

(1983) 07 PAT CK 0005

In the Patna High Court

Case No : Appeal From Appellate Decree No. 663 of 1970

Shrimati Budhni Mahotain and Another

APPELLANT

Vs

Gobardhan and Bhogta @ Gobra and Others

RESPONDENT

Date of Decision : 19-07-1983

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 46, 46(b)
Constitution of India, 1950 — Article 19(1)(f)

Citation : (1984) PLJR 399

Hon'ble Judges : Satya Brata Sanyal, J;N.P. Singh, J

Bench : Division Bench

Advocate : Kameshwar Prasad, Pradeep Kumar and Sunil Kumar Sinha, for the Appellant;

Judgement

Satya Brata Sanyal, J.—This second appeal is by defendant Nos. 2 to 5, directed against the concurrent judgment of the courts below declaring void and inoperative the sale deed dated 12.9.1958, Ext. 8, through which they acquired the Scheduled properties from defendant No. 1, in a suit instituted by the plaintiff-respondents seeking declaration that the purported sale deed is violative of section 46 Proviso (b) of the Chotanagpur Tenancy Act (hereinafter referred to as "the Act") and recovery of possession after eviction of the appellants. Both the courts below held that the defendant-appellants are in illegal possession of the Scheduled properties by virtue of void and inoperative sales executed by defendant No. 1 in favour of defendant Nos. 2 and 3, inasmuch as, even though the vendor and the vendee are members of the Scheduled caste, the transfer has been effected without the previous sanction of the Deputy Commissioner in violation of the provisions of section 46 of the Act. The courts below after having so held, decreed the suit of the plaintiffs seeking recovery of possession after evicting the defendant-appellants, from the suit laid. The courts below directed that the plaintiffs be treated as joint owner of the suit plots with defendant No. 1 and remain in joint possession of the disputed plots with defendant No. 1.

2. Since decision of this case turns round on a pure question of law, it is not at all necessary to set out in detail the respective cases of the parties. Suffice it to say, admittedly all the defendants are members of the scheduled castes. It is also not in dispute that the defendant-appellants in pursuant to their purchases are in possession of the disputed plots. The said transfer is of the year 1958. Both the courts have found that defendant No. 1 is not an imposter and the plaintiffs are the agnates of defendant No. 1. These are the necessary facts to be borne in mind for the decision of the legal question involved in this suit.

3. Mr. Kameshwar Prasad, learned counsel appearing for the defendant-appellants contended that the sale deed, Ext. 8, dated 12.9.1958 is not void and inoperative inasmuch as section 46 proviso (b) of the Act, is violative of Article 19(1)(f) of the Constitution of India. In short, he contended that parties being members of scheduled castes, any transfer of land by sale, exchange, gift, will or lease by them in the year 1958 cannot be restricted by section 46 of the Act, by any Act of Parliament or Legislature in view of Article 19(5) of the Constitution of India, as it stood prior to the Constitution (44th Amendment) Act 1978, inasmuch as operation of any existing law imposing reasonable restriction to the exercise of freedom engrafted under Article 19(f) can be confined to scheduled tribes only.

4. The Act was passed in the year 1908. Section 46 of the Act underwent many amendments, The Section originally stood as hereunder:--

46(1). No transfer by a raiyat of his right in his holding or any portion thereof,

(b) by mortgage or lease, for any period expressed or implied, which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement, shall be valid to any extent; provided that a raiyat may enter into a bhugut bandha mortgage of his holding or any portion thereof for any period not exceeding seven years.

(2) No transfer by a raiyat of his right in his holding or any portion thereof shall be binding on the landlord, unless it is made with his consent in writing.

(3) No transfer in contravention of sub-section (1) shall be registered, or shall be in any way recognised as valid by any court, whether in the exercise of civil, criminal or revenue jurisdiction.

(4) At any time within three years after the expiration of the period which a raiyat has, under this section transferred his right in his holding or any portion thereof, the Deputy Commissioner may, in his discretion, on the application of the raiyat, put the raiyat into possession of such holding or portion in the prescribed manner.

(5) Nothing in this section shall affect the validity of any transfer (not otherwise invalid) of a raiyat's right in his holding or any portion thereof made bona fide before the first day of January, 1903.

The section was amended in the year 1938. The amendment relevant for the purpose of this case is as follows:--

46(1) No transfer by a raiyat of his right in his holding or any portion thereof shall be valid to any extent except as provided in this section.

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(3) An occupancy raiyat, who is an aboriginal or a member of a scheduled caste, may transfer his right in his holding or a portion of his holding by sale or exchange to another aboriginal or to another person who is a member of a scheduled caste, as the case may be, and who is resident within the local limits of the police station area within which the holding is situate and with the sanction of the Deputy Commissioner, by gift or will to a near relative without limitation of residence.

(4) (a) An occupancy raiyat, who is not an aboriginal or a member of scheduled caste, may transfer hit right in his holding or any portion thereof to any person who is resident within the local limits of the police station area within which the holding is situate by sale, exchange, gift, will, mortgage or lease.

(b) A non-occupancy raiyat, who is not an aboriginal or a member of a scheduled caste, may transfer his right in his holding or any portion thereof to the same extent as an aboriginal raiyat or a raiyat who is a member of a scheduled caste may transfer his right in his holding or portion thereof in accordance with clauses (a) and (b) of sub-section (2).

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(10) Nothing in this section shall affect the validity of any transfer, nor otherwise invalid, of a raiyat's right in his holding, or any portion thereof, made bonafide before the first day of January, 1903.

The section again was amended in the year 1947 and the relevant amendment is as hereunder:--

46. (1) No transfer by a raiyat of his right in his holding or any portion thereof,

(b) by mortgage or lease, for any period, expressed or implied which exceeds or might in any possible event exceed five years, or

(b) by sale, gift or any other contract or agreement, shall be valid to any extent;

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Provided further that--

(a) an occupancy raiyat who is an aboriginal may transfer with the previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift or will to another aboriginal who is a resident within the local limits of the area of the police station within which the holding is

situate;

(b) an occupancy raiyat who is a member of the scheduled caste may transfer with the previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift, will or lease to another person who is a member of the scheduled caste and who is a resident within the local limits of the district within which the holding is situate; and

(c) an occupancy raiyat who is not an aboriginal or a member of a scheduled caste, may transfer without the sanction of the Deputy Commissioner his right in his holding or any portion thereof to another person, who is resident within the local limits of the district in which the holding is situate.

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(3) No transfer in contravention of sub-sec. (1) shall be registered or shall be in any way recognised as valid by any court, whether in exercise of civil, criminal or revenue jurisdiction.

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(6) In this section, the expression "aboriginal" includes any person declared by the State Government, by notification, to be an aboriginal for the purpose of this section and the expression "scheduled caste" means any caste declared by the State Government, by notification to be a scheduled caste.

In the year 1955, by Bihar Act XX of 1955, in place of the words "an aboriginal", the words "a member of the Scheduled tribe" was inserted in proviso (a) and in proviso (b) for the words "Scheduled Caste" in the said proviso ""Scheduled caste and backward classes" were substituted. There have been few more amendments by Bihar Act 11 of 1976, with which, I will not be concerned in the present case. The two provisos (a) and (b) of section 46(1) as it stands in the year 1976 are as hereunder:--

46(1).....

(a).....

(b).....

Provided further that:--

(a) an occupancy-raiyat who is a member of the Scheduled Tribes may transfer with the previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift or will to another person who is a member of the Scheduled Tribes and who is a resident within the local limits or the area of the police-station within which the holding is situate;

(b) an occupancy raiyat who is a member of the Scheduled Castes or Backward Classes may transfer with the previous sanction of the Deputy Commissioner his right in his holding or a portion of his holding by sale, exchange, gift, will or lease

to another person who is a member of the Scheduled Castes or, as the case may be Backward Classes and who is a resident within the local limits of the district within which the holding is situate.

From a perusal of the amendments aforesaid of section 46 of the Act, it is manifest that on the date the Constitution of India came into force, the right to transfer land by any mode was restricted and regulated by the Act in relation to aboriginals and Scheduled Castes and in the year 1955, the said restriction was extended to Schedule Castes and Backward Classes as well.

5. Relevant provision of Article 19 before and after Constitution 44th Amendment, 1978 read as hereunder:--

19. (1) All citizens shall have the right:--

(a).....

(b).....

(c).....

(d).....

(e).....

(f) to acquire, hold and dispose of property; and

(g).....

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(5) Nothing in sub-clauses (d), (e) and (f) of the said clauses shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

After Constitution 44th Amendment Act 1978;

19(1) All citizens shall have the right:--

(d) to move freely throughout the territory of India

(e) to reside and settle in any part of the territory of India; and

(f)

(g) to practice any profession, or to carry on any occupation, trade or business.

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(5) Nothing in sub-clause (d),

(e)of the said clause affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing reasonable

restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interest of the general public or for the protection of the interests of any Scheduled Tribes.

6. In support of the point formulated, Mr. Kameshwar Prasad contended that 46(1) Proviso (b) of the Act abridges the fundamental rights of Scheduled Castes to deal with their properties as they like. The restriction sought to be imposed by the Act is unreasonable as such the sale deed executed by defendant No. 1 in favour of the appellants is valid, legal and very much operative in law. Learned counsel refers to the case of Bhagaran Thakur v. Kewal Singh (1969 B.L.J.R. 134). A Full Bench decision of this Court to fortify his submissions. Nobody appears for the respondents in this appeal.

7. As it has been noticed earlier, section 46(1) Proviso (b) so far as it relates to Scheduled Caste is a pre-Constitution enactment. If the said enactment in force is found to be inconsistent with the provisions of Part-III of the Constitution of India at the commencement of the Constitution, to the extent of inconsistency, the enactment is void. The true effect of Article 13 is beyond controversy now. Article 13(1) in relation to Pre-Constitution enactment is to render an Act inconsistent with fundamental right, inoperative to the extent of inconsistency. "It is overshadowed by the fundamental right and remains dormant but is not dead". The Act is not void ab-initio on account of the inconsistency with Article 13(1) of the Constitution as they were passed by competent authority. Article 15(1) "only nullified them and made them ineffectual and nugatory and devoid of any legal force or binding effect." The essential and vital difference between Article 13(1) and 13(2) is, therefore, in the former case the Pre Constitution "Act operated for some time and for certain purpose" whereas in the later ewe, post Constitutional Act suffers from voidness from the very inception as it has been enacted in defiance of prohibition to make them. (See Keshavan Madhava Menon Vs. The State of Bombay, ; Behram Khurshed Pesikaka Vs. The State of Bombay, ; Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, ; Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, ; Deep Chand Vs. The State of Uttar Pradesh and Others,).

8. Bearing in view the provisions of Article 13(1) of the Constitution of India, it is now to be seen whether the restriction imposed u/s 46 (1) Proviso (b) in the matter of acquisition, and disposal of property by Scheduled Castes in the year 1958, is void and inoperative, so as to confer no right and title to the appellants over the property in dispute. Article 19(1)(f) of the Constitution as it stood prior to the Constitution 44th Amendment 1978, conferred fundamental right to every citizen the right to acquire, hold and dispose of property. Clause (5) of Article 19 of the Constitution as it stood then envisages that the operation of any existing law in so far as it imposes or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub clauses is legal and valid if it is enacted in the interest of general public or for the protection of the interest of any in any scheduled tribe. It is, therefore,

manifest that Article 19(1)(f) as it stood then being fundamental right on the question of property right conferred on the citizens of India unrestricted right to acquire, hold and dispose of the property with the only restriction imposed upon such right as is envisaged under clause 5 of the said Article "in the interest of general public or for the protection of the interest of any scheduled tribe." This Court in the case of Bhageran Thakur v. Kewal Singh and others (supra) held that:

the Constitution makers also conferred, therefore social preferential treatment in respect of the provisions of section 19(1)(f) only on the scheduled tribes. The Bihar Legislature, however, oblivious of the limited restriction under clause (5) lumped together "Scheduled tribes, Schedule castes and Backward classes" under Chapter VIIA of the Bihar Tenancy Act, and applied the restrictive provisions of sections 49C and 49M to backward classes also. If the Constituent Assembly intended that backward classes also should be put on the same footing as the scheduled tribes under Article 19(1)(f), there was nothing to prevent the makers of the Constitution from incorporating the expression "Backward Classes" also with "Scheduled Tribes", as has been done in several Articles, such as Articles 15 and 16.

After having set out the said reasons, the Full Bench of this Court held that:

Section 49C of the Bihar Tenancy Act, in so far as it relates to the interest of the members of the backward classes, is not in consonance with Article 19(1)(f) of the Constitution, and is not protected by clause (5) of that Article, and must be struck down as invalid. As a logical corollary, the absolute prohibition against sale contained in section 49M by a court in execution of a decree or passing a decree to that effect relating not merely to a raiyati right but all classes of tenancy, is still more unreasonable and must be held ultra vires Article 19(1)(f).

It may be stated here that the words "protected tenant" was inserted in section 49C of the Tenancy Act by Bihar Tenancy Amendment Act, 1955 (in short "the Bihar Act 1955") and, therefore, a post-Constitution enactment. The protected tenant was defined u/s 49B also by the said amendment which expression embraced scheduled castes, scheduled Tribes and backward classes. As the aforesaid amendment was post-Constitution Act, their Lordships of the Full Bench held the amendment Act to be void being made in defiance of the prohibition to make them by the Constitution of India. In the instant caste, even though the Act is pre-Constitution but on the same parity of reasons on the commencement of the Constitution, the restrictions imposed by 49(1) Proviso (b) in relation to members of the Scheduled castes became "nullified and devoid of any legal force or binding effect." As a corollary, the impugned sale deed, Ext. 8 did not suffer from any vice of the restriction imposed by the Act.

9. The validity of section 46 in different context came to be considered by another Full Bench of this Court in the case of Ramdayal Sahu Vs. Hari Shankar Lal Sahu and Others, . What was being considered in the said case was the

restrictions upon the power of a seller to sell his property only to a resident within the local limits of the districts in which the holding is situate. The Full Bench held that section 46(1)(C) and section 47 of the Act is so far as it restricts the sale of a raiyati holding belonging to a person of a class other than Scheduled castes, Scheduled tribes and backward classes to the resident within the district in which the holding is situate, as well as the general restriction upon the power of a court to put to auction sale in execution of a decree even the agricultural land of a person belonging to classes other than scheduled tribes, scheduled castes and backward classes is invalid and ultra vires Articles 19(1)(f) of the Constitution. The Full Bench did not make any pronouncement as to whether the restrictive provisions on the power of transfer of scheduled tribes, scheduled castes and backward classes were reasonable or unreasonable. On the contrary this point was left open. In the words of their Lordships "it is not necessary to make any definite pronouncement." This case, therefore, is no authority on the question which falls for my decision in the present case.

10. Before I part with this judgment I must observe that, in this case the court is not called upon to decide the effect of the Constitution 44th Amendment Act, 1978. However, it was held in the case of Mahendra Lal Jaini v. State of Uttar Pradesh and others (supra) that when the pre-Constitution laws become inconsistent on the coming into force of the Constitution, the effect of the amendment of the Constitution so far a pre-Constitution law is concerned would be "to far a pre-Constitution law is concerned would be" to remove the shadow cast on it by this declaration. The law thus revives. However, On the case of the second clause, applicable to post Constitution laws, the Constitution does not recognise their existence, having been made in defiance of a prohibition to make them. Such defiance makes the law enacted void. In their case, therefore, there can be no revival by an amendment of the Constitution, though the bar to make the law is removed so far as the period after the amendment is concerned."

11. The sale deed dated 12.9.1958 (Ext. 8) which was declared void by the courts below, is, therefore, not correct on the contrary, the said sale deed is very much legal, operative and the appellants possession of the property pursuant to the said legal transfer is also valid in law. In the result, the appeal is allowed and the judgment and decree of the courts below are set aside. The plaintiffs respondents are not entitled to any relief whatsoever and their suit fails. There shall be no order as to costs.