S.K. RahimuddIn and ors. Vs. Lakho Devi and ors.

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Court : Patna

Decided On : Dec-11-1977

Judge : M.Y. Eqbal, J.

Appeal No. : Civil Writ Jurisdiction Case No. 325 of 1988 (R)

Appellant : S.K. RahimuddIn and ors.

Respondent : Lakho Devi and ors.

Disposition : Applications Allowed

Judgement :

M.Y. Eqbal, J.

1. In this writ application, the petitioners have prayed for quashing the order dated 9.12.1986 passed by the respondent No.2 the Commissioner, South Chotanagpur Division, Ranchi, in Lohardaga Revenue Revision No. 376/86 and also the order dated 30.5.1986 passed by the respondent No. 3, Additional Collector, Lohardaga in S.A.R. Appeal No. 15-R 15 of 1976-77 and order dated 29.3.1976 passed by respondent No. 4, Special Officer, Lohardaga, in Section A. R. Case No. 73/75. By the aforesaid orders, the respondents authorities ordered for restoration of land in favour of the private respondents in purported exercise of jurisdiction under Section 71A of the Chotanagpur Tenancy Act.

2. The facts relevant for the disposal of this case are that the respondent No. 1 Somra Singh Kherwar (now substituted on account of his death), son of Budhu Kherwar initiated a proceeding for restoration of land measuring 1.27 acres of R. Section Plot No. 137 under R.S. Khata No. 40 of village Hesa Pirhi P.S. Lohardaga, Distt. Ranchi, under Section 71A of the said Act against the petitioners.

3. The case of the respondent No. 1 is that one Mostt. Rudni Kherwarni, wife of Murli Singh was the recorded raiyat in respect of the aforesaid land and the died intestate. The respondent No. 1 claims that he is the nephew of the recorded tenant of Mostt. Rudhni and is a landless person and on the basis of that, the respondent No. 1 claimed restoration of land alleged to have came in illegal possession of the petitioners.

4. The case of the petitioners is that the recorded tenant Mostt. Rudni Kherwani died issue less much before 1949 and the land was abandoned. The ex-landlord after few years entered into possession and made the land Bakast. Thereafter, in the year 1949 the ex-landlord settled 0.63 1/2 decimals of land in favour of Sk. Gandoor, father of the petitioner No. 1 who paid rent to the ex-landlord and after vesting, to the State of Bihar. It is further stated that the petitioner No. 2 is in possession of the land by virtue of sale made by the petitioner No. 1 in the year 1975. The petitioner No. 1 also sold 31 decimals of land in favour of the petitioner No. 3. It is stated that the settle always paid rent to the State of Bihar.

5. The Special Officer, Scheduled Area Regulation, after hearing the parties, allowed the application in terms of the order dated 29.3.1976 and ordered for restoration of the land in favour of the respondent No. 1. It was

held by the Special Officer that when the land was abandoned by the recorded tenant, the Ex-landlord ought to have taken permission of the Deputy Commissioner before making the said land as his bakast land. Since permission was not taken by the ex-landlord, there is violation of Section 73(2) of the said Act and therefore, the land is liable to be restored in favour of the respondent No. 1 Aggrieved by the said order, the petitioners preferred an appeal before the Additional Collector who dismissed the appeal affirming the order of the Special Officer. The appellate authority held that the application for restoration was not barred by limitation, inasmuch as the application was filed within 30 years from 17.1.1949 when the land was settled by the ex-landlord in favour of the father of the petitioner. The petitioners then moved the Commissioner of Chotanagpur Division by filing a Revision Application who dismissed the revision application in terms of the order dated 9.12.1986 holding that there was no ground to interfere with the orders passed by the respondents authorities.

6. Mr. L.K. Lal, learned Counsel for the petitioners assailed the impugned orders passed by the respondents authorities as being illegal and wholly without jurisdiction. The learned Counsel submitted that the respondent authorities have committed grave illegality in so far as it held that application under Section 71A of the Act is maintainable for violation of Section 73(2) of the said Act. The earned Counsel submitted that Section 73 is a self-contained provision and if there is violation of the aforesaid provision, then the remedy is provided under the same. According to the learned Counsel, prior permission of the Deputy Commissioner is not mandatory under the provisions of Section 73(2) of the said Act.

7. On the other hand, Mr. S.N. Sinha, learned Counsel appearing for the respondents supported the orders by submitting that the application under Section 71A of the said Act was well maintainable as the petitioners came in possession of the land on the basis of the settlement which was made by the ex-landlord in violation of the provisions of Section 73(2) of the said Act. According to the learned Counsel, the application for restoration is maintainable for violation of any of the provision of the Act, including Section 73(2) of the said Act.

8. Before appreciating the submissions advanced by the earned Counsel for the parties, it would be useful to look into the provision of Section 73 of the Chotanagpur Tenancy Act, 1908, which reads as under:

73, Abandonment of land by Raiyat-(1) if a Raiyat Voluntarily abandons the land held or cultivated by him, without notice to the landlord and ceases either himself or through any other person to cultivate the land and to pay his rent as it falls due, the landlord may at any time after the expiration of the agricultural year in which the Raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take into cultivation himself.

(2) Before a landlord enters under this Section, he shall send a notice to the Deputy Commissioners in the prescribed manner, stating that he has treated the holding as abandoned and is about to enter on it accordingly; and the Deputy Commissioner shall cause a notice of the fact to be published in the prescribed manner and if an objection is preferred to him within one month of the date of publication of the notice shall make a summary inquiry and shall decide whether the landlord is entitled under Sub-section (1) to enter on the holding. The landlord shall not enter on the holding unless and until such objection has been decided in his favour, or if no objection is preferred, until the expiration of one month from the date of publication of the notice.

(3) When a landlord enters under this section, the Raiyat shall be entitled to apply to the Deputy Commissioner for the recovery of possession of the land at any time not later than the expiration of three years in the case of an occupancy Raiyat or in the case of a non-occupancy Raiyat one year, from the date of the publication of the notice; and thereupon the Deputy Commissioner may on being satisfied that the Raiyat did not voluntarily abandon his holding, restore him to possession in the prescribed manner on such terms, if any, with respect to compensation to person injured and payment or arrears of rent as to the Deputy Commissioner may seem just.

This Section was adopted from Section 87 of the Bengal Tenancy Act, 1858, hereinafter to be referred to as 'the Bengal Tenancy Act', for shoot. Under the Bengal Tenancy Act, the provision of abandonment has been extended, to the under Raiyats also. From reading of Section 73 of the Chotanagpur Tenancy Act, 1908 (hereinafter to be referred to as 'the Act' for short), it is manifest that this provision gives right to the landlord to take possession of abandoned holding without preferring a suit. However, this section simply provides for certain steps to be taken by the landlord for his own protection against any subsequent action on the part of the tenant, when there is no person in actual possession of the land. The object of enactment of this provision has been dealt with in the book. 'The Chotanagpur Tenancy Act, 1908, by J. Reid.' at page-83 giving reference to the decision in Bhagaban Chandra Missir v. Bisseswari Debya (3 CWN 46) which reads as under:

Aboriginal raiyats in Chota Nagpur frequently desert their holding in periods of stress, and emigrate to the labour districts, without making any arrangements for the cultivation of the lands comprised within their tenancies, or for the payment of rent. They sometimes return in a year or two, and not un-commonly assert that they have not abandoned their tenancies. The object of the section is to safe guard the legitimate interests of the landlord in these cases, and per contra to protect the raiyats against fraudulent resumption.

It is well settled that in order to construe abandonment within the meaning of this section the following three elements should invariably be present: (i) a voluntary abandonment of holding without notice to the landlord (ii) absence of arrangement for payment of rent and (iii) cessation of cultivation of his holding. The cultivation of land and payment of rent are the two primary duties of tenant and the dereliction of such duties aggravated by voluntary departure from holding is strong evidence of the severance of the feudal tie leaving it open to landlord to re-enter. From reading of the provisions of Sub-section (2) of Section 73 of the Act. It appears that before entering into the holding it is incumbent upon the landlord to send notice to the Deputy Commissioner in prescribed manner stating that he has treated the holding as abandoned and he is about to enter on it accordingly. It is well settled that no notice is necessary to enable the landlord to obtain Khas possession of the holding. It is not the notice which terminates the tenancy, but the voluntary abandonment coupled with the facts on the part of the landlord indicating that he considers the tenancy at an end and it is for the court in such cases to determine whether the tendency has been terminated. This question was considered by this Court in the case of Safiuddin v. Lawrence Somra Kerketta and Anr. : AIR1956Pat186 and this Court observed as under:

The only difference between the landlord who has taken recourse to the requisite proceedings and one who has not done so is that a landlord, who has taken proceedings before the Deputy Commissioner, will have an indefeasible right by virtue of abandonment from the date of order recorded by the Deputy Commissioner treating the land as abandoned.

The landlord, however, who has not taken recourse to this proceeding can not claim indefeasible title and he may be defeated by suit being started by the person entitled to the property within twelve years of the commencement of possession of the landlord.

9. As noticed above, Sub-section (3) of Section 73 of the Act provides that when a landlord enters into the holding so abandoned, the Raiyat shall be entitled to apply to the Deputy Commissioner for the recovery of possession of the land at any time, not later than expiry of three years in the case occupancy raiyat, or, in the case of non-occupancy raiyat, one year from the date of publication of the notice. On such application being filed, the Dy. Commissioner when finds on the basis of evidence that the raiyat did not voluntarily abandoned his holding, restore him to possession on such terms with respect to compensation to person injured and payment of arrears of rent as the Dy. Commissioner may seem just. It means that if the landlord had entered on the land without following the procedure provided under Sub-section (2), the rule of law of limitation will apply.

10. If we go through the scheme of the Act, it will appear that the object of putting restriction on transfer by the member of the Schedule Tribe under Section 46 of the Act is to stop sale of holding by raiyats and to

restrict all forms of mortgage and thereby to save aboriginal population from falling into the clutches of the speculative money-lenders. The scheduled Area Regulation, 1969 was framed for the purpose of giving adequate safeguard to the aboriginals who were exploited by persons who are not members of the Scheduled Tribe. The scope of Section 71A of the Act is, therefore, extended to such extent that even if a raiyat belonging to a member of the Scheduled Tribe is forcefully dispossessed by any illegal means, then the land shall be restored to such raiyat. But the intention of the framer of the Regulation is not that if a raiyat voluntarily abandoned his holding and left any interest and the landlord resumed it as his own land even then, after expiry of 20/25 years, land will be restored by applying the provision of Section 71A of the Act and that too at the instance of a person having no blood relationship with the original raiyat and without any proof that the person claiming restoration is legally entitled to such holding.

11. As noticed above, in the instant case, there is admitted position that the recorded raiyat, who was a lady, died intestate much before 1949 and the land remained abandoned for so many years when the landlord entered into possession. Thereafter, the landlord settled the land in the year 1949 and the settle after coming into possession of the holding paid rent to the land-lord and to the State of Bihar after vesting of the stage and continuously exercised exclusive right, title, interest and possession for more than 12 years. It was only after 24-25 years of the settlement one person claiming himself to be the nephew of the recorded tenant filed an application under Section 71A of the Act for restoration of the land on the ground that he is the nephew of the recorded raiyat and is a landless person. In my opinion, this is not the aim and object of Section 71A of the Act. It is not the case of the person applying for restoration that either the land was not voluntarily abandonment by the recorded raiyat or that the ex-landlord or the settle came in possession of the land by fraudulent method or by illegally dispossessing the original raiyat, or any person claiming through him. Admittedly, before 1969 when the Regulation came into force, the settle from the ex-landlord perfected their title by remaining in possession for more than 12 year. It is not a case where the transfer of holding took place in contravention of the provisions of Section 46 of the Act or by any fraudulent method or transfer of the holding took place in contravention of the provisions of the Act. It is a case where the ex-landlord entered into possession of the abandoned land without following the procedure provided under Sub-section (2) of Section 73 of the Act, the remedy of which has been provided under Sub-section (3) of Section 73 of the Act; as held by this Court, in the event the procedure provided under Sub-section (2) is not followed by the landlord, then the land-lord cannot claim indefeasible title and the title of the land lord may be defeated by suit filed by the person entitled to the property within 12 years of the commencement of the possession of the landlord, Safiuddin v. Lawrence Somra Kerketta.

12. In the case of Manchegowda v. State of Karnataka AIR 1954 SC 1151, a question arose as to whether Sections 4 and 5 of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Land) Act, 1979 will apply to the Karnataka lands where transfer was made not in violation of the provisions of Sections 4 and 5 of that Act. The Apex Court held as under:

Though we have come to the conclusion that the Act is valid, yet, in our opinion, we have to make certain aspects clear Granted lands which had been transferred after the expiry of the period of prohibition do not come within the purview of the Act, and cannot be proceeded against under the provisions of this Act. The provisions of the Act make this position clear, as Sections 4 and 5 become applicable only when granted lands are transferred in breach of the condition relating to prohibition on transfer of such granted lands. Granted lands transferred before the commencement of the Act and not in contravention of prohibition on transfer are clearly beyond the scope and purview of the present Act. Also in case where granted lands hand been transferred before the commencement of the Act in violation of the condition regarding prohibition on such transfer and the transferee who had initially acquired only a voidable title in such granted lands had perfected his title in the granted lands by prescription by long and continuous enjoyment thereof in accordance with law before the commencement of the Act, such granted lands would also not come within the purview of the present Act, as the title of such transferees to the granted lands has been perfected before the commencement of the Act. Since at the date of the commencement of the Act the title of such transferees had

ceased to be voidable by reasons of acquisition of prescriptive rights on account of long and continued user for the requisite period, the title of such transferees could not be rendered void by virtue of the provisions of the Act without violating the constitutional guarantee. We must, therefore, read down the provisions of the Act by holding that the Act will apply to transfers of granted lands made in breach of the condition imposing prohibition on transfer of granted lands only in those, cases where the title acquired by the transferee was still voidable at the date of the commencement of the Act and had not lost its defensible character at the date when the Act came into force. Transferees of granted lands having a perfected and not avoidable title at the commencement of the Act must be held to be outside the pale of the provisions of the Act. Section 4 of the Act must be so constructed as not to have the effect of rendering void the title of any transferee which was not voidable at the date of the commencement of the Act.

13. It is a well settled proposition of law that the law of limitation fixing a period of limitation for initiating a suit or proceeding is a procedural law and not a substantive one. Section 71A of the Act had, by no stretch of imagination, the effect of reviving an extinguished and lost claim and giving life to a dead horse. I am, therefore, of the opinion that when the claim became barred by not invoking the provisions of Sub-section (3) of Section 73 of the Act till the petitioners and their predecessor in interest perfected their title by prescription and that too before coming into force of the Scheduled Area Regulation, 1969. In such circumstances, recourse cannot be had to by applying the provisions of Section 71A of the Act. In this connection, reference may be made to the principles laid down by the Supreme Court in the case of Yeshwant Rao v. Baburao : [1978]2SCR814 .

14. Thus, after giving my anxious consideration into the provisions of the abandonment as provided under the Act, I come to the conclusion that in a case where the landlord enters on the holding and resumes possess on without following the procedure provided under Sub-section (2), then an application at the instance of raiyat for recovery of possession of the land can be filed and the limitation for filing such application shall be governed by the ordinary rule of limitation. As held by this Court in the case of Safiuddin (supra), the limitation for filing such application is twelve years of the commencement of the possession of the landlord. Even if we apply the amended provision of Article 65 of the limitation Act, it shall be 30 years instead of 12 years. However, the authorities exercising the power must be satisfied on the basis of evidence adduced by the person claiming possession that either he is a raiyat or, he being the heir and legal representative of the raiyat is entitled to get back possession and such application must be filed within 30 years of commencement of possession of the land. It must also be proved that the raiyat did not voluntarily abandon his holding.

15. Applying the aforesaid principle in the instant case, I find that all the three ingredients are not present. The applicant although claimed himself to be the nephew of the raiyat has not led any evidence to that effect. Morever, there is no finding of any of the authorities that the applicant is, in fact, nephew of the recorded raiyat Mostt. Rudni Kherwarin. The original authority before whom the application under Section 71A of the Act was filed simply recorded in the order that the applicant is the nephew and landless person. The appellate authority on the other hand, has held that the question whether the applicant is the nephew or not is a question that can be decided only by civil court. However, at the same time, the appellate authority held that there is no reason to interfere with the finding of the Special Officer on this issue. There is no finding of the revisional authority. If further appears from the impugned orders that it was not disputed by the applicant that the land was not voluntarily abandoned by the raiyat. There is no whisper in the impugned orders to the effect that the land was not voluntarily abandoned; rather, it is not disputed by the appellant that the land was voluntarily abandoned by the raiyat much before 1949. The second ingredient is also absent in the instant case. It further appears from the impugned orders that on the question of limitation, both the original authority and the appellate authority have held that since the application was filed within 30 years from 17.1.1949, the application was within time and the land can be restored under Section 71A of the Act. In my opinion, both the authorities have committed serious error of law as also error of fact. As noticed above, 17.1.1949 is the date when the land in question was re-settled by the ex-landlord in favour of the father of the

petitioner No. 1 In the deed there is recital as noticed by the authorities that the land was abandoned much before 1949 by the raiyat and the landlord entered into possession and made the land Bakast and thereafter it was settled in 1949. In my view, therefore, the period of 30 years will commence from the date when the landlord entered into possession after the land was abandoned by the raiyat. Admittedly, the land was voluntarily abandoned by the raiyat much before 1949, and, therefore, the authorities have committed serious illegality in holding that the application filed by the so called nephew of the raiyat was maintainable.

16. Having regard to the facts and circumstances of the case as well as the principles of law discussed hereinabove, in my considered opinion, the impugned orders passed by the respondents-authorities are bad in law and cannot be sustained.

17. In the result, this application is allowed and the impugned orders passed by the respondents authorities are set aside.