

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1144 of 2008 (O&M)

Date of Decision: 09.03.2015

Sat Narain and another

... Appellants

Versus

State of Haryana and another

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Sanjay Majithia, Sr. Advocate,
with Mr. Suryakant Gautam, Advocate,
for the appellants.

Mr. Mukesh Kaushik, DAG, Haryana.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? **Yes..**

RAJIV NARAIN RAINA, J.

1. It may be recorded in the beginning that the second appeal paper book was burnt in a fire and has been reconstructed by means possible.

2. This is plaintiffs' second appeal. Their suit for declaration with relief of permanent injunction based on possession of suit land was partly decreed by the Civil Judge (Junior Division) Panipat in Civil Suit No.172 of 2003 instituted on December 12, 1997 and judgment was passed and decree drawn on November 11, 2005. The learned trial Judge directed the respondent-State of Haryana not to dispossess the plaintiffs and to alienate the suit property except in due course of law. The plaintiffs have, according to the trial court, failed to establish their title to corpus realty.

3. The case in brief set up in the plaint is that in the column of ownership of the suit property in the revenue record, the name of the State

Government has been recorded as owner and this entry is alleged to have been wrongly entered in the Jamabandi as evacuee property. The plaintiffs pleaded that the suit land was never declared evacuee property since neither notification under section 7 of the Administration of Evacuee Property Act, 1950 (for short "1950 Act") was ever published in the official Gazette declaring it as evacuee property nor has any notice been issued to any person interested in claiming rights therein. Besides, no special notice was given to the predecessors-in-interest of the plaintiffs by the competent authority in charge of implementation of the 1950 Act. It was urged that since the suit land was not an evacuee property declared neither the State Government nor the Central Government could deal with the suit corpus. To say that the property in dispute was evacuee property would be a misreading of the provisions of the relevant statutes.

4. The predecessors-in-interest of the plaintiffs, the present appellants, were in settled possession of the suit even before Partition of India in 1947 and had thus acquired ownership rights by way of adverse possession. It is so recorded in the revenue record since that period of time. In the column of possession it was recorded that the suit land is "Billa Lagan Bewajay Taswar Malkiat Khud" (for short "BLBTMK"). The entry in the column of rent the words "Bill Lagan Bawajay Taswar Malkiat Khud" is recorded in the Jamabandi for the years 1935-36. It is claimed by the plaintiffs that this entry with continued possession perfects their right to ownership by way of long settled possession with no private party claiming any interest therein. In the absence of declaration published under sections 7 and 8 of the Administration of Evacuee Property Act, 1950 no property

could vest in the Custodian so as to enable him to make allotment to displaced persons in settlement of claims. The present suit has been filed against the State of Haryana and the Custodian Department alone.

5. The defendants entered appearance and in reply to the suit refuted the claim of the plaintiffs. The State claimed that the suit land was acquired as evacuee property and had thus vested in the Custodian. As per Jamabandi for the year 1994-95 the plaintiffs are shown to be unauthorized occupants of the suit land falling in village Rer Kalan Tehsil and Distt. Panipat and the land in the ownership of the Provincial Government. The Jamabandis for the year 1969-70 to 1974-75 recorded ownership as "Arazi Matruka" converted to read ownership by Provincial Government in the Jamabandi for the year 1979-80. Therefore, the property vested in the Custodian. The plaintiffs are gair marusi. One account of such revenue entries it was prayed by the defendants that the suit deserves to be dismissed.

6. The plaintiffs filed a replication and controverted the averments made in the written statement as being incorrect and re-affirmed their version in the plaint.

7. The parties went to trial on eight issues including the last one on relief, the principal of which issues put to trial was whether the plaintiffs are owners in possession of the suit land and whether they are entitled to relief of injunction upon which to prove the onus was placed correctly on the plaintiffs. Four jurisdictional issues were on the shoulders of the defendants to prove, including the jurisdiction of Civil Court to decide the case. Also were want of notice under Section 80 (2) of the CPC; proper valuation of suit; locus standi; and the 7th was a legal issue whether the suit was liable to

be dismissed for non-compliance of Order 7 Rule (I) of the CPC.

8. The plaintiffs did not lead any oral evidence. Instead, they produced documentary evidence, seventeen in number, of which were the Jamabandis *inter alia* for the years 1911-12, 1931-32, 1935-36 and 1939-40. They also produced the judgment and decree dated June 05, 1993 apart from Jamabandis 1993-94 and onward.

9. On the other hand, the defendants produced DW-1 Ram Niwas, a functionary of the Government who deposed in the stand that the suit was evacuee property vested in the Provincial Government prior to Partition which is owned by Muslims who migrated to Pakitsan and after the Partition of India the suit land became evacuee property to be administered by the 1950 Act. The plaintiffs were shown as gair marusi in the revenue record and being unauthorized occupants over the suit land they have never acquired ownership by way of adverse possession. State relied on the Jamabandis for the year 1943-44 and 1999-2000. It produced an application for purchasing land (Ex.D-3); endorsement of Tehsildar sales (Ex.D-4); copy of the order dated December 13, 2003 (Ex.D-5) and copy of the notice (Ex.D-6).

10. No evidence in rebuttal was led which was closed on November 11, 2005. It may be noticed that in the original suit, private defendants 3 to 25 were sought to be impleaded as parties against whom declaration of ownership and injunction was prayed for but both the applications were withdrawn by the plaintiffs without leave to re-file the same. The question was whether the property was evacuee property and, therefore, State Government had authority to alienate or auction the same to third parties in

accordance with law by treating corpus as evacuee property. There appears to be no doubt that in the first Jamabandi relied upon i.e. for the year 1911-12 and onwards the revenue entries records BLBTMK and by this entry it is urged by the plaintiffs that this tantamount to securing title by prescription by way of adverse possession against the true owner and for this legal proposition, they placed reliance on a decision of this Court in **Bhupinder Nath vs. Surasti**, 2005(2) RCR 235. The true owners as per Jamabandi up to 1933-34 reveal one Foji and Jabba sons of Kanhiya and Gafur son Bhola as owners. In the Jamabandi for the year 1954-55 the suit property is shown as evacuee property in the column of ownership and this position continued till the Jamabandi for the year 1984-85 when the ownership column was changed to read the Provincial Government as owner of corpus property.

11. The following questions of law arise for determination in this case:-

"(i) Whether the land in dispute could be held to be evacuee property in view of the mandatory provision of the sec. 7A of the Administration of evacuee property Act?

(ii) Whether a suit can be held to be bad for non-joinder of necessary party in the absence of specific plea and issue in this regard?

(iii) Whether the appellants have no locus standi to challenge the entries in jamabandis, only because their forefathers did not raise any objection?

(v) Whether the State Govt. and custodian department are not sufficient party to claim the relief of declaration?

(vi) Whether it is necessary to make an evacuee a party to seek a relief of adverse possession who has lost title in property?"

12. The moot point which arose for consideration was whether the predecessors-in-interest of the plaintiffs were in possession of suit property prior to 1947 and had, therefore, perfected their title by adverse possession

with the advent of Partition of India and creation of Pakistan as a separate dominion; the true owners were destined never to return to India to claim the suit property. However, the true owners were never made party to the *lis* to contest acquisition of title by prescription and, therefore, the finding of ownership cannot be returned in their absence as argued by the State before the trial Judge. For this legal proposition, the trial Judge read the decision of the Supreme Court in **Konda Lakshmana Bapuji vs. Govt. of Andhra Pradesh and others**, AIR 2002 Supreme Court 1012 where the necessary ingredients for establishing plea of adverse possession have been culled out that possession should be adequate in continuity, in publicity and in extent rolling over the statutory period which required i.e. 12 years with the animus of holding the land adverse to the true owners for ownership rights to emerge and be judicially recognized by a court of law in India.

13. Therefore, the learned trial Judge arrived at the conclusion that judgment cannot be pronounced or the case adjudicated in the absence of true owners who according to the plaintiffs were true owners but stood divested of their title through plaintiffs' adverse possession of the corpus when true owners have not returned from Pakistan to assert their ownership rights. The Court noticed that for the first time, the predecessors-in-interest of the plaintiffs were recorded in the Jamabandi for the year 1943-44 and shown as BLBTMK with reference to prior Jamabandi for the year 1935-36 of the same status. Therefore, plaintiffs are no longer shown in the ownership column as owners. Since time kept running out to the historical event of Partition and coming into existence of two countries in 1947, the possession of plaintiffs could not be shown as BLBTMK for 12 years

continuously against the true owner from 14th August 1947.

14. Notwithstanding the record, the case under adverse possession was not proved though the courts below. It was not the case of the plaintiffs set up in the frame of the suit that their possession ripened into full ownership when they did not claim adverse possession against the State Government. The plaintiffs have thus been held with no title to the suit property. Therefore, they are not entitled to challenge the status of the suit property as one falling under the category of evacuee property. At best, they can be said to be persons in physical possession of suit corpus without any legal title thereto. Hence, a declaration of ownership cannot be granted by decree in their favour and the case relied upon in *Bhupinder Nath vs. Surasti* (supra) is inapplicable to the facts of their case and is distinguishable.

15. However, the plaintiffs were able to prove possession for the last more than 80-90 years and thus had a right to seek an injunction against the State as prayed for that they be not dispossessed forcibly except in accordance with law and its due process. With respect to issue # 3 on the question of jurisdiction of the civil court being barred by Section 36 of the Displaced Persons (Compensation and Rehabilitation) Act 1954 (for short "1954 Act") read with Section 46 of the Administration of Evacuee Property Act, 1950, the plaintiffs in order to get out of the bar urged that they were not in the position of persons challenging any orders passed under those Acts and would be seen only as persons seeking declaration of ownership by way of adverse possession and the relief of injunction which can only be granted by the civil court under the common law and the same cannot be

granted by statutory authority empowered under the aforesaid Acts. To establish this legal right, the plaintiffs relied on a large selection of judgments by citing rulings in **Kanwar Kamaljit Singh and another vs. Custodian Evacuee Property Punjab and Ors**, 1991 PLJ 511; **Jaswant Rai and another vs. Ram Singh and another** 1987 PLJ 126; **Jodh Singh (Deceased) Rep. By L.Rs. vs. Joginder Singh and others**, 1987 PLJ 6; **Union of India etc. vs. Kharati Lal etc.**, 1973 CLR 31; **Gurbax Singh vs. The Financial Commissioner and another**, 1991 PLJ 192; **Kundan Singh and others vs. Rai Singh and others**, 1983 PLJ 159 and **State of Punjab and others vs. Ram Rakha and others**, 1997(2) PLJ 637.

16. The trial Judge took the view that since possession was recorded as gair marusi since 1911-12 the relief could only be claimed before the civil court and, therefore, the preliminary objection of the State was liable to be rejected that civil court had no inherent jurisdiction to decide the case. The provisions of law cited barred grant of injunctions in respect of actions taken or to be taken in pursuance of any power conferred by the 1954 Act. Admittedly, the Defendant State had not taken any action against the plaintiffs under the 1954 Act since no cause of action had accrued under the statutory enactment. The suit was maintainable. The State led no evidence on these issues on which the onus was on them and they were decided against the defendants and in favour of the plaintiffs. In the main, the suit was partially decreed by the learned trial Judge. Declaration as to ownership and title was refused. But an injunction was granted restraining defendants from auctioning or alienating the suit property or from dispossessing the plaintiffs from the land described in the plaint as per Jamabandi of the year

1994-95, except in due course of law. The State has not appealed against the judgment and decree of the trial court and it is thus final qua it.

17. Needless to say that both the parties felt aggrieved by the judgment and decree of the learned trial court and preferred appeals which have been decided by the common judgment and decree dated September 07, 2007 by the court of first appeal.

18. The learned lower appellate court re-appreciated the evidence on record in the light of the revenue record with effect from the year 1911-12 onwards. It was not disputed that the claim of the plaintiffs is based on the rights of their forefathers through whom they claimed possession and presently ownership rights in the special facts of this case. If the plaintiffs argued that no notice was issued to their forefathers before the suit land was declared evacuee property, then the forefathers did not agitate the matter or raised any objection which forecloses the rights of the plaintiffs. If the case was foreclosed against the forefathers, the plaintiffs lost their locus standi to raise objection having stepped into their shoes.

19. On its turn, the State argued that the trial Judge fell in error in upholding the possession of the plaintiffs over the suit land. Their counsel harped on the revenue record which disclosed the plaintiffs' predecessors-in-interest were recorded as gair marusi and they could not better that position in law. However, since the defendants themselves admitted the plaintiffs to be recorded as gair marusi then it admits their possession of corpus land. If possession is admitted, then injunction can well be issued to protect unlawful dispossession except in due course of law.

20. In the short six page order, the learned Additional District Judge,

Panipat has upheld the finding recorded by the trial court on the material issues # 1 to 7 but without examining or analyzing the issue of ownership by adverse possession on the principles attaching to adverse possession and the plaintiffs have been non-suited for the reason that their predecessors-in-interest did not object to the declaration of the property as evacuee property and, therefore, the court *a quo* affirmed the finding of the trial Judge that plaintiffs have no locus standi to challenge post 1947 revenue entries in the record and especially when the property has been declared in the Jamabandies to be in the ownership of the Provincial Government. It would be relevant to consult what an "evacuee" and "evacuee property" mean by definition.

21. Section 2 (d) of the Administration of Evacuee Property Act, 1950 defines an "evacuee" as under:-

"(d) "evacuee" means any person,-- (i) who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances, leaves or has, on or after the 1st day of March, 1947, left, any place in a State for any place outside the territories now forming part of India, or

(ii) who is resident in any place now forming part of Pakistan and who for that reason is unable to occupy, supervise or manage in person his property in any part of the territories to which this Act extends, or whose property in any part of the said territories has ceased to be occupied, supervised or managed by any person or is being occupied, supervised or managed by an unauthorized person, or

(iii) who has, after the 14th day of August, 1947, obtained, otherwise than by way of purchase or exchange, any right to, interest in or benefit from any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan, or

(iv) who has, after the 18th day of October, 1949, transferred to Pakistan, without the previous approval of the Custodian, his assets or any part of his assets situated in any part of the territories to which this Act extends, or

(v) who has, after the 18th day of October, 1949, acquired, if the acquisition has been made in person, by way of purchase or exchange, or, if the acquisition has been made by or through a member of his family, in any manner whatsoever, any right to, interest in, or benefit from, any property which is treated as evacuee or abandoned property under any law for the time being in force in Pakistan;"

Whereas, section 2 (f) of 1950 Act defines "evacuee property" as follows:

"2 (f) "evacuee property" means any property of an evacuee whether held by him as owner or as a trustee or as a beneficiary or as a tenant or in any other capacity, and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode of transfer which is not effective by reason of the provisions contained in section 44, but does not include-- (i) any ornament and any wearing apparel, cooking vessels or other household effects in the immediate possession of an evacuee,

(ii) any property belonging to a joint stock company, the registered office of which was situated before the 15th day of August, 1947, in any place now forming part of Pakistan and continues to be so situated after the said date;"

It would also be useful to quote the provisions of section 7A of the 1950 Act. It reads:-

¹[7-A. Property not to be declared evacuee property on or after 7th May, 1954.

Notwithstanding anything contained in this Act, no property shall be declared to be evacuee property on or after the 7th day of May, 1954:

Provided that nothing contained in this section shall apply to-

(a) Any property in respect of which proceedings are pending

on the 7th day of May, 1954, for declaring such property to be evacuee property, and

(b) The property of any person who, on account of the setting up of the Dominions of India and Pakistan or on account of civil disturbances or the fear of such disturbances had left on or after the 1st day of March, 1947, any place now forming part of India, and who on the 7th day of May, 1954, was resident in Pakistan:

Provided further that no notice under Sec. 7 for declaring any property to be evacuee property with reference to Cl. (b) of the preceding proviso shall be issued after the expiry of six months from the commencement of the Administration of Evacuee Property (Amendment) Act, 1954 (42 of 1954).

Explanation I-*A person shall be deemed to have been resident in Pakistan on the 7th day of May, 1954, within the meaning of Cl. (b) of the first proviso, if he was ordinarily residing in Pakistan before that date, notwithstanding that he was temporarily absent from Pakistan on that date.*

Explanation II.*-A person who had left India for Pakistan before the 7th day of May, 1954, on the authority of a passport or any other valid travel document issued by any competent authority in India, and who was temporarily residing in Pakistan on that date, shall not be deemed to have been resident in Pakistan on that date within the meaning of Cl. (b) of the first proviso.*

Explanation III.*-A person who had left Pakistan for India on or after the 18th day of July, 1948, and who was in India on the 7th day of May, 1954, shall, unless he came to India under a valid permit for permanent return or for permanent resettlement, issued under the Influx from Pakistan (Control) Act, 1949 (23 of 1949), be deemed to have been resident in Pakistan on the 7th day of May, 1954, within the meaning of Cl. (b) of the first proviso.]"*

22. Heard learned counsel for the parties at length and perused the lower court record on the substantial questions of law as above framed and

agreed to be the spinal issues requiring adjudication in second appeal.

23. Mr. Sanjay Majithia, learned senior counsel appearing for the appellants submits that no notice was served by the State Government to the occupants of the corpus land before the adverse revenue entry was made with respect to ownership vesting in Provincial/State Government as being evacuee property. He says that this fact was pleaded in para.3 of the plaint and was not controverted in the written statement. The suit for declaration of title and permanent injunction restraining State from using its muscle was filed by the plaintiffs when the offending entry came to their notice. The predecessors' of plaintiffs are duly reflected in possession as gair marusi. However, in the Jamabandi for the year 1935-36 Ex.P-16/A in column 10 the predecessors of plaintiffs are reflected in possession as BLBTMK. This entry is repeated successively in Jamabandies for the years 1939-40 Ex.P-17/A, 1943-44 Ex.P-1/A while in the Jamabandi for the year 1954-55 Ex.P-2/A (at page 81 of the LCR) the words recorded in column 10 are "Bila Lagan Batasawar Malkiat Khud" (for short BLBMK). This entry is repeated in Jamabandi for the years 1963-64 Ex.P-3/A; the Jamabandi for the year 1969-70 Ex.P-4 and Jamabandi for the year 1974-75 Ex.P-5. There is a small change in the Jamabandi for the year 1994-95 Ex.P-8 which reads BLBMK and this is repeated in the Jamabandi for the year 1999-2000 Ex.P-9- "Billa Lagan Bewajah Malkiat Khud" and it is for this reason that till the date of filing of the suit in 1997 the plaintiffs considered themselves as owners of the land in view of the revenue entries and that the owners were civilly decedent never returning to the corpus to reclaim property by virtue of intention of migration to their Newfoundland surrendering their

rights forever.

24. What is clearly noticeable and of utmost importance is that a sea change was brought about in the Jamabandi for the year 1935-36 at the hands of the agents of the State when the term "gair marusi" was converted into BLBTMK in the presence of the true owners who are Muslims who suffered Partition in 1947 and had migrated to Pakistan never to return or claim suit property. It is thus argued by Mr. Majithia that by 1947, 12 years had passed with the stamp of BLBTMK which position remained till the date of filing of the suit and, therefore, long settled possession had ripened into ownership and the law that the plaintiffs cannot claim ownership by adverse possession, since it is a defence plea, will not come into play as the true owners migrated never to return and, therefore, their presence was not required to settle the controversy by a decree and no weight can be adversely attached to plaintiffs not pressing their application to implead true owners mentioned in the application that was withdrawn. In any case, true owners having migrated to Pakistan became foreigners and, therefore, rights in land stood extinguished by their act of migration and in their failing to claim or reclaim the suit property. The admitted possession since 1911-12 was sufficient to perfect their title and thus the property ceased to be evacuee property on the expiry of 12 years from Partition. Because the true owners migrated to Pakistan it would become an impossible act to perform in making the previous owners as parties to the litigation and expecting them to come forward to defend their title being citizens of an alien country on the principle of *animus manendi*. It is said that on gaining new domicile, the old would be lost. Neither would protection be afforded by an Indian

Court nor litigation accepted between the residents of both the countries in respect of properties left behind by either from the newly created dominions by migration. The train to Pakistan does no longer carry any extra baggage of litigation or court decrees executable with respect to properties left behind. Therefore, Mr Majithia submits that both the courts below have not appreciated this vital point and have gone by the rule book that adverse possession cannot be claimed against true owners and in their absence some practical allowance has to be given by the court to adjust to an irreversible, irremediable and irretrievable fact of migration of the true owner whom it would be impossible to serve and hear in the making of a decree while his rights might stand extinguished. This is an international law issue which cannot be reconciled by the civil courts in India except by treaty signed by the two nations of which there is none in existence. In any event, the State cannot claim exclusive ownership to corpus on the basis of the revenue record as produced by the plaintiffs and reflected in the Jamabandies which was never theirs except when corpus does qualifies as evacuee property governed by statutory law in India.

25. Mr. Majithia draws by inferential reasoning the dicta of ruling of the Supreme Court in **State of Punjab and others vs. Ram Rakha and others**, 1997 (2) PLJ 637, a case dealing with mutation entries which showed mortgagees in possession of land to tenants till the mortgagees became absolute owners as mortgage became irredeemable after expiry of 60 years from the date of mortgage. In any case, by the time, the Evacuee Interest (Separation) Act, 1951 (for short "1951 Act") was promulgated to declare properties as evacuee properties then by virtue of irretrievable

mortgage from the original mortgagor migrating to Pakistan the Government cannot declare the property as evacuee property or claim interest in the land as evacuee property by virtue of provisions of section 11 of the 1951 Act. Such a situation has happened in this case, though not in a case of mortgage, since BLBTMK would become in a sense irredeemable by the true owner whose whereabouts are not known; forget about serving summons on them. Mr. Majithia cites a Division Bench decision of this court in **Union of India etc. vs. Kharati Lal etc.** reported in 1973 Current Law Journal 31 which is also a case of mortgage where this court held that right of the true mortgagor would stand extinguished and the competent officer under the 1951 Act can have no jurisdiction to take any steps under sections 6, 7, 8 or 10 of the aforesaid Act. The competent officer has jurisdiction only with regard to composite property, that is, a property in which is a non-evacuee has any subsisting interest. Therefore, when the 1951 Act was enforced the mortgages stood extinguished and not open to redemption.

26. Mr. Majithia next submits by drawing strength from the Administration of Evacuee Property Act, 1950 read with the Package Deal Properties (Disposal) Act, 1976 (for short "1976 Act") and the Package Deal Properties (Disposal) Rules, 1976 with reference to section 7 and 7-A and section 2(1-A) of the twin Acts respectively that it is incumbent on the custodian of evacuee property that he has to notify evacuee property under section 7 of the 1950 Act by an order. In the absence of any such notification, the property cannot be said to be evacuee property. The Act lays down that no property can be treated as evacuee property after May 07,

1954, the cut-off date. Since only those surplus evacuee properties are called package deal properties which are taken over by the State Government or the Sales Commissioner acting under Central Government administered through State agencies under section 4 of the 1976 Act otherwise it would not confer jurisdiction to State functionary to allot or transfer such property. While deciding the case the learned Single Bench of this court held as above in **Dalip Singh vs. Financial Commissioner (Appeals), Punjab and others** reported in 2011(4) RCR (Civil) 305: 2010 (3) PLR 526.

27. Mr. Majithia then submits that the decision in *Bhupinder Nath's* case has been misread by the courts *a quo*. This court considered the meaning and effect of "Billa Lagan Ba Khial Malkiat" (for short "BLBKM") holding that it represents adverse possession because it shows that the person in possession was not obliged to pay any rent because he considered himself as owner. Mr. Majithia relies on para.11 of the said judgment which reads:-

"11. The predecessors in interest to the plaintiff were paying no rent to the owner and in fact they considered themselves as owners. The entry "Billa Lagan Ba Khial Malkiat" is an entry representing adverse possession because it shows that the person in possession was not obliged to pay any rent because he considered himself as owner. Such an entry would amount to adverse possession conferring ownership rights on the predecessors in interest of the plaintiff. The absence of word 'Khud' will not make any difference when it is proved that the predecessors in interest of the plaintiff were not paying any rent and they were not obliged to pay any rent because they considered themselves to be the owners. Moreover, Exhibit P8 shows that the predecessors in interest of the plaintiff were in possession of the suit property for the year ending 1915-16

and it is not known as to how and in what capacity they were in possession as entry in column no 9 of the jamabandi for the year 1915-16 is 'La Ilmi' (i.e. lack of knowledge or on account of ignorance). In fact, it nowhere shows that they were tenants in possession. Therefore, there was no bar in the year 1935-36 to claim themselves to be in adverse possession and based their claim with effect from 1935-36 as has been claimed in para 1 of the plaint. In my considered opinion, when an entry shows that the rent was not being paid because they considered themselves as owners, that shall be sufficient proof of hostility and shall constitute adverse possession. The possession of predecessors in interest of the plaintiff had ripened into full ownership by adverse possession in the year 1952-53 by efflux of time."

28. In order to further thrash out the meaning of the revenue entry BLBKM and where such entry stands is in favour of person recorded in the Jamabandi in column 9 relating to possession and if such entry continues for more than 12 years, the person in possession becomes absolute owner by dint of adverse possession irrespective of the fact that in the column of ownership the name of actual owner continues to be reflected. Such an entry means that the rent is not being paid because the person considered himself as owner which is a clear declaration of notice of open and hostile possession against the interest of the true owner.

29. For the same proposition, Mr. Majithia relies on an earlier dicta of this court laid down in **Kundan Singh and others vs. Rai Singh and others**, 1983 PLJ 159 that where the revenue term 'bila lagan tasawar malkiat khud' was employed and considered when mentioned in revenue record of rights. In such case what would be the role of adverse possession in the face of such entry. The Urdu word tassavur (tasawar) means to suppose, to imagine or to conceive. Thus, entries in revenue record of

BLBTMK is sufficient proclamation to the owner that person in possession of land is owner by prescription and inaction of owner in not asserting rights by surrender. The learned Single Judge drew strength from the decision of the Lahore High Court in **Sohawa Singh vs. Kesar Singh**, AIR 1932 Lahore 586 and the decision of the Supreme Court in **Shikharchand vs. Digambar Jain Praband Karini Sabha**, AIR 1974 SC 1178 and an unreported judgment of this court in Regular Second Appeal No.809 of 1973, *Joginder Pal vs. Angad Singh* decided on October 21, 1982 to give shape to such rights.

30. It would be of some importance to understand *Sohawa Singh's* case (supra) which was distinguished but the learned Single Judge in *Kundan Singh's* case in *Sohawa Singh's* case wherein it was held that mere non-payment of rent or discontinuance of payment of rent or payment of only revenue and cess was not sufficient ground for holding that the tenancy was determined and the tenant's possession was adverse. The court distinguished the Lahore High Court decision when it found that in the case in hand of the learned Single Judge that it was never the case set up by either side that there was an induction originally as tenants on the suit land. In this context, the learned Single Judge observed that if that would have been the case and there have been evidence to that effect, then it could be successfully argued that mere non-payment of rent by itself is not sufficient to prove adverse possession. On this ground, *Sohawa Singh's* case was distinguished.

31. In *Kundan Singh's* case the defendants had from the very beginning been claiming themselves to be in cultivating possession of the

suit land as owners without payment of any *lagan*. The revenue entry 'bila lagan tasawar malkiat khud' has to be understood in this sense. Since the entry itself is sufficient proclamation to owner that person in possession of lands as owner by fiction of tassavur (tasawar) or by imagination a legal fiction. This is the subtle distinction between the two situations as I read the judgments.

32. In the present case, the revenue entry came 12 years before 1947 although the plaintiffs' predecessors-in-interest were earlier to 1934-35 recorded as gair marusi or unauthorized occupants of land.

33. On the other hand, Mr. Mukesh Kaushik, learned Deputy Advocate General, Haryana submits in support of the judgments and decrees of the courts below that gair marusi remains a gair marusi and the revenue entry relied upon by the appellants is of hardly any legal consequence especially when the forefathers of the plaintiffs succumbed to the revenue entries post Partition which had led to entry in column 10 in the Jamabandi showing the State as the owner in the ownership column. Then the plaintiffs cannot claim ownership over the property.

34. Be that as it may, it would have to be understood as to what is the meaning of the terms "tassavur" and "Ba khial". From the Urdu dictionary and meanings assigned it stands out that both words are synonymous. Both are based on imagination and legal fiction. Therefore, no distinction may be drawn in cases where the two revenue expressions are used. They mean the same thing. I agree with Mr. Majithia on this contention.

35. Mr. Majithia would next submit that merely because the forefathers did not agitate the adverse revenue entry in favour of the State

even then such an entry could have dependent only on a documented declaration of evacuee property by formal order of Government and that too displaying the status of the corpus before May 07, 1954 in view of the provisions of section 7-A of the 1950 Act. Section 7-A deals with procedure in cases where land belonging to Muslim evacuees and was, therefore, required to be put in the compensation pool thereby divesting owner of property. When persons having interest in land are divested of their rights then they have to be heard and be granted opportunity of hearing in order to abide by the law in making such declaration of land but also the principles of natural justice and to adhere to the substantive and procedural law laid down in the provisions of section-7 indicating that where no hearing was given to person likely to be affected then the order would be unlawful. For this legal proposition, reliance is placed on a decision of the learned Single Judge of this court in **Kamaljit Singh and another vs. Custodian Evacuee Property Punjab & Ors.**, 1991 PLJ 511 and in the same line of reasoning is **Jodh Singh (deceased) Rep. by LRs vs. Joginder Singh** and others, 1987 PLJ 6 also a decision rendered in second appeal where the court held that not only a general notice to all persons is to be given who claim interest in such property but also in addition, a special notice to every person who in the opinion of the Competent Officer may have a claim in such property. This is required by section 6 read with section 11 of the 1951 Act. If property is made to vest in the custodian without following this procedure, the order is void and non est. It is open to challenge in the civil court even if statute expressly bars jurisdiction of civil court. On opportunity of right of hearing before land is declared surplus by the Collector, then the rule of

audi alteram partem has to be weighed and notice given to land owners under rule 6 of the Punjab Security of Land Tenures Act, 1953 (for short "1953 Act"). This is the mandate of principles of natural justice and rule 6 read with section 25 of the 1953 Act. This legal proposition has been settled by a Bench of five Hon'ble Judges of this court in **State of Haryana and others vs. Vinod Kumar and others**, AIR 1986 Punjab & Haryana 407; 1986(1) PLR 222 where proper notice was not served nor hearing offered the order would be void.

36. There is no gainsaying that in the present case the defendant State has not produced a notification or declaration with respect to corpus prior to the appointed day i.e. May 07, 1954 declaring the property as evacuee property. If the suit property is not evacuee property by definition not having been notified, the defendants had no jurisdiction to deal with the property assuming it as evacuee property and, therefore, had no right, title or interest in the disputed property which remains an actionable issue at best between the plaintiffs and the true owners and, therefore, both the courts below have seriously erred on the point that because the predecessor-in-interest did not raise an objection therefore the right of the appellants stands foreclosed. The dichotomy is between the State rights and the rights of private persons. We cannot forget that the Constitutional Forty-Fourth Amendment of 1978 deleted the right to property from the list of fundamental rights with an introduction of a new provision, Article 300-A, which provided that "no person shall be deprived of his property save by authority of law" (Constitution 44th Amendment, w.e.f. June 10, 1979).

Thereafter, it became a constitutional/civil/statutory right and not

enforceable under Part III of the Constitution of India as a fundamental right. By June 1979 read with the case law and the provisions of the cited Acts and rules plaintiffs' rights appear to have crystallized and ripened into ownership. Therefore, the case of the plaintiffs was not foreclosed since the property had not been notified as evacuee property except for the entries in the revenue record of which the State was master and custodian to allow changes as it desired through its official agents, which to my mind is insufficient demonstration of title by the State where it had none whatsoever to stake or fence lawfully to the exclusion of the plaintiffs or to recover the land. It cannot be gainsaid that both mutations and jamabandies are not conclusive of ownership rights and title to property, the presumption of truth being rebuttable, and to that extent the findings of both the courts below are not legally tenable and deserve to be set aside leaving the question of ownership and title to be examined between the plaintiffs and the true owner, if they ever turn up to assert them in a court of law in India. But the defendants can have none of it under guise of self serving revenue entries made without understanding their import after forensic debate or due application of mind and the case law on the subject.

37. For the foregoing reasons, the appeal is allowed. The appellate decree is set aside to the extent that it holds the findings of the learned trial Judge in para.14 of the judgment that plaintiffs were not entitled to challenge the status of the suit property as evacuee property and that they have failed to prove their title to corpus better than the State in any manner or that plaintiffs cannot claim ownership by way of adverse possession against the State is held not legally sound or sustainable in law and in fact

because the defendant State is not the notified owner of corpus as evacuee property in terms of the provisions of the Acts dealing with evacuee property which property is left unclaimed by owners' migration to Pakistan following the Partition of India. There is present no documented declaration of evacuee property of the corpus land on record vesting corpus in the State for distribution by a formal order and by a gazette notification issued under the authority of the statutory enactments under consideration. To the extent that the trial court granted protection to the plaintiffs against alienation of the suit property by the defendant State, I am inclined to hold that this direction will stand confirmed and is made absolute but subservient to rights, if any, subsisting or enuring in the original Muslim owners who migrated to Pakistan in 1947 never to turn up. The property in dispute not having being declared evacuee property in accordance with law, the corpus cannot legally be dealt with by the defendant State as they are found not entitled to oust the right and interest in the corpus land of the plaintiffs whose possession and title stand perfected. Accordingly, the revenue entries in favour of the State are ordered to be reversed in favour of the plaintiffs. For all intents and purposes the plaintiffs are declared owners of the property in dispute.

38. On hearing the parties and having reflected on their submissions, the above substantial questions of law are answered accordingly in favour of the plaintiffs and against the defending State in the broad reasoning recorded as above. The State Government is held not to be owner of the property in dispute. The suit property is not a declared evacuee property.

Hence, defendants are not authorized to treat the same as evacuee property.

The adverse entries in the Jamabandies on and after the change was recorded in favour of Provincial Government are not correct being a misreading of the law and are thus liable to be ignored. The suit stands decreed with costs. Decree sheet be drawn.

(RAJIV NARAIN RAINA)
JUDGE

09.03.2015
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