Privy Council Appeal No. 62 of 1945

Punjab Province - - - - - - - - - *Appellant*

v.

Daulat Singh and others - - - - - - *Respondents*

FROM

THE FEDERAL COURT OF INDIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JANUARY, 1946

Present at the Hearing:

LORD THANKERTON
LORD MACMILLAN
LORD WRIGHT
LORD SIMONDS
LORD GODDARD

[*Delivered by* LORD THANKERTON]

This is an appeal from the judgment and order of the Federal Court of India, dated the 8th May, 1942, by which the judgment and decree of the High Court of Judicature at Lahore, dated the 27th February, 1941, dismissing appeals by the appellant and respondents Nos. 2 and 3 respectively from the judgment and decree of the Subordinate Judge, IV Class, Sialkot, dated the 22nd July, 1940, were set aside and the case sent back to the High Court with a direction for the framing of proper issues and the remittal of the case to the trial Court for further trial and decision.

The only question in this appeal is whether, and, if so, to what extent, section 5 of the Punjab Alienation of Land (Second Amendment) Act, 1938, Punjab Act X of 1938 is rendered invalid by section 298 of the Government of India Act, 1935, as being *ultra vires* of the Punjab Provincial Legislature. The Punjab Act of 1938, which may be conveniently referred to as the impugned Act, by section 5 purported to insert a new section 13A in the Punjab Alienation of Land Act, 1900 (Indian Act XIII of 1900), which may be referred to as the principal Act, the new section being expressly given retrospective effect.

The principal Act, as amended up to the 1st June, 1939, when the impugned Act came into operation, deals with permanent alienation of land in Part II (sections 3 to 5), and temporary alienation of land in Part III (sections 6 to 13) of the Act. The expression " land " is defined in section 2 (3), and, broadly stated, it covers agricultural land and buildings, and excludes building sites and buildings in a town or village; and, by section 2 (4), " permanent alienation " is defined to include sales, exchanges, gifts, wills and grants of occupancy rights. By section 3 it is provided that, except where the alienor is not a member of an agricultural tribe, or the alienor is a member of an agricultural tribe and the alienee is a member of the same tribe or of a tribe in the same group, a permanent alienation of land shall not take effect as such unless and until sanction is given thereto by a Deputy Commissioner, and section 14 provides that any such permanent alienation shall, until such sanction is given, or if such sanction has been refused, take effect as a usufructuary mortgage in form (*a*) permitted by section 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers to be reasonable.

As regards temporary alienations of land, section 6 (1) provides that if a member of an agricultural tribe mortgages his land and the mortgagee is not a member of the same tribe, the mortgage shall be made in one of certain prescribed forms, and section 9 (1) provides that, if a member of an agricultural tribe makes a mortgage of his land in any manner or form not permitted by or under the Act, the Deputy Commissioner shall have authority to revise and alter the terms of the mortgage so as to bring it into accordance with such form of mortgage permitted by or under the Act as the mortgagee appears to him to be equitably entitled to claim.

Perhaps the most important section of the principal Act for present purposes is section 4, under which the Local Government, for which the Provincial Government was substituted in 1937, were, by notification in the Official Gazette, to determine what bodies of persons in any district or group of districts were to be deemed to be agricultural tribes or groups of agricultural tribes for the purposes of the Act. Accordingly, by Punjab Government Notification No. 63, dated the 18th April, 1904, it was determined that for the purpose of the Act—

> " (1) In each district of the Punjab mentioned in column 1 of the Schedule attached to this notification, all persons either holding land or ordinarily residing in such district and belonging to any one of the tribes mentioned opposite the name of such district, in column 2, shall be deemed to be an " agricultural tribe " within the district.
>
> (2) All the ' agricultural tribes ' within any one district shall be deemed to be a group of agricultural tribes."

The Schedule has from time to time been amended.

In view of the restrictions on alienation, a practice grew up of adopting the method of acquiring and holding property *benami*, so familiar in India, so that transfers from members of agricultural tribes were made into the name of a person belonging to the same tribe or group of tribes as *benamidar*, for the benefit of a person who was not a member of such tribe or group of tribes. Such cases came before the Court on various occasions, but, in order to explain the situation under which the transaction here in question came into being, and which would appear to have led to the passage of the impugned Act, it will be sufficient to refer to two of these cases, for that purpose only, and not for the purpose of the consideration by this Board of the correctness of the decisions. In *Shamas-ud-din* v. *Allah Dad Kahn*, A.I.R., 1925 Lah. 65, the Lahore High Court held the ostensible vendee entitled to recover possession of the property from the vendor, whatever might be the legal position between the former and the alleged non-agricultural beneficiary; this is the ordinary law relating to *benami* transactions. In 1932, a Full Bench of the same Court in *Qadir Baksh* v. *Hakam*, I.L.R., 13 Lah. 713, A.I.R. 1932 Lah. 503, held in an action by an alleged *benamidar* to recover possession of the property from an alleged beneficiary that the latter was entitled to prove that such was the real relationship between the parties, that such a transaction was an evasion of the provisions of the principal Act, but that it was not necessarily void *ab initio*, and the possession of the beneficiary was not necessarily unlawful in every case, though the Court would not lend its support to either confederate, and the possession must remain where it lay.

In the year 1933, one Jumman, the father of respondents Nos. 2 and 3, executed a mortgage with possession to respondent No. 1, who is a member of an agricultural tribe, of certain agricultural land and rights in the District of Sialkot in the Schedule to the Notification of 1904, to secure repayment of Rs.1,500 to one Gopal Das. It is not disputed that respondent No. 1 was a *benamidar*, and that Gopal Das, who is not a party to the present suit, was the real beneficiary. While the mortgage deed has not been produced, it is admitted that it is not in a form permitted by the principal Act, and that it would fall into the category referred to in section 9 (1) of the principal Act.

In February, 1939, the impugned Act was enacted, and, by a notification under section 1 (2) of the Act, it came into force on the 1st June, 1939. By section 5 of the impugned Act it is provided that before section 14 of the principal Act, a new heading and four new sections should be inserted.

The new heading and the first of the new sections, so far as relevant to the present case, read as follows:—

" III—A.—*Benami Transactions.*

13—A. (1) When a sale, exchange, gift, will, mortgage, lease or farm purports to be made either before or after the commencement of the Punjab Alienation of Land (Second Amendment) Act, 1938, by a member of an agricultural tribe to a member of the same agricultural tribe or of a tribe in the same group, but the effect of the transaction is to pass the beneficial interest to a person who is not a member of the same tribe or of a tribe in the same group, the transaction shall be void for all purposes, and the alienor shall be entitled to possession of the land so alienated, notwithstanding the fact that he may have himself intended to evade the provisions of this Act.

(2) If the Deputy Commissioner either of his own motion or on the application of the alienor, is satisfied after making such enquiries as may be prescribed from the parties concerned, and recording evidence that an alienation is void under the provisions of the preceding sub-section he shall by order in writing, after recording his reasons, eject any person in occupation of the land under such sale, exchange, gift, will, mortgage, lease or farm and place the alienor in possession."

A proviso to sub-section (2) of the new section 13A provides for compensation to the person ejected for improvements in the discretion of the Deputy Commissioner. Sub-section (3) is not material. It should be added that by section 21 of the principal Act the jurisdiction of the Civil Courts is excluded in any matter which the Provincial Government or any Revenue-officer is empowered by the Act to dispose of, and that any rights of appeal conferred are to persons within the Revenue Department.

In October, 1939, Jumman, the mortgagor, having died, his sons, respondents Nos. 2 and 3, applied under section 5 of the impugned Act to the Deputy Commissioner for avoidance of the mortgage and recovery of possession of the mortgaged property, on the ground that the real beneficial mortgagee was not respondent No. 1, but Gopal Das, who was not a member of an agricultural tribe. Thereupon respondent No. 1, on the 27th November, 1939, presented a petition against respondents Nos. 2 and 3, in the Court of the Subordinate Judge, First Class, Sialkot, alleging that, in view of section 298 of the Government of India Act, 1935, the impugned Act was void and *ultra vires* of the Punjab Legislature, and claiming (*a*) a declaration of his right as mortgagee with possession, (*b*) a declaration that respondents Nos. 2 and 3 had no right to take possession through the Deputy Commissioner after taking steps under the impugned Act, and (*c*) a permanent injunction restraining them from obtaining possession of the land by taking out proceedings under the impugned Act. In a written statement respondents Nos. 2 and 3 maintained the validity of the impugned Act, that section 298 of the Act of 1935 was not contravened by the impugned Act, and that the present appellant was a necessary party. By order dated the 27th May, 1940, the appellant was made a party, and on the 22nd June, 1940, preliminary issues were fixed, namely,

1. Had the Punjab Legislature no jurisdiction to enact Act No. X of 1938 (Punjab) for reasons mentioned in paras. 8 and 9?

2. If not, has the Civil Court jurisdiction to determine the question of *benami* nature of the transaction in dispute?

Issue No. 2 raises no separate point, as the answer to No. 1 necessarily determines the answer to No. 2.

At that time, and until after the decision of the Federal Court, section 298 provided as follows:—

" 298. (1) No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India.

(2) Nothing in this section shall affect the operation of any law which—

(*a*) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area to any person not belonging to any such class; or

(*b*) recognises the existence of some right, privilege or disability attaching to members of a community by virtue of some personal law or custom having the force of law.

(3) Nothing in this section shall be construed as derogating from the special responsibility of the Governor-General or of a Governor for the safeguarding of the legitimate interests of minorities."

By section 4 of the India and Burma (Temporary and Miscellaneous Provisions) Act, 1942, two amendments of section 298 were made, the only material one being the substitution of a new paragraph (*a*) of sub-section (2) of section 298, as follows:—

" (*a*) prohibits, either absolutely or subject to exceptions, dispositions of agricultural land situate in any particular area and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area or as being an aboriginal tribe, in favour or for the benefit of any person not belonging to that class."

By section 6 (2) of the Act of 1942, it was provided that the amendments made by sections three and four of the Act in the Government Act, 1935, should be deemed to have been made therein immediately before the passing thereof. It follows that, for the purposes of this appeal, their Lordships must have regard only to section 298 as amended by the Act of 1942, and another result has followed the amendment, viz., that certain contentions which have been dealt with by the Courts in India, are no longer available and the question of the validity of the impugned Act will rest on the decisioin of one or at most of two questions.

The first question is whether the impugned Act, by section 5, contravenes sub-section 1 of section 298 of the Act of 1935. If it does not contravene sub-section (1), the attack on the impugned Act fails, and so does the suit. If, on the other hand, section 5 of the impugned Act does contravene sub-section (1) of section 298, the question arises whether the appellant can claim the benefit of sub-section (2), and here the respondent No. 1 admits that the transaction here in question does fall within the class of disposition described in paragraph (*a*) of subsection (2), but he maintains that it does not authorise or afford protection for retrospective legislation, and that the rerospecive effect of the new section 13A may be easily eliminated by the deletion of the three words " either before or " from the early part of sub-section (1) thereof, leaving the impugned Act otherwise operative.

The Subordinate Judge appears to have assumed that the impugned Act contravened sub-section (1) of section 298 of the Act of 1935, and, as regards sub-section (2), which in its then form related only to sales and mortgages, he pointed out that the impugned Act prohibited, in addition, exchanges, gifts, wills, leases and farms, and said. " The Act, which cannot be declared void in part and upheld in the rest, is therefore, *ultra vires* the Provincial Legislature as it contravenes the provisions of section 298(1) of the Government of India Act 1935." This ground of judgment was obviated by the subsequent amendment of sub-section (2) of section 298 The learned Judge also held that section 292 of the Act of 1935 barred the authority of the Provincial Legislature to legislate retrospectively in view of a Full Bench ruling of the Allahabad High Court (A.I.R. 1940 All. 272), but that ruling was over-ruled by a decision of the Federal Court (A.I.R. 1941 F.C. 16) before the appeal in the present case came before the Lahore High Court, and no further contention was based on section 292. The contention that the impugned Act, so far as intended to operate

retrospectively, was not authorised or afforded protection by sub-section (2) of section 298 does not appear to have been made before the Subordinate Judge.

On an appeal taken by the present appellant, and an appeal by the present respondents Nos. 2 and 3, the High Court of Lahore dismissed both appeals, and affirmed the decree of the Subordinate Judge. The learned Judges held that the impugned Act contravened the provisions of sub-section (1) of section 298, in respect that it operated merely by reason of descent alone, that sub-section (2)—as it then stood—could only save sales and mortgages, and did not authorise or protect the avoidance of sales and mortgages retrospectively, and that there would be no difficulty in holding that the impugned Act was valid so far as future sales and mortgages were prohibited. On this last point the learned Judges differed from the Subordinate Judge, but this did not affect the result so far as the mortgage in suit was concerned, it having been executed five years before the impugned Act was passed. Dalip Singh J., in the leading judgment did discuss the question of the validity of the principal Act, and expressed a somewhat tentative opinion, but Monroe and Sale J.J. found it unnecessary to express any opinion. Their Lordships will refer to this matter later.

The High Court having certified in terms of section 205 of the Act of 1935 that the case involved a substantial question of law as to the interpretation of that Act, the present appellant appealed to the Federal Court, which, by a majority judgment (Gwyer C.J. and Varadachariar J., *diss.* Beaumont J.) held that the impugned Act contravened sub-section (1) of section 298, in respect that in some cases it would operate as a prohibition on the ground of descent alone and agreed with the High Court that the benefit of sub-section (2) of section 298 could not be claimed for the impugned Act so far as it purports to avoid transactions entered into or titles acquired before the impugned Act became law, as the word " prohibit " can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction. Having so far followed the views of the High Court, Varadachariar J., with whom Gwyer C.J. agreed, proceeded to express a view of the matter, which was not supported before the Board, and with which their Lordships are unable to agree. After stating that the question was not exactly one as to the validity or invalidity of the Act, but rather whether the prohibitions contained in it were operative or not, the learned Judge said that the circumstances in which the provisions of the impugned Act will be in operative must be limited to cases where the beneficiaries under the *benami* transactions fall outside the terms of the notifications under section 4 of the principal Act only on the ground that they are not descended from members belonging to the specified tribes. The learned Judge further said, that in this view, the decree dismissing the appeal to the High Court could not stand, and that enquiry would be necessary as to the ground on which Gopal Das, the alleged beneficiary under the suit mortgage, was said to be a non-agriculturist, as, without such an investigation, it could not be decided whether the suit transaction is void under the impugned Act.

In his dissenting judgment, Beaumont J. sums up his opinion in these words, " I would however rest my judgment that section 13A of the impugned Act is not *ultra vires* the Punjab Legislative Assembly on the wider ground that in applying the terms of section 298 (1) it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based. If the only basis of the Act is discrimination on one or more of the grounds specified in section 298 (1), then the Act is bad; but if the true basis of the Act is something different, the Act is not invalidated because one of its effects may be to invoke such discrimination. In my opinion, in the present case the true object of the impugned Act is to avoid a method of evading the principal Act, which itself is unobjectionable, and although some of the rights avoided by the Act may be vested in persons whose only disqualification is lack of a particular descent, such lack of descent is not the only, or even the primary, ground on which the rights are avoided."

In accordance with the opinion of the majority of the Court, the decree of the High Court was set aside, and the case sent back to the High Court with a direction that proper issues were to be framed in the light of the observations in the majority judgment, and the case remitted to the Trial Court for further trial and decision.

Their Lordships desire to point out the limited nature of the issue in this appeal. In the first place, no question of the validity of the principal Act arises; neither of the two issues taken raises the question, no question of its validity was suggested by the respondent No. 1 before the Board, and the appellant would clearly be concerned to defend its validity. The amendment of section 298 of the Act of 1935 by the Act of 1942, and the view of the impugned Act taken by their Lordships, and the concession by the respondent No. 1 of its validity as regards future *benami* transactions, are not encouraging for any attack on the validity of the principal Act. In the second place, Mr. Pritt, for the appellant, sought to rest some argument on section 23 of the Indian Contract Act, 1872, and in particular illustration (i) thereof and on sections 84 and 96 of the Indian Trusts Act, 1882, in order to suggest that the effect of the *benami* mortgage in the present case was to defeat the provisions of the principal Act, but in the opinion of their Lordships that question does not arise in the present suit, and will not be precluded by any decision on the validity of the impugned Act, which, by its terms, assumes that the *benami* transaction has taken effect. In any event, such an issue cannot be decided in the absence of Gopal Das, the beneficial mortgagee.

Turning then to sub-section (1) of section 298 of the Act of 1935, it was not disputed before the Board that a personal right is thereby conferred on every subject of His Majesty domiciled in India, and, in the opinion of their Lordships, the general legislative powers conferred respectively on the Federal Legislature and the Provincial Legislature by sub-section 1 of section 99, are subject, *inter alia,* to the provisions of section 298. Beaumont J. holds that in applying the terms of sub-section (1) of section 298, it is necessary for the Court to consider the scope and object of the Act which is impugned, so as to determine the ground upon which such Act is based. Their Lordships are unable to accept this as the correct test. In their view, it is not a question of whether the impugned Act is based only on one or more of the grounds specified in section 298 (1), but whether its operation may result in a prohibition only on these grounds. The proper test as to whether there is a contravention of the sub-section is to ascertain the reaction of the impugned Act on the personal right conferred by the sub-section, and, while the scope and object of the Act may be of assistance in determining the effect of the operation of the Act on a proper construction of its provisions, if the effect of the Act so determined involves an infringement of such personal right, the object of the Act, however laudable, will not obviate the prohibition of sub-section (1). In marked contrast to this, sub-section (2) does take into consideration the object of the impugned Act, despite the contravention of the personal right conferred by sub-section (1). On the question whether the impugned Act does contravene sub-section (1), Mr. Pritt, for the appellant, conceded that membership of a tribe was, generally, a question of descent, and, therefore, the question may be stated as " whether the impugned Act prohibits any subject of His Majesty domiciled in India ' on the grounds only . . . . of descent ' from acquiring, holding or disposing of property in British India ". Three points arise on the question so stated, the first one being whether the provisions of the impugned Act involve a prohibition within the meaning of sub-section (1); in the opinion of their Lordships, there can be no doubt that the avoidance of the *benami* transaction and the recovery of possession by the alienor, which are enacted by the impugned Act for the first time, involve such a prohibition. The second—and most important point—is whether such prohibition is only on grounds of descent. In view of the opinion already expressed by their Lordships, it will be enough to show that such will be the result in some of the cases affected by the impugned Act, and it is clear, for example, that if the beneficial vendee or mortgagee either ordinarily resides or holds land in the district, but is not a member of an agricultural tribe, he will be prohibited only on the ground of descent. The third and last point is whether by the provisions of the impugned Act, such a person can be said to be prohibited " from

acquiring, holding or disposing of property " within the meaning of sub-section (1) of section 298; in the opinion of their Lordships only one answer is possible, vizt. that he is so prohibited.

Their Lordships, accordingly, hold that the provisions of the new section 13A, enacted by section 5 of the impugned Act, do involve a contravention of sub-section (1) of section 298 of the Act of 1935, and are *ultra vires* the Provincial Legislature, unless they can be shown to be authorised and protected from such a result by sub-section (2) (*a*) of section 298. As already stated, it is not now disputed by respondent No. 1 that, as regards future transactions, the impugned Act is so authorised and protected, and the only question remaining is whether sub-section (2) (*a*) authorises and protects the opening up and avoidance of *benami* transactions which were in existence at the date of the impugned Act. In the opinion of their Lordships, sub-section (2) (*a*) only excepts from the operation of sub-section (1) a prohibition of future action, for the reason expressed by Varadachariar J., that the word " prohibit " can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction, and cannot include an attempt to reopen or set aside transactions already completed, or to vacate titles already acquired. Their Lordships therefore agree with the High Court and the majority of the Federal Court that the benefit of sub-section (2) (*a*) cannot be claimed for the impugned Act so far as it purports to operate retrospectively.

It follows, in the opinion of their Lordships, that the impugned Act, so far as retrospective, was beyond the legislative powers of the Provincial Legislature, and, if the retrospective element were not severable from the rest of the provisions, it is established beyond controversy that the whole Act would have to be declared *ultra vires* and void. But, happily, the retrospective element in the impugned Act is easily severable, and by the deletion of the words " either before or " from the early part of sub-section (1) of the new section 13A, enacted by section 5 of the impugned Act, the rest of the provisions of the impugned Act may be left to operate validly.

The majority of the Federal Court appear to have contemplated another form of severability, vizt., by a classification of the particular cases on which the impugned Act may happen to operate, involving an enquiry into the circumstances of each individual case. There are no words in the Act capable of being so construed, and such a course would in effect involve an amendment of the Act by the Court, a course which is beyond the competency of the Court, as has long been well established. Their Lordships are therefore of opinion that the course adopted by the majority of the Federal Court, and embodied in the order, is not warranted, and must be set aside.

The result is that the impugned Act being *ultra vires* and void in so far as it purports to operate retrospectively, it cannot affect the position of respondent No. 1 under the mortgage in suit, but the decision of the present suit will not affect or prejudice any question that may arise as to action by the Deputy Commissioner under section 9 of the principal Act, and the relief sought by respondent No. 1 must be adjusted so as to confine it within the limits of the present suit as explained in the course of this judgment.

It follows that in substance the appellants have failed in this appeal but a difficulty arises owing to the order made by the Federal Court remitting the action to be reheard against which respondent No. 1 did not cross-appeal. Accordingly their Lordships are of opinion that the appeal should be allowed, that the order of the Federal Court, except so far as it sets aside the decree of the High Court and relates to costs, should be set aside, and that it should be declared that the impugned Act, in so far as it purports to operate retrospectively, is *ultra vires* of the Provincial Legislature, and that a permanent injunction should be granted restraining the appellant and respondents Nos. 2 and 3 from taking proceedings under the impugned Act. Their Lordships will humbly advise His Majesty accordingly. In the circumstances the appellant will pay respondent No. 1's costs of this appeal.

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In the Privy Council

PUNJAB PROVINCE

v.

DAULAT SINGH AND OTHERS

DELIVERED BY LORD THANKERTON

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