Sukhdev and anr. Vs. Financial Commissioner and ors.

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Court : Jammu and Kashmir

Decided On : Oct-15-2004

Reported in : 2005(1)JKJ151

Judge : Permod Kohli, J.

Acts : Land Revenue Act - Section 15; ;Hindu Succession Act; ;Hindu Law

Appeal No. : OWP No. 786/2001

Appellant : Sukhdev and anr.

Respondent : Financial Commissioner and ors.

Advocate for Def. : S.S. Lehar, Sr. Adv. and; Niten Bhasin, Adv. for the Respondent-2

Advocate for Pet/Ap. : V.R. Wazir, Adv.

Judgement :

Permod Kohli, J.

1. Petitioners and respondent-2 are sons of late Devi Ditta from different wives.Respondent-2 from the first wife whereas petitioners are from the second wife. Devi Ditta died in the year 1953 and his estate devolved upon the petitioners and respondent-2. Mutation No. 31 came to be attested on 14.6.1955 in favour of

the petitioners and respondent-2 where under 50% share of the estate of the deceased, has been allowed in favour of petitioners and 50% in favour of respondent-2 on the basis of some alleged custom of' Choonda Wand'. At the time of death of Devi Ditta, rule of inheritance was governed by old Hindu Law and was based upon the rule of survivorship. Two collaterals of Devi Ditta namely; Charan Dass and Sadhu Ram also had landed property. Charan Dass died issueless in the year 1953 and his share in the estate devolved upon his real brother Sadhu Ram. Sadhu Ram also died issueless in the year 1955. His estates also devolved upon the petitioners and respondent-2 being collaterals under the law of survivorship. Another Mutation No. 40 of village Mukra Tehsil Jammu came to be attested in favour of petitioners and respondent-2 on 27.5.1958 relating to the estate of Charan Dass/Sadhu Ram. Under this mutation also, the property was mutated in the ratio of 50 : 50 allegedly on the basis of' Choonda Wand' custom.

2. It is alleged by the petitioners that the estates devolved upon them and respondent-2 was joint and in the year 1998, they wanted to partition the same. It was at this stage that respondent-2, demanded half share in the land with the petitioners. Thereafter, petitioners came to know of attestation of Mutations Nos. 31 and 40. They accordingly obtained copies of the said mutations and filed a revision petition before the Joint Settlement Commissioner, Jammu (with powers of Settlement Commissioner) on 8.5.1998 challenging Mutation No. 40. Said revision petition came to be dismissed vide order dated 20.8.1999 by the Joint Settlement Commissioner with the following observations:

'I have gone through the record available on the file carefully. From the perusal of the records, these things emerges:

(i) Sadhu deceased issueless during the year 4.1.1955 much before the Hindu Succession Act came into force;

(ii) Inheritance of Devi Ditta father of the parties which was attested on 14.6. 1955 has not been challenged by the petitioners. It is time barred as has been held by the Hon'ble High Court, J&K.;

As such there seems no need to interference in the impugned orders. Hence the revision petition is hereby dismissed. The parties shall bear their own costs.

The file after its due completion be consigned to records.'

3. Petitioners preferred two revision petitions before the Financial Commissioner on 24.11.1999 against the order passed by the Joint Settlement Commissioner as also the Mutation No. 31 passed by the Naib Tehsildar. Both these revision petitions also came to be rejected on 25.7.2001 by the Financial Commissioner on two grounds: (i) that the property has devolved upon the parties on the basis of custom of 'Choonda Wand' which was prevalent at the relevant time; and (ii) that the revision petitions are barred by time. These two orders dated 25.7.2001 passed by the Financial Commissioner and the order dated 20.8.1999 passed by the Joint Settlement Commissioner, have been assailed in the present petition.

4. The challenge to the aforesaid orders is based upon the following grounds:

(i) that at the time of attestation of mutation, petitioners were minor. The mutation was attested in their absence;

(ii) that rejection of the revision petition on the ground of limitation, is contrary to law as there is no period of limitation prescribed under law.

(iii) that alleged custom of 'Choonda Wand' was neither pleaded nor established before the Mutating Officer and hence the devolution of estate on the basis of the alleged custom is impermissible; and

(iv) that devolution of estates should have been on the basis of rule of survivorship as was prevalent at the time of attestation of mutation.

Copies of mutations are on record.

5. From these documents, it is evident that petitioners were not present at the time of attestation of mutation nor any notice was given to them. The mutations are thus attested at their back.

6. As far the question of applicability of the custom of 'Choonda Wand' is concerned, it is not revealed from the mutation that any such custom was alleged or was established before the Mutating Officer. The Joint Settlement Commissioner rejected the revision petition of the petitioners on the ground that Sadhu Ram died issueless before coming into force the Hindu Succession Act and Inheritance of Devi Ditta, which was attested on 14.6.1999, has not been challenged by the petitioners within the prescribed time. The Financial Commissioner before whom second revision petition came to be filed by the petitioners, dismissed both the revision petitions on the following grounds:

(i) that the revision petitions are barred by time; and

(ii) that the custom of 'Choonda Wand' was prevailing at the relevant time.

7. As far the question of limitation is concerned, the Joint Settlement Commissioner has placed reliance upon the judgment of this Court in case titled Mst Zaina v. Financial Commissioner and Ors. reported in SLJ 1983 J&K; 1. In this case, this court held that normally the period of limitation for filing revision petition should be the same as the period for filing appeal.

8. Financial Commissioner and Settlement Commissioner are entitled to exercise revisional jurisdiction under section 15 of J&K; Land Reforms Act, which is noticed as under;

'15. Power to revise orders:

(1) The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any Revenue Officer under his control.

(2) The Divisional Commissioner may call for the record of any case pending before or disposed of by any Revenue Officer under his control.

(3) If in any case in which, the Divisional Commissioner has called for a record he is of opinion that the proceedings taken or order made should be modified or revised he shall report that case with his opinion thereon for the orders of the Financial Commissioner.

(4) The Financial Commissioner may, in any case called fro by him under Sub-section (1) or reported to him under Sub-section (3), pass such order as he thinks fit.

Provided that, he shall not under this section pass an order reversing or modifying any proceeding or order of a subordinate officer affecting any question of right between private persons without giving those persons an opportunity of being heard.'

9. A perusal of the asfore said section reveals that the Financial Commissioner and the Divisional Commissioner are entitled to revise any order passed by any subordinate officer under their control. No period of limitation is prescribed under this section. The question of application of limitation for filing revision before the Financial Commissioner came up for consideration before the Full Bench of this Court in case titled Baboo Ram v. The Financial Commissioner and Ors. reported in JKLR 1972 41, wherein the court observed as under:

'A combined reading of Section 86 of the Tenancy Act and Section 15 of the Land Revenue Act would make it clear that the power of the Financial Commissioner to interfere in revision are very wide and extensive. Unlike the powers of his counter part in Punjab, the powers enjoyed by the Financial Commissioner under the Tenancy Act in force in our State are not subject to the limitations and restrictions contained in Section 115 of Civil Procedure Code. Sitting on the revisional side it is open to him to pass any order which he may deem proper in the circumstances of a case.'

10. Reliance is also placed upon a judgment of the Division Bench of this Court in case titled Jan Mohammad v. Revenue Minister and Ors. reported in 1975 KLJ 11 where the court was examining the scope of Section 30 (6) of the J&K; Big Land Estates Abolition Act and the question of application of law of limitation in absence of there being any provision laying down any period of limitation therein. The court accordingly observed as under:-

'... Sub-Section (7) lays down the period of limitation for an appeal but no period of limitation has been laid down for a revision. It may also be mentioned here that there has been a concurrent finding both of the Financial Commissioner as well as of the respondent-1 firstly that there is no period of limitation for such application in revision and secondly that the provisions of the Limitation Act would not be attracted. It was conceded by the learned counsel for both the parties that the findings of both the Financial Commissioner as well as of respondent-1 were correct and the position therefore, is that the Act does not provide or lay down any period of limitation for such applications in revision and the provisions of the Limitation Act would also not be attracted.'

11. It is accordingly contended that both the courts have committed an error of law in invoking the period of limitation to reject the revision petitions.

12. It is contended on behalf of respondents that where the Financial Commissioner or the Divisional Commissioner exercise power suo moto, period of limitation will not be attracted. However, the limitation will be attracted where the aggrieved party invokes revisional jurisdiction.

13. A similar question also fell for consideration before this court and a co-ordinate bench of this court in case titled Smt. Bishno Devi v. State of J&K; and Ors. reported in 2001 SLJ 86 wherein the court held as under:

' Again suo moto power can be exercised even if attention of the concerned authority is drawn by third person. When some illegality is brought to the notice of the authority vested with suo moto power by a third person, and action is taken then even that action would be an action taken in exercise of suo moto jurisdiction. Such was the view expressed by Punjab and Haryana High Court in Jaswant Singh v. State of Punjab, (1986) IPB Legal Reports and Statutes 314. What was being interpreted was section 69 of the Punjab Co-operative Societies Act, 1961. This section confers suo moto powers on the State Government. It was observed that there is no difference in the exercise of the powers when action is taken by the State Government itself or when the action is taken when third person brings some illegality to the notice of the State Government. At page 318, it was observed :

'I hence fail to see how the position would become diametrically different if the matter is brought to the notice of the revisional authority (which is clothed with wide powers) by one of the parties to the dispute. The State Government is not a natural person and has no personal knowledge of its own and matters are thus brought to its notice either directly or by its employees or by other and no fatality can attach to an order on the hpertechnical ground that if the State Government had acted suo moto its action would have been unreasonable but merely because the action is taken on proceedings brought to its notice by another the self same action would become vitiated.'

14. Keeping in view the language used in Section 15 of the Land Revenue Act which confers revisional jurisdiction upon the Financial Commissioner and Divisional Commissioner and the ratio of the judgments noticed above, I am of the considered opinion that the observations made in case reported in SLJ 1983 J&K; 1, neither lay down a sound proposition of law nor does it create a binding precedent. Applying the ratio of judgments of Full Bench and Division Bench(supra) of this court, there cannot be two opinions that both the authorities below have committed glaring illegality by applying the limitation to reject the revision application filed by the petitioners. It is also relevant to note that what is the period of limitation, has not been indicated in the impugned orders.

15. Now coming to the grounds 3 and 4, which are inter-related, the moot question that falls for consideration whether there was any custom prevalent where under the devolution of the estate of the deceased Devi Ditta and Sadhu Ram was to devolve upon the petitioners and responent-2 in the ratio of 50 : 50. As noticed above, the Mutating Officer has not referred to any such custom and the basis thereof nor the Joint Settlement Commissioner has said anything about the existence of such custom and its application to the parties. However, the Financial Commissioner in the impugned order dated 25.7.2001 has observed as under:-

'... Therefore, the only question before this court is whether or not the custom of 'Chundawant' was prevailing at that time. In support of this, some mutations and have been filed by the counsel for the respondent and as such it is established beyond doubt that this custom actually prevailed..'

'... The law of survivorship under which members of joint family inheriting the ancestral or the self acquired property of their paternal ancestor take the estate subject to the rule of survivorship will also not help in the face of the custom of 'Chundawand' existence whereof has been clearly established...'

16. These findings of the Financial Commissioner are based upon two documents produced by respondent-2 before the Financial Commissioner. One document (Annexure-E) relates to village Chak Makwal Tehsil Hiranagar District Kathua for the year 1979 -80 wherein it is mentioned that custom ' Chundawand' for division of property of land owners. From the copy placed, it appears that a copy of this document was obtained on 2.7.2001. Another document (Annexure-G) is a Mutation No. 18 of village Keran Tehsil and District Jammu. It is mentioned in this mutation that two persons namely Kirpu and Chandu have stated the existence of custom 'Chundawand'. Copy of this document was also obtained on 7.7.2001. It has been brought to my notice that arguments were heard by the Financial Commissioner on 26.6.2001 as mentioned at page -2 of the judgment wherein the Financial Commissioner has noted as under:

'Case came up for final hearing on 26.6.2001 and was to be heard on the question of limitation only but counsel for both the parties agreed to argue the case in toto which was allowed.'

17. It is submitted on behalf of petitioner that these documents obtained by the Financial Commissioner after the arguments were heard and the judgment reserved. No notice of these documents was ever given to the petitioner and therefore, reliance on these documents is unwarranted.

18. Suffice it to say that it was improper on the part of the Financial Commissioner to have relied upon the documents those were not produced before him till the time of hearing of the case and reliance placed upon these documents, is against the principles of natural justice. Apart from this, even if these documents are taken into consideration, it does not in any manner advance the case of rerspondent-2. It is settled proposition of law that whenever a party relies upon any custom, it has to be established that the custom is prevalent either in the locality, in the community or the persons who are claiming the benefit. A custom has to be specifically

pleaded and established.

19. The Apex Court in Kochan Kani Kunjuraman Kani etc v. Mathevan Kani Sankaran Kani and Ors. reported in AIR 1971 SC 1398 held as under:

'In our opinion the High court misdirected itself in determining the question before it. It over looked the fact that the only plea of the respondent was that Kanikkars tribe was governed by Marumakkathayam law. He did not plead any family custom. Before he could succeed in his suits, he had to establish the custom pleaded by him. Proof of any other custom could not help him.'

20. This court in case Ab Ahad Akhoon v. Financial Commissioner and Ors. reported in 2003(3) JKJ 237, held as under:

'It is not disputed that the parties being Muslims, were governed by Muslim Personal Law. In the event the Muslim Personal Law is to be deviated on the basis of some custom, such custom was required to be specifically pleaded and proved before the mutating officer or for that matter any other authority that considered the issue. It is no body's case that any custom was ever pleaded or established before the mutating officer or before the revisional/ reviewing authority, nor is it evident from the orders passed by the authorities below that the custom was specifically pleaded and proved.'

21. In view of the settled position of law, a custom has to be pleaded and established to exclude application of Personal Law of the parties or for that matter the Statutory Law, if permissible. Nothing has happened in the present case. The mutating officer has just applied the custom without determining the question of its application to the parties. The Financial Commissioner has also fell in error by returning a finding on application of the custom based upon documents which had no relevance so far the parties are concerned, that too after the arguments were heard and judgment reserved.

22. I am of the view that respondent-2 has failed to establish the custom and thus, was not entitled to the benefit of the same.

23. In any case, there was no question of applying custom of 'Chundawand' as far the share of Charan Dass and Sadhu Ram is concerned. The custom of 'Chundawand' at the most is applicable where a person has two wives. So far Charan Dass and Sadhu Ram are concerned, both of them died issueless. Even Devi Ditta, predecessor -in- interest of parties was not alive at the time of death of Sadhu Ram whose estate devolved upon parties hereto directly in the year 1955. Estate of Charan Dass/Sadhu Ram could devolve in equal shares upon the petitioner and respondent -2. Since the custom has not been established, the parties being governed by Hindu Law, were/are entitled to the estate of Devi Ditta by rule of survivorship.

24. Mr. S.S. Lehar, senior counsel appearing for respondent-2 has lastly submitted that the petitioner has not disputed the existence of custom amongst the parties and therefore, he had no occasion to establish the same. He relies upon two documents produced before this court to establish that such a custom namely 'Chundawand' is applicable in district Jammu also. One document is Wajib-Al-Arz for the village Chack Magu Tehsil and district Jammu and the entry contained in this document says that such a custom is applicable in the said village. To the same effect, there is another document relating to Dhundpur Tehsil and District Jammu. Entry in this document also says that the custom of 'Chundawand' is appalicable to this village. Both these documents are of no consequence.

25. For what has been stated above, both the orders, passed by the Financial Commissioner and Joint Settlement Commissioner are hereby set-aside. The Mutation Nos. 31 and 41 attested by Naib Tehsildar are also hereby set aside and the matter remanded to Naib Tehsildar concerned to decide the mutation on the basis of rule of survivorship as was prevalent at the time of death of Devi Ditta and Sadhu Ram.