
(1973) 02 GAU CK 0008
In the Gauhati High Court
Case No : Second Appeal No. 4 of 1971

Smt. Suruji Upadhya

APPELLANT

Vs

Gostha Behari Das

RESPONDENT

Date of Decision : 02-02-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 9
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1974 Guw 5

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : G.S. Bhattacharjee, A.S. Bhattacharjee and G.C. Goswami, for the Appellant; N.M. Lahiri and B.M. Mahanta, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—In this second appeal the plaintiff Suruji Upadhya challenges the correctness and validity of the concurrent decrees of dismissal of her suit for khas possession of the land described in the schedule appended to the plaint passed by the Munsiff at Karimganj and the Assistant District Judge, Silchar.

2. According to the allegations made by the plaintiff her husband Tribhuban Upadhaya had purchased the land in dispute from the defendant Gostha Behari Das by a registered deed dated 7-12-58 and had let out the land to the vendor in his capacity as non-occupancy tenant on the same date against the payment of 20 maunds of paddy per annum. The defendant having made a default in the payment of the rent. Tribhuban Upadhaya filed the Rent Suit No. 15 of 1962 against the defendant and that suit ended in a decree based on compromise. On the death of Tribhuban Upadhaya. his estate, the plaintiff pleaded. was exclusively inherited by her, as she required the demised land for her own use after the death of her husband and since the period of lease mentioned in the Kabuliyat Ext. 1 had expired, she filed the suit culminating in this appeal on 6-6-67 for khas possession of the land on eviction of the defendant on whom she

had previously served a notice calling upon him to vacate the land by 13-4-67.

3. The suit was resisted by the defendant on diverse grounds, such as. it is not maintainable in the form laid, it is barred by time, waiver, estoppel and acquiescence, the plaintiff had not served any valid notice of ejectment on him, it is bad for non-joinder of parties and it is also shut out by the provisions of the Sylhet Tenancy Act, On merits, though the defendant admitted having sold the land to the plaintiff's husband but pleaded that it had been sold subject to the condition of re-purchase. He admitted further that he had entered into possession of the land as a tenant with effect from 7-12-58 on the term that he shall pay 20 maunds of paddy per annum by way of rent. He also conceded that the plaintiff's husband had sued him for recovery of Rs. 600/- as arrears of rent and that that suit resulted in a decree for Rs. 200/- on the basis of settlement reached between the parties. Another term of the compromise then reached, according to the defendant, was that the plaintiff's husband had agreed that he (the defendant) would continue in possession of the land "as tenant with jote right on condition of paying Chukti money at the rate of Rs. 100/- per annum instead of giving 20 maunds of paddy per year". This concession, the defendant urged, he had been able to extract from Tribhuban Upadhya as a consideration for his giving up the claim of re-purchase of the land for the price at which he had earlier sold it to him. The defendant pleaded that in view of the agreement reached between the parties on 18-2-1963 and on the basis of which the suit for recovery of rent was decided, the plaintiff has no right to claim his eviction from the land.

4. The trial Court settled the following issues between the parties:--

1. Is there any cause of action?
2. Is the suit maintainable in its present form?
3. Is the suit time barred?
4. Is the suit bad for estoppel, waiver and acquiescence?
5. Is the suit bad for want of service of valid notice?
6. Is the suit bad for defect of parties?
7. Is the plaintiff entitled to get a decree as claimed?
8. What relief, if any. is the plaintiff entitled to?

5. Under issue No. 2 the Munsiff held that the defendant is an Adhiar and not a tenant under the plaintiff and so the civil court has no jurisdiction to try the suit. The finding of the Court on issue No. 4 was that since in terms of the agreement reached between the parties at the time of the rent suit the amount of rent had been altered from 20 maunds of paddy per annum to a cash sum of Rs. 100. The plaintiff is estopped from claiming any relief on the basis of the Kabuliyat Ext. 1 executed between the parties on 7-12-1958. Issue No. 1 was also decided

against the plaintiff. However, the remaining issues were left undetermined on holding that in view of Court's findings on issues Nos. 2 and 4, they "do not arise". In consequence, the suit of the plaintiff was dismissed with costs.

6. An appeal by the plaintiff against the Munsiff's decree taken to the Court of the Assistant District Judge, Silchar, aborted, the latter having agreed with the former's findings that the status of Gostha Behari Das in respect of the suit land vis-a-vis the plaintiff is that of an Adhiar and not of a tenant and that as such the civil Court had no jurisdiction to try the suit.

7. The fate of this second appeal hangs by the reply to the question whether or not the defendant is an Adhiar as would be soon evident from the discussion of the relevant provisions of the Assam Adhiars Protection and Regulation Act, 1948. hereinafter called the Adhiar Act. Section 9 of the CPC provides that the Courts shall (subject to the provisions contained in the Code) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The Explanation appended to the Section runs: "A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies." The parties' counsel were not at issue on the point that the character of the dispute which arises for determination in this litigation is "of a civil nature". It therefore follows that the civil court shall have the jurisdiction to try the suit unless it is proved that its jurisdiction is barred either expressly or impliedly. It was contended by Sri N. M. Lahiri. who represented the defendant-respondent, that the jurisdiction of the civil court to try the present dispute is barred by the provisions of the Adhiar Act. Sri G. S. Bhattacharjee. who appeared for the plaintiff-appellant, urged on the other hand that the defendant being not an Adhiar but a tenant the jurisdiction of the civil court to try the suit is not ousted. Section 12 of the Adhiar Act states, inter alia, that no Civil Court shall entertain any suit or proceeding in respect of any matter which an Adhi Conciliation Board or a Revenue Officer is empowered to dispose of under this Act except as provided under this Act. To determine whether the matter in dispute is one which the Adhi Conciliation Board or a Revenue Officer is competent to dispose of, I have gone through the whole of the Act. Sub-section (1) of Section 5 of the Act provides that an Adhi Conciliation Board may, on application by the landlord and after due notice and enquiry as prescribed, order an Adhiar to cease to cultivate an Adhi land and to be evicted therefrom in the manner prescribed if the land is bona fide required by the landlord for his personal cultivation or that an Adhiar has failed to deliver within the prescribed time to his landlord such share or quantity of the produce as he was bound to give. The plaintiff had sought the aid of the civil court, as stated earlier, for eviction of the defendant on the grounds that she required the land personally and that the defendant had failed to deliver to her the agreed quantity of paddy. It looks obvious to me that the claim made by the plaintiff is of the nature which can surely be entertained and decided by the Adhi Conciliation Board u/s 5(1) of the Adhiar Act. As such, the jurisdiction of the civil court would

be barred u/s 12 of the Act as also u/s 9 of the CPC provided it can be said with definiteness that the defendant is an Adhiar.

8. According to clause (1) of Section 2 of the Adhiar Act, Adhiar "means a person who under the system generally known as Adhi (whether Guchiadhi/or Gutiadhi) barga, chukti, bhag or chukani cultivates the land of another person on condition of delivering a share or quantity of the produce of such land to that person". Sri Rhattacharjee submitted for the appellant that the defendant is not proved to be an Adhiar. that he is actually a tenant, and that as such the case falls within the scope of the Sylhet Tenancy Act. 1936 and so the plaintiff was well within his right in approaching the civil court for claiming eviction of the defendant on the two grounds set out in the plaint. It was also urged by Sri Bhattacharjee that the Adhiar Act does not operate in the permanently Settled Districts of the State of Assam. After a close study of the Adhiar Act and the Sylhet Tenancy Act. I have found both the submissions made by Sri Bhattacharjee as sans merit. The preamble of the Adhiar Act reads: "Whereas it is expedient to provide for the protection of tenants of agricultural lands paying rent in kind in the Province of Assam." Subsection (2) of Section 1 of the same Act states that the State Government may, by notification in the official Gazette, extend all or any of the provisions of this Act to agricultural lands in any district, local area or class of estates in the State of Assam where the Goalpara Tenancy Act. 1929. or the Assam (Temporarily Settled Districts) Tenancy Act, 1935. or the Sylhet Tenancy Act. 1936 is applicable. It is obvious that the Act can be made applicable to any District of Assam where, inter alia, the Sylhet Tenancy Act. 1936. is in force. It was actually the stand of Sri Bhattacharjee himself that the Sylhet Tenancy Act applies in the District of Cachar. and since he did not contend that the State Government had not issued a notification that the Act shall apply to that District the second of his two submissions under consideration falls through. There is no warrant for the proposition that the Act cannot apply to a Permanently-Settled District or that it cannot operate in those areas of Assam where the Sylhet Tenancy Act. 1936, is in force.

9. The fallacy underlying the first of the two submissions of Sri Bhattacharjee is that an Adhiar is not a tenant. That his stand is legally unsustainable is made manifest by the preamble and other provisions of the Adhiar Act. According to its preamble the Act was brought on the statute book of the State to provide for the protection of tenants of agricultural lands paying rent in kind in the Province of Assam. The definition of Adhiar (reproduced above) also makes it manifest that an Adhiar enters upon the land on the condition of delivering a share or quantity of the produce of such, land to the person under whom he cultivates the land as an Adhiar. The description of the person from whom the Adhiar takes the land is given as "landlord" in Section 5 of the Act. And "landlord" is defined in Section 2(5) of the Adhiar Act as the person directly under whom the Adhiar holds the land on condition of delivering a share or quantity of the produce thereof. Therefore there appears to be no room for doubt on the point that an Adhiar is a tenant though he pays the rent in kind and not in cash. In the Sylhet Tenancy Act

the expression "tenant" is defined in Section 3(15) 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 person. This definition is subject to an exception with which we are not concerned. An Explanation appended to this definition of "tenant" states that a person who cultivates the land of another person under the system generally known as "Adhi". "Barga" or "Bhag" on condition of delivering a share of the produce to that person or under the system known as "Chakran", "Kiran", "nonkar" "Etmander" or "Bhandari" on condition of rendering service to that person, is not a tenant unless?

(i) such person has been expressly admitted to be a tenant by his landlord in any document executed by him, or executed in his favour and accepted by him, or

(ii) he has been or is held by a Civil Court to be a tenant.

In Section 2(18) of the Sylhet Tenancy Act the expression "Rent" is defined to mean whatever is lawfully payable in money or in kind by a tenant on account of the use and occupation of the land held by the tenant. This definition of the expression "Rent" unmistakably brings out that the rent payable by a tenant can either be in cash or in kind and this definition accords with the generally accepted connotation of that expression. The definition of "tenant" given in Section 2(16) also yields the conclusion that but for the Explanation appended to it, even an Adhiar would be a tenant for the purpose of the Sylhet Tenancy Act. Therefore, I am driven to the conclusion, which clearly looks inescapable, that an Adhiar is also a tenant but his distinct qualification is that he pays the rent in kind. Another observation which must necessarily be made is that an Adhiar would also rank as a tenant for the purpose of the Sylhet Tenancy Act if he is expressly admitted to be a tenant of his landlord in any document executed by him, or executed in his favour and accepted by him, or, alternatively, he has been or is held by a Civil Court to be a tenant. The upshot of the discussion is that an Adhiar is a specie of the genus called tenant though he would not be considered as a tenant for the purpose of the Sylhet Tenancy Act unless he can bring his case within any of the two exceptions mentioned in the Explanation (added to Section 2(16) of that Act.

10. Probably, as it appeared during the course of arguments. Sri Bhattacharjee was confusing "tenancy" with "lease" as defined in Section 105 of the Transfer of Property Act. According to that Section, a lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. One of the distinctive ingredients of a lease of immoveable property is that there should be "transfer of a right to enjoy such property," and another is that that transfer should be "for a certain time." These are not the necessary ingredients of the tenancy. Therefore, if a particular transaction does not answer the description of lease, it may and can take the

shape of a tenancy. The expressions used in the Adhjar Act and the Sylhet Tenancy Act are "tenant" and "landlord" whereas according to Section 105 of the Transfer of Property Act the transferor is called the "lessor" and the transferee the "lessee". The phraseology used in the three enactments and the definition Sections thereof bring out the difference between lease and tenancy. Though the rights acquired by an individual may not necessarily tantamount to a lease, yet he cannot be denied the status of a tenant if the terms of the agreement entered into by him fall within the ambit of Section 2(1) of the Adhjar Act.

11. This brings me to the consideration of the question whether the agreement entered into between the defendant and the deceased husband of the plaintiff gives the former the status of an Adhjar. That agreement was incorporated in the writing marked Ext. 1. The document bears the heading "CHUKTIBHAGI DEED". The operative part of the document reads as under:--

This "Chukti Bhagi" deed is executed to the following effect:--

That with the intention of cultivating 9 1/4 bighas of your land (6 1/4 bighas in R. S. dag No. 22 of..... and 3 bighas in R. S. dag No. 35/446 of..... Mouza..... Pargana Pratapgarh, P. S. and Sub-Registry Patharkandi, District Caohar) for a period of 8 years, I execute this Chukti Bhagi Deed in favour of you and hereby promise that I shall pay to you 20 maunds of Sali paddy as annual Chukti paddy of the aforesaid land by the 30th day of Pous every year and shall take therefore receipt signed by you. Except such a receipt no other paper shall hold good as receipt for my payment of the paddy. If I do not pay the paddy within the prescribed time. I shall be legally bound to pay the same with compensation. I shall keep intact the boundary of the land. I shall not avoid payment of paddy on ground of any part of the land lying fallow. On expiry of the term. I shall not possess the land except on a fresh agreement. The present market value of the said paddy is Rs. 160.00.

12. The document clearly mentions that Gostha Behari Das had taken the land for a period of 8 years, that he had undertaken to pay 20 maunds of Sali paddy by way of annual Chukti paddy to Tribhuban Upadhya and that he would be bound to pay that much paddy even if the land lay fallow in any particular year. In the body of the document itself it is described as Chuktibhagi deed, This description of the document establishes that Gostha Behari Das had taken the land under the system generally known as Chukti or Bhagi. Further, he had agreed to pay the rent in kind respecting the land mentioned in the deed. Therefore, he is clearly an Adhjar. In the Rent suit filed by Tribhuban Upadhya against Gostha Behari Das in the year 1962. a compromise was arrived at between them. Ex. B is the copy of the compromise deed executed between the parties. In the last paragraph thereof the nature of the rent payable is stated to be "Chukti paddy". It looks obvious that not only the original agreement between the parties lends supports to the stand taken by the defendant, but the document executed between the parties four years after also affirms the correctness of that stand. I would therefore hold in agreement with the two

Courts below that the defendant is an Adhiar but I must hasten to add that an Adhiar is also a tenant though of a special category described in Section 2(1) of the Adhiar Act.

13. On behalf of the defendant-respondent the attention of this Court was invited to the decision in *Jovtish Ch. Nath v. Eidani Mea*. AIR 1963 Ass 49 (SB), in support of the submission that the defendant is an Adhiar. In the reported case the persons holding the land had taken settlement of it for growing crops by cultivation for a term of 8 months and had promised to pay to the owner of the land 80 1/2 maunds of Sali paddy. It was further agreed that if the paddy was not given within the stipulated time they shall be bound to deliver the same with compensation at the rate mentioned in the document and that in case they were unable to give the paddy they shall pay Rs. 100/- by way of price of the paddy. The argument urged on behalf of the owner before the Full Bench was that since the persons in occupation had undertaken to deliver Sali paddy by way of rent irrespective of the facts that they grew paddy or not and that they grew Sali paddy or any other variety of paddy, it could not be said that they had agreed to give the produce of the land and as such they could not be taken as Adhiars. The Full Bench held while repelling the argument that the agreement to pay 80 1/2 maunds of Sali paddy showed that the landlord intended that the tenants will grow Sali paddy and a Part of the produce will be given to the landlord. The Full Bench observed further that taking the document as a whole it could not be said that the intention of the landlord was not to get a part of the produce and that the mere fact that the quantity of paddy was specified did not establish that there was no agreement to the effect that paddy was to be given out of the produce. The facts of the case in hand are in all respects identical with those of the reported case and as such I am bound by the view taken by the Full Bench.

14. The last point taken by Sri Bhattacharjee was that the previous rent suit between the parties operates as *res judicata* on the point of the nature of the agreement made between them. It was urged by Sri Bhattacharjee that since the first suit had been decreed by the Civil Court, it necessarily follows that the relationship between the parties is of landlord and tenant and not of landlord and Adhiar. However, it is settled law that Section 11 of the CPC does not strictly apply to compromise decrees since it applies in terms only to suits and issues which have been heard and finally decided by a Court. A consent decree, it is equally well settled, does not operate as *res judicata* though a judgment by consent raises an estoppel between the parties as much as a Judgment whereby a decree is passed in exercise of Court's mind in a contested case. It is for the reason that a judgment by consent is intended to put an end to litigation between the parties in the same manner as a judgment which results from the decision of the Court after the matter has been fought out to the end. The Supreme Court held in the case of *Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others*, . that a consent decree is as binding upon the parties thereto as a decree passed by *invitum*. However, before a consent decree tantamounts to an estoppel, it is necessary that the question

raised in the subsequent suit was present to the minds of the parties at the time the previous suit was decided and it was actually dealt with by the consent decree. Nothing said in the compromise (vide copy Ext. B) reached between the parties in the previous suit, it will be noticed, indicates that there was any contest between the parties about the nature of the agreement Ex. 1 concluded between them. Moreover, a perusal of the Adhjar Act will show that the Adhjar Conciliation Board or a Revenue Officer is not vested with power to pass a decree for recovery of the quantity of produce which the Adhjar owes to the landlord and so the jurisdiction of the Civil Court to entertain and decide such a suit is not barred. As such, the previous decision does not operate as *res judicata* in the present suit.

15. No other point was urged by Sri Bhattacharjee in support of the appeal.

16. In the result the appeal fails and stands dismissed. However, I direct that the parties shall bear their own costs in all the three Courts.