ISMALEBBE
v.
JAYAWARDENA, ASSISTANT COMMISSIONER OF AGRARIAN SERVICES AND OTHERS

COURT OF APPEAL,
S. N. SILVA, J.,
C. A. APPLICATION No. 978/83,
OCTOBER 08, 1990.

Interpretation – Whether application of a Proviso of a section is restricted to the section immediately proceeding it–Agrarian Services Act, No. 58 of 1979, Sections 4(1) and (2) – Need for interpretation of any provision to be consistent with the provisions of the Constitution. Constitution – Article 12(1).

The 2 to 5 respondents are owners of a land, 28 acres in extent of which 22 acres are in paddy. The petitioner became the tenant cultivator of the land in 1984. On 18.11.1982 the 2 to 5 respondents filed an application against the petitioner to the Commissioner of Agrarian Services seeking a declaration in terms of the proviso to Section 4(2) of the Agrarian Services Act, No. 58 of 1979 that he is not entitled to the rights of a tenant cultivator, on the basis that he is also the owner cultivator of paddy land of not less than 5 acres in extent. The 2 to 5 respondents claimed that the petitioner was the owner cultivator of more than 20 acres of paddy land. The 1st respondent (Assistant Commissioner) held the inquiry and found that the petitioner was the owner cultivator of

paddy land of not less than 5 acres in extent and not entitled to the rights of a tenant cultivator in terms of the proviso to S. 4(2) of the Agrarian Services Act. The petitioner moved for a Writ of Certiorari to quash this decision.

Held :

(1) The proviso to Sub-section 4(2) of the Agrarian Services Act deals with a specific class of cases namely that of tenant cultivators who are also owner cultivators of paddy land of not less than 5 acres in extent. The operation of this proviso is not restricted to districts in respect of which the Minister has made an order in terms of Subsection (2). It will apply to every tenant cultivator who is also an owner cultivator of paddy land of not less than 5 acres in extent. In other words the proviso will apply to situations covered by both subsections (1) and (2) of Section 4.

(2) If Section 4 is interpreted to mean that the proviso to Subsection (2) of section 4 is limited in application to Subsection (2) and does not extend to Subsection (1), it would result in a irrational classification of persons and would violate the right to equality before the law, which right is guaranteed to every person by Article 12(1) of the Constitution.

Any provision of law should be interpreted so that it would apply in a manner consistent with the Constitution which is the Supreme Law of the land.

(3) Even as a general rule of interpretation it is not permissible to restrict the operation of the proviso to the subsection which immediately precedes it. A proviso should be construed in relation to the entire section and where necessary in the context of even the other sections.

Cases referred to –

(1) *Karunadasa v. Wijesinghe (1986) Sri LR 368.*

(2) *R. V. Newark Inhabitants 3B & C 71.*

(3) *Saradambal v. Seethalakshmi AIR 1962 Mardras 108.*

APPLICATION for Writ of Certiorari to quash decision of Assistant Commissioner of Agrarian Services.

S. C. Crosette Thambiah with *K. Thevarajah* for the petitioner.
Faiz Musthapha, P.C. with *N. M.* Shaheid for respondents.

Cur. adv. vult.

October 26, 1990

S. N. SILVA, J.,

The 2nd to 5th Respondents to this application are the owners of a land called "Vaddukaduveli" in extent about 28 acres of which 22 acres are under paddy, situated in the Ampara District. The Petitioner became the tenant cultivator of this paddy land in 1964. In 1968 the 2nd to 5th Respondents filed case No. D.C. Batticaloa 2441/L for the recovery of

arrears of rent and for the eviction of the Petitioner. The basis of the claim for eviction was that the Petitioner was not a tenant cultivator within the meaning of the operative law since he cultivated the paddy land with hired labour. The District Court gave judgment in favour of the 2nd to 5th Respondents and the Petitioner was evicted pending an appeal filed by him against the judgment. The appeal filed by the Petitioner, C.A. 233/73(F) was allowed by this Court and the order for eviction entered by the District Judge was set aside. The judgment of this Court was affirmed by the Supreme Court on 22.10.1982.

On 18.11.1982 the 2nd to 5th Respondents made an application against the Petitioner to the Commissioner of Agrarian Services for a declaration in terms of the proviso to Section 4(2) of the Agrarian Services Act, No. 58 of 1979 that he is not entitled to the rights of a tenant cultivator, on the basis that he is also the owner cultivator of paddy land of not less than 5 acres in extent. The 2nd to 5th Respondents claimed that the Petitioner was the owner cultivator of more than 20 acres of paddy land. It was contended by the Petitioner that he gifted some of his paddy lands to his children prior to the Agrarian Services Act. The 1st Respondent being the Assistant Commissioner who held the inquiry into the said application arrived at a finding that there was ample evidence to establish that the Petitioner was the owner cultivator of paddy land not less than 5 acres in extent. On this basis the 1st Respondent held that the Petitioner is not entitled to the rights of a tenant cultivator in terms of the proviso to Section 4(2) of the Act. Thereupon the Petitioner filed this application for a Writ of Certiorari to quash the declaration made by the 1st Respondent.

Learned Counsel appearing for the Petitioner sought to challenge the said declaration only on the ground that it is *ultra vires*. It was the submission of Counsel that a declaration could not be made under the proviso to Section 4(2) although the Petitioner was an owner cultivator of an extent, not less than 5 acres, because the Minister has not made an order in terms of Section 4(2) of the Act in respect of the Ampara District where the paddy land is located. It was submitted that the proviso to Section 4(2) will apply only in respect of a district where the Minister has made an order in terms of Section 4(2). The submission of learned President's Counsel appearing for the 2nd to 5th Respondents was that the proviso will apply to every instance where a tenant cultivator is also an owner cultivator of paddy land not less than 5 acres in extent.

In other words, that the proviso will apply to situations covered by both sub-sections (1) and (2) of Section 4. Learned President's Counsel further submitted that the interpretation contended for by Counsel for the Petitioner would result in an absurdity.

Submissions of Counsel relate only to the interpretation of Section 4 of the Agrarian Services Act which enacts as follows :

4. (1) The maximum extent of paddy land that could be cultivated by a tenant cultivator shall be five acres.

(2) The Minister may subject to the provisions of sub-section (1) by Order published in the Gazette determine the extent of paddy land that may be cultivated by a tenant cultivator in any district to which such Order relates :

Provided, however, that where the Commissioner is satisfied after due inquiry that a tenant cultivator is also an owner cultivator of any paddy land of not less than five acres in extent, the Commissioner may declare that such tenant cultivator shall not be entitled to his rights as a tenant cultivator under the provisions of this Act, and accordingly the provisions of subsections (3), (4), (5) and (6) of this section shall apply to such tenant cultivator.

(3) The tenant cultivator shall, if he is in occupation of an extent of paddy land in excess of the extent specified in an Order under subsection (2), subject to the approval of the Commissioner, be entitled to select the extent of paddy land which he is entitled to cultivate, and shall vacate the balance extent on being ordered to do so by the Commissioner.

(4) Where a tenant cultivator fails to comply with the provisions of subsection (3) he shall be evicted from the extent of paddy land in excess of the extent specified in the Order under subsection (2) and the provisions of Section 6 shall apply to any such eviction.

Subsections (5) and (6) are applicable only upon a vacation of the paddy land by the tenant cultivator and are not relevant to the submissions.

Learned Counsel for the Petitioner relied on two grounds in support of his contention that the proviso will only apply where the Minister has made an order in terms of subsection (2). They are :

(i) that the proviso appears immediately beneath subsection (2) and as such should qualify only that subsection ;

(ii) that the concluding words in the proviso, "and accordingly the provisions of subsection (3),(4),(5) and (6) of this section shall apply to such tenant cultivator", clearly indicate that the proviso is intended to qualify only subsection (2).
The submission is that subsection (3) and the consequential provisions can apply only where there is an order by the Minister in terms of subsection (2).

Section 4 of the Agrarian Services Act is a new provision, in that the preceding legislation on the subject namely the Paddy Lands Act, No. 1 of 1958, the Agricultural Lands Law, No. 42 of 1973 and the Agricultural Productivity Law, No. 2 of 1972 did not have a provision of similar import. Under these laws a limit was not placed as to the extent of paddy land of which a person could be a tenant cultivator. Whereas, Section 4 (1) of the Agrarian Services Act directly imposes a limit as to the extent of paddy land in respect of which a person could be a tenant cultivator. It is stated specifically that the maximum extent of paddy land that could be cultivated by a tenant cultivator shall be 5 acres. The opening words of subsection (2) "the Minister may subject to the provisions of subsection (1)", imply that the limit that may be imposed by the Minister in respect of any district, in terms of the subsection, has to be less than the extent of 5 acres specified in subsection (1). Therefore subsection (1) could be considered as laying down a maximum of 5 acres applicable to the entire Island whereas an exception could be made in respect of any particular district by the Minister by reducing it to a lesser extent. Subsection (2) does not contain any guidelines as to the exercise of the discretion vested in the Minister. Considering that the limit that may be imposed by the Minister should be less than 5 acres, it may be gathered that the Minister will be guided by considerations such as the extent of cultivable paddy land in the district, the density of the agricultural population and the availability of irrigated water.

The proviso to subsection (2) does not seek to impose directly or indirectly a limitation as to the extent of paddy land that may be cultivated by a tenant cultivator. It empowers the Commissioner to

declare that a person is "not entitled to his rights as a tenant cultivator". Thus the extent of paddy land to be cultivated by a tenant cultivator which is fixed at a maximum of 5 acres in subsection (1), and may be reduced to a lesser extent by subsection (2) is brought down to zero by the proviso. The criteria, on the basis of which the proviso operates, is not the same as that of subsections (1) and (2). In these subsections the criteria is the extent of paddy land cultivated by the tenant cultivator. In the proviso, the criteria is the extent of paddy land of which the tenant cultivator is an owner cultivator. Therefore, the proviso operates on criteria that is distinct from that of subsections (1) and (2) and also its consequence is more far reaching than what is provided for in the two subsections.

I have to now consider whether the proviso operates only where the Minister has made an order in terms of subsection (2), as contended by learned Counsel for the Petitioner.

The Minister is empowered in terms of subsection (2) to lower the limit of paddy land in respect of which a person could be a tenant cultivator in a particular district. If the proviso is to operate only in such an instance, a person who is a tenant cultivator of paddy land situated in a district in respect of which the Minister has not made an order under subsection (2) can be the tenant cultivator of 5 acres of paddy land and also the owner cultivator of any extent of paddy land. On the other hand, in a district in which the Minister has made an order in terms of subsection (2) reducing the extent of paddy land in respect of which a person could be a tenant cultivator, from 5 acres to a lesser extent, if the tenant cultivator is also an owner cultivator of not less than 5 acres, that person could cease to be the tenant cultivator of even the reduced extent as ordered by the Minister. This consequence could be described as absurd, as submitted by learned President's Counsel for the Respondents. Certainly, it would result in an irrational classification of persons being tenant cultivators who are also owner cultivators of paddy land of not less than 5 acres in extent. Such an interpretation would discriminate against this category of tenant and owner cultivators, in a district in respect of which the Minister has made an order in terms of subsection (2) and be favourable to similar persons in districts in which the Minister has not made an Order in terms of subsection (2). Therefore, the interpretation contended for by Counsel for the Petitioner would result in a violation of the right to equality before the law that is guranteed to every person by Article 12(1) of the Constitution. Any

provision of law should be interpreted so that it would apply in a manner consistent with the Constitution being the Supreme Law of the land. An interpretation that may result in a provision being applied in a manner inconsistent with the Constitution has to be avoided. In this regard it is stated as follows in *Bindra's Interpretation of Statutes* (1987, 7th Edition at page 161) :

> "It is well settled that if certain provisions of law construed in one way would make them consistent with the Constitution, and another interpretation would render them unconstitutional, the Court would lean in favour of the former construction".

An examination of case law shows that a proviso is a fertile area from which arguments of varied dimensions could be thrown up. It has been argued that the contents of a proviso limit the ambit of operation of the main section and at times in the reverse, that the ambit of the proviso is restricted by the main section. In the case of *Karunadasa v. Wijesinghe*[1] it was argued that the 2nd proviso to Section 765 of the Civil Procedure Code limits the ambit of the main section. The Supreme Court held against this submission "upon a reading of the provisions of both the main enactment of section 765 and of the two provisos" (page 364).

In this case the submission of Counsel for the Petitioner is the reverse of the submission advanced in *Wijesinghe's* case. Here the submission is that the ambit of the proviso is limited by the provisions of the subsection that immediately precedes it. In my view the correct approach to the construction of a proviso is to read it in the entire context in which it appears. As observed by Holroyd, J. in the case of *R v. Newark Inhabitants* [2] such a matter has to be decided upon the words and their import and "not upon the division into sections that may be made for the convenience of reference in the printed copies of the Statutex".

As a matter of interpretation, the submission of learned Counsel for the Petitoner that the proviso should be considered as qualifying only subsection (2) is untenable. In the case of *Saradambal v. Seethalakshmi*[3] Pillai, J. observed as follows :

> "Unless there are special indications to show that a proviso to a section is limited to one part of it, normally the proviso governs the entire section, secondly, it is not necessary for the purpose of making a proviso applicable to the entire section to repeat it after each clause of that section. The proviso is really in the nature of an exception which takes a class of cases out of the operation of the main section."

The foregoing passage of the judgement of Pillai, J., has been reproduced verbatim in Bindra's Interpretation of Statutes (7th Edition, at page 80). Therefore, even as a general rule of interpretation it is not permissible to restrict the operation of the proviso to the subsection which immediately precedes it. A proviso should be construed in relation to the entire section and, where necessary in the context of even the other sections. It should be considered a legislative measure to remove a certain class of cases from the operation of the main section and where necessary the other sections of the Act. The proviso to Section 4(2) deals with a specific class of cases namely of tenant cultivators who are also owner cultivators of paddy land not less than 5 acres in extent. In respect of this class of cases the proviso vests a power in the Commissioner to make a declaration that a person coming within the class is not entitled to his rights as a tenant cultivator under the provisions of the Act. The words, "The Commissioner may declare that such tenant cultivator shall not be entitled to his rights as a tenant cultivator under the provisions of this Act," appearing in the proviso are a clear indication that the proviso is intended to operate as an exception not only to subsections (1) and (2) of Section 4 but also to the other sections of the Act that grant a tenant cultivator an extensive security of tenure. In this regard, I wish to cite the following passage from *Maxwell* on the Interpretation of Statutes (12th Edition, Tripathi Publication p. 190).

> "If, however, the language of the proviso makes it plain that it was intended to have an operation more extensive than that of the provision which it immediately follows, it must be given such wider effect."

The construction placed by me above to the proviso is also in accord with the legislative purpose underlying the provisions of Section 4. It is apparent that Section 4 was introduced, as a departure from previous legislation on the subject, in order to strike a balance between the competing interests of the tenant cultivators and that of owners of paddy land. It is from this stand point that a limit was placed at 5 acres by subsection (1) as the maximum extent in respect of which any person could be a tenant cultivator. Subsection (2) empowers the Minister to lower this limit in respect of any district by Order published in the Gazette. The purpose of the proviso is to deal with the class of cases in which tenant cultivators are also owner cultivators of extent of not less than 5 acres. With regard to this class of tenant and owner cultivators,

legislature has thought it fit to vest a power in the Commissioner, to make a declaration that such a person is not entitled to the rights of a tenant cultivator under the provisions of the Act. Indeed, it would detract from this legislative purpose if the proviso is construed as being operative only where the Minister has made an Order in terms of subsection (2).

Learned Counsel for the Petitioner also relied on the words; "and accordingly the provisions of subsection (3),(4),(5) and (6) of this section shall apply to such tenant cultivators", to support his submission that the proviso only qualifies subsection (2). It was submitted that the provisions of subsection (3) in particular cannot operate unless there is an Order made by the Minister in terms of subsection (2).

It is clear from the scheme of Section 4 that subsections (3),(4),(5) and (6) would ordinarily operate only where the Minister has made an Order in terms of subsection (2) reducing the extent of paddy land that may be cultivated by a tenant cultivator in any particular district, from 5 acres to a lower extent. In the absence of the words relied upon by Counsel the provisions of the subsections would not apply to an instance regulated by the proviso. The submission of counsel was that the greater portion of subsection (3) would not apply if the proviso is construed as qualifying subsection (1) as well. However, it is seen that the same portions of subsection (3) will not apply even if the interpretation contended for by Counsel is given by limiting the operation of the proviso to subsection (2) only. In my view the words, "and accordingly the provisions of subsections (4),(5) and (6) shall apply to such tenant cultivators" should be construed as a legislative measure to make the provisions of these subsections applicable *mutatis mutandis* to every instance regulated by the proviso.

For the reasons stated above I am of the view that the proviso to subsection 4(2) of the Agrarian Services Act deals with a specific class of cases namely that of tenant cultivators who are also owner cultivators of paddy land of not less than 5 acres in extent. The operation of this proviso is not restricted to districts in respect of which the Minister has made an Order in terms of subsection (2). It will apply to every tenant cultivator who is also an owner cultivator of paddy land not less than 5 acres in extent. The Commissioner is empowered by this proviso to make a declaration after due inquiry that any such person shall not be entitled to his rights as a tenant cultivator under the provisions of the Act.

Thereupon the Commissioner is empowered to make an order in terms of subsection (3) directing the tenant cultivator to vacate the paddy land so cultivated by him. Subsection (4) will apply where a tenant cultivator fails to comply with such an Order and he would be liable to be evicted in accordance with the procedure provided for in section 6 of the Act. The provisions of subsections (5) and (6) will then apply in relation to the particular land vacated by the tenant cultivator.

Counsel for the Petitioner did not seek to canvass the order made by the 1st Respondent on any ground other than what is referred to above. I am of the view that the ground urged by the Counsel is untenable and I acordingly dismiss this application with costs fixed at Rs. 1,500 payable by the Petitioner to the 2nd to 5th Respondents.

Application dismissed.