Gurucharan Singh vs Kamla Singh & Ors on 9 September, 1975

Equivalent citations: 1977 AIR, 5 1976 SCR (1) 739, AIR 1977 SUPREME COURT 5, 1976 2 SCC 152, 1976 (1) SCR 739, 1976 PATLJR 23

Author: V.R. Krishnaiyer

Bench: V.R. Krishnaiyer, A.C. Gupta, Syed Murtaza Fazalali

PETITIONER:
GURUCHARAN SINGH

Vs.

RESPONDENT:
KAMLA SINGH & Ors.

DATE OF JUDGMENT09/09/1975

BENCH:
KRISHNAIYER, V.R.
BENCH:
KRISHNAIYER, V.R.
GUPTA, A.C.
FAZALALI, SYED MURTAZA

CITATION:
1977 AIR 5 1976 SCR (1) 739
1976 SCC (2) 152
CITATOR INFO :
F 1978 SC 30 (2)
RF 1979 SC1769 (28)
R 1981 SC1284 (21)
RF 1991 SC 663 (10)

ACT:
Bihar Land Reforms Act, 1950, Sections 2K, 3, 4 and 6 and rule 7-H of the Rules-Khas possession-Right to possess if amounts to possession in law

HEADNOTE:
Section 3 of the Bihar Land Reforms Act, 1 950, transfers all interests in estates or tenures of a proprietor or tenure-holder to the State as from a date notified under section 4. Section 6 carves out of this land mass and leaves untouched, apart from raiyati holdings the bakasht lands in Khas possession of the 'intermediary' i.e.,

the prior full owner.

Several items of property were gifted by one Ram Badan Singh to his two wives whose names were duly mutated in the revenue register. By further gift deeds and transfers the lands covered by the original gift deeds can to vest in the plaintiff and defendants, second party. They divided them as per a partition deed Exhibit 4/a dated October 30, 1952 whereby the suit lands fell to the exclusive share, of the plaintiff along with some other items while other properties were similarly allotted to defendants 2nd party. Despite this fact defendants, second party, sold the suit lands to the defendants first party alleging an oral partition sometime before August 1952 and under cover of that ease, committed trespass. Thereupon, a scramble for possession of these properties and a proceeding under s. 145 Cr. P.C. ensued in which the defendants, first party, got their possession upheld by Magistrate's order dated S-4-1954. The plaintiff brought the present suit in April 1955 for a declaration of' his title, for possession and mesne profits on the score that his exclusive possession was by force taken away in July-August 1954 by defendants first party the latter put forward the plea of prior oral partition and exclusive hostile possession, tracing their claim through defendants second party. The courts of tact found against the defendants and decreed the suit, but in Letters Patent Appeal, the respondents i.e., the defendants 1st party succeeded on the ground that the plaintiff had lost his title on account of the operation of sections 3 and 4 of the Bihar Land Reforms Act, 1950.

In this appeal filed on the basis of the special leave granted by this court, it was contended for the appellant that (i) Section 6 of the Act applied to the facts of the case and so there was no vesting of title in the State of the suit lands; (ii) This case, resting on the Act, which had been on the statute book for several' years, had not been set up at the earlier stages of the litigation at and should not have been permitted at the Letters Patent Appeal stage in the High Court for the first time; and (iii) The deed of partition was not legally divestative of rights in view of the provisions of the Estates Partition Act, 1897, which empowered the Collector along to partition the properties, which not having been done, the lands remained in co-ownership therefore the possession of' the defendants first party, was that of co-sharers. If that were so. the possession of one co-sharer was constructive possession of the other co-sharer and the plaintiff was thus in khas possession under s. 2k of the Act and, on that basis, s. 6 of the Act saved the disputed properties from vesting in the State.

Rejecting the contentions except to a small extent of modifying the decree,

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HELD: (i) It is well settled that a pure question of

law going to the root or the case and based on undisputed or proven f acts could be raised even before the Court of last resort, provided the opposite side was not taken by surprise or otherwise unfairly prejudiced [745-E-F]

Connecticut Fire Insurance Company v. Kavanach. [1892] A.C. 473, 480. referred to.

740

In the present case the new plea springs from the common case of the, parties and nothing which may work injustice by allowance of this contention has been made out. [746-A]

(ii) The Magistrate did not direct possession of the B-Schedule properties to be handed over to the defendants, first party, but declared their actual possession. He has done no wrong nor conferred any unjust advantage. There is no principle on which it could be held that these circumstances deprive . party of the benefit of his possession and of the dispossession of the plaintiff flowing from s.6 of the Act. [746D-E]

(iii) Neither the provisions of section 6(1) nor those of section 35 contain any prohibition against the civil court's power to decide the issue of the and right to possession of the plaintiff and, as a necessary corollary, the claim of actual possession set up by the defendants, first party. Nor can section 6(2) inferentially interdict the plenary power of the Civil court. [746.A B]

(iv) The partition is valid, it divests title it binds all. but, so far as land revenue liability is concerned, it relieves parties from the burden falling on the other sharer's land only if the exercise prescribed in the Estates Partition Act is gone through. The statute is a protective fiscal armour, not a monorail for division among co-owners to travel. Section 7 makes it clear. Not that Courts have lost power to decree partition nor that co-owners have become powerless to separate their shares voluntarily but that land revenue shall not be prejudiced without the procedure under that Act being gone through. More clinching is the fact that the plaintiff has here come to Court on the sole case of partition by metes and bounds and has founded his relief not as co sharer but as exclusive owner. [747 G-H, 748 Al

Mahanth Ram Bhushan Das V. Ramrati Kuer, 1965 Bihar L.J. 119, referred

(v) The purpose and purport of section 6(1) is to allow the large land holders to keep possession of small areas which may be designated as the private or privileged or mortgaged lands traditionally held directly and occasionally made-over to others, often servants or others, in the shape of leases or mortgages. It is obvious that section 6(1) uses the word 'including' to permit enlargement of the meaning of khas possession for the limited purpose of that section, emphasising thereby that, but for such enlargement, the expression khas possession excludes lands outstanding even

with temporary lessees. It is perfectly plain, therefore, that khas possession has been used in the restricted sense of actual possession and to the small extent it had to be enlarged for giving relief to proprietors in respect of 'private', 'privileged' and mortgaged lands, inclusive expressions had to be employed. Khas possession is actual possession. Constructive possession or possession in law is what is covered by sub-clauses of section 6(1). It is not correct to say mat possession is so wide as to include a mere right to possess, when the actual dominion over the property is held by one in hostility to the former.. [751-AB, G-H, 752-C-E.]

(vi) In Anglo American jurisprudence also possession is actual possession and in a limited set of cases, may include constructive possession, but when there is a bare right to possess bereft of any dominion or factum of control, it will be a strange legal travesty to assert that an owner is in possession merely because he has a right to possess when a rival, in the teeth of owner's opposition. is actually holding dominion and control over the land adversely, openly and continuously. This court has rejected the theory that the possession of a trespasser was that of the owner. [752 H, 753A, 754-D.]

Surajnath Ahir v. Prithinath Singh [1963] 3 S.C.R. 290, Ram Bijai Singh & Ors v. Behari Singh @ Bagandha Singh [1964] 3 S.C.R. 363 relied on.

Brij Nandan Singh v. Jamuna Prasad A.I.R. 1958 Pat. 589, referred to.

(vii) It is undeniable that the plaintiff had title to the entire Schedule properties as against defendants, first party, and second party. If defendants. first party, were not in possession the plaintiff would still be entitled for a decree

741

for possession of the same. If neither is in possession, the presumption that the owner is in possession holds good and he is entitled to that possession being restored to him. Therefore, the plaintiff is entitled to a decree for possession regarding the items of properly covered by paragraph, 27 of the written statement filed on behalf of the contesting defendants, first party. the rights of the State as against the plaintiff in regard these items of property, will not in any manner be effected. [754H. 755-A-B]

observation: Prima facie section 4 (f)and (g) of the Act and rule 7-H of the Rules framed under the Act attract the jurisdiction of the State and its revenue authorities. In the present case, the defendants, first party, are rank trespassers and have no equity in their favour. Section 4(f) declares that the Collectors shall be deemed to have taken charge of the estates and interests vested in the State. This means he has a public duty to take charge of lands vested in the State. Surely, a responsible public office

like the Collector, charged with duty of taking delivery of possession of lands which by virtue of the vesting the State is entitled to take direct possession, will proceed to disposses the trespasser. In this case, defendants, first party the trespassers and the plaintiff being out of the pale of section 6, the State ii entitled to the direct possession of the suit lands. [756B, 755-D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 716 of Appeal by Special Leave from the Judgment and order dated the 2nd March, 1967 of the Patna High Court in Letters Patent Appeal No. S of 1962.

S. C. Mishra and U. P. Singh for the appellant. S N. Prasad , A. K. Srivastava, M. S. Narasimhan and B. P. Singh for the respondents.

The Judgment of the Court was delivered by KRISHNA IYER, J.-This appeal, by special leave, turns substantially on the application of section 6 of the Bihar Land Reforms Act, 1950 (hereinafter called, the Act), to the case situation the facts having been decided concurrently and finally in favour of the appellant. Still he lost at the stage of the Letters Patent Appeal, because 3 Division Bench of the High Court held that he had been robbed of his right to sue by Section 6 of the Act.

We may set out the relevant facts briefly. Although a number of items of immovable property were involved in the suit, which was for ejectment on title. the lands now in dispute are bakasht lands in the 'B' Schedule to the plaint. for easy reference called suit lands. Regarding the rest the plaintiff's suit has been decreed. several items of property were gifted by one Ram Badan Singh to his two wives whose names were duly mutated in the revenue register. The further course of the proprietary history takes us to the creation of a wakf and the office of mutawalli which are not relevant to the controversy before us but are interesting when we remember that the donees were Hindus and yet they had executed a wakf and constituted themselves as mutawallis. This shows how community life absorbs and blends jural concepts, overriding religion in the creation of an inter- laced legal culture. This is by the way.

We may now take up the thread at the point where by further Gift deeds and transfers the lands covered be the original gift deeds case to vest in the plaintiff and defendants, second party. they divided them as per a partition deed Exhibit 4 'a dated (October 30, 1952 whereby the suit lands fell to the exclusive share of the plaintiff, along with some other items while other properties were similarly allotted to defendants 2nd party. Undaunted by this fact defendants, second ;3 party, sold the suit lands to the defendants first party alleging an oral partition sometime before August 1952 and under cover of that case, committed trespass. Thereupon, a scramble for possession these properties and a proceeding under s. 145 Cr.P.C. ensued in which the defendants, first party, got their possession upheld by the Magistrate`s order dated 5.4.1954. Inevitably the plaintiff brought the present suit in April 1955 for a declaration of his title, for possession and mesne profits on the

score that his exclusive possession was by force taken away in July-August 1954 by defendants, first party. The latter put forward the plea of prior oral partition and exclusive hostile possession, tracing their claim through defendants-second party. The courts of fact found against the defendants and decreed the suit as prayed for, but in Letters Patent Appeal, the present contestig respondents, i.e., the defendants 1st party, urged with success that the plaintiff had lost his title thanks to the operation of ss. 3 and 4 of the Act and could not salvage any interest under s. 6 thereof. The defeated plaintiff has come up to this Court, as appellant, assailing the findings of the High Court mainly on three grounds: According to Shri S. C. Misra, learned counsel for the appellant s. 6 of the Act applied to his case and so there was no vesting of title in the State of the suit lands. He further pressed that, any way, this case, resting on the Act, which had been on the statute block for several years had not been set up at the earlier stages of the litigation and should not have been permitted at the Letters Patent Appeal stage in the High Court for the first time. His third contention was that the deed of partition Exhibit 4/a was not legally divestative of rights in view of the provisions of the Estates Partition Act, 1897 which, in his submission, empowered the Collector alone to partition the properties, which not having been done, the lands remained in co ownership wherefore the possession of the defendants, first party, was that of co- sharers. If that were so, the possession of one co-sharer was constructive possession of the other co-sharer and the plaintiff was thus in khas possession under s. 2k of the Act and, on that basis, s. 6 of the Act saved the disputed properties from vesting in the State. All these three-fold contentions were sought to be repelled by counsel for the respondent and we proceed to examine them.

We may as well mention here, but dilate on it later, that certain items out of the B-Schedule bakasht lands are, on the showing of defendants second party, not in their possession, although the plaintiff has averred., in his pleading, dispossession of all the B-Schedule lands The legal impact of this circumstance on s. 4(a) and the schemes of the Act has to be gauged, in the context of the relief claimed by the plaintiff and the eligibility of possessory benefits of the contesting defendants.

The central issue obviously is the resolution of the competition between vesting of the suit lands in the State by virtue of ss. 3 and 4 and their exemption from such deprivation by the saving provision in s. 6 in favour of tile plaintiff.

A close-up of the profile of the land reform law would help us appreciate the purpose and programme of the statute and the meaning of the provision under construction . The project, as highlighted in the Preamble in grandiose and in keeping with Part IV of thus Constitution, but ill actual implementation drags its feet. Indeed, counsel on both sides were readily agreed only on one point, viz., that neither his Act nor the law setting a ceiling on land ownership slumbering the statue book since 1962, has been seriously enforced. The Ninth Schedule to the Constitution can immunise a legislation from forensic challenge but what schedule can invigorate a half-inert Administration into quick implementation of welfare-oriented, urgently needed, radical legislation now Lying mummified in the books ? If the assertion of non-implementation of land reforms laws made at the bar were true, the Bihar State Government has much to answer for to 'We the People of India' and to the stultified legislature whose 'reform' exercise remains in suspended animation. In this very case, before the High Court, the Advocate General has appeared for the plaintiff- landowner and yet the State has not bestirred itself to appear and claim the suit lands. We are left in obscurity on the vital

point, neither counsel nor the records throwing any light on whether the State has been given notice in the case in the High Court. The social transformation cherished by the Constitution involved re-ordering of the land system and a vigilant administration would have intervened in this 20-year-old litigation long ago and extinguished the private contest to the advantage of the State. The feudal will may, not unoften, furtively hide, in strategic positions may, be.

We may begin consideration of the merits of the rival cases by a broad projection of the Act. Its basic object is to extinguish the proprietary rights and transfer absolutely, and free from all private interests, such ownership to the Stat.. The tillers are not to be up rooted and so, they i.e., the raiyats and under-raiyats are to be settled on terms of fair rent. The Act, making; a simplistic dischotomy sufficient for our study, thus absolutely vests in the State all lands, freed from all private rights (sec.

3) as from a date notified under s. 4, but carves out of this land mass and leaves untouched. apart from raiyati holdings, the bakasht lands in the khas possession of the 'intermediary' i.e., the prior full owner (sec. 6). Lands not falling within the saved category will be directly managed by the State (sec. 13), if need be, by ejecting trespassers if they are found ill illegal occupation [sec. 4(g)]. 'rh valuable rights attached to or imbedded in lands, like trees, fisheries, minerals also go to the State. A seemingly bold legislation stroke of substantial land nationalisation will be reduced to pathetic futility if the flood-gates of evasion are kept ajar by plausible but diluted interpretation of s. 6 as urged by the landlords. The Court must suppress the mischief and advance the remedy . Indeed. if we may anticipate our conclusion, the pronouncements of this Court in Surajnath Ahir v.

Prithinath Singh(1) and Ram Ran Bijai Singh & Ors v. Behari Singh @ Bagandha Singh,(') bar and bolt the, door of escape in a big way and counsel for the appellant has striven to impress on us the need to reconsider and distinguish that view because it is inconsistent with vintage jurisprudence and Anglo-American concepts bearing on possession of an owner.

Let us get down to an openheart surgery in a limited way to check upon the soundness of this cardinal submission. The consternation expressed by appellant's counsel that the High Court's interpretation of sec. 6 will create rights in rank trespassers and distort and defeat the right to possess enjoyed by Zamindars does not, by itself, disturb us. We are in a juridical province of agrarian reform. The creative legal ideas needed to effectuate this developmental plan are conceptually alien to the old land law and 'rural' jurisprudence, wearing as they do radical contenance. The Court, in the process of construction must help the chariot of land reform move forward and sections 3 and 6 are the vital wheels.

Having regard to the significance of the State's presence even in private litigation bearing on eviction and the like, s. 4(ee) provides for notice to the State in certain classes of cases but the present suit and later proceedings are not covered by the term of s. 4(ee) and counsel on either side, when we enquired, did not show interest in taking steps to implead the State or otherwise to give notice to it in the present appeal. We have to Leave it at that. The consequence of non-impleader or absence of notice to the State will naturally be visited on the parties, in the sense that the State will not be bound by this adjudication and its rights vis-a-vis the plaintiff and the defendants, first party will remain unaffected. So also of other third parties on the suit lands.

We have already adverted to the skeletal scheme of the Act, of vesting the lands in the State and saving in the hands of proprietors such lands as are in their khas possession, including certain categories spelt out in s.6 by settling them on fair rents under the State. So, the crucial concept of khas possession calls for judicial scrutiny rather closely so i-has loopholes for escape through the meshes of s.6 may not frustrate the land reform law itself. But what is legitimately due by way of legislative justice to erstwhile proprietors should not be denied. With this and in view, the Legislature has defined khas possession in s.2k which reads thus: G "2. Definitions-In this Act, unless there is anything repugnant in the subject or context,-

(k) '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 (1) [1963] 3 S.C.R. 290. (2) [1964] 3 S.C.R. 363.

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; Explanation :-"Land used for horticultural purposes"' means lands used for the purpose of growing fruits, flowers or vegetables."

He who runs and read will readily make out that what is meant is actual possession with one's feet on the land, plough in the field and hands in the soil, although hired labour is also contemplated. The emphatic point is that possession is actual possession and admits of no dilution except to the extent s.6 itself, by an inclusive process permits. This basic idea banishes the importation of the right to possess as tantamount to khas possession. It would be a perversion of definition to equate the two. Of course, Shri S. C. Misra, appearing for the appellant, has preset before us that jurisprudentially even the right to possess should be regarded as possession. Indeed, this Court has had occasion to consider and construe the relevant provision in Surajnath Ahir and Ram Ran Bijai Singh (supra) and our task is largely to explain and adopt.

Before we examine this quintessential aspect presented before us will complex scholarship by Shri S. C. Misra we Had better make. short shrift of certain other questions raised by him. He has desired ` us, by way of preliminary objection, not to give quarter to the plea, founded on s. 6 of the Act, to non-suit his client, since it was a point raised be nova at Letters Patent state. The High Court have thought to this objection but overruled it, if we may say so rightly. The Court narrated the twists and turns of factual and legal circumstances which served lo extenuate the omission to urge the point earlier but hit the nail on the head when it held that it was well-settled that a pure question of law going to the root of the case and based on undisputed or proven facts could be raised even before the Court of last resort, provided the opposite side was not taken by surprise or otherwise unfairly prejudiced. Lord Watson, in Connecticut Fire Insurance Company v. Kavanach,(1) stated the law thus:

> When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering

> which the Court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not any case to be followed unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts if fully investigated would have supported the new plea." (1) [1892] A. C. 473, 480.

17-L925SupCI /75 We agree with the High Court that the new plea springs from the common case of the parties, and nothing which may work injustice by allowance of this contention at the late stage of the Letters Patent Appeal has been made out to our satisfaction. Therefore, we proceed to consider the impact and applicability of s.6 of the Act to the circumstances of the present case.

Counsel for the appellant, in his turn, in this Court went a step further to raise two new points not urged in the prior state of the litigation. We have heard him but arc not persuaded to, agree with him. According to him, the defendants, first party, had stated in their written statement that their possession of the disputed items as based on the order of the Magistrate under s.145 Cr. P.C.`. That order having been found erroneous, no benefit could accrue to the defendants. So stated, it is a little obscure and indeed the point itself is obscure. There was a proceeding under s.145 Cr. P.C. before the criminal court in view of the dispute regarding the claims of actual possession. In the order of the Magistrate, the oral partition relied on by the defendants was held proved and the subsequent deed of partition relied on by the plaintiff held not been acted upon. Counsel says that this led to the occupation by trespass of the suit properties. Since the Magistrate's order had led to this prejudicial consequence it was not proper to permit the party to benefit by his own wrong founded on an 'actus curiae'. We see no force at all in this contention. The Magistrate did not direct possession of the B-shedule properties to be handed over to the defendants, first parts, but declared their actual possession. He has done no wrong nor conferred any unjust advantage. There is no principle on which it could be held that these circumstance deprive a party of the benefit of his possession and d of the dispossession of the plaintiff flowing from s.6 of the Act; if any rights accrued from a statutory provision, it could not withheld for the reasons urged by counsel for the appellant The next new discovery in this Court turns on the absence of jurisdiction of the civil court to give relief when the substance the matter falls within the special jurisdiction of the revenue authorities . Counsel submitted that this new point occurred to him on reflection and was being pressed by him because it had force . The plaintiff's prayer . for declaration of title and for- possession was negatived by the High Court in the light of s.6 of the Act wherein it was held that he had no khas possession and his interests could not in any manner be saved by that provision It was not a case of the defendant claiming or securing any relief regarding possession but the plaintiff"s title standing negatived. The suit itself was for ejectment on little and sans title, ejectment could not be granted The title of the plaintiff was sought to be rested on s.6 at the letters patent Appeal level but on a construction of that Provision the Court held against him In short the High Court did nothing to investigate into the possession of parties but on the admitted fact that the Defendants" first party, were in possession by trespass-the plaint alleges this-the Court Dismissed the suit, since s. 6 of the Act divested the plaintiff of his quondam proprietorship. Moreover, there is nothing in s. 35 of the Act, relied on by counsel to substantiate his submission, depriving the civil court of its jurisdiction to decide questions of declaration of title and consequential relief of possession. Section 35 deals with different types of suits Indeed, s.6(1) with which we are concerned, also contains no inhibition

against the civil court's power to decide the issue of title and right to possession of the plaintiff and, as a necessary corollary, the claim of actual possession set up by the defendants first party Nor, can s. 6(2) inferentially interdict the plenary power of the civil court. In short, the plea of bar of the restriction is specious and fails Another peripheral issue invoked before the High Court and here to undo the defendant's claim of exclusive possession and consequential absence of khas possession in the plaintiff was based on the provisions of the Estates Partition Act, 1897.

Shri Misra propounded what, unfortunately, strikes us as a fallacious proposition. He went to the extreme extent of maintaining that a partition of lands, to be valid, should be in terms of the Estates Partition Act, 1897 and. until then, a deed or decree effecting division by metes and bounds does not legally operate. If so, Ex.4/a remains an arrangement for separate enjoyment between co-owners, title continuing, joint. The follow-up of this reasoning is that the suit properties are in the possession of co-shares viz, defendants first party (derived from defendents., second party) and possession of one co-sharer is possession of the other. The plaintiff thus is in constrictive possession good enough to bring him into the rescue shelter provided by s.6 Of the Act. He relied on the ruling in Mahanth Ram Bhushan Das v. Ramrati Kuer(1) and the various provisions of the Estates partition Act to Make out his thesis. The support derived from the decision is more apparent than real because, as noticed by the High Court, the suit there was not, unlike here, brought on the foot of` a partition and the ruling(r laid down that any 'amicable division' among, co-sharer would not bind the Revenue until the partition was effected as visualised under the Estates Partition Act. Shri Misra's study of the provisions of the said Act is free from confusion, save in one fundamental respect That one point, missed by him, is that the whole statutory project is to protect the land revenue, not to affect title. The partition is valid, it divests title, it binds all; but, so far as land revenue liability is concerned, it relieves parties from the burden falling, on the other sharer's land only if the exercise prescribed in the Estates Partition Act is gone through. The statute is a Protective fiscal armour not a mono- for division among co-owners to travel. Section 7 makes it clear. Not that Courts have lost power to decree partition nor that co-owners have become impotent to separate their shares voluntarily but that land revenue shall not be prejudiced without the procedure under that Act being gone through. More clinching is the fact that the plaintiff has here come to Court on the sole case of partition by metes and bounds and has founded his relief not as co-sharer (1) 1965 Bihar L. J. 119.

but as exclusive owner. Seeming legal ingenuity has small chance in A court and to miss the point and pertinence of a measure is to travel to a wrong destination.

Now we come to the master problem presented at learned length by Shri S. C. Misra and deferentially listened to by us to discover its substance and the solution. 'A 'blind understanding' has been the result, and as his argument concluded we 'came out by the same door, as in (we) went'. It behaves us to set out counsel's submission and the setting of the Act to explain why we do not agree with him and what we regard is the master-key to the construction of section 6.

We must first appreciate that it is a land reform law we are interpreting and not just an ordinary statute. The social-economic thrust of the law in this area should not be retarded by judicial construction but filliped by the legal process, without departing from the plain meaning and

objective of the Act. We may delineate the content and contours of section 6 with which we arc directly concerned in the present case. The preamble to the Act, which sheds skylight on the statute, reads:

> "An Act to provide for the transference to the State of the interests of proprietors and tenure- holders in land and of the mortgages and lessees of such interests including in tersest in trees, forests, fishries, jalkars, ferries, hats bazaars. mines and minerals and to provide for the constitution of a l and Commission for the State of Bihar with powers to advise the State Government on the agrarian policy to be pursued by the State Government consequent upon such transference and for other matters connected therewith"

From this it is fairly clear that the legislative goal s to liquidate all intermediary interests and vest the ultimate ownership on land in the State. In this sense, the import of the Act is a tepid measure of land nationalisation. Section 3 in unmistakable language vests the absolute proprietorship in all the lands in Bihar in the State, the succeeding sections spell out details. F We may here read sections 3, 4(g) and 6(1) of the Act:

> "3. Notification vesting an estate or tenure in the State-
>
> (1) The State Government may, from time to time, by notification declare that the estates or tenures of a proprietor or tenure-holder, specified in the notification, have passed to and become vested in the State.
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> (2) The notification referred to in sub-section (1) shall be published in the official Gazette A copy of such notification shall be sent by registered post, with acknowledgement due, to the proprietor of the estate recorded in the general registers of revenue-

paying or revenue-free lands maintained under the Land Registration Act, 1876 (Ben. Act 7 of 1876), or in case where the estate is not entered in any such registers and in the case of tenure-holders, to the proprietor of the estate or to the tenureholder of the tenure is the Collector is in possession of a list of such proprietors or tenure-holders together with their addresses, and such posting shall be deemed to be sufficient service of the notification on such proprietor or., where such notification is sent book post to the tenure-holder, on such tenure-holder for the purposes of this Act.

(3) The publication of such notification, in the Official Gazette shall be conclusive evidence of the notice of the declaration to such proprietors or tenure-holders whose interests are affected by the notification"

"4. Consequences of the vesting of an estate or tenure in the State-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:

(g) Where by reason of the vesting of any estate or tenure or any part thereof in the State under provision of this Act, the Collector is of opinion that the State is entitled to the direct possession of any property he shall, by an order in writing served in the prescribed manner on the person in possession of such property, require him to deliver possession thereof to the State or show cause, if any, against the order within a time to be specified therein and if such person fails to deliver possession or show cause or if the Collector rejects any cause shown by such person after giving him a reasonable opportunity of being heard, the Collector shall for reasons to be recorded"

take or cause to be taken such steps or use or cause to be used such force as, in his opinion, may be necessary for securing compliance with the order or preventing a breach of the peace:

Provided that if the order under clause (g) is passed by an officer below the rank of the Collector of a district, an appeal shall, if preferred within sixty days of the order., lie to the Collector of the district and the Collector shall dispose of the appeal in accordance with the prescribed procedure"

"6. Certain other lands in khas possession of intermediaries to be retained by them on payment of rent as raiyats having occupancy rights-(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-

(a)(1) proprietor's private lands let out under a lease for a term of years or under a lease from year to year, referred to in section 116 of the Bihar A Tenancy Act, 1885 (8 of 1885),

(ii) landlord's privileged lands let out under a registered lease for a term exceeding one year or under a lease, written or oral" for a period of one year or less, referred to in section 43 of the Chota Nagpur Tenancy Act, 1908 (Ben. Act 6 of 1908),

(b) lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lease of an estate or tenure and cultivated by himself with his own stock or by his own servants or by hired labour or with hired stock, and

(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 section 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 r 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:

Provided that nothing contained in this sub-section shall entitle an intermediary to retain possession of any naukarana land or any land recorded as chaukidari or goraiti jagir or mafi goraiti in the record-of-rights or any other land in respect of which occupancy right has already accrued to a raiyat before the date of vesting.

Explantion.-For the purposes of this sub-section. 'naukarana land' means land held as a grant burdened with service in lieu of rent or held simply in lieu of wages for services to he rendered."

Although there is a blanket vesting of proprietorship in all the lands in the State, the legislation is careful, in this initial state of agrarian reform, not to be too deprivatory of the cultivating possession of those who have been tilling the land for long. Therefore, while the consequence of the vesting is stated to be annihilation of all interests, encumbrances and the like in the land, certain special categories of rights are saved. Thus, raiyats and under-raiyats are not dispossessed and their rights are preserved. The full proprietor's khas possession is if so not disturbed. Certainly. the large landholders, whose lands have for long been under tenancy, lose their lands to the State by virtue of the vesting operation (of course, compensation is provided for).

Nevertheless, the reform law concedes the continuance of a limited species of interests in favour of those Zamindars. The three-fold class of lands is brought into the saving bucket by including them in the khas possession of the proprietors. They are legislatively included in khas possession by an extended itemisation in section 6(1). The purpose and the purport of the provision is to allow the large land holders to keep possession of small areas which may be designated as the private or privileged or mortgaged lands traditionally held directly and occasionally made-over to others, often servants or others in the shape of leases or mortgages. The crucial point to remember is that section 3 in its total sweep" transfers all the interests in all lands to the State, the exception being lesser interests under the State set out in detail in sections 5, 6 and 7. So much so, any person who claims full title after the date of vesting notified under s. 4 has no longer any such proprietorship. All the same, he may have a lesser right if he falls within the saving provisions viz., sections 5, 6 and 7 Sections 5 and 7 do not apply here. The claim of the plaintiff is that he can sustain his right to recover possession in this suit, as coming within the oasis of section 6(1).

There is no case that the sub-clauses (a), (b) and (c) of section 1) 6(1) apply. Counsel's contention is that he comes within the ambit of the main paragraph, being allegedly in khas possession. To appreciate the further discussion, it is useful to recapitulate that the appellant has averred in his plaint that he had been dispossessed as early as 1954 by a brazen act of trespass by the contesting respondents who were holding adversely to him. Undaunted by this fatal fact counsel claimed to be in possession and argued still. The focus was turned by him on the concept of khas possession defined in section 2(k). He presented a historical perspective and suggested that the genesis of khas possession could be traced to the Bengal Tenancy Act, 1885. May be, the draftsmen might have drawn upon those earlier land tenure laws for facility, but we must understand right at the outset

that the Constitution of India has inaugurated a new jurisprudence as it were, guided by Part IV and reflected in Part II. When there has been a determined break with traditional jurisprudence and a big endeavour has been made to over-turn a feudal land system and substitute what may be called transformation of agrarian relations, we cannot hark back to the bygone jura or hold a new legislation captive within the confines of vanishing tenurial thought. De hors the historical links-a break-away from the past in the socio-legal system is not accomplished by worship of the manes of the law-khas possession means what the definition, in plain English, says. The definition clause is ordinarily a statutory dictionary, and viewed that way, we have in the early part of this judgment explained how it means actual, cultivatory possession-nothing less nothing else. Of course, section 6(1) makes a special addition by 'including' other demised lands by express enumeration.

Section 6 does not stop with merely saving lands in khas possession of the intermediary (erstwhile proprietor) but proceeds to include certain lands outstanding on temporary leases or mortgages with others.

as earlier indicated. These are private lands as known to the Bihar Tenancy Act, privileged lands as known to the Chota Nagpur Tenancy Act, land outstanding with mortgagees, pending redemption and lands which are actually being cultivated by the proprietor himself. Ordinarily what is outstanding with lessees and mortgagees may not fall within khas possession. The Legislature, however, thought that while: the permanent tiller's rights should be protected and therefore, raiyats and under-raiyats should have rights directly under the state, eliminating the private proprietors, the Zamindar or proprietor also should be allowed to hold under the State., on payment of fair rent, such lands as have been in his cultivatory possession and other lands which were really enjoyed as private or privileged lands or mortgaged with possession by him. With this end in view, section 6(1) enlarged its scope by including the special categories. The word 'include' is generally used in interpretation clauses in order to enlarge the meaning of that words or phrases occurring in the body of the statute. It is obvious that section 6(1) uses the word 'including' to permit enlargement of the meaning of khas possession for the limited purpose of that section, emphasising thereby that, but for such enlargement, the expression khas possession excludes lands outstanding even with temporary lessees. It is perfectly plain, therefore, that khas possession has been used in the restricted sense of actual possession and to the small extent it had to be enlarged for giving relief to proprietors in respect of 'private' 'privileged' and mortgaged lands inclusive expressions had to be employed. Khas possession is actual possession, that is "a foothold on the land, an actual entry, a possession in fact, a standing upon it, an occupation of it, as a real, administrative act done"(l). Constructive possession or possession in law is what is covered by the sub- clauses of section 6(1). Even so, it is impossible to conceive, although Shri Misra wanted us to accept, that possession is so wide as to include a mere right to possess, when the actual dominion over the property is held by one in hostility to the former. Possession, correctly understood, means effective, physical control or occupation. "The word possession is sometimes used inaccurately as synonymous with the right to possess". (Words and Phrases, 2nd Edn., John B. Sounders., p.151). "In the Dictionary of English Law (Earl Jowitt) 1959 at p. l 367 "possession" is defined as follows: 'possession, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical

control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidence by external signs for if the thing shows no signs of being under the control of anyone, it is not possessed; . . .' In the end of all, however the meaning of 'possession' must depend on the context." (ibid. p. 153). May be, in certain situations, possession may cover right to possess. It is thus clear that in Anglo- American jurisprudence also, possession is actual possession and in a limited set of cases, may include constructive possession, but when (1) American Jurisprudence, Words & Phrases Vol. 33, p. 103.

there is a bare right to possess bereft of any dominion or factum of control, it will be a strange legal travesty to assert that an owner is in possession merely because he has a right to possess when a rival, in the teeth of owner's opposition, is actually holding dominion and control over the land adversely, openly and continuously. Admittedly in the present case" the possession of the plaintiff had ceased totally at least two years before the vesting under section 4 took place. This situation excludes khas possession.

We have the uniform authority of this Court to hold that the possession of a trespasser, by no stretch of imagination, can be deemed to be khas possession or even constructive possession of the owner. In Surajnath Ahir (supra) this Court considered the definition of khas possession in the Act in the context of section and after adverting to Brij Nandan Singh v. Jamuna Prasad, on which Shri Misra placed massive reliance, observed:

> "Reliance was placed by the High Court on the case reported as Brijnandan Singh v. Jamuna Prasad for the construction put on the expression 'khas possession' to include subsisting title to possession as well, and therefore for holding that any proprietor, whose right to get khas possession of the land is not barred by any provision of law, will have a right to recover possession and that the State of Bihar shall treat him as a raiyat with occupancy right and not as trespasser. We do not agree with this view when the definition of khas possession' means the possession of a proprietor or tenure-holder either by cultivating such land himself with his own stock or by his own servants or by hired labour or with hired stock. The mere fact that a proprietor has a subsisting title to possession over certain land on the date of vesting would not make that land under his 'khas possession' ".

The attempt to distinguish this decision on the score that the observation is obiter does not appeal to us and the rule laid down there is in conformity with the principle as we have earlier expounded. The law has been indubitably laid down in Ram Ran Bijai Singh (supra) where a Bench of five Judges of this Court discussed khas possession in section 2k and the scope of section 6 of the Act. The same Full Bench(1) case earlier referred to was pressed before the learned Judges, and over-ruling that case, Ayyangar,, J. speaking for the Court stated the law in these unmincing words:

> "Mr. Sarjoo Prasad however relied on certain observations in the judgment of the Full Bench of the Patna High Court in Sukdeo Das v. Kashi Prasad where 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' (1) A.I.R. 1958 Pat. 589.

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.

The possession of the contesting defendants in the present case was in their own right and adverse to the plaintiff, even on the case with which the appellants themselves came into Court." .. In this context the plea made by the plaintiffs relevant to the character of the possession of the contesting defendants assumes crucial importance, for if they were admittedly trespassers then they could not be said to hold the property on behalf of the mortgagors and the entire basis of the argument as to the property being ill the khas possession of the plaintiffs would disappear.. It was on the basis of their possession being wrongful that a claim was made against them for mesne profits and it was on the footing of their being trespassers that they were sued and possession sought to be recovered from them. In these circumstances we consider that it is not possible for the appellants to contend that these tenants were in possession of the property on behalf of the mortgagor and in the character of their rights being derived from the mortgagor.' The Court rejected the theory that the possession of a trespasser was that of the owner. Other decisions of the Patna High Court and this Court were referred to at the bar but the position having been made unmistakable by the two cases just mentioned, we do not wish to burden this judgment-with case law any further.

The conclusion we, therefore, draw is that on the facts found-indeed, on the facts averred in the plaint-the plaintiff had no khas possession of the suit lands and cannot use section 6 as a rescue raft. His title was lost when section 4 was notified as applicable to the suit lands by section 3 in 1956. Without title he could not maintain the action for recovery of possession. But that is not the end of the matter. He is certainly entitled to mesne profits from the defendants, first party, until the date of vesting, i.e." January 1, 1956. We, grant him a decree in this behalf subject to the qualification mentioned below. Again, the contesting defendants, in paragraph 27 of their written statement, have admitted that they had no possession of or connection with some of the plots mentioned in Schedule to the plaint and set out therein. The High Court has dismissed the suit in entirety after noticing the admission of the contesting defendants that they have not been in possession of those items covered by paragraph 27 of the written statement. The plea in that paragraph is that these lands have been made over to the defendants, second party. It is undeniable that the plaintiff had title to the entire Schedule properties as against defendants. first party, and second party. If defendants, first party. were not in possession and defendants, second party,, were in possession, the plaintiff would still be entitled to a decree for possession of the same. It neither is in possession the presumption that the owner is in possession holds good and he is entitled to that possession being restored to him. Therefore, a decree for possession of these items covered by paragraph 7 of the written statement filed on behalf of the contesting defendants, first party, is also granted. Here we must utter a word of caution and condition our decree accordingly. The State, by the vesting operation, has become the owner and very probably the plaintiff cannot sustain any claim to be in possession as against the State. While we do not investigate this aspect, we wish to make it perfectly plain that the rights of the State, as against the plaintiff, in regard to the items for which we are giving him a decree, will

not in any manner be affected. Likewise, if some third party is in possession of those items unclaimed by the defendants, first party, their possession, if any, also will not be prejudiced. After all, the decree of this Court can bind and regulate the rights of the parties to the litigation and not others. Inevitably, the mesne profits which we have decreed will be confined to those items which are found to be in the possession of the defendants, first party.

There is a disturbing feature about this case. We have already indicated how there is an apparent indifference on the part of the State in securing its rights granted by the Act. Here is a case where the - defendants, first party,, are rank trespassers and have no evident equity in their favour. Section 4(f) declares that the Collector shall be deemed to have taken charge of the estates and interests vested in the State This means he has a public duty to take charge of lands vested in the State. Surely, a responsible public officer like the Collector, charged with a duty of taking delivery of possession of lands which by virtue of the vesting the State is entitled to take direct possession of, will proceed to dispossess the trespasser. In this case, defendants first party, are trespassers and the plaintiff being out of the pale of section 6, the State is entitled to the direct possession of the suit lands. We expect the Collector to do his duty by section 4(g). Counsel for the respondents drew our attention to rule 7H:

> "7-H. How to deal with cases in which proprietor, etc.. not found in possession on the date of vesting-If the Collector holds on the report of enquiry held under rule 7-E or 7-F that the outgoing proprietor or tenure- holder, or his temporary lessee or mortgagee" was not in possession of the lands or buildings referred to in rule 7-G, he shall fix the fair rent or ground-rent thereof in the manner prescribed in these rules and the person who may be found to be in possession of such lands or buildings shall thereupon be liable to pay the rent or ground-rent so fixed to the State Government with effect from the date of vesting."

Although we need not elaborately study the implications of this pro vision, it is fairly clear that this rule does not confer any right or equity to be in possession in favour of d trespasser. All that it does is to make the man in possession, be he trespasser or not, "liable to pay the rent or ground-rent so fixed to the State Government with effect from the date of vesting.' It is the liability to pay rent that is created, not the equity to claim possession. After all, the land reform measure is intended to conserve as much land as is available in the hands of the State and any trespasser who distorts this claim and snatches possession, cannot benefit by his wrong. May be. there are special circumstances which may persuade the State to give possession of any land either to its erstwhile proprietor or to one who has been in long possession rightly of wrongly. We do not make any observation in that behalf but point out that prima facie section 4(f) and (g) and rule 7-H attract the jurisdiction of the State and its revenue 13 authorities. The policy of the Act includes the State taking over and managing lands not saved by sections 5, 6 and 7 and are not found to be in possession of the proprietor so that the eventual distribution to the landless and the like may be worked out smoothly.

The appeal is dismissed in substantial measure except to the extent of the relief by way of mesne profits and possession in regard to a few items mentioned in paragraph 27 of the contestants' written statement The parties will bear their costs throughout in the peculiar circumstances of the

case. This judgment will not affect the rights, if any. either party may seek or has secured from the State.

V.M.K. Appeal dismissed.