(2009) 05 CHH CK 0009

In the Chhattisgarh High Court

Laxmi Bai (Smt.) APPELLANT

Vs

State of Chhattisgarh and Others RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2009) 3 MPHT 68 : (2009) 4 MPJR 36

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Satish K. Agnihotri, J.—The petitioner, by this petition under Articles 226 and 227 of the Constitution of India, impugns the order dated 16-5-2005 (Annexure P-12), passed by the Board of Revenue, Chhattisgarh, Bilaspur, Circuit Court, Raipur in Revenue Case No. 5/A-21/2004-05.

2. The facts, in nutshell, as projected by the petitioner, are that the petitioner (Smt. Laxmi Bai) is widow of Barjo Gond. According to the report of the Sub Divisional Officer (Revenue), Saraipali, dated 5-1-2004, Reju had two sons, i.e., Govind and Dayaram. Govind had one son Barjo Gond. Dayaram had three sons, namely Chamra, Chamroo and Karoo. Barjo Gond died issueless. The three sons of Dayaram, namely Chamra, Chamroo and Karoo are dead. Balakram (respondent No. 4) is the son of Chamra, Parasram (respondent No. 3) is the son of Chamroo and Tulsiram (respondent No. 5) is the son of Karoo.

3. By way of succession, the petitioner is owner of 7.60 hectare land (30 khasra numbers), situated at Village Bhalukona, Tehsil Saraipali, District Mahasamund. Since the petitioner is a widow and issueless, she kept Surendra Narayan Das with her as her son, who is looking after the affairs of the petitioner in her old age. Looking to her old age, with an intention to settle her properties in her life time itself, on 26-7-2001 (Annexure P-1) the petitioner moved an application u/s 165 of the Chhattisgarh Land Revenue Code, 1959 (for short ''Land Revenue

Code'') before the Collector, Mahasamund, seeking permission to execute a ''Will'' in favour of Surendra Narayan Das in regard to the above stated property. The case was registered as Revenue Case No. 65/A-21/2004-05.

4. By order dated 28-1-2002 the matter was referred to the Tehsildar, Saraipali for enquiry and report after affording opportunity of hearing to objectors, if any. The respondent Nos. 3 to 5 filed their objection (Annexure P-4), claiming themselves as legal heirs of the petitioner. The Tehsildar also obtained opinion of the Gram Panchayat, Rajadih. Accordingly, a meeting of Gram Panchayat was held and the resolution dated 10-10-2002 (Annexure P-5) was passed. After having enquired from all angles, the Tehsildar, Saraipali submitted his report on 24-3-2002 (Annexure P-9) to the Sub Divisional Officer (Revenue), Saraipali. The Sub Divisional Officer (Revenue) by order dated 2-8-2004 (Annexure P-10) submitted the report to the Collector, Mahasamund.

5. The Collector, Mahasamund by order dated 13-9-2004 (Annexure P-11) dismissed the application filed by the petitioner under the provisions of Section 165 of the Land Revenue Code, with the observation that the application is premature. The applicant is an Adivasi. The question, as to whether an Adivasi can execute a ''Will'' in favour of a non-Adivasi falls within the domain of a Civil Court. Being aggrieved, the petitioner preferred an appeal, which was dismissed by order dated 16-5-2005 (Annexure P-12), passed by the Board of Revenue, Chhattisgarh, Bilaspur, Circuit Court, Raipur in Revenue Case No. 5/ A-21/2004-05. Hence this petition.

6. Shri B.P. Sharma, learned Counsel appearing for the petitioner would submit that the findings and conclusions arrived at by the Collector as well as Board of Revenue are erroneous and not sustainable in the eyes of law. The petitioner is entitled to execute a ''Will'' in her life time, thus, holding that the application seeking permission was ''premature'', is not sustainable. The provisions of Section 165 of the Land Revenue Code provides for transfer of right of property by a Bhumiswami, belonging to a tribe, which has been declared to be an aboriginal tribe by the State Government, with the permission of the Competent Authority, i.e., Collector. The question in the present case arisen for determination is whether execution of ''Will'' amounts to transfer of property?

7. I have heard learned Counsel appearing for the petitioner and perused the records appended to the petition.

8. The petitioner, who intends to execute a ''Will'' of her property in favour of one Shri Surendra Narayan Das is still alive. A ''Will'' comes into effect after death of the testator, as a ''Will'' is revocable at any time. Section 2 (h) of the Indian Succession Act, 1925 defines ''Will'' as under:

2. (h) "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

9. Thus, a ''Will'' can be carried into effect after death of the testator only. At this

stage, there is no involvement of the transfer of the interest when the testator is still alive.

10. The Supreme Court in State of West Bengal and another Vs. Kailash Chandra Kapur and others, , defines the difference between ''transfer'' and ''Will'', and observed that "Transfer connotes, normally, between two living persons during life; Will takes effect after demise of the testator and transfer in that perspective becomes incongruous.

11. A Division Bench of the Karnataka High Court in N. Ramaiah Vs. Nagaraj S. and Another, , observed as under:

12. The differences between a transfer and a Will are well recognized. A transfer is a conveyance of an existing property by one living person to another (that is a transfer intervivos). On the other hand, a Will does not involve any transfer, nor effect any transfer intervivos, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. In other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as personal law (non-testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a Will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on he happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus, to treat a devise under a Will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession.

12. Thus, the definition of ''Will'' under the provisions of the Indian Succession Act, 1925 and the judicial pronouncements as stated hereinabove, make it clear that the ''Will'' is not a transfer of the property as transfer takes place between two living persons and the ''Will'' comes into effect after death of the executor. This does not involve any transfer intervivos.

13. Section 164 of the Land Revenue Code provides for devolution of the interest of Bhumiswami on his death either passed by the inheritance, survivorship or bequest, as the case may be. The same is subject to personal law of the Bhoomiswami. Thus, the application u/s 165 of the Land Revenue Code, seeking permission of the Collector was ill advised and misconceived. The entire exercise done by the Collector, seeking a report from the Tehsildar and Sub Divisional Officer is void ab initio, as the same has no sanction of law. Similarly, calling of the report inviting objections from the other persons also was a nullity. The observation of the authorities below that the petitioner may approach to the civil forum for redressal of her grievance has also been passed without authority of law. Thus, the application of the petitioner for permission to the Collector, at this stage, is not maintainable u/s 165 of the Land Revenue Code.

14. Accordingly, this petition is allowed to the above extent. No order as to costs.

