

(2001) 11 OHC CK 0023
In the Orissa High Court
Case No : O.J.C. No. 691 of 2001

Raghabendra Bose and Others	Vs	APPELLANT
State of Orissa and Others		RESPONDENT

Date of Decision : 05-11-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Succession Act, 1925 — Section 276

Citation : (2002) 93 CLT 127

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : R.K. Mohanty and K.K. Mishra, for the Appellant; P.K. Routray, P.R. Sutar, M.R. Dash, R.K. Rout and N.K. Deo, for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—This writ petition is directed against an order passed by the Revenue Divisional Commissioner, Central Division, Cuttack, O.P. No. 2 in Misc. Case No. 7 of 2000 filed by O.P. Nos. 4 and 5 thereby allowing the prayer for their substitution in place of the deceased-appellant Asit Kumar Ghosh in Khasmahal Lease Appeal No. 2/94 and condoning the delay in filing the application and setting aside the order of abatement, vide, annexure-8. According to the petitioners, the aforesaid order in Annexure-8. was passed by the R.D.C in a perfunctory manner and ex parte without affording the petitioners and opportunity of hearing.

2. The brief facts, as the averments made in the present writ petition tend to reveal, are that on 2.5.1904 the disputed property, which is situated in Puri town, was leased out in favour of one Ray Hariballav Bose Bahadur by the Collector, Puri, for a period of thirty years. In a family settlement, the disputed property fell to the share of Hariballav's brother, Sadhu Prasad Bose, who was succeeded by his only son Nityananda Bose. By a registered award deed dated 25.1.1922, Nityananda created a private trust in respect of the disputed property

along with other properties in favour of his brother-in-law, Sidheswar Ghosh, and appointed him as the trustee. After becoming the trustee, the said Sidheswar sold away the property to himself without the knowledge of Nityananda Bose by virtue of a sale deed dated 25.7.1922, which was registered at Calcutta, in which Sidheswar was shown as vendor as well as vendee. After the death of Sidheswar, Nityananda created another trust in favour of one Akshya Kurnar Ghosh, the younger brother of late Sidheswar, as per the registered deed dated 8.5.1930 in respect of the disputed property and some other properties. On 15.10.1931 Akshya died leaving behind his last will and testament dated 3.8.1931 by appointing one Pravash Chandra Mallick and Dulal Chand Aich as trustees and executors. By virtue of the aforesaid last will and testament, Pravash Chandra and Dulal Chand managed the properties of Akshya as well as the properties of Nityananda. The lease in respect of the present disputed property expired on 1.5.1934 and Pravash and Dulal Chand applied for renewal of the lease before the collector, Puri, in the capacity of trustees and executors of the estate of the late Akshya and, according to the petitioners they had suppressed the fact that they were the trustees to the estate of Nityananda. On 21.12.1940 the collector, Puri, granted renewal of the lease and executed the lease deed dated 21.12.1940 in favour of Pravash and Dulal as trustees to the estate of late Akshya with effect from 2.5.1934 for a period of thirty years expiring on 1.5.1964.

In the year 1946, the widow of late Akshya adopted Asit Kumar Ghosh as her son, who, after attaining majority, filed a suit in the Calcutta High Court against Pravash and Dulal for relinquishment from trusteeship and executorship. On 10.8.1965 the Tahasildar, Puri, initiated a suo motu Balu Lease Renewal Case No. 45 of 1965-66 and directed the Revenue Inspector, Sadar, Puri, to ask the lessee for filing of renewal application by 18.10.1965. On 25.12.1965 Asit Ghosh filed an application for renewal of the aforesaid lease and the said lease was again renewed for a further period of thirty years with effect from 2.5.1964 in the name of Asit Ghosh.

After expiry of the lease in the year 1994, Asit Ghosh again applied for renewal of the lease and at this point of time the petitioners came to know about the aforesaid act done by Akshya behind their back and filed a cross-objection before the Collector with a prayer to renew the lease of the disputed property in their favour and prayed for dismissal of the application of Asit Ghosh, on several grounds including the one that Akshya was trustee in respect of the disputed property of Nityananda and the property reverted back to Nityananda's family, i.e., the original creator of the trust.

In the meantime, as stated by the petitioner, the Calcutta High Court declared the trust of Nityananda to have ceased in the year 1974 and Asit's right, if any, stood extinguished. The Collector, Puri, after hearing both the parties, rejected the prayer of Asit and renewed the lease of the disputed property in favour of the petitioners for a period of thirty years in Balu Misc. Case No. 2/94 by his order dated 27.8.1994. On being aggrieved, the said Asit filed an appeal before the

R.D.C - O.P. No. 2 in Khasmahal Lease Appeal No. 2/94 during the pendency of which Asit died leaving behind an unregistered will in favour of O.P. Nos. 4 and 5, namely, Sunil Krushna Ghosh and Pradeep Kumar Ghosh, and one Pallav Kumar Banerjee, who is stated to be dead. The executors of late Asit Kurnar Ghosh as per the alleged will claimed for substitution in place of the appellant- Asit Kumar Ghosh before O.P. No. 2 in the aforesaid appeal. Their prayer was rejected by O.P. No. 2 by order dated 10.4.1996 and the appeal was dropped. At this point of time, one Manju Mohanty claiming herself to be the registered power of attorney of the executors of Late Asit Kumar Ghosh, i.e., O.P. Nos. 4 and 5, filed a writ petition being O. J.C. No. 3672/1996 in this court challenging the appellate order dated 10.4.1996 passed by O.P. No. 2. The writ petition was disposed of on 27.10.1997 upholding the appellate order dated 10.4.1996 passed by O.P. No. 2. The executors of Asit Kumar Ghosh preferred an appeal being S.L.P (C/ No.23595/ 96 in the apex Court and the same was also dismissed as withdrawn.

It is worthwhile to mention here that in the meantime on 11.9.1996 the petitioner applied before the Tahasildar, Puri, for permanent settlement of suit property under the Orissa Government Land Settlement Act, hereinafter referred to as the O.G.L.S. Act, which was registered as.B.P.L case No. 43/96.

Further, the said executors of late Asit Kumar Ghosh also filed an application u/s 276 of the Indian Succession Act being P.L.A 257/1997 before the Calcutta High Court for grant of Probate in respect of the last will of late Asit Kumar Ghosh which, according to the petitioners, was allowed by the Calcutta High Court. While the matter stood thus, one Smrutirani Miter filed another substitution petition through her power of attorney Manju Mohanty in Khasmahal Lease Appeal No. 2./1994 for her substitution claiming herself to be sister of late Asit Kumar Ghosh, on which the R.D.C directed the Collector to make an enquiry regarding the claim of aforesaid Smrutirani Miter that she is the sister of Asit Kurnar Ghosh. The present petitioners challenged the aforesaid order of the R.D.C in O.J.C. No. 1422 of 1999 in which this court by order dated 30.3.1999 directed stay of further proceeding regarding the enquiry. Thereafter Manju Mohanty, who was claiming herself to be the power of attorney of Asit Kumar Ghosh as well as the executors of Asit Kumar Ghosh, forcibly evicted the present petitioner No.1 from ground floor of the disputed property for which the petitioners filed a petition before the Collector to take khas possession of the disputed property in exercise of his power under Clause 20 of the Bihar and Orissa Estate Manual tilt a final decision is taken in Balukhand Lease Case No. 43 of 1996 in his favour. According to the petitioners, the action of the police in forcibly evicting Petitioner No.1 from the disputed property was challenged in O.J.C No.12662/1999 and during the pendency of the aforesaid writ petition, Collector, Puri, by his order dated 21.10.1999, after hearing the parties, directed the Tahasildar to take Khas possession of the disputed building and the said order was challenged by Manju Mohanty in O.J.C . No. 13175/1999 in this Court. This court while dismissing the writ petition by order dated 26.11.1999, which is annexed to the present petition as Annexure 3, observed in para 5 as follow :

"5. As it stands now, the lease in respect of the disputed property stands renewed in favour of opposite party No. 5 his brother and mother. So far as the petitioner is concerned , as already noted, she claims to be the power-of-attorney-holder of Asit Kumar Ghosh who admittedly has in the meantime died in November, 1994. After his death, the power-of-attorney, if any, in favour of the petitioner does not further subsist. One Smritirani, claiming to be the sister of Asit Kumar Ghosh has opened another front of litigation. We may note that if the petitioner is a stranger to the disputed property, Smritirani is a greater stranger. "

The aforesaid order in Annexure-3 was challenged in SLP (C) No. 17798/1999 and the apex Court dismissed the said SLP and upheld the order of this Court.

On 2.2.2000 petitioner No. 1 filed a petition before the Collector for restoration of possession over the disputed property and disposal of Balu Permanent Lease Case No.43 of 1996, vide Annexure-4. As the matter was delayed and the application for restoration of possession was not disposed of by the Collector, petitioner No. 3 filed a writ petition in O.J.C. No. 6630/2000 praying, inter alia, for a direction to the Collector, Puri, for finalisation of the petitions in respect of the disputed property and this court by order dated 1.8.2000 (Annexure-5) without expressing any opinion on the contentions raised, directed as follows :

"..... I direct the collector, Puri to dispose the Balukhand Permanent Lease Case No.43 of 1996 along with other ancillary applications by 15th September, 2000. It would be open to the petitioner to raise all contentions before the Collector. It goes without saying that as long as the property under the possession of the Govt. appropriate steps for maintenance shall be taken. "

When ultimately the aforesaid order was not complied with, petitioner No. 3 filed a petition in O.C.M. No. 615/2000 . In the meantime, the Collector has passed the order in favour of the petitioners and lease deed has been executed and presented for registration, vide Annexure-7. At this juncture, O.P. Nos. 4 and 5 filed a petition before the R.D.C - O.P. No. 2 for their substitution basing upon the decree passed in a probate proceeding in P.L.A. No. 257 of 1997 along with a petition for condonation of the delay and for setting aside the order of abatement. The petition for substitution was registered as Misc. Case No. 7 of 2000 on the file of O.P. No. 2. O.P. No. 2 by an ex parte order passed on 16.11.2000 allowed the misc. Case filed by O.P. Nos. 4 and 5 and restored Khasmahal Lease Appeal No. 2/94 and condoned the delay of four years. This order in Annexure-8 is under challenge in the present writ petition.

3. According to Shri P. K. Routray, learned counsel appearing for O.P. Nos. 4 and 5, the submissions of the petitioners are not tenable because the sale by the trustee to the administrator on 25.7.1922 has not been challenged by the petitioners in any court of law and the sale was affected for payment of debt on the Nityananda Bose's estate and for preserving other properties. Therefore, according to O.P. Nos. 4 and 5, the petitioners contention that the sale is invalid , inoperative and void cannot be accepted . That apart, it is vehemently argued

that the ancestors of Asit purchased the land, mutated their names, lease was renewed in their favour, R.O.R . was published in their favour and, therefore, the application for renewal and the subsequent action of the R.D.C in re-opening the matter is legal and justified. At the same time, in the counter affidavit it is also contended that after the probate of the will, the property has come to the hands of O.P. Nos. 4 and 5 and the same has been mentioned in the letter of administration and, according to O.P. Nos. 4 and 5 , though the property was transferred in the year 1922 and subsequently on the strength of sale deed mutation was done in the name of the ancestors of Asit Kumar Ghosh and after their death the lease was renewed in the name of Asit Kumar Ghosh, who made an application for permanent settlement but the Collector illegally renewed the lease in the name of the petitioners which is challenged in Balu Khasmahai Lease Appeal No. 2/94 before the R.D.C passed the impugned order in Annexure-8 condoning the delay and setting aside the abatement and restored Khasmahai Lease Appeal No. 2/94, which is under challenge in this writ petition.

4. Admittedly, as it appears from the notes of submissions so filed by both the parties, the R.D.C has not heard both the parties and passed an ex parte order. But the fact remains that the impugned order of the R.D.C. only facilitates re-opening of the Khasmahai Lease Appeal No. 2/94 which was dropped since 1996. At this stage one other side of the case should not be overlooked. That is the initiation of proceeding under the provisions of the O.G.L.S. Act registered as B.P.L Case No. 43/96, wherein the Collector has settled the land in question on permanent basis in favour of the petitioners as per the orders passed in O.J.C. No. 6630/2000, the relevant portion of which has been quoted in the foregoing paragraph. So, no fruitful purpose would be served if the K. L. appeal is re-opened and allowed to continue except dragging the litigation for years to come. While passing the impugned order, the R.D.C has not taken all the above mentioned aspects into consideration and condoned the delay of four years without any rhyme and reason. Apart from that the R.D.C. went one step ahead by passing the order of status quo, which is clearly contrary to the order passed in O.J.C. No. 6630/2000. Therefore, the impugned order in Annexure-8 fails to withstand the judicial scrutiny and is liable to be set aside. Accordingly, the writ petition is allowed, the impugned order is quashed, and the Collector is directed to proceed with Balukhand Permanent Lease Case No. 43 of 1996 in accordance with law and in terms of the order of this Court passed in O.J.C No. 6630/2000, and dispose of the same within three months of receipt of this order. No cost

5. Writ petition allowed.