(2012) 07 P&H CK 0297

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Writ Petition No. 8577 of 2002, 4477 of 2006, 10762 of 2009, 20312 of 2010, 11637, 11638, 11639, 11643, 11650, 11851, 12652, 12653, 12654, 20776 of 2010 and 2081 of 2012

Bhag Singh	APPELLANT
Vs	
State of Punjab and Others	RESPONDENT

Date of Decision: July 6, 2012

Acts Referred:

- Punjab Village Common Lands (Regulation) Act, 1961 - Section 11, 2, 2(g), 2(g)(1), 2(g)(5)

Citation: (2013) 1 RCR(Civil) 130

Hon'ble Judges: Rakesh Kumar Jain, J; Rajive Bhalla, J

Bench: Division Bench

Advocate: Sarjit Singh, with Mr. Jagdev Singh in CWPs No. 4477 of 2006, 20776, 11637, 11638, 11639, 11643, 11650 and 11851 of 2010 and 2081 of 2012 and Mr. Sanjay Majithia, with Mr. Anshul Joy in CWP No. 8577 of 2002, for the Appellant; Rajesh Bhateja, Advocate for the Gram Panchayat in CWP Nos. 8577 of 2002 and 4477 of 2006, 10762 of 2009, 20776, 12652, 12653 and 12654 of 2010, for the Respondent

Final Decision: Dismissed

Judgement

Rajive Bhalla, J.

By way of this judgment, we shall decide Civil Writ Petition Nos. 8577 of 2002, 4477 of 2006, 10762 of 2009, 20312 of 2010, 11637, 11638, 11639, 11643, 11650, 11851, 12652, 12653, 12654, 20776 of 2010 and 2081 of 2012, as they involve adjudication of similar questions of law and fact. Facts necessary for adjudication are being taken from Civil Writ Petition No. 8577 of 2002. We need not burden the file by narrating the history of the case as it involves repeated orders of remand passed by the Commissioner or by this court, directing the Collector or the Commissioner, to decide the matter afresh. The matter was remanded, for the last time, to the Director-cum-Special Secretary, Government of Punjab, Rural Development and

Panchayat Department, Chandigarh, in Civil Writ Petition No. 19368 of 1997 for deciding the appeal afresh.

2. The dispute, in brief, is whether the land in dispute is excluded from "Shamilat Deh" as defined u/s 2(g)(1) of the Punjab Village common Lands (Regulation) Act, 1961 (hereinafter referred to as the "1961 Act"). The Director has held that the land, in dispute, is "Shamilat Deh", and therefore, vests in the Gram Panchayat. It has also been held that as the petitioner has failed to prove that he was in possession of the land, before 26.1.1950, he cannot claim ownership. The Director has also held that as the petitioner had taken the land, in dispute, on chakota, from the Gram Panchayat, he can not challenge the ownership of the Gram Panchayat. As a result, the petitioners have also been ordered to be evicted from the land in dispute. The factual position is more or less similar in all the connected writ petitions.

3. Counsel for the petitioner submits that the impugned order is a nullity as the Collector has not framed issues, thereby causing serious prejudice to the petitioner. The order is even otherwise a nullity as authorities under the Act have not recorded a finding that the land is "Shamilat Deh". The recording of such a finding is a sine qua non for exercise of power u/s 7 of the Punjab Village Common Lands (Regulation) Act, 1961 (hereinafter referred to as "the 1961 Act"). It is also argued that the land, in dispute, was recorded as "Shamilat Deh Hasab Rasad, Zare Khewat", in possession of "Makbuja Malkan". Section 2(g)(1) of the 1961 Act postulates that land recorded as "Shamilat Deh" alone shall vest in the Gram Panchayat. The land has, therefore, been wrongly held to be "Shamilat Deh". In support of this argument, counsel for the petitioner places reliance upon judgments reported as G.P. Ugani v. State of Punjab 1997 (3) R.C.R. (Civil) 79 : 1997 (2) PLJ 3 and Gram Panchayat Vs. The State of Punjab and Others,

4. Another argument pressed into service is that as the land was "Banjar Qadim" in jamabandi for the year 1958, i.e., before enactment of the 1961 Act, it is excluded from "Shamilat Deh" by virtue of section 2(g)(5) of the 1961 Act. The Gram Panchayat has not produced any evidence, much less any revenue record to, show that the land was used for common purposes of the village. Counsel for the petitioner presses into service a Full Bench judgment of this Court reported as G.P. Sadrao v. Baldev Singh, 1977 PLJ 276. It is also submitted that the petitioner is in continuous cultivating possession since 1958, when he put "Banjar Qadim" land to cultivation, without payment of any charges to any person, except, Nautor charges, paid to the government. It is also pointed out that the petitioner had migrated from Pakistan and came to occupy this land for cultivation. The findings recorded by the Commissioner that the petitioner had taken the land on Chakota, are contrary to the record.

5. Counsel for the Gram Panchayat, on the other hand, submits that the land is "Shamilat Deh" as defined by section 2(g)(1) of the 1961 Act and vests in the Gram Panchayat, by virtue of section 3 of the 1961 Act. The expression "Hasab Rasad Zare

Khewat" that follows the words "Shamilat Deh" merely indicates the manner in which share holding of proprietors was calculated, prior to enactment of the Pepsu Village Common Lands (Regulation) Act, 1954 (hereinafter referred to as the "Pepsu Act"). After enactment of the Pepsu Act, all rights, title or interest, held by proprietors, in "Shamilat Deh", came to an end and expressions like "Hasab Rasad Zare Khewat", were rendered superfluous. It is further contended that non-framing of issues is a mere procedural irregularity as parties were alive to the dispute and had led evidence. The petitioner has even otherwise failed to plead or prove any prejudice. It is also contended that as the 1961 Act came into force on 4.5.1961, the petitioner was required to prove that the land was "Banjar Qadim" on 4.5.1961. The petitioners have, however, pleaded that they began cultivating the land in the year 1958, thereby negating their plea that land was "Banjar Qadim" and is, therefore, excluded from "Shamilat Deh".

6. We have heard counsel for the parties and perused the impugned orders.

7. The dispute, in the present case, commenced in the year 1981 and may, hopefully, reach fruition with the decision of these writ petitions. We would, at the outset, like to deal with the plea that land recorded as "Shamilat Deh Hasab Rasad Zare Khewat" continues to vest in proprietors and is not "Shamilat Deh". Before we answer this question, we would set out, in brief, the nature and evolution of "Shamilat Deh".

8. A village consisted of and even today consists of land used for cultivation and land used for common purposes. The common land of a village is used and reserved for pastures, roads, ponds, cremation grounds etc. and is generally denoted by the words "Shamilat Deh". The common land was owned by proprietors, in accordance with their share holdings, determined either in proportion to their proprietary land holdings, i.e., "Hasab Rasad Zare Khewat" or in accordance with the land revenue paid, i.e., "Hasab Rasad Paimana Malkiat". The words "Hasab Rasad Zare Khewat", "Hasab Rasad Paimana Malkiat", merely denoted the manner of calculating share holdings of proprietors, in Shamilat Deh, or Shamilat Patti and had no relevance to the nature of land. The common land belonging to a Patti, a Panna, a Thola, or a Taraf, was represented by the words Shamilat, Patti, Taraf, Panna or Thola, thereby indicating that the land was the common land of a Patti etc. "Shamilat Deh" was generally recorded in possession of proprietors by the words "Makbooja Malkan", i.e., possession in ''common'' of the proprietary body, with no particular proprietor in separate possession. Where, however, a proprietor was in separate "cultivating possession" of any part of "Shamilat Deh", his name was so recorded in a particular khasra number or numbers. Shamilat Deh of a village vested in proprietors and was used and managed by them to the exclusion of non proprietors. Shamilat Patti etc. vested in members of the Taraf, Patti, Panna or Thola "Shamilat Deh" or "Shamilat Patti" could be leased, mortgaged, sold and partitioned by proprietors in accordance with their share holdings.

9. The enactment of the Pepsu Act and the Punjab Village Common Lands (Regulation) Act, 1953, collectively, called "Shamilat Law" brought about a paradigm shift in the ownership of "Shamilat Deh". "Shamilat Law" was enacted as a measure of agrarian reform so as to break the stranglehold of proprietors and extinguish their proprietary rights by permitting, for the first time, non-proprietors to use common land, without any let or hindrance. By these statutes land described as "Shamilat Deh", came to vest in a Gram Panchayat, without exception. "Shamilat Law" was repealed and enacted as the "1961 Act". Section 2(g)(1) of the 1961 Act defines "Shamilat Deh", to include lands described, in the revenue record, as "Shamilat Deh" subject, however, to certain exceptions set out in Section 2(g) and Section 4 of the 1961 Act.

10. Despite the enactment of section 2(g)(1) of the 1961 Act, revenue authorities continued to record the expressions "Hasab Rasad Zare Khewat" or "Hasab Rasad Paimana Malkiat" etc. after the words "Shamilat Deh". As already discussed, these expressions do not relate to the nature of the land but denote the proprietary position, before enactment of the Pepsu Village Common Lands (Regulation) Act, 1954; the Punjab Village Common Lands (Regulation) Act, 1953 and the Punjab Village Common Lands (Regulation) Act, 1961, and are, therefore, superfluous. The question has already been answered in two separate judgments namely, Kashmir Singh and Others v. Joint Development Commissioner (IRD), Punjab, Chandigarh and others 2006 (1) L.A.R. 607 and Sita Ram etc. v. G.P. Ismaila etc. (Civil Writ Petition No. 9368 of 2007) recorded by Division Benches, on 20.6.2007.

11. It is, therefore, beyond debate that the words "Shamilat Deh", would determine the nature of the land and words like "Hasab Rasad Zare Khewat", "Hasab Rasad Paimana Malkiat", etc. are a mere indication of the past ownership of proprietors, extinguished by the Pepsu Act and the 1961 Act. We would, at this stage, like to point out that the vires of these statutes have been upheld by this Court and by the Hon''ble Supreme Court.

12. Counsel for the petitioner has placed reliance upon judgments in Gram Panchayat Vs. The State of Punjab and Others, in support of his argument, that "Shamilat Deh Hasab Rasad Zare Khewat is not "Shamilat Deh". We would, in all fairness, proceed to deal with these judgments in detail.

13. In Gram Panchayat Muradpur v. State of Punjab, a question arose before a learned Single Bench, of this court, whether the Additional Director Consolidation of Holdings, could rectify an error committed during consolidation. After considering the order passed by the Additional Director, it was held that as the Additional Director, Consolidation of Holdings, has merely rectified an error and not decided any question of title, the order is legal and valid. A sentence in the judgment that "Shamilat Deh Hasab Rasad Zare Khewat," vests in proprietors, in our considered opinion, cannot be elevated to the status of a ratio. Even if, one were to construe this expression as a declaration that "Shamilat Deh Hasab Rasad Zare Khewat," does

not vest in the Gram Panchayat, the declaration so recorded, is contrary to the ratio of the judgments of the Hon''ble Supreme Court in G.P. Nurpur v. State of Punjab and others, 1997 (1) PLJ 269 and G.P. Sidh v. State of Punjab, 1997 PLJ 313, wherein, while considering the power of Director Consolidation, it has been unambiguously held that the Director Consolidation has no jurisdiction to declare whether land vests or does not vest in a Gram Panchayat. In addition, the judgment does not make a reference to section 2(g)(1) of the 1961 Act. The judgment, in our considered opinion, cannot be held to be a binding precedent for the argument that "Shamilat Deh Hasab Rasad Zare Khewat," is not "Shamilat Deh" and is, therefore, over-ruled.

14. In G.P. Ugani v. State of Punjab,(supra), the writ petition was dismissed in limine without reference to section 2(g)(1) or section 3 of the 1961 Act, which define "Shamilat Deh" and provide for vesting of "Shamilat Deh" in a Gram Panchayat. The judgment, in our respectful opinion, cannot be held to be a binding precedent as it only makes a passing reference while dismissing the writ petition that, "Shamilat Deh Hasab Rasad Zare Khewat", belongs to proprietors.

15. We would now proceed to deal with the next argument, namely, that as the land was ''Banjar Qadim'' and not used, as per revenue record for common purposes, it is excluded from "Shamilat Deh". Section 2(g)(5) of the 1961 Act, which provides for such an exclusion, reads as follows:

2(g) "Shamilat deh" includes-

(1) XX XX XX

(2) XX XX XX

(3) XX XX XX

(4) XX XX XX

(5) lands in any village described as banjar qadim and used for common purposes of the village, according to revenue records.

16. Section 2(g)(5) of the 1961 Act postulates that Shamilat Deh includes land described as "Banjar Qadim" and used as per the revenue record for common purposes. The Pepsu Act, declared that land described as "Shamilat Deh", shall without exception, vest in a Gram Panchayat. However, as this definition was rather expansive, the Pepsu Act was repealed and replaced by the 1961 Act. Section 2(g)(1) to (5) of the 1961 Act define land that is "Shamilat Deh" whereas section 2(g)(i) to (xi) define the circumstances in which land though "Shamilat Deh" shall be excluded from "Shamilat Deh". Section 4 of the 1961 Act also enacts certain provisions for exclusion of land from "Shamilat Deh".

17. A person claiming that his land is excluded from "Shamilat Deh", by reference to any of the clauses, of Section 2(g) of the 1961 Act shall be required to prove the ingredients of the exclusion clause. A few of these clauses set out dates from which

such a person would be required to prove his plea, whereas other clauses are silent, as to any date. As section 2(g)(5) of the 1961 Act does not prescribe a date, a person claiming benefit u/s 2(g)(5) of the 1961 Act, namely that the land is "Banjar Qadim" and not used as per the revenue record for common purposes, would be required to prove these facts as on 4.5.1961, (the date of enactment of the 1961 Act). We would, at this stage, like to reproduce a relevant extract from the judgment in CWP No. 6727 of 2012 decided on 30.3.2012, wherein this point has been dealt with in detail:-

With the enactment of the 1954 Act, lands described as "Shamilat Deh" whether "Shamilat Deh" simpliciter or followed by expressions like "Hasab Rasad Arazi Khewat", "Zare Khewat" or "Hasab Rasad Paimana Malkiat", came to vest in a Gram Panchayat. As the 1954 Act did not provide a comprehensive definition of "Shamilat Deh", it was repealed and re-enacted as "the 1961 Act". Section 2(g) of the 1961 Act provides a comprehensive definition of "Shamilat Deh". Section 2(g)(1) to (5) describes land that shall be "Shamilat Deh" and section 2(g)(i) to (ix) describes situations in which such land shall be excluded from "Shamilat Deh". Section 3(1) of the 1961 Act postulates that this Act (''the 1961 Act'') shall apply and before the commencement of this Act, the "Shamilat Law" (i.e. the 1954 Act) shall be deemed always to have applied to all lands which are "Shamilat Deh" as defined in Clause-(g) of Section 2 of 1961 Act. Section 3(2)(i) of the 1961 Act provides that where any land has vested in a Gram Panchayat under the Shamilat Law (1954 Act) but is excluded from "Shamilat Deh" by Section 2(g) of the 1961 Act, all rights, titles and interest of the Gram Panchayat shall cease and shall be vested in such person or persons in whom they vested before the Shamilat Law (1954 Act). Section 4 of the Act provides for vesting of land in Gram Panchayats and protection of possession of non-proprietors.

A conjoint reading of Section 2(g)(i), Section 3 and Section 4 of the 1961 Act, reveals that all land described as "Shamilat Deh" came to vest in Gram Panchayat by virtue of the 1954 Act and only such "Shamilat Deh" is excluded, from vesting in a Gram Panchayat, as is provided for by Section 2(g) or Section 4 of the 1961 Act. The 1961 Act has retrospective operation only to the extent provided by Section 3. Section 3(1) and 3(2)(i) of the 1961 Act reads as follows:-

3 Lands to which this Act applies:-

(1) This act shall apply and before the commencement of this Act the Shamilat Law shall be deemed always to have applied to all lands which are shamilat deh as defined in clause (g) of section 2.

(2) Notwithstanding anything contained in subsection (1) of Section 4,--

(i) where any land has vested in a Panchayat under the Shamilat Law, but such land has been excluded from shamilat deh under clause (g) of section 2 other than the land so excluded under sub-clause (ii-a) of that clause, all rights, title and interest of the panchayat in such land as from the commencement of the Punjab Village

Common Lands (Regulation) Amendment Act, 1995, shall cease and all such rights, title and interest shall vest in the person or persons in whom they were vested, immediately before the commencement of the shamilat law;

(3) XX XX XX XX

A landowner, claiming that his land is excluded from "Shamilat Deh", shall be required to prove the ingredients of the exclusion clause, from the date set out, in the clause so invoked. Where, however, an exclusion clause does not set out any date, the landowner could be required to prove the ingredients, of the exclusion clause, as on the date of enactment of the 1961 Act, i.e., 4.5.1961.

18. The petitioner was required to prove that the land in dispute was "Banjar Qadim" and was not used, as per the revenue record, for common purposes of the village as on 4.5.1961. A perusal of the pleadings filed, in the petition, u/s 11 of the Act, reveal that it is the positive case of the petitioner that he came into cultivating possession of the land, in dispute, in 1958 and changed the nature of land from "Banjar" to ''Barani'' (cultivable) in the year 1958. The petitioner admits that land was not "Banjar" on the date of the enforcement of the 1961 Act. The petitioner''s admission that the land was not "Banjar Qadim" on 4.5.1961 negates the very foundation of his plea. The revenue record, relied upon by the petitioner, does not advance his case, as there is no revenue entry or any other evidence to prove that land was "Banjar Qadim" on 4.5.1961 (the date of enforcement of the 1961 Act). We have no hesitation in holding that as the land, in dispute, is recorded as "Shamilat Deh", it cannot be excluded from "Shamilat Deh" on the premise that it was "Banjar Qadim" as it was already "Barani", i.e. ''cultivable land'' on the date of enforcement of the 1961 Act.

19. We also express our inability to accept the argument that impugned orders are vitiated for non framing of issues or failure to record a finding that land is "Shamilat Deh". The present proceedings commenced in the year 1981 when the petitioner filed a petition u/s 11 of the 1961 Act. The case was repeatedly remanded either by this court or by the Commissioner for one illegality or the other but at no stage of these proceedings, did the petitioner raise a whisper of a plea or canvass that nonframing of issues has caused any prejudice or that he has been deprived of an adequate opportunity to adduce evidence. It is true that the Collector should have framed issues, but at the same time, we cannot ignore a long line of precedents, that mere nonframing of issues, does not render an order illegal or void, particularly, when parties were alive to the issue, in hand, accordingly led evidence on that issue and have not pleaded or prima facie established any prejudice. A perusal of the impugned order, directing eviction of the petitioner, clearly reveals that a finding has been recorded that the land is "Shamilat Deh", as such, the petitioner''s submission that no such finding has been recorded, is incorrect. In view of what has been stated hereinabove, writ petition No. 8577 of 2002 and all the connected writ petitions are dismissed, but with no orders as to costs.