
(2013) 01 RAJ CK 0071
In the Rajasthan High Court
Case No : Civil Writ Petition No. 961 of 1995

Bhawani Shankar

APPELLANT

Vs

The Board of Revenue and Others

RESPONDENT

Date of Decision : 03-01-2013

Acts Referred:

Rajasthan Tenancy Act, 1955 — Section 42, 42(a), 42B, 53, 7
Transfer of Property Act, 1882 — Section 44

Citation : (2013) 2 WLN 71

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : R.K. Agrawal and Mr. Yogesh Pujari, for the Appellant; R.P. Vijay, for the Respondent

Final Decision : Allowed

Judgement

Mohammad Rafiq, J.—This writ petition seeks to challenge the order passed by the Board of Revenue dt. 18.12.1992 by which the appeal of the petitioner against the judgment of Revenue Appellate Authority dt. 16.07.1990 was dismissed and also the order of the Revenue Appellate Authority which had reversed the order passed by Assistant District Collector dt. 26.03.1990 was maintained. Assistant Collector by its aforesaid order dismissed the revenue suit filed by respondent No. 2 Madan Mohan for cancellation of sale deed made in favour of the petitioner by respondent No. 3 Babu Lal. Respondent No. 3 Babu Lal, happens to be brother of respondent No. 2 Madan Mohan. Petitioner purchased the plot of land measuring 34" x 80" from respondent No. 3 Babu Lal by registered sale deed executed on 31.07.1980. Assistant District Collector vide its order dt. 16.06.1988 on application of the petitioner for cancellation of sale deed and recovery of possession, converted the use of land from agriculture to residential. Pursuant thereto, petitioner deposited the requisite conversion charges and a patta of the aforesaid land in the size of 34" x 80" was issued out of khasra No. 797 in his name. Shri R.K. Agrawal, learned senior counsel appearing for the petitioner argued that the Revenue Appellate Authority as well

as Board of Revenue allowed the revenue suit filed by the respondent No. 2 on the premise that the land purchased by the petitioner was a land of joint khatedari of respondent Nos. 2 and 3. The sale of land by respondent No. 2 alone without the consent of respondent No. 3 amounted to fragmentation of holding and violated Section 42(a) and Section 53 of Rajasthan Tenancy Act. However, subsequently Clause (a) of Section 42 of the Rajasthan Tenancy Act was deleted with effect from 11.11.1992 vide Section 6 of the Rajasthan Tenancy (Amendment) Act, 1992. Restriction on the sale of transfer thus did not remain operative. Sale made in favour of petitioner by respondent No. 3 on 31.07.1980 confers indefeasible right, title and interest in favour of the petitioner. Deletion of Clause (a) of Section 42 of the Act by Act No. 22 of 1992 was having retrospective effect for all purposes and it would be as if that Clause (a) to Section 42 of the Act was never incorporated in the Act and, therefore, the sale of his share of the land by respondent No. 3 to the petitioner should be treated valid. The Board of Revenue delivered its judgment dismissing appeal of the petitioner on 18.12.1992 even though the aforesaid amendment deleting Clause (a) of Section 42 of the Act became effective from 11.11.1992. In the circumstances, the petitioner filed review petition drawing attention of the Board towards this error apparent on the face of record. The Board of Revenue however committed a grave error in holding that deletion of Clause (a) to Section 42 would not have retrospective effect. Learned senior counsel relied on the judgment of this Court in Lal Chand @ Lalaram vs. Nathu (since deceased) Mst. Munni & Ors., 1998 DNJ (Raj.) 63 on interpretation of Section 42(a) holding that amendment thereof was retrospective in nature. Such amendment would always be taken to be retrospective in nature argued the learned senior counsel relying on the judgment of Supreme Court in Darshan Singh Vs. Ram Pal Singh and another, The Board thus illegally dismissed the revision petition.

2. Shri R.K. Agrawal, learned senior counsel also cited the Rajasthan Tenancy (Amendment) Act, 1995 whereby Section 42B was inserted in the Act with effect from 06.05.1995 to provide that where any sale, gift or bequest made by a khatedar-tenant of his holding or part of the holding before the commencement of the aforesaid Rajasthan Tenancy (Second Amendment) Act, 1992 Act No. 22 of 1992 was void on account of contravention of any of the provisions of Clause (a) of Section 42, such sale, gift or bequest may be declared to be valid by the Collector or any Officer or authority empowered by the State Government in this behalf on an application made to him or it within such time and in such manner and on payment of such fee and penalty as may be prescribed. Learned senior counsel submits that since the matter was subjudice before this Court and an interim order directing parties to maintain status quo was passed on 21.02.1995, there was no occasion for the petitioner to approach the competent authority for seeking declaration as to validity of the transaction. Petitioner is agreeable to approach the competent authority under that provision even now subject to decision of this Court.

3. Shri R.K. Agrawal, learned senior counsel for the petitioner has argued that

respondent No. 3 sold only half of his share out of the land of khasra No. 797 and to that extent, he was fully competent to sell his share. It is not even the case of the respondent No. 2 that the respondent No. 3 had sold the land to the petitioner in excess of his share. Learned senior counsel submitted that the land of joint khatedari can be sold. Even if the disputed khasra number measuring 5 bighas was in joint khatedari of respondent Nos. 2 and 3, the respondent No. 3 could have sold his share of the land. He in support of his arguments relied on Section 44 of the Transfer of Property Act, 1882 to argue that where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same. In support of this argument, learned counsel has relied on the judgment of this Court in Khema and Others Vs. Shri Bhagwan and Others, It is therefore prayed that the impugned orders passed by the Board of Revenue and the Revenue Appellate Authority be set aside and that of the Assistant District Collector be restored.

4. Per contra, Shri R.P. Vijay, learned counsel for the respondents opposed the writ petition and argued that the amendment by which Clause (a) of Section 42 was deleted with effect from 11.11.1992 would not have the effect of retrospectively validating the transaction of sale, which was otherwise void having been effected in breach of Section 42(a) and Section 53 of Rajasthan Tenancy Act, 1955. Learned counsel for respondents submits that Section 42(a) of the Rajasthan Tenancy Act as it existed originally, provides that sale by a khatedar tenant of his interest in the whole or part of his holding shall be void, if it is not a survey number when the area of survey number so sold is in excess of the minimum area prescribed for the purpose of sub-Section (1) of Section 53. Section 53 provides that no holding shall be divided so as to result in holding of less area than the minimum prescribed by the State Government for each district, or part of a district. The respondent No. 3, therefore, could not have sold part of the holding.

5. Shri R.P. Vijay, learned counsel for the respondents submits that so long as the partition between the parties had taken place and the land was not divided by leaps and bounds, the respondent No. 3 could not on his own sell land to the petitioner and such a transaction of sale would be void. The Revenue Appellate Authority was fully justified in holding so. The Board was also justified in holding that the amendment in question would be only prospective in nature and not retrospective.

6. Shri R.P. Vijay, learned counsel for the respondents submitted that the petitioner should be required to approach the competent revenue Court by filing a suit for partition and till such time the competent Court determines the exact share of the parties in the land of joint khatedari, the petitioner cannot be allowed to continue with the possession of disputed land. In this connection,

learned counsel referred to discussion made by the Revenue Appellate Authority in para 10 of the judgment and also the discussion made by the Board of Revenue in para 7 of the impugned judgment. Learned counsel in support of his arguments relied on the judgment of Supreme Court in *Jai Singh and Others Vs. Gurmej Singh*,

7. I have given my anxious consideration to the rival submissions and perused the material on record.

8. Evidently, Clause (a) of Section 42 restricted the sale by a khatedar-tenant of his interest in the whole or part of the holding if it was not a survey number when the area of the survey number was so sold is in excess of the minimum area prescribed for the purpose of sub-Section (1) of Section 53 in which case also the area not transferred shall not be fragment. Section 53 simultaneously provides that no holding shall be divided so as to result in holding of less area than the minimum prescribed by the State Government for each district, or part of a district. It is these provisions which have been relied on by the Revenue Appellate Authority and the Board of Revenue in dismissing the appeals filed by the petitioner, which concurrently held that sale of his share of land, which was part of the holding, by respondent No. 3 in favour of the petitioner amounted to fragmentation of holding and being in breach of those provisions, was void. The question therefore arises whether deletion of Clause (a) of Section 42 would have the effect of legalising transaction of sale by respondent No. 3 in favour of petitioner. This Court in *Lal Chand*, supra has examined nature of the aforesaid amendment by which Clause (a) to Section 42 was deleted. The said Clause (a) prohibited division of land holding into fragments of less area than the minimum prescribed area. With the deletion of the Clause (a) and amendment of Section 42(a) and Section 53 of the Act, the restriction regarding fragmentation was held to have been retrospectively done away with by this Court due to change of law. The amended provisions were held to be retrospective in nature. This became all the more clear when Section 42B introduced by the Rajasthan Tenancy Act, 1995 with effect from 06.05.1995 is analysed in the fact situation of the present case. In order to appreciate the said provision, it is deemed proper to reproduce Section 42B in extenso:

42-B Declaration as valid of sale, gift and bequest: Where any sale, gift or holding made before the commencement of the Rajasthan Tenancy (Second Amendment) Act, 1992 Act No. 22 of 1992 was void on account of contravention of any of the provisions of Clause (a) of Section 42, as it stood before the said amendment Act of 1992, such sale, gift or bequest may be declared to be valid by the Collector or any Officer or authority empowered by the State Government in this behalf on an application made to him or it within such time and in such manner and on payment of such fee and penalty as may be prescribed.

9. A perusal of the aforesaid provision of Section 42-B clearly show that where any sale made by a khatedar-tenant of his interest or part of holding before the commencement of the Rajasthan Tenancy (Second Amendment) Act, 1992 Act

No. 22 of 1992 was void on account of contravention of any of the provisions of Clause (a) of Section 42, as it stood before the said amendment Act of 1992, such sale may be declared valid by the Collector or any Officer or authority empowered by the State Government in this behalf on application made to him or it within such time and in such manner and on payment of such fee and penalty as may be prescribed. Although it is true that the petitioner has not approached the Collector or the competent authority under the said provision seeking a declaration as to validity of sale of the disputed land in the plot size of 34" x 80" by respondent No. 3 to him, but that was owing to the fact that already the writ petition was filed by him before this Court prior to introduction of the aforesaid amendment and interim order was passed by this Court on 21.02.1995 directing parties to maintain the status quo with regard to land in dispute.

10. Coming now to the argument whether the respondent No. 3 could have sold his share of the land out of the land of khasra No. 797, I find that the respondent did not before any of the forums namely; Assistant Collector, the Revenue Appellate Authority or even the Board of Revenue, set up a case that the respondent No. 3 has sold land in excess of his share i.e. more than half of the share. If that is the case, such transaction of sale would certainly inhere a right in the petitioner by virtue of Section 44 of the Transfer of Property Act to the extent of transferor's right to joint possession or other common or part enjoyment of the property. In the present case, the petitioner was already put in possession by the respondent No. 3 of his share of the land and on that basis, petitioner applied for conversion of the land from agriculture to residential which was allowed by the Additional Assistant District Collector. A patta on that basis was issued in favour of the petitioner. Petitioner has already raised construction of the house and is presently residing therein. There is therefore no need for the petitioner after three decades now to again approach the Revenue Court to obtain a formal decree of partition. This is so because the respondent No. 2 has not been able to show that his brother respondent No. 3 sold the land in excess to his share. This Court in Khema, supra has held that khatedar-tenant has the power to alienate the land in the ancestral property and such transfer would be valid to the extent of his share even if effected without the permission of other co-sharers, but would be void only in respect of transfer of shares of other co-sharers. The question for division of holding by leaps and bounds would arise only if the other co-sharers alleged that such transfer is extended also to his share. In the present case, no such case has been set up by the respondents, therefore, that situation would not arise.

11. In Darshan Singh, supra, the question before the Supreme Court was that whether Punjab Custom (Power to Contest) Amendment Act, 1973 would or would not apply to pending proceedings. While the plea set up by the petitioner before the Supreme Court was that it would not apply to the pending proceedings, the Supreme Court held that Section 7 of the Principal Act as amended by the Amendment Act, 1973 put a complete bar to contest of any

alienation of ancestral or non-ancestral immovable property or appointment of an heir to such property on the ground that such alienation or appointment was contrary to custom. The language used in the provision is inconsistent with the continued existence of the custom. The words "no person shall contest any alienation on the ground that such alienation is contrary to custom" in Section 7 are very significant. A plain reading of the provision even when construed prospectively leads to the result that the right to contest being contrary to custom has been totally effaced and taken away. Thus no person has any right to contest any alienation of immovable property, whether ancestral or non-ancestral, on the ground of being contrary to custom after 23.01.1973, the date on which the aforesaid Amendment Act came into force. This provision will thus apply to all pending actions whether at the stage of trial or before the appellate Court. An appeal is a continuation of the suit and if a right to contest an alienation on the ground of being contrary to custom has been taken away, such right to contest cannot be permitted even at the stage of first appeal or second appeal.

12. In *Mithilesh Kumar and Another Vs. Prem Behari Khare*, it was held that when an Act is declaratory in nature the presumption against retrospectivity is not applicable. In that case, the Benami Transactions (Prohibition) Act, 1988 was held to be declaratory in nature and the presumption against retrospectivity was held to be not applicable. A statute in effect declaring the benami transactions to be unenforceable belongs to this type. It was held that Parliament has jurisdiction to pass a declaratory legislation. As a result of the provisions of the Act, all properties held benami at the moment of the Act coming into force may be affected irrespective of their beginning, duration and origin. This will be so even if the legislation is not retrospective but only retroactive. Such provision was held applicable even to pending suit, claim or action including pending appeal against decree passed on such suit, claim or action.

13. In view of above discussion and in view of the categorical provision contained in Section 42B referred to supra, the amendment aforesaid must be held to have enabled competent authority to retrospectively validate the sale which otherwise was invalid being in breach of Section 42(a) read with Section 53 of the Rajasthan Tenancy Act, 1955. In the result, this petition is allowed. The impugned order passed by the Board of Revenue and the Revenue Appellate Authority are set aside. The petitioner is set at liberty to make an appropriate application to the Collector or Officer or Authority empowered by the State Government under the provisions of Section 42B seeking a declaration as to validity of the transactions of sale on payment of such fee and penalty as per his direction. If any such application is made, the competent authority shall decide the same within a period of three months.

The writ petition is accordingly allowed with no order as to costs.