

STATE OF BIHAR

v.

LT. COL. K. S. R. SWAMI

(K. N. WANCHOO, K. C. DAS GUPTA and
J. C. SHAH, JJ.)

1961

September 22.

Forest Land—Reclamation—Whether Collector's or Forest Officer's order should prevail—Extinction of rights—When takes place—Bihar Private Forest Act, 1947 (Bihar 9 of 1948), s. 30, Proviso—Bihar Protected Forest Rules, rr. 1 to 4, 8.

The respondent was the tenant of a tract of land which formed part of a forest and continued to remain in possession thereof after the Zemindari interest of the proprietor became vested in the State Government under the Bihar Land Reforms Act, 1952. The Government notified its intention to constitute the forest a private protected forest and by a subsequent notification under s. 30 of the Indian Forest Act prohibited the breaking up or cleaning the land of this and certain other "protected forests" for cultivation whereupon the employees of the Forest Department started interfering with the agricultural operations carried on by the respondent. The respondent then sought the permission of the Collector to start reclamation and cultivation of this area and the Collector gave him permission to "go ahead with the work of reclamation and cultivation of this area." The forest officer disregarded the Collector's order and made the respondent stop reclamation. Ultimately the Government interfered insisting on the withdrawal of the Collector's order. The questions which arose for decision in this case was whether (1) the order passed by the Forest officer on the basis of rule 4 of the Bihar Protected Forest Rules, which prohibited the cutting or removal of trees without the permission of the Forest Officer should prevail over the permission granted by the Collector under r. 8 and (2) whether the respondent's right to the land had ceased under s. 19 of the Bihar Private Forests Act.

Held, that rr. 1 to 4 apply to the cutting or removal of trees where inspite of such cutting the forest would remain a forest but those rules did not control the cutting of trees which would be necessary for clearing the land for cultivation or any other purpose which was controlled only by r. 8. In the present case the permission given by the Collector under r. 8 was in accordance with law and neither the Forest Officer nor the Government had any authority in law to interfere with that permission for the clearing or cultivation of the land.

The extinction of rights under s. 19 of the Act could take place only after the publication of the final notification

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under s. 30 and not by a notification under the proviso thereof pending the completion of enquiries under the provisions of the Act.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 354 of 1957.

Appeal from the judgment and decree dated October 7, 1955, of the Patna High Court in Misc. Judicial Case No. 422 of 1954.

L. K. Jha, D. P. Singh, R. K. Garg, M. K. Ramamurthi and S. C. Agarwala, for the appellants.

B. K. P. Sinha and A. G. Ratnaparkhi, for respondent.

1961. September 22. The Judgment of the Court was delivered by

Das Gupta J.

DAS GUPTA, J.—This appeal by the State of Bihar challenges the correctness of an order made by the High Court at Patna in an application by the respondent under Art. 226 of the constitution. The respondent was inducted as a tenant on a tract of land measuring 245.69 acres in village Singpur by the then proprietor in November, 1945, and continued to remain in possession after the Zemindari interest of the proprietor became vested in the State of Bihar in consequence of a notification under the Bihar Land Reforms Act (Bihar Act XXX of 1952) on the 30th December, 1952. In 1945 this area was forest land. On September 15, 1946, a notification was published under section 14 of the Bihar Private Forest Act, 1946 declaring the Government's intention of constituting the forest a private protected forest. By the same notification the Governor further ordered that until the publication of a notification under s. 30 of the Act all the rights to cut, collect and remove trees or any class of trees in or from the forest shall cease to exist subject to conditions and specifications specified in the Second Schedule. The result of this notification was that immediately on its publication in the Government Gazette the respondent's right to cut, collect and remove trees

ceased so long as this forest continued to be a private forest. On the 6th April, 1948, a notification under the proviso to s. 30 of the Bihar Private Forest Act, was published. After the forest land became vested in the State on the 30th December, 1952, there was a notification on January 22, 1953, which both parties agree, was in substance under the proviso to s. 29 of the Indian Forest Act, 1927. It is the common case of both the parties that in consequence of this notification the forests in Singpur Village became a protected forest. On May 29, 1953, a further notification under section 30 of the Indian Forest Act was made prohibiting the breaking up or clearing the land of this and certain other "protected forests" for cultivation. As local employees of the Forest Department acting under the Divisional Forest Officer, Gaya, started interfering with the agricultural operations carried on on behalf of the petitioner apparently on the strength of this notification of May 29, 1953, the respondent sought the permission of the Collector of Gaya to start reclamation and cultivation of lands. On April 22, 1954 the Collector of Gaya gave the petitioner permission "to go ahead with the work of reclamation and cultivation in this area." The Forest Officer however disregarded the Collector's orders and made the petitioner to stop reclamation. On being approached by the appellant the Collector called upon the Forest Officer to furnish an explanation as to why he had flouted deliberately the Collector's orders. Ultimately, the Bihar Government sent a telegram to the Collector, Gaya, on June 10, 1954 desiring that the order issued by the Collector on April 22, permitting the respondent "to go ahead with the reclamation should be withdrawn pending the decision of the Government in the matter". The Collector forwarded a copy of this telegram to the respondent for information and necessary action on June 11, 1954.

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It does not appear that any further order has been made by Government in the matter. On August 2, 1954 the respondent made his application to the High Court of Judicature at Patna praying that an appropriate writ be issued for cancellation by the Government of Bihar of the directions given on June 10, 1954 to the Collector and for restraining the Government of Bihar and the Forest Officer from interfering with the petitioner's possession over this land in village Singpur.

The petitioner's case was that the forest having become a protected forest under Chapter IV of the Indian Forest Act the Collector was the proper and competent authority to give permission to clear or break up for cultivation, land in this forest under Rule 8 of the rules made by the Government of Bihar in exercise of the power conferred by section 32 of the Indian Forest Act, 1927 and that neither the Forest Officer nor the Government of Bihar itself could in law interfere with what he was doing on the strength of that permission.

In opposing the petition the State of Bihar contended that the Collector's order was of no avail in the face of rule 4 of the rules made by the Government of Bihar under section 32 which provides that "no person shall cut, convert, or remove from the said forest or otherwise deal in trees etc., of the forest" except in accordance with Rules I, II and III.

At the hearing of the petition it was further argued on behalf on the State that the right of the petitioner to the land in dispute had been extinguished under section 19 of the Bihar Act IX of 1948, on the publication of a notification by the Government of Bihar under the proviso to section 30 of that Act. The High Court rejected this argument, being of the opinion that extinction could take place only when the final notification under section 30 was published and as this final notification was not published section 19 had no application

to the case. The High Court also held that in a case where a Collector grants permission under Rule 8 of the Bihar Protected Forest Rules the Divisional Forest Officer had no power to interfere by virtue of Rules 1 to 4 of the same Rules. Accordingly the High Court allowed the petition and made an order quashing the State Government's order conveyed in their telegram of the 10th June and the order of the Forest Officer dated the 1st May, by which this Officer had prohibited reclamation of the disputed land by the petitioner.

In this Court, Mr. Jha raised both the points on which the petition was resisted before the High Court, *viz.*, (1) that the petitioner's right to the land had ceased under s. 19 of the Bihar Private Forests Act and (2) that the order passed by the Forest Officer on the basis of Rule 4 of the Bihar Protected Forests Rules should prevail over the permission granted by the Collector under r. 8.

Mr. Jha's first contention on the first point was that when a notification is made under the proviso to section 30, no further notification under section 30 need be made at all. In our opinion, there is no force in this contention.

The provisions of the Bihar Private Forests Act, 1947 in respect of private Protected Forests are contained in Chapter III of the Act. The scheme of these provisions is that the State Government on being satisfied that it is necessary in the public interest to apply the provisions of the chapter to any private forest, may constitute such forest a protected forest in the manner laid down; the first step that has to be taken is the issue of a notification under section 14 declaring that it is proposed to constitute a forest a private protected forest and calling for objections of all landlords whose interests are likely to be affected. The hearing of objections is provided for in section 15, sub-section 3 of which section further provides that if no objection is presented or when objection is so presented and

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finally disposed of the Government may issue a notification declaring its decision to constitute the area a private forest and appointing an officer "to enquire into and determine the existence, nature and extent of any rights other than landlord's rights, alleged to exist in favour of any person in or over any land in the forest". Section 16 provides that on the issue of such a notification under sub-s. 3 of s.15 the Forest Settlement Officer shall publish a proclamation fixing a period of not less than three months from the date of such proclamation for claims to be made by all persons as regards rights other than landlord's rights. Section 17 empowers the Forest Settlement Officer to enquire into all claims preferred in response to the notification and also into the existence of any rights mentioned in sub-s.3 of s. 15 and not claimed under s. 16. Section 22 of this Chapter deals with the procedures for dealing with claims of forest contractors and grantees. Section 23 provides that in the case of claim to a right in or over any land other than a right of way or right of pasture or a right to forest produce or water course the Forest Settlement Officer shall pass an order admitting or rejecting the same in whole or in part subject to the provisions of sections 25 and 26. Section 27 gives a right of appeal to any person who has made a claim under section 16 or section 22 against the order passed by the Forest Settlement Officer under ss. 22, 23, 24 or 26. Section 30 provides for the final action to be taken by the Government in the matter of constituting a private protected forest. The main portion of the section is in these words:—

"Where the following events have occurred, namely,

(a) the period fixed under section 16 for preferring claims has elapsed and all claims, if any, made under sections 16 and 22 have been disposed of by the forest settlement officer, and

(b) if any such claim has been made, the period limited by section 27 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer,

the State Government shall publish a notification in the Official Gazette specifying, definitely according to boundary marks erected or otherwise, the limits of the forest which is to be constituted a private protected forest, and declaring the same to be a private protected forest, from the date fixed by the notification and from the date so fixed such forest shall be deemed to be a private protected forest".

It is followed by a proviso in the following words:—

"Provided that, if in the case of any forest in respect of which a notification under section 14 has issued, the State Government consider that the inquiries, procedure and appeals referred to in this Chapter will occupy such length of time as to cause undue delay in the forest being declared a private protected forest, such delay, in the opinion of the State Government being prejudicial to the public interest, the State Government may, pending the completion of the said enquiries, procedure and appeals, declare by a notification containing the particulars specified in this section, such forest to be a private forest".

It is abundantly clear that the notification under the proviso is not intended to amount to a final constitution of the private forest as a private protected forest. The notification under the proviso is to be made only "pending the completion of the said enquiries procedure and appeals". Quite clearly, these enquiries, procedure and appeals are not stopped by the declaration under the proviso. They have to

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be completed and it is only after their completion that a notification can be made by the Government under the main part of the section. On a reasonable reading of the section it is therefore abundantly clear that even where the Government thinks fit to make a declaration under the proviso, this will have effect only so long as the period fixed under section 16 for preferring claims (i) has not expired; (ii) claims under ss. 16 and 22 have not been disposed of; (iii) the periods limited by section 27 for appealing from the orders passed in respect of those claims have not elapsed; and (iv) all appeals preferred against such orders have been disposed of.

Turning now to section 19 of this Chapter we find it laying down that "rights (other than landlord's rights) in respect of which no claim has been preferred under s. 16 and of the existence of which no knowledge has been acquired by enquiry under s. 17, shall be extinguished, unless before the notification under s. 30 is published, the person claiming them satisfies the Forest Settlement Officer that he had sufficient cause for not preferring such claim within the period fixed under s. 16."

The appellant's argument is that the words "notification under s. 30 is published" includes a notification made under the proviso to that section and that consequently when a notification under the proviso to s. 30 has been published all rights other than landlord's rights, in respect of which no claim has been preferred and of the existence of which no knowledge has been acquired by an enquiry under s. 17, shall be extinguished.

This argument is in our opinion wholly unacceptable. Considered in the background of the provisions in the Act for claims to be made under s. 16, for enquiry into these by the Forest Officer and thereafter for appeals from the decision of the Forest Officer, after the completion of all of which only the final notification constituting the private forest a private protected forest can be

made, it is clear that rights "other than landlord's rights" in respect of which no claim has been preferred under s. 16 or which have not been disclosed by enquiry under s. 17 were intended by the legislature to be extinguished only after the final notification is made. It is to be noticed that three months' time from the date of the proclamation under s. 16 is to be allowed for making claims. The enquiry under s. 17 can start only after these claims have been made and some more time must elapse before an enquiry can be completed into the existence of rights which have not been claimed under s. 16. A notification under the proviso of s. 30 can however be made at any time after the notification under s. 14 has issued. It is meaningless to speak of rights in respect of which no claim has been preferred under s. 16 and of the existence of which no knowledge has been acquired by an enquiry under s. 17, before the period for the enquiry under s. 17 has expired. Again, there will be no extinction of rights, under s. 19, if the person claiming the rights satisfies the Forest Settlement Officer that he had sufficient cause for not preferring the claim within the period fixed under s. 16. The question of thus satisfying the Forest Settlement Officer can clearly not arise before the period fixed under s. 16 has expired. All this clearly shows that the extinction of rights under s. 19 can take place only after the final notification under s. 30 has been published.

It is necessary to consider next the apparent conflict between the powers of the Officers of the Forest Department under rr. 1 to 4 and the powers of the Collector under r. 8 of the Protected Forest Rules. Under r. 1 persons who are *bona fide* residents of Khasmahal lands may cut, convert and remove to their homes for their own domestic use certain trees but the Forest Officer can in his discretion withdraw this privilege. Certain other trees as specified in the Rule may

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be cut by such *bona fide* residents with the previous permission of the Forest Officer. Under r. 2 the Forest Officer may by an order in writing authorise in certain circumstances villagers of adjacent villages also to cut and remove trees mentioned in r. 1. Rule 3 provides that the Divisional Forest Officer may grant license to any inhabitant of a town or village in the vicinity of a forest to take trees, timber, or other produce for his own use to any person whatsoever authorising him to fell or remove trees for the purpose of trade on payment of fees at current rates as may be sanctioned by the Chief Conservator of Forests. Rule 4 on which special reliance is placed on behalf of the State is in these words :—"No person shall cut, convert or remove from the said forest or otherwise deal with any trees, timber or other forest produce of the said forest.....except as provided in Rules I, II and III. Rule 8 under which the Collector gave permission runs thus : "No land in the said forest shall be cleared or broken for cultivation or any other purpose without the written permission of the Collector". There is an apparent conflict here between the provisions of r. 4 and r. 8 ; for, while under r. 4 no cutting, conversion or removal of trees can be made except under license issued under r. 3 or permission granted by the Forest Officer under r. 2 or under the provisions of r. 1, all this can be set at naught if a written permission is granted by the Collector for clearing or breaking up the land for cultivation or any other purpose necessarily involving the cutting and removal of trees.

On behalf of the appellant-State Mr. Jha argued that r. 8 has no operation so long as trees are standing and it is only if trees have been cut or removed under the provisions of rr. 1, 2 and 3 and only stumps of those trees are standing that the Collector can give permission for clearing the forest land or breaking it up for cultivation. We are unable to persuade ourselves that in making

these rules the Government intended to give such limited authority only to the Collector.

It is obvious that while Rules 1, 2, 3 and 4 were made under clauses a, b, c and d of section 32, Rule 8 has been made under clause g of section 32 which is for the definite matter of "clearing and breaking up of land for cultivation or any other purpose" in a protected forest. The reasonable way of reading Rules 1 to 4 and Rule 8 appears to us to be that Rules 1 to 4 apply to the cutting or removal of trees where in spite of such cutting the forest would continue to be a forest; but cutting of trees which is necessary for clearing the land for cultivation or any other purpose is not controlled by Rules 1, 2, 3 or 4 but only by Rule 8. That seems to us to be the only way of harmonious construction of Rules 4 and 8 and that must, in our opinion, have been intended by the rule making authority.

In the present case therefore when the tenant on the land asked for permission to clear the land for cultivation and it was this clearing which involved the cutting and removal of trees Rules 1 to 4 had no application and Rule 8 under which the Collector acted applied. It may be mentioned here that though Rule 8 is in the negative form, it is what has been called a pregnant negative, saying on the one hand that land in the forest may be cleared or broken for cultivation or any other purpose with the written permission of the Collector and on the other hand that without such permission no such clearing or breaking up for cultivation or any other purpose shall take place. The permission given in the present case by the Collector was therefore in accordance with law and neither the Forest Officer nor the Government had any authority in law to interfere with that permission.

The last argument advanced by Mr. Jha is that the prohibition by the State Government of clearing or breaking up for cultivation or for any other purpose of any land in a protected forest by the notification dated May 29, 1953, under s. 30 of

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the India Forest Act, 1927, must prevail over the permission given by the Collector. It is to be noticed that whereas section 30 empowers the State Government *inter alia* to prohibit such breaking up or clearing for cultivation of any land in a protected forest, section 32 empowers the State Government to make rules to regulate *inter alia* "the clearing and breaking of land for cultivation or any other purpose" in a protected forest. Even if the legislature had said nothing else in this matter, it would have been plausible to argue that the prohibition under the notification would yield before any permission given under the Rules under s. 32. All doubts are however set at rest by section 34 of the Act which runs thus :—

"Nothing in this Chapter shall be deemed to prohibit any act done with the permission in writing of the Forest Officer, or in accordance with rules made under s. 32, or except as regards any portion of a forest closed under s. 30, or as regards any rights the exercise of which has been suspended under s. 33, in the exercise of any right recorded under section 29".

It follows clearly and necessarily from section 34 that the prohibition by notification of the clearing of land would be ineffective where such clearing is being made in accordance with Rule 8 of the Rules made under section 32.

All the contentions raised in the appeal therefore fail. We are of opinion that there is no legal authority for the State Government to interfere with the clearing or cultivation of land by the respondent which is proposed to be done in accordance with the written permission granted by the Collector under Rule 8 of the Protected Forest Rules, 1953.

It appears that through some oversight the High Court ordered the issue of a writ of *certiorari*, though a writ in the nature of *mandamus* was

prayed for. It is clear that the appropriate writ in the circumstances of the present case is a writ in the nature of *mandamus* and we modify the order made by the High Court to this extent that a writ in the nature of *mandamus* be issued directing the appellant-Government to cancel its order on the Collector made on June 10, 1954 and restraining the Government and the Forest Officer from interfering with the petitioner's possession over 245.69 acres of land in village Singpur which he possesses as tenant.

The appeal is dismissed with costs.

Appeal dismissed.

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GOLLAPALLI RAMALINGAMURTHI AND ORS.

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR and
RAGHUBAR DAYAL, JJ.)

Fraud—Benami Conveyance in fraud of creditors—Suit by benamidar for possession—Plea of fraud in defence—If barred by estoppel—Proper approach—Public interest—Indian Trusts Act 1882 (2 of 1882) s. 84.

The conveyance in suit was the result of a collusive plan between respondent 1 and respondent 2 to defraud the latter's creditors. The agreement was that respondent 1 was to act as the benamidar for respondent 2 and his sons, the appellants. The fraud succeeded and the creditors of respondent 2 were in fact defrauded. Thereafter respondent 1 brought the present suit for declaration of title and recovery of possession against respondent 2 and the appellants on the basis of the conveyance. The latter resisted the suit on the ground that the conveyance was fraudulent, unsupported by consideration and passed no title. The High Court in second appeal held that the appellants and respondent 2 were estopped from pleading fraud in the suit and decreed the same. The question was whether the view taken by the High Court was correct and the ostensible owner was entitled to a decree.

Held, that there could be no question of estoppel in a case where both the parties were guilty of fraud