PATNA HIGH COURT

Brijnandan Singh

Vs

Jamuna Prasad Sahu

A.F.O.D. No. 205 of 1948

(K. Ahmad and S.C. Misra, JJ.)

14.01.1958

JUDGMENT

K. Ahmad, J.

1. The matter in controversy in this case is the specific performance of a contract, as covered by the registered document dated 15-6-1943. Thereunder defendant No. 1 the proprietor of the eight annas interest in touzi No. 744/34 had agreed to give in perpetual lease his half share in 32 bighas of Zirat and bakasht lands of that tauzi lying in khata No. 618 to two persons (1) Jamuna Prasad Sahu (Plaintiff No. 1) and (2) Jagarnath Prasad Sahu (originally defendant No. 2 and subsequently transposed to the category of plaintiff No. 2) on terms as stated thereunder. Two of those terms were that that the Settlees in return would pay rent for it at a fixed rate of Re. 1/- per bigha and nazarana at the rate of Rs. 1162-8-0 per bigha. It seems that at that time the defendant appellant was hard-pressed for money, as he had to make payment of a mortgage decree, which was then under execution against him on behalf of two persons (1) Ramji Singh and (2) Ragho Singh; and it has for that that he had decided to part with some of his bakasht and zirat lands. But at that time those zirat and bakasht lands were in the possession of his rehandars and one of the terms agreed upon with them was that the land given in rehan could be redeemed only in the month of Jeth, that means always just before the commencement of the next agricultural year. It was, however, unfortunate that the agreement for lease could be completed only at or about 27th of Jeth 1350 Fasli, when the month of Jeth was practically closing. So there was hardly time enough for the parties to complete their entire transaction including the payment of the nazarana amount within that short period of a few days that had still to expire in the month of Jeth. And the danger was that if payments were not made to the rehandars within those three days then on the one hand they would not agree to give up their possession for the next one year and on the other the settlees in that case would not be willing to stand by the agreement unless they got immediate possession from the next succeeding agricultural year. Therefore, in order to obviate that contingency, the parties to the agreement arranged that the transaction should be completed in two stages; firstly by the execution of an agreement, as was done under the aforesaid registered deed, dated 15-6-1943, and then by the execution of a final document of lease within a period of two months from that date on the payment of the entire nazarana money.
Thus, they thought that they would get about two months' time sufficient to complete the entire

transaction and in the meantime under the first document authority was given to the lessee to pay up the rehan money to the rehandars and in return for it to take possession of those lands from them. Further, according to the averments made in the plaint, this was also agreed upon:

> "(1) That if defendant No. 1 does not execute the patta within two months, the plaintiff and the defendants 2nd party shall be competent to realise the entire amount paid by them together with interest at the rate of Re. 1/- per cent., per mensem from the person and property of defendant No. 1.
> (2) That in case the patta is not executed the plaintiff and the defendant 2nd party shall be competent to get the patta executed by seeking relief in court and besides this to realise Rs. 1,600 as compensation from the persons and properties of defendant No. 1."

2. The case of the plaintiffs is that pursuant to the aforesaid agreement, a sum of Rs. 5,138-8-0 was paid to some of the rehandars in part satisfaction of the defendant's share of debt. Yet in spite of repeated demands, the defendant appellant has been all along unwilling to receive the balance of the nazarana money and to execute the final document of lease, as agreed upon, and hence the suit giving rise to this appeal.

3. Originally there were two suits, one by each of the two plaintiffs. Title Suit No. 72 of 1946 was on behalf of plaintiff No. 1 Jamuna Prasad Sahu and was instituted on 14-8-1946, while title Suit No. 73 of 1946, was on behalf of plaintiff No. 2 Jagarnath Prasad Sahu and was instituted on 15-8-1946, and as they arose out of the same transaction, they had been made analogous and were heard together. Subsequently, however, on 25-2-1948, after the close of the hearing but before the delivery of the judgment, an application was filed in Title Suit No. 72 of 1946, on behalf of plaintiff No. 2 Jagarnath Prasad Sahu praying therein that he may be allowed to be added as a co-plaintiff in that suit. That prayer was allowed with the result that thereafter title Suit No. 72 of 1946 came to be the common suit" on behalf of both the plaintiffs; and in those circumstances the trial court thought and I think rightly that the other suit, namely, Title Suit No. 73 of 1946 filed by that plaintiff No. 2 Jagarnath Prasad Sahu became infructuous. Thus, the adjudication on the matter in issue between the parties was finally given only in T. S. 72 of 1946 and it is the decree passed in that suit which is now in appeal before us at the instance of the defendant 1st party.

4. The defendant proprietor in defence thereto raised a number of pleas. Of those, the important were (1) that the agreement was not complete

> (2) that it suffered from vagueness and uncertainty,
> (3) that Some interpolations had been made in the deed of agreement (4) that the plaintiffs did not pay any rehan debts as agreed upon (5) that time was the essence of the contract and even on their own admission, the plaintiffs did fail in the payment of the money due under the mortgage decree and also at least a part of the rehan money and so they were not entitled to any relief under the agreement relied upon by them and (6) lastly that in the meantime the lands covered by the deed of agreement had already been settled with a third party namely, one Jaimungal Lal, under the document dated 22-1-1944 (Exhibit B) and so that by itself was enough for the aforesaid agreement dated the 15th June 1943 to

be subsequently unenforceable in law.

5. The trial court on an elaborate consideration of the materials brought on the record found and I think rightly that there was no substance in any of those pleas raised by the proprietor defendant) and accordingly on 28-2-1948, decreed the plaintiff's claim for specific performance as also for interest and damages as prayed for.

6. Since then an important event has happened and that is the enactment of the Bihar Land Reforms Act 1950 and it is not denied that thereunder the proprietary interest of the said tauzi No. 744/34 has also by now vested in the State of Bihar. Therefore for that reason the appeal has now been pressed before us mainly on the ground that this subsequent vesting of the estate under the Land Reforms Act has given rise to a complete frustration of the aforesaid agreement dated 15-6-1943, and as such the plaintiffs are not entitled to any relief thereunder and much less to the relief for specific performance and that on the facts of this case the performance of that contract would entail a great hardship on the appellant. Lastly it has been contended that in any view of the matter at least the claim for interest and damages is unwarranted in law. Thus, the contentions raised on behalf of the defendant in the court below have practically all been given up in appeal save and except the one on the question of costs and damages, and the appeal has been confined to the aforesaid two points only.

7. Before, however, I go into these two questions, I think it is necessary for the proper appreciation of this case that I should first give here a brief history of the transaction and then the nature and character of the contract entered into between the parties under the registered deed dated 15-6-1943.

8. The aforesaid tauzi No. 744/34 was initially the 16 annas property of one Raghunath Singh. On his death it was inherited by his two grandsons (1) Hari Kishun Singh and (2) Brijnandan Singh, the defendant appellant. Subsequently Hari Kishun Singh sold his share to one Murina (?) Kuer. But in the meantime the entire 16 annas interest in the touzi had already been mortgaged and most of the zirat and bakasht lands therein had been given in rehan. So by the time the defendant appellant Brijnandan Singh and Munna Kuer came to own this touzi a decree for mortgage had already been passed and put under execution. Further the rehan bonds were also getting over due for payment. So these proprietors in their common anxiety to save the property from sale in the execution of the mortgage decree agreed to settle their entire aforesaid 32 bighas of Zirat and Bakasht lands permanently on a fixed rental of Re. 1/- per bigha and to pay up their entire due out of the nazarana money that they were to get in lieu thereof. In this way two ekrarnamas, both of the same date, namely, 15-6-1943 one by each of them came to be executed for the settlement of those bakasht and zirat lands. Unfortunately none of those ekrarnamas could be carried out completely with the result that both the landlords were sued for the specific performance of their agreements as embodied in their respective ekrarnamas.
It, however, appears that the suit against Munna Kuer has already been compromised. So now it is the claim against defendant Brijnandan Singh alone which is in appeal before us.

9. Now as to the nature and character of the transaction, there are some facts which appear to he undisputed, for example (1) that at the time when the aforesaid agreement was arrived at, the right to possession in those lands was in the proprietor defendant, though the possession over

them was in their rehandars; (2) that that right to possession in the defendant landlord was then by virtue of his right of ownership in the estate, (3) that the transfer agreed upon between the parties was admittedly one for an out and out lease in perpetuity, and (4) that the subject-matter of agreement was agricultural lands. But what is not very clear is whether the deed of agreement was by itself meant to constitute an out and out lease as agreed upon between the parties or that it was merely an agreement to give a lease in future. If the document by itself constituted an out and out lease then the present suit for specific performance of the contract is in substance nothing but a suit for the recovery of that property given in lease; but if it is an agreement to grant lease in future then the suit for specific performance of that agreement can be one for the enforcement of a personal right alone to get that property as agreed upon. This inquiry, however, as to whether a particular agreement constitutes an out and out lease or is merely an agreement to grant lease in future is sometimes not easy to answer unless the principles underlying the legal concept of lease are clearly kept in view. Lease, as we know, is essentially a severance of the right of possession from the right of ownership. And the right of ownership in its own turn according to Salmond is only a particular kind of right in it which under the English law is known as the fee simple in land; and though such a right is always inclusive of the right of possession yet in law it is separable from the bundle of rights constituting fee simple and is also transferable independent of it and it is this which lies at the root of transfer by lease. Contrary to it are the incidents of transfer by sale or mortgage. In the former the transfer is that of the fee simple itself while in the latter the transfer is that of an interest in that fee simple." Therefore in English law a lease for a term is what is known as a chattel interest and not a real interest corresponding to an interest in property, but in our system of law a lease though a right distinct from ownership is a transfer of interest in the immovable property. That being so. a contract in order that it may constitute lease under the Transfer of Property Act has to be demised in praesenti. That means an agreement to grant lease in future cannot constitute lease (*E. M. Joseph v. Samsunder*[1],). But as Section 5 of the Transfer of Property Act specifically says that 'a transfer of property' is a conveyance of property in present or in future, so the mere fact that an agreement provides that the lease is to commence from a future date (*Sultanali v. Tyeb Pirmahomed*[2], *Ramjoo Mahomed v. Haridas Mullick*[3], *Vithu Jairam v. Akaram Depaji*[4], and *Mihan Khan v. Muhammad Bakhsh*[5], (E)), or that there is a provision therein for the execution of a formal document in future (*Mopurappa v. Ramaswami*[6], *Purmananddas Jiwandas v. Dharsey Virji*[7],), will not make the transaction a merely executory agreement and not a lease. Nor, as it is clear from what has been stated above any actual entry on the land is necessary to complete a lease though at the same time it does not mean that where possession is allowed to be taken under an agreement, it may necessarily amount only to creating an interest in the property and not only a personal agreement *Sabdi Bepari v. Sheikh Budhai*[8], *Dwarkanath v. Ledu Sikdar*[9], *Lakshan Chandra Mondal v. Takim Dhali*[10], *Behari Manjhi v. Govind Manjhi*[11], and *Driscoll v. Borough of Battersea,*[12] Therefore, in order to judge whether a particular contract constitutes an out and out lease or a mere agreement to grant lease, the facts of each case has to be judged on its own merits in the light of the aforesaid principles.

10. Now in the case of the Agreement before us the solitary term which may possibly give an indication of a demise in praesenti is the right given to the plaintiffs to redeem the same from the rehandars. That, however, is not so unequivocal as not to bear any other interpretation contrary to it. It may be, which I think is more probable in the context of the facts stated therein, that that redemption as stated therein was to be done on behalf of the landlord and not on behalf of the plaintiffs though out of the money which under the agreement had to be paid by the plaintiffs to

the proprietor defendant. Therefore it is difficult to hold that thereunder there was any demise in praesenti. That means the registered deed dated 15-6-1943 constituted only an agreement to grant lease in future and not an out and out lease. And the fact that the agreement related to an agricultural land is not by itself of any particular importance on the facts of this case as it is the admitted case of both the parties that the transfer by lease even if any was in this case made by a registered agreement and not otherwise. Therefore the contention of Mr. Harnandan Singh that the agreement even though valid was subsequently frustrated on the vesting of the estate in the State of Bihar has to be tested on the footing that the contract under the registered document was not out and out lease but only an agreement to grant a lease in future. Now the general consequences of the vesting of an estate under the Land Reforms Act are given in Section 4 and that read with Section 6 deals with the effect of vesting on the zirat and bakasht lands lying in such estate. The relevant parts of those two sections read as follows:

> "4. Notwithstanding anything contained in any other law for the time being in force or in any contract, on the publication of the notification under sub-section (1) of Section 3 or sub-section (1) or (2) of Section 3A the following consequences shall ensue, namely:
> (a) Subject to the subsequent provisions of this Chapter, such estate or tenure including the interests of the proprietor or tenure-holder in any building or ...(other than the interests of Raiyats or under raiyats) shall, with effect from the date of vesting, vest absolutely in the State free from all incumbrances and such proprietor or tenure holder shall cease to hold any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act."
> "6 (1) On and from the date of vesting, all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, including-
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> * * * * *

shall, notwithstanding anything contained in this Act, be deemed to be settled by the
State with such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner:" Relying on these two sections, Mr. Harinandan Singh has made the following submissions - (1) that the agreement made by the landlord in favor of the plaintiffs under the registered document dated 15-6-1943, was in the nature of an incumbrance within the meaning of that word as used in Section 4 of the Land Reforms Act and as with effect from the date of vesting wherein the lands in dispute lie all incumbrances created thereunder including the agreement dated 15-6-1943, disappeared, therefore, there was now nothing left to be enforced in law, and (2) that as these lands on the date of vesting were in khas possession of the defendant proprietor, they were statutorily settled back with the defendant afresh as a raiyat and, therefore, the title now held by the defendant proprietor in those lands is a title different to that which he originally had in them. And in support of these contentions, reliance has been placed by the learned Advocate on the principles laid down in ***Sheo*** *Narayan v. State of Bihar*[13]*,* and *Madan Lal v. Kaviraj Basudevanand*[14]*,*

11. The answers to these contentions, in my opinion, primarily depend on the contentions of the following questions: (f) What is the exact interest which vests in the State Government by virtue of a notification issued under Section 3 of the Bihar Land Reforms Act? (2) Whether there is any interest which does not vest in the State Government or is not adversely affected by virtue of that notification? If so, what is that interest? (3) Does the provision of statutory settlement as contemplated under section 6 of the Land Reforms Act create a new title or does it only give a legal recognition to the old right of possession which the outgoing proprietor had in those lands by virtue of his ownership in the estate as a whole? (4) Whether the word 'incumbrance' as used in Section 4 of the Bihar Land Reforms Act, refers only to the interests which vest in the Government or also to those which do not vest in the Government? (5) What is the scope and implication of the phrase 'Khas possession', as used in Section 6 of the Bihar Land Reforms Act?

12. So far as the first of these questions is concerned, it now stands decided by the Full Bench decision of this Court in 1957 BLJR 72, that on the issue of a notification under Section 3 of the Bihar Land Reforms Act it is the title of the whole estate which becomes vested in the State of Bihar and not only the right and title of the proprietor in the estate. Therefore, here also it has to be held that after the issue of the notification under Section 3 of the Bihar Land Reforms Act relating to touzi No. 744/34 it was the whole estate which vested in the State Government and not only the right and title of its two proprietors Munna Kuer and Brijnandan Singh. But the learned Chief Justice in that case made it further clear that-

> "It is important to notice that Section 4 (a) expressly states that the estate or tenure vests absolutely in the State free from all incumbrances, and the only rights saved under Section 4 (a) are the interests of raiyats or under-raiyats. Section 4 (a) also states that such proprietor or tenure holder shall cease to have any interests in such estate or tenure, other than the interests expressly
> saved by or under the provisions of this Act."

Therefore, though it is true that on the issue of a notification under Section 3 of the Bihar Land Reforms Act, the estate of the proprietor as such passes and not only the interest of the proprietor, yet on the terms of the section itself, this vesting of the state is subject to certain exceptions and that not only to the advantage of the raiyats and under-raiyats alone in whose favour the exemption is as a matter of fact total but at least to some extent in favour of the outgoing proprietor too though in his case the exemption, as is quite natural with the scheme of the Act, is very limited and confined only to a few well defined rights as are specified in Sections 5, 6, 7 and 9 of the Act, of which on the facts of this case, as already stated, Section 6 alone is relevant. That says that in lands specified therein the outgoing proprietor shall be entitled to retain possession and the same shall be deemed to be settled by the State with him. In my opinion, the expression 'retention' in this section has been used with a purpose and that has, to be carefully noted. The dictionary meaning of the expression 'to retain' is "to hold or keep in possession", "to keep from departure or escape", "to detain", and "not to lose or part with". If that is so then the word "retention" contemplates a continuity of the right in the outgoing proprietor, or in other words, the right of possession over the lands specified in the section which were in the proprietor from before are allowed to continue as such even after the change as provided' therein, namely, the vesting of the estate. Therefore, I think that the true and correct interpretation of Section 6 read with Section 4 (a) of the Act is that though on the publication of notice under

Section 3 of the Land Reforms Act the estate of the proprietor as such passes and not only the interest of the proprietor, yet his right to possession over lands which are used for agricultural and hortricultural purposes and are in his khas possession on the date of vesting is exempted from that statutory process of transfer and is left as they were in outgoing proprietor. That means, in the process of vesting the right to possession in such lands is automatically separated from the rest of the title in the estate and what is thereafter finally taken away from the proprietor in respect to those lands on the vesting of the estate is what is embodied in the latter and not the right of possession in them. It has, however, to be conceded that this construction of the section is prima facie not consistent with what is implied by the word 'settlement' which has been used therein along with the word 'retention' for the word 'settlement' does by implication suggest that in the process of vesting the right to possession in such lands is also vested in the State and thereafter it is settled back with the outgoing proprietor by the operation of law. But it is important to note that that settlement howsoever binding in law is hot real and is brought about by mere fiction. Therefore, in order to read the section consistently and harmoniously as a whole as also along with the rest of the Act, as it ought to be read under the established rules of construction, it is necessary that the implication underlying (here into " ") the word "settlement" should be kept confined within the amplitude of the particular purpose for which it has been used therein and not beyond it especially when in doing so it would not only bring about inconsistency but incohesion in the whole scheme of the Act. Fiction, as defined in Corpus Juris, Volume 25, page 10-36, is:

> "A legal assumption that a thing is true which is either not true, or which is a probably false as true; as assumption or supposition of law that something which is or may be false is true, or that a state of fact exists which has never really taken place, an allegation in legal proceedings that does not accord with the actual facts of the case, and which may be contradicted for every purpose, except to defeat the beneficial and for which the fiction is invented and allowed : *New Hamshire Strafford Bank v. Cornell*[15], (O).

The rule on this subject is that the court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work wrong contrary to the real truth and substance of the thing *Hibberd v. Smith, 67 California 547 at O. 561(Supra)* (P); *Jhonson v. Smith, (1760) 2 Burr 950 at p. 962: 97 ER 647(Supra)*." That means, fiction in the realm of law has a defined roll to play and it cannot be stretched to a point where it loses the very purpose for which it is used and in no case should it be allowed to perpetrate injustice. This is so is also supported by the weighty words, expressed in *United States v. 1960 Bags of Coffee, (1814) 8 Cranch (US) 398 at p. 415(supra)*, wherein Story J., observes:

> "It seems to be a rule founded in common sense, as well as strict justice that 'fiction of law' shall not be permitted to work any wrong, but shall be used 'ut res magis valeat quam pereat'."

That being the position, here also we have to find out both from the language of the section as also from the scheme underlying the Act as to what is the main purpose for which the fiction of settlement has been imported in that section. I think it has been introduced with the sole object of adjusting the relationship in regard to the lands specified therein between the incoming State and

the ongoing proprietor and thereby enabling, on the one hand, the incoming State to assess rent on those lands, and on the other, the outgoing proprietor as such to have a defined legal status in the right of possession which is left behind in him on vesting and not in any way to affect adversely the interest of the third parties or of the proprietor inter se between themselves in that right to possession or to create any new title as against any of these persons; that means, as against third parties the Act leaves the right to possession in those lands in the outgoing proprietor, as it was before, with the result that if there is any dispute with regard to that right to possession in such lands between the outgoing proprietor and third parties, that dispute has to be decided like any other question of title in the general court of law. And that is quite understandable for it cannot be reasonably conceived that the right, which is substantially left intact free from the effect of vesting in the outgoing proprietor, will at all be made a subject of adjudication under the provisions of the Land Reforms Act and more so when third parties are involved therein. After all, the scope of the Land Reforms Act is limited and is essentially confined to the adjustment and settlement of those rights alone in the estate which as a result of vesting are transferred from the outgoing proprietor to the incoming State and a few other topics which also besides them have been dealt with therein are only such as are so inextricably mixed up with them that some working arrangement had to be made in regard to those rights also. Therefore, unless specifically provided, the right of third parties has to be presumed to be beyond the scope of that Act. That being so, I think that so far as the third parties are concerned, their interest in the right to possession in lands referred to in Section 6 of the Act is
not in any way affected or altered by the vesting as provided in the Act. In substance, the gist of the scheme under the Land Reforms Act with regard to the right to possession in agricultural lands in a Zamindari estate is that if there is any tenant already on them from before at the time of vesting then his right therein is left undisturbed and he continues to enjoy that right as such without any alteration or modification; and if there is no tenant thereon from before, that is, the proprietor is in khas possession thereof without the intervention of a tenant then he as against all excepting the incoming State continues to enjoy that right to possession as before without any alteration or modification, that is, his right to possession therein also is left undisturbed; but as the outgoing proprietor thereafter ceases to hold ownership in them, they are deemed to be settled with him in the eye of law as a raiyat qua the incoming State with right in the State to assess rent for them as their proprietor.
And so far as the decision in 1957 BLJR 57, is concerned, that is based on Section 9 of the Land Reforms Act. Therefore, it is not of much importance in construing Section 6 of that Act.

13. Now comes the fourth question which is in connection with the question of 'incumbrance' as used in Section 4 (a) of the Act. "Incumbrance", as defined in Law Lexicon,

> "is a burdensome and troublesome load; a burden, obstruction and impediment; anything that impedes motion or action, or renders it difficult or laborious clog; hindrance; check a word used as synonymous with obstruction, a burden or charge upon property; a legal claim or lien upon an estate which may diminish its value: a liability resting upon an estate; anything that impairs the use or transfer of property; an embarrassment of an estate or property so that it can not be disposed of without being subject to it. As applied to an estate in land, it may fairly include whatever charges, burdens, obstructs, or impairs its use or prevents or impedes its transfer."

This suggests that in relation to land, that is the context in which it has been used in Section 4 (a) of the Land Reforms Act. its proper implication is that of "a legal claim or lien upon an estate which may diminish its value" or "a liability resting upon an estate". A question, however, arises whether it is this general meaning of the word "incumbrance" in which it has been used in Section 4 (a) of the Act in relation to property or is there any other specialised meaning which can be reasonably attributed to it. Now so far as the Land Reforms Act itself it concerned, there is no specific definition given in it of the word "incumbrance". But in Section 2 (t) it

> "all words and expressions used in this Act but not -defined in this Act and defined in the Bihar Tenancy Act, 1885, or the Chota Nagpur Tenancy Act, 1908, shall-
> (i) in their application to the area to which the Chota Nagpur Tenancy Act, 1908, applies, have the

same meanings as in that Act;

> (ii) in their application to the area to which the Bihar Tenancy Act, 1885, applies have the same meanings as in that Act; and
> (iii) in their application to any area in the Santal Parganas, have the same meanings as in the Bihar Tenancy Act, 1885."

In this case we are concerned with the agricultural lands in areas to which the Bihar Tenancy Act 1885 applies. Therefore, for the purpose of this case reference has to be made to the Bihar Tenancy Act but unfortunately in that Act also there is no definition provided of the word "incumbrance" as such. And so far as Section 161 of that Act is "concerned, that deals with incumbrance only in relation to the right of tenancy and not in relation to any other right. What it says is:

> "161 (a). The term 'incumbrance', used with reference to a tenancy, means any lien, sub-tenancy, easement or other right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section."

And I think it needs no argument to say that the legislature in using the word "incumbrance" in Section 4 (a)could not have used it in that sense for the interests of raiyats and underraiyats have been specifically exempted under Section 4 from the operation of the vesting under the Act. Therefore, I thing that the word 'incumbrance' in Section 4 has been used in its general or dictionary meaning, that is, in the sense of 'a burden or charge upon property'.

If that is so then it follows that the word 'incumbrance' within the meaning of Section 4 (a) of the Act means nothing more than the incumbrance on those rights or properties which thereunder vest in the State as a result of the notification issued under Section 3 of the Act. And that is why it plainly says that on the issue of notification the estate with affect from that date shall vest absolutely in the State free from all incumbrances. That logically means that it refers to those rights which vest in the State and not those which do not. That being so, the incumbrance, if any, on the Tight which is saved by Section 6 of the Act cannot be adveresly affected as a result of

vesting under Section 3 or Section 4 (a) of that Act. In that view of the matter, though the agreement dated 15-6-1943, does not amount to an incumbrance within the meaning of burden or charge upon the right to possession over the zirat and bakasht lands specified therein, yet as that right does not vest along with the -estate in the State of Bihar on the issue of the notification trader Section 3 of the Land Reforms Act, the incumbrance is not in any way adversely affect or wiped out as a result of that notification. Therefore, the contention advanced by Mr. Harmandan Singh that on the vesting of the estate the agreement also ceased to have any force can-not be accepted.

14. Now I take up the fifth point, namely, what is the scope and implication of the phrase khas possession' as used in Section 6 of the Bihar Land reforms Act. It is true that the phrase 'khas possession' has to be read here within the meaning of its definition which is provided in Section 2 (k) of the Land Reforms Act, which says:

> " 'khas possession' used with reference to the possession of a proprietor or tenure-holder of any land used for agricultural or horticultural purposes means the possession of such proprietor or tenure-holder by cultivating such land or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock."

I think stress here has been given on two elements, firstly, on possession, as contemplated in law, namely, Juridical possession and, secondly, on the form in which the act of possession is exercised at the time of vesting by the outgoing proprietor. Now so far as culturable lands in a zamindari estate are concerned, possession over them by the proprietor under the scheme of the Bihar Tenancy Act is always taken to be either through tenants or directly without the intervention of any tenant. In the case of the former the possession being through tenants, he has no right to act in any way contrary to their statutory interest and much less to induct any other person in his place as a tenant thereof. But in the latter, where the possession over the same is without the intervention of any tenant, he may exercise his right as a proprietor over it in any form or manner that law permits and which, according to him, is advantageous to his interest; say even by inducting a tenant, and it is this possession which generally in the zamindari world is known as a case of khas possession. That means, the word 'khas' in relation to possession over lands in a zamindari estate connotes a possession of the proprietor without the intervention of any tenant and not an actual possession or physical possession. In other words, the word 'khas' conveys an idea of exclusiveness as opposed to the word 'am', which means general. In the case of possession through tenants, the possession cannot be said to be khas for it is a possession wherein others are also interested, namely in the case of agricultural lands, tenants; while, in the case of khas possession, the possession is exclusively of the proprietor without the intervention of any tenant.

Therefore, I think that the expression 'khas possession' in respect of culturable lands in Section 6 of the Land Reforms Act has been used in a technical sense and it means those lands which are in the private or personal possession of the landlord as contradistinguished with those which are in his possession through tenants. And it is for that reason that the definition directs that in the case of such a possession cultivation or horticultural operation should be done by the proprietor or tenure-holder himself with his own stock or by his own servants or by hired labour or with hired stock but in no case by a person who is its tenant; for once it is found that there is already a

tenant on that land then no other tenant can be inducted on it so long as the former is there. And as it was not in the scheme of the legislature that the statutory settlement of the bakasht and zirat lands with the outgoing proprietor should be made even at the cost of ejecting tenants who may be there from before so for the statutory settlement of such lands with them it was made a condition precedent that at the time when the estate vests in the State, the possession of the proprietor over the bakasht and zirat lands should be directly his, that is, should be through this servant or through hired labour or through a hired stock and not through a tenant. That being so, in my opinion, there is no justification for holding that the word 'khas' imports an idea of actual and not one as stated above or that the word 'possession' conveys the idea of physical possession or what is called occupation and not that of juridical possession. If that is so then to this extent Mr. Harinandan Singh is correct to say that because on
the date of vesting of the estate of the defendant proprietor the lands in dispute were in his khas possession, he became the statutory settlee thereof since that date qua the incoming State. But that does not mean, as already stated above, that this right to possession thus secured to the outgoing proprietor by the fiction of statutory settlement is in any way qua third parties or inter se between themselves any new the and not a continuation of the one which he had already in them from before as proprietor of the estate. And as the aforesaid right to possession does not vest in the State under Section 4 read with Section 6 of the Land Reforms Act, the incumbrance, if any, on it cannot be adversely affected by the vesting. Therefore so far as the rights of the third parties or the rights of the proprietors inter se in these lands are concerned, they remain intact and are not in any way effaced or destroyed. And if this is so, it necessarily follows from it that any agreement already arrived at in regard to the right of possession over such lands cannot be open to any frustration by the vesting of the defendant's estate in the State of Bihar. But what may possibly happen is that thereafter the State of Bihar by virtue of the powers given to it under the provisions of the Land Reforms Act may settle a rent for it at a rate higher than what was agreed upon between the parties under the agreement dated 15-6-1943. That means, the risk is there that the lands in dispute may be saddled with extra burden as a result of this statutory change but that cannot be a ground for the proprietor to say that the contract already entered into by him has been frustrated. The relevant law of frustration, as provided in Section 55 of the Contract Act, reads as follows:

> "A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

This contemplates that as a result of some subsequent event, the performance of the contract becomes totally impossible with the result that the law contemplates that it stands discharged. Here on the facts as stated above, I think it is difficult to hold that the vesting of the estate in the State of Bihar has made it impossible for the outgoing proprietor to fulfill the contract with regard to the bakasht and zirat lands which had already been entered into by him with the plaintiffs. Further, as that section is exhaustive on the doctrine of frustration, *Satyabrata v. Mugneeram*[17], there is no scope for looking at it from any larger point of view. So the contention of Mr. Harinandan Singh on the point of frustration has to be rejected. It is, however, to be made clear that in case the rent of the lands assessed by the State is at a rate higher than what is provided in the agreement, that may at best give an option to the lessee, as is contemplated under Section 15 of the Specific Relief Act, either not to enforce that contract or to enforce it on

condition that he would forgo that part of it which cannot be performed by the proprietor in view of the vesting of the estate in the State of Bihar. In other words, he has to accept the right of possession over the lands in dispute with rent asssessed by the State of Bihar and not on what had been originally agreed upon between them and the defendant landlord.

15. Then remain the questions as to hardship and as to costs and damages. I must confess, that in view of what I have stated, I am not in a position to find any ground justifying the plea of; hardship. The contract was entered into by the defendant
proprietor openly and with full understanding of the same. Further, as found by the trial court, which has not been challenged here, the party, if any, who was in default, was the proprietor defendant himself. Therefore, it does not lie in the mouth of the, proprietor defendant now to say that the enforcement of the contract would entail any hardship on him. Further, it has to be noted that according to the finding of the trial court a part of the nazarana money has already been paid by the plaintiff to the rehandars of the defendant proprietor and that in proof thereof they have taken back the rehan documents also. That unmistakably shows that originally the plaintiffs were willing to do their part of the contract, and when perhaps they scented that there was something wrong they stopped making further payments, which every prudent man in those circumstances would have done. Thus, the hardships if any, is in favour of the plaintiffs and not it favor of the proprietor defendant. Therefore, he is liable, as held by the trial court, to compensate the plaintiffs for the loss incurred by them due to the default made on his part. The agreement executed by the defendant proprietor specifically provides that-

> "If I fail to execute the perpetual patta with in the term, the claimant shall realize the entire amount paid by him to the creditors with interest at the rate of 1 per cent., per mensem from, the person and properties of me the executant. The claimant shall also be competent to get the patta executed or registered under the terms of the agreement by seeking relief in court.

Besides this he (he claimant) shall be competent to realize Rs. 1,600/- (Rupees one thousand and six hundred) and damages from the properties and person of me, the executant." Accordingly under the terms of the contract liability for compensation was two fold; first to pay interest at the rate of 1 per cent., per mensem on the money advanced by the plaintiff to the rehandars and secondly to pay them a lump sum compensation of Rs. 1600/- for being kept out of possession over the bakasht and zirat lands which had been agreed upon to be given in lease. By now a period of fourteen years have already elapsed from the date of the agreement. Therefore, it cannot be said that the amount of Rs. 1600/- is in any way exhorbitant or that that interest at the rate of 1 per cent., per mensem: on the money already paid to the rehandars is by itself sufficient to compensate the entire loss that the plaintiffs have suffered during all these years, due to the default committed by the defendant proprietor. In that view of the matter, I think there is no good reason made out for any interference with the order already passed by the trial court respect of damages and costs.

16. For the reasons stated above, I think there is no substance in this appeal and it is accordingly dismissed with costs.

S.C. MIsra, J.

17. I agree. I think it, however, necessary to add a few words in regard to the point raised by the learned counsel for the appellant. With regard to the provisions of Sections 4 and 6 of the Bihar Land Reforms Act, 1950, my learned brother has given detailed reasons as to why the contentions are not to be accepted. I would not cover the same ground. I would like to explain why the argument of the learned counsel for the appellant is not acceptable for further reasons as well. The first question for consideration is whether after the publication of the notification under sub-section (1) of Section 3, the estate of a proprietor or tenure-holder vests in the State of Bihar in toto. This question has been answered in the affirmative in the Full Bench decision of this Court in the case of 1957 BLJR 72, and this matter need not be pursued further.

18. The next question considered by my learned brother is with regard to whether the settlement made by an outgoing intermediary, whose estate has vested in the State of Bihar under the Land Reforms Act, of any land in his Khas possession is to be treated as an incumbrance. In my opinion, it is not so. Section 4 speaks of the vesting of an estate in the State of Bihar free from all incumbrances, but it saves the interests of raiyats or under-raiyats from the effect of the order of vesting except in regard to the relationship with their out-going landlord in whose place the State of Bihar would be substituted. The Legislature in plain terms, therefore, has laid down that the interests of raiyats and under-raiyats will not be treated as anything in the nature of an incumbrance. In the present case, the appellant is alleged to have made a settlement of the disputed property in favour of the respondents which property was in his Khas possession as the proprietor on payment of a lump sum consideration and the fixation of rent of one rupee per bigha, and the settlees were to hold that land in their Khas possession and cultivate it. Prima facie, the status of such a settlee would be that of a raiyat at a fixed rate, but he would be raiyat all the same. Even if he were to be treated as a tenure-holder holding the disputed land for cultivation, he would still be entitled to the privilege conferred on the tenure-holder under Section 6 of the Act. In any view, such an interest would not be an incumbrance and I think it unnecessary to enter into an elaborate consideration of the implications of the word "incumbrance" in relation to the Land Reforms Act for the decision of the present appeal.

19. The crucial question for consideration in deciding this appeal, however, is whether the decree in favour of the respondents for possession of the land can be upheld. The contention of the learned counsel for the appellant is that his client cannot be ordered to give possession to the plaintiffs-respondents of the disputed land in spite of the execution of the agreement to settle in their favor. He has relied upon Section 2 (jj) which, as I have said, lays down that an intermediary includes the proprietor, tenure-holder, under-tenure-holder and a trustee, and Section 6 which lays down that an intermediary in Khas possession of all private lands, privileged lands or lands used for agricultural and horticultural purposes as specified in that section, shall be deemed to hold that lands after the order of vesting as settled by the State with the intermediary. It is contended that on the date of the order of vesting, the appellant was in possession as proprietor. The right of the plaintiffs-respondents amounted only to a right to obtain possession, but they could not be held to be in Khas possession. In view of the clear words used in the section, the appellant alone could be deemed to be settlee from the State and any right which might be available to any person as against the appellant must be deemed to be obliterated as a result of the order of vesting.
In reply to the argument advanced by the learned counsel for the respondents that it would work injustice, the reply given by the learned counsel for the appellant is that the Legislature can

intervene in the matter if it thinks that the situation calls for a remedial legislation on the point. The Court of law is concerned with the law as it stands where the words have got to be given their plain meaning. In my opinion, the contention is not sound. What the learned counsel for the appellant invites us to accept is the narrow meaning of word "possession". It is well-settled that the word "possession" stands for a concept which is capable of different constructions according to the contexts. As was held by Kindersley, V. C. in *Wilton v. Colvin*[19], (T). in connection with the word "possession", the word may have three different meanings. In connection with the word "seised", it is often used as meaning to embrace all that the party is entitled to, both in realty and personalty; to embrace all interests which the party has or may have at any time, whether in possession, remainder or reversion; and vested or contingent. Possession is thus a concept which may be either a case of actual possession or legal or juridical possession. Possession may be possession in fact or possession in law or, otherwise put, actual or constructive possession. I think it unnecessary to define the various shades of meaning, but it is enough to mention here that when the word "possession" is used it will have to be construed with reference to the context in what sense it has been used. The Legislature may employ the word "possession" and it is for the law Court to interpret in what particular manner the word is to be understood in the context where it occurs. It has, however, been contended by the learned counsel for the appellant that the Legislature has used the phrase "Khas possession" and emphasis is upon the word "Khas", so that it must be taken as confining the privilege of Section 6 of the Act only to a proprietor or a tenure-holder who is himself in actual possession. In my opinion, however, it is not so. The words "Khas possession" in relation to the possession of the proprietor or tenure-holder under the Tenancy Law in India, in general, and in Bengal and Bihar, in particular, have been understood as referring to the possession of the proprietor or tenure-holder, as opposed to the possession of a tenant under him. When the Legislature, in enacting the Land Reforms' Act, used the two words in Section 6, it was evidently intended to distinguish the direct possession of the proprietor or tenure-holder as opposed to his possession of the land through a tenant. This is what is recognized in. Section 2 (k) of the Act. A concession was made in favor of the proprietor of tenure-holder in respect of such lands so that he would be deemed to be a raiyat with the right of occupancy in such land. The Legislature, in my opinion, never intended to lay down that a person in actual possession alone would be entitled to the privilege provided for in Section 6, but it intended to define the status.

A person enjoying the status of a landlord with land in his khas possession, and used for agricultural and horticultural purposes, as opposed to land in possession of the tenants, would be entitled to bold the land as having been settled with him by the State. Even Cls. a (i), a(ii), (b) and (c) of this section indicate that what is meant is status and not mere possession, in fact, juridical possession and not merely actual possession, right to take Khas possession and not mere physical possession. In Corpus Juris, volume 49, page 1095, it is stated,

> "Thus it appears that there may be different modes of acquiring and holding possession of land; and what constitutes possession in a given instance is sometimes difficult to determine, owing to the existence of qualifying circumstances."

Possession may thus connote ownership and also possession by relation of law to speak of the relation of the owner with his land in possession of a trespasser of which

[19](1856) 3 Drew, 617 at pp. 622-623

he can recover possession. To place upon it a construction, therefore, to the effect that emphasis

was laid by the Legislature on actual possession of the proprietor on the date of vesting would not be warranted.

20. This view of law is also supported with reference to a number of curious situation which might arise if the contrary view is accepted. Let us take for illustration a case where the bakasht land of the proprietor has been trespassed upon a few months prior to the order of vesting under Section 3 (1) of the Act by a wrong-doer so that it can well be contended that on the date of vesting the proprietor is not in actual possession.
In that view, he would not be entitled to be treated as a person who could hold the land as a raiyat. Under the general law of the land such a proprietor is entitled to institute a suit for recovery of possession, but the construction contended for by the learned counsel for the appellant would render his suit incompetent. This was never the intention of the Legislature, nor is there any provision in the Land Reforms Act contrary to the right of a person to institute a suit for recovery of possession of the land to which he is entitled, except in so far as when it concerns proprietary interest notice of the suit, appeal or proceeding must be given to the State Government. In fact, a suit for declaration of title in regard to the proprietary interest could not be rendered incompetent because, in any case, title has to be declared in order to determine the right of compensation. It is different what the agency to determine the compensation would be. It appears to me that, in view of these anomalies which are bound to arise if we interpret the words "Khas possession" in the narrow sense of "actual possession", the correct construction would be to take the word "possession" in a broad sense of right to possession as well, and the use of the word "Khas" does not militate against this construction. As I have indicated above, the Legislature has used the word "Khas" for the specific purpose of distinguishing such land from the constructive possession of the landlord of the land through a tenant.

21. Learned counsel for the appellant further contended that, in any case, the suit must be dismissed in view of sub-section (2) of Section 6. Sub-section (2) provides:

> "If the claim of (an intermediary) as to his khas possession over the lands referred to in sub-section (1) or as to the extent of such lands is disputed by any person prior to the determination of rent of such lands under the said sub-section, the Collector shall, on application, make such inquiry into the matter as he deems fit and pass such order as may appear to him to be just and proper." It has been contended that, in view of this provision, since there is a dispute in the present case also it must be determined by the Collector. In my opinion, this contention is also equally unsound. My learned brother has expressed the opinion that this section is intended to apply to the case of a dispute between the proprietor and the State and it does not contemplate that the Collector has jurisdiction to hold an enquiry and to decide the matter where one of the parties is a person other than the proprietor holding interest in the estate.

It may well be urged that the words of the section are plain and they are not confined to a dispute between the proprietors and the State. I have no objection to accepting such a contention and the order passed by the Collector will bind the parties. Such an order is appealable under Section 8 and it can not be challenged, in a Civil Court under the provisions of Section 35 of the Act. Section 35 provides that no suit shall be brought in any Civil Court in respect of any entry in or

omission from a Compensation Assessment-roll or in respect of any order passed under Chapter II etc., etc. Sections 6 and 8 occur in Chapter II, so that the jurisdiction of the Civil Court is barred in respect of such an order only. But even on a literal construction, the jurisdiction of the Civil Court is not generally barred. All that sub-section (2) provides is where such a dispute arises, the Collector shall, on application, make such enquiry into the matter as he deems fit and pass such order as may appear to him just and proper; but this does not in plain terms oust the jurisdiction of the Civil Court. Such a construction is also consistent with the terms of Section 35. To quote Section 35:

> "No suit shall be brought in any Civil Court in respect of any entry in or omission from a compensation Assessment-roll or in respect of any order passed under Chapters II to VI or concerning any matter which is or has already been the subject of any application made or proceedings taken under the said Chapters."

The finality attaches to the order passed under Chapters II to VI or concerning any matter which is or had already been the subject matter of any application made or proceedings taken under the said Chapters. Where, therefore, two co-proprietors and a proprietor and a third person are disputing for possession and an application has been filed before the Collector regarding it, the matter shall be enquired into by him and a decision given which shall be final subject to the appeal under Section 8. But Section 6(2) does not say that the jurisdiction is exclusive. It is well-settled that ouster of jurisdiction of the Civil Court is not to be easily presumed. If the Legislature intended that a dispute of the nature referred to in sub-section (2) of Section 6 is to be enquired into only by the Collector, there should have been a further provision that such a dispute cannot be laid before a Civil Court. In my opinion, therefore, there is no clear provision for the ouster of the jurisdiction of the Civil Court. Moreover, it would be inconsistent with the clear policy of the law that where a third person is disputing the title of the proprietor, where complicated questions may arise, he is bound to have it enquired by the Collector himself. The right of such a party to take the appeal to the highest tribunal as provided in the Code of Civil Procedure would thus be indirectly curtailed. Such a curtailment is not easily to be presumed. Very much so, as in the present case, a dispute with regard to the respondents' right to get Khas possession arose as early as the year 1946 and the respondents actually were granted a decree by the Court on 20-2-1948. If the Legislature intended that even where the Civil Court was already in seizin of such a dispute its jurisdiction must be vacated and all decrees and orders passed by the Civil Court must be equally vacated, there should have been a clear provision to that effect as in Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. which runs thus:

> "11(1). Notwithstanding anything contained in any agreement or law to the contrary and subject to the provisions of Section 12, where a tenant is in possession of any building, be shall not be liable to be evicted therefrom, whether in execution of a decree or otherwise, except....."

in my opinion, therefore, the contention of the learned counsel for the appellant that the Civil Court cannot pass a decree in a dispute relating to a property referred to in Section 6(1) of the Land Reforms Act, cannot be entertained.

22. In the result, it must be held that the appeal has no merit and it is dismissed with costs.

Appeal dismissed.

Cases Referred.

[1] AIR 1929 Ran 164
[2] AIR 1930 Bom 210
[3] AIR 1925 Cal 1087
[4] AIR 1917 Nag 207
[5]18 Ind Cas 496 (Lah)
[6] AIR 1934 Mad 418; AIR 1930 Bom 210
[7] ILR 10 Bom 101; and AIR 1925 Cal 1087
[8] AIR 1925 Cal 370
[9] ILR 33 Cal 502
[10] AIR 1924 Cal 558
[11] AIR 1930 Pat 356
[12](1903) 1 KB 881
[13]1957 BLJR 72 (FB)
[14]1957 BLJR 57
[15]2 NH 324 at p. 327
[16]2 NH 324 at p. 327
[17] AIR 1954 SC 44