KESAR SINGH AND ORS. A

v.

SADHU

JANUARY 29, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.] B

Punjab Custom (Power to contest) Act, 1920—Amendment Act of 1973—S.7—Executability of the decree in execution when the matter goes to the root of the jurisdiction—Held, since the Amendment Act was applicable at the time of passing the decree by the appellate court, the decree was a C *nullity.*

Darshan Singh **v.** *Ram Pal Singh,* **AIR (1991) SC 1654, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3191 of 1996. D

From the Judgment and Order dated 30.1.92 of the Punjab & Haryana High Court in C.R. No. 330 of 1992.

M.R. Sharma and Prem Malhotra for the Appellants.

E

The following Order of the Court was delivered :

Leave granted.

Substitution allowed.

F

Though the respondent has been served, he is not appearing either in person or through counsel. We have heard the counsel for the appellants. The respondent filed a suit in 1978 for recovery of possession of the land from the appellants on the basis of a declaratory decree obtained by one Nathu in the year 1924 as a collateral on the basis of the custom. It is their case that the appellant had purchased the property from Rulia who is an alienator to Nathu and under the custom he was the nearest collateral and this alienation was not supported by consideration. On appeal, dismissal of the suit by trial Court met reveral. The Second Appeal was dismissed in RSA No. 2416/79. In execution the appellant took the plea that since the customary right had been taken away by an amendment made later, the H

A decree passed by the trial Court is a nullity. That application was negatived and in the impugned order dated January 30, 1992 the High Court dismissed the revision. Thus this appeal by special leave.

The controversy is no longer *res integra*. This Court in *Darshan Singh* v. *Ram Pal Singh*, AIR (1991) SC 1654 considered the effect of the B Amendment Act 1973 on the customary right of the Punjab Custom (Power to Contest) Act, 1920 and held that :

"Considering the above principles, the provisions of the Principal Act, the statement of object and reasons and the provisions of the C Amendment Act and the decisions of the Punjab High Court and of this Court, we are of the view that S.7 of the Principal Act as amended by the Amendment Act is retrospective and is applicable to pending proceedings. The decisions of this Court dated 28-11-1986 in *Ujaggar Singh* v. *Dharma Singh,* Civil Appeal No. 1263 of 1973 and in *Udham Singh* v. *Tarsem Singh,* Civil Appeal No. 1135 D of 1974 dated 15-7-1987 do not need reconsideration.

In course of the arguments it transpired that some of the appellants might have had right to contest the alienations under the Hindu Law. Doubts have been expressed as to whether after these appeals are dismissed any such claim would be tenable in law inasmuch as, E it is submitted, the right under the Principal Act was a statutory right which has now been taken away. The answer to the question would depend on what resulted when the Punjab Laws Act and the Principal Act were passed. There appears to be no doubt that by the former the customs were preserved and by the latter the F customary right to contest alienation was regulated. This would be clear from the following analysis.

However, the intention of the legislature and the provisions of the statute have to be carefully examined to ascertain the result. "An Act of Parliament which recognises the existence and validity of a G custom may not operate to create new statutory rights in favour of the persons or classes of persons who might formerly have benefited by the custom. Such a statute may merely have the effect of sanctioning the validity of the custom as a custom, without merging the custom in the higher title by statute".

H In the instant case we are of the view that the custom was con-

firmed and regulated by the Punjab Laws Act and the Principal Act and it was done away with by the Amendment Act. No statute was passed on the basis of the custom itself so as to transform the custom itself into a higher statutory right. Therefore, either before or after the custom has been done away with by the Amendment Act, the rights of the parties under Hindu Law remain unaffected and will provide the rule of decision where alienations are contested under Hindu Law. It was observed by Robertson, J. in *Daya Ram* v. *Sohel Singh,* 110 PR (1906) 390 that "in all cases under S.5 of the Punjab Laws Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary it is only when the custom is established that it is to be the rule of decision." These observations were approved by the privy Council in *Abdul Hussein Khan* v. *Bibi Sona Dero,* (1917) 45 Ind Ap 10(13) = AIR (1917) PC 181 at p.183). This was reiterated by this Court in *Salig Ram* v. *Munshi Ram,* [1962] 1 SCR 470 = AIR (1961) SC 1374 holding that "where the parties are Hindus, the Hindu Law would apply in the first instance and whosoever asserts a custom at variance with the Hindu Law, shall have to prove it....."

In view of the above position, the view of the learned judge that the appellant is not entitled to raise the executability of the decree in execution is not correct since the Amendment Act was applicable at the time of passing the decree by the appellate Court and the above decree, therefore, is nullity. When the matter goes to the root of the jurisdiction, it is settled law that it can be raised even in execution also. Under those circumstances, the High Court was not right in rejecting the revision of the appellants stating that they are not entitled to raise the plea of nullity. In this view of settled legal position, it does not serve any purpose to remand the matter to the executing court for fresh orders.

Accordingly, the appeal is allowed. The orders of the courts below are set aside. Consequently, the execution petition also stands dismissed. No costs.

G.N. Appeal allowed.