

# RAJASTHAN HIGH COURT

Babu Singh

Vs.

State of Rajasthan

C.S.A. No. 189 of 1998  
(Rajesh Balia and H.R. Panwar, JJ.)

19.07.2001

## JUDGEMENT

### **Rajesh Balia and H. R. Panwar, JJ.**

1. Heard learned counsel for the parties. This appeal has come in the facts and circumstances to be noticed hereinafter. Respondent No. 6 has lodged a complaint on 3rd July, 1989 before Tehsildar at Camp Sukharana that the petitioner appellant has forcibly taken possession of 37 bighas of land in Chak 5 M.D. which is in the khatedari of applicant's husband Akura Ram and a case is going on in that regard, therefore, the said occupant be evicted and possession be delivered to the complainant. On very same day 3rd June, 1989 the report was taken from Patwari in which it was reported that Babu Singh s/o Niku Singh is residing at said land which he has purchased through registered sale deed. However, the report neither says from whom Babu Singh has purchased said property and on what date. As would be noticed hereinafter this lack of information, only goes to show that it was made even without verifying any fact. However acting on the report on that very day an order was made that the petitioner be evicted and land may be delivered to Harijan and the proceedings under Section 175 Rajasthan Tenancy (Act) may be taken, in view of the fact that the sale in favour of the petitioner is void ab initio.

2. Coming to know of this order, the petitioner appealed before Revenue Appellate Authority who by his order dated 28th April, 1990 held; firstly that the order passed by Tehsildar on 3-6-1989 was administrative in nature and the appeal against it is not maintainable. Secondly, he was also of the view that while the land which is claimed by the petitioners in his possession and subject-matter of sale in his favour is situated in Chak 5 M.D. Muraba Nos. 83 and 82, whereas as per report of the Tehsildar the

land of Akuraram, deceased husband of the complainant is situated in Muraba No. 121 Chak 5 M.D. and there is variance about the identity of land in question.

3. According to this finding, the appeal was dismissed. On further appeal Board of Revenue by its order dated 28-5-1995 held that there is no illegality in the order passed by the Revenue Appellate Authority. He has noticed that prior to the present proceedings a proceeding under Section 175 had taken place against the petitioner which was decided in his favour and appeal against that order filed by the State is still pending. In that view of the matter, the petitioner could not have been evicted by the order under challenge, which appears to be passed in exercise of his administrative power. As on the date the order dated 3-6-1989 was passed against the petitioner-appellant appeal against the order of the Assistant Collector under Section 175 dated 22-9-1977 was pending. By ignoring those proceedings, which has been culminated in favour of the petitioner, he could not have been evicted by the proceedings under challenge. This contention of the petitioner has been rejected by the Board of Revenue on the ground that the decision which has been rendered under Section 175 in the proceedings of 22-9-1977 having been made subject-matter of the appeal was not final and, therefore, it could not come in way of making the order in question made by the Tehsildar on 3-6-1989. He has also not upheld the contention of the petitioner on the ground that neither could file a suit for declaration, nor he can be permitted to take the plea of adverse possession because of (sic) his possession was illegal, therefore, the claim of the petitioner comes to an end. On these findings revision was dismissed.

4. Aggrieved with all these orders, the petitioner preferred the writ petition before this court, which has been decided by the order under appeal. The learned Judge has primarily dismissed the petition on the ground that sale in petitioner's favour being void because of Section 42 of the Rajasthan Tenancy Act, there was no substantial failure of justice and jurisdiction under Article 226 need not be invoked even if there is want of jurisdiction. Thus, by holding that though impugned order dated 3-6-1989 has been passed in breach of principle of natural justice, the petition has been dismissed on the ground by not exercising discretion in favour of the petitioner.

5. It has been contended by learned counsel for the petitioner that the learned single Judge was not right in coming to the conclusion that there is no substantial failure of justice. He pointed out that so far as application of the respondent No. 6 is concerned it was founded on the basis that she herself has been forcibly dispossessed from the

land in question some time back and the possession be restored to her. The case of the complainant was that the land was in the tenancy of her husband, who was a member of Scheduled Caste and, therefore, their tenancy rights cannot be affected by the act of petitioner. The Patwari has reported that the petitioner is in possession of the land under registered sale deed of Nihal Singh. On the basis of report of Patwari it was not the case of forcible dispossession of complainant by the petitioner, nor the petitioner was a transferee from Akuda either. How and in what manner Nihal Singh acquired the land was not a part of report. Thus on the basis of complainant and Patwari's report no case of eviction forthwith had been made out, and order of dispossession of the petitioner on the spot without even verifying the basic facts was a clear abuse of authority and process of law.

6. The petitioner in his appeal has pointed out that original tenant Akura Ram has sold his property in 1963 in favour of Nihal Singh from whom he has purchased in 1975. This fact is not in dispute before us. These facts have not been disputed. This establishes two things, firstly the complainant or her husband was not forcibly dispossessed from the land in question at all which was purchased by the petitioner. The complainant's husband had voluntarily sold and delivered possession to Nihal Singh, predecessor-in-title of the petitioner, way back in 1963 and the petitioner too was in possession of the land in dispute since 1975. Secondly these facts, did not find place in the report of Patwari obtained on spot. Absence of such facts can only be either because no enquiry into facts was at all made or deliberately for reason best known to reporting officer, it was an attempt to make out a case that petitioner was direct transferee from the said Ankura, alleged to be a member of Scheduled Caste. Moreover from these facts, it is very clear that the complainant was not entitled to recover the possession from the petitioner without holding an enquiry and reach a conclusion that he has been forcibly dispossessed from the land by the petitioner. It has been stated in the application itself that the petitioners have possession over the land in dispute for many years.

7. As per the facts emerging, the original tenant Akuda has transferred his tenancy rights in 1963 to one Nihal Singh, who in turn has sold his rights to present petitioner in 1975 and put him in possession. Akuda was not in possession since transfer made by him in 1963. The case at least comes to that transfer made by Akuda being void in view of proviso (b) to Section 42 no right, title or interest of Akuda passed to Nihal Singh and consequently to Babu Singh the present petitioner. This may result in that

agreement not being capable of enforced Akuda remained owner of tenancy rights and with that also retained rights to recover possession of land in his own right from the person put in possession under a void deed of transfer. Thus by dint of void transfer by a member of Scheduled Caste or Scheduled Tribe the right of existing tenant would not extinguished under Section 63 immediately. However, since right to recover possession remained with tenant, his right became subject to Section 63(1)(iv) of the Tenancy Act. If he fails to sue for recovering possession within 12 years from the date the transferee under void transfer was put in possession, and his suit for recovering that possession has become barred by time, his tenancy rights otherwise extinguishes in terms of Section 63(1)(iv) of the Rajasthan. Tenancy Act. Un deniably, on the Revenue Authorities' own conclusion, Akuda had not sued for recovery of possession of land in question during his lifetime, nor any such application as has been made by his widow giving rise to present proceedings was made before. Thus said Akuda or his legal representatives have lost right to recover possession from their transferees, whose position can at worst be of a person in possession adverse to title of owner. Period of filing suit for recovering possession from him, still continue to be governed by limitation prescribed for recovering possession. Thus widow of Akuda could not have maintained an application for recovering possession from the petitioner, when the tenancy right of her husband had already become extinct under Section 63(1)(iv) of the Act.

8. The another aspect of the matter is right of State to secure possession from such transferee under a void contract in possession under Section 175 of the Act. Sections 175 and 176 which forms part of the scheme providing consequence of transfer of possession under a void transfer under proviso (b) to Section 42 reads as under :-

"175. Ejectment for illegal transfer or sub-letting - (1) if a tenant transfers or sub-lets or executes an instrument purporting to transfer or sub-let, the whole or any part of his holding otherwise than in accordance with the provisions of this Act and the transferee or sub-lessee or the purported transferee or sub-lessee has entered upon or is in possession of such holding or such part in pursuance of such transfer or sub-lease both the tenant and any person who may have thus obtained or may thus be in possession of the holding or any part of holding, shall on application of the landholder, be liable to ejectment from the area so transferred or sub-let or purported to be transferred or sub-let.

(2) To every application under this section, the transferee or the sub-tenant or the

purported transferee or the sub-tenant, as the case may be, shall be joined as a party.

(3) On an application being made under this section, the Court shall issue a notice to the opposite party to appear within such time as may be specified therein and show cause why he should not be ejected from the area so transferred or sub-let or purported to be transferred or sub-let.

(4) If appearance is made within the time specified in the notice and the liability to ejectment is contested, the Court shall on payment of the proper Court-fees, treat the application to be a suit and proceed with the case as a suit :

Provided that in the event of the application having been made by a Tehsildar in respect of land held directly from the State Government no court-fee shall be payable.

((4-A) Notwithstanding anything to the contrary contained in sub-section (4), if the application is in respect of contravention of the provisions contained in Section 42 or the proviso to sub-section (2) of Section 43 or Section 49-A the Court shall after giving a reasonable opportunity to the parties of being heard, conclude the enquiry in a summary manner and pass order, as far as may be practicable, within a period of three months from the date of the appearance of the non- applicants before it, directing ejectment of the tenant and his transferee from the area transferred or sub-let in contravention of the said provision.)

176. Decree or order under Section 175-A decree or order under Section 175 may direct the ejectment of a tenant and his transferee, or sub-lessee or purported transferee or sub-lessee from the area transferred or sub-let or purported to be transferred or sub-let otherwise than in accordance with the provisions of this Act."

9. Section 175 enables the land-holder to make an application before competent authority to eject both the tenant and his transferee. This is indicative of the scheme that by indulging in transfer of his tenancy rights contrary to Section 42, a member of Schedule Caste or Scheduled Tribe too becomes liable to be ejected along with transferee in possession. It may be noticed that such right of evicting both tenant and transferee is conferred only in case the transfers in contravention of Section 46-A is put in possession. Otherwise, if possession of land is not transferred, Section 175 does not come into operation. This is further indicative of the fact that while transfer in breach of clause (b) of proviso to Section 42, does not affect as such tenancy right of khatedari tenant, but if he parts with possession, he too become liable to be ejected

from his tenancy rights and on such ejection order made his tenancy right come to an end. Therefore, dispossession of a transferee is not automatic whenever a complaint is made that he is in possession under a void transaction. On such transfer though a tenant is not immediately divested of his tenancy right immediately, but he can be ejected by the State; if he has parted with possession, along with transferee, which ensures that he does not become beneficiary of proceedings under Section 175. His failure to recover possession within the time prescribed for taking proceedings for recovery of possession, also results in extinguishment of his right.

10. Be that as it may the landlord viz. State had already taken recourse to Section 175 of the Act and was unsuccessful before the trial Court, and appeal before RAA was pending when application was filed by Smt. Dhapi widow of Akuda on 3-7-1989. The proceedings commenced under Section 175 by filing application of the land-holder, is to be tried as suit when such application for ejection is contested and decision therein binds all the parties. Tenant too is party to such proceedings and in fact tenant was party to those proceedings. Thus having suffered order against eviction in proceedings under Section 175, the remedy of parties thereto was to approach higher forum against that order. The land-holder did took recourse to such remedy by filing appeal, in which tenant too is also a party who had already lost remedy to recover possession on his own by filing a suit for recovery of possession. In these circumstances in no event applications of respondent Smt. Dhapu could have been entertained and eviction could be ordered in the manner in which it has been done. The only remedy of the land-holder was to persue its appeal that was pending.

11. It is of significance to notice that Legislature has designedly not provided for automatic vesting of law on invalid transfer in the State, nor it has empowered to have recourse to evict a transferee from a member of Scheduled Caste or Scheduled Tribe but who himself is not a member of Scheduled Caste or Scheduled Tribe, as the case may be in a summary procedure against a rank trespasser under Section 91 of the Land Revenue Act, but has devised a mechanism by which it was left to land-holder to make an application to eject tenant and transferees in possession and on contest, such application is to be treated and tried as a suit. Under Section 176 a decree for ejection is envisaged against a tenant as well as a transferee in possession in proceedings under Section 175.

12. In the said proceedings a serious issue exist between the parties to be decided viz.

whether on failure by the tenant to eject the person in possession under a void transfer, the said person in possession becomes a khatedar by adverse possession against the person holding khatedari rights? If so whether Nihal Singh become a khatedar by adverse possession and thereafter transfer by him in favour of the petitioner, which is not being a transfer from a member of Scheduled Caste to a person who is not such member is at all hit by Section 42.

13. In view of the said serious issue having already subject-matter of a pending lis, particularly in making impugned order which has been taken in hot haste in most bizzare manner by completing all enquiry on the spot at the back of petitioner who is not a transferee from a Scheduled Caste, nor who has dispossessed any member of Scheduled Caste in possession when he entered the possession under a sale from a person not a member of Scheduled Caste on a complaint by a person who had already lost her right to recover possession from the State as well as from person in possession, it cannot be said that no substantial failure of justice has occasioned so as to warrant to take a position of non-interference, notwithstanding clear breach of natural justice in making the impugned order, by the Revenue Authority.

14. Apparently the order under appeal does not take into account all these circumstances and clear position of law emerging from provisions of Rajasthan Tenancy Act while refusing to exercise discretion in favour of the petitioner and, therefore, cannot be sustained.

15. Accordingly, this appeal succeeds and the order under appeal as well as the order passed by the Revenue Authorities are set aside. There shall be no orders as to costs.

16. However, it is made clear that the respondent State shall be free to prosecute proceedings initiated by it under Section 175 in accordance with law by taking remedial measure in respect of order passed in such proceedings, provided these proceedings have not been finally concluded.

Appeal allowed.