
AIR 1953 Ori 92 : (1952) 18 CLT 33

Orissa High Court

Case No: Second Appeal No's. 55 to 67 fo 1948

Padmanabho Singh

APPELLANT

Vs

Arjuna Panigrahi and
Others

RESPONDENT

Date of Decision: Sept. 8, 1950

Acts Referred:

- Evidence Act, 1872 - Section 74
- Limitation Act, 1908 - Article 144

Citation: AIR 1953 Ori 92 : (1952) 18 CLT 33

Hon'ble Judges: Narasimham, J

Bench: Single Bench

Advocate: K. Patnaik, for the Appellant; B. Mohapatra, for the Respondent

Judgement

Narasimham, J.

These thirteen appeals are against the appellate judgment of the Subordinate Judge of Berhampur affirming the judgment of the Munsif of Aska dismissing thirteen suits brought by the plaintiff-appellant for realisation of Jodi (quit rent) from the respondents.

2. The appellant is the proprietor of Dharakot estate which is an impartible zamin-dari in Ganjam District. He brought thirteen suits for realisation of arrears of Jodi from the respondents and some other co-sharers in respect of several inam lands situated within his zamindari. One of them was a Dharmila inam which was the subject-matter of R. S. No. 383 of 1944 which corresponds to F. A. 54 of 1948 in the Subordinate Judge's Court and against which Second Appeal No. 61 of 1948 was filed before this Court. So far as this suit is concerned, the trial Court held that the claim for Jodi was barred by res judicata in view of a previous decision between the parties. This view on the question of res judicata was not challenged in the lower" appellate Court. Mr. K. Patnaik on behalf of the appellant frankly conceded that he could not reagitate this question in this second appeal. Therefore Second Appeal No. 61 of 1948 must in any case fail.

3. The remaining twelve appeals deal with pro-settlement inams. In the title deeds of the inam register (Ext. 1 series) all these inams are shown as being in the possession of the alienees from the original inamdars. But in respect of every inam a certain sum is shown as Jodi payable to the zamindar in addition to quit rent payable to Government. The zamindar's claim to realise Jodi is based solely on the Inam register. But there is absolutely no evidence on his side to show that Jodi was ever realised from the Inamdars. On behalf of the respondents therefore it was contended that the entries in the Inam register are not conclusive on the question and that in view of the admission by the zamindar to the effect that he never realised any Jodi from the respondents, the Court ought to have held that no such rent was payable. The trial Court however rejected this contention relying mainly on the entries in the Inam Register. In my opinion, the trial Court took the correct view. It may be that the relevant entries in the Inam register regarding Jodi payable to the zamindar may not have a statutory presumption of correctness such as an entry in the record-of rights. But as pointed out by the Privy Council in -- "Arunachalam. Chetty A. R. R M V. v. Venkatachalapathi Guruswamigal", 43 Mad 253 at p. 263 the Inam register was prepared after thorough enquiry at the spot by public officials. Entries contained therein should in the absence of actual and authentic evidence to the contrary be given utmost importance. Moreover, if the relevant rules dealing with the fixation of quit rent payable to the Government by an Inamdar are scrutinised it will be noticed that Jodi payable to the zamindar enters into the calculation for fixing quit rent. Therefore the entries in the Inam register cannot be brushed aside as a weak piece of evidence on the side of the zamindar or as having been more than rebutted by mere non-realisation of Jodi at any time. I would therefore agree with the trial Court and hold that the zamindar's right to realise Jodi as mentioned in the Inam register should be recognised. Apparently this point was not seriously pressed before the lower appellate Court.

4. The main ground on which both the Courts have dismissed the plaintiff's suits is based on adverse possession. The admitted facts are that the plaintiff never realised Jodi. The evidence of defendant Ramahari Patro (D. W. 1) which has been accepted by both the Courts was to the following effect.

"I pay quit rent to Government and nothing to zamindar. For the last 30 years the zamindar is making demand for Kattubadi from us. We never paid nor we are liable to pay Kattubadi for these lands. We protested against payment of Kattubadi. Thereupon plaintiff filed suits for lands covered by some Patta but they were dismissed..... For more than 12 years I am not paying Kattubadi in spite of demand by Raja and Raja knows this."

(By the word "Raja" the witness obviously meant the zamindar of Dharakot). From this evidence both the Courts held that not only was there non-payment of rent but that the Inamdar definitely asserted rent-free title and that this assertion was known to the zamindar for more than 12 years. Therefore the defendants had acquired rent-free title by adverse possession. But in my opinion even if the evidence of the defendant (D. W. 1) is accepted in full, it does not show that the defendants asserted rent-free title to the lands

for the statutory period of 12 years to the knowledge of the zamindar. There is a fine but real distinction between "non-payment of rent in spite of demand" by the zamindar on the one hand and "protest against payment of rent" on the ground that the zamindar had no right to demand the same. D. W. 1 has nowhere expressly stated that the protest against payment of Kattubadi was made for more than 12 years to the knowledge of the zamindar. All that he says is that for more than 12 years he was not paying Kattubadi in spite of demand and that the zamindar was aware of this non-payment. So far as the protest is concerned his evidence is

"we protested against payment of Kattubadi. Thereupon plaintiff filed suit for lands covered by some patta but they were dismissed."

The year in which the protest was made was not spoken to by the witness but the word "thereupon" used in recording his deposition seems to indicate that the first batch of suits by the zamindar was filed soon after the protest by the defendants against payment of kattubadi. It is an admitted fact that the first batch of suits was filed sometime in 1940 and therefore the protest by the tenants against demand must have taken place shortly before. At any rate, it could not have taken place in 1932 unless one does violence to the expression "thereupon." It was urged that the deposition may not have been correctly recorded and that too much importance should not be attached to the word "thereupon" in the deposition of defendant Ramahari Patro. I cannot however accept this contention. When the defendants claim rent-free title by adverse possession it was clearly their duty to lead clear and cogent evidence to show that rent-free title was asserted to the knowledge of the zamindar for a period of 12 years from the date of the institution of the suits. If the defendants' witness does not expressly give any evidence to that effect but on the contrary his evidence as recorded by the Munsif shows that the protest against payment was made shortly before the filing of suits by the zamindar in 1940 the defendants cannot ask the Court to construe the deposition liberally so as to give them the benefit of the law of limitation. The trial Court and the lower appellate Court have both committed an error of record in assuming that the defendants always protested against the claim made by the Raja. I have already shown that defendant Ramahari Patro himself makes a distinction between "non-payment of rent in spite of demand" on the one hand and "protest against payment of kattubadi" on the other. All that he says is that this non-payment was for more than 12 years whereas the protest was made sometime in 1939 or so.

5. Mr. Mohapatra then urged that non-realisation of any Jodi for more than 80 years coupled with non-payment by the Inamdar in spite of demand made by the zamindar for a period of 30 years is itself sufficient to establish rent-free title by adverse possession. In support of this argument he relied on -- [Jafar Ahmed and Others Vs. Maharaja Birendra Kishore Manikya Bahadar](#), ; -- Birendra Kishore v. Bhoirab Chandra", AIR 1915 Cal 170(1) and -- [Kesho Prasad Singh Bahadur Vs. Tribeni Sahay](#), . If these cases are however carefully scrutinised it will be noticed that they do not deal with acquisition of rent-free title by adverse possession. On the contrary, they refer to cases where a

presumption of lost grant can be reasonably made where there has been non-realisation of rent for several years and where the origin of the tenancy is unknown. But in the present case the Inam register shows clearly the origin of the tenancy and it also shows that some Jodi was actually payable to the zamindar. Under these circumstances there can be no question of presuming a lost grant from the mere fact of nonpayment in spite of demand. The distinction between acquisition of rent-free title by adverse possession on the one hand and presumption of lost grant in favour of rent-free title on the other has been clearly brought out by Rowland J. in -- [Keshava Prasad Singh Vs. Brahmdev Rai and Others](#), and [Mohan Lal Jha and Others Vs. Kameshwar Singh Bahadur of Darbhanga](#). The defendants in the present case never put forward the plea of rent-free title on the basis of lost grant and such a plea cannot stand in view of the entries in the Inam register. The limited question for consideration was whether rent-free title was acquired by adverse possession. For this purpose non-payment of rent for several years may be a piece of evidence but it is not by itself sufficient to prove rent-free title by adverse possession. As pointed out in -- *Magdeo Narain v. Baldeo*", AIR 1922 PC 272, mere non-payment of rent or discontinuance of payment of rent does not by itself create adverse possession. In -- [Girish Chandra Gagopadhaya and Another Vs. Sri Krishna De Nag and Another](#), this point was further elaborated and it was observed that apart from nonpayment of rent the tenant should further show that the landlord was aware of his asserting rent-free title in himself. Similarly in a Bombay decision reported in -- "*Vinayak Balkrishna v. Sitaram*", 17 Ind Cas 943 (Bom.) it was pointed out that apart from, non-payment of rent the tenant must do some act which is inconsistent with the landlord's title. To a similar effect are the observations of the Patna High Court in -- [\(Raja Sri Sri\) Jyoti Prasad Singh Deo Bahadur Vs. Rajendra Narayan Singh Deo and Others](#), and -- [Kameshwar Singh Bahadur Vs. Shaikh Sakhawat Ali and Others](#). The former case is of some importance because there, in the record-of-rights which carried a statutory presumption of correctness, there was an entry to the effect that the tenant was in possession of the land without payment of rent. Even then it was held that so long as the tenancy subsists mere non-payment of rent would not suffice for establishing the tenant's right by adverse possession. In the present case on the contrary the Inam roister shows that rent is payable to the zamindar.

6. Mr. Mohapatra however urged that this is not a case of mere non-payment of rent but non-payment of rent after demand by the zamindar for a period of 30 years. He urged that this distinguishes this case from the cases cited above and that when the zamindar was aware for more than 30 years that he has been demanding rent and the tenants have not been paying rent, the Court can reasonably infer that the tenants were asserting rent-free title to the knowledge of the zamindar. I am however unable to accept this argument. I have already shown that non-payment whether with or without demand by the zamindar is not tantamount to protesting against such demand. Doubtless protest against a demand may reasonably imply a challenge of the landlord's right to demand. But mere non-payment does not imply such a challenge. The landlord might not have cared to realise rent but that would not affect his title unless there is clear evidence of assertion of

rent-free title by the tenants to the knowledge of the landlord. Therefore on the evidence of the defendant Ramahari Patro which has been relied on by both the Courts I would hold that the tenants have not made out a case of rent-free title by adverse possession.

7. But this conclusion does not necessarily enable the plaintiff to succeed in all the suits. The trial Court has rightly stressed the fact that in respect of some suits where there are several co-sharer Inamdars in separate possession of their shares one suit against all co-sharers is not maintainable inasmuch as the Inamdars have no joint and several liability. He has rightly relied on -- [Musafkanni Ravuthar and Others Vs. Doraisingam and Others](#), in support of this view. Mr. Patnaik on behalf of the appellant frankly conceded this point but pressed for a decree in those suits where the whole of the Inam lands covered by the pattas are in the sole possession of defendant Ramahari Patro. Those suits are O. S. Nos 335 of 1944, 337 of 1944, 398 of 1944, 416 of 1944 and 432 of 1944. In those suits the claim was made only against Ramahari Patro and the finding of the trial Court on this point is

"In the rest of the suits Ramahari Patro is the sole defendant. Therefore he is liable for the suit claim but in view of my observations that he has successfully "set up an adverse title to the proprietor the suit claims are also barred."

In view of my decision on the question of adverse possession the plaintiff is clearly entitled to a decree in the aforesaid five suits.

8. For the aforesaid reasons S. A. Nos. 55 of 48, 58 of 48, 59 of 48, 60 of 48, 63 of 48, 64 of 48 and 65 of 48 corresponding to O. S. Nos. 320 of 44, 343 of 44, 346 of 44, 375 of 44, 399 of 44, 408 of 44 and 414 of 44 are dismissed with costs on the ground of non-maintainability. S. A. No. 61 of 48 corresponding to 383 of 44 is dismissed with costs on the ground of "res judicata". S. A. Nos. 56 of 48, 57 of 48, 62 of 48, 66 of 43 and 67 of 48 are decreed with costs throughout. The appeals are thus allowed in part.

9. Leave to appeal is granted to the respondents in S. A. Nos. 56 of 48, 57 of 48, 62 of 48, 66 of 48 and 67 of 48 where the suits have been decreed.