Privy Council Appeals Nos. 13, 82 *and* 102 *of* 1926.

Patna Appeals Nos. 90 *and* 89 *of* 1924 *and* 23 *of* 1925.

Kumar Kamakhya Narayan Singh - - - - - *Appellant*

v.

Ram Raksha Singh and others - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Charan Mahto and others - - - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Brahma Narayan Singh and others - - - - - *Respondents*

(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MARCH, 1928.

Present at the Hearing:

VISCOUNT SUMNER.
LORD ATKINSON.
LORD SINHA.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

These are consolidated appeals by Kumar Kamakhya Narayan Singh, the plaintiff in three suits, against three decrees of the High Court of Patna, the first two dated the 6th of August, 1924, and the third dated the 19th of March, 1925, by which the decrees of the learned Subordinate Judge were reversed and the plaintiff's suits were dismissed.

The first appeal, viz., No. 13 of 1926, related to suit No. 58 of 1920, which was instituted on the 1st April, 1920.

The plaintiff, being a minor and a ward of Court, sued through his next friend: the defendants were alleged to be the heirs or assigns of Syed Mazaffar Hossein and Syed Mahamad Hossein.

The plaintiff, as the proprietor of the Ramgarh estate, claimed a declaration that the defendants had no permanent and heritable interest in the villages Jabda and Jobdi. There was a further claim for possession of the said villages and mesne profits.

The High Court came to the conclusion that the defendants had made a definite assertion of an adverse right more than twelve years prior to the suit, that they always claimed to hold as permanent mukarraridars, and that the suit was barred by article 144 of the Limitation Act.

The material facts are as follows :—

The two above-mentioned villages were leased by the plaintiff's predecessor, Maharaja Shri Shri Ramanath Singh, on the 31st December, 1865, to the said Syed Mazaffar Hossein and Syed Mahamad Hossein.

The kabuliat, which was produced, shows that the lease was "mukarrari istemrari" at an annual rent of Rs. 344. The mukarraridars undertook to cultivate the villages and keep the tenants contented.

It was provided that they should have no right to transfer the villages, that they should not cut fruit-bearing trees, and that they would bear the expense relating to earth work.

On the 17th September, 1875, Syed Mahamad Hossein executed an ikranarma stating that he had no interest in the lease.

On the 1st August, 1879, the other lessee, Syed Mazaffar Hossein, assigned his interest in the villages in consideration of the sum of Rs. 1,861 to Sahai Singh, who was the predecessor in title of the defendants 1 to 10.

The deed recited that the said villages were held by Syed Mazaffar Hossein in perpetual mukarrari istemrari.

Both the original lessees died about 1891. Sahai Singh, the assignee, remained in possession of the villages until his death, which occurred about 1915: since that time the defendants continued in possession.

It appears that the Ramgarh Raj had given a usufructuary mortgage to one Narsingh Dyal Sahu, who was in possession of the two villages from 1891/1892 to 1897/1898. The mortgagee sued the original lessee, Syed Mazaffar Hossein, and the predecessor in title of the defendants for rent, and obtained decrees, which were duly paid by the defendants or their predecessor in title. It is an admitted fact in this case that no rent was paid to the original lessor, the Maharaja, or his successors by Sahai Singh, or the defendants. Notices to quit were served in 1915 and again on the 20th August, 1919, but the defendants remained in possession, and, accordingly, the suit was brought in 1920.

In or about the year 1903, Sahai Singh apparently was willing to pay rent to the plaintiff's predecessor in title, provided that his name was entered as the holder of the mukarrari interest and that he was given receipts made out in his own name.

The plaintiff's predecessor in title refused to do this, but expressed his willingness to receive rent and give marfatdari receipts. Sahai Singh refused to accept marfatdari receipts, and consequently no rent was paid by Sahai Singh to the original lessor.

It may be taken as a fact that rent was paid to the mortgagee, and that after the mortgage came to an end about 1898, no rent was paid by Sahai Singh or the defendants to anyone.

It appears that the predecessor in title of the plaintiff had instituted suits for possession against the heirs and assigns of mukarraridars holding under leases similar in terms to the lease in the present case.

In 1877 the predecessor in title of the plaintiff was unsuccessful, but in 1903 he got a decree for possession against one Narsingh Dyal Sahu. The appeal to the High Court of Calcutta in that case is *Narsingh Dyal Sahu* v. *Ram Narain Singh,* 30 Cal. 883.

It was decided by the High Court, relying upon a decision of the Judicial Committee of the Privy Council, that the words "mukarari istemrari" do not in their lexicographical sense primarily imply any heritable character in the grant as the term "mourasi" does: but that they simply imply permanency from which in a secondary sense such heritable character might be inferred, it always being doubtful whether they meant permanent during the lifetime of the persons to whom they were granted or permanent as regards hereditary character, and that the words do not *per se* convey an estate of inheritance.

It was held that the tenures created by the leases in that case were grants tenable for the life of the grantee only and that they were neither heritable nor transferable.

The position, therefore, seems to have been that from and after 1877 the predecessor in title of the plaintiff was alleging that in the case of leases similar to that in the present appeal, the grant came to an end when the original lessees died. On the other hand, the mukarraridars were maintaining the position that such leases conveyed an estate of inheritance—until in about 1903 the predecessor in title of the plaintiff succeeded in obtaining a decision in his favour.

It was not alleged on behalf of the plaintiff-appellant at the hearing of this appeal that the lease of December, 1865, was more than a lease for the life of the original lessees, but the above-mentioned facts are material in considering the other contentions urged on behalf of the parties to this appeal.

It was argued on behalf of the plaintiff-appellant that when the mortgagee in possession demanded and received rent from the

predecessor in title of the defendants, he was acting under the provisions of Section 76 (*a*) of the Transfer of Property Act, 1882 ; that as long as the mortgage was in force the powers of the proprietor mortgagor were vested in the mortgagee ; that when the term of the mortgage came to an end about the year 1898, the predecessor in title of the defendants became the tenant of the predecessor in title of the plaintiff, and therefore that the defendants cannot set up adverse possession.

It was argued further on behalf of the plaintiff that the nature of the tenancy was a holding over by Sahai Singh and his successors upon the terms of the original lease, except as to duration ; that by reason of section 116 of the Transfer of Property Act, 1882, it became a tenancy from year to year ; that it remained in existence until notice to quit was given, and therefore that the tenancy was in existence within twelve years of the institution of the suit and that the suit was not barred by the Limitation Act.

The main question, therefore, to be determined is whether, after the termination of the original lease in or about 1891, there was existing between the predecessor in title of the plaintiff and Sahai Singh or the defendants such a relation as to create a tenancy from year to year.

It is clear that there was no express recognition of the defendants or their predecessor in title as tenants by the plaintiff's predecessor in title.

In their Lordships' opinion, on the facts established in this case, the payment of the rent decrees obtained by the mortgagee against Syed Mazaffar Hossein, the original lessee, and Sahai Singh was not sufficient to create a tenancy between the mortgagor and Sahai Singh or the defendants.

The mere payment of the rent decrees obtained by the mortgagee is not inconsistent with the case of the defendants and their predecessors in title that they were permanent tenure holders. The payment of the rent may well have been made in order to preserve the tenure, on which they relied from being sold.

In their Lordships' opinion, it has been established that the position between the predecessor in title of the plaintiff and the defendants' predecessor in title was that, on the one hand, the Maharaja was asserting that the grant to the original mukarraridars conveyed a life interest only, and that after 1891 the predecessors of the defendants had no right to be in possession of the lands. On the other hand, the mukarraridars and their assignees were claiming that the lease was of a permanent heritable character, and that this was the position up to 1903, when Sahai Singh endeavoured to get his name entered as the holder of a permanent tenure, and the proprietor refused, and would only agree to give marfatdari receipts, which Sahai Singh declined to accept, with the result that Sahai Singh remained in possession without paying any rent.

So far from being in agreement as to a tenancy, the parties were at arm's length, and, in their Lordships' opinion, after the

termination of the lease for lives, there was no recognition by the plaintiff or his predecessor in title so as to constitute the defendants or their predecessors in title tenants, as alleged by the plaintiff. In fact, the evidence shows that the then proprietor of the Raj refused to recognise the defendants' predecessors as his tenants.

In these circumstances their Lordships are of opinion that the plaintiff failed to prove that the relationship of landlord and tenant, on which he relied, was in existence within twelve years prior to the institution of his suit, and that, therefore, the plaintiff's suit for possession was barred by the Limitation Act, and this appeal should be dismissed.

The second appeal, No. 82 of 1926, related to suit No. 87 of 1920, which was instituted on the 1st April, 1920.

The plaintiff is the same as the plaintiff in the last appeal, and sued as the proprietor of the Ramgarh estate for a declaration that the defendants have no permanent and heritable interest in the three villages mentioned in the plaint, and that their right to possession ceased at the end of the Sambat year 1976, for possession of the said villages and for mesne profits.

The facts of this case are different from the facts in the last appeal, but the main issue between the parties is the same.

In 1865 the wife of the then owner of the Ramgarh estate, acting on his behalf and with his consent, granted a mukarrari istemrari lease to Tulsi Mahto and Lachman Mahto.

Lachman died in 1866 and Tulsi died in 1883.

The defendants 1 to 3 and 5 are the heirs of the original mukarraridars of the three villages. The defendants 11 to 16 and 19 to 22 are darmukarraridars.

The other defendants who contested the suit relied on a defence which succeeded at the trial, and which has not been disputed in this appeal.

The learned Judge who tried the suit made a decree for possession in favour of the plaintiff, except as to 4·09 acres being in the possession of certain defendants therein specified. The learned Judges of the High Court were of opinion that the decision of the learned Subordinate Judge in so far as he decreed the plaintiff's suit for possession against the defendants other than the defendants 6 to 9 should be set aside, and accordingly the plaintiff's suit was dismissed *in toto*.

The plaintiff alleged that the right of the lessor and his heirs to re-enter accrued on the death of the last surviving grantee, viz., in 1883, but that the defendants, who were the heirs or assigns of the original grantees, remained in possession with the assent of the landlord as tenants from year to year; that at the time of the preparation of the record of rights they asserted that they were entitled to continue in possession as mukarrari istimidars. Notices to quit, therefore, were served in 1915 and again in September, 1919, but the defendants remained in possession, and this suit was instituted in 1920.

After the death of the last survivor of the original mukarraridars, the heirs remained in possession and paid rent to the predecessor in title of the plaintiff, but receipts were given in the marfatdari form, *i.e.*, the receipts were made out in the names of the original mukarraridars, but the names of the persons who made the payment were also entered in the documents.

This practice was continued until about the year 1898.

At or about that time one of the defendants went to Padma and requested the Maharaja to accept rent and give a receipt to the person paying the rent in his own name.

The Maharaja refused to accept the rent and to grant a receipt as requested.

After that time no rent was paid, and it was alleged in evidence on behalf of the defendants that no demand for rent had been made on behalf of the Maharaja since the above-mentioned incident.

As in the first appeal, it was agreed by the parties to this appeal that the original lease of 1865 conveyed a life estate only.

It was, however, contended on behalf of the plaintiff-appellant that after the death of Tulsi Mahto in 1883 the heirs of the original mukarraridars, who remained in possession, were tenants on sufferance, and that when they paid rent, which was accepted by the predecessors in title of the plaintiff, they became his tenants from year to year by operation of law that this tenancy continued until it was determined by the notice to quit, and consequently that the suit was in time.

In short, it was argued that the relationship of landlord and tenant between the predecessor in title of the plaintiff and the heirs of the original mukarraridars came into existence in 1883 ; and that the mere non-payment of rent did not put an end to such relationship, which existed until the notice to quit was given in 1919.

The main defendants alleged that the heirs of the original mukarraridars and their assignees had been in adverse possession of the property in suit for more than twelve years before the suit, by right of permanent mukarrari interest therein, and the High Court accepted this contention and decided the appeal in their favour.

In answer to this argument it was urged on behalf of the plaintiff-appellant that, where a tenant admits that he holds as a tenant of the person *who claims to be his landlord*, but disputes the terms of the tenancy and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny his landlord's title as to work a forfeiture, and that a man, who admits he is a tenant cannot rely on adverse possession by asserting a larger tenancy than that admitted by his landlord : and that when the persons who are defendants in an ejectment suit are tenants, they cannot obtain the right of permanent occupancy by prescription.

The decisions in *Maharaja of Jeypore* v. *Rukmini Pattamahevi*, 46 I.A. 109 and 118, *Maharani Beni Pershad Koeri* v. *Dudh Nath*

Roy and others, 26 I.A. 216, and *Madhavrao Waman Saundalgekar and others* v. *Rajhunath Venkatesh Deshpande* (50 I.A. 255) and *Nainapillai Marakayar* v. *Ramanathan Chettiar* (51 I.A. 83) and other cases were referred to.

Their Lordships do not think it necessary to refer to the above-mentioned cases in detail, for the facts of the present case do not, in their opinion, bring it within the rulings contained therein.

In this case the evidence goes to show that after the expiration of the lease for lives the plaintiff's predecessor in title did not, in fact, claim to be the landlord, he did not admit any tenancy on the part of the defendants or their predecessors and he did not, in fact, allow the defendants or their predecessors to be in possession as tenants.

Their Lordships need not refer again at any length to the position which existed at the material times between the plaintiff's predecessor in title and the mukarraridars of the estate.

It may be summed up in the words of the learned Judge who delivered the judgment in the High Court :—

> "The Ramgarh estate consistently and uniformly held out that the estate granted under the istemrari mukarrari deeds was only a life estate to enure during the lifetime of the grantees. The heirs of the grantees equally consistently insisted that the grants were permanent and heritable grants."

This was the state of things when Tulsi Mahto died in 1883.

The question then arose what was the position of the heirs of the mukarraridars.

The heirs were claiming a permanent right and endeavouring to establish it by getting the landlord to accept rent and give a receipt in their name. The landlord was receiving the rent, but protecting himself by giving receipts in the names of the original mukarraridars.

In their Lordships' opinion the effect of this was that the rent was paid and received by the parties respectively without prejudice to their above-mentioned contentions until the question of the rights in respect of the lease was settled.

Then there came a time, viz., about 1898, when the defendants, who are heirs of the mukarraridars, or one of them on their behalf, demanded receipts in their own name ; the landlord refused to give such receipts and no more rent was paid.

The question is whether it can be inferred from these facts (because there is no express agreement) that there was an implied agreement between the plaintiff's predecessor in title and the heirs of the original mukarraridars that they should continue in possession as tenants from year to year, for it was admitted on behalf of the plaintiff-appellant that unless he can establish that there was such a tenancy, he cannot succeed in this appeal.

In their Lordships' opinion this appeal must be decided upon the special facts of the case, which go to show, as already stated, that after the lease for lives expired the plaintiff's predecessor in

title did not recognise the heirs of the mukarraridars as tenants. He was aware of the position taken up by the heirs of the original mukarraridars and the permanent right which they claimed and which they were desirous of establishing, and he was at pains not to do anything which might be taken to recognise that right. The parties were really at arm's length, the heirs of the original lessees were asserting their permanent interest with a liability to pay rent, a right which the Maharaja refused to recognise, but which they continued to assert consistently and which they had asserted ever since the death of Tulsi Mahto in the year 1883.

It was argued that the principle contained in the provisions of Section 116 of the Transfer of Property Act, 1882, should be applied, for although it could not be said that this case came expressly within the provisions of the section, it was argued that the provisions thereof should be used by way of analogy as laying down a rule of equity and good conscience. In their Lordships' opinion this is not a case of the lessee or underlessee holding over within the meaning of the section, but even if the case were to be considered on the assumption that the provisions of the section were applicable, the facts of this case would go to show, as already stated, that the parties in paying and accepting rent after the expiration of the lease for lives were acting without prejudice to their respective contentions, and it would have to be held that there was an "agreement to the contrary" which would prevent the application of the provisions of the section in the present case.

Much reliance was placed by the learned counsel who appeared for the plaintiff-appellant on the case of *Jadu Nath Belel* v. *Raj Narain Mukherjee* (17 Cal. Weekly Notes 459). The learned counsel argued that the above-mentioned case was on all fours with the case now under consideration.

Their Lordships are unable to take that view. A reference to the case will show that the facts of the cited case are materially different from the facts of this case.

The learned judges of the High Court, in the cited case stated in their judgment :—

> "It appears that after his purchase Jadu Nath Belel held the jote in the name of the original tenant . . . and both parties must be held to have accepted the position that Jadu Nath Belel was paying rent in the name of the old tenant and that the plaintiff was his landlord."

Their Lordships are not concerned to express any opinion as to the correctness of the above-mentioned decision, it is sufficient for them to note the finding of fact, upon which the case rested.

On the facts of the case now before the Board, their Lordships have arrived at the conclusion that the predecessor in title of the plaintiff did not recognise the heirs of the mukarraridars as his tenants from year to year, which finding in itself differentiates the case from the above-mentioned cited case.

Their Lordships, therefore, are of opinion that the plaintiff's claim for possession was barred by the Limitation Act, and that this appeal should be dismissed.

The third appeal, No. 102 of 1926, related to suit No. 35 of 1919, which was instituted on the 20th February, 1919.

The plaintiff is the same as in the two other suits and sued as the proprietor of the Ramgarh estate, in respect of certain villages mentioned in the plaint; he claimed (1) a declaration that the defendants have no permanent and heritable interest in the said villages and that their right to possession ceased at the end of the Sambat year 1974, (2) possession of the villages, and (3) mesne profits.

The defendants were alleged to be heirs or assigns of Bhagwan Ram Pandey and Mohan Ram Pandey.

The learned Subordinate Judge gave a decree for the plaintiff against the defendants, with the exception of defendants 20, 20 (*a*) and 21.

The learned Judges of the High Court allowed the appeal and dismissed the plaintiff's suit.

In 1866 the then proprietor of the Ramgarh estate granted a mukarrari istemrari lease to Bhagwan Ram Pandey and Mohan Ram Pandey.

Mohan Ram Pandey, the survivor of the two lessees, died in 1884.

As already stated, it is not now alleged that the lease of 1866 would be effective for more than the lives of the above-mentioned lessees. The predecessor in title, therefore, of the plaintiff became entitled to possession of the said villages in 1884 and this suit was not brought until 1919.

The main point in this appeal is the same as in the second, which has already been considered.

Indeed, the learned counsel who appeared on behalf of the plaintiff-appellant stated that there was no material difference between the second and the third appeals.

The learned Judges of the High Court came to the conclusion on the facts of this case that the plaintiff's predecessor in title was not willing to recognise the defendants as tenants, and that the suit was barred by the Limitation Act.

Their Lordships are of opinion that this conclusion is correct and that the evidence in this appeal is not sufficient to establish the case which the plaintiff admittedly has to make out in order to succeed, viz., the existence of a tenancy from year to year between the predecessor of the plaintiff as landlord, on the one hand, and the heirs of the mukarraridars as tenants on the other hand.

They are therefore of opinion that this appeal also should be dismissed.

In their Lordships' opinion, all three appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

KUMAR KAMAKHYA NARAYAN SINGH

v.

RAM RAKSHA SINGH AND OTHERS.

SAME

v.

CHARAN MAHTO AND OTHERS.

SAME

v.

BRAHMA NARAYAN SINGH AND OTHERS.

(*Consolidated Appeals.*)

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