
(1974) 08 OHC CK 0015
In the Orissa High Court
Case No : Second Appeal No. 194 of 1970

Bhagaban Gouda

APPELLANT

Vs

Ukia Dei

RESPONDENT

Date of Decision : 20-08-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Orissa Estates Abolition Act, 1951 — Section 39
Orissa Merged States (Laws) Act, 1950 — Section 7, 8

Citation : AIR 1975 Ori 139 : (1975) 41 CLT 101

Hon'ble Judges : G.K. Misra, C.J.; B.K. Ray, J

Bench : Division Bench

Advocate : S.P. Mohapatra, for the Appellant; R. Das, P.K. Das and J. Swain, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—Shorn of irrelevant details the cases of the plaintiff and defendant may be stated in short. The plaintiff's case is as follows:--

One Swarn Bag died in or about 1927 leaving behind his widow Jamuna Bewa and daughter Sabitri. Ukia (plaintiff) is the daughter of Sabitri and Balabhadra. Jamuna died on 19-8-1955. The disputed land with an area of 3.60 acres in khata No. 195 of village Jamankira (in the ex-State of Bamra), now in the district of Sambalpur stood recorded as Nariha Jagir lands in the name of Swarna Bag. The same was recorded in the name of Jamuna Bewa after the death of Swarna Bag. On Jamuna's death defendant was requested by the plaintiff to look after the lands. Defendant belied the trust and stealthily got his name mutated in the Revenue Mutation Case No. 166/32 of 1955-56 falsely alleging that he was the adopted son of both Swarna Bag (Sabitri?) and Balabhadra though, in fact, there was no adoption. Amongst other reliefs, plaintiff asked for declaration of title and recovery of possession.

Defence case is that the defendant is the adopted son of Balabhadra and Sabitri,

both of whom pre-deceased Jamuna. Jamuna gifted the disputed land to the defendant by a plain paper document on 10-10-54 and since then he is in possession of the suit land in his own right, title and interest. The disputed lands were Nariha Jagir lands and not rayati initially. Nariha Jagir was abolished in the ex-State of Bamra in 1964 and the disputed land was settled by the State on the defendant in Nariha Jagir Land Case No. 5/4 of 1964-65. Plaintiff has no title or possession and the suit was barred by adverse possession.

2. The trial court recorded the following findings-

- (i) Defendant is not the adopted son of Balabhadra and Sabitri,
- (ii) The suit lands were service tenure lands being Nariha Jagir lands and not rayati lands;
- (iii) Plaintiff is the heir of Swarna Bag being daughter's daughter;
- (iv) Defendant failed to prove the alleged gift on 10-10-54 by Jamuna in his favour.
- (v) The suit is not barred by adverse possession.
- (vi) The suit is not bad for non-joinder of the State of Orissa as a party.
- (vii) The settlement of the suit land with the defendant in 1964 is not u/s 7 (g) of the Orissa Merged States" (Laws) Act, 1950 (hereinafter to be referred to as the 1950 Act).
- (viii) The suit land was settled with the defendant in 1964 u/s 8 (2) of the Orissa Estates Abolition Act, 1951 (hereinafter to be referred to as the 1951 Act) and as such the settlement of the Nariha Jagir lands with the defendant on rayati basis by the State cannot be questioned in Civil Court u/s 39 of that Act.

3. Findings (1) and (iii) to (vii) were in favour of the plaintiff. The suit was, however, dismissed on the last finding that Civil Court has no jurisdiction u/s 39 of the 1951 Act to entertain the suit.

Plaintiff filed an appeal before the District Judge, Sambalpur, which was heard by the learned Subordinate Judge.

4. Findings (i) to (vii) were not assailed before the lower appellate court on behalf of the defendants and the second finding was not challenged by the plaintiff. Those findings are thus concluded as pure findings of fact. The learned Advocate for the appellant also clearly stated to us that he does not assail those findings.

5. The finding of the trial court that the suit was not bad for non-joinder of the State of Orissa as a party defendant was confirmed by the learned Subordinate Judge. The concurrent conclusion of the courts below on this point has not been rightly assailed before us. The fight is in between the plaintiff and the defendant regarding title to the disputed land and the State of Orissa is not a necessary

party.

6. The only contention urged before the lower appellate court was that Section 39 of 1951 Act ousted the jurisdiction of the Civil Court to entertain the suit. The learned Subordinate Judge examined Section 7 (g) of the 1950 Act and Section 8 (2) of the 1951 Act and held that the settlement on the defendant in 1964-65 was not under any one of those Acts and that Section 39 was not a bar. He reversed the conclusion of the trial court on this point and decreed the suit.

Defendant has filed the second appeal against the reversing judgment.

7. The learned Advocate for the appellant urged that both the courts below acted contrary to law in ignoring the fact that the Nariha Service tenure was abolished by the State of Orissa in 1964 and the land was settled on rayati basis on the defendant who acquired title thereto and that the suit was liable to be dismissed as on abolition of the service tenure, plaintiff had no subsisting title in the disputed property.

Mr. Das on behalf of the plaintiff, on the other hand contended that the disputed land was given to Swarna Bag not in lieu of service but that it was his rayati land burdened with service and on abolition of the service plaintiff was entitled to the disputed land as rayati land in her own right, title and interest subject to payment of rent.

Both the contentions require careful examination.

8. Before these questions are answered we may indicate that the learned Subordinate Judge reached the correct conclusion in holding that Section 7 (g) of the 1950 Act and Section 8 (2) of the 1951 Act have no application to the facts and circumstances of this case.

9. Section 7 (g) as amended of the 1950 Act runs thus-

"When land is held as service tenure, either under the ruler or any member of his family the liability of the holder of such tenure to render service for the use and occupation thereof shall cease, and he shall on payment of such rent as may be assessed by the Sub-divisional Officer having jurisdiction or any other officer, not below the rank of a Sub-Deputy Collector authorised by the Collector in this behalf as fair and equitable, acquire occupancy right therein:"

Thus, Section 7 (g) does not apply to all lands held on service tenure. It has application to service tenure held either under the Ruler or any member of his family.

In the ex-State of Bamra in some villages there were Narihas and Burgis appointed to supply water and render services to visiting officers. The Jagirdars used to hold those service tenures on rent free basis. (See para. 30 at p. 23 of Ramadhyani's Report, Vol. III on Land Tenures and the Revenue System of the Orissa and Chhatisgarh States). Nariha Jagirs in the ex-State of Bamra were thus not service-tenures held either under the ruler or any member of his family.

Section 7 (g) of the 1950 Act, has, therefore, no application to this case. The position is also clarified by Exts. E, F/I and G.

Ext. G is the Press Note issued in 1964 by the Government of Orissa. It runs thus-

"In the ex-State of Bamra the Nariha Jagirs were granted to certain persons for rendering service to the village community. In the ex-State areas of Bamra and Rairakhol Burgi Jagirs were also granted for similar purposes. As these services are no longer required it had been decided by Government that these Jagirs should be abolished immediately and the Jagir lands be settled with occupancy rights therein on fair and equitable rent in favour of the holders of Jagirs and others in actual possession as on 1-7-64 free of salami subject to the condition that they need not perform the services any more for which the Jagirs were originally granted, No reservation of land will be made for the Gram Sabhas and no patta fee will be levied.

2. The Jagir holders desirous of availing themselves of this opportunity of acquiring occupancy rights in lieu of surrendering their rights and interests in such jagir lands may apply to the Collector, Sambalpur or any other Revenue Officer authorised by him in this behalf on or before 30-11-1964."

A copy of this Press Note was forwarded by the Collector to the Sub-divisional Officers of Deogarh, Kuchinda and Rairakhol by Memo No. 3838 (6) Rev. dated 30-10-64.

Adverting to the Press Note of the Government the Deputy Commissioner, Land Reforms, Orissa, wrote a letter (Ext. F/I) to the Collector of Sambalpur on 5th November, 1964 indicating the manner in which various types of Jagirs and subsisting tenures in the district of Sambalpur are to be dealt with. Material portions of this letter dealing with the ex-State of Bamra may be extracted.

"xx xx xx (1) Jagirs for rendering service to the village community.

Besides Narihas it appears from Sri Ramadhyani's report that there are some Choukidars in all villages and that in some villages Narihas and Burgis are appointed to supply water and render other services to touring officers. If any such jagir was granted for rendering personal services to the Ruler, the same may be dealt with u/s 7 (g) of the O. M. S, (Laws) Act, 1950. The services of Choukidars can be dispensed with under the Orissa Offices of Village Police (Abolition) Act. As the services of Narihas and Burgis for rendering services to the village community are no longer required in the present setup of administration these jagirs may be enfranchised as ordered by Government in the aforesaid G. O. by inviting applications from the Jagirdars upto the end of November, 1964 as indicated in the Press Note, copy forwarded to you in Govt. Memo. No. 67063/R dated 10-10-64. This work should be completed by 15-12-64 and completion report furnished by 25-12-64 at the latest.

XX XX XX"

Subsequent to Exts. G and F/I the Board issued instructions as per Ext, E for enfranchisement of Jagirs in ex-State areas of Bamra and Rairakhol in the district of Sambalpur and for settlement of Jagir lands. The procedure for settling the Jagir lands as per the Government order and the Press Note was indicated as extracted hereunder-

"The Jagir lands which were originally granted to various Jagirdars will generally be found in cultivating possession of the Jagirdars concerned or in the event of his death in cultivating possession of his heirs. There may however be cases where the Jagir lands may be found in cultivating possession of some other persons not in any way connected with the services of the Jagir lands themselves. Government orders contemplate that the Jagir holding will be settled with the Jagirdars, their heirs or other persons in actual possession on 1-7-64 on the following conditions;--

1. No salami or patta fee will be charged for such lands,
2. No reservation will be made out of these jagir lands for Gram Sabha.
3. The Jagirdars desirous of availing themselves of this opportunity of acquiring occupancy right in lieu of surrendering their rights and interests in respect of such jagir lands will apply to the Collector or any other Revenue Officer authorised by him in this behalf by 30th November. 1964, clearly stating the particulars of jagir lands to be settled with them.
4. Immediately after 30-11-64, the Collector, or any other officer authorised by him should start a miscellaneous revenue case for all Jagirs in respect of all villages. An extract from the finally published R.O.R. of the village so far it relates to the Jagir lands in question should be kept in the case record and consulted while settling the lands. A sketch map of the Jagir lands settled should be kept in record. Where the R.O.R. has not been finally published, a true copy of the draft record of rights should be kept in case record and consulted. Where, however, record of rights operation has not yet been taken up a schedule describing the situation and area of the land should be prepared and kept in the case record. Where survey has not yet been made final, a sketch map of the lands settled basing on the not final map should be kept in the case record.
5. The S.D.O. should then after due enquiry draw up a self-contained order mentioning clearly the plot number, area and classification of land now in cultivating possession of the particular Jagirdar or his heir, or other persons as the case may be and the fair and equitable rent settled for the land. The S.D.O. settling the Jagir lands should publish the lands proposed to be settled by hanging in his office notice Board, a copy of the particulars of the lands proposed to be settled with the persons concerned and if anybody has any objection for said settlement, he may file objection within 30 days from the date of such publication. After the expiry of the period specified in the said publication, the S.D.O. should hear objections if any and pass final order in settling the land both in contested and uncontested cases according to the merits of the case. An

appeal against the decision of the S.D.O. may lie to the Collector. In cases where no objection is filed within the specified time, final orders will be passed by the S.D.O. The rent should be assessed at the rates already fixed for similar lands in the village. Where rent has not yet been fixed for any particular class of land in village, the rent will be fixed as on similar lands in the neighbouring village.

XX XX XX After the settlement is thus made the holder of the land will be given a rayati patta after expiry of the period of appeal according to the usual procedure. The final order of the officer settling the lands shall be communicated to the Revenue Inspector concerned for entering the tenants' name, xx xx xx"

From Ramadhyani's Report which compiled the law prevailing in the ex-State of Bamra and the aforesaid documents it will be clear that Nariha Jagir lands were not service tenures held under the Ruler or any member of his family. The learned Subordinate Judge was, therefore, right in holding that Section 7 (g) of the 1950 Act has no application to the facts and circumstances of this case.

10. The next question for consideration is whether the suit is barred by Section 39 of the 1951 Act which runs thus-

"39. Bar to jurisdiction of Civil Courts in certain matters.-- No suit shall be brought in any Civil Court in respect of any entry in or omission from a Compensation Assessment Roll or in respect of any order passed under Chapters II to VI or concerning any matter which is or has already been the subject of any application made or proceeding taken under the said Chapters."

In this case the suit is not in respect of any entry in or omission from a compensation assessment roll. It is also not in respect of any order passed under Chapters II to VI or concerning any matter which is or has already been the subject of the any application made or proceeding taken under the said chapters. Section 39 has, therefore, no application to this case.

11. Reliance was, however, placed on Section 8 (2) of the 1951 Act occurring in Chapter II that the settlement on the defendant in 1964-65 was under this provision. Section 8 (2) runs thus-

"8. Continuity of tenures of tenants.-

(1) xx xx xx (2) Any person holding land in a village for service as a village servant by whatever name called, shall be deemed to hold it under the State Government subject to such terms and conditions as he was entitled or subject to, immediately before the date of vesting."

This Sub-section is merely declaratory of the status of the village servant holding land in a village for service immediately before the date of vesting. There is no vesting of such Jagir lands in the State. The settlement of the disputed land on the defendant in rayati character was not u/s 8. There is no provision for settlement of service tenure lands on the holder or any other person u/s 8 (2) of the Act.

The suit is, therefore, not barred by Section 39 of the Act.

12. We have already referred to Exts. G. F/I end E. The State Government took a policy decision for resumption of Jagirs and settlement of those service tenure lands on Jagirdars, their heirs or other persons in actual possession as on 1-7-64, on conditions which have already been enumerated. A procedure was prescribed calling for application and objection thereto and for settlement after proper enquiry. An administrative appeal was provided to the Collector against the order of the S. D. O. who is the competent authority to settle the land on behalf of the State. Thus, there was an elaborate administrative procedure prescribed for settlement of the lands after resumption. It is in accordance with this provision that the defendant made an application for settling the land on him. Undisputedly he was in possession of the disputed lands on 1-7-64. Plaintiff did not file any application or objection to the application filed by the defendant for settlement of the disputed lands on her after resumption. If the resumption is valid and the disputed Nariha Jagir lands belong to the State the defendant acquired a valid title by such settlement. Without resumption the plaintiff was the heir to succeed to the Nariha Jagir lands.

13. To get out of the difficulty of the settlement of the Nariha Jagir lands on rayati basis on the defendant Mr. Das contended that the disputed lands were originally rayati in character and belonged to deceased Swarna Bag as rayati lands. The State had no title therein and consequently the resumption is without jurisdiction and the settlement is liable to be quashed. He makes the position clear that the rayati lands of Swarna Bag were burdened with service and towards the remuneration of the service the rent was quitted in part and consequently on resumption the lands are to be inherited by the plaintiff subject to payment of rent.

14. To appreciate the aforesaid contentions, material facts in this regard may be stated. In paragraphs 4 and 6 of the plaint the following averments were made:

"4. xx xx xx The remaining lands of Khata No. 122 of said village were of one Sada Nariha and as such the settlement records were prepared in the names of Sada Nariha and Jamuna Bewa. A sum of Rs. 9/3/5 was assessed to be the Land revenue in respect of Khata No. 122. Out of which lands rental Rs. 3 were Mafi lands (Na riha Jagir) and the balance were rayati lands for which land revenue and other cesses were payable as ordinary rayati lands of the tenants."

"6. xx xx xx The Nariha Jagir lands rental worth Rs. 2 have been subsequently converted to rayati lands and have been equally allotted to both the Nos. 122 and 195."

The plaint case is somewhat confused. Though the averment is indicative of the fact that a part of the disputed land was rayati and the other part was service tenure with rents, payable, ultimately in paragraph 6 there is an admission that the Nariha Jagir lands rental worth Rs. 3 have been subsequently converted to rayati lands. It is clear from this statement that initially the lands were not rayati

but were subsequently converted to rayati lands. When they were converted is not indicated in the plaint.

In paragraphs 4 and 6 of the written statement the averments in the plaint are countered.

"4 xx xx xx Subsequently the share of Jamuna was denuded through a Khadua Khatiyani and its area was 3.60 acres which is now the suit lands. The whole of 3.60 acres of lands were Nariha Jagir lands and out of this, lands rental of Rs. 1.50 were Maufi lands and the balance lands were rent payable. But it is never a fact that these balance lands were rayati lands. Further the Maufi lands and the rent payable lands out of this Khatiyani were not specifically determined.

As the suit lands are service tenure lands, the persons working, as Nariha in the village is to enjoy the whole area of the land and when he will be discharged from the office, he is bound to leave the whole area of the lands and it is never a fact that he will retain the rent payable lands."

"6. xx xx xx It is not a fact that the Nariha Jagir lands rental Rs. 3 have been subsequently converted to rayati lands. But the fact is that the Maufi lands rental Rs. 1.50 along with the lands having its area 3.60 acres in all were already recorded in Khata No. 195 in the name of the defendant and subsequently these lands were settled with the defendant on rayati basis by the State, vide Settlement of Nariha Jagir Lands Case No. 5/4 of 1964-65."

Thus, the positive case of the defendant is that the disputed lands were not rayati lands though in respect of a portion rent had been remitted. The further positive case was that the service tenure lands became rayati only after resumption when the same was settled on the defendant in 1964-65.

On the aforesaid averments parties entered into contest and issue No. 1 to the effect "Has the plaintiff got any title to the suit lands?" was determined.

The learned Munsif recorded his findings in paragraph 7.

"7. xx xx xx Therefore on the basis of the evidence of the P. Ws. and D. Ws. the conclusion is irresistible that the balance suit lands were also Nariha Jagir lands. In the result, all the suit lands are held to be service tenures being Nariha Jagir lands."

On a thorough discussion of the evidence, oral and documentary the trial court upheld the defence contention that the Nariha Jagir lands were not originally rayati in character but they became rayati only on settlement on the defendant in 1964-65 after resumption. This finding of fact was not assailed by the plaintiff before the lower appellate court. It is concluded and cannot be assailed in second appeal.

15. Mr. Das, however, made an ingenious attempt to get over the finding of fact that the suit lands were not rayati lands originally by relying upon Exts. L and 5/a. Before advert to these documents it would be appropriate to deal with the

relevant law on the point.

16. Jagirs are of two kinds (i) lands are granted in lieu of services with the condition that when the services cease either on account of the servant not desiring to do the service or for the disappearance of the necessity for such services the lands shall revert to the grantor; and (ii) the service tenure holder has his tenancy rights in the land. In consideration of his rendering certain services the rent is remitted either in whole or in part.

In both the classes of service tenures the right of resumption is in the grantor or the proprietor. Resumption means getting back what was granted. If the land had been granted, resumption means taking back the land. If the land originally belonged to the service tenure holder resumption means imposition of rent either in full or in part accordingly as it had been quitted.

It is, therefore, necessary to determine in each case whether the grant was of the land or of the rent. Specification of shares between covenants and fact of entry of rent payable and to be paid in the settlement entries are not determinative. They can be taken into consideration along with other circumstances.

One of the most important "tests to be applied in each case is to determine the nature of the service which it is required to be performed by the service tenure holder. The value of the service is to be compared with the extent of the grant. If the services to be performed are negligible one may reasonably infer that the grant was by way of remission of the rent either in whole or in part. If the services to be performed are of a regular nature and of onerous type the reasonable inference is that it was the land which was granted.

In ILR (1949) Cut 186 (*Duryodhan Kar v. Raja Chandra Bhanu Deb*) a Bench of this Court consisting of Ray, C. J. and Panigrahi J. rendered a clear exposition of the law. The same view has been taken by a Special Bench in *Brajasundar Deb Vs. Binode Rout and Others*, . In paragraph 14 of the judgment Das, J. as he then was, fully accepted the analysis given in ILR (1949) Cut 186. Reliance was placed by the Special Bench on AIR 1931 157 (Privy Council) and the following passage was extracted:

"The distinction to be borne in mind is between the grant of an office to be remunerated by the use of land and the grant of land burdened with service. In the former case the land will prima facie be resumable in the latter case prima facie it will not but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus will be upon the grantor to make out such a condition."

Reliance was placed by Mr. Das on ILR (1963) A P 1085 (*Lakshmi Reddy v. Subba Reddy*) and (1969) 1 SCR 869 (*Begum Suriva Rashid v. State of Madhya Pradesh*). These decisions do not take a view contrary to what has been said in the aforesaid Orissa decisions. In the Andhra Pradesh case it was said the effect

of enfranchisement of service inams is to disannex the inam from the office by imposing a quit rent and convert it into ordinary property and does not operate as a resumption and a regrant. This proposition is in line with the second dictum indicated above, that is to say, where rent has been quitted in lieu of service and the land is burdened with service, then on the extinction of the service tenure the rent is to be re-assessed. Enfranchisement means nothing else than freeing the service tenure from the obligation of the service.

The Supreme Court decision does not lay down any proposition to the contrary. Their Lordships observed thus-

"There is a distinction between a muafi and a jagir. The former is a remission of land revenue whereas the latter is an assignment of land revenue to the grantee."

On an examination of the facts and circumstances of that, case their Lordships held that in Bhopal State, the expressions "naslan-bad-naslan" and "Batnan-bad-batnan" in the muafi grant had the same meaning as in a jagir grant.

We would now examine Ext. L and 5/a and see how far they advance the case of the plaintiff. Ext. L is the khatian showing that the suit lands are Nariha Jagir lands. The Hakiyat (status) in column No. 4 is mentioned as Nariha Jagir. The remarks column shows that in 1956 the lands were taken from khata No. 122 and were allotted to khata No. 195. It appears from column No. 13 that the land was assessed to rent of Rs. 5/14/2 out of which Rs. 1/8/- was quitted (Nariha Jagir Man). In recording the finding of fact the trial court took into consideration Ext. L and the reasons which influenced it need not be repeated, as the finding was not assailed before the lower appellate court.

Ext. 5/a dated 14-10-60 is the certificate of mutation of rayati lands. After the death of Jamuna the disputed lands were mutated in the name of the defendant as if the lands were rayati. This document is not of much significance. It is of recent origin. Despite the admitted position that the suit lands are Nariha Jagir lands the mutation officer allowed mutation on the footing of its being rayati without understanding the legal import of his own act in determining the nature and character of the tenure. We do not find sufficient justification to take a different view from the concurrent finding of fact on the basis of Ext. 5/a.

17. The significant feature in this case is that Nariha Jagir service tenure was created for the purpose of supplying water to public servants coming to the village. This is a very onerous task. It is a matter of common knowledge that in ex-State areas various classes of public officers used to frequent villages. The Nariha is to supply water to all of them. The annual rent of the disputed land assessed in the khatian is Rs. 5/- and odd. It is difficult, may impossible to imagine that for a remuneration of about Rs. 6/-a Nariha would agree to supply water to the public servants throughout the year. This is a decisive test that the land itself was assigned by the ex-State of Bamra as a remuneration for the services to be performed by the Nariha in the village. The decision taken by the State of Orissa for re-settlement as indicated in Exts. E, F/I and G is consistent

with this conclusion.

Defendant has thus successfully established that land was granted towards remuneration of services and the Nariha Jagir lands were not originally rayati. Both the courts below failed to keep the correct law in view and consequently this aspect of the matter was not clearly analysed by them.

18. Thus, though we agree that the plaintiff is the successor-in-interest, on resumption the lands reverted to the State and the service tenure came to an end. It was open to the State to settle- it in the manner indicated in Exts. E, F/I and G. Defendant made the application and land has been settled on him on rayati basis. Plaintiff was not vigilant and did not take any steps to get her claims, if any, recognised. Defendant has got title to the suit lands which have been settled on him on rayati basis. Plaintiffs' suit is bound, to fail.

19. In the result, we set aside the judgment of the lower appellate court and restore that of the trial court though for different reasons. The second appeal is allowed but in the circumstances, without casts.

B.K. Ray, J.

20. I agree.