
(1983) 09 OHC CK 0007
In the Orissa High Court
Case No : Second Appeal No. 212 of 1978

Kanaka Barikani

APPELLANT

Vs

Chandra Sekhar Mahaprabhu and Others

RESPONDENT

Date of Decision : 08-09-1983

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 3, 3A, 6, 7, 8

Citation : AIR 1984 Ori 39

Hon'ble Judges : G.B. Patnaik, J

Bench : Single Bench

Advocate : P.K. Misra, for the Appellant; S.C. Mohapatra and Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

G.B. Patnaik, J.—Defendant No. 1 (a/1) is the appellant against a reversing judgment.

2. Plaintiff, the deity Sri Chandra Se-khar Mahaprabhu represented by the trustee Sri Chaitanya Das, filed the suit, for recovery of possession and for mesne profits with respect to the land covered by T. D. No. 129 on the averment that the deity is the owner of the land and Bairagi Das was the last previous trustee who was cultivating the lands under khas cultivation. After Bairagi, Chaitanya Das continued as the trustee. During survey operation for issue of Patta and fixation of rent, the defendants tried to put forth a fictitious claim and produced some sale deed alleged to have been executed by one Nilapu Kantaru. Nilapu Apudu and others. In the detailed enquiry conducted by the Assistant Settlement Officer, deity's title was declared and the Assistant Settlement Officer further held the defendants to be trespassers. On account of such trespass, the plaintiff had filed the suit.

By way of amendment, an additional relief was asked for to the effect that the notification dated 30-9-1965 published in the Orissa Gazette on 1-10-1965 under

the provisions of the Orissa Estates Abolition Act did not apply to the suit land as the suit land is not an "estate" as contemplated in the said Act.

3. In the written statement filed by the defendants, the averments in the plaint were denied and further it was asserted that the defendants had perfected their title by remaining in continuous possession over the statutory period.

4. The learned Subordinate Judge framed as many as 14 issues and on appreciation of the evidence on record came to hold :--

"To sum up the above discussions, my findings on issue No. 1 is that the suit lands belonged to the plaintiff by the time when the suit was filed, on issue No. 2 is that the plaintiff was in possession of the suit lands within 12 years from the date of the filing of the suit, on issue No. 3 is that the defendants (defendants 1 and 2) trespassed into the suit lands in the year 1960, on issue No. 4 is that the defendants have not acquired their title in respect of the suit lands by way of adverse possession and on issue No. 5 is that the suit lands appertain to Parlakhaspa but not to Bada-Khingra."

Issues Nos. 7 and 9 were not pressed at the time of hearing. On issue No. 12, the learned trial court found on admission of all parties :--

"Hence my finding on this issue is that the suit lands covered under T. D, No. 129 of Parla-Khaspa are an estate and vested in the State by virtue of the notification of the year 1965 subject to claim and reference preferred and notification made in the year 1974.""

On issue No. 13, the learned trial court found :--

"In view of Ext. 8, it is evident that the claim preferred by the plaintiff was pending when the Act 33 of 1970 came into force."

and on issue No. 14, held:--

"In view of this notification (dated 18-3-1974) the suit lands vested in the State free from all encumbrances and the plaintiff cannot maintain the suit."

On issue No. 10, the learned trial court held that the defendants \ and 2 were liable to pay mesne profits for the period of three years from the date of institution of the suit and also for future mesne profits. The trial court though found that the plaintiff had cause of action, but held that the suit was not maintainable against defendant No. 3 for want of notice under S. 80 of the Civil P. C. Ultimately, on the basis of the findings arrived at on issues Nos. 6, 12 and 14, the suit was dismissed.

5. On appeal (Title Appeal No. 8/77 (39/74 GDC), the plaintiff only challenged the findings of the learned Subordinate Judge under issues Nos. 13 and 14. The learned Appellate Judge confirmed the finding so far as issue No. 13 is concerned by holding that the suit land was an "estate". He, however, relying on the decision of this Court in the case of Nakula Bisoy v. Jagannath Mahaprabhu

(1976) 1 CWR 352, held that the suit was maintainable since the defendants were rank trespassers. The conclusion of the appellate court in paragraph 11 of its judgment is as follows:--

"Therefore, relying on 1976 (1) CWR 352 I hold that the suit which was commenced on the basis of title and possession against the defendants can be continued as only a possessory suit after vesting and the plaintiff will be entitled to a declaration of possessory title."

Having declared the title of the plaintiff, the learned appellate Judge further directed the contesting defendants to deliver vacant possession of the land to the plaintiff within a month from the date of decision of the appeal. The correctness of this conclusion is under challenge in this second appeal.

6. The suit lands admittedly being an estate within the meaning of the Orissa Estates Abolition Act (hereinafter referred to as the "Act") and the same estate having vested by issue of notification under the Act, the only question that remains to be considered is whether in view of extinguishment of title of the plaintiff, a suit for recovery of possession can be maintained even against a trespasser. At this stage it is profitable to note the history of the legislation with respect to "trust estate". Chapter II-A of the Act dealt with trust estate and how the Tribunal could declare so and on what basis. By Orissa Act 33 of 1970 which came into force on 21-12-1970, Chapter II-A of the Act was repealed. Section 7 of the repealing Act provided that on the date the repeal came into force, if any claims or references under the repealed chapter were pending, then those claims shall be deemed to have been excluded from the operation of the vesting notification. In this particular case, Ext. 8, the order-sheet of the claim case before the Tribunal, shows that the application filed by the plaintiff was pending when the Orissa Act 33 of 1970 came into force. Thus, by operation of law, the lands stood excluded from the vesting notification. Thereafter, the State Legislature passed Orissa Act 3 of 1974 which came into force from 26-2-1974, The State Government thereafter issued a notification dated 18-3-1974 whereby the intermediary interest of all intermediaries whose estates have been declared as "trust estates" under Chapter II-A, estates in respect of which claims and references made under the Chapter were pending on the date of commencement of Orissa Act 33 of 1970, and the intermediary interest of all intermediaries in respect of all estates other than those which have already vested in the State Government, stood vested in the State free from all encumbrances.

The suit lands with respect to which application under Chapter II-A was pending when Orissa Act 33 of 1970 came into force, therefore, vested in the State Government free from all encumbrances by the notification dated 18-3-1974.

7. The question that now arises for consideration is whether notwithstanding the vesting of estate in the State free from all encumbrances, a plaintiff can maintain an action for recovery of possession against a trespasser. The law on the subject has been discussed by some authorities of this Court as well as of the Supreme

Court. In the case of Nara-singha Charan Rai v. Radhagobind Dey (1967) 33 CLT 655 a Bench of this Court held :--

"It is well settled that the vesting the intermediary has no right to sue for recovery of possession even from a trespasser and his right, if any will have to be worked out under the provisions of the Act, such as Sections 6, 7, 8 and 9. In view of this position, the Civil Court had no jurisdiction to grant to the plaintiffs the reliefs as in (a) and (b) above."

It may be stated here that relief (a) was,

"That the disputed property is the Debottar property of plaintiff No. 1 with , plaintiffs 2 to 4 and defendant No. 9 as Marfatdars."

and relief (b) was,

"That defendants 1 to 8 be directed to vacate the suit house and to give over possession to the plaintiffs."

In the case of Bhuaneswar Padhi Dewan Bakshi Mohanatra v. K. Ramamurthy Subicdhi ILR 1964 Cut 132 Narasimham, C. J., after referring to the judgment of the Supreme Court in the case of Surajnath Ahir and Others Vs. Prithinath Singh and Others, held that if an intermediary's right was taken over by the Government, he would have no right to sue for recovery of possession even from a trespasser. His rights, if any, would have to be worked out under the provisions of the Estates Abolition Act itself. In Suraj Ahir's case (supra) the Supreme Court was considering a similar question arising out of the Bihar Land Reforms Act. The Supreme Court held thus (at p. 458):--

"It is clear therefore that the land in suit cannot be deemed to be settled with the respondents by the State in accordance with the provisions of Section 6 of the Act. In the absence of any such settlement, no rights over the land in suit remained in the respondents after the date of vesting, all their rights having vested in the State by virtue of Sub-section (1) of Section 3 of the Act.

We are therefore of opinion that the respondents lost their right to recover possession from the appellants, even if they were trespassers, on their estate vesting in the State, by virtue of Sections 3 and 4 of the Act and that therefore, thereafter, they had no subsisting right to recover possession from the appellants."

A similar case also came up for consideration before the Supreme Court in the case of Sabitri Devi Thirani Vs. Satya Narain Mandal, . The Court held (at p. 43) :--

".....Although the respondent did not have any legal title and has been found to be a trespasser but the entire estate of the appellant including the disputed land had vested in the State under the Act and therefore the suit for possession was not maintainable unless the appellant could take advantage of Section 5 read with Section 2 (j) of the Act (Bihar Land Reforms Act, 30 of 1950)."

It may be stated that Section 3 of the Bihar Act saved "homestead" land in possession of the intermediary from the operation of vesting.

In view of the aforesaid authoritative, pronouncements, there cannot be any dispute that an intermediary who has not worked out his right under the provisions of the Act, after vesting of the estate, cannot maintain a suit for recovery of possession even against a trespasser.

8. It is, however, necessary to deal with the decision of this Court in Nakul Bisoy's case 1976 1 CTR 352 relying on which the lower appellate court has decreed the plaintiff's suit. In that case, the lower appellate court had found that the plaintiffs had title to the suit land and also the plaintiffs were in continuous possession till the date of suit and, therefore, plaintiffs' possession had been confirmed. While the second appeal was pending, President's Act 3 of 1974, came into operation. The land in question in that case was earlier declared to be a trust estate by the tribunal in Misc. Case No. 1937 of 1963. In the context, S. K. Ray, J. (as he then was) held that the act of vesting being subsequent to the institution of the suit, the Civil Court would continue to have jurisdiction and a suit for possession against the entire world except the true owner would be maintainable and the true owner being the State, the suit commenced on the basis of title and possession against the defendants could be continued as a possessory suit. In my opinion, these observations of the learned Judge in that wide form are not correct in view of the earlier Bench decision and the two Supreme Court decisions referred to earlier. The learned lower appellate court was, therefore, in error in coming to the conclusion that notwithstanding vesting of the estate, the suit for recovery of possession would be maintainable against a trespasser. In conclusion, therefore, I hold that the suit is not maintainable and accordingly I set aside the judgment and decree of the Additional District Judge, Ganjam-Boudh, Berhampur, in Title Appeal No. 8/77 (39/74) and restore the judgment and decree of the Subordinate Judge, Parlakhemundi in T. S. No. 1 of 1973 (T. Section 40/64).

9. The second appeal is allowed. I direct both parties to bear their own costs in this Court since Mr. S. C. Moha-patra appearing for the respondent fairly conceded to the aforesaid position of law.