ORISSA HIGH COURT

Khetramohan Baral

Vs

Rasananda Misra

Second Appeals Nos.68,69,70 and 72 of 1960

(R.L. Narasimham, C.J. and R.K. Das, J.)

12.10.1961

JUDGMENT

Narasimham, C. J.

1. These four second appeals were heard analogously and will be disposed of in one judgment. They arise out of the judgment and decree of the learned Additional District Judge of Cuttack-Dhen-kanal confirming the judgment and decree of the Munsif, Second Court, Cuttack, in four suits as described in the chart below:

Number of suit in the trial court.	**Number of the appeal before the Addl. District Judge.**
O.S.No.208/50	T.A.41/56
O.S.No.209/50	T.A.42/56
O.S.NO.210/50	T.A.43/56
O.S.No.212/50	T.A.45/56

2. In the trial Court O.S. Nos.208, 210, 211 and 212 of 1950 were all disposed of by one judgment. Though they were all tried analogously with T.S. No.209 of 1950, a separate judgment was however delivered in T.S. No.209 of 1950 by the learned Munsif. Five separate decrees were prepared in respect of all the aforesaid title suits. Five appeals were filed against the judgments and decrees of the learned Munsif and all the five appeals (Title appeals 41 to 45 of 1956) were disposed of by the lower appellate Court by one judgment and five separate appellate decrees were also drawn up. In the High Court also five separate second appeals were preferred by the defendants (Second appeals 68 to 72 of 1959). Of these, Second Appeal No.71 of 1559 was disposed of by a separate judgment today. The remaining four appeals namely Second appeals 68, 69, 70 and 72 of 1959, will all be governed by this judgment.

3. In all these four appeals though the plaintiffs are different the defendants are the same. The

plaintiffs, by separate suits prayed for a declaration that they were occupancy raiyats in respect of certain items of properties described in the plaints. The defendants are admittedly the successors in interests of one Ganeswar Mohanty and his ca-sharers (hereinafter referred to as the Mahantis) who were recorded as occupancy raiyats (Sthitiban) in respect of all the suit properties. These properties appertain to Khata No.169 of the Current Settlement (Ex.U) having an area of 7.219 acres. In the Current Settlement the Mahanties were shown as Sthitiban Raiyats and the cash rental payable to the superior landlord for the entire Khata was shown as Rs.25-14-6 (Ext.U). Plaintiffs in O.S. Nos.208, 210, 211 and 212 of 1950 were recorded as Sikimi Dhulibhag tenants under the Mahantis in respect of small portions of the said Khata in the Current Settlement. The plaintiffs in T.S. No.209 of 1959 were recorded as Sikimi under the Mahantis in the same Khata but it was further recorded that they were paying cash rent of Rs.6-6-0 (See Ext.7/a) to the Mahantis.

4. The main issue in these suits was the same, namely whether the Current Settlement entry was incorrect and whether the plaintiffs' status was that of occupancy raiyats whereas the defendants' status was that of mere tenure-holders.

5. For appreciating the points in issue, it is necessary to describe in some detail the nature of the entries made in respect of the same property in the previous Settlements. It is admitted that the ancestor of the Mahantis was one Shiva Gharan Mohanty who was working as a Patwari of the then Zamindar of the rnouza. In Bhourian Settlement of 1938-42 (Ext.4) the property was recorded as "Chakaran" of the said Shiv Charan, but the fact that it was in the 'chassi' (cultivation) of the predecessors in interest of the plaintiffs was also expresly recorded. In the next Settlement, Provincial Settlement of 1898-99 (Ex.U/2) all the plots were recorded in the name of one Srikrishna Mohanty and his status was described as Patwari Jagir Babel. It was also recorded that no rent was paid. The area of the holding was shown as 7.189 acres. In the Revisional Settlement of 1906-1912 (Ex.U/1) the same property was recorded in Khata No.230 in the name of one Gani Mohanty, but the area was shown as 7.189 acres as before. Gani Mohanty's status was described as "Thani Stitiban Sabak". The cash rent was shown as Rs.19-2-0 and cess as Rs.0-9-6 making up a total of Rs.19-11-6. In the current settlement, as already pointed out the area of the plot was shown as 7.219 acres and the khata number was shown as 169 in the name of Ganeswar Mohanty and others. Their status was shown as 'Stitiban' and the cash rent payable was recorded as Rs.25-14-6. In the Settlement records the status of the plaintiffs was recorded merely as Sikimi except in the records relating to Provincial Settlement where the plaintiffs' status was described as "Sikimi Dakhal Satwa Suny raiyati." In the Revisional Settlement records their status was described as 'Sikimi Dhuli-bhag' with the exception of the plaintiffs in O.S. No.209 of 1950, who have been shown as paying cash rent of Rs.6-6-0.

6. The plaintiffs have an onerous duty to discharge before they can succeed in the litigation. Apart from their position as plaintiffs - on whom the burden is cast to affirmatively establish their case - sub-section (3) of section 117 of the Orissa Tenancy Act casts on the Court the duty to presume the entries in the Current Settlement to be correct until they are proved by evidence to be incorrect. As pointed out by a Division Bench of this Court in *Chunilal v. Mulsankar*[1], following *Surpat Singh v. Bhupendra Narain*[2], the presumption of correctness attaching to settlement records prepared under the Orissa Tenancy Act cannot be rebutted by other presumptions under the general law, but must be rebutted by proof of facts inconsistent with the

Settlement entry. As regards the value to be attached to previous settlement entries, the proviso to sub-section (3) of Section 117 of the Orissa Tenancy Act says:

> "Provided that if any entry in the record of rights is altered in a subsequent record of rights, the latter entry shall be presumed to be correct until it is proved by evidence to be incorrect, but the previous entry shall be admissible as evidence of the facts existing at the time such an entry was made."

7. The two lower courts thought that the presumption of correctness in favor of the Current Settlement entry showing the Mahantis as Sthitiban raiyats was rebutted by the entries in Sikimi Khata (Exts.7, 7-a, 7-b, 7-c and 7-4) where the Mahantis were recorded in the column meant for 'Madhyasatwaadhikari'. It is true that the expression Madhyasatwadhikari means 'tenure-holder'. The lower courts thought that the Settlement entry, in so far as the raiyati Khata of the Mahantis was concerned, was contradicted by the entry describing their status as 'Madhyasatwadhikari' in the Sikimi Khata of the plaintiffs. Here the two courts have committed a serious error. A perusal of the Sikimi Khata (Exts.7 series) will show that the printed form ordinarily used for occupancy raiyats was used for filling up entries in respect of Sikirni tenants. In that printed form there is a column "Name of Madhya Satwadhikari" in all the raiyati khatas, because, ordinarily, a raiyat holds land under a tenure-holder. But as there was no separate printed form for recording Sikimi Tenants, the same form was used by the Settlement authorities. The Settlement authorities took care to record the status of these tenants as 'Sikimi' and entered the name of their immediate landlord in the column meant for 'Madhya-Satwa.dbikari'. This practice is based on the Rule 134 of the Technical Rules of the Settlement Department of Bihar and Orissa, Vol.I, 1927 which says that the rules for filling up the columns in raiyati khatas shall apply 'Mutatis mutandis,' for under-raiyats also. Doubtless, if the Settlement authorities had scored through the word 'Madhyasatwadhikari' and inserted 'Stitiban' raiyat in the appropriate column of the Sikimi khata that would have been better. But in the Sikimi khata of the plaintiffs, though the mohantis were shown under the coloumn 'Madhya Satwadhikari', there was a reference to khata No.169 (Ext.U) in which their status was clearly described as 'Stitiban'. Hence, in the context, the expression 'Madhya satwadhikari' occurring in the printed form of the sikimi khata of the plaintiffs must only mean 'intermediate landlord Between sikimi tenants on the one Band and the zamindar on the other.' Exhibit 7 series cannot therefore be taken to be inconsistent with the status of the Mahantis as Stitiban raiyats as shown in Ext.U. The lower Courts should not have attached any importance to the expression 'Madhyasatwadhikari' occurring in those exhibits.

8. The main question that now remains is as to whether the plaintiffs have led evidence to show that the current settlement entry is incorrect. They have relied mainly on the evidence of some of the plaintiffs' witnesses to the effect that the plaintiffs' ancestors and their predecessors in interset have been in possession of the respective plots from the time of the Bhourian Settlement of 1933-42. One of the defendants' witnesses A.W.5 also admitted that the plaintiffs and their ancestors were in possession of their respective plots from time immemorial. There was also some evidence of transfer of the plots by the Sikimi tenants in the past. On the basis of this evidence the two lower courts seem to have thought that the plaintiffs have affirmatively established their status as occupancy, raiyats and that the Current Settlement entry was therefore incorrect.

9. In the Bhourian Settlement though the cultivation of the ancestors of the plaintiffs was noted the lands were recorded in the name of Shiv Charan Mohanty as "Chakaran" which is a kind of service tenure. Bengal Rent Act of 1859 (Bengal Act 10 of 1859) recognised two classes of tenants, namely, raiyats on the one hand and under-tenants on the other. Section 6 of that Act is as follows:

> "6. Every Raiyat - who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him, whether it he held under a patta or not, so long as he pays the rent payable on account of the same. But this rule does not apply to Khamar, nijjote or sir lands belonging to the proprietor of the estate or tenure and let out by him on lease for a term, or year by year, nor (as respects the actual cultivator) to lands sublet for a term or year by year by a raiyat having a right of occupancy."

The ancestors of the plaintiffs could not possibly claim that they were raiyats within the meaning of the aforesaid section of the Bengal Act 10 of 1859. In the Bhourian Settlement they were merely shown as cultivating the lands. Hence, even if it be assumed that from the time of Bhourian Settlement in 1838-42 up to the date of the passing of the Bengal Act 10 of 1859 they were in actual cultivation of the lands, they cannot claim right of occupancy until they further show that though the Mahantis were the raiyats having a right of occupancy the lands were sublet to them for an indefinite period and not for a term or from year to year - as required in the last portion of the aforesaid section. The two lower courts thought that by virtue of section 6 of the Bengal Act 10 of 1859, the ancestors of the plaintiffs had acquired occupancy status. Here the lower courts missed one important point. If, as now urged by the plaintiffs' Advocate, the plaintiffs are entitled to occupancy status by virtue of the last portion of section 6 of Bengal Act 10 of 1859 it amounts first of all to an admission that the Mahantis had a right of occupancy. The plaintiffs must then show that the Mohantis sublet the lands to their ancestors for an indefinite period and not for a fixed term or from year to year. There is absolutely no evidence as to how the land was sublet by the Mohantis to the plaintiffs' ancestors. Merely because there is a general admission that the plaintiffs' ancestors were in possession of the lands all along, it cannot be held that the lands were sublet to them for an indefinite period and not for a fixed period, or from year to year. As the statute casts the burden on the plaintiffs to rebut the correctness of the Settlement entry by proof of facts inconsistent with the entry, the plaintiffs must further show the exact nature of the possession of the plaintiffs' ancestors up to the passing of Bengal Act 10 of 1859, and they cannot ask the court to draw inference in their favor from a mere admission of their continued possession which is inconclusive and not inconsistent with the Settlement entry.

10. The lower appellate Court seems to have thought that as there was some evidence of transfer by the plaintiffs' ancestors to outsiders, it must be assumed that they had occupancy status. The Court then went to observe:

> "It is not disputed that the rights which the plaintiffs' predecessors had, in the disputed lands were being inherited in the family and that the persons in possession of the lands for the time being were also transferring them to outsiders. There is absolutely no evidence to show that this was at any time objected to by the predecessors of the defendants. This is another circumstance which considerably strengthens the plaintiffs' case that their

predecessors had occupancy right in the disputed properties and that they were not mere sikimi tenants holding the lands under other occupancy raiyats."

There is some confusion in the reasoning of the lower appellate Court. It is not the duty of the Mahantis (defendants) to affirmatively establish that in every case of succession either by inheritance or transfer such succession was recognised by them as the superior landlord. On the other hand, if the plaintiffs wanted to rely on this as a piece of evidence to show that they had occupancy rights, they must show affirmatively that whenever there was succession by inheritance or transfer the consent of the Mahantis was not obtained and that the successors in interests of the original sikimi tenants continued to remain in possession in their own right. The burden of proving this fact cannot be shifted on the defendants in view of the statutory presumption in their favour. As there is no evidence on either side to show whether on each occasion of succession either by inheritance or transfer, the Mahanti's consent was obtained or not, this circumstance cannot be used for the purpose of showing that the plaintiffs' ancestors acquired occupancy rights. Hence, neither section 6 of Bengal Act 10 of 1859 nor the other circumstances mentioned above help the plaintiff's case.

11. It is true that in the Provincial Settlement the plaintiffs' ancestors namely the sikimi tenants were recorded as raiyats though it was stated that they were Sikimi Dakhal Satwa Sunya (Sikimi with no rights). This entry was made presumably in view of the following note in paragraph 339 at page 233 of Madras Settlement Report:

"Under-tenants of jagirdars are strictly speaking raiyats, but do not acquire rights of occupancy."

In the Provincial Settlement papers the status of the Mahantis was merely described as 'Patwari Jagir Bahel' and no rent was shown as payable by them to the Zajmindar. It may therefore be assumed that the mahantis held the lands as Jagirs. But the expression Jagir is somewhat ambiguous as pointed out in paragraph 60 of Dalziel's Settlement Report (at page 22) real jagirdars are those who hold lands purely on condition of rendering service to the zamindar and who are liable to be ejected if their services were no longer required, or if they are not performed. But there may also be another class of jagirdars who were originally raiyats, but who, on subsequently agreeing to render service to the zamindar, were given the concession of non-payment of rent in lieu of that service. In respect of this latter class, when their service is no longer required or performed, their original status as occupancy raiyats will revert and the only right that zamindar will have, is to assess them full rent. It is well known that what is granted alone can be resumed. it it is a grant of land for service, the land itself may be resumed when the service is no longer required. But if it is a grant of concession of non-payment of rent to an occupancy raiyat in lieu of his rendering service to the zamindar, what will be resumed will be that concession and he will be liable to pay the full rent on such resumption, but his status as an occupancy raiyat cannot be taken away. This distinction has been pointedly noticed in the aforesaid paragraph of Dalziel's Report. It is well known distinction based on several previous judicial decisions. There may also be another class of jagirs in which a tenure-holder paying rent to his zamindar was exempted from payment of rent in lieu of his rendering service to the zamindar. In his case also if the service is no longer performed or required he will be liable to pay full rent, but his right as a tenure-holder cannot be taken away. In paragraph 334 at page 230

of Maddox's Settlement Report Vol.1 there is a reference to the jagirs of Patwaris of the Zamindar. There he pointed out that

> "the jagirs of Patwaris have been resumed and assessed at full rates. They have been treated as thani raiyati and have ceased to be liable to render any service to the State, village, or zamindar".

Thus Maddox's Report also shows that he was fully aware of this class of jagirs where, on resumption, the land itself was not taken away but occupancy status was conferred on the jagirdar and full assessment of rent was made. But so far as the lands in dispute in the present litigation are concerned Maddox did not record the Mahantis as 'Stitiban' but merely as jagirdars (Ex.U/2), but he noted that no rent was payable. The obvious inference therefore is that during Maddox Settlement operations the services were continued to be performed by the patwari jagirdars to the zamindar, and consequently the question of resumption and conferring of occupancy raiyats on them did not arise. But during the Revisional Settlement (Ex.U/1) the cash rent payable was fixed and the jagirdars' status was recorded as 'Thani stitiban'. During the Current Settlement also as pointed out by Dalziel in the aforesaid paragraph of his report (already cited) these jagirdars were recorded as 'Stitiban' and cash rent fixed during the Revisional Settlement was slightly enhanced from Rs.19-11-6 to Rs.25-14-6.
It must be presumed (until the contrary is proved by evidence) that the Settlement authorities made careful enquiries about the origin of the rights of the Mahantis in the disputed properties and then held that they were originally occupancy raiyats - though the rent was commuted to service for a long time. That was the reason why upto the time of the Revisional Settlement no rent was fixed on the holding. It was only during the Revisional Settlement that their status was noted as "Thani Stitiban" and cash rent of Rs.19-11-6 was shown as payable. It is true that the entries in the current settlement records are only presumptive and it was always open to the plaintiffs to show that from its inception, the jagir of Mahantis was of the other type, namely (i) grant of land in lieu of service or (ii) grant of rent free concession to a tenure-holder, and that consequently when the service was no longer rendered the land itself was resumed, and the Mahantis had no further interest at all in it or else they became tenure-holders liable to pay rent. But the plaintiffs have led practically no evidence on this point. The origin of the 'Chakaran' interest of Shiv Charan Mohanty as recorded in the Bhowrian Settlement (Ext.4) is not known to any one. We have to rely only on the various Settlement records. It must therefore be held that from the time of the Revisional Settlement (Ex.U/1) the status of the Mahantis (which was reiterated in the Current Settlement also) was recognised as that of occupancy raiyats and not tenure-holders.

12. The lower appellate Court observed that one of the witnesses for the defendants (D.W.5) admitted that his ancestors obtained chakaran jagir in respect of 52 acres of land, spread over 35 villages in Usnupur Jagir and that consequently the presumption would be that the Mahantis were tenure-holders and not raiyats. Apparently that Court drew this presumption by virtue of Sub-section (5) of Section 5 of the Orissa Tenancy Act. But this will not suffice to rebut the presumption of correctness attaching to the Settlement entry. The Settlement authorities were fully aware of the presumption to be drawn under the aforesaid sub-section and yet they recorded the Mahantis' status as 'Stitiban'. The presumption of correctness attaching to the settlement entry, as laid down in sub-section (3) of Section 117 of the Orissa Tenancy Act, cannot be rebutted by

another presumption under the same Act, but must be rebutted by proof of facts inconsistent with the entry.

13. The lower appellate Court has relied to some extent on the observations of the Privy Council in *Anup Mahto v. Mita Dusah*[3], that Sikimi tenants under a service tenure may acquire occupancy rights under certain circumstances. Though there may be some apparent similarity between that case and the instant case, there is one fundamental distinction which should not be ignored. There, in the Settlement records the landlords' status was not shown as 'Stitiban' as in the present case, but they were merely recorded as tenants of the proprietors, holding revenue-free lands on service tenure as jagir. Their Lordships of the Privy Council expressly noticed this fact in the following terms, at page 6:

> "The plaintiffs (meaning the landlords) in the extract relating to their tenancy are not shown as raiyats, nor is there any entry in column 10 recording whether or not they had occupancy rights as there must have been - if it had been intended to record them as raiyats".

Here it is just the contrary. In the last two settlements (the current Settlement and the Revisional Settlement) the landlords' status has been expressly recorded as 'Stitiban' meaning occupancy raiyat. In the Privy Council case their Lordships, on a construction of the record of rights, both of the landlord and of the Sikimi tenants, held that the landlord was a tenure-holder and not a raiyat, and that consequently there was no inconsistency in the acquisition of full occupancy rights by the Sikimi tenant under the tenure-holder. But once it is held that the status of the Mahantis as raiyats with occupancy rights, as recorded in the Settlement record of rights, has not been proved to be incorrect, the plaintiffs as their under-tenants cannot obviously claim the status of occupancy raiyats. Similarly, the view of Maddox in his Report on the Provincial Settlement operations, to the effect that under-tenants of service tenures are strictly speaking raiyats with no rights of occupancy cannot help either party. He was obviously referring to under-tenants of jagirdars who were not originally
occupancy raiyats prior to their becoming jagirdars.

14. I may now take up an interesting question of law raised by Mr. R.N. Sinha for the respondents. In the connected second appeal (Second appeal No.71 of 1959) arising out of Title appeal No.44 of 1956 before the learned Additional District Judge, I have held that the appeal has abated as a whole and that the judgment of the learned Munsif holding that the appellant landlords were tenure-holders and the plaintiffs in O.S. No.211 of 1950 (out of which that appeal arose) were occupancy raiyats, has attained finality due mainly to the negligence of the defendants in not impleading Sashi Dei, daughter of the deceased plaintiff No.4 Dhadi Behera in appeal before the District Judge and also in the appeal before us. The total area which was the subject matter of the litigation in that suit was 2.36 acres appertaining to Sikimi Khata No.20 (under parent khata No.169). In the other suits (out of which the present second appeals arose) (though the plaintiffs claimed different parcels of land they were all shown under the same khata. Mr. Sinha contended that in all the five suits the main issue was whether the appellant landlords were tenure-holders or occupancy raiyats in respect of the lands covered by parent Khata No.169 and that was the main reason why all those suits were consolidated and heard together. Mr. Sinha, therefore, urged that once this court holds that the decision of the learned Munsif in O.S. No.211

of 1950 that the appellants are tenure-holders in respect of that khata has attained finality that decision must operate as res judicata in all the other suits which were heard together and that the appellants cannot be permitted now to reagitate this question again in these Second appeals. Otherwise, according to him, there will be conflict of decisions one court of competent jurisdiction holding in one suit that the appellants are tenure-holders in respect of the lands recorded in khata No.169 and another equally competent court holding them to be occupancy raiyats in respect of other lands recorded in that Khata. Mr. Sinha however fairly conceded that Section 11, Civil Procedure Code may not, in terms, apply because the plaintiffs in the five suits were different, and the plots which they claimed were also different though all of them were recorded under the same Khata under a common landlord. But as Section 11, Civil Procedure Code, is not exhaustive, Mr. Sinha urged that this issue must be held to have been barred by the wider principles of res judicata. The question for decision therefore is when different suits are heard analogously mainly because an important common issue is involved even though the parties are not necessarily the same and the properties in dispute are also different, will the decision in one of the suits which is not challenged on appeal, operate as res judicata when the decisions in other suits are challenged before the appellate Court? Most of the decisions cited by Mr. Sinha do not go so far as contended by him. Thus *Narahari v. Shankar*[4], deals with a case where there was only one suit as one decree though two appeals were filed subsequently. Similarly, *Mrs. Gertrude Oates v. Mrs. Millicent D'Cilva*[5], and *Sumi Devi v. Pranakrushna*[6], refer to two cross-suits between the same parties where the principles of res judicata embodied in Section 11 of the Civil Procedure Code would directly apply. Mr. Sinha then relied on the observations of a single Judge (Ray J. as he was then) in *Raghunandan v. Soubhagya Sundari Devi*[7], There, one of the cosharer landlords instituted several rent suits for the recovery of her share of arrear rent from her tenants. The principal defendant in all those suits was pro forma defendant No.1

Who was another co-sharer landlord who challenged the right of the plaintiff to institute those suits saying that as the sole executor of the will of the previous landlord, he alone was entitled to realise rents from the tenants. The real fight was between the plaintiff and pro forma defendant No.1, as to whether the plaintiff was entitled to institute such rent suits. The tenants (defendants) supported the claim of defendant No.1, though the tenants in the different suits were not necessarily the same. All the suits were heard analogously and disposed of by one judgment, but defendant No.1 preferred an appeal only in one of the suits and allowed the decision of the lower court in respect of the other suits to stand. The question arose as to whether that appeal was barred by res judicata. The learned Judge (Ray J.) held that the appeal was barred by res judicata inasmuch as there would be conflict of decisions equally binding between the same persons and on the same issue. That decision was upheld in Letters Patent Appeal in *Raghunandan Singh v. Soubhagya Sundari Devi*[8], But in that case the decision of both the learned single Judge and the Division Bench in the Letters Patent Appeal, proceeded on the assumption that, in essence the parties in all the suits were the same. The tenants were supporting defendant No.1 who was challenging the title of the plaintiff - They had no independent contest of their own. Hence, in the Letters Patent Appeal, the learned Judges did not go into the further question as to what would happen if the parties in all the consolidated suits were different, and they merely followed the previous decision of the Patna High Court in AIR 1933 Patna 78 which was admittedly a case of two cross suits between the same parties. Here however the position is fundamentally different. The plaintiffs in all the five suits had nothing in common between them except the fact that they had a common landlord and their lands were all entered under the same Khata. They did not derive title to the disputed property from one another .Five separate suits were filed and though

they were all heard analogously five separate decrees were prepared by the trial Court. Similarly the different appeals preferred before the learned Additional District Judge were all disposed of in one judgment but five separate decrees were prepared. Before this Court also five separate appeals were filed. It was for the convenience of the parties and of the court that the five suits were consolidated and one common judgment was delivered, but for all practical purposes it must be assumed that they were distinct litigations though the main issue was common. Similarly a recent decision of a single Judge of this Court reported in *Suria Devi v. L.N. Thakur*[9], is also distinguishable, because, there, though on paper the parties in the two suits (tried together) were different, the learned Judge held in realty the main parties were the same and consequently the decision in one of the suits would operate as res judicata in the other.

15. In the absence of further authority I am not inclined to extend the wider principles of res judicata to cases of this type. Any such extension may lead to startling results. The landlord whose title is challenged by some of his tenants may file collusive suits along with genuinely contested suits, get them all heard and decided analogously by the lower court and so manoeuvre that appeals are not filed against the decision in the collusive suits and then raise the plea of res judicata when the judgments in the really contested suits are challenged before the appellate Court.

16. In *Mt. Zohra v. Raza Khan*[10], cited by Mr. Sinha, there are
the following interesting observations:

> "Now it is usual in India to consolidate suits where common questions of law and fact are involved. It is done under Section 151 of the Civil Procedure Code, for unlike English Law there is no statutory provision in India for consolidation. In the first place, there is no reason why the Court should not deliver one judgment and prepare one decree-sheet in consolidated suits. But then it may be, as in the case before us, that the judge delivers the main judgment in one suit and makes a brief reference to it in the other and prepares two decree-sheets one in each case. If in such circumstances the aggrieved party appeals from one decree and not from the other, we are strongly of opinion that it is a question of fact which has to be decided on the merits of each case whether the decree which has not been appealed against and has therefore become final, in any way deprives the appellant of the alleged rights or refuses him the relief which he directly or indirectly seeks to get on appeal. If it does, the appeal should be dismissed, for the decree which has become final acts as res judicata; if it does not, the appeal should be entertained".

Even if the aforesaid question be taken as essentially a question of fact (depending on the circumstances of the case), I see no reason why the appellants should be denied their right to challenge the decision of the Munsif, in the present appeals though in Second Appeal No.71 of 1959 that decision must be held to be final due to the abatement of the appeal as a whole.

17. On the other hand, Mr. B. Mohapatra for the appellants cited *Parduman Singh v. State of Punjab*[11], and *Ramyad Singh v. Mt. Pan Kuer*[12], which support the contrary view. The latter case is somewhat similar to the present case because there also one of the appeals abated due to the failure to substitute the legal heirs of a deceased party within the prescribed tune. The question

arose whether the other connected appeal could be pursued. The learned Judge, while referring to the various decisions of the Patna High Court observed that they were distinguishable because,

> "it is clear that none of the three cases cited above has any application to the facts of this case, because the plaintiff in one suit was quite different from the plaintiff in the other suit".

18. For these reasons the second appeals are allowed, the judgment and decree of the lower court are set aside and the plaintiffs' suits are dismissed with costs throughout. There will however be one set of costs in all these four appeals.

R. K. Das, J.

19. I agree.

Appeals allowed.

Cases Referred.

[1] First Appeal No.34 of 1956, D/-7-9-1961 (Orissa)
[2] AIR 1937 Pat 165
[3] AIR 1934 PC 5
[4] AIR 1953 SC 419
[5] AIR 1933 Pat 78
[6] AIR 1956 Ori 68
[7] AIR 1947 Pat 125
[8] AIR 1948 Pat 191
[9] 1960-2 Orissa J D 143
[10] AIR 1945 Pesh 35
[11] AIR 1958 Pun 63
[12] AIR 1958 Pat 562