(1983) 07 OHC CK 0022

In the Orissa High Court

Case No : M.A. No. 100 of 1983

B.B. Patnaik APPELLANT

Vs

N.A.C. and Another RESPONDENT

Date of Decision : 25-07-1983

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 31 Rule 1, Order 31 Rule 3, 151
Orissa Municipal Act, 1950 — Section 121, 123, 124, 124(1), 127
Orissa Municipal Rules, 1953 — Rule 203, 208, 209, 210, 211

Citation : (1983) 56 CLT 356

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : Y.S.N. Murty, for the Appellant; J.K. Misra, B. Rath and N.C. Misra Advs., for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—This appeal arises from an order rejecting the Plaintiff''s application for temporary injunction.

2. The Appellant alleged that the Chairman of the Notified Area Council. Aska and its Executive Officer negotiated with him for grant of lease of a tank locally called "Jokabandha" for eight years and on terms agreed to a lease deed was executed and registered on 26-2-1981. The Appellant thereafter invested a large sum for pisciculture. As the Respondents attempted to disturb his possession, the Appellant instituted a suit and filed an application therein under Order 31, Rules 1 and 3 read with Section 151 of the CPC for temporary injunction. In response to the notice, the Respondents showed cause stating that though the lease deed had been executed and registered, the same not having been approved by the Collector as required by Rule 210 of the Orissa Municipal Rules (hereinafter called ''the Rules''), the Appellant did not acquire any enforceable right. They further asserted that the Collector having cancelled the lease, the Plaintiff-Appellant was not entitled to any relief.

3. The learned Subordinate Judge denied temporary injunction. He held that the lease being for a period of eight years, it required sanction of the Collector. The Collector having cancelled the lease on 24-6-1981, the Appellant did not acquire any right under the lease deed. He further found that possession of the tank was to be delivered under the lease deed on 1-7-1981. The order of cancellation was passed on 24-6-1981 before the time stipulated for delivery of possession.

4. Mr. Y.S.N. Murty, the learned Counsel for the Plaintiff-Appellant, vehemently urged that when the Appellant had deposited the amount and the lease deed had been executed and registered and when there was a direction from the, Government for execution of the lease deed the cancellation thereof by the Collector was illegal and of no consequence. The Plaintiff Appellant had acquired title of a lessee in respect of the tank in question. He submitted that the learned Subordinate Judge was in error in relying upon Rule 210 of the Rules, whereas the correct provision applicable to the facts of the case was Section 127 of the Orissa Municipal Act (for short, ''the Act''). Section 127 of the Act reads as under:

127. Power to purchase lease or sell lands: Subject to any restrictions imposed by or under this Act or rules prescribed, a municipal council may subject to the previous sanction of State Government, purchase or take on lease any land for the purpose of this Act and may transfer by sale, mortgage, lease, gift, exchange or otherwise, any property vested in it, not being the property vested in it, or held by it on trust, the terms of which are inconsistent with the right so to transfer.

Mr. Murty contended that the tank being the property which had vested in the Notified Area Council, the Council was competent to transfer by lease with the previous sanction of the State Government. As the State Government had accorded approval the lease deed executed and registered by the Council through its Executive Officer conveyed title to the Appellant-lessee.

5. Mr. J.K. Misra, the learned Counsel for the Respondents, combated the aforesaid contentions raised by the Appellant contending that the correct provision applicable to the facts and circumstances of the case was Rule 210 and not Section 127. In that connection, he drew attention to Sections 121, 123 and 124 of the Act and to Rules 208, 209, 210 and 211 of the Rules.

6. Sections 121, 123 and 124 read as follows:

121. Property of the municipal council: All property within the municipality of the nature hereinafter in this section specified than private property or property maintained by Government or any other local authority shall vest in and belong to the municipal council and shall, with all other property of whatever nature or kind which may become vested in municipal council be under its direction, management and control that is to Fay

(a) all public roads including the soil, the pavements, stones and other materials thereof and all drains, bridges, culverts, trees, erections, materials, implements and other works or things provided for such roads;

(b) all public channels, water courses, springs, tanks, ghats, reservoirs, cisterns wells, aqueducts, conduits, tunnels, pipes, pumps and other water-works, whether made, laid or erected at the cost of the municipal council or otherwise and all bridges, buildings, engines, works, materials and things connected therewith or appertaining thereto and also any adjacent land appertaining to any such tanks;

(c) all public sewers, drains, and all works, materials and things appertaining thereto and other conservancy works;

(d) all filth, rubbish and offensive matter collected by the municipality under this Act; or

(e) all public lamps, lamp-posts and apparatus connected therewith or appertaining thereto; and

(f) All buildings or other works constructed by municipal council form the municipal fund and all lands, building; or other property transferred to the municipal council by State Government or acquired by gift, purchase or otherwise for local public purposes.

123 Government may place other property under municipal council - It shall be lawful for the State Government from time to time to direct that any road, bridge, channel, building or other property, movable or immovable, which is vested in the State Government for the purpose of the State and which is situated within a municipality shall, with the consent of the municipal council and subject to such exceptions and conditions as the State Government may make and impose, be placed under the control and administration of the municipal council for the purposes of this Act and thereupon such toad, bridge, channel, building or other property shall under the control and administration of the municipal council subject to all exceptions and conditions so made and imposed and to all charges and liabilities affecting the same.

124. Transfer of certain public institution to municipal council:

(1) Any hospital dispensary, school, rest house, ghat or market within a municipality, not being private property or the property of a religious institution or society, and all medicines, furniture and other articles appurtenant thereto not being such property, may, by order of the State Government duly published on the spot and in the Gazette be vested in the municipal council and thereupon all endowments or funds belonging there to shall be transferred to and vested in such municipal council as trustee for the purposes to which such endowments and funds were lawfully applicable at the time of such transfer and the municipal council shall not utilize the property as vested for any purpose other than that for which it was originally meant without previous sanction of State Government:

Provided that on such order shall be published until one month after notice of the intention to transfer such property shall have been published in the Gazette and within the municipality in the Oriya language.

(2) If the municipal council within one month after publication of the notice under Sub-section (1), object to the transfer to itself of any hospital, school, rest house, ghat or market on the ground that its funds cannot bear the charge, then such transfer shall not be made, save under such conditions, as the municipal council may agree to accept.

The relevant rules are as under:

208. Transfer otherwise than by lease of immovable property vesting in but belonging to a council Immovable property vesting in but not belonging to a Council shall not be transferred or charged in contravention of the condition, subject to which such property become vested in the Council.

209. Transfer otherwise than by lease of immovable property belonging to a Council-A Council shall not make or sanction any transfer except by way of lease, or any immovable property belonging to it or create or sanction the creation of any charge upon any such property if the value of the property so transferred or the amount for which the charge is so cleared exceeds Rs. 10,000/- (ten thousand) without the previous sanction of the Collector of the district.

210. Transfer by lease of immovable property belonging to a Council-A Council may lease out any immovable property belonging to it:

Provided that no such lease shall be valid in case the period of the lease exceeds three years unless the sanction of the Collector of the district has been obtained therefor.

211. Transfer by lease of immovable property vested in but not belonging to a Council. A Council may lease out any property vested in but not belonging to the Council other than road sides and street margins:

Provided that no lease shall be granted in contravention of the condition subject to which such property became vested in the council.

7. The provisions show that a distinction has been maintained between on the one hand property vested in and belonging to the Council and on the other property simply vested in it or placed under its control and administration. That is why Rules 203 and 211 lay emphasis by stating property vested in but not belonging to the Council. All property of the nature specified in Section 121 not only vest in and belong to the Council; but are under its direction, management and control. A tank within the municipality is one such category of property of the municipality which not being a private property or property maintained by Government or any other local authority, vests in and belongs to the Council. Section 124 does not apply to a tank. Section 127 applies to property which simply vests in the Council, not being the property vested in it or held by it on trust, the terms of which are inconsistent with the right so to transfer.

8. There is no material on record to show that the tank in question merely vested in the Council u/s 123. On the contrary, the disputed property being a tank within the Council, there being no other material to indicate contra, it could reasonably be presumed that the tank vested in and belonged to the Council. Assuming that such a presumption is not available, the burden was on the Plaintiff to satisfy that the lease in question was covered by Section 127. No material was placed before the learned Subordinate Judge to establish that the tank in question merely vested in the Council but did not belong to it.

9. In course of hearing of this appeal, the Appellant filed an affidavit with a certificate from the Tahasildar to the effect that the tank in question belonged to the State Government and had been transferred to the Council for pisciculture and management. The Appellant asserted in the affidavit that the tank did not belong to the Council. The Respondents controverted the said allegation by an affidavit stating that the tank in question vested in and belonged to the Council and was under its direction, management and control since the constitution of the Council in 1957.

10. I take no notice of these affidavits and the certificate from the Tahasildar, Aska, which were filed in course of the hearing. The onus probandi was on the Appellant to satisfy the court that he had a prima false case. The best evidence should have been the order of the Government simply vesting the tank in the Council for the purpose of pisciculture and management. The Appellant having failed to produce the primary evidence, the learned Subordinate Judge rightly held that the tank in question was governed by Rule 210. Moreover under the terms of the lease, possession was to be delivered on 1-7-1981 The Collector, instead of approving the lease, cancelled it on 24-6-1981. It is difficult to behave that Appellant got possession of the tank. The learned Subordinate Judge was, therefore, right in holding that the requirements for grant of a temporary injunction had not been satisfied by the Appellant.

11. It therefore, see no merit in this appeal which is liable to be dismissed. I may, however, state that the observations made herein are only for the purpose of the interlocutory matter. The trial is yet to take place on the facts and circumstances which would transpire then, it shall be open to the judge trying the case to come to his own independent bindings without in any way being influenced by the observations made herein. In the result, the appeal is dismissed; but without costs.

