

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**RSA No. 743 of 2016 (O&M)
Date of Decision: 30.05.2016**

Department of Rehabilitation/CustodianAppellant

Vs.

Het Ram and others

....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

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

Present: Mr. Siddharth Sanwania, D.A.G., Haryana,
for the appellant.

AMOL RATTAN SINGH, J. (ORAL)

This second appeal has been filed by the defendant Department of Rehabilitation, against the judgments and decrees of the courts below, decreeing the suit of the plaintiff, whereby he sought a declaration that he be declared to be owner in possession of land cultivated by him as a "Gair Marusi Tenant/Bashirah Malkan Bawajah Derina Kasht", being an old cultivator for 43 years, in actual physical possession over the suit land measuring 32 kanals and 18 marlas, situated at Mauja Alipur, Tehsil Ballabgarh, District Faridabad.

He further claimed that even under the Punjab Tenancy Act, 1887, he having paid "Chakota"/Lagan and the amount of land revenue plus the rates and cesses to the land owners, with no demand for any enhanced rent or any other charges from them, he had acquired ownership rights in the land.

Other than the owners who were impleaded as respondents No.1 to 27 before the learned Civil Judge (Junior Division), Faridabad, in the suit filed by the appellant-plaintiff, the department of Rehabilitation/Custodian, through the Joint Secretary of the Department, was impleaded as defendant No.28.

2. Upon notice issued to them, defendants No.1 to 5, 9 to 13 and 19 to 21, filed a joint written statement in which, other than the usual preliminary objections, on merits it was submitted that the suit land was in the cultivating possession of Mohmadans before partition and at the time of partition, it became "Matroka", as recorded in the column of cultivation, in the revenue record, and that the plaintiff was recorded as a "Gair Marusi" Pattedar under "Matroka", under a "Gair Marusi Awal", i.e. primary tenants, in the jamabandi for the years 1961-62 and 1966-67.

Thereafter, there was a sudden change in the column of cultivation in the name of the plaintiff, without giving any notice to the defendants-owners and as such, the said entry was not tenable.

3. The present appellant, i.e. the Department of Rehabilitation-defendant No.28, filed a written statement through the Tehsildar Sales, stating therein that in the jamabandi for the year 1961-62, the suit land was recorded in the name of the first defendant, Rama Nand, in the column of ownership, and in the column of cultivation, "Arazi Matroka" was recorded as "Gair Marusi Awal" and the cultivation was otherwise recorded to be that of plaintiff Het Ram.

It was also stated in the reply that in column No.10 of the jamabandi, there was an entry recorded as "Jaumgi Gair Morose Awal Basharah Malkan Bawajha Deriana Kasat", with the same entry recorded in the subsequent jamabandies, from the years 1967 to 2002.

(It may be noticed here that the suit was instituted on 24.04.2005, by respondent-plaintiff Het Ram).

Yet further, the reply stated that in the ownership column, 'Local Malkan' and 'Arazi Matroka' as "Gair Marosi Awal", was recorded as the owner, through Het Ram.

It was contended that the plaintiff is in illegal possession of the suit land and he has not paid the rent/use and occupation charges to the Government and had never approached the office of defendant No.28 (the present appellant), for purchase of the land.

4. On the aforesaid pleadings of the parties, the following issues were framed by the learned Civil Judge:-

- "1. Whether the plaintiff has acquired occupancy rights in respect of the land in question mentioned in para no.1 of the plaint? OPP
2. If issue no.1 is proved in affirmative, whether plaintiff has become owner in possession of suit land? OPP
3. Whether plaintiff is entitled to a decree of permanent injunction as prayed for? OPP
4. Whether the suit of the plaintiff is not maintainable in the present for? OPD
5. Whether the plaintiff has no locus standi and no cause of action to file the present suit? OPD

6. Relief.”

5. The plaintiff examined himself, one Mange Ram, Om Parkash and Ram Singh, as witnesses and tendered in evidence copies of a judgment dated 21.12.1998 as Ex.P3, a copy of the decree sheet as Ex.P4, copy of a judgment dated 21.9.2006 as Ex.P5, a copy of the decree sheet dated 21.9.2006 as Ex.P6, a copy of judgment dated 21.12.1998 as Ex.P7, copy of the decree sheet dated 21.12.1998 as Ex.P8, a copy of the judgment dated 24.4.2009 as Ex.P9 and a copy of the decree sheet dated 24.4.2009 as Ex.P10. He also tendered jamabandies from the years 1961-62 to 2007 and a khasra girdawari, by way of documentary evidence.

6. The defendants on the other hand, examined one Jagdish as DW1 and Mange Lal, Tehsildar Sales, as DW2. They relied upon jamabandies for the years 1954-55 to 2001-02.

7. After appraising the evidence, the learned Civil Judge first discussed the provisions of Sections 4 and 5 of the Punjab Tenancy Act, 1887, which provides for rights of occupancy to tenants subject to, as recorded by that Court, the following three conditions:-

- “1. At the commencement of the Act (1st Nov.1887) the tenant occupied that land paying to rent therefore beyond the amount of land revenue thereof and the rates and cesses of the time being chargeable thereon.
2. Two preceding generation in the male line of descent through grand-father or grand uncle

must have occupied the same on the terms specified in Para (1) above.

3. The period of such occupation must not be less than 20 years before 1st November, 1887."

He further discussed Section 6 of the Act as follows:-

- "1. That he has recorded as a tenant, having right of occupancy in land in a record of rights sanctioned by the State Government before the 21st day of October, 1868.
2. That he has continuously occupied that land from the time of the preparation of that record."

Thereafter, Section 8 was referred to, which, according to that Court, grants occupancy rights on the following conditions:-

- "1. The right has been generally or customarily or by the act of the proprietors conceded to other tenants similarly placed in the same village or in its neighborhood; of
2. The recognition of the right would be in accordance with the custom of the country; or
3. There has been promise to never to eject; or
4. The right would exist but for a palpable error in the Settlement Records."

8. Upon considering the aforesaid provisions, the Civil Judge came to the conclusion that the plaintiff could claim occupancy, though could not claim any other right under Sections 5 and 6, but could lay his claim under Section 8 of the Act of 1887, inasmuch as, his claim could be considered based on the fact that there was no intention to eject him at any point.

Citing the law laid down in **Smt. Sudha Aggarwal**

and others v. Sat Narain and another, 1994 PLJ 688, that Court held that if a tenant was in continuous possession for 30 years, then a presumption could be raised that there was an implied promise not to eject him, thereby giving rise to a claim under Section 8.

9. Thereafter, Sections 2(f) and 3 of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952, were considered by that Court.

As per Section 2(f), an occupancy tenant has been defined to include those tenants who were recorded as such in the revenue records immediately before the Act came into force and those who obtained rights of occupancy after the commencement of the Act, by virtue of having fulfilled the conditions laid down in the said provisions.

In fact, thereafter, holding that the plaintiff had acquired the rights after the commencement of the Act, in terms of the Act of 1952 and thereby the suit land vested in him under Section 3 of that Act, such vesting resulted in simultaneous extinguishment of the rights of the owner.

10. Discussing the evidence of the witnesses, the learned Court found that DW1, Jagdish, had admitted in his cross-examination that he had not seen the land since 1947 and had further shown his ignorance as to whether the Patwari visits the land, as was stated in the plaint. He also admitted that he had not filed any suit for getting the plaintiff dispossessed, nor had he filed any suit with respect to rent and in fact, he was not even

aware of the description of the land at all.

Similarly, DW2 Mange Lal also admitted in his cross-examination that in the jamabandies since the year 1961, the name of the plaintiffs' father had been appearing in the column of possession and that he himself (DW2) did not have any record pertaining to the name of the owner and further, he also had not actually seen the disputed land.

11. Thereafter, as regards the maintainability of the suit, citing a judgment of a Full Bench of this Court in **Shiv Charan v. Financial Commissioner, Haryana and others**, 2004(4) RCR (Civil) 543, it was held that the Civil Court had jurisdiction to entertain a suit, in respect of both categories of tenants, given in Section 2(f) of the Act of 1952.

12. On the basis of the aforesaid discussion by the learned Civil Judge, the suit of the plaintiff was decreed in his favour, holding him to have become owner of the suit property by virtue of Section 8 of the Act of 1887 and Section 3 of the Act of 1952.

13. The present appellant, i.e. the Department of Rehabilitation, filed an appeal against the aforesaid judgment, impleading the plaintiff as respondent No.1 through his legal heirs, (as he seems to have died in the meanwhile) and further impleading defendants No.2 to 27 as proforma respondents.

14. In his judgment, the learned Additional District Judge, in the aforesaid first appeal, after discussing the evidence in brief, first noticed the contention of the appellant-defendant No.28 that since the suit land was shown to be under the tenancy

of "Matroka" from 1954-55 to 1966-67, the land stood vested with the custodian/the Department of Rehabilitation, as at the time of the partition of the country, it was under the cultivation of Muslim tenants who immigrated to Pakistan. Hence, it was contended by the appellant, that the plaintiff could not have acquired any occupancy rights so as to be declared to be the owner of the property.

However, finding that the plaintiff was actually in cultivating possession of the property for 1961-62, it was held by the first appellate Court, that his tenancy did not stand "vested in the State Government".

It was further held that even if it was believed that Muslim tenants were earlier the tenants and the plaintiff was a sub-tenant, even then the Custodian, i.e. the appellant Department, did not become a tenant, as there was no order whereby tenancy rights vested in the Department. It was further observed that it was because of this reason that the entries in the revenue record (without specific reference to the specific entries), "disappeared in same fashion in which they had appeared". Thus, with the exit of principal tenants, the plaintiff being shown as a tenant for more than 30 years, it was held that he became the principal tenant and even if the tenancy was to be counted from 1971-72, when entries of Arazi Matroka as tenant Awal disappeared, the plaintiff had still acquired ownership rights in 2005, when he filed the suit. (In fact, it is at this stage that the appearance and disappearance of entries of a specific kind are

referred to by the first Appellate Court).

15. Hence, holding as above, that Court dismissed the first appeal filed by the appellant.

16. When this 2nd appeal earlier came up for hearing before this Court, vide order dated 23.05.2016, this Court had *prima facie* expressed an opinion that it would be not just be inequitable but wholly a travesty of justice, to put the respondent-plaintiff to another round of litigation, when the State had not declared the property ever to be evacuee property since 1947, even though, admittedly, the property was in the hands of Muslim tenants who immigrated to Pakistan in the wake of the partition.

Today, very fairly, learned counsel for the State has pointed to Section 7-A of the Administration of Evacuee Property Act, 1950, which reads as follows:-

"Property not 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 section 7 for declaring any property to be evacuee property with reference to clause (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 clause (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 clause (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 clause (b) of the first proviso.]”

17. Thus, it is very clear that as per second proviso to Section 7-A of the aforesaid Act of 1950, no notice under Section 7, notifying any property to be evacuee property in terms

of Clause (b), of the first proviso to Section 7-A, could be issued after the expiry of six months from the commencement of the Administration of Evacuee Property (Amendment) Act, 1954, i.e. Act 42 of 1954.

Section 7 of the Act of 1950 stipulates that where the custodian is of the opinion that any property is an evacuee property within the meaning of the Act, he may cause notice thereof to be given to the persons interested and after holding an enquiry into the matter, pass an order declaring any such property to be evacuee property.

Section 7 of the Act is also reproduced hereinbelow:-

7. Notification of evacuee property. (1)

Where the Custodian is of opinion that any property is evacuee property within the meaning of this Act, he may, after causing notice thereof to be given in such manner as may be prescribed to the persons interested, and after holding such inquiry into the matter as the circumstances of the case permit, pass an order declaring any such property to be evacuee property.

(1A) *Where during the pendency of any proceeding under sub- section (1) for declaring any property to be evacuee property any person interested in the property dies, the proceeding shall, unless the Custodian otherwise directs, be continued and disposed of as if such person were alive.]*

(2) *Where a notice has been issued under sub-section (1) in respect of any property, such property*

shall, pending the determination of the question whether it is evacuee property or otherwise, be incapable of being transferred or charged in any way, except with the leave of the Custodian, and no person shall be capable of taking any benefit from such transfer or charge except with such leave.

(3) *The Custodian shall, from time to time, notify, either by publication in the Official Gazette or in such other manner as may be prescribed, all properties declared by him to be evacuee properties under sub- section (1).*

18. As already noticed in an earlier order, evacuee property has been defined in Section 2 (f) of the Act of 1950, to mean any property of an evacuee held by him either as an owner or a trustee or a beneficiary, or as a tenant, or in any other capacity.

Vide Section 8 of the Act of 1950, any property declared to be evacuee property under Section 7, shall be deemed to have vested in the Custodian for the State.

19. Learned counsel for the State submits that the Administration of Evacuee Property Act, 1950, was repealed on 05.09.2005 but the suit was filed by respondent No. 1 (plaintiff) Het Ram on 24.04.2005, i.e. within the period in which the aforesaid Act was in operation. He, therefore, submits that in terms of clause (b) of Section 7-A of the Act of 1950, the property would be evacuee property and simply because the notification to that effect was not issued before 1954, i.e. before the commencement of the Administration of Evacuee Property (Amendment) Act, 1954, or within 6 months thereafter, it would

not change the nature of the property as undoubtedly it was in the occupation of Muslim tenants who immigrated to Pakistan in 1947. As such, he submits that the definition of evacuee property undoubtedly covering the property in dispute, it would be deemed to have vested in the Custodian by virtue of Section 8 of the aforesaid Act.

He has thereafter referred to Section 2 (b) of the Haryana Evacuee Property (Management and Disposal) Act, 2008, which defines an evacuee property as follows:-

"evacuee property" means any evacuee property which has been received by the State Government from the Government of India in any manner or has become evacuee by operation of any law, rules or orders or any other property described as such in the revenue record and includes the properties mortgaged by erstwhile Muslim evacuee owners in favour of locals or vice-versa;"

He submits that after the commencement of the Act of 2008, in any case the property would still vest in the Government, the definition of evacuee property being, under the Act of 2008, such evacuee property as was received by the State Government from the Government of India in any manner, or has become evacuee property by operation of any law rules or orders, or any other property described as such in the revenue record, including property mortgaged by erstwhile Muslim

evacuee owners in favour of locals or vice-versa.

Learned State counsel therefore submits that the Mulsim tenants being the "Awwal/ tenants", with respondent No. 1-plaintiff being a sub tenant under them, the Custodian and subsequently the State Government, stepped into the shoes of the "Awwal/ tenants" who immigrated to Pakistan and as such, by operation of the Act of 2008, the property could still be declared to be evacuee property by the State Government.

20. Having heard learned counsel for the appellant-State, I unable to accept any of the aforesaid arguments. Though he has made a strenuous effort to bring the property within the definition of evacuee property, a bare perusal of the second proviso to Section 7-A aforesaid, makes it very clear that any property, even though it may otherwise have been occupied by a person who immigrated to Pakistan in the wake of the partition of 1947, could only be declared to be evacuee property after a notification in that respect was issued and which was required to be issued prior to the commencement of Act 42 of 1954, or within 6 months thereafter.

Admittedly, no such notification has been issued till date. In fact, the State woke up to the fact that this property was earlier in the hands of Mulsim tenants who had immigrated to Pakistan, for the first time after the suit was filed in the year 2005 by respondent No. 1-plaintiff, seeking that he be declared to be the owner thereof in terms of the Punjab Tenancy Act 1887 and Punjab Occupancy of Tenants (Vesting of Proprietary Rights),

Act 1953.

21. As regards the property having become evacuee property pursuant to the enactment of the Act of 2008, even as per Section 2 (b) of the said Act, evacuee property is only such property as was received by the State Government from the Government of India in any manner, or such property as became evacuee by operation of any law, rules or orders, or was described as such in the revenue record, including property mortgaged by erstwhile Muslim evacuee owners in favour of locals or vice-versa.

I do not see how the aforesaid provision also covers the suit property, inasmuch as, firstly it was never received by the State Government from the Government of India (the Custodian being the representative of the Government of India); secondly, it did not become evacuee property even by operation of any law, it not having been notified as such even till date, far less before or 6 months of the enactment of Act No. 42 of 1954.

22. Though learned State counsel submits that the property was described to be 'Arazi Matruka', which would translate into rent free property that has devolved upon the heirs of the original owner/cultivator. He, therefore, submits that since, from the year 1960-1971 the revenue records reflected the property as such in the column of cultivation, it would translate to mean that it was property in the hands of Government, being the 'legal heirs/successors-in-interest' of the Muslim tenants, who have immigrated to Pakistan.

Even that argument is not sustainable, in view of the fact that there is no basis shown for any entry at all in the revenue record in favour of the Government, even as a tenant on the said property, as, to repeat, no notification declaring the property to be evacuee property was ever proved before the Courts below. Simply by an entry in the revenue record, for which there was no legal basis, the property cannot be deemed to be evacuee property.

Though an entry in the revenue record is presumed to be correct in terms of Section 44 of the Punjab Land Revenue Act 1887, such presumption is rebuttable.

Therefore, for the aforesaid reason, that there was actually no basis for the entry in favour of Government, there being no notification declaring the property to be evacuee property and secondly, such entry, if it existed at all, also having ceased to exist in favour of the Government since 1971 least, there is no basis to hold that the property was ever evacuee property.

As such it cannot be declared to be evacuee property even in terms of the Act of 2008.

Consequently, finding no merit in the appeal, it is dismissed *in limine*, with no order as to costs.

CM No. 2018-C-2016

The issue of condonation of the delay of 317 days in filing the appeal is rendered academic, in view of the fact that the appeal has been dismissed on merits. Consequently, that issue is

not gone into.

(AMOL RATTAN SINGH)
JUDGE

May 30, 2016
nitin