

(1939) 08 PAT CK 0009

In the Patna High Court

Surja Mohan Thakur and Others

APPELLANT

Vs

Rama Prasad Pandey and Others

RESPONDENT

Date of Decision : 03-08-1939

Acts Referred:

Bengal Tenancy Act, 1885 — Section 103A, 105
Registration Act, 1908 — Section 49

Citation : AIR 1940 Patna 37

Hon'ble Judges : Mohamad Noor, J; Manohar Lall, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This is an appeal by the plaintiffs arising out of a suit instituted by them for declaration of title to and for recovery of possession of the lands in suit, which are 25 bighas in area, together with mesne profits. The suit was decreed by the learned Subordinate Judge in part by granting a decree to the plaintiffs to recover the rent entered in the Record of Rights from the defendants second party who was held to be occupancy raiyat in respect of the suit lands. The plaintiffs have preferred this appeal in which they ask for a decree for recovery of khas possession against the defendant second party also and in any case they claim a decree for mesne profits which in their contention had been wrongly refused. The defendants first party have preferred a cross-objection and by it they pray that the decree of the learned Subordinate Judge be reversed so far as it has decreed the suit in part in favour of the plaintiffs so that the suit should be dismissed in its entirety.

2. It will be convenient to state the facts very shortly. The case of the plaintiffs is that their ancestors had purchased 8 annas share in taluqa Masudanpur from one Mt. Sahodra, who was the proprietor at that time, by a registered deed of sale dated 22nd February 1872, and soon after the sale the vendees gave 25 bighas of land in that taluka in mokarari for life to the same Mt. Sahodra by means of an unregistered patta bearing date 18th March 1872. Mt. Sahodra having died on 1st January 1926 the plaintiffs entered into khas possession of these lands which till then were in the possession of the Musammat. Defendants 1 and 2 claiming

themselves to be gotias of Mt. Sahodra cut and removed the paddy crops which had been grown on the suit lands on behalf of the plaintiffs on 18th November 1926, thereby completely ousting the plaintiffs from possession of the same.

3. Hence the plaintiffs instituted the present suit for recovery of possession of these 25 bighas of land after ousting defendants 1 and 2 and they claimed certain amount of mesne profits. Defendants 1 and 2 in their defence asserted that the suit was barred by limitation, that the kabuliat which had been propounded by the plaintiffs in support of the case that Mt. Sahodra was granted a mokaarari enuring for her life only was not genuine, and that the disputed land was given by the ancestors of the plaintiffs in perpetual mokaarari istamrari by an unregistered patta on 18th March 1872. Reliance was placed on the entry in the Record of Rights of the year 1908. These defendants also stated in their defence that defendants second party was an occupancy raiyat in possession of the suit lands and. has been so recognized in the Survey Department.

4. The allegations of the plaintiffs regarding possession were seriously disputed. The appellants after the filing of the written statement just referred to impleaded Govind Prasad Pandey as defendant second party who filed a separate written statement supporting in the main the allegations of the defendants first party.

The learned Subordinate Judge in an elaborate judgment has come to the conclusion that the kabuliat (Ex. 1) relied upon by the plaintiffs was a genuine document executed by Mt. Sahodra, that the mukarari rights, which were conferred upon the Musammat by means of the patta, (not produced), of which the kabuliat is a counterpart, were to last for the lifetime of Mt. Sahodra only and that the oral and documentary evidence regarding the plaintiffs having obtained possession of the disputed lands in 1926 and their having been dispossessed in November 1926, was utterly unreliable and not worthy of credence.

5. The learned Subordinate Judge further held that the survey entry regarding the possession of the defendants second party as an occupancy raiyat of the lands in suit was correct. Upon these findings, which cannot be seriously assailed, supported as they are by good oral and documentary evidence, the appeal of the plaintiffs must fail. We have heard Mr. P.R. Das in support of the appeal. He has been unable to satisfy us that the judgment of the learned Subordinate Judge can be successfully assailed, even assuming that the plaintiffs have been able to prove that the mukarari granted to the Musammat conferred upon her rights enuring for her life only. This was seriously challenged by the respondents and this contention will be considered at some length while considering the cross-appeal. In the result the appeal of the plaintiffs fails and must be dismissed.

6. I now come to the cross-appeal filed by the respondents, namely defendants 1 and 2. The contention which has been seriously put forward on their behalf is that the learned Subordinate Judge was in error in holding upon a construction of the kabuliat that Mt. Sahodra obtained rights enuring for her lifetime only by

means of the mukarari grant of 1872 and that he should have held that the rights conferred upon the Musammat were in the nature of a mukarari grant for perpetuity so that on her death the right to remain in possession of the suit lands was with these appellants who have been found to be in possession ever since in their capacity as reversioners of the estate represented by her. In the alternative it was argued on their behalf that the Musammat asserted a permanent mukarari right on 23rd February 1908, at the attestation stage before the survey authorities and since then she was in possession under open assertion of an adverse right and that by the lapse of 12 years ending in 1920 or 1921 before her death the Musammat must be held to have acquired a permanent mukarari right.

7. At the outset it must be observed that neither of the parties in the Court below urged, nor the learned Subordinate Judge took into consideration that the kabuliat (Ex. 1) could not be used in evidence in order to determine the nature and terms of the tenancy created admittedly on 18th March 1872; because it is unregistered. Similarly the patta (although it has not been produced) being unregistered could not be considered by virtue of Section 49, Registration Act, to determine the terms upon which this tenancy was created. The law is quite clear upon this point. The learned advocates for both sides appearing before us conceded that the terms of the tenancy could not be determined by looking at the unregistered kabuliat or the patta and that the present controversy must be decided upon such other admissible evidence as may be found upon the record.

8. What then is the evidence which could be relied upon? Mr. J.M. Ghosh who appeared for the plaintiffs on the first day of the hearing before us attempted to show that the entry in the survey Record of Rights dated 13th August 1908 (Ex. H) was erroneous. That entry records Mt. Sahodra as a tenure-holder for 16.37 acres of land liable to pay Rs. 16-1-9 as rent under patta dated 18th March 1872 to the superior landlord, namely the predecessors of the plaintiffs. The entry in Clause 11 which indicates the nature, conditions and incidents of the tenure is "mokarrari istam-rari." It was argued on the basis of Ex. 27 and Ex. 29 that this entry was incorrect. Ex. 27 is a petition of objection filed by Mt. Sahodra on 23rd February 1908, u/s 103-A, Bengal Tenancy Act, asking for a relief in the following words:

Khewat No. 1 relates to istimrari mukarari interest of the first party. At the time of attestation through the mistake of the karpardaz of the first party the words "for life" have been written in Clause 10. It is prayed that the word "perpetual" may be substituted for the words "for life" in Clause 10 of khewat No. 1 relating to istimrari mukarari interest of the first party.

9. Exhibit 29 is an order sheet of the survey officer. On 10th April 1908 that officer ordered a notice to the parties to appear before him on 18th April 1908 to dispose of the objection petition (Ex. 27). On 18th April 1908 the order runs "objector absent, case struck off." It was therefore argued by Mr. J.M. Ghosh that in the absence of any, evidence adduced on behalf of Mt. Sahodra the survey

authorities were not justified in making the entry as indicated already. He also pointed out that Exs. 26 and 28 showed that there was no record of any proceedings under Sections 105 and 106, Ben. Ten. Act, in respect of this entry. In other words the argument before us on the first day was that the entry in the Record of Rights is based upon no materials whatever and should be held to be incorrect in face of the previous petition (Ex. 27) which was disposed of in the absence of the objector. Mr. P.R. Das who appeared for the plaintiffs on the following day adopted a different line of reasoning.

10. He argued that the entry in the survey Record of Rights (Ex. H) must be presumed to be correct as provided by Section 103-B, Ben. Ten. Act. But he argued that the entry only describes Mt. Sahodra as "mukarari istimraridar" and on referring to a number of cases decided by their Lordships of the Judicial "Committee he submitted that the words "istimrari mukarari" did not necessarily mean a mukarari which is perpetual but it may mean mukarari to enure for life only. The difficulty in accepting this argument is that cases which were relied upon by the learned Counsel are cases which deal with the construction of a document of title in which the words "mukarari istimrari" were used but do not help us in deciding the matter when the term is used by the survey authorities. Now looking to the Guide and Glossary of the Survey and Settlement Operations in the Patna and Bhagalpur Divisions (in which the land in suit lies) of the year 1907, it is clear that the survey authorities used the words "istimrari mukarari" as having a special meaning. At page 18 the words "istimrari mukarari" are definitely used to mean "a tenure held in perpetuity at a fixed rent" and in the remarks column it is stated that when the words "mukarari istimrari" are found in the records by itself unqualified, it should be held to mean "a tenure held in perpetuity at fixed rates."

11. I therefore conclude that the survey authorities intended to convey by the expression used in Clause 11 of Ex. H that Mt. Sahodra was a permanent mukararidar at fixed rent. It can be reasonably assumed that there are other papers, which have not been produced before us, which would show why the survey authorities, notwithstanding their having rejected the application of objection of Mt. Sahodra on 18th April 1908, in default of her appearance, ultimately decided that her claim was correct. It is well known that an entry in the survey Record of Rights carries with it a statutory presumption of correctness and the onus is upon the person, who alleges that the entry is incorrect, to prove by evidence that it is so. In the present case I am satisfied that the entry has not been proved by any evidence to be incorrect; and indeed as pointed out above, Mr. Das appearing for the plaintiffs relies upon the entry as being correct but wanted to place a different interpretation thereupon.

12. The pleadings of the parties show that the plaintiffs' case was that Mt. Sahodra was a mukararidar for her life only. The defendants on the other hand in para. 11 of the written statement asserted that the settlement with Mt. Sahodra was a perpetual mukarari. Both parties therefore agreed that there was a

settlement but they do not agree as to the terms and incidents of that settlement. In these circumstances, it is for the plaintiffs, who sue in ejectment, to establish satisfactorily the nature of the grant. The plaintiffs are unable to give any evidence apart from the kabuliyat, which is inadmissible in evidence, and therefore the suit for recovery of possession must fail upon the simple ground that they have been unable to show that the entry in the survey Record of Rights is incorrect, and that the rights of Mt. Sahodra terminated in law on her death in 1926 and that the defendants first and, second party obtained no right after her death.

13. The defendants argued as an alternative case that in any event the assertion by Mt. Sahodra in 1908 by means of the petition (Ex. 27) gave the plaintiffs a cause of action to institute a suit for recovery of possession and as they failed to do so the Musammat must be held to have acquired title as a permanent mukararidar by mere assertion of that right and by continuing in possession thereafter of the lands in suit under that right from that date for a period of more than 12 years. It is unnecessary to consider whether a tenant who is let into occupation for a limited term can, during the continuance of that term, by mere assertion, acquire a higher title than what was given to her on the date of her entering into possession. But in the circumstances of this case I must conclude that as the plaintiff has been unable to prove the terms of the tenancy created in favour of Mt. Sahodra on 18th March 1872 it must be assumed in the absence of evidence to the contrary that the tenancy was tenancy from year to year, see *Martin v. Smith* (1853) 9 Ex 50 , or a tenancy-at-will. Such a tenancy can be determined on the expiry of the year or by a mere demand for or suing for possession.

14. When Mt. Sahodra asserted in 1908 that she was not a tenant at will or a yearly tenant but was a mukararidar in perpetuity she asserted title hostile to the plaintiffs' ancestors and cause of action accrued to them to resume possession of the 25 bighas of land either immediately or at least on the expiry of that year of tenancy. No such suit was instituted nor is there any evidence that the terms upon which the Musammat was to hold the lands in future were altered by any agreement; but on the other hand the entry in the survey Record of Rights being distinctly to the knowledge of the plaintiffs' ancestors recording her as a permanent mukararidar, was allowed to remain unchallenged. It must follow that the suit of the plaintiffs which has been instituted in 1931 is hopelessly barred by time.

15. I would therefore allow the cross-appeal of the respondents and dismiss the suit of the plaintiffs. In dealing with the question of costs it must be remembered that the defendants first party have succeeded because it was discovered by my learned brother when the argument began that the documents of title were inadmissible in evidence for want of registration and this point was never agitated in the Courts below. I would accordingly order that the defendant second, party should have his costs of this Court and the Court below. The

appeal of the plaintiffs will be dismissed with costs in this Court. The plaintiffs will bear their own costs throughout and the cross-appeal is allowed without costs.

Mohamad Noor, J.

16. I agree.