

(1958) 04 MP CK 0019

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 538 of 1956

Smt. Sonabai

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 01-04-1958

Acts Referred:

Central Provinces Tenancy Act, 1920 — Section 40
Constitution of India, 1950 — Article 226, 227
General Clauses Act, 1897 — Section 6
Madhya Pradesh Land Revenue Code, 1954 — Section 169(3)

Citation : AIR 1958 MP 368 : (1958) ILR (MP) 137 : (1958) 3 MPLJ 452

Hon'ble Judges : M. Hidayatullah, C.J;B.K. Choudhuri, J

Bench : Division Bench

Advocate : A.P. Sen, for the Appellant; M.R. Bobde and P.R. Padhye, (for No. 3) and S.B. Sen, (for Nos. 1 and 2), for the Respondent

Final Decision : Allowed

Judgement

This is a petition under Arts. 226 and 227 of the Constitution of India directed against an order passed by the Board of Revenue on 11th January, 1958 (Annexure 8).

The petitioner Sona Bai Balwate was the occupancy tenant of a field bearing khasra No. 276, -which had a garden and a bungalow upon it. The third respondent Gyarsiram made an application on 21-1-1952 u/s 40 of the C. P. Tenancy Act for a declaration that Sona Bai was habitually subletting this field and that he was thus entitled to be declared an occupancy tenant of the field.

According to him, the field had been sublet for the statutory period and that he himself was the sub-tenant for the agricultural years 1949-50, 1950-51 and 1951-52. The case was sent for enquiry and report to the Naib-Tahsildar, who reported on 29-6-1953 that on the date of the application (21-1-1952) Gyarsiram was not a tenant "but a trespasser and that he was not entitled to make an "application u/s 40 of the C. P. Tenancy Act.

The papers were placed before the Sub-Divisional Officer, Harda, who held by his order dated 31-8-1953 that Gyarsiram was a tenant and was thus entitled to make the application. On appeal the Deputy Commissioner, Hoshangabad, held by his order dated 26-3-1954 that there was no proof that Gyarsiram was given the lease for the year 1951-52 and thus he was not entitled to maintain the application.

Gyarsiram thereupon appealed to the Board of Revenue, which in view of the decisions of this Court conceded that it was a condition precedent to the making an application under S, 40 of the Tenancy Act that the applicant should be a sub-tenant on the date of the application. The learned President of the Board of Revenue felt, in view of the contrary findings on the subject given by the Sub-Divisional Officer and the Deputy Commissioner, that it was necessary for him to give a finding once again.

The learned President considered the matter and gave a finding that Gyarsiram was a subtenant on the date he had made the application. He, therefore, set aside the order of the Deputy "Commissioner, Hoshangabad, and restored that of the Sub-Divisional Officer. The present petition has been filed against the order of the Board of Revenue after an application for review filed before it had been dismissed.

It was contended before us by Shri A.P. Sen, who appeared for Sona Bai, that the finding is based on no evidence whatever and that we are entitled to reverse the decision of the Board of Revenue under our powers granted by Article 227 of the Constitution, if not by a writ of certiorari issued under Article 226. It was also contended on behalf of Sona Bai that the learned President, Board of Revenue did not consider the bar against such declarations imposed by Section 40 of the C. P. Tenancy Act. now by Section 169 (3) of the Madhya Pradesh Land Revenue Code.

The learned counsel drew our attention to a decision of the Board of Revenue given by the President reported in Smt. C. A. Clarke v. Smt. Renukabai 1958 Nag LJ 90 (A), in which he had held that under the explanation to Section 41 (3) no declaration could be granted against a woman. We shall take the question of law subsequently. We have first to decide whether it is open to us to review at large once again the evidence to find out whether the finding of the Board of Revenue is correct or not,

Normally, this Court does not examine under Article 226 of the Constitution a finding of fact and the material on which it is based. But there are cases in which a finding is necessary to determine whether the Board of Revenue had jurisdiction to deal with the matter at all. This was a finding of that character. It was conceded by Shri Bobde that unless Gyarsiram was a sub-tenant on the date he filed his application u/s 40 of the C. P. Tenancy Act the revenue Courts would have no jurisdiction to make the declaration in his favour. It was laid down by Farwell, L. J. in Rex v. Shoreditch Assessment Committee, Morgan, Ex Parte 1910

2 KB 859 (B), as follows :

"No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction; such question is always subject to review by the High Court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise.

Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it; it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limits at its own will and pleasure -- such a tribunal would be autocratic, not limited -- and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or facts; a Court with jurisdiction confined to the City of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe".

In our opinion, the matter here must be viewed from this angle, if not under Article 226 of the Constitution, at least under Article 227 in our general superintendence and visitorial jurisdiction of the High Court,

The witnesses examined on behalf of Gyarsirara were mainly Gyarsiram and a friend of his by name Jagdish Narain. Neither of them deposed to the grant of a sub-lease to Gyfiraram for the year 1951-52. Jagdish Narain stated that he had gone with Gyarsiram somewhere in January, 1952 with Rs. 800/-, which were not received by Sona Bai. He does not speak of any lease having been granted before that date.

There is not a single sentence in his deposition that he was present at the time the alleged sub-lease was granted to Gyarsiram by Sona Bai or anyone acting with authority on her behalf. All that he says is a general assertion that for the year 1951-52 Gyarsiram had taken the lease for Rs. 550/-. It is curious that Gyarsiram also did not depose to any meeting between him and Mst. Sona Bai at which a grant of a sub-lease was made to him. In the opening portion of his deposition he only says, that he had the lease for 1951-52. That, in our opinion, was not sufficient for the purpose of establishing a sub-lease when it was denied by Sona Bai.

The only evidence which has been led by these two persons is about an incident at which Gyarsiram went to Sona Bai with Rs. 800/-, representing Rs. 250 arrears of the previous years and Bs. 550/- representing the lease money for the year 1951-52. In the same breath both the witnesses say that Sona Bai did not accept the money from them, which shows that at least on that date Sona Bai did not accept him as a sublessee.

It, therefore, remained of Gyarsiram to prove that he obtained the lease on any earlier occasion from Sona Bai or someone acting on her behalf with authority. . Of that, there is not the slightest trace in the evidence of the witnesses cited on behalf of Gyarsiram. Shri Bobde relied upon S 109 of the Evidence Act to show that the relationship which had been established for the year 1950-51 must be deemed to have continued and that Gyarsiram must therefore be considered a tenant, unless the contrary was proved.

Apart from the fact that proof of a subtenant is explicitly required for the application of 3. 40, that section is meant to prevent tenants mortgagees, and lessees from denying their character as such without there being proof of something else. That section is not meant to create a disability for the owner of the property to prove the negative. The burden, therefore, was upon Gyarsiram to prove by affirmative evidence that he had received the field as a sub-tenancy for the year 1951-52. In this he signally failed.

The learned President, Board of Revenue, felt it as if it were his duty to reach some conclusion other than the Deputy Commissioner's. In doing so, the President did not examine the evidence at all. He went on probabilities. To quote his very words :

"There are obvious difficulties in deciding a question of fact in a case of this nature where one party has been proved to" be a liar and the other has at least incentive to lie. As learned counsel for appellant has pointed out, one must go on the probabilities. It appears to me that respondent would have been more likely, as appellant has alleged, to make the payment of previous arrears a condition precedent to granting a fresh lease than to terminate the lease and rely on the civil Court for recovery of the previous arrears.

Appellant is not of such a status as would justify over-much confidence in recovery proceedings through a civil Court. It is this fact which, in the last analysis, influences me to believe his story. In all probability respondent would have granted a fresh lease, mainly for the purpose of recovering previous arrears, rather than have terminated the lease, I, therefore, believe appellant's story that a fresh lease was granted for the year in question. It follows that on the date of making application he was a sub-tenant and not a tres-passer."

This is hardly a decision on a question of fact on which two Courts below had reached conflicting decisions. There is no examination of the evidence to find out whether there was any proof of a sub-tenancy at all. There are a few generalities, but reference to the- evidence there is none. This reference, indeed, could not be made, because the entire evidence of Gyarsiram just lacked this little particular. No wonder, therefore, [hat the President, Board of Revenue, generalized and decided it on ordinary probabilities rather than on any reference to the sworn testimony of witnesses.

The same attitude was once again adopted by the learned President when the question came up before him for review. In paragraph 4 of his order passed on

review he stated that Sona Bai's contention could not be heard because she had not mentioned this ground in the memorandum of appeal, forgetting that she was not the appellant but the respondent and that the memorandum of appeal proceeded from Gyarsiram and not from Sona Bai.

In our opinion, the fundamental finding with regard to the sub-tenancy of Gyarsiram was defective, because it was based on no evidence at all. Once that finding is out of the way, Gyarsi-ram's claim to be declared an occupancy tenant of this field could not be sustained, not only on the view of this Court but also on the views consistently taken by the Board of Revenue itself.

We think that though we cannot interfere with a finding of fact of this character, which is fundamental to jurisdiction, under our powers of issuing a writ of certiorari, we have ample power under Article 227 of the Constitution to rectify a defect of this character. This is an error of jurisdiction on the face of the record, and, in our opinion, ought to be corrected. We accordingly hold that Gyarsiram had no locus standi to file the application which he did on 21-1-1952.

That, however, is not the end of the matter. u/s 40 of the C. P. Tenancy Act there was an explanation that a presumption of habitual sub-letting need not necessarily be drawn in the case of a woman. That explanation was strictly interpreted by the Board of Revenue itself in favour of a woman, particularly a pardanashin woman like Sona Bai. The learned President; Board of Revenue, did not advert at all to the ruling of the Board of Revenue on this point,

He went by the reversal of the finding of the Deputy Commissioner and restored the order of the Sub-Divisional Officer, without considering what the law provided or inhibited in such matters in relation to women. By the time he had passed his order the Madhya Pradesh Land Revenue: Code had come to be passed, and it provided an express prohibition against the granting of declarations against women.

It was contended by Shri Bobde that the law applicable would be the law as laid down in Section 40 of the C. P. Tenancy Act, and he drew our attention to the provisions of the General Clauses. Act. No doubt, pending litigation is not affected by any change of law, except in procedural matters, and substantive rights are not taken away, unless they are expressly included. That, undoubtedly, is a general rule of construction of statutes; but where the law has been altered in such a way as to create a rule of evidence or a rule of decision, then the contrary rule applies and the person who claims to be governed by the old law has to show that pending litigation had been saved from the operation of the new law : See AIR 1936 49 (Privy Council) .

In the present case the rule created by Section 189, Sub-section (3), is a rule of decision for the Courts. There is no reference there either to procedure or to substantive rights. The tribunals concerned have been told that no declaration of this character should be granted against women, and therefore the Board of Revenue was "not competent to grant a declaration against Sona Bai, who was a

woman and a pardanashin lady at that.

It was contended by Shri Bobde that the rule with regard to habitual subletting and the period for which subletting must continue before the holder must be deemed guilty of habitual subletting has been altered. Previously, the total period had to be seven years in a consecutive period of ten years, and now the period is reduced to three years, and therefore Sub-section (2) of Section 169 must first apply before the prohibitory direction given by sub-s. (3) can be attracted. He contended that this was an old case which had arisen u/s 40 of the C. P. Tenancy Act and was not covered by Sub-section (2) of Section 169.

We have considered this argument, and we are of the opinion that it is not sound. The frame of Section 169 shows that the two periods required before a person can be pronounced guilty of habitual subletting have still been preserved. For the one class of cases habitual subletting has to be for seven years and for another class of cases arising after the Madhya Pradesh Land Revenue Code came into operation it has to be for three years.

The fact that the law has made no distinction between one kind of case and another and has taken note of the two different provisions of the law on the subject makes us feel that Section 169 was made to apply not only to cases which are to arise after the Madhya Pradesh Land Revenue Code came into force but also to cases which had arisen before. The protection which was sought to be given in a mild way by the explanation to Section 40 of the C. P. Tenancy Act has been made more stringent and imperative by the provisions of sub-s. (3) of S. 169.

Now, in no case can a declaration be granted against a woman, whether the subletting began before the Code came into operation or thereafter,. Shri Bobde's contention that the tenure has also changed has no significance, because all that has happened is a change in nomenclature but the effect of the tenure is exactly the same. Reference was made in this connexion to Sections 145 and 166 of the Madhya Pradesh Land Revenue Code,

Those sections clearly demonstrate that what was the law before with regard to this aspect of the matter is still the same law; the only difference is that the period of subletting has been reduced and no declaration can be granted against a woman. Since the prohibition is against the Courts from granting declarations; against women we think! that pending cases were covered, unless they were expressly excluded.

For the reasons aforesaid we quash under Article 227 of the Constitution the order of the Board of Revenue and restore that of the Deputy Commissioner. Respondent No. 3 shall bear the costs of this petition. Counsel's fee Rs. 50/-.