

(1998) 07 OHC CK 0042

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 446 and 3378 of 1995

Satyabhama Mishra alias Golap Mishra and Another and Smt.
Susama Ratha and Another

APPELLANT

Vs

Hari Prasad Santuka and Others

RESPONDENT

Date of Decision : 28-07-1998

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (1998) 86 CLT 453 : (1998) 2 OLR 272

Hon'ble Judges : P.K. Misra, J;D.M. Patnaik, J

Bench : Division Bench

Advocate : R. Ch. Mohanty, R.K. Mohanty, D. Mohanty, N. Behuria, P.K. Mohanty and S.K. Acharya in OJC 446/95 and Bhawani Prasad Tripathy, in OJC 3378/95, for the Appellant; N. Patra and A.K. Patra (OPs. 1-14), for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—The present writ applications have been filed on behalf of the tenants challenging the legality of the order of eviction passed by the appellate authority in appeal.

2. The disputed premises belonged to Jayanarayan, who had inducted Lingaraj Nanda, Proprietor of Annapurna Theatre "B" Group. Subsequently, after the death of Jayanarayan, his three sons, Bisweswar Lai, Kedarnath and Ramanandalal instituted eviction proceeding under the Orissa House Rent Control Act, 1967, which was numbered as M.R.C. Case No. 111/70. They sought for eviction on the ground of wilful default in payment of rent, their bona fide requirement for personal use and occupation and further on the ground that the tenants had sublet the disputed house to other persons.

By order dated 13.2.1974, the House Rent Controller rejected the application. H.R.C. Appeal No. 14/74 was filed by the landlords. The chief Judicial Magistrate, the appellate authority, while upholding the finding regarding subletting, allowed the appeal and directed for eviction on the ground that there had been wilful

default in payment of rent and the landlords require the disputed premises in good faith for their occupation and use.

Lingaraj, the original tenant and Annapurna Theatre (the present petitioner No. 2 in OJC 446/95) filed OJC No. 1030/74 in this Court by judgment dated 27.6.1975, this Court quashed the order of the appellate forum and remanded the matter to the appellate authority for fresh disposal permitting the parties to adduce fresh evidence. The landlords filed Civil Appeal No. 993 (N) of 1975 before the Supreme Court of India. During the pendency of the appeal in the Supreme Court, the original tenant Lingaraj Nanda and the original landlord-petitioners expired and the legal representatives of the parties were substituted. The Supreme Court while declining to interfere with the order of the High Court directed that the appellate authority should dispose of the proceeding within six months.

After the matter came back from the Supreme Court, the appellate authority after giving further opportunity to parties to adduce further evidence has allowed the appeal under the impugned order (Annexure-1 in OJC No. 446/95) on the ground that there was wilful default in payment of rent as well as on the ground that the landlords require the disputed premises for their personal use and occupation. OJC No. 446/95 has been filed by one of the legal representatives of Lingaraj Nanda as well as by Annapurna theatre "B" Group. The other three legal representatives of the original tenant have been impleaded as opposite parties 17, 18 and 19 in the said writ application. The connected OJC No. 3378/95 has been filed by another legal representative of the original tenant. This judgment will govern both the writ applications.

3. The learned counsel for the petitioners in OJC No. 446/95 has urged that the appellate authority while disposing of the appeal after remand has not kept in view the observations of the High Court in the previous judgment. It has been submitted that the findings of the appellate forum being contrary to materials on record and having been rendered without keeping in view the directions contained in the earlier judgment of the High Court are liable to be quashed. It is also contended that the appellate forum has proceeded on wrong basis by placing the onus on the tenants to disprove the case of the landlords.

The learned counsel for the petitioners in OJC No. 3378/95 has adopted the contentions raised in the connected case.

The learned counsel appearing for the landlords (the legal representatives of the original landlords) has contended that the findings recorded by the appellate forum are not available to be challenged by invoking jurisdiction under Article 227 of the Constitution of India.

4. Coming to the question of bona fide requirement, it appears that the original landlords had pleaded that they required the disputed premises for carrying on and expanding their business as they required more space for expansion of their business and also for their residential accommodations. It had also been pleaded

that they had a shop in a rented house belonging to another person who was trying to evict them. Similarly, the landlord in respect of another shop occupied by them on rental basis had obtained order of eviction against them. It had been indicated that the family members of the three branches had grown in size and their residential accommodation was also insufficient and as such they required the disputed premises as well as the vacant space attached to it for construction of their residential houses after demolishing the existing old and dilapidated structure.

The tenants while refuting the aforesaid allegations of the landlords had pleaded that there was no bona fide requirement.

5. Though the original authority had come to the conclusion that there was no bona fide requirement, the appellate forum on a thorough re-consideration of the materials on record has come to a different conclusion. It has found that the size of the family of the original landlords has increased and besides, to meet the requirement of their growing business activities, the landlords and their family members require more accommodation and more space. The finding is based on discussion of relevant materials on record. The inference drawn by the appellate forum on the evidence accepted by it to the effect that there was bona fide requirement by the landlords can, by no stretch of imagination, be characterised as baseless so as to warrant interference in exercise of extraordinary jurisdiction of the High Court under Article 227 of the Constitution of India. A perusal of the decision of the appellate forum indicates that the appellate forum has considered all the relevant materials on record and has come to the conclusion that the house is required by the landlords. The learned counsel for the petitioners has not been able to point out any error of law apparent on the face of record to successfully challenge the finding recorded by the appellate forum on this score.

As is well-settled by the Supreme Court in the decision reported in *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, which has been followed in numerous decisions of the Supreme Court as well as of this Court, the High Court while deciding a writ of certiorari does not sit in appeal over the judgment of the inferior tribunal. The jurisdiction of the High Court in such matters is supervisory in nature and the scope of interference is limited to the question of any error of law apparent on the face of record, or any jurisdictional error committed by the inferior tribunal. Such writ is not directed against the decision itself, but against the decision-making process. Unless the inferior tribunal adopts any illegal procedure or has committed any error of law apparent on the face of record, the High Court should not interfere with the findings recorded by the inferior tribunal even though the High Court is inclined to take a different view on the evidence on record. For the aforesaid reasons, I am unable to accept the contention of the petitioners on the question relating to finding of the appellate forum on the issue of bona fide requirement.

6. Coming to the question of wilful default in payment of rent, the appellate forum has held that by the time the application for eviction was filed, the tenants

had not paid rent for two months. It has further been held that on earlier occasions the tenants had not paid rent in time and the landlords had to file suits for realisation of arrear rents on several occasions. It has been contended by the learned counsel for the petitioners that as per the decision of the High Court in the earlier writ application, the onus was on the landlords to prove that there was wilful default and the appellate forum has not kept in view the observations of the High Court in this regard.

7. It is true that mere default in payment of rent or delay in payment of rent may not be considered as wilful by itself. It has to be proved that the default in payment of rent or delay in payment of rent was wilful. In the present case, after remand, the landlords have called for the records from the Post Office with a view to prove that the tenants had remitted the rents after the due date of payment. In this context, the finding of the appellate forum is that as per the original agreement, the rent was payable by 7th of each succeeding month. It has further found that though the period of such original agreement as extended by subsequent agreement had expired, yet it is evident that the rent was payable by 7th of each succeeding month. The plea of the tenants that the rent was payable by the end of next month has not been accepted. Therefore, one must proceed on the footing that the rent was payable by 7th of each succeeding month. From the materials on record, as discussed and found by the appellate forum, it is apparent that on several occasions prior to the filing of the proceeding for eviction, the tenants had paid or remitted rent beyond the due date and, as a matter of fact, the landlord had to file suits for recovery of the arrear rents on several occasions. Keeping in view the submission of the tenants in the appellate forum to the effect that the rent was payable by the end of next month, the principle of law laid down by the Supreme Court in several cases that when rent was being paid and accepted as per the convenience of the parties, there was no fixity of time for payment of rent and mere delay in payment of rent cannot be taken to be a case of wilful default, is not applicable to the present case. The very fact that the landlords had to file suits for realisation of arrear rent on several occasions, negatives such contention that the conduct of the parties shows that there was no fixity of time regarding payment of rent. In the present case, though the documents from the Post Office could not be proved as those documents had been destroyed, the conclusion of the appellate forum on the basis of evidence of an employee of the Post Office who had been examined after remand that there had been delay in remitting the rent, cannot be said to be a finding without any evidence. The inference drawn by the appellate forum after considering all the relevant and available materials on record is not vitiated by any error of law apparent on the face of record. The documents though called for by the landlords were not available. However, one should not lose sight of the fact that the tenants also could have produced materials to indicate regarding the actual dates on which the rent had been remitted through money order. The receipts granted by the Post Office at the time of remitting the amount through money order must have been in the

possession of the tenants. Neither the receipts had been produced, nor any documentary or oral evidence had been advanced to indicate regarding the dates on which the various amounts had been remitted by money order. The finding recorded by the appellate forum keeping in view all the above aspects is essentially a finding of fact and not available to be challenged in a writ application under Articles 226 and 227 of the Constitution of India. Even though it would have been possible for the High Court to take a different view of the matter, but that cannot be a ground to interfere with the finding of the lower tribunal.

8. Though such a point has not been specifically raised either before the House Rent Controller and the appellate authority, or in the writ application, the learned counsel for the petitioners submitted that the disputed premises was a Khasmahal land and the term of such Khasmahal lease has expired and the landlords should not be permitted to recover possession, as their title to the disputed land has been extinguished. Such argument has been advanced in course of argument by filing an affidavit. The tenants have filed a counter affidavit challenging this position and have filed a copy of the record-of-rights indicating that the disputed property has been recorded in their names even subsequent to the expiry of the Khasmahal lease. Such a new point which had not been raised before the appellate authority even after the remand, and in the writ application, cannot be entertained for the first time in course of argument. Besides, even assuming that the Khasmahal lease has expired and has not been re-settled with the landlords, that is a matter between the State and the original lease-holders and the petitioners who were admittedly the tenants of the original lease-holders and had paid rents even after the expiry of the term of the Khasmahal lease, cannot take benefit of such a contention. Law is well settled that even a trespasser's right cannot be challenged by a tenant under the Transfer of Property Act. In the present case, the landlords definitely stand on a better footing than a trespasser, as they can be characterised as lessee holding over after the expiry of the term of Khasmahal lease. For the aforesaid reasons, the contention raised for the first time in course of hearing of the writ application is bound to be rejected.

9. It has also been contended by the learned counsel for the petitioners that petitioner no.2, a premier cultural group having theatre show on the disputed premises for at least half a century, should not be evicted from the disputed premises. The provisions contained in the Orissa House Rent Control Act do not envisage that question relating to requirement of a tenant to continue in possession is a relevant factor for deciding about the bona fide requirement of the landlord. It may be that the petitioner No.2 may find itself in difficulty, but that is a matter foreign to the scope of enquiry under the provisions of the Orissa House Rent Control Act. It may be that if the Theatre Group approaches the State Government an appropriate arrangement can be made by the State Government in order to encourage the cultural activity.

10. For the aforesaid reasons, I do not find any merit in the writ applications, which are accordingly dismissed. The petitioners are allowed four months" time to vacate the premises. In the peculiar circumstances of the case, there will be no order as to costs.

D. M. Patnaik, J.

I have gone through the leading judgment of my learned brother P. K. Misra, J, elaborately discussing and giving reasons for dismissing the writ petitions. I agree with the conclusion and decision so arrived.

But considering that Annapurna Theatre "B" Group is the oldest of the four premier professional theatres including Janata Rangamancha, Annapurna "A" and Kalashree, and has been able to maintain the long cultural heritage of Orissa, once the organisation is asked to vacate the present place, it is definite that the public will be deprived of the entertainment unless another place is made available to it. There is no gainsaying the fact that the long-drawn litigation might have been one of the main reasons for crippling the interest of those who stood for the organisation. With a view to maintain this cultural heritage, I am of the view that the organisation if so advised may move the State Government to allot a piece of land either at the disputed site or at any other suitable place in Cuttack Town by way of lease/grant and on receiving such application, Government may consider and dispose of the same as per law. Such an application for the land in dispute, if at all, should be filed to the appropriate authority within a period of one month from the date of delivery of the judgment and the authorities shall take decision within a period of three months thereafter. The petitioners are, however, hereby directed to hand over vacant possession of the disputed premises to the opp. parties on completion of four months from the date of delivery of this judgment.