
(1976) 01 OHC CK 0006
In the Orissa High Court
Case No : Second Appeal No. 344 of 1972

Ajib Chandra Mohanty	Vs	APPELLANT
Maheswar Routra and Others		RESPONDENT

Date of Decision : 09-01-1976

Acts Referred:

Transfer of Property Act, 1882 — Section 106

Citation : (1976) 42 CLT 363

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : S.C. Mohapatra and S. Kar, for the Appellant; R.C. Patnaik, P.K. Misra and A. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Ray, J.—This is a Defendant No. 1's second appeal from the confirming decision of the lower appellate Court in a suit for declaration of title, and recovery of possession with respect to a residential house standing in an area of 58 decimals in Heragohiri Sahi of Puri town.

2. Originally the suit land without the house constituted Amrutamanohe Lakhraji Niskar Baheli land belonging to Kausalya Das Math (Defendant No. 2). One Madan Mohan Patnaik took lease of the disputed land from the Math on 8-6-1916 for a period of twenty years and constructed a house thereon. On the death of Madan Mohan his son Laxminarayan sold the suit property to Narahari Mohanty on 12-8-1930. The later sold it to the Plaintiff on 3rd December, 1935. The Plaintiff then let out the suit house to Defendant No. 1 in 1948 who subsequently got his name mutated in landlord's sherista and also in Municipal records without the knowledge of the Plaintiff. The Plaintiff coming to know of these surreptitious acts of ownership on the part of Defendant No. 1 filed a house rent control case for his eviction from the suit house. The latter denied Plaintiff's title to the suit land in that proceeding and questioned the House-Rent Controller's jurisdiction to entertain the eviction proceeding. Accordingly, the House Rent Controller

referred the Plaintiff to civil Court for establishment of his title. The present suit was filed in the aforesaid circumstances.

3. Defendant No. 2 did not appear in the suit. Defendant No. 1 who alone contested, denied Plaintiff's title to and possession over the suit property. He also denied the relationship of landlord and tenant between himself and the Plaintiff. His positive case is that he has been In possession of the suit property in his own right since the year 1936 and has been paying rent to the landlord and has got his name recorded in the Municipal records. The Plaintiff filed two proceedings in the Court of the House-Rent Controller one in the year 1962 and the second in the year 1962, but in both these proceedings he failed. He also pleaded that since the Plaintiff was never in possession of the suit property within twelve years of the suit, he must be non-suited on ground of limitation.

4. The trial Court held that the Plaintiff has subsisting title and he inducted Defendant No. 1 as a monthly tenant into the suit house and Defendant No. 1 continued to possess the house in that capacity till his tenancy was determined by the Plaintiff's notice dated 3-9-1965. The notice to quit is valid and legal. He also found that the suit is in time and the civil Court has got jurisdiction to entertain the suit.

5. The lower appellate Court Confirming the decision of the trial Court held as follows; b) Plaintiff has subsisting title to the suit property having purchased the same in the year 1935 and inducted Defendant No. 1 as a monthly tenant under him in the year 1945. (b) Plaintiff paid ground rent to the landlord (Defendant No. 2) for the period from 1949-50 to 1956-57. (c) Plaintiff had asked Defendant No. 1 to pay Municipal tax on his behalf to be adjusted towards rent and, accordingly, Defendant No. 1 paid tax on his behalf till 1955 when he surreptitiously and without the knowledge of the Plaintiff got his name recorded in the Municipal records. The mutation of Defendant No. 1's name was, however, set aside in Municipal Case No. 214 of 1962-63 and the name of the Plaintiff was restored in respect of the suit property. (d) Plaintiff had served a valid notice to quit before instituting the suit. The notice to quit u/s 106 of the Transfer. Property. Act was issued on 3-9-1965 and the suit having been filed within twelve years of such notice, is not barred by limitation, and the suit is maintainable in civil Court. (e) The first notice issued by the Plaintiff on 3-7-1950 (Ext. 9) to Defendant No. 1 determining the tenancy had not, in fact, been served.

6. Mr. Mohapatra, the learned Counsel for the Appellant, has raised four contentions, namely: (1) the Court below should have held that the Plaintiff has no title but the Defendant No. 1 has acquired title to the suit property; (2) the Defendant No. 1 has acquired title by adverse possession since he repudiated the Plaintiff's title in the year 19-18; (3) in any case, since 1950 the Plaintiff having given notice of termination of the tenancy of Defendant No. 1, the possession of the latter thereafter will be, adverse and he being in such adverse possession for more than, twelve years acquired title to the suit property; and (4) after finding

that the Defendant No. 1 had been inducted as a tenant; under the Plaintiff, the lower appellate Court should not have, granted the relief of eviction, because such a relief was within the exclusive jurisdiction of the House-Rent Controller under the House Rent Control Act which has been enacted as a measure of public policy.

7. The first three contentions are essentially questions of fact. On a perusal of the written statement I do not find that Defendant No. 1 has specifically pleaded acquisition of title by adverse possession. He has not put forward any positive case of acquisition of his title in the year 1936 except saying that he has been in possession thereof since then in his own right. As has been held by the Court below the evidence does not support such a contention of his and, in my opinion, both the Courts have rightly negated that defence case. In absence of any express averment as to the point of time when his adverse possession commenced in his pleading or in his evidence, it is difficult to hold that his possession was adverse for twelve years or more so as to create title in him. That apart, there is no reliable and trustworthy evidence to warrant a finding that Defendant No. 1's possession was *nee vi*, *nee claim* and *nee preario*.

8. The only serious contention to be dealt with is as to whether the civil Court, after having rendered a finding that the Plaintiff had inducted the Defendant No. 1 as tenant into the suit house thereby creating a relationship of landlord and tenant between them, is to proceed to give the other relief of eviction, in view of the mandatory provisions of Sections 6, 7, 13 and 14 of the House-Rent Control Act. As against this contention, the learned Counsel for the Respondent urges that the Defendant No. 1 having raised an objection to the jurisdiction of the House Rent Controller on the ground that there is no relationship of landlord and tenant between him and the Plaintiff and having succeeded in his defence before the House Rent Controller, as could be apparent from the latter's final order (Ext. F), he shall not be permitted to take the plea of lack of jurisdiction of the civil Court on the basis of the findings rendered therein. In this connection reliance has been placed on an unreported decision of this Court in the case of *Abdul Malik Hasanali v. Warjang S.A.* No. 45 of 1966.

The Defendant No. 1 in the house rent control case took the stand that he was occupying the suit house by virtue of his own right and that the Plaintiff had no title to the same. By that stand the Defendant No. 1 questioned the jurisdiction of the House-Rent Controller to adjudicate upon the petition for eviction filed by the Plaintiff and ultimately succeeded in getting that petition dismissed. This stand substantially amounts to repudiation on his part of the relationship of landlord and tenant, if there was any, which is different from determination of tenancy on the part of the landlord by efflux of time or otherwise. In the civil suit the Defendant No. 1 took the identical stand as before the House-rent Controller. Having got the eviction petition before the House rent Controller dismissed by successfully pleading his want of jurisdiction to entertain the eviction proceeding he shall not be permitted to again invoke the jurisdiction of the House Rent

Controller for the purpose of ousting the jurisdiction of the civil Court in granting the relief prayed for by the Plaintiff.

In Abdul Malik's case this Court accepted the principle that a party denying the jurisdiction of a particular Tribunal and having succeeded in that plea cannot deny the truth of that plea in the subsequent proceeding before another Tribunal. Reliance was placed on certain decisions of other High Courts in support of this principle. This is sought to be distinguished by Mr. Mohapatra on the ground that in Abdul Malik's case the tenant changed his plea taken before the House-Rent Controller in the civil suit. Before the House-Rent Controller he denied the relationship of landlord and tenant which was acceded to by the Plaintiff and accordingly the House-Rent Controller threw out the application for eviction for lack of jurisdiction. In the civil suit for eviction the tenant resisted it on the ground that he was occupying the house under an agreement with the landlord and that as he was a tenant by virtue of the agreement he could not be evicted except in due process of law under the House Rent Control Act and, accordingly, the civil Court had no jurisdiction to evict him. The agreement was found to be genuine. In the context of these facts it was held that a party denying the jurisdiction of the House Rent Controller could not be allowed to veer from that position in the civil suit.

9. The point of distinction urged by Mr. Mohapatra has no substance. The view taken in Abdul Malik's case is a well established proposition as an incident to the law of estoppel. It will be pertinent to quote a passage from Bigelow on Estoppel, Sixth Edition, which runs as follows:

If parties in Court were permitted to assume inconsistent positions in the trial of their causes, -the usefulness of Courts of justice would in most cases be paralysed, the coercive process of the law, available only between those who consented to its exercise, could be set at naught by all. But the right to all men, honest and dishonest, are in the keeping of the Courts, and consistency of proceeding is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of a litigation must act consistently with it one cannot play fast and loose.

At another place the same author has said:

The principle under consideration will apply to another suit than the one in which the action was taken, where the second suit grows out of the judgment of the first. It is laid down that a Defendant who obtains judgment upon an allegation that a particular obstacle, exists cannot in a subsequent suit based upon such allegation deny its truth.

In the case of Gajapatiraj v. Secretary of State AIR 1926 P.C. 18, their Lordships of the Judicial Committee referred to the aforesaid principle In the following words:

A litigant who has all along maintained a position in support of one and in this case the more important, branch, of his suit cannot be permitted, when he fails upon this branch to withdraw from the position and assert the contrary, more especially - when he thereby places his opponent at a great disadvantage. There could be no clearer case for the application of the doctrine of estoppel owing to the conduct of the litigant.

10. The question of approbation and reprobation has been dealt with at page 171 of Halsbury's Laws of England, Third Edition, Volume 15. There, it is observed:

On the principle that person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions, first, that the person in question having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile, and second, that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

This extract has been accepted by the Supreme Court in the case of Nagubai Ammal and Others Vs. B. Shama Rao and Others, , where it has been held the operation of the maxim that a person cannot approbate and reprobate should be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. Their Lordships of the Supreme Court also relied upon the following observations of Scrutton, L.J. in the case of Verschures Creameries Limited v. Hull and Netherlands Steamship Company Limited (1921) 2 K.B 608

A Plaintiff is not permitted to "approbate and reprobate". The phrase is apparently borrowed from" the Scotch law, where it is used to express the principle embodied in our doctrine of election namely, that no, party can accept and reject the same instrument: Ker v. Wauchone (1919) 1 H.L.J. 1(21) (232) (F). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

The aforesaid principle has also been reiterated in a recent decision of Delhi High Court in the case of P.L. Mehra, etc. Vs. D.R. Khanna etc., , as follows:

Thus a person having successfully resisted a suit filed by R for his ejectment from the land in suit on the ground that R was not a Bhumidhar and the suit for ejectment was not maintainable in a revenue Court cannot take up inconsistent stand in subsequent suit relating to the same land brought by the successors-in-interest of R and contend that R was a Bhumidhar and the suit for ejectment should have been filed in a revenue Court. He having already taken advantage of his pleas about the status of R and the maintainability of a suit in a revenue

Court by the dismissal of the earlier suit cannot now turn round and take the stand that R was a Bhumidhar and the suit was triable in a revenue Court. (Quoted from head-note)

11. There is indeed a rule by way of an exception to the aforesaid doctrine that there can be no estoppel against a statute. Mr. Mohapatra invokes this rule and argues that Defendant No. 1 despite service of notice to quit by which his tenancy has been terminated would continue to be a tenant as defined in Sub-section (5) of Section 2 of the Orissa House Rent Control Act. Being a tenant he shall not be liable to be ejected except as provided in Section 7 thereof (vide section b of that Act). To evict such a tenant proceedings must be initiated u/s 7 before the Controller. Thus the civil Court has no jurisdiction to pass a decree for eviction, even though one or other of the grounds envisaged under Sub-section (2) of Section 7 has been made out. In the instant case, the Defendant No. 1 repudiated his tenancy right before the year 1962-63 when he got his name mutated as owner in respect of the suit house. That was not a case of termination of his tenancy right at the instance of the landlord. Thus, having repudiated his tenancy right and having claimed an independent title to the suit house, he converted his position to that of a trespasser. That is the stand he took before the House Rent controller and adhered to it even in the civil Court. The finding of the Courts below that he had been inducted in the year 1945 did not constitute him a tenant as defined in Sub-section (5) of Section 2 of the House Rent Control Act in view of his act of repudiation sometime prior to 1962-63. His position after repudiation will be nothing more than that of a rank trespasser. It is only where a tenancy is terminated at the instance of the landlord and the tenant continues in possession despite such termination, that he would continue to constitute a statutory tenant and would be afforded protection under the various provisions of the House Rent Control Act. Therefore, having, by his own conduct, adopted the status of a trespasser and on that basis having denied the jurisdiction of the House Rent Controller and having succeeded in that plea, cannot now deny the truth of that plea which constitutes him a trespasser in the civil Court. The finding of the courts below that he had been inducted as a tenant in the year 1945 does not militate against this stand of Defendant No. 1. Mere issuance of a notice to quit in the year 1945 before institution of the suit for eviction would not make Defendant No. 1 a tenant as that notice was apparently issued as a matter of abundant precaution. The position Mr. Mohapatra now wants to adopt for his client, Defendant No. 1. that he is a tenant within the meaning of Sub-section (5) of Section 2 of the House Rent Control Act is inconsistent with his earlier position which, in law, makes him a rank trespasser. In view of the aforesaid doctrine of estoppel, Defendant No. 1 cannot be allowed to plead lack of jurisdiction of the House Rent Controller to obtain some advantage there and then turn round and plead in civil Court that the House-Rent Controller has absolute jurisdiction to secure some other advantage. He having taken a particular position deliberately before. House Rent Controller, without mistake induced by the Plaintiff must act consistently with it. Besides, as

already indicated above he does not come within the purview of the definition of "tenant" under Sub-section (5) of Section 2 of the House Rent Control Act. As such, he cannot get any assistance from the rule that there can be no estoppel against a statute.

12. For the aforesaid reasons, I am satisfied that the decision of the Courts below in granting a decree for eviction are correct. In result, there is no merit in this appeal which is dismissed with costs.

Appeal dismissed with costs.