

(1970) 02 OHC CK 0039

In the Orissa High Court

Case No : Miscellaneous Appeal No. 25 of 1964

Gajaraj Sahu

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 13-02-1970

Acts Referred:

Central Provinces Tenancy Act, 1898 — Section 46(1), 47

Constitution of India, 1950 — Article 31

Orissa Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced Persons (Land Acquisitions) Act, 1948 — Section 7(1)

Citation : (1970) 36 CLT 782

Hon'ble Judges : G.K. Misra, C.J.;S.K. Ray, J;R.N. Misra, J

Bench : Full Bench

Advocate : G.B. Patnaik and D.P. Mohapatra, for the Appellant; A.G. and K.C.J. Roy, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—This appeal is confined to Khunti No. 6 in Village Patrapalli in Sambalpur district, in which the disputed lands of about 10.39 acres are situate. They were acquired on 15-11-1951. They have been recorded as Gounti Raiyati lands. The arbitrator granted compensation at 500 times the deduced rent u/s 7 (1) (e) second proviso, of the Orissa Development of Industries, Irrigation, Agriculture, Capital Construction, and Resettlement of Displaced Persons (Land Acquisition) Act, 1948 (Orissa Act 18 of 1948) -- (hereinafter to be referred to as the Act). The correctness of some of the decisions of this Court was challenged while the case was heard by one of us. Some of those decisions are conflicting. To resolve this conflict, the matter has been referred to the Full Bench.

2. Mr. Patnaik for the appellant contends that raiyati lands in Sambalpur district cannot be said to be saleable under the Central Provinces Tenancy Act, 1898 (herein after to be referred to as the Tenancy Act) and as such the second proviso to Section 7 (1) (e) of the Act does not apply and the appellant is entitled to compensation on the market value of the land under the first proviso -- which

would be 16 times the net yield.

3. To appreciate the aforesaid contention. Section 7 (1) of the Act -- which prescribes the method of determining compensation -- may, so far as material, be quoted:--

"7 (I) Where any land has been acquired under this Act, there shall be paid compensation, the amount of which shall be determined in the manner and in accordance with the principles hereinafter set out, that it so say---

* * * * * (e) The Arbitrator in making his Award, shall have due regard to the provisions of Sub-section (1) of Section 23 of the Land Acquisition Act, 1894.

Provided that the market value referred to in the first clause of Sub-section (1) of Section 23 of the Act shall be deemed to be the market value of such land on the date of publication of the notice under Section- 3 or as the case may be, the preliminary notification under Sub-section (1) of Section 4 of the Land Acquisition Act, 1894, referred to under Sub-section (2) of Section 3 or on the first day of September, 1939, with an addition of 50 per cent, whichever is less:

Provided further that where under any law or custom having the force of law, the lands are not saleable, the market value of such lands shall be such multiple as may be prescribed of the deduced rent to be calculated in the prescribed manner, with addition of 50 per cent."

In State of Orissa Vs. Bharat Chandra Nayak, a Division Bench of this Court struck down the first proviso to Section 7 (1) (e) as unconstitutional. The whole of the first proviso is not unconstitutional. Only the last sentence of the proviso to the effect "market value on the first day of September 1939 with addition of 50 per cent whichever is less" was unconstitutional. By giving the 1939 price the market value of the land which was the just equivalent was not given and so, on the authority of The State of West Bengal Vs. Bela Banerjee and Others, it was observed, by inadvertence, that the whole of the first proviso was unconstitutional. A similar erroneous observation was made in 27 (1961) CLT 126 (Banamali Babu v. State of Orissa).

4. The disputed lands have been recorded as "Gounti Rayati" lands. Gounti raiyati means raiyati lands held by the Gounti during his tenure of office. Gounti raiyati lands are therefore raiyati lands.

5. The second proviso to Section 7 (4) (e) of the Act prescribes that if the lands are not saleable, then the market value shall be determined as laid down therein. If the lands cannot be described to be not, saleable, then the market value would be determined in accordance with the first proviso.

6. The question for consideration is whether raiyati lands in Sambalpur district were not saleable prior to the coming into force of the Central Province Tenancy (Orissa Amendment of C. P. Act 11 of 1898) Act, 1953 (Orissa Act 10 of 1953 -- hereinafter to be referred to as the Amending Act). By the Amending Act, Section

46 (3) of the Tenancy Act was substituted and Sections 47 and 48 were omitted.

7. The relevant provisions of the Tenancy Act and the Amending Act may now be set out.

Section 47 (3) of the Tenancy Act, so far as material ran thus:--

"No occupancy tenant shall be entitled to sell, make a gift of, mortgage, sub-let (except for a period not exceeding one year) or otherwise transfer his right in his holding or in any portion thereof, and every such sale, gift, mortgage, sublease (other than that for a period not exceeding one year) or transfer shall be voidable in the manner and to the extent provided by the two next following sections :

Provided that an occupancy tenant may transfer his right of occupancy to any person who, if he survived the tenant, would inherit the right to occupancy, or to any person in favour of whom as a co-sharer, the right of occupancy originally arose, or who has become by succession a cosharer therein:

Section 47 (1) and (2) ran thus:--

"47 (1) if an occupancy tenant transfers any portion of his right in any land in contravention of the provisions of the last foregoing section, any such person as would be entitled to inherit his right in his holding in the event of his death without nearer heirs, or the landlord from whom the tenant held the land may, on application to the revenue officer, made within two years from the date on which in pursuance of the transfer the tenant parted with possession of the land be placed in possession, subject, so far as the Revenue Officer may in accordance with the rules made by the local Government, determine, to his acceptance, of the liabilities of the transferring tenant, for arrears of rent and for advances made by the landlord or other persons for the necessary expenses of cultivation.

* * * * * (2) As among several persons so entitled and being desirous of being placed in possession, the right to be so placed shall accrue in the order in which such persons would have inherited the right of the tenant in the subject-matter of the transfer if the tenant had died. Failing any such persons the right shall accrue to the landlord."

Section 48 prescribes the procedure on application, and reads thus:--

"When any such application, as aforesaid is made, the Revenue officer shall issue a notice to all persons who seem to him prima facie to have a right equal or prior to that of the applicant and shall also cause local proclamation to issue in the village in or from which the holding was cultivated, inviting all persons claiming to be the heirs of the tenant who made the transfer, to appear before him on a date to be fixed and shall, after hearing such of the persons to whom notice was issued to appear, and any other persons who may apply to be heard in the matter, decide whom from among such of them as desire to be placed in

possession is first entitled to be so placed.

Provided that in the case of a sublease if the tenant who made the sublease appears and pays within such period as the Revenue Officer may determine the amount of the consideration, if any has passed, for which the sublease was made and the costs of the applicant if he would otherwise have been successful, the revenue officer may replace the tenant himself in possession of the land if he is satisfied that the tenant made the sub-lease in ignorance of the law and is able and willing to cultivate the holding."

8. Section 46 (3) of the Tenancy Act, as amended by the Amending Act runs:--

"46 (3). The holding of an occupancy tenant shall be saleable by Court in execution of a rent decree or any other decree.

Provided that if the holding belongs to a member of a Scheduled Tribe, the sale other than a sale held for recovery of the dues of a society registered under any Co-operative Society Act or for recovery of an advance made to him. under the Land Improvement Loans Act, 1803, or the Agriculturists Loans Act, 1884, shall not be held unless the decree-holder obtains the previous permission in writing of the Deputy Commissioner."

A new Sub-section (4) to Section 46 was introduced by the Amending Act after omitting the old Sub-sections (4) and (5).

"(4) If any transfer is made in contravention of the provisions of this section, the Deputy Commissioner may, either on his own motion, or on application by the transferor or his successor in interest, declare the transfer void and evict the transferee from the holding or a part of the holding, as the case may be:

Provided that no such transfer shall be declared void or such transferee liable to eviction after the expiry of twelve years from the date of his coming into possession of the holding or a part of the holding in pursuance of such transfer".

9. As the acquisition was made on 15-11-51, the scope of the Amendment Act does not directly arise for consideration. The point is whether raiyati lands in Sambalpur district were not saleable within the ambit of the second proviso to Section 7 (1) (e) of the Act, prior to the coming into force of the Amending Act.

10. We would now make an elementary analysis of the scope and ambit of Section 46 (3) and Section 47 of the Tenancy Act. Section 46 (3) lays down that no occupancy tenant shall be entitled to sell his right in his holding and such transfer shall be voidable as indicated in Section 47. The first proviso to Section 46 (3) however gives legal sanction to the transfer of the right of occupancy to two classes of persons. They are: (i) the next preferential heir of the occupancy tenant on the date of transfer and (ii) a person who was a co-sharer in respect of the occupancy right or became a cosharer by succession. If the transfers are made in favour of the two classes of persons mentioned in the first-proviso, then the transfer is valid and not voidable as mentioned in the main part of Section 46

(3).

Thus transfers to a particular class of persons are valid and are voidable if made to persons other than those referred to in the first proviso to Section 46 (3).

Section 47 lays down the (who?) could avoid such a sale, if transfer is made in contravention of Section 46. The right of avoiding sale vests first in the persons who would be entitled to inherit the occupancy right in the event of the death of the occupancy tenant without nearer heirs. If there are no such heirs the landlord would be entitled to avoid the sale. There is, however, a further restriction that the transfers cannot be avoided until an application to that effect is made within two years from the date on which the tenant parted with possession of the land in pursuance of the transfer.

Section 2 (g) and (i) of the Indian Contract Act define "void" and "voidable" agreement. An agreement not enforceable by law is said to be void. An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of others, is a voidable contract.

Thus, raiyati lands in Sambalpur district in which the tenants claim occupancy right are freely transferable in favour of the classes of persons enumerated in the first proviso to Section 46 (3). If the transfers are made beyond this periphery, they are voidable. If the transfers are not avoided within a period of two years by the persons entitled to avoid them, as enumerated in Section 46 (1) then the transfers become valid. If the transfers are avoided within the prescribed period of limitation, the transfers would be void.

These are the unassailable conclusions arrived at on the plain language of the statute. It is difficult to accept the wide construction that occupancy rights are not transferable or saleable in the district of Sambalpur prior to the coming into force of the Amending Act. It would be more accurate to say that there were certain restrictions on the right of transfer prior to the coming into force of the Amending Act; that is to say, the lands were freely saleable to particular classes of persons, but not to others. The transfers were also valid if they were not avoided u/s 47 within the prescribed period of limitation.

11. We would now examine the various decisions cited before us.

The earliest decision on the point is reported in (1913) 17 CLJ 646 (Baikunthnath Misra v. Laboo Nag) where a Division Bench of the Calcutta High Court consisting of Chitty J. and Teunon J. made the following observations with regard to the scope of Section 46 (3) of the Tenancy Act:

"In our opinion, the words of the Act are too plain to admit of any doubt. u/s 46 (3) an occupancy tenant is prohibited from making certain transfers and it is enacted that "every such sale, gift, mortgage, sub-lease (other than for a period not exceeding one year) or transfer shall be voidable in the manner and to the extent provided by the next two following sections"; that must be taken to mean that an occupancy right is transferable, but the transfers may be avoided by the

landlord in a particular way."

In our opinion this decision correctly interprets the scope of Sections 46 and 47. In that particular case, the landlord challenged the transfer made in favour of persons not covered by the first proviso to Section 46 (3), but his application was dismissed as it had been filed after the prescribed period of limitation. The aforesaid Calcutta case supports our conclusion.

No contrary decision of the Patna High Court which was the successor of the Calcutta High Court has been brought to our notice.

The first Orissa decision dealing with this question is to be found in *State of Orissa Vs. Bharat Chandra Nayak*, . In paragraph 11, their Lordships Panigrahi C. J. and Mohapatra J. observed thus:

"The contention on the part of the respondent is that it is only the occupancy right which is made non-transferable under the provisions of Section 46 (3) of the Central Provinces Tenancy Act and the Land in question not being an occupancy right, is not hit by the said provisions and therefore be deemed as transferable."

The contention was rejected. In that case the lands, in respect of which compensation was being claimed, related to Gounti raiyati lands. A point was made out that Gounti Raiyati lands were different from raiyati lands. With regard to raiyati lands, it was conceded that they were non-transferable. The contention advanced was that Gounti Raiyati lands were different from Raiyati lands and were transferable. This contention was negatived, there being no distinction between Gounti Raiyati and Raiyati lands. This decision is, therefore, no authority on the question whether occupancy rights in the district of Sambalpur prior to the Amending Act were not saleable. The conclusion reached in that case that occupancy rights were not transferable, was based on the concession made by the Advocate for the respondent.

The next Orissa decision on the point is 27 (1961) CLT 126. In paragraph 7 their Lordships (Narasimham C. J. and Das J.) expressed their view thus on the aforesaid two sections :--

The learned Arbitrator rightly pointed out that the raiyati lands in Sambalpur district, though not saleable freely, were not wholly unsaleable inasmuch as Sub-section (3) of Section 46 of the Central Provinces Tenancy Act, 1898, authorised the free sale of raiyati lands to certain classes of people. Moreover, that sub-section does not render sales to other persons wholly void, but only voidable to the limited extent permitted by Section 47. These raiyati lands in Sambalpur district are of a peculiar type neither wholly non-saleable nor freely saleable. The Arbitrator, however, assumed such lands to be non-saleable for the purpose of applying the proviso to Clause (e) of Sub-section (1) of Section 7 of the Act. Mr. G. K. Misra for the appellant has challenged the view of the Arbitrator. It is, however unnecessary to decide that point here because I accept Mr. Misra's

contention that the said proviso has no application to the present case."

The view expressed in the first part of the aforesaid observations conforms to our conclusion and we are of opinion that the point was correctly analysed. This decision, however, cannot be taken as an authoritative pronouncement as their Lordships did not decide the matter finally.

In 31 (1965) CLT 683 (State of Orissa v. Banamali Babu) the same question came up for consideration again before" a Division Bench of this Court consisting of Ahmad C. J. and Barman J. (as he then was). In paragraph 4 of the judgment their Lordships observed --referring to 27 CLT 126:--

"While remanding the case to the successor Arbitrator, this Court had indicated that the character of these raiyati lands in Sambalpur district, governed by the Central Provinces Tenancy Act 1898, is somewhat peculiar, without being either wholly non-saleable or freely saleable".

The above extract does not state the position correctly. As has been pointed out already, though in 27 (1961) CLT 126 such a view was expressed, it was not finally so decided in that case. This is clear from the last sentence in paragraph 7 of the judgment to the effect.

"It is however unnecessary to decide that point now because I accept Mr. Misra's contention that the said proviso has no application to the present case."

Their Lordships in 31 (1965) CLT 683 overlooked this last sentence. That decision therefore cannot be taken to be an authority in its exposition on the scope and ambit of Section 46 (3) and Section 47 of the Tenancy Act.

In paragraph 21 of 31 (1965) CLT 683 their Lordships further observed thus:

"In fact, in estimating the market value of the land, the element of non-transferability should not be considered. In the case of raiyati lands also the capitalised value of the net income should be taken as the market value, and the restriction on the right of transfer of raiyati land is not at all material. We have already pointed out the somewhat peculiar character of the lands in question governed by the provisions of the Central Provinces Tenancy Act, as then in force."

With respect, we must say that this passage does not represent the correct law. There is no final determination in this case as to whether raiyati lands in Sambalpur district are not saleable. If they are not saleable the second proviso to Section 7 (1) (e) of the Act, would have full application, and the element of non-transferability " cannot be ignored. Their Lordships however observed just the contrary, in the first sentence of the aforesaid extract. So far as the last sentence in the aforesaid extract is concerned, it was taken to have been established on the basis of 27 (1961) CLT 126, but as already pointed out 27(1961) CLT 126 did not finally decide the point. 31 (1965) CLT 683 cannot therefore be taken to be an authoritative pronouncement that raiyati lands in

Sambalpur district are not saleable. The State of Orissa Vs. Baishnab Sahu and Others, dealt with a case in respect of lands which were acquired subsequent to the Amending Act. It is therefore no authority regarding the scope and ambit of Section 46 (3) and Section 47 of the Tenancy Act, as they stood prior to the amendment. There, a Bench of this Court consisting of Narasimham C. J. and Das J. made certain observations which were not relevant to the question and also not based on any discussion. In paragraph 2, their Lordships observed thus:--

"Under the old Section 46 of the Act, there were restrictions on the sale of lands of an occupancy tenant, and in estimating the market value of such lands the rules made by the Government of Orissa under Orissa Act 18 of 1948, in exercise of the powers conferred by the second proviso to Clause (e) of Sub-section (1) of Section 7 of that Act would undoubtedly have prevailed."

This is a bald statement of law and was not based on discussion; nor was it based on any earlier pronouncement of this Court. In fact as we have indicated above, there was no previous pronouncement of this Court on this point. In all those cases, either the fact of non-transferability was assumed or the case was disposed of on other grounds. The above observations, therefore, not being based on a considerable analysis, must be taken to be obiter.

12. There is no controversy that after the Amending Act came into force this Court held in The State of Orissa Vs. Baishnab Sahu and Others, that all the restrictions imposed u/s 46 disappeared and the raiyati lands in Sambalpur district were freely saleable. This decision was affirmed in 1969 SCD 438 (State of Orissa v. Baishnab Sahu). In the Supreme Court decision, there is no observation which runs counter to our conclusion as to the scope and ambit of Section 46 (3) and Section 47 of the Tenancy Act.

13. Our conclusions may, therefore, be summed up as follows:--

(i) Gounti raiyati lands are Raiyati Lands.

(ii) Raiyati lands in Sambalpur district were freely transferable to certain classes of persons as referred to in the first proviso to Section 46 (1) of Tenancy Act.

(in) Those lands were also transferable in favour of other persons, but the transfer so effected was voidable; if such transfer is not avoided during the period of limitation of two years prescribed u/s 47 by certain classes of persons, then the transfer was valid.

(iv) Raiyati lands in Sambalpur district cannot, therefore, be said to be non-saleable within the meaning of Section 7 (1) (e) second proviso, of the Act.

(v) If the raiyati lands cannot be said to be non-saleable, then the second proviso has no application and compensation is to be paid under the first proviso to Section 7 (1) (e) excluding the unconstitutional part thereof.

14. In the result the impugned award of the Arbitrator is set aside and the case

is sent back to him to determine the compensation as indicated above.

15. The appeal is allowed, but in the circumstances without costs.

Ray, J.

16. I agree.

R.N. Misra, J.

17. I agree.