

(1980) 05 OHC CK 0008
In the Orissa High Court
Case No : First Appeal No. 71 of 1971

Hansraj Kooverji Rathor

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 15-05-1980

Acts Referred:

Limitation Act, 1963 — Article 113

Orissa Estates Abolition Act, 1951 — Section 3, 6, 7

Citation : AIR 1980 Ori 184 : (1980) 50 CLT 68

Hon'ble Judges : P.K. Mohanti, J;N.K. Das, J

Bench : Division Bench

Advocate : S.C. Mohapatra and P. Misra, for the Appellant; A.G. and S.S. Mohanty, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

Das, J.—Appellant is the plaintiff in a suit for declaration of his right of occupancy in respect of the property in dispute and for injunction restraining the defendants from taking possession of the said property and for further declaration that the revenue authority has no jurisdiction to deal with the property, inasmuch as the provisions of the Orissa Estates Abolition Act are not applicable.

2. The property in question stands recorded in settlement in the name of one Banchhanidhi Sahu who had occupancy right in the same by virtue of his purchases in the year 1921-22 from different persons who had also occupancy right therein. Banchhanidhi subsequently acquired a small share of proprietary interest in the suit Touzi to the extent of 10 Pies and 16 Krantis. In the year 1930, Banchhanidhi mortgaged the disputed land along with other undisputed occupancy holdings as well as his proprietary interest to one Raghu Karsan. In 1935, said Raghu Karsan purchased the entire mortgaged property in an execution sale and took possession of the same through court. In 1940, Raghu Karsan sold the raiyati land to Kooverji Karson, father of the plaintiff and Kooverji continued to possess the same as a raiyat. In 1944, the plaintiff became owner

of the suit property by virtue of a family partition and has been in full and khas possession of the same as occupancy raiyat since then. The plaintiff continued in possession as occupancy raiyat for more than twenty five years. After abolition of the estate, when there was publication of notice u/s 5 of the Orissa Estates Abolition Act, the plaintiff became aware of the fact that there was erroneous and incorrect entry in the settlement papers in respect of the disputed land as Nijehas land and in consequence of that a proceeding under the Orissa Estates Abolition Act was started. The Tahsildar ordered to take possession of the land under the provisions of the said Act. Being aggrieved by the order of the Tahsildar, the plaintiff filed appeal before the Additional District Magistrate, Cuttack, but the appeal was disallowed. It is claimed that the plaintiff having acquired occupancy right over the land, the provisions of the Orissa Estates Abolition Act are not applicable and the entry in the settlement record of rights in respect of the disputed land as Nijehas land is erroneous.

3. The State of Orissa is the only defendant in the suit. In the written statement, it is contended that the suit is barred by limitation and is hit by the provisions of Section 39 of the Orissa Estates Abolition Act. The claim of the plaintiff that he is in khas possession of the disputed property as an occupancy raiyat has been denied. It is asserted that the entry in the record-of-rights is correct. The plaintiff has accepted the position of correctness of the entry by preferring claim under Sections 6 and 7 of the Orissa Estates Abolition Act and, as such, the suit is to be dismissed.

4. The trial Court has held as follows:

(a) The plaintiff from the time of his predecessor has been in possession of the suit land continuously for more than twentyfive years as occupancy raiyat and has got occupancy right in the same.

(b) The provisions of the Orissa Estates Abolition Act are not applicable in the present case.

(c) The status of the plaintiff and his predecessor-in interest in respect of the disputed land earlier to the settlement of 1930-31 has been occupancy raiyat.

(d) The entry in the record-of-rights of 1930-31 describing the suit property as Nijehas land is erroneous and incorrect; and

(e) The plaintiff who has acquired occupancy right in respect of the suit holding does not lose that right as a consequence of the vesting of the estate and he continues as an occupancy raiyat. These findings stand undisputed in this appeal.

5. The trial court has further held that the suit is barred by limitation under Art. 113 of the Limitation Act. The reason for the same as assigned by the trial court is that the plaintiff made an application under Sections 6 and 7 of the Orissa Estates Abolition Act for settlement of fair rent. The order of the Collector under the said Act was passed on 4-1-65. The plaintiff appealed against that order and the appeal was disposed of on 10-11-68. It has been held by the trial court that

the threatening to the right of the plaintiff was on 4-1-65, i.e, the date when the order of the Tahsildar was passed. The suit having been instituted on 18-4-69 is barred by limitation.

6. This is the only point challenged in this appeal. It is contended by Mr. Mohapatra, the learned counsel for the appellant, that the admitted position being that the plaintiff is an occupancy raiyat at respect of the holding and is in possession of the same, and that the finding of the trial court being that the entry in the settlement record-of-rights is incorrect and the provisions of the Orissa Estates Abolition Act are not applicable to the land in question, in other words, the suit property does not vest in the State Government, the prayer for declaration of occupancy right as well as incorrectness of the entry in the settlement record-of-rights should not have been disallowed and injunction should have been granted. It is further contended that the order of the Tahsildar was subject to appeal and the appeal having been disposed of on 10-11-68, the order of the Tahsildar merges in the appeal and limitation is to be computed from the date of disposal of the appeal. Mr. Mohapatra also contends that the order of the Tahsildar and that of the appellate court should be considered as continuing wrong and, as such, Section 22 of the Limitation Act is applicable. He also contends that it is a recurring wrong and, as such, the plaintiff is entitled to ask for injunction.

7. It is well settled that entries in settlement record-of-rights do not create or extinguish any title. These entries are only evidence of possession at the time of settlement having a presumptive value to that effect. The admitted position is that the plaintiff has got occupancy right over the property and he has been all along in possession of the same. The provisions of the Orissa Estates Abolition Act are not applicable to the disputed property. Accordingly, the property has not vested in the State Government. In *Kumar Bimal Chandra Sinha Vs. State of Orissa*, it has been held that the raiyati interests in the lands are not affected by the abolition of the proprietary interests. It has also been held:--

"Heading the definition of "estate" in Section 2 (g) and that of "intermediary" in Section 2 (h) together the position in law is that "estate" includes the interest, by whatever name called, of all persons, who hold some right in land between the State at the apex and the raiyat at the base. That is to say, the Act is intended to abolish all intermediaries and rent receivers and to establish direct relationship between the State, in which all such interests vest, after abolition under the Act, and the tillers of the soil. The interest of a raiyat was not at all touched by the Act. Since the appellants held the lands along with the buildings not as proprietors but as raiyats, their interest did not vest in the State."

Therefore, the title and possession of the plaintiff remain intact. Even if plaintiff filed a petition under Sections 6 and 7 of the Orissa Estates Abolition Act, it might be under wrong impression or under wrong advice. That does not affect his right or possession in any way. When plaintiff has occupancy right in respect of the property, it is in no way affected by the notification u/s 3 of the Orissa

Estates Abolition Act and the property does not vest and also the provisions of Section 5 of the Act are not applicable to the disputed property. The fact that the plaintiff applied for settlement under Sections 6 and 7 does not affect his right and possession in any way, The title has been acquired by operation of law and he is in possession of the property continuously for more than twentyfive years as an occupancy raiyat. Under these circumstances, the question of limitation does not arise. The entire proceeding under the Orissa Estates Abolition Act is invalid, illegal and without jurisdiction. Had it been a valid proceeding, then and then only the question of limitation would have arisen. But in the present circumstances, the question of limitation does not arise at all. The trial court was labouring under a wrong impression that there was a threatening and the limitation would run from the date of the order of the Tahsildar in the proceeding under Sections 6 and 7 of the Act. A void proceeding or a void instrument or a void order can be ignored. The plaintiff could have safely ignored the vesting notification. In the circumstances, we hold that the question of limitation does not arise at all.

8. Even assuming that the provisions of Article 113 of the Limitation Act are applicable, in that case the limitation would run from the date of the final order in the appeal which is in 1969. This position is no longer *res integra*. It has been held in *The Province of Orissa and Another Vs. Durjodhan Das Gaontia and Others*, that the person having the right and being in possession is not bound to institute a suit when there was first interference. That was a case where the Lambardar was in possession of the property. It was held in that case that limitation would run only from the last order of the Commissioner. The plaintiffs in that case were lawful holders of offices, namely, the office of a Lambardar and the office of the Panches. They were in possession of those offices and whenever there was an interference with the performance of their duties as such, a fresh cause of action arose. Reliance was placed on a Full Bench decision of the Madras High Court in *Annaswami Aiyangar v. Adivarachari* AIR 1941 Mad 81 in which it was held that plaintiffs were not bound to file a suit when there was the first interference. This Court also approved the principles laid down in *Annasami Aiyangar alias Ramaswami Aiyangar and Others Vs. Nithiyapadi Adivarachari and Others*, wherein it was held:

"Limitation cannot be deemed to run so long as the adverse order is sub judice or is being challenged by the persons against whom it was made by an appeal to a higher tribunal and is liable to be set aside or to merge in the decision of the tribunal."

On the aforesaid principle laid down by this Court, there is no scope for the respondent to contend that the suit is barred by limitation and limitation, if any, would run from the date of the final order in appeal.

9. On the aforesaid analysis, we hold that the finding of the trial court on the question of limitation is not sustainable. In view of this finding, the other questions raised by the learned counsel for the appellant do not arise for

consideration. It may be mentioned here that it is for the defendant to establish that the suit is barred by limitation. It is contended by the learned Advocate-General that the plaintiff has admitted that he was served with a notice for giving up possession. From the contents of the plaint, it appears that the plaintiff has nowhere stated that any notice was served on him to give up possession. In paragraph 6 of the plaint, it is stated that a notice was published u/s 5 of the Act and in para 8 it is stated that the proceeding u/s 5 was misconceived and illegal. In that paragraph it is also stated that the order of the revenue authority who had no jurisdiction to pass an order of vesting of the disputed property and taking possession u/s 5 (h) of the Orissa Estates Abolition Act was misconceived and illegal and that does not affect the raiyati right of the plaintiff. Basing on these averments in the plaint, it is contended on behalf of the respondent that this amounts to service of notice u/s 5 (h) of the Act. Section 5 provides consequences of vesting of an estate on the publication of the notice u/s 3. Clause (h) of Section 5 runs as follows:--

"Where, by operation of this Act, the right to the possession or any estate or any part thereof vests in the State Government, the Collector may, by written order served in the prescribed manner, require any person in possession of such estate or any part thereof to give up possession of the same by a date specified in the order, and it shall be competent for the Collector to take, or cause to be taken, such steps as, in the opinion of the Collector, may be necessary for securing compliance with the said order or preventing any breach of the peace x x"

Rule 4 of the Orissa Estates Abolition Rules provides that notice under Clause (h) of Section 5 shall be in form A, which is appended to the Rules. This form provides that a notice is to be served on the intermediary asking him to give up possession by a particular date so as to enable the Collector to take charge of the property u/s 5 of the Act. It is for the defendant to establish that a notice was issued in form A, as provided under Rule 4, but no such material has been placed before the Court. If the defendant takes a definite stand that the suit is barred by limitation, then he has to establish that notice u/s 5 (h) and as contemplated in Form A was issued and served on the plaintiff. But there is no such evidence on record. Accordingly, we hold that the defendant has signally failed to establish that the suit is barred by limitation. It cannot be inferred from the averments in the plaint, as stated above, that the plaintiff at any place admits the position that a notice as contemplated in Form A was served on him. There is no averment in the written statement to that effect also. Accordingly, we hold that the plea of limitation has not been established nor proved by the defendant.

On the aforesaid analysis, we hold that the finding of the trial court as to limitation is not sustainable and the suit is not barred by limitation.

10. In the result, the appeal is allowed with costs and the decree of the trial court is set aside. Hearing fee is assessed at Rs. 200.

P.K. Mohanti, J.

I concur.