

A BALESHWAR TEWARI (DEAD) BY LRS. AND ORS.

v.

SHEO JATAN TIWARY AND ORS.

MARCH 20, 1997

B [K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.]

C *Bihar Land Reforms Act, 1950/Bihar Land Reforms Rules, 1951 : ss. 2(k), 6 and 35/Rule 7E(3)—"Khas possession"—Intermediary selling in 1957 the land in possession of lessee—Purchaser filing suit for declaration of title—Tenant claiming to be in possession as lessee since 1925—Suit dismissed—Appellate court decreed the suit holding that entries for 1952-69 showed purchaser in possession and intermediary who must be in actual possession—Though the inclusive definition in s.6(1)(a) of the Act would also include yearly lease, but it indicates that possession should always be retained*
D *by the intermediary and the tenant must have no security of his tenancy right—But in the instant case the tenant remained continuously in possession of the land right from 1925, though possession was taken in execution of decree in 1979 and the necessary animus possidendi was absent—Creation of record is a camouflage to defeat just and legal right or claim or interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills—It*
E *is the duty of person claiming through an intermediary to establish by unequivocal evidence that the intermediary retained his right as such in land but that has not been done—Judgment of High Court and subordinate Judge are set aside and decree passed by trial court is restored—Purchaser would restitute possession to the raiyat.*

F *Gurcharan Singh v. Kamla Singh & Ors., [1976] 2 SCC 152; Ramesh Bejoy Sharma v. Pashupati Rai & Ors., [1979] 4 SCC 27; Labanya Bala Devi (Smt.) v. State of Bihar, Patna Secretariat, Patna & Anr., [1994] Supp. 3 SCC 725 and Brighu Nath Sahay Singh & Ors. v. Md. Khalibur Rahmanh & Ors., [1995] 5 SCC 687, relied on.*

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2533 of 1980.

H From the Judgment and Order dated 27.4.79 of the Patna High Court in S.A. No. 326 of 1978.

Ranjit Kumar and Ms. Binu Tamta for the Appellants.

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B.B. Singh for the Respondents.

The following Order of the Court was delivered :

This appeal by special leave arises from the judgment of the single Judge of the High Court of Patna, made on April 27, 1979 made in S.A. No. 326/1978 dismissing the appeal *in limine*.

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The respondent-plaintiff laid the suit for declaration of title to 3 bighas and six kathas of land bearing Plot No. 235 and 243 in Khata No. 952 situated in Mauza Nainijore Pachhim Diara, Police Station Brahmpore, District Bhojpur.

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The admitted position is that the respondent had purchased the land on May 23, 1957 for a sum of Rs. 82.2 annas from the Raja Dumraon Raj. Proceedings under Section 145 of Cr.P.C. were initiated in which it was held that the appellant was found in possession of the land. Consequently, the above declaratory suit came to be filed by the respondent. It is the case of the appellant that he has been in possession of the land as a lessee since the year 1925. The trial Court accepted his contention and recorded a finding as under :

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"These own documents of the Dumraon Raj clearly show that the defendant has been in possession over the suit land as a raiyat since 1925. The defendant has also filed the original Khatiwani of the year 1350 fasli prepared by Dumraon Raj which also finds the name of defendant's ancestor over the suit land. Ex. C is the Jamabandi Register of the Dumraon Raj which also has the name of defendant's ancestor over the suit Khata No. 91. Thus, the above documents of the defendant clearly prove that the suit land was never the proprietor's Zeerat land and was never in Khas possession of Dumraon Raj. Rather these documents show that the Defendant has been in possession of the suit land as a raiyat."

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On that basis, the suit was dismissed. On appeal, the Subordinate Judge held that the entries for the year 1952-69 show that the respondent was in possession of the land and, therefore, Raja Dumraon Raj had leased out the land to the appellant on year to year basis and thereby in the enquiry under Rule 7-E(iii) of the Bihar Land Reforms Rules, 1951 and

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A Section 35 of the Bihar Land Reforms Act (for short, the "Act"), no suit could be brought in any civil Court in respect of the order passed thereunder. Thereby, it is seen that at page 21, he recorded thus :

B "Since the suit land was given on lease from year to year being proprietor's private land, it was not necessary to prove that the Dumraon Raj was in Khas possession over the suit land. It is important to add here that the plaintiff has been able to show by production of Chitha that Dukhi Tiwari and other persons were recorded in several years of chitha in respect of the suit land. This fact also establish the fact that the suit lands were given on lease
C from year to year by the Dumraon Raj and the act of possession either by the defendant or other person in different years clearly do not confer any right of occupancy or title over the suit land of those persons recorded in the chitha."

D At page 22, it is further recorded that

"The possession of different persons of the suit land on the basis of lease does not change the character of private land nor it can confer a title to those persons nor perfect title by adverse possession."

E Thus, he concluded that the respondent had the title of the property. Accordingly, he declared that the respondent had valid title to the property. It is also evidenced that in 1979, in execution of the decree, the respondent came into possession of the land.

F From these facts, the question that arises for consideration is : whether the respondent's predecessor-in-title, Dumraon Raj was in Khas possession of the land and thereby the respondent acquired title of the property under the sale deed?

G Shri Ranjit Kumar, learned counsel for the appellants, contends that the finding recorded by the Subordinate Judge is clearly incorrect in view of the law laid down by this Court. Shri B.B. Singh, learned counsel for the respondents, contends that in view of the provisions of section 6(1)(a) and the order passed under Rule 7- E(iii), the land is the private land of the Dumraon Raj and the appellant had not acquired any raiyat right under
H the Bihar Land Reforms Act. The estate was abolished in 1951. Thereafter,

the appellant was not recognised as a raiyat. There was no evidence that he was recognised as owner of the land. Therefore, the respondent has proved that he is the owner of the land. The declaration of title is vitiated by error of law. A

In view of the respective contentions, the question for consideration is : whether the view taken by the Subordinate Judge is correct in law? Section 6(1) of the Act states that 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 proprietor's 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...shall, subject to the provisions of Section 7A and B, 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 of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner. Sub-section (2) postulates that if the claim of an intermediary, as to his Khas possession over the lands referred to sub-section (1) or as to the extent of such lands, is disputed by any person prior to the determination of the rent of such lands under the said sub-section, the Collector shall on application, make such inquiry into the matter as he deems fit and pass such order as may appear to him to be just and proper. Khas Possession has been defined in Section 2(k) of the Act which reads as under : B C D E

"2(k) Khas possession 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 lands or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock." F

The controversy relating to Khas possession is no longer *res integra*.

This Court in *Gurcharan Singh v. Kamla Singh & Ors.*, [1976] 2 SCC 152 at 162 in paragraph 20 and 21 had dealt with this aspect and a three Judge Bench held as under : G

"There is no case that the sub-clauses (a), (b) and (c) of Section 6(1) apply. Counsel's contention is that he comes within the ambit H

- A of the main paragraph, being allegedly in khas possession. To appreciate the further discussion, it is useful to recapitulate that the appellant has averred in his plaint that he had been dispossessed as early as 1954 by a brazen act of trespass by the contesting respondents who were holding adversely to him. Undaunted by this fatal fact Counsel claimed to be in possession and argued still.
- B The focus was turned by him on the concept of khas possession defined in Section 2(k). He presented a historical perspective and suggested that the genesis of khas possession could be traced to the Bengal Tenancy Act, 1885. May be, the draftsman might have drawn upon those earlier land tenure laws for facility, but we must understand right at the outset that the Constitution of India has inaugurated a new jurisprudence as it were, guided by Part IV and reflected in Part III. When there has been a determined break with traditional jurisprudence and a big endeavour has been made to overturn a feudal land system and substitute what may be called a transformation of agrarian relations, we cannot hark back to the bygone jura or hold a new legislation captive within the confines of vanishing tenurial thought. *De hors* the historical links - a breakaway from the past in the socio-legal system is not accomplished by worship of the manes of the law - khas possession means what the definition, in plain English, says. The definition
- C clause is ordinarily a statutory dictionary, and viewed that way, we have in the early part of this judgment explained how it means actual, cultivatory possession - nothing less, nothing else. Of course, Section 6(1) makes a special addition by 'including' other demised lands by express enumeration.
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- F Section 6 does not stop with merely saving lands in khas possession of the intermediary (erstwhile proprietor) but proceeds to include certain lands outstanding on temporary leases or mortgages with others, as earlier indicated. These are private lands as known to the Bihar Tenancy Act, privileged lands as known to the Chota
- G Negpur Tenancy Act, lands outstanding with mortgagees pending redemption and lands which are actually being cultivated by the proprietor himself. Ordinarily what is outstanding with lessees and mortgagees may not fall within khas possession. The legislature, however, thought that while the permanent tiller's rights should be protected and, therefore, raiyats and under-raiyats should have
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rights directly under the State eliminating the private proprietors, the zamindar or proprietor also should be allowed to hold under the State, on payment of fair rent, such lands as have been in his cultivatory possession and other lands which were really enjoyed as private or privileged lands or mortgaged with possession by him. With this end in view, Section 6(1) enlarged its scope by including the special categories. The word 'include' is generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. It was obvious that Section 6(1) uses the word 'including' to permit enlargement of the meaning of khas possession for the limited purpose of that section, emphasising thereby that, but for such enlargement, the expression khas possession excludes lands outstanding even with temporary lessees. It is perfectly plain, therefore, that khas possession has been used in the restricted sense of actual possession and to the small extent it had to be enlarged for giving relief to proprietors in respect of 'private', 'privileged' and mortgaged lands inclusive expressions had to be employed. Khas possession is actual possession, that is a foothold on the land, and actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, administrative act done Constructive possession or possession in law is what is covered by the sub-clauses of Section 6(1). Even so, it is impossible to conceive, although Shri Misra wanted us to accept, that possession is so wide as to include a mere right to possess, when the actual dominion over the property is held by one in hostility to the former. Possession, correctly understood, means effective, physical control or occupation;

The world possession is sometimes used inaccurately as synonymous with the right to possess. (Words and Phrases, 2nd Edn., John B. Sounders, p.151).

In the Dictionary of English Law (Earl Jowitt) 1959 at p. 1367 "possession" is defined as follows :

"Possession, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisite of possession. First there must be

A actual or potential physical control. Secondly physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed;..."

B In the end of all, however, the meaning of 'possession' must depend on the context. (ibid p. 153)

C May be, in certain situations, possession may cover right to possess, it is thus clear that in Anglo-American jurisprudence also, possession is actual possession and in a limited set of cases, may include constructive possession but when there is a bare right to possess bereft of any dominion or factum of control, it will be a strange legal travesty to assert that an owner is in possession merely because he has a right to possess when a rival, in the teeth of owner's opposition, is actually holding dominion and control over the land adversely, openly and continuously. Admittedly, in the present case, the possession of the plaintiff had ceased totally at least two years before the vesting under Section 4 took place. This situation excludes khas possession."

E This was reiterated by a Bench of two Judges in *Ramesh Bejoy Sharma v. Pashupati Rai & Ors.*, [1979] 4 SCC 27 at 37 in paragraph 28 held as under :

F "The word used in Section 6 is not 'possession' but it is qualified by the adjective 'khas possession, its equivalent being 'actual possession' as the word is understood in contradistinction to the word 'constructive possession'. Frankly speaking the law has still not provided clear and unambiguous definition of the jurisprudential concept of possession. Number of angular approaches to the problem of possession can be referred to with confidence. Here we to the problem of possession can be referred to with confidence. Here we are concerned with what is called 'khas possession' in a statute for ushering agrarian reforms and, therefore, the purpose and object behind the legislation must inform the interpretative process. The interpretation must tilt in favour of the actual cultivator, the tiller of the soil. Dealing with this expressions this Court

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in *Gurcharan Singh v. Kamla Singh* has observed as under :

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"There are, therefore, three requisites of possession. First there must be actual or potential physical control. Secondly physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed; ...,"

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In the end of all, however, the meaning of 'possession' must depend on the context, (ibid p. 153).

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May be, in certain situation, possession may cover right to possess, it is thus clear that in Anglo-American jurisprudence also, possession is actual possession and in a limited set of cases, may include constructive possession but when there is a bare right to possess bereft of any dominion or factum of control, it will be a strange legal travesty to assert that an owner is in possession merely because he has a right to possess when a rival, in the teeth of owner's opposition, is actually holding dominion and control over the land adversely, openly and continuously."

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After thus observing this approved the ratio extracted above in *Surajnath Ahir* case as also the ratio in *Ram Ran Bijai Singh* case."

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In *Labanya Bala Devi (Smt.) v. State of Bihar, Patna Secretariat, Patna & Anr.*, [1994] Supp. 3 SCC 725 at 727 after extracting the definition held thus :

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"the saving by Section 6(1)(b) is only of the lands actually used for agricultural purposes in a State or a tenure of a lessee or a temporary lessee and directly in his possession and cultivated by himself with his own stock or by his own raiyat rights has been confirmed statutorily subject to the terms contained therein."

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In *Brighu Nath Sahay Singh & Ors. v. Md. Khalibur Rahmanh & Ors.*, [1995] 5 SCC 687 another Bench considered the definition of "khas possession" in Section 2(k) and held as under :

"A reading of Section 2(k) read with Section 4 and 6 of the Act

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- A clearly envisages that the intermediary must, as on the date of vesting, be in possession of the land used for agricultural purpose or horticulture purpose as a tenure-holder by cultivating such land or carrying on horticulture operations thereon by himself with his own stock or by his own servants or by hired labour or with hired stock."

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- Thus, it could be seen that though the definition of "intermediary right" as used in Section 6(1)(a) of the Act, is inclusive of the yearly cultivation and intermediary becomes owner of such land subject to payment of rent determined, the intendment of khas possession is referable to the intermediary who must be in actual possession, i.e., one foot on the land, and the other on the plough in the field and hands in the soil; although hired labour is also contemplated. The emphasis is on the point that the possession is actual possession and admits of no dilution except to the extent specified under Section 6, i.e., itself by an inclusive process, permits and the animation of retention of possession always must be manifested. It must also be read with Bihar Tenancy Act wherein "khas possession' has been dealt with.

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- It is true that the inclusive definition in Section 6(1)(a) would also include yearly lease but it indicates that the possession should always be retained by the intermediary and the tenant must have no security of his tenancy right. But when the tenant remained continuously in possession of the land well over years, right from 1925 as found by the trial Court, admittedly, the possession was taken in execution of the decree in 1979 and the necessary *animus possidendi* was absent.

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- The question that arises is : whether it will be a "khas possession" and the respondent is entitled to declaration that the intermediary remained in possession as khas possession. In view of the law laid down by this Court, as extracted earlier, and the factual position, the conclusion would be that the tenant remained in possession in his own right as a raiyat though he was paying rent to the intermediary prior to the abolition. His possession is only of a raiyat possession. It is the duty of the respondent to establish by unequivocal evidence that the intermediary retained his intermediary right in the land and that proof has not been established by adducing any evidence. It is true that there is a finding by the Subordinate Judge that an enquiry under Rule 7-E(iii) was held but there is no finding

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recorded by the Subordinate Judge that the enquiry was conducted after issuing notice to the appellant. A

Under these circumstances, even if any enquiry was conducted unless the appellant is given notice and an opportunity to adduce the evidence to establish his right in the enquiry made, the finding generally does not binds him. Entries in revenue records is the paradise of the patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the land he ploughs, as his dominion and generally obeys, with moral fiber the command of the intermediary so long as his possession is not disturbed. Therefore, creation of records is a camouflage to defeat just and legal right or claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills. B C

Shri B.B. Singh, in these circumstances, seeks to contend that this question has not been canvassed in the courts below. Since the matter requires examination, it may be remanded to the High Court for consideration. We find that in view of the above findings recorded, the remittance of the matter would render little assistance. D

Under these circumstance, we are constrained to allow the appeal and set aside judgment of the High Court and also of the Subordinate Judge confirming the decree of the trial Court dismissing the suit. In consequence, the respondent is directed to restitute the possession to the appellant within two months from the date of the receipt of this order. In case, he fails to do so, the appellant is at liberty to have it executed with police assistance and take persuasion. No costs. E F

R.P.

Appeal allowed.