
(1950) 08 OHC CK 0006
In the Orissa High Court
Case No : Second Appeal No. 277 of 1947

Narayan Behera and Others	Vs	APPELLANT
Ch. Narasing Charan Mohapatra and Another		RESPONDENT

Date of Decision : 31-08-1950

Acts Referred:

Orissa Tenancy Act, 1913 — Section 3(16), 3(23), 74

Citation : AIR 1951 Ori 60 : (1950) 16 CLT 220

Hon'ble Judges : Panigrahi, J; Jagannadhadas, J

Bench : Division Bench

Advocate : B.K. Pal and G. Jagati, for the Appellant; L.K. Dasgupta, for the Respondent

Final Decision : Allowed

Judgement

Jagannadhadas, J.—This is an appeal by defendants 2 to 4 lessees from defendant 1, against an order of remand by the lower appellate Court. The plaintiff brought a suit for recovery of 4.68 acres of Lakhraj Babel lands which belong to defendant 1, a Thakur represented by a Marfatdar. The plaintiff is the landlord of the Touzi to which this Lakhraj land, was attached for purposes of road-cess u/s 85, Bengal Cess Act. The Lakhrajdar, defendant 1 fell into arrears with reference to road-cess for the year 1940.41. Under Schedule 7 of the Cess Act the Touzidar is entitled to recover such arrears as arrears of rent. The plaintiff accordingly filed a suit for the said arrears, obtained a decree and purchased the property in execution sale of, the said decree. He got delivery in pursuance thereof on 11-4-41. Defendant 1 through his Marfatdar, had previously created in favour of defendants 2 to 4, a permanent lease dated 28-8-37, marked, ex. a. The plaintiff claims to recover possession of the land covered by the permanent lease on the footing that by virtue of his purchase in court auction the prior permanent lease has become annulled and that therefore he is entitled to recover possession free of that lease. In the alternative, he claims that the lease was created by the Marfatdar of the deity without any legal

necessity and that he is entitled to prove the same and got the land freed from the permanent lease on such proof.

2. The trial Court held that the plaintiff did not obtain any first charge by virtue of the purchase which he took in execution of the decree for arrears of road-cess and that therefore he cannot treat the previous permanent lease as annulled. He also held that since he has purchased only the right, title and interest of defendant 1 as on the date when he obtained the decree, he was not entitled to question the validity of the prior lease created by defendant 1. The suit was accordingly dismissed.

3. The plaintiff appealed to the lower appellate Court. On appeal the point relating to the annulment of the prior permanent lease as the legal result of his purchase in execution of the decree for arrears of road-cess does not appear to have been seriously pressed. The point which appears to have been argued is as to the locus standi of the plaintiff to question the validity of the permanent lease on the ground that it was not executed for legal necessity.. The learned appellate Judge was of the opinion that the plaintiff was entitled to challenge the validity. But in view of the fact that the question as to the existence or otherwise of the legal necessity did not form the subject-matter of a specific issue and trial, though raised in the pleadings, be, at the request of both parties, remanded the case to the trial Court in order that an issue about the question of legal necessity may be framed and tried and decided. It is against this order of remand that defendants 2 to 4 have come up in appeal before us.

4. The main point argued on behalf of the appellants is that the learned appellate Judge was wrong in thinking that the court-auction-purchaser, the plaintiff, was entitled to challenge the validity of the prior permanent lease by defendant 1. He argues that the validity of the lease could be challenged only by the succeeding Marfatdar of the deity and for its benefit and that the right, title and interest conveyed under the court-auction-purchase does not convey the right of the judgment-debtor to question the lease. He further urges that Mahomed Muzami Ullah Khan v. Mithu Lal 33 all. 783 : 11 I. C. 220 on which the learned Judge relies cannot be applied to a case like the present. I agree with the contention of the appellant. In discussing this legal question, it is necessary to mention that it has been stated by counsel for the appellant that the property we are concerned with here, is property which belongs to what may be called a family endowment constituting a private trust and that the case has gone on that footing though there is nothing very expressly on the record to substantiate it. This assertion on behalf of the appellant's counsel has not been challenged by the respondents' counsel who agrees that, that was the impression on which the case was conducted throughout. I state this at the outset of the consideration of the legal question, because it is conceivable that if the endowment was a public endowment, different considerations may arise.

5. The question that arises for decision is whether when in respect of a family endowment of a private nature, a perpetual lease which may be invalid for want

of legal necessity, is created, the subsequent purchaser thereof in court-auction, has the right to challenge the validity of the lease. There is no doubt that the succeeding Marfatdar or other members of the family interested in the endowment and upkeep are entitled to challenge the validity for the benefit of the deity. It is said that this right of challenge is incidental to the property which has been transferred and passes to the transferee with the property transferred. It is argued on behalf of the respondents that once a property is transferred, the right to challenge any prior transaction affecting it which in any way detracts from the full enjoyment of the property is incidental to the transfer itself as being an incident of the property-right transferred. In support of this certain cases have been cited of which it is sufficient to refer to the cases in *Dickinson v. Burrell* (1666) 1 Eq. 337 : 35 L J. Ch. 371 and *Khudi Ram v. Somnath A. I. R. 1933 Cal. 451 : 143 I. C. 675*. This legal position is undoubtedly correct. But it does not follow that where the right of challenge is a right of avoidance and where the transfer is of the right, title and interest of the judgment-debtor in court sale, such right of avoidance is necessarily incidental to the transfer of right, title and interest. That must depend upon the nature of the right of avoidance and the ambit of the right, title and interest purchased. A prior transaction may be totally void and in such a case the right of challenge and avoidance may be nothing more than the obtaining of declaration that the property is unaffected by the prior transaction. On the other hand, a prior transaction may be avoidable either in the sense that it is good until actually set aside or though invalid from its inception, such invalidity can be taken advantage of only by certain persons who have either the option to affirm or disaffirm the transaction. (See *In re Appava Naicken A. I. R. 1931 Mad. 377 : 128 I. C. 695* ; *Maharaw Kesho Prasad Singh Bahadur Vs. Chandrika Prasad Singh and Others*, and *Hanmanthappa v. Dundappa AIR 1931 Bom. 234 : 151 I C. 1043* for the distinction between void and voidable. In such cases, the right of avoidance is in the nature of a personal right and is not necessarily implicit in the transfer of the property. The person affected by the prior transaction having the option either to ratify or affirm the transaction it cannot necessarily be assumed that that option which is personal to him has been transferred, even assuming that such a personal right can be the subject-matter of the transfer, in view of the fact that the property itself is transferred. See *Inayat Ilahi and Others Vs. Hardeo Sahai* .

6. Learned counsel for the respondents has drawn our attention to the case in *Putrevu Kamaraju Vs. Chunduri Gunnayya and Others*, and similar cases, but they are cases where the prior transaction consisted of an absolute sale of the entire property under circumstances which are open to challenge and the later transfer is of that very property by the very person entitled to challenge and in such a case, the later transfer itself amounts to exercise of the right of avoidance by the very person entitled to avoid it originally. But where as in the present case, the prior transaction was only a transfer of limited interest in the property, a subsequent transfer may be merely of the outstanding interest or it may be of the property itself under terms and in circumstances which express or imply the

avoidance of the prior transaction by the transferor himself, what it actually is depends on facts,

7. In the present case, the prior transaction sought to be challenged by the plaintiff is a permanent lease created by the Marfatdar, defendant 1 on behalf of the deity. If, as has been assumed, the endowment is a private family trust, the only persons entitled to challenge the alienation are the members of the family. They have the right either to affirm it, or disaffirm it because it is well settled that they could even withdraw the endowment from the trust by their consensus as held by the Privy Council in *Durga Nath v. Ramchunder* 2 Cal. 341 : 4 I.A. 52 P.C. It therefore follows that the right of avoidance of the permanent lease in this case could be exercised only by the succeeding Marfatdar or the members of the family. The plaintiff cannot be said to have that option vested in him as a result of his court-auction purchase. Indeed a court-auction purchase which is in invitum and not based on the consensus of the judgment-debtors, cannot be taken to proceed on the footing of the judgment-debtor having previously exercised his right of avoidance. There are no doubt certain cases where a court auction, purchaser has been permitted to exercise the right of avoidance which his judgment-debtor had. But all the cases of such kind which have been brought to our notice are cases relating to the purchase in court auction of the undivided interest of a Hindu coparcener and they stand on a special footing. The right of the court auction-purchaser in such cases to challenge a prior avoidable transaction has been based on the Privy Council decisions which recognise the equity of the court-auction-purchaser to compel the partition of the family property which his, judgment-debtor could have. See *Deendayal Lal v. Jugdeep Narain Singh* 4 I. A. 247 : 3 Cal. 198 *Balgobind v. Narain Lal* 15 ALL. 339 : 20 I. A. 116. The case in *Mahomed Muzami Ullah Khan v. Mithu Lal* 33 ALL. 783 : 11 I.C. 220 which has been relied on by the lower appellate Court is a case which is based on the authority of those cases. It appears to me therefore that the plaintiff in this case has not, by his purchase of the right, title and interest of his judgment, debtor, acquired the right to avoid the prior permanent lease. The question of legal necessity does not therefore arise and the order of remand by the lower appellate Court is erroneous.

8. The respondent has filed a memo of cross-objection raising the question that by virtue of his auction-purchase in execution of decree for arrears of land-cess, he takes the property free of any prior encumbrance and is therefore entitled to treat the permanent lease as annulled. If this contention is correct, the suit is bound to succeed on this single ground! alone. It appears, however, from the judgment of the lower appellate Court that this question was not pressed before that Court, though the point had been decided against the plaintiff in the trial Court. Since, however this is a pure question of law, we have allowed learned counsel for the respondent to argue it. I am; satisfied, on a consideration of the relevant provisions, that his argument is untenable. It is no doubt true that the arrear of road-cess is collected by the Touzidar u/s 47, Cess Act, whereby he can collect it as an arrear of rent. Learned counsel for the respondents relies on the

definition of the word "rent" in the Orissa Tenancy Act and points out that that definition for certain purposes includes also any money recoverable under any enactment for the time being in force as if it was rent. One of the purposes so specified is Section 74, Orissa Tenancy Act under which a landlord has a first charge. It appears to me, however, that the arrear of landless cannot be treated as rent falling within this definition. That definition by the very connotation of the words and phrases therein applies as between persons from whom the rent as such is recoverable, for instance, as between a landlord and tenant and the like. It is unnecessary for me however to deal with it at any great length as the same will be dealt with fully by my learned brother.

9. In the result, the appeal must be allowed and the suit must be dismissed with costs throughout.

10. Panigrahi, J.-I agree, and would like to add a few words. Mr. Dasgupta appearing for the plaintiff-respondent relied upon certain provisions of the Cess Act (Bengal Act ix [91 of 1880) and certain other provisions of the Orissa Tenancy Act of 1913, and contended that; "cess" is rent within the meaning of the Orissa Tenancy Act and what passed at a sale held in execution of a decree for arrears of cess is the tenure itself and not merely the right, title and interest of the judgment-debtor. As this question is of some importance, I would like to make a few observations.

11. The contention is that under a. 47, Cess Act, the holder of an estate to whom any sum may be payable under the provisions of the Cess Act may recover the same with interest at the rate of twelve and a half percent per annum in the same manner as if they were arrears of rent due to him. It is next pointed out that the Orisaa Tenancy Act defines rent as including "also money recoverable under any enactment for the time being in force as if it was rent." It is, therefore, contended that "cess" is rent within the meaning of the Orissa Tenancy Act.

12. It is next contended that Schedule 4, Orissa Tenancy Act, which creates a first charge in respect of rent on a holding is one of the sections specifically mentioned in Schedule (16) of the said Act in defining rent. It is, therefore, argued that cess" like "rent" is a first charge upon the holding within the meaning of Schedule 4, Orissa Tenancy Act. If this is correct, the rest of the provisions of the Tenancy Act would undoubtedly apply and what would pass at the execution sale is the tenure itself and not the mere right, title and interest of the judgment-debtor. If the hypothesis on which this argument proceeds is correct, the result must follow. But I am unable to accede that the hypothesis itself is right. To appreciate the position, it is necessary to refer to certain provisions of the Cess Act. Section 4, Bengal Cess Act defines an "estate" as land included under one entry in the general registers of revenue-paying lands and of revenue-free lands prepared and maintained by the Collector of a District under the Land Registration Act, 1876, or under any similar law for the time being in force. The land is admittedly registered as Lakhraj-Bahel of defendant I recorded

under special no. 8753 and general No. 31239 of Mauza Bichitrapur. Section 41 (1), Cess Act prescribed the mode of payment of cess by the holder of an estate. It says:

"Every holder of an estate shall yearly pay to the Collector the entire amount of the local cess calculated on the annual value of the lands comprised in such estate"

and Schedule 1 (2) prescribes how a tenure-holder is to pay the cess and Section 41 (3) prescribes how a cultivating raiyat and the holder of a chaukidari chakaran is to pay cess for every year. Section 85 of the Act makes a special provision for Orissa and lays down that

"any revenue-free estate not exceeding 500 standard bighas in extent, of which the valuation shall have been completed, shall, for the purpose of payment and levy of the cess due in respect thereof, be annexed to any other estate within the ambit of which it is situate or which it adjoins."

It would, therefore, appear on a mere reading of these provisions that defendant 1 who is the holder of an estate is liable to pay his cess to the Collector and for purpose of collection this estate has been annexed to the neighbouring estate of the plaintiff, namely, plaintiff's Touzi No. 3797. I may also mention here that u/s 9, Cess Act, any cess payable by an estate-holder to the Collector may be realised as a public demand and would obviously come within the public demand enumerated in Schedule I, Bihar and Orissa Public Demands Recovery Act, 1914. The question, therefore, is, if the holder of the neighbour-ing touzi has been authorised by the Collector to collect the cess due from this estate, does he fulfil the character and role of the Collector and does the estate-holder become his tenant within the meaning of Orissa Tenancy Act? It is clear that if the Collector were to file a suit or to recover it under the Public Demands Recovery Act, what would pass to the purchaser in such a sale held by him is only the right, title and interest of the judgment-debtor and not the estate itself. See *Mahanund Chuckerbutty v. Banimadhub Chatterjee* 24 Cal. 27 and *Ahsanulla v. Manjura Banoo* 30 Cal. 778. Does it make any difference if that collection is made by the holder of a Tauzi to whom the right of collection has been assigned by the Collector? Section 74, Orissa Tenancy Act, on which reliance has been placed runs as follows:

"Where a tenant is a permanent tenure-holder, a bajiaftidar, a raiyat holding at fixed rate, a chandnadar or an occupancy raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding, shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

Is defendant 1 who is holder of an estate, a tenure-holder, within the meaning of the Bengal Cess Act? "Tenure" is defined in Schedule (3) of the said Act as including every interest in land, whether rent-paying or not, save and except an "estate" as above defined. The "holder of an, estate" has been in explicit terms

excluded from the definition of "tenure." Defendant 1 can by no means come within the meaning of Section 74, Orissa Tenancy Act as a permanent tenure-holder. Nor can his status be that of a tenant as defined by the Act itself. "Tenant" is defined in Schedule (23) and

"means a person who holds land under another person and is, or but for a special contract would be liable to pay rent for that land to that person."

Defendant 1, as has already been pointed out, holds the land under the Collector on a revenue-free tenure and not as a tenant under the plaintiff. Section 74, Orissa Tenancy Act, therefore, cannot be invoked by the plaintiff in this case, and the definition of "rent" must apply only to such classes of people between whom there is the relationship of landlord and tenant.

13. My conclusion, therefore, is that "cess" is not "rent," though it may be realisable as if it was rent under the Orissa Tenancy Act and a sale held in execution of a decree against an estate-holder does not pass the estate itself to purchaser. The plaintiff must, therefore, fail on this ground also.

14. In the result the suit must fail and the appeal allowed with costs as has been directed by my learned brother.