 F. in respect of appellants' holding. The khasras for the years 1328, 1330, 1333, 1335 and 1336 F. had, it was averred, actually been filed by the landlord in rent suit No. 838 of 1933 against Sheosaran Teli out of whom rent appeal No. 181 of 1934 arose and appellant heard of them and took copy. In the copy the khasra batai for the paddy of 1335 in respect of the plaintiffs' holding No. 60 (it is shown by mistake as No. 70 but is really No. 60 as the plot numbers tally) purports to be in the jurisdiction of Deoki Singh gomasta and shows 23 bighas 8 kathas 1 dhur in 20 plots (including plot 935) as having produced 191 maunds of paddy or an average of about a little over 8 maunds per bigha, giving, after deduction of 10 per cent for wages, and the addition of road-cess, a landlord's share of 88 maunds 33 srs 8 chs. exclusive of neg. The whole is signed by Deoki Singh gomasta and the patwari Bhairo Lal and is initialed by the inspector. The contention of appellant is that he used due diligence and that if the batai khasra for the paddy crop of 1335 and danabandi papers for the rabi crop of 1335 and for both paddy and rabi crops of 1336 be now taken into evidence and considered by this Court, the Court must arrive at a different conclusion, since these papers establish the division of the paddy in 1335 and a much lower outturn at all times as well as the fact that the plaintiffs' papers were forged. Appellant claimed that the suit ought to be dismissed with costs.

5. Upon the application for review being admitted a counter-affidavit was filed by

the same Deoki Singh on behalf of the landlords. It entirely fails to give any explanation of the quantities shown in the batai khasra or to give any reason for the failure to produce the village papers in the trial Court. The deponent denies that batai took place, pointing to the fact that whereas appellants had receipts for previous years they had none for the years in suit and sets out the estate procedure as follows: An officer of the head-office makes a takhmina or eye-estimate of the produce upon which, if the crop is not divided, a suit is brought; if the crop be taken to the khalihan, an inspector from the head-office goes there and by measurement ascertains the landlords' share leaving it to the gomasta to realise it and give a receipt, and the gomasta also gives a receipt to the inspector for record in the office. In the present case, it is stated, the raiyat, after the ascertainment of the landlords' share, removed the entire amount and the deponent reported that rent was due, whereupon the plaintiffs brought the suit on the basis of the takhmina. But this explanation is, in the circumstances of the case, ridiculous, since Deoki Singh, when examined in Court, deposed that he and Sheobhajan Lal made the takhmina and he proved the takhmina papers implying that these papers showed the produce; whereas, of course, even assuming that there had been a takhmina, the batai khasra shows the actual produce ascertained by measurement. He also deposed that the batai khasras of his time were at the kachahri of the plaintiffs, implying that for that holding no batai khasra existed. In a further affidavit on behalf of the defendant appellant it is pointed out that in fact the servants of the landlord take away the landlord's share and never grant receipts till months later after approval thereof by the amla at the headquarters; the batai papers were deliberately withheld because they show that actual division was made and the landlords' share was received by the landlords through the amla who signed the khasras, and it is denied that takhmina papers were ever prepared in this instance.

6. At the first hearing we held that these papers constituted new and important matter which the defendant could not with the exercise of due diligence bring on the record at the trial and granted a review of judgment. We called for the original khasra hatai of Rajoi from which the copy had been taken, and Mr. Mitter for the landlords engaged to bring the village papers of Rajoi in respect of which the defendant made application in July 1930; Most of those papers have now been produced, and we have admitted them in evidence without objection. We find that the original khasra batai for the paddy of 1335 agrees with the copy produced by the applicant, and in respect of the holding of the appellant it is signed by Deoki Singh gomasta and Bhairrolal patwari and initialed by the inspector Tribeni Prasad Singh, and that the other papers also are wholly inconsistent with the claim of the landlord as to the produce of the holding on that and the other occasions in suit.

7. As all the evidence is before us and as the Subordinate Judge has retired and the Munsif is about to become a Subordinate Judge and as the matter is an old one, it is in the interest of all that we should hear the appeal and determine the issues of fact necessary for the disposal of it which by reason of its failure to call

for the evidence required by the defendant were substantially not determined by the lower appellate Court, namely the quantity of the crop and the question of payment, rather than remand the appeal. The discussion on these points may be preceded by considering what the evidence for the landlord amounts to. He filed what purported to be his papers and he secured the evidence of a pleader commissioner as to the outturn of 1337-F. The only evidence adduced by the plaintiff in support of the papers which he filed, was that of his gomasta Deoki Singh. The witness supported the eye estimate as made by himself, but he is completely discredited by the existence of the batai khasra which is the plaintiffs' own document filed by them in another suit to show what the yield was and which is signed by the witness himself. He suppressed the fact that a batai khasra for the holding had been prepared and was signed by himself, the patwari and the inspector. At no stage of the trial did this witness suggest that though there had actually been a batai proceeding, the crop had been removed. Palpably nothing that such a witness states in favour of the plaintiffs' case can be accepted. To establish the plaintiffs' claim, there remain therefore only the estimate of the Commissioner, such admissions as have been made by the defendant and such inferences as can be drawn from the plaintiffs' papers unsupported by oral testimony.

8. In respect of quantity of produce, first consideration is due to the paddy crop of 1335. It is of course impossible to contend that the yield exceeded the figures found in the batai khasra. Those figures also establish how unsafe as a basis for decision as to the yield of 1335 is the estimate of the Commissioner as to the yield of 1337-F. or any other year. Mr. Mitter has candidly stated that there is no scope for a rent suit when there is a batai khasra since it is an account of realisation on the thrashing floor. Mr. S.M. Mullick, who also appeared for the landlords, concedes that the claim in the plaint as to the quantity of the paddy was "due to some mistake" and that the quantities shown in the batai khasra must, of course, be accepted. They certainly show the maximum that could be claimed. They also show a yield on substantially the same lines as the yield shown in khasras and receipts of other years. The figures in the batai khasra must therefore be accepted for the paddy of 1335 and on the basis of the figures of 1335 and those in similar khasras and receipts for previous years, which constitute the only safe evidence available as to the paddy produce of 1336, the yield of paddy in that year must be found to be the same as in 1335. The Commissioner's estimate of the crops in 1337, even if made in the raiyat's presence, stands condemned when compared with the actual yield of paddy in 1335 and cannot be relied upon to any extent. With regard to the rabi crops, the only finding that can possibly be arrived at on the evidence is that the quantity of produce in each year is in accordance with the admission of the defendant.

9. On the question of payment, Mr. Mitter's admission has been given above. Mr. S.M. Mullick makes the suggestion feebly that the batai khasra was not conclusive in the absence of receipts which, be argued, are given in the estate. But Mr. Mitter's admission mentioned above is entirely in accordance with the

facts. A batai khasra invariably connotes actual division, and, as has been pointed out, the suggestion of the plaintiffs that the raiyat, a Kayastha too, had forcibly removed the crops was never made until the landlords and their amlas had been caught out. The defendant's evidence closely accords with the probabilities and must be accepted that the division actually took place and that it is the custom in this estate that the receipts are not given at the time of division on some such plea as that they will be forthcoming after approval by the amla at the headquarters or, as a defence witness deposed in this case, simply that the receipt book is not available being at head quarters. It being beyond doubt that the paddy crop of 1335 was divided and that both the village and headquarters staff of the landlord were well aware of the fact, the suit against the raiyat could only have been brought from an ulterior motive. That motive manifestly had reference to the proposed commutation of the produce rent and the rate of commutation which was then in controversy between the parties. It may be noted that commutation has actually taken place on a subsequent application by the raiyat u/s 40, Ben. Ten. Act, the inflated yield decreed in the present litigation being utilised in the Revenue Court to the serious disadvantage of the raiyat in respect of the amount of rent settled on commutation.

10. The question of division of paddy in 1336 and of rabi in both years is more difficult. The evidence of payment adduced on behalf of the raiyat is cogent enough, especially in the absence of any credible evidence on the part of the landlords. The Courts below have disbelieved the defendant's evidence substantially because of the absence of receipts; but that the absence of a receipt is not a sound ground for discrediting this evidence is, as has already appeared, abundantly clear with regard to the paddy crop of 1335. Receipts are supposed to be given, but they are in fact given at the convenience and at the pleasure of the amlas of the landlord who are in a position to put off the raiyat by such a statement as that the receipt book is at headquarters. When there is any reason to do so, as there was in the present case owing to the dispute as to the rent to be fixed on commutation, the receipt for the bhaoli rent can readily be withheld altogether; that is certainly what took place in regard to the paddy of 1335. On careful consideration it would appear that it also took place, as the witness deposes, with regard to the other produce in suit and that the landlord first put pressure on the raiyat to agree to an inflated rent on commutation and on the raiyat's refusal the takhmina papers were fabricated, and the relevant papers showing actual division of the crop were suppressed and the present suit instituted against the raiyat for rent which had been paid and at an unconscionable false calculation. Accepting, therefore, the only untainted evidence on record, I would hold that the paddy crop of 1336 and the rabi crops of both years in suit were realised by division and that nothing was due to the plaintiffs when they brought their false suit at monstrously inflated rates of produce. The issue of payment is, therefore, found in favour of the defendant-appellant. Upon this view the appeal is allowed and the suit is dismissed with costs throughout. The suit having been instituted without reasonable and

probable cause, the defendant is, under the provisions of Section 68(2), Ben. Ten. Act, awarded damages of twenty-five per cent. of the whole amount claimed. We trust that Munsifs and appellate Courts in the districts will, in dealing with bhaoli suits and especially those of the district of Gaya, take warning from this case in respect not only of this landlord but of all others who claim on the basis of takhmina papers and make difficulties as to the production of village papers and the best oral evidence. An unwholesome practice has prevailed fairly generally of failing to grant receipts promptly, if at all, for produce rent and then suing for the rent paid if the raiyat seemed to be what the landlord chose to regard as "recalcitrant" or contemplated an application u/s 40, Ben. Ten. Act. The scope of the practice will, it may be tested, become attenuated under the amendment reducing the limitation for suits claiming produce rent. The present case is also a good illustration of grossly inflated demand by the landlord and of an absurd report by a pleader commissioner such as ought not to impose upon a circumspect judicial officer. It is probably one of many cases, distinguished from others only by the fact that the raiyat was in a position to avail himself of the lucky chance whereby the papers of the landlords which the Courts below permitted them to withhold, forgetfully were produced in Court in other litigation to the present confusion of the landlords and their amlas. They have, however, not heard the last of the matter. The village papers will not be returned to the plaintiffs without the special order of this Court.

James, J.

11. I agree entirely.