(1938) 10 FED CK 0001

In the Federal Court

Pashupati Bharti APPELLANT

Vs

Secretary of State and Anr. RESPONDENT

Date of Decision : 11-10-1938

Acts Referred:

Citation : AIR 1938 FC 1

Hon'ble Judges : Justice Maurice Gwyer,Justice Shah Sulaiman,M. R. Jayaka

Bench : Full Bench

Judgement

Spens, C.J.—This appeal raises a short point turning on the construction of a clause in the Madras Agriculturists'' Relief Act, 1938. That

enactment made provision for the relief from indebtedness of persons comprehended in the definition of ""agriculturist"" in Section 3 (ii) of the Act.

Out of the general scope of this definition, certain classes of persons were excluded by four provisos. The fourth of these provisos, numbered D,

excluded any person who was

a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion

any sum exceeding Rs. 500 is paid as peshkush or any sum exceeding Rs. 100 is paid as quitrent, jodi, kattubadi, poruppu or the like, or is a janmi

under the Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue to the Provincial Government.

2. The appellants (father and son) are mortgagors who had executed a mortgage bond in favour of respondent 1 on 27th March 1929, securing

repayment of a sum of Rs. 26,000, with compound interest at 14 annas per cent, per month, with yearly rests. The security comprised three items

of property, namely, a house in Berhampore town, a village named Kumari in

Kurla estate, Aska Taluk of the then Ganjam District, and a village

named Tharlipeta, situate in the Tekkali Taluk, also included in the Ganjam District at that time. The appellants, as owners of Kumari and

Tharlipeta, are ""landholders"" of ""estates"" and it has not been disputed that if both the ""estates"" are taken into account, the appellants will be

excluded from the definition of ""agriculturist"" by reason of proviso D above set out, because the two estates taken together pay more than Rs. 500

as peshkush. It however happened that when Orissa was constituted into a separate Province in April 1936, the old Ganjam District of the Madras

Presidency was divided into two parts, one portion being retained in the Madras Presidency and tacked on to the Vizagapatam District, the other

portion being incorporated in the Orissa Province. The position now is that Kumari which pays more than Rs. 500 by way of peshkush has been

included in the Orissa Province and Tharlipeta which pays a peshkush of less than Rs. 500 continues to be part of the Madras Presidency. The

Madras Agriculturists'' Relief Act became law on 22nd March 1938, but there was no similar legislation in Orissa till June 1939. This suit was

instituted on 3rd March 1939, in a Subordinate Judge''s Court in the Madras Presidency. Appellant 1 who was the sole plaintiff (his sons being

impleaded as defendants) prayed for a redemption decree on the taking of accounts between him and the mortgagee; and he claimed that the

accounts should be taken not on the basis of the terms of the bond, but in accordance with the provisions of the Madras Agriculturists'' Relief Act.

3. It was contended on behalf of the appellants that to exclude a person by reason of proviso D to the definition of ""agriculturist"" in the Act, two

conditions must coexist, namely, that the estate to be taken into account must be an estate situate within the Madras Presidency and that a

peshkush of not less than Rs. 500 must be payable to the Provincial Government of Madras. A case like the present does not seem to have been

present to the mind of the Legislature. And as a matter of reason or policy, it is difficult to see why the Legislature should have thought of treating a

person who owned two estates within the Province differently from one who owned two estates of which one was situate within the Province and

the other in a neighbouring Province. The only question therefore is what is the effect of the language employed by the Legislature. It was recognised by counsel for the appellant that his contention as to the peshkush being payable to the Government of Madras could not receive

support from the words ""to the Provincial Government"" at the end of proviso D, because the intervening words ""jodi,"" ""kattubadi,"" ""poruppu,"" etc.,

might include payments to landholders and not to the Government and as a matter of grammar it would therefore be impossible to tack on the

words ""to the Provincial Government"" to the words relating to ""peshkush."" It was nevertheless contended that that result must be reached, because

Clause (a) of the definition speaks of ""land in the Province of Madras"" and of the assessment being made by the Provincial Government. This does

not seem to us to warrant the inference which we were asked by the appellants to draw. Clause (a) of the definition is the enabling provision, but

the provisos are only in the nature of disabling or excluding clauses. A person must no doubt possess agricultural or horticultural land in the

Province of Madras before he can at all become entitled to claim the benefit of the Act. But his prima facie claim on the ground of the possession

of such property might, as shown by provisos A, B and C, be excluded even on account of his possession of properties outside the Province of

Madras. The scheme of the provisos is that certain classes of persons are, by reason of their general financial position or the nature of the interest

they possess in landed property, outside the category of those whom it was the policy of the Legislature to relieve by the provisions of the Act. The

payment of peshkush exceeding a certain amount, like the payment of kattubadi or poruppu exceeding a certain amount was merely taken as a

measure of the status or financial position of the payer; and for this purpose, it would make no difference whom the payment was made to. It may

even be argued with some plausibility that the use of the words ""to the Provincial Government"" at the end of proviso D and their absence after the

words ""paid as peshkush"" in the middle of the proviso justifies the inference that in the latter case it was not intended to take into account only the

amount of peshkush payable to the Madras Government.

4. The main argument in support of the appeal therefore was that unless the estate to be taken into account was situate within the Madras

Presidency as now constituted, its owner could not be held to fall within the description of a ""landholder of an estate under the Madras Estates

Land Act, 1908"" in the proviso. It was contended that only an estate which was governed by the Madras Estates Land Act in 1938, when the

Madras Agriculturists'' Relief Act was enacted could be comprehended by these words and that we must therefore take into account only the

Tharlipeta estate in the present case. A possible answer to this contention may be that the word ""under"" in the expression ""under the Madras

Estates Land Act"" only means ""as defined in;"" in this view, the reference to that Act would only be a way of describing the property and need not

necessarily imply that the estate should be governed by the provisions of that Act. It is however unnecessary to base our conclusion on this ground.

It was admitted on behalf of the appellants that the Madras Estates Land Act was even now in force in the areas transferred to the Orissa Province

from Madras and that Kumari was therefore governed by that Act. But it was argued that the Act was not proprio vigors in operation in the

transferred territory and that therefore the Kurla estate could not be an estate included in the words of proviso D. It will be convenient to refer to a

few statutory provisions and orders before examining this contention.

5. Section 289, Constitution Act, provided for the formation of the Province of Orissa and the incorporation therein of such areas separated from

the Presidency of Madras as might be specified in an Order in Council. Under Sub-section (2) of that section, the Order in Council may contain

provisions with respect to the laws which, subject to amendment or repeal by the Provincial or, as the case may be, the Federal Legislature, are to

be in force in any part of Orissa. The Constitution of Orissa Order, 1936, came into operation on 1st April 1936. While transferring certain areas

from the Madras Presidency to the Orissa Province, para. 26 of that Order provided that the provisions of the Order should not be deemed to

have effected any change in the territorial application of any enactment, notwithstanding that that enactment was expressed to apply or extend to

the territories for the time being under a particular administration. If the matter had stood here, there could be little doubt that the Madras Estates

Land Act would have continued to operate propriovigore in the transferred areas in spite of their transfer to the Orissa Province. The order

however contains another provision (para, 11) in the part relating to the transitional period, that is, the period between 1st April 1936, and 1st

April 1937. Paragraph 11 states that the provisions of Section 71, Government of India Act (meaning the Act of 1915), shall apply to the whole of

Orissa and Regulations may be made thereunder accordingly. Under this power, the Governor-General in Council made Regulation 1 of 1936,

entitled a Regulation to declare the law in force in the Province of Orissa. This Regulation terminated the operation of certain Madras Acts in the

transferred areas, but as regards other enactments, it made the following provision by Section 7:

Subject to the provisions of Paras. 16 and 17 of the Government of India (Constitution of Orisaa) Order, 1936, all enactments, other than

enactments repealed by this Regulation, made by any authority in British India and all notifications, orders, etc., which were immediately before, the

first day of April 1936 in force in any of the areas comprised in the Province of Orissa shall, in their application to such areas, be construed as if

references therein by whatever form of words to the authorities, territory or Gazettes mentioned in col. 1 of Schedule 1 were references to the

authorities, territory or Gazettes respectively mentioned or referred to opposite thereto in col. 2 of the said Schedule.

In the schedule, item 3 (a) directs that ""the Presidency of Madras"" must be construed as referring to ""the areas separated from the Presidency of

Madras and forming part of the Province of Orissa."" It has been contended on behalf of the appellants that the result of this Regulation, read in the

light of Para. 11 of the Orissa Order in Council, was to terminate the operation of the Madras Estates Land Act as such in the transferred areas

and to enact for this area a new Act in the same terms. We are unable to accede to this contention. Paragraph 11 of the Order in Council must be

read along with Para. 26 and reading the Regulation in the light of these two provisions, it is reasonably clear that its object and effect was not to

enact a law for the transferred areas, but to provide how certain provisions of laws assumed to be in force in the transferred areasobviously under

para. 26 of the Order in Councilshould be interpreted in view of the changed circumstances.

6. It was next argued that the proviso to Para. 8 of the Adaptation of Indian Laws Order, 1937, had a material bearing on the case. The paragraph

is in the following terms:

In any Indian law in force immediately before the commencement of this order, any reference by name or description to any territory shall, unless

the contrary intention appears or unless it has been, or is by this order, otherwise expressly provided, be construed as a reference to the territory

which bore that name or answered to that description at the date when the enactment containing that name or description came into operation.

7. The proviso says:

that in the application of any enactment to Madras, Bombay, Bihar or the Central Provinces references in that enactment to Madras, Bombay,

Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated

therefrom on the constitution of the Provinces of Orissa and Sind.

Two contentions were founded on this proviso: (1) that after the promulgation of this order (which came into operation on 1st April 1937), all

Madras Acts which theretofore continued to operate in the transferred areas ceased so to operate, and (2) that the word ""Madras"" used in any

subsequent Madras enactment like the Agriculturists'' Relief Act could only refer to the Madras Presidency exclusive of the transferred areas. The

second contention does not seem to us to be correct in that broad form. Being only a proviso to what is contained in the main portion of Para. 8,

the proviso can affect only laws in force before 1st April 1937, because it is only those laws that are dealt with by the opening words of Para. 8.

Further, the word ""Madras"" in the expression ""Madras Estates Land Act"" is only a part of the description of the Act and does not bear on the

application of the enactment."" And the first contention does not seem to be warranted by the language of the proviso. Its purpose is not to

terminate the operation of any law in any particular area, but only to provide a particular rule of construction and even that only in respect of ""the

application of any enactment to Madras."" It appears to us that this proviso did for the rest of the Madras Presidency what Section 7 Regn. 1 of

1936 did for the transferred areas, the underlying assumption in both cases being that the pre-existing laws continued to operate as before, subject

to the rule of construction enacted by the Regulation and by para. 8 of the Order in Council respectively.

8. We accordingly think that the words ""landholder of an estate under the

Madras Estates Land Act, 1908,"" occurring in proviso D to the

definition of ""agriculturist"" in the Madras Agriculturists'' Relief Act, 1938, are applicable as well to an estate in the areas transferred from the

Madras Presidency to the Orissa Province as to an estate which remained in the area now constituting the Province of Madras. The learned Judges

of the High Court at Madras were therefore right in holding that the appellants were excluded from the benefit of the Madras Agriculturists'', Relief

Act, 1938.

9. It is stated in the judgment of the High Court that the only contention urged in the appeal related to the claim to relief under the Madras

Agriculturists'' Relief Act. We were however told that a claim was also made for relief under the Orissa Moneylenders'' Act, as per ground No. 9

in the memorandum of appeal to the High Court. As we have already stated, the Orissa Act was passed only in June 1939, and no relief on the

basis thereof could have been claimed in the plaint. The Advocate-General of Madras who appeared for the contesting respondent admitted that

the contention based on the Orissa Act was mentioned by counsel for the appellant when he opened the appeal before the High Court, but he

added that the contention was not persisted in when he pointed out certain objections to the sustainability of the claim. He was however not

prepared to say that the contention was abandoned. Before us, he mentioned three prima facie objections: (1) that the question whether the

contesting respondent was a moneylender within the meaning of the Orissa Act might have to be tried as a question of fact; (2) that Orissa Act

made provision only for cases where a moneylender was suing as a plaintiff, which is not the case here; and (3) that the relevant section in that Act

was framed only as a direction to the Court not to award more than a certain amount by way of interest and that the Orissa Legislature could give

such a direction only to Courts situate in that Province and not to Courts situate in other Provinces. As we propose to remit the case to the High

Court for a consideration of the questions arising under the Orissa Act, we do not wish to say anything that may seem to prejudge the issue or

prejudice either side. We required the Advocate-General to mention his objections only to see whether they were so obviously well-founded as to

make a remand unnecessary. As regards the second and third objections, we are not satisfied that there may not be answers which should at least

be considered by the Court whilst the possibility that it might be necessary to have further facts found could not be allowed to deprive the

appellants of their rights under the Orissa Act, if otherwise they should be found entitled thereto. In a redemption suit, the accounts between the

parties have to be taken once for all and their rights declared and it will not be just to deprive the appellants of an opportunity of putting forward

their claim under the Orissa Act. If necessary, it will be for the High Court to direct the Court of first instance to try any issues of fact that this

aspect of the case may be found to involve.

10. It was suggested before us that the appellants'' claim to relief under the Orissa Act might once for all be heard and decided by this Court. This

did not seem to us to be the appropriate course to adopt. It would deprive us of the benefit of a judgment of the High Court on the point and, as

above indicated, it might be necessary in a particular view to direct a trial of questions of fact. We accordingly set aside the decree of the High

Court and remit the case with a direction that the High Court shall hear and determine the appellants'' claim to relief under the provisions of the

Orissa Money-lenders'' Act and pass such further decree or order as may seem to it appropriate, in the light of the conclusion that it may come to

on that question. The appellants have failed on the only point which they pressed before the High Court; and for the omission of the High Court to

deal with the question raised under the Orissa Act, the appellants are themselves to blame. They must accordingly pay the costs of respondent 1 in

this appeal.

