
(1993) 02 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 11 of 1982

Fakir Sah

APPELLANT

Vs

Netra Sah (having died) Hadu Sah and Others

RESPONDENT

Date of Decision : 24-02-1993

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 7
Orissa Offices of Village Police (Abolition) Act, 1964 — Section 4(1)

Citation : (1993) 2 OLR 106

Hon'ble Judges : G.B. Pattnaik, J

Bench : Single Bench

Advocate : P.K. Misra, for the Appellant; A.S. Naidu and P. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

G.B. Pattnaik, J.—Defendant No. 1 is the appellant against a reversing judgment in a suit for declaration of title and recovery of possession of "B" Schedule property or, alternatively, for partition of "A" Schedule properties into five equal shares and allotting the plaintiffs" 2/5ths share.

2. Plaintiffs" case in nutshell is that the common ancestor Dhubai had six sons, but one of the sons, Kaibalya died issueless. The other five sons are Kara, Hari, Usta, Panchu and Puina. Kara"s son is Bhuja and Bhuja"s son Fakira is defendant No. 1. Hari"s son Netra is plaintiff No. 1 and Panchu"s son Bhulku is plaintiff No. 2. It is alleged in the plaint that the entire "A" Schedule lands were the lands which Dhubai was enjoying by rendering service as Jhankari, a village Police. There had been a partition in the family amongst the five sons of Dhubai, but the Jhankari service lands described in Schedule-A had not been partitioned. But by an amicable arrangement, part of "A" Schedule lands described in Schedule-B was being enjoyed by Usta and Panchu and thereafter by the plaintiffs. It is also further alleged that the lands attached to Jhankari Service were impartible in nature and in accordance with the custom the eldest member of the family

renders the services of Jhankari and even though Kara was the Jhankari after death of Dhubai and after Kara's death Bhuja became Jhankari, but the land which they were enjoying as Jhankari was the joint family property. In a proceeding u/s 145 of the Code of Criminal Procedure, possession of defendant No. 1 having been declared the plaintiffs filed the suit for the reliefs as already stated.

3. Defendant No. 1 alone contested the suit. The other defendants remained ex parte. The case of defendant No. 1 was that on the death of Dhubai, Kara was appointed as Jhankari and after Kara's death Bhuja was appointed as Jhankari and for rendering the service he was in exclusive possession of the suit land. It was his further case that there had been a complete partition amongst the sons of Dhubai, but the suit land being Jhankari service land had been given to Bhuja alone who was the person rendering the services of Jhankari. It is also the further case that in a proceeding under the Orissa Offices of Village Police (Abolition) Act, 1964 (Orissa Act 3 of 1964), Ac. 6.660 decimals of land was settled in the name of the village Deity through defendant No. 1 as Jhankari and the rest Ac. 6,660 decimals of land was settled with defendant No. 1 on raiyati basis and that land does not assume the character of joint family property and, therefore, the plaintiffs cannot claim any right over the same.

After narrating the findings of both the Courts below, His Lordship found :

6. The only contention raised by Mr. Misra appearing for defendant No. 1-appellant is that the lower appellate Court committed gross error of law in holding that on settlement, the land becomes the joint family property and each member of the joint family has a share in it, in view of the specific provision contained in the Orissa Offices of Village Police (Abolition) Act

Mr. Mohanty appearing for the respondents, on the other hand, contends that settlement of Jagir land in favour of any member of the joint family would enure to the benefit of other co-sharers and, therefore, there is no infirmity with the decision of the lower appellate Court.

The rival contentions require a careful examination of the provisions of the Abolition Act under which the lands were settled and some decided case-laws on the point.

7. Under the provisions of the Orissa Offices of Village Police (Abolition) Act (hereinafter referred to as the "Abolition Act"), with effect from and on the appointed date, all Jagir lands stand resumed and vested absolutely in the State Government free from all encumbrances as provided in Section 3 (1) (e) of the Abolition Act, But under the proviso to the said sub-section, if a person being a Jbankar was immediately before the appointed date discharging the duties of a village priest attached to the office of Jhankar, then he would be entitled to continue to hold fifty per cent of the Jagir lands so long as he continues to discharge the said duties. Section 4 of the Abolition Act provides for settlement of lands. u/s 4(1), Jagir lands resumed under the Act would be settled with rights

of occupancy therein on a fair and equitable rent to be determined in the prescribed manner with the village police officer or with him and all those other persons, if any, who may be holding the land or any part thereof as his co-sharers or as tenants in pursuance of any local custom, usage or practice under him or under such co-sharer to the extent that each such person was in separate and actual cultivating possession of the same immediately before the appointed date. For better appreciation of the point in issue. Section 4 (1) of the Abolition Act is extracted herein below in extenso :

"4. Settlement of land and solatium :

(1) All Jagir lands resumed under the provisions of this Act shall, subject to the provisions of Sub-section (2), be settled with rights of occupancy therein on a fair and equitable rent to be determined in the prescribed manner, with the village police officer or with him and all those other persons, if any, who may be holding the land or any part thereof as his co-sharer or as tenants in pursuance of any legal custom, usage or practice under him or under such co-sharer to the extent that each such person was in separate and actual cultivating possession of the same immediately before the appointed date."

On a plain reading of the aforesaid provision, I have no hesitation to come to the conclusion that a settlement made in favour of a village police officer u/s 4(1) will not ensure to the benefit of his co-sharers. The lower appellate Court obviously committed an error in construing Section 4(1) of the Abolition Act. Section 4(1) contemplates settlement of the Jagir lands with right of occupancy therein with the village police officer and all those other persons who may be holding the land or any part thereof whether as co-sharer or as tenants, to the extent that each such person was in separate and actual cultivating possession of the same immediately before the appointed date. The guiding factor for settlement u/s 4(1) of the Abolition Act is, therefore, the separate and actual cultivating possession of the extent of land and consequently, the provision of Section 4(1) is not susceptible of a construction that settlement made in favour of a person would enure to the benefit of his co-sharers. The lower appellate Court as well as Mr. Mohanty appearing for the respondents relied upon several authorities of this Court in relation to a settlement made under the Orissa Estates Abolition Act for the proposition that such settlement would enure to the benefit of all the co-sharers. In view of this submission, I think it appropriate to notice the provision for settlement with the intermediary under the Orissa Estates Abolition Act.

8. Section 7 of the Orissa Estates Abolition Act provides that on and from the date of vesting of lands used for agricultural or horticultural purposes and in possession of a mortgage which immediately before the execution of the mortgage bond were in khas possession of such intermediary shall be deemed to be settled by the State Government with such intermediary and with all the share-holders owning the estate and such intermediary with all the share-holders shall be entitled to retain possession thereof and hold them as raiyats under the

State Government having occupancy rights in respect of such land subject to the payment of such fair and equitable rent as may be determined by the Collector in the prescribed manner. The provisions of Section 7(1)(a) and (c) are extracted herein below in extenso :

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

(1) 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)

(c) lands used for agricultural or horticultural purposes and in possession of a mortgagee, which immediately before the execution of the mortgage bond were in khas possession of such intermediary, shall notwithstanding anything contained in this Act, be deemed to be settled by the State Government with such intermediary and with all the share-holders owning the estate and such intermediary with all the share-holders, 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 in the prescribed manner."

Similarly, u/s 6 of the Orissa Estates Abolition Act, in respect of homesteads and the buildings of the intermediary which are in possession of the intermediary on the date of vesting would be deemed to be settled by the Government with such intermediary and with all the shareholders owning the estate who shall be entitled to retain possession of such homesteads and of such buildings or structures together with the lands on which they stand, as tenants under the State Government subject to payment of such fair and equitable ground-rent as may be determined by the Collector in the prescribed manner. In view of the aforesaid language of Sections 6 and 7 of the Orissa Estates Abolition Act, this Court came to hold that a settlement made in favour of one of the co-sharers intermediary under the Orissa Estates Abolition Act will enure to the benefit of the other co-sharers. (See Kunja Meher and Ors. v. Narayan Meher and Ors. 1973(1) CWR 97 Krupasindhu Biswal and 3 others v. Anantaram Biswal and Ors. 1972 (2) CWR 1983 . The aforesaid decisions of this Court in relation to settlement made in favour of an intermediary under the Orissa Estates Abolition Act, cannot have any application to a settlement made in favour of a village police officer under the provisions of the Abolition Act, in view of the provisions of Section 4 of the said Act. The provisions of the Orissa Merged Territories (Village Offices Abolition) Act (Orissa Act 10 of 1963) which is in pari materia with the Orissa Offices of Village Police (Abolition) Act with which I am concerned in the present case came up for consideration before their Lordships of the Supreme Court in the case of Maguni Charan Dwivedi Vs. State of Orissa and Another, . Construing v. 5 of the Act, their Lordships of the Supreme Court

held that the expression "each such person" in Sub-section (1) of Section 5 would include the holder of the village office, so that in order to be eligible for settlement of the land with occupancy rights, he must also be in separate and actual cultivating possession of the Bhogra lands immediately before the appointed date. The aforesaid observation would apply to the case in hand.

In the aforesaid premises, the lower appellate Court was totally in error in holding that the settlement made in favour of defendant No. 1 would enure to the benefit of other co-sharers like the plaintiffs. In my considered opinion, no co-sharer can claim any right in respect of the land which had been settled with defendant No. 1 under Ext. D under the provisions of the Abolition Act. The impugned judgment and decree of the lower appellate Court are accordingly set aside and the plaintiffs, suit is dismissed.

The second appeal is allowed, but there will be no order as to costs.