
(1998) 05 OHC CK 0025
In the Orissa High Court
Case No : O.J.C. No. 5451 of 1991

Brundaban Ramanuja Das	Vs	APPELLANT
Hajuri Prafulla Chandra Khuntia and Others		RESPONDENT

Date of Decision : 06-05-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Estates Abolition Act, 1951 — Section 6, 7, 8, 8(1), 8(4)

Citation : AIR 1998 Ori 219

Hon'ble Judges : S.N. Phukan, C.J;P.K. Tripathy, J

Bench : Division Bench

Advocate : B.B. Mohanty, for the Appellant; N.C. Pati, for the Respondent

Final Decision : Allowed

Judgement

S.N. Phukan, C.J.—The petitioner has prayed for quashing of order dated 18-2-1988 passed by the Tahsildar and O. E. A. Collector, Puri in Claim Case No. 9057 of 1963 vide Annexure-1 and the order passed in revision by the Member, Board of Revenue dated 28-9-1991 in O. E. A. Revision Case No. 19 of 1990 vide Annexure-3.

2. The admitted facts are that one Balabhadra Khuntia the common arrester of the opposite parties, was the owner and intermediary of the disputed land as well as the house standing thereon. The said Balabhadra Khuntia executed a lease deed in favour of the present petitioner. While the said lease was in subsistence, the disputed land vested in the State of Orissa in pursuance of notification issued u/s 3 of the Orissa Estates Abolition Act, 1951 (for short, "the Act"). After the vesting, Raghunath Khuntia, son of Balabhadra Khuntia filed application on 30-10-1963 under Sections 6 and 7 of the Act, which was registered as O. E. A. Case No. 9057 of 1963. The case was dismissed for default on 20-11-1965. On an application being filed by the landlord for restoration, the order of dismissal was set aside. The case was allowed by order dated 14-12-1966. Against the said order, the present petitioner filed an appeal, being O. E. A. Appeal No. 46 of

1967 before the Additional District Magistrate, Puri on the ground that the question of restoration was not considered. The said appeal was allowed and the matter was remanded back to the Revenue Officer for consideration of the restoration petition. Ultimately, on 17-2-1988, the restoration matter was taken up and it was allowed on consent. But the present petitioner filed an affidavit on 18-2-1988 stating that there was no consent for the restoration order dated 17-2-1988. Thereafter, the case was allowed by order dated 2-3-1988 and the petitioner preferred an appeal, being O. E. A. Appeal No. 1 of 1988, which was dismissed on 7-7-1990. Against the order of the appellate Court, a revision petition was filed before the Member, Board of Revenue, being Revision Case No. 19 of 1990. The revision was dismissed by a reasoned judgment dated 28-9-1991, vide Annexure-3 to the writ petition.

3. The main contentions raised before this Court on behalf of the petitioner are :--

(1) The restoration of the case is illegal; and

(2) Settlement of the suit land in favour of the landlord under Sections 6 and 7 of the Act is illegal inasmuch as the landlord was not in possession of the suit land on the date of vesting;

4. Before taking up the points raised, let us quote Section 6 and the relevant portions of Sections 7 and 8.

"6. Homesteads of intermediaries and buildings together with lands on which such buildings stand in the possession of intermediaries and used as golas, factories or mills to be retained by them on payment of rent:--

(1) With effect from the date of vesting, all homesteads comprised in an estate and being in the possession of an intermediary on the date of such vesting, and such building or structures together with the lands on which they stand, other than any buildings used primarily as offices or kutcheries or rest houses for estate servants on duty as were in the possession of an intermediary at the commencement of this Act and used as golas (other than golas used primarily for storing rent in kind), factories or mills for the purpose of trade, manufacture or commerce, or used for storing grains or keeping cattle or implements for the purpose of agriculture and constructed or established and used for the aforesaid purpose before the 1st day of January, 1946, shall notwithstanding contained in this Act, be deemed to be settled by the Government with such intermediary and with all the share-holders owning the estate, who shall be entitled to retain possession of such homesteads of such buildings or structures together with the lands on which they stand, as tenants under the State Government subject to the payment of such fair and equitable ground rent as may be determined by the Collector in the prescribed manner :

Provided that where the intermediaries have come to any settlement among themselves regarding the occupation of buildings and file a statement to that effect before the Collector, the buildings shall be deemed to have been settled

with the intermediaries according to that settlement :

Provided further that homesteads in actual possession of the intermediary shall be settled with him free of ground-rent in those areas where no ground-rent is charged under the existing law on homestead lands.

(2) xxx xxx

(3) Notwithstanding anything contained in Sub-section (1), where an intermediary constructed a building or structure in his estate after the 1st day of January, 1946, and used it on the date of vesting for the purposes mentioned in sub-section (1), he may be entitled to retain possession of such building or structure together with the land on which it stands as a tenant under the State Government subject to the payment of ground-rent as provided in Sub-section (1) only if the Collector after an enquiry, is satisfied that it is constructed or used for a bona fide purpose and not with a view to defeat the provisions of Section 5 of this Act.

7. Certain other lands in khas possession of intermediaries to be retained by them on payment of rent as raiyats having occupancy rights :--

(i) On and from the date of vesting :--

(a) all lands used for agricultural or horticultural purposes which were in khas possession of an intermediary on the date of such vesting;

(b) lands used for agricultural or horticultural purposes and held by a temporary lessee or lessees of an intermediary who owns either as intermediary or in any other capacity less than thirty-three acres of land in total extent situated within the State;

xxx xxx xxx

8. Continuity of tenure of tenants :--

(i) Any person who immediately before the date of the vesting of an estate in the State Government was in possession of any holding as a tenant under an intermediary shall, on and from the date of vesting, be deemed to be a tenant of the State Government and such person shall hold the land in the same rights and subject to same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting.

xxx xxx xxx We may also quote the definition of the words "homestead" and "khas possession", as contained in Sub-sections (i) and (j) respectively of Section 2 of the Act.

"2. Definitions :--

In this Act, unless there is anything repugnant to the subject or context :--

xxx xxx xxx (i) "Homestead" means a dwelling house used by the intermediary

for the purposes of his own residence or for the purpose of letting out on rent together with any courtyard, compound, garden, orchard and out building attached thereto and includes any tank, library and place of worship appertaining to such dwelling house but does not include any building comprised in such estate and used primarily as office or kutchery for the administration of the estate on and from the 1st day of January, 1946;

(j) "Khas possession" used with reference to the possession of an intermediary of any land used for agricultural or horticultural purposes means the possession of such intermediary by cultivating such land or carrying horticultural operations thereon himself with his own stock or by his own servants or by hired labour or with hired stock;"

It is also necessary to refer to the definition of the term "tenant", as contained in Section 3 (23) of the Orissa Tenancy Act, 1913, which runs as follows :--

"2. Definitions.

In this Act, unless there is something repugnant in the subject or context-

xxx xx (23) "tenant" means a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that persons."

5. Before considering the contentions raised, we must be conscious of the writ jurisdiction, more particularly in case of certiorari under Articles 226 and 227 of the Constitution of India. The writ Court is not appellate Court and every error in law or in fact, which can be corrected by the superior Court by appeal or revision cannot be a ground to exercise the writ jurisdiction. The High Court in certiorari may invoke if there is error of law apparent on the face of the record, that being one of the grounds in exercising the writ jurisdiction under Articles 226 and 227 of the Constitution of India.

6. The first point to be considered is whether restoration of the original petition filed under the Act by the Ex-Intermediary was legal or not. From the perusal of the appellate orders and also impugned revisional orders, we find that the authorities have duly considered the matter and have held that it was correctly done. This decision cannot be faulted and we are of the opinion that this is not the matter for writ Court to go into. Therefore, the contention of the petitioner that restoration petition was wrongly decided need not be considered by us.

7. According to the petitioner there was delay of one day and without substitution the claim case was decided by the Tahasildar. One day delay is to be ignored. That apart, we find that all the legal heirs of Balabhadra Khuntia were reflected in the cause title. Therefore, this also cannot be agitated before us. We say so as the Apex Court held that Courts are respected for deciding the matters on merit and not on technicalities.

8. Now let us consider the main point namely whether the settlement of the suit

land in favour of the Ex-Intermediary under Sections 6 and 7 of the Act is legal or not. Section 6 of the Act inter alia provides that with effect from the date of vesting, all homesteads comprising in an estate and being in the possession of an intermediary on the date of such vesting, and such buildings or structures together with the lands on which they stand, other than any buildings used primarily as offices or kutcheries or rest houses for estate servants on duty as were in the possession of an intermediary at the commencement of this Act and used as golas (other than golas used primarily for storing rent in kind), factories or mills for the purpose of trade, manufacture or commerce, or used for storing grains or keeping cattle or implements for the purpose of agriculture and constructed or established and used for the aforesaid purpose, before the 1st day of January, 1946, shall be deemed to be settled by the Government with such intermediary and with all the -share-holders owning the estate, who shall be entitled to retain possession of such homesteads of such buildings or structures together with the lands on which they stand, as tenants under the State Government subject to the payment of equitable ground rent as determined by the Collector. Thus, it is clear that all homestead in possession of the intermediary shall vest with him subject to payment of ground rent. Therefore, the intermediary is entitled to homestead in his possession.

9. From the record more particular, the inspection report of the Tahasildar, we find that land in question was let out to the present petitioner on 11-6-1957 by executing registered lease deed and delivered possession for construction of a Cinema Hall and the said Cinema Hall stillexists. Under the lease deed the period of lease was for 20 years and the petitioner was entitled to gel extension of lease for another period of 20 years. After the Act came into force, u/s 3 of the Act on 29-3-19,63 the estate including the disputed land vested with the State Government. After vesting, Raghunath Khuntia son of Balabhadra Khuntia on 30-10-63 made an application under Sections 6 and 7 of the Act before the Collector for settlement of the land with him.

10. It appears that the disputed property is a Cinema Hall which was constructed much before the disputed land vested with the State Government u/s 3 of the Estate Abolition Act. We also find from record that the heirs of the respondent filed a suit for realisation of the rent from the petitioner which was decreed and rent was realised from the petitioner. Therefore, on the date of vesting, the disputed land was being held by this petitioner as a tenant and in fact this is not disputed.

11. From Section 6 of the Act it follows that all homestead except the homestead excluded under the said Section after the date of vesting shall be deemed to be settled by the State Government with the ex-intermediary as tenant on payment of fair and equitable rent to be determined by the Collector in the prescribed manner, who shall be entitled to retain possession of such buildings or structures together with the lands on which they stand. From Section 7 of the Act it follows that in respect of other lands which were in khas possession of an intermediary

on the date of vesting shall vest with the ex-intermediary as tenant subject to the conditions as laid down in the said section. Therefore, the legislature made a distinction between homestead and other lands in case of homestead the ex-intermediary shall be entitled to retain the land as a tenant if he was in possession, but in respect of other lands he shall be a tenant provided he was in khas possession of the land. The present disputed property admittedly was in possession of the petitioner as a tenant.

12. In Clauses (i) and (j) of Section 2 of the Act, relates to definition of "homestead" and "khas possession" which we have extracted above. We may refer to Clause (23) of Section 3 of the Orissa Tenancy Act, 1913 which defines "tenant" and according to the said definition, it means a person who holds land under another person and is, or but for a special contract would be, liable to pay rent for that land to that person. This definition is clear that even if a person holds the land through another person as a tenant, the said person is the landlord.

13. "Khas possession" has been defined in Clause (j) of Section 2 of the Act and from this definition we find that such possession by the intermediary would be his if he carries on agriculture or horticulture operation by himself with his own stock or by his own servants or by hired labour or with hired stock, but there is no such restriction regarding the homestead.

14. In the case in hand, admittedly, the present petitioner was holding the land as tenant. As he is a tenant, he was holding the land on behalf of the Ex-Intermediary. Therefore, we hold that possession of the disputed land as tenant by the present petitioner would amount to possession by ex intermediary. The above view was also expressed in *Kamala Devi v. Maitrei alias Maithili Sukla* ILR (1973) Cut 1372. This Court held that possession as referred to in Section 6 of the Act is not khas possession as required in respect of agricultural land referred to in Section 7 of the Act and consequently, the possession of the homestead land by a tenant under the intermediary would amount to possession of the intermediary u/s 6 of the Act.

15. The main question to be decided is whether the disputed property is homestead or not. If it is held that it is homestead, it would pass on to the Ex-Intermediary though it is possessed by the petitioner as a tenant. According to clause (i) of Section 2 of the Act, "homestead" means a dwelling house used by the intermediary for the purpose of his own residence or for the purpose of letting out on rent together with any courtyard, compound, garden, etc. including the place of worship, but does not include any building comprised in such estate and used primarily as office or kutchery for the administration of the estate on and from the 1st day of January, 1946.

16. According to Black's Law Dictionary, Fifth Edition, "homestead" means dwelling house and the adjoining land where the head of the family dwells, the home farm; the fixed residence of the head of a family, with the land and

buildings surrounding the main house. Therefore, for the purpose of homestead, it must be dwelling house. According to Oxford Advanced Learner's Dictionary, Indian Edition, "homestead" means a house with the land and out buildings round it, especially a farm and land given to a person by the State on condition that he lives on it and cultivates it and the word "homesteader" means person who lives on a homestead. Therefore, to get the benefit of homestead land by the intermediary u/s 6 of the Act, it must be a house where persons live. We have already held that possession by tenant is also possession by the intermediary.

17. From the definition of "homestead" in the Act and the Dictionary meanings stated above, by no stretch of imagination it can be said that a Cinema Hall is a homestead. Therefore, the intermediary cannot get the benefit of Section 6 in respect of the disputed property.

18. Sub-section (1) of Section 8 of the Act inter alia provides that any person who immediately before the date of the vesting of an estate in the State Government was in possession of any holding as a tenant under an intermediary shall on and from the date of vesting, be deemed to be a tenant of the State Government and such person shall hold the land in the same rights and subject to same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting. This section applies to both homestead and agricultural land. As the petitioner was holding the present disputed property, which is not homestead, as a tenant, he is entitled to get the benefit of the provisions of Section 8(1) of the Act. In fact, the petitioner filed an application u/s 18(4) of the Act, but in our opinion, such application is not necessary and vesting of disputed property on the tenant, namely, the petitioner, is automatic.

19. In *Radhamani Oiby v. Braja Mohan Biswal*, (1984) 57 C LT 1 (FB), this Court held that Section 3(1) of the Act makes no provision for an application and no enquiry is contemplated under this section. It was further held that this Section is merely declaratory of the continuity of the tenure of tenants as it was immediately before the date of vesting and no application is entertainable for determining rival claims under this Section. It was held that there is no provision for appeal against an order passed u/s 8(1) of the Act.

20. As the disputed property is not homestead and is a Cinema Hall which is under the possession of the petitioner as tenant, it is automatically deemed to have been settled with the petitioner in terms of Section 8 (1) of the Act.

21. We may also refer to another decision of this Court in *Satyendra Kumar Rai Choudhury v. Mahant Sri Shakta Charan Das* (1973) 39 C LT 787, where it was held that dwelling house not used for the purposes of ex-intermediaries and not used for the purpose of letting out on rent by him cannot be subject of deemed settlement as envisaged in Section 6 of the Act.

22. From the above discussion, we find that, the above legal aspect, namely, Section 8(1) of the Act, and the question whether the disputed property is

dwelling house or not has not been properly considered by the Tahsildar as well as the appellate authority. Therefore, it is a fit case to exercise our writ jurisdiction.

In the result, the petition is allowed and the impugned judgment and orders are quashed.

The matter is remanded back to the Tahsildar, Puri to consider the above aspect afresh. Parties are directed to appear to before him in the third week of May, 1998. Cost on the parties.

P.K. Tripathy, J.

23. I agree.