ALLAHABAD HIGH COURT

Manhoo Mal

Vs.

Mulloo

Second Appeal No. 1978 of 1954 associated with Second Appeals Nos. 873/C, 874/C and 1179/C of 1954, against judgment of Civil J. Budaun
(M.C. Desai, C.J., V.G. Oak and R.S. Pathak, JJ.)

20.07.1954. 07.05.1963

JUDGMENT

Desai, C.J.

1. This is an appeal by a plaintiff whose suit under Section 209 of the Zamindari Abolition and Land Reforms Act for possession over a plot of agricultural land has been dismissed by the Courts below. The facts, as found by them, are that the land in dispute was Sir of the appellant on 30-6-1962 the day preceding the date of vesting mentioned in Section 4 of the Act. In 1358 Fasli corresponding to 1950-51 the respondent took unlawful possession of the land. After the Act came into force on 1-7-1952, the appellant sued the respondent claiming that he acquired bhumidari rights over it by virtue of Section 18 and alleging that the respondent acquired no right whatsoever under the Act and was liable to be ejected under Section 209 as a trespasser. He also claimed damages. The suit was contested by the respondent, who claimed to have been in possession for more than 12 years as a hereditary tenant and to have acquired adhivasi right under Section 3 of the Zamindari Abolition and Land Reforms (Supplementary) Act 31 of 1952 which matured into sirdari rights under Section 240-B of the Act. The suit was dismissed by the trial Court on 14-10-1953 and by the lower appellate Court on 20-7^1054. Both held that the respondent became an adhivasi and could not be ejected as a trespasser under Section 209. The appellant filed this second appeal on 12-10-1954 which came up for hearing before our brother Mithan Lal, who thought that it raised several important questions of frequent occurrence and referred it to a larger Bench.

2. The law in respect of trespasser under the U.P. Tenancy Act, which was in force up

to 30-6-1952 was that a trespasser could be ejected under Section 180 of the U.P. Tenancy Act at the instance of the person entitled to admit him to tenancy within a period of two years commencing on the 1st July following the date of unauthorized occupation. Consequently, the respondent was liable to be ejected by the appellant through a suit to be brought under Section 180 on or before 30-6-1953. It was provided in Section 180 that if a suit under Section 180 became barred by time the trespasser would be a hereditary tenant. No suit was brought under Section 180, but, before the period of limitation expired, the U.P. Tenancy Act itself was repealed by the Zamindari Abolition and Land Reforms Act which contained Section 209 providing for suits against trespassers by bhumidars, sirdars, asainis and Gaon Sabhas, and Section 342 empowering the State Government to make orders for removal of difficulties arising out of the transition from the provisions of the Tenancy Act to those of the Zamindari Abolition and Land Reforms Act. In exercise of the powers conferred by Section 342 the State Government issued a number of removal of difficulties orders. The first was issued in 1952 and Clause (2) of it laid down that except as expressly provided in the Act (the reference henceforth will be to the Zamindari Abolition and Land Reforms Act except where a contrary indication is given) a suit in respect of any right acquired or liability incurred under the Tenancy Act could be instituted in the Court in which it would have been instituted under that Act and was to be heard, enquired into and decided under, and in accordance with its provisions. Though the Act contains Section 209 providing for the relief which could have been obtained under Section 180 of the U.P. Tenancy Act, it does not contain any express provision forbidding the institution of such a suit after 30-6-1952. Consequently, a suit under Section 180 could have been filed at any time upto 30-6-1953 and could be decided in accordance with the provisions of the U.P. Tenancy Act, but of course the Zamindari Abolition and Land Reforms Act, which came into force on 1-7-1952, remained operative and, whatever rights were acquired under its provisions also remained in force. The so called Removal of Difficulties Order did not suspend the operation of the Zamindari Abolition and Land Reforms Act or keep in abeyance the rights acquired under it. How a suit under Section 180, U.P. Tenancy Act, could be decided in accordance with the provisions of the Zamindari Abolition and Land Reforms Act is beyond comprehension. If a person, who was liable to be sued as a trespasser under Section 180, U.P. Tenancy Act, acquired a certain right under the Zamindari Abolition and Land Reforms Act on account of which he was entitled to remain in possession, unless ejected in accordance with the provisions of Zamindari Abolition and Land Reforms Act, it is not understood how the suit under Section 180,

U.P. Tenancy Act, could be decreed. Whatever may be said about the institution after 30-6-1952, and the decision, of a suit under Section 180 of the U.P. Tenancy Act, the Removal of Difficulties Order did not keep alive the provisions of Sub-Section (2) of Section 180 conferring hereditary rights upon a trespasser after the expiry of the period of limitation for such a suit. A trespasser who had not already acquired hereditary rights under Sub-Section (2) prior to 1-7-1952 will not acquire them after that date. The respondent, therefore, could not claim that the effect of the appellant's failure to file a suit under Section 180 prior to 1-7-1953 was that he acquired hereditary right by virtue of Sub-Section (2). If he acquired any rights he acquired them only under the Zamindari Abolition and Land Reforms Act.

3. When the Act came into force on 1-7-1952 all estates vested in the State free from all encumbrances, all tenancy rights were extinguished and new tenancy rights were created. Certain land was deemed to be settled with certain persons on whom were conferred new rights as bhumidars or sirdars and certain land was let remain in possession of certain persons without its being settled with them and they were given certain rights known as adhivasi rights. In respect of land deemed to be settled with bhumidars and sirdars inferior tenancy rights akin to old sub-tenancy rights and known as asami rights were conferred upon certain persons in actual occupation. Section 18 provides that sir and khudkhast holders and proprietary grove holders became bhumidars. A *bhumidar* has under Section 142 and subject to the provisions of the Act the right to be in exclusive possession of the land. He is not liable to ejectment, vide Section 199. Section 19 provides that all land held by ex-proprietary, occupancy and hereditary tenants Khali be deemed to be settled with them as sirdars and subject to the provisions of the Act they will be entitled to take or retain possession of the land. A sirdar has, subject to the provisions of the Act, the right to be in exclusive possession of the land, vide Section 146, and he cannot be ejected from it except as provided in the Act, vide Section 200. He is liable to ejectment on the suit of the Gaon Sabha on certain grounds such as that he has made a transfer in contravention of the provisions of the Act, that he has used the land for a non-agricultural purpose or that he has brought under cultivation, or planted a grove upon, common pasture land, tank, pathway etc. Under Section 20 a tenant of sir, a sub-tenant of a certain class, a person recorded as occupant of any land in the khasra or khatauni of 1356 Fasli and a person who was entitled to regain possession under Section 27 of the United Provinces Tenancy (Amendment) Act of 1947 were conferred adhivasi rights unless they became bhumidhars or asamis under Section 21(h) and were entitled, subject to the provisions

of the Act, to take or retain possession. Asami rights are conferred by Section 21 and under Section 146 an asami has the right to exclusive possession subject to the provisions of the Act. Under Section 202 be is liable to be ejected on the suit of the land-bolder on certain grounds.
In 1952 the Land Reforms (Supplementary) Act No. 31 of 1952 was passed. Section 3 of which provides that every person who was in cultivatory possession during the year 1359 Fasli but who did not become a bhumidar, sirdar, adhivasi or asami under Sections 18 to 21 of the Act would become with effect from 1-7-1952 either an asami from year to year or an adhivasi, depending upon circumstances and would be entitled to all the rights and be subject to all the liabilities conferred or imposed upon an asami or an adhivasi. He would become an asami from year to year if the *bhumidar* or sirdar of the land was on 1-7-1952 a person referred to in items (i) to (vi) of Section 10 (2) of the Act; otherwise he would become an adhivasi. The items mentioned in Section 10(2) are a woman, a minor, a lunatic, an idiot, a blind or physically infirm person and a person in the Armed Forces of the Indian Union. The effect of this provision was that a trespasser in possession of land in 1359 Fasli became an adhivasi if the sir holder or proprietary grove holder or ex-proprietary, occupancy or hereditary tenant was not a person mentioned in Section 10(2), items (i) to (vi). Subject to Sections 233 and 234 an adhivasi continues to have all the rights and liabilities which he possessed or, was subject to, on 30-6-1952. Section 233 deals with rent payable by an adhivasi and Section 234, with his ejectment. He is liable to ejectment on the ground of his being in arrears of rent or of transferring his holding or using the land for a non-agricultural purpose.

4. By Act XX of 1954 the legislature added Chapter IX-A, containing Sections 240-A to 240-M in the Act. Section 240-A provides that the State Government may declare that as from a certain date the rights, title and interest of the land-holder in the land which on the date immediately preceding the said date, was held or deemed to be held by an adhivasi, shall as from that date cease and vest in the State. The State Government has made such a declaration and the date specified is October 30, 1954. The effect of declaration is, as stated in Section 240-6, that an adhivasi becomes a sirdar with effect from that date. There was a controversy about the vires of Act No. XX of 1954, but Shri Shanti Bhushan disclaimed all intention to challenge its vires before us and stated that the question before us was of interpretation only.

5. The appellant on account of his being a sir-holder on 30-6-1952 became a *bhumidar*

under Section 18 with effect from 1-7-1952; this fact was not disputed before us. He had subject to the other provisions of the Act the exclusive right of possession and was not liable to ejectment. The respondent on account of his cultivatory possession in 1359 F, became an adhivasi with effect from 1-7-1952 and Sri Shanti Bhushan conceded this fact. As an adhivasi he became entitled subject to the provision of the Act to retain possession of the land. The question before us is how to balance the rights of the *bhumidar* and of the adhivasi.

6. The Act recognises only three classes of tenure holders, namely bhumidars, sirdars and asamis, vide Section 129; and adhivasi is not a tenure-holder at all. Land is deemed to be settled with bhumidars and sirdars but not with adhivasis. Once the State Government has settled the land with a *bhumidar* there cannot arise any question of its settling it again with an adhivasi. By creating adhivasis the legislature simply recognised the existing cultivatory possession of certain persons, even though the land was not settled with them or was settled with other. They were in possession on 30-6-1952 and the legislature simply maintained their possession. The right given to adhivasis to take or remain in possession was against the State Government and not against tenure-holders with whom the land might be deemed to have been settled. Rights and liabilities of an adhivasi and of the *bhumidar* with whom the land was deemed to be settled were left to be governed by Section 231. The *bhumidar* was not in occupation, whereas the adhivasi was in occupation in 1359 F. and the State Government has simply recognised his right to remain in occupation, subject to the liabilities to which he was subject on 30-6-1952. He was liable to ejectment at the suit of the intermediary *bhumidar* on 30-6-1952 and this liability is retained by him as an adhivasi. There is no provision in respect of an adhivasi corresponding to Sections 199 and 200, he is not declared to be immune from ejectment. Section 234 states the grounds on which he is liable to be ejected, but these grounds cannot be said to be exhaustive in the absence of a provision that he is not liable to be ejected except on these grounds or as provided in the Act. A sirdar or an asami cannot be ejected except on the grounds stated in Sections 201 and 202, but that is the result of the provisions of Section 200. In the absence of an analogous provision an adhivasi cannot contend that he is not liable to be ejected except on the grounds stated in Section 234. This is consistent with Section 231 which keeps alive his liability to ejectment. Adhivasi rights are not conferred by Section 20 upon trespassers only; certain persons in lawful possession are also conferred adhivasi rights such as tenants of sir, sub-tenants, and persons entitled on 30-6-1952 to regain possession under Section 27(1)(c) of the U.P.

Tenancy (Amendment) Act, 1947. A person who became an adhivasi on account of his lawful possession was not under any liability to ejectment on 30-6-1952 and, therefore, would not be liable to ejectment by virtue of Section 231. Section 234 had, therefore, to be enacted to provide ground for his ejectment. The liability of a trespasser-adhivasi to be ejected was subject to the law of limitation applicable to a suit under Section 180, U.P. Tenancy Act, and in the present case the respondent could be ejected by a suit instituted prior to 1-7-1953. This liability does not at all conflict with the provision that he was entitled to remain in possession because his right to remain in possession was subject to the liability to be ejected in accordance with the provisions of the U.P. Tenancy Act. The existence of this liability to be ejected in accordance with the provisions of the U.P. Tenancy Act was one of the reasons for the Removal of Difficulties Order. The present suit was instituted on 5-12-1952, but under Section 209 of the Act and not under Section 180, U.P. Tenancy Act. Section 209 has not retrospective effect; it applies to writs against persons taking or retaining possession of land otherwise than in accordance with the provisions of the law for the time being in force after 30-6-1952. The suit has to be brought by a bhumidar, sirdar or asami or the Gaon Sabha and is maintainable only if the defendant took or retained possession without their consent. A question of their consent would arise only after 30-6-1952, because prior to 1-7-1952 there did not exist bhumidars, sirdars, asamis and Gaon Sabhas. Further the Removal of Difficulties Order itself provides that a suit to enforce a liability to ejectment existing on 30-6-1952 must be brought as if the U.P. Tenancy Act were still in force, i.e., under Section 180 thereof. The respondent's liability to ejectment arose under Section 180, U.P. Tenancy Act, and not under Section 209 of the Zamindari Abolition and Land Reforms Act; the liability existed before he became an adhivasi and did not come into existence subsequently. Section 234 refers to liability to ejectment arising after 30-6-1952. Consequently, the appellant's suit under Section 209 was misconceived remedy and was doomed to fail.

7. Section 231(2) applies to an adhivasi the provisions of Sections 171 to 175 containing rules regarding succession to tenancy rights. This provision does not mean that if he became an adhivasi on account of unlawful occupation he is not liable to ejectment under the old law. Just as the legislature recognized his right to occupation, even though it was unlawful occupation, so also it could recognize the right of certain persons to succeed to him. Just as his own right to occupation is subject to a liability to ejectment in accordance with the old law, so also is the succession by his heirs subject to the liability of being ejected in accordance with, the old law. Section 240-A

conferring sirdari rights on adhivasis with effect from October 30, 1954 also is not inconsistent with trespasser-adhivasis liability to ejectment under the old law. The liability was subject to the law of limitation and in. most cases the period of limitation for ejectment of trespasser-adhivasis under Section 180, U.P. Tenancy Act, expired before Act No. XX of 1954 came into force. There was nothing anomalous in the State Government's conferring sirdari rights, upon trespasser-adhivasis, who by lapse of time became immune from ejectment under Section 180, U.P. Tenancy Act.

8. A person who becomes an adhivasi under Section 20(b) on account of his being recorded as an occupant in the Khasra or Khatauni of 1356-F, or being entitled to regain possession under Section 27(1)(c) of the U.P. Tenancy (Amendment) Act, 1947, may within 30 months from 1-7-1952 apply for being put in possession of the Sand under Section 232(1). It was contended that if an adhivasi was liable to be ejected under Section 180 of the U.P. Tenancy Act it would have been useless to give him a right to be put in possession under Section 232(1). The right conferred upon adhivasis is against the State and not against tenure-holders. No rights have been conferred upon adhivasi to be exercised against tenure-holders, like-bhumidars and sirdars. Consequently an adhivasi-would be entitled to sue for possession under Section 232(1) only if no tenure-holder was entitled to be in possession. Since an adhivasi has not been given a right against a tenure-holder he cannot apply for dispossession of a tenure-holder.

9. In *Ram Krishan v. Bhagwan Baksh Singh,* [1] Tandon and Misra, JJ., held that a trespasser's possession was not possession within the meaning of Section 3 of the supplementary Act No. XXXI of 1952 and that he did not acquire adhivasi rights. What had happened in that case was that Bhagwan Baksh Singh forcibly dispossessed Ram Krishan a tenant, in the beginning of 1359 F. and cultivated the land. The learned Judges held as follows :

> "In our opinion the facts of this case have an important bearing on the true meaning to be given to the fact of occupation by the respondent ..... A person who through force inducts himself over and into some land and also succeeds in continuing his occupation over it cannot be said to be in possession of that land though he has occupation over it ..... A person who has no claim to the property but succeeds by show of force in acquiring physical control over

> the same cannot be treated to be in its possession even though he may have physical control over it.
> ..... In order to constitute possession in a legal sense, there must exist, not only the physical power to deal with the thing as one likes and to exclude others but also the determination to exercise that physical power on his own behalf. Animus which so often is considered essential in the concept of possession will be lacking in such a case."

With great respect I am unable to accept this statement about the nature of possession and the meaning of "cultivatory possession" used in Section 3 of the Supplementary Act. Possession in quite distinct from title and can be independent of it. Adverse possession, which is possession without title, is possession and there has never been any doubt about it. There is no law which says that possession cannot be acquired with force or by a person who has no title. Not only can a person acquire possession without having any title and without even claiming to have a title and by the use of force but also he can maintain it against a third person having no better title than him.

> "Actual possession of real estate without title ..... is always sufficient to sustain an action of trespass quare clausum fregit against one having no superior right. Even a person who has acquired possession illegally may maintain trespass against anyone who unlawfully disturbs his possession. Indeed, possession without right can only be disturbed by the rightful owner of the land, or by some one claiming under him". See Section 52, American Jurisprudence 'Trespass' para 26, at p. 855."

Animus that is required for possession is present when a person forcibly takes possession with an intention to use physical power over the land on his own behalf. All that is required is an intention to use physical power and not a lawful right to use it. The learned Judges have misunderstood *Hemanta Kumari Debi v. Midnapur Zamindary Co., Ltd.,* [2] which never lent any support to the observation reproduced above. I am also at a loss to understand how the facts of a particular case can ever influence the meaning to be given to certain words in a statute. I have no hesitation in saying that the case was wrongly decided.

10. It has been contended by Sri S.S. Verma in Special Appeal No. 722 of 1962 that if Section 3 of the Supplementary Act gave adhivasi rights to a trespasser it would

infringe Articles 19 and 31 of the Constitution. Before one considers the provisions of these two articles one must clearly understand what exactly has happened under the Zamindari Abolition and Land Reforms Act and the Supplementary Act. Under the main Act all rights of intermediaries have been extinguished and all estates have vested in the State free from all encumbrances, i.e., free from all tenancy rights created by them. The State has acquired the estates and this acquisition of the estates has been held by the Supreme Court not to violate Article 31. After the acquisition nobody was left with any claim against the State. Thereafter the State itself settled the estates with certain persons and recognized the right of certain other persons to remain in possession subject to pre-existing liabilities. Neither Article 19 nor Article 31 has anything to do with the settling of the estates or with the maintenance of possession. If a tenant was forcibly dispossessed in 1359 F, and the trespasser continued in possession, he acquired adhivasi rights under Section 3 of the Supplementary Act. No right guaranteed to the tenant by Article 19 was infringed by the States granting adhivasi rights to the trespasser. The tenant had already lost all his rights, title and interest on account of the vesting under Section 4 of the main Act. When as result of the vesting he was left with no right, title and interest in the land, it is obvious that the subsequent granting of adhivasi rights to the trespasser did not infringe any of his Article 19 rights in the land. Whatever acquisition by the State was done was through the vesting and not through the subsequent granting of adhivasi rights to the trespasser. So Article 31 also was not infringed by the subsequent Act. Article 31-A which was enacted on 24-4-1955, but with retrospective effect, validated acquisition of all estates. It was argued by Sri S.S. Verma that a void enactment cannot be validated by retrospective effect being given to an amendment of the Constitution, but Section 4 of the main Act and Section 3 of the Supplementary Act were never void. It was also said that Article 31-A does not coyer adhivasi rights because they are claimed not against the State but against tenure-holders like bhumidars and sirdars. The argument is clearly irrelevant. Article 31-A is certainly not concerned with the State's granting adhivasi rights, but it does not follow that the State's granting adhivasi rights, is unconstitutional or does not come within its other constitutional powers. There is no provision in the Constitution which restricts its powers to dispose of its property or to create rights in it. The State was, after acquiring the estates, free to create any rights in favor of any persons in them. So it could create adhivasi rights in favour of trespassers even if it had settled the estates with others. Further, as I have explained earlier, though it has called trespassers adhivasis, it has simply maintained their possessory rights and has not freed them from any liabilities to which they were

subject before the vesting. If a tenant's right to regain the land from a trespasser is a right to acquire property, that right was taken away when the vesting took place free from all encumbrances before the Supplementary Act was enacted and came into force. Further, the Removal of difficulties Order preserved his right subject to the law of limitation and the provisions of the main Act. If he could not maintain his right on account of certain provisions of the main Act he cannot make a grievance of the Supplementary Act. Section 3 of the Supplementary Act close not take into consideration the right or title behind cultivatory possession; if a person was in cultivatory possession in 1359 F. he got adhivasi rights (if he had not acquired bhumidhari, sirdari or asami rights under the main Act) regardless of whether his possession was lawful or unlawful. In actual practice if he had not acquired bhumidari, sirdari or asami rights under the main Act in spite of his being in cultivatory possession in 1359 F. his possession must have been without title. Had his possession been lawful it must have been as a tenure-holder or as a sub-tenant and he would have acquired some eight under the main Act. A trespasser can be as much in cultivatory possession as the owner of the land. After the vesting with extinction of all rights, title and interest, there could not survive any question of a person's being a trespasser. There can be a trespasser if another person has a title giving him a right to possession. Nobody can be said to be a trespasser. The respondent in special appeal No. 722 of 1962 might have been a trespasser on 30-6-1952 but was not one on 1-7-1952 when he was granted adhivasi rights.

11. As at present advised, I am unable to gay whether it is possible for two or more persons to claim adhivasi rights under Section 20, one under one provision, another under another provision and so on, but if it is possible, the adhivasi rights of the person in possession on 30-6-1952 will prevail over those of others. Even if two or more persons can get adhivasi rights under Section 20 it is obvious that they all cannot or be put in possession. Possession being exclusive has to be with only one of them. An adhivasi who is already in possession is entitled to remain in possession so long as he is not ejected in the enforcement of the liability existing on 30-6-1952 or under Section 234 and so long as he is not ejected, another adhivasi cannot be restored to possession. The necessary consequence must, therefore, be that adhivasi rights of other will disappear.

12. The above was the position prior to Act No. XX of 1954. This Amendment Act came, into force on 10-10-1954 and was not given a retrospective effect. By virtue of

Section 240-A the appellant in the second appeal lost his bhumidari rights and the respondent became a sirdar from 30-10-1954. That this suit brought by the appellant against the respondent was pending did not postpone the operation of Section 240-A. The legislature was competent to take away rights or to confer new rights during the pendency of a suit in respect of the rights. It is not correct that every suit should be decided in accordance with the taws in force at the date of the institution of the suit. If a *bhumidar* loses his rights during the pendency of a suit instituted by him as a *bhumidar* he cannot get the relief sought as a *bhumidar* in the suit and the suit must fail. The suit under Section 200 of the Act must be dismissed now because the plaintiff has ceased to be *bhumidar* even though he was *Bhumidar* on the date of its institution. This is not giving retrospective effect to the Act No. XX of 1954. The taking away the plaintiff's rights and conferring better rights upon the respondent is being given effect to from the date on which it came into force and not from any earlier date.

13. The words "held or deemed to be held by an adhivasi" in Section 240-A do not mean that the land was lawfully held or deemed to be held by an adhivasi and do not exclude from the scope of Section 240-A a trespasser-adhivasi. Land in which adhivasi rights are created is land held by an adhivasi. The Zamindari Abolition and Land Reforms Act makes no distinction between one adhivasi and another. Different kinds of persons acquire adhivasi rights, but once they have acquired them the distinction between them disappears and it is no longer relevant to consider what rights they had previously or how they acquired adhivasi rights except for purposes of Section 231. It is true that a Full Bench of this Court of which I was a member held in *Bhuddhan Singh v. Nabi Bux,* [3] that the words "belonging to or held by an intermediary" in Section 9 mean land lawfully held by an intermediary and that this section does not apply to buildings, etc., in the occupation of a trespasser. The words in Section 240-A are "held or deemed to be held" and not 'belonging to or held" and the word "held" used in isolation may not have the same meaning as the word used jointly with the words "belonging to". Further since an adhivasi is given by the Act a right to remain in possession, land in possession of an adhivasi, even if he was a trespasser previously, is land lawfully occupied by him and, therefore, can be said to be "held" by him. It is immaterial that the legislature has not conferred any tenure upon him. Even if prior to 1-7-1952, when he was a trespasser, the land could not be said to have been "held" by him, since 1-7-1952 it must be said to be held by him as an adhivasi. That he may be liable to be ejected will not mean that it is not "held" by

him. There is nothing in the provisions of Section 240-A to suggest that they were to apply only to certain adhivasis and not to others. Section 240-6 which states the effect after the issue of the notification under Section 240-A, does not use the word "held" with refer, once to the adhivasi; any person who on 29-10-1954 was an adhivasi, or was deemed to be an adhivasi, becomes a sirdar. A trespasser-adhivasi is an adhivasi within the meaning of Section 240-B(a) and becomes a sirdar and, since this is the consequence of the issue of the notification under Section 240-A, it follows that the notification could be issued in respect of land in possession of a trespasser-adhivasi also.

14. I do not see anything unconstitutional in the provision in Section 240-A to the effect that the interest of a bhumidhar shall cease and vest in the State from the date of the notification. Article 31-A(1)(a), which is deemed to have been in force when Sections 240-A, 240-6, etc., were added in the Act by Section 14 of Act No. VIII of 1956, saves a law providing for the acquisition by the State of any rights in any estate or the extinguishment of such rights. Bhumidhari rights were created by the Act and they were created subject to the liability of being extinguished under Section 240-A. Consequently extinguishment of the rights or their vesting in the State cannot be said to be in violation of Article 31(2). Whatever rights were granted by the State under Section 18 of the Act were subject to the liability mentioned in Section 240-A and the enforcement of the liability could not be said to deprive bhuraidhars of their property when they had no right to the property immune from that liability. I am also by no means clear that extinguishment of bhumidari rights followed by their vesting in the State amounts to their being compulsorily acquired by the State within the meaning of Article 31(2), Even if it amounted to acquisition the object was to settle the land with persons who were is possession or were entitled to take possession as adhivasis and this may be said to be a public purpose. Compensation was to be paid to bhumidars for the loss of their rights, and, therefore, even if the matter were to be judged with reference to Article 31 and not Article 31-A, nothing in violation of Article 31 would be found in the provisions of Sections 240-A, 240-B, etc.

15. After an adhivasi has become a sirdar under Section 240-6 he has ceased to be subject to the liabilities mentioned in Section 231 and is not liable to be ejected except as provided in Section 201. The instant suit against the respondent is not covered by Section 201 and must fail on that ground alone.

16. In the connected Civil Misc. Writ No. 2314 of 1961 the petitioner is aggrieved by orders passed by the Board of Revenue. The Board of Revenue passed the first order on 27-8-1960 and the petition was filed on 17-8-1961 for certiorari to quash it. The reason given for the delay is that the petitioner filed a review application in the Board and that it was dismissed on 25-5-1961.

17. In one petition the petitioner cannot challenge both the orders of the Board of Revenue. If he challenges the earlier order dated 27-8-1960 he should have come to this Court for certiorari within a reasonable time of it. The Court expects a petitioner to come to it within ninety days of the order and if he comes after ninety days and does not give sufficient explanation for his failure to come within ninety days his petition is liable to be dismissed by this Court, in the exercise of its discretion, on the ground of laches. The fact that he applied to the Board for review of the impugned order is not a sufficient cause for his not applying for certiorari because applying for a review cannot be said to be an adequate alternative remedy. The Board is not bound by any law to entertain a review application and to grant it. If the petitioner challenges the later order of the Board, namely the order passed on the review application, he will succeed only on showing that the Board's refusal to review its earlier order was refusal to exercise jurisdiction vested in it or was based on a manifestly illegal view. The review application was rejected by the Board not on the ground that it had no jurisdiction to entertain it but on merits; the petitioner failed to make out any case for review. The petitioner took a certain plea but the Board found no substance in it and held that there was no error in its earlier order. When it did not see any error in its earlier order it was bound to eject the review application and no case whatsoever was made out for its order being quashed.

18. The Zamindari Abolition and Land Reforms Act does not contain any provision for the Board's reviewing its order and apparently it derives its power of review only from Order 47, C.P.C. Under Order 47 it can review an order on the ground of discovery of new and important matter or on the ground of some mistake or error apparent on the face of the record or for any other sufficient reason. In this case the petitioner did not allege in his review application discovery of new and important matter. There was no mistake or error apparent on the face of the record in the Board's order; whatever view it took it took deliberately and according to its interpretation of the law. No other cause existed for the review. It was obvious from the Board's order itself that it did not suffer from any mistake or error apparent on the face of the record.

If it was wrong it was wrong not on account of any mistake or error apparent on the face of the record, but on account of erroneous interpretation of the law. The petitioner should not, therefore, have wasted time before applying for certiorari and this Court in the exercise of its discretion should refuse to issue certiorari after so much delay. In any case, after he had applied for the review and failed his right should be restricted to applying for certiorari against the order refusing review. If he treated applying for review as an adequate alternative remedy, he is estopped from pleading that it is not and now he would be aggrieved only if the Board's refusal to grant review was such as could be quashed by certiorari. He cannot in this petition take any plea which he could not take in the application for review; if he could apply for review on only a particular plea and not on all pleas on the basis of which he could apply for certiorari, it means that applying for review was not an adequate alternative relief or that he gave up the other pleas. In either case this Court will consider only the order passed on the application for review. If he could not take up certain pleas in the application for review he should not have wasted time in applying for it and should have come to this Court with a petition for certiorari within reasonable time.

19. The order refusing review does not suffer from any manifest illegality and cannot be quashed by certiorari. This Court does not exercise appellate powers over the Board. If its order is illegal it should be got corrected through an appeal to the Supreme Court under Article 136. This Court is powerless to correct mere errors, even if of law. The petitioner had no justification whatsoever to apply for review and could not by own voluntary act create a sufficient cause for not applying for certiorari within ninety days by unjustifiably applying for review.

20. The result is that the instant suit was bound to be dismissed whether it was covered by the U.P. Tenancy Act or by the Zamindari Abolition and Land Reforms Act. This appeal should, therefore, be dismissed with costs.

Oak, J.

21. The facts of the case have been given in the judgment of the learned Chief Justice. I now proceed to consider the five questions raised by the learned single Judge in his order of reference dated 20-2-1961. Question No. 1 : Bhumidars were created under Section 18 of U.P. Zamindari Abolition and Land Reforms Act (Act No. 1 of 1951, hereafter referred to as the Act). Adhivasis were created under Section 20 of the Act. Another provision for creation of Adhivasis was Section 3 of U.P. Act No. XXXVI of

1952 (cultivatory possession in 1359 F). According to Section 18 of Act No. 1 of 1961, a *Bhumidar* was entitled to take or retain possession of his land. Similarly, under Section 20 of the Act, an Adhivasi was entitled to take or retain possession of his land. The question is how to reconcile these conflicting claims of a *Bhumidar* and an Adhivasi. According to Section 199 of the Act, no *Bhumidar* is liable to ejectment. But when an Adhivasi cultivates land of which another person is a Bhumidar, possession of the Adhivasi does not constitute ejectment of the Bhumidar. Under Chapter X of the Act, a *Bhumidar* pays land revenue. Under Chapter IX of the Act, an Adhivasi has to pay rent. These provisions indicate that the status of an Adhivasi was subordinate to that of a Bhumidar. The relationship between a *Bhumidar* and an Adhivasi under Act No. 1 of 1951 was analogous to the relationship between a zamindar and a tenant and that between a tenant and a sub-tenant under the U.P. Tenancy Act. There was no difficulty in adjusting the claims of a tenant and a subtenant under the U.P. Tenancy Act. A tenant was entitled to receive rent from a sub-tenant; while the sub-tenant was entitled to cultivate the land. That was the position as regards the rival claims of a *Bhumidar* and an Adhivasi under Act No. 1 of 1951. A *Bhumidar* was entitled to receive rent; but the Adhivasi was entitled to actual physical possession. A Bhumidhar had no right to obtain cultivatory possession as against an Adhivasi. That was so, even if the Adhivasi was initially a trespasser. As soon as the trespasser became an Adhivasi, the *Bhumidar* became powerless to obtain cultivatory possession, except by ejecting the Adhivasi in accordance with law.

22. Question No. 2 : In the, present case the respondents are not claiming any right on the basis of an entry in village papers in 1356 F. It is not, therefore, necessary to answer question No. 2.

23. Question No. 3 : Rights and liabilities of Adhivasis were governed by Chapter IX of the Act. A trespasser-Adhivasi was also governed by the same provisions. Section 231 of the Act states :

> "(1) Except as provided in Sections 233, 234 and 237 and subject to his paying the rent, an Adhivasi shall continue to have all the rights and the liabilities which he possessed or was subject to in respect of the land on the date immediately preceding the date of vesting....."

24. In the present case the defendants-respondents were initially trespassers. They

were liable to ejectment under Section 180, U.P. Tenancy Act. It was, therefore, contended for the appellant that, the defendants-respondents continued to be liable to ejectment as trespassers by virtue of Section 231 of Act No. 1 of 1951. It must, however, be pointed out that. Section 231 is subject to the provisions of Sections 234 and 237 of the Act. Section 234 of the Act deals with ejectment of an Adhivasi, and runs thus :

> "Without prejudice to the provisions of Section 237, an Adhivasi shall not be ejected from the land held by him except.,...,.....,,."

Three circumstances have been enumerated in Section 234. The present case does not fall under any of the three Clauses (a), (b) and (c) of Section 234. Section 237 provides for ejectment of an Adhivasi from an uneconomic holding. The appellant did not proceed under Section 237 either. An Adhivasi was not liable to ejectment except as provided in Sections 234 and 237 of the Act.

25. The defendants became Adhivasis under Section 3 of Act No XXI of 1952. That was long before Chapter IX-A was inserted in U.P. Act No. 1 of 1951. When Chapter IX-A of Act No. 1 of 1951 came into force, the defendants were Adhivasis. They were also in actual possession. There is, therefore, no difficulty in holding that, the land was held by them as Adhivasis within the meaning of Section 240-A of. Act No. 1 of 1951.

26. Question No. 4 : In a sense, a Second Appeal is a continuation of a suit. This Second Appeal has to be decided in conformity with the rights of the parties at the time of the decision of the Second Appeal by this Court. In the absence of a statutory provision to the contrary, a party is entitled to the benefits of new legislation during the course of litigation. The Civil Judge decided the appeal before him in July 1954. Chapter IX-A of the Act became effective in October 1954. In disposing of this Second Appeal, we must recognize the rights that have accrued in favour of the defendants-respondents under Chapter IX-A of the Act.

27. Question No. 5 : Mr. Shanti Bhushan, appearing for the appellant, did not press this point before us. I shall, therefore, assume that U.P. Act No. XX of 1954 and Chapter IX-A of Act No. 1 of 1951 are constitutionally valid.

28. The Second Appeal has to be disposed of in the light of my answers on questions

Nos. 1, 3 and 4. Although at one time the defendants were liable to ejectment under Section 180, U.P. Tenancy Act, their position considerably improved from time to time. The present suit was filed under Section 209 of Act No. 1 of 1951, as if the defendants were trespassers. But the defendants were not trespassers on the date of the suit. They were then Adhivasis. They could not be then ejected except as provided in Sections 234 and 237 of the Act. The appellant made no attempt to eject them under Section 234 or under Section 237 of the Act. The suit under Section 209 of the Act could not succeed. The situation became worse for the appellant, when Chapter IX-A of the Act came into force. The plaintiff-appellant lost his Bhumidari rights under Section 240-A of the Act; and the respondents' Adhivasi rights ripened into Sirdari rights under Section 240-B of the Act.

29. So, on any view of the matter, the plaintiffs claim must fail. I agree that the Second appeal should be dismissed with costs.

Pathak, J.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Cases Referred.

1. 1961 All LJ 301
2. AIR 1942 Cal 233
3. AIR 1962 All 43