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**(1989) 07 MP CK 0010**

**Madhya Pradesh High Court**

**Case No:** First Appeal No. 163 of 1984

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| Bhagwati Prasad | | APPELLANT |
| | Vs | |
| Chandrabhanu and Others | | RESPONDENT |

**Date of Decision:** July 28, 1989

**Acts Referred:**

- Constitution of India, 1950 - Article 13, 35, 372
- Vindhya Pradesh High Court Constitution Ordinance, 1948 - Section 28

**Citation:** (1993) 2 DMC 218 : (1989) ILR (MP) 473 : (1990) JLJ 569 : (1990) MPJR 334

**Hon'ble Judges:** B.M. Lal, J

**Bench:** Single Bench

**Advocate:** M.L. Jaiswal, for the Appellant; N.K. Shukla and Fakhruddin, for the Respondent

**Final Decision:** Allowed

**Judgement**

B.M. Lal, J.

This plaintiff''s appeal u/s 96 C.P.C. is directed against the judgment and decree dated 27-8-84 passed by the Court of Additional Judge to the Court of District Judge, Chhatarpur, whereby the suit filed by the appellant for declaration that the sale-deed dated 20-5-83 executed by the respondents No. 1 and 2 in favour of respondent No. 3 for the land in dispute, alienated in the man annexed to the plaint, vide letters A-B-C-D, is not binding on the plaintiff and the same be declared void and the plaintiff alongwith respondents No. 1 and No. 2 be declared as owners thereof, has been dismissed.

The short facts leading to this appeal are as under : Pandit Rajaram Sharma had three sons, viz., Kalicharan, Durgaprased and Bhagwati Prasad. Chandra Bhanu, respondent No. 1 is the son of Kalicharan. The house in question situate in Chhatarpur, is ancestral property belonging to their common ancestor Atal Pujari and after his death Pandit Rajaram became the owner of the suit house. He died in

the year 1967. After his death all his three sons, stated above, succeeded him. Kalicharan, father of Chandra Bhanu died in the year 1969. This ancestral house and the appurtenant land ad-measuring 55''x 9'', after the death of Kalicharan was sold by his son Chandra Bhanu and uncle Durgaprasad and they executed a sale-deed in favour of respondent No. 3 Mohandas Sindhi for an amount of Rs. 38.000/-.

The said sale-deed has been challenged by Bhagwati Prasad, the appellant, on the ground inter alia that no partition has taken place between the parties either during the life time of Pandit Rajaram who died in the year 1967 or after the death of Kalicharan who died in the year 1969 and this an cestral house and its appurtenant land remained joint property of Bhagwati Prasad, plaintiff, respondent No. 1 Chandra Bhanu and respondent No. 2 Durgaprased (since dead and his legal representatives are on record). Therefore, the appellant Bhagwati Prasad pleaded that the said sale-deed of the suit house and appurtenant land is not binding on him and he be declared joint owner alongwith the respondents No. 1 and 2.

Durgaprasad and Mohandas Sindhi filed a joint written-statement whereas Chandra Bhanu has filed his separate written statement. Durgaprasad died during the pendency of this appeal and accordingly his name was deleted and his legal representatives have been brought on record before this Court.

The respondents, while resisting the suit justified the sale of the suit house and its appurtenant land. In the alternative it is contended that to the extent of their share, Chandrabhanu and Durgaprasad can sell the suit property and it is for the purchaser (respondent No. 3 to file a suit for partition.)

The plea set up by the respondents No. 1 and 2 that partition has taken place on 25-7-59 and the suit property had come in their possession, have been negatived. Further, the various pleas raised that the same plot was got attached by one Rambux Kurmi in order to justify that the same was the exclusive property of Durgaprasad, have also been negatived.

The Trial Court, however, non-suited the plaintiff on the ground that the appellant should have filed a suit for partition applying the dictum laid down in Babulal v. Tulsiram 1978 M.P.L.J37, giving rise to the present appeal.

The point in issue which goes to the root of the case is :

"Whether ancestral immovable property situated in erstwhile Vindhya Pradesh State, of undivided Hindu family, could be sold by a co-parcener to the extent of his share without the consent of other co-parceners and without getting it partitioned by metes and bounds?".

This position is n"t disputed that according to Mitakshra Law as administered in West Bengal and Uttar Pradesh, no co-parcener can alienate even for value his undivided interest without the consent of the other co-parceners, unless the alienation be for legal necessity or for payment of antecedent debt by father. This is

not all, even in case of alienation of such property in favour of a coparcener, the consent of the other co-parceners is also necessary, (see Para 260, Chapter XII of Mulla Principles of Hindu Law-15th Edition at page 347).

The Mitakshra Law as administered in Uttar Pradesh was made applicable to the erstwhile Vindhya Pradesh Region by legislating Vindhya Pradesh High Court Constitution Ordinance No. 5 of 1948, published in Rewa Raj Gazette Extra-Ordinary dated August 12, 1948. Section 28 of the Ordinance runs as under :

"All cases in the High Court and in the Courts subordinate to the High Court shall be decided according to, and all proceedings in such Courts shall be governed by, the law for the time being in force in the United State of Vindhya Pradesh and, where no law is in force in the United State of Vindhya Pradesh concerning any particular matter, the decision of that matter shall be according to the principles of the law in force in the United Provinces of Agra and Oudh on the subject so far as it can be applied to the said United State, and subject to such alterations as may be necessary in the circumstances prevailing in the said United State, and in the absence of any guide in the laws in force in United Provinces of Agra and Oudh, such matter shall be decided according to equity, justice and good conscience.

As such Mitakshra Hindu Law as administered in Uttar Pradesh governing rights of the persons in regard to property has been adopted in Vindhya Pradesh Region also by virtue of the said Ordinance.

By interpreting Ordinance No. 5 of 1948 in Rammilan v. Bhagwat 1963 M.P.L.J 166 it has been held that Mitakshra Law as administered in Uttar Pradesh is also applicable to the parties in Vindhya Pradesh Region as well.

However, it is contended that how it is applicable is not clear from Rammilan''s case (supra) as there is no discussion about it.

Before entering into the controversy in issue, the learned Counsel appearing for the parties have been asked to search and find out as to whether the Ordinance No. 5 of 1948 has been repealed or modified by now by competent Legislation. But in their exhaustive probe they could not find out any such legislation repealing or modifying the said Ordinance. Therefore, a question arises--

Whether after coming into force of the States Reorganization Act, 1956 w.e.f., 1.11.56, the territorial jurisdiction of erstwhile State of Vindhya Pradesh, though merged in larger Madhya Pradesh State, yet Mitakshara Law as administered in Uttar Pradesh governs the rights in respect of the property of the citizens of Vindhya Pradesh Region?".

In this context it is pertinent to refer the decision of the Apex Court in The Director of Industries and Commerce, Government of A.P. Hyderabad y. V. Venkata Reddy AIR 1973 S.C. 327 wherein dealing with the similar situation it was held that Mulki Rules prevalent in erstwhile Telangana Region, continue in force in that region even

after its becoming a part of larger Andhra Pradesh State, on coming into force of the States Re-organization Act, 1956.

In this regard it is relevant to refer certain provisions of the Constitution of India in order to ascertain whether Ordinance No. 5 of 1948 is still in force. In this regard provisions of Articles 35(b) 372 and 13(b) of the Constitution are relevant. Article 35(b) reads as under :

"35. Notwithstanding anything in this Constitution :--

(a) ... ... ...

(b) any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in Sub-clause (i) of Clause (a) or providing for punishment for any act not referred to in Sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptation and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament.

Explanation,-- ... ... ..."

This Article appearing in Chapter III of the Constitution deals with the fundamental rights.

As pointed out by the learned Counsel appearing for the respective parties that till date Ordinance No. 5 of 1948 has not been repealed, altered of amended, therefore, in view of the provisions of Article 372 and those of Article 35(b) of the Constitution of India, the said Ordinance No. 5 of 1948 continues to be in force till date and is applicable in Vindhya Pradesh Region. As such, even if erstwhile Vindhya Pradesh has been merged in new Madhya Pradesh State after the States Reorganisation Act, 1956 which does not change the legal situation and Mitakshara Hindu Law as administered in Uttar Pradesh shall continue to govern the Vindhya Pradesh Region, but certainly the Mitakshra Law as administered in Madhya Pradesh shall not extend to the erstwhile Vindhya Pradesh Region and the effect of States Reorganisation Act, 1956 making Vindhya Pradesh Region a part of new Madhya Pradesh, has to be ignored for this purpose in view of the provisions of Article 35(b) of the Constitution.

Then strong reliance was made on Kailash Pati Devi Vs. Bhubneshwari Devi and Others, , wherein it has been ruled that a purchaser of joint family property from a member of the family, may have right to file general suit for partition against all the members of the joint family and that may indeed be a proper remedy to effectuate his purchase. This case is from Allahabad (Uttar Pradesh) and therefore, it is submitted that the view taken by this Court in Full Bench decision in Ramdaval v. Manaklal 1973 M.P.L.J. 650, that in such situation the purchaser of a coparcenary property may file suit for partition, is similar to that of Smt. Kailashpati Devi''s case (supra). As such there is no distinction between the property situated in Madhya

Pradesh or in Uttar Pradesh,

At the outset it may be stated that the facts of Smt. Kailashpati Devi''s case (supra) is not applicable to the instant case. Here, it is necessary to give reference of para 260 of Mulla Hindu Law (ibid). It has already been made clear that Mitakshra Law as administered in Uttar Pradesh, no coparcener can alienate, even for value, without the consent of other coparceners, his share in the coparcenary property; but there are exceptions to the same, i.e., an alienation may be made for legal necessity or for payment of antecedent debt by father. Smt. Kailashpati Devi''s case (supra) judgment is a short one and does not contain facts is detail. There might be that the property in question sold, was for legal necessity or for payment of antecedent debt by father and in that context, the Apex Court held that the purchaser of joint family property from a member of the family may have right to file general suit for partition against all the members of the joint family. But, in the instant case, it is not that Chandra Bhanu and Durgaprased sold the joint coparcenary property to the respondent No. 3 Mohandas Sindhi for any legal necessity or for payment of antecedent debt by father. Therefore, Smt. Kailashpati Devi''s case (supra) does not help the case of the respondents,'' being distinguishable on facts.

From the discussion above, the legal position that emerges is that in the instant case the property situate in Chhatarpur District which is admittedly a part of the erstwhile Vindhya Pradesh Region, and therefore, according to Mitakshra Hindu Law, which is, as stated, still applicable in that Region, and the parties are governed by it, the respondents Chandra Bhanu and deceased Durgaprasad had to right to alienate the coparcenary undivided interest without the consent of the, appellant Bhagwati Prasad, acting contrary to .the provisions of Para 260 of Mulla Hindu Law referred to above and thus, the sale dated 20-5-83 is void.

For the reasons stated above, the appeal is allowed and the suit is decreed with costs, setting aside the judgment and decree impugned. Counsel''s fee, according to schedule, if certified.