

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 26.11.2024

Pronounced on 29.11.2024

LPA No.2/2023

Gopal Singh, aged 40 years

S/o Late S. Prem Singh

R/o Village Bara, Tehsil and District Samba

...Appellant(s)

Through:- Mr. Dhiraj Choudhary, Advocate

V/s

1. Rita Devi W/o Late Sh. Kuldip Singh
2. Dalip Singh S/o Sh. Raghubir Singh
3. Varinder Singh S/o Sh. Raghubir Singh
4. Surinder Singh S/o Sh. RAghubir Singh
- 5(a) Love Singh S/o Late Sh. Balwan Singh
- 5(b) Arjun Singh S/o Late Sh. Balwan Singh
- All residents of Village Bara,
Tehsil & Distt. Samba.
6. Addl. Deputy Commissioner with powers of Agrarian Reforms
Commissioner, Samba
7. Naib Tehsildar, Samba
8. Tehsildar Samba
9. Ashok Singh S/o Late Sh. Prem Singh
10. Neelam Kumari W/o Late Sh. Ghar Singh
11. Sahil Sambyal S/o Late Sh. Ghar Singh
12. Mehak Sambyal D/o Late Sh. Ghar Singh
- Respondent NO.12 being minor through her mother(R-10)
- Respondent Nos.9 to 12 residents of village Barra
Tehsil and District Samba

...Respondent(s)

.....Proforma respondents.

Through:- Mr. Amarvir Manhas, Advocate for
R-1 to 5
Ms. Monika Kohli, Sr. AAG for R-6
to 8
Mr. Rakesh Chargotra, Advocate for
R-9 to 12

**Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE MOHD. YOUSAF WANI, JUDGE**

JUDGMENT

Sanjeev Kumar J

1. This *intra court* appeal by the appellant (respondent No.2 before the Writ Court) is directed against the judgment of a learned Single Judge [“the Writ Court”] dated 6th December, 2021 passed in OWP No.1731/2013 titled Rita Devi and others v. Ghar Singh and others, whereby the Writ Court has set aside the order of the Jammu & Kashmir Special Tribunal {“the Tribunal”] dated 4th October, 2013 and upheld the order of the Commissioner Agrarian Reforms (Additional Deputy Commissioner, Samba).

2. Before we advert to the grounds of challenge urged by Mr. Dhiraj Choudhary, learned counsel appearing for the appellant, we deem it appropriate to set out few facts that are germane to the controversy raised in this appeal.

3. The land falling in Khasra Nos.185 min and 186 min, total measuring 26 kanals 6 marlas situate at village Bara Tehsil and District Samba [“subject land”] is indisputably recorded in the ownership of Ram Ditta and others. Appellant herein along with his two brothers, Ghar Singh and Ashok Singh and sister Bindu Devi are the sons and daughter of Late Prem Singh, who is recorded in cultivating possession of the subject and in Kharief 1971 and prior thereto. It is because of this entry in the revenue record, Naib Tehsildar Circle-2, Samba attested mutation under Section 4

of the Jammu & Kashmir Agrarian Reforms Act, 1976 [“the Act”] in the year 1981 in the presence of Lamberdar, Chowkidar and other respectable persons of the village. It is, though, intriguing but is a fact that consequential mutation under Section 8 of the Act i.e. mutation No.312 was attested in favour of the appellant and his brothers and sister in the year 2003. The respondent Nos.1 to 5 herein i.e. Kuldeep Singh and others [“private respondents”] challenged both the mutations, one attested under Section 4 and the other under Section 8 of the Act, by way of appeals before the Additional Deputy Commissioner, Samba (Commissioner Agrarian Reforms).

4. The appeal as against the mutation under Section 4 of the Act was filed after almost 27 years whereas the appeal against the mutation under Section 8 of the Act was filed after five years and, therefore, the appeals were accompanied by an application for condonation of delay. The appellant herein filed objections to the condonation of delay application(s), the Additional Deputy Commissioner, Samba without recording any findings or making any discussion about the justification/sufficient cause shown by the respondents to justify huge delay of 27 years, considered the application for condonation of delay along with main appeals and disposed of the same vide order dated 8th February, 2011. Additional Deputy Commissioner, Samba allowed the appeals on merits and held that on the basis of spot inspection conducted by him under Rule 50 of the Jammu & Kashmir Agrarian Reforms Rules, 1977, [“the Rules of 1977”] the appellants and the private respondents constituted one family in Kharief 1971 and prior thereto and, therefore, the cultivation by a co-sharer should

be deemed to be cultivation of all the co-sharers constituting a joint Hindu family. The Additional Deputy Commissioner, thus, set aside both the mutations and remanded the case back to the mutating officer to attest the mutations afresh after providing opportunity of being heard to the respondents. A composite order condoning the delay and disposing of the appeals on merits was passed by the Additional Deputy Commissioner, Samba on 8th February, 2011.

5. Feeling dissatisfied and aggrieved by the order dated 8th February, 2011 passed by the Additional Deputy Commissioner, Samba, appellant herein along with his brothers and sister filed a revision petition before the Tribunal on 23rd June, 2011. Before the Tribunal, the appellant urged that the Additional Deputy Commissioner without giving any reason or justification condoned the delay of more than 27 years and in the process also ignored the objections in writing filed by the appellant. It was argued before the Tribunal that the Additional Deputy Commissioner [“appellate authority”] in terms of Rule 50 of the Rules of 1977 could go on spot only to resolve dispute of entry made in the revenue record in respect of personal cultivation provided the dispute is between the landlord and the tenant. The Tribunal considered the rival contentions and having perused the record, came to the conclusion that the Additional Deputy Commissioner, Samba had not considered the objections filed by the appellant to the application for condonation of delay and had in a mechanical manner condoned the huge delay, which was more than 27 years. It was observed by the Tribunal that the Additional Deputy Commissioner, Samba had neither conducted any enquiry with regard to

the delay nor had given any reason for condoning the huge delay of more than 27 years. The Tribunal vide its order dated 14.10.2013 accepted the revision petition and remanded the case back to the Additional Deputy Commissioner, Samba [“appellate authority”] with a direction to decide the application for condonation of delay first and thereafter decide the appeals on merits.

6. The order of the Tribunal dated 14.10.2013 was called in question by the private respondents before the Writ Court. The Writ Court has vide order and judgment impugned dated 06.12.2021 set aside the order of the Tribunal and upheld the order of the Commissioner Agrarian Reforms. The Writ Court has come to the conclusion that in view of the fact that the appellate authority had found the attestation of mutations impugned before it contrary to the procedure prescribed under Rule 14 of the Rules of 1977, as such, the delay in filing the appeals was inconsequential.

7. The appellant is aggrieved of and has called in question the order of the Writ Court on the ground that the Writ Court could not have ignored the delay of twenty-seven (27) years in filing the appeal before the appellate authority (Additional Deputy Commissioner, Samba) only for the reason that the Writ Court found the order of the appellate authority sound in law.

8. Having heard learned counsel for the parties and perused the material on record, we are of the considered opinion that the judgment impugned passed by the Writ Court is not in consonance with law and, therefore, deserves to be set aside.

9. Indisputably, father of the appellant is recorded as tenant in cultivating possession of the subject land in kharief 1971 under the landlord Ram Ditta and others. The name of the private respondents or for that matter their predecessor-in-interest nowhere exists in the revenue record. As a matter of fact, it is not the case of the private respondents that they were ever in cultivating possession of the subject land. The appellate authority, which claims to have conducted an on spot enquiry has also not held the private respondents in cultivating possession in kharief 1971. The appellate authority was, whoever, of the opinion that since the appellant and the private respondents constituted a joint family and, therefore, cultivation of the father of the appellant should be deemed to be the personal cultivation of the other co-sharers i.e. private respondents herein. The appellate authority has, thus, proceeded, on a totally misconceived notion of legal position.

10. It is not in dispute that the entry of kharief 1971 is crucial for determining the rights and liabilities of the landlord and tenant under the Act. Under Section 4 of the Act, the landlord/owner of land as defined under Section 2(11) of the Act, if not cultivating the land personally in kharif 1971, shall lose all rights, title and interests therein and such land shall vest in the State free from encumbrances w.e.f. 01.05.1973. In terms of Section 8 of the Act, the tiller, who is found personally cultivating the land vested in the State under Section 4 in kharif 1971, shall be vested with ownership rights subject to payment of levy and other conditions laid down in Section 8 of the Act.

11. In the instant case, there is not even an iota of doubt or dispute that in Kharif 1971, it is the father of the appellant Prem Singh, who is recorded as tiller in cultivation of the subject land. There is no attempt made by the private respondents at the time of attestation of mutation or prior thereto seeking correction of the Girdawari entry in terms of Rule 4 of the Rules of 1977. The Naib Tehsildar was, thus, perfectly right in law in attesting the mutation under Section 4 of the Act in favour of the father of the appellant Prem Singh vide mutation No.212 dated 30.09.1981.

12. Although, there is nothing on record to demonstrate that the appellant, proforma respondents and the private respondents constituted a Joint Hindu Family in the year 1971 or prior thereto, yet even if we were to believe it to be correct, it was only Prem Singh, who was in cultivating possession of the subject land in Kharif 1971 and not his brothers and sisters and other members of the so called Joint Hindu Family. The appellate authority has totally misunderstood the issue and has perhaps drawn sustenance for his view from the definition of 'personal cultivation' given in Section 2(12) of the Act, wherein in Sub-clause (b) it is provided that personal cultivation shall mean cultivation by any member of the family, if any, to which he belongs. Needless to say that 'personal cultivation' is a term which refers to the cultivation by the landlord and not cultivation by the tenant. The term 'personal cultivation' is relevant to find out as to whether in kharif 1971 the landlord was cultivating his land personally or through tiller. For facility of reference Section 2(12) of the Act is reproduced hereunder:-

“(12) “personal cultivation” by a person shall mean cultivation— (a) by the person himself ; or

(b) by any member of the family, if any, to which he belongs ; or

(c) by a khana-nishin daughter or khana-demad or a parent of the person ; or

(d) by a son, adopted son or pisarparwardah, not included in the family, if any, to which the said person belongs ; or

(e) by brother or sister of the person ; or

(f) in the case of such religious or charitable institutions of public nature as are notified by the Government, by a member of the management or, on behalf of the management, by a servant or hired labourer on payment of wages otherwise than as a share of crop ; or

(g) in the case of a person, who is minor, insane, physically disabled or incapacitated by old age or infirmity, widow or serving in defence force, or in detention or prison, by a servant of hired labourer under the personal supervision of the guardian or any agent of such person ; provided that such servant or hired labourer or guardian or agent does not bear the risk or cost of cultivation nor receives wages or remuneration as a share of crop ;

Explanations. —(i) Unauthorised cultivation shall not be deemed to be personal cultivation and, where land has been occupied unauthorisedly, the person who, but for such unauthorised occupation, would have been personally cultivating such land shall be deemed to be in personal cultivation :

Provided that in the case of land—

(a) which cannot thus be deemed to be in the personal cultivation of any person ; or

(b) covered by section 24 of the Jammu and Kashmir Big Landed Estates Abolition Act, Svt. 2007 ; or

(c) rights wherein have been transferred against the provisions of any law for the time being in force ;

personal cultivation shall be deemed to be that of the State :

Provided further that only by reason of his having been in unauthorised cultivation, such person shall not be ineligible for allotment of the land becoming surplus under this Act, including such land.

(ii) Where any land has been exchanged in lieu of any other land as a result of consolidation proceedings under the Jammu and Kashmir Consolidation of Holdings Act, 1962, any person who was personally cultivating land, so exchanged, in

Kharif, 1971 shall be deemed to have been personally cultivating, in that harvest, the land acquired in lieu of that land.

(iii) Where any land has been left fallow during Kharif, 1971 in normal course of agricultural husbandry, personal cultivation of such land in Kharif, 1971 shall be deemed to be of the person who personally cultivated it for three consecutive harvests prior to Kharif, 1971.

(iv) Land under kah-krisham, pichi, bedzar or safedzar, land growing fuel or fodder, and unculturable or banjar land situated outside demarcated, undemarcated or berun-i-line forests, shall be deemed to be in personal cultivation of the owner.

(v) Patches of gair-mumkin and zeri-sayah (under the shade of trees) land existing in a survey number shall be deemed to have been in personal cultivation of the person cultivating the rest of the land in such survey number personally in Kharif, 1971.

(vi) Where land has been mortgaged with possession before or during Kharif, 1971 and the mortgage has not been redeemed before the commencement of this Act, the mortgagor shall, subject to the provisions of section 10, be deemed to have been personally cultivating such land in Kharif, 1971.

(vii) Where possession of land has been obtained temporarily on bilateral or trilateral basis or in lieu of payment of rent for purpose of transplanting saffron bulbs, in accordance with the custom known locally as 'kara-korh' or 'kadawar' in saffron growing areas of Kashmir Valley, personal cultivation of such land shall be deemed to be of that person who would, but for such custom, have been cultivating it personally.

(viii) Personal cultivation by a person shall not cease to be so merely because of engagement of hired labour : Provided that the labour so engaged is supplemental to, and not in substitution of, the labour of such person ; and that such labour is paid wages in cash or kind but not in crop share.

(ix) For determining the person personally cultivating land during Kharif, 1971, entries in khasra girdawari shall be presumed to be true unless the contrary is proved.

(x) Where a person, after having been inducted as tenant by alienee of a limited owner, has been in continuous cultivating possession of such land for not less than twenty years prior to Kharif, 1971, such person shall be deemed to be in personal cultivation of such land, any judgment, decree or order of any court or authority notwithstanding.

Note :—For purposes of this clause, "limited owner" shall have the meaning as under the Mitakshara School of Hindu Law."

13. The definition of 'personal cultivation', which would mean and include cultivation of land by the landlord himself, cannot be stretched to

mean that cultivation by one member of a family as tenant under a landlord shall be cultivation as tenant by all the members. It is not the case of the private respondents anywhere that a common ancestor of the appellant and the private respondents was a tenant under the landlord Ram Ditta and others and the tenancy thereafter was inherited by the appellant, his brothers and sister and private respondents.

14. The Writ Court has also not appreciated that the appellate authority had failed to appreciate that as per the revenue record of Kharif 1971 and even prior thereto it was Prem Singh, the predecessor-in-interest of the appellant, who was all along recorded in personal cultivation under the landlord Ram Ditta and others. The landlord, whose rights were escheated to the State under Section 4 of the Act and thereafter conferred upon the appellant, his brothers and sister under Section 8 of the Act, did not raise any objection before any authority. The private respondents were rank strangers to the subject land and, therefore, were not required to be heard at the time of attestation of the mutations.

15. There is nothing on record to show as to how it took 27 years for the private respondents to throw challenge to the mutation attested under Section 4 of the Act in the year 1981 for filing appeal before the appellate authority. As is rightly observed and held by the Tribunal, the appellate authority had mechanically condoned the delay and that, too, solely on the ground that mutation had been attested at the back of the private respondents and, therefore, they had no knowledge of attestation of mutations. The Writ Court held the delay inconsequential having regard to the merits of the controversy and also for the reason that the condonation of

delay is in the discretion of the authority concerned. While we do not dispute the proposition that condonation of delay is a matter in the discretion of the authority authorized to condone the delay but the same cannot be condoned mechanically without giving any reasons. The discretion to be exercised by the authority in condoning the delay must be judicial discretion and such discretion cannot be exercised arbitrarily and against the well settled norms of exercise of such discretion.

16. We have gone through the record produced by the Additional Deputy Commission, Samba and found that delay of 27 years has been condoned without holding any enquiry, without giving due consideration to the objections filed by the appellant and without giving any reasons for such condonation.

17. We could have set aside the judgment of the Writ Court and upheld the order passed by the Tribunal, that would have resulted in remanding the matter back again to the appellate authority for considering the delay first and then decide the appeal(s) on merits. However, we are not doing so as that would put the parties to another round of litigation. We have gone through the entire record and for the reasons given above, we are satisfied that the mutations attested under Sections 4 and 8 of the Act in favour of the appellant, his brothers and sister are in consonance with law.

18. For the foregoing reasons, the appeal is allowed. The judgment of the Writ Court dated 06.12.2021 is set aside. Order of the Tribunal dated 14.10.2013 to the extent it sets aside the order dated 08.02.2011 passed by the appellate authority is upheld. We, however, do not approve the order of

the Tribunal insofar as it remands the matter to the mutating officer i.e. Tehsildar/Naib Tehsildar to pass fresh orders on mutations after hearing both the parties. Since we have found no merit in the claim of the private respondents, therefore, we would like to put the controversy between the parties at rest. Mutations attested under Sections 4 and 8 of the Act in favour of the appellant, his brothers and sister are upheld.

(Mohd. Yousaf Wani)

Judge

(Sanjeev Kumar)

Judge

JAMMU
29.11.2024
Vinod,PS

Whether the order is speaking: Yes
Whether the order is reportable: Yes