

(1964) 11 OHC CK 0009
In the Orissa High Court
Case No : First Appeal No. 81 of 1962

Sribatcha Padhano and after him Bauri Padhan and Others	APPELLANT
Vs	
Narasu Naik and Others	RESPONDENT

Date of Decision : 23-11-1964

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145, 145(4), 146

Citation : (1965) 31 CLT 1153

Hon'ble Judges : Narsimham, C.J.; Das, J

Bench : Division Bench

Advocate : B.K. Pal, B.K. Panigrahi, G.B. Patnaik and Bijoy Pal, for the Appellant; R.C. Misra and P.C. Mohapatra, for the Respondent

Judgement

Narsimham, C.J.—This is an appeal from the judgment of the Additional Subordinate Judge of Berhampur, dismissing the Plaintiffs' suit for recovery of possession of certain lands in village Lokamari and for other consequential reliefs.

2. The disputed lands have been described in the schedule attached to the plaint and their total area is 13.48 acres. The lands are known as Matho Billo, Kheranjia and Mandakinia. Village Lakkamari originally formed part of the former Zamindari of Bodogodo, prior to its abolition. It is admitted by both parties that as early as 1868, the Zamindar of Bodogodo created a Dharmilla inam (Ext. L) endowing the lands in favour of a deity known as Balaji Mahaprabhu. According to the Plaintiffs, however, the inam was created only in respect of the rajabhagam right of the Zamindar (landlord's share) whereas the Plaintiffs' ancestors who were in actual possession were left in possession as raiyati. According to the Defendants however both the kudivaram and melwaram rights were endowed in favour of the Deity. The lands were possessed by the archakas of the Deity for several years. But it is admitted by both sides that the Zamindar resumed the inam, took the Deity inside his Palace and converted these lands into what are known as "Santa Kheta" lands. The exact date when this resumption took place is not clear—the Defendants asserting that it took place in 1913 and the Plaintiffs, asserting that

it took place in or about 1930 when the Zamindar became apprehensive that with the coming into force of the Madras Hindu Religious Endowments Act the Endowments Department may deprive him of any control over the lands. For the purpose of this litigation, however, it may be assumed that the resumption took place near about 1930. Thereafter, the Zamindar used to realise rajabhagam through various lessees known as Guttadars, who were given the right to collect the roundest from the actual cultivators. It is also admitted by both sides that the Guttadars, as such, were not in actual cultivation of the lands and they used to realise rajabhagam from the cultivators. But for some periods the cultivators themselves became the Guttadars and, on three occasions, their possession continued to remain undisturbed. The real controversy, however was as to who was in actual possession of the lands. According to the Plaintiffs they and their ancestors always remained in actual possession and used to pay rajabhagam to the Guttadars except during those periods when they were themselves the Guttadars. Similarly, Defendants 1 and 2 also contended that their families were in possession and used to pay rajabhagam to the Guttadars except during those periods when they were themselves the Guttadars.

3. The Settlement proceedings in village Lokkamari took place sometime before 1948 and the lands were entered as "Parityakts Bedakhali" in the possession of the Rani Saheba of Bodogodo. Plaintiff No. 8 Juria Padhano filed an objection before the Assistant Settlement Officer in 1948 Ext. D-1 claiming that his family has been in possession for a long time. Though he admitted that the lands were the Zamindar's Khetta lands. The Zamindar however examined some witnesses to show that Juria Padhan was never in possession of the lands. One of those witnesses was none else but Defendant No. 1 Narasu Naik, who stated that he used to cultivate the lands in dispute. The Assistant Settlement Officer, on 11-4-1948 rejected the claim of Plaintiff No. 2 and directed that the lands should continue to be recorded as Parityakta Bodakhali Raiyati. Soon afterwards, Defendant No. 1 filed an objection before the Assistant Settlement Officer (see Ext. E) saying that the lands should be recorded in his name as raiyati as he has been cultivating the lands for several years. The Assistant Settlement Officer, by his order dated 14-12-1950, upheld the claim of Defendant No. 1 and directed that the lands should be recorded as raiyati lands. Hence, in the final record of rights dated 10-7-1951 (Ext. F) Defendants 1 and 2 were recorded as raiyats with occupancy status.

4. Soon afterwards however criminal cases started between the Plaintiff and the Defendants, which eventually led to a proceeding u/s 145, Code of Criminal Procedure in M.C. 106 of 1962. Preliminary notice u/s 145, Code of Criminal Procedure was issued on 10-9-1952 see Ext. H-and the final order in favour of these Defendants was passed by the Magistrate on 19-12-1958-see Ext. H-1 declaring these Defendants to be in actual possession of the disputed lands. Against that order a revision was filed before the High Court in criminal revision No. 331 of 1957 and the High Court, by its order dated 7-8-1959 confirmed the order of the Magistrate. Then the Plaintiffs brought the present suit under appeal

on 30-1-1960.

5. Apart from fighting out the criminal proceeding u/s 145, Code of Criminal Procedure the Plaintiffs moved the Board of Revenue to get the record-of-rights corrected in their favour in R.P. No. 166/285 of 1952. As directed by the Board, another Assistant Settlement Officer made a preliminary enquiry locally and submitted a report-see Ext. 5 dated 27-8-1953-in favour of the Plaintiffs. The Board of Revenue, by its order dated 8-3-1958-see Ext. 6 accepted the report of that Assistant Settlement Officer and directed that the lands should be recorded as the raiyati lands of the Plaintiffs. The record of rights was thus corrected.

6. We have, thus a peculiar position-a Magistrate in a proceeding u/s 145, Code of Criminal Procedure initiated in 1952 held the Defendants to be in possession and his order was confirmed by the High Court in revision; whereas the Board of Revenue after a local enquiry by the Assistant Settlement Officer held on 27-8-1953, allowed the petition of the Plaintiffs by its order dated 8-3-1958 (Ext. 6), held them to be in possession of the disputed plots and directed the correction of the record-of-rights accordingly. Hence any presumption of correctness attaching to the record-of-rights as originally prepared (Ext. f) in 1951 in favour of the Defendants will no longer be available to them in view of the order of the Board of Revenue, and the presumption now is undoubtedly on favour of the Plaintiffs. But in this case both parties have led ample evidence to show the actual possession of the property by the respective claimant; and the question is one of appreciating the evidence at its proper worth. The case does not depend on academic discussion about burden of proof.

7. The learned Additional Subordinate Judge was inclined to accept the contention of the Defendants that when the Zamindar of Bodogodo created the Darmilla inam in favour of the Deity Balaji Mahaprabhu in 1868 he granted both the varams to the deity and not only the malwaram as alleged by the Plaintiffs. In taking this view he relied mainly on the fact that in the original patta Ext. 1 creating that inam, the inamdar was authorised either to induct tenants on the lands or to cultivate them himself, (Chashi chashayi) which would show that the kudivaram interest also was granted to the inamdar. But he thought that the Plaintiffs' father Lakshman Padhan came to be in actual possession of the property in view of the cess receipts (Exts. 3, 3/80, 3/b and 3/d) ranging from the year 1906 to 1912, and that as the Darmilla inamdar was a mare "landholder" when the Madras Estates Lands Act came into force in 1908, Lakshman Padhan must be deemed to have acquired occupancy rights as a raiyat. But he was confronted by three muchalikas exts. N, N/1 and N/2 of the years 1915-1916-two of which, Exts. N and N/1 were executed by Plaintiff No. 2 Ananda Pradhan in favour of the Zamindar which would show prima facie at any rate that Ananda was not a raiyat, in respect of the disputed property. Then the learned Judge held, on a discussion of the oral evidence of the Gutta receipts (Ext. 2 series) that the Plaintiffs continued in possession of the lands till 1946 but he thought that in 1947 they were dispossessed by the Defendants. In coming to

this conclusion he relied mainly on the admission by the Plaintiffs' own witness, P.W. 5, made in favour of the Defendant which, according to him, strongly corroborated the evidence of the Defendants' witnesses. As the suit was brought in 1960 he thought that the Plaintiffs were out of possession for more than the statutory period of 12 years and that consequently the Plaintiffs' suit must be dismissed as there was no subsisting title on the date of filing of the suit.

8. One striking feature in this case is the complete absence of any rent receipt on the side of the Plaintiffs to show that they ever paid the produce rent (rajabhagam) to the landlord at any time. The Plaintiffs have all along asserted that the lands were their rayati lands having been reclaimed by their ancestors and they were in continuous possession of the same till the survey and settlement operations of 1948 u/s 62 of the Madras Estates Lands Act which had come into force in 1908, the land-lord was bound to grant receipts on payment of rajabhagam by the raiyat and it is strange indeed that for a period of nearly 40 years from 1908 to 1948 the Plaintiffs could not faceted in obtaining a single rent receipt from the landlord. In paragraph 3 of the plaint, however, it was asserted as follows:

The inam deity being a Darmilla inam the Plaintiffs and their predecessors have been paying the rajabhagam rent as per the directions of the Zamindar to the trustees or the archaka who have been looking after the worship. The Plaintiffs and their ancestors predecessors have been regularly obtaining receipts for payment of such rajabhagam on the suit lands, to the deity.

The receipts referred to in the aforesaid paragraph have not been filed in this litigation and when Plaintiff No. 1 (as P.W. 14) was questioned about it he flatly denied that any rent receipt was ever granted to him either during the period when the Darmilla Inamdar, namely the arch aka of the deity was the landholder or subsequently when the Zamindar leased out the landlord's right to the Guttadars. When his attention was drawn to the afore-said averment in paragraph 3 of the plaint, he denied the same. Moreover, while deposing before the Assistant Settlement Officer on 18-8-1953 (in Ext. G series) in R.P. No. 166/285 of 1952) he stated that his ancestors got a patta from the landlord and that that patta was missing. This patta would undoubtedly have shown whether raiyati status was conferred on the Plaintiffs' ancestors. But while deposing in court he flatly denied not only the grant of patta by the Zamindar to his ancestor in respect of the disputed property but also feigned lapse of memory, when his attention was drawn to his own statement before the Assistant Settlement Officer. However powerful a Zamindar may be it is difficult to believe that a raiyat who acquired occupancy right by virtue of the coming into force of the Madras Estates Land Act in 1908 and who continued in possession thereafter for nearly 40 years would have been unable to obtain receipts when the paid bhag rent to his landlord. If the landlord and refused to grant receipts he could easily have approached the Collector for penal action against the landlord as provided in Section 65 of the Madras Estates Land Act. I must therefore reject the extreme

contention put forward by the Plaintiffs that they and their ancestors were raiyats in respect of the disputed lands at any rate from 1908-if not from an earlier date.

9. It is true, as rightly pointed out by the learned lower court that the cess receipts Ext. 3 Series show that the Plaintiffs' father Lakshman Pradhan was in actual possession of the lands from 1906 to 1912. Similarly the muchalikas in the name of Plaintiff No. 2 Ananda Pradhan Exts. N and N/1 show that he was in actual possession in 1916. For their subsequent possession, however, the Plaintiffs have relied solely on oral evidence. It is true that they have produced certain Gutta receipts, Exts. 2/n, 2/p, 2/r, 2/s and 2/t. But possession as Guttadar will not be possession as actual cultivator of the disputed lands because on the Plaintiffs' own case the Guttadar was merely a lessee of the landlord for collection of rajabhagam from the persons in cultivating possession of the lands. These Gutta receipts do not prove the essential question for decision in this case namely whether the Plaintiffs have proved actual possession of the disputed lands in recent times. We need not go earlier than 1930 when, according to the Plaintiffs, the Zamindar resumed the inam and converted these lands into "Santa Kheta" lands and leased out the rajabhagam to various guttadars in succession. As regards the names of the Guttadars from 1930 to 1948 the evidence given by Plaintiff No. 1 in G.R. case No. 119 of 1952 (see Ext. U) furnishes the following information. Plaintiff No. 1 was the Guttadar from 1929 to 1931; P.W. 10 was the Guttadar of the But lands Known as Matho Billo from 1944 to 1946; P.W. 4 Agadhu Patra was the Guttadar from 1935 to 1938. P.W. 9 Pano Padhan was the Guttadar from 1939 to 1942 along with Plaintiff No. 2 (AnandPadhan); P.W. 8 Giridhari Das was the Guttadar from 1913 to 1944. But Plaintiff No. 1 would not clearly say as to who was the Guttadar from 1947 to 1949. In his deposition in Ext. U he addicted that the Defendants became the Guttadars during that period. When his attention was drawn to his previous statement he denied having made any such statement. Thus Plaintiff No. 1 has shown himself to be an unreliable witness who was ready to contradict himself to suit his purpose.

10. I may now discuss the oral evidence of possession adduced by the Plaintiffs.

P.W. 1 is one Hady Patro who claims to have possessed the lands adjacent to the disputed lands. He deposed about the Plaintiffs' possession, but he is a Komatti by caste living in Bodogodo village where he has got a grocery shop. Though he emphatically denied the suggestion that his lands in the disputed village were tenanted, Sribatcho (Plaintiff No. 1) as P.W. 4 categorically admitted in cross-examination that Hadu Patro's lands were always tenanted. He immediately however corrected himself by saying:

Since the last 8 to 10 years Hadu Patro himself cultivates his lands.

On this admission of Plaintiff No. 1 it is clear that Hadu Patro's lands were tenanted till 1952 or so. A komatti having a grocery shop in Bodogodo village, whose lands in Lokkamari were let out to tenants during the relevant period, is hardly competent to prove the actual possession of the Plaintiffs family over the

land for so many years, as stated by him in his examination in chief. His evidence on the question of possession must therefore be rejected.

P.W. 2 Bhagat Moharana broke down in cross-examination and frankly admitted that he could not say who possessed the suit lands or Matho billa one of the suit lands, "prior to four years back". His evidence on the question of possession is therefore worthless.

P.W. 3 Basta Goud, is a Goud who was constrained to admit in cross-examination that he could not say to whom the Plaintiff was paying rajabhagam for cultivating the Matho Billo lands.

P.W. 4 Agadhu Patro is also a grocery shop keeper in Bodogodo village. He stated that he used to go twice a month to Lokamari village and had seen the Plaintiff in possession of the disputed lands for a very long time. But he admitted that he has no lands in that village. He was one of the Guttadars of the lands between 1935-38. But he was unable to say who was the Guttadars after him. A person who had no lands in the village who has a grocery shop in Bodogodo and who has practically nothing to do with the village ever since he ceased to be the Guttadar in 1938 is hardly competent to say if the Defendants ever took gutta lease of the lands-though many other p.w.s. including Sribatcho himself (in his previous deposition Ext. U) admitted that the Defendants were the guttadars from 1947 to 1949.

P.W. 5 Ramahari Patnaik was the group karan of the village Lokamari from 1948 to 1952. Even in examination in chief he stated that the lands of the village deity were in the possession of the first Defendant when he took over as Karan of the village in 1948. He further added that during the years 1948 to 1952 the suit lands were in the possession of the first Defendant, and that as Karan it was his duty to go round the villages lands and see the crops. His evidence thus completely supports the case of the Defendants that from 1948 to 1952 at any rate the Defendants were in actual possession of the disputed property. Mr. Pal ingeniously contends that this witness might have got confused and that his evidence regarding Defendants possession should not be accepted because he had also stated that Defendants 1 and 2 never cultivated or possessed the Deity's lands. But when these answers favorable to the Defendants were given by this witness even in examination in chief, he was not further questioned with a view to show that there was confusion in the statements made by him or else that he had turned hostile. His evidence was therefore rightly given importance by the learned lower court as supporting the case of the Defendant.

P.W. 6 Maguni Misra is an ex-employee of the Zamindar of Bodogodo. His evidence on the question of possession in favour of the Plaintiff has not much value because he admitted that till 1943 he was working under Shergada Zamindar and he came away to Bodogodo only thereafter. Hence he is not competent to prove the possession prior to 1943. Moreover, this witness frankly admitted that from 1947 to 1949 the Defendant No. 1 was the Guttadar. He

could not give the boundaries of the disputed lands and though he stated that he had seen the disputed lands being cultivated by the plough men of Plaintiffs 1 and 2, he could not name the ploughmen. He has himself no lands near Lokamari. The evidence of possession given by an employee of the Zamindar who came to the Zamindari only in 1943 and who has no lands in that village and who could not even give the boundaries of the suit lands and who was not able to even identify the ploughmen who cultivated the lands on behalf of the Plaintiffs has practically no value on the question of actual possession.

P.W. 7 Taru Goudo is a nephew of one Bouri who according to Plaintiff No. 1 is his sworn friend. Apart from this close intimacy between the two this witness frankly admitted in cross-examination that he had never seen the Plaintiff giving rajabhagam to Defendant No. 1 though P.W. 6 admitted that Defendant No. 1 was the Guttadar from 1947 to 1949. If really the Plaintiff was in possession even during those years, as a tenant, he must have paid rajabhagam to the Guttadar. Moreover, this witness admitted that Defendant No. 2 was a witness of one Ramo Gouda against whom this witness had brought criminal case. His interestedness is thus obvious.

P.W. 8 Giridhari Das was one of the former Guttadars of the village. He only proves the possession of Plaintiff No. 1 when he was the Guttadar. But while deposing before the Assistant Settlement Officer this witness frankly admitted as follows:

I cannot say who activated the lands either before or after the period when I was Mustajar.

Though he denied this statement, when confronted with the same in cross-examination, it is proved by Ext. J series. This witness is thus quite incompetent to prove possession. P.W. 9 Pano Padhan was one of the former Guttadars. He is an agnatic relation of Plaintiff No. 1. He could not give the names of the Guttadars who took the suit lands on gutta either prior or subsequent to his guttiadar ship.

P.W. 10 Satyabadi Samantarai is also one of the former Guttadars. He is the present Karnam of the group of villages including Lokamari. He proves Plaintiffs' possession only for the years 1944-1946 when he was the Guttadar. About their cultivation, this witness has only hearsay knowledge. Moreover, he is on inimical terms with Defendant No. 3 because the latter brought a civil suit against him. As Defendant No. 3 is a mortgagee from Defendants 1 and 2 in respect of the suit lands a witness who is inimically disposed towards Defendant No. 3 cannot be said to be a disinterested person.

P.W. 11 Kanhu Gouda practically broke down in cross-examination by saying that he has no lands in Lokamari village and he could not say who cultivated the suit lands during the last four years. His evidence on the question of possession is also of no value.

P.W. 12 Sanyasi Naik is the Karji of the village. But he is also the Sammandhi of Plaintiff No. 1. Apart from this close relationship, there is enmity between him and Defendant No. 1 because the latter had filed a petition against him alleging that he was creating party factions in the village. He has no personal knowledge about the person to whom he paid the rent for the suit lands for the years 1948 to 1952, because, before the Assistant Settlement Officer, he stated that he did not know who paid rent for the suit lands. His interested testimony on the question of possession cannot therefore carry any weight.

The only other witness on the side of the Plaintiff is P.W. 14 Sribatso Pradhan whose evidence also cannot be accepted in view of his contradicting his previous deposition on material points-as already referred to earlier.

11. Thus the oral evidence adduced on the side of the Plaintiffs is not sufficient to show that they were in actual cultivating possession of the disputed lands from the date of resumption of the inam by the Zamindar even if we assume that date to be somewhere in 1930. The mere fact that he was one of the Guttadars is not sufficient to show that he was actually cultivating the lands because, on the Plaintiffs' own evidence, Guttadars generally do not cultivate the lands that they have taken on Gutta-their sole duty being the collection of rajabhagam on behalf of the Zamindar. Doubtless, if, prior to the taking of Gutta, the Guttadar was himself in cultivating possession he may continue to be in such possession, but on the unsatisfactory evidence adduced by the Plaintiffs, it will not be proper for a Court of fact to hold that he proved that he was in actual possession till 1946 as alleged by the Plaintiffs. To this extent I must disagree with the finding of the learned lower Court.

12. But there is no doubt from the admission made by P.W. 5 that ever since the taking of Gutta by Defendant No. 1 in 1947 the Plaintiffs were never in possession. Defendant No. 1's possession is practically admitted by P.W. 5. It is true that the witnesses examined by the Defendants to prove their possession cannot be said to be disinterested, and the lower court has commented adversely on their evidence but as this is a suit for eviction brought by the Plaintiffs they cannot rely merely on the weakness of the evidence of possession adduced by the Defendants. They must prove their possession within 12 years before commencement of the suit. This they have signally failed to do for the reasons already mentioned. I should further point out; that the Defendants' story that they were in actual cultivation of the suit lands was not put forward for the first time after the trouble started in 1952, but as early as 1948 while deposing before the Assistant Settlement Officer Defendant No. 1 stated that he had taken lease of the lands and was cultivating them himself.

13. For these reasons, I must hold that the Plaintiffs have failed to prove by satisfactory evidence that they were in possession of the lands-at any rate from 1930 if not earlier. On the other hand Defendants' possession from 1947 is well established. When the Defendant was entered as a raiyat in respect of the suit lands (see Ext. E) he continued to remain in possession and when the Plaintiffs

disturbed his possession a criminal case was brought in the Court of the Special First Class Magistrate of Aska in G.R. case No. 118/1952 in which the Plaintiffs were convicted. Proceedings u/s 146, Code of Criminal Procedure were started at about the same time and the preliminary order was passed on 10-9-1952 (see Ext. H) and the lands were also attached. The land remained under attachment till the date of passing of the final order on 19-12-1958 (see Ext. H/1), when the possession of the Defendants was declared and the lands were handed over to them. The present suit was filed on 30-1-1960.

14. Mr. Pal for the Plaintiffs contended that the period during which the lands were under attachment in the proceeding u/s 145, Code of Criminal Procedure (i.e. from 10-9-1952 to 19-12-1953) should not be counted in favour of the Defendants in considering whether the Plaintiffs have proved possession within 12 years prior to the date of commencement of the suit. According to him, possession of the property with the receiver appointed by the Magistrate u/s 145(4), Code of Criminal Procedure would ensure to the benefit of the person who is ultimately declared to have title to the property and not in favour of the party whose possession was found by the Magistrate in that proceeding. He therefore urged that on the finding of the lower court that the Plaintiffs were in possession up to 1946-if the period between 1952 to 1958 when the lands were under attachment was excluded-the Plaintiffs can as well claim to have been in possession within 12 years prior to the commencement of the suit. But I have already pointed out that the trial courts' finding about the Plaintiffs' possession upto 1946 cannot be accepted. It may be that the Plaintiffs' father was in possession from 1906 to 1912, and Plaintiff No. 2 was in possession by virtue of the muchalikas in 1916, but in the absence of any rent receipts and of any documents to prove possession from 1930, mere oral evidence of the Plaintiffs' witnesses is wholly insufficient to support a finding that they were in possession till 1946. The Zamindar had resumed the inam and had made it his Santa Kheta lands. It may be that different cultivators including the Plaintiffs and the Defendants cultivated the lands on different occasions. Plaintiffs' continuous possession from 1930-46 cannot be believed. Hence, any discussion about the effect of the possession of a Receiver when the lands were under attachment, u/s 145(4), Code of Criminal Procedure becomes somewhat academic.

15. In any case, this question is settled beyond doubt by the decision of the Calcutta High Court, reported in Abinash Chandra Chowdhury Vs. Tarini Charan Chowdhury and Others, where the learned Judge made a distinction between an attachment made u/s 146, Code of Criminal Procedure and an attachment made u/s 145(4), Code of Criminal Procedure and held that the attachment under the latter provision will enure to the benefit of the person ultimately to be declared to be in possession and not of the person who may ultimately declared to be the true owner of the property. The learned Judge also relied on the passages in Halsbury, First Edition, Volume 19, page 139 (paragraph 269) and Volume 24, page 384 (paragraph 723) corresponding to Halsbury, Third Edition, Volume 24, page 255 (paragraph 489) and Volume 32, page 419 (paragraph 683) regarding

the possession of the Court through a Receiver. I must accordingly hold that the Plaintiffs have not been in possession within 12 years prior to the commencement of the suit.

16. Mr. Pal then urged that the aforesaid view of the Calcutta High Court may require modification, in view of the recent pronouncement of the Supreme Court in *Ittavira Mathai Vs. Varkey Varkey and Another*, (paragraph 12) where their Lordships observed: