AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 374 of 1998

1. Mohd.Mustafa son of Shamshuddin, aged about 42 years.
2. Smt. Hiramani wife of Shankar Jaiswal, aged about 45 years

Both cultivators, Residents of Village Kusmi, Tahsil Kusmi (Samri), District Sarguja (M.P.)

---- Appellants

Versus

1. Ramapati, S/o Jagtu Kishab, Aged about 30 years
2. Bandha S/o Bharu Kishan Aged about 50 years

Both residents of Village- Kusmi, Tahsil- Kusmi (Samri) District Sarguja

3. State of Madhya Pradesh (Now C.G.) Through the Collector Sarguja

---- Respondent

For Appellants : Shri B.P. Gupta, Advocate
For Respondents No.1 & 2 : Shri Shakti Raj Sinha, Advocate
For Respondent No.3/State: Shri D.R. Minj, Dy. GA for the State

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Hon'ble Shri Justice Goutam Bhaduri

Order On Board

19/11/2018

1. Heard.

2. The instant appeal is against the judgment and decree dated 12.05.1998 passed in Civil Suit No.25-A/97 by the Second Additional District Judge, Ambikapur, whereby the suit filed by the plaintiff/appellant was dismissed. The

suit was filed by Mohd. Mustafa and Smt. Hiramani for declaration and permanent injunction. As per the plaint pleading the suit property was shown in the schedule A of the plaint, situated at village Kusmi, P.H. No.26 (A), Tehsil Kusmi, District Surguja, it was contended that the house and the superstructure situates over the suit plot. According to the plaintiff before 02.10.1959 the suit land was recorded in the name of Theki S/o Suna, Caste Bargah, they were not covered within the schedule tribe community. The schedule A property was bearing Khasra No.358, admeasuring 0.70 acres which was purchased by Theki from the earlier owner namely Pusa Kisan and Ghasiya Kisan, who were the son of Bhulan and thereafter his name was recorded. The said sale was prior to 2.10.1959. It was stated that Pusa Kisan and Ghasiya Kisan since were not the members of schedule tribe community, as such they were not required to take any permission under Section 165 (6) of the Chhattisgarh Land Revenue Code, 1959 (for short 'the Code, 1959'), consequently the provisions of Section 165 (6) and Section 170-B of the Code, 1959 would not be applicable to them. After the death of Theki, the land was recorded in the name of the legal heirs and name of Sarawati and Janki were recorded. Saraswati and Janki executed two sale deeds one in favour of Mohd. Mustafa on 21.02.1976 which was in respect of land bearing Khasra No.358/2 and another sale deed was executed in favour of Smt. Hiramani in the year 1991. It was stated that after purchase of the land superstructure was raised over the said land and house was constructed and was used other than the agricultural purposes. Subsequently, the revenue case No.312/A/23/90-91 and revenue case No.228A-23/91-92 was commenced and without giving opportunity of

hearing to the plaintiff, the land was directed to be returned to defendant No.1 Rampati and defendant No.2 Bandha, for which the suit was filed to declare the order passed by the SDO, Ramanujganj as null and void and declaration be passed in favour of the plaintiff.

3. The defendant No.1 Rampati and defendant No.2 Bandha, filed their written statement and admitted that the subject land was purchased by Theki S/o Suna prior to 2.10.1959. It was further stated that since the permission was not obtained as required under Section 165 of the Code, 1959, therefore, the land ought to have been returned to the original holder. The defendant further contended that Pusa Kisan and Ghasiya Kisan are the the maternal grand father of defendant No.1 and maternal uncle of defendant No.2 thereby were related. Subsequently, the defendants No.1 & 2 proceeded ex-parte and no evidence was led on behalf of them. The state government, which was defendant No.3, contended that the order passed by the SDO (R), Ramanujganj is according to the law and since no appeal was filed, therefore, the said order has attained its finality and no cause of action arose in favour of the plaintiffs.

4. Learned Court below on the basis of the evidence of the parties framed five issues in respect of issue no.1 whether the suit property bearing Khasra No.358, admeasuring 0.280 Hectares was purchased on 21.02.1976? it was held in affirmative. Further it was held that after purchase of the property, the plaintiffs have raised their superstructure/house therein and are living therein and held in affirmative. In respect of the revenue case whereby the State was directed to return the land to the original owner, the Court held that the order

was passed well within jurisdiction and eventually dismissed the suit. Hence this appeal.

5. Learned counsel for the appellants would submit that the categorically averments were made by the plaintiffs that they were not heard before orders were passed. It was further contended that the State did not adduce any evidence to show and rebut those facts to establish that proper opportunity of hearing was given. It was further contended that in absence of any evidence, that remained un-rebutted that plaintiff should have been accepted. Learned counsel would further submit that the finding of the SDO is illegal since as per the revenue record the original holder was only described as Kisan, therefore, the Kisan could not have been included to be within the Nagesiya community as against Article 342 of the Constitution of India. He placed his reliance in the case of ***Chhedisao Vs. Ranglal & others {2014 (3) C.G.L.J. 21}*** and further submits that in absence of presidential order, the presumption cannot be drawn in favour of person within the schedule list. He further submits that the transaction as would reveal was prior to commencement of the Act, 1959 or 2nd October, 1959, therefore, in any case, the provisions of Section 170-B of the Code, 1959 would not be applicable to invoke the provisions of Section 165 of the Code, 1959, therefore, the order itself cannot be sustained. He further submits that the finding of the misjoinder has been recorded without that issue being framed on the subject, consequently such issue cannot be allowed to sustain.

6. Per contra, learned counsel for respondents No.1 & 2 would submit that the

order of the SDO is well merited and the civil Court was not within its right to exercise its jurisdiction to annul the order. He further submits that the word Kisan has been included as Nagesiya by the High Court of Madhya Pradesh in Second Appeal No.366/1987, therefore, the order of the SDO is well merited which do not call for any interference.

7. Learned State counsel support the judgment and order passed by the SDO.

8. Perused the record, evidence and pleading of the parties.

9. The plaintiff has stated that initially they received the notice from the SDO, Ramanujganj, wherein they were directed to appear in person. Subsequently, they were informed that the cases would be taken up at Kusmi and on the date so given they appeared before the SDO, Kusmi but the officer did not come and it was informed that the Court was canceled and the next date would be informed, however, the next date was not given and without hearing the plaintiff, the orders Ex. P-5 & Ex. P-6 were passed. The State government has not produced any evidence. There is no cross-examination has been made except that the denial which has come on record no notice of proceeding were given. The plaintiff has produced the impugned order dated 24.02.1996 as Ex. P-5 and order dated 06.02.1996 as Ex. P-6, which are certified copies of the order of the SDO. The effect of the order is de propritory. When it was a categorical case of the plaintiff that they were not heard and were not given the opportunity, in absence of any order-sheet of the proceedings, which could have been filed by the State, the adverse inference can very well be drawn that the plaintiffs were

not given the opportunity of proper hearing.

10. As has been held in the case of ***Dhanajiram & anr. Vs. Praveen Kumar & ors. {2014 (2) C.G.L.J. 334}*** that the bar created under Section 257 (1) (L-1) of the Code against the orders passed by the Revenue Authorities under Section 170-A and 170-B of the Code in their exclusive jurisdiction even then the civil Court had jurisdiction to entertain and consider the matter up to the extent whether the authority concerned has complied with the prescribed procedure or not while holding the enquiry and passing the order. When it was a categorical case of the plaintiff by pleading and since remained unrebutted that they were not heard before passing of the impugned order, the Civil Court could have very well gone into this issue.

11. While reading order of the Court below, which has traveled all the merits of the case, the result of the order would be a de propritory effect. Being the effect State should have produced the concerned case file to show the documents were considered as to the finding reached by the Court below whether is correct or not. Ex. P-1 is the Surguja settlement record of Village Kusmi, which shows different Khasra numbers including the Khasra No.358 is recorded in the name of Pusa Kisan and Dhaniya Kisan both s/o Bhulan Kisan they have been shown as 'kaum Kisan'. Subsequent document Ex. P-3 is the record of right of the Land Revenue Code of 1954, which shows that Khasra No.358 was recorded in name of Bilba Chava wd/o Theki, Saraswati D/o Theki and Janki D/o Theki. The remark column of Ex. P-3 records that the said land was purchased from the original holder of the land namely Pusa Kisan S/o Bhulan

and Ghasiya S/o Bhulan for Rs.35/- and their name was recorded by order dated 11.09.1959, The remark column of this document therefore reflects that the purchase was made prior to 11.09.1959.

12. The Chhattisgarh Land Revenue Code, 1959 came into force from 2nd October, 1959, vide notification No.11135-VII-N, dated 21.09.1959 published in M.P. Gazette dated 21.09.1959, therefore, the act itself came into being after the date of purchase as compared to Ex. P-3 as the sale was made by Pusa Kisan and Ghasiya Kisan prior to 21.09.1959.

13. As per Ex. P-4, the subject land was subsequently recorded in name of legal representative of Theki namely Bilba Chava wd/o Theki, Saraswati D/o Theki and Janki D/o Theki. Ex.P-3 also affirms the fact that the land was recorded in the name of Bilba Chava wd/o Theki, Saraswati D/o Theki and Janki D/o Theki, but subsequently sold the one part of the property in favour of plaintiff No.1 Mohd. Mustafa on 21.02.1976 admeasuring 0.080 hectares. As per Ex. P-4 another part was sold in favour of Smt. Hiramani by Ex.P-7 by sale deed dated 14.11.1991. As per the statement of the plaintiff that after the purchase the house was constructed and superstructure was raised over the plot in the aforesaid background the provisions of Section 170B of the Code, 1959 are examined, the relevant part is reproduced hereunder:-

> **"170-B. Reversion of land of members of aboriginal tribe which was transferred by fraud.-** (1) Every person who on the date of commencement of Madhya Pradesh Land Revenue Code (Amendment) Act, 1980 (hereinafter referred to as the Amendment Act of 1980) is in possession of agricultural land which belonged to a member of a tribe which has been declared

to be an aboriginal tribe under sub-section (6) of section 165 between the period commending on the 2nd October, 1959 and ending on the date of the commencement of Amendment Act, 1980 shall, within two years of such commencement, notify to the Sub-Divisional Officer in such form and in such manner as may be prescribed, all the information as to how he has come in possession of such land.

(2) If any person fails to notify the information as required by sub-section (1) within the period specified therein it shall be presumed that such person has been in possession of the agricultural land without any lawful authority and the agricultural land shall, on the expiration of the period aforesaid revert to the person to whom it originally belonged and if that person be dead, to his legal heirs.

[2-A] If a Gram Sabha in the Scheduled area referred to in clause (1) of Article 244 of the Constitution finds that any person, other than a member of an aboriginal tribe, is in possession of any land of a Bhumiswami belonging to an aboriginal tribe, without any lawful authority, it shall restore the possession of such land to that person to whom it originally belonged and if that person is dead to his legal heirs:

Provided that if the Gram Sabha fails to restore the possession of such land, it shall refer the matter to the Sub-Divisional Officer, who shall restore the possession of such land within three months from the date of receipt of the reference.

(3) On receipt of the information under sub-section (1), the Sub-Divisional Officer shall make such enquiry as may be deemed necessary about all such transactions of transfer and if he finds that the member of aboriginal tribe has been defrauded of his legitimate right he shall declare the transaction null and void and pass an order revesting the agricultural land in the transferer and, if he is dead, in his legal heirs.

(3). On receipt of information under sub-section (1), the Sub-Divisional Officer shall make such enquiry as may be necessary about all such transactions of transfer and if he finds that the member of aboriginal tribe has been defrauded of his legitimate right he shall declare the transaction null and void and -

(a) Where no building or structure has been erected on the agricultural land prior to such finding pass an order revesting the agricultural land in the transferer and if he be dead, in his legal heirs,

(b) Where any building or structure has been erected on the agricultural land prior to such finding, he shall fix the price of such land in accordance with the principles laid down for fixation of price of land in the Land Acquisition Act, 1894 (No.1 of 1894) and order the person referred to in sub-section (1) to pay to the transferer the difference, if any, between the price so fixed and that price actually paid to the transferer:

> Provided that where building or structure has been erected after the 1st day of January, 1984 the provisions of clause (b) above shall not apply.
>
> Provided further that fixation of price under clause (b) shall be with reference to the price on the date of registration of the case before the Sub-Divisional Officer."

14. The reading of the Section 170 B of the Code, 1959 would show that it was applicable to the holder of a land through an aboriginal tribe or a land which belong to tribe which has been declared to be an aboriginal tribe under sub-section (6) of section 165 between the period commending on the 2nd October, 1959 and ending on the date of the commencement of Amendment Act, 1980.

15. Ex. P-1 described that the original holder that is Pusa Kisan and Dhaniya Kisan their caste have been shown as 'kaum Kisan'. The order passed by the SDO, it is held that as per finding in the Second Appeal No.366/87 of the M.P. High Court, Kisan has been held to ba a Nagesiya, therefore, has been held to be a tribe. In this context, the law laid down by this Court in the case of ***Chhedisao Vs. Ranglal & others {2014 (3) C.G.L.J. 21}*** would be of relevance, wherein it has been answered that Kisan cannot be enveloped in the word Nagesia by shelving the provisions of Article 342 of the Constitution of India and it was held that by circular dated 16.03.2001 directing that the Kissan community be teated as part of Nagesia tribe, would be against the law and Kissan could not be treated as schedule tribe. The Court in para 9 has held thus which is reproduced hereunder:-

> ***"9***.....It appears that on the basis of the order passed by the High Court of Madhya Pradesh, the State Government of Chhattisgarh issued circular dated 16/03/01 directing that the 'Kissan' community be treated as part of 'Nagesia' tribe. This

course of action was wholly impermissible under the law and clearly in the teeth of the judgment of the Supreme Court in the cases of Basavalingappa (supra) and Bhaiya Lal (supra) reaffirmed in Milind's Case. The State Government rightly withdrew communication dated 16/03/01 vide its order 04/02/11 (Annexure P/5). Merely because an application for return of land was filed by the respondent claiming it to be a tribe on the strength of circular dated 16/03/01, the order passed by the Sub-Divisional Officer cannot be said to be in accordance with law declared by the Supreme Court which is binding on all Courts and Tribunals. The circular dated 16/03/01 could not have conferred any benefit on 'Kissan' community by treating them as scheduled tribe being part of 'Nagesia' scheduled tribe."

16. In view of the aforesaid legal proposition, this Court has no hesitation to hold that the finding of the SDO by holding the Kissan to be within the definition of Nagesia cannot be given effect to and Kissan word has to be read independently without any influence by any other list as otherwise it would amount to defeat the spirit of Article 342 of the Constitution of India.

17. For the sake of brevity Article 342 of the Constitution of India is reproduced hereunder:-

342. Scheduled Tribes - (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

18. As has been reiterated above, the transaction having been effected prior to 2nd

October, 1959, even if the word kissan is deemed to be inculded as Schedule Tribe, the transaction would fall out of the ambit to invoke and press into motion the Section 170 B of the Code, 1959 as on the date when the transaction was concluded and on the date of commencement of the 1959 Act, the land was not held by the tribe. With respect to misjoinder the Court has given a finding of misjoinder. The perusal of the judgment would show that no issue was framed over it. Furthermore, Order 1 Rule 1 of CPC provides that all person may be joined in one suit as plaintiffs where any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transaction is alleged to exist in such person, whether jointly severally or in the alternative and if such persons brought separate suits, any common question of law or fact would arise. Therefore, by application of it would show that even if separate suit would have filed common question of law or fact would arise and order dated 06.02.1996 and 24.02.1996 has the similar effect. In a result, the finding of the misjoinder of the plaintiffs is not proper and cannot be given effect to. In a result, in view of the aforesaid discussion, it appears that the appeal is required to be allowed.

19. Consequently, the appeal is allowed and the order dated 24.02.1996 passed in No.312/A/23/90-91 and order dated 06.02.1996 passed in revenue case No.285A23/90-91 are set aside. No order as to costs.

Sd/-

Goutam Bhaduri
Judge

Ashu