
(1992) 05 OHC CK 0002

In the Orissa High Court

Case No : Original Jurisdiction Case No. 2682 of 1987

Manmohan Rout (and after him) Sundari Devi and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-05-1992

Acts Referred:

Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 —
Section 2, 3

Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 51

Orissa Estates Abolition Act, 1951 — Section 8(1)

Citation : (1992) 74 CLT 454 : (1992) 2 OLR 529

Hon'ble Judges : G.B. Pattnaik, J;A. Pasayat, J

Bench : Division Bench

Advocate : B.B. Mohanty, for A.K. Bose and P.K. Giri, for the Appellant;
Additional Government Advocate and S.S. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

G.B. Pattnaik, J.—The orders of the consolidation authorities under Annexures 3, 4 and 5 are the subject-matter of challenge in this writ application. The disputed land is a tanR measuring Ac. O. 67 decimals appertaining to plot No. 1861 under Major Settlement Khata No. 269 corresponding to C. S. Record-of-Rights plot No. 1665 under Khata No. 182. The petitioners' case is that the disputed land was under the ex-intermediary under Anabadi Khata and in 1944, the said ex-intermediary leased out the property in favour of petitioners 1 and 2 and father of petitioners 3, 4 and 5 as well as one Madan Rout. The said Madan Rout transferred his interest in favour of the petitioners by means of a registered deed of gift and since the date of the lease, the petitioners are using the tank for agricultural purpose by utilising the water of the tank for raising various vegetables in their lands. According to the petitioners' case after the vesting of the intermediary rights, the landlord submitted the Ekpadia to the revenue authorities mentioning the names of the petitioners to be the lessees in respect

of the disputed land. The revenue authorities in pursuance of the said Ekpadia prepared the Tenant's Ledger wherein the petitioners' names were recorded and thereafter the petitioners continued to pay rent and became raiyats under the State. But notwithstanding the same, in 1977 Major Settlement Record of-Rigrus, the tank was recorded as "Rakshit" though in the C. S. Record-of-Rights of the year 1930, the property had been recorded under Anabadi Khata in the name of the ex-intermediary. after the consolidation operation started in the village, the disputed property was shown in the Land Register in the Rakshit Khata and, therefore, the petitioners filed objection which was registered as Objection Case No. 972/152 before the Consolidation Officer u/s 9 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act with the prayer that the petitioners' names be recorded with Sthitiban status. The opposite parties intervened in the aforesaid proceeding and laid a claim that they had a right of user of the water of the tank. The Consolidation Officer rejected the petitioners' claim on the ground that the petitioners did not take any steps to correct the Record-of-Rights before the Settlement authority nor the petitioners had taken any steps in any Court of law for declaration of their title over the suit land and since the tank was being used by the public for bathing purposes, the petitioners cannot claim any right over, the same. The Consolidation Officer further held that the payment of rent in the year 1979 by the petitioners long after the publication of the Record-of-Rights does not enure to the benefit of the petitioners.

Being aggrieved by the order of the Consolidation Officer under Annexure-3, the petitioners preferred an appeal before the Deputy Director, Consolidation and the Deputy Director dismissed the appeal by order dated 7-7-1981, annexed as Annexure-4. The appellate authority came to hold that the tank being used for communal purposes by the villagers and the villagers having the right of user the petitioners cannot have any occupancy right over the same. It was also held that no agricultural tenancy could be created in respect of a tank.

Being aggrieved by the said order of the appellate authority under Annexure-4, the petitioners filed a revision which was registered as Revision Case No. 158 of 1983 before the Consolidation Commissioner. The Consolidation Commissioner disposed of the revision and rejected the same by his order, annexed as Annexure-5. The Commissioner also confirmed the finding that the villagers use the water of the tank. He further held that the land in question being communal in nature. Section 4 of Orissa Act 1 of 1948 prohibits any transfer of such land and, therefore, the petitioners cannot claim any interest over the land in question. The petitioners thereafter have approached this Court in this writ application.

2. Mr. B. B. Mohanty, the learned counsel for petitioners, raises the following contentions in assailing the orders passed by the consolidation authorities :

(i) The ex-intermediary having granted a lease in respect of the disputed tank since 1944 and after the vesting of the estate the said ex-intermediary having included the petitioners' names, in the Ekpadia submitted by him and the

revenue authorities having included the petitioners' names in the Tenant's Ledger and having accepted the rent from them, the petitioners have acquired a permanent tenancy right under the State so far as the disputed land is concerned and that right cannot be taken away by any entry in the Record-of-Rights, as the Record-of-Rights does not create or extinguish right, title interest of a person in respect of any property ;

(ii) The consolidation authorities committed gross error in coming to the conclusion that the villagers have established a communal right of using the water of the tank and such conclusion is wholly erroneous and cannot be sustained :

(iii) Even if it is held that the villagers have the right to take water from the tank, but that right and petitioners' permanent right over the tank can co-exist and consolidation authorities committed error in rejecting the petitioners' right solely on the ground that the villagers use the tank for communal purpose ; and

(iv) The Consolidation Commissioner committed gross error of law in applying the provisions of the Orissa Act 1 of 1948 as the said Act cannot have any application in the facts and circumstances of the present case.

Mr. S. S. Mohanty, the learned counsel appearing for the villagers-opposite parties on the other hand, contends that in the absence of the original deed of lease by the ex-intermediary in favour of the petitioners, the entry of the petitioners' name in the Ekpadia by the ex-intermediary as well as the entry of the petitioners' names in the Tenant's Ledger by the revenue authority and acceptance of rent by the said revenue authority could not be sufficient to conclude that the right of tenancy was created in favour of the petitioners and consequently the Consolidation authorities were wholly justified in negating the petitioners' claim, Mr. Mohanty further contends that in view of the finding that the villagers have a communal right over the tank, the consolidation authorities were right in their conclusion that the petitioners' claim cannot be entertained.

3. In view of the rival submissions, the first question that arises for consideration is whether in the facts and circumstances of the present case, the consolidation authorities were justified in rejecting the petitioners' case of acquisition of a Sthitiban right under the State pursuant to the lease in their favour by the ex-intermediary and inclusion of the petitioners' names in the Ekpadia followed by inclusion of their names in the Tenant's Ledger and acceptance of rent by the Tahasildar. Mr. S. S. Mohanty, the learned counsel appearing for the opposite parties vehemently argues that the inclusion of somebody's name in the Ekpadia is of no consequence and that would not create a right in favour of the person concerned. In support of this contention reliance has been placed on the decision of this Court in the case of Chini alias Chain Mahanty v. Ram Chandra Bhoi and Anr. 36 (1970) CLT 924. No doubt, in the aforesaid case, a learned Single Judge of this Court came to hold that mention of defendant No. 1's name in the Rafa submitted by the ex-proprietor could not create rights in favour of the

party or extinguish rights of others, but it has been so observed as it was found in that case that the plaintiffs were in possession of the lands as tenants under an oral tenancy accompanied by delivery of possession and, therefore, the landlord has no right to confer such a tenancy right on defendant No. 1 by introducing his name in the Rafa submitted to the State. In our considered opinion, this decision is of no application to the facts and circumstances of the present case. The forms below have negated the petitioners claim solely on the ground that the lease deed itself executed by the ex-intermediary was not produced. But we are of the opinion that the said reasoning can hardly be sustained in law. In the case of Jagannath Nanda v. Bishnu Dalei and Ors. 40 (1974) CLT 888 a Bench of this Court considered the question of creation of an agricultural tenancy and it was held that under the tenancy laws, a formal document was not necessary to create an agricultural tenancy and a tenant could be inducted to an agricultural holding by mere acceptance of rent whereafter he could acquire the status of a tenant. It was further held in the said case that the term "agriculture" was of wider import than the term cultivation and consequently a purpose for which a lease was taken may be connected with agriculture but not necessarily ancillary to cultivation and hence the fact that the disputed property is a tank would not necessarily make the lease one for non-agricultural purpose. After analysing the provisions of the Orissa Estates Abolition Act, the learned Judges further held that in law there is a vesting of the estate and then follows the deemed settlement by the State of the raiyat's right. In coming to the aforesaid conclusion, the learned-Judges relied on the decisions of the Supreme Court in Shivashankar Prasad Shah and Others Vs. Baikunth Nath Singh and Others, and Bhudan Singh and Another Vs. Nabi Bux and Another, . In the aforesaid case, the intermediary himself was claiming acquisition of occupancy right over the disputed land in question. In our considered opinion, the ratio of the aforesaid case would apply fully to the present case.

In the case in hand, the petitioners claim to have obtained the land by virtue of a lease by the ex-intermediary in the year 1944. Though the lease deed had not been produced, but the undisputed entry made by the ex-intermediary in the Ekpadia was produced before the consolidation authorities and further the inclusion of the petitioners' names in the Tenant's Ledger by the Revenue Officer as well as acceptance of rent from the petitioners by the revenue authorities were also produced before the consolidation authorities. Under the provisions of the Orissa Estates Abolition Act, Section 8 (1) contemplates continuity of tenure of tenants and provides that a person who immediately before the vesting of the estate was in possession of a holding as a tenant under an intermediary, shall on and from the date of vesting be deemed to be a tenant of the State Government and such person shall hold the land in the same rights and subject to the same restrictions and liabilities as he was entitled or subject to immediately before the date of vesting. As has been held by the Full Bench of this Court in the case of Smt. Basanti Kumari Sahu Vs. State of Orissa and Others, that the Tahsildar is required to hold an enquiry u/s S (1) which is of an executive nature before he

accepts rent from a person treating him to be a tenant under the State. In the aforesaid premises, when undisputedly petitioners' names were included in the Tenant's Ledger by the revenue authorities and rent was accepted from them, there cannot be any manner of doubt that the petitioners were accepted as tenants under the State Government and that right cannot be taken away in any manner by any entry in the Record-of-Rights. It is too well-settled that Record of Rights does not create or extinguish title and, therefore, the petitioners' right which they acquired by virtue of acceptance of rent from them by the revenue authority u/s 8 (1) of the Orissa Estates Abolition Act cannot be whittled down in any manner and the consolidation authority committed gross error of law in rejecting the petitioners' claim on the ground that the original lease deed was not produced. In our considered opinion, the conclusion of the consolidation authority is wholly erroneous and the same cannot be sustained and must accordingly be set aside. On the materials produced in the proceeding, we are of the considered opinion that the petitioners have been held to be tenants under the State under the provisions of the Orissa Estates Abolition Act and that right of theirs must be accepted by the consolidation authority.

4. The next question that arises for consideration is whether the Commissioner of Consolidation was justified in negating the petitioners' claim on the assumption that the prohibition contained in the Orissa Communal, Forest and Private Lands (Prohibition of Alienation) Act, 1948 (Orissa Act 1 of 1948) applied to the lease executed by the ex-intermediary in favour of the petitioners and, therefore, no right was conferred on the petitioners. The expression "communal land" has been defined in Section 2 "a) to mean, in relation to cases governed by the Orissa Tenancy Act, lands recorded as Gochar Rakshit or Sarbasadharan in the Record-of-Rights or waste-lands which are either expressly or impliedly set apart for the common use of the villagers whether recorded as such in the Record-of-Rights or not. In the C. S. Record-of-Rights the land had not been recorded either as Gochar, Rakshit or Sarbasadharan. There is no material to establish that the land was either expressly or impliedly set apart for the common use of the villagers. Therefore, the land cannot be held to be communal land u/s 2 (a) of Orissa Act 1 of 1984 and consequently, the prohibition contained in Section 3 of the said Act will have no application. The Commissioner, therefore, grossly erred in law in applying the provisions of the aforesaid Act to the impugned transaction. The conclusion of the Commissioner on that score must, therefore, be set aside.

5. The next question that has been raised is whether the villagers (opposite parties) did establish their communal right over the land in question. The aforesaid question, in fact, does not arise for consideration in the present proceedings as the consolidation authorities are bound to respect the decisions of the authorities under the Orissa Estates Abolition Act and in view of Sub-section (.1) of Section 61 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act and further the opposite parties have not adduced an iota of material in support of their claim of a communal right over the land in question, in our considered opinion, the consolidation authorities committed

grose error in proceeding under the impression that the villagers have been able to establish a communal right over the disputed tank. The conclusion of the consolidation authorities on that score, therefore, cannot be sustained and is accordingly set aside.

6. In view of our conclusion that the petitioners continued to be tenants under the State which is established by the fact of inclusion of their means in the Tenant's Ledger by the revenue authority and acceptance of rent from them by the revenue authority, the consolidation authorities are duty bound to accept the petitioners as tenants under the State and that right of the petitioners cannot be taken away in any manner. In the aforesaid premises, the orders passed by the consolidation authorities under Annexures-3, 4 and 5 are hereby quashed and it is held that the petitioners have been accepted as tenants under State by the revenue authority.

The writ application is accordingly allowed. There will be no order as to costs.

A. Pasayat, J.

I agree.