IN THE HIGH COURT OF MADHYA PRADESH

AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 17th OF FEBRUARY, 2025

SECOND APPEAL NO. 2837 OF 2022

ANKUSH TIWARI

VS.

THE STATE OF MADHYA PRADESH & OTHERS

Appearance:

Shri Ashok Kumar Jain – Advocate for the appellant

Shri Girish Kekre with Shri Alok Agnihotri – Government Advocates for the respondent/State.

Reserved on: 28.11.2024

Pronounced on : 17.02.2025

JUDGMENT

This appeal is under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 16.11.2022 passed by V Additional District Judge, Katni in Civil Appeal RCA No. 66/2022 dismissing the same affirming the finding given by the trial court dismissing the suit i.e. Civil Suit No. RCSA 318/2021 decided by order dated 20.06.2022.

2. This appeal is of 2022 and was admitted on 24.09.2023 on the following substantial question of law:-

> "Whether the courts below were justified in holding that the appellant did not derive any right, title or interest in the land through the Will executed by late Lagni Bai because of the prohibition contained in Section 165 of the Land Revenue Code.?"

3. Before answering the submission made by the learned counsel for the parties and also the substantial question of law framed by the Court while admitting the appeal, necessary facts of the case are required to be mentioned:

4. A civil suit was filed by the plaintiff/appellant seeking declaration of title and permanent injunction saying that the land situate at Village Bichhiya Survey No. 03 area measuring 1.570 hectare and Survey No. 4 area measuring 2.050 hectare, the land of village Gulwara Survey No. 408 area measuring 4.440 hectare, land of village Gaitra Survey No. 403 area measuring 0.430 hectare and Survey No. 404 area 0.430 hectare and the land of Village Badagaon Survey No. 1504 area 0.410 hectare and Survey No. 1505 area measuring 0.390 hectare owned and possessed by him and a decree in this regard be passed and consequent upon the said decree, the respondents be restrained permanently from interfering in the peaceful possession of the plaintiff over the suit lands. All the suit lands originally belonged to one Lagnibai having no legal heirs and she was being taken care of by the plaintiff who was looking-after her in her lifetime. Lagnibai considering all these aspects, in full sensibility, executed a Will on

21.12.2020 and at the time of executing the same, some Chandrabhan Dubey and Anand Kumar Barman came with her at Tahsili Court. The said Will got notarized before the Notary, who verified the thumb impression of Lagnibai. She died on 08.03.2021 and after her death, plaintiff became the owner all her land and was also in possession of the same. In the revenue record, the land is still recorded in the name of Lagnibai. Since the Revenue Court could not mutate the name of the plaintiff on the basis of Will, therefore, plaintiff had no other option but to file a suit. According to the plaintiff, the Will was not a document of transfer and as such he was not required to take any permission from the Collector. Hence, it was claimed in the suit that on the basis of Will dated 21.12.2020, the plaintiff was entitled to get a decree of declaration and permanent injunction.

4.1 Since the defendants/respondents remained ex-parte, therefore, the trial court proceeded in the matter so as to decide the issue as to whether plaintiff was entitled to get a declaration, as has been claimed by him in the suit, and also entitled to get the decree of permanent injunction or not.

4.2 The plaintiff in support of his claim produced several documents and also the witnesses, who supported the stand of the plaintiff, as was taken in the plaint.

4.3 The trial court finally dismissed the suit and refused to grant any decree in favour of the plaintiff mainly on the ground that Lagnibai belonged to scheduled tribe category and if any transaction was to be made in favour of a non-tribe person then as per Section 165(6) of the

M.P. Land Revenue Code, 1959 (For brevity 'Code, 1959'), permission from the Collector for transferring the land had to be obtained, but there was no such permission and therefore, decree, as claimed by the plaintiff, cannot be granted.

4.4 An appeal was preferred under Section 96 of the Code of Civil Procedure to challenge the judgment and decree passed by the trial court dismissing the suit of the plaintiff/appellant. The appeal was registered as RCA No. 66/2022 and decided by the impugned judgment and decree dated 16.11.2022 wherein the appellate court had also considered the respective provision of Section 165(6) of the Code, 1959 and found that without permission of the Collector, transfer as made by Lagnibai in favour of plaintiff was illegal and void and as such the same deserved to be set aside and finally the appellate court found that the plaintiff failed to prove his case and the trial court had rightly dismissed the suit. As such, appeal was also dismissed.

5. Learned counsel for the appellant has submitted that the transaction, which is involved in the present case, was through a Will. He has submitted that if a Will is executed by a tribe then no permission of the Collector is required because the Will does not come within the ambit of requirement as provided under sub-section (6) of Section 165 of the Code, 1959 and therefore, both the judgments and decree passed by the courts below are contrary to law and deserve to be set aside.

6. Learned counsel for the appellant in support of his contention has placed reliance upon the following judgments:

1. State of West Bengal and another vs. Kailash Chandra Kapur and others – AIR 1997 SC 1348

2. WP No. 4542/2012 – Rajalal vs. Komal Singh decided by the High Court of M.P. by order dated 04.03.2014.

3. Laxmi Bai (Smt.) vs. State of Chhattisgarh decided by the Chhattisgarh High Court by order dated 05.05.2009 in a Writ Petition filed under Article 226/227 of the Constitution; and

4. Ghanshyam vs. Yogendra Rathi – 2023 LiveLaw (SC) 479.

7. Learned counsel for the respondent has opposed the submission made by the learned counsel for the appellant and submitted that as per the settled legal position, both the courts below have rightly dismissed the suit and the appeal preferred by the appellant. He has also placed reliance upon a judgment reported in **1993 MPLJ 80 -Chambaram vs. Chanda & others** .

8. Thus in view of the submission made by the learned counsel for the parties and the substantial question of law framed by this Court, the only question remains to be adjudicated as to whether transaction made by the original owner Lagnibai transferring her rights and title of the lands in question in favour of plaintiff could have been done by her without seeking permission of the Collector, as required under Section 165 of the Code, 1959 or not. At this stage, it would be proper to reproduce the sub-section (6) of Section 165 of the Code, 1959 and also to take note of the judicial pronouncements on the issue relied upon by the learned counsel for the parties, which are as under:-

> "165 (6) [Notwithstanding anything contained in sub-section (1) the right of bhumiswami 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 part of the area to which this Code applies shall-
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> (i)in such areas as are predominately inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, not be transferred nor it shall be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification;
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> (ii)in areas other than those specified in the notification under clause (i), not to be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe without the permission of a Revenue Officer not below the rank of Collector, given for reasons to be recorded in writing."

The Calcutta High Court in case of **Kailash Chand (supra)** has observed as under in respect of the transaction made through a Will:

> "12. In view of the above-settled legal position, the question is whether the bequest made by Mullick in favour of the respondent is valid in law and whether the Governor is bound to recognise him. It is seen that clauses (7), (8) and (12) are independent and each deals with separate situation. Clause (7) prohibits sub-lease of the demised land or the building erected thereon without prior consent in writing of the Government. Similarly, clause (8) deals with transfer of the demised premises or the building erected thereon without prior permission in writing of the Government. Thereunder, the restricted covenants have been incorporated by granting or refusing to grant permission with right of pre-emption. Similarly, clause (12) deals with the case of lessee dying after

executing a Will. Thereunder, there is no such restrictive covenant contained for bequeath in favour of a stranger. The word "person" has not been expressly specified whether it relates to the heirs of the lessee. On the other hand, it postulates that if the bequest is in favour of more than one person, then such persons to whom the leasehold right has been bequeathed or the heirs of the deceased lessee, as the case may be, shall hold the said property jointly without having any right to have a partition of the same and one among them should alone be answerable to and the Government would recognise only one such person. In the light of the language used therein, it is difficult to accept the contention of Shri V.R. Reddy, that the word "person" should be construed with reference to the heirs or bequest should be considered to be a transfer. Transfer connotes, normally, between two living persons during life; Will takes effect after demise of the testator and transfer in that perspective becomes incongruous. Though, as indicated earlier, the assignment may be prohibited and the Government intended to be so, a bequest in favour of a stranger by way of testamentary disposition does not appear to be intended, in view of the permissive language used in clause (12) of the covenants. We find no express prohibition as at present under the terms of the lease. Unless the Government amends the rules or imposes appropriate restrictive covenants prohibiting the bequest in favour of the strangers or by enacting appropriate law, there would be no statutory power to impose such restrictions prohibiting such bequest in favour of the strangers. It is seen that the object of assignment of the government land in favour of the lessee is to provide him right to residence. If any such transfer is made contrary to the policy, obviously, it would be defeating the public purpose. But it would be open to the Government to regulate by appropriate covenants in the lease deed or appropriate statutory orders as per law or to make a law in this behalf. But so long

> as that is not done and in the light of the permissive language used in clause (12) of the lease deed, it cannot be said that the bequest in favour of strangers inducting a stranger into the demised premises or the building erected thereon is not governed by the provisions of the regulation or that prior permission should be required in that behalf. However, the stranger legatee should be bound by all the covenants or any new covenants or statutory base so as to bind all the existing lessees."
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> *Emphasis supplied*

In case of **Laxmibai (Supra)**, the Chhattisgarh while dealing with the provisions of Section 165 of the Code, 1959 has also observed as under:-

> "**12.** The differences between a transfer and a Will are well recognized. A transfer is a conveyance of an existing property by one living person to another (that is a transfer intervivos). On the other hand, a Will does not involve any transfer, nor effect any transfer intervivos, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. In other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as personal law (non-testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a Will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus, to treat a devise under a Will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession. Thus, the

> definition of 'Will' under the provisions of Indian Succession Act, 1925 and the judicial pronouncements as stated hereinabove, make it clear that the 'Will' is not a transfer of the property as transfer takes place between two living persons and the 'Will' comes into effect after death of the executor. This does not involve any transfer intervivos. Section 164 of the Land Revenue Code provides for devolution of the interest of Bhumiswami on his death either passed by the inheritance, survivorship or bequest, as the case may be. The same is subject to personal law of the Bhoomiswami. Thus, the application under Section 165 of the Land Revenue Code, seeking permission of the Collector was ill advised and misconceived. The entire exercise done by the Collector, seeking a report from the Tehsildad and Sub Divisional Officer is void ab initio, as the same has no sanction of law. Similarly, calling of the report inviting objections from the other persons also was a nullity. The observation of the authorities below that the petitioner approach to the civil forum for redressal of her grievance has also been passed without authority of law. Thus, the application of the petitioner for permission to the Collector, at this stage, is not maintainable under Section 165 of the Land Revenue Code. Accordingly, this petition is allowed to the above extent. No order as to costs."

In case of **Rajalal (supra)**, the High Court of M.P. has placed reliance upon the decision of Chhattisgarh passed in the case of Laxmibai has also observed as under:-

> **"7.** SECTION 164 of MPLRC deals with devolution, whereas, sections 165 of the Code talks about "rights of transfer". Section 164 of the Code makes it clear that interest of Bhoomiswami shall, on his death, pass by inheritance, survivorship or bequest. Thus, the right accrued to the legal representatives on the death of Bhoomiswami are to be dealt with as per section 164 of the Code.

> Section 165 deals with transfer. The Indian Succession Act, 1925 defines "will" u/s 2(h) which reads as under:-
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> > 2(h). "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.”

The Supreme Court in case of **Ghanshyam (supra)** while dealing with the provision of Section 54 of the Transfer of Property Act, 1882 has observed as under:-

> **“9.**No doubt, agreement to sell is not a document of title or a deed of transfer of property by sale and as such, may not confer absolute title upon the plaintiff-respondent over the suit property in view of Section 54 of the Transfer of Property Act, 1882, nonetheless, the agreement to sell, the payment of entire sale consideration as mentioned in the agreement itself and corroborated by the receipt of its payment and the fact that the plaintiff-respondent was put in possession of the suit property in accordance with law as is also established by the possession memo on record, goes to prove that the plaintiff-respondent is de-facto having possessory rights over the property in part performance of the agreement to sell. The possessory right of the plaintiff-respondent is not liable to be disturbed by the transferer, i.e., the defendant-appellant. The entry of the defendant-appellant over part of the suit property subsequently is simply as a licencee of the plaintiff-respondent. He does not continue to occupy it in capacity of the owner.
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> **13.**Similarly, the Will dated 10.04.2002 executed by the defendant-appellant in favour of the plaintiff-respondent is meaningless as the Will, if any, comes into effect only after the death of the executant and not before it. It has no force till the testator or the person making it dies. The said stage

> has not arrived in the present case and, therefore, even the aforesaid will in no way confers any right upon the plaintiff-respondent."

As per the respondents, the High Court of M.P. in the case of **Chambaram (supra)** has very specifically dealt with the respective provision of Section 165(6) and observed as under:-

> **"16.** Any other interpretation of the term 'transfer' occurring in section 165(6) of the M.P. Land Revenue Code, 1959, would defeat the purpose behind its enactment and would open gates for tricks and designs being adopted by unscrupulous land greedies to deprive aboriginals of the land held by them. It is a judicially noticeable fact that aboriginals are liberally granted land by the State, mostly on priority basis, with the object of settling them and for their upheaval. If only the theory of extinction of title of the aboriginals and acquisition of title in non-aboriginals by resort to the plea of 'adverse possession' was to be recognised it would not be difficult to find out cases where non-aboriginals would purchase the land though prohibited by law and then file suits of the nature as is at hand, compelling or persuading the aboriginal holders in conceding to the claim and thereby securing transfer of title in disguise.
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> **17.** This Court is definitely of the opinion that the term 'transfer' as occurring in section 165(6) of the Code is not to be given restricted meaning, also not to be read in the light of the definition given in section 5 of the Transfer of Property Act. It has to be liberally construed, assigning an extended meaning so as to cover every contingency which results in depriving the aboriginal holder of the title and vesting the same in any non-aboriginal. That interpretation only would satisfy the Legislative intent and the laudable public purpose behind."

9. Considering the aforesaid enunciation of law it is clear that in all the aforesaid cases relied upon by the learned counsel for the parties, the Courts have considered different aspects of sale and transfer and also considered the requirement of seeking permission in respect of the land which is held by a person from the State Government and a person acquiring Bhumi Swami rights or occupancy land is granted by the State Government or he is a licensee of the Government and later on becomes Bhumi Swami then the said land without permission of the revenue officer below the rank of Collector cannot be transferred. In case of **Chambaram (supra)**, the High Court of M.P. has very specifically dealt with the respective provision i.e. Section 165(6) of the Code, 1959 and also considered the very object of the Statute for formulating such a provision putting rider upon transfer of land belonging to tribes and also considered that if mode of Will is used for transferring a land then as to how and in what manner the very purpose of putting rider to save the interest of the tribes would be frustrated. Not only this, but the Court has also held that the suit cannot be decreed only because the defendants have not contested the same and observed that it is the duty of the Court to see that even in absence of any opposition the claim, if any, is raised by the plaintiff is lawful then only the decree can be granted.

However, learned counsel for the appellant by relying upon the judgments has tried to emphasize that the transfer by way of a Will has not been considered to be a document of transfer of title as per Section 54 of the Transfer of Property Act and therefore, as per the language used by the Statute under Section 165(6) of the Code, 1959, the document of Will

is not a document of transfer of title and therefore, the Will does not fall within the ambit of requirement of Section 165(6) of the Code, 1959. The Supreme Court recently in case of **Sanjay Sharma vs. Kotak Mahindra Bank Ltd. & Ors – SLP (C) No. 330/2017** decided by order dated 10.12.2024 has observed as under:

> "**27.** Section 54 of the Transfer of Property Act, 1882, defines a "sale" as the transfer of ownership in exchange for a price that is either paid, promised, or part-paid and part-promised. This provision further describes the manner in which a sale is effected. It stipulates that, in the case of tangible immovable property valued at one hundred rupees or more, the transfer can be made only through a registered instrument. The use of the term "only" signifies that, for tangible immovable property valued at one hundred rupees or more, a sale document lawful only when it is executed through a registered instrument. Where the sale deed requires registration, ownership does not pass until the deed is registered, even if possession is transferred, and consideration is paid without such registration. The registration of the sale deed for an immovable property is essential to complete and validate the transfer. Until registration is effected, ownership is not transferred.
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> **29.** This Court in *Babasheb Dhondiba Kute vs. Radhu Vithoba Barde in SLP(C) No.29462 OF 2019* held that the conveyance by way of sale would take place only at the time of registration of a sale deed in accordance with Section 17 of the Registration Act, 2008. Till then, there is no conveyance in the eyes of law."

But, still this Court is of the opinion that the High Court in the case of **Chambaram (supra)** has not only considered the scope of Section 165(6) of the Code, 1959, but has also considered the very object of the word 'transfer' in the respective provision and also observed that the

word ‘transfer’ should be interpreted in a particular manner so as to consider the object of word ‘transfer’ and its significance to that of the object putting embargo for seeking permission of the Collector before transferring the land holding by aboriginal tribe to a non-aboriginal.

10. In view of the aforesaid, this Court has no reason to take a different stand than the stand taken by the Court in case of **Chambaram (supra)**. I do not find any weakness in the opinion of the Court so as to defer with the same, and, in fact, I am also of the opinion that if such type of transaction is approved only because the said transaction does not come within the purview of Section 54 of the Transfer of Property Act, the very purpose of formulating the respective provision by the makers of law would become redundant and the sole purpose of putting rider on such transactions would be frustrated and as such I don’t find that both the courts below have committed any illegality holding that the decree of declaration cannot be granted in favour of plaintiff/appellant.

11. Appeal dismissed.

(SANJAY DWIVEDI)

JUDGE

Raghvendra

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