

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

R.S.A. No. 546 of 1991

Date of Decision: 24 - 8 – 2017

Diwana

....Appellant

v.

Balbir Singh and others

....Respondents

CORAM: HON'BLE MR.JUSTICE RAJ SHEKHAR ATTRI

Present: Mr.Umesh Aggarwal, Advocate
for the appellant.

Mr.H.S.Saini, Advocate
for respondents No.1 and 2.

RAJ SHEKHAR ATTRI, J.

Remaining unsuccessful before the Courts below, the plaintiff has come up in this appeal assailing the judgment and decree dated 30.4.1990 passed by the trial court vide which the suit of the plaintiff was dismissed and that of the first appellate court dated 4.2.1991 vide which the first appeal was dismissed.

This case has checkered history. The suit property was the common land owned by “*Shamilat Deh Patti Her Swaich Hasab Rased Raqba Arazi Khewat*”. Both Mohammedans and Hindus proprietors were co-sharers therein before partition of the country.

It is the case of the plaintiff-appellant that after partition, the

Mohammedan proprietors had left to Pakistan. Therefore, the property of their share was declared as evacuee under the provisions of the Administration of the Evacuee Property Act, 1950 and mutated in the name of the Custodian General. Subsequently, vide Mutation No.10045, the land was partitioned and share of the Custodian was separated.

It is also the case of the plaintiff-appellant that much before partition of the country, his father and fore-fathers were in cultivating possession in the suit land being tenants. Even after sanction of Mutation No.10045, they remained in possession of the suit property. Subsequently, Tehsildar (Sales) has allotted the land to defendant-respondents No.1 and 2 in an illegal manner, albeit the possession of the plaintiff-appellant was never disturbed.

As such, the plaintiff-appellant has been seeking declaration that alleged partition/specification of shares vide Mutation No.10045 are illegal and void and he sought permanent injunction restraining the defendants-respondents from interfering into the possession of the plaintiff-appellant over the suit land.

Suit has been contested by defendants-respondents No.1 and 2, pleading, inter alia, that same is bad for non-joinder of necessary parties as the civil court has no jurisdiction to try the suit. On merits, it is admitted that the Custodian General was the exclusive owner of the suit land which fell to his share in the partition and thereby the Custodian was allotted 12197/18348 shares and the mutation was sanctioned accordingly.

It is also the case of defendants-respondents No.1 and 2 that they have purchased the suit property in open auction which took place on 28.8.1986 and that they have paid the sale price. As such they are entitled

to take possession in accordance with law from the Custodian being the lawful owners.

Defendant-respondent No.3 also contested the suit inter alia alleging that jurisdiction of the civil court is barred and that no notice had been issued to this defendant under Section 80 C.P.C.. However, on merits, it is admitted that plaintiff-appellant and his fore-fathers were in possession but they are/were not tenants as alleged by the plaintiff-appellant. However, it is admitted that Tehsildar (Sales) has partitioned the evacuee share vide order dated 10.9.1984. Thereafter, the land was sold in open auction which was purchased by defendants No.1 and 2 and they are entitled to possession thereof.

From the pleadings of the parties, the following issues were framed:-

1. Whether the plaintiff is in possession of land in suit as tenant and is entitled to a decree of permanent injunction on the grounds stated in the plaint? OPD
2. Whether the specification of shares, partition and allotment of land to defendant No.2 and 2 is illegal, null and void and is not binding upon the rights of the plaintiff on the grounds stated in para No.8 of the plaint? OPD
3. Whether the land in suit is a evacuee property and so the civil court has got no jurisdiction to try and entertain the present suit? OPD
4. Whether the plaintiff did not serve a notice u/s 80 CPC upon the defendant No.3 before filing the present suit? OPD
5. Whether the plaintiff has no locus standi to file the present suit? OPD
6. Whether the suit is not maintainable against defendant No.3? OPD

7. Whether the suit is bad for non joinder of necessary parties? OPD
8. Relief.

Learned trial Court has afforded adequate opportunities to the parties to adduce evidence. On appreciation of evidence, the suit was dismissed holding that the plaintiff failed to establish his tenancy and first appeal was also dismissed.

I have heard learned counsel for the parties and with their assistance perused the record.

Learned counsel for the plaintiff-appellant has vehemently contended that possession of the plaintiff-appellant is continuous, settled as a tenant and he cannot be dispossessed except in due course of law. In support of his contention, he has placed reliance on **State of Tamil Nadu v. Sivarsan**, (1996)10 JT 141.

On the other hand, learned counsel for the defendant-respondents has submitted that possession of the plaintiff-appellant is unauthorised and not as a tenant, therefore, he is not entitled to injunction as prayed for. It has been further argued that concurrent findings of the Courts below cannot be disturbed.

This Court has given its thoughtful consideration to the rival contentions and analyzed the evidence on the record.

The substantial questions of law which have arisen for determination are as to whether possession of the plaintiff-appellant is as a tenant or he is an un-authorised occupant; and as to whether the plaintiff-appellant is entitled to injunction?

First of all coming to the possession of the plaintiff-appellant.

His possession is admitted by the defendants. Defendant No.3 has

unequivocally admitted that the plaintiff-appellant and his father and fore-fathers were in possession of the suit land. Apart from it, the revenue record well established the possession of the plaintiff-appellant. The jamabandi Ex.D1/A for the years 1979-80 and jamabandi Ex.D4 for the years 1984-85 transpired that Diwana son of Sukh Lal is in possession as a “gair marusi”. The possession of the plaintiff-appellant is also shown in Khasra Girdawaries Exs.P4 to P10 i.e. from Kharif 1962 to Rabbi 1986. Earlier his father Sukh Lal was in possession and after his death plaintiff-appellant entered into possession as a “gair marusi”.

So far as oral evidence is concerned, Diwan Chand plaintiff appeared as PW1 and proved his possession. Balbir defendant appeared as DW1. He admitted that he had not obtained the possession from the Custodian. However, he has shown his ignorance as to whether plaintiff-appellant Diwana or any other person is cultivating the suit land. Thus, a bare perusal of oral and documentary evidence reveals that Sukh Lal was in possession and after his death, plaintiff-appellant Diwana came into possession of the land and their status is shown as “gair marusi” in the revenue record.

Now coming to the nature of the possession of the plaintiff-appellant - as that of the tenant or as an un-authorised occupant; Admittedly, the plaintiff-appellant has never paid any rent to the Custodian - the real owner. In fact there is no evidence if he or his fore-fathers had ever paid rent to anybody. He wants to take undue advantage of the entries in the revenue record wherein he is mentioned as “gair marusi” in column No.5 but column No.9 which is meant for payment of rent, does not depict if he is a tenant or paying rent and it is left blank. In jamabandi Ex.D4 for the year

1984-85, it is mentioned in column No.9 “batai tehai bashrah khata No.1” (at the same rate as per khata number one). However, jamabandi Ex.D1/A for the year 1979-80 is silent with regard to payment of rent. A single entry in jamabandi Ex.D4 does not prove if he is a tenant under the Custodian. While appearing as PW1 Diwan Chand has nowhere stated that he is paying the rent to anybody. He had simply stated that the land belonged to ‘Shamilat Her Swaich’ and that earlier his father and fore-fathers were cultivating the same and after their death, he is cultivating it. Thus, it is neither pleaded nor proved that plaintiff-appellant's father or fore-fathers had been paying rent to anybody.

“Rent” as defined under the Punjab Tenancy Act, 1887, commonly is four kinds, namely, :-

- “(a) Batai rents – a definite share of the crop.
- (b) Zabti rents – cash rents for particular crops which cannot conveniently be divided, are fixed rates per kanal or bigha.
- (c) Nakdi rents – cash rent paid on land irrespective of the crop grown upon it.
- (d) Chakota rents – lump grain rents or rents consisting of a fixed amount of grain in the spring, and a fixed amount of money in the autumn harvest. “Chakota” is also used to denote a lump cash rent paid on a holding.”

Expression “tenant” has been defined under Section 4(5) of the Punjab Tenancy Act, 1887 which reads as under:-

“(5) “tenant” means a person who holds land under another person, and is, or but for a special contract would be,

liable to pay rent for that land to that other person, but it does not include:-

- (a) an inferior land owner, or
- (b) a mortgagee or the rights of a landowner, or
- (c) a person to whom a holding has been transferred, or an estate or holding has been let in farm, under the Punjab Land Revenue Act, 1887, for the recovery of an arrear of land revenue or of a sum recoverable as such an arrear, or
- (d) a person who takes from the [Government] a lease of unoccupied land for the purpose of subletting it.”

Further, the term “landlord” defined under Section 4(6) is as under:-

“(6) “landlord” means a person under whom a tenant holds land, and to whom the tenant is, or but for a special contract would be, liable to pay rent for that land,”

Thus, a combined reading of sub-sections (5) and (6) of Section 4 makes it abundantly clear that tenant is a person who holds the land under another person i.e. landlord, and he, or but for a special contract would be liable to pay rent to the landlord. In the case in hand, no “special contract” in terms of sub sections (5) and (6) (ibid) has been proved or pleaded. Thus, there is no relationship of tenant and landlord between the parties.

Even there is no evidence if he himself is a proprietor. He wants to derive benefit of the term “gair marusi” as recorded in the revenue record and khasra girdawari entries. It is settled law that the term “gair

marusi” generally means and denotes a tenant-at-will. The terms “gair marusi” and “tenant” are synonymous. But in column No.9 of the jamabandi, which denotes payment of rent, is kept blank or does not depict payment of a peculiar kind of rent, then the person in occupation, though recorded as “gair marusi” cannot be treated as a tenant.

In **Bhag Singh v. State of Punjab**, 2015(1) PLJ 193 similar proposition of law was discussed. In that case, State of Punjab filed an application under Sections 4 and 5 of the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, 1973 for eviction of the petitioners from the land which was recorded in the name of Central Government being evacuee property. Petitioners claimed that they are tenants and their names are entered as “gair marusi”. However, this plea was negatived and in para 6, it was observed as under:-

“6. Perusal of jamabandi for the year 1996-97 (Annexure P-7) reveals that column No.9 is blank. It is nowhere mentioned as to in what capacity petitioners came into possession of the property nor any other evidence has been led as to how they became tenant in the property in question either under the Central Government or State Government by way of lease or in any other manner. In view of the settled principle of law that when rent column is blank and does not depict the status of cultivator shown in column No.5, person cannot be treated as gair marusi tenant. This Court in RSA No.185 of 1986 titled '**Kuldip Chand v. Jagdish Lal and others**', decided on 22.01.2014 has held as under:-

“A perusal of jamabandi Ex.PA clearly indicates that in cultivation column word 'gair marusi' has been

*mentioned but column No.9, which is rent column, is blank. When rent column is left blank it does not mean that appellant is tenant of this land, he is only occupant. Entry in rent column i.e. Colum No.9 determines the capacity of the person in which he is occupant of the land. Division Bench of this Court in **Mukhtiar Singh vs. State of Haryana**, 2013(3) PLR 433 has held that phrase 'gair marusi' merely refers to an occupant of land only if it was accompanied by an entry of payment of rent, in the relevant column of the revenue record, would raise inference of a tenancy. It is to be noticed that many a times word 'gair marusi' is mentioned in column No.5, however, in the rent column it is mentioned as lessee or on chakota. If the rent column is left blank then it will be deemed that possession of the appellant is not as tenant."*

Thus, it is clear that the plaintiff-appellant is not a tenant- rather he is an un-authorised occupant. Similar is the position with regard to his father as shown in the jamabandi for the year 1979-80 Ex.P1.

Now the question arises as to whether the plaintiff is entitled to the injunction as prayed for? It is settled proposition of law that a person in a settled possession, even though a trespasser, cannot be ejected forcibly and should be evicted by due process of law.

The legal term "Due process of law" has been defined in the case of **Maria Margarida Sequeria Fernandes and others v. Erasmo Jack de Sequeria (Dead) through L.Rs. and others**, 2012(2) Apex Court Judgments 96 at page 108 as under:-

81. Due process of law means nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due of law. Due

process means an opportunity for the defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court.

82. The High Court of Delhi in a case **Thomas Cook (India)**

Limited v. Hotel Imperial 2006 (88) DRJ 545 held as under:

"28. The expressions 'due process of law', 'due course of law' and 'recourse to law' have been interchangeably used in the decisions referred to above which say that the settled possession of even a person in unlawful possession cannot be disturbed 'forcibly' by the true owner taking law in his own hands. All these expressions, however, mean the same thing -- ejection from settled possession can only be had by recourse to a court of law. Clearly, 'due process of law' or 'due course of law', here, simply mean that a person in settled possession cannot be ejected without a court of law having adjudicated upon his rights qua the true owner.

Now, this 'due process' or 'due course' condition is satisfied the moment the rights of the parties are adjudicated upon by a court of competent jurisdiction. It does not matter who brought the action to court. It could be the owner in an action for enforcement of his right to eject the person in unlawful possession. It could be the person who is sought to be ejected, in an action preventing the owner from ejecting him. Whether the action is for of a right (recovery of possession) or protection of a right (injunction against dispossession), is not of much consequence. What is important is that in either event it is an action before the court and the court adjudicates upon it. If that is done then, the 'bare

minimum' requirement of 'due process' or 'due course' of law would stand satisfied as recourse to law would have been taken. In this context, when a party approaches a court seeking a protective remedy such as an injunction and it fails in setting up a good case, can it then say that the other party must now institute an action in a court of law for enforcing his rights i.e., for taking back something from the first party who holds it unlawfully, and, till such time, the court hearing the injunction action must grant an injunction anyway? I would think not. In any event, the 'recourse to law' stipulation stands satisfied when a judicial determination is made with regard to the first party's protective action. Thus, in the present case, the plaintiff's failure to make out a case for an injunction does not mean that its consequent cessation of user of the said two rooms would have been brought about without recourse to law."

Hon'ble Supreme Court in **Meghmala and others v. G. Narasimha Reddy and others**, 2011(2) Apex Court Judgments 496 (in paragraphs 34 and 35) made the following observations:-

"34. Even a trespasser cannot be evicted forcibly. Thus, a person in illegal occupation of the land has to be evicted following the procedure prescribed under the law. (Vide **Midnapur Zamindary Co. Ltd. Vs. Naresh Narayan Roy AIR 1924 PC 124; Lallu Yeshwant Singh Vs. Rao Jagdish Singh & Ors. AIR 1968 SC 620; Ram Ratan Vs. State of U.P. AIR 1977 SC 619; Express Newspapers Pvt. Ltd. & Ors. Vs. Union of India & Ors. AIR 1986 SC 872; and Krishna Ram Mahale Vs. Mrs. Shobha Vankat Rao AIR 1989 SC 2097**).

35. In **Nagar Palika, Jind Vs. Jagat Singh AIR 1995 SC 1377**, this Court observed that [Section 6](#) of the Specific Relief Act 1963 is based on the principle that even a trespasser is entitled to protect his possession except against the true owner and purports to protect a person in possession from being dispossessed except in due process of law.”

Learned trial Court and the first appellate Court have failed to appreciate that possession of the plaintiff-appellant is continuous, long and settled. Therefore, he cannot be evicted except in due process of law. To the mind of this Court, the Courts below erred in law in not granting injunction to the plaintiff-appellant to this extent. Consequently, the findings of the learned trial Court to this extent are liable to be set aside and reversed.

As a result, this appeal is accepted with costs and judgments and decrees of the Courts below are set aside. The suit of the plaintiff-appellant for permanent injunction stands decreed to the extent that he cannot be dispossessed except in due process of law.

(**RAJ SHEKHAR ATTRI**)
JUDGE

August 24, 2017.

RC

<i>Whether speaking/reasoned?</i>	<i>Yes</i>
<i>Whether reportable?</i>	<i>Yes</i>