## LETTERS PATENT APPEAL

*Before R. S. Narula, C.J. and D. S. Lamba, J.*

KUL BHUSHAN ETC.,—*Appellants.*

*versus*

FAQIRA AND OTHERS,—Defendant-Respondents.

*Letters Patent Appeal No.* 35 *of* 1974.

March 10, 1976.

*Punjab Security of Land Tenures Act* (X *of* 1953)—*Sections* 10A(*a*) *and* (*b*), 10-*B and* 25—*Limitation Act* (36 *of* 1963)—*Articles* 65 *and* 100—*Surplus area in the hands of a big landowner—Order of utilization of such area implemented after his death—Land inherited by heirs—Each heir holding permissible area—Suit for possession by such heirs—Jurisdiction of Civil Court—Whether barred—Such suit—Whether governed by Article* 65.

*Held* that section 19A(a) of the Punjab Security of Land Tenures Act, 1953 authorises the State Government or any Officers empowered by it to utilise "any surpplus area". Clause (b) of that section which overrides clause (a) on account of the *non obstante* clause with which it expressly saves from the operation of clause (a) any area which has ceased to be surplus either on account of acquisition by the State under any law or which may be in the hands of an heir who has got it by inheritance. Where the heirs of a deceased landlord by inheritance become small landowners because the land which each one of them acquires by inheritance is within the permissible ceiling and none of them has, therefore, any surplus area, by operation of section 10-B, the saving specified in favour of the heirs under clause (b) of section 10-A would apply. When the order of utilisation and possession in favour of the allottees is passed and implemented after the death of the deceased land owner, such order is not taken or made "under the Act" and therefore section 25 of the Act has no application and jurisdiction of the Civil Court to try a suit for possession filed by the heirs is not barred.

*Held*, that an order of utilisation of the land in the hands of heirs of a deceased landlord who are small land owners by inheritance is non-existent in the eye of law and absolutely void *ab initio*. It is not necessary to have such an order set aside and a suit for possession by such heirs is governed by Article 65 of the schedule to the Limitation Act 1963, as it is a suit for possession of immovable property. Article 100 of the Limitation Act does not apply to those cases where the act or order of any officer is *ultra vires* or without jurisdiction or is otherwise a nullity. (Para 4).

*Letters Patent Appeal under Clause X of the Letters Patent from the decree and Judgment of Hon'ble Mr. Justice M. R. Sharma, passed* in R.S.A. No. 442 of 1973, dated the 24th day of October, 1973, setting *aside the decree of Shri R. L. Garg, Additional District Judge, Gurgaon, dated the 14th February, 1973, whereby decree of Shri H. C. Gaur, Senior Sub-Judge, Gurgaon, dated the 30th day of November,* 1970, *was reversed, and dismissing the suit of the plaintiffs-Respondents.*

Pritam Singh Jain, Advocate and V. M. Jain, C. B: Goel, Advocates, *for the appellants.*

Gian Singh, Advocate, H N. Mehtani, D.A.G., Haryana: *for the respondents.*

JUDGMENT

R. S. Narula, C.J. (Oral).—(1) The facts giving rise to this appeal are not in dispute. Bihari Lal was a big landowner. His surplus area was determined and declared under the Punjab Security of Land Tenures Act, 1953 (hereinafter called the Act), on January 28, 1960. In December that year Bihari Lal died. More than 2½ years later, the area which was surplus in the hands of Bihari Lal was allotted to the tenants who are now respondents before us. Possession of the allotted area was also given to the tenants. On October 30, 1969, Kul Bhushan and others (the sons and widow of Bihari Lal) heirs of Bihari Lal filed a suit for possession of the land in dispute on the ground that there was no surplus land in the hands of the plaintiff-appellants who had become small landowners after the death of Bihari Lal and before the utilisation of the land, and, therefore, they had been illegally dispossessed of the land which order could not be justified under the Act. The suit was contested by the tenant-respondents on various grounds which led to the framing of as many as ten issues which are reproduced below:—

"1. When Bihari Lal died?

2. Whether the plaintiffs are his heirs?

3. Whether the plaintiffs were small landowners on or before the death of Bihari Lal?

4. Whether the suit land had been utilised in the life-time of Bihari Lal?

5. If issue No. 4 is not proved and issues Nos 2 and 3 are proved, whether it could be utilised after his death?

6. Whether the utilisation of land in favour of defendants Nos. 4 to 7 is illegal and void for reasons mentioned in paragraph No. 6 of the plaint?

7. Whether the notice under section 80, Civil Procedure Code, was illegal?

8. Whether the civil Court has jurisdiction to try the suit?

9. Whether the suit is barred by time?

10. Whether the suit is bad for misjoinder of parties, and causes of action and multifariousness?"

The findings recorded on the above-quoted issues by the trial Court in its judgment, dated November 30, 1970, were that Bihari Lal had died in December, 1960, that the plaintiffs were his heirs, that the plaintiffs were small landowners after the death of Bihari Lal, that the suit land had not been utilised in the lifetime of Bihari Lal, and that the same could not be utilised under the Act after his death. It was, therefore, held that the utilisation of the land in favour of defendant-respondents Nos. 4 to 7 was void, and that the Civil Court had the jurisdiction to try the suit. It was further found that the suit was not bad for misjoinder of parties or causes of action, but the suit was dismissed on account of the finding on issue No. 4 to the effect that it was barred by time. The suit was held to be beyond time under article 113 of the Schedule to the Limitation Act, 1963 (hereinafter called the new Act). The unsuccessful plaintiffs' appeal was allowed by the judgment and decree of the Court of Shri R. L. Garg, Additional District Judge, Gurgaon, dated February 14, 1973. The learned Additional District Judge applied article 65 of the Schedule to the new Act to the case for reversing the finding of the trial Court on issue No. 9. All other findings of the trial Court were affirmed. The result of the decree passed by the first appellate Court was that it was the defendant-tenants' turn to go up in Regular Second Appeal No. 442 of 1973. That appeal was allowed by the judgment and decree of a learned Single Judge of this Court, dated October 24, 1973. The decision of the learned Single Judge has led to the filing of this Letters Patent Appeal by the unsuccessful plaintiffs. The learned Judge has held that the suit was barred under section 25 of the Act and was also barred by time under article 100 of the new Act.

(2) In this appeal under clause X of the Letters Patent against the said judgment of the learned Judge in Chambers it has been contended by Mr. Pritam Singh Jain that the jurisdiction of Civil Courts is excluded by section 25 of the Act for trying only such suits wherein the validity of any proceeding or order taken or made "under this Act" is sought to be called in question. His argument is that the order of utilisation and giving possession of the land in dispute to the contesting respondents was not an order under the Act as the Act did not permit any such order being passed and did not envisage possession of the land of the plaintiff-appellants being given to the respondents, and that the plaintiffs were not big land-owners under the Act and did not have any surplus area in their hands. The plaintiffs did not contest the declaration of surplus area in the hands of their predecessor-in-interest, that is Bihari Lal. They have not at any stage attacked the validity, legality or correctness of the order passed under the Act on January 28, 1960. The argument of the learned counsel is based on a plain reading of section 10-A(a) and (b) read with section 10-B of the Act. Those provisions are in the following terms:—

> "10-A. (a) The State Government or any officer empowered by it in this behalf, shall be competent to utilise any surplus area for the resettlement of tenants ejected, or to be ejected, under clause (i) of sub-section (1) of section 9.
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> (b) Notwithstanding anything contained in any other law for the time being in force, and save in the case of land acquired by the State Government under any law for the time being in force or by an heir by inheritance no transfer or other disposition of land which is comprised in a surplus area at the commencement of this Act, shall affect the utilisation thereof in clause (a).
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> 10-B. *Saving by inheritance not to apply after utilisation of surplus area.* Where succession has opened after the surplus area or any part thereof has been utilised under clause (a) of section 10-A, the saving specified in favour of an heir by inheritance under clause (b) of that section shall not apply in respect of the area so utilised."

Section 10-A(a) authorises the State Government or any officer empowered by it to utilise "any surplus area". Clause (b) of that section which overrides clause (a) on account of the *non-obstante* clause

with which it (clause b) begins expressly saves from the operation of clause (a) any area which has ceased to be surplus either on account of acquisition by the State under any law or which may be in the hands of an heir who has got it by inheritance. On the findings of fact recorded in this case which have not been challenged before us it is patent that the plaintiffs were not big landowners and the land which each one of them had acquired by inheritance was within the permissible ceiling and none of them had, therefore, any surplus areas. Things would have been different if the surplus area in the hands of Bihari Lal had been utilised before his death. By operation of section 10-B, the saving specified in favour of the heirs by inheritance under clause (b) of section 10-A would not then have applied to the case. In this case, however, it is the admitted fact that the order of utilisation and possession in favour of the allottee-tenants was made, passed and implemented after the death of Bihari Lal. Section 10-B of the Act has, therefore, no application to the case which is fully covered by section 10-A(b). That being the case, it appears to us that the proceeding or order which is sought by the respondents to be made unvulnerable under section 25 of the Act was not taken or made "under the Act", and, therefore, section 25 which is reproduced below has no application to the case:—

> "*Exclusion of Courts and authorities.*—Except in accordance with the provisions of this Act, the validity of any proceedings or order taken or made under this Act shall not be called in question in any court or before any other authority."

(3) The learned Single Judge has taken the view that the order of utilisation was a mere wrong order or an illegal order, and, therefore, it was for the plaintiff to approach the authorities under the Act to avoid that order or proceeding. It was on that basis that the learned Judge has held that the plaintiffs would have to seek a declaration that the order passed by the authorities "under the Act" should be set aside. There is no quarrel with the proposition of law that if the order had been merely wrong, illegal or invalid but passed "under the Act", the jurisdiction of the Civil Court to question the same would have been barred by section 25 and the plaintiffs would have to approach the authorities under the Act to set that order aside. Nor have we any doubt that even in the present case the plaintiffs could have, if so advised, approached the authorities under the Act for setting aside the order and proceeding of utilisation. Even a Court without jurisdiction has the jurisdiction

to decide whether it can or cannot be approached for granting a relief or whether its jurisdiction is or is not barred under a statutory provision. That does not, however, mean that a person is compelled to have an order which is void *ab initio* and *non est* avoided by having resort to a proceeding under the particular enactment under which the order purports to have been passed. This has been authoritatively laid down in *Kiran Singh and others* v. *Chaman Paswan and others* (1). It was held by their Lordships that it is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. Their Lordships observed that a defect of jurisdiction strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties. Be that as it may, the bar under section 25 of the Act is very much restricted. It is settled law that exclusion of the ordinary Civil Court's jurisdiction under section 9 of the Code of Civil Procedure has not to be readily inferred, but must be strictly proved. Once it is held that the proceeding or order of utilisation of the land of the plaintiffs after the death of Bihari Lal was not one under the Act, it only needs reference to the decisions of the Privy Council, the Lahore High Court and the authoritative pronouncement of their Lordships of the Supreme Court in the following cases to hold that the exclusion of the Civil Court's jurisdiction under section 25 of the Act has no application to the facts of the present case:—

(i) *Secretary of State* v. *Mask & Co.* (2).

(ii) *Lahore Electric Supply Co. Ltd.* v. *Province of Punjab* (3).

(iii) *K. L. Gauba* v. *Punjab Cotton Press Co. Ltd.*, (4).

(iv) *Dhulabhai,* etc. v. *State of Madhya Pradesh another* (5).

(4) The only other ground on which the plaintiffs' suit has been dismissed by the learned Single Judge is the learned Judge's decision on issue No. 9 relating to limitation. Article 100 of the new Act

(1) A.I.R. 1954 Supreme Court 340.
(2) A.I.R. 1941 Privy Council 105.
(3) A.I.R. 1943 Lahore 41.
(4) A.I.R. 1941 Lahore 234 (F.B.).
(5) A.I.R. 1969 S.C. 78.

which is equivalent to article 14 of the Limitation Act, 1908 (hereinafter referred to as the old Act) provides, *inter alia,* that the limitation for filing a suit to set aside any act or order of an officer of the Government in his official capacity is one year from the date of the Act or order of the officer. Following the judgment of the Full Bench in *Dhaunkal* v. *Man Kauri and another* (6), the learned Judge held that the order of utilisation had to be avoided and could not be ignored by the plaintiffs. Void as well as voidable orders were referred to and discussed in *Dhaunkal's case.* It was held that in the case of a voidable order it was necessary to have it set aside. From the discussion on the first point it is clear that the order of utilisation of the land in the plaintiffs' hands was not a mere voidable order, but was an order which was non-existent in the eye of law, and was absolutely void *ab initio,* and, therefore, was one which was in fact non-existent in the eye of law. That being the case it was neither necessary for the plaintiffs to have that order set aside, nor could the plaintiffs' suit which was a simple suit for possession be held to be a suit for declaration about the order being voidable or void or a suit for setting aside the order or proceeding. In this view we are supported by the judgment of Bishan Narain, J., (as he then was) in *Sudhu Singh* v. *Chanda Singh and others* (7), and the Division Bench judgment of the Allahabad High Court in *Jagdish Prasad Mathur and others* v. *United Provinces Government* (8). In *Sadhu Singh's case* (the judgment in which case is in turn based on an earlier Division Bench judgment of the Bombay High Court in *Secretary of State* v. *Faredoon Jijibhai Divecha and others* (9), and the judgment of the Madras High Court in *Thiruvenkatacharyulu and others* v. *Secretary of State* (10), it was held that if the act or an order of an officer is illegal or *ultra vires* it does not require to be set aside and article 14 of the old Act has no application to such a case. In the case of Jagdish Prasad Mathur and others (supra), the Division Bench of Allahabad High Court held that article 14 of the old Act does not apply to those cases where the act or order of any officer is *ultra vires* or without jurisdiction or is otherwise a nullity. Their Lordships observed that the article applies only to such cases where there is no question of the *ultra vires* of the order or of the want of jurisdiction of the person making the

(6) 1970 P.L.J. 402.
(7) A.I.R. 1957 Pb: 108.
(8) A.I.R. 1956 Allahabad 114.
(9) A.I.R. 1934 Bombay 434.
(10) A.I.R. 1934 Madras 147.

order but where the order is sought to be set aside on some other ground. We are in respectful agreement with the dictum of Bishan Narain, J., in *Sadhu Singh's case* and the decision of the Allahabad High Court in the *case of Jagdish Prasad Mathur and others* to the extent to which it is necessary to rely on those cases for the present case. In the absence of applicability of article 100, the suit is governed by article 65 of the Schedule to the new Act as this was a suit for possession of immovable property. The suit having been filed within 12 years was obviously within time under that article. Even the respondents have not suggested that any other article would apply in case our finding regarding the non-applicability of article 100 is correct.

(5) Mr. Gian Singh, learned counsel for the tenant-respondents has argued on the authority of the judgment of a learned Single Judge of this Court in *Kuldip Singh* v. *The Financial Commissioner and others* (11), that it was incumbent on the plaintiffs to move the Collector under section 10-A read with rule 6 of the Rules, framed under the Act to obtain the requisite relief, and, therefore, they could not have filed the suit from which the present appeal has arisen. We have already held that both the remedies were available to the plaintiffs and the mere fact that they could have approached the authorities does not bar the civil suit the jurisdiction to try which is not excluded by section 25 of the Act. Mr. H. N. Mehtani, learned counsel for the State, has referred to the judgment of this Court in *Hardev Singh and others* v. *The State of Punjab and others* (12), and argued that though the suit was so worded as to make it one for possession, it was in effect and in reality a suit for setting aside the order of utilisation passed under section 10-A(a) of the Act. We are unable to spell out any such proposition of law from the judgment of the Division Bench in *Hardev Singh's case* (supra).

(6) No other point has been argued before us in this appeal. For the foregoing reasons we allow this appeal, reverse the judgment and decree of the learned Single Judge and restore in its place the decree of the learned Additional District Judge. The suit of the plaintiff-appellants stands decreed as laid though without any order as to costs.

*N.K.S.*

(11) 1973 P.L.J. 146.
(12) 1971 P.L.J. 263.