

Azad Singh and Others

Vs

Barkatullah Khan and Others

Civil Appeals Nos. 282-283 of 1969

(D. A. Desai, O. Chinnappa Reddy JJ)

26.04.1983

JUDGMENT

DESAI, J. –

1. These two appeals by special leave arise from two suits filed by Barkatullah and Sahfiullah for possession of land more particularly set out at the foot of the plaint against the Zamindars and Prem Kumari and Noor Mohammad. Briefly stated the plaintiffs' case was that they were thekadars and the theka was taken for personally cultivating the land and therefore under Section 12 of the C. P. Zamindari Abolition and Land Reforms Act, 1950 ('1950 Act' for short), they have become hereditary tenants and they were in possession of land on April 1, 1950. It was alleged that the hereditary tenants yet Prem Kumari and Noor Mohammad took land on lease for Zamindars and entered possession after April 1, 1950. It was alleged that the lessees from the Zamindar had no right to remain in possession as against hereditary tenants. On this short ground the plaintiffs sought possession of the land.
2. The defendants were the Zamindars and two lessees contested the suit. The averments made in para 4 of the plaint were not controverted specifically and it was merely stated that they are subject to the additional pleas. The only plea put forward on behalf of the lessees worth noticing is that the lessees were in cultivatory possession during the year 1359 F and being not a person who has become a bhumidhar, sirdar, adhivasi or asami is entitled to all the rights of adhivasis under U. P. Land Reforms (Supplementary) Act, 1952 ('1952 Act' for short).
3. The trial court dismissed the suit observing that the plaintiffs were thekadars of the land and under Section 12 of the land and under Section 12 of the 1950 Act have acquired rights of hereditary tenants but the lessees were in cultivatory possession in 1359 F and therefore have acquired the right of adhivasi. Thekanama was held to be defective on the question of theka being given exclusively for personal cultivation. The two plaintiffs preferred two separate appeals and both the appeals were disposed of by the First Additional Civil & Sessions Judge, Gonda as per his judgment dated September 1, 1958. Broadly stated, the learned Judge agreed with the findings of the trial court and dismissed the appeals. The original plaintiffs carried the matter in second appeal. Two separate appeals were preferred, but by the time the appeals came up for hearing, a statement was made that both the plaintiffs have compromised the dispute inter se and that the suit be treated as one and if the appeal is to be allowed, possession is to be given jointly to two appellants as against the respondents.
4. The learned Judge disposed of both the appeals by common judgment reversing the decision of the trial court and the first appellate court holding that the plaintiffs had acquired the status of

hereditary tenants and in possession on May 1, 1950 and, therefore, the Zamindars had no right to dispossess the plaintiffs and induct the two lessees in possession. It was further held that as the lessees lease, possession under Zamindars who had no right to grant the lease, possession of the lessees being thus unlawful against the plaintiffs, they could not have acquired the adhivasis' rights. Accordingly, the suit was decreed and a decree for possession was granted in favour of the plaintiffs. Hence these two appeals by special leave.

5. Both the original lessees have died and their heirs and legal representatives are prosecuting these appeals.

6. Mr. Rangarajan, learned counsel for the appellants, urged that in view of the finding of the trial court that there was no specific authority given to the thekadars for personal cultivation of the lands comprised in the theka, the thekadars plaintiffs did not acquire the right of hereditary tenants under Section 12 of the 1950 Act. This was the principal contention urged in these two appeals.

7. 1950 Act was a measure of agrarian reform enacted with a view to abolishing the zamindari system and for acquisition of intermediaries' rights. Section 4 provided for vesting of estates in the State free from all encumbrances with effect from the date to be specified by the State Government in a notification. Section 6, inter alia, provided the consequences of the vesting of an estate in the State, one such being that all rights, title and interest of all the intermediaries shall cease and be vested in the State. Section 12 provides that the thekadars would acquire the rights of hereditary tenants in certain circumstances. It reads as under :

(1) Where any land was in the personal cultivation of a person on May 1, 1950, as a thekadar thereof and the theka was made with a view to the cultivation of the land by such thekadar personally, then notwithstanding anything in any law, document or order of court, he shall be deemed to be a hereditary tenant thereof entitled to hold, and when he has been ejected from the land after the said date, to regain possession, as a hereditary tenant thereof liable to pay rent at hereditary rates.

(2) The fact that the land comprised in the theka has been in the personal cultivation of the thekadar since the commencement of the theka shall, notwithstanding anything contained in Sections 91 and 92 of the Indian Evidence Act, 1872 (1 of 1872), be receivable in evidence for showing that the theka was of the nature referred to in subsection (1).

1952 Act enacted certain supplementary provisions in respect of the 1950 Act. Section 3 of 1952 Act provided that every person who was in cultivatory possession of any land during the year 1359 Fasli but is not a person who as a consequence of vesting under Section 4 of the 1950 Act has become a bhumidhar, sirdar, adhivasi or asami under Section 18 to 21 of the said Act shall be and is hereby declared to be, with effect from the appointed date - (b) if the bhumidhar or sirdar was not such a person, an adhivasi, and shall be entitled to all the rights and be subject to all the liabilities conferred or imposed upon an asami or an adhivasi. There is an explanation to the section which is not material. Original lessees claimed that they have acquired the status of adhivasi under Section 3 of the 1952 Act.

8. It is not in dispute that the original plaintiffs were thekadars. It was however contended that unless the theka was exclusively for personal cultivation of the land comprised in the theka, the

thekadars would not acquire the status of hereditary tenants. Section 12 which has been extracted hereinbefore specifically provides that where any land is in personal cultivation of a person on May 1, 1950, as a thekadar thereof and the theka was made with a view to the cultivation of the land by such thekadar personally then notwithstanding anything in any law, document or order of court, he shall be deemed to be hereditary tenant thereof entitled to hold, and when he has been ejected from the land after the said date, to regain possession as a hereditary tenant thereof liable to pay rent at hereditary rates. This section came in for interpretation in Babu Noorul Hasan Khan v. Ram Prasad Singh', wherein it was held that a thekadar of an estate ceases to have any right to hold or possess as such any land in such estate with effect from the date of its vesting. But this is subject to two exceptions; one such being as enacted in Section 12 which provides that if such land was in personal cultivation of a person on May 1, 1950, as a thekadar thereof and if the theka was made with a view to the non obstante clause occurring in sub-section (I) of Section 12 of the Act, the thekadar would be deemed to be a hereditary tenant of the land entitled to hold land as such and liable to pay rent at hereditary rates. If such hereditary tenant has lost possession he is entitled to regain his possession. It was further held that if, however, the land was in personal cultivation of the thekadar merely as a thekadar appointed to collect rent from other tenants and incidentally allowed to cultivate the sir or khudkasht land of the lessor then he will be a mere asami in accordance with Section 13 (2) of the Act. This interpretation of Section 12 was reaffirmed in Raghunandan Singh v. Brij Mohan Singh. It would thus appear well-settled that before a thekadar can claim the status of a hereditary tenant, he must not only be a thekadar but the theka must be specifically granted for personal cultivation of the land included in the theka by the thekadar.

9. The question therefore, is whether in this case the land included in the theka of the original plaintiff provided for personal cultivation of the land by the thekadar or personal cultivation was incidental to other rights and obligations such as collection of rent from other rights and obligations such as collection of rent from other tenants ? This would necessitate examination of the original document creating theka. That was not read to us, but Mr. Rangarajan relied upon the following observation in the judgment of the learned Trial Judge :

I have read the context (sic possibly contract) of the thekanama. There is no authority given specifically or impliedly for personal cultivation by the Thekedars of the land comprised in the Theka unless there was such a provision, I fear no rights of hereditary tenancy could have been acquired by the plaintiffs.

It was urged that the learned Judge specifically came to the conclusion that the theka was not created exclusively and specifically for personal cultivation of the lands involved in the theka. The learned Appellate Judge found that the thekadars were in actual possession and personal cultivation of the land for a period of 11 years. He further found that the theka would be deemed to have been granted for personal cultivation and if the plaintiffs (thekadars) have been found to be in personal cultivation of the suit (sic) on May 1, 1950 as thekadars, they would be entitled to the benefit of Section 12 of 1950 Act. The learned Appellate Judge then concluded that it is satisfactorily proved that the plaintiffs-thekadars were in possession on May 1, 1950. However, the learned Judge declined to grant relief to the plaintiffs on the finding that the lessees had acquired adhvavis' right under 1952 Act. It clearly transpires from the findings of the first appellate court, which is the last fact-finding court, that the theka was for personal cultivation of the land involved in the theka and the thekadars were personally cultivating the land for a period of 11 years. The High Court in second appeal noticed that the thekadars were personally cultivating the land. Nothing was pointed out to us to show that thekadars had any other duty to perform such as collecting rent from other tenants. There is nothing in the record to show that the theka was as a consideration for some other

duties to be performed by the thekadars to the zamindars. Therefore, the conclusion is inescapable, that the theka was created exclusively for personal cultivation of the land involved in the theka by the thekadars.

10. If it is clearly established that the theka was created exclusively for personal cultivation of the land by the thekadars, the ratio of the decision of this court would lead to the conclusion that the thekadars acquired the status of hereditary tenants under Section 12 of the 1950 Act.

11. The only question that remains for consideration is whether the original lessees acquired adhvasis' rights under Section 3 of the 1952 Act. Section 3 which has been extracted hereinbefore provides that any person who has not become a bhumidhar, sirdar, adhvasi or asami under 1950 Act if he is in cultivatory possession of any land during the year 1359 Fasli and if the bhumidhar or sirdar was not such a person such person in cultivatory possession would acquire the status of an adhvasi. The High Court examined what is the significance of the expression 'cultivatory possession' in Section 3. The High Court rightly held that if the thekadars had acquired the status of hereditary tenants as theka was up to and inclusive of the year 1359 Fasli, the zamindars had no right to induct lessees in possession after depriving the thekadars of their possession and therefore possession of the lessees was not lawful against the thekadars. The High Court rightly held that the lessees could not be said to be in cultivatory possession of the land on the appointed day. In reaching this conclusion. The High Court relied upon a decision of this court in *Sonawati v. Sri Ram*. The court held as under :

The expression "cultivatory possession" is not defined in the Act, but the Explanation clearly implies that the claimant must have a lawful right to be in possession of the land, and must not belong to the clauses specified in the explanation. "Cultivatory possession" to be recognized for the purpose of the Act must be lawful, and for the whole year 1359 Fasli. A trespasser who has no right to be in possession by merely entering upon the land forcibly or surreptitiously cannot be said to be a person in "cultivatory possession" within the meaning of Section 3 of U. P. Act 31 of 1952. We are of the view that the Allahabad High Court was right in holding in *Ram Krishna v. Bhagwan Baksh Singh* that a person who through force inducts himself over and into some land and succeeds in continuing his occupation over it cannot be said to be in cultivatory possession of that land so as to invest him with the rights of an asami or an adhvasi, and we are unable to agree with the subsequent judgment of a Full Bench of the Allahabad High Court in *Manhoo Mal v. Mulloo* that occupation by a wrongdoer without the meaning of Section 3 of the U. P. Act 31 of 1952.

Therefore in order to obtain the benefit of Section 3 of 1952 Act, the person claiming to be in cultivatory possession must show that his or her possession was lawful. The High Court consistent with certain findings of the trial court and the first appellate court held that possession of the lessees in 1359 Fasli was not lawful and this necessarily follows from the finding given by the courts that the thekadars were in cultivatory possession of the plots in dispute on the appointed day i.e. May 1, 1950 and thereby became entitled to acquire the rights of hereditary tenants. We are in agreement with the conclusion recorded by the High Court.

12. It must therefore follow as a necessary corollary that the lessees did not acquire the right of adhvasi and the hereditary tenants would be entitled to a decree for possession. The appeals are thus dismissed with costs.

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