

(1972) 03 OHC CK 0021

In the Orissa High Court

Case No : Second Appeal No. 518 of 1967

Patta Mohapatrani and Others

APPELLANT

Vs

State of Orissa and Another

RESPONDENT

Date of Decision : 28-03-1972

Acts Referred:

Constitution of India, 1950 — Article 31A(2)
Orissa Estates Abolition Act, 1951 — Section 2, 5
Specific Relief Act, 1963 — Section 34

Citation : AIR 1972 Ori 248

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : D. Mohanty and P.C. Mohapatra, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—The plaintiffs are in appeal against the reversing decision of the learned Additional District Judge of Berhampur. They had sued for their title and possession of the property which is 19.37 acres shown in the schedule of the plaint. The learned Trial Judge gave them a decree while the lower appellate court dismissed their suit by reversing the decision of the trial court.

2. When this Second Appeal was placed before our learned brother Patra, J., he by order dated 23-9-1971 directed the case to be heard by a Division Bench.

3. According to the case stated in the plaint there are three revenue villages known as Kahakapur, Kaitha Binayakapalli and Khandadevuli. All these were initially one village known as Kahakapur which formed a part of the Biridi estate. The zamindar of Biridi by a zeraiti patta dated 1871 leased out the entire village of Kahakapur to one Balabhadra Tripathy, By then all the lands in the village were covered by forest, jungle and bushes. The lease envisaged improvement by the lessee. Balabhadra reclaimed a portion of the property and made it fit for cultivation. In terms of the lease he was to pay a Banjar cist of Rs. 120/- per

year to the estate. The zemindar of Biridi being in need of money had usufructually mortgaged this property with Balabhadra for a seven year period. In 1913. Balabhadra's son Ballav and other members of Balabhadra's family transferred the village along with all the lands therein to Baishnab Mohapatra under a registered sale deed dated 5-1-1913 for a consideration of Rs. 13,000/-. Baishnab was the father of the plaintiff No. 1. Baishnab reclaimed some more lands after 1913. He dug up tanks for storing water for cultivation. He also allowed different persons to construct their houses and remain in possession of portions of the property located in the village. Tanks, their bundhs. Dandas and the village site which were not in occupation of the tenants are really the property in suit now. It was alleged that the zamindar of Bobili purchased the Biridi estate and between the purchaser and the father of the plaintiff No. 1 there was a suit on the question of title to the property. On 12-1-1916, there was a compromise in terms whereof the plaintiff No. 1's father obtained recognition of his leasehold title to the half of the disputed property as specified in the compromise petition and the map appended thereto. The plaintiffs claimed that they were the exclusive owners in possession of the disputed property. In 1954, the record-of-rights were published wherein these properties were shown as Paramboke. With the vesting of the estate under the Orissa Estates Abolition Act (1 of 1952) the State of Orissa and its public officers started interfering with the plaintiff's enjoyment. The record of rights were erroneous and since they did not create any title and the plaintiffs' interest was not immediately in jeopardy, the plaintiffs had not taken any action to rectify the defect until their possession was interfered with by the Orissa Panchayat, the defendant No. 2, to whom it was alleged that the management of the tanks was transferred by the defendant No. 1. The plaintiffs, therefore, filed the suit for the reliefs indicated above.

4. The defendants 1 and 2 filed two separate written statements, but adopted almost a similar stand. It was contended that since the lands in dispute were Paramboke as per the record-of-rights and the estate vested on 1-6-1953, by operation of law as contained in Section 5 of the Orissa Estates Abolition Act the disputed property vested in the State of Orissa. The plaintiffs have no right, title or interest in the property and their suit is not maintainable. It was next contended that the plaintiff's had acquiesced in the title of the defendant No. 1 by various acts of theirs. It was said that trees on the disputed property were sold in public auction by the defendant No. 1 and no objection was raised against it-For making improvements to some of the tanks the plaintiff No. 2 had acted as a contractor under the defendant No. 2. When there was an encroachment proceeding and penalty was levied under Orissa Act 15 of 1954, plea of title was not raised and the plaintiff No. 1 got evicted from the property.

5. The learned trial Judge came to find that the plaintiffs had title to the property and were also in possession. He accordingly decreed the suit.

6. The defendants appealed and the learned Additional District Judge reversed the decree of the trial Court and dismissed the suit. He held that the plaintiffs

had failed to establish that their ancestors had dug the tanks. He further found that the lands stood recorded as Paramboke and the Grama Panchayat had made improvements. He also found that the plaintiff had not applied to the Collector for settlement of the lands with them after vesting. These findings were utilised for the reversal of the decree of the trial Court.

7. Both the Courts below, though one of them found in favour of the plaintiffs while the other decided in favour of the defendants, have failed to make a proper analysis of the case. Admittedly before the lease was granted in 1871, the property in suit along with the other lands of the village had formed part of the estate. The patta (Ext. 1) was on jeroiti basis. Reference to this document shows that the entire village was not made the subject-matter of lease. The inam portion was separated and the remaining part of the village was leased out. The annual cist was determined at a varying rate for the first five years and at a uniform rate in perpetuity thereafter. The lessee was entitled to dig tanks, reclaimed property by cutting down jungles, plant trees and be in possession as he desired. Thus in terms of the lease, the intermediary created a tenancy in favour of the lessee. By the sale deed of 1913 (Ext. 5) the leasehold interest was transferred to the plaintiff No. 1's father. On a reference to the sale deed it transpires that the leasehold interest as obtained by the permanent lease deed dated 13-3-1871 was being conveyed. There was no reference to tanks, Dandas, etc. in the sale deed. Exhibit 6 is the title deed of the plaintiffs. Then came the dispute between the plaintiff No. 1's father on one side and the transferee of the lessor's interest on the other. The compromise dated 12-1-1916 is Ext. 1. Ext. 7 is the survey map of the village Kahakapur which was made a part of the compromise of 1916. Allotments have been clearly indicated. In the map (Ext. 7) there is an endorsement to the following effect:--

"The lands mentioned above are to be divided into two equal parts assigning the northern part to the Biridi zamindar and the southern to the appellant Baishnab Mohapatra. In marking the division the whole lands are to be treated as one block, no notice being taken of wet, dry or paramboke. The result may be that the division may give one party more wet land than the other."

In Ext. 2 it has been clearly stated that out of the total area of 136.60 acres, 68.30 acres stood allotted to the share of Baishnab Mohapatra and a similar extent to the Raja of Bobili, the alienee from the original lessor. Under Ext. 7 the tanks have been given their names. The property in suit is correctable with reference to such names. Mr. Mohanty, the learned counsel for the appellants, had also placed before us a comparative table of the survey numbers of the old and new settlements. With reference to them it is clear that the property now sued for stood allotted in terms of the compromise to the share of Baishnab. The learned Government Advocate for the respondents did not seriously dispute this conclusion which by analysis we had come to in Court during hearing of the appeal.

8. The disputed property which was a part of the leasehold was no more a part of

the estate. The lessor's right was that of the intermediary, but possession vested in the lessee and the plaintiffs were thus not the holders of the intermediary interest. It is well settled that Orissa Estates Abolition Act has application only to estates as defined in the Act and in respect of the property which has been the subject-matter of a leasehold duly made under the law the Act does not have application. The plaintiffs were in the status of tenants with a right to hold land and were not intermediaries within the meaning of the term under the Estates Abolition Act. It was indicated by their Lordships of the Supreme Court in *Kumar Bimal Chandra Sinha Vs. State of Orissa*, .

"The Act was intended to abolish all proprietors, sub-proprietors, tenure-holders and under-tenure-holders, with a variety of names, but did not touch the interest of the raiyat. The same person, by transfer or by operation of law, might at the same time occupy different status in relation to land. He may be in respect of a particular area, which is geographically included in the estate, the proprietor. That land may be held by a raiyat not directly under a proprietor but under a tenure-holder, who holds directly under the proprietor. The proprietor may have acquired the interest of a raiyat. Thus the proprietor, in his capacity as the owner of the estate holds the entire estate, and he may have by purchase acquired the interest of a raiyat, paying rent for the raiyati interest to his immediate landlord, the tenure-holderThe appellants held the Paikpara estate as proprietors. They also appear to have purchased the properties in question comprising raiyati lands with certain buildings thereon from the raiyat. Hence the position in law is that though these lands with the buildings are situate geographically within the ambit of the appellant's estate, they are not part of the estate".

Though the leasehold in question was located within the estate it had really ceased to be a part of an estate for the purpose of abolition and the plaintiffs were not intermediaries within the meaning of Section 2(h) of the Estates Abolition Act.

9. The learned Government Advocate wanted to say that there were other recorded tenants of the village and the interest of the plaintiffs would really be that of an intermediary. The definition of "estate" given in the Constitution under Article 31-A (2) is wide, but the Orissa Estates Abolition Act has not adopted such a wide definition. A Bench of this Court in ILR (1971) Cut 425, (*A. Kameswaranama v. State of Orissa*) has observed,

"There is no longer any controversy that after the seventeenth Amendment of the Constitution, the expression "estate" has got a very wide connotation. It would be applicable only to those estate abolition laws of the States where a similarly wide definition has been expressly given in the statutory definition. In order to see whether the disputed properties would constitute an estate or not the definition given in the Constitution would be of no assistance unless a similar definition has been given in the Act".

The learned Government Advocate In fact did not make any serious attempt to

contend that the leasehold in question was liable to vest under the Estates Abolition Act.

10. He also contended that the plaintiffs could not have acquired the rayati right in these lands in view of the definition of "rayati land" in Section 3 (16) of the Madras Estates Land Act. We do not think there is any merit in this contention. The operation of the provision is not retrospective. Again the plaintiffs or their ancestors had dug the tanks on rayati land. Merely because tanks are dug on rayati lands, it is not the intention of the Act to change the nature of the land used as beds and bundhs of tanks.

11. It is true that as a consequence of vesting under the provision of Section 5 of the Estates Abolition Act lands of the type in dispute, namely, tanks, tank-beds, Dandas and other Paramboke lands would vest in the State, but such vesting would take place as an incidence of vesting only when these lands form part of an estate. If such lands are located within a leasehold which has been segregated from, the estate by creation of some interest other than an intermediary interest in accordance with law, there is no scope for vesting by operation of the Estates Abolition Act. The learned Appellate Judge clearly went wrong in holding that by operation of Section 5 of the Estates Abolition Act the properties stood vested in the State of Orissa.

12. The defendants had emphasised on the fact that subsequent to vesting the plaintiffs had accepted the title of the State. As instances of such conduct on the part of the plaintiffs, it has been shown that one of the plaintiffs acted as a contractor under the defendants for improvement of the property while another allowed himself to be evicted under the Prevention of Encroachment Act by even suffering penalty. It has also been pleaded and by evidence shown that the plaintiffs lay by while the defendants improved the property. Such conduct, if it were estoppel, might stand in the way of relief being granted to the plaintiffs, but the defendants have not so alleged and the courts below have not so found. Such conduct with reference to continuity of possession may be relevant, but there is no clear material to show that by the aforesaid acts of possession the plaintiffs have been kept out of the property for more than 12 years before suit. It would, therefore, follow that merely because under some mistaken impression one or the other of the plaintiffs had behaved in the manner indicated above, loss of title cannot be found therefrom.

13. The next question for consideration is the effect of the record-of-rights. These records were finally published sometime in 1954. The suit was instituted on 15-5-1964. It is well known that the settlement records neither confer nor extinguish title. If the plaintiffs have title otherwise to the property, the re-cord-of-rights which are assailed in this case cannot affect such title of theirs.

14. On the basis of some evidence on record it was contended that the lands in question were being used by others who have come to reside in the village. Mr. Mohanty, the learned counsel for the plaintiffs, does not dispute that fact. Such

persons are not parties to the litigation. It may be by long user certain rights in respect of use may have been prescribed by them in respect of the various items of the disputed properties. We would do well not to decide anything behind them affecting their right, if any, and would, therefore, leave that aspect of the matter here by saying that such persons who may have any such right to the disputed property are not affected by the decree now passed and they are free to use and enjoy the property in any manner they have been enjoying and are entitled to have their right determined without the least hindrance by our present determination, in the proper court as and when necessary.

15. It is, however, clear from the materials on record that the State of Orissa could not acquire title to the disputed property. The only manner in which such title is claimed to have been acquired is the process of abolition and we have already indicated at length that that process is not available for acquisition of the disputed property. The defendant No. 2, is a transferee of possession only from the defendant No. 1. As the defendant No. 1 did not acquire title it was certainly not entitled to transfer possession or management of some of the properties in dispute in favour of the defendant No. 2. It must, therefore, be concluded that neither of the defendants has any right, title or interest in the disputed property.

16. There has been an allegation of improvements to the disputed property at considerable expenses from public funds at the stage of trial. But no plea on such score was raised in the two written statements of the defendants. During hearing of the appeal the learned Government Advocate had, however, stressed upon this aspect of the matter saying that there was evidence of improvement. We find that there was no issue on the question and the matter had not been examined in the courts below. As we find that in the pleadings no foundation was laid for such claim, the oral evidence, if any should not have been admitted into the record. The courts below are right in not framing any issue on the question. The defendants did not intend to get themselves compensated for the alleged improvements and had, therefore, not laid claim therefor. We negative the plea of the learned Government Advocate that the improvements must be assessed and the defendants need be compensated.

17. An objection had been raised in the written statements regarding the maintainability of the suit. The bar u/s 34 of the Specific Relief Act was said to apply. The plaintiffs alleged that they were in possession. They sued for declaration of title and confirmation of their possession. In the setting of the litigation the reliefs were adequate and in fact no other relief which the plaintiffs were entitled to was omitted to be asked for. We do not see any justification for the conclusion of the learned Appellate Judge that the suit was bad u/s 34 of the Specific Relief Act.

18. On the analysis made above by us the only conclusion which we can reach is that the plaintiffs have title to the property and the defendants have none. We have also found that the plaintiffs are in possession of the property. We would accordingly hold that the plaintiffs were entitled to a decree as claimed. The

decree of the lower appellate court has, therefore, to be reversed and that of the trial court restored. The appeal is allowed. The plaintiffs shall have their costs throughout.

Panda, J.

19. I agree.