

IN THE BOARD OF REVENUE FOR RAJASTHAN, AJMER

1. Revision No.138/2003/LR/Udaipur :

Shyam Sunder S/o Shri Bhanwar Lal Bhardwaj,
R/o Hiran Magri, Sector-14, Udaipur.

... Petitioner.

Versus

1. Sheela Kothari W/o Shri Dhanraj Kothari,
R/o 111, Saheli Nagar, Udaipur.
2. Secretary, Urban Improvement Trust, Udaipur.
3. Pankaj Kumar S/o Shri Pawan Bansal,
R/o Hiran Magri, Sector-13, Udaipur.
4. Neeraj Kumar S/o Shri Naliniranjan Lodha,
R/o 170, Bhopalpura, Udaipur.
5. Smt. Laad Devi W/o Shri Sukan Chand Chandaliya,
R/o 211-A, Bhopalpura, Udaipur.
6. Pankaj Kumar S/o Shri Rajmal Jain,
R/o 366, Aror Nagar, Udaipur.

... Non-Petitioners.

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2. Revision No.140/2003/LR/Udaipur :

1. Neeraj Kumar S/o Shri Naliniranjan Lodha,
R/o 170, Bhopalpura, Udaipur.
2. Smt. Laad Devi W/o Shri Sukan Chand Chandaliya,
R/o 211-A, Bhopalpura, Udaipur.
3. Pankaj Kumar S/o Shri Rajmal Jain,
R/o 366, Aror Nagar, Udaipur.

... Petitioners.

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R/o Hiran Magri, Sector-13, Udaipur.
4. Shyam Sunder S/o Shri Bhanwar Lal Bhardwaj,
R/o Hiran Magri, Sector-14, Udaipur.

... Non-Petitioners.

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S.B.

Shri Pramil Kumar Mathur, Member

Present :

Shri Purna Shankar Dashora:- counsel for petitioner/petitioners.

Shri Manish Pandia, brief holder of Shri Lunkaran Pandya and Shri Ajeet

Singh:- counsels for non-petitioner no.1.

Shri Jaswant Singh Sankhla:- counsel for non-petitioner no.2.

Remaining non-petitioners:- absent despite due service.

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Dated : 10 July, 2012

J U D G M E N T

As this batch of revision petitions arises from the common order dated 19.12.2002 involving common question of fact & law, the same are being disposed of by this common judgment.

2. In these revision petitions, the assail is to the order dated 19.12.2002 passed by the learned Additional Divisional Commissioner, Udaipur by which he has set aside the order dated 06.10.2001 passed by the learned Authorised Officer & Secretary, Urban Improvement Trust, Udaipur (in short to be called the "Authorised Officer") under section 90B of the Rajasthan Land Revenue Act, 1956 (hereinafter to be referred as "the Act") whereby he had ordered for termination of rights & interest of parties in the land and also ordered for resumption of the said land.

3. Filtering the unnecessary details, the facts which are requisite to be frescoed for the purpose of disposal of the present revision petitions are that present petitioner/ petitioners and non-petitioners no.1 & 3 filed an application under section 90B of "the Act" to the "Authorised Officer" expressing their willingness to surrender their rights in the disputed land khasra no.646 to 648 situated at Village Savinakheda, Udaipur with the intention of developing such land and made request for order for termination of rights and for resumption of such land.

4. The application was accepted by the "Authorised Officer" on 06.10.2001 and detailed order was passed about termination of rights and resumption of disputed land. Being dissatisfied with the order dated 06.10.2001, non-petitioner no.1 Sheela filed an appeal before the learned

Additional Divisional Commissioner, Udaipur claiming that under the provisions of Section 90B of "the Act" after the surrender of the land, proportionate land should be made available to the persons who had surrendered the land. The learned "Authorised Officer" did not distribute the land proportionately and had given only one plot to non-petitioner no.1 while as per the proportionate division, she is entitled for five plots. Therefore, the order of the "Authorised Officer" passed on 06.10.2001 is required to be annulled and matter may be remitted back for passing the order *de novo* by distributing the land proportionately. Learned Additional Divisional Commissioner, Udaipur allowed the said appeal on 19.12.2002 on the ground that distribution of the land among the tenants was not in consonance with Rule 18 to Rule 21 of the Rajasthan Tenancy (Board of Revenue), Rules 1955 and set aside the order passed by the "Authorised Officer" on 06.10.2001 with the direction to make available the proportionate land to all co-tenants as per their respective shares.

5. Aggrieved by the said order dated 19.12.2002, the present revision petitions have been filed.

6. I have heard learned counsel for the parties and perused the record.

7. It is argued by the learned counsel for the petitioner/ petitioners led by Shri P.S. Dashora that all co-tenants of the disputed land have filed an application under section 90B of "the Act" before the "Authorised Officer" and after following the procedure established by law & due enquiry, learned "Authorised Officer" has ordered to resume the disputed land as per law. "Authorised Officer" has passed the order under section 90B(3) of "the Act" which is not appealable. Therefore, the impugned order passed by the learned Additional Divisional Commissioner was without jurisdiction. According to him, learned Additional Divisional Commissioner, Udaipur has wrongly exercised its jurisdiction while entertaining such appeal because as per sub section (7) of section 90B of "the Act", appeal can be filed against the order made under sub section (5) of section 90B and not against the order passed under sub section (3) of section 90B of "the Act". Appeal filed before the Additional Divisional Commissioner, Udaipur was beyond the period of

limitation accompanied by the application for condonation of delay. Though, the learned Additional Divisional Commissioner has allowed the appeal, but he has not made comment or disposed the application for condonation of delay leaving non compliance of Order 41 Rule 3A of the Code of Civil Procedure (hereinafter in short to be referred as "the CPC"). As per the legal compulsion, it was the bounded duty of the learned Additional Divisional Commissioner to decide the point of limitation before disposing the appeal on merits. He further submitted that the provisions of Rule 18 to Rule 21 of the Rajasthan Tenancy (Board of Revenue), Rules 1955 are not applicable to the proceedings initiated under section 90B of "the Act".

8. *Inter alia*, he has argued that petitioner Shyam Sunder had filed an application under Order 41 Rule 27 read with under section 151 of "the CPC" for taking the additional evidence on record, but that application was also not decided by the appellate court which is also against the mandatory provisions of "the CPC". He also stressed that order passed under section 90B of "the Act" is revisable. Hence, revision is liable to be accepted. Learned counsel for the petitioners has placed reliance on the following judgments in support of his contentions :-

1. AIR 2002 Supreme Court page 204
2. AIR 1977 Supreme Court page 1555
3. AIR 1996 Supreme Court page 1321
4. AIR 1998 Rajasthan page 214
5. 2009(1) RRT page 330
6. 2011 RRD page 649
7. 2012 RRD page 323
8. 2006 RBJ (13) page 78
9. 1994 RRD page 276
10. 1993 RRD page 24
11. 1991 RRD page 164
12. 1998 DNJ (Raj.) page 767
13. 1998 RRD page 349
14. 1997 DNJ (Raj.) page 271
15. 1997 DNJ (Raj.) page 738
16. 1998 RBJ page 137
17. 2006(1) RRT page 16
18. 1993 RRD page 598
19. RLW 1967 page 1
20. 1984 RRD page 520
21. 1979 RRD page 564
22. 1985 RRD page 108
23. 1982 RRD page 641

9. Per contra, learned counsel for the non-petitioner no. 1 Shri Manish Pandya has submitted that after completion of proceedings under section 90B of "the Act", land vests in the local authorities, therefore, revision is not maintainable. He further submitted that land was made available to co-tenants as per the agreement executed between them. He also submitted that Additional Divisional Commissioner has full right to hear the appeal and Board has no jurisdiction to entertain, hear & dispose the revision moved against the order passed under section 90B of "the Act".

10. Learned counsel Shri Ajeet Singh has contended that the document filed along with application submitted under Order 41 Rule 27 Code of Civil Procedure has already been considered by the learned Additional Divisional Commissioner. He also submitted that revisions against the order passed under section 90B of "the Act" are not maintainable. Therefore, both the revisions are liable to be dismissed.

11. Learned counsel Shri J.S. Sankhla has submitted that "Authorised Officer" has passed the order under the provisions of section 90B(5) of "the Act", therefore, the arguments submitted by learned counsel for petitioner/petitioners are not tenable. Hence, revision petitions are liable to be dismissed.

12. I have given my earnest consideration to the rival contentions and scanned the matter carefully.

13. So far as the ground of maintainability of appeal before Additional Divisional Commissioner is concerned, a reference to the relevant provision is necessary to consider the tenability of petitioner/petitioners' contentions. Section 90B of "the Act" runs as under :-

"90-B. Termination of rights and resumption of land in certain cases -

(1) Notwithstanding anything to the contrary contained in this Act and the Rajasthan Tenancy Act, 1955 (Act No.3 of 1955) where before the commencement of the Rajasthan Laws (Amendment) Act, 1999 (Rajasthan Act No.21 of 1999) any person,

holding any land for agricultural purposes in Urbanisable limits or peripheral belt of an urban area, has used or has allowed to be used such land or part thereof, as the case may be, for non-agricultural purposes or, has parted with possession of such land or part thereof, as the case may be, for consideration by way of sale or agreement to sell and/or by executing power of attorney and/or will or in any other manner, for purported non-agricultural use, the rights and interest of such person in the said land or holding or part thereof, as the case may be, shall be liable to be terminated and such land shall be liable to be resumed.

(2) Where any land has become liable to be resumed under the provisions of sub-section (1), the Collector or the officer authorised by the State Government in this behalf, shall serve a notice, calling upon such person to show cause why the said land may not be resumed summarily, and among other things, such notice may contain the particulars of the land, cause of proposed action, the place, time and date, where and when the matter shall be heard.

(3) When the tenant or the holder of such land or any person duly authorised by him, as the case may be, makes an application to the Collector or the officer authorised by the State Government in this behalf, expressing his willingness to surrender his rights in such land, with the intention of developing such land for housing, commercial, institutional, semi-commercial, industrial, cinema or petrol pump purposes or, for the purpose of multiplex units, infrastructure projects or tourism projects or, for such other community facilities or public utility purposes, as may be notified by the State Government, the Collector or the officer authorised by the State Government in this behalf, shall upon being satisfied about the willingness of such person, order for termination of rights and interest of such person in the said land and order for resumption of such land.

(4) The proceedings in the matter shall be conducted summarily and shall ordinarily be concluded within a period of sixty days from the first date of hearing specified in the notice served under sub-section (2).

(5) Where, after hearing the parties, the Collector or the officer authorised by the State Government in this behalf, is of the opinion that the land is liable to be resumed under sub-section (1), he shall after recording reasons in writing, order for termination of rights and interest of such person in the said land and order for resumption of the said land.

(6) The land so resumed under sub-section (3) and (5) shall vest in the State free from all encumbrances and shall be deemed to have been placed at the disposal of the concerned local authority under section 102-A of this Act with effect from the date of passing such order:

Provided that the land surrendered under sub-section (3) above, shall be made available to the person, who surrenders the land, for its planned development in accordance with the rules,

regulation and bye-laws applicable to the local body concerned, for housing, commercial institutional, semi-commercial, industrial, cinema or petrol pump purposes or, for the purpose of multiplex units, infrastructure projects or tourism projects or, for other community facilities or public utility purposes.

(7) The person, aggrieved by the order made under sub-section (5), may appeal to the Divisional Commissioner or the officer authorised by the State Government in this behalf, within thirty days of passing of order under sub-section (5).

(8) The Divisional Commissioner or the officer authorised by the State Government in this behalf shall, after hearing the parties, pass appropriate orders in such appeal within a period of sixty days from the date of presentation of appeal before him.

(9) The order passed by the Divisional Commissioner or the officer authorised by the State Government in this behalf in appeal under this section shall be final."

14. Bearing the above provision in mind, from the perusal of the file, it is evident that petitioners/ non-petitioners Shyam Sunder, Sheela Kothari, Pankaj Kumar S/o Pawan, Neeraj Kumar, Smt. Laad Devi and Pankaj Kumar S/o Rajmal surrendered the disputed land to the "Authorised Officer" under the provision of section 90B of "the Act" with the intention of developing such land. There is no quarrel to the fact that title of the above mentioned petitioners is based on a legal document.

15. In these revision petitions, the prime contention raised by the learned counsel for the petitioner/ petitioners is that pattas were issued under section 90B of "the Act" by the UIT on the basis of order passed by the competent authority under sub section (3) of section 90B of "the Act", but no appeal is provided if order was passed under section 90B(3) of "the Act" before the Divisional Commissioner under sub section (7) of section 90B of "the Act". As per section 90B of "the Act", there exists two provisions for termination of rights & resumption of land :

- (a) firstly in accordance with sub section (3) of Section 90B, and
- (b) secondly under sub section (5) of Section 90B.

Under sub section (3) of section 90B of "the Act", the land can be resumed from tenant or the holder of such land or any person duly authorised by him and when it is surrendered before the competent authority, expressing his willingness to surrender his rights in such land with the intention of developing such land for stipulated purposes. Thereafter, the competent

authority may resume the said land and can issue patta in his favour because of the fact that under section 90B(3), agricultural lands were surrendered for resumption by the tenant suo motu by expressing his willingness, while under section (5) of section 90B of "the Act" land can be resumed by the State Government suo motu; and against only the order passed under section 90B(5), appeal is maintainable under section 90B(7) of "the Act" and there is no provision for filing any appeal against the order made under section 90B(3) of "the Act". Hence, the Additional Divisional Commissioner has illegally entertained the appeal against the order so made by the "Authorised Officer" for resumption of the land under sub section (3) of section 90B of "the Act".

16. Therefore, on the basis of above discussion, it is abundantly clear that the order passed by the learned Additional Divisional Commissioner is entirely without jurisdiction as he has no power to entertain or adjudicate the appeal filed against the order passed under section 90B(3) of "the Act".

17. Now let us scan the second contention raised by the learned counsel for the petitioner/ petitioners about the non-compliance of Order 41 Rule 3A of "the CPC" which exists as follows :-

"Order 41 Rule 3-A. Application for condonation of delay -

(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal."

18. Though it is settled legal theorem that court should adopt liberal approach in condonation of the delay, but simultaneously it is also true that objection regarding limitation is not merely a technical objection, but it is a

substantial & material objection which determines the jurisdiction of the appellate court to entertain, hear and decide the appeal. If an appeal is filed beyond the prescribed time, the first question to be decided is as to whether the appeal is within the prescribed period of limitation and if not, whether the application under section 5 of the Limitation Act, if any filed along with the appeal, should be allowed by condoning the delay in preferring the appeal. In this regard, the provision as envisaged in section 3(1) of the Limitation Act, 1963 carries much significance & importance in this matter, which is as follows :-

"3. Bar of Limitation -

(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application, made, after the prescribed period shall be dismissed, although limitation has not been set up as a defence."

The true construction of sub section (1) of section 3 is that a suit, appeal or application if time barred shall be dismissed after the prescribed period of limitation, even though limitation has not been pleaded in defence. It is the duty of the court not to proceed with the appeal if it is made beyond the period of limitation prescribed. Though the provision of section 3 of the Limitation Act is controlled by and subject to the provision of sections 4 to 24 of the Limitation Act and court has inherent power to condone the delay, but before proceeding with the case without following the first step as mentioned in Order 41 Rule 3A of "the CPC", an appellate court cannot rather should not proceed to dispose of the appeal on merits keeping in view the mandatory provision of section 3 of the Limitation Act, meaning thereby the question of limitation should be decided before proceeding with the appeal observing the due compliance of section 3 of the Limitation Act which specifically states that whenever any suit, appeal or application is preferred after the prescribed period of limitation, it has to be rejected invariably unless delay is condoned in accordance with the law even if limitation has not been taken as a defence by any of the authority.

19. It is clear from Sub Rule (1) of Order 41 Rule 3A of "the CPC" that at the time of presentation of appeal which is barred by limitation, appellant is required to file an application that he has sufficient cause for not

filing the appeal within the period of limitation. Thereafter, it is incumbent upon the court to decide the application before it proceeds to decide the appeal on merits. In case the court accepts the application, only then it can proceed under Rule 11 or Rule 13 of Order 41 of "the CPC". If the application for condoning the delay in filing the appeal is dismissed, the question under Rule 11 and its consideration under Rule 13 does not arise.

20. As a matter of fact, Rule 3A of Order 41 creates a positive bar disabling a court to pass any order in any appeal filed before it without taking care to first decide finally the question of limitation as to determine whether or not the appeal is time barred. The legislature has been so particular that it has debarred the court even from making any order for stay of execution of the decree against which the appeal is proposed to be filed so long as the court does not after hearing under Rule 11 decide about the consideration of appeal. Thus, it is obvious that the court will have to decide first as to whether the delay should be condoned or not and if the court comes to the conclusion that there exists no sufficient grounds to condone the delay, the appeal shall not be treated to have been admitted and in that case, invariably the appeal cannot be preferred to the higher courts.

21. In the instant case also, it is undisputed that against the original order of the "Authorised Officer" dated 06.10.2001, an appeal has been filed before the learned Additional Divisional Commissioner on 23.9.2002 along with the application for condonation of the delay in preferring the appeal which was not decided by learned Additional Divisional Commissioner even along with the impugned order. Therefore, in my considered opinion, the learned Additional Divisional Commissioner has flouted the mandatory provisions as enshrined in Order 41 Rule 3A of "the CPC".

22. The next question which now survives for consideration is whether the reluctance towards the application filed under Order 41 Rule 27 of "the CPC" is fatal or is justified. A close scrutiny of the case file of the learned Additional Divisional Commissioner reveals that petitioner Shyam Sunder has filed an application under Order 41 Rule 27 of "the CPC" before the learned Additional Divisional Commissioner on 18.12.2002 but that

application remained undecided. In this regard, I am of the firm view that since the application moved under Order 41 Rule 27 of "the CPC" was not disposed of and the learned Additional Divisional Commissioner has failed to take notice of the application preferred under Order 41 Rule 27 of "the CPC" and did not decide whether additional evidence could be permitted to be admitted in evidence. This is consistent erudite view held by the Hon'ble Apex Court in various judicial pronouncements as well as of Hon'ble Rajasthan High Court that when an application for production of additional evidence under Order 41 Rule 27 of "the CPC" was filed by the petitioner, it was the duty of the appellate court to deal it with the same on merits. That being the legal position, the question projected is no more *res integra*; thus, I have no other alternate but to hold that without having the disposal of the application filed under Order 41 Rule 27 of "the CPC", the appeal cannot be adjudicated on merits.

23. Now coming to the important part of these revision petitions, as prayed by the learned counsel for the non-petitioners that revisions are not maintainable is concerned, "the Act" has incorporated section 83 & section 84 as enabling provisions for preferring revisions regarding non-judicial proceedings & judicial proceedings. Section 83 deals with the powers of the State Govt. who entertained a revision of the order passed by subordinate officers in non-judicial matters while section 84 empowers the Board of Revenue to interfere in revisions with the order of the lower courts passed in any case of a judicial nature. Here, it is beyond any cavil of doubt that present case belongs to order passed by the subordinate officers in non-judicial matters and hence falls within the ambit of section 83 of "the Act". This is admitted position that by notification no. F.4(3)(c)Rev./Col./67, April 17, 1967 and notification no. F.6(46)Gr.Rev.4/72 August 22, 1972, the State Government delegated its powers under section 83 of "the Act" to the Board of Revenue for Rajasthan and now the Board of Revenue is competent to deal with all matters in revision. Now there is no difference between non-judicial & judicial matters for the litigants and they may approach to the Board of Revenue for remedy under section 83 & section 84 without any hesitation as to the jurisdiction of the Board.

24. My above view is supported by the judgment delivered by the Hon'ble Full Bench of the Board of Revenue in the matter of 'Munsif Ali Vs. State' 1966 RRD page 66.

25. As it has been held that learned Additional Divisional Commissioner was not competent to entertain & decide the appeal filed before him and it cannot be doubted that matter relating to resumption of agricultural land under section 90B of "the Act" is a non-judicial matter and by virtue of provision of section 83 & notifications issued to this effect, Board of Revenue can exercise revisional power of the State Govt. in non-judicial proceedings not connected with settlement held by any officer subordinate to it. Therefore, in a proper case, the Board can exercise its discretion and take recourse to the supervisory power vested in it under section 83 of "the Act".

26. In addition to all, the combined effect of section 8 & section 9 of "the Act" confers the Board of Revenue a special status to exercise powers of superintendence & control to all subordinate revenue courts and subordinate officers being the highest revenue court of appeal, revision & reference.

27. In view of the legal position as explained, I have therefore no hesitation in holding that the impugned order passed by learned Additional Divisional Commissioner, Udaipur being without jurisdiction and without complying the mandatory provisions of Order 41 Rule 3A & Order 41 Rule 27 of "the CPC" cannot be sustained in law. Hence, the revision petitions having full of substance are allowed and the impugned order dated 19.12.2002 passed by the learned Additional Divisional Commissioner, Udaipur is set aside.

Pronounced in open court.

(PRAMIL KUMAR MATHUR)
Member

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