
(2008) 08 OHC CK 0111
In the Orissa High Court

Purna Chandra Behera

APPELLANT

Vs

Dibakar Behera and Others

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Orissa Land Reforms Act, 1960 — Section 22(1), 23

Citation : (2009) 108 CLT 463 : (2008) 108 CLT 463 : (2009) 2 OLR 996 Supp

Hon'ble Judges : B.S. Chauhan, C.J.;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This writ appeal has been filed against the Judgment and order of the Learned Single Judge dated 27.9.2007 passed in OJC No. 1320 of 1999 by which the Writ Petition filed by the Appellant challenging the order passed by the Sub-Divisional Officer, Puri - Respondent no. 3 in proceedings u/s 23 of the Orissa Land Reforms Act, 1960 (hereinafter referred to as the "Act") initiated at the instance of respondent Nos. 1 and 2, and orders of other Revenue Authorities confirming the same stand dismissed.

2. The facts and circumstances giving rise to this case are that Respondent Nos. 1 and 2 filed Misc. Case No. 96 of 1992 u/s 23 of the Act before the Revenue Officer, Puri for cancellation of sale deed dated 2.5.1972 executed in favour of the Appellant by their father without prior permission of the Revenue Officer. The said Misc. Case was allowed by the Revenue Officer vide Judgment and Order Dated 9.5.1983 (Annexure-1) and the sale deed dated 2.5.1972 was held to be null and void. Appellant was directed to restore possession to the said Respondents. Being aggrieved, the Appellant preferred appeal, i.e. OLR Appeal No. 12/ 83 which was dismissed vide Judgment and Order Dated 31.7.19:85 (Annexure - 2). The said Judgment and order of the Appellate authority was affirmed by the revisional authority in Revision No. 5/85 vide Judgment and Order Dated 28.1.1995 (Annexure-3), Against the said revisional order the Writ Petition was filed which has also dismissed vide Judgment and Order Dated

27.9.2007. Hence this appeal.

3. Before us, the Learned Counsel for the Appellant has agitated the sole ground that as notice was not served upon the transferor Judgment and orders impugned herein, being violative of principle of natural justice stood vitiated. Thus appeal deserve to be allowed.

4. On the other hand, Mr. P. Panda, Learned Additional Standing Counsel has vehemently opposed the appeal contending that the alleged sale deed being in contravention of the statutory provisions of Section 22(1) of the Act was void and therefore, the Judgment and orders passed by the Revenue Authorities do not require any interference. The said Judgments are in consonance with law. Provisions of Section 22(1) of the Act are mandatory and require strict adherence. Hence the appeal is liable to be dismissed.

5. We have considered the rival contentions of the parties and perused the record.

Section 22(1) of the Act reads as under:

22. Restriction on alienation of land by Scheduled Tribes-

(1) Any transfer of holding or part thereof by a raiyat, belonging to a Scheduled Tribe shall be void except where it is in favour of -

(a) a person belonging to a Scheduled Tribe; or

(b) a person not belonging to a Scheduled Tribe when such transfer is made with the previous permission in writing of the Revenue Officer:

Provided that in case of a transfer by sale, the Revenue Officer shall not grant such permission unless he is satisfied that a purchaser belonging to a Scheduled Tribe willing to pay the market price for the land is not available, and in case of a gift unless he is satisfied about the bona fides thereof.

(2) xxx xxx xxx (3) Except with the written permission of the Revenue Officer, no such holding shall be sold in execution of a decree to any person not belonging to a Scheduled Tribe.

xxx xxx xxx.

6. Section 23(1) empowers the revenue authority to initiate proceedings and evict a person in case he is found to be in possession in pursuance of a sale deed in contravention of the provisions of Section 22(1) of the Act. Section 23(2) provides for imposition of penalty if a person is found to be in possession of the land transferred in his favour in contravention of the provisions of Section 22(1) and such a penalty is to be determined taking into consideration the period during which he retained the illegal possession in pursuance of the void transaction.

7. While dismissing the writ petition, the learned Single Judge affirming the

findings recorded by the Court below has categorically held as under:

(i) The Revenue Officer is competent in law to examine correctness of the transfer deed in view of provisions of Section 23(1) of the Act.

(ii) By virtue of provisions of Section 22(1) of the Act the transaction is void.

(iii) The question as to whether in such a case the notice to the transferor is mandatory has been answered in negative.

(iv) As the transferor was not alive on the date of deciding the case by the Writ Court the question of remand could not arise.

8. Provisions of Section 22(1) are mandatory in nature and any transaction entered in contravention thereof is void ab initio. Non-observance of the said provisions attracts dispossession and requires restoration of the property to the transferor or his legal assignee and further provides for imposition of penalty depending upon the tenure during which he held possession of the land illegally.

9. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

10. In *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, the Supreme Court laid down that law which creates public duties is directory but if it confers private rights it is mandatory. Relevant passage from this Judgment is quoted below:

It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done.

11. A Constitution Bench of the Hon'ble Supreme Court, in *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya*, considered the issue and held as under:

For ascertaining the real intention of the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is

avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

12. In *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, ; and *State of Mysore and Others Vs. V.K. Kangan and Others*, , whether a provision is mandatory or directory, would, in the ultimate analysis, depends upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

13. In *Sharif-ud-din Vs. Abdul Gani Lone*, , the Hon''ble Supreme Court, while considering the provisions of Sub-Section (3) of Section 89 of the J&K Representation of People Act, 1957, held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory. The Apex Court held as under:

If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory. Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow.

14. Similar view has been reiterated in AIR 1972 1935 (SC); *State of Mysore and Others Vs. V.K. Kangan and Others*, ; *Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others*, ; *Dalchand Vs. Municipal Corporation, Bhopal and Another*, ; *Ganesh Prasad Sah Kesari and Another Vs. Lakshmi Narayan Gupta*, ; *B.P. Khemka Pvt. Ltd. Vs. Birendra Kumar Bhowmick and Another*, ; *Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others*, ; *Lakshmanasami Gounder Vs. Commissioner of Income Tax , Selvamani and Others*, ; *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat*, ; *Collector of Customs, Calcutta Vs. Tin Plate Co. of India Ltd.*, ; *Dinkar Anna Patil and Others Vs. State of Maharashtra and Others*, ; *Shashikant Singh Vs. Tarkeshwar Singh and Another*, ; *Balwant Singh and Others Vs. Anand Kumar Sharma and Others*, ; *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, ; *Chandrika Prasad Yadav Vs. State of Bihar and Others*, ; *Kailash Vs. Nanhku and Others*, ; *Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others*, ; and *Dove Investments Pvt. Ltd. and Others Vs. Gujarat Industrial Inv. Corporation Ltd. and Another*, .

15. in *Rubber House Vs. Excellsior Needle Industries Pvt. Ltd.*, the Hon''ble

Supreme Court considered the provisions of the Haryana (Control of Rent & Eviction) Rules, 1976, which provided for mentioning the amount of arrears of rent in the application and after placing reliance upon large number of judgments, including *Bhikraj Jaipuria v. Union of India* AIR 1932 SC 113; *K. Kamaraja Nadar Vs. Kunju Thevar and Others*, ; *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, ; *Ajit Singh and Others Vs. State of Punjab and Another*, , the provision was held to be directory though the word "shall" has been used in the statutory provision for the reason that non-compliance of the rule, i.e. non-mentioning of the quantum of arrears of rent did involve no invalidating consequence and also did not visit any penalty.

16. In *Shri B.S. Khurana and Others Vs. Municipal Corporation of Delhi and Others*, , the Hon"ble Supreme Court considered the provisions of the Delhi Municipal Corporation Act, 1957, particularly those dealing with transfer of immovable property owned by the Municipal Corporation. After considering the scheme of the Act for the purpose of transferring the property belonging to the Corporation, the Court held that the Commissioner could alienate the property only on obtaining the prior sanction of the Corporation and this condition was held to be mandatory for the reason that the effect of non-observance of the statutory prescription would vitiate the transfer.

17. In *State of Haryana and Another Vs. Raghubir Dayal*, , the Supreme Court has observed as under:

The use of the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word "shall" prima facie ought to be considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word "shall", therefore, ought to be constructed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word "shall" as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and proscribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory.

18. In *Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, , the Hon"ble Apex Court held that where "the imperative language, the beneficent purpose and importance of the provisions for efficacious implementation of the general scheme of the Act, all unerringly lead to the conclusion that they were intended to be mandatory, neglect of any of those

statutory requisites would be fatal."

19. The law on this issue can be summarised that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed. But the circumstance that Legislature has used the language of compulsive force is always of great relevance and in the absence of anything contrary in the context indicating that a permissive interpretation is permissible, the Statute is to be construed as peremptory.

20. Validity of the provisions of Section 22 of the Act has been upheld by a Division Bench of this Court in *Ram Chandra Swain v. Sub-Divisional Officer, Sadar, Cuttack and Ors.* 38 (1972) C.L.T. 980, observing that the restriction so imposed are not unreasonable. There is no absolute ban on alienation. The restriction is more or less regulatory & power is conferred on a public officer even to permit alienation under the given circumstances. The evil which is sought to be remedied by imposition of the restriction is the miserable economic condition of the backward Scheduled Tribes and Scheduled Castes. It cannot be held to be in interest of the general public to allow any class of persons to remain exploited for ever & thereby permit seeds of discontent to originate & grow.

21. In *Jadumani Darji v. Kishanlal Bhagaban Das Firm and Ors.* 72(1991) C.L.T. 634, this Court examined a case where the application for permission had been filed but the sale deed was executed and registered prior to grant of sanction. The Court held that the sale deed was void for want of permission from the Revenue Officer as the property had been alienated by a Scheduled Tribe person in favour of a non-Scheduled Tribe, the provision of Section 22(3) was attracted. A similar view has been taken by a Division Bench of this Court in *Baidhar Behera v. The Special Officer, O.L.R., Central Division and Ors.* 1990 (I) OLR 369.

22. A Division Bench of this Court in *Karunakar Gond and Another Vs. Pitabas Sahu and Others*, held that the Revenue Officer while granting permission should be satisfied that the purchaser belongs to Scheduled Tribe and willing to pay the market price. The transfer without complying the provisions is null and void. The Court further held that it is a social legislation for protection of weaker Sections of the society and therefore requires strict adherence.

23. In *Satyabhama Pandey v. Bhagirathi Jaipuria and Ors.* 1988 (II) OLR 420, this Court held that in view of the provision of Section 22(3), sale deed in execution of a decree of a Civil Court, in case found to be in contravention of statutory provisions of Section 22 of the Act, the transaction will be void. While deciding the said case, reliance had been placed on the Division Bench Judgment of this Court in *Petambar Pujari Vs. Bhikari Meher and Another*, .

24. In *Somanath Sipka v. State of Orissa and Ors.* 1984 (I) OLR 805, this Court held that even the recovery in view of the certificate proceedings under the Orissa Public Demands Recovery Act, the sale deed cannot be executed in

contravention of the provision of Section 22(3) of the Act for the reason that such proceedings are in the nature of execution proceedings of a decree.

25. Void has been defined as: ineffectual; nugatory; having no legal force or legal effect: unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid. (Vide Black's Law Dictionary). "Void" means a contract entirely devoid of legal effect or it is devoid of main result contemplated. In *Smt. Kalawati Vs. Bisheshwar*, , the Apex Court held that "void" means non-existent from its very inception and a ban against its recognition. It also means merely a nullity and may be ignored even in collateral proceeding as if it never were. "Void" does not have any legal force or effect, the validity of which may be ascertained by any person whose rights are affected at any time or at any place directly or indirectly. "Void" means- without any legal force, effect or consequence; invalid; null; worthless; sipher; useless and ineffectual. [Vide *Nutan Kumar and others Vs. IInd Additional District Judge, Banda and others*,].

26. In *State of Kerala Vs. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and others*, , the Apex Court held that the word "void" has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity depending upon the gravity of infirmity as to whether fundamental or otherwise. A thing which is found non-est & does not require to set that aside though it is sometimes convenient to do so, and a void order does not require setting aside. (Vide *Suresh Chandra v. State of West Bengal AIR 1936 Cal. 110*).

27. Admittedly no permission had been taken from the Revenue Officer prior to execution of the sale deed. The transaction being in violation of law is void.

28. We do not find any force in the submission of the Learned Counsel for the Appellant that in absence of notice to the transferor the orders of the revenue authorities stood vitiated for the reason that the Appellant has not been able to explain what is prejudice caused to him in absence of notice to the transferor.

29. Unless in a given situation the aggrieved party makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/inquiry/selection/result. (Vide *Jankinath Sarangi Vs. State of Orissa*, ; *Sunil Kumar Banerjee Vs. State of West Bengal and Others*, ; *Major G.S. Sodhi Vs. Union of India (UOI)*, ; *Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.*, ; *Krishan Lal Vs. State of Jammu & Kashmir*, ; *Rajendra Singh Vs. State of Madhya Pradesh and others*, ; *State Bank of Patiala and others Vs. S.K. Sharma*, ; *S.K. Singh Vs. Central Bank of India and Others*, ; *Union of India and Ors. v. IC-14827, Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827)*, ; *State of U.P. Vs. Shatrughan Lal and Another*, ; *State of U.P. Vs. Harendra Arora and Another*, ; and *Debotosh Pal Choudhary Vs. Punjab National Bank and Others*,).

30. In *State of A.P. Vs. Thakkidiram Reddy and Others*, , the Apex Court while dealing with a similar issue relied upon its earlier Judgment in *Willie (William)*

Slaney Vs. The State of Madhya Pradesh, , wherein it has been observed that in judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given full and fair chance to defend himself, and rejected the contention that for omissions and errors in the charge, the trial stood vitiated.

31. In the instant case, Learned Counsel for the Appellant has not been able to point out what is the prejudice caused to the Appellant and under what circumstances the Judgment and Order of the Revenue Authorities could stand vitiated, if no prejudice has been caused to him.

32. The case requires to be examined from another angle also. The Appellant knowing well as what was the statutory requirement had entered into a void transaction. He is disentitled to claim any protection from the Equity Court.

33. A person alleging his own infamy cannot be heard at any forum, what to talk of a Writ Court, as explained by the legal maxim "*allegans suam turpetudinem non est audiendus*". If the Petitioners have committed a wrong in occupying the public land they cannot be permitted to take the benefit of their own wrong. (Vide G.S. Lamba and Others Vs. Union of India (UOI) and Others, ; Narender Chadha and Others Vs. Union of India and Others, ; Ashok Kapil Vs. Sana Ullah (Dead) and Others, ; & T. Srinivasan Vs. T. Varalakshmi (Mrs), .) and this concept also stands explained by the legal maxims "*Commodum ex injuria sua nemo habere debet*"; & "*nullus commodum capere potest de injuria sua propria*".

34. In view of the above, we are of the considered opinion that sale deed executed in favour of the appellant being in contravention of the mandatory provisions of the Act is void. Appellant cannot be permitted to take advantage of mischief played by himself, rather he disentitled himself for any equitable relief. Non-issuance of notice to the transferor has not caused any prejudice to him.

Appeal lacks merit and is accordingly dismissed.

B.N. Mahapatra, J.

I agree.