

(1999) 10 MP CK 0060
In the Madhya Pradesh High Court
Case No : S.A. No. 292 of 1991

Ram Kishore

APPELLANT

Vs

Smt. Battoobai and another

RESPONDENT

Date of Decision : 27-10-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Madhya Pradesh Land Revenue Code, 1959 — Section 165(6)
Transfer of Property Act, 1882 — Section 53A

Citation : (2000) 2 MPLJ 148

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

Advocate : Manish Chawra, for the Appellant; Sanjay Sharma for respondent No. 1 and Ku. T. Tandon, Panel Lawyer for State, for the Respondent

Final Decision : Dismissed

Judgement

S.P. Khare, J.

This is defendant's second appeal u/s 100, Civil Procedure Code. The following substantial question of law was formulated by order dated 18-2-1992 while admitting this appeal:--

"Whether the finding that the appellant was not in possession of the suit property in part performance of the agreement Ex. D-1 is perverse in view of the facts and circumstances of the case."

Answer: No.

The facts relevant for the decision of the question referred above are that Tularam and Puran were Bhumiswamis of the land bearing Khasra No. 84/1 area 2 acres of village Rajon, Tehsil Babai, District Hoshangabad. They belonged to aboriginal tribe. They sold this land to plaintiff Battoobai, a member of the aboriginal tribe, by registered sale-deed dated 23-3-1985 (Ex. P-1). They had delivered possession of this land to defendant Ramkishore, who does not belong

to aboriginal tribe, in pursuance of the agreement to sell dated 4-1-1981 (Ex. D-1). The defendant claimed that he is entitled to retain possession of this land in part performance of contract as per section 53-A of the Transfer of Property Act. That has been negated by the trial Court and also by the first Appellate Court. The defendant has been directed to deliver possession of the land to the plaintiff.

There is a concurrent finding of fact that defendant Ramkishore is "Kahar" and he does not belong to aboriginal tribe as per notification issued u/s 165(6) of the M.P. Land Revenue Code, 1959 (hereinafter to be referred to as the Code). There is no permission of the Collector for the agreement to sell dated 4-1-1981 (Ex. D-1). Section 165(6) of the Code as amended from 29-11-1976 provides that the right of a Bhumiswami belonging to an aboriginal tribe (i) in such areas as are predominantly inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, shall not be transferred "nor it shall be transferable" either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification. By the notification dated 21-2-1977 published in M.P. Rajpatra dated 11-3-1977 areas comprised within the limits of Tehsil Hoshangabad have been declared as the area predominantly inhabited by aboriginal tribes. On the date this notification was issued Babai was also in Hoshangabad Tehsil and it became separate Tehsil from 29-3-1984. The date 26-1-1977 has been specified as the date from which this ban has been imposed. Even if it is assumed that Babai tehsil is not the area predominantly inhabited by aboriginal tribes, there is no permission of the Collector as per section 165(6)(ii) of the Code. That clause inter alia provides that the land shall not be "transferable" by a member of the aboriginal tribe to a person not belonging to such tribe without the permission of a Revenue Officer not below the rank of Collector.

By use of the word "transferable" in addition to the word "transferred" in clauses (i) and (ii) of sub-section (6) of section 165 of the Code it has been made clear that the legislative prohibition brings within its purview the "agreement to sell" also. Some confusion was sought to be created by raising an argument that the agreement to sell is outside the mischief of section 165(6) as it stood before 29-11-1976 and, therefore, the legislature intervened and by the clear and unequivocal language imposed a ban on the agreement to sell also. That is with the object of affording protection to the members of the aboriginal tribe from their exploitation by those persons who are not members of aboriginal tribe. Therefore, section 53-A of the Transfer of Property Act does not come to the rescue of the person who has obtained possession of the land in breach of the provision in section 165(6) of the Code.

In *Mewalal Kanhaiyalal Vs. Jankibai and Others*, the unamended section 165(6) of the Code was the subject matter of interpretation and it was held relying upon earlier decisions including the judgment of the Division Bench in *Panau vs. Ajitram*, 1975 MPLJ 651 that even an "agreement to transfer" should be read

within the meaning of word "transfer" and no delivery of possession can be permitted to be defended by invoking the doctrine of part performance. Such an agreement has been held to be void. There was a consensus of judicial opinion that the agreement to sell in violation of section 165(6) of the Code is also void and unenforceable and that has crystalised into the amended provision. Any agreement forbidden by law or if permitted it would defeat the provision of any law, such as section 165(6) of the Code is unlawful and void, within the meaning of section 23 of the Contract Act. There can be no specific performance of such contract nor can it be relied upon in equity for protection of possession as part performance of the Contract u/s 53-A of the Transfer of Property Act.

The defendant in the present case cannot use the agreement to sell as a shield to retain his possession. The question of law formulated in this appeal is answered accordingly. The view taken by the two Courts is unassailable. This appeal is dismissed.