

(2012) 06 SHI CK 0105

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 156 of 2002

State of Himachal Pradesh

APPELLANT

Vs

Sarwan Kumar (deceased) through his L.Rs: Shri Rakesh Kumar, Shri Vinod Kumar, Smt. Mamta Devi, Kumar and Smt. Sarla Devi

RESPONDENT

Date of Decision : 11-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 80(1)

Citation : (2012) 06 SHI CK 0105

Hon'ble Judges : Kuldip Singh, J

Bench : Single Bench

Advocate : J.S. Rana, Assistant A.G, for the Appellant; P.C. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Kuldip Singh, Judge

1. The appellant having lost in both the Courts has filed appeal against judgment, decree dated 19.6.2001 passed by learned Additional District Judge-I, Kangra at Dharamshala in Civil Appeal No. 69-P/1999 affirming judgment, decree dated 28.5.1999 passed by learned Senior Sub Judge, Kangra at Dharamshala in Civil Suit No. 483/93 (RBT No. 61/98). The facts, in brief, are that Sarwan Kumar, predecessor-in-interest of respondents had filed a suit for declaration that he is owner in possession of the land measuring 0-01-17 hectares alongwith structure standing thereon, which is part of the land comprised in Khasra Nos. 1733/1724 and 1722/1495 situate in Mohal Rodi, Mauza Khalet, Tehsil Palampur as per jamabandi for the year 1989-90. The order dated 26.5.1993 passed by Commissioner in the case titled State vs. Sarwan Kumar is illegal, without authority, null and void and is liable to be set aside. The consequential relief of permanent prohibitory injunction has also been prayed.

2. The further case of the predecessor-in-interest of the respondents is that he

had no place to live nor owned any house. He applied for the allotment of the suit land which was allotted to him by the appellant. He raised one room residential house on the suit land in 1974. It was done on the assurance of the officials of the appellant that allotment will take some time, he could proceed with construction. The allotment of the suit land measuring 0-01-17 hectares was made on 13.6.1981 comprised in Khasra No. 1495/4. He deposited the amount of ` 7.68 paise in August, 1981. He raised further construction without any objection from the appellant.

3. In the year 1992, the cancellation of the allotment proceedings initiated against him. The Commissioner on 26.5.1993 cancelled the allotment. There existed no forest/tree on the suit land. The Forest Conservation Act, 1980 is not applicable. The appellant is estopped from cancelling the allotment. The officials of the appellant on the strength of impugned order threatened to interfere in the possession of the predecessor-in-interest of the respondents over the allotted land. On these allegations, the suit was filed.

4. The suit was contested by the appellant. It was pleaded that the allotment was procured by the allottee by misrepresenting him to be a resident of Mohal Rodi and a landless person. The public of the area and members of the Forest Co-operative Society, Khalet objected to the unjustified allotment. The inquiry was conducted through Tehsildar, who reported that the predecessor-in-interest of the respondents was a resident of Matt, Mauza Nanaun, he was not eligible person under the allotment and the allotment in his favour is liable to be cancelled. The case for cancellation was moved by the SDO (Civil), Palampur. The Commissioner cancelled the allotment after affording an opportunity to the allottee. It has been denied that construction was raised over the suit land on the assurance of the officials of the appellant. There was no construction at the time of allotment. The allotment was the result of misrepresentation and fraud. The cancellation proceedings were rightly initiated. The suit land was part of reserve pool. The allottee was an encroacher. He had no locus-standi to sue. The objections of estoppel, non-joinder of necessary parties, jurisdiction and non-compliance of Section 80(1) CPC were also taken. The submission was made for dismissal of the suit.

5. The replication was filed. On the pleadings of the parties the following issues were framed:-

1. Whether the plaintiff is owner in possession of the suit land? OPP
2. Whether the order dated 26.5.1993 passed by the Addl. District Magistrate, Kangra exercising the powers of Commissioner under the Himachal Pradesh Village Common Lands Act (Vesting and Utilisation) Act in case No. 18/93 titled as State vs. Sarwan Kumar is illegal without authority, null and void? OPP
3. Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP

4. Whether the plaintiff has got no cause of action? OPD
5. Whether the plaintiff has no locus-standi? OPD
6. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD
7. Whether civil court has no jurisdiction to entertain the present suit? OPD
8. Whether the suit is liable to be dismissed for want of notice u/s 80, CPC? OPD
9. Whether the suit is bad for non-joinder of necessary parties? OPD
10. Relief.

The issues No. 1 to 3 were answered in affirmative and issues No. 4 to 9 in negative and the suit was decreed on 28.5.1999. The appeal filed by the appellant was dismissed on 19.6.2001 by the learned Additional District Judge, hence second appeal, which has been admitted on the following substantial questions of law:

1. Whether the Civil Court has jurisdiction to entertain the present suit in view of the bar created under the H.P. Village Common Lands (Vesting & Utilisation) Act?
2. Whether the mis-reading of documents Ext.P-1, P-3 and Ext. DW has vitiated the findings of the learned Courts below?
3. Whether the order passed by the learned Addl. District Magistrate, Dharamshala exercising the powers of Commissioner under the Act was valid and with authority, if so, what is its effect?
6. Heard and perused the record. The learned Assistant Advocate General has submitted that the learned Courts below have misread and misinterpreted Ex.P-1, Ex.P-3 and Ex.D-4. Ex.P-2 (D-5) order dated 26.5.1993 passed by Commissioner under the Himachal Pradesh Village Common Lands (Vesting and Utilisation) Act, 1974 (for short "Act"). The Civil Court has no jurisdiction over order dated 26.5.1993 of the Commissioner in view of Section 10 of the Act.
7. The learned counsel for the respondents has submitted that the allotment of the land was made on 13.6.1981. The allotment has been cancelled under colourable exercise of power, therefore, Section 10 of the Act is not applicable. It has been submitted that the two Courts below have concurrently held in favour of the allottee. The appellant has failed to make out a case for cancellation of allotment. The appellant has not concealed any material fact from the authorities, therefore, allotment made in favour of the allottee has been wrongly cancelled on 26.5.1993. He has prayed for dismissal of the appeal.
8. The substantial questions of law No. 1 to 3 are interconnected, therefore, all of them are taken up collectively for consideration. The Section 10 of the Act provides as under:-

Bar of jurisdiction.-Save as otherwise expressly provided in this Act, no order made by the Collector or the State Government or any officer authorized by it, as the case may be, shall be called in question by any court or before any officer or authority".

Ex.P-1 Missal Hakiyat indicates that State is the owner of the suit land which is in possession of Forest Department and Bartandarans have rights therein. As per Missal Hakiyat Ex.P-3 Khasra No. 1495 (old) 1135 min, measuring 0-32-08 hectares is owned by the Gram Panchayat and in possession of Forest Department with Bartandarans having rights therein. Ex.D-4 is the patta.

9. The allottee appeared as PW-4 and has stated that he had applied for allotment and thereafter land was allotted to him. He constructed house on the allotted land and nobody objected at that time. In cross-examination, he has stated that the land was vacant when it was allotted. The appellant in the written statement has pleaded that allottee was bonafide resident of Matt, Mauza Nanaun, he misrepresented to be a resident of Mohal Rodi, Mauza Khalet and landless person and got the suit land sanctioned in his favour through misrepresentation. The "Patta" was given on 13.6.1981. The allotment has been cancelled by Commissioner on 26.5.1993.

10. Ex.D-3 is the report dated 9.7.1985 of the Tehsildar, Palampur. In Ex.D-3, it has been stated that Sarwan Kumar is not the resident of Rodi Mohal nor he is a landless person. In the demarcation file of Mohal Rodi the name of allottee does not appear in the list of landless persons. The Tehsildar recommended review of the allotment. The Commissioner has observed that in view of Forest Conservation Act, 1980, the forest land could not be allotted. The allotment is in contravention of the orders of the Government. The allottee is not a resident of Mohal Rodi. The land in question is a part of reserve pool and is in possession of the Forest Department and it could not have been allotted. The Commissioner ultimately cancelled the allotment.

11. The appellant in the written statement has not taken the objection that the land is part of reserve pool. The two Courts below have returned the findings that the appellant has not led plausible evidence in support of the plea that the land is part of reserve pool. In the written statement there is no plea that land in question is Forest land and, therefore, it could not be allotted in view of Forest Conservation Act, 1980. The view taken by the two Courts below cannot be said to be wrong inasmuch as there is no plea in the written statement that land in question is Forest land and evidence is also lacking that land in question is part of reserve pool.

12. The Act has been amended from time to time. The definition of landless person at the relevant time in Section 2 (c) was as follows:

landless person" means a person who holding no land for agricultural purposes, whether as an owner or a tenant, earns his livelihood principally by manual labour on land and intends to take the profession of agriculture and is capable of

cultivating the land personally.

The sub section (1) of Section 8 of the Act at the relevant time provided as follows:-

8. Utilization of land vested in the State Government.-(1) All lands vested in the State Government under this Act shall be utilized for the following purposes:-

(a) xxx

(b) the remaining land for allotment to a landless person or a person whose holding is less than one acre to make his holding one acre under a scheme to be framed by the State Government by notification in the Official Gazette. The allottee shall pay an amount at the rate of forty-eight times the land revenue and rates and cesses chargeable on the land allotted to him under the said scheme, either in lump sum or in six monthly instalments not exceeding four. (2), (3), (4) xxx

13. The Clause 3 of the Himachal Pradesh Village Common Lands Vesting and Utilisation Scheme, 1975 (for short "Scheme") provides that immediately after the land vested in the State Government u/s 3 of the Act is mutated in favour of the State Government, the Tehsil Revenue Officer shall invite applications through proclamation from the eligible persons in form-1 to be submitted to him within 6 weeks thereof. The Clause 4 of the Scheme provides when application is made under paragraph 3 or when the Tehsil Revenue Officer suo-motu initiates proceedings under the proviso of paragraph 3, he shall after giving the persons seeking allotment or being considered for allotment, an opportunity of being heard and after making such summary inquiry as he may consider necessary, prepare a statement for Revenue estate including (1) particulars of each eligible person, (2) the land, if any, owned or held by such person, (3) the area which can be allotted to such person under the Act; and (4) the revenue estate or estates for which such person indicates preference for allotment of land in case no area is available for allotment in the revenue estate where he holds land. The Clause 6 of the Scheme provides if any eligible person cannot be allotted land in the revenue estate in which he resides, the Collector may, having due regard to his preference, allot him land in land revenue estate in which it is available.

14. The Clause 13 (4) provides :

if at any time, it comes to the notice of the Commissioner either through an application made by any person or otherwise, that the allotment of any land under this Scheme was made to a person who was not entitled or eligible for such allotment or the allotment was wrong on any other grounds, he may call for the record of the case and after making such enquiries as he thinks proper either in person or through a Revenue Officer subordinate to him and after giving an opportunity to the parties concerned, he may cancel the grant of land and make such other orders in connection therewith as he deems necessary in the circumstances of the case".

15. It is clear from Section 2(c) that a person, who does not hold the land for agricultural purposes, whether as an owner or a tenant, earns his livelihood principally by manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally is landless person, such landless is eligible u/s 8 (1) (b) of the Act read with Rules and the Scheme. The Act nowhere provides that the landless person should be in a particular Revenue estate. The Clauses 3, 4 (4) and 6 of the Scheme indicate that a landless person under the Act could be allotted land in Revenue estate other than the Revenue estate where he holds the land or where he resides. The Commissioner under Clause 13(4) of the Scheme has power to reconsider the allotment. However, in order to exercise that power, jurisdictional facts must be proved and the power must be exercised within reasonable time. The arbitrary use of power under the garb of Clause 13 (4) without any semblance of the jurisdictional facts affecting the right of allottee over the allotted land is certainly subject to the jurisdiction of the Civil Court.

16. In the present case the allotment was made on 13.6.1981, the proceedings for cancellation were started on 2.1.1993 and the allotment was cancelled on 26.5.1993 vide Ex.D-5 on the ground that the allottee was not the resident of Mohal Rodi, the allotted land was found in reserve pool, the Forest Department is in possession of the allotted land which could not be allotted in view of Forest Conservation Act, 1980. The appellant has miserably failed to prove that the allotted land was part of reserve pool. There is no whisper in the written statement that the allotted land was Forest land and was not allottable in view of Forest Conservation Act, 1980. The allottee was not the resident of Mohal Rodi was not a bar for allotment of land to the allottee at the relevant time under the Act, Rules and Scheme. The proceedings for cancellation of the allotment were started after 11 years of allotment.

17. The Clause 13(4) of the Scheme provides cancellation of grant by Commissioner "at any time". The expression "at any time" is also in Rule 30 (1) of the H.P.Nautor Rules, 1968, which provides that Financial Commissioner may at any time call for the record of any case pending before, or disposed of by any officer subordinate to him and under Rule 30 (iv) pass such orders as he thinks fit provided that he shall not reverse or modify any order without giving party concerned an opportunity of being heard. In *Mangheru vs. State of Himachal Pradesh and others* ILR (H.P.) 1981 (10) 283, Full Bench has considered Rule 29 and Rule 30 of the Nautor Rules, 1968 and has held as under:-

19. The Division Bench in *Percy Chauhan's* case after considering various authorities observed thus:

In view of this position we conclude that the power of review contemplated by rule 29 and of revision contemplated by rule 30, could be exercised only within a reasonable time. What is a reasonable time is a question of fact depending upon the peculiar facts and circumstances of each case. If a land is given for agriculture or horticulture or for constructing water-mill or water channel, we

think that ordinarily a period of one year to exercise the power of review or revision may be considered reasonable in view of the fact that the fruits of these operations could be reaped within one year. However, if the Nautor land is granted for other purposes, such as construction of building for residence or construction of Dharmsala, etc., then having regard to the facts of the case the period of time would be even less (emphasis supplied).

20. Now, there is no dispute that the peculiar facts and circumstances of each case should determine "a reasonable time". For example, if a grantee has suppressed material facts or has obtained the allotment by playing a fraud or a deception "the reasonable time" will have to be determined with reference to the time when the fraud or deception came to light. Various cases where a party had concealed material facts and succeeded in obtaining the allotment have come to our notice. We cannot allow a party to reap the fruits of his deception or fraud simply on the ground that it had successfully kept them concealed over a sufficiently long period of time. However, once the fraud is uncovered then action is required to be taken within a reasonable time thereafter. Article 56 of the Limitation Act lays down a limitation of three years from the date of the knowledge of fraud and we are of the opinion that it will be reasonable to lay down that ordinarily within a period of three years from the date of knowledge of fraud the suo motu powers can be exercised.

21. We, however, do not agree with the Division Bench that a period of one year is a reasonable time to exercise such powers where the land is given for agriculture, horticulture, or for constructing water-mill or water channel. It appears that the reason given by the Division Bench is that the fruits of these operations could be reaped within one year. The Bench seems to have overlooked the provisions of rule 12. This rule grants a period of two years to the grantee for carrying on the operations for which the land has been granted. In other words, a grantee may wait for more than one year before carrying out the necessary operations. Proviso to this rule extends a period of two years in certain cases. It is only after the grantee has started utilizing the land granted to him that the grant will become public knowledge. And it is only thereafter that persons affected by it may challenge the grant. We are, therefore, of the opinion that ordinarily a period of three years should be considered reasonable for exercising the powers of review or revision where the grantee had not played a fraud or deception in obtaining the grant.

18. The interpretation given to rule 30 of the Nautor Rules, 1968 by the Full Bench can be applied to expression "at any time" used in Clause 13 (4) of the Scheme. The Tehsildar on 9.7.1985 vide Ex.D-3 recommended for cancellation of allotment. It means appellant was aware of alleged defect in the allotment on 9.7.1985. The proceeding under Clause 13 (4) of the Scheme started on 2.1.1993 and allotment was cancelled on 26.5.1993 vide Ex.D-5. The cancellation proceedings started after about 7 1/2 years from the recommendation made by Tehsildar on 9.7.1985. Thus, taken from any angle,

the allotment has been wrongly, illegally and arbitrarily cancelled on 26.5.1993. The Commissioner had no jurisdiction to exercise power under Clause 13(4) of the Scheme after 11 years of allotment. The order dated 26.5.1993 of the Commissioner is arbitrary without jurisdiction and, therefore, appellant cannot take protection of Section 10 of the Act. In order to invoke Section 10 of the Act, it is necessary that order must not be without jurisdiction. The Commissioner in the facts and circumstances of the case had no jurisdiction to cancel the allotment of allottee after 11 years of allotment and 7 1/2 years after recommendation made by Tehsildar for cancellation of allotment. The Civil Court in a case like this, is not expected to sit with folded hands helplessly when a poor allottee who has constructed his house and residing there with his family for the last over 25 years was threatened to pack up and clear the land. The Civil Court is the competent Court to consider the threatened acts of appellant and pass appropriate order to protect the aggrieved person. The two Courts below have rightly appreciated the material on record in decreeing the suit. There is no merit in the appeal. The substantial questions of law No. 1 to 3 are decided against the appellant. In view of above discussion, the appeal fails and is accordingly dismissed with no order as to costs.