

(1989) 11 OHC CK 0007
In the Orissa High Court
Case No : Second Appeal No. 249 of 1980

Hata Barik

APPELLANT

Vs

Raghunath Harichandan and Others

RESPONDENT

Date of Decision : 07-11-1989

Acts Referred:

Orissa Tenancy Act, 1913 — Section 235, 235(1), 236, 236(1)

Citation : AIR 1990 Ori 199

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Mohapatra and A.N. Misra, for the Appellant; S.C. Dash and B.K. Patnaik, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Plaintiff has preferred the appeal and legal representative of deceased defendant No. 1 as respondents have preferred a cross-objection assailing the appellate decree in this Second Appeal.

2. Plaintiff and defendants Nos. 2 to 7 are barbers by caste belonging to the same family as per the following genealogy:--

Madhab

Bidya

Dasa

Hata (Plaintiff)

Nata Desai (D.2)

Dama

Bula

Kanakalata(D.3)

Pravasini(D.4)

Kashi(D. 5)

Panu(D.6)

Bairagi(D.7)

Defendant No. 1 is a Khandayat by caste and has purchased "A" and "B" Schedule properties of the plaint from defendants Nos. 2 to 4 by a registered sale deed dated 16-4-1973 (Ext. "K").

3. Admittedly, "A" Schedule property is 80 decimals of homestead in Plot No. 48 recorded as Grama Savak mina and "B" Schedule property is 309 decimals of agricultural rayati land in Plot No. 1148 jointly recorded in names of Nata and Hata with note of possession of Nata. 57 1/2 decimals of homestead in "A" schedule on western side and half of plot No. 1148 on its Southern side has been purchased by defendant No. 1 from defendants Nos. 2 to 4 as per Ext. "K".

4. Short case of plaintiff material for this second appeal is that both the Scheduled properties are joint family property. "A" schedule property is barber service tenure of the family members. On death of Nata defendants Nos. 2 to 4 were not rendering village service and as such have no right over the same. "B" schedule land was divided half and half between plaintiff and Nata but plaintiff is in long possession as of right to the exclusion of Nata and accordingly, he has acquired title by adverse possession by ousting Nata.

5. Case of defendant No. 1 is that the family was separated by partition and in 57 1/2 decimals from western side of Plot No. 48 in "A" schedule Nata constructed his house. Half of Plot No. 1184 in "B" Schedule was in possession of Nala by partition. After death of Nata his legal representatives defendants Nos. 2 to 4 sold the property to him and delivered possession.

6. Trial court decreed the suit in respect of "A" schedule and dismissed it in respect of "B" schedule. Appellate Court, however, dismissed the suit in respect of "A" schedule and decreed the same in respect of "B" schedule. Both parties accordingly assail the appellate decree.

7. The following three substantial questions of law are involved in this appeal : --

(a) Whether "A" schedule land is partible.

(b) Whether "A" schedule land is governed u/s 236 of the Orissa Tenancy Act, 1913, (hereinafter referred to as "the Act"),

(c) Whether plaintiff has acquired title by adverse possession in respect of "B" schedule land.

8. "A" schedule land is admittedly services tenure land. There is no evidence with regard to the terms of the grant to consider whether the tenure is in lieu of service or is burdened with service. Only evidence is the record of right showing

that it is Gram Sevak Mina. It is not disputed that to render barber service to the villagers, the tenure is enjoyed by the family of plaintiff. It is also not disputed that both plaintiff and his brother Mata were rendering barber service to the villagers and after death of Nata his widow defendant No. 2 and married daughters defendant Nos. 3 and 4 are not rendering such service.

9. Whether the service tenure is liable for partition would depend upon nature of the tenure and terms of the grant. This has been laid down in the decision reported in *Brajasundar Deb Vs. Binode Rout and Others*, and followed in *Bhagaban Gouda Vs. Ukia Dei*, .

10. In *Bhagaban Gouda Vs. Ukia Dei*, referring to the decisions reported in AIR 1949 31 (Orissa) , *Brajasundar Deb Vs. Binode Rout and Others*, , AIR 1931 157 (Privy Council) and (1969) I SCR 869 (*Begum Surya Rashid v. State of Madhya Pradesh*) it has been held that there are two kinds of service tenures where --

(i) Lands are occupied in lieu of services with the condition that when the services cease either on account of the servant not desiring to do the service or for the disappearance of the necessity for such services, the lands shall revert to the grantor and

(ii) the service tenure-holder has his tenancy rights in the land and in consideration of his rendering certain service the rent is remitted either in whole or in part.

In both the classes of service tenures, the, right of resumption is in the grantor or the, proprietor. Resumption means getting back what was granted. If the land originally belonged to the service tenure holder, resumption means imposition of rent either in full or in part, accordingly, as has been quitted and where the land has been granted, the same can be taken back.

It is, therefore, necessary to determine in each case whether the grant was of the land or of the rent. Specification of shares between co-tenants and fact of entry of rent payable and to be paid in the settlement entries are not determination of the question. They can be taken into consideration along with other circumstances. This general principle in respect of all service tenures in Orissa is to be kept in mind while construing the provisions of various statutes as well as custom, whenever pleaded.

11. Learned counsel for the appellants relied upon a decision reported in *Balaram Rai and Others Vs. Mt. Ichha Patrani and Others*, and submitted that service tenure lands are not partible and alienable. This decision has been rendered in respect of a devottar service grant in Bargarh Sub-division of Sambalpur District governed under the Central Provinces Tenancy Act. Considering terms of the grant, it was observed :--

"The Government have reserved to themselves the right to resume if the performance of the service is refused or if the line of grantee becomes extinct for want of heirs. That the grantee is to enjoy the village on condition of performing

service is itself an indication that the grant is inalienable and that the grantee is to enjoy it hereditarily does not detract from the character of the grant. Since the grant is made for the performance of seba-puja it is necessary that the property should remain in the hands of the grantee, and any alienation of his interests would be opposed to the terms of the grant besides being contrary to public policy. That other members of the family are entitled to share in the income and participate in the puja does not imply that the property as such can be partitioned. For convenience of enjoyment the members may agree to hold in definite shares and agree to perform the service by rotation. This is recognised by custom throughout the country and is consistent with the purpose for which the grant had been made. There is a unity by of title in the family and any member of the family can claim right of worship and consequently the right of enjoyment as well; but this claim to enjoy in shares is confined among the members of the family inter se and cannot avail against the grantor or the Government who have the right of resumption".

It shall have no application since terms of the grant are not known in the present case. Besides, statutory provisions like Sections 235, 236 and 237 of the Act govern the service tenure and no custom has been pleaded to govern the rights and liabilities of grantees.

12. Learned counsel for the appellant relied upon the decision reported in Hari Behera Vs. Harikrishna Kantha, and ILR (1962) CLT 191 (Kunja Rout v. Radhu Moharana) and submitted that a tenant is to establish that in his homestead he ordinarily resides to bring it within the scope of Section 236(i) of the Act as substituted in 1946. He also relied upon the decision reported in Biseswar Giri Vs. Haraprasad Behera and Others, and submitted that a purchaser relying upon transferable right of his vendor is to prove the requirements of Section 236 (1) of the Act. It reads as follows:--

"236. (I) Notwithstanding anything in this Act, the incidents of tenancy of any tenant including the holder of a service-tenure, in respect of the homestead in which such tenant ordinarily resides shall be regulated by the provisions of this Act applicable to land held by an occupancy raiyat; Provided that when a homestead is held as a service-tenure or a part thereof and the holder of such tenure ceases to perform the service, he shall be liable to pay such rent for the occupation of the homestead as may be determined by the Collector on an application filed either by the landlord or by the holder of such tenure.

Explanation-- A Chandandar is also a tenant within the meaning of this sub-section.

(2) xxx xxx xxx"

13. Admittedly, "A" schedule land is homestead of plaintiff and Nata. In the decisions of this Court in Biseswar Giri Vs. Haraprasad Behera and Others, . Section 236 (1) was applied on the finding that tenant was ordinarily residing in the disputed land. In the present case, there is no assertion in the written

statement that Hata was ordinarily residing in 57.4 decimals of homestead land purchased by defendant No. I.

14. submitted by learned counsel for the appellant that the Barber Service being for village community is for general public and is not restricted to a person or family and accordingly, in view of Section 235(1) proviso of the Act as substituted in 1951 the character of the "A" Schedule land continued to be service tenure of the family and defendants Nos. 2 to 4 not having rendered barber service to the village cannot get the rent settled to acquire right of occupancy to alienate the same. Section 235(1) reads as follows:--

235. Saving as to Service-tenures:-- (1) When any land is held as a ghatwali or other service tenure and the holder of such tenure ceases to perform the service for any reason whatsoever he shall on an application filed either by a landlord or by the holder of such tenure be liable to pay such rent in cash for the use and occupation of the land as may be determined by the Collector. Upon such determination of the cash-rent the incident of said tenure shall be regulated by the provisions of this Act applicable to land held by an occupancy raiyat notwithstanding anything contained thereunder:

Provided that if the service is rendered to a religious or charitable institution and not to a person or a family; or if the service is for the public in general, or for the Government the holder of such a service-tenure shall not have the benefit of this section.

(2) and (3) xxx xxxx xxx

15. order to highlight his submission, learned counsel relied upon the decision of this Court in S. A. 420 of 1965 decided on 24-3-1970 (Notoi Sethi v. Jadu Sethi and others) where it has been held that Deshahata Jagir is granted to a person for service to a community and not to the exintermediary and accordingly, there is no scope for any tenancy right u/s 8(I) of the Orissa Estates Abolition Act. In S. A. 202 of 1971 decided on 30-8-1974 (Nabakishore Satnal v. Hata Barik) it was held that Deshahata Jagir for Barber service is not transferable and not affected by Section 8(2) of the Orissa Estate Abolition Act, 1951. In (1971) 1 CWR 68 (Bishnu Charan Bank v. Goknel Nayak construing Section 235 (1) proviso it has been held that villagers of a particular village satisfied the term "public in general". From the aforesaid decisions, it is clear that a service tenure for rendering barber service to the village community continues as such.

16. It is no doubt true that Section 236 of the Act is a special provision for service tenure which is homestead whereas section 235 is a general provision applicable to all service tenures including homestead. Since there is no assertion that the service tenure was ordinarily used as residence, Section 235 (1) Proviso would prevail over section 236 (I) and in respect of service tenures including homestead for rendering service to public in general no occupancy right is created to be transferable. In other words, in the language of the principle in decision reported in Bhagaban Gouda Vs. Ukia Dei, service tenures for rendering

service to a person or a family u/s 235 (I) of the Act is grant in lieu of rent where in absence of rendering service the service holder shall not be liable for eviction but the grantor shall be entitled to collect fair rent whereas in respect of grant burdened with rendering service to religious or charitable institution or for the public in general or for the Government, the tenant shall be liable for eviction by the grantor and Collector has not been authorised to fix rent to confer occupancy right on the tenant.

17. When the grant is burdened with service by the family, it is not liable for partition or transfer. It continues to be a grant to the entire family till the service is required to be rendered and is so rendered by any member of the family. There is no scope for fragmentation unless the grantor creates new grant in substitution of the old grant in favour of individual members of the family which is not the case of the parties.

18. Since 1 have discussed in the earlier paragraphs that "A" Schedule service tenure is a grant burdened with service being service to the public in general as provided in Section 235(1) Proviso of Act, it is not liable to partition and alienation. Accordingly, defendants Nos. 2 to 4 had no right to alienate any part of the same and defendant No. 1 has not acquired any title over it by purchase, under Ext. K since defendant No. I has claimed that he has taken delivery of possession, his legal representatives are liable to be evicted therefrom. Suit is to be decreed in respect of "A" Schedule and appeal shall succeed.

19. Coming to "B" schedule property, which is subject matter of cross-objection, plaintiff claimed that by partition, it fell to his share and he was in possession notwithstanding joint recording. Alternatively, he pleaded that he is in exclusive possession of the same for more than 12 years against interest of Nata by ousting him from the said land. Case of defendant No. 1 is that Southern half of "B" schedule property in plot No. 1184 fell to the share of Nata and defendants Nos. 2 to 4 who are successors of Nata had right to transfer the same to the plaintiff.

20. Appellate court found that plaintiff is in possession of entire plot No. 1184 since 1956 for more than 12 years. He accepted evidence of plaintiff that on payment of Rs. 80/- Hata, he came to possession of entire plot No. 1184 for which in spite of joint recording, his exclusive possession is noted. Appellate Court has not taken into consideration that plaintiff did not make out a case of purchase from Nata at the time of settlement. There being no pleading, evidence to this effect is not admissible. His case in the plaint has been given a go-by in view of this statement of purchase. Thus, the basis of possession having failed, there is no scope for giving a finding of adverse possession. In view of joint recording, although exclusive possession of plaintiff has been recorded, defendants Nos. 2 to 4 had valid title to transfer half of the same. Suit of the plaintiff cannot succeed in respect of "B" Schedule is to be dismissed.

21. In the result, appeal and cross-objection both are allowed. Parties shall bear

their own costs throughout.