

(2011) 02 CHH CK 0056
In the Chhattisgarh High Court
Case No : Second Appeal No. 474 of 1995

Fakiro (Dead) through Legal Heirs Gorango and Others	APPELLANT
Vs	
Jalsay and Others	RESPONDENT

Date of Decision : 09-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Madhya Pradesh Land Revenue Code, 1959 — Section 165(6), 169, 170A, 170B, 190(2A)

Citation : (2011) 3 CGLJ 330

Hon'ble Judges : N.K. Agarwal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

N.K. Agarwal, J.—The instant Defendant's second appeal was admitted for hearing by this Court on 1-5-1996 on the following substantial questions of law:

- (1) Whether the suit filed by the Respondent was tenable in view of Sections 170-A and 170-B of the M.P. Land Revenue Code ?
- (2) Whether the dismissal of the application, filed by the Respondent u/s 170-A and 170-B of the M.P. Land Revenue Code was res judicata in this case ?

Facts of the case in nutshell are as under:

2. The Defendants/Appellant herein are non-tribes. The Plaintiffs/ Respondents No. 1 to 5 herein are tribes. Pursuant to agreement of sale dated 17-1-1962, the original Defendant Fakiro Sah obtained possession of the suit land, which is agricultural land. In the absence of any permission u/s 165(6) of the M.P./C.G. Land Revenue Code, 1959, (briefly, "the Code") the suit land could not be transferred by registered sale deed in favour of the Defendants.

3. Vide M.P. Act, 61 of 1976 with effect from 29-11-1976, Section 170-A was brought into statute book according to which, the Sub Divisional Officer may, on

his own motion or on an application made by the transferer of agricultural land belonging to a tribe which has been declared to be an aboriginal tribe under Sub-section (6) of Section 165 on or before the 31st December, 1978, enquire into a transfer effected by way of sale, or in pursuance of a decree of a court of such land to a person not belonging to such tribe or transfer effected by way of accrual of right of occupancy tenant u/s 169 or of Bhumiswami under Sub-section (2-A) of Section 190 at any time during the period commencing on the 2nd October, 1959 and ending on the date of commencement of the M.P./C.G. Land Revenue Code (Third Amendment) Act, 1976 to satisfy himself as to the bonafide nature of such transfer.

4. After coming into force of above provision, the Plaintiffs have preferred an application u/s 170-A of the Code before the Sub Divisional Officer who registered Revenue Case No. I-A-23/76-77. The said application was dismissed by the Sub Divisional Officer holding, application filed after 14 years and also the mutation had already been made in favour of the Defendants.

5. Vide M.P. 15 of 1980, Section 170-B was inserted in the Code with effect from 24-10-1980, according to which, every person who on the date of commencement of the Madhya Pradesh Land Revenue Code (Amendment) Act, 1980 is in possession of agricultural land which belonged to a member of a tribe which has been declared to be an aboriginal tribe under Sub-section (6) of Section 165 between the period commencing on the 2nd October, 1959 and ending on the date of the commencement of Amendment Act, 1980 shall, within two years of such commencement, notify to the Sub-Divisional Officer in such form and in such a manner as may be prescribed, all the information as to how he has come in possession of such land and if any person fails to notify the information as required by Sub-section (1) within the period specified therein it shall be presumed that such person has been in possession of the agricultural land without any lawful authority and the agricultural land shall, on the expiration of the period aforesaid revert to the person to whom it originally belonged and if that person be dead, to his legal heirs.

6. After coming into force of the above provision, the Plaintiff filed an application u/s 170-B of the Code before the Sub-Divisional Officer for restoration of possession of the suit land. The Sub-Divisional Officer vide its order dated 31-5-1982 dismissed the above application on the ground that this application is barred by principle of res judicata in view of order passed by the Sub-Divisional Officer on 6-3-1978 in Revenue Case No. 1-A-23/76-77.

7. At this stage, the Plaintiff filed a suit for declaration of his title over the suit land on the ground that the orders passed by the Sub-Divisional Officer dated 6-3-1978 and 31-5-1982 are illegal and void and for restoration of possession.

8. Preliminary objection regarding maintainability of the suit was raised. Preliminary issue was decided in Plaintiffs' favour, however the suit was dismissed holding as time barred in the light of the fact that the Defendant were

in continuous peaceful possession of the suit land pursuant to the agreement of sale dated 17-1-1962 and the suit was not filed within a period of 12 years.

9. Thereagainst appeal was preferred. The same was allowed holding the suit within time and the suit was decreed in Plaintiffs' favour.

10. Shri H.S. Patel, learned Counsel for the Appellant referring to Section 257(1-1) of the Code would submit, the suit is barred u/s 257 of the Code and, therefore, the decree of the appellate court is without jurisdiction. He would further submit, the order passed by the Sub-Divisional Officer u/s 170-A of the Code on 6-3-1978 had attained finality since no appeal or revision was preferred and, therefore, learned Sub-Divisional Officer while passing the order u/s 170-B of the Code has rightly held the above application as barred by principle of res judicata and as such, the same had also attained finality since no appeal or revision has been preferred.

11. On the other hand, learned Counsel appearing for the Respondents would submit, the orders passed by the Sub-Divisional Officer are patently illegal, passed without following the due procedure of law prescribed therefor. u/s 9 of Code of Civil Procedure, the civil court has jurisdiction to try all the suits of civil nature and the decree passed by the appellate court deserves to be upheld. Reliance has been placed on the judgment of Supreme Court in the case of State of Andhra Pradesh Vs. Manjeti Laxmi Kantha Rao (D) By L.rs. and Others, and in case of Dhulabhai v. State of M.P 1969 MPU 1.

12. I have heard learned Counsel for the parties and perused the record and judgment and decree of both the courts below.

13. A bare reading of Section 170-A of the Code, would reveal that it applies to transfer effected by way of sale. In the instant case, admittedly the transfer of suit land was not effected by way of sale nor transfer was effected by way of accrual of right of occupancy tenant u/s 169 or of Bhumiswami under Sub-section (2-A) of Section 190, at any time during the period commencing on the 2nd October, 1959 and ending on the date of commencement of the M.P./C.G. Land Revenue Code (Third Amendment) Act, 1976 and therefore, the provisions contained in Section 170-A of the Code have no application in the instant case and the Sub Divisional Officer was even not empowered to enquire into the matter under the above provision and thus the order passed by the Sub-Divisional Officer was without jurisdiction.

14. The Sub-Divisional Officer acting u/s 170-B of the Code vide its order dated 31-5-1982 has dismissed Plaintiffs' application as according to him, the order dated 6-3-1978 operates as res-judicata. The grounds of assail under both the provisions are different. As held hereinabove, the order passed by the Sub-Divisional Officer u/s 170-A of the Code was without jurisdiction and therefore, in view of above, by no stretch of imagination it can be said that the order dated 6-3-1978 operates as res judicata so far as application filed by the Plaintiff u/s 170-B of the Code is concerned and the order dated 31-5-1982 whereby

application has been dismissed as barred by principle of res judicata is patently illegal and contrary to the provisions contained therein.

15. It is not in much dispute that Section 257 of the Code puts a specific bar on the jurisdiction of the civil court to entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board or any Revenue Officer is by this Code empowered to determine, decide or dispose of including matters relating to Section 170-B of the Code. It is also not in much dispute that the Code provides full machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of civil court in that regard.

16. The matter needs consideration in the light of judgment of Supreme Court on which the Respondents have placed their reliance.

17. The Supreme Court in case of Dhulabhai v. State of M.P. (supra) has laid down the following tests:

(i) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected as suit lies.

(ii) A challenge to the provisions of the particular Act as ultra vires cannot be brought before the Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunal.

(iii) Where the statutes gives a finality to the orders of the Special Tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provisions, however does not exclude those cases where the provisions of particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(iv) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

(v) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is relevant enquiry.

(vi) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(vii) An exclusion of the jurisdiction of the civil court is not readily to be inferred

unless the conditions above set down apply.

18. The same principles are again enunciated by the Supreme Court in the case of *State of Andhra Pradesh Vs. Manjeti Laxmi Kantha Rao (D) By L.rs. and Others*, wherein in para 5 of its judgment observed as under:

5. The normal rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognizance by them is either expressly or impliedly excluded as provided u/s 9 of the CPC but such exclusion is not readily interred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of the civil courts to try civil suit. The test adopted in examining such a question is (i) whether the legislative intent to exclude arises explicitly or by necessary implication, and (ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it. In *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, it was noticed that where a statute gives finality to the orders of the special tribunals jurisdiction of the civil courts must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit and such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

19. The normal rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognizance by them is either expressly or impliedly excluded as provided u/s 9 of the CPC but such exclusion is not readily inferred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of civil courts to try a civil suit. The test adopted in examining such a question is (i) whether the legislature intent to exclude arises explicitly or by necessary implication, and (ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it. In *Dhulabhai v. State of M.P.* 1969 MPLJ 1 it was noticed that where a statute gives finality to the orders of the Special Tribunals, jurisdiction of the civil Courts must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit and such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

20. Now coming to the facts and circumstances of the present case, it would be crystal clear that the order of S.D.O. u/s 170-A of the Code was without jurisdiction and therefore, it would not operate as *res judicata* in the proceedings initiated by the S.D.O. u/s 170-B of the Code. In the instant case, apparently the provisions contained in Section 170-A and 170-B of the Code have not been complied with and the statutory tribunal i.e. S.D.O. has not acted in conformity with the fundamental principles of judicial procedure and therefore, for this purpose, civil court's jurisdiction is not excluded in the light of above principles

laid down by the Supreme Court in the above referred cases and the substantial questions of law are answered accordingly.

21. The first appellate court has gone into the question which was required to be decided by the S.D.O. and therefore, the first appellate court could have seen only the questions whether fundamental basic principles have been followed or not by the competent authority passing the order and the jurisdiction of civil court is limited to the above extent. Thus it is clear that the first appellate court has proceeded beyond jurisdiction to interfere on merits of the order. The court should have seen whether the procedure has been followed or not and should not have gone into the questions to be decided by the competent authority. Since it is apparent from the order that the order passed by the S.D.O. dismissing the application u/s 170-B of the Code is patently illegal thus it can be said that the order passed by the S.D.O. was not in accordance with law.

22. The order of S.D.O. is liable to be set aside and is hereby set aside and the S.D.O. is directed to decide the matter afresh in accordance with law after giving full opportunity of hearing to both the parties.

23. The appeal is allowed in part. The judgment passed by the courts below are modified to the above extent.