Haji Sk. Subhan

Vs

Madhorao

Civil Appeal No. 285 of 1958

(K. N. Wanchoo, K. C. Das Gupta, J. C. Shah, Raghuvar Dayal JJ)

16.10.1961

JUDGMENT

RAGHUBAR DAYAL, J. –

This appeal, on certificate granted by the High Court at Nagpur, is directed against its order dismissing the appellant's appeal against the dismissal of his objection, under s. 47 of the Code of Civil Procedure, by the III Civil Judge, Class I, Nagpur.

The respondent purchased at auction sale, held by the Revenue Officer for recovery of arrears of land revenue, eight anna share of Ganpatrao in mouza Vadoda, Tehsil and District Nagpur, in the Central Provinces, and obtained formal possession of that share on September 23, 1938. Ganpatrao relinquished his share in khudkahst lands they were recorded as the occupancy land of his wife and sons. They surrendered those fields to lambardar Narain, who leased those fields in occupancy right to the appellant in 1940. The respondent filed a suit for possession of certain fields including the fields in suits viz., fields khasra Nos. 147 and 154, and based his claim on his proprietary right to recover possession and not on the loss of possession on account of the appellant's dispossessing him. The suit was decreed and the decree was upheld by the Nagpur High Court by its order dated April 20, 1951, it being held that the respondent was entitled to the fields in suit which were originally khudkasht fields as part and parcel of the eight anna share of Mahal No. 2 purchased by the respondent.

It so happened that between the closing of the arguments in the appeal before the High Court, some time before March 31, 1951, and the delivery of judgment on April, 20, 1951, the Madhya Pradesh Abolition of proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M.P. Act No. I of 1951), hereinafter called the Act, came into force. This fact does not appear to have been brought to the notice of the High Court as it did not consider the effect of the Act on the appeal before it.

The respondent-decree holder filed execution application for the recovery of costs and delivery of possession on July 23, 1951. The appellant paid up the costs, but on August 31, 1951, filed an objection to the application for delivery of possession on the ground that the respondent-decree holder had no right to dispossess the appellant-judgment debtor, as the respondent had lost his proprietary rights to the fields and the appellant had acquired rights to occupy them subsequent to the confirmation of decree for possession by the High Court. It was stated that the malguzari proprietary rights of the respondent-decree holder, except his rights over home-farm fields, ceased to exist on March 31, 1951, by virtue of s. 3 of the Act and vested in the State thereafter. Home-farm fields were those fields which were recorded as khudkasht or sir fields in the Jamabandhi of 1948-49. The fields in suit were not so recorded and were recorded as occupancy fields of appellant.

It was further contended that the State had, after the date of vesting, collected rent from the appellant recognizing the land in suit to be the tenancy land of the appellant.

On September 24, 1951, the appellant filed an application stating further facts in support of his objection. He stated that the respondent neither claimed, in the ex-propriation proceedings before the Compensation Officer, Nagpur, the fields in suit as his khudkasht lands, nor raised any such claim in proceedings for fixation of assessment on his home-farm and that the decree-holder had not been declared malik makbuza of the land in suit. He further stated that the respondent had included the rent of the fields in suit in the area of the village for the purposes of claiming compensation and thereby got more compensation on that account and that the fields in suit had been declared malik makbuza of the appellant on July 22, 1952, under s. 41 of the Act.

The respondent contended before the Executing Court that the appellant could not raise such objections in the Executing Court and should have raised them in the High Court before it had passed the orders in the appeal. He further contended that he had not lost his right to possess the fields in suit and that his claim to possession of the fields was not affected by the Act the provisions of which did not apply to the facts of the case. He also contended the State had absolutely no right to collect any rent for the fields from the appellant and any collection made did not affect the respondent's rights. He further contended that the appellant could not take any advantage of his omission to claim the land in suit as his home-farm as he could not have moved in the matter without obtaining possession or of a declaration of malik makhbuza under s. 41 of the Act during the pendency of the execution application as he had fraudulently suppressed the fact that he had been held by the High Court not to have been an occupancy tenant of the land in suit and that the respondent had a decree for possession against him.

The State of Madhya Pradesh was served with notice of the objection and filed its statement of facts stating therein that plots in suit were not shown as home-farm by the ex-proprietor respondent, that no Jamabandhis; as required by s. 2(g) of the Act, were field in the compensation proceedings and that, consequently, the respondent was not declared mailk makbuza of those plots. It was also stated that the appellant had been declared malik makbuza of the plots under s. 41/56 of the Act on application under s. 4(2) of the Madhya Pradesh Agricultural Raiyats and Tenants Acquisition of Privileges) Act, 1950 (M.P. Act XVIII of 1950), and that he has paid land revenue to the State.

The Execution Court dismissed the objection. It held that the vesting of respondents proprietary rights in the State did not come in his way to take possession of the fields in execution of the decree, as the Deputy Commissioner could not take possession of the fields in suit under s. 7 of the Act as they were occupied lands. It further held that the land in suit did not form the respondent's home-farm and that the respondent could not be the malik makbuza of the fields under s. 38(1) of the Act as the fields were not in his possession. It further held that the declaration of the appellant, who was a trespasser, as a malik makbuza, was illegal. The appellant then went in appeal to the High Court.

The High Court relied on the case reported as Rahmatulla Khan v. Mahabirsingh [I.L.R. [1955] Nag. 983] in which it was held that the definition of a 'home-farm' in s. 2, clause (g), of the Act, should be liberally construed and should include the fields of a proprietor who was entitled to get the Revenue papers of 1948-49 corrected as a result of the decree in his favour, even though the fields were not recorded as his khudkasht in the 1948-49 papers, because it was the duty of the Revenue Authorities to make correct entries in the Jamabandis and other village papers. The High Court, however, pointed out that the decision in Rahmatullah's Case [I.L.R. [1955] Nag. 983] made out an exception in the definition which is not in it and in effect laid down that the application of the

Act depended upon the result of pending litigation, a view which was not accepted in the earlier Full Bench Case of Chhote Khan v. Mohammad Obedullakhan [I.L.R. [1953] Nag. 702]. The learned Judges further said :

> "Though we do not agree with the view of Mudholkar, J., the decision ranks as a Division Bench Case and we follow it, though reluctantly."

The learned counsel for the appellant has urged that the respondent is not entitled to execute the decree for possession as he had lost the proprietary right which entitled him to get possession. It is further urged that the appellant has secured the rights of malik makbuza of the land subsequent to the decree and has thus got a right to remain in possession in spite of the decree. The learned counsel for the respondent mainly relies on the contention that the Execution Court cannot go behind the decree and therefore must execute it and deliver possession to the respondent.

Before considering the question arising for determination in this appeal, it will be convenient to detail the relevant provisions of the Act and their effect. The preamble of the Act says that it is expedient to provide for the acquisition of the rights of the proprietors in estates, mahals, alienated villages and alienated lands in Madhya Pradesh and to make provision for other matters connected therewith. This indicates that the Act purported to deal with the rights of the proprietors and not directly with the rights of other persons in the estates mahals, alienated villages and alienated lands. The proprietors were intermediaries between the person actually cultivating the land and the Government. They realised rent from the former and paid revenue to the latter.

Section 3 is the vesting section and its sub-ss. (1) and (2) read :

> "(1) Save as otherwise provided in this Act, on and from a date to be specified by a notification by the State Government in this behalf, all proprietary rights in an estate, mahal, alienated village or alienated land, as the case may be, in the area specified in the notification, vesting in a proprietor of such estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor, shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all encumbrances.
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> (2) After the issue of a notification under sub-section (1), no right shall be acquired in or over the land to which the said notification relates, except by succession or under a grant or contract in writing made or entered into by or on behalf of the State; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf."

In accordance with the provisions of this section, the proprietary rights in an estate, mahal, alienated village or alienated land in the area specified in the notification vesting in a proprietor or such estate etc., were to pass from such proprietor and vest in the State for purposes of the State free from all encumbrances. These provisions themselves were sufficient to divest the proprietor of such estate etc., of his proprietary right. The consequences of such vesting are further specified in s. 4. In view of sub-s. (2) of s. 3, no right could be acquired over the land which had vested in the State except by succession or under a grant or contract in writing made or entered into by or on behalf of the State. This means that no person could acquire any right over such land under a decree passed in his favour subsequent to the vesting of the estate on the notified date and that therefore the respondent

did not acquire the right to possess this land under the decree in his favour.

The relevant portion of sub-s. (1) of s. 4 are :

> "(1) When the notification under section 3 in respect of any area has been published in the Gazette, then, notwithstanding anything contained in any contract, grant or document or any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereinafter set forth shall, from the beginning of the date specified in such notification (hereinafter referred to as the date of vesting), ensue, namely -
>
> #(a) all rights, title and interest vesting in theproprietor..... in such area including land (cultivable orbarren),..... shall ceases and be vested in the State for purposesof the State free of all encumbrances.....##
>
> (e) the interest of the proprietor so acquire shall not be liable to attachment or sale in execution of any decree or other process of any court, civil or revenue, and any attachment existing at the date of vesting or any order for attachment passed before such date shall, subject to the provisions of section 73 of the Transfer of Property Act, 1882, case to be in force."

Sub-sections (2) and (3) of s. 4 are as follows :

> (2) Notwithstanding anything contained in sub-section (1), the proprietor shall continue to retain the possession of this homestead, home-farm land, and in the Central Provinces also of land brought under cultivation by him after the agricultural year 1948-49 but before the date of vesting.
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> (3) Nothing contained in sub-section (1) shall operate as a bar to the recovery by the outgoing proprietor of any sum which becomes due to him before the date of vesting by virtue of his proprietory rights and any such sum shall be recoverable by him by any process of law which but for this Act would be available to him."

It is to be noted that the consequences mentioned in s. 4 follow the notification under s. 3, notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force. The question is whether the word 'document' includes a decree of the Court. We do not see any good reason why a decree of the Court, when it affects the proprietary rights and is in relation to them, should not be included in this expression. The main object of ss. 3 and 4 and in fact, of the Act itself, is that all the bundle of rights which a proprietor possesses on account of his proprietorship of the land within the estate etc., should cease, except such rights which are saved to the proprietor under some specific provision of the Act. Any rights which accrue to the proprietor under a decree by virtue to his proprietary right will not, under the scheme of the Act, prevail over the statutory consequences following the vesting of the proprietary rights in the State and will be lost to the proprietor. One such right is the right of the proprietor under a decree to obtain possession over certain land. Such a decree for recovery of possession is the result of the recognition of the proprietor's right of possession as proprietor over that land as against the claim of the judgment debtor to retain possession of that land. The proprietary right vests in the State and as a consequence of it the proprietor's right under the decree to obtain possession also vests in the

State, even though the State gets right to the possession of the land under other provisions of the Act as well.

Section 7 empowers the Deputy Commissioner to take charge, on the date of vesting, of all lands other than occupied lands and homestead of all interest vesting in the State under s. 3. This means that the Deputy Commissioner could take possession of the land in suit on the date of vesting, i.e., on March 31, 1951, as it was neither the proprietor's home-farm, nor occupied land, as defined in cl. (k) of s. 2, of the appellant who was held by the High Court to be a trespasser - vide judgment of the High Court dated April 20, 1951, now reported in Subhan v. Madhorao [I.L.R. [1951] Nag. 895].

'Occupied land' means, in relation to the Central Provinces, according to sub-cl. (i), land held immediately before the date of vesting in absolute-occupancy or village service tenure, or land held as malik-makbuza, or land comprised in a home-farm. Occupied land did not include land held by a person as a trespasser.

The provisions of cl. (e) of sub-s. (1) of s. 4 indicate that certain decrees against the interest of the proprietor become inexecutable on the vesting of his rights in the State. There is therefore good reason to hold that decrees in his favour also become inexecutable if they are based on his proprietary right which he possesses no more and which has vested in the State.

The Act provided, by sub-s. (3) of s. 4, that the out-going proprietor was free to recover any sum which had become due to him before the date of vesting by virtue of his proprietary rights by any process of law which, but for the Act, would be available to him. It does not provide for the outgoing proprietor to recover possession of land by any process of law, if he had become entitled to the possession of that land before the date of vesting. The absence of any such provisions adds strength to the view that the proprietor's right to obtain possession of land under a decree in his favour gets lost to him after the date of vesting.

Sub-Section (2) of s. 4 of the Act provides that the proprietor can continue to retain possession of home-farm land after the vesting of his proprietary right in the State. The respondent cannot take advantage of this provision even if the land in suit be held to be home-farm. He was not in possession of the land in suit on the date of vesting and no question of continuing to retain possession arose. In fact, the fields in suit could not be his home-farm and therefore he got no right to retain possession over them.

Clause (g) of s. 2 of the Act defines 'home-farm'. It reads :

> "(g) 'home-farm' means, -
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> (1) in relation to Central Provinces, -
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> (i) land recorded as sir and khudkasht in the name of a proprietor in the annual papers for the year 1948-49, and
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> (ii) land acquired by a proprietor by surrender from tenants after the year 1948-49 till the date of vesting;
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> (2) in relation to merged territories, that part of the land under the personal cultivation of the proprietor on the date of vesting which was similarly under cultivation in the agricultural year 1949-50 and which he is entitled to retain on the

termination of proprietary tenure under any instrument having the force of law and applicable to such tenure.

Explanation. - Land under personal cultivation includes land allowed to lie fallow in accordance with the usual agricultural practices but does not include any land in lawful possession of a raiyat or tenant.

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It is significant to note in this connection that sub-cl. (i) refers to land actually recorded as sir and khudkasht in the annual papers of 1948-49 and does not refer in terms to land which was the sir and khudkasht of the proprietor in that year and which ought to have been recorded as such in those papers but had not been so recorded. Another point to be noted is that though cl. (ii) refers to land acquired by the proprietor by surrender from tenants between the close of the year 1948-49 and the date of vesting no reference is made in this definition to land the possession of which had been obtained by the proprietor as a result of a decree during that period of to the possession of which the proprietor was held entitled under the decree of the Court passed before the date of vesting.

It is also significant to notice that in sub-s. (2), the land answering the description of 'home-farm' is described differently. Only that land comes within the expression 'home-farm' which had been under the personal cultivation of the proprietor on the date of vesting and which had been similarly under cultivation in the agricultural year 1949-50, and which he is entitled to retain even on the termination of his proprietary tenure under any instrument having the force of law and applicable to that tenure. Personal cultivation of the proprietor at two relevant dates was the main criterion. Such cultivation was not made the criterion in the definition in sub-cl. (i) of sub-s. (1). It is not necessary, according to that sub-clause, that the proprietor be personally cultivating that land. The only condition requisite for the proprietor having certain land treated as his home-farm was the fact that the annual papers of 1948-49 recorded that land as his sir and khudkasht. The basis was the record and not the fact of actual cultivation or his title to that land.

The definition evinces the intention of the Legislature to remove the question of certain land being 'home-farm' or not from the sphere of litigation. Recorded entry was treated to be the basis for adjudging the land to be 'home-farm.'

There is no ambiguity about the definition of 'home-farm' and so the question of strict or liberal construction does not arise.

These considerations lead to the conclusion that land cannot come within the definition of 'home-farm' which had not been actually recorded as sir and khudkasht in the name of the proprietor in the annual papers for the year 1948-49 or which had not been acquired by the proprietor by surrender from tenants after the years 1948-49 till the date of vesting. The plots in suit were neither actually recorded as the respondent's sir and khudkasht in the 1948-49 annual papers nor had been acquired by him by surrender from tenants during the period mentioned in sub-cl. (ii) of cl. (1) of the definition and so could not be the respondent's home-farm.

The decree of the trial Court was passed on July 12, 1944. As that decree was under appeal in 1948-49, it would not be right to say that the Revenue Authorities were in error in not correcting the entries in the annual papers. They could not have corrected them merely on the basis of the decree. Correction in the entries would have been made if there had been change of possession. No change

of possession took place and therefore no entry could have been made in the annual papers of 1948-49 with respect of the plots in suit to be the khudkasht of the respondent. In fact, even if the respondent had taken possession over the land in suit by executing the decree passed by the trial Court, an entry of his holding that land as khudkasht could have been made only if he had brought the land under his own personal cultivation and not if he had let out the land to some other person. This consideration, again, would go against the respondent even if a liberal interpretation was to be given to the definition of 'home-farm'.

Section 12 requires that every proprietor should file a statement of claim in the specified form and verity that statement in accordance with Order VI, rule 15, Code of Civil Procedure. The respondent filed his compensation statement, Document No. 1, on September 20, 1951, and mentioned in his claim the total gross rental of his proprietary share. This rental included the recorded rent of the land in suit.

Section 83 provides that every entry in the record-of-rights, the annual papers and the register or proprietary mutations in the Central Provinces, shall, for purposes of assessment and payment of compensation be presumed to be correct. This means that for the purpose of settlement of the claim filed by the respondent under s. 12, the entry of the appellant's being an occupancy tenant in the annual papers had to be presumed to be correct and, as a consequence of such a presumption, the land in suit cannot be taken to be the respondent's khudkashut in 1948-49, and this supports the construction we have placed on the definition of 'home-farm' in s. 2(g).

Sub-section (1) of s. 38 provides that every proprietor who is divested of his proprietary rights in an estate or mahal, shall, with effect from the date of vesting, be a malik makbuza of the home-farm land in his possession. The respondent does not appear to have taken any steps to get himself recognized as a malik makbuza of the land in suit on the ground that it was his home-farm. In fact, he states in his reply to the appellant's objection that he could not have moved in the matter without obtaining possession.

Exhibit A-1, dated May 8, 1951, is the statement of fixation of assessment on the home-farm of the respondent. It does not include the land in suit.

Section 45 provides inter alia that any person who, immediately before the date of vesting, was in possession of any holding as an occupancy tenant, shall be deemed to be a tenant of the State and shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to, immediately before the date of vesting.

Section 41 provides inter alia for occupancy tenants to be declared in the prescribed manner to be malik makbuza of the land comprised in their holding on payment of the amounts mentioned in the section. The appellant applied for such a declaration on July 22, 1952 and got the declaration in his favour on the basis of the entry in the village papers, though that entry of his being an occupancy tenant was wrong in view of the finding of the High Court.

Exhibit A-4 is the declaration by the Naib Tehsildar, Nagpur, on July 22, 1952, under s. 41 of the Act, that the appellant was malik makbuza in respect of the land in suit.

Exhibit A-6 is the copy of the Jamabandhi for holding serial No. 121 of mauze Vadoda for the year 1948-49, showing the respondent to be the occupancy tenant of the land in suit.

Section 46 provides that every person deemed or declared to be a malik makbuza under section 33

or section 41 and every other malik makbuza in a mahal, shall be entitled to any right which a tenant has under the village wajibul-arz. The appellant therefore got entitled to such rights of a tenant.

It is clear from the various provisions of the Act already discussed in relation to the facts of this case, that the respondent was not recorded and could not have been recorded to have khudkast in the land in suit in the papers of 1948-49 and therefore could not have claimed this land as his home-farm. In fact, he did not claim so. He therefore lost his proprietary rights in this land and they got vested in the State. He therefore had no subsisting right to recover possession of the land in suit, in spite of the decree in his favour passed on the basis of his being the proprietor of the land in suit, and the appellant being in wrongful possession of that land. On the other hand, the appellant contained in possession and has, on the basis of the entries in the village papers which had to be presumed correct for the purpose of assessment of compensation secured a declaration of his being malik makbuza of such land from an officer of the State in whom the land in suit now vests. His right to occupy the land under this right was not adjudicated by the High Court in the judgment leading to the decree ought to be executed. He can therefore object to the execution of the decree for the delivery of possession as the respondent has no subsisting right and as he has secured from the State a good right to possess it as malik makbuza, even though it be on the basis of a wrong entry in the village papers.

The right to possession vests in the State and, under s. 7, the Deputy Commissioner formally takes possession of the land, which is not home-farm or occupied land within the definition of these expressions in the Act. If the land in suit be treated to be the appellant's occupancy tenancy, his right to remain in possession as occupancy tenant continues after the vesting of the land in suit, in the State. If the land in suit be not taken to be occupancy land of the appellant in view of the finding of the High Court, the Deputy Commissioner would be deemed to have taken possession of the land from the appellant and any subsequent possession of the appellant would be deemed to be possession under the State.

The contention that the Executing Court can not question the decree and has to execute it as it stands, is correct, but this principle has no operation in the facts of the present case. The objection of the appellant is not with respect to the invalidity of the decree or with respect to the decree being wrong. His objection is based on the effect of the provisions of the Act which has deprived the respondent of his proprietary rights, including the right to recover possession over the land in suit and under whose provisions the appellant has obtained the right to remain in possession of it. In these circumstances, we are of opinion that the Executing Court can refuse to execute the decree holding that it has become inexecutable on account of the change in law and its effect.

Chhote Khan's Case [I.L.R. (1953) Nag. 702] has not much bearing on the question under consideration in the present case, as it did not deal with the executability of the decree obtained by a proprietor against a trespasser subsequent to the coming into force of the Act. It dealt with the executability of decrees in favour of the proprietors and passed prior to the enforcement of the Act and held that they had become inexecutable as the effect of ss. 3, 4, 5, 7, 50 and 60 of the Act was that the rights which were exercisable by the proprietor, lambardar and sadar lambardar by reason of holding that character could not longer be exercised by them and that, even though the cause of action for enforcing those rights arose before the Act came into force, they could not be contained by those persons after the Act came into force as they had ceased to hold that character.

The fact in Rahmatullah's Case [I.L.R. (1955) Nag. 983] were as follows : The plaintiffs sued for possession in respect of 9.18 acres khudkasht lands on the allegation that his predesessor-in-interest,

Khubiram, had purchased the defendant's interest in the village including khudkasht lands at a revenue auction sale on April 29, 1936. It was contended that the defendant has no right to remain in possession of the khudkasht lands which, along with the proprietary interest, passed at the revenue sale. The defendant contested the suit on the grounds that his khudkasht lands did not pass in the revenue sale, that he had continued all along in possession in respect of the same and had thus acquired the rights of occupancy tenancy which were confirmed in consolidation proceedings. The suit was decreed in its entirety by the trial Court but the 1st appellate Court confirmed the decree with respect to a portion of khudkasht land which was held to be included in the revenue sale. By the time the second appeal was heard in the High Court, the Act had come into force. It was contended on behalf of the defendant-judgment debtor that the suit must fail in view of the provisions of the Act as interpreted in Chhote Khan's Case [I.L.R. (1953) Nag. 702]. In view of the difference of opinion between the learned Judge who heard the second appeal, two questions were referred to a third Judge for opinion and one of the questions was :

> "Does the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (No. I of 1951) bar a suit by an ex-proprietor for recovery of khudkasht lands purchased by him before the Act came into force ?"

Mudholkar, J., to whom the questions were referred said at p. 996 :

> "It is clear from the documents on record that Khubiram had obtained possession of the land in suit after he purchased it along with the village share. The land was thus khudkasht of Khubiram and accordingly it continued to be khudkasht of the respondent who is a successor-in-title of Khubiram. No doubt, this land, though the khudkasht of the respondent, was wrongly recorded as occupancy land of the appellant. But an erroneous recording of a khudkasht land as an occupancy land would not in law alter the real character of that land. Thus, despite the wrong entry, the land must be regarded as having always been the khudkasht of the respondent. If this Court affirms the decree of the two Courts below, the effect of its decision would not be to alter the character of the land and convert a land which is not khudkasht into a khudkasht land."

Interpreting the definition of 'home-farm' in the Act to include such land, which, though not recorded as khudkasht of the proprietor in the annual papers of 1948-49, ought to have been recorded as such, he held that the suit was not barred. This is not a correct view, for the reasons stated by us earlier.

As we are of opinion that the land in suit could not be the 'home-farm' of the respondent as it was not recorded as his khudkasht in the annual papers of 1948-49, the respondent's proprietary right of this land was lost and got vested in the State on the coming into force of the Act. On the other hand, we have also held that the appellant obtained a declaration of malik makbuza in his favour from the State, and thus has secured a right to possess it. In these circumstances, the decree sought to be executed by the respondent has become inexecutable and therefore the order under appeal deserves to be set aside. We accordingly allow the appeal and set aside the order of the Court below and allow the objection of the appellant to the execution of the decree and dismiss the execution application filed by the respondent.

In the circumstances of the case, we make no order as to costs.

Appeal allowed.

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