
(1964) 01 OHC CK 0020
In the Orissa High Court
Case No : M.A. No. 55 of 1962

Dewan Chitra Bhanu Singh Rai	Vs	APPELLANT
Balmukund Singh Rai		RESPONDENT

Date of Decision : 08-01-1964

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 18, 18(1), 2, 3
Transfer of Property Act, 1882 — Section 100

Citation : (1965) 31 CLT 932

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : Lalit Mohan Nanda and S. Acharya, for the Appellant; B. Mohapatra and R.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—Balmukund Singh Rai, the Respondent-Petitioner, is the son of the elder brother of the father of Dewan Chitra Bhanu Singh Rai, the Appellant. The Appellant was the Zamindar of the Zamindary of Loisinga in the ex-State of Patna. The Zamindary vested in the State of Orissa on 27-11-1952 under the Orissa Estates Abolition Act (here in after referred to as the Act). On 18-6-1953, the Petitioner filed an application u/s 18(1)(b) of the Act alleging that he was a maintenance holder in the Zamindary of Loisinga succession to which was governed by the law of primogeniture and that he was in receipt of a monetary allowance in lieu of maintenance which was a charge on the zamindary. The quantum of maintenance that he used to get was alleged to be Rs. 125/- per month and an annual sum of Rs. 667/- which represented the annual land revenue of village Budhipadar in the Loisingha zamindary towards "Mudhikhia". Both these items were charges on the zamindary. In the alternative a consolidated sum of Rs. 16,000/- was claimed.

2. The Appellant filed written statement challenging the claim. The fact that the zamindary vested in the State of Orissa. and that the Petitioner Balmukund Singh

Rai was getting maintenance at the rate of Rs. 125/- per month was not disputed. It was, however, averred that the annual sum of Rs. 667/- received towards "Mudhikhia" as not towards maintenance and that none of the amounts were charges on the zamindary. The quantum of the claim was also disputed.

3. The learned District Judge of Bolangir-Kalahandi, who was the Claims Officer, held that the amount of Rs. 667/-, which the claimant-Petitioner's father was getting for village Budhipadar, had no relation to the maintenance claimed by the Petitioner. No appeal has been filed by the petitions against this adverse finding and the decision has become final and is not the subject matter of this appeal. The learned District Judge, however, held that the Petitioner used to get Rs. 125/- per month as maintenance and that was a charge on the zamindar. He allowed the application and decreed a consolidated maintenance of Rs. 10,136/10/-. The miscellaneous appeal has been filed against this decree.

4. In appeal, the quantum is not challenged. Mr. Nanda presented the appeal with fairness and clarity and raised two contentions-

(i) The finding of the Claims Officer that the maintenance decree in Civil Appeal No. 37 of 1942 was a charge on the zamindary is not supported by the judgment in that case and that the maintenance was not a charge on the zamindary in any manner.

(ii) The Appellant was a mere Revenue Collector and servant under the ex-State Land Revenue Act and the Sanad granted to him by the Maharaja and the Ruler. The proprietary title belonged to the ex-State of Patna and that the zamindary was not transferable in any manner nor saleable in execution of any decree and that the Appellant had no interest in the zamindary and no charge could be legally created on that zamindary.

These contentious require careful consideration.

5. Section 18(1)(b) of the Act enacts-

Ever maintenance holder in an estate succession to which is governed by the law of primogeniture; who is in receipt of a monetary allowance in lieu of maintenance which is a charge on the estate or part thereof vested in the State Government u/s 3, may within the period specified in Clause (a) notify in the prescribed manner to the Claims Officer in writing his claim for maintenance and the amount of allowance which he is entitled to receive thereof.

It is not disputed that the Petitioner is a maintenance-holder, that the succession to the zamindary of Loisingha is governed by the law of primogeniture and that the Petitioner was in receipt of a monetary allowance of Rs. 125/- per month in lieu of maintenance. The only question for determination is whether the monetary allowance in lieu of maintenance was a charge on the zamindary.

Mr. Nanda did not directly contend that the zamindary was not an estate. But the argument advanced by him that the Appellant was a mere Revenue Collector and

servant of the zamindary having no interest in the zamindary in substance and effect, amounts to an argument that the zamindary was not an estate. This argument has no force. The Appellant is stopped from raising such an argument. The zamindary has vested in the State Government on the footing that it was an estate. When that Appellant himself claims compensation under the Act, he is precluded from raising the question that it was not an estate and that he was a mere revenue collector and servant under the ex-State of Patna. On a true construction of Section 113 of the Patna State Land Revenue Act (Act III of 1940) hereinafter referred to as the Land Revenue Act this contention is also not correct. If the Appellant would satisfy all the conditions laid down in Section 113, Sub-section (2), Clauses (a), (b) and (c) viz., the continued loyalty of the tenure-holder to the Ruler or his government, the proper management of the tenure and any other conditions imposed on the tenure-holder by any written lease or sanad granted to such tenure-holder by the Ruler-he was entitled to enjoy the tenure without its being liable to resumption subject to other restrictions imposed in other sections of the Land Revenue Act. He cannot be said to be a mere revenue collector and servant of the estate. In the Final Report on the Revenue Settlement of Patna State, 1937, the characteristic feature of the tenure of the zamindary tenures are service grants. Section 2(g) of the Act defines "estate". It includes any jagir, inam, or maufi or other similar grant. This definition is very wide and includes within its ambit the zamindary of Loisingha.

6. It is now necessary to determine the meaning of the word "charge" used in Section 18(1)(b) of the Act. Mr. Mohapatra contends that the word "charge" in Section 18(1)(b) of the Act does not carry the same meaning as it has in Section 100, Transfer of Property Act. According to him, "charge" as a technical word of legal use, conveys an idea of obligation. He placed reliance on its meaning as given in Law Lexicon by Ramanath Ayyar. I am unable to accept such a contention. In Section 18 of the Act, the words "mortgage" and "charge" have been used. When prior to the passing of the Act, the Transfer of Property Act is already on the file, those words must be taken to have been used in the same sense. He also places reliance on a passage at Page 132 of Ghose's Law of Impartible Property, 2nd Edition to the effect-

Junior members of an impartible estate are in the position of disqualified heirs and in strict Hindu law their maintenance is a charge on the family ancestral estate.

Their Lordships of the Judicial Committee observed in AIR 1942 P.C. 3, that in the case of an impartible joint family estate, the junior male members of the family who are not sons or brothers of any holder of the impartible estate are not entitled to maintenance from the impartible estate save on ground of special custom. Apart from the fact that in the previous judgment the Petitioner was declared to be entitled to maintenance and that the Land Revenue Act makes provision for payment of maintenance to relatives, under the general Hindu Law the Petitioner would not have been entitled to maintenance, he being the first

cousin of the Appellant. The existence of a charge in favour of the Petitioner under the general Hindu Law does not at all arise. The aforesaid passage in its application to the Petitioner would not create a charge as in view of the dictum of the Judicial Committee he would not have been entitled to maintenance. In view of the clear provisions of Section 18(1)(b) of the Act, it cannot be held that in favour of every maintenance-holder in an impartible estate, creation of a charge is to be implied. Even if they might be receiving maintenance, they are not entitled to make an application under the section unless a charge has been created in their favour. A Division Bench of this Court has held in M.A. 10 of 1962 that mere receipt of a monetary allowance in lieu of maintenance would not, by itself, constitute a charge on the estate.

7. Section 100 of the Transfer of Property Act enacts that where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. It is thus clear that in order to create a charge u/s 100, Transfer of Property Act, it is not necessary to employ any technical or particular form of words. All that is required is that there must be a clear intention to make a particular property a security for the payment of money. In *Raja Sri Sri Shiva Prasad Singh Vs. Beni Madhab Chowdhury*, the distinction between a mortgage and a charge was clearly indicated. A charge only gives right to payment out of a particular fund or property without transferring the same. The mortgage in essence is a transfer of an interest in specific immoveable property. In ILR 7 Mad 23, a Hindu executed a document agreeing to pay to his sister Rs. 10/- per annum from the profits of an estate inherited by him from his maternal grand-mother. It was held that a charge was created on the profits of the estate. In *Mt. Sahodra Vs. Badri Prasad and Others*, it was held that where a fund was indicated for payment of certain allowance, the latter must be deemed to be a charge on the former. In (1889) 23 O.B.D. 239, a charge was indicated as giving a right to payment out of a particular fund or property without transferring that fund or property. In *Nathan Lal and Others Vs. Durga Das*, their Lordships observed that a charge does not involve the transfer of the interest in the property subject thereto and arises from the circumstance that certain property, moveable or immoveable, or any interest in such property, is indicated with certainty as the fund out of which a certain claim is to be met or satisfied. The same principle is enunciated, though in a different set of facts, in *T.S. Swaminathudayar Vs. The Official Receiver of West Tanjore*. Their Lordships observed that the moment there is a provision for owlet made in a partition decree, the member in whose favour that provision has been made is entitled to a lieu or a charge over the property which has fallen to the share of the member. If such a lieu or a charge is expressly declared, so far so good, but even if it is not so expressly declared, there is by necessary implication the creation of a lien or a charge in his favour for the amount of such owelty. Even if no express charge was created, there was in equity a lien or a charge created. Thus the test to determine whether a charge has been created

or not is to find out if the Petitioner has been given a right to payment of maintenance out of the impartible estate.

8. Mr. Mohapatra contends that the right to payment of maintenance has been given out of the impartible estate both by the decree, passed by the ex-State Patna High Court in Civil Appeal No. 137 of 1942 and also under the Land Revenue Act. Mr. Nanda, on the other hand, contends that the charge was not created under the previous decree and could not have been created under the Land Revenue Act. To appreciate Mr. Nanda's contention, the relevant provisions under the Land Revenue Act may be noticed. Section 113 lays down the incidents of the tenure of a Zamindar. Sub-section (1), Clauses (ii) and (iv) are as follows-

(ii) The tenure shall be heritable but not transferable by sale, gift, mortgage or otherwise.

(iv) The tenure shall be non-saleable in execution of any decree and no decree shall be passed for the sale thereof.

Mr. Nanda contends that as the tenure is not transferable in any manner and as no decree shall be passed for the sale of the tenure and as the tenure is not saleable in execution of a decree, there can be no charge in respect of such tenure. His argument proceeds on the assumption that no charge can be created in respect of a property which cannot be pursued by sale of the property in case of default of payment of dues for which the charge was created. This assumption suffers from a fallacy. In the test of a charge, which I have laid down no such legal principle inheres. Even though the tenure is not transferable and cannot be sold in execution of a decree, a receiver can be appointed in respect of such tenure and from the income of the state the dues can be paid. The crucial test is whether the Petitioner's claim for maintenance was indicated to be paid out of the income of the estate. The non-transferability of the tenure is not a test for concluding that a charge cannot be created in respect of the tenure. The ex-State Patna High Court passed the decree for maintenance on the following findings-

We therefore hold that the Plaintiff, the first cousin of the Defendant, is entitled to maintenance out of the impartible estate in the hands of the estate.

In the language of (1889) 23 Q.B.D. 239, it clearly indicated the right to payment of maintenance to the Petitioner out of a particular property, which, in this case, is the impartible estate without transferring that property to the Petitioner. The decretal order, therefore, satisfies the test of the definition of "charge". The only other question is whether the charge created by the decree comes within the purview of Section 100, Transfer of Property Act. On this point, there is conflict of authority which is unnecessary to discuss. The matter has been fully dealt with in a Full Bench decision of five Judges in AIR 1943 354 (Oudh). With respect I am inclined to accept that decision as laying down the correct law. Their Lordships held that a charge created by a decree of a Court was a charge created by operation of law and would come within Section 100,

Transfer of Property Act. I am, Therefore, satisfied that though not expressly stated in the judgment of the ex-State Patna High Court that a charge was created on the estate, the decretal order clearly created a charge within the meaning of Section 100, Transfer of Property Act.

9. That apart, a charge has been created in favour of the Petitioner under the Land Revenue Act itself. Section 113, Sub-section (2), Clause (c) lays down that the tenure shall be held subject to any written lease or sanad granted to such tenure-holder by the Ruler. The sanad recites that the Maharaja and Ruler of Patna State recognises the Appellant as the Zamindar of the Loisingha estate and that he and his successors were entitled to hold the estate subject to the terms and conditions set forth therein. Para 4 of the sanad recites that the zamindari is resumable for breach of conditions set forth in this sanad. Para 31 prescribes that the tenure holder shall be responsible to provide for the proper maintenance of his relatives. Admittedly the Petitioner is a near relative of the Appellant being his first cousin. If the Appellant failed to provide for the proper maintenance of the Petitioner under para 4 of the sanad and Section 113(2)(c) of the Land Revenue Act, the tenure was resumable by the Ruler. By these provisions, the Petitioner was given the right to payment of maintenance out of the estate and the failure on the part of the Appellant was to entail in the resumption or the extinction of the tenure. Even though the tenure is not transferable in any manner or liable to be sold in execution of a decree, a much more rigorous penalty was attached to the infraction of the direction in the sanad. By operation of law a charge was created on the tenure. It is now well settled that the words "by operation of law" are more extensive than the words "by law" and a charge created "by operation of law" includes a charge directly created by the provisions of the Act as well as other charges created indirectly as a legal consequence of certain conditions. In this case, as I have already indicated, the charge was created by the law itself.

10. Thus a charge was created on the estate both by the decree, passed by the ex-State Patna High Court and under the Land Revenue Act. The Petitioner's claim was, therefore, rightly decreed.

11. In the result, the appeal fails and is dismissed with costs. Appeal dismissed.