

(1942) 02 PAT CK 0011
In the Patna High Court

Sahdeo Singh and Others

APPELLANT

Vs

Jadu Mestar and Others

RESPONDENT

Date of Decision : 04-02-1942

Acts Referred:

Bihar Tenancy Act, 1885 — Section 23(2)(c), 25

Citation : AIR 1942 Patna 370

Hon'ble Judges : Rowland, J;Chatterji, J

Bench : Full Bench

Judgement

Rowland, J.—This second appeal refers to an area of only 6½ dhurs of land but has been referred to a Division Bench by Agarwala, J. as it raises a point of law of first impression. The appellants are the plaintiffs. They are the landlords of village Mathuritola within which defendants 2-5 had a holding Khata No. 121 with an area of 3 bighas or more. Out of this they sold 6½ dhurs to defendant 1 a resident of village Dehri by sale deed dated 21st February 1938. The transferee, in accordance with the procedure laid down in the Bihar Tenancy Act as recently amended, forwarded the mazarana money to the plaintiffs by money order which was accepted and the name of defendant 1 was given mutation in the Sherista of the plaintiffs in respect of the transferred land. Thereafter defendant 1 began to erect a house both on the area which he had purchased and also by encroachment on a portion of the gairmazrui land of the plaintiffs which is adjacent thereto. So the suit was brought to recover possession of the portion of the gairmazrui land which had been encroached, by demolishing that portion of the house which had been erected thereon. To this extent the suit has succeeded. Secondly, it was claimed not that the 6½ dhurs should be forfeited as u/s 25, Bihar Tenancy Act, but that the defendant should be restrained by an injunction from building a house on it, on the ground that the land had all along been in use for cultivation, and by erecting structures on it it will become unfit for cultivation. The Courts below on a reading of Section 23(2)(c), Bihar Tenancy Act, have held that the defendant was entitled to build a house on the land and that the plaintiffs were not entitled for the injunction asked for.

2. In second appeal it has been suggested that the defendant having built over all the area transferred to him is not a tenant within the meaning of the Act, that he no longer falls within the definition of a raiyat because he is no longer holding the land for the purpose of agriculture. Then it is said that by building on the entire area transferred to him he has used the land in a manner which renders it unfit for the purposes of the tenancy or impairs its value which he was not entitled to do, so that he is liable to be, if not ejected, at least restrained from the misuse complained of.

3. Before examining the provisions of Section 23 as amended in 1934 it may be convenient to refer to the state of the law before that amendment was made. The expression "tenant" is defined in Section 3(3) as meaning a person who holds land under another person, and is or but for a special contract would be, liable to pay rent for that land to that 1 person. "Rent" means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. There is nothing in these definitions to suggest that the existence of a tenancy or the relation between landlord and tenant is affected by the use to which the land is put. If a tenancy is created for one purpose and the tenant uses it for another, then that will not of itself terminate the tenancy though it may give the aggrieved party a cause of action for terminating it. In any case in the present suit the landlord had not prayed for ejectment. He has not repudiated the tenancy and I find no substance in the contention which was first advanced in argument before us that there is now no subsisting tenancy. Raiyat is defined in Section 5(2) as meaning "primarily a person, who has acquired a right to hold land for the purpose of cultivating it" and including also the successors-in-interest of persons who have acquired such a right and an explanation is added that "where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it."

4. Undoubtedly the defendants 2-5 were raiyats of the land in suit. This is not disputed. Undoubtedly defendant 1 is the successor-in-interest of the defendants 2-5 so far as regards the land in suit. The tenancy of defendants 2-5 was originally acquired obviously for the purpose of cultivation.

5. Now I turn to consider the rights of an occupancy raiyat in the matter of building on his holding. The earliest decision that has been shown to us is one of the Calcutta High Court in *Nyamutoollah Ostagur v. Gobind Churn Dutt* (66) 6 W.R 40 it was said:

We think it clear that every man possessed, of a right to hold the land permanently--that is, of a right of occupancy,--can do what he likes with the land so long as he does not injure it to the zemindar's detriment.

It was further said:

Plaintiff in no way suffers by the building of a pucca house on the land of the

occupancy ryot; on the contrary, the land is rendered more valuable.

6. Consistently with this decision Section 23, Ben. Ten. Act, as originally enacted, provided that "when a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy; but shall not be entitled to out down trees in contravention of any local custom."

7. The right to build a house was dealt with in Sections 76 and 77 as a part of the right to make improvements. In Section 76(2)(f) the erection of a suitable dwelling house for the raiyat and his family, together with all necessary out offices was one of the things which were to be "presumed to be improvements" within the meaning of this section ; but Clause (3) of Section 76 made the reservation that, "no work executed by the raiyat of a holding shall be deemed to be an improvement for the purposes of this Act if it substantially diminishes the value of his landlord's property."

8. Among the cases decided under the old law we have been referred to Lal Sahoo v. Deo Narain Singh (78) 3 Cal. 781 in which an order was upheld restraining the transferee of land from an occupancy raiyat from building thereon. It had been held in the Court below that occupancy rights were not transferable. Some observations were cited by Ainslie J, from Jugut Chander Roy v. Eshan Chander (75) 24 W.R. 220 and his Lordship observed:

The statutory right of occupancy cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted, and although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment but it was pointed out that in Jugut Chander Roy v. Eshan Chander (75) 24 W.R. 220 what was done was to remand the case for inquiry among other things whether any and what express injury resulted to the plaintiff from the acts complained of.

9. After the passing of the Bengal Tenancy Act, in Surendra Narain Singh v. Hari Mohan Misser (04) 31 Cal. 174 the High Court had granted the landlord a permanent injunction restraining his tenant from erecting a factory for the preparation of indigo, grown on the land of the tenancy, on the ground that the erection of an indigo factory on a part of such land must render it unfit for the purposes of the tenancy because the purposes of the tenancy being the cultivation of the crops, that is agricultural purposes, the portion of the land built upon will evidently be unfit for such purposes. But this decision was reversed by the Privy Council in Hari Mohan Misser v. Surendra Narayan Singh (07) 34 Cal. 718 Sir Arthur Wilson observing that the proposition of law was laid down too broadly, with-out reference to the circumstances of individual cases, "without regard to the size of the holding, or of the area withdrawn from actual cultivation, or to the effect of such withdrawal upon the fitness of the holding,

taken as a whole, for profitable cultivation,"

10. It may be taken that these matters were to be borne in mind in deciding whether there had been such misuse of the land of a tenancy as rendered it unfit for the purpose of the tenancy taken as a whole. In *Rjkishore Mandal v. Rajani Kant* AIR 1917 Cal 280 where a portion of a holding had been withdrawn from actual cultivation and it was proposed by the defendant to establish a market thereon and to erect permanent structures for that purpose an order was made for an injunction restraining the defendant from erecting buildings on the disputed land and holding a market thereon. In this Court in *Mahadeo Rai v. Sheogulam Mahto* AIR 1917 Pat 150 a landlord sued to eject a tenant who out of a holding of 14 bighas and odd had used 7½ dhurs as the site of a kutcha pucca house intended either for purposes of a dwelling house or as a shed for cattle. The plaintiff alleged that the defendants in erecting the house in question had used the holding for purposes inconsistent with the nature of the tenancy. The High Court accepted the findings of the lower Courts that the erection of the house was an improvement and that the improvement was of a suitable character having regard to the nature of the tenancy. The case is relevant as showing the matters to which the Courts of fact might properly have regard in deciding such cases. Reference was made to Section 76 under which the erection of a suitable dwelling house for the raiyat was to be presumed to be an improvement unless the contrary is shown and it would not be deemed to be an improvement if it substantially diminished the value of the landlord's property.

11. Now, I turn to Section 23 of the Act as amended in 1934. Sub-clause (1) repeats the material portion of the old Section 23 omitting the reservation that the raiyat shall not be entitled to cut down trees in contravention of local custom. As to "the erection of buildings for the domestic or agricultural purposes of the raiyat and his family" this is a matter provided for by Sub-section (2) and this Sub-section says in the broadest terms that this "shall not be deemed to impair the value of the land materially or to render it unfit for the purposes of the tenancy." It is no longer open to the Courts to speculate or to receive evidence to show that the erection of buildings (not imerely a dwelling house as in Section 76) for the domestic or agricultural purposes of the raiyat and his family is or is not an improvement or does or does not impair the value of the land or does or does not render it unfit for the purposes of the tenancy. The section says it shall not be deemed to do these things. The question what proportion of the area of the tenancy is occupied by the structures erected thereon is no longer a point; on which such a case has not to be decided.

12. A further point is taken that what has been done in this case is something more than what is authorised by Section 23, that there has been in fact a conversion of the holding to a purpose that is not agricultural. In answer to this argument, Mr. A.N. Lai suggested that the purpose of the tenancy as between himself and the landlord was to be considered to be the erection of a house because the area is so small that the landlord might know, when the transfer fee

is offered to him, that the purchaser must be intending to use it for the erection of a house so that there was between him and his landlord a tenancy for the erection of a house and there has been no change by him in the purpose of the tenancy. I do not think that any such implications can be read into the mere acceptance by the landlord of the transfer fee. u/s 26A(2) of the Act, as it now stands, it was not open to the landlord to refuse the transfer fee. It must, therefore, be considered that as between the parties the purpose of the tenancy was an agricultural tenancy of the ordinary kind: but the purposes of an agricultural tenancy include the erection of a building for the domestic purposes of the raiyat and there is no finding of either of the Courts below that the holding has been converted to any other purpose. The question what would be the consequences if the holding had been so converted (for instance to use as a shop or a factory) does not arise in this case and I would reserve my opinion as to that. On the record as it stands, there is nothing to show that the land in suit has been used for any other purpose than for the residence of the raiyat and that is a purpose covered by Section 23(2)(c). In the result I would dismiss the appeal with costs.

Chatterji, J.

I agree.