

Mithlesh Kumari and Another

Vs

Fateh Bahadur Singh and Another

Civil Appeal No. 2597 of 1983

(K. N. Saikia, M. M. Punchhi JJ)

22.02.1991

JUDGMENT

SAIKIA, J. –

1. This appeal is from the judgment of the Allahabad High Court dated October 27, 1980 in Second Appeal No. 567 of 1973 allowing the appeal and decreeing the suit of respondent 1 for specific performance of contract dated April 5, 1966, wherein it was stipulated that defendant 1 (respondent 2) had executed a fictitious sale deed dated September 2, 1966 for Rs. 1000 in favour of defendant 2 Kalawati, in respect of half of the suit chak and another sale deed dated December 21, 1966 for Rs. 2000 in favour of defendant 3 Mithlesh Kumari. Accordingly the plaintiff (respondent 1) prayed for directing the defendants 2 and 3 (appellants herein) to execute the required sale deed in case it was not possible for the court to get it executed by defendant 1.

2. Respondent 1 Fateh Bahadur sued respondent 2 Jang Bahadur and the appellants in O.S. No. 278 of 1970, for specific performance of his contract whereunder respondent 2 Jang Bahadur had agreed to sell his Chak No. 249 admeasuring 10 bighas, 12 biswas and 10 biswansis to respondent 1 for Rs. 5000 out of which Rs. 4000 were paid and the balance Rs. 1000 to be paid within 5 years whereafter respondent 2 Jang Bahadur was to execute a sale deed in favour of respondent 1 Fateh Bahadur. The Court of Munsif, Fatehpur decreed the suit only for recovery of Rs. 4850 plus pendente lite and future interest on Rs. 4000. Fateh Bahadur's appeal therefrom having been dismissed by the Civil Judge he preferred Second Appeal No. 567 of 1973 in the High Court of Judicature at Allahabad, contending that the transfers in favour of defendants 2 and 3, the appellants herein, by Jang Bahadur were in contravention of the provisions of Section 168-A of the U. P. Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act 1 of 1951) hereinafter referred to as 'the Act', and thus were void and that the view taken by the lower court that the title of Jang Bahadur came to an end since void transfers were made in favour of appellants Kalawati and Mithlesh Kumari, and thus, Jang Bahadur was no longer the holder of any title which could be conveyed to Fateh Bahadur was erroneous in law. Reliance was placed on a decision of the High Court in Parmanand v. Board of Revenue, U.P. Allahabad (1966 All LJ 963). The defendants 2 and 3 who are appellants herein, contended that the two transfers made by Jang Bahadur in their favour were not hit by the provisions of Section 168-A of the Act inasmuch as the transfers were of a portion of the shares of Jang Bahadur in the plot in dispute. It was urged that for a transfer being hit by provisions of Section 168-A of the Act the same should be in respect of a specific piece of land and not a share in a holding. Reliance was placed on a decision of the same High Court in Bibhuti v. Kashi Ram (1977 AWC 491).

3. It is was not disputed that the area of land transferred under the two sale deeds in favour of appellants Kalawati and Mithlesh Kumari amounted to fragments under the Act. The High Court

considered the question as to whether a transfer which had been made not of the entire share of a tenure-holder in a holding but of a fragment would be hit by the provisions of Section 168-A of the Act and took the view that the two transfers made in favour of Kalawati and Mithlesh Kumari were clearly hit by the provisions of Section 168-A of the Act in view of the provisions of sub-clause (2) of that section and that the benefit of Section 43 of the Transfer of Property Act could be availed by Kalawati and Mithlesh Kumari only if the sale deeds executed in their favour could be looked into and as those sale deeds were void in the eye of law it would be presumed as if no legal transfer took place in their favour and there being no legal transfer no question of applicability of Section 43 of the Transfer of Property Act arose. As Jang Bahadur executed the agreement of sale in favour of Fateh Bahadur and as the sale deeds in favour of Kalawati and Mithlesh Kumari were held to have been void, Fateh Bahadur, according to the High Court, was entitled to a decree of specific performance against Kalawati and Mithlesh Kumari on payment of Rs. 1000 within a period of 2 months from the date of receipt of the record in the trial court failing which the court would execute the sale deed in favour of the plaintiff. The appeal was accordingly allowed and the suit decreed as above.

4. Mr. K. V. Vishwanathan, the learned counsel for the appellants submits that the sale made by Jang Bahadur to appellant 2 Kalawati on September 2, 1966 being hit by the provisions of Section 168-A of the Act the subject matter of transfer i.e. 5 bighas, 6 biswas and 5 biswansis of Plot No. 249 in village Kichakpur got vested in the government and the interest of Jang Bahadur in that part of the holding stood extinguished on the date of transfer i.e. September 2, 1966; that the sale made to Kalawati being void, Jang Bahadur was left only with 5 bighas, 6 biswas and 5 biswansis in Plot No. 249 of village Kichakpur. Jang Bahadur having transferred that whole or entire portion to appellant 1 Mithlesh Kumari by sale deed dated December 21, 1966, such transfer being transfer of the whole area of the Bhumidhar it would be covered by the proviso under Section 168-A and as such, the sale would not be hit by the provisions of Section 168-A; that Sections 168-A; that Sections 166, 167, 168, 168-A and 189(aa) form a scheme and if the sale is hit by the provision of Section 168-A, the result would be that on the date of sale, the interest of the vendor in the subject matter of sale would stand extinguished under Section 189(aa) and hence Section 189(aa) is the provision which extinguishes the right of the vendor in that part of the holding which he contracted to sell in violation of Section 168-A; and that the interest of the transferee would stand extinguished under Sections 167 and 168 when the Gaon Sabha or the landholder ejects the transferee from the premises. According to counsel, harmoniously construing Sections 168 and 189(aa), it would be amply clear that while Section 189 (aa) extinguishes the interest of the vendor on that part of the property which he contracted to sell in violation of Section 168-A on the date of transfer itself, the interest of the transferee would be extinguished on ejection from the suit premises; and the High Court erred in directing the appellants to specifically execute the sale deed in favour of respondent 1.

5. Ms. Rachna Gupta, the learned counsel for respondent 1, submits that as the sale deeds in favour of the two appellants have been held to be void the High Court rightly decreed the suit for specific performance against them on payment of the balance of Rs. 1000; and that he having been in possession of the land and respondent 2's fragmented sales having been found to be void, even if the land would vest in the State, respondent 1 would not be divested automatically and the State has to seek possession in accordance with the law.

6. The only question that falls for determination is what would be the effect of the two fragmented sales in favour of the appellants. In other words, whether as a result of the two sales the entire holding of the bhumidhar Jang Bahadur would vest in the State or only the half in the first sale

would vest in the State and the remaining half would thereafter constitute the whole in the hand of the bhumidhar Jang Bahadur and the second sale being of the whole of his remnant holding would be valid so as to convey and transfer right to the vendee Mithlesh Kumari.

7. There is no dispute that the land of 10 bighas, 12 biswas and 10 biswansis was itself a fragment as defined in clause 8(a) of Section 3 of the Act being less than 3.125 acres. There is also no dispute that the suit land is in a consolidated area and that the appellants were not tenureholders. It would, therefore, follow that the two halves sold to the appellants were fragments of a fragment.

8. The Act was passed as it was considered expedient to provide for the abolition of the Zamindari system which involved intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land tenure consequent upon such abolition and acquisition and to make provision for other matters connected therewith. The original Act did not define fragment. The definition of 'fragment' was added by Section 2 of the U.P. Act 18 of the 1956 with a view to prevent fragmentation and promote consolidation of holdings in order to avoid uneconomic units. Sections 152 to 175 of the Act dealt with transfer. Section 152 provided :

"152. Bhumidhari interest when transferable. - (1) The interest of a bhumidhar with transferable rights shall subject to the conditions hereinafter contained, be transferable.

(2) Except otherwise expressly permitted by this Act or any other law for the time being in force, the interest of a bhumidhar with non-transferable rights shall not be transferable.

(3) A bhumidhar referred to in sub-section (2) may, in such circumstances as may be prescribed, mortgage, without possession his interest in his holding, as security for a loan taken from the State Government by way of taqavi, or from a cooperative society or from the State Bank of India, or from any other bank, which is a Scheduled bank within the meaning of clause (e) of Section 2 of the Reserve Bank of India Act, 1934, or from the Uttar Pradesh State, Agro-Industrial Corporation Limited, and may also transfer, by way of gift, the interest in his holding, except the part thereof which has been so mortgaged, to a recognised educational institution for any purpose connected with instructions in agriculture, horticulture and animal husbandry."

9. The interests of sirdar or asami were originally not transferable as Section 153 said : "Except as expressly permitted by this Act, the interest of a sirdar and asami shall not be transferable." Sections 154 to 170 dealt with transfer of land by bhumidhar. Section 166 originally provided that any transfer made by or on behalf of a sirdar or asami in contravention of the provisions of that chapter was to be void. Section 166 has undergone amendments. The section was substituted by the present section by U.P. Act 20 of 1982 with effect from June 3, 1981. The present section says : "Every transfer made in contravention of the provisions of this Act shall be void." What was the position in 1966 on the dates of the instant sales has to be known and correctly applied. Section 167 earlier provided for the consequences of void transfers in the following language :

"167. Consequences of void transfers. - (1) Where a sirdar or asami has made any transfer in contravention of the provisions of this Act, the transferee and every

person who may have thus obtained possession of the whole or part of the holding shall be liable to ejection on the suit of the Gaon Sabha or the landholder, as the case may be.

(2) A decree for ejection under sub-section (1) may direct the ejection of the sirdar or asami from the whole or part of the holding as the court may, having regard to the circumstances of the case, direct."

This section was also substituted by the same Act 20 of 1982 with effect from June 3, 1981. Section 167 now says :

"167. (1) The following consequences shall ensue in respect of every transfer which is void by virtue of Section 166, namely -

(a) the subject matter of transfer shall with effect from the date of transfer, be deemed to have vested in the State Government free from all encumbrances;

(b) the trees, crops and wells existing on the land on the date of transfer shall, effect from the said date, be deemed to have vested in the State Government free from all encumbrances;

(c) the transferee may remove other movable property or the materials of any immovable property existing on such land on the date of transfer within such time as may be prescribed.

(2) Where any land or other property has vested in the State Government under sub-section (1), it shall be lawful for the Collector to take over possession over such land or other property and to direct that any person occupying such land or property be evicted therefrom. For the purposes of taking over such possession or evicting such unauthorised occupants, the Collector may use or cause to be used such force as may be necessary."

10. The position before the amendment has not been shown to us to enable us to apply the relevant law to the facts of the case. Section 168 which dealt with consequences of ejection under Section 167 has been omitted by U.P. Act 8 of 1977 with effect from January 28, 1977. What was the provision in 1966 is not clear to us. We are told that the section stood as follows in 1966 :

"168. Consequences of ejection under Section 167. - Upon ejection in a suit under Section 167 all the rights and interest of the sirdar or asami in the holding (or part thereof) or in any improvements made therein or to get compensation for such improvements shall be extinguished."

But we have not been shown the enactment.

11. Section 168-A was added by Section 9 of U.P. Act 18 of 1956, subject to the saving contained in Section 23 thereof. This section now says :

"168-A. Transfer of fragments. - Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of

tenure-holder who has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred.

(2) The transfer of any land contrary to the provisions of sub-section (1) shall be void.

(3) When a bhumidhar has made any transfer in contravention of the provisions of sub-section (1) the provisions of Section 167 shall mutatis mutandis apply."

Section 168-A has undergone amendment by Section 2 of U.P. Act 28 of 1961 when for the words "whole of the plot to which the fragment pertains is hereby transferred", the present words "the whole or so much of the plot in which the person has bhumidhari rights which pertains to the fragment is hereby transferred" were substituted. This amendment would not affect the instant case. Some words between '167' and 'shall' were omitted by U.P. Act 13 of 1977, with effect from January 28, 1977. It may be necessary to know what those were. Sub-section (1) of Section 168-A begins with a non-obstante clause and it overrides the provisions of any law for the time being in force. The expression 'no person' would include the bhumidhar. The object of the section is to prevent fragmentation of land situated in a consolidated area and transfers that would result in fragmentation or further fragmentation shall be void and to such transfers Section 167 will mutatis mutandis be applicable. This section comes into play only when a fragment situated in a consolidated area is transferred. If transfer of a fragment is made in favour of tenure-holder who has a plot contiguous to the fragment, the purpose of law is not defeated inasmuch as it will be consolidated with the contiguous plot of the transferee. When the land held by a person in a consolidated area is already a fragment then as was provided previous to the amendment in 1961 the whole of the plot to which the fragment pertained was to be transferred. After the amendment, the invalidity and applicability of Section 167 is limited to a case where the transfer is not in favour of any such tenure-holder and to the whole or so much of the plot in which the person has bhumidhari rights which pertains to the fragment is thereby transferred. If the transferor had bhumidhari rights on the whole of the whole of the fragment the whole has to be transferred. If the person has bhumidhari rights only in a part of the plot that part on which he has bhumidhari rights can be transferred. The part on which the person has not bhumidhari rights is not covered by the provisions not because that would not result in further fragmentation but because he had transferable bhumidhari rights only on that portion and not on the other portion. There is no doubt that under sub-section (2) transfer of any land contrary to the provisions of sub-section (1) shall be void and under sub-section (3) the provisions of Section 167 shall mutatis mutandis apply.

12. Section 189 deals with extinction of the interest of a bhumidhar with transferable rights and Section 190 deals with extinction of the interest of a bhumidhar with non-transferable rights. Section 189 earlier provided :

"189. Extinction of the interest of a bhumidhar. - The interest of a bhumidhar in his holding or any part thereof shall be extinguished -

(a) when he dies intestate leaving no heir entitled to inherit in accordance with the provisions of this Act;

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(b) when the land comprised in the holding has been acquired under any law for the time being in force relating to the acquisition of land, or

(c) when he has been deprived of possession and his right to recover possession is barred by limitation."

The words "bhumidhar with transferable rights" were substituted in the first sentence by U.P. Act 8 of 1977 with effect from January 28, 1977. Clause (aa) was added by Section 50 of U.P. Act 37 of 1958, so that the amended section now reads :

"189. Extinction of the interest of a bhumidhar with transferable rights. - The interest of a bhumidhar with transferable rights in his holding or any part thereof shall be extinguished -

(a) when he dies intestate leaving no heir entitled to inherit in accordance with the provisions of this Act;

(aa) when the holding or part thereof has been transferred or let out in contravention of the provisions of this Act;

(b) when the land comprised in the holding has been acquired under any law for the time being in force relating to the acquisition of land; or

(c) when he has been deprived of possession and his right to recover possession is barred by limitation."

The substitution of the words "bhumidhar with transferable rights" for the word "bhumidhar" would not make any difference when the bhumidhar had transferable rights but would make a difference where the bhumidhar had also lands with non-transferable rights. Thus, under the amended provisions the interest of a bhumidhar with transferable rights in his holding or in part thereof shall be extinguished when the holding or part thereof with bhumidhari rights has been transferred or let out in contravention of the provisions of the Act. In other words when he had bhumidhari rights on the entire holding and the same is transferred or let out in contravention of the provisions of the Act his interest shall be extinguished. If he had bhumidhar right only on a part thereof and it has been transferred or let out in contravention of the provisions of the Act his interest in bhumidhari right in that part shall be extinguished. The reason behind the provisions to make fragmentation is the need to prevent further fragmentation if the bhumidhar with his bhumidhari rights over a fragment tries to transfer the fragment, his right over the fragment is extinguished. Will the same be the result if instead of transferring the entire fragment he transfers a fragment of a fragment ? If only a fragment of a fragment is so transferred would the whole fragment be vested in State ?

13. Applying the law to the facts of the case in hand we find that the bhumidhar Jang Bahadur's land admeasuring 10 bighas, 12 biswas and 10 biswansis was itself admittedly a fragment. Jang Bahadur entered into an agreement to sell the land on April 5, 1966 and respondent 1 Fateh Bahadur on payment of advance of Rs. 4000 is stated to have had possession of the land. That sale would attract the provisions of Section 168-A if it resulted in transfer of the fragment. The sales to the appellants Kalawati defendant 2 was dated September 2, 1966 and to Mithlesh Kumari defendant 3 was dated December 21, 1966. These two sales would be covered by the old provisions of Sections 166 and 167, which sections did not deal with the case of bhumidhar but only by sirdar or asami. But Section 168-A would be attracted and the provisions of Section 167 would mutatis mutandis be applicable.

14. The High Court did not examine the facts of the case in light of the laws prevailing at the time of the sales. If the sales were in contravention of the provisions of law so as to entail invalidity of the sale and vesting of the land sold in the State, the question whether in such a case specific performance of the contract would be justified or not would also be germane. While holding both the sales to the appellants to have been void, the High Court did not take into consideration the exception as to transfer of "the whole or so much of the plot in which the person has bhumidhari rights". The High Court also failed to notice and apply clause (aa) of Section 189 which was added by Section 50 of U.P. Act 37 of 1958 and was applicable to the case.

15. *Festinatio justitiae est noverea informateeni.* (Hob. 97) Hasty justice is stepmother of misfortune. *Injustum est nisi tota lege inspecta, de una aliqua ejus particula proposita judicare vel respondere.* It is unjust to decide or respond to any particular part of a law without examining the whole of the law. But we are in time constraint. By consensus with the learned counsel for the parties, we set aside the impugned order and remand this case to the High Court for disposal in accordance with the law applicable to the facts of the case expeditiously. The appeal is disposed of accordingly. We leave the parties to bear their own costs.

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