Bai Achhuba Amar Singh

Vs

Sri Kalidas Harnath Ojha and Others

Civil Appeal No. 397 of 1962

(K. Subba Rao, Raghuvar Dayal, J. R. Mudholkar JJ)

06.12.1963

JUDGMENT

MUDHOLKAR J. –

This is an appeal by special leave from the judgment of the High Court of Bombay allowing a writ application preferred before it by the first respondent and setting aside the order of the Bombay Revenue Tribunal which had upheld the order of the Prant Officer in a matter arising under the Bombay Tenancy and Agricultural Lands Act, 1948 (Bom. LXVII of 1948) hereafter referred to as the Act.

The appellant was admittedly the owner of Survey Nos. 231 and 260 of the village Duchakwada, Taluka Deodar, District Banaskantha in the State of Gujarat. Survey No. 231 was leased out to a tenant, Vira Pana, while Survey No. 260 had been reserved by her in the year 1950 for grazing cattle. Possibly other cattle in the village were also allowed to graze there because of paucity of grazing facilities therein.

The appellant is a jagirdar and evidently possesses considerable property. The respondent no. 1 was for some time her karbhari (manager of her estate). While he was occupying that position he obtained from her a sale deed on October 31, 1950, in respect of both these fields. According to the appellant she received no consideration for the transaction. However, that is not material. Shortly thereafter, the appellant made an application to the Mamlatdar, Deodar, for a declaration that the sale deed was invalid as being in contravention of ss. 63 and 64 of the Act. It would appear that at about the same time certain villages of Duchakwada made an application before the Collector, Banaskantha, under s. 84 of the Act for the summary eviction of the respondent no. 1 on the ground that the transaction was rendered void by virtue of the provisions of ss. 63 and 64 of the Act and also seeking the reservation of Survey No. 260 for grazing purposes. If seems that the appellant's application also went before the Collector, inasmuch as the order he made dealt with the appellant's contention also. It ran thus :

> "Taking into consideration all the circumstances it is hereby ordered that the sale made by Shrimati Achhuba in respect of two fields Vidvalu and Vaghdelavalu should be treated as void under section 64(3) of the Bombay Tenancy and Agricultural Lands Act and the village records corrected accordingly. Shrimati Achhuba should be persuaded to set apart these two fields as grazing area for the grazing of village cattle of Dudhakwada in order to maintain the standard as fixed by the Government. If she agrees, the persons in the present occupation of the land should be evicted and the fields kept open for free grazing of village cattle".

An application for revision preferred by the respondent no. 1 before the Bombay Revenue Tribunal was dismissed by it. Thereupon he preferred a writ petition before the High Court. The High Court while it affirmed the order of the Revenue Tribunal, insofar as Survey No. 231 was concerned, remanded the matter to the Collector for deciding two points, one being whether the respondent no. 1 was an agriculturist and the other whether there was a tenant on the land and if it found that there was no tenant whether the Collector was justified in declaring the sale void under s. 63(1). When the matter went back to the Revenue Tribunal after remand it was contended on behalf of the respondent no. 1 that the Collector had no jurisdiction to declare the sale to be void without passing a consequential order under s. 84. The Tribunal held that since this point had not been raised at the earlier stages of the proceedings nor even before the High Court the point should not be allowed to be raised. The Tribunal further held that the respondent no. 1 was not an agriculturist. It also held that the Collector was justified in declaring the sale even of Survey No. 260 void. A second writ petition was preferred by the respondent no. 1 against this order; but it was dismissed by the High Court.

It will thus be seen that it had finally been held in the proceedings to which the respondent no. 1 was party that the entire transaction in his favour was void and that he was in unauthorised occupation not only of Survey No. 231 but also of Survey No. 260.

In the year 1956 the Act was extensively amended. The amendment came into force in August, 1956. One of the new provisions in the Act is s. 84-A. This provision reads thus :

> "Section 84A(1) : A transfer of any land in contravention of section 63 or 64 as it stood before the commencement of the Amending Act, 1955 made after the 28th day of December, 1948 (when the Bombay Tenancy and Agricultural Lands Act, 1948 came into force) and before the 15th day of June, 1955 shall not be declared to be invalid merely on the ground that such transfer was made in contravention of the said sections if the transferee pays to the State Government a penalty equal to one per cent of the consideration or Rs. 100, whichever is less :
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> Provided that, if such transfer is made by the landlord, in favour of the tenant in actual possession, the penalty leviable in respect thereof shall be on rupee :
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> Provided further that if any such transfer is made by the landlord in favour of any person other than the tenant in actual possession, and such transfer is made either after the unlawful eviction of such tenant, or results in the eviction of the tenant in actual possession, then such transfer shall not be deemed to be validated unless such tenant has failed to apply for the possession of the land under sub-section (1) of section 29 within two years from the date of his eviction from the land.
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> (2) On payment of such penalty, the Mamlatdar shall issue a certificate to the transferee that such transfer is not invalid.
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> (3) Where the transferee fails to pay the penalty referred to in sub-section (1) within such period as may be prescribed, the transfer shall be declared by the Mamlatdar to be invalid and thereupon the provisions of sub-sections (3) to (5) of section 84C shall apply."

Seeking to avail himself of this provision the respondent no. 1 made an application before the

Mamlatdar, Deodar for validation of the transfer in his favour. This application was granted by the Mamlatdar. Shortly after this happened the Collector of Banaskantha took up the matter suo motu in revision and set aside the order of the Mamlatdar. A revision application preferred against the order of the Collector was dismissed by the Revenue Tribunal. Thereafter the respondent no. 1 preferred a writ petition before the High Court which was thus his third writ petition. That petition having been allowed, the appellant has come up before this Court, as already stated, by special leave.

The High Court, in allowing the application came to the conclusion that the previous adjudication to the effect that the transaction upon which the respondent no. 1 relies is invalid, does not, in so far as Survey No. 260 is concerned, come in the way of applying the provisions of sub-s. (1) of s. 84A. The High Court observed that a transfer in contravention of ss. 63 and 64 becomes invalid by operation of law and has not to be declared to be such and, therefore, the mere fact the Collector has declared a transfer to be invalid because it contravenes either of these sections would not render the new provisions inapplicable.

In coming to this conclusion the High Court has apparently overlooked the provisions of s. 84 and also the fact that it was under this provision that the appellant as well as the villagers had sought redress from the Collector, upon the ground that the sale deed on which the respondent based his claim to possession of the fields was in contravention of the provisions of ss. 63 and 64. We are no longer concerned with Survey No. 231 but are concerned only with Survey No. 260.

It is no doubt true that ss. 63 and 64 render certain transactions invalid. But where advantage is sought to be taken of the invalidity of a transaction on the ground that it contravenes ss. 63 and 64 and relief such as that awardable under s. 84 of the Act is sought, it becomes necessary for the Collector to adjudicate upon the dispute and decide whether the transaction is or is not rendered invalid by either of these provisions. It is because of this that the Collector did proceed to adjudicate upon the validity of the transaction.

It was contended before us that all that was before the Collector was an application made by certain residents of Duchakwada who had been deprived of their grazing rights over Survey No. 260. That is not correct because there is the admission of the respondent no. 1 himself in his writ petition before the High Court, dated February 17, 1959, that the villagers had sought the cancellation of the sale deed which comprised of the fields and that the appellant also had made an application for the cancellation of the sale deed in his favour. Even assuming that the appellant had not moved the Collector under s. 84 or that her application was not properly before the Collector, we may point out that for invoking the provisions of s. 84 of the Act it is not of the essence than an application must be made by the landlord alone. Upon the language of that provision any person interested can resort to the remedy provided therein and when its provisions are resorted to it becomes the bounden duty of the Collector to decide under cl. (a) thereof as to whether the person sought to be evicted is or is not in possession in pursuance of an invalid transfer.

It was next contended on the respondent's behalf that so far as Survey No. 260 is concerned the Collector had refused to pass an order of eviction and, therefore, the declaration as to invalidity of the sale of Survey No. 260 made by the Collector would be no bar to the applicability of s. 84A. This contention is also without any force. We have already quoted the portion of the order of the Collector in so far as it related to the prayer of the appellant for evicting the respondent no. 1 from Survey No. 260. It will be clear from it that the Collector did grant a conditional relief with respect to this field. For granting such a relief it was thus necessary for the Collector to adjudicate upon the validity or otherwise of the transfer. The Collector's order was affirmed by the Revenue Tribunal

and the writ petition in which the respondent challenged it before the High Court was dismissed. The whole question, including the validity of the Collector's order must, therefore, be regarded as having become final and conclusive between the parties. Even assuming that despite all that has happened, it is open to us to consider whether the order of the Collector declaring the sale transaction to be void was within his jurisdiction or not, we have little doubt that it was within his jurisdiction. No doubt, neither s. 63 or s. 64 nor even s. 84 speaks of making a formal declaration by the Collector that a transaction is void because it is in contravention either of s. 63 or s. 64 cannot be just ignored by the transferor. Some authority must determine whether in fact the transfer is in contravention of either of these provisions. The question of obtaining such a determination will arise where the transferor has lost possession. For obtaining possession of which the transferor was deprived in consequence of an invalid transfer the Act enables him to resort to the provisions of s. 84. Under that provision the Collector has to ascertain, as already stated, whether the transfer is in fact in contravention of s. 63 or s. 64. His finding in that regard is tantamount to a declaration that the transfer is invalid. We may point out that there is no provision in the Act which expressly provides for the making of a formal declaration by any Revenue Authority to the effect that a transfer in contravention of s. 63 or s. 64 is invalid. When the legislature provided in s. 84A that a transfer in contravention of either of the two sections what it meant was merely this that the transfer shall not be treated to be invalid even when it is found to be in contravention of s. 63 or s. 64 of the Act. This is precisely what the Collector these words they will be meaningless.

We are further of the view that the provisions of s. 84A are prospective in their application. A bare perusal of the provisions of s. 84A would show that what that section does is to impose an embargo upon the making of a declaration that a transfer is invalid on the ground that it was made in contravention of the provisions of ss. 63 and 64. Its operation is thus prospective in the sense that it bars making of any declaration or a finding that a transfer is invalid after it came into force. It does not affect any adjudication in which a transfer had already been held to be invalid. Thus it can possibly have no application to a case like the present wherein a declaration or a findinge as to invalidity had already been made by the Collector and was followed by an order of eviction, albeit conditional. The Mamlatdar, therefore, had no jurisdiction to issue the certificate in question to the respondent. That being the position we must hold that the High Court was in error in setting aside the order of the Revenue Tribunal upholding that of the Collector. We, therefore, set aside the order of the High Court and restore that of the Revenue Tribunal. Costs throughout will be borne by the respondent no. 1.

RAGHUBAR DAYAL J. –

I am of opinion that the appeal be dismissed.

The appellant, Jagirdar of village Duchakwada, sold two fields bearing Survey Nos. 231 and 260, to respondent no. 1, Kalidas Harnath Ojha, hereinafter called the respondent on October 28, 1950. On November 24, 1952 the Collector, District Banaskantha, passed an order, after an enquiry on applications, by certain persons of that village to the Government, to him and to the Deputy Collector, Tharad that the sale deed of the two plots was invalid in view of the provisions of ss. 63 and 64 of the Bombay Tenancy and Agricultural Lands Act, 1948 (Act LXVII of 1948), hereinafter called the Act. He ordered the eviction of the appellant from plot no. 231 as he found that one Harijan Vira Pana, one of the applicants, was the tenant of that plot. We are not now concerned with this order with respect to plot no. 231.

With regard to plot no. 260, the Collector ordered in view of the shortage of grazing land of cattle in

the village :

> "Shrimati Achhuba should be persuaded to set apart these two fields as grazing area for the grazing of village cattle of Duchakwada in order to maintain the standard as fixed by the Government. If she agrees, the persons in the present occupation of the land should be evicted and the fields kept open for free grazing of village cattle."

The Collector was wrong in mentioning the two fields in the above quoted order, as one of the fields in dispute before him was field No. 231 and about which he had earlier, in his order, directed the Prant Officer to restore that field to Harijan Vira Pana immediately.

The respondent's appeal against this order was dismissed by the Bombay Revenue Tribunal on October 27, 1955. The Revenue Tribunal treated the Collector's order to be an order under s. 84 of the Act. The respondent then approached the High Court of Bombay with Special Civil Application no. 2817 of 1955. The High Court allowed the application on July 2, 1956 with respect to plot no. 260, set aside the order of the Revenue Tribunal and remanded the dispute about that plot to be decided by the Tribunal afresh, according to law. On remand, the Tribunal again dismissed the respondent's appeal on June 3, 1957. The respondent again went to the High Court by Special Civil Application No. 2220 of 1957. The High Court dismissed the petition on December 18, 1957.

In the meantime, on August 1, 1956 the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 (Act XIII of 1956) came into force. By this Act, s. 84A was added in the parent Act. This section reads :

> "(1) A transfer of any land in contravention of section 63 or 64 as it stood before the commencement of the Amending Act, 1955, made after the 28th day of December 1948 (when the Bombay Tenancy and Agricultural Lands Act, 1948, came into force) and before the 15th day of the June 1955 shall not be declared to be invalid merely on the ground that such transfer was made in contravention of the said sections if the transferee pays to the State Government a penalty equal to one per cent of the consideration or Rs. 100, whichever is less;
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> Provided that, if such transfer is made by the landlord, in favour of the tenant in actual possession, the penalty leviable in respect thereof shall be one rupee :
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> Provided further that if any such transfer is made by the landlord in favour of any person other than the tenant in actual possession, and such transfer is made either after the unlawful eviction of such tenant, or results in the eviction of the tenant in actual possession, then such transfer shall not be deemed to be validated unless such tenant has failed to apply for the possession of the land under sub-section (1) of section 29 within two years from the dated of his eviction from the land.
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> (2) On payment of such penalty, the Mamlatdar shall issue a certificate to the transferee that such transfer is not invalid.
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> (3) Where the transferee fails to pay the penalty referred to in sub-section (1) within such period as may be prescribed, the transfer shall be declared by the Mamlatdar to be invalid and thereupon the provisions of sub-sections (3) to (5) of section 84C shall apply."

The respondent took advantage of the provisions of this section, deposited Rs. 35 as fine on December 9, 1957 and the same by got the order of the Mamlatdar Tenancy Aval Karkun, recognizing the sale to him of plot no. 260 under the sale deed of 1950.

The Deputy Collector set aside the order of the Mamlatdar holding that s. 84A did not apply to the sale of plot no. 260 as that sale had been declared to be invalid by the Collector prior to the coming into force of s. 84A. The The respondent then went in revision against this order to the Bombay Revenue. Tribunal and was unsuccessful. He then filed Special Civil Application No. 302 and prayed for the quashing and the setting aside of the Tribunal's Order. The High Court set aside the order of the Tribunal holding that s. 84A applied to the sale of plot no. 260 to the appellant, that the sale was invalid by operation of law and required no declaration to that effect from the Collector and that there was nothing in s. 84-A which would justify excluding from the operation of that section transfers which had been declared invalid prior to the coming into force of that provision of law. The High Court restored the order of the Mamlatdar dated December 9, 1957 by which he had issued a certificate to the respondent that the transfer of plot no. 260 was not invalid. It is against this order that Bai Achhuba has preferred this appeal after obtaining special leave from this Court.

The appellant was a party to all the proceedings subsequent to the order of the Collector dated November 24, 1952. She did appear before the Collector during his enquiry. It was stated at the hearing of the appeal that she had also applied to the Collector. This was disputed by the respondent. The matter was considered to be of some importance in view of the respondent's contention that the previous orders on the application of the villagers operated as res judicata, and this Court ordered the appellant, on March 9, 1963 to file certifide copies of the various documents mentioned in that order. Those documents included the alleged application made to the Collector and an affidavit by the appellant showing that she was a party to the proceedings before the Collector. The appellant filed copies of certain orders of the various Court and a copy of the special Civil Application No. 2220 of 1957. She did not file a certified copy of the application said to have been presented by her to the Collector simultaneously with the other villagers. Nagarlal Dalpatram Vyas, describing himself as a Karbhari of the appellant, state in his affidavit

> "I personally went to the Mamlatdar of Deoda Prant Officer of Radhanpur, the Collector of Banaskantha, the Bombay Revenue Tribunal and the High Court of Gujarat, to obtain a certificate copy of the application made by the applicant herein to the Collector of Banaskantha, which resulted into his said order 24 November 1952, but I have been told that the record is not there any of those Courts and Authorities. I was told by the Collector of Banaskantha the record of the case had gone to the Bombay High Court. On inquiry it is found that the Gujarat High Court does not have it though in ordinary course it ought to have received it from Bombay High Court."

The respondent has filed a counter-affidavit stating that the appellant had not filed any petition or application before the Collector under s. 84 of the Act seeking his eviction. On this material, I am not satisfied that the appellant had applied to the Government or the Collector simultaneously with the other villagers on whose applications the Collector made an enquiry and passed the order of November 24, 1952. The Collector's order makes no mention of any application by the appellant and states that certain persons of village Duchakwada, among whom were agriculturists and tenants of Duchakwada Jagir, had made application praying that the sale deed be declared void and the village records corrected accordingly. None of the other orders of the Court makes any reference to the application by Bai Achhuba to the Collector, even though some of them definitely state about

her application to the Mamlatdar. The order of the Revenue Tribunal dated June 3, 1957 states :

> "The original proceedings started on an application made to the Collector of Banaskantha by some villagers of Duchakwada."

The High Court, in its order on Special Civil Application No. 2220 of 1957 referred to the application of Bai Achhuba to the Mamlatdar and then said :

> "It would appear that shortly before this application, an application had been made by certain villagers of the place and by the application the villagers claimed that the sale deed should be declared void and the village records should be corrected accordingly."

To my mind the following questions arise this case : (i) Whether any proceedings started on the application of the villagers for the setting aside the sale deed and the correction of the record, can be said to be proceedings under s. 84 of the Act. (ii) Whether the Collector, in such proceedings, can make a declaration, distinct from deciding or making a decision, about the invalidity of the sale deed or whether he can merely decide about the invalidity of the sale deed in order to form an opinion whether the person proceeded against was in possession of the land unauthorisedly or wrongfully and therefore should be evicted or not. (iii) Whether the order of the Collector, be it of declaration or of mere decision about the invalidity of the sale deed with respect to sale of plot no. 260, had become final before the coming into force of the provisions of s. 84A of the Act on August 1, 1956. (iv) If such order had become final, whether that affects the operation of s. 48A in this case.

On the first point it may be assumed that the proceedings before the Collector in 1952 were proceedings under s. 84 of the Act as had been treated by the Revenue Tribunal and the High Court in the various proceedings before them.

On the second point, I am of opinion that there is nothing in any provision of the Act which empowers the Collector to make a declaration about the sale deed to be invalid or void for contravening the provisions of ss. 63 and 64 of the Act. The High Court, in its order dated July 2, 1956 in Special Civil Application No. 2817 of 1955 said, in dealing with the matter about the plot No. 231 :

> "Again, in our view, an order passed by a Collector ordering summary eviction of a person who, in his view, is unauthorisedly occupying or is in wrongful occupation of the land does not decide finally any question of title and we agree with the view of the Tribunal that it is open to the petitioner Kalidas Oza to file a civil suit to establish his title in the Civil Court."

Again, in its order dated December 18, 1957 in Special Civil Application No. 2220 of 1957, the High Court said :

> "Mr. Barot argues that a Tenancy Court cannot give a declaration that a sale in contravention of either section 63 or section 64 is invalid. Mr. Barot would seem to be right. A tenancy Court is not competent to give a declaration. The power is the power of a Civil Court to give such declaration in conformity with the provisions of section 42 of the Specific Relief Act. But I do not agree with the contention of Mr. Barot that a Tenancy Court cannot decide the question as to whether section 63 or a

> breach of section 64 of the Act and it is precisely this question which the Collector as well as the Bombay Revenue Tribunal have decided."

It is clear therefore that though the Collector has necessarily, in certain proceedings under s. 84 of the Act, to record a finding that certain sale deed is invalid and consequently the person in possession, on its basis, is in unauthorised possession, he has no power to formally declare the sale deed to be invalid. Ordinarily it is for the Civil Court to make a formal declaration about the validity of a deed. It is only when any other Act specifically empowers a certain officer or Court to declare a certain deed invalid that Court or officer would have the power to make such a declaration. It follows that the Collector could not, in proceedings under s. 84 of the Act, make a declaration about a sale deed to be invalid. All what he decided by his order dated November 18, 1952 was that in view of the provisions of law the sale deed in favour of respondent no. 1 was invalid. The appellant must have realised that the decision of the Collector could not amount to the setting aside of the sale deed declaring it to be invalid and so she instituted a Civil Suit in 1953 for a declaration that the sale deed was null and void and for the recovery of possession over the properties included in the sale deed. This suit was dismissed under O.IX, r. 8 read with O.XVII, r. 2 of the Code of Civil Procedure.

The order of the Collector deciding that the sale deed was invalid had not even become final by the time s. 84A was introduced in the Act on August 1, 1956. On July 2, 1956 the High Court remanded the matter to the Revenue Tribunal for decision according to law. The Tribunal passed its order on June 3, 1957.

It follows therefore that apart from the consideration already mentioned that the Collector had no power to declare a sale deed invalid while dealing with a matter under s. 84 of the Act, that order had not become final by August 1, 1956 and that therefore the respondent could take advantage of the provisions of s. 84A. He could have his sale deed which was executed between December 28, 1948 and June 15, 1955 validated on payment of the requisite penalty under sub-s. (1) of s. 84A. This section empowers the Mamlatdar to issue the certificate of validity and by sub-s. (3) provides that the Mamlatdar would declare the transfer to be invalid in case the transferee failed to pay the penalty. The provisions of s. 84A brought the matter of validity or invalidity of a transfer deed within the jurisdiction of the Mamlatdar. It was in the exercise of this jurisdiction that the Mamlatdar issued a notice on October 7, 1957 to the respondent for paying the penalty of Rs. 100 calculated at the rate of 5% on the consideration of the sale deed. On December 9, 1957 the Mamlatdar issued the necessary certificate validating the sale deed on the respondent's paying Rs. 35. I consider the certificate to be good in law.

It is not necessary to express an opinion in this case whether the Mamlatdar could certify a transfer to be valid in case it had been legally declared invalid by a competent Court previously.

I am therefore of opinion that the order of the High Court under appeal is correct and that this appeal be dismissed.

ORDER

In view of the judgment of the majority, the Order of the High Court is set aside and that of the Revenue Tribunal restored. The costs throughout will be borne by Respondent No. 1.

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