

(1925) 06 PAT CK 0013

In the Patna High Court

Tarni Singh @ Tomi Singh and Others

APPELLANT

Vs

Satnarain Maharaj and Others

RESPONDENT

Date of Decision : 22-06-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 105, 105A, 49

Citation : AIR 1926 Patna 9

Hon'ble Judges : Dawson-Miller, C.J; Macpherson, J

Bench : Full Bench

Judgement

Macpherson, J.—This appeal has been preferred by the defendants first party from the decree of the District Judge of Monghyr in which he affirmed the decree of the Munsif for the ejectment of the appellants and of the defendants second party from the land in suit.

2. The land in suit is a reputed area of 137½ bighas which at the time of the cadastral survey was found to be actually 157 bighas 2 kathas. In the record-of-rights finally published in 1908 the adoptive mother of plaintiff No. 1 and the plaintiff No. 2 who is his natural mother, as guardians of their respective minor sons, were entered in the record-of-rights as "jotdar istimrari lekin mukarrari nahi," signifying "permanent tenant but not at a fixed rent," the defendants first party, now appellants, as "dar jotdar istimrari lekin mukarrari nahi" signifying "permanent under-tenant but not at a fixed, rent," and the defendants second party as occupancy raiyats under the darjotdar. The defendants first party were also entered as in cultivating possession of a portion of the area and as receiving Rs. 350 as rent from defendants second party. The plaintiffs sued for adjudication that the plaintiff No. 1 is occupancy raiyat of the land in suit; the defendants first party are dar-rayat of the land and not "dar-jotdar istimarari lekin mukarrari nahi" as shown in the record-of-rights, and the defendants second party have no concern with the land, for khas possession thereof from the defendants and for mesne profits from Asin 1327. The case on behalf of the plaintiffs was briefly as follows:--

3. The land in suit was a jot held by Hibharan Singh as an occupancy-raiyat. On the 29th November, 1893, the jot was sold in execution of a rent decree and purchased by Nand Maharaj, the right sold being shown as "hak mokabzat." On the 25th October, 1897, Nand Maharaj granted a dar-jot of the jot so purchased by him for the years 1305--1311 at an annual rent of Rs. 400 to Khanro Singh, father of defendants Nos. 1 to 3. This grant is described as thika patta and the grantee as thikadar and as mustajir; and it is set out that after expiry of the term of the thika patta the thikadar shall not retain possession over the lands in suit without executing a new patta and will give up possession of the expiry of the term or if the grantor sells the land. On the expiry of that patta a new patta, Ex. D-I, for the period 1312--1320 was executed on the 5th February, 1904, by Mussammat Mini, widow of Jaisa Maharaj, for herself and as guardian of plaintiff No. 1 and by plaintiff No. 2 who is the widow of Nand Maharaj for herself and as guardian of Durgapat Maharaj, her son, now deceased. It may be here observed that Jaisa Maharaj and Nand Maharaj were brothers, and Jaisa adopted plaintiff No. 1, that plaintiff No. 1 is the sole surviving male member of the joint family and that plaintiff No. 2 has been joined in this litigation merely to avoid future dispute. The patta Ex. D-I differs considerably from the patta of 1897. The executants set out therein that they "have executed a patta conferring a darkarindgi jot in respect of the land demised for a term of nine years at an annual rental of Rs. 400, and that "objection on the score of (loss through) inundation, drought, hail and storm will be the concern of you the raiyat," and make provision for renewal which will be quoted and discussed later. The grantee is referred to as "jotdar" and in particular there is no mention of thika, thikadar, or mustajir.

4. In the record-of-rights of 1908 the lessee is shown as Khanro Singh and Nandlal Singh of whom the former is the father of defendants Nos. 1 to 3 and the latter (his brother) is the father of defendants Nos. 4 and 5. These five defendants constitute the defendants first party though plaintiffs do not admit that defendants Nos. 4 and 5 have any concern with the land.

5. Towards the end of the settlement operations the Banaili Raj, which besides being proprietor of the village had then become the immediate landlord of the plaintiffs' tenancy, applied u/s 105 of the Bengal Tenancy Act for settlement of a fair and equitable rent in respect of it, the tenants having been as will be remembered recorded as jotdar istimrari lekin mukarrari nahi." The tenant thereupon claimed u/s 105-A to be an occupancy raiyat and that claim was sustained. That decision, however, does not bind either defendants first party or defendants second party as they were not parties to the litigation.

6. After the expiry of the lease Ex. D-I in 1913 the plaintiffs sued the defendants for recovery of possession of the leased land and for mesne profits. It was held in appeal that as plaintiffs had realized some rent for 1321, the year after the expiry of the period of the kabuliyat, notice u/s 49 of the Bengal Tenancy Act was necessary before the defendants could be ejected. The suit was accordingly

dismissed. The plaintiffs thereafter issued notice upon the defendants first party u/s 49 which was served in 1325, calling upon them to relinquish the land from 1327, and as the defendants first party failed to comply therewith plaintiffs instituted the suit for ejectment out of which this appeal has arisen.

7. The suit was contested by defendants Nos. 1 to 5. They contended that they were in fact occupancy raiyats and that in any case the plaintiffs could not in view of the patta of 1904 eject them.

8. The Munsif decreed the suit holding that Hibharan Singh and therefore the purchaser of his interest, Nand Maharaj, who is now represented by the plaintiff No. 1 was a raiyat and that the defendants first party have neither occupancy right nor any permanent right. On appeal the District Judge affirmed the decision holding that the evidence on record established that the tenancy of the plaintiff No. 1 is raiyati and that the defendants have no permanent tenancy over the land in suit and are liable to be ejected.

9. In second appeal the decision of the lower appellate Court is assailed on the following three grounds:

(1) The plaintiff No. 1 has wrongly been held to be of raiyati status and entitled on that ground to eject the appellants. (2) Even if the land is the occupancy holding of the plaintiff No. 1 the defendants first party are not in view of the terms of the lease of 1904 liable to ejectment since that lease confers upon them a permanent tenancy. (3) The suit was not within the pecuniary jurisdiction of the Munsif and his decision being void for want of jurisdiction, there should be a remand of the suit to a competent Court for trial.

10. Now as laid down in *Debendra v. Bibhudendra* AIR 1918 PC 8 in determining whether the status of a tenant under the Bengal Tenancy Act is that of a tenure-holder or a raiyat, what has to be considered is: (1) the purpose for which the land was acquired, and (2) the extent of the tenancy. In the present case the area exceeds 100 bighas and therefore there is u/s 5(5) of the Bengal Tenancy Act a presumption, until the contrary is proved, that the tenancy is a tenure. But if the first criterion is established the second does not arise, while if the first is not established the second is conclusive. The finding of the final Court of fact is that the presumptions in favour of the defendants u/s 103-B and Section 5(5) of the Bengal Tenancy Act have been rebutted by the evidence adduced by the plaintiffs and though a substantial question of law may, and generally does arise in determining whether a tenant is a raiyat or a tenure-holder, the point as indicated by Lord Sumner in *Rajani Kant v. The Secretary of State* AIR 1918 PC 95, depends ultimately on questions of fact. In second appeal the High Court is not entitled to go behind the findings of fact of the lower appellate Court unless such findings result from the misconstruction of a document of title or the misapplication of law or procedure: *Uma Charan v. Midnapur Zamindari Co.* (1915) 19 CWN 270. On behalf of the appellants it is contended by Mr. N.N. Singh in regard to the finding on the question of status, first, that it is based on a

misconstruction of the document of 1876, by which the tenancy of Hibharan Singh was created, and" secondly, that there is a misapplication of the law inasmuch as the finding that the plaintiff No. 1 is a raiyat is based on evidence legally insufficient to support it, or rather that there is no evidence to support the finding.

11. Now Ex. B, the document of 1876, is a brief patta kaulkarar (agreement) in favour of Tekan Singh and Hibharan Singh executed by the darmustajirs in respect of 275 bighas for a period of seven years, from 1284 at an annual rental of Rs. 221. The only relevant provisions are "it behoves that you cultivate and get cultivated the land in the said village (jot wo abad karke wo karake, and pay the said rent, etc., [literally "it behoves that you (by) doing and getting done ploughing and cultivation (reclamation) pay the said rent, etc.] and "objection on the score of (loss through) inundation, drought and calamities of the sky will be your concern." The learned District Judge held, that the expression "jot wo abad karke wo karake" was consistent either with the status of a raiyat or the status of a tenure-holder. It is now urged that taken in conjunction with the area of 275 bighas [or even with the moiety of that area held by each of the two lessees and (as the sale in 1903 of half of the area shows) accepted by the landlord as a separate tenancy] the word "karake" points to the grant of a tenure. In my opinion such is not necessarily the case, and it is impossible on that word alone to hold that a tenure rather than a holding is implied, especially when the grantees take from a darmus tajir. Apart from the fact that the words, "jot wo abad" would seem in the word "abad" to imply reclamation of the soil in addition to cultivation, the lessees and each of them in his own moiety might well contemplate cultivation of such an area by their (or his) own family or hired servants without any idea of settling raiyats upon it. Much the same language was indeed used in the leases discussed in *Debendra v. Bibhudendra* AIR 1918 PC 8 and in *Rajani Kant v. The Secretary of State* AIR 1918 PC 95 but in those leases there were clear indications that a tenure was intended, and it was so found by the final Court of fact. The District Judge has in my judgment taken a correct view of the terms of the original lease.

12. The original lease being inclusive the attendant circumstances may be looked at to determine the purpose for which the tenancy was created. The learned District Judge found that that purpose was established by three pieces of evidence: (1) the statement of Kamala Singh one of the original settlement-holders, who deposed that originally the settlement was a raiyati one; (2) the deposition of Tilak Singh who is a nephew of Hibharan Singh and 71 years of age and who stated that the land was jungle at the "time of the settlement and that the settlement-holders got the jungle cut, and cultivated the land with their own ploughs; and (3) the mention in the sale certificate of 1893 "that Hibharan Singh, judgment-debtor, had "hak mokabzat," i.e., occupancy right in the land sold."

13. Mr. N.N. Singh strenuously contends that the evidence relied upon by the

District Judge is conclusive as to the status of Hibharan Singh and his successor in interest and could not, especially as it is not contemporaneous, negative the statutory presumptions arising under Sections 103-B and 5(5) of the Bengal Tenancy Act. It is urged that the opinion of the witness Kamla Singh is valueless especially as the area is so large that the reclamation of the land by the lessee is not altogether inconsistent with an intention to settle raiyats upon it and so is inconclusive, and that "hak mokabzat" is not "occupancy right" as used technically in the Bengal Tenancy Act, but is simply a loose expression meaning "the right to possession."

14. Now the lower appellate Court had before it the evidence of Kamla Singh which has not been shown to us, and it is therefore impossible to say that he ought not to have relied upon it. Again though reclamation of the whole jot by the settlement-holders and cultivation by their own ploughs may not be absolutely inconsistent with a tenure, it is entirely contrary to experience in this province in cases where the tenancy is a tenure or the tenant proposes to settle raiyats upon the land and become a rent-receiver, more especially where the settlement-holder belongs to an agricultural caste or tribe. It has also not been shown that from 1876 to the date of sale in 1893 there were any under-tenants. It was only when the "landlord and stamp-vendor, as Nand Maharaj describes himself, came into possession that sub-leasing began. Finally it is not possible to say that in the circumstances the term "hak mokabzat" does not, as the District Judge held, denote the "occupancy right" of the Bengal Tenancy Act which had been in force for eight years at the time of the sale.

15. There is no substance in the complaint of the learned advocate that the defendants' evidence on the subject of status has not been considered. The learned Judge having referred to the presumptions proceeded to examine the nature of the settlement, and as will be seen, below the patta of 1904 does not throw, any light on the character of the tenancy of Hibharan Singh.

16. Findings of fact of the lower appellate Court cannot be assailed in second appeal, however gross and inexcusable the error therein if, as Lord Macnaghten said in *Durga Chaudhurani v. Jawahir Singh Chaudhuri* (1890) 18 Cal 23, "the lower appellate Court had before it evidence proper for its consideration in support of its finding." It is impossible to say that the learned District Judge had not before him evidence on which a finding of fact could legally be based that the presumptions in favour of plaintiff No. 1 being a tenure-holder were rebutted and that he is in fact a raiyat as he claims to be. The first point therefore fails.

17. It is next urged that even if the plaintiff No. 1 is a raiyat he is not entitled to eject the appellants. In support of this contention reliance is placed on a provision in the patta of 1904 which runs as follows: "When the term of the patta will expire, you, again taking a fresh patta from us (the executants) will cultivate, and if contrary to this provision you cultivate, then rent will be realized at the rate of Rs. 3 per bigha, the rate for adjoining lands, and if you the karinda will all along pay faithfully punctually) the rent fixed under the patta then the

land shall remain in your possession and occupation as before."

18. There are two branches to the argument. In the first place reference is made to Section 18 of the Bengal Tenancy Act and it is urged that it is for plaintiff No. 1 to show that he is not "a raiyat at fixed rates" who is not precluded by Section 85 of the Bengal Tenancy Act or any other enactment from making such a transfer as is involved in the provision quoted. The plaint however sets out that the plaintiff No. 1 is an occupancy raiyat and presumably an entry to that effect was also made in the record-of-rights u/s 109-D of the Bengal Tenancy Act after the decision u/s 105-A. The appellants also never asserted that their landlord plaintiff No. 1 held his tenancy at fixed rates. Indeed the point was never previously taken and it is not mentioned in the grounds of appeal. It therefore cannot; be taken now. But apart from that the implied finding throughout is that the plaintiff No. 1 is an occupancy raiyat.

19. The main contention however is that the plaintiff is in some manner estopped by the provision quoted from ejecting the appellants. In support of it reliance is placed upon the Full Bench decision of the Calcutta High Court in Chandra Kanta Nath and Others Vs. Amjad Ali Hazi, and it is urged that as in the lease of 1904 the plaintiff's predecessors held themselves out to be tenure-holders and so Section 85(2) of the Bengal Tenancy Act was not a bar to the registration of the deed of sublease, though it purports to create a term exceeding nine years, the grantor, even if a raiyat, cannot now be permitted to derogate from his own grant and eject the grantee to whom he made a permanent grant. This argument manifestly lacks foundation unless it is found that the lessors of 1904 held themselves out as having a right higher than that of occupancy raiyat. The learned District Judge was not satisfied that the pardanashin ladies who executed the deed were even aware of the provision or accepted it. But apart from that finding, I am unable to hold that the executants of the lease of 1904, at all professed to have a higher status than the status of a raiyat. The period of nine years is a very common one for a sub-lease by a raiyat and less probable in a grant of an under-tenancy or a raiyati settlement. The word "raiyat" is indeed used in Ex. B but only in the stipulation that "objection on the score of (loss through) inundation, drought, hail and storm will be the concern of you, the raiyat" which is merely an adaptation of the similar provision in the patta of 1876. The word "raiyat" has here not the usual technical meaning nor any special significance, being merely equivalent to grantee. Manifestly it must be interpreted in conjunction with the definite statement in the deed that the grantors have executed a patta conferring a darkarindgri jot, the literal meaning of which is "sub-management jot." In the course of the document the term "karinda" signifying "agent" or "manager," is twice used of the grantee. The description in the last sentence of the lessee as "jotdar" must also be read in the light of that description of the tenancy. The lease is perhaps one which might equally be executed by a raiyat or by a tenure-holder, but that is all that can be said in favour of the contention on behalf of appellants. Accordingly it must be regarded as a sub-lease granted by the executants in the capacity which they

actually occupied. Plaintiff No. 1 is therefore not estopped from denying that he holds a higher status than that of an occupancy raiyat. Ex. D-1 appears to have been admitted to registration contrary to the provisions of Section 85(2) through a misconception on the part of the registering officer, and whether the misconception was that the term of the sublease granted by a raiyat was not more than nine years, or was that the executants held a tenure, is immaterial. There is certainly no evidence that lessor and lessee conspired by false or equivocal recitals to evade the provisions of the statute. Ex. D-1 therefore does not affect the property demised, at any rate beyond the period of nine years. The first of the three cases dealt with in the Full Bench decision cited is that which applies to the present circumstances and the raiyat is entitled to eject the grantee upon giving notice u/s 49(2) as has been done in the present instance. The second point also cannot prevail.

20. As to the third point, the suit was valued at Rs. 1,100 and was instituted in the Court of the Munsiff having jurisdiction to try suits of value not exceeding Rs 2,000. Objection to the jurisdiction of the Court was taken before the Munsiff. Before the District Judge in appeal the objection was renewed But the trial by a Court of a suit beyond its pecuniary jurisdiction is not in itself a ground for setting aside his order on appeal unless the appellate Court is satisfied that the under-valuation has prejudicially affected the disposal of the suit on the merits. The District Judge recorded that he was not so satisfied. It is however now argued that in fact the disposal of the suit on the merits was prejudicially affected because the forum of appeal would on a correct valuation of the suit have been the High Court and not the District Judge, and Babu Mohini Mohan Misser and Others Vs. Babu Gour Chandra Rai and Others and Babu Pirthi Chand Lal Chowdhuri and Others, is cited in support of the contention That decision does not assist the appellants. Therein it was held that where in a suit tried by a Subordinate Judge the appeal was wrongly preferred to the District Judge in disregard of his pecuniary jurisdiction in appeal, the appeal was incompetent and Section 11 of the Suits Valuation Act, 1887, was inapplicable as in fact the under-valuation prejudicially affected the disposal of the appeal on the merits. In the present case the appeal lay to the District Judge whether the correct valuation of the subject-matter was Rs. 1,100 or was Rs. 3,650 as the District Judge found it to be for purposes of assessment of court-fee. The real plea on behalf of the Appellants is that the true valuation exceeded Rs. 5,000 so that the appeal from the decision in the suit would lie to the High Court. But that plea must fail in the first place because it is not taken in the grounds of appeal and in the second place because there is nothing before us which would lead us to hold that the valuation of Rs. 3,650 is erroneous, and the appeal in a suit so valued lies to the District Judge and not to the High Court. The third submission also fails.

21. I would therefore dismiss this appeal with costs.

Dawson-Miller, C.J.

22. I agree.