

Smt. Mahesha Devi Vs. State of U.P. and Others

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Court : Allahabad

Decided On : Aug-18-1998

Reported in : 1999(1)AWC592

Judge : S.H.A. Raza, J.

Acts : Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 - Sections 5(1), 10(2), 38A and 38B; [Transfer of Property Act, 1882](#) - Sections 53; Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 - Sections 31(2)

Appeal No. : Writ Petition No. 3042 of 1983

Appellant : Smt. Mahesha Devi

Respondent : State of U.P. and Others

Advocate for Def. : C.S.C.

Advocate for Pet/Ap. : Pradeep Kant, ;Dr. R.K. Srivastava and ;Km. Prem Prakashini Misra, Advs.

Judgement :

S.H.A. Raza, J.

1. In an earlier proceeding, the petitioner has filed objection under Section 10 (2) of the U. P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as the Act) against a notice served upon her on 25.11.1974. In that objection, the objector alleged the sale of about 35 acres of land out of the entire land of which she was the tenure holder. She prayed for discharge of the notice.

2. Two issues were framed by the Prescribed Authority ; firstly, as to whether the objector had executed a sale deed of 35 acres in 1967 out of her holding as alleged, and secondly, to what relief the objector was entitled.

3. According to the petitioner she transferred 12.41 acres of land in favour of Vijai Kumar son of Sri Ambika Prasad Misra, 12.21 acres in favour of Ajai Kumar son of Sri Ambika Prasad Misra and 11.73 acres land in favour of Arun Kumar son of Lalita Prasad Misra. As those sale deeds were prior to the relevant cut of date, i.e., 24.1.1971, the Prescribed Authority did not club that land with the holding of the petitioner.

4. The said Act was amended by the U. P. Act No. XX of 1976, with an Explanation was added in sub-section (1) of Section 5 of the Act which provided that in determining the ceiling area applicable to a tenure-holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account. The Explanation merely qualifies that when the ceiling area of a person who is the tenure-holder on 8.6.1973 is being worked out all the land held by him in his own right shall be taken into account. irrespective of the fact whether such land is held by him in his own name or ostensibly in the name of other person. The said Explanation was added by way of abundant caution so as to obviate a possible argument that even though a person actually holds the land that cannot be considered to be his own holding because it stands recorded in the name of some other person but this Explanation does not forbid the transferor of the property to assert that the benefit of Section 53 of the Transfer of Property Act is also available to him.

5. By means of the said Amendment No. XX of 1976, provisions of Sections 38A and 38B were inserted. As far as the provisions of Section 38A are concerned, it is procedural in nature though it came into effect on 10.10.1975, according to which

power to ask the tenure-holder to furnish such Information for proper adjudication of the surplus land could not be exercised before such amendment. The tenure-holder, thus, is bound to furnish any of the information which is in respect of any land, held by him and the members of the family,

6. Section 38B provides that no finding or decision given before the commencement of this section in any proceeding or on any issue, (including any order, decree or judgment) by any Court, tribunal or authority in respect of any matter governed by this Act, shall bar the trial of such proceeding or issue under this Act, in accordance with the provisions of this Act as amended from time to time. Thus, this section empowers the Prescribed Authority appellate court to consider any point or issue again, notwithstanding that there has previously been a judgment order or finding on the same point. Thus, a finding or a decision given before the Section 38B came into force on October 10, 1975, for purposes of Ceiling Act are not final. They can be re-opened and the question involved in it can be re-tried. Any finding or decision will not bar re-trial of an issue which necessarily arises for decision under the provisions of Ceiling Act.

7. Section 38B makes the provisions of the Ceiling Act to have an over-riding effect and so the findings which are in conflict or at variance with the provisions of the Ceiling Act are revisable. But otherwise the decisions are to be recognised even on proceedings under the Ceiling Act. But in all cases, notices need not be Issued. Notices can only be issued in such cases which are likely to be effected by the amendment introduced by the Amending Act No. II of 1975 and Act No. XX of 1976. The question often arises is as to whether Section 38B is a blank cheque permitting reopening of such issues by ignoring the findings given on issues about which no amendment is involved.

8. With this prelude, I have to examine the correctness of the fresh notices which were issued to the petitioner, after coming into force of Act No. XX of 1976 on 10.10.1975. The notice under Section 10 (2) read with Section 38B of the Act can be issued if some additional land to be surplus, over and above the land which was declared surplus in the earlier proceedings was found in the holding of a tenure-holder. After the decision in the earlier proceedings in the Instant case,

some additional land devolved upon the petitioner within the petitioner inherited from her brother.

9. Counsel for the petitioner asserted that the proceedings which were initiated against the petitioner after coming into force of U. P. Act No. XX of 1976 was barred by principles of res judicata inasmuch as the land which was transferred by the petitioner prior to 24.1.1971 cannot be clubbed with the holding of the petitioner.

10. The Prescribed Authority was of the view that the Lekhpal and, Naib Tehsildar found the possession of Ambika Prasad Misra on the land which was alleged to have been transferred by the petitioner, in favour of two minor sons of Ambika Prasad Misra, who was the Manager of the petitioner. It was stated by the Lekhpal and Naib Tehsildar that Ambika Prasad Misra was Manager of the petitioner who used to manage the agricultural properties of the petitioner. Ambika Prasad Misra, in his statement, also admitted the fact that he had to manage and supervise the agricultural holding of the petitioner. The Prescribed Authority was of the view that when the land was transferred in the year 1967 by the petitioner in favour of Vijay Kumar and Ajai Kumar they were minors, meaning thereby that at the time of said transfer they were aged about 12 or 15 years of age. The Prescribed Authority also stated in his order that the original sale deed was not presented before the Court. The Naib Tehsildar (Ceiling) stated that being the Manager of the petitioner, Ambika Prasad Misra, got the land fictitiously transferred in favour of his two minor sons but actually Ambika Prasad Misra remained in possession, over the land and from the statement of Sri Misra, it transpired that his possession over the land which was allegedly transferred in the capacity of a manager in favour of Vijay Kumar and Arun Kumar was of Smt. Mahesha Devi, the petitioner. He was also of the view that the present proceedings which were initiated after coming into force of U. P. Act No. XX of 1976 was not barred by the principles of res Judicata. The Prescribed Authority was also of the view that the land which the petitioner inherited from her brother Ishwardin can be clubbed with the holding of the petitioner as it devolved upon the petitioner after the earlier proceedings came to an end hence the issuance of fresh notices under Section 10 (2) of the Act is just and proper and it is not barred by principles of constructive res Judicata.

11. In the light of the aforesaid facts and circumstances of the case, the case of the petitioner deserves to be considered.

12. In Ram Lal v. State of U. P. and others. 1978 AWC 713, an Hon'ble single Judge of this Court observed :

'A general review of the earlier orders was not the internment of the provisions permitting re-determination. It was confined to cases which required re-determination in view of the amendments incorporated in the Principal Act.'

'Where the amendments incorporated in the Principal Act not affected the decision in the earlier proceeding as regards a part of the petitioner's holding as an ancestral sir and khudkasht. A re-opening of the earlier proceedings was not called for and the findings recorded and the decision reached in them could not be set-aside in the proceedings which were started again after a fresh notice was issued under Section 10 (2) after the amendment of the Principal Act by U. P. Act No. XX of 1976.'

It was further observed :

'Where change in law affects an earlier decision of a competent court, the decision is not reversed, only the result is 'affected to the extent the change in the law affects it.

The Legislature can amend a law to render a decision ineffective but only to the extent it was affected by the change introduced.

A change in law can thus affect the decision of a Court only to the extent that the decision becomes contrary, to law. If the change in law does not touch the question decided by the competent court, the decision is not affected and would continue to be binding between the parties.'

Regarding the scope and ambit of Section 38B, Hon'ble single Judge indicated :

'Section 38B was introduced to achieve the object of the various amendments introduced in the Principal Act and to give effect to them. Section 38B, contemplates that if by the amendments made in the Principal Act certain findings

or decisions had become contrary to law, those findings or decisions could be reopened and the principle of *res judicata* would not bar a retrial of these issues in accordance with the provisions of the Principal Act as amended. This provision did not authorise the calling authorities to ignore the decisions rendered or decrees passed by competent courts, tribunals or authorities in respect of matters which were not affected by the changes made in the Principal Act. Such decisions, would continue to be binding on the parties and would operate as *res judicata* between them.'

13. A Division Bench of this Court in *Yadunath v. State*, 1979 AWC 167, held :

'Subject to Explanation II to Section 5 (1) the initial burden of proving that a transaction entered into by a tenure-holder prior to 24th January, 1971 is a genuine transaction is on the tenureholder. Where, however the material on record indicates circumstances which satisfy the Prescribed Authority either that as a result of the transaction the title in the holding has passed to some other person or that circumstances exist which indicate that a prudent person should act upon the supposition that the title has passed to a third person, the burden shifts and it would be for the State Government to show that the transaction in question was really a sham transaction.'

14. Now the question arises as to what is the meaning of 'sham transaction'. The words 'false' and 'sham' are synonym. 'Sham', the adjective, is defined as false, counterfeit, pretended, feigned, unreal ; and the noun is given the primary meaning of that which deceives expectation, any trick or fraudulent device that disappoints, make believe, imposition, humbug. *Williams v. Territory*, 108 p. 243. 245. 13 Ariz. 27, 27 LRANS 1032. 'Sham' is defined by Webster to mean false, counterfeit, pretended, and Mr. Chilly says it is pleading a matter known by the party to be false, for the purpose of delay or some other unworthy object. The essential element of a sham plea is its falsity, and a defendant must have some unworthy objection view, as vexation or delay. (*Nichols v. Jones*, N. Y. 6 How. Prac. 355, 356). To establish an 'allegation' as 'sham' the moving party has the burden of clearly demonstrating that it is without factual basis. *Mann v. Luke*, 68 NYS 2d 313. 317. 272 App Dtv 19. In *Budh Pal Singh v. Additional District and*

Session Judge, Badaun, 1979 AWC 203, an Hon'ble single Judge of this Court indicated, relying upon the views expressed by the Hon'ble single Judge in Ram Lal v. State (supra), that the constitutional position as discussed by him. with regard to the proper scope of legislative power in relation to judicial decisions, which have become final is that the Legislature can render the decisions ineffective only to the extent that those decisions are affected by any changes in the law subsequently brought about with retrospective effect. In view of this basic principle, although the language of Section 38B, on the face of it, is wide enough to cover even re-determination of issues unaffected by the legislative amendment, the provision has to be limited, by the principle of 'reading down', to only those matters in respect of which the findings are affected by amendments carried out in the Principal Act.

15. In Kedar Singh v. Additional District Judge, Varanasi, 1979 A WO 693, a Division Bench of this Court held :

'Section 38B, which was introduced in the Ceiling Act by Amending Act No. XX of 1976 which came into force on 10th October, 1975 applies only where retrial is necessitated by reason of the amendments introduced by the aforesaid Amending Act becoming applicable. If in a case any provision introduced by the aforesaid Amending Act is applicable, a previous decision or finding will not bar retrial of such an issue or proceeding.'

It was further held that:

'In the instant case since Explanations I and II to Section 5 (1) became attracted the proceedings were validly reopened by Issuance of a fresh notice after the coming into force of the Amending Act No. XX of 1976. Section 38B applied and the findings given in the earlier ceiling proceedings would not operate as res judicata, so as to bar retrial of the issue relating to the land covered by the gift deeds. It is thus apparent that the previous decision of the ceiling authorities lost its binding character. The gift deeds were rightly ignored.'

16. Thereafter a Full Bench of this Court in Prakash Singh v. Prescribed Authority, Bilaspur, Ramur, 1986 RD 39, set at rest the controversy which follows after the

decision in *Balwant v. State*, 1980 ALJ 775 (DB), which was not held to be a good law. Before the Full Bench following two questions were referred :

'(1) Whether the decision in *Balwant v. State* (supra), or the decision *Uma Shankar v. State*, *Sukhbir v. Prescribed Authority* and *Kedar Singh v. 1st Additional District Judge*, lay down the correct law on the question of the true meaning and scope of Section 34 (3) of the U. P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1976 (U. P. Act No. XX of 1976) and Section 38B of the U. P. Imposition of Ceiling of Land Holdings Act. 1960 as amended up to date ;

(2) What is the true meaning and scope of sub-section (2) of Section 31 of U. P. Imposition of Ceiling on Land Holdings (Amendment) Act (U. P. Act No. XX of 1976) with reference to the present case.'

Regarding first question, it was observed :

'But where the question arises : what would be the effect of the previous decision if a fresh notice under Section 10 (2) is Issued. On the points which have already been decided, the earlier decision will operate as *res judicata*. It would have no effect on the new grounds which are taken for reducing the surplus area further in pursuance of the Amending Act. The obvious reason is that fresh grounds would raise new controversies which have not been decided. That would have to be considered afresh on the evidence of the parties.

For the reasons Indicated above, the two observations in *Balwan v. State* (supra), quoted earlier in this judgment must be held as not laying down the law applicable to all cases where fresh notice under Section 10 (2) of the Act is issued, but those observations were applicable to the facts of that particular case alone. With these observations, we answer point No. 1.'

17. In view of the law laid down by the Full Bench, the contention of the petitioner's counsel that after coming into force of U. P. Act No. XX of 1976 the proceeding cannot be reopened or revived is not sustainable. Admittedly, after the earlier proceedings were over, holding of the petitioner was increased after she inherited the agricultural holding after the death of her brother, A new ground existed for the

issuance of fresh notice.

18. As far as the contention of the petitioner's counsel that the land which was the subject-matter of transfer prior to 24.1.1971 cannot be clubbed with the holding of the petitioner, because it was also the subject-matter of earlier proceedings in which the validity of the transfer was up-held by the ceiling authorities is concerned, in view of the law laid down in *Yadunath v. State* (supra), by a Division Bench of this Court which is binding upon this Court, I am of the view that initial burden of proving that the transaction was entered into by the tenure-holder prior to 24.1.1971 is bona fide and genuine transaction is on the tenure-holder but where, however, the material on record indicates circumstances which satisfy the Prescribed Authority either that as a result of the transaction, the title in the holding has passed to some other person or that circumstances exist which indicate that a prudent person should act upon the supposition that the title has passed to a third person, the burden shifts and it would be for State Government to show that the transaction in question was really a sham transaction.

19. The Prescribed Authority in its order indicated that admittedly the land was transferred to two minor sons of Ambika Prasad Misra in the year 1967 much prior to 24.1.1971. If there existed circumstances which indicated that title has passed to third person, it was upon the State Government to prove that the transaction in question was really a sham transaction. If it is assumed that Ambika Prasad Misra was the Manager of the petitioner and had, been managing the agricultural holding of the petitioner, the law does not prohibit a tenure-holder to transfer his/her land either in favour of a Manager or his sons. Certainly, the Prescribed Authority was within his rights to examine as to whether the sale transaction was entered into prior to the coming into force of Act No. XX of 1976 was a sham transaction, but burden was upon the State Government to prove beyond any shadow of doubt that the said transaction was false, counterfeit, pretended, feigned, unreal or it was trick or fraudulent device or humbug.

20. Explanation I of Section 5 (1) provides that in determining the ceiling area applicable to a tenure-holder, all land held by him in 'his own right whether in his own name. or ostensibly in the name of any other person shall be taken into

account.

21. Explanation I is applied only in proceedings for determination of ceiling area applicable to a tenure-holder. If a person was tenure-holder on 8.6.1973 and proceedings for determination of his ceiling were initiated, then in that proceedings all land held by him in his own name or ostensibly in the name of any other person shall be taken into account. but if he was not a tenure-holder at all on that date 8.6.1973 Explanation I may not apply. However, Explanation II could be applied if the requirement of said Explanation were established. Inasmuch as the said Explanation does not use the term 'tenure-holder' but uses, the term 'person'. As such if the requirement of the Explanation II were fulfilled, the transfer shall be presumed unless contrary is proved to the satisfaction of the Prescribed Authority to be holding the land on 8.6.1973.

22. The Prescribed Authority has indicated only two circumstances: : firstly, that Ambika Prasad Misra being the Manager was managing the agricultural property of the petitioner and secondly the sale transaction was in favour of his two sons who were 12 and 15 years of age on the date of sale transaction, i.e.. 1967, hence the petitioner was an ostensible owner within the meaning of Explanation I of Section 5 (1) of the Act. There is no finding that the sale deeds were sham, false, fictitious or fraudulent. In view of the fact that the finding of the Prescribed Authority is too cursory and sketchy, hence on that question only the case deserved to be reconsidered afresh by the Prescribed Authority.

23. In view of what has been indicated above, the findings of the Courts below to the extent that the proceedings can be revised or reopened after coming into force of U. P. Act No. XX of 1976 is upheld, which resulted in the increase of the surplus land on account of the land which the petitioner inherited from her brother. The findings of the Courts below on the remaining points are also up-held, but as far as the finding on sale transaction in favour of the two minor sons of Ambika Prasad Misra which took place in the year 1967 is concerned, is quashed. Only on this point, the case is remitted to the Prescribed Authority to consider afresh as to whether the sale transaction in favour of the two minor sons of Ambika Prasad Misra was bona fide transaction or a sham transaction after providing parties an

opportunity to adduce any further evidence, if they so desire to produce and decide the same in accordance with law.

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