

(1955) 03 OHC CK 0005
In the Orissa High Court
Case No : O.J.C. No. 199 of 1954

Labala Dharma Sahu

APPELLANT

Vs

The State of Orissa and Others

RESPONDENT

Date of Decision : 28-03-1955

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Estates Abolition Act, 1951 — Section 3, 5

Citation : (1955) 21 CLT 375

Hon'ble Judges : Panigrahi, C.J.; Morapatra, J

Bench : Division Bench

Advocate : N.V. Ram Das, for the Appellant; B. Mohapatra, General, for the Respondent

Final Decision : Allowed

Judgement

Mohapatra, J.—This is a petition under Articles 226 and 227 of the Constitution of India for appropriate relief in the following circumstances on 28th October, 1952, Sri Purnachandra Harichandan Jaga Deo, the ex-proprietor of Surangi estate, executed registered deed granting the Petitioner the right to catch and carry away fish in the tank locally known as Mukundo Deb Sagar situate in Surangigarh appertaining to survey No. 754. The area of the tank is Ac. 130-55 cents. This deed is for a period of 15 years and the Petitioner is liable under the deed to pay annual rental of Rs. 100/- to the ex-proprietor of Surangi. It was executed by both the ex-proprietor and the Petitioner. Under the terms of deed, the Petitioner had made the first year's rental of Rs. 100/- and also deposited a further sum of Rs. 300/- as a security to be later on adjusted towards rental for three years. By Notification dated 30th June 1953 u/s 3 of the Orissa Estates Abolition Act (Act I of 1952), hereinafter referred to as "the Act", the estate of Surangi vested in the State of Orissa, opposite party No. 1. Thereafter the Collector of Ganjam (Opposite party No. 3) served a notice under Sub-clause (h) of Section 5 of the Act requiring the Petitioner to give up possession of the fishery lease of Mukundo Deb Sagar by 30th November 1953. The Petitioner made an application before

the Collector for recommending his case for confirmation of the settlement by the President, Board of Revenue. The Collector having rejected his petition, a similar application was filed before the President, Board of Revenue, Orissa, who found that this was not a case u/s 5(i) of the Act as it was not a lease in respect of any land or mine and the Collector was justified in serving a notice u/s 5(h) of the Act calling upon the Petitioner to make over possession of his rights under the aforesaid deed. It is after this order dated 19th June 1954 that the present petition has been filed.

2. In the meantime we have decided two sets of cases of similar nature. In the case of Khan Saheb Muhammed Khan v. The State of Orissa ILR 1954 Cutt. 671, the ex-proprietor of Kharsel estate which had vested in the State of Orissa by a notification u/s 3 of the Act had granted Pattas for collection of Kendu leaves from the trees standing within the estate. The Collector having served a notice u/s 5(h) of the Act calling upon the lessee to make over possession of his rights to collect and carry away Kendu leaves, the petition under Article 226 was filed in this Court. Relying upon exactly a similar case of their Lordships of the Supreme Court under the Madhya Pradesh Abolition of Proprietary Rights etc., Act I of 1951 reported in Chhotabhai Jethabai Patel and Co. Vs. The State of Madhya Pradesh, and on a full discussion of the provisions of our Act, we have held that the contracts by the ex-proprietor in favour of the Petitioner do not transfer possession of the land on which the Kendu trees stand or grow, nor is there transfer of possession of trees themselves. The contracts are mere licenses permitting the Petitioner to go upon the land of the proprietor to pluck, gather and carry away Kendu leaves. There being therefore no transfer of possession of any part of the estate or any land within the estate, the Collector was not empowered to disturb the possession of such person in whose favour the contracts were granted. Such contracts, we have found definitely, are not "encumbrances" within the meaning of the Act, but are mere licenses. The second batch of cases are more appropriately akin to the present one. The cases are covered by our judgment in O.J.C. Nos. 21, 22 and 23 of 1954 disposed of on 21st February, 1955. The Petitioners there claimed right to catch and carry away fishes from some portions of Chilka Lake, on the basis of previous agreements, for heavy considerations with the ex-proprietors of the estates under which the portions of Chilka Lake are situated and which also vested in the State of Orissa on account of notification under the provisions of Section 3 of the Act. On a full discussion of the subject, we have found that such contracts or leases, as they may be called, are mere licenses and do not create any interest in favour of the lessees or licensees in respect of water or the soil underneath the water. Mere right to rear, catch and carry away fish is not an interest in immoveable property. We have definitely found that such rights of the Petitioners are not affected by the vesting order u/s 3 of the Act as they are not encumbrances and the lessees cannot be held to be in possession of any part of the estate which had vested in the Government. The principle laid down in O.J.C. Nos. 21, 22 and 23 of 1954 applies with greater force to the facts of the present case when we refer to the

terms of the registered document. The document deals with liberties, powers and privileges to be exercised and enjoyed by the lessee and the restrictions and conditions as to the exercise of such liberties, power and privileges, and they are embodied in two parts attached to the schedule of the document. It would be better to quote the above provisions in the document itself

"Liberties, powers and privileges to be exercised and enjoyed by the lessee subject to the restrictions and conditions" in

PART I.

1. Liberty and power at all times during the term hereby demised to enter or cause entry upon the tank and to rear, stock, develop, catch, carry away and dispose of all the fish in the said tank.
2. Liberty and power for or in connexion with any of the purposes mentioned in this part to fish by planting stake nets or fences setting traps, casting nets or fishing rods or other appliances.
3. Liberty and power for or in connection with any of the purposes mentioned in this part to moor boats to any bund or revetment.
4. Liberty and power for or in connection with any of the purposes mentioned in this part to erect sheds on or in proximity to bunds, revetments tank bed or foreshore.
5. Liberty and power for or in connexion with any of the purposes mentioned in this part to remove weeds or vegetation by manual labour or by the use of mechanical appliances or chemicals.
6. Liberty and power for or in connexion with any of the purposes mentioned in this part to prevent removal of fences, traps, nets, fishing rods or other appliances planted, cast or used in the tank and to prevent obstruction to mooring the boats and removal of weeds and vegetation.

PART II.

Restrictions and conditions as to the exercise of the liberties, powers and privileges in Part I

1. Not to use in the exercise of the liberties, powers and privileges mentioned in part I any dynamite or explosive substances.
2. Not to open or shut sluice belonging to the tank exercise of the said liberties, powers or privileges or for any whatsoever.
3. Not to let outwater or erect partition bunds in the said tank so as to prevent discharge of water from any part of the tank.
4. Not to claim any compensation for any loss sustained on account of the absence of water or alteration of water level in the said tank.

5. Not to prevent access to the tank by the lessor or his agents to any reasonable time to view the state and condition of the tank whether for the other purposes.

6. Not to assign, underlet or part with possession or enjoyment of the right of fishing or any part thereof without the consent of the lessor being first heard or obtained.

Not to prevent discharge of water from the tank through the existing outlets or other authorised outlets for the purpose of irrigation or for the purpose of earning out repairs to the tank at any time.

3. On a fair perusal of these terms, it is absolutely clear to our mind that the ex-proprietor did not transfer any interest in favour of the Petitioner either in the water of the tank or the soil underneath. The grant was merely one of liberties and powers during the period of 15 years to enter, cause an entry upon the tank and to rear, stock, develop, catch and carry away fish in the tank. There was not even transference of possession either of the water or the land which remained with the ex-proprietor even after the execution of the deed in question.

4. The learned Advocate-General has however relied upon the recital in the document itself that there was demise of the tank itself in favour of the lessee and not merely a grant of the liberties, powers and privileges enumerated in the deed. Indeed there is the recital "the lessor hereby grants and demises unto the lessee the said tank situated lying and being in the said survey No. 754 above referred to, together with the liberties, powers and privileges to be exercised or enjoyed in connection herewith which are mentioned in Part I of the schedule etc". If really the tank itself was demised there is no meaning in enumerating the privileges granted in favour of the Petitioner and the restrictions under which the privileges are to be exercised.

5. There cannot be any dispute that we have got to look to the very substance of the document and not merely to the form of it and further that the document must be read as a whole in order to be construed correctly. We will here simply quote a passage appearing in paragraph 12 in our judgment reported in *Khan Saheb Muhammed Khan v. The State of Orissa*.

Whether an instrument operates as a lease or as a license is a matter not of words, but of substance, *Mamikutti v. Puzhakka*. If the effect of the instrument is not to give exclusive possession it will take effect as license though called a lease or letting. On the other hand, if exclusive occupation is given it matters not whether it is subject to reservations and restrictions. If it only gives the use of the property in a particular way or on certain terms, while it remains in the possession and control of the owner, it will only be a license See, *Mulla's Transfer of Property Act*.

In the present case manifestly exclusive possession was not made over in favour of the Petitioner, The document grants to the Petitioner the right to use the

property in a particular way subject to conditions and reservations. It can never be anything more than a license.

6. We would, therefore, pass exactly the same order as we passed in O.J.C. Nos. 21, 22 and 23 of 1954. The petition is allowed and the order dated 19th June 1954, passed by the President, Board of Revenue, is quashed. We would further direct that the opposite parties should not interfere with the rights of the Petitioner during the unexpired portion of the period covered by the registered deed dated 28th October, 1952. The Petitioner is entitled to costs of this proceeding. Hearing fee is assessed at rupees two-hundred (Rs. 200/-).

Panigrahi, C.J.

7. I agree.