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WP-12779-2024

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

WRIT PETITION No. 12779 of 2024*SALEEM KHAN AND OTHERS**Versus**NIZAM AND OTHERS*

Appearance:

Shri Makbool Ahmad Mansoori - Advocate for the petitioners.

Shri Ajay Jain - Advocate for the respondent No.1.

Shri Shashikant Bhati - Government Advocate for the State.

Reserved on :- 14.11.2024

Pronounced on :- 13.05.2025

ORDER

This petition under Article 226 of the Constitution of India has been preferred by the petitioners being aggrieved by the order dated 24.01.2022 (Annexure P/1) passed by the Commissioner, Indore Division, Indore affirming the order dated 16.03.2018 (Annexure P/2) passed by Sub Divisional Officer (Revenue) Kasrawad, District Khargone who in turn had affirmed the order dated 20.12.2017 passed by the Tehsildar, Tehsil Kasrawad, District Khargone.

02. The facts of the case in brief are that one Karim Khan was the owner of the disputed land bearing survey No.224 area 10.319 hectare, Village Mathday, Tehsil Kasrawad, District Khargone. He had three sons namely Jamsher Khan, Dharab Khan and Dilawar Khan and one daughter,



Naseeman Bi. The petitioners represent the estate of two sons of Karim Khan and respondents No.1 to 7 represent the estate of Naseeman Bi.

03. Respondents No.1 to 7 had filed an application under Section 178 of M.P. Land Revenue Code, 1959 (hereinafter referred to as "the Code") before the Tehsildar stating that they are legal heirs of Naseeman Bi and their names are also recorded in the revenue records over the disputed land. Prayer was made by them for partition of the disputed land and allotment of their share to them. The petitioners contested the application by filing their reply stating that respondents No.1 to 7 have never been in possession of the disputed land and even their mother Naseeman Bi had never been in possession thereof hence they are not entitled for claiming partition. It was also stated that daughter of the original owner would not be entitled for any share in the disputed land.

04. By order dated 20.12.2017, the Tehsildar held respondents No.1 to 7 to be entitled for 1/3rd share in the disputed land being daughters of Naseeman Bi. The aforesaid order was affirmed by the Sub Divisional Officer holding that respondents No.1 to 7 would be entitled to 1/3rd share even as per principles of Muslim Law. The said order has been affirmed by the Additional Commissioner by way of the impugned order.

05. Learned counsel for the petitioners has submitted that respondents No. 1 to 7 are heirs of daughter of original holder Karim Khan. The parties are governed by Muslim Law and the dispute relates to agricultural land hence as per Section 164 of the Code devolution of interest in the disputed land would be in accordance with the personal law of the parties. The order



of partition passed by the authorities below granting equal share in favour of heirs of a daughter is not in conformity with principles of Muslim Law and is also against the provisions of Section 164 of the Code. As per Clause 61 of Mulla's Principles of Mahomedan Law there are three classes of heirs. Two living sons and one daughter of original owner would fall within the Category No.(2) i.e. residuaries which provides that a daughter takes as a residuary with the son, the son taking double portion. Thus, two sons of original owner Karim Khan are entitled to take double portion then his daughter. The partition could not have been made as per Section 178 of the Code. Though the Muslim Personal Law (Shariat) Application Act, 1937(hereinafter referred to as "the Act, 1973") provides that all questions (save questions relating to agricultural land) regarding intestate and succession in a property left by a Muslim are governed by the said Act but as per 7th Schedule, List - II (State List) of Constitution of India, transfer and alienation of agricultural land is covered in Entry 18. The 7th Schedule, List-III (concurrent list) Item No.5 deals with intestacy and succession. Thus, the Union Legislature as well as the State Legislature both are empowered to enact law regarding intestacy and succession. While enacting Section 2 of the Act, 1937, the Union Legislature has left question relating to agricultural land out of the scope of Central Act hence the State Legislature was well empowered to enact law governing questions relating to intestacy and succession in agricultural land. Thus, it is the Code which shall prevail which provides for application of Muslim law in respect of inheritance and survivorship. It is hence submitted that the impugned orders having been



passed contrary to the aforesaid provisions deserve to be set aside.

06. Per contra, learned counsel for respondents No. 1 to 7 has submitted that the Act, 1937 itself provides that Muslim Personal Law would not be applicable in respect of agricultural land hence there is no question of its applicability despite the same being a Central Act. It itself has excluded operation of personal law in respect of agricultural land hence it is only Section 178 of the Code which shall prevail. It is hence submitted that the petition deserves to be dismissed.

07. I have considered the submissions of the learned counsel for the parties and have perused the record.

08. Section 164 of the Code deals with devolution of interest in agricultural land and is as under:-

"164. [Devolution. [Substituted by M.P. Act No. 38 of 1961 (w.e.f. 8-12-1961).]

- Subject to his personal law the interest of bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be.]"

09. By virtue of Section 2 of the Act, 1937, rule of decision in cases regarding *inter alia* intestate succession where the parties are Muslims has been specified to be the Muslim Personal Law (Shariat). The said provision is as under:-

"2. Application of Personal Law to Muslims.—Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property properly inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."

10. The dispute in the present petition is as regards succession to



agricultural land belonging to a Muslim. As per Item No.5 of 7th Schedule, List - III of the Constitution of India, which is a concurrent list, both the Union Legislature as well as State Legislature are empowered to enact law regarding succession. The same is as under:-

"5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

11. Section 2 of the Act, 1937 makes Muslim Personal Law applicable in respect of matters *inter alia* regarding intestate succession where the parties are Muslim. The same excludes questions relating to agricultural land. The Act has hence excluded itself in respect of any matter relating to agricultural land meaning thereby that in respect of agricultural land it has no application whatsoever. The effect thereof is that the Union Legislature had saved the question relating to agricultural land and had kept the same out of the scope of the Central Act as a result of which the State Legislature became well empowered to enact law governing questions relating to succession in agricultural land belonging to a Muslim.

12. The Union Legislature as well as the State Legislature both are empowered to enact law regarding succession. However, the Act, 1937 has excluded itself as regards questions relating to agricultural land meaning thereby that there is no central enactment governing the field. Since the State Legislature also had concurrent power its enactment which is the Code would govern the field which is the only law in this regard. Section 164 of the Code provides that the interest of Bhumiswami shall, on his death, pass by inheritance, survivorship of bequest as the case may be but subject to his



personal law. It is this Section which would prevail and not Section 178 and consequently it would be the Muslim Personal Law which would be applicable in respect of questions regarding inheritance or survivorship in respect of agricultural land held by a Muslim.

13. Admittedly, at the time of death of original holder Karim Khan his two sons and one daughter were alive. As per Clause 63-I of Mulla's Principle of Mahomedan Law, the sons would take double portion and daughter, i.e. predecessor of respondents No.1 to 7, would take one share meaning thereby that respondents No.1 to 7 would have $1/5^{\text{th}}$ share in the disputed land whereas the petitioners would have $4/5^{\text{th}}$ share therein.

14. As a result of the aforesaid discussion, the impugned orders passed by the authorities below are hereby set aside and it is held that the petitioners have $4/5^{\text{th}}$ and respondents No.1 to 7 have $1/5^{\text{th}}$ share in the disputed land.

15. The petition is accordingly allowed and disposed off.

(PRANAY VERMA)
JUDGE

Shilpa