

(1975) 01 OHC CK 0017
In the Orissa High Court
Case No : Second Appeal No. 233 of 1971

Sailabala Baxi

APPELLANT

Vs

Johanas Bissoi and Others

RESPONDENT

Date of Decision : 06-01-1975

Acts Referred:

Constitution of India, 1950 — Article 341
Orissa Scheduled Areas Transfer of Immovable Property (by Scheduled Tribes)
Regulations, 1956 — Section 2

Citation : AIR 1975 Ori 216

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : P.C. Mohapatra and D. Mohanty, for the Appellant; Y.S.N. Murthy and S.P. Raju, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Defendant No. 1 is in second appeal against the affirming decision of the learned District Judge, Koraput in a suit for title, recovery of possession or alternatively for recovery of the consideration money paid for the sale.

2. Defendant No. 1, plaintiff alleged, sold the land covered by plots numbers 267, 238, 239 and 482 appertaining to khata No. 137 of village. Kenduguda to plaintiff under a registered sale deed dated 31-12-1962 (Ext. 1) for a consideration of Rs. 1,000/-. During the recent settlement operations, plaintiff claimed patta on the strength of his title and possession. Defendants 2 to 6 contested plaintiffs claim on the allegation that they were in possession before plaintiff got into possession and their surrender to defendant No. 1's father-in-law for arrears of revenue was invalid and contrary to the provisions of Orissa Regulation 2 of 1956. The final record-of-rights was published in the names of defendants 2 to 6. After receiving the record of rights, defendants 2 to 6 forcibly entered into the property on 27-10-1965 and cut away the standing crop. A proceeding u/s 145 of the Code of Criminal Procedure was initiated which

terminated in favour of the defendants. Plaintiff thereafter filed the suit on 8-7-1967.

3. Defendant No. 1 took the stand that plaintiff knew that the other defendants were not able to pay the dues and had given up cultivation and relinquished the land in favour of the land-holder Binayak Baxi and plaintiff had also made due enquiries and had come to learn that defendant No. 1 as pattadar was in possession of the land. Plaintiff had made due enquiries and was satisfied about the defendants' title and thereafter had entered into the sale transaction. According to defendant No. 1, Orissa Regulation 2 of 1956 had no application because defendants 2 to 6 are not members of the Scheduled Tribes.

Defendants 2, 3 and 6 who entered contest in a joint written statement took the stand that defendant No. 1 is the daughter-in-law of Binayak Baxi, the ex-intermediary of the inam village. Defendant No. 1 was not the pattadar of the suit property and had no right, title or interest to convey to plaintiff. The contesting defendants were Bhotras by caste and, therefore, belonged to the scheduled tribes and were entitled to the protection of Regulation 2 of 1956. The disputed property was never in khas possession of the ex-intermediary and the unregistered deed of relinquishment from the second defendant was invalid in law because no permission had been obtained as envisaged under the aforesaid Regulation. Even if there were a valid relinquishment, the fresh settlement had to be with the necessary permission; otherwise it is bound to be affected in view of the provisions of the Regulation. Defendants 4 and 5 laid no claim to the property.

4. The learned Trial Judge found that the inami estate vested with effect from 1-7-1954 under the provisions of the Orissa Estates Abolition Act; Binayak had no title to the disputed property and, therefore, defendant No. 1 acquired no title under the patta in her favour. While refusing to declare the title of plaintiff, the learned Subordinate Judge gave a decree for refund of the consideration money together with interest. He further recorded a finding that defendants 2 to 6 were Bhotras -- a community covered by Orissa Regulation 2 of 1956.

5. The learned District Judge in appeal came to hold that the inamdar continued to have title to the property until 1-7-1963 on the basis of the compromise (Ext. K). He further found that defendants 2 to 6 were members of the Scheduled Tribes and, therefore, the Orissa Regulation had application to them. In the absence of the requisite permission the learned Appellate Judge held in agreement with the learned Subordinate Judge that the relinquishment under Ext. B by the second defendant in favour of the inamdar Binayak was invalid. He further found that the patta in favour of defendant No. 1 by Binayak was contrary to Section 5 of the Regulation as there had been no requisite permission and accordingly defendant No. 1 obtained no title to the property. Accordingly he affirmed the decree of the learned Subordinate Judge. This affirming decree is impugned in second appeal.

6. Three contentions have mainly been raised on behalf of the appellant:

(1) Defendants 2 to 6 are not members of the Scheduled Tribes and the finding reached in the courts below is contrary to law;

(2) Even if they are members of the Scheduled Tribes, Section 5 of the Regulation has no application to the facts of the case; and

(3) The order of refund of the consideration money is unwarranted.

7. Contention No. 1: -- Defendants 2, 3 and 6 in their written statement said that they were Bhotras by caste and were "covered by Scheduled Tribes as contemplated by the Constitution of India and Regulation 2 of 1956 of Orissa". Plaintiff as P. W. 1 stated:--

"Defendants 2 to 6 are Bhotras by caste and they are of Scheduled Tribes.....

Defendant No. 1 did not examine herself, but her father-in-law was examined as D. W. 1. He did not lead any evidence in support of the plea that defendants 2 to 6 were not members of the Scheduled Tribes. The other defendants led evidence to support the contention that they were Bhotras and belonged to the Scheduled Tribes.

Both the courts below have come to find that these defendants (2 to 6) are Bhotras. u/s 2 (e) of the Regulations, "Scheduled Tribes" shall mean "the Scheduled Tribes specified in respect of the State of Orissa in the Constitution (Scheduled Tribes) Order, 1950", and in the said Order, so far as the State of Orissa is concerned, "Bhottada" or "Dhotada" occurring as Item No. 5 in the list declares members of the said community to be a Scheduled Tribe.

Learned counsel for the appellant relies upon certain decisions of the Supreme Court. In the case of Parsram and Another Vs. Shivchand and Others, , the court approved the earlier decisions in the case of B. Basavalingappa Vs. D. Munichinnappa, and in the case of Bhaiyalal Vs. Harikishan Singh and Others, . In B. Basavalingappa Vs. D. Munichinnappa, , it had been said:--

".....,... Wherever one caste has another name it has been mentioned in brackets after it in the Order, Therefore, generally speaking, it would not be open to any person to lead evidence to establish that caste B is part of Caste A notified in the order."

In the second case Bhaiyalal Vs. Harikishan Singh and Others, , the court held:--

"....., the plea that the Dohar caste is a sub-caste of the Chamar caste cannot be entertained in the present proceedings in virtue of the Constitution (Scheduled Castes) Order, 1950. In order to determine whether or not a particular caste is a scheduled caste within the meaning of Article 341, one has to look at the public notification issued by the President in that behalf. In the present case, the notification refers to Chamar, Jatav or Mochi and so in dealing with the question in dispute between the parties, the enquiry which the Election Tribunal can hold is whether or not the appellant is a Chamar. Jatav or Mochi. The plea that though the appellant is not a Chamar as such, he can claim the

same status by reason of the fact that he belongs to the Dohar caste which is a sub-caste of the Chamar caste, cannot be accepted. It appears to us that an inquiry of this kind would not be permissible having regard to the provisions contained in Article 341."

Dealing with the point raised in Pars-ram's case (AIR 1969 SC 597), the court held:--

"These judgments are binding on us and we do not therefore think that it would be of any use to look into the gazeteers and the glossaries on the Punjab castes and tribes to which reference was made at the Bar to find out whether mochi and chamar in some parts of the State at least meant the same caste although there might be some difference in the professions followed by their members, the main difference being that Chamars skin dead animals while Mochis do not. However that may be the question not being open to agitation by evidence and being one the determination of which lies within the exclusive power of the President, it is not for us to examine it and come to a conclusion that if a person was in fact a mochi. he could still claim to belong to the scheduled caste of Chamars and be allowed to contest an election on that basis."

Relying on these decisions, Mr. Mohanty for the appellant contends that "Bhotras" have not been declared as members of the Scheduled Tribes. The Presidential order refers to "Bhottada" and not to "Bhotra". Therefore, evidence could not have been received from the parties in support of the contention that defendants 2 to 6 were really "Bhottadas". According to Mr. Mohanty, some observations of this court in the case of Damodar Mohapatra v. Raghunath Pradhani (1969) 35 C LT 139 cannot be taken to be good law in view of the pronouncements of the Supreme Court referred to above. This Court said in paragraph 5 of the judgment:

"Whether a Bhotra comes within any of the sub-groups of Scheduled Tribes enumerated in Part IX is a pure question of fact. The decree-holder from the very start accepted the position that judgment debtor No. 1 was a member of the Scheduled Tribe. If any objection had been raised that he was not a member of the scheduled tribe the purchaser from judgment-debtor No. 1 and judgment-debtor No. 1 could have pleaded and proved that they belonged to one of the sub-groups of the Scheduled Tribes. I accordingly do not find any substance in the contention of Mr. Ramdas that on a bare comparison of the various classes of Scheduled Tribes in Part IX of the Order the court would come to a conclusion that judgment-debtor No. 1 was not a member of the Scheduled Tribe."

Some of these observations may run counter to the rule indicated by the Supreme Court in the cases referred to above, but it is unnecessary to reach a final conclusion in this case on such score.

Plaintiff and defendants 2 to 6 have taken the stand that defendants 2 to 6 are Bhotras belonging to the Scheduled Tribes. The dispute in the present case does not-relate to any sub-caste of the named caste. Bhotras as pleaded in the case

and Bhottadas as indicated in the Presidential Order refer to the same community and the courts below appear to have come to the correct conclusion. I do not think, on the basis of the decisions of the Supreme Court referred to above, defendant No. 1 can succeed in her contention that defendants Nos. 2 to 6 are not members of the Scheduled Tribes. The first contention must accordingly fail.

8. Contention No. 2. Section 5 of the Regulation 2 of 1956 provides:--

"(1) No surrender or relinquishment of any holding or a part of a holding by a tenant to a landlord under any law for the time being in force and applicable to such tenancy, such tenant being a member of a Scheduled Tribe, shall be valid unless after such surrender or relinquishment the landlord thereof by whatever name called either settles the said holding or part of the holding as the case may be, with another member of a Scheduled Tribe or else retains it in his possession or settles it with any other person with the approval of the competent authority when such member of a Scheduled Tribe is not available.

(2) Any surrender or relinquishment shall be deemed to be a transfer of immovable property within the meaning of this Regulation and except as otherwise provided in Sub-section (1) the other provisions of this Regulation shall, so far as may be, apply.

(3)"

According to defendants 2, 3 and 6, they were tenants in possession of the property. Defendant No. 1 took the stand that defendant No. 2 had relinquished the tenancy interest in the property by Ext. B dated 8-6-1959 in favour of her father-in-law Binayak. Binayak in his turn, according to defendant No. 1, granted a patta in her favour two days thereafter under Ext. C. Once it is held that defendants 2, 3 and 6 were members of the Scheduled Tribes and in view of the conceded position that defendant No. 1 is not a member, of the Scheduled Tribes, Section 5 of the Regulation is certainly attracted. Only when the settlement was in favour of a member of the Scheduled Tribes Binayak's action would not have been open to dispute. The view taken by the courts below about the effect of Section 5 of the Regulation is thus not open to challenge.

9. Contention No. 3. The finding of the courts below is that the sale deed (Ext. 1) is for good consideration and a sum of Rs. 1,000/- had been received by defendant No. 1 from plaintiff. Accordingly on the finding that plaintiff is not entitled to have his title declared on the footing of Ext. 1, the learned Subordinate Judge decreed refund of the consideration money for which there is a specific prayer in the plaint. The Lower Appellate Court has upheld that part of the decree. Defendant No. 1 has failed to establish her specific plea that her defect of title was known to plaintiff at the time the sale transaction took place. I do not think there is any justifying circumstance to relieve defendant No. 1 -- vendor from the direction in the decree for refunding the consideration money. There is no justification for defendant No. 1 to appropriate the consideration

money when she is unable to pass good title to plaintiff. That part of the decree also is not open to attack in my view.

10. The second appeal must accordingly fail. It is dismissed with costs throughout.