

(1969) 09 MP CK 0015
In the Madhya Pradesh High Court
Case No : S.A. No. 906 of 1967

Sukhsen and another

APPELLANT

Vs

Shravan Kumar

RESPONDENT

Date of Decision : 23-09-1969

Acts Referred:

Madhya Pradesh Land Revenue Code, 1954 — Section 152(2)

Citation : (1972) MPLJ 95

Hon'ble Judges : A.P. Sen, J

Bench : Single Bench

Advocate : A.H. Saifi and M.L. Jaiswal, for the Appellant; M. At. Sapre, for the Respondent

Final Decision : Allowed

Judgement

A.P. Sen, J.

This is an, appeal from the judgment and decree of the IIIrd Additional District Judge, Jabalpur, dated 14th August 1967, confirming the judgment and decree of the Civil Judge, Class II, Murwara, dated 16th August 1966, decreeing the plaintiff's claim for declaration and possession of the suit lands,

The two questions canvassed in this appeal are (1) whether the defendants are governed by the Mitakshara School of Hindu Law and if so, if the suit lands formed their joint family property, having regard to the finding that they were joint in mess and estate; and (ii) whether the sale of the suit lands by the defendant No. 1 was in contravention of sect/on 152 (2) of the Madhya Pradesh Land Revenue Code, 1954, and thus, being void and unenforceable, could not be the foundation of the plaintiff's title.

So far as the first question is concerned, the learned counsel for the appellants rightly urges that the Additional District Judge has erred in holding that the parties are not governed by Hindu law. The law is well settled that Raj-Gonds are not Hindus but the presumption is that they are governed by Hindu law unless

the contrary is shown. [Rajah Chhattarsingh v. Diwan Rbshan Singh 1946 N L J 690 : AIR 1946 Nag. 277 : ILR 1946 Nag. 159 and Dashrath Prasad v. Laloo Singh 1951 NLJ 616 : AIR 1951 Nag. 343 : ILR 1951 Nag. 873]. That the defendants are Raj-Gonds is an undisputed fact. [See, plaint, para 3 and the cause-title therein and Exs. P-1, P-2, P-4 and P-15]. Contrary to this admitted position, the plaintiff's father P. W. 1 Chetram tried to assert that they were Gonds. The Additional District Judge's assumption that the defendants were not Hindus because they worship Dulha Dev and Khermai proceeds on misplacing the burden of proof on them to establish that they had adopted Hindu law. In view of the plaintiff's own admission in the plaint that the defendants were Raj-Gonds, the presumption is that they are Hindus and, therefore, governed by Hindu law for all purposes unless the contrary is proved.

But the learned counsel is not right in suggesting that this gives rise to the inference that the suit lands were impressed with the character of being coparcenary property of the defendants and, therefore, the plaintiff being a stranger-purchaser was not entitled to be in exclusive possession thereof. The mere circumstance that the defendants constitute a joint Hindu family does not give rise to the presumption that a family, because it is joint, possesses joint property or any property. The law is that if a party contends that the property is joint family property, the burden of proving that it is so rests on the party asserting it. The Courts below have found that the suit lands were the separate property of the defendant No. 1 Sukhsen. They have also found that there was no ancestral nucleus from which the property in question may have been acquired. These are findings of fact based upon appreciation of evidence and are binding on this Court in second appeal. That being so, the further submission that the plaintiff being a stranger-purchaser must work on his rights in a suit, for partition does not arise.

It remains for me now to deal with the second point which the learned counsel has pressed for my consideration, His contention is that even assuming that the suit lands were not coparcenary property of the defendants, the plaintiff would still not be entitled to a decree because the sale deed in his favour is hit by section 23 of the Contract Act, on the ground that the sale of the suit lands was in contravention of section 152 (2) of the Madhya Pradesh Land Revenue Code, 1954. That section reads:

152(2) . Notwithstanding anything in sub-section (1), the right of a tenure-holder 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 the Revenue Officer not below the rank of a Collector, given for reasons to be recorded in writing.

It is argued firstly that the Collector acts as a persona designate, and secondly, that in granting permission for transfer, he must record his reasons in writing. The fact that Raj-Gonds have been declared by the State Government to be

members of an aboriginal tribe u/s 152(2) , has not been disputed before me. The only question that arises is whether the requirements of the section had been fulfilled. The learned counsel places reliance on nay decision in Shri Deo Parashnathji v. K.K. Godre 1969 RN 333, but that decision is not applicable. There, I had occasion to construe section 3 of the Madhya Pradesh Public Trusts Act, 1951. That provision declares that the Collector shall be the Registrar of Public Trusts and there was no provision under the Act for delegation of his powers, whereas the Madhya Pradesh Land Revenue Code, 1954 provides by section 14(2) that an Additional Collector shall exercise such powers and discharge such duties conferred and imposed on a Collector by the Code. It would, therefore, appear that the Additional Collector is an authority of concurrent jurisdiction so far as the powers, functions and duties of the Collector are concerned under the Code, Now, section 152(2) ibid directs that the transfer shall be with the permission of a Revenue Officer not" below the rank of a Collector The Additional Collector not only fulfils this requirement but, being a co-ordinate authority as the Collector, was entitled to deal with the matter.

The learned counsel then urges that there was no conferral of power upon the Additional Collector to try such class of cases, by a notification of the State Government. The defendants did not plead that the sanction was invalid on that ground which is a mixed question of fact and law. Even apart from this, the recommendation of the Sub-Divisional Officer in according permission to the defendant No. 1 Sukhsen to transfer the holding received the approval of the Additional Collector vide Ex. P-15 when he endorsed" As proposed". The learned counsel tries to overcome this difficulty by urging that though the Additional Collector was entitled u/s 26(2) to make over for enquiry and report the case arising u/s 152 (2) to the Sub-Divisional Officer, the latter could not further sub-delegate the enquiry to the Naib Tahsildar. The normal rule is that there cannot be sub-delegation of his powers by a delegate under the maxim "delegata protests non protest delegate unless there is a provision enabling further delegation. Now, section 26 (2) not only speaks of the Collector, which term includes the Additional Collector but also of the Sub-Divisional Officer or the Tahsildar who may similarly make over for enquiry and report any case arising under the provisions of the Code. There being a statutory provision for such sub-delegation, the Sub-Divisional Officer was clearly entitled to remit the case to the Naib Tahsildar for enquiry and report.

The "learned counsel for the appellants is on a surer ground when he contends that the requirements of section 152(2) were not complied with unless the Additional Collector recorded reasons in writing for permitting the transfer. The giving of reasons is a condition precedent, the learned counsel urges, to the exercise of the power itself, and, therefore, the failure on the part of the Additional Collector to record his reasons renders the permission granted u/s 152 (2) ibid, invalid, and consequently, the transfer being in contravention of the section was void and legally inoperative to confer any title on the plaintiff. In his reply, learned counsel for the respondent while accepting that although the

objection now raised had not been taken at any stage earlier, the question being a pure question of law, the appellants are entitled to raise it, nevertheless, urges that the appellants are precluded from questioning the validity of the sanction granted by the Additional Collector for the reason that the defendant No. 1 had subjected himself to the former's jurisdiction and if he was aggrieved by his order, his remedy was by way of an appeal u/s 41 of the Code. In other words, the argument is that the sanction could not be challenged in a collateral proceeding like a suit by raising a plea in defence. It is also urged that jurisdiction of a civil Court is barred u/s 236 of the Madhya Pradesh Land Revenue Code, 1954. Reliance is placed on *Nathu v. Dilbande Hussain* 1964 MPLJ 822, *Shri Pragdas v. Union of India* 1967 MPLJ 868 (SC) and *Nowrozabad Colliery Mazdoor Sangh v. P. Jeejeebhoy* 1969 MPLJ 611.

The objection that civil Courts have no jurisdiction to adjudicate upon a question of this nature in so far as it is based on section 236 of the Code, does not appear to be well founded. The language of that section is-

Except as otherwise provided in this Code, or in any other enactment for the time being in force, no civil Court shall entertain any suit instituted or application made to obtain a decision or order on any matter which the State Government, the Board, or any Revenue Officer is, by this Code, empowered to determine, decide or dispose of; and in particular and without prejudice to the generality of this provision, no civil Court shall exercise jurisdiction over any of the following matters;-

* * * *

Admittedly, this is not one of the matters specified in clauses (a) to (v) enumerated therein. We are, therefore, left with the opening words of the section. The exclusion of jurisdiction of civil Courts is not to be readily inferred but such exclusion must either be explicitly expressed or clearly implied. Even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with. [*AIR 1940 105 (Privy Council)*]. The provisions of section 236 must, therefore, be strictly construed. Now, the language of that section prohibits the institution of a suit to obtain a decision in any matter which the revenue authorities are empowered to determine. The plea in defence challenging the validity of the transfer, although it involves an enquiry whether the requirements of section 152 (2) had been complied with by the Additional Collector, does not require the Civil Court to decide whether sanction for such transfer should have been granted or not. That was, and is, a matter within the exclusive jurisdiction of the Collector. The section, in terms, does not apply to prevent an adjudication by the civil Court as regards the invalidity of the sanction, which renders transactions a nullity due to non-fulfillment of conditions which are; pre-requisites for the grant of such sanction u/s 152 (2) .

In *Nathu v. Dilbahde Hussain* (supra), *Dixit O.J.* and *Pandey J.*, interpreting

section 257 of the Madhya Pradesh Land Revenue Code, 1959, which corresponds to section 236 of the Code with which I am concerned, observed:

It will be seen that section 257 really consists of two parts, the first being contained in the provision beginning with "Except as otherwise provided in this Code", and ending with "the State Government, the Board or any Revenue Officer, is by this Code empowered to determine, decide or dispose of, and the second being covered by the provision in particular and without prejudice to the generality of this provision) no civil Court shall exercise jurisdiction over any of the following matters". The first limb of section 257 is only a general provision with regard to the exclusion of certain matters from the jurisdiction of the civil Court-The second limb particularly specifies matters which the State Government, the Board or any other Revenue Officer is empowered by the Code to determine, decide or dispose of and categorically says that in regard to those matters no civil Court shall exercise jurisdiction. The expression "Except as otherwise provided in this Code, or in any other enactment for the time being in force", with which section 257 begins, relates only to the general provision contained in section 257 and does not qualify the second limb of section 257 particularizing: the matters which are outside the jurisdiction of a civil Court. In the first part, the expression used is "no civil Court shall entertain any suit instituted or application made...." In the second part occurs the expression "no civil Court shall exercise jurisdiction over any of the following matters. The repetitions of these expressions about the exclusion of civil Court's jurisdiction, and the use of expression "in particular and without prejudice to the generality " of this provision", make it clear that with reference to the items included in clauses (a) to (z-2) it is not necessary for the Court to examine further whether any of these items comes within the scope of the general provision contained in the second part of section 257, and whether in regard to them there is any "otherwise" provision in the Code or in any other enactment. In regard to the enumerated matters, there is a statutory recognition in section 257 itself that no civil Court shall exercise jurisdiction over them.

The object of that provision is clearly to exclude the jurisdiction of a civil Court in regard to all matters which the State Government, the Board or any Revenue Officer is by the Code empowered to determine, decide or dispose of, irrespective of the fact whether in regard to the matter there has or has not been any determination or decision by the competent revenue authority.

The other two decisions relied upon appear to have no relevance to the question of jurisdiction.

That brings me to the contention resting on section 152 (2) *ibid* that the recording of reasons in writing is a *sine qua non* to the grant of permission for transfer. Reliance is placed on *H.N. Matak v. The State of M.P.* 1961 MPLJ 125 : (M.P. No. 259 of 1960, decided on the 5th July 1961) *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, , *Madhya Pradesh Industries Ltd. v. Union of India* 1966 MPLJ 266 (SC) and *Mohd. Murtiza Khan v. State of*

M.P. 1966 MPLJ 933 (SC). The learned counsel for the respondent is not right in suggesting that the transfer cannot be challenged in a collateral proceeding like a suit by a plea in defence. The suit being for ejectment, is based on title and the defendants have, therefore, the right to plead invalidity, if any, of the transfer, which is the foundation of the plaintiff's title. Coming to the expression "for reasons recorded in writing", learned counsel for the appellants urges that failure to record such reasons renders the transfer invalid. On the other hand, learned counsel for the respondent contends that such failure merely renders the order granting permission defective.

In H. N. Malak's case (supra), Dixit C.J. and Pandey, J. struck down an order of the Collector u/s 3 of the Madhya Pradesh Accommodation (Requisition) Act, 1948, on the ground that he had not recorded his opinion for requisitioning of property. In that case the Rent Controlling Authority put up a note and Collector just signed beneath it without indicating his own opinion about the matter. It was observed :

Ex facie, in our Judgment, the note of the Rent Controlling Authority and the Collector's bare signature beneath it raise the inference that the Collector put his signature beneath the note as a matter of mechanical routine. From the mere fact that the Collector put his signature below the note of the Kent Controlling Authority it cannot be assumed that he formed an opinion about the necessity for requisitioning any accommodation and for requisitioning all the three bungalows suggested by the authority. If the Collector had appreciated the necessity for applying his mind as required by section 3 (1) , he would have recorded some opinion to express the appropriateness of the course suggested by the Kent Controlling Authority. But the Collector merely put his signature without revealing his own mind or opinion on the necessity for requisitioning the accommodation.

Similarly, their Lordships of the Supreme Court in the case of Collector of Monghyr (supra) held that the requirement for recording of reasons u/s 5- A of the Bihar Private Irrigation Works Act, 1922, was mandatory and the failure to make a speaking order would defeat the object with which the provision was inserted, and the protection sought to be conferred thereby would be denied. In dealing with Administrative Tribunals, their Lordships in Madhya Pradesh Industries" case (supra), stated :

The condition to give reasons for orders introduces clarity and excludes or at any rate minimises arbitrariness; it gives satisfaction to the party against whom the order is made, and it also enables the appellate or supervisory Court to keep the Tribunals within bounds. A reasoned order is a desirable condition of judicial disposal. The extent and the nature of reasons depend upon each case.

That decision is not very apposite to the present circumstances. There, their Lordships were interpreting rule 53 of the Mineral Concession Rules, 1960, i. e. dealing with quasi-judicial proceedings. In their later pronouncement in Shri Pragdas's case (supra), their Lordships in dealing with that very provision stated

that failure of the Central Government to record reasons would render the order prima facie defective. Nevertheless, they went on to state:

Recording of reasons and disclosure thereof is not a mere formality) and an order which does not give reasons is, therefore, liable to be quashed.

The authorities more in point are the decisions in the case of H.N. Malak and Collector of Monghyr (supra). In the latter case, their Lordships held the exercise of the powers u/s 5-A of the Bihar Private Irrigation Works Act, 1922, where no reasons were recorded by the Collector, as unjustified by the statute and void. So also, this Court in H. N. Malak's case reached a similar conclusion. A fortiori, applying the same principles to the circumstances of the present case, the failure of the Additional Collector to record his reasons in writing renders the grant of permission for transfer u/s 152 (2) of the Madhya Pradesh Land Revenue Code, 1954, a nullity, and, therefore, the transfer being void, is legally unenforceable. It is true that the defendant No. I Sukhsen had himself initiated proceedings and the permission was granted on his asking, but the requirements of section 152 (2) ibid being imperative, the defendants are not estopped from challenging the validity of the transfer because there is no estoppel against a statute. [See AIR 1937 114 (Privy Council) .] In case of a statute like section 152 (2) of the Madhya Pradesh Land Revenue Code, enacted for the benefit of a section of the public, that is, on grounds of public policy; where the statute imposes a duty of a positive kind like the recording of reasons in writing permitting transfer of his rights by a Bhumiswami belonging to an aboriginal tribe, which is a condition precedent to the validity of the transfer, the failure to perform that "duty does not prevent the recipient of the permission from challenging its validity on the ground of non-fulfillment of the terms of the section. So, their Lordships of the Supreme Court in Mohd. Murtiza Khan's case (supra), in dealing with an order granting a patta, state:

The order ex facie does not indicate that the requisite permission was obtained from the Government. Ordinarily, if such a previous permission had been obtained, it would have been mentioned in the order,

* * * *

In the circumstances, when it does not disclose any recital of each a previous permission...it follows that the order, having been made in non-compliance with the necessary conditions of the Bhopal State Land Revenue Act, 1932, is void.

Such being the law, the plaintiff cannot succeed on the strength of the sale-deed in his favour. The contract having been discovered to be void, the defendant No. 1 Sukhsen must refund the consideration received by him, u/s 65 of the Contract Act. That was the course followed by their Lordships of the Privy Council in AIR 1943 20 (Privy Council) where a mortgage, though an open, honest and reasonable transaction, was invalid for want of permission of the Collector; and in those circumstances, the mortgagee was held entitled to relief u/s 65 of the Contract Act. On the principle underlying that section, the plaintiff has clearly a

right to restitution of the consideration of Rs. 400 paid by him, under the sale-deed dated 2nd June 1956, with interest @ 6% per annum thereon with effect from the even date.

The result is that the appeal succeeds and is allowed. The decree passed by the IIIrd Additional District Judge, Jabalpur, is set aside and instead, the plaintiff is awarded a decree for Rs. 400, together with interest @ 6% from 2nd June 1956 till realisation. The costs shall be borne by the parties as incurred throughout.