Supreme Court of India
Mst. Kanchaniya And Ors vs Shiv Ram And Ors on 22 April, 1992
Equivalent citations: 1992 AIR 1239, 1992 SCR (2) 670
Author: S Agrawal
Bench: Agrawal, S.C. (J)

PETITIONER:
MST. KANCHANIYA AND ORS.

Vs.

RESPONDENT:
SHIV RAM AND ORS.

DATE OF JUDGMENT22/04/1992

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
FATHIMA BEEVI, M. (J)

CITATION:
1992 AIR 1239 1992 SCR (2) 670
1992 SCC Supl. (2) 250 JT 1992 (3) 174
1992 SCALE (1)868

ACT:
Madhya Pradesh Land Revenue Code, 1959--Sections 2,237, 248(1) read with Section 13, kawaid Maufidaran of Gwalior State--Maufi land--Control of Aukaf Deptt. of Government--Mutation of land in the name of Maufidar (Pujari of the temple)--Whether Pujari can lease out--Whether lessee acquired Bhumiswami rights on the commencement of the Code--Possession of land by the lessee whether authorised--Ejection of lessee--Validity of.

Constitution of India, 1950--Article 226--Writ petition under--Pendency--Death of lessee--Effect of.

Constitution of India, 1950--Article 136--Appeal--Appreciation of evidence--Legal heirs of lessee not cultivated the maufi land--Direction to Govt. to determine whether permission to be given for cultivation.

HEADNOTE:
The ruler of the former Gwalior State by way of maufi gave 78 Bighas 17 Biswas of Agricultural land to a temple of Shri Ram Janakiji.

The father of respondent no.1 was the Pujari of the temple and he was described as the Maufidar in the revenue records. The maufi grant was revoked and the maufi land was

handed over to the Department of Aukaf as Government property vide Circular dated August 13, 1934 of the Government of Gwalior State.

Mutation was made of the agricultural land as Government property and its management was handed over to the Pujari, the father of respondent No. 1 On the death of the Pujari, his son, the respondent No.1's name was mutated by the Collector's order dated March 26, 1960. Out of the agricultural land, 19 Bighas 8 Biswas was given by the father of respondent No.1 to one Malkhan, the predecessor of the appellants for cultivation and he continued to cultivate the same even after the death of respondent No.1's father.

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In 1967, respondent no.1 moved an application under section 248(1) of the Madhya Pradesh Land Revenue Code, 1959 before the Tehsildar for eviction of the predecessor of the appellants, Malkhan, alleging that he was in unauthorised possession of the land measuring 19 Bighas 8 Biswas.

The Tehsildar initially passed an order for ejectment against Malkhan treating him as a trespasser.

On appeal the order was set aside and the matter was remanded for reconsideration. Therefore, the Tehsildar recorded evidence and rejecting the application of respondent no.1, held that land was given by respondent No.1 to Malkhan on lease for his life and as the said lease was still effective, Malkhan was not in unauthorised possession of the land.

The Tehsildar's order was affirmed in appeal by the Sub-divisional officer.

Second appeal filed by respondent No.1 was allowed by the Additional Commissioner holding that the priest of the temple could only manage the affairs of the temple and he could either himself cultivate the land of the temple or get the same cultivated by any other person, but he could not change the ownership of the temple and since the priest was not the land-owner, he had no right to lease out the land of the temple to any other person and the lease given by him was meaningless and illegal and ineffective since the land in question was Aukaf property.

Malkhan filed a revision before the Board of Revenue which was allowed wherein it was held that the State Government gave the land for worship and service in the temple cultivating the land by the priest of the temple or getting it cultivated by somebody else. It was also held that the father of respondent No.1 allotted the land to Malkhan for his life time and that under the authority of the said patta, Malkhan was in possession and he had made improvements on the land and that respondent No.1 was regularly receiving Rs.100 annually towards the land revenue and also passed over its receipt.

The Board of Revenue's order was challenged by respondent No.1 filing a writ petition in the High Court,

which was allowed by a Single Judge. The High Court held that the application of the Pujari was maintainable under s.248(1) of the Code; that the Board of Revenue was wrong

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in treating the possession of Malkhan as authorised; that section 168(4) of the Code was not applicable to the present case because the land in dispute was Aukaf land and neither the deities nor the respondent No.1 could be regarded as the Bhumiswamis thereof. Restoring the order passed by the Additional Commissioner, the High Court ordered the eviction of the appellants from the land in accordance with the provisions of section 248 of the Code.

Against the Judgment of the High Court this appeal by special leave was filed by the lessees.

The appellants urged that the High Court was in error in holding that Malkhan (lessee) was in unauthorised possession of the land and that the application filed by respondent no.1 under section 248(1) of the Code was maintainable; that it was competent for father of the respondent No.1 (lessor) to grant a sub-lease in favour of Malkhan in view of the relevant law applicable to the land in the former State of Gwalior; that after coming into force of the Code, lessee (Malkhan) acquired Bhumiswami rights over the said land with effect from October 2, 1960 that the decision of the Division Bench of the Madhya Pradesh High Court in Thakur Panchamsingh v. Mahant Ram, Kishan Das and ors. AIR 1972 MP 14 did not lay down the correct law; that respondent No.1, having inducted Malkhan as a tenant on the land in dispute, was estopped from asserting that he had no right to grant tenancy in favour of Malkhan and that possession of lessee was unauthorised; that since Malkhan had been granted a patta by the father of respondent No.1 (lessor), which was valid for life time of Malkhan and respondent no. 1 addmitted having received rent from lessee after the death of the lessor, the Board of Revenue rightly held that possession of the lessee was authorised and that the High Court was not justified in interfering with the order passed by the Board of Revenue in exercise of its jurisdiction under Article 226 of the Constitution.

Dismissing the appeal, this court,

Held: 1.01. Pujari does not have any right in the land and his status is that of a manager and that he could get the land cultivated either himself or through others so that the income derived therefrom could be applied towards worship and upkeep of the temple and that the grant would be resumed for breach of any of the conditions or upon the death of the former

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Pujari. In other words, the rights of the Pujari do not stand on the same footing as those of a Kashtakar Mourushi in the ordinary sense who was entitled to all rights including the right to sell or mortgage. [683 A-C]

1.02. The Pujari or the manager of the Devasthan holds

the lands given to him under the Parwana issued under s.13 of the Kawaid Maufidaran of Gwalior State as a manager of Government property. He functions under the overall control and supervision of the Aukaf Department because in the event of his failure to properly manage the affairs, he can be removed and the Parwana issued in his favour can be revoked. Since under the terms of the Parwana, the Pujari or the manager can get the land given for the worship and upkeep of the Devasthan cultivated by some other person, it is necessary that the Aukaf Department exercises control in the matter of initiation of proceedings for ejectment of a person who is allowed to cultivate by the Pujari or the manager which means that the proceedings for such ejectment under s.248(1) of the Code should be initiated by the Pujari or manager only after obtaining the approval of the Aukuf Department. [686 B-D]

1.03. A Pujari had no other status than that of the manager functioning under the control of the Aukuf Depart ment and he had no right to transfer, either by way of sale or mortgage or by lease, the land entrusted to him. [683 C]

1.04. Once it is held that Pujari (lessor), father of respondent No.1 was not competent to grant a lease in respect of the land in dispute and the patta granted by him in favour of Malkhan (lessee) was invalid and no rights were conferred on Malkhan in the land as a result of the patta, the claim of the appellants that they have acquired Bhumis-wami right on the land in dispute cannot be sustained. [683 E]

1.05. Since no rights were created in favour of Malkhan under the patta granted by the lessor, Malkhan (lessee) cannot claim to be a subtenant of the land in dispute on the date of the commencement of the Code and, therefore, the submission that of Malkhan had acquired Bhumiswami rights over the land in dispute cannot be accepted. [684 A-B]

1.06. In 1967, when the application was moved by respondent no.1, s.248(1) empowered the Tehsildar to summarily eject any person who unauthorisedly takes or remains in possession of any occupied land, abadi,

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service land or any land which has been set apart for any special purpose under s.237. [684 C]

1.07. The land in dispute does not fall in any of the excepted categories mentioned in s.2(z-3). It must, therefore, be held to be unoccupied land. Since it was set apart for a public purpose, viz., for the upkeep of temple, it can be said to be land set apart for a special purpose under clause (j) of sub-s.(1) of s.237 of the Code. [684 E]

Thakur Pancham Singh v. Mahant Ramkishandas and Ors. AIR 1972 MP 14, approved.

2.01. In view of the death of Malkhan during the pendency of the writ petition in the High Court the question whether respondent No.1 has granted a patta permitting Malkhan to cultivate the land in dispute during his life

time, does not survive because even if it is held that the patta granted in favour of Malkhan by respondent no.1 permitted Malkhan to cultivate the land during his life time, the said authority under which Malkhan was in possession of the land came to an end on the death of Malkhan and the possession of the appellants over the land in dispute after the death of Malkhan cannot be said to be authorised by respondent no.1. [685 A-C]

2.02. Malkhan had died during the pendency of the writ petition in the High Court and, as a result, the possession of the appellants has become unauthorised, since then. The appellants cannot, therefore, seek relief on the ground that their possession over the land in dispute is not unauthorised and they cannot be evicted under s.248(1) of the Code. [685 H-686 A]

Lachmeshwar Prasad Shukul and Ors. v. Keshwar Lal Chaudhuri and Ors., 1940 FCR 84, Patterson v. State of Alabama. [1934] 294 US 600, at page 607 and Qudrat Ullah v. Municipal Board, Bareilly, [1974] 2 SCR 539, referred to.

3. In the instant case, the Board of Revenue, has stated that respondent no.1 has never cultivated the land and has no arrangement for cultivation and that even if the land is given in his possession he would give it to somebody else for cultivation. In these circumstances, it is directed that a senior official in the Aukuf Department of the Gov-
ernment of Madhya Pradesh should examine whether the appel-
lants can be per-

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mitted to cultivate the land in dispute on terms as suitably revised and till the matter is so considered, the appellants are no dispossessed from the land in dispute. [686 D-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4010 of 1983.

From the Judgment and Order dated 6.10.1980 of the Madhya Pradesh High Court in Misc. Petition No.12 of 1973.

Shiv Dayal and S.K. Gambhir for the Appellants. S.K. Bagga, Sheeraj Bagga, Mrs. Surestha Bagga, V.K. Sapre and S.K. Khandekar for the Respondents.

The Judgment of the Court was delivered by S.C. AGRAWAL, J. This appeal by special leave is directed against the judgment of the High Court of Madhya Pradesh dated October 6, 1980 in M.P. No. 12/73 arising out of proceedings initiated by Shiv Ram, respondent no. 1 herein, against Malkhan under Section 248(1) of the Madhya Pradesh Land Revenue Code, 1959 (hereinafter referred to as 'the Code'), for his ejectment from 19 Bighas 8 Biswas of land in Village Juara, District Morena, Madhya Pradesh, on the ground that he was in unauthorised possession of the said land.

In Village Juara, District Morena, falling in the former Gwalior State, there is a temple of Shri Ram Janakiji. 78 Bighas 17 Biswas of agricultural land had been give, by way of maufi, for the temple by the ruler of the former Gwalior State. Vasudev Rao, father of respondent no.1, was the Pujari of the said temple and he was described as the Maufidar in the revenue records. The said maufi grant was revoked and the maufi land was handed over to the Department of Aukaf as Government property vide Circular dated August 13, 1934 of the Government of Gwalior State. By order of the Commissioner (Maufi & Aukaf), Government of Gwalior State, dated December 10, 1935, mutation was made of the said agricultural land as Government property and its management was handed over to the Pujari, Vasudev Rao for the purpose of management through Parwana issued is his favour. On the death of Vasudev Rao, the name of respondent no.1 was mutated in the place of Vasudev Rao by order of the Collector of Morena dated March 26, 1960. Out of the said agricultural land, 19 Bighas 8 Biswas was given by Vasudev Rao to Malkhan for cultivation and he continued to cultivate the same even after the death of Vasudev Rao. Malkhan has died and the appellants herein are his legal representatives.

In 1967, respondent no.1 moved an application under section 248(1) of the Code before the Tehsildar, Juara wherein it was alleged that Malkhan was in unauthorised possession of the said 19 Bighas 8 Biswas of land and it was prayed that he may be evicted from the same. On the said petition, the Tehsildar initially passed an order for eject- ment against Malkhan treating him as a trespasser. The said order was set aside on appeal and the matter was remanded for reconsideratoion. Thereafter, the Tehsildar recorded evidence and passed an order rejecting the said application of respondent no.1 and holding that land has been given by respondent no.1 to Malkhan on lease for his life and that the said lease was still effective and, therefore, Malkhan was not in unauthorised possession of the land. The said order of the Tehsildear was affirmed in appeal by the Sub- divisional officer, Juara by his order dated April 7, 1971. Secona appeal filed by respondent no.1 was allowed by the Additional Commissioner, Gwalior Divisxion, Gwalior, by his order dated February 22, 1972 whereby it was held that the priest of the temple could only manage the affairs of the temple and he could either himself cultivate the land of the temple or get the same cultivated by any other person but he could not change the ownership of the temple and since the priest is not the landowner, he has no right to lease out the land of the temple to any other person and the lease given by him is meaningless and illegal and that Malkhan did not get any benefit from his statement that father of re- spondent no.1 had given the lease to him and that he had also got a lease for eight years again after the Code came into effect in the year 1959. It was held that the said lease should be deemed to be illegal and ineffective since the land in question is Aukaf property. Aggrieved by the said order of Additional Commissioner, Malkhan filed a revision before the Board of Revenue which was allowed by a member of the Board of Revenue by order dated September 27, 1972. It was held that the State Government has given the land for worship and service in the temple and that the intention was that either the priest of the temple should cultivate the land or get it cultivated by somebody else and to carry on the expenses of the temple with its income . The learned Member of the Board of Revenue also held that father of respondent no.1 had allotted that land to Malkhan for his life time and that under the authority of the said patta, Malkhan is in possession and has made improvements on the land and the respondent no.1 had regularly received Rs.100 annually towards the land revenue and also passed over its receipt. It was observed that respondent no.1 has never cultivated the land and had no arrangement for cultivation and even if the land was given in his

possession, he would give the same to somebody else. The Board of Revenue was of the view that though Malkhan had no interest in the disputed land it would not be just that he is dispossessed for the simple reason that there is possibility of some more income to respondent no.1. Against the said order of the Board of Revenue, re- spondent no.1 filed a writ petition in the High Court which was allowed by a learned Single Judge by judgment dated October 6, 1980. Before the High Court it was claimed, on behalf of the appellants, that since Malkhan had been in- ducted as a sub-tenant by Vasudev Rao and by resopondent no.1 after him, their possession was not unauthorised and as such they were not liable to be evicted in proceedings under s.248 of the Code. Another contention that was raised before the High Court was that the land in dispute being Government land on his own showing, respondent no.1 had no right to maintain an application under s.248(1) of the Code. It was lastly urged that the land in dispute endowed to temple of Shri Ram Jankiji and as such deities of Shri Ram Jankiji are Bhumiswamis of the suit land and therefore, ejectment pro- ceedings could be started only before the Sub-divisional Officer under Section 168(4) of the Code. The High Court rejected all the three contentions. As regards the question of maintainability of an application for ejectment under s.248(1) of the Code, the High Court, relying on an earlier Division Bench decision of the same Court, in Thakur Pancham Singh v. Mahant Ramkishandas and Ors., AIR 1972 MP 14 held that the application of the Pujari was maintainable under s.248(1) of the Code and the learned Member, Revenue Board was wrong in treating the possession of Malkhan as autho- rised. The High Court further held that section 168(4) of the Code was not applicable to the present case because the land in dispute was Aukaf land and neither the deities of Shri Ram Jankiji nor the respondent no.1 could be regarded as the Bhumiswamis thereof. The High Court, therefore, allowed the writ petition filed by respondent no.1 and restored the order passed by the Additional Commissioner dated February 22, 1972 and ordered that the appellants be ejected from the land in dispute in accordance with the provisions of section 248 of the Code.

Shri Shiv Dayal, the learned counsel appearing for the appellants, assailing the judgment of the High Court, has urged that the High Court was in error in holding that Malkhan was in unauthorised posses- sion of the land in dispute and that the application filed by respondent no.1 under section 248(1) of the Code was maintainable. The submission of the learned counsel is that it was competent for Vasudev Rao to grant a sub-lease in favour of Malkhan in view of the relevant law applicable to the land in dispute in the former State of Gwalior and that after coming into force of the Code, Malkhan acquired Bhu- miswami rights over the said land with effect from October 2, 1960. In this context, Shri Shiv Dayal has submitted that the decision of the Division bench of the Madhya Pradesh High Court in Thakur Pancham Singh v. Mahant Ramkishandas and Ors. (supra) does not lay down the correct law. Shri Shiv Dayal has also submitted that respondent no.1, having inducted Malkhan as tenant on the land in dispute, is estopped from asserting that he had no right to grant tenan- cy in favour of Malkhan and that possession of Malkhan was unauthorised. It has been urged that since Malkhan had been granted a patta by Vasudev Rao which was valid for life time of Malkhan and respondent no.1 has admitted having received rent from Malkhan after the death of Vasudev Rao, the Board of Revenue had rightly held that possession of Malkhan was authorised and that the High Court was not justified in interfering with the order passed by the Board of Revenue in exercise of its jurisdiction under Article 226 of the Con- stitution.

We will first examine the question as to the nature of right of Vasudev Rao in the land in dispute and whether he was competent to grant a lease in favour of Malkhan in respect of the said land. For that purpose it is necessary to refer to the relevant provisions of the "Kewaid Maufidaran" and "Qanoon Mal" of the former Gwalior State.

Maufi grants for Devasthan lands were governed by section 13 of Kawaid Maufidaran. The said provision, as translated in English, was as under:

"13. Where, on enquiry or at the time of mutation, a Devasthani Maufi land is found to have been derived from Nagis (Defective) Sanad, it shall be deleted from Maufi category and shall be entrusted to the Aukaf Department for Management of Devasthan, and entry of such land shall be made in the Patwari Papers as follows:-

'Government property, under management of Aukaf Department relating to Devasthan.' The Maufidar shall be deemed to be holding the land as Pujari or manager Devasthan and, in lieu of service he shall have the right of a Mourushi Kashtakar in such land for which a rent free patta shall be granted to him by Aukaf Department:

Provided that in the event of the services being not rendered satisfactorily by the Pujari or manager the Aukaf Department shall have the authority to dispossess such Mourushi Kashtakar and appoint another Pujari or manager in his place and grant him patta for such land." The expression 'Kashtakar Mourushi' was defined in clause (29) of s.2 of the 'Qanoon Mal' which provision, as translated in English, was as follows:

"Kashtakar Mourushi" :- "Kashtakar Mourushi is one whose rights being heritable, the Malguzar cannot evict him without order of the Court, nor can he enhance the rent without his consent or without an order of the court :

provided that in case a Pujari or manager who has mourushi rights under section 13 of Kawaid Maufidaran Juzne Arazi and Naqdi does not render his services properly, the Aukaf Department shall have the authority to dispossess him without an order of the Court.

The following four categories of tenants were specified in Section 249 of Qanoon Mal :

(i) Ex-proprietary tenant;

(ii) Mourushi or Dakhilkar, i.e., Occupancy Tenant;

(iii) Gair Mourushi of Gair Dakhilkar, i.e., Non- occupancy Tenant; and

(iv) Sub-Tenant.

In Section 265 of Qanoon Mal, it was provided that dakhilkar right is transferable by way of sale or mortgage subject to the conditions laid down. One of the conditions prescribed in the second

proviso to s.265 was that dakhilkar right acquired by a pujari or manager under s.13 of the Qanoon Mal could not be subject to sale of mortgage.

The aforesaid provisions in s.13 of the Kawaid Maufidaran and s.265 of Qanoon Mal have been considered by the Madhya Pradesh High Court in Pancham Singh's case (supra) wherein also the Maufi grant in respect of a temple had been resumed and a parwana had been granted to the Pujari of the temple in accordance with Section 13 of Maufidaran and the Pujari had granted a sub-lease and the question was whether the Pujari was competent to grant the sub-lease. In that context, the High Court has also referred to s.110 of the Land Records Manual of the former Gwalior State wherein it was provided that a Pujari should be recorded as a Kashtakar Dakhilkar Bila Lagani, i.e., with no right or interest, and to Circular No.4 of Samvat 1991 of the former Gwalior State which required that :

> "The entry of such land in the Jamabandi should be made in the Patti of Milkiyat Sarkar under the management of the Aukaf Department in the column of 'owner' and the Pujari of Mujavir should be entered in ziman 4 as Mourusi Bila Lagani."

In Pancham Singh's case (supra), the learned Judges have also set out the terms of the Parwana (as contained in the printed from) which is granted by the Aukaf Department in accordance with s.13 of Kawaid Maufidaran. In the said Parwana, it is mentioned that in accordance with s.13 of Kawaid Maufidaran the land which was earlier entered in the Maufi Register has been deleted from the said Register and has been handed over to the Aukaf Department and the said land is now being given by the Department to the grantee 'bila lagani' in lieu of service for the purpose of worship of Devasthan and it shall be under the control of Aukaf Department. The grantee shall keep the Devasthan in a proper condition and shall make proper arrangement for worship from the income of the land by cultivating the same personally or getting it cultivated through somebody else. So long as the grantee and his heirs property manage the Devasthan, till then only they would be entitled to enjoy the land. If any defect or mismanagement in the worship of devasthan on the part of the grantee or his heirs is found proceedings for removal will be initiated and another person would be ap- pointed from amongst the heirs, if found fit from conducting the worship or otherwise another proper person would be appointed to manage the Devasthan and the land would be delivered to him. It was clearly mentioned in the Parwana that as a result of cancellation of the maufi the grantee, as Maufidar, does not have any right in the same and now this land would be entered in the Register and other papers of the Patwari as Government property under the control of Aukaf Department for the management of the Devasthan.

Construing the terms of the Parwana in the light of Section 13 of Kawaid Maufidaran, the High Court has held :

"The Parwana must be read in the context of Section 13 of the Kawaid Maufidaran. The deed must be read as a whole in order to ascertain the true meaning of its several clauses. Strict legal language having been used in the Parwana, it must receive its legal meaning. Under the terms of the Parwana, the former Pujari has no other status than that of a manager. He could get the lands cultivat- ed either himself or through servants, but he had no right to alienate the same in any manner. It cast a

duty upon him to keep the lands under culti- vation so that the income derived therefrom could be applied towards the Puja and the upkeep of the temple. He was under the direct control of the Aukaf Department. The Parwana expressly stated that the grant shall be resumed for breach of any of the conditions or upon the death of the former Pujari. The maufi lands all the while belonged to the Government. The former Pujari was, therefore, not a Kashtakar Mourushi or a government lessee or an ordinary tenant of the maufi lands, but was merely holding them on behalf of the Aukaf Depart- ment for purpose of management."(p.16) Referring to the definition of "Mourushi Kashtakar" contained in clause (29) of s.2 of the Qanoon Mal, the High Court had observed:

"On a plain reading, the definition excludes a Pujari. The former Pujari was, therefore, not a Kashtakar Mourushi of the maufi land, but was merely holding them on behalf of Aukaf Department for purposes of management."(p.16) Rejecting the contention that every Mourushi Kashtakar had the right to sub-let and that though a Pujari had no right to transfer by mortgage or sale there was no restric- tion on sub-letting, the High Court has laid down :

"It would be repugnant to the nature of the grant itself to clothe such a person with a right to transfer of any kind. The whole purpose of the grant, which was for upkeep of the temple, would be frustrated if the maufi lands were allowed to be sub-let by the Pujari and new rights created in favour of a stranger. Where a grant of land is made in consideration for service to be rendered by a grantee, in lieu of wages, it is an implied condition of the grant that if the services are not performed or are not required, the grant can be resumed. The Parwana expressly stated that the grant in favour of the former Pujari was resumable for breach of any of the conditions set out there- in, or upon his death or removal. The death of the former Pujari was, in the instant case, the termi- nal point. That being so, the grant lapsed with his death. As the grant created no interest in favour of the former Pujari, whatever rights the peti- tioners's father, Thakur Murlidhar Singh had also lapsed and he became a rank trespasser." (p.17) Shri Shiv Dayal has submitted that the learned judges of the Division Bench of the High Court were in error in hold- ing that a Pujari was not a Kashtakar Mourushi of the maufi land and that the said finding is contrary to the language of s.13 of Kawaid Maufidaran wherein it is clearly stated that the Pujari would have the rights of a Kashtakar Mou- rushi. According to Shri Shiv Dayal the only limitation on the rights of the Pujari as a Kashtakar Mourushi was that contained in s.265 of the Qanoon Mal whereby he was preclud- ed from selling or mortgaging the Maufi lands but there was no provision restricting his right to create a lease for cultivation of the lands. We are unable to agree. Although under s.13 of Kawaid Maufidaran, the right of a Kashtakar Mourushi have been conferred on the Pujari and under s.265 of the Qanoon Mal, the restriction on his right was with regard to sale and mortgage only but it cannot be ignored that under s.13 of Kawaid Maufidaran the right of a Kashta- kar Mourushi which have been conferred on the Pujari is subject to the overriding condition that in case he does not perform his duties properly, he can be removed and another Pujari can be appointed and a patta would be issued in his favour. This is also borne out by definition of the expres- sion 'Kashtakar Mourushi' in s.2(29) of the Qanoon Mal which imposes the condition that the Aukaf Department would be entitled to dispossess, without an order of the court, the Pujari who obtains the right of Kashtakar Mourushi on the basis of Kawaid Maufidaran and who does not render his services properly. The matter is further made clear by the prescribed form of the Parwana which is issued to the Pujari wherein it is also clearly mentioned that Pujari does not have any right in the land and his status is that of a manager

and that he could get the land cultivated either himself or through others so that the income derived therefrom could be applied towards worship and upkeep of the temple and that the grant would be resumed for breach of any of the conditions or upon the death of the former Pujari. In other words, the rights of the Pujari do not stand on the same footing as those of a Kashtakar Mourushi in the ordi- nary sense who was entitled to all rights including the right to sell or mortgage. We are, therefore, in agreement with the view of the Division Bench of the Madhya Pradesh High Court in Pancham Singh's case (supra) that a Pujari had no other status than that of the manager functioning under the control of the Aukaf Department and he had no right to transfer, either by way of sale or mortgage or by lease, the land entrusted to him. In that view of the matter, it must be held that patta granted in favour of Malkhan by Vasudev Rao, father of respondent no.1, was not valid and did not confer any right or interest on Malkhan in the land covered by the said patta.

Once it is held that Vasudev Rao was not competent to grant a lease in respect of the land in dispute and the patta granted by him in favour of Malkhan was invalid and no rights were conferred on Malkhan in the land as a result of the said patta, the claim of the appellants that they have acquired Bhumiswami right on the land in dispute cannot be sustained. The said claim is based on the provisions of ss.185, 189 and 190 of the code.

Under s.185(1), every person, belonging to any of the categories specified thereunder, shall be called an occupancy tenant and shall have all the rights and be subject to all the liabilities conferred or imposed upon an occupancy tenant by or under the Code. Under s.190, Bhumis- wami rights are conferred on an occupancy tenant in cases where the Bhumiswami, whose land is held by an occupancy tenant, fails to make an application under s.189(1) within the period laid down therein. The submission of Shri Shiv Dayal is that Malkhan, being in occupation of the land in dispute as a sub-tenant, became an occupancy tenant under s.185(1), and since the Bhumiswami of the land in dispute did not make an application under s.189(1), Malkhan acquired Bhumiswami rights over the same under s.190 of the Code. This contention proceeds on th assumption that Malkhan was a sub-tenant of the land in dispute on the date of coming into force of the code. But since we have found that no rights were created in favour of Malkhan under the patta granted by Vasudev Rao. Malkhan cannot claim to be a sub-tenant of the land in dispute on the date of the commencement of the Code and, therefore, the submission of Shri Shiv Dayal that Malkhan had acquired Bhumiswami rights over the land in dispute cannot be accepted.

The only question which remains to be considered is whether the application filed by respondent no.1 under s.248(1) of the Code was maintainable. In 1967, when the application was moved by respondent no. 1, s.248(1) empowered the Tehsildar to summarily eject any person who unauthorisedly takes or remains in possession of any occu- pied land, abadi, service land or any land which has been set part for any special purpose under s.237. The expression 'unoccupied land' is defined in s.2(z-3) of the Code as under :

> " `unoccupied land, means the land in a village other than the Abadi or service land or the land held by a Bhumiswami, a tenant or a Government lessee;"

The land in dispute does not fall in any of the excepted categories mentioned in s.2(z-3). It must, therefore, be held to be unoccupied land. Since it was set apart for a public purpose, viz., for the upkeep of temple, it can be said to be land set apart for a special purpose under clause (i) of sub-s.(1) of s.237 of the Code. What has to be seen is whether the possession of Malkhan of the same was unauthorised. It has been urged on behalf of the appellants that the possession of Malkhan could not be said to be unauthorised on the date of the filing of the application by respondent no.1 in view of the fact that Vasudev Rao, father of respondent no.1, had granted a patta permitting Malkhan to cultivate the land during his (Malkhan's) life time and after the death of Vasudev Rao, respondent no.1 had also granted a patta permitting Malkhan to continue in cultivation of the land in dispute and had been receiving Rs.100 annually as rent for Malkhan. There is dispute between the parties with regard to the terms of the patta granted by respondent no.1. According to the appel- lants, under the said patta, Malkhan was entitled to contin- ue for his life time whereas according to respondent no.1, the patta was granted for a limited period which had ex- pired. It has been urged by learned counsel for the appel- lants that in view of the patta whereby Malkhan was permit- ted to cultivate the land in dispute for his life, it cannot be said that possession of Malkhan was unauthorised. In view of the death of Malkhan during the pendency of the writ petition in the High Court, the question whether re- spondent no.1 has granted a patta permitting Malkhan to cultivate the land in dispute during his life time, does not survive because even if it is held that the patta granted in favour of Malkhan by respondent no.1 permitted Malkhan to cultivate the land in dispute during his life time, the said authority under which Malkhan was in possession of the disputed land came to an end on the death of Malkhan and the possession of the appellants over the land in dispute after the death of Malkhan cannot be said to be authorised by respondent no.1.

In Lachmeshwar Prasad Shukul and Ors. v. Keshwar Lal Chaudhuri and Ors., (1940) FCR 84, Varadachariar, J. has observed :

> "It is also on the theory of an appeal being in the nature of a re-hearing that the courts in this country have in numerous cases recognized that in moulding the relief to be granted in a case on appeal, the court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against."

(p.103) In his concurring judgment, Gwyer, C.J. has referred to the following observations of Hughes C.J. in Patterson v. State of Alabama, [1934] 294 US 600, at p.607 :

> "we have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered". (p.87) In Qudrat Ullah v. Municipal Board, Bareilly, [1974] 2 SCR 539, this Court has held that it is permissible for the court to take note of the extinguishment of the statutory tenancy while considering the appeal and grant relief to the appellant accordingly. We can, therefore, take note of the fact the Malkhan has died during the pendency of the writ petition in the High

> Court and, as a result, the possession of the appellants has become unauthorised, since then. The appellants cannot, therefore, seek relief on the ground that their possession over the land in dispute is not unauthorised and they cannot be evicted under s. 248(1) of the Code.

On the aforesaid view of the matter, the appellants must fail and the appeal has to be dismissed. But before we do so, we consider it necessary to advert to an aspect which cannot be ignored. We have found that the Pujari or the manager of the Devasthan holds the lands given to him under the Parwana issued under s.13 of the Kawaid Mufidaran as a manager of Government property. He functions under the overall control and supervision of the Aukaf Department because in the event of his failure. to properly manage the affairs, he can be removed and the Parwana issued in his favour can be revoked. Since under the terms of the Parwana, the Pujari or the manager can get the land given for the worship and upkeep of the Devasthan cultivated by some other person, it is necessary that the Aukaf Department exercises control in the matter of initiation of proceedings for ejectment of a person who in allowed to cultivate by the pujari or the manager which means that the proceedings for such ejectment under s.248(1) of the Code should be initiat- ed by the Pujari or manager only after obtaining the approv- al of the Aukaf Department. In the instant case, the Board of Revenue, has stated that respondent no. 1 has never cultivated the land and has no arrangement for cultivation and that even if the land is given in his possession he would give it to somebody else for cultivation In these circumstances, we consider it appropriate to direct that a senior official in the Aukaf Department of the Government of Madhya Pradesh should examine whether the appellants can be permitted to cultivate the land in dispute on terms as suitably revised and till the matter is so considered, the appellants are not dispossessed from the land in dispute.

The appeal is, therefore, dismissed. It is, however, directed that a senior official in the Aukaf Department of Government of Madhya Pradesh shall consider whether the appellants can be permitted to cultivate the land in dispute on terms which may be suitably revised. In case the said official is of the view that the appellants can be so per- mitted, a suitable direction in that regard may be given by the Aukaf Department directing respondent no.1 to permit the appellants to cultivate the land on the revised terms. The appellants shall not be ejected from the land in dispute till the matter is so considered. The parties are left to bear their own costs.