

MANU/BH/0060/1983

Equivalent Citation: AIR1983Pat257, 1983(31)BLJR579, 1983PLJR443

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Civil Writ Jurisdiction Case Nos. 484 of 1973 and 1610 of 1976

Decided On: 18.05.1983

Appellants:**Chandeshwar Singh and Ors.**

Vs.

Respondent:**Dahu Mahto and Ors.**

Hon'ble Judges/Coram:

H.L. Agarwal , P.S. Sahay and Binodanand Singh , JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Ram Nandan Prasad, Adv. No. 2, Mahesh Prasad, Adv. No. 3, Bal Mukund Prasad Sinha, Adv. (in C.W.J.C. No. 484/73) and Sachchidanand Jha, Adv. (in C.W.J.C. No. 1610/76)

For Respondents/Defendant: Rameshwar Prasad, Government Pleader No. 6, Amarendra Kumar Sinha, Adv. (in C.W.J.C. No. 484/73), R.B. Mahto, (A.A.G.), Syed Rafat Alam, Adv. (in C.W.J.C. Number 1610/76) for Official Respondents, Rajendra Prasad, Adv. (for No. 1), Bishwanath Prasad, Adv. No. 2 and Prem Kumar Verma, Adv. (for No. 5)

JUDGMENT

H.L. Agarwal, J.

1. Both these cases have been heard together as the points of law involved in them are identical. The question of law that has been referred to the Full Bench is the correctness of a Bench decision of this Court in the case of Ram Janam Gareri v. Narbadeshwar Singh (MANU/BH/0125/1973 : AIR 1973 Pat 396), wherein it was held that there could be no waiver with regard to the question of jurisdiction.

2. I shall first take up this case. This case was placed before a Division Bench, of which I was a Member, on 23-7-1976 when a doubt was expressed regarding the correctness of the Bench decision in Ram Janam Gareri's case (MANU/BH/0125/1973 : AIR 1973 Pat 396) (supra) and the matter was ultimately referred to the Full Bench. Similar doubt was expressed in the next case on 4-9-1979 and thus both the cases were placed before us. Three other, cases were also listed before this Bench ultimately they were sent back to Division Bench at the request of learned counsel for both the parties appearing in those cases.

3. Both the cases are directed against the orders passed by the authorities under the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961 (for short 'the Act') in a matter under Section 16 (3) of the Act, On 11-5-1966 the petitioners purchased 22 decimals of land from Sadhu Saran Singh and others appertaining to plot Nos. 774 and, 775 under Khata No. 34 of Tauzi No. 1352 in village Basiwan, which in course of the consolidation proceedings was given Chak Number 581, for Rs. 2,000/-. It may be mentioned that in the sale deed in question

the name of respondent No. 1 was mentioned in the northern boundary. On 30-7-1976 respondent No. 1 filed an application under Section 16 (3) of the Act before the Sub-divisional Magistrate, Biharshariff for an order for transfer of the land to him on the ground that he was an adjacent raiyat, of the said chak towards the north by virtue of his Chak No. 564, Two rejoinders (show cause) were filed by the petitioners; one on 8-10-1966 in which they pleaded that the nature of the land was not agricultural and, therefore, the application for pre-emption was not maintainable. In the second show cause petition dated 29-8-1968 they raised two further pleas, namely, (1) that the Chaks in question were intervened by a lane and, therefore, the plea of adjacency was irrelevant and meaningless for the purpose of the Act and, (2) in the sale deed in question a wrong mention of the name of respondent No. 1 was wrongly shown in the boundary.

4. It is proper to notice some of the provisions which give rise to the questions involved in these cases, at this very stage. Section 16 (3) requires an application to be made "before the Collector in the prescribed manner for the transfer of the land to him on the terms and conditions contained in the sale deed." The expression "Collector" has been defined in Clause (b) of Section 2 which reads as follows:

" 'Collector' includes an Additional Collector or any other officer, not below the rank of a Sub-Deputy Collector appointed by the State Government to discharge all or any of the functions of a Collector under this Act," The State Government in the Revenue Department issued a notification dated 20-5-1967 by which the Land Reforms Deputy Collectors were empowered to discharge the functions of the Collector under Sub-section (3) of Section 16 of the Act within their respective jurisdictions. In his order dated 23-9-1967 the Sub-divisional Officer has noticed the said notification and transferred the case to the Land Reforms Deputy Collector for disposal.

Section 31 contains the provisions for transfer and withdrawal of the cases from one officer to another exercising the powers of a Collector under this Act. Sub-section (2) of this section reads as follows :

"(2) The Collector of the district may, at any time :--

(a) transfer an application or proceeding pending before him to any officer exercising the powers of Collector under this Act, or withdraw any such application or proceeding pending before any such officer and either dispose it of himself or transfer it to any other such officer for disposal; and

(b) Withdraw any appeal pending before any authority, below his rank, prescribed under Sub-section (1) of Section 30 and either dispose it of himself or transfer it for disposal to any other authority."

The Land Reforms Deputy Collector received the record and ultimately by his order dated 28-11-68 (Annexure 6) allowed the application of respondent No. 1 for pre-emption, rejecting the story of the intervening lane between the two plots. He, however, recorded no finding regarding the nature of the land

It may be mentioned that no objection regarding the irregularity in the order of the transfer of the case by the Subdivisional Officer or, for that matter, lack of jurisdiction of the Land Refoms Deputy Collector, was raised by the petitioners before him.

An appeal against the order of the Deputy Collector was filed before the Subdivisional Officer by the petitioners and the same was dismissed by his order dated 11-1-1972 (Annexure 7) and similarly the petitioners also failed before the Board of Revenue in its revisional jurisdiction, vide the resolution dated 23-10-1973 (Annexure 8). No objection with respect to the jurisdiction of the Deputy Collector was taken either before the appellate or the revisional Court. Then the petitioners filed the present writ application.

5. The petitioners challenged the orders of the Revenue authorities in the main writ application only on merits and it was in the supplementary affidavit that they challenged the order of transfer by the Subdivisional Officer on the ground that he had no power of transfer in view of the provisions contained in Section 31 (2) of the Act and when this point was pressed and reliance was placed upon the case of Ram Janam Gareri (MANU/BH/0125/1973 : AIR 1973 Pat 396) (supra), the matter was referred to the Full Bench, as already said earlier.

6. The correctness of the said Bench decision is challenged, inter alia, on the ground that while considering the question of waiver, an earlier Bench decision of this Court in the case of Posan Singh v. Inderdeo Singh (MANU/BH/0123/1952 : AIR 1952 Pat 328) was not considered. In that case the record of a civil suit was transferred from the Court of the Second Additional Munsif, Munger, to that of the Third Additional Munsif without any order of the District Judge sanctioning the transfer of the suit, although the transferee Court had all the necessary jurisdiction to entertain the suit. In neither Court the question of jurisdiction was raised. It was raised for the first time in second appeal where a question was raised that as the suit was in seisin of the Second Additional Munsif it could not without any order of transfer under Section 24 of the Code of Civil Procedure, have been dealt with by the Third Additional Munsif. Rejecting this argument it was observed that the Third Court had inherent jurisdiction to try the suit and all that was necessary was that certain procedure should have been followed in order to remove the case from the file of the Additional Munsif Second Court to his file. The failure to obtain this order was a defect of procedure which has been cured by waiver. Similar view was also taken in Kusum Kumari's case AIR 1935 Pat 439.

7. We have seen that by the notification of the Revenue Department dated 20-5-1967 Land Reforms Deputy Collectors were empowered to discharge the functions of the Collector under Section 16 (3) of the Act within the local limits of their respective jurisdictions. It is therefore, obvious that the Land Reforms Deputy Collectors were given concurrent jurisdiction along with other officers included within the definition of "Collector" and, therefore, it is not a case where the Deputy Collector had any inherent lack of jurisdiction. It was contended at the Bar that a pre-emptor was entitled to choose his forum and could make an application under Section 16 (3) before any of the authorities exercising jurisdiction of the Collector within the local limit in question, I, however, did not examine the propriety of this contention, but the fact remains that the Land Reforms Deputy Collector had he inherent jurisdiction to entertain as well as decide a case which was transferred to him under Section 31 (2) of the Act, The maxim that no amount of consent can create jurisdiction, therefore, will not apply here, because the principle of waiver would not cure the defect of jurisdiction where the authority lacks inherent jurisdiction in the matter. Maxwell in his Interpretation of Statutes while dealing with waiver has said as follows:

"Everyone has a right to waive and to agree to waive the advantage of a law

made solely for the benefit and protection of the individual in his private capacity, which maybe dispensed with without infringing any public right or public policy

The regulations governing the practice and procedure of civil courts may in the same way, when not going to the jurisdiction, be waived by those for whose protection they were intended.

It was accordingly argued by the learned counsel for the respondents that the petitioners having taken no exception to the transfer of the proceeding by the Subdivisional Officer to the Land Reforms Deputy Collector at any stage and having taken a chance for winning the case, should not be permitted to wriggle out of his defeat under the cover of the irregularity committed in the transfer of the proceeding by the Sub-divisional Officer.

8. There is a catena of authorities in support of the above contention. But the argument of learned counsel for the petitioners was that there was no estoppel against statute and inasmuch as the Act provided a particular mode of transfer, it was open to the petitioners to raise this question, which was a pure question of law, at any stage of the proceeding. He also referred to several authorities in this regard,.

First I shall refer to the case of Motilal Padampat Sugar Mills Co. Ltd. v. State of U. P. (MANU/SC/0336/1978 : AIR 1979 SC 621). In that case the question of waiver came for consideration on the basis of writing of a letter by the petitioner to the authority of the Sales Tax Department for availing of concessional rates of sales tax without being unaware of the Government notification exempting him from sales tax issued by the State Government under Section 4A, and it was observed that "there was no presumption that every person knows law. It is often said that everybody is presumed to know law, but it is not a correct statement, there is no such maxim known to the law." It is on this background that the plea of waiver raised on behalf of the State Government against the appellant was rejected. In that case the question of fastening with the knowledge of legal position depended upon certain notifications, but in this case the codified statute has provided the procedure of transfer and, therefore, the ratio of that case can have no application to the case before us.

Reliance was next placed on the case of Associated Hotels of India Ltd. v. S. B. Sardar Ranjit Singh (MANU/SC/0333/1967 : AIR 1968 SC 933) where the question of waiver in somewhat similar situation was discussed and it was observed that "a waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom waiver is claimed had full knowledge of his rights and facts enabling him to take effectual action for the enforcement of such rights." The matter arose out of an eviction proceeding on the ground of sub-letting in breach of the provisions of the Delhi and Ajmer Rent Control Act

Reference was also made to the Full Bench case in Ganesh Ram v. Smt Ramlakhan Devi (MANU/BH/0008/1981 : AIR 1981 Pat 36) where it was observed that "for waiver to be effective it is essential that the person granting it should be fully informed, as to his right.....Mere omission in taking a point in the appellate court cannot by itself amount to waiver". In this case also it was found as a fact that nothing was shown that the appellant had the knowledge of the legal point which became available to him on the decision of a Full Bench of this Court in Ram Nandan Sharma v. Maya Devi (MANU/BH/0067/1975 : AIR 1975 Pat 283) overruling the earlier contrary view, and that he intentionally gave it up.

In all these three cases on which the reliance was placed, the facts and circumstances were different and, therefore, the Court found, difficulty in applying the rule of waiver. Not a single case was cited where the rule of waiver was not applied where an apparent and positive knowledge of a right was so imminent and obvious on the face of it, as in the present case, where a procedure for transfer of a proceeding was laid down in similar terms of Section 24 of the Code of Civil Procedure.

9. I may now refer to some other cases which, may be relevant to the point. A Bench of this Court in the case of Syed Mohammad Ali Ismail v. Sri Baldeo Singh (MANU/BH/0021/1955 : AIR 1955 Pat 115) :(1954 BLJR 441) , considering the effect of non-compliance of Rule 5 of Order 38 of the Code of Civil Procedure, while pointing out the distinction between an illegality and irregularity, quoted with approval an observation of Mookerjee, J. in the Full Bench case of Ashutosh Sikdar v. Behari Lal Kirtania ILR 1908 Cal 61. I have deliberately referred to this decision because it is not the case of the petitioners that they became aware of this infirmity for the first time after filing the writ application in this Court, nor it is their case that on account of the transfer of their case to the Land Reforms Deputy Collector any prejudice was caused to them.

10. Then there is another principle which will also go against the petitioners, and, that is that the petitioners having taken a chance in the proceeding before the Deputy Collector for defeating the pre-emptor and having lost there, cannot now turn round and challenge the order on the ground of lack of jurisdiction. There are cases under the election law on this point. First I may refer to the case of Ram Lakhan Singh v. State of Bihar reported, in the notes of 1964 BLJR 56 where the petitioners who was a candidate and had taken active part in the election of Gram Panchayat and lost the election for the office of Mukhiya after contest, was not subsequently allowed to challenge the election itself on the ground that it was illegal and ultra vires. The same principle had been reiterated in two other cases, namely, National Coal Co. Ltd. v. L. P. Dave (MANU/BH/0076/1956 : AIR 1956 Pat 294) and Mukund Ram Tanti v. S. I. Raza (MANU/BH/0090/1962 : AIR 1962 Pat 338). In the former case it was observed "

.....a party cannot be permitted, to raise a plea of want of jurisdiction so as to render its decision void and ineffective. Moreover, when a party submits to the jurisdiction of a court and takes a chance of getting a decision in its favour, it cannot be permitted to challenge the jurisdiction of the court after the decision has gone against it,"

11. Then again, in the case of the State of Bihar v. S. K. Sahay (MANU/BH/0009/1971 : AIR 1971 Pat 37), where a party had actively participated in an arbitration proceeding after the expiry of the period of four months, was estopped from challenging the award on the ground of its having been made after the expiry of the period.

12. Learned counsel for respondent No. 1 placed reliance upon the case of Tikaram & Sons Ltd. v. Commr. of Sales Tax, U. P. (MANU/SC/0159/1968 : AIR 1968 SC 1286) where the appellants had voluntarily submitted to the jurisdiction of the revisional authority under the U. P. Sales Tax Act and the High Court on the question of validity of certain provisions of that Act and later on when they wanted to avoid the decision, it was held that the appellants having submitted to the jurisdiction and having taken a chance of judgment in their favour could, not take exception to the jurisdiction of the High Court.

The same principle has been laid down in the case of Pannalal Binjlal v. Union of India (MANU/SC/0020/1956 : AIR 1957 SC 397) which arose out of an Income Tax proceeding, where the cases of the petitioners were transferred from one Income Tax Officer to another officer, and none of the petitioners raised any objection to their cases being transferred and it was only after the decision of the Supreme Court in another case was pronounced that those petitioners woke up and asserted, their alleged rights. This was disallowed. The objection was rejected and it was held that if they had submitted to the jurisdiction of the Income Tax Officer to whom their cases had been transferred, they were not entitled, to raise any objection on that account later on.

13. Learned counsel for the petitioners referred to the case of Sohan Singh v. General Manager, Ordnance Factory (MANU/SC/0357/1975 : AIR 1981 SC 1862) where in very much similar circumstances, Untwalia, J., speaking for the Court, rejected a plea challenging the jurisdiction of the labour court which was raised for the first time in the writ petition. On this ground he also tried to distinguish the other case of the Supreme Court in Koopilan Uneen's daughter Pathumma v. Koopilan Uneen's son Kuntalan Kuthy (MANU/SC/0372/1981 : AIR 1981 SC 1683) cited by learned State counsel, where in a civil appeal the Supreme Court ruled, that objection to territorial jurisdiction of a court cannot be entertained in absence of the evidence of failure of justice in consequence of the trial in a wrong court, before a court of appeal.

In this background counsel for the petitioners in this case also contended that the question of prejudice or waiver was not at all relevant when the provision was clear. He also cited two decisions of the Supreme Court, namely, (1) State of Uttar Pradesh v. Singhara Singh (MANU/SC/0082/1963 : AIR 1964 SC 358), and (2) Commissioner of Income Tax, Madras v. Indian Bank Ltd., Madras (MANU/SC/0145/1964 : AIR 1965 SC 1473). Neither of the cases has, however, any bearing on the point canvassed by the learned counsel for the petitioners and, therefore, I need not discuss them.

It may well be that there is no specific provision like Section 21 of the C. P. Code, nor it is possible to incorporate all the provisions of the procedures, contained either in the Civil or the Criminal Procedure Codes, in the special enactments which are conducted by applying the general principles of the procedure as well as the rule of evidence.

14. Before recording my conclusions I think it would be better to refer to the facts and the arguments in the other case which has been heard along with the first case.

This case has been filed by the pre-emptor having, lost before all the three authorities. 2 kathas out of plot No. 840 measuring 5 kathas 10 dhurs, were sold by respondent No. 6 to respondent No. 5 on the fifth February, 1973, for Rupees 2,700/- . The petitioner made an application for pre-emption on 27th April, 1973 before the Land Reforms Deputy Collector, Muzaffarpur West, respondent No. 4, claiming pre-emption on the ground, of being an adjacent raiyat of the adjoining plot towards the west of the land in question. One of the points set up in defence to the claim of preemption was that a strip of 10 dhurs of unsold land of plot No. 840 intervened between the plots of the purchaser and the pre-emptor. The other defence was that the nature of the land was not agricultural. It appears from the order sheet of the case (Annexure 3) that while the matter was being dealt with by the Land Reforms Deputy Collector for a few dates in the admission matter, the case began to be dealt with suddenly from 20-8-1973 by the Subdivisional Officer, Muzaffarpur West,

(respondent No. 3), and he became in seisin of the proceeding and ultimately decided the case against the petitioner accepting both the points of the purchaser mentioned above. The petitioner also failed before the appellate authority (Annexure 5) and the Additional Member, Board of Revenue (Annexure 6).

In this case the slight difference is that there does not appear to be any order of transfer by the Land Reforms Deputy Collector to the Subdivisional Officer. The file might have gone either on the administrative side or under some order of transfer. Be that as it may, in this case also no objection in regard to the authority and to the jurisdiction was raised by the petitioner either before the Subdivisional Officer or before the appellate authority, and this was raised before the Board, of Revenue. The Board of Revenue has, however, disposed of this objection on a different ground, namely, that cognizance of the matter having been taken by the Subdivisional Officer who passed the order of admission, the proceeding before him was valid.

In this regard the argument of the learned counsel for the petitioner was that the Board of Revenue has misdirected itself in overruling the objection on the theory of taking of the cognizance of the proceeding, when Section 31 (2) (a) prescribes the power of the Collector of the district even to transfer an application in the same manner.

There may be some force in this argument, but the fact remains that the objection was not taken by the petitioner at the earliest possible stage and he submitted to the jurisdiction and participated in the proceeding and took a chance in the same manner as the pre-emptors of the first case. With respect to the raising of the objection at the earliest opportunity, one of the arguments advanced on behalf of the petitioner was that the Ceiling Act contained no provision like Section 21 of the Code of Civil Procedure and, therefore, he was entitled to raise this question even at a later stage without proving the case of prejudice.

15. It is, no doubt, true that a tribunal or an authority acting under a special statute derives its powers to so act within the four corners of that statute, I do not find any reason why the well defined principles of procedure which do not run counter or, in any way, in conflict with the special provisions in those special Acts, should not be applied to cases arising under the special Acts.

The legal principle and the distinction, between the cases in which the courts lack the jurisdiction to try a case and where a jurisdiction is irregularly exercised by a court is now well settled. Whereas in the former case the court ought not to have entered upon the trial, in the latter, it could have avoided the trial but not necessarily. Competency of a court to try an action goes to the root of the matter and when such competence is not found, it has no jurisdiction at all to try the case. But objection based on irregular exercise of jurisdiction is a matter which parties can waive. Equally well settled is the proposition that where there are two or more competent courts which can entertain a suit, parties to the concerned transaction can contract to vest jurisdiction in one of such courts to try their disputes. If such a contract is clear, unambiguous and explicit, it is not hit by Section 28 of the Contract Act either.

16. I have already said, that it was not disputed before us that the Deputy Collector, Land Reforms, and the Sub-divisional Officer were vested with concurrent powers to entertain and dispose of cases under Section 16 (3) of the Act, so much so that counsel for the petitioner had asserted, that it was open to them to choose their forum either by filing an application before the Deputy Collector or the Subdivisional

Magistrate. In Ram Janam Gareri's case (MANU/BH/0125/1973 : AIR 1973 Pat396) while considering the question, S. N. P. Singh J. (as he then was), perhaps, lost sight of this fundamental factor, as in the fifth paragraph where the question of waiver has been dealt with, he has observed that the petitioner "cannot be shut out from raising the point which goes to the root of the jurisdiction." There was no question of going to the root of the jurisdiction in the case. That principle would apply only where there is an inherent lack of jurisdiction and, in my opinion, this distinction having not been well kept in mind, has led, him, (if I may say so with great respect) to the error in holding that the petitioner could not be shut out from raising the question of jurisdiction and the principle of waiver would not apply in this case. All the authorities of this Court as well as of the Supreme Court are clear in point that in a case of concurrent jurisdiction or, for that matter, where there is no lack of inherent jurisdiction, the objection as to jurisdiction, can be waived by a party. That apart, I have also cited several other cases in which applying the principle of estoppel the belated objection, after having taken a chance or having participated in the matter, has been, overruled.

17. For the reasons discussed above, I venture to hold that Ram Janam Gareri's case was not correctly decided I would accordingly overrule the same and hold that the observation with regard to the jurisdiction of the respective Land Reforms Deputy Collector and Subdivisional Officer could not be raised by the petitioners either in this Court or before the Board of Revenue.

18. No other point was argued in challenge of the impugned orders in both the cases. Both the applications, therefore, must fail and are hereby dismissed. In the circumstances of the case, however, I am not inclined to make any order as to costs.

P.S. Sahay, J.

19. I fully agree with the reasonings and conclusions of my learned brother Agrawal, J, but would like to add a few words of my own.

20. In view of the notification dated 20th May, 1967, Land Reforms Deputy Collectors were authorised to exercise the power of a Collector under the Act. The first case was transferred by the S. D. O. to the file of the Land Reform. Deputy Collector. In the second one petition for pre-emption was filed before the Land Reforms Deputy Collector but it actually came before the S. D. O. and both the authorities decided the matter. In these writ applications the jurisdiction of the two courts have been challenged. Now the question for consideration is whether the transfer by the S. D. O. to the Land Reforms Deputy Collector in the first case and the decision of the S. D. O. in the second case can be sustained in law. In my opinion the contentions raised on behalf of the petitioners, in both the cases, have been rightly rejected by my learned brother. Both of them had jurisdiction to decide the matter under the Act. Therefore, the question that waiver cannot confer jurisdiction, as held in the case of Ram Janam Gareri (MANU/BH/0125/1973 : AIR1973 Pat 396) (supra), which has been doubted, has lost sight of various factors which have been noticed by my learned brother Agrawal, J. Therefore, the orders passed by the original courts cannot be set at naught merely on this technical point. Moreover, at the time of final hearing counsel for the petitioners were asked to show as to what prejudice had been caused to them to which they did not give any answer and they could not have done so. This point was not taken earlier at any stage except in this Court. The parties, thus, having taken a chance of getting a decision in their favour, cannot be allowed to challenge the jurisdiction when the decision has gone against them. In cases under Section 145

of the Code of Criminal Procedure the same principle has been reiterated in a number of decisions and I may refer to some of them and they are *Shib Nara-yan Das v. Satyadeo Prasad* (MANU/BH/0055/1942 : AIR1943 Pat 44); *Jim Dusadh v. Ashraf Hussain* (1970 BLJR776) and *Most. Bimla Devi v. Sobhanath Mahamarik* 1975 BBCJ 246.

21. There is another aspect of the matter which cannot be lost sight of. The petitioners wanted to invoke the extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. In the facts and circumstances of the cases under consideration, will this Court be justified in quashing all the orders of the Revenue Courts and send the case back on remand on the technical ground raised, by the petitioners when nothing has been argued on merit at all? The answer, in my opinion, must be in negative. This will be amount to encouraging litigations and harassments to the other parties, a fact which has to be kept in mind while exercising the extraordinary power. Rather. I would go to the length of saying that this Court should not interfere if we find that justice has been done between the parties by the authorities who have decided the matter and., in this connection I may refer to a decision of the Supreme Court in the case of *S. J. Aggarwal v . Karji Narain Bhai* (MANU/SC/0489/1980 : AIR 1980 SC 1611). The applications have been rightly dismissed.

Binodanand Singh, J.

While agreeing with the conclusion of the learned brother Agrawal, J., with which the learned brother Sahay, J., have also agreed that the case of *Ram Janam Gareri* (MANU/BH/0125/1973 : AIR 1973 Pat 396) (*supra*) was not correctly decided, I would add some of my own observations.

22. The correctness of the principle laid down in the case of *Ram Janam Gareri* (*supra*) that in absence of an order from the Collector of the District transferring the case to the file of the Land, Reforms Deputy Collector from the file of Subdivisional Officer, waiver by a party will not confer jurisdiction to the Land Reforms Deputy Collector since absence of such an order goes to the root of the jurisdiction of the Land Reforms Deputy Collector and the party cannot be shut out from alleging this point in the writ Court has been doubted, on the basis of the principle laid down in the case of *Posan Singh v. Indradeo Singh* (MANU/BH/0123/1952 : AIR 1952 Pat 328) where absence of an order by the District Judge transferring a suit from the Court of Additional Munsif, 2nd Court to the Court of Additional Munsif, Third Court, has been held, to be a defect of procedure which had been cured by waiver. This case was not taken into consideration while deciding *Ram Janam Gareri's* case (*supra*).

23. In my view the principle enunciated in *Posan Singh's* case (MANU/BH/0123/1952 : AIR 1952 Pat 328) could not have been applied with full force in *Ram Janam Gareri's* case (MANU/BH/0125/1973 : AIR 1973 Pat 396) since the facts and circumstances of both the cases are different. In *Posan Singh's* case the suit in question was transferred to the Additional Munsif, Second Court, Munger, by an order of the District Judge. Subsequently, the record of the case was sent to the Additional Munsif, Third Court, Munger by the Additional Munsif, Second Court, with an endorsement of the order-sheet -- "transferred to the file of Third Additional Munsif in anticipation of District Judge's order". So apparently the sending of the file by the Munsif, Second Court to the Court of Munsif, Third Court by means of an endorsement on the order-sheet was intended to be under the order of the District Judge and the record was sent to the Third Court in anticipation of such an order of

the District Judge of course, the order of the District Judge approving such transfer could not be traced out. In such circumstances, it cannot be said that the Munsif, Second Court, transferred the suit from his file to the file of Munsif, Third Court, exercising its own power. In this back ground, it was held in Posan Singh's case that the failure to obtain the order of the District Judge was only a defect of procedure which had been cured by waiver.

24. In the case of Ram Janam Gareri and the cases in hand the position is different. In Ram Janam Gareri's case (MANU/BH/0125/1973 : AIR 1973 Pat 396) as well as in C. W. J, C. No. 484 of 1973 the Subdivisional Officer has transferred the proceeding under Section 16 (3) of the Bihar Land Ceiling Act, 1961 (hereinafter referred to as 'the Act') from his file to the file of Land Reforms Deputy Collector, whereas in C. W. J. C. No. 1610 of 1976 an application under Section 16 (3) of the Act was filed before the Land Reforms Deputy Collector and was being dealt with by him. The case began to be dealt with suddenly by the Subdivisional Officer, Muzaffarpur West. So obviously the principle laid down in Posan Singh's case (MANU/BH/0123/1952 : AIR 1952 Pat 328) on the fact and in the circumstances of that case cannot be applied to the case of Ram Janam Gareri (MANU/BH/0125/1973 : AIR 1973 Pat 396) and the two writ applications in the hand. In this connection it may further be mentioned that in my view Section 24 of the Code of Civil Procedure (hereinafter referred to as 'the Code') does not appear to be in pari materia with Section 31 (2) (a) of the Act. First for the reason that there is no provision in the Act like Section 21 of the Code and secondly from the reading of Section 16 (3), along with Sub-sections (2) and (3) of Section 31, of the Act the scheme contemplated under the Act appears to be that an application filed under Section 16 (3) (i) of the Act has to be disposed of by the Collector before whom the same is filed. I say so on consideration of Sub-section (2) of Section 24 of the Code and Sub-section (3) of Section 31 of the Act. Sub-section (2) of Section 24 of the Code runs thus :--

"Where any suit or proceeding has been transferred or withdrawn under Sub-section (1), the Court which (is thereafter to try or dispose of such suit or proceeding) may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn."

But Sub-section (3) of Section 31 of the Act lays down the following:--

"The authority or officer to whom any application, proceeding or appeal is transferred under this section shall deal with and dispose it of, as if it had been preferred before him."

The words 'as if it had been preferred before him', read with the provisions contained in Section 16 (3) of the Act to the effect that a co-sharer of the transferor or any raiyat holding land adjoining the land transferred, shall be entitled, to make an application before the Collector and the Collector shall pass necessary orders thereon clearly indicate that the Legislature intended that an application under Section 16 (3) of the Act should be disposed of by the Collector before whom it is made. So obviously for conferring jurisdiction on a Collector with respect to a particular application, which was not filed before him, the order of the Collector of the District under Section 31 (2) (a) of the Act seems to be necessary. But the facts remain that in Ram Janam Gareri's case (MANU/BH/0125/1973 : AIR 1973 Pat 396) and in the two writ applications the officers, who disposed of the application under Section 16 (3) of the Act, were Collectors for the purpose of Section 16 (3), within the meaning

of Section 2 (b) of the Act and thus they had inherent jurisdiction and were competent to dispose of an application under Section 16 (3) of the Act. It cannot be said that there was inherent lack, of jurisdiction in them to dispose of such matter. In this view of the legal position it cannot be said that absence of an order under Section 31 (2) (a) of the Act of the Collector of the District will go to the root of jurisdiction, since the officers in the three cases were otherwise competent to dispose of an application under Section 16 (3) of the Act. No prejudice on account of want of such order having been pointed out by the learned counsel appearing in either of the writ applications and the parties having contested the proceeding al-through in C. W. J. C. No. 484 of 1973 and up to the appellate stage in another writ application without raising such an objection it cannot be held that the orders of the Deputy Collector Land Reforms in C.W.J.C. No. 484 of 1973 and the order of the Subdivisional Officer in other writ application disposing of the application under Section 16 (3) of the Act, are without jurisdiction. In my view also want of an order of transfer under Section 31 (2) (a) of the Collector of the District does not go to the root of jurisdiction, which defect stood cured by waiver.

25. A few words more I may say regarding the decision in Ram Janam Gareri's case (MANU/BH/0125/1973 : AIR 1973 Pat 396). The principle that waiver cannot confer jurisdiction on a Court has been correctly stated in that case but it has been wrongly applied to the facts of the case. In my view this error appears to have resulted due to the fact that in that case it has not been correctly held that the absence of an order of the Collector of the District under Section 31 (2) (a) of the Act transferring the case from the file of Subdivisional Officer to the file of Deputy Collector Land Reforms went to the root of the jurisdiction. Perhaps, the legal position that the Land Reforms Deputy Collector was otherwise competent to dispose of an application under Section 16 (3) of the Act since he was also a Collector within the meaning of the Act hence it was not a case where there was inherent lack of jurisdiction has been lost sight of.

26. Both the applications have, therefore, rightly been dismissed.

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