Madhu Kishwar & Ors vs State Of Bihar & Ors on 17 April, 1996

Equivalent citations: 1996 AIR 1864, 1996 SCC (5) 125, AIR 1996 SUPREME COURT 1864, 1996 (5) SCC 125, 1996 AIR SCW 2178, (1996) 4 JT 379 (SC), (1996) 1 HINDULR 610, (1996) 2 PAT LJR 133, (1996) 2 BLJ 327

Author: K. Ramaswamy

Bench: K. Ramaswamy, Kuldip Singh, M.M. Punchhi

PETITIONER:
MADHU KISHWAR & ORS.

Vs.

RESPONDENT:
STATE OF BIHAR & ORS.

DATE OF JUDGMENT: 17/04/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
KULDIP SINGH (J)
PUNCHHI, M.M.

CITATION:
1996 AIR 1864 1996 SCC (5) 125
JT 1996 (4) 379 1996 SCALE (3)640

ACT:

HEADNOTE:

JUDGMENT:

WITH WRIT PETITION (C) NO. 219 OF 1986 Juliana Lakra.

V. State of Bihar.

J U D G M E N T Punchhi, J.

In these two petitions under Article 32 of the Constitution, challenge is made to certain provisions of the Chota Nagpur Tenancy Act, 1908, (hereafter referred to as `the Act') which go to provide in favour of the male, succession to property in the male line, on the premise that the provisions are discriminatory and unfair against women and therefore, ultra vires the equality clause in the Constitution. A two-member Bench hearing these matters at one point of time on soliciting was conveyed the information that the State of Bihar had set up a Committee to consider the feasibility of appropriate amendments to the legislation and to examine the matter in detail. It was later brought to its notice that the Committee ultimately had come to the opinion that the people of the area, who were really concerned with the question of succession, were not interested in having the law changed, and that if the law be changed or so interpreted, letting estates go into the hands of female heirs, there would be great agitation and unrest in the area among the scheduled tribe people who have custom-based living. The two-member Bench then ordered as follows:

> "Scheduled tribe people are as much citizens as others and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the matter of succession to property with a view to maintaining cohesiveness in regard to Scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate. Since this aspect of the matter has not been examined by the State of Bihar and the feasibility of permitting inheritance and simultaneously regulating such inheritance for the purpose of ensuring that the property does not go out of the family by way of transfer or otherwise we are of the view that in the peculiar facts of the case the State of Bihar should re examine the matter. In these circumstances, instead of disposing of the two writ petitions by a final order, we adjourn the hearing thereof for three months and direct the State of Bihar to immediately take into consideration our order and under take the exercise indicated and report to the court by way of an affidavit and along with that a copy of the report may be furnished by the Committee to be set up by the State of Bihar."

In pursuance thereof, the State of Bihar has furnished an affidavit to the effect that a meeting of the Bihar Tribal Consultative Council was held on 31-7-1992, presided over by the Chief Minister and attended to by M.P.s and M.L.A.s of the tribal areas, besides various other Ministers and officers of the State, who on deliberations have expressed the view that they were not in favour of effecting any change in the provisions of the Act, as the land of the tribals may be alienated, which will not be in the interest of the tribal community at present. The matter was not closed, however, because the Council recommended that the proposal may widely be publicized in the tribal community and their various sub-castes may be prompted to give their opinion if they would like any change in the existing law. It is in this backdrop that these petitions were placed before this three-member Bench for disposal.

We have read with great admiration the opinion of our learned brother K, Ramaswamy,J. prepared after deep and tremendous research made on the conditions of the tribal societies in India, leave alone the State of Bihar, and in drawing a vivid picture of the distortions which appear in the regulation of succession to property in tribal societies, when tested on the touchstone of the codified

Hindu law now existing in the form of The Hindu Succession Act, 1956 etc. It is worth-while to account some legislation on the subject. The Hindu Succession Act governs and prescribes rules of succession applicable to a large majority of Indians being Hindus, Sikhs, Buddhists, Jains etc. whereunder since 1956, if not earlier, the female heir is put at par with a male heir. Next in the line of numbers is the Shariat Law, applicable to Muslims, whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets. Then comes the Indian Succession Act which applies to Christians and by and large to people not covered under the aforesaid two laws, conferring in a certain manner heirship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of section 2 of the Hindu Succession Act significantly provides that nothing contained in the Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government by means of a notification in the official gazette. Section 3(2) further provides that in the Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females. (Emphasis supplied). General rule of legislative practice is that unless there is anything repugnant in the subject or context, words importing the masculine gender used in statutes are to be taken to include females. Attention be drawn to Section 13 of the General Clauses Act. But in matters of succession the general rule of plurality would have to be applied with circumspection. The afore provision thus appears to have been inserted ex abundantl cautela. Even under Section 3 of the Indian Succession Act the State Government is empowered to exempt any race, sect or tribe from the operation of the Act and the tribes of Mundas, Oraons, Santals etc. in the State of Bihar, who are included in our concern, have been so exempted. Thus neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat Law is applicable to the custom governed tribals. And custom, as is well recognized, varies from people to people and region to region.

In face of these divisions and visible barricades put up by the sensitive tribal people valuing their own customs, traditions and usages, judicially enforcing on them the principles of personal laws K applicable to others, on an elitist approach or on equality principle, by judicial activism, is a difficult and mind-boggling effort. Brother K. Ramaswamy, J. seems to have taken the view that Indian legislatures (and governments too) would not prompt themselves to activate in this direction because of political reasons and in this situation, an activist Court, apolitical as it avowedly is, could get into action and legislate broadly on the lines as suggested by the petitioners in their written submissions. However, laudable, desirable and attractive the result may seem, it has happily been viewed by our learned brother that an activist court is not fully equipped to cope with the details and intricacies of the legislative subject and can at best advise and focus attention on the State polity on the problem and shake it from its slumber, goading it to awaken, march and reach the goal. for in whatever measure be the concern of the court, it compulsively needs to apply, somewhere and at sometime, brakes to its self-motion, described in judicial parlance as self restraint. We agree therefore with brother K. Ramaswamy, J. as summed up by him in the paragraph ending on page 36 of his judgment that under the circumstances it is not desirable to declare the customs of tribal inhabitants as offending Articles 14, 15 and 21 of the Constitution v and each case must be examined when full facts are placed before the Court.

With regard to the statutory provisions of the Act, he has proposed to the reading down of section 7 and 8 in order to preserve their constitutionality. This approach is available from page 36 onwards of his judgment. The words "male descendants" wherever occurring, would include "female descendants". It is also proposed that even though the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 in terms would not apply to the Scheduled Tribes, their general principles composing of justice, equity and fairplay would apply to them. On this basis it has been proposed to take the view that the Scheduled Tribe women would succeed to the estate of paternal parent, brother or husband as heirs by intestate succession and inherit the property in equal shares with the male heir with absolute rights as per the principles of Hindu Succession Act as also the Indian Succession Act. However much we may like the law to be so we regret our inability to subscribe to the means in achieving such objective. If this be the route of return on the Court's entering the thichet, it is for better that the court kept out of it. It is not far to imagine that there would follow a bee-line for similar claims in diverse situations, not stopping at tribal definitions, and a deafening uproar to bring other systems of law in line with the Hindu Succession Act and the Indian Succession Act as models. Rules of succession are indeed susceptible of providing differential treatment, not necessarily equal. Nonuniformities would not in all events violate Article 14. Judge-made amendments to provisionary over and above the available legislature, should normally be avoided. We are thus constrained to take this view, even though it may appear to be conservative, for adopting a cautious approach, and the one proposed our learned brother is, regretfully not acceptable to us.

The Chota Nagpur Tenancy Act was enacted in 1908. It's preamble suggests that it was a law to amend and consolidate certain enactments relating to the law of landlord and tenant and the settlement of rent in Chota Nagpur. It extends to North Chota Nagpur and South Chota Nagpur divisions, except areas which have been constituted as municipalities under the Bihar and Orissa Municipality Act, 1922. Chapter II, thereof providing classes of tenants containing Sections 4 to 8 is reproduced hereafter:

> CHAPTER II Section 4:
>
> CLASSES OF TENANTS - There shall be, for the purposes of this Act, the following classes of tenants, namely :
>
> (1) tenure-holder, including under- tenure-holders, (2) raiyats, namely :
>
> (a) occupancy-raiyats, that is to say, raiyats having a right of occupancy in the land held by them,
>
> (b) non-occupancy raiyats, that is to say, raiyats not having such a right of occupancy, and
>
> (c) raiyats having khunt-Katti rights.

(3) under raiyats, that is to say, tenants holding, whether immediately or immediately, under raiyats, and (4) Hundar Khunt-kattidars."

Section 5:

"MEANING OF 'TENURE-HOLDER' - Tenure-holder means primarily a person who has acquired from the proprietors or from another tenure- holder, a right to hold land for the purpose of collecting rents or bringing At under cultivation by establishing tenants on it, and includes

(a) the successors-in-interest of persons who have Acquired such a right, and

(b) the holders of tenures entered in any register prepared and confirmed under the Chota Nagpur Tenures Act, 1861, but does not include a Mundari khuntkattidar.

Section 6:

"MEANING OF RAIYAT -(1) 'Raiyat' means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have acquired such a right, but does not include a Mundari khunt-kattidar. Explanation- Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(2) A person shall not be deemed to be a raiyat unless he holds and either immediately under a proprietor or immediately under 3 tenure-holder or immediately under a mundari khunt-kattidar. (3) In determining whether a tenant is a tenure-holder or a raiyat, the court shall have regard to

(a) local custom, and

(b) the purpose for which the right of tenancy was originally acquired.

Section 7:

"(1) MEANING OF 'RAIYAT HAVING KHUNT-KHATTI RIGHTS' " Raiyat having--khunt katti rights' means a raiyat in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of the village or their descendants in the male line, when such raiyat is a member of the family which founded the village or a descendant in the male line of any member of such family:

Provided that no raiyat shall be deemed to have khunt katti rights in any land unless he and all his predecessors-in-title have held such land or obtained a title thereto by virtue of inheritance from the original founders of the village.

(2) Nothing in this Act shall prejudicially affect the rights of any person who has lawfully acquired a title to a khunt kattidari tenancy before the commencement of this Act.

Section 8:

"MEANING OF MUNDARI KHUNT-KATTIDAR 'Mundari khunt-kattidar' means a Mundari who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family, and includes -

3. (a) the heirs male in the line of any such Mundari, when they are in possession of such land or have any subsisting title thereto; and

(b) as regards any portions of such land which have remained continuously in the possession of any such Mundari and his descendants in the male line, such descendants.

At this place, Section 76 alongwith its illustrations would also need reproduction:

"76. SAVING OF CUSTOM - Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions.

ILLUSTRATIONS I. A custom or usage whereby a raiyat obtains a right of occupancy as soon as he is admitted to occupation of the tenancy, whether he is a settled raiyat of the village or not, is inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. This custom or usage, accordingly, wherever it exists, will not be affected by this Act.

II. A custom or usage by which an under raiyat can obtain rights similar to those of an occupancy raiyat is, similarly, not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act, and will not be affected by this Act.

III. A custom or usage whereby a raiyat is entitled to make improvements on his tenancy and to receive compensation therefor on ejectment is not inconsistent with, and is not expressly or by necessary implication modified or abolished by the provisions of this Act. That custom or usage accordingly, where it exists, will not be affected by this Act. IV. A custom or usage whereby korkar is held, -

(a) during preparation for cultivation, rent-free, or

(b) after preparation, at a rate of rent less than the rate payable for ordinary raiyati land in the same village, tenure or estate, is not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act.

That custom or usage accordingly, wherever it exists, will not by affected by this Act,"

A bare outline of these provisions goes to show that these have been enacted to identify classes of tenants. These provisions have no connection with the ownership of land. Section 3(XXVI) defines 'tenant' to mean a person who holds land under another and is, or but for a special contract would be. liable to pay rent for that land to that other person. Sub-section (1) of Section 4 is plainly tied up with Section S. Subsection (2)(d) & (b) of Section 4 is tied up with Section 6 and sequally with Section 76. Local customs, as the illustrations under Section 76 show, are for the purpose of streamlining the tenancy rights and landlord- tenant relationship. Sub-section (2)(c) of Section 4 in the same pattern is tied up with Section 7. Lastly sub-section (4) of Section 4 is tied up with Section 8 relating to "Mundari Khunt-kattidhar". All these tenants as classified, do not own the tenanted lands, but hold land under others.

Their tenancy rights are identified and regulated through these provisions. The personal laws of the tenants nowhere figure in the set up.

The solitary decided case available under section 8 of the Act and where personal law of the Mundari was allowed to intrude is Jitmohan Singh Munda v. Ramratan Singh and Another [1958 Bihar Journal Reports 373], There the learned Judges of the High a Court comprising the Bench seem to have differed on the applicability of section 8 but not on its scope. The case there established was that the Mundari Khunt Kattidar deceased was of Hindu religion and on that basis it was held that his widow could retain possession of the tenancy rights of her deceased husband during her life time. The right of the male collateral to take possession was deferred by the intervening widow's life estate. This case could, in a sense, be taken as stare decisis, when none else is in the field, in order to take the cue that personal law of a female descendant of a Mundari Khunt Kattidar could steal the show and be section 8 would have to/read accordingly. But this case is decided on misreading of section 8. The earlier part of it providing the meaning of Mundari Khunt Kattidar has been overlooked. It has been assumed, on the basis of the latter part that the expression has an inclusive definition and thus would not exclude the Mundari's widow governed by Hindu Law. The High Court at page 375 of its report observed as follows:-

"The contention based on section 8 also terminologically cannot be accepted. In the first place, in defining Khunt Kattidar interest as quoted above, the 14 word used is 'includes' whereaftar occur clauses

> (a) and (b) containing reference to the male line of a Mundari. The word includes' cannot be taken to be exhaustive."

Jitmohan Singh's case can not thus be a guiding precedent. It is at best a decision on its own facts. There is no scope thus in reading down the provisions of section 8 and even that of section 7 so as to include female descendants alongside the male descendants in the context of section 7 and 8. It is only in the larger perspective of the Constitution can the answer to the problem be found.

Life is a precious gift of nature to a being. Right to life as a fundamental right stands enshrined in the Constitution. The right to livelihood is born of it. In Olga Tellis & Ors. v. Bombay Municipal Corporation and Others [AIR 1986 SC 180] this Court defined it in this manner in para 32 of the report:

> ".....The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood.
>
> If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas J. in Baksey, (1954) 347 M.D. 442 that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in Munn v. Illinois, (1877) 94 US 113, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh v. State of UP [1964(1) SCR 332].

And then in para 33:

> "Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any Court, are nevertheless fundamental in the governance of the country. The Principles contained in Arts.39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not. by affirmative action, be v compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21."

Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the ethers harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is what Section 7 and 8 recognize. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, grand-daughter, and others joint with him have, under Section 7 and 8, to make way to a male relatives within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognized, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in section 7 and 8 has to remain suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions. to be read as a burden to the statutory right of mala succession, entitling her to the status of an intervening limited dependent/descendents under section 7 and 8. In this manner alone, and upto this extent can female dependents/descendents be given some succour so that they do not become vagrant and destitutes. To this extent, it must be so held. We would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. The intervening right of female dependents/descendents under section 7 and 8 of the Act are carved out

to this extent, by suspending the exclusive right of the male succession till the female dependent/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose.

For the afore-going reasons, disposal of these writ petitions is ordered with the above relief to the female dependents/descendents. At the same time direction is issued to the State of Bihar to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law. It is also directed to examine the question of recommending to the Central Government whether the later would consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the a Indian Succession Act at this point of time in so far as the applicability of these provisions to the Scheduled Tribes in the State of Bihar is concerned. These writ petitions would on these directions stand disposed of making absolute the interim directions in favour of the writ petitioners for their protection. No Costs.