SUPREME COURT OF INDIA

Ram Kristo Mandal

Vs.

Dhankisto Mandal

C.A.No.1123 of 1965

(J. M. Shelat and K. S. Hegde, JJ.)

15.07.1968

JUDGEMENT

SHELAT, J.:-

1. This appeal, by special leave, raises the question whether an exchange of land situate in Sonthal Parganas or land situate elsewhere is invalid by reason of the provisions of S. 27 (1) of the Sonthal Parganas Settlement Regulation, 3 of 1872. It is not in dispute that the lands in question, set out in Schedule B to the plaint were raiyati lands and were governed by the said Regulation.

2. The appeal arises from a suit filed by the appellants for a declaration of title and possession of lands described in Schedules B, C and D to the plaint. The lands belonged to one Tonu Mandal who died several years ago leaving him surviving two daughters, Manoda and Nilmoni Dasi. Manoda died in 1940 and Nilmoni Dasi died in 1948. On the death of the said Tonu Mandal, the two daughters inherited his property as limited owners. There was a settlement thereafter between them as a result of which the said Manoda got 10 annas share and the said Nilmoni Dasi got 6 annas share in the said properties. On Manoda's death, Nilmoni Dasi succeeded to her share. Consequently,

Nilmoni Dasi was possessed of the entire property of Tonu Mandal as a limited owner. The said Nimoni Dasi had four sons, all of whom died during her lifetime. She left, however, grandsons surviving her. These grandsons were defendants first party in the suit and Schedule D properties were in their possession at the time when the suit was filed. The said Nilmoni Dasi had executed a sale deed in 1314 Bengali Sambat Year in respect of Schedule properties in favour of the predecessors-in-title of the defendants third party and these defendants were in possession of those properties at the date of the suit. In 1295 Bengali Sambat Year, she had also executed a deed of exchange in favour of one Premmoyee Dasi under which she gave away Schedule B properties in exchange for Schedule E properties situate in village Sokrul. In accordance with the said exchange, the names of the two ladies were recorded as raiyats of the respective properties. The descendants of the said Premmoyee Dasi were defendants of the second party and were in possession of Schedule B properties at the date of the suit. The defendants of the first party were in possession of Schedule E properties.

3. The said Tonu Mandal had two brothers, Santusta Mandal and Bhim Mandal. Plaintiff 2 was the sole surviving descendant of Bhim Mandal when the said Nilmoni Dasi died, and plaintiff 1 and the defendants of the fourth party, Kalipada and Gobind, were the surviving descendants of the said Santusta Mandal at that time. Under the Dayabhaga law by which the parties were governed, the two appellants (plaintiffs) and the defendants of the fourth party were the nearest reversioners of the said Tonu Mandal after the death of Nilmoni Dasi and were entitled to succeed to his estate, the share of the appellants and that of the defendants of the fourth party being equal. The said Gobind Mandal died while the suit was pending and his sons and widow were brought on record as his legal representatives.

4. The appellants' case was that the said sale deed in favour of the defendants of the third party and the said deed of exchange in favour of the said Premmoyee Dasi were not valid and binding on them, being neither for legal necessity nor for the benefit of the estate of Tonu Mandal and that defendants of the first party had no right, title or interest to the properties in their possession after Nilmoni Dasi died. The defendants, on the other hand, contended that the said sale and the said exchange were for legal necessity or for the benefit of the estate and that as they were in possession of the said properties for a very long time their title thereto had ripened in any event by adverse possession. The trial court and the District Court in appeal concurrently found that the said Nilmoni Dasi was in possession of schedules D and E properties and though the defendants of the first party took possession on her death of the said properties, they had no right, title or interest therein and were trespassers. Both the courts also rejected the plea of adverse possession on the ground that Article 141 of the Limitation Act, 1908 applied enabling the appellants, as reversioners, to file a suit for possession within twelve years after the death of the said Nilmoni Dasi. They also concurrently found that the said sale deed in favour of defendants of the third party and the said deed of exchange in favour of the said Premmoyee Dasi, the mother of defendant 6, were neither for legal necessity nor for the benefit of the estate of Tonu Mandal. The trial Court, on these findings, passed a decree, which was confirmed by the District Court, in favour of the appellants declaring their title to an 8 annas share in Schedules B, C and D properties and granted joint possession thereof along with defendants of the fourth party. The District Court while confirming the decree passed by the trial court clarified that in view of the finding that the said deed of exchange was not valid and binding on the appellants, the respondent (defendant 6) was entitled to fall back upon Schedule E properties.

5. Aggrieved by the said judgment and decree passed by the District Court, the respondent filed second appeal No. 1467 of 1958 and the two grandsons of the said Nilmoni Dasi, Tribhanga Gorain and Pawan Gorain, preferred second appeal No. 1468 of 1958 in the High Court. The High Court dismissed second appeal No. 1468 of 1958 on the ground that it was not entitled to interfere with the concurrent findings of fact arrived at by the trial court and the District Court. So far as second appeal No. 1467 of 1958 was concerned, the High Court came to the conclusion that the said deed of exchange executed by Nilmoni Dasi was valid and binding on the appellants and consequently set aside the decree in relation to Schedule B properties and dismissed the appellants' suit in regard thereto.

6. Before the High Court, the appellants raised two contentions in regard to Schedule B properties: (1) that the said exchange was neither for legal necessity nor for the benefit of the estate of Tonu Mandal; and (2) that in any event S. 27 of the said Regulation, 3 of 1872, as it stood at the date of the said transaction, governed Schedule B properties which were admittedly raiyati properties and forbade any transfer thereof and, therefore, the said exchange was invalid. As regards the first contention, the High Court held that though the said exchange could not be said to be for legal necessity, it was for the benefit of the estate. Regarding the second contention, the High Court disallowed the contention on the ground that it was raised for the first time during the arguments before it and it could not allow it to be raised as it involved an investigation of certain facts, namely, (a) that the respondents could have shown if the contention had been raised earlier, that as provided by S. 27 (1), the record of rights had set out the right of Nilmoni Dasi to transfer the said lands and that if that were so, S. 27 would not bar transfer of the said lands by such a person; and (b) that the respondents could also have contended that if the said exchange was invalid by reason of S. 27 (1), they held the lands after the said exchange adversely to the reversioners of Nilmoni Dasi and that they being in possession for more than twelve years their title was completed by adverse possession.

7. The High Court, however, was nor correct in its view that the contention based on S. 27 (1) was raised for the first time in the course of arguments before it. It is clear from the judgment of the District Court that the contention based on S. 27 was in fact canvassed before it. That is clear from the fact that the District Judge, in the course of his judgment, has clearly (drawn a distinction between lands situate in Sonthal Parganas, that is, Schedule B properties, and the lands situate in village Birbhum, that is, Schedule E properties and has observed that whereas S. 27 applied to the former it did not apply to the latter. The High Court, therefore, was not right in disallowing the said contention on the ground that it was not raised earlier.

8. Section 27 of the Regulation laid down an absolute bar to sales of the rights of a raiyat. As aforesaid, it is not in dispute that the said Nilmoni Dasi was a raiyat in relation to the lands in Schedule B properties. The section provided that

"No transfer by a raiyat of his right in his holding or any portion thereof by sale, gift, mortgage,

lease or any other contract or agreement, shall be valid unless the right to transfer has been recorded in the Record of Rights and then only to the extent to which such right is recorded."

Sub-section (2) of that section provided that "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." The language of S. 27 is clear and unambiguous. It prohibits any transfer of a holding by a raiyat either by sale, gift, mortgage or lease or by any other contract or agreement. The section is comprehensive enough to include a transfer of the holding by way of an exchange. The Schedule B properties were admittedly of raiyati character and were, therefore, inalienable. Sub-section (2) of S. 27 in clear terms enjoins upon the courts not to recognise any transfer of such lands by sale, mortgage, lease, etc. or by or under any other agreement or contract whatsoever. Therefore, even assuming that the contention as to the invalidity of the said exchange under S. 27 was raised for the first time before the High Court, the language of subs. (2) being absolute and clear, the High Court had to take notice of such a contention and was bound to hold such an exchange as invalid if it was shown that sub-s. (1) of S. 27 applied to that transaction.

9. The prohibition against transfers of raiyati, lands situate in Sonthal Parnagas has its roots in the peculiar way of life of Sonthal villages, which favoured the emergence of a powerful village community with its special rights over all the lands of the village. This community of village raiyats has preferential and reversionary rights over all lands in the village, whether cultivated or uncultivated . There is also in the majority of the villages of this district a headman, who, in addition to performing certain village duties, collects rent from the raiyats and pays it to the proprietor. One of his duties in his capacity as the headman is to arrange for settlement of lands in his village which may fall vacant and be available for settlement. All the raiyats in the, village are included in the Jamabandi prepared for the village and it is the headman's duty to settle the available land to one of the Jamabandi raiyats. It is manifest that the interest of the village community as also of the headman would suffer if the land, which as raiyati land would be included in the Jamabandi, is allowed to be taken out of the total quantity of the raiyati lands. If once these lands are allowed to lose their raiyati character, it is certain the village may find in the course of a few years the total stock of land available for settlement to resident raiyats dwindling before their eyes. It was in this state of things that the alienation of a raiyati holding in any form was interdicted by Government orders in 1887. These orders had the effect of checking the practice of open transfers. But transfers in disguised forms continued as is clear from a note by McPherson to the settlement report of the Sonthal Parganas wherein he warned against such disguised transfers. His note was accepted by Government and the result was the amendment of the Regulation by which S. 27 was inducted therein: [see Jyotish Thakur v. Tarakant Jha, 1963 Supp 1 SCR 13 at pp. 20, 21 = (AIR 1963 SC 605 at pp. 608, 609).].

10. Section 27 having thus laid down a prohibition against transfer of raiyati land, the burden of showing that it applied and, therefore, the said exchange was invalid was, no doubt, upon the appellants. But once it was shown that the subject-matter of the exchange, namely, Schedule B properties, was raiyati land situate in Sonthal Parganas, if the respondent wanted to show that the prohibition did not apply by relying upon the exception to the rule laid down by subs. (1) the burden

to prove that exception would shift on to the respondent. It was, therefore, for the respondent to establish that the record of rights contained an entry to the effect that the transferor in respect of those lands had the right to transfer them. The High Court, therefore, was not justified in disallowing the contention raised by the appellants either on the ground that the said contention was raised for the first time before it or on the ground that if raised earlier, the respondent could have shown that there was such an entry in the Record of Rights as to the transferor's right to transfer the said lands.

11. The High Court also was not correct in disallowing the said contention on the ground that the respondent could have shown that he had completed his title to Schedule B properties by adverse possession if the said exchange was invalid under S. 27. Such a plea was in fact raised by the respondent and was rightly rejected by the District Court on the ground that Art, 141 of the Limitation Act, 1908 applied and that the suit having been filed only two years after the death of Nilmoni Dasi, their claim to a declaration and possession was not barred. A person who has been in adverse possession for twelve years or more of property inherited by a widow from her husband by any act or omission on her part is not entitled on that ground to hold it adversely as against the next reversioners on the death of such a widow. The next reversioner is entitled to recover possession of the property, if it is immoveable, within twelve years from the widow's death under Article 141. This rule does not rest entirely on Article 14l but is in accord with the principles of Hindu law and the general principle that as the fight of a reversioner is in nature of spes succession is and he does not trace that title through or from the widow, it would be manifestly unjust if he is to lose his right by the negligence or sufferance of the widow: [cf Kalipada Chakraborti v. Palani Bala Devi, 1953 SCR 503 = (AIR 1953 SC 125) and Mulla's Hindu Law, 13th ed. 233]. The High Court was thus in error in disallowing the said contention on either of the two grounds suggested by it.

12. Counsel for the respondent, however, contended that S. 27 does not in express terms mention an exchange and, therefore, a transaction of exchange was beyond the scope of that section. Under S. l18 of the Transfer of Property Act, 1882, a transaction is exchange when two persons mutually transfer the ownership of one thing for the ownership of another provided it is not an exchange of money only. A transfer of property in completion of an exchange can be made only in the manner provided for the transfer of such property by sale. It is not, therefore, right to say that an exchange does not involve transfer of property and, therefore, does not fall within the scope of S. 27. As aforesaid, the language of S. 27 (1) is comprehensive enough to include any agreement or contract of exchange and, consequently it must be held, given the other conditions of that section, that that section would apply to a transaction of exchange. It is true that Sections 27 and 28 of the Regulation were repealed by the Sonthal Tenancy (Supplementary Provisions) Act, 14, of 1949. But Section 27 was in force when the said transaction of exchange was made and governed the transaction made by Nilmoni Dasi and Premmoyee Dasi. That transaction being invalid and void, the fact that S. 27 was subsequently repealed made no difference as the repeal could not have the effect of rendering an invalid and void transaction a valid and binding transaction.

13. The next contention was that by reason of S. 11 of the Regulation, the appellants' suit was not maintainable as the validity of the said exchange could not be agitated in a Court once the settlement

Court had made an entry in regard thereto. Section 11 lays down that except as provided in S. 25A no suit shall be filed in any civil Court regarding any matter decided by any settlement officer and his decisions and orders regarding the interests and rights above mentioned shall have the force of a decree of a Court. But neither S. 11 nor S. 25A of the Regulation has any application to the facts of the instant case. The only effect of S. 11 is that a decision of a settlement officer under the Regulation has the force of a decree of a civil Court and such a decision can only be challenged subsequently in a Court of law to the limited extent provided by S. 25A. However, the question whether the said exchange of Schedule B properties for Schedule E properties was invalid or not by reason of S. 27 was neither agitated before, nor determined by, any settlement officer or Court and, therefore, the bar of S. 11 cannot apply to the present suit. That being the position, we do not see any merit in the contention raised by counsel on the basis of S. 11.

14. For the reasons aforesaid, the High Court was in error in interfering with and setting aside the decree passed by the trial Court and confirmed by the District Court. The District Court was also right in holding that in view of the appellants being entitled to Schedule B properties, they were not entitled to their alternative claim in respect of Schedule E properties and that consequently the successors-in-title of the said Premmoyee Dasi would be entitled to Schedule E properties. We, therefore, allow the appeal, set aside the judgment and decree passed by the High Court and restore the decree passed by the trial Court and confirmed by the district Court. The respondents will pay to the appellants the costs of this appeal and in the High Court.

K.S.B.

Appeal allowed.