



Judicial Academy Jharkhand

HANDBOOK ON LAND LAW

1. *Land Law: C.N.T., S.P.T., B.L.R. Act*
2. *Wilkinson Rule: A Critical View*
3. *Customary Laws of Inheritance among Tribals – A Case for Gender Equality*
4. *Deconstructing the Exercise of Private Rights over Forest Lands*
5. *Analysis of Culpability for Offences Related to Forest Land vis-à-vis Special Acts and the Indian Penal Code*

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RANCHI



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LAND LAW :
C.N.T., S.P.T., B.L.R., ACT

“Just like in heaven, everybody wants a piece of land”

...John Steinbeck

a. INTRODUCTION

Land is at the root of many a litigation both civil and criminal in the Subordinate Courts. The core of civil litigation in the subordinate courts is related to the land and different types of rights associated with it. Suits of different nature like declaratory suit for title based on inheritance, or partition, specific performance of contract for sale, claim of title over the land on the basis of adverse possession have all their genesis in land disputes. Trial Courts as well as first appellate courts, being courts of fact have to arrive at a clear finding of facts in such cases.

Any proof of fact within the meaning of Section 3 of the Evidence Act is to be based on the matters before the court in a particular case which includes both oral and documentary evidence.

In civil cases documentary evidence assumes greater significance as it excludes oral evidence under Sections 91, 92 and 94 of the Evidence Act. To gain clear grip over the facts of a case the ability to read and analyse the documents adduced into evidence is of fundamental importance. The documents which usually come up for consideration in a civil case are land revenue records like, record of rights, revenue receipts, settlement deeds, sale deeds, records of mutation proceedings. It is a settled principle of law that revenue records neither create nor extinguish title nevertheless they are valuable piece of evidence. The ability to read these documents is the first requisite before the import and effect of these documents could be fully appreciated.

In law title is the foundation of ownership or of just possession. Title over land can come by conveyance, inheritance, will, settlement etc. and there are specific laws that govern the particular mode of transfer of property. There is one set of laws that primarily guides the tenant and landlord relationship and there are land reforms laws which extinguished the intermediary rights of the tenants and tenure-holders.

The main tenancy and land reform laws in the State of Jharkhand are Bihar Land Reforms Act, 1950, Chotanagpur Tenancy Act, 1908 and Santhal Pargana Tenancy Act, 1949. Different provisions of these Acts may apply in a case depending upon the facts

of the case. There is an interplay of tenancy and land reform Acts and, therefore, a clear conception of law on the point is essential for a Presiding Officer of a court. In most of the cases involving land dispute, these Acts come up for consideration and, therefore, a clear understanding of these Acts is of paramount importance. These laws in its present form have evolved on account of amendments brought in them from time to time. It is also necessary to understand their process of evolution because in actual application of these laws it becomes necessary to examine as to what was the provision that was in force at the particular period of consideration when that particular conveyance of property took place. For practical purpose, a discussion on land law shall not be complete unless the provisions of Forest Act are also discussed for a large portion of Jharkhand comes under forest land and there are a large number of cases of encroachment of such land based of forged and fabricated documents. This article attempts to deal with the broad outline and important provisions with case laws, which is necessary to understand the land law and its evolution.

The CNT and SPT Act were enacted for different administrative districts of Chotanagpur and Santhalpargana. At present in the the Districts of Santhalpargana viz Dumka, Sahebganj, Godda, Jamtara, Godda and Deoghar and Pakur the provisions of SPT Act apply and in other districts of Jharkhand the provisions of CNT Act apply.

The claim of title invariably involves determination of the chain of title through which the property is claimed to have devolved. It can be based on inheritance, partition, conveyance and will. In any case, devolution of title depends upon the title of person, through whom the title is claimed. The oft repeated saying goes that no one can convey a better title than he himself has. Therefore, the title of the person through whom the claim of title is made becomes a crucial issue on which the fate of the civil suit turns either way. In order to give a finding regarding title, the issues of the classes of tenants and tenure holders and their rights over the land in question may come up directly or incidentally in a suit. Bihar Land Reforms Act 1950 brought a tectonic shift in the agrarian relation by removing intermediaries and their interest came to be vested in the State. Certain lands in the Khas Possession of the intermediaries were saved from the rigors of vesting. Briefly stated, the type of land which vested in the State, depends largely on the nature of the land and the tenure.

HISTORICAL BACKGROUND

To comprehend the present Land law it is necessary to travel to pre-independence time.

Pre-colonial Administrative system of Chota nagpur :

Though Chota Nagpur has long history of settled life, it never had any strong centralized system of governance. Different tribal communities were governing their own villages .

During the Mughal empire the formal allegiance of local ruler was obtained but it never penetrated deep into the villages so as to exercise direct control.

Munda Manki System :

This village based administrative system varied depending upon the communities, but usually it was governed by the village headman known as Munda and the priest was known as Pahan. Network of 8-10 villages were headed by a Manki who used to solve disputes arising between / among different mundas.

The pieces of land were held jointly by the villagers and there was no concept of an individual holding of land as a proprietor of land in his own personal capacity. Different portions of land were earmarked for different purpose, like some portion of the land was marked as rajhas the produce of which was reserved to be sent to the king as tribute, certain portion was reserved for religious activities called sarana land, some portion of land for community dancing and celebration known as akhars land and some portion of agricultural produce was for everyday use.

Munda Manki system has to a large extent, been retained in Kolhan area under the Wilkinson rule.

Structural changes in the land administration in colonial era :-

Land revenue was the primary source of the State income and therefore the Govt took keen interest to regularize the Land Record. East India Company in **1765** received Dewani Right to Collect land rent of Bengal subha from the Mughal emperor by the Allahabad Treaty after the battle of Buxar. By and large the company initially continued the system of revenue collection of the Mughal. Chotanagpur fell in the Bengal province hence, the company asserted its right to collect land revenue in cash from the inhabitants of Chotanagpur. The first major step in this direction was taken by Lord Cornwallis in **1790** with announcement of permanent settlement of land- revenue for a period for ten years in Bengal. The East India Company introduced zamindari system to collect land revenue in Bengal presidency including the area of Chotanagpur. Its effect was to make the Zamindars permanent owners of the land subject to payment of a fixed annual revenue to the Government. Bihar was part of Bengal at that time and the introduction of the new system of land revenue collection resulted in exploitation and tribal unrest in parts of

Chota Nagpur and Santhal Pargana. Further, the system of revenue collection in cash was strongly disliked by the inhabitants which resulted in Kol uprising in 1832. It was against this background that CNT Act was enacted basically to protect the interest of tribals from being dispossessed from their land. The Chotanagpur Tenures Act, 1869 was enacted, which provided for appointment of Commissioners and the Commissioners were empowered to investigate and ascertain the titles and tenures of all lands within the limit assigned to him which may be alleged by any person to be held upon "Bhuinhari and Majhahas" respectively. The power of restoration was also vested with the Special Commissioner for restoration of Bhuinhari and Majhahas tenures wrongfully dispossessed

Chotanagpur Landlord and Tenant's Procedure Act was enacted in the year 1879 and apart from the subsequent amendments made therein complementary legislations in the shape of Chotanagpur Commutation Act, 1897, the Chotanagpur Tenancy (Amendment) Act, 1903 and the Chotanagpur (Amendment) Act, 1905 were duly promulgated. Because of the necessity to amend and consolidate the law relating to the landlord and tenant and the settlements of land in Chotanagpur the Chotanagpur Tenancy Act, 1908 was promulgated and the statutes mentioned above were then repealed. What is interesting to note is that in the 1908 Act there was a blanket restriction on the transfer of their rights by the raiyat without any reference to the social group. This restriction was partially relaxed with regard to the aboriginals by 1920 amendment which provided that such transfer of right may be made by such tribe, caste, group or community or section thereof. To give further protection to raiyats of aboriginal class and those belonging to Scheduled Caste, amendments were made in the Act by substituting section 14 by section 46 of the CNT by the 1947 (Amendment) Act. By the amendment Act of 1955, the word Scheduled Tribe was substituted in Section 46 in place of aboriginal. To effectuate the same purpose later section 71A was inserted by serial no. 3 of the Bihar Scheduled Areas Regulation, 1969 with specific reference to the raiyats, who were members of the scheduled tribes. By the same amending Act in section 72 a further limitation was placed on the surrender of land by a raiyat in so far as it could be done only with the previous sanction of the Deputy Commissioner in writing. How the evolution of law and the exact law in force at a particular time becomes relevant for adjudication can be demonstrated from *Biga Pahan case. Biga Pahan Vs Adolf Tirkey* 1991(1)BLJR 114

If any body had been in possession of land before 1st January 1908, by reason of a settlement made by a pahan, there is absolutely no doubt that he has acquired a right of occupancy by reason of provision under Section 17 and 19 of the Act.

The bar in acquisition of occupancy right in bhuinhari lands was introduced for the first time in 1938 by CNT Amendment Act whereby Section 48(6) was inserted.

In this case if the predecessor-in-interest of defendant-respondent were in possession for a period of more than 12 years then there was no bar to acquisition of occupancy right over it.

LAND SURVEY OPERATION

Land revenue being the biggest source of revenue of the State, it was the primary concern of the Govt to conduct Survey of land to prepare the record of rights with the details of the land, tenant and the Land Lord. The Government of India wrote to the Secretary of State for India vide letter bearing No. 6 dated the 21st March, 1882 explaining the general objects of survey and preparation of record of rights to put an end to the uncertainty which led to land disputes, to protect the raiyats, to improve local knowledge and enable Revenue officers and civil courts to more effectively examine and deal with various land related disputes.

The special objects were :-

1. The preparation of reliable maps of estates, tenures and holdings.
2. The protection of the aboriginals (tribes) against unscrupulous landlords.
3. Fixation of the amount of praedial conditions (abwabs and begari) and their commutation into fixed cash payments.
4. The recording of local usages and customs.

The colonial government conducted massive cadastral survey (1902 onwards) and revisional survey (1927 onwards) to prepare record of the rights of the land holders. A *cadastre* is normally a parcel based and up to date land information system containing a record of interests in land ie rights, restrictions and responsibilities. The revisional survey and settlement operation 1930 settled rents for the *raiya*t of every denomination. Every *raiya*t was given *khatian* which contained the description of the plots and the rents which he was to pay to the landlord. The record of the cadastral and revisional survey is still the only authentic records of the land in Jharkhand .

Land surveys were conducted in different areas. The survey was conducted to prepare the land records and the detailed procedure has been laid down in chapter XII of the CNT Act. Section 81 provides the particulars to be recorded in the record of rights.

Section – 81 of CNT prescribes the particulars to be recorded such as:-

- (a) Name of each tenant or raiyat / occupant

- (b) The class of the tenant whether tenure holder, Mundari Khunt- Kattidar, settled rayiat, occupancy rayiat, non-occupancy-rayiat, under -rayiat etc.
- (c) The boundary of the land
- (d) The name of the landlord.
- (e) The name of each proprietor in the local area or estate
- (f) The rent payable
- (g) The mode in which the rent has been fixed whether by contract, by the order of the court or otherwise.
- (h) If the rent is gradually increasing the time to recorded
- (i) The rights and obligation of the raiyats
- (j) The special conditions
- (k) Any easement attaching to the land for which the record of right is being prepared.
- (l) If the land is claimed rent free – whether the rent is actually paid.
- (m) The rights on forest produce, jungle land or waste land or to graze cattle on any land.
- (n) The right of any resident of the village to reclaim jungle land / waste land or to convert land into korkar.

Before the final publication of record of rights a preliminary publication is made under **section 83**, which is the draft record of rights so as to receive and consider the objections made in the entries therein. Under it the objections have to be considered and disposed of in the prescribed manner. Revenue Officer shall finally frame the record and cause it to be finally published which shall be a conclusive evidence that record has been duly made under this chapter. There is a presumption of correctness of final publication of record of rights under Section 84(3) of the CNT Act.

It has been held in *Tata Iron and Steel Company Vs Mrs Parbati*, 1997 (1) BLJR 72 that Kacha Khatian (draft publication) issued in the name of X during survey operation does not give presumption of correctness under Section 84 unless the same is finally published.

Section 87(1) makes a special provision for institution of suits before Revenue Officer at any time within **three months** from the date of certificate for final publication of record of right. With the insertion of **Section 87 (1)(ee) CNT Act** by amendment Act 1920 , the power of Revenue Officer was extended to hear suits where such dispute included **question relating to the title** in land or to any interest in land as between parties to the suit .

Section 87(2) makes provision for appeal from the decision of the revenue officer in Sub-Section (1) before the Judicial Commissioner under chapter XVI and second appeal lies to the High Court.

Section 258 C.N.T. Act – Bar of jurisdiction of civil court.

It will be appropriate at this stage to consider the scope of **Section 258** which provides that no suit shall be entertained in any Civil Court to vary, modify or set aside, either directly or indirectly, any decision, order or decree of any Deputy Commissioner or Revenue Officer in any suit or proceeding under Sections, 20, 32, 35, 42, 46(4), 49, 50, 54, 61, 63, 65, 73, 74(A), 75, 85, 86, 87, 89 or Section 91 (Proviso) or under chapter XIII, XIV, XV, XVI and XVIII except on the ground of **fraud or want of jurisdiction**.

Whether section 258 bars the jurisdiction of civil court to decide the title has been answered by the *Hon'ble Patna High Court in Parithosh Maity Vs. Ghashi Ram Maity (1987 PLJR 354)* in which it has been held that section 258 creates only conditional bar of jurisdiction of civil court. There is nothing in chapter XII or in any other provision of the CNT Act that a party can be debarred from instituting a suit in Civil Court to establish **his title and recover possession of his property** merely because there having been a proceeding under section 87 with regard to such property. Under section 87 a Revenue Officer cannot entertain a suit for possession---A decree or order of a revenue court can also be challenged, in a civil court, where such decree order or decision is the result of fraud. A civil suit for declaration of title and confirmation of possession and, inter alia, challenging the entries in the revenue record would still be maintainable even after insertion of clause(ee) in S 87(1) CNT Act -- Thus, the pre-condition for the applicability of S.258 is the existence of an earlier order or decree of a Revenue officer or Deputy Commissioner in a prior proceeding. From perusal of this Section it is manifest that if earlier any decision has been made by a Revenue Court in any suit under S. 87, then only other courts or the civil court have no jurisdiction to entertain any suit either to vary, modify or set aside the decision. It also makes it clear that the aforesaid decision or order will have the force or effect of a decree of a civil court in a suit between the parties. However if there is no order or decision under the Sections specified in Section 258 including therein Section 87, the jurisdiction of the civil court will not be barred and specially so for declaration of title and confirmation of possession or recovery of possession. In this case the earlier view in *Gobardhan Sahu AIR 1936 Pat 611* was affirmed.

What can be inferred from the above is that inspite of the interdict of Section 258, a suit is maintainable in a civil court **for declaration of title and recovery or confirmation of possession** even if the party has not filed a suit under Section 87(1). The reason being that the revenue court can not pass an order for confirmation or recovery of possession. Such an order can also be challenged on the ground of fraud and want of jurisdiction. The

question can still be raised as to whether a purely declaratory suit can be filed against a final publication of record of right . To my mind such a suit will be barred in terms of Section 258. The ratio decided in **Paritosh Maity case** permits a suit to be filed in the Civil court when the relief of recovery of possession is pleaded.

2005 (2) JCR 462 (Jagdishprasad Sahu Versus State of Jharkhand and others) Division Bench Section 71A, 46 and 258 C.N.T. Act cannot deal with title. The aggrieved who had challenged order under section 71A C.N.T. Act by filing writ was advised to seek remedy by filing suit.

2004 (2) JLR 169 (Etwara Oraon and others Versus Karo Oraon and others) suit for declaration of title along with consequential reliefs is maintainable in civil court and is not barred under Section 258 C.N.T. Act. After adverse order under Section 71A of the C.N.T. Act suit was filed which was held to be maintainable.

2005 (3) JCR 132 (Lucas Kharia and others versus Baraik Bahadur Singh and others) Application under Section 71A of C.N.T. Act was filed after statutory period of thirty years. It was held that order is illegal and without jurisdiction. Subsequent suit for declaration of title is maintainable and not barred by Section 258 of the C.N.T. Act.

Bheem Singh Munda Vs. State of Jharkhand 2013 (2) JCR 691 (Jhar.) – This case involved Mundari Khuntkattidari Tenancy in which there was a dispute between the petitioner Madhusudan Munda (deceased) and the present appellant Bheem Singh Munda with respect to particular Mundari Khuntkattidari Tenancy for Khewat No. 4/1 . The Circle Officer passed an order in Uttaradhakari Case No. 121 of 1995-96 and decided the title in favour of the petitioner Madhusudan Munda. This order was challenged before S.D.O., Khunti under Section 242 of the CNT Act, wherein it was held that for declaration of title and right the proper forum was to approach the Civil Court in view of the disputes between the parties. Madhusudan Munda, moved the Hon'ble Court by filing Writ Petition wherein the Hon'ble Single Judge quashed the order of the Circle Officer. The order of the Hon'ble Single Judge was challenged in LPA. It was held that as per section 87 of the CNT Act, 1908 where a dispute arises involving a question relating to title in land or interest in land, in between the parties the suit can be instituted before the Revenue Officer under section 87, but it appears that this can be a suit in relation to the proceeding under chapter XII only, which chapter deals with records of right and settlement of rent and Section 81(b) includes the particulars which are required to be recorded like the Mundari Khuntkattidar. Therefore, with respect to the correction in entry, a suit can be entertained by the Revenue Officer only. Civil Suit with respect to entry relating to Mundari-Khuntkattidari tenancy right in record of right is barred. Section 245 of the Act provides that if in the course of any proceeding under section 244, any question of title is raised, which could, in the

opinion of the Deputy Commissioner, more properly be determined by the Civil Court, the Deputy Commissioner shall refer such question to the Principal Civil Court in the district for determination. Therefore, on the reference of the Revenue Officer of such a dispute as mentioned in Section 244 only the Civil Court could examine the issue of the above right. Instead of referring the dispute under section 245 of the CNT Act, the Revenue Officer directed the parties to get their title decided through Civil Court. It was held that this order was right quashed.

Revision by Revenue officer- Under section 89 any Revenue Officer especially empowered by the State Government in his behalf may on application, or his own motion within 12 months of the final publication of record of right or decision under section 83, Section 85 or Section 86 revise the same. Section 89(2) provides for appeal from the order passed under Sub-Section(1) before the prescribed officer. The forum of preferring appeal has been provided in Rule 74 of the CNT Rules, 1959.

TYPES OF REVENUE REGISTERS

It shall be desirable at this stage to take note of different registers as the entries in some of the registers are made pursuant to the land survey operations.

Register I-A

Jamabandi Register is prepared under Survey Settlement operation under CNT and SPT Act. The entry in the register is called khatian. it has 17 columns but entries are made in 14 columns as per the particulars given in Section 81 of the CNT Act.

Register I-B Continuous Khatian is maintained in Form I of The Bihar Tenant Holding(Maintenance of Records) Rules 1976 (It is enclosed at appendix NoI)-It is prepared under Bihar Tenant Holding(Maintenance of records) Act 1975

Register No.IA is prepared under Survey Settlement operation and no change can be made in it until there is another revisional survey. Before the next survey operation is taken up, if there is any changes with respect to the land, it is incorporated in Register IB which is called continuous Khatian. Where there has not been revisional survey this register will be in form I A. Where there has been a survey and record of rights prepared it will be updated in form I B (the continuous Khatian).

The tahsildar is not permitted to make any alteration or correction either in the Register IA or IB continuous khatian, except by the general or special order of the khasmahal Deputy Collector.

Computerization of up to date land record is done on the basis of Register IB. The computerization has the advantage to do away with the practice of manual entry and once it is stored in the PDF file any manipulation can to a large extent be ruled out . One of the difficulty in computerization of the land record in the state of Jharkhand is said to be non-availability of up to date land records.

Register II - Tenant's Ledger or Rent Roll

It is maintained in **Form No. 2** of Bihar Tenant Holding(Maintenance of Records) Act 1975 (it is enclosed at appendixNoII). It is prepared on mutation of the land after the change of tenant and/or their rent roll. It contains the land revenue demand along with the cess. The revenue receipts are prepared and issued on the basis of this register. Such entries are to be made in pursuance to the order passed in a mutation proceeding. Any entry against such order is a nullity.

2009 (2) JCR 153 (Jhar.) Jagdeo Mahto Vs. Commissioner, North Chotanagpur Division, Hazaribagh – Jamabandi standing in the name of a particular person can be cancelled in appropriate cases when brought to the notice of the revenue authorities that order for creating Jamabandi has been passed by an authority, who has no authority or jurisdiction at all, but after giving prior notice and an opportunity of hearing to the concerned person where interest would be adversely affected.

In Mahabir Kansi Vs State of Jharkhand JCR 2008(4) 429 it has been held that a Jamabandi based on forged sada Hukumnama in collusion with the Government officials without obtaining the order of competent authority, is illegal and liable to be cancelled.

Some of the relevant terms are as follows:-

Khata - A record of right in respect of one holding in which plot no. area, boundary, nature of holding etc has been mentioned.

Khatian - A volume containing Khatas ie detailed record for each separate holding for the plots

Khewat - The record of rights in respect of proprietor and tenure holders. Record of the proprietary interest and of the interest of all tenancies intermediate between proprietor and raiyat. Khewat I is with respect to the highest proprietor and II, III , IV etc are for the other intermediaries between and proprietor and raiyat.

Bujharat - Preliminary explanation of the entries in the record by munsarin to the parties concerned before the publication of draft of record of right. Munsarin is the scribe who makes the entries in the record of right.

It is a settled principle of law that revenue records neither create nor extinguish

title, but they are valuable piece of evidence with respect to the possession of the parties. Once a record of right is published there is a presumption of correctness with respect to the entries in terms of Section 84(3) of the CNT Act. These entries have to be carefully scrutinized in any case. The entry in the column no2 mentions the name of the raiyats, which can be an evidence of jointness of status when it has been jointly recorded in the name of the brothers. At the same time in the remarks column, if they are shown to be separately in possession of the lands it can be an evidence that at the time of the relevant survey be the that cadastral or revisional, as the case may be, they were separately dealing with the landed properties. These are material evidence which is to be read with other evidence on record to determine the status of jointness or partition in a particular case. Separate possession can be an evidence of separate possession by convenience or it can be an evidence of partition. In **AIR 1946 (Pat.) 278 Mt. Ramjhari Kuer and others Vs. Dayanand Singh and others** residential houses were recorded in the name of members of different branches separately. Therefore, the entries in the record of rights were regarded of considerable importance indicating separation in the sense of not only definition of shares but also partition. Here in this case in the survey record of rights, khewats and khatians, fauzdar share in the joint family properties had been separately specified. It was held that this by itself is not conclusive proof of separation but it is a relevant evidence which enters into consideration on the question at issue.

So on the question of jointness the entries in the record of right assumes importance . If the name of raiyats is separately recorded in the raiyati column it is an evidence of partition and if it is jointly recorded and separate possession has been shown in the remarks column then it is a matter of appreciation in the light of other evidence as to whether it was merely separate possession for convenience or the presumption of jointness stood rebutted.

In the state of Jharkhand large tract of Govt. land come under forest and there are many cases where unscrupulous litigants stake their claim of title on such lands. The original entries in such cases assume pivotal importance to determine an issue regarding the nature of the land, whether it had vested in the State or whether it was declared a reserved or protected forest under the Indian Forest Act 1927. The entries along with map prepared during survey are relevant in such cases.

In order to determine whether the particular land came under restriction under Section 46 of the CNT Act and Section 20 of the SPT Act one has often to fall back on the original source which is usually the cadastral survey record of rights. These entries are also important for determining the pedigree of the parties in title suits or land acquisition cases and those involving the title with respect to land in question.

It has been held in **2010(2) JCR 170(Jhr) Yubraj Tiwary Vs State of Jharkhand** that *Jamabandi once created can not be canceled by revenue authorities unless there is established ground of fraud or misrepresentation or that the Jamabandi is found to have been created by an order without Jurisdiction and assailed within reasonable time.*

2008(3) JCR 639 (Jhr) Dineshwar Prasad Vs State of Jharkhand

Long standing jamabandi can not be canceled except by decree or order of a competent court or when it is established that jamabandi was created by playing fraud.-- The right of tenancy is a statutory right and the same can not be taken away except by the procedure prescribed by law. Under the CNT Act the raiyati right can not be denied except in execution of the decree passed in terms of Section 22 of the CNT Act.

b. MAIN PROVISIONS OF CNT ACT

When the claim of title in any case is based on inheritance, will or conveyance the right and title of the predecessor-in-interest becomes a relevant issue. For instance, if a claim is based on inheritance from a predecessor-in-interest say X and he claims to have acquired the land in question by settlement, then following questions need to be answered on the basis of evidence on record?

- I When was the settlement made and by what instrument?
- II Whether the instrument was acted upon or it was a sham paper transaction?
- III What are the documentary evidences to support that it was acted upon? Say for example whether revenue receipts were issued and relevant entries were made?
- IV Whether the landlord had a right to settle that particular land?

These questions take us to the question of nature of land, nature of tenancy the intermediary rights and the rights of raiyat. Understanding of these is necessary because all the lands were not heritable and the settlement was also dependent on the nature of land . Any conveyance of land also depends on the tenancy law which permitted or restricted it in a particular point of time.

This needs to be determined in the light of the relevant Tenancy Act, BLR Act and the laws of inheritance applicable to the parties. After the coming into force of the Bihar Land Reform Act 1950, the estate or tenure of a proprietor or tenure-holder vested in the State. So in order to adjudicate on the claim of title , it is necessary to understand the class of Tenants and Tenure Holders provided under the CNT Act, along with the nature of land so as to determine the implication of vesting on these class of tenants or tenure holders. Whether such a tenure was alienable or not also needs to be answered. This can be relevant in a case to adjudicate on the claim of title by any party through such tenure-holder, as to whether that particular tenure-holder had the capacity to settle that particular land or pass a valid title with respect to it to the present claimant. What are the classes of tenants and tenure-holders and whether they come under the category of occupancy-raiyat can

be germane in any case together with consequences of vesting under Section 4 BLR Act on the particular class of tenure-holder. Section 6 and 7 are the saving clauses which provides that certain lands in khas possession and building, golas, factories or mills to be retained by the intermediaries on payment of rent as occupancy raiyats. Therefore if the land was in khas possession of the tenure-holder then it was saved from the rigors of Section 4 of the BLR Act.

CLASSES OF TENANTS AND TENURE HOLDERS

Tenant under Section 3(xxvi) means a person who holds land under another person and is liable to pay rent for that land to that person.

Section 4 of the CNT Act describes following classes of tenants :-

1. **Tenure holders** including under-tenure-holders.
2. **raiyaat, namely**
 - (a) occupancy-raiyats, that is to say raiyats having a right of occupancy in the land held by them ,
 - (b) non-occupancy raiyats having no such occupancy right.
 - (c) raiyats having khunt katti rights.
3. **under raiyats**, that is to say tenants holding whether immediately or mediately under raiyats.
4. **Mundari Khut Kattidar** – A Mundari who cleared the jungle and made the land fit for cultivation and his descendants in the male line.

Section 5 lays down the meaning of a **tenure-holder** as a person who has the right to hold the land for the purpose of collecting rents or bringing under cultivation by establishing tenants. **Raiyat** as defined under Section 6 means primarily a person who has acquired a right to hold land for the purpose of cultivating it.

Section 8 of the CNT Act provides that a **Mundari Khuntkattidar** means a Mundari, who has acquired a right to hold jungle land for the purpose of bringing suitable portion thereof under cultivation by himself or by male members of his family. The heirs in the male line alone are in the category of Mundari Khuntkattidar.

From the definition of raiyat as given under Section 6 of the CNT Act, it is manifest that the Mundari-khunt-kattidaari is not a raiyat, rather they are a class of tenant within the meaning of section 4 and their special status to hold land arises on account of bringing

Jungle land under cultivation. For our present purpose, it is necessary to consider the non-transferable nature of the tenancy. There are certain restrictions on transfer of Mundari Khuntkattidari tenancy under section 240. But, section 241 provides and permits certain transfers. If any person encroached upon the Mundari Khuntkattidari tenancy or a portion thereof such person can be ejected under section 242 of the CNT Act. Mundari Khuntkattidari tenancy gives certain rights to the person, who are known as khewatdars in chapter XVIII of the CNT Act, 1908. There is no time limit for such ejection when the transfer is made in contraavention to Section 240.

Chapter IV of the CNT from Sections 16 to 36 deals with occupancy raiyat and the incidence of occupancy right and Chapter VI deals with Non-occupancy raiyat.

Who is an occupancy raiyat ?

Firstly, Section 16 confers the status of occupancy raiyat on every raiyat who immediately before the commencement of the Act had a right of occupancy by custom usage or otherwise whether they had completed 12 years of cultivation or not. Meaning thereby occupancy raiyat signifies a class of raiyat having a right of occupancy at the time of the commencement of the CNT Act.

Secondly, Settled raiyats within the meaning of Sections 17 and 18 shall have occupancy right under Section 19.

Under Section 17 a **settled raiyat** is a person as a person who for a period of **12 years before or after** the commencement of this Act has continuously held as raiyat land situated in any village. Under Section 18 Bhuinhars and Mundari Khunt-Kattidars is to be deemed to be settled raiyat. A settled raiyat within the meaning of Section 17 or Section 18 of the Act shall have occupancy right. Under Section 19 every person who is a settled raiyats of a village has occupancy rights. Thus, a person who held the land for 12 years or Bhuinhars and Mundari Khuntkattidars had occupancy right over the land. The occupancy raiyats were guaranteed certain rights, which have been recognized as the incidents of occupancy right laid down in Sections 21 to 24 of the CNT Act. Section 22 protects occupancy raiyat from eviction except on specific grounds mentioned therein. Section 23 provides devolution of occupancy right on the death of the raiyat underlining its hereditary character. The status of raiyats having occupancy right remained the same as before vesting. Considering the special nature of bhuinhari and Mundari-khun-kattidari tenancy, they were saved from vesting by the operation of the BLR Act.

Chapter VI (S/38 to S/42) lays down the provision with respect to non-occupancy raiyats. This class of raiyats stood on a different footing and was not conferred with the same privileges as enumerated above in case of occupancy raiyats. Section 41 enumerates the ground on which a non occupancy raiyat can be ejected.

For all practical purposes after independence, with respect to the incidents these two categories of raiyats has ceased to exist. Any raiyat, whose name is now entered in Register II is an occupancy raiyat and has all such rights.

Section 37 of the CNT Act provides that provisions of the Act relating to occupancy-raiyats shall also apply to raiyats having Khunt Katti right.

All the Tenures except Bhuinhari Tenures and Mundari Khunt katti Tenures have vested in the State in terms of sections 3A and Section 4 of the Bihar Land Reforms Act, 1950.

MANJHIHAS LAND : Lands which were cultivated by the landlord himself with his own stock, or by his own servants or by hired labour, or were held by a tenant on lease for a term exceeding one year or on a lease written or oral for a period of one year or less and which were by custom recognized as privileged land were called Manjihhas land. A person who obtained this land on lease from the landlord, **did not acquire occupancy rights** in it irrespective of the period under his possession.

ZIRAT : Zirat land means a privileged land of the land lord as defined under Section 118 of CNT Act .

BLT 1989 page 267 Santa Lohar –Vrs- Dwarika Sahu. It is absolutely clear that no occupancy right could accrue in respect of the land in question. Even assuming that the defendant being *adhbataidar* were under-raiyat the suit properties were neither heritable nor transferable. Admittedly some of the persons whose name in remarks column find place as adhbataidar have died and it is also evident. The defendants no. 1, 2, 3 have sold their properties to the defendant no. 5 and 6.

BAKAST LAND : Bakast land is the land which were in **cultivating possession of the landlords** and were unprivileged land in direct possession of the proprietor or tenure holder. It was within the competency of the landlord either to cultivate it personally or through his person or settle to it to any raiyat. The land which was cultivated by the landlord himself is also called Bakast malik.

Manjhias, bakast and zirat land being in khas possession came within the protective umbrella of Section 6 of the BLR Act.

After settlement it becomes the raiyati land of a raiyat.

RESTRICTIONS ON TRANSFER BY RAIYAT

The tenancy Act imposing restrictions on transfer of raiyati rights has evolved in stages and therefore, before addressing the question whether a particular transfer is made in contravention of any of the restrictions imposed under the Act, it is imperative

on the part of the Court to address the question, *firstly*, at what point of time a particular restriction came into force and, *secondly*, whether the transfer in question was made before or after the coming into force of the particular restriction.

In the case *Biga Pahan and Ors. v. Adolf Xitain and Anr., (1991) 39 (1) BLJR 114*, the plaintiff had filed a suit for the declaration of title and recovery of possession on the ground that the settlement made by the grandfather of the plaintiff to the successor-in-interest of the defendant was in contravention of Section 48 (6) of the CNT Act because it was a *bhuinhari* tenure. The Hon'ble Court, in this case, held that Section 48(6) was enacted by an amendment in 1938 whereas the settlement in question was made anterior to 1938 and, therefore, the plea of contravention of Section 48(6) was not accepted since the restriction did not exist at the time when the settlement was made.

It is interesting to note that **expressions like S.T, SC or Backward classes were totally absent under the original CNT Act 1908** and there was complete restriction on the transfer of the right by raiyat . Section 46 read as under

S/46-- Restrictions on transfer of their rights by the raiyats

1. No transfer by **a raiyat** or his right in his holding or any portion thereof
 - (a) by **mortgage or lease**, for any period, express or implied, which exceeds or might in any possible event exceed **five years, or**
 - (b) by **sale, gift** or any other contract or agreement, **shall be valid** to any extent:

Provided that a raiyat may enter into a bhugut bundha mortgage of his holding or any portion thereof for any period not exceeding **seven years**.

2. **No transfer** by a raiyat of his right in his holding or any portion thereof **shall be binding on the landlord**, unless it is made with his consent in writing.
3. **No transfer** in contravention of sub-section (1) **shall be registered**, or shall be recognized in any way recognised as valid by any Court, whether in the exercise of the civil, criminal or revenue jurisdiction.
4. At any time **within three years** after the expiration of the period for which a raiyat has, under this Section, transferred his right in his holding or any portion thereof, **the Deputy Commissioner, may in his discretion on the application of the raiyat put the raiyat in possession of such holding** or portion in the prescribed manner.
5. Nothing in this section shall affect the validity of any transfer (not otherwise invalid) of a raiyat's right in his holding or any portion thereof made bonafide before the First day of January 1903.

By Section 14 of 1920 Amendment Act section 46 was interalia amended to add the following Sub-section (2)

“(6) (a) With the previous sanction of the Governor – General in council, the local government may by rules declare that any specified class or classes of transfer (not being transfer by an aboriginal raiyat to a non-aboriginal transferee) in contravention of sub-section 1 may be validly made by a raiyat of such tribe, caste, group or community, or section thereof, of such class. In such area or areas and subject to such restrictions in respect of the person by whom and the person to whom the transfer be made, sanction of any officer or other authority, quantity of land or proportion of the holding may transferred, and any other matter or matters whatsoever, as may be specified.

and thereupon nothing in sub-section 1, 3 and 4 shall affect the validity of any such transfer so made by such raiyat after the date of publication of the rules in the Gazette or such later date as may be prescribed”

Impact of this amendment was partial lifting of restriction on transfer as per rules to be framed by the local government for such caste, class or community, other than the aboriginal raiyat.

The next stage in the evolution of the CNT Act is **CNT Amendment Act, 1938**. The main features of the these amendments as follows:

Section 46(1) – no transfer by a raiyat of his right in his holding or any portion thereof shall be valid to any extent except as provided in this section.

Section 46(2) – an aboriginal raiyat or a raiyat who is a member of scheduled caste may transfer his right in his holding -

(a) by bhugut bandha mortgage to a society registered under Bihar and Orissa Cooperative Societies Act, 1935.

(b) by lease to any person for a period which does not exceed five years.

Section 46(3) – An occupancy raiyat who is an aboriginal or a member of a Scheduled Caste may transfer his right in his holding to another aboriginal or a member of scheduled caste the resident within the local limits of the police station area and with the sanction of the Deputy Commissioner.

Section 46(4) (a) –An occupancy raiyat who is not an aboriginal or a member of scheduled caste, may transfer his right to any person within the local limits of the police station.

Section 46(4)(b) – A non-occupancy raiyat, who is not an aboriginal or a member of scheduled caste may transfer his right.

Section 46(5) – The Deputy Commissioner may of his own motion or an application of the raiyat eject the transferee and place the raiyat in possession at any time within 12 years from the date of the transfer in contravention to the provision of this section.

Section 46(7) – No such transfer by a raiyat in contravention of sub-section 2,3 and 4 shall be registered.

Section 46(8) – No transfer by a raiyat of his right in his holding or any portion thereof by sale, exchange, gift, mortgage or lease shall be valid unless it is made by a registered instrument. In this expression aboriginal and the expression scheduled caste includes any person declared by the Governor, by notification to be an aboriginal or scheduled caste.

Section 48 – Restriction of transfer of Bhuinhari tenure

(i) A member of the Bhuinhari family may transfer any Bhuinhari tenure in the same manner and to the same extent as an aboriginal raiyat may transfer his right under section 46.

Section 48-A – Restrictions on the sale of Bhuinhari tenure – no decree or order shall be passed by any court for the sale a right of a member of a Bhuinhari family in his Bhuinhari tenure.

What is evident from the above 1938 amendments is that original 1908 Act imposed certain restrictions on transfer and sale of Bhuinhari tenures under section 48 with respect to any land in a village other than land known as manjihahas or bethkheta and section 46 and 47 were made applicable to all Bhuinhari families. The 1938 amendment under section 48 lifted the complete restriction on transfer of Bhuinhari tenure by the 1908 Act and permitted its transfer at par with aboriginal raiyat under section 46(2)(a)(b) by Bhugut Bandha mortgage or by lease not exceeding five years.

Further major amendment in section 46 was effected by **CNT Amendment Act, 1947**. The only significant change brought about by this Act was reduced the period from 12 years to 3 years by the Deputy Commissioner to put the raiyat into possession of such holding in case of transfer in contravention to the provision of this section.

By **CNT Amendment Act, 1955** words “a member of Scheduled tribe” was substituted in place of “aboriginal” and words “backward classes” was also added with “scheduled caste”.

The last major amendment in the CNT Act has been effected by **CNT Amendment Act, 1969** by which section 3-A and 4-A were introduced.

After incorporating these amendments section 46 of the CNT Act is as under:

Section – 46 – Restrictions on Transfer of their right by raiyats.- (1) No transfer

by a raiyat of his right in his holding or any portion thereof--by mortgage or lease for any period expressed or implied, which exceeds or might, in any possible way, exceed **five years** or by sale or gift or any other contract or agreement **shall be valid to any extent**.

Provided that a raiyat may enter into Bhugut Bandha Mortgage of his holding or any portion thereof for any period not exceeding **seven years** provided further that –

- (a) an occupancy-raiyat, who is a member of **Scheduled Tribe** may transfer with the previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift or will **to another person who is a member of Scheduled Tribe and** who is a resident within the local limits of the area of the police station within which the holding is situate;
 - (b) an occupancy-raiyat, who is a member of [**Scheduled Caste or Backward Classes**] may transfer with previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift, will or lease **to another person who is a member of [Scheduled Caste or Backward Class as the case may be] and** who is a resident within the local limits of the District within which the holding is situate;
 - (c) any occupancy-raiyat may transfer his right in his holding or any portion thereof to a society or bank registered under Bihar and Orissa Cooperative Societies Act 1935 or to the State Bank of India or a Bank specified in column 2 of the first schedule to the Banking Companies Acquisition and transfer of Undertakings Act, 1950 or to a company or a corporation owned by or in which less than 51% of the share capital is held by the State Government or the Central Government or partly by the State Government and partly by the Central Government and which has been set up with a view to provide agricultural credits to cultivators.
 - (d) any occupancy-raiyat, who is not a member of the Schedule Tribes, Schedule Caste or Backward classes, may, transfer his right in his holding or any portion thereof to any other person, by sale exchange, gift, will, mortgage or otherwise to any other person.
- 2) A transfer by a Raiyat of his right in his holding or any portion thereof under sub-section (1) shall be binding on the landlords.
 - 3) **No transfer** in contravention of sub section (1) **shall be registered** or shall be in any way recognized as valid by any court whatever in exercise of civil, criminal or revenue jurisdiction.

In order to further safeguard the interest of the tribal Sub-Section 3A and 4A were inserted by the **amendment Act of 1975**

Under Sub-Section 46(3A) - Deputy Commissioner has been made a necessary

party in all suits of civil nature relating to any holding or any portion thereof in which one of the parties is a member of Scheduled Tribe and the other party is not a member of Scheduled Tribe.

Sub-Section 4 takes the safeguard forward and provides that where the **transfer has been made in contravention** of clause (a) of Sub-Section (1) the Deputy Commissioner either on his own motion or on the application of the raiyat **put the raiyat in possession of the holding or portion thereof, at any time within 3 years after expiration of the period on which a raiyats has transferred his right in his holding or any portion thereof.**

Section 46-4A (a) – The Deputy commissioner on his own motion or on an application filed by the occupancy raiyat, who is a member of Scheduled Tribe that the transfer has been made in violation of Section 46 (1)(a) **hold an inquiry** in the prescribed manner to determine if the transfer has been made in contravention of clause(a) of the second proviso to Sub-Section 1.

Provided that no such application be entertained by the Deputy Commissioner **unless it is filed within 12 years** by such occupancy raiyat from the date of transfer of his holding

Section 46-4A(b) If after the inquiry the Deputy Commissioner comes to a finding that there has been no such contravention the petition shall be rejected.

Section 46-4A(c) If after holding such inquiry the Deputy Commissioner comes to a finding that such the transfer has been made in contravention of Section 46(1)(a) **he shall annul such transfer and eject the transferee from such holding or portion thereof.**

Provided further that where the Deputy Commissioner is satisfied that the **transferee has constructed a substantial structure or building** on such holding or portion thereof before the commencement of **Chota Nagpur Tenancy (Amendment) Act 1969**, he may notwithstanding any other provision of this Act **validate such a transfer** made in contravention of Section 46 (1)(a) of the Second Proviso to Sub-Section(1) **if the transferee either makes available to the transferor an alternative holding or portion of holding, as the case may be, of the equivalent value, in the vicinity or pays adequate compensation.**

(5) Nothing in this Section shall affect the validity of any transfer of a Raiyat's right in his holding made bonafide before the 1st day January 1908

In 1938 there was an amendment in C.N.T. Act by Chotanagpur Amendment Act, 1938 which received the assent of Centre / Governor on 9th of May, 1938 and was published in Bihar Gazette dated 1/6/1938. By this Amendment Act, amendments were made in

different sections of the C.N.T. Act including Section 46. It was provided that an occupancy raiyats of an ab-original or a member of scheduled caste may transfer his right in his holding or portion of his holding by sale or exchange to another aboriginal or to another person who is a member of scheduled caste, as the case may be and who is a resident with the local limits of the police station area within which the holding is situate and with the sanction of the Deputy Commissioner, by gift or will to a near relative without limitation of residence. Thus according to this amending provision there were no restriction whatsoever in sale of raiyati holding belonging to a member of scheduled tribe by **sale or exchange** to another member of scheduled tribe within the local limits of the police station and no permission of the Deputy Commissioner was required. The permission of the Deputy Commissioner was required only in a case where the tribal wanted to gift his raiyati land or bequeath by way of **will** his right in the holding to near relative relative without limitation of residence.

From the above provision it will be manifest that Section 46 of the CNT Act provides not only the restrictions on the transfer of the land, but also it provides the procedure for **restoration** and **annulment** of such transfer in case of such a transfer in contravention of the restrictive clause. The remedy of restoration under Section 46(4) is available to all and is not confined to Scheduled Tribes, but the limitation is three years after the raiyat has transferred his right.

The provision for **annulment** of any transfer in contravention of Section 46 has been made under Section 46(4-A)(a). This remedy is restricted to an occupancy-tenant who is the member of Scheduled Tribes and the period of limitation to entertain such an application is 12 years. The Deputy Commissioner before passing an order has to hold an inquiry in this regard.

Another special feature of this provision is that where the transferee has constructed a **building or structure**, the Deputy Commissioner shall order to remove the same within a period of Six months or at most two years extended period from the date of such order. Where however a **substantial structure** has been constructed by the transferee, DC may validate such a transfer on two conditions. Firstly, if the transferee makes available to the transferor an **alternative holding** or portion of a holding , as the case may be, of the equivalent. Or Secondly, transferee makes pays **adequate compensation** to the transferor.

Fagua Oraon Vs State of Jharkhand 2008(4) JCR 249 (Jhr)

A Civil suit is not maintainable under Section 258 of the CNT Act against statutory permission granted under Section 46 by statutory authority.

The scope of the proviso to section 46(1) regarding the right of the raiyats to enter into a “Bhugut Bundha” mortgage or his holding or any portion thereof came up for

consideration in **Felix Tamba Vs. The State of Jharkhand and others 2008 (4) JCR 542 (Jhar.)**.

In this case a circular of Government of Jharkhand whereby it had been notified that no person, who is a member of scheduled tribe community can obtain loan for construction of his house and for the purpose of education by mortgaging his land. It was held that although sub section 1 of Section 46 restricted transfer by a raiyat by his holding by way of mortgage, lease, sale and gift but the proviso to sub-section 1 is an exception which provides that a raiyat may enter into a Bhugut Bundha of his holding for any period not exceeding 7 years and if mortgagee is a society then such period may be extended to 15 years. The object of this is to prevent the raiyats from falling in the clutches of private money lenders. It was held that section 46 does not restrict or prohibit the members of scheduled caste and scheduled tribe from getting financial assistance from banks for the purpose of construction of residential houses by creating mortgage of the raiyati holding sought to be used for residential purposes. It was further held that members of scheduled caste and scheduled tribes were entitled to higher education. The circular was held to be in contravention with the provision of section 46 of the CNT Act.

Section 71 A Power to restore possession to member of the Schedule Tribes over land unlawfully transferred-- If at any time it comes to the notice of the Deputy Commissioner that **transfer of land belonging to a raiyat or a mundari Khunt Kattidar or a bhuinhar who is a member of the Scheduled tribe has taken place in contravention of Section 46 or Section 48 or Section 240 or any other provisions of this Act or by any fraudulent method including decrees obtained in suit by fraud and collusion**, he may after giving reasonable opportunity to the transferee , who is proposed to be evicted, to show cause and after making necessary inquiry in the matter **evict the transferee from such land without payment of compensation and restore it to the transferor or his heir**, or in case the transferor or his heir is not available or is not willing to such restoration, resettle it with another raiyat belonging to the Scheduled Tribe according to the village custom for the disposal of an abandoned holding.

Provided that if the transferee has within 30 years from the date of transfer, constructed any building or structure on such holding or portion thereof, the Deputy Commissioner shall, **if the transferor is not willing to pay the value of the same , order the transferee to remove the same within a period not exceeding six months from the date of order, or within such extended period of two years from the date of order as the Deputy Commissioner may allow failing which the Deputy Commissioner may get such building or structure removed.**

Provided further that where the Deputy Commissioner is satisfied **that the transferee**

has constructed a substantial structure or building on such holding before coming into force of Bihar scheduled Areas Regulation 1969, he may, notwithstanding any other provisions of the Act, validate such transfer where the transferee either makes available to the transferor an alternative holding or portion thereof or as the case may be of the equivalent value of the vicinity or pays adequate compensation.

Provided also that if after an inquiry the Deputy Commissioner is satisfied that the transferee has acquired a title by adverse possession and that the transferred land should be re-settled or restored, he shall require the transferor or his heir or another raiyat as the case may be, to deposit with the Deputy Commissioner such sum of money as may be determined by the Deputy Commissioner having regard to the amount for which the land was transferred or the market value of the land as the case may be and the amount of any compensation for improvement effected to the land which the Deputy Commissioner may deem fair and equitable.

Section 71 A of the Act has been brought under the Statute by virtue of Section 4 of the Bihar Scheduled Area Regulation, 1969. The Bihar Scheduled Areas Regulation, 1969 was published in the Bihar Gazette extra-ordinary dated **9th of February 1969** in order to make certain provisions and to amend certain laws in Scheduled Areas in the State of Bihar for the peace and good government of the said areas. In exercise of the powers conferred by Sub-paragraph (1) of paragraph 6 of the fifth schedule to the Constitution of India, the President of India by virtue of notification published in the Gazette of India dated 26th of January 1950 promulgated the Scheduled Areas part A States (Order) 1950 and declared in the State of Bihar, Ranchi District, Singhbhum District excluding Dhalbhum Sub-Division, Santhal Parganas District excluding Godda and Deoghar Sub-Division and Latehar Sub Division of Palamau District as Scheduled Areas. The said order was rescinded and the Scheduled Areas (State of Bihar, Gujrat, Madhya Pradesh and Orissa) Order 1977 was promulgated by the President of India by publication in the Gazette of India extra-ordinary part II Section 3(i) dated 31.12.1977 according to which in the State of Bihar, Ranchi District, Singhbhum District, Latehar Sub-Division and Bhandaria Block of Garhwa Sub-Division in Palamau, District Dumka, Pakur, Rajmahal and Jamtara Sub-Division and Sundar Pahari and Boarijor Block of Godda Sub-Division of Santhal Pargana District were declared as Scheduled Areas. The above order was rescinded and the Scheduled Areas (State of Chhattisgarh, Jharkhand and Madhya Pradesh) Order 2003 was promulgated by virtue of notification published in Gazette of India extra-ordinary Part II Section 3(i) no. 79 dated 20.2.2003 by the President of India according to which so far as the state of Jharkhand is concerned the areas specified below were declared as Scheduled Areas:-

Jharkhand

1. Burmu, Mandar, Chanho, Bero, Lapung, Ratu, Namkom, Kanke, Ormanjhi, Angara, Silli, Sonahatu, Tamar, Bundu, Arki, Khunti, Murhu, Karra, Torpa and Rania block in Ranchi District.
2. Kisko, Kuru, Lohardaga, Bhandra and Senha blocks in Lohardaga District.
3. Bishunpur, Ghaghra, Chainpur, Dumri, Raidih, Gumla, Sisai, Bharno, Kamdara, basia and Palkot block in Gumla District.
4. Simdega, Kolebira, Bano, Jaldega, Thethaitangar, Kurdeg and Bolba blocks in Simdega District.
5. Barwadih, Manika, Balumath, Chandwa, Latehar, Garu and Mahuadarn blocks in Latehar District.
6. Bhandaria block in Garhwa District.
7. Bandgaon, Chakradharpur, Sonua, Goelkera, Manoharpur, Noamundi, Jagannathpur, Manghgaon, Kumardungi, Manjhari, Tantnagar, Jhickpani, Tonto, Khuntpai and Chaibasa blocks in West Singhbhum district.
8. Govindpur (Rajnagar), Adityapur (Gamharia), Seraikella, Kharsawan, Kuchal, Chandil Inhagarh and Nimdih blocks in Seraikella Kharsawan district.
9. Golmuri, Jugsalai, Patmada, Potka, Dumaria, Musabani, Ghatsila, Dhalbhumgarh, Chakulia and Bahragora blocks in East Singhbhum District.
10. Saraiyahat, Jarmundi, Jama, Ramgarh, Gopikandar, Kathikund, Dumka, Sikaripara, Raneshwar and Masalia blocks in Dumka district.
11. Khudhit, Nala, Jamtara and Narainpur blocks in jamtara district.
12. Sahebgang, Borio, Taljhari, Rajmahal, Barharwa, Pathna and Barhet blocks in Sahebganj District.
13. Litipara, Amrapara, Hiranpur, Pakur, Maheshour and Pakuria blocks in Pakur district.
14. Boarijore and Sunderpahari blocks in Godda district.

The expression used in Section 71 A is “...if at any time it comes to the notice of the Deputy Commissioner.....” The ratio of the authorities on this point is that the power under this Section is to be invoked within a reasonable time. It has been held in **Fulchand Munda Vs State of Bihar [2008(2)JCR(SC)1]** that although no period of limitation is provided for exercising the power under Section 71 /A by the Deputy Commissioner, the party affected is called upon to approach the appropriate authority or the power has to be exercised by the Deputy /Commissioner within a reasonable period of time .

In Kameshwar Narayan Singh Vs State of Jharkhand [2009]3 JLJR 48 the

application for restoration was filed in 1995, after 54 years which was held that it can not be termed as reasonable and it was even otherwise barred by limitation. **2009 (4)JLJR 325** is also to the same effect.

The right of the raiyat to transfer his holding has been recognized subject to certain conditions enumerated under **Sections 46 Proviso(a),(b) (c) and (d)**. Under Section 46(a) an occupancy raiyat who is a member of the Scheduled Tribe may transfer with the previous sanction of the Deputy Commissioner his right in his holding by sale, exchange, gift or will to another person who is a member of the scheduled tribes and who is a resident within the local limits of the area of the police station within which the holding is situate.

(b) An occupancy raiyat who is member of the scheduled caste or the backward classes may transfer with the previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift, lease or will to another person, who is a member of schedule caste or the case may be backward class and is resident within the local limits of the district.

The above restrictions do not apply to others. No transfer in contravention of the above provisions can be registered or recognized as valid.

It has been held in **2014(1)JCR 342(Jhr) State of Jharkhand Vs Taurian Infrastructure Pvt. Ltd** that transfer of land of a tribal in favour of non-tribal is prohibited in law consequently possession by a non-tribal on basis of illegal transfer cannot be recognized.

Limitation:

Section 46 (4) of the Act provides that at any time within **3 years** after the expiration of the period of transfer in violation of the provisions of section 46 the Deputy Commissioner on the application of the raiyat shall put the raiyat into possession of such holding or portion.

Section 46(4-A)(a) provides period of limitation of 12 years within which a Deputy Commissioner may entertain application for annulling the transfer on the ground that **the transfer** was made in contravention of clause (a) of second proviso to Sub-section(1).

A combined reading of Section 46 and 71 A will reveal that under Section 46(4) there is limitation of **three years** from the transfer by raiyat of his right in his holding within which the raiyat has to move the DC for restoration. This provision applies to all raiyats and is not restricted to the Tribals. The Proviso to Sub-Section (4-A) (a) extends the limitation **to 12 years** to consider an application for restoration of a tribal. There is no limitation provided under Section 71 A within which the restoration may be allowed. A close look at these provisions will make it clear that these provisions operate in distinct

and different fields and there is no contradictions in them. Both Section 46(4-A)(a) and Section 71 A are specific provisions relating only to Scheduled Tribe and does not apply in case of Scheduled Caste and Backward Caste. The difference being that Section 71 A is only with respect to Scheduled areas for transfer made in violation Sections 46,48 and 240 of the Act, whereas Section 46 (4-A)(a) shall apply in other areas when the transfer is in violation to second proviso(a) to Section 46. It may therefore be said that any transfer in contravention of Section 46 can be challenged by the Scheduled Caste and Backward Classes within three years and by the Scheduled Tribe within 12years . In case of Scheduled under Section 71 A there is no time fixed for restoration in case of Scheduled Tribe, but nevertheless it is to be within reasonable time as per the ratio decided by Hon'ble The Apex Court in case of **Situ Sahu case**.

The above restrictions initially failed to produce the desired result and in order to circumvent the provisions collusive suits were filed. To check this practice Section 46(3A) and (4A) were inserted by amendment Act of 1976. The Deputy Commissioner was made a necessary party in all suits of civil nature relating to any holding or portion there of in which one of the parties to the suit was the member of the scheduled tribe under Section 3A. Under Sub-Section 4A the DC has the power to annul such a transfer which was in contravention to clause(a) of the second proviso to sub-section (1)

It is to be noted that the **necessity of permission of Deputy Commissioner** for transfer of land between tribal to tribal came into force by the **Amendment Act, 1947 with effect from 5.5.1948** and it has got no retrospective effect. Therefore, the transfer of land without the permission of Deputy Commissioner before 5.5.1948 cannot be held to be invalid. It has been held in **Manu Oraon & anr. Vs. Hira Kuar 2003 (1) JCR 494** that for partition there is no requirement of obtaining the permission of Deputy Commissioner.

A legal question arose as to whether surrender of land by raiyat in favour of landlord without obtaining previous permission of the Deputy Commissioner amounted to transfer in violation of provisions of section 46 of CNT Act. Whether the surrender by a scheduled tribe of his statutory right to hold land for the purpose of cultivation would amount to transfer within the meaning of section 71A of the CNT Act, 1908 came up for determination in the full bench judgment of the Patna High Court in **Bina Rani Ghosh Vs Commissioner South Chota Nagpur Division [1985 AIR Pat 352]**--*Surrender of a raiyati interest by by Scheduled Tribe-- Lanlord making settlement of such surrendered raiyat interest the same day-- Surrender amounts to transfer-- Surrender without prior permission of the Deputy commissioner is invalid under Section 72 of the Act*

Note: The requirement of surrender with the previous sanction of the Deputy

Commissioner has been inserted by the CNT Amendment Act of 1947 which came into force with effect from 5-1-1948.

RESTRICTION ON TRANSFER OF LAND BY BACKWARD CLASSES AND SCHEDULED CASTE

As discussed above restriction on transfer by a raiyat being a member of Scheduled Caste was introduced by 1938 amendment in Section 46 and by Backward classes by 1955 Amendment Act.

Validity of transfer in contravention of clause (b) to 2nd Proviso of sub-section(1) to Section 46

Analogous provisions putting a clog on transfer by protected tenant who were members of Scheduled Castes and Backward Classes has been laid in **Chapter VIIA** of the Bihar Tenancy Act .

These provisions came under challenge in **Bhageran Thakur vs. Kewal Singh 1969 PLJR 30(FB)** It was held in this case that in the restrictions to transfer as laid down in Chapter VIIA of the Bihar Tenancy Act , the test of reasonableness of Section 49-C was not satisfied and it **was held to be void** so far as it provided that no sale by members of backward classes of his right in his tenure, holding or tenancy is valid.

Chotanagpur constituted part of Bihar and following this Judgement, the restriction of transfer as provided under Section 46 proviso (b) was deemed to be lifted by analogy and transfer of land started taking place.

Whether restriction on transfer as provided under Section 46 proviso (b) with respect to transfer of land by scheduled caste or backward class in favour of a person belonging to some other category is valid or not came up for consideration in **Budhni Mahtain Vs. Gobardhan Bhokta reported in 1984 BLT 226** in this case it was held that the restriction imposed by proviso (b) to Section 46 (1) of the CNT Act as ultra vires under Article 19 (1)(f) and 19 (5) of the Constitution. This issue again came for consideration before full bench in **Mathura Singh Vs. Tetli Dom 1996 (2) BLJR 1116**. Mathura Singh filed a declaratory suit for a decree for confirmation of his possession. One of the issues in the suit was whether purchase of the suit land by the plaintiff – appellant from defendant was in violation of section 46 (1) of the CNT Act. It was not in dispute that defendant vendor had not obtained permission of Deputy Commissioner before transferring he land in favour of the plaintiff. The Additional Munsif decreed the suit on the reason that the sale cannot be held to be invalid as defendant was estopped from raising the plea under section 46 (1). On appeal the first appellate court came to a contrary finding and in first appeal the matter came up before the High Court. **The Hon'ble Court held that the provision**

under section 46(1) was not ultra vires and the transfer being without permission was not valid. Section 46 is completely immune from attack of violation of Article 19(1)(f) in view of its inclusion in IXth Schedule item no 209. In the said judgment the decision reported in **1984 BLT 226** was held per-in-curium and not a good law. Their Lordships also considered the decision reported in **1969 PLJR 30 (FB)** and in paragraph 11 of the judgment it was held that Bhageran Thakur's case related to backward classes and this case and Budhni Mahtain's case related to members of scheduled caste. It was further held that direct decision of the court in **Shashtri Pado's case (AIR 1967 Patna 25)** which upheld the constitutional validity of Section 46(1)(C) was not brought to the notice of their Lordships.

Further in the decision reported in **2002 (2) JCR 150 (Pogi Kuer Vs. Nageshwar Pradhan and os others)** it was held that sale of land by scheduled caste to another person without sanction of the Deputy Commissioner is in violation of the provision of section 46 and is invalid.

Similarly in the decision reported in **2003 (4) JCR 233 (Sital Baitha alias Ram and others Vs. Rudi Chamar and others)** it has been held that if sale deed is executed by a member of scheduled caste without the permission of the Deputy Commissioner is invalid and sale deed is ab-initio void and the vendee has acquired no right, title and interest in the suit land.

Their Lordships in ;the decision reported in **2012 (1) JLJR 199 (Shalkhan Murmu Versus State of Jharkhand)** have observed that court should be strict in implementation of Land Reforms Law and protect the interest of down-trodden people belonging to scheduled tribe, scheduled caste and backward class community. Thus the law which exists now provides that an occupancy raiyats belonging to a member of scheduled caste or backward class community can transfer his raiyat land by sale, exchange, gift, will or lease to another member of scheduled caste and backward class community, as the case may be and who is resident of the same district in which the holding is situate with the previous sanction of Deputy Commissioner.

Kanti Devi Versus State of Jharkhand and others, 2009 (4) JCR 384 (Jhr.) -Section 46 – Transfer in violation of compromise decree passed in the title suit would amount to a fraud upon the statute itself and cannot create and right in favour of the vendee.

Ramesh Pramanik Versus State of Bihar and others, 2009 (3) JCR 25 (Jhr.) – Section 46(3-A) – Compromise in the title suit regarding transfer of the right in raiyati land in contravention of the provision of Section 46(3) of the Act is illegal and invalid.

Md. Munna Ali and another Versus State of Bihar and others) 2002 (3) JCR 121

– **Section 46** – Compromise decree obtained by Civil Court is violation of Section 46 – such decree is of no avail.

Rambriksh Gupta Versus State of Bihar and others, 2003 (4) JCR 206 – Section 46(1) and 71A – Applicability of transaction in contravention of section 46 of Act – Subsequent confirmation by compromise – effect of compromise between the parties may not be a fraud on the court but it was certainly a fraud against the statute – Authorities in exercise of power under Section 71A of the Act are competent to restore possession by annulling such transaction- Restoration order rightly passed.

BHUINHARI LAND :

Bhuinhars are the descendants of the Pioneer families who cleared the jungle and brought that particular area under cultivation and became owners. The word Bhuinhar means the owner of the soil. Bhuinhari lands are the land which are really the ancestral holdings of the descendants of the aboriginal clearers of the village.

The above tenure was included in the survey done by Babu Rakhal Das Haldhar under the Chhotanagpur Tenure Act (Act II of 1869) commonly known as Bhuinhari survey.

The object of the survey was to make a record of the ancestral Holdings of the aboriginal tribes in Ranchi District and the lands entered in the register prepared under this survey are generally shown as Bhuinhari tenure held by persons claiming to be descendants of original founder of villages. If a particular land is entered in the register maintained under the Act then it will be deemed to be a Bhuinhari Tenure. The Bhuinhari Tenure has been treated as a separate class under the Act and specific provisions have been made in respect of such tenures.

In the survey of 1869 the Bhuinhari Register were prepared according to the different khunt into which the Bhuinhari were divided. The word khunt means lineage and it is applied to the agnatic descendants from common ancestors. In the last settlement the Bhuinhars were entered in Khewat according to Bhuinhari Register of 1869 survey and the particulars of khunt of Bhuinhars was shown in column no. 3 of the khewat.

Taylor classified the bhuinhari land under the Chotanagpur Tenure Act in seven categories–

1. Bhuinhari – The cultivation of the original clearers of the village.
2. Bhuinhari Mahtos – The official cultivation of the Mahto.
3. Bhuinhari Mundari – The official cultivation of the village Munda.
4. Bhuinhari Pahanie – The official cultivation of the Pahan or village priest.

5. Bhuinhari Pahbhara – Lands given for the service of carrying after at the village sacrifices.
6. Bhuinhari Dalikatari lands – The income of which is devoted to religious purposes in the village.
7. Bhuinhari Bhutkheta lands – The income of which is devoted in the religious purposes in the village.

Section 48 - Restriction of transfer of Bhuinhar Tenure

(I) A member of 'Bhuinhari' family may transfer any Bhuinhari tenure which is held by him or any portion thereof in the same manner and to the same extent as an aboriginal raiyat may transfer his right in his holding under clause (a) and (b) of Sub-Section 2 of Section 46.

Sub-Section 4 lays down the power of the Deputy Commissioner to eject the transferee and place such member of Bhuinhari Tenure in possession when the transfer has been made in contravention of the Section within 12 years of the said transfer.

It has been held in the judgment reported in **1997 (1) BLJR 401 (Harihar Sahu Versus Commissioner, South Chotanagpur and others)** that if claim for restoration of bhuinhari land is made after 12 years the same would be barred by limitation according to Section 48(4) of the C.N.T. Act. It is pertinent to mention here that by virtue of amendment in Section 71A of the C.N.T. Act by Regulation 1 of 1986 the land belonging to Mundari Khuntkattidar and bhuinhari also come within the purview of Section 71A of the C.N.T. Act. The said amending provision is not retrospective in operation as would also be evident from the judgment reported in **1992 (2) BLJR 986 (Bukan Ansari and others versus State of Bihar and others)**.

Section 48A – Restriction on the sale of Bhuinhari Tenure.

Section 49 - Transfer of occupancy holding or Bhuinhari Tenure for certain purposes- The land could be transferred for religious, charitable and educational purpose prior to amendment of **Section 49 of the CNT Act, 1996**. By virtue of the said amendment land can be now transferred for industrial and mining purpose with sanction of the Deputy Commissioner. In Section 49 there was amendment by CNT Amendment Act, 1975 and clause (5) was inserted according to which power has been given to State Government to annul the transfer if consent of the Deputy Commissioner has been obtained in contravention of the provisions of sub-section (1) and (2) by misrepresentation or fraud if claim is made within 12 years from the date on which written consent is given by the Deputy Commissioner in regard to transfer of holding of occupancy raiyats belonging to a member of Scheduled Tribe.

Sections 49 and 71A C.N.T. Act.

If the land has been transferred pursuant to permission granted by the Deputy Commissioner under Section 49 of the C.N.T. Act, according to Section 49(5) of the said Act which has been inserted by section 5 of C.N.T. (Amendment) Act, 1975, the State Government may at any time within a period of twelve years from the date on which written consent is given by the Deputy Commissioner in regard to the transfer of any holding or part thereof belonging to an occupancy raiyat who is a member of scheduled tribe either on its own motion or on an application made to it in this behalf set aside such written consent and annul the transfer if, after holding an enquiry in the prescribed manner and after giving reasonable opportunity to the parties concerned to be heard it finds that the consent had been obtained in contravention of the provisions of Sub-sections (1) and (2) by misrepresentation or fraud and in case any holding or part thereof has been transferred on the basis of such written consent, direct the Deputy Commissioner to take further necessary action under Clause (C) of sub Section 4A of Section 46. Thus the aggrieved member of scheduled tribe cannot invoke the provision of Section 71A of the C.N.T. Act. It has been consistently held that if transfer of land has taken place in pursuance of sanction of the Deputy Commissioner under Section 49 of the C.N.T. Act the provision of Section 71A of the said Act is not attracted as held in the decisions reported in **1990 BLT 352 Division Bench (Sri Rajendra Nath Kapoor Versus the State of Bihar and others)**, 2003 (3) JCR 492 (**Niranjan Mahli and another versus State of Bihar and others**), 2001 (1) JLJR 225 (**Jiwan Lal, Hemanth Kumar and others versus State of Bihar and others**), 2004 (3) JCR 343 (**Kusum Devi etc and Pravir Kumar and others versus State of Bihar and others**), 2007 (7) JCR Division Bench (**Etwa Oraon Versus Smt. Kusum Devi and others**), 2009 (2) JCR 20 (**arish Chandra Keshri versus State of Jharkhand and others**), 2010 (3) JCR 468 (**Paika Murmu and others versus State of Jharkhand and others**).

Mundari Khunt Kattidari Tenancy Chapter XVIII

Section 240 of the Act lays down the restriction on transfer of Mundari Khunt Kattidari tenancy - No Mundari Khunt Kattidari tenancy or portion thereof shall be transferable by sale, whether in execution of decree or order of a court or otherwise. No mortgage shall be valid except bhugut bandha mortgage. No lease of this tenancy or any portion thereof shall be valid except a mukarari lease of uncultivated land when granted to a mundari or a group of mundaris.

The above restriction has been partly lifted under **Section 241** and Mundari-khunt-kattidar may without the consent of his land lord transfer the land comprised in his tenancy

for any reasonable and sufficient purpose having relation to the good of the tenancy or of the tenure or the estate.

Section 241 Transfer for certain purposes - Mundari Khunt-Kattidar-may transfer the land comprised in his tenancy for a religious or charitable purpose such as the use of the land for any charitable, religious or educational purpose or for the purpose of manufacture or irrigation. The consent of the Deputy Commissioner is required for transfer of the land.

Section 242 provides that if any person obtains possession of a Mundari-khunt-kattidari tenancy or any portion in contravention of the provision of Section 240 the Deputy Commissioner may eject him therefrom.

In **Bhim Singh Munda Vs State of Jharkhand 2013(2)JCR 69 (Jhr)** the legal issue that came for determination was whether a Civil suit with respect to the entry relating to Mundari Khunt -Kattidari tenancy right in the record of right is maintainable ? The question was answered in the negative and it was held that if in the course of any proceeding under Section 244 any question of title is raised , which in the opinion of Deputy Commissioner, more properly be determined by a civil Court , the Deputy Commissioner shall refer such question to the principal for determination. – If there is a bonafide dispute between two claimants involving question of title, then civil court can examine the issue only on reference. Section 251, bars any suit under Section 87 for decision of any dispute regarding Mundari Khunt Kattidari in a record of right.

RESTORATION OF LAND UNDER SECTION 71 A OF CNT ACT

Bihar Scheduled Areas Regulation 1969 inserted Section **71A** in the CNT Act to undo the wrongs committed in contravention to the provisions of section 46, 48 or 240 of the Act. This is the specific provision for the scheduled tribe and if at any time it comes to the notice of the Deputy Commissioner that on illegal transfer of land belonging to a raiyat or a mundari khuntkattidar or a Bhuinhar has taken place by any fraudulent method, including decrees obtained by fraud in the suit by collusion after giving notice, he may evict the transferee from such land without payment of compensation and restore it with the transferor or with the heir of the raiyat or another **raiyat belonging to scheduled tribe**.

By the above regulation certain amendments were made in different Acts including the Code of Civil Procedure, Limitation Act. The proviso to Article 65 of the Limitation Act was amended and period of adverse possession was extended to 30 years instead of 12 years. Wide discretion was vested in the Deputy Commissioner to restore land.

The only reprieve to the transferee has been given is that where a substantial structure of building has been raised before coming into force of Bihar Scheduled Areas Regulation

1969 he may validate such transfer where the transferee make available to the transferor an alternative holding or portion thereof or pays adequate compensation as may be determined. If the transferee acquired title by adverse possession and the transferred land should be restored he shall require the transferor or his heir or the another raiyat as the case may be to deposit with the Deputy Commissioner such sum of money as may be determined.

The constitutional validity of section 71A was challenged in **Amrendra Nath Dutta Vs. State of Bihar AIR 1983 (Pat) 151** in which it was held that the Bihar Scheduled Areas Regulation 1969 was valid piece of legislation. It was further held that section 71A was not retrospective in operation which conferred power to Deputy Commissioner to evict persons to whom transfer has been made prior to coming into force of section 71A. Under Section 71A of the Act, the jurisdiction of the Deputy Commissioner is to determine whether the transfers were made in contravention of section 46 or any other provision of the Act or by any fraudulent method and not transfers in contravention of Bihar Schedule Area Regulation, 1969. And, therefore, even without being retrospective in operation, Section 71A can include within its ambit, transfers made prior to the coming into force of that section, if they were in contravention of Section 46 or any other provision of the Act or by any other fraudulent method.

Section 71 applies to agricultural land and not to land falling under municipal area. So where in the khatian the land has been shown to be Chhaparbandi Section 71 A shall have no application.

In the judgment of the Hon'ble Supreme Court reported in **AIR 1992 SC 195 (Pandey Oraon Versus Ramchandra Sahu and others)** it has been held that the term transfer contemplates situation where possession has passed from one to another and, as a fact, member of scheduled tribe is entitled to hold possession has lost it and one not a member of said tribe has come in possession. It has further been held that the provision of Section 71A of the C.N.T. Act is beneficial and the legislative intention is to extend protection to a class of citizen who is not in a position to keep his properties in absence of protection. Their Lordships of the Hon'ble Supreme Court in the decision reported in **Jai Mangal Oraon vs. Smt. Mira Nayak and Others, (2000) 5 SCC 141** have held that when surrender of the land was made in the year 1942, previous sanction from Deputy Commissioner was not necessary. Such surrender also cannot be held bad merely because it was not at the end of agricultural year but immediately before, more so when party has acquired right about forty years back. Their Lordships of the Hon'ble High Court of Jharkhand in the judgment reported in **2004 (2) JLJR 253 (Chaitu Oraon and another versus the State of Jharkhand and others)** have held that application for restoration of land filed after forty three years from the date of surrender is apparently barred by limitation. Similarly in the judgment reported in **2013 (1) JCR 313 (Shyam Narayan Singh and another versus**

Commissioner, South Chotanagpur Division and others) it has been held that power under Section 71A of the C.N.T. Act cannot be exercised after unreasonable long time during which third party's interest might have come into effect. In that case claim for restoration of the land was filed after delay of forty one years. The writ application was allowed. In the judgment reported in **2011 (4) JCR 73 (Smt. Sharda Devi Versus the Commissioner, South Chotanagpur Division, Ranchi)** it has been held that there was no restriction of transfer inter-se-between the members of scheduled tribe at the relevant time and as such violation of section 71A of the C.N.T. Act does not arise. Restoration application filed after lapse of forty four years can by no stretch of imagination is reasonable time. In another judgment reported in **2011 (4) JCR 334 (Malati Murmu Versus State of Jharkhand and others)** it has been held that application for restoration of land filed after thirty five to forty years from the date when the person concerned came in possession of the disputed land is not maintainable being barred by limitation. In the judgment reported in **2009 (1) JCR 193 (Akhouri Akhileshwari Charan Lal and others Versus State of Bihar and others)** it has been held that surrender and settlement of land made within the span of few days is quite legal and valid. It has further been held that application for restoration of the land filed after thirty five years from the date of surrender was barred by limitation. Their Lordships in the decision reported in **2012 (4) JCR 580 (Budhwa Munda Versus State of Jharkhand and others)** have held that seeking exercise of jurisdiction under Section 71A of the C.N.T. Act cannot be sought after long delay of more than fifty years. In view of the above consistent judicial pronouncements, it cannot be said that there is no period of limitation for claiming restoration of the land under the provision of section 71A of the C.N.T. Act.

Whether section 71A of the C.N.T. Act applies in a case where the land has been auction sold by the order of Court?

It has been held in the decision reported in **1988 BLT 172 (Raj Sewak Singh and another versus State of Bihar and others)** that transfer does not cover involuntary transfer. When transfer took place in execution of decree by direction of court for auction, such a transfer is beyond the scope of Section 71A of the C.N.T. Act. In the judgment reported in **1990 BLT 217 (Abdul Salim Versus the Commissioner, South Chotanagpur Division and others)** it has been held that application under Section 71A of the C.N.T. Act is not maintainable in case of auction sale of the land by court in execution of a decree. Further in the judgment reported in **2003 (4) JCR (Jagdish Prasad Singh and another Versus State of Bihar and others)** it has been held that in a case where disputed land has been transferred in pursuant to the execution case and the auction purchaser has been put in possession, provision of Section 71A is not applicable. Similarly in the judgment reported in **2013 (1) JCR 174 (Bana Munda Versus State of Bihar (now Jharkhand)** it has been

held that if there has been auction of the property by Official liquidator pursuant to the order of the Kolkata High Court, provision of Section 71A of the C.N.T. Act is not attracted.

Whether transferee of land can claim restoration under Section 71A of the C.N.T. Act?

Section 71A of the C.N.T. Act is applicable when transfer of land is made by a raiyat who is a member of scheduled tribe and not where such a raiyat is himself a transferee and not a transferor as held in the judgment of **Ramchandra Sahu alias Ramchandra Prasad alias Kolha Sahu versus State of Bihar and others reported in 1990 (1) PLJR 604 Division Bench**. Further it has been held in the judgment reported in **2010 (1) JCR 427 (Saraswati Devi Versus State of Jharkhand and others)** that application under Section 71A of the C.N.T. Act for restoration of possession of land filed by person claiming land by way of purchase by registered sale deed is not maintainable.

Whether principle of res-judicata applies in a proceeding under Section 71A of the C.N.T. Act?

It is a settled principle of law that principle of res-judicata is well applicable in a proceeding under Section 71A of the C.N.T. Act. Thus if an earlier proceeding under Section 71A of the C.N.T. Act has been decided against the applicant and which has attained finality, subsequent proceeding for restoration of the land is not maintainable and is barred by the principle of res-judicata as held in the decisions reported in **1987 BLT 234 (Sohan Mahto and others versus State of Bihar and others)**, **1993 (1) PLJR 14 (Md. Salimuddin alias Dhaiba Khan versus Commissioner, South Chotanagpur Division, Ranchi)**, **1996 (2) PLJR 719 DB (Smt. Satyabati Devi Versus the State of Bihar and others)**, **1995 (1) BLJR 604 (Harikrishna Prasad Keshari and others versus State of Bihar and others)**, **2005 (1) JCR 237 (Gadia Oraon and others versus State of Jharkhand and others)**, **2004 (2) JCR 107 (Bibi Makho and others Versus State of Bihar and others)** and **2003 (4) JCR 395 (Jagdish Prasad Singh and another versus State of Bihar and others)**.

In the judgment reported in **(1991) 2 BLJR 1048 (Patras Oraon Versus State of Bihar and others)** it was held that transfer of land between the members of Scheduled Tribe in 1944 is not in violation of Section 46 of the C.N.T. Act. The embargo put by the amending Act of 1947 is not retrospective. The order allowing application for restoration of possession under Section 71A of the C.N.T. Act was quashed.

2003 (3) JLJR 626 Anupama Rai Vs. State of Bihar An application was filed by a member of Scheduled tribe against the petitioner under section 71A of CNT Act for restoration of three and half *kathas* of land in village Kokar, Ranchi on the ground that he has been dispossessed from the said land. The restoration application was contested inter alia

on the ground that the brother of the petitioner purchased one acre of chapparbandi land from Lakho Oraon by registered deed of sale dated 19/5/1959 and came in possession of the same. The petitioner and his brother got their names mutated and had been paying chapparbandi rent to the state of Bihar. The order of restoration was passed by the special officer. The restoration order was challenged in CWJC 713 of 1980 (R) filed by the petitioner in which the matter was remanded with observation that if the land was chapparbandi, as alleged by the petitioner it will be covered by the Transfer of Property Act and not by the CNT Act. After the remand the special court admitted evidence on behalf of the parties and recorded a finding that the land appears to have been converted into chapparbandi land and therefore the Section 71A of the Chotanagpur Tenancy Act is not applicable. The order of the special Officer was set aside in appeal by the Deputy Commissioner and in revision by the Commissioner. Against the revisional order the writ application was filed by the petitioner. It was contended that the Jamabandi submitted by the ex-landlord showed that it was converted into chapparbandi and the same was accepted by revenue authorities. Considering the ground the writ was allowed and the order of restoration was set aside.

In the judgment of **Kamal Khess and another versus State of Jharkhand and others reported in 2011 (4) AIR Jharkhand High Court Reports 138** it has been held that if the land has not been used for agricultural purpose since 1929, Section 71A of the C.N.T. Act is not applicable. In that case in municipal survey record of right the land was mentioned as **makan katcha khaprapose main agan with hata and municipal taxes were paid**. Similarly in the judgment reported in **1989 BLT 404 (Akhilshwar Prasad Srivastava and others Vs. Commissioner, South Chotanagpur Division, Ranchi and others)** it has been held that provision of Section 71A is not applicable if the land ceases to be agricultural land and has been converted into Chhapparbandi one. Similarly in **1989 BLT 407 (Smt. Munni Devi and others Vs. Special Officer, SAR, Ranchi and others)** it has been held that the Chhapparbandi lands are not covered under the provisions of C.N.T. Act. Thus for transfer of Chhapparbandi land by a tribal no permission of the Deputy Commissioner is required.

Situ Sahu and Ors Vs State of Jharkhand & Ors 2004(8) SCC 340

The use of words “at any time” in Section 71 A is evidence of the legislative intent to give sufficient flexibility to the Deputy Commissioner to implement the Socio-Economic Policy of the Act viz to prevent the inroads into the rights of the ignorants, illiterate and Backward Citizens. Thus, where the Deputy Commissioner chooses to exercise his power under Section 71 A it would be futile to contend that the period of limitation under Limitation Act has expired. The period of limitation is intended to bar suits brought in civil courts where the party himself chooses to exercise his right of seeking restoration of his immovable property. But, where, for socio-economic reasons, the party may not even

be aware of his own rights, the legislature has stepped in by making the officer of the state responsible for doing social justice by clothing him with sufficient power. However, even such power cannot be exercised after an unreasonably long time during which third party interest might have come into effect.---- Lapse of 40 years is certainly not a reasonable time for exercise of power, even if it is not hedged by a period of limitation.

It has been held in **Sarmishtha Sinha & Meera Prasad Vs State of Jharkhand 2010 (2)JLJR 392** that **Section 71 A does not apply in case of land validly converted into Chapparbandi land** by tenant with the permission of land lord by registered deed. The Hon'ble Court followed the authority of *Ashwini Kumar Roy Vs State of Jharkhand*, in which it was held that Section 71 A did not apply in case of Chapparbandi Land and lands which fell within the Jurisdiction of Municipality. Application for restoration having been filed after 51 years of transfer it was also held to be barred by limitation.

SURRENDER & ABANDONMENT OF LAND BY RAIYAT S/72&73

The right of Surrender of holding by raiyat at the end of any agricultural year is recognized under Section 72 of the CNT Act. The requirement of previous sanction of the Deputy Commissioner has been inserted by the Ammendment Act of 1947 which came into force with effect from 5.1.1948. It is also known as *istifanama* and prior to 5.1.1948 there was no requirement of sanction of the Deputy Commissioner.

In some of the case claim to title is based on abandonment of land followed by the settlement of the abandoned land by the landlord in favour of the predecessor-in-interest to the party concerned. Section 73 is the relevant provision which lays down the condition under which the land is to be resumed by the Landlord on abandonment by raiyat.

Section 73-(1) If a raiyat voluntarily abandons the land held or cultivated by him, **without notice to the land lord and ceases to pay his rent 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 Commissioner** 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 the notice to be published in the prescribed manner and if an objection is preferred within one month from 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 land unless and until such objection has been decided in his favour, or if no such objection is received within one month of the publication of 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 three years in case of a Occupancy raiyat and one year in case of a Non-Occupancy raiyat from the date of publication of notice.; and thereupon the Deputy Commissioner may on being satisfied that the raiyat did not abandon his hoding may restore him to possession.

[2004] 1 JLJR205 Jamhir Ansari Vs Ketna Oraon

The status of a *adhbataidar* is that of a tenant and not of a hired labour. Derilection of duty aggravated by voluntary departure from holding is a strong evidence of severance of relationship of landlord and tenant and landlord becomes entitled to resume possession-- Instantly defendant-respondent having remained in continuous cultivating possession over the suit part for several years beyond 12 years perfected his right and title in the suit property.

SETTLEMENT OF WASTE LAND

The tenure-holder had the right to settle the wasteland especially *gairmazurwa Khas* land to bring it under cultivation. This right flows from the definition of tenure-holder which included the right to collect rent by bringing the waste land under cultivation.

Revenue collection being the primary responsibility of the tenure holder, he had right to settle the land to the raiyats which was in the nature of perpetual agricultural lease on condition of paying revenue. But this right was not unfettered and only a specific category of land could be settled by him.

The ex-zamindars were the custodian of Gairmajarua Malik and Gairmajarua Aam. The G.M. Khas land was also known as Gairawad Malik in cadastral record. They had power to settle Gairmajarua khas land with raiyats for cultivation purpose through plain paper Hukumnama or through registered settlement deeds. These settlements were basically in nature of agricultural lease and there are authorities on the point of Hon'ble Patna High Court which recognizes such settlement by plain unregistered deeds of settlement to show the nature and character of possession.

Sections 73 and 71A of the C.N.T. Act

In a case the recorded raiyat died and ex-landlord treating the land as abandoned, took possession and settled it with another person. The nephew of recorded raiyats applied for restoration of land. It was held in the judgment reported in **1998 (1) BLJR 149 (S.K. Rahimuddin and others versus Lakho Devi and others)** that no order for restoration under Section 71A of the C.N.T. Act can be passed. It has been held in the judgment reported in **2004 (2) JCR 559 (Shankar Nahak Versus Bharat Coaking Coal Limited through Director, Koyla Bhawan, Dhanbad and others)** that section

73 of the C.N.T. Act gives right to the landlord to take possession of abandoned holding without filing a suit. Further their Lordships in the decision reported in **2004 (1) JCR 407 (Jamhir Ansari Versus Ketna Oraon and others)** have held that when landlord had entered into the land treating the same as abandoned without following the procedure prescribed, rule of limitation will apply. In order to constitute abandonment within the meaning of Section 73 of the CNT Act, there must co-exist a voluntary abandonment of holding, absence of arrangement for payment of rent and cessation of cultivation of the said holding. The cultivation of land and payment of rent are the two permanent duties of tenant and the dereliction of such duties aggravated by voluntary departure from holding is strong evidence of the severance of the relationship of landlord and tenant.

Most Ugni and another Vs Chowa Mahto AIR 1968 (pat) 302 FB

The unregistered Hukumnama though inadmissible can be looked into to show the nature and character of possession. The oral evidence of terms of lease is not admissible, but independent of the hukumnama, the rent receipts themselves would indicate the rate of rent, the area and nature of the right of the lessee. It is true that valid agricultural lease may be created by a registered instrument and if such a registered document is created the delivery of possession is not necessary to prove the title of the lessee. If however, the lease is not registered, and is, therefore inadmissible as evidence of title, it will be open to the tenant concerned to show that he obtained raiyati interest on the strength of actual possession and acceptance of rent by the landlord. There is also no legal bar to a person claiming raiyati interest on two alternative pleas. He may claim such a right on the basis of a written document of lease. If, however, such claim fails on the ground that the document being compulsorily registrable, nevertheless his alternative plea based on actual possession coupled with acceptance rent by landlord may succeed.

Mahadeo Oraon Vs State of Bihar & Ors 2009(4)JLJR 106

Unregistered Hukumnama is not admissible and cannot be considered as a deed of gift

The Supreme Court in **Kedar Nath Vs Prahlad Rai AIR 1960 SC 213** approved the observation of "Lord Mansfield in *Holman Vs Johnson* (1775) 1 Cowp 341,343. The public policy is this : **ex dolo malo no ortur actio**. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise **ex turpi cusa** or the transgression of a positive law of the country, there the court says he has no right to be assisted.

Section 63A and 63 B are the relevant provisions settlement of waste land by the State Govt.

The tenure-holders had earlier before vesting had similar power to settle waste land

with the raiyats in order to bring them under cultivation and increase the revenue of the State. The power of settlement was however not unfettered and only a particular class of land could be settled by the landlord. Thus the landlord had no authority to settle Gair Majurwa aam land. Settlement deed is also called *Hukumnama* which is a written permission by the land lord to a tenant to reclaim waste land or cultivate , the land lords Khas land which is a kind of perpetual and transferable lease.

There are instances galore when the claim of title is made by unscrupulous litigants on the basis of forged and fabricated settlement deed called hukumnama executed by the ex-landlord. The question that naturally arises is as to what are the evidences to be looked into for a valid settlement deed. If it was a sada hukumnama the court will normally look for additional evidence to test the validity of it. The credibility of such sada hukumnama can be ascertained from the entries in the return filed by the zamindar to the effect and also by the fact of opening of Jamabandi in the local revenue offices quick on the heels of the abolition of zamindari.

Jaggiwan Singh Vs The State of Bihar(Now Jharkhand) 2013(4) JCR 692 (Jhr)

Recorded tenant surrendered the land in question to ex-landlord by registered deed of surrender dated 18.5.1942--- Settlement made in favour of the mother of the petitioner subsequent thereto in 1943-- She continued to pay rent to ex-landlord. Merely because a settlement is made within one year of surrender , it would not necessarily mean that surrender and settlement would form part of the same transaction.

Mahbir Kashi State of Jharkhand (Jhr) 2008(4)JCR428

Jamabandi based on forged sada Hukumnama in collusion with the Government officials without obtaining order of competent authority, is illegal and liable to be cancelled. ----- It appears that illegal Jamabandi of Gairmajurwa Khas land is the valuable property of the the State Govt which got vested in the State under Bihar land Reforms Act 1950

XIII LANDLORDS PRIVILEGED LAND

Section 118 of the CNT Act defines Landlords Privileged Land as lands which are cultivated by the landlord himself with his own stock or by his own servants or by hired labour or are held by a tenant on lease for a term (exceeding one year, or on a lease written or oral for a period of one year or less), and which are by custom, recognized as privileged land in which occupancy – right cannot accrue. Zirat land in Chotanagpur division, lands which are known as man, Manjhiahs, Bethkheta also are landlords privileged lands.

It has been held in **Santa Lohar Vs. Dwarika Sahu 1989 BLT (Rep) 267** that if a person was in khas possession on date of vesting he acquired an occupancy right

MAIN PROVISIONS OF SPT (SUPPLEMENTARY PROVISIONS) ACT, 1949

HISTORICAL BACKGROUND

This Act extends to Dumka, Jamtara, Sahibganj, Godda, Deoghar and Pakur.

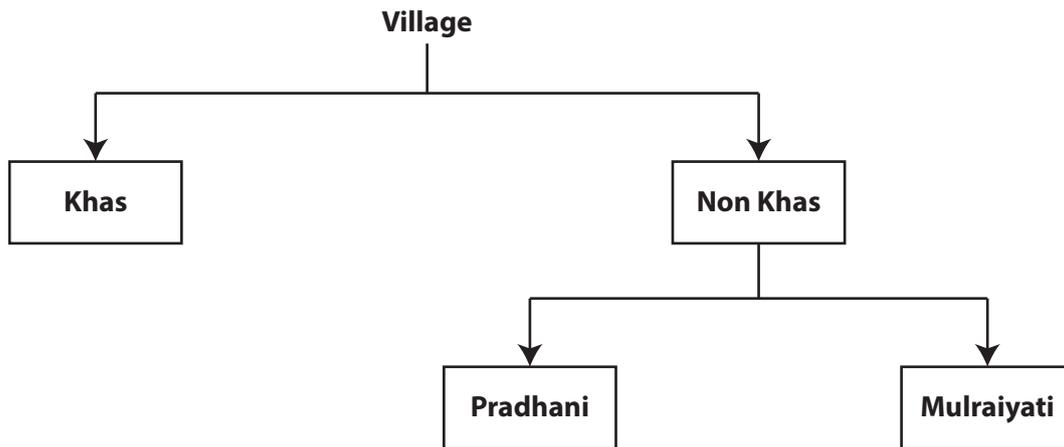
The historical background of the SPT Act has been lucidly captured in the judgment rendered by Hon'ble Mr. Justice S.S. Sandhwalia in **(1985) 0 AIR (Pat) 196**. The historical retrospect here spans a period of more than a century. Its true perspective is against the back-drop of primordial backwardness of the santhal tribes interspersed in the deeply wooded and semi tropical forests of the district of Santhal Pargana. The underlying rationale of Regulation III of 1872 and earlier regulation going back even beyond the middle of 19th Century may be noticed from the final settlement report in the district of Santhal Parganas by J.F. Gantzer, which is supplemented to the earlier and more celebrated and exhaustive report of Sir Hugh Mcpherson : *The question of transfers with which the settlement has to deal, and it is infact one which affects the very root of the Santhal Parganas System. Broadly speaking it may be said that the whole object of the agrarian law of the districts since 1872, when Regulation III of that year was introduced, is to ensure that the population should be allowed to remain undisturbed in possession of its ancestral property, and that any reclamation of waste lands, which is done in any village shall be done only by the jamabandi raiyats of the village. The history of the district plainly shows that the vast majority of the people in it are quite unable to grasp the principle of outsiders taking possession of their land whether legally or illegally, that is to say, either by force or by the ordinary means of acquiring land such as sale, mortgage or certain form of sub-lease.*

For our purpose it is, perhaps, unnecessary to deal beyond the year 1872, when Regulation III was enacted and subsequently, amendments were made therein. In chronological order, this was followed by the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949, which came into force on 1st of November, 1949 as the very heading in the statute indicates, it was not intended to altogether repeal or substitute the

earlier Regulation III of 1872, but was somewhat supplementary in nature. While some of the provisions or Regulation III of 1972 continued as supplemented by the Act, certain sections thereof were, however, repealed and substituted by more elaborate provisions of the Act, which might have become necessary by passage of time. In this category falls section 20 of the Act, which in terms substituted Section 27 of the earlier Regulation III of 1872”.

There is no court of *munsif* in Santhal Pargana and the power to hear suits up to the value of Rs 500/- is vested in the Deputy Commissioner. One of the factual fall out of this is that suits are filed in the Courts of Sub-Judge by simply increasing the suit value.

Under the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 (*hereinafter* referred to as “the SPT Act”), villages¹ have been classified into *khas* villages and the others which are *non khas* villages.



Khas Village

According to Section 4(ix) of the SPT Act, a “khas village” means a village in which there is no mulrai-yat nor for the time being any village headman irrespective of whether there was or was not previously a mulrai-yat or village headman in the village. Before the coming into force of BLR Act, such villages were under the direct control of the landlord and after the BLR Act such villages are under the direct control of the government.

1 Section 4(xxi) – “village” means – The area defined, surveyed and recorded as a distinct and separate village in the map and record-of-rights prepared under any law for the time being in force, and Where a survey has not been made and a record-of-rights has not been prepared under any such law, such area as the Deputy Commissioner may, with the sanction of the Commissioner, by general or special order, declare to constitute a village :

Provided that when an order has been passed under Section 9 of the Santhal Parganas Settlement Regulation (Reg. 3 of 1872) directing that a survey be made and record-of-rights prepared in respect of the whole or any part of the Santhal Parganas, the State Government may by notification, declare that in such area ‘village’ shall mean the area which for the purposes of such survey and record-of-rights may be adopted by the Settlement Officer, subject to the control of the Commissioner, as the unit for making the survey and preparing the record-of-rights.

Non Khas Village

A Khas village can over the time become a non-khas village if a headman is appointed under Section 5 of the Act and a non-khas village can become Khas village if there is no heir of a mulraiayat or the village headman is dismissed from his office. Therefore the office of mulraiayat or village headman is only in case of non-khas village. How this classification of khas and non-khas village evolved can be better understood in the light of the report of the district gazetteer which refers to the manner in which the office of mulraiayati was created and in H. Mc. Pherson's settlement, 540 such villages were recognized.

CRITERIA FOR APPOINTMENT AS A VILLAGE HEADMAN IN KHAS VILLAGE (Sec. 5)

In case of **khas village**, a Village Headman is appointed under **Section 5** on an application of a raiyat or of landlord of any **khas village** and with **consent of at least 2/3rd of the Jamabandi raiyats** of the village ascertained in the manner prescribed. Rule 3 of the Santal Parganas Tenancy (Supplementary) Rules, 1950 prescribes the manner² of ascertaining the consent of *jamabandi raiyats* and appointment of headman under section 5. On such consent, the Deputy Commissioner may declare that the headman shall be appointed for the village and shall then proceed to make appointment in the prescribed manner.

Landlord to report the death of village Headman (Sec. 6)

Section 5 of the Act provides powers of appointment of a headman of a khas village and section 6 relates to powers with respect to a village which is non khas. According to section 6, when the village headman of a village which is non khas, dies, the landlord of the village shall report the fact within three months of its occurrence to the Deputy Commissioner with a view to the appointment of a village headman in the prescribed manner.

2 Rules regarding the manner of ascertaining the consent of jamabandi raiyats and appointment of headman under section 5-(1)On receipt of an application from a raiyat or a landlord under section 5, the Deputy Commissioner shall issue notice to the jamabandi raiyatsof the village and to the landlord in Form A.(2)The consent of at least two-thirds of the persons recorded as jamabandi raiyats of the village shall be ascertained by the Deputy Commissioner by show of hands : Provided that if on the date so fixed at least two- thirds of the persons recorded as jamabandi raiyats of the vil- lage fail to be present the Deputy Commissioner shall fix another date and issue fresh notices in the manner prescribed in sub rule 3(1), if on the date so fixed, at least two thirds of the persons recorded as jamabandi raiyats again fail to be present the Deputy Commissioner shall summarily reject the application made under section 5.

(3) The decision of the Deputy Commissioner as to whether a person is entitled to vote or not shall be final.

(4) If at least two –third of the persons recorded as jamabandi raiyats give their consent for appointment of headman for the village, the Deputy Commissioner shall at once invite nomination for the appointment of headman and proceed to make the appointment.

(5)In making the appointments of headman under section 5 or section 6 the Deputy Commissioner shall, as far as possi- ble, follow the rules prescribed in Schedule V except where these rules, expressly or by necessary implication, provide otherwise.

Village headman to be granted patta and to execute Kabuliyat and furnish security (Sec. 7)

- (1) A village headman shall on appointment be granted a patta, and may be required to execute a kabuliyat in the prescribed form. He shall in the discharge of the duties of his office be governed by such rules as may be made by the State Government.
- (2) The village headman on appointment or when record-of-rights is being prepared under the Santal Parganas Settlement Regulation (Reg.3 of 1872) may be required to pledge so much only of his own or the family holding or holdings held under the same landlord as would in the opinion of the Deputy Commissioner suffice together with the official holdings to secure the village rent for one year:

Provided that ordinarily the rent of the official holding, if any plus that of the lands pledged as security shall be at least ten per centum of the total village rent payable by the village headman:

Provided further that at every appointment of a new village headman , the consent of co sharers, if any, shall be taken in writing before the family holding is pledged as security for village rent. The co sharers shall have the right to have their shares released from security ,at any time after the first five years, but all arrears of village rent must be paid up in full before any share is so released.

- (3) A village headman shall have the opinion to give at any time cash security instead of, or to supplement , the security of his land. The Deputy Commissioner shall fix the amount of such cash security which when paid shall be placed in revenue deposit.

Landlord to supply copies of jamabandi and record-of-rights to newly appointed village headman (Sec.8)

Non transferability of village headman's office (Sec.9)

Only land recorded as such to be treated as mulraiayat ka jote and mulraiayti jote (Sec.10)

To proceed further with the provisions of the SPT Act, it is important to know what a mulraiayat and a "village headman" means.

Village Headman

Section 4 (xxiii) defines "village headman" as the person appointed or recognized whether before or after the commencement of this Act by the Deputy Commissioner or other duly authorized officer to hold the office of a village headman whether known as pradhan, mustajur, manjhi or otherwise, but does not include a mulraiayat.

Mulraiayat

Mulraiayat is not defined under the SPT Act. As per gazetteer of the Ranchi District, a mulraiayat is like a village headman who is the descendant of the original founder of the village. In 1876-77 in the course of settlement of the then sub-division of Deoghar by Mr. Browne Wood, 80 men, who had been recognized as Headmen, presented a petition to the Government claiming that they were raiyats having a right to transfer their holdings and cultivators under them should be recorded as under raiyats or korfadars with no right of occupancy. It was finally decided that these persons and others in like possession should be styled mulraiayat; but the rights of cultivators were protected by the record of rights. The two criteria for settling claims to the status of mulraiayats, both of which were needed to be satisfied, were –

1. That the claimant should be descendent of the original founder of the village; and
2. That the right of the transfer of the mulraiayati interest had been exercised and established.

On the basis of the above, mulraiayati status was recorded in H. Mc. Pherson's settlement in 540 villages. A mulraiayat is a village Headman, who possesses certain special rights and subject to some special incidents. He had a right to transfer his mulraiayati rights as a whole and to a single individual and a co-mulraiayat had a similar right to transfer only as a whole one to a single individual in specified share in the mulraiayati right including the official holding (if any) corresponding to that share and the private holding, if any. The transferee needs recognition from the Deputy Commissioner. A mulraiayat or his co-sharer with the sanction of sub-divisional officer for partition of their private holding and on receiving by partition a separate holding, a co-sharer (other than mulraiayat himself) becomes an ordinary jamabandi raiyat. The official holding cannot be partitioned. A mulraiayat or co-mulraiayat had the right to settle out of his private holding as a whole or in part with the consent of the Sub-Divisional Officer on rental to the raiyats. Lands so settled became the ordinary raiyati land of the village. When mulraiayat or co-mulraiayat dies the main heir is entitled to succeed and if there be no main heir, the Deputy Commissioner may permit a female heir to succeed. All succession has to be reported to the Sub-Divisional Officers and by him to Deputy Commissioner, who has to recognize the succession. The mulraiayat or the whole body of co-mulraiayat acting jointly may with the consent of the Deputy Commissioner surrender the right of transfer, in which case (he or they) becomes ordinary Pradhan. If a mulraiayat dies without an heir or is dismissed for misconduct, there shall thereafter, be no mulraiayat of the village. The Deputy Commissioner shall after consulting the proprietor, either appoint a Pradhan or declare the village khas. If a co-mulraiayat dies without an heir or is dismissed, the Deputy Commissioner may appoint

another co- mulraiyyat or takes such other action for disposal of the deceased or dismisses co- mulraiyyat's right and the performance of his duties, as he deems best after consulting the proprietor, villagers and other co- mulraiyyats. ----- District Gazetter, Santhal Parganas (1938), P. 303

The office of mulraiyyat is hereditary in nature and next heir who is fit, is entitled to be a mulraiyyat. He possesses special rights. When a mulraiyyat dies, the nearest male heir is entitled to succeed and if there is no male heir the D.C. may permit a female heir to succeed. In *Thakur Hembrom v. State of Bihar*, 1980, it was held that authorities should have first considered the case of person claiming right to the post of pradhan on the basis of hereditary claim. It was pointed out that the procedure of election under Section 5 comes only after rejecting the hereditary claim.

In *Mahipal Mishra v. State of Jharkhand*, 2003 2 JLJR 275, it has been held that if the Head Man died then he may leave successor or he may not leave successor and if he does not leave successor then a fresh step under the Rules has to be taken for appointment of a new Head Man. But if he has left some heirs then the question of acceptability of that heir is to be determined as per the Rules. Obvious it is that this acceptability can be ascertained from the will of 2/3 of Jamabandi Raiyats. Rule 3(1) provides that first of all a notice has to be given to 2/3 Raiyats (which ordinarily is called 16 anna raiyats) and if they do not turn up then subsequent notice has to be given and if even thereafter they do not turn up then the Deputy Commissioner will decide the matter rejecting the application made under Section 5.

Schedule V of the Santal Parganas Tenancy (Supplementary) Rules, 1950 provide for the rules for the appointment of headmen.

“In appointing headmen the following rules should be taken into consideration:

The headman must be a resident of the village or his permanent home must be within one mile of the village.

1. The appointments of headmen shall be made in accordance with village customs, and before confirming any appointment, the Deputy Commissioner shall satisfy himself that the candidate is generally acceptable to the raiyats, and an opportunity shall also in every instance, be afforded to the proprietor to object to any candidate.
2. No subdivision of the office of headman can be allowed or recognized unless-
 - (a) There are different classes of raiyats in the village who have always been managed separately
 - (b) Such subdivision has been recognised at the last settlement.

3. The office of headman being hereditary, the next heir, who is fitted should be headman. If the heir be a minor, he may be appointed headman with a *Sarbrakhar* to manage for him until he attains his majority.

If no suitable *sarbrakhar* can be found, the right of minor lapses.

4. A person may be refused succession on the death of his father\mother if for reasons to be recorded, he/she be considered unfit for the post.

It has been held in *Smt Devimai Murmu v. State of Jharkhand and others* 2009(4) JCR699(Jhr) that Section of the Act is applicable only in the matter of appointment of a village headman for a Khas village and that the office of the “pradhan” of a non-khas village is hereditary in nature and the next heir, who is fit, is entitled to be appointed as headman. There is no provision either in the Santhal Pargana Tenancy Act 1949 or in the Rules made there under which puts any restriction or debars any female from being appointed as headman. Daughter may however become entitled to become Headman only if she is gharjamai, daughter meaning thereby that she must have been married to a person by performing gharjamai form of marriage and her husband must have been living at her-in-laws place by severing his relationship with his own family.

It has been held in *Babulal Hembrum v. State of Bihar* 1998 (1) PLJR 43 that in view of the headman’s duty it is self evident that for any meaningful discharge of those duties, it would be essential for the headman to permanently and regularly reside in the village in question and it would not be possible to discharge those duties satisfactorily in case he lived outside the village on government postings and came to the village only intermittently. The court was of the considered view that only a person residing in the village can be considered to be suitable candidate for the office of the headman. The word mulraiyyat is synonymous with the word “village pradhan” or “village headman” and only difference is that mulraiyyats are entitled to retain there raiyati land.

Under **section 9**, the office of the village headman is made non transferable.

Babulal Mandal v. State of Jharkhand, 2008 (3) JLJR455- It has been held in this case that in case of dispute about appointment of a village Pradhan due to the death of the earlier Pradhan the claim of the persons claiming right to the post of Pradhan on the basis of hereditary comes first, and thereafter if one of them was not found acceptable by the villagers then as per rule the S.D.O. should go for election.

RIGHTS, POWERS AND DUTIES OF THE VILLAGE HEADMAN

The rights and duties of the pradhan are enumerated in the record-of rights prepared during the Settlement operations. Some of them are:³

Rights of headmen:

- (a) To enjoy the official holding, where such exists, on payment of rent.
- (b) To receive one anna per rupee on the rent collected from raiyats, in addition to the rent due from them.
- (c) To receive a deduction of one anna per rupee on the rent payable to the proprietor, if paid in due time.
- (d) When a raiyat abandons his land or dies without heirs, the headman shall settle the entire holding.

Duties of the headman:

- (a) To collect and punctually pay the rent to the proprietor.
- (b) To perform the prescribed police duties.
- (c) With that assistance of the raiyats, to repair the dykes, dams, tanks belonging to this village, other than those which are within the duties of the proprietor, also village paths and boundary marks and to preserve the camping and grazing grounds.
- (d) To observe the orders of government prohibiting the transfer in any way of the office of headman, and all manner of transfer or subdivision in raiyati holdings.
- (e) To guard the respective rights of Government, the proprietor and the raiyats.
- (f) To preserve intact the headman's private holding for cultivation and where it exists, his official holding, including old man (service) lands.
- (g) To assist the proprietor in procuring sarkari rasad.
- (h) To realise from the raiyats and to pay to the pragnait, chaukidar and other such officials, their customary and other legal dues.
- (i) To realize from the raiyats and to pay over to that proprietor, road and public work cess, as ordered by Government

Rule 4 of the Santal Parganas Tenancy (Supplementary) Rules, 1950 prescribes the rules regarding the manner in which village headman shall discharge his duties.

3 Binod Mohan Prasad, Malhotra's Santhal Parganas Tenancy Manual(Revised and Enlarged),Malhotra Bros, Reprint Edition 2002

- 4. Rules regarding the manner in which village headman shall discharge his duties.**-(1) In discharge of the duties of his office the village headman shall be governed by the *patta* granted to him and the *kabuliyat* executed by him as also by the record-of -rights for the village. The *patta* and the *kabuliyat* shall be in the form set out in Schedule III.
- (2) It shall be his duty to act as true custodian of the common rights of the village community and he shall with reasonable promptness report infringement of any such rights to the Deputy Commissioner.
- (3) The village headman shall not take part in any subversive activities.
- (4) The headman shall comply with the directions given to him by the Sub - divisional officer or any officer authorized by the Deputy Commissioner in this behalf.
- (5) Where a Gram *Panchayat* has been established under the *Bihar Panchayat Raj Act, 1948*, the headman shall give his full co-operation towards successful working of the Panchayat.
- (6) In case of contravention of any of these sub-rules, the Deputy Commissioner may, in his discretion , dismiss the headman or impose a fine on him.

The main function of a village headman or mulraiyyat is collection of land revenue and settlement of waste land. Under Section 4(xv) rent means whatever is lawfully payable in money by a village headman or mulraiyyat of a village to the landlord of that village in accordance with the record of rights also referred as village rent. The mulraiyyat or the headman is entitled to commission from each raiyyat, one in the rupee on the rent collected by the mulraiyyat or other headman from the raiyyat in terms of The Santal Parganas (Payment of Commission to Headman) Regulation, 1942.

DISMISSAL OF HEADMAN

According to Schedule V of the Santal Parganas Tenancy (Supplementary) Rules, 1950, the power of dismissal rests with the Deputy Commissioner subject to an appeal to the Commissioner, Santal Parganas. Headmen are liable to be dismissed for the following reasons, and the heir of the headman dismissed for misconduct shall have no claim to the office:

- (1) On account of personal unfitness through excessive age; defective intellect or physical infirmity, provided that in cases of this kind, a headman during his life time may

with the approval of the Deputy Commissioner, appoint his heir to act for him. Any misconduct on the part of heir will render him liable to lose his claim to succession on the death or resignation of the headman for whom he acts.

- (2) On account of any proved fraud, violence, contempt of Court or other grave misconduct or of such oppressive or inconsiderate treatment of the raiyats or gross neglect of their interest as may be considered to unfit him for the post.
- (3) For destroying, damaging or failing to guard the common property and recorded rights of the village, or for collecting from raiyats in excess of the settlement rates.
- (4) For failure without due cause to pay his village rents punctually or for alienating or attempting to alienate, without permission his jot which is security for the rent.
- (5) The interest of a headman *manjhi* or *mustajir* is not transferable by sale or otherwise.
- (6) But in case where such interest has been sold through the Courts and where the right of purchaser has never since been questioned, recognition should not be refused to the purchaser merely on the ground that the sale took place subsequent to the prohibition by Government of such sale.

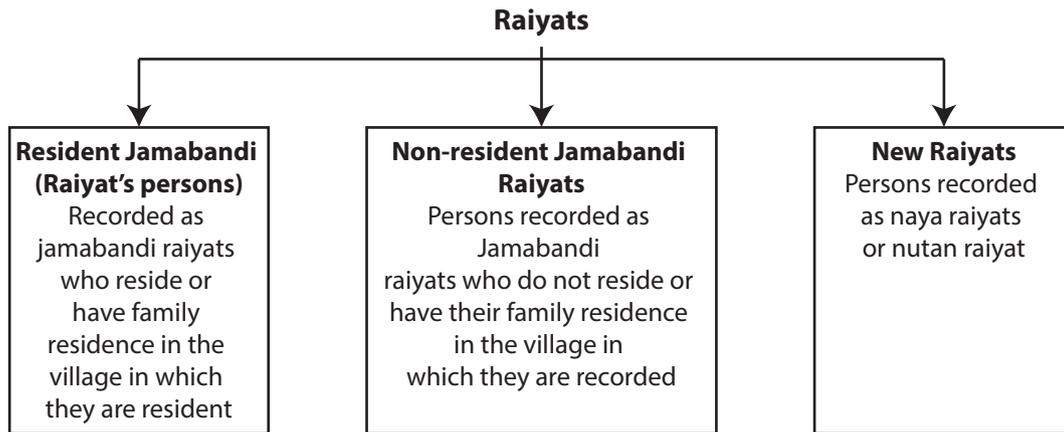
CLASSES OF RAIYAT AND RESTRICTIONS ON TRANSFER

Raiyat

According to Section 4 sub clause (xiii) "raiyyat" means a person not being a landlord, 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; and includes the successor in interest of a person who has acquired such a right.

Classes of Raiyats (Sec. 12)

Raiyats have been classified into three classes which are given in the next page :-



Rights of raiyats given in section 13 to 19 can be summarised as under:

1. Rights of raiyats in respect of use of land
2. Raiyats not to be ejected by order of the Deputy Commissioner
3. Raiyat's right to manufacture tiles and bricks
4. Raiyat's right to construct bandhs, etc. on his own holding and to enjoy fish and other produce
6. Rights of raiyats in trees on his own holding.
7. Raiyat's right to erect buildings
8. Division of holding and distribution of rent.

Rights of raiyats given in sections 37, 39 and 40 can be summarised as under:

1. Raiyat's right to graze cattle
2. Raiyat's right to excavate tanks etc. other than their holdings
3. Rights of fishery in a khas tank not to interfere with raiyats rights

Restrictions or transfer of raiyati holding in Santhal Pargana (Provisions contained in Sections. 20 to 25)

Section 20 reads as follows :

“Transfer of raiyat's right –

(1) No transfer by a raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, will, lease or any other contract or agreement, express or implied shall be valid **unless the right to transfer has been recorded in the record of rights** and then only to the extent to which right is so recorded:-

Provided that a lease of raiyati land in any sub-division for the purpose of establishment or continuance of **an excise shop** thereon may be validly granted or renewed by a raiyat for a period not exceeding one year with the previous written permission of the Deputy Commissioner :

Provided further that gifts by recorded santhal raiyats to a sister and daughter are permissible under the santhal law, such a raiyat with the previous written permission of the Deputy Commissioner validly makes such a gift :

Provided also that an aboriginal raiyat may, with previous written permission of the Deputy Commissioner, make a grant in respect of his land not exceeding one half of the area of his holding to his widowed mother or to his wife for her maintenance after his death.

(2) No right of an aboriginal raiyat in his holding or any portion thereof which is transferable shall be transferred in any manner **to anyone but a bonafide cultivating aboriginal raiyat of the pargana or taluk or tappa in which the holding is situated:**

Provided that **nothing in the sub-section shall apply to** a transfer made by an aboriginal raiyat or his right in his holding or portion thereof in favour of his **gharjamai**.

Provided further that an aboriginal raiyat with the previous sanction of the Deputy Commissioner and other raiyats without such a previous sanction, enter into a simple mortgage in respect of his holding with any scheduled bank or a society or a financial institution or with a company or a corporation owned by or in which not less than 51% of the share capital is held by the State Government, with a view to provide credit to agricultural cultivators.

(3) **No transfer** in contravention of sub-section 1 or 2 **shall be registered**, or shall be in any way recognized as valid by any court, whether in exercise of civil, criminal or revenue jurisdiction.

(4) **No decree** or order shall be passed by any court for the sale of the right of a raiyat in his holding or any portion thereof, nor shall any such right be sold in execution of a decree or order unless such a right of transfer or the raiyat has been recorded in the record of rights.

(5) If at any time it comes to the notice of the Deputy Commissioner that a transfer of land belonging to a raiyat, who is a member of scheduled tribe has taken place in contravention of sub-section 1 or 2 or by any fraudulent method including collusive decree he may after giving notice and making necessary inquiries **evict the transferee** from such land and restore it to the transferor or his heir or in case the transferor or his heir is not

available or is not willing to such restoration, resettle with another raiyat belonging to scheduled tribe:

Provided that if the transferee within 30 years from the date of transfer constructed any building or structure on such holding or portion thereof, the Deputy Commissioner, shall, if the transferor is not willing to pay the value of the same, order the transferee to remove the same within six months from the date of the order, or within such extended time not exceeding two years:

Provided further that where the Deputy Commissioner is satisfied that the transferee has constructed a substantial structure or building on such holding or portion thereof before coming into force of the Bihar Scheduled Area Regulation, 1969 he may validate such a transfer where the transferee makes available to the transferor an alternative holding or portion thereof or pay adequate compensation to be determined by the Deputy Commissioner for rehabilitation of the transferor.

Provided also that if after an enquiry the Deputy Commissioner is satisfied that transferee has acquired title by adverse possession and the transferred land should be restored or resettled, he shall require the transferor as his heir as the case may be to deposit with the Deputy Commissioner such sum of money as may be determined by the Deputy Commissioner.”

A plain reading of this Section brings out close similarity with Section 46 of the CNT Act with the only difference with respect to the restrictive clause on the raiyat land. Under Section 20 of the SPT Act there is a blanket restriction on the transfer of all land, save and except those which have been recorded as transferable in the record of rights. On the other hand, the restriction under Section 46 CNT is with reference to transfer of land inter se of different classes as laid down in proviso (1) (a) to (c) of Section 46. Thus under these restrictions in Chotanagpur the land can be transferred from Schedule Tribes to Scheduled Tribes, scheduled Castes to Scheduled Castes and from Backward Classes to Backward Classes, subject to certain restrictions. The restriction in Santhal Paragana does not proceed on this line rather it applies to all and the transfer is permissible only when it is so recorded in the record of rights.

The above restrictions do not apply if the land was homestead called **Basauri land**. Such transfer do not fall within **Section 20** of the SPT Act.

In *Anath Bandhu Mandal v. State of Bihar*, 2018 1 JLR 112, the Court referred to *Nirbhay Kr. Shahabadi v. State of Jharkhand*, 2014(1) JCR 102(Jhr.) wherein it has been held that as per the Final Report on the Revision Survey and Settlement Operations in the District of Santhal Parganas, 1922-35 by J.F. Gantzer, a **Basauri tenancies may be created in two ways:-**

- (a) *By settlement of waste land under Clause 3 of the record of rights and duties, and.*
- (b) *By acquisition under the provisions of Section 25-A of Regulation-II of 1886.*

According to custom and practice all Basauri holdings are transferable and no distinction is ordinarily made in the incidents of such holding whether obtained by settlement under Clause-3 of the record of right or by acquisition under Section 25-A of Regulation-II.

Therefore, based on the above judicial pronouncement the Court held that if any land is acquired by the landlords under Section 25-A of Regulation-II of 1886 and even after vesting, they are continuing in possession of the same, they are to be treated as raiyats under the Bihar Tenancy Act, 1885 and the landlords have right to make settlement of the said land to any of his raiyats for homestead purpose for which no permission of Deputy Commissioner was required u/s 20 of the S.P.T. Act, 1949 since this provision shall have prospective operation.

In *Rajo Mian v. Puran Mian*, 1987 BLJR 91, the principal question that came for determination was whether the Revenue Court had the Jurisdiction to evict a person who had come in possession of the land on the basis of a compromise decree of the civil court, if that compromise was collusive. It was held that a transferee cannot perfect his title on the basis of a collusive decree of a civil court. Revenue Court has jurisdiction to evict the person from the land which is obtained by fraud or collusion.

In *Banshidhar Pal v. State of Bihar*, 2000 1 PLJR 994, the Court referred to the decision in *Ram Narain Sah v. State*, 1976 BBCJ 433 in which it has been held that if a land belonging to Schedule Tribe is transferred in contravention of Sub-sections (1) and (2) of Sec. 20 of the Act by any fraudulent method, the expression any fraudulent method will include a collusive compromise decree.

Both Section 20(5) and Section 42 have provisions for eviction of transferee where the transfer took place in contravention to the provisions of the SPT Act.

In *Deo Narayan Singh v. Commissioner Bhagalpur Division*, AIR 1985 Pat 196, the Full Bench of the Patna High Court distinguished between section 20(5) and section 42. The Court said:

“By reference to the provisions of the Act it is obvious that the scope of S. 42 is larger than that of S. 20(5). While S. 20(5) is applicable when the conditions provided therein are fulfilled, S. 42 comes into play whenever there is any encroachment, reclamation, acquisition or possession of agricultural land in contravention of the provisions of this Act or any law or anything having the

force of law in the Santhal Parganas. Therefore, while S. 42 is general, S. 20(5) applies in specific cases when the conditions stated therein are fulfilled.

Another distinction between S. 20(5) and S. 42 is that while under S. 20(5), after ejectment, the competent authority can restore the land to the original raiyat, no such power is given in S. 42."

Godo Mahto v. State Of Bihar, 1980 BLJ 72 – The Court referred to *Bhauri Lal Jain v. Sub-divisional Officer of Jamtara, 1972 BLJR. 897*, in which it has been explained that if there is, in fact, a settlement contrary to the provisions of the Regulation aforesaid then, although the settlement may not be valid, a party actually in continuous possession may acquire title by adverse possession. This of course, only relates to settlements made prior to the coming into force of the Act.

Doman Prasad Yadav v. The State of Jharkhand, 2008 (1) JLR 506 – It was held that **basuari (homestead land) was a dwelling unit and same did not belong to any cultivator and does not come within the ambit of section 20 of SPT Act.** The said section 20 creates bar for registration of raiyati land by sale and gift unless such transfer is committed in the record of rights.

In case of any transfer in contravention of these provision the D.C. can evict the transferee and restore the land to the raiyat or his heir or resettle the land with another raiyat according to village custom. S.A.R. will be applicable in Scheduled Area also.

Shyam Sunder Barnwal v. State of Jharkhand and ors 2004(3) JCR 371 (Jhr) –The petitioner challenged the order issued by Deputy Commissioner-cum-District Registrar, Deoghar vide Memo No. 10, dated 14/1/2004, whereby he had imposed a mandatory condition of production of verification report of the Circle Officer in a prescribed format before the Registrar for registration of deeds in the district of Deoghar. The Hon'ble Court while upholding the order of the Deputy Commissioner held that there is a statutory bar in transferring the holding by sale, gift, mortgage, will, lease or any other contract unless right to transfer has been recorded in the record of rights. Under the aforesaid provision certain instructions have also been issued which inter alia provide that if the land falls within the municipal area where no record of rights have been prepared, an enquiry to that effect has to be made as to whether the land is transferable or not.

The above restriction under Section 20 is subject to the saving clause under Sections 21, 22 and 23.

Under **Section 21**, a non-aboriginal raiyats can transfer his land by bhugut bandha for a period not exceeding 6 years up to the extent of one fourth of his paddy and bari lands to a land mortgage bank, a grain gola, a crop, society and a raiyat of Santal Pargana.

Under **Section 22** a raiyat may make over his holding temporarily on trust for cultivation to a raiyat after notifying to the S.D.O. and Headman or mulraiyat in the following circumstances:-

- (i) His temporary absence from the village.
- (ii) His sicknesses or physical incapacity.
- (iii) Loss of plough cattle.
- (iv) The raiyat being a widow or minor.

If period has been stipulated, and the raiyat does not resume cultivation himself, the holding shall be presumed to be abandoned after 10 years.

Section 23 Exchange of raiyati land – (1) SPT Act provides for the exchange of lands desired by the raiyats on an application in writing to the Deputy Commissioner, who may in his discretion permits such an exchange to be made, if he is satisfied that :-

- (a) The parties to the exchanged are both jamabandi raiyats with respect to the lands proposed to be exchanged.
 - (b) The lands proposed to be exchanged are situated in the same village or in a contiguous village.
 - (c) The transaction is not a concealed sale but is a bonafide exchange sought to be made for the mutual convenience of the parties.
 - (d) The lands proposed to be exchanged are of the same value.
- (2) Any exchange of lands made otherwise than under provision of sub section 1 and without previous permission in writing of the Deputy Commissioner shall be deemed to be a transfer made in contravention of section 20.

State of Jharkhand & Anr. v. Pakur Jagaran Munch, 2011(2) SCC 591 – The brief fact of this case is that the Department of Health and Family Welfare, Government of Jharkhand and Deputy Commissioner, Pakur authorized the Executive Engineer, Pakur to construct a hospital building under National Leprosy Eradication Programme and for improving the standards of health of the tribal residents of the area. The said Gochar land was identified as suitable for the construction of the hospital with the consent of village headman and village community. The State government denotified releasing the said 4.44 acres of Gochar land in plot no. 1061 and in its place declaring 4.44 acre of Gair Majurua (Government) khas land in khata no. 44, plot no. 62, 199 and 427 as Gochar under section 38 (2) of the SPT Act. This notification was challenged before the Hon'ble Jharkhand High Court, which was held to be not valid in law being barred under section 38(1) read with 67 and 69 of the Tenancy Act. This order came under a challenge before the Apex court in this case. The

Apex court allowed this appeal and held that Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949-Section 2(1)-Santhal Parganas Settlement Regulations, 1872-Regulations 10, 13, 24 and 25 – Dereservation or re-categorisation of a land recorded as Gochar in record-at-rights is not within scope of Tenancy Act-However, even if a land had been recorded as a Gochar in record of –rights of a village in pursuance of settlement under regulations, it can be re-opened and altered at any time, without waiting for next settlement, with previous sanction of State Govt.

SETTLEMENT

Chapter IV of the SPT Act deals with the provision of settlement of waste land and vacant holdings (Sections 27 to 42)

When we discuss the power of settlement, it is to be in reference to the particular class of village. With respect to the non-khas village it is the Headman or the mulraiya who has the power to settle subject to the procedure laid down under Chapter IV, whereas in case of Khas village the power of settlement lies with the Govt functionaries. If it is a pradhani village or Headman village then the wasteland will be settled by village Pradhan or village Headman with the permission of the Deputy Commissioner.

According to **Section 27** of the SPT Act, the settlement of waste land shall be made by a patta or amalnama in the prescribed form. The patta or amalnama shall be prepared in quadruplicate, one copy shall be given to the raiyat concerned, one copy shall be sent to the Deputy Commissioner, one copy shall be sent to the landlord and the fourth shall be retained by the village headman or mulraiya, as the case may be.

The principles to be followed in settling waste land or vacant holding are laid down in **Section 28** as follows :

- (a) Fair and equitable distribution of land according to the requirement of each raiyat and his capacity to reclaim and cultivate;
- (b) Any special claim for services rendered to the village community, society or state;
- (c) Contiguity or proximity of the waste land to jamabandi land of the raiyat;
- (d) Provision for landless labourers who are bonafide permanent residents of the village and are recorded for a dwelling house in a village.

The record-of –rights contain the following village common rights relating to waste land:

- (a) The village community has joint rights over the waste land of the village. Jamabandi raiyats have a preferential rights to the settlement of it for reclamation. No waste land may be settled with a non- jamabandi raiyat without the consent of the Sub-divisional officer and the proprietor. The proprietor or raiyats, if aggrieved by the action of the headman in settling waste land, may object before the Sub-divisional officer, who after due enquiry, may set aside or modify the settlement. No Sal or other reserved tree may be cut down in order to reclaim waste land, without the permission of the proprietor. The proprietor shall not unreasonably refuse such permission. No land recorded as village grazing land, may be brought under cultivation.
- (b) Jamabandi raiyats have the rights to graze their cattle free of charge on the recorded grazing land and on the village waste land not reserved for forest under section 15, Regulation III of 1872; but with the sanction of the Deputy Commissioner, the proprietor or headman may for a specified period, enclose with an adequate fence a reasonable portion of the village waste land , to promote the growth of forest, and during such period grazing will be prohibited within the enclosed area. If the raiyats allow any other cattle to graze within the village, the proprietor will be entitled to cess.

Amitav Kumar v. State of Jharkhand, 2018 4 JLR 670

Facts

The writ petition had been filed for quashing the order dated 12.05.2004, passed by the Commissioner, Santhal Pargana, Division, Dumka, in RMA Case No. 132/1993-94, whereby the order passed by the Deputy Commissioner, Sahibganj had been upheld and the three settlements made in favour of Khemanand Pandit @ Hemanand Pandit (original writ petitioner since deceased and substituted by his legal heirs) had been cancelled.

- The original writ petitioner was resident of village Telo, which is adjoining to village Barachandbasi in the District of Sahibganj. Vide order dated 31.01.1956, the Pradhan of village Barachandbasi had made an application before the Sub Divisional Officer proposing settlement of land in favour of 8 persons including original writ petitioner, which was duly granted to the petitioner vide order being Settlement Case No. 170 of 1955-56. Thereafter another petition was filed being Settlement Case No. 54/59-60 by the Pradhan of village Barachandbasi for settlement of further property in favour of the original writ petitioner mentioning therein that he is a very poor Jamabandi Raiyat of village Telo and village Barachand Basi is quite adjacent to village Telo. It was also mentioned that the settlement of the property involved in Settlement Case No. 54/1959-60 was settled in his favour around 5 years ago. An

application was filed before the Sub Divisional Officer for approval of the settlement. Thereafter the Sub Divisional Officer, Sahibganj is said to have issued notice to the 16 anna jamabandi raiyat to file their objection and ultimately the raiyats raised no objection and therefore the land was settled in favour of the original writ petitioner vide order dated 03.11.1959.

- So far as 3rd settlement is concerned, this is also related to the property in the village Barachandbasi and the settlement case was numbered as 111/1964-65 and vide order dated 10.08.1968, the Sub Divisional Officer, Rajmahal at Sahibganj had refused to settle the property in favour of the petitioner on the ground that the petitioner is an outsider. Against this, the original writ petitioner filed appeal before the Appellate Authority which was numbered as Revision Misc. Appeal No. 143/1968-69 and was disposed of in favour of the original writ petitioner vide order dated 25.01.1969.

These orders were brought to the notice of the learned Commissioner, Bhagalpur Division, and one Santhal Pargana Revision Misc. Reference Case No. 38/82-83 was started in which order dated 17.02.1983 was passed whereby permission was accorded to Deputy Commissioner, Santhal Parganas to review the orders of Additional Deputy Commissioner, Santhal Parganas and S.D.O. Sahebganj under Section 60 of the Santhal Parganas Tenancy Act. Thereafter a proceeding for review was initiated by the Deputy Commissioner and the case was numbered as Revision Misc. Petition Case No. 37/1984-85 and the orders of settlements made in favour of the original writ petitioner were set aside by the Deputy Commissioner, Sahibganj *inter alia* on the ground that the original writ petitioner was an outsider and the land could not be settled in their favour. It was held that the original writ petitioner was neither an aboriginal nor a jamabandi raiyat.

Thereafter against this order, appeal being RMA Case No. 132/93-94 was filed before the commissioner, Santhal Pargana, Division, Dumka which was dismissed vide order dated 12.05.2004.

Petitioner's Contentions

It was submitted that the orders of settlements were originally passed by the Sub Divisional Officer in the matter of 1st and 2nd settlement and so far as 3rd settlement is concerned, initially the Sub Divisional Officer had refused to settle the land in favour of the original writ petitioner, but subsequently the order of the Sub Divisional Officer was set aside by the appellate authority namely Additional Deputy Commissioner of Santhal Pargana Division, Dumka. The Deputy Commissioner could not have exercised the power under Section 60 of the Santhal Pargana Tenancy(Supplementary Provisions) Act 1949 to annul the settlements made in favour of the original writ petitioner, as the power of review

could be exercised by the same Authority who had passed the order or by his successor in office. He submits that the impugned order dated 17.05.1993 passed in Revenue Misc. It was contended that the matter has not been taken into consideration by the Commissioner, Santhal Pargana, Division, Dumka while passing the impugned order dated 12.05.2004, passed in R.M.A. Case No. 132/93-94 wherein the order dated 17.05.1993 was under challenge.

Respondent's Contentions

It was submitted that the impugned order which has been passed by the Deputy Commissioner, Sahibganj dated 17.05.1993 has been passed in exercise of power of Revision under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and not by exercising power of review under Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949. Under the provisions of Section 59 of the Act, the Deputy Commissioner has been empowered to exercise his power of revision and such exercise of power can be done even suo motu. For exercise of such suo motu power, there is no period of limitation prescribed.

It was further submitted that the term "raiyat" has been defined under Section 4 of the Santhal Pargana Tenancy(Supplementary Provisions) Act 1949. Village has also been defined in Section 4(xxi). Sections 27 and 28 of the Act were also referred to which deals with the settlement of waste land and vacant holdings and it was contended that the principle to be followed in the settlement of waste land and in vacant land is fair and equitable distribution of land according to the requirement of different raiyat and also provision for landless labourers who are bonafide permanent residents of the village and are recorded for a dwelling house in the village.

So far as section -16(a) of the record-of-right is concerned, it was submitted that there is clear provision that the village community has joint right over the waste land of the village. Jamabandi raiyats have a preferential rights to the settlement of it for reclamation. Further, no waste land may be settled with a non jamabandi raiyat without the consent of the sub divisional officer and the proprietor. Since the waste land of the village is a joint property of the village community, the same could not have been settled to an outsider. There is no bar that the waste land can be settled with non-jamabandi raiyat, but the same cannot be settled to an outsider who is not a resident of the village.

It was further submitted that the provision cannot be read in isolation and the record-of right has been taken care of by making settlement of waste land in the village. Clause 16(a) of the Record of Rights has to be read with clause 12 and upon such reading it transpires that the property of the village cannot be settled to an outsider.

Issues:-

- A. *Whether the impugned order suffers from any jurisdictional error?*
- B. *Whether the lands could have been settled in favour of original writ petitioner who admittedly was not a resident of village Barachandbasi and was a resident of adjoining village Telo?*
- C. *Whether, otherwise also, the three settlements made in favour of the original writ petitioner has been rightly set-aside on account of non compliance of mandatory provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949?*

The Hon'ble Court looked into the relevant provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949. This Act was enacted to amend and supplement certain laws relating to landlords and tenants in Santhal Pargana.

Clause 12 of record of rights as mentioned in Santhal Pargana Manual, 1911 reads as under :

<p><i>12. Rights of the headman Note (1) Jamabandi raiyat in this section and 16 includes the children and heirs of jamabandi raiyat. It does not include a raiyat who has acquired land in the village by purchase and has been recorded as "Jamabandi khariddar"</i></p> <p><i>Note (2) The word "community" is intended to draw a distinction between Dikus and non-Dikus. "Non-Diku" includes Sonthale, Paharias, Mahulis, Koras, Kols, Dhangars, Rajwars, Domes, Harls and Bauris.</i></p>	<p><i>(a) To enjoy the official holding, where such exists on payment of rent,</i></p> <p><i>(b) To receive one anna per rupee on the rent collected from raiyats, in addition to the rent due from them.</i></p> <p><i>(c) To receive a deduction of one anna per rupee on the rent payable to the proprietor, if paid in due time.</i></p> <p><i>(d) When a raiyat abandons his land or without heirs, the headman shall settle the entire holding with one or other of the following, giving preference in the order mentioned:-</i></p> <p><i>(1) With a resident jamabandi raiyat of the same community.</i></p> <p><i>(2) With himself, if resident, or with a resident jamabandi raiyat of a different community.</i></p>
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	<p><i>(3) With himself, if non-resident, or with a non resident jamabandi raiyat.</i></p> <p><i>(4) With a non-jamabandi raiyat. Whenever he settles other than with a resident jamabandi raiyat of the same community he will report the settlement to the hakim, who after the objections of the proprietor and raiyats, will confirm or modify the settlement provided that no non jamabandi raiyat may get settlement without the consent of the proprietor</i></p> <p><i>(e)</i></p> <p><i>(f)</i></p>
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Clause 16 (a) of record of rights as mentioned in Santhal Pargana Manual ,1911 reads as under:-

<p><i>16. village common rights</i></p>	<p><i>(a)The village community has joint rights over the waste land of the village. Jamabandi raiyats have a preferential rights to the settlement of it for reclamations. No waste land may be settled with a non –jamabandi raiyat without the consent of the sub divisional officer and the proprietor. The proprietor or raiyats, if aggrieved by the action of the headman in settling waste land, may object before the sub-divisional officer, who after due enquiry may set aside or modify the settlement. No Sal or other reserved tree may be cut down in order to reclaim waste land, without the permission of the proprietor. The proprietor shall not unreasonably refuse such permission. No land recorded as village grazing land, may be brought under cultivation.</i></p> <p><i>(b) -----</i></p> <p><i>(c) -----</i></p> <p><i>(d)-----</i></p> <p><i>(e)-----</i></p> <p><i>(f)-----</i></p> <p><i>(g)-----</i></p>
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“raiyat” has been defined under Section 4 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949.

4(xiii) “raiyat” means a person not being a landlord, 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; and includes the successor in interest of a person who has acquired such a right;

Explanation –A village headman shall be deemed to be raiyat in respect of his private holding if any.

“Village” has also been defined in Section 4(xxi) which reads as under:-

4(xxi) Village means,-

the area defined, surveyed and recorded as a distinct and separate village in the map and record-of-rights prepared under any law for the time being in force, and where a survey has not been made and a record-of-rights has not been prepared under any such law, such area as the Deputy Commissioner may, with the sanction of the Commissioner, by general or special order, declare to constitute a village :

4(xxii) “village community” means the body of all the Jamabandi raiyats of a village, their co-sharers, children and heirs.

Classes of “Raiyats” have been mentioned in section 12 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 which reads as follows:-

“12. Classes of raiyats- There shall be for the purposes of this Act the following classes of raiyats, namely:-

(a) resident Jamabandi raiyats, that is to say, persons recorded as Jamabandi raiyats who reside or have their family residence in the village in which they are recorded;

(b) non-resident Jamabandi raiyats, that is to say persons recorded as Jamabandi raiyats who do not reside or have their family residence in the village in which they are recorded;

(c) new raiyats, that is to say, persons recorded as naya raiyats or notun raiyats.”

Section 27 and 28 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 read as under:-

27. Settlement of waste land to be made by patta in prescribed form-Settlement of waste land shall be made by a patta or amalnama in the prescribed form. The patta or amalnama shall be prepared in quadruplicate, one copy shall be given to the raiyat concerned, one copy shall be sent to the Deputy Commissioner, one copy shall be sent to the landlord and the fourth shall be retained by the village headman or mulraiyat, as the case may be.

28. Principles to be followed in settling waste land or vacant holdings-In making settlement of waste land or vacant holdings regard shall be had to the following considerations in addition to the principles recorded in the record-of-rights,-

(a) fair and equitable distribution of land according to the requirements of each raiyat and his capacity to reclaim and cultivate;

(b) any special claim for services rendered to the village community, society or State;

(c) contiguity or proximity of the waste land to jamabandi land of the raiyat;

(d) provision for landless labourers who are bona fide permanent residents of the village and are recorded for a dwelling house in the village.

Section 59 and 60 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 read as under:-

59. "Revision-(1) The Commissioner or the Deputy Commissioner may on his own motion or otherwise, call for the record of a case decided by a Court under his control in which an appeal does not lie or in which for cause shown to his satisfaction an appeal has not been preferred within the time limit there for, and may pass such order in the case as he thinks fit:"

Provided that the Commissioner shall not pass such order on an application by a party until the Deputy Commissioner or the Additional Deputy Commissioner, as the case may be, has heard the matter in revision or appeal and passed an order.

(2) The Deputy Commissioner may, by order in writing, empower any Sub-divisional Officer under his control to exercise the powers conferred on the Deputy Commissioner by sub-section (1) with respect to the decisions of all or any of the Courts of Deputy Collectors not in charge of a sub-division, under the Control of the Deputy Commissioner.

60. Review- (1) The Commissioner may, for sufficient reasons to be recorded in writing, review any order which has been passed by himself or a predecessor in exercise of any power conferred by this Act.

(2) An officer subordinate to the Commissioner shall not review any order made by him or by a predecessor, except for the purpose of correcting a clerical error or other error or, manifestly the result of an oversight, without previously obtaining:-

(a) in the case of a Deputy Collector or a Sub-divisional Officer, the permission of the Deputy Commissioner; and

(c) in the case of the Deputy Commissioner or the Additional Deputy Commissioner, the permission of the Commissioner.

Regarding the first issue, whether the impugned order suffers from any jurisdictional error, the Hon'ble Court held as follows:

- “1. From perusal of the records of the case, it appears that the permission was accorded under Section 60 of the Santhal Pargana Tenancy (supplementary provisions) Act, 1949 to the Deputy Commissioner, Santhal Pargana to review the orders of settlements (i.e. settlements made in favour of original writ petitioner) passed by the Additional Deputy Commissioner, Santhal Pargana and Sub Divisional Officer, Sahibganj vide order dated 17.02.83 in Santhal Pargana Revision Misc. Reference Case No. 38/82-83 by the Commissioner, Bhagalpur Division.
2. However, apparently, as per provisions of review contained in Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949, the power to review can be exercised only by the authority who passed the order or by the successor in office of the same authority.
3. Accordingly this court is of the considered view that power of review could not have been exercised by the Deputy Commissioner in connection with the two orders of settlement passed by the Sub Divisional Officer and/or in connection with the third settlement pursuant the appellate order passed by Additional Deputy Commissioner.
4. However, from perusal of impugned order dated 17.05.1993 passed by the Deputy Commissioner, Sahibganj in R.M.P. Case No. 37/84-85, it appears that the same has not been passed pursuant to the aforesaid order dated 17.02.1983 empowering him to exercise power of review, but the same has been passed by exercising suo motu revisional power under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and this aspect of the matter has been taken care of by the Commissioner, Santhal Pargana, Divisiona, Dumka while passing the impugned order dated 12.05.2004 and he has clearly recorded that the Deputy Commissioner had exercised his power under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and for which Deputy Commissioner was duly competent.
5. Accordingly, the contention of the petitioner that the power of review under Section 60 could not have been exercised by the Deputy Commissioner to review the order passed by the Sub Divisional Officer and Additional Deputy Commissioner is correct, but, in spite of this legal position the impugned order cannot be set-aside as the impugned order passed by the Deputy Commissioner dated 17.05.1993 is not an order of review, but the order has been passed by exercising power under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949. Thus this court does not find any jurisdictional error in the impugned order.”

Regarding the second issue, whether the lands could have been settled in favour of

original writ petitioner who admittedly was not a resident of village Barachandbasi and was a resident of adjoining village Telo, the Hon'ble Court held as follows:

- a. *Admittedly the property settled by the three settlements are in the village Barachandbasi and the original writ petitioner belonged to the village Telo.*
- b. *Admittedly the original writ petitioner was never a raiyat of village Barachandbasi, much less, a Jamabandi Raiyat or non Jamabandi Raiyat.*
- c. *The provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 are only supplementary provisions and the same has to be read along with the provisions relating to record of rights which were existing prior to 1949. This includes Clause 12 and 16 of record of rights as mentioned in Santhal Pargana Manual, 1911 whose provisions which are relevant for the purposes of this case has been quoted above.*
- d. *Clause 12 of record of rights as mentioned in Santhal Pargana Manual, 1911 vide its note (1) clearly provides that the Jamabandi Raiyat includes the children of Jamabandi Raiyats. It further provides that it does not include a raiyat who has acquired the land in the village by purchase and has been recorded as "Jamabandi Khariddar".*
- e. *This provision has to be read with clause 16 which deals with common right of villagers and provides that the waste lands belongs to the village community and preference is to given to Jamabandi Raiyat in the matter of settlement and no wasteland can be settled to a non jamabandi Raiyat without consent of sub-divisional officer and the proprietor.*
- f. *This court is of the considered view that upon conjoint reading of clause 12 and 16, one of the categories of non jamabandi raiyat would be those raiyats who have acquired the land in the village by purchase and by virtue of clause 12, such persons have been specifically excluded from the category of "Jamabandi raiyat".*
- g. *Section 12 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 provides the classes of raiyats as "resident Jamabandi Raiyats" who resides or their family residence in the village.*
"non resident Jamabandi Raiyats" who do not resides or their family residence in the village.
"new Raiyats" who are recorded as new raiyats .
- h. *From the definition of raiyat as defined under section 4(xiii) of Santhal Pargana*

Tenancy (supplementary provisions) Act, 1949 it appears that the village head man has been given the status of a raiyat by virtue of the explanation.

This definition indicates that the term "raiyat" is referable to a village as the village headman can be a "raiyat" only in respect of his village and not in respect of all the villages.

- i. Moreover the definition of the term "village" as defined in section 2(xxi) of Santhal Pargana Tenancy (supplementary provisions) Act, 1949, clearly indicates that every village is a properly marked area having its map and its record of rights. Thus village is an unit in itself.*
- j. The definition of the term "village community" as defined under section 2(xxii) clearly indicates that the same consists of all the "jamabandi raiyats" of the village with their co-sharers, children and heirs.*
- k. Thus from the conjoint reading of the provisions it appears that the waste land belongs to the village community which consists of "jamabandi raiyats" of the village and they have preferential right of settlement of waste lands of the village. At the time of settlement the raiyats of the village are to be heard who have a right to object.*
- l. The settlements can also be made to non jamabandi raiyats but the term non jamabandi raiyats cannot be extended to those who do not belong to the village in view of the fact that there are other raiyats in the village who are non jamabandi raiyats and the status of jamabandi raiyat cannot be acquired even by a person who purchases a property in such village but does not belong to the village concerned.*
- m. From perusal of the classes of tenants as mentioned in section 12 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949, it appears that the term Jamabandi Raiyat is linked to a village and there are two terms one is "resident Jamabandi Raiyat" and other is "non- resident Jamabandi Raiyat" but the term "non jamabandi raiyat" has not been used in this section.*
- n. This court is of the considered view that non jamabandi raiyats are those raiyats of the village who do not have the status of jamabandi raiyat. One such example of non jamabandi raiyats is a per clause 12 of record of rights as mentioned in Santhal Pargana Manual, 1911, i.e a raiyat who acquires land in the village by purchase.*
- o. Thus this court is of the considered view that even a non jamabandi raiyat has to*

be a resident of the village so as to entitle himself for settlement of wasteland of the village.

- p. In the instant case, admittedly the original writ petitioner was never a raiyat of village Barachandbasi, much less, a Jamabandi Raiyat or a non Jamabandi Raiyat of the said village. He was resident of another village namely Telo.*
- q. Accordingly, this court is of the considered view that the land of village Barachandbasi could not have been settled in favour of the original writ petitioner.*
- r. So far as the judgment reported in 1997(1) PLJR 716 which has been relied upon by the petitioners is concerned, the same has no applicability to the facts and circumstances of the case, as in the said judgment, it has been held that the Act does not debar the authority to make settlement of waste land with non jamabandi raiyat.*
- s. The said judgment does not decide the point as to whether the settlement could have been made in favour of a person who is not a resident of the village.*
- t. This court is of the considered view as held above that in a village there are “non jamabandi raiyats” and even a “non jamabandi raiyat” has to be a resident of the village so as to entitle himself for settlement of wasteland of the village.*
- u. Moreover in the said judgment reported in 1997(1) PLJR 716 the issue argued and decided was that the settlement can be made even in favour of non jamabandi raiyat and there is no such bar under the Santhal Pargana Tenancy Laws.*
- v. But the issue involved in this case is whether the settlement of waste land can be made in favour of “non jamabandi raiyat” who is not a resident of the village and as already held above, this court is of the considered view that settlement of wasteland cannot be made to a “non jamabandi raiyat” who is not a resident of the village.*
- w. This Court further finds that this Court in judgment reported in 2006(4) JCR 390 (Jhr) has taken a view following the judgment passed by Hon’ble Patna High Court reported in 2000(2) BLJR 1084 wherein while dealing with the provisions of section 28 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 it has been held that pre-requisite for settling wasteland and vacant holding is that the settlee must be a “jamabandi raiyat” or must be a “permanent raiyat” or must be a “permanent resident” of the village.*
- x. Thus this court is of the considered view that the Deputy commissioner has rightly taken a view that the land of village Barachandbasi could not have been settled*

in favour of the original writ petitioner who was admittedly not a resident of village Barachandbasi.”

Regarding the third issue, whether, otherwise also, the three settlements made in favour of the original writ petitioner has been rightly set-aside on account of non compliance of mandatory provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949, the Hon'ble Court held as follows:

“In connection with the 1st settlement made in the year 1955-56 dated 31.01.1956, there is nothing on record to suggest that any notice was issued to the 16 anna raiyat prior to passing of the order dated 31.01.1956, although it has been simply recorded that there is no objection . A specific finding of fact has been recorded by the Deputy commissioner in the impugned order that legal procedure in connection with the settlement was not followed. This court is of the definite view that the procedures in connection with settlement of wasteland in Santhal Pargana including the procedure regarding issuance of 16 anna raiyat is not a mere formality in view of the provision of clause 16(a) record of rights as mentioned in Santhal Pargana Manual, 1911 which provides that village community has joint right over the wastelands of the village. Accordingly, this court is of the considered view that this settlement has been rightly cancelled by the deputy commissioner and this order has been rightly confirmed by the commissioner in the impugned order in which this court does not find any illegality or perversity.

The 2nd settlement was made in favour of the original writ petitioner in settlement case no 54/1959-60 which accordingly to the deputy commissioner was made without application of mind and the objection of 16 anna raiyat was rejected in a summary manner. The deputy commissioner has held that this settlement was also made in total disregard to the mandate of law and the procedure and this order has been rightly confirmed by the commissioner in the impugned order in which this court does not find any illegality or perversity.

The 3rd settlement was made in favour of the original writ petitioner pursuant to order of the appellate authority in Revenue Misc. Appeal no 143/1968-69 which itself was passed on the basis of the fact that there was already a settlement made in favour of the original writ petitioner. This court finds that as the earlier settlement was not in accordance with law, therefore the third settlement based on earlier settlement cannot be sustained in the eyes of law. Accordingly this court does not find any illegality or perversity in the impugned order.”

According to the Hon'ble Jharkhand High Court in, *Jai Kishore Sah v. State of Jharkhand and Others* reported in (2018)1 JCR 102, the provisions of Section 28 of the Act of 1949 do not make any distinction between the member of scheduled tribe or a member of any other caste in the matter of settlement of waste land and vacant holding provided conditions enumerated therein as also principles recorded in the record of rights are satisfied.

Section 29 provides that a mulraiyat, Pradhan or Village Headman shall not settle any waste land or vacant holding with himself or any co-mulraiyat without the previous sanction in writing of the Deputy Commissioner. (*Gadaha Mandal v. State Of Bihar*, 2000 3 PLJR 756)

In case where there are two or more village headmen, co-mulraiyat or landlords in a village held jointly by them and the settlement of waste land has not been made jointly, the settlement may on objection be set aside or modified at the discretion of Deputy Commissioner under **Section 31**.

Under **section 32** a person aggrieved from the settlement or refusal to settle a waste land or vacant holding may make an application before the Deputy Commissioner within one year from the date on which reclamation in pursuance of settlement was made or settlement was refused. The Deputy Commissioner on such an application, shall serve a notice to the parties of the date on which the application is to be heard and after hearing the parties and after enquiry the Deputy Commissioner may where the settlement has been made confirm, modify or set aside the settlement, or , in cases where settlement has been refused , order the waste land or vacant holding to be settled. He may himself settle the land or holding in question with a jamabandi raiyat in accordance with the principles laid down in Section 28 and in the record-of-rights on such terms as he may think proper.

It has been held in *Ghanshyam Pandit v. Commissioner* 1988 PLJR 140 that the provisions of Section 32 are applicable only in respect of such cases where settlements have been made after coming into force of the Act. The settlements which were made by the village pradhan before coming into force of the Act cannot be modified or varied or set aside in term of Section 32 of the Act.

Section 33 provides that settlement of waste land is liable to be **set aside if not cultivated within 5 years**.

In *Lilu Hembrom v. State of Jharkhand*, 2018 4 JLJR 292 it was held that under section 33 of Santhal Pargana Tenancy (Supplementary Provisions) Act 1949, the settlement can be cancelled only if the ingredients of section 33 of the said Act is satisfied.

It has been held in *Sheikh Allaiddin v. State of Bihar* 2000 (3) BLJ 95 (Pat) that for settling waste land and vacant holdings, the settle must be a Jamabandi raiyat or must

be permanent raiyat or must be permanent resident and be so recorded in the record of rights.

According to **Section 34**, the Deputy Commissioner may set apart village waste land for jaher-than or burning or burial ground if the area recorded as such is found to be inadequate.

According to **section 35**, water reservoirs such as bandhs, ahars, tanks etc. used for flood protection, irrigation, bathing, washing and drinking purposes shall not be settled except with the consent of raiyats and the approval of the Deputy Commissioner.

According to **section 36**, the settlement of rivulets, nalas on the boundary of villages, burning or burial ground, camping ground, boundary marks, roads, paths and places of worship are not to be settled.

According to **section 38**, grazing ground is prohibited from being settled or brought under cultivation. In *Bakshish Hussain Khan v. State of Jharkhand*, 2017 3 JLJR 669, it has been held that it is well settled that the nature of land is to be considered on the basis of revenue records maintained by the government. So long as the nature of land is mentioned as gochar land in the revenue records, the report of any revenue authority is of no consequence.

According to section 41, the settlement of vacant holding of waste land in a Paharia village within the Daman –i-koh Government Estate with a non-paharia is prohibited.

Section 42 of SPT Act is a special provision wherein the Deputy Commissioner has reclaimed, acquired or come into possession of agricultural land in contravention of the provisions of this Act.

It has been held in *Bhauri Lal Jain v. Sub-Divisional Officer, Jamtara* 1972 PLJR 415 that word 'may' in Section 42 means 'must' in the scheme or background of the legislation. The Deputy Commissioner, whenever he comes across case of wrongful possession of land held in contravention of the provisions of the Act, is bound to order for eviction as envisaged in the Act.

No question of discrimination within the meaning of Article 14 of the Constitution arises and the power under Section 42 being not administrative but quasi-judicial has to be exercised according to the right of the parties.

Nakul Chandra Mandal v. Commissioner Bhagalpur Division, 1979 BLJR 201 –

Only 16 annas raiyats are entitled for settlement in Santhal Pargana and outsider cannot take settlement. Deputy Commissioner can exercise his jurisdiction to annul the settlement made in favour of outsiders at any time without any restriction of time period.

Revenue court has jurisdiction to set aside a compromise decree obtained by suppressing a previous decision. The validity of the order of Deputy Commissioner cannot be challenged in the civil court.

APPEAL, REVISION, REVIEW

According to section 57, except as otherwise provided in this Act, from every order passed under this Act, an appeal shall lie, when the order was made

- (a) By a Deputy Collector exercising powers of the Deputy Commissioner to the Sub divisional Officer vested with the powers of the Deputy Commissioner in this behalf;
Provided that the Deputy Commissioner shall have power to order any such appeal to be transferred to his own file or to the file of the Additional Deputy Commissioner empowered in this behalf;
- (b) By a Subdivisional Officer exercising powers of the Deputy Commissioner, to the deputy Commissioner:
Provided that the Deputy Commissioner shall have power to order any such appeal to be transferred to the file of the Additional Deputy Commissioner empowered in this behalf;
- (c) By the Deputy Commissioner or the Additional Deputy Commissioner, to the Commissioner;
- (d) By the Commissioner confirming the order of the Deputy Commissioner dismissing a mulraiyat or co-mulraiyat under section 11 of the Record- of rights of Mulraiyati village, to a tribunal appointed by the State Government in this behalf.

Second Appeal (Section 58)

- (1) Subject to the provisions of section 59 with respect to revision, an appellate order shall be final in all cases where the decision of the lower court is affirmed, and no second appeal shall be allowed except when the Subdivisional Officer, the Additional Deputy Commissioner has varied the decision of the lower court, in which case an appeal shall lie-
 - (a) When the appellate order was made by a Subdivisional officer vested with the appellate powers, to the Deputy Commissioner:
Provided that the Deputy Commissioner shall have power to order any such

appeal to be transferred to the file of the Additional deputy Commissioner empowered in this behalf;

- (b) When the appellate order was made by the Deputy Commissioner or the Additional Deputy Commissioner, to the Commissioner.
- (2) No second appeal shall lie from any order passed on appeal by the Commissioner or by the tribunal appointed under clause (d) of section 57

Revision (section 59)

- (1) The Commissioner or the Deputy Commissioner may on his own motion or otherwise, call for the record of a case decided by Court under his control in which an appeal does not lie or in which for cause shown to his satisfaction an appeal has not been preferred within the time limit therefor, and may pass such order in the case as he thinks fit:

Provided that the Commissioner shall not pass such order on an application by a party until the Deputy Commissioner or the Additional Deputy Commissioner, as the case may be, has heard the matter in revision or appeal and passed an order.

- (2) The Deputy Commissioner may, by order in writing, empower any Subdivisional Officer under his control to exercise the powers conferred on the Deputy Commissioner by Subsection (1) with respect to the decisions of all or any of the Courts of Deputy Collectors not in charge of a subdivision, under the control of the Deputy Commissioner.

Review (Section 60)

- (1) The Commissioner may, for sufficient reasons to be recorded in writing, review any order which has been passed by himself or a predecessor in exercise of any power conferred by this Act.
- (2) An Officer subordinate to the Commissioner shall not review any order made by him or by a predecessor, except for the purpose of correcting a clerical error or other error, manifestly the result of an oversight, without previously obtaining.
- (a) In the case of a Deputy Collector or a Subdivisional Officer, the permission of the Deputy Commissioner ; and
 - (b) In the case of the Deputy Commissioner or the Additional Deputy Commissioner, the permission of the Commissioner.

Bar to suits (Section 63)

No suit shall be entertained in any Court to vary, modify or set aside, either directly or indirectly, any order of the Deputy Commissioner in any application which is cognizable by the Deputy Commissioner under this Act and every such order shall, subject to the provisions of this Act relating to appeal and revision be final :

Provided that nothing contained in this section shall bar the jurisdiction of a Civil court in matters in which it had jurisdiction immediately before the commencement of this Act.

Tarini Marandi v. Lakshmi Mahto, 1998(3) BLJR 1662 – According to section 63 , it is clear if suit does not seek to vary, modify or set aside the order of the Deputy Commissioner or to avoid such order the Civil court has jurisdiction to entertain suit. Where an order of the Deputy Commissioner is in excess of the jurisdiction or without jurisdiction than it can certainly be challenged in a suit and the Civil Court has the jurisdiction to entertain the suit.

Limitation

Section 64. General rule of Limitation-All applications made under this Act, for which no period of limitation is provided elsewhere in this Act, shall be made within one year from the date of the accruing of the cause of action.

Provided that there shall be no period of limitation for an application under section 42.

Section 65. Limitation for ejectment suits- An application for ejectment of a raiyat on the ground mentioned in section 14 shall be made within two years from the date of the misuse complained of.

Section 65A. Limitation for suits for arrears of rent by or on behalf of Government-Notwithstanding anything to the contrary contained in any law for the time being in force, the period of limitation for a suit for recovery of arrears of rent brought by or on behalf of the State Government shall be ten years from the end of the agricultural year in which the arrears become due.

Section 66. Limitation for appeals- Every appeal under this Act shall be presented-

- (a) To the tribunal appointed under clause (d) of section 57 or to the Commissioner, within ninety days from the date of the order appealed against; and
- (b) To the Deputy Commissioner or to the Sub divisional Officer within sixty days of the order appealed against.

MAIN PROVISIONS OF BLR ACT

VESTING OF THE ESTATE OR TENURE

The BLR Act, 1950 was a landmark legislation in the sense that it ended colonial land governance system (the zamindari system) by abolishing all intermediary (Tenure holders) between State and tenant and brought state and tenant in direct relation. It provided for the transference to the State of the interests of the proprietor and tenure-holders in the land of the mortgagees and lessees of such interests including interests in trees, forests, fisheries , jalkars, ferries ,hats, bazaars, mines and minerals. All the intermediary interests except Mundari Khuntkatidari tenancy and Bhuinhari tenure vested in State (BLR Act Secs. 3 & 4)

The salient features of this Act came up for a detailed discussion in **Guru Charan Singh Vs Kamla singh 1976(2)SCC152** . The object and scope of the Act has been succinctly laid down in Full Bench Judgement of Hon'ble Mr Justice Krishna Iyer , “ Although there is a blanket vesting of proprietorship in all the lands in the State, the legislation is careful, in this initial stage of agrarian reform, not be deprivatory of the cultivating possession of those who have been tilling the land for long. Therefore while the consequence of vesting is stated to be annihilation of all interests, encumbrances and the like in the land, certain special categories of rights are saved. Thus, the raiyats and under-raiyats are not dispossessed and their rights are preserved. The full proprietor's khas possession is also not disturbed. Certainly the large landholders whose lands have for long been tenancy, loose their land to the State by virtue of vesting operation(of course , compensation is provided for).Nevertheless , the reform law concedes the continuation of the limited species of interests in favour of those Zamindars. The three classes 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 itemization in Section 6(1). The purpose and the purport of the provision is to allow the large landholders to keep the small areas which may be designated as the private or privileged or mortgaged lands traditionally held directly and occasionally made over to others, often servant or others , in the shape of lease or mortgages. The crucial point to remember is that Section 3 in

its total sweep , transfers all the interest in all lands to the State, the exception being the lesser interest under the state set out in detail in Section 5,6 and 7. So much so, any one who claims full title after the date of vesting notified under Section 4 has no longer any such proprietorship. All the same , he may have a lesser right if he falls within saving provisions viz Sections 5,6 and 7..... Section does not stop with merely saving lands in khas possession of the intermediary(erstwhile proprietor) but proceeds to include certain lands on temporary leases or mortgages with others, as earlier indicated. These are private lands known to the Bihar Tenancy Act , privileged lands as Known to the Chota Nagpur Tenancy Act, lands outstanding with the mortgagees pending redemption and the land which are actually being cultivated by the proprietor himself . Ordinarily what is outstanding with the lessees and mortgagees may not fall within the khas possession. The legislature , however, thought that permanent tillers rights should be protected and therefore, raiyats and under-raiyats should have rights directly under the state, eliminating the private proprietors, the Zamindars or proprietor also should be allowed to hold under the state, on payment of fair rent, such land as has been in his cultivating possession and other land which were really enjoyed as private or privileged or mortgaged with possession by him. With this end in view Section 6(1) enlarged its scope by including the special categories”.

Date of vesting means in relation to an estate or tenure vested in the State, the date of publication in the official Gazette of the notification under Sub-Section(1) or (2) of Section 3A in respect of such estate or tenure.

Section 3 provides that the State Govt. may from time to time, by notification, declare that the estate or tenure of the proprietor or tenure-holder , specified in the notification have passed to and become vested in the State.

“**Estate**” means any land and fishery and ferry rights included under one entry in any one of the general registers of revenue paying lands and revenue free lands prepared and maintained under the law for the time being in force.

“**Proprietor**” means a person holding in trust or owing for his own benefit an estate or part of an estate, and includes the heirs and successors-in-interests of a proprietor.

Holding means land or lands held by a Raiyat and treated as a unit for assessment of revenue.

Section 3A provides that the intermediary interest of all intermediaries in whole of the State have passed to and become vested in the State.

The consequence of vesting has been laid in Section 4 of the BLR Act. Section 4(a) to(c) lays down different interest which got vested in consequence of the notification

of vesting. Once an estate vests in the State, the various interests of the intermediaries enumerated therein are also vested in the State absolutely free from all encumbrances, barring the raiyati or under-raiyati interest. When an estate is vested in the State, any encumbrances is automatically wiped out.

One of the provisions that is often invoked in cases where transfer has taken place soon before vesting and the transfer is challenged on the ground that it has been made to avoid the consequences of vesting is **Section 4(h)** which provides that the Collector shall have power to make inquiries in respect of any transfer including the settlement or lease of any land comprised in such estate or tenure or the transfer of any kind of interest in any building used primarily as office or kutchery for the collection of rent of such estate or tenure or part thereof and if he is satisfied that such transfer was made at any time after the first day of January 1946, with the object of defeating any provision of this Act or causing loss to the State, he may after giving notice to the parties annul such transfer, dispossess the person claiming it and take possession of such property.

In order to canvass the genuineness of such a transfer by sada hukumnama it is some times argued that the Collector had an opportunity to verify the boanfides of the settlement deed under Section 4(h), failing which the settlement can not be challenged now. In other words it is canvassed that since the transfer was not inquired and annulled in terms of Section 4(h), at the time of vesting, any such transfer can not be inquired and cancelled now.

Now this issue can be approached from two angles, firstly, where following the settlement return has been filed by the outgoing proprietor or the ex-landlord in terms of Rule 7 B of the Bihar Land Reforms Rules 1951. If the return is proved to have been filed, then the Collector can be imputed with the knowledge of the transfer and if the Collector failed to initiate inquiry regarding the genuineness of the transfer under Section 4(h), then it cannot now take the plea that the transfer was made to avoid the consequence of vesting. If on the other hand, if neither return is filed with respect to the transfer, nor any entry is made in register II, then the said document can be only said to be a sham paper transaction and the Collector can not be said to have any knowledge about the said transfer. Unless any information regarding such transfer is given to the Collector, the plea that collector had the opportunity to initiate the inquiry at the time of vesting under Section 4(h) can not be availed. Unless any information regarding transfer in the form of return was given by the outgoing proprietor or tenure-holder, the Collector can not be said to have any material on record to initiate inquiry under Section 4(h).

In **Upendra Narain Singh Vs State of Bihar (1996)5 SCC499** the order of annulment of transfer by Collector on the basis of finding that granting patta in favour of appellant

by the ex-landlord-Zamindar, having been effected after the specified date ie 1.1.1946 was fraudulent to defeat the provision of the Act was under challenge. One of the ground of challenge was that order of annulment passed by Collector was not confirmed by State Govt. under the proviso. It was held that confirmation being an administrative act, its absence will not clothe the appellant any right at any stage so as to seek declaration of his on ground that thereby the order of annulment became ineffective.

In 2002 (9) SCC 677 State of Bihar and Others Vs. Sharda Prasad Rai and Others The question came up for determination as to whether proceeding initiated by the appellants under Section 4(h) of the Bihar Land Reforms Act, 1950, but subsequently dropped, would bar initiation of proceeding under Section 4(g) of the Act.

It was held "A perusal of clause (h) would show that it empowers Collector to make an enquiry in respect of any transfer including the settlement or lease of any land comprised in such estate or tenure or the transfer of any kind of interest in any building used primarily as office or cutchery for the collection of rent of such estate or tenure or part thereof. If on making enquiries the Collector is satisfied that such transfer was made at any time after the first date of January, 1946 with the object of defeating any provisions of the Act or cause loss to the State or obtaining higher compensation thereunder, he is required to give reasonable opportunity and notice of being heard to the parties concerned and is entitled to annul such transfer, dispossesses the person claiming under such transfer and take possession of such property on such term as may appear to him equitable.

The import of clause (g) is entirely different. It says that where by the reason of the vesting of the estate or tenure or any part thereof in the State under the provision of the Act, the Collector is of the opinion the State is entitled to direct the possession of any property, he is enjoined to serve a written order in the prescribed manner on the person in possession of such property requiring him to deliver possession thereof to the State or to show cause, if any, against the order within the period specified therein. When such a person fails to deliver possession or show cause or when a cause has been shown, the Collector after giving such a person, a reasonable opportunity of being heard reject the cause shown, for reasons to be recorded in writing, it can take or authorize taking of such steps including use of force as may be necessary for securing compliance with the order or preventing breach of peace. Thus it is clear that these two clauses contemplate two different situations and they operate in different fields an action under clause (h) does not debar the State from taking action under other clause, namely, Clause (g)".

Smt. Kalpana Pandey Vs. State of Jharkhand 2008 (4) JCR 389 -

Facts : Jamabandi number 626, mauza - Pakur, Thana No. 128, was recorded in the name of the husband of the petitioner Late Anand Mohan Pandey in the revenue register

and jamabandi was created according to the petitioner, before vesting of the State in the year 1948. The nature of the land was Gair Mazarua Malik land. The said land was settled with petitioner's husband by Amalnama followed by grant of rent receipts and delivery of possession. After vesting of the State enquiry was made regarding the said jamabandi created by the landlord and the same was maintained and the jamabandi was opened and continued in the name of petitioner's husband by the revenue officer. Since thereafter her husband had been paying rent to the State and was coming in peaceful possession. In the year 1982 after more than 30 years, the petitioner's husband got a notice under section 4 (h) of the Act 1950 from Circle Officer, Pakur. The Circle Officer being satisfied with the claim dropped the proceeding. Suddenly in the year 1995 another notice under section 4 (h) was issued by the S.D.O. Pakur and in the ensuing proceeding the jamabandi was cancelled.

It has been held in the case that jamabandi once created cannot be cancelled by the revenue authority unless there is established ground of fraud, misrepresentation or the jamaband is found created by an order passed without jurisdiction and assailed within a reasonable period. Jamabandi as such may not be a document of right, title, interest and possession, but jamabandi once created does establish the relationship of landlord and tenant and creates a valuable tenancy right under the provision of law. Section 13 of the S.P.T. Act , enumerates the right of raiyats in respect of use of land and provides that a raiyats may use the land of his holding in any manner of local usage or custom or irrespective of any local usage or custom in any manner which does not materially impair the value of the land or render it unfit for cultivation. A tenant cannot be ejected on any other ground than as provided under section 39 of the S.P.T. Act.

LANDS IN KHAS POSSESSION OF INTERMEDIARIES

Section 6 is the saving clause which protects the land in khas possession of the proprietor and tenure holder and they will be entitled to retain possession thereof and hold them as raiyat under the State having occupancy right in respect of such lands on payment of rent. The category of lands which have been enumerated in this section are all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting, including –

- (a) (i) **Proprietor's private land 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 Tenancy Act.
- (ii) **Landlords Privileged land** 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 CNT Act.

- (b) Lands used for agricultural or horticultural purposes and held in the direct possession of a temporary lessee of an State or tenure and cultivated by himself with his own stock or by his own servant or by hired labour or with hired stock.
- (c) Lands used for agricultural or horticultural purposes forming the subject matter for subsisting mortgage on the redemption of which the intermediary is entitled to recover khas possession thereof.

The above categories of land shall be deemed to be settled by the state with such intermediary and he shall be entitled to retain possessions thereof and hold them as raiyat under the State having occupancy rights.

The proviso further provides that the intermediary shall not be entitled to retain possession of any naukarana land, chowkidari chakran or goraiti jagir or mafi goraiti in the record or right, which has already accrued to the raiyat before the date of vesting.

From the above definition it is evident that the intermediary was entitled to retain land in khas possession. What is Khas Possession has been defined under **Section 1(k) of the BLR Act, 1950**, "Khas possession used with reference to the possession of the proprietor or tenure holder of any land used for agricultural or horticultural purpose means the possession of such proprietor or tenure holder by cultivating such land or carrying on such horticultural operations thereon himself with his own stock or by his own servants or by hired labour or hired stock".

The definition as to what precisely constituted "Khas Possession" was put forward in **Brajnandan Vs J.P.Sahu 1958 BLJR 122**. It was stated that in the definition of khas possession stress has been given on two elements ie Juridical Possession and on the form in which the act of possession is exercised at the time of vesting by the outgoing proprietor. The term khas signifies the possession of the proprietor sans the interposition of any tenants, **and not physical or actual possession**.

The Apex Court held in **Suraj Ahir Vs Pritam Singh AIR 1963 SC 454** that the above view was not correct and held that the definition as it stands can only relate to actual or cultivating possession by the intermediary or tenure-holder, either personally or by means of hired labours. The intermediary is denied the shelter under Section 6 of the Act by the very fact that any other kind of constructive possession is foreign to the definition.

An interesting question fell for consideration in **Ramesh Bijoy Sharma and ors Vs Pasupati Rai and ors 1979(4) SCC27** that if the tenant-at-will is in actual possession

and holds out against landlord and questions his right to be put in possession, can it be regarded as khas possession of the landlord?

This question was answered in the negative and it has been held that a tenant-at-will is some one other than the landlord. If a tenant-at-will is cultivating land used for agriculture, the agricultural operation carried out by him can not be said to be the cultivation of the landlord himself, nor the stock of the tenant-at-will can be regarded as the stock of the landlord, nor the tenant-at-will can be regarded as the servant of the landlord. The word used in Section 6 is not "possession" but it is qualified by the adjective 'Khas Possession' its equivalent being 'actual possession' as the word is used in contradistinction to the word 'constructive possession'. The expression khas possession used in Section 6(1) of the BLR Act does not include the right to take possession. The subsisting title of the Landlord over certain land on the date of vesting would not make that land under his khas Possession.

The ratio of this case is consistent with the earlier authorities on the point viz 1971(1) SCC 556, (1964) 3 Scr 363 and so on. In **Balehwar Tiwari Vs Sheo Jatan Tiwari 1997 AIR 2089** it has been held that *intendment of Khas possession is referable to intermediary who must be in actual possession-- Possession is actual and admits of no dilution except to extent specified u/s 6 of the BLR Act.*

Apart from the land under khas possession, such buildings or structures together with lands on which they stood, other than any building used primarily as offices or kutcheries referred to in clause (a) of Section 4, as were in the possession of an intermediary and used as golas, factories or mills for purpose of trade, manufacture or commerce or used for storing grains or keeping cattle or implements for the purpose of agriculture and constructed and used for the aforesaid purpose before the first day of January, 1946 has been deemed to be settled by the State with such intermediary and he shall be entitled to retain possession as tenant under section 7 of the BLR Act.

In **State of Bihar Vs Sharda Prasad Rai (2002) 9 SCC 677** the question that came up for determination was whether proceeding initiated by the appellant under Section 4(h) of the Bihar Land Reforms Act, 1950, but subsequently dropped, would bar initiation of proceeding under Section 4(g) of the Act. It was held, "....."

The determination of the question as to whether an estate vested or not revolves round the crucial date of vesting **i.e. 6/11/1951**. If the intermediary or proprietor was not in khas possession on that date his title to the property would stand extinguished. In **Shashi Bhushan Manki Vs. Sabi Mundaian 1986 BBCJ 716** the ex-ghatwal continued to be in possession of the ghatwali tenure in spite of nomination of new ghatwal on the date of vesting, the land was deemed to have been settled with him following notification under the BLR Act.

In 1996 AIR SC 1936 **Mosammat Bibi Sayeeda Vs State of Bihar** the interpretation of Section 4(a) meaning of 'Bazar' came up for consideration. This is also known as Patna Market case where in the Appellants claimed that the shops are homesteads within the meaning of Section 2(J) of the BLR Act. The substantial question of law as to the meaning of word "Bazar" namely Patna Market and other such markets came within Section 4(a). Hon'ble the Apex Court answered in the affirmative and held that *on and with effect from the date of publication of the notification under Section 3, the totality of the right, title and interest held by the intermediary stands abolished. The consequences thereof, as enumerated in Section 4(a) is extinguishment of the pre-existing right, title and interest over the entire estate including the enumerated items in Section 4(a) which includes huts, and bazars in the State and the pre-existing right title and interest held by the intermediary.--- In order to constitute bazar all that is necessary is a place where buyer and sellers congregate to sell and buy. It will be difficult to accept that complexes are not Bazars within the meaning of Section 4(a) of the BLR Act. They being the Bazars of a proprietor or ex-intermediary, must be held to have vested consequent upon notification under Section 3 of the Act.*

Apart from the lands in khas possession of the intermediaries which have been saved from vesting, Section 7 extends the protective umbrella to the intermediaries with respect to buildings together with lands on which such buildings stand in the possession of the intermediaries and used as golas, factories or mills to be retained by them on payment of rent at the time of commencement of the BLR Act. The ex-proprietor is entitled to retain possession of golas on his bakast land subject to payment of rent.

Section 35- Bar to jurisdiction of civil court in certain matters – No suit shall be brought in any civil court in respect of any entry in or omission from a compensation Assessment roll or in respect of any order passed under chapter – II to VI or concerning any matter which is or has already been subject of any application made or proceeding taken under the said chapters.

Form – K - Application by proprietor of tenure Holder for 7B

Form -L- General notice issued by Collector

Form –M - Preparation of Rent Roll.

The fair rent or ground rent determined under these rules in each proceeding together with the register particulars shall be entered in form –M rent roll under the signature of the Collector, such rent Roll shall form part of the case record to which it relates.

UNDER RAIYAT, SIKMIDAR, DAR RAIYAT -

A Sikmidar is an under raiyat – Under raiyat is a Tenant holding the land under a raiyat – As under raiyat as of right does not acquire any occupancy right in the land held by him under a raiyat in absence of any custom or usage prevalent in the Area.

Sikmidars have neither heritable nor transferable right unless there is a custom or usages contrary to that. The right of under raiyat survives till his life and it extinguishes after death of Sikmidar in possession for more than 12 years no acquisition of heritable right by Adverse possession.

Right of an under raiyats or sikmidar – According to Section 76 C.N.T. Act a custom or usage by which an under raiyats can obtain rights similar to those of an occupancy raiyats is similarly, not in consistent 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. The said provision says that by custom occupancy right can be acquired by an under raiyats. There is no provision under the C.N.T. Act regarding heritability of the right of an under raiyats or a sikmidar. It is a settled principle of law that right of an under raiyats or sikmidar is not heritable under the law the same may be heritable by custom and custom is require to be pleaded and proved and onus lies upon the peson who claims such custom to plead and prove the same. It has been held in the decision reported in **AIR 1936 Patna 384 (Jugesh Chandra Bose versus Maqbul Hussain)** that the interest of an under raiyats with occupancy right is not heritable under the law and the defendant has not proved the custom of heritability of the right of an under raiyats and is liable to be evicted from the suit premises. Their Lordships in the Division Bench decision reported in **AIR 1964 Patna 31 (Johan Oraon (Ekka) and another versus Sitaram Sao (Bhagat) and others)** have held that an under raiyats with occupancy status is not heritable under the law though it may be heritable by custom. Where in a suit for declaration the defence was that the defendants acquired permanent occupancy right in the disputed land from their father who had acquired those property by prescription, it was held that the custom of heritability was not established and the defendants were liable to be evicted. In another decision reported in **1988 BLT 258 (Haripada Mahato and another versus State of Bihar and others and Dasrath Mahto versus Commissioner, C.N. Division South, Ranchi and others)** it has been held that the plea regarding custom in a particular village has not been established, Section 76 of the C.N.T. Act cannot be applied. Sikmidar even if remains in possession of land for a period of more than 12 years cannot acquire heritable right by adverse possession. In para 14 of the said judgment it was held that in the village note there is no mention about heritability of the tenancy. Further in the single Bench decision reported in **2002 (3) JCR 554(Waxpol Industries Limited Versus State of Bihar and**

others) it has been held that when the custom of heritability of sikmidar has not been proved by evidence and even if the sikmidar and / or his heirs remained in possession for more than twelve years, no acquisition of heritable right by adverse possession is available. It has further been held that sikmidar has neither heritable not transferable right and without taking resort to Section 46 of the C.N.T. Act any transfer of tribal land by sikmidar is illegal and invalid and confers no right or title on the vendee. Similarly in the decision reported in **2004 (1) JCR 98 (Sandhya Rani Devi and others versus Gour Chandra Panda and others)** it has been held that right of an under raiyats is neither transferable not heritable unless there is custom or usage to the contrary. The right of an under raiyats survives till his life and extinguishes on his death. Their Lordships in the decision reported in **2005 (2) JLJR 95 Division Bench (Waxpol Industries Limited versus State of Bihar and others)** have held that in absence of any evidence regarding heritable right of sikmidar which has not been proved and the plea regarding custom has not been established and as such sikmidar even if remains in possession for more than twelve years cannot acquire heritable right by adverse possession.

[Acknowledgement: My thanks to Sri Arun Prasad, Retd. IAS and Sri Bansi Prasad, Senior Advocate, Civil Court, Ranchi for their invaluable insight and inputs in preparing this article.]

GLOSSARY

Gairahi – A kind of communal land from the produce of which the expense of Ghost worship is made.

Gairmzurwa Malik or Gairmazurwa Khas - Uncultivated land or parti lands ditch or up-land not fit for agricultural purposes of the landlord over which any raiyat can make it fertile by levelling it making Korkar etc, after taking due permission from the land lord and the same can be settled to a raiyat.

Gairmazuruwa Aam Land - Un-cultivated communal land of the land Lord like road, temple, mosque burial place, hat, bazar etc which can not be settled to any body.

Maswar - A system of procurement in which a raiyat pays as rent to his land lord and amount of produce equivalent to the quantity of the seed sown by him.

Mokarry - A Permanent lease,

Mokarridar -leaseholder

Mokarrari- A permanent heritable and transferable tenunre, rent fixed in a pre-emption

Naukrana- Land given by the Land Lord for rendering service.

Village Note- Is attached with the record of right.

Land Lords privileged- Land(Section 118)

BIRIT – A grant or a gift.

BIRIT PUJAI – A grant or gift made to a person on the condition that he carries or worship of any particular God, Temple or deity. Also indicates holding in possession of the recognized Pahan of the village.

BRIT PUJAI – Appertaining to Brit Puja or Ghost Worship.

BHUGUT BANDHA MORTAGAGE – Means a Transfer of the interest of Tenant in his Tenancy for the purpose of securing the payment of money advanced or to be advanced by way of loan upon the condition that the loan with all interest thereon, shall be deemed to be extinguished by the profit arising from the tenancy during the period of mortgage.

KORKAR – Means land whatever name locally known such as ‘Babhala’ Khunwat, Jalsasam’ or ariat which has been artificially levelled or embarked primarily for the cultivation of rice and

a) Which previously was jungle waste or uncultivated or was cultivated up land

or which through previously cultivated has become unfit or cultivation of transplanted rice and

- b) Which has been prepared for cultivation by a cultivation (other than the landlord) or by the predeceased in interest other than the landlord.

ABAD	:	Cultivate
ANABAD MALIK	:	Land Lord's Waste Community
ANABAD SARBSHADHARAN:		Waste Land belonging to village Community
BAKASHT LAND	:	Raiyati Land temporarily in possession of the land lord
BAKASHT MALIK	:	In cultivating possession of the Landlord
BANDOVAST	:	Settlement
BATALI	:	Actually divided
BATAIDARI	:	System of division of produce
BAYNAMA	:	Sale deed
BEDAKHAL	:	Injection, Eviction from land
BEGAAR	:	A forced laborer
BE-LAGAN	:	Without rent
CHAK	:	Block
DHUR, DHURKI	:	Unit of measurement
ESTATE	:	Land included under one entry in any of general registers
GAIR ABAD	:	Uncultivated
GAIR MAZRUA	:	Uncultivated, Parti
INDRAJ	:	Entry in record
JAMABANDI	:	Rent Roll of the Land Lord
KASTKAR	:	The person under whose direct cultivation the land is Exclusive Land of the Land Lord
KHATA	:	Khatian for one holding
KHATIAN	:	detailed record for each separate holding of the plots
KISTWAR	:	Survey of all the fields, wasted Land, house etc. of a village by amin

LAGAN	:	Rent
MALGUJARI	:	Land Revenue
MAUZA	:	A village as recognized and separately mapped at the time of revenue survey.
PARCHA	:	A duplicate of the khatian made over the Land lord and tenant during Khanapuri.
PARTI	:	Land lying fallow
PARTI KADIM	:	Old fallow Land not cropped within three years.
PARWANA	:	An order by a person in authority
PATTA	:	A kind of lease
RAIYAT	:	A person who has acquired a right to hold land for the purpose of cultivation
SAHAN	:	Enclosure or Court yard; the uncultivated land adjoining and forming part of the home stead
SALAMI	:	A capital payment being paid by tenant to land lord .
TASDIQUE	:	Attestation of the draft record of rights during survey operation.

Appendix I Register 1B

FORM - I
Maintenance of records Form of continuous Khatian to be maintained by the Anchal Adhikari
under Section 3 (1)
(See Rule 4)
Continuous Khatian

Village Anchal Rev. P.S. Name of proprietor
 State of Bihar Police station R.T. No.
 If Shikmi Khatian the name of the actual tenant along with khata number:

Serial no. in the Khatian	Name of tenant fathers name, caste and residence	Plot Plot no. Boundary	Nature of land (Classification)	Area A D Hec.	Possession, nature of possession Shikmi possession etc. Remarks
1	2	3	4	5	6 7 8 9

Rent about plots with kind rent, its conditions for possession	The period of possession of the non-occupancy raiyat (2) procedure for fixation of rent and condition of rent if it increases gradually (3) special conditions if any	Substance of the order for making changes	Remark
Rent excluding assessed reason cess, according to the enquiries to the enquiries of the A. A. excluding cess			
10	11	13	14

Statement —

- (1) If Khata is possessory the name of the raiyats who have got possession on the plot shall be entered in col. 9.
- (2) If the possession is through lease, mortgage then the number of registration deed, date of registration and amount consideration will also be mentioned in col. 9.
- (3) The name of Shikmi raiyat will also be mentioned in this column, If the period of possession is less than twelve years then the period of possession will also be mentioned.
- (4) If the trees are not in possession of raiyat, the name of the person to whom it belongs, his share and nature of tree and number will be mentioned.

Appendix - II

MAINTENANCE OF RECORDS FORM NO. - 2
 Register of Tenants Ledger
 (See Rule 4)

Form of tenant Khata Register to be maintained by Anchel Adhikari under Section 3 (i)

District Sub-division Anchal Tenants ledger number
 Village R.T.No. Khata No. Police Station Name of tenant
 Father's Name Village P.O.

Area		Annual demand		Rent		Coins		
Year	Area	Decimals	Year	Approval for changes	Rupees	Paise	Rupees	Paise
1	2	3	4	5	6	7	8	9

	Education Cess			Health Cess			Remarks	
	Arrear Collection	Demand Collection	Paise	Arrear Collection	Demand Collection	Paise		
13	14	15	16	17	18	19	20	21

Collection		Cess											
Year	Total Demand	Total Collection	Receipt No. Challan No. Money order No.	Arrear		Demand		Current		Demand		Road Cess	
				Collection	Paise								
1	2	3	4	5	6	7	8	9	10	11	12		

Administration of Civil Justice in Kolehān: A critical approach on justification for retention of Wilkinson's Rules.

By: Pradeep Kumar Srivastava,
Principal District & Sessions Judge,
West Singhbhum at Chaibasa.
Dated: 9th day of March, 2015

INTRODUCTION:

The District of Singhbhum has an earmarked area which is known as the "Kolehān" for the last few centuries. Sadar Sub-division of Chaibasa comprises the present day Kolehān where a separate system of administration of Civil Justice and other affairs are transacted under the Rules framed by Thomas Wilkinson, Governor General's agent in South-West Frontier Agency in 1837.

HISTORICAL BACKGROUND OF THE WILKINSON'S RULES

Edward Tuite Dalton C.S.I. In his book "Description Ethnology of Bengal published in 1972" has mentioned the following facts:-

"The district of Singhbhum in which the Ho or Lakra Kola are located lies to the south east of Chutia Nagpur proper or between 22 and 23 of north latitude and 86°53' and 85°2' of east longitude. It measures 124 miles in extreme length from east to west and 64 miles, in its greater breadth from north to south. The total area is by survey 4503 square miles, of this 1905 square miles constitute the exclusive Ho territory known as the Kolehān. The most fertile and highly cultivated portion of this tract surrounds the station of Chaibasa at a general level of seven hundred and fifty feet above the sea and here are massed about two thirds of the Kolehān population. The South of this extending to the Baitarnfriver the general level rises to upwards of 1000 feet and the kols of this plateau are less civilized and more turbulent than those of the lowersteppe. The whole district is undulating, traversed

by dykes of trap which rise in rugged masses of broken up rock and the views are on all sides bounded by ranges of hill, rising to 2900 feet. To the south west bordering on Chutia Nagpur is a mountainous tract of vast extent sparsely inhabited by the wildest of the Kols, this, however, appears to be the region from which they first descended into the Singhbhum plains. Saranda bordering on Gangpur at the extreme south west of the District is called "Saranda of the seven hundred hills". It is a mass of mountains which rise to the height of 3500 feet and contains, but a few foot hamlets nestled in deep valleys belonging for the most part to a very unreclaimed tribe of kols. The inhabitants of the western hills bordering on Chutia Nagpur generally retain the name of Mundas and connect themselves rather with the people of Chutia Nagpur than with the HOS of Singhbhum."

Chutia Nagpur, as part of Bihar, was ceded to the British Government in A.D. 1765; but the earliest arrangement with the Rana occurred in 1772, when it is stated that the chief appeared before Captain Camac commanding a force in Palamau, and after exchange of turbans with the Company's representatives, duly acknowledged himself a vessel of that great power, gave as Rs.3,000 and agreed to do service against the Maharattas. The oldest settlement deed is dated 1179 Fasli, by which Raja Dripnath Sahi of Khukhra, alias Nagpur, agreed to pay 12,000 rupees, viz. Mal or rent 6,000 rupees, nazranah or tribute, 6,000. For some years after this, the Raja was allowed to administer the territory as the chief of a tributary mahal, but in 1816 or 1817, it was found necessary to deprive him of magisterial powers, the estate was placed under the Magistrate of Ramgarh, who held Court alternatively at Sherghati and Chatra. Natives of Bihar who were considered foreigners of Chutia Nagpur were sent into the country as Police officers, and occasionally the Nazir of the Ramgarh Magistrates Court was deputed with extraordinary powers to inspect and report on the administration. Up to A.D. 1831, when the most serious revolt of the Kols of Chutia Nagpur occurred, there can be no doubt that the changes of government which had taken place were not beneficial to them. They were neglected by their new masters, oppressed by aliens and deprived of the means they had formerly possessed of obtaining redress through their own chief. The rajha, by no means satisfied at this own loss of dignity and authority, gave but surely answers to complaints who came before him. The Darogahs (Native Police Officers), the highest resident officials under the British Government, declared it was not competent to them to decide on the grievances that then most harassed the Kols; these were complaints, that they had been dispossessed by foreigners, Muhammadans, Sikhs, and others, who had obtained from the sub-proprietors farms of the Kol villages over the heads of the Kol headman; but it often happened that the unfortunate Kol who with difficulty made his way to the far off station found the tables turned on him when he got there. A host of witnesses in the pay of the opposite party

were already there prepared to prove “that he had not only no right in the land, but was a turbulent rebel besides.”

The author has further described as under:-

“The judicious officers who was now Agent to the Governor General for the newly formed non-regulation province the south western Frontier the late Sir Thomas Wilkinson at once recognized on the necessity of a thorough subjugation of the Kols and the im-policy and futility of forcing them to submit to the chiefs. He, therefore, proposed an occupation of Singhbhum by an adequate force and when the people were thoroughly subjugated to place them under the direct management of a British Officer to be stationed at Chaibasa in the heart of their country. These views were accepted by Government and in furtherance of them two regiments of Native Infantry a brigade of guns and the Ramgarh battalion the whole force commanded by Colones Richards entered Singhbhum in Nov. 1836. Operations were immediately commenced against the refractory pirs, and by the end of February, following all the Mankis and Mundas had submitted. There appears to have been very little actual fighting during this campaign. All the most important parts of the Kolhan were visited by the Agent and his troops the men whom it appeared desirable to make examples of in-consequence of their having been leaders in the previous lawless proceedings were given up for captured, and the others readily acquiesced in the arrangements proposed.”

2. On examination of early recorded history of Kolhan, it is found that in 1837, 23 Kol Pirs are Parganas belonging to the three chieftains of Porahat, Saraikela and Kharsawan were detached from their Estates and with four others taken from Mayurbhan in Orissa were for the first time brought under the direct control of the British Government under the name of Kolehan, which was named as “Kolehan separate Estate” and included in the South-West Frontier Agency, Chaibasa became the Headquarter of the Kolehan Estate.

In the mean time, Regulation XIII of 1833 was promulgated on 2nd December 1833 for abolition of course of Diwani Adalat of Zilase of Ramgarh, Jangal Mahals and Midnapur and for providing special rules for the Superintendence of certain tracts as was included in the Zilase as was included in the aforesaid Zilase.

Section V there in stipulated, as follows :-

“It shall be competent to the Government General by an order in Council to prescribe such rules as he may deem proper for the guidance of the Agent, all the officers subordinate to his control and authority, to determine what shall be exercised by the Agent and his Assistants respectively, also to determine, to what extent the decision of the Agent to Civil Suits shall be final and in what suits an appeal shall lie to the Sadar Dewani Adalat, and to

define the authority to be exercised by the Agent in Criminal trials and what case he shall submit for the decision of the Nizamat Adalat.”

Section IV of this Regulation, which is also important, reads as follows :-

“The administration of civil and criminal justice, the collection of revenue, the Superintendence of the police, of the land revenue, customs abkaree, stamps, and every branch of Government within the tracts of country separated as prescribed in the foregoing section, shall be vested in an officer appointed by the Governor General in Council, to be denominated agent to the Government-General.”

A Code of Rules was drawn by the Captain Wilkinson for the administration of Civil Justice (commonly known as Wilkinson’s Rules in 1834). Admittedly, it is being acted upon since more than 150 years.

This set of Civil rules was procedural ones, which prepared the framework of Civil justice. The features were ready and expeditious justice, the induction of the tribal Manki-Munda system of governance and rule through tribal customs. These kept Kolhan beyond the jurisdiction of the Civil Procedure Code. This way the Hos of Kolhan have retained their particular identity so far administering civil justice is concerned. Here we will also take into account conflicting values representing by two types of people tribals and non-tribals living in Kolhan. Tribals rather the Hos think that these rules not only provide cheap and expeditious justice but more so the British administered them through their men and customs, which they prize most.

In the background of Kol insurrection in Chhotanagpur during the period 1831-1833 Captain Thomas Wilkinson framed the following rules under the Regulation 13 of 1833 and within the meaning of Section 51 of the Government of India Act 1833.

For the sake of convenience, the Wilkinson’s Rules for the administration of Civil Justice within the jurisdiction of the Agent to Governor General under Regulation XIII of 1833 is hereinafter given below:

1. Civil suits of the value of 300 and under that sum whether for personal or real property shall be cognizable by the Munsif or the native Chiefs or others, who may hereafter be entrusted with the powers of Munsif with exception of suits in which the defendants Cutchary servants of Europeans or Americans are parties and with exception also of lands held exempt from the payment of Revenue provided the claim include the whole amount of demand arising from the cause of action and be not for damages on account of alleged arising from the cause of action and be not for damages on account of alleged personal injuries or for personal damages of whatever nature, Munsifs are prohibited from receiving suits in “form a paupers”

but it is competent to the Assistant to the Governor General's Agent to refer such suits to them.

2. Civil suits of whatever value are ordinarily to be instituted in the Court of the Assistant within the limits of whose Division of the jurisdiction, the cause of action may have originated or in which the defendant may be residing but the Governor General's Agent may admit the institution of any suit in the first instance in his own Court whenever for special reasons he may judge it advisable and he is empowered to try and decide all suits or appeals which may be instituted before him or referred to him by his Assistant.
3. No Civil suits for personal property shall be cognizable in any court in the jurisdiction in which the cause of action shall have originated more than six years antecedent to the institution of the suit the Rule have effect from the date of promulgation of this order. In like manner twelve years shall be the limit authorised to try and decide in their capacity of Revenue Collectors shall be instituted within one year from the date on which the cause of action shall have arisen or if the complaint be for forcible dispossession of lands, it shall be preferred within three months, provided always that it shall be competent to the Assistant on sufficient cause of delay being shown, or in cases of violent or fraudulent acquisition of property to admit and to try the merits of any suit although the period limited shall have expired.
4. All suits in every court shall be tried and decided openly and publicly in presence of parties or their authorized agents.
5. In all suits the plaint shall be written on stamped paper of the value of specified in No. 8 of the schedule B Regulation X of 1829 and answers on stamped paper of the value specified in No. 9 of Schedule B Regulation X of 1829. Unless the Agent or Assistant in whose court suit may be instituted be satisfied of the inability of either party to pay the court to admit the plaintiff to use of the defendant to answer in "Forma pauper" and to remit the stamp duty, but persons instituting groundless or vexatious suits shall be liable to moderate fine, at the discretion of the court commutable in defaults of payment imprisonment in the civil jail for a period not exceeding one month. The value of lands, houses as laid down in notes to 8 of schedule B Regulation X of 1829 and in suits for damages, injury and loss of caste and the like amount to be computed of rate assumed by the plaintiff.
6. With exception to the plaint and answer no stamp paper shall be required for any petition process pleading or Roznamcha in any suit.
7. All complaints relation to balances or under exaction of rent or disputed Revenue account be received on stamped paper and shall be heard and decided by the

assistant any parties who may be dissatisfied with the decision of an assistant being at liberty to institute an appeal to the agent.

8. In all suits which may be instituted, the amount or value of the property claimed or involved shall be specified in the petition of the plaintiff. On the plaintiff being filed, summons or notices shall be served on the defendant containing a requisition to attend in person or be an authorised agent to defend the suit on or before a certain day to be therein specified; Such notice shall be served through the head of the village or estate where the defendant, may reside, or through the jamadar of the court, by whom the summons and notices shall be returnable on a fixed day with an endorsement, certifying the manner in which it may have been served.
9. If the defendant shall appear and answer to the plaintiff, the court after making such enquiries from the parties or their agents as may appear necessary with a view to ascertain the precise object of the action and the grounds on which it is maintained and having recorded the same shall proceed to investigate the merit of suit a sufficient notice being given to the parties of the day on which the suit may be brought to a hearing. In cases in which the justness of the claim shall be admitted by the defendants, pleading may be dispensed with.
10. Should the defendant in suit abscond or neglect to attend to defend the suit the agent's or assistant's courts as the case may be shall at the expiration of three weeks from the date of the return of the summons proceed to try the "ex-parte" or in the event of the plaintiff neglecting to proceed on his suit for three weeks such suits shall be dismissed unless good cause for the delay shall be shown. Under the like circumstances the Munsifs shall refer to the assistant for orders, before trying a suit, "ex-parte" whose duty shall be to ascertain if the summons was served on the defendant or if the plaintiff's neglect has been satisfactorily established.
11. The attendance of the witness of the parties shall either be procured by means of subpoena to be served through the heads of villages or estate in which they reside or by a process to be served by the parties themselves or by the jamadar of the Court, and any witness who may fail to attend shall be liable to a fine at the discretion of the Court to be enforced, if necessary by attachment of his personal property. The court may on all cases order the parties to reimburse their witnesses the expense incurred by their attendance or to provide for their subsistence while in attendance on the court. Time deposition of witnesses shall be taken in either Hindustanee or Bengalee language whichever they may be most conversant, and such oath shall previously be and inserted by the court as may be most binding on their conscience. In case in which a witness may reside at a considerable distance, or may be unable

- from sickness, or other cause to attend the court, his deposition may be taken by the nearest Munsif or Darogah or written interrogations to be transmitted by the court.
12. In the Bihar portion of the jurisdiction the proceedings shall be recorded in Hindustance and in the Bengal portion in the Bengalee language. The parties shall in all cases be at liberty to plead their own cause either in person or by an authorised agent.
 13. Every decree in a suit which may be passed by the agent, his assistant, or a Munsif shall specify the names of witnesses whose deposition have been taken, the amount money or value of the property decreed, the costs of the suit of every description and if the latter in what proportion, and on fees or costs whatsoever shall be levied from parties in civil suits, except as may be authorised by these Rules or by any special orders of Government, and the parties in all cases in which they may desire it to be furnished with a copy of the decree within ten days after the decision shall have been passed.
 14. An appeal in all suits shall be from the court of the Munsifs to those of the assistants and from the court of the assistants to that of agent provided the petitions of appeal from Munsifs to assistants court, and from assistants court to agent, be preferred in the first case either to Munsifs or assistants in the latter to assistant or an agent within six weeks of the date of the decree. All petitions of appeals, shall specify the grounds of dissatisfaction with the decisions and (unless preferred by the pauper, shall be written on stamped paper of the value specified in No. 8 of schedule b Regulation X of 1829. The Execution of decrees passed by the Munsifs or assistants shall not be stayed, notwithstanding the appeal unless the appellant given security, to the fulfillment of the decrees, should they fail in furnishing security, respondent to be at liberty to sue out for execution of the decree on giving security for performing the final orders passed by the higher courts.
 15. Whenever an appeal shall be preferred to an assistant from the Munsifs decision, or to the agent from the assistants decisions, it shall not be necessary to summon the respondent in the first instance but forthwith to call for the original record of the proceedings in the case, and if after the perusal of the record of the original suit and petition of appeal in the presence of the appellant or his agent, the assistant or agent, as the case may be shall see no reason to alter the decision appealed from, it shall be competent to the assistant or agent to confirm the same and to communicate the order for confirmation through the court from whose judgment the appeal was made to the execution of the decree. Should the assistant or the agent admit the appeal he will cause a notice to be issued to the respondent; on the attendance of

the parties, or if the respondent shall not appear after the due notice having been served on him, on the attendance of the appellant only or his authorised agent, the assistant or Governor General's Agent as the case may be shall proceed to try and decide the merits of the appeal and shall pass a final decision confirming, modifying or reversing the decision of the Munsif or assistant as the case may be as he shall judge proper.

16. The agent or assistant as the case may be empowered to call for any further evidence in a case appellant, or to refer the same back to the munsif or assistant or further evidence, When not sufficiently investigated. The agent or assistant is likewise empowered on the application of any party suit decided by a Munsif or an assistant but not appealed, to grant a view of judgment, provided sufficient cause be shown and the application be preferred within six weeks or cause shown why that period has been exceeded and the agent or assistant is further competent to remove to his own or any other court in the jurisdiction by precept under his official seal and signature any cause which may be pending in a lower court recordings his reasons for so doing.
17. With the exception of the court of the agent which shall be at liberty to employ an assistant or Munsif, all decrees shall be carried into effect by the court by which the suit may have been originally tried and decided and shall be enforced by attachment and sale of personal property, or arrest and imprisonment of the person or the debtors except, Rajas and other whom the agent may consider it proper to exempt. Decrees shall be executed by an order addressed to an officer of the Court or the Head man of the estate in which the debtor may usually reside or where the property may be situated.
18. The agent is empowered to afford relief to insolvent debtors or their sureties who may have no means of discharging the amount demandable from them, on receiving a statement on oath containing a fair disclosure of all property belonging to him of whatever description, and if the agent, shall be satisfied from the inquiry he may make, or cause to be made by his assistants, that the statement is true, and that the party in confinement has surrendered for the disposal of the court any property in his possession, the agent, may order his release from confinement, but the creditor may at any period bring to sale, in satisfaction of his demand, by application to the court, any property landed being subject to Rule 27 which may subsequently be possessed by the party released, may cause the party to be again confined if he shall appear to have been guilty of any fraudulent concealment of his property at the time of discharge.

19. Persons confined in civil jail in execution of a decree shall receive daily subsistence allowance of two annas to be paid through an officer of the Court by the party at whose suit, the debtor shall be confined and it shall be the duty of that officer of the Court to require a deposit in advance for such persons of one month, subsistence allowance, in default of payment of which he shall report the circumstances to the agent of his assistant within 12 hours and the prisoner shall forthwith be released from confinement and it is hereby further provided that no person shall be liable to personal confinement in satisfaction of a decree for any sum not exceeding Rs. 50/- beyond a period of six months at the expiration of which he shall be released by any personal property belonging to such person shall be liable to sale in execution of the judgment, or such part thereof as may remain due. The following rules are passed for the adjustment of suits by panchayat.
20. The Governor General's agent and his assistants are authorised at their discretion refer suits for decision to Panchayats after the plaints had been filed and defendant's answer received. Either at the sadar station or any other party of the district where the Agent's on the assistant's cutchery may be at the same time. The Panchayat to consist of three or five persons to be selected by the agents or assistants from amongst the person most conversant with the matter at issue. The persons to compose the Panchayat shall not be nominated until the plaintiff, defendant, and witnesses had been assembled. The plaintiff and defendant shall each be permitted to challenge any member of the Panchayat and on giving sufficient reason for the challenge or other person or person shall be selected to supply his or their place. The plaintiff and the defendant or their Agents. Shall each be called on. On the Governor general's Agent or his assistant determining to refer a suit to a Panchayat, and before the member of the Panchayat have been nominated to enter into engagement to abide by the decision of a Panchayat to be nominated by the Governor General's Agent or his Assistant shall immediately direct a moharrir to attend the Panchayat, whose duty it shall be under the direction of the Panchayat to record their proceedings and award. He shall then direct them to proceed forthwith at some convenient place in his kutchery or adjoining it to investigate the matter at issue, when the pleadings shall have been finished and evidence taken the Panchayat shall direct the Moharrir the parties to retire, consult and decide on their award and when they have come to a decision they shall recall the Moharrir to record the award, which award having been duly attested with their signature they shall deliver to the court appointing it whom a decree in conformity therewith shall be passed which shall not be appealable or set side, unless corruption can be proved against the Panchayat or unless the

- award shall be contrary to the common law of the country or the rules enacted by the Governor General in Council.
21. When the matter at issue is a boundary dispute between two villages within the same estate the Panchayat shall be selected from amongst the Head, most influential and respectable men from the adjacent village with the Estate, who shall proceed to the boundary and decide the dispute after careful investigation and fix such boundary marks as will leave no room for further disputes. When the boundary dispute is between petty Zamindars, jagirdars or other holding a taluk or Estate or several villages in same large Estate the panchayat shall be selected from amongst the most respectable and influential persons on the neighboring Zamindars or jagirdar, who shall proceed to the boundary, to decide the point at issue after careful investigation and place such boundary marks as will prevent further dispute. With exception the Panchayats shall be formed and proceed in manner directed in the last rule.
 22. As the decisions of suit by Panchayat is to expedite justice and for the general good, all persons shall be liable to be employed on them, it shall however be the duty of the Agent and Assistants to make their selection from amongst the persons above indicated, in the manner which subject them to last convenience.
 23. When a matter at issue is a boundary dispute between two large Estate paying Malguzari direct to Govt. the governor General's Agent or Assistant at the case may shall proceed to the spot and after minute investigation pass the decree. An appeal laying from the Assistant to the Agent who shall, whether the suit originated in his own Court, or has appealed from the Assistants, pass his decree. Except when the tranquility of the country will be likely to be disturbed by so doing in which case shall make a previous reference for the order of the Right Hon'ble the Governor general in Council.
 24. The Governor General's Agents and his Assistants are required to encourage all persons to refer their disputes to private arbitration or Panchayat without coming into Court.
 25. Parties shall be at liberty to settle suit by Rajinamas at any state of the proceedings, but shall only be entitled to receive back their stamp when settled before the witness have been heard.
 26. Wakeels shall not be permitted to plead in any of the Court within the jurisdiction, but parties shall be allowed to conduct their business in the Courts either in person or by Mokhtears or or authorised agents. But suits for the remuneration of agents or Mokhtears shall not be heard or decided in any Court.

27. No sale, transfer or mortgage of any landed property on account of rent or on any other account shall be legal until the authority of the Governor General's Agent. The object of this Rule is to discourage exactions litigation which the Regulation Province is greatly promoted by intriguing Wakeels and Mokhtears.
28. The Governor General's Agent shall immediately have proclaimed that in future his consent to the sale, transfer of mortgage of landed property belonging to the Rajas, Jagirdars, Zamindars and other proprietors whose lands have been in possession for generations will generally withheld.
29. In all suits originally filed in the Court of the Agent and decided by him involving money transaction exceeding Rs. 5000/-, if either party be dissatisfied with the decision and the Agent shall doubt the soundness of his decisions he shall receive a petition of appeal from the party dissatisfied on the stamped paper of the value of Rs. 350 and forward it with his original proceedings and a translation of them into the Persian language to the Sudder Diwany for its final orders when the Sudder-Diwany after making such further investigation as shall appear necessary shall give final judgment on the merits of the case. Although the form of the proceedings may be at variance to that prescribed by the General Regulations.
30. In all cases of disputed succession (original or in appeal) to large or small estates when a decision may endanger the public tranquility or when the Agent shall have a difficulty in coming to a decision previously in giving final judgment he shall make reference to the Right Hon'ble the Governor General in Council.
31. On any point connected with the administration of Civil Justice, which may not be provided for by these, Rules the assistants and Munsifs shall be guided by the instruction they may receive from the Agent who in all cases appearing to require reference to the Government shall suspend passing any orders and report the circumstances of the case for the orders of the Governor General in Council.

The rules framed for the administration of criminal justice were superseded by the Code of Criminal Procedure which was extended to the entire area of Chhotanagpur by the Government order No.3167 dated 26.12.1861 and as Kolehan was held to be an integral part of the province of Chhotanagpur, the appellate Criminal Procedure jurisdiction over the Kolehan was transferred from the Commissioner of Chhotanagpur to the Judicial Commissioner of Chhotanagpur. The Indian Penal Code and the Code of Criminal Procedure again formally extended to the Kolehan by notification no. 1384 dated 21st October 1881, as against it Civil Procedure Code and the Civil Court Acts were not extended to the Kolehan.

It, therefore, follows that the Rules framed by Captain T. Wilkinson for the

administration of Civil Justice in Chhotanagpur (although, no trace of its promulgation by the Governor General in Council is found) are operative in Kolehan, thus, neither the High Court nor the Judicial Commissioner could interfere in Civil Matter connected with the Kolehan so long as these rules are not superseded by the formal extension to it by the Civil Courts' Act and the Code of Civil Procedure.

3. In 1874 (Act 14 of 1974) scheduled District Act was promulgated S.7 thereof reads as under:-

SECTION 7- CONTINUANCE OF EXISTING RULES AND OFFICERS:

“All the Rules herebefore prescribed by the Governor General in Council are the local Government for the guidance of officers appointed within any of the scheduled Districts for all or any of the purposes mentioned in Section 6 and in force at the time of passing this Act, shall continue to be in force unless and until the Governor General in Council or the local Govt., as the case may be, otherwise directs. All existing officers so appointed previous to the date on which this Act comes into force in such District, shall be deemed to have been appointed hereunder.

In Duli Chand Khirwal AIR 1958 (Patna) 366 and Mahendra Singh AIR 1958 (Patna) 603, it was held that Wilkinson's Rules were in force after promulgation of Scheduled District Act 1874 by virtue of Provisions of Section 7 of that Act.

In 1874, the post of Kolehan Superintendent was created for looking after the interest of tribals and he was made the principal revenue officers of this area. HE implemented various schemes, settled government waste land and was the sole custodian of triabals in the area, even arbitrating the matter of domestic and family disputes. He also discharged the function of Munsiff in Kolehan and tried Civil Suits. Munda and Manki served processes, Civil disputes were preferred to arbitration of the Mankis. The case in which the decision was divided the decision by the Deputy Commissioner was final. Thereafter an appeal lie before the Commissioner of Chhotanagpur Division and Board of Revenue.

4. During 1913-1918 A.D., Tucky I.C.S., Assistant Settlement Officer, Chhotanagpur conducted Survey and settlement of the Kolehan and published in his report in 1920, whose observation regarding the system is a Bench Mark information regarding the working of the system in the early part of this century, which may be quoted as follows :-

“The Kolehan, which was a Government estate if situated within the district of Singhbhum which, forms south eastern portion of Chotanagpur Division. The Kolehan was divided into 26 Pirs. The whole estate is a non police tract, but for administrative

convenience three of the north western Pirs, Kuldiha, Kainua; and Gulkeria, have been put in the jurisdiction of Chakradharpur Police Station, and Saranda and Rela Pirs in the south west in Manoharpur. The remaining 21 Pires constitute the Kolhan Thana. The larger Pirs are further subdivided into Mankis divisions or ilakas, each under a Manki or Divisional headman. There are 75 such divisions. The number of village under one Manki varies from 3 to 33, and the area from 1,002 acres to 31,349 acres. In each village there is a Munda or village headman. On the 12th August, 1765, the Dewani of Bengal, Bihar and Orissa was conferred upon East India Compoany by Emperor Shah Alam. The tract of Chhotanagpur was included in Suba Bihar and had several fudal lords. Their mutual rivalry gave the British opportunities to occupy the Hazaribagh and palamau and part of the district of Gaya, Manbhum and Monghyr, as well as Chotanagpur proper. This was formed in 1780 with headquarters at Sherghati in the Gaya district and at Chatra in the Hazarbagh district. The Raja was allowed a free hand in the internal administration of the country, though it was nominally included in the Military collectorship of Ramgarh. The internal condition of the dirstrict during this Collector ship was marked by incessant rivalries among Jagirdars, incursions of the Marathas and occasional infiltration of the Larka Kole of Singhabhum into Chota Nagpur, and above all the incompetence of the Raja to keep in subjugation the dependent Rajas and the turbulent elements. Therefore, in absence of peace and order, discontent among the masses increased, suggesting the failure of the Military Collectorship. Owing to the repeated rising of the Mundas and Oraon, Chota Nagpur, as part of the Ramgarh district was brought under the administration of the East India Company and the Maharaja was no longer a Tributary Chief. In 1819, a political agent to the Government of South Bihar was appointed. This Synchronised with a great drought in the Tamar Pargana, and the transfer of the police administration from the Raja to the British under the Superintendent of Police. The administration took an ultimately measure in imposing a tax on hanria (rice-beet) when a Munda rising in the pargana of Tamar, Rahe, and Silli was gaining ground. This added to the discontent among the aboriginals. The suppression of the revolt was followed by a number of administrative reforms. The insurrection brought home the necessity for a closer administration and more effective control by British officers on the spot. Accordingly, the whole system of administration was changed, and the South -West Frontier Agency was established in 1834, with headquarters at Kishanpur (Ranchi). The Agency included, Ramgarh, Kundu, the Jungle Mahals (except Bishenpur, Sainpahari and Sherghar) Pargana Dhalbhum an the dependant tributary Mahals. Captain Thomas Wilkinson was appointed the first Agent, and one of his Principal Assistant, Leiutenant Oseley, was placed in charge

of the Lohardaga Division, which corresponded roughly to the present district of Palamau and Ranchi with headquarters at Lohardaga.”

It is further observed that an officer Incharge of the Kolehan (Koleha Superintendent) in addition to the usual work of Estate Management, tried all the Civil Cases and usually the criminal cases also. The C.P.C. was not in force and civil cases were instituted in the first instance by ordinary petitions, and were as a rule treated as miscellaneous cases without the formality necessary for a civil suit. If the case was complicated the Kolehan Superintendent may have put it as a regular civil suit and allow pleaders to appear, but this can not be done without his permission.

The staff of the Kolehan Superintendent consisted of a couple of clerks, the Kolehan Inspector whose work had been explained as an overseer who dealt with road, building and irrigation works. There was a Kolehan sub-Inspector of Police with a few constables. They were employed in the investigation. This was the whole staff of Kolehan except for the village official.

The administration was paternal, largely by executive order and direct touch was kept between the D.C. and the Kolhan Superintendent on the one hand, and the headman and the raiyats on the other.

Cases of all kinds were referred to the Mankis and Mundas, and the objects of the administration was in so far possible to decide everything on the spot and discourage litigation in the Courts.

All the administrative matters civil, revenue and criminal were kept as far as possible in the hands of the same officer and it is necessary to understand, as to how the whole of the work lumped together just to appreciate the effect of the introduction of the Chotanagpur Tenancy Act as the working basis of the revenue administration.

Two main objects of their system of administration had been (1) to preserve the paternal government through the village communal system and (2) to keep the Kolehan as a reserve for the Hos. For these objects it was essential that -

- (a) The Mankis and the Mundas should be controlled by the Deputy Commissioner of Singhbhum District.
- (b) Only the Deputy Commissioner should have powers to settle land with the Dikkus.

This control had been secured hitherto by executive orders, but such executive orders had no legal basis, and it was necessary either to legalize the present form of administration and to give up that 80 years experience has evolved.

EFFECT OF THE APPLICATION OF THE C.N.T. ACT.

Under the C.N.T. Act as it extends at present the Mankis and Mundas were recorded as a tennure holders and unless it was held that this fall within the provisions of Sec.77, punishments of fine and dismissal by the orders of the Deputy Commissioner appear to be illegal. So were the provisions for the recovery of rent both from the headmen and the raiyat and the measures taken to control dikkus, while auction purchase holdings allowed Dikkus to gain admission into Ho villagers without restriction.

HALLETT'S PROPOSALS

In correspondence regarding the settlement of the Kolhan the necessity for amendment of the C.N.T. Act was recognized and proposals to that effect were asked from the Deputy Commissioner of Singhbhum. These proposals were submitted by Mr. Hallett's Letter No. 1269 R. From Hallett Dy. Commissioner Singhbhum to the Commissioner C.N.Division, Dated Chaibasa the 9th June, 1977. The powers proposed to be given to the Deputy Commissioner to take action on his own illegal settlement made by a village headman was felt to be necessary, because it is so much the interests of the particulars raiyat that have to be safeguarded as that of village community that will suffer through the introduction of an undesirable Dikku. On the same grounds it was recommended the extension of that power to the provision of Section 71 of the Act, and give the D.C. the right to restore on his own motion to a tenant his possession in his tenancy or any part thereof, if objected from it was a Dikku may obtain a footing on a village as an agriculturist by gaining forcible possession of land.

DAYAL'S RECOMMENDATION:

Sri R.L.Dayal, Deputy Commissioner of Singhbhum in 1956 was of the opinion that only a portion of the Wilkinson's Rules were out of date so far as the own existence of Sadar Diwani Adalat are the Governor General in Councils were concerned, but the essence of the Wilkinson's Rules still holds good. He advocated for continuance of the system with gradual change over because Manki Munda were established institution in the society and any decision to replace might have popular repercussion. He was sure that the whole idea of this system was to prevent the Hos from being exploited by intermediaries either in bureaucratic or legal and by outsiders and non-adviasies.

5. Propriety of the Wilkinson's Rules and justification for it's retention :-

- (a) In Miscellaneous Judicial Case No. 548 of 1962 Jyotindra Nath Roy Vs. A.C.C. Ltd. Jhinkpani (Patna High Court), it was held that Kolehan Superintendent was never invested with any power by any notification or under any law to exercise the powers of Munsiff to try the suit in questions under Wilkinson's Rules.

The result was that whole basis of Wilkinson's Rules and Kolehan System were jeopardized, Kolehan Courts suspended their activities and ultimately the State Government had to pass the Kolehan Civil Justice (Regulating and validating) Act 1966 (Bihar Act 3 of 1967).

Again in the Kolehan Civil Justice Judgment dated 19.12.69 in C.W.J.C. No. 644 and 645 the Hon'ble Patna High Court held that the Additional Deputy Commissioner Singhbhum has no jurisdiction to try Civil Suit in the Kolehan Area under Kolehan Civil Justice (Regulating and Validating) Act 1966 (Bihar Act 3 of 1967) without proper authorization of District Commissioner, Singhbhum, prior to the aforesaid enactment civil suit in Kolehan area were tried by the Additional D.C., the Kolehan second officer and the Kolehan third officer etc. Since as far back as 1941 they have been deciding cases all without any authorization by the D.C., these trials were without jurisdiction.

Considering the serious consequences flowing from the aforesaid judgment, the State Government of Bihar parts the Kolehan Civil Justice(Regulating and Validating) Act (Bihar Act 8 of 1978) to regulate the administration of Civil Justice and validate certain past action in the Kolhan with the exception of the areas comprised within the Municipality of Chaibasa in the Sadar Sub-division of the District of Singhbhum is enacted by the Legislature of the State of Bihar. The **Section 2(1)** of the Act speaks that "*Notwithstanding anything contained in any other law for the time being in force any judgment, order or decree of any court, the officers mentioned in column 1 of the schedule shall, in regard to the trial of civil suits and proceedings arising within the local limits of the Kolhan with the exception of the areas comprised within the Municipality of Chaibasa in the Sadar Sub-division of the district of Singhbhum and hearing of appeals or petitions for review of revision arising therefrom, be deemed to have validly exercised the powers which the officers, mentioned in the corresponding entries in column 2 thereof exercised under the Wilkinson's Rule and under Regulation XIII of 1838, and no order, judgment or decree passed by them shall be deemed to be invalid or shall be called in question in any court or proceeding whatsoever merely on the ground that they were not so empowered*".

WILKINSON RULE A CRITICAL VIEW

SCHEDULE

Column 1	Column 2
a.) Kolhan Superintendent or Kolhan Second Officer or Kolhan Third Officer or Deputy Collector-in-charge of Land Reforms or any other Officer authorized by the Deputy Commissioner of Singhbhum to try civil suits and proceedings of the value not exceeding 5000 rupees.	Munsif
b.) Deputy Commissioner or Addl. Deputy Commissioner of Singhbhum or any officer authorized by the Deputy Commissioner of Singhbhum to try civil suits and proceedings of the value not exceeding 5000 rupees and to hear appeal arising from the judgments of the officers mentioned in column 1 above.	Assistant to the Governor General's Agent
c.) Commissioner of Chotanagpur Division	Governor-General's Agent

- (b) The validity of the Wilkinson's Rules was earlier challenged before the Patna High Court in the case of Duli Chand Vrs. State of Bihar, AIR 1958 (Patna) 366, Mahendra Singh Vrs. Commissioner of Chotanagpur Division, AIR 1958 (Patna) 603 and in the case of V.Ahya Vrs. Deputy Commissioner, 1970 BLJR-855.

Wherein the rules have been held intra-virus but, in a recent reported judgment of Full Bench of Patna High Court in Mora Ho Vrs. State of Bihar, AIR 2000 (Patna) -201, held that Wilkinson's Rules have not been framed by a Competent authority therefore they lack statutory force, under regulation XIII of 1833, Section V, it was Governor, who was competent to prescribe rule, by in order in council. No power was delegated to the agent though the original of the Wilkinson's rules is not available and in the typed copy, it was shown to have been signed by Captain Thomas Wilkinson's, he having not delegated with power to frame rules, the same can't be held to be a rule framed u/s V of Regulation XIII of 1833. Wilkinson's rules cannot be stated to have saved and continued by virtue of Section 7 of Scheduled District Act 1874. Thus, the Wilkinson's rules cannot be said to be statutory.

Accordingly, judgment rendered in Duli Chand Vrs. State of Bihar, AIR 1958 (Patna) 366 and Mahendra Singh Vrs. Commissioner of Chotanagpur Division, AIR 1958 (Patna)-603 overruled.

It was further observed by the majority view that these rules have not statutory force but, the admitted position is that they have been followed and acted upon in the administration of Civil Justice in the Kolehan area of Singhbhum District for about 150

years. If these rules are made in applicable, now, in the absence of any suitable substitute, it may cause hardship and confusion. Therefore, it is expedient that till the new rules / regulations are framed by the government in place of these rules, these rules should continue to hold the field.

Accordingly, State Government was directed to do the needful in this regard within a period of three months.

Aforesaid direction of the Hon'ble Patna High Court has not yet been complied with by the Government. In a recent case reported in 2010 (4) JLJR-335, it has been held by the Hon'ble Jharkhand High Court that Wilkinson's rules which has not been framed by the Competent Authority and lack statutory force, have been accepted as a valid law and acted upon by the Government, officers and people of Kolehān area and still Civil Justice is administered under these rules. The administration of Civil justice in Sadar Sub-division of Singhbhum couldn't be governed by the C.P.C. but by Wilkinson's rules which have no statutory force, even then, this rule is applicable in Kolehān Division in Singhbhum District, relied upon the judgment in 2001(2) JCR-77 (F.B.) Mora Ho Vrs. State of Bihar under appeal before Supreme Court.

6. The deficiencies of the Wilkinson's rules has been pointed out in the following judicial pronouncement :-

(i) *In the Judgment of **Tata Iron & Steel Co. Ltd. vs State Of Jharkhand And Ors.** Decided on 6 May, 2002 it has been held that:*

"The Wilkinson's Rules was framed sometime in the year 1833. The Rule 20 of Wilkinson's Rules provide decision through panches. The Deputy Commissioner cannot nominate himself as one of the punches but to accept the nomination of panches as made by the plaintiff and defendant, whatever the finding is given by the punches is binding on the Deputy Commissioner except in the case of bias or mala fide. In this background, the question of appointment of an Arbitrator and to entertain application under the Arbitration Act by a Kolhan Court does not arise. Such appointment of Arbitrator will be against the provision of Rule 20 of the Wilkinson's Rules and will vitiate the entire proceeding."

(ii) *In the case of **Sura Kudada And Ors. vs State Of Bihar And Ors.** decided on 4 February, 2000 reported in 2000 (3) BLJR 1858 the Hon'ble Patna High Court laid down that:*

"It appears that the record of rights were definitely wrongly prepared giving go-by to the decision arrived at earlier by the Kolhan Superintendent already mentioned above and the title and possession of the plaintiffs had already been

established long back in the year 1914-15, but the revenue records were not corrected accordingly and this gave a handle to the defendants to create trouble about the possession and title of the plaintiffs and then, the plaintiffs have no other alternative but to come in the suit, I do not find that in the circumstances of the case, Rule 3 of the Wilkinson's Rules would create a bar in coming up for declaration of the title over the suit land."

It was further held at para 11:

"Moreover, it is an established principle of law that majority of the award should be accepted unless it can be shown that the same suffers from the procedural defect as contemplated under Rule 20 of the Wilkinson's Rules or that the same is devoid of consideration of the customs prevailing amongst tribals. There was no plea of misconduct against the majority members who gave their award in favour of the plaintiffs. This aspect has been considered when objection was raised against the award by both the Courts below and came to the concurrent findings. There is no scope of this Court to interfere with such concurrent findings unless the same suffers from jurisdictional error or error apparent on the face of it."

- (iii) *Whether Panchas constituting the Panchayat under Rule 20 of the Wilkinson Rules must be aware of tribals law and customs and whether the customary law of tribals would prevail over the general law of country?*

*This question was decided by the Hon'ble Patna High Court in the judgment reported in **1988PLJR39:1987BBCJ551, Ganga Ho vs. State of Bihar**, whereby it has been held that " The customary laws of the Oraon and Munda tribal communities in the matter of inheritance are akin to each other. The customary law of inheritance prevalent among tribals would prevail over the general law of country. The law applicable to Oraon community would also be applicable to members of HO community. Presumption in law in that judicial or official acts have been performed in regular manner, therefore, Panches constituting the Panchayat, must be presumed to be fully conversant with tribal laws and customs, and also to have acted fairly in making their award".*

- (iv) **Whether the Courts constituted under the Wilkinson's Rules can pass the order of Injunction**

*This matter was raised before the Hon'ble Patna High Court in the case of **Orissa Manganese & Minerals Pvt. Ltd. vs. Commissioner reported in 1987 BBCJ 617**, whereby held that: " The courts constituted under the Wilkinson Rules are statutory tribunals. Such authority must confine its jurisdiction within the four corners of the provisions of these rules. The courts constituted under these*

rules, cannot exercise jurisdiction which is not specifically vested in it nor can it exercise any power for purpose of grant of Injunction, which power has not been conferred by statute."

(v) *Whether the suit is barred by limitation is a question of fact?*

From the language of Rule 3, it will appear that the power is on the Court to take cognizance of a suit with regard to real property from the date of cause of action for several dispossession in the year 1950 is barred by limitation under provision of Rule 3 (Goma Ho and Others V State of Bihar and Others) CWJC No.595 of 1980 (R) decided on 10th November, 1989.

7. Apart from lacunas and deficiencies in the rules itself as discussed above certain practical problems were also felt for continuance of the Wilkinson's Rules in the Kolehan area.

After independence conflict in views started spreading, the people started questioning the utility and continuance of set-up of rules created by the Military Officers hundreds of years ago even after introduction of general laws and regulations and promulgation of Indian Constitution.

This aspect has been agitating the Bihar Tribes Advisory Council as well as the State Government of Bihar since last few decades. The Bihar State Law Commission has already recommended that the age old system of meeting Civil Justice by the Court of Kolehan Superintendent under Wilkinson's Rules should be substituted by the introduction of general system of Civil justice so that uniformity with other areas is brought about. The Tribes Advisory Council also got interested in it, Judicial contents also made it imperative on the State Government to enact uniform system of Civil Rules by scraping prevailing old rules.

The Kolehan inquiry committee appointed by the State Government in 1948 has accepted that Civil justice is still administered under the Wilkinson's Rules and these rules are statutory rules framed under Regulation XIII of 1833 and still in force by virtue of Section 7 of the Scheduled District Act 1874. **However, the committee made the following recommendations/ suggestions to the Government:-**

- (i) The administration of Kolehan has to be developed progressively to approximate to the administration of the rest of the Chotanagpur which maintaining the essential features of the existing system prevailing in the Kolehan.
- (ii) In Kolehan suits the Deputy Commissioner and Kolehan Superintendent may allow appearance of lawyers in cases which they considered involve complicated question of law.

- (iii) The Wilkinson's Rules are out of date and Santhal Civil Rules with suitable modification to suit the Kolehan may be adopted.
- (iv) In Kolehan suits there should be a provision that the Deputy Commissioner and the Kolehan Superintendent should transfer cases to the Civil Court if both contested parties make a joint prayer that their cases should be tried in a Civil Court. In cases so transferred, the Code of Civil Procedure should be made applicable. Para-73. At this stage, it is worth to mention here some special features of the Wilkinson's Rules under which civil justice is being administered in the Kolehan. The original Court for cases for the value less than R.300/- is that of the Kolehan Superintendent with an appeal to the Deputy Commissioner and the original Court for cases of higher value is the Deputy Commissioner with an appeal to the Commissioner.

Para-74. Cases are instituted by ordinary petitions. Where the case is allowed to assume the form of a regular civil suit it is valued according to Court-fees Act. As regard procedure, normally the procedure provided under the Wilkinson's Rules and the procedure provided in the Code of Civil Procedure, not inconsistent with the Wilkinson's Rules, are valued. But all endeavors are made for adjudication of dispute by village Panchayat as arbitrators. The majority of petitions are however treated as miscellaneous petitions and settled by the Kolehan Superintendent without being allowed to assume the form of a civil suit. The method of administration of civil justice in this area are that the disputes be arbitrated in the village assembly and not heard by Secretary from such individual witnesses as may be produced in Court. The parties are entitled to apply to the Deputy Commissioner to have their cases decided in regular form of civil suit on payment of Court fees but this is allowed only after all efforts are made first to settle the dispute in village assembly and the result of such proceeding is always placed on record before a formal suit is admitted. The Panchas can be appointed at any time even after a formal suit has commenced, if the party agreed to abide by their decisions. The outstanding advantage of this system is that it is a cheap, speedy and efficient system of justice but in ordinary matters.

Para-75. There is a wrong notion about the Wilkinson's rules among the general public specially the aboriginals of Kolehan who misconstrued it and thought it to be a law protecting their general interest. They nourished an idea that Wilkinson's Rules would protect their right and give relief to all troubles after little knowing of it. They hardly know that it is almost a customary law for administering civil justice in Kolehan. The rules were framed in 1833 when the people of Kolehan were illiterate, ignorant, uncivilized and were living mostly in jungle. There are large deficiency in the said rule to cope with the present system of life in Kolehan.

Para-76. Wilkinson's Rules given justice to the people with lesser expenditure but there has been a drastic change in the civilization of the tribals and now a days the Kolehan aboriginals became literate and therefore, how the said rule which was originally meant to administer justice to illiterate and ignorant people shall continue when literacy and wisdom have progressively dawn in them. Moreover, the Wilkinson's Rule followed in a very pocketed portion of the Singhbhum District but in the rest portion of the district, such as Bandgaon etc. the rule is not followed though aboriginals reside there in majority.

Para-77. There are other deficiency in the said rule also. For example, in Kolehan area there are at present factories, mines and offices of big companies like TISCO etc. have cropped up. If any dispute or grievance arises in Kolehan due to dismissal, wrongful transfer etc. then where the aggrieved party would seek his legal remedy. There is no Court for them and there is no remedy under the said rule inasmuch as the Kolehan Superintendent has no jurisdiction to try such suit. Similarly the Courts established under the Wilkinson's Rules lacks statutory jurisdiction to decide the dispute in between landlord and tenant. There are other anomalies also in the cases where the remedy lies under the Company law, Workmen Compensation Act, Industrial law, Service matter etc. There are thousands of tribals who are employed in factories, mines and other big organization in Kolehan and if any dispute arises regarding their dismissal and suspension from service or their transfer they have no Court to get justice, when other tribal of Chaibasa town or of Jamshedpur may get such remedy from their civil Court under the Code of Civil Procedure. There is no provision under the Wilkinson's Rule for grant of immediate and expeditious remedy in the matter of dismissal, suspension or transfer of the tribals by the employers. Likewise, if a dispute arises with regard to the quantum of compensation payable under the Land Acquisition Act, the matter has to be referred in accordance with the provisions of Land Acquisition Act. But for the land situated in Kolehan and if such disputes arisen after acquisition the aggrieved tribals cannot seek remedy under the Wilkinson's Rules for final settlement of the compensation. Similarly the Courts constituted under the Wilkinson's Rules have no jurisdiction to decide the question with regard to the grant of probate, letter of administration and succession certificate in the manner provided under the Indian Succession Act. A very interesting anomaly appears to be that a decree passed by a Court under the Wilkinson's Rules can be executed only in Kolehan and nowhere else. A decree passed by Kolehan court cannot be executed in any other Courts in India. Unlike, a decree passed by a Civil Court can be executed in any Civil Court situated within the territory of India.

Para-78. The Kolehan Enquiry Committee in his report dated 31st July, 1948 has recorded the following finding on the issue of administration of civil justice :- "Cases are instituted by ordinary petitions. The Court fees Act is nominally in force in the Kolehan

and where a case is allowed to assume the form of a regular civil suit, it is valued according to the Court-fees Act. As regards procedure, the Civil Procedure Code is followed in a modified form, so that it is not inconsistent with "Wilkinson's Rules; but great use is made of the ordinary village Panchayat as arbitrators. The majority of petitions however, are treated as miscellaneous petitions and settled by the Kolehan Superintendent without being allowed to assume the form of a Civil Suit. Though this is the procedure still followed, it appears that the results are not as happy as it was in the past. The Hos have advanced from their backward State; they have lost faith in their Mankis and Mundas and have also come under the influence of lawyers and touts. While recording the evidence of witnesses, it transpired that some Mundas act as touts for lawyers. So most of the miscellaneous petitions, do not end with the Kolehan Superintendent, Arbitration by Mankis is in many cases a failure these days. So ultimately the Kolhan Superintendent has to allow most of these petitions to assume the form of civil suits. This is putting a strain on the existing staff and is perhaps not giving real satisfaction to the litigant. Ho. In the past this system gave cheap and speedy justice to Ho. But now it is neither cheap nor speedy.

Para-79.- The Committee in his report has come to the following conclusion:- "The Wilkinson's Rules" are out of date. It is suggested that the Santal Civil rules might be adopted for the Kolehan. This will be a move in the right direction and in course of time the Civil Procedure Code can be brought in. If the new rules are brought into force a provision may be added providing for the transfer of such cases as is considered fit by the Deputy Commissioner to the regular Munsiff or Sub-judges Court for disposal according of law. If both the contesting parties want to have their case tried in a Civil Court, then the Deputy Commissioner (including the Kolehan Superintendent) should have no discretion, but must transfer the case to the Court. When a case is thus transferred, the Civil Procedure Code should be made applicable. Wilkinson's Rules will no longer be applicable to them.

Para-80- All these deficiencies in the Wilkinson's Rules were also considered and discussed in a symposium on Wilkinson's Rules held in the district of Chaibasa. This symposium was organized by Mr. Barun Sen Gupta, the Protect Director of Free Legal Aid Committee and was presided by Mr. Bagun Sumbrai, M.P. In which many dignitaries also participated. It appears that on the suggestion made by the enquiry committee for framing of a new set of rule on the line of Santhal Pargana Civil Rules, an initiative was taken by the Government.

It further appears that in 1983 a draft regulation namely, The Bihar Schedule Area (Wilkinson's Rule) Regulation, 1983 was prepared in order to amend and re-arrange the Wilkinson's Rule for its application to the entire Kolhan Area. But, there is nothing to show that this draft regulation or any other rule or regulation has been enacted by the State

Government in order to remove the deficiencies in the Wilkinson's Rule or to enforce any other rules or procedure in the Kolehān area.

8. Government of Bihar Welfare Department has also called for a report after thorough investigation from Bihar Tribal Welfare Research Institute, which submitted its report on 04.09.79. The institute during survey found following practical difficulties due to Wilkinson's Rules:-

- * The Wilkinson's rule don't provide and form for having any Succession Certificate under the Indian Succession Act.
- * Now with the growth of industrialization and mining activities and urban development in Kolehān area lots of industrial workers or their heirs requires succession certificate to obtain their respective legal dues from their employees which is very difficult to obtain under Wilkinson's rules. The succession certificate in uncontested cases are granted by the Court of District Judge and governed by the Civil Procedure.
- * In Land acquisition matter they feel great trouble for developmental purposes facilitated by new industrialization, opening up of new mines, industrial growth centre, city etc. the State Government acquire land in the Kolehān area, when there is a dispute about quantum of compensation and claims for compensation the matter is referred to the Court of District Judge, Singhbhum, who as a matter of fact has no jurisdiction over this matter as Wilkinson's Rule is silent about it.
- * In Labour Laws matter also there is same difficulties. In Kolehān area there are lots of mining, industrial and agricultural workers but the appellate Court regarding payment under minimum wages Act and other such Acts have no jurisdiction over the Kolehān area. Rules also don't provide any remedy regarding this.
- * There is no provision of deciding Matrimonial Suits under Wilkinson's Rules.
- * The Kolehān area has also been brought under the Bihar State Panchayati Raj Act and appointment of statutory Panchayat Authority have considerably curtailed and overlooked the working of rule's personnels.
- * Order XIV of C.P.C. regarding framing of issues, material position of facts and law shall have to be taken into consideration because it has been observed that Additional Collector can reject many cases without following any legal decorum.
- * Application under the Indian Succession Act or the Provincial Insolvency Act

or complicated legal issues involving industries, mines, business establishment should not be sent for arbitration necessarily but could be heard in the Kolehan Court.

- * The party should be given reasonable opportunity to set aside the ex-parte order in reasonable time.
- * There is no provision for appeal against orders unlike the provisions of Section 104 read with Order XLIII Rule 1 C.P.C.
- * The institute after proper survey has come to conclusion that the Kolehan system has become by now part and parcel of the social fabrics of the Hos. The best thing would be to strike the balance by having a well-disciplined rural administrative system cadre with Manki at the head at Pir level and Munda at the village level. Every village and every Pir should have separate Munda and Manki of his Secretariat Staff with knowledgeable village officials, talking in Ho language and having fair knowledge as the aspirations of the Hos, then alone this responsible Arbitration Type of Kolehan system of administration can bring solace to the people. The State may not have any difficulty in bringing the bribe taking dishonest village officials and functionaries to book. The Deputy Commissioner can change his Hukumnama as and when find that a particular Manki and Munda has transgressed his limit. Accordingly, the institute advised for some amendment in the old Wilkinson's Rules.
- * It was further observed that the scraping of the Wilkinson's Rules is a legislative questions and it should be settled in the legislative assembly. This report at best can give some ideas for necessary amendment and reforms in the Wilkinson's Rules so that the new challenges are met and the Ho's are not left dis-satisfied on the issue like this.

CONCLUSION

9. From the aforesaid discussion of the history of promulgation of the Wilkinson's Rules for administration of Civil Justice in Kolehan Area and its continuous application about more than one and half century, when compared with the need and requirements of the developing society as pointed out in various reports and judicial pronouncement as discussed above, it is evident that the Wilkinson's Rules are not able to cope with the all practical problems faced by the modern society of Kolehan area. The main reason for not adopting any change in Rule by the dominant tribals of Ho communities is that Hos of Kolehan are renowned for their bravery

and self respect and self rule, the Britishers granted them these boon (Wilkinson's Rules) and autonomy of self rules as they realized that it was useless to wage war for years to subjugate them. They feel that any drastic change in the system will create drastic situation and it will touch off popular violent agitation. Any such change will drastically disrupt the social democratic set-up.

In my humble opinion change in law as per demand of society is common phenomena of any legal system. It has been said by eminent jurist Roscoe Pound that law is social engineering. As an engineer removes defects from any instrument and makes it workable in right manner. Similarly, the law grows through amendments or interpretations suitable to the condition of society from time to time. The law can't remain rigid, in-elastic or standstill. Although time tested Wilkinson's Rules is prevailing since more than 150 years in the Kolehān area but, it has been proved that the rule itself has many inherent deficiencies/ lacunas due to passage of time and various legislation made applicable in the territory of India.

The Indian constitution which is the supreme law of the land was enforced in the year 1950, it contains various provisions for development and safeguard of schedule tribes and people belonging in tribal areas. It guarantees the equality of law and equal protection of law to every person, it ensures social, political and economic justice for all. The constitution contemplates a welfare state, and enjoins duties on state to secure that the operation of the legal system promotes justice, on a basis of equal opportunities, and shall, in particular, provide free legal aid by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Accordingly, Legal Services Authorities Act 1987 was enacted, a unit under this Act at District level is District Legal Services Authorities which makes access to justice more cheaper even without cost to people belonging to Schedule Caste and Schedule Tribes community by providing free legal aid and assistance through Competent Advocates as well as by Financial support in matter of Court fee, Process fee etc.

Here it is pertinent to mention that vide notification no. A/AB/303/53-3533J dated 26.08.1952 the Government of State of Bihar has extended the application of code of Civil Procedure to the Municipality of Chaibasa and Chakradharpur which is working satisfactorily without any agitation from any corner. Now, it is high time to enforce the provisions of Civil Procedure Code throughout the Kolehān Estate which is more efficacious than the Wilkinson's Rules as it stands now. The Section 89 of the Code of Civil Procedure mandates for redressal of disputes at first through the settlement of disputes outside the Court, through Arbitration, Conciliation, Judicial Settlement

including settlement through Lok Adalat or Mediation. The litigants in Kolehan areas are being deprived from taking advantage of these provisions and also deprived from time bound speedy redressal of their disputes as provided in C.P.C., due to rigid Wilkinson's Rules and they are compelled to get justice from incompetent, ignorant, illiterate and untrained Arbitrators of their own. The present forum for Civil justice is being presided by the Executive Officers, who are also not trained in arbitration and Law Graduate to appreciate the legal questions properly. Most of the time of these officers are spent in administrative works leaving no sufficient time for trial of the contested suit or miscellaneous petitions which are mounting. It appears that the old cases are pending since 1975 and the ratio of institution of contested Title Suit in recent few years have been drastically decreased in number showing that the people have lost their faith in the present system of administration of Civil justice.

The Indian constitution has commenced since about 65 years and undergone more than 100 amendments. The old age Wilkinson's Rule has never undergone any change up till now in spite of changing need of the society, and virtually has become incapable enough to cope with the diverse legal problems that arise in Kolehan today. The Ho's and other such genties have particular allergy for the steps like substantive Wilkinson's Rules. There is no valid justification for retention of these Rules as it exist at present and it is high time for State legislature to do needful at earliest for fulfilling the hopes and aspirations of the people in Kolehan.



Customary law of inheritance among tribals- A case for gender equality

“The progression in law and the perceptual shift compels te present to have a penetrating look to the past.”

- Joseph Shine vs. Union of India

INTRODUCTION

A Custom can be defined and described as a conduct which has been in continuous practice and has become a rule or norm of the society or community which has approved of it as such and accepted the same as having the force of law for the members of the society or community. In *Subramanian Chettiar v. Kumarappa Chettiar*²⁶ custom has been defined as “a particular rule which has existed from the time immemorial and has obtained the force of law in a particular locality” while in *Hur Prasad v. Sheo Dayal*²⁷, custom has been defined asa “rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from long usage obtained the force of law.’

According to Sir John Salmond, “*custom is frequently the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.*” Salmond further states that “*the national conscience may well be accepted by the courts as an authoritative guide; and of this conscience national custom is the external and visible sign.*” According to Austin, “*Custom is a rule of conduct which the governed observed spontaneously and not in pursuance of law set by a political superior.*” Sir C.K. Allen also defines custom “*as legal and social phenomenon growing up by forces inherent in society— forces partly of reason and necessity, and partly of suggestion and imitation.*”

The Indian Evidence Act deals with the concept in several of its provisions such as Section 13, 32(4), 35, 48 and 49 which deal with the relevancy, admissibility and the mode of proving custom.

THE ESSENTIALS AND PROOF OF A VALID CUSTOM

The essential characteristics of a valid legally binding custom are :-

²⁶ AIR 1955 Mad 144.

²⁷ 26 W.R. 55 (P.C.).

CUSTOMARY LAW OF INHERITANCE AMONG TRIBALS-A CASE FOR GENDER EQUALITY

- (i) That it should be ancient – the basic feature of a custom is that it must have in itself some sense of antiquity and should be existing from time immemorial. According to Blackstone, “a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary.”
- (ii) That it must have uniformity and continuity – The immemorial existence and use of a custom can be established from the fact that it is uniform, continuous and definite and not variable. The continuous and uninterrupted following of a custom by a community is the sine qua non for the existence of a valid custom in the community. According to Blackstone, interruption within legal memory defeats the custom ‘*continua dico ita quod non fit legitime interrupta*’. The discontinuance of a custom has the effect of abandoning it regardless of the fact whether the same was intentional or accidental.
- (iii) That it must be certain – A valid custom has the force of law and confers certain rights on the members of the community following it and, therefore, the custom must be certain, clear and definite. The rights and duties flowing from a custom must be certain for the existence and recognition of the custom as a customary right. Apart from this, it must also be certain as to the geographical limits to which it extends and the communities or societies which follow it and are affected by the custom.
- (iv) That it must be consciously accepted as of right – For a custom to have the force of law, the members of the community following it must have the intention and conviction of following the custom as legally binding upon them and the rights and duties accrued therefrom must be intended to be enforceable. In the absence of such an intention or conviction, a custom fails to be a legal custom and may remain as a non-enforceable social custom.
- (v) That it must be reasonable – One of the essential requirements of a valid custom is that it must be reasonable. A custom long in practice does not continue to have the force of law if it loses its reasonability and does not conform to the idea of justice and equity prevalent at any point of time. The common law principle *malus usus abolendus est*, an evil custom should be abolished is applicable to every custom. For example, the practice of sati in India was abolished because it was unreasonable and evil. The ground of usage and antiquity are not sufficient for the validation of a custom as legally enforceable if it does not conform to the idea of justice and would do more harm than good if not discontinued. According to Salmond, “Custom, in order to be deprived of legal efficacy, must be so obviously and seriously repugnant to right and reason, that to enforce it as law would do more mischief than that which would result from the overturning of expectations and arrangements based on its

presumed continuance and legal validity.” According to Allen, what is required to be proved vis-à-vis a custom is its unreasonableness and not its reasonableness meaning thereby that the party who challenges a custom must prove its unreasonableness.

- (vi) That it should not be opposed to morality, public policy or an express enactment – A valid custom must also be moral for the society where it is practiced. The idea of morality is not an objective concept and may differ from place to place and from society to society and, therefore, there is no fixed test for ascertaining that a custom is immoral. It may depend upon several factors which a Court must consider while deciding on its conscience whether a custom is immoral or not.

The ground of public policy is also an essential aspect for a valid custom and like morality, the ground of public policy also does not have a fixed criterion as a test. According to *Subba Rao J. in Gherulal v. Mahadeodas*²⁸, the doctrine of “public policy” is an “untrustworthy guide”, “variable quality” and “unruly horse”. A custom may generally be opposed to public policy if it adversely affects the interests or welfare of the public.

A custom must also not be opposed to or in conflict with the provisions of the Constitution or other statutes of the Country. According to Coke, “No custom or prescription can take away the force of an Act of Parliament.” However, if a custom is prevalent as a personal law for a community, it can override the provisions of a statute regulating personal laws unless the custom itself is opposed to the general principles of equity, justice, good conscience and morality. In other cases, unless expressly provided so in a statute, a custom cannot override the provisions of a statute.

Custom possessing these elements is *prima facie* valid though it may be unenforceable if it is opposed to or is in conflict with the general principles of justice, equity, good conscience, or is immoral or unreasonable or opposed to the provisions of a statute of the country. The existence of a custom is not presumed and it must be strictly proved by the party who asserts its existence and practice. All these factors, associated with the existence and validation of a custom, are operative elements. A valid custom to be legally enforceable must possess both, the formative elements (essential features) and must also be in consonance with the principles related to the operative elements (invalidating elements).

In *Udaya Swain v. Satya Swainani*, (1970) 36 Cut LT 1330, the Orissa High Court held that a custom, in order to be recognized by Courts, must be ancient, certain and reasonable

28 AIR 1959 SC 781.

and when in derogation of the general rules of law must be construed strictly. It is essential that it should be established, to be so by clear and unambiguous evidence.

In *Mst. Maro and Others v. Paras Ram and Others*, the Himachal Pradesh High Court had held that it is true that a custom to be binding must be ancient. But the English rule 'that a custom, in order that it may be legal and binding must have been used so long that the memory of man runneth not to the contrary' is not applicable to Indian conditions. What is necessary to be proved is that the usage has been acted upon in practice for such a long period, and with such invariability to show that it has, by common consent, been submitted to as to the established governing rule of a particular district.

In *Kochan Kani Kunju Raman Kani v. Mathevan Kani Sankaran Kani* AIR 1971 SC 1398, the Supreme Court of India held that it is well established that in the matter of custom a party has to plead in specific terms as to what is the custom that he is relying on and he must prove the custom pleaded by him. He can-not be permitted to prove a custom not pleaded by him. Anybody who puts forward 'a custom must prove by satisfactory evidence the existence of the custom pleaded, its continuity and the consistency with which it was observed. A party against whom a custom is pleaded must have notice as to what case he has to meet. The opposite party apart from rebutting the evidence adduced by the plaintiff may be able to prove that the custom in question was not invariably followed. He cannot get ready with that evidence without knowing the nature of the custom relied upon by the plaintiff.

IMPORTANCE OF CUSTOM AS LAW

A custom may be classified into two – One, which does not have a binding effect and, second, the one which has a legally binding effect. The first category includes those customs which are concerned with less important aspects of social life. One of the most popular examples of such custom is the one related to the kind of dress one must wear on a particular occasion, for example, in a funeral. According to the custom, in funerals, people must not wear colourful dresses and should restrict themselves to black like in European Countries or white, like in India. Such customs do not have the force of law and is followed due to societal pressure. If such customs are violated or not followed, there is no punishment or deprivation of any right but will only be subjected to the criticism and displeasure of the members of the community. This type of customs are known as “social customs”.

The second category of customs is important and has the force of law as these customs are binding on the group of people or community following them. These customs, “*which*

in a more definite and stringent sense, are regarded as the specific duties and obligations of men. Such customs may regulate the obligation of marriage and the upbringing of children, the transmission of property at death, or the modes of consummating and fulfilling agreements. Such customs do not pertain to the sphere of social formalities, outward decorum, or aesthetics; rather, they are concerned with the serious business of society, the work that must be accomplished in order to secure and guarantee satisfactory conditions for collective life."²⁹ These customs are legal customs and have the force of law.

The customs which have the force of laws are customary rules and are legally enforceable in the sense that they are binding and mandatory rules of conduct conferring positive duties and rights on the members of the community following them and the breach thereof is accordingly viewed. In legal customs, people do not have a choice or discretion, as in the case of a social custom. According to Salmond, 'A legal custom is one whose legal authority is absolute—one which in itself and proprio vigore possesses the force of law.' A legal custom may further be classified into – General Custom and Local Custom.

A local custom is classified on the basis of the geographical area since it is followed in a particular area and its application is restricted to that area only. According to Salmond, "The term custom in its narrower sense means local custom exclusively." "Tribal custom' is a custom confined to a particular tribe, caste or community."³⁰ Tribal custom, in certain cases, applies to geographical local custom where the population of a particular district or town or region is covered by the said tribal community at the most. However, in other cases it applies both to the geographical locality and the personal locality. The customs applicable to the Tribals in Jharkhand which is the topic of discussion herein fall within the category of a local custom which has a legal binding effect as the same has the force of law for the specific tribe belonging to a particular area.

THE CUSTOMARY LAWS OF INHERITANCE AND SUCCESSION AMONG TRIBALS

Tribe has been defined as a social group of a simple kind, the members of which speak a common dialect, have a single government and act together for such common purposes as warfare. Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities e.g. bands, villages or neighborhoods and are often aggregated in clusters of a higher order called nations.³¹

29 Bodenheimer, Edgar, "Jurisprudence: The Philosophy and the Method of Law", First Indian Reprint (1996), Harvard University Press, U.S.A., at p 300.

30 Gour, Sir Hari Singh, "The Hindu Code", (1973), Law Publishers, Allahabad, Vol. I, at p 156.

31 W.H.R. Rivers, Encyclopedia Britannica. Vol. 22, 1961 Edn. at page 465 as cited in "The Customary Laws of the Munda and the Oraon" by Dr. Jai Prakash Gupta.

Munda and Oraon

Munda tribe is the main Kolarian tribe residing in the highlands of Chotanagpur division. The Oraon are the one of the purely aboriginal tribes of Chotanagpur divisions of the Jharkhand State.

The conception of property is very rigid among the Munda and the Oraon. Like other similar tribes, they do believe that all landed property including the natural resources is the property of the community and not of an individual and it is only meant for the livelihood of all the members of the community.

According to Dr. Jai Prakash Gupta,³² the general rules of inheritance and succession are as follows:

Son's right to inherit

After the death of the father, if the sons do not agree to live together, a Panchayat is convened and the property is divided according to the Mundari and Oraon rules of inheritance. When the deceased leaves behind a widow and grown up sons and daughters, the Panch will first set apart some land, generally equal to a younger son's share, for the maintenance of the widow. In the land allotted to her she can only have a life interest. If for the rest of her days, she decides to live separate from her sons and independent of any pecuniary benefits from any of the sons in particular, then on her death the maintenance land will be divided equally among the sons. But, usually, the widow chooses to live with one of the sons and in that case, her maintenance land is cultivated and enjoyed by that son. If the son meets all her funeral expenses, then he becomes entitled to those lands.

Now the residue of the real and personal property left by the deceased father will be divided by the Panchayat in equal shares among all the sons except that the eldest son will usually get a little land in excess. If there had been a partition during the lifetime of the father and since then other sons were born to the father, the entire immovable property will be re partitioned on the father's death by the Panch among all the sons of the deceased father on the principles as indicated above.

However if for some reasons like marriage with a non -Mundari girl, the legitimate son of the deceased has been outcaste and lost his tribal rights , he will not be entitled to a share at partition unless he has been restored to the caste by the Panch after he has given up the alien wife.

32 The Customary laws of the Munda and the Oraon, Jharkhand Tribal Welfare Research Institute, 2002

Widow's maintenance

When the deceased owner leaves no son but only a child less widow or a widow with daughters only, the widow is allowed a life interest in the property left by the husband. The widow may give temporary leases such as Zurpeshgi of the real property left by her husband but she has no authority to sell any real property by her husband without the consent of the all bhayads or agnates of her deceased husband. However, if she leaves the village of her deceased's husband and goes to reside permanently with her father or brother, her right to enjoy the usufruct of her husband's land will be forfeited, and it will then go to the nearest agnates. If the widow remarries, she at once loses all right to all moveable and immoveable properties left by her deceased husband. She is just allowed to take away with her the jewellery she has on her and her wearing apparel.

Inheritance rights of daughters

Daughters among the Mundas do not inherit. Nor are the sons of the deceased owner under any obligation to make over to their sisters anything which their father either on his death bed or earlier desired them to give her. The sons are however bound to support unmarried sisters until their marriage. But an unmarried sister may choose to live in the house of any one of the brothers. On her expression of such desire, the Panch may allot some additional land to the brother under whose care the daughter chooses to live. The additional land will be repartitioned in equal shares among the brothers after the marriage of the sister.

When a deceased Munda leaves an unmarried daughter or daughters and no widow or son, the unmarried daughter or daughters will be entitled to the personal property left by their father and will be in possession of the lands left by the deceased till their marriage. Neither a daughter's husband nor a daughter's sons are entitled to inherit.

In the absence of sons, widow, or unmarried daughters of a deceased Munda, his property goes to the nearest male agnate(s). If the deceased's father is alive, the property passes to him. If he is dead, the brothers of the deceased owner will inherit in equal shares. The sons of a predeceased brother will take the share that would have fallen to their father if he had been living at the time

Ghar-dijoa

The Ghar-dijoa who lived with his son-less deceased father –in –law till his death and assisted him in his cultivation and other affairs till his death, will get all the moveable property left by the deceased, and such share of the real property, if any , as according to

the circumstances, the Panch may think proper to give him, the rest going to the nearest male agnate(s). Any land that may be given to the ghar-dijoa by the Panch may be enjoyed by him as long as his wife is alive, after which the inheritance passes to the nearest bhayad, as a daughter's son does not inherit.

Illegitimate sons

Illegitimate sons of the deceased owner, or sons of the deceased's wife by a former husband, do not get any share in the property left by the deceased. But if any such son had been living in the same house with the deceased, he is sometimes given a small plot of land for his maintenance, although he cannot claim this as a matter of right. He cannot have a legal right even to any lands that his father (the deceased owner) might have given him to cultivate. On the death of the father, he is bound to give up such lands if the legitimate heir of the deceased owner so demands. Even when the deceased leaves no legitimate sons, and his widow taking a life interest in the property allows the illegitimate son to continue to hold the lands, the latter is bound to give up the lands on the death of the widow if the reversioner requires him to do so.

Adopted Son belonging to the same clan

If the last owner has left a duly adopted son of one of his bhayads or agnates, he shall, if he was duly adopted with the consent of other *bhayads*, inherit all the property left by the deceased after deducting a suitable portion for the maintenance of the widow and the widows, if any, of the deceased, which again after the death of such widow or widows, devolves to the adopted son.

Adopted Son from a different clan

If the last owner has left an adopted son belonging to a clan different from his clan, he shall inherit the *non-bhuinhari* lands left by the deceased and the material articles left by him. The *Bhuinhari* lands of the deceased shall, in such a case, remain in the possession of the widow or widows during their lifetime, and on their death shall revert intact to such member/members of the *khunt* of the last male owner as stand nearest to him in agnatic relation. If there is no *bhayad* left, the Panch may make over the property left by the deceased to the *non-bhayad* or adopted son from a different clan.

Bhayads or Agnates

If an owner of property among both the tribes dies living behind him neither a son nor a lineal male descendant of such a son, nor a ghar-damadadopted in the house as a

prospective son in-law, nor a widow, nor an unmarried daughter, the property belonging to him either real or personal shall go to the nearest male agnates in the following order:-

- a. If the father is alive, he shall inherit the property.
- b. In the absence of father, his brother or brothers together with the sons of any of the predeceased brother(s), or their male descendants shall inherit the property.
- c. In the absence of a father, or brother, or brother's sons, the deceased owner's, father's brother together with the sons, if any, of a predeceased brother of the father, shall inherit the property, the sons of a predeceased uncle taking between themselves the share that their father would have received if he had been alive.
- d. In the absence of father's brothers, the sons of the father's brothers shall inherit the property per stripes and in the absence of father's brother's sons, the property shall be divided in equal shares among those of the surviving agnates, provided always that the sons of such a predeceased kindred shall receive between themselves the share that their father would have received if he had been alive.

According to the custom prevailing among both the tribes, the inheritance is not limited to agnates upto any particular degree of relationship. When all relatives with whom any agnatic relationship can be traced are exhausted, and in the case of a deceased *bhuinhar*, it is only when all his fellow *bhuinhars* of the same village and belonging to the same clan (whether actually living in the same village or elsewhere) are extinct, the property remains unclaimed, then it shall vest in the state.

SANTHALS

Inheritance

According to L S S O'Malley³³, the family share all they have in common till the death of the father, when the property is divided equally among the sons. It is only the eldest son who gets a bullock and a rupee more than the others. The daughters however have no right to any of the property, the idea being that she is expected to get married and be supported by her husband and her sons. She gets a gift, customary and therefore demandable, but it is not inherited. Lately, however with the sanction of the courts, only daughters have been given a life tenure of the father's land, and this virtually means inheritance by daughters.

If a man dies without sons or daughters, the property passes to the father if he is alive, and if he is dead, to the brothers of the deceased by the same father (not necessarily

33 Bengal District Gazetteers Santal Parganas, Logos Press, New Delhi, Second Indian Reprint 1999

by the same mother); if the latter are dead, their sons will succeed. In default of these, the deceased's paternal uncles and their sons succeed. The widow of a childless man is allowed one calf, one bandi (10 to 12 maunds) of paddy, one ehati and one cloth, and returns to her parent's house, unless a son sometimes happens, she is kept by her husband's younger brothers. If one of them keeps her, he is not allowed more than the one share of the deceased man's property, which he would get in any case.

If a man leaves only daughters, their paternal grandfather and uncles take charge of them and of the widow, and the property remains in their possession. When the daughters grow up, it is the duty of these relatives to arrange for their marriages and to give them the presents which they would have been given by their father. When all the daughters have been disposed of, the widow gets the perquisites of a childless widow and goes to her father's house or lives with her daughters. A widow with minor sons keeps all the property in her own possession, the grandfather and uncles seeing that she does not waste it. If the widow remarries before the sons are married, the grandfather and uncles take possession of all the property; the mother of the children has no right to get anything, except sometimes a calf is given to her out of kindness. There are special rules in case where there is a son-in-law who has married under the ghardi jawae form. If his wife has no brothers, and the son-in-law stays on in the house and works for his father-in-law till he dies, then he inherits all the immovable property and half the moveable property the other half of which goes to the relatives of the deceased. If there is more than one such son-in-law, they divide the property between them.

In *Narayan Soren v. Ranjan Murmu*³⁴ it was the plaintiffs' case that in Santhal community a widow is not entitled to adopt any child and if her husband died issueless the properties are inherited by other surviving agnates. The Court held that it was specifically pleaded by the defendants/respondents that according to Santhal custom a widow is also competent to adopt a child. The defendants asserted that formal ceremonies like *Bonga Tola* and *Nim Da Mari* were duly performed. Subsequently, a deed of adoption was also registered. Witnesses of the same community were examined by the defendants who have consistently deposed about the custom prevalent in Santhal Community for adoption of a child by a widow. Not only that one of the witnesses D.W. 5 Misil Soren has deposed that he was taken in adoption by Maino Tudu, a widow after the death of her husband Jiwan Besra. Therefore, the Hon'ble Jharkhand High Court upheld the finding of the trial court that the defendants by adducing positive evidence proved that a Santhal widow is competent to adopt a child in absence of her husband.

In *Haradhan Murmu v. State of Jharkhand*³⁵ Mangal Soren had no male issue and had three daughters namely Dewla, Jowa and Singo. Mangal Soren had married his three

34 2013 4 JLJR 18

35 2018 SCC OnLine Jhar 1903

daughters in 'Ghar-jamai' form and all his three daughters were given equal shares in the property of Mangal Soren and they were cultivating the land separately.

During his life time, Mangal Soren applied for granting permission for making gift of his share of property to all the three daughters. This case was registered as Revenue Misc. Case No. 83/1960-61 and vide order dated 29.06.1961, the Sub Divisional Officer granted permission for gifting his property to his three daughters. Prior to passing the order, Jamabandi raiyats i.e 16 anna raiyats were heard in the matter and there was no objection on their part. However, inspite of permission, Mangal Soren could not execute gift deed in favour of his three daughters and expired, but his three daughters continued to separately possess and cultivate the property. Thereafter Devla Soren, the eldest daughter died issueless and specific case of the petitioners was that upon death of Devla Soren, the land of Mangal Soren devolved on two remaining daughters of Mangal Soren i.e. Jowa Soren and Singo Soren who are the mothers of two writ petitioners.

The Jharkhand High Court was of the considered view that the gift in favour of the three daughters having not been executed by the recorded tenant inspite of permission granted under section 20 of the aforesaid Act of 1949, the rights of the three daughters will be governed by status of their respective husbands and/or their status as per the customary law amongst Santhals as has been noticed in Gantzer's Settlement report.

The Jharkhand High Court held that the *three married daughters of the recorded tenant through their husbands, all having been married in ghar jamai form of marriage, had right to inherit the property through their husbands having the status of adopted sons under the customary law of Santhal Pargana*. In such circumstances all the three sons in law will have equal status in the matter of inheritance as ghar jamai under the customary law of santhals who are treated as sons. Therefore upon death of the eldest "son in law" and eldest daughter dying issueless, their respective share will devolve upon the other two "sons in law" in the capacity of sons of the recorded tenant.

Partition

If there are many grandsons, or if the sons do not live happily together, especially if the father had married again and had other issue, the father and mother may make partition. A panchayat is called and the father divides all the land and cattle keeping one share for himself. The son with whom the parents live retains possession of their share during their lifetime. Daughters get no share in the property, but if they are unmarried they get one calf each, that being the dowry given to them at marriage. Unmarried sons get a double share of the live stock, one share representing their marriage expenses. The cattle which the daughters in law received from their fathers and brothers and from their father

in law at the time of marriage is not divided, but the cattle which the sons got at marriage are divided. If a woman dies when her sons are unmarried, they cannot demand a partition even if their father takes a second wife, but they can do so after they are married. The father gets one share and the sons one share each. If the second wife has no children when the father dies, the sons of the first wife can take the share their father got, but they will have to pay for the funeral of their step-mother.

Customary Tribal Laws and Gender Equality

Clause (25) of Article 366 of the Constitution of India reads as under:

“Scheduled Tribes” means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution.”

The Customary laws of tribes in Jharkhand exclude women from inheriting the ancestral property and after the death of a sonless tribal, the property devolves upon the agnates. The widow of the deceased is entitled to maintenance only. However, these women can sometimes be declared as practising witchcraft and can be ousted from the property by the agnates of the deceased husband in order to grab the property.³⁶ The unmarried daughters are also to be maintained by their brother after the death of their father only till their marriage.

According to para-46 of Gantzer's report, it has been recorded that

“according to Santhal tribal law only male can inherit land. Sons jointly succeed their father if brothers are co-sharer in a holding and one brother dies without issue, the surviving brother and the son of predeceased brother inherit his share per stripes. The Hindu and Mohmedan Law of succession do not apply to the Santhal. The Santhal tribal law is quite definite in not allowing female to inherit, but this law is gradually undergoing the change” and situation created by this change is discussed in a separate paragraph below. It has further been observed in the following paragraph of the said report that

“The rules against female succession among Santhals whether Christians or non-Christians are changing owing to the force of public opinion, and the rules which have been previously accepted, cannot be treated as hard and fast and binding for all time. The change which is occurring is in the direction of ameliorating the condition of women and giving them a more assured footing in the family. During the course of the revision settlement operations, the daughters of a deceased Santhal have some times been recorded as his heirs not

³⁶ RAMESH SHARAN, Alienation and Restoration of Tribal Land in Jharkhand Current Issues and Possible Strategies, available at <http://rlarrdc.org.in/images/Alienation%20and%20Restoration%20of%20Tribal%20Land%20in%20Jharkhand.pdf>

only without opposition from the agnates but at their request. In other cases it appears from title suit decisions, that arbitrators in Santal cases, have found in favour of daughters. This is particularly, so in the case of girls who suffer from any physical defects . In dealing with cases of this nature the custom adopted in a particular locality must be carefully considered. It would be unwise to force upon an unwilling litigant a decision in advance of custom . If a change in custom has been well established and generally accepted, it will, of course, be treated as the customary law of the locality in mitigation of the harshness of the ancient tribal law.”

The Hon’ble Supreme Court in *Lingappa Pochanna Appelwar v. State of Maharashtra*,³⁷ while considering Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 have explained the concept of distributive justice. Their Lordships have held as under:

“Under the scheme of the Constitution, the Scheduled Tribes as a class require special protection against exploitation. The very existence of Scheduled Tribes as a distinctive class and the preservation of their culture and way of life based as it is upon agriculture which is inextricably linked with ownership of land, requires preventing an invasion upon their lands. The impugned Act and similar measures undertaken by different States placing restrictions on transfer of lands by members of the Scheduled Castes and Tribes are aimed at the State Policy enshrined in Art. 46 of the Constitution which enjoins that “The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and Tribes and shall protect them from social injustice and all forms of exploitation.” One has only to look at the artlessness, the total lack of guile, the ignorance and the innocence, the helplessness, the economic and the educational backwardness of the tribals pitted against the artful, usurious, greedy land grabber and exploiter invading the tribal area from outside to realize the urgency of the need for special protection for the tribals if they are to survive and to enjoy the benefits of belonging to the ‘Sovereign, Socialist, Secular, Democratic Republic’ which has vowed to secure to its citizens ‘justice, social, economic and political’ ‘assuring the dignity of the individual’.

The great importance which the Founding Fathers of the Constitution attached to the protection, advancement and prevention of exploitation of tribal people may be gathered from the several provisions of the Constitution.

Apart from Art. 14 which, interpreted positively, must promote legislation to protect and further the aspirations of the weak and the oppressed, including

³⁷ (1985) 1 SCC 479

*the tribals, there are Arts. 15(4) and 16(4) which make special provision for reservation in Government posts and admissions to educational institutions. Even the Fundamental Rights guaranteed by Art. 19(1)(d) and (e), that is, the right to move freely throughout the territory of India and the right to reside and settle in any part of the territory of India are made expressly subject to reasonable restrictions for the protection of the interests of any Scheduled Tribe. The proviso to Art. 275 specially provides for the payment out of the Consolidated Fund of India as grants in aid of the revenues of a State such capital and recurring sums as may be necessary to meet the cost of developmental schemes for the promotion of the welfare of the Scheduled Tribes in the State. Art. 330 provides for reservation in the House of the People for the Scheduled Tribes. Art. 332 provides for the reservation of seats for the Scheduled Tribes in the Legislative Assemblies of the States. Art. 335 specially directs that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of the State. Art. 343(2) empowers the President to specify the tribes or tribal communities or parts of them which shall be deemed to be Scheduled Tribes for the purposes of the Constitution. Arts. 244 and 244A of the Constitution make special provision for the administration and control of the scheduled areas and the scheduled tribes in any State by the application of the Fifth and the Sixth Schedules. Paragraph 3 of the Fifth Schedule particularly enjoins the Governor of each State having scheduled areas to report to the President annually or whenever so required, regarding the administration of the scheduled area in that State, and the executive power of the Union is extended by that paragraph to giving directions to the State as to the administration of the said area. Paragraph 5(2) empowers the Governor to make regulations for the peace and good Government of any area in any State which is for the time being a scheduled area and, in particular, and without prejudice to the generality of the foregoing power, such regulations may (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area; (b) regulate the allotment of land to members of Scheduled Tribes in such areas; and (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area. Mention has already been made of Art 46 of the Directive Principle which specially enjoins the State to protect the Scheduled Castes and Tribes from all social injustice and from all forms of exploitation. **All these provisions emphasize the particular care and duty required of all the organs of the State to take positive and***

stern measures for the survival, the protection and the preservation of the integrity and the dignity of the tribals.”(emphasis supplied)

Under the Hindu Succession (Amendment) Act, 2005 a daughter has been introduced as a coparcener. However, according to Section 2(2) of the Hindu Succession Act, the Act is not applicable to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs. In *Daudwa Uraon v. Karuelous Uraon*³⁸, it was held that in view of section 2(2) of the Hindu Succession Act, 1956 the Act will not be applicable to the members of the Scheduled Tribe in the matter of inheritance and succession.

However, if the member of the Scheduled Tribe has been “sufficiently hinduised” then they will be governed by the Hindu law of Succession and inheritance. In *Gopal Singh Bhumij v. Giribala Bhumij*³⁹, it has been held as follows:

“There cannot be any doubt that it is possible that aboriginals of non – Hindu Origin can become sufficiently Hinduised so that in the matter of inheritance and succession they are prima facie governed by the Hindu Law, except so far as any custom at variance with such law is proved.

*Reference in this connection may be made to *Chunkku Manjhiv. Bhabani Manjhian*⁴⁰.*

However, the question as to whether the parties are “Hinduised out and out or have become sufficiently hinduised” are questions of fact. The burden of proof is initially upon the plaintiff to show that the parties have become “hindus out and out” or have become “sufficiently hinduised” so as to be governed in the matter of succession and inheritance by any school of Hindu Law.”

Further, the Court held that in order to prove that the parties have become ‘sufficiently hinduised’ and/or “out and out hinduised’ it was necessary for the plaintiff to show that the family and/or other Bhumijis of the village and / or neighbouring villages have adopted Hindu religion or have been following all the rites and customs normally followed by the Hindus.

In *Labishwar Manjhi v. Pran Manjhi*⁴¹, the question that was raised before the Supreme Court was whether the parties who admittedly belong to the Santhal Tribe are still continuing with their customary tradition or have they after being Hinduised changed their customs to that which is followed by the Hindus. The Apex Court noted that after

38 1988 PLJR 603

39 AIR 1991 Pat 138

40 AIR 1946 Pat 218. In this case, the question for consideration was whether the parties are Hindus, and are governed by the Mitakshara school of Hindu law in matters of inheritance and succession, or whether they being non-Hindus, a customary rule of agnatic succession excluding the females obtains amongst them.

41 (2000) 8 SCC 587

remand the first appellate court recorded the finding that most of the names of the families of the parties are Hindu names.

*“Even PW 1 admits in the cross-examination that they perform the pindas at the time of death of any body. Females do not use vermilion on the forehead after the death of their husbands, widows do not wear ornaments. Even PW 2 admits that they perform shradh ceremonies for 10 days after the death and after marriage females used vermilion on their foreheads. **The finding of the words is that they are following the customs of the Hindus and not the Santhal customs. In view of such a clear finding it is not possible to hold that sub-section (2) of Section 2 of the Hindu Succession Act excludes the present parties from the application of the said Act. Sub-section (2) only excludes members of any Scheduled Tribe admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribes they are Hinduised and they are following the Hindu traditions.**”*

(emphasis supplied)

Therefore, the Supreme Court held that sub-section (2) will not apply to exclude the parties from application of the Hindu Succession Act. The High Court fell into error in recording a finding to the contrary. In view of this, the widow of Lakhiram would become the **absolute owner** by virtue of Section 14 of the said Act, consequently the gift given by her to Appellants 2 and 3 was a valid gift, hence the suit of Respondent 1 for setting aside the gift deed and inheritance stood dismissed.

In *Velamuri Venkata Sivaprasad (dead) by LRs. v. Kothuri Venkateswarlu (Dead) by LRs.*,⁴² it has been held that in the matter of interpretation of statutes specially relating to womenfolk, due weightage should be given to the constitutional requirement of equality of status, therefore, Hindu Succession Act, 1956 should be interpreted accordingly. In this case it has been held that,

“Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. Gender bias is being debated throughout the globe and the basic structure of the Constitution

42 (2000) 2 SCC 139

permeates quality of status and thus negates gender bias. Gender equality is one of the basic principles of our Constitution. The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes wherein specially the women folk would otherwise be involved. The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure therefrom."

Recently, in *Bahadur v. Bratiya*⁴³, the Himachal Pradesh High Court held as follows:

"According to the plain language of section 4 of the Hindu Succession Act, 1956,⁴⁴ any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act. In view of this though there is no conclusive evidence that the custom is prevailing in the Gaddi community that the daughters would have no rights in the property but even if it is hypothetically assumed that this custom does exist, the same would be in derogation of section 4 of the Hindu Succession Act, 1956."

The Himachal Pradesh High Court further held that Article 15 of the Constitution of India prohibits discrimination on the ground of sex. Articles 38, 39 and 46 "envisage socio-economic justice to the women" and also Preamble to the Constitution. Rule of law should establish uniform pattern in the society. In order to have a dignified status, women have to be advanced socially and economically. The daughters in a society, who are Hindu, cannot be left and segregated from mainstream. They are entitled to equal share in the property since gender discrimination violates fundamental rights.

Therefore, the Himachal Pradesh High Court held that in view of the definite law laid down by their Lordships of the Hon'ble Supreme Court and the judgments of various other courts, provisions of subsection (2) of section 2 of Hindu Succession Act, 1956 will not come in the way of inheritance of the property by the daughters belonging to tribal area where Hinduism and Buddhism is followed.

The Hon'ble Supreme Court in *C.Masilamani Mudaliar v. Idol of Sri. Swaminathaswami*

⁴³ 2015 SCC OnLine HP 1555

⁴⁴ Section 4 of the Hindu Succession Act, 1956 reads as under:4. Overriding effect of Act:- (1) Save as otherwise expressly provided in this Act,-(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act; (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

Swaminathaswami Thirukoil,⁴⁵ has held that section 14 of the Hindu Succession Act should be construed harmoniously consistent with the constitutional goal of removing gender-based discrimination and effectuating economic empowerment of Hindu females. Their Lordships have further held that **women have right to elimination of gender based discrimination particularly in respect of property so as to attain economic empowerment. This forms part of universal human rights and they have right to equality of status and opportunity which also forms part of the basic structure of the Constitution. The Supreme Court is obliged to effectuate these rights of women. The personal laws inconsistent with the constitutional mandates are void under Article 13 of the Constitution of India.**

In *Madhu Kishwar v. State of Bihar*⁴⁶, it has been held that neither the Hindu Succession Act, nor the Indian Succession Act, nor even the Shariat law is applicable to the custom-governed tribals. In this case challenge was made to certain provisions of the Chotanagpur Tenancy Act, 1908 which 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.

The Hon'ble Supreme Court in this case held as follows:

*"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 others 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 Sections 7 and 8 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Sections 7 and 8, to make way to 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 recognised, 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 Sections 7 and 8 has to remain in suspended animation so***

45 (1996) 8 SCC 525

46 (1996) 5 SCC 125

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 male succession, entitling her to the status of an intervening limited dependants/descendants under Sections 7 and 8. In this manner alone, and up to this extent can female dependants/descendants 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 dependants/descendants under Sections 7 and 8 of the Act is carved out to this extent, by suspending the exclusive right of the male succession till the female dependants/descendants choose other means of livelihood manifested by abandonment or release of the holding kept for the purpose.” (emphasis supplied)

Thus, we see that in order to protect the female descendants from becoming vagrant and destitute, the Apex Court established their right to livelihood over the land.

In *Gazula Dasaratha Rama Rao v. State of A.P.*, AIR 1961 SC 564 , it has been held by the Constitution Bench that Article 13 of the Constitution lays down inter alia that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar as they are inconsistent with fundamental rights, shall to the extent of the inconsistency be void. In that Article “law” includes custom or usage having the force of law. Therefore, even if there was a custom which has been recognised by law with regard to a hereditary village office, **that custom must yield to a fundamental right.**

Our Constitution is a “living Constitution” which means that though there is necessity of certainty of law, yet with the societal changes and more so, when the rights are expanded by the Court in respect of certain aspects having regard to the reflective perception of the organic and living Constitution, it is not apposite to have an inflexible stand on the foundation that the concept of certainty of law should be allowed to prevail and govern. *The progression in law and the perceptual shift compels the present to have a penetrating look to the past.*⁴⁷

It has been held in *Joseph Shine v. Union of India*, (2019) 3 SCC 39 that the hallmark of a truly **transformative Constitution** is that it promotes and engenders societal change. Also, it is the duty of the Court to break the stereotypes and promote a society which regards women as equal citizens in all spheres of life—irrespective of whether these spheres may be regarded as “public” or “private”.

⁴⁷ Joseph Shine v. Union of India, (2019) 3 SCC 39.

In the light of these judicial pronouncements it is required to revisit the customary laws of the tribals in order to establish economic justice and gender equality as recognised in the Constitution.

TRIBAL LAWS OF INHERITANCE: A PLEA FOR CHANGE.

Law is both an index of social change and also a means to it. The codification of customary law into statutory law is reflective of this change. There are situations where law becomes an instrument of change and becomes a vehicle of social engineering. There are certain socio-legal issues which intimately affect the tribal society and there is a need for honest introspection of and study on these issues. One such issue is the Customary law of inheritance which applies to the Tribals. Schedule Tribes means such tribes or tribal communities or part of or group as are specified in part II of schedule to the constitution order 1950. According to the amendment Act of 1977 to this order there about 33 Scheduled Tribes in Bihar. They include Oraon, Mahli, Munda, Ho, Santhatls. The Tribal Community have no codified laws of inheritance and they are governed by the customary law . The Hindu succession Act 1956 or the Indian Succession 1925 do not apply to the Tribals. Section 76 of the CNT Act clearly lays down that nothing in the Act shall affect any custom, usage or customary right .One of the fundamental features of Oraon and Santhal customary law of inheritance of the tribals is that the female are excluded from inheritance. The succession is patrilineal. According to this rule where a deceased Oraon dies leaving behind lineal male descendants and a widow, suitable maintenance consisting of lands generally less than what a son will receive, shall be allowed to the widow and balance of the property is divided amongst sons , grand sons, great grand sons.

But, where the last owner has left no lineal male descendant the distribution of his property shall be regulated as follows:

- (I) Adopted son belonging to the same clan.** If the last owner has left duly adopted son born of his one of his Bhayads or agnates duly adopted with the consent of other Bhayads or agnates , will inherit all the property left by the deceased after deducting a suitable portion for the maintainance of the widow or widows.
- (II) Son adopted from a different clan:.** If the last owner have left and adopted son belonging to a clan difference from his own , he shall inherit the non -Bhuinhari land of the deceased. The Bhuihari land of the deceased remains in possession of the widow .
- (III) Sonless widow:** She will be entitled to the administration and usufruct of the

property, so long as she lives in the house and does not re-marry . Any surrender or transfer of the land shall be void as against her reversioner.

(IV) Ghardamad: If there is no male issue or adopted son but only a Ghardamad duly adopted into the house as prospective son -in -law by the last male owner , Rajhas lands left by the deceased male on death of the widow goes to such Ghardamad and the Bhuinhari lands shall go to the nearest male agnates .

(V) Agnates : If the Oraon owner of property dies leaving no lineal male decendant or a Ghardamad the property shall go to the nearest male agante or agnates.

To sum up in cases of an Oraon or Santhal or any other tribal of Chotanagpur and Santhal pargana, owner of property dies leaving behind no male issue , the property cannot be succeeded by any female heir . The reason for such a peculiar system of inheritance arises because of peculiar belief in the state of the human soul after death. The human spirit, after death is believed to reside in the underworld with other spirits of the same clan of the village and constitute a closely united group. These spirits are believed to derive nutrition from the offering made to them by their male descendants daily before every regular meal, periodically at certain sacrificial feast, and annually at the great bone burial festival. It is through these sacrifices that the spirits of the dead keep themselves in touch with such property. It is because of these beliefs that the customary rule of inheritance seeks to preserve the property in the hands of the male descendants.

In day to day life excluding the female member from inheritance presents practical difficulties. For example, if the last male owner has no male issue and leaves behind three daughters, his property cannot be succeeded by any one of them. Common tribal who is unaware of intricacies of law, in such situation fail to understand as to why they are being deprived of their legitimate share in their father's property. It is beyond their simple understanding, as to why their shares in father's property go to the agnates. The result is that whenever a male owner dies leaving behind no male issue, claims and counterclaims start flying with respect to his property. Agnates start jockeying for their share, by excluding the genuine female descendants. It results in social and family strife. The normal contrivance to bypass the rigors of the customary law is adopted by making claim on the basis of being ghardamad. The second mode is sale or gift made by the last owner. But before making such a transfer it is necessary to seek the permission U/S 46 of the CNT Act. Further a female heir may be held to be entitled to inheritance under the Hindu Succession Act if they are able to prove that they have been sufficiently Hinduised. It has been held in Dhani Manjhi and another Vs RangaManjhi and another 1999(1)PLJR 605 that by efflux of time a tribal may become Hinduised and they shall be governed by Hindu law. But for invoking Hindu Succession Act in order to entitle the female heirs to inheritance the party concerned will

have to plead and prove that they have been sufficiently Hinduised and are governed by The Hindu Succession Act. But such a declaration will necessitate a protracted litigation which may not be in the interest of the common tribal community. In all these situations the parties have to undergo the normal grind of the Judicial process before establishing their legitimate claim. Even if they succeed, it consumes lots of their time, money and energy. For getting their rights they are perforce involved in a spate of litigation.

Evolution of society and laws is a continuous process. The tribal society is changing fast. The occupational structure of the society is also changing. Females in particular are excelling in all department of life. In such a situation it will be anachronistic to deny them right of inheritance and allow the tribal society to be riven by property disputes. It was precisely to meet such a situation that the law of succession was codified and now we have Hindu Succession Act 1956 applying to Hindus, Sikhs, Jainas and Buddhists and Indian Inheritance Act 1925 for Christians and Parsees. In both these systems females have been given right to succession but none of them applies to the members of the tribal community. There is no point in denying the females of tribal society right of inheritance. It is high time that there should be rationalization and codification of the tribal laws relating to inheritance with progressive and practical provision by allowing the right of inheritance to the females.

In order to accomplish this object, a simple law of inheritance which acknowledges the right of females to inheritance is required. There can be a number of options for enacting such a law. Firstly, the Hindu Succession Act 1956 for Hindu tribals and Indian Succession Act for Christian tribals can be adopted. Secondly, there can be a separate law of succession for the tribals taking the features of the Hindu Succession Act 1956 and the Indian Succession Act 1925. But in any case there must be some codified law in this respect which can remove the cloud of uncertainty in matters of succession of the tribals.

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DECONSTRUCTING THE EXERCISE OF PRIVATE RIGHTS OVER FOREST LANDS

Any discussion on land laws will not be complete unless the state of forest land is also not discussed at length. This is so because the scarce forest lands are under tremendous pressure on account of increase in population, urbanization and allied activities related thereto. There is an attempt to not only encroach upon forest land but also grab it on the basis of false and fabricated document coupled with wrong interpretation of law. The net result is further depletion of the fragile green cover on account of industrialization and urbanization.

Some strange and twisted pleas are put before the Court to justify the land grab under cover of legal rights. Some practical instances shall demonstrate the manner in which such pleadings are advanced in the court of law. One very common plea taken in such cases is the claim based on the settlement of land ante the date of the notification of the particular land as reserved or protected forest land. It is pleaded that land belonged to the predecessor-in-interest of the petitioner before the notification of the land as Government Land and after the passage of 30 years, the land is no longer a protected forest land and hence there is a resumption of the right of the petitioner.

The question that confronts us is whether, by passage of time or even with the expiration of the period of notification, a Government Land gets converted into a private land. The plea of passage of time is taken on the basis of the limitation of 30 years provided under Section 30 of the Indian Forest Act, 1927. Before we take the discussion forward, it is significant to note that neither in the case of “reserved forest” notified under Section 20 nor in the case of “protected forest” under Section 29, the nature of land changes with passage of time.

The provisions regarding reserved forests are dealt with under Chapter II of the Forest Act 1927 (hereinafter called the Forest Act) from Sections 3 to 27. There is an elaborate procedure for constituting a Reserve Forest which is initiated by the notification under Section 4 and the final notification of Reserve Forest is made under Section 20 after following the process as laid down thereunder. Section 3 of the Forest Act states that the state government may constitute any forest land or waste land, **which is the property of the government or over which the government has proprietary right**, a reserved forest. Under Section 4 the process is initiated by notification by the State Government specifying the situation and limits of such land and appointing an officer hereinafter called Forest Settlement Officer to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within

such limits, or in or over any forest produce, and to deal with the same as provided under this chapter. Section 5 bars the accrual of forest rights after the issuance of a notification under section 4 except by succession or under a grant or contract in writing made by or on behalf of the government. This requirement of a grant or contract in writing is also required when it is claimed from a private person who had such vested right before the notification under section 4. After proclamation under section 6, an inquiry under section 7 into the claims to rights of pasture or to forest produce etc is made and finally determined under section 15 of the Act. While holding the inquiry the Forest Settlement Officers may exercise the power of civil court in the trial of suits under section 8. In this process the statements of claims with respect to the existence of any right mentioned in section 4 or 5 shall be taken down in writing by the forest settlement officer under section 7.

Under section 9, rights in respect of which no claim has been preferred under section 6 and of the existence of which no knowledge has been acquired by inquiry under section 7, shall be extinguished, unless before the notification under section 20 is published, the person claiming them satisfies the Forest Settlement Officer that he had sufficient cause for not preferring such claim within period fixed under section 6.

Under Section 11, the Forest Settlement Officer shall pass an order admitting or rejecting a claim to a right in or over any land , other than right of way or right of pasture or right to forest produce or a water-course. If such claim is admitted in whole or in part, the forest settlement officer shall either:

- (i) exclude such land from the limits of the proposed forest; or
- (ii) come to an agreement with the owner thereof for the surrender of his rights; or
- (iii) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894 (1 of 1894)

From this it follows that reserved forests were conceived of a government forest area free from all rights except that of pasture, forest produce etc.. The care to be taken before notification in cases where right over the land to be notified under section 4 is admitted, is to ensure that such portions are either excluded or acquired. The Forest Act goes into the minutest details regarding the extent of minor rights of pasture or to forest produce to be recorded when they are admitted under section 14. Section 15 further clarifies that such admitted rights are not unrestricted for the entire forest area but for this purpose it provides to set out some other forest – tract conferring the right of pasture. It also contemplates passing of such other orders as will ensure the continued exercise of the rights so admitted having due regard to the maintenance of the reserved forest.

The provisions of appeals have been made under section 17 and 18.

The final notification under section 20 is made in the official gazette, specifying definitely, according to boundary mark erected or otherwise, the limits of the forest which is to be reserved, and declaring the same from a date fixed by the notification.

It has been held in **State of UP Vs. Deputy Director of Consolidation, AIR 1996 SC 2432** that the Forest Settlement Officer has the power of a civil court and his order is subject to appeal and final revision before the state government. The Forest Act is a complete code and contains elaborate procedure for declaring and notifying a reserved forest.

Under Section 3 “The State Government may constitute any forest land or waste land **which is the property of Government or over which the Government has propriety rights**” as a “reserved forest”. Further, **protected forest** are notified under Section 29 which also starts with similar expression that “The State Government may, by notification in the Official Gazette, declare the provisions of the Chapter applicable to any forest land or waste land which is not included in the reserved forest but **which is the property of Government, or over which the Government has propriety rights**”. Neither in Section 3 nor in Section 29 has any time limit been provided. Therefore, to put up a case claiming a land on the ground that it has reverted to the claimant after a period of 30 years of notification is misconceived and misleading to the core.

The import of these provisions is the complete exclusion of rights on the forest and save and except some limited right, such as a right of way or right of pasture, or a right to forest-produce or a water-course that too by an express order as required under Section 12, no right over the notified land is admitted or recognized after the notification under Section 5.

The provisions related to “Protected Forests” have been provided under Chapter IV, from Section 29-34. As stated earlier, a Government forest land or a land over which the Government has propriety rights is notified as a protected forest under Section 29 which does not prescribe any time limit thereof. Once a Government Land has been notified as reserved forest or protected forest, its nature does not change with the passage of time.

This brings us to the time limit under Section 30. For a clear understanding of the provisions of the Section, it is extracted herein below:-

“30. Power to issue notification reserving trees etc. – The State Government may by notification in the Official Gazette –

(a) Declare any trees or class of trees in a protected forest to be reserved from a date fixed by the notification, or

- (b) *Declare that any portion of such forest specified in the notification shall be closed for such terms, **not exceeding 30 years, as the State Government thinks fit, and the rights of private persons, if any, over such portion shall be suspended during such term, provided that the remainder of such forest be sufficient, and in a locality reasonably convenient, for the due exercise of the right suspended in the portion so closed, or***
- (c) *Prohibit, from a date fixed as aforesaid, the quarrying of stones, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal of, any forest produce in any such forest, and the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, of any land in any such forest.”*

This Section contemplates three situations – **firstly**, where trees or a class of trees in a protected forest can be declared protected; **secondly**, where the State Government is empowered to close any portion of protected forest for a term not exceeding 30 years during which the rights of any private person get suspended for the said period, and **thirdly**, where the State Government can prohibit the quarrying of stones, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal of, any forest produce in any such forest, and the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, of any land in any such forest.

The need for Section 30 is a part of forest conservation and management under which a part of protected forest can be closed or a species of tree can be reserved for the purpose of afforestation which may require the forest rights as notified under rules under Section 32 to be suspended. In order to achieve such an objective, the State Government is empowered to suspend, for any period not exceeding 30 years, the rights of private persons which exist even after the declaration of a land as protected forest. The period of 30 years specified under Section 30 contemplates that an area of a protected forest can be closed by the State Government for a maximum period of 30 years and during this period, the rights of private persons related to and associated with the use of such area gets suspended.

After the lapse of 30 years, neither the nature of the forest changes nor the nature of the land changes; what changes is the resumption of certain rights in the protected forest area which were put in abeyance by the notification under Section 30 for 30 years. Therefore, it is not tenable in the eyes of law to claim private title or right to possession

over a Government land which has been declared protected forest on the ground that the nature of the land or forest has changed after the expiration of 30 years.

In light of the discussions made hereinabove, it is also pertinent to mention here the provisions of Section 2 of the Forest Conservation Act, 1980 which imposes restrictions on the de-reservation of forest or use of forest land for non-forest purpose. The Section starts with the non-obstante clause “*notwithstanding anything contained in any other law for the time being in force in a State....*”, which means that the provision therein overrides any other law in any State for the time being in force and in case of any conflict between the provisions of the Act and any other Act, Section 2 of the Forest Conservation Act shall prevail.²⁶ According to Section 2, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing—

- (i) that any reserved forest (within the meaning of the expression “reserved forest” in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;
- (ii) that any forest land or any portion thereof may be used for any non-forest purpose.
- (iii) that any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency or any other organisation not owned, managed or controlled by Government;
- (iv) that any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for reforestation.

The Section further explains the scope of “non-forest purpose” and specifies that it means the breaking up or clearing of any forest land or portion thereof for (a) the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants; (b) any purpose other than reforestation; but does not include any work relating or ancillary to conservation, development and management of forests and wildlife, namely, the establishment of check-posts, fire lines, wireless communications and construction of fencing, bridges and culverts, dams, waterholes, trench marks, boundary marks, pipelines or other like purposes.

Under Section 2 of the Act, there are two prohibitions – *firstly*, the State government is not empowered to declare a reserved forest as ceasing to be so, and, *secondly*, “any forest” land or any portion thereof cannot be used for non-forest purpose.²⁷ The word “any forest land” connotes that as far as the prohibition related to the “non-forest purpose”

²⁶ See, *Ashok Marketing Ltd. v. Punjab National Bank*: (1990) 4 SCC 406.

²⁷ *Ambica Quarry Works v. State of Gujarat* (1987) 1 SCC 213.

is concerned, it is applicable even to forests lands which are not reserved.²⁸ According to the Patna High Court in ***Bihar State Mineral Development Corporation v. State of Bihar, (1998) 2 PLJR 204***, even the land belonging to a private person will come within the mischief of this Act irrespective of ownership. The Patna High Court while discussing whether the nature of a Forest Land changes on acquisition thereof and the scope of the applicability of Section 2 on such lands, held as follows:-

*“15. Thus this provision of Section 2(i) and (ii) of the Forest (Conservation) Act gives answer to the question that **it is not automatic that by virtue of acquisition of forest land, its character as forest land automatically stands ceased and it emerges as non-forest land.** But for the use of non-forest activity, in the instant case, excavation of minor mineral, prior permission of the Central Government is a must, inasmuch as Section 2 of the Forest (Conservation) Act, 1980, applies with full force, in the grant of renewal of mining lease as well and even if any non-obstante clause either appearing in the lease agreement or even in Indian Forest Act, the same will be defeated by the maxim “leges posteriores priores contrarias abrogant” i.e. latter laws abrogate earlier contrary laws. Not only this, the Forest (Conservation) Act, 1980, is a special Act and, as such, also it prevails over the Indian Forest Act. Hence, until the provisions of Section 2 of the Forest Conservation Act is not satisfied before the grant of renewal of the lease form the mining operation, it is not that only by virtue of acquisition of forest land its character as forest land automatically stands ceased and it would emerge as non-forest land providing a perpetual lever in the hands of the appellant to use that land for non-forest purposes in the manner it likes.” (emphasis supplied)*

Another common plea is based on the provisions of **Bihar Private Forest Act, 1947**. As stated in the discussion on the Indian Forest Act, provisions were made for the notification of Government land as Reserved Forest or Protected Forest in terms of Chapter II or Chapter IV respectively of the Indian Forest Act. Initially, apart from the Government lands and forests, there were also private forests in the possession of proprietors or tenure holders before the coming into force of the Bihar Land Reforms Act, 1950 (BLRA). By operation of Section 3 of the BLRA, through a Government Notification, the estates or tenures of a proprietor or tenure-holder, specified in the notification, passed to or became vested in the State, save and except the land in *khas* possession of intermediaries detailed under Section 6 of the Act which was to be retained by them on payment of rent as *raiyyats* having occupancy rights. Further, under **Section 4** of the BLRA, in consequence of vesting of estate or tenure in the State, the interests of the proprietors or the tenure-holders in such estate or tenure including **their interests in trees, forests, fisheries, jalkars, hats, bazars, mela and ferries** and all other *sairati* interests, as also their interest in all subsoil including

²⁸ See also, *Yashwant Stone Works v. State of Uttar Pradesh and others*, AIR 1988 All 121.

any rights **in mines and minerals** whether discovered or undiscovered, or whether been worked or not, inclusive of such rights of a lessee of mines and minerals, comprised in such estate or tenure (other than the interests of *raiyats* or under-*raiyats*) **shall, with effect from the date of vesting, vest absolutely in the State** free from all encumbrances and such proprietor or tenure-holder shall cease to have any interest in such estate or other than the interests expressly saved by or under the provisions of this Act.

Prior to the vesting of the interest in the State as aforementioned under the provisions of the BLRA, the Bihar Private Forest Act, 1947 was in existence which received the assent of the Governor General on 15.02.1948 and the assent was first published in the Bihar Gazette on 03.03.1948 and the Act came into force from 1st April, 1948. Section 2 of the Act specifies that the Act shall not be applicable to any land which is vested in the Government or to any land in respect of which notifications and orders issued under the Indian Forests Act, 1927 are in force. A “private forest” has been defined under Section 3(9) of the Act as *a forest which is not the property of the Government or over which the Government has no proprietary rights or to the whole or any part of the forest produce of which the Government is not entitled*. From this, it is amply clear that this Act had been enacted for and was applicable to Private Forest land in contradistinction to the Government Forest Land to which Indian Forest Act applied. However, after coming into force of the BLRA, these private forests as mentioned in the Bihar Private Forests Act got vested in the State. At present, the practical significance of the lands notified under the Bihar Private Forests Act read with the provisions of Sections 3 and 4 of the Bihar Land Reforms Act is that these private forests have been vested in the State and any claim to any of such forest lands by any private party is not tenable in the eyes of law.



ANALYSIS OF CULPABILITY FOR OFFENCES RELATED TO FOREST LAND VIS-À-VIS SPECIAL ACTS AND THE INDIAN PENAL CODE

The Indian Forest Act was enacted about a hundred year ago in 1927, when forests were in abundance and the country was endowed with thick forest cover. Today, the Government Forest area is spread out in thousands of hectares but there has been depletion in the density of the forest cover and the actual forest resulting in shortage of timber and consequently a sharp rise in its price. This has resulted in rampant felling and theft of trees. Quite surprisingly, there is not a single provision in the Forest Act to address the menace of theft of trees in the forest area. There is, however, a rationale behind not having the offences already defined under the IPC to have them in the Forest Act. Since, the offence of theft and other such cognate offences were specifically made penal under the IPC, they were not mentioned in the Forest Act so that they could be proceeded under IPC in such cases. Therefore, prosecution of such persons, involved in these illegal activities, under the provisions of the Indian Penal Code (IPC) becomes an imperative necessity. Practically, most of the cases of offences under the Indian Forest Act are inquired into by the officials of the Forest Department and prosecution reports related thereto, are submitted without invoking the penal provisions of the IPC even in cases where the offences under the IPC are disclosed. The result is that a large number of cases related to the offence of theft of forest products go unpunished as per the provisions specifically enumerated to address such offences under the IPC. The present article attempts to discuss important legal aspects relating to this issue.

Criminal liability arising out of illegal activities committed in forest area

Normally, following illegal activities committed in forest area are reported in the state of Jharkhand:-

- felling of trees
- theft of timber
- encroachment of forest land for urban, industrial or agricultural purposes
- illegal mining and quarrying of stones in forest area.

Now, wherever the case is reported only under the Forest Act, an inquiry is conducted under Section 72 of the Indian Forest Act and Prosecution Report is usually submitted under Section 33 of the Indian Forest Act which is treated as an official complaint by the Court of Magistrates. Even in cases where there are materials disclosing an offence under

the provisions of the Indian Penal Code, for instance, offences under Section 379, 411 or 414 etc. of the IPC, the prosecution report usually do not include these charges. This is perhaps because of the mistaken notion that in view of the Forest Act which is a special Act, the provision of IPC, which is a general Act, is excluded.

The exclusion clause is provided under Section 4(2) of the Cr.P.C which reads as under:

“All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being enforced regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offence.”

According to Section 5 *nothing contained in this code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.*

From these provisions what can be safely deduced is that by special enactment the procedure as laid down under Cr.P.C. can be excluded, but as such the penal provisions are not excluded. Even with regard to procedure, the existence of special law by itself cannot be taken to exclude the operation of the Code of Criminal Procedure. Unless the special law expressly or impliedly provides that certain offences shall be tried exclusively by court constituted under the Act, the jurisdiction of the court to try the offences under the Code cannot be said to have been excluded. If the particular Act enacting an offence also provides for procedure for investigation, inquiry or trial then the same will exclude the application of the Code. It has been held in ***Moti Lal v. CBI, AIR 2002 SC 1691*** that cases of offences under the Wild Life Protection Act shall be tried as per the provisions of the Cr.P.C., as there is no specific provisions contrary to the Act.

Even when the act involves theft of minerals from the forest area, the cases are usually not registered under the Indian Penal Code and the Mining Officials confine themselves to the penal provisions of Mines and Minerals Act 1956.

It is interesting to note that only in cases when the FIR is registered by the Police, the penal provisions of the IPC are invoked along with the Forest Act.

The analysis made hereinabove brings us to the following questions:-

- **What is the reason for this dichotomy of the cases not being usually registered for IPC offences along with the provisions of the Forest Act?**
- **Are the Forest Officials barred from reporting an offence involving penal provisions under the IPC ?**

- **Or that the Police Officers cannot register a case of theft involving trees, forest produce or minerals from forest area?**

It is to be appreciated that the penal provisions under the Indian Forest Act are very light and extends upto a maximum of two years of imprisonment and fine upto a maximum of Rs. 5000 under Section 33. Similar are the penalties under Section 42. The net result of this is that in case of large scale felling and theft of trees, the offenders get away with almost negligible or no punishment if the IPC Offences are not attached with those under the Indian Forest Act.

This is probably due to the misconception that sometimes arises regarding the complete ouster of a general Act (in this case IPC) by a special Act (in this case, the Indian Forest Act and Mines and Minerals Act). However, as stated earlier, the exclusion clause can oust the general Act only when the special Act expressly excludes its application. Moreover, the exclusion is about the procedure and not about the penal provisions.

Regarding framing of charge, Section 220(3) of the CrPC provides that if the act alleged constitutes an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for each of such offences.

In a case involving POCSO the matter came up before the Hon'ble Delhi High Court as to whether charges for similar offence under IPC can also be framed?

The question was answered in *Gaya Prasad Pal v. State, 2016 SCC On Line Delhi 6214* – In this case it has been held that in terms of Section 220(3) and 221 Cr.P.C it was permissible to put an accused for trial under both IPC offence for rape and that for offence under POCSO, and the accused can be convicted for offences under both these Acts, but he cannot be sentenced for offence under both the Act and in terms of Section 71 IPC and the corresponding provision under POCSO he can be sentenced only under any one of the Act.

In a judgment rendered by the Hon'ble Apex Court in *Municipal Corporation of Delhi v. Shiv Shankar, AIR 1971 SC 815*, it has been clarified that when act or omission amounting to an offence under two or more enactments continues, the offender could be punished for each offence for which he was tried but the quantum of punishment is limited by section 71 of the Penal Code. In such a trial the maximum punishment that could be awarded is the maximum punishment that the court which tries him can award for anyone of the offences for which he was tried.

What is significant to note is that Section 33 applies for acts done in contravention of notification under Section 30 or rules under Section 32 of the Forest Act. The offence of theft of forest property or receiving it is quite distinct and not covered under Section

33 of the Forest Act, 1927. Further, Chapter IX deals with penalties and procedure, but this chapter also does not provide for offences like theft or receiving of stolen property and consequently if the IPC offences are not invoked, such incidents shall go unpunished. Therefore, if the fact of the case discloses such an offence there is no impediment in taking cognizance and proceeding under appropriate provisions of the IPC.

In **2002 (10) SCC 601, State of H.P. v. Satya Dev Sharma & others**, which involved criminal conspiracy hatched by timber merchants and private land owners with the government officials for the purpose of felling and misappropriating the trees standing on government lands pursuant to the said criminal conspiracy, the officials of the state government along with private persons were put on trial for offences under sections 120B IPC read with section 218, 379, 467, 468, 471 and 419 of the IPC besides section 33 of the Indian Forest Act and also section 5 (2) of the Prevention of Corruption Act, 1947.

With regard to the procedure, there are two options available to the forest officials in cases of theft or other IPC offences. The **first** is either a FIR can be instituted with local police and in such case the police will investigate and submit police report as per its power of investigation under Cr.P.C. Particularly in cognizable offence, the matter should be reported to the concerned police station and if any person has been arrested, he needs to be produced before the police in terms of Section 64 of the Forest Act 1927.

The **second option** is that on the basis of the offence report under Forest Act, the forest official can conduct a preliminary inquiry and submit the prosecution report both under IPC and under Forest Act before the Court of the Magistrate having power to take cognizance. In that case the Court will treat the prosecution report as an official complaint and proceed as per the provision of inquiry as per chapter XV and XVI of the Cr.P.C. Even in cases where the offence report and prosecution report has been submitted by the forest department only under the provisions of the Forest or Wild Life Act, but the materials from the offence report and prosecution report along with seizure list, disclose some IPC offences, the cognizance in such cases should be taken for IPC offences as well and accordingly, the accused must be proceeded against both for IPC offences and offences under Forest Act.

Here a question may be raised about the power of the Forest official to conduct preliminary inquiry under the provision of Cr.P.C.?

While there cannot be any doubt about the exclusive power of investigation of a police officer under Chapter XII of the Cr.P.C, the power of inquiry that a forest officer exercises under Section 72 of the Indian Forest Act 1927 is of inquiry and not of investigation. In principle, the police needs to follow the procedure provided under Special Act, but can follow procedure under the Code which are not specifically covered under the Act. For

example, in NDPS cases, the I.O. has to follow the procedure under the Code, not specifically covered under the Special Act.

The forest official cannot exercise power of investigation under Cr.P.C but they are already invested with power of inquiry, search, seizure and arrest under chapter IX of the Indian Forest Act 1927. It is on the basis of this power that prosecution report is filed after inquiry.

Lastly, in cases where the prosecution report has been submitted under Forest or Wildlife Act provisions, but the content also discloses an offence under IPC, the Court magistrate can take cognizance and proceed treating it as an official complaint case.

In case of theft of mines and minerals from a government forest area can a case be instituted by a Police officer?

*Under Section 22 of the **Mines and Minerals (Development and Regulation), Act, 1957** no court shall take cognizance of any offence **punishable under this Act** or any rules made thereunder except upon complaint in writing made by a person authorized in this behalf by the central or state government.*

What is prohibited under this provision is complaint **for offence punishable under this Act (the MMDR Act)** by a person not authorized by the Central or State Government, but this restriction does not hold ground where an offence under IPC is committed. The penal provision under Section 21 of MMDR Act, 1957 is limited to contravention of provision under Section 4 of the Act. Section 4 restricts a person from reconnaissance, prospecting or mining operation except under and in accordance with the terms and conditions of the permit or of a prospecting license. It further restricts transportation etc. except transportation or storage of any mineral in accordance with the rules framed therein. The protection of this provision is for persons who have license or permits of mining and when they act in contravention of it. Such cases attract the penal provision of section 21 for which a complaint needs to be filed in terms of Section 22 of the MMDR Act, 1957. The protective umbrella of Section 22 is thus available only to those persons who are lawfully carrying out the mining operation with a valid permit or license and have acted in derogation of the condition of the licence. This provision will not apply to a complete stranger or a trespasser who without any permit or license commits theft of minerals. In such cases the IPC offences shall be attracted and will apply with full force and the case can be lodged by any person including a police officer as per the provision of Cr.P.C.

Murari Singh Vs. State of Jharkhand, 2019 (2) JLJR 446 – Relying on the judgment of Hon'ble Supreme Court in State Vs. Sanjay, 2014 (9) SCC 772, it was held that the ingredients constituting the offence under the MMDR Act and the ingredients

of dishonestly removing sand and gravel from the river beds without consent, which is property of the state are different. The latter is a distinct offence under Section 378 of the IPC and hence for commission of the offence, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the offence without awaiting the receipt of the complaint that may be filed by the authorized officer for taking cognizance in respect of violation of various provisions of the MMDR Act.

Confiscation under The Indian Forest Act (as amended by Bihar Act 9 of 1990)

Section 52- Seizure and its procedure for the property liable for confiscation:

1. Where there is reason to believe that a forest offence has committed in respect of any forest produce, such produce, together with all tools, arms, boats, vehicles, ropes, chains or any other article used in committing any such offence, may be seized by any Forest officer or Police Officer.
2. Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, either produce the property seized before an officer not below the rank of Divisional Forest Officer authorized by the state government in this behalf by notification, (hereinafter referred to as the authorized officer) or where it is, having regard to quantity of bulk or or other genuine difficulty, not practicable to produce the property seized before the authorized officer, or where it is intended to launch criminal proceedings against the offender immediately, make a report or such seizure to the Magistrate having jurisdiction to try the offence on account of which seizure has been made:

Provided that when the forest produce with respect to which such offence is believed to have been committed is the property of government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be report of the circumstances to his immediate superior.

3. Subject to sub-section 5, where the authorized officer upon production before him of property seized or upon receipt of report about seizure as the case may be, is satisfied that a forest offence has been committed in respect thereof, he may by order in writing and for reasons to be recorded, confiscate forest produce so seized together with all tools, arms, boats, vehicles, ropes, chains or any other article used in committing of such offence. The Magistrate having jurisdiction to try the offence may, on the basis of the report of the authorized confiscating officer cancel the registration of the vehicle used in committing the offence, the license of the vehicle driver and the license of the arms. A copy of the order on confiscation shall be forwarded without undue delay to the

conservator of forests of the forest circle and which the forest produce, as the case may has been seized.

4. No order confiscating any property shall be made in the sub-section 3 unless the authorized officer –
 - (a) Sends an intimation about initiation of proceedings for confiscation of property to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made;
 - (b) Issues a notice in writing to the person from whom the property is seized and to any other person who may appear to the authorized officer to have some interest in such property;
 - (c) Affords an opportunity to the persons referred to in clause (b) of making a presentation within such reasonable time as may be specified in the notice against the proposed confiscation and ;
 - (d) Gives to the officer effecting the seizure and the person or persons to whom notice has been issued under clause (b), a hearing on date to fix for such purposes;
 - (e) No order of confiscation under sub-section 3 other than forest produce seized shall be made if any person referred to in clause (b) of sub-section 4 proves to the satisfaction of satisfied officer that any such tools, arms, boats, vehicles, ropes or chains or other article where used without his knowledge for his connivance or as the case may be, without the knowledge or connivance of his servant or agent that all reasonable and necessary precautions has been taken against used of the objects aforesaid for commission of forest offence;

Section 52A – Appeal against the order of confiscation

Any person aggrieved by an order of confiscation may within 30 days of the order, or if the fact of the order has not been communicated to him within 30 days of date of knowledge of such order, prefer an appeal in writing, accompanied by such fee payable in such form as may be prescribed, along with the certified copy of order of confiscation to the District Magistrate of the district in which the forest produce has been seized.

Explanation:

- (1) The time required for obtaining certified copy of order of confiscation shall be excluded while computing period of 30 days referred to in this sub-section.

- (2) The appellate authority referred to in section 52A, may, where no appeal has been referred before him suo motu within 30 days of date of receipt of copy of the order of confiscation by him, and shall on presentation of memorandum of appeal issue a notice for hearing of appeal or, as the case may be, of suo motu action to the officer effecting seizure and to any person including appellant if any, who in the opinion of the appellate authority is likely to be adversely affected by the order of confiscation, and may send for the record of the case:

Provided that no formal notice of appeal be issued to such amongst the appellant, officer effecting seizure and any other person likely to be adversely as aforesaid as may waive the notice or as may be informed in any other manner of date of hearing of appeal by the appellate authority;

- (3) The appellate authority shall send intimation in writing of lodging of appeal or about suo motu action to the authorized officer;
- (4) The appellate authority may pass such order of interim nature for custody, preservation or disposal (if necessary) of the subject matter of confiscation, as may appear to be just or proper with the circumstances of the case;
- (5) The appellate authority having regard to the nature of a case or the complexities, involved, may permit parties to the appeal to be represented by respective legal practitioner;
- (6) On the date fixed for hearing of the appeal or suo motu action, or on such date to which the hearing may be adjourned, the appellate authority shall peruse the record and hear the parties to the appeal, if present in person, or to any agent duly authorized in writing or through a legal practitioner, and shall thereafter proceed to pass an order of confirmation, reversal or modification order of confiscation:

Provided that before passing any final order the appellate authority may, if it is considered necessary for proper disposal of appeal or for proper disposal of suo motu action make further in file itself or caused it to be made by a authorized officer, may also allow parties to file affidavits for asserting or refuting any fact that may rise for consideration and may allow proof of facts by affidavit.

- (7) The appellate authority may also pass such orders of consequential nature, as it may deem necessary;
- (8) Copy of final order or an order of consequential nature, shall be sent to the authorized officer for compliance or for passing any appropriate order in conformity with the order of appellate authority;

Section 52B – Petition for revision before Secretary, Forest and Environment Department, Government of Bihar against the order of appellate authority.

- (1) Any party to the appeal, aggrieved by final order or by the order of consequential nature passed by the appellate authority may within 30 days of the order sought to the impugned, submit a petition for revision to the Secretary;
- (2) The Secretary may confirm, reverse or modify any final order or an order of consequential nature passed by the appellate authority;
- (3) Copies of the order passed in revision shall be sent to the appellate authority and to the authorized officer for compliance or passing such further order or for taking such further action as may be directed by such court;
- (4) For hearing and deciding revision under this section the Secretary shall as far as may be, exercise the same power and follow the same procedure as exercised and followed while entertaining, hearing and deciding a petition under the Cr.P.C.;
- (5) Notwithstanding any thing contrary contained in Cr.P.C. order passed under this section shall be final and shall not be called in question before any court.

Section 52C- Bar or jurisdiction of court etc. in certain circumstances.

- (i) On receipt of intimation under section 52 (4) about initiation of proceeding for confiscation of property by the Magistrate having jurisdiction to try the offence on account of which the seizure of property which is subject matter of confiscation, has been made, no court, or tribunal other than the authorized officer, appellate authority and revisional authority shall have jurisdiction to make orders with regard to possession, delivery, disposal or distribution of the property and in regard to which proceedings for confiscation or any other law for the time being in force;

Section 52D- Power of entry, inspection, search and seizure

Any Forest Officer not below the rank of Range Officer of forest or any Police Officer not below the rank of Sub-Inspector, may, if he has reasonable grounds to believe that any forest offence has been committed in contravention of this act, enter upon inspect or search any place, premises, land, vehicle or boat and seized any illegal forest produce and all tools etc. used in committing of any such offence.

Section 53 – Powers to release property seized under section 52

Any Forest Officer of a rank not below the rank of Ranger, who, or whose subordinate has seized any tools etc. under section 52 may release the same on the execution by the owner thereof a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made.

State of Madhya Pradesh v. Uday Singh, 2019 SCC OnLine SC 420

Related to the ouster of jurisdiction of Courts and Tribunals under Section 52C

In this case, the Hon'ble Supreme Court discussed and laid down principles regarding the provisions of Section 52-C, related to the ouster of jurisdiction, in the Indian Forest Act, as applicable to the State of Madhya Pradesh (*vide* MP Act 25 of 1983) which is analogous to an same as Section 52-C of the Indian Forest Act, as applicable to the State of Bihar (*vide* Bihar Act 9 of 1990). Discussing the provisions related to the ouster of jurisdiction under Section 52-C, the Hon'ble Court held as follows :-

“The order of confiscation under Section 52(3) is subject to an appeal under Section 52-A and a revision under Section 52-B. Sub-section (5) of Section 52-B imparts finality to the order of the Court of Sessions in revision notwithstanding anything contained to the contrary in the CrPC and provides that it shall not be called into question before any court. Section 52-C stipulates that on the receipt of an intimation by the Magistrate under sub-section (4) of Section 52, no court, tribunal or authority, other than an Authorised Officer, an Appellate Authority or Court of Sessions (under Sections 52, 52-A and 52-B) shall have jurisdiction to pass orders with regard to possession, delivery, disposal or distribution of the property in regard to which confiscation proceedings have been initiated. Sub-section (1) of Section 52-C has a non obstante provisions which operates notwithstanding anything to the contrary contained in the Indian Forest Act 1927 or in any other law for the time being in force. The only saving is in respect of an officer duly empowered by the State Government for directing the immediate release of a property seized under Section 52, as provided in Section 61. Hence, upon the receipt of an intimation by the Magistrate of the initiation of confiscation proceedings under sub-section (4)(a) of Section 52, the bar of jurisdiction under sub-section (1) of Section 52-C is clearly attracted.”

2005 (10) SCC 437, State of Jharkhand Vs. Govind Singh

Can a vehicle seized under section 52 be released on payment of fine in lieu of confiscation?

This question has been answered in this case in the negative wherein it was held that on a combined reading of section 52 and section 68 of the Forest Act as amended by the Bihar Act, the vehicle liable for confiscation may be released on payment of the **value of the vehicle and not otherwise**. This is certainly a discretionary power, the exercise of which will depend upon the gravity of the offence. The officer is empowered to release the vehicle on payment of the value thereof as compensation. Section 68 of the Act deals with the power to compound offences.

In this case in a protected forest area, a truck was found loaded with 11.8 tonnes of coal. Confiscation proceeding arising out of the forest case was instituted and a show cause notice was issued. The respondent filed a reply to the notice. After considering the same the DFO, Hazaribagh directed confiscation of truck. The appeal and the revision were dismissed. The Hon'ble Court was moved under Article 226 and it was held by the Court *"it will be inequitable to direct confiscation considering the value of the coal was not established and therefore to meet the ends of justice it was held that power to impose fine in lieu of confiscation can be read into under section 52(3) of the Act. Accordingly a fine of Rs. 50,000 was imposed and the seizing authority was directed to release the vehicle on payment of the amount."*

The Apex court while allowing the appeal of the state held that confiscation in terms of sub-section 3 of the section 52 of the Act is a statutory action, which provides that when forest offences as defined in section 2(3) of the Act are believed to have been committed in respect of the seized vehicle, the authorized officer may confiscate the forest produce and the vehicle involved in transportation of the forest produce. Foundation for action in terms of Section 52(3) of the Act is the believe entertained by the officer concerned that forest offence has been committed. It is not the value of the forest produce which is relevant, but the value of the article liable for confiscation.

State of Bihar Vs. Kedar Sao, 2004 (9) SCC 344

A truck carrying illicit katha (about 450 KG) was seized by the range officer of forest exercising power under section 52 of the Indian Forest Act, 1927 (as substituted by Bihar Act 9 of 1990. The authorized officer by order dated 19/1/1992 ordered the confiscation of the seized truck. The Hon'ble Patna High Court held the confiscation without jurisdiction and set it aside. The power of confiscation was with court and not the DFO. It was further held that Bihar Produce Regulation of Trade Act, 1984 alone apply to the case and the Indian Forest Act stood excluded. The Apex Court held that the High Court had not only

ignored amendment Act 9 of 1990 but had also misapplied the Trade Act. The Trade Act did not efface the Central Act as amended by Bihar Act. The appeals were accordingly allowed.

Amit Kumar Vs. State of Jharkhand, 2019 SCC Online Jhar 438

A speeding truck loaded with coal extracted by illegal mining from JORDAG Notified Protected Forest Area was intercepted and seized. On the basis of the prosecution report confiscation proceeding was initiated and it was confiscated by the DFO and the same was upheld in appeal and revision.

The order of confiscation was set aside by the High Court mainly on the ground that the petitioner produced document of purchase of coal from CCL Depot. It was also held that sections 33, 41 and 42 of the Forest Act was not attracted.

Mosomat Purnima alias Sugni Devi v. State of Jharkhand, 2018 SCC Online Jhar 1904

The plea for release of confiscated vehicle was raised on the ground that during the pendency of the writ petition, the criminal case against him has been dropped and he is acquitted of the charges by judgment dated 25.08.2017. Cognizance was not taken under Section 33 of the Indian Forest Act.

While dismissing the petition, the Hon'ble Court held that the trailer was seized on the basis of the report of the Police Officer under Section 52 read with Bihar Amendment. Pursuant to the Police Report, there was reason to believe that Forest offence has been committed. After notice, the petitioners appeared before the Authorized Officer but never made out a case that the tractor and trailer was used without his knowledge or without his connivance. Thus, the onus under Section 52(5) on the petitioner was not discharged.

The Hon'ble Court by following the ratio of the judgment of the Hon'ble Apex Court, reported in (1985) 4 SCC 573 held that the two proceedings, namely criminal and confiscation, are quite separate and distinct in as much as confiscation proceeding is not dependent upon launching of criminal prosecution.

State of West Bengal v. Mahua Sirkar, (2008) 12 SCC 763.

The Apex Court held that a bare reading of Sub-section 2 of Section 59-B (West Bengal Amendment) makes the position clear that no order of confiscation shall be made if the owner proves to the satisfaction of the Authorized Officer that such tool etc. was used in carrying the forest produce without the knowledge or connivance of the owner. The requirement is mandatory that the owner has to prove that he had no knowledge or had not connived. Mere assertion without anything else will not suffice. This aspect has to be established by sufficient material.

Bibi Amna Khatoon v. State of Jharkhand, 2013 SCC Online Jhar 57

A duty has been cast upon a person under Section 52(5) of the Bihar Amendment Act 1990 who claims release of the vehicle and objects to the confiscation of the vehicle to prove that such articles in the vehicle were put without his knowledge or connivance and further, he took reasonable and necessary precaution against the use of his vehicle for commission of forest offence. The petition for release was accordingly dismissed.

State of Jharkhand through DFO, Dhanbad Forest Division v. Binod Kumar Saria, (2007) 3 JCR 503 (Jhr)

Relying on the judgment of the Apex Court in *State of West Bengal v. Sujit Kumar Rana*, wherein it was observed by the Apex Court that a confiscation envisages a civil liability whereas an order of forfeiture of forest produce must be preceded by a judgment of conviction. Although indisputably having regard to the phraseology used in Section 59 A (2), there cannot be any doubt whatsoever that commission of a forest offence is one of the requisite ingredients for passing an order of confiscation; but the question as to whether the order of acquittal has been passed on that ground and what weight has to attached thereto is a matter which, in the Hon'ble Court's opinion, should not be gone at this stage

State of West Bengal v. Sujit Kumar Rana, (2004) 4 SCC 129

Jurisdiction of criminal court stood excluded under Section 59G of the Act once the confiscation proceeding was initiated. However, High Court can exercise such a power only in exercise of its power of judicial review. The interim release of the confiscated vehicle by the High Court was held not proper. In such cases, since the matter was not pending before a criminal court, therefore, the power under Section 482 could not be exercised. The confiscation proceedings do not commence unless notice under Section 59-B is issued to the parties concerned. The nature of order of confiscation of forest produce is not a penalty or punishment. Such an order, however, can be passed only in the event if a valid seizure is made and Authorized Officer satisfies himself regarding the ownership of the forest produce in the state and also regarding the commission of forest offence. A proceeding for confiscation can be initiated irrespective of the fact as to whether prosecution for the commission of a forest offence has been lodged or not.

Smt. Chandrawati Devi v. State of Bihar, (1992) 1 PLJR 247

A transaction in respect of kendu leaves does not amount to a forest offence within the meaning of Indian Forest Act. Therefore, an order passed for confiscation of a vehicle engaged in carrying kendu leaves under purported exercise of jurisdiction will be invalid. The violation, if any, will be of the provisions of Bihar Kendu Leaves Act 1973.

Bijay Krishna Sahay v. State of Bihar, (FB) – (1998) 3 PLJR 429

Illegality of search and seizure will have no bearing on the confiscation proceeding and the criminal case. Neither the criminal case will fail, nor will the confiscation proceedings become non-maintainable. The Authorized Officer can take into account the relevant evidence/material even if obtained on illegal search and seizure after giving reasonable opportunity of being heard in respect thereof to the persons whose property is sought to be confiscated.

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*List of
Important Authorities*

THE STATE OF JHARKHAND VS. TAURIAN INFRASTRUCTURE
[2014 (1) J C R 342 (Jhr)]

The State of Jharkhand & Ors. (In All Cases) ... Appellant
Versus

Taurian Infrastructure Pvt. Ltd. (In All Cases) ... Respondent

R. BANUMATHI, CJ AND APARESH KUMARI SINGH, J.

L.P.A NO. 103 WITH L.P.A NO. 104 AND 105 OF 2013 DECIDED ON DECEMBER 2, 2013

(A) Tenancy—Mutation—Order with regard to mutation—Can be passed on basis of possession only—Circle Officer/LRDC/Deputy Commissioner not supposed to determine title and proprietary right in the immovable property—Mutation proceedings not judicial proceedings.

[Paras 21 and 22]

(B) Chota Nagpur Tenancy Act, 1908, Section 46(1)(b) Proviso (a) and (b)—Transfer of land by a member of Scheduled Tribe in favour of non-tribal not to be registered—Transfer made in contravention of Section 46(1)—Not to be recognized as valid by any Court of law—Prior permission of the Deputy Commissioner necessary—Transfer of law of tribal in favour of non-tribal prohibited in law—possession of land by non-tribal on basis of illegal transfer cannot be recognized.

[Para 29]

Case-laws.—2005 (1) JLR 1—Relied on; AIR 1996 SC 2306—Referred.

(C) Chota Nagpur Tenancy Act, 1908, Section 46(1)(b) Proviso (b)—Transfer of land—Occupancy raiyati being a member of Scheduled Tribe/backward class—Can transfer land to another person who is Scheduled Tribe/backward class and resident of same police station within which the holding is situated with prior permission of the Deputy Commissioner—Restriction applicable to Scheduled Tribe equally applicable to a member of Backward Class.

[Para 34]

Law laid down :

C.N.T., 1908, Sec. 46(1)(b)].—Transfer of land of a tribal in favour of non-tribal is prohibited in law consequently possession by a non-tribal on basis of illegal transfer cannot be recognized.

Counsel :

V.K. Prasad, SC (L&C), for the petitioners.

B. Poddar, Sr. Adv., D. Poddar, R.K. Bhargava, P. Poddar and A. Sinha, for the respondent.

JUDGMENT

R.Banumathi, CJ.—These L.P.As are preferred against the order of the learned Single Judge passed in writ petitions nos.,934/2011, 946/2011 and 940/2011, setting aside the order passed by the Deputy Commissioner, Ranchi, in Mutation Revision Nos.63, 64 and 65R15/2009-10 dated 16.11.2010.

2. Since all L.P.As arise out a common judgment, they have been heard together and are being disposed of by this common judgment.
3. The case of the respondent-writ petitioner:- One Lal Harak Nath Shahdeo, ex-landlord, was holding different pieces of land comprising of Mouza – Hazam, Thana No.281 and Mouza – Kharsidag,Thana No.326.. The ex-landlord, Lal Harak Nath Shahdeo, through his grandson and duly constituted power of attorney holder, namely, Kisto Kali Nath Shahdeo, granted permanent raiyati settlement in favour of one Dr. Shiv Shankar Sahay Srivastava by registered deed of permanent settlement dated 9.9.1947. On the basis of the aforesaid settlement, the said Dr. Shiv Shankar Sahay Srivastava came in possession of the land and paid rent to the ex-landlord against the grant of rent receipts and there was family partition in the family of Dr. Shiv Shankar Sahay Srivastava by a partition deed dated 6.8.1971 and land settled in favour of Dr. Shiv Shankar Sahay Srivastava was partitioned amongst his seven sons, namely, (1) Gauri Shankar Sahay, (2) Ravi Shankar Sahay, (3) Tara Shankar Sahay, (4) Hari Shankar Sahay, (5) Vinay Shankar Sahay, (6) Prem Shankar Sahay and (7) Bipin Bihari Sahay.
4. As per the share allotted to the aforesaid seven sons, a Mutation Case No.52R27/1976-77b was filed and by the order dated 11.10.1976, the then Circle Officer allowed mutation in separate names showing mutation granted in favour of seven sons of Dr. Shiv Shankar Sahay Srivastava. Out of the seven sons, Gauri Shankar Sahay, Tara Shankar Sahay and Vinay Shankar Sahay sold 13.72 acres of land to one Sharad Kumar Modi by terms of registered sale deed dated 28.6.1995. Thereafter Sharad Kumar Modi applied for mutation, which was allowed by the order dated 20.3.2003. The writ petitioner purchased the lands, which are the subject-matter in issue, by three sale deeds dated 3.1.2008. The writ petitioner-respondent filed three applications for mutation and by the order dated 31.3.2008, the Circle Officer allowed mutation application with respect to the land under Khata No.48 and rejected mutation application in respect of the land under Khata Nos. 45,75 and 85.
5. Aggrieved by the order passed by the Circle Officer, the writ petitioner-respondent filed Mutation Appeals before the Land Reforms Deputy Collector, Ranchi, (hereinafter called as LRDC). By the order dated 1.7.2008, the LRDC set aside the order passed by the Circle Officer and mutation was allowed in favour of the respondent with respect to the Khata Nos.75, 85 and 45, i.e. with respect to 41 acres of land aforesaid.
6. During the course of enquiry conducted with respect to mutation of 41 acres of land in favour of the respondent, various illegalities and irregularities came to light and the Circle Officer filed Mutation Revision Nos.63, 64 and 65R15/2009-10 before the Deputy Commissioner, Ranchi. By the order dated 17.2.2010, the Deputy Commissioner admitted the revision applications, staying the order of LRDC dated 1.7.2008. Challenging the order passed by the Deputy Commissioner, the writ petitioner-respondent filed W.P (C) Nos.2693, 2715 and 2713/2010. The said writ petitions were disposed of directing the Deputy Commissioner to dispose of the revision applications of the respondent at an early date. Thereafter the

Deputy Commissioner allowed the revision applications and set aside the order dated 1.7.2008. Being aggrieved by the order passed by the Deputy Commissioner, Ranchi, the writ petitioner-respondent filed three writ petitions being W.P (C) No.934, 940 and 946/2011.

7. The appellant-State of Jharkhand filed counter affidavit and supplementary counter-affidavit contending that the writ petitions filed by the respondent involved disputed questions of facts which could not be adjudicated under Article 226 of the Constitution. According to the appellant-State of Jharkhand, since the original settlement was granted on 9.9.1947, the said transfer had been made to defeat the provisions of the Bihar Land Reforms Act, 1950, causing loss to the Government or to obtain higher compensation since the settlement was made after the cut-off date i.e. 1.1.1946 and therefore, it was a fit case for initiation of a proceeding under section 4(h) of the Bihar Land Reforms Act, 1950 for annulment of the settlement. It was also contended that purchase of land by the respondent by sale deeds dated 3.1.2008 was made to grab the lands of Khata No.45 and Khata No.85, which were Gair Mazuruwa Malik land and also the lands of Khata No.75 which was Kaimi in name. It was averred that the respondent did not bring on record any document as to how the respondent claimed the Kaimi land measuring 3.91 acres, which was recorded in the name of Budhan Lohar. According to the appellant -State, the transfer of land belonging to the Scheduled Tribe is hit by section 46 of the Chota Nagpur Tenancy Act, 1908.
8. Upon consideration of rival contentions, learned Single Judge, by the common order dated 10.4.2012, held that the LRDC had taken into consideration all relevant facts and came to the conclusion that LRDC rightly ordered mutation proceedings in the name of the respondent. The learned Single Judge held that the mutation court has a very limited jurisdiction and has only to see that the semblance of title and possession of the property and ignoring the scope of mutation proceedings, the Deputy Commissioner has delved into the question of title and possession and on those findings, the learned Single Judge set aside the order passed by the Deputy Commissioner and restored the order passed by the LRDC in Mutation Appeal Nos.31,32 and 33R15/2008-09.
9. Challenging the order of the writ court, learned counsel for the appellant-State mainly raised the following four contentions:-
 - The settlement in the year 1947 being beyond 1.1.1946 is hit by section 4(h) of the Bihar Land Reforms Act, 1950 and the same cannot be made.
 - Out of 41 acres, 1.34 acres of land are Bakast in nature, 36.01 acres of land are Gair Mazurwa in nature and 3.91 acres of land are Kaimi in nature and under section 46 of the Chota Nagpur Tenancy Act, 1908, there is complete bar for Schedule Tribe/backward classes to transfer the lands to non-tribal/non-backward class.
 - The mutation application filed by the respondent was not at all maintainable under the provisions of the Bihar Tenants Holding (Maintenance of Records) Act, 1973.
 - The purpose of mutation is only for alteration in the entries in the continuous Khatian and for collection of revenue and not for resolving the dispute, rival claims like adverse claim to the recorded person.
10. Learned Senior Counsel appearing for the respondent contended that the respondent purchased the property from the sons of Dr. Shiv Shankar Sahay Srivastava and mutation

The State of Jharkhand Vs. Taurian Infrastructure

was effected earlier in the name of ex-landlord. Lerner senior counsel appellant-State to contend that the lands under Khata Nos.75, 85 and 45 are Kaimi lands and that mutation cannot be effected.

11. We have considered the submissions of the learned counsel for the appellant and learned Senior Counsel for the respondent.
12. The respondent contends that they purchased the property from Suresh Kumar Sarawgi, Raj Kumar Tiberwal and Sharad Kumar Modi. The details of various sale deeds under which respondent purchased the property in dispute are as under:-

“L.P.A NO.103/2013 (arises out of W.P(C) No.934/2011 and Judgment dated 10.4.2012.

Registered Sale Deed No.91 dated 3.1.2008.

Vendor — Suresh Kumar Sarawgi

Village	Khata No.	P.S. No.	Plot No.	Area
Hazam	75	281	26	1.46 acres
Hazam	75	281	29	2.45 acres
			Total	3.91 acres

“L.P.A NO. 104/2013 (arises out of W.P(C) No.936/2011 AND Judgment dated 10.4.2012.

Registered Sale Deed No.92 dated 3.1.2008.

Vendor — Raj Kumar Tiberwal

Village	Khata No.	P.S. No.	Plot No.	Area	Nature of Land
Hazam	85	281	1	2.63 acres	Gairmazrua Malik
Hazam	85	281	30	3.11 acres	Gairmazrua Malik
Hazam	85	281	3	1.34 acres	Gairmazrua Malik
Hazam	85	281	551	6.64 acres	Gairmazrua Malik
			Total	13.72 acres	

“L.P.A NO. 105/2013 (arises out of W.P(C) No.910/2011 AND Judgment dated 10.4.2012.

Registered Sale Deed No.90 dated 3.1.2008.

Vendor — Sharad Kumar Modi

Village	Khata No.	P.S. No.	Plot No.	Area
Hazam	45	281	49	1.00 acres
Hazam	45	281	551	2.45 acres
			Total	3.45 acres

13. The respondent mainly traced their title and possession to the settlement deed dated 9.9.1947 in favour of one Dr. Shiv Shankar Sahay Srivastava. The contention of the appellant-State is that the said settlement deed dated 9.9.1947 made in favour of Dr. Shiv Shankar Sahay Srivastava was hit by the provision of section 4(h) of the Bihar Land Reforms Act,

- 1950, since the settlement was made to defeat the object of the Bihar Land Reforms Act, 1950.
14. The object of the Bihar Land Reforms Act, 1950 is intended to provide for the transference to the State of the interests of proprietors and tenure-holders in land of the mortgagees and lessees of such interests as indicated in the preamble of the Act. As per Section 4(a), such tenure including the interest of the proprietor or tenure holder in any building or part of a building comprised in such estate or tenure shall vest absolutely in the State free from all encumbrances. Any transfer made after 1.1.1946 is not valid.
 15. In terms of section 4(h) of the Act of 1950, the Collector shall have power to make enquiries in respect of any transfer including the settlement or lease of any land comprised in such estate or tenure as any transfer or settlement made after 1.1.1946 is not a valid transaction. The Collector shall have power to make enquiries in respect of any transfer including settlement or lease of any land comprised in such estate.
 16. The settlement deed relied upon by the respondent is dated 9.9.1947. According to the appellant-State, the original settlement deed dated 9.9.1947 has been made to defeat the provision of the Bihar Land Reforms Act, 1950 and therefore, it was a fit case for initiation of a proceeding under section 4(h) of the Bihar Land Reforms Act, 1950 for annulment of the settlement and the respondent has not produced any document to show that under Khata Nos.75, 85 and 45, there was raiyati settlement.
 17. In the revisional order, the Deputy Commissioner, Ranchi, observed that the subject is related to Section 4(h) of the Bihar Land Reforms Act, 1950 and the settlement deed dated 9.9.1947 cannot be taken to be a valid document to effect mutation. The Deputy Commissioner had also made certain observations regarding the settlement under the Power of Attorney of the grand son of Lal Harak Nath Shahdeo.
 18. The questions are whether the land settlement deed dated 9.9.1947, which is subsequent to cut-off date 1.1.1946, is a valid transaction and whether the said land has become raiyati settlement are the disputed questions of fact and these disputed questions of fact cannot be decided in mutation proceedings and without considering the nature of possession, mutation cannot be effected.
 19. Learned Single Judge held that the mutation court has very limited scope of going into the details of title and has only to see the semblance of title and possession of the property. Learned Single Judge further held that without being aware of the true import and the provisions of the law relevant to the context, the Deputy Commissioner has made several observations with regard to the title and possession and therefore, learned Single Judge set aside the order passed by the Deputy Commissioner.
 20. Learned Senior Counsel for the respondent submitted that the mutation proceeding is only for the purpose of collection of revenue and the Deputy Commissioner was not right in going into the question of title and therefore, the learned Single Judge rightly set aside the order passed by the Deputy Commissioner.
 21. It is not in dispute that the order with regard to mutation has to be passed on the basis of possession only inasmuch as the authority concerned cannot decide any such dispute and complicated question of title. We are also of the view that in mutation proceeding, the

Circle Officer/LRDC/Deputy Commissioner are not supposed to determine the title and proprietary right in the immovable property for the reason that the mutation proceedings are merely in the nature of fiscal enquiries, instituted in the interest of the State for the purpose of ascertaining that each of the several claimants is in occupation and for the purpose of collection of revenue.

22. Of course, the Deputy Commissioner, Ranchi, made certain observations regarding the documents produced by the respondent. There is no dispute with regard to the legal proposition that mutation proceeding is not a judicial proceeding and the right, title and interest cannot be determined in such a proceeding. It is a fiscal enquiry only for the purpose of collection of revenue.
23. At the same time, the Circle Officer and Deputy Commissioner are not precluded from considering the evidence on the basis of which the appellant is claiming possession, vide 2005(1) JLR 1 (**State of Jharkhand & Ors. Vs. Arjun Das**). Lest the benevolent object of the Acts of the Chota Nagpur Tenancy Act, 1908 and the Bihar Land Reforms Act, 1950 would be defeated.
24. As pointed out earlier, the respondent traced the title through the settlement deed dated 9.9.1947, the partition in the family of Dr. Shiv Shankar Sahay Srivastava, and other documents. Orders of mutation of the heirs of Dr.Sahay and one Mr.Sarawgi, respectively, show that they do not show the valid orders of the devolution of title on Dr.Shiv Shankar Sahay said to have devolved on the basis of the settlement made on 9.9.1947, made through the alleged Power of Attorney Holder of Harak Narayan Sahadeo.
25. Perusal of written submission made by the writ petitioner in the Mutation Revision Case at page 68 (iii) to (v) also fails to disclose any documents in support of the contention that the title passed in favour of Dr.Sahay from the landlord Mr.Harak Nayan Sahadeo and as to when Dr.Sahay became a statutory tenant. In the absence of any documents, it cannot be contended that the Deputy Commissioner exceeded the jurisdiction in making certain observations regarding lack of title.
26. The order of the Deputy Commissioner impugned in the writ petition also takes into account that the LRDC did not issue any notice upon the State before annulling the order of the Circle Officer whereunder the mutation in respect of the three plots bearing Plot Nos.45,75 and 85 respectively were refused. It also takes notice of the fact that no proof of return of erstwhile Jamindar of such permanent settlement made in favour of Dr.Sahay has been made. In the writ petition also, no such document has been adduced. While so, the learned Single Judge was not right in setting aside the orders of the Deputy Commissioner.
27. According to the respondent, the lands were originally in the name of ex-landlord, Lal Harak Nath Shahdeo. As pointed out earlier, the respondent failed to disclose any documents in support of its contention that the title passed in favour of Dr.Shiv Shankar Sahay. According to the appellant-State, the total land involved in three mutation applications is 41 acres, out of which 1.34 acres of land are Bakast in nature, 36.01 acres of land are Gair Mazurwa in nature and 3.91 acres of land are Kaimi in nature, which are standing in the name of Budhan Lohar.
28. Learned counsel for the appellant contended that section 46 of the Chota Nagpur Tenancy Act, 1908 prohibits a transfer of land by the Scheduled Tribe to a non-tribal and therefore,

the respondent cannot seek for mutation proceedings. Section 46(3) of the Tenancy Act, 1908 reads as under:-

“No transfer of contravention of sub-section (1), shall be registered or shall be, in any way recognized as valid by any Court, whatever in exercise of civil, criminal or revenue jurisdiction.”

29. Sub-section (3) of section 46 of the Chota Nagpur Tenancy Act, 1908 clearly provides that no transfer of land by a member of Scheduled Tribe in favour of non-tribal shall be registered and even if such a transfer is made in contravention of section 46(1) of the Chato Nagpur Tenancy Act, 1908, the same shall not be recognized as valid by any court of law. In terms of section 46(1)(b), proviso (a) and (b), for transfer of land by a occupancy-raiyati to another person, who is a scheduled tribe and resident of the area of the same police station within which the holding is situated, prior permission of the Deputy Commissioner is necessary and when transfer of land of a tribal in favour of a non-tribal is prohibited in law, then possession of land by non-tribal on the basis of illegal transfer cannot be recognized. Considering the question of mutation proceeding in respect of the transaction by a member of scheduled tribe in favour of non-tribal in violation of provisions of section 46 of the Tenancy Act, 1908, the Division Bench of this Court in the case of **State of Jharkhand & Ors. Vs. Arjun Das** reported in 2005(1) JLR 1 held as under:-

“21. Coming back to the instant case, as noticed above, mutation was refused by the Circle Officer, on the ground that the petitioner purchased the land from a member of Scheduled Tribe in violation of the provisions of Section 46 of the C.N.T Act. If that is so, transfer of land by a member of Scheduled Tribe in favour of the petitioner in violation of the provisions of the Act is itself illegal, null and void and the purchaser has not acquired right, title and interest over the said land. In such circumstances even if the purchaser came in possession of the tribal land by virtue of transfer by a member of Scheduled Tribes in contravention of the provisions of C.N.T. Act, possession of such transferee cannot be recognized by any Court of law. The Circle Officer can, therefore, refuse to enter the name of the purchaser by deleting the name of the tribal from the revenue records or from register-II maintained by the office of the Circle Officer.”

30. According to the appellant, land under Khata nos.75 and 85 are Gair Mazurwa land and 45 as indicated in Survey Khatiyani are Kaimi land, which was recorded in the name of Langra Lohar, a member of Scheduled Tribe and any transfer by occupancy-raiyati, who is a Scheduled Tribe, to a non-Scheduled Tribe is hit by section 46(3) of the Chota Nagpur Tenancy Act, 1908. According to the appellant, Khata No.75 of disputed land is Kaimi land. The contention of the appellant is that there are no documents to show that duly constituted power of attorney holder, namely, Kisto Kali Nath Shahdeo, was granted permanent rayati settlement.
31. In his order, the Deputy Commissioner has made certain observations that the Bakast land held by the ex-zamindar is only 1.34 acres out of 41 acres, whereas the total Government Gair Mazurwa land in the whole of the case was 36.01 acres and 3.91 acres of land is tribal land and that the settlement deed is only an attempt to grab the Gair Mazurwa land and also the tribal land. Those observations of the Deputy Commissioner is only in the context of considering the documents for the purpose of examining the correctness of the order of the LRDC. In our considered view, those observations would not amount to deciding the

title and the Deputy Commissioner cannot be said to have exceeded the jurisdiction of a mutation proceeding.

32. When transfer of land of a tribal in favour of a non-tribal is prohibited in law, then possession by a non-tribal on the basis of illegal transfer cannot be recognized and the ratio laid down in the decision reported in 2005(1) JLR 1 (supra) squarely applies.
33. Placing reliance upon AIR 1996 SC 2306 (**Nityanand Sharma & Ano. Vs. State of Bihar & Ors.**), learned Senior Counsel submitted that Lohars are 'other backward class' and are not scheduled tribe and therefore, the original transaction in favour of the ex-landlord, Lal Harak Nath Shahdeo, is not hit by section 46 (3) of the Chota Nagpur Tenancy Act, 1908.
34. By a careful reading of section 46(1)(b) proviso (b) of the Chota Nagpur Tenancy Act, 1908, it is seen that occupancy-raiyati, who is a member of scheduled tribe/backward class, can transfer land to another person who is a scheduled tribe/backward class and a resident of the same police station within which the holding is situated, only with the prior permission of the Deputy Commissioner. The restriction that is applicable to a member of the scheduled tribe is equally applicable to a member of backward class. Therefore, the contention of the learned Senior Counsel for the respondent does not advance the case of the respondent.
35. The questions whether the alleged settlement deed dated 9.9.1947 in favour of Dr. Shiv Shankar Sahay Srivastava is hit by Section 4(h) of the Bihar Land Reforms Act, 1950 and also hit by Section 46(3) of the Chota Nagpur Tenancy Act, 1908 and whether the alleged possession on the basis of such illegal transfer can be recognized, are serious questions to be decided by the appropriate forum where parties can adduce oral and documentary evidence. When any transaction is challenged as invalid and hit under the provisions of Section 4(h) of the Bihar Land Reforms Act, 1950 and Section 46(3) of the Chato Nagpur Tenancy Act, mutation cannot be effected.
36. Having regard to the nature of contentious issues raised by the appellant-State, the Deputy Commissioner, Ranchi, rightly set aside the order of LRDC and restored the order of the Circle Officer. The contentious issues raised by the appellant-State both in the counter-affidavit and supplementary counter-affidavit were not considered by the learned Single Judge and the learned Single Judge was not right in interfering with the order of the Deputy Commissioner, Ranchi and the impugned order dated 10.4.2012 passed by the learned Single Judge is liable to be set aside.
37. The order dated 10.4.2012 passed in W.P (C) Nos. Nos.,934/2011, 946/2011 and 940/2011 is set aside and these L.P.As are allowed. The order of the Deputy Commissioner, Ranchi, confirming the order of the Circle Officer dated 31.3.2008 is restored.

L.P.A. allowed.

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MAHADEO ORAON VS. STATE OF BIHAR & ORS.
[2009] 0 Supreme(Jhar) 10161/ [2009] 4 JLJR 106

Mahadeo Oraon ... Petitioner
vs.
State of Bihar & Ors. - Respondents

AJIT KR. SINHA, J.
CWJC NO. 2383 OF 1999(R) DECIDED ON : 1.5.2009

Chota Nagpur Tenancy Act, 1908—Sections 7/A and 48(4)—restoration of land—order of restoration reversed by Revisionai Authority on the ground of limitation—Revisionai Authority erred in coming to such conclusion because the period of limitation was 30 years as the land was Bakast Bhuinhari land —.Moreover, unregistered Hukumnama is not admissible and can not be considered as a deed of gift — application allowed.(Paras 5 to 9)

CHOTA NAGPUR TENANCY ACT : S.48(4), S.71(a)

Cases Referrred : 1992(2) PLJR 986-Relied upon.

Order

In the instant writ petition the petitioner prays for issuance of a writ in the nature of certiorari or any other writ, order or direction for quashing the order dated 18.5.1999 passed by respondent No.2, Commissioner, South Chota Nagpur Division, in S.A.R. Revision No. 120/1991, allowing the said revision and setting aside the orders of land restoration passed by the respondent Nos. 3 and 4 respectively in favour of the petitioner in the purported exercise of his revisional powers under Section 217 of the Chota Nagpur Tenancy Act as the Respondent No. 2 has completely misdirected himself in law by misconstruing the limitation period as provided under Section 48(4) of the Chota Nagpur Tenancy Act and in not applying the limitation of 30 years as applicable in cases of land restoration under Section 71 A of the Chota Nagpur Tenancy Act.

2. The facts, in brief, are set out as under:-

The petitioner had preferred an application under Section 71A of the C.N.T. Act for restoration of land of 45 decimals under R.S. Plot No. 319, Khata No. 179 at Village-Madhukam, P.S.-Sukhdeo Nagar, District-Ranchi and the same was registered as S.A.R. Case No. 169 of 1993-94. The learned Special Officer, Ranchi, respondent No. 4 herein, allowed the petition for restoration vide its order dated 13.12.1996 and S.A.R. Appeal No. 570R 15/97 was preferred under the provisions of Section 48(4) of C.N.T. Act, It was also dismissed on 15.7.1998. Thereafter S.A.R. Revision No 120 of 1998 was filed before the Commissioner who is respondent No. 2 herein, and vide its impugned order dated 18.5.1999 he was pleased to

allow the revision reversing the order of the authorities below and the same is sought to be challenged by the petitioner in the present writ petition.

3. The main contention raised by the learned counsel for the petitioner is that respondent No. 2 revisional authority has clearly erred and misdirected itself while interpreting the provisions of Section 48(4) of the C.N.T. Act in passing the impugned order which relates to restriction on the transfer of Bhuinhari land. The second contention raised by the learned counsel for the petitioner is that the exercise of jurisdiction by respondent No.2 without applying the deadline of 30 years of amended rule of limitation as provided by the Amending Act No.1 of 1986, which came into effect from 1.9.1986 by terms whereof Bhuinhari lands were also brought within the sweep of Section 71 A of the C.N.T. Act was illegal. In the instant case the restoration application was filed in the year 1993 i.e. much before 30 years. It has also been contended that respondent No.2, revisional authority himself after holding that the Sada Hukumnama had been concocted in the year 1974 by Abdul Rahman for transferring the land in question to one Ram Janam Sharma, the vendor of private respondent Nos. 5 to 14 in the year 1974-75-76 and 1991 ought to have further held that the transfer in favour of Ram Janam Sharma as also in favour of private respondent was of no consequence and it has not conferred any title on the private respondent Nos. 5 to 14. The learned counsel for the petitioner further submits that transfer in favour of private respondent Nos. 5 to 14 was not made by any member of Bhuinhari family but admittedly by Abdul Rahman and Ram Janam Sharma who were not member of the Bhuinhari family and sub-section 3 of Section 48 clearly provides that such a transfer shall not be valid. It has also been submitted that the petitioner being Oraon is a member of scheduled tribe and is entitled to the protection and enforcement of its right relating to the property as secured under Section 300-A of the Constitution of India and though being agnate relation of the recorded tenant had accordingly filed the application under Section 71A of the C.N.T. Act claiming restoration of the land in question.
4. The learned counsel for the respondents in reply submits that the Land being Bakast petition for restoration would be after the expiry 91 years from the date of transfer or dispossession and thus the claim of the petitioner had already extinguished by limitation that the land in question was settled TrTCftapparbandi right In the year 1948 by the recorded tenants Chotka Mahadeo Oraon in favour of one Abdul Rahman and said Abdul Rahman subsequently transferred the land in question by registered document to Ram Janam Sharma on 3.4.1974 and said Ram Janam Sharma in his turn has transferred portions of the land in question to the present respondents by means of registered document. It has also been submitted that building has been constructed long before the enforcement of Scheduled Area Regulation Act, 1969 and the limitation up to 12 years, as provided in Section 48(4) of the C.N.T. Act prior to coming into force of Amending Act, 1986 was applicable in the present case. It has also been contended that respondent Nos. 5 to 14 alongwith their vendor have remained in possession for a period of more than 12 years when the Amending Act, 1986 came into force and therefore they have acquired title by adverse possession.
5. In the instant case the Revisional Authority vide its order dated 18.5.99 which is sought to be challenged/set aside the order passed by the learned authority below and allowed the revision. There is no dispute about the fact that the restoration application was filed as S.A.R. Case No. 169 of 1993-94 in the land being Bakast Bhuinhari. The land which was owned and possessed by one Chotka Mahadeo Oraon was orally settled in favour of

Abdul Rahman coupled with grant of rent receipt and delivery of possession followed by customary Hukumnama dated 3.2.1948 and he had constructed boundary wall after taking settlement of land and a house in a portion of the land and later on sold a portion of the land to Ram Janam Sharma through Registered Sale Deed in the year 1974 in which son of Chotka Mahadeo Oraon namely Mangru Oraon figured as a witness. The said Ram Janam Sharma sold the land acquired by him through registered deed of sale in the year 1974 75 to the petitioner and other respective purchaser who came into possession of the respective land alongwith house standing thereon. They have also got their name mutated in the Ranchi Municipal Corporation and are paying taxes. The land is Chapparbandi and homestead and as such the provision of Section 71 A of the C.N.T. Act are not attracted.

6. It will be relevant to quote Section 71A of the Chotanagpur Tenancy Act along with the first proviso in which there was an amendment by way of Bihar Regulation No. 1 of 1986 extending the period of limitation of 30 years from the date of transfer with reference to Section 48(4) of the Act:-

"71 A. Power to restore possession to member of the Scheduled Tribes over land unlawfully transferred.-If at any time, it comes to the notice of the Deputy Commissioner, that transfer of land belonging to a raiyat [or a Mundari Khunt Kattidar or a Bhuinhari] who is a member of the Scheduled Tribes has taken place in contravention of Section 46 [or Section 48 or Section 240] or any other provision of this Act or by any fraudulent method, [including decree obtained in suit by fraud and collusion] he may, after giving reasonable opportunity to the transfer, who is proposed to be evicted, to show cause and after making necessary enquiry in the matter, evict the transferee from such land without payment of compensation and restore it to the transferor or his heir, or, in case the transferor or his heir is not available or is not willing to agree to such restoration, re-settle it with another raiyat belonging to Scheduled Tribes according to the village custom for the disposal of an abandoned holding:

Provided that if the transferee has within 30 years from the date of transfer, constructed any building or structure on such holding or portion thereof, the Deputy Commissioner shall, if the transferor is not willing to pay the value of the same, order the transferee to remove the same within a period of six months from the date of the order, or within such extended time not exceeding two years from the date of the order as the Deputy Commissioner may allow, failing which the Deputy Commissioner may get such building or structure removed:"

7. In the instant case there is no dispute about the fact that the land in question which was Bhuinhari land was transferred on 30.3.1974 and the petition for restoration was filed in the year 1993 and thus, in view of the amendment of the first proviso to Section 71 A of the Act the limitation period to file the restoration petition under Section 71 A is 30 years from the date of transfer. The fact remains that the limitation period prescribed under Section 48(4) of the Act was 12 years before amendment which stood amended by Amendment Act No. 1 of 1986 and the same was published in the Bihar Gazette on 1.9.1986 extending the limitation period to 30 years.
8. In 1992(2) PLJR pg. 986 this Court while considering a similar issue held that the Bhuinhari tenures came within the purview of Section 71 A from 1986 alone and the period of limitation would be deemed to have been extended to 30 years.
9. In the aforesaid background, the revisional authority has clearly erred in allowing the

revision petition and setting aside the order passed by the authority below solely on the ground that the petition for restoration was filed in the year 1993 and the limitation under Section 48(4) of the Chotanagpur Tenancy Act is 12 years. The revisional authority further erred in holding that the amended Act No. 1 of 1986 was published in the Bihar Gazette on 1.9.1986 and therefore, the petitioner alongwith their vendors have remained in possession for a period of more than 22 years when the amended Act No. 1 of 1986 came into force and thus, they acquired title by adverse possession.

The fact remains that period of 30 years has to be counted from the date of transfer in view of the amendment brought about in the first proviso to Section 71 A of the Act and thus, the interpretation given by the revisional authority is on the face of it erroneous and illegal. The language of the first proviso as well as Section 48(4) of the Act is that 30 years has to be computed from the date of transfer. It is well settled that transfer of land cannot be done by virtue of only a Sada Hukumnama and an unregistered Hukumnama is not admissible and cannot be considered as a deed of title more so, when the settlement was also oral.

10. Considering the aforesaid facts and circumstances of the case, this writ petition is allowed and the impugned order dated 18.5.1999 passed by revisional authority i.e Commissioner, South Chotanagpur Division is quashed.
11. There shall be no order as to costs.

□□□

MAHABIR KANSI VS. STATE OF JHARKHAND
2008 (4) JCR 429

MAHABIR KANSI ... Appellant
VERSUS
STATE OF JHARKHAND ... Respondents

AJIT KUMAR SINHA, J.
DECIDED ON AUGUST 07, 2008

JUDGMENT

Ajit K. Sinha, J.—The present writ petition has been preferred challenging the order dated 13.1.1999, passed by the Deputy Commissioner, Ranchi, in Misc. Appeal No. 254 of 1998, whereby, it has affirmed the order dated 6.4.1997, passed by the Sub Division Officer, Ranchi in Misc. Case No. 27 of 1996-97.

2. The facts in brief, as submitted by the petitioner, are set out as under :

The land, in dispute, pertains to R.S. Khata No. 268, Plot No. 2983, comprising a total area of 1.08 Acres of Village-Argora, Police Station-Arogra, Thana No. 207. A proceeding being Misc. Case No. 27 of 1996-97 was initiated by the Sub-Divisional Officer, Ranchi, on the direction of Additional Collector, since the plot, in question, was recorded as Gairmazarua Malik Parti Kadim in the revisional survey records of right.

3. In the show cause, filed by the petitioner, it was submitted that the land, in question, was settled by the Ex. Landlord Maharaja of Ratugharha by way of grant of Hukumnama, dated 22.3.1942 on receipt of Salami of Rs. 549/- only from the settlee, namely, Samu Sahu son of Jago Sahu. It has further been submitted that after settlement, the Ex. Landlord was granted receipt, which was duly accepted and acknowledged. The settlee paid rent of Rs. 14/- only as fixed in the document of settlement and that is how he came in possession and acquired valid right, title and interest over the land. It is further submitted that the landlord after vesting of estate with the State of Bihar submitted return of the land, showing the said Samu Sahu as raiyat of the land, in question. The petitioner further submits that after the death of the settlee, his son Chandan Sahu inherited the lands, in question, and paid rent in respect thereof. Chandan Sahu being the sole owner of the lands as per the satisfaction of his necessity sold the lands, in question, in favour of the petitioner vide, registered deed of sale dated 30.3.1989 on receipt of valuable consideration amount of Rs. 1,50,000/- only and that is how the petitioner acquired a valid and perfect title over the lands, in question. The petitioner's name was thereafter mutated in the Anchal office and the rents were paid. The petitioner further contends that no proceeding under Section 4(h) of the Bihar Land

Reforms Act, 1950 was ever initiated by the State with respect to the lands, in question, for annulment of the settlement and, thus, the Sub-Divisional Officer has clearly erred in coming to the conclusion and has illegally vide its order dated 6.4.1997 cancelled the settlement of the petitioner. Being aggrieved with the order dated 6.4.1997, the petitioner preferred Misc. Appeal No. 254 of 1998 before the Deputy Commissioner, Ranchi, which was also dismissed. It appears that the petitioner, thereafter, preferred Mutation Revision No. 56 of 1999 before the learned Commissioner, who also vide its order dated 7.5.2002 rejected it on the ground that second revision was not maintainable. Accordingly, the present writ petition has been preferred, challenging the orders dated 6.4.1997 and 13.1.1999.

4. The respondents in the counter affidavit have submitted that the disputed land was recorded as Gairmazarua Malik Parti Kadim in the revisional survey records of right and in view of the claim/demand for an area of 49 Decimals of the land, in question, a proceeding was initiated by the Sub-Divisional Officer, Sadar, Ranchi vide Misc. Case No. 27 of 1996-97 to examine the genuineness of the demand in respect of the land, in question, created in the name of said person in Register-II of Circle Officer, Town Anchal, Ranchi. The respondents submit that the land, in question is gairmazarua Malik land of the Government and the demand of the land, in question, was created to grab the valuable land in collusion of the Government officials and under the above mentioned facts and circumstances the demand of the disputed land, recorded in the name of the petitioner in Register-II of the Circle Officer, Ranchi, was cancelled by the learned Sub-Divisional Officer, Sadar, Ranchi vide impugned order dated 6.4.1997. It has further been submitted that five Revenue Appeals were preferred before the Deputy Commissioner and the facts, involved in all the appeals, were same and the learned Deputy Commissioner after hearing all the aforesaid appeals together passed a common order dated 13.1.1999, rejecting the appeals. The appellant authority specifically held that the land, in question, in Gairmazarua Malik land as recorded in the records of right and after vesting of Jamindari, the entire Gairmazarua land vested in the State Government under Sections 3 and 4 of the Bihar Land Reforms Act, 1950 and the State Government is deemed to be in possession by way of its statutory right and no one had the legal or vested right to settle this land after vesting of Jamindari. It is further submitted that in case the land of Gairmazarua Khata have been settled prior to 1956 then the Ex. Landlord would have submitted the return of the land to the State Government, in which the name of the settlee would have been recorded as raiyat in respect of the land and after vesting of Jamindari, the State Government would have entered the name of said raiyat in Register-II and granted rent receipt thereof to the raiyat and the name of the raiyat would have been recorded in the Tenants Khatiyani and Tenants Ledger Register, prepared according to Section 3 of the Bihar Tenants Holding (Maintenance of Rent) Act, which is not the case herein. It has also been submitted that the vendors of the petitioner as raiyat have neither filed copy of the return (M-Form) nor the rent receipt from 1956 to 1983 to prove their claim. The respondents have further submitted that the Jamabandi, produced by the petitioner was examined and found to be fake and forged.
5. In the supplementary counter affidavit, filed by the respondents, it has been specifically stated that the present land, in question, has been enlisted in the land scam of Ranchi District being Complaint No. 2 of Village-Argora and a criminal case regarding manipulation and forgery of documents along with the interference with the Government records in connivance with the revenue officials has been lodged against the writ petitioner Mahabir Kanshi being R.C. Case

No. 20 of 2000, which is sub-judice before the vigilance Court, Ranchi. It is further submitted by the respondents that a criminal case has also been lodged against the delinquent revenue officials, which has been registered as Vigilance P.S. Case No. 33 of 2002, and the same is sub-judice before the Court of Vigilance and the charges against the delinquent revenue officials have already been framed for initiation of departmental proceedings against them and the same has been sent to competent authority.

6. I have considered the pleadings and submissions of the rival parties. It appears that the illegal Jamabandi of Gairmazarua Khas land is the valuable property of the State Government, which stood vested in the State under the Bihar Land Reforms Act, 1950 and was rightly annulled by the Sub-Divisional Officer, Sadar, Ranchi. It is further clear that the contention of the petitioner about the Ex. Landjord having submitted its return to the State Government at the time of vesting of Jamindari and the contention that the State Government had accepted the vendors of the petitioner raiyats is on the face of its false and erroneous for the sole reason that no rent receipt from 1956 of 1983 was produced by the petitioner to prove his claim. Even the photo copy of the Jamabandi as produced by the petitioner examination was found to be forged and fake and held to be procured in collusion with some of the revenue officials. The fact remains that both criminal and departmental proceedings have already been against the delinquent officials and charge-sheet has also been submitted. The contention of the petitioner that Sada Hukumnama and Jamindari, receipts were produced also cannot be relied upon for the sole reason that the same can always be manufactured and in any case, no original document was filed by the petitioner and the Xerox copy cannot be relied upon. The fact remains that criminal cases have already been lodged against the petitioner also in the land scam case with regard to manipulation of forged documents and interference with the Government records in connivance and collusion with the revenue officials for which vigilance case has already been initiated and is pending as R.C. Case No. 20 of 2000 and further departmental proceedings have also been initiated wherein charge sheet has been filed. It will be apparent on perusal of Registrar-II that the Jamabandi, of the said disputed lands was created in Register-II based on forged Sada Hukumnama, in the year 1970-71 in the name of Samu Sao in collusion with the Revenue Officers of the State Government, who were neither authorized nor competent. In any case, the entry in Register-II was without any order of the competent authority and against the statutory law and circulars of the Government and the entire action of the petitioner was by way of fraud and collusion and, thus, he is not entitled to any equitable relief. The contention of the petitioner that no action under Section 4(h) of the Bihar Land Reforms Act was initiated is also unsustainable for the sole reason that the transfer itself was illegal, fraudulent and by way of collusion and, thus, not tenable and in any case, the land, in question, vested in the State and that is how it came into possession and the State is the statutory owner of the land.
7. In the aforesaid background, the illegal Jamabandi, based on forged Soda Hukumnama in collusion with the Government officials without obtaining the order of the competent authority was rightly cancelled by both the authorities i.e., the Sub-Divisional Officer and the Deputy Commissioner by a concurrent findings of facts and law. This writ petition, thus, being devoid of any merit, is, accordingly, dismissed, but without any order as to costs.

Petition dismissed.

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DINESHWAR PRASAD VS. STATE OF JHARKHAND
2008 (3) JCR 639 (Jhar.)

Dineshwar Prasad ... Petitioner
Versus
State of Jharkhand & Ors. ... Respondents

NARENDRA NATH TIWARI. J.

WP (C) NO. 2900 OF 2007, DECIDED ON JUNE 17, 2008

(A) Bihar Land Reforms Act, 1950, Section 4(h)—Cancellation of jamabandi—Jamabandi in respect of the land running in the name of petitioner's predecessor in interest since 1955-56— Petitioner purchased part of the land— His name was mutated—He has been paying rent and having continuous peaceful possession as owner—State accepted the right by accepting the rent from the predecessor in interest of the petitioner—Cancellation of long running jamabandi arbitrary and illegal—Cannot be cancelled unless there is decree/ Order of a competent Court or when it is established that it was created by play-ing fraud by the raiyat or it was vitiated in law. (Paras 16 and 17)

(B) Chhotanagpur Tenancy Act, 1908, Section 22—Right of tenancy—A statutory right—Cannot be taken away except by procedure prescribed by law— Raiyati right cannot be denied and petitioner cannot be evicted from occupancy holding except in execution decree passed in terms of Section 22 of the Act. [Para 18]

Law laid down :

[B.L.R. Act, 1950, Sec. 4(h)]—Long running jamabartdt cannot be cancelled except by a decree/order of a competent Court or when it is established that jamabandi was created by playing fraud.

Counsel:

V. Shivnath (Sr. Adv.). A.K. Sinha and N.K. Singh, for the petitioner.

M. Prasad. SC (L&C) and Manoj Kumar, for the respondents.

JUDGMENT

By the Court.—In this writ petition the petitioner has prayed for quashing the State of Jharkhand & Ors. Respondents orders dated 3.9.2006 (Annexure-5), 10.9.2002 (Annexure-3) and 5.12.2000 (Annexure-2).

2. The petitioner claims to be the raiyat of the land appertaining to R.S. Khata No. 194, plot

- No. 3683, measuring an area of 41.99 Decimals of Village-Simalia, Thana No. 739, District-Ranchi (hereinafter called as 'the said land').
3. According to the petitioner, the said land was recorded as Gair Mazarua Khas of the landlord Thakur Mahendra Nath Shahdeo in the Revisional Survey Records of Right.
 4. The ex-landlord Thakur Mahendra Nath Shahdeo had settled 12 acres of the said land in favour of one Rang Nath Sahu, son of the late Raghunandan Sahu of Village-Tikra Toli as far back as on 9.6.1942.
 5. Rang Nath Sahu sold an area of 20 Decimals of the said land to the petitioner by virtue of the registered sale deed No. 4313 dated 4.5.1992.
 6. Rang Nath Sahu further sold an area of 20 Decimals of the said land to the petitioner's wife Smt. Chanchala Devi by virtue of the registered sale deed dated 7.7.1992. The petitioner came in physical possession of the said land and has been in continuous peaceful possession thereof.
 7. Since after the settlement of the said land, the settlee Rang Nath Sahu had been in continuous possession of the said land and rent was assessed by the ex-landlord and he had been paying rent to the ex-landlord. After coming into force of the Bihar Land Reforms Act, 1956, rent was assessed in the name of Rang Nath Sahu in Case No. A-29/1955-56 and jamabandi No. 194/624 was created in the name of Rang Nath Sahu.
 8. After purchasing the land, the petitioner applied for mutation in his name in Mutation Case No. 183R27/93-94, before the Circle Officer, town Anchal. The same was allowed and the name of the petitioner was mutated in respect of the said land. The petitioner claims to be in continuous peaceful possession of the said land having right of ownership and possession.
 9. Suddenly on 5.9.1997, a notice was issued to the petitioner from the Office of the Circle Officer, Kanke, Ranchi in a proceeding initiated for cancellation of the long running jamabandi running in the name of the petitioner's predecessor-in-interest, Rang Nath Sahu. The petitioner appeared and filed his reply stating all the facts regarding his possession over the said land, mutation of the said land in his name and acceptance of rent by the State-respondents, accepting him as raiyat and others grounds". But the respondent No. 4 without considering the petitioner's reply, made recommendation for cancellation of the petitioner's jamabandi by his order dated 5.12.2000 and forwarded the record to the Land Reforms Deputy Collector, Ranchi-respondent No. 3. On receipt of the record, the Land Reforms Deputy Collector issued notice to the petitioner. The petitioner appeared and filed his reply stating the entire facts. But despite the same, the respondent No. 3 recommended to the Deputy Commissioner for cancellation of the petitioner's jamabandi and directed the respondent No. 4 to prevent sale or purchase or construction over the land in question.
 10. The Deputy Commissioner also issued a notice to the petitioner in which the petitioner appeared and stated all the facts. The case was heard at length on 14.1.2004. After hearing, the Deputy Commissioner kept the order reserved for al time.
 11. Aggrieved by the long pendency, the petitioner preferred writ petition before this Court being WP (C) No. 1464/2005. The said petition was disposed of by order dated 31.3.2005 directing the Deputy Commissioner to dispose of the case preferably within three months, if the same has not already been disposed of.

12. The Deputy Commissioner an purported compliance of the said direction passed the order dated 3.9.2006 whereby he has remanded the case with another case to the Circle Officer, Kanke, Ranchi observing that in view of the order passed in Misc. Case No. 17/1997-98, that jamabandi opened in the name of Rang Nath Sahu be cancelled.
13. The grievance of the petitioner is that he is the purchaser of a portion of the said land from Rang Nath Sahu. Though jamabandi running in his name has not been cancelled by the said order, the cancellation of jamabandi running in the name of his predecessor-in-interest. Rang Nath Sahu, shall directly and adversely affect the petitioner.
14. It has been submitted that there is no valid ground for assailing or cancelling the long running jamabandi running in favour of Rang Nath Sahu and the impugned order of the Deputy Commissioner is wholly illegal and without jurisdiction.
15. A counter-affidavit has been filed by the State-respondents contesting the writ petition. It has been stated, inter alia. that originally the said land was recorded as Gair Mazarua Malik land in the Revisional Survey Records of Right. It was found from the Register-II, Vol. III of Mouza-Simalia that a demand in respect of 64.27 acres of the said land was opened in the name of Rang Nath Sahu. But no original document was produced in support of the said entry in the name of Rang Nath Sahu. It has been stated that the jamabandi of the land .in question has been created with the object of defeating the provisions of the Bihar Land Reforms Act. The Deputy Commissioner, Ranchi has passed the impugned order for annulment of the demand running in respect of the land in question in exercise of power conferred under Section 4(h) of the Bihar Land Reforms Act, 1950. A proceeding under Section 4(h) of the Bihar Land Reforms Act for annulment of the demand running in the name of the petitioner was initiated in the Court of the Land Reforms Deputy Collector, Sadar Ranchi being Misc. Case No. 225/1997-98/27/2000. The jamabandi opened in respect of Gair Mazarua Malik land is not legal and proper and as such the impugned orders are legal and justified.
16. I have heard learned counsel for the parties and considered the facts and materials on record. It is an admitted position that though the land in question has been originally recorded as Gair Mazarua Malik in the Revisional Survey Records of Right, finally framed and published in the year 1930-35, jamabandi in respect of the said land has been running in the name of Rang Nath Sahu since the date of vesting in the year 1955-56. On the basis of the said jamabandi and the continuous Register-II. the respondents all along accepted rent and recognized Rang Nath Sahu as raiyat in respect of the said land for more than five decades. The petitioner is a purchaser of a portion of the said land. After purchasing the said land, he applied for mutation in his name before the Circle Officer. After due enquiry, mutation was allowed in his favour in Mutation Case No. 183R27/93-94 by the order of the Circle Officer, Kanke. He has been also paying rent in respect of the land purchased by him/his wile. The cancellation of long running jamabandi is, thus, wholly arbitrary, illegal and without any basis. The revenue authorities have no jurisdiction to pass orders for cancellation of the settlement under the provision of Section 4(h) of the Bihar Land Reforms Act, without following the prescribed procedure/provision of law. Though the land is recorded as Gair Mazarua Malik or Gair Abad Malik in the Revisional Survey Records of Right, the State has recognized the tenancy right of Rangnath Sahu by accepting rent over a period of several decades. His name had been running in the Tenant's Ledger/Register-II maintained by the Anchal Office for such a long time without any objection from any quarter.

17. It has been repeatedly held that a long running jamabandi cannot be cancelled, unless there is any such decree/ order of a competent Court or it is established in any legal proceeding that the jamabandi was created by playing fraud by the raiyat or the creation of such jamabandi was vitiated in law.
18. The right of tenancy is a statutory right and the same cannot be taken away except by the procedure prescribed by law. Under the provisions of the Chota Nagpur Tenancy Act, the raiyati right cannot be denied and the petitioner cannot be evicted from his occupancy holding except in execution of the decree passed in terms of Section 22 of the Chota Nagpur Tenancy Act.
19. The respondents have not brought any document on record to show that there is any such decree/order of the competent Court or there was any established fraud in obtaining the jamabandi either by the predecessor-in-interest or by the petitioner.
20. In view of the above, the impugned orders as contained in Annexures-2, 3 and 5 do not sustain in law and the same are, hereby, quashed. This writ petition is allowed.
21. No orders as to cost.

Petition allowed.

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**JAGDEO MAHTO VS. COMMISSIONER, NORTH CHOTANAGPUR
2009 (2) JCR 153 (Jhar.)**

Jagdeo Mahto ... APPELLANT
VERSUS

The Commissioner, North Chotanagpur Division, Hazaribagh and others ... RESPONDENTS

R.R. PRASAD, JJ.

LPA NO. 425 OF 2006 DECIDED ON FEBRUARY 10, 2009

(A) Revenue Laws—Mutation proceedings—Decided by the Revenue Authority—While deciding mutation proceeding Revenue Authority is not a Court of law—Mutation proceedings—Mutation proceedings are the administrative proceedings. [Para 19]

Case-laws.—2003 (4) JCR 41 (Jhr); 2003 (2) SCC 464; 1993 (2) PLJR 118— **Relied on.**

(B) Civil Procedure Code, 1908, Section 11—Applicability of—Not applicable to the proceeding which is not a judicial proceeding—Not applicable to order passed by a revenue authority since the order passed by such authority is not an order passed by a Court of law. [Para 19]

(C) Jamabandi—Cancellation of—Orders for cancellation was passed when the revenue authorities found the same was opened by a karmachari without any valid order from the competent authority —Order for creating Jamabandi was passed by a person who was not authorised under the law and as such the same was without jurisdiction—An order passed without jurisdiction can be cancelled by a competent authority after giving proper notice and opportunity of hearing to the party—Who would be adversely affected.[Para 21]

Case-laws.—2005 (1) JCR 329 (Jhr)— Distinguished; 2003 (4) JCR 41 (Jhr) : 2003 (3) JLJR 793; 2004 (1) JCR 497 (Jhr) : 2004 (1) JLJR 718—**Referred**; 2007 (2) SCC 355—**Relied on.**

(D) Jamabandi—Running or standing in the name of any particular person—No bar under law in cancelling the same. [Para 21]

Case-laws.—2001 (3) JCR 206 (Jhr) : 2001 (1) JLJR 75; 2003 (4) JCR 41 (Jhr) : 2003 (3) JLJR 793; 2004 (1) JCR 497 (Jhr) : 2004 (1) JLJR 718—**Not approved.**

(E) Revenue Laws—Revenue records —Entries in—Does not confer title on a person whose name appears in record of lights—Jamabandi—Creation of—Neither creates any right and title in favour of one or the other nor cancellation of, extinguish right and title of actual owner— Title of the property can only be decided by a competent Civil Court.

[Paras 24 and 25]

Case-laws.—1993 (2) PLJR 255; 2007 (6) SCC 186—**Relied on.**

Law laid down :

[Revenue Laws].—Jamabandi standing in the name of a particular person can be cancelled in appropriate cases when it is brought to the notice of the revenue authorities that the order for creating Jamabandi has been passed by an authority who has no authority of jurisdiction at all but after giving prior notice and an opportunity of hearing to the concerned person where interest would be adversely affected.

Counsel :

Indrajit Sinha and V.K. Prasad, for the appellant.

Ram Prakash Singh, JC to GP—II, for the State.

Anil Kumar Sinha, Sr. Adv. and Rahul Kumar, for the respondent No. 6.

Manjul Prasad, Praveen Kumar and D.K. Pathak, for the respondent No. 8.

JUDGMENT

Amareshwar Sahay, J.—In this appeal, the appellant has challenged the order dated 09.08.2006 passed in W.P.(C) No. 881 of 2002 by which the learned Single Judge, disposed of the writ petition without interfering with the orders which were challenged in the writ petition. The learned Single Judge by relying on a decision of the Patna High Court in the case of “Sitaram Choubey Vs. State of Bihar reported in 1993(2) PLJR 255” held that creation of Jamabandi neither creates any right and title in favour of one or other nor cancellation of Jamabandi extinguishes right and title of actual owner and, therefore, the impugned orders will not affect the right and title of actual owner and further that the disputed question of fact cannot be decided in the writ jurisdiction. It was observed that the aggrieved person may move the Court of competent jurisdiction for appropriate relief.

2. The facts in short are that the appellant/writ petitioner filed the aforesaid W.P.(C) No. 881 of 2002 before this Court challenging the order dated 08.07.2001 passed by the Land Reforms Deputy Commissioner, Ramgarh as well as the Order dated 24.04.2001 passed by the Additional Collector, Hazaribagh as also the Order dated 18.12.2001 passed by the Commissioner, North Chhotanagpur Division, Hazaribagh whereby, Jamabandi running in the name of the petitioner with respect to Plot No. 122 under Khata No. 69 situated in Village – Murramkalan, measuring 1.04 Acres, was ordered to be cancelled and Jamabandi was ordered to be opened in the name of Babulal Mahato, the original Respondent No. 5, who is now dead.
3. The case of the writ petitioner/appellant are that the lands of Khata No. 69 and 52 of Mouza Murramkalan were auction sold in execution of a rent decree against the recorded tenants, namely Sadhu Mahto and Bhairo Mahto and were purchased by the Ex-landlord Umraon Singh and others. Subsequently, the grand father of the appellant, namely, Guna Ram Koiri had been granted settlement of various lands on 13.11.1919 under Khata No. 69 comprised within Plot Nos. 122, 183, 184, 285 and 286, having total area of 2.01 Acres and Khata No. 52, comprised within Plot no. 162 measuring an area of 1.76 Acres in Mouza Murramkalan by the Ex-landlord Umraon Singh and others.

Pursuant to such settlement, the grand father of the appellant, who became the raiyat of

the lands settled in his favour, paid rent to the exlandlord. Subsequently, the Chhotanagpur Banking Association, by virtue of an auction sale, had purchased the proprietary interests of the ex-landlord and became the landlord so far as the grandfather of the appellant is concerned and thus, realised rent from him and on receipt of which executed rent receipts in favour of Guna Ram Koiri.

After coming into force of the Bihar Land Reforms Act, the Chhotanagpur Banking Association had filed a return under the Bihar Land Reforms Act showing Guna Ram Koiri as its raiyat. After the vesting of the lands with the State Government, a Jamabandi was created in favour of Guna Ram Koiri and his name was entered in Register II and rent was realised from the said Raiyat by the erstwhile State of Bihar.

In the year 1956 – 57, Plot Nos. 285 and 286, Khata No. 69, measuring 69 decimals, were acquired for construction of Ramgarh Block. In exercise of their raiyati rights, the heirs of late Guna Ram Koiri had also sold Plot No. 182 and 183 of Khata No. 69 to one Inder Singh and others through a registered Sale Deed dated 11.02.1965, they got their names mutated and entered in Register-II.

Sometime in the year 1990, on the basis of a report of the Circle Amin, a proceeding being Misc. Case No. 2/1990 – 91 was initiated in respect of Khata No. 69 and 52 had been initiated which included the land in dispute. In the said proceeding notices were issued to the original respondent no. 5 namely Babulal Mahato (since deceased) pursuant to which he appeared and filed his objection and similarly, the appellant also appeared and the matter was contested, inter alia, with regard to the land in question also.

The Circle Officer, by an order dated 06.10.1990 held that the Jamabandi opened and running in the name of the appellant did not require any reconsideration and thus, ordered that the same should be continued and consequently, directed the matter to be placed before the Land Reforms Deputy Collector, who in terms of order dated 12.03.1991 dropped the proceedings of Misc. Case No. 2/1990 – 91. The orders passed in aforesaid Misc. Case No. 2/1990 – 91 were never challenged and, thus, the same attained finality.

After a lapse of almost 10 years, the original respondent no. 5 Babulal Mahato (since deceased), filed an application on 25.05.2000 before the Circle Officer, Ramgarh praying for assessment of rent in respect of the disputed lands referred to hereinbefore, which was registered as Rent Assessment Case No. 3/2000 – 01.

Upon notice, the appellant appeared and filed his show cause reiterating as to how he has acquired the right and title over the disputed lands.

4. According to the appellant, the Circle officer, vide an order dated 26.06.2000, without considering the objection of the appellant in its proper perspective as well as the orders passed in Misc. Case No. 2/1990 – 91, recommended cancellation of the jamabandi running in the name of the appellant, inter alia, on the ground that the Jamabandi opened and running in the name of the appellant was doubtful. The Circle Officer further directed that the Jamabandi be opened in the name of original respondent No. 5 and rent be realised from him and consequently forwarded the same to the Land Reforms Deputy Collector. The Land Reforms Deputy Collector, Hazaribagh, upon receipt of the records from the Circle Officer, vide an order dated 08.07.2000, ordered cancellation of the appellant's Jamabandi and entering the name of original respondent No. 5 in the Register-II.

5. Being aggrieved by and dissatisfied with the aforesaid order dated 08.07.2000, the appellant preferred an appeal before the Additional Collector, Hazaribagh, being Misc. Case No. 12 of 2000, which was dismissed in terms of order dated 24.04.2001.
6. Against the aforesaid order dated 24.04.2001, a revision was preferred before the Commissioner, North Chhotanagpur Division, Hazaribagh being Jamabandi Revision No. 48/2001 which was also dismissed by order dated 18.12.2001.
7. Thereafter, the writ petitioner/appellant, by filing W.P.(C) No. 881 of 2002, challenged the aforesaid order passed by the Circle Officer, Land Reforms Deputy Collector as well as of the Commissioner. As already noticed above, the writ petition was disposed of by the impugned Order dated 09.08.2006, which is under challenge in this appeal at the instance of the writ petitioner.
8. It is relevant to mention here that during the pendency of the writ petition, the original Respondent No. 5 – Babulal Mahato died and thereafter, the present Respondent Nos. 5 to 8 were substituted in his place who happened to be the transferees of the disputed land.
9. Mr. Indrajit Sinha, learned counsel appearing for the appellant firstly submitted that the proceeding of Rent Assessment Case No. 3/ 2000 – 01 was barred by principle of resjudicata and hence, it was not maintainable. Elaborating his arguments, he submitted that since the issue as to whether Jamabandi in the name of the tenant should be allowed to be continued, was already decided earlier in Misc. Case No. 2/1990 – 91, therefore, the same could not have been allowed to be reagitated and reconsidered in a subsequent proceeding in view of the fact that Babulal Mahato had appeared and contested the earlier case being Misc. Case No. 2/1990 – 91 and therefore, the application filed by him for assessment of rent was not maintainable.

Mr. Indrajit Sinha next contended that it is not disputed that Jamabandi in favour of the appellant and his predecessor in interest had been running since vesting of the land under Bihar Land Reforms Act with the erstwhile State of Bihar and therefore, this long standing Jamabandi could not have been cancelled by the authorities concerned. In this regard, reliance has been placed by learned counsel in the cases reported in 2001(1) JLJR 75, 2003(3) JLJR 793, 2004(1) JLJR 718 and 2005(1) JCR 329.

10. On the other hand, Mr. Anil Kumar Sinha, learned Senior Counsel appearing on behalf of the Respondent No. 6 submitted that the arguments of the appellant that the order passed in Misc. Case No. 2/ 1990 – 91 has reached its finality since it was never challenged and hence, the proceeding was barred by principles of res-judicata, is not at all tenable and correct. As a matter of fact, the subject matter of Misc. Case No. 2/1990 – 91 was with respect to part of lands of Khata No. 69 bearing Plot Nos. 183 and 182 having an area of 0.31 and 0.11 Acres respectively and the whole dispute in that case was as to whether the existing entry in respect of the three Plot of Khata No. 69 and 94 were correctly made or not and at no point of time, Misc. Case No. 2/1990 – 91 was initiated in respect of the lands of Khata No. 52.

He further submitted that Misc. Case No. 2/1990 – 91 was not initiated on the basis of any application made by any person. The said proceeding was not for cancellation of existing Jamabandi nor it has for creation of Jamabandi rather it was a proceeding initiated at the instance of Karamchari itself and the order passed in the said proceeding was not appellable. It was next contended that Babulal Mahato, the original Respondent No. 5, filed an

application before the Circle Officer, Ramgarh for assessment of rent vide Rent Assessment Case No. 3/2000 – 01 in which the writ petitioner appeared and filed its show-cause and in that proceeding, he did not raise the plea of res-judicata. Therefore, the plea of res-judicata cannot be raised by the appellant at the appellate stage as has been held in the case of “V. Rajeshwari” reported in (2004) 1 SCC 551.

It is also submitted that since there is concurrent findings on facts by three revenue authorities and therefore, those findings on facts were not disturbed by the learned Single Judge in exercise of the writ jurisdiction. According to him, the original Respondent No. 5 Babulal Mahato executed registered sale deed in favour of respondent no. 6 in whose name also Jamabandi has been opened.

11. According to the learned Senior Counsel, the authorities, while adjudicating Jamabandi, do not exercise judicial or quasi judicial function. The authorities while passing orders in Mutation proceedings can not be termed as Courts nor the proceedings before them are the judicial proceedings as has been held in the case of Depta Tiwari and Ors reported in 1987 PLJR 1037 and in the case of “Shanti Devi- versus- State of Bihar & Others, reported in 1993 (2) PLJR, 118”.

In this view of the matter, Section 11 of C.P.C. applies to a proceeding with respect to a Court, cannot be applied in the present case and it will not operate as a bar. He submitted that the Hon’ble Supreme Court, in the case of Mahila Bajrangi Vs. Badri Bai reported in (2003) 2 SCC 464 has held that Mutation proceeding before Revenue Authorities are not judicial proceeding.

12. In view of the facts stated hereinabove and the points raised by the respective parties, which have been noticed in the forgoing paragraphs, let us examine the law on the point raised by the parties.
13. So far as the first question with regard to res-judicata as raised by the parties, let us examine the provisions of Section 11 of the Code of Civil Procedure, which speaks about res-judicata, which reads as under:-

“11. Res-judicata – No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

14. In order to apply Section 11 C.P.C. in a particular case the following conditions are required to be fulfilled;
 - (i) The identity of the matter in issue.
 - (ii) The identity of party.
 - (iii) The parties in the subsequent suit must have litigated under the same title in the former suit.
 - (iv) The Court, which decided the former suit, must have been competent to try the subsequent suit or the suit in which the issue has been subsequently raised.

- (v) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the former suit;
15. Apart from the above conditions, the foremost condition is that the suit or the matter in issue should have been decided by a competent Court of law.
 16. In the present case, admittedly, the order of Jamabandi has been passed in a mutation proceeding. A mutation proceeding is decided by the Revenue Authority.
 17. The Supreme Court in the case of “Mahila Bajrangi Vs. Badri Bai reported in (2003) 2 SCC 464” has clearly held that the mutation proceedings before the Revenue Authorities are not judicial proceedings in a court of law and it does not decide question of title to immovable properties.
 18. The Division Bench of Patna High Court in the case of “Shanti Devi- versus- State of Bihar & Others, reported in 1993 (2) PLJR, 118” after relying on its earlier decision, held that the mutation proceedings are the administrative proceedings and not judicial proceedings and, therefore, the officers acting under the provisions of Mutation Manual are not Courts nor the proceeding before them are judicial proceedings.
 19. Since the Revenue Authorities while deciding a mutation proceeding have been held to be not a court of law and the mutation proceedings before them are held not the judicial proceedings by the Supreme Court, therefore Section 11 of the Code of Civil Procedure cannot be applied to a proceeding which is not a judicial proceeding and it cannot be applied to an order passed by a revenue authority since the order passed by such authority is not an order passed by a Court of law. Therefore, the provision of Section 11 C.P.C., i.e. of res-judicata would not be applicable to such proceeding.
 20. The second submission of Mr. Sinha, the learned counsel appearing for the appellant that the Jamabandi running and standing since long in the name of the appellant can not have been cancelled in view of the decision of the Single Bench of this Court in the case of “Dilip Kumar Mahto-versus- The State of Bihar & Others, reported in 2001 (1) JLJR 75, “Smt. Gulbasi Devi & Others- versus- State of Bihar & Others, reported in 2003 (3) JLJR 793”, “Jitan Mahto & Another-versus- State of Bihar & 5 Others, reported in 2004 (1) JLJR 718” and of the Division Bench in the case of “ State of Jharkhand-versus- Mithila Sahkari Grih Nirman Sahyog Samiti & Others, reported in 2005 (1) JCR 329 (Jhr.)”.

In the case reported in 2001 (1) JLJR 75, the Single Bench of this Court has held that Jamabandi running in the name of a particular person for several years cannot be cancelled at the instance of the claimant in a summary proceeding. Proper course for the claimant is to move the Civil Court of competent jurisdiction for proper relief.

In the case reported in 2003 (3) JLJR 793 it has been held that once Jamabandi is opened in favour of a person and that continued for a number of years it can be cancelled only by initiating a proceeding by the Collector under Section 4 (h) of the Bihar Land Reforms Act. The same view was taken in the case reported in 2004 (1) JLJR 718.

The judgment in the case of “State of Jharkhand-versus- Mithila Sahkari Grih Nirman Sahyog Samiti & Others, reported in 2005 (1) JCR 329 (Jhr.)” relied by the appellant is not exactly on the said point. From the said judgment it appears that the Division Bench was dealing with a

case in which Jamabandi was cancelled not with respect to the entire land of particular plot but a portion thereof and that also without any notice to the affected persons.

21. In the present case we find from the orders passed by the revenue authorities, which was challenged by the writ petitioner in the writ petition, that in fact, Jamabandi was earlier opened by a Karamchari and that also without any order of a competent authority. The Commissioner in his order has given finding that the writ petitioner's claim was based on sada 'Hukumnama' in respect of raiyati land whose veracity could not be adjudged. It was further held by him that the petitioner could not submit a chit of paper with regard to his acquisition of land in auction sale.

Therefore, we find the revenue authorities passed their orders for cancellation of Jamabandi after they found the same was opened by a Karamchari without any valid order from the competent authority. In other words, the order for creating Jamabandi was passed by a person who was not authorised under the law and as such the same was without jurisdiction.

22. According to us if an order is found to have been passed by an authority having no jurisdiction or when such order is found to be absolutely illegal based on the apparent error on law or facts or when it is found to be perverse not based on record then certainly in such cases Jamabandi running or standing in the name of a particular person can be cancelled by a competent authority but of course after giving proper notice and opportunity of hearing to the party who would be adversely affected.
23. It is a settled law that any order passed without jurisdiction is a nullity. Reference in this regard may be made to the decision of the Supreme Court in the case of "Hasham Abbas Sayyad- versus- Usman Abbas Sayyad & Others, reported in (2007) 2 SCC 355" in which it has been held as under:-

"The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res-judicata which are procedural in nature would have no application in a case where an order has been passed by the tribunal/court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non jndice, being a nullity, the same ordinarily should not be given effect to."

It has not been pointed out to us that there is any bar under the law in cancelling the Jamabandi running or standing in the name of any particular person.

In the aforesaid three judgments of the learned Single Judge in the cases of "Dilip Kumar Mahto-versus- The State of Bihar & Others, reported in 2001 (1) JLJR 75, "Smt. Gulbasi Devi & Others- versus- State of Bihar & Others, reported in 2003 (3) JLJR 793", "Jitan Mahto & Another-versus- State of Bihar & 5 Others, reported in 2004 (1) JLJR 718, we find that no reason has been assigned in those judgments as to why the Jamabandi running or standing in the name of particular person in an appropriate case, cannot be cancelled. Therefore, we do not approve the view expressed in the aforesaid three judgments of this court referred in this para.

24. In view of the discussions above, we hold that Jamabandi standing in the name of a particular person can be cancelled in appropriate cases such as when it is brought to the notice of the revenue authorities that the order for creating Jamabandi has been passed by an authority

who has no authority or jurisdiction at all or where the same is found to be based on the apparent error of record/facts or on law but of course, after giving prior notice and an opportunity of hearing to the concerned person, whose interest would be adversely affected.

25. This Court in the case of “Sitaram Choubey & Ors. - versus- State of Bihar & Ors., reported in 1993 (2) PLJR 255” as well as the Supreme Court in the case of of “Suraj Bhan & Ors.- versus- Financial Commissioner & Others, reported in (2007) 6 SCC 186” have held that entries in the revenue records does not confer title on a person whose name appears in record-of- rights. The creation of Jamabandi neither creates any right and title in favour of one or the other nor cancellation of Jamabandi extinguishes right and title of actual owner. The entries in the revenue records or jamabandi have only “fiscal purpose” and no ownership is conferred on the basis of such entries. The title of the property can only be decided by a competent civil court.

In our view, the learned Single Judge rightly refused to interfere with the impugned orders passed by the revenue authorities by observing that the aggrieved person may move before a court of competent jurisdiction for appropriate relief.

26. In view of the discussions and findings above, we do not find any merit in this letters patent appeal. Accordingly, the same is hereby dismissed. However, in the facts and circumstances of the case, there shall be no order as to cost.

R.R. Prasad, J.—I agree.

LPA dismissed.

□□□

JAGJIVAN SINGH VS. STATE OF BIHAR
2013 (4) JCR 692

Jagjivan Singh ... Petitioner

Versus

1.The State of Bihar (Now Jharkhand) & Ors. ... Respondents

P.P. BHATT, J.

C.W.J.C. NO. 3106 OF 1998, DECIDED ON JULY 18, 2013

Chotanagpur Tenancy Act, 1908, Sections 71-A and 46—Restoration of land—Recorded tenant surrendered the land in question to ex-landlord by registered deed of surrender dated 18.5.1942—Previous sanction of Deputy. Commissioner not required at that time—Settlement made in favour of mother of the petitioner subsequent thereto in 1943—She continued to pay rent to ex-landlord—Proceedings under Section 71-A of the Act initiated after expiry of 30 years—Hopelessly barred by limitation—Respondent Nos. 2 and 4 had no jurisdiction to pass the order of restoration of lands—Impugned order not being in consonance with law quashed. [Para 8]

Case-laws.—1987 BLT (Ref) 303; 2004 (4) JCR 211 (SC); (2004) 4 JLR 109 (SC); (2009) 2 JCR 517 (Jhr); 1993 (1) BLJR 328; AIR 2000 SC 2276; 2004 (1) JCR 107 (Jhr); 2008 (2) JCR 1 (SC)—**Relied on.**

Law laid down :

[CNT Act, 1908, Sees. 71-A and 46].—Merely because a settlement is made with one year of surrender, it would not necessarily mean that surrender and settlement would form part of the same transaction.

Counsel :

Amar Kr. Sinha, Md. Abdul Wahab and Kundan Kumar Ambastha, for the petitioner.

Ram Prakash Singh, J.C. to GP II, for the Respondent-State.

JUDGMENT

By Court.—The petitioner, by way of filing the present writ petition under Article 226 of the Constitution of India, has prayed for quashing and setting aside the order dated 22.4.1986 (Annexure-3 to this petition) passed by respondent No. 4 in S.A.R. Case No. 201 of 1979-80 by which, the land measuring an area of 1.07 acres out of plot No. 71 of Khata No. 29 situated at village- Hesway, P.S.- Senha, District- Lohardaga has been ordered to be restored in favour of the mother of the respondent No. 5 under the provisions contained in Section 71A of the Chotanagpur Tenancy Act. It is further prayed for quashing the order dated 27.9.96 passed by the Commissioner,

South Chotanagpur Division, Ranchi in Lohardaga Revenue Revision No. 116 of 1989 allowing the revision filed by respondent No. 5 and setting aside the order of the Addl. Collector, Lohardaga passed in SAR Appeal No. 68 R 15/81-82 and confirming the order of the S.D.O. Lohardaga.

2. Heard the learned counsel for the petitioner as well as the learned counsel for the respondents and perused the order impugned as well as materials placed on record.

3. The facts giving rise to the present petition are as under;

That the land of Plot No. 71 of Khata No. 29 situated at Village Hesway, P.S. Senha, District-Lohardaga was recorded in the name of Mahabir Kherwar son of Labnu Kherwar in the Revisional Survey Record of Rights. It is the case of the petitioner that the recorded tenant namely Mahabir Kherwar being in urgent need of money surrendered the lands measuring an area of 1.67 decimals out of plot No. 71 of Khata No. 29 situated at Village Hesway, P.S. Senha, District- Lohardaga to the Ex-landlord on 18.5.1942 by virtue of a registered deed of surrender for a consideration of Rs. 80/- and the surrender was made prior to 1947 and therefore, there was no need for taking previous sanction of the Deputy Commissioner and as such surrender of the land to the Ex-landlord was just and proper. It is further case of the petitioner that the aforementioned land was settled in the year 1943 in the name of mother of the petitioner's namely Jugalmani Devi and so long the petitioner's mother was alive she remained in possession of the lands. The petitioner's mother went on making payment of rent to the Ex-landlord and after vesting of Jamindari return was filed in the name of the mother of the petitioner and she paid rent regularly to the State of Bihar and the petitioner's mother was recognized as a raiyat by the State of Bihar. After the death of petitioner's mother the petitioner inherited the aforesaid lands and came into possession of the same. Thereafter, Masomat Deo Kuwar Kherwarin mother of the respondent No. 5 filed SAR Case No. 201/1979-80 in the court of the SDO, Lohardaga against the petitioner claiming restoration of the lands measuring an area of 1.07 acres out of Plot No. 71 of Khata No. 29 situated at Village Hesway, P.S. Senha, District- Lohardaga. Thereafter, the petitioner appeared and filed show cause stating inter alia that the land was surrendered by the Khatiyani raiyat on 18.5.1942 by virtue of a registered deed of surrender and thereafter settlement was made in favour of the petitioner's mother in the year 1943 and she went on paying rent to the Ex-landlord and after vesting of estate return was filed in the name of the mother of the petitioner and she went on making payment of rent regularly to the State of Bihar. According to petitioner, he produced registered deed of surrender, rent receipts and other relevant documents. It is pertinent to note that during the pendency of the SAR Case the mother of the respondent No. 5 Deo Kuwar Kherwarin died and her legal heir was not substituted and brought on the record. Thereafter the matter was heard and the learned SDO by terms of the order dated 22.4.1986 passed the order for restoration of the land in favour of the mother of the respondent No. 5, who was not alive at the time of passing of the order.

4. Being aggrieved and dissatisfied with the said order, the petitioner preferred SAR Appeal being SAR Appeal No. 68R 15/1981-82 before the Additional Collector, Lohardaga impleading the respondent No. 5 the only legal heir of Masomat ost. Deo Kuwar and the said appeal was allowed by terms of the order dated 27.6.1987 and the order dated 22.4.1986 passed by the SDO, Lohardaga for restoration of the land was set aside. Thereafter, respondent No. 5, being aggrieved by the said order, filed Lohardaga Revision No. 116/89 before the

Commissioner, South Chotanagpur Division, Ranchi which was allowed by terms of the order dated 27.9.1996 and the order passed by the Additional Collector was set aside and the order passed by the SDO for restoration of the land was confirmed.

5. The learned counsel for the petitioner submitted that the orders passed by respondent Nos. 2 and 4 are ab initio, illegal, void and without jurisdiction. It is further submitted that the proceeding under Section 71A CNT Act is hopelessly barred by limitation as the case was initiated much after the expiry of 30 years. It is further submitted that the land under proceeding was surrendered voluntarily by the recorded tenant in favour of the Ex-landlord on 18.5.1942 by virtue of registered deed of surrender i.e. much before the coming into force of CNT Amendment Act (Act XXV of 1947) and at that time permission was not required and as such, there is no contravention of either Section 46 or any other provisos of the CNT Act. It is further submitted that it is settled principle of law that elements of fraud are required to be pleaded and proved by cogent evidence and the respondent No. 5 has failed to prove the same by cogent evidence. It is further submitted that in view of the fact that the surrender of the land was made in the year 1942 and the petition for restoration of land was filed in the year 1979-80, the respondent Nos. 2 and 4 have no jurisdiction to pass order for restoration of the lands under proceeding and the same is against the mandate of law, and therefore, the orders passed by respondent Nos. 2 and 4 as contained in Annexures- 3 and 5 are liable to be quashed.

Learned counsel for the petitioner further submitted that the settlement made within a period of one month from the date of surrender does not necessarily mean that the surrender and the settlement would form part of the same transaction. The question as to whether a surrender and subsequent settlement would form part of the same transaction or not, would depend upon the facts and circumstances of each case and has got to be decided on the basis of materials on record. In this context, the learned counsel for the petitioner has referred to and relied upon the decision reported in 1987 BLT(Rep.) 303 (Bishram Sahu Vs. Bhairo Oraon and Ors.). Learned counsel for the petitioner has also referred to and relied upon the decisions reported in (2004)4 JLR 109 SC(Situ Sahu and Ors. Vs. State of Jharkhand and Ors.) and 2009(2) JCR 517 (Kameshwar Narayan Singh and Anr. Vs. State of Jharkhand and Ors.) on the point of limitation to show that for exercise of power under Section 71A of restoration of land held that the lapse of 30 years is certainly not a reasonable time for exercise of power and the same was declared to be barred by limitation. The learned counsel for the petitioner in support of his submission has also referred to and relied upon decision given in the case of Jhalku Ahir Vs. State of Bihar and Ors. reported in 1993) (1) BLJR 328, Jai Mangal Oraon Vs. Smt. Mira Nayak and Ors. with Jai Mangal Oraon Vs. Rita Sinha and Ors. reported in AIR 2000 SC 2276, Bibi Makho and Ors. Vs. State of Bihar and Ors reported in 2004(1) JCR 107 and Fulchand Munda Vs. State of Bihar & Ors. reported in 2008 (2) JCR 1 SC.

6. As against this, the learned counsel appearing for the respondent- State Government by referring counter affidavit filed on behalf of respondent Nos. 1 to 4 submitted that the matter relates to the registered deed of surrender. The petitioner himself admits that the surrender was made on payment of a consideration money of Rs. 80/- on 18.5.1942. It is further submitted that at the relevant period of 1942, there was no restriction for transfer of lands by way of sale between schedule tribe to schedule tribe, despite of this the procedure of surrender was adopted on payment of consideration money. It is also submitted that the

registered deed of surrender was made just to transfer the lands in favour of the person belonging to non-tribal and, therefore, there is contravention of Section 46 CNT Act. It is further submitted that the deed of surrender is a fraudulent one. It is further submitted that the petitioner did not produce any cogent evidence of his possession over the land in dispute since the year 1943 despite several adjournments granted by the authorities. It is also submitted that the settlement made within one year from the date of surrender shall form part of same transaction and it amounts to transfer in contravention of Section 46 CNT Act and therefore, Section 71A CNT Act is attracted in the present case. It is also submitted that the petitioner was Opp. Party before the SAR Court in SAR Case No. 201/1979-80 but he did not produce any documentary evidence of death of the party though the onus to bring such fact was on him. It is further submitted that the petitioner has not adduce any evidence of his possession since the year 1943 and therefore, limitation of 30 years as fixed by this Hon'ble Court in 1992 judgment is not attracted at all. It is also submitted that the deed of surrender made on payment of consideration money for Rs. 80/- cannot be said voluntarily and the said surrender is in contravention of provision of Sections 72 and 46 of the CNT Act and therefore, Section 71(A) CNT Act is also attracted in the present case. It is also submitted that the enactment of Schedule Area Regulation 1969 is an special enactment and under this law onus to prove lies upon the person proposed to be evicted by filing show cause that he has not taken the lands in contravention of Section 46 or any other provisions or by fraudulent method. It is lastly submitted that the orders passed by respondent Nos. 2 and 4 are just and in accordance with the provision of law and therefore, the present writ petition may be dismissed.

7. Considering the rival submissions of the parties and from perusal of impugned orders as well as materials placed on record, it appears that the land in question was settled by virtue of the registered deed of surrender on 18.5.1942 meaning thereby, the said transaction was made prior to 1947 and therefore at the relevant point of time, there was no need for obtaining prior permission as per Section 46 of the CNT Act, which came into force on 5.1.1948. It also appears that the application for restoration was also filed by the mother of the respondent No. 5 after lapse of 37 years and therefore, as per settled proposition of law, the said application was hopelessly time barred as it emerge from the material on record. Now the above mentioned facts are required to be analyzed in view of the settled position of law as cited by the learned counsel for the petitioner, which appears to be relevant for the purpose of deciding the present case. Para 2 of the judgment reported in 1987 BLT(Rep.) 303 (Bishram Sahu Vs. Bhairo Oraon and Ors.) reads as under;

“2. In this case, the facts are short and not in dispute. On 14.2.1995 the father of respondent No. 1 surrendered the aforementioned lands in favour of landlords and thereafter, a fresh settlement was granted by the landlord in favour of petitioner. Respondent Nos. 3 and 4 while passing orders as contained in Annexures 2 and 3 to the writ petition held that the settlement having been made within a period of one month from the date of surrender, the surrender and settlement is part of same transaction and as such, the same being a transfer having been made in contravention of the provisions of Section 46 of the Chotanagpur Tenancy Act, respondent No. 1 was entitled to get lands restored in his favour in terms of the provisions of Section 71-A thereof. However, as this writ petition is being disposed of on a short question, I need not consider the question as to whether surrender made on 14.2.1945 and the subsequent settlement dated 10.3.1945 was a part of the same transaction or not. Suffice it to say that

only because a settlement is made after one month or even after a few days of the surrender, it does not necessarily mean that the surrender and the settlement would form part of the same transaction. The question as to whether a surrender and subsequent settlement would form part of the same transaction or not, would depend upon the facts and circumstances of each case and has got to be decided on the basis of materials on record. However, in the instant case, it appears that respondent No. 4 refused to entertain the revision only on the ground that there were concurrent finding of fact by the courts below”.

Paragraph 8 of the judgment reported in (1993) (1) BLJR 328 (Jhalku Ahir Vs. State of Bihar and Ors.) reads as under;

“8. It is now well settled that prior to coming into force of Chotanagpur Tenancy (Amendment) Act, 1947, the recorded tenants were not required to obtain prior permission of the Deputy Commissioner before effecting surrender of their raiyati holdings. It is also not a case where respondent No. 5 has contended that the surrender made by the recorded tenants to the ex-landlord and the consequent settlement made by the ex-landlord in favour of grand father of the petitioner being part of the same transaction, the same contravenes provision of Section 46 of the Chotanagpur Tenancy Act.”

Paragraph 15 of the judgment reported in AIR 2000 SC 2276 (Jai Mangal Oraon Vs. Smt. Mira Nayak and Ors. with Jai Mangal Oraon Vs. Rita Sinha and Ors.) reads as under;

“15. No doubt, the understanding of the High Court about the scope of Section 71-A as interpreted by the earlier decisions of that court noticed therein may not be good or correct in view of the later declaration of law by this court but, the High Court did not proceed to rest its conclusion to uphold the claims of the contesting respondents who were writ petitioners before the High Court, only on that ground. The High Court has considered, at length the further question as to whether Section 71-A, introduced in 1969, was attracted to this case of surrender effected by a registered deed, on 15.1.1942, in the light of the then existing statutory provisions contained in Sections 46 and 72 of the CNT Act. The nature of consideration and the other reasons assigned in support of the order made in CWJC No. 118 of 1986-R makes it clear that the statutory provisions as they stood in force on 15.1.1942 neither envisaged the obtaining of prior sanction of the Deputy Commissioner before a surrender by a tenant could be made of his interest in favour of the landlord nor could such surrender be held bad merely because it was not at the end of the Agricultural Year but immediately before. Those issues seem to have been considered and decided, even dehors the controversy raised with reference to the character of the land, proceeding on an assumption on the basis that it involved, a surrender of raiyati interest. We find nothing illegal or wrong in the said reasoning and the conclusions arrived at by the learned judges in the High Court appear to be well merited and quite in accordance with the statutory provisions of force, at the relevant point. Therefore, in our view, no interference is called for with the orders of the High Court, in this regard.”

Paragraph 12 of the judgment reported in AIR 2004(1) JCR 107 (Bibi Makho and Ors. Vs. State of Bihar and Ors.) reads as under;

“12. In the present case, the surrender of the land by registered deed was made in the year 1935 whereas the provision for taking prior permission of the Deputy Commissioner was enacted by Amendment Act in the year 1947. The said amendment was prospective and

not retrospective and, therefore, it cannot be said that any prior permission of the Deputy Commissioner was required to be taken for surrender of the land by any raiyat prior to 1947 i.e. before the Amendment Act came into force and, therefore, the finding of the learned Additional Collector and the Commissioner in their orders as contained in Annexures 4 and 5 are absolutely illegal. This point has also been settled by the Supreme Court in the case of Mai Mangal Oraon (Supra), wherein it has been held that provision of Sections 46 and 72 as amended and Section 71-A as inserted by the amendment Act, are not applicable in case of surrender, appointment made prior to 1947.”

Paragraphs 13 and 14 of the judgment reported in 2004(4) JLR 109(SC) (Situ Sahu and Ors. Vs. State of Jharkhand and Ors.) read as under;

“13. We will assume that the surrender of tenancy on 7.2.1938 and the settlement of the lands on the present appellant on 25.2.1938 were in quick succession and could be viewed as parts of the same transaction within the meaning of the term 'transfer' as contemplated by the Act. Nonetheless, it has not been established before us that the transfer was contrary to any other provisions of the Act.”

“14. We shall now examine the last argument of Shri Narasimha that transfer was fraudulent. Even on this, we are afraid that the appellants are entitled to succeed. We need not go into the details of the transaction for we may even assume that the transfer was fraudulent. Even then, as held in Ibrahimpatnam (Supra), the power under Section 71A could have been exercised only within a reasonable time. Looking to the facts and circumstances of the present appeal, we are not satisfied that the Special Officer exercised his powers under Section 71A within a reasonable period of time. The lapse of 40 years is certainly not a reasonable time for exercise of power, even if it is not hedged in by a period of limitation. We derive support to our view from the observations made by this Court in Jai Mangal Oraon case (Supra), which was also a case which arose under the very same provision of law. There this Court took the view that Section 46(4)(a), which envisaged a prior sanction of the Deputy Commissioner before effecting the transfer in any of the modes stated therein, was introduced only in the year 1947 (with effect from 5.1.1948) and no such provision existed during the relevant point of time when the surrender was made in that case (15.1.1942). Obviously, therefore, no such provision existed in 1938, and the same reasoning applies.”

Paragraph 5 of the judgment reported in 2008 (2) JCR 1 SC (Fulchand Munda Vs. State of Bihar & Ors.) reads as under;

“5. As per Section 46 of the CNT Act, 1908, as it stood in 1922, no transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period expressed or implied would be effected which exceeds or might in any possible event exceed five years. It further restricted transfer by way of sale, gift or any other contract or agreement and such transfer shall not be valid to any extent. The suit of the appellant's predecessors for possession on the basis of oral mortgage was culminated into a decision by the High Court in second appeal (AFAD No. 1909/1948) where a clear-cut finding was recorded that there could not have been an oral usufructuary mortgage of immovable property for value of more than Rs. 100/- under Section 59 of the Transfer of Property Act, the same being bad in law. Thus, the predecessors of the respondents could not be treated to be in possession under the mortgage. Under the the CNT Act as it stood in the year 1922, the transfer could have been challenged as it contravenes Section 46 of the CNT Act, being a contract or agreement of transfer. That plea having not been

taken by the appellant's predecessors, the appellant and his predecessors were not entitled to raise the question of transfer being invalid under Section 46 of the CNT Act as it stood in 1922 on the principle of constructive res judicata. Section 46 of the CNT Act, by virtue of its amendment with effect from 5.1.1948, restricts and prohibits transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period expressed or implied, which exceeds or might in any possible event exceed five years. It further restricts transfer by a raiyat of his right in his holding or any portion thereof, apart from mortgage etc., by way of sale, gift or any other contract or agreement and if such transfer is effected it shall be invalid. Section 71-A of the CNT Act authorizes the Deputy Commissioner to evict the transferee from such land and to restore possession to the raiyat if the transfer is being effected in contravention of Section 46 or any other provision of the CNT Act. Thus, if there is contravention of Section 46, the Deputy Commissioner is authorized to evict the transferee from such land and restore it to the transferor under Section 71-A of the CNT Act. The predecessors of the respondents could not be treated to be in possession in contravention of Section 46 as possession of land by them has been upheld by the High Court in its decision. The decision of the High Court can not be reopened by taking advantage of amendment in Section 46 which came into force with effect from 5.1.1948. Section 71-A of the CNT Act would be attracted only in case the Deputy Commissioner finds that the impugned transfer was made in contravention of Section 46 or any other provision of the CNT Act. The decision of the High Court comes in the way of the Deputy Commissioner in arriving at any such findings. The possession having been denied to the appellant's predecessors holding that there was no contravention of Section 46 as it stood in 1922, the appellant cannot be permitted to take advantage under Section 46 on same having been amended by an Act of 1947. That apart, although there is no period of limitation prescribed for exercising the power under Section 71-A by the Deputy Commissioner, the party affected is called upon to approach the appropriate authority or the power has to be exercised by the Deputy Commissioner within a reasonable period of time. The gap of more than 50 years for challenging the transaction of 1922 cannot be said to be a reasonable time for exercising the power even if it is not hedged in by a period of limitation.”

Paragraphs 6 and 7 of the judgment reported in 2009(2) JCR 517 (Kameshwar Narayay Singh and Anr. Vs. State of Jharkhand and Ors.) reads as under;

“6. The Hon'ble Supreme Court in 2004(4) JCR 211(SC) : 2004(4) JLJR (SC) 109 (Situ Sahu Vs. State of Jharkhand) while considering Article 65 of the Limitation Act, 1963 for exercise of power under Section 71A for restoration held that lapse of 40 years is certainly not a reasonable time for exercise of power even if it is not hedge in by a period of limitation and the same was declared to be barred by limitation. In the aforesaid background the Hon'ble Supreme Court held that the special Officer ought not have exercised his power under Section 71A of the Act after such a unreasonable period of time. It is further relevant to refer the judgment reported in 2000(5) SCC 141 (Jai Mangal Oraon Vs. Mira Nayak) wherein both the issues of time limit and the necessity of obtaining the previous sanction of the Deputy Commissioner for effecting surrenders was considered and the Hon'ble Supreme Court held that the CNT (Amendment) Act, 1947 amended sections 46 and 72 and made it prospective with effect from 5.1.48 and it was specifically held that under Section 46(4-A) the mandatory requirement of prior sanction of the Deputy Commissioner before effecting transfer was introduced only by the amendment Act, 1947, with effect from 5.1.1948 and no such provision existed prior to that date and thus it cannot apply retrospectively. In this

judgment it was also considered that merely because Section 71-A commences with the words, if at any time, it cannot be taken to mean that the power can be exercised at any time without any point of time limit.

7. In the instant case, the settlement took place by virtue of customary hukumnama in the year 1941 itself and the application for restoration was filed in the year 1995 i.e. after lapse of almost 54 years which cannot be termed as reasonable and thus it was even otherwise barred by the limitation. The Revisional Authority has committed serious legal error by holding that in absence of the permission of the Dy. Commissioner, the transfer of the raiyati land in question of the Zamindar was illegal. The amendment came into effect only on 5.1.48 which made it mandatory to seek permission of the Dy. Commissioner whereas the transfer in the instant case the ex landlord made raiyati settlement in the year 1941 itself and at that time there was no requirement for seeking prior permission of the Deputy Commissioner.”
8. In view of the facts and circumstances of the present case and also in view of the proposition of law discussed above it becomes very clear that only because a settlement is made within one year of surrender, it does not necessarily mean that the surrender and the settlement would form part of the same transaction. The question as to whether a surrender and subsequent settlement would form part of the same transaction or not, would depend upon the facts and circumstances of each case and has got to be decided on the basis of the materials on record. In the instant case, it appears that the land was settled on 18.5.1942 by virtue of registered deed of surrender and thereafter, the settlement was made in favour of the petitioner's mother in the year 1943 and she went of paying rent to the Ex-landlord. It further appears that the return was filed after vesting of Estate and return was filed in the name of the mother of the petitioner and she went of making payment of land regularly to the State of Bihar. It further appears that the petitioner produced registered deed of surrender, rent receipt and other relevant documents before the authorities concerned. In the instant case, it appears that the proceedings under Section 71A CNT Act is hopelessly barred by limitation as the same was initiated after the expiry of 30 years. It also appears that the lands under proceeding was surrendered voluntarily by recorded tenant in favour of the Ex-landlord on 18.5.1942 by virtue of registered deed of surrender i.e. much before coming into force of CNT Amendment Act (Act XXV of 1947) and at that time permission was not required and as such, there is no contravention of either Section 46 or any other provisions of the CNT Act. Moreover, as per the settled principle of law, elements of fraud are required to be pleaded and proved by cogent evidence but in the instant case, the respondent No. 5 has failed to prove the same by cogent evidence. In the present case the surrender of the land was made in the year 1942 and the petition for restoration of land was filed in the year 1979-80 and, therefore, respondent Nos. 2 and 4 have no jurisdiction to pass the order of restoration of lands as the same is contrary to the position of law discussed above. Therefore, this court is of the view that the impugned orders dated 22.4.1986 and 27.9.1996 passed by the learned SDO, Lohardaga and the Commissioner, South Chotanagpur Division, Ranchi, respectively are not in consonance with the provision of law and the same are required to be quashed and set aside.
9. Accordingly, orders dated 22.4.1986 (Annexure-3) and 27.9.1996 (Annexure-5) are ordered to be quashed and set aside. This writ petition stands allowed, accordingly.

Petition allowed.



FULCHAND MUNDA VS. STATE OF BIHAR
2008 (14) SCC 774

FULCHAND MUNDA ... Appellant
Versus

STATE OF BIHAR AND OTHERS ... Respondents.

(BEFORE P.P. NAOLEKAR AND DALVEER BHANDARI, JJ.)
CIVIL APPEAL NO. 3267 OF 2001 DECIDED ON JANUARY 24, 2008*

Tenancy and Land Laws — Chota Nagpur Tenancy Act, 1908 (6 of 1908)—Ss. 71-A and 46 — Application under — Constructive res judicata and limitation — Applicability — Suit filed by predecessor-in-interest of appellant for declaration of title and recovery of possession of land claimed to have been transferred to predecessor-in-interest of respondent on the basis of oral usufructuary mortgage as mentioned in record-of-rights in the year 1922 — Suit dismissed by trial court and first appeal thereagainst also dismissed — But second appeal allowed by High Court in 1951 on the finding that the suit was not maintainable as there could not have been an oral usufructuary mortgage of immovable property for value of more than Rs 100 under S. 59, TP Act and hence it was bad in law and that predecessor-in-interest of appellant neither redeemed the mortgage nor came in possession of the land — After commencement of Bihar Scheduled Areas Regulation in 1969, successive applications under S. 71-A for restoration of the land were filed in 1976, 1977 and 1983 by predecessor-in-interest of appellant but the same were dismissed by Special Officer, Scheduled Areas Regulation holding that predecessor of respondent had perfected their title and application for restoration was barred by limitation—About more than 50 years of the alleged transaction of 1922, fresh application under S. 71-A moved by appellant on ground that transfer of land to predecessor of respondent was invalid being in contravention of S. 46 as it stood in 1922 — Held, application barred by principle of constructive res judicata and limitation — Plea that the transfer being invalid under S. 46 as it stood in 1922 having not been taken by appellant's predecessors, appellant not entitled to raise the same again — Possession of predecessors of respondents having already been upheld by High Court, that decision of High Court cannot be reopened by taking advantage of amendment of S. 46 in 1948 — Although no limitation period is prescribed for exercising power under S. 71-A, same must be exercised within a reasonable time — Civil Procedure Code, 1908 — S. 11 — Limitation — Reasonable period, in absence of prescription of any specific period in statute — Bihar Scheduled Areas Regulation, 1969 (1 of 1969)

* From the Final Order dated 19-1-2000 of the High Court of Judicature at Patna, Ranchi Bench in LPA No. 145 of 1999 R.

Held:

Section 71-A of the CNT Act authorises the Deputy Commissioner to evict the transferee from such land and to restore possession to the raiyat if the transfer is being effected in contravention of Section 46 or any other provision of the CNT Act. Under the CNT Act as it stood in the year 1922, the transfer could have been challenged as it contravenes Section 46 of the CNT Act, being a contract or agreement of transfer. That plea having not been taken by the appellant's predecessors, the appellant and his predecessors were not entitled to raise the question of transfer being invalid under Section 46 of the CNT Act as it stood in 1922 on the principle of constructive res judicata. The predecessors of the respondents could not be treated to be in possession in contravention of Section 46 as possession of land by them has been upheld by the High Court in its decision. The decision of the High Court cannot be reopened by taking advantage of amendment in Section 46 which came into force with effect from 5-1-1948. Section 71-A of the CNT Act would be attracted only in case the Deputy Commissioner finds that the impugned transfer was made in contravention of Section 46 or any other provision of the CNT Act. The decision of the High Court comes in the way of the Deputy Commissioner in arriving at any such findings. The possession having been denied to the appellant's predecessors holding that there was no contravention of Section 46 as it stood in 1922, the appellant cannot be permitted to take advantage under Section 46 on same having been amended by an Act of 1947. That apart, although there is no period of limitation prescribed for exercising the power under Section 71-A by the Deputy Commissioner, the party affected is called upon to approach the appropriate authority or the power has to be exercised by the Deputy Commissioner within a reasonable period of time. The gap of more than 50 years for challenging the transaction of 1922 cannot be said to be a reasonable time for exercising the power even if it is not hedged in by a period of limitation. (Paras 14, 13 and 15)

Appeal dismissed

Advocates who appeared in this case :

S.B. Upadhyay, Senior Advocate (Kumud L. Das, Shiv Mangal Sharma, Rajesh R.Dubey, Ms Santosh Mishra, Pawan Upadhyay and Ms Sharmila Upadhyay, Advocates) for the Appellant;

Sunil Kumar, Senior Advocate (Manish Mohan, Ms Anit Kanuga, Ms Mridula Ray Bhardwaj, Ashok Mathur, Ajit Kr. Sinha and Nitish Masey, Advocates) for the Respondents.

The Judgment of the Court was delivered by

P.P. NAOLEKAR, J.— The brief facts of the case necessary for deciding the questions involved are that the land of Plots Nos. 1695, 517 and 802 under Khata No. 288 within Khewat No. 6/1 of Village Hochar, PS Kanke, District Ranchi was recorded in the record-of-rights as bakast bhuinhari land in the name of Chamtu Pahan and others as landlords. In the record-of-rights in the remarks column, these lands were shown in possession of Kolha Kumhar and others, the predecessors-in-interest of the private respondents herein as beyayani bakbaje. The recorded bhumidar Chamtu Pahan and others filed a title suit against Kolha Kumhar and others for relief of declaration of title and recovery of possession. The said suit was decreed by the trial court and the appeal preferred by the predecessors-in-interest of the respondents herein was dismissed. A second appeal being appeal from Appellate Decree No. 1909 of 1948 filed by the defendants in the original suit was allowed by the High Court on 20-9-1951 and the judgment and decree passed by the trial court and that of the first appellate court was set aside. The Court came to the finding that the appellant's predecessors neither redeemed mortgage nor came in possession of the land and that the suit for

recovery of possession was not maintainable. The Court recorded the finding that there was an oral usufructuary mortgage as not yet been repaid and that mortgage, under Section 59 of the Transfer of Property Act, is bad in law and as such the defendants' possession as mortgagees must be ignored.

2. After commencement of the Bihar Scheduled Areas Regulation, 1969 (Regulation 1 of 1969), successive applications were filed under Section 71-A of the Chota Nagpur Tenancy Act, 1908 (for short "the CNT Act") by the predecessors-in-interest of Chamtu Pahan bearing SARs Nos. 65 of 1976, 82 of 1977 and 543 of 1983. All these applications were ultimately rejected by the Special Officer, Scheduled Areas Regulation, in terms of the orders dated 16-9-1976, 7-7-1977 and 31-12-1983 respectively holding that the predecessors-in-interest of the respondents had perfected their title and the applications for restoration were barred by limitation.
3. Despite rejection of the suit and the applications moved under Section 71-A of the CNT Act, a fresh application was moved by the appellant claiming himself to be the heir of Chamtu Pahan alleging therein that he by caste is Munda and is a member of the Scheduled Tribes and is the priest (Pahan) of his village and the land in question measuring a total area of 6.38 acres is bakast bhuinhari pahani land recorded in the name of his grandfather Chamtu Munda/Pahan and others in the record-of-rights. It was alleged that the land in question is community land, the usufruct of which is used for the community feast at the time of Sarna Puja or Bhut Puja held by the community members on several occasions of the agricultural year and the said land cannot be transferred to a person other than the members of a bhuinhari family as provided under Section 48 of the CNT Act. It was further alleged that although such land is non-alienable, the ancestors of the respondents by playing fraud on the grandfather of the appellant, namely, Chamtu Munda, took the same on oral zerpesgi (mortgage) for Rs 154 for a period of 20 years as mentioned in the record-of-rights in the year 1922 and, thus, the transfer being in contravention of Section 46 of the CNT Act, possession of the land be restored.
4. The application moved by the appellant was allowed vide order dated 21-12-1987 by the Special Officer, Scheduled Areas Regulation, who directed restoration of possession of the land in favour of the appellant. The private respondents herein thereupon preferred an appeal before the Additional Collector, Ranchi which was allowed by him. Considering the judgment and order passed in the second appeal by the High Court as also the orders passed on successive applications under Section 71-A of the CNT Act, he came to the conclusion that fresh application under Section 71 -A was not maintainable. Consequently, the order of restoration of possession was set aside.
5. The appellant preferred a revision before the Divisional Commissioner under Section 217 of the CNT Act, which was allowed and restoration of possession order was restored. That was challenged by the respondents by filing a writ petition in the High Court. Learned Single Judge of the High Court while allowing the writ petition held that the revisional authority committed an error in ignoring the findings arrived at by the High Court in the second appeal and also the successive orders passed by the Special Officer earlier rejecting the applications for restoration filed by the predecessors-in-interest of the appellant. The Court also held that the Commissioner totally ignored the effect of Section 27 of the Limitation Act and failed to see that the application for restoration was barred by limitation as also by the

principle of res judicata. The order of the learned Single Judge was upheld by the Division Bench in letters patent appeal. That is how the matter has come before us.

6. It is contended by Mr S.B. Upadhyay, learned Senior Counsel for the appellant that the orders of the High Court are contrary to the provisions, intendment, letter and spirit of the Bihar Scheduled Areas Regulation, 1969 (Regulation 1 of 1969) which is a welfare legislation concerning the members of the Scheduled Tribes, which is mainly intended, by insertion of Section 71-A in the CNT Act, for restoration of their lands transferred in favour of non-tribals fraudulently or in contravention of Sections 46 and 48 and other provisions of the CNT Act.
7. It is further urged by the learned Senior Counsel that there is no limitation prescribed for resorting to the provision of Section 71-A of the CNT Act; and that (he earlier decision of the High Court will not operate as res judicata. Whereas, it is contended by Mr Sunil Kumar, learned Senior Counsel for the private respondents that when successive applications under Section 71-A of the CNT Act moved by the predecessors-in-interest of the appellant have been rejected, the Special Officer committed an error in entertaining the fresh application moved by the appellant.
8. It is further urged that the earlier decision of the High Court operates as res judicata and in any case the principle of constructive res judicata would be applicable as all the questions available with the appellant to be agitated before the Court shall be deemed to have been adjudicated against him.
9. To better appreciate the arguments advanced by the counsel on both sides, it would be pertinent to note the relevant provisions of the Chola Nagpur Tenancy Act, 1908 (the CNT Act).
10. The relevant provisions of Section 46(1) of the CNT Act as it stood in the 1908 Act and substituted by the Amendment Act of 1947 which came into force with effect from 5-1-1948 read as under:

"46. Restrictions on transfer of their rights by raiyats.—(1) No transfer by a raiyat of his right in his holding or any portion thereof—

 - (a) by mortgage or lease, for any period, expressed or implied, which exceeds or might in any possible event exceed five years, or
 - (b) by sale, gift or any other contract or agreement, shall be valid to any extent:"
11. In the CNT Act, Section 71-A was inserted by the Bihar Scheduled Areas Regulation, 1969 (Regulation 1 of 1969). Later on, by the Bihar Scheduled Areas (Amendment) Regulation, 1985 (Regulation 1 of 1985), after the word "raiyat", the words "or a Mundari Khunt Kattidar or a Bhuinhar" were inserted. Section 71-A, as amended by the Bihar Scheduled Areas (Amendment) Regulation, 1985, reads as under:

"71-A. Power to restore possession to member of the Scheduled Tribes over land unlawfully transferred.—If at any time it comes to the notice of the Deputy Commissioner that transfer of land belonging to a raiyat or a Mundari Khunt Kattidar or a Bhuinhar who is a member of the Scheduled Tribes has taken place in contravention of Section 46 or any other provision of this Act or by any fraudulent method, including decrees obtained in suit by fraud and collusion he may, after giving reasonable opportunity to the transferee, who is proposed

to be evicted, to show cause and after making necessary enquiry in the matter, evict the transferee from such land without payment of compensation and restore it to the transferor or his heir, or, in case the transferor or his heir is not available or is not willing to agree to such restoration, resettle it with another raiyat belonging to the Scheduled Tribes according to the village custom for the disposal of an abandoned holding:"

12. As per Section 46 of the CNT Act, 1908, as it stood in 1922, no transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period expressed or implied would be effected which exceeds or might in any possible event exceed five years. It further restricted transfer by way of sale, gift or any other contract or agreement and such transfer shall not be valid to any extent. The suit of the appellant's predecessors for possession on the basis of oral mortgage was culminated into a decision by the High Court in second appeal (AFAD No. 1909 of 1948) where a clear-cut finding was recorded that there could not have been an oral usufructuary mortgage of immovable property for value of more than Rs 100 under Section 59 of the Transfer of Property Act, the same being bad in law. Thus, the predecessors of the respondents could not be treated to be in possession under the mortgage.
13. Under the CNT Act as it stood in the year 1922, the transfer could have been challenged as it contravenes Section 46 of the CNT Act, being a contract or agreement of transfer. That plea having not been taken by the appellant's predecessors, the appellant and his predecessors were not entitled to raise the question of transfer being invalid under Section 46 of the CNT Act as it stood in 1922 on the principle of constructive res judicata. Section 46 of the CNT Act, by virtue of its amendment with effect from 5-1-1948, restricts and prohibits transfer by a raiyat of his right in his holding or any portion thereof by mortgage or lease for any period expressed or implied, which exceeds or might in any possible event exceed five years. It further restricts transfer by a raiyat of his right in his holding or any portion thereof, apart from mortgage, etc. by way of sale, gift or any other contract or agreement and if such transfer is effected it shall be invalid.
14. Section 71-A of the CNT Act authorises the Deputy Commissioner to evict the transferee from such land and to restore possession to the raiyat if the transfer is being effected in contravention of Section 46 or any other provision of the CNT Act. Thus, if there is contravention of Section 46, the Deputy Commissioner is authorised to evict the transferee from such land and restore it to the transferor under Section 71-A of the CNT Act.
15. The predecessors of the respondents could not be treated to be in possession in contravention of Section 46 as possession of land by them has been upheld by the High Court in its decision. The decision of the High Court cannot be reopened by taking advantage of amendment in Section 46 which came into force with effect from 5-1-1948. Section 71-A of the CNT Act would be attracted only in case the Deputy Commissioner finds that the impugned transfer was made in contravention of Section 46 or any other provision of the CNT Act. The decision of the High Court comes in the way of the Deputy Commissioner in arriving at any such findings. The possession having been denied to the appellant's predecessors holding that there was no contravention of Section 46 as it stood in 1922, the appellant cannot be permitted to take advantage under Section 46 on same having been amended by an Act of 1947. That apart, although there is no period of limitation prescribed for exercising the power under Section 71-A by the Deputy Commissioner, the party affected is called upon to approach the

appropriate authority or the power has to be exercised by the Deputy Commissioner within a reasonable period of time. The gap of more than 50 years for challenging the transaction of 1922 cannot be said to be a reasonable time for exercising the power even if it is not hedged in by a period of limitation.

16. For the aforesaid reasons, the appeal is without substance and is dismissed.

□□□

**BHEEM SINGH MUNDA VS. STATE OF JHARKHAND AND ORS.
2013 (2) JCR 691 (Jhar.)**

Bhim Singh Munda ... Appellant

Vs.

State of Jharkhand and others ... Respondents

PRAKASH TATIA, CJ AND MRS. JAYA ROY, J.

L.P.A. NO. 538 OF 2004, DECIDED ON SEPTEMBER 13, 2012

(A) Chotanagpur Tenency Act, 1908, Sections 3(xvi) and 8—Mundari Khunt—Kattidari right—Acquisition of— Scope of—Explained—Mundari Khunt— Kattidari tenency gives certain rights to the person who are known as Khewat-dars which have been given in Chapter XVIII of CNT Act. [Para 6]

(B) Chotanagpur Tenency Act, 1908, Section 87, Scope of—With respect to the correction in entry a suit can be entertained by the Revenue Of-ficer only. [Para 7]

(C) Chotanagpur Tenency Act, 1908. Section 251, Scope of—Bars any suit under Section 87—Says no suiffshall be entertained under Section 87 of the Act for decision of any dispute regarding any entry relating tp a Mundari Khunt— Kattidari tenency in a record of rights. [Para 7]

(D) Chotanagpur Tenency Act, 1908, Sections 87, 245 and 251—Civil suit with respect to the entry relating to the Mundari Khunt—Kattidari tenency right in record of rights is barred—If in the course of any proceedings "under Section 244 any question of title is raised, which could in the opinion of the Deputy Commissioner, more properly be determined by a civil Court, the Deputy Commissioner shall refer such question to the principal civil Court for determination—If there is a bona fide dispute between the~iwo" claimants "involving question of title, then civil Court can:examine the issue only on reference—Instead of referring the dispute, directing the parties to get their title decided through civil Court—Writ Court has rightly quashed the order passed by the Circle Officer—Matter remanded back before the Recenue Officer for consideration in accordance with law—Appeal partly allowed. [Paras 7 to 9]

Counsel :

Manjul Prasad, for the appellant.

Rabindra Prasad, for the respondents.

JUDGMENT

By Court.—Appellant is aggrieved against the order of learned Single Judge dated 15.04.2004

passed in W.P.(C) No.229 of 2002 by which the learned Single Judge set aside the order dated 07.07.1995, (Annexure-3) passed by the Circle Officer, Sonahatu in Uttaradhikary Case No. 121 of 1995-96 on the ground that the Circle Officer, Sonahatu had no jurisdiction in the matter to decide the question of title in respect of the claim of Jamindari of Khewat i.e., Mundari Khunt-kattidar.

2. It appears from the facts of the case that, in the matter of Mundari Khunt-kattidari tenancy, which is a special right created by the Chotanagpur Tenancy Act, 1908 and for which special provision with respect to the Mundari Khunt-kattidars have been provided in the Chapter XVIII of the Act of 1908. There was dispute between the petitioner Madhu Sudan Munda(now deceased) and the present appellant Bhim Singh Munda with respect to particular Mundari Khunt-kattidari tenancy for Khewat No. 4/1.
3. It appears that Circle Officer passed one order on 07.07.1995 in Uttradhikary Case No. 121 of 1995-96 and decided the said question of title in favour of Madho Singh Munda and Madhusudan Singh Munda, respondent nos. 4 and 5, declaring them to be Jamindar of said Khewat No. 4/1. However, Sub-Divisional Officer, Khunti on 12.10.2001 entertained an application under Section 242 of the C.N.T. Act, 1908 filed by Bhim Singh Munda(respondent no. 5 of the writ petition) wherein Sub-Divisional Officer held that for declaration of their title and the right, the proper forum is to approach the Civil Court in view of the dispute between the parties with regard to the title and, therefore, the Sub-Divisional Officer, Khunti refused to decide the dispute. Madhusudan Singh Munda, petitioner, approached this Court by filing a writ petition No. 229 of 2002, wherein learned Single Judge held that since the Circle Officer had no jurisdiction to pass the order dated 07.07.1995, therefore, that order is without jurisdiction and consequentially set aside. Appellant aggrieved against the judgement of the learned Single Judge dated 15.04.2002, has, therefore, preferred this appeal.
4. Nobody appeared on behalf of the respondents-legal representatives of the original petitioner.
5. Heard learned counsel for the appellant.

It appears from the provisions in the C.N.T. Act, 1908 that Mundari Khunt-katti has been defined in Clause (xvi) of Section 3 of the Act of 1908 which is as under :—

(xvi) “mundari khunt-kattidari tenancy” means the interest of a 'Mundari khunt-kattidar'.

6. What is the right of Mundari Khunt-kattidari is given in Section 8 of the Act of 1908, which is as under :—

“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,—

- (a) the heir male in the male 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 has remained continuously in the possession of any such Mundari and his descendants in the male line, such descendants.”

Therefore, the Mundari Khunt-kattidari right can be acquired which allows one 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 the male heirs of said Mundari Khunt-kattidar and which appears to be a hereditary right in view of Clause (b) of Section 8 which says that a Mundari Khunt-kattidari right as regard to any portion of such land which has remained continuously in possession of any such Mundari Khunt-katti and his descendants in the main line, such descendants, also are Mundari Khunt--kattidar. There are certain restrictions on transfer of Mundari Khunt-kattidari tenancy as has been provided in Section 240. But Section 241 provides and allows certain transfers. If, any person encroached upon the Mundari Khunt-kattidari tenancy or portion thereof, such person can be evicted under Section 242 of the Act of 1908. Mundari Khunt-kattidari tenancy gives certain rights to the persons who are known as Khewatdars which have been given in Chapter XVIII of the C.N.T. Act, 1908. Section 245 provides for reference of question of title to Civil Court which may arise in the course of proceeding under Section 244 and if the Deputy Commissioner holds an opinion that for proper determination, the matter is required to be referred to the Civil Court, the Deputy Commissioner can refer such question to Principal Civil Court in the district for determination.

7. As per Section 87 of the C.N.T. Act, 1908, where a dispute arises involving a question relating to title in land or in interest in land, in between the parties, the suit can be instituted before the Revenue Officer under Section 87, but it appears that this can be a suit in relation to the proceedings under Chapter XII only which Chapter deals with the records of right and settlement of rent and Section 81(b) includes the particulars which are required to be recorded like the Mundari Khunt-kattidar. Therefore, with respect to the correction in entry, a suit can be entertained by the Revenue Officer only. As per Clause (viii) of Section 3, Revenue Officer under Act of 1908 means, any officer whom the State Government may appoint to discharge any of the functions of the Deputy Commissioner. Section 251 of the C.N.T. Act, 1908 bars any suit under Section 87 and says that no suit shall be entertained under Section 87 for the decision of any dispute regarding any entry relating to a 'Mundari Khunt-kattidari' tenancy in a record-of-rights.

Therefore, complete reading of above provisions makes it clear that civil suit with respect to the entry relating to the Mundari Khunt-kattidari tenancy right in record-of-rights is barred. In Annexure-4, dated 11.10.2001, the Sub-Divisional Officer, Khunti held that in view of the dispute of title, the parties should go to the Civil Court for declaration of their title and the right which could not have been done in view of Section 251 of the Act of 1908. However, at this place, it will be relevant to mention that Section 245 of the C.N.T. Act, 1908 itself provide that if in the course of any proceedings under Section 244, any question of title is raised, which could, in the opinion of the Deputy Commissioner, more properly be determined by a Civil Court, the Deputy Commissioner shall refer such question to the Principal Civil Court in the district for determination. Therefore, firstly, it is the duty of the Revenue Officer to decide with respect to the issue relating to the entry in the record-of-rights of the Mundari Khunt-kattidari tenancy and if, he finds a bonafide dispute between the two claimants involving question of title, then upon his reference only the Civil Court can examine the issue of the above right. In this case, so far as Annexure-3, dated 07.07.1995, passed by the Circle Officer, Sonahatu is concerned, that was wholly without jurisdiction whereas the learned Revenue Officer should also or could have referred the dispute to the Civil Court under Section 245 of the C.N.T. Act, 1908. But instead of doing so, he directed the parties to get their title decided through Civil Court. Learned counsel for the appellant submitted that, in fact, the Revenue

Officer has already on 23.12.2003 in favour of the appellant and, therefore, in view of the said order dated 23.12.2003, now there is no need to send the matter either to Revenue Officer or there is no need of referring the matter to Civil Court for adjudication.

8. In view of the above reasons, we are of the considered opinion that learned Single Judge has rightly quashed and set- aside the order dated 07.07.1995, annexure-3, passed by the Circle Officer, Sonahatu in Uttradhikariy Case No. 121 of 1995-96. We are also of the considered view that Sub-Divisional Officer also could have referred the matter to Civil Court for adjudication if he found that there is a bonafide dispute of title between the parties and that has not been done. In this L.P.A., one order has been placed on record by the appellant passed by the Revenue Officer, dated 23.12.2003 and that order was not before the learned Single Judge and, therefore, so far as this order is concerned, we are of the considered opinion that the matter can be sent back to the Revenue Officer for consideration after giving notice to the respondents-the legal representative of the petitioner and the Revenue Officer may also consider the order dated 23.12.2003 and may decide the matter in accordance with law and may also, if finds the order, Annexure-1, dated 23.12.2003, to be a valid order, may proceed accordingly.
9. This appeal is partly allowed accordingly.
10. A copy of this order may be produced before the concerned Revenue Officer by the appellant.

Appeal partly allowed.

□□□

BALESHWAR TIWARI VS. SHEO JATAN TIWARI
1997 (5) SCC 112

Baleshwar Tewari (Dead) by LRS. and Others ... Appellants;
Versus
Sheo Jatan Tiwari and Others ... Respondents.

(BEFORE K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.)
CIVIL APPEAL NO. 2533 OF 1980, DECIDED ON MARCH 20, 1997*

Tenancy and Land Laws — Bihar Land Reforms Act, 1950 (30 of 1950) — Ss. 6(1) & 2(k) — 'Khas possession' of intermediary — Means actual possession and not mere bare right to possession — Though land may be leased out on yearly basis but possession must always be retained by the intermediary and lessee should never have any security of his tenancy right — Burden of proof on intermediary — Entries in revenue records not sufficient evidence — Even if enquiry held under R. 7-E of Bihar Land Reforms Rules and S. 35 of the Act wherein it was found that the intermediary retained the actual possession and land was leased to appellant on year to year basis but in absence of any notice and opportunity to the appellant to adduce evidence to establish his right, finding in the enquiry would not be binding on him — When appellant continuously remained in possession for long years and possession could be taken by respondent only in execution of decree of trial court, possession of respondent cannot be held to be khas possession — Revenue records — Entries in — Value of

Held:

Though the definition of "intermediary right" as used in Section 6(1)(a) of the Act, is inclusive of the yearly cultivation and intermediary becomes owner of such land subject to payment of rent determined, the intendment of khas possession is referable to the intermediary who must be in actual possession, i.e., one foot on the land, and the other on the plough in the field and hands in the soil; although hired labour is also contemplated. The emphasis is on the point that the possession is actual possession and admits of no dilution except to the extent specified under Section 6, i.e., itself by an inclusive process, permits and the animation of retention of possession always must be manifested. It must also be read with Bihar Tenancy Act wherein "khas possession" has been dealt with. (Para 12)

Gurucharan Singh v. Kamla Singh, (1976) 2 SCC 152; Ramesh Bejoy Sharma v. Pashupati Rai, (1979) 4 SCC 27; Labanya Bala Devi v. Slate of Bihar Patna Secretariat, 1994 Supp (3) SCC 725; Brighu Nath Sahay Singh v. Mohd. Khalilur Rahman, 11995) 5 SCC 687, relied on

* From the Judgment and Order dated 27-4-1979 of the Patna High Court in S.A. No. 326 of 1978.

Suraj Nath Ahir v. Prithinath Singh, (1963) 3 SCR 290 : AIR 1963 SC 454; Ram Ran Bijai Singh v. Behari Singh, (1964) 3 SCR 363 : AIR 1965 SC 524, cited

It is true that the inclusive definition in Section 6(l)(a) would also include yearly lease but it indicates that the possession should always be retained by the intermediary and the tenant must have no security of his tenancy right. But when in this case the tenant remained continuously in possession of the land well over years, right from 1925 as found by the trial court and the possession was taken in execution of the decree in 1979, the necessary animus possidendi was absent. The tenant remained in possession in his own right as a raiyat though he was paying rent to the intermediary prior to the abolition. His possession is only of a raiyat possession. It is the duty of the respondent to establish by unequivocal evidence that the intermediary retained his intermediary right in the land and that proof has not been established by adducing any evidence. It is true that there is a finding by the Subordinate Judge that an enquiry under Rule 7-E(ni) was held but there is no finding recorded by the Subordinate Judge that the enquiry was conducted after issuing notice to the appellant. Unless the appellant is given notice and an opportunity to adduce the evidence to establish his right in the enquiry made, the finding generally does not bind him. Entries in revenue records is the paradise of the patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the land he ploughs as his dominion and generally obeys, with moral fibre the command of the intermediary so long as his possession is not disturbed. Therefore, creation of records is a camouflage to defeat just and legal right or claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills. (Paras 13 to 15)

Appeal allowed

Suggested Case Finder Search Text (*inter alia*):

(khas near possession)

May search again and add:

(intermediary)

Advocates who appeared in this case :

Ranjit Kumar and Ms Binu Tamta, Advocates, for the Appellants; B.B. Singh, Advocate, for the Respondents.

Chronological list of cases cited

1. (1995) 5 SCC 687, Brighu Nath Sahay Singh v. Mohd. Khalilur Rahman
2. 1994 Supp (3) SCC 725, Labanya Bala Devi v. State of Bihar Patna Secretariat
3. (1979) 4 SCC 27, Ramesh Bejoy Sharma v. Pashupah Rai
4. (1976) 2 SCC 152, Gurucharan Singh v. Kamla Singh
5. (1964) 3 SCR 363 : AIR 1965 SC 524, Ram Ran Bijai Singh v. Behari Singh
6. (1963) 3 SCR 290 : AIR 1963 SC 454, Suraj Nath Ahir v. Prithinath Singh

ORDER

1. This appeal by special leave arises from the judgment of the single judgment of the single

judge of the High Court of Patna, made on April 27, 1979 made in S.A. No. 326/1978 dismissing the appeal in limine.

2. The respondent-plaintiff laid the suit for declaration of title to 3 bighas and six kathas of land bearing Plot No. 235 and 243 in Khata No. 952 situated in Mauza Nainijore Pachhim Diara, Police Station Brahmopore, District Bhojpur.
3. The admitted position is that the respondent had purchased the land on May 23, 1957 for a sum of Rs. 82.2 annas from the Raja Dumraon Raj. Proceedings under Section 145 or Cr.P.C. were initiated in which it was held that the appellant was found in possession of the land. Consequent thereto, the above declaratory suit came to be filed by the respondent. It is the case of the appellant that he has been in possession of the land as a leasee since the year 1925. The trial Court accepted his contention and recorded a finding as under:

"These own documents of the Dumraon Raj clearly show that the defendant has been in possession over the suit land as a raiyat since 1925. The defendant has also filed the original Khatiswani of the year 1350 fasli prepared by Dumraon Raj which also finds the name of defendant's ancestor over the suit land. Ex. C is the jamabandi Register of the Dumraon Raj which also has the name of defendant's ancestor over the suit Khata No. 91. Thus, the above documents of the defendant clearly prove that the suit land was never the proprietor's Zeerat land and was never in khas possession of Dumraon Raj. Rather these documents show that the Defendant has been in possession of the suit land as a raiyat."

4. On that basis, the suit was dismissed. On appeal, the Subordinate Judge held that the entries for the year 1952-69 show that the respondent was in possession of the land and, therefore, Raja Dumraon Raj had leased out the land to the appellant on year to year basis and thereby in the enquiry under Rule 7 - E(iii) of the Bihar Land Reforms Act [for short, the "Act"] no suit could be brought in any civil Court in respect of the order passed thereunder. Thereby, it seen that at page 21, he recorded thus:

"Since the suit land was given on lease from year to year being proprietor's private land, it was not necessary to prove that the Dumraon Raj was in khas possession over the suit land. It is important to add here that the plaintiff has been able to show by production of Chitha that Dukhi Tiwari and other persons were recorded in several years of Chitha in respect of the suit land. This fact also establishes the fact that the suit land were given on lease from year to year by the Dumraon Raj and the defendant or other person in different years clearly do not confer any right of occupancy of title over the suit land of those persons recorded in the chitha."

At page 22, it is further recorded that "

"The possession of different persons of the suit land on the basis of lease does not change the character of private land nor it can confer a title to those persons not perfect title by adverse possession."

Thus, he concluded that the respondent had the title of the property. Accordingly, he declared that the respondent had valid title to the property. It is also evidenced that in 1979, in execution of the decree, the respondent came into possession of the land.

5. From these facts, the question that arises for consideration is: whether the respondent's

prodecessor-intitle, Dumraon Raj was in Khas possession of the land and thereby the respondent acquired title of the property under the sale deed?

6. Shri Ranjit Kumar, learned counsel for the appellants, contends that the finding recorded by the subordinate judge is clearly incorrect in view of the law laid down by this Court. Shri B.B. Singh, learned counsel for the respondents, contends that in view of the provisions of section 6(1) and the order passed under Rule 7-E(iii), the land is the private land of the Dumraon Raj and the appellant had not acquired any raiyat right under the Bihar Land Reforms Act. The estate was abolished in 1951. Thereafter, the appellant was not recognised as a raiyat. Therefore, there was no evidence that he was recognised as owner of the land. Therefore, the respondent has proved that he is the owner of the land. The declaration of title is vitiated by error of law.
7. In view of the respective contentions, the question for consideration is : whether the view taken by the Subordinate Judge is correct in law? Section 6(1) of the Act states that 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 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 Tenancy Act, 1885...Shall, subject to be settled by the State which such intermediary and he shall be entitled to retain possession thereof and hold them as a raiyat under the State having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner. Sub-section (2) postulates that if the claim of an intermediary, as to his khas possession over the lands referred to sub-section (1) or as to the extent of such lands, is disputed by any person prior to the determination of the rent of such lands under the said sub-section, the Collector shall on application, make such inquiry into the matter as he deems fit and pass such order as may appear to him to be just and proper. Khas possession has been defined in Section 2(K) of the Act which reads as under:

"2(K) Khas possession with reference to the possession of a proprietor or tenure-holder of any land used for agricultural or horticultural purposes means the possession of such proprietor or tenure-holder by cultivating such lands or carrying on horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock."

This controversy relating to Khas possession is no longer *re integra*.

8. This Court in *Gurcharan Singh Vs. Kamla Singh & Ors.* [(1976) 2 SCC 152 at 162 in paragraph 20 and 21] had dealt with this aspect and a three judge Bench held as under:

"There is no case that the subclauses (a), (b) and (c) of Section 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 or 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 draftsman 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 VI and reflected in Part III. When there has been a determined break with traditional jurisprudence and a big endeavour has been made to overturn a feudal land system and substitute what may be called a transformation of agrarian relations, we cannot hark back to the bygone jura or hold a new legislation captive within the confiners of vanishing tenurial thought. De hors the historical links - a breakaway from the past in the socio-legal system is not accomplished by worship of the manes of the law - khas possession means of the law- Khas possession means what the definition, in plain English, says. The definition clause is ordinarily a statutory dictionary, and viewed that was, we have in the early part of this judgment explained how it means actual, cultivatory possession - nothing less, nothing else. Off 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 other, as earlier indicated. These are private lands as known to the Bihar Tenancy Act, privileged lands as known to the Chota Nagpur Tenancy Act, lands 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, though 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 the words or phrases occurring in the body of the stature. 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, put 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, and occupation of it, as a real, administrative act done Constructive possession or possession in law is what is covered by the sub-clause 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 on e 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. Saunders, p.151).

In the Dictionary of English Law (Earl Jowitt) 1959 at p. 1367 "possession" is defined as follows:

"Possession, the visible possibility or 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 requisite of possession. First three requisite 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 evidenced by external signs, for if the thing shows no sign 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)

Maybe, 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 there is a bare right to possess bereft of any dominion or factum or control, it will be 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 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."

9. This was reiterated by a Bench of two Judges in *Ramesh Bejoy Sharma vs. Pashupati Rai & Ors.* [(1979) 4 SCC 27 at 37 in paragraph 28] held as under:

"The word used in Section 6 is not 'possession' but it is qualified by the adjective 'Khas possession' its equivalent being 'actual possession' as the word is understood in contradistinction to the word 'constructive possession'. Frankly speaking the law has still not provided clear and unambiguous definition of the jurisprudential concept of possession. Number of angular approaches to the problem of possession can be referred to with confidence. Here we are concerned with what is called "Khas possession" in statute for ushering agrarian reforms and, therefore, the purpose and object behind the legislation must inform the interpretation must tilt in favour of the actual cultivator, the tiller of the soil, Dealing with this expressions this Court in *Gurucharn Singh vs. Kamla Singh* has observed as under :

"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 evidenced by external signs. Under the control of anyone, it is not possessed:...." In the end of all, however, the meaning of 'possession' must depend on the context, end of it, however, the meaning of 'possession' must depend on the context, (ibid p. 153) Maybe, 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 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."

After thus observing this approved the ration extracted above in Surajnath Ahir case as also the ratio in Ram Ran Bijai Singh case."

10. In *Labanya Bala Devi (Smt.) vs. State of Bihar, Patna Secretariat, Patna & Anr.* [(1994) Supp. 3 SCC 725 at 727] after extracting the definition held thus:

"... The saving by Section 6(1)(b) is only of the lands actually used for agricultural purposes in a State or a tenure of a lessee or a temporary lessee and directly in his possession and cultivated by himself with his own stock or by his own raiyat rights has been confirmed statutorily subject to the terms contained therein."
11. In *Brighu Nath Sahay Singh & Ors. vs, Md. Khalipur Rahmanh Ors.* [(1995) 5 SCC 687] another Bench considered the definition of "Khas possession" in Section 2(K) and held as under:

"A reading of Section 2(K) read with Section 4 and 6 of the Act clearly envisages that the intermediary must, as on the date of vesting, be in possession of the land used for agricultural purpose or horticulture purpose as a tenure-holder by cultivating such land or carrying on horticulture operations thereon by himself with his own stock or by his own servants or by hired labour by his own servants or by hired labour or with hired stock."
12. Thus, it could be seen that though the definition of "intermediary right" as used in Section 6(1)(a) of the Act, is inclusive of the yearly cultivation and intermediary becomes owner of such land subject to payment of rent determined, the intendment of khas possession is referable to the intermediary wh must be in actual possession, i.e., one foot on the land, and the other on the plough in the filed and hands in the soil; although hired labour is also contemplated. The emphasis is on the point that the possession is actual possession and admits of no dilution except to the extent specified under Section 6, i.e., itself by an inclusive process, permits and the animation of retention of possession always must be manifested. It must also be read with Bihar read with Bihar Tenancy Act wherein "Khas possession" has been dealt with.
13. It is true that the inclusive definition in Section 6(1)(a) would also include yearly lease but it indicates that the possession should always be retained by the intermediary and the tenant must have no security of his tenancy right. But when the tenant remained continuously in possession of the land well over years, right from 1925 as found by the trial Court admittedly, the possession was taken in execution of the decree in 1979 and the necessary animus possidendi was absent.
14. The question that arises is: whether it will be a "khas possession" and the respondent is entitled to declaration that the intermediary remained in possession as khas possession. In view of the law laid down by this Court, as extracted earlier, and the factual position, the conclusion would be that the tenant remained in possession in his own right as a raiyat though he was paying rent to the intermediary prior to the abolition. His possession is only of a raiyat possession. It is the duty of the respondent to establish by unequivocal evidence that the intermediary retained his intermediary right in the land and that proof has not been established by adducing any evidence. It is true that there is a finding y the Subordinate Judge that an enquiry under Rule 7-E(iii) was he held but there is no finding recorded by the Subordinate Judge that enquiry was conducted after issuing notice to the appellant.
15. Under these circumstances, even if any enquiry was conducted unless the appellant is given

notice and an opportunity to adduce the evidence to establish his right in the enquiry made, the finding generally does not binds him. Entries in revenue records is the paradise of the patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the land he ploughs, as his dominion and generally obeys, with moral fiber the command of the intermediary so long as his possession is not disturbed. Therefore, creation of records is a camouflage to defeat just and legal right of claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills.

16. Shri B.B. Singh, in these circumstances, seeks to contend that this question has no been canvassed in the courts below. Since the matter requires examination, it may be remanded to the High Court for consideration. We find that in view of the above findings recorded, the remittance of the matter would render little assistance.
17. Under these circumstance, we are constrained to allow the appeal and set aside the judgment of the High Court and also of the Subordinate Judge of confirming the decree of the trial Court dismissing the suit. In consequence, the respondent is directed to restitute the possession to the appellant within two months from the date of the receipt of this order. In case, he fails to do so, the appellant is at liberty to have it executed with police assistance and take possession. No costs.

□□□

STATE OF BIHAR VS. UMESH JHA
2002 (9) SC 50

State of Bihar and Another ... Appellants;
Versus
Umesh Jha ... Respondent.

JUSTICE J.L. KAPUR, JUSTICE K. SUBBA RAO, JUSTICE M. HIDAYATULLAH,
JUSTICE J.C. SHAH, JUSTICE RAGHUBAR DAYAL
CIVIL APPEAL NO. 425 OF 1957, DECIDED ON 3RD DAY OF MAY, 1961

For the Appellants : B.K. P. Sinha and D.P. Singh, Advocates.

For the Respondent : L.K. Jha, Senior Advocate (R.C. Prasad Advocate, with him).

The Judgment of the Court was delivered by

SUBBA RAO, J.—This appeal by certificate raises the question of the construction of s. 4(h) of the Bihar Land Reforms Act, 1950 (Act 30 of 1950) (hereinafter referred to as the Act), as amended by the Bihar Land Reforms (Amendment) Act, 1959 (Bihar Act 16 of 1959) (hereinafter called the Amending Act").

2. The facts giving rise to the appeal lie in a small compass. Plots NOW. 383 and 1033 are tanks in village Lakshmipur alias Tarauni in the District of Darbhanga. The respondent claims to have taken settlement of the said plots in the year 1943 from the landlords of Raghapur Estate of which the said plots formed a part. After the coming into force of the Act, the said Estate vested in the State of Bihar. Thereafter, one Sheonandan Jha and some other villagers of Lakshmipur filed a petition before the Collector alleging that the alleged settlement was not true, and that in fact the settlement was nominally effected only after January 1, 1946. The Additional Collector, Darbhanga, in exercise of the powers conferred on him under s. 4(h) of the Act, held that the said settlement was actually made after January 1, 1946, and that it was only a paper transaction; having annulled the said settlement, the Additional Collector, by his order dated January 18, 1955, called upon the respondent to give up possession of the said plots by January 30, 1955. Aggrieved by the said order, the respondent filed a petition in the High Court of Judicature at Patna under Art. 226 of the Constitution for a rule in the nature of a writ of mandamus or any other appropriate writ cancelling the order of the Additional Collector dated January 18, 1955, and restraining the appellants from interfering with his possession of the said two plots. That petition came to be decided by a division bench of the High Court; and the learned Judges by their order dated February 21, 1956, held that the Additional Collector had no jurisdiction to entertain and decide the question whether the settlement, which was prima facie shown to have been

made before January 1, 1946, was actually made after that date. On the basis of that finding, the order of the Additional Collector was set aside. The State of Bihar and the Additional Collector of Darbhanga have preferred the present appeal against the said order.

3. Learned counsel for the State contends that s. 4(h) of the Act has been amended with retrospective effect, that under the amended section the Collector has power to decide whether a transfer is made before 1946 or thereafter, and that, therefore, the order of the High Court can no longer be sustained.
4. Learned counsel for the respondent, while conceding the retroactivity of the amendment, relies upon the second proviso added by the amendment to s. 4(h) and contends that under the said proviso the order of the Collector cannot take effect nor possession taken thereunder, unless the said order has been confirmed by the State Government and that in the instant case there has not been any such confirmation. Further he questions the constitutional validity of the said section on the ground that it infringes the fundamental right of the respondent under Arts. 14, 19 and 31 of the Constitution and is not saved by Art. 31A thereof.
5. The second contention of learned counsel for the respondent may be disposed of first. Under Art. 31A of the Constitution, no-law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Art. 14, Art. 19 or Art. 31. The question is whether s. 4(h) of the Act is such a law as to be hit by Art. 31A of the Constitution. Section 4(h) of the Act confers power on a Collector, inter alia, to make inquiries in respect of any transfer of any land comprised in an estate and to cancel the same if he is satisfied that such transfer was made any time after January 1, 1946, with the object of defeating any provisions of the Act or causing loss to the State or obtaining compensation thereunder. It is said that the section *ex proprio vigore* does not provide for acquisition by the State of any estate or of any rights therein or for the extinguishment or modification of any such rights and therefore, is not protected by Art. 31A of the Constitution. This argument in effect disannexes s. 4(h) of the Act from the setting in which it appears and seeks to test its validity independently of its interaction on the other provisions of the Act. Section 4(h) is an integral part of the Act, and taken out of the Act it can only operate in vacuum. Indeed, the object of the section is to offset the anticipatory attempts made by landlords to defeat the provisions of the Act. Suppose the Collector cancels a transfer of land by the owner of an estate under the said section; the said land automatically vests in the State, with the result that the rights of the transferor and the transferee therein are extinguished. The said result accrues on the basis that the said land continued to be a part of the estate at the time the Act came into force. That apart, the section is a part of the Act designed to extinguish or modify the rights in an estate, and the power conferred on a Collector to cancel a transfer of any land in an estate is only to prevent fraud and to achieve effectively the object of the Act. This question was directly raised and answered by this Court in *Thakur Raghbir Singh v. State of Ajmer* (1). There, the constitutional validity of the Ajmer Abolition of Intermediaries and Land Reforms Act, 1955 (Ajmer III of 1955) and s. 8 thereof was attacked. Section 8 of the said Act conferred a power on the Collector to cancel a lease or contract, if he was satisfied that it was not made or entered into in the normal course of management, but in anticipation of legislation for

the abolition of intermediaries. Repelling the said contention, Wanchoo, J., speaking for the Court, observed thus:

"The provision is not an independent provision; it is merely ancillary in character enacted for carrying out the objects of the Act more effectively..... Such cancellation would sub-serve the purposes of the Act, and the provision for it therefore be an integral part of the Act, though ancillary to its main object, and would thus be protected under Art. 31A(1)(a) of the Constitution."

The same reasoning applies to s. 4(h) of the Act, and for the same reasons we hold that s. 4(h) of the Act is likewise protected by Art. 31A of the Constitution.

6. The first question turns upon the interpretation of the relevant provisions of the Amending Act. To appreciate the argument it would be convenient to read the material provisions of the said Act.

"Section 3. Amendment of section 4 of Bihar Act XXX of 1950.- In section 4 of the said Act,—
(iv) in clause (h)—

(a) the words, figures and commas "made at any time after the first day of January, 1946," shall be omitted and shall be deemed always to have been omitted;

(b) after the words "if he is satisfied that such transfer was made," the words, figures and commas "at any time after the first day of January, 1946," shall be inserted and shall be deemed always to have been inserted; and

(c) the words "and with the previous sanction of the State Government" shall be omitted;

(v) to clause (h) as amended above, the following provisos shall be added, namely:-

"Provided that an appeal against an order of the Collector under this clause, if preferred within sixty days of such order, shall lie to the proscribed authority not below the rank of the Collector of a district who shall dispose of the same according to the prescribed procedure:

Provided further that no order annulling a transfer shall take effect nor shall possession be taken in pursuance of it unless such an order has been confirmed by the State Government."

After the said amendment the relevant part of the section reads:

"The Collector shall have power to make inquiries in respect of any transfer including the settlement..... if he is satisfied that such transfer was made at any time after the first day of January, 1946, with the object of defeating any provisions of this Act or causing loss to the State or obtaining higher compensation thereunder, the Collector may, after giving reasonable notice to the parties concerned to appear and be heard and with the previous sanction of the State Government annul such transfer, dispossess the person claiming under it and take possession of such property on such terms as may appear to the Collector to be fair and equitable."

The main differences material to the present enquiry between the section as it was before the amendment and thereafter are that under the unamended section it was a moot point whether the Collector had the power to set aside a transfer, whether it was effected before or after January 1, 1946; whereas under the amended section such a power is clearly and expressly conferred on him: while under the original section, the Collector had to take the

previous sanction of the State Government before he made the order annulling a transfer and dispossessing the person claiming under it, under the amended section the order made by the Collector shall neither take effect nor can he take possession before his order is confirmed. The short question is whether the second proviso, added by the Amending Act, is retrospective in operation, that is, whether the order of the Collector made before the Amending Act, though made with the previous sanction of the State Government, would still require for its taking effect a subsequent confirmation by the State Government.

7. Learned Counsel for the State contends that the amendments made by s. 3(iv)(a) and (b) are retrospective, but the amendment made by s. 3(v) of the Amending Act is prospective. This contention appears to be sound, both in letter as well as in spirit. The different phraseology used in cls. (a) and (b) of subs. (iv) of s. 3 of the Amending Act in the matter of omissions supports it. While in cl. (a) the omission shall be deemed always to have been omitted, in cl. (b) the words mentioned therein shall only be omitted indicating by contrast that the omission in the former is expressly made retrospective while in the latter it is necessarily prospective. If that be the true construction, the condition of previous sanctions would continue to operate in respect of the Collector's order made before the amendment came into force. If the proviso be given a retrospective operation, it directly comes into conflict with the result brought about by cl. (c) of sub-s. (iv) of s. 3 of the Amending Act. An order with the previous sanction of the Government may have been passed and possession also taken by the Collector, yet a further confirmation by the Government should be sought for to revalidate it. This construction would not only attribute to the Legislature redundancy but would also enable a party to seek for restoration of the land taken possession of by the Collector on the basis of a technicality. Even in a case where possession has not been taken by the Collector, the said anomaly would persist, for two sanctions would be required. The alternative construction makes the working of the section smooth and avoids the introduction of the said incongruity and, therefore, we prefer to accept it, particularly when it is consistent with the plain meaning of the words used in the section. The result is that in respect of an order already made by the Collector before the Amending Act, the previous sanction obtained would suffice, and in respect of an order made after the Amending Act, a subsequent confirmation by the State Government is required.
8. Even so, it is argued by learned counsel for the respondent that the High Court, presumably in view of its acceptance of the respondent's preliminary point, did not consider the question whether the inquiry had been made by the Collector in strict compliance with the provisions of the section, and whether the previous sanction of the State Government was obtained before he made the said order. In the affidavit filed in support of the petition in the High Court there is no specific allegation that no such inquiry has been made or that no such sanction has been obtained. Nor did the counsel for the appellant raise the said question in the arguments before the High Court. In the circumstances we do not think that this Court is justified in allowing the respondent to raise the said question for the first time before us. We, therefore, reject this plea.
9. In the result we set aside the order of the High Court and allow the appeal. But, in the circumstances of this case, we direct the parties to bear their own costs here and in the High Court.

Appeal allowed.



STATE OF BIHAR VS. SHARDA PRASAD RAI
2002 (9) SCC 677

State of Bihar and Others ... Appellants;
Versus
Sharda Prasad Rai and Others ... Respondents.

(BEFORE SYED SHAH MOHAMMED QUADRI AND S.N. PHUKAN, JJ.)
CIVIL APPEAL NO. 1215 OF 1992, DECIDED ON NOVEMBER 1, 2000

Tenancy and Land Laws—Bihar Land Reforms Act, 1950 (30 of 1950) — S. 4(g) and (h) — State's right to direct possession of any property vesting in it under provisions of Act [S. 4(g)] and State's right to annul transfer of property carried out with object of defeating the provisions of Act [S. 4(h)] — Held, the import of clause (g) is completely different from that of clause (h) — Each deals with a different situation and operates in a different field — Action initiated under clause (h) does not operate to prevent State from subsequently taking action under clause (g) — High Court erred in allowing the respondent's writ petition and in quashing the appellant State's notice under S. 4 (g) — Matter remanded to original Revenue Authority (Paras 6 and 7)

Appeal allowed

ORDER

1. This appeal by the State of Bihar & Others is from the judgment and order of the High Court of Patna in CWJC No. 2814 of 1982 dated May 20, 1983.
2. The question raised in this appeal is a short question, namely, whether proceedings initiated by the appellants under Section 4(h) of the Bihar Land Reforms Act, 1950, but subsequently dropped, would bar initiation of proceedings under Section 4(g) of the said Act.
3. The respondents are the legal heirs of the original lessee of an extent of 387 bighas 16 kathas and 8 dhurs of land situated in Mauza Hajipur Bishrampur, Parganas Teliagarhi, Sub Division Rajmahal, Thana Sahibganj, District Dumka, Bihar State, under Kabuliyat executed in favour of one F.H. Kurtis on January 24, 1919. After coming into force of the Bihar Land Reforms Act, 1950 (for short the Act), the Collector initiated proceeding under Section 4(h) of the Act in Miscellaneous Case No. 14 of 1954-55 which was dropped on December 13, 1955. Again proceeding under the same provision was initiated in Case No. 1 of 1963-64 but that was also dropped on April 17, 1965. The present litigation commenced with issuance of notice under Section 4(g) of the Act. After affording opportunity of being heard to the respondents, the Deputy Collector, in charge Land Reforms and Development, Sahib Ganj, eventually dropped the proceedings by order dated August 17, 1970. The appellants challenged the validity of

Provided further that no order annulling a transfer shall take effect nor shall possession be taken in pursuance of it unless such an order has been confirmed by the State Government.

5. A perusal of Clause (h) would show that it empowers the Collector to make inquiry in respect of any transfer including the settlement or lease of any land comprised in such estate or tenure or the transfer of any kind of interest in any building used primarily as office or cutchery for the collection of rent of such estate or tenure or part thereof. If on making enquiries the Collector is satisfied that such transfer was made at any time after the 1st day of January, 1946 with the object of defeating any provisions of the Act or causing loss to the State or obtaining higher compensation thereunder, he is required to give reasonable notice and opportunity of being heard to the parties concerned and is enabled to annul such transfer, dispossess the person claiming under such transfer and take possession of such property on such terms as may appear to him equitable.
6. The import of Clause (g) is entirely different. It says that where by reason of the vesting of the estate or tenure or any part thereof in the State under the provision of the Act, the Collector is of the opinion that the State is entitled to the direct possession of any property, he is enjoined to serve a written order in the prescribed manner on the person in possession of such property requiring him to deliver possession thereof to the State or to show cause, if any, against the order within the period specified therein. When such a person fails to deliver possession or show cause or when a cause has been shown, the Collector after giving such a person, a reasonable opportunity of being heard rejects the cause shown, for reasons to be recorded in writing, he can take or authorise taking of such steps including use of force as may be necessary for securing compliance with the order or preventing breach of peace. The proviso to Clause (g) is not relevant for our purpose.
7. Thus it is clear that these two Clauses contemplate two different situations and they operate in different fields and action under Clause (h) does not debar the State from taking action under the other Clause, namely, Clause (g) in this view of the matter and in view of the Act that the parties have not placed before the authorities their cases and the relevant material in support thereof, we consider it just and appropriate to remand the matter to the original authority, the Deputy Collector, in charge Land Reforms, Saheb Ganj, Santhal Parganas, (appellant No. 3). In the result, we set aside the order of the Deputy Collector, and the impugned order of the High Court and remand the case to the said original authority. The appeal is accordingly allowed but in the circumstances of the case we make no order as to costs.

□□□

**SHARMISTHA SINHA VS. STATE OF JHARKHAND
2010 (2) JLJR 392**

Sharmistha Sinha (in 6768)
Meera Prasad (In 6729) ... Petitioners
Versus
State of Jharkhand & Ors. (in both) ... Respondents

AMARESHWAR SAHAY, J.
WP(C) NOS. 6768, 6729 OF 2002 DECIDED ON : (17.9.2009)

Chotanagpur Tenancy Act, 1908—Section 71-A—Restoration of Chapparbandi land—land validly converted into Chapparbandi land by tenant with the permission of landlord by registered deed—delayed application after lapse of 51 years—not reasonable—when on earlier occasions the application for restoration was rejected and become final, subsequent application for the same would be hit by principles of res judicata—appeals allowed.

CHOTA NAGPUR TENANCY ACT : S.71(a)

Cases Referred :

(2000) 5 SCC 141; 2004(4) JLJR (SC) 109; (2008)2 JCR 1 (SC) : 2008(1) JLJR (SC)309-Relied upon.

2004(2) JLJR 253; 1989 BL T (Reports) 407: 1990(2) PLJR 332-Noticed.

2004(1) JCR 237(Jhr.); 2004(1) JLJR 515; 2004(2) JCR 107(Jhr.); 1990(1) PLJR 604; 1996(2) PLJR 719-Relied upon.

AIR 1992 SC 195: 1992(1) PLJR (SC)89; 1970 PLJR 139; 1988 PLJR 211; 2004(4) JCR 535 (Jhr.): 2005(1) JLJR 1 : (Jhr.); 2006(3) JCR 204(Jhr.): 2006(2) JLJR 585; 2003(4) JCR 233 (Jhr.): 2003(4) JLJR 286; 2007(1) JCR 137 (Jhr.); 2001 (1) JLJR 165-Distinguished.

Order

These two writ petitions have been filed against the common order dated 25.11.2002 passed by the Commissioner, South Chhotanagpur Division, Ranchi, in Ranchi SAR Revision No. 46/1997. This order of the Commissioner has been annexed as Annexure-7 in WPC No 6768/2002, Annexure-6 in WPC No. 6729/2002, by which in exercise of the revisional power, the learned Commissioner has set aside the order dated 30.10.1996 passed by the Dy. Commissioner, Ranchi in SAR Appeal No. 18R, 15/94-95 and allowed the revision application, filed by Respondent No.5 Bandhan Oraon.

2. The relevant facts, in short, are that a proceeding under Section 71 A of the Chhotanagpur

Tenancy Act, being SAR Case No. 26/89-90 was initiated on an application made by Bandhan Oraon, S/o Sanicharwa Oraon (Respondent No.5 herein) against Smt Pratima Bakshi (Respondent No.6) for restoration of the land appertaining to Plot No. 1589 within Khata No. 121 area 52 decimals. It was claimed on the ground that the applicant Bandhan Oraon was illegally dispossessed from the said land though he is the descendent of the recorded tenant, and a member of Scheduled Tribes. The writ petitioners Sarmistha Sinha and Meera Prasad were added as party respondents in the aforesaid proceeding before the S. A.R. Officer since they had purchased part of the disputed land by registered deeds of sale.

3. The Special Officer, SAR, by his order dated 30th November, 1994, contained in Annexure-3 to the writ petition, dismissed the application for restoration, mainly on the ground that on 22.11.1957 by a registered Kabuliat, the nature of the disputed land had been changed and it was made "Ghhaparband" with the permission of the landlord and therefore, Section 71 A of the Chhotanagpur Tenancy Act has no application in a case of 'Ghhaparbandi' lands.
4. Being aggrieved by the order passed by the Special Officer, S.A.R., Bandhan Oraon (Respondent No.5) preferred an appeal before the Deputy Commissioner, Ranchi, which was registered as SAR. Appeal No. 18R, 15/94-95. The Deputy Commissioner, by terms of the order contained in Annexure-4, dated 30.10.1996, dismissed the appeal after hearing the parties and confirmed the order passed by the Special Officer, SAR holding that Section 71A of the Chhotanagpur Tenancy Act does not apply in the case of Ghhaparbandi land and that the application filed by the applicant for restoration of the land was barred by limitation since it was filed after a lapse of 40 years.
5. The respondent no. 5 thereafter, moved before the Commissioner, South Chhotanagpur Division, Ranchi, by filing a revision application against the orders passed by the Special Officer as well as against the order of the Deputy Commissioner which was registered as Ranchi SAR Revision No. 14/1997. The learned Commissioner by the impugned order dated 25.11.2002 contained in Annexure-7, has allowed the revision application and set aside the orders passed by the Special Officer as well as the order of the Deputy Commissioner, Ranchi, and directed for restoration of the land in question in favour of Respondent No.5 Bandhan Oraon. It is this order, which has been challenged by both the writ petitioners in these two writ petitions.
6. The petitioners of both the writ petitions namely, Sarmistha Sinha and Meera Prasad, are the purchasers of part of the lands in question. The petitioner Sarmistha Sinha has claimed to have purchased 6.25 kathas of land from Smt. Pratima Bakshi by a registered sale deed on 24.8.1990, whereas the petitioner Meera Prasad of WPC No. 6729/2002 has claimed to have purchased 8 kathas of the lands out of the plot in question from Smt. Sibani Mukerjee by a registered sale deed dated 31.4.1984 and the said Smt. Sibani Mukherjee, i.e. her vendor had purchased the said land from Smt. Pratima Bakshi by a registered sale deed dated 8.4.1976.
7. The case of the petitioners is that the lands in question, i.e. plot no 1589, under Khata No. 121 measuring an area of 152 acres was originally recorded in the name of Sanicharwa Oraon and Somra Oraon, both sons of Soma Oraon. By a registered deed of settlement dated 22.11.1951, (Annexure-1) the nature of the land of plot no. 1589 was changed and it was converted into a 'Ghhaparbandi' by the recorded tenant with the permission of the ex-landlord Narmdeshwar Pd. Singh. After the lands in question become 'Ghhaparbandi', the recorded tenant Soma Oraon sold and transferred part of his 'Ghhaparbandi' land, measuring

21 kathas 12 chhatak out of the total area of 152 acres, to Smt. Pratima Bakshi (Respondent No.6) by a registered deed of sale dated 6.12.1951. Further case of the petitioners is that Smt. Pratima Bakshi constructed a house and other structure over the land purchased by her and she also got her name mutated in the office of the Ranchi Municipal Corporation and paid holding tax in her name. She also filed return under the provision of Urban Land Ceiling Act and claimed that the lands were chhaparbandi and she did not possess excess land. Accordingly the proceeding under the Urban Land Ceiling Act initiated against her, was dropped. Thereafter, Smt Pratima Bakshi transferred 6.25 kathas of the said 'Ghhaparbandi' land of plot no. 1589 to the writ petitioner Sarmistha Sinha by a registered sale deed dated 24.8.1990. After purchasing the land alongwith building, the petitioner Sarmistha Sinha, renovated the old house and constructed a 'Pucca' building and also got her name mutated in Ranchi Municipal Corporation within holding no. 2026(A)/11.

8. The petitioner Meera Prasad in WPC No. 6729/2002, has stated that Smt. Pratima Bakshi, sold 8 kathas of 'Ghhaparbandi' land of the aforesaid plot no. 1589 to Mrs. Sibani Mukherjee W/o Atula Nand Mukherjee by a registered deed of sale on 8.4.1976. Smt. Sibani Mukherjee got her name mutated in the Circle Office and also in the records of Ranchi Municipal Corporation. The said Sibani Mukherjee subsequently, by a registered sale deed dated 31.8.1984, sold the said 8 kathas of 'Ghhaparbandi' land in favour of the petitioner.
9. Mr. Amar Kumar Sinha as well as Mr. Ayush Aditya, learned counsel appearing on behalf of the petitioners, submitted that it is a settled law that in a case of land, the nature of which is 'Ghhaparbandi' and is within the area of Municipal Corporation, an application Under Section 71 A of the Chhotanagpur Tenancy Act is not maintainable since Section 71 A of the said Act has got no application so far as the 'Ghhaparbandi' land is concerned. They further submitted that the application for restoration filed by the respondent no. 5 was also hopelessly barred by limitation, since it was filed after about a gap of 38 years.

Mr. Ayush Aditya, learned counsel appearing for the petitioner in WPC No. 6729/2002 further submitted that earlier also the respondent no. 5 had filed an application for restoration under Section 71A of the Chhotanagpur Tenancy Act against the writ petitioner Meera Prasad being S.A.R. Case No. 26/89-90, which was already dismissed on 30.11.1994 and the appeal against the said dismissal order was also dismissed by the appellate court and, therefore, the second application for restoration filed by the Respondent No. 5 for the same cause of action against Meera Prasad is barred by res judicata.

In support of their contentions, they have placed reliance in the case of Situ Sahu and others vs. State of Jharkhand and Others reported in 2004(4) JLJR 109; Fulchand Munda vs. State of Bihar and Others reported in 2008(2) JCR 1 (SC) : 2008(1) JLJR (SC) 309 Jai Mangal Oraon vs. Mira Nayak (Smt.) and Others and analogous cases reported in (2000)15 SCC 141: Ashwini Kumar Roy VS. State of Bihar reported in 1987 BL T Page 332(Pat.)(RB); Anupama Roy vs. The State of Bihar and Others reported in 2003(31) JLJR 626: and Jaitu Oraon and Another vs. The State of Jharkhand and Others reported in 2004(21) JLJR 253: and Munni Devi & Ors. vs. Special Officer, Scheduled Areas Regulation reported in 1989 BLT (Reports) 407 [: 1990(2) PLJR 332].

10. On the other hand, Ms. Shubha Jha, learned counsel appearing for the respondent no. 5, by referring to the statements made in the counter affidavit filed on behalf of Respondent No. 5 submitted that the land in question was never converted into Chhaparbandi and Sanicharwa

Oraon, i.e. the father of the Respondent No.5 never surrendered his raiyat land in favour of the landlord. The transfer of the land in question in favour of the petitioners or their vendor have been made in contravention of the provisions of Chhotanagpur Tenancy Act and, therefore, the learned Commissioner has rightly set aside the order passed by the Special Officer as well as the order of the Deputy Commissioner passed in appeal.

11. From the impugned order passed by the learned Commissioner contained in Annexure-7 in WPC No. 6768/2002 equivalent to Annexure-6 in WPC No. 6729/2002, it appears that the learned Commissioner has based her orders on the ground that Sanicharwa Oraon could not have executed the Kabuliat alone because the lands were jointly held by Sanicharwa Oraon and his brother.
12. There is no dispute of the fact that the total area of plot no. 1589 was 1.52 acres and even if it is-accepted that the entire area was held and possessed by Sanicharwa Oraon and his brother even then Sanicharwa Oraon was definitely entitled to sell half of the area of the entire plot no 1589 whereas Sanicharwa Oraon has sold only 36 decimals of lands to Smt. Pratima Bakshi after conversion of the land by registered deed dated 22.11.1951. Therefore, the finding by the learned Commissioner that Sanicharwa Oraon alone had no authority to transfer the land cannot be sustained.
13. In the present case, I find that the land in question was allowed to be converted into 'Chhapparbandi' by registered deed in the year 1951 itself and after conversion of the land into 'Chhapparbandi', the same was sold by the father of the respondent no. 5 to Smt. Pratima Bakshi by a registered Sale Deed dated 22.11.1951 and she also paid holding tax and 'Chhapparbandi' rent etc. therefore it appears that the land in question was validly converted into 'Chhapparbandi' land by the recorded tenant with permission of the landlord by a registered deed and subsequently, the said land was sold by registered deed of sale in favour of Smt. Pratima Bakshi on 22.11.1951 by a registered document.
14. In the case of Ashwini Kumar Roy vs. State of Bihar reported in 1987 BLT Page 332 (Pat)(RB), the Division Bench of the Patna High Court, has clearly held that no proceeding under Section 71A of the Chhotanagpur Tenancy Act can be initiated for restoration of 'Chhapparbandi' land. If the land is 'Chhapparbandi' then it will be governed by Transfer of Property Act and not by the Chhotanagpur Tenancy Act. In the case of Anupama Roy vs. The State of Bihar and Others reported in 2003(31 JLJR 626. a Single Bench of this Court also quashed the order of restoration passed by the Courts below on the ground that the land in question was a 'Chhapparbandi' land.
15. In this view of the matter, as per the decision of the Division Bench in the case of Ashwini Kumar Roy vs. State of Bihar reported in 1987 BL T Page 332(Pat.)(RB); Anupama Roy vs. The State of Bihar and Others reported in 2003(31 JLJR 626. I hold that the application under Section 71 A of the Chhotanagpur Tenancy Act filed by the respondent no. 5 for restoration of the land in question, was not maintainable in view of the reasons stated hereinabove.
16. Now coming to the question of limitation. I find that in the case of Jai Mangal Oraon vs. Mira Nayak (Smt.) and Others and analogous cases reported in (2000)15 SCC 141, the Supreme Court has held as follows:-

"Merely because Section 71 A commences with the word "at any time it cannot be taken to

mean that those powers can be exercised without any point of time limit as in this case, after nearly about 40 years, rights of the parties acquired in the meantime under ordinary law and the law of limitation."

In the case of *Situ Sahu and Others vs. State of Jharkhand and Others* reported in 2004 (4) JLR 109, the Supreme Court held that the test is not whether the period of limitation prescribed in 1963 Act has expired but whether the power under Section 71 A of the Chhotanagpur Tenancy Act was sought to be exercised after unreasonable delay and the lapse of 40 years is certainly not a reasonable time for exercise of power.

In the case of *Fulchand M.unda vs. State of Bihar and Others* reported in 2008(21 JCR 1 (SC) [: 2008(1) JLR (SC) 309], it has been held that power under Section 71 A of the Chhotanagpur Tenancy Act can be exercised by the deputy Commissioner within a reasonable period of time. Gap of more than 50 years for challenging the transfer cannot be said to be the reasonable time.

17. In the present case, admittedly, the land in question was transferred in the year 1951 whereas, the application for restoration was filed in the year 1990 and the order for restoration has been passed by the Commissioner on 25.11.2002. Therefore, it is apparent that the application for restoration was filed after about 38 years whereas, the power under Section 71 A has been exercised after a gap of 51 years. Therefore, it can be said that the power for restoration was exercised after a long lapse of time which was not reasonable therefore it is held that the application for restoration filed by the respondent no. 5 was barred by limitation.
18. It appears that the assertion of the petitioner Meera Prasad that earlier also an application under Section 71 A of the Chhotanagpur Tenancy Act was filed against her by respondent no. 5 Bandhan Oraon being SAR Case No. 26/89-90 and the same was dismissed by the Special Officer as well as by the Appellate Authority. This point has already been settled by a number of judgments of this Court wherein it has been held that if on earlier occasions the application for restoration has been rejected and it has become final then subsequent application for restoration for the same would be hit by principles of *res judicata*. Reference in this regard may be made to the decisions in the case of "*Gadia Oraon & Ors. vs. State of Jharkhand and Ors.*, reported in 2004(1) JCR 237 (Jhr.), and "*Bibi Makho vs. State of Bihar*, reported in 2004(11 JLR 515: 2004(21 JCR 107(Jhr.1: and "*Ram Chandra Sahu vs. State of Bihar*, reported in 1990(1) PLJR 604; and "*Smt. Satyawati Devi vs. State of Bihar*, reported in 1996(2) PLJR 719".
19. It would not be out of place to mention here that though Mrs. Shubha Jha, learned counsel has very vehemently argued on behalf of the respondent no. 5 and cited several decision such as reported in *Pandey Oraon vs. Ram Chander Sahu and Others* reported in AIR 1992 SC 195 [: 1992(1) PLJR (SC)89j; *Jageshwar Sikhar and Others vs. Yubrajin Srimati Baidehi Kuer & Anr.* reported in 1970 PLJR 139; *Dcotu Ohdar vs. State of Bihar* reported in 1988 PLJR 211; *State of Jharkhand and Others vs. Arjun Das* reported in 2004(41 JCR 535(Jhr.1 [: 2005(11 JLR 1j; *Sakhiya Kumari vs. State of Bihar* reported in 2006(31 JCR 204(Jhr.1 [: 2006(2) JLR 585]; *Sitlal Baitha @ Ram & Ors. vs. Rudi Chamar & Ors.* reported in 2003(4) JCR 233 (Jhr:) [: 2003(41 JLR 286]; *Jainath Sahi vs. State of Bihar and Others* reported in 2007(11 JCR 137(Jhr.) and *Ajay Metachem Ltd. vs. Commissioner, South Chhotanagpur Division and*

Others reported in 2001 (11 JLR 165. but not a single decision cited by her is relevant for the points in issue in this case. Therefore, I have not discussed those decisions.

20. In view of the discussions and findings above, these two writ petitions are allowed. The orders dated 25.11.2002 passed by the Commissioner, South Chhotanagpur Division, Ranchi, in Ranchi SAR Revision No. 46/1997 which has been annexed as Annexure-7 in WPC No. 6768/ 2002 and. Annexure-6 in WPC No. 6729/ 2002, are hereby set aside. Consequently, the order dated 30.10.1996 passed by the Dy. Commissioner, Ranchi in SAR Appeal No. 18R, 15/94-95 is hereby affirmed. However, in the facts and circumstances of the case, there shall be no order as to cost.

□□□

KORIN @ ETWARI DEVI VS. INDIA CABLE COMPANY LTD.
1978 (0) AIR SC 312

Korin ... Appellant

Versus

Indian Cables Co. Ltd. and Others ... Respondents

M.H. BEG, C.J.I., A.C. GUPTA AND P.S. KAILASAM, JJ.

CIVIL APPEAL NO. 2068 OF 1968 DATED ON 18-11-1977

Advocates appeared : Mr. S.C. Agarwal and Mr. A.P. Gupta, Advocates, for Appellant; Mr. Sachin Chowdhary, Sr. Advocate (M/s. P.K. Mukherjee and D.N. Gupta, Advocates with him) (for No. 1) and Mr. R. C. Prasad, Advocate (for No. 4), for Respondents.

Cases Referred :

approved : Joy Chand v. Bhutnath Khan

Secretary of State v. Babu Bern Prasad

JUDGMENT

A.C. Gupta, J.—This appeal by special leave is by a defendant in a suit for declaration of title and recovery of possession. The property in dispute consists of two survey plotes, 2677/5782 measuring Order, 18 acres and 2677/5783 measuring Order 10 acres, the total area being Order 20 acres, in Tetanga Basti, House Sahchi, Police Station Colmuri in Pargana Dhalbhum, District Singhbhum. The suit was dismissed by the trial court, concerned by the first appellate court, and the Patna High Court on second appeal affirmed the decision of the lower appellate court decreeing the suit. The relevant facts are as follows : The fourth respondent Tata Iron and Steel Co. Limited (hereinafter referred to as TISCO) were the proprietors of the disputed plots of land which formed part of the area acquired under the Land Acquisition Act by the local government for TISCO. In 1924 these two plots of land along with other lands were leased out by TISCO to the plaintiff, the Indian Cable Co. Limited (hereinafter referred to as the plaintiff Co.). TISCO also settled another area measuring about 5 bighas 17 kathas with one Rajdeo, predecessor in interest of the present appellant. There is some dispute as to whether this settlement was in 1924 or 1928 but that is not of any great importance in the present controversy between the parties. According to the plaintiff Co. Rajdeo trespassed into the two disputed plots of land in November 1932 It appears that in a proceeding under Section 87 of the Chhota Nagpur Tenancy Act, 1908 (referred to hereinafter as the Act) initiated by Rajdeo it was held that the disputed plots were outside the area settled out by TISCO with Rajdeo and were part of the land leased out by TISCO to the plaintiff Co. . It was further held that Rajdeo had been in forcible possession of the plots for about five years since 1932 from which he could be removed only by legal process. There after the plaintiff Co. instituted title suit No. 116 of 1938 in the Court of the Munsif at Jamshedpur for Rajdeo's eviction from the land on

which he had trespassed which was roughly 1.70 acres in area and included the two disputed plots. It was again found in that suit that the disputed plots were not part of the 5 bighas and 17 kathas of land settled by TISCO with Rajdeo as it was held that Rajdeo had acquired 'kathas' rights in the portion of the disputed plots in his occupation and therefore he was protected against eviction in view of the provisions of Section 78 of the Act. That suit was accordingly dismissed.

2. Later, on March 25, 1945, TISCO recovered under Section 50 of the Act prosecution of the entire holding of 5 Bighas 17 kathas settled by them with Rajdeo. The plaintiff Co. on July 27, 1954 filed title suit No. 280 of 1954 out of which their appeal arises for Rajdeo's eviction from the two disputed plots in the court of the Munsif at Jamshedpur. The Munsif held that Rajdeo was not dispossessed from the entire holding under Section 50 of the Act, but retained possession of 1,1/2 bighas, that Rajdeo was a nonejectable 'korkar' riyat in respect of his holding under TISCO and was therefore protected from eviction under Section 78 of the Act in respect of his homestead that he built on the disputed plots. It was further held that in view of the Bihar Land Reforms Act, 1950 the intermediary rights of both TISCO and their lessees, the plaintiff Co. , had vested in the State of Bihar and it was the State of Bihar alone that could maintain an action for ejection against Rajdeo. The trial court was also of opinion that the findings recorded in the earlier suit, title suit No. 116 of 1938, were res judicate in the present suit and therefore Rajdeo's character as a korkar riyat in respect of his homestead on the disputed plots could not be reopened. It may be stated here that Rajdeo died during the pendency of the suit and was substituted by his heirs and legal representatives.
3. On appeal by the plaintiff Co. , the first appellate court reversed the Munsif's decision and dismissed the suit. The appellate court found that the entire agricultural land held by Rajdeo under TISCO had been taken away from him under Section 50 and consequently he ceased to be a riyat in respect of the portion of land on which his homestead stood and thus lost the protection given by Section 78 of the Act. The appellate court held that the findings recorded in title suit No. 116 of 1938 could not be res judicate because of the changed circumstances that now the question of Rajdeo's title to the two disputed plots on which his homestead stood was to be considered independently from whatever his interest in the said plots was when they formed part of the agricultural land from which he had been dispossessed under Section 50. It is however a little difficult to understand the relevance of the proceeding under Section 50 to which the trial court and the first appellate court both referred. It that proceeding related to a holding under a different landlord, and was not part of the land belonging to the plaintiff now in dispute, Rajdeo's dispossession under Section 50 could possibly have no bearing on the nature of his interest in the disputed plots. However, as it appears that all the courts including the High Court as well as the parties to the litigation proceeded on the footing as if the homestead plots and the agricultural land constituted one holding, we do not propose to pursue the matter further.
4. The High Court in second appeal preferred by the defendants affirmed the decision of the first appellate court. The High Court also held that the findings in title suit No. 116 of 1938 were not res judicates, that the protection of Section 79 of the Act was not available to the defendants after they were dispossessed from the agricultural lands under Section 50 and consequently Rajdeo's homestead become subject to the ordinary incidents of a tenancy governed by the Transfer of Property Act. On the point that after the Bihar Land Reforms Act, 1950 came into force the plaintiff Co. and their lessor TISCO ceased to have any interest in the disputed land therefore this suit for recovery of possession at their instance was not maintainable, the High Court was

of opinion that as the tenancy of the two disputed plots was governed by the provisions of the Transfer of Property Act and not the Chhota Nagpur Tenancy Act, the vesting of estates under the Bihar Land Reforms Act had "nothing to do with the present suit for eviction of the defendant".

5. As regards res judicate, if the nature of the defendants' interest in the disputed plots changed after TISCO recovered possession of Rajdeo's agricultural lands under Section 50 of the Act, the reason given by the first appellate court why the Rule of res judicata should not apply would be sound calling for no inference. A test to find out if the right that the defendants had in the disputed plots had undergone a change consequent on their dispossession from the agricultural lands is whether the protection of Section 78 was still available to them. Section 78 reads:

"Homesteads, when a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local customs or usage, and, subject to local customs or usage by the provisions of this Act applicable to land held by a raiyat."

Mr. S. Chaudhury appearing for the first respondent, the plaintiff Co., referred to two decisions of the Patna High Court on Section 78. In Joy Chand Vs. Bhutnath Khan, (1) a Division Bench of the High Court held that Section 78 will apply so long as the tenant of the homestead continues to be a raiyat in respect of the other land but no longer. In Secretary of State vs Babu Ben Prasad.(2) another Division bench held that Section 78 "was enacted as a protection to the cultivating tenant, so that he may not be turned out of his homestead as long as he holds his raiyati land. If he parts with the raiyati land, his tenancy of the homestead becomes subject to the ordinary incidence and does not suffice to keep up his status as "raiyat" This appears to be the consistent view taken by the Patna High Court on the point, and we find no reason, at last none has been pointed out, inducing us to take a different view.

6. It follows therefore that the defendants' tenancy is governed by the provisions of the Transfer of Property Act, and, on the facts found, the plaintiff Co. would be entitled to a decree for recovery of possession unless, consequent on the vesting of the estates and tenures under the Bihar Land Reforms Act, 1950 it ceased to have any interest in the subject matter of the suit. The trial court held that the land had vested in the State, the first appellate court did not advert to the question, and the High Court thought it was not relevant. The High Court apparently failed to see that the question was relevant in order to find out if the suit was maintainable at the instance of the plaintiff Co. . We, therefore, send the matter back to the High Court. The High Court will record a finding as to whether the land forming the subject matter of the suit had vested in the State and the plaintiff Co. ceased to have any interest in the land consequent on the vesting. If the High Court finds that the land had vested and the plaintiff Co. had no subsisting interest therein, it will dismiss the suit. If however the High Court finds that the land had not vested or that the plaintiff Co. retained an interest in the land in spite of vesting, it will affirm the decree of ejectment passed by the first appellate court. As it may be possible to decide the question on affidavits and as this is a very old case, the High Court will try to dispose of the matter expeditiously, if possible within three months from the date when it receives back the record of the case.
7. The appeal is allowed to the extent and in the manner indicated above. There will be no order as to costs to this appeal. Order accordingly.

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PARITOSH MAITY VS. GHASHI RAM MAITY
AIR 1987 (Pat.) 167

Paritosh Maity and etc ... Appellants

Versus

Ghasiram Maity and another ... Respondents.

S. S. SANDHAWALIA, C.J., SATYESHWAR ROY AND R. C. P. SINHA, JJ.

*S.A. NOS. 36 AND 149(R) OF 1977, D/- 11-12 -1986.**

Chota Nagpur Tenancy Act (6 of 1908) (as amended by Chhotanagpur Tenancy (Amendment) Act, 1920 -Bihar and Orissa Act (6 of 1920), S.84, S.87, S.92, S.139A and S.258 - Civil suit for declaration of title confirmation of possession challenging entries in revenue records - Maintainable notwithstanding insertion of Cl.(ee) in S.87(l) by Amendment Act (Civil P.C. (1908), S.9).

F.A. 215 of 1977 (R) D/-2-3-1984 (Pat), Overruled.

A civil suit for declaration of title and confirmation of possession and, inter alia, challenging the entries in the revenue record would still be maintainable even after the insertion of Cl.(ee) in S.87(l), Chotanagpur Tenancy Act, 1908. AIR 1936 Pat 611 Affirmed. F.A. 215 of 1977(R), D/-2-3-1984 (Pat) Overruled. F.A. 43 of 1968 (R), D/-11-7-1979 (Pat) Distinguished. (Para 21)

S.87 (1) undoubtedly permits a suit to be instituted before a Revenue Officer within the narrow period of limitation of three months from the date of the certificate of final publication of the record of rights, for deciding any dispute regarding any entry which a Revenue Officer has made or omitted from such records. The provision further clarifies that such a suit would lie whether such dispute be with regard to the wide ranging matters specified in els. (a) to (f) and including the newly inserted Cl.(ee). What, however, is very significant and first meets the eye is the fact that though S.87 provides for a suit of the aforesaid nature, it does not even remotely say that a suit for declaration of title and confirmation of possession or recovery of possession cannot be entertained by any Civil Court. It is manifest that there is no express bar whatsoever and indeed not even a hint of an implied bar against the jurisdiction of the Civil Courts in S.87. It is a settled principle of law that even where there is a provision in the statute regarding exclusion of jurisdiction of civil courts, it has to be strictly construed. Herein, apart from strict construction, there is manifestly nothing in S.87 which could even remotely hint at any express bar or one by necessary implication. By now, because of settled judicial precedent, the legislatures are well aware of the language and terminology to be employed where the jurisdiction of the civil or other courts is to be completely ousted. Case law discussed. (Paras 12, 13, 14)

* Against order of Jugal Kishore Prasad, 1st Addl. Sub. Judge, Jamshedpur. D/-18-9-1976.

Cases Referred :

AIR 1985 Pat 352:19R5 Pat LJR 732

(1984) First Appeal No. 215 of 1977 (R) D/-2-3-1984 (Pat), Mosowar Khan v. S.K. Alim (Overruled)

AIR 1981 SC 2016

(1979) First Appeal No. 43 of 1968(R) D/-11-7-1979 (Pat), Sahodri Kuer v. Lai Barjeshwar Nath Sahdeo (Distinguished)

AIR 1977 SC 5

AIR 1971 SC 681

AIR 1971 SC 2320

AIR 1969 SC 439

AIR 1969 SC 560

AIR 1966 SC 1718

AIR 1964 SC 1126

AIR 1963 SC 361

AIR 1963 SC 605

AIR 1961 SC 149

AIR 1961 Pat 142 (FB)

P.C. Roy, Mrs. Jaya Roy, P.K. Sinha and D.K. Sarkar, for Appellants; S.B. Sinha, V. Shivnath P. Modi, A.K. Mehta, P.R. Bhagat, P.S. Rai, A. Sahay, S.K. Chatopadhyaya and Mrs. Indrani Choudhary, for Respondents.

JUDGMENT

S.S. Sandhawalia, C.J. :- Whether a civil suit for declaration of title and confirmation of possession, challenging, inter alia, the entries in the revenue records would still be maintainable after the insertion of Clause (ee) in Section 87(1), Chotanagpur Tenancy Act, 1908, by the Chotanagpur Tenancy (Amendment) Act, 1920 (Bihar and Orissa Act VI of 1920), is the significant common question in these two connected Second Appeals, referred to the Full Bench for an authoritative decision.

2. The representative matrix of facts for the decision of the pristinely legal question above may be noticed briefly from Second Appeal No. 36 of 1977(R) (Paritosh Maity v. Ghasiram Maity). The plaintiff-respondent had instituted a suit for declaration of title and confirmation of possession and for a permanent injunction with respect to a portion of land in Revenue Khata No. 105, Plots Nos. 347 and 361, which had been recorded in the recent survey Plot No. 1153, the area being 0. 25 acre and 0. 17 acre, respectively, in Mouza Chalunia, Police Station Chakulia, District Singhbhum. It was the claim that the entries in the revenue records with regard to the aforesaid plots had been wrongly recorded in the Anand Khata of Bihar Sarkar, though the State of Bihar had no manner of title and interest therein, and, as a matter of fact, these plots belonged to the plaintiff, as he was in peaceful possession thereof.

The suit was contested on behalf of the defendants, and, on the pleadings of the parties, as many as 8 issues were framed, including Issue No. 1 with regard to the very maintainability of the suit as framed. It would appear that, during the course of trial, Issue No. 1 was not seriously pressed and no patent defect with regard to the frame of the suit was pointed out by the defendants and the same was decided in favour of the plaintiff. On the other issues as well the findings went in favour of the plaintiff and the suit was decreed with regard to declaration of title in favour of the plaintiff and confirmation of his possession, restraining the defendants, from interfering therewith. On appeal by the defendants, the learned First Additional Subordinate Judge, Jamshedpur, in a detailed judgment, confirmed the findings of the trial court, and discovering no merit in the appeal, dismissed the same with costs.

3. In the present second appeal, the defendant-appellant primarily pressed the point that the very suit was not maintainable in view of the insertion of Clause (ee) in Section 87(1), Chotanagpur Tenancy Act (hereinafter referred to as the Act), and, further the courts below had failed to draw the presumption of correctness attaching to the entries in the record of rights. Reliance was placed on the unreported judgment in *Mosowar Khan v. Sk. Alim* (First Appeal No. 215 of 1977(R), decided on the 2nd March, 1984). The learned single Judge, considering the significance of the question, referred the appeal to the Division Bench.
4. Before the Division Bench, hearing both the connected second appeals (Second Appeals 36 and 149 of 1977(R)) a conflict of precedent within the Court was noticed with an earlier Division Bench decision reported in AIR 1936 Pat 611 (*Gobardhan Sahu v. Lal Mohan Kharwar*). The matter was, therefore, referred to be heard by a larger Bench. That is how it is before us.
5. Learned Counsel for the defendant-appellant in Second Appeal No. 36 of 1977(R) vehemently contended that the very suit preferred by the plaintiff-respondent was not at all maintainable, after the insertion of Clause (ee) in Section 87(1) of the Act. It was argued that any question relating to title to the land or its possession between the parties to the suit could now be agitated only by way of a suit under Section 87 of the Act before a revenue officer. It was claimed that this provision now conferred exclusive jurisdiction on the revenue officer by virtue of Section 87(1)(ee) and a civil suit with regard thereto was barred by virtue of Section 258 of the Act. Firm reliance was placed on the decision in *Mosowar Khan v. Shaikh Alim* (supra) wherein it has been observed as under :-

"Since a forum has been created under the Act for deciding such disputes, the plaintiff, if aggrieved by the entry in the record of rights, as appears from Ext. E, ought to have filed a suit under Section 87(1)(ee) of the Act. In our opinion, the suit, therefore, was not maintainable."
6. On behalf of the plaintiff-respondent challenge is laid to both the correctness of the stand and the decision relied upon. Particular reliance on his behalf was placed on the earlier Division Bench decision in *Gobardhan Sahu v. Lal Mohan Kharwar*, (AIR 1936 Pat 611) (supra).
7. Inevitably, the meaningful issue herein turns on the relevant statutory provisions and more pointedly on the changes brought about in the Act by the Chotanagpur Tenancy (Amendment) Act, 1920 (Bihar and Orissa Act 6 of 1920). It is, therefore, not only necessary to refer to the Act, but indeed it is apt to notice the relevant part of the provisions in extenso at the very outset, for facility of reference.

"84. Presumptions as to final publication and correctness of record-of-rights :

(1) XXX XX

(2) The State Government may by notification, declare, with regard to any specified area, that a record-of-rights has been finally published for every village included in that area; and such notification shall be conclusive evidence of such publication.

(3) Every entry in a record-of-rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved, by evidence, to be incorrect."

"87. Institution of suits before Revenue Officer :

(1) In proceedings under this Chapter, a suit may be instituted before a Revenue Officer, at any time within three months from the date of the certificate of the final publication of the record-of-rights under Sub-section (2) of Section 83, for the decision of any dispute regarding any entry which a Revenue Officer has made in, or any omission which he has made from, the record, except an entry of a fair rent settled under the provisions of Section 85 before the final publication of the record-of-rights, whether such dispute be-

XXX XXX XXX

(ee) as to any question relating to the title in land or to any interest in land as between the parties to the suit; or,

(f) as to any other matter;

and the Revenue-Officer shall hear and decide the dispute :

Provided that the Revenue Officer may, subject to such rules as may be made in this behalf under Section 264, transfer any particular case or class of cases to a competent Civil Court for trial:

XXX XXX XXX

(2) An appeal shall lie, in the prescribed manner and to the prescribed officer, from decisions passed under Sub-section (1) and a second appeal to the High Court shall "lie from any decision on appeal of such officer as if such decision were an appellate decree passed by the Judicial Commissioner under Chapter XVI."

92. Bar to jurisdiction of Courts in matters relating to record-of-rights :

No suit shall be brought in any Court in respect of any order directing the preparation of a record-of-rights under this Chapter, or in respect of the framing, publication, signing or attestation of such a record or of any part of it."

"139A: Exclusive jurisdiction of Deputy Commissioner in certain cases :

Subject to the provisions of Chapter XII, no Court shall entertain any suit concerning any matter in respect of which an application is cognizable by the Deputy Commissioner under Section 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this Act relating to appeal, be final."

"258. Bar to suits in certain cases.-- Save as expressly provided in this Act, no suit shall be entertained in any Court to vary, modify or set aside either directly or indirectly, any decision,

order or decree of any Deputy Commissioner or Revenue Officer in any suit, application, or proceeding under Section 29, Section 32, Section 42. Section 46 Sub-section (4), Section 49, Section 50, Section 54, Section 61, Section 63, Section 65, Section 73, Section 74-A, Section 75, Section 85, Section 86, Section 8J, Section 89 or Section 91 (proviso), or under Chap. XIII, XIV, XV, XVI or XVIII, except on the ground of fraud or want of jurisdiction, and every such decision, order or decree shall have the force and effect of a decree of a Civil Court in a suit between the parties and subject to the provisions of this Act relating to appeal shall be final."

8. It appears to me that the true, construction of the aforesaid provisions is rooted in the legislative history and can be well construed in that perspective background. The larger purpose and import of the Act has been very elaborately discussed in the recent Full Bench decision in *Bina Rani Ghosh v. Commr., South Chotanagpur Division*, 1985 Pat LJR 732 : (AIR 1985 Pat 352). It is unnecessary to traverse the same ground again and it would, perhaps, suffice to recall that the true perspective of the Act is against the backdrop of the primordial backwardness of the scheduled tribes interspersed in the deeply wooded and semi-tropical forests of the Chotanagpur Division and the adjoining district of Santhal Parganas. What calls for notice with particularity is the larger purpose of the insertion of Clause (ee) in Section 87(1) of the Act, not merely in isolation but equally in the perspective of other complementary changes brought about by the amending Act in a number of other provisions as well. Chapter XII of the Act as its very heading indicates, contains Sections 80 to 100 pertaining to entries in the record-of-rights and settlement of rent. It is, perhaps, unnecessary to advert to individual sections thereof or elaborate the scheme of this Chapter at any great length. Indeed, it is manifest that the same is intended to provide in some detail the procedure for the purpose of making entries in the revenue records and the adjudication of any dispute regarding such entries before a Revenue Officer. It is somewhat common ground that prior to 1920, despite the existence of these provisions, litigations in the Civil Courts continued with regard to questions relating to title in land or to any interest in land as betwixt the parties to the suit. Indeed, it would appear that on the earlier provisions precedent consistently held that a suit for declaration of title or recovery of possession and injunction would not lie before Revenue Officer and inevitably had to be brought in a Civil Court on the existing provisions of Section 87. Apparently to change the situation and to bring even questions of title relating to land or other interest therein within the ambit of Section 87, Clause (ee) was inserted in Sub-section (1) thereof by the Bihar and Orissa Amending Act VI of 1920. As is being indicated hereinafter, substantive changes were brought in the other provisions of the Act as well by the aforesaid Amending Act of 1920.
9. The corresponding change brought about in Sub-section (2) of Section 87 may be first noticed. Apparently because questions of title in land or any interest in land had been brought within the sweep of a suit under Section 87 (and otherwise also with regard to Clauses to (f)) a second appeal to the High court from any decision in the first appeal by a Revenue Officer was provided as if such decision was an appellate decree passed by the Judicial Commissioner under Chap. XVI. This was indeed a significant provision which brought the Revenue Officers and the Courts directly under the aegis and adjudication of the High Court itself in second appeal. Reference is again called for to Section 258 and what meets the eye is the fact that it does not place a blanket bar on the jurisdiction of the Civil Court but, as its title indicates, merely puts a bar to suits in certain cases. The Amending Act broadened the base of Section 258 by extending it to any decision of any Deputy Commissioner or Revenue

Officer in any suit, and extended it to applications as well and further provided that all such decisions, orders or decrees shall have the force and effect of a decree of a Civil Court in a suit between the parties and subject to the provisions of this Act relating to appeals.

10. Against the aforesaid legislative background, one may now revert to the wholly well known provisions of Section 9, Civil P.C., the relevant part thereof may be quoted for facility of reference:

"The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

There cannot be any dispute that questions relating to title in land or any interest in land are matters of a civil nature. Both generally and specifically the suits involved in this set of appeals are suits of a civil nature and jurisdiction of the Civil Court can only be barred if firstly, it is expressly excluded or secondly, if it is so done by necessary implication. Indeed, in this context some basic propositions are so well established by judicial pronouncements that they need to be only recapitulated, viz. :

- (i) A litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in Civil Court unless its cognizance is either expressly or impliedly barred and there is a strong presumption in favour of the jurisdiction of a Civil Court (see (1) AIR 1964 SC 1126 (*V. R. Sadacope Naidu v. Bakthavatsalam*), (2) AIR 1961 SC 149 (*Brij Raj Singh v. Lj Singh v. Laxman Singh*), and (3) AIR 1961 Patna 142 (FB) (*Patna Municipal Corporation v. Ram Bachan Lal*)).:
 - (ii) The exclusion of jurisdiction of Civil Court is not to be readily inferred. A statute ousting jurisdiction of the Civil Court must do so either in express terms or by use of such language as would necessarily lead to such an inference (see AIR 1969 SC 439 (*Musamia Imam Haider Bax Razvi v. Rabari Govindbhai Ratnabhai* and AIR 1969 SC 560 (*Dewaji v. Ganpatlal*)).
 - (iii) The onus is on the party who seeks to oust the jurisdiction of the Civil Court to establish its stand. Further, a statute ousting the jurisdiction of the Civil Court must be strictly construed (see AIR 1966 SC 1718 (*Abdul Waheed Khan v. Bhawani*)).
 - (iv) Even if the jurisdiction of the Civil Court is excluded by statute, in case where the provisions of such statute have not been complied with, or a statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the Civil Courts would still have jurisdiction to examine such cases (see AIR 1966 SC 1718 : *Abdul Waheed Khan v. Bhawani*).
11. It is in the light of the aforesaid well established principles of law that the question regarding the exclusion of the jurisdiction of the Civil Court in the present case has to be examined with reference to the provisions of the Act.
12. Inevitably one must first turn to Section 87 which is the most relevant provision of law for the decision of the question involved. Sub-section (1) thereof undoubtedly permits a suit to be instituted before a Revenue Officer within the narrow period of limitation of three months from the date of the certificate of final publication of the record of rights, for deciding any dispute regarding any entry which a Revenue Officer has made or omitted from

such records. The provision further clarifies that such a suit would lie whether such dispute be with regard to the wide ranging matters specified in Clauses (a) to (f) and including the newly inserted Clause (ee). What, however, is very significant and first meets the eye is the fact that though S, 87 provides for a suit of the aforesaid nature, it does not even remotely say that a suit for declaration of title and confirmation of possession or recovery of possession cannot be entertained by any Civil Court. It is manifest that there is no express bar whatsoever and indeed not even a hint of an implied bar against the jurisdiction of the Civil Courts in Section 87. As mentioned above, it is a settled principle of law that even where there is a provision in the statute regarding exclusion of jurisdiction of civil courts, it has to be strictly construed. Herein, apart from strict construction, there is manifestly nothing in Section 87 which could even remotely hint at any express bar or one by necessary implication. By now, because of settled judicial precedent, the legislatures are well aware of the language and terminology to be employed where the jurisdiction of the civil or other courts is to be completely ousted. A salient and typical example may be noticed from Section 57 Bihar and Orissa Cooperative Societies Act, where it is provided as under :-

"57. Bar of jurisdiction of Courts.-- (1) Save in so far as expressly provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of any matter concerned with the winding up or dissolution of a registered society under this Act, or of any dispute required by Section 48 to be referred to the Registrar or of any proceedings under Chap. VI1-A.

(2) X X XX

(3) XX XX X"

13. What, therefore, deserves highlighting herein is the fact that neither Section 87 nor Section 258 (to which detailed reference would follow) uses the aforesaid terminology and not even any which could remotely indicate an unequivocal exclusion of the jurisdiction of the Civil Courts. Apart from analogy, a reference may be made to Sections 92 and 139-A of this very Act, the latter one having been inserted by the amending Act of 1920, which are in the terms following :-

"92. Bar to jurisdiction of Courts in matters relating to record-of-rights. -- No suit shall be brought in any court in respect of any order directing the preparation of a record-of-rights under this Chapter, or in respect of the framing, publication, signing or attestation of such a record or of any part of it."

"139-A. Exclusive jurisdiction of Deputy Commissioner in certain cases.-- Subject to the provisions of Chap. XII, no Court shall entertain any suit concerning any matter in respect of which an application cognizable by the Deputy Commissioner under Section 139, and the decision of the Deputy Commissioner on any such application shall, subject to the provisions of this Act relating to appeal, be final."

It will be somewhat plain from the aforequoted provision that the Legislature in this very statute was well aware of the language to be employed where its intent was to exclude the jurisdiction of other Courts. No such language has been even remotely used in Section 87. Without labouring the point any further it can, perhaps, be unhesitatingly said that Section 87 which is the material provision for consideration does not spell out any express or implied bar of the jurisdiction of the Civil Court.

14. The matter may also be viewed from another refreshing angle. It is common ground that prior to the Amending Act of 1920, Section 87(1) existed with Clauses (a) to (f) thereof. The provision thus permitted a suit before the Revenue Officers disputing the entry or the omission thereof even though such a dispute fell within the wide ranging ambit of the aforesaid clauses. However, no authority was cited before us that under the unamended provision a suit in the Civil Court would have been barred in this wide ranging field even though no suit before the Revenue Officer was preferred within the limitation of three months from the date of the certificate of the final publication of the record of rights. Thus, the jurisdiction of the Civil Courts has not been held to be barred with regard to Clauses (a) to (f). The insertion of Clause (ee) in 1920, therefore, does no more than putting the questions relating to title in land or any interest in land as betwixt the parties to the suit on the same pedestal as the matters contained in the earlier Clauses (a) to (f). Therefore, a civil suit was not barred with regard to Clauses (a) to (f) a fortiori such a civil suit is equally not barred with regard to Clause (ee) pertaining to questions of title in land or any interest therein.
- 14A. Yet again the very short period of limitation prescribed by Section 87 for bringing a suit before a Revenue Officer is not without significance either. As noticed earlier, this has been fixed within three months from the date of the certificate of the final publication of the record of rights. Both the terminus a quo and the limited time are in a way a pointer to and indicative of the fact that the larger and the basic remedy by way of a civil suit was not to be abrogated. The lis for a suit for the declaration of title and recovery of possession may well arise long after the final publication of the record of rights. That terminus, therefore, would have little relevance to such a suit and it would be anomalous to hold that the same cannot be brought beyond three months from the date even where the lis may have actually arisen thereafter, even otherwise it looks somewhat inconceivable that valuable rights pertaining to title in law and recovery of possession thereof would become barred within three months from the date of the certificate of the final publication of the record of rights, merely because they have some connection with the entries in the record of rights and thus will be rendered unenforceable.
15. The stage is now set for a consideration of Section 258 which bars suits in certain cases. What, however, deserves notice at the very outset is that even this section is not creating an absolute bar of jurisdiction against the Civil Courts, but only a conditional bar applicable in certain cases specified therein. If one may say so, it is a limited bar which would be elaborated hereinafter. What deserves pinpointing herein is that this section does not employ the unequivocal phraseology noticed earlier in Section 57 of the Bihar and Orissa Co-operative Societies Act, or of Section 139-A of this very Act itself. It is true that it bars the jurisdiction of any other Court including a Civil Court, to entertain a suit but such a prohibition is limited only to a suit either to vary, modify or set aside directly or indirectly any decision, order or decree of any Deputy Commissioner or Revenue Officer in a suit or application or proceeding under the sections mentioned therein including Section 87. Thus, the precondition for the applicability of Section 258 is the existence of an earlier order or decree of a Revenue Officer or Deputy Commissioner in a prior proceeding. From a perusal of this section it is manifest that if earlier any decision has been made by a Revenue Court in any suit under Section 87, then only the other Courts or the Civil Court have no jurisdiction to entertain any suit either to vary, modify or set aside the decision, It also makes it clear

that the aforesaid decision or order will have the force or effect of a decree of a Civil Court in a suit between the parties, However, if there is no order or decision under the sections specified in Section 258 including therein Section 87, the jurisdiction of the Civil Court will not be barred and specially so in a suit for declaration of title and confirmation or possession or recovery of possession. What further calls for notice is the fact that even where Section 258 would be attracted, the bar is not absolute, and if the orders, decision or decree are challenged on the ground of fraud or want of jurisdiction, such a suit can still be entertained by the Civil Court. It would thus be manifest that the sine qua non for the applicability of Section 258 in the present context would be the existence of an order or decree in a previous suit under Section 87. If there has been no previous suit for the same lis, no question of any varying, modifying or setting aside the same either directly or indirectly can arise. Thus, in the absence of an earlier suit under Section 87 in this context, the provisions of Section 258 would not be applicable or attracted at all.

16. The true legal effect of a harmonious reading of Sections 87 and 258 may, therefore, be noticed. Chapter XII provides for the record of rights and Section 83 therein deals with the preliminary publication, the amendment and the final publication of the record of rights, whilst Section 84 creates certain rebuttable presumptions in favour of the correctness of the entries in the record of rights. However, Section 87 provides a remedy by way of a suit before the Revenue Officer for resolving any dispute with regard to such an entry in the record of rights or an omission therefrom. In essence, such a suit is thus directed as a challenge to the entry or omission in such a record, but Section 87 further provides that this can be raised even where such a dispute be with regard to matters specified in Clauses (a) to (f) of Section 87. In a way, therefore, Section 87 provides a special and additional remedy pertaining to entries in the revenue records as soon as they are finally published and certified. That is why the Legislature has chosen to provide a narrow limitation of three months from the date of the certificate of the final publication of the record of rights for bringing such a suit. To my mind, this remedy is not in any way in derogation of the civil rights of the parties, but indeed is a special and additional remedy which may be availed of within a limited period of three months, if a party feels aggrieved by any of the entries in the record of rights. However, if such a remedy is availed of by the parties then the statute now provides an appeal and even a second appeal to the High Court itself in the very forum of Sub-section (2), Section 87 which inevitably would achieve finality. Thus, if actual resort has been made to a suit under Section 87 then for an identical lis Section 258 would bar a further resort to the Civil Courts except on the grounds of fraud or want of jurisdiction. Obviously enough, to bring in even this limited bar, the lis would have to be identical. However, as already noticed and it bears repetition that if no resort has been earlier made to a suit under Section 87 by the parties, the very precondition for the application of Section 258 would be absent and it cannot come into play in such a situation.
17. Inevitably, one must now turn to precedent as well Learned counsel for the parties advocating against the existence of any bar to the civil jurisdiction have rightly placed reliance on AIR 1971 SC 681, (Dayaram v. Dawalat Shah); AIR 1963 SC 605, (Jyotish Thakur v. Tarakant Jha); AIR 1963 SC 361, (Raja Durga Singh v. Tholu); AIR 1977 SC 5, (Guru Charan Singh v. Kamla Singh); AIR 1966 SC 1718, (Abdul Waheed Khan v. Bhawani) and AIR 1981 SC 2016, (Sayed Mohomed Baquir El-Edroos v. State of Gujarat).
18. On the other hand, primal reliance by the learned counsel advocating the bar to the

civil jurisdiction was placed on AIR 1971 SC 2320, (Haiti v. Sundar Singh). Therein on a construction of the provisions of the Delhi Land Reforms Act, it was held that the jurisdiction of the Civil Courts was ousted. However, what fell for consideration by their Lordships in the said case was Section 185(1), Delhi Land Reforms Act, which is in the following terms:-

"Except as provided by or under this Act, no Court other than a Court mentioned in Col. 7 of Schedule I shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, take cognizance of any suit, application or proceedings mentioned in Col. 3 thereof."

Now, plainly enough, the aforesaid section in unequivocal terms bars the jurisdiction of any other Court including a Civil Court in spite of Section 9, Civil P.C. There is no provision even remotely similar to the aforesaid one in the present Act. Consequently, it is inapt to invoke the ratio of the said case in the context of the provisions of the Chotanagpur Tenancy Act, which have been discussed in detail earlier.

19. Within this jurisdiction, reliance was sought to be placed on the observations of the learned single Judge in Sahodri Kuer v. Lal Barjeshwar Nath Sahdeo, (First Appeal No. 43 of 1968(R) decided on the 11th July, 1979). However, a close perusal of the said judgment would indicate that the observations therein in no way spell out a bar or advance the proposition that a civil suit would not be maintainable. Therein the import of Sections 84 and 87 was discussed and it was observed that the provisions in Chapter XII envisage a machinery for the adjudication of disputes with regard to the correctness of the entries in the record of rights or with regard to the title in land or any interest in the same. However, those observations, to my mind, are no warrant for elongating them to the holding of an inflexible bar to the jurisdiction of the Civil Court. The case is thus distinguishable. This, however, cannot be said of Mosowar Khan v. Sk. Alim, (F.A. 215 of 1977(R)) decided on the 2nd of March, 1984. Therein the Division Bench observed as follows:-

".....Section 87 of the Act provides for institution of a suit before the Revenue Officer at any time within three months from the date of the certificate of the final publication of record of rights for the decision of any dispute regarding any entry when such dispute, inter alia, be as to the question relating to the title in land or to any interest in land as between the parties to the suit. The dispute between the parties, therefore, was a question relating to the title in land. Since a forum has been created under the Act for deciding such disputes, the plaintiffs, if aggrieved by the entry in the record of rights as appears from Ext. E, ought to have filed a suit under Section 87(1)(ee) of the Act. In our opinion, the suit, therefore, was not maintainable."

20. A close perusal of the judgment would indicate that the counsel were somewhat remiss in not bringing to the notice of the Bench all the relevant provisions of the Act. Equally the earlier Division Bench judgment in Gobardhan Sahu v. Lal Mohan Kharwar, (AIR 1936 Pat 611) (supra) was not cited. Even otherwise the issue does not seem to have been well debated and the various considerations discussed in the earlier part of the judgment were apparently not canvassed. With the deepest deference to the learned Judges, it seems to me, the conclusion with regard to the nonmaintainability of the suit was not correctly arrived at and the judgment has consequently to be overruled. The earlier view in Gobardhan Sahu v. Lal Mohan Kharwar, AIR 1936 Pat 611 is hereby affirmed.
21. To finally conclude, the answer to the question posed at the outset is rendered in the

affirmative both on principle and precedent. It is held that a civil suit for declaration of title and confirmation of possession and, inter alia, challenging the entries in the revenue record would still be maintainable even after the insertion of Clause (ee) in Section 87(1), Chotanagpur Tenancy Act, 1908.

22. In the light of the above, it has necessarily to be held in Paritosh Maity v. Ghasiram, Second Appeal No. 36 of 1977(R) that the civil suit preferred by the plaintiff respondent was perfectly maintainable in law. The appeal is otherwise without merit and is consequently dismissed though the parties are left to bear their own costs.
23. In Second Appeal No. 149 of 1977(R), (Shri Radhagobinda Jew v. Panu Mahto) the suit preferred before the Civil Court is held to be maintainable. However, the appeal stands concluded by concurrent findings of fact which do not call for any interference by this Court and the same is consequently dismissed. There will be no order as to cost.
24. Satyeshwar Roy, J. :- I agree.
25. R.C.P. Sinha, J. :- I agree.

Appeal dismissed.

□□□

GURU CHARAN SINGH VS. KAMLA SINGH
1976 (2) SCC 152

Gurucharan Singh ... Appellant;
Versus
Kamla Singh and Others ... Respondents.

(BEFORE V.R. KRISHNA IYER, A.C. GUPTA AND S. MURTAZA FAZAL ALI, JJ.)
CIVIL APPEAL NO. 7816 OF 1968, DECIDED ON SEPTEMBER 9, 1975*

Tenancy and Land Laws — Bihar Land Reforms Act, 1950 — Sections 2k and 6 — Relative scope — Khas possession — Meaning and scope — Mere right to possess if also included — Scheme of the Act — Party having right to possess, held, cannot benefit from Section 6 if actual possession held by a trespasser — Right of possession vests in the State — Party however entitled to mesne profits till date of vesting — Duty of State under Section 4(g) and Rule 7-H to take possession of such lands

Words and Phrases — "Possession" and "khas possession" — Meaning of

The plaintiff, appellant herein, and defendant, second party were co-owners of certain lands. By a partition deed dated October 30, 1952 the suit lands fell to the exclusive share of the plaintiff-appellant. But the defendant, second party sold the suit lands to defendants first party, respondents herein, alleging an oral partition sometime before August 1952 and committed trespass. Proceedings under Section 145, Cr. P. C. ensued and defendants first party got their possession upheld by Magistrate's order dated April 5, 1954. The appellant 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 defendant, second party. The courts of fact found against the defendants and decreed the suit as prayed for, but in Letters Patent appeal, the present contesting respondents, i.e., the defendants, first party, urged with success that the plaintiff had lost his title due to the operation of Sections 3 and 4 of the Act and could not salvage any interest under Section 6 thereof. The defeated plaintiff appealed to the Supreme Court.

Held:

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 Section 4 has no longer any

* Appeal by Special Leave from the Judgment and Order dated March 2, 1967 of the Patna High Court in Letters Patent Appeal No. 5 of 1962.

such proprietorship. AH the same, he may have a lesser right if he falls within the saving provisions viz., Sections 5, 6 and 7. (Para 19)

Khas possession under Section 2(k) means actual cultivatory possession. Section 6(1) makes a special addition by including other demised lands by express enumeration. 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. 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. Constructive possession or possession in law is what is covered by the sub-clauses of Section 6(1). Even so it is not 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. (Para 21)

Possession, correctly understood, means effective, physical control or occupation. The word possession is sometimes used inaccurately as synonymous with the right to possess. So 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. (Para 21)

Hence the possession of a trespasser, by no stretch of imagination, can be deemed to be khas possession or even constructive possession of the owner. Here 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. Therefore without title he could not maintain the action for recovery of possession. (Paras 22, 21 and 23)

Suraj Nath Ahii v Ptiliinalk Singh, (10631 3 SCR 200 : AIR 1963 SC 454 and Ram Ran Bijai Singh v. Behari Singh alias Bogmdha Singh, (1964) 3 SCR 363 : AIR 1965 SC 254, followed.

Brij Soudan Singh v. Jamuna Prasad, AIR 1058 Pat 589 (FB) : ILR 37 Pat 339 and Sukhdeo Das v Kashi Prasad, AIR 11J8 Pat 630 (FB) : ILR 37 Pat 918, held already overruled

However the appellant is certainly entitled to mesne profits from the defendants, first party, until the date of vesting, i.e., January 1, 1956. (Para 23)

Also on facts the contesting defendants admitted that they had no possession of or connection with some of the plots mentioned in Schedule B to the plaint and set out therein. Since neither of the defendants is in possession, the presumption that the owner is in possession holds good and he is entitled to that possession being restored to him. However the rights of the State, as against the plaintiff, in regard to these items will not 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. (Para 23)

Moreover the Collector under Section 4(g) and Rule 7-H has a public duty to take charge of lands vested in the State. 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.(Para 24)

Civil Procedure Code, 1908 — Sections 100-101 and 109 — New plea of law — Can be raised even at appellate stage — New plea of law rightly permitted at Letters Patent stage by High Court

Held :

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. (Para 11)

Connection Fire Insurance Co v. Kavanagh, 1892 AC 473, 480, relied on.

Criminal Procedure Code, 1898 — Section 145 — Proceedings under taken up where title disputed — Order under declaring actual possession later set aside — Held, such circumstance could not deprive a party of the benefit of his possession and of the dispossession of the other party under a statutory provision (Para 12)

Tenancy and Land Laws — Exclusion of civil courts by special statute on land reforms — Held, jurisdiction of the civil court not excluded where the suit was a title suit and the title was disclaimed by the provisions of the special statute — Civil Court can grant consequential relief of possession — Bihar Land Reforms Act, 1950, Sections 6 and 35 — C.P.C., 1908, Section 9 (Para 13)

Estates Partition Act, 1897 — Scope of — Held, requirements of the Act are meant only for protection of land revenue and do not affect title — Do not affect parties' power to partition voluntarily or courts' power to decree partition (Para 15)

Mahanth Ram Bhushan Das v. Ramrati Kuer, 1965 Bihar LJ 119, explained

Interpretation of Statutes — Socio-economic legislation — Interpretation should further the object and purpose of — Legislative history becomes irrelevant when the Act seeks to usher a new order (Paras 17 and 20)

Appeal dismissed

M/2641/C

Advocates who appeared in this case :

S. C. Mishra, Senior Advocate (U. P. Singh, Advocate, with him), for the Appellant;

S. N. Prasad and A. K. Srivastava, Advocates, and M. S. Narasimhan, Advocates for B. P. Singh, Advocate, 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.

2. We may set out the relevant facts briefly. Although a number of items of immovable property were involved in the suit, which was for ejection 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 interlaced legal culture. This is by the way.

3. 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 appelland, assailing the findings of the High Court mainly on three grounds: According to Shri S. C. Misra, learned counsel for the appelland 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 cosharers. 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.
4. 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.

5. 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.
6. 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 this 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 statute 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 and owner 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.
7. 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 State. The tillers are not to be uprooted and so, they i.e., the raiyats and under-raiyats are to be settled on terms of fair rent. The Act, making; a simplistic dichotomy 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 in illegal occupation [sec. 4(g)]. 'The 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 *Suraj Nath Ahir v. Prithinath Singh** 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.
8. Let us get down to an openheart surgery in a limited way to check upon the soundness

* [1963] 3 S.C.R. 290.

† [1964] 3 S.C.R. 363

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 countenance. 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.

9. 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.
10. 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 it 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:
"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 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.
11. 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 to 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*,* 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 in 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.

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.

12. 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 are 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-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 a party of the benefit of his possession and of the dispossession of the plaintiff flowing from s.6 of the Act; if any rights accrued from a statutory provision, it could not be withheld for the reasons urged by counsel for the appellant.
13. The next new discovery in this Court turns on the absence of jurisdiction of the civil court to

* [1892] A. C. 473, 480.

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 forpossession 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 ejection on little and sans title, ejection 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.

14. 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.
15. 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 defendants., 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* 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 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-

* 1965 Bihar L. J. 119

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 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.

16. 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 behoves 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.
17. 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 tenureholders 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.

18. 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 tenureholder, specified in the notification, have passed to and become vested in the State.

(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 revenuepaying 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 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 be rendered."

19. 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).
20. 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.

21. 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"(1). 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. Saunders., p.151).

In the Dictionary of English Law (Earl Jowitt) 1959 at p. 1 367 "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.

22. 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' 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.

23. 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.

24. 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 tenureholder, 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 provision, it is fairly clear that this rule does not confer any right or equity to be in possession in favour of 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 or 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 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.

25. 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.

□□□

JAMHIR ANSARI VS. KETNA ORGAN
[2004] 1 BBCJ(Jhar) 105/ [2004] 1 JLJR 2051[2004] 1JCR 407/
[2003] 0 Supreme(Jhar) 3467

Jamhir Ansari ... Appellant
Versus
Ketna Organ ... Respondent

VISHNUDEO NARAYAN, J.

APPEAL FROM APPELLATE DECREE 76 OF 1988 DECIDED ON : 18 NOVEMBER, 2003

Chota Nagpur Tenancy Act, 1908 - Section 73- Status of an Adhbataidar- is that of a tenant and not of a hired labourer - dereliction of duty aggravated by voluntary departure from holding is a strong evidence of severance of relationship of landlord and tenant and landlord becomes entitled to resume the possession - instantly, defendant-respondent having remained in continuous cultivating possession over the suit part for several years beyond 12 years perfected his right and title in the suit property- plaintiff-appellant have not prayed for recovery of possession when she stood dispossessed rather have filed the suit for declaration of title simplicitor- appeal dismissed. (Paras 11 and 12)

CHOTA NAGPUR TENANCY ACT: 5.73,S.73(2)

JUDGMENT

Vishnudeo Narayan, J.

1. This appeal at the instance of plaintiff-appellant is directed against the impugned judgment and decree dated 16.3.1988 and 30.3.1988 passed in Title Appeal No. 9 of 1983/14 of 1983 by Shri B.N. Singh, 1st Additional Judicial Commissioner, Ranchi whereby and whereunder the said appeal was dismissed affirming the judgment and decree dated 22.12.1982 and 10.1.1983 passed in Title Suit No. 202 of 1981/62 of 1982 by Shri Ram Nath, Additional Sub-Judge, Ranchi.
2. The original plaintiff-appellant has died during the pendency of this appeal and her heir and legal representative stands substituted in this case.
3. The plaintiff-appellant had filed the aforementioned suit for declaration of her title in respect of the suit plot detailed in the Schedule at the foot of the plaint.
4. The case of the original plaintiff-appellant, in brief, is that the suit plot aforesaid was recorded in the Revisional Survey Records of Right in the name of her father Sheikh Shohabat as RKaimi Adhbataida under Most. Sushila Kuar, the landlord, under khata No. 104 of village Kharta and the said Sheikh Shohabat, being a Kaimi Adhbataidar is a tenant

with occupancy rights and is not liable to eviction and after the vesting of the estate, said Sheikh Shohabat became a full fledged raiyat of the said suit plot and he was in peaceful possession thereof since more than 50 years. It is alleged that Sheikh Shohabat died in the year 1936 leaving behind her only daughter, the original plaintiff- appellant, who inherited the suit plot and she came in possession thereof and continued as such since then. It is further alleged that the plaintiff-appellant lived in the house of her husband in another village and she is cultivating the suit plot through her own cousin Sheikh Bucha as her agent who is holding the suit plot on her behalf and the defendants-respondent without any rhyme or reason started creating disturbances in her peaceful possession over the suit plot on false pretext without any legal right, title or interest therein and he, being a stranger, intends to grab the suit plot taking advantage of her absence. It is also alleged that khata No. 104 consists of three plots including the suit plot and the defendants-respondent is advancing false and mala fide claim over the suit plot only which has cast a clog on her title and hence the necessity of the suit.

5. The case of the defendants-respondent, inter alia, is that Sheikh Shohabat died before 1941 leaving behind no legal heir and his tenancy in respect of the land of khata No. 104 of village Kharta extinguished and the then landlord came in khas possession of all the three plots Including the suit" plot of khata No. 104 and the land of khata No. 104 became the "Bakast" land of the landlord Most. Sushila Kuar and she held and possessed the suit plot as a Bakast land during her life and after her death her descendants, namely, Nawal Kishore Dhar Dubey and others came in khas and exclusive possession of the land of khata No. 104 and in the year 1941 said Nawal Kishore Dhar Dubey and others settled the suit plot with Budhram Oraon, the uncle of the defendants-respondent by virtue of Hukumnama followed by rent receipts and after taking settlement Budhram Oraon came in khas and exclusive possession over the suit plot and he paid rent to the landlord before the vesting of the estate and, thereafter to the State of Bihar. The further case of the defendants-respondent is that Budhram Oraon died issueless and this defendant-respondent No. 1 being his nephew and nearest male agnate inherited the suit plot and came in khas; and exclusive cultivating possession over the same and he is in peaceful continuous possession over the suit plot openly and adversely to all the persons and he also stands mutated in respect thereof and he is paying rent to the State and in the present survey operation he has been recorded in the Survey Records of Right in respect thereof without any objection by the plaintiff-appellant. It is also alleged that the plaintiff-appellant is not the daughter of Sheikh Shohabat and she has not inherited the suit plot and she has never come in cultivating possession over the same and it is false to say that she has cultivated the land through Sheikh Bucha. The further case of the defendants-respondent is that khata No. 104 consists of three plots and none of the plots of the said khata is in possession of the plaintiff-appellant. It is alleged that the suit plot is in possession of this defendants-respondent and plot No. 1114 is in possession of Sheikh Amir and Sheikh Jambir which they have acquired by registered deed of sale executed by Nawal Kishore Dhar Dubey aforesaid and plot No. 160 of the said khata is in possession of the descendants of the ex-landlord. Lastly it has been contended that the suit of the plaintiff appellant is barred by law of limitation and adverse possession and ouster as well as under Section 34 of the Specific Relief Act in view of the fact that the suit of the plaintiff-appellant is simpliciter a suit for declaration and no relief for recovery of possession has been sought for.

6. In view of the pleadings of the parties the trial Court framed the following issues for adjudication in this case :
- (i) Is the suit maintainable as framed?
 - (ii) Has the plaintiff got any cause of action for the suit?
 - (iii) Is the suit barred by adverse possession, limitation and ouster?"
 - (iv) Is the plaintiff daughter of the recorded tenant sk. Shohabat and rightful owner of the suit land?
 - (v) Is the plaintiff in possession of the suit land through her agent and relative late Buchas son within the statutory period?
 - (vi) Is the story of resumption by landlord true and made according to legal process and valid?
 - (vii) Are Nawal Kishore Dhar Dubey and others heir of ex-landlord Most. Sushila Kuar and the settlement of the land in favour of defendant No. 1 valid?
 - (viii) Is the plaintiff entitled to any relief or reliefs, if any?
7. In view of the oral and documentary evidence on the record the learned trial Court while deciding issue Nos. 4 and 5 has held that the original plaintiff-appellant Sahiman is the daughter of Sheikh Shohabat but she was not in possession over the suit land after the death of her father and the case of the plaintiff-appellant being in possession through her agnate or relative i.e. Sheikh Jambir was also found to be incorrect. The learned Court below has further held regarding issue Nos. 6 and 7 that after the death of Sheikh Shohabat the suit plot became vacant and was resumed by the then landlord who subsequently settled it to Budhram Oraon who came in cultivating possession of the same and subsequently it was inherited by the defendant-respondent No. 1 who is continuing in possession thereon. The learned trial Court also held that the suit is barred by adverse possession, ouster and limitation.
8. Aggrieved by the judgment and decree of the trial Court the plaintiff- appellant preferred Title Appeal No. 9 of 1983. The lower appellate Court on reappraisal and re appreciation of the evidence, oral and documentary, on the record affirmed the judgment and decree of the trial Court and dismissed the appeal. The plaintiff-appellant preferred this appeal before this Court and while admitting the appeal for hearing this Court formulated the substantial question of law which runs thus :
- "Whether in view of the fact that the owner of the property in question left behind a daughter, namely, the appellant who is a Class 1 heir under the Muslim law; in view of the provision as contained in Section 23 of the Chotanagpur Tenancy Act, the landlord had a right to make settlement of the self-same land."
9. Assailing the impugned judgment it has been submitted by the learned counsel for the appellant that the suit plot admittedly stands recorded as Kaimi Adhbataidar in the name of Sheikh Shohabat, the father of the original appellant under khata No. 104 of village Kharta in the Survey Records of Rights and Kaimi Adhbataidar is a tenant having occupancy rights and the status of the Adhbataidar is that of the tenant and not of a hired labourer and it is well settled that an Adhbataidar has to give to the landlord the half produce the land he

cultivates as rent and there is a relationship of landlord and tenant between a landlord and his Adhbataidar and Adhbataidar is not liable to be evicted from his tenancy except in accordance with the provisions contained in Section 22 read with Section 73 of the Chotanagpur Tenancy Act (hereinafter referred to as the said Act). It has also been submitted that the original plaintiff-appellant having come in cultivating possession of the suit plot on the death of her father Sheikh Shohabat has not surrendered or abandoned the suit plot at any point of time and in this view of the matter, the case of resumption of the suit plot by the landlord as contended by the defendant-respondent without observing the provisions of Section 73 of the said Act has no leg to stand and further there is no chit of paper to establish the fact that the landlord before the resumption of the said land had sent a notice to the Deputy Commissioner in the prescribed manner stating therein that he has treated the holding as abandoned and the landlord shall not enter in holding unless and until the objection has been decided in his favour if preferred by the tenant or if no objection is preferred until the expiration of one month from the date of publication of the notice by the Deputy Commissioner and both the Courts below have committed error of law in respect thereof in dismissing the suit as well as the appeal of the plaintiff-appellant. It has further been contended that the case of perfecting title by adverse possession in respect of the suit plot as contended by the defendant-respondent is not tenable in this case in view of the fact that no specific date of taking possession of the suit plot by the landlord or his settlee Budhram Oraon adversely to the plaintiff-appellant has been disclosed in the written statement of the defendant and also no ingredients of perfecting title by adverse possession has been averred therein as mandated under the law and in support of his contention reliance has been placed on the ratio of the case of Parwatabai v. Sonabai and Ors., AIR 1997 SC 381. It has been contended that the original plaintiff-respondent is the daughter of Sheikh Shohabat, the recorded Kaimi Adhbataidar of the suit plot and Section 23 of the said Act mandates that if a raiyat died intestate in respect of a right of occupancy, it shall descend in the same manner as other immovable property subject to any local custom to the contrary. It has been contended that it is well settled that the High Courts while considering the matter in exercise of its jurisdiction in second Appeal or Civil Revision would not reverse the finding of fact as recorded by the Courts below. But it is not an absolute proposition. In a case where the finding is recorded without any legal evidence on the record, or on misreading of evidence or suffers from any legal infirmity, which materially prejudices the case of one of the parties or the finding is perverse, it would be open for the High Court to set aside such a finding and to take a different view. Lastly, it has been contended that the learned appellate Court below has committed an error of law in dismissing the said appeal and viewed thus, the impugned judgment is unsustainable.

10. Refuting the contention aforesaid it has been submitted by the learned counsel for the defendant-respondent that the learned Court below on proper appreciation and re appraisal of the evidence has affirmed the finding of the trial Court and there is concurrent finding of possession of the defendant-respondent on the suit plot and it has now become a conclusive fact and the defendant-respondent has acquired the suit plot by virtue of Hukumnama (Ext. D) executed by the ex-landlord who had resumed the suit plot being abandoned after the death of the recorded tenant Sheikh Shohabat and the settlement has been made by the said Hukumnama in the year 1941 and since then Budhram Oraon and

after him his nephew, the defendant-respondent were in possession over the same. It has also been contended that the right of appeal under Section 100 of the Code of Civil Procedure is neither a natural nor an inherent right attached to the litigation and it being a substantial statutory right it has to be recorded in accordance with law in force at the relevant time and the conditions mentioned under Section 100 of the CPC must be strictly fulfilled before a Second Appeal is maintained and no Court has the power to add to or enlarge those grounds and the Second Appeal cannot be decided on merely equitable grounds and it is not within the domain of the High Court to Investigate the grounds on which the findings were arrived at, by the last Court of fact, being the first appellate Court. It has also been contended that in a case where from a given set of circumstances two Inferences are possible, one drawn by the lower appellate Court is binding on the High Court in Second Appeal and adopting any other approach is not permissible and the High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence. It has been contended that here in this case, the original plaintiff-appellant has admitted that her father had died in the year 1936 and two or three years thereafter the ex-landlord has resumed the suit plot and thereafter the ex-landlord has settled the suit plot by executing a Hukumnama in favour of Budhram Oraon and since then Budhram Oraon and after his death his nephew, the defendant-respondent is in cultivating possession of the said suit plot and in view of the admission aforesaid of the plaintiff- appellant it has become an established fact that the ex landlord was in possession of the land and thereafter Budhram Oraon and after him the defendant- respondent came in continuous cultivating possession over the same and this fact has been established by the concurrent finding of both the Courts below. It has been observed by this Court in case of Sumitra Devi and Ors. v. Par-bati Devi, 1996 (1) PLJR 294, that in second appeal the High Courts interference is not required where the Judgment and decree passed by the Courts below are concluded by finding of fact under the provisions of Section 100 of the Code of Civil Procedure. Further reliance has been placed on the ratio of the case of Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and Ors., AIR 1999 SC 2213 and Satya Gupta (Smt.) @ Madhu Gutpa v. Brijesh Kumar, 1998 (6) SCC 423. It has also been submitted that Section 73 of the said Act is self-contained provision and If there is violation of the aforesaid provision, then the remedy is provided under Section 73 itself and prior permission of the Deputy Commissioner is not mandatory under the provisions of Section 73(2) of the said Act and it is well settled that no notice is necessary to enable the landlord to obtain khas possession of the holding of its being abandoned as it is not the notice which terminates the tenancy but the voluntary abandonment coupled with the acts on the part of the landlord indicating that he considers the tenancy at an end and it is for the Court in such case to determine whether the tenancy has terminated and the landlord is not bound to take any proceeding under Section 73 of the said Act whereas the landlord acquires a good title to the land by virtue of abandonment. In support of his contention reliance has been placed upon the ratio of the case of Safluddin v. Lawrence Somra Kerketta and Anr., AIR 1956 Pat 186. Further reference has been placed on the ratio of the case of Sk. Rahimuddin and Ors. v. Lakho Devi. 1998 (1) PLJR 593. Lastly, it has been contended that the plaintiff-appellant has got neither title nor she was ever in possession of the suit land at any time within twelve

years of the suit and the absence of the date of coming in possession by the ex-landlord after over the suit plot has no relevancy in this case and 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 cannot 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 and in the present case, however, the suit was filed beyond twelve years from taking over possession by the landlord of the abandoned land and learned Courts below has rightly held that the suit is barred by law of limitation and in this view of the matter, the ratio of the case of Parwatabai, (supra) has no application in this case.

11. It is an admitted case of the parties to the suit that plot No. 1089 of khata No. 104 of village Kharta which is the suit plot stands recorded in the Survey Records of Right in the name of Sheikh Shohabat, the father of the original plaintiff-appellant (since dead) besides two other plots as Kaimi Adhbataidar. Sheikh Shohabat as per the case of the plaintiff appellant has died in the year 1936 leaving behind the plaintiff-appellant as his legal heir and prior to his death, the plaintiff-appellant stands married and she was living in her matrimonial home about eight miles away from village Kharta. It is well settled that an Adhbataidar has to give to the landlord, half of the produce of the land he cultivates as rent. The status of an Adhbataidar is that of a tenant and not that of a hired labourer and there is a relationship of landlord and tenant between the landlord and his Adhbataidar and Sheikh Shohabat as per entry in the Survey Records of Right is a Kaimi Adhbataidar and it means that he has occupancy right as Adhbataidar in respect of the suit plot and Sheikh Shohabat has died intestate having the right of occupancy in the suit plot which was inherited by the plaintiff-appellant as per provision of Section 23 of the said Act. The case of the plaintiff-appellant is that after her marriage she was getting the suit plot besides other plots cultivated through her cousin brother Sheikh Bhucha. As per the case of defendant-respondent, the suit plot besides other plots of Khata No. 104 was abandoned after the death of Sheikh Shohabat which was resumed by the then landlord, Shushila Kuar and the same was possessed by the then landlord as her Bakast land and thereafter her descendant settled the land with Budhram Oraon by executing a Hukumnama (Ext. D) followed by rent receipts and since Budhram Oraon and after his death his nephew, the defendant-respondent continued in cultivating possession thereon and had paid rent to the then landlord and after vesting of the estate of the State of Bihar. The Hukumnama (Ext. D) and rent receipts (Ext. C series) are referred to in this connection. In order to construe abandonment within the meaning of Section 73 of the said Act there must co-exist a voluntary abandonment of holding without a notice to the landlord, absence of arrangement for payment of rent and cessation of cultivation of the said 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 relationship of the landlord and tenant and in such a situation it is always open to the landlord to resume the possession of the said abandoned land. PW 1, the defendant-appellant in her evidence has admitted in the most clear and unequivocal terms that after the death of her father,

Sushila Kuar, the then landlord of her village resumed the possession of the suit plot and thereafter her descendant Nawal Kishore Dhar Dubey settled the same with Budhram Oraon, the uncle of the present defendant respondent and PW 3 has also deposed in para 5 of his cross-examination that after the death of Sheikh Shohabat, the ex-landlord came in possession of the disputed plot. There is also admission on the record as per their evidence read with the evidence of PW 4 that Budhram Oraon and after his death, the defendant-respondent has been coming in cultivating possession of the disputed plot. There is also no chit of paper on the record brought by the plaintiff-respondent to give an inkling of the fact that the rent of the suit plot was ever paid to the ex-landlord after the death of Sheikh Shohabat and after the vesting of the estate to the State, And to crown all, PW 8 Sheikh Jahir along with his two brothers has acquired plot No. 1114 of khata No. 104 aforesaid which was recorded as Kaimi Adhbataidari land of Sheikh Shohabat by virtue of sale deed dated 1.11.1961 (Ext. B) executed by Nawal Kishore Dhar Dubey, the descendant of the then landlord Shushila Kuar. PW 8 is the son of Sheikh Bucha, the cousin brother of the original plaintiff- appellant. Therefore, the finding of the learned Courts below cannot, be said to have been recorded without any legal evidence on the record or on misreading of evidence or the said findings suffers from any legal infirmity which materially prejudices the case of one of the parties and thus the finding recorded by both the Courts below cannot be said to be perverse.

12. For appreciating the rival contentions advanced by the learned counsels for the parties it is necessary to look into the provisions of Section 73 of the said Act, which reads thus :-

"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 Commissioner 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 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 of arrears of rent as to the Deputy Commissioner may seem just."

From reading of Section 73 of the said Act, it is manifest that the provision aforesaid

gives right to the landlord to take possession of abandoned holding without preferring a suit. However, it 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. The object of enactment of this provision has been dealt with in the book "The Chota Nagpur Tenancy, 1908 by J. Reid" giving reference to the decision in the case of Bhagaban Chandra Missir v. Bisseswari Debya, (3) CMN 46, which reads thus :

"Aboriginal raiyats in Chota Nagpur frequently desert their holdings 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 uncommonly assert that they have not abandoned their tenancies. The object of the section is to safeguard the legitimate interests of the landlord in these cases, and per contra to protect the raiyats against fraudulent resumption."

Section 73(1) of the said Act mandates that if the land is abandoned by the tenant without notice to the landlord and the tenant ceases to cultivate the said land and to pay rent, the landlord may enter on the holding and let it to another tenant or take into cultivating himself. It, therefore, appears that it is not at all necessary to send a notice to the Deputy Commissioner to enable the landlord to obtain khas possession of the holding abandoned by the tenant. It is not the notice which terminates the tenancy but the voluntary abandonment of the land by the tenant which terminates the tenancy. The said question arose for consideration in the case of Safiuddin, (supra) and it was observed that the landlord is not bound to take any proceeding under Section 73 of the said Act and the landlord acquires a good title to the land by virtue of abandonment. It has further been observed which runs thus :

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 cannot 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."

Section 73(3) of the said Act provides that when a landlord enters into the abandoned holding and resumed possession over it, the tenant has the right 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 riyat, or in the case of a non-occupancy riyat one year, and on such application being filed, the Deputy Commissioner may on being satisfied that the riyat did not voluntarily abandon his holding, restore him to possession on such terms with respect to compensation to person Injured and payment of arrears of rent as to the Deputy Commissioner may seem just. It is, therefore, clear that if the landlord had entered into the land without following the procedure provided under Sub-section (2) of Section 73 of the said Act, the rule of law of limitation will apply for the tenant to get back the possession of the said land. It, therefore, appears that the provision contained in Section 73 of the said Act is self-contained in itself. Here in this case, as per the evidence on the record, the plaintiff-appellant was residing in her matrimonial home eight miles away from the suit plot and after the death of Sheikh Shohabat, the land

was abandoned and the landlord resumed its possession which came in his khas cultivating possession and thereafter in-the year 1941, the landlord settled the land vide Ext. D with Budhram Oraon, the uncle of the defendant respondent followed by rent receipts and since then Budhram Oraon and thereafter his nephew, the defendant-respondent came in cultivating possession over the same and continued as such. It, therefore, appears that the defendant-respondent has perfected his right and title in the suit property by remaining in continuous cultivating possession of the suit plot for several years beyond twelve years. The plaintiff-appellant here in this case has filed the suit beyond twelve years from the date of landlords possession as well as also beyond twelve years from the settlement of the land by the landlord in favour of Budhram Oraon, the uncle of the defendant-respondent and as such the suit filed by the plaintiff- appellant is definitely barred by limitation. And last but not the least, the plaintiff-appellant has filed the suit simplicitor for declaration of title without any relief of recovery of possession when as per the evidence on the record she stands dispossessed of the suit plot and in this view of the matter also the suit filed by the plaintiff-appellant is equally not maintainable. Both the Courts below have properly construed the evidence on the record and the principle of law involved therein and there is no illegality in the impugned judgment requiring an interference therein.

13. There is no merit in this appeal and it fails. The impugned judgment of the learned Courts below is hereby affirmed. The appeal is hereby dismissed but without costs in the facts and circumstances of this case.

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MORA HO VS. STATE OF BIHAR

[2000] 0 Supreme(Pat) 16509/ [2000] 1 BLJR 783/ [2000] 1 PUR 6921
[2000] 1 BU7621 [2000] 0 AIR(Pat) 101/ [2000] 1BBCJ 353

Mora Ho
Versus
State Of Bihar

R.A.SHARMA, S.J.MUKHOPADHAYA AND M.Y.EQBAL JJ.

CIVIL WRIT JURISDICTION CASE NO. 198 OF 1979 ; DECIDED ON : JANUARY 5, 2000

Per S.J. Mukhopadhaya , J.- Scheduled Districts Act, 1874-Section 7 with Section V of Regulation XIII of 1833-Validity of Wilkinson& Rules-Under Regulation it was Governor who was competent to prescribe rule, by an order in Council-No power was delegated to the Agent-Though the original of the Wilkinson& Rules is not available and in the typed copy, it was shown to have signed by captain Thomas Wilkinson-He having not delegated with power to frame rules, the same cannot be held to be a rule framed under Section V of Regulation XIII of 1833-Wilkinsons Rules cannot be stated to have been saved and continued by virtue of Section 7 of Scheduled District Act-Thus the Wilkinson& Rules cannot be stated to be statutory. (Paras 15 and 16)

AIR 1958 pat 366. AIR 1958 Pat. 603-Qverruled.

Per R.A. Sharma, J. (Concenting) Held-Wilkinson& Rules have not been framed by a competent authority, therefore they back statutory force-But Wilkinsons Rules shall continue to be followed in the administration of civil justice of Kolhan area till suitable Rules/Regulations in place of those rules have been framed by the Government-Directed the State Govt. to do the needful in this regard within a period of three months.(Majority View) (Para 37)

Per M.Y. Eqbal, J.-Held-Wilkinsons Rule have been accepted as valid law and acted upon by the Govt. officers and the people of Kolhan area for more than 150 years and still the Civil Justice is administrated under Wilkinsons Rule-Wilkinson& Rule was made under Regulation XIII of 1833 read with Govt. of India Act, 1833 and it became the substantive part of legislation -The said rule was saved by subsequent legislation and recognised as valid piece of statute-Wilkinson& Rule cannot be declared ultra vires merely because of some error or Irregularity In the matter of Its publication. (Paras 39 & 40)

AIR 1958 Pat.366, AIR 1958 Pat.803,1970 BLJR 855 (Minority view) -Approved.

Per S.J. Mukhopadhaya,J.-code of Civil Procedure, 1908-Section 1 (as amended by

Act 104 of 1976)-In view of 1976 Amendment sub-section (3) to Section 1, CPC was substituted and it holds field for the whole district of Singhbhum including Kolhan area. (Para 21)

Per R.A. Sharma, J. -Expressed no opinion on the question about applicability of CPC to Kolhan area. (Para 6)

Per M. Y. Eqbal, J. -Held-Even after the amendment made in Section 1 of CPC by virtue of Amendment Act of 1976 the Kolhan area remained excluded from the operation of CPC by virtue of Notification dated 26.8.1953. (Para 37)

SCHEDULED DISTRICTS ACT : 5.7

Cases Referrred:

C.V. Ahya V/s. Dy. Commissioner, 1970 BLJR 855

Judgment

R.A.SHARMA, J.

1. I have gone through the two judgments prepared by my two learned brothers (S.J. Mukhopadhaya and M.Y. Eqbal, JJ.) who along with me were the members of the Full Bench, which was constituted to answer the questions referred, which have been reproduced on the 2nd page of the judgment of Hon ble S.J. Mukhopadhaya, J.
2. Hon ble S.J. Mukhopadhaya, J. has held that Wilkinsons Rules have not been framed by the Governor General in the Council, who was the only competent authority at the relevant time to frame such Rules and, therefore, they lack statutory force and the law laid down by the Division Bench earlier in the case of Dulichand Khirwal, AIR 1958 pat 366 and Mahendra Singhs case, AIR 1958 Patna 603, does not represent the correct legal position. Hon ble M.Y. Eqbal, J. on the other hand has taken a contrary view holding the said Rules to be statutory in nature. The decisions of the Division Bench of this Court in Dulichand Khirwal, AIR 1958 Patna 366 and Mahendra Singhs case, AIR 1958 Patna 603 (supra) have, accordingly, been approved by him.
3. For the reasons given by Hon ble S.J. Mukhopadhaya, J. I agree with him that the Wilkinsons Rules have not been framed by a competent authority and, therefore, they lack statutory force.
4. Although these Rules have no statutory force but the admitted position is that they have been followed and acted upon in the Administration of Civil Justice in the Kolhan area of Singhbhum district for about 150 years. Even Hon ble S.J. Mukhopadhaya, J. in paragraph 16 of his judgment has held that "the Wilkinsons Rules thus cannot be stated to be statutory, though it can be held to be a general law, being followed for more than 11/2 century. Final report on the survey and settlement operation in the district of Ranchi (1910) and the final report on the re-settlement of the Kolhan Government Estate (1913-1918) have also recorded that the Rules framed by Captain wilkinson though not sanctioned by the Government but have been followed in the Administration of Civil Justice. If these Rules are

made inapplicable, now, in the absence of any suitable substitute, it may cause hardship and confusion. Therefore, it is expedient that till the new Rules/ Regulations are framed by the Government in place of these Rules, these Rules should continue to hold the field.

5. It may further be mentioned that the Wilkinsons Rules are applicable to a small area of land known as "Kolhan Estate" in the district of Singhbhum. These Rules are not applicable to other Tribal areas, including the remaining part of the district of Singhbhum. Hon ble M.Y. Eqbal, J. in Paragraph 45 to 50 of his judgment has highlighted the deficiency in the Willkinsons Rules to cope with the present system of life and litigation in Kolhan. The learned Judge has pointed out that these Rules were framed about 150 years ago in order to govern and regulate the litigations of the illiterate and ignorant tribals but by passage of time literacy and wisdom have progressively dawned on them on account of which these Rules have become inadequate to meet their requirements. In this connection the learned Judge has also observed that the large number of industries have been established in Kolhan area but these Rules do not lay down any procedure for resolving the dispute relating to dismissal, wrongful transfer of the workmen as well as the dispute between the landlord and the tenant. It is further pointed out that the decree passed by a Court under these Rules cannot be executed anywhere in the country excepting Kolhan itself. Even the Kolhan Enquiry Committee in its report dated 31st July, 1948 has highlighted some such deficiency and in this connection has observed as under :-

"Cases are instituted by ordinary petitions. The Court-fees Act is nominally in force in the Kolhan and where a case is allowed to assume the form of a regular civil suit, it is valued according to the Court-fees Act. As regards procedure, the Civil Procedure Code is followed in a modified form, so that it is not inconsistent with RWilkinsons Rules; but great use is made of the ordinary village Panchayat as arbitratrors. The majority of petitions, however, is treated as miscellaneous petitions and settled by the Kolhan Superintendent without being allowed to assume the form of a civil suit. Though this is the procedure still followed it appears that the results are not as happy as it was in the past. The Hos have advanced from their backward state; they have lost faith in their Mankis and Mundas and have also come under the influence of lawyers and touts. While recording the evidence of witnesses, it transpired that some Mundas act as touts for lawyers. So most of the miscellaneous petitions, do not end with the Kolhan Superintendent, Arbitration by Mankis is in many cases a failure these days. So ultimately by the Kolhan Superintendent has to allow most of these petitions to assume the form of civil suits. This is putting a strain on the existing staff and is perhaps not giving real satisfaction to the litigant Ho. In the past this system gave cheap and speedy justice to Ho. But now it is neither cheap nor speedy."The said Committee has, accordingly, recommended for framing of the Rules for the Kolhan Estate also on the line of Santal Civil Rules. In this connection, Brother M.Y. Eqbal, J. has noted the fact that the draft regulation was framed in 1983 in order to replace the Wilkinsons Rules but they have not been made final so far. It appears that there is inaction on the part of the Government in this regard. It is high time that the Government should act and provide better substitute."

6. For the reasons given above, I agree with Hon ble S. J. Mukhopadhaya, J. that the Wilkinsons Rules do not have statutory force and the questions referred to the Full Bench are answered in terms of his judgment. It is, however, not necessary for me to express any opinion on the question about the applicability of the Civil Procedure Code to the Kolhan area.

7. But for the reasons given hereinafter, the Wilkinsons Rules shall continue to be followed in the Administration of Civil Justice of Kolhan area till suitable Rules/Regulations in place of those Rules have been framed by the Government. The State Government shall do the needful in this regard within a period of three months from the date of receipt of the copy of this Judgment.
8. Let a copy of this judgment be sent to the Chief Secretary, Government of Bihar, for compliance at the earliest.S. J. MUKHOPADHAYA, J. :-
The case relates to right and title in respect of Plot No. 2075 under Khata No. 141 of village Konkoo, Thana No. 14, situated within Kolhan area (District- Singhbhum).
9. Initially, a Kolhan Title Suit No. 27/66 was preferred by petitioner, which was withdrawn, having filed before a Court having no jurisdiction, followed subsequently as Kolhan Title Suit No. 1/71, preferred the Additional Deputy Commissioner, Chaibasa. In terms with Rule 20 of the Wilkinsons Rules , it was referred to Panches, who on hearing the parties submitted award in favour of defendants. The suit was decreed, accordingly, in favour of defendants, against which the petitioner preferred Title Appeal No. 84/74 before the Commissioner South Chotanagpur Division Ranchi. The appeal having rejected, the present petition was preferred, wherein while challenging the award/decreed, the petitioner raised the question of validity of Wilkinsons Rules.
10. The validity of Wilkinsons Rules was challenged, from time to time, but upheld by Division Bench of this Court in Dulichand Khirwal Vis. State of Bihar, AIR 1958 Pat 366, Chotanagpur Division, AIR 1958 Pat 603.
11. In the present case, taking into consideration the submission made on behalf of the petitioner and the Division Bench decisions in Dulichand Khirwal, AIR 1958 Patna 366 and Mahendra Singh, AIR 1958 Patna 603, the Court was of the view that the aforesaid cases need reconsideration by a larger Bench and referred the matter to determination the following questions :-

"(i) The authenticated copy of the Wilkinsons Rules is not available in the records nor is there any publication as to how Rules were purported to be framed or made under paragraph 5 of Regulation XIII of 1833. A typed copy of the Rules signed by Captain Thomas Wilkinson is available in the records. Captain Thomas Wilkinson was an Agent of the Governor General and the Rules framed or made under the signature of Captain Thomas Wilkinson cannot be said to be a Rule within the meaning of paragraph 5 of Regulation XIII of 1833.(ii) With the enactment of the Government of India Act, 1915, substantive part of the legislation by British Parliament of Chapter Act, 1833, was wholly repealed and Regulation XIII of 1833 made under the said Act also stood repealed and the Wilkinsons Rules, which are said to have been framed under the said Regulation also stood repealed, inasmuch as petitioner Sec. 130 of the Government of India Act, 1915, nor the 4th Schedule of the said Act saved Regulation XIII of 1833 or Wilkinsons Rules.(iii) By the Government of India (Adoption of Indian Laws) Order 1937, the Schedule District Act 1874 was not adopted. Consequently, the operation of the Scheduled District Act 1874, ceased to exist and the Wilkinsons Rules could no longer be saved under Sec. 7 of the Scheduled District Act XIV of 1874.(iv) After enactment of Schedule Areas (Part A State) Order, 1950, and amended Schedule Areas (State of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977, by the President of India

in exercise of the power conferred under sub-paragraph 2 of the paragraph 6 of the Vth Schedule, the continuation of the Wilkinsons Rules is ultra vires."

12. The main question raised on behalf of the petitioner is that the Wilkinsons Rules is not a Rule framed under Section v of Regulation XIII of 1833, nor can be said to be a statutory rule having binding force.
13. To determine the aforesaid questions, it is necessary to trace out the history of Wilkinsons Rules, as also the Acts, Enactments; Rules and Regulations, as issued, from time to time, since 1833 in that regard.
14. The Kolhan, which was a Government estate is situated within the district of Singhbhum which, forms south eastern portion of Chotanagpur Division. The Kolhan was divided into 26 Pirs. The whole estate is a non police tract, but for administrative convenience three of the north western Pirs, Kuldaha, Kainua; and Gulkeria, have been put in the jurisdiction of Chakradharpur Police Station, and Saranda and Rela Pirs in the south west in Manoharpur. The remaining 21 Pires constitute the Kolhan Thana. The larger Pirs are further subdivided into Maniks divisions or ilakas, each under a Manki or divisional headman. There are 75 such divisions. The number of village under one Manki varies from 3 to 33, and the area from 1,002 acres to 31,349 acres. In each village there is a Munda or village headman. On the 12th August, 1765, the Dewani of Bengal, Bihar and Orissa was conferred upon East India Company by Emperor Shah Alam. The tract of Chota Nagpur was included in Suba Bihar and had several fudal lords. Their mutual rivalry gave the British opportunities to occupy the territories. The Military Collectorship of Ramgarh embraced the whole of the present district of Hazaribagh and Palamau and part of the districts of Gaya, Manbhum and Monghyr, as well as Chota Nagpur proper. This was formed in 1780 with headquarters at Sherghati in the Gaya district and at Chatra in the Hazaribagh district. The Raja was allowed a free hand in the internal administration of the country, though it was nominally included in the Military Collectorship of Ramgarh. The internal condition of the district during this Collectorship was marked by incessant rivalries among Jagirdars, incursions of the Marathas and occasional infiltration of the Larka Kola of Singhbhum into Chota Nagpur, and above all the incompetence of the Raja to keep in subjugation the dependent Rajas and the turbulent elements. Therefore, in absence of peace and order, discontent among the masses increased, suggesting the failure of the Military Collectorship. Owing to the repeated rising of the Mundas and Oraons, Chota Nagpur, as part of the Ramgarh district was brought under the administration of the East India Company and the Maharaja was no longer a Tributary Chief. In 1819, a Political Agent to the Government of South Bihar was appointed. This synchronised with a great drought in the Tamar Pargana, and the transfer of the police administration from the Raja to the British under the Superintendent of Police. The administration took an ultimately measure in imposing a tax on hanria (rice-beer) when a Munda rising in the pargana of Tamar, Rahe, and Silli was gaining ground. This added to the discontent among the aboriginals. The suppression of the revolt was followed by a number of administrative reforms. The insurrection brought home the necessity for a closer administration and more effective control by British officers on the spot. Accordingly, the whole system of administration was changed, and the South-West Frontier Agency was established in 1834, with headquarters at Kishanpur (Ranchi). The Agency included, Ramgarh, Kundu, the Jungle Mahals (except Bishenpur, Sainpahari and Sherghar) Pargana Dhalbhum and the dependant tributary Mahals. Captain Thomas

Wilkinson was appointed the first Agent, and one of his Principal Assistant, Lieutenant Oseley, was placed in charge of the Lohardaga Division, which corresponded roughly to the present district of Palamau and Ranchi with headquarters at Lohardaga." (Quoted from the final report on the resettlement of the Kolhan Government Estate, published in 1920 (period 1913- 1918) by A.D. Tuckey, I.C.C.).

15. Regulation XIII of 1833 was promulgated on 2nd Dec. 1833 for abolition of the Courts of Dewani Adalat of Zilase of Ramghur and Jungal Mahals and for providing special Rules for the superintendence of certain tracts as was included in the Zilase of Ramghur, Jungal Mahals and Midnapur. Section V therein stipulated, as follows :-

"It shall be competent to the Government General by an order in Council to prescribe such rules as he may deem proper for the guidance of the Agent, all the officers subordinate to his control and authority, to determine what shall be exercised by the Agent and his Assistants respectively, also to determine, to what extent the decision of the Agent to Civil Suits shall be final and in what suits an appeal shall lie to the Sadar Dewani Adalat, and to define the authority to be exercised by the Agent in Criminal trials and what case he shall submit for the decision of the Nizam Adalat." Section IV of this Regulation, which is also important, reads as follows :- "The administration of civil and criminal justice, the collection of revenue, the Superintendence of the police, of the land revenue, customs abkaree, stamps, and every branch of Government within the tracts of country separated as prescribed in the foregoing section, shall be vested in an officer appointed by the Governor General in Council, to be denominated agent to the Government-General."

16. A Code of Rules was drawn by the Captain Wilkinson for the administration of Civil Justice (commonly known as Wilkinsons Rules). Admittedly, it is being acted upon since more than 150 years. For the time, in the case of Dulichand, AIR 1958 Patna 366, doubt was raised in respect of Wilkinsons Rules, when it was pleaded that there was no proof that Wilkinsons Rules were prescribed by the Governor General in the Council for the guidance of officers appointed within any of the schedule District. Similar plea taken in the case of Mahendra Singh AIR 1958 Patna 603, and in the present case, where specific plea taken that the Wilkinsons Rules were never published nor prescribed by the Governor General. There is no date of publication shown nor any signature put thereon, nor it was adopted by any subsequently Act Rule. The Division Bench in Dulichands case, AIR 1958 Patna 366, made the following observations :-

"It is true that the typed copy of Wilkinsons Rules produced by the parties before us has been signed by Mr. Wilkinson as "Governor Generals Agent." x x x x x x x x x x x x x x." But it is undisputed position that Wilkinsons Rules have been accepted as valid law and acted upon by the Government Officers and the people of Kolhan area for several decades. Decisions have been given, titles to property have passed and contracts have been made on the basis that Wilkinsons Rules continue to exist in Kolhan area. It is important to note that the Kolhan Inquiry Committee appointed by the State Government in 1948, has said in Chapter II of its report that civil justice is still administered under Wilkinsons Rules and that these rules are statutory rules framed under Regulation XIII of 1833, and are still in force by virtue of Sec. 7 of the Scheduled Districts Act. It was stated by learned counsel on behalf of the opposite party that the order in Council by which the Governor General prescribed the rules is not traceable. But in a case of this description, I think that the maxim *omnia presumuntur*

rite of solemniter ease acta donee probetur in contrarium is applicable."In the case of Mahendra Singh AIR 1958 Patna 603, while reiterating the aforesaid finding, the Division Bench further, held, as follows : "In view of the principle laid down in the above mentioned cases we must presume in the present case that Wilkinsons Rules were prescribed by the Governor-General by an order in Council under Section V of Regulation XIII of 1833 and that these rules have been continued by Act XIV of 1874 and succeeding statutes. I, therefore, reject the contention of learned Counsel for the petitioners on this point."

17. Though in both the cases, same conclusion drawn, contrary reasons given for coming to the conclusion. For example, the plea of petitioner that the Rule framed under Section IV of Regulation XIII of 1833 was rejected in the case of Dulichand Khirwal, AIR 1958 Patna 366 on the ground that it was not possible to answer the question from the typed copy of the Rules. In the case of Mahendra Singh, AIR 1958 Patna 603. On the basis of same set of typed copy, on mere presumption, it was held to be a Rule framed under Section V of Regulation XIII of 1833.
18. On the other hand, while reiterating the aforesaid observations, the Court in the case of Mahendra Singh, AIR 1958 Patna 603, held the Wilkinsons Rules made under Section V of Regulation XIII of 1833 on mere presumption, giving reference of one or other case.
19. It has not been made clear in the case of Dulichand Khirwal, AIR 1958 Patna 366 and Mahendra Singh's case AIR 1958 Patna 603, in absence of specific evidence whether the Governor General prescribed Wilkinsons Rules by an order in Council and in absence the date of publication as to how the Court gave finding on presumption that the Rule was framed under Section V of Regulation XIII of 1833.
20. It will be evident that in both the cases, the Courts took into consideration Chapter II of report submitted by Kolhan Inquiry Committee appointed by the State Government in 1948, where it was reported that the Civil Justice is still done under Wilkinsons Rules and that those rules are statutory rules framed under Regulation XIII of 1833 and are still in force by virtue of Sec. 7 of the Schedule District Act 1874. However, no doubt raised relating to such Kolhan Inquiry Committees report. Though, it was not brought on record whether the Governor General prescribed them by an order in Council nor the date of publication.
21. The letter No. 363 dated 17th Feb. 1834 issued from Judicial Department to Captain T. Wilkinson (the Agent who framed the Rules) shows that the said rule framed for Civil Justice was not prescribed by the Governor General by an order in Council, till said date, as it was suspended. The said letter reads, as follows : "I am directed by the Hon ble the Vice President in Council to acknowledge the receipt of a letter from you dated the 13th ultimo submitting arrangements made by you for the future management of the tract country placed under your authority by Regulation XIII, 1833 and the rules which you propose to prescribe for the guidance of your Assistants in the administration of Civil and Criminal Justice within the tracts placed under their respective jurisdiction.
 2. His Honour in Council approves your having divided the districts into three Divisions to be denominated the Manbhum, Lohurdugga and Hazareebaugh Divisions, the first being placed under Ensign Neilson, the second under Lieutt. Ouseley and the third under Mr. Davidson. The general instructions which you have issued for the guidance

of those officers as well as the rules for the administration of Criminal Justice with the modification noted in the annexure paper are also approved.

3. It is considered proper to suspend the orders regarding the proposed Rules for Civil Justice till the regulation on that subject which is now prepared by Mr. Millet under the direction of Sudder Courts be passed. Many of the new rules will be applicable to your jurisdiction, and it will be easy to add any that may be specially applicable to that territory as well as to exclude from operation, there such as many be in applicable there.
4. The Assistants are authorised to provided themselves each with an office tent of the size of a Captains Regulation Tent and to charge the expense in Contingent bills. The charge of carriage for the Kutchery tents when the Assistants may be marching will be included in the contigent charges of the office."Thereby, it is evident that the Wilkinsons Rules were not given seal under Section V of Regulation XIII of 1833, till 17th Feb. 1934. There is nothing on the record to suggest that it was prescribed by the Governor General, subsequent to the said date. On the other hand, the other reports show that it never received any sanction, as mentioned hereunder :Final report on the survey and settlement operations in the district of Ranchi (1902-1910):-

"A simple code of rules was also drawn up by Captain Wilkinson for the administration of Civil Justice, but it did not receive the sanction of Government, pending the promulgation of a Bill on the subject , which was under preparation at the time, but which was never passed. There was, therefore, no specific rules to guide the Courts in the administration of Civil Justice for some years, until the intorduction of the Civil Procedure Code (Act VIII of 1859). The Courts, however, appear to have been guided by the general spirit of the rules framed by Captain Wilkinson and by the Regulations. An appeal was allowed from the decision of the Munsiffs to the Assistant and from the decisions of the letter to the Agent."Final report on the resettlement of the Kolhan Government Estate, published in 1920 (period 1913-1918) by A.D. Tuckey, I.C.S. :-

"For the administration of Civil Justice, there were two Munsiffs, one at Lohardaga, and the other at Ranchi. The Principal Assistants tried some original civil suits and heard appeals from the decisions of the Munsiffs. For the guidance of the Courts, a simple Code of rules was drawn up by the Captain /Wilkinson which though not sanctioned by Government, appears to have been followed till the introduction of the Code of Civil Procedure (Act VII of 1859). Two salutary rules, drafted by Captain Wilkinson may be mentioned, one with the object of discouraging vedatious litigation, prohibited vakils from practising in any Courts and allowed suits to be conducted only through the agency of Mukhtears, or authorised agents the other declaring that no sale, mortgage or transfer of landed property was valid without the consent of the Agent was intended to prevent disputes over transferred property and to discourage the old landlords from running into debt. A rule prohibited the Munsifs from granting ex parte decree against Mundas, Manis, Kols, and other such ignorant people. The Principal Assistant, Dr. Davidson, first issued and enforced this rule in 1838, but this rule was later supressed by the Code of Civil Procedure resulting in numerous fraudulent

ex parte decrees against the Mundas which were one of the causes of the subsequent agrarian discontent."

22. Thus, in absence of an order prescribing them by Governor General in Council and in absence of date of promulgation, on mere presumption, it cannot be held to be a rule framed under Section V of Regulation XIII of 1833. Under Regulation V, it was the Governor General who was competent to prescribe rule, by an order in Council. Agents were to be guided by such rules. No power was delegated to the Agent. Though the original of the Wilkinsons Rules is not available and in the typed copy, which was produced before this Court in 1958, it was shown to have signed by Captain Thomas Wilkinson. He having not delegated with power to frame rules, the same cannot be held to be a rule framed under Section V of Regulation XIII of 1833. At best, it can be stated to be a draft rule, drafted by Captain Wilkinson, as shown in the final report published in 1920. There are five grounds on which a bye-law may be treated as ultra vires, as shown in "Craies on Statutes" (page 324). One of the ground is that they are not made, mentioned and published in the manner prescribed by the Statute which authorises the making of them. In absence of the original Rules, authority of Captain Wilkinson; date of publication, and the date on which the Governor General prescribed the same, one can hold the Wilkinson Rules as ultra vires. Doubt was raised in earlier cases as to whether the Wilkinsons Rules were in force after promulgation of Scheduled District Act, 1874 (Act 14 of 1874). In both the aforesaid cases of Dulichand Khirwal AIR 1958 Patna 366 and Mahendra Singh, AIR 1958 Patna 603, it was answered in affirmative in view of Sec. 7 of 1874 Act. To determine this question, it is necessary to quote relevant section of 1874 Act which reads, as follows:-

"Sec. 7 : Continuance of existing rules and officers. All the rules herebefore prescribed by the Governor General in Council or the Local Government for the guidance of officers appointed within any of the Scheduled Districts for all or any of the purposes mentioned in Section six and in force at the time of passing of this Act, shall continue to be in force unless and until the Governor General in Council or the Local Government, as the case may be, otherwise directs. All existing officers so appointed previous to the date on which this Act comes into force in such District, shall be deemed to have been appointed hereunder. Admittedly, there is nothing on the record to suggest that the Wilkinsons Rules was prescribed by the Governor General. Admittedly, it was not framed by the Local Government for the guidance of the officers. Thereby, the Wilkinsons Rules cannot be stated to have been saved and continued by virtue of Sec. 7 of the Scheduled District Act. This Court in the case of Dulichand Khirwala, AIR 1958 Patna 366 and Mahendra Singh, AIR 1958 Patna 603, placed reliance on maxim "omina preesumuntur rite et solenniter esse acta donec probatur in contrarium", it means "all things are presumed to have been done correctly, lawfully and with due formality until the contrary is proved.

23. Even if the aforesaid maxim is made applicable in respect of Wilkinsons Rules, though it can be presumed to have been done correctly, lawfully and with due formality, it cannot be presumed to have been done under Section IV of Regulation XIII of 1833. The Wilkinsons Rules thus cannot be stated to be statutory, though it can be held to be a general law, being followed for more than 11/2 century. In the aforesaid background, I do not subscribe to the findings given by the Division Bench in the cases of Dulichand Khirwal, AIR 1958 pat 366 and Mahendra Singh, AIR 1958 pat 603 to the extent above.

24. In view of aforesaid findings, while the first question is answered in positive i.e. in favour of petitioner and against the State, the same being not statutory rule or rule framed under Regulation XIII of 1833, the question of its repeal by one or other Act does not arise. Thereby, no further answer is required to be given in respect of Question Nos. 2, 3 and 4, as referred above.
25. It is not in dispute that the Wilkinsons Rules is a procedural law. One of the questions arises as to what will be the procedure to be followed in Kolhan area for administration of civil justice, if the said rule is not made applicable.
26. In the case of Dulichand Khirwal, AIR 1958 pat 366, one of the ground taken by the petitioner was that the procedure prescribed under Wilkinsons Rules was no longer in force in view of judgment of this Court in K K. Sinha V/s. Basudeo Harjiwan Pathak, Misc. Judi. Case No. 392 of 1952, disposed of on 22nd Dec. 1952. The Court in that case, observed, as follows : "The first ground taken by learned Counsel on behalf of the petitioner is that the Deputy Commissioner of Singhbhum adopted a procedure prescribed by Wilkinsons Rules which are no longer in force and so the Commissioner of Chota Nagpur had no jurisdiction to hear the appeal. In support of this argument reference was made to a judgment of this Court in K.K. Sinha V/s. Basudeo Harjiwan Pathak, Misc. Judi. Case No. 392 of 1952, D/- 22-12-1952 (A) where it was held that Act II of 1951, amended the Civil Procedure Code so as to extend its operation to the whole of India, including the so called shceduled districts, with the exception of certain Tribal Areas in the State of Assam, in the State of Madras and in the State of Jammu and Kashmir and in the State of Manipur; Act II of 1951, received the assent of the President on 17-2-1951, and came into effect from that date, and so it was held by the High Court in that case that the Civil Procedure Code applied to the entire district of Singhbhum, including the scheduled area of Kolhan. But on behalf of the State of Bihar it was pointed out by learned Counsel that the effect of this judgment has been superseded by a subsequent notification of the State Government dated 26-8-1952, issued in exercise of the authority conferred on the State Government by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India. The notification of the State Government is in the following terms."No. A/AB/303/53-3533J. :-

In exercise of the powers conferred by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Bihar is pleased to direct that the Code of Civil Procedure (Amendment) Act 1951 (II of 1951), shall not apply to the Sadr Subdivision of the district of Singhbhum except the areas comprised within the Chaibassa and Chakkradharpur Municipalities.

This notification shall be deemed to have come into force on the 1st April, 1951 the date on which the said Act was brought into force by the Central Government. By order of the Governor of Bihar, R. Singh, Secy. In view of this Government I do not think that the ratio of the decision in Misc. Judi, Case No 392 of 1952, D/- 22-2-1952 (Pat) (A) has any application to the present case and the argument of the learned Counsel on this point must fail. RThe aforesaid view was reiterated in the case of Mahendra Singh, AIR 1958 Patna 603.

27. After the aforesaid decisions, now more than 30 years have passed, various amendments made in the meantime, in different laws, including amendment of C.P.C. made in 1976, whereby Sub-sec. (3) was substituted by Code of Civil Procedure (Amendment) Act, 1976

(Act 104 of 1976), on 1st Feb. 1977 for old Sub-sec. (3), to reflect the present position as to the extent the Code which reads, as follows :

"Sub-section (3) of Sec.1 of C.P.C., , 1908 :-

(3) It extends to the whole of India except .- (a) the State of Jammu and Kashmir;(b) the State of Nagaland and the tribal areas.Provided that the State Government concerned may, by notification in the Official Gazette, extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or such other tribal areas as the case may be with such, supplemental, incidental or consequential modifications, as may be specified in the notification.Explanation. -In this clause, "tribal areas" means the territories which, immediately, before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to, in Paragraph 20 of the sixth Schedule of the Constitution."

28. Thereby, even if the Bihar Governments Notification dated 26th August, 1953 is taken into consideration, whereby Code of Civil Procedure (Amendment) Act, 1951 was not made applicable to the district of Singhbhum, in view of 1976 amendment, whereby Sub-sec. (3) to Sec. 1 of C.P.C. was substituted, I hold that the C.P.C. holds field for the whole district of Singhbhum, including Kolhan area.The questions, thereby referred to Full Bench, are answered, accordingly, in favour of petitioner. However as this finding will come into effect from prospective date, any decision already rendered under Wilkinsons Rules cannot be automatically held to be illegal, till a decision otherwise given by any competent Court of law.
29. The present writ petition is remitted for decision on merit, to be placed before an appropriate Bench (of learned single Judge).
30. M. Y. EQBAL, J. :-
(Dissenting) I regret my inability to agree with my learned Brother S.J. Mukhopadhaya, J. that the Wilkinsons Rules cannot be said to be statutory and that the decisions of the Division Bench in the case of Dull Chand V/s. Bihar State, AIR 1958 Patna 366 and Mahendra Singh V/s. Commissioner of Chotanagpur Division, AIR 1958 pat 603 are not correct. I also regret to agree with the view expressed by my learned Brother that the Code of Civil Procedure holds the field for the whole district of Singhbhum including Kolhan area.
31. Before discussing the main question with regard to the validity of Wilkinsons Rules, it would be useful to state in brief the background and the legislative history as to under what circumstances such rule was framed for the administration of civil and criminal justice amongst the Ho community in the tribal areas.
32. The learned authority on the Ho is the Ethnology of Bengal, in which Colonel Dalton has described their physique and intellect, their customs and manners, their morals and religion, their occupations and traits, individual and tribal, with great fulness and lucidity. The tradition of the Hos regarding their origin and that of the human race as given by Colonel Dalton, which is quoted hereinbelow :-
"Ote Boram and Singhonga were self-created; they made the earth with rocks and water, and they clothed it with grass and trees, and then created animals-first, those that man domesticates, and afterwards wild beasts. When all was thus prepared for the abode of man,

a boy and girl were created, and Singbonga placed them in a cave at the bottom of a great ravine, and finding them to be too innocent to give hope of progeny, he instructed them in the art of making illi (rice beer), which excites the passions, and thus the world became peopled. When the first parents had produced twelve boys and twelve girls, Singbonga prepared a feast of the flesh of buffaloes, bullocks, goats sheeps pigs, fowls and vegetables; and making the brothers and sisters pair off, told each pair to take what they most relished, and depart. Then the first and second pair took bullocks and buffaloes flesh and they originated the kola (Hos) and the Bhujij (Matkum); the next took of the vegetables only, and are the progenitors of the Brahmans and Kshattiyas; others took goats and fish and from them are the Sudras. One pair manki or divisional headman, while each village has its own Munda or headman. The latter are all subject to the authority of the Mankis, who are assisted by tahildars of village accountants (a port introduced in 1867) and by dakuas or constable appointed by the Mankis. Every Munda is responsible for the payment of the revenue, and for the detection and arrest of criminals in his village, to the Manki, who is in his tum responsible to Government. For acting as revenue collectors the manki receive a commission of 10 per cent and the mundas 16 per cent. of the revenue which passes through their hands. Besides these duties, the mankis and mundas, each in his degree, have certain informal powers to decide village disputes and questions of tribal usage.

33. It would also be useful to mention here the history and origin of land revenue administration in the Kolhan area :-

"After the conquest of the Kolhan in 1821, the Hos acknowledged the suzerainty of the Singhbhum Chiefs and agreed to pay rent of 8 annas per hal (plough) i.e. practically per pair of bulcks to be increased to Re. 1 if circumstancess admitted of it. Their submission was, however, nominal. The Chiefs were unable to exercise any effective control over them, and from 1830 to 1836 the Hos successfully resisted every attempt to realise rent, and waged war on their neighbours. In 1836 a strong force was sent against them, and after some bloodshed they were reduced. On the conclusion of the campaign, the British Government resolved to bring their territory under its direct rule. Accordingly, 23 Pirs over which the Rajas of Porahat, Saraikela and Kharaswan claimed suzerainty, were, with four other Pirs, taken from Mayurbhand, brought under direct management under the name of the Kolhan. The first settlement was carried out on 1837 when Major Wilkinson fixed the rental at 8 annas per plough of land, this being the sum assessed but not paid in 1821. The total assessment was Rs. 5,108 for 622 villages, and was realised without difficulty. At the same time, the old village system of the Hos was maintained by the recognition of the Mankis or village headman and of the mankis or headman of groups of villages. The former collected the rent of their own villagers and paid it to Government through the mankis. In 1855, without altering the principles of assessment, but by simply doubling the rate per plough, a net revenue of Rs. 17,448 was obtained, and a settlement for 12 years was concluded."Quoted from the book Bangal District Gazetteers SINGHBHUM, SAR AIKELA AND KHARSAWAN, Written by L.S.O.s MALLEY.

34. From the aforesaid book it further appears that for the purpose of administration Kolkhan was divided into 73 local divisions, each comprising a group of 5 to 20 villages. Each division was under a Manki or Divisional headman, under whom again are the mundas or village headman the Tahsildars or village accounts, and the dakuas or village constables. The Mankis collect from the Mundas the village rents as fixed by the settlement and pays

them into the District Treasury according to the kists. It was his duty to prevent foreigners that are not already recorded as resident ryots from cultivating or holding lands in any village within his Pir without the written permission of the Deputy Commissioner. He was entitled, in consultation with his Munda, to settle the land, waste land with resident ryots and to assess such lands at rates not exceeding those established by settlement. He was also responsible for the protected forest contained in his Pir. The Manki was liable to fine and dismissal by the Deputy Commissioner for disobedience of the order or breach of the terms of his patta or of dismissal being subject to confirmation by the Commissioner of the Division. Similarly, the Munda was the village headman and his village was settled with him under the terms of patta. The rent was not liable to enhancement during the period of lease but the Government reserved the right to increase the rates for bera, bad and gora land at any future settlement. The Munda was responsible for payment of the village rent through the mankis of the Pir according to the kists. He was bound to collect rent according to village Jamabandi given to him. The author of the book further describes the Munda as the police officer of his village and, as such, is subordinate to the Manki who is the police officer of the Pir. He was bound to obey all legal orders he received from the Manki as well as superior authority.

35. Sir Herbert Risley, K.C.I.E. C.S.I. studied in detail about the culture of tribals in India. In his book "People of India" published in 1915, he has stated that the Hos of Singhbhum and the Mundas of the Chutia Nagpur Plateau have also exogamous septs of the same type as the Oraons and Santhal, with similar rules as to the totem being taboo to the members of the group. The lists given in the Tribes and Castes of Bengal contain the names of 323 Munda septs and 40 Ho septs. Six of the latter are found also among the Santhals. The other Ho septs appear to be mostly of the local or communal type, such as are in use among the Kandhs, but this is not quite certain, and the point needs looking into by some one well acquainted with the Ho dialect, who would probably find little difficulty in identifying the names, as the tribe is known to be in the habit of giving to places descriptive names having reference to their natural characteristics. Nearly all the Munda sept names are of the totem type, and the characteristic taboos appear to be recognised. The Tarwar or Talwar sept, for example, may not touch a sword, the Udbaru may not be the oil of a particular tree, the Sindur may not use vermilion, the begbela may not kill or eat a quail, and, strangest of all, rice is taboo to the Dhan sept. the members of which, though rice is grown all round them, must supply its place with gondli or millet. It is difficult not to be sceptical as to the rigid observance of this last prohibition.
36. Similarly, Sir T.S. Macpherson, in his book "Operation for the preparation of Records of Rights" in Pargana Porahat, district Singhbhum, has gone in detail with the earlier history of the tribes. According to the author, Pargana Porahat comprises all villages within the old Singhbhum Raj, which are situated outside the Government Kolhan, and the political states of Seraikela and Kharsawan, and in which the Zamindar of Porahat is either rent receiver or has a reversionary interest whereby he may, according to Chotanagpur customs, resume tenures. The term Pargana is occasionally applied to the subordinate estates and to the two sadant Pirs of Porahat (Chakradharpur and Porahat). Pir is probably the Mundari and Ho. Ko or Kolhan Pirs contain over 90 per cent of aboriginals, the so called sadan Pir omitting Chakradharpur town, also contain a slight majority of aboriginals, practically all Hos. The author further says that in 1908 the Porahat became tributaries. The porahat

family claims to be the Rathor (Kadambassi) Rajputs. In 1918 Raja Ghanshyam Singh, with the object of being recognised as paramount over Seraikela and Kharswan, regaining the family idol from Seraikela and receiving assistance to subjugate the aboriginals, became tributary to the British Government. In 1921, Major Roughsedge, commanding the Ramgarh Battalion, induced the Kols to agree to pay 8 annas per plough of oxen to the Chiefs of Porahat, Seraikela and Kharsawan, to be increased to one rupee after years but the money was never paid either by the Hos of the present Kolhan or by the Mundaris of the Kolhan, Pirs of the Porhat and from 1830 to 1836 the whole body of aboriginals resisted all attempts to realise rent and waged war on the claimants. In 1832 the Mundaris of Bandgaon also joined in the insurrection of Dasai Manki of Kochang, because of the attempt of the tenure holder to destroy Khuntkatti rights amongst them through the imposition of the plough tax and introduction of diku headman. The whole pargana, the Molhan and South Ranchi continued by Sonu Kandhapatar of Korakela (and contrary to the wish of the Raja Porahat) by him delivered up to Majdor "Wilkinson, the Agent to the Governor General.

37. Now I shall give the brief history of the tribals of Chotanagpur as narrated by Edward Tuite Dalton C.S.I. in his book "Descriptive Ethnology of Bengal", published in 1872. According to the author the Mundaris say that they had no Raja when they first took up the country, now called Chutia Nagpur. They formed a congeries of small confederate states. Each village had its chief also called a Munda, literally a head and, as a village often consisted of one family, the inhabitants were all of Munda dignity, and hence it became a name for the whole tribe. In the Mabhum district the word Munda becomes Mura which has also the same meaning. As these kols have taken up the word Munda, the Santals have appropriated the term Manjhi and the Bhumij. The Mundari villages had each its staff of officers, and from the customs that still prevail in most old villages, the organisation that has descended from very primitive times, appears to have been very complete.

38. The author Sir Dalton, while describing the geographical distribution of the District of Singhbhum, has noted the following facts :-

"The district of Singhbhum in which the Ho or Lakra Kola are located lies to the south east of Chutia Nagpur proper or between 22 and 23 of north latitude and 86-53 and 85-2 of east longitude. It measures 124 miles in extreme length from east to west and 64 mile, in its greater breadth from north to south. The total area is by survey 4503 square miles, of this 1905 square miles constitute the exclusive Ho territory known as the Kolhan. The most fertile and highly cultivated portion of this tract surrounds the station of chaibasa at a general level of seven hundred and fifty feet above the sea and here are massed about two thirds of the Kolhan population. To the south of this extending to the Baitarnfriver the general level rises to upwards of 1000 feet and the kols of this plateau are less civilised and more turbulent than those of the lowersteppe. The whole district is undulating, traversed by dykes of trap which rise in rugged masses of broken up rock and the views are on all sides bounded by ranges of hill, rising to 2900 feet. To the south west bordering on Chutia Nagpur is a mountainous tract of vast extent sparsely inhabited by the wildest of the Kols, this, however, appears to be the region from which they first descended into the Singhbhum plains. Saranda bordering on Gangpur at the extreme south west of the District is called "Saranda of the seven hundred hills". It is a mass of mountains which rise to the height of 3500 feet and contains, but a few poor hamlets nestled in deep valleys belonging for the most part to a very unreclaimed tribe of kols. The inhabitants of the western hills bordering

on Chutia Nagpur generally retain the name of Mundas and connect themselves rather with the people of Chutia Nagpur than with the Hos of Singbhum."

39. Chutia Nagpur, as part of Bihar, was ceded to the British Government in A.D. 1765; but the earliest arrangement with the Raja occurred in 1772, when it is stated that the chief appeared before Captain Camac commanding a force in Palamau, and after exchange of turbans with the Companys representatives, duly acknowledged himself a vassal of that great power, gave as Rs. 3,000 and agreed to do service against the Maharattas. The oldest settlement deed is dated 1179 Fasli, by which Raja Dripnath Sahi of Khukhra, alias Nagpur, agreed to pay 12,000 rupees, viz. mal or rent 6,000 rupees, nazranah or tribute, 6,000. For some years after this, the Raja was allowed to administer the territory as the chief of a tributary mahal, but in 1816 or 1817, it was found necessary to deprive him of magisterial powers, the estate was placed under the Magistrate of Ramgarh, who held Court alternatively at Sherghati and Chatra. Natives of Bihar who were considered foreigners in Chutia Nagpur were sent into the country as Police officers, and occasionally the Nazir of the Ramgarh Magistrates Court was deputed with extraordinary powers to inspect and report on the administration. Up to A.D. 1831, when the most serious revolt of the Kols of Chutia Nagpur occurred, there can be no doubt that the changes of government which had taken place were not beneficial to them. They were neglected by their new masters, oppressed by aliens and deprived of the means they had formerly possessed of obtaining redress through their own chief. The Raja, by no means satisfied at this own loss of dignity and authority, gave but surely answers to complaints who came before him. The Darogahs (Native Police Officers), the highest resident officials under the British Government, declared it was not competent to them to decide on the grievances that then most harassed the Kols; these were complaints, that they had been dispossessed by foreigners, Muhammadans, Sikhs, and others, who had obtained from the sub-proprietors farms of the Kol villages over the heads of the Kol headman; but it often happened that the unfortunate Kol who with difficulty made his way to the far off station found the tables turned on him when he got there. A host of witnesses in the pay of the opposite party were already there prepared to prove "that he had not only no rights in the land, but was a turbulent rebel besides."

40. The author further described as under :-

"The judicious office who was now Agent to the Governor General for the newly formed non-regulation province the south western Frontier the late Sir Thomas Wilinon at once recognised on the necessity of a thorough subjugation of the Kols and the impolicy and futility of forcing them to submit to the chiefs. He, therefore, proposed an occupation of Singbhum by an adequate force and when the people were thoroughly subued to place them under the direct management of a British Officer to be stationed at Chaibasa in the heart of their country. These views were accepted by Government and in furtherance of them two regiments of Native Infantry a brigade of guns and the Ramgarh battalion the whole force commanded by Colones Richards entered Singbhum in Nov. 1836. Operations were immediately commenced against the refractory pirs, and by the end of February, following all the Mankis and Mundas had submitted. There appears to have been very little actual fighting during this campaign. All the most important parts of the Kolhan were visited by the Agent and his troops the men whom it appeared desirable to make examples of inconsequence of their having been leaders in the previous lawless proceedings were given up for captured, and the others readily acquiesced in the arrangements proposed."

41. In the Imperial Gazetteer of India, Vol XV of 1908, the geographical description of Kolhan area has been described as under :-

"Kolhan. - Government estate in Singhbhum District, Bengal, lying between 21° 58 and 22° 43 N. and as 85° 21 and as 86° 3 E., with an area of 1.955 square miles. The Kolhan is a low plateau, varying in elevation from 750 feet above sea level in the neighbourhood of Chaibasa to upward of 1,000 feet in the south. On the north, east, and south, the country is for the greater part open and gently undulating, it is covered with prosperous villages and is well cultivated, the depressions between the ridges being invariably sown with rice and some portion of the uplands with cereals, pulses, or oilseeds. In the southeast the surface is very rocky and covered with jungle; and in the west and south west are mountainous tracts thickly covered with jungle and very sparsely inhabited. The villages here are mere hamlets scattered on the bill slopes and an area of 529 square miles has been formed into forest Reserves."
42. Further, according to the Imperial Gazetteer, it appears that the British made use of the traditional village administrative structure for administration of the predominantly tribal area. Each village has its own Munda or headman, all of whom are subject to the authority of the Manki or Divisional headman. However, Munda is responsible for the payment of the revenue and for the detention and arrest of criminal in his village to the Manki who in his turn responsible to Government. It further appears that persons other than Hos were not allowed to settle in the estate without the permission of the Deputy Commissioner.
43. In the historical background of Kol insurrection in Chotanagpur during the period 1831 to 1833 Captain Thomas Wilkinson framed the aforesaid rule. The original copy of the said rule is not traceable and a typed copy of the said rule is available which is still followed in the Kolhan area. The said rule was framed under the Regulation XIII of 1833 and within the meaning of Sec. 51 of the Government of India Act, 1833.
44. The validity of the Wilkinsons Rules was earlier challenged in this Court in the case of Duli Chand V/s. Bihar State, AIR 1958 Patna 366, Mahendra Singh V/s. Commissioner of Chotanagpur Division, AIR 1958 Patna 603 and in the case of V. Ahya V/s. Deputy Commissioner, (1970 BLJR 855).
45. In Duli Chands case the validity of Wilkinsons Rules was challenged on the ground, inter alia, that Regulation XIII of 1833, in pursuance of which the agent to the Governor General made Wilkinsons Rules, having been repealed by Act XII of 1876, Wilkinsons Rules did not exist any longer and they had automatically been repealed with the repeal of Regulation XIII of 1833. This argument was negated with reference to Sec. 7 Act XIV of 1875 i.e. Schedule District Act, 1874. This Court further rejected the contention of the petitioner that rules were not framed by the Governor General under Section V of Regulation XIII of 1833. The relevant portion of the judgment in Duli Chand case has been quoted in the judgment of Brother Mukhopadhaya, J. and I need not repeat the same. However, I must indicate here that in Duli Chand s case this Court held that though the order in council by which Governor General prescribed the rules is not traceable. the maxim "omina praesumuntur rite et solennieter esse acta donea probetur in contrarium is applicable. In other words, their Lordships held that the principle of maxium "communis error facit jus" should be applied.

46. Similarly, in Mahendra Singhs case (AIR 1958 Patna 603) this Court came to the same conclusion and held that Wilkinsons Rules framed under Regulation XIII of 1833 continued by virtue of Sec. 7 of Act XIV of 1874 and the succeeding statute. Their Lordships further held that Wilkinsons Rules have been accepted as valid law and acted upon by the Government Officers and the people of Kolhan area for the several decades, even after passing of Act 1 of 1905. The principle of maxim "communis error facit jus" should be applied in this case.
47. In V. Ahya case (1970 BLJR 855) this Court followed the earlier two decisions referred to hereinabove and arrived at the same conclusion. Their Lordships held that it must be presumed that the rules were made by the authority of the Governor General.
48. Mr. P.K. Sinha, learned Sr. counsel appearing for the petitioners, has advanced a very exhaustive and elaborate argument after taking much pain by bringing before us the relevant materials with regard to the historical background of Kol insurrection in Chotanagpur during the period 1831 to 1833. The first attack on the validity of the Wilkinsons Rules by Mr. Sinha is that although under Regulation XIII of 1833 read with Sec. 51 of the Government of India Act, 1833, Governor General in Council was empowered to make rule for the purpose of superintendence and control of the whole civil and military Government but there is no evidence or material to show that Wilkinsons Rules framed under the aforesaid Regulation was ever approved by the Governor General in Council and was duly published in any official gazette. Learned counsel submitted that admittedly Thomas Wilkinson, who was the agent of the Governor General, framed rules, called Wilkinsons Rules for the purpose of administration of civil and criminal justice in Kolhan areas. According to the learned counsel any such rule framed by Thomas Wilkinson being the agent of the Governor General, cannot be said to be rule framed by the Governor General in Council under Regulation XIII of 1833 read with Sec. 31 of the Government of India Act, 1833. Learned counsel made alternative argument and submitted that the Government of India Act, 1833 vested its power to the Governor General in Council to make Regulation, who is a delegated authority and such delegated authority cannot redelegate legislative power to an authority to make rule/regulation. Learned counsel, therefore, submitted that on this ground also and also on the principle "delegates non protest delegate" Wilkinsons Rule is ultra vires. Mr. Sinha then submitted that on the commencement of Indian Council Act, 1861 attempt was made to constitute councils in India to Govern people representation. Learned counsel submitted that Schedule District Act, 1874 was enacted and Governor General assent was given on 8-12-1874. Under the said Act the Kolhan in the district of Singhbhum was declared as Schedule area. According to the learned counsel Wilkinsons Rules was never saved by virtue of Sec. 7 of the Schedule District Act, 1874. Learned counsel also advanced his argument on the constitutional validity of the Wilkinsons Rules.
49. It has not been disputed that Thomas Wilkinson, the agent of Governor General in Council, framed a rule known as Wilkinsons Rules for the purpose of administration of civil and criminal justice. The original rule so drafted is not traceable. There is also no evidence to show that the draft rule in relation to administration of civil justice was approved by the Governor General in Council. This fact is evident from the letter issued from the Judicial Department dated 17th Feb. 1834 to Captain Thomas Wilkinson. That letter referred to the approval granted by the Governor General was rules for the administration of criminal justice. By the said letter it was directed to suspend to rule for civil justice till Regulation on

that subject, which was under conflict, be passed, Except that, it is said that there is nothing to show that either the Wilkinsons Rules for administration of civil justice was approved by the Governor General in Council or it was prescribed in the official gazette.

50. As noticed above, in all the earlier three judgments this Court proceeded on the basis that Wilkinsons Rules framed under Regulation XIII of 1833 was saved and continued by virtue of Sec. 7 of Act XIV of 1874 and by the succeeding statute. It is, therefore, worth to examine the relevant provisions of Act, XIV of 1874.
51. The main thrust of Mr. P.K. Sinha is that the Wilkinsons Rules was never saved by Sec. 7 of the Act 1874 rather by virtue of Sec. 3 of the said Act various other enactments were made applicable in Kolhan area. In this connection learned counsel drawn my attention to a Notification No. 1401 dated 21-10-1881 which is available in Appendix X in the Reids report of the year 1902 to 1910. Learned counsel submitted that various other enactments shown in the notification were made applicable in the Kolhan area. According to the learned counsel, therefore, no historical thread is found from the Reids report that Wilkinsons Rules was in force.
52. I do not, find much force in the submission made by the learned counsel. In my view, learned counsel has misconstrued the notification issued under the Schedule District Act, 1874, which I shall deal with hereinafter.
53. Sec. 1 of the said Act defines the term "Schedule Districts" mean territories mentioned in the first schedule hereto annex and from the date fixed in the resolution hereinafter mentioned shall also include any other territory to which the Secretary of the State of India by Resolution may declare the provisions of the 33rd of Victoria Chapter Ill. Sec. 3 of the said Act provides that the local government with the previous sanction of the Governor General in Council may from time to time by Notification in the Gazette of India and also in the local Gazette (if any) can declare (a) what enactments are actually enforced in any of the Schedule District or in any part of any such Districts (b) declare any enactment though it is not actually enforced in any of the said Districts or in any part of any such districts.
54. Pursuant to the aforementioned Act, it was argued that various enactments were enforced in the District of Chotanagpur Division by virtue of a Notification No. 1401 dated 21st Oct. 1881. This Notification is available in Appendix X in the Reids report of the year 1902 to 1910. It appears that various enactments have been shown in the Notification which were made applicable in the Kolhan area. At this stage it is worth to quote the relevant paragraph from the final report on the Survey and Settlement Operation namely, Reids Report, which reads as under :-

"Paragraph 56 :- Civil justice - A simple Code of rules was also drawn up by Captain Wilkinson for the administration of civil justice, but they did not receive the sanction of Government, pending the promulgation of a will on the subject, which was under preparation at the time, but which was never passed. There were, therefore, no specific rules to guide the courts in the administration of civil justice for some years. The introduction of the Civil Procedure Code (Act VIII of 1859). The Courts, however, appeared to have been guided by the general spirit of the rules framed by Captain Wilkinson and by the Regulation. An appeal was allowed from the decision of the Munsif to the assistant and from the decisions of the latter to the agent."

55. Thus, from the Reids report it is evident that the Regulation and the Wilkinsons Rules became applicable and the same was being followed by the Courts and the authorities. The Notification No. 1401 dated 21st Oct. 1881, upon which learned counsel put heavy reliance, reads as under :-

"APPENDIX X ENACTMENTS IN FORCE IN THE DISTRICTS OF THE CHOTA NAGPUR DIVISION. No. 1401, dated Simla, the 21st October, 1881 From -A MACKENZIE , Esq. Offg. Secretary to the Govt. of India Home Depts. To - The Secy. To the Govt. of Bengal, Judicial, Political, and Appointment Depts. I am directed to acknowledge the receipt of your letter No. Gazette of India, amended notification declaring the enactments in force in, and to be extended to, the districts in the Chota Nagpur Division.

2. In reply, I am to say that with the following modifications the notifications are approved and will be published in the Gazette of India of the 22nd instant.
3. Act XII of 1879 (amending the civil Procedure Code, the Registration Act, 1877, and the Limitation Act, 1877) which is inserted in the schedules to notifications C, D, E and F has been omitted, because as pointed out in paragraph 2 of the letter from this office, No. 727, dated the 28th May last, that Act, in so far as it amends the Civil Procedure Code, was extended to all the districts of the Chota Nagpur Division by Home, Revenue, and Agriculture Department notification, No. 1259, dated the 1st Dec. 1880, while in so far as it amends the Registration and Limitation Act, it is entered in the schedule to notification B. The attention of the local officers will doubtless be drawn by the Government of Bengal to any separate notification now in force extending Acts not included in these schedules.
4. With regard to notification A, I am to observe that in view of the provisions of Sec. 1 paragraph 2, and Sec. 3 of the Scheduled District Act, the correct procedure appears to be, first to declare the Act itself in force in a scheduled district, and then to declare any other enactments in force in such district, by a separate notification. Accordingly, the reference to Act XIV of 1859 in notification A has been omitted, and Sec. 15 of that Act has been declared in force in the Kolhan by a separate notification. Further, the second clause to this notification seems scarcely necessary, and has also been omitted. Such a clause is only inserted in a notification declaring a larger number of enactments in force in a district in order to remove any doubt which may possibly arise as to whether the list of enactments is intended to be an exhaustive list of all enactments in force in the place to which such notification relates.
5. As Bengal Act IX of 1879 (Court of Wards) and VII of 1878) (Excise Revenue), which are entered in the Schedule to notification B have been amended by Bengal Act III of 1881 (Court of Wards) and IV of 1881 (the Bengal Excise Amendment Act, 1881), these two latter Acts have also been entered in the schedule.
6. Lastly, I am to say that it is not understood why Acts V of 1881 (probate and Administration) and VI of 1881 (District Delegates Act), which were inserted in the schedule to the original notification submitted with your letter No. 1151 J. dated the 14th March last, have been omitted from the schedule to notification B. The omission is probably accidental, and the Act have accordingly been included in the schedule to the notification as issued.

7. A copy of the notifications, amended in accordance with the above remarks, is enclosed."
56. From perusal of the aforesaid notification No. 1401 it is manifest that the said notification was not finally given effect to rather another notification Nos. 1393 and 1394 dated 21st Oct. 1881 were issued in exercise of power conferred by Sec. 3 of the Act XIV of 1874, which are quoted hereinbelow:-
- "No . 1393, dated Simla, the 21st Oct. 1881 Notification - By the Government of India, Home Dept. In exercise of the powers conferred by Sec. 3 of Act XIV of 1874 (the Scheduled District Act). His Honour the Lieutenant Governor of Bengal is pleased with the previous sanction of the Governor General in Council, to declare that the said Act is in force in the Kolhan, in the district of Singhbhoom, in the Chota Nagpur Division.No. 1394 In exercise of the powers conferred by Sec. 3 of the Act XIV of 1874 (the Scheduled Districts Act), His Honour the Lieutenant Governor of Bengal is pleased with the previous sanction of the Governor-General in council, to declare that the enactments mentioned in the schedule hereto annexed are in force in the districts of Hazaribagh, Lohardugga, and Manbhoom and in pergunnah Dhulbhoom and the Kolhan, in the district of Singhbhoom, to the extent to which they are at present in force in any part of Bengal not included in any scheduled district force in the said portions of the Chota Nagpur Division, and not included in the said schedule."
57. From paragraph 2 of the aforesaid notification, it is manifestly clear that the Wilkinsons Rules which was admittedly in force in the Kolhan area was sufficiently saved and it was made clear that the notification will not affect and it was made clear that the notification will not affect the operation of any enactments in force in the said portions of Chota Nagpur Division and not included in the schedule.
58. The next submission of Mr. Sinha, learned counsel appearing for the petitioner, that the Wilkinsons Rules did not exist any more after Regulation XIII of 1833 was repealed by Government of India Act, 1915, also has no leg to stand. It is true that various acts including Government of India Act, 1833 specified in 4th Schedule were repealed by the Government of India Act, 1915 but even after repeal of the Act the validity, rule, resolution etc. were saved. For better apprehension, Sec. 130 of the Government of India Act, 1915 is quoted hereinbelow :-

"130. Repeal. - The Acts specified in the Fourth Schedule to this Act are hereby repealed, to the extent mentioned in the third column of that Schedule :Provided that this repeal shall not affect -(a) the validity of any law, charter, letters patent, Order in Council, warrant, proclamation, notification, rule, resolution, order, regulation, direction or contract made, or form prescribed, or table settled, under any enactment hereby repealed and in force at the commencement of this Act, or(b) the validity of any appointment, or any grant or appropriation of money or property made under any enactment hereby repealed, or(c) the tenure of office, conditions of service, terms of remuneration or right to pension of any officer appointed before the commencement of this Act. Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any letters patent or other document, to any enactment repealed by this Act, shall for all purposes be constructed as references to this Act, or to the corresponding provision thereof. Any reference in any enactment in force

in India, whether an Act or Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment or in any letters patent or other document, to any Indian legislative authority, shall for all purposes be construed as references to the corresponding authority constituted by this Act."

59. From bare reading of clause (a) of the proviso to Sec. 130, it is clear that even after repeal of Government of India Act, 1833 the regulation and the rule namely, Wilkinsons Rules, which was admittedly in force, has not been affected. This is the reason why even after the repeal of Government of India Act, 1833 the Wilkinsons Rules continuously remained in force in the Kolhan area till date. It is, therefore, incorrect to say that by the passage of time the Government of India Act, 1833 lost its force and the regulations and the rules framed thereunder have been repealed and have become non-existent.

60. At this stage, I must take notice of the fact that even after the commencement of Government of India Act, 1935 the Wilkinsons Rules, which was in force in the Kolhan area, has not been repealed by any specific enactment rather it was saved. For better appreciation Sees. 292 and 293 of the Government of India Act, 1935 are worth to be quoted hereinbelow:-

"292. Existing law of India to continue in force -Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately, before th Commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.293. Adaption of existing India laws, etc. -His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces :Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.In this section the expression "law" does not include an Act of Parliament, but includes any ordinance, order, bye law, rule or regulation having in British India the force of law."

61. Even under the provisions of the Government of India (Adaptation of Indian Laws) Order, 1937 , the Schedule District Act, 1874 ceased to have effect but the continuing validity of any notification, appointment, regulation, direction or determination made thereunder, which was in force has been saved. I am, therefore, of the view that Wilkinsons Rules which was admittedly in force, has been saved by subsquent legislation.

62. So far application of Code of Civil Procedure is concerned, it has not been disputed that by virtue of Code of Civil Procedure (Amendment) Act, 1951 the operation of the Code was extended to the whole of India including the Schedule Districts, with the exception of certain tribal areas in the State of Assam, in the State of Madras and in the State of Jammu and Kashmir and in the State of Manipur. The State of Bihar then came with a Notification dated 26-8-1953, issued in exercise of power conferred on the State Government by sub-paragraph (1) of paragraph 5 of the Vth Schedule of the Constitution of India. By the

said notification the sadar sub-division of the District except the area comprised within the Chaibasa and Chakradharpur Municipality have been excluded from the operation of Code of Civil Procedure. This was obviously done because of the fact that in the Sadar Sub-division of the District of Singhbhum i.e. in the Kolhan area the procedure provided under the Wilkinsons Rules was applicable and was in force.

63. It appears that under the Wilkinsons Rules the suits were to be heard by the Munsiff or Assistant to the Governor Generals Agent, but really they were heard by Kolhan Superintendent or Deputy Commissioner of Singhbhum or an officer authorised by the Deputy Commissioner. Realising that the hearing of the suits by the Kolhan Superintendent or Deputy Commissioner or an officer authorised by him was irregular, the State Legislature came with a validiating Act namely, Kolhan Civil Justice (Regulating and Validating) Act, 1966. By the said Act all actions of the officers exercised power under the Wilkinsons Rules have been validated. This Act was published in the Bihar Gazette Extraordinary dated 20th March, 1967. This Act has only two sections, of which Sec. 2 reads as under :-

"2. Regulation and validation of certain past actions in the Kolhan with the exception of Chaibassa Municipality in the Sadar Sub-Division of the district of Singhbhum. Notwithstanding anything contained in any other law for the time being in force, or any judgment, decree or order of any Court, the officers mentioned in Column I of the Schedule shall, in regard to the trial of civil suit and proceeding arising within the local limits of the Kolhan with the exception of the areas comprised within the municipality of Chaibassa in the Sadar Sub Division of the district of Singhbhum and hearing of appeal, review or revision arising therefrom, exercise the powers which the officers mentioned in the corresponding entries in column 2 thereof exercised under the Wilkinsons Rules made under Regulation XIII of 1833, and shall be deemed always to have validly exercised such powers and no order, judgment or decree passed by them shall be deemed to be invalid or shall be called in question in any Court or proceeding whatsoever merely on the ground that they were not so empowered."

64. The State Legislature again in 1978 came with a similar Validating Act, namely, Kolhan Civil Justice (Regulating and Validating) Act, 1978 after repealing the earlier Validating Act, of 1966. It is, therefore, clear that the Legislature always recognised the vality of Wilkinsons Rules which is in force in the Kolhan area for more than 150 years for the purpose of administration of civil justice and all actions taken and power exercised by the officers under the said Rule, has been validated. In this way the procedure provided under the Code of Civil Procedure was not made applicable in the Kolhan area in the district of Singhbhum where the Wilkinsons Rules has been in force for the administration of civil justice.
65. In 1887, in order to consolidate the law relating to civil courts in Bengal, the North West Provinces and Assam, the British Parliament enacted a law namely, the Bengal, Agra and Assam Civil Courts Act, 1887. The operation of this Act was extended to the territories then administered by the Lieutenant Governor of Bengal, the Lieutenant Governor of North West Provinces and the Chief Commissioner of Assam. Learned counsel appearing for the petitioner has not disptued that the operation of this Act has not been ex1ended in the Kolhan area in the district of Singhbhum.66. In 1976 a drastic amendment has been made in the Code of Civil Procedure, 1908 on the basis of recommendation of Law Commission with the

sole object to expedite the disposal of civil suits and proceedings, so that justice may not be delayed. The other object was also to make the procedure not so complicated rather to make it simple to ensure fair deal to the poorer section of the community who do not have the means to engage a pleader to defend their case.⁶⁷ The question now falls for consideration is whether after the amendment introduced in the Code of Civil Procedure 1908 by virtue of Code of Civil Procedure (Amendment) Act, 1976, it has been made applicable in the Kolhan area in the district of Singhbhum. In this regard submission was made by the learned counsel that even if Wilksons Rule was in force in Kolhan area, after the amendment made in the Code of Civil Procedure in 1976 and particularly in view of Sub-sec. (3) of Sec. 1, the Code of Civil Procedure has been made applicable to the whole district of Singhbhum including the Kolhan area. In my opinion, the submission made by the learned counsel has no force at all. As noticed above, by Notification dated 26-8-1953 issued by the State of Bihar the Sadar Sub-division of district of Singhbhum except the area comprised within Chaibasa and Chakradharpur Municipality have been excluded from the operation of the Code of Civil Procedure. In my opinion, therefore, even after the amendment made in Sec. 1 of the Code of Civil Procedure by virtue of Amendment Act of 1976, the Kolhan area remained excluded from the operation of Code of Civil Procedure by virtue of Notification dated 26-8-1953. For better appreciation Sec. 157 of the Code of Civil Procedure is quoted hereinbelow:-

"157. Continuance of orders under repealed enactments.- Notifications published declarations and rules made places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act 8 of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf."⁶⁸ From perusal of the aforementioned provision, I have no doubt in my mind in holding that by virtue of Notification dated 26-8-1953 issued by the State of Bihar, the Sadar Sub-division of district of Singhbhum excluding Chaibasa and Chakradharpur Municipality shall remain excluded from the operation of Code of Civil Procedure and the said Notification shall have the same force.⁶⁹ Having regard to the entire facts and circumstances of the case and the relevant provisions of law discussed hereinabove, I am of the view that the Wilkinsons Rule was made under Regulation XIII of 1833 read with Government of India Act, 1833 and it became the substantive part of legislation. I further hold that Wilkinsons Rule, so made and still in force in the Kolhan area, was saved by virtue of Sec. 130 of the Government of India Act, 1833 and Regulation XIII of 1833 and further the said rule was saved by subsequent legislation and recognised as valid piece of statute.⁷⁰ Besides the above, I am in full agreement with the view expressed by this Court in Duli Chands case (AIR 1958 Patna 366) (supra) and Mahendras case (AIR 1958 Patna 603) (supra) and hold that Wilkinsons Rules have been accepted as valid law and acted upon by the Government officers and the people of Kolhan area for more than 150 years and still the Civil justice is administered under Wilkinsons Rule. This Court in aforementioned two judgments rightly held that Wilkinsons Rule cannot be declared ultra vires merely because of some error or irregularity in the matter of its publication rather the maxim "Omnia Praesumuntur rite et solenniter esse acta doneo probetur in contrarium" is applicable. Further the maxim "communis error facit jus" should be applied in this case.⁷¹ I further agree with the ratio

decided by another Division Bench of this Court in the case of C. V. Ahya V/s. Deputy Commissioner of Singhbhum, 1970 BLJR 855. In that case their Lordships after considering the entire background of different legislation have held that it must be presumed that the rules were made by the authority of the Governor General although they purport to have been issued by the Agent to the Governor General. It was further held that the administration of justice in Sadar Sub-division of Singhbhum could not be governed by the Code of Civil Procedure but by Wilkinsons Rules which still hold the ground.⁷² Now I shall deal with the other aspect on the question of the validity of the Wilkinsons Rule. It is undisputed position that the Wilkinsons Rules have been accepted as valid law and acted upon by the Government officers and the people of Kolhan area for several decades. The Kolhan Inquiry Committee appointed by the State Government in 1948 has accepted that civil justice is still administered under Wilkinsons Rules and these Rules are statutory rules framed under Regulation XIII of 1833 and still in force by virtue of Sec. 7 of the Schedule District Act 1874. However, the Committee made the following recommendations/suggestions to the Government :- (i) The administration of Kolhan has to be developed progressively to approximate to the administration of the rest of the Chotanagpur which maintaining the essential features of the existing system prevailing in the Kolhan. (ii) In Kolhan suits the Deputy Commissioner and Kolhan Superintendent may allow appearance of lawyers in cases which they considered involve complicated question of law. (iii) The Wilkinsons Rules are out of date and Santhal Civil Rules with suitable modification to suit the Kolhan may be adopted. (iv) In Kolhan suits there should be a provision that the Deputy Commissioner and the Kolhan Superintendent should transfer cases to the civil Court if both contested parties make a joint prayer that their cases should be tried in a Civil Court. In cases so transferred, the Code of Civil Procedure should be made applicable.⁷³ At this stage, it is worth to mention here some special features of the Wilkinsons Rules under which civil justice is being administered in the Kolhans. The original Court for cases for the value less than Rs. 300.00 is that of the Kolhan Superintendent with an appeal to the Deputy Commissioner and the original Court for cases of higher value is the Deputy Commissioner with an appeal to the Commissioner.⁷⁴ Cases are instituted by ordinary petitions. Where the case is allowed to assume the form of a regular civil suit it is valued according to Court-fees Act. As regard procedure, normally the procedure provided under the Wilkinsons Rules and the procedure provided in the Code of Civil Procedure, not inconsistent with the Wilkinsons Rules, are valued. But all endeavours are made for adjudication of dispute by village Panchayat as arbitrators. The majority of petitions are however treated as miscellaneous petitions and settled by the Kolhan Superintendent without being allowed to assume the form of a civil suit. The method of administration of civil justice in this area are that the disputes be arbitrated in the village assembly and not heard by Secretary from such individual witnesses as may be produced in Court. The parties are entitled to apply to the Deputy Commissioner to have their cases decided in regular form of civil suit on payment of Court-fees but this is allowed only after all efforts are made first to settle the dispute in village assembly and the result of such proceeding is always placed on record before a formal suit is admitted. The Panches can be appointed at any time even after a formal suit has commenced, if the party agreed to abide by their decisions. The outstanding advantage of this system is that it is a cheap, speedy and efficient system of justice but in ordinary matters.⁷⁵ There is a wrong notion about the Wilkinsons Rules among the general public specially the aboriginals of Kolhan who misconstrued it and thought it to be a law

protecting their general interest. They nourished an idea that Wilkinsons Rules would protect their right and give relief to all troubles after little knowing of it. They hardly know that it is almost a customary law for administering civil justice in Kolhan. The rules were framed in 1833 when the people of Kolhan were illeterate, ignorant, uncivilised and were living mostly in jungle. There are large deficiency in the said rule to cope with the present system of life in Kolhan.⁷⁶ Wilkinsons Rules give justice to the people with lesser expenditure but there has been a drastic change in the civilisation of the tribals and now a days the Kolhan aboriginals became literate and therefore, how the said rule which was originally meant to administer justice to illiterate and ignorant people shall continue when literacy and wisdom have progressively dawn in them. Moreover, the Wilkinsons Rule followed in a very pocketed portion of the Singhbhum District but in the rest portion of the district, such as Bandgaon etc. the rule is not followed though aboriginals reside there in majority.⁷⁷ There are other deficiency in the said rule also. For example, in Kolhan area there are at present factories, mines and offices of big companies like TISCO etc. have cropped up. If any dispute or grievance arises in Kolhan due to dismissal, wrongful transfer etc. then where the aggrieved party would seek his legal remedy. There is no Court for them and there is no remedy under the said rule inasmuch as the Kolhan Superintendent has no jurisdiction to try such suit. Similarly the Courts established under the Wilkinsons Rule lacks statutory jurisdiction to decide the dispute in between landlord and tenant. There are other anamolies also in the cases where the remedy lies under the Company law, Workmen Compensations Act, Industrial law, service matter etc. There are thousands of tribals who are employed in factories, mines and other big organisation in Kolhan and if any dispute arises regarding their dismissal and suspension from service or their transfer they have no Court to get justice, when other tribal of Chaibasa town or of Jamshedpur may get such remedy from their civil Court under the Code of Civil Procedure. There is no provision under the Wilkinsons Rule for grant of immediate and expeditious remedy in the matter of dismissal, suspension or transfer of the tribals by the employers. Likewise, if a dispute arises with regard to the quantum of compensation payable under the Land Acquisition Act, the matter has to be referred in accordance with the provisions of Land Acquisition Act. But for the land situated in Kolhan and if such disputes arisen after acquisition the aggrieved tribals cannot seek remedy under the Wilkinsons Rules for final settlement of the compensation. Similarly the Courts constituted under the Wilkinsons Rules have no jurisdiction to decide the question with regard to the grant of probate, letter of administration and succession certificate in the manner provided under the Indian Succession Act. A very interesting anamoly appears to be that a decree passed by a Court under the Wilkinsons Rules can be executed only in Kolhan and nowhere else. A decree passed by Kolhan Court cannot be executed in any other Courts in India. Unlike, a decree passed by a Civil Court can be executed in any Civil Court situated within the territory of India.⁷⁸ The Kolhan Enquiry Committee in his report dated 31st July, 1948 has recorded the following finding on the issue of administration of civil justice :-"Cases are instituted by ordinary petitions. The Court-fees Act is nominally in force in the Kolhan and where a case is allowed to assume the form of a regular civil suit, it is valued according to the Court-fees Act. As regards procedure, the Civil Procedure Code is followed in a modified form, so that it is not inconsistent with "Wilkinsons Rules; but great use is made of the ordinary village Panchayat as arbitrators. The majority of petitions however, are treated as miscellaneous petitions and settled by the Kolhan Superintendent without being allowed to assume the

form of a civil suit. Though this is the procedure still followed, it appears that the results are not as happy as it was in the past. The Hos have advanced from their backward State; they have lost faith in their Mankis and Mundas and have also come under the influence of lawyers and touts. While recording the evidence of witnesses, it transpired that some Mundas act as touts for lawyers. So most of the miscellaneous petitions, do not end with the Kolhan Superintendent, Arbitration by Mankis is in many cases a failure these days. So ultimately the Kolhan Superintendent has to allow most of these petitions to assume the form of civil suits. This is putting a strain on the existing staff and is perhaps not giving real satisfaction to the litigant Ho. In the past this system gave cheap and speedy justice to Ho. But now it is neither cheap nor speedy."79. The Committee in his report has come to the following conclusion :-"The "Wilkinsons Rules" are out of date. It is suggested that the Santal Civil Rules might be adopted for the Kolhan. This will be a move in the right direction and in course of time the Civil Procedure Code can be brought in. If the new rules are brought into force a provision may be added providing for the transfer of such cases as is considered fit by the Deputy Commissioner to the regular Munsiff or Sub-Judges Court for disposal according to law. If both the contesting parties want to have their case tried in a Civil Court, then the Deputy Commissioner (including the Kolhan Superintendent) should have no discretion, but must transfer the case to the Court. When a case is thus transferred, the Civil Procedure Code should be made applicable. Wilkinsons Rules will no longer be applicable to them."80. All these deficiencies in the Wilkinsons Rules were also considered and discussed in a symposium on Wilkinsons Rules held in the district of Chaibasa. This symposium was organised by Mr. Barun Sen Gupta, the Protect Director of Free Legal Aid Committee and was presided by Mr. Bagun Sumbrai, M.P. in which many dignatories also participated. It appears that on the suggestion made by the enquiry committee for framing of a new set of rule on the line of Santhal Pargana Civil Rules, an initiative was taken by the Government. It further appears that in 1983 a draft regulation namely, the Bihar Schedule Area (Wilkinsons Rule) Regulation, 1983 was prepared in order to amend and re-arrange the Wilkinsons Rule for its application to the entire Kolhan area. But, there is nothing to show that this draft regulation or any other rule or regulation has been enacted by the State Government in order to remove the deficiencies in the Wilkinsons Rule or to enforce any other rules or procedure in the Kolhan area. In my opinion, therefore, it is high time when immediate attention of the State Government is needed. A direction is, therefore, 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 rule. The State Government must comply the direction within a period of three months from today. Reference answered accordingly.

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**HARADHAN MURMU, SON OF LATE NANDLAL MURMU AND
ORS. VERSUS THE STATE OF JHARKHAND AND ORS.
2018 0 Supreme(Jhk) 1371;**

Haradhan Murmu, son of late Nandlal Murmu nad ors. - Petitioners
Versus
The State of Jharkhand and ors. - Respondents

ANUBHA RAWAT CHOUDHARY, J.
W.P. (C) NO. 186 OF 2011 ; DECIDED ON : 07.09.2018

Tribal Laws-Customary Law of Santhal Succession-Three daughters of recorded tenant were married in Gharjamai form of marriage-Accordingly, three married daughters of recorded tenant through their husbands, all having been married in Gharjamai form of marriage, had right to inherit property through their husbands having status of adopted sons under customary law of Santhal Pargana-Trends of change in customary law of Santhal regarding inheritance of property by women, particularly daughters where there are no sons of recorded tenant, has been duly acknowledged and considered in Gantzer's settlement report-Present status about such customary law which deprives Santhal women from inheriting property, is required to be examined by conducting a study to find out what further changes have taken place in trend observed as back as in year 1927-1935, which can be undertaken even by Law Commission. (Paras 24, 25, 30 and 31)

JUDGMENT :

1. Heard Mr. Rajeeva Sharma, Senior counsel assisted by Mrs. Rita Kumari, counsel appearing on behalf of the petitioners.
2. Heard Mr. Mayank Mohit Sinha, counsel appearing on behalf of respondent nos. 6,8,9,10,13 and 14.
3. Heard Mr. Kaustav Panda, counsel appearing on behalf of respondent-State.
4. This writ petition has been filed for the following reliefs:-
 - A. "The order dated 24.7.2006 (Annexure-5) passed by the learned Commissioner, Santhal Parganas Division, Dumka in RMR No. 87/91-92 upholding the order dated 04.09.1991 (Annexure-4) passed by the Charge Officer No. 1, Dumka in RER No. 9/1988, whereby the order dated 1.11.1985 (Annexure-3) passed by the Assistant

Settlement Officer (Respondent no. 4) in RE Case No. 4/884 and 5/885 of 1985 of Mouza-Bichkore was confirmed.

- B. This Hon'ble Court may be pleased to hold and declare that the lands in question inherited by Devla Soren daughter of Mangal Soren (RT) by virtue of her marriage in 'Gharjamai' developed on her two sisters (mothers of the petitioners) as Devla Soren died issueless, and further that the lands were gifted to them by their father;"

5. Counsel for the petitioner submits as under:-

- i. The property involved in this case is lands of JB No. 41 of Mouza-Bichkore in the District of Dumka which was originally recorded in the name of Mangal Soren and Padum Soren. Mangal Soren had no male issue and had three daughters namely Dewla, Jowa and Singo. Mangal Soren had married his three daughters in 'Ghar-jamai' form and all his three daughters have been given equal share in the property of Mangal Soren and they were cultivating the land separately.
- ii. During his life time, Mangal Soren applied for granting permission for making gift of his share of property to all the three daughters. Initially petition dated 19.11.1960 was filed wherein in was clearly mentioned that Mangal Soren had married all his three daughters in Ghar-Jamai form, but in the prayer, there was certain error and accordingly another petition dated 5.5.1961 was filed rectifying the error and prayer was made seeking permission to gift the property to all the three daughters who were married in ghar jamai form.

This case was registered as Revenue Misc. Case No. 83/1960-61 and vide order dated 29.06.1961, the Sub Divisional Officer granted permission for gifting his property to his three daughters. Prior to passing the order, Jamabandi raiyats i.e 16 anna raiyats were heard in the matter and there was no objection on their part. However, inspite of permission, Mangal Soren could not execute gift deed in favour of his three daughters and expired, but his three daughters continued to separately possess and cultivate the property.

The counsel submits that even rent receipts were separately issued by the state with respective shares to all the three daughters.

- iii. Thereafter Devla Soren, the eldest daughter died issueless and specific case of the petitioners is that upon death of Devla Soren, the land of Mangal Soren devolved on two remaining daughters of Mangal Soren i.e. Jowa Soren and Singo Soren who are the mothers of two writ petitioners. He submits that at "Khanpuri" stage of survey, name of all the three daughters of Mangal Soren were entered in the corresponding new Jamabandi no. 21 , but the respondents objected against the entry which led to initiation of R.E. Case Nos. 4/884 and 5/885 of the year 1985 in the court of Assistant Settlement Officer who passed the order dated 01.11.1985 against the petitioners. The petitioners filed an application for reversion before the settlement officer and the matter was transferred to the charge officer-I. When the matter came up before the Charge Officer, registered as R.E.R. Case No. 9/1988 , the said authority rejected the application vide order dated 04.09.1991. Against this order, the petitioners filed revision being R.M.R. Case No. 87/91-92 before the Commissioner, Santhal Pargana Division, Dumka who vide impugned order dated 24.07.2006 dismissed the revision.

- iv. Counsel for the petitioners submits that from perusal of the application which was filed by the recorded tenant namely Mangal Soren as contained in Annexure-1 and Annexure 1/1 of the writ petition, he had clearly indicated that he had given his three daughters in marriage in Ghar jamai form and he had made a request seeking permission to gift his property equally to his three daughters. He submits that pursuant to the said petitions, notices were issued to the 16 Anna Raiyats who represent the entire village community. They did not raise any objection to the petition and prayer made by the Mangal Soren and they submitted that there is custom of gifting the property to the daughters. He submits that this stand of the Jamabandi raiyats' has been mentioned in the order of permission granted by the Deputy Commissioner which is contained in Annexure-2 to this writ petition. He submits that there was no problem during the life time of eldest daughter and all the three daughters have continued in possession to the extent of their respective share, but after the death of eldest daughter proceeding bearing R.E. Case No. 4/484 of 1985 and 5/885 of 1985 was initiated and agnates of the mother of the petitioners claimed that only the eldest daughter was married in 'Ghar Jamai' form of marriage and as per the customs of Santhal Pargana only she was entitled to inherit the entire property. She having died issueless and upon her death, entire property will devolve upon her agnates and not to the other two daughters of the recorded tenant.
- v. He submits that while passing the final order passed in the said case being R.E. Case No. 4/484 and 5/885 of 1985 it has been recorded that 16Anna Raiyat had taken a stand that only Devla Soren was accepted in marriage through 'Ghar Jamai' form. Although the said authority has taken notice of the fact that rent receipts were being issued separately to all the three daughters of Mangal Soren from 1955-56 up to date, but he observed that issuance of rent receipts cannot be a basis of title and a direction was issued to evict the remaining two sisters i.e., the mothers of the writ petitioners from the property. Thereafter R.E.R. Case No. 9/1988 before charge officer-I was initiated and in the said proceeding, while considering the fact as to whether three daughters were taken in marriage in Ghar-Jamai form or not, charge officer based his finding by drawing adverse inference by the fact that Mangal Soren had applied for permission to gift the property to the daughters and if all the three daughters were married through Ghar Jamai form, there was no occasion for him to seek permission to gift the property to his daughters. According to the authority the very act of Mangal Soren to apply for permission gift the property equally to all the three daughters indicates that only Devla Soren was married in 'Ghar Jamai' form and therefore she was the only successor of the property and her two sisters (who are mothers of the petitioners) did not inherit any property. The Charge Officer also observed that in view of the aforesaid fact, agnates of Devla Soren became entitled to the property after the death of Devla Soren.
- vi. Thereafter revision was filed before the revisional authority and revision was dismissed vide order dated 24.07.2006.
- vii. Counsel for the petitioners while assailing the impugned order passed in the revision, submits that Commissioner has given two reasons for rejecting the revision. Firstly, he has held that there is no such Santhal custom of giving all daughters in Ghar Jamai form of marriage; and that there may be more than one Ghar Di Jamai, but Ghar Jamai

will not be more than one and also observed that there is wide difference between Ghar Jamai and Ghar Di Jamai.

Secondly, the Commissioner observed that recorded tenant had also filed application before the Sub Divisional Officer for permission to gift the half of the land to two of the daughters inter-alia implies that recorded tenant intended to compensate his two daughters who would not have inherited any share in the property because only the eldest daughter was married in Ghar Jamai form of marriage.

- viii. Counsel for the petitioners submits that the order passed by the Commissioner is perverse on two grounds.

Firstly, there is no such custom or material on record and there is no such custom, that there can be only one Ghar Jamai. He submits that impugned order has been passed on the assumption that there can be only one ghar jamai.

Secondly, although the gift deed, for which permission was granted, was not executed, but the recorded tenant had himself indicated in his petition that all the three daughters were married in the form of Ghar Jamai and order permitting transfer by gift to the daughters was passed after hearing the parties including 16 Anna Raiyat. The fact about marriage of three daughters in ghar-jamai form as mentioned in the petition itself was never disputed by 16 Anna Raiyat at the time of grant of permission for gift to the three daughters. The counsel submits that subsequently it is not permissible for them to take different stand by merely making a statement that Ghar Jamai form of marriage was only for the eldest daughter. He also submits that authorities have also ignored the fact that property was in the possession of the three daughters of the recorded tenant and rent receipts were also issued since 1955-56 and were paying rent separately to the State.

- ix. Counsel for the petitioner has referred to the extract from Gantzer's settlement report which deals with customs of Santhal Tribal law of inheritance. He submits that it has been recorded as back as during the period from 1922-1935 in the said survey report that rules against female succession among Santhals whether Christians or non-Christians are changing owing to the force of public opinion and the rules which have been previously accepted cannot be treated as hard and fast and binding for all time. The change which is occurring is in the direction of ameliorating the condition of women and giving them a more assured footing in the family.
- x. He submits that it was also recorded in the said settlement report that it was noticed during the course of revision of settlement operations that the daughters of a deceased Santhal have sometimes been recorded as his heirs not only without opposition from the agnates, but at their request. In such other cases, it appears from the title suit decisions that arbitrators in Santhal cases have found in favour of daughters. It was observed that in dealing with the case of this nature the custom adopted for the particular locality must be carefully considered and after change of custom, if a change in custom has been well established and generally accepted, it will, of course, be treated as the customary law of the locality in mitigation of the harshness of the ancient tribal law. He submits that follow up action to this sequel in the Legislature in

the year 1949 clearly included enabling the raiyat to gift the property to his daughter by way of gift.

- xi. He submits that the law of inheritance in connection with daughters and even to ghar-Jamai should be treated as part of the customary law of the area. He further submits that changes from the old customary law in connection with inheritance of property by women in Santhal Community has also been taken judicial note by this Hon'ble Court in judgment dated 12th December 2008 passed in Second Appeal No. 292 of 1987(P). He further submits that in the situation of the nature involved in this case, this court should acknowledge the right of inheritance of the property of the three daughters after the death of the recorded tenant and this is not only in furtherance to what has been observed by the Gantzer's Survey Settlement Report, but would be in furtherance of various provisions of the Constitution of India including Articles 13,14,15, 21, 38,39 and 46 and also in furtherance of Viena Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).
 - xii. Counsel for the petitioners refers to the judgment passed the Hon'ble Supreme Court reported in (1996) 5 SCC 125 (Madhu Kishwar versus state of Bihar and others), and submits that discrimination against women in the matter of inheritance amongst tribes of santhal pargana has been noticed.
6. Counsel appearing on behalf of the private respondents submits that petitioners have lost in all the forums and it has been held that it was only the eldest daughter who was married in 'Ghar Jamai' form .The petitioners having lost before the authorities below, there being no perversity or illegality in the impugned orders, the same do not call for any interference. He further submits that the very fact that the recorded tenant had applied for gifting the property itself indicates that he was conscious of the fact that his two younger daughters would not inherit the property after his death as their husbands were not "ghar jamai" but were "ghardi jamai". He submits that the permission to gift was granted, but such gift was not executed. Accordingly upon death of the eldest daughter married in Ghar Jamai form, the property has to revert back to the agnates as she died issueless and other two daughters cannot inherit the property of the eldest daughter.
 7. Counsel appearing on behalf of respondent State submits that the respondent in the counter affidavit has annexed the enquiry report of the Revisional Survey and Settlement Operation of Santhal Pargana, 1922-35 issued by Gantzer's and he submits that there is specific mention in the report that under the Santhal Tribal Law of Inheritance only male can inherit the land. He submits that in order to inherit the property the daughter may be given to marriage in the form of Ghar Jamai and in such circumstances she would be entitled to inherit the property. In the instant case only the eldest daughter has given marriage in Ghar Jamai form and only she had inherit the property and after her death her agnates would be entitled to the entire property as she died issueless.
 8. After hearing counsel for the parties and after considering the materials available on record this court finds that admittedly the parties are governed by the law of inheritance relating to Santhals. All the parties have relied upon the Gantzer's Settlement report which relates for the period 1927-35.
 9. The relevant extract of the aforesaid Gantzer's Settlement report is as under :-

“Santhal Tribal Law of Inheritance.- “According to Santhal tribal law only males can inherit land. Sons jointly succeed their father. If brothers are co-sharer in a holding and one brother dies without issue, the surviving brothers and the sons of predeceased brothers inherit his share per stirpes. The Hindu and Muhammadan laws of succession do not apply to Santhals. Santhal tribal law is quite definite in not allowing females to inheritance but this law is gradually undergoing a change and the situation created by this change is discussed in a separate paragraph below. According to tribal custom it is permissible for a man with daughters and no sons to take a son-in-law into his house as a ghar-jamai is a formal proceeding leaving no room for doubt as to the father-in-law’s intention and resulting in the ghar-jamai cutting off all connections with his own family as far as his rights to property are concerned and becoming to all intents and purposes the son of his father-inlaw. When such adoption has been formally made, the ghar-jamai can succeed as a son and oust other male relatives. It is of importance to note that a ghar-jamai can be adopted only by a deliberate public act in the presence of the village community at the time of the marriage, and that according to tribal law a father-in-law cannot at a later stage convert an ordinary son-in-law into a ghar-jamai. In both cases the bridal party goes from the bride’s house to fetch the prospective husband and no dowry (pon) is given, but whereas the ghar-jamai is adopted permanently as a son, a ghardi jamai merely lives and labours in his wife’s home for a previously stipulated period which may extend up to five years. He thereby works off the debt due on account of the nonpayment of pon. A ghardi-jamai is not entitled to get anything from his wife’s family, but the woman herself is usually given a small present (arpa) annually at the harvest season and this is utilized for setting up her ne home.

At the expiry of the stipulated period, the ghardi-jamai is free and may return to his own home with his wife.

When a ghar-jamai has succeeded to his father-in-law’s estate the holding has usually been recorded in his sole name. In some cases, at the request of the parties, the wife has been jointly recorded with her husband. The rules against female succession among Santhals whether Christian or non-Christian are changing owing to the force of public opinion, and the rules which have been previously accepted, cannot be treated as hard and fast and binding for all time. The change which is occurring is in the direction of ameliorating the condition of women and giving them a more assured footing in the family. During the course of the revision of settlement operations the daughters of a deceased Santhal have sometimes been recorded as his heirs not only without opposition from the agnates but at their request. In other cases it appears from title suit decisions, that arbitrators in Santhal cases have found in favour of daughters. This is particularly so in the case of girls who suffer from any physical defects. In dealing with cases of this nature the custom adopted in a particular locality must be carefully considered. It would be unwise to force upon an unwilling litigant a decision in advance of custom. If a change in custom has been well established and generally accepted it will, of course, be treated as the customary law of the locality in mitigation of the harshness of the ancient tribal law.

As a rule we have tried as far as we could legally do so, to record daughters in all cases where not to do so would have involved real hardship, e.g. where the male relations not only want to claim the land but refuse to maintain the girl. Where close male relations, who obviously have a clear right under the law, have been suspected to be likely to desert the girl, we have

recorded them, but have also endeavoured to record the girl in the remarks column of the khatian as khorposhdar until death or marriage.

As regards, widows, the entries have had perforce to be even less uniform. There have been not a few cases in which no objection has been raised to be recording of the widow in her own right, and in such cases she has been described as wife of so and so. As in the case of Hindu widows, this entry is intended to indicate that she has inherited the property from her late husband, and that when she dies it will revert to those male relations who would ordinarily have inherited it at once under Santhal law. In other cases the widow has like the daughter been recorded only in the remarks column as a khorposhdar for certain plots sufficient to maintain her, until her death.

To sum up it may be said that where a Santhal woman has been recorded as wife of so and so, she holds a widow's right as if she were a Hindu widow. Where a Santhal woman has been recorded as daughter of so and so, she may be taken to have full rights of inheritance somewhat in the manner of a woman inheriting stridhan property under the Hindu law. The question of succession in such cases is still somewhat in doubt as the system is so new, but there seems little doubt that if she dies issueless, Santhal sentiment would prefer that the property should revert to her nearest male relatives."

10. From perusal of said report it appears that there is distinction between the 'Ghar Jamai' and 'Ghar Di Jamai' and the marriage in the form of 'Ghar Jamai' amounts to adoption of son in law as son but this is not so in the case of marriage in the form of 'Ghar di Jamai'. The 'Ghar Jamai' is adopted permanently as a son, and 'Ghar di Jamai' merely lives and labours in his wife's home for a previously stipulated period which may extend to five years.
11. This court also finds that the Gantzer's report had duly acknowledged the change in the customary law in connection with the inheritance of property by females and the change in the direction to ameliorating the condition of the women and giving them a more assured footing in the family and this was indicated by the fact that during the Revisional Survey and Settlement Operation of Santhal Pargana, it was found that daughters in the Santhal community have sometimes being recorded as heirs not only without opposition from agnates but at the request of the agnates. This shift in the custom regarding matter of inheritance of property by females, particularly daughters when there are no sons of the recorded tenant, was duly acknowledged and it was indicated that in dealing with the cases of this nature, the custom adopted in the particular locality must be carefully considered.
12. This court finds that an application was made by the recorded tenant namely Mangal Soren wherein he had applied for seeking permission to gift his property to his three daughters and clearly stated in his application that he had married his daughters in the form of 'Ghar Jamai', meaning thereby that he had adopted all the three son-in-laws as his sons. However in the initial application seeking permission to gift his property, he had stated about marriage of all his three daughters by ghar jamai form but a prayer was made to gift his property to only second and third daughter half share each. This was rectified vide another petition dated 05.05.1961 whereby the mistake in the initial petition was indicated and permission was sought to gift to all the three daughters.

Photocopy of certified copy of these two petitions are contained in annexure 1 and 1/1 respectively.

13. The said petitions were taken up and notices were issued to 16 Anna Raiyat representing the village community who appeared and did not object to the prayer made by the said recorded tenant and also submitted that there is custom amongst them to gift properties to daughters. On the one hand 16 Anna Raiyat representing the village community did not object to the statement made by recorded tenant that his three daughters were married in 'ghar Jamai' form and on the other hand no objection was ever raised in connection with gift and gift was sought to be supported by referring to customs. Admittedly the permission to gift the properties to the three daughters under section 20 of the aforesaid Act of 1949 was granted by the competent authority vide order dated 29.06.1961 in revenue miscellaneous case no 83 of 1960-61. However the recorded tenant could not execute the gift in favour of his three daughters and expired.
14. This court is of the considered view that the gift in favour of the three daughters having not been executed by the recorded tenant inspite of permission granted under section 20 of the aforesaid Act of 1949, the rights of the three daughters will be governed by status of their respective husbands and/or their status as per the customary law amongst Santhals as has been noticed in aforesaid Gantzer's Settlement report.
15. This court finds that the recorded tenant in his application seeking permission to gift the properties to his three daughters clearly mentioned that his three daughters were married in ghar jamai form of marriage and this stand of the recorded tenant was never objected to by the village community, rather the permission to gift the properties to the three daughters was supported by them by citing custom to gift property to daughters.
16. This court finds that there is no dispute that husband of the daughter married in ghar jamai form of marriage in entitled to inherit property of father in law as a son. The specific case of the respondents is that only eldest daughter was married in ghar jamai form of marriage and accordingly only the eldest son in law was entitled to inherit the properties of the recorded tenant and the eldest daughter and son in law having died issueless, the properties will be inherited by her agnates and not by the second and third daughters/son in laws of the recorded tenant.
17. The respondents herein have not been able to show any law amongst santhal tribe before the authorities below as well as before this court indicating that there can be only one 'Ghar Jamai'.
18. This court finds that at the time of application by the recorded tenant seeking permission to gift the property to his three daughters, the recorded tenant had clearly indicated that he has married all his daughters in ghar jamai form of marriage and this stand of the recorded tenant was never controverted by the 16 anna raiyat representing the village community in aforesaid revenue miscellaneous case no 83 of 1960-61. This court is of the considered view that 16 Anna Raiyat representing the village community cannot be permitted to take a different stand in subsequent proceedings after death of the recorded tenant as well as after death of the eldest daughter of the recorded raiyat who admittedly died issueless.
19. However at the stage of khanapuri the name of the three daughters was entered in jamabandi number 21 but at the stage of attestation the respondents (representing the agnates of the daughters of the recorded tenant) objected against the entry resulted in the proceedings being RE Case No. 4/884 and 5/885 of 1985. An objection was raised by the agnates of the

daughters of the recorded tenants that after death of the eldest daughter and her husband who died issueless, the property should be recorded in the name of the agnates and not in the name of the other two daughters/son in law on the ground that the other two daughters were never given in ghar jamai form of marriage. The authority vide order dated 1.11.1985, on the basis of the stand taken by 16 Anna Raiyat representing the village community, held that only the eldest daughter was given in ghar jamai form of marriage and not the other two daughters of the recorded tenant. Accordingly the entry made in favour of other two daughters in the record of rights should be deleted and the name of only the eldest daughter (deceased) should be entered. From the perusal of the order passed it appears that the two remaining daughters had also produced the revenue receipts of the year 1956-57 and indicated their possession and right over the property but the same was rejected on the ground that issuance of rent receipts do not confer any right over the property. This order does not refer to the proceedings and order passed in aforesaid revenue miscellaneous case no 83 of 1960-61.

20. Thereafter application for reversion was filed before the settlement officer who transferred the matter to the charge officer -I who registered the case as RER NO. 9 of 1988. The charge officer -I vide impugned order dated 04.09.1991 confirmed the order dated 1.11.1985 passed in RE Case No. 4/884 and 5/885 of 1985 on the ground that if the recorded tenant had married all his three daughters in ghar jamai form of marriage, there was no occasion for him to file application being revenue miscellaneous case no 83 of 1960-61 for the purposes of seeking permission to gift the property to his two daughters. On the basis of this finding the authority held that this by itself proves that only the eldest daughter was married in ghar jamai form of marriage who according to customary law inherits the entire property and not the other two daughters and upon the death of the eldest daughter the property will devolve upon the agnates of the daughters and not upon the other two daughters. The authority further rejected the claim of the other two daughters based on the revenue receipts/rent receipts issued in their favour.
21. This court finds that impugned order dated 04.09.1991 passed in RER No. 9 of 1988 by the charge officer -I is perverse on two points. Firstly, the authority has overlooked the fact that the recorded tenant has applied for permission in case numbered as revenue miscellaneous case no 83 of 1960-61 to gift the property to all his three daughters and had made categorical statement that all of them were married in ghar-jamai form in which 16 Anna Raiyat representing the village community had admittedly appeared and not raised any objection and indicated that there is custom of gifting property to the daughters. The authority has considered only the application contained in annexure 1 to this writ petition where prayer was made only to gift property to two of his daughters although it was specifically stated that all the three daughters were married in ghar jamai form and has over looked the subsequent application contained in annexure 1/1 to this writ petition where prayer was rectified to gift property to all his three daughters.

Further the authority concluded that if all the three daughters were married in ghar jamai form there was no requirement to file application seeking permission to gift the property to his daughters as they would have inherited by virtue of such marriage. This finding is also perverse in view of the fact that as per customary law amongst santhals, in case there is no son to inherit the property, the property is inherited by the son in law who is married to the daughter in ghar jamai form and is not inherited by the daughter. Therefore even in case of

marriage by ghar jamai form, the recorded tenant, in order to ensure that the property goes to his daughter, will have to execute a gift in her name which can be done only after due permission under section 20. In absence of such gift the property would go to the son in law married in ghar-jamai form and not to the daughter.

Accordingly, this court find that merely because an application was filed seeking permission to gift the property to the daughters, no adverse inference could have been drawn against the petitioners.

Secondly, this court also finds that the authority has also failed to give due importance to the fact that the revenue receipts and rent receipts were also issued since 1955-56 and the daughters were also in possession of the property.

This is due to the reason that as per Gantzer's Settlement report, the rules against female succession among Santhals whether Christian or non-Christian are changing owing to the force of public opinion, and the rules which have been previously accepted, cannot be treated as hard and fast and binding for all time. The change which is occurring is in the direction of ameliorating the condition of women and giving them a more assured footing in the family. During the course of the revision of settlement operations the daughters of a deceased Santhal have sometimes been recorded as his heirs not only without opposition from the agnates but at their request. In other cases it appears from title suit decisions, that arbitrators in Santhal cases have found in favour of daughters. This is particularly so in the case of girls who suffer from any physical defects. In dealing with cases of this nature the custom adopted in a particular locality must be carefully considered. It would be unwise to force upon an unwilling litigant a decision in advance of custom. If a change in custom has been well established and generally accepted it will, of course, be treated as the customary law of the locality in mitigation of the harshness of the ancient tribal law.

It has been further summed up in the said report that it may be said that where a Santhal woman has been recorded as wife of so and so, she holds a widow's right as if she were a Hindu widow. Where a Santhal woman has been recorded as daughter of so and so, she may be taken to have full rights of inheritance somewhat in the manner of a woman inheriting stridhan property under the Hindu law. It has been further observed that the question of succession in such cases is still somewhat in doubt as the system is so new, but there seems little doubt that if she dies issueless, Santhal sentiment would prefer that the property should revert to her nearest male relatives.

22. The aforesaid order dated 04.09.1991 passed in RER NO. 9 of 1988 was challenged before the commissioner in revision case no R.M.R. 87 of 91-92 and the said authority rejected the revision vide impugned order dated 24.07.2006 and rejected the claim of the petitioners regarding marriage of all the three daughters in ghar jamai form of marriage by stating that there cannot be more than one ghar jamai and that application for permission to gift was made by the recorded tenant only for two of the three daughters because the eldest one was already married in ghar jamai form of marriage.
23. This court find that both the reason which has been assigned by the Commissioner in the impugned order dated 24.07.2006 to reject the revision petition are perverse. Firstly, there is no such material on record to demonstrate that as per customary law of santhals only one daughter can be married in ghar jamai form of marriage. It has been held in the judgment

reported in (2008) 13 SCC 119 (Surajmani Stella Kujur versus Durga Charan Hansdah) followed in Laxmibai versus Bhagwantbuva reported in (2013) 4 SCC 97 that custom being in derogation of general rule, is required to be construed strictly . A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence. This court finds that during the course of arguments and inspite of repeated queries from the court, the respondents have not been able to show any material to establish that as per customary law of santhals, where a recorded tenant has more than one daughter, only one daughter can be married in ghar jamai form of marriage so as to inherit the properties of father in law.

Secondly, the other reason which has been mentioned the Commissioner that the very fact that the recorded tenant had earlier filed application before the Sub Divisional Officer seeking permission to gift half of the land to two out of the three daughters, implies that the recorded tenant was intending to compensate his two daughters who would not have got any share because the fact that one daughter was married in ghar jamai form, is also perverse. This finding is apparently in conflict with the contents of the petitions filed before the authority seeking permission which are contained in annexure-1 and 1/1 to this writ petition and order granting permission is contained in annexure 2 to this writ petition which has been passed in revenue miscellaneous case no 83 of 1960-61. On the face of the petitions it is apparent that the petition which was initially filed (annexure-1) clearly indicated that all the three daughters were married in the form of ghar-jamai, however prayer was made seeking permission to gift property only to two of the younger daughters. Subsequent petition (annexure-1/1) indicated that there was an error in earlier petition and that error was rectified by praying that the permission to gift the property should be given in connection with all the three daughters. This court finds that merely because a petition was filed seeking permission to gift the property to the daughters, that does not mean that form of marriage in connection with three daughters was not ghar-jamai form of marriage. Further in the said proceedings being revenue miscellaneous case no 83 of 1960-61, the 16 Anna Raiyat representing the village community had appeared and did not dispute the statement made by the recorded tenant regarding marriage of three daughters in ghar- jamai form of marriage way back in the year 1960-61 and after the death of the recorded tenant the three daughters throughout remained in possession of their respective shares. In this background the revisional authority could not have rejected the claim of the petitioners that the three daughters of the recorded tenant were married in ghar-jamai form by making an observation, without any basis, that such phenomenon is unheard of amongst Santhals and there cannot be more than one ghar jamai.

24. As a cumulative effect of the aforesaid findings, this court is of the considered view, in the facts and circumstances of this case, (particularly in view of the stand was taken by the recorded tenant as back as in the year 1960-61 during the proceeding being revenue miscellaneous case no 83 of 1960-61 that all the three daughters were married in 'ghar-jamai' form , and there being no bar under the santhal customs in having more than one daughter married in ghar- jamai form) that the three daughters were married in ghar jamai form of marriage and the authorities below have committed serious error of record as well as of law while appreciating the materials on record. Accordingly, the three married daughters of the recorded tenant through their husbands, all having been married in ghar jamai form of marriage, had right to inherit the property through their husbands having the status of adopted sons under the customary law of Santhal Pargana. In such circumstances

all the three sons in law will have equal status in the matter of inheritance as ghar jamai under the customary law of santhals who are treated as sons. Therefore upon death of the eldest "son in law" and eldest daughter dying issueless, their respective share will devolve upon the other two "sons in law" in the capacity of sons of the recorded tenant.

25. Accordingly the impugned order dated 24.7.2006 (Annexure-5) passed by the learned Commissioner, Santhal Parganas Division, Dumka in RMR No. 87/91-92 is hereby set-aside.
26. Before concluding this judgement, it would be further useful to note that in the case of Madhu Kishwar and others Vs. State of Bihar & others (1996) 5 S.C.C. 125, provisions of Chotanagpur Tenancy Act, 1908 which provide succession to property in the male line was challenged on the ground being discriminatory and unfair against women and, therefore, ultra vires to equality clause in the Constitution. In the said case, the Hon'ble Supreme Court in the majority view held as under in para 13 and gave directions in para 14 to the then state of Bihar as under :-
 13. "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 others 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 Sections 7 and 8 recognise. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Sections 7 and 8, to make way to 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 recognised, 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 Sections 7 and 8 has to remain in 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 male succession, entitling her to the status of an intervening limited dependants/descendants under Sections 7 and 8. In this manner alone, and up to this extent can female dependants/descendants 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 dependants/descendants under Sections 7 and 8 of the Act is carved out to this extent, by suspending the exclusive right of the male succession till the female dependants/descendants choose other means of livelihood manifested by abandonment or release of the holding kept for the purpose.

14. For the afore-going reasons, disposal of these writ petitions is ordered with the above relief to the female dependants/descendants. 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 latter would consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the Indian Succession Act at this point of time insofar 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.”
27. In the dissenting view in the said judgment, the following observations were made in para 28, 37 and 38 and directions were issued in para 56 which reads as follows :-
- “28. As per the U.N. Report 1980 “women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world’s income and own less than one-hundredth per cent of world’s property”.
- Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory, therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind.”
- “37. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with the march of time. Justice to the individual is one of the highest interests of the democratic States. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

38. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands."
- "56. I would hold that the provisions of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with the male heir with absolute rights as per the general principles of the Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christians. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lineal descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lineal descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act.
28. This court has also taken judicial notice of the aforesaid change in the matter of inheritance amongst santhal women in judgment relied upon by the counsel for the petitioners dated 12th December 2008 arising out of judgment and decree dated 21.07.1987 in Title Appeal No. 4/1983. While deciding the said case this court has observed as follows:-
- "16. From the aforesaid discussions, it is evidently clear that custom prevailing in the Santhal community has undergone a great change. The rules against female succession among santhals whether christen or nonchristens are changing owing to the force of public opinion. The change which is occurring is in the direction of uplifting the condition of women and giving them right in the family as also in the property. From the books of the great scholars who are the authors of many books including the books in Survey and Settlement quoted herein before, it is manifestly clear that there

are instances where a sonless male or female have taken in adoption a grandson or any of the agnates of the family.”

29. The counsels appearing in this case have not been able to point out as to what steps were taken by the state government after the directions issued by the Hon’ble Supreme court in para 14 of the said judgement.
30. Considering the fact that the issue of inheritance of property amongst tribal women in the state of Jharkhand, particularly with respect to santhal women, with respect to whom the trend in their favour was observed as back as in the year 1927-35 in aforesaid Gantzer’s settlement report, some steps are required to be taken by conducting some study about the recent trends and make appropriate recommendations.
31. The trends of change in customary law of Santhal regarding inheritance of property by women, particularly daughters where there are no sons of recorded tenant, has been duly acknowledged and considered in Gantzer’s settlement report as quoted above and it was observed in the report itself that in the customary law dealing with the cases of this nature, the custom adopted in particular locality must be carefully considered. The trend of shift of customs in santhals in the matter of women’s right to property was noted in the said report as back as in the year 1927-35. This court is of the considered view that the present status about such customary law, which deprives santhal women from inheriting property, is required to be examined by conducting a study to find out what further changes have taken place in the trend observed as back as in the year 1927-1935, which can be undertaken even by the law commission.

□□□

NARAYAN SOREN & ORS. VERSUS RANJAN MURMU & ORS.
2013 4 JLJR 18; 2008 0 Supreme(Jhk) 1446;

Narayan Soren & Ors. – Appellants
Versus
Ranjan Murmu & Ors. - Respondents

M.Y. EQBAL, J.

APPEAL FROM APPELLATE DECREE NO. 292 OF 1987(P) DECIDED ON : 12.12.2008

Santhal Customary Laws – High Court in the second appeal cannot interfere with the concurrent finding of both the courts below with regard to the existence of a custom as to the right of a female to adopt the child and also the fact of the widow adopting the child as per due ceremony as well as an adoption deed. (Paras 11 and 20 to 24)

JUDGMENT

M. Y. Eqbal, J.-This second appeal is directed against the judgment and decree dated 21.7.87 passed by 3rd Additional District Judge, Dumka in Title Appeal No. 4/83 affirming the judgment and decree passed by 2nd Additional Subordinate Judge, Dumka in Title Suit No. 34/78 whereby the suit filed by the plaintiffs-appellants was dismissed.

2. At the time of admission of the appeal the following substantial question of law was formulated:- "Whether the courts below have erred in law in placing the onus on the plaintiff to prove that there was no custom of adoption by females among the Santhals?"
3. The facts of the case lie in a narrow compass:-

The plaintiffs-appellants filed the aforementioned suit for declaring that defendant no. 3, Rani Hansda, wife of Sundar Soren has no right to adoption and Balak Murmu is not the adopted son of Rani Hansda. The plaintiffs' case is that the plaintiff no. 1 is the agnate of Chandar Soren, husband of Rani Hansda. Other defendants are members of the same family being agnates and claiming inheritance in the property of Sundar Soren. Sundar Soren died leaving behind his widow Rani Hansda, who allegedly was maintained by the plaintiffs. During lifetime Chandar Soren alleged to have executed a Jimmanama on 5th March, 64 with respect to his entire properties and since then the plaintiffs-appellants are in possession of the property of Sundar Soren. It is alleged that taking advantage of complicity and oldness of Rani Hansda, the defendant no. 1 who is grandson of the common ancestors, got a deed of adoption executed on 17.5.77. The plaintiffs' case is that in Santhal community a widow is not entitled to adopt any child and if her husband died issueless the properties are inherited by other surviving agnates.

4. The defendants contested the suit by filing written statement on the ground that according to Santhal custom a widow is also competent to adopt a child. It is pleaded that formal ceremony like Bonga Tola and Nim Da Mari were duly performed. Subsequently a deed of adoption was also registered. The defendants' case is that after the death of Sundar Soren the plaintiffs started creating trouble, which resulted in initiation of criminal proceedings and after the plaintiffs failed in their attempt, the instant suit has been filed.
5. The trial court framed five issues including the issue with regard to Santhal custom of widow adopting a child. The trial Court recorded a finding that a widow can adopt a child and all ceremonies were performed while defendant no. 1 was adopted by the widow. The trial Court, after considering both oral and documentary evidence, recorded a finding that a Santhal widow is fully competent to adopt a child. The Court further recorded a finding that all customs and ceremonies were performed at the time of taking delivery of a child from the mother.
6. Aggrieved by the said judgment and decree passed by the trial court, the plaintiffs-appellants preferred appeal before the District Judge, Dumka being Title Appeal No. 4/83. The appellate court after re-appreciation of the entire evidence affirmed the finding of the trial court and held that the defendants by adducing positive evidence proved that a Santhal widow is competent to adopt a child in absence of her husband.
7. Mr. Rajiv Sharma, learned counsel appearing for the appellants, assailed the impugned judgment and decree mainly on the ground that the courts below have wrongly shifted the onus upon the plaintiffs to prove by evidence that the widow had not adopted the child. Learned counsel submitted that a Santhal widow has no legal right under the custom to adopt a son.
8. Before deciding the substantial question of law, I would like to discuss the customary law of Santhal and the right of female under their customary law with regard to adoption, although the finding has been conclusively recorded by two courts. It is worth to mention here that the counsel for the appellants has confined his argument on the question of law formulated at the time of admission of the appeal.
9. The Santhals are justly described as the largest, most integrated and possibly the most resilient tribe in eastern India. They made the Santhal Parganas their home early in the colonial period and spilled over the Gangas into Pumea. They have played a crucial role as a reclaimers of land and excellent at the transplantation of paddy.
10. W.G. Archer, a renowned officer during British period, spent most of his administrative career in Bihar. He stayed many years in Santhal Parganas as Deputy Commissioner and as a Special Officer of Judicial Department to record the Santhal laws. He also became Joint Editor with Verrier Elwin of Men in India founded by S.C. Roy. Archer had close link with scholars and administrator who were active in the area of tribal studies. He has spent many years to know the customs and other history of Santhals. In the introductory chapter of adoption among the Santhal Communities, the author, W.G. Archer, in his book Tribal Laws and Justice, said:-

"IN HIS paper on Santa rules of succession, Campbell says: 'Adoption is not practised by the Santals' and Boddington while dissenting remarks, 'I have heard of one or two instances'. Sir Robert Russell, on the other hand, made enquiries in 1924 from 'an assembly of parganaits

in the Dumka Damin, the parganait of Amrapara, the Sardars of Sikaripara, Rajbandh, Banspahari, Masanjour and a number of others' and found that such a custom existed from very early times. At the present day there is no uncertainty for the practice is not only a Santal custom but is a common expedient in Santal life.

The most usual situation which results in adoption is when a Santal has no son. 'It is for love and joy that we want sons' said Salku Soren, Deshmanjhi of Durgapur. But beyond this delight in male children is the knowledge that a son is the main support in old age. A Santal ploughs so long as his health and strength remain but sooner or later these must end and then if he has no son there is only the decrepitude of old age, its weak helplessness, the plight of 'an old man, a dull head among windy spaces'.

It is in circumstances such as these that a Santal often resorts to adoption-sometimes only to secure a son but more usually to gain a prop in his fading years."

IV. THE PERMANENT WIDOW IN A JOINT FAMILY

If this is the position when a widow remarries what are her rights if she does not take another husband but remains a widow? In such cases she is virtually a substitute for her husband. She steps into his place, acts as his representative and exercises almost all his rights and duties.

If her husband was joint with his brothers she will continue to live in the family and the situation will not differ materially from what it was in her husband's lifetime. Her right to maintenance will continue and if her husband's family neglects her without cause she can demand sufficient land to keep her. If there is a complete family partition the widow and her children will get the share which would have gone to her husband had he been alive.

11. So far adoption made by a widow, the author says:-

"In almost all cases adoption is done only by men but there is no bar to a widow adopting a son or daughter 'for her dead husband'. As in all cases of adoption village approval is a necessary condition but such cases almost always occur only when there are no agnates to oppose or where the husband's brothers fully approve. Moreover it is generally accepted that if a widow so adopts she will do so from her husband's greater family. There have so far been no cases in which the village has overruled the agnates and has allowed adoption by a widow against their will.

The widow of Sital Soren of Raghunathpur adopted the son of her dead husband's brother's son.

In Jhanjhko the widow of Bhondo Murmu took a son of her husband's brother as *posu putra* and the same was done by the widow of Tilak Marandi of Dahua and the widow of Jiban Soren of Litipara.

In a case from Birgaon the widow of Chandra Soren adopted an outsider. Her dead husband had left no agnates and the boy was adopted from outside the family with the approval of the village."

12. In an article "Contextual Need for Change in Santhal Customary Law of Inheritance", the author of the article, Mr. Ramesh Chandra has gone in detail and said:-

"As mentioned earlier, the Santhal Customary Law provides for movement of landed property in the male line. Other immoveable property also gets restricted at that level. As per local understanding, there is no codified law in this respect for Santhali women. However, according to Gantzer's Settlement Report (1935) a clear picture of customary law is visible. A few of expressions derived from Santhali oral traditions to give some understanding about the position of women in Santhali society are "Jinis Knako" meaning 'they are things' indicating women as object and their position not more than any other object owned by Santhali men and she is taken as an appendage alongwith other commodities. "Sashhamrao Hivali" meaning "wife is the property of her husband'.

The Santhals are patriarchal and patrilineal people. The inheritance of property moves in male line; in exceptional cases it can also go in hands of females, but only temporarily. In case of inheritance of landed property the Santhali Customary Law does not provide safeguarding the interest of landed property. However, some westernized interpretation of Santhal Customary Law is available from Gantzer's Settlement Report which portrays the customary law favouring Santhal women.

According to Santhal tribal law only males can inherit land, some jointly succeed their father, if brothers are cosharer in a holding and one brother dies without issue, the surviving brothers and the sons of predeceased brothers inherit his share. The Hindu or Muhammadan Laws of succession do not apply to Santhals. Santhal tribal law is quite definite in not allowing females to inherit. But this law is gradually undergoing a change.

As regards widows, the entries have tended to be even less uniform. There have been not a few cases in which no objection has been raised to the recording of the widow in her own right, and in such cases, she has been described as wife of so and so. As in the case of Hindu widow, this entry is intended to indicate that she has inherited the property from her late husband and that when she dies it will revert to those male relations who would ordinarily have inherited it at once under Santhal Law. In other cases, the widow, like the daughter, has been recorded only in the remarks column as a Khorposhdar for certain plots sufficient to maintain her until her death.

For the sake of interpretation of ongoing practice of customary law it may clearly be said that in relation to their landed property the situation is that where a Santhal woman has been recorded as wife of so and so, she holds a widow's right as if she were a Hindu widow or she may be taken to have full rights of inheritance some what in the manner of a woman inheriting Stridhan property under the Hindu Law. The question of succession in such cases still remains in doubt as they system is new, but there seems little doubt that the property should revert to her nearest male relatives.

No transfer by a Raiyat of his right in his holding or any portion thereof, by sale, gift, mortgage, will, lease or any other contract or agreement, expressed or implied, shall be valid unless the right to transfer has been recorded in the record of rights, and then only to the extent to which such right is so recorded."

13. In the final report on the 'Revision' Survey and Settlement Operations in the district of Sonthal Parganas, 1922-35', J.F., Gantzer said:-

"45. Females.-Entry of Women's names in the, records,- The relevant portion of Khanapuri Rule No. 46 reads as follows:-

"If a female is the cultivator of a field her name should be accompanied by that of her father if she inherited the property from him, or by that of her husband if she inherited from him. It may be assumed, therefore, that the revision settlement records have been prepared in accordance with the prescribed rule, but in the absence of any definite finding on the point at Issue embodied In a dispute list or other order passed by an Assistant Settlement Officer, the value to be attached to, the, entry of a father's name or a husband's 'name, as the case may be, is open to challenge when the 'exact nature of the woman's 'title is under consideration in a subsequent suit. The position may be summed up in Mr. Dain's observation in his judgment, dated 9th April, 1934 in Commissioner's Santal parganas Settlement Appeal No. 128 of 1933-34:-

"When a woman holds land, it has not been the practice in the Santal Parganas to make any, entry indicating the exact, nature, Of the right by which she holds it, and any observations made on the subject at this stage would not bind a court before which the issue may be directly raised at some future time."

46. Santal Tribal Law of Inheritance.-According to Santal tribal law only males can inherit land. Sons jointly succeed their father. If brothers are co-sharers in a holding and one brother dies without issue the surviving brothers and the sons of predeceased brothers inherit his share per stripes.

The Hindu or Muhammadan Laws of succession do not apply to Santals tribal law is quite definite in not allowing females to inherit, but this law is gradually undergoing a change and the situation created by this change is discussed in a separate paragraph below. According to tribal custom, it is permissible for a man with daughters and no sons to take a son-in-law into his house as a Gharjamai and to give him thereby all the rights of a son. The adoption of a Gharjamai is a formal proceeding leaving no room for doubt as to the father-in-law's intention and resulting in the Gharjamai cutting off all connection with his own family as far as his rights to property are concerned, and becoming to all intents and purposes the son of his father-in-law. When such adoption has been formally made the Gharjamai can succeed as a son and oust other male relatives. It is of Importance to note that a Gharjamai can be adopted only by a deliberate public act in the presence of the village community at the time of the marriage, and that according to tribal law a father-in-law cannot at a later stage convert an ordinary son-in-law into a Gharjamai. A widow cannot in any circumstances, create a Gharjamai. There is a distinction between a Gharjamai and a Ghardi-jamai. In both cases the bridal party goes from the bride's house to fetch the prospective husband and no dowry (pon) is given, but whereas the gharjamai is adopted permanently" as a son, a ghardi-jamai merely lives and labours in his wife's home" for a previously stipulated period which may extend up to five years. He thereby works off the debt due on account of the non- payment of pon. A ghardi-jamai is not entitled to get anything from his wife's family, but the woman herself is usually given a small present (arpa) annually at the harvest season, and this is utilized for setting up her new home. At the expiry of the stipulated period, the Ghardi-jamai is free and may return to his own home with wife."

14. In the final report on the 'Survey and Settlement Operations in the district of Sonthal parganas, 1898-1907', H. McPherson said:-

"One of the most interesting sections of Mr. Bompas' note is that which sets forth Sonthal customary law on the subject of partition, inheritance and marriage, subjects which perhaps

in view of clause (c), Section 23 of Regulation III of 1872, should have been dealt with more fully in the settlement record-of-rights of Sonthal villages than has been done. As the principles set forth by Mr. Bompas in his note were followed in disputes about inheritance that arose during the settlement in Sonthal villages, it will make this report more complete if I quote below those portions of Mr. Bompas' note which are pertinent to the subject.

"(1) Sonthal Partition.-When there are many grandsons or the sons do not live happily together, the father and mother will make a partition, a panchayat will be called and the father will divide all the land and cattle and will keep one share for himself; and the son with whom the parents live, will retain possession of their share during their lifetime. When the father and mother cannot get about, the sons will have to support them, as, when they were little and could not support themselves, the father and mother supported them with great trouble. Daughters get no share. Often at marriage they give them one calf each; and so at a partition if there are unmarried daughters they get one calf each. At a partition unmarried sons get a double share of the live stock, one share for their marriage expenses. Cattle which the daughters-In-law got from their father and brothers and father-in-law at the time of marriage will not be divided but the cattle which' the sons got at marriage will be divided.

"(2) Inheritance.-If a woman dies while her sons are unmarried, they cannot demand a partition even if their father takes a second wife, but they can do so if they like after marriage. The father gets one share and the sons one share each. If the second wife has no children, when the father dies, the sons of the first wife can take the share their father got, but if they take it they will have to pay for the funeral of their stepmother.

"If a woman is left a widow without sons, her husband's father or brothers will get the whole property. The woman will get only one calf, one bandi (If paddy, one bati and one cloth, and will return to her parents' house. Some men under these circumstances' will keep their elder brother's widow and riot let her return to her parents. This is considered very praiseworthy. The brother who keeps the widow will get his own share of the deceased brother's property, he will not take the whole.

"If a widow has daughters, their paternal grandfather and uncles will take charge of mother and daughters, and tile property will remain 'in their possession. When the daughters grow up, they will marry them, and at their marriage they will give them what presents they would have got from their father, and they will support the mother until her death. When all the daughters are disposed of, the widow will get the perquisites of a childless widow and go to her father's house or will go and live with her daughters.

"The widow with a son will keep all the property in her own possession; the grandfather and uncles can only properly look on to see that the wife does not waste the property. If a widow remarries before her sons are married, tine grandfather and uncles will take possession of all the property and the mother of the children has no right to get anything. Sometimes a calf is given her out of kindness and is called bhandkar."

15. Although patrilineal system amongst the Santhals is under stress, the author W.G. Archer himself had noticed the growing trend towards the change whereby a landless widow inherited her late husband's land until she remarried. He had also observed how the

settlement operation in deference to local custom recognized right of a women by recording them as owner. In Gantzer's Settlement Record, it is mentioned that settlement confers right of widows and daughters beyond the customary law. In the Bihar District Gazettes of Santhal Parganas, by P.C. Roy Choudhary, the status of a woman has been described as under:-

"A Santal women plays a Wiry important role in Santal community. Seemingly she occupies an inferior position but she has her rights alongwith obligations according to custom and tradition. The civil condition of a Sanal woman has been undergoing changes alongwith the impact of modernism. There have been some investigations into the position of a Santal woman by several scholars. Mr. W.G. Archer, who was a Deputy Commissioner of Sanal Parganas some years back has also made some investigations.

The joint family system of tie Santal has undergone a great change. E.G. Man in his book "Santhalia and that Sonthals" (1867) had mentioned that a Santal is "blessed with laree families.....nine olive branches being a common number to one mans quiver..... ". But from investigation it was found that the joint family system has become now a rarity. Hardly a son after marriage lives jointly with his father. The marriage ipso facto creates a separation and a Santal family now consists of the married couples and their unmarried children. Poverty due to small holding of the Santal cultivators seems to be the main cause of breaking the joint family tie. Joint family system envisages property, particularly landed properly to create a co-partnership. The spread of literacy and education, especially among the Christian Santals seems to be also a factor for separation. There is a tendency among the educated service-holders to live separately. Sometimes the father is himself responsible for separation in case of re-marriage. "

16. From the aforesaid discussions, it is evidently clear that custom prevailing in the Santhal community has undergone a great change. The rules against female succession among santhals whether christian or non- christians are changing owing to the force of public opinion. The change which is occurring is in the direction of uplifting the condition of women and giving them right in the family as also in the property. From the books of the great scholars who are the authors of many books including the books in Survey and Settlement quoted hereinbefore, it is manifestly clear that there are instances where a sonless male or female have taken in adoption a grandson or any of the agnates of the family.
17. In the case of Madhu Kishwar and Others vs. State of Bihar & Others [(1996)5 S.C.C. 125] [: 1996(2) PLJR (SC)133], provisions of Chotanagpur Tenancy Act, 1908 which provide succession to• property in the male line was challenged as discriminatory and unfair against women and, therefore, ultra vires to equality clause in the Constitution. In the said case, the Supreme Court observed:-
 - "37. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the Preamble of the Constitution. They constitute the core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and

mores must undergo change with the march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

38. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society stands."

Their Lordships further observed:- "28. As per the U.N. Report 1980 "women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundredth per cent of world's property".

Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory, therefore, to render them socioeconomic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind."

18. The customary law of adoption prevailing in the Santhals has been recognized in the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949. Section 20 of the said Act put a restriction in the transfer of raiyati holdings by a raiyat except with the written permission of the Deputy Commissioner. Section 20 of the Act however, provides some relaxation in the transfer of raiyati land by way of usufructuary mortgage to Bank and the Society registered under Bihar and Orissa Co-operative Societies Act, 1935. Section 24 of the Act makes registration of certain transfers of raiyati holdings mandatory. Section 24 reads as under:-

- "24 Registration of certain transfers of raiyati holdings.-(1) When a raiyati holding or any portion thereof is transferred by sale, gift, will or exchange in accordance with the provisions of this Act and the record-of-rights, the transferee or his successor in title may cause the transfer to be registered in the office of the landlord of the village.
- (2) Notwithstanding anything to the contrary contained in the record-of-rights or any law or anything having the force of law in the Santal Parganas, the landlord

shall allow the registration of such transfers, and shall not be entitled, except in the case of a transfer by sale, gift or will, to levy any registration fee. In the case of a transfer by sale, gift or will, the landlord shall be entitled to levy a registration fee of the following amount, namely,-

- (a) when rent is payable in respect of the holding or portion, a fee of two per centum on the annual, rent thereof:

Provided that such fee shall not be less than eight annas or more than fifty rupees; and, (b) when rent is not payable in respect of the holding or portion, a fee of one rupee:

Provided that a gift to the husband or wife of the donor to a son adopted under the Hindu Law, or the daughter, sister, adopted son or adopted daughter of the donor under the Santal law, or to a relation by consanguinity within three degrees of such donor shall not require any registration fee to be paid to the landlord.

- (3) If any landlord refuses to allow the registration of any such transfer as is mentioned in sub-section (1), the transferee or his successor in the title may apply to the Deputy Commissioner, and the Deputy Commissioner shall thereupon, after causing notice to be served on the landlord, make such enquiry as he considers necessary, and shall, if he is satisfied that the transfer, is not contrary to the provisions of this Act or the record-of-rights, pass an order declaring that the transfer shall be deemed to be registered, and may also pass such order as he thinks fit in respect of the costs of any such enquiry."

19. From reading of proviso 2 of sub-section (2) of Section 24, it is evidently clear that it gives relaxation by providing that in case of gift of adopted 'son or adopted daughter of the donor under the Santhal Law, no registration fee is required to be paid. There is sufficient indication about the custom of adoption amongst the Santhals.
20. Be that as it may, the only substantial question of law needs to be answered in this appeal is as to whether the Courts below have erred in law in placing the onus on the plaintiff to prove that there was no custom of adoption by females among the santhals.
21. In my considered opinion where plaintiff asserts that adoption of a child by female is not customary in Santhals and the defendant discharged the onus by adducing evidence to show that adoption of, child by female santhal is customary then heavy onus lies on the plaintiff for proving that such custom of adoption of a child is not customary in Santhals.
22. In the case of "Mt. Barkar Biri vs. Mohd. Amin and Anr." (A.I.R. 1935 Lahore 325), a Division Bench of Lahore High Court while dealing with the customary law observed:-

"We may say at once that the decision of the case has proceeded on entirely erroneous grounds. Even since their Lordships of the Privy Council have decided 1917 PC 181 (1), the law has been very clear that when a person asserts that he is governed by custom It is incumbent upon him to prove that he is so governed and further to prove what that custom is. There is no uniform custom applicable to the whole of the Punjab nor has it so far been codified. It is well known that custom differs from place to place and from tribe to tribe and it is also recognized by authority that it may differ from family to family. In words of

Robertson, J. in 110 PR 1906, which have been quoted with approval by their Lordships of the Privy Council in 1917 PC 181(1):-

"It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be the rule of decision, but only any custom applicable to the parties concerned".

23. In the instant case, it was specifically pleaded by the defendants/respondents that according to Santhal custom a widow is also competent to adopt a child. The defendants asserted that formal ceremonies like Bonga Tola and Nim Da Mari were duly performed. Subsequently, a deed of adoption was also registered. Witnesses of the same community were examined by the defendants who have consistently deposed about the custom prevalent in Santhal Community for adoption of a child by a widow. Not only that one of the witnesses D.W. 5 Misil Soren has deposed that he was taken in adoption by Maino Tudu, a widow after the death of her husband Jiwan Besra.
24. Both the trial Court and the Appellate Court after recorded a concurrent find (sic-finding?) about the custom of adoption of a child by a female santhal and the finding is based on oral evidence coupled with registered document of adoption. The finding of fact recorded by two courts cannot and shall not be held to be perverse in law. The impugned judgment and decree passed by the Trial Court and affirmed by the Appellate Court, therefore, cannot be disturbed in Second Appeal.
25. For the reasons aforesaid, there is no merit in this appeal, which is, accordingly, dismissed.

□□□

**ANATH BANDHU MANDAL & ORS. VERSUS
THE STATE OF BIHAR & ORS.
2018 1 JLJR 112; 2017 0 Supreme(Jhk) 1087;**

Anath Bandhu Mandal & Ors. – Petitioners
Versus
The State of Bihar & Ors. – Respondents

RAJESH SHANKAR, J.
CWJC NO. 5031 OF 2000(P) DECIDED ON : 10-08-2017

JUDGMENT :

1. The present writ petition has been filed for quashing the order dated 11.3.2000 passed in Misc. Case No. 28/1998-99 whereby the Deputy Commissioner, Deoghar, upheld the order of the Circle Officer for removal of the encroachment from the land upon which the petitioners are in possession.
2. The factual background of the case is that the land situated at Mouza-Nawadih No. 392, Plot No. 75 appertaining to Jamabandi No. 33/6, P.S.-Palajori, Dist. Deoghar (hereinafter called the said land) was recorded as Basauri Khas Malik of the proprietor/Ghatwal namely Hari Kishore Prasad Singh. He settled the said land to different raiyats including the ancestors of some of the petitioners much before the enforcement of the Bihar Land Reforms Act, 1950. For better appreciation of the case, the details of the settlements have been given as follows:
 - (i) One Yashoda Bala Dashi, grandmother of the petitioner no. 1 had been settled 4 decimals of land of plot no. 75 of Mouza-Nawadih by way of registered deed of settlement in the year 1946.
 - (ii) One Rakhil Kapri had been settled 2 kathas 10 dhurs of plot no. 75, marked plot no. 75/2 of MauzaNawadih. The son of Rakhil Kapri sold the said land to one Yusuf Ali Ansari, father of the petitioner no. 2 by registered sale deed dated 29.3.1967.
 - (iii) Bhol Nath Dutta (the father of the petitioner no. 3) had been settled 6 Kathas 5 dhurs of plot no. 75 marked as 75(ka) of Mouza-Nawadih by way of registered deed in the year 1945.
 - (iv) One Banshi Ram Marwari (father of the petitioner no. 4) had been settled 2 Kathas of land of plot no. 75 marked as plot no. 75/6 by way of registered deed in the year 1945.
 - (v) Bhol Nath Dutta (the father of the petitioner no. 3) had sold 2 decimals of plot no. 75 to Radha Shayam Sah (petitioner no. 5) by way of registered deed of sale dt. 25.4.1975.

to 1st April, 1949 and after the settlement of the said land, Pucca building had been constructed thereon and the rent was being paid to the then Gharsara Estate and after vesting of Zamindari to the State of Bihar.

4. In November, 1998, in course of encroachment drive, the respondent nos. 2 and 3 threatened the petitioners to remove their Pucca structure failing which the same would be demolished, claiming the land to be Government land. Thereafter, the petitioners filed Misc. Case No. 28 of 1998-99 in the Court of learned Deputy Commissioner, Deoghar for a direction upon the Circle Officer, Palajori not to disturb the peaceful possession of the petitioners. The Deputy Commissioner (respondent no. 2) directed the respondent no. 3 to submit report, who in turn submitted his report stating inter alia that the then Deputy Commissioner in Review Misc. Appeal No. 36 of 1963 held that plot no. 75 of Mouza-Palajori and plot no. 1244 of Mouza-Nawadih are Govt. land. On the basis of the said report, the D.C., Deoghar passed an ex parte order dated 11.3.2000 upholding the order of the respondent no. 3 to remove the petitioners from the plot no. 75 being encroachers on the said land.
5. The learned Senior Counsel for the petitioners submits that the impugned order has been passed by the Deputy Commissioner, Deoghar on the basis of the order dt. 4.5.1964 passed in Rev. Misc. Appeal No. 36 of 1963-64 as also the judgment dated 8.12.1960 passed by the Patna High Court in M.J.C. No. 313 of 1959. However, on perusal of the order dated 4.5.1964 passed in Rev. Misc. Appeal No. 36 of 1963-64, it would be evident that one Nityanand Prasad was the appellant in the said case. The petitioners were never noticed in the said case and, therefore, giving up of the claim pertaining to Plot No. 75 by said Nityanand Prasad has no binding effect and the same cannot be made applicable to the petitioners. It is further submitted that a Basauri settlement was also made with Nityanand Prasad by registered deed dt, 26.8.1947 with respect to plot no. 73 of Jamabandi No. 33-6 and plot no. 1243 of Jamabandi No. 63 and also other plots. After vesting of Zamindari, the respondents started settling the said lands to other persons against which Nityanand Prasad filed Misc. Jurisdiction Case No. 313 of 1959 before the Patna High Court. The said case was disposed of vide judgment dt. 8.12.1960 by holding that without initiating any proceeding u/s 4(h) of the Bihar Land Reforms Act, 1950 the respondents cannot treat the settlement as a nullity. Thereafter, in Rev. Misc. Appeal No. 36/1963-64 the plot nos. 73 and 1243 were released in favour of Nityanand Prasad on his assertion that he gives up his 'Claim over' plot nos. 75, 45 and 1244. The learned Senior Counsel further submits that Nityanand Prasad being one of the settlees of part of Plot No. 75 could forego/give up only that part of Plot No. 75 which actually belonged to him. The plot no. 75 is a big plot of land and there have been many settlees, who came in possession over the said plot as Basauri settlement from the ex-landlord settled in the year 1945-46 (prior to 1.4.1949). It is further submitted that since the petitioners were neither party in M.J.C. No. 313 of 1959 nor before the Deputy Commissioner, Deoghar in Rev. Misc. Appeal No. 36 of 1963-64, the said fact remained unclarified. The learned Senior Counsel also submits that in the year 1993 also, the Circle Officer, Palajori had issued notices to the petitioners informing that during verification, plot no. 75 was found to be Government land, however; after submission of relevant documents by the petitioners relating to their right, title and interest over the said plot of land, the State authorities did not proceed further in the said matter.
6. The learned Senior Counsel for the petitioners further submits that the nature of the settlement was Basauri settlement done by the 'ex-landlord in the year 1945-46 and as

such after coming into force' of Bihar Land Reforms Act, 1950 the said land did not vest in the Government and therefore, there is no question of any claim by the Government over the said plot. Moreover, after vesting of Zamindari, the State Government prepared Register-II on the basis of chart which were prepared by the Zamindar which shows the description, nature, area of the land and the name of the persons whose right, title, interest and possession over the lands are covered. These particulars were submitted by the Ex-landlord in Form 'K' under the Bihar Land Reforms Act, 1950. It is further submitted that a separate list which related to Basauri lands was prepared by the concerned Circle Inspector on 1.4.1959 in which the name of the petitioners also find place. It is further submitted that since the settlements of the land were made in the year 1945-46 and the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 came into force on 1.4.1949, the case of the petitioners shall be governed by Santhal Pargana Rent Regulations, 1886.

7. The learned Senior Counsel, in support of his argument has relied upon the following judgments:-
 - (i) Sri mati Sugia Debi & Anr. VS. Chando Kapri & Ors. reported in 1959 B.L.J.R. 95;
 - (ii) Sri Boddhiranth Mishra and 7 Ors. VS. The State of Bihar & 7 Ors. reported in 1969 PLJR 373; and
 - (iii) Nirbhay Kr. Shahabadi & Anr. VS. State of Jharkhand & Ors. reported in 2014(1) JCR 102(Jhr).
8. The learned counsel appearing on behalf of the Respondent-State submits that the names of patta holders, Banshi Ram Marwari, Rakhai Kapri, Bhola Nath Dutla are not recorded either in the revenue papers nor any rent is taken from them. So far as the name of Jasoda Bala Dhasi is concerned, her name has been illegally recorded without fixation of rent. The mutation of Yusuf Ali Ansari and Radhe Shayam Sah are also illegal. Moreover, the land is recorded as Parti Kadim and as such no mutation proceeding can be launched for that land. It is further submitted that after vesting of Zamindari, on the basis of return of Zamindar, the Register-II was prepared and since in the return of the Zamindar, the names of patta holders were not there, their names were not entered in the Register-II.
9. Heard the learned counsel for the parties and pursued the materials available on record. It appears that the Deputy Commissioner, while passing the impugned judgment/order, primarily relied upon the orders passed by the Patna High Court. in M.J.C. No. 313 of 1959 as well as the order passed by the Deputy Commissioner, Dumka in Rev. Misc. Appeal No. 36 of 1963-64. However, both these cases were related to the claim of one Nityanand Prasad who had no concern with the right, title and interest over the land of the petitioners. Even if it is assumed that Nityanand Prasad had relinquished his right before the Deputy Commissioner during the proceeding of Rev. Misc. Appeal No. 36 of 1963-64 upon a portion of plot no.75 on which he was in possession, the said relinquishment cannot be made applicable to the petitioners as they were not party to the said proceeding. Moreover, at that time, the documents pertaining to the right/title of the petitioners upon the said land was not there. From the facts of the case, it transpires that plot no. 75 is a big chunk of land and in some part of plot no. 75, the petitioners have been in possession since long by virtue of registered Basauri Settlement. Moreover, the petitioners were also not party in M.J.C. No. 313/1959. Thus, giving up of claim with respect to plot no. 75 by one Nityanand Prasad before the

Patna High Court in M.J.C. No. 313 of 1959 as also in the proceeding of Rev. Misc. Appeal No. 36/1963-64 before the Deputy Commissioner, Dumka is not binding upon the petitioners.

10. So far as the argument of the respondent-State that in the return filed by the Zamindar, the names of the predecessor in interest of the petitioners were not there, the judgment relied upon the petitioners is required to be considered.
11. In the case of Sri Boddhinath Mishra (supra) a Division Bench of this court in para 25 held as under- "25.....Therefore, the legislature has taken special care in laying down that after vesting of the estates, the outgoing intermediaries will acquire the status of a tairyat with occupancy rights within the meaning of the Bihar Tenancy Act and not of an occupancy raiyat within the meaning of a Santhal parganas Settlement Regulation 3 of 1872 in respect of the land in his khas cultivation even though the land b, situated in the district of Santhal Parganas. Sec. 53 contemplates the acquisition of the holding or a portion of the holding of a raiyat within the meaning of the Act. The petitioners not being raiyats under the Santhal Parganas Tenancy Act, 1949" their lands cannot be acquired under the provisions of Sec. 53 of the Act. In that view of the matter also the acquisition proceeding (Annexure-E) so far the lands of the petitioners are concerned is invalid, and illegal, and, as such, it must be quashed."

In the case of Sugia Debi vs. Chando Kapri reported in 1959 BLJR 95 in para 3 it is held as under:-

- "3. We are unable to accept the argument of learned counsel for the appellants as correct. It is the admitted position in this case that the plaintiff had taken settlement of the dispute land from the landlords on the 28th May, 1949. That is a crucial date, because the Amending Act, namely (Bihar Act 14 of 1949) came into force on the 1st Nov. 1949 and so it is obvious that the plaintiffs had taken settlement of the disputed land before the promulgation of the' Amending Act. In other words, the plaintiffs had acquired a vested right before the Amending Act came into force, and it is a well established principle that we cannot give such retrospective construction to an amending Act as to affect past transactions, and so as to affect vested rights which had sprung up before the Amending Act came into force. The law on the subject has been recently expounded by this Bench retrospective operation of a statute as regards vested rights applies not only to substantive rights but applies equally to remedial rights, like right of action, including rights of appeal."

A similar view has also been taken by- the Judicial Committee in the case of Delhi Cloth and General Mills Company VS. Income Tax Commissioner, Delhi, where the law is stated as follows:-

".... While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively, in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to

apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect.

In view of these well established principles we are of opinion that the present case is governed by the old law as it stood before the Amending Act, namely Bihar Act 14 of 1949, and it follows, therefore, that the Deputy Commissioner had no jurisdiction u/s 53(6) of Bihar Act 14 of 1949 to order restoration of the land to the defendants. We accordingly hold that there is no substance in this appeal and dismiss this appeal. There is be no order as to costs."

12. In the case of Nirbhay Kr. Shahabadi (supra) in Para 21, this court has held as under-
- "21. As per the Final Report on the Revision Survey and Settlement Operations in the District of Santhal Parganas, 1922-35 by J.F. Gantzer, a Basauri tenancies may be created in two ways:-
- (a) By settlement of waste land under Clause 3 of the record of rights and duties, and. (b) By acquisition under the provisions of Section 25-A of Regulation-II of 1886.

According to custom and practice all Basauri holdings are transferable and no distinction is ordinarily made in the incidents of such holding whether obtained by settlement under Clause-3 of the record of right or by acquisition under Section 25-A of Regulation-II. "

13. From the above judicial pronouncements it is clear that if any land is acquired by the landlords under Section 25-A of Regulation-II of 1886 and even after vesting, they are continuing in possession of the same, they are to be treated as raiyats under the Bihar Tenancy Act, 1885 and the landlords have right to make settlement of the said land to any of his raiyats for homestead purpose for which no permission of Deputy Commissioner was required u/s 20 of the S.P.T. Act, 1949 since this provision shall have prospective operation. Thus, the argument on behalf of the State-respondents that in the return filed by the Zamindar, the name of the petitioners are not there, is not sustainable. Moreover, The D.C. Deoghar while passing the impugned order dt. 11.3.2000 did not consider these aspects of the matter at all and the petitioners have been directed summarily to vacate the said land. As it transpires from the facts of the present case that the petitioners and their predecessors in interest have been in possession of the land in question, since 1945-46, the order dispossessing the petitioners from the said land in course of an encroachment drive cannot be legally sustained. The Patna High Court in M.J.C. No. 313 of 1959, as discussed herein above, has held that the settlement made in favour of Nityanand Prasad cannot be said to be nullity without initiating proceeding u/s 4(h) of the Bihar Land Reforms Act, 1950.
14. In the present case also no proceeding u/s 4(h) of Bihar Land Reforms Act, 1950 has been initiated against the petitioners. This legal position has also not been taken into consideration by the D.C., Deoghar (respondent no. 2) while passing the impugned order dt. 11.3.2000.
15. In view of the aforesaid discussions, this writ petition is allowed. The order dated 11 th March, 2000 passed in Misc. Case No. 28 of 1998-99 (appears to have been wrongly typed as Misc. Case No. 28/1997-98) by the Deputy Commissioner, Deoghar is set aside. However, the Respondent-State is at liberty to take appropriate recourse against the petitioners as provided under law.

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AMITAV KUMAR VERSUS THE STATE OF JHARKHAND & ORS.
2018 4 JLJR 670; 2018 0 Supreme(Jhk) 1017;

Amitav Kumar, Son of late Khemanand Pandit @ Hemanand Pandit & Ors. - Petitioners
Versus
The State of Jharkhand & Ors. - Respondents

ANUBHA RAWAT CHOUDHARY, J.
W.P. (C) No. 1029 of 2006, Decided On : 21-03-2018

ORDER :

1. Heard Mr. Rajeeva Sharma, learned senior counsel appearing for the petitioners assisted by Mrs. Nitu Singh, Advocate.
2. Heard Mr. Ashish Kr. Thakur, A.C. to S.C. (L&C) appearing for the respondents-state.
3. This writ petition has been filed for quashing the order dated 12.05.2004, passed by the Commissioner, Santhal Pargana, Division, Dumka, in RMA Case No. 132/1993-94, whereby the order dated 17.05.1993, passed by the Deputy Commissioner, Sahibganj in RMP Case No. 37/84-85 has been upheld and the three settlements made in favour of Khemanand Pandit @ Hemanand Pandit(original writ petitioner since deceased and substituted by his legal heirs) has been cancelled.
4. Counsel for the petitioners submits as under:-
 - (a) Following three settlements in Mouza-Barachandbasi in Sahebganj District were made in favour of the original writ petitioner:-
 - i. 3 bighas of plot no. 223 by order dated 31.01.1956, passed by Sub Divisional Officer, Sahibganj in Settlement Case No. 170 of 1955-56.
 - ii. 2 bighas , 16 Khatas and 17 dhurs of plot no. 331 and 4 bighas of plot no. 323 by order dated 03.11.1959 passed by the Sub Divisional Officer, Sahibganj, in Settlement Case No. 54/1959-60.
 - iii. 10 bighas of plot no. 323 by order dated 25.01.1969 passed by the Additional Deputy Commissioner, Santhal Pargana, Dumka in Revenue Misc. Appeal No. 143/1968-69 arising out of settlement case no 111 of 1964-65.
 - (b) Counsel for the petitioners submits that the original writ petitioner was resident of village Telo, which is adjoining to village Barachandbasi in the District of Sahibganj.
 - (c) Vide order dated 31.01.1956, the Pradhan of village Barachandbasi had made an

application before the Sub Divisional Officer proposing settlement of land in favour of 8 persons including original writ petitioner, which was duly granted to the petitioner vide order being Settlement Case No. 170 of 1955-56.

- (d) Thereafter another petition was filed being Settlement Case No. 54/59-60 by the Pradhan of village Barachandbasi for settlement of further property in favour of the original writ petitioner mentioning therein that he is a very poor Jamabandi Raiyat of village Telo and village Barachand Basi is quite adjacent to village Telo. It was also mentioned that the settlement of the property involved in Settlement Case No. 54/1959-60 was settled in his favour around 5 years ago. An application was filed before the Sub Divisional Officer for approval of the settlement. Thereafter the Sub Divisional Officer, Sahibganj is said to have issued notice to the 16 anna jamabandi raiyat to file their objection and ultimately the raiyats raised no objection and therefore the land was settled in favour of the original writ petitioner vide order dated 03.11.1959.
- (e) So far as 3rd settlement is concerned, this is also related to the property in the village Barachandbasi and the settlement case was numbered as 111/1964-65 and vide order dated 10.08.1968, the Sub Divisional Officer, Rajmahal at Sahibganj had refused to settle the property in favour of the petitioner on the ground that the petitioner is an outsider. Against this, the original writ petitioner filed appeal before the Appellate Authority which was numbered as Revision Misc. Appeal No. 143/1968-69 and was disposed of in favour of the original writ petitioner vide order dated 25.01.1969.
- (f) Learned counsel further submits that these orders were brought to the notice of the learned Commissioner, Bhagalpur Division, and one Santhal Pargana Revision Misc. Reference Case No. 38/82-83 was started in which order dated 17.02.1983 was passed which reads as follows:-

“This is a reference made by the learned Deputy Commissioner, Santhal Parganas vide his order dated 21.04.1982 in R.M.P. Case No. 5/81-82 for according permission under Section 60 of the Santhal Parganas Tenancy Act, 1949 to review the orders of the Additional Deputy Commissioner, Santhal Parganas and the S.D.O. Sahebganj whereby the lands in question were settled with Khemanand Pandit in violation of the provisions of law. I have heard the learned lawyer for Khemanand Pandit. There is no substance in his contention that it was not a fit case to be reopened. If he has a case he can place it before the learned Deputy Commissioner.

The permission is accorded to learned Deputy Commissioner, Santhal Parganas to review the orders of Additional Deputy Commissioner, Santhal Parganas and S.D.O. Sahebganj under Section 60 of the Santhal Parganas Tenancy Act. It is presumed that while reviewing he would give an opportunity to Khemanand Pandit to place his case before him.”

- (g) Thereafter a proceeding for review was initiated by the Deputy Commissioner and the case was numbered as Revision Misc. Petition Case No. 37/1984-85 and the orders of settlements made in favour of the original writ petitioner were set aside by the Deputy Commissioner, Sahibganj vide order dated 17.05.1993 inter alia on the ground that the original writ petitioner was outsider and the land could not be settled in their

favour. It was held that the original writ petitioner was neither an aboriginal nor a jamabandi raiyat.

- (h) Thereafter against this order, appeal being RMA Case No. 132/93-94 was filed before the commissioner, Santhal Pargana, Division, Dumka which was dismissed vide order dated 12.05.2004.
 - (i) Counsel for the petitioners submits that the impugned order dated 17.05.1993 which was passed by the Deputy Commissioner, Sahibganj, was passed pursuant to the order dated 17.02.1983, passed in Santhal Pargana Revision Reference Case No. 38/82-83, whereby permission was accorded to the learned Deputy Commissioner, Santhal Pargana to review the order of the Additional Deputy Commissioner, Santhal Pargana, and Sub Divisional Officer, Sahibganj, under Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949. He submits that orders of settlements were originally passed by the Sub Divisional Officer in the matter of 1st and 2nd settlement and so far as 3rd settlement is concerned, initially the Sub Divisional Officer had refused to settle the land in favour of the original writ petitioner, but subsequently the order of the Sub Divisional Officer was set aside by the appellate authority namely Additional Deputy Commissioner of Santhal Pargana Division, Dumka. He submits that the Deputy Commissioner could not have exercised the power under Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949 to annul the settlements made in favour of the original writ petitioner, as the power of review could be exercised by the same Authority who had passed the order or by his successor in office. He submits that the impugned order dated 17.05.1993 passed in Revenue Misc. Petition No. 37/84-85 is wholly without jurisdiction and accordingly is fit to be set aside. He submits that this aspect of the matter has not been taken into consideration by the Commissioner, Santhal Pargana, Division, Dumka while passing the impugned order dated 12.05.2004, passed in R.M.A. Case No. 132/93-94 wherein the order dated 17.05.1993 was under challenge.
 - (j) Counsel for the petitioners on the merits of the matter has relied upon the judgment passed by this Court reported in 1997(1) PLJR 716 to submit that it has been held by this Court that the waste land can be settled even in favour of "non jamabandi raiyat" and accordingly he submits that in view of this judgment, the impugned orders are fit to be set aside.
 - (k) Counsel for the petitioners has also referred to the provisions of the record of rights as mentioned in Santhal Pargana Manual 1911 particularly Section 16 (a) thereof which has been referred in the judgment reported in 1997(1) PLJR 716.
5. The counsel for the respondents submits as under:-
- i. Counsel for the respondents on the other hand submits that the impugned order which has been passed by the Deputy Commissioner, Sahibganj dated 17.05.1993 has been passed in exercise of power of Revision under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and not by exercising power of review under Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949. Under the provisions of Section 59 of the Act, the Deputy Commissioner has been empowered to exercise his power of revision and such

exercise of power can be done even suo motu. For exercise of such suo motu power, there is no period of limitation prescribed. He further submits that from perusal of the impugned order dated 17.05.1993 it does not appear that this order has been passed pursuant to the order dated 17.02.1983 passed in Santhal Pargana Revision Misc. Ref. Case No. 38/82-83 passed by the Commissioner, Bhagalpur, Division by which permission was accorded to learned Deputy Commissioner, Santhal Pargana Division to review the order passed by the Additional Deputy Commissioner, Santhal Pargana and Sub Divisional Officer, Sahibganj under Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949. He further submits that the Deputy Commissioner had exercised his power of revision under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and has been mentioned in the impugned order dated 12.05.2004 passed by the Commissioner in R.M.A. Case No. 132/93-94. He submits that there is no illegality in the impugned order and accordingly the writ petition is fit to be dismissed.

- ii. He further submits that other wise also, the order dated 17.02.1983 passed in Santal Pargana Revision Ref. Misc. Case No. 38/82-83 was passed after hearing the original writ petitioner, but the original writ petitioner had never challenged the said order. This submission is without prejudice to the contention that the Deputy Commissioner had exercised his power of revision under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949. Counsel for the respondents also submits that the order passed by the Deputy Commissioner in R.M.A. Case No. 37/1984-85 has not been challenged by the original writ petitioner and only the order of the Commissioner, Santhal Pargana Division, Dumka dated 12.05.2004 passed in R.M.A. Case No. 132/1993-94 upholding the order of the Deputy Commissioner, Sahibganj has been challenged.
- iii. Counsel for the respondents on the merits of the case submits that term "raiyat" has been defined under Section 4 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949. Village has also been defined in Section 4(xxi). Counsel for the respondent also referred to Section 27 and 28 of the Act which deals with the settlement of waste land and vacant holdings.
- iv. Counsel for the respondents submits that the principle to be followed in the settlement of waste land and in vacant land is fair and equitable distribution of land according to the requirement of different raiyat and also provision for landless labourers who are bonafide permanent residents of the village and are recorded for a dwelling house in the village.
- v. Counsel for the respondents submits that so far as section -16(a) of the record-of-right is concerned, there is clear provision that the village community has joint right over the waste land of the village. Jamabandi raiyats have a preferential rights to the settlement of it for reclamation. Further, no waste land may be settled with a non jamabandi raiyat without the consent of the sub divisional officer and the proprietor. Counsel for the respondents submits that since the waste land of the village is a joint property of the village community, the same could not have been settled to an outsider. Admittedly, the original writ petitioner is a resident of village Telo. He submits that from perusal of the said provision, it is clear that there is no bar that the waste land can be settled with non jamabandi raiyat, but the same cannot be settled to an outsider who is not a resident of the village.

- vi. Counsel for the respondents also submits that the provision cannot be read in isolation and the record-of- right has been taken care of by making settlement of waste land in the village. He submits that clause 16(a) of the Record of Rights has to be read with clause 12 and upon such reading it transpires that the property of the village cannot be settled to an outsider.
6. After hearing counsel for the parties and after going through the records of the case, this court finds that the following points are involved in this case:-
- A. Whether the impugned order suffers from any jurisdictional error?
- B. Whether the lands could have been settled in favour of original writ petitioner who admittedly was not a resident of village Barachandbasi and was a resident of adjoining village Telo?
- C. Whether, otherwise also, the three settlements made in favour of the original writ petitioner has been rightly set-aside on account of non compliance of mandatory provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949?
7. Before appreciating the rival contentions of the parties, it is necessary to look into the relevant provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949. This Act was enacted to amend and supplement certain laws relating to landlords and tenants in Santhal Pargana.
8. Clause 12 of record of rights as mentioned in Santhal Pargana Manual, 1911 reads as under:

<p>12. Rights of the headman Note (1) Jamabandi raiyat in this section and 16 includes the children and heirs of jamabandi raiyat. It does not include a raiyat who has acquired land in the village by purchase and has been recorded as "Jamabandi khariddar"</p> <p>Note (2) The word "community" is intended to draw a distinction between Dikus and non-Dikus. "Non-Diku" includes Sonhale, Paharias, Mahulis, Koras, Kols, Dhangars, Rajwars, Domes, Harls and Bauris.</p>	<p>(a) To enjoy the official holding, where such exists on payment of rent,</p> <p>(b) To receive one anna per rupee on the rent collected from raiyats, in addition to the rent due from them.</p> <p>(c) To receive a deduction of one anna per rupee on the rent payable to the proprietor, if paid in due time.</p> <p>(d) When a raiyat abandons his land or without heirs, the headman shall settle the entire holding with one or other of the following, giving preference in the order mentioned:-</p> <p>(1) With a resident jamabandi raiyat of the same community.</p> <p>(2) With himself, if resident, or with a resident jamabandi raiyat of a different community.</p> <p>(3) With himself, if non-resident, or with a non resident jamabandi raiyat.</p> <p>(4) With a non-jamabandi raiyat. Whenever he settles other than with a resident jamabandi raiyat of the same community he will report the settlement to the hakim, who after the objections of the proprietor and raiyats, will confirm or modify the settlement provided that no non jamabandi raiyat may get settlement without the consent of the proprietor</p> <p>(e)</p> <p>(f)</p>
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Clause 16 (a) of record of rights as mentioned in Santhal Pargana Manual ,1911 reads as under:-

16. village common rights	<p>(a)The village community has joint rights over the waste land of the village. Jamabandi raiyats have a preferential rights to the settlement of it for reclamation. No waste land may be settled with a non – jamabandi raiyat without the consent of the sub divisional officer and the proprietor. The proprietor or raiyats, if aggrieved by the action of the headman in settling waste land, may object before the sub-divisional officer, who after due enquiry may set aside or modify the settlement. No Sal or other reserved tree may be cut down in order to reclaim waste land, without the permission of the proprietor. The proprietor shall not unreasonably refuse such permission. No land recorded as village grazing land, may be brought under cultivation.</p> <p>(b) -----</p> <p>(c) -----</p> <p>(d)-----</p> <p>(e)-----</p> <p>(f)-----</p> <p>(g)-----</p>
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9. “raiyyat” has been defined under Section 4 of the Santhal Pargana Tenancy (Supplementary Provisions) Act 1949.

4(xiii) “raiyyat” means a person not being a landlord, 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; and includes the successor in interest of a person who has acquired such a right;

Explanation –A village headman shall be deemed to be raiyyat in respect of his private holding if any. “Village” has also been defined in Section 4(xxii) which reads as under:-

4(xxii) Village means,-

the area defined, surveyed and recorded as a distinct and separate village in the map and record-of-rights prepared under any law for the time being in force, and

where a survey has not been made and a record-of-rights has not been prepared under any such law, such area as the Deputy Commissioner may, with the sanction of the Commissioner, by general or special order, declare to constitute a village :

4(xxiii) “village community” means the body of all the Jamabandi raiyats of a village, their co-sharers, children and heirs

10. Classes of “Raiyyats” have been mentioned in section 12 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 which reads as follows:-

“12. Classes of raiyyats- There shall be for the purposes of this Act the following classes of raiyyats, namely:-

(a) resident Jamabandi raiyyats, that is to say, persons recorded as Jamabandi

raiylats who reside or have their family residence in the village in which they are recorded;

(b) non-resident Jamabandi raiylats, that is to say persons recorded as Jamabandi raiylats who do not reside or have their family residence in the village in which they are recorded;

(c) new raiylats, that is to say, persons recorded as naya raiylats or notun raiylats.”

11. Section 27 and 28 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 read as under:-

27. Settlement of waste land to be made by patta in prescribed form-Settlement of waste land shall be made by a patta or amalnama in the prescribed form. The patta or amalnama shall be prepared in quadruplicate, one copy shall be given to the raiyat concerned, one copy shall be sent to the Deputy Commissioner, one copy shall be sent to the landlord and the fourth shall be retained by the village headman or mulraiylat, as the case may be.

28. Principles to be followed in settling waste land or vacant holdings-In making settlement of waste land or vacant holdings regard shall be had to the following considerations in addition to the principles recorded in the record-of-rights,-

(a) fair and equitable distribution of land according to the requirements of each raiyat and his capacity to reclaim and cultivate;

(b) any special claim for services rendered to the village community, society or State;

(c) contiguity or proximity of the waste land to jamabandi land of the raiyat;

(d) provision for landless labourers who are bona fide permanent residents of the village and are recorded for a dwelling house in the village.

12. Section 59 and 60 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 read as under:-

59. “Revision-(1) The Commissioner or the Deputy Commissioner may on his own motion or otherwise, call for the record of a case decided by a Court under his control in which an appeal does not lie or in which for cause shown to his satisfaction an appeal has not been preferred within the time limit there for, and may pass such order in the case as he thinks fit:”

Provided that the Commissioner shall not pass such order on an application by a party until the Deputy Commissioner or the Additional Deputy Commissioner, as the case may be, has heard the matter in revision or appeal and passed an order.

(2) The Deputy Commissioner may, by order in writing, empower any Sub-divisional Officer under his control to exercise the powers conferred on the Deputy Commissioner by sub-section (1) with respect to the decisions of all or any of the Courts of Deputy Collectors not in charge of a sub-division, under the Control of the Deputy Commissioner.

60. Review- (1) The Commissioner may, for sufficient reasons to be recorded in writing,

review any order which has been passed by himself or a predecessor in exercise of any power conferred by this Act.

(2) An officer subordinate to the Commissioner shall not review any order made by him or by a predecessor, except for the purpose of correcting a clerical error or other error or, manifestly the result of an oversight, without previously obtaining:-

(a) in the case of a Deputy Collector or a Sub-divisional Officer, the permission of the Deputy Commissioner;

(b) in the case of the Deputy Commissioner of the Additional Deputy Commissioner, the permission of the Commissioner.

13. The aforesaid points which have been mentioned above are decided in the following manner.

14. Point no A Whether the impugned order suffers from any jurisdictional error?

- A. From perusal of the records of the case, it appears that the permission was accorded under Section 60 of the Santhal Pargana Tenancy (supplementary provisions) Act, 1949 to the Deputy Commissioner, Santhal Pargana to review the orders of settlements (i.e settlements made in favour of original writ petitioner) passed by the Additional Deputy Commissioner, Santhal Pargana and Sub Divisional Officer, Sahibganj vide order dated 17.02.83 in Santhal Pargana Revision Misc. Reference Case No. 38/82-83 by the Commissioner, Bhagalpur Division.
- B. However, apparently, as per provisions of review contained in Section 60 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949, the power to review can be exercised only by the authority who passed the order or by the successor in office of the same authority.
- C. Accordingly this court is of the considered view that power of review could not have been exercised by the Deputy Commissioner in connection with the two orders of settlement passed by the Sub Divisional Officer and/or in connection with the third settlement pursuant the appellate order passed by Additional Deputy Commissioner.
- D. However, from perusal of impugned order dated 17.05.1993 passed by the Deputy Commissioner, Sahibganj in R.M.P. Case No. 37/84-85, it appears that the same has not been passed pursuant to the aforesaid order dated 17.02.1983 empowering him to exercise power of review, but the same has been passed by exercising suo motu revisional power under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and this aspect of the matter has been taken care of by the Commissioner, Santhal Pargana, Divisiona, Dumka while passing the impugned order dated 12.05.2004 and he has clearly recorded that the Deputy Commissioner had exercised his power under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 and for which Deputy Commissioner was duly competent.
- E. Accordingly, the contention of the petitioner that the power of review under Section 60 could not have been exercised by the Deputy Commissioner to review the order passed by the Sub Divisional Officer and Additional Deputy Commissioner is correct, but, inspite of this legal position the impugned order cannot be set-aside as the impugned order passed by the Deputy Commissioner dated 17.05.1993 is not an

order of review, but the order has been passed by exercising power under Section 59 of the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949. Thus this court does not find any jurisdictional error in the impugned order.

15. Point no B

Whether the lands could have been settled in favour of original writ petitioner who admittedly was not a resident of village Barachandbasi and was a resident of adjoining village Telo?

- a. Admittedly the property settled by the three settlements are in the village Barachandbasi and the original writ petitioner belonged to the village Telo.
- b. Admittedly the original writ petitioner was never a raiyat of village Barachandbasi, much less, a Jamabandi Raiyat or non Jamabandi Raiyat.
- c. The provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 are only supplementary provisions and the same has to be read along with the provisions relating to record of rights which were existing prior to 1949. This includes Clause 12 and 16 of record of rights as mentioned in Santhal Pargana Manual, 1911 whose provisions which are relevant for the purposes of this case has been quoted above.
- d. Clause 12 of record of rights as mentioned in Santhal Pargana Manual, 1911 vide its note (1) clearly provides that the Jamabandi Raiyat includes the children of Jamabandi Raiyats. It further provides that it does not include a raiyat who has acquired the land in the village by purchase and has been recorded as "Jamabandi Khariddar".
- e. This provision has to be read with clause 16 which deals with common right of villagers and provides that the waste lands belongs to the village community and preference is to given to Jamabandi Raiyat in the matter of settlement and no wasteland can be settled to a non jamabandi Raiyat without consent of sub-divisional officer and the proprietor.
- f. This court is of the considered view that upon conjoint reading of clause 12 and 16, one of the categories of non jamabandi raiyat would be those raiyats who have acquired the land in the village by purchase and by virtue of clause 12, such persons have been specifically excluded from the category of "Jamabandi raiyat".
- g. Section 12 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 provides the classes of raiyats as "resident Jamabandi Raiyats" who resides or their family residence in the village.
"non resident Jamabandi Raiyats" who do not resides or their family residence in the village. "new Raiyats" who are recorded as new raiyats .
- h. From the definition of raiyat as defined under section 4(xiii) of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 it appears that the village head man has been given the status of a raiyat by virtue of the explanation.
This definition indicates that the term "raiyyat" is referable to a village as the village headman can be a "raiyyat" only in respect of his village and not in respect of all the villages.
- i. Moreover the definition of the term "village "as defined in section 2((xxi) of Santhal

Pargana Tenancy (supplementary provisions) Act, 1949, clearly indicates that every village is a properly marked area having its map and its record of rights. Thus village is an unit in itself.

- j. The definition of the term “village community” as defined under section 2(xxii) clearly indicates that the same consists of all the “jamabandi raiyats” of the village with their co-sharers, children and heirs.
- k. Thus from the conjoint reading of the provisions it appears that the waste land belongs to the village community which consists of “jamabandi raiyats” of the village and they have preferential right of settlement of waste lands of the village. At the time of settlement the raiyats of the village are to be heard who have a right to object.
- l. The settlements can also be made to non jamabandi raiyats but the term non jamabandi raiyats cannot be extended to those who do not belong to the village in view of the fact that there are other raiyats in the village who are non jamabandi raiyats and the status of jamabandi raiyat cannot be acquired even by a person who purchases a property in such village but does not belong to the village concerned.
- m. From perusal of the classes of tenants as mentioned in section 12 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949, it appears that the term Jamabandi Raiyat is linked to a village and there are two terms one is “resident Jamabandi Raiyat” and other is “non- resident Jamabandi Raiyat” but the term “non jamabandi raiyat” has not been used in this section.
- n. This court is of the considered view that non jamabandi raiyats are those raiyats of the village who do not have the status of jamabandi raiyat. One such example of non jamabandi raiyats is a per clause 12 of record of rights as mentioned in Santhal Pargana Manual, 1911, i.e a raiyat who acquires land in the village by purchase.
- o. Thus this court is of the considered view that even a non jamabandi raiyat has to be a resident of the village so as to entitle himself for settlement of wasteland of the village.
- p. In the instant case, admittedly the original writ petitioner was never a raiyat of village Barachandbasi, much less, a Jamabandi Raiyat or a non Jamabandi Raiyat of the said village. He was resident of another village namely Telo.
- q. Accordingly, this court is of the considered view that the land of village Barachandbasi could not have been settled in favour of the original writ petitioner.
- r. So far as the judgment reported in 1997(1) PLJR 716 which has been relied upon by the petitioners is concerned, the same has no applicability to the facts and circumstances of the case, as in the said judgment, it has been held that the Act does not debar the authority to make settlement of waste land with non jamabandi raiyat.
- s. The said judgment does not decide the point as to whether the settlement could have been made in favour of a person who is not a resident of the village.
- t. This court is of the considered view as held above that in a village there are “non jamabandi raiyats” and even a “non jamabandi raiyat” has to be a resident of the village so as to entitle himself for settlement of wasteland of the village.
- u. Moreover in the said judgment reported in 1997(1) PLJR 716 the issue argued and

decided was that the settlement can be made even in favour of non jamabandi raiyat and there is no such bar under the Santhal Pargana Tenancy Laws.

- v. But the issue involved in this case is whether the settlement of waste land can be made in favour of “non jamabandi raiyat” who is not a resident of the village and as already held above , this court is of the considered view that settlement of wasteland cannot be made to a “non jamabandi raiyat” who is not a resident of the village.
- w. This Court further finds that this Court in judgment reported in 2006(4) JCR 390 (Jhr) has taken a view following the judgment passed by Hon’ble Patna High Court reported in 2000(2) BLJR 1084 wherein while dealing with the provisions of section 28 of Santhal Pargana Tenancy (supplementary provisions) Act, 1949 it has been held that pre-requisite for settling wasteland and vacant holding is that the settlee must be a “jamabandi raiyat” or must be a “permanent raiyat” or must be a “permanent resident” of the village.
- x. Thus this court is of the considered view that the Deputy commissioner has rightly taken a view that the land of village Barachandbasi could not have been settled in favour of the original writ petitioner who was admittedly not a resident of village Barachandbasi.

16. Point no C

Whether, otherwise also, the three settlements made in favour of the original writ petitioner has been rightly set-aside on account of non compliance of mandatory provisions of Santhal Pargana Tenancy (supplementary provisions) Act, 1949?

In connection with the 1st settlement made in the year 1955-56 dated 31.01.1956, there is nothing on record to suggest that any notice was issued to the 16 anna raiyat prior to passing of the order dated 31.01.1956, although it has been simply recorded that there is no objection . A specific finding of fact has been recorded by the Deputy commissioner in the impugned order that legal procedure in connection with the settlement was not followed. This court is of the definite view that the procedures in connection with settlement of wasteland in Santhal Pargana including the procedure regarding issuance of 16 anna raiyat is not a mere formality in view of the provision of clause 16(a) record of rights as mentioned in Santhal Pargana Manual,1911 which provides that village community has joint right over the wastelands of the village. Accordingly, this court is of the considered view that this settlement has been rightly cancelled by the deputy commissioner and this order has been rightly confirmed by the commissioner in the impugned order in which this court does not find any illegality or perversity.

The 2nd settlement was made in favour of the original writ petitioner in settlement case no 54/1959-60 which accordingly to the deputy commissioner was made without application of mind and the objection of 16 anna raiyat was rejected in a summery manner. The deputy commissioner has held that this settlement was also made in total disregards to the mandate of law and the procedure and this order has been rightly confirmed by the commissioner in the impugned order in which this court does not find any illegality or perversity.

The 3rd settlement was made in favour of the original writ petitioner pursuant to order of the appellate authority in Revenue Misc. Appeal no 143/1968-69 which itself was passed on

the basis of the fact that there was already a settlement made in favour of the original writ petitioner. This court finds that as the earlier settlement was not in accordance with law, therefore the third settlement based on earlier settlement cannot be sustained in the eyes of law. Accordingly this court does not find any illegality or perversity in the impugned order.

17. Considering the aforesaid facts and circumstances of the case and the findings arrived and recorded above, this writ petition is dismissed.

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MADHU KISHWAR & ORS. VERSUS STATE OF BIHAR & ORS.
1996 0 AIR(SC) 1864; 1996 0 AIR(SCW) 2178; 1996 2 CLT(SC) 273; 1996 1 HLR 610;
1996 2 HLR 6; 1996 4 JT 379; 1996 2 PLJR(SC) 133; 1996 3 Scale 640; 1996 5 SCC 125;
1996 Supp1 SCR 442; 1996 4 ; Supreme 192; 1996 0 Supreme(SC) 794;
1996(4) Supreme 192

Madhu Kishwar & Ors. etc. -Petitioners
Versus
State of Bihar & Ors. -Respondents

KULDIP SINGH, MADAN MOHAN PUNCHHI AND K. RAMASWAMY, JJ.
WRIT PETITION (C) NO. 5723 OF 1982 WITH WRIT PETITION (C) NO. 219 OF 1986
DECIDED ON 17-4-1996

Tribals-Succession to property in tribal societies-Chhota Nagpur Tenancy Act, 6 of 1908-Sections 7, 8 and 76-Validity of-Challenged as discriminatory and unfair against women and therefore ultra vires equality clause-Sections 7 & 8 exclude woman tribals from inheritance solely on basis of sec-Whether custom of inheritance offends Articles 14, 15 and 21 of the Constitution?-(No).

Held : Per K. Ramaswamy, J.-

Customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court. (Para 25)

Sections 7 and 8 of the Act exclude woman tribals from inheritance to the Khuntkutti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. (Para 26)

By operation of Section 13(1) of General Clauses Act, males includes females, of course, subject to statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled Tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 are accordingly read down and so on that premise are valid. (Para 27)

As regards the prevention of fragmentation of agricultural land, it is already held that if at the instance of sons the agricultural lands are divisible and each son is entitled to hold and enjoy his share separately, daughters also would be entitled to a separate share at a partition and enjoyment therein. The fragmentation in that behalf, therefore, should not stand an impediment to the daughter s claiming an intestate succession and to claim a share in the agricultural lands. The Hindu Succession Act regulates succession of agricultural land and the word `property in Sections 6 to 8, 14 and 15 and other sections in that Act would include agricultural land. Thus considered, the operation of sub-section (1) of Section 4 will have an overriding effect for Hindu female claiming parity with Hindu male for succession to the agricultural lands held by the father, mother, etc. and sub-section (2) does not stand an impediment for such a right of devolution. (Para 30)

Provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christian. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lenial descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lenial descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act. (Para 34)

Held: Per Kuldip Singh & M.M. Punchhi, JJ.-

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. (Para 39)

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 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 and each case must be examined when full facts are placed before the Court. (Para 40)

With regard to the statutory provisions of the Act, he has proposed to the reading down of Sections 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 thicket, it is far 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. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, 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 by our learned brother is, regrettably not acceptable to us. (Para 41)

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 Sections 7 and 8. It is only in the larger perspective of the Constitution can the answer to the problem be found. (Para 44)

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 others 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 male succession, entitling her to the status of an intervening limited dependents/ descendants under section 7 and 8. In this manner alone, and upto this extent can female dependents/descendants 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/ descendants 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 dependents/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose. (Para 46)

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 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. (Para 47)

IMPORTANT POINT

The exclusive right of male succession conceived of in section 7 and 8 of the Chhota Nagpur Tenancy Act, 6 of 1908, 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.

JUDGMENT

K. Ramaswamy, J.-These two writ petitions raise common question of law: whether female tribal is entitled to parity with male tribal in intestate succession? The first petitioner is an Editor of a Magazine Manushi espousing the causes to ameliorate the social and economic backwardness of Indian women and to secure them equal rights. Petitioner Nos. 2 Smt. Sonamuni and 3 Smt. Muki Dui are respectively widow and married daughter of Muki Banguma, Ho tribe of Longo village, Sonua Block, Singhbhum District in Bihar State. The petitioner in Writ Petition No.219/86, Juliana Lakra is an Oraon Christian tribal woman from Chhota Nagpur area. They seek declaration that Sections 7, 8 and 76 of the Chhota Nagpur Tenancy Act, 6 of 1908, (for short, the Act) are ultra vires Articles 14, 15 and 21 of the Constitution of India. They contend that the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. Their discrimination based on the customary law of inheritance is unconstitutional, unjust, unfair and illegal. Even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought to bear brunt at the behest of lineal descendants or their extermination. Even married or unmarried daughters are excluded from inheritance, when they were subjected to adultery by non-tribals; they are denuded of the right to enjoy the property of her father or deceased husband for life. The widow on remarriage is denied inherited property of her former husband. They have elaborated by narrating several incidents in which the women either were forced to give up their life interest or became target of violent attacks or murdered. Petitioner Nos. 2 and 3 in the first writ petition sought police protection for their lives and interim directions were given.

2. When this court has taken up the matter for hearing, in the light of the stand of the respondents taken at that time to suitably amend the Act, by order dated December 16, 1986, the case was adjourned with the hope that the State Government would suitably amend Sections 7 and 8 of the Act. By further order dated August 6, 1991, this court after being apprised of the State Government constituting a Committee to examine the desirability to amend the Act giving equal rights of inheritance to women, further adjourned the hearing awaiting the report of the Committee. The State-level Tribal Advisory Board consisting of the Chief Minister, Cabinet Ministers, legislators and parliamentarians representing the tribal areas, met on July 23, 1988 and decided as under:

"The tribal society is dominated by males. This, however, does not mean that the female members are neglected. A female member in a tribal family has right of usufruct in the property owned by her father till she is unmarried and the same is the property of her husband after the marriage. However, she does not have any right to transfer her share to any body by any means whatsoever. A widow will have right to usufruct of the husband's property till such time she is issueless and, in the event of her death the property will revert back to the legal heirs of her late husband. In case of a widow having offspring the children succeed the property of the father and the mother will be a care taker of the property till the children attain majority. The Sub-Committee also felt that every tribal does have some land and in case the right of inheritance in the ancestral property is granted to the female descendants, this will enlarge the threat of alienation of the tribal land in the hands of non-

tribals. The female members being given right of transfer of their rights in the origin of mal-practices like dowry and the like prevalent in the other non-tribal societies."

When the matter was taken up for final disposal and the resolution of the Board was brought to the notice of this Court, by order dated October 11, 1991, this court further expressed thus:

"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."

3. The State Government reiterated its earlier stand, as stated in an affidavit filed in this behalf. Sections 6, 7, 8 and 76 of the Act are as follows:

"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 Nundari 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 land either immediately under a proprietor or immediately under a 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 customs, and (b) the purpose for which the right of tenancy was originally acquired.

7. (1) Meaning of raiyat having khunt-khatti rights .-"Raiyat having kunt 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 kunt 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.

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-
- (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.

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."

In *Ramalaxmi Ammal v. Shivanadha Perumal Sheroyar*¹, the Judicial Committee had held that custom is the essence of special usage modifying the ordinary law of succession that it should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone the legal title to recognition depends. In *Abdul Hussain Khan v. Bibi Sona Dero*², when it was pleaded that by customs of the family, the sister of an intestate Mohammedan was excluded from inheritance in favour of a male paternal collateral, by operation of Section 26 of the Bombay Regulation IV of 1827, (a usage was in question in the suit), the Board held that the custom was not established to exclude the sister of the deceased from inheritance.

4. By operation of Article 13(3)(a) of the Constitution law includes custom or usage having the force of law. Article 13(1) declares that the pre-constitutional laws, so far as they are inconsistent with the fundamental rights shall, to the extent of such inconsistency, be void. The object, thereby, is to secure paramountcy to the Constitution and give primacy to fundamental rights. Article 14 ensures equality of law and prohibits invidious discrimination. Arbitrariness or arbitrary exclusion are sworn enemies to equality. Article 15(1) prohibits gender discrimination. Article 15(3) lifts that rigour and permits the State to positively discriminate in favour of women to make special provision, to ameliorate their social, economic and political justice and accords them parity. Article 38 enjoins the State to promote the welfare of the people (obviously men and women alike) by securing social order in which justice,-social, economic and political-shall inform of all the institutions of national life. Article 39(a) and (b) enjoin that the State policy should be to secure that men and women equally have the right to an adequate means of livelihood and the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 38(2) enjoins the State to minimize the inequalities in income and to endeavour to eliminate inequalities in status, facilities and opportunities not only among individuals but also amongst groups of people. Article 46 accords special protection and enjoins the State to promote with special care the economic and educational interests of the Scheduled Castes and Scheduled Tribes and other weaker sections and to protect them from social injustice and all forms of exploitation. The Preamble to the Constitution

charters out the ship of the State to secure social, economic and political justice and equality of opportunity and of status and dignity of person to every one.

5. The General Assembly of the United Nations adopted a Declaration on December 4, 1986 on "The Right to Development" to which India played a crusading role for its adoption and ratified the same. Its preamble cognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfilment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political, economic, social and political rights.

Article 1(1) assures right to development-an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized, fundamental freedoms can be fully realized. Article 6(1) obligates the State to observe all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub-article (2) enjoins that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and political rights. Sub-article (3) thereof enjoins that "State should take steps to eliminate obstacle to development resulting from failure to observe civil and political rights as well as economic, social and cultural rights. Article 8 casts duty on the State to undertake, all necessary measures for the realisation of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources and fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

6. Human Rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women (for short "CEDAW") was ratified by the U.N.O. on December 18, 1979. The Government of India who was an active participant to CEDAW ratified it on June 19, 1993 and acceded to CEDAW on August 8, 1993 with reservation on Articles 5(e), 16(1), 16(2) and 29 thereof. The Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes it more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality

between men and women etc. Article 1 defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 2(b) enjoins the State parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women" to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause (C) enjoins to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that "the State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women". Article 14 lays emphasis to eliminate discrimination on the problems faced by rural women so as to enable them to play "in the economic survival of their families including their work in the non-monetized sectors of the economy and shall take.... all appropriate measures..." Participation in and benefit from rural development in particular, shall ensure to such women the right to participate in the development programme to organize self groups and cooperatives to obtain equal access to economic opportunities through employment or self-employment etc. Article 15(2) enjoins to accord to women equality with men before the law, in particular, to administer property....".

7. The Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(b) defines human rights to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international Conventions and enforceable by courts in India". Thereby the principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.
8. Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoins to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-a-vis Articles 1, 3, 6 and 8 of the Declaration of Right to Development. Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should

by appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

9. Article 15(3) of the Constitution of India positively protects such Acts or actions. Article 21 of the Constitution of India reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally, in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51A(h) and (j) of the Constitution of India, not only facilities and opportunities are to be provided for, but also all forms of gender based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights.
10. Bharat Ratna Dr. B.R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to, and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitute conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constitute economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins this Court to breath life into the dry bones of the Constitution, international Conventions and the Protection of Human Rights Act, to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights.
11. As per the U.N. Report 1980 "women constitute half the world population, perform nearly two thirds of work hours, receive one tenth of the world's income and own less than one hundredth per cent of world's property". Half of the Indian population too are women. Women have always been discriminated and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women, from time immemorial, suffered discrimination and social inequalities and made them to accept their ascribed social status. Among women, the tribal women are the lowest of the low. It is mandatory,

therefore, to render them socio-economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life. We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind.

12. Agricultural land is the foundation of a sense of security and freedom from fear. Assured possession is a lasting road for development, intellectual, cultural and moral and also for peace and harmony. Agriculture is the only sources of livelihood for the tribes, apart from collection and sale of minor forest produce. Land is their most important natural asset and imperishable endowment from which the tribals derive their sustenance, social status, a permanent place of abode and work. The Scheduled Tribes predominantly live in Andhra Pradesh, Maharashtra, Bihar, Gujarat, Orissa, Madhya Pradesh, Rajasthan and North Eastern States, though they spread to other States sparsely.
13. The empirical study by Anthropologists and Sociologists reveals that the customary laws of the tribes are not uniform throughout Bharat. Even in respect of intestate succession, they are not uniform. Though the customs of the tribes have been elevated to the status of law, obviously recognized by the founding fathers in Article 13(3)(a) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. In *Sant Ram v. Labh Singh*³, this Court held that the custom as such is effected by Part III dealing with fundamental rights. In *Bahu Ram v. Baijnath Singh*⁴, it was held that law of pre-emption based on vicinage is void. In *G. Dasaratha Rama Rao v. State of A.P.*⁵, this Court held that discrimination based on the ground of descent only offends Article 16(2).
14. In India agricultural land forms the bulk of the property. In most of the tenancy laws, women have been denied the right to succession to agricultural lands. The discernible reason in support thereof appears to be to maintain unity of the family and to prevent fragmentation of agricultural holdings or diversion of tenancy right. In *Atam Prakash v. State of Haryana*⁶, testing the validity of Section 15 of the Punjab Pre-emption Act, 1930, for the aforesaid reasons, this Court held that the right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition, quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession, are today irrelevant. Classification on the basis of unity and integrity of either the village community or the family or on the basis of the agnatic theory of succession, cannot be upheld. Due to march of history, the tribal loyalties have disappeared and family ties have been weakened or broken and the traditional rural family oriented society is permissible. Accordingly Section 15(1), clauses (1) to (3), violates fundamental rights and were declared ultra vires.
15. When male member has the right to seek partition and at his behest, fragmentation of family holding is effected, why not the right to inheritance/succession be given to a female? On agnatic theory, she gets a shadow, but not substance. Right to equality and social justice is an illusion. The denial is absolutely inconsistent with public policy, unfair, unjust and unconscionable. The reason of fragmentation of holding or division of tenancy right would hardly be a ground to discriminate against a woman from her right to inherit the property of the parent or husband. In *V. Tulasamma v. Sessa Reddy*⁷, this Court, cognizant to equality in

intestate succession by Hindu woman, held that after the advent of independence old human values assumed new complex; women need emancipation; new social order need to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the times. In *Chiranjit Lal v. Union of India*⁸, this Court held that the guarantee against the denial of equal protection of the law does not mean that identically the same rule of law should be made applicable to all persons within the territory of India in spite of difference in circumstances or conditions. It means that there should be no discrimination between one person and another. It is with regard to the subject matter of the legislation. In *State of West Bengal v. Anwar Ali Sarkar*⁹ it was held that the prohibition under Article 14 is to secure all persons against arbitrary laws as well as arbitrary application of laws. It applies to procedural and substantive law. *Menaka Gandhi v. Union of India*¹⁰ reiterates its creed on grounds of justice, equity and fairness lest law becomes void, oppressive, unjust and unfair.

16. Eugene Smith in his *Indian Constitution* has stated that secularization of law is essential to the emergence of modern Indian State, foundation of which stands on twin principles of democracy and secularism. He further stated that "the existence of different personal law contradicts the principles of non-discrimination by the State". Non-discrimination is based on the philosophy of the individual, not the group, as the focal point and the basic unit of the nation. The civilization, culture, custom, usage, religion and law are founded upon the community life for man's well being. The man will obey the command of the community by consent. The law formulates the principles to maintain the order in the society to avoid friction. Democracy brings about bloodless revolution in the social order through rule of law. Therefore, when women are discriminated only on the ground of sex in the matter of intestate succession to the estate of the parent or husband, the basic question is whether it is founded on intelligible differentia and bears reasonable or rational relation or whether the discrimination is just and fair. Our answer is no and emphatically no.

In *State of Bihar v. Kameswar Singh*¹¹, this Court had held that in judging the reasonableness in imposing restrictions Court would take into consideration public purpose in Article 39. In *Kasturi Devi v. State of Karnataka*¹², this Court held that if law is made to further socio-economic justice it is prima facie reasonable and in public interest. In other words, if it is in negation, it is unconstitutional. In *Chandra Bhavan Boarding House v. State of Mysore*¹³, it was held that "the mandate of the Constitution is to build a welfare society and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizen are not met. In *Narendar Prasad v. State of Gujarat*¹⁴, it was held that no right in an organized society can be absolute.

Enjoyment of one's rights must be consistent with the enjoyment of the rights of others. In a free play of social forces, it is not possible to bring about a voluntary harmony; the state has to step in to set right the imbalance and the directive principles, though not enforceable; mandate of Article 38, to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession based on sex.

In *Thota Sesharathamma v. Thota Manikyamma*¹⁵, construing Section 14 of the Hindu Succession Act 1956 and its revolutionary effect on the right to ownership of the land by Hindu woman, this Court held that the validity of Section 14(1) drawn from the pre-existing limited estate held by a Hindu woman must be tested on the anvil of socio-economic justice,

equality of status and by overseeing whether it would subserve the constitutional animation. Article 15(3) relieves the State from the bondage of Articles 14 and 15(1) and charges it to make special provision to accord socio-economic equality to woman.

17. The Hindu Succession Act revolutionized the status of a Hindu female and used Section 14(1) as a tool to undo past injustice to relevel her to equal status with dignity of person on par with man and removed all fetters of Hindu woman's limited estate which blossomed into full ownership. By legislative fiat the discrimination in intestate succession meted out to woman was done away with. The Court should, therefore, endeavour to find out whether the disposition clauses in the instrument will elongate the animation of Section 14 and would permeate the aforestated constitutional conscience to relieve the Hindu female from the Sashtric bondage of limited estate. Articles 14, 15 and 16 frowns upon discrimination on any ground and enjoin the State to make special provisions in favour of the woman to remedy past injustice and to advance their socio-economic and political status. Economic necessity is not a sanctuary to abuse woman's person. Section 14, therefore, gives to every Hindu woman full ownership of the property irrespective of the time when the acquisition was made, namely, whether it was before or after the Act had come into force, provided, she was in possession of the property. Discrimination on the ground of sex in matters of public employment was buried fathom deep and is now a relic of the past by decisions of this court. In *C.B. Methamma v. Union of India*¹⁶, *Air India v. Nagesh Mirza*¹⁷, and a host of other decisions are in that path. True that clauses (h) and (j) of para 3 of Schedule 6 of the Constitution give power to District or Regional Councils in North Eastern States to alter law relating to inheritance and customs; they too are bound by the law declared under Article 141 of the Constitution to be consistent with Articles 15(3), 14 and Preamble of the Constitution.
18. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) & (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the Constitution. They constitute core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must constantly keep changing as civilization and culture advances. The customs and mores must undergo change with march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.
19. Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. Therefore, law is the foundation on which the potential of the society

stands. In *Sheikriammada Nalla Koya v. Administrator, Union Territory of Laccadives*¹⁸, K.K. Mathew, J., as he then was, held that customs which are immoral are opposed to public policy, can neither be recognized nor be enforced. Its angulation and perspectives were stated by the learned Judge thus:

"It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It was been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at the given moment, and that in arriving at the decision, the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A judge may not set himself in opposition to a custom which is fully accepted by the community.

But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, whose guardians of an ancient tradition, which has proved itself, and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organizations of existing society. Thus, the judge is not bound to heed even to the clearly held opinion of the greater majority of the community if he is satisfied that that opinion is abhorrent to right thinking people. In other words, the judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality."

20. As in other parts of the country, in Bihar, most of the tribes like Munda, Oraom and Ho practised shifting cultivation along with the settled cultivation as it has not been popular with the tribe to combine various modern productive technology. But, by passage of time, when the land has become scarce, they too have settled down to ploughing cultivation on fixed tenures. Due to diverse reasons which it is not necessary for the purpose of this case to elaborate, major part of the land slipped out from their holdings.
21. Notable researchers, who spent their valuable time living among the tribes, are W.G. Archer, Dy. Commissioner, Santhal Pargana during 1939-40, Prof. Christopher Von Furer-Haimendorf, a German Sociologist appointed by Nizam of Hyderabad in 1940 who spent his life with the tribals in Nizam State in Andhra Pradesh as well as Arunachal Pradesh. Portrayed life style and customs operating among the Tribals, Haimendorf says in his "Tribes in India, the Struggle for Survival" that Chenchoo women, tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they cannot inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband, are joint possessors of the family property insofar as it is acquired by the daily labour. In South India, in particular Andhra Pradesh, after the grant of ryotwari pattas to the tillers of the soil including the tribes, they acquire permanent right to fixed land holdings and there does not exist any discrimination in matter of intestate succession between man and woman. "Issues in Tribal Development" by Prof. P. Ramaiah of Kakatiya University, Andhra Pradesh, at page 9 it is stated that "hereditary rights rule the property

distribution arrangements. If a man dies, his wife and sons get equal share of the property. Widow gets her husbands share from the property". At page 14 he has further stated, "land is a part of his spiritual as well as economic heritage".

Dr. L.P. Vidyarthi in his *Tribal Development Act and its Administration*, published by Concept Publishing Co., (1986 Edn.), has stated at page 310 that the element of certainty and definiteness of customs in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In Tribal Society, custom is generally a product of dominating mind, nurtured in the belief of super-natural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep rooted in the element of totem and taboos. That is the reason that majority of the customs prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage. If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till death, agricultural operations are the sole occupation for livelihood; all are tagged, linked and based upon certain conduct and behaviour reflecting, nearly custom and it may be said that entire tribal society is based upon the rigid rules of custom and any society still untouched by the influence of urbanization exists in the phenomenon of religion mixed with magic custom.

Archer in his "Tribal Law and Justice-The Santhal View of Woman" has stated in 1939-40 that the unmarried daughter has ordinarily no right at all in land. She cannot ask for partition and if her brothers separate, some land may be kept by her father or brother for financing her marriage and maintaining her, but that is to fulfill their duties towards her and does not confer upon her any rights. At the partition, she is given no share. She has a right to maintenance. If her father or brothers or fathers agnates are against discharging their duties, she can claim enough land for keeping her till marriage. She can acquire the land of her own which is her absolute property. If her father dies leaving no other heirs or agnates, she will get his land until she is married. If she is married, her sisters will share equally with her. If she has no sisters, the property goes to the village community. With regard to married daughters, he stated, that two to three bighas of land would be given as "Stridhan" at the time of marriage. In respect of that property, right of the father, brother or agnates are extinguished. The property given is her absolute property. Her children inherit her property. In their absence, it passes on to the father, brother, mother or her male agnates. With regard to the right of married woman, at page 156, he has stated that at partition the wife and children get one share and the husband gets one share. He has given instances of one Safal Hansdeak of Tharia. With regard to the right of the widow, she is like a Hindu widow having right to maintenance. If her husband died while he was joint holder with his brothers she will continue to live in the family and the situation will not differ materially from what it was in her husbands lifetime. Her right to maintenance will continue and if her husbands family neglects her without cause, she can demand sufficient land to keep herself. If there is a complete family partition the widow and her children will get the share which would

have gone to her husband had he been alive. She gets life estate like Hindu widows estate. "The Mundras and their Courts" by Sarad Chandra Roy, 14th Ed. at p. 244 to 451 (1915). The Origins of Chotanagpur by Sarad Chandra Roy at p. 369 to 370 (1915 Ed.) dealt with inheritance on the same lines. So they need no reiteration.

22. In *Doman Sahu v. Buka*¹⁹, though Mundas and Mundari women in Ranchi District are akin to other tribals, since they regard themselves as Hindus, it was held that Hindu law of succession would apply to them. In *Ganesh Matho v. Shib Charan*²⁰, Kurmi Mahtons of Chota Nagpur adopted Hindu religion. The Division Bench held that it must be presumed that ordinarily they are governed by Hindu law in matters of inheritance and succession except insofar as parties prove any custom obtaining among them which is at variance with it. It was held that Mitakshara Hindu law of succession was applicable to them. They did not prove any special custom alleged by them. In "Law Enforcement in Tribal Areas" by S.K. Ghosh, Director, Law Institute, Calcutta, published by Ashish Publishing House at page 89 it is stated that though the Hindu Succession Act 1956, Hindu Marriage Act 1954, Hindu Adoption and Maintenance Act 1956 did not apply, "because of their contacts with other advanced societies some changes have taken place among tribes in the observance of marriage, divorce, etc. In the event of any litigation, the tribal courts are unable to reach a definite conclusion as these customary codes as they are unwritten code. Therefore, it was recommended that a proper study of customary codes of the tribals should be made and the same may be codified properly." "Some State governments have already taken action to codify the personal laws of important tribal groups. These laws can be gradually dispensed with or repealed when the tribals are fully assimilated with the main body of our national community." At pages 90-91 he explained the customs among the Bhils living in Madhya Pradesh and Rajasthan who constitute largest tribal group in the country, of a marriage by elopement or capture or by arrangement. They are very truthful people and they do not hesitate to speak against the culprits, though they may happen to be kith and kin.
23. The Garos, the Khasis and the Jaintias are the main inhabitants of Meghalaya State. They observe monogamy. The daughter (Nokma Dongipa Mechik) descendant from the ancestor is chosen for marriage for common ancestors. The husband goes and lives with the wife which in Hindu law known as Illatom son-in-law. The custom is that the senior-most household of the area maintains a line of inheritance from the mother to the chosen daughter and the husband of the inheritress mother, popularly known as Nokma is accepted as the constitutional head of the A Khing. The lands are held in common ownership of the machong, the usufruct rights are granted to all the residents of the AKhing. Mikirs, a populous tribe in Meghalaya is patrilineal. The sons inherit property and it is divided among them. In the absence of male heirs, the nearest agnate inherits that land. The daughters have been excluded. In the absence of sons and brothers, the widow retains the property provided she marries one of her husbands clan. The Gonds in Andhra Pradesh, Madhya Pradesh, Bihar and Orissa observe monogamy. At page 139, he has stated that the custom is heritable and transferable and right of inheritance is patrilineal. The male heirs would succeed and the females are completely excluded. The sons take equal shares, but among the Apa Tanis and the Nactes, the system of primogeniture prevails, i.e. the eldest son only inherits the fathers landed property which has been softened among Apa Tanis. In Manipur, the custom among Thandon Kukis is that the property is of the Chief of the village. The practice is of shifting cultivation and the Chief distributes the plots among the groups. The system of inheritance

among the Naga group is that at the death of the last owner, the succession is by patrilineal and the rules of primogeniture prevails among them. The practice is that during his life-time the father gives some land to the younger brother as well.

24. In a report on Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa by Dr. Bhupinder Singh and Dr. Neeti Mahanti of Jigyansu Tribal Research Centre, sponsored by the Ministry of Welfare, Government of India and submitted on May 19, 1993, it is stated at page 1 in last paragraph of his preface that to reduce tribal customary laws into formal, technical, straight-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middle-men etc. The customs which differ, in whatever magnitude, from the community to other would help exploitation of the tribals by application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. Whims and fancies in dispensation of justice would be avoided. They concluded that "we must proceed deliberately and wirely." In Chapter III at page 8 it is stated thus:

"Customary law refers to rules that are transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society."

At page 9, it is stated that "the major areas of interest for a tribal community is inheritance of land, forest rights and social customs like marriage, divorce, desertion, child support, death, birth etc." Santhals, one of the largest tribes of India spread over West Bengal, Orissa, Bihar and parts of Assam and Tripura. It is observed at page 30 on the "Chapter Succession to Property" that the succession is in favour of the son, in his absence to the daughter, in their absence to the relative. Even among Santhals, it is not strictly patrilineal. If they have no son, succession is open to the daughter and if they have neither son nor daughter then to the relative of the family. Some people among them preferred succession among son and daughter equally. On husbands demise, the widow gets a share in the property, as life-estate. In their conclusion at page 37, they have stated that the Santhals and Saora tribals practice patrilineal as a mode of succession. At pages 38-43, after detailed discussion it is stated that though there is considerable "on-going acculturation process", the tribes have not completely discarded the customs. At page 45, it was mentioned that though Santhal society is predominantly patrilineal, they do not strictly adhere to it. The inheritance in favour of the daughter has been softened but Soara society is conservative and less exposed to winds of change. They preferred sons to daughters only if there is no son in the family and other relatives of the family. However, the widow inherits the estate of her husband. The working group of the 7th Five Year Plan on the tribal development recommended codification of customary laws prevalent among the tribals in its report at pages 323-24 of the Planning Commission documents. Dr. B.L. Maharde, a bureaucrat of Rajasthan Civil Services, in his "History and Culture of Girjans" in the State of Rajasthan, narrated the practices of tribals at page 84 stating that the property after the death of the father is equally divided among the sons by the village elders of Panchayat and in case of dispute, by the private Panchayat. The youngest son, since he lives with his father, is entitled to have an extra share. The grandson of his pre-deceased son is entitled to an equal share. Daughters are not entitled to inherit their fathers' property, but they can share the animal wealth. The son-in-law is entitled to equal share. The widow has right to property which she loses on her remarriage. We do not

get any material as regards succession among the tribals in Madhya Pradesh, Maharashtra and Gujarat and in view of the general trend we assume that in those States also partilineal succession would be in vogue.

25. It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court.
26. Section 2(2) of the Hindu Succession Act, similar to Hindu Marriage Act, Hindu Adoption and Maintenance Act, excludes applicability of customs to the Scheduled Tribes as defined by clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the official Gazette otherwise directs. Explanation 11 to Article 25 does not include them as Hindus. The Chotanagpur Tenancy Act and the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949, the Bihar Scheduled Areas Regulation, 1969 intend to protect the lands of the tribals and their restoration to them. Sections 7 and 8 of the Act regulates the right of Khuntketti Raiyats. By operation of customary inheritance, the son and lineal descendants inherit the lands held by the tribes for the purpose of cultivation by himself or male members of his family. Section 76 read with Section 6 gives effect to custom, usage or customary right provided thereunder not inconsistent with or not necessarily modified or abolished by the provisions of the Act. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. As stated earlier, it must keep pace with march of time with the heart beats of the society and with the needs and aspirations of the people. As seen, even among the tribals in Bihar, the customs have now undergone advancement. They prefer both son and daughter alike though not uniformly. Succession is patrilineal; Santhals practically adapted the Mitakshara Hindu law of succession. The Hindu Succession Act modified the pre-existing law and intestate succession gives right of succession to Hindu female. Section 14(1) has enlarged limited estate known to Sastric law into absolute right of property held by a Hindu female. In the Law of Intestate and Testamentary Succession, (1991 Ed.) at page 21, Prof. Diwan has stated that Section 2(2) does not mean that Scheduled Tribes which were, prior to the codified Hindu law, governed by Hindu law will not, now, be governed by the Hindu law. If before codification, any Scheduled Tribe was governed by Hindu law, it will continue to be governed by it. However, it would be uncodified Hindu law that would apply to

them. It is settled law that the procedural or substantive law which offend the fundamental right are void. Sections 7 and 8 of the Act exclude woman tribals from inheritance to the Khuntkutti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. In *Maneka Gandhi v. Union of India*²¹ this Court held that reasonableness is an essential element of equality; non- arbitrariness pervades Article 14. The Court must consider the direct and inevitable effect of the action in adjudging whether the State action offends the fundamental right of the individual. This Court sustained the validity of Passport Act by reading down the statutory provisions. Justice, equity and good conscience are integral part of equality under Article 14 of the Constitution which is the genus and Article 15 is its specie. In *Harbans Singh v. Guranchatta Singh*²², this Court held that though the Transfer of Property Act did not per se apply to the State of Punjab at the relevant time, the general principles contained therein being consistent with justice, equity and good conscience would apply.

27. Under the General Clauses Act, male includes female. In *Jitmoham Singh Munda v. Ramratan Singh*²³, interpreting Mundari Khunt Kattidari widow's right to remain in possession of Mundari Khunt Kattidari tenancy, after the death of her husband, the Bihar High Court held that the widow would have life estate in tenancy rights as they have adopted Hindu law of succession. There is no reference whatsoever to the exclusion of the widow of the particular Mundari. Therefore, in respect of Khunt Kattidari tenancy, the widow would be entitled to possession and Section 8 is not inconsistent with that position. In *Jani Bai v. State of Rajasthan*²⁴ interpreting Rajasthan Colonisation Act, 1954, the Division Bench held that male descendants would include female descendants and the adult son and the daughter should be treated alike both being equally eligible for allotment under the rules under that Act. By operation of Section 13(1) of General Clauses Act, males includes females, of course, subject to statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled Tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 are accordingly read down and so on that premise are valid.
28. The question then is: whether the interpretation is consistent with Sub-section (2) of Section 4 of the Hindu Succession Act, 1956? Entry 7 of List III of Seventh Schedule to the Government of India Act 1935 provided "Wills, intestacy and succession save as regards agricultural land." Entry 5 of the Concurrent List in the Seventh Schedule of the Constitution omitted the words "save as regards agricultural lands" and provided merely "intestacy and succession; joint family and partition". In *Basavant Gouda v. Smt. Channabasawwa*²⁵, a Division Bench of Mysore High Court in paragraph 11 had held that Entry 5 of the Concurrent List of the Seventh Schedule would apply to succession of agricultural lands under Hindu Succession Act. It followed the judgment of *Amar Singh v. Baldev Singh*²⁶ in its support. The same view was taken by a Division Bench of the Orissa High Court, in a judgment rendered by B. Jagannadha Das, J., as he then was, in *Laxmi Debi v. S.K. Panda*²⁷.

In *Gopi Chand v. Bhagwani Devi*²⁸, a Division Bench of Punjab High Court had held that Sub-section (2) of Section 4 of Hindu Succession Act does not apply to the Delhi Land Reforms Act conferring permanent tenancy rights of Bhumidar or asami, laid down in Section 50 of that Act. If it is otherwise, it would be inconsistent with Section 4(1) of the Hindu Succession Act and would be void. In *Phulmani Dibya v. State of Orissa*²⁹, a Full Bench has held that

exclusion of woman from succession to any Brahmottar grant discriminates against woman under Article 15 on ground of sex and that, therefore, became void offending Article 15(1). In *Tokha v. Smt. Samman*³⁰, a single Judge of that Court held that the occupancy rights held by a limited owner (widow) before the Hindu Succession Act had come into force, enlarged as absolute property under the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act and thereby she became an absolute owner and was entitled to gift over land as an absolute owner which was upheld.

29. In *Mayne's Hindu Law and Usage* (13th Ed.), revised by Justice A. Kuppaswami, commenting on Sub-section (2) of Section 4 of Hindu Succession Act, in paragraph 17 at page 960, it is observed that the legislature can always provide that the devolution of tenancy rights shall be dependent upon personal law, i.e., Hindu Succession Act. The legislature can also lay down that in certain circumstances there would be one kind of succession and in different circumstances the holding shall devolve on different persons. Devolution in the case of a Bhumidari under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, is not affected by Section 14 of the Hindu Succession Act as tenures created by the Uttar Pradesh did not create proprietary interest but only tenancy right. In *Bajaya v. Gopikabai*³¹, a Bench of three Judges of this Court held that Bhumiswami and Bhumidari rights are two classes of tenure-holders of lands paying land revenue to the State and are governed by the provisions of the Hindu Succession Act. The tenancy rights having been separately dealt with by the Madhya Pradesh Land Revenue Code, the devolution of the rights of an ordinary tenancy and an occupancy tenant are in accordance with the personal law of the deceased tenant.
30. Sub-section 2 of Section 4 of the Hindu Succession Act, to remove any doubts, has declared that the Act shall not be deemed to affect the provisions of any law in force providing for (i) preventions of fragmentation of agricultural holdings; (ii) for the fixation of ceiling; and (iii) for the devolution of tenancy rights in respect of such holdings. It is the policy of the legislature that with a view to distribute the surplus land ceiling on agricultural land has been prescribed so that the surplus land would be distributed to the landless persons etc. Therefore, the operation of such law was excluded from the purview of the Hindu Succession Act. This Court in *Smt. Sooraja v. SDO, Rehli*, Civil Appeal No.1180/84 decided on November 22, 1994, has upheld the ceiling law and held that married daughters are not entitled to intestate succession of the father nor a separate holding since the definition of "family" did not include married daughter. The devolution of the tenancy rights are governed by Entry 18 to the List II of the Seventh Schedule. Therefore, the Hindu Succession Act to that extent stands excluded. As regards the prevention of fragmentation of agricultural land, it is already held that if at the instance of sons the agricultural lands are divisible and each son is entitled to hold and enjoy his share separately, daughters also would be entitled to a separate share at a partition and enjoyment therein. The fragmentation in that behalf, therefore, should not stand an impediment to the daughter's claiming an intestate succession and to claim a share in the agricultural lands. The Hindu Succession Act regulates succession of agricultural land and the word 'property' in Sections 6 to 8, 14 and 15 and other sections in that Act would include agricultural land. Thus considered, the operation of sub-section (1) of Section 4 will have an overriding effect for Hindu female claiming parity with Hindu male for succession to the agricultural lands held by the father, mother, etc. and sub-section (2) does not stand an impediment for such a right of devolution.

31. The reason assigned by the State level committee is that permitting succession to the female would fragment the holding and in the case of inter-caste marriage or marriage outside the tribe, the non-tribals or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. If fragmentation at his instance is permissible under law, why the daughter/widow is denied inheritance and succession on par with son? In Kerala State, the Hindu Succession Act, 1956 was modified in relation to its application to the State of Kerala, by amendment of Devasthanam Properties (Admission of Temporary Management and Control and Hindu Succession) (Amendment) Act, 1958 and of the (Kullaiamma Thumporan Korilakam Society Partition) Act, 1961. Kerala Hindu Joint Family Abolition Act, 1975 brought about change bringing female into the fold for succession per capita. Equally, the Hindu Succession (A.P. Amendment) Act 13 of 1986, the Andhra Pradesh Legislature took lead and amended Section 6 of the Parent Hindu Succession Act and Section 29A conferred on the unmarried daughter the status of co-parcener by birth and has given her right to claim partition and equal share along with the sons. In the event of sale by the daughter of the property obtained at the partition Section 29C gives right to male heirs to purchase the property on payment of the consideration. In the event of disagreement on the consideration, the Court having the jurisdiction is given power to determine such consideration. In the event of non-payment by male heirs, the right has been given to the female heir to sell the property to outsiders. Karnataka and Maharashtra legislatures have followed the suit and suitably amended the Hindu Succession Act, 1956.
32. Throughout the country, the respective State laws prohibit sale of all lands in tribal areas to non-tribals, restoration thereof to the tribals in case of violation of law and permission of the competent authority for alienation is a must and mandatory and non-compliance renders the sale void. The Act referred to hereinbefore prevailing in Bihar State expressly prohibit the sale of the lands by the tribals to the non-tribals and also direct restoration or recompensation by equivalent lands to the tribals. Therefore, if the female heirs intend to alienate their lands to non-tribals, the Acts would operate as a check on their action. In the event of any need for alienation, by a tribal female, it would be only subject to the operation of these laws and the first offer should be given to the brothers agnates. In the event of their refusal or unwillingness, sale would be made to other tribals. In the event of a disagreement on consideration, the civil court of original jurisdiction should determine the same which would be binding in the partition. In the event of their unwillingness to purchase the same, subject to the permission of the competent officer, female tribal may sell the land to tribals or non-tribals. Therefore, the apprehension expressed by the State-level committee is unfounded.
33. The Christians in India are governed by the Indian Succession Act, 1925. It is stated that by operation of Section 1 notification issued under the Government of India Act of 1935, the operation thereof stood excluded to the tribal Christians residing in the State of Bihar. There is no such prohibition in other States. Even otherwise, though the principles of Indian Succession Act are strictly inapplicable, the general principles therein being consistent with justice, equity and good conscience should equally be applicable to the tribal Christians of the Bihar State.
34. I would hold that the provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles

contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women would succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christian. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation, 1969, Santhals (Amendment) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lenial descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lenial descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act.

35. The writ petitions are accordingly allowed and rule nisi is made absolute. The interim direction given for the protection of the petitioner Nos. 2 and 3 in the first writ petition would continue until they voluntarily seek its withdrawal or modification in writing made to the District Superintendent of Police and an order in that behalf is passed and communicated to them.
36. In the circumstances, parties are directed to bear their own costs. Punchhi, J. (Majority Opinion)
37. In these two petitions under Article 32 of the Constitution, challenge is made to certain provisions of the Chota Nagpur Tenancy Act, 1908, (hereafter 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 undertake 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.Ps. and M.L.As. 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 publicised 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.

38. 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.
39. 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 abundanti 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.

40. 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 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 and each case must be examined when full facts are placed before the Court.
41. 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 thicket, it is far 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. Non-uniformities would not in all events violate Article 14. Judge-made amendments to provisions, 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 by our learned brother is, regretfully not acceptable to us.

42. The Chota Nagpur Tenancy Act was enacted in 1908. Its 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) Mundar Khunt-kattidars.” Section 5:

“Meaning of ‘Tenure-Holder’—Tenure-holder means primarily a person who has acquired from the proprietor, or from another tenure-holder, a right to hold land for the purpose of collecting rents or bringing it 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, 1869, but does not include a Mundari khunt-kattidar. 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 land either immediately under a proprietor or immediately under a 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 Right’—‘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-little 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-

- (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 ejection 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 karkar 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 be affected by this Act.”

43. 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 5. Sub-section (2)(a) & (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.
44. 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* (supra). There the learned Judges of the High 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 section 8 would have to be 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 word used is ‘includes’ whereafter 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.
45. 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*³³ 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 bylaw. That is but one aspect of the right to life. An equally important facet 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 Articles 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 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.”

46. 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 others 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 male succession, entitling her to the status of an intervening limited dependents/descendants under section 7 and 8. In this manner alone, and upto this extent can female dependents/descendants 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/descendants 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 dependents/descendent chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose.

47. For the afore-going reasons, disposal of these writ petitions is ordered with the above relief to the female dependents/descendants. 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 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.

Writ petitions disposed of accordingly.

21 (1978) 2 SCR 621.

22 (1991) 1 SCR 614.

23 1958 Bihar Law Journal Report 373

24 AIR 1989 Raj. 115.

25 AIR 1971 Mysore 151.

26 AIR 1960 Punjab 666 (FB).

27 AIR 1957 Orissa 1.

28 AIR 1964 Punjab 272.

29 AIR 1974 Orissa 135.

30 AIR 1972 Punjab and Haryana 406.

31 (1978) 2 SCC 542.

33 AIR 1986 SC 180.

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