

(1969) 04 OHC CK 0019

In the Orissa High Court

Case No : O.J.Cs. No's. 46 and 47 of 1965

Mahant Sri Bhakti Charan Das

APPELLANT

Vs

Satyen Kumar Raichoudhury and Another

RESPONDENT

Date of Decision : 10-04-1969

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 2, 32A, 47, 9, 9(1)
Orissa Estates Abolition Rules, 1952 — Rule 8

Citation : AIR 1969 Ori 241 : (1969) 35 CLT 696

Hon'ble Judges : S. Barman, C.J;B.K. Patra, J

Bench : Division Bench

Advocate : M. Mohanty, for the Appellant; R.N. Misra, R.K. Dey and A.G. in O.J.C. No. 46/65 and R.N. Misra, M.K. Dey and A.G. in O.J.C. No. 47/65, for the Respondent

Final Decision : Allowed

Judgement

Barman, C. J.

1. The point involved in these matters is whether the Board of Revenue has jurisdiction to entertain second appeals from an order of the Collector u/s 9 of the Orissa Estates Abolition Act, 1951 (Orissa Act No. 1 of 1952). Section 9 (1) as substituted by Orissa Act XV of 1956, read with the proviso and the explanation is as follows:

"9. Appeal against Collector's order under Sections 5, 6, or 7.

(1) An appeal against any order of the Collector under Sub-section (4) of Section 3-B, Clauses (h), (i) and (k) of Section 5, Sub-section (1) of section 6 or 7, Sub-section (3) of Section 8 and Sub-sections (3) and (4) of Section 8-A, if preferred within sixty days of such order, shall lie to the Board of Revenue which shall dispose of the appeal according to the prescribed procedure:

Provided that if such order is passed by Officer other than the Collector of the district an appeal if preferred within sixty days of such order shall lie to the said

Collector, who shall dispose of the appeal according to the same procedure as is prescribed for disposal of such appeals by the Board of Revenue.

Explanation -- The Collector of the District referred to in the proviso shall for the purpose of this sub-section include a Deputy Collector appointed as the Additional District Magistrate of the District."

2. The petitioner in both these writ petitions is the sebaitemarfatdar of a Deity Sri Radha Nikunja Behari Thakur, installed at Madhwa Goudiva Math, in Iswarpur, Kendrapara within the district of Cuttack. He claims certain lands appertaining to Nijchas and Nijjote, on the basis of an agreement by the two proprietors thereof for grant of a permanent registered lease of the lands in favour of the petitioner as sebaitemarfatdar of the said Deity, in consideration of certain salami and annual rent as mentioned in the petitions. It is said that shortly after the said agreement the proprietors died and therefore a formal lease could not be executed during their lifetime. It is said that after vesting, the sons and legal representatives of the deceased proprietors made application to the Khasmahal Tahsildar for settlement of fair and equitable rent in their names in respect of their respective shares in the lands. stated to be in the possession of the petitioner, u/s 6 of the Orissa Estates Abolition Act. The petitioner filed an objection to the said application. The Tahsildar overruled the objection and allowed the application u/s 6 of the Act for settlement of fair and equitable rent. Against the said order of the Tahsildar the petitioner preferred an appeal to the Collector under the Estates Abolition Act (Additional District Magistrate) who allowed him appeal-Thereafter the sons and legal representatives of the deceased proprietors preferred a second appeal against the order of the Collector to the Board of Revenue. The Member, Board of Revenue allowed the second appeal, set aside the appellate order of the Collector (Additional District Magistrate) and restored the original order passed by the Tahsildar. The petitioner challenges the maintainability of the second appeal before the Member, Board of Revenue as incompetent and without jurisdiction.

3. The rival contentions of the parties in which the point as to whether a Second appeal lies to the Board of Revenue from an order of the Collector, are in substance, these. According to the petitioner no second appeal lies to the Board of Revenue from an order of the Collector of the district in appeal from an order passed by an officer other than the Collector; under the proviso to Section 9 (1) such an order of the Collector of the district is final. It was however contended on behalf of the opposite parties that a second appeal lies to the Board of Revenue in that according to them the main enacting Section 9 (1) provides that an appeal lies against any order of the Collector including an appellate order passed by the Collector in appeal from an order passed by an officer other than the Collector.

4. The scheme of Section 9 (1) appears to be this: The main section (without the proviso) provides for the appellate jurisdiction of the Board of Revenue in appeal from any order of the Collector under certain sections of the Act as specified

therein. The language is "any order of the Collector"; it does not mention original or appellate order of the Collector. It is the proviso to Section 9 (1) which makes provision for the appellate jurisdiction of the Collector in appeal from an order passed by an officer other than the Collector. The point is whether a further appeal lies to the Board of Revenue from the appellate order of the Collector in appeal from an order passed by an officer other than the Collector. The Explanation to Section 9 (1) inserted by Orissa Act XXIII of 1957 clarifies what the "Collector of the district" referred to in the proviso means so as to include in that expression, for the purpose of the sub-section, a Deputy Collector appointed as Additional District Magistrate of the district as provided therein.

5. In the absence of direct authority on the point, it has to be decided according to the well-settled rules of interpretation of statutes.

6. Section 9 as it originally stood in Orissa Act No. 1 of 1952 without the proviso or the Explanation was simply this:

"9. An appeal against any order of the Collector under Clause (i) of section 5, Sub-section (2) of Section 6 or 7, if preferred within sixty days of such order, shall lie to the Board of Revenue which shall dispose of the appeal according to the prescribed procedure".

7. Now, the question for consideration is: What is the effect of the proviso subsequently introduced in Section 9 (1)? The normal function of a proviso is to except something out of an enactment and to qualify something enacted therein which, but for the proviso, would be within the purview of the enactment. A proviso is not to be construed as excluding or adding something by implication. As stated by Lord Watson in *West Derby Union V. Metropolitan Life Assurance Society* (1897) AC 647 :

"if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso".

These cardinal principles of statutory construction were also reiterated by our Supreme Court holding that a proviso to a particular provision of a statute only embraces the field that is covered by the main provision; it carves out an exception to the main provision to which it has been enacted as a proviso and to no other. It was also held that where the main provision is clear, its effect cannot be cut down by the proviso. But where it; is not clear the proviso which cannot be presumed to be a surplusage can be properly looked into to ascertain the meaning and scope of the main provision, *Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others*, ; and *Hindustan Ideal Insurance Co. Ltd. Vs. Life Insurance Corporation of India*, .

8. It was contended on behalf of the petitioner that the right of appeal must be given by express enactment and can-not be implied. This principle was laid down by the Privy Council as early as in 1912 in *Rangoon Botatoung Co. Ltd. v.*

Collector. Rangoon ILR (1912) Cal 21 and reiterated in a recent judgment of the Supreme Court in Seth Banarsi Das Vs. The Cane Commissioner and Another, in the following terms:

"The right to appeal is a substantive right and is to be conferred on a party by or under the Act. The Act must either provide for the appeal or enact that the rules framed thereunder may provide for appeals against certain orders or decisions. In the absence of such a provision in the Act the rules cannot provide for appeals."

The enacting provision in Section 9 (1) as substituted by Orissa Act XI of 1956 provided for an appeal against any order of the Collector under Sub-section (4) of Section 3-B. Clauses (h), (i) and (k) of Section 5, Sub-section (1) of Section 6 or 7, Sub-section (3) of Section 8 and Sub-sections (3) and (4) of Section 8-A if preferred within 60 days of such order. It was argued that "such order" occurring in the proviso must have reference to an order passed by the "Collector" within the meaning of that expression as defined in Section 2 (d) of the Act and not by the "Collector" referred to in the proviso as defined in the Explanation to Section 9 (1) quoted above. In other words, the argument is that the enacting Section 9 (1) does not expressly provide that there will be an appeal to the Board of Revenue against any order of the Collector passed in appeal from an order made by an officer other than the Collector. Similarly, the rule-making power conferred by Section 47 of the Act does not expressly provide that the rules may provide for appeals to the Board of Revenue against an appellate order of the Collector of the district under the proviso; nor is there any other express provision in the rules conferring a right of second appeal to the Board of Revenue against any appellate order that may be passed by the Collector; indeed, it is significant that wherever the Legislature intended to provide for second appeal they have done so expressly as in Section 32-A,

9. In the ultimate analysis, therefore, the argument in support of the view that no second appeal lies to the Board of Revenue from an appellate order of the Collector boils down to this. The enacting provision in Section 9 (1) providing for appeal from any order of the Collector (passed under the provisions of the Act specified therein) to the Board of Revenue is independent of what was subsequently added by way of a proviso laying down that an appeal shall lie to the Collector of the district from an order of an officer other than the Collector of the district as explained in the Explanation to Section 9 (1); the proviso does not expressly say that there shall be a further appeal to the Board of Revenue from such appellate order of the Collector of the district. The position would thus be as follows: On the same subject-matter an order may be passed originally by either the "Collector" or any other officer; if the original order is passed by the "Collector", an appeal lies to the Board of Revenue; if, on the other hand, the order is passed by any other officer, an appeal would lie only to the Collector of the district under the proviso" to Section 9 (1) and no second appeal would lie to the Board of Revenue from such appellate order.

In other words, according to the contention of the petitioner, which appears to have considerable force, the intention of the Legislature was to make final and conclusive the two types of orders, namely the order of the Board of Revenue in appeal from an original order of the "Collector" as defined in Section 2 (d) under the enacting provision in Section 9 (1) and also the appellate order of the "Collector of the district" in appeal from an order passed by an officer other than the Collector of the district under the proviso, leaving no scope for a second appeal to the Board of Revenue.

10. This view that no second appeal lies is further supported by the very language of the enacting provision in Section 9 (1) as well as that of the proviso in that in the enacting provision what is contemplated is an appeal against an original order of the "Collector" (as defined in Section 2 (d)) whereas in the proviso an appeal is provided to the "Collector of the district" against any original order passed by an officer other than the Collector of the district. The expression "Collector of the district" in the proviso has been explained in the Explanation to the proviso to include an Additional District Magistrate also. It will not, therefore, be correct to say that "any order" of the "Collector" referred to in the enacting provision in Section 9 (1) can include an order in appeal passed by the "Collector of the district" referred to in the proviso, because the two authorities, namely the "Collector" as defined in section 2 (d) and the "Collector of the district" mentioned in the proviso are two different functionaries.

11. There is one other aspect which also supports this view. In the ultimate analysis of the enacting provision in Section 9 (1) and the proviso as discussed above, the expression "such order" occurring in the proviso cannot but have reference only to an original order passed by an officer other than the Collector of the district because such officer is capable of passing only an original order. Therefore as to the nature of the order contemplated under the enacting provision in Section 9 (1), the position appears to be this. The order in the said enacting provision and the order under the proviso must both be of the same nature because of the use of the expression "such order" in the proviso. Therefore, as an order passed under the proviso cannot but be an original order it necessarily follows that "any order" occurring in the main enacting provision must necessarily refer to an original order passed under the various sections enumerated therein. In this view of the position, there is no scope for holding that "any order" in the enacting provision in Section 9 (1) was intended to include an appellate order.

12. One clinching fact which supports the view that no second appeal lies is the provision in the last part of the proviso to Section 9 (1) prescribing the same procedure as is prescribed for disposal of appeals by the Board of Revenue against any order of the Collector under the enacting part of that section. The proviso requires that the Collector of the district shall dispose of the appeal

"according to the same procedure as is prescribed for disposal of such appeals by the Board of Revenue."

13. Rule 8 of the Orissa Estates Abolition Rules prescribes the procedure for disposal of appeals u/s 9 and it says that- the procedure to be followed by the Board of Revenue in disposing of appeals against an order of the Collector under Sub-section (4) of Section 3-B, Clauses (h), (i) and (k) of Section 5, Sub-section (1) of Section 6 or 7, Sub-section (3) of Section 8 and Sub-sections (3) and (4) of Section 8-A shall be the same as is provided under Order 41 of the Code of Civil Procedure, 1908. The procedure provided in Order 41 is the procedure for the disposal of first appeals. The very fact that pointed reference is made only to Order 41 and not order 42 CPC which is the procedure prescribed for second appeals, is enough to show that the Legislature never contemplated that u/s 9, the Board of Revenue would ever have the occasion of disposing of second appeals. Under the proviso, the appeal which a Collector of a district disposes of can under no circumstances be anything other than a first appeal. The fact that under the proviso a Collector of a district is to dispose of the appeal according to the same procedure as is prescribed for disposal of such appeals by the Board of Revenue is a further point in favour of the conclusion that the procedure that the Board of Revenue to follow under the main provision is the one prescribed for disposal of first appeals.

14. It is in this view on the different aspects based on a harmonious construction of the entire Section 9 (1) read as a whole that we come to the conclusion that no second appeal lies to the Board of Revenue. The petitioner's contention challenging the maintainability of the second appeal to the Board of Revenue is upheld.

15. In the result therefore, the orders of the Board of Revenue dated November 30, 1964 in E. A. S. A. Nos. 54 and 55 of 1964 are quashed. The writ petitions are accordingly allowed. There will be no order for costs.

Patra, J.

16. I agree.