
(2008) 11 OHC CK 0024
In the Orissa High Court
Case No : W.A. No. 54 of 2007

Janmajoy Purohit

APPELLANT

Vs

Shankarsan Kalo and Others

RESPONDENT

Date of Decision : 18-11-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 11 OHC CK 0024

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : H.S. Mishra, A.K. Mishra and T.K Sahu, for the Appellant; U.K. Samal, B.R. Barik and S.P. Patra for Respondents 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

B.S. Chauhan, C.J.—This appeal has been filed by the Appellant against the judgment and order of the learned Single Judge dated 22.1.2007 by which while dismissing the writ petition filed by the Respondent Nos. 1 and 2, certain directions have been issued to the Statutory Authority to take action against certain persons including the Appellant for violating the provisions of law.

2. The facts and circumstances giving rise to the case are that one Sanatan Kalo had agricultural lands. He had three sons, one of them was Somnath. Two sons of said Somnath namely, Kanahei and Puma had transferred their share in favour of one Hardugan Tete vide Registered Sale Deed dated 4.4.1969 for a consideration and he was put in possession. The transfer and the transferee belonged to the Scheduled Tribes. The Transferee Hardugan Tete sold the land by registered sale deed dated 7.9.1971 for a consideration in favour of Janmajoy Purohit after taking permission of the competent authority under the Statute i.e. Section 3(2) of Regulation 2 of 1956 by filing Misc. Case No. 234 of 1970. He had been put in possession. However, after a lapse of long period, the descendants of another son of Sanatan Kalo challenged the transfer on the ground that the land had been transferred by a person of Scheduled Tribe in favour of a non-

Scheduled Tribe person and therefore there was violation of law.

3. That one Durga Pr. Panda had encroached a portion of the case land without having any right, thus the Appellant filed Title Suit No. 44 of 1990 before the Civil Judge (Sr. Division), Sundargarh. The same was decreed in favour of the Appellant. The said Durga Pr. Panda preferred Appeal before the learned District Judge, Sundargarh vide Title Appeal No. 35 of 1993 which was also dismissed confirming the judgment and decree of the Trial Court. Being aggrieved, the said Durga Pro Panda preferred Second Appeal before this Court vide Second Appeal No. 236 of 1997 which is pending for hearing.

4. That during pendency of the said Civil Suit the said Durga Pr. Panda along with his brother instigated late Raghunath Kalo, father of the Respondent No. 1 to file a petition u/s 3(2) of Regulation 2 of 56 for restoration of the case land in their favour vide Misc. Case No. 22 of 1990. During pendency of the said Misc. Case, the said Raghunath Kalo died. Thereafter, the Respondent No. 1 being the legal heir of said Raghunath Kalo filed a petition supported by an affidavit with his brother to drop the case on the ground that the case land belonged to Kanhei Kalo and Puma Kalo who had sold to Hardugan Tete, and afterwards the Transferee, Hardugan Tete, sold the same to the Appellant after due permission and payment of consideration by the Registered sale deed.

5. Respondent No. 5 vide order dated 29.05.1999 without issuing any order to the present Appellant allowed the case.

6. Being aggrieved of the aforesaid order, the Appellant filed an appeal No. 19/1999 which was allowed observing that the Appellant legally purchased the said land from Hardugan Tete after obtaining permission from the competent authority vide judgment and order dated 23.3.2000. The said order was challenged in a writ petition which has been dismissed giving the aforesaid direction. Hence this appeal.

7. Mr. H. Mishra, Learned Counsel for the Appellant has submitted that No. direction could have been issued by the learned Single Judge adversely affecting the Appellant without giving opportunity of hearing to the Appellant. More so, as the writ petition was dismissed and the Respondent Nos. 1 and 2 have not filed any appeal against that judgment and order, they could not be permitted to take benefit of direction given by the learned Single Judge which adversely affects the present Appellant. Respondent Nos. 1 and 2 could not have any locus standi as they could not claim themselves to be the "person aggrieved" for the simple reason that land of two co-sharers had been sold in favour of Hardugan Tete and even if the sale in favour of the Appellant by Hardugan Tete is illegal, it is only the descendants of Hardugan Tete who can be aggrieved. Hardugan Tete had been put in possession in view of the sale deed dated 4.4.1969 and the Appellant had also been put in possession by Hardugan Tete in 1971. Therefore, Respondent Nos. 1 and 2 cannot be heard so far as the property transferred to the present Appellant by Hardugan Tete is concerned. The co-sharer had a right

to transfer his share but he could not put the purchaser into possession unless there is partition by metes and bound. In the instant case, there had been partition by metes and bound and possession had been handed over to Hardugan Tete. Whether the sale in favour of the Appellant is void or not cannot be the subject matter of concern of the Respondent Nos. 1 and 2, the descendants of Sanatan Kalo. Therefore, the appeal deserves to be allowed.

8. Mr. Samal, Learned Counsel appearing for the Respondent Nos. 1 and 2 has submitted that if the sale is void being in contravention of the statutory provision by Hardugan Tete in favour of the Appellant, his clients being Scheduled Tribes have a right to challenge the same. More so, it was a undivided joint family property of Sanatan Kalo. Therefore, neither Hardugan Tete nor the Appellant could not be put into possession. The appeal is devoid of any merit and is liable to be dismissed.

9. We have considered the rival submissions made by the Learned Counsel for the parties and perused the record.

10. The family genealogy is given below for better appreciation of facts.:

Genealogy

Sanatan Kalo (Dead) Benudhar (dead) Somnath (dead) Kuna (dead) Sadasiv Dhaneswar Binod Kanhei (dead) Purna (dead) Ratna (dead) Raghu (dead) Pitambar

11. Kanhei and Purna alienated their share in favour of Hardugan Tete vide sale deed dated 4.4.1969 and he had been put in possession. The said Hardugan Tete had sold the same to the present Appellant vide sale deed dated 7.9.1971 after taking permission dated 8.7.1971 from the competent authority in Misc. Case No. 234 of 1970. It is evident from this fact that the said Respondents who are descendants of Sanatan Kalo cannot have any grievance so far as the sale of share of the other descendants Sanatan Kalo in favour of Hardugaon Tete is concerned.

12. Copy of the order dated 8.7.1971 has been produced before the Court that Misc. Case No. 234 of 1970 was filed by Hardugan Tete for seeking permission of the competent authority to transfer his land to a non-Scheduled Tribe person and it was so granted by the competent authority in accordance with law. Therefore the question regarding the validity of the transferer in favour of the Appellant becomes immaterial. Even otherwise, if it is presumed that there may be some issue regarding the said transfer, the Respondent Nos. 1 and 2 could not have any grievance whatsoever. The submission on their behalf that purchaser cannot be put to possession of joint family property at all is preposterous.

13. A co-sharer has a right to transfer his undivided share, however, he may not be able to put the vendee in possession without having the partition of the said property so made. This view stands fortified by the judgment of the Hon"ble Supreme Court in Mamidi Venkata Satyanarayana Manikyala Rao and Another Vs.

Mandela Narasimhaswami and Others, , wherein the Court held as under:-

Now, it is well settled that the purchaser of a co-parcener's undivided interest in the joint family property is not entitled to possession of what he had purchased. His only right is to sue for partition of the property and ask for allotment to him of that which, on partition, might be found to fall to the share of the co-parcener whose share he had purchased.

14. While deciding the said case, the Supreme Court placed reliance upon its earlier judgment in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, , wherein the Court had held as under:-

All that (vendee) purchased at the execution sale, was the undivided interest of co-parcener in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work-out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour.

(Emphasis added)

15. In Kartar Singh Vs. Harjinder Singh and others, , the Hon''ble Apex Court held that where the sharers are separable and a party enters into an agreement even for sale of share belonging to other co-sharer, a suit for specific performance was maintainable at least for the share of the executor of the agreement, if not for the share of other co-sharers. The decree of specific performance cannot be granted straight away since the property will have to be partitioned. Whenever a share in the property is sold, the vendee has a right to apply for the partition of the property and get the share demarcated.

16. In view of the above, the law emerges is that a undivided share of a Co-sharer can be a subject matter of sale, but possession cannot be handed over to the vendee unless the property is partitioned by metes and bounds, either by the decree of a Court in a partition suit, or by settlement among the co-sharers.

17. In the instant case, it is admitted by the Learned Counsel for the Respondent Nos. 1 and 2 that Hardugan Tete had been put into possession of the land purchased by him. Subsequently, he handed over the possession of the said land to the Appellant. In the facts situation, Hardugan Tete was the owner of the property in possession which was subsequently transferred to the Appellant after taking permission from the competent authority under the Statute. The said Respondents could have No. concern with the property whatsoever. Thus, they cannot be heard in any Court in this regard.

18. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. Writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by the Petitioner that there is a breach of the statutory duty on the part of the Respondents. Therefore, there must be judicially enforceable

right for the enforcement on which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. The State of Orissa Vs. Madan Gopal Rungta, ; Saghir Ahmad Vs. The State of U.P. and Others, ; The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, ; Kalyan Singh v. State of U.P., AIR 1962 SC 1183; The Nagar Rice and Flour Mills and Others Vs. N. Teekappa Gowda and Bros. and Others, ; Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, ; Hans Raj Kehar and Others Vs. State of Uttar Pradesh and Others, ; Mani Subrat Jain and Others Vs. State of Haryana and Others, ; Thammanna Vs. K. Veera Reddy and Others, ; State of Kerala Vs. Smt. A. Lakshmikutty and others, ; State of Kerala and Others Vs. K.G. Madhavan Pillai and Others, ; Mithilesh Garg, Vs. Union of India and others etc. etc., ; Northern Plastics Ltd. Vs. Hindustan Photo Films Mfg. Co. Ltd. and Others, ; Dr. Duryodhan Sahu and Others Etc. Etc. Vs. Jitendra Kumar Mishra and Others Etc. Etc., ; Utkal University Vs. Dr. Nrusingha Charan Sarangi and Others, ; and Ghulam Qadir Vs. Special Tribunal and Others,).

19. In Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others, , the Apex Court has held that only a person who is aggrieved by an order can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition.

20. In M.S. Jayaraj Vs. Commissioner of Excise, Kerala and Others, , the Hon''ble Supreme Court considered the matter at length and placed reliance upon a large number of its earlier judgments, including The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others, and held that the Court must examine the issue of locus standi from all angles and the Petitioner should be asked to disclose the legal injury suffered by him.

21. In Rajendra Singh Vs. State of Madhya Pradesh and others, ; the Apex Court held that mere violation of law does not give rise to a party for a cause of action to approach the Court unless he satisfies the Court that the order passed prejudice a party.

22. If the aforesaid case is examined in the light of the settled legal proposition, admittedly the transfer in favour of the Hardugan Tete was valid in accordance with law and he had valid title over the property. Subsequently, he transferred the said property in favour of the present Appellant after taking permission from the Statutory Authority and put him into possession. The application for

restoration of the possession filed by Respondent Nos. 1 and 2 itself shows that the Appellant had been in possession of the property. Therefore, we are of the considered view that the Respondent Nos. 1 and 2 cannot have any claim whatsoever in respect of the aforesaid property.

23. Learned Single Judge has rightly held that as the dispute remain in respect of the sale by Hardugan Tete to the Appellant and the said Respondent Nos. 1 and 2 had No. concern with the case property and to that effect dismissed their writ petition, we are of the opinion that the learned Single Judge should not have issued direction to restore the land to Hardugan Tete taking it from the Appellant as neither Hardugan Tete nor his descendants were parties in the writ petition nor any such case had been put up by the descendants of Hardugan Tete. More so, had any opportunity been given to the present Appellant, who was Respondent No. 3 in the writ petition, he could have satisfied the learned Single Judge when the sale was made in his favour after taking permission from the competent authority as required under the law and such direction was unwarranted. More so, the order of the learned Single Judge also require eviction of the Appellant if the sale deed dated 7.9.1971 is found to be in contravention of the statutory provisions. It is enough to satisfy the Court if such permission would have been given to the Appellant. Therefore, such direction does not require any compliance as it would amount to futile exercise.

24. In view of the above, the appeal succeed and is allowed. The direction issued by the learned Single Judge to proceed in consonance with the provisions of Regulation 2 of 1956 and examined as to whether the sale deed in favour of the Appellant is valid or not is hereby set aside. No. cost.