

(1993) 11 MP CK 0014
In the Madhya Pradesh High Court
Case No : S.A. No. 30 of 1977

Mewalal Kanhaiyalal

APPELLANT

Vs

Jankibai and Others

RESPONDENT

Date of Decision : 02-11-1993

Acts Referred:

Madhya Pradesh Land Revenue Code, 1959 — Section 165(6)
Registration Act, 1908 — Section 58
Transfer of Property Act, 1882 — Section 53A

Citation : (1993) ILR (MP) 604 : (1994) 39 MPLJ 369 : (1994) MPLJ 369

Hon'ble Judges : M.V. Tamaskar, J

Bench : Single Bench

Advocate : J.P. Sanghi and N.K. Sanghi, for the Appellant; Waghmare and S.R. Waghmare, for the Respondent

Final Decision : Dismissed

Judgement

M.V. Tamaskar, J.

This is plaintiff/appellant's second appeal against the judgment and decree passed by the Addl. District Judge, West Nimar, Khargone, in C.A. No. 11-A/76, against the Judgment and decree passed by Civil Judge, Class I, Khargone in C. A. No. 17-A/71, setting aside the judgment and decree passed by the trial Court and allowing the appeal vide paras 38 to 42 of the judgment.

The original holder of the suit property i.e. agricultural land and house as described in para 1 of the plaint was one Kanaksingh, who was Bhilala belonging to an aboriginal tribe. He died in 1968 leaving Birjubai, his second wife, as well as plaintiff, who is grand daughter of Kanaksingh, being daughter of Sitabai (from another wife Laxmibai). The genealogy is as under :--

Kanaksingh (died 1968) | ----- | | Laxmibai
Birjubai (died on 28-8-1968) | | Jankibai (Plaintiff)

The suit was also filed for possession and mesne profits for the years 1968-69,

1969-70, 1970-71 at the same rate.

The suit property after the death of Kanaksingh was mutated in the name of plaintiff Jankibai, wife of Kalusingh, residing with her husband at the village Kawan. The defendant/appellant, is resident of village Lalkheda and non-advaisi. The respondent Nos. 2, 7 and 3 are lawyers by profession and purchasers of land from Jankibai, plaintiff, Respondent No. 1 but the same are not in dispute in this appeal. Mainly the controversy centres round Jankibai and Mewalal as under :

Kanaksingh had a house at Lalkheda which was sold for a consideration of Rs. 2,000/- vide Ex. P. 4/D. 3, a registered sale deed on 6-12-1968. It is alleged that the sale deed was got executed by practising fraud, and no consideration passed. Vide Ex. P. 2, an agreement was got executed for sale of agricultural land for a consideration of Rs. 14,000/-. Out of which Rs. 500/- were paid and rest was to be paid at the time of registration, for which, a condition was incorporated that plaintiff shall apply to the authority for sanction u/s 165(6) of the MP Land Revenue Code (for short the "Code"). Possession was handed over to the defendant/appellant said to be as a part performance.

The plaintiff challenged the above agreement on the ground of fraud and undue influence. Mewalal was told to manage the property but by using his position, some blank papers were got signed on which the contents of agreement were got written. Thus it is not binding on the plaintiff and the same was liable to be ignored being void, being against the statutory provisions. It was pleaded that Mewalal was on good terms with the plaintiff but even after the order of mutation passed on 19-7-1969, he did not inform her. She came to know about it in October, 1970, that the sale was without consideration and not binding.

The defendant/appellant denied the allegations and stated that Jankibai was well known to the defendant/appellant. She had come to the village after death of Kanaksingh, stayed there for some time, had good relations with all. The Sale Deed and agreement were attested by Kalu Singh, husband of Jankibai, as also by her maternal uncle. There was no fraud. It was stated that the agreement or contract to sell was not barred under the provisions of the Code. What was barred was transfer. In any case on the basis of agreement the possession was given, as such invoking the doctrine of part performance u/s 53A of the Transfer of Property Act (for short the Act"), he was entitled to defend his possession.

The trial Court framed issues, recorded evidence and the findings :--

- (a)(1) It was not correct that Mewalal created any terror in mind of plaintiff that it was dangerous for her to live in Lalkheda, nor did he commit any fraud, nor blank papers were got signed,
- (2) That sale of house vide Ex. P. 4/D. 3 was valid and binding on plaintiff,
- (3) The agreement Ex. P. 2 was voluntarily executed,
- (4) It was also held that the defendant's possession being in nature of part

performance u/s 53A of the T. P. Act.

On these findings the suit of plaintiff was dismissed,

(b) On appeal being filed --

The lower appellate Court held --

The Court decided the appeal on legal grounds accepting all the findings by the trial Court as under : In para 19 - The lower appellate Court held that that the controversy centres only between plaintiff/appellant and Mewalal Defendant-respondent No. 1.

In para 20 -- Referring to Exs. P. 12 to 14 show Mewalal plaintiff was ready for sale.

In Para 21 -- Vide Ex. P.3 the sale deed was executed before Sub-Registrar at Khargone, that plaintiff failed to prove that no consideration was paid.

In para 22 -- The order of mutation Ex. P. 11, in name of plaintiff alone was made on 19-7-1969.

In para 23 -- It was held that plaintiff had failed to prove fraud played in respect of execution Ex. D.2.

In para 25 -- Having given all these findings the lower appellate Court discussed the legal plea of bar u/s 165 of the MP Land Revenue Code; held that both Ex. D.2 and Ex. D.3 were hit by the above bar and held that Mewalal did not get any right or title in the land. It was also held that question of mesne profit was not properly decided.

Shri Sanghi and Shri Garg, learned counsel for the appellants urged -- Firstly -- That Section 165(6) of the Code did not bar any contract or agreement to sale. Secondly -- that the agreement itself provided a condition for obtaining permission from the Collector as such there was no contravention of Section 165 (6) of the Code. Thirdly- That under the doctrine of part performance he was entitled to defend any action claiming possession. Also stated that the allegation of fraud and undue influence are contradictory to averments in plaint and in evidence.

The learned counsel for appellant referred to the findings recorded by the lower Appellate Court paras 14, 17, 21, 22, 25, 26 to 29, 30 of the judgment. It was contended that having affirmed all the findings of the trial Court, it committed an error in arriving at legal inferences, misinterpreting the provisions and the law relating to Section 53A of the Act.

Shri Sanghi, learned Sr. counsel for the appellant stated that the agreement or contract would become void only if permission is refused under the Act, till then the appellant can defend his possession. It is not shown that permission was sought and refused in writing. Relying on AIR 1930 287 (Privy Council) and Nathulal Vs. Phoolchand, it was stated that whenever a clause for obtaining a

sanction/permission, is provided, the contract does not become void, because the sanction or permission was not obtained. The doctrine of part performance clothed him with a valid defence against any action for recovery of possession.

Section 165(6) of the Code reads as under :

"(6) Notwithstanding anything contained in sub-section (1), the right of a Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the State Government by a notification in that behalf for the whole or a part of the area to which this Code applies shall not be transferred to a person not belonging to such tribe without the permission of a Revenue Officer not below the rank of a Collector, given for reasons to be recorded in writing."

Section 70 of the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007 reads as follows :

"Section 70 : Voluntary sale of holdings (1) subject to the rules made under this Act, a Pakka Tenant may with the previous sanction of the (Collector) transfer his rights in the whole or part of the holding by sale to registered co-operative farming society of the same village in which the land is situated or to a bona fide agriculturist.

(2) Subject to the rules made under this Act, a transfer by sale effected without the previous sanction of the (Collector) may be validated by such authority on payment by the transferee of a penalty which may extend to two years" revenue or rent of the land transferred : provided that the transfer has been made to a registered cooperative farming society of the same village in which the land is situated or to a bona fide agriculturist.

(3) The (Collector) shall grant permission for sale under sub-section (1) or validate a sale under sub-section (2) in the following cases only :

(a) if the Pakka tenant wants to sell away all his holdings in the pargana; or

(b) if at least 5 acres of irrigated land or 15 acres of non-irrigated land are still left in the possession of the Pakka tenant for the maintenance of himself and his family :

Provided that the sale has not been effected fraudulently with a view to defeat the interest of his heirs.

(4) A sale to a person other than a bona fide agriculturist or a registered co-operative farming society can be effected only with the sanction of the Government on payment of such fee as the Government may prescribe.

(5) No sale shall without the previous sanction of the Government be sanctioned or validated under this section in favour of any person who already holds or would hold in his name if the sale is sanctioned, land measuring more than 50 acres on Pakka tenure : Provided that this restriction shall not apply in the case of a registered co-operative farming society.

(6) Subject to the provisions contained in sub-sections (1), (2), (4), and (5) the following persons and bodies shall have a prior claim to purchase the land under this section in the order in which they are mentioned -

(a) a co-tenant,

(b) a sub-tenant who is for more than 2 years in possession of the land which is being sold; and

(c) a registered co-operative farming society of that village, if any.

(7) In case of any dispute regarding the price of which land should be sold under sub-section (c) the vendor or pre-emptor may apply to the Tahsildar who will fix the price taking into consideration the market price prevailing in that locality or village.

(8) No sale under this section shall be deemed to be valid until the sale deed effecting such a sale has been registered in accordance with the law of registration in force for the time being."

I have considered arguments of learned counsel for the appellant. Firstly - In relation of sale of house vide Ex. P. 4/D. 3. The finding recorded by the trial Court was that there was no fraud played by Mewalal and that the sale deed executed with consideration. It was also held that the registration was done before the Sub-Registrar at Khargone. The endorsement on the sale deed discloses payment of consideration before the Sub-Registrar. In these circumstances it cannot be said that no payment was received by the plaintiff, under sale deed Ex. D. 3. The proposition that when endorsement is made in respect of payment of consideration before the Sub-Registrar, it will be presumed that the payment has been made. In AIR 1948 110 (Nagpur) it has been clearly stated that endorsement proves the payment of consideration before the Sub-Registrar unless it is rebutted by very strong evidence. Sub-Registrar has not been examined nor any one else to show that no payment was made.

There is another question which has to be considered along with this case. Whether the sale of a house is prohibited u/s 165/(6) of the Code? In 1981 Revenue Nirnaya 13, (High Court) Justice B. C. Verma (as he then was) held that no permission was required for sale of house as such keeping in view the finding recorded by the trial Court. I am of the view that lower Appellate Court committed a mistake in setting aside the finding recorded by the trial Court. It cannot be held that the transfer of the house was bad in law because of the bar u/s 165(6) of the Code. In view of this, the finding recorded in para 38(2) of the judgment is set aside and it is held that the sale of house vide Ex. P. 4/D. 3 was not hit by Section 165(6) of the Code.

Now the second question that arises is that of agreement to sale in respect of agricultural land. The lower Appellate Court has stated that no fraud was played in executing Ex. D. 2. However, it set aside Judgment of trial court purely on legal question.

In 1974 MPU 761, it is held as under :

"(a) MPLR Code (20 of 1959) Section 165(6) Agreement of sale by member of abominable tribe to one not such a member without permission of Collector is void.

If an agreement is entered into by a member of an aboriginal tribe for selling agricultural land to person who is not a member of the aboriginal tribe, the obtaining of permission of Collector is a condition precedent and if the condition is not fulfilled the transaction would be void. [1979 MPLJ 66].

(b) Madhya Pradesh Land Revenue Code (20 of 1959), Section 165(6) and Transfer of Property Act, Section 53A and Contract Act, Section 165(6) - Purchaser put in possession cannot rely on Section 53A of the T. P. Act to justify possession. Doctrine is not available when transaction is nullified - 65 of the Contract Act."

A reading of Section 165(6) of the Code makes it clear that transfer is not permissible unless permission is obtained. What is of importance is that the provision has been made for the protection of the members of the tribe. Admittedly the agreement to transfer was in respect of agricultural property. What is the meaning of the word "transfer" in the .section? Does it only refer to legal transfer i.e. after permission. Say for instance in the instant suit/appeal the possession was handed over despite the prohibition in the statute, does it not mean transfer for all purposes, wherein the property is being exploited for reaping crops and benefits by paying only Rs. 500/- out of Rs. 14,000/- the total price. Say if the permission is not obtained, can the transferee retain possession indefinitely? What happens to other procedural aspects under the Act? 17. There is a validation clause in M. N. Land Revenue and Tenancy Act, 1950, there is no such clause in MP Land Revenue Code.

The case of Nathulal Vs. Phoolchand, therefore, should be read in the context of the provision.

When the legislature provides for prohibition of sale, can the same be whittled down by finding out by-lanes for escape? Whether Section 53A of T. P. Act will be available in view of the fact that MPLR Code, 1959 is a later law than the T. P. Act. The doctrine of part performance u/s 53A of the T. P. Act should not be read to validate transaction in view of the fact that MP Land Revenue Code had received the assent of the President on 15th September 1959 and published on 21st September, 1959 in M. P. Gazette. The intention of the legislature is obviously is to prohibit the transfer. To give a meaning to the provision, even agreement to transfer should be read within the meaning of word transfer which will further the intention of legislature and no delivery of possession can be said to be defended by invoking the doctrine of part performance. In 1960 MPLJ 230, Mahabir Prasad Ramdhin v. Samroo Kaliram it is pointed out that the intention of the legislature should be furthered rather destroying it. It is held as under :

"The object cannot be achieved if invalid transfers are excluded from the purview of the Revenue law. The word "transfer" should, therefore, be so interpreted as to further the object of the Legislature rather than defeat it."

In this regard a Division Bench decision of this Court - 1975 MPLJ 651, Panau Karansingh Sahu v. Ajitram Bisahudas and Ors. wherein it is held as under:

"As regards the question whether such a transfer in contravention of Section 165(6) of the Code and Section 165(10) of the Code, 1959, is void or voidable, we would affirm the view of A. P. Sen, J., 1972 MPLJ 95, in the said cases and the view of Bhawe, J. 1970 MPLJ 66, in the present case that such a transfer should be held to be void and not voidable. Our reasons for coming to this conclusion are thus : In analogous provisions under the C. P. Tenancy Act, 1920, S. Ismay, Judicial Commissioner in Daji Vithal Dhok v. Moreshwar Venkatesh Gharpurey held that the effect of Section 46 of the C. P. Tenancy Act, 1920, was to abrogate the powers of a Registrar or Sub-Registrar to register certain documents, which were in contravention of Section 12 or 13 of the Act. If the Registrar or the Sub-Registrar were to be deceived into registering a document would not be effective for the purpose for which it was created. The same view was expressed by Drake Brockman, Judicial Commissioner, in Nilkanth v. Chavla opining that because of the prohibition about registering the document if registered in contravention to the statutory provision of Section 46 of the C. P. Tenancy Act, 1920, would be invalid."

It is held in 1961 J LJ 700 and 1974 RN 409 (High Court) that possession found illegal cannot be retained u/s 53A of the T. P. Act. 1960 MPLJ 230 (FB), states that transfer implies all transfers.

In the instant case, possession cannot be said to be validly obtained on the doctrine of part performance u/s 53A of the T. P. Act. Decisions relied by the learned counsel, Maruti Gurappa and Another Vs. Krishna Bala and Another, have no application. In such case only relief in equity can be granted to refund the consideration and not allow to retain possession.

A reference may also be made to 1989 R. N. 259. But this judgment does not take note of D. B. Decision i.e. 1975 MPLJ 651 which in turn has affirmed Sukhsen's case - a judgment by Hon'ble A. P. Sen, J. 1972 MPLJ 95, as he then was.

The judgment and decree as recorded in paras 38 to 43 except as indicated in para 13 of this judgment is confirmed. This appeal is dismissed with costs. Counsel's fee as per schedule.