
(1978) 03 OHC CK 0018
In the Orissa High Court
Case No : Second Appeal No. 65 of 1976

Arjuna Jena

APPELLANT

Vs

Chaitanya Thakur and Others

RESPONDENT

Date of Decision : 17-03-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, 2(2)
Orissa Hindu Religious Endowments Act, 1939 — Section 58, 58(1), 70, 76
Orissa Hindu Religious Endowments Act, 1951 — Section 25

Citation : (1978) 45 CLT 461

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

Bench : Single Bench

Advocate : P.V. Ramdas, for the Appellant; G.A.R. Dora and J. Patnaik, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Ray, J.—The Plaintiffs instituted the suit out of which this appeal arises against the Defendant for accounts and mesne profits in respect of the suit lands for the years from 1966-68 on the plea that as the Defendant was in unlawful possession of the suit lands belonging to the Plaintiff-deity and appropriated the income thereof for the said period he was liable to pay mesne profits to be determined after rendition of accounts by him (Defendant).

The case of the Plaintiffs as made out in the plaint may briefly be stated thus: One Sarat Chandra Das was appointed as interim trustee of the Plaintiff-deity by order of the Commissioner of Endowments No. I063/180-G., dated 6-12-1967 on the retirement of the hereditary trustee Shri Ramhari Das and was in management of the deity's properties including the suit lands. The former trustee had let out the suit lands to the Defendant on a permanent lease without prior sanction of the Endowment Commissioner and so, the said lease was invalid and inoperative. The Assistant Commissioner of Endowments by his order dated 17-8-1968 also held that the lease was invalid and his order was confirmed in

Revision Case No. 45 of 1908 on 19-11-1968. Possession of the suit lands was delivered to the Plaintiffs on 15-12-1968. Thereafter, the Defendant did not pay the usufruct of the suit lands for the years from 1966-68 during which period he was in unlawful possession in spite of demand. So, the Plaintiffs were obliged to institute the suit for the reliefs as aforesaid.

2. The Defendant contested the suit in the trial Court by filing a written statement. His case was that the Endowment Commissioner having accorded post facto sanction to the lease in favour of the Defendant in respect of the suit lands granted by the previous trustee of the Plaintiff-deity for the benefit of the deity in favour of the Defendant, the lease was valid and binding on the Plaintiffs, and so, the Defendant's possession of the suit lands for the years from 1966-68 could not be said to be that of a trespasser; that the suit was barred by res judicata ; that the Plaintiffs were estopped from challenging the validity of the lease; that the suit lands being in am lands and the same having been leased out to the Defendant the latter acquired a right of occupancy in the same under the Madras Estates Land Act; that the Plaintiff-deity was an intermediary in respect of the suit lands and the said estate of die Plaintiff-deity having vested in the State of Orissa under the Orissa Estates Abolition Act, it (Plaintiff) could not maintain the suit for mesne profits and that the Defendant having paid rent for the suit lands to the Plaintiff for the period for which mesne profits is claimed, he (Defendant) could not again be asked to pay mesne profits.

3. The trial Court decreed the suit of the Plaintiffs, but instead of passing a decree for mesne profits, it passed a decree for rent as according to it there was relationship of landlord and tenant between the parties for the suit period, and so, the Plaintiff-deity was only entitled to rent from the Defendant and not mesne profits.

4. On appeal by the Plaintiffs against the decision of the trial Court, the Court below reversed the decision of the trial Court and decreed the Plaintiffs' suit by granting the relief of mesne profits. Hence the present appeal by the Defendant.

5. The Court below, while coming to the conclusion that the Plaintiffs are entitled to recover mesne profits has recorded the following findings, viz., (a) the lease in favour of the Defendant in respect of the suit lands granted by the previous trustee being without the sanction of the Commissioner of Endowments as provided under the Orissa Hindu Religious Endowments Act, 1939, the same was invalid and inoperative, and therefore, possession of the Defendant for the years from 1966-68 of the suit lands was that of a trespasser and (b) the Defendant having appropriated the income of the suit lands for the period while in unlawful possession was liable to pay mesne profits.

6. Mr. P.V. Ramdas, learned Counsel for the Appellant, argues as follows: The lease granted in favour of the Defendant was in the year 1953 and on the strength of that lease the Defendant was inducted upon the suit lands as a permanent lessee. At the time when the lease was created, the Orissa Hindu

Religious Endowments Act of 1939 was in force. Section 58 of that Act provides that no lease for a term exceeding five years of any immoveable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the commissioner and two persons who shall be officers in the service of the Crown appointed by the Provincial Government in this behalf. That provision, according to Mr. Ramdas, does not say that a lease granted by a trustee for a period of more than five years is a void one. It is urged by him that a lease which was created without the previous sanction of the commissioner for a period of more than five years could be validated by obtaining post facto sanction of the commissioner subsequent to the creation of that lease. In these circumstances, the lease in question cannot be said to be an ab initio void one, but is only a voidable transaction. When admittedly the Plaintiff has not avoided the lease on the ground that the same was created without the prior sanction of the commissioner, possession of the Defendant of the suit lands on the strength of that lease cannot be said to be that of a trespasser. So, even if the lease in favour of the Defendant was without the prior sanction of the commissioner, before the lease was avoided by the Plaintiff in a properly constituted suit or proceeding, the relationship of landlord and tenant between the parties would continue under that lease. Therefore, the trial Court was right in saying that the Defendant was a tenant in respect of the suit lands under the Plaintiffs for the period from 1966 to 1968. The substance of the contention raised by Mr. Ramdas is that the lease in question is not void but voidable and no action having been taken by the Plaintiff to avoid the lease on the ground of want of sanction the Defendant cannot be said to be liable to pay mesne profits to the Plaintiffs as claimed. It is very seriously urged by Mr. Ramdas that a scrutiny of the language used in Section 58 of the 1939 Act does not justify a conclusion that a lease created in respect of a property of a temple without prior sanction of the commissioner is a void one. A comparison is made by Mr. Ramdas to the language used in Section 58 of the 1939 Act with the language used in the corresponding provision u/s 19 of the subsequent Act, viz., the Orissa Hindu Religious Endowments Act, 1951 which came into force on 22-12-1955. Attention is invited to the language of Section 58 of the old Act, the relevant portion of which reads thus:

58(1)no lease for a term exceeding five years of any Immovable property belonging to any math or temple....shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the commissioner and two persons, who shall be officers in the service of the Crown, appointed by the Provincial Government in this behalf.

The relevant portion of the corresponding Section 19 of the subsequent Act reads thus;

19(1) Notwithstanding anything contained in any law for the time being in force no lease for a term exceeding five years of any immoveable property belonging to, or given or endowed for the purpose of any religious institution, shall be

made unless it is sanctioned by the commissioner as being necessary or beneficial to the institution, and no such transfer shall be valid or operative unless it is sanctioned.

Comparison is made by Mr. Ramdas between the words "shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the commissioner and two persons" used in Section 58 of the old Act and the words "no lease for a term exceeding five years of any immovable property belonging to, or given or endowed for the purpose of any religious institution shall be made unless it IS sanctioned by the commissioner" used in Section 19 of the new Act. It is contended that the words "shall be made" used in Section 19 of the new Act are meant to say that the lease created without the prior sanction of the commissioner is void whereas the words "no lease shall be valid or operative" used in Section 58(1) of the old Act do not convey the same meaning. In other words, Mr. Ramdas contends that in making a departure from the language used in Section 58(1) of the old Act, while enacting a corresponding provision in the new Act u/s 19(1), the legislature intended that a lease cannot be created without the prior sanction of to commissioner under the new Act thereby meaning that any lease so created will be a void one. But from the language used under the old Section 58(1) it cannot be said that the legislature had such an intention. By using the words in Section 58(1) as quoted above the legislature meant that a lease granted without the prior sanction of the commissioner will not be void ab initio but will only be a voidable one. After hearing Mr. Ramdas at length I do not see that there is any difference in the intention of the legislature while enacting Section 58(1) of the old Act and in making a corresponding provision u/s 19(1) of the new Act. To me it appears that the legislative intent is the same under both the provisions in the old as well as in the new Act. While saying that no lease shall be valid or operative without the prior sanction of the commissioner in Section 58(1) of the old Act, the legislature intended that a lease created without the prior sanction as contemplated under that provision would be a void one and not voidable as urged by Mr. Ramdas. The very language used in Section 58(1) of the old Act clearly indicates that a lease created without the prior sanction of the Commissioner shall be invalid and inoperative. It is thus very clear that a document purporting to be a lease created between the parties without the prior sanction of the commissioner is invalid and inoperative from the very inception and does not bring into existence the relationship of landlord and tenant between the parties at all. A reference in this connection may be made to the decision reported in *Chiranjilal Patwari v. Commissioner* 40 (1974) C.L.T. 41, in which Section 58 of the Orissa Hindu Religious Endowments Act of 1939 came up for consideration. It was contended before their Lordships in that case that a permanent lease granted without the prior sanction of the commissioner being ab initio void for want of sanction, Petitioner's possession on the basis of such a lease was adverse from the very beginning. Their Lordships said after quoting Section 58(1) of the old Act that the alienation by lease without the prior

sanction of the commissioner postulates a preexisting sanction and that Section 19 of the later Act does not provide for any retrospective sanction. In that view their Lordships declared a subsequent proceeding u/s 19 of the new Act which had terminated in according sanction to a lease created without the prior sanction of the commissioner when the old Act was in force as without jurisdiction. It is, therefore, very clear from that decision that a lease created under the old Act in violation of the provisions contained in Section 58(1) of that Act is a void one and cannot be validated by obtaining post facto sanction from the commissioner. Mr. Ramdas in support of his assertion that the lease in the present case is a voidable one relies upon a decision of this Court reported in *Saleb Khan and Another Vs. Madar Saheb Pir and Others*, . That decision related to a case of alienation of wake property under the Mohammedan law. His Lordship Narasimham, J (as he then was), while delivering the judgment, said that it was a well settled principle of Mohammedan law that in the absence of any provision in the wake deed a Mutawalli was not entitled to make any alienation of the wake property even for legal necessity without the permission of the court and that in a proper case the Court could grant permission with retrospective effect. On the basis of that decision it is contended by Mr. Ramdas that in case of similar prohibition under the Mohammedan law when his Lordship in the aforesaid decision has said that post facto sanction can be granted by the Court, it is legitimate to conclude that an alienation of wake property without the prior sanction of the Court is not void ab initio but is only avoidable one. On the authority of the said decision it is argued by him that a similar view should also be taken while interpreting a similar provision under the Orissa Hindu Religious Endowments Act of 1939 which is nothing but a prohibition against alienation of property belonging to a religious endowment. Such a contention is not at all acceptable. In the present case, we are concerned with the actual language used in Section 58(1) of the 1939 Act and to decide if on the basis of the language used in the said provision a lease in violation of that provision is void or voidable. In the case relied upon by Mr. Ramdas, no provision of the Mohammedan law expressed in the very same language in which the provision u/s 58(1) of the 1939 Act has been expressed came up for interpretation. Therefore, merely because in that case it was held that the Court could grant a post facto sanction to alienation of wake property, it cannot be said that in the present case the lease is a voidable one and not void ab initio. Mr. Ramdas then invites my attention to a decision reported in *Athmanathaswami Devasthanam v. K. Gopalaswami* AIR 1965 S.C. 3311, in which a prohibition against alienation under the Madras Hindu Religious Endowments Act of 1927 (2 of 1927) came up for consideration. Section 76 of that Act which has been quoted in that decision is practically in the same language as that of the provision contained in Section 58(1) of the Orissa Hindu Religious Endowments Act, 1939. While dealing with Section 70 of Act 2 of 1927, their Lordships of the Supreme Court said that even in spite of the prohibition contained in Section 76 the order for the grant of patta to the lessee without fixing any period even though might be taken to be for a period exceeding five years in pursuance of the provision of Section 6(1) of the

Madras Estates Land Act, the lessee acquired a permanent right of occupancy in his holding. Their Lordships further held that such permanent right of occupancy was not conferred on the Appellant on account of the term fixed in the lease but that right was conferred by the Madras Estates Land Act on the lessee by virtue of Section 6(1) of that Act because the mere admission of a raiyat to the possession of a raiyat land by the landholder gives that raiyat the permanent right of occupancy in view of the statutory provisions of Section 6 of the Madras Estates Land Act. That case, therefore, cannot be compared with the case before me. Certainly their Lordships of the Supreme Court in that case never came to the conclusion as contended by Mr. Ramdas that a lease created in respect of the property belonging to a religious endowment in violation of the provision contained in Section 76 of the Madras Hindu Religious Endowments Act, 1927 was a voidable one. What their Lordships decided in that case was that the lessee having been admitted into raiyat land by the landholder acquired a permanent right of occupancy in view of the statutory provision of Section 6 of the Madras Estates Land Act in spite of the prohibition contained in Section 76 of the Madras Hindu Religious Endowments Act, 1927. Hence, unless Mr. Ramdas is able to show that in spite of the prohibition contained in Section 58(1) of the Orissa Hindu Religious Endowments Act, 1939 the Defendant acquired a permanent right of occupancy in the lands, he cannot escape the liability of paying mesne profits.

The next decision relied upon by Mr. Ramdas is Shah Mohammad Habib Sajjada Nasin Vs. Moulvi Manzoor Ali and Another, . In that case, a Mutawalli granted a lease of land for agricultural purposes. It was a permanent lease. After the death of the Mutawalli, his son tried to annul the lease on the ground that the Mutawalli had no right to create a lease of wake property for a period exceeding three years. Their Lordships held that in spite of the prohibition against grant of lease exceeding three years under the existing law, if the lessee on the face of the lease is admitted to zeraiti land of the proprietor, an occupancy right is created in favour of the lessee in spite of the prohibition contained under the Mohammedan law under the Tenancy Act, and so, in such a case, even though the lease was for a period of more than three years in contravention of the prohibition contained In law, the lessee acquired a right of occupancy 10 the land. That decision seems to be in line with the decision of the Supreme Court referred to above, and therefore, can be of no assistance to Mr. Ramdas.

It is then contended by Mr. Ramdas that in the present case the Defendant had taken the plea that he acquired an occupancy right in the lands in question on the strength of the lease in view of the fact that the lands covered under the lease were raiyati lands. After going through the written statement of the Defendant I find that at some place he has claimed the status of an occupancy raiyat in the leasehold. But no issue has been framed on the question as to whether the Defendant has acquired occupancy right in the lands on the strength of the lease in his favour, and therefore, the trial Court has not recorded any finding on the question. A perusal of the judgment of the Court below also shows

that the point now raised by Mr. Ramdas has not been argued there and has not been decided. Certainly, under the provisions of the Madras Estates Land Act, if the land let out to the Defendant by the previous trustee is found to be raiyati land, the Defendant in spite of the prohibition contained in Section 58(1) of the 1939 Act will acquire a right of occupancy in the land. But the question as to whether the lands covered under the lease in favour of the Defendant are raiyati lands or not has not been gone into by the Courts below and it is difficult at this stage to accept the contention of Mr. Ramdas that the Defendant has acquired the status of an occupancy raiyat in respect of the lands covered under the lease without the necessary materials.

The next contention raised by Mr. Ramdas is that conceding that the lease granted in favour of the Defendant is void ab initio, the only way available to the Plaintiffs to recover possession of the leasehold is by taking recourse to the procedure laid down u/s 25 of, the Orissa Hindu Religious Endowments Act, 1951. Admittedly, no such proceeding has been taken, and on the other hand, it is urged that a proceeding which had been initiated u/s 25 of the 1951 Act by the present Plaintiffs was quashed by this Court in O.J.C. No. 615 of 1973 in the decision *Arjuna v. Commissioner of Hindu Religious Endowments* ILR 1975 Cutt. 755. Therefore, the Plaintiffs are not entitled to any relief before being restored to possession of the leasehold in a proceeding u/s 25 of the 1951 Act. This contention of Mr. Ramdas has also no force. In a proceeding u/s 25 of the 1951 Act the commissioner is to be satisfied on two points, viz., (i) if the property sought to be proceeded against in that proceeding belongs to the deity and, (ii) whether there has been an illegal alienation. If the commissioner is satisfied on these two points, he gets jurisdiction to restore possession of the property to the deity. This has been decided in the decision *Chiranjilal Patwari v. Commissioner H.R.E. Orissa* 40 (1974) C.L.T. 41. From that decision it cannot be said that unless the commissioner accepts the lease in the present case to be an illegal alienation and on that basis restores possession of the leasehold to the deity, the possession of the lease in respect of the leasehold is to be treated as lawful. I have already held that for non-compliance with the provisions contained in Section 58(1) of the 1989 Act the lease created in favour of the Defendant is a void one, and therefore, Defendant's possession of the leasehold is that of a trespasser from the very inception. That being so, the contention of Mr. Ramdas that the Plaintiff cannot be granted a decree for mesne profits without taking recourse to a proceeding u/s 25 of the 1951 Act must be held to be without any force.

Lastly, it is urged by Mr. Ramdas that mesne profits has been defined u/s 2(2) of the CPC as the profits of the property which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profit. Under Order 20, Rule 12, CPC a procedure has been prescribed for a suit for recovery of possession of immoveable property and of mesne profits. As no such procedure has been followed in the present case, the Plaintiffs cannot be granted a decree for mesne profits. Such a contention is absolutely devoid of any merit. Order 20, Rule 12,

CPC deals with a suit for recovery of possession of immoveable property and of mesne profits from such property. In the present case, the properties which had been leased out to the Defendant have vested in the State of Orissa under the Orissa Estates Abolition Act. It was because of this the proceeding commenced u/s 25 of the 1951 Act by the Plaintiffs for recovery of the leasehold properties from the Defendant was quashed by this Court in the decision *Arjun Jena v. The Commissioner of H. Rel. Endowments*⁵, as before recovery of possession could be effected the lands vested in the State of Orissa. In such circumstances, the Plaintiffs could not have instituted a suit for recovery of the leasehold against the Defendant together with mesne profits. It has already been held that possession of the Defendant in respect of the leasehold is that of a trespasser from the very inception, and therefore, for the period from 1965 to 1968 he must be held to be in unlawful possession of the same. Thus, the Defendant has been rightly held by the Court below to be liable for payment of mesne profits.

No other point has been raised before me.

7. In the result, the appeal fails and is accordingly dismissed. In the circumstances, there will be no order for costs.

Appeal dismissed.