
(1962) 04 GUJ CK 0014
In the Gujarat High Court

Shirajuddin Badarali

APPELLANT

Vs

Somaji Pulaji and Others

RESPONDENT

Date of Decision : 06-04-1962

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 85A, 88, 88(1), 89(2)
(b)
Civil Procedure Code, 1908 (CPC) — Section 2(2)

Citation : (1963) 4 GLR 308

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Judgement

V.B. Raju, J.—Opponents Nos. 1 and 2 to this petition had filed a suit praying for a declaration that a notice dated 26-4-58 issued by the Mamlatdar was illegal and praying for an injunction restraining the Mamlatdar and his agents or servants from disturbing their possession of the suit land. The Joint Civil Judge Senior Division Ahmedabad held that the suit land is a service Inam land useful to Government assigned for the remuneration of the services of a Patel. The learned Judge also held that u/s 88 of the Bombay Tenancy and Agricultural Lands Act 1948 which will hereinafter be referred to as the Act nothing in the provisions of the Act applies to lands belonging to or held on lease from the government. He also referred to the Explanation to Section 88 of the Act which reads as follows:

For the purposes of Clause (a) of this section land held as Inam or Watan for service useful to Government and assigned as remuneration to the person actually performing such service for the time being u/s 23 of the Bombay Hereditary Offices Act 1874 or any other law for the time being in force shall be deemed to be land belonging to Government.

But according to the learned Judge this explanation was added by Section 15 of Act LXIII of 1958 and Section 21 of Act LXIII of 1958 provided that the amendment made by Section 15 shall be deemed to have been made and to

have come into force on the date on which the Bombay Tenancy and Agricultural Lands (Amendment) Act 1955 came into force. This date is 1-8-56. The learned Judge therefore held that the plaintiffs rights as protected tenants were created long before 1 -8-56 and they were not affected by Section 89(2)(b) of the Act. He also held that the civil Court has no jurisdiction to decide whether the plaintiffs are tenants or not and that the Court has to make a reference u/s 85A of the Act to the Mamlatdar to decide that issue. He therefore made a reference to the Mamlatdar u/s 85A of the Act to decide whether the plaintiffs are tenants or not of the suit land.

2. In revision it is contended that this order is a failure to exercise jurisdiction or a material irregularity in the exercise of jurisdiction. Two preliminary points were raised by the Learned Counsel for the opponents Nos. 1 and 2. He contends that by sending the issue regarding tenancy to the Mamlatdar the Court had finally decided conclusively one of the questions involved in that suit and therefore the decision which amounts to a decree is appealable.

Now a decree is defined in Section 2(2) of the Civil Procedure Code. Sometimes a decision on a question of jurisdiction might make a decision a decree but merely sending an issue for determination by the Mamlatdar in my opinion does not make the order a decree. The suit remains pending and has to be decided after the issue referred is determined by the Mamlatdar. The Learned Counsel relies on Kedar Nath Sanyal v. S.K. Ghose 1961 CWN 789 where it is observed as follows:

The learned District Judge seems to think that if he dismisses a suit on the preliminary ground of want of jurisdiction he is not required to draw up a decree. It is needless to say that there is no warrant for this view in the Civil Procedure Code.

There is therefore no merit in this preliminary objection.

It is secondly urged that it is only the Mamlatdar who is the aggrieved party because the suit is for a declaration that a notice issued by the Mamlatdar is illegal and praying for an injunction restraining the Mamlatdar and his agents from disturbing the plaintiffs from their possession of the suit land. The petitioner was also added as a party. He can also therefore come in revision and the State of Gujarat who appears before me also supports the revision application. There is therefore no merit in the preliminary objection.

In his order the learned Judge observed that the plaintiffs are cultivating the suit lands as protected tenants from 1929-30 to 1957-58 and that the suit land is a service Inam land useful to Government assigned for the remuneration of the services of a Patel. He also held that prior to the amendment of Section 88 of the Bombay Tenancy Act (Amendment Act No. 63 of 1958) on 11-7-58 such lands were not tempted from the operation of the Bombay Tenancy Act 1948 He also observed that the said amendment by which Watan or Inam land assigned for service useful to government and assigned as remuneration shall be deemed to be land belonging to Government is retrospective from 1-8-56 but the plaintiffs

rights as protected tenants were created long before 1-8-56. He also observed as follows:

Persons who are already tenants or protected tenants prior to 1-8-56 are entitled to seek the protection of the provisions of the B.T. Act and the landlord has to get the matter decided by applying u/s 29 of the said Act and the Mamlatdar has to proceed to decide the question under Sections 70 and 71 of the said Act. The position of law being as above this Court has no jurisdiction to decide whether plaintiffs are tenants or not and the Court has to make a reference u/s 85A of the said Act to the Mamlatdar to decide the issue as below because the contentions of the parties involve such an issue which is required to be decided by the Mamlatdar as discussed above.

No doubt the amendment of Section 88 of the Act made by Section 15 of Act 63 of 1958 which added the explanation to Section 88 of the Act is retrospective from 1-8-1956. Section 88 of the Act to which the explanation is added provides that nothing in the foregoing provisions of the Act shall apply to lands including to or hold on lease from the Government.

3. The foregoing provisions include provisions relating to substantive right and also provisions relating to rules of procedure. The explanation came into force from 1-8-56 and from that date onwards the provisions of the Act relating to procedure would be applicable even if they relate to matters concerning rights prior to 1-8-56. Sections 85 and 85A are rules of procedure and they read as follows:

85. (1) No Civil Court shall have jurisdiction to settle decide or deal with any question which is by or under this Act required to be settled decided or dealt with by the Mamlatdar or Tribunal a Manager the Collector or the Gujarat Revenue Tribunal in appeal or revision or the State Government in exercise of their powers of control.

(2) No order of the Mamlatdar the Tribunal the Collector or the Gujarat Revenue Tribunal or the State Government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation: For the purpose of this section a Civil Court shall include a Mamlatdar's Court constituted under the Mamlatdar's Courts Act 1906.

85A. (1) If any suit instituted in any Civil Court involves any issue which required to be settled decided or dealt with by any authority competent to settle decide or deal with such issues under this Act (hereinafter referred to as the competent authority) the Civil Court shall stay that suit and refer such issue to such competent authority for determination.

(2) On receipt of such reference from the Civil Court the competent authority shall deal with and decide such issue in accordance with the provisions of this Act and shall communicate its decision to the Civil Court and such Court shall thereupon dispose of the suit in accordance with the procedure applicable

thereto. Explanation: For the purpose of this section a Civil Court shall include a Mamlatdars Court constituted under the Mamlatdars Courts Act 1906.

These two sections do not apply to lands belonging to or held on lease from the Government and if the suit lands are State lands by reason of the explanation the provisions of the Act namely Sections 85 and 85A of the Act would not apply to them from 1-8-56 onwards. Therefore if a suit is filed in 1958 in respect of lands belonging to or held on lease from Government or in respect of land which is a State land by reason of the Explanation Section 85A does not apply and the Civil Court would have jurisdiction and the Civil Court should not make a reference u/s 85A of the Act. But that does not mean that the provisions relating to substantive rights in the Act are not applicable if the substantive rights were prior to 1-8-56. In the instant case the suit was filed on 10-9-58 i.e. after 1-8-56.

4. Section 88 makes a reference to the foregoing provisions of the Act and although the explanation to Section 88 of the Act is retrospective from 1 onwards the provisions of the Act will have to be classified. If the provisions of the Act relate to substantive rights the effect of the explanation is to make it retrospective only from 1-8-56 onwards. In any case the suit was filed after 1-8-56. It is therefore clear that nothing in the provisions of the Act will apply to lands which belong to Government by reason of the fact that they are deemed to be to belong to government in terms of the explanation to Section 88 of the Act. The learned Judge below has held that these lands are State lands and therefore he was wrong in making a reference to the Mamlatdar to determine the issue of a protected tenant. That does not mean that the Civil Court which has jurisdiction and which has to ignore Sections 70 85 and 85A of the Act for the purpose of this litigation has necessarily to ignore the other provisions of the Act. Whether or not the rights of the parties are affected by the explanation to Section 88 of the Act is a matter which will have to be decided by the Civil Court.

5. The Learned Counsel for the opponent has relied on a judgment of their Lordship of the Supreme Court in Civil Appeal No. 185 of 1956. Their Lordships were dealing with the effect to be given to Section 88(1) of the Act of 1948 which in terms provided that Sections 1 to 87 of the Act of 1948 will not apply to lands of the situation of the land in dispute before their Lordships. Their Lordships were dealing with the effect of the provisions relating to the substantive rights of the parties but their Lordships did not deal with or decide the question whether the rules of procedure are also to be affected. The Act provides that in certain matters the Mamlatdar has authority to decide and in certain matters the Civil Court has jurisdiction. But while exercising jurisdiction the Civil Court has to refer the matter to the Mamlatdar if it falls u/s 85A of the Act Admittedly by reason of Section 88(1) of the Act read with the explanation if a suit is filed after 1-8-56 the Civil Court alone will have jurisdiction if the lands are lands of the type mentioned in Section 88(1) read with the explanation to Section 88 of the Act. In the instant case the suit was filed after 1-8-56. There is therefore nothing in the judgment of their Lordships of the Supreme Court

whether by way of decision or by way of observations to negative this view.

6. The learned Judge below was therefore wrong in referring the issue to the Marmalatdar. But it has been contended that he has not decided all the facts necessary for the application of the explanation to Section 88 of the Act. Before the explanation is applicable it must be proved that the land is held as Inam or watan for service useful to government and assigned as remuneration to the person actually performing such service for the time being u/s 28 of the Bombay Hereditary Offices Act 1874 or any other law for the time being in force. The following requirements must be satisfied namely:

(1) The land must be Inam or watan; (2) It must be held for service useful to government; (3) It must be assigned as remuneration to a person; (4) That person must be actually performing that service for the time being; and (5) It must be assigned u/s 23 of the Bombay Hereditary Offices Act 1874 or any other law for the time being in force. The learned Judge has not considered all these requirements carefully. He is therefore directed to consider all these requirements. If all these requirements are satisfied he should proceed to decide the suit. If they are not he should make a reference u/s 85A. The revision application is allowed. There will be no order as to costs.