Kailash Rai

Vs

Jai Jai Ram and Others

Civil Appeal No. 1229 of 1967

(C.A. Vaidialingam, I.D. Dua JJ)

22.01.1973

JUDGMENT

VAIDIALINGAM, J. -

1. The question that arises for consideration in this appeal, by special leave, relates to the proper interpretation to be placed on Section 18, sub-section (1), clause (a) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) hereinafter referred to as the Abolition Act.

2. In order to appreciate the claim of the plaintiff based upon the provision quote above, it is necessary to set out the pedigree which is as follows :

# Baijnath | ---------- | | | | Ram Prasad Bishundat Hanuman Manudat | | | | Chirkut Balkaran Ghulai Gauri | | Mst. Retraji | Ganpat Ram Adhare |(Defdts.-Respdt.) Mst. Pha- | rambei ---------- | | | | Pateshari Jaijai Ram | (Defdts.- Respdts.) Mst. Ramrati | Kailash (Plff.-Applt.)##

3. It will be noted from the above pedigree that the plaintiff is the son of Mst. Ramrati and the grandson of Ram Adhare. After the death of Ram Adhare, the defendants-respondents got their names recorded over the properties on the allegation that Ram Adhare was a member of a joint family with them. Mst. Ramrati, mother of the appellant, filed suit No. 918 of 1945 in the Court of Civil Judge for a declaration that she was entitled to the property inherited from her father, Ram Adhare. Relief for possession of the properties was also claimed. As she died during the pendency of the suit the appellant before us, Kailash Rai, got himself substituted as heir-son of Ramrati. On May 16, 1947, the Additional Civil Judge decreed the appellant's claim. On June 13, 1947, the plaintiff obtained dakhaldahani through court. The respondents, who are defendants in the said suit, filed an appeal in the High Court which was dismissed on March 18, 1952.

4. On July 1, 1952, the Abolition Act came into force. The appellant filed suit No. 1132 of 1953 in the court of the Munsif, Gorakhpur for the division of the holdings on the grounds that all the plots were joint bhumidhari and that his one-fourth share should be separated. The defendants contested the claim on the ground that they alone have got bhumidhari rights in the properties and the plaintiff has no right, title or interest. The learned Munsif accepting the defence dismissed the suit. On appeal by Kailash Rai, the learned District Judge of Gorakhpur upheld his claim under Section 18(1)(a) and decreed his suit, thus reversing the judgment of the Trial Court. The defendants carried the matter in Second Appeal No. 397 of 1956 to the Allahabad High Court. In the first instance, the High Court by its order, dated July 27, 1965, called for a finding from the District Court on the

following question :

> "Whether the defendant-appellant were in exclusive possession of the Khudkasht and sir plots in dispute and if so, since When ?"

The District Court submitted its finding to the effect that the defendants were in exclusive possession of the khudkasht and sir plots in dispute since 1947. The High Court accepted the finding and by its judgment and order, dated September 19, 1966, allowed the defendants' appeal and dismissed the plaintiff's suit on the ground that he was not in cultivatory possession of the plots in dispute. This appeal is against the said judgment of the High Court.

5. The contention of Mr. J. P. Goyal, learned counsel for the appellant, is that as the plaintiff and the defendants were admittedly co-sharers and the appellant's right, title and interest have been declared in suit No. 918 of 1945, the possession by the defendants, who are some of the co-sharers, is, in the eye of law, possession for and on behalf of the appellant also. If so, the appellant is a person, who is in possession of the lands as khudkasht. In any event, the lands must be considered to be 'held or deemed to be held' by the appellant as khudkasht so as to attract Section 18(1)(a) of the Abolition Act. His further contention is that suit No. 1132 of 1953 out of which these proceedings arise, is really a suit under Section 176 of the Abolition Act for partition of the bhumidhari rights as between the co-sharers.

6. Mr. S. K. Bagga, learned counsel for the defendants, urged that the appellant should have really filed an appeal against the order of the High Court, dated July 27, 1965, in and by which it called for a finding regarding the possession of the properties. Not having challenged that order, the counsel urged, it is no longer open to the appellant to challenge the final order of the High Court accepting the finding submitted by the District Court. The counsel further contended that the decision of the High Court is in accordance withe the view held in a previous decision reported in Rama Kant Singh and Others v. Deputy Director of Consolidation and Others. (AIR 1966 AII 173 : 1965 AII WR (HC) 125 : 1965 ALJ 313) When the defendants have been found to be in cultivatory possession of the properties, the view of the High Court negativing the appellant's claim is, according to Mr. Bagga, fully justified.

7. This will be the convenient stage to refer the material provisions of the Abolition Act. Section 3 defines the various expression. In Clause 26, it is provided that certain other expressions referred to therein, including khudkasht and sir, shall have the meaning assigned to them in the United Provisions Tenancy Act, 1939 (hereinafter referred to as the Tenancy Act). Section 3(9) of the Tenancy Act defines khudkasht as "land other than sir cultivated by a landlord, and under-proprietor or a permanent tenure-holder as such either himself or by servants or by hired labour". Sir is defined in Section 6 occurring in Chapter II of the Tenancy Act. Section 4 of the Abolition act provides for vesting of estates from a date to be specified by notification. Section 18(1) of the Abolition Act, which is relevant for out purpose, runs as follows :

> "18. Settlement of certain lands with intermediaries or cultivators as bhumidhars. - (1) Subject to the provisions of Sections 10, 15, 16 and 17, all lands -
>
> (a) in possession of or held or deemed to be held by an intermediary as sir, khudkasht or an intermediary grove,
>
> (b) held as a grove by, or in the personal cultivation of a permanent lessee in Avadh,

(c) held by a fixed-rate tenant or a rent-free grantee as such, or

(d) held as such by -

(i) an occupancy tenant, }

(ii) a hereditary tenant, } Possessing the right to transfer

(iii) a tenant on patta dawami } the holding by sale. or istamrari referred to in Section 17.

(e) held by a grove-holder,

on the date immediately proceeding the date of vesting shall be deemed to be settled by the State Government with such intermediary, lessee, tenant, grantee or grove-holder, as the case may be, who shall, subject to the provisions of this Act, be entitled to take or retain possession as bhumidhar thereof.

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8. There is no controversy that the date of vesting is July 1, 1952 and the date immediately preceding the date of vesting is June 30, 1952. Under Section 18(1)(a), broadly speaking, it will be seen, all lands in possession of, or held, or deemed to be held by an intermediary as sir, khudkasht or an intermediary's grove on June 30, 1952, shall be deemed to be settled by the State Government with such intermediary. The said intermediary is entitled to take or retain possession as bhumidhar subject to the provisions of the Abolition Act. In order to claim rights under clause (a), it is necessary that lands should be (1) in possession of an intermediary as khudkasht or sir or (2) held by an intermediary as khudkasht or sir or (3) deemed to be held by an intermediary as khudkasht or sir. If any one of these alternatives is established. clause (a) will stand attracted. Khudkasht, as we have already pointed out, means land, other than sir cultivated by a landlord either by himself or by servants or by hired labour.

9. The question is whether the appellant can be considered to be in "possession" of the lands as Khudkasht or whether it can be considered that the lands are "held or deemed to be held by him" as khudkasht. The finding sent by the District Court is no doubt prima facie against the appellant. But we cannot ignore the decree that has been obtained by him in suit No. 918 of 1945 and the further fact that he is working out the said decree by asking for partition in the present proceedings. According to the High Court, as possession is with the defendants, the plaintiff-appellant cannot get any relief.

10. It should be remembered that the District Court has recorded a definite finding that the defendants have not set up any plea of ouster. This finding, so far as we could see, has not been disturbed by the High Court. The decree in suit No. 918 of 1945 clearly recognises the right of the appellant as a co-sharer along with the defendants. In law the possession of one co-sharer is possession both on his behalf as well as on behalf of all the other co-sharers, unless ouster is pleaded and established. In this case, as pointed out by us earlier, the finding is that the defendants have not raised the plea of ouster. There is no indication in the Abolition Act or the Tenancy Act that bhumidhari rights are not intended to be conferred on all the co-sharers or co-proprietors, who are entitled to the properties, though only some of them may be in actual cultivation. One can very well visualise a family consisting of father and two sons, both of whom are minors. Normally, the

cultivation will be done only by the father. Does it mean that when the father is found to be cultivating the land on June 30, 1952, he alone is entitled to the bhumidhari rights in the land and that his two minor sons are not entitled to any such rights ? In our opinion, the normal principle that possession by one co-sharer is possession for all has to be applied. Further, even when one co-sharer is in possession of the land, the other co-sharers must be considered to be in constructive possession of the land. The expression 'possession' in clause (a), in our opinion, takes in not only actual physical possession, but also constructive possession that a person has in law. If so, when the defendants were in possession of the lands and when no plea of ouster had been raised or established, such possession is also on behalf of the plaintiff-appellant. Under such circumstances, the lands can be considered to be in the "possession" of the appellant or, at any rate, in his constructive possession.

11. Clause (a), as we have pointed out, takes is two other contingencies also, namely, lands held as khudkasht or lands deemed to be held as khudkasht. Even assuming that, in view of the finding of the District Court, the defendants are in possession, nevertheless, the lands in question can be considered to be held or deemed to be held by the appellant also. The expression 'held' occurs in Section 9 of the Abolition Act. In interpreting the said expression, this Court in Budhan Singh and Another v. Nabi Bux and Another, ((1970) 2 SCR 10 : (1969) 2 SCC 481, 486 (para 12)) has held that it means 'lawfully held'. This Court has further observed that :

> "According to Webster's New Twentieth Century Dictionary the word 'held' is technically understood to mean to possess by legal title. Therefore by interpreting the word 'held' as 'lawfully held' there was no addition of any word to the section. According to the words of Section 9 and in the context of the scheme of the Act it is proper to construe the word 'held' in the section as 'lawfully held'."

12. Mr. Bagga, however, contended that the expression 'held' in clause (a) denotes actual possession. As the finding on that point is against the appellant, the lands cannot be considered to be 'held' by him. We are not inclined to accept this contention. In clause (b) occurs the words 'held as a grove by'. If the expression 'held' occurring in clause (a) means actual possession, then the same meaning must be given to the same word occurring in clause (b) also. But it will be seen that in the latter part of clause (b), the Legislature has used the expression 'personal cultivation' with reference to Avadh, whereas it has not used any such expression in the first part of clause (b). Therefore, the expression 'held' must have a meaning different from personal cultivation. In our opinion, the expression 'held' can only be taken to connote the existence of a right or title in a person. The appellant's right and title as holder of the lands has been declared and settled in suit No. 918 of 1945. It can also be held that the lands can be considered to be 'deemed to be held' by the appellant. The expression 'deemed to be held' has been used by the Legislature to treat persons like the appellant bhumidhars by creating a fiction.

13. We cannot accept the contention of Mr. Bagga that the appellant should have challenged the order of the High Court, dated July 27, 1965, calling for a finding from the first appellate court. The order was passed at an intermediary stage and the appellant was justified in waiting for the final decision of the High Court to be given.

14. It is now necessary to consider the decision of the Allahabad High Court in Rama Kant Singh and Others v. Deputy Director of Consolidation and Others (supra), following which the present decision under appeal has been rendered. It is no doubt true that the said decision does support the respondents in the sense that it holds that only that co-proprietor who is in cultivatory possession,

becomes khudkasht holder and that possession over proprietary rights by itself does not confer khudkasht holder's rights. The said decision, we find, has laid undue emphasis on cultivatory possession, which alone will attract clause (a) of Section 18(1). There is no consideration in the said decision of the various aspects referred to us and we are not inclined to agree with the view taken by the High Court in the said decision.

15. In the result, the judgment and order of the High Court under appeal are set aside and the decision of the District Judge, Gorakhpur, in Civil Appeal No. 494 of 1955 will stand restored. There will be no order as to costs in this appeal.

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