

(1966) 04 MP CK 0022
In the Madhya Pradesh High Court
Case No : M.P. No. 7 of 1965

Rameshwar Dayal

APPELLANT

Vs

Board of Revenue, M.P., Gwalior and Others

RESPONDENT

Date of Decision : 25-04-1966

Acts Referred:

Madhya Bharat Land Revenue and Tenancy Act, 1950 — Section 92

Citation : (1967) JLJ 110 : (1967) MPLJ 165

Hon'ble Judges : M.A. Razzaque, J;H.R. Krishnan, J

Bench : Division Bench

Advocate : S.D. Sanghi, for the Appellant; W.Y. Pandey and Balwantsingh, for the Respondent

Final Decision : Allowed

Judgement

H.R. Krishnan, J.

This is a petition under Article 227 of the Constitution by the ultimate winning party in a revenue litigation who was, however, frustrated in execution by the view taken by the Board of Revenue that though another party, namely, the non-petitioner No. 3 Nasirkhan had taken part at different stages of the litigation still he was not bound by the decree of the lowest Court because he had not been originally a party there. The question for decision is really one but it can be set out in two different aspects; first, whether a party getting itself impleaded at his own instance on the off-chance of a favourable decision, can at a later stage finding the decision adverse be heard to plead that it is not bound by the decision because it was not originally a party, in other words, whether it can be allowed to approbate and reprobate in regard to the same matter at different times; secondly, when a Superior Court revives the decision of an inferior Court in appeal or revision, whether the restored decree is that of the lower Courts as it originally stood or whether it is that decree plus the imprimatur or seal of the superior Court. The difference can be very material where during this interval another party has come on record at his own instance claiming to be interested

even at the stage at which the original cause of action arose.

Though the questions are formulated somewhat theoretically their practical application becomes clear and vivid when the facts of this case are set out. In the village Shoukatganj in tahsil Jaora there is a holding about the extent and identity of which there is no dispute. It has been originally even during the rule of the Nawab of Jaora part of his private land with the present Petitioner as the shikmi. After 1947 it became the property of the ex-ruler of which he claimed to be the pakka tenant with the Petitioner continuing as the shikmi or sub-tenant. Sometime in the beginning of 1953 the Nawab dispossessed him whereupon the Petitioner sued for reinstatement u/s 92 of the Madhya Bharat Land Revenue and Tenancy Act before the Naib-Tehsildar. The Nawab who is the non-petitioner No. 2 here contested it alleging different grounds which were all rejected with the result the Naib-Tehsildar finally made an order on 26-6-1961 ordering reinstatement of the Petitioner and restoration of possession and grant of damages payable by the Nawab.

A matter of interest is that this process took about 8 years during which there had been on the one hand a remand in the revenue Courts and on the other a regular suit for permanent injunction by the Nawab in all of which the latter was unsuccessful.

Thereupon the Nawab filed an appeal (what is usually called a first appeal in the revenue Courts) before the Sub-Divisional Officer. This by itself is something of a routine but there was one unusual feature. Non-petitioner No. 3 Nasirkhan who at this moment makes his first appearance in the story prayed that he should be impleaded as an Appellant even though he had not been either impleaded by the Petitioner, nor had sought to intervene before the Naib-Tehsildar. One of the defences set up by the Nawab was that the land had been sold for arrears of land revenue. Now Nasirkhan's story was that he was in possession and had been in possession from before the Petitioner's suit by settlement from the Nawab. The point of the story is that this prayer was granted and Nasirkhan along with the Nawab was allowed to become a party and prosecute the appeal. As it is necessary to grasp the consequence of this order we note that whatever the interests of Nasirkhan he was not bound to seek to be impleaded; he could have kept out of the litigation and raised his claim for what it was worth as a third party at the time of the execution of the order restoring possession. When, on the other hand, he prayed for being made a party it was open to the Court either to grant his request or refuse to do it leaving it to him at the appropriate moment to pursue the remedies open to third parties. As it was, Nasirkhan insisted upon becoming a party and the Court granted his request. Further refinements were possible; it was open to the intervener either to ask for a remand so as to enable him to place his case more fully before the lower Court, or to seek leave to adduce further evidence in the first appellate Court or if satisfied that the record already contained materials that he wanted to place before the Court, to proceed without a prayer either for remand or for further

evidence. As it was, Nasirkhan chose the last course. Now the appeal prosecuted by the Nawab and Nasirkhan (non-petitioners 2 and 3) was allowed and the Naib-Tehsildar's order of restoration along with consequential order for damages was set aside.

After this the Petitioner as the original Plaintiff went up in second appeal to the Commissioner impleading the Nawab and Nasirkhan as Respondents. Now this appeal was also allowed and the order of the Naib-Tehsildar restoring possession and granting damages was revived by the Commissioner with the difference that this revival was with Nasirkhan as a party and in rejection of Nasirkhan's plea regarding a state of affairs which according to him existed even during the proceedings before the Naib-Tehsildar. After this the Nawab and Nasirkhan together went up in revision before the Board of Revenue praying that the Commissioner's second appellate order should be set aside and the Sub-Divisional Officer's first appellate order should be revived. This, however was refused and the Board in exercise of revisional powers refused to interfere. The result was that the original order of the Naib-Tehsildar directing the restoration of possession and the payment of compensation by the Nawab stood with the imprimatur of the Commissioner and the Board made in the proceedings to which Nasirkhan was also a party.

One would have normally expected that the Petitioner would hereafter have easy sailing in getting the possession and either receiving the damages from the Nawab or realising it through the revenue Courts. He accordingly applied for execution of the order, namely, of the Board affirming that of the Commissioner which in its turn had affirmed that of the Naib-Tehsildar. At this stage Nasirkhan appeared as if he was a third party and urged that he was in possession by a settlement from the Nawab granted even before the proceedings u/s 92 were started and as he had not been a party before the Naib-Tehsildar he could not be ejected. The Naib-Tehsildar pointed out that Nasirkhan having in any case invited himself as party at the later stages of the litigation and could not be heard to say that he was not bound by the order. Accordingly he rejected the objection. Now the dispute went up the ladder of the appellate tribunals, the Sub-Divisional Officer setting aside the Naib-Tehsildar's order and upholding Nasirkhan's objection and the Commissioner in his turn setting aside the Sub-Divisional Officer's order and rejecting Nasirkhan's objections. On this Nasirkhan again went to the Board in revision from the order of the Commissioner. The same tribunal which had originally dismissed Nasirkhan's revision from the Commissioner's appellate order and held him liable to be removed in accordance with the Naib-Tehsildar's order now held that he was not bound by the judgment of the Naib-Tehsildar and allowed the revision. It restored the first appellate order of the Sub-Divisional Officer. The key to this extra-ordinary decision is in Paragraph 5 of the Board's order dated 27th October 1964; the wording is somewhat obscure but the idea seems to be that to bind Nasirkhan it was not sufficient that he had been impleaded on his own request and was permitted to file the appeal and take part in the subsequent litigation;

This, it goes without saying is not enough, as there has been no judicial decision on this plea which can be said to affect the decree that was proposed to be executed against him. The appellate Courts and the revision Court cannot be said to have accepted the applicant's plea as is evident from the fact that they did not modify the original order. Besides, the applicant's plea was that he was in possession of the land since long, and it was not his case that he had entered into possession after acquiring a title in the land either during the pendency of the suit or after the decree was passed. This it was up to the non-applicant No. 2 to raise this plea in the course of the execution proceedings and to prove it duly if he wanted the decree to be executed against the applicant too.

In arriving at this extra-ordinary conclusion the Board seems to have been guided by what it understood as an analogy between the instant case and the one reported in *Ishvar Sangappa Gurlingappa Vs. Ramrao Bhagwantrao Inamdar*, .

The result of the entire process is that the present Petitioner who had won in the revenue Courts and who had in three out of the four stages confronted Nasirkhan on the same problems and satisfied those Courts that Nasirkhan's claim was not worth accepting was still prevented from executing the decree as a result of the Board's permitting Nasirkhan now to claim the status of a third party not bound by the Naib-Tehsildar's order.

The Petitioner has come under Article 227 alleging that the Board's decision was not only unjust but also against the accepted principle that a party may not be allowed to approbate and reprobate and having elected one course in the hope of securing a favourable decision be permitted to adopt another course when he found that it was not paying. Accordingly he wants this Court to order that the Board's decision in revision is illegal and that once Nasirkhan had taken part in the litigation he is bound by it and cannot in execution claim the status of a third party. As against it, the opposite party Nasirkhan takes the position that after all the Commissioner has revived the order of the Naib-Tehsildar and in that order there is no mention of Nasirkhan; therefore, whatever he might have done at later stages of the litigation, the order now in force does not mention his name and he is not bound by it. He relies upon the ruling reported in *Ishvar Sangappa Gurlingappa Vs. Ramrao Bhagwantrao Inamdar*, and claims a position in the present litigation similar to that of defendant No. 3 in the other to which points of similarity or otherwise we shall in time revert.

The main problem is what has been formulated, firstly, whether a party having elected to implead himself in a litigation can when he finds the decision going against him just dissociate himself and claim that he was not a party. If such an attitude is permitted legal proceeding would become a caricature and would be nothing short of what has been described in English Courts as "Legalistic fraud". The principles applicable have been repeatedly explained under the heading of the formula that a party may not approbate and reprobate and once has elected a particular course should be bound by it. The best exposition is what is

contained in Halsbury's Laws of England (Third Edn.) Vol. 15, page 171, Paragraph 340:

Approbation and reprobation on the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions, first, that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and, second, that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

This is similar to the principle laid down in the old Nagpur ruling reported in *Raghubarprasad v. Sattoo* AIR 1926 Nag. 164. There a party insisted upon an adjudication of an issue which on one view might have been unnecessary and the adjudication having been adverse to him he wanted to get rid of it on the ground that it was really unnecessary. The Court held-

Neither party who has taken the chance of a favourable decision, when defeated, can ask reversal on the ground that the issue was not properly triable in that action.

A position converse to this arose in the case reported in AIR 1927 108 (Privy Council). The principle, however, has been made clear. There a party sought to be impleaded but was refused and accordingly the decision was not binding on him. If, however, the prayer for being impleaded had been granted, the decision would have been binding.

The only proper view in this case is that Nasirkhan was bound by the decision passed against him by the revenue Courts. His attitude is so grossly inequitable that to encourage it is against all the canons of justice and the principle that the Court should as far as possible encourage honesty and fairplay and discourage tricks played on them by parties who take conflicting positions as it appears to suit them. If Nasirkhan had not entered the litigation and had come up at the time of the execution, the position would have been quite different. The Petitioner would either have succeeded in showing that Nasirkhan had after all derived from the Nawab, in which case of course he would have been turned out of the property without any more ado; if the matter was complicated all that would have happened was a claim case by Nasirkhan as a third party and a title suit as the case may be, by either party according as the claim was allowed or disallowed. All this would have happened without any difficulty of limitation. But Nasirkhan chose the alternative of seeking leave of the Court to file an appeal jointly with the Nawab and at subsequent stages came up with the appeals and revisions as suited him either on his own or along with the Nawab who in any case was also impleaded. Having done this he confronted the Petitioner at all the stages and in spite of initial success in the first appeal ultimately lost both in

second appeal and in revision. It is surprising that the Board should have persuaded itself that in spite of this he was not bound by the decree.

One ruling that seems to have weighed much with the Board is the Bombay decision already referred to. There a party impleaded as Defendant No. 3 at a subsequent stage as the purchaser of the suit property was held not to be bound. The basic difference is that in that litigation this Defendant No. 3 purchased the property subsequent to the decree about the execution of which the controversy arose. In the instant case Nasirkhan's account is that he has been in possession from before the order of the Naib-Tehsildar and in fact from before the initiation of the proceedings u/s 92 before him.

A somewhat ingenious argument is advanced that after all the Additional Commissioner and the Board had directed the revival of the Naib-Tehsildar's order without any express modification. Since that order did not originally contain Nasirkhan's name, though he was a party to the litigation at the time of the order of the superior tribunals he is not bound by it. We do not agree. The order in force now is not that of the Naib-Tehsildar simpliciter but that order with the seal of confirmation put on it by the superior Courts in the proceedings to which Nasirkhan was a party on his own choice. When this aspect of the matter is visualized the argument becomes almost childish. In fact it is what the English Courts call "estoppel by record" and what we would call *res judicata*. Certainly it is not the species of *res judicata* covered by Section 11, CPC but one of the same genus analogous but lying outside its strict limits. It is unnecessary to expand on this problem except to note that Courts have held repeatedly that Section 11 is not exhaustive and there are many types of *res judicata* not falling strictly within its ambit. In fact having been a party to the litigation Nasirkhan's attempt to wriggle out of it in execution proceedings is barred by the general principles of *res judicata*.

Thirdly, a new point is sought to be made by the non-petitioner No. 3 Nasirkhan at this stage for the first time, namely, that the Naib-Tehsildar himself might have been incompetent and without jurisdiction to try the suit. The legal position is simple. Section 92 like the previous section really empowers the Tehsildar to start proceedings for the restoration of possession. However the Government is competent by general or special orders to authorise the Naib-Tehsildars to exercise the powers statute has conferred on the Tehsildars. Whether this particular Naib-Tehsildar was competent to entertain the suit in 1953 would depend upon whether at that time there was such an order. Had the non-petitioner at any earlier stage raised this question it should have been perfectly easy either for the Petitioner who was the Plaintiff there or for the Court itself to satisfy him of the gazette notification. Actually, keen as has been the contest no doubt was ever thrown upon the existence of such an order. Everybody including Nasirkhan proceeded on the assumption that the Naib-Tehsildar had been empowered. In fact, even in his return in this Court there is no suggestion whatsoever about the possible incompetence of the Naib-Tehsildar and the

absence of the Government order empowering him. It is just at the final stages of the argument that such a suggestion has been made. Certainly we cannot entertain in a proceeding under Article 226 or 227 any such plea which has not been raised before the subordinate tribunals. This ground is therefore rejected.

In the result the petition is allowed and it is ordered that the Board's decision in the execution case dated 27th October 1964 to the effect that Nasirkhan non-petitioner No. 3 is not bound by the Naib-Tehsildar's order is held to be illegal. He is certainly bound by it and in fact any question by him in regard to the effect of that order is barred by the principles of res judicata.

The Petitioner shall get his costs from the constesting non-petitioner No. 3 Nasirkhan of this petition along with hearing fee Rs. 200 (Two hundred) only.