Jyotish Thakur and Others

Vs

Tarakant Jha and Others

Civil Appeal No. 443 of 1959

(P. B. Gajendragadkar, K. C. Das Gupta, J. R. Mudholkar JJ)

11.09.1962

JUDGMENT

DAS GUPTA, J. -

If a raiyat of lands in the District of Santhal Parganas acquires the entire superior landlord's interests, does his raiyati interest cease to exist or does he continue to be a raiyat in addition to becoming a superior landlord ? This is the main question raised in this appeal arising out of a suit for declaration and delivery of possession of 12 bighas, 16 kathas, 4 dhurs of land in Mauza, Chhatahara in the District of Santhal Parganas. The plaintiffs and the four defendants, described in the plaint as defendants 2nd party, are the successors in interest of one Santokhi Jha who became owner of the entire raiyati interest in these lands many years ago. Some time after he became a raiyat of this land, Santokhi purchased by a registered deed the entire interest of the Lakhirajdar under whom he was the raiyat. On May 15, 1935, these lands were sold by the 2nd party defendants and others including the plaintiffs 1 to 6, to the present appellants. The plaintiff's case is that no interest passed to the vendees by that sale deed, because the raiyati character of the land was existing on the date of transfer and this was inalienable under the provisions of Regulation III of 1872. It was further pleaded that this transfer of 1935 was fraudulent and collusive and that there was no legal necessity for the transfer.

The defendants first party denied the allegations of fraud or collusion and further pleaded that the transfer was made for legal necessity for paying antecedent debts of the family and they are therefore binding on the plaintiffs. They also pleaded that the lands in the suit were not, on the date of the sale, raiyati but Bakasht lands of the Malik and so there was no bar to the sale of these lands under the provisions of Regulation III of 1872.

The Subordinate Judge, Dumka, who tried the suit held that the sale was justified by legal necessity and that it was not fraudulent or collusive. He further held that while the plaintiffs were not estopped from challenging the sale deed it was binding on them. The learned Judge was also of the opinion that the land did not retain its raiyati character after Santokhi, the raiyat, acquired the landlord's interest and in that view rejected the plaintiff's contention that the lands were inalienable under the provisions of section 27 of the Regulation III of 1872. Accordingly he dismissed the suit.

On appeal by the plaintiffs the District Judge, Santhal Parganas, agreed with the findings of the Trial Court and held that the suit had been rightly dismissed.

The plaintiffs then appealed to the High court of Judicature at Patna. Before the High Court the finding that the sale deed was for legal necessity and there was no fraud or collusion were not

challenged. The entire argument in support of the appeal was that the raiyati interest continued to exist inspite of the acquisition of the landlord's interest by the sole raiyat, Santokhi, and the subsequent entry in the settlement records showed that the lands were Bakasht Malik. The learned Judge (Banerjee, J.) who heard the appeal, was of opinion that there was no conflict between the several entries in the record of rights the first of which showed the lands as held by Santokhi as the raiyat while the later settlement records showed lands as Bakasht Malik and that in law the raiyati interest continued even after the raiyat acquired the superior landlord's interest. He was also of the view that assuming that the equitable doctrine of merger could be applied in such cases of "unity between the interests of the raiyat and the landlord" in the Santhal Parganas, the facts and circumstances of this case showed that there was no merger. He also rejected the contention made by the respondents that the plaintiffs were estopped from challenging the deed of sale. Accordingly he allowed the appeal, holding that the sale was void with regard to the raiyati interest.

The Letters Patent Appeal by the defendants Ist party from this decision was unsuccessful; the learned Judges who heard the appeal being of opinion, in agreement with Mr. Justice Banerjee, that the raiyati interest recorded in the earlier settlement continued "inspite of the entry 'Bakasht Malik' in the subsequent Settlements and the raiyati interest could not be alienated by the sale deed of May 15, 1935."

The High Court, however, gave a certificate that as regards the value and nature of the case it fulfilled the requirements of s. 110 of the Code of Civil Procedure read with Article 135 of the Constitution of India and was a fit case for appeal to this Court. On that certificate the defendants first party have preferred the present appeal.

The first contention which Mr. Jha urged in support of the appeal in that after Santokhi acquired the Lakhirajdar's interest, he ceased to be a raiyat. The argument is two-fold. First, he argues that as a matter of law, there was an automatic merger of the raiyati interest in the larger interest, the Lakhirajdar's interest. Secondly, it is argued that at least Santokhi had the option to merge the raiyati interest in the Lakhirajdar's interest, and he exercised that option. The first argument is indeed the language of the law of merger at English common law. Black-stone in his Commentaries on the Laws of England, Vol. II, 4th Edition, p. 151 put the matter thus : "..... Whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated; or in the law phrase, is said to be merged that is, sunk or drowned in the greater". In England equity however soon stepped in to modify the rigour of this doctrine by laying down that one must look at the intention of the parties to decide whether there has been a merger or not. The result of the statutory provisions in the Judicature Act of 1873 and later of the Law of Property in 1925 has been that merger will be held to have taken place only where, there would be a merger both at common law and in equity. Foa puts the matter thus in his Law of Landlord and Tenant, 8th Edition, p. 643 : "..... if the circumstances are such that a Court of equity would formerly have held that there was no merger in equity there is now no merger at law....." When no intention is expressed, the English courts in deciding what the intention was, looked to the benefit of the person in whom the interests coalesce. On this question of intention it has also been held that a presumption will exist against merger where it can be shown that it is either the duty or the interest of the person acquiring the outstanding estate that the two estates should be preserved as separate interests. (Vide Re Fletcher, [1917] 1 Ch. 339).

We have referred to the doctrine of merger in England even though there was no reference to it at the Bar, for the reason that the state of the law in England appears to have influenced the judicial thinking in this country. As early as 1868 a question arose before the High Court at Calcutta in

Noomesh v. Rai Narain [(1868) 10 W.R. 15.] whether the doctrine of merger applied to the case of a Patni taluk coming into the hands of the Zamindar. The Court answered the question in the negative. Sir Barnes Peacock observed in his judgment thus :-

> "My own impression is that the doctrine of merger does not apply to lands in the mofussil in this country. I believe it is the practice in this country for Zamindars to purchase and keep on foot patni taluks with the necessity of adopting the practice, which is followed in England, of purchasing such taluks in the name of a trustee to prevent the merger of them. If the doctrine of merger applies, a Zamindar could not purchase and hold a patni tenure in khas possession." A similar view was taken in Ruston v. Atkinson [(1869) 11 W.R. 485.] and Savi v. Panchanan [(1876) 25 W.R. 503.]. In Prosonna v. Jagat, [(1878) 3 C.L.R. 159.] decided in 1878, the Court however held that while the union of the superior and subordinate interests might not automatically cause a merger of the latter in the former, the conduct of the party concerned might show that he did not intend to keep the two interests alive as mutually distinct rights and if this was shown, merger should be held to have taken place. In decision of the Privy Council in Raja Kissen Dutt Ram v. Raja Mumtaz Ali Khan, [(1879) I.L.R. 5 Cal. 198.] there was a statement in favour of the possibility of merger of resumable birt tenures in a superior interest, where the holder did not take steps to keep the two interests alive as distinct. In a larger number of cases decided after this date the Calcutta High Court has taken the view as in Prosonna v. Jagat [(1878) 3 C.L.R. 159.] that were the conduct of the party concerned showed that he did not intend to keep the two interests alive as mutually distinct rights the union of the superior and subordinate interests will result in merger of the latter in the former. (Vide Surja Narain Mandal v. Nand Lall Sinha, [(1906) I.L.R. 33 Cal. 1212.] Ulfat Hossain v. Gayani Dass [(1909) I.L.R. 36 Cal. 802.] and Promotha Nath Roy v. Kishore Lal Sinha, [(1916) 21 C.W.N. 304.] Dakshavani Dasi v. Amrita Lal Ghosh [(1919) 23 C.W.N. 826.]. A similar view was indicated by the Patna High Court (Chamier, C.J., and Sharfuddin J.) in Lachanbati v. Bodhnath [A.I.R. 1918 Pat. 651.].

Statutory provisions as regards merger were made in the Transfer of Property Act in 1882 and in the Bengal Tenancy Act in 1885 - which was later extended to Bihar. These statutory provisions have, admittedly no application to the present case. The legal position as regards merger, apart from these statutory provisions, may be stated thus. That while the union of the superior and subordinate interests will not automatically cause a merger, merger will be held to have taken place if the intention to merge is clear and not otherwise. In the absence of any express indication of intention, the courts will proceed on the basis that the party had no intention to merge if it was to his interest not to merge and also if a duty lay on him to keep the interests separate. In deciding the intention of the party the courts will have regard also to his conduct.

To this general statement of law in India it is necessary to add that there are special features in the land tenure in Santhal Parganas which make it difficult for the law of merger to apply there. The Santhal way of life favoured the emergence of a powerfull village community with its special rights over all lands of the village. This community of village raiyats has preferential and reversionary rights over all lands at the village whether cultivated or uncultivated. (Vide Final Report on the Survey and Settlement Operations in the District of Santhal Parganas). There is also in the majority of the villages of this district a headman who in addition to performing certain village duties collects rents from the raiyats and pays it to the proprietor. The headman is not however a tenure holder. One of his duties in that capacity is to arrange for settlement of lands in his village which may fall

vacant and available for settlement. All the raiyats in the village are included in the Jamabandi prepared for the village and it is the headman's duty to settle the available land to one of the Jamabandi raiyats.

It does not require much imagination to see that the interests of the village community as also of the headman are likely to suffer if the land which as raiyati land would be included in the Jamabandi is allowed to be taken out of the total quantity of the raiyati lands. If once raiyati lands are allowed to lose their character as such a village may find in the course of a few years the total stock of land available for settlement to resident raiyats, dwindling before their eyes.

It was in this state of things that the alienation of Raiyat's holdings in any form was interdicted by Government orders in 1887. These head the immediate effect of checking the practice of open transfer which had sprung up during the first years of Wood's Settlement; but transfers in a disguised form continued and the officers had to be constantly on watch to check the passage of village lands into the hands of persons whose intrusion within the village community was considered pernicious. (Appendix XV of the Settlement Report of the Santhal Parganas). In his note on the subject of the alienation policy of lands in the Santhal Parganas, Mr. McPherson, expressed himself strongly against any sales in any form being allowed. "To allow sales in any form will, I think", runs the note, "tend to weaken the communal system of the Santhal Parganas and the position of the Pradhan. The root idea of the system is that all the cultivated lands of the village belong in a way to the whole community".

His recommendation was accepted by the Government and the result was the amendment of the prohibition of transfer in Regulation III of 1872. As a result of the amendment section 27 stands thus:-

> "27. (1) No transfer by a raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, lease, or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the record of rights, and then only to the extent to which such right is so recorded.
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> (2) No transfer in contravention of sub-section (1) shall be registered, or shall be in any way recognised as valid by any court, whether in the exercise of civil, criminal or revenue jurisdiction.
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> (3) If at any time it comes to the notice of the Deputy Commissioner that a transfer in contravention of sub-section (1) has taken place, he may, in his discretion, evict the transferee and either restore the transferred land to the raiyat or any heirs of the raiyat who has transferred it, or re-settle the land with another raiyat according to the village custom for the disposal of an abandoned holding :-
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> Provided -
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> (a) that the transferee whom it is proposed to evict has not been in continuous cultivating possession for twelve years,
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> (b) that he is given an opportunity of showing cause against the order of eviction, and
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> (c) that all proceedings of the Deputy Commissioner under this section shall be subject to control and revision by the Commissioner".

It is important to remember this background of a raiyat's rights and duties and the incidents of raiyati lands in considering the question how far the doctrine of merger applies to the Santhal Parganas. On behalf of the respondents Mr. Chatterjee has urged that a raiyat is in law bound to keep his raiyati interest separate even when he acquires the superior interest. There is, in our opinion, considerable force in this contention. Even if we assume that it will be in the interest of the raiyat himself to put an end to his raiyati interests in order to remove the bar against transfer, the interests of the village community to which he belongs and the Pradhan make it obligatory on him to keep the raiyati interest in tact. So, it seems to us prima facie that in the community village areas of the Santhal Parganas which cover the greater part of the district - a raiyat has not got the right to put an end to his raiyati interest even where he acquires the superior interest. We are nclined to hold, as at present advised, that the doctrine of merger does not apply to the case of raiyati holders in the Santhal Parganas; but we do not wish to express a final opinion on this point in the present case.

Even if we assume that it is open to a raiyat to treat the raiyati interest as merged in the proprietary interests we are clearly of opinion that the evidence in this case does not show that this was done by Santokhi. In their attempt to show that Santokhi decided to treat raiyati interest as merged in the Lakhirajdar interest the appellants relied on Ex. I - a certified copy of the order-sheet in Settlement Objection Case No. 41 of 1909. The objection was made by Santokhi in respect of the entry in the record of rights of the land now in dispute. After stating that Santokhi purchased the Zamindari interest three years ago, the order reads thus : "Santokhi is now the Zamindar and the sole raiyat in the village. It seems necessary to have him as Pradhan now. He wants the village to be made Khas and his jote interest as Bakasht Malik. I think this should be allowed. Submitted to Settlement Officer." The Settlement Officer approved of the proposal and the record was corrected accordingly by entering "Bakasht Malik" against this land. Mr. Jha has tried to persuade us that in making the prayer that his jote interest should be recorded as Bakasht Malik. Santokhi was treating his raiyati interest as at an end. We are not impressed by this argument. Admittedly, the phrase "Bakasht Malik" as used by settlement authorities means "in the cultivation of the owner." At page 83 of the Settlement Report on the Santhal Parganas we find the statement that "in a few villages there are agricultural lands which formerly belonged to raiyats, but have come into the hands of proprietors usually by purchase at auction sales in the days when the courts were selling raiyati jots for arrears of rent. These lands now entered as "bakasht malik" occur both in pradhani and khas villages." In a foot-note an explanation of the word Bakasht Malik is given thus : "Bakasht Malik lands in the cultivating possession of landlords, but not privileged". This is followed by a note as regards "Khas Khamat" thus : "Khas Khamat - privileged lands in the private possession of landlords."

We are unable to see anything that would justify Mr. Jha's argument that assertion of Bakasht Malik status carried with it a negation of raiyati status of the land. When Santokhi prayed for record of the land as "Bakasht Malik" all he wanted was the record of the fact that the land which was formerly recorded as in the cultivating possession of a raiyat under a landlord was record of the land as "Bakasht Malik" all he wanted was the record correction of the former entry was needed because of the very fact that Santokhi, the raiyat, had acquired the landlord's interest. It will be reading too much into Santokhi's prayer to think that he asserted that he had decided to put an end to the raiyati nature of the land and to treat his raiyati interest as merged in the landlord's interest. It is proper to mention also that, in our opinion, it was not really in Santokhi's interest that the raiyati should cease to be such. So long as his raiyati interest was kept alive he had the rights of a raiyat in the village Jamabandi lands. These would cease if his raiyati interest came to an end. What he might appear to gain by getting rid of the bar against transfer would be more harmful to him and his family in the long run.

All things considered, it seems to us clear that it was to the benefit of Santokhi to keep the raiyati interest distinct and separate from the Zamindari interest acquired by him. This was also, in a way, his duty under the community village system in the Santhal Parganas. Even if we were to hold therefore that the doctrine of merger applies to the Santhal Paraganas to this extent that if the person in whom the two interests unite choose to treat them as one the lesser interest should be held to have merged in the larger interest, there is in the present case no evidence of such choice and Santokhi must be held to have intended to keep the two interests distinct and separate. Our conclusion therefore is that the raiyati interest did not merge in the proprietary interest.

Mr. Jha's next contention that the entry in the subsequent record of rights should prevail over any entry in an earlier record would have been of assistance to his clients only if the entry of Bakasht Malik amounted to a negation of the raiyati interest. As we are of opinion that the entry Bakasht Malik does not amount to such a negation and is a neutral expression as regards the continuance or otherwise of raiyati interest there is in effect no conflict between the earlier settlement entry and the subsequent entries and no question as to which should prevail arises.

For the same reasons Mr. Jha's contention that the decision of the Settlement Officer that the land was Bakasht Malik operates as res judicata is beside the point; for, it is unnecessary for the plaintiffs to challenge the correctness of that entry.

Another point raised by Mr. Jha is that the question whether the raiyati interest continued to exist after Santokhi acquired the proprietary interest is a question of fact and the Trial Court and the Court of First Appeal having held that that interest had ceased to exist it was not open to the High Court in Second Appeal to go behind that finding. It is not possible to say, however, in the facts and circumstances of the present case, that the question whether the raiyati interest continued or not after Santokhi purchased the propriety interest is a pure question of fact. The decision of the question depended on a correct appreciation of the doctrine of merger as applicable to Santhal Parganas and so the question whether the raiyati interest continued to subsist after Santokhi's purchase of the proprietary interest cannot but be considered to be a mixed question of law and fact. There is, therefore, no substance in the argument that the High court was not justified in going behind the conclusions of the Courts below.

The result of the conclusion that Santokhi's interest was not merged in his proprietary interest and continued side by side with his raiyati interest necessarily is that the sale by the plaintiffs and other successors-in-interest of Santokhi in 1935 did not in law transfer the raiyati's interest in the land to the vendees. For, it is common ground that the right to transfer raiyati interest was never recorded in the record of rights as regards these lands.

As a last resort Mr. Jha argued that in any case the civil court has no jurisdiction in the matter and the only relief that can be given when an invalid transfer of raiyati interest takes place is under s. 27(3) of the Regulations. This sub-section of s. 27 gives a Deputy Commissioner of the District the right to evict the transferee and either restore the transferred land to the raiyat or any of his heirs or to re-settle the land with another raiyat according to the village custom, if at any time it comes to his notice that a transfer in contravention of sub-section 1 of s. 27 had taken place. We can find no reason to think however that the provision of this relief was intended to be exhaustive and to be a bar against any other reliefs in the courts. Indeed, the provisions of sub-section 2 of s. 27 that no transfer in contravention of sub-section 1 shall be in any way recognized as valid by any court, make it obligatory for the civil court when a dispute arise as regards the title to lands to ignore transfers made in contravention of s. 27(1). For the proper exercise of that obligation it is necessary

for the Court to decide whether in fact the transfer on the basis of which one of the parties to the litigation bases his claim was really made in contravention of s. 27(1). If the Court is satisfied that there was such contravention the court must necessarily proceed to dispose of the case on the basis that no title accrued to the transferee by such transfer. The objection that s. 27(3) stands in the way of the plaintiffs' getting relief in the civil court cannot therefore succeed. It may be mentioned that this objection was not taken on behalf of these appellants in any of the courts below.

It remains now to notice the cases cited at the Bar. In Sarda Devi v. Ram Louchan Bhagat [A.I.R. 1926 Pat. 444.] the Patna High Court held that s. 27 of the Regulation (3 of 1872) does not prohibit the landlord from transferring his interest in a raiyati holding if the landlord by some means or other comes into possession of such holding. If this decision was intended to lay down the law that the rayati interest of the landlord also passed by the transfer, we are of opinion that the decision was wrong. We find however that the High Court was careful to point out that what was being sold there - in a court sale - "was the right, title and interest of the judgment-debtor's 4 annas Brahmottar interest and in the 62 bighas of land held by her in the capacity of a Brahmottardar." That would be quite correct as section 27 prohibits transfer of the raiyati interest and not of the landlord's interest which may co-exist in a person along with Raiyati interest.

In Madan v. Kheelu [(1957) I.L.R. 36 Pat. 439.] which was also cited by Mr. Jha is support of his contentions, the Patna High Court had to consider whether certain lands were Ghatwali land of the plaintiffs' father. Before the High Court a plea was raised that some of the properties in suit were recorded in the Khatian Jamabandi of the year 1904 in the name of the defendants as raiyat and so these were not Ghatwali lands of the defendants. It appeared that in the Revision Survey and Settlement in 1932 the lands were recorded as "appertaining to Mahal Ghatwali" belonging to Maharaj Rai Ghatwal, as his Bakasht. The High Court held on a consideration of the provisions of s. 25 of the Regulations that this 1932 entry prevailed. In that connection they also held that entry Bakasht was sufficiently wide to include khud-kast, sir and Zerait and that in the facts of the case before them it was proper to hold that the entry of raiyat in the earlier record was wrong and ought to have been merely Ghatwal. The learned Judges laid emphasis on the fact that there was no evidence before them to show to whom the alleged raiyati belonged or when it came into the possession of Maharaj Rai and that on the other hand it was established that the land was never the raiyati land of the appellant but was the pradhani jote of Maharaj Rai Ghatwal. It is unnecessary for us to decide whether in the facts and circumstances of that case the decision of the High Court was correct. We need only say that this case did not purport to decide that the entry Bakasht would always imply the negation of a raiyati right. It may be mentioned that the attention of the learned judges who decided this case was drawn to the High Court's decision in the case now under appeal before us and they distinguished it by saying that the earlier decision should be held to be a finding restricted to its own facts and circumstances.

Our conclusion therefore is that the High Court was right in holding that the sale of May 15, 1935 was void with respect to the raiyati interest and only the right to receive rent passed by this sale to the defendants first party.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

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