

(1996) 10 OHC CK 0012
In the Orissa High Court
Case No : O.J.C. No. 4424 of 1991

Braja Kishore Mohapatra and Others

APPELLANT

Vs

Mitu Sahu and Others

RESPONDENT

Date of Decision : 31-10-1996

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 7(1)

Citation : (1997) 1 OLR 21

Hon'ble Judges : S.C. Datta, J; R.K. Patra, J

Bench : Division Bench

Advocate : B. Pal, for the Appellant; P. Mukherjee, for O. Ps. 1 to 6 and P.C. Mohanty, Additional Government Advocate for O. Ps. 7 to 9, for the Respondent

Final Decision : Allowed

Judgement

R.K. Patra, J.—In this writ application, challenge is to the order dated 27-2-1991 (Annexure-1) of the Additional District Magistrate, Angul in OEA Appeal Case No. 18 of 1986 by which he has modified the order dated 1.2-8-1985 (Annexure-5) of the OEA Collector in OEA Case No. 932 of 1973 by excluding plot No. 72 measuring Ac. 5. 02 decimals (tank) and plot No. 181 measuring Ac. 1. 14 decimals (Bandha Adi) from being settled with the petitioners.

2. Khata No. 9 admeasuring Ac. 28. 29 decimals in mouza Gangadharpur, P. S. Parjang in Kamakhyanagar Sub-Division was recorded jointly in the names of one Duttahari Mohapatra and others who were predecessors in interest of the petitioners under the status ""Panapik Lakhraj Bahel" in the revenue settlement of the year 1923-24, which vested in the State free from all incumbrances u/s 3-A of the Orissa Estates Abolition Act, 1951 (hereinafter referred to as "the Act") vide Revenue Department Notitication N-o. 29251 dated 2-5-1973. The disputed property i. e. Plot No. 78 (Ac. 5. 02 decimals) and Plot No. 181 (Ac. 1. 14 dec.) being part of the aforesaid Khata No. 9 also came to be vested in the State. The petitioners as the" intermediaries in khas possession of the lands including the disputed lands, applied for settlement u/s 7 of the Act to the OEA Collector-cum-

Tahasildar, Kamakhyanagar which was registered as OEA Case No. 9V3 of 1979. The OEA Collector by order dated 31-5-1977 settled Ac. 2. 38" decimals of land u/s 7 of the Act with the petitioners and resumed possession of Ac. 22.71 decimals. The disputed lands were within the area resumed by the OEA Collector. Being aggrieved by the aforesaid resumption, the petitioner filed Appeal No. 16 of 1977 before the Additional District Magistrate, Dhonkanal. The appellate authority by order dated 21-7-1981 remanded the case to the OEA. Collector for re-disposal with specific direction that the petitioners should be given an opportunity of hearing in the matter. In the meantime, the Ha1 settlement operation came in and the disputed lands were recorded in the name of the petitioners vide Bebandobast Khata No. 27. As there was delay in the disposal of the case by the OEA Collector after the matter was remanded to him, the petitioners applied for settlement of the lands including the disputed lands to the Tahasildar, Kamakhyanagar vide OEA Lease Case No. 33 of 1985. The Tahasildar issued" proclamation inviting objections and since no objection was filed within the statutory period of 30 days, he settled the lands including the disputed lands with the petitioners on rayati basis subject to payment of salami and back rent vide order dated 23-5-1985 (Annexure-2).Following the said order, the petitioners were duly issued with patta (Annexure-3) In the meanwhile, the OEA Collector in pursuance of the order of remand took up the matter for hearing and passed order on 18-8-1986 (Annexure-5) settling the lands including the disputed lands with the petitioners u/s 7 of the Act. Being aggrieved by the order of settlement (Annexure-5), opp. party No.1 filed appeal bearing OEA Appeal Case No. 12 of 1986 before the Additional District Magistrate, Angul who by impugned order dated 27-6-1991 (Annexure- 1) held that the disputed lands being tank and/or adi were not available to be settled with the ex-intermediaries " u/s 7 of the Act inasmuch as the tank and/or adi could not be possessed by cultivating them for agricultural or horticultural purposes. He accordingly, directed the disputed lands to stand vested in the State. As already indicated the aforesaid part of the impugned order is the subject-matter of challenge in this writ application.

3. Sri Pal contended that the finding recorded by the appellate authority at Annexure-1 that a tank or its adi could not be possessed by cultivating them for agricultural purposes and as such was not available to be settled u/s 7 of the Act is vulnerable in law. The counsel for opp. party No, 1 in his note of submission. stated that the disputed tank and its adi were never in possession of the petitioner from- the date of vesting and it being a question of fact. the writ Court cannot disturb the impugned finding recorded by the appellate authority in the impugned order at Annexure-7.

4. Section 7 (1) (a) of the Act so far as relevant, provides that on and from the date of vesting, all lands used for agricultural or horticultural purposes, which were in khas possession of an intermediary on the date of such vesting shall notwithstanding anything contained in the Act be deemed to be settled by the State Government with such intermediary who shall be entitled to retain

possession thereof and hold them as raiyats under the State Government having occupancy rights in respect of such lands subject to the payment of such fair and equitable rent as may be determined by the Collector From the aforesaid provision, it is clear that an intermediary can have the benefit of it if he was found in khas possession of the tends used; for agricultural or horticultural purposes on the date of vesting.

5. On careful perusal of the impugned order, it would appear that the Additional District Magistrate upset the settlement of the disputed lands being of the view that a tank or its adi could not have been possessed by the petitioners by cultivating them for agricultural or horticultural purposes.

6. At this stage, it would be profitable to extract the relevant discussion made by the OEA Collector on the point at issue in the order dated 12-8-1985 (Annexure-5).

"xx xx xx Two questions now arise for consideration-

(a) Whether that portion of khata No. 9 (Sabik) which consists of tanks comes within the definition of land.

(b) Whether the khata No. 9 was under khas possession of the applicants by the time of its vesting.

As regards (a) agrarian reforms is the basic consideration of all land laws enacted since the independence of this country. Tanks made and maintained within adjoining agricultural land to facilitate irrigation and cultivation are nothing but part and parcels of such agricultural lands. Such tank cannot have any separate entity. One such tank is made for the purpose of agriculture, it may simultaneously be used for other individual purposes, such as fishing etc.

But by this primary purpose is not lost. The subsequent Land Reforms law also carries the same message. Therefore, tank under khata No, 9 are nothing but lands capable of being settled in favour of the appellants.

As regards point b) whether the applicants were in khas possession of the tank under khata No. 9 by the time of vesting is a question of fact. As per ROR it is presumed that the appellants were in khas possession of the tank and this has been confirmed by the decision of title suit No 8/3 of 1962-65 in the Court of Subordinate Judge, Dhenkanal.

On perusal of the evidence taken in the Civil Court the oral evidence may not be questioned and no party adduce oral evidence above.

XX XX XX 7. Is the finding recorded by the OEA Collector that the tank within the adjoining agricultural lands cannot have a separate entity and is a part and parcel of agricultural lands valid in law ? A Bench of this Court in Jagannath Nanda v. Bishnu Dalai : 40 (1974) CLT 888 in paragraph 9 of the judgment relying on a Bench decision of the Calcutta High Court in Surendra Kumar Sen Chaudhury and Others Vs. Chandratara Nath and Others, held that the property

which might include a tank does not necessarily make the lease one for non-agricultural purpose. In Surendra Kumar Sen Choudhury's case (supra) the question for consideration was whether the lease purported to be of a tank for the purpose of rearing fish and of its banks for the purpose of stacking grass for cattle and grazing cattle was for agricultural purpose. Graham, J. observed that the term "agriculture" is of wider import than the term "cultivation", The tank and its banks must be treated as one holding and cannot be split up as water portion distinguished from the dry portion. If a portion of the demised area is used for agricultural purposes, that would determine the character of the lease as a whole. Mitter, J. while concurring with Graham, J. in his separate opinion held that the true test as to whether the lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with tank within it. In this respect, the area of the surrounding land is an important factor to be considered.

8. In view of the aforesaid, the finding of the OEA Collector that the disputed tank and its adi under khata No. 9 is a part and parcel of the agricultural land deserved to be settled with the intermediary is unassailable. The ADM in appeal has taken the view contrary to the aforesaid finding of the OEA Collector which cannot be sustained in law and is, therefore, liable to be set aside.

9. As already indicated, the OEA Collector in the order dated 12-8-1985 (Annexure-5) recorded the finding that the intermediaries were in khas possession of the disputed lands on the date of vesting. In appeal, the ADM has not disturbed the said finding in the impugned order. On careful reading of the order of the OEA Collector dated 12-8-1995 (Annexure-5) we find that the observation that the intermediaries were in khas possession of the disputed lands on the date of vesting is based on materials available on record and cannot be said to be baseless.

10. In the result, the operative portion of the impugned order at Annexure-1 whereby the Additional District Magistrate has modified the order of the OEA Collector with regard to the settlement of the disputed land with the petitioners is quashed. The writ application is accordingly allowed. There would be no order as to costs.

S.C. Datta, J.

11. I agree.