
(1994) 08 GUJ CK 0005

In the Gujarat High Court

Case No : Special Civil Application No. 3590 of 1980

Divaliben

APPELLANT

Vs

Mavjibhai Vasanjibhai Ahir

RESPONDENT

Date of Decision : 25-08-1994

Acts Referred:

Bombay Revenue Tribunal Act, 1957 — Section 32G, 32G(4)
Bombay Tenancy and Agricultural Lands Act, 1948 — Section 70, 76, 76(1)
Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2, Order 18 Rule 4, 100, 100(1)
Constitution of India, 1950 — Article 227

Citation : AIR 1995 Guj 151

Hon'ble Judges : Akbar Nanjibhai Divecha, J

Bench : Single Bench

Advocate : A.H. Mehta, for the Appellant; A.J. Pandya, for the Respondent

Final Decision : Allowed

Judgement

A.N. Divecha, J.—Does any or every defect in the procedure call for interference by the Gujarat Revenue Tribunal (the Tribunal for convenience) with the appellate order in exercise of its powers u/s 76 of the Bombay Tenancy and Agricultural Lands Act, 1948 (the Act for brief) irrespective of the fact whether or not such defect is in consequential and whether or not no miscarriage of justice has occasioned thereby? This is the main question that has cropped up in this petition under Article 227 of the Constitution of India questioning the correctness of the decision rendered by the Tribunal on 12th November, 1980 in Revision Application No. TEN.B.S. 222 of 1979.

2. The facts giving rise to this petition move in a narrow compass. The respondent herein moved an application u/s 70(b) of the Act for his declaration as a tenant in respect of some five parcels of land bearing Survey Nos. 129 admeasuring 1 acre 32 gunthas, 130 (Part) admeasuring 3 acres 17 gunthas, 63 admeasuring 1 acre 14 gunthas, 135/2 admeasuring 0 acre 14 gunthas and 180 (Part) admeasuring 0 acre 20 gunthas all situated in village Karri, taluka Mahuva,

district Surat (the disputed lands for convenience). He also moved an application for interim injunction u/s 70(ab) of the Act. It came to be registered as Tenancy Case No. 37 of 1978 in the Mamlatdar's Court at Mahuva. After recording evidence and hearing the Parties, by his order passed on 14th May, 1979 in Tenancy Case No. 37 of 1978, the Mamlatdar at Mahuva held the petitioner not to be a tenant of the disputed lands and his application came to be rejected. A copy of the aforesaid order passed by the Mamlatdar is at Annexure-A to this petition. That aggrieved the respondent herein. He therefore carried the matter in appeal before the Deputy Collector at Vyara. It came to be registered as Appeal No. 46 of 1979. By his order passed on 17th September, 1979 in the aforesaid appeal, the Deputy Collector at Vyara dismissed it. Its copy is at Annexure-B to this petition. The aggrieved petitioner thereupon invoked the revisional jurisdiction of the Tribunal u/s 76 of the Act. A copy of the memo of revision is at Annexure-C to this petition. That came to be registered as Revision Application No. TEN.B.S. 222 of 1979. By its decision rendered on 12th November, 1980 in the aforesaid revisional application, the Tribunal accepted it and remanded the matter to the Mamlatdar for deciding the matter afresh after giving full opportunity of leading evidence to the concerned parties and of being heard. A copy of the aforesaid decision of the Tribunal is at Annexure-D to this petition. That aggrieved the present petitioner. She has therefore invoked the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India for questioning the correctness of the decision at Annexure-D to this petition.

3. It transpires from the decision of the Tribunal at Annexure-D to this petition that the Tribunal found the procedure adopted by the Mamlatdar to be defective inasmuch as certain depositions were not recorded on oath. The Tribunal also found defect in the procedure adopted by the Mamlatdar in as much as the present petitioner was represented by her power of attorney-holder before the Mamlatdar and the Mamlatdar recorded the evidence of the power of attorney-holder without administering oath. In view of this defect in the procedure adopted by the Mamlatdar as found by the Tribunal, the order of the Mamlatdar at Annexure-A to this petition and the order of the Deputy Collector at Annexure-B to this petition were upset by the Tribunal and the matter was remanded to the Mamlatdar for deciding the matter afresh as aforesaid.

4. Shri Mehta for the petitioner has urged, that the Tribunal overstepped its jurisdictional limits prescribed u/s 76 of the Act by finding fault with the procedure adopted by the Mamlatdar without examining the case whether or not the defect in the procedure adopted by the Mamlatdar was substantial and whether or not such substantial defect, if any, resulted in any miscarriage of justice. According to Shri Mehta for the petitioner, the condition precedent for exercise of revisional powers by the Tribunal on the ground of defect in the procedure adopted by the lower authority is that such defect should not only be substantial but it must have resulted in miscarriage of justice. Shri Mehta for the petitioner has urged that in the instant case the so-called defect in the procedure

adopted by the Mamlatdar as found by the Tribunal can by no stretch of imagination be said to be substantial and by no stretch of imagination it can be said to have resulted in any miscarriage of justice. Besides, runs the submission of Shri Mehta for the petitioner, the respondent herein at no point of time raised this point in his memo of revision before the Tribunal.

5. In order to appreciate the aforesaid submissions urged before me by Shri Mehta for the petitioner, it would be quite proper to look at Section 76 of the Act. It reads :

"Section 76. (1) Notwithstanding anything contained in the Bombay Revenue Tribunal Act, 1957 an application for revision may be made to the Gujarat Revenue Tribunal constituted under the said Act against any order of the Collector except an order u/s 32P or an order in appeal against an order under Sub-section (4) of Section 32G on the following grounds only :

- (a) that the order of the Collector was contrary to law,
- (b) that the Collector failed to determine some material issue of law, or
- (c) that there was a substantial defect in following the procedure provided by this Act or that there has been failure to take evidence or error in appreciating important evidence which has resulted in the miscarriage of justice."

(2) In deciding applications under this section the Gujarat Revenue Tribunal shall follow the procedure which may be prescribed by rules made under this Act after consultation with the Gujarat Revenue Tribunal."

It is obvious that the Tribunal has in the instant case exercised its revisional powers under Clause (c) of Sub-section (1) of Section 76 of the Act. As pointed out hereinabove, the Tribunal found a defect in following the procedure provided by the Act on the part of the Mamlatdar. However, the question that has arisen is whether or not any or every defect in following the procedure would be sufficient for exercise of its revisional powers by the Tribunal u/s 76(1)(c) of the Act.

6. On bare perusal of the aforesaid statutory provision it becomes clear that the condition precedent for exercise of revisional powers on the ground of a defect in following the procedure provided by the Act is twofold. In the first place, such defect should be substantial in nature. Secondly, such substantial defect should have resulted in the miscarriage of justice. If neither facet of the condition precedent is fulfilled, the Tribunal has no jurisdiction to exercise its revisional powers merely on the ground that there was a defect in following the procedure provided by the Act. Any or every defect of inconsequential nature does not invest any power in the Tribunal to exercise its revisional powers for upsetting any order of the lower authority under challenge before it u/s 76 of the Act. Even if the procedural defect is substantial in nature, that by itself does not invest the Tribunal with any power to interfere with the order or orders under challenge unless it is found that such substantial defect has resulted in the miscarriage of justice.

7. At this stage it would be quite proper to look at the relevant provisions contained in Section 100 of the Civil Procedure Code, 1908 (the Code for brief) prior to its amendment by the CPC (Amendment) Act, 1976. The said unamended provision of the Code provided for a second appeal to the High Court from the appellate decree inter alia on the ground of a substantial error or defect in procedure provided by the Code or any other law for time being in force, which may possibly have produced error or defect in the decision of the case upon the merits. The aforesaid unamended statutory provision of the Code cannot be said to be *pari materia* with the relevant provisions contained in Section 76(1)(c) of the Act. However, it cannot be gainsaid that the aforesaid two statutory provisions are somewhat similar in contents.

8. The Supreme Court has on occasion to interpret the unamended provision providing for a second appeal in the Code in its ruling in the case of *Ramchandra v. Ramalingam* reported in AIR 1963 Supreme Court at page 302. In para 12 at pages 305-306 of the reported ruling it has been held :

"It is necessary to remember that Section 100(1)(c) refers to a substantial error or defect in the procedure. The defect or error must be substantial -- that is one fact to remember; and the substantial error or defect should be such as may possibly have produced error or defect in the decision of the case upon the merits -- that is another fact to be borne in mind."

By analogy, the aforesaid dictum of law pronounced by the Supreme Court in its aforesaid ruling will be applicable in the present case. As pointed out hereinabove, the condition precedent for exercise of revisional powers on the part of the Tribunal u/s 76(1)(c) of the Act on the ground of a defect in following the procedure provided thereby is that such defect should be substantial in nature and also that such substantial defect has resulted in the miscarriage of justice. Unless the aforesaid condition precedent is satisfied in toto, the Tribunal has no jurisdiction to upset the order or orders under challenge before it in exercise of its powers u/s 76 of the Act on the ground of a defect in following the procedure provided thereby.

9. In the instant case, the Tribunal found that on behalf of the respondent herein as many as eight witnesses were examined. Out of the said eight witnesses, only one witness was not examined on oath. I have perused the order of the Mamlatdar at Annexure-A to this petition. His evidence has carefully been considered by the Mamlatdar in favour of the respondent herein. When seven witnesses on behalf of the respondent were examined on oath and only one witness was examined without administering oath to him and when the evidence of that witness adduced on behalf of the respondent herein was found to be not supporting the case of the respondent at trial, the defect in following the procedure cannot be said to be substantial in nature. It would have been quite a different thing if a witness was examined at trial without administering any oath to him and that witness might have made false statements in evidence and such false statements had influenced the forum trying the matter. In that case, the

defect in following the procedure could be said to be substantial in nature. Similarly, the witnesses examined on behalf of the petitioner herein were also not administered oath as found by the Tribunal. On perusal of the order of the Mamlatdar at Annexure-A to this petition, it becomes clear that the evidence adduced on behalf of the petitioner at trial has not at all been considered by the said authority in deciding the case. The oral evidence adduced on behalf of the petitioner which was in file is thus found not to have influenced the decision of the Mamlatdar. In that view of the matter, the recording of the oral evidence of the witnesses examined at trial on behalf of the petitioner herein without administering oath to them would be of no consequence. The defect in following the procedure provided in the Act in that case would be inconsequential in nature. By no stretch of imagination it can be considered as substantial.

10. Even assuming for the sake of argument that examination of a witness at trial without administering oath to him is a defect of substantial nature irrespective of its influencing the decision making authority, the second facet of the condition precedent for exercise of revisional powers u/s 76(1)(c) of the Act on that ground has to be kept in mind. The Tribunal has been ordained thereby to take into consideration whether or not such defect has resulted in miscarriage of justice. If there is no miscarriage of justice on account of a substantial defect in following the procedure provided by the Act, the Tribunal can be said to be overstepping its limits if it upsets the order or orders under challenge before it on that ground in exercise of its powers u/s 76 of the Act.

11. In the instant case, I have perused the order of the Mamlatdar at Annexure-A to this petition and the order of the Deputy Collector in appeal at Annexure B to this petition. I have found that both the authorities have considered the case on merits uninfluenced by any such defect in the procedure. In fact, no such defect in the procedure was brought to the notice of either authority. That apart, as pointed out herein-above, the Mamlatdar has considered the evidence of the eighth witness examined on behalf of the respondent herein without administering oath to him in favour of the respondent. In that view of the matter, not administering any oath to the eighth witness of the respondent cannot be said to have resulted in any miscarriage of justice. Similarly, as pointed out hereinabove, the Mamlatdar has not at all taken into consideration the evidence of the witness examined on behalf of the petitioner herein at trial. Again, no miscarriage of justice can be said to have been found if those witnesses were not administered any oath.

12. In view of my aforesaid discussion, I am of the opinion that neither facet of the condition precedent for exercise of the powers u/s 76(1)(c) of the Act on the ground of a defect in following the procedure provided by the Act was fulfilled in the instant case. The Tribunal could not have upset the orders under challenge before it on the ground on which it has upset them.

13. Besides, the Tribunal ought to have been slow in upsetting the order or orders under challenge before it on this ground, more particularly when it was

not urged by or on behalf of the respondent herein in its memo of revision at Annexure C to this petition. When the second facet Of the condition precedent requires the Tribunal to see that the substantial defect in following the procedure provided by the Act has resulted in miscarriage of justice, it would be incumbent on the part of the revisional applicant to show to the Tribunal how not following such procedure had resulted in miscarriage of justice. In that view of the matter, such contention ought to have been taken up by the revisional applicant before the Tribunal. It is a settled principle of law that Tribunal cannot make out a new case for a party in exercise of its limited revisional powers u/s 76 of the Act.

14. Strange enough is the ground of interference with the orders under challenge before the Tribunal in the instant case. The Tribunal found defect in the procedure followed by the Mamlatdar also on the ground that the Power of Attorney-holder examined on behalf of the piesent petitioner at trial could not have been examined as a witness. A Power of Attorney-holder is given power to act on behalf of the person giving such power. That would possibly include all acts which a party could do. If the Power of Attorney-holder has no personal knowledge as to certain facts deposed to by him at trial, his evidence can be disbelieved or even discarded. Simiply because he is examined as a witness at trial on behalf of a party, it cannot be said that there was a defect in following the procedure provided by the Act. The Code nowhere prohibits examination of a Power of Attorney-holder as a witness in any proceeding. Even a third party can be examined as a witness on behalf of a party to the proceeding. If that be so, a Power of Attorney-holder of a party can certainly be examined as a witness in any proceeding.

15. In view of my aforesaid discussion, I am of the opinion that the Tribunal had no jurisdiction to upset the order at Annexurc-A to this petition as affirmed in appeal by the appellate order at Annexure B to this petition, It deserves to be quashed and set aside.

16. In the result, this petition is accepted. The impugned decision rendered by the Gujarat Revenue Tribunal at Ahmedabad on 12th Nov. 1980 in Revision Application No. TEN.B.S.222 of 1979 is quashed and set aside. Rule is accordingly made absolute with no order as to costs.