IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 4296-4297 OF 2009

BHARAT BHUSHAN ...APPELLANT(S)

VERSUS

TEJ RAM AND ORS. ...RESPONDENT(S)

O R D E R

1. The defendant no.1 in the suit is in appeal challenging the order of the High Court by which the suit dismissed by the learned Trial Court and the First Appellate Court has been decreed in Second Appeal.

2. The parties to the suit belong to the Kannoaura Tribe which is a notified scheduled tribe under the Constitution (Scheduled Tribes Order 1950). The plaintiffs are the sons of Defendant No.3, who sold the property to Defendant No.1 who was a minor at the relevant point of time and was represented by his father i.e. Defendant No.2. The pleadings and counter pleadings of the parties give rise to a simple issue which was summarized by the High Court

in the following terms:

> **At the time of hearing learned counsel for the parties submitted that legality of transfer of land by deceased Defendant No.3 in favour of Respondent-Defendant No.1 is to be examined in the light of Wajib-ul-Arz Ex.P.G. It was relied upon at the time of hearing by both learned counsel in this case.**

3. The learned Trial Court held that the Customary Law governing the parties recorded in a book known as "Wajib-ul-Arz" (Exhibit P.G) did not prohibit the Defendant No.3, the owner of the land, to effect the transfer. However, the same was without any legal necessity. Hence the suit was dismissed. The plaintiffs filed an appeal before the First Appellate Court. The First Appellate Court while maintaining the finding with regard to the competence of defendant no. 3 to sell the land reversed the finding on the point of legal necessity. Accordingly, the decree of dismissal was maintained. In second appeal (upon remand of the matter) the High Court framed two substantial questions of law which are as follows:

> **1. When parties are admittedly governed by custom, was the First Appellate Court below justified in importing the doctrine of legal**

necessity under Hindu Law while dismissing the appeal of the appellants and such a finding is sustainable in the eyes of law?

2. In the absence of findings on Issue No. 8, which were recorded in favour of the appellants and against the respondents, having been challenged by the latter, since they were not aggrieved from such findings, first appellate Court below was justified in passing the impugned judgments while setting aside the findings on such issue?

4. The High Court answered the Second Appeal by holding that under the Customary Law in force (Exhibit PG) the Defendant No. 3 was not legally competent to effect the transfer. Accordingly the suit was decreed.

5. We have heard the learned counsels for the parties.

6. Shri A.K. Sanghi, learned senior counsel appearing on behalf of the appellant-defendant has contended that the High Court in the impugned order had answered both the questions of law in favour of the defendant and therefore, the reversal of the decree of dismissal of the suit was not justified. It is further argued that the High Court while exercising its jurisdiction under Section 100 of the

Code of Civil Procedure ought not to have reversed the findings recorded by the learned Trial Court and the First Appellate Court on a re-appreciation of the evidence and materials on record. Exercise of jurisdiction in such a manner by the High Court was totally uncalled for. It is argued by the learned counsel for the appellant that the High Court in coming to its impugned findings had interpreted sub-clauses 9, 10 and 11 of Clause 30 of the Wajib-ul-Arz which deal with rights of widows in partition and rights of issues. Though the case had proceeded on a consideration of the aforesaid limited part of the Customary Law i.e. Clause 30, Shri Sanghi has drawn our attention to Clause 16 of the Wajib-ul-Arz to point out that in terms thereof there is no restriction on an owner of the land to transfer/alienate such land. It is, therefore, urged that having regard to provisions contained in Clauses 16 and 30 (Sub-clauses 9,10 and 11), this Court ought to hold that the transfer of the land by Defendant No. 3 in favour of Defendant No.1 is valid and justified. It has been further argued that the aforesaid issue raises pure questions of law and therefore there is no bar for this Court to go into

the same and provide an appropriate answer to the questions raised.

7. The arguments offered on behalf of the appellant have been countered by the learned counsel for the respondents by contending that the parties had gone to trial on the basis of a clear understanding that the provisions of sub-clauses 9,10 and 11 of Clause 30 govern them and that their rights are to be adjudicated within the four corners of the aforesaid provisions of the Wajib-ul-Arz. In any event, according to the learned counsel for the respondents, the interpretation of clause 16 of the Wajib-ul-Arz that has been urged on behalf of the appellant would have the effect of rendering sub-clauses 9, 10 and 11 of Clause 30 nugatory and futile and therefore on a harmonious construction of the two sets of provisions, Clause 16 may be read subject to provisions of sub-clauses 9,10 and 11 of Clause 30.

8. We have considered the respective submissions advanced at the bar. The substantial questions of law framed by the High Court upon remand of the matter have already been noticed. While it is correct that

the answer to the said questions is in favour of the defendants, the same does not necessarily answer the core issue that was required to be decided in the second appeal in favour of the appellant-defendant, namely, that the transfer made by Defendant No. 3 to Defendant No.1 was permissible under the Customary Law in force. This is because the substantial question of law relate to the question of legal necessity which principle of Hindu Law stands excluded by the explicit principles of the Customary Law that govern the parties.

9. We have read and considered sub-clauses 9, 10 and 11 of Clause 30 as well as Clause 16 of the Wajib-ul-Arz, the original of which in Urdu and the translated versions thereof have been placed before us by the respective parties. As there is no variance in the translations offered by the respective parties, the above provisions may be reproduced below:

> **<u>Clause 16 : Rights regarding sale and mortgage of property</u>**
>
> **1. Land holders can sell or mortgage their own properties. State will make no interference except in case of a swale to an outsider where permission of State is**

required.

2. In case of sale or mortgage of the entire Khata the incidence of Atwara shall be on Mushtari (Purchaser) and Murtehan (Mortgagee).

3. A Mujara (i.e. person cultivating for the owner i.e. tenant) cannot sell or mortgage ancestral property without permission of the owner of land.

Clause 30 : Rights of widows regarding share in partition and shares of issues

Sub-clause 9

In the case of daughter, daughter shall not get any share along with her brothers.

Sub clause 10

In the absence of male issues, the owner of land can get the land mutated during his life time in favour of daughters through gift or will and the widow shall have no right. The Reyasat shall not take notice of the same.

Sub-clause 11

In the presence of absence of male issues, the owner of a holding has the right that he may out of his holding transfer the same through gift or will in favour of his daughter, son-in law, or an adopted son and can do so through Sankalpa or alm but in that condition registration of the same is compulsory.

10. Clause 30 deals with rights of widows regarding share in partition and shares of issues.

While sub-clause 9 may not be relevant, sub-clauses 10 and 11 make it abundantly clear that in the presence or absence of male issues, the owner of the land/property, during his life time, is entitled to transfer/alienate the same by gift or will in favour of his daughter, son in law or adopted son provided the instrument of transfer is registered. If sub-clauses 10 and 11 of Clause 30 of the Wajib-ul-Arz is to the above effect, purport and effect of Clause 16, which deals with rights regarding sale and mortgage of property, will naturally have to be understood in a manner that the rights under Clause 16 do not destroy or erode what is provided under sub-clauses 9, 10 and 11. We, therefore, hold that Clause 16 of the Wajib-ul-Arz does not override the provisions of sub- clauses 9, 10 and 11 of Clause 30; rather the said clause 16 will have to be read as subject to the provisions of sub-clauses 9, 10 and 11 of the Clause 30.

11. Having read and understood the relevant provisions of the Wajib-ul-Arz in the above manner, we can find no fault with the eventual conclusion recorded by the High Court. We are, therefore, not inclined to interfere with the order under appeal.

Consequently, the appeals are dismissed, however, with no order as to costs.

…..J.
[RANJAN GOGOI]

NEW DELHI **…..J.**
16TH SEPTEMBER, 2015 **[N.V. RAMANA]**

ITEM NO.102 COURT NO.8 SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Civil Appeal No(s). 4296-4297/2009

BHARAT BHUSHAN **Appellant(s)**

VERSUS

TEJ RAM AND ORS. **Respondent(s)**
(with interim relief and office report)

Date : 16/09/2015 These appeals were called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE RANJAN GOGOI
HON'BLE MR. JUSTICE N.V. RAMANA

For Appellant(s) **Mr. A.K. Sanghi,Sr.Adv.**
Mr. Rohitash S.Nagar,Adv.
Mr. Himanshu Mahra,Adv.
Ms. Sunita Sharma,Adv.

For Respondent(s) **Mr. Rajesh Gupta,Adv.**
Mr. Harpreet singh,Adv.
Mr. Ajay Choudhary,Adv.

UPON hearing the counsel the Court made the following
O R D E R

The appeals are dismissed in terms of the signed order.

(MADHU BALA) **(ASHA SONI)**
COURT MASTER **COURT MASTER**
(Signed order is placed on the file)