

Udai (Dead) through Lrs.

Vs

Deputy Director of Consolidation, Varanasi and Others

Civil Appeal No. 405 of 1975

(S. Ranganathan, M. M. Punchhi JJ)

04.12.1989

ORDER

RANGANATHAN, J. –

1. The original appellant Udai and one Pargash (the predecessor-in-interest of the fifth respondent herein) were recorded as sirdars over khata Nos. 203 and 217 in village Murmaicha, Purgana Bhadohi, Tahsil Gyanpur, District Varanasi. The fourth respondent Smt. Raghunathi filed an objection, under Section 9 of the U.P. Consolidation of Holdings Act, challenging the correctness of the entries made in favour of Udai and Pargash. She claimed that she had been in possession of the said plots and that Udai and Pargash had no connection therewith. The case of the Udai and Pargash, on the other hand, was that the plots in question has been let out to them by the objector, that they had been recorded as sub-tenants in the year 1357 Fasli and, as such, they had acquired sirdari rights. The Consolidation Officer upheld the claim of Smt. Raghunathi in respect of khata No. 203 but rejected it in respect of khata No. 217.

2. The Settlement Officer, by his order dated January 18, 1968, allowed the appeal of Udai but dismissed the appeal of Smt. Raghunathi in respect of khata no. 217 with the result that both Udai and Shri Ram (son of Pargash) were held sirdars of the respective khatas. The revision petition of Smt. Raghunathi before the Deputy Director of Consolidation was unsuccessful and thereupon she filed a writ petition being CMW No. 6844 of 1972 in the High Court of Allahabad challenging the orders of the consolidation authorities.

3. Before the High Court, the controversy between the parties was within a very narrow compass. It was common ground that Udai and Pargash had been recorded as shikmi tenants in 1357 Fasli and that this was tantamount to their being sub-tenants in respect of the plots in question. The short point that was urged before the High Court was that a sub-tenant in possession of the lands could not claim rights under Section 20(b)(i) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'the Act'). It is contention that has been accepted by a learned Single Judge of the Allahabad High Court, who, consequently allowed the writ petition and quashed the rights conferred on Udai and Pargash. This had led to the present appeal.

4. As before the High Court, before us, the short question that arises for consideration is whether a sub-tenant in possession of the property is entitled to adhivasi or sirdhari rights under Section 20 of the Act. This section, insofar as it is material, reads thus :

"20. Every person who -

* *##

(b) was recorded as occupant, -

(i) of any land ... in the khasra or khatauni of 1356 Fasli prepared under Sections 28 and 33 respectively of the U.P. Land Revenue Act, 1901 (U.P. Act 3 of 1901)

shall ... be called adhvasi of the land and shall ... be entitled to take or retain possession thereof."

Only one slight modification to be noted in regard to the applicability of the section to the present case, which relates to Varanasi District, is that, by a subsequent amendment, the reference to 1356 Fasli has to be read as reference to 1357 Fasli in respect of areas comprised in the erstwhile Banaras State. In other words, the question is : Can a person recorded in the village records as sub-tenant in respect of certain land for 1357 Fasli be said to have been 'recorded' as 'occupant' of that land for that fasli ?

5. The answer to the above question seems self-evident if one were to go by the purely etymological meaning of the word "occupant". In the absence of any statutory definition; that word would clearly cover any person who has been recorded as having been in occupation of the land in question in the relevant fasli irrespective of the capacity in, or title under, which he so occupied it. There will therefore be no reason, normally speaking, to exclude a person whose occupancy is recorded on that basis of his sub-tenancy. It appears, however, that in one of the early decisions under the Act, a Full Bench of the Allahabad High Court (*Ram Dular Singh v. Babu Sukhu Ram* (61 All LJ 667 : AIR 1964 All 498 (FB)) took the view that a person entered as sub-tenant in the khasra and khatauni of 1356 Fasli could not be treated as a recorded occupant within the meaning of Section 29(b)(i). However, a later Full Bench (*Chobey Sunder Lal v. Sonu alias Sonpal* ((1967) 65 All LJ 960 (FB)) held to the contrary in view of the decisions of the Supreme Court in *Upper Ganges Sugar Mills Ltd. v. Khalil-ul-Rahman* ((1961) 1 SCR 564 : AIR 1961 SC 143) and *Amba Prasad v. Abdul Noor Khan* ((1964) 7 SCR 800 : AIR 1965 SC 54).

6. It, however, appears that the above two decisions of the Supreme Court and that of the Full Bench in *Chobey Sunder Lal* case ((1967) 65 All LJ 960 (FB)) had been distinguished by the same High Court in *Pir Khan v. Deputy Director of Consolidation* ((1965) 62 All LJ 591) and *Radha Kishori v. Joint Director of Consolidation* ((1972) 70 All LJ 738). In the latter case it was observed :

"The Supreme Court has held that the entry of a sub-tenant is an entry of an occupant qua the tenant-in-chief and the entry of a tenant is an entry of an occupation qua the landlord. It, therefore, follows from the Supreme Court judgments that the entry of a tenant or sub-tenant in the records of 1356 Fasli can amount to an entry of occupant; but it does not follow from this that every entry of tenant or sub-tenant in the records of 1356 Fasli must necessarily amount to an entry of occupant So far as we can see, the 1967 Full Bench deals with a different question and has not overruled the decision of the Division Bench in *Pir Khan* case ((1965) 62 All LJ 591). An occupant can only be against the zamindar or the tenant or sub-tenant of the land, i.e. against someone holding the legal title in the land. If the land has been let out to a tenant, then the occupant can only be against the tenant. If the name of the tenant is recorded in the records of 1356 Fasli and he can be considered to be a recorded occupant also, then he will be an occupant against himself. Section 20(b) does not contemplate a

rightful tenureholder being an occupant - it contemplates an occupant as someone other than the rightful tenureholder who is capable of acquiring adhivasi rights against him."

However, the court observed, "in the view which we are taking, it is neither necessary to examine this question any further nor to refer the matter for decision to a larger bench." That view was that the claimant before the court had acquired adhivasi rights under Section 20(a)(i) and that right was not affected whether or not he was recorded occupant for purposes of clause (b)(i).

7. In the judgment under appeal, the learned Judge has, following the Division Bench decision in Pir Khan ((1965) 62 All LJ 591) and Radha Kishori ((1972) 70 All LJ 738) held that a sub-tenant could not be treated as a recorded occupant under Section 20(b)(i) of the Act. This takes us to a consideration of the two Supreme Court decisions referred to above.

8. In *Upper Ganges Sugar Mills Ltd. v. Khalil-ul-Rahman* ((1961) 1 SCR 564 : AIR 1961 SC 143), the landlord had granted a tekha to the company up to 1355 Fasli. On the company's refusal to vacate on the expiry of the tekha, the landlord successfully sued for ejection under Section 19 of the U.P. Tenancy Act. But, pending the suit and appeals (in all of which it failed), the company had continued to be in possession and, though it handed over formal possession on July 1, 1953, had resisted actual ejection. On July 1, 1953, the company filed a suit to recover possession under Section 232 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, claiming that it had become an adhivasi under Section 20 of the Act, for the company had been recorded in 1356 Fasli as in possession of the land as tekhdar. The landlord resisted the suit on two grounds; (a) that the company, having been in possession under courts orders, was in possession not on its own behalf but on behalf of the courts; and (b) that the company, having been recorded in 1356 Fasli as a tekhdar, its possession was not on its own behalf but on behalf of the landlords whose tekhdar it was. Neither of these contentions was accepted by the Supreme Court. Wanchoo, J. for the majority held that the company had acquired adhivasi rights in the land and was entitled to the possession thereof. Simply because there were stay orders which enabled the company to remain in possession, the possession was not on behalf of the court. The company remained in possession in the same right in which it was in possession before the decree was passed on November 3, 1948. Though the company was recorded in possession as a tekhdar, it was an occupant in its own right and not on behalf of the landlord. It was open to the court to look beyond the entry of the company as a tekhdar in the khasra. Das Gupta, J. however, held in his dissenting judgment :

"The company did not acquire the rights of an adhivasi. The word "occupant" means a person in possession in his own right and not on behalf of someone else. The benefit under the section is available only to those "recorded" as "occupants". It is not permissible to look beyond the record to ascertain whether the claimant has been "recorded as occupant". The record in the khasra of the possession "as tekhdar" amounts to record of possession on behalf of tekhdar's lessor."

9. The facts in *Amba Prasad v. Abdul Noor Khan* ((1964) 7 SCR 800 : AIR 1965 SC 54) were more complicated. But, for our present purposes, it is sufficient to extract the facts as set out in the headnote. Before the coming into operation of the Act, Amba Prasad was the zamindar of the disputed land. The names of the respondents had been recorded in the khasra for 1356 Fasli as persons in possession of the disputed land but they had been dispossessed after June 30, 1949. They claimed adhivasi rights under Section 20 on the strength of the record for 1356 Fasli and were successful in their claim before the Board of Revenue. The Supreme Court dismissed Amba Prasad's

appeal. Hidayatullah, J. (as His Lordship then was) analysed the terms of Section 20 and its explanations thus : (SCR pp. 807-808)

"The scheme of the section may now be noticed. The section, speaking generally, says that certain persons "recorded" as "occupants" of lands (other than grove lands or lands to which Section 16 applies) shall be known as adhivasis and shall be entitled to retain or to regain possession of them, after the date of vesting which was July 1, 1952. Such persons do not include an intermediary (Explanation IV). Such persons must be recorded as occupants in the khasra or khatauni for 1356 Fasli (July 1, 1948 to June 30, 1949). If such a person is in possession he continues in possession. If he is evicted after June 30, 1948 he is to be put back in possession notwithstanding anything in any order or decree. By fiction such persons are deemed to be entitled to regain possession (Explanation I). The emphasis has been laid on the record of khasra or khatauni of 1356 Fasli and June 30, 1948 is the datum line. The importance of an entry in these two documents is further apparent from Explanations II and III. Under the former, if the entry is corrected before the date of vesting (July 1, 1952), the corrected entry is to prevail and under the latter the entry is deemed to be corrected (even though not actually corrected, if an order or decree of a competent court ordering the correction had been made before the date of vesting and the order or decree had become final. There are thus two date lines. They are June 30, 1948 and July 1, 1952, and the title to possession as adhivasi depends on the entries in the khasra or khatauni for the year 1356 Fasli."

His Lordship then observed :

"Before we proceed to decide whether the answering respondents satisfy the above tests we must consider what is meant by the terms 'occupant' and 'recorded'. The word 'occupant' is not defined in the Act. Since khasra records possession and enjoyment the word 'occupant' must mean a person holding the land in possession or actual enjoyment. The khasra, however, may mention the proprietor, the tenant, the sub-tenant and other person in actual possession, as the case may be. If by occupant is meant the person in actual possession it is clear that between a proprietor and a tenant the tenant, and between him and a person recorded in the remarks column as "dawedar qabiz" the dawedar qabiz are the occupants. This is the only logical way to interpret the section which does away with all intermediaries. If rights are not to be determined except in the manner laid down by the section, the entries must be construed as explained by the four explanations. Once we find out the right person in the light of the explanations, that person continues as an adhivasi after July 1, 1952 provided he is in possession or was evicted after June 30, 1948. If he was evicted after June 30, 1948 he is entitled to regain possession in spite of any order or decree to the contrary. The word 'occupant' thus signifies occupancy and enjoyment. Mediate possession, (except where the immediate possessor holds on behalf of the mediate possessor), is of no consequence. In this way even persons who got into occupation when lands were abandoned get recognition. The section eliminates inquiries into disputed possession by accepting the records in the khasra or khatauni of 1356 Fasli, or its correction before July 1, 1952. It was perhaps thought that all such disputes would have solved themselves in the four years between June 30, 1948 and June 30, 1952."

His Lordship concluded by touching upon the question whether the person claiming rights under Section 20 should prove actual possession in 1356 Fasli and, observing that this question had been left open in the Upper Ganges case ((1961) 1 SCR 564 : AIR 1961 SC 143), said there was no reason to disturb a long established line of decisions of the Allahabad High Court answering the question in the negative. In the result, Amba Prasad's appeal was dismissed.

10. It is necessary to refer to yet one more decision of this Court and that is Nath Singh v. Board of Revenue ((1968) 3 SCR 498 : AIR 1968 SC 1351). In this case, the village records showed the respondents as sub-tenants from the appellants of the lands in question. One R who was the tekhedar of the proprietary rights, sued to eject the appellants and respondents alleging that the sub-letting was illegal. The suit was dismissed in March 1946 (i.e. towards the end of 1353 Fasli) on the ground that there was no sub-letting and that the entries in the records to this effect were not correct. Despite the decision in the suit, no attempt was made by anyone to correct the entries in the village records and the respondents continued to figure as sub-tenants in these records, until 1358 Fasli. When the lekhpal, on his own, removed those entries from the year 1358 Fasli. In 1952 (i.e. 1360 Fasli), after the Act came into force, the respondents claimed adhivasi rights and sued to recover possession of the lands. They succeeded before the Board of Revenue and the High Court declined to interfere under Article 226. In an appeal by special leave, the Supreme Court held that the court had to go by the entry in the record of rights, that it was not necessary to enquire whether the respondents had become sub-tenants after the decision in the suit filed by R and that, as between the tenant and the sub-tenant, the entry in the record of rights in favour of the sub-tenant made him the occupant entitled to the adhivasi rights under Section 20. The court followed the decisions in Upper Ganges ((1961) 1 SCR 564 : AIR 1961 SC 143) and Amba Prasad ((1964) 7 SCR 800 : AIR 1965 SC 54). As to the former decision the court observed :

"This case establishes that a person recorded as an occupant on the relevant date although found by courts of law to have no right to possession even prior thereto, is not to be denied adhivasi rights."

As to the latter, the court quoted, the apparent approval, extensive extracts from the judgment of Hidayatullah, J.

11. In the last case before this Court, four arguments had been addressed on behalf of the appellants :

(1) The correctness of the entry in the record of rights of 1356 Fasli can be gone into and is capable of challenging in a court of law exercising jurisdiction under Article 226.

(2) In the present case there was an adjudication in March 1946 and the respondents were not sub-tenants : consequently, unless they showed they had thereafter become sub-tenants the benefit of the entry in their favour in 1356 Fasli not be availed of by them.

(3) Under Rule 183 of the Rules framed under the Act it was incumbent on the respondents to state in their applications the dates of their dispossession and the failure to do so rendered their petitions defective.

(4) In the khasra of 1356 Fasli the respondents were only recorded as sub-tenants but

not as occupants and hence they cannot get the benefit of Section 20(b)(i) of the Act.

This Court held, apropos these arguments :

"These (earlier) decisions negative the first, second and the fourth points sought to be raised on behalf of the appellants. The record of rights for the year 1356 Fasli had not been corrected after wards. We have to go by the entry in the record of rights and no enquiry need be made as to when the respondents became sub-tenants after the decision in favour of the landlord, Ram Dhani Singh. The last decision of this Court also shows that as between the tenant and the sub-tenant the entry in the record of rights in favour of the sub-tenant makes him the occupant entitled to the adhvasi rights under Section 20 of the Act.

With regard to the point as to the violation of Rule 183 it is enough to say that the point was not canvassed before the Board of Revenue and as such we need not look into it."

12. From the above extract, it seems clear that Nath Singh ((1968) 3 SCR 498 : AIR 1968 SC 1351) clinches the issue before us. It unequivocally holds that a person recorded as sub-tenant in 1356 Fasli (here 1357 Fasli) is entitled to claim, as against the tenant, that he is entitled to adhvasi rights under Section 20. Sri Swarup, however, vehemently urges that this is not so. He points out that Nath Singh ((1968) 3 SCR 498 : AIR 1968 SC 1351) does not purport to overrule either Upper Ganges ((1961) 1 SCR 564 : AIR 1961 SC 143) or Amba Prasad ((1964) 7 SCR 800 : AIR 1965 SC 54); on the contrary it purports to only follow and apply these decisions. He contends that, if a mere entry in the village records as sub-tenants in 1356 Fasli were sufficient to confer adhvasi rights, the whole discussion in Upper Ganges was beside the point. This Court (constituting five learned Judges) need not have at all entered into an elaborate discussion, as they did, not about the nature of the possession of the company in that case : whether it was in possession as tekhedar (on behalf of someone else) or in its own right. This shows, says Sri Swarup, that what is important is that the person claiming the rights should have been entered as an occupant entitled to possession of the lands in his own right and not as an agent or on behalf of the zamindar or the principal tenant. He invites our attention to the passage from Amba Prasad ((1964) 7 SCR 800 : AIR 1965 SC 54) which we have emphasised above (para 9) and contends that the said passage outlines an exception and that the present case, unlike Upper Ganges ((1961) 1 SCR 564 : AIR 1961 SC 143) and Amba Prasad ((1964) 7 SCR 800 : AIR 1965 SC 54), falls under the execution so set out. In Nath Singh ((1968) 2 SCR 498 : AIR 1968 SC 1351), he also points out, the person claiming the rights was in occupation not as a sub-tenant but in his own right. According to Sri Swarup, to claim rights under Section 20(b)(i), it is not enough that the claimant is recorded as an occupant in the village records as of 1357 Fasli; it is also necessary that such occupancy should be traceable to a right in himself and not a right derived from a principal tenant. The object of the legislation, he says, was to abolish zamindari rights and not the rights of intermediate holders of property like tenants.

13. The argument is ingenious but we do not think it is open to the respondent in view of the categorical decision in Nath Singh ((1968) 3 SCR 498 : AIR 1968 SC 1351). Contention (4) as set out at p. 501 and the conclusion at p. 504 of the above judgment leave no doubt regarding this. Shri Swarup's argument indirectly asks us to go behind the entry in the village records and enter into a discussion as to whether the person recorded as sub-tenant was in possession or not, was entitled to possession or not and, if yes, in what capacity he was entitled to, or was in, such possession, a plea that goes directly in the teeth of all the three decisions. The discussion in Upper Ganges ((1961) 1

SCR 564 : AIR 1961 SC 143) does not negative this position. That discussion was in the context of repelling a specific contention urged before the court by the landlord, which derived inspiration, perhaps from the specific exclusion of 'tekhedar' from the definition of the expression 'tenant' in the U.P. Tenancy Act, 1936. That contention viz that the company's possession was either on behalf of the court or was on behalf of the landlords was negated. That decision cannot, therefore, be treated as lying down that occupancy as a sub-tenant would not be sufficient for the purposes of Section 20(b)(i). So far as Amba Prasad ((1964) 7 SCR 800 : AIR 1965 SC 54) is concerned, the observation in the judgment show that even the tenant and sub-tenant can be regarded as occupants vis-a-vis the proprietor and the tenant respectively. It is only where, although the name of the tenant or sub-tenant is shown in columns (5) and (6) of the khasra, some other person is shown in the remarks column as the actual occupant that the tenant or sub-tenant cannot be regarded as the "recorded occupant". In our opinion, therefore, Amba Prasad ((1964) 7 SCR 800 : AIR 1965 SC 54) and Nath Singh ((1968) 3 SCR 498 : AIR 1968 SC 1351) are decisive of the issue in the present case.

14. Learned counsel for the fourth respondent, however contended that this respondent was a disabled landholder within the meaning of Section 10 read with Section 157 of the Act. He contended that she was entitled to become the owner of the plots in dispute and that the appellant could be no more than an asami in respect of the same, in view of the provisions contained in Sections 10, 21 and 157 of the Act. This is a point which had been raised by the respondent in the writ petition. We find that, in the counter-affidavit, the fifth respondent had raised an objection that it was not open to the writ petitioner to take up this plea in this writ petition. However, this aspect of the matter was not considered by the High Court as the writ petition was allowed on the principal ground raised in it. Since we have reversed the decision of the High Court on the construction of Section 20(b)(i) of the Act, it is only just and proper that the respondent should be given an opportunity to urge this ground before the High Court, if it is found to be open to her to do so, and to substantiate the same, if she can. While, therefore, we allow this appeal and set aside the judgment of the High Court, we direct that the writ petition be reheard by the High Court on this point.

15. With these observations, we allow the appeal, set aside the order of the learned Judge of the High Court and leave it to the High Court to consider the issue mentioned in the preceding para afresh.

16. In the circumstances, we make no order as to costs.

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