

(1978) 12 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : Civil Write Petition No. 112 of 1977

Daulat Ram etc.

APPELLANT

Vs

The State of Himachal Pradesh etc.

RESPONDENT

Date of Decision : 05-12-1978

Acts Referred:

Constitution of India, 1950 — Article 226(3)
Himachal Pradesh Tenancy and Land Reforms Act, 1972 — Section 104, 104(3), 122, 2(7)
Himachal Pradesh Tenancy and Land Reforms Rules, 1975 — Rule 27

Citation : (1978) 7 ILR HP 742

Hon'ble Judges : C.R. Thakur, J

Bench : Single Bench

Advocate : H.S. Thakur and Prem Goyal, for the Appellant; H.K. Paul, for the Respondent

Judgement

C.R. Thakur, J.—These six petitions raise a common question and can conveniently be disposed of by a single judgment.

2. In C.W.P. 112 of 1977, the Petitioners had been recorded as tenants of the land, khasra number 49, measuring 22 bighas 19 biswas situate in Mauza Nallaha Doem Jatol, Pargana Chhabrot, Tehsil and District Simla, under the Government. Previously this area was under the ownership of the erstwhile Pepsu State, and at that time also the Petitioners had been recorded as tenants under the Pepsu Government, and now they are recorded as tenants under the Himachal Pradesh Government, and the land is recorded as Ghasini. By virtue of the provisions of Section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Act No. 8 of 1974) (hereinafter referred to as the Act), the rights, title and interest in the tenancy land of the landowner shall vest in the tenants free from all encumbrances. According to the Petitioners since they had been recorded as the tenants, therefore, they had become the landowners of the land, khasra number 49, from the date of the promulgation of the rules framed u/s 122 of the Act. These rules were promulgated on 4th October, 1975. Thereafter

in pursuance of Rule 28, mutation of the land in favour of the Petitioners was effected and the Assistant Collector 2nd Grade, Simla, attested the same on 12th April, 1977, vide Annexure B.

3. After the Petitioners had become the owners, they wanted to plant fruit trees on the land and for that purpose it -was necessary to fell the trees and reclaim the land. In order to reclaim the land they wanted to sell the trees. The Petitioners applied for the requisite permission for felling the trees after demarcating the area so that they may be able to export the timber for sale after obtaining requisite permission from the Forest Department. That application is, dated 20th April 1977, addressed to the Chief Conservator of Forests, accompanied by a copy of the mutation, and a certificate from the Horticulture Inspector of the area duly counter-signed by the. Block Development Officer that the said area was fit and suitable for raising an orchard, but the requisite permission had not been granted. The Petitioners represented to the Forest Minister, but in spite of his assurance that the matter would be considered, permission had not so far been accorded. They again made a joint representation, copy of which is Annexure D on 2nd August 1977, but no action was taken, thereon also.

4. The Petitioners contend that by virtue of the fact that they had become the owners of the land they have got every right to fell the, trees and extract timber, but the obstacle which has been created by the Forest Department is that the export permission is not given and the timber extracted cannot be exported for sale.

5. According to the Petitioners they had already deposited the amount as required under the Act for the export permit and the Government has already received this amount.

6. Further it was Contended that the Petitioners had been discriminated, inasmuch as the Forest Department had already given such permits in a number of such like cases, whereas they had not accorded any permission to the Petitioners. The Petitioners were, the owners of the trees, which were standing on the land. The contention of the Respondents, according to the Petitioners, is that they are only the owners of the land and not of the trees, which was wholly incorrect, because the trees must go with the land, Respondents had no right to put any fetter on the rights of the Petitioners to develop the land and remove the trees standing thereon. The Petitioners, therefore, prayed for issue of a writ in the nature of mandamus directing the Respondents to allow the Petitioners to fell the trees standing on the area after getting the area demarcated through the revenue agency in the presence of the representatives of the Forest Department, and further to allow the Petitioners to export the timber extracted from the trees.

7. The Petitioners filed a supplementary affidavit incorporating therein further additional pleas. The additional pleas are that the Advocate-General had raised a plea that the order of mutation of ownership attested in favour of the Petitioners

showed that the revenue officer had while deciding the mutation of ownership of land observed that the trees would not be felled and that it had become, therefore, necessary to challenge this part of the order. The Petitioners contended that the revenue officer could not impose condition or put fetter on the owner ship rights which had vested in the Petitioners by the operation of law, as such the remark of the revenue officer in the mutation order is non-est, void and ineffective, and, according to the Petitioners, they were not bound by such remarks. Such remarks have been incorporated by the revenue officer without jurisdiction and are a nullity in the eye of law, and the remarks being without jurisdiction are liable to be quashed. The Petitioners also furnished the names of those persons in this additional affidavit to whom permission had been granted for the felling of the trees.

8. In C.W.P. 113 of 1977, the Petitioners were recorded as occupancy tenants of the State of Himachal Pradesh. They are also the residents of village Kachhat, in Pargana Chhabrot. They are recorded the tenants of the land, khasra number 46, measuring 65 bighas 12 biswas, and they also made similar pleas as raised by the Petitioners in C.W.P. 112 of 1977. They were also not permitted to fell the trees" from the area of which they had become owners by virtue of the provisions of Section 104(3) of the Act and the rules made under the Act.

9. In C.W.P. 114 of 1977, the five Petitioners also belong to village Dumehar in Pargana Chhabrot, and were recorded as tenants of land, khasra number 4 measuring 124 bighas. Biswas under the Government, and they also had become owners but when they wanted to fell the trees they were not permitted to do so as according to the Forest Department they were not the owners-of the-trees. They also made similar prayers.

10. In C.W.P. 116 of 1977 also the Petitioners, who are seven in number, belong to village Nallaha, Pargana Chhabrot and they have been vested with the proprietary rights in respect of khasra numbers 43, 45, 48, 50, 51, 54, 70 and 75, measuring 79 bighas 19 biswas by virtue of the provisions of the Act, but they also have not been permitted to fell the trees in order to reclaim the land for purposes of raising an orchard.

11. In C.W.P. 117 of 1977, the Petitioners is a resident of village Jangal Doem Jatol, Pargana Chhabrot, Tehsil and District Simla, and he has become the owner of the land, khasra numbers 44, 47, 52 and 53, measuring 10 bighas, by virtue of operation of law as he had been recorded as a tenant under, the Himachal Pradesh Government. He also wanted to fell the trees but he was not permitted on the ground that he was not the owner of the trees although the ownership of the land had vested in him.

12. In C.W.P. 115 of 1977 also the Petitioners are recorded tenants in the land comprised in khasra No. 11, measuring 56- 19 bighas in V. Bincher, and they have also raised similar pleas as in the other petitions.

13. In the reply submitted by the State on the affidavit of Shri M.P. Gupta,

Conservator of Forests, it is pleaded that the grant of tenancy rights is already under dispute and an appeal is being filed against the order of the Assistant Collector 2nd Grade, Simla- The owner is restricted by this mutation order from felling of the trees. The Petitioners have not filed any appeal against the said mutation order and as such the petitions are not competent. It had been earlier denied that the Petitioners were the tenants with possession but in reply to the subsequent affidavit of the Petitioners it was admitted that they were the tenants. However, the Respondents relied merely on the condition Laid down in the mutation whereby the Petitioners had-been restrained from felling the trees. It was averred that the area is under the possession of the Forest Department and was being managed, and maintained by the Forest Department. According to the Respondents, the Petitioners were given only the right to remove the grass and to graze their cattle. Permission for the felling of the trees had not been accorded because the ownership of the area is under dispute, and further the Assistant Collector- 2nd Grade had also made it clear that the Petitioners were not entitled to fell the trees.

14. Therefore the first point that arises is whether the writ petition is barred for not having filed an appeal against the mutation order.

15. The contention of the Respondents was that the grant of the proprietary rights itself was under dispute and an appeal was filed against the order of the Assistant Collector 2nd Grade. This means" that the Respondents challenged the grant of the proprietary rights in respect of the land and that is why, according to them, they had filed the appeal, but they have not placed any material on the record to substantiate their plea if any appeal had been filed. It may be stated that the Petitioners in C.W.P. 112 of 1977 were recorded as tenants of the land prior to the grant of proprietary rights by the mutation, Annexures B and B-I. Similarly in the other cases also the copies of the mutations whereby the proprietary rights had been granted reveal that the Petitioners prior to the grant of proprietary rights were recorded as tenants of the land. They had been paying the land revenue as also the cesses. These documents in the other writ petitions are also Annexures B and B-I. Again, in para 2 of the return to all these petitions it is admitted by the Respondents that the Petitioners are shown as tenants in the revenue record. However, they dispute the entries in the revenue record.

16. Under Sub-section (3) of Section 104 of the Act, all rights, title and interest (including a contingent interest, if any) of the landowner of the land held by tenants shall be extinguished and all such rights, title an interest shall vest in The tenants free from all, encumbrances created by the landowner, With effect from the date to be notified by the State Government in the Official Gazette, provided that if the tenancy is created after the commencement of this Act, the provision of this Sub-section shall apply immediately after the creation of such tenancy. It cannot be disputed: that the entry of tenancy existed-much before the promulgation of the Act, and the Respondents cannot question the tenancy when it is so recorded in the revenue papers which is a conclusive proof of the

factum of the existence of the tenancy. Once a person is entered as a tenant in the revenue record then notwithstanding any agreement, etc. to the contrary, the person so entered shall become the owner by virtue of the provision of Sub-section (3) of Section 104 of the Act. The conferment of the proprietary right under the Act is automatic from the date of the issue of the notification by the State Government in the Official Gazette, and the vestment of ownership shall be free from all encumbrances. Under Rule 27 of the Himachal Pradesh Tenancy and Land Reforms Rules, 1975, all rights, title and interests in the tenancy land of landowners shall vest in the non-occupancy tenants with effect from the commencement of these rules. Similarly, the proprietary rights of tenancy- land of the non-occupancy tenants on Government land shall also vest in the tenants from the commencement of these rules. These rules came into force on 3-10-1975. Therefore, from that date the ownership rights vested free from all encumbrances on the persons who were so recorded as tenants under the land-owners or for the matter of that the State Government in that land. Therefore, the plea taken up by the Respondents that they, were not the tenants is wholly incorrect because they cannot set up this case when they are so recorded, and once they are so recorded they become the owner of the land by virtue of the operation of law and they actually became owners with effect from the date of the publication of the rules.

17. The second submission made by the learned, Counsel for the Respondents was that the Petitioners did not avail of the alternative remedy, inasmuch as they did not go in appeal against the mutation order. The submission made by the learned Counsel for the Petitioners is that the order was without jurisdiction and it was not necessary for them to have gone in appeal.

18. The learned Counsel for the Respondents has cited a few authorities to bring home his point that unless the Petitioners exhaust their alternative remedy this petition is not maintainable. I think it is needless to refer to the authorities if it is found that the order is without jurisdiction and as such non-est.

19. In *State of Madhya Pradesh v. Babu Lal and Ors.* AIR 1977 S.C. 1718, it has been held by their Lordships of the Supreme Court that if there is an error apparent on the face of the record and the judgment is illegal and in clear violation of the law then the High Court ought to set it aside and not direct the party to file a suit for declaration that the decree is null and void.

20. Similarly, if there is any wrong interpretation of the statutory provision Laid down by the authorities then in that case also the High Court is justified in setting aside the order without directing the parties to take resort to alternative remedy, and in this behalf I may refer to *Mohd. Shafi Vs. Additional District and Sessions Judge (VII), Allahabad and Others*,

21. Similarly when there is a question of the interpretation of any statute, etc. then without directing the parties to seek resort to the alternative remedy, the High Court can interfere as would be clear from *State of Uttar Pradesh and*

Others Vs. Indian Hume Pipe Co. Ltd., . In this case, the question was as to what is the true connotation of the words "sanitary fittings"" and whether the hume pipes manufactured and sold were sanitary fittings within the meaning of that expression and it was held, that since the entire material on the basis of which this, question could be determined was placed before the Sales Tax Officer and it pointed in one and only one, direction, namely, that the hume pipes were not sanitary fittings and that there was nothing to show otherwise, the High Court was justified in entertaining the writ petition. Moreover, there is no rule of law that the High Court should not entertain a writ petition where an alternative remedy is available to a party.

22. The Full Bench of the Gujarat High Court in A"bad Cotton Mfg. Co. Ltd. Etc. v. Union of India and Ors. AIR 1977 Gujat 113 held:

"When the Petitioner is to be asked to exhaust his alternative remedies provided under the Act before entertaining the writ petition, this discretion would always be material where the order is a nullity as being ex facie Without jurisdiction or in non-compliance with the provisions, of the Act or the essential principles of justice or on any other ground as explained in Union of India (UOI) Vs. Tarachand Gupta and Bros, or Bhopal Sugar Industries case, AIR 1967 S.C. 549 or, Mohd. Nooh's case AIR 1958 S.C. 86 and is, therefore, a purported order or nullity. In such a context the alternative remedy would be a futile remedy because it did not affect the inherent nullity in the challenged decision, which would result in the material distinction that the party may appeal against such decision but he, was not bound to do so. Therefore, in such cases where the challenge is on the ground that the order is an ultra vires order, the question of exhausting alternative remedy could hardly arise as the Petitioner could straightway seek remedy of judicial review.

Now we have to see whether this order which is challenged by Petitioner in these writ petitions is void.

23. I have already quoted Sub-section (3) of Section 104 of the Act. Under the provision of this Sub-section, the rights of the landowner in the land held by tenant shall stand extinguished his such rights, title and interest shall vest in the tenant free from all encumbrances created by the landowner with effect from 1-10-1973 on payment of compensation. Therefore, the provision of law does not leave any room for doubt that a person who is entered as a tenant he is to become the owner of the land with effect from 1-10-1973 on payment of compensation or from the date of the publication of the rules, as already stated above. So there is no question of laying any condition or imposing fetter rights of ownership. The rights which are to vest any fetters and the law enjoins to confer absolute ownership in the land. Therefore, if any fetter is laid that would be in contravention of this statutory provision," and any such condition which is against the statutory provision would be void. In these circumstances the ratio laid down in the aforesaid authorities would be fully applicable to the cases in hand. Applying the test of the aforesaid authorities it would, therefore, be

apparent that the order as contained in the mutation which lays fetters on the rights of the Petitioners is a nullity and as such void, and, therefore, the contention raised by the Respondents that the Petitioners should be directed to seek alternative remedy before they invoke the extra-ordinary jurisdiction of the Court is totally incorrect because the order which is void would remain to be void and it would be a futile exercise to the party to direct it to resort to the remedy by way of appeal or revision. It is well settled as is apparent from the Supreme Court decisions cited above that when the order is void the Court will not insist on the party to seek alternative remedy available to him under the statute. Therefore, in my opinion, the provision of Article 226(3) of the Constitution will not be applicable to the facts of the present cases.

The order under challenge reads as under:

"12-4-77: Entries of grant of proprietary rights under Chapter 9 of the Land Reform Tenancy Act, 1972 from Himachal Pradesh Government in favour of Daulat Ram 1/3rd, Smt. Maina one share, Kula Nand, Ram Saran 2 shares, Shiv Ram 3 shares at the rate of 1/3rd, Ram Dass 1/3rd, relating to khasra number 49, measuring 22 bighas 19 biswas is accepted on the terms that the trees shall not be felled from the land.

Section 104 of the Act aims at conferring proprietary rights on the tenants. Now we have to see whether the trees which are standing on the land in question are also land or not. It is contended by the learned Counsel for the Respondents that the trees are standing in a demarcated forest and that the Petitioners have got no right to them. Further, the land is only a Ghasini land and it cannot be treated as a land.

24. First we have to see the definition of land as given u/s 2(7) of the Act which is as under:

(7) "land" means land which is not occupied as a site of any building in a town or village and is occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pasture and includes-

- (a) the sites of buildings and other structures on such land,
- (b) orchards,
- (c) ghasnies,
- (d) banjar land, and
- (e) private forests.

The contention of the Respondents in view of the definition as given above is belied because Ghasini also falls under the definition of land. The Petitioners are recorded as tenants of the land, the nature of which is Ghasini and which admittedly falls within the definition of land. Further, in so far as the trees are concerned they are admittedly land because they are embedded and planted on

the land and anything which is standing or embedded in the land also comes within the purview of land.

25. It has been decided by this Court in *Union of India V. Matha* 1975 ILR 145 that if in the Jamabandi the land is shown as ghasini for which rent is payable it would come within the definition of "land" despite the fact that a number of trees stand on the land or the land is comprised in a Khasra which is situated within the demarcated forest. In the instant cases, as would be apparent from the copies of the Jamabandis the Petitioners are recorded as tenants of the land which is of the nature of Ghasini, and they are paying land revenue or rent, whatever it may be called and, therefore, the case of the Petitioners is covered squarely by the principle enunciated in this judgment cited above. Therefore, the submission made by the learned Counsel for the Respondents that the land falls within the demarcated forest and the Petitioners cannot become the owners of the land and muchless of the trees standing thereon is absolutely incorrect.

26. In *Divisional Forest Officer, Himachal Pradesh and Another Vs. Shri Daut and Others*, it had been held that the expression "right, title and interest of the landowner in the land" includes trees standing on the land. Therefore, in the face of the judgment of the Supreme Court there remains no room for doubt to hold that the trees standing on the land are also land, and land also includes Ghasini irrespective of the fact whether they are in the demarcated forest or outside that. The Petitioners have been recorded as tenants of the Ghasini land on which there are trees standing and, therefore, these trees are also land. Once the Petitioners are held, entitled under the law to be vested with the rights, title and interest of the landowner in the land held by them as tenants, they become owners of the land including the trees. Therefore, the fetter placed by the Respondents that they cannot cut the trees is wholly illegal and without jurisdiction because the law does not make any exception in respect of any land on which there are trees. The result, therefore, is that, the order being void cannot be sustained.

27. I, therefore, allow those writ petitions" and quash the orders as contained in Annexures B to the writ petitions. The Petitioners being the absolute owners of the property have got every right, to cut the trees, however, subject to the rules, if any, for felling the trees on private lands. The writ petitions are, there fore, decided accordingly, and it is directed that the Petitioners shall be held entitled to costs in each of the petition from the Respondents assessed at Rs. 200/ - in each petition.