

(1958) 01 PAT CK 0015
In the Patna High Court
Case No : Misc. Judl. Case No. 491 of 1955

Dulichand Khirwal

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 20-01-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 1
Scheduled Districts Act, 1874 — Section 7

Citation : AIR 1958 Patna 366

Hon'ble Judges : V. Ramaswami, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : N.L. Untwalia and Shanker Kumar, for the Appellant; K.P. Varma, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramaswami, C.J.—In this case the petitioner. Dulichand Khirwal, seeks a writ in the nature of certiorari from the High Court for the purpose of calling up and quashing the order of the Commissioner of Chota Nagpur, dated 11-2-1956, in Kolhan Title Appeal No. 124 of 1954.

2. The petitioner was a lessee for a period of five years from the State Government with regard to 42 acres of land in village Kusmunda, Police Station Chaibasa, in the Kolhan area. The said lease was for working a quarry for China clay in the said area. The rental fixed for working of the quarry was Rs. 125/- per year. Respondent No. 1, the State of Bihar, filed Kolhan Suit No. 31 of 1952, against the petitioner for recovery of a sum of Rs. 2,250/- on account of the minimum royalty due for the period from 21-5-1945 to 20-5-1950.

The suit was filed in the court of the Additional Deputy Commissioner of Singhbhum, who dismissed the suit on merits on 9-4-1954. The State of Bihar thereafter took an appeal before the Commissioner of Chota Nagpur Division, who heard the appeal on merits and allowed the appeal, holding that the State of Bihar was entitled to get a decree against the defendant for the recovery of the

amount claimed.

3. The first ground taken by learned Counsel on behalf of the petitioner is that the Deputy Commissioner of Singhbhum adopted a procedure prescribed by Wilkinson's Rules which are no longer in force and so the Commissioner of Chota Nagpur had no jurisdiction to hear the appeal. In support of this argument reference was made to a judgment of this Court in K.K. Sinha v. Basudeo Harjiwan Pathak, Misc. Judl. Case No. 392 of 1952, D/- 22-12-1952 (A) where it was held that Act II of 1951, amended the CPC so as to extend its operation to the whole of India, including the so-called scheduled districts, with the exception of certain Tribal Areas in the State of Assam, in the State of Madras and in the State of Jammu and Kashmir and the State of Manipur. Act II of 1951, received the assent of the President on 17-2-1951, and came into effect from that date, and so it was held by the High Court in that case that the CPC applied to the entire district of Singhbhum, including the scheduled area of Kolhan.

But on behalf of the State of Bihar it was pointed out by learned Counsel that the effect of this judgment has been superseded by a subsequent notification of the State Government, dated 26-8-1953, issued in exercise of the authority conferred on the State Government by sub-paragraph (1) of paragraph 5" of the Fifth schedule to the Constitution of India. The notification of the State Government is in the following terms.

"No. A/AB/303/53-3533J. ":- In exercise of the powers conferred by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India, the Governor of Bihar is pleased to direct that the CPC (Amendment) Act, 1951 (II of 1951), shall not apply to the Sadar Subdivision of the district of Singhbhum except the areas comprised within the Chaibassa and Chakradharpur Municipalities.

2. This notification shall be deemed to have come into force on the 1st April, 1951, the date on which the said Act was brought into force by the Central Government.

By order of the Governor of Bihar, R. Singh, Secy."

In view of this Government notification I do not think that the ratio of the decision in Misc. Judl. Case No. 392 of 1952, D/- 22-12-1952 (Pat) (A) has any application to the present case and the argument of learned Counsel on this point must fail.

4. It was then submitted on behalf of the petitioner that Regulation XIII of 1833, under 1 which the Agent to the Governor General made Wilkinson's Rules, has been repealed by Act XII of 1876 and, therefore, Wilkinson's Rules do not exist any longer as they have been automatically repealed with the repeal of Regulation XIII of 1833. I do not think that this argument is correct, because Section 7 of Act XIV of 1874, has the legal effect of continuing the life of Wilkinson's Rules. Section 7 of Act XIV of 1874, States as follows :--

"7. All rules heretofore prescribed by the Governor-General in Council or the Local Government for the guidance of officers appointed within any of the Scheduled Districts for all or any of the purposes mentioned in Section 6 and in force at the time of the passing of this Act, shall continue to be in force unless and until the Governor General in Council or the Local Government, as the case may be, otherwise directs.

All existing officers so appointed previous to the date on which this Act comes into force in such District, shall be deemed to have been appointed hereunder."

It was urged on behalf of the petitioner that Section 7 does not apply to this case because there is no proof that Wilkinson's Rules were "prescribed by the Governor-General in Council for the guidance of officers appointed within any of the Scheduled Districts" within the meaning of Section 7 of Act XIV of 1874. Going back to the Provisions of Regulation XIII of 1833, we find that the authority to prescribe rules has been granted to the Governor-General u/s V of the Regulation, which runs as follows :--

"V. It shall be competent to the Governor-General, by an Order in Council, to prescribe such rules as he may deem proper for the guidance of the agent and all the officers subordinate to his control and authority to determine what powers shall be exercised by the agent and his assistants respectively; also to determine to what extent the decision of the agent in civil suits shall be final, and in what suits an appeal shall lie to the Sudder Dewanny Adawlat, and to define the authority to be exercised by the agent in criminal trials, and what cases he shall submit for the decision of the Nizamut Adawlut."

Section IV of this Regulation is also important and must be reproduced in full :--

"IV. The administration of civil and criminal justice, the collection of revenue, the superintendence of the police, of the land revenue, customs, abkaree, stamps, and every branch of Government within the tracts of country separated as prescribed in the foregoing section, shall be vested in an officer appointed by the Governor-General in Council, to be denominated agent to the Governor-General."

The argument on behalf of the petitioner is that Wilkinson's Rules were framed u/s IV of Regulation XIII of 1833, and not u/s V by the Governor-General by an Order in Council, But no material has been produced on behalf of the petitioner to show that the rules were not framed by the Governor-General under S. V of Regulation XIII of 1833.

It is true that the typed copy of Wilkinson's Rules produced by the parties before us has been signed by Mr. Wilkinson as "Governor-General's Agent." But the first paragraph of the typed copy shows that the rules have been framed "for the administration of Civil Justice within the jurisdiction of the Agent to the Governor-General under Regulation XIII of 1833." It is, therefore, not possible to say from the typed copy of the rules whether the Governor-General has prescribed them by an Order in Council or whether Mr. Wilkinson himself made the rules under the

authority granted to him by Section IV of the Regulation.

But it is the undisputed position that Wilkinson's Rules have been accepted as valid law and acted upon by the Government Officers and the people of Kolhan area for several decades. Decisions have been given, titles to property have passed and contracts have been made on the basis that Wilkinson's Rules continue to exist in Kolhan area, it is important to notice that the Kolhan Inquiry Committee appointed by the State Government in 1948, has said in Chapter II of its report that civil justice is still administered under Wilkinson's Rules and that these rules are statutory rules framed under Regulation XIII of 1833, and are still in force by virtue of Section 7 of the Scheduled Districts Act. It was stated by learned Counsel on behalf of the opposite party that the order in Council by which the Governor-General prescribed the rules is not traceable.

But in a case of this description, I think that the maxim *omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium* is applicable. There is a striking illustration of this principle in *Queen v. Powell* (1854) 118 ALLE. R. 1183 (B) in which a Bye-law of a Corporation was presumed to exist from long usage, and in *Williams v. Eyton*, (1858) 157 ALLE. R. 318 at p. 320 (C) where the presumption was made from usage that there was a statutory order of two justices u/s 8 of the General Enclosure Act. The presumption was also applied by the Full Bench of the Allahabad High Court in *Queen-Empress v. Ganga Ram* ILR All. 136 (D) in which a question arose as to the validity of the appointment of Mr. Justice Burkitt, of the Allahabad High Court under the provisions of Sections 7 and 16 of the Statute 24 and 25 Vic., Cap, 104.

It was held by the learned Judges constituting the Pull Bench that the presumption, must be drawn that Mr. Justice Burkitt was lawfully appointed from the fact that he was actually functioning as a Judge of the High Court since November, 1892. The gravity of the question was apparent because if Mr. Justice Burkitt Was not legally appointed, all his judgments, decrees and orders in Civil and Criminal cases would have been *ultra vires* and illegal.

It was, therefore, held by the Pull Bench that it must be presumed that the appointment was legally made in the exercise of some power unknown to the Court vested in the Secretary of State for India. In view of the principle laid down in the above-mentioned cases we must presume in the present case that Wilkinson's Rules were prescribed by the Governor-General by an order in Council u/s V of Regulation XIII of 1833, and that these rules have been continued by Act XIV of 1874, and succeeding statutes. I, therefore, reject the contention of Mr. Untwalia on this point.

5. It was argued by learned Counsel on behalf of the petitioner that even if Wilkinson's Rules were made u/s V of Regulation XIII of 1833, by the Governor-General by an order in Council, nevertheless the passing of Act I of 1903, put an end to the life of these rules. Learned Counsel conceded that Section 7 of Act XIV of 1874, contained a saving clause. It was also conceded by learned Counsel for

the petitioner that Act XII of 1891, also contained a saving clause. Section 3 of this Act is in the following terms ;--

"3. The repeal by this Act of any enactment shall not affect any Statute, Act or Regulation in which such enactment has been applied incorporated or referred to;

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing;

Nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment provide or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction exemption, usage, practice, procedure or other matter or thing not now existing or in force."

But it was pointed out by the learned Counsel that Act I of 1903, repealed Act XII of 1891, including section 3 and the Schedules, and subsequent passing of amending Act X of 1914, did not have the effect of reviving the saving clause. I do not wish to pronounce any concluded opinion on this point. Assuming that the argument of the learned Counsel is right, the fact remains that Wilkinson's rules have been accepted as valid law and acted upon by the Government Officers and the people of Kolhan area for several decades, even after the passing of Act I of 1903. I have already referred to the Kolhan Inquiry Committee appointed by the Stats Government in 1848, which states in Chapter II of its report that Civil Justice is still administered in the area under Wilkinson's Rule. It is menifest that for a long period of time suits have been fought, decisions have been given, titles to property have passed and contracts have been made on the basis that Wilkinson's Rules continue to validly exist in the Kolhan area. In my opinion, the principle of the maxim communis error facit jus should be applied to this case. The principle underlying the maxim is that "the law so favours the public good, that it will in some cases permit a common error to pass for right;" as an instance of which may be mentioned the case of common recoveries in English law, which were fictitious proceedings introduced by a kind, of pia fraud to clued the statute de Donis and which were at length allowed by the courts to be a bar to an estate tail, so that these recoveries however clandestinely introduced, became by long use and acquiescence a legal mode of conveyance whereby a tenant in tail might dispose of his lands.

There is a reference made to this principle by lord Blackburn in his speech in Dayidson v. Sir R. C. Sinclair (1878) 3 A. C. 765 at pp. 787-88 (E) as follows :--

"The silence of the Judges on this point is accounted for from their thinking that the point had been concluded by authority since the decision of *Weatherstone v. Marquis of Tweeddale* (12 Shaw 1) (F) now forty-five years ago and assuming (perhaps from the point not being pressed before them) that this was now generally agreed by the practitioners in Scotland that it was unnecessary to say anything about it. My Lords, I need hardly say that the opinion of the profession, on any matter of every-day occurrence on which they are continually asked to advise, is a very weighty authority. A court of appeal should be cautious before determining that a decision frequently considered and always acquiesced in, was wrong.

And if from the time which has elapsed and the nature of the point (as, for instance, a point in convincing law), there is reason to believe that rights have been regulated and arrangements as to property made on the basis of the decision, it may be right to uphold it, even though convinced that it was originally wrong. In such cases the maxim "*communis error facit jus*" applies."

In a subsequent case *Charles Dalton v. Henry Angus and Co.* (1881) 6 A. C. 740 at p. 812 (G) Lord Blackburn states :

"I quite agree with what is said by the late Chief Justice Cockburn in *Angus v. Dalton* (1878) S QBD 85 at p. 105 (H), that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and" nothing else, "no one had the faintest belief that any grant had ever existed and the presumption was known to be a mere fiction".

He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of; even where it was originally a blunder and inconvenient, *communis error facit jus*. But to refuse to administer a long-established law because it was based on a fiction of law, admitted to be for a purpose and producing a result very beneficial, is as it seems to me at least as great a usurpation of what is properly the function of the legislature as it was at first to introduce that fiction."

In my opinion, therefore, the principle of the maxim *communis error facit jus* applies to the facts of the present case and the argument of learned counsel for the petitioner must be rejected.

6. It was then argued on behalf of the petitioner that the suit was instituted in the year 1952, and the CPC was then applicable, and, therefore, it was incumbent upon the Deputy Commissioner to try the suit in accordance with the CPC and no appeal was competent before the Commissioner of Chotanagpur Division. I do not accept this argument as correct, because the notification of the State Government dated 26-8-1953, expressly makes it retrospective. Paragraph

2 of the Notification states that it shall be deemed to have come into force on 1-4-1951 the date on which the CPC (Amendment) Act, 1951 (Act II of 1951) was brought into force by the Central Government."

It is clear, therefore, that by a legislative fiction the notification should be treated as having come into force on the date when the suit against the petitioner was filed. In my opinion, effect must be given to this legislative fiction created by the government notification dated 26-8-1953, issued in exercise of the authority conferred by sub-para (1) of Paragraph 5 of the Fifth Schedule to the Constitution of India and it must be deemed that the CPC (Amendment) Act, 1951 (Act II of 1951) was not effective in Kolhan area on the date when the suit against the petitioner was filed. If that is the correct view of the law, it follows that the Deputy Commissioner of Singhbhum was right in treating the suit as a Kolhan suit and the Commissioner of Chotanagpur Division had jurisdiction to hear and determine the appeal as a Kolhan appeal.

7. The question as to how far the legislative fiction has to be carried is a question which depends upon the construction of the particular statute or particular notification. If the notification enacts that something shall be deemed to have been done, which in truth and fact was not done, the court is entitled as a matter of construction of the notification to determine and ascertain for what purpose and between what persons the fiction has to be applied and full effect has to be given to that fiction and it should be carried to its logical limits.

That is the principle laid down by the Supreme Court in *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, . The matter has also been put very clearly by Lord Asquith in *East End Dwellings Co. Ltd. v. Pinsbury Borough Council* 1952 AC 109 (J). The question at issue in that case was the proper interpretation to be placed on S. 53 (a) of the Town and Country Planning Act, 1947. In dealing with that question Lord Asquith expressed the same principle as follows:

"If you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so, also imagine as real the consequence and incidents which if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that, having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

8. The last argument addressed on behalf of the petitioner is that the Deputy Commissioner actually tried the suit under the CPC and so the appeal before the Commissioner of Chotanagpur Division was not competent. It was pointed out by learned Counsel that the lease was executed between the parties in the town of Chaibassa within the limits of Chaibassa Municipality, and even under the Government Notification dated 26-8-1953, the area comprised in the Chaibassa

Municipality was excluded from the operation of Wilkinson's Rules.

It was, however, admitted that the lease was with regard to certain lands in the Kolhan area and the order of the Deputy Commissioner, dated 1-2-1954, shows that he had jurisdiction to treat the suit as a Kolhan suit. It was argued on behalf of the petitioner that the Deputy Commissioner actually decided to try the suit under the Civil Procedure Code, but I do not think that his contention is supported by the wording of the order of the Deputy Commissioner dated 1-2-1954. The relevant portion of the Order is as follows:

"The argument of the learned Advocate for the defendant is that the plaintiff has based his claim only on an agreement executed at Chaibassa and therefore this suit be treated as a Kolhan suit but should be taken cognizance of by the Subordinate Judge having jurisdiction over Chaibassa where the agreement was executed. The G. P. on the other hand points out that according to his plaint the claim has reference to properties situated in Kolhan as also the agreement executed at Chaibassa and therefore both courts have jurisdiction in this suit.

I find that there is force in Government pleader's argument. In effect however this would be little difficult because I am also competent to take cognizance as a regular Subordinate Judge and whether trying the suit as a Kolhan Suit or regular Subordinate Judge, I shall follow the regular procedure prescribed by the C. P. C.

I however hold that as the claim has reference both for properties, whether situated in Kolhan as also to the agreement at Chaibassa, this court even as Kolhan Court is competent to take cognizance. This issue is therefore decided in favour of the plaintiff. The remaining issues are amended after hearing both parties."

On reading the order sheet I am of opinion that the Deputy Commissioner of Chaibassa has tried the suit as a Kolhan suit and not as a suit instituted under the provisions of the CPC and, therefore, the appeal before the Commissioner of Chotanagpur was competent.

9. For these reasons the application fails and must be dismissed with costs. Hearing fee Rs. 100/-.

Kanhaiya Singh, J.

10. I agree.