
(1957) 05 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No's. 910 and 1052 to 1060 of 1955

Budhu Singh and Others

APPELLANT

Vs

The Board of Revenue and Another

RESPONDENT

Date of Decision : 03-05-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 115
Specific Relief Act, 1877 — Section 42
Uttar Pradesh Agricultural Tenants (Acquisition of Privileges) Act, 1949 — Section 12, 6
Uttar Pradesh Tenancy Act, 1939 — Section 63
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 1

Citation : AIR 1957 All 719

Hon'ble Judges : Mehrotra, J;M.L. Chaturvedi, J

Bench : Division Bench

Advocate : H.C. Sharma, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Chaturvedi, J.—These are ten connected writ petitions, under Article 226 of the Constitution, in which common questions of law arise and they may conveniently be disposed of by one judgment.

2. One Ahmadi Begam was the zamindar of the plots in dispute in all the ten petitions, and she claimed that the plots were her khudkasht dots The petitioners in the petitions claimed to be the tenants of different plots owned by Ahmadi Begam. She accordingly filed ten suits u/s 63 of the U.P. Tenancy Act for a declaration that the plots were her khudkasht plots that the petitioners were not the tenants of these plots and that they were all in her possession.

The petitioners denied that the plots were khudkasht plots of Ahmadi Begam and set up tenancy rights in different) plots in themselves. Ahmadi Begam died during the pendency of the suits and 2nd respondent was impleaded as her legal

representative. The suits were filed in the year 1945, but they remained pending for a long time in the trial Court. During their pendency, the U.P. Agricultural Tenants (Acquisition of Privileges) Act of 1949, (hereinafter called the Acquisition of Privileges Act), came into force, and the defendants in the ten suits, who are the petitioners before us, deposited ten times the rent of the plots that they were claiming, and obtained certificates u/s 6 of the Act.

The certificates were obtained by the petitioners in September and October, 1949. The 2nd respondent then filed applications under c for cancellation of the certificates. The Assistant Collector allowed the applications and cancelled the certificates but an appeal by the petitioners the Additional Commissioner took a different view. By his judgment dated 3rd July, 1951 he allowed the appeals and dismissed the applications made by the 2nd respondent for cancellation of the certificates. The copies of this judgment were filed in the ten suits u/s 63 of the U P. Tenancy Act pending before the Judicial Officer.

On the 1st July 1952 the U.P. Zamindari Abolition and Land Reforms Act, Act No. 1 of 1951, (hereinafter called the Zamindari Abolition Act) came into force. The Judicial Officer decided these ten suits on the 1st June 1953. He held that the plots in dispute were the khadkasht plots of the 2nd respondent, and the petitioners were not the tenants of any of the plots, nor were they in possession of the plots.

The petitioners filed appeals against the decrees in the ten suits, and the Additional Commissioner affirmed the findings of the Judicial Officer and dismissed the appeals on the 13th August 1954. The petitioners then filed ten second appeals before the Board of Revenue and the Board has dismissed all these, appeals by its judgment dated 30th August, 1955. The petitioners now pray for the quashing of the judgment of the Board of Revenue, mentioned above and for the issue of a writ of mandamus to the Board directing it, to decide the second appeals in accordance with law.

3. The learned counsel appearing for the petitioners have urged two points in support of their petitions. The first point is that the decision of the Additional Commissioner dated 3rd July 1951 dismissing the application of the 2nd respondent for the cancellation of the certificates, filed u/s 12 of the Acquisition of Privileges Act. has the force of res judicata in so far as the question whether the petitioners were tenants of the plots was concerned. The second point is that the petitioners have acquired rights under Sections 16, 18 and 20 of the Zamindari Abolition Act, and the revenue Courts should have decided this question.

4. The learned counsel for the respondent has controverted both the above propositions, and as regards the second one he has contended that it was open to the Revenue Courts to grant a declaration to the 2nd respondents that the plots, were his sir and khudkasht plots on the dates of the suits and that the petitioners were not then the tenants of those plots.

5. In order to show that the decision of the Additional Commissioner in proceedings for cancellation of the certificates u/s 12 of the Acquisition of Privileges Act acted as res judicata, the learned counsel for the petitioners referred to a decision of the Supreme Court In the case of Raj Lakshmi Dasi and Others Vs. Banamali Sen and Others, . He argued that the plea of res judicata in the present cases was not founded on Section 11 of the CPC but on general principles of law, and all that was necessary for the petitioners to show was that the decision was given by a Court of law of competent jurisdiction and that the question arose directly and substantially for adjudication there.

It was argued that the Additional Commissioner in these proceedings actually considered the question whether the petitioners were tenants of the plots or not, and the decision that he arrived at would show that the petitioners were the tenants. The decision of the Additional Commissioner was final and its correctness could not be challenged in any other suit or proceeding. It was further argued that the plea of res judicata based on general principles of law could not be negated on the ground that the Court, which had decided the case previously, was not competent to decide the subsequent suits as well. The general principles enunciated by the learned counsel are the same, which have been affirmed by their Lordships of the Supreme Court at page 173 (of SCR) : (at p. 40 of AIR) of the above report where they say:

"Where a plea of res Judicata is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of res judicata on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like revenue Courts, Land Acquisition Courts, Administration Court, etc. It is obvious that these Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the statute."

In this connection their Lordships referred to the Privy Council case of AIR 1939 133 (Privy Council) .

6. Accepting the above decision of the Privy Council and some other cases, the learned Judges held that where the right to receive compensation for property acquired under land acquisition proceedings depended on the title to the property acquired, and the dispute as to title is raised by the parties and is decided by the Land Acquisition Judge after contest, this decision as to title operates as res judicata in a subsequent suit between the same parties. But in the same case the learned Judges have further observed that facts are necessary to establish in order to succeed in the plea of res judicata, and at page 164 (of Ind App): (at p. 136 of AIR) of the report they say:

"In order successfully to establish a plea of res judicata or estoppel by record it is necessary to show that in a previous case a Court, having jurisdiction to try the

question, came to a decision necessarily and substantially involving the determination of the matter in issue in the later case."

7. It becomes, therefore, necessary to see (1) whether the Assistant Collector and the Additional Commissioner acted as Courts, (2) whether they had jurisdiction to try the question of tenancy raised in these suits and (3) whether the question of tenancy necessarily and substantially arose in those proceedings?

8. In order to decide whether these officers act as Courts under the Acquisition of Privileges Act, it would be necessary to refer to some of the provisions of that Act. The preamble to the Act says that it is expedient to provide for payment by tenants with a view to facilitate the abolition of zamindari and to provide for reduction of rent and protection from ejectment. The object of the Act thus was to collect money from the tenants in order to enable the Government to provide for compensation to the zamindars, which it was proposed to pay to them for the abolition of their zamindari rights.

The original Section 3 and the subsequently added sections (in the year 1950), namely, Sections 3-A, 3-B and 3-C lay down which class of tenants or other persons were entitled to apply for grant of a certificate or declaration u/s 6 of the Act. They were generally to deposit ten times the rent, and the amount of rent was to be determined u/s 4. An application for grant of the certificate was to be accompanied by a treasury challan showing that the rent has been deposited and an extract from the khatuni showing the plot or plots to which the application related. u/s 6(2), if the Assistant Collector was satisfied that the applicant was prima facie entitled to the declaration and the amount deposited by him was not less than ten times the rent payable by him, he was bound to grant the declaration.

9. Section 7 then mentions the privileges which a person was entitled to as a result of the declaration granted to him u/s 6, and these privileges were that the person was not liable to ejectment in any decree or order passed under the U.P. Tenancy Act, and that he was entitled to transfer the land and was also entitled to a reduction of the amount of rent by half. Section 7-A made it clear that no person, who obtained a declaration u/s 6, was entitled to any larger share in the land by virtue of the declaration than he was otherwise entitled to and that notwithstanding the declaration the interests of other tenants were to continue unaffected.

Section 12 authorises a person interested in the land to apply for cancellation of the declaration to the Assistant Collector, and there were three grounds on which a declaration could be cancelled. It could be cancelled (1) if it was obtained fraudulently by making a false suggestion or by concealment from the Assistant Collector of something material to the case, (2) if the declaration was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant of the declaration even though the untrue statement was made in ignorance or inadvertently and (3) if a decree or order was obtained from a

competent Court, which decree or order rendered it proper that the declaration should be cancelled.

Section 13 of the Act provided for an appeal against the order of Assistant Collector to the Commissioner, and the order passed by the Commissioner, was to be final. Section 14 said that no suit, prosecution or other proceeding was to lie against any person for any act done or purporting to be done under the Act or any rule made there under without the previous sanction of the Provincial Government.

10. The above summary of the provisions of the Act would, show that the State was contemplating the abolition of zamindaris in the near future, and with a view to facilitate that work it was decided to confer some additional privileges on the persons who were declared to be entitled to deposit ten times the rent. The privileges that were conferred were for a temporary period till the final scheme of the abolition of the zamindari came into force. When the later Act did come into force, it included within it- self similar provisions for the deposit of ten times the rent and for obtaining a certificate as also for cancellation of the certificates.

As a result of the final scheme, the certificates which had been obtained by the tenants to whom Sub-section (2) of Section 10 applied, were cancelled and the amount deposited was to be returned, while others, who belonged to the classes mentioned in Section 3 of Sub-section (2) or Section 3-A of the Acquisition of Privileges Act and who had obtained declarations u/s 6 of the Act, were declared to be Bhumidhars, (see Section 18 of the Zamindari Abolition Act).

11. There can be no doubt about the fact that while granting a certificate or declaration u/s 6 the Assistant Collector, who could be appointed as such u/s 2(a) of the Acquisition of Privileges Act, was not sitting as a Court. He was only required to see prima facie (Section 6(2)) that the applicant was entitled to apply u/s 3 and the declaration was not to affect the rights of any other tenant (Section 7-A). No notice was to be given to any person and even an occupant of land, who might be a rank trespasser, was permitted to deposit ten times the rent and obtain a certificate.

There was no his in these proceedings and there were no two parties, nor were any rights to be determined, and only a prima facie right to make an application was to be seen. No decision on any disputed question of fact or law was to be given, and the Assistant Collector was not expected to write any judgment, but was merely to issue a certificate or declaration. It cannot be said that he was acting as a Court while granting a declaration u/s 6.

His position was like the position of other Administrative Officers who used to issue permits or licences under the different control orders. The Assistant Collector in these proceedings was not to follow even the procedure like the one that is provided under the Motor Vehicles Act for the issue of permits for running stage carriages. As a matter of practice, many of the Assistant Collectors appointed under the Acquisition of Privileges Act, in their zeal to collect more

money, did not insist even on proper formalities being observed. Even in the instant cases the Additional Commissioner has remarked that the certificates were granted without any applications by the petitioners.

12. The next question is whether they could be said to be acting as Courts while deciding applications u/s 12 of the Acquisition of Privileges Act. The section itself does not provide for the issue of notice or the examination and cross-examination of witnesses. Rule 43 framed under the Act, however, says that in the hearing and disposal of applications under Sections 3 and 12 of the Act, the Assistant Collector is to follow the procedure and possesses the powers followed or possessed by an Assistant Collector while deciding any proceeding under the U.P. Land Revenue Act in respect of certain specified matters.

The matters specified are the enforcing of the attendance of witnesses and their examination on oath, the compelling of the production of documents, the punishment for contempt and service of notices. No section of the Act or the Rule confers a right on the parties to summon and examine witnesses and to produce documents, but the Assistant Collectors, under the Act were given powers of enforcing the attendance of witnesses and compelling production of documents.

The procedure that they were to follow was the procedure under the Land Revenue Act in respect of only those matters specified in the Rule. If they refused to summon certain witnesses or to accept certain documents, their decision might be reversed on the ground that they had not followed the rules of natural justice. But there was nothing in the Act or the Rules framed under it, which compelled the Assistant Collectors to summon and examine all the witnesses which the parties wanted them to do.

13. It is true that Rule 44 assumes that the Assistant Collectors were Courts and the Rule makes provision for the transfer of cases from one Revenue Officer or Revenue Court to another, but the word "Court" appears to have been loosely used and the powers that these officers enjoy are exactly the same in proceedings u/s 3 or 6 and in proceedings u/s 12. If the Assistant Collectors are not Courts while granting a declaration u/s 6, it would require some clear provision in that Act or the Rule to show that they were acting as Courts when cancelling those certificates.

As a matter of fact, the Assistant Collector, appointed under the Acquisition of Privileges Act, may be a person who has got no powers under the U.P. Tenancy Act. or the U. P. Land Revenue Act and was not an Assistant Collector under any of the latter two Acts. In the present cases. it appears, that the Naib Tahsildar was appointed as Assistant Collector, and it is he who granted the declarations and it is he who cancelled them. I am, therefore, unable to hold that an Assistant Collector, while deciding an application u/s 12 of the Acquisition of Privileges Act, is a Court.

14. The next question is whether the Commissioner, while deciding an appeal filed before him u/s 13 of the Acquisition of Privileges Act is a Court or not. The

Commissioner under this Act is the same person who has been appointed Commissioner under the Land Revenue Act. There can be no doubt that the Commissioner while exercising his powers" under the above Act is a Court, but it does not necessarily follow that he is also a Court while exercising the powers under the Acquisition of Privileges Act. The Revenue Officers have to perform a great deal of administrative work, apart from their judicial work, and even against administrative orders appeals sometimes lie, for example appeals by Patwaris or Laghpals against their orders of dismissal.

I have, therefore, to see whether the Commissioner, while hearing an appeal, u/s 13 of the Acquisition of Privileges Act, acts as a Court or not. I have already held that the Assistant Collector, against whose order an appeal lies to the Commissioner, does not act as a Court, and I think the same is the position with the Commissioner when he hears an appeal filed, u/s 13 of the Act. The only order that he can pass in appeal is to maintain or cancel the declaration granted u/s 6, and the grounds on which he can cancel that declaration are mentioned in Section 12 of the Act, which do not concern themselves at all with the rights of the parties.

15. The first two grounds are to the effect that a declaration can be cancelled for *suggestio falsi* or *suppressio veri* and an untrue allegation of a material fact whether made deliberately or inadvertently. The third ground is the existence of an order or decree of a competent Court, which renders it proper that the declaration, be cancelled. This would show that in the proceedings under this Act no rights are to be determined, and the only fact with which the officers are concerned is whether a particular person should have a declaration under the Act or not.

That declaration merely grants a certain privilege and no permanent subsisting right. The privileges are immunity from ejection under decrees or orders passed under the U.P. Tenancy Act and the power to transfer. Even a trespasser is entitled to a declaration and that declaration could not be cancelled u/s 12 of the Act, if he had straightforwardly stated while obtaining the certificate that he was a rank trespasser.

16. The question whether a particular officer was acting as a Court or tribunal came up for consideration in a number of cases before the Supreme Court and the learned Judges have laid down certain principles for determining the question, but the result in those cases was to be the same whether the officer was acting as a Court or a tribunal. No case has been brought to my notice in which it became necessary to distinguish between a Court and a tribunal, and it was, therefore, not necessary for their Lordships to consider the essential difference between the two.

17. In the case of *The Bharat Bank Ltd., Delhi Vs. Employees of the Bharat Bank Ltd., Delhi and The Bharat Bank Employees' Union, Delhi*, the Supreme Court held by a majority decision that the Industrial Tribunals set up u/s 7 of the

Industrial Disputes Act of 1947 are not Courts in the technical sense of the word, but that they are tribunals, and leave to file a special appeal against their decisions can be granted by the Supreme Court under Art. 136 of the Constitution. Leave to appeal under that Article can be granted against the decisions of Courts and tribunals both, and hence it was held that a special appeal lay to the Supreme Court.

The Industrial Tribunals were held to be discharging functions of a judicial nature and it was said that they had almost all the trappings of a Court. On the principles laid down in the above case, the Assistant Collector and the Commissioner may be held to be tribunals while deciding an application u/s 12 of the Act, but they are not Courts of law.

18. In the case of *Maqbool Hussain Vs. The State of Bombay*, the question for determination was Whether the authorities under the Sea Customs Act acted as judicial tribunals when they decided the question regarding compensation, increased rate of duty or penalty. It was held that they were not judicial tribunals and hence any decision arrived at by them was not one which would attract the provisions of Article 20(2) of the Constitution. While considering the question whether the decision of the authorities was a judicial decision, their Lordships referred to the well-known case of *Cooper v. Wilson*, (1937) 2 KB 309 (E), and quoted a passage at page 340 where four requisites of a judicial decision have been specified, The four requisites mentioned therein are:

"(1) The presentation (not necessarily orally) of their, case by the parties to the dispute;

(2) If the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of the argument by or on behalf of the parties on the evidence:

(3) If the dispute between them is a question of law, the submission of legal, argument by the parties, and

(4) A decision which disposes of the whole matter by a finding upon the facts in dispute and application of the law of the land to the facts so found, including where required, a ruling upon, any disputed question of law. A quasi-judicial decision equally pre-supposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4)."

19. Applying the above principles to the case before me, it appears to me that the first two existed in a case of an application u/s 12 of the Acquisition of Privileges Act, but the third is absent as no question of law can be raised under that section and the fourth is also absent because the matter disposed of is merely a question of cancellation of a certificate, which can be done only on determination of certain question of fact but not on determination of any questions of law.

20. In *Brajnandan Sinha Vs. Jyoti Narain*, , it was held that a Commissioner appointed under the Public Servants (Enquiries) Act of 1950 did not constitute a Court within the meaning of the word as used in the Contempt of Courts Act. The main reason for holding that he was not a Court was that he could not give a definite judgment but merely made a report. Their Lordships have, however, observed that the word "Court" as used in the Contempt of Courts Act would prima facie mean the Courts of law subordinate to High Courts in the hierarchy of Courts established for the purpose of administration of justice. They also observed that the definition of "Court" in Section 3 of the Evidence Act was not exhaustive and was framed only for purposes of that Act.

21. In *Halsbury's Laws of England*, 3rd Edition. Vol. IX, it is stated at page 342 that the word "Court" originally meant the sovereign's palace and it then acquired the meaning of the place where justice was administered and also came to mean the persons who exercised the judicial functions under authority derived either immediately or mediately from the sovereign. All tribunals, however, are not Court, merely because they exercise jurisdiction over persons by reason of the sanction of the law.

22. A Division Bench of the Calcutta High Court in the case of *Dwarkanath Mandal and Another Vs. Srigobinda Choudhuri*, , held that a certificate Officer under the Bengal Public Demands Recovery Act of 1919 was not a Court with any special jurisdiction and his decision, therefore, could not operate as res judicata in subsequent proceedings. The learned Judges observed:

"It seems to me that there is considerable force in this contention, many officers have been invested with the powers of a Court for different purposes; for instance a Registering Officer exercises the powers of a Court for the purpose of summoning witnesses, taking evidence and so forth. In certain instances a Survey Officer has also been given that power. That does not necessarily make those officers a Court with special jurisdiction."

23. After a consideration of the law and facts, mentioned above, I have come to the conclusion that an Assistant Collector or a Commissioner, while acting under the Acquisition of Privileges Act, are not Courts whose decisions may have the force of res judicata in proceedings before regular Courts where the same question again arises.

24. The next point that has to be considered in this connection is whether the Assistant Collector and the Commissioner were competent to decide the question whether the petitioners were the tenants of Ahamadi Begam or the second respondent. If they were not competent to decide the question of tenancy, it is obvious that their decision of the question would have no binding force on any subsequent litigation between the parties. The Board of Revenue has spent a Rood deal of time in considering whether the said tribunals are tribunals of exclusive jurisdiction or not, but that question docs not appear to be very important in the case, because the question of tenancy is a question which can

be decided by revenue Courts, as has been done in the present cases, and the officers under the Acquisition of Privileges Act have no exclusive right to determine the said question, assuming that they could decide it.

25. The learned counsel for the petitioners urged that fraud, concealment or misstatement of facts, mentioned in Section 12 of the Acquisition of Privileges Act. could only be with respect to the right of the claimant to obtain a declaration u/s 6 and these matters had to be decided while dealing with an application for cancellation. Assuming this to be so, the officers cannot be said to have exclusive jurisdiction to decide the question of tenancy.

The principle of exclusive jurisdiction was discussed in numerous cases in order to determine whether the decision of a revenue Court on a question of tenancy was binding on a civil Court or not. The revenue Courts were Courts of exclusive jurisdiction with respect to tenancy rights and the civil. Courts were held to be bound by the decisions of the revenue Courts on those questions, because the revenue Courts were the only Courts having jurisdiction to decide the questions.

In cases with regard to the grant of declarations and their cancellation under the Acquisition of Privileges Act, even if the Assistant Collector and the Commissioner have Jurisdiction to decide the question of tenancy the exclusiveness of that jurisdiction was confined to the grant or refusal to grant, or cancellation or refusal to cancel the declaration, and it cannot be said that they have exclusive right to determine the question whether a certain person is a tenant of a zamindar or not. That question can certainly be determined by regular revenue Courts.

26. The real question for determination in the present cases is whether the Assistant Collector and the Commissioner are competent to decide the question of tenancy while acting under the Acquisition of Privileges Act. I have already referred to the provisions of Section 12 of the Act, which mention the grounds on which a declaration can be cancelled. The grounds nowhere mention the fact that the declaration is to be cancelled, if it is found that the person was not entitled to get it. The cancellation is confined to grounds of fraud, concealment and misstatement of fact. If a person correctly stated the facts and obtained a declaration, even though he was not legally entitled to obtain it, the declaration cannot be cancelled u/s 12.

In the present cases the Additional Commissioner himself has remarked that no applications for the grant of certificates were made by the petitioners, and the same may be the position in any other cases. In such cases there can be no question of cancelling a certificate under Clause (a) or (b) of Section 12, because there was no statement of fact which can be said to have been wrongly made, nor any concealment of material fact. The rules framed under the Act show that the Patwaris were to prepare the Khataunis Of which copies were supplied to the tenants and occupants, and if the tenant or occupant wanted to deposit the money, the Assistant Collector may easily have accepted it and granted a

certificate, Clauses (a) and (b) would not permit cancellation of certificates or declarations granted under the above circumstances, but the certificate or declaration could be cancelled under Clause (c) if a party obtained a decree or order from a competent Revenue Court which made it proper that the certificate be cancelled.

The real question that was to be considered under Clauses (a) and (b) of Section 12 was the question whether there was fraud, concealment of material fact or misstatement of fact while obtaining a certificate. If a statement had been made that a person was an occupant or a tenant, and the certificate was obtained on that statement of fact, the question could subsequently arise in proceedings for cancellation of the certificate whether the statement made was correct or not. In order to decide this question it would incidentally have to be considered whether the statement that the claimant was a tenant or occupant was correct. The main question for decision was the incorrectness of the statement and not the actual right of the person to obtain a certificate.

In fact, a trespasser could obtain a certificate and there would be no question for determination of his right, nor is it true that any person who obtained a certificate, became a Bhumidhar of the land.

27. The declarations obtained validly by tenants of disabled zamindars, mentioned in Sub-section (2) of Section 157 of the Zamindari Abolition Act were cancelled by Sub-section (3) of Section 18 of that Act. Similarly, persons who had obtained the declarations but did not come within the classes mentioned in Section 3 and Sub-section (2) of Section 3-A of the Acquisition of Privileges Act, do not become Bhumidhars because of the provisions of, Sub-section (2) of Section 18 of the Zamindari Abolition Act. In view of the different provisions of the Acquisition of Privileges Act, I have come to the conclusion that the Officers appointed under that Act were not tribunals of competent jurisdiction to decide the question of status of the parties before them.

28. In point of fact the Additional Commissioner in the present cases actually said,

"If the possession and title of the appellant was disputed by Syed Iqbal Ahmad (respondent No. 2) after 18 months, the lower court had no jurisdiction to go into the details of the title and possession as it did in this case."

He then refers to rule 8 and thinks that the Assistant Collector should have referred the matter to the sub-Divisional officer and says that the Assistant Collector had no jurisdiction to go into the title and possession and to decide those questions.

Earlier he said that the petitioners were recorded bona fide hereditary tenants and on the basis of these entries certain forms, meaning the copies of Khataunis, were issued to the petitioners. What the Assistant Collector should have done was to decide whether there had been any fraud, concealment or misstatement

of fact, and, in view of the fact that there was no application made by the petitioners for grant of the declarations, there could be no question of their having committed any fraud, concealment or mis-statement of facts.

In cases where no application was made for the grant of a declaration, there would be a very few cases where the declaration could be cancelled at all. I consequently do not think that the Assistant Collector and the Commissioner were tribunals of competent jurisdiction to decide the question whether the petitioners were tenants of the 2nd respondent.

29. The third requirement of *res judicata* appears also to be missing in the case, because the question whether the petitioners were tenants did not necessarily and substantially arise in the proceedings under the Acquisition of Privileges Act. They not having made any application for the grant of certificates, the certificates could not be cancelled under Clauses (a) and (b) of Section 12, unless some oral statement was proved to have been made by them, at the time when they obtained the certificates 18 months earlier. Such an oral statement was never set up, nor found to have been made, by any of the courts.

A reading of the judgment of the Commissioner shows that he was of the opinion that the question whether the petitioners were tenants of the land should not have been decided by the Assistant Collector, It is true that he then proceeded to consider whether the petitioners had paid rent to the zamindar and whether the receipts filed by them were genuine, but that appears to have been done only because a decision concerning them had been given by the Assistant Collector and the Commissioner was not satisfied with the decision on those points. He nowhere found as a matter of fact that the petitioners were appointed tenants by Ahamadi Begam herself and the learned counsel for the petitioners could only urge that that is a necessary inference from the fact that the Commissioner was not prepared to hold that certain receipts of rent filed by the petitioners had been improperly obtained.

If the receipts were genuine, they would evidence the fact that the petitioners had been appointed tenants by Ahamadi Begam. But the fact remains that the Commissioner had clearly expressed his opinion that the Assistant Collector should not have gone into the question of title and possession in any detail and also that he had no jurisdiction to do it, and the Commissioner himself does not find anywhere that the petitioners were appointed tenants by Ahamadi Begam.

The question, therefore, whether the petitioners were tenants cannot be said to have necessarily and substantial arisen in the proceedings under the Acquisition of Privileges Act, nor is there any clear decision on the point contained in the judgment, which, it is said, has the force of *res judicata* with respect to it. In my opinion, the decision of the Additional Commissioner dated 3-7-1951 does not have the force of *res judicata* on the question whether Ahamadi Begam had appointed the petitioners as her tenants or not.

30. Before coming to the second question, namely, whether the petitioners have

acquired any rights under the Zamindari Abolition Act, it has to be determined whether revenue courts were bound to decide this matter. The suits were filed in the year 1945 and they were for a declaration that the plaintiff was the khudkasht holder in possession of the plots and that the defendants (petitioners before me) were not the tenants of any of those plots.

The Board of Revenue has held that this being a suit purely for a declaration, it was not necessary in this suit to go into the question whether the petitioners had acquired any rights under the Zamindari Abolition Act or not because the declaration would be with respect to the position as it stood on the date that the suits were filed. I do not find any error apparent or otherwise in the view taken by the Board.

I am not sitting as a Court of appeal over the decision of the Board, and I can interfere with that decision only if there is any patent or manifest error in it. Far from saying that there is any error in the decision, I am inclined to agree with the view taken by the Board. Generally, in suits for declaration, the courts only determine the position as it stood on the date of the plaint; but if there has been any subsequent legislation during the pendency of the suit in the trial court or in any court of appeal and that legislation has been given retrospective operation so that the plaintiff's title is negatived even on the date of the suit, the subsequent legislation has to be taken into consideration and the suit dismissed.

There may also be cases where the declaration sought is a useless relief and the declaration would be an infructuous one. In such cases also the court may, under the general law, refuse to grant a declaration as also in cases where a mere declaration is claimed and not the other effective reliefs to which also the plaintiff was entitled.

31. In one respect the provisions of certain sections of the U. P. Tenancy Act appear to be different from the general law and the difference is that some of the sections, including Section 63 of the U.P. Tenancy Act, confer a statutory right on a zamindar claiming khudkasht land, or a tenant claiming khudkast land, or a tenant claiming tenancy in the land, to claim a declaration concerning their respective rights. On the admitted facts of the cases, the suits u/s 63 of the U.P. Tenancy Act were maintainable and Ahamadi Begam and, after her, the 2nd respondent were claiming a declaration which the statute had authorised them to claim.

The court would be authorised to refuse the declaration only if there has been some subsequent legislation depriving the respondents of their rights on the date that the suits were filed. It is not said that the provisions of the Zamindari Abolition Act have any such retrospective operation. The question here is not of the provisions of the Zamindari Abolition Act being retrospective, (they have clearly not been given any retrospective operation), but the question is whether the coming into force of the Zamindari Abolition Act, during the pendency of the suit in the trial court, necessarily meant that the declaration claimed should be

refused.

The cases, where ejectment of a defendant is sought and a legislation is passed during the pendency of the suit in the trial court or in the court of appeal, prohibiting such ejectment, are quite different. The ejectment in such cases is after the decree has been passed and, if the ejectment would not be justified on that date because of a legislation passed during the pendency of the suit, the court should take the subsequent legislation into consideration and refuse to pass the decree.

32. The Pull Bench case of Jagannath Vs. Board of Revenue, U.P., Allahabad and Others, was a case where a suit had been filed u/s 180, U.P. Tenancy Act, which was a suit for ejectment of a defendant. The Zamindari Abolition Act came into force when the suit was pending in appeal, and it was proved in the case that the defendant had acquired Adhivasi rights and could not be ejected from the land. It was held that the provisions of the Zamindari Abolition Act should be taken into consideration and the suit for ejectment dismissed.

33. In a subsequent Bench decision of this Court in Balak Ram v. Board of Revenue, 1957 All LJ 224 (I) it was held that a defendant in a suit u/s 180 of the U.P. Tenancy Act could set up the plea, even at the stage of second appeal, that he had acquired the right of an Adhivasi u/s 20 of the Zamindari Abolition Act but where no such plea was put forward, the plaintiff's suit for ejectment, which had been decreed before the coming into force of the Zamindari Abolition Act, was not to be dismissed simply because subsequently the rights of the Zamindars had been abolished in some classes of land.

The dismissal of a suit, under the above circumstances, would mean that the plaintiff was not entitled to possession of the land, even before he lost his rights under the Zamindari Abolition Act. The further consequence of the dismissal would be that he would have to refund the profits that he earned during the period he was entitled to possession of the property after he had obtained possession under a decree of the court passed before the Zamindari Abolition Act came into force.

34. The learned counsel for the petitioners referred us to two decisions of the Federal Court of India reported in AIR 1939 74 (Federal Court) and Lachmeshwar Prasad v. Keshwar Lal AIR 1941 PC 5 (K). In the second case it has been held that the hearing of an appeal under the procedural law of India is in the nature of re-bearing and therefore in moulding the relief to be granted in a case on appeal, the appellate court is entitled to take into account even facts and events which have come into existence after the decree appealed against.

It is further said that the appellate court is competent to take into account legislative changes since the decision in appeal was given and its powers are not confined only to see whether the lower court's decision was correct according to the law as it stood at the time when its decision was given. In the first case a similar view was taken and it was held that the power to take subsequent

legislation into consideration being there in the appellate court, the Federal Court could also exercise it and its powers were not less than the powers of the appellate court.

35. The facts of the Supreme Court case of Chunilal Khushaldas Patel Vs. H.K. Adhyaru and Others, were very different, but an observation of their Lordships at page 674 of the Report supports the view taken by the Board of Revenue. The observations are,

"Even though an appeal is in the nature of a re-hearing and the courts in this country can take into account the facts and events which have come into existence after the decree appealed against, it could be only for moulding the relief to be granted in the appeal."

36. In a number of cases decided under the U.P. Control of Rent and Eviction Act of 1947, this court has taken the view that even in second appeals the High Court should take into consideration the provisions of the Act, even if the Act was not in force when the courts below decided the case. But they were also cases of ejectment and therefore distinguishable from the facts of the present cases.

37. In the case of a suit purely for a declaration, I think it is open to the court to declare the right of the parties according to law as it stood on the date that the suit was filed. In order to grant the relief claimed by the plaintiff in such a case, it is not necessary to take into account the subsequent legislation. The relief need be moulded only to this extent as to say that the declaration would be confined to the position as it was on the date that the suit was filed, and this is what the Board of Revenue has done.

It was not necessary to take subsequent legislation into consideration in order to mould the relief which the plaintiff was entitled to. If the questions of acquisition of rights under the Zamindari Abolition Act had been raised and decided by the trial court and the first appellate court, it would have been open to the Board of Revenue to decide them finally. But in the present case, it appears that only one question of the acquisition of Adhivasi rights was raised for the first time before the commissioner and the commissioner rejected it. The Board of Revenue did not confirm the decision of the Commissioner and left the matter open, as it was of the opinion that it was not bound to decide the question. I think it was within the discretion of the Board of Revenue to decide the question or not, and the exercise of the discretion in the present cases was not such as to justify any interference under Article 226 of the Constitution.

38. The learned counsel for the petitioners urged that, in order to avoid multiplicity of litigation, the rights of the petitioners, under the Zamindari Abolition Act should have been considered by the Board of Revenue, but, as I have stated above, the matter was a discretionary one and not obligatory.

39. Coming now to the alleged acquisition of rights under the Zamindari Abolition Act, it is claimed that the petitioners have acquired rights under Sections 16, 18

and 20 of that Act. But I find that, on the material before the Board of Revenue and before me it is not even possible to satisfactorily decide this question. u/s 16, the petitioners claim that they should be deemed to be hereditary tenants of the land, but before Clause (i) can apply the petitioners have to prove not only that they were recorded as occupants of the land in a record revised under Chapter IV, of the U.P. Land Revenue Act or corrected by an officer specially appointed in this behalf by the State Government, but also that they were in possession of the land on the date of vesting or that under Clause (ii) they were recorded in a record of rights prepared under Clause (e) of Section 32 of the Land Revenue Act for the year 1356 F, and also that they were in possession of the land on the date of vesting. There is no finding that they were in possession on the date of vesting. On the state of evidence on the record, they could not get the benefit conferred by Section 16 of the Zamindari Abolition Act.

40. The claim u/s 18 is that the petitioners, became Bhumidhars under Sub-section (2) of that section. But for making out this case, they have to prove not only that they have acquired the declaration u/s 6 of the Acquisition of Privileges Act but also that they are persons belonging to the class mentioned in Section 3 or Sub-section (2) of Section 3-A of that Act. The findings arrived at by the first two courts, and not interfered with by the Board of Revenue negative the claim that the petitioners belonged to these clauses.

41. For the last claim u/s 20 the petitioners have to prove that they were recorded as occupants of the land in the Khasra or Khatauni of 1356 F. It has also to be shown that the land is of a description mentioned in Clauses (i) and (ii) of Sub-section (b) of Section 20. The Commissioner had rejected this claim, but the Board of Revenue did not go into the matter and I think the Board was not bound to go into it. If the petitioners have acquired any rights under the Zamindari Abolition Act, they can enforce those rights in appropriate proceedings. The grant of a declaration that the second respondent or his predecessor was the khudkasht holder of the land on the date of the suit and the petitioners were not the tenants of those plots, does not affect any right of the petitioners which might have accrued to them under the Zamindari Abolition Act, which came into force on the 1st July 1952.

42. The last point urged was that a mere declaration like this would be an infructuous relief and should not be granted to the respondent. I do not think that this contention is correct. The declaration would help the respondent a great deal, because it would show that the petitioners were not appointed as tenants of the plots by the zamindar in the year 1945 or before that, and there is no assertion that the petitioners were appointed tenants after the date of the suit. If the same position continued till the 1st July 1932, the respondent would acquire Bhumidhari rights over the land. Assuming that the petitioners have acquired Adhivasi rights, the 2nd respondent would be entitled to compensation under U.P. Act No. XX of 1954. Apart from this, as already stated, the 2nd respondent had a statutory right to obtain a declaration u/s 63 of the U.P. Tenancy Act, and I think

he is entitled to obtain it.

43. For the above reasons, I think that all these writ petitions should be dismissed with costs.

Mehrotra, J.

44. I had the advantage of reading the judgment of my brother and I am in complete agreement with the conclusion arrived at by him that the present petitions must be dismissed; but as I do not completely agree with some of the reasons given by him, I would like to give my separate judgment.

45. The facts have been fully set out in the judgment of my brother and I need not repeat them. Two main points were urged by the counsel for the petitioners. Firstly that the decision of the Addl. Commissioner dated 3rd July, 1951 dismissing the applications of the second respondent for the cancellation of the certificates filed u/s 12 of the Acquisition of Privileges Act, has the force of Res judicata in so far as the question whether the petitioners were tenants of the plots was concerned and secondly that the petitioners have acquired rights under Sections 16, 18 and 20 of the Zamindari Abolition Act, and the revenue courts should have decided this question.

46. In my opinion, the first point urged by the petitioners has no force. My brother has fully dealt with this question and I am in complete agreement with him that the decision of the Addl. Commissioner dated 3rd July 1951, will not constitute Res Judicata.

47. Coming to the second question, the counsel for the petitioners argued that the defendants had become hereditary tenants u/s 18 of the Zamindari Abolition and Land Reforms Act because they were recorded as occupants in 1356 F, and were in possession in 1359 F. In case they have acquired hereditary rights in the land, the land ceased to be the plaintiff's khudkasht. As the Zamindari Abolition and Land Reforms Act had come into force before the decree was passed by the trial court, it was open to the trial court to have taken into consideration this change in the law and if the effect of this change was that the plaintiffs were deprived of their rights in the land, the Courts should not have granted a declaratory decree to the plaintiffs.

The Board of Revenue repelled this contention on two grounds. It held that the plea had not been taken before the Board although an application was made on the 1st July seeking an amendment of the grounds of appeal and thus the Board held that the counsel for the respondents rightly contended that the matter could not be determined without fresh evidence which was necessary on the point of possession in 1359 F. If the plea had been raised at an earlier stage, the plaintiffs-respondents would have had an opportunity of saying that the defendants were not in possession in 1359 F.

The Board, however, further repelled the contention on the ground that the petitioners were not entitled to the tenant of Section 16 as that necessarily gives

rise to the question whether Section 16 can be given retrospective effect pending a declaratory suit under one of the Sections 59-63 of the U.P. Tenancy Act. The Board was of the opinion that the considerations which governed the question of retrospective application of Section 16 in declaratory suits, are very different from the considerations upon which this question depends so far as Sections 18 and 20 of the Zamindari Abolition and Land Reforms Act go.

The question really to be considered by the Board of Revenue was whether it is open to the defendants to rely upon Sections 16, 18 and 20 of the Zamindari Abolition and Land Reforms Act which, had come into force during the pendency of the suit in order to establish their right which they acquired under, those sections and further contend that as they have succeeded in establishing the right under any of these sections, the plaintiffs should not be granted a declaration inasmuch as the acquisition of the rights by the defendants under any of the Sections 16, 18 or 20 had the effect of putting an end to the title of the plaintiff about which they were seeking a declaration.

The view which the Board seems to have taken is that if the defendants are allowed to take advantage of the provisions of the, Zamindari Abolition and Land Reforms Act, which had come into force during the pendency of the suit it would be defeating the right of the plaintiffs which they admittedly possessed at the time when the suit was filed, and thus it would be giving a retrospective effect to Sections 16, 18 and 20 of the Zamindari Abolition and Land Reforms Act in the sense that it would be effecting the vested rights.

It was held by the Full Bench of this Court in Jagannath Vs. Board of Revenue, U.P., Allahabad and Others, , that in a suit filed u/s 180, U.P. Tenancy Act, the defendant could set up the defence that he had acquired Adhivasi rights and could not be ejected from the land even though the U.P. Zamindari Abolition and Land Reforms Act had come into force during the pendency of the appeal. In that case the argument, that if a defendant is allowed to claim the benefit of the provisions of the U.P. Zamindari Abolition and Land Reforms Act which had come into force during the pendency Of the suit, it will have the effect of giving the provisions of the Zamindari Abolition and Land Reforms Act a retrospective effect in as much as it will affect the vested rights of the petitioners both as to the subject matter of the suit as well as to the right to file the suit, was repelled. Two questions were referred to the Full Bench in this case :--

"(i) Would Section 20 affect the rights of the parties to the suit even though the suit had been filed prior to coming into force of Section 20?

(ii) Whether the provisions of the U.P. Land Tenures (Legal Proceedings) Removal of Difficulties) Order, 1952, would make any difference to applying the provisions of Section 20 to pending suits or appeals."

Both the questions were answered together in the following terms :--

"Notwithstanding anything contained in the U.P. Land Tenures (Legal

Proceedings). Removal of Difficulties) Order, 1952, a suit, appeal or other legal proceeding u/s 180 of the U.P. Tenancy Act, 1939 pending on the 30th June, 1952 will be decided with reference to any right which may have accrued to either party in the land the subject-matter of the suit, appeal or other proceedings under the U.P. Zamindari Abolition and Land Reforms Act, 1950."

It will be useful to refer to some of the observations in the judgment. At page 277 (of All LJ): Cat p. 433 of AIR) it was observed that:--

"The question to be determined is whether a defendant in a suit u/s 180 of the Tenancy Act who has acquired the status of an Adhivasi during the pendency of the suit or appeal can set up his right to possession as an answer to the plaintiffs' claim. In our opinion he is entitled to do so. It is no doubt a general rule that where the intention of the legislature is doubtful an enactment will not be construed so as to affect vested rights of action; but the matter is one of construction, and if upon a consideration of the enactment as a whole it is apparent that it was the intention of the legislature that the provisions of the Act should be applicable to pending suits, they will be so applied. *Quilter v. Maplesor*, (1882) 9 QBD 672 (M) is an instructive case on this point. In the case before us the legislature as part of a radical scheme of land reform, has conferred not only a new status upon certain persons but has vested those persons with rights which are inconsistent with the continued exercise by other persons of rights which they formerly possessed. Prior to the 30th June, 1952, the petitioner had a legal right to obtain an order for the ejectment of the third respondent; after that date the third respondent obtained prima facie a right to take or retain possession of the land from which the plaintiff sought to have been ejected."

In interpreting the provisions of the U.P. Zamindari Abolition and Land Reforms Act it was further observed at page 279 (of All LJ): (at p. 434 of AIR) that :--

"The Act provides for the vesting of all proprietary rights in the State, and save where land was in the personal cultivation of a thekedar the latter ceases to have any right to hold or possess such land. It creates new categories of tenure-holders, bhumidhars, sirdars, and asamis; certain tenants of sir, sub-tenants and occupants of land became adhivasis. The whole pattern of land tenure has been changed; new rights have been created and old rights abolished. The U.P. Land Tenures (Legal Proceedings) Removal of Difficulties) Order was made for one purpose only, as an aid to the transition, from the old system to the new, and we are of the view that the order must, if possible, be so construed as to be in harmony with the Act under which it is made and as an order which confers upon a plaintiff rights which have been taken from him or which deprives a defendant of the benefit or rights with which he has been invested."

It will therefore not be right to hold that because the effect of allowing the defendant to claim his rights which accrued to him under the provisions of the Zamindari Abolition and Land Reforms Act will be to defeat the vested rights of the plaintiffs it should not be allowed to be asserted. In my opinion the principle

underlying the Full Bench decision applies to the cases of declaration also.

The question whether the plaintiffs will be denied the relief of declaration in respect of their rights which they admittedly possessed at the time of the suit because the defendants have acquired a right during the pendency of the suit under an enactment which had come into force during the pendency of the suit, is entirely a different question. In cases of suits for possession it has been held by the Full Bench, and there is no doubt, that if during the pendency of the suit the defendant acquires a right on account of which he cannot be ejected from the land, such a right will be given effect to and the plaintiff will not be granted a decree for ejectment even though he was entitled to such a decree when the suit was brought.

In my judgment, no distinction can be drawn on principle between the cases of ejectment and the cases where the suit is for declaration that the change in the legislation can be considered in order to mould the relief which the plaintiff has claimed in a suit even though the changes in the legislation had come into existence during the pendency of the appeal has been well recognised in the case of AIR 1941 5 (Federal Court) .

:1939 FCR 193 : (AIR 1939 PC 74) These decisions were based on the principle that in India the right of appeal is a right of rehearing. This principle only means that as soon as the appeal was filed, the suit itself will be deemed to have revived and pending and whatever reliefs could be granted by the court of the first instance, if this suit was pending before it could be granted by the appellate court. This decision to my mind assumes that the trial court could take into consideration change in the legislation which comes into force during the pendency of the suit in moulding the relief which the plaintiff was entitled to.

If the Federal Court was of opinion that even the trial court could not take into consideration the legislation which comes into force during the pendency of the suit, the question of giving such a power to the appellate court would not have arisen at all. The argument in that case was based on the assumption that even if the trial court had such a right the appellate court had none because the decree had already been passed by the trial court.

In any view of the matter, therefore, the revenue courts were entitled to take into account in moulding the relief which the plaintiff was entitled to get, the fact that the law has been changed during the pendency of the suit under which the defendants were entitled to claim certain rights in the land. If the right which the defendants claimed under the provisions of the Zamindari Abolition and Land Reforms Act is such as to take away the right of the plaintiff or if the right which has been acquired by the defendants was such as would have been inconsistent with the right claimed by the plaintiff, it will certainly be open, to the revenue courts to refuse the relief or declaration to the plaintiffs.

The plaintiffs may as well have been entitled to a decree if on the merits either the defendants failed to establish their rights in the land under the provisions of

the new Act or that they failed to set up that plea before a proper court if the acquisition of the right by them depended upon certain question of fact which could have been determined by that court alone.

48. Examining in the light of these observations, as I have already pointed out, the defendants petitioners in this case were not entitled to defeat the claim of the plaintiffs-respondents for a declaratory decree on the ground that they had acquired a right u/s 16 of the U.P. Zamindari Abolition and Land Reforms Act inasmuch as they had not pleaded that defence before the courts below. If they had raised such a point, the courts below would have considered the question of the petitioners' possession in 1359 F. which was a necessary condition before the defendants could acquire any rights u/s 16.

49. As regards claim of the defendants of Bhumidhari rights u/s 18, in view of the decision of the Board of Revenue that the decision of the Addl. Commissioner did not constitute res judicata, the petitioners, on the findings arrived at by the revenue courts have not acquired a bhumidhari right, and, therefore, on the merits there was no bar to the grant of a declaratory decree to the plaintiffs in this case,

50. As regards the plea of the defendants u/s 20, the Addl. Commissioner in appeal had repelled the defence on merits. The Board of Revenue no doubt in its order has not endorsed the reasonings of the Addl. Commissioner but has based its decision entirely on the consideration that Section 20 cannot be given a retrospective effect but, in my opinion, any grant of reliefs to the plaintiffs declaring that the land was their khudkasht u/s 63 at the time when the suit was filed, will not give rise to any inconsistent position.

I would, therefore, like to base my judgment not on the ground that the defendants cannot be allowed to take advantage of Sections 16, 18 or 20 of the U.P. Zamindari Abolition and Land Reforms Act inasmuch as that will have the effect of depriving the plaintiff of their vested rights and thus it would be giving retrospective effect or on the ground that in declaratory suits u/s 63 it is not open to the trial court to take into account any change in law during the pendency of the suit; but on the ground that so far as the plea of Section 16 is concerned, it was not pleaded by the present petitioners with the result that the proper court of fact could not determine the necessary facts which were required to give a right to the petitioners and as regards Section 18 on the ground that the decision of the Addl. Commissioner not being res judicata the defendants petitioners have not proved that they acquired bhumidhari rights and as to Section 20 on the ground that if the claim of the plaintiffs-opposite parties is confined to the date of the suit and a declaration is granted that the land was their khudkasht on the date of the suit, such a declaration will not be inconsistent with any right which the defendants can claim u/s 20 of the U.P. Zamindari Abolition and Land Reforms Act.

51. I would, therefore concur with the proposed order of my brother, that these

writ petitions should be dismissed with costs.

BY THE COURT:

52 For the reasons given in our separate but concurring judgments, all these petitions are dismissed with costs in favour of Iqbal Ahmad respondent.