
(2014) 11 OHC CK 0047
In the Orissa High Court
Case No : F.A. No. 59 of 1980

Kanakabala Swain and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 39, 5(i) — Orissa Tenancy Act, 1913 - Section 61

Citation : (2015) 1 ILR 737

Hon'ble Judges : B.P. Ray, J.

Bench : Single Bench

Advocate : N.K. Sahu, for the Appellant; S. Mishra, Addl. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

B.P. Ray, J.—This appeal has been filed by the appellants challenging the judgment and decree dated 21.11.1979 and 28.11.1979 respectively passed by the learned Subordinate Judge, Balasore in T.S. No. 95 of 1974-I in dismissing the suit. The original plaintiff - Jagdish Chandra Swain, father of the present substituted appellants, daughter and sons, appellants 2 and 3 filed the suit, being O.S. No. 95 of 1974-I in the court of the learned Subordinate Judge, Balasore for declaration that the plaintiff was the occupancy tenant in respect of the suit land and the proceeding under section 5(i) of the Orissa Estate Abolition Act (in short, "the Act") being void and nullity, did not affect their right.

2. The suit land measures Ac.10.00 and was in the Anabadi Khata within the Zamindary of defendants 3, 4 and 5, namely, Jagdish Kumar Mandal, Manindra Kumar Mandal and Dinendra Kumar Mandal. They inducted Jagdish as tenant in respect of the suit land and have executed a registered lease deed on 21.5.1948. The father of the plaintiff and after his death, the plaintiffs and their mother were in cultivating possession thereof as a tenant and were paying rent to the Zamindar. In view of the fact that the original plaintiff - Jagdish Chandra Swain

was deaf and dumb and mentally insane, he filed the suit represented by mother guardian. After the vesting of the Estate under the Estate Abolition Act, the original plaintiff got PARCHA in his favour. The landlord had only cultivated a small portion of the said anabadi land prior to the lease deed, but after the lease, the plaintiff's father reclaimed all the lands and had been cultivating the same before the date of vesting and on the date of vesting. Thus, he acquired rights under Section 61 of the Orissa Tenancy Act as a shtitiban raiyat in respect of Lot No. 1 of the suit schedule land. After vesting of Estate, the plaintiff having not received the PARCHA for all the lands leased out to him, on enquiry, he came to learn that a case under Section 5(i) of the Act had been initiated by the Tahasildar whereunder lease had been cancelled on 23.8.1971 and the plaintiff could know about such cancellation only on 7.6.1974.

3. The contention of the plaintiff in the suit was that the proceeding under Section 5(i) of the Act was illegal and the order passed therein is unenforceable and without jurisdiction. The proceeding against him is also void due to non-observance of rules of natural justice. No notice was served on Jagdish or his guardian nor they have been called upon to give show cause or to give evidence in support of the same. The plaintiff was a born idiot and, as such, the Collector passed the impugned order in a mechanical manner although no document was filed on behalf of the lessee. He falsely recorded that registered lease deed and rent receipts were filed in the said proceeding. In view of the collusion of the Zamindars with the State Government, the plaintiff had no knowledge of the proceeding till three years of cancellation. Thus, the O.E.A. Collector acted beyond his jurisdiction and passed order cancelling the lease on 23.8.1971 in Misc Case No. 273/304 of 1970/71 without following the procedure laid down in law on a finding that the lease has been created after 01.01.1996 by the ex-landlords to evade vesting and to get higher compensation. It was submitted by the plaintiff that such finding was without any material on records. There was no valid proceeding under Section 5(i) of the Act and in any view of the matter, such proceeding will not affect the occupancy right of the plaintiff in respect of the suit land. The plaintiff being in possession of the suit land as an occupancy raiyat/shtitiban tenant and his possession over the suit land being threatened, the plaintiff filed the suit for the relief that the proceeding under Section 5(i) of the Act is without jurisdiction, unenforceable and illegal and, as such, liable to be ignored and for declaration of his occupancy right over the suit land. The cause of action for the suit has been stated to be on 7.6.1974 when the plaintiff could know about the order of cancellation under the aforesaid provisions of the Act.

4. The Tahasildar - defendant No. 2 did not file any written statement. The Collector, Balasore - defendant No. 1 filed written statement, though both of them contested the suit. The suit was resisted on the following grounds:

- (i) There was no cause of action;
- (ii) The suit was not maintainable;

(iii) The suit is barred by limitation;

(iv) The suit having been filed beyond three years from the final order i.e., 23.08.1971 under section 5(i) of the Act, the suit is barred by limitation. The suit is also not maintainable in view of the bar contained in Section 39 of the Act;

(v) The lease being prima facie ineffective and void, the same being executed after 1.1.1946 and as such there was no valid lease. The defendants having denied that the ex-intermediaries ever exercised possession over the Anabadi lands, the registered lease deed said to have been granted in favour of the plaintiff is a fake document and only a paper transaction to create evidence.

(vi) The possession of the plaintiff was also denied.

The further case of the defendants-State is that the cause of action for the suit has been manipulated though there is nothing to support that the cause of action for filing of the suit was accrued on 07.06.1974. The land measuring Ac.0.01 decimal in village - Isannagar has been included in the plaint in order to confer jurisdiction and the suit for declaration was fictitious without filing appeal against the order under Section 5(i) of the Act.

5. On the basis of the aforesaid rival pleadings of the parties, the trial court framed as many as ten issues, out of which, issue Nos. 2, 6, 8 and 9 were taken up together, such as, the maintainability of the suit as to whether the suit is barred under Section 39 of the Act, whether the registered sale deed is legal, valid and operative in law and, whether the plaintiff has any right, title, interest and possession over the suit property.

6. On the aforesaid issues, the trial court has given the following findings:

The plaintiff has not been able to prove acquisition of occupancy right in respect of the suit land under Section 61 of the Orissa Tenancy Act. But as regards the plaintiff's alternative claim of acquisition of occupancy right over the suit land by registered lease deed dated 11.4.1948 (Ext. 1) and issuance of rent receipts (Exts.2 to 2/g) by the ex-Intermediaries and after vesting by the State, the trial court found that there was no challenge to the plaintiff's allegation that he was in possession over the suit properties. There was nothing on record to show that the lease deed was illegal and invalid in the eye of law. The defendants have not adduced any evidence at all to that effect. Rent was being paid by the lessee to the ex-intermediary under Exts.2 to 2/d and to the State after vesting under Exts.2/e to 2/g. Acceptance of rent by the State after vesting of the estate shows the creation of tenancy. Therefore, there is no doubt that the plaintiff has acquired occupancy right, though not under Section 61 of the Orissa Tenancy Act, but under the Orissa Estates Abolition Act by virtue of the lease and on acceptance of rent by the ex-intermediaries and after vesting by the State.

So far as issue Nos. 2 and 6 are concerned, the trial court gave the following findings:-

(a) the record does not show if any notice on the lessee was, in fact, served;

(b) Jamini Kanta Swain appeared two days after the order of issue of notice. It cannot be said that notice was served as said Jamini Kanta Swain had no authority and no such authority was produced by him for his appearance on behalf of the lessee.

(c) The order sheet dated 2.6.1971 shows that the lessee was a minor and infirm.

Thus, on going through the Ext. 6 series, the evidence of P.W. 3 and Ext. B series, the evidence of P.W. 2, it was held that Jamini Kanta Swain and Brajendra Nath Pradhan were in inimical term. The plaintiff was not minor nor an idiot though he was deaf and dumb and had deformity of limbs since birth. Thus, it was found "if it came to the notice of the Collector that the lessee was a minor and infirm, it was incumbent upon him to appoint his legal guardian, which has not been done. No authority was demanded by the Collector from Jamini Kanta Swain ad Brajendra Nath Pradhan as to on what authority, they appeared for Jagdish Chandra Swain. Thus, it was held that Jamini Kanta Swain and Brajendra Nath Pradhan had no authority to act on behalf of the plaintiff. Thus, on discussion of the law on the subject and the evidence, both oral and documentary, it was found ultimately that mandatory provisions of law have not been followed in the proceeding under Section 5(i) of the Act and the Civil Court is competent to go into the question and, therefore, Section 39 of the Act is not a bar and the suit is maintainable.

7. While deciding Issue No. 5, it was held by the trial court that the suit is for declaration. Articles 56, 57 and 58 of the Limitation Act relate to suits for declarations and the present suit comes under Article 58 of the Limitation Act, which is residuary Article. The period of limitation is three years, when the right to sue first accrues. In the present case, when the proceeding and the final order passed by the Collector under Section 5(i) of the Act was within the knowledge of the lessee and her mother-guardian, the suit should have been filed within three years from the date of order i.e., 23.08.1971. Therefore, the limitation for filing of the suit would run from the date the order passed by the Collector. The suit having been filed on 17.12.1974 by the plaintiff, the suit is clearly barred by limitation.

8. Though the trial court recorded the finding that the plaintiff has acquired the right of occupancy over the suit land on the basis of the lease deed and on payment of rent to the ex-intermediary and thereafter to the State, but dismissed the suit holding that the same is barred by limitation.

9. Mr. N.K. Sahu, learned counsel for the appellants assailing the aforesaid finding of the trial court strenuously urged that the learned court below has committed serious error of law by recording the finding that the suit is barred by limitation, though the learned trial court on assessment of evidence has come to the conclusion that, in the proceeding under Section 5(i) of the Act, the mandatory provision of law has not been followed as no notice was ever served

on Jagdish before passing of the order of cancellation on 18.03.1971 cancelling the lease. It is submitted that when an order is void ab initio, no decree for setting aside the same is necessary as the same is non est in the eye of law being a nullity. Mr. Sahu further submits that under Section 5(i) of the Act, notice to the parties concerned as a condition precedent for cancellation of the lease is mandatory. In the purported proceeding under Section 5(i) of the Act, such procedure having not been followed, the purported decision arrived at by the Collector cancelling the lease is a nullity and, therefore, there was no need to challenge such order while filing the suit for declaration of occupancy right of the plaintiff. If an order is a nullity from its very inception, no order is necessary to declare such order as void and the learned trial court has completely misdirected itself in coming to such an erroneous finding and, as such, the impugned judgment and decree passed by the trial court is liable to be set aside.

10. In support of the aforesaid contention, learned counsel for the appellants relies upon the decisions in the cases of Collector, Cuttack v. Atun Chandra Das and another, ILR 1972(1) Cuttack 753 , Krupasindhu Misra (and after him) Krupasindhu Misra and Another Vs. Gobinda Chandra Misra and Others, , Rankanidhi Sahu Vs. Nandakishore Sahu, , Ajudh Raj and others Vs. Moti, and Dewan Chand Chhaju Mal Vs. Raghibir Singh Milkha Singh, .

11. On the other hand, learned counsel for the State submits that the lease having been granted admittedly after one 1.1.1946 inducting the appellants as tenants, the O.E.A. Collector has rightly set aside the lease by entertaining the proceeding under section 5(i) of the Act. However, the learned counsel for the State is unable to satisfy this Court that before the passing the order under section 5(i) of the Act, the Collector has followed the fundamental principle in the matter of issuing notice to the plaintiffs-appellants to file their show cause in the matter. In the case of Collector, Cuttack (supra), this Court has held that under Section 5(i) of the Act, notice to the parties concerned is condition precedent for cancellation of lease is mandatory. Under the statutory rules made under the Act the forms of notice have been prescribed for the lesser and also of the lessee. The Division Bench of this Court ultimately held that the proceeding under Section 5(i) of the Act was not valid as contemplated under law so as to raise a bar under Section 39 of the Act.

In the case of Krupasindhu Misra (and after him) Biranchi Prasan Mishra and another (supra), the Full Bench of this Court, while approving the cases of Baikuntha Das v. Smt. Sabitri Devi and another and Lalbehari Patnaik v. Saraswati Ray and others, held as follows:-

".....It is only after such public notice is given, the Collector would get jurisdiction to proceed to dispose of the claim case. When an Act enjoins upon a specified authority that a particular act has to be done in a particular manner so that it may have jurisdiction to act further in the matter, the Act must be done in that manner in order to be considered valid, and confer on the authority such further jurisdiction"

In the case of Rankanidhi Sahu (supra), this Court in paragraphs - 16 and 17 of the judgment, on the similar facts, held that Article 59 will apply when a suit is filed for cancellation or for setting aside a document which is not void ab initio. After a document is void ab initio and is an illegal document from its very inception, it is not required either to cancel or to set aside by filing a suit, because according to law, such a document does not exist.

In the case of Ajudh Raj and others (supra), the Hon''ble apex Court held in paragraphs-5 as follows:-

"The principle for deciding the question of limitation in a suit filed after an adverse order under a Special Act is well settled. If the order impugned in the suit is such that it has to be set aside before any relief can be granted to the plaintiff, the Provision of Article 100 will be attracted and if no particular Article of the Limitation Act is applicable, the suit must be governed by the residuary Article 113, prescribing a period of 3 years. Therefore, in a suit for title to an immovable property which has been the subject matter of proceeding under the Special Act if an adverse order comes in the way of the success of the plaintiff, he must get it clear before proceeding further. On the other hand, if the order has been passed without jurisdiction, the same can be ignored as nullity, that is, nonexistent in the eye of law and it is not necessary to set aside; and such a suit will be covered by Article 65.

12. In the case of Ajudh Raj and others (supra), the proposition of law as settled by the Hon''ble apex Court in paragraph-5 of the judgment fully applies to the facts of the present case.

13. Keeping in view the position of law as settled by this Court and the Hon''ble apex Court referred to above and on examination of the evidence available on record, this Court found that no notice was ever served on the lessee in the proceeding under Section 5(i) of the Act, which was initiated against the plaintiff. One Jamini Kanta Swain had appeared in the aforesaid proceeding two days after the order was passed for issuance of notice. No document was produced before the Court that said Jamini Kanta Swain had obtained any authority to represent the lessee on his behalf. Apart from this, the trial court, on examining the record has specifically recorded the finding that "If it came to the notice of the Collector that the lessee was a minor and infirm, it was incumbent upon him to appoint his legal guardian, which has not been done. No authority was demanded by the Collector from Jamini Kanta Swain and Brajendra Nath Pradhan as to on what authority they appeared for Jagdish Chandra Swain".

14. In this factual position, this Court holds that no notice was ever served on the plaintiff and the mandatory procedure as required under law was not complied with before passing of the order of cancellation dated 18.03.1971. Therefore, the order passed by the Collector under Section 5(i) of the Act is nothing but a nullity and a decree for setting aside the same is not necessary under law. The trial court is completely erred in law in holding that the suit is

barred by limitation, inasmuch as the suit was filed beyond three years from the date of the order of cancellation passed by the Collector in the proceeding under Section 5(i) of the Act. In the result, the appeal is allowed. The impugned judgment and decree dated 21.11.1979 and 28.11.1979 respectively passed by the learned Subordinate Judge, Balasore in T.S. No. 95 of 1974-I is set aside and the relief prayed for in the suit is allowed. The parties shall bear their respective costs.