

(1990) 09 OHC CK 0018
In the Orissa High Court
Case No : First Appeal No. 172 of 1982

Narayan Ch. Rana

APPELLANT

Vs

Balasore Municipal Council

RESPONDENT

Date of Decision : 21-09-1990

Acts Referred:

Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972 — Section 14, 2
Transfer of Property Act, 1882 — Section 106, 111, 116

Citation : AIR 1991 Ori 179

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, J.C. Panda and B. Routray, for the Appellant; M. Patra, B. Dagare, B. Brahamchari and D. Deo, for the Respondent

Final Decision : Partly Allowed

Judgement

S.C. Mohapatra, J.—Defendant is appellant in this first appeal against decree for eviction from a tank and damages for illegal occupation thereof.

2. Case of plaintiff is that the suit tank is known as Agapokhari. It was part of the estate of Raja Manmathnath Deb an intermediary under the Orissa Estates Abolition Act and was recorded in his Anabadi Khata. This tank vested in State of Orissa free from all encumbrances under the said Act. Since tank was used by public plaintiff maintained and managed the tank and being a public tank, it automatically vested in the Municipality under provisions of the Orissa Municipal Act, 1950. Plaintiff was leasing out the right of pisciculture in the tank since the time it took over management in the year 1953 on specific condition that water of the tank shall not be polluted. Defendant took lease for pisciculture in 1956 beginning from 16-3-1956 on annual rental basis. Lease having expired on 31-3-1973, plaintiff served notice on defendant on 4-4-1973 to vacate. Without vacating, defendant filed a suit for permanent injunction against plaintiff from interfering with his possession. In Second Appeal No. 237 of 1977 decided on 8-1-1979, High Court reversing decrees of both Courts decreed the suit making it

clear that plaintiff would not interfere with possession of defendant without evicting him in due course of law. Accordingly, suit for eviction has been filed claiming compensation for six years amounting to and for pendente lite and future damages Rs. 18,000/- at the rate of Rupees 3,000/-per year.

3. Case of defendant is that lease did not expire on 1-4-1973 and no notice u/s 106 Transfer of Property Act having been issued to defendant, suit for eviction is not maintainable. According to him, there was an agreement between Municipality and defendant on 16-3-1956 that he would rear fish in the tank for five years and would construct two ghats. Annual premium was fixed at Rs.280/-. On 29-1-1958, another agreement was executed granting lease for 12 years from 1961 when term of the earlier lease was to expire with specific condition that defendant would re-excavate the tank for which premium was reduced to Rs. 100/- per year. This term of lease was extended for a further period of two years. When Executive Officer asked defendant to hand over possession on the ground that term has expired on 31-3-1973, defendant approached Collector and Revenue Divisional Commissioner. Being unsuccessful there, he had to file a suit which was decreed in Second Appeal restraining Municipality not to interfere with his possession as long as he is not evicted from the suit tank in due course of law. Defendant specifically asserted that lease was valid till 1975 and letter of Executive Officer dated 4-4-1973 calling upon plaintiff to give possession of the tank on the ground that term of lease expired on 31-3-1973 is not correct.

4. Plaintiff examined five witnesses and proved documents marked Exts. 1 to 9. Defendant examined three witnesses and proved documents marked Exts. A and B. Trial Court marked certified copy of the judgment in Second Appeal as Ext. I. Considering the materials, trial Court having decreed the suit for eviction and compensation of Rs. 12,000/- at the rate of Rs. 2,000/- per year, this appeal is filed by defendant.

5. Mr. R. R. Mohapatra, learned counsel for the appellant submitted--

(a) After coming into force of Orissa Act 2 of 1983 amending the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter referred to as "the Act"), suit for eviction and damages is not maintainable in view of bar of suit u/s 14 thereof;

(b) Period of lease having continued till 1975 and defendant having continued in possession thereafter, suit is bad in absence of notice u/s 106, T. P. Act;

(c) Damages for six years is barred by limitation."

Each of the above submissions requires careful consideration.

6. It is not disputed that Section 14 of the Act was not attracted when suit was instituted in the year 1979. By Act 2 of 1983, the Act was amended during pendency of this appeal. By amendment, definition of "Public Premises" was substituted and amongst others, premises belonging to or taken on lease by a

Municipal Council came within the definition of Public Premises. u/s 4, Estate Officer being of opinion that any person is in unauthorised occupation of a public premises is to issue a notice to such person to show cause why he shall not be evicted and after enquiry has power u/s 5 to direct eviction of such person. u/s 7(2), Estate Officer has also power to assess damages and recover the same. Appeal lies against such orders u/s 9 and order becomes final as provided in Section 10. Exhaustive provision having been made under the Act, Section 14 provides that no suit or other proceeding in respect of matters or disputes for determining or deciding which provision is made in the Act shall be instituted in any Court of law except under and in conformity with provisions of the Act.

7. Under the Act an authorised occupant can be evicted and directed to pay damages. Definition of unauthorised occupant u/s 2(g) in relation to any Public Premises includes continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever. "Occupation" has not been defined under the Act. Ordinary meaning of occupation is possession. An occupant need not be owner. It will suffice if he has some degree of control. Occupant means a person holding land in possession or actual enjoyment. For the purpose of "the Act" occupant is a person who having obtained the right to possess a public premises, has the right to prohibit entry of another into it. In the context of this meaning right to rear and catch fish in a tank which is a public premises would not amount to occupation of the tank. Defendant has admitted that he has constructed two pucca ghats as per terms of the agreement. In agreement dated 29-1-1958 (Ext. 9) defendant clearly stated that members use the tank in various ways. Thus, Municipal Council had not lost control over the tank by giving the right to rear and catch fish to the defendant for a fixed term. Although term of such permission had expired and defendant continued to rear and catch fish in the tank, he does not come within the meaning of unauthorised occupant. Accordingly, Section 14 of the Act does not bar a suit for eviction or for damages.

8. Section 14 provides that no suit shall be instituted. In Section 15 of the Central Act on the subject (Act 40 of 1971) which was enacted earlier, it has been provided that no Court shall entertain a suit in respect of eviction of a person in unauthorised occupation of any public premises or damages. In Section 67 of the Orissa Land Reforms Act, it is provided that no suit shall be entertained. Thus, State Legislature being aware of the difference in meaning of the two words "institute" and "entertain" in its wisdom chose to use the word "instituted". So far as the disputed tank is concerned, it became public premises in 1983 only on amendment of the Act. By that time suit had not only been instituted but also decided by the trial Court. Right of a party at the time of institution of the suit shall continue unless Legislature specifically or impliedly takes it away. State Legislature made a transitory provision with regard to pending appeals under the Act before the District Judge on account of change of forum of appeal. No provision was made in respect of pending suits or appeals

against decree. Under Administrative Tribunals Act, pending suits were provided to be transferred to Tribunals constituted under that Act but appeals were allowed to continue. Though this place of legislation is subsequent to amendment of the Act by Act 2 of 1983, applying the legislative jurisprudence, intention of legislature can be gathered from it to come to a conclusion that pending suits or appeals against decrees were not intended to be barred u/s 14 of the Act.

9. On my finding that transfer of only the right to rear and catch fish in a tank does not amount to occupation of the tank where right of others or general public in respect of other enjoyment or use of tank remain unaffected, the Act has no application for eviction of such person to whom the right of rearing and catching fish has only been transferred, Section 14 is also not applicable to pending suits on appeals. Contention of Mr. R. K. Mohapatra in this respect has no force.

10. Coming to next contention of Mr. Mohapatra, in Second Appeal No. 287 decided on 8-1-1979 arising out of a suit for injunction filed by defendant against plaintiff on account of notice served on 4-4-1973 by the defendant to vacate possession of the suit tank in favour of plaintiff, it was directed that plaintiff can evict the defendant in due course of law. It is not disputed that no further notice has been given before filing of the suit. In this context, it is to be examined whether notice u/s 106 of the Transfer of Property Act was required and whether the same has been validly issued.

11. Section 106 of Transfer of Property Act reads as follows:--

"106. Duration of certain leases in absence of written contract or local usage-- In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year terminable, on the part of either lessor or lessee, by six months" notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee, by fifteen days" notice expiring with the end of a month of the tenancy.

Every notice under this section must be in writing, signed by or on behalf of the person giving it, and either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party, or to one of his family servants at his residence, or (if, such tender or delivery is not practicable) affixed to a conspicuous part of the property."

12. In the present case lease if any was under a contract as admitted by both parties. Originally, right to rear and catch fish was given to defendant in the year 1953 for seven years. During continuance thereof, parties entered into agreement on 29-1-1958 and executed agreement (Ext. 9). Subsequently, defendant having given up possession of another small tank, period of such right given as per Ext. 9 was extended by two years. Thus, the lease, on the basis of a contract was for more than one year. A lease of immovable property for

agricultural or manufacturing purposes where there is no contract to the contrary shall be deemed u/s 106, T. P. Act to be a lease from year to year and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month. In respect of such types of leases notice for the period fixed u/s 106 is necessary for termination. In the present case, Section 106 is not attracted since period fixed in the contract was more than one year and cannot be deemed to be either from year to year or month to month. Accordingly, such lease, if any, is determined u/s 111 (a) by efflux of time limited by contract. Hence, no notice as required u/s 106, T. P. Act is necessary. If, however, Section 116, T. P. Act would govern the lease, Section 106 would be attracted. Section 116 reads as follows :

"116. Effect of holding over --If a lessee or under lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee, or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month according to the purpose for which the property is leased, as specified in Section 106."

Section 116, thus applies where a tenant continues after determination of the lease and lessor accepts rent or otherwise assents to the continuance of the lessee in possession.

13. To appreciate contention of Mr. R. K. Mohapatra, it is to be examined as to when the lease, if any, was determined and whether the plaintiff accepted rent or otherwise assented to continuance of defendant to rear and catch fish after efflux of time.

14. In 1953, defendant was given the right by the plaintiff to rear and catch fish for seven years. Thus, the time limited in the lease would have effluxed in 1960-61. During continuance of time fixed, plaintiff passed a resolution on 25-9-1957 to extend the period of lease provided defendant agrees to re-excavate the tank at his own cost. Thereupon, Ext. 9 was executed on 29-1-1958. In clause (1) of Ext. 9 it was stipulated that defendant would re-excavate the tank within 1959, Clause (2) provided that from that year defendant shall rear fish on payment of Rs. 100/- per year on or before 31st March of the year. Clause (3) provided that defendant would exercise the right of rearing and catching fish for 12 years from the date, of completion of re-excavation of the tank. Clause (6) provided that in case of vis major if re-excavation is not completed within the year, defendant would complete re-excavation by next year and shall continue to exercise the right for 12 years from the date of completion of re-excavation. As defendant gave up possession of another small tank, the period was extended by the defendant for another two years which was conveyed to the defendant in letter No. 755 dated 28-7-1961. This letter has not been produced by any party in Court.

15. Since terms have been fixed in writing in a document, those terms shall prevail. Defendant has stated that he completed re-excavation in 1960-61. That by itself would not give him benefit of the extended period. When defendant agreed to complete re-excavation in the year 1959, normally 12 years would start from and of the year. To get advantage of computation from later period, defendant was required to prove that re-excavation could not be completed in the year 1959 due to circumstances beyond his control by act of God. No such case has been made out by defendant either in the previous suit as revealed from the judgment in Second Appeal or in the written statement or even in his deposition. In the various documents in which notices by plaintiff were challenged by defendant, no such case was made out. As revealed from the judgment in Second Appeal (Ext. 1) defendant made out a case of lease which began in the year 1953 till 1960-61 which was extended by 12 years and further extended by two years more. In this suit defendant denies existence of any such lease. In evidence also he has denied to have been permitted by plaintiff for rearing and catching fish. Ext. 1 the agreement dated 16-3-1956 clearly shows that defendant was permitted by plaintiff to rear and catch fish for five years till 31-3-1961. In Ext. 9 dated 29-1-1958 defendant agreed to rear and catch fish for 12 years from the date of completion of re-excavation within 1959. Ext. 3 is a notice by plaintiff in reply to which defendant sent Ext.3/a. He has clearly admitted the agreements. On consideration of these materials, it is clear that as per Ext. 9 the lease is to come to an end latest by 31-12-1971. Taking extension of two years, lease was determined on 31-12-1973. Even assuming that the lease was to be determined in 1975, there is no evidence that after determination of the lease in the year 1975, plaintiff received rent or assented to defendant's continuing in possession. Rather, from 1971 plaintiff demanded that defendant ought to vacate the tank. Thus, Section 106, T. P. Act is not applicable to this case by attracting Section 116. Continuance of possession by temporary injunction from Court and ultimate permanent injunction till defendant is evicted in due course of law, cannot be held to be assent by plaintiff for continuance of defendant in possession. Since defendant had no right to continue to rear and catch fish after 31-12-1973 or after 1975, trial Court rightly decreed the suit for eviction.

16. Mr. Mohapatra relied upon the decision reported in *Satish Chand Makhan and Others Vs. Govardhan Das Byas and Others*, and submitted that suit having been filed without notice u/s 106, T. P. Act is not maintainable since after expiry of the lease, defendant is a tenant holding over. Facts of this decision are completely different. In the decision of the Supreme Court tenant continued in possession on the basis of an unregistered lease. Expiry of time in an unregistered lease which is not admissible in evidence does not attract Section 111(a) of the Transfer of Property Act. In those facts it was held that the tenant being a tenant holding over having continued in possession on the basis of an unregistered lease, notice u/s 106, T. P. Act was necessary. Said decision has no application to this case and on the facts of this case, defendant cannot be treated as a tenant holding over.

17. Pendente lite and future damages have not been granted by trial Court and plaintiff has not challenged the same. Trial Court decreed damages at the rate of Rs.2,000/- per year for six years. Plaintiff could not have claimed damages for more than three years in the suit. Accordingly, decree for damages is reduced and suit for damages at Rs.2,000/- per year for three years is decreed.

18. In the result, First Appeal is allowed in part. Plaintiff is entitled to costs of the suit and this appeal to the extent suit is decreed.