

(1961) 09 GUJ CK 0008
In the Gujarat High Court

Dhadhal Suragbhai Kalabhai	Vs	APPELLANT
Soni Vinodchandra Pranlal and Others		RESPONDENT

Date of Decision : 01-09-1961

Acts Referred:

Barkhali Abolition Act, 1951 — Section 38, 8(2)(a), 8(2)(a)
Constitution of India, 1950 — Article 19

Citation : (1962) 3 GLR 159

Hon'ble Judges : K.T. Desai, C.J;M.R. Mody, J

Bench : Division Bench

Judgement

K.T. Desai, C.J.—The petitioners are the barkhalidars of the village Anandpur. Respondent No. 1 was their tenant. He was allotted six

acres and ten gunthas of bagayat lands called Bhadwadi under the provisions of the Barkhali Abolition Act 1951 Under the provisions of Section 8

Sub-section (2)(a) of the Act the petitioners had a right of pre-emption in respect of the said lands in the event of the first respondent desiring to

sell or lease the said lands. On 28th October 1958 the first respondent sold the aforesaid lands to respondent No. 2 for Rs. 3000 under a

registered deed of sale without giving the first option to the petitioners to purchase the same. Thereupon on 18th December 1958 the petitioners

applied to the Deputy Collector of Wadhwan under the provisions of the aforesaid Section 8(2)(a) and Section 38 and Rules 82 and 82B framed

under the aforesaid Act for the summary eviction of the second respondent and for handing over the possession of the said lands to the petitioners.

The first respondent contended that the petitioners had waived their right of pre-emption to purchase the said lands. That contention was negatived

by the Deputy Collector. He held by his judgment and order dated 31st August

1959 that the petitioners had a right-of pre-emption in respect of the said lands that the first respondent had not given any opportunity to the petitioners to exercise that right and to purchase the said lands. He ordered respondent No. 2 to be summarily evicted from the lands in question under the provisions of Section 3B of the aforesaid Act read with Rule 82A(2) of the Rules framed under the aforesaid Act. He held that in the result the land reverted back to the first respondent and that he was free to sell it as provided in Chapter V of the Saurashtra Barkhali Abolition Rules. From the aforesaid decision the petitioners as well as the second respondent went in revision before the Bombay Revenue Tribunal. The Revenue Tribunal was of the view that the Deputy Collector had rightly held that as the provisions of Section 8(2)(a) and the rules thereunder had been contravened the sale in favour of the second respondent was void and that the land should revert to the first respondent who had sold it. The Revenue Tribunal by its order dated 30th November 1959 dismissed both the revision applications. The petitioners have come before us praying that the aforesaid orders should be quashed and that a writ direction or order should be issued against the Revenue Tribunal and the Deputy Collector or either of them ordering them to direct the Mamlatdar of Chotila to fix the price of the aforesaid lands.

2. Mr. Nanavaty the learned advocate for the petitioners strongly relied upon the provisions of Section 8(2)(a) of the aforesaid Act which run as under:

The Barkhalidar in respect of land allotted to him for personal cultivation under Sub-section (1) and the tenant in respect of land allowed to remain in his possession under the said sub-section shall have a mutual right of pre-emption for ten years for lease or sale at a price to be determined by the Mamlatdar under the rules made under this Act.

It is not disputed before us that the lands in question were allowed to remain in the possession of the first respondent as the tenant of the aforesaid

lands under the aforesaid Sub-section (1) and that under the said section the petitioners as Barkhalidars would have a right of preemption. By

Section 36 of the aforesaid Act the Saurashtra Government was empowered by notification in the official gazette to make rules for carrying out the

purposes of the Act. In exercise of the powers conferred by Section 35 of the

aforesaid Act and of other enabling powers the Saurashtra

government framed certain rules. By rule 76 it is provided as under:

76 (1)-Where a Barkhalidar or a tenant intends to lease or sell his occupancy holding at any time within ten years the Barkhalidar or tenant as the

case may be shall give notice in writing to the tenant or Barkhalidar requiring him to state within three months from the date of service of such

notice whether he is willing to keep on lease or purchase the holding.

(2) if within the period of three months so specified the tenant or the Barkhalidar intimates in writing that he is willing to keep on lease or purchase

the holding the Barkhalidar or tenant as the case may be shall make an application in Form XIII to the Mamlatdar for the determination of price of

the lease or sale.

3. From this rule it appears that where a tenant intended to sell his occupancy holding he had to give a notice in writing to the barkhalidar requiring

the barkhalidar to state within three months from the date of the service of the notice whether the barkhalidar was willing to purchase the holding. If

the barkhalidar intimated to the tenant that he, the barkhalidas, was willing to purchase the holding, then the tenant was required to make an

applicatin to the Mamlatdar for the determination of the price of sale. Rules 78, 79, 80, 81 and 82 of the aforesaid Rules provide as under:

78.-For the purpose of determining the price the Mamlatdar shall take into consideration one or more of the following factors

1. The price shall be computed on the market value of such or similarly situated land or

2 The price shall be twenty times the assessment or

3 The price shall be twenty times the net annual value i.e. the rent after deduction of land revenue local rates and cost of management.

79. Mamlatdar shall by an order in writing require the tenant or Barkhalidar to deposit the price so determined within one month from the date of

the order.

80. On the deposit of such amount the land shall be deemed to have been transferred to the tenant or the Barkhalidar and the amount deposited

shall be paid to the Barkhalidar or the tenant as the case may be.

81. The Mamlatdar shall then grant a certificate to the tenant or the Barkhalidar

specifying the land so transferred.

82. the tenant or the Barkhalidar fails to intimate his willingness to keep on lease or purchase the land within the time specified in Rule 76 or fails to

deposit the amount of price within the time specified in Rule 81 the tenant or the Barkhalidar as the case may be shall be deemed to have

relinquished his right of pre-emption and the Barkhalidar or the tenant shall then be entitled to lease or sell the same to any other person.

4. Subsequently in exercise of the powers conferred by Section 35 the Saurashtra government framed additional Rules 82A and 82B. Rule 82A to

the extent that it is relevant provides as under:

(1) Where a Barkhalidar or a tenant leases or sells the land in respect of which they have the mutual right of pre-emption for ten years as provided

in Clause (a) of Sub-section (2) of Section 8 to a person other than his tenant or Barkhalidar without complying with the provisions contained in

Rule 76 the Collector may give notice in writing to such lessee or purchaser as the case may be requiring him to show cause in writing within such

reasonable period as may be specified in the notice why he should not be evicted under the provision of Section 38 from the land leased or sold to

him.

(2) After receiving the reply of the lessee or the purchaser, as the case may be the Collector shall proceed to hear the lessee or the purchaser as

the case may be and the Barkhalidar and the tenant concerned on such date as may be fixed and communicated by him to the parties and after

hearing them he may pass such order as he thinks proper u/s 36.

5. Section 38 of the Act referred to above runs as follows:

Summary eviction:

Any person who is in unauthorised occupation or wrongful possession of any land or dwelling house not being entitled to such occupation or

possession under the provisions of the Act may be summarily evicted by the Collector.

Rule 82B provides as follows:

If the order passed under Sub-rule (2) of Rule 82A directs that the lessee or the purchaser, as the case may be shall be summarily evicted the land

in respect of which such order is passed shall revert to the Barkhalidar or the

tenant, as the case may be, and such Barkhalidar or the tenant, as the case may be shall be free to lease or sell such land if he intends to do so in accordance with the provisions of this Chapter.

Mr. Nanavaty has strongly urged that rule 82B which provides that the land should revert, in the case like the present, to the tenant and that tenant

would be free to lease or sell such land if he intends to do so is void and inoperative in law as the right of pre-emption conferred upon the

petitioners by Section 8(2)(a) has been infringed thereby. He says that the petitioners as barkhalidars in exercise of their right of pre-emption were

entitled to the possession of the aforesaid lands and that the Deputy Collector and the Tribunal were under an obligations to direct the Mamlatdar

to fix the price in respect of the aforesaid lands. Mr. Nanavaty urged that a two-fold right was conferred upon his clients the barkhalidars u/s 8(2)

(a). One was a right of purchasing the aforesaid lands at a price to be determined by the Mamlatdar if the 1 respondent the tenant intended to sell

the said lands the same being the primary right of pre-emption. The other was the secondary right to follow the said lands when the sale thereof

had been effected without a proper offer being made to the petitioners to acquire the same. In support of his contention he relied upon a decision

of the Supreme Court in the case of Bishan Singh and Others Vs. Khazan Singh and Another, In that case Justice Subba Rao in the course of his

judgment observers at page 340 as under:

Before attempting to give a satisfactory answer to the question raised it would be convenient at the outset to notice and define the material incidents

of the right of pre-emption. A concise but lucid statement of the law is given by Flowden J. in Dhani Nath v. Budhu 136 Pun Re. 1894 thus:

A preferential right to acquire land belonging to another person upon the occasion of a transfer by the latter does not appear to me to be either a

right to or a right in that land. It is jus rem alienum acquirendum and not a jus in re aliena.... A right to the offer of a thing about to be sold is not

identical with a right to the thing itself and that is the primary right of the pre-emptor The secondary right is to follow the thing sold when sold

without the proper offer to the pre-emptor and to acquire it if he thinks fit inspite of the sale made in disregard of his preferential right.

The aforesaid passage indicates that a pre-emptor has two rights: (1) Inherent

or primary right i.e. a right to the offer of a thing about to be sold and (2) secondary or remedial right to follow the thing sold.

6. Mr. Nanavaty contends that the first respondent having sold the property to the second respondent the petitioners had acquired a right to follow the property which was sold and to have the property for themselves at a price to be determined by the Mamlatdar. Mr. Nanavaty is right in his contention. The price at which the petitioners would be entitled to purchase the property has to be determined u/s 8(a) of this Act by the Mamlatdar. In the exercise of the rule-making power the government has the power to frame rules for carrying out the purposes of the Act. The Government has no right or authority to curtail in any manner the right of preemption conferred by Section 8(a). Rule 82A which provides for the eviction of the purchaser who has acquired the property in breach of the right of the pre-emptor is not challenged. What is urged by Mr. Nanavaty is that after the purchaser has been evicted possession of the land ought not to revert to the vendor as provided by Rule 82B but ought to be given to the pre-emptor. A pre-emptor has a right to obtain possession of the land only on payment of the price. Until such price is determined and is deposited or paid the pre-emptor is not entitled to have the possession of the land. If a purchaser who has obtained possession of the land in breach of the right of the pre-emptor is evicted before the price of the land is determined by the Mamlatdar and is deposited or paid by the pre-emptor the land is liable to revert to the vendor. Rule 82B to the extent that it lays down that the possession is to revert to the vendor would not in that event be in excess of the rulemaking powers of the Government. When however it is provided by rule 82B that the vendor would then be free to lease or sell such land if he intends to do so in accordance with the provisions of Chapter V of the Rules relating to the enforcement of the rights of a pre-emptor the same militates against the right conferred upon the pre-emptor by Section 8(2)(a) of the Act and is invalid and void to the extent that it seeks to deprive the pre-emptor of his secondary or remedial right to follow the land so sold. On the land reverting to the vendor the land would still be subject to the secondary or remedial right of the pre-emptor to purchase the land at a price to be determined by the Mamlatdar. Only if the pre-emptor fails to exercise such right that the vendor would be free

to lease or sell such land if he intends to do so in accordance with the provisions of Chapter V of the Rules. Mr. Nanavaty drew our attention to the fact that there were no rules framed by the Government providing for the enforcement of such secondary or remedial right. That no doubt is true. The Saurashtra government in framing the rules has failed to take into account this secondary remedial right of the pre-emptor. The failure however on the part of the Government to frame rules cannot negative the right of the pre-emptor conferred u/s 8(2)(a).

7. The application that was made by the petitioners in this case was an application to the Deputy Collector. The Deputy Collector had only the power u/s 38 to summarily evict the second respondent. By the operation of Rule 82B on the second respondent the purchaser being evicted the land would revert to the first respondent. The Deputy Collector is not empowered to fix the price at which the pre-emptor was entitled to purchase the land. For the purpose of determining the price an application would have to be made to the Mamlatdar. The petitioners as pre-emptors had the secondary or remedial right to have the price of the land determined by the Mamlatdar and to be put in possession of the land on deposit or payment of the price so determined. Before the Revenue Tribunal the petitioners contended that they were entitled to be put in possession without payment of the price. The said contention was rightly negated by the Tribunal. At a late stage it was contended before the Tribunal that the Mamlatdar should be directed to fix a reasonable price. The Tribunal in the course of its Judgment has observed that such a plea was not taken before the Deputy Collector and did not even find a place in the memo of revision. The Tribunal did not entertain the said plea at such a late stage.

We see no reason to interfere with the order of the Tribunal in this connection.

The orders passed in this case to the extent that they provide that the 1st respondent was free to sell the lands as provided in Chapter V of the

Saurashtra Barkhali Abolition Rules are set aside. The 1st respondent would be free to sell the lands as provided in Chapter V of the Saurashtra

Barkhali Abolition Rules subject to the right which had accrued to the petitioners of purchasing the lands at a price to be fixed by the Mamlatdar.

We express no opinion on the question whether the right which had accrued to the petitioners of purchasing the lands at a price to be fixed by the

Mamlatdar still survives or not.

8. The first respondent in his further reply dated 15th February 1961 to the petition had contended that Section 8(2)(a) of the Barkhali Abolition

Act creating the right of pre-emption was ultra vires the Constitution of India as it offended against Article 19 of the Constitution. As the first

respondent has not filed any petition challenging the orders on the ground that the petitioners had no right of pre-emption at all as Section 8 (a) was

ultra vires the Constitution he has not pressed the point before us reserving liberty to urge the point in any other proceedings.

The plea about the invalidity of Rule 82B was taken for the first time before us. There will be no order as to costs as regards the petitioners. The

1st respondent will pay to the Advocate General the costs of the petition.