

(2009) 01 OHC CK 0066

In the Orissa High Court

Premnath Khanna ' Pramnath Khanna

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 06-01-2009

Acts Referred:

Evidence Act, 1872 — Section 115

Transfer of Property Act, 1882 — Section 43

Citation : AIR 2009 Ori 166 : (2009) 107 CLT 741 : (2009) 1 OLR 416 : (2011) 7 RCR(Civil) 1621

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.M. Das, J.—By virtue of registered sale deed dated 26.8.1997, the petitioner purchased land measuring Ac.0.55 decimals under Khata No.387 appertaining to Plot No.303/1502 corresponding to Sabik Plot No.484/1/1 under Sabik Khata No.9 situated in Mouza -Rourkela Town, Unit No.43 (previously mouza Durgapur) under Panposh Tahasil in the district of Sundargarh, from the opp.party No.5. It is the case of the petitioner that originally the disputed property was recorded in the name of one Rajib Panda in the Sabik Settlement R.O.R. as would be found in Annexure-5. Sudarsan Panda son of said Rajib Panda sold the case land to the father of the opp.party No.4, i.e., late Dwarika Das Atha on 22.6.1965. The said Dwarika Das Atha subsequently sold the land on 30.6.1971 to the opp.party No.5. It also transpires that the State instituted Brahmattar Mafi Case No.6/56-67 under the O.E.A. Act. Pursuant to the Press Note issued on 26.4.1964. The original owner-Sudarsan Panda and many other intermediaries filed a joint petition for settlement of the said land under Sections 6 and 7 of the O.E.A Act, which was allowed by order dated 30.12.1972. According to the petitioner, the land being settled with the ex-intermediary, who was the original owner, the subsequent sale deeds automatically were validated under Sections 43 of the T.P. Act. However, during subsequent settlement, the R.O.R. was finally published on 25.5.1981 recording the name of Dwarika Das Atha as the raiyat

but under Bebandobasta Status. The petitioner filed a revision under the Orissa Survey and Settlement Act before the Joint Commissioner of Land Records, who is the Joint Commissioner of Consolidation and Settlement, Sambalpur, for correction of the Record of Rights. The Joint Commissioner of Consolidation and Settlement by order dated 19.2.2006 passed in the revision petition numbered as Settlement Revision No.545 of 2005, dismissed the revision on the ground that the petitioner did not produce any document in support of his case. It appears from the said order that the petitioner relying upon the provisions of Section 43 of the Transfer of Property Act submitted that his name should be recorded in the Record of Rights, The learned Joint Commissioner of Consolidation and Settlement holding that Section 43 of the T.P. Act requires something more than what has been pleaded by the petitioner and further holding that the petitioner has not produced any document in support of his case, dismissed the said revision with the observation that the dispute can only be adjudicated upon by the civil Court.

2. The opp.parties 4 and 5 had no objection for recording the name of the petitioner in the Record of Rights. The petitioner being aggrieved by the order passed by the Joint Commissioner of Consolidation and Settlement, preferred W.P. (C) No.4631 of 2006 before this Court. This Court by its order dated 6.3.2007 after elucidating the facts of the case, came to the conclusion that the said impugned order dated 9.2.2006 passed in Settlement Revision Case No.545 of 2005 cannot be sustained and accordingly quashed the same. The matter was remitted back to the Joint Commissioner to hear the revision afresh and dispose of the same expeditiously after giving due opportunity of hearing to the parties and the petitioner was directed to produce all relevant records in support of his claim before the said Joint Commissioner of Consolidation and Settlement. The opp.party No.4 Dwarika Das Atha having expired in the meantime, this Court further directed that the revision, after remand, shall proceed against his son, who was impleaded in his place and the opp.party No.5.

3. Pursuant to the remand order passed by this Court, the Joint Commissioner reopened the revision case and issued notices to the parties concerned. The certified copy of the order sheet has been annexed to the writ petition as Annexure-4. From the same, it is disclosed that the case was posted to 18.4.2007 on which date, the opp.party - Nimush Atha appeared through his advocate and both the opp.parties gave consent to the claim of the petitioner. Hearing was concluded on 9.5.2007 and the matter was reserved for passing orders. By order dated 4.7.2007, the Joint Commissioner taking note of the grounds placed by the learned Counsel for the petitioner and on considering the settlement made u/s 6 and 7 of the O.E.A. Act in O.E.A. Case No.6/5 of 1966-67 and the submission of the petitioner that Section 43 of the T.P. Act applies to the facts of the case, ultimately concluded that the Bebandobasta case pending at the Tahasildar level is the right action taken by the Tahasildar so as to reach a finality. He further held that as the revision has been filed before the Bebandobasta case has been disposed of and it has been filed beyond the period

of limitation, the revision cannot be considered. With regard to the applicability of Section 43 of the T.P. Act, the Joint Commissioner held that the ingredients of Section 43 of the T.P. Act can only be examined in a proper Court of law. Holding thus, he disallowed the revision by dismissing the same. Being aggrieved by the said order, the petitioner has preferred the present writ petition for appropriate relief.

4. Mr. R.K. Mohanty, learned Counsel for appearing for the petitioner vehemently urges that the Joint Commissioner has acted contrary to law in holding that the Bebandobasta Case instituted before the Tahasildar is the right action taken on the M.S. Khata and the said case having not been finally disposed of, before the revision was filed, the revision petition has no significance. He further submitted that the conclusion that the revision cannot be entertained being barred by time and that the ingredients of Section 43 of the T.P., Act can only be established through proper Court of law are also erroneous.

5. The submissions made in support of the petitioner's case can be summarized as follows:

(a) u/s 43 of the Transfer of Property Act the sale by Sudarsan in favour of Dwarika and sale by him in favour of Om Prakash gets automatically validated. The benefit obtained by Dwarika by way of settlement in 1972 in Annexure-1 will automatically come to the benefit of the subsequent transferees who shall be held to be sthitiban tenants. Moreover, when the said transfer is done after the settlement the same gets automatically validated.

(b) The opp.party No.2 should not have directed the petitioner to approach the competent civil Court as law is well settled that any settlement made under the O.E.A. Act cannot be challenged in any other forum and jurisdiction of the civil Court is specifically barred u/s 39 of the O.E.A Act.

(c) When the petitioner in spite of all odds produced all materials and also explained the reason for his not giving the same at the right time, the opp.party No.2 should have considered the matter in its true prospective and should have passed appropriate order as per law without directing to approach the civil Court. Moreover, when other similarly placed persons, whose lands were settled under Annexure-1, got their R.O.R. under Annexure-11 series, the petitioner cannot be deprived of the same.

(d) The pendency of B.B. case is not of much significance because the lands having been settled in favour of the father of the opp.party No.4 and subsequently the others having got the benefit of the same, the petitioner cannot be deprived of the benefit accrued to him by virtue of order under Annexure-1.

(e) The opp.party No.2 should not have passed the impugned order under Annexure-4 holding that the revision petition is not maintainable because this Court while remanding the matter had only directed to scan the records and come to a finding whether the name of the petitioner is to be recorded or not.

Furthermore, the effect of Section 43 should have been considered by the opp.party No.2.

6. The moot question, therefore, which arises for consideration in the present case is as to whether the provisions of Section 43 of the T.P. Act should be applied to the facts of this case to hold that in view of the settlement made in favour of the vendor of Dwarika Das Atha under Sections 6 and 7 of the O.E.A. Act will automatically confer title to the subsequent transferees and as to whether the findings arrived at by the Joint Commissioner that the petitioner should approach the competent civil Court for establishing his title, can be sustained in view of the bar created u/s 39 of the O.E.A. Act.

7. For appreciating the above questions, it would be apt to quote Section 43 of the T.P. Act, which is as follows:

43. Transfer by unauthorized person who subsequently acquires Interest In property transferred. - Where a person (fraudulently or) erroneously represents that he is authorized to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this Section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

8. In support of his contention, Mr. R.K. Mohanty, learned Counsel for the petitioner relied upon the decision in the case of Fatechand Tarachand and Another Vs. Parashram Maghanmal, , Full Bench decision of the AHahabd High Court in the case of Parma Nand Vs. Champa Lal and Others, and the decision of the Allahabad High Court in the case of Jagat Narain and Another Vs. Laljee and Others, .

In the case of Parma Nand (supra), the Full Bench of the Allahabad High Court, considering Section 43 of the T.P. Act held that the vital difference between the representation referred to in Section 43 of the T.P. Act and the representation mentioned in Section 115 of the Evidence Act, is that while the representation u/ s 43 of the T.P. Act is a term of the contract or the transfer, the same is not necessarily so in the case of a representation mentioned in Section 115 of the Evidence Act. In the cases of Rajapakse v. Ferando AIR 1920 PC 216 and Tllakdharl Lal v. Khedan Lal AIR PC 112, the Privy Council held as follows:

Where a grantor had purported to grant an interest in land which he did not at the time possess but subsequently obtained, the benefit of his subsequent acquisition goes automatically to the earlier grantee, that is, it feeds the estoppel.

If a man who has no title whatever to property grants it by a conveyance which in form would carry the legal estate, and he subsequently acquires an interest sufficient to satisfy the grant, the estate instantly passes. In such a case there is nothing on which the second grant could operate in prejudice to the first.

9. u/s 43 of the T.P. Act, the transfer of the subsequently acquired property takes place automatically as in the English law. But it takes place not at the moment when the interest is acquired, but at the moment the transferee exercises the option that the interest shall stand transferred to him. This is the first contingency where the Indian law differs from the English law and the second one is that it does not apply the doctrine of feeding the estoppel so as to impair the rights of subsequent transferee in good faith for consideration without notice of the existence of the option in the prior transferee and both these deviations in the Indian law have no bearing upon the question whether the stage of knowledge of the first transferee is material. While considering the title of a transferee, when the transferor on the date of transfer for consideration, had no title over the property, it would be seen that where a representation is a term of the contract or of a transfer made for consideration the promisee or transferee need only rely upon the two doctrines, namely, the doctrine of the Common Law called "estoppel by deed" coupled with the doctrine of "feeding the estoppel" and the doctrine of Equity that "Equity treats that as done which ought to be done". Under both these doctrines knowledge on the part of the promisee or transferee that the transferor did not have the authority to transfer the property which he purported to transfer is immaterial and does not deprive of the benefit of the doctrines except when the contract or transfer is illegal or invalid. This equity creates a personal obligation which compels the transferor to perform his contract when he is able to do so on the acquisition of the subsequent interest. The Full Bench of Allahabad High Court took note of the decision in the case of *Hoiroyd v. Marshall* (1862) 10 ALC 191, where it was held that it is quite true that a deed which professes to convey property which is not in existence at the time is as a conveyance void at law simply because there is nothing to convey. So in equity a contract which engages to transfer property which is not in existence cannot operate as an immediate alienation because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time and he receives the consideration for the contract and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired.

10. The Bombay High Court in the case of *Fatechand Tarachand and anr.* (supra), referring to the decision in the cases of *Holroyd v. Marshall* (1861) 10 HLC 191 and *Collyer v. Isaacs* (1881) 19 Ch. D. 342 held that it is true that in India, the law does not recognize any distinction between legal estates and equitable estates, but the rule that a transfer of property which is to come into existence in future, operates upon the property when it comes into existence does not depend upon recognition of any distinction between legal and equitable estates. The rule is an illustration of a well known maxim "that equity regards that as done which ought to be done". The Courts in India are Courts which administer

equity as well as law, and the maxim would be regarded as applicable in India.

11. The Allahabad High Court again in the cases of Jagat Narain and Anr. (supra) applying the benefit of Section 43 of the T.P. Act, concluded that if a person professed to transfer the interest of a Bhumidhar in a land in which he had only the nontransferable interest of a Sirdar but he subsequently acquires in the land the interest of a Bhumidhar the benefit of the subsequent acquisition would go to the transferee, u/s 43 and the subsequently acquired interest of a Bhumidhar will be deemed as having passed to the transferee under the transfer in his favour.

12. The expression "property" in Section 43 does not mean, or at least does not necessarily mean, the physical object which is in popular language regarded as property but connotes interest in property, and if this is borne in mind there is no room for the argument that Section 43 applies only when the transferor had no interest in the property at all and not when he had an interest but it was not transferable.

13. From a plain reading of Section 43 of the T.P. Act and the interpretation of the said Section, it would be amply clear that applying the provisions of Section 43 of the T.P. Act to the facts of the present case, it is found that once the property in dispute was settled in favour of the vendor of Dwarika Das Atha, i.e., the father of the opp.party No.4 under Sections 6 and 7 of the O.E.A. Act, the petitioner, who is a subsequent transferee of the portion of the said property, acquired valid title to the same. The Joint Commissioner was, therefore, in error in holding that Section 43 of the T.P. Act and its ingredients can be established only before a proper Court of law. Section 43 of the T.P. Act is not required to be established but the benefit of the same automatically accrues in favour of the petitioner when settlement was made under Sections 6 and 7 of the O.E.A. Act in favour of the vendor Dwarika Das Atha.

14. Addressing the question as to whether the Joint Commissioner is correct in holding that in view of initiation of the bebandobasta case, the revision under the Survey and Settlement Act is incompetent and further holding that the question of applicability of Section 43 of the T.P. Act can only be considered by the competent civil Court, it would be seen that Section 39 of the O.E.A. Act creates a bar of jurisdiction of civil Courts in respect of any order passed under Chapters-II to VI or concerning any matter, which is or has already been the subject of any application made or proceedings taken under the said Chapters. Sections 6 and 7 of the O.E.A. Act occurs in Chapter-II thereof and, therefore, the bar u/s 39 squarely applies to an order passed on an application under Sections 6 and 7 of the O.E.A. Act. Law is also well settled that when the intermediary interest was abolished, the previously existing rights of the intermediary with whomsoever it rested came to an end. By a settlement made under Sections 6 and 7 of the O.E.A. Act, a new and independent title is acquired by the intermediary, which is not in any manner connected with or dependent upon passing of the title or otherwise that might have occurred due to operation of the O.E.A. Act. Thus, irrespective of the defects that might have existed in the title prior to the date of

abolition the intermediary acquires a valid title by virtue of the settlement obtained from the State Government. Section 39 of the Act is a clear bar for questioning the validity of the order of settlement by determining fair and equitable rent u/s 8A of the O.E.A. Act.

15. As it is an admitted case that the property was settled in favour of the vendor of Dwarika Das Atha in an application under Sections 6 and 7 of the O.E.A. Act, there cannot be any doubt that on such settlement, the petitioner, who is a subsequent transferee, acquired valid title to the property by operation of Section 43 of the T.P. Act. The Joint Commissioner was, therefore, in error in not allowing the revision petition filed by the petitioner.

16. In view of the above, the impugned order dated 4.7.2007 under Annexure 4 cannot be sustained and is accordingly quashed. The Tahasildar - opp. party No.3 is directed to record the purchased property of the petitioner in his name and issue the corrected record of rights to the petitioner as expeditiously as possible, preferably, within a period of one month from the date of production of the certified copy of this judgment by the petitioner before him.

17. The writ petition is accordingly allowed.