Salehbhai Mulla Mohamadali (dead) by L.Rs.

Vs

State of Gujarat and others

Civil Appeal No. 1865 of 1975

(B. C. Ray, N. M. Kasliwal JJ)

25.10.1991

JUDGEMENT

KASLIWAL, J.:-

1.This appeal by Special leave is directed against the judgment of the High Court of Gujarat dated 7/ 10th February, 1975.

2. The plaintiffs Nos. 2 to 4 were Dumaldars of village Nalej of erstwhile State of Chhota Udepur (hereinafter referred to as the Jagirdars). The Jagirdars vide exhibit 58 dated 9-1-1954 sold all the teak trees in favour of plaintiff No.1 (hereinafter referred to as the contractor) for a sum of Rs. 6,001/- and received a sum of Rs. 101/- as earnest money. By another agreement exhibit 59 dated 29th July, 1954, the Jagirdars sold all the Mahuda trees in favour of the contractor for a sum of Rs. 5001/ - and received a sum of Rs. 600/- as earnest money. On 1st August, 1954 Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953 (hereinafter referred to as the 'Jagir Abolition Act') was applied to village Nalej. The compensation in lieu of trees was not awarded to the Jagirdars as the same had already been sold by the Jagirdars in favour of the contractor. The contractor made an application to the Collector of Baroda under Sourashtra Felling of Trees Act for permission to cut the trees in question. The Collector forwarded the application to the Mamlatdar of Chhota Udepur who granted the permission vide order dated 25th September, 1961. The contractor then started cutting the trees in question. However, the Prant Officer, Chhota Udepur prevented the contractor from cutting the trees. The contractor then made representations to the Divisional Forest Officer and the Government. In reply the contractor was told that the Jagirdar had no right to the trees standing in the reserved forest area and in the waste land. Thereupon the contractor's authorisation to cut the trees and his transit passes to transport the goods were withheld. The Government invited tenders for the sale of the trees already cut and sold the same on 30th July, 1962 for a spin of Rs. 15786/-.The Government also sold other trees to other persons and realised from them some amounts. The Jagirdars and the contractor filed a suit against the Government of Gujarat and the Divisional Forest Officer, Chhota Udepur, District Baroda for rendition of account, for a declaration of the plaintiffs' title to the trees in question and for a declaration of the right of the contractor to cut the trees in question and to remove the cut materials.

2A. A declaration was also sought that the impugned action of the Government was illegal, ultra vires and unlawful and to give a direction to the Government to issue the necessary authorisation and transit passes for cutting and removing the trees in question in favour of the contractor. It was also prayed that out of the sale proceeds of the cut materials on 30th July, 1962 for Rs. 15786/- an amount of Rs. 1267.82 having paid by the Divisional Forest Officer, a decree for the balance of Rs.

14518.18 may be passed against the Government.

3. The Trial Court by judgment dated 31st March, 1967 partly decreed the suit. It was declared that the Jagirdars were the full owners of the trees and as such the contractor had also become the full owner of the trees. It was also declared that the contractor was entitled to cut and remove these trees and the State of Gujarat, its officers, servants and agents were ordered to issue necessary permit, authorisation and transit passes to plaintiff No. 1 (contractor) for removal of the trees. The State was also ordered to pay Rs. 14518.18 together with proportionate costs and interest at 4% per annum on this amount from the date of decree till realisation. The State of Gujarat, its officers, servants and agents were also restrained by perpetual injunction not to interfere with the rights of ownership of the plaintiffs except in due course of law. Prayer for rendition of accounts was dismissed.

4. The State of Gujarat, aggrieved by the judgment and decree of the trial Court filed an appeal in the High Court. The Division Bench of the High Court allowed the appeal, set aside the decree passed by the trial Court and dismissed the suit. The cross-objections filed by the plaintiffs were also dismissed.

5. It would be necessary to state some events which have a material bearing with the case. The Jagir Abolition Act came into force on 1-8-54 as already mentioned above. The Government issued a Notification dated 15th February, 1955 under Sec. 4 of the Forest Act, 1927 and constituted certain survey numbers of the village Nalej into a reserve forest. Thereafter another Notification was issued under Section 20 of the Forest Act constituting Survey No. 102 alone into a reserve forest. It may be noted that in the present case we are concerned with the Teak and Mahuda trees standing on survey No. 102 of village Nalej. Learned counsel appearing on behalf of the State of Gujarat had raised the following contentions before the High Court:

> 1. Under the Forest Rules of Chhota Udepur State Chhota Udepur State had exercised rights over three kinds of forest-reserved, protected and open. These rights devolved upon the State of Gujarat. Therefore, the State of Gujarat can exercise those rights and issue under Section 4 of the Forest Act, 1927 the impugned notification.
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> 2. Under the Forest Rules of Chhota Udepur State 21 kinds of trees including teak and Mahuda trees were reserved trees and they were prohibited from being cut. The interest which Chhota Udepur State had in those trees devolved upon the State of Gujarat and, therefore, under Section 4 of the Forest Act, 1927 it was within the power and authority of the State of Gujarat to issue the impugned notification.
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> 3. Under Section 5 of the Jagir Abolition Act the soil vested in the Jagirdars and not the trees. Therefore, the Jagirdars could not have sold away to the contractor the trees in question. Since the trees in question had vested in the State; it was within the power and authority of the State to issue the impugned notification.
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> 4. The agreement executed by the Jagirdars in favour of the contractor were not valid and, therefore, not enforceable at law. They did not confer any title upon the contractor. Alternatively, if the contractor had acquired any rights under the said agreements, his remedy lay in claiming compensation in respect of his rights which were hit by the impugned notification.

6. The High Court dealt with the above four contentions in seriatim. While dealing with the first

contention the High Court considered that the decision of the appeal largely turned upon the Forest Rules of Chhota Udepur State. The High Court after considering the matter in detail held that survey No. 102 of village Nalej was a reserved forest during the days of Chhota Udepur State. The High Court referred to the forest Rules of Chhota Udepur State in order to find out the position in relation to survey No. 102 of Nalej. Schedule 'A' of the Rules contained the detailed description of areas which was declared as, reserved forest. At Serial No. 11 Village Nalej has been mentioned amongst other villages. Columns 7 and 8 showed that an area of 290 acres and 14 gunthas of village Nalej was declared as reserved forest. No survey number of that area had been mentioned therein. According to the High Court this Entry in Schedule 'A' lends support to the fact that there was one reserved forest admeasuring 290 acres and 14 gunthas in village Nalej of Chhota Udepur State. Survey No. 102 of Village Nalej as a reserved forest was not mentioned but this was on account of the reason that Chhota Udepur State made its Forest Rules in 1934 which were published in 1938 when the reserved forest area of village Nalej did not bear any survey number. However, it was mentioned in the Rules that there was one reserved forest in village Nalej to the extent of 290 acres and 14 Gunthas. The plaintiffs themselves admitted in agreement exhibit 59 that survey No. 102 was a reserved forest. It was then held that in respect of a reserved forest Jagirdars did not have the right to cultivate any land nor to cut any trees. The only right he had was a right to graze cattle and to remove some forest produce in accordance with Regulations made by Chhota Udepur State in that behalf. The Jagirdar did not have any right to any trees situated in a reserved forest. With the merger of Chhota Udepur State with the then State of Bombay the property belonging to Chhota Udepur State in the reserved forest devolved upon the State of Bombay and subsequently upon the State of Gujarat. The High Court thus accepted the first contention raised on behalf of the State of Gujarat.

7. The High Court then considered the second contention and in this regard observed that Rule 4 of the Forest Rules of Chhota Udepur State contained the list of reserved trees. 21 kinds of trees had been listed as reserved trees which included the Teak and Mahuda trees which formed the subject-matter of the two transactions between the Jagirdars and the contractor. The High Court then held that the right to forest produce which Chhota Udepur State had in respect of such trees in the "open forest" devolved upon the State of Bombay, on merger of Chhota Udepur State with it and thereafter upon the State of Gujarat. It was thus held that the second contention raised on behalf of the State was right and the same was upheld.

8. The High Court found no substance in the third contention and rejected the same. However, the High Court observed that in the light of the finding recorded on the second contention it was quite clear that the trees which vested in the Jagirdars vested in them subject to such right or interest in them which the State had under the Forest Rules of Chhota Udepur State.

9. In the 4th and last contention challenging the validity of the two agreements Exhibits 58 and 59, the High Court observed that there are two aspects of this contention. The first aspect is that agreements Exhibits 58 and 59 were compulsorily registrable and that since they were not registered, they did not convey any title to the contractor in respect of the subject-matter of the agreements. The High Court in this regard held that what was transferred was the standing timber and not any interest in soil. Therefore, the two agreements were not compulsorily registrable. The High Court then considered the second aspect of the 4th contention. It was argued on behalf of the State that all the survey numbers to which agreements Exhibits 58 and 59 related were waste lands and as such under Section 8 of the Jagir Abolition Act they vested in the State. The High Court in this regard held that forest lands are not waste lands. Therefore, they have not vested by virtue of the provisions of Section 8 of the Jagir Abolition Act in the State of Gujarat. The High Court in view of the findings recorded above on the first and second contentions in favour of the State,

allowed the appeal and dismissed the suit filed by the plaintiffs.

10. Learned counsel for the plaintiffs appellants raised altogether new line of argument before us. It was submitted that the appellants did not challenge the existence or the legality of the Chhota Udepur Forest Rules but their submission was that the said Rules did not apply to the facts and circumstances of this case. It has been contended that the aforesaid Forest Rules, together with all other laws of Chhota Udepur State, stood repealed on 28-7-48 when the States (Application of Laws) Order 1948 came into force. On and from 28-7-1948 the Forest Act, and the Rules made thereunder became applicable. The two agreements were made on 9-1-1954 and 29-7-1954 long after the Chhota Udepur Forest Rules were repealed and before the issuance of the Notification by the Government dated 12-5-55 declaring its intention to make a part of survey No. 102 of Nalej as reserved forest under Sec. 4 of the Forest Act. It has thus been submitted that so far as the impugned contracts are concerned the same are not adversely affected either by the Forest Rules of Chhota Udepur State or by the Notification issued under Section 4 of the Forest Act. It has been contended that the High Court was wrong in holding that the impugned contracts dated 9-1-1954 and 29-7-1954 could not pass any right on the contractor as the same were hit by the provisions of Chhota Udepur State Forest Rules, when in fact those forests Rules had already been repealed.

11. It was also argued that the High Court's decision about reserved forests is based on surmises and so called admission in the contract Exhibit 59. The words used in the plaint are "alleged jungle bhag" which does not amount to an admission that it is a reserved forest. In the agreement Exhibit 59 the words used are "So-called reserved forest" and subsequently in the same agreement the words used are "reserved Padtar (vacant)". It has thus been submitted that the earlier use of words 'so-called' is not repeated subsequently and as such it means that the plaintiffs had denied the same to be reserved forest. As regards Entry No. 11 in the Schedule to the Forest Rules of Chhota Udepur State, the High Court itself has observed that no survey number is mentioned. This itself goes to prove that survey No. 102 was not intended to be covered by the said Entry No. 11. Thus it was not proved that survey No. 102 was a reserved forest. It was further argued that assuming that survey No. 102 in village Nalej was a reserved forest under the Forest Rules of Chhota Udepur State, it ceased to be so from 28-7-48. It is an admitted position that the Notification under Section 4 of the Forest Act was published on 12-5-55 and in case survey No. 102 of village Nalej was already continuing as reserved forest under the Forest Rules of Chhota Udepur State, then there was no necessity at all of issuing a fresh Notification under Section 4 of the Forest Act. The fact that such Notification was issued on 12th May, 1955 clearly goes to show that survey No. 102 did not constitute reserved forest in between the period 28-7-48 to 12-5-55.

We do not find any force in the above submission made on behalf of the appellants. So far as the legality of the Chhota Udepur State's Forest Rules is concerned, it was nowhere challenged by the plaintiffs. In the written submissions filed before us on behalf of the appellants the point made at 1.1 itself reads as under:

> "The appellants do not challenge the existence or the legality of the Chhota Udepur Forest Rules (hereinafter the Forest Rules). The appellants merely submit that those Rules do not apply to the facts and circumstances of this case."

12. Apart from the above stand taken by the appellants themselves, judgment of the High Court of Gujarat in Special Civil Application No. 404/ 61, State of Gujarat v. Kumar Shri Ranjit Singhji Bhavani Singhji, Sri C. M. Thakur Jagir Abolition Officer, Baroda and others decided on 22nd April, 1965 has been placed on record by the learned counsel for the appellants. In the aforesaid

judgment Shelat, C. J., and Bhagwati, J. (as he then was) have observed that in 1934, the State of Chhota Udepur promulgated amended Forest Rules under Notification of August 1, 1934. The Notification was issued under the signature of the Ruler himself. These Rules, therefore, became and constituted the law of the State.

13. The High Court in the impugned order before us has also placed reliance on such Rules. The High Court has rightly held that at serial No. 11 an area of 290 acres and 14 gunthas of village Nalej was declared as reserved forest. No survey number on that area could have been mentioned because the reserved forest area of village Nalej did not bear any survey number at that time. However, it cannot be disputed that there was one reserved forest in village Nalej admeasuring 290 acres and 14 gunthas and the plaintiffs themselves have admitted in the plaint that the trees in question were in the alleged jungle bhag. In the agreement exhibit 59 also the words used are "so called reserved forest". Thus apart from the above admissions, the entire case has been, contested in the trial Court as well as in the High Court on the assumption that the trees in question were standing on the area: of reserved forest declared by the Chhota Udepur State. In case the plaintiffs wanted to show that the trees in question were not inside the reserved forest area they should have taken such stand in a clear manner and it would have been very easy for them to succeed in the suit without going through all the various legal submissions made by the parties. Thus we see no reason to take a different view from the High Court and we affirm the finding of the High Court in this regard that the trees in question stood on the area which was declared as reserved forest under the Forest Rules framed by the Chhota Udepur State.

14. In order to appreciate the other submission made by the learned counsel for the appellants we would refer to the Indian States (Application of Laws) Order, 1948 (hereinafter referred to as 'Application of Laws Order', 1948). It would be necessary to reproduce Section 5 which repeals the enactments in force in Indian States.

> Section 5:- Repeal of enactments in force in Indian States:-- All enactments in force in the Province of Bombay and extended to any such State under paragraph 3 shall stand repealed :

Provided that the appeal by this Order of any such enactments shall not affect the validity, invalidity, effect or consequence of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, of any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing;

Nor shall the repeal by this order of any enactment affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, in so far as the same respectively is not in any way inconsistent with any of the enactments extended under paragraph 3 of this order, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;

Nor shall the repeal by this order of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force immediately before the date on which this order comes into force.

15. There is no doubt that Chhota Udepur State, has been mentioned in Schedule I of the

Application of Laws Order and all enactments in force in Chhota Udepur stood repealed and the Indian Forest Act, 1927 mentioned in Schedule 11 became applicable, but the proviso to Section 5 clearly provides that the repeal by this order shall not affect any right, title, obligation or liability acquired, accrued or incurred. Thus the Jagirdars had already acquired, accrued or incurred a liability in respect of the trees in question which were part of the reserved forest as declared under the Forest Rules of Chhota Udepur State. There is nothing on the record to show that the Jagirdars were cutting trees from that part of village Nalej which was declared reserved forest during the time of erstwhile Chhota Udepur State. Jagirdars could not have given a better title to the contractor in respect of the trees, which the Jagirdars themselves did not possess. The repealing of the Forest Rules of Chhota Udepur State on 28th July, 1948 did not furnish any additional or increased rights to the Jagirdars which they did not have before the merger of Chhota Udepur State.

16. It has been vehemently contended on behalf of the appellants that it was a case of full proprietorship right in the Jagir and the Jagirdars had full and complete rights of ownership in the soil, as well as the trees. Reliance is placed on the definition of proprietary Jagir under Clause XVIII as contemplated in Section 2 of the Jagir Abolition Act which reads as under:

> "Proprietary Jagir" means a Jagir in respect of which the Jagirdar under the terms of a grant or agreement or by custom or usage is entitled to any rights or interest in the soil."

17. It has been contended that the Jagirdars in the present case had not only a right over the trees but also interest in the soil and as such they had full right to sell the trees to the contractor. It was submitted that even if there were any restrictions on cutting of trees so long as forest rules of Chhota Udepur State remained in force that restriction was removed on 28-7-48 when such rules were repealed by the Application of Laws Order. After the forest rules of Chhota Udepur State were repealed, the Jagirdars got full right to alienate the trees as such right was inherent in the right of a proprietary Jagir. It was also submitted that the Government of Bombay had itself taken policy decision that all contracts made by the Jagirdars prior to the abolition of Jagirs on 1-8-54 shall be honoured. It cannot be considered the intention of the Government to take away such vested rights in the Jagirdar having come into force on 28-7-48, after a lapse of seven years by issuing a Notification on 12-5-55 under Section 4 of the Forest Act. It has also been contended that the Government has recognized the right of full ownership in the trees in favour of other Jagirdars similarly situated and there was no justification for taking such arbitrary and discriminatory action against the plaintiffs alone.

18. The above submissions are based on a total misconception. As already mentioned above, there is no question of taking away any rights. It is no doubt correct that it is a case of proprietary Jagir, but it does not confer any right in respect of trees standing in a reserved forest. Once it is established that during the time of existence of erstwhile State of Chhota Udepur an area admeasuring 290 acres and 14 gunthas in village Nalej was declared as reserved forest and Jagirdars had no right at all in the trees standing in such area of reserved forest, the Jagirdars cannot be considered to have acquired a greater right on 28-7-48 when the Forest Rules of Chhota Udepur State were repealed by the Application of Laws Order.

19. There is another insurmountable difficulty for the plaintiffs inasmuch as the trees had not been cut and removed prior to 12-5-55 when admittedly a Notification has been issued under Sec. 4 of the Forest Act also. That being so no relief can be sought for cutting and removing the trees in question after 12-5-55 as the survey No. 102 has been constituted as reserved forest under the

provisions of Forest Act. The trees in question are Teak and Mahuda trees which were out of 21 kinds of trees declared as reserved trees which were prohibited from being cut under the extent of forest rules of Chhota Udepur State. Such trees even if standing in forest were not allowed to be cut. Thus examining the matter from any angle, we are clearly of the opinion that the plaintiffs are not entitled to any relief as claimed in the suit.

20. So far as the ground of discrimination is concerned, it is well settled that in order to establish the same it is necessary to make out such case in the pleadings. In the present case no such ground was taken in the plaint nor any facts or material were placed on record during the trial of the suit or before the High Court and the same cannot be considered for the first time before this Court, specially when the defendants were not given any opportunity to meet the same.

21. In our view the High Court was right in dismissing the suit.

22. In the result we find no force in this appeal and the same is dismissed. In the facts and circumstances of the case we direct no order as to costs.

Appeal dismissed.

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