

# IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**RSA No. 225 of 1998.**

**Judgement reserved on: 8.12.2008.**

**Date of decision: December 31, 2008.**

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**Smt. Kartari Devi & ors.**

**..... Appellants**

**Vs.**

**Udham Singh & ors.**

**.....Respondents.**

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***Coram***

**The Hon'ble Mr. Justice Kuldeep Singh, Judge.**

***Whether approved for reporting?***

**For the Appellants : Mr. N.K.Thakur, Advocate.**

**For the Respondents : Mr. H.K. Bhardwaj, Advocate, for  
respondent No. 1.**

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**Kuldeep Singh, Judge.**

This appeal has been directed against the judgement and decree dated 30.8.1997 passed by learned District Judge, Una in Civil Appeal No. 3/1992, confirming judgement, decree dated 5.8.1991 passed by learned Sub Judge Ist Class, Court No.II, Amb in case No. 1041 of 1984.

**2.** The brief facts of the case are that respondent No. 1 Udham Singh filed a suit for declaration that he is owner in possession of land measuring 5 Kanals 14 Marlas to the extent of

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***Whether the reporters of the local papers may be allowed to see the Judgment?***

2/3<sup>rd</sup> share out of land measuring 8 Kanals 11 Marlas, comprised in khewat No. 301, khatauni No. 655 and Khasra Nos. 1095 and 1113 vide jamabandi 1979-80, village Gagret, Tehsil Amb, District Una, the revenue entries and mutation No. 3531 showing Prem Singh as owner in possession of land measuring 2 Kanals 17 Marlas to the extent of 1/3<sup>rd</sup> share out of land measuring 8 Kanals 11 Marlas are wrong and illegal having no effect on the rights of respondent No. 1. In the suit, consequential relief of permanent injunction from taking forcible possession of the suit land was also prayed with alternative relief of possession.

3. The respondent No. 1 further pleaded that suit land measuring 8 Kanals 11 Marlas was jointly owned and possessed by him and respondents Gurbachan Singh as well as Puran Singh. He having 2/3<sup>rd</sup> share, Gurbachan Singh and Puran Singh 1/3<sup>rd</sup> share in the suit land. In the same ratio the suit land was earlier owned by the father of respondent No. 1 and the father of Gurbachan Singh as well as Puran Singh as tenants- at- will. The case of respondent No. 1 is that after the death of his father Meghoo, he succeeded to the tenancy of his father and came in possession to the extent of 2/3<sup>rd</sup> share and on coming into force H.P. Tenancy and Land Reforms Act, 1972 (for short, the Act), he has become owner in possession of 2/3<sup>rd</sup> share equivalent to 5 Kanals 14 Marlas out of 8 Kanals 11 Marlas. Gurbachan Singh and Prem Singh have succeeded their father Dheru alias Piaru to the extent of 1/3<sup>rd</sup> share and they are owners in possession, measuring 2 Kanals 13 Marlas out of 8 Kanals 11 Marlas of the suit land. It has been pleaded that Prem Singh had no right,

title in the suit land. Prem Singh illegally got changed the revenue entries of the suit land in his favour to the extent of 1/3<sup>rd</sup> share i.e. 2 Kanals 17 Marlas out of 8 Kanals 11 Marlas as tenant -at -will and on the basis of illegal entries further succeeded in sanctioning mutation No. 3531 of proprietary rights under Section 104 (3) of the Act in his favour to the extent of 1/3<sup>rd</sup> share at the back of respondent No. 1 Udham Singh. The mutation No. 3531 in favour of Prem Singh is wrong and illegal.

**4.** Prem Singh died and his legal representatives were brought on record, who contested the suit by filing written statement. They took preliminary objections of maintainability, limitation, estoppel, non -joinder of necessary parties, jurisdiction of the court to try the suit. On merits, their pleaded case is that their predecessor Prem Singh and Udham Singh were uterine brothers. Prem Singh was brought up by Meghoo as his son, who treated him as his son. Meghoo was in possession of the suit land as tenant at will on payment of rent and after his death Udham Singh and their predecessor Prem Singh entered in possession in the same capacity and now appellants No.1 to 6 are in possession alongwith respondent No.1 of the suit land. Prem Singh, the predecessor-in-interest of appellants No. 1 to 6 entered in possession of the suit land qua his share as tenant- at- will on payment of rent under Lachhman Dass, who was in *hissedari* possession of the suit land. Prem Singh was adopted son of Meghoo. On coming into force of the Act, respondent No. 1 and Prem Singh became owners as the conferment of proprietary rights is automatic under the Act. After the death of Prem

Singh, appellants No. 1 to 6 are in possession of the suit land qua the share of Prem Singh. The proprietary rights were conferred in presence of the parties. The respondents No. 2 and 3 also contested the suit by filing separate written statement. They took almost the same defence as was taken by appellants in the written statement. The respondent No. 1 filed replications. The learned Sub Judge on 5.8.1991 decreed the suit for possession and dismissed the suit for relief of injunction. The decision dated 5.8.1991 was assailed by way of an appeal. The appellants in the first appellate court filed an application under Order 6 Rule 17 CPC, which was dismissed but in revision this court allowed the amendment, thereafter, an additional issue 12(A) of adverse possession was framed. The appeal was dismissed by learned District Judge on 30.8.1997, hence this appeal, which has been admitted on the following substantial questions of law:-

1. What is the effect of entry of tenancy appearing in the name of Shri Prem Singh independently in the jamabandi for the year 1960-61 Ex. D-6?
2. What is the effect of sanction of mutation under Section 104 of H.P. Tenancy and Land Reforms Act in favour of Shri Prem Singh?
3. Whether the jurisdiction of the civil court is barred so far it relates to challenge of the mutation under Section 104 of the H.P. Tenancy and Land Reforms Act in the Civil Court without resorting to the provisions of Act itself?

5. I have heard Mr. N.K.Thakur, learned counsel for the appellants and Mr. H.K. Bhardwaj for respondent No.1 and gone through the record. It has been submitted on behalf of the appellants that two courts below have not drawn proper inference from the oral and documentary evidence on record. Prem Singh was recorded in his individual capacity as tenant to the extent of 1/3<sup>rd</sup> share on the suit land which is also supported by jamabandi for the year 1960-61 Ex. D 6. On attestation of mutation No. 3531 conferring proprietary rights on Prem Singh to the extent of 1/3<sup>rd</sup> share on the suit land, it is no more in doubt that Prem Singh was tenant on 1/3<sup>rd</sup> share of the suit land. In any case, the civil court cannot go into the question of legality or otherwise of conferment of proprietary rights of 1/3<sup>rd</sup> share of suit land in favour of Prem Singh, the appellants are the successors of Prem Singh. The two courts below have committed illegality in not properly construing the legal position. Mr. Bhardwaj on the contrary has submitted that it was never the pleaded case of appellants that Prem Singh in his own capacity was tenant to the extent of 1/3<sup>rd</sup> share on the suit land. The pleaded case of the appellants is that Prem Singh succeeded to the tenancy of Meghoo alongwith Udham Singh in equal share. Meghoo was tenant to the extent of 2/3<sup>rd</sup> share on the suit land, appellants claimed their right on the suit land through Prem Singh and Meghoo and not by way of independent right of tenancy of Prem Singh. The mutation No. 3531 was attested behind the back of Udham Singh without following mandatory provision of law, and therefore, the jurisdiction of the civil court remains intact and it has not been ousted.

**Substantial questions of law No. 1 to 3.**

6. Substantial questions of law No. 1 to 3 are interconnected and, therefore, all of them are being taken up collectively. In order to establish independent right of Prem Singh on suit land, the learned counsel for the appellants has relied Ex. D 6, copy of jamabandi for the year 1960-61. The learned counsel for the appellants with the help of Ex. D 6 wants to show that Prem Singh was tenant to the extent of 1/3<sup>rd</sup> share on land shown in Ex. D 6, his contention is that this land did not come to Prem Singh through Meghoo. He has submitted that statement of PW 1 Nagina Ram special power of attorney holder of Udham Singh was recorded on 19.2.1991 and on that date PW 1 has stated that Meghoo had died 16 years ago, in other words, Meghoo had died around the year 1975. In Ex. D 6 Prem Singh has been independently shown tenant on the land. This submission of the learned counsel for the appellants has no force so far as the suit land is concerned for two reasons (i) in Ex. D 6, khasra numbers 1534, 1535, 1555 measuring 8 Kanals 11 Marlas are shown. The suit land consists of khasra Nos. 1095 and 1113 measuring 8 Kanals 11 Marlas. The khasra numbers of the suit land are entirely different than the khasra numbers of the land shown in Ex. D 6. It has not been shown by the learned counsel for the appellants that khasra numbers shown in Ex. D 6 were later on given khasra Nos. 1095 and 1113, and (ii) the appellants in their written statement have pleaded that Prem Singh got 1/3<sup>rd</sup> share in the suit land through Meghoo. It is not the pleaded case of the appellants that Prem Singh did not get the suit land through Meghoo. In these

circumstances, the appellants cannot be heard to say that Prem Singh independently in his own capacity was tenant to the extent of 1/3<sup>rd</sup> share on the suit land in view of their stand that Prem Singh succeeded to the tenancy land of Meghoo alongwith Udham Singh. The substantial question of law No.1 is accordingly decided against the appellants.

7. The pleaded case of respondent No. 1 is that predecessor-in-interest of appellants No. 1 to 6 in connivance with the revenue staff succeeded in sanctioning mutation No. 3531 of proprietary rights under Section 104(3) of the Act to the extent of 1/3<sup>rd</sup> share at his back which confers no right on appellants after the death of Prem Singh. This has been denied by the appellants. PW 1 Nagina Ram in the context of mutation conferring proprietary rights has stated that mutation was sanctioned in favour of Prem Singh in absence of Udham Singh. DW 1 Kartari Devi in her statement has nowhere stated that mutation conferring proprietary rights on Prem Singh of tenancy land to the extent of 1/3<sup>rd</sup> share out of suit land was sanctioned with notice and in presence of Udham Singh. Rule 28 of the H.P. Tenancy and Land Reforms Rules, 1975 provides that mutation under sub-section (3) of Section 104 shall be attested in the presence of the parties. The onus of issue No. 8 regarding jurisdiction of the civil court was on appellants. It was on them to prove that the civil court has no jurisdiction. The mutation No. 3531 has not been placed on record. The respondent No. 1 has discharged negative burden of issue No. 8 by clearly stating that

mutation of proprietary rights was attested in favour of Prem Singh behind the back of Udham Singh.

8. In **Chuhniya Devi vs. Jindu Ram 1991 (1) Sim.L.C.223**, one of the questions before the Full Bench was whether civil court has the jurisdiction in respect of an order of conferment of proprietary rights under Section 104 of the Act, which has not been assailed under the said Act. The Full Bench answered that question in the following manner:-

**“The civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under section 104 of the H.P. Tenancy and Land Reforms Act, 1972, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with.”**

9. Rule 28 provides that mutation under sub-section (3) of Section 104 of the Act shall be attested in presence of the parties. The attestation of mutation in favour of non-occupancy tenant under sub-section (3) of Section 104 of the Act read with Rule 28 affects the rights of a land owner in the property to his detriment and, therefore, the rule is mandatory. The case of respondent No. 1 is that mutation No. 3531 of proprietary rights in favour of Prem Singh was attested behind his back and he has proved this by leading negative evidence as noticed above, but appellants have not rebutted this by leading positive evidence even though onus to prove issue of jurisdiction was on the appellants. In other words, the mandatory requirement of the Act and the Rules was not followed before attestation of mutation No. 3531 of proprietary rights in favour of Prem Singh. In these



circumstances, the civil court has the jurisdiction to try the suit in view of **Chuhniya Devi's** (supra).

**10.** The appellants have not denied that respondent No. 1 was tenant on the suit land, they denied his extent of share and projected that after Prem Singh they have 1/3<sup>rd</sup> share on the suit land, which has been denied by respondent No. 1. The dispute between appellants and respondent No. 1 is primarily of co-tenancy which is clear from issue No. 2, which has been decided against the appellants. The dispute between appellants and respondent No. 1 is of tenant and tenant as against the landlord and tenant. The revenue officer would attest the mutation of ownership in favour of non-occupancy tenant under Rule 28 after following due procedure. The mutation of ownership cannot be attested under Rule 28 on a person who is not a non-occupancy tenant. The two courts below have recorded a finding of fact that Prem Singh was not a tenant on the suit land. After Prem Singh, appellants have not proved their tenancy on the suit land. In these circumstances, mutation No. 3531 was attested without jurisdiction in favour of Prem Singh who was not tenant and therefore, does not affect the rights of respondent No. 1 on the suit land. The civil court has jurisdiction to adjudicate the dispute between the parties in view of facts of the present case. The exclusion of jurisdiction of civil court is not to be lightly inferred. The appellants have failed to make out any case for interference. Accordingly, substantial questions of law No. 2 and 3 are answered against the appellants and in favour of respondent No. 1.

**11.** No other point was urged.

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**12.** As a result of the above discussion, the appeal fails and is accordingly dismissed with no orders as to costs.

**December 31, 2008.**  
(Hem)

**( Kuldip Singh )**  
**Judge.**