

(1964) 07 OHC CK 0003
In the Orissa High Court
Case No : Second Appeals No. 161 of 1963

Dhubal Dharua

APPELLANT

Vs

Sartuka Dharua and Others

RESPONDENT

Date of Decision : 27-07-1964

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100(1), 103

Citation : (1965) 31 CLT 349

Hon'ble Judges : Misra, J

Bench : Single Bench

Advocate : M.S. Rao and M.K.C. Rao, for the Appellant; G. Rath and K.M. Panda, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—Second Appeal No. 160 of 1963 and Second Appeal, No. 161 of 1963 respectively arise out of Title Suits no 4 and 5 of 1958. The land in dispute in T.S. No. 4 of 1958 is plot No. 614/1 covering an area of 0.60 acre and the land in dispute in T.S. No. 5 of 1958 is plot No. 180 covering an area of 0.50 acre. Defendants 1 to 3 are the contesting Defendants in T.S. No. 4 of 1958 and Defendants 1 to 9 are the contesting Defendants in T.S. No. 5 of 1958. The other Defendant common in both the suits is the State of Orissa. Though the lands in dispute and the contesting Defendants are different, the facts are identically similar in both the cases, and the rights and liabilities of the parties arise out of the same proceeding and same document. The suits and appeals have accordingly been analogously heard. The facts in S.A. No. 160 of 1963 would cover the facts in the other appeal. As the facts of both the suits have separately been given by the Courts below, it would be sufficient, for the proper understanding of the case, to refer to the facts in T.S. No. 4 of 1958.

Plaintiff's case in this suit is as follows He and Defendants 1 to 3 are residents of village Badibahal. He was the Thikadar of the village and Defendants 1 to 3 were the co-sharer Thikadars Government decided as per its letter (Ext. 32) dated

19-12-1949 from the Secretary to Government Revenue Department, to the Commissioner, Northern Division, Sambalpur, that the Thikadari system should be abolished and steps should be taken for conversion of Bhogra lands into rayati lands in the ex-State of Patna. Thikadari system was abolished on 1-4-1950. Plaintiff's case is that under the Bhogra conversion proceedings, five acres of land were to be set apart as service-Jagir by carving those out of the Bhogra lands before the rest of the lands are converted into rayati lands. Accordingly plot No. 1796 measuring an area of 0.70 acre was taken out of Plaintiff's possession. Plot No. 614/1 measuring an area of 0.60 acre was taken out of the possession of Defendants 1 to 3 and plot No. 180 measuring an area of 0.50 acre was taken out of the possession of Bhagabat and others who are the contesting Defendants in the other suit for Jagir purpose. Though these lands were carved out for Jagir purposes to be taken from the Plaintiff and other co-sharer, for the purpose of convenience Government took the entire five acres from the Plaintiff's possession exclusively and gave the lands in dispute in exchange to the Plaintiff. Accordingly Plaintiff gave up from his possession towards Jagir plot No. 614 2020 measuring an area of three acres and plot No. 611 measuring an area of two acres and agreed to take the disputed land of 1.10 acres by way of exchange. This arrangement was agreed to by all the interested parties and received the approval and sanction of the Board of Revenue. By an agreement, Plaintiff surrendered Thikadari tenure. On the extinction of Thikadari tenure Government became the sole owner of all the Bhogra lands in the village. Government, in turn, resettled the Bhogra on rayati tenancy on the Thikadar and his co-sharers according to their respective actual possession. Plaintiff's name was mutated and he obtained Parcha for the same. In 1954-55 the contesting Defendants in both the suits trespassed on the disputed lands. The suit is for declaration of title, recovery of possession and for mesne profits.

2. The State of Orissa does not contest the suit. The case of the contesting Defendants is that there was an amicable arrangement since long between the various co-sharers and the suit lands is in the shares of Defendant No. 2. There was a proposal to take 0.60 decimals of land from the Defendants; but on their objection an identical area was taken from some other land. Moreover 0.60 acre cannot be carved out from the share of Defendant No. 2 alone. Defendants, in substance, make a denial and assert that the Thikadar cannot surrender the Thikadari tenure and the Government had no right to take out the disputed land from the possession of the Defendants and settle it with the Plaintiff.

3. The learned trial Court found that the suit land was given to the Plaintiff in exchange for the Jagir land and the Plaintiff is the legal and rightful owner of the same. He accordingly decreed the suit and allowed mesne profits. The learned Subordinate Judge held that upon surrender of the Thikadari tenure in favour of the Government by the Plaintiff, the latter was free to make any disposition and that the co-sharers had no locus standi to question the surrender. He, however, dismissed the suit holding that the settlement of the disputed land with the Plaintiff on rayati basis did not confer any title on him. By following *Dirju Patra v.*

Minaketan Patel 26 C.L.T. 216 he adopted a queer reasoning that though the Government can take away a portion of the land for Jagir and that cannot be questioned by the parties, the property upon conversion to rayati becomes partible joint property, and if 5 acres were taken exclusively from the possession of the Plaintiff towards Jagir, he is entitled to bring a suit for partition and get a proportionate share from the other co-sharers if his land falls short of his legal share but cannot acquire title to the disputed land.

4. Mr. Rath advanced two contentions:

(i) The source of the power and authority of the Revenue Officers to settle Bhogra lands on rayati tenancy is derived from Ext. 32, and that once 5 acres of Bhogra lands were reserved for settlement as service-Inam for village officers from the lands in possession of the Plaintiff, the Government had no further jurisdiction and authority to take the disputed lands in exclusive possession of the Defendants and settle them with the Plaintiff as, in terms, Ext. 32 enjoins that Bhogra would be settled on rayati tenancy with the Thikadar and his co-sharers according to their present possession; and

(ii) When the Bhogra land was subsequently converted to rayati land, it lost its character of impartibility and the ordinary rule Hindu Law regarding the right of different members to claim partition by metes and bounds would necessarily revive. Accordingly if the entire Jagir was carved out from the land in the exclusive possession of the Plaintiff, he is entitled to bring a suit for partition wherein allotment should be made according to legal shares and he cannot bring a suit for declaration of title and recovery of possession in respect of the disputed lands.

5. In order to appreciate the first contention, the relevant portions of Ext. 32 may be extracted Clause 2. All lands recorded as Bhogra in 1936 settlement excepting the items mentioned hereunder would be settled on rayati tenancy with the Thikadar and his co-sharers according to their present possession. The possession would be determined entirely by the Revenue Authorities and the decision of the Commissioner, Northern Division, shall be final in this regard.

The items to be omitted from Bhogra are:

(a)....

(b) 5 acres of Bhogra lands to be selected by the Revenue Authorities subject to confirmation by the Commissioner, Northern Division, to be reserved for settlement as service-Inam (Jagir) for village officers.

The Commissioner of Northern Division was one of the Members of the Board of Revenue.

It is to be made clear that none of the parties to this appeal challenged the legality of Ext. 32 and the Bhogra conversion proceedings. The judgment proceeds on the footing that the Bhogra conversion proceedings and Ext. 32

were legal and within jurisdiction.

Mr. Rath, however, contended that the source of the power of the Revenue Authorities being Ext. 32, any act in contrary of its terms is ultra virus. It is the admitted case of website or that plot No. 614/2020 with an area of 3 acres and plot of the with an area of 2 acres-in all 5 acres-have at present b in reserved by the Revenue Authorities as the service-Inam (Jagir) for village officers and these lands were in the possession of the Plaintiff before such selection. Mr. Rath contended that I after the Revenue Authorities exercised their power of selection and reserved the aforesaid 5 acres for Jagir, they had no further jurisdiction or power to take away the disputed lands from the possession of the Defendants and settle those with the Plaintiff. If, in fact, both the transactions were independent and separate and the settlement of the disputed lands was done subsequently to the selection of the Jagir land, Mr. Rath's contention is unassailable. This contention, however, has no factual basis. By one and the same decision the Government in the first instance carved out the disputed lands along with other lands to constitute the 5 acres of Jagir, and for convenience exchanged the disputed lands with some lands in possession of the Plaintiff. The fact that the whole thing done was one single and indivisible transaction and manifest from Ext. 6 and other connected documents. Ext. 6 is a list showing the resettlement of Bhogra lands in village Badibahal on the abolition of the Thikadari system. As against the disputed lands, there is a note in the Remarks Column that these lands have been given by way of exchange towards the Jagir lands set apart from Bogra lands. There is no material or evidence on record that this exchange was subsequently done. On the contrary, the evidence is clear that the disputed lands were initially carved out and selected as Jagir lands. This arrangement was confirmed by the Member, Board of Revenue, after all parties endorsed their agreement to it. The contesting Defendants have themselves expressed their consent to the arrangement under Ext. 6 by appending their signature's to it. Subsequently also they are passed on the disputed lands, and when the Plaintiff reported to proceedings in Revenue and Criminal Courts, they clearly admitted that the disponded lands were taken by way of exchange towards Jagir ultimately carved out from the exclusive possession of the Plaintiff. The order of the Member, Board of Revenue, (Ext. 21) dated 1-1-final approval and sanction is to the effect.

The Thikadars and co-sharers in possession have agreed to the distribution of the old and new Bhogra as finalized in this regard by the Collector. By notice they were given an opportunity to bring to my notice errors, if any, in the arrangement. The time limit has expired and no objection has been filed within time. The arrangement proposed is reasonable and is hereby confirmed. Collector would arrange for issue of Patta and taking of Kabulayats accordingly. The Jagir reserved will be in the Khas possession of the State and would be leased out temporarily on auction and for one year at a time for cultivation.

Accordingly Patta was issued to the Plaintiff in respect of the disputed lands. As

no argument was advanced before any of the Courts below that the transaction was one single and indivisible, their findings have not been precisely worded to answer the point. The learned trial Court had recorded a clear finding to the effect.

The conclusion becomes inescapable that the suit lands were given to the Plaintiff in exchange for the 5 acres of the Sagir lands taken out of Plaintiff's possession.

The learned lower appellate Court has not reversed this finding and has not recorded any finding that the transactions were separate and distinct so that the disputed lands were exchanged subsequent to the selection of the 5 acres of Jagir lands.

Under Section 103, Code of Civil Procedure, the High Court may, if the evidence on record is sufficient, determine any issue of fact necessary for the disposal of the appeal which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in Sub-section (1) of Section 100. If the five acres of Jagir lands were first selected from the lands in possession of the Plaintiff and later on to compensate him the disputed lands were taken out of the possession of the Defendant and were settled on rayati basis with the Plaintiff, the act would be in contravention of the injunction prescribed in Ext. 32. But if by one and the same transaction the disputed lands were selected for Jagir and were exchanged for other lands, the act is legal and within jurisdiction. It was open to the Revenue Authorities to select proportionately from the lands in possession of different co-sharers on equitable consideration. The disputed lands were selected for Jagir. These lands were excluded from Bhogra lands and none of the parties could claim any title to such lands. The title vested in the Government who exchanged those for the lands exclusively in possession of the Plaintiff and conferred title on the Plaintiff on rayati basis. All these were done by one and the same transaction. Government and the Defendants were themselves parties to the exchange the learned Subordinate Judge did not at all apply his mind to this aspect of the case. On a reference to the materials on record, which I have already discussed, I am satisfied that the entire arrangement was one single and indivisible whole and it was first incorporated into Ext. 6 with the consent of the parties. It was supervised and checked up by various intermediate revenue authorities after inviting objections. It ultimately received the sanction of the Board of Revenue, the highest revenue authority. Under Ext. 32 that decision cannot be questioned.

6. In view of the aforesaid conclusion on the first contention, the second contention does not arise. If the disputed lands were initially set apart for Jagir, the selection is final and cannot be questioned. It no longer remains as a part of the residual property so as to be settled on rayati basis on the members of the joint family, and the theory that inequality would be adjusted in partition amongst the members inter se does not arise for consideration. Krishna Chandra

v. Hrushikesh 26 C.L.T. 187 has no application to the facts of this case.

7. In the result, the Plaintiff's suits are bound to succeed. The appeals are allowed, the judgment and decree of the learned Subordinate Judge are set aside and those of the learned trial Court are restored. Parties are to bear their own costs throughout. Appeal allowed.