

(1943) 04 PAT CK 0006

In the Patna High Court

Sadhu Sharan Singh and Another

APPELLANT

Vs

Deonath Saran Rai @ Bacha Babu and Others

RESPONDENT

Date of Decision : 02-04-1943

Acts Referred:

Bihar Tenancy Act, 1885 — Section 49

Citation : AIR 1943 Patna 206

Hon'ble Judges : Fazl Ali, C.J.;Sinha, J;Chatterji, J

Bench : Full Bench

Judgement

Sinha, J.—The facts culminating in this Letters Patent appeal from the judgment of Agarwala J. are as follows: The plaintiffs-appellants are recorded in the record of rights as raiyats in respect of the lands in dispute, being holding No. 117 in village Dekuli, pargana Madhal, within the jurisdiction of the Munsif of Gopalgunj, in the district of Saran. Under the plaintiffs, the sole original defendant, Gaya Singh, was recorded as an under-raiyat in respect of the sikmi Khata No. 63 with a note in the remarks column that the under-raiyat had rights of occupancy in the lands aforesaid. It appears further that the recorded under. raiyat Gaya Singh executed two deeds of gift in the year 1934, giving away his moiety share in Sikmi Khata No. 63 to Deonath Saran Rai alias Bacha Babu, his daughter's son, and to Chandrasekhar Prasad, his son-in-law. The plaintiffs, landlords of Gaya Singh, do not seem to have taken any notice of this transaction said to have been effected by the two deeds of gift aforesaid. They appear to have treated the under-raiyati interest of Gaya Singh as subsisting inasmuch as they purported to serve a notice u/s 49, Bihar Tenancy Act, on 23rd March 1936, requiring him to give up possession by 30th Baisakh 1343, Fasli, corresponding to 6th May 1936. The plaintiffs brought the present suit on 25th March 1938, for ejectment of Gaya Singh who was the sole defendant in the suit on the ground that he had refused to quit the land in spite of the service of the notice aforesaid.

2. Gaya Singh contested the suit on various grounds, of which we need take notice, for the purposes of this appeal, of the following ones only: (1) that the

suit was bad for defect of parties inasmuch as he had walked out of the holding in which he had only a moiety share, the other moiety belonging to his agnate Sheodhar Singh, who was a necessary party to the suit: (2) that his donees aforesaid were in possession by Virtue of the deeds of gift aforesaid, and they were also necessary parties to the action; (3) that he had occupancy rights in the land in question which had been recognised by the survey authorities both at the cadastral survey in the year 1900 and the revisional survey in the year 1918; and (4) that the notice purporting to be u/s 49 Bihar Tenancy Act, was not in accordance with law.

3. Before the suit came on for actual hearing, the original defendant Gaya Singh died on 10th May 1938, and the plaintiffs substituted as his heirs and legal representatives his two donees aforesaid as also his daughter. It may be noted at this stage that the plaintiffs' cause of action, as alleged in the plaint, was not that the interest of an under-raiyat being non-transferable, he had abandoned his holding by executing the two deeds of gift aforesaid; but that Gaya Singh had become a trespasser after the service of the notice aforesaid u/s 49, Bihar Tenancy Act. In other words, this was a suit under the provisions of the Bihar Tenancy Act and not a mere suit in ejectment under the general law. This distinction has got to be borne in mind in view of the important consequences which follow therefrom as would appear hereinafter. The Court of first instance decreed the suit on the findings that the original defendant Gaya Singh was a mere under-raiyat and that the entry in the record of rights to the effect that he had occupancy rights in the land had been proved to be incorrect that there was no defect of parties as it had not been proved that Sheodhar Singh had really a moiety share in the holding in question; and lastly, that the notice u/s 49 was proper, and duly served. There was an appeal from the decision of the trial Court on behalf of the donees aforesaid of Gaya Singh who had been substituted on his death on the record of the case as defendants. Before the appellate Court also, the same contentions as had been raised at the trial were reiterated. The lower appellate Court agreed with the findings aforesaid of the trial Court. But another argument seems to have been advanced successfully on behalf of the plaintiffs, as would appear from the following paragraph in the judgment of the lower appellate Court:

An under-tenancy is neither heritable nor transferable and hence the deeds of gift executed by Gaya Singh (Exs. C and C (1)) will be deemed to be invalid documents. Defendants 1 and 4 cannot acquire any interest in the holding by virtue of those deeds and they are liable to be ejected as mere trespassers without a notice u/s 49. The interest of an under-raiyat not being heritable terminates after his death and in the present case also Gaya Singh being dead, his under-raiyati interest in the holding in dispute terminated after his death and the plaintiffs are entitled to get khas possession of the land.

4. Further, it may be noted that, at the time the case was argued before the lower appellate Court and the judgment delivered by the Court on 10th April

1940, the Bihar Tenancy (Amendment) Act (Bihar Act, 11 of 1938), had come into force on 10th December 1938. Hence, before the lower appellate Court the question of the applicability of the provisions introduced by the Amending Act was discussed, and the Court made the following observations in that connexion:

My attention was drawn to Section 48A, Amended Bihar Tenancy Act of 1938. This section lays down that every person who for a period of 12 years whether wholly or partly, before or after the commencement of the Bihar Tenancy Amendment Act, 1938, has continuously held land as an under-raiyat in any village, whether under a lease or otherwise, shall be deemed to have acquired, on the expiration of that period, a right of occupancy in the land which he has so held for the said period. This section is new and it provides for acquisition of occupancy right by an under-raiyat. The notice in this case was served, on Gaya Singh on 23rd March:1936 that is long before the Bihar Tenancy Amendment Act come into force. At the date of the service of the notice Section 49 contained provisions for the ejectment of under-raiyats and the plaintiffs in compliance with those provisions served a notice to quit. Therefore, the tenancy of Gaya Singh terminated after the service of the notice on him. The notice was served on 23rd March 1936 and Gaya Singh ought to have quitted the land in Jeth 1344 Fasli. 30th Jeth 1344 Fasli would correspond to 23rd June 1937. Therefore, from 1st Asarh 1344 which would correspond to 23rd June 1937 Gaya Singh became trespasser., The new Section 48A will not apply to his case as he was not holding the land as an under-raiyat on the date the Amended Act came into force.

5. From the concurrent decisions of the Courts below the donees aforesaid brought a second appeal to this Court, being Second Appeal No. 536 of 1940, which was heard and decided by Agarwala J. Following the Division Bench decision of this Court reported in Agin Singh and Another Vs. Bhudeo Singh and Another, the learned Judge of this Court held that Section 48A, Bihar Tenancy Act, applied to the facts of the present case and that the fact of Gaya Singh's death did not make any difference to the application of the section. In that view of the ease, he allowed the appeal and dismissed the suit with costs throughout. He also granted leave to appeal under the Letters Patent. This Letters Patent appeal has been placed for hearing by a Full Bench in view of the important considerations arising in this appeal.

6. At the outset it may be emphasised that the cause of action alleged in the plaint is not that the tenant had made an unauthorised transfer by the deeds of gift aforesaid; and therefore, made himself liable to ejectment. As a matter of fact, the donees were not parties to the suit as originally framed. They have been brought on the record of this case only as the heirs and legal representatives of the original defendant, Gaya Singh, after his death during the pendency of the suit in the trial Court. If that had been the cause of action for the suit it would have been a suit for ejectment of the transferees aforesaid, not under the Bihar Tenancy Act, but under the general law, and different considerations would have arisen. But this suit was based on the allegation that after service of the required

notice u/s 49, Bihar Tenancy Act, (before the amendments introduced by Act 11 of 1938) the under-raiyat had refused to vacate the land and was, therefore, liable to be ejected as a trespasser. It is this case which we have to deal with in this appeal. The first question which arises for decision in this appeal is whether Section 48A, Bihar Tenancy Act, which was introduced by the Bihar Act 11 of 1938 and which came into force on 10th December 1938, could apply to the present suit. Section 48A runs as follows:

Every person who, for a period of twelve years, whether wholly or partly, before or after the commencement of the Bihar Tenancy (Amendment) Act, 1938, has continuously held land as an under-raiyat in any village, whether under a lease or otherwise, shall be deemed to have acquired, on the expiration of that period, a right of occupancy in the land which he has so held for the said period.

7. This very question came up for decision before a Division Bench of this Court in *Agin Singh and Another Vs. Bhudeo Singh and Another*, . Their Lordships, Rowland and Chatterji JJ. relying upon the cases relating to the retrospective operation of Section 26N, Bihar Tenancy Act, held that Section 48A of the Act would apply to pending cases, even though the under-raiyat had been ejected in pursuance of the decree of the Court which was then under second appeal in the High Court at the time the Act came into force. This case was followed by *Agarwala J.*, sitting singly in *Jai Narain Raut and Others Vs. Mt. Dhaneshari and Others*, . The same question was discussed in another Division Bench ruling of this Court in *Bhagwari Prasad Vs. Sahadeo Upadhaya*, . Their Lordships of the Division Bench consisting of Harries C.J. and Fazl Ali J. held that Section 48A, Bihar Tenancy Act, was retrospective and applied to a pending action, and that the object of the section was to quiet titles which were more than twelve years old and to ensure, that, if during those twelve years the under-raiyat had not finally been ejected, he will have the right to remain on the land as if he was an occupancy tenant. Section 48A, they held further, could be invoked as much to affirm a decree under appeal as to reverse one which may have been valid at the time it was passed. Another decision of *Agarwala J.* sitting singly, on the same point, came up before the Letters Patent Bench consisting of Harries C.J. and Ramcharitar Sah v. Doma Mian 1942 C.W.N. 75 . Their Lordships, following the previous two decisions of the Division Bench referred to above, applied the provisions of Section 48A, Tenancy Act, to a case where the notice to quit had been served before the Act came into force. It will thus be clear that there is a large body of judicial opinion in favour of the view that Section 48A, Bihar Tenancy Act, is retrospective, in its operation in the sense that it will protect an under-raiyat who has not been ejected by a decree which has not become final between the parties.

8. In other words, the section can be applied to cases in which a decree for ejectment has been passed in favour of the landlord, but which was pending in appeal at the date the Act came into force. Whether the section can be invoked by a tenant who had already been ejected out of Court or through Court before

the Act came into force is not a question before us, and therefore, need not detain us. In my opinion, giving effect to the plain meaning of the words of the section, there is no doubt that it was meant to protect from ejectment all under-raiyats whose rights were still in controversy in a Court of law and who had completed the period of twelve years occupation, either wholly before the time the Act came into force, or partly before and partly after the coming into operation of the Act. As a matter of fact, counsel for the appellant did not urge before us that the previous decisions of this Court referred to above had been wrongly decided.

9. But it has been urged on behalf of the d appellant that as Gaya Singh had died on 10th May 1938, before the Act came into force, there was no interest left upon which the Act could operate inasmuch as, under the law as it stood before the amendment the interest of an under raiyat was neither transferable nor heritable. It was, further, contended that the words used in Section 48A, namely, (omitting the unnecessary words) "every person who has continuously held land as an under-raiyat" show that the Legislature intended that the tenant whose rights are in controversy should have been in existence at the date the Act came into force. Otherwise, the Legislature would have used the word "had" instead of "has". The answer to these contentions is that an Act which, in terms, like the Act in question, is retrospective in effect, has got to be applied at the date of the decision of the Court with reference to the state of things in existence at the date of the suit. As already indicated, the plaintiffs sued in ejectment Gaya Singh who had been claiming, before and after the commencement of the suit, rights of occupancy in the land, and the Court has to decide whether his claim to hold the land with rights of occupancy in it was or was not well-founded at the date of the suit. The Court ordinarily will not take into consideration events happening after the institution of the suit. The plaintiffs did not withdraw their suit when Gaya Singh died.

10. On the other hand, they brought on the record of this case his heirs and legal representatives who contested the suit on the same grounds as had been taken by Gaya Singh himself. The Court has therefore to decide the rights and liabilities of the parties with reference to the date of the suit. Further, as already indicated, the plaintiffs did not sue the transferees in ejectment on the ground that they were trespassers and do not acquire any rights in the land by virtue of the deeds of gift aforesaid. If the suit had been so constituted, perhaps different considerations may have arisen. But the plaintiffs chose to ignore those transactions and to treat the interest of the under-raiyat, namely Gaya Singh, still subsisting when two years after the execution of the deeds of gift they served a notice to quit upon Gaya Singh u/s 49, Bihar Tenancy Act. Hence, in my opinion, the death, of Gaya Singh during the pendency of the suit in the trial Court would not make any difference to the legal position in this case.

11. The next question which arises is whether the mere service of notice u/s 49, Tenancy Act, had the effect of terminating the tenancy of Gaya Singh and making

him a trespasser only. If that is the effect of the service of the notice aforesaid, the tenancy would be deemed to have come to an end at the end of the agricultural year 1344 Fasli, the notice having been served on 23rd March 1936, corresponding to 15th Chait 1343, Fasli. But in this case the position is complicated in view of the fact that the tenant had been asserting, to the knowledge of the landlord since before the preparation of the record of rights in the year 1900, that he had occupancy rights in the land. He persisted in asserting that right even during the time of the preparation of the revisional record of rights in the year 1918. This right the survey authorities had recognised, and a note is to be found in the finally published khatian that Gaya Singh had acquired occupancy rights in the holding in question. Hence, in my opinion, it is not a simple case of an under-raiyat whose rights could be terminated merely by serving a notice u/s 49, Bihar Tenancy Act. The record of rights has a statutory presumption of correctness, and the tenant had ample justification for holding on to the land even after the service of the notice, all the time claiming that he could not be ejected as he was not a mere under-raiyat, but had such rights in the land as are possessed by an occupancy raiyat. Whether this claim was right or wrong, and whether the entry in the record of rights was correct, are questions which had to be determined by the Court if and when the matter was brought for adjudication by the Court. Hence, in my opinion, there is no substance in the contention that the mere service of notice terminated the tenancy, and the cases in *Freeman v. Evans* (1922) 1 Ch. 36 and *Tayleur v. Wildin* (1868) 3 Ex. 303 which lay down that a tenancy from year to year is determined by six months notice to quit, do not apply to the facts and circumstances of the, present case.

12. Counsel for the appellants further contended that the interest of an under-raiyat having rights of occupancy in the land has not been made transferable, and consequently, the transfer by Gaya Singh by the deeds of gift aforesaid had the effect of forfeiting any rights that he had in the land. He has referred to the provisions of Section 48B, Amending Act, and, on the basis thereof, contended that it does not recognise in the under-raiyat having occupancy rights the right to transfer the holding or a part thereof. In this connexion he has relied upon the decision of Rowland J. sitting singly, in *Abbas Khan and Another Vs. Sk. Mohammad Hussain and Another*, It has been laid down in that case that the words "occupancy holding" in Section 26A, Bihar Tenancy Act, refer to the holding of an occupancy raiyat and not to the land of a under-raiyat having a right of occupancy. The right of transfer of occupancy holding conferred by Section 26A on every raiyat does not enable an under-raiyat having an occupancy right in the land to transfer that land without his landlord's consent. It has also been said in that case that the Legislature has left the interest of an under-raiyat non-transferable as it was before the passing of the Amending Act in 1988. In this connexion I will only repeat what I have said before that-the suit out of which this appeal arises was not based on the ground that Gaya Singh had forfeited his rights as an under-raiyat as a consequence of the transfers

aforesaid. Counsel for the appellants contended that he could be permitted to amend his plaint so as to make this ground as the ground of attack on Gaya Singh's title, but, in my opinion, this amendment of the plaint, sought to be made at this late stage, is not permissible on this ground alone that it would change the cause of action for the suit and would mean a retrial of the whole case on a new footing after the substituted defendants are given an opportunity to file a fresh written statement.

13. In my opinion, such a course is neither permissible in law nor desirable in equity. It may, further, be noted that Section 48B, of the Amending Act, has made the interest of an under-raiyat having rights of occupancy in the land heritable. Gaya Singh has left his daughter as his heir, but she has not contested the suit, presumably because she may have been advised that the suit as framed, by the plaintiffs had no substance in it. To a plaint as sought to be amended now she may have a good defence. Hence, in my opinion, we would not be justified, in the circumstances of this case, to reopen the whole controversy by substituting another cause of action for the one set out in the plaint as it stands now. Hence, in my opinion, there is no substance in the contentions raised on behalf of the plaintiffs appellants. In the result the decision of the learned Single Judge must be affirmed and the suit dismissed with costs throughout.

Fazl Ali, C.J.

14. In *Bhagwari Prasad Vs. Sahadeo Upadhaya, and Ramcharitar Sah v. Doma Mian* (42) 1942 P.W.N. 75 all of them decided by Division Bench. In all these cases it has been consistently held that by reason of the words "shall be deemed to have acquired, on the expiration of that period a right of occupancy" Section 48A is clearly retrospective and applies to all persons who have held as under-raiyats and who have not been ejected when the Act came into force. The contention that the under-raiyati interest of Gaya Singh had already been determined by service of notice before the institution of the suit and therefore the rights of the parties could not be affected by Section 48A which came into force after such determination, is without any substance. The service of notice merely furnished a cause of action for the ejectment suit, because without it no suit would lie u/s 49. But the notice could not extinguish the under-raiyati interest of Gaya Singh. Section 89, Bihar Tenancy Act, provides: "No tenant shall be ejected from his tenure or holding except in execution of a decree." Until Gaya Singh was ejected in execution of a decree, his right could not be extinguished. Section 48A is, by express terms, made retrospective, and it has been held in the said previous decisions of this Court that it would apply to a pending action. There is no reason to dissent from the view taken in these decisions.

18. It has been found as a fact that Gaya Singh was in continuous possession of the disputed land as an under-raiyat for more than 12 years before the service of notice u/s 49. Consequently, by operation of Section 48A, he must be deemed to have acquired a right of occupancy in the land before the notice was served on

him u/s 49, the service of notice, therefore was quite ineffective and could not be made the basis of a suit for ejectment. In the next place, it has been argued that, in any event Section 48B can have no application, because Gaya Singh died before the section came into force, and he left no heritable interest. This argument assumes that the interest which he had at the time of his death was that of an under-raiyat, which was not heritable. But I have already shown that by operation of Section 48A he must be deemed to have acquired an occupancy right in the land before the institution of the suit. The crucial point of time with reference to which the rights of the parties must be determined is the date of the suit. At that date Gaya Singh must be deemed to have acquired a right of occupancy in the land u/s 48A, and therefore, when he died, his interest in the land devolved upon his heirs as if the land had been held by him as an occupancy raiyat, as laid down in Section 48B. Admittedly his daughter is his heir, and she was impleaded on his death as one of his legal representatives. The plaintiffs, there, fore, were not entitled to khas possession.

19. Lastly, it has been argued that Gaya Singh having made a gift of the disputed land to his daughter's son and son-in-law and the gift being invalid (even assuming that Section 48B was applicable), the plaintiffs are entitled to khas possession. But, in the first place, the basis of the suit was service of notice u/s 49 and not the invalid gift. In the second place, the daughter, being the heir and having succeeded to the occupancy right, the plaintiffs could not claim khas possession. In the last place, the gift was in respect of a half share of the disputed land and not the entire holding.

20. In my opinion, the decision of Agarwala J. is correct and I would dismiss the appeal with costs.