MANU/BH/0078/1957

Equivalent Citation: AIR1957Pat226, 1957(5)BLJR72

IN THE HIGH COURT OF PATNA
FULL BENCH

Misc. Judicial Case No. 193 of 1955

Decided On: 04.01.1957

Appellants:**Sheo Narayan Chaudhury and Ors.**
Vs.
Respondent:**State of Bihar and Ors.**

Hon'ble Judges/Coram:
Vaidynathier Ramaswami , C.J., Jamuar and Chaudhuri , JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Harinandan Singh and Angad Ojha, Advs.

For Respondents/Defendant: Govt. Adv. and Bajrang Sahai, Adv.

JUDGMENT

Jamuar, J.

1. This is an application under Article 296 of the Constitution for the issue of an appropriate writ to quash an order of a settlement of a hat known as Gudari Hat made by opposite party No. 2 with opposite party No. 3 and to restrain the latter from interfering with the peaceful possession of the petitioners.

2. The facts giving rise to this application are these. The petitioners claim to own and (SIC) a holding known as a "Bitori" holding measuring about five bishas in village Kasba the boundary of which has been given in paragraph I of the petition. Village Kasba was under the zamindari of Choti Kothi of which the proprietor was Mahipal Bahadur Singh of Purnea. This holding of the petitioners stood recorded in the landlord's sherista in the names of their ancestor. Dular Chaudhury and Kantu Chaudhury at a rent of Rs. 2-10-8 and this was payable to the Choti Kothi.

On a portion of the aforesaid holding, there are some pucca and kutcha houses having been constructed by the ancestors of the petitioners, and it is stated in the petition that the petitioners have been "carrying on business" in these houses. On an area of about two bighas, out of the five bighas of the holding, the petitioners have their houses, while on another area of about two bighas there stand temples and a hat is held on a portion of this land. The remaining one bigha is parti land.

It is then alleged that the petitioners are settled raivats of an adjoining village named Bahura Phulwari and that this they have acquired occupancy rights in the Bitori holding in village Kasba. With regard to the 'hat', it is stated that every morning and evening a 'hat', known as Gudari Hat, is held, and the income from this 'hat' is realised by the petitioners and spent over the upkeep of the temples and the deities. The landlord is stated to have had nothing to do with the realisation of the toll from this 'hat', the roll having been realised by the petitioners and their ancestors from time immemorial,

3. In 1954, the Zimindari of Choti Kothi of Mahipal Bahadur Singh vested in the State of Bihar and the State, it is stated, has been granting receipts with respect to the Bitori holding since then, and no toll has been realised by the State in respect of the 'hat'. The petitioners say that they came to know that the Additional Collector of Purnea was going to hold a settlement of the 'hat' by public auction and filed an objection before him stating that the holding belonged to them as also the 'hat' and that the State had no right to make a settlement of it. The Additional Collector of Purnea, however, held a public auction and settled the 'hat' with opposite party No. 3 on the 16th of March, 1955 for a sum of Rs. 2,200/-without notice to the petitioners.

4. It was in these circumstances that the petitioners filed the present application on the ground that the aforesaid settlement of the 'hat' made by the Additional Collector infringed the fundamental right guaranteed to the petitioners under Clauses (f) and (g) of Article 18 of the Constitution and it further contravened Art, 31 of the Constitution, as the 'hat' is the tenancy land of the petitioners and had not vested in the State of Bihar with the result that the Additional Collector had no jurisdiction to pass any order in respect of it.

5. The argument advanced in support of this application was that the Bihar Land Reforms Act (Act XXX of 1950) does not apply to the 'hat' in question, and that this 'hat' must be held not to have vested in the State of Bihar. For this proposition the case of Chaudhary Mohammad Afaque v. State of Bihar (MANU/BH/0072/1956 : ILR 35 Pat 119: AIR 1956 Pat 283) (At was cited.

6. In reply, the learned Government Advocate contended on behalf of the State. that, in the first place, on the facts of the present case, the petitioners can claim no right to the holding in question and in the second place the decision in Mohammad Afaque's case (A) finds no support from the various provisions of the Land Reforms Act, and ought not to be followed.

7. The petitioners have described the land upon which the 'hat' is held as "Bitori" which, according to them, means "homestead land for residential purposes" What is the nature of such land has been explained in the Final Report of the Survey and Settlement Operations in the district of Purnen for 1901-1908 of Mr. J.B. (SIC) I.C.S. In paragraph 149. (p. 46) it is stated as follows:

> "A novel claim with regard to a ralyat's subletting a piece of land to an under-raiyat for building a house on it was urged on behalf of the Darbhanga Raj, and of Mr. Porbes, of the Sultanpur Estate. Their theory was that no one was ever allowed to settle in a village except as the tenant of the proprietor and directly under his protection and supremacy; and that if a raiyat allowed any one to build a house on a corner of his holding, the raiyat, was bound to go to the estate office, to apply for a proportionate abatement of his rent and a diminution of the area of his holding; the new settler was also to come to the estate office and have himself entered on the jamabandi either as an agricultural or a non-agricultural tenant. He was then to be assessed to 'bithouri', which means literally 'consideration for settling' and may be the equivalent of either 'mutarfa' (ground rent) or 'katiari' (profession tax); and theoretically, on his taking up waste lands or an abandoned holding for cultivation, he was excused from any further payment of 'bithouri'.
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> Such was the theory, to which this Department was urged to give effect. But as in practice no such reduction of area and rent had been made, the request

was not complied with. The theory was unquestionably based on the proprietors' wish to keep every one resident on the estate directly dependent on them."

8. Now, assuming that the petitioners collect the tolls from the hat held on a portion of the land, are they tenants and have they acquired occupancy rights in the land? They seek the a d of Section 182 and of Sub-section (5) of Section 20 of the Bihar Tenancy Act, 1885. These sections had come up for consideration in a Full Bench case of this Court in Bhagwat Sharma v. Baijnath Sharma MANU/BH/0143/1954 : AIR 1954 Pat 408 (B). The petitioners have no raiyati land in village Kasba where the land in question lies. They claim to be settled raiyats of an adjoining village named Bahura Phulwari. and by reason of this fact they alleged that the have acquired occupancy rights in their homestead land in village Kasba.

I have stated that on a portion of the land in Tillage Kasba the petitioners have houses, and it is stated in paragraph 4 of the petition that they have been "carrying on business in these houses". It is nowhere alleged that the petitioners have been carrying on agricultural operations from their houses in village Kasba. Merely to say that the petitioners are settled raiyats in an adjoining village will not mean that they have arable and under their cultivation It was held in the aforesaid Full Bench case of this Court that the conditions for the applicability of Section 182, Bihar Tenancy Act, are that the tenant must be a raiyat at the time, that is to say, have arable lands and must be using the other land for his residence.

It is the co-existence of these two elements that brings in the section. If the aforesaid two elements do not exist, Section 182 can have no application. It is permissible for a tenant to have his homestead land in one village and arable land in another but the villages must be contiguous or nearby. This must be so in order to enable the tenant to carry on his agricultural objections from his place of residence.

In the present case, the petitioners suffer from two disabilities--one is that they do not say that they have any arable land in village Bahura Phulwari and the second is that it is not even alleged that they carry on agricultural operations from their residence in village Kasba in these circumstances Section 182, Bihar Tenancy Act, can be of no assistance to the petitioners and they cannot be- held to have acquired any occupancy rights in village Kasba.

9. Furthermore, the 'hat' does not appear to be held on any portion of the homestead land but rather on a portion of the land on which stand temples. It is quite clear that the petitioners cannot claim any raiyati interest in the land in village Kasba. They have no tenancy right and they have acquired no occupancy right. They are, at the best, tenants-at-will, and thus mere licensees.

The distinction between a lessee and a licensee Is well-established. The cardinal distinction is that in a lease, there is a transfer of interest in land, whereas in the case of a licensee, there is no transfer of interest although the licensee acquires the right to occupy the land. A mere demand for possession is sufficient for a tenant at-will. If a statute provides for the vesting of land In the State from a certain date, such land shall vest and In my opinion, a mere licensee can have no valid objection.

10. The next question that arises is, what is It that, in the present case, has vested in the State of Bihar under the Bihar Land Reforms Act (hereafter to be called the Act) ? And it is in this connection that the case of (MANU/BH/0072/1956 : ILR 35 Pat 119: AIR 1956 Pat 283) (A) becomes relevant.

11. Chaudhary Mohammad Afaque, the petitioner in that case, claimed the right to hold a mela on a piece of land which he alleged to have taken in settlement from the Mutwalli of a Wakf estate. The State of Bihar had contended that the mela was being held on behalf of the Wakf Estate, the transactions between the petitioner and Mutwalli having been farzi. and since the Wakf Estate had vested in the State of Bihar under the Act, the State had the right to hold the mela and not the petitioner, as the State had stepped in the shoes of the ex-tenure-holder of the Waqf Estate and had acquired the same right to hold the mela. The right to hold the mela was thus claimed to have vested in the State of Bihar.

12. It was observed by their Lordships that on behalf of the State there had been no allegation that on the relevant date the land upon which the mela was held was in direct possession or control of the Waqf Estate so that the State claimed the right to hold the mela on the land irrespective of the fact whether the land was in actual physical possession of the petitioner as raiyat, or whether it was in khas possession of the Waqf Estate as such.

It was not disputed that the Waqf Estate had vested in the State of Bihar; but it had been taken for granted that the land was in possession of the petitioner of that case. The question, then, which fell for decision was whether the provisions of Ss. 4(a) and 4(g) of the Act were attracted so far as the right to hold the mela and to collect tolls therefrom was concerned. Their Lordships referred to the provisions of Sections 4(a) and 4(g), and having regard to the definition of the term "estate" in the Act they held that the words 'estate', 'tenure' or 'tenure-holder' referred to lands.

Hence, the words "trees, forests, fisheries, Jalkars, hats,' bazars, and ferries and all other sairati interests" occurring in Section 4(a) must also have reference to lands which, by virtue of the Act, vested in the State. Hence, even if the word "Mela" be construed to be included within the expression "all other sairati interests" occurring in Section 4 (a), it should be held that such sairati interests must have been derived from the lands "in direct possession or control of the proprietor or tenure-"holder", as the case may be, whose estate has vested in the State.

Thus, if trees, forests, fisheries, jalkars, hats and bazars have no reference to lands which have vested in the State, under the Act, the State is not entitled to the possession of any of them. The learned Government Advocate has taken exception to the aforesaid construction and argued that the construction sought to be put is too narrow and that was not the intention of the legislature; in other words, according to him, Section 4 has been misconstrued.

12A. The learned Government Advocate contended that- it is inaccurate to say that sairati interest must have been derived from lands in direct possession or control of the proprietor or tenure-holder as this proposition would have the effect that a proprietor has no title to land which is in possession of a tenant.

It will be apparent from Section 3(1) of the Act that the "estate" of a proprietor as such passes and not the right, title or interest of- the proprietor. The only limitation is that, by virtue of Section 4(a) of the Act, the interests of raiyats or under-raiyats are excluded, and when the estate vests, it vests "free from all incumbrances", and the proprietor ceases "to have any interests in such estate" other than the interests expressly saved by or under the provisions of the Act.

The definition of an 'incumbrance' in Section 161 of the Bihar Tenancy Act was referred to and It was urged that a tenancy-at-will is itself an incumbrance and that if

the landlord has settled the land with the petitioners, who are not raiyats or under-raiyats. the landlord has created a tenancy-at-will which is but an incumbrance.

13. Sections 3 and 4 of the Act came up for consideration by their Lordships at the Supreme Court in the case of Kamakshya Narain Singh v. Collector and Deputy Commissioner of Hazaribagh (S) MANU/SC/0080/1955 : AIR 1956 SC 63 (C). There too, the question for determination was as to what had vested in the State of Bihar on the publication of the notification under Section 3 and by virtue of the provisions of Section 4(a) of the Act.

The argument was that, having regard to the definition of "estate" in the Act, it was the land, if anything, comprised in the notified estate, that had vested. Their-Lordships said that although the word "land" is used in the definition of "estate", the provisions of Sections 4, 5 and 7 show the necessary intention to include something more than the land when an estate vests in the State.

They pointed out that, under Section 4(a), it is not only the estate but also buildings of a certain description and other things which vest in the State absolutely and, under Sections 6 and 7, the buildings mentioned therein also vest in the State, because the buildings in question are deemed to be settled by the State with the intermediary in possession. This could only be on the supposition that these buildings vested in the State and the person in possession held the same as settles under the State.

The learned Government Advocate referred to Section 37 of the Land Revenue Sales Act (Act XI of 1859) under which a purchaser of an estate sold for the recovery of arrears "acquires" the estate free from all encumbrances etc. This, it was urged, would be an, aid to the correct interpretation of Sections 4, 5 and 7 of the Land Reforms Act. as this Act contains the law of acquisition of estates and provides the machinery by which acquisition of an estate takes place.

14. It has thus been contended for the State that, having regard to Sub-section (2) of Section 3A of the Act, the State acquires the right of the intermediary. The whole estate vests except the interests of raiyats or under-raiyats. The argument was further supported by the reasoning adopted in the case of Rebati Ranjan v. State of Bihar MANU/BH/0036/1953 : AIR 1953 Pat 121 (D), where it had been held that the failure by the State Government to mention the correct names of the proprietors or tenure-holders would not invalidate the notification under Section 3(1) nor would it prevent the title to the estate or tenure passing to or becoming vested in the State Government under the provisions of Section 3(1). Thus it would appear that it is the estate which vests and not only the interest of the proprietor.

15. Thus in so far as the decision in the case of (MANU/BH/0072/1956 : ILR 35 Pat 119: AIR 1956 Pat 283) (A) to the effect that only such sairati interests as are derived from the lands in direct possession or control of the proprietor or tenure-holder vest in the State is concerned, it must be held to have been wrongly decided. It is the estate excluding the interests, of raiyats or under-raiyats that vests and not only the interests of the proprietor.

16. The petitioners, therefore, can claim no right to the above Gudari Hat on the ground that it has not vested.

17. For these reasons, in my judgment, the petitioners are not entitled to the grant of any writ against the respondents. I would dismiss this application, but I would make no order for costs.

Vaidynathier Ramaswami, C.J.

18. I agree. The main question for determination in this case is--what is the interest which vests in the State Government by virtue of a notification-issued under Section 3 of the Bihar Land Reforms Act? On behalf of the petitioners reliance is placed upon a decision of this High Court in ILR 35 Pat 119: (AIR 1956 Put 283) also reported in 1956 Pat LR 1 (A) and it is submitted that the State Government has no right to take possession of the 'hat' known as Gudari Hat.

It was submitted on behalf of the petitioners that the State Government has no right to take possession of any 'hat' or bazar unless such 'hat' or bazar was held on land in direct possession or control of the proprietor or tenure-holder. The opposite view point was put forward by the learned Government Advocate and it was argued that as soon as the notification is issued under Section 3, the title of the whole estate becomes vested in the State Government and not only the right and title of the proprietor in the estate.

It was submitted by the learned Government Advocate that the decision of the learned Judges in(MANU/BH/0072/1956 :ILR 35 Pat 119: AIR 1956 Pat 283) (A) is not correct. I agree with the learned Government Advocate that the decision of the learned Judges in (MANU/BH/0072/1956 : ILR 35 Pat 119: AIR 1956 Pat 283) (A) does not lay down the correct law and must be overruled. Section 3(1) of the Bihar Land Reforms Act states:

> "3. (1) The State Government may, from time to time by notification, declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State."

Section 4(a) is very important and must be reproduced in full:

> "4. Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of the notification under Sub-section (1) of Section 3, or Sub-section (I) or (2) of Section 3A, the following consequences shall ensue, namely:
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> (a) Subject to the subsequent provisions of this Chapter, such estate or tenure including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or cutchery for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, jalkars, hats, bazars and ferries and all other sairati interests as also his interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estates or tenure (other than the interests of raiyats or under-raiyats) shall, with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act."

It is important to notice that Section 4(a) expressly states that the estate or tenure vests absolutely in the State free from all incumbrances, and the only rights saved under Section 4 (a) are the interests of raiyats or under-raiyats. Section 4(a) also states that

> 'such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act."

In this connection Sections 5, 6, 7 and 9 are also important. These sections deal with the Interests of the proprietor which are expressly saved by the statute. Section 5 deals with the homesteads of proprietors and tenure-holders of which they are in possession on the date of vesting. The section provides that with effect from the date of vesting all such homesteads shall be deemed to be settled by the State with such proprietor or tenure-holder and they shall be entitled to retain possession of the land comprised in such homesteads and to hold it as a tenant under the State free of rent.

The effect of Section 5 is that even with regard to homesteads there is a vesting in the State Government, but there is a statutory lease back to the proprietor or tenure-holder. Section 6 deals with lands used for agricultural or horticultural purposes which are in khas possession of the proprietors or tenure-holders on the date of such vesting.

With regard to these lands the section provides that the proprietor or tenure-holder shall be entitled to retain possession thereof to hold them as a raiyat of the estate having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner. Section 7 relates to buildings or structures together with the lands on which they stand which may be in khas possession of a proprietor or tenure-holder at the commencement of the Act and used as 'golas', factories or mills, or used for storing grains or keeping cattle or implements for the purpose of agriculture. With regard to these buildings and lands the section provides that they shall be deemed to be settled by the State with such proprietor or tenure-holder subject to the payment of such fair and equitable ground-rent as may be determined by the Collector in the prescribed manner.

Section 9 relates to mines worked directly by the proprietor or tenure-holder on the date of the commencement of the Act. With regard to these mines the statute provides that they shall be deemed to have been leased by the State Government to the proprietor or tenure-holder, as the case may be, and such proprietor or tenure-holder shall be entitled to retain possession of those mines as a lessee thereof. Section 9(2) provides that the terms and conditions of the said lease by the State Government shall be such as may be agreed upon between the State Government and the proprietor or tenure-holder, as the case may be, or, in default of agreement, as may be settled by a Mines Tribunal appointed under Section 12.

In the course of argument counsel for the petitioners referred to the definition of the expression "estate" in Section 2(i) of the Act. Section 2(i) defines an estate to mean

> "any land included under one entry in any of the general registers of revenue-paying lands and revenues-free lands, prepared and maintained under the law for the 'time being in force by the Collector of a district, and includes revenue-free lands not entered in any register and a share in or of an estate."

It was argued that the expression "estate" has reference to land and, therefore, the sairati interest mentioned in Section 4(a) must have reference to land in direct possession or control of the proprietor or tenure-holder whose estate has vested in the State Government. This argument is fallacious and cannot be accepted.

The question has to be determined not upon the language of the definition of the expression "estate" in Section 2(i) taken in isolation, but the question has to be determined in the context and letting of other important sections of the statute, namely Section 4(a) and Sections 5, 6 and 7. An argument similar to that of the petitioners was rejected by the Supreme Court in (S) MANU/SC/0080/1955 : AIR 1956 SC 63 (C) and it was pointed out that although the word "land" is used in the definition of "estate" the provisions of Sections 4, 5 and 7 of the Bihar Land Reforms Act show the necessary intention to include something more than the land when an estate Vests in the State Government.

It was pointed out that under Section 4 (a) it was not only the estate but also buildings of certain description and other things which vest in the State Government absolutely on the publication of a notification under Section 3. Under Sections 5 and 7 the buildings mentioned therein also vest in the State Government, because the buildings in question are deemed to be settled by the State with intermediary in possession.

This could only be on the supposition that these buildings vested in the State and the person in possession held the same as settlee under the State. Counsel for the petitioners also referred to the language of Section 4(g) of the Act. I do not think that Section 4(g) has much bearing on the interpretation of Section 3, nor does it throw any light on the quality or amplitude of the interest which vests in the State Government on publication of a notification under Section 3. The view that I have expressed is also supported by the decision Of a Division Bench of this Court in MANU/BH/0036/1953 : AIR 1953 Pat 121 (D).

It was held in that case that it was not incumbent upon the State Government to mention in the notification under Section 3(1) the correct name of the proprietor or the tenure-holder. It was also held that the failure of the State Government to mention the correct names of the proprietors or tenure-holders did not invalidate the notification under Section 3(1), nor did it prevent the title to the estate or tenure passing to or becoming vested In the State Government. The learned Government Advocate also referred to Section 37 of the Bengal Land Revenue Sales Act, 1859 (Bengal Act XI of 1859), which states that

> "the purchaser of an entire estate in the permanently settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants,
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> X X X"

With regard to this section it was held by the Judicial Committee in Surja Kanta Acharjya v. Sarat Chandra Roy MANU/PR/0076/1914 : 18 CWN 1281:(AIR 1914 PC 82) (E) that on the failure of an owner to pay the Government assessment, his estate or interest in the land was forfeited and the purchaser at a revenue sale purchased not the interest of the defaulting owner but that of the Crown, subject to the payment of the Government assessment, and as against a person who claimed title to any portion of the estate by adverse possession, the time limited by the Limitation Act commenced to run from the date of the sale.

This principle was applied by the Calcutta High Court in a latter case, Jobeda Khatun

v. Tulsi Charan Das, MANU/WB/0450/1922 : AIR 1923 Cal 82 (P) and it was held that a person in adverse possession who occupied the disputed land without payment of rent to the defaulting proprietor, was bound to surrender possession when the sale was confirmed, and if the land was not so surrendered, he rendered himself liable for mesne profits, as he unlawfully kept the purchaser out of possession. For these reasons I agree with my learned brother Jamuar, J, that the decision in (MANU/BH/0072/1956 : ILR 35 Pat 119:AIR 1956 Pat 283); A) does not lay down the correct law and that the present application must be dismissed.

Chaudhuri, J.

19. I agree.