

1994 S C M R 456

[Supreme Court of Pakistan]

*Present: Abdul Shakurul Salam and Muhammad Afzal Lone, JJ*

Capt. ASMAT HAYAT KHAN and others---Appellants

versus

YOUSAF MASIH and others---Respondents

Civil Appeal No. 802 of 1984, decided on 22nd January, 1991.

(On appeal from the judgment of the Lahore High Court, Lahore, dated 5-3-1975, passed in Writ Petition No. 776-R/69).

(a) Displaced Persons (Land Settlement) Act (XLVII of 1958)---

---S. 2(3)---West Pakistan Rehabilitation and Settlement Scheme, 1956, para. 29---Constitution of Pakistan (1973), Art. 185---Houses built by respondents on Ghair Mumkin Abadi---Such site was allotted in favour of appellants as agricultural land---Validity---For purposes of allotment in terms of para. 29, Rehabilitation and Settlement Scheme, 1956, only that classification of land as entered in Special Jamaband, had to be taken into consideration---Site in question, was recorded in special Jamabandi as Ghair Mumkin Abadi; therefore, it could not have been dealt with under the provisions of Displaced Persons (Land Settlement) Act, 1958 and allotted as agricultural land---Allotment of such site as an agricultural land in favour of appellants was thus void ab initio. [p. 458] A

(b) Displaced Persons (Land Settlement) Act (XLVII of 1958)---

---S. 2(3)---Constitution of Pakistan (1973), Art. 199---Constitutional jurisdiction, exercise of---Question of delay in approaching High Court---Such question having not been raised before High Court, could not be raised before Supreme Court in appeal---Objection as regards delay in approaching High Court was not warranted for respondents were in settled possession of their houses and as soon as appellants interfered with peaceful enjoyment of property respondents agitated first before Chief Settlement Commissioner and thereafter through invocation of Constitutional jurisdiction---Constitutional petition was thus competent and could not have been thrown away on plea of laches---Judgment of High Court setting aside allotment in question, being in conformity with law was maintained in circumstances. [p. 458] B

Malik Muhammad Afzal and Tauqir Afzal, Advocates Supreme Court instructed by Hamid Aslam Qureshi, Advocate-on-Record for Appellants.

M.S. Baqar, Advocate Supreme Court instructed by Sh. Salahuddin, Advocate-on-Record for Respondents.

Date of hearing: 22nd January, 1991.

JUDGMENT

1994] **MUHAMMAD AFZAL LONE, J.**—The dispute relate to land bearing Khasra Nos.69/67/38, situate in Chak No.44/NB, Tehsil and District Sargodha, which alongwith some other area, was allotted to the appellants against their verified claim for agricultural land. The respondents moved a petition under section 11 of the Displaced Persons (Land Settlement) Act before the Chief Settlement Commissioner that the land formed part of Abadi Deb; they were in possession thereof since before the year 1914, and had built their houses thereat; it, therefore, could not be allotted to the appellants, as agricultural land. This petition was dismissed by the Deputy Commissioner, Sargodha, as delegatee of the Chief Settlement Commissioner, on the ground that the land having been permanently settled on the respondents, the case could not be re-opened under section 11. The respondents then invoked the writ jurisdiction of the High Court, which was accepted on 5-3-1975, by a learned Single Judge, who maintained:--

"After considering the arguments of the parties I have come to the conclusion that this writ petition must succeed. The Special Jamabandi shows that the property in question was Ghair Mumkin Abadi. According to this document an area of 16 Kanals 10 Marlas was covered under the Abadi and, therefore, could not have been allotted as agricultural land."

This judgment of the High Court has been assailed through this appeal.

2. In support of the appeal it has been urged that the land was purchased by the non-Muslim evacuee from the Provincial Government in the year 1946; the respondents, who were tenants under him in the agricultural land, occupied the site for purposes subservient to agriculture and raised some construction. In the submission of the learned Counsel for the appellants, the land did not shed off its character as an agricultural land as defined in section 2(3) of the Act. It was also argued that the allotment having been made years ago, the High Court, in exercise of its writ jurisdiction, was not justified to set aside the same after such a long period.

3. Before us the existence of the houses built by the respondents, who are 104 in number, over the site in dispute, has not been controverted. The case of the appellants, however, is that whatever the construction exists at the site is for purposes subservient to agricultural and, therefore, the land falls within the mischief of section 2(3) *ibid*. It being so, according to the learned Counsel, the land was available for disposal under the Act as agricultural land. From the perusal of the record we find that this argument was also raised before the High Court, but repelled with the observation that:--

"There is nothing on record to show that the land in question was subservient to agriculture. On the other hand it is being admitted that Katcha houses were built on the property in question and the same are in occupation of the petitioners. There is nothing in the scheme or the

Act that the Katcha houses in which the tenants of a particular landlord live shall be deemed to be subservient to agriculture."

Whether the houses built by the respondents are meant for purposes subservient to agriculture is a question of fact and in this behalf after examining the record before us we have not been persuaded to differ with the view expressed by the High Court. There should be no doubt that, under para 29 of the Rehabilitation Scheme for the purposes of allotment, only the classification of the land, as entered in the Special Jamabandi, had to be taken into consideration. The High Court has clearly held that in the Special Jamabandi the land is recorded as Ghair Mumkin Abadi. Obviously, the site, which is Ghair Mumkin Abadi, could not have been dealt with under the provisions of the Land Settlement Act and allotted as agricultural land. The allotment in favour of the appellants so far as an area measuring 16-1/2 Kanals is concerned that forms part of Khasra Nos.69/67/38, and constitutes Ghair Mumkin Abadi, as maintained by the High Court, is void ab initio.

4. As regards the delay in approaching the High Court, the impugned judgment does not indicate that such an objection was raised by the appellants before the High Court. We see no justification to entertain such an objection now. It seems to us that the respondents were in settled possession of their houses and as soon as the appellants interfered with their peaceful enjoyment of the property they agitated the matter first before the Chief Settlement Commissioner and thereafter through invocation of writ jurisdiction. In these circumstances the writ petition could not have been thrown away on the plea of laches.

5. The view taken by the High Court is in conformity with law and the impugned judgment does not suffer from any illegality to call for interference by this Court. The appeal is, therefore, dismissed, and the parties are left to bear their own costs.

A.A./A-1060/S

Appeal dismissed

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[Supreme Court of Pakistan]

*Present: Shafiur Rahman, Ali Hussain Qazilbash and  
Muhammad Rafiq Tarar, JJ*

**GHULAM HAMID KHAN through Legal Heirs  
and 3 others---Appellants**

versus

**Dr. GHULAM BHEEK KHAN and 4 others---Respondents**

Civil Appeals Nos. 213 and 214 of 1987, decided on 11th August, 1991.