

## **Azad Singh & Others vs Barkat Ullah Khan & Others on 26 April, 1983**

**Equivalent citations: 1983 AIR 1139, 1983 SCR (2) 927, AIR 1983 SUPREME COURT 1139, 1983 ALL. L. J. 633, 1983 (9) ALL LR 1 (R), 1983 UJ (SC) 450, (1983) 9 ALL LR 1, 1983 REVDEC 233, 1983 (3) SCC 111**

**Author: D.A. Desai**

**Bench: D.A. Desai, O. Chinnappa Reddy**

PETITIONER:  
AZAD SINGH & OTHERS

Vs.

RESPONDENT:  
BARKAT ULLAH KHAN & OTHERS

DATE OF JUDGMENT 26/04/1983

BENCH:  
DESAI, D.A.  
BENCH:  
DESAI, D.A.  
REDDY, O. CHINNAPPA (J)

CITATION:  
1983 AIR 1139                      1983 SCR (2) 927  
1983 SCC (3) 111                1983 SCALE (1) 469  
CITATOR INFO :  
D                      1988 SC 587 (14)

ACT:  
U.P. Zamindari Abolition and Land Reforms Act, 1950-s.  
12(1)-Interpretation of-Hereditary tenant-Thekedar under a  
Theka for personal cultivation necessary.  
U.P. Land Reforms (Supplementary) Act, 1952-S. 3-  
Interpretation of-Adhivasi-Cultivatory possession must be  
lawful.  
Words and Phrases-Cultivatory possession.

HEADNOTE:  
The plaintiffs, who were Thekedars, filed two suits for  
possession of land Leased out by the Zamindars to the  
defendants-lessees on the ground that since the Thekedars

had become hereditary tenants under s. 12 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and were in possession of that land on 1st day of May, 1950, the Zamindars had no right to grant lease and the lessees had no right to enter and remain in possession of that land after that date. The lessees pleaded that they were in cultivatory possession of the land during the year 1359 Fasli and were entitled to all the rights of adhivasis under the U.P. Land Reforms (Supplementary) Act, 1952. The trial court dismissed the suits observing that the Thekedars had acquired rights of hereditary tenants but the lessees were in cultivatory possession in 1359 Fasli who had therefore acquired the right of adhivasi. The first appellate court dismissed the appeals. The High Court in second appeal reversed the decision of the trial court and the first appellate court and decreed the suits. On appeal, it was contended that since there was no authority given to the Thekedars for personal cultivation of the lands comprised in the Theka the Thekedars did not acquire the right of hereditary tenants under s. 12 of the 1950 Act.

Dismissing the appeals,

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HELD: Section 12 of the 1950 Act provides that if any land was given to a person for personal cultivation by him on the 1st day of May 1950, as a Thekedar thereof, then because of the non-obstante clause occurring in sub-section (I) of section 12 the Thekedar would be deemed to be a hereditary tenant of the land entitled to hold the land as such and liable to pay rent at hereditary rates. If such hereditary tenant has lost possession he is entitled to regain his possession. If, however, the land was in the personal cultivation of the Thekedar who was appointed merely to collect rent from other tenants and incidentally allowed to cultivate the Sir, or Khudkasht land of the lessor then he will be a mere asami in accordance with section 13

928

of the Act. Before a Thekedar can claim the status of a hereditary tenant, A he must not only be a Thekedar but the Theka must be specifically granted for personal cultivation of the land included in the Theka by the Thekedar.

[931 H, 932 A-C]

Babu Noorul Hasan Khan v. Ram Prasad Singh and Ors [1980] I SCR 977 and Raghunandan Singh and Ors v. Brij Mohan Singh and Ors., [1980] 2 SCR 1063, referred to.

In the instant case the Theka was created exclusively for personal cultivation of the land involved in the Theka be the Thekedars and not as a consideration for some other duties to be performed by the Thekedars to the Zamindars. The Thekedars were in possession of the land and were personally cultivating the land on the 1st day of May, 1950. The Thekedars acquired the status of hereditary tenants under section 12 of the 1950 Act. [933 C-E]

Section 3 of the 1952 Act provides that any person who has not become a bhumidar, sirdar, adhivas. Or asami under the 1950 Act if he is in cultivatory possession of any land during the year 1359 Fasli and if the bhumidar or sirdar was not such a person, such person in cultivatory possession would acquire the status of an adhivasi. To obtain the benefit of section 3 the person claiming to be in cultivatory possession must show that his or her possession was lawful. [933 F-G, 934 F]

Sonawati and Ors. v. Sri Ram and Anr., [1968] I SCR 617, referred to.

In the instant case since the Thekedars had acquired the status of hereditary tenants as Theka was up to and inclusive of the year 1359 Fasli, the Zamindars had no right to induct lessees in possession after depriving the Thekedars of their possession and therefore possession of the lessees in 1359 Fasli was not lawful. Therefore the lessees did not acquire the right of adhivasi. [933 H, 935 A]

#### JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 282-283 of 1969.

Appeals by special leave from the Judgment and order dated the 15th October, 1968 of the Allahabad High Court in Second Civil Appeals Nos. 978/58 and 11 of 1959.

S. Rangarajan, Mrs. S. Bagga and Uma Jain for the Appellants.

K.L. Hathi, P.C. Kupur, R.S. Mehta, O.P. Verma and S.N. Singh for the Respondents.

The Judgment of the Court Was delivered by DESAI, J. These two appeals by special leave arise from two Suits filed by Barkatullah and Sahfiullah for possession of land more particularly set out at the foot of the plaint against the Zamindars and Prem Kumari and Noor Mohammad. Briefly stated the plaintiffs' case was that they were Thekadars and the Theka was taken for personally cultivating the land and therefore under sec. 12 of the U P. Zamindari Abolition and Land Reforms Act, 1950 ('1950 Act' for short), they have become hereditary tenants and they were in possession of land on 1st April 1960. It was alleged that the Zamindars had no right to lease the land after the plaintiffs became hereditary tenants yet Prem Kumari and Noor Mohammad took land on lease from Zamindars and entered possession after 1.4 1950. It was alleged that the lessees from the Zamindar had no right to remain in possession as against hereditary tenants. On this short ground the plaintiffs sought possession of the land.

The defendants were the Zamindars and two lessees contested the suit. The averments made in para 4 of the plaint were not controverted specifically and it was merely stated that they are subject to additional pleas. The only plea put forward on behalf of the lessees worth-noticing is that the lessees

were in cultivatory possession during the year 1359-F and being not a person who has become a bhumidar sirdar, Adhivasi or Asami is entitled to all the rights of Adhivasis under U.P. Land Reforms (Supplementary) Act, 1952 ('1952 Act' for short) The trial court dismissed the suit observing that the plaintiffs were Thekadars of the land and under sec. 12 of the 1950 Act have acquired rights of hereditary tenants but the lessees were in cultivatory possession in 1359-F and therefore have acquired the right of adhivasi. Thekanama was held to be defective on the question of Theka being given exclusively for personal cultivation. The two plaintiffs preferred two separate appeals and both the appeals were disposed of by the First Additional Civil and Sessions Judge, Gonda as per his judgment dated September 1, 1958. Broadly stated, the learned Judge agreed with the findings of the trial court and dismissed the appeals. The original plaintiffs carried the matter in . second appeal. Two separate appeals were preferred, by the time the appeals came up for hearing, a statement was made that both the plaintiffs have compromised the dispute inter Se and that the suit be treated as one and if the appeal is to be allowed, possession is to be given jointly to two appellants as against the respondents H The learned Judge disposed of both the appeals by common judgment reversing the decision of the trial court and the first appellate court holding that the plaintiffs had acquired the status of A hereditary tenants and were in possession on 1.5.1950 and, therefore, the Zamindars had no right to dispossess the plaintiffs and induct the two lessees in possession. It was further held that as the lessees came into possession under Zamindars who had no right to grant the lease possession of the lessees being thus unlawful against the plaintiffs, they could not have acquired the Adhivasi rights. Accordingly, the suit was decreed and a decree for possession was granted in favour of the plaintiffs. Hence these two appeals by special leave Both the original lessees have died and their heirs and legal representative are prosecuting these appeals.

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

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

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

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

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

It is not in dispute that the original plaintiffs were Thekedars. It was however contended that unless the Theka was exclusively for personal cultivation of the land comprised in the Theka, the Thekedars would not acquire the status of hereditary tenants. Sec. 12 which has been extracted herein before specifically provides that where any land is in personal cultivation of a person on the 1st day of May, 1950, as a Thekedar thereof and the Theka was made with a view to the cultivation of the land by such Thekedar personally then notwithstanding anything in any law, document or order of court, he shall be deemed to be hereditary tenant thereof entitled to hold, and when he has been ejected from the land after the said date, to regain possession as a hereditary tenant thereof liable to pay rent at hereditary rates. This section came in for interpretation in Babu Noorul Hasan Khan v. Ram Prasad Singh & Ors (1) wherein it was held that a Thekedar of an Estate ceases to have any right to hold or possess as such any land in such Estate with effect from the date of its vesting. But this is subject to two exceptions; one such being as enacted in 5. 12 which provides that if such land was in personal cultivation of a person on the 1st day of May, 1950, as a thekedar thereof and if the theka was made with a view to the A cultivation of land by such thekedar personally, then because of the non-obstante clause occurring in sub-sec. (I) of s. 12 of the Act, the Thekedar would be deemed to be a hereditary tenant of the land entitled to hold land as such and liable to pay rent at hereditary rates. If such hereditary tenant has lost possession he is entitled to regain his possession. It was further held that if, however, the land was in personal cultivation of the Thekedar merely as a Thekedar appointed to collect rent from other tenants and incidentally allowed to cultivate the Sir or Khudkasht land of the lessor then he will be a mere Asami in accordance with sec. 13(2) of the Act. This interpretation of sec. 12 was re-affirmed in Raghunandan Singh & Ors. v. Brij Mohan Singh & Ors(1) It would thus appear well-settled that before a Thekedar can claim the status of a hereditary tenant, he must not only be a Thekedar but the Theka must be specifically granted for personal cultivation of the land included in the Theka by the Thekedar.

The question therefore, is whether in this case the land included in the Theka of the original plaintiffs provided for personal cultivation of the land by the Thekedar or personal cultivation was incidental to other rights and obligations such as collection of rent . from the other tenants ? This would necessitate examination of the original document creating Theka. That was not read to us, but

Mr. Rangarajan relied upon the following observation in the judgment of the learned trial Judge:

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

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

If it is clearly established that the Theka was created exclusively for personal cultivation of the land by the Thekedars, the ratio of the decision of this Court would lead to the conclusion that the Thekedars acquired the status of the hereditary tenants under sec. 12 of the 1950 Act.

The only question then remains for the consideration is whether the original lessees acquired Adhivasis rights under sec. 3 of the 1952 Act. Sec. 3 which has been extracted herein before provides that any person who has not become a bhumidar, sirdar, adhivasi or asami under 1950 Act if he is in cultivatory possession of any land during the year 1359 Fasli and if the bhumidar or sirdar was not such a person, such a person in cultivatory possession would acquire the status of an adhivasi. The High Court then examined what is the significance of the expression 'cultivatory possession' in sec. 3. The High Court rightly held that if the Thekedars had acquired the status of hereditary tenants as Theka was up to and inclusive of the year 1359 Fasli, the Zamindars had no right to induct lessees in possession after depriving the Thekedars of their possession and therefore possession of the lessees was not lawful against the Thekedars. The High Court rightly held that the lessees could not be said to be in cultivatory possession of the land on the appointed day. In reaching this conclusion, the High Court relied upon a decision of this Court in *Sonawati & ors. v. Shri Ram Anr.*<sup>(1)</sup> The Court held as under:

"The expression "cultivatory possession" is not defined in the Act, but the Explanation clearly implies that the claimant must have a lawful right to be in possession of the land, and must not belong to the classes specified in the explanation. "Cultivatory possession" to be recognized for the purpose of the Act must be lawful and for the whole year 1359 Fasli. A trespasser who has no right to be in possession by merely entering upon the land forcibly or surreptitiously cannot be said to be a person in "cultivatory possession" within the meaning of s. 3 of U.P. Act of 1952. We are of the view that the Allahabad High Court was right in holding in Ram Krishna v. Bhagwan Baksh Singh(2) that a person who through force inducts himself over and into some land and succeeds in continuing his occupation over it cannot be said to be in cultivatory possession of that land so as to invest him with the rights of an asami or an adhivasi, and we are unable to agree with the subsequent judgment of a Full Bench of the Allahabad High Court in Nanhoo Mal v. Muloo and ors.(B) that occupation by a wrongdoer without any right to the land is 'cultivatory possession' within the meaning of s. 3 of the U.P. Act 31 of 1952".

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

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

H.S.K.

Appeals dismissed.