

(1933) 11 PAT CK 0004
In the Patna High Court

Ram Prasad Singh

APPELLANT

Vs

Mohan Mandal and Others

RESPONDENT

Date of Decision : 21-11-1933

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : AIR 1934 Patna 524

Hon'ble Judges : Mohammad Noor, J

Bench : Division Bench

Judgement

Mohammad Noor, J.—This is an appeal against a decision of the District Judge of Manbhum, partly affirming and partly reversing a decision of the Munsif of Purulia. The facts are these. The plaintiff-appellant instituted a suit for recovery of possession of certain land which he claimed to be a part of his tabedari tenure in village Sirkabad appertaining to Pargana Kasaipar District Manbhum, the case being that the tabedari tenure was inalienable and succession to it was governed by the rule of lineal primogeniture. He alleged that the land in suit was part of the khorposh land of the junior members of his family which reverted to him on their line becoming extinct. He further alleged that the junior members without any right created encumbrances in favour of the defendants or their ancestors and on the reversion of the khorposh tenure to him he was entitled to avoid them. The suit was for recovery of possession by annulling these encumbrances. There were twenty-three defendants in the suit.

2. The learned Munsif dismissed the suit against defendants 21 to 23 on the ground that those defendants had occupancy rights in land in their possession. He however decreed it against defendants Nos. 1 to 20. Two appeals against this decree were then preferred to the District Judge of Manbhum. Appeal No. 309 of 1929 was on behalf of defendants Nos. 2 to 10 and Appeal No. 323 of 1929 was on behalf of the plaintiff against the defendants Nos. 21 to 23. The learned District Judge decreed the appeal of the defendants, and dismissed that of the plaintiff. In effect he seems to have dismissed the entire suit of the plaintiff. I will

have to revert to this point later on. The plaintiff has now preferred two second appeals against the decrees of the learned District Judge passed in the two appeals aforesaid. Appeal No. 1252 of 1931 relates to that part of the suit which affects defendants Nos. 21 to 23.

3. This appeal is not pressed, and it is obvious that there is no merit in it inasmuch as there is a concurrent finding of fact that so far as the defendants are concerned they are holding the land as raiyats, and have acquired occupancy rights therein.

The main controversy is about the points which arise in Appeal No. 1251 of 1931. The learned Munsif decreed the plaintiff's suit holding that succession to tabedari tenures in general is governed by the rule of lineal primogeniture to which inalienability and impartibility is a necessary incident. He held that the status of the junior members of the family of the plaintiff who were holding the land and who created the encumbrances in dispute, must have been that of a khorposhdar because the tenure being impartible, they could not have been share-holders.

4. The learned District Judge seems to have taken quite a different view. These jagirs and tenures in the estate of Pachet in Manbhum were Police service lands, the services being renderable to Government. It is obvious that as long as the tenures were service tenures for the performance of Police duties, it was necessary that succession should be by lineal primogeniture, and impartibility and inalienability should be the incidents attached to them. Now it appears that in 1881 the Government issued a notification dispensing with the service which had to be rendered by the jagirdars and other Police service tenure-holders. An argument was advanced before the learned District Judge that as the services were no longer renderable in respect of the tabedari tenure, the incident of inalienability disappeared as the notification itself indicates and consequently the impartibility also went along with it.

5. If the learned District Judge would have accepted this contention of the defendants he would certainly have been wrong, but a careful reading of his judgment leaves no room for doubt that he has not accepted that contention. He has incidentally referred to the notification of 1881 and proceeded to decide the case on evidence of this case. He has held that the tenures not being service tenures now, the service having been withheld more than 50 years ago, it was for the plaintiff to establish that the defendant vendors were khorposhdars and not share-holders in the tenure. The learned District Judge then proceeded to examine the evidence in the case and came to the conclusion that the plaintiff failed to establish that the grantors of the defendants were khorposhdars.

6. The relevant portions of the judgment of the learned District Judge are these:

There is no document or satisfactory evidence to show that Natabar Singh and Chunu Singh were merely khorposhdars and that their tenures were resumable either on their death or on the extinction of their lives.

Later on he says:

I think it is for the plaintiff, before he can resume, to show clearly that in this particular case the relatives of the tabedar held only khorposh grants and not as share-holders.

Further on, speaking of the plaintiff he says:

He has not established that Natabar Singh and Chunu and their descendants were only holders of maintenance grants with no permanent interest; rather the documents in the case seem to show that they were his share-holders with the ordinary rights of alienation.

Now these are clear findings of fact and cannot be disturbed in second appeal and on these, in my opinion, no question of law arises and, therefore, Appeal No. 1251 so far as it relates to defendants Nos. 2 to 10 must also be dismissed.

7. There is one thing which requires consideration. As I have said that defendants Nos. 1 and 22 to 20(?) against whom a decree was passed by the learned Munsif, did not appeal to the learned District Judge and the appeal was only on behalf of defendants Nos. 2 to 10 and that appeal was, as I have said, No. 309 of 1929. The learned District Judge in the concluding portion of the judgment says as follows:

Appeal No. 309 must therefore be allowed and the suit dismissed with costs to the appellants throughout.

8. Obviously the learned District Judge meant that the appeal of the appellant defendants was to be allowed and the suit, so far as it relates to them, was to be dismissed and costs were to be allowed to them; but the wording of the judgment may lead one to think that the entire suit was dismissed and that perhaps the learned District Judge was exercising his power under Order 41, Rule 33, of the CPC and I am informed that the decree has been prepared on that basis. If so, that decree must be varied. The decree of learned Munsif as against defendants Nos. 1 and 11 to 20 who had not appealed to the learned District Judge and who had a distinct and separate interest in the subject matter of the suit apart from the interest of other defendants, will stand and the decree of the learned District Judge so far as he appears to have dismissed the suit against them will be vacated. As was held in this Court in the case of Kesho Prasad Singh v. Narayan Dayal 1925 Pat 285, Order XLI, Rule 33 is intended, speaking generally, to enable the appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the trial Courts, but it ought not to be applied to cases where there has been a distinct and separate decree against those defendants who have not chosen to appeal.

9. The result is that Second Appeal No. 1252 of 1931, is dismissed with costs. Second Appeal No. 1251 of 1931 is allowed in part. The decree of the learned

District Judge so far as it dismissed the suit against defendants Nos. 2 to 10 will stand, and those defendants who have entered appearance will get their costs. The decree so far as it dismisses the suit against defendants Nos. 1 and 11 to 20 is reversed and the decree of the learned Munsif to that extent is restored. As these defendants had not appealed to the District Judge and they have entered no appearance in this Court there will be no order for costs.