

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

**RSA-3330-2016 (O&M) and
RSA-3512-2016 (O&M)
Date of Decision:12.09.2018**

Kanwar Bhan (deceased) through LRs

...Appellant(s)

Versus

Khurshid and others

...Respondents

CORAM:- HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr.Kanwaljit Singh, Sr. Advocate with
Mr.Chirag Wadhwa, Advocate for the appellant(s).
Mr.Arun Jain, Sr. Advocate with
Mr.Amit Jain, Advocaes and
Mr.Adarsh Jain, Advocate for the respondents.

ANIL KSHETARPAL, J.

By this judgment, RSA Nos.3330 and 3512 of 2016 shall stand disposed of with the consent of learned counsel for the parties, who admit that question which needs consideration in both the appeals, although, arising from separate suits, is common.

The defendant-appellant through his legal heirs has filed these two appeals against the judgments and decrees passed by both the courts below. The plaintiffs-respondents in both the suits, which are identical in pleadings, pray for a decree of declaration that they be declared occupancy tenants and consequently owners in possession of the property in dispute as per Section 3 of the Punjab Tenants (Vesting of Proprietary Rights) Act, 1953 (for short 'the 1953 Act'). In the plaint, the plaintiffs claimed that they have become occupancy tenants as per the provisions of Section 5(2) and 8 of the Punjab Tenancy Act, 1887 (for short 'the 1887 Act'). The plaintiffs

have pleaded that they were inducted as tenants and they are in possession of the land at lease money of Rs.1 per kanal for the last 50 years. It was further pleaded that there is a custom in the locality of acquiring occupancy right by the tenants like the plaintiffs.

The plaintiffs through their father had previously filed an application for claiming the same right which was initially decreed by the revenue authorities constituted under the 1887 Act, however, in appeal/revision, the order was set aside, as it was found that it is only the civil court which is competent to grant such declaration. A Full Bench of this Court, while deciding the question that whether authorities constituted under the 1887 Act, have the jurisdiction to grant such declaration, has held that the civil court has the jurisdiction.

The defendant-appellant contested the suit and pleaded that the property in dispute was a evacuee property allotted to him by the Rehabilitation Department. The claim made by the plaintiffs for having acquired the status of occupancy tenant and consequently ownership was denied.

The learned trial Court held that since it is proved on the file that the plaintiffs are in continuous possession of the property at lease money of Rs.1.20/- per kanal, which has not been increased for quite some time and the plaintiffs are proved to be in continuous possession since 1966-67, therefore, they have acquired the right under Section 5(2) of the 1887 Act to get declaration that they have acquired the right of occupancy tenants and and therefore, ownership.

The learned first appellate court has held that the rate of rent remained same and never enhanced and, therefore, the findings of trial court have been affirmed.

This Court has heard the learned senior counsel for the parties at length and with their able assistance gone through the judgments passed by the courts below and the record.

At the outset, learned senior counsel for the respondents admitted that the case of the plaintiffs would not fall/covered by the provisions of Section 5(2) of the 1887 Act. However, he submitted that the case of the plaintiffs would be covered by Section 8 of the 1887 Act, which provides that status of occupancy tenant can also be acquired on any ground than the grounds specified in those provisions of the 1887 Act.

This Court had occasion to consider the entire scope of various provisions made in the 1887 Act with regard to acquisition of right of occupancy and consequently ownership vis a vis pursuant to the 1953 Act in **RSA No.5057 of 2016 (Parbhat and others Vs. Surender Singh and others)**, decided on 8.1.2018.

Before proceeding further, it would be appropriate to extract the relevant provisions of Sections 5, 6, 7, 8, 9, 10 and 11 of the 1887 Act (deal with the rights of occupancy tenant) and Sections 2(f) and 3 of the 1953 Act, which are as under:-

“5. Tenants having right of occupancy - (1) A tenant(a) who at the commencement of this Act has for more than two generations in the male line of descent through a grandfather or grand-uncle and for a period of not less than twenty years, been occupying land paying no rent therefore beyond the amount of the land-revenue thereof and the rates and cesses for the time being chargeable thereon; or
(b) who having owned land, and having ceased to be landowner thereof otherwise than by forfeiture to the Government or than by any voluntary act, has since ceased to be land-owner continuously occupied the land; or

(c) who in a village or estate in which he settled along with or was settled by the founder thereof as a cultivator therein, occupied land on the twenty-first day of October, 1868, and has continuously occupied the land since that date; or

(d) who being jagirdar of the estate or any part of the estate in which the land occupied by him is situate, has continuously occupied the land for not less than twenty years, or, having been such jagirdar, occupied the land while he was jagirdar and has continuously occupied it for not less than twenty years, has a right of occupancy in the land so occupied unless, in the case of a tenant belonging to the class specified in the clause (c), the landlord proves that the tenant was settled on land previously cleared and brought under cultivation by, or at the expense of, the founder.

(2) If a tenant proves that he has continuously occupied land for thirty years and paid no rent therefore beyond the amount of the land-revenue thereof and the rates and cesses for the time being chargeable thereon, it may be presumed that he had fulfilled the conditions of clause (a) of sub-section (1).

(3) The words in that clause denoting natural relationship denote also relationship by adoption, including therein the customary appointment of an heir and relationship, by the usage of a religious community.

6. Right of occupancy of, other tenants recorded as having the right before passing of Punjab tenancy Act, 1908 -

A tenant recorded in a record-of-rights sanctioned by the State Government before the twenty-first day of October, 1868, as a tenant having a rights of occupancy in land which he has continuously occupied from the time of the preparation of that record, shall be deemed to has a right of occupancy in that lands unless the contrary has been established by a decree of a competent Court in the suit instituted before the passing of this Act.

7. Right of occupancy in land taken in exchange - *If the tenant has voluntarily exchanged the land, or any portion of*

the land, formerly occupied by him for other land belonging to the same landlord, the land taken in exchange shall be held to be subject to the same right occupancy as that to which the land given exchange had not taken place.

8. Establishment of right of occupancy on grounds other than those expressly stated in Act - *Nothing in the foregoing sections of this Chapter shall preclude any person from establishing a right of occupancy on any ground other than the grounds specified in those sections.*

9. Right of occupancy not to be acquired by mere lapse of time - *No tenant shall acquire a right of occupancy by mere lapse of time.*

10. Right of occupancy not to be acquired by joint owner in land held in joint ownership - *In the absence of a custom to the contrary, no one of several joint owners of land shall acquire a right of occupancy under this Chapter in land jointly owned by them.*

11. Continuance of existing occupancy rights - *Notwithstanding anything in the foregoing sections of this chapter, a tenant, who immediately before the commencement of this Act has a right of occupancy in any land under an enactment specified in any line of the first column of the following table shall when this Act comes into force, be held to have, for all, the purposes of this Act, a right of occupancy in that under the enactment specified in the same line of the second column of the table.*

Sections 2(f) and 3 of the 1953 Act are also as under: –

“2(f) *“occupancy tenant” means a tenant who, immediately before the commencement of this Act, is recorded as an occupancy tenant in the revenue records and includes a tenant who, after such commencement obtains a right of occupancy in respect of the land held by him whether by agreement with the landlord or through a court of competent jurisdiction or otherwise, and includes also the predecessors and successors in*

interest of an occupancy.”

“Section 3

Section 3. Vesting of proprietary rights in occupancy tenants and extinguishment of corresponding rights of landlords – *Notwithstanding anything to the contrary contained in any law, custom or usage for the time being in force, on and from the appointed day-*

(a) all rights, title and interest (including the contingent interest, if any, recognized by any law, custom or usage for the time being in force and including the share in the Shamilat with respect to the land concerned) of the landlord in the land held under him by an occupancy tenant, shall be extinguished, and such rights, title and interest shall be deemed to vest in the occupancy tenant free from all encumbrances if any, created by the landlord:

Provided that the occupancy tenant shall have the option not to acquire the share in the Shamilat by giving a notice in writing to the Collector, within six months of the publication of this Act or from the date of his obtaining occupancy rights whichever is later;

(b) the landlord shall cease to have any right to collect or receive any rent or any share of the land revenue in respect of such land and his liability to pay land revenue in respect of the land shall also cease;

(c) the occupancy tenant shall pay direct to the Government the land revenue accruing due in respect of land;

(d) the occupancy tenant shall be liable to pay, and the landlord concerned shall be entitled to receive and be paid, such compensation as may be determined under this Act.

Learned senior counsel for the appellant, while drawing attention of the Court to the revenue record, has submitted that it is the

pleaded case of the plaintiffs in both the suits that they are the tenants over the land at lease money of Rs.1 per kanal, whereas land revenue as per jamabandi for the year 1966-67 was Rs.2 for the entire land measuring 31K-17M. He further drew attention of the Court to the jamabandi for the year 1972-73, where the land revenue is Rs.1.53/- with respect to land measuring 24K-1M which continues in jamabandi for the years 1977-78, 1982-83 continuously. He has further submitted that if lease money is calculated, it comes to Rs.8 per acre and for land measuring 24K-1M with respect to the first suit filed, it would come to little more than Rs.24/-. He further submitted that both the courts below have not recorded any findings that at the time of inception of tenancy, there was any promise not to evict the tenants. He further drew attention of the Court to Ex.P2/A, a receipt of deposit of rent from the year 2000 to 2008 when the tenants-plaintiffs deposited Rs.200/-. He further submitted that no custom has been proved by the plaintiffs. He further submitted that in the judgments passed by the learned trial court in various cases, it is nowhere held that there is any custom in the area enabling 'gair marusi' tenants to acquire the occupancy rights.

On the other hand, learned senior counsel for the respondents-plaintiffs submitted that from the various judgments passed by the civil courts in various cases, which have been filed, it is clearly proved that such declaration is being granted by the courts.

This Court in **Parbhat's (supra)** had occasion to deal with the identical issues and it was held as under:-

“It is not the case of the plaintiffs that they have become occupancy tenants, in terms of Section 5(2) of the 1887 Act. As per Section 5(2) if a tenant proves that he has continuously

occupied land for thirty years and paid no rent beyond the amount of the land-revenue and the rates and cesses for the time being chargeable thereon, it may be presumed that he had fulfilled the conditions of clause (a) of sub-section (1).

It is not the pleaded case of the plaintiffs that they have not paid any rent for the land beyond the amount of land revenue, rates and cesses for the time being chargeable on the land. It is the case of the plaintiffs that they or their predecessor have already been allotted the proprietary rights of land to the extent of 4/11th share under the provisions of Haryana Ceiling On Land Holdings Act, 1972.

The learned trial court granted declaration to the plaintiffs under Section 8 of the 1887 Act. Section 8 of the Act is an enabling provision where any person can establish a right of occupancy tenant on any ground other than the grounds specified in those Sections. In other words, under Section 8, the Court is empowered to declare a person occupancy tenant if such person establishes a right of occupancy on any ground other than the grounds specified in Section 5, 6 and 7 of the 1887 Act. Section 9 of the 1887 Act clearly provides that merely on the ground that a tenant has been sitting over the land for sufficient long time would not enable the tenant to claim a right of occupancy.

The learned first appellate court has noticed, after discussing the evidence led namely copies of Jamabandis to prove the predecessor of the plaintiffs and thereafter the plaintiffs are recorded as Gair Marusi (non-occupancy tenants). This fact is not contested by the Learned Senior Counsel for the appellants. Gair Marusi tenants are the tenants at will of the land owners. However, but for the right of inheritance available under the statutory provisions, such tenants were not having any right of inheritance of the tenancy. The word 'Marusi' means occupancy (source- Punjab Settlement Manual 1899 by Douie's), whereas Gair means 'non'. Therefore, the literal meaning of Gair Marusi is

non occupancy. Such term is used for the tenants at the wish of the land owners.

The reliance placed by the learned senior counsel for the respondent on the judgment passed in **Muni Ram and others Vs. Phullia & Lalu, 1974 PLJ 369** is clearly misplaced as in the aforesaid case, the Court had ultimately held that the tenants failed to prove their right of occupancy. Para 7 of the judgment passed in **Muni Ram's** case (supra) is extracted as under:-

It is the admitted case of both sides that the plaintiffs were not recorded as occupancy tenants in the revenue records immediately before the commencement of the Occupancy Tenants Act. Nor do the plaintiffs claim to have obtained any right of occupancy in the land in question at any time after the commencement of the Occupancy Tenants Act. Nor has any post Act agreement been pleaded. The plaintiffs can succeed only if they prove that an occupancy tenancy under Section 8 of the Tenancy Act existed. For proving that, they have to show that at the inception of the tenancy the agreement was not to eject the predecessors-in-interest of the plaintiffs. There is no such evidence on record at all. Lalu plaintiff himself in his statement no doubt made an averment in that behalf and much capital has been made by his counsel to the effect that no direct questions impugning the correctness of that averment were put to Lalu plaintiff in cross-examination. The fact, however, remains that none of the plaintiffs was alive at the time of the inception of the tenancy. The plaintiffs have admitted that none of the persons who were living at the time of the commencement of the tenancy of their great-grandfather is now alive. The statement of Lalu about what was said by the land-owners to the great-grandfather of the plaintiffs is, therefore, sheer hearsay, and does not amount to evidence. In the plaint it was claimed that the occupancy tenancy came into existence in 1860. No evidence at all has been led regarding the tenancy

*from 1860 to 1878. What happened after the inception of the tenancy is not relevant. Even the entries after 1879 do not show the existence of an occupancy tenancy. There is break of two years during 1944-47, during which period the rent was also enhanced. That is not a stray entry like the one which existed in **Anant Ram and another v. Lakhbir Gupta, 1962 L.L.T. 43**. That entry related to a period of ten days only between the two crops. The entry relating to enhancement of rent for several years cannot, therefore, be considered to be stray entry. Long possession by itself does not confer any right on the plaintiffs. Counsel for the plaintiffs laid emphasis on the mention of priesthood (prohtai) of the plaintiffs in the entries of 1944-46, and said that this fact indicated that the ancestors of the plaintiffs were never intended to be ejected from the land. There is no such entry of priesthood (prohtai) in respect of any of the ancestors of the plaintiffs. Mention of such a fact in recent entries cannot, in my opinion, show as to what was the intention of the land-owners at the time of the inception of the tenancy in 1860 or even in 1879. In these circumstances, I think that the judgment of the trial Court on the merits of the case was correct and, and that the lower appellate Court has not applied the correct law in decreeing the plaintiff's suit. The entry of 1944-46 was not a stray entry and could not be legally ignored.”*

It is well established that if a owner is to be divested of a right in the property, the provisions of the Act have to be strictly construed. The courts cannot be swayed by their emotions and perceptions. Once someone is claiming that they have acquired ownership in the immovable property, he is required to establish the aforesaid right beyond any reasonable doubt. No doubt Section 8 of the 1887 Act enables a tenant to establish a right of occupancy of any ground other than the grounds specified in other Sections of the Act. However, such right has to be established beyond reasonable

doubt. In **Muni Ram and others Vs. Phullia and Lalu, 1974 PLJ 369**, this Court culled out certain prepositions of law for grant of such declaration.

On careful examination of the aforesaid prepositions, it is established that for establishing the right, the tenant is required to prove the aforesaid requirement. In the present case, it will be noticed that as per jamabandi for the year 1966-67, the nature of land measuring 24K-1M which is being claimed for the first suit, was having sailab (land not fit for cultivation because of dampness).

In the second suit which is in respect of Rectangle No.2, Khasra Nos. 10 and 11, the land measuring 12K-11M is depicted as Banjar Qadim again not fit for cultivation. Same is the position in the jamabandi for the year 1972-73. The land is proved to be fit for cultivation only with effect from the jamabandi for the year 1977-78. Still further, as per jamabandi for the year 1963-64 (Ex.D5), lease money was Rs.5 per Bigha which is not equivalent to Rs.1 per kanal. Still further, as per jamabandi for the year 1955-56 Ex.D6, lease money is shown as Rs.2 per Bigha. Hence, it is not possible to hold that no finding can be recorded that rent has remained static during all these years.

Both the courts have failed to examine these aspects of the matter before granting declaration. On careful reading of the judgments passed by the courts below, it is apparent that neither both the courts have drawn distinction between the rights for under Section 5(2) and Section 8 of the 1887 Act nor examined the distinction between both the provisions. In fact both the courts have held that the plaintiffs-respondents have acquired the right under Section 5(2) of the 1887 Act, whereas the learned counsel

for the plaintiffs-respondents has at the very outset admitted that the case of the plaintiff would not fall in Section 5(2) of the 1887 Act. Although, the first appellate court has referred to the judgment in **Muni Ram's** case (supra) however, failed to read the complete judgment. Ultimately, as noticed, the suit filed by the tenants was ordered to be dismissed even in the case of **Muni Ram's** case (supra). As regards the judgments which have been filed by the plaintiffs in support of their plea of custom, in none of the judgments, copies whereof were available on the file of the trial court, it has been held that there is a custom in an area for grant of status of occupancy tenants to gair marusi tenants. The literal meaning of 'Gair Marusi' is 'non-occupancy'.

In view of the above-said discussion, both these appeals are allowed. The judgments and decrees passed by both the courts below are set aside. The suit filed by the plaintiffs shall stand dismissed. Pending application(s), if any, shall also stand disposed of, in terms thereof.

12.09.2018
mks

(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No