
(1973) 03 AHC CK 0027
In the Allahabad High Court
Case No : Special Appeal No. 1018 of 1967

The State of U.P. and Another	Vs	APPELLANT
Dhan Singh and Others		RESPONDENT

Date of Decision : 24-03-1973

Acts Referred:

Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 — Section 4(2)

Citation : AIR 1974 All 131

Hon'ble Judges : G.C. Mathur, J

Bench : Single Bench

Advocate : K.C. Agarwal and K.B.L. Gaur, for the Respondent

Final Decision : Disposed Of

Judgement

G.C. Mathur, J.—Dhan Singh respondent No. 1, was the tenure-holder of a large area of land. A notice u/s 10 of the U. P. Imposition of Ceiling on Land Holdings Act, 1960, was served upon him. He filed objections claiming that his family consisted of seven members. He also claimed certain exemptions. By the time the objections came to be decided his family had increased to nine members and he claimed that the ceiling area should be calculated on the basis of nine members in his family. The Prescribed Authority accepted his contention and calculated the ceiling area at 64 acres, but in calculating the surplus area the Prescribed Authority committed some error. Dhan Singh preferred an appeal for correcting the error in the calculation of the surplus area. In the appeal it was urged on behalf of the State Government that the child born subsequent to the coming into force of the Act could not be taken into account in calculating the members of the family. This contention was accepted by the Appellate Authority and it held that on the date the Act came into force, which is the relevant date, the family consisted of only seven members and was, therefore, entitled to a ceiling area of 56 acres only. It further held that the surplus area calculated on this basis came to something more than what had been declared by the Prescribed Authority and, therefore, Dhan Singh was not really aggrieved by the

order of the Prescribed Authority. It, accordingly dismissed the appeal. Thereupon a writ petition was filed before this Court.

2. It appears that out of the two children born after the coming into force of the Act, one was a son who was in embryo on the date the Act came into force. It was urged before the learned Single Judge that this son should be deemed to have been in existence on the date the Act came into force and should be taken into account in determining the family. The learned Single Judge accepted this contention and held that a child in the womb was a child in existence on the date the Act came into force. He, accordingly, held that the family consisted of eight members and was entitled to a ceiling area of 64 acres. On this basis the surplus area was found to have been wrongly calculated and the learned Single Judge remanded the case to the Appellate Authority for correction of the mistake. The State Government has now preferred this appeal against the judgment of the learned Single Judge.

3. The only question which arises for determination in this appeal is whether a child who was born after the Act came into force, but who was in embryo on that date, can be treated to be a child in existence on the date. The learned Standing Counsel has relied upon the decision of a Division Bench of this Court in *State Vs. District Judge and Others*, The facts of this case are identical to the facts of the case before us. In this case the family of the tenure-holder consisted of five members, but a son was born in February, 1961, increasing the number to six. It was held by the Division Bench that the relevant date for determining the ceiling area was the date of the enforcement of the Act (January 3, 1961) and, therefore, a son born after this date could not be taken into account in determining the number of the members of the family. Since the son in this case was born in February, 1961, it is obvious that he was in embryo on the date the Act came into force and still the Division Bench held that he could not be treated as a member of the family for purposes of calculating the ceiling area. Learned Counsel for the contesting respondents has contended that the specific question whether a child in embryo on the date the Act came into force should be deemed to be a child in existence on that date was not raised or decided in this case.

4. How the ceiling area is to be calculated is set down in Section 4 of the Act The relevant part of Sub-section (2) of Section 4 with which we are concerned reads thus:--

"2 (a) The ceiling area of a tenure-holder shall be forty acres of Fair Quality Land.

(b) Where the tenure-holder has, or consists of a family having more than five members, the ceiling area of such tenure-holder shall be the area mentioned in Clauses (a) together with eight acres of Fair Quality Land for every additional member of the family, subject to a maximum of twenty-four such acres."

Clause (c) of Section 3 defines a family and enumerates the relations who are to be included in the family. Sub-clause (iii) refers to "son and son's son, as long as they are un-separated from the holder". Therefore, what is to be seen is as to

how many members were there in the family of the tenure holder Dhan Singh on January 3, 1961, Members have to belong to one of the classes enumerated in the definition of the family. The question is whether the son who was in embryo on January 3, 1961 can also be deemed to have been in existence on that date and to constitute a member of the family. The doctrine deeming a son in embryo to be in existence on a date prior to the date of his actual birth has been applied to rights of inheritance and succession and to rights incidental to these rights such as the right to partition and the right to challenge alienations made by the Karta of a joint Hindu family. In *Ram Dayal v. Bhim Sen*, 1965 All LJ 1142 this doctrine was applied to succession u/s 35 of the U. P. Tenancy Act. It was held that a daughter's son who was in womb at the death of his maternal grandfather or his widow would be deemed to have been in existence at the time of their death and would inherit the latter's tenancy. The Bench which decided this case observed that according to all civilised systems of jurisprudence a child in embryo at the death of the holder of a proprietary interest, if born alive after his death, is deemed to be living at his death. There are decisions, to which it is unnecessary to make a reference, holding that a Hindu son born subsequently is competent to contest alienations made by the father when the son was in his mother's womb. But the doctrine is not of general or universal application. In *Guramma v. Malappa* AIR 1964 SC 510 the Supreme Court held that the doctrine could not be applied to adoption. It was held that the existence of a son in embryo, of a co-widow does not invalidate the adoption made by the widow and that the son in embryo, even though born alive subsequently, could not be deemed to have been in existence at the time of the adoption. In *T.S. Srinivasan Vs. Commissioner of Income Tax, Madras*, the Supreme Court held that the doctrine could not be applied to tax matters. It was held that the doctrine that a Hindu undivided family comes into existence from the date a son is conceived is not of universal application and it is applied mainly for the purpose of determining rights to property and safeguarding such rights of the son. The doctrine has been applied in cases where such a son would acquire some right of property if he were deemed to have been in existence on some date prior to the date of his actual birth. In the present case since Dhan Singh is the tenure-holder, his son who was conceived on the date the Act came into force and was born alive subsequently would not acquire any right in the holdings even if he were deemed to have been in existence on 3-1-1961. The holding continues to be that of Dhan Singh. The only effect of deeming his son to have been in existence on 3-1-1961 would be that Dhan Singh would be entitled to retain a little more land in his ceiling area. But the application of the doctrine would not confer any direct right or benefit on the son. Therefore, the non-application of the doctrine and non-recognition of the existence of the son on 3-1-1961 will not affect any right of the son. The doctrine cannot be invoked or applied merely to confer some benefit on the father. We have not been referred to any case where the doctrine has been applied to cases where rights of inheritance and succession and rights incidental to these rights are not involved. We are of opinion that the doctrine cannot be invoked in determining ceiling area of a tenure-holder under

the Act. This is also implied by the decision of the Division Bench of this Court which decided the case State v. District Judge.

5. The provisions of the Act also show that the doctrine cannot be supplied to the Act. The relevant words of Clause (b) of Sub-section (2) of Section 4 are--

"Where the tenure-holder has a family having more than five members.,....."

The language indicates that the family and its members must be actually in existence on the relevant date. It does not contemplate a notional existence either of the family or of its members. Normally, an unborn child, even if in the womb, is not taken or counted as a member of the family. Clause (c) of Section 3 defines "family" and enumerates five classes of relations who are to be included in the family. The third and the fifth classes are--

"(iii) son and son's son as long as they are un-separated from the holder;

(v) daughter and un-separated son's daughter as long as they are unmarried;"

The language used here is not appropriate to a person not actually in existence on the relevant date. The words "separated or un-separated" and "married" or "unmarried" can only be used for persons in actual existence and not for persons notionally in existence. Clause (c) further provides that the five classes of relations enumerated therein are to be included in the family provided they are not tenure-holders in their own separate rights. This proviso also indicates that the relations talked of in Clause (c) of Section 3 must be in existence on the relevant date and should not be tenure-holders in their own separate rights. No question of being a tenure-holder in his own right can arise in respect of a person not actually in existence.

6. Since, in our opinion, the son conceived before the date of the enforcement of the Act, but born afterwards cannot be deemed to have been in existence on the date of the enforcement of the Act, the family of Dhan Singh, the tenure-holder, consisted only of seven members on the relevant date. That being so, he was entitled to a ceiling area of 56 acres only, on that basis the surplus area which has been determined cannot be said to be in excess of what was legally the surplus area. If there was any error in determining the surplus area, it was in favour of Dhan Singh, the tenure-holder. The District Judge was, therefore, right in dismissing the appeal. His order did not call for any interference in the writ petition.

7. The appeal is, accordingly, allowed, the judgment of the learned Single Judge is set aside and the writ petition is dismissed. The parties will bear their own costs of the appeal as well as of the writ petition.