

**(1970) 07 GUJ CK 0018**

**In the Gujarat High Court**

**Case No : Spl. Civil Application No. 1357 of 1966**

Dahyabhai Somabhai and Another

APPELLANT

Vs

Ramaji Kesraji and Others

RESPONDENT

**Date of Decision : 21-07-1970**

**Acts Referred:**

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 70, 85, 85  
Constitution of India, 1950 — Article 226, 227  
Mamlatdars Court Act, 1906 — Section 5

**Citation : AIR 1971 Guj 232 : (1971) GLR 809**

**Hon'ble Judges : D.A. Desai, J**

**Bench : Single Bench**

**Advocate : J.M. Patel, for C.T. Daru, for the Appellant;**

## **Judgement**

1. This petition under Article 227 of the Constitution of India is directed against the judgment and order of the Mamlatdar, Gandhinagar in Mam. Court Act Case No. 16/65 pronounced on 19th April 1966 and confirmed by the Prant Officer, Gandhinagar in Revision Application No. 6/66 on 30th September 1966. One Mafatlal Punamchand was the owner of the lands bearing S.No. 1137 admeasuring 1 acre 27 gunthas and S.No. 1138 admeasuring 1 acre and 27 gunthas situated within the revenue limits of Isanpur Mota in Gandhinagar District. Mafatlal Punamchand the owner of the lands sold the same to the petitioners by a sale deed dated 26th April 1956 for a consideration of Rs. 1350/-. The petitioners say that they came into possession of the lands on the date of the sale and since then they are in continuous possession except for a short period in 1964. As this sale was effected on 26th April 1956 that is after 15th June 1955 and before 1st April 1957, when the Amending Act of 1955 came into force, the Mamlatdar held an enquiry whether the sale was in contravention of Section 63 or 64 of the Bombay Tenancy and Agricultural Lands Act, 1948 as it stood before the commencement of the Amending act 1955. The Mamlatdar declared the sale to be invalid by his order dated 9th December 1958. Unfortunately it appears that after declaring the sale invalid, the Mamlatdar did

not proceed to pass the consequential order as required by Section 84-B(2) of the Bombay Tenancy and Agricultural Lands Act, 1948 which requires that the Mamlatdar shall direct that the possession of the land be restored to the person from whom it was purchased and the amount of consideration paid, if any, shall be returned by the purchaser to the vendor. Present respondent Ramaji Kesraji claimed to be the tenant of this land. It appears that his name appeared as tenant in the Government records. The Agricultural Lands Tribunal commenced an enquiry u/s 32G of the Bombay Tenancy and Agricultural Lands Act, 1948 to determine the price. In the course of this inquiry, the Agricultural Lands Tribunal held that respondent was not the tenant of the land and the proceedings were dropped by his order dated 30th January 1960. The petitioners have stated that no appeal or revision is preferred against this order. The Talati of village Isanpur Mota in execution of the order declaring the sale invalid proceeded to take possession of the land from the petitioners and handed over the same to the respondent on 3rd April 1964. The petitioners thereupon approached the Mamlatdar on 21st April 1964 contending that they have been unlawfully dispossessed by the Talati and the Talati had no power, authority or jurisdiction to recover possession from them. The Mamlatdar by his order dated 19th June 1964 directed that the respondent should hand over possession of the lands to the petitioners and pursuant to this order, the petitioners came back into possession of these lands. The respondent preferred an appeal against the order of the Mamlatdar directing him to restore possession of the land to the petitioners; but it is not clear as to what has happened to that appeal. The respondent thereafter filed a suit u/s 5 of the Mamlatdar's Courts Act praying for possession of the suit lands. The respondent alleged in the plaint that he is a tenant of the suit lands and that he has been unlawfully dispossessed and the sale in favour of the petitioners having been declared invalid, they have no title to the lands and therefore, the respondent is entitled to be restored to possession. The petitioners appeared in the suit and raised a contention that the Mamlatdar's Court has no jurisdiction to decide the question of tenancy and has accordingly no jurisdiction to entertain the suit. The Mamlatdar negatived this contention and directed that possession of the lands be handed over by the present petitioners to the respondent. The petitioners carried the matter in revision to the District Deputy Collector and Prant Officer without success. The petitioners have challenged the aforementioned two decisions of the Mamlatdar and the District Deputy Collector in this petition.

2. Mr. J.M. Patel, learned Advocate, who appeared for the petitioners urged that a Court set up under the Mamlatdar's Courts Act and known as Mamlatdar's Court is a Civil Court and if before such a Court a question is raised whether a particular person is a tenant or not within the meaning of the Bombay Tenancy and Agricultural Lands Act, 1948, the Mamlatdar's Court will have no jurisdiction to decide that issue and the issue will have to be referred to the Mamlatdar u/s 85A of the Bombay Tenancy and Agricultural Lands Act, 1948. It was, therefore, urged that if the Mamlatdar while presiding over the Mamlatdar's Court decides

the issue that a particular person is a tenant, the finding will be without jurisdiction and the order would be a nullity. It was also urged that in this case the petitioners as defendants specifically contended in the written statement that the Mamlatdar's Court has no jurisdiction to decide question of tenancy and as the matter was not referred to the Mamlatdar u/s 70(b) of the Bombay Tenancy and Agricultural Lands Act, 1948, and the Mamlatdar while deciding the suit u/s 5 of the Mamlatdar's Courts Act proceeded to inquire into the question of tenancy the decision of the Mamlatdar is without jurisdiction and there is such patent lack of jurisdiction that the decision is wholly invalid and is a nullity.

3. The scheme of the Mamlatdar's Courts Act shows that the State Government shall set up a Court known as Mamlatdar's Court over which the Mamlatdar shall preside. Undoubtedly, the respondent approached the Mamlatdar by invoking jurisdiction of the Mamlatdar's Court u/s 5 of the Mamlatdar's Courts Act. The respondent by filing suit u/s 5 of the Mamlatdar's Courts Act prayed for possession against the petitioners. The respondent specifically claimed his right to possession on the allegation that he is a tenant of the lands and he has been unlawfully dispossessed and that he is a tenant entitled to possession of the lands from the petitioners, who are according to the respondent in unauthorised possession of the lands. The allegation in the plaint is clear and unequivocal and right to possession is founded upon the claim of status of a tenant vis a vis lands involved in the dispute. This particular status claimed by the respondent was specifically denied by the petitioners and therefore an issue would necessarily arise whether the respondent was a tenant of the lands. Once that issue arises on the pleading of the parties, the question would immediately arise whether the Mamlatdar presiding over the Mamlatdar's Court will have jurisdiction to decide the issue of tenancy.

4. It is by now well settled that the Mamlatdar's Court set up under the Mamlatdar's Courts Act is a Civil Court. In *Mahadaji v. Sonu* (1872) 9 Bom HCR 249 and *In re Savanla* ILR (1880) Bom 137 it was specifically held that the Mamlatdar's Court is a Civil Court. The Explanation to Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Tenancy Act) also provides that for the purpose of Section 85 a Civil Court shall include Mamlatdar's Court constituted under the Mamlatdar's Court Act, 1906. The issue whether the respondent is a tenant of the land specifically arose before the Mamlatdar's Court which is a Civil Court. Section 85 of the Tenancy Act provides that no Civil court will have jurisdiction to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by the Mamlatdar or the Tribunal, a Manager, the Collector, the Gujarat Revenue Tribunal or in appeal or revision by the State Government in exercise of their powers of control. Therefore, if an issue arises for which the Mamlatdar functioning under the Tenancy Act is constituted an exclusive forum then such an issue cannot be decided or dealt with by the Mamlatdar while presiding over the Mamlatdar's Court because the Mamlatdar's Court is a Civil Court and the jurisdiction of the Civil Court to decide, settle or deal with such a question is

ousted. It is also well settled by a catena of decisions that the question whether a particular person is a tenant of a particular land within the meaning of the Tenancy Act can be decided or dealt with by the Mamlatdar u/s 70 of the Tenancy Act as the Mamlatdar is constituted an exclusive forum for the decision of the said issue. Thus, it appears crystal clear that if a question arises as to whether the person is a tenant of a particular land or not within the meaning of the Tenancy Act, the Mamlatdar functioning under the Tenancy Act will have an exclusive jurisdiction to decide that question. If such an issue arises before a Civil court which includes the Mamlatdar's Court, the Civil Court will have no jurisdiction to decide or settle or deal with the same. Section 85A provides procedure as to how the Civil Court should deal with an issue for deciding which the Mamlatdar has exclusive jurisdiction. Section 85A provides that if in any suit instituted in any Civil Court an issue arises which is required to be settled decided or dealt with by any of the authorities set up under the Tenancy Act, the Civil Court shall stay the suit and refer such issue to the authority competent to decide the same. There is also an Explanation appended to Section 85A which provides that for the purpose of Section 85A a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Court Act, 1906. This provision clearly indicates that if an issue arises whether a party to the proceeding brought before the Mamlatdar under the Mamlatdar's Court Act is a tenant or not, that issue cannot be decided by the Mamlatdar while presiding over the Mamlatdar's Court and the issue will have to be referred to the competent authority, namely, the Mamlatdar functioning under the Tenancy Act. This will be the effect on reading together Section 5 of the Mamlatdar's Court Act and Sections 85 and 85A of the Tenancy Act. In the suit which the respondent filed before the Mamlatdar, Gandhinagar, u/s 5 of the Mamlatdar's Court Act on the pleadings of the parties a specific issue arises whether respondent was tenant of the lands. Obviously such an issue cannot be decided by the Mamlatdar while presiding over the Mamlatdar's Court. Obviously, the Mamlatdar in such circumstances would have to proceed as indicated in Section 85A of the Tenancy Act. Therefore, the Mamlatdar while presiding over the Mamlatdar's Court should have referred that issue to the Mamlatdar functioning under the Tenancy Act. This would be the strict compliance with law. If the Mamlatdar while presiding over the Mamlatdar's Court proceeds to decide the issue for which the Mamlatdar functioning under the Tenancy Act has exclusive jurisdiction, obviously the order and finding of the Mamlatdar who is presiding over the Mamlatdar's Court will be without jurisdiction and as there would be patent or complete lack of jurisdiction, the order would be a nullity. So far, Mr. Patel is right in his submission and for the reasons to be presently mentioned if the petitioners had not disentitled themselves to a writ of certiorari, I would have unhesitatingly quashed the order.

5. The petitioners have prayed for a writ of certiorari to quash and set aside the order of the Mamlatdar and the order passed by the District Deputy Collector in revision. The question would immediately arise whether the petitioners are

entitled to the writ of certiorari. I am not inclined to grant this writ on two specific grounds - first being that the point raised is entirely technical and second and more important being that the petitioners have disentitled themselves to a writ of certiorari.

6. Taking up the first ground, namely that the question raised by the petitioners is entirely technical, it may be pointed out that in the ultimate analysis it is the same Mamlatdar who would decide both the issues. Undoubtedly, the Mamlatdar presiding over the Mamlatdar's Court has no jurisdiction to decide or deal with the question which is required to be decided or dealt with by a competent authority under the Tenancy Act, yet if he was to strictly follow the letter of law the same Mamlatdar will have to make reference u/s 85A of the Tenancy Act to himself as functioning u/s 70 of the Tenancy Act. He will have then formally to stay the suit filed u/s 5 of the Mamlatdars' Courts Act and then proceed u/s 70 of the Tenancy Act and to hold enquiry whether respondent who was plaintiff before the Mamlatdar was a tenant of the land. Having recorded the finding whether the respondent was or was not the tenant, he has to report to himself in his other capacity as Mamlatdar presiding over the Mamlatdar's Court. It is the same officer functioning under the same designation and almost performing identical duties except that the functions under two different statutes. The parties would be the same. The evidence would be the same. The issue would be the same and the decision would govern the disposal of the matter brought before him. Viewed from this angle, the contention raised that the Mamlatdar while presiding over the Mamlatdar's Court set up under the Mamlatdar's Courts Act has no jurisdiction to decide or deal with the issues which are required to be decided or dealt with by the Mamlatdar u/s 70 of the Tenancy Act is purely technical.

7. I am however not inclined to issue a writ of certiorari for the very important reason that the petitioners have disentitled themselves to the relief by way of writ of certiorari which is not a writ of right but under certain circumstances, it is a matter of discretion of the Court. Mr. Patel very strenuously urged that if the impugned order is passed by a Tribunal with patent lack of jurisdiction the order is a nullity or non est and this Court must quash the same. It was urged that such an extraordinary jurisdiction is conferred on the High Court in order to see that all the subordinate Courts and Tribunals function within the specified limits of their jurisdiction and if any one deviate therefrom the High Court can correct the same by issuing an appropriate writ. It is true that the power of superintendent conferred by Article 227 of the Constitution must be exercised by the High Court to see that all the subordinate Courts and Tribunals function within the specified limits of their jurisdiction. If any subordinate Court or Tribunal exercises jurisdiction not vested in it, the order or action of the Court or Tribunal can be corrected by issuance of an appropriate writ. But the question is whether in every case where it is brought to the notice of the High Court that a Tribunal had exceeded its jurisdiction, the Court as a matter of right should issue a writ at the instance of the party whose conduct has disentitled him to a relief

by way of certiorari. Certiorari is not a writ of right but it is a discretionary relief that can be granted by the Court. In Halsbury's Laws of England Third Edn. Vol. 11 p. 140 it is observed that:

"Although the order is not of course it will though discretionary nevertheless be granted *ex debito justitiae* to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to the relief."

In *King v. Stafford Justices: Ex parte Stafford Corpn.*, (1940) 2 KB 33 (CA) it is observed that the order for the issue of the writ of certiorari is, except where it goes as of course, strictly in all cases, a matter of discretion. It is further observed that whether it is a matter of discretion the Court is entitled to inquire into the conduct of the applicant and the circumstances of the case in order to ascertain whether it is proper or not proper to grant the remedy sought. It is thus open to the Court to inquire into the conduct of the applicant before relief by way of writ of certiorari can be granted. Whenever any relief cannot be claimed *ex debito justitiae* or as a matter of course or as a matter of right, the Court has discretion whether to grant relief or not. The Court would certainly be justified in inquiring into the conduct of the applicant who has moved the Court for the relief by writ of certiorari. If in such a case, the impugned order is shown to be even without jurisdiction, the High Court is not bound to interfere with it, unless it is satisfied that the order is unjust and wrong on the merits. The High Court will ordinarily exercise its power under Article 227 in aid of justice and not to promote technicality.

8. Mr. Patel however referred to *R. Kantilal and Co. and Another Vs. Azizul Haque and Bros.*, and urged that it is one thing to refuse to interfere with an invalid order in the exercise of discretion and it is quite a different thing to give effect to the invalid order as a valid order. Mr. Patel urged that refusal of this Court to exercise jurisdiction under Article 227 would result in keeping alive an order which is invalid. It is true that the order passed by the Mamlatdar would remain as it is if the Court refused to exercise jurisdiction under Art. 227. But thereby this Court is not giving effect to that order. The petitioners are not relying upon that order in support of their claim. The Court is not basing its decision on that order or the Court is not deciding the rights of the parties as flowing therefrom. I am not inclined to grant relief because apart from what the respondent has done in the course of the proceedings, the conduct of the petitioners to be presently mentioned has disentitled them to any relief in the present proceedings. Reference was also made to *Issardas Somamal Lulla Vs. The Collector of Madras and Additional Custodian of Evacuee Property, Madras*, . In that case it is specifically observed as under:

"A writ of certiorari is issued at the discretion of the superior Court. It cannot be held to be a writ of right or one issued as a matter of course. But for the exercise

of the discretion, of the Court, there are some well accepted principles. In issuing the writ, if the Court is moved by a member of the public having no personal or particular interest in regard to the subject matter, the matter would be one, entirely for the discretion of the Court. But if on the other hand, it is moved by a party aggrieved by the order of the inferior tribunal, the Court is bound to issue the writ at his instance, except in cases where he had disentitled himself to the discretionary relief by reason of his own conduct like submission to jurisdiction, laches etc."

It appears to be well settled that if the applicant has disentitled himself to the relief by way of certiorari, the matter would be at the discretion of the Court and the Court may decline to issue the writ even if it is shown that the impugned order is without jurisdiction.

9. The petitioners are the persons who have purchased the land in contravention of the provisions of the Tenancy Act and the sale has already been declared invalid as far back as 7th September 1958. If the sale in favour of the petitioners is declared invalid as far back as 7th September 1958 and that order has become final obviously the petitioners have no semblance of title to the land. It is these petitioners who claim relief by way of certiorari as against the person who is adjudged to be a tenant of the land and who, it appears, must have been deprived of the possession without due process of law. Even without going so far, the hard fact remains that the petitioners purchased the lands in contravention of the provisions of Section 63 and 64 of the Tenancy Act and their sale has been declared to be invalid. Once sale of land in their favour has been declared invalid, it would follow as a necessary corollary that they have no semblance of title to this land and their possession would certainly be unauthorised. The petitioners such as these moved this Court by way of petition under Article 227 and have invoked the jurisdiction of this Court for relief by way of certiorari. If this Court exercised jurisdiction in their favour, it would be perpetuating something which has been done in defiance of Statute like the Tenancy Act and which was enacted as a measure for advancement of social justice. The effect of granting relief would be to deny the respondent what may justly be due to him. Would it then be proper to exercise this extraordinary jurisdiction in favour of the petitioners? As stated earlier, the jurisdiction conferred upon this Court to issue prerogative writ should be exercised in aid of justice and not to promote technicality and even if the impugned order appears to be invalid it is not unjust. Therefore, I am not inclined to grant relief in this petition.

10. The petition is accordingly dismissed and rule is discharged with no order as to costs.

11. Petition dismissed.