
(2017) 04 OHC CK 0036

In the Orissa High Court

Case No : 222 of 1994

Hosanlal Sahu & others

APPELLANT

Vs

State of Orissa & another

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

[Transfer of Property Act, 1882](#), [Section 105](#) - Lease defined
[Orissa Prevention of Land Encroachment Act, 1972](#), [Section 7\(2\)](#), [Section 3\(a1\)](#)

Citation : (2017) 04 OHC CK 0036

Hon'ble Judges : A.K.Rath

Bench : SINGLE BENCH

Advocate : S.Mantry, P.C. Panda

Final Decision : Dismissed

Judgement

1. This appeal is directed against the judgment and decree dated 2.7.1994 and 16.7.1994 respectively passed by the learned District Judge, Kalahandi-Nuapada in Title Appeal No.24 of 1989 reversing the judgment and decree dated 26.7.1989 and 9.8.1989 respectively passed by the learned Sub-Judge, Nuapada in Title Suit No.18 of 1988.

2. Bhagirathi Sahoo, predecessor-in-interest of the appellants, as plaintiff instituted the suit for declaration of title and confirmation of possession over the suit land. The case of the plaintiff is that the suit land measuring Ac.3.90 dec. in Mouza-Mundagaon is situated within Khariar Road town. The ex- intermediary leased out the same to him in the year 1952. He took steps for settlement of the land, but the settlement authority did not record the same in his name. Prior to 1961-1962, there was no revenue village, namely, Khariar Road. While the matter stood thus, the Government directed the Tahasildar to develop Khariar Road as town. Thereafter, village Mundagaon was included in Khariar town and recorded in the name of the State. The Tahasildar, Nuapada started

Encroachment Case No.VII-5-48 of 1960-1961 against him. The same was dropped. Again, the Tahasildar started Encroachment Case Nos.3,4 and 5/1966-67 against him. Order of eviction was passed. Assailing the same, he filed Revenue Appeal Nos.4, 5 and 6 of 1967 before the A.D.M., Kalahandi. Pursuant to the order passed by the A.D.M., he filed Mutation Case No.1197 of 1967. The mutation case having been rejected, he filed Mutation Appeal No.1 of 1969 before the S.D.O. Nuapada. The case was remanded. After remand, the mutation case was dismissed. Thereafter, he filed Mutation Appeal No.3 of 1973 before the S.D.O., Nuapada, which was dismissed with an observation that he can take recourse for settlement of the suit land. In pursuance of the said order, Additional Tahasildar granted lease patta in his favour. It is further stated that in 1961-62, a master plan was prepared for the township of Khariar Road. The lands appertaining to Plot Nos.1238, 2231/2029, 2129, 2144, 2199, 2246, 2243, Khata No.693 were acquired. He is a tenant. The Tahasildar granted lease pattas and received rent from him. However, the R.O.R was not corrected. Taking advantage of the erroneous entry in the R.O.R, the Tahasildar again started Encroachment Case No.730/84 and issued notice to him. His son objected to the same. The Tahasildar dropped the encroachment proceeding. He approached the settlement authority to record his name in respect of the suit land, but the settlement authority declined to record his name.

3. The Tahasildar, Nuapada, defendant no.2, filed written statement stating therein that at no point of time, the suit land was leased out to the plaintiff. The old Zamanbandi of village-Mundagaon discloses that the suit land was "Ghasa padia". It was recorded in the name of the Government of Orissa. The suit land was recorded in the name of the Government during settlement operation under Khata No.693 as "Abad Jogya Anabadi". The plaintiff never possessed the suit land at any point of time. He is not an occupancy raiyat. The lease pattas had been cancelled and the suit lands were restored to the originals Khata. The plaintiff encroached upon the suit land for which the encroachment cases had been started against him. The suit is not maintainable as the plaintiff had not preferred any appeal against the order of Tahasildar.

4. On the inter se pleadings of the parties, learned trial court struck eight issues, out of which issue nos.3,4 and 5 are pivotal. The same are quoted below;

"3. Whether the defendant No.2 is competent to cancel the lease? 4. Whether the lease pattas issued by the defendant No.2 is valid and binding? 5. Whether the plaintiff has acquired his occupancy tenancy over the suit lands?"

5. To substantiate the case, the plaintiff had examined two witnesses and on his behalf, seventeen documents had been exhibited. On behalf of the defendants, four documents had been exhibited. Learned trial court came to hold that lease pattas vide Exts.13, 14 and 15 are not valid and binding. Defendant no.2 was not competent to cancel the lease pattas without any reason and

accordingly answered issue nos.3 and 4. It further held that the plaintiff has

been inducted as a tenant by the Ex-Thikadar under Ext.1 and as such, he acquired occupancy right over the suit land. Accordingly, possession of the plaintiff was confirmed. The suit was decreed in part. The unsuccessful plaintiff had filed appeal before the learned District Judge, Kalahandi-Nuapada, which was eventually dismissed. It is apt to state here that during pendency of the appeal, the appellant having died, his legal representatives, present appellants have been brought on record.

6. The second appeal was admitted on Ground No.1 enumerated in the appeal memo. The same is quoted below;

"1. Whether the judgments of both the courts below are liable to be set aside for total non-consideration of the orders by Additional District Magistrate, Kalahandi in Revenue Appeal Nos.4 to 6 of 1967 in Exhibits 10 to 12 dated 30.9.1967 setting aside the initiation of encroachment cases on the suit land and assessing penalty against the plaintiff as infructuous with further finding that the plaintiff has been validly granted lease of the suit land in possession of the plaintiff since 1952 after abolition of Thikadari interest in 1959 ?"

7. Heard Mr. Mantry, learned counsel for the appellants and Mr. Panda, learned Addl. Government Advocate for the respondents.

8. Mr. Mantri, learned counsel for the appellants, argued with vehemence that on 10.7.1952, Ex-Gountia leased out the suit land to the original plaintiff for agricultural purpose on acceptance of rent and delivered possession. While the matter stood thus, the Gountia system was abolished on 1.6.1959. There was no revenue village Khariar Road before 1961-62. The Government directed the Tahasildar, Nuapada to prepare plan for approval of Khariar town. Thereafter, Encroachment Case No.5/48 of 1961-62 was initiated against the plaintiff. The same was closed on due enquiry. In the settlement ROR, the suit lands were recorded in the name of defendant no.1 with note of forcible possession of the plaintiff. Thereafter, Encroachment Case Nos.3 to 5 of 1966-67 was initiated by defendant no.2 and the order of eviction was passed against the plaintiff. Challenging the same, the plaintiff filed Revenue Appeal Nos.4 to 6 of 1967 before the A.D.M. The appellate authority set aside the order of eviction and directed the Tahasildar to pass a fresh order. Thereafter, the plaintiff filed Objection Case No.119 of 1967 to recognize him as tenant under the State. The same was rejected by the defendant no.2. Thereafter, he filed Mutation Appeal No.3 of 1973 before the S.D.O. At this juncture certificate case was initiated for realisation of rent. The plaintiff paid rent from 1956 onwards, vide Ext.A. The land was settled in his favour. Again show cause was issued by the Addl. Tahasildar to re-open Encroachment Case Nos.3 to 5 of 1966-67. The arrear rent was collected from 1956 onwards. Defendant no.2 initiated suo motu lease case Nos.730 and 728 of 1976 and cancelled the lease pattas on 27.6.1977, vide Exts.13 to 15. Again notice was issued in encroachment case. The plaintiff approached settlement authority to record his name in the ROR. He further submitted that once pattas are issued by the authority, the same cannot be

cancelled without any rhyme or reason. The order of cancellation is bad in law. The plaintiff is in possession of the suit land. The Tahasildar has no jurisdiction to cancel the pattas. Learned appellate court is not justified in holding that Ext.1 being unregistered document is hit by Section 105 of the Transfer of Property Act and does not confer title. Ext.1 was granted by Ex- Gountia. After Orissa Amendment to C.P Tenancy Act, the same does not require any registration. The agricultural tenancy can be created by delivery of possession of the land. The plaintiff was in possession of the suit land and used to pay rent and as such, he was a tenant in

the State. Placing reliance on Section 8 of the Orissa Estate Abolition Act, he submitted that after abolition of Gounita system, the plaintiff became a deemed tenant.

9. Per contra, Mr. Panda, learned Addl. Government Advocate, submitted that the suit land is situated in the heart of Khariar Road. After abolition of Gountia system, the land was vested in the State. Since pattas were granted in favour of the plaintiff on erroneous assumption that he was a landless person, the same was cancelled. Moreover, there is no prayer in the suit to set aside the order of cancellation. The suit in the present form is not maintainable.

10. On a cursory perusal of Ext.1, patta granted by the Ex- Thikadar in favour of the plaintiff, it is evident that there is no description of property. For unauthorised occupation of the suit land, encroachment case was initiated against the plaintiff. The plaintiff paid rent and penalty and as such, he has admitted the title of the State. The plea of the plaintiff is mutually destructive. Though he asserts that he is an occupancy raiyat and deemed tenant; but on the other hand, he admits the title of the State.

11. Ext.15 is the lease patta granted in favour of the plaintiff in Encroachment Case No.4 of 1966-67. Section 7(2) of the Orissa Prevention of Land Encroachment Act (hereinafter referred to as "the OPLE Act") provides that notwithstanding anything contained in sub- section (1) where any land is in the unauthorised occupation of a landless person, the Tahasildar may instead of evicting such person from the land in his unauthorised occupation, settle the same with him, so however, the land so settled with him together with the land excluding homestead, if any, owned by him and the lands owned by all the members of his family who are living with him in common mess, shall, on no account, exceed one standard acre and shall not include more than one-tenth of an acre of land which is being utilised or can be utilised for purposes of homestead. It further provides that where the land in the unauthorised occupation of a person is situated within a Municipality or a Notified Area constituted under the Orissa Municipal Act, 23 of 1950, the settlement of land with such person shall be made by the Sub- divisional Officer on a reference made to him in that behalf by the Tahasildar. The settlement shall not take effect until the order for settlement made by the Sub-divisional Officer is confirmed by the Collector of the district and the person in favour of whom the settlement is

made, makes payment of the market value of the land assessed by the Sub-divisional Officer in the manner prescribed by rules made under this Act provided that on failure of payment of the market value within the time fixed by the Sub-divisional Officer, the person in unauthorised occupation of the land shall be liable to be summarily evicted from the land in accordance with the provisions of the Act.

12. Admittedly the order of settlement was not confirmed by the Collector. The market value of the land was not assessed, nor the same was paid by the plaintiff. P.W.2 in his cross-examination admits that he is having the land more than thirteen acres. Section 3 (a-1) of the OPLE Act defines "Landless person". Landless person means a person, the total extent of whose land excluding homestead together with lands of all the members of his family who are living with him in common mess, is less than one standard acre and whose total annual income of all the members of his family who are living with him in common mess, does not exceed rupees six thousand and four hundred or an amount which the State Government may, by notification from time to time, specify in that behalf. The plaintiff was not a landless person. Had the said fact been disclosed before the authority, the pattas could not have been granted. The pattas had been cancelled. There is no prayer in the suit to set aside the order of cancellation of the same.

13. In *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and others*, AIR 1996 SC 906, the apex Court held as follows:

".... In our opinion, even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact be effective inter parties until it is successfully avoided or challenged in higher forum. Mere use of the word "void" is not determinative of its legal impact. The word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity, depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise and in this case, the only complaint about the initiation of the suo moto proceedings by Board was, that it was not initiated on intimation by the State Land Board about the non-filing of the statement as required by Section 85(7) of the Kerala Land Reforms Act. In our opinion, this is not a case where the infirmity is fundamental. It is unnecessary to consider the matter further. 7. In Halsbury's Laws of England, 4th edition, (Reissue) Volume 1(1) in paragraph 26, page 31, it is stated, thus:- "If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved." In the *Judicial Review of Administrative Action*, De Smith. Woolf and Jowell, 1995 edition. at pages 259-260 the law is stated, thus:- "The

erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly impatient with the distinction, to the extent that the situation today can be summarised as follows: (1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent Jurisdiction." Similarly, Wade and Forsyth in Administrative Law, Seventh edition- 1994, have stated the law thus at pages 341-342 :- "...every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Radcliffe said : An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. This must be equally true even where the brand of invalidity is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

14. The ratio in the case of M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (supra) applies with full force to the facts of the case. The substantial question of law is answered accordingly.

15. In the result, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.