

(1973) 01 OHC CK 0024
In the Orissa High Court
Case No : Second Appeal No. 405 of 1969

Bibhuti Bhusan Mohanty

APPELLANT

Vs

Kulamoni Das and Others

RESPONDENT

Date of Decision : 16-01-1973

Acts Referred:

Evidence Act, 1872 — Section 145
Orissa Tenancy Act, 1913 — Section 236, 236(1)

Citation : (1973) 39 CLT 589

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

Bench : Single Bench

Advocate : L.K. Dasgupta and J.K. Mitra, for the Appellant; D. Mohanty, M. Patra and P.K. Das, for the Respondent

Judgement

B.K. Ray, J.—Plaintiff is the Appellant in a suit for declaration of title to, for confirmation or in the alternative for recovery of possession of the suit land and for a permanent injunction against Defendant Nos. 1 to 7 restraining them from coming upon the suit land or from creating disturbance in Plaintiff's peaceful possession thereof.

2. The case of the Plaintiff may briefly be stated as follows : The suit land with an area of O. 07 acre under plot No. 883 in khata No. 24 in village Bhadimul stands recorded in the names of Defendant No. 8 and Ananda father of Defendant No. 9 as sikimi tenants. The C.S. record-of-rights is Ext. 2. The Suit land is a homestead which contained the residential house of Defendant No. 8 and of Ananda. It is in this residential house the recorded sikimi tenants were originally residing. On the death of Ananda his son (Defendant No. 9) continued to live in the said residential house with Nitei (Defendant No. 8). The suit land therefore being a homestead in which Defendant No. 8 and Ananda and after him, his son (Defendant No. 9) were ordinarily residing, u/s 236 of the Orissa Tenancy Act as amended in 1946 the sikimi tenants, viz : Defendant No. 8 and Ananda and after Ananda his son (Defendant No. 9) acquired occupancy right in the suit land. In

the year 1965, under the sale deed (Ex. 1), Defendant Nos. 8 and 9 transferred the suit land in favour of the Plaintiff for a cash consideration of Rs. 200.00/-. By virtue of this transfer the Plaintiff came to possess of the suit land and is in possession thereof as an occupancy tenant Defendant Nos. 1 to 7 who were tenure holders in respect of the suit land ceased to be tenure holders after the vesting of the tenure in the State of Orissa under the Orissa Estates Abolition Act, and therefore, they have absolutely no manner of right, title and interest in the suit land. As on account of enmity between the Plaintiff on one hand and Defendant Nos. 1 to 7 on the other, the latter threatened to interfere with the Plaintiff's possession in the suit land, the Plaintiff has instituted the suit for the aforesaid reliefs.

3. Defendant Nos. 1 to 3 in a joint written statement, while denying the plaint allegations in toto assert that during the settlement operations of the year 1930. Defendant No. 8 and father of Defendant No. 9 stood recorded as sikimi tenants in respect of the suit land under the predecessors-in-interest of Defendant Nos. 1 to 7 and Defendant No. 8 and father of Defendant No. 9 had their residential house on the suit land at that point of time. About four years after the settlement operations, the recorded sikimi tenants gave up the suit land where after the suit land was amalgamated with the land of Defendant Nos. 1 to 7 and was used as a garden. Therefore, Section 236 of the O.T. Act as amended in 1946 has absolutely no application to the case. It is further alleged by Defendant Nos. 1 to 3 that the settlement entry showing that the predecessors of Defendant Nos. 1 to 7 were tenure holders in respect of the suit land is wrong. As a matter of fact, the predecessors of Defendant Nos. 1 to 7, and after them, Defendant Nos. 1 to 7 are really occupancy tenants in respect of the suit land under whom Defendant No. 8 and father of Defendant No. 9 were sikimi tenants for some time and hence, the plaint allegation that the tenure holders interest of Defendant Nos. 1 to 7 in the suit land has vested in the State of Orissa under the Orissa Estates Abolition Act is false. On those allegations, Defendant Nos. 1 to 3 claim for dismissal of the suit.

4. The trial Court held that Defendant Nos. 1 to 7 being only tenure holders in respect of the suit land, their tenure holders interest has vested in the State of Orissa, and therefore, Defendant Nos. 1 to 7 have no interest in the suit land. It further held that on the date of commencement of the amending Act of 1946 which amended Section 236 of the O.T. Act, Defendant No. 8 and father of Defendant No. 9 had their residential house on the suit land where they were ordinarily residing, and therefore, under the provisions of Section 236 of the O.T. Act, they acquired the status of occupancy tenants in respect of the suit land. Having come to the aforesaid findings, the trial Court concluded that Defendant Nos. 8 and 9 being themselves occupancy tenants in respect of the suit land conveyed a valid title under the sale deed (Ex. 1) in favour of the Plaintiff in respect of the land in suit. On the aforesaid conclusions, it decreed the Plaintiff's suit.

5. The lower Appellate Court reversed the findings of the trial Court and held that the Plaintiff failed to prove that either Defendant or Defendant No. 9 or his father was ordinarily residing in the suit homestead having abandoned the same long long ago and that Defendant Nos. 8 and 9 were not occupancy tenants in respect of the suit land by the date of the sale deed (Ex. 1) in favour of the Plaintiff. It further held that the predecessors of Defendant Nos. 1 to 7 were not tenure holders, but were occupancy tenants in respect of the suit land. On these findings, it allowed the appeal and dismissed the Plaintiff's suit.

6. The finding of the lower Appellate Court that Defendant Nos. 1 to 7 are tenure holders but occupancy tenants in respect of the suit land is not seriously challenged before me. That apart, on a comparison of Ext. 2, settlement patta granted to Defendant Nos. 8 and 9 with Ext. C the settlement patta granted to the predecessors of Defendant Nos. 1 to 7 in respect of the suit land, it is very clear that Defendant Nos. 1 to 7 are occupancy tenants and not tenure holders in respect of the suit land.

7. It is contended by Mr. L.K. Dasgupta learned Counsel for Appellant that in view of the respective contentions of the parties and in view of the categorical finding of the trial Court that Defendant No. 8 and father of Defendant No. 9 had their residential house on the suit land where they were ordinarily residing at the time when the amendment Act of 1946 amending Section 236 of the O.T. Act came into force and that therefore Defendant No. 8 and the father of Defendant No. 9 acquired the status of occupancy raiyats in respect of the suit land by virtue of Section 236 of the O.T. Act as amended in 1946, it was incumbent on the lower Appellate Court to come to a categorical finding as to whether under the amendment Act of 1946 amending Section 236 of the O.T. Act Defendant No. 8 and the father of Defendant No. 9 acquired the status of occupancy raiyats in respect of the suit land. It is urged that the lower Appellate Court has not given definite findings on the relevant questions at issue. It has after discussing the evidence in paragraph 14 of its judgment observes as follows:

It is clear from the above discussion that there was no residential house existing on the suit land for a long period and that Defendant Nos. 8 and 9 were not residing at the time of the sale. It has been clearly established that there was no house there and Defendant Nos. 8 and 9 were not residing there and that they had a different residential house elsewhere, and as such they could not have conveyed a valid title to the Plaintiff who is to be therefore non-suited.

The aforesaid observation which appears to be the final conclusion shows that the lower Appellate Court has missed the real point in controversy between the parties. What was require of the lower Appellate Court was to come to a categorical finding as to whether on the date the amendment Act of 1946 amending Section 236 of the O.T. Act came into force, Defendant No. 8 and the father of Defendant No. 9 had their residential house on the suit homestead where they were ordinarily residing, because it is only when it would be found that the sikimi tenants were ordinarily residing on the suit homestead on the

date of commencement of the aforesaid Act, they would acquire the status of occupancy raiyats, and after having acquired occupancy right in the suit homestead, they would be able to transfer the suit holding in favour of the Plaintiff since there is no dispute that an occupancy holding is transferable without the consent of the landlord. Had the lower Appellate Court been alive to the real point at issue, it would not have given a vague finding as indicated above. Further, it appears from the judgment of the Court below that while assessing the evidence led by the Plaintiff it has accepted the previous statements of some of the Plaintiff's witnesses as substantive evidence in the case and has relied upon them, because they contradict the statements given by the witnesses in the suit itself. No doubt, of these witnesses, one is the Plaintiff, and as such, his previous statement making an admission on the relevant question in issue may be proved and accepted as substantive evidence without the previous statement being confronted. But regarding the other witnesses, u/s 145 of the Evidence Act, they can be contradicted by their previous statements when confronted. Thus it is clear that the previous statements of witnesses who are not parties can be only used for the purpose of contradiction and not as substantive evidence. The Court below has, therefore, erred in law in accepting the previous statements of some of the Plaintiff's witnesses as substantive evidence in the case. It follows therefore that the finding arrived at by the Court below, as indicated above, whatever be its worth cannot stand in view of the fact that the said finding has been arrived at relying upon the evidence which is not substantive evidence under law. On these two grounds, the judgment of the lower Appellate Court is liable to be set aside.

8. Mr. D. Mohanty, learned Counsel for Respondents raises a point that Section 236 of the O.T. Act as amended in 1946 does not confer occupancy right on a tenant in respect of a holding where he ordinarily resides for all time to come. According to him, such a tenant would only be entitled to the protection of an occupancy raiyat as long as he is in occupation of the holding and is residing on the homestead. It is urged that the tenant who on account of the fact that he is residing in the homestead enjoys the protection available to an occupancy raiyat does not acquire the right of an occupancy raiyat in respect of the homestead, and therefore, cannot transfer the homestead in favour of another. For this proposition, he relies upon two decisions reported in *Digambar v. Minaketan* ILR 1965 Cutt 259 and *Indra Chand Dutt Choudhury and Others Vs. Tinkari Ghose and Another*, . So far as the decision reported in *Digambar v. Minaketan* ILR 1965 Cutt 259 is concerned, it only lays down that a tenant can be said to be entitled to the benefits u/s 236, of the O.T. Act only when he satisfies the conditions laid down in the section, viz., that he is ordinarily residing in the homestead either by the time the amending Act comes into force or at any time thereafter. The decision does not go any further. In other words, it does not say that once a tenant is found to be residing in the homestead by the relevant time and enjoys the benefits of an occupancy raiyat, u/s 236 of the O.T. Act, the said right would be lost to him, if he ceases to reside in the homestead after having enjoyed the

benefits for some time. The said decision also does not lay down the proposition that the benefits conferred on a tenant residing in a homestead u/s 236 of the O.T. Act do not confer upon him the status of an occupancy raiyat in respect of a homestead for all purposes, and therefore, he cannot transfer the homestead to another just like an occupancy raiyat transfer his holding. In this view. I do not think that this decision supports the contention of Mr. Mohanty. As regards the decision reported in Indra Chand Dutt Choudhury and Others Vs. Tinkari Ghose and Another, , it has absolutely no application to the present case and does not support the proposition advanced by Mr. Mohanty. Section 236(1) of the O.T. Act reads as follows:

236(1). Notwithstanding anything in this Act, the incidents of tenancy of any tenant, including the holder of a service tenure, in respect of the homestead in which such tenant ordinarily resides, shall be regulated by the provisions of this Act, applicable to land held by an occupancy raiyat:

x x x x

The language of the section expressly mentions that the incidents of tenancy of a tenant in respect of the homestead in which he ordinarily resides shall be the same as the incidents of tenancy of an occupancy raiyat. To accept the contention of Mr. Mohanty would amount to defeating the intention of the Legislature in enacting the provision referred to above. There can be no doubt that the aforesaid section has been incorporated into the Act for the benefit of a tenant who ordinarily resides in a homestead irrespective of the nature of his tenancy. Therefore, any interpretation of the language used in the section which would go against the spirit and intendment of the section is not permissible. Further a plain reading of the section clearly indicates that tenant acquires the status of an occupancy raiyat in respect of the holding where he ordinarily resides. If the interpretation of Mr. Mohanty is accepted, it would amount to giving a tenant the protection of an occupancy right in respect of his homestead as long as he ordinarily resides therein. The words "as long as" are not in the section. Therefore, we cannot introduce those words when they are not actually there in the section itself. Secondly, the right of an occupancy raiyat is transferable. If the section gives all the rights available to an occupancy raiyat to a tenant ordinarily residing in the homestead, he would have also the right which is available to an occupancy raiyat of transferring his homestead. The proposition advanced by Mr. Mohanty, if accepted, would mean that a tenant ordinarily residing in a homestead would not be permitted to transfer the same even though the section itself gives him all the rights of an occupancy raiyat. I am therefore of the view that u/s 236 of the O.T. Act as amended in 1946, a tenant ordinarily residing in a homestead as such and not having occupancy right therein previously acquires occupancy right in respect of the homestead for all purposes. The contentions raised by Mr. Mohanty therefore are of no avail.

9. In the result, the appeal is allowed, the judgment and decree of the lower Appellate Court are set aside and the case is remanded to it for disposal

according to law, in the light of the observations made above. Costs of the appeal will abide the final result.