

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

RSA No.2551 of 1988 (O&M)

Date of Decision: April 23rd, 2019

Baloo Singh

...Appellant

Versus

Tehsildar Sales Faridabad & another

...Respondents

CORAM: HON'BLE MR.JUSTICE AMIT RAWAL

**Present: Mr. Keshav Partap Singh, Advocate,
for the appellant.**

**Mr. Pawan Kumar Jangra, Addl.A.G.Haryana,
for the State.**

AMIT RAWAL, J.

The present Regular Second Appeal, at the instance of the appellant-plaintiff, is directed against the judgments and decrees of the courts below, whereby the suit of the plaintiff for declaration and permanent injunction as a consequential relief to be owner in possession of land measuring 8 kanals, has been dismissed by the trial Court and affirmed in appeal.

It was alleged that the plaintiff was owner in possession of agricultural land measuring 8 kanals. The aforementioned property described in Para 1 of the plaint was earlier mortgaged for a sum of ₹ 425/- with defendant No.1-Tehsildar Sales Faridabad, but the same was redeemed as per the entry in the jamabandi for the year 1979-80 (Ex.P1). Defendant No.1 illegally claimed to be mortgagee with possession and owner by way of prescription as the possession after redemption continued with the

plaintiff.

The aforementioned suit was contested by the defendants by raising numerous preliminary objections in the amended written statement that the suit property was already acquired and being evacuee property, the civil court did not have jurisdiction as per the provisions of Section 36 and 46 of the Displaced Person (Compensation and Rehabilitation) Act, 1954 and Administration of Evacuee Property Act, 1950 respectively. There was suppression of certain facts as the plaintiff did not disclose in the order dated 26.12.1978 of the Assistant Custodian-cum-Tehsildar (Sales), Gurgaon, which had attained finality. On merits, it was pleaded that land measuring 1 bigha 11 biswas comprised in Khasra No.596/247/1 was mortgaged by Inyat Khan in favour of Sher Khan vide mutation No.78 dated 27.05.1926 for a sum of ₹ 300/-, but during settlement, this khasra was changed to 338 and during consolidation as 473, which was mortgaged by some mortgagee in the year 1945. The new khasra numbers were 28/4 and 5 (8-0) in all 16 kanals. The land again was mortgaged for the second time by Inayat Khan in favour of Wazir Khan vide mutation No.22 dated 18.02.1945 for a sum of ₹ 425/-. Both the mortgages were never redeemed and thereafter the Custodian Department became the successor-in-interest of the evacuee property by efflux of time. The second mortgage was redeemed but the first mortgage remained intact.

The suit property was advertised for auction from time to time since 1947 and the plaintiff also participated in the auction held on 09.09.1981 and 14.09.1981 and admitted the Government to be owner of the property.

Since the parties were at variance, the trial Court framed the

issues twice, i.e., on 18.05.1983 and 08.05.1985. The same read thus:-

“Issues framed on 18.05.1983

- 1. Whether the plaintiff is owner in possession of the suit land? OPP*
- 2. Whether the suit land has not been redeemed within limitation as alleged and defendant has become owner of the suit land? OPD*
- 3. Whether the civil court has got no jurisdiction to try the present suit? OPD*
- 4. Whether the suit is bad for want of notice u/s 80 CPC? OPD*
- 5. Whether the suit is barred by limitation? OPD*
- 6. Relief.*

Issues framed on 08.05.1985

- 1. Whether the suit land has never been got redeemed? OPD*
- 2. Whether the area mortgaged vide mutation No.78 dated 27.5.26 was comprised in Khasra No.596/274 measuring 1 biga and 11 biswas and during settlement this khasra was changed to 308 (1 biga 11 Biswas)? OPP”*

Both the parties led extensive evidence.

The trial Court holding the plaintiff to be owner in possession by rendering finding on issue No.1 dismissed the suit on the premise that it did not have the jurisdiction as the property was evacuee. Appeal taken before the Lower Appellate Court was also dismissed.

Mr. Keshav Partap Singh, learned counsel representing the appellant-plaintiff, in support of the memorandum of appeal, submitted that the entry in the jamabandi for the year 1956-57 was, reflected for the first time as an evacuee property. As per the provisions of Section 7A of the Administration of Evacuee Property Act, 1950, no property can be declared to be evacuee on or after 07.05.1954. Once the department had taken the

plea of having become the owner by efflux of time as mortgagee by way of prescription, the other plea of acquisition of title under the provisions of 1950 Act could not have sustained. Ex.P1 jamabandi for the year 1979-80 reflected in the column of possession in favour of the plaintiff. Had the mortgage not redeemed, entry would have been different. No cross appeal was filed qua issue No.1. Even the jamabandi Ex.P5 also reflected the possession of the plaintiff. Ex.D15 and Ex.D16 reflected the mutation in favour of the plaintiffs, but the courts below did not refer to the aforementioned documents, therefore, there is an abdication.

Mr. Pawan Kumar Jangra, learned Additional Advocate General, Haryana representing the State submitted that the concurrent findings of facts arrived at by the courts below regarding the jurisdiction cannot be said to be suffering from illegality or perversity as the order of the Collector declaring the property to be evacuee has not been assailed. Plaintiff had an independent remedy.

I have heard the learned counsel for the parties, appraised the paper book, records of the courts below and of the view that the following Substantial Question of Law arises for determination by this Court:-

“Whether the Tehsildar Sales, Faridabad can claim the ownership as a mortgagee by efflux of time?.”

Ex.P1 jamabandi for the year 1979-80 reflected the ownership, much less possession of the suit property in favour of the plaintiff. If the mortgage had not been redeemed, the entry would have been different. Mutation Ex.D15 is of 12.12.1981. State Government cannot take the plea of ownership by efflux of time as the status would have always be of a mortgagee in the absence of its redemption. No documentary evidence has

been placed on record or referred to, during the course of hearing that the suit property was not redeemed. Had the position been otherwise, suit for redemption would have been maintainable which can be filed at any time as there is no limitation in the absence of any time line.

Section 7 of 1950 Act provides a procedure for declaring the property to be evacuee. For the sake of brevity, the same reads thus:-

“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) ³ 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).”

No such pleading or opportunity or notice had been brought on record establishing that the plaintiff was ever heard, much less given

opportunity. If the property had been put on auction, the allotment letter would have been the best possible evidence to establish only the ownership in favour of the subsequent allottee. The plaintiff has been able to prove the ownership and, therefore, the suit for declaration and permanent injunction as a consequential relief was filed.

As per Section 7A of 1950 Act, there is an embargo of declaring the land as evacuee property on or after 07.05.1954. The same reads thus:-

“7A. 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)”

All these factors have not been adverted to and, therefore, there is a perversity. Accordingly, while allowing the appeal, the question of law is answered in favour of the appellant-plaintiff and against the respondent-

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defendants. The concurrent findings are set-aside. Suit of the plaintiff is decreed. The defendants are restrained from dispossessing the plaintiff as it exists at the time of filing the suit.

April 23, 2019
ramesh

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned
Whether Reportable:

Yes/No
Yes/No