PATNA HIGH COURT

Ramrudhar Singh

Vs

Dileshwar Singh

A.F.O.D. No. 322 of 1960

(Ramaswami, C.J, K. Sahai and N.L. Untwalia, JJ.)

09.09.1964

JUDGMENT

Sahai, J.

1. This Bench has been constituted to hear this appeal as some important points of law are involved.

2. This appeal by defendant No. 1, who was the only contesting defendant in the trial Court, arises out of a suit for partition of some lands situated in villages Tutikel and Sokarla in Ranchi District described in Schedule A and some move-able properties described in Schedule B attached to the plaint. The admitted genealogical table of the family is as follows : I may add that Balram Singh left two daughters also. They are Musammat Domni Kuer and Musammat Baidahi Kuer, defendants Nos. 5 and 6, respectively, in this suit. The parties are Bhogtas by caste.

3. The plaintiff's case is that the parties are governed by the Mitakshara School of Hindu Law, that the suit properties are joint ancestral properties, and that Bishambhar and Nilambar separated in status but there was no partition by metes and bounds. The lands described in schedule A were formerly majhias end bakasht lands; but, after the zamindari vested, they became raiyati lands of the parties. The plaintiff is entitled to a half share in the schedules A and B properties on partition.

4. The case of the defendant appellant is that, by custom, the rule of lineal primogeniture prevails in the family, that, by reason of this rule, the eldest brother gets the entire property and becomes the malik whereas the younger brother is merely given khorposh, that Bishambhar succeeded to Dular, and Balram succeeded to Bishambhar, that Balram gave some lands as khorposh grant to the plaintiff, and that the defendant-appellant succeeded to Balram and became the malik. On these grounds, his case is that the plaintiff is not entitled to partition or any share in the suit properties and that his suit is liable to be dismissed.

5. The learned Subordinate Judge, who tried the suit, held that there was no custom of lineal primogeniture in the family, that there was unity of title and possession between the plaintiff and

the contesting defendant, that the plaintiff was entitled to a half share in the immoveable properties described in Schedule A but not to any share in the moveable properties described in Schedule B. On these findings, he decreed the suit in part, and directed that the plaintiff would get his half share in Schedule A properties carved out by the appointment of a pleader commissioner.

6. Mr. L.K. Chaudhuri, who has appeared on behalf of the appellant, has urged the following three points :

> 1. That the rule of lineal primogeniture is the lex loci of Ranchi District, and, therefore, the learned Subordinate Judge ought to have held that this rule prevailed in the family of the parties.
> 2. That the custom of prevalence of the rule of primogeniture in the family of the parties has been established on the evidence adduced in the case.
> 3. That defendant No. 1 has been recognised by the State of Bihar under Section 6 of the Bihar Land Reforms Act, 1950 (hereinafter to be referred to as the Act), as the raiyat in respect of the lands in suit, and that the plaintiff is not entitled to any share in them. In this connection, he has urged that the authority of the Full Bench decision of this Court in *Sukhdeo Das v. Kashi Prasad Tewari*[1], has been shaken by the decisions of the Supreme Court in *Suraj Ahir v. Prithinath Singh*[2], and *Ram Ran Bijai Singh v. Behari Singh*[3],

I propose to consider these points in the order in which I have mentioned them.
7. Point No. 1 - Mr. Chaudhuri has drawn our attention to paragraph 253 of the Final Report by J. Reid, I. C. S. , on the Survey and Settlement Operations in the District of Ranchi from 1902 to 1910. In this paragraph, Mr. Reid has quoted Col. Dalton, the then Commissioner of Chota Nagpur Division, as having written, in 1875, about the jagirs held by people in Ranchi District as follows :

> "The ordinary Hindu Law does not apply to these estates (jagirs), as, by custom and under the provisions of a Regulation passed in 1800, primogeniture is 'admittedly' the 'lex loci".

Mr. Reid has, however, himself said :

> "Jagir tenures are also not partible. The law of primogeniture is the rule in the Maharaja's family. The eldest son, therefore, succeeds to the estate, the younger brothers being entitled only to maintenance grants. This custom has always regulated the succession to landed property among the various jagirdars and other tenure-holders, we are of the same family as the chief. Not only is this so, but 'nearly' all the subordinate tenure-holders, who are not of the same family, have adopted the same custom of succession to the exclusion of the ordinary Hindu law of inheritance. Its prevalence is so marked that even members of the lower castes, who become land-owners, such as the Rautias and Kurmis, 'usually adopt it'".

This passage shows that the rule of lineal primogeniture prevails in different branches of the Maharaja's family, and that, in so far as families belonging to other castes like the parties of this case are concerned, the use of the word 'nearly' and the words 'usually adopt it', which I have underlined (here into ' ') makes it clear that the rule is not one of universal application. Had the rule been really the 'lex loci', it should have applied without exception to all residents of the district, irrespective of caste or family. It seems to me, therefore, that Col. Dalton and Mr. Reid have loosely referred to the rule of primogeniture as the lex loci of the district. Their opinion in this respect is not correct. Indeed, Mr. Reid has said in the last sub-paragraph of paragraph 253 :

> "In a few cases of comparatively recent date, the decisions of the Civil and Revenue Courts tend to foster the idea that primogeniture is not the customary law. The decisions, however, appear to be based on an imperfect appreciation of the local usage, which it is not always easy to prove to the satisfaction of the Courts, however certain and ancient it may be. Should this tendency continue, in another half century a system of succession, which is entirely opposed to local usage, will have been introduced, with the calamitous result that most of the ancient estates of the district will be sub-divided and in the end transferred piecemeal to money lenders and other interlopers."

This passage shows that Mr. Reid felt that the rule of primogeniture should prevail for otherwise ancient estates would be ruined. It seems manifest, however, that the Courts could not accept a custom of the prevalence of the rule of primogeniture unless it was proved to their satisfaction that the custom was certain and ancient. Mr. Reid has himself said that it was not easy to prove this. That being so, I cannot accept that the rule of primogeniture was or is the lex loci of Ranchi District.

8. In *Gajendra Nath Sahi Deo v. Mathuralal Nath Sahi Deo*[4], Atkinson, J. has held that the rule of primogeniture is the lex loci of Chota Nagpur : but Chapman, J. has decided the case without coming to any such conclusion. In fact, Chapman, J. has observed towards the end of his judgment.

> "It is, in my view, important to avoid so far as possible making judicial pronouncements which are not absolutely necessary for the determination of a case as set out by the pleadings of the parties, more especially as such pronouncements tend in any event to precipitate and to fossilise legal conceptions which, in the case of Chota Nagpur of any rate, are probably transitional and temporary. There is also a peril of an opposite but equally serious kind, I mean the danger of antedating modern ideas."

In view of the grounds given by Chapman, J. for his decision, it is quite clear that the observation of Atkinson, J. that the rule of primogeniture was the lex loci of Chota Nagpur was in the nature of obiter dictum. I may also mention that Atkinson, J., while sitting with Jwala Prasad J., had to consider a similar question in *Ram Charan v. Harihar Mahto*[5], and he observed, with reference to his observations in Gajendra Nath Sahi Deo's case, 1 Pat LJ 109 that he and Chapman, J. were, in that case.

> "both satisfied beyond all doubt that on the Maharaja's estates and in his family the

> custom of impartibility and primogeniture was established in all cases. I went a little further and held that it was the lex loci of the province : I may have been right or I may have been wrong"

9. In *Rup Raj Rai v. Permanand Rai*[6], Macpherson, J., with whom Agarwala, J. agreed, has also held that the rule of primogeniture is the lex loci of Ranchi District. It appears, however, that the decision is really based upon the evidence adduced in that case, and that, while the learned Judges were concerned with the question whether the rule of primogeniture prevailed in the family of the parties, they were not concerned with the question as to whether the rule was the lex loci of the Ranchi District. It seems to me that the observation about the rule being the lex loci of the district cannot be accepted.

10. In *Harakhnath Ohdar v. Ganpat Rai*[7], Manohar Lall, J., with whom Harries, C.J. has agreed, has observed :

> "..... on the facts of each particular case it must be decided by the Courts of fact whether the parties, who belong to the aboriginal tribes in the District of Ranchi or Manbhum are governed by their own custom (to be proved) or by the Hindu law, that is to say in each case the Court of fact must find out whether the rule of primogeniture or the rule of agnatic succession or the rule of Hindu law applies ... As observed already, I am unable to assume that simply because the parties live in the Ranchi District and have obtained this jagir from the Maharaja of Chota Nagpur they must be assumed to be governed by the rule of primogeniture."

With great respect, I entirely agree with this observation. The rule of primogeniture cannot be held to be the lex loci of Chota Nagpur Division or Ranchi District. Whether or not this rule prevails by custom in any particular family or caste has to be proved to the satisfaction of the Court in each case, and it is the party which alleges the existence of this custom which must prove that it exists. I may add that, in paragraph 8 of his written statement, the defendant has alleged that the rule of primogeniture prevails in his family and not that it prevails by custom in his caste or in the whole district. In paragraphs 10 and 11 of the written statement, he has also referred to the fact that the rule of primogeniture prevails in his family as a family custom. The first point raised by learned counsel therefore, fails.

11. Point No. 2 - Mr. Chudhuri has taken us through the evidence, oral and documentary, with a view to persuade us to reach a conclusion different from that arrived at by the learned Subordinate Judge. It seems to me, however, that the learned Subordinate Judge has given good reasons for holding that the custom of prevalence of the rule of primogeniture in the family of the parties has not been established. It is unnecessary for me to repeat all his grounds; but I may refer to some salient features.

12. The plaintiff and his witnesses have denied the existence of such a family custom.
The contesting defendant has examined six witnesses. Sudheshwar Singh (D.W. 1)
has said that 'he rule of primogeniture prevails in his caste, and thus he speaks of a wider custom than that pleaded by the contesting defendant. He has stated that his grand-mother was given

khorposh; but the document (exhibit C) produced by him shows the grant of khorposh by a husband to his wife. This does not prove the existence of the rule of primogeniture. This witness has also said that Chhakan Singh was his grandfather and that his elder brother, Chandrabhan Singh, had given khorposh to Chhakan Singh. This is not supported by any document. Exhibit 1(b) is the khewat of village Takba, where this witness resides, and it shows Chandrabhan Singh recorded in khewat No. 3 with one Gobardhan Singh, the share of each being eight annas. This exhibit, therefore, does not support the witness, and, I think he has been rightly disbelieved.

13. Jagdunath Singh (D.W. 2) is a resident of village Sarangapani. He also speaks of the prevalence of the rule in his caste. He says that his father, Deonarain, got khorposh from his father, Rangnath. This witness goes to the length of saying that he does not know how many sons Rangnath had. I do not think that this witness can be relied upon.

14. D.Ws. 3 and 5 do not speak of any custom. D.W. 6 is the contesting defendant himself, and D.W. 4 is his karpardaz. They are interested witnesses.

15. Some judgments and khewats have been filed for the purpose of showing that the rule of primogeniture prevails in some other families. They are of no avail to show the prevalence of such a custom in the family of the parties. Though the cadastral survey Khewat (exhibit G) of village Tukikel shows that the name of Bishambhar Singh is entered under khewat No. 3 as a Khorposhdar, the revisional survey khewat (exhibit 1(e)) of the same village, prepared in 1930, shows that, under khewat No. 3, the names of both Bishambhar Singh and plaintiff Dileshwar Singh, son of Nilambar Singh, are entered as Khorposhdars, with the remark that they hold in equal shares. The cadastral survey khewat (exhibit 1(c)) and the revisional survey khewat (exhibit 1(d)) of village Sokarla show that the names of both Bishambhar and Dileshwar are entered as Khorposhdars with equal shares; It is manifest that these entries go against the case of the contesting defendant, and show that the plaintiff is also entitled to a half share in the lands of Tutikel and Sokarla. There is no entry of the kind found in Rup Raj Rai's case, AIR 1934 Patna 95 that, on separation, the plaintiff would merely get khorposh. In these circumstances there is no escape from the conclusion that the evidence adduced in the case does not establish that the rule of primogeniture prevails in the family of the parties. The second point raised by learned counsel also, therefore, fails.

16. Point No. 3-The intermediar, interests, in the two villages in question have, admittedly, vested in the State of Bihar under Section 4 of the Act. Exhibits F series are rent schedules prepared in 1958 and 1959 in respect of the lands of these two villages. The names of the applicants mentioned in column No. 3 are those of defendant Damrudhar Singh and his brother Jagarnath Singh (defendant No. 2).

17. Mr. Chaudhuri has argued that the lands referred to in the Schedules (exhibits F series) have been recorded in the names of the defendant and his brother under Section 6(1) of the Act, as they were found to be in their khas possession, and, therefore, whatever may be the position of Jagarnath Singh, the plaintiff has no right to a share in those lands on partition. In other words, his contention is that it is only the intermediary, who is in khas possession of land used for agricultural or horticultural purposes, who can be treated as occupancy raiyat in respect of that land. He urges that no intermediary, who is not in such khas possession on the date of vesting of his estate, is entitled to hold it us an occupancy raiyat, irrespective of whether he is a cosharer of

the intermediary who is in khas possession or the person in khas possession, a rank trespasser.

18. I do not think that the fact that the names of only the contesting defendant and Jagarnath have been entered in the rent schedules is a matter of importance. What has to be considered is whether, on a true construction of Section 6(1) of the Act, the suit lands in the two villages can be deemed to have been settled by the State of Bihar in favor of the plaintiff also.

19. At this stage, I may read the relevant parts of Section 6(1) :

> "(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 :
> X X X X X
> (c) lands used for agricultural or horticultural purposes forming the subject-matter of a subsisting mortgage on the redemption of which the intermediary is entitled to recover khas possession thereof;

shall, subject to the provisions of Sections 7A and 7B, 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 . ..." I may also quote the definition of the expression khas possession' in Section 2(k) of the Act :

> " '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;"

20. Leaving aside the cases referred to in clauses (a) to (c) of Section 6(1), which have been artificially included as being cases of "khas possession", Section 6(1) may be interpreted to mean that lands used for agricultural or horticultural purposes will be deemed to by settled by the State with (1) only that intermediary who was in actual cultivating possession; or (2) also the cosharers of the intermediary who was in such possession on the principle that the possession of one cosharer is the possession of all; or (3) even the intermediary who was not in such possession but had a sub sisting right to recover possession from a trespasser who had not yet perfected his title.

21. The word 'intermediary' has been used in Sections 6(1) and 2(k) in singular number; but it obviously includes plural. Section 15(2) of the Bihar and Orissa General Clauses Act (I of 1917) makes this clear. It follows that, if there are more intermediaries than one and all of them are in joint possession, the lands in their khas possession would be retained by the entire body of intermediaries as raiyats with occupancy rights. The question, however, will seriously arise, if one co-sharer is in actual cultivating possession of the lands, whether the settlement by the State will enure to his benefit alone or to the benefit of all his co-sharers along with him. There is no reason to suppose that the Bihar Land Reforms Act has impliedly, though not expressly,

abrogated settled principles of law unconnected with the object and purpose of its enactment. For instance, a family, consisting of two brothers had a family business as well as proprietary interest in a village. One brother looked after the business, and the other looked after the proprietary interest, including cultivation of the bakasht lands for agricultural or horticultural purposes. They separated in status but continued to look after the family business and the family intermediary interests as before. It would, undoubtedly, be unjust if the brother who was in actual cultivating possession of the lands on behalf of the family became the exclusive raiyat in respect of those lands when the estate vested, and was also held entitled to a share in the family business which was being looked after by the other brother.

22. The principle that one cosharer holds a property on behalf of all until he claims adversely to the rest or, in other words, there is ouster is well established. The object and purpose of the enactment were to remove intermediaries from their position between the State and the tenant, and I do not think that the well-established principle as to the rights of cosharers or co-owners was meant to be disturbed. There is no express provision of this kind in the Act, and an intention of the Legislature to abrogate that principle cannot he assumed.

23. A similar question arose for consideration before a Full Bench of this Court in Second Appeal No. 634 of 1959 reported in 1958 BLJR 559 . The appeal arose out of a suit for partition of certain plots of land in which the plaintiffs claimed a share. It was argued on behalf of the defendants-appellants that the disputed lands must be deemed to have been settled under Section 6(1) of the Act with the defendants who were in khas possession of the lands on the date of vesting, and, therefore, the interests of the plaintiffs, who were only cosharers, had been extinguished by operation of the Act, with the result that they were no longer entitled to seek partition. Jamuar, J. who has delivered the judgment of the Bench, has observed :

> "Even if one of the intermediaries is in cultivating possession, the land will be deemed to be settled with the entire body of the intermediaries interested therein, though for the time being some of the intermediaries were not in actual possession of the land. There is nothing in Section 6 to warrant exclusion of such intermediaries as are not in actual possession of the land on the date of the vesting". He has again said :
> "The possession of a co-owner is, in law, the possession of his other co-owners. The reason is that the possession of one co-owner who is entitled as such co-owner to be in possession of the property must be referred to his lawful title to enter and cannot, therefore, be considered adverse to other co-owners. If he wants to exclude the other co-owners from possession it is for him to make a declaration of ouster. Nothing short of ouster or something equivalent to ouster can bring about the cessation of the interest of the other co-owners. The possession of the co-owner, therefore, must enure to the benefit of all the co-owners whose title stands admitted and he cannot resist the suit for partition or possession of the other co-owner, although he may effectively use his possession against those having no title. In the case of *Asher v. Whitlock*[8], a similar principle was laid down."

His Lordship has further referred to Section 90 of the Indian Trusts Act, 1882 and has said :

> "Therefore, apart from the construction I have put on Section 6 in the light of the definition of the proprietor, tenure-holder and the intermediary under the existing law by virtue of Section 90 of the Trusts Act, the possession of a co-owner will enure to the benefit of the other co-owners wherever the co-owner by virtue of his position as such has gained any advantage in derogation of the interests of the other co-owners."

24. On the above considerations, the decree for partition passed in favour of the plaintiffs was affirmed. I may add, however, that there are some observations in the judgment to the effect that khas possession as contemplated by the Act would include a right to possession in a case where a trespasser is in possession, and has not perfected his title. The decision in *Brij Nandan Singh v. Jamuna Prasad*[9], in which similar views have been expressed was approved.

25. Mr. Chaudhuri has argued that the authority of the Full Bench decision has been shaken by the decision of the Supreme Court in 1963 BLJR 1 and 1963 BLJR 868 (SC). In Suraj Ahir's case, 1963 BLJR 1 the plaintiffs alleged that the defendants were mortgagees, and that they (the plaintiffs) had redeemed the mortgages in 1943. On the allegation that the defendants did not make over possession of the suit lands, the plaintiffs instituted their suit for declaration of title and recovery of possession Their Lordships held that the mortgage was not subsisting, and, therefore, clause (c) of Section 6(1) of the Act was not applicable. On an interpretation of the definition of 'khas possession' in Section 2(k) of the Act, they held that khas possession would not include the right to possession. They disapproved of the view expressed in 1958 BLJR 122 that khas possession would include subsisting title to possession, and therefore, a proprietor, whose right to get khas possession of the land was not barred by any provision of law would have a right to recover possession, and that the State of Bihar should treat him as a raiyat with occupancy right. Raghubar Dayal, J. observed.

> 'The mere fact that a proprietor had a subsisting title to possession over certain land on the date of vesting would not make that land under his 'khas possession'.

It is clear therefore that the land in suit can not be deemed to be settled with the respondents by the State in accordance with the provisions of Section 6 of the Act. In the absence of any such settlement, no rights over the land in suit remained in the respondents after the date of vesting, all their rights having vested in the State by virtue of Sub-Section (1) of Section 3 of the Act."

26. In Ram Ran Bijai Singh's case, 1963 BLJR 868 (SC) the defendants first and second parties claimed to be in possession of the lands in suit as tenants. They were alleged to have been inducted on the lands by mortgagees; but, ultimately, they claimed adversely not only to the mortgagors but also the mortgagees. The plaintiffs came into possession of some lands on redemption of the mortgages; but they could not get possession of the lands in suit. They, therefore, instituted the suit for recovery of possession of those lands. Their Lordships held that Section 6(1)(c) of the Act could not apply because there was no relationship of mortgagor and mortgagee between the plaintiffs on one side and the defendants first and second parties on the other on the 1st January 1955, when the estate vested in the State of Bihar. On this basis, they held that the lands could not be deemed to have been settled with the plaintiffs, and they were

not, therefore, entitled to recovery of possession.

27. Reference was made to the Full Bench decision in 1958 BIJR 559 and Ayyangar, J., who delivered the Judgment of the Court, observed, with reference to the decision, that therein,

> "the learned Judges appear to consider the possession even of a trespasser who has not perfected his title by adverse possession for the time requisite under the Indian Limitation Act as the khas possession of the true owner. We consider that this equation of the right to possession with 'khas possession' is not justified by principle or authority. Besides this is also inconsistent with the reasoning of the Full Bench by which constructive possession is treated as within the concept of khas possession."

Thus, the Supreme Court has disapproved of the observation made in the Full Bench decision of tills Court in Sukhdeo Das's case, 1958 BLJR 559 to the effect that khas possession includes a subsisting right to possession when the trespasser has not perfected his title.

28. There is nothing in either of the two judgments of the Supreme Court, which I have referred to above, to show that the main decision of the Full Bench to the effect that the possession of one co-sharer is the possession of all the co-sharers has at all been considered or disapproved of. Indeed, Ayyangar, J. has said in one part of his judgment in Ram Ran Bijai Singh's case, 1963 BLJR 868 (SC) that the Full Bench had held in Sukhdeo Das's case, 1958 BLJR 559 that the actual physical possession of one co-sharer was the khas possession of all the co-sharers, but has said nothing to show that he disapproved of this principle.

29. Mr. Chaudhuri has referred to an unreported decision of a Division Bench of this Court in *Harihar Giri v. Kaviraj Basudeva Nand*[10], and analogous case, disposed of on the 11th October, 1963 (Pat). Those cases also arose out of a suit for partition. S.P. Singh, J., who has delivered the Judgment of the Bench, has accepted the contention that, when the estate vested in the State of Bihar, a co-sharer, who was not in possession of lands used for agricultural or horticultural purposes, was not entitled to any interest in it. In support of this view, he has made reference to the decisions of the Supreme Court in Sura] Ahir's case, 1963 BLJR 1 and in Ram Ran Bijai Singh's case, 1963 BLJR 868 (SC). With great respect, I am unable to agree. In my judgment, it is necessary to keep in view the difference between two legal concepts; one being that the possession of one co-sharer is the possession of all until there is ouster, and another being that khas possession as defined in Section 2(k) of the Land Reforms Act does not include subsisting title to recover possession from a trespasser who has not yet perfected his title. The latter principle has been laid down by the Supreme Court in the two decisions referred to above, and, to the extent that the Full bench decision of this Court has observed otherwise, it must be held to have ceased to be authoritative. So far as the first principle is concerned, that has been accepted by the Full Bench of this Court, and, as I have already shown, it has not been considered or disapproved of by the Supreme Court in the two decisions. The learned Judges of the Division Bench have not analysed the decision of the Full Bench and those of the Supreme Court in order to find out the extent to which the Supreme Court decisions have affected the Full Bench decision. I am respectfully of opinion that the view expressed in the un-reported decision in Harihar Girl's case, F. A. No. 378 of 1959 dated 11-10-1963 (Pat) as to the applicability of the Supreme Court decisions in a suit for partition by one cosharer against others is not correct, and

must be overruled.

30. A Division Bench, consisting of Mahapatra and Tarkeshwar Nath, JJ. had occasion to consider the same question in another unreported decision in *Sidheshwar Mukherjee v. Bhubneshwar Pd. Narain Singh*[11], and analogous civil revision, disposed of on the 14th January, 1964 (Pat). Their Lordships have considered the Full Bench decision of this Court and both the Supreme Court decisions, and have come to the conclusion that the main principles laid down by the Full Bench has remained unaffected. Mahapatra, J. who has delivered the judgment of the Bench, has observed :

> "One part of the reasoning of the Full Bench decision was that the right to possession of a person can come within the meaning of khas possession of that person and by way of illustration, the right of possession against a trespasser, who had not matured his title by 12 years of such possession, was mentioned. The Supreme Court disapproved that but that does not mean and cannot be said to mean that the Supreme Court disapproved the other and the main part of the Full Bench decision, namely, the khas possession of one co-sharer, co-owner, co-ex-proprietor or co-ex-tenure-holder will be taken to be such khas possession of the entire body of such co-sharers, co-owners, co-exproprietors or co-ex-tenure-holders, as the case may be, and in that view a suit for partition by one of them in respect of the bakasht lands, in which possession is
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> left with the ex-intermediary under Section 6 of the Act, can be maintained in spite of the vesting of the estate."

The unreported decision in Harihar Giri's case, F. A. No. 378 of 1959 dated 11-10-1963 (Pat) was brought to the notice of their Lordships, but Mahapatra, J. observed :

> "I have endeavoured to point out that the two decisions of the Supreme Court are not against the concluding view of the Full Bench decision of this Court. If I am right there, then a co-sharer's khas possession will not stand in the way of the claim of another cosharer for partition of the bakasht lands after the vesting of the estate in the Government. The Full Bench decision in this respect is binding upon us. A different view about those two Supreme Court decisions vis-a-vis the Full Bench decision of this Court is not open to be adopted for our guidance"

31. Two other decisions of Mahaptra and Tarkeshwar Nath, JJ. have been referred to at the Bar. One is the case of *Ganesh Choudhary v. Mangal Prasad Singh*[12], The Supreme Court decision in Suraj Ahir's case, 1963 BLJR 1 was considered in that case, but the judgment proceeded upon a point which does not arise for consideration in the instant case. The other decision is in the case of *Phulchand Kahar v. Sarju Pd*[13]., In that case their Lordships have considered the decision in Rani Ran Bijai Singh's case. 1963 BLJR 868 (SC) and have held that a decree for recovery of possession in favour of the plaintiff against a trespasser, who was in possession on the date of vesting of the estate, cannot be sustained. There is no question in the present case of a trespasser having been in possession of the suit lands on the date of vesting of the estate.

32. I may also make reference to an unreported decision of Mahapatra and A.B.N. Sinha, JJ. in *Ram Bhushan Das v. Mt. Ramrati Kuer*[14], Following the Full Bench decision in the case of Sukhdeo Das, 1958 BLJR 559 : (MR 1958 Pat 630) and the unreported decision in Sidheshwar Mukherjee's case. First Appeal No. 572 of 1958 (Pat), Mahapatra, J., who has delivered the judgment of the Bench, has observed :

> "If the suit lands were in khas possession of a co-sharer proprietor on the date of vesting, it would be taken to be in khas possession of the entire body of the co-sharer proprietors, and, in that sense, all the co-sharers will be entitled in possession under Section 6."

33. In the result, the third point raised by Mr. Chaudhuri also fails. I hold that the plaintiff's suit for partition has been rightly decreed. The appeal, therefore fails, and it is dismissed with costs.

Ramaswami, C. J.

34. I agree.

Untwalia, J.

35. I also agree.

Appeal dismissed.

Cases Referred.

[1]1958 BLJR 559
[2]1963 BLJR 1
[3]1963 BLJR 868 (SC)
[4]1 Pat LJ 109
[5] AIR 1916 Pat 363
[6] AIR 1934 Pat 95
[7] AIR 1941 Pat 625
[8](1865) 1 QB 1
[9]1958 BLJR 122
[10] First Appeal No. 378 of 1959
[11] First Appeal No. 572 of 1958
[12]1963 BLJR 906
[13]1964 BLJR 13
[14] First Appeal No. 622 of 1958, dated 20-08-1964 (Pat)