

(1958) 02 PAT CK 0003

In the Patna High Court

Case No : Appeal From Original Decree No. 460 of 1950

Babu Badri Singh and Others

APPELLANT

Vs

Babu Ram Kishore Prasad Singh and Others

RESPONDENT

Date of Decision : 14-02-1958

Acts Referred:

Bihar Land Reforms Act, 1950 — Section 2, 5, 6, 6(1), 7
Bihar Tenancy Act, 1885 — Section 120
Trusts Act, 1882 — Section 90

Citation : AIR 1958 Patna 626 : (1958) 6 BLJR 194

Hon'ble Judges : N.L. Untwalia, J;C.P. Sinha, J

Bench : Division Bench

Advocate : Tarkeshwar Nath and Radha Raman Sinha, for the Appellant; B.C. Ghose, U.C. Sharma, K.K. Sinha, Harians Kumar, Mashusudan Singh, Arun Chandra Mitra, Tarkeshwar Dayal and Ramanandan Singh, for the Respondent

Final Decision : Allowed

Judgement

N.L. Untwalia, J.—This appeal arises out of a suit for partition. The appeal was filed by defendants Nos. 1-14. An application has been filed by appellants 2, 3, 7, 8, 9 and 10, who were respectively defendants Nos 2, 3, 7, 8, 9 and 10 in the Court below, praying that they maybe transposed to the category of respondents for the reasons stated in the application. There seems to be no objection to this and the hearing of the appeal has proceeded on the basis that the said appellants are now in the category of respondents.

2. The plaintiff-respondents first party filed the suit in question in the Court of the Subordinate Judge at Darbhanga for partition of touzi No. 4896, khewat No. 3 in patti khalispur original and khewat No. 7/1 in patti Harlochanpur dependency. The share of the plaintiffs and defendants 1 "to 21 was -/14/- annas, 19 gandas and odd which was entered in khewat No. 3 and the remaining one anna and odd share belonged to defendants Nos. 22-30 and was separately entered in khewat No. 3/2, and, they were impleaded as defendants second

party in the suit. The said share of one anna and odd is not the subject-matter of this suit. The plaintiffs and defendants first and second parties own 16 annas share which is recorded in the other khewat No. 7/1 in patti Harlochanpur."

The plaintiffs claim 4 annas 10 gandas and odd shares in both the khewats. According to their case, the parties were in joint possession and occupation of the two khewats. In khewat No. 3 there were about 50 bighas of zirat land and about 14 bighas of auction purchased and abandoned bakasht land, details of which were given in the schedules to the plaint. They further stated in the plaint that although the possession and occupation of the plaintiffs and defendants first party are separate for the sake of convenience and cultivation, the partition of the touzis according to proportionate shares had not been duly effected. On these allegations the suit was filed in 1948 for partition of the two khewats aforesaid.

3. A written statement was filed on behalf of defendants 15-17 praying that in case partition was effected, a separate patti with respect to the share of these defendants might be carved out and they might be put in separate possession and occupation of the same. Four other written statements were filed by defendants Nos. 1-14; one by defendants Nos. 1, 5, 6, 13 and 14, the second by defendants Nos. 2 and 7-10, the third by defendant No. 3 and the fourth by defendants Nos. 4, 11 and 12.

They were the defendants who really contested the suit and, inter alia, their common defence was that there had been a previous partition before the survey settlement proceedings with respect to the zirat, bakasht and gair-mazrua lands of khewat No. 3, patti Kalispur (? Khalispur) between the plaintiffs' ancestors and the ancestors of the defendants first party by metes and bounds and each party was in separate and exclusive possession of the lands allotted to them on such partition. The record-of-rights was accordingly prepared showing separate possession of such lands of different parties according to the previous partition. The schedules annexed to the written statements, show the lands which were completely partitioned by metes and bounds and also show the lands which were left joint between the parties. They, however, raised no objection to the partition of khewat No. 7/1, patti Harlochanpur.

4. The learned Subordinate Judge by his judgment dated 8-8-1950, decreed the suit for partition of the two khewats and passed a preliminary decree holding that the story of previous partition of certain lands set up by defendants 1-14 was not correct and that the parties were in separate possession of such lands for the sake of convenience and cultivation.

5. Mr. Tarkeshwar Nath, the learned Advocate, who has argued the appeal on behalf of the remaining appellants, namely, appellants Nos. 1, 4, 5, 6 and 11-14 attacked the finding of the learned Subordinate Judge that there was no previous partition of the zirat and bakasht lands as claimed by the appellants. He submitted, on the basis of Ext. A, a thica patta dated 20-6-1873 as also on the

basis of Ext. D, the khatian of mouza Khalispur, that there was previous partition by metes and bounds, between the parties, of the lands separately entered in the khatian, Ext. D. For the reasons given by the learned Subordinate Judge, I hold that Ext. A does not show that there had been partition by metes and bounds of bakasht lands or of the entire patti between the co-sharers as alleged by the appellants.

The separate entry in the khatian is consistent with the case of the plaintiffs that the parties were in separate possession of the zirat and bakasht lands for the sake of convenience. It does not prove exclusive possession of one party and/or the ouster of the other parties. The learned counsel also referred to the oral evidence of P. Ws. 1 and 2 as also of D. Ws. 1, 5 and 12. The evidence of P.Ws. 1 & 2 is consistent with the case of the plaintiffs that the parties are in separate possession for the sake (of?) convenience of cultivation. Their evidence does not show that there was ever any partition by metes and bounds as was alleged on behalf of the appellants. D.W. 1 is not a witness of partition. His evidence is that he has been seeing the maliks separately cultivating the lands and that does not necessarily prove partition. D.W. 5, who is aged only 48 years, cannot be a witness to partition.

He was defendant No. 2 in this action and claimed that he has been coming in exclusive possession of certain lands which his father got on partition. He in cross-examination reveals ignorance about the details of partition and, therefore, his evidence cannot prove the case of the appellants. D.W. 12 was defendant No. 5 in the action and in his cross-examination he stated that the partition was of both raiyati and bakasht lands and it was a complete partition. He also stated that a paper of batwara had been written out. It will be noticed that even according to the case which was put forward on behalf of the appellants, nakdi income, that is to say, raiyati lands had not been partitioned nor was there any batwara paper written out. No such paper has been filed in the case.

I, therefore, in agreement with the finding of the learned Subordinate Judge hold that the appellants or any of the contesting defendants have failed to prove their story of previous partition of certain lands, in khewat No. 3 before the survey or at any time. But the position remains even according to the case of the plaintiffs and as found by the learned Subordinate Judge also, that the parties were coming in separate possession of certain zirat and bakasht lands in khewat No. 3. Though, therefore, in law, possession of one co-sharer was possession of the other co-sharers, yet, factually all co-sharers were not in khas possession of all the zirat and bakasht lands.

6. Mr. Nath raised a new point in this Court that the estates having vested in the State of Bihar under the Bihar Land Revenue Act, 1950, on 1-1-1956, the decree of the learned Subordinate Judge for partition of such estates cannot stand and this Court should take notice of this new legislation and its effect on the decree. Since the point was of some importance and a new one, which was raised in this Court, the case was adjourned for two or three days in order to enable the

learned counsel for the respondents to meet this point. Arguments were advanced by Mr. U. C. Sharma on behalf of some of the respondents as also by Mr. B. C. Ghose, who appeared for some of the original respondents as well as the appellants transposed to the category of respondents. I will now discuss below this new and important point raised in the case.

7. Mr, Nath submitted that the estate consisted, of the right to collect rent from the raiyats and the proprietors" private lands, zirat, bakasht etc., The whole estate having vested in the State of Bihar, there was nothing to partition. He further submitted that proprietors" private lands, which were in khas possession of the intermediaries would be deemed to have been settled u/s 6 of the Bihar Land Reforms Act by the State with those intermediaries who were in khas possession of such lands. This created a new title and the intermediaries who were in possession of such land got back these lands on fresh lease from the State by virtue of Section 6 of the Act. Therefore, the lands which were once upon a time the proprietors" private lands are no longer available for partition. In that view of the matter he submitted that the present suit for partition must be dismissed.

The plaintiffs or any of the parties may bring a fresh title suit for partition or for declaration of title and recovery of possession on the basis of the new title, if any, which they may have. The contention put forward on behalf of the respondents was that so far cash collections are concerned, the parties will get compensation from the State of Bihar according to their shares and no new title has been created under the Land Reforms Act, So far the proprietors" private lands are concerned, the argument was that such lands can still be partitioned and are still available for partition. Therefore, according to them, the suit should not be dismissed and the parties should not be driven to another suit for partition of the lands in question. After giving my most anxious consideration I am of the opinion that the contention of Mr. Nath must be accepted so far as partition of khewat No. 3 is concerned. Section 6(1) of the Bihar Land Reforms Act, 1950, reads as follows :

"On and from the date of vesting, all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, including --

(a) (i) proprietors" private lands let out under a lease for a term of years or under a lease from year to year, referred to in Section 116 of the Bihar Tenancy Act, 1885,

(ii) landlords" privileged lands let out under a registered lease for a term exceeding one year or under a lease, written or oral, for a period of one year or less, referred to in Section 43 of the Chota Nagpur Tenancy Act, 1908,

(b) lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lessee of an estate or tenure and cultivated by himself with his own stock or by his own servants or by hired labour or hired stock, and

(c) lands used for agricultural or horticultural purposes and in the possession of a mortgagee which immediately before the execution of the mortgage bond were in khas possession of such proprietor or tenure-holder, shall, notwithstanding anything contained in this Act, be deemed to be settled by the State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State 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 :

Provided that nothing contained in this sub-section shall entitle an intermediary to retain possession of any land recorded as chaukidari chakran or goraiti fagir or mafi goraiti in the record of rights or any other land in respect of which occupancy right has already accrued to a raiyat before the date of vesting".

The expression "khas possession" has been defined in Section 2(k) of the Act which runs as follows :

"Khas possession used with reference to the possession of a proprietor or tenure-holder of any land used for agricultural or horticultural purposes means the possession of such proprietor or tenure-holder by cultivating such land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock".

It will thus be noticed that Section 6 in the first instance provides that all lands used for agricultural or horticultural purposes which were in khas possession of an intermediary on the date of vesting of an estate shall be deemed to be settled by the State with such intermediary and he would be entitled to retain possession thereof and hold them as a raiyat under the State 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. Khas possession is possession in fact and that also of a particular type, namely, the possession of a proprietor or a tenure-holder, by cultivating such land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock.

Certain kinds of lands which are not covered within the meaning of khas possession as defined in Section 2(k) of the Act are also included in Section 6 and they are enumerated in Clauses (a), (b) and (c) of Sub-section (1) of Section 6. Such lands also by virtue of the said section shall be deemed to be settled by the State with an intermediary who will be entitled to them.

It is, however, worthy of notice that neither Section 2(k) nor Section 6 covers such lands which were in factual possession of one co-sharer though in constructive possession or possession in law of all the co-sharers. It would, therefore, follow on a plain reading of the aforesaid provisions of the Act that only the particular co-sharer, who was in khas possession of the land on the date of vesting of the estate, khas possession within the meaning of Section 2(k), shall get lease back of the lands, in his khas possession by virtue of Section 6 of

the Act and he and he alone shall be entitled to retain possession thereof as a raiyat under the State. It may be, in a fresh suit, on new facts being investigated, the other co-sharers may be able to claim a share in such lands or a share in the usufruct thereof or some other relief because of Section 90 of the Indian Trusts Act or some other principles of law, justice, equity and good conscience. But, it is manifest that a simple suit for partition, which was instituted on the basis of joint possession in law of all the proprietors is not maintainable now.

8. In the case of Raja Bahadur Kamakshya Narain Singh and Others Vs. The Collector and Deputy Commissioner of Hazaribagh and Others, , it has been held as follows :

"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 on the publication of a notification u/s 3. Under Sections 5 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 settlee under the State".

From the case of Sheo Narayan Chaudhury and Others Vs. State of Bihar and Others, , decided by a Full Bench of this Court, I may quote a passage, with respect, from the judgment of My Lord the Chief Justice, which runs as follows :

"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 u/s 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 interest 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 u/s 12".

It would, therefore, appear from the above authorities what vested in the State of Bihar was the whole estate of the intermediary; and homestead, lands, buildings and mines as are mentioned in Sections 5, 6, 7 and 9 of the Act are leased back to the intermediary who was in possession or khas possession, or was directly working the mines, as the case may be, within the meaning of the aforesaid sections. Therefore, it is a creation of new title by operation of law and so far as the lands and mines are concerned, the lease Back is only to those intermediaries who were in khas possession of the lands as defined in Section 2(k) including those mentioned in Clauses (a), (b) and (c) in Section 6(1) and the intermediaries who were directly working the mines, as mentioned in Section 9. Therefore, a simple suit for partition instituted on the basis of the title before coming into force of the Land Reforms Act is not maintainable and the preliminary decree passed in such a suit cannot be allowed to stand. In the case of *Madan Lal v. Kaviraj Basudevanand* 1956 PLR 552 (C), it was held as follows :

"The further contention of Mr. Lal Narain Sinha that by reason of Sections 5, 6, 7, 9 and 10, new titles are created in the intermediary is also correct. From the date of the vesting, the original title of the proprietor completely vanishes, and new title comes into, existence. Such a title is not joint title. This new title depends on new state of facts found to be in existence at the commencement of the Act and at the date of vesting, and it does not flow from the Act itself.

In such circumstances, the plaintiff's original title has vanished, and unless the new facts creating a new title, if any, in the plaintiff, are pleaded in the suit and

investigated afresh by the Court below the plaintiff on the basis of the original pre-Act preliminary decree cannot claim any right in the properties in suit, and, as such, he cannot insist that the Receiver must take possession of the properties, which have all now vested in the State. There is no property left now which the Receiver can take possession of. The contention of Mr. S. C. Sinha that no new title is created because of the vesting, and that the original title of the plaintiff remains unbroken, and it is still continuing cannot be accepted in view of the above provisions of the Act".

9. Mr. B. C. Ghose made reference to Section 120 of the Bihar Tenancy Act and submitted that the definition in Section 2(k) of the Bihar Land Reforms Act is not a new one but is similar to the said section of the Bihar Tenancy Act. He, therefore, contended that the expression "khas possession" must be interpreted to include the constructive possession of one co-sharer in the proprietors' private lands though that particular co-sharer may not be in actual possession. I am unable to accept this contention. Section 120 lays down rules for determination of proprietors' private lands for the guidance of the Revenue Officer preparing the record-of-rights. That section itself would show that the proprietors' private lands may be of several kinds one of which is mentioned in Clause (a), Sub-section (1) of Section 120, which corresponds to the definition given in Section 2(k) of the Bihar Land Reforms Act.

In that view of the matter also it would appear from a plain reading of the various provisions of the Bihar Land Reforms Act that the Legislature has not enacted lease back of lands and mines under Sections 6 and 9 to those co-sharers (intermediaries) who were not in khas possession of the lands within the meaning of Section 2(k) read with Section 6 and who were not directly working the mines within the meaning of Section 9 of the Act. It may be a lacuna in the Act itself. If so, it is for the Legislators to fill it up. It may be that the Legislators intended to lease back the lands and the mines only to such intermediaries who are active and capable enough to cultivate the lands and to work the mines on the date of vesting of the estate. If so, the language is plain enough to indicate that intention.

10. In this view of the matter I hold that the plaintiffs' suit in so far as it relates to the partition of khewat No. 3, patti Khalispur must now be dismissed. But, the position is different so far the partition of khewat No. 7/1, patti Harlochanpur, is concerned. In this khewat it was nobody's case nor is there any finding to the effect that any particular co-sharer was in khas possession of any particular portion of the proprietors' lands of that khewat. In the absence of such a finding it must be presumed that the entire body of co-sharers was in khas possession of the entire proprietors' private lands, and, therefore, even though new titles have been created yet the pleader Commissioner appointed for partition of the lands in question of khewat No. 7/1 will be able to partition the same. So far thenakdi collection is concerned it is no longer available for partition and the co-sharers will get compensation from the State according to their respective shares.

11. In the result, the appeal is allowed in part and the decree of the learned Subordinate Judge directing partition of khewat No. 3, patti Khalispur, is set aside and the decree directing partition of khewat No. 7/1, patti Harlochanpur, is maintained in the light of the observations made above. In the circumstances of this case, it is directed that the parties will bear their own costs of this appeal.

C.P. Sinha, J.

12. I agree.