

(1984) 11 RAJ CK 0016
In the Rajasthan High Court
Case No : Civil Writ Petition No. 136 of 1984

Kamad and Others

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 07-11-1984

Acts Referred:

Constitution of India, 1950 — Article 19, 226
Transfer of Property Act, 1882 — Section 53A

Citation : (1985) RLW 1 : (1985) 1 WLN 11

Hon'ble Judges : N.M. Kasliwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

N.M. Kasliwal, J.—Brief facts leading to this writ petition are that non-petitioner No. 4, Mst. Soni, filed a suit for possession against the petitioners in respect of lands bearing Khasra Nos. 795/1, 793/2, and 796 and 797 measuring 26 Bighas 10 Biswas situate in village Gothiana Tehsil Kishangarh, District Ajmer. The suit was filed on the allegation that the disputed land was mortgaged with the petitioners by Peeru deceased husband of the plaintiff some ten years back. After expiry of 10 years, the mortgage automatically extinguished and the plaintiff was entitled to possession. In the alternative it was also pleaded that for redeeming the mortgage, the defendant-petitioners had stated that the land had been sold to them by Peeru on September 13, 1963. It was thus alleged that since the husband of the plaintiff was a member of Scheduled Caste, any sale which was made in favour of the petitioners, was violative of Section 42 of the Rajasthan Tenancy Act, 1955 here in after referred to as "the Act") and on this account also the plaintiff was entitled to a decree for possession.

2. The defendant-petitioners in the written statement totally denied the fact of mortgage and further asserted that the land in question was in their cultivatory possession since long and Peeru also sold his khatedari rights on September 13, 1953 for a consideration of Rs. 360/-. It was also pleaded that the sale was

made by Peeru prior to the amendment of Section 42 of the Act, which came into force with effect from May 1, 1964 and as such the sale was not violative of Section 42 of the Act and in the alternative they had also acquired khatedari rights u/s 19 of the Act. On the basis of the above pleadings, learned Assistant Collector, Kishangarh, framed several issues and after recording oral and documentary evidence held that Peeru was the khatedari tenant of the land in question. So far as the factum of mortgage is concerned, the same was not held proved. The sale being unregistered and in violation of Section 42 of the Act, had no validity and was a mere waste paper, It was further held that the suit was within limitation and in the result the suit of the plaintiff was decreed. The defendant-petitioners aggrieved against the judgment of the Assistant Collector filed an appeal. The Revenue Appellate Authority also by judgment dated March 15, 1977, dismissed the appeal and upheld the order of the Assistant Collector. The learned Revenue Appellate Authority while dealing with the question of alleged sale dated September (3, 1963, in favour of the petitioners discussed the oral and documentary evidence and held that even in fact such sale was not proved by the defendants. It was also found that the defendants failed to prove their possession prior to October 15, 1955. Even the receipts of rent filed by the defendants did not make a mention of the disputed land and in any case, the same related to the period after 1955. The Jamabandis filed by the plaintiff consisting of Samvat years 2021 to 2024 also mention the name of Peeru as Khatedar. As regards oral evidence of long possession produced by the defendant-petitioners the learned Revenue Appellate Authority observed that in case the defendant-petitioners claimed to be in possession prior to October 15, 1955, then they ought to have taken proceedings for recording khatedari in their favour but no such steps were taken.

3. A second appeal filed by the defendant-petitioners in the Board of Revenue was also dismissed by order dated October 22, 1983. The Board of Revenue held that it was proved beyond any manner of doubt that Peeru was the Khatedar tenant of the disputed land and the defendants were claiming the land on the basis of an alleged sale-deed dated September 13, 1963, made by Peeru for a consideration of Rs. 360/-. It was held by the Board of Revenue that such sale being unregistered it conferred no khatedari rights in favour of the defendants and in any case such sale was also void as the same was in violation of Section 42 of the Act. It was also held that even if the defendants may be found in possession of the land in question prior to coming into force of the Act, the defendants got no advantage as upto Sept. 13, 1963, even according to the defendants Peeru was Khatedar and as such their possession prior to September 13, 1963 would be considered with the consent of Peeru. It was also held by the Board of Revenue that the defendants were not entitled to any benefit of Section 53A of the Transfer of Property Act as even according to the defendants own showing they were not transferred possession on September 13, 1963 by the alleged sales-deed and the sale-deed being not executed even on sufficient stamps and being in violation of the provisions of law, gave no benefit to the

defendants. The appeal as such filed by the defendants was dismissed.

4. Mr. Bardhar, learned Counsel for the petitioners, contended that all the Revenue Courts failed to consider that the transaction of sale made by a member of Scheduled Caste in favour of a person not belonging to the same Caste, was declared void only with effect from May 1, 1964, while the sale in favour of the petitioners was effected on September 13, 1963 and as such the provision of Section 42 of the Act cannot be attracted in the present case. Reliance is placed on Pt. Triveni Shyam Sharma v. Board of Revenue, Rajasthan RLW1964 512.

5. I see no force in this contention. The facts in Pt. Triveni Shyam Sharma's case (supra) were that Pt. Triveni Shyam Sharma and one Gyarsa jointly filed a suit against Mangya and four others for possession of Khasra No. 538 situate in village Thundi, Tehsil Dausa. It was averred that the plaintiff No. 2 Gyarsa in that case was a khatedar tenant of said Khasra No. 53S which was a grove land and that he had transferred his khatedari rights by sale to Pt. Triveni Shyam Sharma by a registered sale deed dated December 31, 1955. It was further stated that the vendor had delivered possession of the grove-land to Pt. Triveni Shyam Sharma and that the defendants had without any rightful claim wrongfully dispossessed Pt. Triveni Shyam Sharma from the said property and so it was prayed that the possession of the property should be restored to him. The defendants contested the suit. One of the grounds raised by them before the Assistant Collector, Dausa, was that Gyarsa was a member of the Scheduled Caste and that he could not transfer his khatedari rights in favour of Pt. Triveni Shyam Sharma as he was not a member of Scheduled Caste. Reliance was placed on behalf of the defendants on the proviso to Section 42 of the Tenancy Act (Act No. 3 of 1955), which was added by the Rajasthan Tenancy (Second Amendment) Act, 1956. It was urged on behalf of the petitioners before the High Court that the said proviso could not affect the transaction, which had taken place on December 31, 1965, retrospectively Their Lordship, considered Section 42 of the Act which was amended by the Rajasthan Tenancy (Second Amendment) Act (No. 28 of 1956), which came into force on September 22, 1956. Section 4 of this Second Amendment Act ran as follows:

Section 4: To Section 42 of the Principal Act, the following proviso shall be added before the Explanation and shall be deemed always to have been so added, namely,

Provided that no Khatedar tenant being a member of a Scheduled Caste or a Scheduled Tribe shall so transfer his interest in the whole or a part of holding to any person who is not a member of a scheduled caste or a scheduled tribe.

It was observed that it was obvious from the language of the proviso, which was added to Section 42 that after the amendment, a Khatedar tenant, who was a member of the Scheduled Caste or Scheduled Tribe was restrained from transferring his interest in the whole or in part of his holding to any person who was not a member of a Scheduled Caste or a Scheduled Tribe. It appears that

this restriction was imposed for protecting the interest of the khatedar-tenants, who were members of a Scheduled Caste or a Scheduled Tribe. Their Lordships then considered the impact of the words "shall be deemed always to have been so added" used by the Legislature in Section 4 of the Second Amendment Act which indicated that proviso was meant to operate retrospectively. Their Lordships then examined whether the Legislature could by merely introducing the deeming clause while inserting proviso to Section 42 of the Principal Act deprive the petitioner of his vested rights without providing any compensation therefor. It was held that when Gyarsa had already transferred his interest before the Second Amendment came into force, the deeming clause, if held to be valid, would not protect the vendor, but would tend to deprive the vendee i.e. the petitioner of the rights and interest which had already vested in him. The deeming clause would not, therefore, be saved by Clause (5) and it would be violative of Article 19(1)(f) of the Constitution. It was, therefore, held that the deeming clause was violative of Article 19 in so far as it resulted in divesting the petitioner in whom the vendor's right and interest had vested before the Second Amendment.

6. The above case renders no assistance at all to the petitioners in the present case. The Second Amendment in Section 42 by which a proviso was added to Section 42 was brought into force on September 22, 1956. In Pt. Triveni Shyam Sharma's case (supra) the sale had been affected on December 3, 1955, i.e. prior to September 22, 1956. In the case before us even the alleged sale has been made on September 13, 1963, which is much latter to the coming into force of the Second Amendment Act. There is no question in the present case of any rights having been vested in the defendants prior to September 22, 1956. After September 22, 1956, there was a clear prohibition in making any sale by a member of a Scheduled Caste or a Scheduled Tribe in favour of a person who was not a member of a Scheduled Caste or a Scheduled Tribe.

7. So far as the amendment made by Act No. 12 of 1964, dated May 1, 1964. in Section 42 is concerned, the only change made was that a further prohibition was put that the sale, gift or bequest by a khatedar tenant of his interest in the whole or part of his holding shall be void if such sale, gift or bequest is by a member of a Scheduled Caste in favour of a person, who is not a member of Scheduled Caste or by a member of a Scheduled Tribe in favour of a person who is not a member of the Scheduled Tribe. By the Second Amendment Act No. 28 of 1956, which came into force on September 22, 1956, the prohibition was that no khatedar tenant being a member of a Scheduled Caste or a Scheduled Tribe shall so transfer his interest in the whole or a part of his holding to any person, who is not a member of a Scheduled Caste or a Scheduled Tribe. But now by Act No. 12 of 1964 which came into force on May 1, 1964 such transaction has been held to be void, if it is made by a member of Scheduled Caste in favour of a person who is not a member of Scheduled Caste or by a member of Scheduled Tribe in favour of a person who is not a member of Scheduled Tribe. The above amendment by Act No. 12 of 1964 though brought into force on May 1, 1954 i.e.

after the alleged sale on September 13, 1963, but the fact remains that even the earlier proviso which was added to Section 42 by Second Amendment Act No. 28 of 1956, also prohibited any transfer of interest in holding by a member of a Scheduled Caste or a Scheduled Tribe to any person who was not a member of Scheduled Caste or a Scheduled Tribe. In the face of such provision existing even on September 13, 1963, any transfer made by Peeru, who was admittedly a member of Scheduled Caste in favour of defendant petitioners, who were not the members of Scheduled Caste or Scheduled Tribe was totally prohibited.

8. A division bench of this Court in *Ram Chandra v. Om Prakash* RLW 1978 442 has clearly held that a sale in contravention of the proviso to Section 42 being forbidden by law, within meaning of Section 25 of the Indian Contract Act is void and not enforceable in law. The sale in question in that case was held to be void and not merely voidable. In this view of the matter there is no force in the contention of Mr. Bardhar that the transaction in question being made prior to May 1, 1954, was not void and could be enforced under law.

9. Apart from the above legal question, fact of sale itself has been held as not proved by the Revenue Appellate Authority. Such finding of fact has been rightly upheld by the Board of Revenue and no interference can be made by this Court in the exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

10. There is no force in the contention of Mr. Bardhar that the suit is barred by limitation as filed beyond a period of 12 years. Even according to the defendants own showing Peeru was khatedar tenant upto September 13, 1963 and they are claiming their right on the basis of the alleged sale made in their favour on September 13, 1963. The suit has been filed on December 19, 1970 and as such the same is well within limitation.

11. In Section 183 of the Act the words "on the suit of the person or persons entitled to eject him as tenant" have been substituted by Section 2 of Rajasthan Act No. 17 of 1970, published in Rajasthan Gazette dated November 27, 1970 for the words "on the suit of the person or persons entitled to adm.t him as tenant". The present suit has been filed on December 10, 1970, and as such the present plaintiff Mst. Soni was entitled to bring a suit as being the person entitled to eject the defendants.

12. It may also be mentioned that Section 19 of the Act provided for conferment of rights on certain tenants of Khudkasht and subtenants. Section 19(2) provided that the sub-tenant, who claimed that the right of Khatedari accrued to him on the appointed date was required to apply to the Assistant Collector for a declaration, within two years of that date. Admittedly no such steps were taken by the defendant petitioners for declaration of any khatedari rights in their favour, even if for arguments sake it may be considered as contended by Mr. Bardhar that the defendant petitioners being sub-tenants had acquired khatedari rights. This contention of Mr. Bardhar has also no force as the defendant

petitioners have not come out with a case that they were sub-tenants of Peeru. In view of those circumstances the Board of Revenue has rightly held that the defendant petitioners being trespassers were liable to ejectment u/s 183 of the Act

13. In the result, I find no force in this writ petition and it is accordingly dismissed with no order as to costs.