

Ram Jivan

Vs

Smt. Phoola (sead) by Lrs. and Others

Civil Appeal No. 901 of 1968

(R.S. Sarkaria, Syed M. Fazal Ali JJ)

30.01.1976

JUDGMENT

FAZAL ALI, J. -

1. This is an appeal by special leave against the judgment of a Division Bench of the High Court of Allahabad dated October 5, 1966, and raises a question of law regarding the applicability of Sections 172 and 174 of the U. P. Zamindari Abolition and Land Reforms Act, 1950 (Act No. 1 of 1951).

2. It appears that the case had a chequered career and the dispute between the parties passed through several phases both before the revenue courts and in the High Court. In order to appreciate the point of law involved in this appeal, it may be necessary to give a resume of the facts which culminated in the judgment of the High Court under appeal. The dispute refers to lands comprised in khata Nos. 1002, 1344 and 1411 of village Bishunpur in the district of Rae Bareli (U. P). It is not disputed that these khatas originally belonged to one Harbans who died leaving behind three sons, namely, Gurdin, Ramcharan and Ramadhin. Ramcharan appears to have died issueless but Ramadhin died leaving a widow Smt. Menda and a daughter from her Smt. Phoola who was respondent No. 1. The other son Gurdin died leaving a son Jit who had contested the present proceedings against Smt. Phoola. During the pendency of the present proceedings Jit also died and the proceedings have been continued by his son Ram Jivan alias Lallu. The district of Rae Bareli fell in what was previously known as the Oudh Area of the United Provinces. The dispute between the parties appears to have arisen on the death of Ramadhin one of the sons of Harbans who died in 1916 leaving behind his widow Smt. Menda. At the time of the death of Ramadhin in 1916 the tenancy of the lands in dispute was governed by the provision of the Oudh Rent Act, 1886 - hereinafter referred to as 'the Rent Act of 1886'. Under the provision of the Rent Act of 1886 Smt. Menda was to continue in possession of the lands as an heir of Ramadhin but only during the fixed period of the tenancy on the rent payable to the landlord and was not entitled to renewal of the same. The terms and conditions of the tenancy at the time of the death of Ramadhin were governed by Section 48 of the Rent Act of 1886 which applied to the Oudh Area where the lands in dispute were situate. Under Section 48 of the Rent Act of 1886 it is obvious that on the death of a tenant his widow was to continue in occupation of the lands for the unexpired portion of the period for which the deceased tenant might have held the holding. Accordingly Smt. Menda continued to occupy the lands after the death of her husband in 1916. Meanwhile five years later the Rent Act of 1886 was amended by U. P. Act 4 of 1921 under which the status of a statutory tenant was conferred on a person who was in possession of the lands on the date when the amendment came into force. The amendment introduced a substantial change in Section 48 of the Rent Act of 1886 and added clause (18) to Section 3 which runs thus :

(18) "Statutory tenant" means a tenant to whom Section 76 or Section 37 applies.

Explanation. - A person who succeeds as an heir of a statutory tenant under Section 48 shall not be deemed to be a statutory tenant unless he has obtained a patta from the landlord or has remained in occupation of the holding for three years after the expiration of the period for which he is entitled to retain occupation of the holding under Section 48 :

Provided that when a holding is held by two or more co-tenants no person who succeeds as an heir of any such co-tenant under Section 48 shall be deemed to be a statutory tenant of the holding unless he has obtained a patta from the landlord, or has remained in occupation of the holding for three years after the expiration of the period for which the heir of the last surviving co-tenant is entitled to retain occupation of the holding under Section 48.

By virtue of the explanation extracted above, a tenant to whom Sections 36 and 37 applied would be deemed to be a statutory tenant. Section 36 of the Rent Act of 1886 runs thus :

Every tenant, not being a tenant with a right of occupancy or a sub-tenant, shall be entitled to retain possession of the holding occupied by him at the commencement of the Oudh Rent (Amendment) Act, 1921, at the rent then payable by him, for a period of ten years from the date of the last change in his rent or the last alteration in the area of the holding, or where no such change or alteration has taken place, from the date on which the tenant was admitted to the occupation of the holding.

As Smt. Menda was in possession of the holding at the date when the amendment came into force, she would be clearly governed by Section 36 and not Section 37 of the Rent Act of 1886 which deals with tenants who were admitted to the occupation of the holding after the coming into force of the amendment. Under Section 36 the widow was entitled to retain possession of the holding acquired by her for a period of ten years from the date on which she was admitted to the occupation of the holding. Thus the combined effect of Section 3(18) and Section 36 of the Rent Act of 1886 would be to clothe Smt. Menda with the status and the rights of a statutory tenant. Section 48 made of a statutory tenant heritable and provided as follows :

(1) When a statutory tenant dies, his heir shall be entitled to retain of the holding at the rent payable by the deceased for a period of five years from the date of the tenant's death, and to receive compensation under the provisions of this Act for improvements, if any, made on the holding by his predecessor in interest, but shall not be entitled to a renewal of the tenancy :

Provided that a person who succeeds as an heir of a deceased tenant to whom clause (e) of subsection (1) of Section 62A applies shall be entitled to retain occupation of the holding at the rent payable by the deceased only for the unexpired portion of the statutory period of the deceased tenant.

(2) Subject to any rights which he may have under Section 22 as representative of the deceased, a collateral relative who did not at the date of the death of the deceased, share in the cultivation of the holding, shall not be deemed to be an heir of the deceased within the meaning of this section.

In the instant case as Smt. Menda had succeeded as an heir to her husband before the amendment of Section 48 her case will be governed by the provisions of Section 48 and she would be entitled to retain possession of the tenancy but not a renewal thereof. It appears that soon after the death of Ramadhin the court of wards claimed that the tenancy had escheated to the State because Ramadhin had left no heirs and that Ramadhin was only a tenant at will. Smt. Menda appears to have resisted

the claim of the court of wards which resulted in proceedings before the revenue courts which ultimately found that Smt. Menda had acquired the independent rights of a statutory tenant and was therefore, not liable to be ejected at the instance of the court of wards. This order was passed by the Assistant collector on June 4, 1926 and thereafter Smt. Menda continued in possession of the holding as a statutory tenant under the amended Rent Act of 1921.

3. We might mention here that previous to the passing of the U. P. Tenancy Act, 1939 the areas of Oudh and Agra in the United Provinces were governed by two separate Acts so far as the tenancies were concerned. The areas in Agra were governed by the Agra Tenancy Act and those in Oudh by the Oudh Rent Act. The U. P. Tenancy Act 17 of 1939 appears to have consolidated the tenancies in the whole of the province and the Legislature passed one Act which would govern all the tenancies in the entire province. The U. P. Tenancy Act 17 of 1939 was passed on December 16, 1939 and by Section 2 thereof the Agra Tenancy Act, 1926 and the Oudh Rent Act, 1886 were repealed. Section 29 of the Tenancy Act conferred the status of a hereditary tenant on any person who was a tenant of the land at the commencement of the Act. Thus Smt. Menda who continued to be in possession as a statutory tenant acquired the status of a hereditary tenant, under Section 29(a) of the Tenancy Act which runs thus :

29. Every person belonging to one or another of the following classes shall be a hereditary tenant, and subject to any contract which is not contrary to the provisions of Section 4 shall be entitled to all the rights conferred, and be subject to all the liabilities imposed on hereditary tenants by this Act, namely :

(a) every person who is, at the commencement of this Act, a tenant of land otherwise than as a permanent tenure-holder, a fixed-rate tenant, a tenant holding on special terms in Oudh, an expropriary tenant, an occupancy tenant, or except as otherwise provided in this Act as a sub-tenant or a tenant of sir.

The Tenancy Act having conferred heritable rights on the tenants to which Section 29 applied also laid down an order of succession in which the rights of the tenants would pass after the death of the tenant. Sections 36 and 37 of the Tenancy Act provided two different modes of devolution in the case of the death of a female tenant. Section 36 runs thus :

36. (1) When a female tenant, other than a tenant mentioned in Section 34, who either before or after the commencement of those Act has inherited an interest in a holding as a widow, as a mother, as step-mother, as a father's mother, or, as a daughter dies or abandons such holding, or surrenders such holding, or a part of such holding or, in the case of a tenant inheriting as a widow or as a daughter, marries such holding or such part of such holding shall, notwithstanding anything in Section 45, devolve in accordance with the order of succession laid down in Section 35 on the heir of the last male tenant, other than a tenant who inherited as a father's father under the provisions of that section.

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Section 37 of the Tenancy Act runs thus :

When a female tenant, other than a tenant mentioned in Section 34 or Section 36 dies, her interest in the holding shall devolve in accordance with the order of succession given below :

##(a) male lineal descendants in the male line of descent ;provided that no member of this class shall

inherit if any male descendant between him and the deceased is alive; (b) husband; (c) unmarried daughter; (d) daughter's son; (e) brother; (f) brother's son.##

It will be seen that under Section 36 of the Tenancy Act the heirs of the husband get precedence over the daughter or the unmarried daughter, whereas in the case of a female tenant falling under Section 37 of the Tenancy Act the unmarried daughter gets precedence over the brother or brother's son. In other words, the policy of the law was that where female tenant died having inherited an interest in the property from her husband, then the male heirs of the husband should get preference over the female heirs. Where, however, the female tenant had died having an independent and self-acquired interest in the holding, her property was to pass in a different manner. We are not concerned in this appeal with either Section 36 or Section 37 of the Tenancy Act, because Smt. Menda had died sometime in September, 1952, when the U. P. Tenancy Act, 1939 had been replaced by the U. P. Zamindari Abolition and Land Reforms Act, 1950 (U. P. Act 1 of 1951) hereinafter to be referred to as 'the Abolition Act'.

4. In short, therefore, Smt. Menda who originally occupied the lands in suit as a tenant on the death of her husband became a statutory tenant under the Rent Act of 1921, a hereditary tenant under the Tenancy Act and finally she acquired the status of a bhumidhar under the Abolition Act which came into force on July 1, 1952. The relevant portion of Section 18 of the Abolition Act may be extracted thus :

18. (1) Subject to the provisions of Sections 10, 15, 16 and 17, all lands -

(a) in possession of or deemed to be held by an intermediary as sir, khudkasht, or an intermediary's 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,) possessing (ii) a hereditary tenant,) the right to (iii) a tenant on patta dawami) transfer the or istamrari referred to) holding by in Section 17) sale.##

(e) held by a grove-holder,

on the date immediately preceding 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.

As Smt. Menda had already become a hereditary tenant under the Tenancy Act she automatically acquired the status of bhumidhar under the Abolition Act and by virtue of the legal fiction created by Section 18(1) of the Abolition Act, the lands, having been vested in the State Government, were deemed to have been permanently settled with the bhumidhar, namely, Smt. Menda in this case. It is the admitted case of the parties that Smt. Menda died sometime in September 1952, i.e. only a few months after coming into force of the Abolition Act. The controversy between the parties now centres round the question as to who would succeed to the tenancy left by Smt. Menda. In other words, the matter to be decided is whether Section 172 or Section 174 of the Abolition Act would

apply to the present case. It is not disputed that Smt. Menda died leaving a daughter Smt. Phoola and her husband's brother's son Jit. These were the two contending heirs for the property left by Smt. Menda.

5. Sections 172 and 174 of the Abolition Act, insofar as they are relevant, may be extracted as follows :

172. (1) When a bhumidhar, sirdar or asami, who has after the date of vesting, inherited an interest in any holding -

(a) as widow, widow of a male lineal descendant, in the male line of descent, mother or father's mother dies, marries, abandons or surrenders of such holding or part thereof; or

#(b) * * * * *##

the holding or the part shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of Section 171) or the last male bhumidhar, sirdar or asami.

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174. When a bhumidhar, sirdar or asami (other than a bhumidhar, sirdar or asami mentioned in Section 171 or 172) who is a woman dies, her interest in the holding shall devolve in accordance with the order of succession given below :

(a) son, son's son, son's son, predeceased son's widow and predeceased son's widow in equal shares per stripes :

(b) Provided firstly that the nearer shall exclude the remoter in the same branch :

(c) provided secondly that a widow, who has remarried, shall be

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(d) daughter;

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(g) brother's son;

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It is therefore, clear that the mode of succession to the property of Smt. Menda would depend on the determination of the question whether Smt. Menda had inherited an interest in any holding or had an independent interest in the holding. This matter appears to have been canvassed before the revenue courts which upheld the plea of Smt. Phoola.

6. To begin with on the death of Smt. Phoola (sic Menda) Jit was successful in getting his name mutated in respect of the khata in dispute as being the nearest heir to Smt. Menda. The mutation was made by the Tahsildar, Maharajgunj on July 30, 1954. This mutation appears to have been challenged by Smt. Phoola who claimed to be the daughter of Smt. Menda and therefore a preferential heir to the property as compared to Jit. In 1957 Smt. Phoola filed a suit under Section

209 of the Abolition Act for the ejectment of Jit from the disputed lands, on the ground that she was the sole legal heir of the property left by Smt. Menda. In the meanwhile in 1961 a notification under Section 4 of the Consolidation Act was issued bringing village Bishunpur in which the lands in dispute were situate under the consolidation operations. Accordingly Smt. Phoola filed an application during the consolidation operations before the Consolidation Officer, Bachhrawan, for correction of the records under Section 10 (1) of the U. P. Consolidation of Holdings Act and prayed that the name of Jit in the khatas in dispute may be struck off and Smt. Phoola's name may be mutated therein. The Consolidation Officer accepted the pleas of Smt. Phoola and he accordingly struck off the name of Jit from the khatas and directed that Smt. Phoola being the legal heir of Smt. Menda her name be mutated in respect of the Khatas. Thereafter Jit filed an appeal against the order of the Consolidation Officer before the Settlement Officer (Consolidations), tahsil Maharajgunj, district Rae Bareli. The Settlement Officer by his order dated December 26, 1961 dismissed the appeal and upheld the order of the Consolidation Officer. Thereafter Jit filed a second appeal before the District Deputy of Consolidation, Rae Bareli, which was permitted under the U. P. Consolidation of Holdings Act as it was in force then. The District Deputy Director of Consolidation upheld the plea of Smt. Phoola and held that she was entitled to inherit the property of Smt. Menda being her legal heir in preference to Jit who was merely her husband's brother's son and relied upon Section 171 of the Abolition Act, and accordingly dismissed the appeal. Thereafter Jit filed a revision before the Joint Director of Consolidation who also dismissed the revision as being concluded by a finding of fact. Thereafter Jit filed a writ petition before the Allahabad High Court on December 21, 1962 and the writ petition was allowed by the Single Judge on August 6, 1965. Smt. Phoola then filed a special appeal before a Division Bench of the Allahabad High Court which reversed the decision of the Single Judge and dismissed the writ petition filed by Jit upholding the plea of Smt. Phoola. Thereafter Jit moved the High Court for granting leave to appeal to this Court and the same having been refused the present appeal by special leave has been filed in this Court.

7. In support of the appeal Mr. J. P. Goyal has submitted that the Division Bench as also the revenue courts had taken a wrong view of the law in holding that Smt. Phoola was entitled to succeed to the property left by Smt Menda. The learned Counsel submitted that the present case squarely fell within the ambit of Section 172 of the Abolition Act since Smt. Menda had originally inherited the property from her husband Ramadhin and, therefore, according to the order of succession provided in Section 171 of the Abolition Act which applied to Section 172, Jit who was the son of the brother of Ramadhin would succeed in preference to the daughter of Smt. Menda. The respondents despite service did not appear and we requested Mr. G. N. Dikshit to assist the Court amicus curiae and we are grateful to him for the valuable assistance he rendered to us in deciding the complicated issues of law involved in this appeal. Mr. Dikshit submitted that at the time when Ramadhin died the tenancy was not heritable and therefore the question of Smt. Menda having inherited the estate of her husband did not arise and the tenancy held by Smt. Menda must therefore be regarded as having been acquired by her in her own right as her self-acquired property and, therefore, the Division Bench of the High Court and the revenue courts were right in upholding the plea of Smt. Phoola.

8. We have gone through the entire record as also the judgment of the Single Judge and the Division Bench and we think that then Division Bench of the High Court has taken an erroneous view of the law in the present case. The Division Bench found that although it was established that Smt. Menda had inherited the property from her husband Ramadhin yet the finding of the revenue courts was that she had acquired the status of a statutory tenant independently and since there was no error of law in this finding of the revenue courts there was no reason for the Single Judge to set aside the order of the Joint Director of Consolidation and allow the petition. It was argued before the High Court that the matter was concluded by a Division Bench decision of the Allahabad High Court in

Mst. Jaini v. Ram Prasad (AIR 1952 All 852 : 1952 ALJ 366) and the High Court appears to have brushed aside this decision on a strange process of reasoning which does not appeal to us at all. The High Court observed as follows :

Mr. Misra has strenuously contended that Jaini v. Ram Prasad is clear authority for the proposition that even in the case of a statutory tenant succession would devolve under Section 36 which, according to Mr. Misra is a counterpart of Section 172 read with Section 171 of the U. P. Zamindari Abolition Act. Jaini v. Ram Prasad is clearly distinguishable because that case came up in appeal before this Court and not in the form of a writ or an appeal against the decision of a learned Single Judge in a writ petition.

It is obvious that whether a Division Bench decision is given in an appeal from an original suit or in a writ petition the ratio is binding on the subsequent. Division Bench, and merely because the previous Division Bench judgment was given in a suit the subsequent Division Bench cannot refuse to follow the same because it was hearing the proceeding in a writ petition. The rule of judicial precedent is a very salutary one and is aimed at achieving finality and homogeneity of judgments. In case the Division Bench under appeal wanted to differ from the previous decision of the Division Bench of the same court it ought to have referred the matter to a larger Bench but it was not open to it to ignore completely the previous decision on illogical and unintelligible grounds as given by the High Court.

9. We are further of the opinion that the Division Bench having found as a fact that Smt. Menda had inherited the property initially from her husband erred in law in not applying the provisions of Section 172 read with Section 171 of the Abolition Act as a result of which Jit being her husband's brother's son was entitled to succeed to the estate left by Smt. Menda in preference to Smt. Phoola the daughter. We now proceed to give reasons for this conclusion.

10. Section 172 of the Abolition Act as extracted above provides that when a bhumidhar who has after the date of vesting inherited an interest in any holding dies the holding would devolve upon the heirs in accordance with the order of succession mentioned in Section 171 of the Abolition Act. It is manifest therefore that in order to determine the applicability of Section 172 of the Abolition Act we must go to the origin of the title of the bhumidhar or the main source from which the bhumidhar has derived interest in the holding. It may be pertinent to note here that the statute uses the words "the holding or the part shall devolve" to denote that if it is found that a widow has inherited an interest in the holding from her husband then it is the holding that devolves and not interest of the widow which ceased after her death. Thus the statute seeks to make a clear-cut distinction between a widow who has inherited an interest from her husband which is dealt with by Section 172 of the Abolition Act and a widow who has acquired an independent interest in the holding which is covered by Section 174 of the Abolition Act. The High Court appears to have overlooked the fact that merely because Smt. Menda having initially inherited possession or occupation of the holding from her husband acquired other types of interests merely by operation of law, that could not destroy the origin or the source of her title which was inheritance from her husband. Nor can we regard the conferment of the status of a statutory tenant or a hereditary tenant or a bhumidhar under the various laws passed by the U. P. Legislature as amounting to an acquisition of a self-acquired interest by the widow. It was, however, argued by Mr. Dikshit that under the Rent Act of 1886 before its amendment by Act 4 of 1921 the estate which was held by Ramadhin was not heritable at all and, therefore, Smt. Menda could not have inherited any interest in the tenancy on her husband's death. In this connection the learned Counsel sought to draw a distinction between the provisions of the Agra Tenancy Act which has made the tenancies heritable and the provisions of the Oudh

Tenancy Act which did not make the tenancies heritable. Although the argument appears to be extremely attractive, on closer scrutiny it is not tenable. The words used in Section 172 of the Abolition Act are "inherited an interest". The statute has not defined the word "interest" and therefore it must be deemed to be of the widest possible amplitude. It will include not only an absolute interest but also a limited interest, a precarious interest and an inchoate interest or the like. Section 48 of the Rent Act of 1886 before its amendment by Act 4 of 1921 stood as follows :

48. (1) The heir of a tenant who dies during the currency of the tenancy of a holding shall be entitled to retain occupation of the holding at the rent payable by the deceased for the unexpired portion of the period for which the deceased tenant might have held without liability to enhancement or ejection, and to receive compensation under the provisions of this Act for improvements, if any, made on holding by himself or his predecessor in interest, but shall not be entitled to a renewal of the tenancy.

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The expressions "heir of a tenant" and "shall be entitled to retain occupation" clearly postulate that the right to retain the occupation of the lands in dispute is given only to the heirs of the deceased tenant which clearly indicates that the person who retains occupation would inherit or succeed to a limited right which the deceased tenant possessed under the Act. In the instant case since Smt. Menda continued to retain occupation of the lands on the death of her husband, she did so only as the heir of her husband and not otherwise, for if that was not so then she could not have been entitled to retain occupation. The word "entitled" clearly signifies that the occupant must have some right, however, precarious or limited it may be. In these circumstances, therefore, there can be no doubt that Smt. Menda's occupation of the tenancy on the death of Ramadhin was by way of inheritance only. There was no other method by which she could have a right or claim to retain occupation of the holding. It is true that the interest of Smt. Menda was a very limited one and she could have been ejected by the landlord under certain circumstances. But Section 48 of the Rent Act of 1886 undoubtedly conferred two important rights on the heir of the deceased tenant - (1) the right to retain occupation of the holding on the rent payable; (2) to receive compensation for the improvement made. In these circumstances, therefore, it cannot be said that the occupation of the lands by Smt. Menda on her husband's death was purely in her individual or independent capacity or that the possession of the lands amounted to her self-acquired property. Section 174 of the Abolition Act would naturally apply only to such cases where a widow does not inherit an interest from her husband but would include cases where the female tenant had an independent interest, namely, an interest which she possessed in the holding as her self-acquired property, her stridhan or the like. That is why Section 174 of the Abolition Act provides that it is the interest in any holding devolves and not the holding. Thus the language used in Sections 172 and 174 of the Abolition Act unmistakably brings forth the distinction of the two contingencies in which the two sections are to apply. The revenue courts have also held as a fact that initially Smt. Menda had inherited the property from her husband but they have construed the conferment of the various kinds of status on Smt. Menda after she had already inherited the property as amounting to her self-acquired property. It seems to us that the revenue courts were wrong in misconstruing the scope and ambit of the words "inherited an interest in any holding" as mentioned in Section 172 of the Abolition Act.

11. Section 172-A of the Abolition Act was introduced by an amendment of the Act in 1954 which makes the position absolutely clear, by declaring that where a sirdar or adhvasi who had inherited any interest in any holding as a widow, it would be deemed to be an accession to the holding of the last male holder thereof. We are, however, not at all concerned with Section 172-A of the Abolition

Act, because Smt. Menda had died two years before the amendment came into force and the question of succession to her estate would be governed by Section 172 or Section 174 of the Abolition Act.

12. In the Division Bench decision in Mst. Jaini's case (supra) the Allahabad High Court had taken the same view. Malik, C. J., speaking for the Court observed thus :

Section 36 does not require that the tenancy as such should have been inherited by the widow. All that it provides is that the widow should have inherited an interest in the holding. The mere fact that she had to remain in possession for a further period of eight years before she could become the statutory tenant of the holding does not mean that she acquired no interest in the holding as a widow. We fail to see how it could be said, in view of the language of Section 36, that her acquisition of a statutory right had nothing to do with the fact that she had inherited an interest in the holding as widow of Bhau. Section 36 was thus clearly applicable.

The Division Bench also relied in the aforesaid case on an earlier unreported of a Single Judge of that Court in Sital V. Suraj Din (Second Appeal No. 421 of 1943 decided on December 20, 1948 (All HC)), where exactly the same view was taken as the one we have taken in the instant case. The observations of the learned Single Judge have been quoted by the Division Bench in the case referred to above thus :

We can assume that she acquired on the passing of the new Act (Act 4 of 1921) a fresh statutory period and a renewal of the tenancy but that does not take away the origin of her title It is only when a female tenant acquires tenancy rights which do not have their origin in inheritance that the case could be taken out of the ambit of Section 36 to be governed by Section 37.

It would be seen that in this case the husband of the appellant had died in 1916 as in the instant case and yet the Court held that it is really the origin of the title that has to be seen and if the tenancy rights had their origin in inheritance then Sections 36 and 37 would not apply.

13. For these reasons, therefore, we are satisfied that the origin of the title of Smt. Menda lay in inheritance of the estate of her husband however limited or precarious it may have been. This being the position, the succession to the estate of Smt. Menda would have to be governed by the provisions of Section 172 of the Abolition Act which has applied the provisions of Section 171 regarding the order of succession. In the order of succession given in Section 171 of the Abolition Act brother's son is a preferential heir. It might be mentioned here that by virtue of the amendment of the Abolition Act in 1954 the married daughter was also introduced as an heir before brother's son. But this was not the position prior to 1954 when the married daughter was completely excluded from inheritance. It is also not disputed that Smt. Phoola was a married daughter on the death of Smt. Menda. In these circumstances, therefore, the holding by Smt. Menda would devolve on Ramadhin's brother's son, namely Jit and thereafter on his heir who is now continuing the present proceedings. Thus the Tahsildar, Maharajgunj was fully justified in mutating the name of Jit in respect of the lands in dispute instead of Smt. Phoola. The revenue courts as also the Division Bench of the High Court had taken a legally erroneous view in holding that the mode of succession would be governed by Section 174 of the Abolition Act as the interest left by Smt. Menda was her self-acquired property.

14. The result is that the appeal is allowed, the judgment of the Division Bench is set aside and that of the learned Single Judge is hereby restored. In the peculiar circumstances of this case, and

particularly having regard to the fact that the respondents have not appeared to contest the appeal before this Court, we make no order as to costs in this Court.

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