
(1952) 10 GUJ CK 0004
In the Gujarat High Court
Case No : Second Appeal No. 55 of 1952

Harsur Samat

APPELLANT

Vs

Samat Rama

RESPONDENT

Date of Decision : 01-10-1952

Acts Referred:

Constitution of India, 1950 — Article 261(1)
Limitation Act, 1963 — Article 14 , 144, 17
Transfer of Property Act, 1882 — Section 14

Citation : (1952) 10 GUJ CK 0004

Hon'ble Judges : Chhatpar, J

Bench : Single Bench

Advocate : H.P. Mankad, for the Appellant; B.D. Shukla, for the Respondent

Judgement

Chhatpar, J.—This appeal arises out of a suit filed by the Respondent Samat against the Appellant Harsur for partition of. an agricultural land. The land originally belonged to two cousins Dana and Oghad and was held from the Nawanagar State on what is called "Buta Hak" tenure, the incidents of which were that the holders were, subject to payment of Vighoti to the State, entitled to full rights including that of alienation by transfer inter vivos and by will; the land was also heritable. One of the terms in the Sanad, however, restricted transfer to a foreigner or a non-agriculturist without the previous sanction of the State. Dana and Oghad were indebted to the State to the extent of Rs. 2000/- and odd on account of arrears of Vighoti, and the parties to the present litigation who are also cousins amongst themselves had stood as sureties to the State for payment. By an agreement dated 13-02-46 Dana and Oghad agreed to transfer the land to the parties to the suit in consideration of agreeing to pay the State dues. Before the agreement could be registered Dana died.

A fresh deed was prepared and executed by his son Uka and Oghad in favour of the parties on 29-06-46 but Uka backed out of it and failed to appear before the registering authority with the result that only the share of Oghad who duly

appeared and admitted execution and receipt of consideration passed to the parties to the suit. The present suit relates to the partition of this share. It further seems that Oghad also tried to wriggle out of the sale on the ground of non-receipt of consideration, and with the connivance of the Plaintiff Samat and Apa Dhana they succeeded in ousting the Defendant Harsur from the land. In the meantime the State was contemplating action for recovery of the State dues which then amounted to Rs. 1456-13-7, Rs. 500/- having been paid by the parties to the suit out of which Rs. 300/- were paid by the Plaintiff Samat and Rs. 200/- by the Defendant Harsur. The Revenue Commissioner of the State wanted to sell the land to realise the State dues; but Oghad made an application in which he stated that he was prepared to pay Rs. 500/- at once and the balance in the next Falgun. This application is not on the record of the case but it is recited in subsequent proceedings as having been made on 30-08-47. He did not disclose the fact of the sale in favour of the parties to the suit in the application and his subsequent conduct in retaking possession with the connivance of Samat and Apa. The Revenue Commissioner, it seems, did not think it fit to restore the land to Oghad who had already sold it to the parties, but ordered its sale on 28-07-47 by public auction for the recovery of the State dues.

The matter subsequently went to the Dewan of the State to whom an application was made. He heard the parties and their advocates. He passed a very peculiar order dated 09-09-47 in which he said that he did not think it necessary to put the land to sale by auction but going through the facts he came to the conclusion that Samat, the Plaintiff was at the bottom of the conspiracy to deprive Harsur of his share in which he was assisted by Oghad and Apa; therefore he thought it proper that Samat's share in the land must be forfeited entirely and that the land must, be given to Harsur and who was to pay the State dues. In pursuance of this order the land was given to Harsur and has remained in his possession till the present suit was filed on 23-05-50 for partition. Samat filed an appeal to the Hazur from the order of the Dewan, but it was dismissed. The trial Court passed a decree for partition, which was confirmed by the lower appellate court. The Defendant has now come in second appeal.

2. Mr. Mankad the learned Advocate for the Appellant has confined his arguments to the following points:

1. That the civil Court had no jurisdiction to deal with the matter. He relied upon an old circular dated 08-02-1906 of the State of Nawanagar published in the Gazette of 16-02-1908 at P. 168.

2. That the suit was barred by limitation as the relief of partition could not be given without setting aside the order of the Dewan dated 09-09-47 confirmed by the Hazur; the suit having been admittedly filed more than a year thereafter was barred by Article 14, Limitation Act.

3. The order of the Dewan confirmed by the Hazur was final and binding.

3. So far as the first point is concerned, no reference was made to the circular of

08-02-1906 in the lower Courts. It no doubt says that the civil Courts will have no jurisdiction to deal with disputes relating to land which were exclusively within the jurisdiction of the Revenue Authorities; but this circular must be deemed to have been abrogated by a circular No. 6 dated 20-07-23 published at page 8 of the compilation called "Revenue Department Circulars of 1907 to 1931" wherein it is clearly mentioned that after a document has been registered, all disputes would be decided by civil Courts. Further after the formation of the State of Saurashtra jurisdiction has been given to the civil Courts to decide all matters of a civil nature except otherwise provided by any law in force in Saurashtra; no law has been shown to me which bars a suit of the present nature. I, therefore, overrule this objection as to the jurisdiction of the civil Court to try the suit. This point was as a matter of fact never raised in the trial Court in the form it is raised before me. Nevertheless I decide the question against the Appellant.

4. The second and the third objections relating to limitation and the nature and finality of the order passed by the Dewan and confirmed by the Hazur may be dealt with together. In the Courts below, it seems, the Appellant-Defendant had principally contested the case on the ground of Articles 14 and 17 of the Covenant by which the Rulers of the former Kathiawar States formed the State of Saurashtra. But this contention has been abandoned by the learned Advocate for the Appellant. He also abandoned a plea based upon Article 261(1) Constitution of India. He seeks to justify the orders of the Dewan as final being within the scope of his power to deal with the subject. He has referred to two notifications, one dated 15-12-1910 published at page 176 of the Nawanagar Gazette of 1st January 1911, Clause (11) whereof says that for a sale of any land permission of the Maharaja Saheb should be obtained, and the other notification dated 18-11-1908 published at p. 243 of the State Gazette of 16-11-1908 wherein the functions and powers of State officers are enunciated, Rule 12 of which vests the power to give permission for sale in the Revenue Secretary and Rule 24 permits him to resume any land and give to Anr. if the land holder in question is guilty of mismanagement subject to the sanction of the Hazur in cases where the rights of the State are prejudiced. Now these two notifications were not relied upon in the lower Courts and for the first time have been unearthed and placed before me. Mr. Mankad urges a general preposition that no land could be transferred without the express permission of the State and the title of the transferee would, be complete only till such sanction was given and he further contends that the state could at any time forfeit the land for mismanagement, which power was vested in the Revenue Commissioner. These arguments were never advanced in the lower Courts.

5. I shall deal with the first argument when considering the nature of the rights of landholders in lands held on "Buta Hak" which were finalised by subsequent orders of the State. As regards the second argument of forfeiture based upon mismanagement, this is a question of fact and I do not permit Mr. Mankad to raise this question for the first time in second appeal before me. No such case was set up either in the written statement nor was any order passed forfeiting

the land on this ground.

Coming to the substance of the main contention of Mr. Mankad, the nature of "Buta Hak" tenure can be gathered from the form of the Sanad prescribed in Circular No. 20 dated 05-09-21 published at page 186 of the Revenue Department Circulars 1907 to 1931. This form gives full proprietary rights to the landholder subject to payment of Vighoti and specifies him to be the Darbari Khatedar Khedut. The tenure is heritable and gives him power to alienate it by transfer, gift or by will subject to payment of certain State dues, the only restriction being that in case of transfer to an outsider or to a non-agriculturist, the previous sanction of the State would be necessary. There is no provision of any previous sanction in respect of a transfer from one agriculturist to Anr. agriculturist both being subjects of the State as admittedly in the present case. Mr. Mankad had not been able to show any circular in this compilation that the sanction of the State was in every case necessary in respect of lands held on "Buta Hak" and that the title of the transferee would not be complete till such sanction was given. The Transfer of Property Act and the Registration Act were not specifically in force in the State of Nawanagar but it is admitted that their spirit was being followed. The transfer in favour of the parties to the suit by the instrument of sale dated (sic) but that possession was also handed over to the vendees. It was only afterwards when Oghad in collusion with the Plaintiff tried to back out of the sale that the subsequent complications arose. I, therefore, hold that sanction of the State was not necessary in the present case and the title of the parties to the land in dispute was complete on the registration of the deed, dated 29-06-46 and consequently both the parties had equal share in the land.

The last question to be considered is the nature and the effect of the orders of the Revenue Commissioner and the Dewan. The form of Sanad above referred to does not contain any clause of forfeiture of land for non-payment of Vighoti. There may be a rule to that effect but Mr. Mankad the learned Advocate for the Appellant has not been able to point out any. The ordinary rule under the Transfer of Property Act in respect of a lease, is that unless there is a clause of reentry, a mere non-payment of rent does not authorise the lessor to forfeit the lease. Assuming any such rule did exist in the State of Nawanagar that an estate held on "Bula Hak" tenure could be forfeited for non-payment of Vighoti, the order of the Revenue Commissioner did not go to this extent. His order was that the land be sold by public auction for recovery of the State dues. The Dewan's order purported to extinguish the right of the Plaintiff only on the ground that he was involved in some conspiracy to defraud the Defendant and deprive him of his share in the land. Mr. Mankad has not been able to point out any provision of law under which such an order could be made. So I cannot construe the order of the Dewan as being an order for forfeiture for non-payment of the State dues. It is an order of depriving a person of his land on the ground of doing a dishonest act towards his co-sharer. No law or rule of the State has been cited vesting such powers in the Dewan. I consequently hold that the order of the Dewan was

entirely without jurisdiction and null and void, and consequently the order of the dismissal of the appeal questioning such an order would be of similar nature although passed by the Hazur.

Much has been made of an argument that the Hazur being the head of the government had full powers to pass any orders whatever and that the civil Court had no jurisdiction to question the same. But it cannot be denied that the order of the Hazur is not based upon any provision of law and cannot even be considered as an act of the royal prerogative as he simply dismissed the petition of the Plaintiff complaining against the order of the Dewan. It could not either be considered as an Act of the State, being an order passed between the Ruler and his subject in which the Ruler was simply acting his executive authority. I therefore, repel the argument of Mr. Mankad that the order of the Hazur was binding and not subject to scrutiny by the civil Courts under the present Constitution.

6. The last question based upon Article 14, Limitation Act can easily be answered by stating that the Article does not contemplate an order which is passed without jurisdiction and which is not within the ambit, of the powers of the officer concerned. I need not discuss in detail the several authorities referred to by the learned Advocates on both sides, but I would refer to the recent case of -- Lady Dinbai Dinshaw Petit v. (sic) (sic) the (sic) applies only to those acts or orders, which are valid until they are set aside. Therefore, if an order is bad from its inception, Article 14 would not apply to such an order because it would be unnecessary for the Plaintiff to get the order set aside. The question, therefore, we have to consider in this appeal is whether the two orders which the Plaintiff challenge if their challenge is successful, are valid till they are set aside or they were invalid from their very inception. If the Collector had the power or the jurisdiction to make these orders and he made them in the absence of any formality required by law or he made them irregularly, it may be said that those orders would not be bad from their inception, but they would be irregular orders which would have to be challenged in a Court of law and set aside, and till set aside they would continue to be good and binding orders. On the other hand, if the orders were made by the Collector without jurisdiction or in the absence of any power given to him under the law, then the orders would be invalid from their very inception. The distinction is the well known distinction between the absence of jurisdiction and the irregular exercise of jurisdiction."

The earlier cases of the Bombay High Court are reported in -- Dhanji Jairam Mali Vs. The Secretary of State for India, and -- Ganesh Shesho Deshpande v. Secy. of State AIR 1920 Bom 105 (1) (C), the principle being that when an order is purported to be passed by an officer under a legal authority vested in him and which order comes in the way of the Plaintiff getting the relief in suit, Article 14 would be applicable; but if an order is either without jurisdiction or is in excess of authority, the order could be treated as nullity and not necessary to be set aside. The Privy Council in the case of -- AIR 1934 108 (Privy Council) refused to apply

Article 14 where the executive act of the Government sought to be applied as a bar was not authorised. The Privy Council case of -- AIR 1927 217 (Privy Council) , cited by Mr. Mankad has no application to the facts of the present case. If merely says that if the order in question was illegal, the Plaintiff was not bound to file a suit to set aside but was entitled to wait until it was enforced against him and the attempt to enforce it against him would give him a good cause of action, which attempt was admittedly within the period of limitation. The question of the applicability of Section 14 was not directly in issue. I, therefore, hold that Article 14, Limitation Act does not apply to the present case; the suit being for partition the general Article 144 would apply and the limitation would run from the date the possession of the Defendant became adverse to that of the Plaintiff Admittedly the suit is within 12 years of such action of the Defendant.

7. In the result, this appeal fails and is dismissed with costs.