

(2023) 01 OHC CK 0071
In the Orissa High Court
Case No : Writ Petition (C) No. 22093 Of 2010

Harihar Sahoo & Anr

APPELLANT

Vs

Lord Shri Jagannath Mahaprabhu Bijee & Ors

RESPONDENT

Date of Decision : 16-01-2023

Acts Referred:

Constitution of India, 1950 — Article 227
Code of Civil Procedure, 1908 — Section 9
Indian Stamp Act, 1899 — Section 33, 35
Orissa Estates Abolition Act, 1951 — Section 39

Citation : (2023) 01 OHC CK 0071

Hon'ble Judges : Biswanath Rath, J

Bench : Single Bench

Advocate : L.K.Moharana

Final Decision : Dismissed

Judgement

Biswanath Rath, J

1. This is a Writ Petition under Article 227 of the Constitution of India impugning the order dated 3.11.2010 passed by the Civil Judge (Sr.Divn.), Puri involving C.S. No.87/33 of 2010-2009, vide Annexure-7. The impugned order involved appears to be in rejection of a Petition, vide Annexure-6 seeking direction of the trial court impounding the unregistered Hata Patta or lease deed dated 11.5.1937 at the instance of the Plaintiff-Petitioners.

2. Background involving the case is the Plaintiffs brought C.S. No.33/2009 even somewhere it is mentioned as C.S. No.87/33 of 2010-2009 on the File of Civil Judge (Sr.Divn.), Puri seeking declaration of the right of occupancy or stitiban right of the Plaintiffs over the suit property, granting decree of permanent injunction against Defendant Nos.1 to 3 restraining them from interfering in the peaceful possession of the Plaintiffs over the suit property, from dispossessing them therefrom, breaking the house thereon or from causing any waste or damage thereto in any manner whatsoever and from impairing its value in any

manner, further for award of cost against the Defendants and grant of such other reliefs as are deemed appropriate in the circumstances of the case.

3. Property involves in the Suit measuring an area of Ac.0.17 decimals is a part of a large patch of land over Sabik Plot No.1625, Sabik Khata No.129, Mouza-Samang, Dist.-Puri, measuring an area of Ac.01.36 decimals claimed to be originally belong to Ex-intermediary Defendant No.1 claiming to be lying fallow without any use. It is claimed, on the request of one Fakir Sahoo S/o.Chai Sahoo, the late grandfather of the Petitioners, the then Marfatdar of Shree of Defendant No.1, late Mahanta Sri Jagannath Ramanuja Das executed an unregistered Hata Patta/lease deed in favour of Fakir Sahoo on 11.5.1937 by inducting him as the Rayat of the said property to carry out horticultural operations on acceptance of Salami of Rs.200/- and fixed annual rent of Rs.2/-. Possession of the suit property was also delivered to the Plaintiffs' grandfather, since which time Fakir Sahoo, the grandfather was in possession and in enjoyment of the suit land by paying rent regularly. It is claimed that Fakir Sahoo, the grandfather of the Plaintiff-Petitioners died in 1950, consequent upon which his son, late Bareni Sahoo, the Plaintiffs' father inherited the rayatis and the Plaintiffs being the legal heirs of late Bareni Sahoo consequently remained in possession of the suit land. In bringing the suit, reason shown to be in the Plaint that after the death of their father, some employees of Defendant Nos.2 & 3 threatened to dispossess the Plaintiff-Petitioners from the suit land following the order dated 26.3.2004 passed in O.E.A (Suo Moto) Case No.267/2000, consequent upon which the suit land claimed to have been settled for fair and equitable rent with Defendant No.2.

It is claimed, the Petitioners' father coming to know the development through the O.E.A. Proceeding preferred O.E.A. Appeal No.5 of 2008 on the File of Additional District Magistrate, Puri, which was claimed to be pending as on the date of filing of the suit. It is claimed, even in spite of pendency of the O.E.A. Appeal, O.Ps.2 & 3 continued to threaten to interfere in the peaceful possession of the Plaintiff-Petitioners resulting filing of the Civil Suit involved herein. Pursuant to notice in the Suit, O.P.1 though did not appear and the Suit remained ex parte against O.P.1, O.Ps.2 & 3, the Defendant Nos.2 & 3 appeared and filed their written statement clearly denying the existence of Hata Patta in favour of the late grandfather of the Plaintiffs. Further challenge is also made to the validity of unregistered Hata Patta/lease deed dated 11.5.1937, if any, for restrictions under the provision of Sections 33 & 35 of the Indian Stamp Act. It is while the matter stood thus claiming foundation in the Civil Suit through such document, the Plaintiffs filed a Petition in the trial court 24.6.2010 for impounding of the unregistered Hata Patta/lease deed dated 11.5.1937 under Sections 33 & 35 of the Indian Stamp Act, for admission of the same as the evidence for collateral purpose, copy of which appears to be at Annexure-6. O.Ps.2 & 3-Defendant Nos.2 & 3 made oral objection to the aforesaid Petition and the trial court after hearing both the Counsel came to reject the Petition, vide order dated 3.11.2010 impugned herein, vide Annexure-7.

4. Mr.Moharana, the Counsel appearing for the Plaintiff-Petitioners challenged the aforesaid impugned order on the premises that the trial court has wrongly accepted the objection of Defendant No.s2 & 3 without considering that such Parties have no locus standi to object such Petition not being the Ex-intermediaries nor even involved in the execution of Hata Patta and/or lease deed. Mr.Moharana contended, for there is no objection by Defendant No.1, the original Executor, there was no scope for entertaining the objection of Defendant Nos.2 & 3. There is allegation that the trial court has illegally accepted the contention of Defendant Nos.2 & 3 that the deed was forged one when particularly there is no challenge to such deed. Counter to such proceeding is also questioned taking their locus standi to have such objection. In reference to Sections 33 & 35 of the Indian Stamp Act 1899 (herein after called as "Act, 1899"), Mr.Moharana, learned counsel for the Petitioners contended, there is failure of appreciating the provision indicated herein above by the trial court. Further there is also allegation that there has been failure in appreciating the provision at Section 17 of the Registration Act, 1908 (herein after called as "Act, 1908").

5. To support his case, Mr.Moharana, learned counsel for the Petitioners also took support of a decision of Madras High Court in Navinraj vrs. Cnanasekar & ors : (CRP (MD) No.1084 of 2012 and M.P.(MD) No.1 of 2012 disposed of on 11.8.2015), decision of Orissa High Court in Braja Sundar Nanda vrs. Pravabati Kar & ors : reported in 2013 (II) OLR 651, decision of the Hon'ble Supreme Court in Avinash Kumar Chauhan vrs. Vijay Krishna Mishra (Civil Appeal No.7530 of 2008 disposed of on 17.12.2008) and the decision in Ram Chandra Das vrs. Hiralal Modi & ors. reported in AIR 1984 Ori. 21.

Referring to the above decisions, Mr.Moharana, learned counsel for the Petitioners reading through particular Paragraphs therein attempted to satisfy that the Plaintiffs have a clear case and have the case of impounding of the instrument involved and their right is very much protected under the provision of Sections 33 & 35 of the Act, 1899. In the above circumstance, Mr.Moharana contended, the impugned order should be interfered with and set aside in allowing the Petition at Annexure-6.

6. From the order-sheet, this Court finds, in this Writ Petition there was direction for issuing notice to the O.Ps. by order dated 24.12.2010 with grant of stay of further proceeding of the Civil Suit involved herein. Office Note discloses, notice was issued to all these O.Ps. by fixing date of appearance to 14.2.2011. Office Note further shows, A.Ds. from the O.Ps. are not back. There is no return of such copies. There is accordingly presumption that notice on the O.Ps. have been served. However, there is no appearance on behalf of Defendant-O.Ps.

7. Looking to the Application at Annexre-6 herein and taking into consideration of the impugned order at Annexure-7, heading of the Petition reads as follows :-

"In the matter of a petition by the plaintiffs for impounding the Unregistered

Hata Patta or Lease Deed dt.11.05.1937 u/S 33 and 35 of Stamp Act.”

Prayer portion of the Petition reads as follows :-

“Therefore, the plaintiffs pray that the court be pleased to exercise its discretion U/S 33 read with Sec.35 of Stamp Act and impound the unregistered Hata Patta or Lease Deed dt.11.05.1937 before trial of the suit or commencement of the hearing of the suit and accordingly the plaintiffs be directed to deposit the required fees for stamp duty etc. after assessment to impound the said document and for which act of kindness they shall as in duty bound ever pray”

8. Reading the above, this Court finds, there remains no dispute that the Plaintiffs have prayed the trial court for impounding of unregistered Hata Patta or lease deed dated 11.5.1937 in exercise of discretion under Section 33 read with Section 35 of the Act, 1899. Keeping in view the document involving the case and reliance of the provision of the Act, 1899, this Court finds, the provisions at Sections 33 & 35 of the Act, 1899 read as follows :-

“33. Examination and impounding of instruments. - (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in 1 [India] when such instrument was executed or first executed:

Provided that -

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1989);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt, -

(a) [the [State Government]] may determine what offices shall be deemed to be public offices; and

(b) [the [State Government]] may determine who shall be deemed to be persons in charge of public offices.

ORISSA AMENDMENT

In Section 33 of the principal Act after Sub-section (1) the following Sub-sections shall be inserted, namely :

“(1-a) If it appears to such person from the copy of an instrument produced or coming in performance of his functions, within three years from the date of registration of the instrument, that such instrument is not duly stamped, he shall call for the original instrument and if he is satisfied on production of the instrument that it has not been duly stamped, impound the same and the deficient amount on duty shall be payable by the person liable to pay the duty.

(1-b) Where the original instrument is not produced such person shall refer the copy of the instrument to the Collector for determination of the market value of the property and the duty payable thereon and the Collector may determine the market value of the property and the duty as aforesaid in accordance with the procedure provided for in sub-section (2) of Section 47-A.”

35. Instruments not duly stamped inadmissible in evidence, etc. -No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that -

(a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure 1898 (V of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by

section 32 or any other provision of this Act.”

Section 33 of the Act, 1899 when provides examination and impounding of instrument, Section 35 provides instrument not duly stamped inadmissible in evidence. It is at this stage, looking to the nature of Petition at Annexure-6, this Court finds, even though there is reference of Section 35 of the Act, the claim appears to be clearly seeking a direction in exercise of power under Section 33 of the Act. In reading of the impugned order, the Plaintiff-Petitioners herein have filed the Petition and in the submission in consideration of such Petition keeping in view the background in the suit urged, the Hata Patta dated 11.5.1937 since is an unregistered instrument cannot be received in evidence without impounding the same before the trial commences and in consideration process, they be directed to deposit the required fees of Stamp Duty etc. O.Ps. appearing therein appear to have made objection to such request. Their contention appears to be since the unregistered Hata Patta is fabricated, antedated and manufactured and such document never seen the light of the day prior to filing of the same in the trial court, law does not permit in impounding such document unless existence of such document is found to be established. It is here from the Plaint, this Court finds, on the document involved herein on coming into light of such

document, the Plaintiffs have the following pleadings in Paragraphs-5 & 7 :-

“5. That the property in respect of which reliefs are sought in this suit is a piece of horticultural land the details of which have been furnished in schedule “A” below (hereinafter referred to as “suit property” in question or property in suit in short throughout the plaint). The aforesaid schedule – “A” forming subject matter of the suit need be read as a part of the plaint.

7. That it will be pertinent to submit here that the defendant deity No.1 (one) had intermediary interest in the sabik suit holding or suit sabik khata and the properties therein including the suit property which was abolished after coming into operation of the provisions of Orissa Estates Abolition Act on 18.03.1974. However the occupancy right or stitiban right of the father of the plaintiffs over the suit property was neither affected nor touched by any of the provisions of Orissa Estates Abolition Act and as such he continued to hold the suit property as an occupancy raiyat or stitiban tenant under the proforma defendant No.4(four) or the state as a deemed tenant. Thus the right, title, interest-in and possession of the father of the plaintiffs was no way affected or disturbed by the operation of the provisions of O.E.A. Act. The father of the plaintiffs was a simple innocent, ignorant, meak and mild person. He was also illiterate and could hardly write his name that too with the dictation of others. Since he was continuing to pay rent to defendant No.1 (one) for the use and occupation of the suit property till vesting of the intermediary interest of the said deity defendant he had absolutely no inkling about the commencement of the settlement proceeding in the suit mouza which started in or around 1965 and ended in 1987. The father of the plaintiffs being ignorant of the settlement proceedings and its camps which were held in

phases at the locality could not take any step to record his name in respect of the suit property. This was more so as neither the defendant No.1 (one) and its agents had ever interfered in the peaceful possession over the suit property of the father of the plaintiffs during that period of settlement proceedings nor the settlement officials ever visited the locality. However the possession of the suit property by the father of the plaintiffs appears to have been reflected in the finally published settlement R.O.R. from the fact that the suit property has been separately carved out as a plot in the finally published current settlement R.O.R. bearing plot No.79 having an area of Ac.0.170 (hundred seventy) decimals under current settlement Khata No.35 (thirty five) of suit mouza. Although the suit current settlement Khata and the properties therein including the suit property and plot have been recorded in the name of defendant No.1 (one) in "Bebandobasti" status or in other words fair and equitable rent has not been settled for the suit current settlement holding with defendant No.1 (one) after vesting of the intermediary interest. It has and had no right, title, interest therein after vesting. Be that as it may since settlement entries neither creates title nor extinguish the same, the non recording of the suit property in the name of the father of the plaintiffs during settlement proceedings has no way affected his right of occupancy or stitiban right therein. Thus the plaintiffs father namely Bareni Sahoo S/o.Late Fakira Sahoo had right, interest-in and possession over the suit property as an occupancy raiyat or stitiban tenant."

In Paragraph-9, the Plaintiffs have admitted the development through the O.E.A. Case involving the very same property. In O.E.A.(Suo Motu) Case No.267 of 2000 and the matter was stated to be pending in O.E.A. Appeal No.5 of 2008 on the File of Additional District Magistrate, Puri even at the time of filing of the suit. Paragraph-12 clearly mentions the cause of action when Defendant Nos.1 to 3 on the basis of the order, the O.E.A. Authority threatened to dispossess the Plaintiffs. There is however no information coming from either side on any development in O.E.A. Appeal at this stage.

9. Filing written statement, vide Annexure-5, Defendant Nos.2 & 3 in Paragraph-7 have the following pleadings :-

"7. That Civil Court has no jurisdiction to try the suit as it is barred u/S.39 of the O.E.A. Act read with Section 9 of C.P.C."

In Paragraph-13, the Defendants have the following plea :-

"13. That it is not admitted that Sabik Plot No.1625 (Sixteen hundred twenty five) under Khata No.129 (One hundred twenty nine) of sabik mouza Samanga was belonging to defendant No.1 (one) and was lying fallow with wild growth. It is false to say that the suit land was a part of a ditch and was not useful. It is a black lie to aver that the grand father of plaintiff namely Fakir Sahu of Markandeswar Sahi approached the then Mahanta of Dakhina Parswa Math to induct him as a rayat in respect of suit property or to hold same as a rayat to carry out horticulture operation on payment of rent to the defendant No.1 (one).

It is false to suggest that since the defendant No.1 (one) derived no income from the suit sabik plot the then Mahanta and marfatdar of deity defendant No.1(one) in course of his prudent Management accepted the proposal of the grand father of the plaintiffs and inducted in the suit property as a rayat to carry out horticulture operation thereon, in acceptance of salami of Rs.200/- (Rupees two hundred) with a fixed annual rent of Rs.2/- (rupees two) only. And it is not true that the then Mahant of Dakhina Parswa Math delivered possession of suit property by making demarcation to said Fakir Sahu. It is outright false and fabricated allegation that the induction of Fakira Sahu was not only evidence by delivery of possession of the said property to him but also by a contemporaneous document that is through an unregistered deed of lease dt.11.5.1973 (Eleventh May Nineteen hundred seventy three) executed by the then Mahanta of Dakhina Parswa Math, Endowment. And it is not accepted that the said Mahant was the sebayat Marfatdar of the deity no.1 (one). It is false to say that Fakira Sahu continued to possess the suit land by carrying out horticulture operation thereon and raised seasonal vegetables therein as a rayat. It is not true that said Fakira Sahu continued to pay fixed annual rent to the deity defendant No.1 (one) to its alleged sebayat marfatdar the then Mahanta of Dakhina Parswa Math. Said Fakir Sahu was never a settled rayat of village nor he was acquired any right, title as an occupancy rayat over the suit land in question as alleged in the plaint. It is not true that Fakira Sahu died in around 1950 (nineteen hundred fifty). It is also not true that Fakira Sahu had one son Bareni Sahu. Fakira Sahu had other sons and daughter at the time of his death. The alleged Bareni Sahu had not inherited the suit property as an occupancy rayat as alleged in para 5 (five) of the plaint. It is also not admitted that the alleged Bareni Sahu have been paying rent to the then Mahant of Dakhina Parswa Math till the vesting of the state under provisions of O.E.A. Act. If any such rent receipts will be produced those receipts should be treated as forged manufactured, antedated documents and the signatures of Mahanta if found place the same signatures should be treated forged and fraudulent. The principle is correct that occupancy rayat right will not vest along with the vesting of the intermediary Estate. But is to be scrutinized and assessed if the alleged rayat right is admitted and not a disputed by the ex-intermediary and that must be on or before the date of vesting. The self styled or self imposed rayat status of Fakir Sahoo on a suit land on the basis of some forged document the above principle is not attracted. The plaintiffs late father or grand father were never occupancy rayat or occupancy tenants under the ex-intermediary on or before the date of vesting. Therefore, they can not take the advantage of the provision of law of O.E.A. Act that the rayat right will not vest. All the allegations in the Para 7(seven) are imaginary, vague and concocted having no truth behind it. It is not within the knowledge of this defendant that the father of the plaintiff was simple, innocent, ignorant a mick and mild person and an illiterate person. It is highly improbable and also ridiculous to aver that the late father of plaintiff have absolutely no inkling about the commencement of proceeding stated in the suit mouza in around 1965 and ended in 1987. It is strongly denied that the father of the plaintiffs was ignorant about the settlement proceedings which were

held in phases in the locality but could not take any step to record his name in suit property respectfully. It is not true that the settlement officers had never visited the suit village and the suit land in question. The question of interfering in the alleged peaceful possession of the plaintiff father of suit property by defendant No.1(one) does not arise since defendant No.1(one) had never given the land to the late father of the plaintiff to enjoys a rayat. Since till 1987 (Nineteen hundred eighty seven) as the plaintiffs late father was not actually a rayat in respect of a suit property and was not in possession of the same and no documents were in possession of late father of the plaintiff. Therefore, steps were not taken in settlement operation and also the settlement officials did not record the possession or any type of right of the late father of plaintiffs. It cannot be interfered from the carving of a separate plot with an area of A 0.170 (One hundred seventy) decs bearing Plot No.79 (seventy nine) that this was in possession of the plaintiff's late father or late grand father or somebody as tenant in respect of the property. It is not correct that the suit plot was recorded in hal settlement in the name of defendant No.1(one) in bebandobasta status. It is false to say that the plaintiff's father Bareni Sahu had got right, interest and possession over the suit property, as an occupancy rayat or sthitiban tenant."

10. Reading the aforesaid, this Court finds, there is strong objection to creation and/or existence of Hata Patta. It is at this stage, for the discussions of this Court herein above, for there is strong dispute to the existence of Hata Patta by the appearing Defendants, there is no situation applying the provision of Section-33 of the Act, 1899. This Court here again finds a strange development questioning the entertainability of the suit even for there already existence of a dispute at the stage of Appeal under the Orissa Estates Abolition Act, 1951 admitted to be at the instance of the Defendants. Therefore, there existed a greater question to be decided also as to the maintainability of the suit in view of the development through the O.E.A. Proceeding.

11. Coming back to the claim of the Petitioners, vide Annexure-6, this Court observes, unless the Plaintiffs establish the survivality of unregistered Hata Patta or the lease deed dated 11.5.1937, the Petition under Section 33 & 35 of the Act, 1899 remains premature.

12. It is at this stage, considering the citations cited by the learned counsel for the Plaintiff-Petitioners, this Court finds, all the decisions are at the second stage of the matter either involving undisputed registered document or some cases involving probability of evidence after the unregistered document is impounded under the provision of Section 33 of the Act, 1899 and keeping in view the mandate through Section 35 of the Act, 1899 reasoning in passing the impugned order. No decision is cited at Bar comes to be rescue of the Petitioners herein.

13. For the observations herein above and as this Court has already held, the Petition, vide Annexure-6 seeking impounding of the document in serious objection, there is no illegality in rejecting such Petition. This Court, therefore, finds, there is no scope for interfering with the impugned order in entertainment

of the Petition at Annexure-6. However, this Court keeps the issue of impounding open and to be claimed only after existence of Hata Patta/lease deed is established in course of trial and the suit is not affected by the development through the Orissa Estates Abolition Act Proceeding.

14. The Writ Petition thus stands dismissed but however keeping the scope of revival of such Application open subject to conditions also indicated herein. No cost.

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