

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Civil Writ Jurisdiction Case No.1537 of 2014**

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1. Nand Lall Yadav Son Of Late Babuli Ahir Resident Of Village - Chausa, Police Station Buxar, District - Buxar

2. Chhote Lall Yadav Son Of Late Babuli Ahir Resident Of Village - Chausa, Police Station Buxar, District - Buxar

.... .... Petitioner/s

Versus

1. The State Of Bihar

2. The Collector, Buxar, District - Buxar

3. The Deputy Collector, Land Reforms, Buxar, District Buxar

4. The Superintendent Of Police, Buxar, District - Buxar

5. The Officer - In - Charge, Police Station Buxar ( M ) District - Buxar

6. The Chairman, Human Rights Commission, Bihar, Patna

7. Ram Ekbal Dubey @ Nathuni Dubey Son Of Late Pradyuman Dubey Resident Of Village - Chausa, Police Station Buxar, District - Buxar

8. Prem Shankar Dubey Son Of Late Deo Kumar Dubey Resident Of Village - Chausa, Police Station Buxar ( M ), District - Buxar

9. Jai Janardan Dubey Son Of Late Deo Kumar Dubey Resident Of Village - Chausa, Police Station Buxar ( M ), District - Buxar

10. Satyendra Narayan Dubey Son Of Late Deo Kumar Dubey Resident Of Village - Chausa, Police Station Buxar ( M ), District - Buxar

11. Budhi Sagar Dubey Son Of Late Ram Ashraya Dubey Resident Of Village - Chausa, Police Station Buxar ( M ), District - Buxar

12. Ghanshyam Dubey Son Of Late Ram Ashraya Dubey Resident Of Village - Chausa, Police Station Buxar ( M ), District - Buxar

.... .... Respondent/s

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**Appearance :**

For the Petitioner/s : Mr. N.K.Choubey, Sr. Adv.  
Mr.Ambuj Nayan Chaubey, Adv.  
Mr. Gopal Swaroop Dubey, Adv,  
Mr. Yogendra Kumar Dwivedi, Adv.

For the State : Mr.Praveen Kumar, AC to GP-22

For Respondent 8 to 12: Mr S.P.Singh, Sr. Adv.  
Mr. R.N.Sharma, Adv.  
Mr. Ram Narayan, Adv.

For Respondent no.7 : Mr.Sanjay Kumar Ojha, Adv.

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**CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY**  
**CAV JUDGMENT**  
**Date: 31-03-2015**

*Shivaji Pandey, J*

In the present writ petition, petitioners have made a prayer  
for quashing of the order dated 21st November 2013 passed by the  
Chairman, Bihar Land Tribunal, Patna in BLT Case No. 378 of 2013 and

the order dated 14<sup>th</sup> September 2009 passed by the Land Reforms Deputy Collector, Buxar in Bataidari Case No. 5 of 1977-78 and also made a prayer for consequential relief to declare the petitioners as Bataidar of the land in question who are in continuous possession of the same and to deliver back the possession of the disputed land.

The matter relates to the lands appertaining to Khata No. 52 of plot no.1265 area 2.51 decimals, Plot no.1303 area 0.97 decimals, plot no. 1271 area 2.65 decimals, plot no. 1279 area 0.23 decimals and plot no. 1283 area 0.66 decimals, total 7.02 acres of village Narwatpur.

The present case has a checkered history, on many occasions both parties have approached this Court and even to the Hon'ble Supreme Court since 1977 – 1978, parties are litigating high pitch battle, as the petitioners have been claiming to be Bataidars of the land, whereas respondent nos. 8 to 12 have disputed his tenancy over the land and have claimed that they have been set up by Ram Ekbal Dubey @ Nathuni Dubey, respondent no.7 in order to take possession of the land in question illegally.

It is an admitted fact that Late Raghubansh Dubey @ Bachchanji Dubey was the original land holder of the land in question who executed the deed of gift on 31st May 1977 in favour of Deo Kumar Dubey and Ramashray Dubey. Deo Kumar Dubey was/is father of Prem Shankar Dubey, Jay Janardan Dubey and Satyendra Narayan Dubey, respondent nos. 8 to 10 whereas Budhdhi Sagar Dubey (Respondent no.11) and Ghanshyam Dubey (Respondent no.12) are sons of Ramashray Dubey.

One Ram Ekbal Dubey, respondent no.7 happens to be the



Gotia of Raghubansh Dubey, the original land owner, who filed T.S.No. 76 of 1989 in the Court of Munsif-II, Buxar against Deo Kumar Dubey and Ramashray Dubey claiming that by fraud Deo Kumar Dubey and Ramashray Dubey, fathers of private respondent nos. 8 to 12 got the gift deed executed, claimed that the deed of gift should be declared to be bad in law. The said Title Suit was dismissed on account of non-payment of court fee but a restoration petition has been filed by the respondent no.7 which is pending for disposal. It is also a fact that Late Raghubansh Dubey executed a registered will in favour of Ram Ekbal Dubey @ Nathuni Dubey, respondent no.7 who filed suit for probate in T.S.No. 16 of 1992 but the said application was rejected, vide judgment and order dated 5th September 2001 by the Additional Sessions Judge, Buxar against that judgment and order, F.A.No. 450 of 2001 has been preferred by the respondent no.7 which is pending for consideration.

As claimed by the petitioner, Babuli Ahir, father of petitioners filed a case claiming that he had been in peaceful possession of the land as Bataidar, growing and sharing crops with the landlord but claimed that Raghubans Dubey in connivance with respondent nos. 8 to 12 have threatened for illegal eviction from the land which led to filing of case before the Land Reforms Deputy Collector on 24<sup>th</sup> February 1978 under Section 48E of the Bihar Tenancy Act (hereinafter, in short, referred to as the 'Act').

The case was registered as Misc. Case No. 5 of 1977-78 (Annexure-3) in which Late Raghubansh Dubey appeared and filed reply on 13th March 1978 where he mentioned that father of petitioners was under raiyat for last 12-13 years and has been paying rent of the land to

him, as Late Raghubansh Dubey was demanding higher rent, he had refused to pay and claimed reason for initiation of the proceeding under the Tenancy Act (Annexure-4).

The Land Reforms Deputy Collector, vide his order dated 4th April 1978, passed the order injuncting illegal eviction of the petitioners from the land in question till the final decision of the case. The Anchal Adhikari was directed to enquire into the matter who after considering the documents and observing physical verification, submitted the report on 2nd January 1978 found the possession of father of petitioners. In the enquiry report, the Anchal Adhikari formed an opinion that a fraud was committed by the respondent nos. 8 to 12 in execution of the deed of gift. As there was an agreement to sell the land but it was illegally turned as deed of gift. When he came to know the aforesaid facts by another registered deed dated 21st June 1977 cancelled the same and the said deed of gift was never given effect to and also claimed that never he came in possession of the land. On the basis of aforesaid report vide order dated 4th April 1978, the landlord was restrained to illegally expel the petitioners from the land in dispute.

After going in detail and after hearing the parties, the Land Reforms Deputy Collector, vide order dated 18th July 1988 declared the possession of father of the petitioners as Bataidar Against that order of Land Reforms Deputy Collector, father of respondent nos. 8 to 12 filed CWJC No. 3819 of 1978 before this Court claiming that the order suffers from legal infirmity and claimed that mandatory provisions for constituting the Board was not complied with. The matter was heard and vide order dated 27<sup>th</sup> April 1979, the order passed by the Deputy

Collector, Land Reforms was quashed on the ground of non-compliance of mandatory provisions by not constituting the Board and referring the matter for conciliation. It appears from the record that Raghubansh Dubey had filed a counter affidavit (Annexure-6) in CWJC No. 3819 of 1978 where he had accepted the tenancy of the petitioner for last 12-13 years.

After remand, the Land Reforms Deputy Collector called a report from the Anchal Adhikari. In pursuance of the report, the Land Reforms Deputy Collector, vide order dated 21st July 1981 passed the order in favour of respondent nos. 8 to 12. Against that order, father of petitioners filed CWJC No. 2678 of 1981 and there also Raghubansh Dubey filed a counter affidavit and accepted the claim of father of petitioners being Bataidar. The case was heard, this Court vide judgment and order dated 11<sup>th</sup> December 1989, quashed the order dated 21st July 1981 and directed for reconsideration of the application.

During the pendency of the case before the Land Reforms Deputy Collector, on remand, Raghubansh Dubey died. The Land Reforms Deputy Collector vide his judgment and order dated 3rd March 1992 rejected the claim of the petitioners. Against that order father of the petitioners challenged the order in CWJC No. 3187 of 1982 which was disposed of in the following manner:-

“As agreed by the parties, I pass the following orders:

i) The impugned order dated 3rd March 1992 passed in Bataidari Case No. 5 of 1977-78 (Annexure-12) is set aside.

ii) The case stands remitted to the D.C.L/R., Buxar who will ask the Anchal Adhikari concerned to make local inspection with respect to the land in question after notice to the concerned parties and

should submit his report with respect to the following questions: -

a) The nature of the land which belongs to respondent nos. 4 and 5 will specifically state whether it is agricultural land or not.

b) Whether the petitioner Babuli Ahair was cultivating the land in the year 1978 when the land in question transferred in favour of respondent nos. 4 and 5.

c) Whether the petitioner is still cultivating the land as on to-day.

iii) If in the said report, it is shown that the petitioner was never cultivating the land in question nor was in possession over the same, then the D.C.L.R., Buxar without referring the matter to the Bataidari Board, will decide the maintainability of the application filed by the petitioner under Section 48E of the B.T.Act. On the other hand, if the report goes in favour of petitioners, then in that case, he will constitute a Bataidari Board and refer the matter for amicable settlement and then will pass order in accordance with law after hearing the parties.”

While the matter was pending before the Land Reforms Deputy Collector, a dispute arose due to illegal act of respondent nos. 8 to 12 which led to initiation of a proceeding under Section 144 of the Code of Criminal Procedure, registered as Case No. 1470 of 1993(M) in which order was passed in favour of petitioners. The learned Land Reforms Deputy Collector disposed of the matter vide order dated 25th July 1999(Annexure-9) where he has recorded the fact that major portion of the land is not culturable as plot no. 1303 area 0.97 decimals is a ditch submerged under water throughout the year. Plot No. 1297 and 1271 area 2.65 decimals is an orchard where cattle Mela is organized, plot no. 1265

and 1279, 1283 area land has been acquired for construction of irrigation of canal, rest small portion of land is culturable. Accordingly the said application was rejected.

Against that order, father of the petitioner filed CWJC No. 5929 of 1999 and this Court vide order dated 15th February 2000 (Annexure-10) quashed the order and remanded back the matter for fresh consideration. The order passed in the aforesaid writ petition was subject matter of LPA No. 365 of 2000 and this Court vide order dated 21st November 2001(Annexure-11) refused to interfere in the matter and directed as follows:

“Whether the dispute is bona fide or not. Taking into consideration special fact of the case, we also direct him to hear both parties and to take decision with regard to said matter within two months from the date of receipt/production of the order. In case he comes to a decision that bona fide dispute exists between the parties, the he will proceed further as provided under Section 48E of the Act otherwise he will dispose of the proceeding at the stage of its initiation itself.

With the aforesaid observation, this appeal is disposed of.”

On remand the Land Reforms Deputy Collector in his order dated 12<sup>th</sup> January 2001, recorded a finding of having bona fide dispute. Against that order, Late Deo Kumar Dubey filed CWJC No. 427 of 2002 and this Court vide order dated 4th April 2002 refused to entertain the petition and dismissed it. There the Court has directed to decide as to whether the land in dispute is agriculturable land or not at the appropriate stage. The said order was challenged in LPA No. 581 of 2002 and the

Court refused to entertain the application and disposed of the matter holding as follows:

“Once finding that bona fide dispute between the parties, he has proceeded under Section 48E of the Act. The learned writ court rightly did not interfere with the said order”

On remand to the Land Reforms Deputy Collector followed the provisions of law, appointed Circle Officer as Chairman of Conciliation Board, took steps for conciliation but failed in the light of the affidavit of Raghubansh Dubey as well as receipt granted by him showing division of Batai crop passed the order dated 16th May 2003 and 17<sup>th</sup> May 2003 (Annexure-14 of writ petition) in favour of father of petitioners holding that he was under-raiyat of the land.

The said order was challenged before the writ court in CWJC No. 6883 of 2003 which was dismissed. Against that the respondent nos. 8 to 12 filed LPA No. 940 of 2003. The Division Bench found that effort for conciliation was not taken as after recall of record from the Board, the Collector under the Act has not taken any effort for its amicable settlement, accordingly, again remanded back the matter, setting aside the order of the Collector directing to dispose of the same within six months. After receipt of the aforesaid order, a Board for conciliation was constituted where the Circle Officer was made Chairman of the Board. The Board did not submit the report within six months, the Circle Officer, Chairman of the Board, referred the file whereupon the Deputy Collector, Land Reforms appointed Panches, took effort for conciliation but the dispute could not be resolved, ultimately the Land Reforms Deputy Collector himself inspected the land in dispute in presence of both



the parties where respondent nos. 8 to 12 produced witnesses whose evidences were recorded and the Land Reforms Deputy Collector arrived to the following finding the land having Khata No. 51, Khesra no. 1307, area 97 decimal, Khesra no. 1271 area 2.65 decimals of land is an orchard having three mango trees, one Jamun tree, two Mahua and one Sharifa tree and the cattle Mela used to be conducted at the said land, the land bearing plot no. 1265, area 2 acres, 51 decimals, of which 66 decimals, plot no. 1279 area 23 decimals of which 13 decimal, plot no. 1283 area 66 decimals of which 21 decimals, total one acre land was acquired by the Government for construction of irrigation canal from plot nos. 1265, 1279 and 1283 total 2.40 decimals of land is culturable there paddy is grown. On the basis of this report (Part of Annexure-17 series) the Land Reforms Deputy Collector vide his order dated 14th September 2009 (Annexure-2 series) held that the land in dispute is under the possession of Respondent Nos. 8 to 12, has been growing paddy crops in the culturable portion of land, petitioners are not Bataidar so much so both sons of Babuli Ahir are engaged in different profession in the city, having no concern with the disputed land. It was also recorded that Babuli Ahir (original petitioner) was never a tenant. Raghubansh Dubey had gifted the land in favour of Dev Kumar Dubey and Ramashray Kuma Dubey, being aggrieved, Nathuni Dubey had filed Probate Case No. 16 of 1992, when he lost he set up Babuli Ahir and got false case instituted against respondent nos. 8 to 12 so much so in TS No. 76 of 1989 original land holder Raghubansh Dubey had never made any statement in his written statement about cultivation of the land by Babuli Ahir.

That order was challenged before the Writ Court in CWJC

No. 13869 of 2009, this Court has disposed of with direction to approach the Appellate Tribunal, the same was also challenged in Letters Patent Appeal vide LPA No. 1567 of 2009, the same was disposed of with direction to the Land Reforms Deputy Collector to verify the stand as to whether he has passed the order under Section 48E(7) or 48E(10) of the Act and so much so that the Court held that if any party is aggrieved by the order of the Land Reforms Deputy Collector he can avail the alternative remedy open to him under the law before the appropriate authority.

On remand, the Land Reforms Deputy Collector vide order dated 24th September 2012 (Annexure-20) disposed of the same holding that he has passed the order under Section 48E(10) and not under Section 48E(7) of the Act. The petitioner again challenged the said order before this Court in CWJC No. 23024 of 2012 as by that time BLT started functioning, this Court vide order dated 15<sup>th</sup> April 2013 transferred the matter before the Tribunal for its disposal.

In the Tribunal, the case was registered as BLT Case No. 378 of 2013, vide its interim order dated 30th July 2013 (Annexure-21), considering the checkered history of the case a limited remand of case was made, directing the Land Reforms Deputy Collector to comply the provisions of Section 48E(10) by making effort for conciliation between the parties within scheduled time and to submit the report to the Tribunal for passing the final order. The Land Reforms Deputy Collector submitted failure report dated 12th September 2013 (Annexure-22) and at last, the Tribunal by the impugned order dated 21st November 2013 (Annexure-1) rejected the application of the petitioners holding that Babuli Ahir was

never declared as Bataidar and, as such, Nand Lall Yadav and Chhote Lall Yadav, the present petitioners did not have locus to proceed with the matter. The land in question is not culturable land, save and except, a small area. Claim of Bataidari can be entertained with respect to the agricultural land, not for homestead and residential land or any other land and rejected the petition which is under challenge before this Court.

In the present case, petitioners have submitted that this Court in LPA No. 940 of 2003 (Annexure-15) remanded back the matter holding that the Collector under the Act without making effort for amicable settlement of the dispute after recall of the record from the Board passed the order and as such order of the Collector is vitiated. On remand, the Deputy Collector Land Reforms did not conduct the proceeding as provided under the law.

The counsel for the petitioners submits that in terms of Section 48E of the Act, the following steps were required to be followed:-

- i) The Board will be constituted;
- ii) The matter will be referred to the Board;
- iii) The Rules framed under the Act provides in what manner Panches will be appointed;
- iv) Two Panches by each party are required to be nominated and in failure the Collector will appoint Panches;
- v) The Board will make an effort to settle the dispute.
- vi) If the parties settle the dispute, the Chairman would submit his report;
- vii) In failure under sub-section(7) the Board will record evidence and remit the matter to the Collector to pass order;

viii) If the Collector agrees with the findings of the Board, in that circumstance, he would pass order in terms of findings recorded by the Board.

ix) In case of disagreement, the Collector will assign his reason for his disagreement with the findings of the Board and if necessary, further enquiry would be conducted.

x) After remand by the Court, the Collector was required to conduct de novo enquiry as provided under Section 48(E)(10) of the Act.

In support of aforesaid submissions, he has relied on the judgment reported in Dhanji Singh v. State reported in 1979 BBCJ 259 (FB) where it has been said, when no attempt is made by the Board to make amicable settlement, the order passed is illegal.

He has further relied on the judgments in the case of Rasik Lal v. State reported in 1979 AIR Pat. 172 where aforesaid principle has been reiterated.

Bhado Uraon v. State of Bihar, reported in 1988 PLJR 1100 (Para- 25, 26, 27, 28, 29, 32) on the point that the Collector before initiation of the proceeding has to form an opinion on prima facie dispute. Once found the dispute will be referred to the Board for conciliation.

Miajan Khan v. State of Bihar reported in 1989 PLJR 389 (Para 24 to 29) on the point of making efforts for amicable settlement as provided under Section 48(E) of the Act.

Raj Kumar Prasad vs. State of Bihar reported in  
1989 PLJR 73.

Awadhesh Kumar Singh vb. State of Bihar reported in

1991(2) PLJR 560 (Para-2).

Dinesh Murmu v. State of Bihar, reported in

1998(1) PLJR 110 and

Kamleshwari Mandal v. Balgovind Thakur reported in

1984 PLJR 419.

Thrust has been given in the argument, while exercising the power under Section 48E(10) of the Act, the Collector was again to constitute a Board to make endeavour to settle the dispute, in failure, the matter be referred to the Collector who will act in accordance with law.

He has further submitted that the order dated 14th August 2009 of the order sheet does not disclose the constitution of the Board under Section 48E of the Act. He has further submitted that the order sheet maintained by the Collector does not reflect the appointment of the Chairman of the Board. He further submitted that the proceeding before the Collector after remand was initiated vide order dated 26<sup>th</sup> June 2009 and the Collector vide order dated 14th September 2009 even before expiry of the period of six months, passed the order which is out of limit provided under Section 48E of the Act.

He has further relied on the order passed by the Hon'ble Supreme Court in SLP No. 34952 of 2010 (Annexure-34) maintaining status quo during the pendency of the LPA No. 1567 of 2009 which was ultimately disposed of vide order dated 30th April 2012 remanding back the matter to the Land Reforms Deputy Collector to clarify as to whether the order was passed under Section 48E(7) or under Section 48E(10) of the Act and the Land Reforms Deputy Collector by his order dated 24<sup>th</sup> September 2010 passed in Bataidari Case

No.5 of 1977-78 held that the order was passed under Section 48E(10) of the Act and not under Section 48E(7) of the Act. He has further submitted that the land in question is culturable which is apparent from Annexure-35 series. Form-17 under the Act was raised in the name of Ramjanam Dubey showing the disputed land to be agricultural land. As the entry shows all the lands are culturable, wrong claim has been made by the private respondents that certain land is ditch, certain portion is orchard where cattle Mela is organized and certain portion has been acquired for construction of canal.

He has further relied on the report of the Superintendent of Police (Annexure-33 series) where it has been opined that it requires a deep investigation to find out whether the complainant, i.e. private respondent nos. 8 to 12 have lodged false case to show their possession over the land in question.

He has further relied on a plaint filed by Late Raghubansh Dubey vide Title Suit No. 76 of 1989 (Annexure-31 Series) whereby and whereunder Late Raghubansh Dubey had sought the relief to declare the deed of gift to be nullity.

The affidavit filed by Raghubansh Dubey in Bataidari Case No. 5 of 1977-78 (Annexure-4) has been relied upon to show that Raghubansh Dubey the original land holder accepted, the land to be under his Bataidari and under cultivation for last 12 to 13 years. He has submitted that the finding recorded by the Land Reforms Deputy Collector with respect to plaint that Raghubansh Dubey never said about the Bataidari of Babuli Ahir in his plaint of T.S.No. 76 of 1977-78 is incorrect in view of Para-14 of the plaint shows the statement about the

cultivation of land by Babuli Ahir.

He further submitted that the purported report (Annexure-17) was submitted by Panches of Private Respondents so much so the Land Reforms Deputy Collector has passed the order dated 10<sup>th</sup> September 21009 behind the back of the petitioners and that too without local inspection. The enquiry report of the Land Reforms Deputy Collector dated 12th September 2009 is the got-up document which the petitioners asserted in Para-36, 37 and 57 of the writ petition. In Para-36 it has been stated that the matter was taken up by the learned Land Reforms Deputy Collector who had recently taken charge, somehow and others he interred into the collusion with the private respondent s. The order-sheet shows that on several dates on account of absence of Panches the case was adjourned, conciliation failed and thereafter the Land Reforms Deputy Collector proceeded with the hearing of the case without waiting for the report of the Panches. No time was granted to them for such report nor it was called for but the Panches ultimately submitted the report on 10th September 2009, even then the Land Reforms Deputy Collector has recorded on 10th September 2009 that he would make local inspection on 12th September 2009, though the order was passed behind the back of petitioners. In Para-37 of the writ petition, it has been stated that on 12<sup>th</sup> September 2009 the Land Reforms Deputy Collector never went to the village but the petitioners were present all through though they were not knowing the fact that that was the day for enquiry. When he left the venue on t he next day he came t o know that on 14th September 2009 final order has been passed by the Land Reforms Deputy Collector. At Para-55 it has been stated that the order-sheet of Bataidari Case No. 5 of 1977-78 does



not reveal that conciliation Board was ever constituted under the leadership of the Circle Officer Buxar. Neither the Land Reforms Deputy Collector followed the procedure as mentioned in Section 48E(6) nor made spot inspection under the Act, rejected the case of petitioner illegally. He further relied on Para-34 of the petition where it has been submitted that after taking all steps for conciliation and appointment of the Board which did not submit any report. The Land Reforms Deputy Collector heard the matter in the light of affidavit of Raghubansh Dubey as well as the rent receipts granted by him of Batai crops. The proceeding in favour of petitioner was decided holding him Bataidar of the land and also prohibited interference of the petitioners. He has further submitted that Para-37 and 55 of the petition refers to the constitution of the Board, has not been replied by the respondent State in its counter affidavit which would be apparent from Para-35 to 43 of the counter affidavit sworn by the Land Reforms Deputy Collector.

He has further submitted that the Land Reforms Deputy Collector in the order dated 14th September 2009 has referred the names of certain witnesses supporting the case of private respondent nos. 8 to 12 and out of them, five persons who supported the case of petitioners are Sahdeo Ram, Bhagwati Ram, Bhushan Prasad Mali, Baliram and Pramod Kumar Pandey. He has further submitted that annexure-D is the affidavit alleged to have been sworn by Bhagwati Ram but his signature is missing. He has further submitted that Babuli Ahir died in the year 2005 and thereafter petitioners have been pursuing the case after proper substitution without objection raised by the private respondent nos. 8 to 12. In that context now respondent nos. 8 to 12 cannot be allowed to raise objection

against the petitioners to pursue the case on the ground of having no provision of succession and took the plea of waiver and estoppels in support has relied on the judgment in the case of Prasun Roy v. Calcutta M.D. Authority, reported in AIR 1988 SC 205 and has also relied on the different part of Vol-IV of Harsburi Law of England (Para 571 to 574) and Vol-16 of Harsbury Law of England from Para-147 1 to 1473 and, as such, locus standi of the petitioners cannot be challenged.

At last petitioners have made a submission that as per the order of this Court, the Collector did not take any effort to settle the dispute and the order passed by the Collector as well as the order passed by the learned Chairman of the Bihar Land Tribunal are illegal and not sustainable in law.

Counsel for the respondents disputed the claim of the petitioners and submitted the order dated 14th August 2009 and 21st August 2009 show, the process of constitution of the Board started. The order dated 25<sup>th</sup> August 2009 shows, from the side of the landlord, Sri Sarangdhar Rai was nominated as Panch whereas Sri Rajdeo Singh and Subedar Pandey were nominated from the side of Bataidars, petitioners which shows the appointment of Panches from both sides and signatures of respective persons shows acknowledgement of their nomination as Panches. The order sheet dated 28th August 2009 shows the signature of Nandlal Rai, petitioner, Sarangdhar Rai as well as signatures of Subedar Pandey and Rajdeo Singh including both parties were present. It has also been recoded that the effort to settle the dispute was made but could not be materialized and the case was fixed on 1<sup>st</sup> September 2009 giving directions to produce their respective documents. The order dated 1<sup>st</sup>



September 2009 shows, the Land Reforms Deputy Collector recorded failure of conciliation of effort, direction was given for production of respective evidences and their written argument. The order dated 1<sup>st</sup> September 2009 shows parties were present, as well as Panches from Bataidar were present but the Panches from private respondent nos. 8 to 12 remained absent. The order-sheet dated 1<sup>st</sup> September 2009 shows that it was seen by Rajdeo Singh, one of the Panches of the Bataidar. He has further submitted that as per the remand order of this Court, it has been submitted by the respondents that in terms of the order passed by this Court, there was no need to constitute a Board but it was required to appoint Panches from both sides and take effort for settlement, no Board comprising Circle Officer was required to be constituted.

Counsel for the private respondent nos. 8 to 12 has relied on the report of Land Reforms Deputy Collector dated 12th September 2009 part of Annexure-17, the report shows number of persons were examined and findings were arrived that petitioners were never in possession of the land and the petitioners have been doing their business out side the village. He has submitted that the land in question some part is an orchard used for holding of cattle Mela, some part of the land is under acquisition, some portion of the land is ditch submerged under water throughout the year and holding that major portion of the land is unculturable. The claim of petitioners being Bataidar per se is illegal. He has further submitted that the petitioners have filed certain affidavits which were sworn before the Notary Public having no value in the eye of law. To support his contention of holding of Mela has relied on Annexure-F series at page 268, receipt granting permission to hold Mela



in certain portion of land, certain portion of the land has been acquired for construction of canal and money was paid to the petitioners is apparently clear from Annexure-F to the counter affidavit filed by the respondents, he has further relied on the order passed by this Court passed in CWJC No. 3187 of 1992 where this Court has given direction to hold an enquiry and give finding on the nature of the land. The enquiry report dated 18th April 1978 (Annexure-D) shows that certain portion of the land is an orchard, witnesses who were examined supported that the land in question was given in gift to Deo Kumar Dubey after execution, relationship of Deo Kumar Dubey with Raghubansh Duey turned sour he had set up Babuli Ahir maliciously and showed him Sikmidar. The report shows that certain portion of the land is fallow as well as an orchard, question of giving the land under cultivation of Babuli Ahir did not arise. He has further submitted that the order passed by the Land Reforms Deputy Collector dated 27<sup>th</sup> May 1999 (Annexure-9) where he has arrived to an opinion, the land is not culturable and the private respondent nos. 8 to 12 have been cultivating the land. The order passed in CWJC No. 4271 of 2002 dated 4<sup>th</sup> April 2012 (Annexure-12) the Court has directed the authority under the Act shall examine the nature of land as to whether the land in dispute is culturable land or not at the appropriate stage.

He has further submitted that Bataidari case was filed on 21st February 1978 (Annexure-3) with respect to land in question whereas before its initiation, Raghubansh Dubey had executed a deed of gift in favour of father of respondents namely, Deo Kumar Dubey and Ramashray Dubey. As Deo Kumar Dubey is the father of respondent nos. 8 to 10 and Ramashray Dubey is father of respondent no. 11 and 12,



whereas Ram Ekbal Dubey @ Nathuni Dubey is the Gotia of Raghubansh Dubey, donor, instigated for cancellation of gift deed whereupon Raghubansh Dubey filed Title Suit No. 76 of 1989 which was dismissed due to insufficient court-fee and later on an application for restoration has been filed by Raqm Ekbal Dubey @ Nathuni Dubey the Genealogical Table (Annexure-H) which has been authenticated by the Block Development authority shows that the petitioners are related to Raghubash Dubey whereas Ram Ekbal Dubey @ Nathuni Dubey does not find place in the Genealogical Table. The record of right prepared during the consolidation proceeding under Section 8 of the Consolidation Act was not final, whereas Khata Pustika (Part of Annexure-F Series) cretin portion of land shows as *Bhith* land and Deo Kumar Dubey has been shown as the land holder.

He has further relied on report of the Land Reforms Deputy Collector (Annexure-17) which shows that most of the land in question are not all agriculturable save and except certain land. Counsel for the private respondents also disputed the submission of the counsel for the petitioners that the allegation made by him that the board was not constituted, no effort was taken for conciliation and no evidence was taken for decision are completely incorrect and wrong, is not sustainable, as is apparent that the Collector under the Act took all steps in terms of direction given by this Court.

Counsel for the respondent nos. 8 to 12 has submitted that as up-to-date, no Court has finally arrived to a conclusion and declared Babuli Ahir as under raiyat so much so there is no finding of authority of any competent jurisdiction of cultivating the land for more than 12 years

and, as such, he could not acquire occupancy right as was never declared as raiyat under Section 48E of the Act and as such the right of inheritance by succession by the petitioners to their father does not apply.

In support of his contention, he has relied on the following judgments:

1963 BLJR 1990 (Munilal Mandal v. Babuji Mandal)

1987 BLJ 636 (Padarath Choudhary v. Most Jagatia and others)

1981 BBCJ 466(Bibi Jaloosan v. Bhulai Baitha)

2002(4) PLJR 31 (Md. Yunus v. Moinuddin) (Para-5 & 6),

2013(2) PLJR 625(Shukdeo Pandit v. State of Bihar)

and further submitted that Bataidari right is available in the agriculturable land and not otherwise. In support of his contention, he relied on the judgment in Shankar Mandal v. State of Bihar, reported in 1991(2) PLJR 426 (FB) (Para-10 & 11) and also relied on order dated 19<sup>th</sup> February 1998 passed in CWJC No. 3187 of 1992 (Annexue-8 at page 108) order dated 4<sup>th</sup> April 2002 passed in CWJC No. 4271 of 2002 (Annexure-12), Report of DCLR dated 12<sup>th</sup> September 2009 (Annexure-17) is the finding recorded by the Land Reforms Deputy Collector that most of the land are not culturable.

The report of the Anchal Adhikari dated 18th April 1978 (Annexure-D, of the counter affidavit of the respondent nos. 8 to 12) Annexure-J series) (counter affidavit of respondent nos. 8 to 12), report of Deputy Collector Land Reforms dated 12<sup>th</sup> September 2013 shows the land not culturable, Annexure-17 report of the Land Reforms Deputy Collector dated 12<sup>th</sup> September 2009, showing the land as not

agriculturable. He has tried to fortify his case by relying on Annexure-E series, receipt granted for holding cattle Mela over plot no. 1271 area 2.654 decimals where regular cattle Mela is conducted on the date fixed and also relied on the notice issued under Section 12(2) of the Land Acquisition Act to the father of petitioners for receiving the compensation amount.

He has further submitted that in pursuance of judgment dated 12<sup>th</sup> September 2008 passed in CWJC No. 3187 of 1992 giving direction of holding enquiry about the nature of land and the report dated 27<sup>th</sup> May 2009 (Annexure-9) in pursuance of direction given above by this Court, the nature of most of the land has been shown as non-agriculture which forfeits his claim. He has drawn my attention to the order passed in CWJC No. 5929 of 1999 (Annexure-10) whereby the petition was allowed and the case was remanded back. He further relied on the order passed in CWJC No. 4271 of 2002(Annexure-12), last portion where liberty was granted to examine the nature of the land and further drew attention to the report dated 16<sup>th</sup> May 1978/18h April 1978 of Annexure-D of Agriculture Supervisor where claim of Sikami has been found to be illegal and be false.

The Appellate Tribunal as well as the LRDC has concurrently recorded that most of the lands are not culturable, except small portion. In view of the judgment reported in the case of Shankar Mandal (supra) where in Para-10 and 11 it has been decided that if the land is not culturable, the question of Bataidari does not arise. He has further submitted that the Tribunal first passed order of limited remand whereupon efforts for compromise were made but it failed.

Counsel for the respondents has further submitted that unless father of petitioners would have acquired the status of occupancy right, the petitioners cannot be allowed to pursue this matter and onus lies upon the petitioners to show their father acquired the right of occupancy.

Upon the judgment reported in the case of Surendra Prasad Vishwas v. State of Bihar reported in 2007(suppl.) PLJR 364.

In reply counsel for the petitions submits that under-raiyat has a right to inherit through predecessor in interest and relied on the definition of 'cultivate personally', sub-section (19) of Section 3, sub-section(3) of Section 4 which defines 'under raiyat' and sub-section(2) of Section (5) which defines the "raiyat". He has further submitted that the claim of office is the personal right of a person to hold that Office but right of cultivation is the right of whole family and not of an individual. He has further submitted that this Court is not to examine the issue involving right arising from Section 48C and 48D of the Act. Section 48C deals with occupancy right and 48D deals with acquiring of raiyati right by occupancy to under-raiyat on payment of certain amount of compensation. In this case, the Court has to decide right of under raiyat, regarding which, lis is pending since 1978, the delay is on account of system and not because of fault of parties. He has further submitted that the order-sheet and the order does not disclose the order of this Court was complied with so much so documents Annexure-29 Series show that Mela was not organized rather the finding has been recorded that at the disputed land crops of *Arhar*, *Jwar* and *Bjar* and paddy crops are/were used to be grown and on enquiry it was found that Babuli Ahir had been cultivating the land.



He has further submitted that the order dated 18<sup>th</sup> May 1978 (Annexure-25), arising from Bataidari Case no. 5 of 1977-78, and order-sheet (Annexure-26 series) show father of petitioners was declared as Bataidar thereby prohibited respondent nos. 8 to 12 to evict the father of petitioners from the disputed land. He has further relied on Form-17 (Annexure-35) showing the land to be agriculturable; Father of petitioners died during the pendency of LPA and it cannot be claimed after substitution the petitioners cannot pursue the dispute after lapse of such a long period. He has further relied on the judgments and order passed by the Hon'ble Supreme Court (Annexure-34) whereby the Court has directed for maintaining status quo and further submitted that the judgment relied upon by the respondents is not relatable to the points raised in the present case. The petitioner has relied on the judgment reported in 2007(1) PLJR 70 where this Court has decided that it is the duty of the Collector in Bataidari case to constitute Board and try to settle the dispute. In absence of the Board, the order is not sustainable.

In this view of the matter, counsel for the petitioner submitted that the order passed by the Land Reforms Deputy Collector as well as by the Bihar Land Tribunal are not sustainable and liable to be quashed.

On examination of the B.T. Act, this Court is of the view that the tenancy otherwise than Raiyat fall under the category of under raiyat either having right of occupancy in the land of the raiyat or may not have such right of occupancy and by dint of right of occupancy a under raiyat will not become raiyat. Section 26A shows that every occupancy holding or a portion thereof that the right of occupancy therein



shall be capable of being transferred or bequeathed in the manner and to the same extent as immovable properties and all are transferable by sale, exchange by gift or shall be subject to provisions of sub-section(2) which provides that every transfer of occupancy holding or a portion thereof together with the right of occupancy by sale, exchange or gift and every bequest of such holding or portion together with the right of occupancy therein shall be made in the same manner and subject to same condition as permanent tenure in respect of registration and payment of registration fee.

This shows that right to transfer and bequeath is only limited to the occupancy holding as has been defined in Section 3(9) of the Act to mean a portion of land held by the Raiyat forming subject matter of separate tenancy.

Chapter VII of the Act deals with the subject of under raiyat. This chapter deals with the manner a limit of the land recoverable from under-raiyat, including produce rent. There is also restriction on certain kind of rent, acquisition of right and occupancy and the extent of right of occupancy by the under raiyat. Section 48 of the Act deals with under raiyat tenancy at money rent and Section 48(A) deals with produce rent recoverable from under raiyat, Section 48B of the Act provides restriction of payment of certain kind of rent by the under raiyat and Section 48C provides that acquisition of right of occupancy by the under raiyat which shows that every person who for a period of 12 years whether wholly or partly before and after commencement of Bihar Tenancy Amendment 1938 has continuously held the land as under raiyat in any village whether under a lease or otherwise shall be deemed to have

acquired on expiration of that period a right of occupancy in the land which he has so held for the said period subject to the proviso containing certain condition precedent and exception thereto. The Section 48D deals with acquisition of raiyati right by occupancy under raiyat. Even by acquiring the occupancy status in the land, the under-raiyat would remain under a raiyat by dint of acquiring the occupancy status will not become raiyat.

On consideration of the aforesaid facts raised by both the parties, this Court has to decide the following issues:

i) Whether after remand order passed by this Court in LPA No. 940 of 2003, the Land Reforms Deputy Collector has followed the provisions of Section 48E(10) of the Bihar Tenancy Act ?

ii) Whether the land in question is mainly agriculturable or otherwise as the B.,T.Act would be made applicable to the land being culturable land only ?

iii) Whether father of petitioners would have proved his relationship as under-raiyat with the land in dispute so much so that he has acquired the qualification of occupancy right ?

iv) Whether the right of cultivation as under-raiyat is the personal right or of family, if it is a personal right, whether heir and successors have right to succeed and inherit the right of cultivation ?

v) Whether the onus lies on the persons to prove his case of tenancy as under-raiyat or it is otherwise ?

vi) Whether this Court under exercise of judicial review will be justified in interfering with the concurrent findings of fact

recorded by the Land Reforms Deputy Collector as well as of the Bihar Land Tribunal ?

Before deciding the issue, it will be relevant to examine the scheme and provisions of the Bihar Tenancy Act and the manner the Collector under the Act is to perform his duties in exercise of power conferred under Section 48E of the Act.

To understand the scheme of the provisions of the Act, it will be appropriate to quote the provisions of the Act are as follows:

“Section 48E : Prevention of threatened ejectment of under raiyat and restoration to possession of under-raiyat unlawfully ejected –

(1) If an under-raiyat is threatened with unlawful ejectment from his tenancy or any portion thereof by his landlord or if there is a dispute between them over the possession of land crop or produce thereof either on the ground of non-existence of relationship of landlord and tenant between them or otherwise or if an under-raiyat is or has been ejected from his tenancy or any portion thereof within twelve years before the commencement of proceeding under this section in contravention of the provisions of section 89 the Collector may, of his own motion or on application made in this behalf by the under-raiyat, initiate a proceeding for preventing the landlord from ejecting the under-raiyat or for settlement of the said dispute or for restoration of possession to under-raiyat unlawfully ejected from his tenancy or portion thereof.

(2) The Collector may, after hearing the parties, about which due notice shall have been given to them or ex-parte, in cases of emergency by an order in writing prevent the landlord from ejecting the under raiyat until disposal of the proceeding or until further orders and if

he is of opinion that any crop or produce of the land which is subject-matter of dispute in the proceeding under this section is liable to-speedy and natural decay, he may, if the situation so warrants and in similar manner as aforesaid direct the proper custody or harvesting or sale, as the case may be, of such crop or produce or the sale proceeds thereof.

(3) When a proceeding is initiated under sub-section(1) the Collector may refer the matter (hereinafter referred to as “dispute”) to a Board to be appointed by him, for promoting the settlement of the dispute between the under raiyat and the landlord.

(4) A Board to be appointed by the Collector in the prescribed manner under sub-section(3) shall consist of a Chairman, who shall be unconnected with the dispute referred to such Board or with any party directly affected by such dispute and two members to represent the parties to the dispute and the person appointed as a member to represent any party shall be appointed on the recommendation of that party:

Provided that if any party does not nominate any person to represent him in the Board or nominates a person who is not available within such time as the Collector considers reasonable, the Collector may appoint such person as he thinks fit to represent that party.

(5) If at any time before the Board has completed its work, the service of the Chairman or any member of the Board ceases to be available, or any member of the Board fails to attend the meeting of the Board on two successive dates without showing cause to the satisfaction of the Chairman, the Collector may appoint any suitable person in the prescribed manner to take his place and the proceeding

shall be continued before such Board as so reconstituted.

(6) The Chairman of the Board to which a dispute is referred shall give written notice to the under-raiyat and his landlord in the prescribed manner and the Board shall make endeavors to bring about an amicable settlement of the dispute and when an amicable settlement of the dispute is brought about, the Board shall forthwith submit as report containing the terms on which settlement had been brought about, to the Collector, who may dispose of the proceeding in accordance with the terms of the report:

Provided that failure on the part of any member of the Board to sign the report shall not effect the validity of the same.

(7) Whereas a Board does not succeed in bringing about an amicable settlement of the dispute, it shall make enquiry into the same, receive such evidence as it considers necessary, record its findings on the disputes and transmit the entire record of the proceeding forthwith to the Collector who may dispose of the proceeding in accordance with the terms of the findings:

Provided that failure on the part of any member of the Board to sign the finding shall not affect the validity of that finding:

Provided further that if any member does not want to sign the findings of the Board he will submit his disagreement on the findings in writing failing which the Chairman will submit his notes on the subject.

(8) In case of disagreement with respect to the findings

of the Board, the Collector shall, after recording his reasons for such disagreement and after giving the parties concerned a reasonable opportunity of being heard, make such enquiry, if any, as he thinks necessary and on being satisfied that –

- (i) the person threatened with ejectment is an under raiyat the Collector shall declare the threatened ejectment illegal and direct that the landlord shall not interfere with the possession of the under raiyat in his tenancy or any portion thereof;
- (ii) the land under dispute is in the tenancy of the under raiyat the Collector shall declare possession of the under raiyat and order the crop or produce or the sale-proceeds thereof, as the case may be, to be divided between the under raiyat and his landlord in accordance with the provisions of sections 69 to 71 of the Act ;
- (iii) the person alleged to have been ejected was an under raiyat of the disputed land on the date of ejectment and was ejected within twelve years before the commencement of proceeding under this section in contravention of section 89, the Collector shall order that the land-lord, or, where any other person, is in possession of the land comprised in the under-raiyat tenancy or portion thereof under any claim derived from the landlord, such person shall restore the under-raiyat to possession of the tenancy or portion from which he

was so ejected.

(9) The order of the Collector under sub-section (6), (7) or (9) shall be in writing and shall state the grounds on which it is made and specify the period which shall not exceed six months from the date of order within which his order shall be carried out.

(10) If the Board fails to record its findings or transmit the record as required under sub-section (7) within a period of six months, the Collector may withdraw the proceeding from the Board and decide the dispute himself according to the provisions of this section.

(11) If the person against whom an order has been made under sub-sections (6), (7) or (8) fails to carry out the orders of the Collector within such reasonable time as may be specified in the order of the order passed to appeal under section 48F the Collector shall 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 compliances with the order or for preventing such threatened ejectment of under raiyat or for restoring possession to under raiyat unlawfully ejected.

(12) The Board shall have the same power regarding the summoning and attendance of witnesses and compelling the production of documents as a Civil Court has under the Code of Civil procedure, 1908 (V of 1908) and the Collector shall have general control and



superintendence over the Board.

(13) Save as expressly provided in this Act, no Civil or Criminal Court shall have any jurisdiction over the subject matter of a dispute after a proceeding is initiated under sub-section (1) by the Collector.

Provided that nothing in this sub-section shall be deemed to affect the power of a Criminal Court to take such action as may be necessary for preventing breach of the peace pending the final disposal of the proceeding by the Collector.”

On plain reading of the provisions, the Collector of his own motion or on an application made in this behalf by the under-raiyat would initiate a proceeding under Section 48E of the Act, (i) if the under-raiyat is threatened with unlawful ejectment from his tenancy or any portion thereof by his landlord, (ii) if there is a dispute between them over the possession of the land, crop or produce thereof, either on the ground of non-existence of relationship of landlord and tenant or otherwise, and (iii) if an under-raiyat is or has been ejected from his tenancy or any portion thereof within 12 years before the commencement of the proceeding under the said section in contravention of the provisions of Section 89, sub-section (2) vests power in the Collector after hearing parties or in case of emergency may pass ex parte order to prevent the landlord from ejecting an under raiyat from the land till the disposal of the proceeding or until further orders.

Sub-section (3) provides that once a proceeding is initiated under sub-section(1), the Collector would refer the dispute to the Board to be appointed by him for promoting the settlement of the dispute between



the parties. Sub-section(4) of Section 48E says that the Board shall consist of a Chairman and two members to represent two parties to be appointed on the recommendation of the parties concerned. In view of sub-section (6), the Chairman has to give written notice to both the parties and then the Board has to make endeavors to bring about an amicable settlement of the dispute. If the Board does not succeed in bringing about an amicable settlement of the dispute, in view of sub-section (7), it has to make enquiry into the same, receive such evidence as it considers necessary, record its findings on the disputes and transmit the entire records of the proceeding forthwith to the Collector who may dispose of the proceeding in accordance with the terms of the findings. In case of disagreement with the report or findings of the Board, the Collector under sub-section(8), after giving the parties concerned a reasonable opportunity of being heard, can make enquiry and he can pass orders restraining the landlord from interfering with the possession of the under-tenant, or declaring the possession of the under-tenant or restoring the possession to the under-tenant. Sub-section (10) provides that if the Board fails to record its finding or transmit the records within a period of six months from the date of its appointment, the Collector may withdraw the proceeding from the Board and decide the dispute himself.

On different occasions, in what manner and method there would be in resolution of dispute under Section 48E has come for consideration,

Section 48E of the Act came for consideration before this Court in the case of Dhanji Singh (supra) where this Court in Para-7 and 8 have provided steps, manner and method to be adopt for the said purposes,

relevant to quote 7 and 8 of the said judgment:-

**Para-7.** In view of the aforesaid provisions, there should not be any difficulty in holding that although the Collector has been vested with general control and superintendence over the proceedings in connection with the dispute between the landlord and the under raiyat, still, at the first instance, after having initiated the proceeding under Sub-Sec. (1) of S.48-E, the Collector has to refer the dispute to the Board. The Board has first to make endeavor for an amicable settlement, failing which it has to make enquiry and has to receive such evidence as it considers necessary, and, thereafter, to record a finding in respect of the dispute. The Collector can decide that dispute only under two contingencies, if he differs with the findings and report of the Board, or, if the Board fails to record its finding within a period of six months from the date of its appointment. But there is no question of Collector deciding the dispute before the Board constituted by him has an occasion to apply its mind. The purpose appears to be obvious, Sub-Sec. (3) itself says in so many words that after initiating the proceeding under Sub-Sec. (1), the Collector may refer the matter to a Board for promoting settlement of the dispute between the parties. The Board, which consists of one representative of both the parties, shall be in much better position to make endeavour about the amicable settlement of the dispute. In the case of Ram Narain Singh V/s. State of Bihar, AIR 1973 Pat 275, a Bench of this Court has considered the scope of this S.48-E and it was pointed out that the function of the Board was similar to arbitrators, the only difference being that in case of a proceeding under S.48-E there is a provision of compulsory reference to arbitration.



In my view, although Sub-Sec. (3) says that when a proceeding is initiated under Sub-Sec. (1) the Collector may refer the matter to a Board to be appointed by him, it has to be interpreted that after initiating the proceeding he has to refer the matter to the Board. It was pointed out, in the aforesaid Ram Narain Singh case in connection with Sub-Sec. (1) of S.48-E that, no doubt, the legislature has used the word may which is generally understood as enabling and not mandatory, but "when the power conferred by the statute is coupled with the duty of the person to whom it is given to exercise it, then even though the word may is used, it has to be construed as imperative." In the case of Julius V/s. Lord Bishop of Oxford [(1880) 5 AC 214] The Lord Chancellor (Earl Cairns) observed :-

"That where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."

It was further observed by the Lord Chancellor :-

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when

called upon to do so."

In my view, although Sub-Sec. (3) of S.48-E uses the expression may, it has to be held that once a proceeding is initiated under Sub-Sec. (1) of that Section, the dispute has to be referred to the Board to be constituted by the Collector. A Bench of this Court in the case of Lakshmi Prasad Bhagat V/s. State of Bihar, 1978 BBCJ(HC) 750 has held that the Collector after initiating the proceeding has no jurisdiction to decide the dispute without reference to the Board. I am in respectful agreement with the said view. If the impugned order amounts to deciding the dispute itself, then it has to be held that the Sub-divisional Officer had no such power before it had been referred to the Board.

Para-8. Being faced with this situation, the learned counsel for the respondent submitted that the impugned order does not amount to deciding the dispute finally, but it only amounts to refusal to initiate a proceeding under Sub-Sec. (1) of that Section. Learned counsel further urged that the Collector is not bound to initiate a proceeding, no sooner an application is filed on behalf of the under-tenant, he has to apply his judicial mind and in appropriate cases he may reject the prayer of the under-tenant. What is the scope of Sub-Sec. (1), can be determined only after it is ascertained as to whether under Sub-Sec. (1) the Collector has to exercise an administrative power or a quasi judicial one.

According to learned Government Advocate, who appeared on behalf of the State, the Collector has no option, after having received an information or petition from the under-tenant regarding threatened ejectment, or a dispute about possession or dispossession of the under tenant, but to refer the same to the Board for decision. As such,



according to him, there is no question of exercise of a quasi judicial power at that stage. In my opinion, it is difficult to accept this contention. Sub-Section (1) prescribes three contingencies, mentioned above, under which the Collector has to initiate a proceeding. The Collector, before initiating the proceeding has to be satisfied on the materials produced before him or on the basis of the information received by him that one of those three requisite conditions exists.

Is the Collector bound to initiate a proceeding under Sub-Sec. (1), if an allegation has been made in the petition of the under-tenant, that he had been dispossessed on a date which is beyond 12 years from the date of the filing of this application ? Similarly, is he bound to initiate a proceeding if the allegation or information is that the under-tenant has been dispossessed not by his landlord but by a third person ? The answer in both the cases shall be in the negative. Therefore, it cannot be said that at the time of initiating a proceeding, the Collector has not to apply his judicial mind for the purpose of ascertaining as to whether the requisite conditions for initiating the proceeding exist or not.”

It appears from the Full Bench judgment, the Collector has been vested with the power of general control and superintendence over the proceeding and particularly sub-section(10) provides that if the Board fails to record its findings or transfer the records within a period of six months from the date of its appointment, the Collector may withdraw the proceeding from the Board and decide the dispute himself.

In the case of Rasik Lal Singh vs. the State of Bihar, reported in AIR 1979 Pat. 172 it has been held that Section 48E(10) of the Act provides that if the Board fails to record its findings and to transmit



the record to the Collector, in such circumstances, the Collector may withdraw the proceeding from the Board and decide the dispute himself according to the provisions of sub-section (6) of Section 48E of the Act. It is also mandatorily required, the Board shall make endeavor to bring about the amicable settlement of the dispute between the parties. If the Board fails to bring about amicable settlement between the parties, then it shall record evidence under sub-section (7) of Section 48-E of the Act. In consequence, the Collector is required to make Endeavour to bring about the amicable settlement of the dispute between the parties. If he fails to do so, he will be entitled to record evidence under sub-section (7) of Section 48E of the Act and decide the issue. It will be relevant to quote Par-2 of the judgment which is as follows:

Para-2 : The Deputy Collector Land Reforms decided the dispute between an under-raiyat and the landlords under Section 48-E(10) of the Act for the reasons that the Board failed to record its findings and to transmit record to the Collector under sub-section(7) of Section 48E of the Act. In this circumstance the Collector decided the dispute under Section 48E(10) of the Act. Section 48E(10) of the Act provides that in such circumstance he Collector may withdraw the proceeding from the Board and decide the dispute himself according to the provisions of this Section. By virtue of sub-section(1) of Section 48E of the Act, the Collector shall have to decide the dispute himself according to the provisions of Section 48E of the Act. Sub-section(6) of Section 48E of the Act requires that the Board shall make endeavours to bring about an amicable settlement of the dispute between the parties. If the Board fails to bring about amicable settlement between the parties, then it shall record evidence under sub-

section (7) of Section 48E of the Act Under sub-section(10) of Section 48E of the Act the Collector shall follow all the provisions of this section. If it is so, the Collector is required to make endeavours to bring about an amicable settlement of the dispute between the parties. If the Collector fails to bring about an amicable settlement between the parties, then he will be entitled to record evidence under sub-section(7) of Section 48E of the Act”

In another judgment in the case of Bhaddo Uraon v. State of Bihar, reported in 1988 PLJR 1101 similar question came for consideration where this Court held that once a proceeding is initiated under sub-section (1) of Section 48E of the Act, the dispute has to be referred to the Board to be constituted by the Collector. The expression “may” in sub-section(3) of the said Section 48E was construed and it was held that the same should be read imperatively. The Collector has no jurisdiction to decide the dispute without reference to the Board. It will be appropriate to quote Para-25 of the judgment which are as follows:

Para-25 I have considered the decision of the Full Bench of this Court in Dhanji Singh (supra). I note that in the judgment of N.P.Singh,J it was held specifically, following an earlier decision of this Court in Lakshmi Prasad Bhagat v. State of Bihar, reported in 1978 BBCJ (HC) 750; 1979 PLJR 82 that once a proceeding is initiated under sub-section(1) of Section 48E of the said Act, the dispute has to be referred to the Board to be constituted by the Collector. The expression “may” in sub-section (3) of the said section 48E was construed and it was held that the same should be read imperatively. It was held further and specifically that After initiating a proceeding under section 48E(1) the Collector has no

jurisdiction to decide the dispute himself without reference to the Board.”

In the case of Miajan Khan v. State of Bihar reported in 1989 PLJR 389, the duty of the Collector under Section 48E of the Act came for consideration where it has been held that the Board must not only make endeavor to bring about the amicable settlement, in fact but if such settlement is arrived at the only function that is cast upon the Board is to transmit the record of the case to the Collector with his findings on the basis thereof. On the other hand, if the settlement cannot be arrived at it is to receive the evidence produced by the parties and to record his findings with regard to endeavor made by him for bringing about the amicable settlement. It will be apt to quote Para-17 and 18 of the judgment which is as follows:

“Para-17: It is, therefore, apparent that the Board must not only make an endeavor to bring about an amicable settlement in fact but if such a settlement is arrived at, the only function, that is cast upon the Board, is to transmit the record of the case to the Collector with its findings on the basis thereof. On the other hand, if such a settlement cannot be arrived at, only in such an event it is to receive evidence as may be produced by the parties. It is, therefore, in my opinion, absolutely necessary for the Board to record a finding with regard to the endeavor made by it for bringing about an amicable settlement.

Para-18: There cannot be any doubt whatsoever that the Board has to record a finding as to what happened to its endeavors relating to bringing about an amicable settlement of the dispute between the parties. In my opinion, therefore, it was obligatory on the part of the Board to record such facts in its order-sheet and I absence of any such entry in

the order-sheet it cannot be presumed that the Board has made an Endeavour to bring about an amicable settlement or such an attempt resulted in a failure.”

In *Raj Kumar Prasad v. State of Bihar* reported in 1989 PLJR 73 in Para-4 and 5 of the judgment, this Court has arrived to a conclusion that the constitution of the Board and the efforts of conciliation by the Board is mandatorily required. In failure, the whole proceeding will vitiate.

In *Awadhesh Kumar Singh v. State of Bihar*, reported in 1991 (2) PLJR 560 this Court said that the first step to be taken is to constitute a Board and for constituting the Board apart from nominating the Chairman, it was incumbent upon the Land Reforms Deputy Collector to appoint the members to represent the interest of the contesting parties. If the Board was not constituted properly it cannot be said that the dispute was referred to the Board to settle the dispute and/ or declare the right of parties. So the thrust has been given of proper constitution of the Board.

This Court again had an occasion to consider the matter relating to Batraidari dispute under Section 48E of the Act in the case of *Dinesh Murmu v. State of Bihar* reported in 1998(1) PLJR 110 where it has been said that the Collector under the statutory obligation has to satisfy himself before constituting the Board and referring the dispute subject to the condition that the claim of under-raiyat be not vexatious, malicious or frivolous dispute but required to be a bona fide Bataidari dispute between the parties. The proceeding under Section 48E of the Act is quasi judicial proceeding and order initiating the proceeding can only be passed by the Collector on due application of mind. It is relevant to quote

Para-8 of the judgment which is as follows:

Para:8 : From the scheme of Section 48E of the Act, it is quite clear that a dispute relating to a claim of Bataidari right must normally be resolved by a Bataidari Board either by amicable settlement or on failure to make the parties arrive at a settlement by an enquiry to be conducted by the Board itself. The Collector, however, is under a statutory obligation to satisfy himself before constituting the Board and referring the dispute to it that the claim made by the under raiyat was not vexatious malicious or frivolous and that there was a bonafide Bataidari dispute between the parties. The reasons for the Collector to so satisfy himself are obvious. In the first place, the decision to initiate a proceeding under Section 48E of the Act has been held to be quasi judicial in nature and hence, an order initiating the proceeding can only be passed by the Collector on due application of mind; the other reason is to protect the land lord from unnecessary harassment from malicious or vexatious claims. The statutory obligation of the Collector to satisfy himself that the claim was not malicious or vexatious does not however, extend his authority to the extent that he may himself decide, on merits, the dispute between the parties. At this stage it needs to be clearly borne in mind that prima facie satisfaction about the claim being bona fide is one thing and it is some thing quite different to take upon oneself the adjudication of the dispute, delve deeply into the respective claims of the parties, shift the evidences adduced on their behalf and then to arrive at a finding regarding the claim being true or untrue. In view of the aforesaid it becomes the duty of the Collector, once he is prima facie satisfied about the claim being bona fide, to constitute a Board and to refer the dispute to it and the

Collector can decline to make reference to the Bataidari Board only in case he found that the claim was ex facia malicious or frivolous.”

The power under Section 48E(10) specifically came for consideration in the case of Kamleshwari Mandal v. Balgovind Thakur, reported in 1984 PLJR 419 where this Court has held that the Collector under sub-section (10) of Section 48E was bound to follow the same procedure which was applicable for the Board. Sub-section 48E(10) of the Act requires the Collector “to decide the dispute himself according to provisions of this Section”. The Collector after withdrawal has to take up the proceeding de novo and the record of the Bataidari Board is of no use and the Collector would not be bound by the evidence recorded by the Board after withdrawal of the proceeding by the Collector, materials before the Board becomes no more for all practical purposes and the Collector has to start the proceeding with clean slate. It would be relevant to quote Para 7 and 8 of the judgment as follows:

“Para-7 : As regards the second contention, I have reexamined the reasons given in the decisions referred to earlier for taking the view that a Collector acting under sub-section (10) of Section 48E was bound to follow the same procedure which was applicable for the Board. Sub-section(10) requires the Collector to ‘decide the dispute himself according to the provisions of this section’. The emphasis that he has to decide the dispute according to the provisions of the Section cannot be given any other meaning than what has been given in the case of Rasik Lal Singh (supra). The Collector after withdrawal has to take up the proceeding de novo and the records of the Bataidari Board are of no use to him. If the contention of Mr. Roy is to be accepted then the Collector

would also be bound by the evidence recorded by the Board or, for that matter, could refer to it, but obviously he cannot do that. In my opinion, the proceedings of the Bataidari Board after withdrawal become no nest for all practical purposes and the Collector has to start with a clean slate.

“Para-8: At the same time we cannot retain the order passed by the Collector in the circumstances. Section 48E of the Act does not authorize the Collector to pass an order in the manner he passed the same. In terms of the directions contained in the said section of the Act, it was obligatory on the part of the Collector to constitute a Board in the manner as directed in the said section and thereupon, the Board should have made efforts for amicable settlement between the parties. Failing which, it was obligatory for the Board to enquire into the complaint, receive evidence and to record findings to be forwarded to the Collector. Only thereafter, the Collector could decide the matter either by accepting the findings or by disagreeing with the same upon recording reasons therefore after hearing the parties. This procedure having not been followed, we are constrained to set aside the order of the Collector and remit back the matter to the Collector with a direction upon him to constitute a Board and thereupon to settle the issue in the manner as indicated above”.

In the case of *Sone Lal Yadav v. State of Bihar* reported in 2007 PLJR 70, this Court had an occasion to decide the issue, action to be taken by the Collector when the dispute between the landlord and the under-tenant is placed before him. The Court has said that he is statutorily bound to constitute the Board and the Board has to make efforts for the settlement of the dispute and in failure of amicable settlement, it will be obligatory for the Board to enquire into the complaint, receive evidence

and recorded a finding to be forwarded to the Collector under the Act and only thereafter the Collector could decide either accepting the finding or disagreeing with the same upon recording reasons thereof and after hearing the parties. In a situation when this procedure is not followed, the order of the Collector would vitiate. It would be proper to quote Para-4 of the judgment which is as follows:

In view of the aforesaid discussion, let us examine the present case as to whether the Collector on remand has followed the provisions as provided under Section 48E(10) of the Act or not. First this Court has to see the nature of the order passed by this Court in LPA No. 940 of 2003 (Annexure-15). The Court has given its opinion when the Collector under the Act exercises his power under Section 48E(10) of the Act recalled the record from the Board he did not make effort for amicable settlement of the dispute. This itself vitiated the order of the Collector. On this finding the matter was remanded back and the Collector was asked to follow the procedure as provided u/s 48E(10) of the Act.

In view of the judgment as discussed above, under Section 48E(10) of the Act, the Collector was required to follow the same procedure to be followed by the Board for conciliation. Meaning thereby he was required to appoint Panches and to make efforts for settlement of the dispute. This Court cannot accept the contention of the petitioners that once the Board failed to get the matter settled, again the Collector is required to constitute the Board consisting chairman and Panches of respective parties but in terms of sub section (7) (8) (9) (10) himself will take responsibility on his shoulder and the duty has been cast upon the

Collector himself to appoint Panches, make effort for amicable settlement and in failure to arrive, in settlement, the Collector on the basis of evidence recorded by him decide the dispute. If the interpretation submitted by the counsel for the petitioner is accepted it will remain an unending process.

On remand of the case, the order dated 21st August 2009 and 25th August 2009 relate to appointment of Panches of the respective parties and from the side of petitioner, Sri Rajdeo Singh and Sri Subedar Pandey were appointed and from the side of the Respondent Nos. 8 to 12 Sri Sarangdhar Rai was appointed as Panches. In the right hand side, signatures of Subedar Pandey and Rajdeo Singh are appearing with the dated "25th August 2009". The order-sheet dated 28th August 2009 shows that Panches from both sides made effort for settlement of the dispute but it resulted in failure. Right hand side shows the signature of the Panches from both sides.

There is specific mention in the order dated 28th August 2009 that effort was made but it resulted in failure and thereafter the order dated 1st September 2009 shows both sides were present and Subedar Pandey and Rajdeo Singh being Panches of Bataidar were present but the Panche of landlord was absent. The Collector directed for production of the evidence and filing of written argument. The next date was fixed on 8<sup>th</sup>/10 September 2009. On 8<sup>th</sup>/10 September 2009 the order sheet shows both sides filed written argument along with the relevant records and the authority has fixed 12th September 2009 for physical verification.

From the report of the Land Reforms Deputy Collector it shows that on 12th September 2009, he visited to the disputed plot after



giving notice to both the parties and further recorded in the report that he had made local inspection with the consent of the parties. There witnesses were already present. The report itself discloses that sons of Babuli Ahir, namely, Nand Lall Ahir and Chhote Lall Ahir were present and in their presence, evidence of witnesses have been recorded and on the basis of local inspection and evidence recorded, he recorded in the report that major portion of the land is not culturable as 97 decimals of land is a ditch, submerged under water, 2.66 acres of land is an orchard where cattle fair is conducted in regular manner and certain portion of the land was taken for construction of canal and rest 2.40 decimals is agricultural.

In the report it has been also mentioned that respondent nos. 8 to 12 have been cultivating the land and sons of Babuli Ahir live outside the village and they do their respective business there. Mother of petitioners has died and they have no connection with the cultivation. This finding has been recorded on the basis of evidence brought before him and after that he passed the order vide order dated 14th September 2009, part of Annexure-2. This Court is of the view that after remand, the Collector was to appoint Panches in terms of Section 48E(10) of the Act. The contention that has been raised by the petitioners is that again the Collector was to make constitution of the Board, this Court is of the view that it will be nothing but moving the clock anti-clockwise. When the Court referred the matter under Section 48E(10) of the Act, then the Collector has rightly allowed the parties to nominate the Panches, he along with Panches made effort to resolve the dispute, in failure he visited the spot, recorded the finding and thereafter decided the dispute. This Court is of the view that Collector has followed the proper procedure in resolving

the dispute.

In the present case, the order was challenged before the Bihar Land Tribunal and there also, the Chairman by interim order dated 30th July 2013 passed in BLT Case No. 130 of 2013 (Annexure-31) directed the Collector to make efforts for settlement of the dispute. After the remand again the Collector made efforts for settlement of the dispute but this time also he has recorded the failure. In such a situation, the stand taken by the petitioners that the order vitiated on account of non-compliance of Section 48E (10) of the Act is not sustainable. Accordingly, the same is rejected.

The contention has been raised by the respondents that most of the lands is not culturable land and, as such, provisions of the Act does not apply and this proposition he has raised on the strength of judgment in the case of Shankar Mandal v. Deputy Collector, reported in 1991(2) PLJR 426. There the Court has held that Section 48E of the Act applies to agricultural land only as the existence of under-Raiyat presupposes the existence of Raiyat and holding held by the Raiyat. There cannot be any Raiyat, if there is no holding within the meaning of the Act and consequently there cannot be under-Raiyat.

In absence of agriculturable land the existence of Raiyat does not arise. In such view of the matter the requirement is to examine, what is the real position of fact with regard to the disputed land. As it appears from the record of the case that certain orders and reports that have been filed by the petitioners are in their favour such as the order dated 18th July 1978 (Annexure-25), order dated 22nd September 2001 (Annexure-26 series) and the order dated 14th March 2002 (part of



Annexure-26) which was recorded on remand LPA No. 365 of 2000 (Annexure-11) whereby direction was given to decide as to whether the dispute is bona fide or not. Accordingly, he has visited the spot, recorded his finding, constituted the Board and has also passed the order dated 16th May 2003 (Annexure-14) which was passed in favour of petitioners on the basis of affidavit filed by Raghubansh Dubey and Annexure-35 Series also shows the nature of the land to be culturable.

In contra certain orders, reports and findings are in favour of respondent nos. 8 to 12 where most of the lands has been shown not agriculturable. On being remanded by the order passed in CWJC No. 3187 of 1992 (Annexure-8) the Deputy Collector Land Reforms vide order dated 27th May 1999 (Annexure-9) has recorded that most portion of the land is non-agricultural and the land is cultivated by Deo Kumar Dubey and others. The report dated 12th September 2009 (Part of Annexure-17) of the Land Reforms Deputy Collector it self shows that most of the lands are not agriculturable. The report of Assistant Agriculture Supervisor) dated 18<sup>th</sup> April 1978 (Annexure-D to the counter affidavit) also shows that the land is not culturable.

The money receipt issued by the Bihar Agriculture Produce Marketing Samiti for holding cattle Mela over plot no. 2179 shows that the cattle fair is organized on this plot so much so that notice issued under Section 12(2) of the Land Acquisition Act by the Government to receive the compensation amount to Ramashray Dubey and others shows (Annexure-E series) that the land was acquired for the canal purpose.

In view of aforesaid discussions facts emerges, some documents indicate that the land in dispute is agriculturable land, certain



reports show the lands are not culturable, the last report of Land Reforms Deputy Collector specifically states that certain portion of the land is ditch, another where the cattle fair is conducted and certain portions have been taken for acquisition, rest 2.40 acres of land is culturable which was challenged before Appellate Tribunal and the Tribunal discussed and did not find the error, this Court is of the view that when there is a concurrent finding of two authorities, it will not be appropriate for this court to interfere with the findings recorded by them and this Court affirms the view that most of the lands are not culturable and only small portion is culturable land and, as such, the proceeding under Section 48E of the Act is not sustainable in law.

This Court does not feel inclined to discuss the issue as to whether the father of the petitioners was under-Raiyat of the land or not but certainly Raghubansh Dubey has filed an affidavit showing him as his under-Raiyat but the fact remains that Raghubansh Dubey has executed the deed of gift in favour of predecessor in interest of respondent nos. 8 to 12 in 1977. The subsequent affidavit filed by him is not germane to prove the existence of relationship for under-Raiyat. As this Court is not going to discuss the issue involved but certainly the fact is that till to-day there is no final adjudication with respect to relation of Babuli Ahir was under-Raiyat. All the time, whenever there is report or order was passed in favour of either of side was remanded back for fresh consideration. In this view of the matter, any finding recorded in earlier order has very little role to show him under-Raiyat of the land but certainly the question would arise, in view of aforesaid position when his status as under-Raiyat was not finalized, he cannot be said to be have acquired the status of an

occupancy Raiyat. If a person has not acquired status of occupancy Raiyat, then the question would arise whether the heirs and successor has a right to succeed as under-Raiyat of the land.

It will be necessary to examine certain provisions of the Bihar Tenachy Act. Section 5 of the Act has defined the Raiyat to mean 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 also the successors in interest of persons who have acquired such a right. It also shows where a tenant of land has a 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 purpose of gathering the produce of it or of grazing cattle on it. Sub-section(3) of Section 5 shows that 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. After introduction of Bihar Land Reforms Act position of tenant has not changed. Under-raiyat has been defined in sub-section (3) of Section 4 which states that tenants holding, whether immediately or mediately, under raiyats and following classes of Raiyat. Raiyats holding at fixed rates, which expressions means raiyat holding either at a rent fixed in perpetuity or at a rate of rent in fixed perpetuity occupancy raiyat, i.e. raiyats having right of occupancy in the land held by them; and non-occupany-raiyat, i.e. raiyat having no such occupancy right.

So the question would arise in the present case whether a person having no occupancy raiyat can succeed to a right of cultivation of his predecessor in interest. The question arose in the case of Bibi Jaloosan



v. Bhulai Baitha, 1981 BBCJ 466 where the issue has been raised whether a tenant who has acquired occupancy right has power to alienate that right by way of sale to the 3rd party or not. There the Court has said that the under-raiyat acquired the occupancy right by dint of continuous possession for more than twelve years can have right of succession does not have right to transfer the land for sale to the 3rd party. As the Court did not find any provision in Chapter-VII which authorizes an under-raiyat who acquired the occupancy right can transfer his right by way of sale. It will be relevant to quote Para-7 & 10 of the judgment which are as follows:

Para-7 Chapter V of the Act deals with the occupancy rights. Section 26 A occurring in Chapter V states inter alia that every occupancy holding or a portion thereof, together with the right of occupancy therein, shall be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property, and all transfers made by sale, exchange or gift and all bequests shall, subject to the provisions of sub-section(2), is binding on the landlord. Section 23 and 23 A of the Act occurring in Chapter V thereof deal with right in respect of the use after acquisition of occupancy right therein and about the rights of occupancy raiyats, etc. Chapter VII of the Act deals with under raiyats. Section 48G occurring in that chapter states about acquisition of rights of occupancy by under raiyats. This follows section 48D, which too occurs in that chapter. It runs as follows:

“An under raiyat, who has acquired a right of occupancy in any land under Section 48A, shall be subject to the same provisions with respect to rights in trees and bamboos and the use of, succession, to, and eviction from such land as an occupancy raiyat.”

Obviously like Section 26A occurring in Chapter V of the Act there is no provision in Chapter VII entitling an under raiyat even after acquisition of the occupancy right by him, to transfer his under raiyati interest by sale or otherwise. In the absence of any provisions in the Act entitling an under raiyati with occupancy right to transfer his under raiyati interest in the land any transfer made by an under raiyat of his under raiyati interest cannot be binding on the raiyat under whom the under tenancy stands, unless the matter is covered by Section 183 of the Act or other relevant provisions thereof regarding which no case has been made out in such a situation the raiyat will be entitled in law to repudiate any such transfer made by the under raiyat undisputedly, the raiyati interest of disputed land belonged to Mushaharu whose heirs sold their interest under the sale deed dated the 4<sup>th</sup> July 1962. Thus the title of the plaintiff over the disputed land as raiyat is intact and was not disputed before this Court. Jitni and after her defendant s 6 and 7 merely claimed to be under raiyat in

respect of these lands, though with a right of occupancy. Thus the symbolical possession of the plaintiff over the disputed land as raiyat after her purchase remains intact.”

“Para- 10 No other contention having been raised it has to be held that the plaintiff is entitled to the declaration of her title as raiyat over the disputed land and to confirmation of her possession thereon as raiyat. She is further entitled for permanent injunction against the defendants restraining them from interfering in any way with her right of possession over the suit land as a raiyat. In view of the law as it stands and the circumstances stated above the transfer of under raiyati interest in favour of the defendants 6 and 7 cannot be regard as a good and valid, much less binding on the plaintiff. The approach adopted by the lower appellate court is wrong and has resulted in findings which cannot but be regard as perverse and illegal.”

In the case of Padarath Chaudhary v. Mastt. Jogtia reported in 1987 BLJ 636 similar issue was raised where the judgment passed in Munilal Mandal and others v. Babuji Mandal: 1963 BLJR 90 was considered and the Hon’ble Court has taken note that in Jageshwar Mishra case, ILR (1) Pat 317 (FB) the full Bench categorically has said –

“It must be held that the Act does not give an under raiyat the right to transfer his interest even if he has an occupancy status.”

“One can distinguish Munilal’s case (supra) on facts by taking notes of the veto which the landlord has been allowed, and



accepting that the raiyat is the landlord with respect to the under raiyat holding in possession of the under raiyat having occupancy right decide the case in favour of the raiyat. The plaintiff respondents are raiyats who have questioned the validity of the transfer made by the under raiyat. This aspect of the case aside, however, in the scheme of things that have given to the raiyat a somewhat superior position even as occupancy tenant that given to the under raiyat, the right to transfer the land has been engrafted in Section 26-A of the Act.”

“I have already taken notice of the scheme of the land the reasoning in Shri Kishun’s case (supra) which go to support the conclusion that the under raiyat having occupancy right by dint of his continuous possession for more than twelve years can have rights to succession etc. but cannot have the right to transfer. A similar view has been taken by Ch. S.S.Sinha,J in Bibi Jaloosan v. Bhulai BAITHA, 1981 BBCJ 466. He has said in no ambiguous words that the transfer by the under raiyat of his under raiyati interest conveys no title to the transferee.”

Similar issue came for consideration in the case of Md. Yunus v. Moinuddin reported in 2002 (4) P.L.J.R. 31 as to whether the Sikmi right is transferable unless custom prevails in the village. The Court has dealt with the Sikmi right, held, even though a person remain in possession for more that twelve years may have a right of succession but cannot have right of transfer, proper to quote para-6 of the judgement

“Para-6: I am unable to accept the submission of Mr. Mazumdar. It is now well known that Sikmi right is not transferable unless a custom prevailing in the village as pleaded and proved. The defendant-appellants



have failed to make out a case of any such custom prevailing in the village. In the case of Padarath Chaudhary & Ors. V. Most. Jagtia & Ors, reported in 1987 BLJ 636 learned Judge of this Court on detailed consideration of various provisions of the Bihar Tenancy Act and also the aforementioned decisions on the point has come to the conclusion that under-raiyat having occupancy right by dint of his continuous possession for more than 12 years can have the rights to succession etc. but cannot have the right to transfer. In the case of Bibi Jaloosan v. Bhulai Baitha (supra) a learned Judge of this Court has clearly held that transfer by an under raiyat under his under raiyati interest conveys no title to the transferee.”

Similar view has been reiterated in the case of Shukdeo Pandit v. State of Bihar, reported in 2013(2) PLJR 625. There the Court has held that Bataidari is an agreement between a raiyat and under-raiyat. That agreement subsists till the said Bataidar is in cultivating possession over the land and he pays to the landlord and gives the answer to the question that the Bataidari right is the personal right, not of the family. It is relevant to quote Para-12 of the judgment which is as follows:

“Para-12 : The original application filed by Khantar Pandit in the year 1991 under Section 48E of the Act has not been brought on record. Khantar Pandit is said to have claimed to be Bataidar in cultivating possession of the land. There is no pleading in the writ petition that Khantar Pandit, the father of the present appellant, claimed the status of occupancy raiyat. Bataidari is primarily an agreement between raiyat and

under raiyat (Bataidar). That agreement subsists till the said Bataidar is in cultivating possession over the land and he pays to the landlord produce-rent for the land held by him. There is no pleading in the writ petition that Khantar Pandit ever claimed to have acquired the right of a raiyat within the meaning of Section 48D of the Act; no statutory provision has been shown to us on the basis of which the appellant herein can claim Bataidari rights by way of inheritance.”

The aforesaid judgments itself exposits the proposition, unless the Bataidar has acquired the status of occupancy raiyat by dint of continuous possession for twelve years cannot claim the right of succession as the under-raiyat, i.e. right to cultivate the land. In this view of the matter, the finding that has been recorded by the Bihar Land Tribunal that after the death of Babuli Ahir, the present petitioners cannot step into the shoe of their father is correct, admittedly Babuli Ahir had never acquired the status of occupancy raiyat under Section 48-C of the Act. As there is no provision under Chapter-VII of the Act dealing with right of under Raiyat provides the right of succession to an under-raiyat having been not declared to have acquired the status of occupancy right. In this view of the matter, the present petitioners, this Court is of the view, cannot succeed to their father Babli Ahir.

The next question that has been raised by the petitioners that as during the LPA proceeding vide LPA No. 940 of 2003 the original land-holder died and present petitioners were substituted, allowed to prosecute the case without any objection from the side of respondents and as such Respondent Nos. 8 to 12 cannot be allowed to raise their objection to prosecute the present case on the ground of waiver, estoppel

and acquiescence.

The judgment that has been relied on by the petitioners in the case of Prasun Roy v. Calcutta M.D. Authority, reported in AIR 1988 SC 205 does not apply to the present case, as that was a case related to arbitration. The Arbitrator was appointed, parties have continued to participate in the proceeding when it was decided against one of the parties, then he has taken the issue of disability of a person to be appointed as an Arbitrator. The Court has held that when he has continued to participate in the proceeding without any protest and he has taken chance of success, in failure he cannot be allowed to turn round and challenge the order but here the fact is quite different. It is also well known principle of law that there is no estoppels against the Statute. If the law does not allow such act to be done even by agreement of the parties, illegality cannot be cured merely, not raised objection at proper stage. In this view of the matter, this Court is of the view that the present petitioners do not have right to pursue the case after death of their father Babuli Ahir in 2005.

In view of the aforesaid discussion, this Court is of the view that the order dated 21<sup>st</sup> November 2013 (Annexure-1) passed by the Bihar Land Tribunal as well as the order passed by the Land Reforms Deputy Collector dated 14<sup>th</sup> September 2009 (Part of Annexure-2) do not require any interference.

Accordingly, this petition is dismissed.

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(Shivaji Pandey, J)