

**(1967) 06 DEL CK 0010**

**In the Delhi High Court**

**Case No : W. Application No. 37 of 1966**

Madho Shobha and Another

APPELLANT

Vs

Lt. Governor Himachal Pradesh and Others

RESPONDENT

**Date of Decision :** 13-06-1967

**Acts Referred:**

**Citation :** AIR 1968 Delhi 59

**Hon'ble Judges :** S.K. Kapur, J

**Bench :** Single Bench

**Advocate :** N.L. Dhingra, for the Appellant; B. Sita Ram and Chhabli Das, for the Respondent

## Judgement

(1) Madho Shoba, the first petitioner, is the minor daughter of Jiwan Lal, the second petitioner. They are residents of village Saproon. Tehsil Kandaghat, District Simla, which was formerly comprised in Punjab State but has now been included in the Union territory of Himachal Pradesh. The petitioners filed the present writ petitioner on the allegations which are set out below: -

One Bishan Singh sold 7 bighas 12 bids was of land entered in Khata No. 48/67 and comprised in fields No. 295/265/5 Min. to two brothers, Om Prakash and Sardari Lal, on November 6, 1950, for Rs. 2,000 by a registered sale-deed. The said Om Prakash and Sardari Lal, sold one bigha out of that land to the first petitioner for Rs. 500 by a deed of sale registered on February 28, 1956. The first petitioner built a house thereon at a cost of Rs. 35,000. The sale in favor of Om Prakash and Sardari Lal was mutated in the revenue records of village Saproon. Some dispute arose between the 1st petitioner and her vendors regarding the boundaries of the land sold to her but it resulted in a compromise under which the area covered by the building constructed by the first petitioner was taken over by the latter in exchange for a part of her land. This exchange was mutated on March 13, 1957. In 1939 the Maharaja of Patiala had acquired land adjoining the land of the first petitioner for "Saproon Market" and mutation in his favor was recorded in the year, 1944. This market land ultimately went to

the State of Punjab in 1956 on merger of the then Pepsu State with Punjab State and Therefore came to be governed by the Punjab Colonisation of Government Lands Act, 1912, (hereafter referred to as the said Act). In 1964 the 2nd respondent the Colonization Officer Punjab Chandigarh sold a plot of land measuring 20 X 30 feet in the area of Mandi Saproon for a shop to Amar Nath, third respondent and another plot of the same size to Naranjan Singh and Hunsha Singh, respondents 4 and 5 respectively. The said respondents 3 to 5 have built their shops on the plots sold to them. In 1956 a dispute arose between the owners of the shops on the one hand and petitioners on the other because the respondents 3 to 5 wanted to discharge their foul water by cutting a portion of the hillock belonging to the first petitioner. The first petitioner, Therefore, served a notice to the said respondents 3 to 5 asking them not to discharge foul water and not to cut the hillock. The third respondent Amar Nath in his reply dated July 9, 1966, to the notice claimed that " about two feet area encroached" by the first petitioner. The Colonization Officer Punjab Chandigarh visited Mandi Saproon on July 28, 1966, when the second petitioner presented an application to him requesting that the respondents 3 to 5 be directed not to construct a drain on the side of the property of the first petitioner. The second respondent Colonization Officer Punjab, thereupon called respondents 3 to 5 to Chandigarh on July 29, 1966, and in collusion with said respondents 3 to 5 without making and inquiry wrote on the second petitioner's application:

"Please issue notice to Shri Jiwan Lal to show cause why action may not be taken u/s 32 of the Punjab Colonization Act, 1912". In pursuance of this order, a show cause notice dated August 29, 1966, was issued to the second petitioner. In the said notice it was inter alias stated that the second petitioner was in an unauthorized occupation of land belonging to the Colonization Department measuring 520 square feet and situated in the colony of Mandi Saproon and that the second petitioner should show cause "on September 6, 1966, in my Court located at Chandigarh on fourth floor Shop-cum-flat No. 12, V-4 Sector 17 why the building/structure unauthorisedly constructed be not demolished and the land got vacated and cleared at your risk and expense. Also show cause why damages be not recovered from you at the rate of Re. 1 per square foot per month for the period you remained in unauthorised occupation of the land of the Department". Thus far I have set out the allegations of the petitioners.

(2) The second petitioner appeared before the Colonization Officer at Chandigarh on September 6, 1966, and filed his written objections. In the said written objections it was inter alias stated that the petitioners had encroachment or field numbers alleged to have been encroached had not been mentioned; that the petitioners were in occupation of the land purchased by them; that Amar Nath and Niranjan Singh shop-keepers had no right to discharge foul water on the land belonging to the petitioner and that no action could be taken under the said Act. It was prayed in the said objections that:

"Before any action is taken the original revenue records with maps i.e. Mussavis

relating to Mandi Saproon and the area purchased by the petitioner be summoned and an experienced senior officer be deputed to make demarcation at the spot from a fixed point and in accordance with revenue records. (3) On that day i.e. September 6, 1966, Jiwan Lal second petitioner made a statement before the Colonization Officer that he will make an application to Tehsildar Kandaghat for demarcation with a copy to the Department of Colonization Officer within three days and proper orders be made thereafter. The second petitioner made an application before the Tehsildar Kandaghat accordingly on September 19, 1966, in which the facts about the purchased of the land by the first petitioner were set out and it was also inter alias stated the there was some dispute with Amar Nath and Niranjan Singh shopkeepers who wanted to build a drain and discharge foul water in the area purchased by the first petitioner. It was prayed that Shir Khushi Ram Kanungo Simla be appointed as local Commissioner to demarcate the disputed area in accordance with the original revenue records in the presence of the parties. The name of Khushi Ram, according to the petitioner, was mentioned as he was the only experienced Qanungo. It appears from the original record that on the said application the Tehsildar Kandaghat appointed Shri Khushi Ram as the Local Commissioner. The Tehsildar, however, later asked the second petitioner to name somebody else for appointment as Local Commissioner. It further appears from the letter dated October 7, 1966, on the original file, from Tehsildar Kandaghat to the Colonization Officer that the second petitioner was asked to name another Qanungo or Patwari because Khushi Ram was on leave. This fact has been disputed by the petitioners who have annexed to the affidavit of Jiwan Lal dated May, 25, 1967, a report of the Naib-Tehsildar Simla reading:

"It is submitted after going through the record that Shri Khushi Ram, Field Qanungo, was not on leave but was on duty on the 5th, 6th and 7th October, 1966." (4) The view that I am taking in the case on another point renders it unnecessary to go into the contention of the learned counsel for the petitioners that effort to substitute some one else for Khushi Ram was with an ulterior motive .On the demand of the Tehsildar Kandaghat to suggest some other Local Commissioner, Jiwan Lal petitioner made a statement on October, 6, 1966, that he did not want to have the land demarcated through any other person. It was in view of this statement that the Tehsildar Kandaghat had written to the Colonization Officer Punjab the letter dated October 7, 1966, mentioned hereinbefore. The Tehsildar forwarded with his said letter dated October 7, 1966, the original application of Jiwan Lal for demarcation along with this statement dated October 6, 1966, to the Colonization Officer. There is on the original file another note dated September 28, 1966, from the Colonization Officer which needs mention because the learned counsel for the petitioner laid a great emphasis thereon in support of his argument that efforts were made for getting a report of demarcation favorable to the respondents 3 to 5.

This note is addressed to Harjit Singh, Colony Kanungo, and directs the Kanungo to visit Mandi Saproon at the time of demarcation and "watch the interest of the

Department. In case any changes to our boundary become necessary I should be informed on telephone. 9 out of 10 no changes to our boundary should be accepted without cogent reasons because the demarcation of our boundaries was also done by the Revenue Staff." I have already mentioned that on the application of Jiwan Lal presented to the Colonization Officer on July 28, 1966, the latter had directed an issue of notice u/s 32. There are a few more endorsements on the said application. One is by the Colonization Officer reading:

"Please supply the plan of the encroached land by Shri Jiwan Lal." This is dated August 1, 1966. On the same day by another endorsement Harjit Singh Kanungo was directed to comply with instruction regarding supply of plan. The third endorsement shows that the plan was supplied on August 2, 1966.

(5) I have already observed earlier that when Jiwan Lal, petitioner appeared before the Colonization Officer on September 6, 1966, the matter was postponed sine die to await the report. No other date appears to have been fixed for hearing the objections of the petitioners after the proposal for fresh demarcation had fallen through. The Collector on receipt of the reports of the Tehsildar Kandaghat contained in his letter dated October 7, 1966, passed an order on October 17, 1966 in Urdu and the free translation thereof is as under:-

"Jiwan Lal made an application dated September 19, 1966, to Tehsildar Kandaghat for demarcation. Tehsildar Kandaghat summoned Jiwan Lal when the latter requested that Khushi Ram Qanungo Simla be appointed for the purpose. Khushi Ram is on leave and Jiwan Lal does not want the demarcation to be done by any one else. The report of the Tehsildar has been received and keeping the above facts in view, it is clear that Jiwan Lal does not want to have the land demarcated and wants to delay the proceedings. Ex parte proceedings are Therefore ordered against Jiwan Lal and the case be placed before me for final orders." The final order was passed on October 18, 1966. It was ordered that Jiwan Lal was in the unauthorized occupation of the land; that the immediate possession of the land be resumed along with any building and structures u/s 32 of the said Act without payment of any compensation; that the building/structure will in due course be removed or demolished u/s 34(iii) of the said Act at the risk and expense of Jiwan Lal, that in case Jiwan Lal himself handed over possession of the vacant land by October 30, 1966, nothing may be charged from him by way of damages, that rent will however be claimed from him for the past period, that in case Jiwan Lal failed to vacate the land by the said date, damages will be charged at the rate of Re. 1 per square foto per month and rent at the rate of 25 paise per square foto per month from the date of unauthorized occupation tentatively fixed as August 29, 1956, to the actual date of vacating the land and that in addition Jiwan Lal will render himself liable for action u/s 33 of the said Act, the Punjab Premises and Land (Eviction and Rent Recovery) Act 1959 or other provision of law.

(6) I am informed by the learned counsel for the petitioners that as a result of this order the first petitioners that as a result of this order the first petitioner will

have to pay by way of rent and damages a sum of over Rs. 75,000 and he will also lose the entire building without any compensation as a result of demolition of the construction made on the area allegedly encroached. The learned counsel for the petitioners raised the following contentions - (1) Section 32 of the Colonization of Government Lands Act 1912, is unconstitutional being violative of Articles 14 and 19 of the Constitution. (2) The condition precedent to the exercise of power u/s 52 of the said Act had not been satisfied in as much as before issue of the notice dated August 29, 1966, to the first petitioner the Collector was never satisfied that there had been an encroachment. The Collector had no material before him at the time of issue of notice. He, with a view of helping respondents 3 to 5, ordered the issue of the notice on July 29, 1966, on the petitioners' application dated July 28, 1966, without looking into the records and in spite of the fact that the plan showing the alleged encroachment was submitted to the Collector on August 2, 1966. (3) The order was mala fide petitioners to sell the house to respondents the petitioners to sell the house to respondents 3 to 5. (4) The Collector having agreed that fresh measurements will be taken ought to have given effect to the agreement before passing the impugned order. Khushi Ram Qanungo had in fact been appointed as a Local Commissioner for taking fresh measurements but the Government withdrew that order on the false pretext that Khushi Ram was on leave. That was done with a view to avoiding demarcation being done by Khushi Ram, an independent Qanungo. The petitioners were justified in insisting upon the measurements being taken by Khushi Ram as he would have done the work impartially and was the only experienced officer available in the State for the work. The note of the Collector dated September 28, 1966, showed that he was showing extra zeal to establish encroachment by the petitioners. (5) Though in the application dated July 28, 1966, presented by the petitioner Jiwan Lal to the Colonization Officer a mention had been made of some earlier demarcation yet those measurements ought to have been ignored because they were taken in the absence of the petitioners of their representative and in complete disregard of the instructions contained in Circular Memorandum No. V1-28620 dated May 11, 1920, issued by the Registrar. High Court of Judicature at Lahore, which, apart from having the force of law, were possessed of inherent reasonableness. In this case, according to the learned counsel, measurements were not taken from a fixed point. (6) The said Act would not be invoked for settlement of purely private disputes between the two owners and (7) there had been a violation of the demands of natural justice inasmuch as the petitioners were not heard by the Collector at all.

(7) Before dealing with the merits, I may point out that this is yet another instance where the State has chosen not to file a proper affidavit in reply and have depended upon a written-statement signed by the Director Colonisation and Land Acquisition Punjab. Affidavit has been filed only by Director of Panchayats and Deputy Secretary to Government of Punjab dealing with some of the paragraphs in the petition namely paragraphs 1 to 13, part of paragraphs 14 and 15 and 16. In the said reply affidavit the deponent has in reply to paragraphs 1

to 7 of the petition merely relied upon the written- statement, unsupported by an affidavit, filed by the Colonization Officer with respect to paragraphs 9 to 13 of the petition the deponent has stated "comments on these paragraphs is the concern of the Colonization Officer Punjab." Paragraphs 14(i) to (iii) and 14 (vi) have not been dealt with at all. In reply paragraphs 15 and 16 it is merely stated "no comments". In paragraph 8 of the said affidavit the deponent has stated that he was the Colonization Officer in the year 1966; that the respondents 3 to 5 were not asked to come to Chandigarh on July 29, 1966, and that the order dated July, 29, 1966, and that the order dated July 29, 1966, issuing notice to the petitioners u/s 32 of the said Act was passed as the area encroached had been measured by the Revenue staff in the presence of the deponent and the petitioners on July 29, 1966. In paragraph 14 of the affidavit the deponent has denied that the order was passed by him under the influence of respondents 3 to 5 or that the petitioners were asked to sell the house to respondents 3 to 5 that any action taken against the petitioners lacked good faith. In the result paragraph 14(ii) alleging that the petitioners were not heard remains unanswered in the reply affidavit.

(8) At this stage I would like to say that on May 26, 1967, Mr. Sita Ram, the learned counsel for the respondent got this case adjourned after it was partly argued as he wanted to produce the records of measurements taken on July 28, 1966, as alleged in the affidavit of Mr. S. S. Parmar. The case was adjourned to May 31, 1967, but Mr. Sita Ram asked for another adjournment as he could not obtain the records. The matter was again adjournment to June 6, 1967, but Mr. Sita Ram was unable to produce any record showing that any demarcation was done with respect to the area in dispute, much less in the presence of the petitioners. He merely produced the Qanungo's diary which showed that the Qanungo did some work in Saproon area from 26th to 30th July, 1966. This diary contained no indication of the nature of the work done by the Qanungo. In the rejoinder affidavit dated May 25, 1967, Jiwan Lal has stated: "No spot measurements were even taken in the presence of the petitioners nor any such measurements were brought to the notice of the petitioners".

(9) The learned counsel for the respondents also raised an objection that the petitioners had an alternate remedy by way of appeal etc. under the provisions of the Punjab Land Revenue Act and Therefore the writ petition should not be entertained. So far as the existence of alternate remedy is concerned, it does not bar the jurisdiction of this Court. Having regard to the circumstances of this case, I am convinced that there has been a complete violation of the rules of natural justice and I do not Therefore, feel inclined to reject the petition on that ground. Since the learned counsel for the petitioners that they had no effective hearing, I need not decide the other contentions raised on their behalf.

(10) I may point out that the learned counsel for the respondents wanted me to decide this case on the assumption that the satisfaction of the Collector embodied in section 32 of the said Act is objective and the Collector is required

to act judicially in deciding the various matters u/s 32. He not only conceded that the Collector must act judicially but also used this argument in defense to the petitioners plea that S. 32 was violate of Articles 14 and 19 of the Constitution.

(11) I would now recur to the argument, that the petitioners had not been heard, in the light of the concession made on behalf of the respondents. In the objections filed by the petitioners before the Colonization Officer various important questions had been raised. The petitioners had contended therein that they had not encroached upon the colony land; that they were the owners of the entire land on which the building had been constructed and that no action could be taken in this matter under the said Act. No doubt the arrangement made by the petitioners with the Colonization Officer as the fresh demarcation fell through but I need not address myself on the question as to who was to be blamed for it. Immediately on the receipt of the report by the Tehsildar Kandaghat that the petitioners did not want the demarcation to be done by any person other than Khushi Ram, the Collector ordered on October, 17, 1966, that proceedings be taken exparte. This was done in spite of the fact that on September 6, 1966, no date of hearing had been fixed on the objections of the petitioners. It is not the case of the respondents that the petitioners had ever agreed that in case fresh demarcation was not done an order adverse to them should be made.

In paragraph 13 of the written-statement filed on behalf of the respondents, unsupported by an affidavit; it is stated that the order was passed u/s 32 in view of the refusal of the petitioners to get the land demarcated by the Revenue authorities. Order u/s 32 could not have been made by way of penalty on the petitioners because of their failure to get the land demarcated afresh. The matter had to be judicially decided on the basis of the materials and facts on record after affording the petitioners an opportunity of being heard. The impression left on my mind on the perusal of the record is that the order was made more out of spirit of penalty on the petitioners than on consideration of the materials. No reasons have been given in the order and there is no discussion as to how the Collector came to the conclusion that there had been an encroachment. Even the elementary requirement of a judicial decision that it must contain reasons, has not been observed. It was incumbent on the Collector to decide that the alleged earlier measurements showing encroachments had been correctly taken. If an opportunity had been given to the petitioners they may have been able to show that the earlier measurements, if any, did not represent the correct position. Even in the absence of fresh measurements the petitioners were entitled to satisfy the judicial mind of the Collector that the materials on which the Collector wanted to act did not show any encroachment. Instead of giving that opportunity, the Collector decided to proceed exparte. I must confess that the decision to proceed exparte is beyond my comprehension. Even if the blame lay on the petitioners for not getting the land demarcated afresh, the Collector was still bound to consider the materials on record after allowing an opportunity to the petitioners to explain to rebut the same. I am unable to subscribe to the view that the petitioners' failure in this behalf could deprive them of their right of

being heard on their objections.

(12) It follows that the order of the Colonization Officer dated October 18, 1966, is bad in law. I, Therefore, allow the writ petition and quash the said order with costs.

(13) Petition allowed.