HIGH COURT OF MADHYA PRADESH : JABALPUR

BEFORE HON. SHRI JUSTICE SANJAY YADAV

Writ Petition No.13246/2013

Smt. Sharmila Tagore and others

versus

Saidullah Khan and others

Shri R.K. Pancholi, learned counsel for petitioners.

Shri Kishore Shrivastava, learned Senior Counsel with Shri Kapil Jain, learned counsel for respondent No.1.

Reserved on : **11.8.2016**

Date of decision : **17.8.2016**

O R D E R

1. Order-dated 5.3.2013 passed in Regular Civil Suit No.A/625/2011, whereby an application under Order 1 Rule 10 of the Code of Civil Procedure, 1908 filed by the petitioners, has been dismissed, is being assailed vide this petition under Article 227 of the Constitution of India.

2. The Civil Suit in which petitioners sought impleadment is at the instance of respondent No.1 for declaration, permanent injunction and declaration that Will dated 12.1.1991 and Letter dated 3.1.1955 is forged and non est in

the eyes of law and for recovery of possession against respondents No.2 to 9 in respect of Cottage No.9 bearing Khasra No.65 (though petitioner alleges that the suit property is situated over Khasra No.56, 64 and 65) situated at Sultania Road, Koh-e-Fiza, Bhopal admeasuring 1.46 acres, on the plea that respondents No.2 to 9 have manufactured a forged and fabricated Will stating that their father Captain Asadullah Khan had given the suit property; whereas, his father was not the owner of suit property but was given for residence by Late Nawab Hamidullah Khan being an A.D.C. The title over the suit property is being set up by the plaintiff on the contentions that Begum Saleha Sultan, daughter of Begum Mehartaj Nawab Sajida Sultan had gifted the suit property vide Memorandum of Oral Hiba dated 29.8.2000 to him, as such he became the owner of the suit property. And, three of the respondents were in permissive possession over parts of suit property who started claiming ownership over it on the basis of forged Will.

3. Petitioners on the plea that mother-in-law of petitioner No.1 and grandmother of petitioners No.2 to 4, Begum

Mehartaj Nawab Sajida Sultan, daughter of Nawab Hamidullah Khan, was the Ruler of Bhopal, declared as such under Article 366(22) of the Constitution of India. That, after the death of Nawab Hamidullah Khan, she (Begum Mehartaj Nawab Sajida Sultan) was recognized as his heir and successor to his entire properties and assets. It is contended that the petitioners being the joint owner of the suit property having 50% share in the same, Begum Saleha Sultan had no right to give away the property in gift to respondent No.1. It is further contended that Begun Saleha Sultan had earlier filed a Civil Suit No.36-A/99 in respect of Khasra No.56, 64 and 65 and other properties of Nawab of Bhopal; wherein she admitted of having small share in the properties and rest of the properties belong to Nawab Mansur Ali Khan Patoudi and her sister Begun Sahiba Sultan. It appears from the pleadings that said suit has been dismissed and First Appeal No.258/2002 is pending in our High Court. Apparently, the petitioner does not gain any ground on the basis of same pleadings in said suit.

4. It was further contended that the suit property as well other properties of Begum Mehartaj Nawab Sajida Sultan was also subject matter of the Civil Suit filed by younger sister of Begum Rabia Sultan, which was decided in favour of Begum Mehartaj Nawab Sajida Sultan; whereagainst, First Appeal No.296/2000 is pending before our High Court.

5. It was also the contention of petitioners in an application under Order 1 Rule 10 CPC that one more civil suit was filed by one Begum Suraiya Rashid and others, which was dismissed in favour of Begum Mehartaj Nawab Sajida Sultan; whereagainst, First Appeal being F.A. No.437/2000 in pending.

6. It was contended that Begum Saleha Sultan had also filed a Civil Suit : RCS No.12-A/2002 for rendition of accounts in respective of entire properties of Nawab of Bhopal claiming 25% share therein. The trial Court as evident from the pleadings has declined to decree the suit for partition.

7. On the basis of these facts, it was contended that since no partition of the suit property has taken place between the legal heirs of Begum Nawab Sajida Sultan, no legal heirs of

Nawab of Bhopal could alienate, sell or gift the properties of Nawab and as per the judgment in two civil suits which are subject matter of challenge in F.A. No.296/2000 and F.A. No.437/2000.

8. With these facts at hand, petitioners sought impleadment in the Civil Suit filed by respondent No.1 vide application under Order 1 Rule 10 CPC.

9. Respondent No.1 opposed the application for impleadment contending *inter alia* that the applicants who claim their right through Begum Nawab Sajida Sultan cannot be permitted to set up their independent right over the suit property without their being a definite declaration by a Court of law that Begum Nawab Sajida Sultan had limited rights over the property she inherited, as could have created clog on her right to gift the property of which she was absolute owner. While denying the contention that the suit property is part of Khasra No.56, 64 and 65, it was contended that Khasra No.56 is a Public Road whereas Khasra No.64 is recorded in the name of Government.

10. The trial Court vide impugned order rejected the application on the following findings :-

''आवेदकगण की ओर से प्रस्तुत आवेदन पत्र के तथ्य इस प्रकार है कि नवाब हमीद उल्ला खॉन की मृत्यु पश्चात् उनकी सारीसम्पत्ति उनकी पुत्री साजिदा सुल्तान को प्राप्त हुई थी। साजिदा सुल्तान की मृत्यु वर्ष 95 में हुई। उनकी सम्पत्ति के आधो भाग के वारिस नवाब मंसूर अली खॉन पटौदी हुये तथा शेष आधे भाग की स्वामिनी दो पुत्रिया सालेहा सुल्तान एवं सबीहा सुल्तान हुई। वादी द्वारा जिस सम्पत्ति के संबंध में दावा पेश किया गया है उस सम्पत्ति के संबंध में कभी कोई वसीयत नामा निष्पादित नहीं किया गया है। उसी सम्पत्ति के संबंध में प्रकरण माननीय उच्च न्यायालय में लंबित है। प्रकरण के निराकरण के लिये यह भी आवश्यक पक्षकार है। अतः उन्हें प्रकरण में पक्षकार बनाये जाने का आदेश दिया जाय।

आवेदन पत्र के समर्थन में श्रीमती शर्मिला टैगौर द्वारा स्वयं का शपथ पत्र पेश किया गया है। वादी की ओर से प्रस्तुत जवाब के तथ्य इस प्रकार है कि खसरा नंबर 56 की भूमि सड़क पर स्थित है। खसरा नंबर 64 शासन की भूमि है। आवेदकगण की ओर से दाविया सम्पत्ति के संबंध में कोई दस्तावेज पेश नहीं किया गया है। उसके द्वारा प्रस्तुत दावे से आवेदकगण को कोई संबंध नहीं है। इस संबंध में आवेदकगण पृथक से दावा प्रस्तुत कर सकते है। अतः आवेदकगण का दावा निरस्त घोषित किया जावे।

उभयपक्ष को सुना गया। प्रकरण का अवलोकन किया गया। पिता केप्टन असद उल्ला खॉन नवाब हमीद उल्लाखा के यहॉ एलडीसी के पद पर कार्यरत थे नवाब हमीद उल्लाखा के यहॉ एलडीसी के पद पर कार्यरत थे नावब हमीद उल्ला खॉ द्वारा उसके पिता के काटेज क्रमांक–9 निवास के लिये दिया गया था। उसके पिता का देहवासन 28.2.96 को हो गई। प्रतिवादी क्रमांक 1 से 8 उसके भाई बहिन है। जिन्होंने उसके पिता के फर्जी हस्ताक्षर वसीयतनामा 12.10.91 को बना लिया है। अतः उसे वादग्रस्त सम्पत्ति का स्वामी घोषित किया जावे तथा वसीयतनामा 12.1.91 और 3.1.55 कूटरचित होने से निरस्त घोषित किया जावे।

इस प्रकार वादी की ओर से प्रस्तुत दावे के अनुसार उसके पिता को नवाब हमीदउल्ला से प्राप्त काटेज क्रमांक–9 की वसीयतनामा के संबंध में प्रतिवादीगण से विवाद है। आवेदकगण श्रीमती शर्मिला टैगोर की ओर से आवेदन पत्र में जो तथ्य दर्शित किया गया है। उसके अनुसार नवाब हमीदउल्ला खॉ की मृत्यु के बाद उनकी सम्पत्ति के वारिसनवाब मंसूर अली खॉ पटौदी तथा दो पुत्रिया साहिला सुल्तान और सबा सुल्तान हुई तथा खसरा नंबर 56,64 और 65 के संबंध में विभिन्न न्यायालयों से निर्णय हुये है जिनकी अपील मान्नीय उच्च न्यायालय में लंबित है।

अतः प्रस्तुत मामले में आवेदकगण को यदि पक्षकार बनाया जाता है तो उससे वाद की बाहुल्यता बढ़ेगी तथा प्रकरण में वसीयत के संबंध में वादग्रस्त बिन्दुओं को गुण–दोषों के आधार पर निराकरण करने में भी असुविधा होगी।

फलस्वरुप आवेदकण दावे में विवादग्रस्त बिन्दुओं के निराकरण हेतु आवश्यक एवं प्रभावी पक्षकार होना नहीं पाया जाता है।

फलस्वरुप आवेदकगण की ओर से प्रस्तुत आवेदन पत्र आदेश 1 नियम 10 सीपीसी निरस्त घोषित किया जाता है।''

11. The impugned order is being challenged on the ground of it being based on misconstruing the facts and law. It is urged that under the garb of challenge to Will, the plaintiff intends to seek declaration over the suit property on the basis of Hiba which happens to be executed by the person through whom the petitioners have inherited various immovable properties including Khasra No.65, therefore, they are the necessary party in the suit. It is urged that even if the plaintiff looses the suit, there will tacit declaration of suit property in favour of the defendants, respondents No.2 to 9 who are real brothers of the plaintiff. Reliance is placed on the decisions in **Savitri Devi vs District Judge Gorakhpur AIR 1999 SC 976**, **Nirmala Dharsingh Baghela vs Ranjit Singh Amarship Dhuman 2000 (3) MPLJ 218**, **Sultan Khan vs Rehman Khan 1999 (1) MPLJ Note 6**,

Sukhram vs Sarjubai 2005 (2) MPHC Today 44 and **Jagannath Prasad Son vs Laxmi Narain Soni and Razia Begum vs Anwar Begum AIR 1958 SC 886** to bring home the submissions that being a necessary party, the rejection of application under Order 1 Rule 10 CPC deserves to be set aside.

12. Respondent No.1 on his turn, has supported the impugned order. It is urged that the respondent is claiming a right on the basis of title conferred on him by virtue of a gift by Begum Saleha Sultan who was having an absolute right to transfer the property by Memorandum of Oral Hiba. It is urged that even if the claim of petitioners is taken into consideration that no individual share was delineated to any of the successors of Late Begum Mehartaj Nawab Sajida Sultan, then also it was within the right of Begum Saleha Sultan to transfer from undivided share. The later submission are on the basis of principle of law laid down by a Full Bench, High Court of Patna in **Commission of Income Tax, Bihar vs Sayed Saddique Imam AIR 1978 PATNA 197**, wherein on a reference made under Section 256(1) of the

Income Tax Act, 1961 for opinion on the question of law as to "whether on the facts and in the circumstances of the case, the income from the house property falls for inclusion in the total income of the assessee ?" learned Judge Shambhu Prasad Singh concurring with the majority view, expressed his opinion on the distinction between Hiba (gift pure and simple) and Hiba-bil-Iwaz (gift for consideration) observing :

> "23. .. The Mohammedan Law makes a distinction between Hiba (gift pure and simple) and Hiba-bil-Iwaz (gift for consideration). According to the original concept of the Mohammedan Law, Hiba-bil-iwaz was also not a sale for it contemplated either a gift the consideration of which was natural love and affection which was not a property or even where the Iwaz or consideration was a property, it was not stipulated for at the time of the gift. In such cases thus there were two gifts which were not simultaneous and did not constitute one act, One was of the property gifted by the donor in favour of the donee and another of the property which was Iwaz or consideration by the donee in favour of the donor. In such cases an undivided share in the property capable of division could not be lawfully transferred for its possession could not be delivered and the gift could not be completed unless the possession was delivered. To avoid this difficulty the Muslim Jurists of India recognised a

> kind of transaction in which the transfer of property by both parties to the transaction was only one act. As it was really not a gift pure and simple but a sale in the real sense of the term, even an undivided share in property known as Musha could be made subject-matter of the transaction. Such transactions also came to be known as Hiba-bil-Iwaz in India. A gift by a Mohammedan in lieu of the dower debt after the marriage has taken place has always been held by judicial decision to be a Hiba-bil-Iwaz which is really a sale of property within the meaning of Section 54 of the Transfer of Property Act and if the value of the property transferred is more than Rs. 100/- then unless a deed is executed and registered the transaction confers no title. .."

13. The distinction between Hiba and Hiba-bil-Iwaz as adverted to when applied in the facts of present case, wherein respondent No.1 has laid a claim on the basis of Memorandum of Oral Hiba, the copy whereof is brought on record, which expresses in clear terms :

> "That, during the life time of Her Highness Mehr Taj Nawab Sajida Sultan Begum, the relationship between the two families continued. The amicable relationship between the two families continues even today, as it had done so earlier.
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> That, this Oral Hiba was made in favour of Party No.2 in view of the fact that Party No.2 has

> also rendered many services and has been of assistance to Party No.1 in all occasions and in helping, looking after and being the guardian to her son Md. F. Faiz Bin Jung for whom Bhopal City was hew and also in view of the fact that Party No.1 is advancing in her age. Looking to all the circumstances, the Party No.1 made the oral Hiba as stated on 10.8.2000".

- leaves this Court to think that in case of Hiba, which is gift pure and simple, on undivided share in property known as Musha could not be a subject matter of transfer. It appears that the plaintiff being aware of this aspect has brought a suit for declaration of title on the basis of Hiba. The suit being not only for declaring the Will in question as null and void but also for declaration of title, makes the petitioners necessary party, because the declaratory relief sought on the basis of Hiba will not be complete, unless the heirs of the donor are made party, as it will be an issue whether donor had a right to give in the gift from the undivided share.

14. It is a settled principle of law regarding impleadment that though the plaintiff is *dominus litis*; however, for determining whether a person is a necessary party; two tests are to be satisfied, viz. (i) there must be a right to some relief against

such party in respect of manner in the proceeding in question; and (ii) it should be possible to pass an effective decree in the absence of such party [Please see **Deputy Commissioner vs Ramkrishna AIR 1953 SC 521**].

15. Even the principle of law laid down by the decisions relied on by the petitioner is in consonance with the law laid down in **Deputy Commissioner** (supra).

16. The impugned order when adjudged on the basis of above analysis cannot be given the stamp of approval, as it takes into consideration only one of the relief sought i.e. the declaration that Will in question is null and void and had glossed over the relief of declaration of title on the basis of Memorandum of Oral Hiba.

17. Though a reliance is placed by respondent No.1 in the decision rendered by the Apex Court in **Ramesh Hirachand Kundanmal vs Municipal Corporation of Greater Bombay (1992) 2 SCC 524** wherein it is held –

> "14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objectives. The person to be joined must be one whose presence is necessary as a party. What

> makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought or relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd., (1956) 1 All E.R. 273, wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie S.A v. Bank of England,(1950) 2 All E.R.611, that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated :
>
> "The test is `May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights."”

The principle of law laid down in this case is of no assistance to the respondents; rather, when closely scrutinize, helps the petitioners in its applicability.

18. Having thus considered, the impugned order-dated 5.3.2013 is hereby set aside. Application filed by the petitioners under Order 1 Rule 10 CPC is allowed. Respondent No.1 is directed to implead the petitioners as defendants.

19. Petition is **allowed** to the extent above. No costs.

(SANJAY YADAV)
JUDGE

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