

(1964) 04 GUJ CK 0005

In the Gujarat High Court

Case No : Civil Revision Appln No's. 216 to 221 and 236 of 1960 with Spl Civil Appln No's. 717 and 1054 of 1962

Adam Asmal Abhram Dadabhai and Others

APPELLANT

Vs

Hiralal Chimanlal Thakore

RESPONDENT

Date of Decision : 10-04-1964

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 83, 85A
Civil Procedure Code, 1908 (CPC) — Section 115, 24, 9

Citation : AIR 1965 Guj 131 : (1965) GLR 99

Hon'ble Judges : N.M. Miabhoy, J;J.B. Mehta, J

Bench : Division Bench

Advocate : V.J. Desai, for the Appellant; A.D. Desai and A.M. Joshi, for the Respondent

Judgement

Mehta, J.

(1) This group of seven Civil Revision Application under sections 115 of the CPC involves a common question of law as to whether the Civil Court has jurisdiction to decide an issue referred to it by the Mamlatdar regarding the question of title which has arisen before him in a proceeding under the Tenancy Act

* * * * (2) Mr. A.D.Desai, while contending that such a reference was competent, has raised three other points before us:

(1) that it was not open to the petitioner to challenge the order of the High Court in this indirect manner?

(2) That the petitioner having not challenged the jurisdiction of the Civil Court and having participated in the said decision on merits of, he is now produced from raising this question?

(3) That the High Courts order in substance and effect being the order of transfer of a case, the Civil Court had jurisdiction to give its decision on the question

directed by the High Court.

(5) In order to appreciate Mr. Desai's contention it would proper at this stage to consider the scheme of the Act in so far as it has bearing on the question before us., along with the order passed by the High Court at the earlier stage. The landlord is prohibited from taking possession of the land held by a tenant except, under an order of the Mamlatdar u/s 29(2) of the Act. the opponent-landlord had, therefore, filed an application within the period of two years from the date on which the right to obtain possession of the land had accrued to him. u/s 29(3) the Mamlatdar had to pass, after an inquiry, such orders thereon as he deemed fit. u/s 70 of which deals with the duties of the Mamlatdar, it is provided that for the purposes of the Act, the duties and functions to be performed by the Mamlatdar shall be mentioned therein which include the following:

x x x x x x x x (a) to include whether a person is a tenant or a protected tenant or a permanent tenant;

x x x x x x x x x (mc) to decide preferences u/s 85-A;

x x x x x x x x x (c) to decide such other matters as may be referred to him by or under this Act.

Section 74 clause (1) (m) provides for an appeal against the Mamlatdar's orders u/s 29 to the collector and Section 73 Clause (1) provides for the revision application being made to the Gujarat Revenue Tribunal, (hereinafter referred to as the Revenue Tribunals). Section 85 bars the jurisdiction of the Civil Court to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar. Section 85A provides as under:

"(1) if any suit instituted in any Civil court involves any issue which are required to be settled, decided or dealt with by any authority competent to settle, decide or deal with such issue under this Act (herein after referred to as the "competent authority") the Civil Court shall stay the suit and refer such issues to which competent authority for determination.

(2) On receipt of such reference from the Civil Court the competent authority shall deal with and decide such issues in accordance with the provisions of this Act and shall communicate its decision to the Civil Court shall there upon dispose of the suit in accordance with the procedure applicable therein.

Explanation. For the purpose of this section a Civil Court shall include a Mamlatdar's Court's order Act, 1906".

It may be noted at this point just like S. 85A which provides for reference being made a Civil Court of certain issues which it is not competent to decide to the Mamlatdar or to the competent authority under the act, there is no corresponding provision which provides for a reference being made by a Mamlatdar to Civil Court on any question which arises in any proceeding before

him and which he is not competent to decide. S. 32Q sub-clause (3) may also be noted in this connection. That section deals with the proceeding before the agricultural Lands Tribunal in connection with the amount of purchase price to be applied towards satisfaction of debts. Sub-section (3) provides asunder:

"If such question involves any question of law regarding the validity of the encumbrance or the claim of the holder of the encumbrance or any question regarding the amount due in respect of the encumbrance, then not with standing anything contained in section 85A, the Tribunal shall in the manner prescribed refer the question for decision to the Civil Judge within the territorial limits of whose jurisdiction the land is situate. On receipt of such reference the Judge concerned shall, after giving notice to the parties concerned try the questions referred to and record findings thereon and send the same to the Tribunal. The Tribunal shall then give the decision in accordance with the said findings".

This is a specific provision which empowers the Agricultural Lands Tribunal to make a reference to the Civil Court. There is no corresponding provision, for reference being made by the Mamlatdar or the Collector or the Revenue Tribunal to a Civil Court or which would invest the Civil Court with the powers to decide any such reference made by these authorities.

(3) These provisions thus set up a complete hierarchy of special tribunals in tenancy cases for the determination of questions specified in section 70 of the Act, so far as the Mamlatdar is concerned with a provision for appeal to the Collector and a revision to the Revenue Tribunal against his orders and to that extent the jurisdiction of the Civil Court is expressly barred u/s 85A of the Act and even a further provision is made for reference by the Civil Court. u/s 85A of such issues to the Mamlatdar and which he is empowered to decide by the provision made in section 70 clause (mc), which imposes a duty on him to decide such a reference.

(4) On the basis of this scheme of the Act in Special Civil Applns. Nos. 2178 to 2187 of 1958 (Bom) filed at the earlier stage in these cases a Division Bench consisting of Shah and Vyas, JJ, on 16-7-1956 held as under:

"It is evident on a reading of Section 70 and S. 85 of the Act that if a question is required to be settled, decided or dealt with by a Mamlatdar, the Civil Court's jurisdiction to settle, decide or deal with that question must be deemed to be excluded. Upon the Mamlatdar being conferred jurisdiction to decide for the purposes of the Act whether a person in a tenant or a protected tenant the jurisdiction of the Civil Court to settle, decide or deal with that question may, in our judgment, be deemed to be excluded. The proceedings filed in the Court of the Mamlatdar for obtaining orders for possession on the footing that the defendants were, therefore, properly instituted, but the question still remains whether the Mamlatdar is competent to decide questions of title which arise on dispute between the contesting parties. There is nothing in Section 70 of the Bombay Tenancy Agricultural Lands Act, 1948, which confers powers upon the

Mamlatdar either expressly or by implication to decide questions of title to land apart from questions relating to the relation to the land lord and the tenant. In the present case, it is true that Thaker alleged that the defendant were his tenants and they had denied his right as a landlord and had thereby forfeited their right to remain in possession of lands as tenants. But the tenants raised a question of title subsisting in them by reason of ancient tenure and adverse possession. It is well settled that where the jurisdiction of the Civil Court is sought to be excluded, the provisions excluding the jurisdiction of the Civil Court must be strictly construed and the Civil Court will not readily assume that the jurisdiction of the Civil Court is excluded where there is no express exclusion prescribed by nature. As we have already pointed out, the legislature entrusted the Mamlatdar with power to decide questions as to title and having provided that certain powers and functions may be performed and exercised by the Mamlatdar and having conferred jurisdiction to decide certain specific matters, we are of the view that when questions of title substantially arising between the parties have to be decided, the Mamlatdar would not be competent to decide those questions and it would be for the Civil Court to decide those questions. The Deputy Collector in this group of cases has come to the conclusion that complicated questions relating to title have been raised when have to be the Civil Court. With that view the Tribunal has concurred. As in the view of the Deputy Collector and the Revenue Tribunal questions relating to title have been raised, and in their view they must be left to the Civil Courts for adjudication, we do not think that we would be justified in disagreeing with that view and holding in exercise of the limits jurisdiction conferred upon the Mamlatdar for deciding questions as to tenancy or protected tenancy, the Mamlatdar should be held entitled to and should decide those questions".

The same view was taken in Special Civil Appln. No. 3038 of 1957, D/- 7-2-1958 (Bom) by a Division Bench consisting of Dixit and Gokahle, JJ. Where also the question of title which had arisen was similarly directed to be referred to the Civil Court.

(5) The only point which is decided by the Bombay High Court at the early stage in these cases is that the proceedings on the footing that the defendants were tenants were properly instituted and that they were dismissed. But when the questions of title substantially arising between the parties have to be decided, the Mamlatdar would not have jurisdiction to decide those questions and they were to be left to Civil Court for adjudication. Their Lordships never examined the question of the competence of the Civil Court to decide a reference made by the Mamlatdar nor did not they purport to transfer the pending applications before the Mamlatdar to the Civil Court. Such a question about the jurisdiction of the Civil Court only be decided by a reference to the statutory powers vested in the Civil Court. As we have pointed out earlier, there is no provision in the Act which empowers a Mamlatdar to make such a reference or which invests the Civil Court with jurisdiction to decide such a reference made by a Mamlatdar. Where ever the legislature intended to provide such a reference being made, as in the

case of Agricultural Lands Tribunal, and for the same being heard and decided by a Civil Court, a specific provision has been made as in S. 32Q of the Act. This is a sufficient indication of the intention of the legislature. Mr. Desai was not able to point out any provision in the Act which would empower the Civil Court to decide such a reference. No provision even of any other enactment was pointed out to us under which a Civil Court could decide such a reference made by a Mamlatdar. In the CPC herein after referred to "as Code" under S. 90 there is a provision for stating cases for the opinion of the Court, which provides that where any person agrees in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed. Order 36 provides for the manner in which such a case has to be stated. Sub-clause (1) provides that the parties claiming to be interested in the decision of any question in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the court with respect to such question,

- (a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or
- (b) some property movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them; or
- (c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

The references even have to be made by an agreement in writing entered into by the parties in claiming to be interested in the decision of the question. In the absence of any such agreement as prescribed, the Civil Court would have no jurisdiction to entertain any such reference. u/s 26 of the Code every suit before the Civil Court shall be instituted by the presentation of a plaint or in such manner, as may be prescribed and under Order 4 Rule 1 every suit has to be instituted by presenting a plaint to the Court or such officer as it appoints in that behalf. Thus, the jurisdiction of the Civil Court has to be invoked only as per the statutory provisions, which provides for such jurisdiction being invoked. In this connection a reference may be made by to section 72 of the Act which provides that in all inquiries and proceedings commenced on the presentation of applications u/s 71, the Mamlatdar or the Agricultural Lands Tribunal shall exercise the same powers as the Mamlatdar's Court Act, 1906 and shall save as provided in section 29 follow the provisions of the said Act, as if the Mamlatdar or such Tribunal were a Mamlatdar's Court under the said Act and the application presented was a plaint u/s 7 of the said Act. This section, read with the explanation to section 85A, which provides that the Civil Court shall include a Mamlatdar's Court under the Mamlatdar's Court Act, 1906, could not carry the case of Mr. Desai any further, for the simple reason that section 85A provides for a reference being made to the competent authority by the Civil Court including a Mamlatdar's Court of only such issues which can be settled, decided or dealt with only by such a competent authority under the Act. The Mamlatdar's Court, therefore, could not u/s 85A refer to a civil Court the questions which only the

Civil Court would have jurisdiction to decide. In these circumstances we cannot, hold that the Civil Court has the power to decide any reference made by a Mamlatdar, Collector or a Tribunal under the Tenancy Act, if a question of title which had arisen in any proceeding before such authority were referred to the Civil Court. Such jurisdiction could only be conferred by the Legislature and it could not be created by any order of the Court. Such a reference is, therefore, clearly incompetent and it would not invest the Civil Court with jurisdiction to decide any question.

(6) As regards the first question raised by Mr. Desai we cannot agree with him that the order of the High Court at the earlier stage operates as *res judicata* so far as the question about the jurisdiction of the Civil Court is concerned to entertain such a reference in the absence of any such power invested in the Civil Court the CPC or under this Act or under any other statutory enactment which empowers it to decide such a reference on the question of title or which empowers the Mamlatdar to make any such competent reference. There is no question of invoking the bar of *res judicata* u/s 11 of the CPC or any principle analogous to *res judicata* in such a case as in fact such a question was never raised nor considered and finally decided in the earlier proceeding.

(7) As regards the second contention of Mr. Desai also, we find no substance therein. It is a settled principle of law that enactment can never confer jurisdiction. If there is an inherent lack of jurisdiction the proceedings are null and void. The defect strikes at the very root of the authority of the Court to decide anything and such a defect cannot be cured even by the consent of the parties. The decision of the Privy Council in the case of *Ledgard v. Bull* 13 I A 134 is the oft quoted authority for the proposition that consent or waiver can cure defect of jurisdiction, but it cannot cure inherent defect of jurisdiction. In *Khaddah Company Ltd. Vs. Raymon and Co. (India) Private Ltd.*, Supreme Court had also repelled a somewhat similar contention in connection with an arbitration award. The arbitration agreement in that case was found to be invalid but it was contended that the respondents were estopped from challenging the award on that ground because they appeared before the arbitrators and had taken part in the proceedings before them. The Supreme Court held that what confers jurisdiction on the arbitrators to decide a dispute is an arbitration agreement as defined in section 2(a) of the Arbitration Act, and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. The Supreme Court therefore, held that it was unable to accept the contention that the respondents were estopped by their conduct from questioning the validity of the award. In these circumstances as the Civil Court in the present case had no jurisdiction to decide such a reference, the parties could not by consent or acquiescence have conferred jurisdiction on the Civil Court to decide such a reference. We, therefore, cannot agree with Mr. Desai that the petitioner was precluded by his conduct from challenging the decision of the Civil Court which was completely without jurisdiction.

(8) That is why Mr.Desai really concentrated his attack on the true nature of the High Court's order and urged that in substance and effect it operated as a transfer of the case to the Civil Court under the directions issued under Article 227 of the Constitution. He further argued that even though a Mamlatdar or a Revenue Tribunal may not have such a power to make a reference to the Civil Court, the High Court in the exercise of its superintendence powers both over the Tribunal and the Civil Courts could resolve such a deadlock in cases, where each had only a partial jurisdiction over the subject matter and none of them had complete jurisdiction. Now the difficulty in Mr.Desai's way is that the order of the High Court in terms directs that the proceedings before the Mamlatdar shall be stayed only the issue in question shall be sent with papers for decision to the Civil Court. If it were an order of transfer of the entire case the Mamlatdar would have no control left over the matter and the proceedings would not have been stayed before him. The distinction between the transfer of a case and the reference on some issue of the case would be that in the former, the entire matter would go over to the transferee Court, while in the latter, the matter would remain on the record of the transferor Court and only an issue would be sent for decision of the other Court. In fact as we have mentioned earlier, the High Court has never supported to exercise the powers of transfer while passing the aforesaid order assuming that such an order of transfer could be made in the exercise of its jurisdiction under Article 227 of the Constitution. Besides, we cannot treat this as a mere procedural question. Such a reference would seriously affect the rights of appeal of the parties, as it had happened in this very case as no decree could be drawn and was refused to be drawn on such a finding on an issue. Such a contention completely ignores the necessary condition which must be fulfilled in every case of a transfer of a proceeding that it could be made only to a competent Court. A tenancy proceeding could never be transferred even by a High Court to the Civil Court in view of the complete exclusion of the jurisdiction of the Civil Court u/s 70 only by a Mamlatdar. In *Srinivasa Iyengar v. Official Assignee of Madras* ILR 38 Mad 472: (AIR 1914 Mad 677), the Madras High Court has held that as the jurisdictions conferred by the Presidency Towns Insolvency Act on the High Court, and by the Provincial Insolvency Act on the mofussil Courts are distinct, and as the provisions of the two Acts differ in such important respect, it is not competent for the High Court to transfer u/s 90 of the Presidency Towns Insolvency Act and u/s 24, Civil Procedure Code, an insolvency petition pending before it under the Presidency Towns Insolvency Act for disposal by a mofussil District Court. At p. 473 (of ILR Mad) : (at p. 677 of AIR) it was observed:---

"It is not necessary for me to express any opinion as to whether this Court in the exercise of its ordinary original civil jurisdiction can make an order u/s 24 of the Code."

The question will remain to be considered viz. is the Court to which this petition has been transferred competent to try and dispose of the same? Their

Lordships answered the question by stating that the transferee Court was not competent to try or dispose of that matter for the simple reason that both the jurisdictions were distinct and the said order of transfer was, therefore, set aside. This decision is a clear authority for the proposition that even if the High Court were to transfer a proceeding the transfer could be only to a competent Court. We cannot therefore agree with Mr.Desai that the effect of the order was to transfer the case to a Civil Court so as to invest it with the necessary jurisdiction to try such a proceeding as if it was a suit instituted before it. The jurisdiction to try any proceeding had to be conferred by law and it could not be done by any judicial order of any Court, including that of the highest Court.

(9) Finally, Mr.Desai urged in this connection that both the Mamlatdar and the Civil Court were bound as subordinate Court or Tribunal to carry out the directions of the High Court. But here in fact both of them have carried out the said direction. The Mamlatdar had sent the issue to the Civil Court as directed and the Civil Court in its turn had entertained the proceeding. But the Civil Court was bound to consider any objection raised before it regarding its total lack of jurisdiction. In this case no such point was raised before the Civil Court and that is why this point of total lack of jurisdiction has been raised u/s 115 of the Civil Procedure Code. We have, therefore, considered the question which the Civil Court was bound to consider whether it had jurisdiction to decide the reference on the question or title made by the Mamlatdar in the absence of any statutory provision. In so doing the Civil Court would not be said to disobey any directions of the High Court nor could we be said to attempt to review any of the previous orders.

(10) In the result there is no substance in any of the points raised by Mr.Desai and in the absence of any provision empowering the Civil Court to decide such a reference its decision is clearly without jurisdiction and it must be set aside. We, therefore, allow all these petitions, set aside the decision of the Civil Court as incompetent and direct the Civil Court to remit the papers to the Mamlatdar in each case as expeditiously as it could be done. The rule is made absolute to that extent. As this point was not urged before the Civil Court, we make no order as to costs in each of these applications.

* * * * * (11) Rules made partly absolute.