

USE BASED ENTITLEMENTS - CHANGING DIMENSION OF LAND OWNERSHIP IN INDIA

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Introduction

Land owning is a dear fact for many citizens in fact some people judge prosperity in terms of the extent of land owned. No person requires land more than the extent required for utility or livelihood people tend to yearn for owning more land. The reasons for owning more extent of land than required could be that: (i) it gives them the pleasure of feeling competent or (ii) it provide more quantum for their progeny to inherit or (iii) it gives them an assurance to generate money in times of need as an asset or (iv) to increase food production or (v) for other reasons better known to them. It is only the few out of the box thinkers who may not have so much liking to own land. In spite of interest to own the land it is the means to own that matters, the more one like to own and the less means they have may lead to desperation or disapproval of the society around them. There are issues such as moral, ethical, social and legal issues involved in owning land. The changing scope of the characteristics of land ownership in India requires to be analyzed as it can have impact on our economical, cultural, social and emotional values.

Legally speaking ownership generally encompasses certain characteristics,¹ in the context of land ownership they can be stated as:

- 1) Right to consume, destroy or alienate the land owned (Owner may plant fruit bearing plants or leave it uncultivated or do not bother to maintain record of ownership which in the long run may ruin his rights or may alienate to others by way of sale, gift etc.);
- 2) Right to use and enjoy and land owned (Owner may construct a house and live in it, cultivate it, develop drip irrigation facility, build resorts and make money out of it etc.);
- 3) Right to possess the land owned (Owner may let out a portion or give on lease but the right to regain possession shall vest with owner so it is not the actual possession that matters but the right to possess matters to determine ownership);
- 4) Indeterminate duration and perpetual interest (Owner may retain ownership until death or sell it, once the sale takes place the

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1. P.J. Fitzgerald (rev.) Salmond, "Jurisprudence", 12th ed.1966, p. 246.

buyer becomes owner and the buyer exercises same rights. So these rights remain perpetually and with whom and how long are indeterminate as it depends on the owner when the intention of dispossession actually materializes); and

- 5) Residuary character (Owner rights are subject to rights of tenants however the residuary rights if any lies with owner and does not go with tenancy).

Modes of Owning Land

In India it is legal for government to acquire others land in the name of eminent domain for any valid purpose under Land Acquisition laws. It is legal under transfer of property law for a mortgagee to acquire mortgagors land if the mortgagor fails to repay as promised in mortgage agreement. It is legal for the children to own their parents land on their death as per the laws of inheritance. It is legal for a non heir to own land under a gift deed or a will deed as permitted by laws of succession. Sale off course is still the primary mode of owning land from an unknown or a known seller. Unclaimed land belongs to the Government. Forest lands, wetlands and other lands which cannot be owned by individuals for any reason provided in any law shall be owned by Government. Corporations, firms and societies may own land in their own name. The prominent modes of land ownership can be summarized as follows:

- 1) Sale (Buyer becomes owner; buyer may be individual, firm, government etc.);
- 2) Inheritance (Heirs of deceased becomes owner in accordance with the applicable law such as Hindu Succession Act, 1956 etc.);
- 3) Succession (Successors of deceased becomes owner by will etc. with applicable law such as Hindu Succession Act, 1956 etc.);
- 4) Mortgage (Mortgagor unable to pay debt and mortgagee as secured creditor becomes owner with applicable law such as Transfer of Property Act, 1882 etc.);
- 5) Eminent domain (Land Acquisition Act, Urban Development Authority Act etc. empower Government to acquire land irrespective of the intention of the owner in the interest of larger public and thus becomes owner. Government may also assign land in public interest to public);
- 6) Adverse possession (Tenancy Laws which empower the tenant in case of long undisturbed tenancy to become owner etc.); and

- 7) Land ceiling (Government may take over land of its citizens or corporation etc. if the extent is beyond the prescribed limit under urban land ceiling or agriculture land ceiling law etc thus claiming ownership).

Nature of Ownership

The nature of ownership may determine the entitlements of owner and the heirs however the characteristics of ownership are generally not affected by nature of ownership. The different types of nature of ownership could be summarized as follows:

- 1) Joint Ownership (The example for this kind of ownership is the coparcenary interest as given in Section 6 of Hindu Succession Act, 1956);
- 2) Co ownership (The example for this kind of ownership can be shareholders of a limited liability Company etc.); and
- 3) Sole Ownership (The example for this kind of ownership can be an Individual owning a piece of land).

The characteristics of ownership in cases of all modes of ownership and all nature of ownership are generally found across in all instances. The following are some of the instances where few of these characteristics are found and not all of them are present.

Limited Ownership

Limited Ownership was provided to widowed Hindu women under the Hindu Women Right to Property Act, 1937 in India before the enactment of Hindu Succession Act, 1956. The Act empowered women (widow, daughter) to inherit property and empowers them to use and enjoy the property they inherited but they could not alienate it except in case of legal necessity and not otherwise, hence this ownership was popularly referred as limited ownership.² This kind of ownership is abolished by the Hindu Succession Act, 1956. This is different from *Stridhana* which was considered women's property and would be inherited by her heirs unlike women's estate (property inherited under Hindu Women Right to Property Act, 1937) which would revert back to the heirs of last male holder. The people who would inherit it as heirs of last male holder were referred as reversioners and their interest in the property was called reversionary

2. The widow would inherit the property of her husband on his death, however on her death the property would revert back to the heirs of the last male holder i.e. her husband in this case and not to her heirs.

interest. This ownership is popularly referred as women's estate or limited ownership, it is called limited ownership as the owner did not enjoy all the powers like other owners.

Life Estate

Another kind of ownership which is prevalent in India since olden times and even today is life estate under which an interest is created in favor of a party who can use and enjoy the property till his death without interruption however he / she can never alienate it. It may be created in favor of heir or a non heir. Section 19 of Transfer of Property Act, 1882 provides for different kind of ownership in land which is known as vested interest.³ Vested interest can be created as a life estate or even otherwise. The vested interest limits the ownership rights.

Testamentary succession also provides for creating such interest by will deeds. Section 119 of the Indian Succession Act, 1925 provides for vesting of legacies⁴.

Section 119: Date of vesting of legacy when payment or possession postponed.

-Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the

3. Section 19 Vested interest:Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.A vested interest is not defeated by the death of the transferee before he obtains possession.Explanation : An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

4. Section 119: Date of vesting of legacy when payment or possession postponed.-Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest. **Explanation** - An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person.

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There are provisions in Hindu law and Mohammedan law relating to the power to execute will.

Joint and Co-ownership – Limited and Life Estate

Joint ownership and co ownership are different from limited ownership and life estate. Joint ownership and co ownership explains the nature of ownership while limited ownership and life estate curtails the rights of owner. For example, joint owner and co owner will own land along with others and the right to inherit differs depending upon the nature of ownership. In case of succession to a joint owner the surviving member or members among the joint owners will succeed to the deceased share, where as in co ownership the legal heirs of the deceased succeed to the share of the co owner and is not dependent upon the surviving co owners. This does not limit the rights as exhibited by ownership there may be right to preemptions recognized under various laws in few situations however it is not the same as limiting the rights of owner, i.e., owner has a right to alienate with preference of purchase being given to some parties in view of the prevailing relationship.

Special Economic Zones

To encourage free trade more and more countries have adopted the model of Special Economic Zone. Special Economic Zone is a geographic territory earmarked to encourage free trade within the specified territory. This territory will be deemed to be foreign territory as far as application of certain laws are concerned, more specially economic laws pertaining to tax, exports and imports, labor laws etc. In India usually minimum 1000 acres of land is earmarked to constitute a Special Economic Zone. The procedure to set up units and the governance regarding those units in the Special Economic Zone is governed depending upon the policies of the

respective Government. It can be set up in public sector, public private partnership etc., however the rights of the unit holders on the land in the Special Economic Zone depends on the nature of Special Economic Zone, terms specified and the policy. This has altered the hitherto concept of land ownership in few situations, in case of a long lease running for 99 years or so there is no change in the ownership rights, however the question of long tenure and the use based investment raises lot of questions such as postponing certain rights of ownership (such as alienation, use and enjoy, destroy etc.) for long time and their implications.

Cooperative Societies

Land is allotted by Governments to certain societies for specific purpose such as housing, education, sports etc. The ownership in the land allotted vests with the society members and the Government does not retain any control over the land, however the use of land is restricted to the purpose specified in the allotment. Land is allotted at a price which could be nominal price or otherwise.

Certain societies acquire land from private parties for specific purposes in such cases they are governed by the specific State legislations which generally restrict the use to the purpose of the society formation.⁵

Trusts and Endowments

Trusts and endowments are created with specific purpose and the trustee or the recipient of an endowment will be obliged to use the property/ land vested upon for the specific purpose for which trust or an endowment is created. Trust and endowments does not create absolute ownership interest rather they create an interest which is in conformity with the trust or endowment deed.

The issue of whether government is the owner of all unclaimed land, forest land, wetland and other acquired property requires consideration in the light of Supreme Court decision in *M.C. Mehta v. Kamalnath*.⁶

The Supreme Court of India in the above case held that “our legal system – based on English common law – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the

5. For example Andhra Pradesh Mutually Aided Cooperative Societies Act, 1995 provides the society members to decide as per the bye laws of the society.

6. (1997) 1 SCC 388.

natural resources. These resources meant for public use cannot be converted into private ownership”.

The Court drew the fine distinction between public use and public purpose. If the natural resource meant for public use is to be converted to public purpose especially into private ownership Government must be cautious and see to it that it does not commit breach of that trust. Court held that public trust doctrine as discussed in this judgment is part of the law of the land.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

The Act recognizes the right of forest dwellers over forests for certain aspects such as collecting minor forest produce, residence, settlement for conversion, fishing, pastoral activities etc. The Act provides for the ways to make such claim by individual or a community as forest dwellers who could be tribal or non tribal. The conditions for tribal population to establish as forest dwellers are less stringent as opposed to non tribal population. The nature of rights raises many legal questions as certain rights are community rights, certain rights are use based rights etc.

The position of forest dwellers rights on land prior to the enactment of Recognition of Forest Rights Act, 2006 can be summed up based on decision of the court in *Banwasi Seva Ashram v. State of U.P.*⁷

The Supreme Court of India accepted a letter written to the Court as writ petition in *Banwasi Seva Ashram v. State of U.P.*⁸ The Supreme Court had to consider issues relating to the claim to land and related rights of the Adivasis living within Dudhi and Robertsganj Tehsils in the District of Mirzapur in Uttar Pradesh. The State Government declared a part of these lands in the two Tehsils as reserved forest as provided under Section 20 of Indian Forest Act, 1927,⁹ and in regard to the other areas notification under Section 4 of the Act was made and proceedings for final declaration of

7. AIR 1987 SC 374.

8. *Ibid.*

9. Section 20: Notification declaring forest reserved: (1)When the following events have occurred, namely –(a) the period fixed under section 6 for preferring claims have elapsed and all claims (if any) made under that section or section 9 have been disposed of by the Forest Settlement-officer; (b) if any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and (c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894 (1 of 1894), have become vested in the Government under section 16 of that Act, the State Government shall publish a notification in the Official Gazette.

those areas also as reserved forests were undertaken. Adivasis and other backward people living within the forest used the forest area as their habitat. They had raised several villages within these two Tehsils and for generations had been using the forests around for collecting the requirements for their livelihood. The Tribals had converted certain lands around their villages into cultivable fields and had also been raising crops for their food. These lands too were included in the notified areas and, therefore, attempt of the Adivasis to cultivate these lands too was resisted.

Criminal cases for encroachments as also other forest offences were registered and systematic attempt was made to obstruct them from free movement. The Government took steps for throwing them out under the U.P. Public Premises (Eviction of Un authorized Occupants) Act, 1972.

In 1983, the Court ordered to work out a formula under which claims of Adivasis or Tribals in Dudhi and Robertsganj Tehsils, to the possession of land and to regularisation of such possession may be investigated by a high powered committee with a view to reaching a final decision with regard to such claims.

The Maheshwar Prasad Committee constituted for the above purpose identified 433 villages lying South of the Kaimur Range of the Mirzapur District to be relevant for the dispute. Out of those 299 were in Dudhi Tehsil and the remaining 134 in Robertsganj Tehsil. The area involved was 9,23,293 acres out of which in respect of 58,937.42 acres notification under Section 20 of the Act has been made declaring the same as reserved forest and in respect of 7,89,086 acres notification under Section 4 of the Act has been made. The Committee in its report pointed out that unauthorized occupation related to roughly one lakh eighty two thousand acres. It has also been stated that the Government by notification dated August 5, 1986, has established a special agency for survey and record operations to solve the problems of the claimants in the area and a copy of the notification has also been produced.

While the matter is pending before the Court, Government has decided that a Super Thermal Plant of the National Thermal Power Corporation Limited ('NTPC') would be located in a part of these lands and acquisition proceedings were initiated. NTPC has agreed before the Court that it shall strictly follow the policy on "facilities to be given to land trustees" as placed

specifying definitely, according to boundary-marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification. (2) From the date so fixed such forest shall be deemed to be a reserved forest.

before the Court in the matter of lands which are subjected to acquisition for its purpose. Regarding the forest dwellers who claim right over the disputed land can claim their right before the forest settlement officer appointed as per the Indian Forest Act, 1927. An appeal shall lie from the settlement officer to the Additional District Judge specially appointed for these cases. All appeals shall lie from the decision of the settlement officer to the Additional District Judge irrespective of the fact whether the appellant chose to file the appeal or not. The Supreme Court also made it clear that if the appellate authority finds the claim justified then the State Government should honor the claim. The Supreme Court also made it clear that legal aid should be provided by the State Government for the forest dwellers. However the Court declined to determine the maintainability of the claim of the forest dwellers over the forest land.

The use based entitlement over forest land has come for adjudication before the Allahabad High Court in the case of *Ishwar Chandra Gupta v. State of U.P.*¹⁰ The Prescribed Authority has passed an eviction order in exercise of power provided under Section 61-B (2)¹¹ of the Indian Forest Act, 1927 (as amended vide The Indian Forest (Uttar Pradesh Amendment) Act, 2000) as well as under Section 34-A¹² of the Wild Life (Protection) Act, 1972 (as amended in 2002 and 2006).

10. AIR 2011 All 88.

11. Section 61-B. Summary eviction of unauthorized occupants:(1)If a Forest Officer, not below the rank of a Divisional Forest Officer is of the opinion that any person is in unauthorised occupation of any land in areas constituted as a reserved or protected forest under Section 20 or Section 29 as the case may be, and that he should be evicted, the Forest Officer shall issue a notice in writing calling upon the persons concerned to show-cause, on or before such date as is specified in the notice, why an order of eviction should not be made. (2) If after considering the cause, if any, shown in pursuance of a notice under this section, the Forest Officer is satisfied that the said land is in unauthorised occupation, he may make an order of eviction for reasons to be recorded therein, directing that the said land shall be vacated by such date, as may be specified in the order, by the person concerned which shall not be less than ten days from the date of the order. (3) If any person refuses or fails to comply with the order of eviction by the date specified in the order, the Forest Officer who made the order under Sub-section (2) or any other Forest Officer, duly authorised by him in this behalf, may evict that person from and take possession of the said land and may, for this purpose, use such force as may be necessary. (4) Any person aggrieved by an order of the Forest Officer under Sub-section (2) may, within such period and in such manner as may be prescribed, appeal against such order to the Conservator of Forests of the circle or to such officer as may be authorised by the State Government in this behalf and the order of the Forest Officer shall, subject to the decision in such appeal, be final.

12. Section 34 A: Power to remove encroachment:(1) Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant conservator of Forests may,-(a) evict any person from a sanctuary or National Park, who unauthorisedly occupies Government land in contravention of the provisions

The Petitioners claim protection under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 which according to them, has overriding effect over the Indian Forest Act, 1927. Besides it they claim that they are in possession over there since the time of their ancestors and are carrying on business to earn their bread and butter since 1928. It is also their case that the shops in the Mandi were allotted to the Petitioners in the year 1928 on yearly lease rent on the application moved by their father. Accordingly their shops are established having electricity connection etc. They paid lease regularly since then, however in 1986 forest authorities refused to accept rents and the petitioners obtained a favorable court order which directed the forest officers to accept rent from them.

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 recognizes the rights¹³ and occupation in forest land of the forest dwelling scheduled tribes¹⁴ and other traditional forest dwellers.¹⁵ The petitioners argue that they are other traditional forest dwellers as per the Act and are entitled as per Section 3 of the Act to live in forest land, maintain patta of the land, manage the land etc. They also

of this Act; (b) remove any unauthorised structures, buildings, or constructions erected on any Government land within any sanctuary or National Park and all the things, tools and effects belonging to such person shall be confiscated, by an order of an officer not below the rank of the Deputy Conservator of Forests: Provided that no such order shall be passed unless the affected person is given an opportunity of being heard. (2) The provisions of this section shall apply notwithstanding any other penalty which may be inflicted for violation of any other provision of this Act.

13. Section 3. (1) For the purpose of this Act, the following rights, which secure individual or community tenure or both, shall be the forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands, namely: (a) right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers; (b) community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes; (c) right of ownership, access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries; (d) other community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities; (e) rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities; (f) rights in or over disputed lands under any nomenclature in any State where claims are disputed; (g) rights for conversion of Pattas or leases or grants issued by any local authority or any State Government on forest lands to titles; (h) rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages; (I) right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use; (j) rights which are recognised under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned

contended that they cannot be evicted as per Section 4 (1)(b) and (5)¹⁶ of the Act which entitle them right to be not vacated. The Allahabad High Court held that the petitioners run the shop, which is not related in any manner to the forest activities nor are they dependent upon any relative activity of forest, therefore, on the count of possession they have no right to continue their shops over there. The Court held that the Petitioners have no right to continue their possession over the forest land with their non-forest activities like doing business.

This case is an example of how use of land determines entitlements over land.

Conclusion

The land ownership issues have taken new dimensions with use based entitlements gaining prominence. The Special Economic Zones, Societies, Trusts, Land Acquisition, Recognition of Forest Rights which are the major issues concerning land ownership today, all have changed the dimension of land ownership. They tend to provide more use based rights such as in case of Special Economic Zones right is vested over land for defined economic activity, forest dwellers right to collect minor forest produce, cultivate etc. are recognized under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

tribes of any State; (k) right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity. (l) any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in Clause (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal; (m) right to in situ rehabilitation including alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005.

14. Section 2 (c) Forest dwelling Scheduled Tribes” means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe pastoralist communities.
15. Section 2 (o) other traditional forest dweller” means any member or community who has for at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for bona fide livelihood needs. Explanation.—For the purpose of this clause, “generation” means a period comprising of twenty-five years.
16. Section 4 (1) Notwithstanding anything contained in any other law for the time being in force, and subject to the provisions of this Act, the Central Government hereby recognises and vests forest rights in- (b) the other traditional forest dwellers in respect of all forest rights mentioned in Section 3.(5) Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.

Ownership has a utility and owner is free to use the land but the use does not determine the ownership in such case; however the recent developments state that utility determines ownership or interest in land which is a phenomenon very rampantly adhered to at present.

In olden days when Hindu women inherited land she would own it with limited rights which could be compared to forest dwellers rights under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 today. The Hindu Succession Act, 1956¹⁷ abolished such discrimination and thereafter legislation was made in 2006 which gave similar entitlements for forest dwellers, it may need another decade or so to again correct it. When it comes to Special Economic Zones it is the government land on which corporate or others are given limited rights we cannot compare them with forest dwellers. Access to land in both cases is not same and is not justified on same grounds. These are few jurisprudential propositions which shall arise in administration of justice in the context of land entitlements based on utility.

17. Section 14 of Hindu Succession Act, 1956.