

**(1972) 08 OHC CK 0015**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 327 of 1968**

Chandrakanta Pani

APPELLANT

Vs

Kamalalochan Pani and Others

RESPONDENT

**Date of Decision :** 22-08-1972

**Acts Referred:**

Orissa Tenancy Act, 1913 — Section 24  
Registration Act, 1908 — Section 49  
Specific Relief Act, 1963 — Section 34

**Citation :** AIR 1973 Ori 68

**Hon'ble Judges :** S.K. Ray, Acting C.J.

**Bench :** Single Bench

**Advocate :** B. Rath and H.K. Jena, for the Appellant; R.C. Patnaik, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

S.K. Ray, Ag. C.J.

1. This appeal is by the plaintiff from the reversing decision dated 5-7-1968 of Sri B.K. Misra, Additional Subordinate Judge, Cuttack, passed in T.A. No. 68 of 1965.

2. The plaintiff filed the suit for declaration of title to 0.200 decimals of land (Kha schedule), confirmation of possession or in the alternative recovery of possession, permanent injunction and for recovery of damages of Rs. 20. The suit land, measuring 0.200 is set out in Kha schedule to the plaint. Kha schedule is the total extent of land in Khata No. 29. Kha schedule is a part of Ka schedule. Entire Khata No. 29 was Bahel land in respect of which defendant No. 9, Saraswati Dibya was the recorded proprietor. Defendant No. 9 executed and registered a lease deed in favour of Ram Mallik Bari Mallik (defendant No. 7) and Das Mallik (defendant No. 8) in respect of the suit properties (Schedule Kha) on 5-6-1949 (Exhibit 5), By mutual arrangement amongst the lessees suit properties were allotted to the exclusive share of Ram Mal-lik. In 1954-55, a

Certificate Case No. 458 of 1954-55 was instituted by the landlord for arrears of road cess in respect of the entire khata (Kha). While that case was pending Ram Mallik died and his widow (defendant No. 4) executed and registered a sale deed in favour of Mala Dei (defendant No. 5) and Suria Dei (defendant No. 6) on 14-2-1955. The registered sale deed is Exhibit 4. Defendants Nos. 7 and 8 executed a deed of relinquishment in favour of the aforesaid purchasers (defendants Nos. 5 and 6) on 25-3-1959, which is Exhibit 2. Defendants Nos. 5 and 6, subsequently on 27-4-1959, sold the suit properties to the plaintiff under a registered sale deed, Exhibit 3. Thereafter defendants Nos. 1 to 3 interfered with the possession of the plaintiff over the suit land by wrongfully cutting a tree standing thereon and thereby compelled the latter to file the present suit.

3. The contesting defendants deny the plaintiff's case of lease granted by defendant No. 9 to Ram Mallik, defendants Nos. 7 and 8 as alleged in the plaint. Their case is that defendant No. 1 purchased entire Khata No. 29 of 1.50 decimals (Schedule Ka in Court auction when it was put to sale in Certificate Case No. 458 of 1954-55 for realisation of road cess, on 25-1-1955 (Exhibit C), and took delivery of possession on 12-7-1956. He then sold 0.70 decimals out of plot No. 337 and 0.150 out of plot No. 336 to defendant No. 3 by registered sale deed dated 25-1-1961, They also denied the allegation of cutting of the tree standing on the suit land.

4. The trial Court decreed the suit on finding that the lease by defendant No. 9 was a valid one, that Ram Mallik, the lessee, got possession on the strength of the lease deed and he and his successor-in-interest were in continuous possession till the properties were sold to the plaintiff and that thereafter the plaintiff also possessed the same till the cause of action for the present suit arose upon the defendants cutting and removing the tree therefrom.

5. The appellate Court reversed the decision and dismissed the suit. His findings are:

(i) The lease deed (Exhibit 5) being an unregistered one is inadmissible in evidence in proof of creation of tenancy or its nature.

(ii) Plaintiff and his predecessors-in-interest were in possession of 0.150 decimals out of 0.200 decimals of the suit land.

(iii) The rent receipts (Exhibits 6 series) are not reliable.

(iv) Ram Mallik and others, the lessees of defendant No. 9, did not acquire any occupancy right in the suit properties and are deemed to be as tenants-at-will and so did not affect the validity of the auction sale in Certificate Case No. 458 of 1954-55 and the title and possession acquired by the defendant No. 1 thereunder.

(v) The plaintiff did not acquire title to the suit land by adverse possession, since his possession commenced from 5-6-1959 and the suit was filed on 6-10-1961.

6. Before going into the merit of this appeal it is necessary to first of all dispose

of an application under Order 6, Rule 17, Civil P. C., filed by the plaintiff-appellant for amendment of the plaint. The amendment was for substitution of "unregistered lease deed dated 5-6-1949" in place of "registered lease deed dated 5-6-1949" in para. 2 of the plaint. This application has been opposed by the respondents Nos. 1 and 2. The reason given for the amendment is that the original error was due to inadvertence and typographical mistake. In my opinion it was so, because the plaintiff produced the deed of lease which is an unregistered one in proof of Ms case stated in para 2 of the plaint. I would, therefore, accept the plaintiff's reason for amendment and allow the amendment of the plaint as sought for, since it does not change the nature of the suit.

7. Coming to merits, the plaintiff has to prove his title in order to succeed. It is said that the lessees under the unregistered lease deed, Exhibit 5, acquired occupancy right in the suit properties and the said right was duly transmitted to the plaintiff by a series of transfers. Alternatively, the plaintiff claims title of an occupancy raiyat having acquired it by oral lease and payment of rent. The position is well settled that an unregistered lease deed is not admissible to prove the terms, duration or nature of tenancy, except the nature and character of possession of the lessees. The prohibition which is mandatory is contained in Section 49 (a) and (c) of the Registration Act. This Court has held in the case of Khema Padhan v. Guna Sahu reported in 32 C LT 478 that the term conferring permanent tenancy or specifying the duration of the tenancy or that the lessees held the property as permanent tenants cannot be proved from unregistered lease deed nor can the unregistered lease deed be admissible to prove that the lessors had agreed to certain amount of rent. What is permissible to be proved is the nature and character of possession showing the existence of the relationship of landlord and tenant and not the further fact that the possession was under a permanent lease. To the same effect is the Division Bench decision of this Court in the case of Collector of Puri v. Budhinath Samantray reported in 35 C LT 552. Besides the principles enunciated in the first case referred to above, their Lordships have gone further to say that the creation of a tenancy can be proved by oral agreement or by acceptance of rent and that the right of occupancy being a creature of the statute can be acquired only u/s 24 of the Orissa Tenancy Act and cannot be conferred by the landlord by contract or otherwise. In view of the admissibility of the unregistered lease deed for the limited purpose as indicated above it is impossible to hold that Rama Mallik, Bai Mallik and Das Mallik acquired any occupancy right in the suit property. The lessees at most can be held to be non-occupancy tenants.

8. It is also well established that non-occupancy rights or under-raiyat rights are neither heritable nor transferable except by custom (vide in cases of G. Gurumurthy v. State reported in (1967) 33 CLT 1128 AIR 1968 Orissa 72 Biseswar Giri Vs. Haraprasad Behera and Others, and Bhikari Bhoi v. Jagannath Mohapatra reported in (1961) 3 Ori 331). The lessees under Exhibit 5 were mere non-occupancy tenants and such rights, in the absence of custom of which there is neither any allegation nor proof, could not be alienated in favour of defendants 5

and 6 under Exhibit 4, registered sale deed dated 14-2-1955 and Exhibit 2, deed of relinquishment dated 25-3-1959. Thus defendants 5 and 6 having had no occupancy right to convey and there being non-recipients of any non-occupancy tenancy right which is non-transferable, the plaintiff acquired no interest from them under Exhibit 3, registered sale deed dated 27-4-1959.

9. The learned counsel for the appellant wanted to contend that a tenancy right was created by acceptance of rent under Exhibits 6 series the rent receipts but such a contention is not entertainable in view of the finding of the lower appellate Court that Exhibits 6 series are not reliable.

10. In the absence of any right, title or interest in his favour, the plaintiff is not entitled to any such declaration, or to the relief of permanent injunction even on the basis of his possession, inasmuch as the contesting defendants are the real owners of the suit property having purchased either the estate or the right, title and interest of defendant No. 9 in the Certificate case.

11. It is next urged by the learned counsel for the appellant that the Bahel estate was abolished in 1965 and in consequence thereof the interest of the contesting defendants vested in the State and they cannot be regarded as real owners so as to resist the plaintiff's suit for confirmation of possession or permanent injunction. This point had never been raised in the Courts below nor has it been raised in the memo of appeal. However, the respondents' counsel has produced a Rent Schedule which has been granted to respondent No. 1 in a proceeding u/s 7 of the Orissa Estates Abolition Act and has asked to take that document as additional evidence. If I have to countenance this new point, I must admit the rent schedule as a piece of additional evidence which indicates that State has recognised him as tenant and, as such, he has subsisting interest in the suit land. In that event the plaintiff must be nonsuited in regard to his relief of confirmation of possession or permanent injunction which can be granted only against a rank trespasser, on the sole basis of possession. This point, therefore, fails.

12. For the aforesaid reasons, I am of opinion that the appeal must fail and the plaintiff must be non-suited. This appeal is accordingly dismissed with costs.