
(2016) 12 RAJ CK 0009
In the Rajasthan High Court
Case No : Spl. ApplWrit No. 369 of 2016

Suleman

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 01-12-2016

Acts Referred:

Rajasthan Tenancy Act, 1955 — Section 63(1)(viii)

Citation : (2017) RRD 66 : (2016) 4 WLN 506

Hon'ble Judges : Mr. Govind Mathur and Mr. Sanjeev Prakash Sharma, JJ.

Bench : Division Bench

Advocate : Mr. O.P. Boob, Additional Government Advocate, for the Respondents; Mr. Mahaveer Pareek, Advocate, for the Petitioners

Final Decision : Allowed

Judgement

Mr. Sanjeev Prakash Sharma, J. - Both the counsel jointly agree that the matter be decided at this stage.

2. With the consent of both the counsel for parties, the matter is heard finally at this stage.

3. By way of this appeal, the appellant before us seeks to challenge the order dated 18.01.2016 passed by the Single Judge in S.B. Civil Writ Petition No.12850/2015 whereby writ petition preferred by him challenging the order of Board of Revenue dated 23.07.2015 has been dismissed.

4. The Board of Revenue vide its judgment has quashed the judgment dated 26.09.2012 passed by Revenue Appellate Authority and in favour of the appellant whereby the Revenue Appellate Authority had reached to the conclusion that there was no evidence to hold that appellant had left his village and migrated to Pakistan and thereby directed the action of the Sub-Divisional Officer for recording the land of the appellant in name of the State, as bad in eye of law and further declared the land in Khasra No.340/151 ad measuring 24 Bighas 5 Biswa as that of the appellant in Village Lakhetali, Tehsil Bandra, District Barmer.

5. In brief facts of the case are that petitioner Suleman a permanent resident of Village Lakhetaali of Tehsil Bandra District Barmer was having Khatedari land ad measuring 24 Bighas 5 Bisa in Khasra No. 304/151 as 7th share of the total land measuring 97 Bighas 4 Biswa being legal heir of Abu Bakar. The Tehsildar moved an application under Section 63 (1) (viii) of the Rajasthan Tenancy Act, 1955 (hereinafter referred to as "the Act of 1955) wherein it was stated that the petitioner-appellant had migrated to Pakistan on the ground that Patwari had mentioned in his movement register about the petitioner having gone to Pakistan without passport and illegally. In view thereof, it was stated that right of the land in question of the petitioner-appellant Suleman stands extinguished and the same be now entered in the name of State. The said application came to be contested by one Mohammed S/o Siddiq who had purchased the part of land of the appellant and it was stated that the appellant had not gone to Pakistan but had actually gone to Sri Ganganagar for earning his livelihood.

6. The Sub-Divisional Officer recorded evidence and passed ex-parte an order dated 02.08.1975 against the petitioner but at the same time accepted the contention of Mohammed S/o Saddiq regarding purchasing of part of the land. The name of the petitioner-appellant was removed from the revenue records and the name of the State was transposed except to the extent of Mohammed S/o Saddiq's share.

7. As soon as the petitioner came to know about the decision dated 02.08.1975, he moved an application under Order 9, Rule 13 of the CPC but the same was rejected on 19.04.1989. Thereafter, he filed an appeal against the said order before the Revenue Appellate Authority, who vide its order dated 28.11.1991, allowed the appeal, set aside the ex-parte order dated 02.08.1975 and order dated 19.04.1989 and remanded the matter back to the Sub-Divisional Officer for decision afresh.

8. Upon remand, the Tehsildar vide order dated 18.07.1996 rejected the application filed under Section 63 (1) (viii) of the Act of 1955 holding that there is no documentary proof of the petitioner migrating to Pakistan.

9. Accordingly the land was directed to be re-entered in the name of the petitioner-appellant.

10. The order dated 18.07.1996 was over-turned by the Sub-Divisional Officer vide his order dated 30.03.2012. An appeal was again filed by the petitioner-appellant before the Revenue Appellate Authority who vide detailed judgment dated 26.09.2012 set aside and restored the order dated 30.03.2012 passed by the Tehsildar.

11. The Revenue Appellate Authority's order was set aside by the Board of Revenue vide order dated 23.07.2015 which has been upheld by the learned Single Judge. Hence the present appeal.

12. Learned counsel for the appellant-petitioner has taken us to the orders

passed by the authorities as stated herein above and it has been argued that there was no evidence available for the Sub-Divisional Officer to hold that the appellant-petitioner had left for Pakistan and had migrated. It was further submitted that the orders of the Board Of Revenue as well as that of the Sub-Divisional Officer were based on surmises and conjectures, as the notice of application under Section 63 (1) (viii) of the Act 1955 had not been served upon the appellant-petitioner and as soon as he came to know of the same, he moved an application for setting aside the ex-parte order. The Tehsildar had rightly directed to re-enter the name of the appellant in the revenue records since there was no migration, but, the Board of Revenue merely on the basis that application under Order 9, Rule 13 CPC had been filed after a long delay presumed that the applicant-appellant had actually left for Pakistan and was not available in India.

13. Learned counsel for the petitioner-appellant argued that entry made by the Patwari in the movement register that the appellant had left for Pakistan illegally and without any passport could not be relied upon as there was no supporting evidence.

14. Further, it has been pointed out that admittedly the application was moved by the purchaser of the part of land namely Mr. Mohammed S/o Saddiq wherein he also has informed the authorities that appellant-petitioner having left for Sri Ganganagar for earning his livelihood. Once the application of Mohammed was accepted and the part of land which Mohammed was handed over by the appellant was accepted, the decision to treat the remaining land as being available to be entered in the name of State under Section 63 (1) (viii) of the Act of 1955 was wholly erroneous as the reply of Mohammed could not be treated as truthful for one part or untruthful for remaining part.

15. Learned counsel for the appellant has further relied upon the view taken by this Court in the matter of Legal Heirs of Abdul v. State of Raj. & Ors. reported in 2004 (2) WLC (Raj.) 327 and also on the view expressed by this Court in case of Sadiq Ali v. State of Raj. & Anr. reported in 2016 CDR 875.

16. Learned counsel for the respondents, however, has vehemently supported the judgment of the Hon"ble Single Judge as well as the Board of Revenue. It has been stated that initially the Tehsildar had called for the evidence and on the basis thereof, had reached to the conclusion that the appellant had migrated to Pakistan. He has further asked this Court to infer that the appellant had left for Pakistan in view of delay in filing application under Order 9, Rule 13 CPC for setting aside the order of Tehsildar dated 02.08.1975.

17. It has been submitted that the Sub-Divisional Officer has rightly reached to the conclusion that as the appellant has not been able to place any other document on record to show his whereabouts for a period of 11? years i.e. period between the order dated 02.08.1975 and the application moved under Order 9, Rule 13 CPC in the Year 1987 and for the said period the appellant did not possess any voter card or any other family card and hence it was rightly

presumed that he had left Pakistan illegally without there being any pass port.

18. We have heard the learned counsel for the parties and have perused the record available. We find ourselves unable to agree with the orders passed by the learned Single Judge and the Board of Revenue.

19. The provisions of Section 63 (1) (viii) of the Act of 1955 envisages circumstance or contingencies in which the interest of a tenant in his holding or a part thereof, as the case may be is extinguished. Section 63 (1) (viii) of the Act of 1955 was added by Gazette Notification dated 28.02.1968 whereby it was added as a contingency when the tenancy may be extinguished if the tenant migrates from India to a foreign country without obtaining a valid passport or without lawful authority. It would be useful to quote the same as well as explanation thereto. Section 63 of the Act of 1955 is reproduced hereunder for ready reference:-

Section 63. Tenancy when extinguished- (1) The interest of tenant in his holding or a part thereof, as the case may be, shall be extinguished-

(i)

(ii)

(iii)

(iv)

(v)

(vi)

(vii)

(viii) if he migrates from India to a foreign country without obtaining a valid passport or without lawful authority.

Explanation- For the purpose of clause (viii), a tenant who moves or enters into a foreign country without obtaining a valid passport under the India Passport Act, 1920 (Central Act No. 34 of 1920) or without a lawful authority shall be presumed to have migrated from India to a foreign country].

Provided that in every case not being a case specified in clause (iii) of sub-section (1), such sub-section shall unless he himself has also been ejected or has become or is liable to ejection under any provision of this Act or any other law for the time being in force or unless he shall have been admitted to his holding otherwise than in accordance with law, have the right of apply for the acquisition of his right of his tenant-in chief in such holding and in the improvements therein on payment of compensation determinable in accordance with sections 23, 24 and 25]

20. From the above it is, therefore, clear that two conditions exist:-

- (a) The Tenant migrates from India to foreign country;
- (b) without obtaining a valid passport and without lawful authority.

21. Thus, if a tenant migrates without obtaining valid passport or migrates without lawful authority the provisions of Section 63 (1) (viii) would operate. As per explanation a presumption has to be drawn if a tenant moves or enters into foreign country without obtaining valid passport.

The word "migrate" was a subject matter of discussion in the case of Sadiq Ali (Supra) as under:-

6. In appeal the argument advanced by learned counsel for the appellant-petitioner is that under Section 63 (viii) of the Act of 1955, the word used "migrates" is of a large amplitude and tenancy rights of a person under Section 63 cannot be extinguished ipse dixit merely on the count of conviction under Section 3 read with Section 6 of the Indian Passport Act, 1967. It is stated that a Division Bench of this Court in the case of Legal Representatives of Abdul v. State of Rajasthan & Ors., reported in 2004 (2) WLC (Raj) page 327 while considering the scope of the expression "migration" held as under:-

"The term "migration" has been defined in the Act. The substantive provision requires that interest of a tenant in his holding is to extinguish if he migrates from India to foreign country without obtaining a valid passport or without lawful authority. The Explanation is for the purpose of creating a fiction by way of rule of evidence that when it can be presumed that a tenant has migrated to a foreign country. It states that as per clause (viii), a tenant who moves or enters into foreign country without a valid passport or without a lawful authority shall be presumed to have migrated from India to a foreign country. Apparently, the emphasis is not shifted from the requirement of "Migration" as a condition of extinguishment of tenancy rights. It may be noticed that migrating from India to a foreign country without obtaining a valid passport or without lawful authority is the part of substantive provision, and the same is the requirement for operating the Explanation.

Apparently the Explanation has been enacted to serve the same purpose.

32. Expression "Migration" has a narrower and wider meaning. In its wider meaning mere movement of any person from one territory to another territory for some duration, without any intention to settle in other country is envisaged. In its narrower sense the "Migration" denotes moving from one place to another for settling at the latter place. Explanation merely provides that for the purpose of clause (viii), if a person moving without a valid passport under the Indian Passport Act or without a lawful authority shall be presumed to have migrated from India to a foreign country. Explanation provides a rule of evidence that unless contrary is proved, a person who move from India to foreign country without obtaining a invalid passport under the Indian Passport Act or without authority of law shall be presumed to have migrated. This only give rise to a

rebuttal presumption. The legislation has not created a legal fiction by deeming clause to assume something to exist what is not. Instead of expression "deemed to have migrated" expression "presume to have migrated" has been used to suggest that in such case what inference is permissible to be drawn. However, it also does not say that such inference shall be conclusive proof of fact required to be proved for extinguishment of right. In the circumstances, it is reasonable to hold that Explanation provides a Rule of evidence to raise a rebuttal presumption against the holder if he is found even to have moved to a foreign territory that such movement was by way of migration. However, the holder can be leading evidence or from material available on record can rebut a presumption and prove otherwise that he has not migrated to other country. A rule of evidence raising a rebuttable presumption can result in burden of proof being shifted to other side, but cannot be raised to status of conclusive proof. Explanation does not provide a rule of conclusive proof of exclude all relevant evidence to prove migration from India to a foreign country without obtaining a valid pass-port or without lawful authority: If mere movement from Indian territory to foreign territory without valid passport or without lawful authority was enough to extinguish the rights of holder for the reason the word "migration" either in clause (viii) or in Explanation would be an add endage.

33. Therefore, the crux of the matter is whether the mere movement of a person into a foreign country without a valid pass-port or without lawful authority itself tantamount to migration or not.

34. In the absence of anything else mere movement shall be presumed to result in migration from India to a foreign country. It results in placing burden on tenant to prove that movement from India to a foreign country without pass-port or without lawful authority is not migration in the sense in which migration is understood after such movement is proved. What amount of evidence and what circumstances would rebut such presumption obviously depends on the facts and circumstances of each given case. Even the circumstances appearing from record may be sufficient in some case to rebut the presumption in the other, even the oral evidence may not be found worthy to rebut the presumption. Once the person takes a stand that he has not migrated, after it is proved that he has moved from Indian territory to foreign territory without lawful authority he may lead evidence in support of his contention that he has not migrated or he may rely on circumstances appearing on record to rebut the presumption.

35. Without considering and rejecting the credibility of the evidence led by the objector would not fulfil the requirement of law before action for evicting a person on the ground that contingency under Section 63(1) has arisen can be sustained. Any other view will convert this Explanation into rule of conclusive proof, which neither the language nor the object of provision support.

22. In the said case of Sadiq Ali (Supra) the concerned petitioner had been convicted for offence under Section 3 of the Passports Act and Tahsildar on account of conviction had proceeded to take action under Section 63 (1) (viii) of

the Act of 1955. However, after considering facts and circumstances of the case, this Court reached to the conclusion that it cannot be said that there was any evidence available on record to arrive at a conclusion that the appellant migrated to Pakistan territory with intention to leave India.

23. Keeping in view the aforesaid, if we look at the facts of the present case, following admitted position emerges:-

(a) Appellant admittedly has 7th share in Khasra No.304/151 of Village Lakhatali, Tehsil Bandra, District Barmer and he sold part of land to one Mohammed S/o Saddiq and by the impugned orders while remaining land has been taken over as State land. The land sold to Mohammed S/o Saddiq has been saved and the right which was transferred from petitioner to Mohammed S/o Saddiq has not been extinguished on the basis of application moved by Mohammed. However, the contention of the petitioner-appellant having left the village for earning his livelihood to Sri Ganganagar was not accepted;

(b) The ex-parte order dated 02.08.1975 was set aside by Revenue Appellate Authority and the same has attained finality;

(c) On remand, Tehsildar has after examining the evidence gives a finding of fact on 18.07.1996 that there is no evidence on record that the appellant had gone to Pakistan;

(d) Admittedly, no case was registered against the appellant for having gone to Pakistan illegally or without obtaining permission from lawful authority either under Section 3 of the Passport Act or under any other provisions of law. The Patwari's movement register of 1965 was also not supported by any evidence;

(e) There was no statement of any witness regarding appellant having gone to Pakistan. On the other hand, all the witnesses stated at different point of time that petitioner having gone for earning livelihood at different place in India itself.

24. In view of above, a presumption could not be drawn even as per the Section 63 (1) (viii) of the Act of 1955 that the petitioner had left for Pakistan illegally or otherwise.

25. In view of above, we are of the firm view that movement of a tenant from his village of tenancy for purpose of earning livelihood to any other place in India would not come within the mischief of Section 63 (1) (viii) of the Act of 1955 and there was no evidence of the appellant-petitioner having migrated to Pakistan or any other foreign country. In view of the law as succinctly discussed in the case of Siddiq Ali (Supra), we find merits in the submissions made by the counsel for the petitioner-appellant and the view taken by the Revenue Appellate Authority.

26. Accordingly, this special appeal is allowed. The judgment impugned dated 18.01.2016 passed by learned Single Bench is set aside, the writ petition is allowed. The judgment dated 23.07.2015 passed by the Board Of Revenue Rajasthan, Ajmer in Appeal Decree/T.A./1288/2003/Barmer is set aside. The

judgment and decree dated 26.09.2012 passed by the Revenue Appellate Authority, Barmer in Revenue Appeal No. 165/2012 is restored and affirmed.

27. No order as to costs.