IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

(1) S.B.Civil Writ Petition No.2578/1993
(Laxmi Chand Vs. Board of Revenue & Ors.)

(2) S.B.Civil Writ Petition No.2579/1993
(Laxmi Chand Vs. Board of Revenue & Ors.)

UNDER ARTICLE 226 & 227 OF THE
CONSTITUTION OF INDIA.

Date of order : 31st January, 2007

PRESENT
HON'BLE SHRI N.P.GUPTA,J.

Mr. JR BENIWAL & Mr. BL CHOUDHARY, for the petitioner
Mr. NS ACHARYA & Mr. OP BOOB, AGA, for the respondent

BY THE COURT:

These two petitions seek to challenge the order of learned Board of Revenue dt. 7.12.1992 (Annexure-11). By this order two appeals have been decided, and both the writ petitions have been filed challenging this very common order. The learned Revenue Appellate Authority had also decided both the appeals by the common order. In that view of the matter, the controversy involved in both these matters being common, both these writ petitions are being decided by this common order.

Facts of the case are, that the petitioner filed a

petition under Section 180(1) of the Rajasthan Tenancy Act, hereafter to be referred to as the Act, on 19.8.1978, against the defendant (being private respondent in these writ petitions) alleging interalia that the land in question is recorded in the name of Kishanlal in the revenue records as Khatedar, who died on 9.1.1977, and the plaintiff claims to be his adopted son, and that Kishanlal left no legal representative. Then, it is alleged that Kishanlal was old and was not capable of cultivating the land personally, therefore, he had given the land in question to defendant, on year-to-year tenancy basis, thus the defendant was subtenant of Khatedar Kishanlal. Then, it is alleged that last agriculture year had come to an end on 30.6.78, and since the plaintiff himself wants to cultivate the land, he asked the defendant to relinquish the possession, but to no good, therefore, the suit has been filed under Section 180(1)(b), for delivery of possession along with mesne profits.

The defendant contested the suit by filing written statement, contending interalia, that Kishanlal was the owner, and with promulgation of Zamindari & Biswedari Abolition Act, his rights came to an end, and since the defendant was in cultivation since before 15.11.59, the plaintiff retains no right to file the suit, the plaintiff being adopted son was also denied. It was denied that the land was on year-to-year basis with the defendant, rather Kishanlal was businessman and was living in the city, and

was getting land cultivated on Theka, and that the defendant is not a subtenant. It was also contended, that the application is barred by time. Then, in additional pleas it was pleaded, that the land is continuing with defendant since before 1959, and there had been no demand of Theka between the parties, and with promulgation of Zamindari & Biswedari Abolition Act the defendant became Khatedar, and Kishanlal retains no right, except that of compensation on resumption. Then, it was contended that the plaintiff has placed no material, that the defendant was in possession on year to year basis, rather no such contract was ever entered, whether oral or in writing, nor was it ever renewed. Various other pleadings were also taken, which need not detain me. The plaintiff then filed a rejoinder controverting the averments made in the written statement, and pleaded, that Kishanlal was not owner but was Maurasi tenant, and the land was of ownership of Ram Pratap, therefore, on the commencement of Rajasthan Tenancy Act, by virtue of Section 15 thereof, Kishanlal became tenant, and rights of Ram Pratap came to an end with promulgation of Zamindari & Biswedari Abolition Act, but the rights of Kishanlal were recognised. Then, it was pleaded that Araji numbers were changed in the process of Murababandi. It was maintained, that plaintiff continues to be the Khatedar tenant.

The learned trial court found, that Kishanlal is established to be a Khatedar tenant, and also found the

plaintiff to be his heir. Then, on the precise question about the defendant being in possession as year-to-year tenant, deciding issue no.4 it was found, that in view of the principles laid down in Section 106 of the Transfer of Property Act, unless it is proved to the contrary, it shall be treated as tenancy year to year. Then, considering the provisions of Zamindari & Biswedari Abolition Act in juxtaposition with Punjab Tenancy Act, and Kishanlal's occupancy as tenant, it was found that he had acquired Khatedari rights under that Act. Then, deciding on the question of limitation, deciding issue no. 9 it was found, that the limitation commences from 30.7.78, and since the suit has been filed on 19.8.78, it is within limitation. It was considered, that the cause of action accrued to the plaintiff on 30.7.78, when he asked the defendant to deliver the possession. In view of the above finding the issue no. 3, regarding plaintiff's entitlement to get decree for possession, was also decided in favour of the plaintiff, and the suit was decreed.

Against this, the defendants filed appeals, and the learned Revenue Appellate Authority reversed the findings of the learned trial court in some respects. The finding about plaintiff being adopted son was affirmed. Then, the findings on issue no. 1 and 2, about Kishanlal and plaintiff being Khatedar of the land in question, was also affirmed. Likewise it was also held, that Khatedari rights accrued to Kishanlal, and not to the defendant, and

thus this finding on issue no. 5 was also affirmed, but then, after discussing the evidence of the parties, it was found, that from the evidence of both the parties it is clear, that nobody had seen giving the land on Theka. The statement of P.W.3 is not at all reliable, as the version is not supported by the revenue record, and he had also admitted, that he does not know as to whether the share was being paid to Kishanlal or not, and if paid in which year. Thus it was found, that the plaintiff has failed to prove, that the land was given to defendant, by Kishanlal on year-to-year basis. Then various reasons were also given in support of this finding. That apart, it was also considered, that in view of the provisions of Rajasthan Tenancy Act, the land could not be sublet for a period exceeding 5 years, and identical provisions existed in Section 19 of the Bikaner Tenancy Act. Then, the story of the plaintiff calling upon the defendant to vacate the possession on a particular date was also considered, and assuming the suit to have been filed on 5.7.79, it was found to have been filed after expiry of one year, since July 1978. Thus, it was considered to be barred by time. It was also considered, that in view of the provisions of Section 45 of Rajasthan Tenancy Act, and the corresponding provisions of Bikaner Tenancy Act, after expiry of the maximum permissible term of 5 years, the defendant becomes a trespasser, and the plaintiff is not entitled to get him evicted under Section 180. In the result the appeal was allowed, the judgment of the learned trial court was set

aside, and the plaintiff's suit was dismissed.

Aggrieved, plaintiff filed a second appeal before the learned Board of Revenue, and the learned Board of Revenue affirmed the judgment of the learned Revenue Appellate Authority. It was held in para 11 as under:-

> "Though the reason given by the R.A.A. is some what different. The learned R.A.A. has observed that Kishanlal died on 9-11-1977 and Laxmi Chand, according to his own statement, called upon the defendant to vacate the land after 2 ½ months. In this way the cause of action arose in February 1978 and the suit having been fled on 5th July 1979 is barred by limitation because the period of limitation prescribed for a suit under section 180 (b) of the Act is only one year..."

Challenging these judgments of learned Board of Revenue, and that of Revenue Appellate Authority, the present writ petitions have been filed.

Assailing the impugned orders, it was contended by the learned counsel for the petitioner, that the learned courts below have patently misread the record, and has held the suit to be barred by time, inasmuch as the suit has been assumed to have been presented on 5.7.79, and accordingly suit has been dismissed as time barred, while the suits had been filed on 19.8.1978 itself, and if this correct date would have been read, the suits were clearly within time from the date of the end of the year concerned, which ended on 30.6.78. Then, it was submitted that all the courts below had found that Kishanlal did acquire Khatedari

rights, and the petitioner is adopted son. Likewise it has also been found, that the defendant was inducted as year to year tenant, with this the learned Revenue Appellate Authority found, that the subletting could not be for a period more than 5 years by virtue of Section 45 of the Act, and on expiry of five years the defendant would become trespasser. It was also considered that even under the Bikaner Tenancy Act, Section 19 prohibited subletting beyond 5 years, and therefore, the plaintiff is not competent to sue under Section 180. While the learned Revenue Board has found, that from the evidence on record, the plaintiff has failed to prove ingredients of Section 180(1), and has spelt out certain contradictions on the basis of Girdawari, which is not a record of right. Learned counsel then submitted, that the finding recorded by the learned Board of Revenue, about plaintiff's failure to prove ingredients of Section 180, is patently perverse, inasmuch as it was admitted by the defendant in the written statement that he was inducted as a sub tenant, and had set up the case that since Kishanlal was Malik, and defendant was sub tenant, consequent upon commencement of Zamindari & Biswedari Abolition Act, he became the tenant. It was specific case of the defendant, that Kishanlal was living in the city, and was getting the land cultivated on share basis. Of course, it was pleaded that the defendant is not tenant on year to year basis, but then again while in the witness box, the defendant clearly admitted, that he had taken the land from Kishanlal after partition of India, and

that there is no writing about the Theka, but he was paying the share as asked by Kishanlal, and was being given on his shop itself. It is also admitted in the witness box, that the land was given to the defendant by Kishanlal for cultivation. According to the learned counsel, from this, it is clear that he was subtenant on year to year basis, and even if the period of sub-tenancy is admitted to have expired on the expiry of period prescribed under the Act, in view of the Division Bench judgment of this Court, in Tiku Ram Vs. Board of Revenue, reported in 2003 R.R.D.-513, he would be a tenant holding over, and does not become a trespasser; with the result, that he can be evicted under Section 180(1), and the petition can be filed within one year of the demand for possession by the petitioner. Learned counsel also relied upon the judgments of Hon'ble the Supreme Court in Choudhary Udai Singh Vs. Narayanibai & Ors., reported in (2000)8 SCC-542, Gorabai (Smt) & Ors. Vs. Ummed Singh & Ors., reported in (2004)5 SCC-130, and Bhura Mogiya & Ors. Vs. Satish Pagariya & Ors., reported in (2001)9 SCC-385, so also on Yogesh Bhardwaj Vs. State of U.P. reported in (1990)3 SCC-355. A feeble argument was also made, that the judgment of the Revenue Appellate Authority is not in accordance with the provisions of O. 41 Rule 31 C.P.C. but then this argument is required to be noticed only for being rejected, as it was not raised either before the Board of Revenue, or even in the writ petition. Learned counsel also relied upon the provisions of Section 209 of the Act, to contend, that even if the

plaintiff may not be found entitled to the relief claimed in the plaint, and on the record he is found entitled to some other relief, even in that event, that relief also can be granted by the Court, even though not prayed for.

I have gone through the record available, and have considered the submissions, and have also gone through the judgments cited at the Bar.

At the outset it may be observed, that the learned counsel for the petitioner is correct, when he contends, that learned Board of Revenue, and the Revenue Appellate Authority had wrongly held the suit to be barred by time by assuming the suits to have been filed on 5.7.1979. From perusal of the plaint itself it is clear that the suits were filed on 19.8.78, thus they were clearly filed within one year, if computed from 30.6.78. This contention is thus disposed.

The question then is, as to whether the petitioner is still entitled to any relief, by way of interference with the impugned order.

Of course, it is not in dispute that the defendants were inducted as sub-tenants, and it has also been found by all the three courts below that Kishanlal did acquire, rather did become Khatedar, consequent upon promulgation of Zamindari & Biswedari Abolition Act, as Ram

Pratap was the owner. It has also been found, that the petitioner is adopted son of Kishan Lal. In that view of the matter, since those findings are not under challenge on the side of the defendant, the matter is to be proceeded with the assumption about Kishanlal having become Khatedar, and the petitioner being his adopted son.

The question is, as to whether even then the plaintiff is entitled to seek a decree for possession against the defendant, whether under Section 180(1)(b) as prayed in the plaint, or for that matter under Section 183, in view of the provisions of Section 209, as invoked by the learned counsel for the petitioner.

Before dealing with this question I may first consider the judgments cited by the learned counsel for the petitioner.

In Choudhary Udai Singh's case a decree for redemption had already been passed, and execution was resisted on the ground of limitation. The objection was overruled, and possession was delivered to the decree holder. In appeal that order was reversed, and that reversal was upheld by the High Court. An application was filed for restitution, that was rejected on the ground, that person who was in possession was not a party in the earlier proceedings, therefore, the suit was filed for recovery of possession against one Kishanlal, who

contested, on the ground, that he has been in possession as a tenant of the Zamindar, on the date when the Zamindari Abolition Act came into force, with the result, that he became a Pucca tenant. The suit decreed by the learned trial court was reversed by the Appellate Court, then the High Court also affirmed the decree, and the matter went to Hon'ble the Supreme Court. Then, a look at para four onwards of the judgment shows, that Hon'ble the Supreme Court was dealing with the question of the rights of the person in possession at the time of commencement of Zamindari & Biswedari Abolition Act. In the present case this aspect has also been decided by the learned courts below in favour of the plaintiff, by concluding, that Kishanlal became the Khatedar, therefore, this ruling does not help the petitioner at all. Then, in Gora Bai's case again Hon'ble the Supreme Court was considering the question of possession, on the anvil of the provisions of Zamindari & Biswedari Abolition Act, and it was held, that the plaintiff could claim benefit of Section 4(2) as ex-proprietor, as the suit lands were in possession of defendant tenant after expiry of the lease, and the landlord was not in actual cultivatory possession, such tenants would be treated as tenant at sufferance, therefore, possession would be treated as unauthorised possession, and proprietor shall be deemed to be in cultivatory possession of the Khudkasht, by virtue of Section 4(2). Learned counsel for the petitioner seeks to stress on the observations, that such tenants have been

treated to be tenants at sufferance. In my view, this would be a distorted reading of the judgment, as Hon'ble the Supreme Court was not adjudicating the rights of the person in actual cultivatory possession, and was adjudicating the rights of the plaintiff as ex-proprietor, therefore, this judgment also does not help the petitioner.

Then, so far Bhura's case is concerned, there is no dispute about the legal proposition, that by virtue of section 209 of the act, the Court has power to grant relief which the plaintiff may be entitled to, notwithstanding that such relief may not have been asked for.

Then, strongest reliance was placed by the leaned counsel for the petitioner on Division Bench judgment of this Court, in Tiku Ram's case, and therefore, the judgment in Tiku Ram's case requires to be considered in a bit detail.

In Tiku Ram's case a suit was filed by legal representatives of one Hazari Mal on 23.8.1965, alleging himself to be tenant, and in 1956-57 the land was given to the defendant for cultivation for five years. Thereafter the defendant requested for continuance of cultivation for one year, and in this process continued from year to year until filing of the suit in August, 1965. It was also alleged that the plaintiff has come to know that the land in question has been entered in defendant's name in

Girdawari since Samwat 2013. By amendment of the plaint it was pleaded that the possession was demanded from the defendant on 15.8.1965. Defendant denied even creation of sublease, and claimed to be in possession since Samwat 2004, and to be cultivating since then. The defendant also claimed that since he had been paying rent to the erstwhile 'Bhokta', on resumption of Jagir the rent is being paid to the State Government, and thus he is in rightful possession of the land. The trial court found that the defendant has failed to prove that he was cultivating the land since 2004 rather it was proved that the land was given by the plaintiff's brother by way of sublease in Samwat 2013. The suit was found to be within limitation according to item 68 of the III Schedule, and it was decreed. The Revenue Appellate Authority affirmed the decree. Then, in appeal the Board of Revenue in the first instance, by the order dt. 9.7.79 held, the suit to be barred by time, Section 45 prohibits subletting for a term exceeding 5 years, and no extension could be granted, and since then the cause of action arose, and therefore, the suit is barred by time. It was also considered that if the suit is considered on the ground of Section 180(1)(b), still because there is no contention on behalf of the plaintiff that he ever accepted rent from Tiku Ram, nor any proof in that regard has been furnished, and there is no assertion in the plaint that defendant continued in possession with his assent after expiry of term of sub-lease, and without deciding other issues the suit was dismissed. Against this a review

petition was filed, which was allowed vide order dt. 23.7.1986, in view of the Full Bench decision of the Board of Revenue, in Bhalla Vs. Mst. Gulab Kanwar, reported in 1977 RRD-1, wherein it was held, that after expiry of the period of lease the lessee would be a trespasser, and suit can be filed under Section 183 within the period of limitation. Consequently, the appeal was directed to be heard afresh on merits. Then, the Board dismissed the defendant's second appeal. Against this judgment again a review petition was filed, and that was also dismissed. Consequently, the writ petition was filed.

In Para-29 of the judgment of this court the contention of defendant was noticed, that in view of the explanation appended to Section 180(1)(b) the defendant can only be treated as tenant by holding over for year to year, and he cannot be treated as trespasser, and the suit must have been held to be barred by time, having not been filed within one year of the expiry of the tenancy. This contention was negatived, and it was held in para-32, that as per the finding recorded by the court below the defendant was let in possession as subtenant in Samwat 2013, five years term expired in the year 1961-62, and in case the defendant is considered to be a trespasser, the period of limitation would be 12 years, and the suit has undoubtedly been filed on 23.8.1965 i.e. within 12 years from 1961-62, when the maximum period of five years of sub-lease had expired. Thus the suit was found to be within

time. Then, dealing with the contention about the defendant being considered to be tenant holding over, it was found, that cause of action would arise when the possession is demanded and refused by the subtenant. It was considered that according to the plaint the defendant was allowed to continue at his request from year to year, and on 15.8.65 he refused the demand of the plaintiff to deliver possession, and the suit was filed. Then, it was noticed that the finding in this respect is in favour of the plaintiff. In those circumstances it was held, accepting the contention of the defendant, that he was not a trespasser, and the suit must be considered to be an application filed under Section 68 of Part 2 of Schedule III, under item 2(ii) of clause 68, still the suit is within time, and he cannot be considered as trespasser qua the lessor. It was further held, that the relationship between lessor and lessee is out come of contract, and explanation to Section 180(1)(b) merely recognises such contractual relationship to continue by consent, either implied or express, for the purpose of providing effective and quick remedy for recovery of possession from the subtenant, and it does not go beyond it to nullify the jural effect of Section 45. Then, in para-51 the two provisions were harmoniously construed, and it was found that no incompatibility remains, by holding, that such continuance of possession remains substantively in violation of Section 45, but for the purpose of pursuing the remedy for recovery of such land from the possession of

a person, he is deemed to be in possession as a tenant or sub tenant, and need not be sued as trespasser. Again in para-52 it was held, that it is not in every case, that a tenant or subtenant after expiry of period of lease is considered to be a tenant or subtenant holding over, and it is only when such continuance is with the consent of the lessor, evidenced by acceptance of rent, or by any other mode, conveying his assent, that the continuance of tenant or subtenant in possession is considered as continuance by holding over from year to year, and that the remedy under Section 183 is to be pursued, where tenant has continued in violation of Section 45, without consent, and application under Section 180(1)(b) can be pursued where the tenant is continuing in possession after expiry of the period of lease, with consent.

Thus, the gravamen of the judgment in Tiku Ram's case is not that in every case where the subtenant continues after expiry of lease or after the term provided by Section 45, he continues to be tenant holding over; rather it is only where he continues in possession with consent, express or implied, by the lessor or his legal representatives, that he would be considered as tenant holding over, otherwise the remedy is available under Section 183.

The matter in hand is required to be examined from the stand point of this legal proposition propounded in

Tiku Ram's case. A look at plaint would show, that all that has been pleaded is, that the defendant was subtenant of Kishanlal, and after his death his tenancy continued from year to year, but there is not even a whisper in the plaint that the defendant paid the consideration of sublease, or continued to pay, or the plaintiff otherwise expressed his consent, rather the defendant in the written statement clearly came with the stand, that with promulgation of Zamindari & Biswedari Abolition Act in 1959 he became a Khatedar, he has denied any contract to have been entered into. Then, in rejoinder also, the stand contemplated to be taken by the plaintiff in Tiku Ram's case has not been taken. Then, even coming to the evidence i.e. the statement of defendant, on which reliance was placed, even therefrom nothing has been elicited, about the defendant continuing in possession with express or implied consent of the plaintiff, after expiry of the lease. In that view of the matter, even on the principles propounded in Tiku Ram's case, the plaintiff was not entitled to file application under Section 180(1)(b).

Considering the case from the anvil of the plaintiff’s entitlement to possession under Section 183, in view of the provisions of Section 209 of the Rajasthan Tenancy Act, even from that stand point the plaintiff is not entitled to get a decree for possession, inasmuch as the period permissible by Section 45 came to an end in 1961-62, and in absence of anything being shown on the side

of the plaintiff about defendant's continuing in permissive possession, as contemplated by explanation to Section 180 (1)(b), as held in Tiku Ram's case the suit was required to be filed within 12 years from the expiry of period permissible under Section 45, which clearly expired in the year 1973-74, while the present suit has been filed in the year 1978. The obvious result is, that as on the date of filing of present suit, the prayer of the plaintiff, even under Section 183, had become barred by time.

In view of the above discussions, considering the case from any standpoint I do not find the plaintiff to be entitled to any decree, or order for possession, against the defendants.

Consequently, the impugned orders of the learned Board of Revenue, and learned Revenue Appellate Authority do not require any interference in these writ petitions. The same are, therefore, dismissed. The parties shall bear their own costs.

(N P GUPTA),J.

/Sushil/