

(1973) 05 OHC CK 0016
In the Orissa High Court
Case No : O.J.C. No. 1091 of 1969

Satyendra Kumar Rai Choudhury	Vs	APPELLANT
Mahant Sri Bhakta Charan Das and Another		RESPONDENT

Date of Decision : 10-05-1973

Acts Referred:

Hindu Succession Act, 1956 — Section 14
Orissa Estates Abolition Act, 1951 — Section 2, 20, 5, 6, 7

Citation : (1973) 39 CLT 787

Hon'ble Judges : S.K. Ray, J;K.B. Panda, J

Bench : Division Bench

Advocate : B K. Pal and M.K. De, for the Appellant; M. Mohanty and B.H. Mohanty, for the Respondent

Judgement

S.K. Ray, J.—Both these applications have been heard together as they are interconnected.

2. Two co-sharer intermediaries filed two separate claim cases under Sections 6, 7 and 8-A of the Orissa Estates Abolition Act (hereinafter referred to as the Act) for determination of fair and equitable rent in respect of plot Nos. 71, 72 and 73 appertaining to nijchas khata No. 28 and in respect of plot No. 82 appertaining to nizjot khata No. 29 along with other plots with which we are not concerned. The claim case by one intermediary was numbered as 51/12 of 1950 from which an appeal was carried by the opposite party to the A.D.M. Cuttack in Orissa Estates Abolition Appeal No. 13/63-64. The decision of this appeal is subject matter of O.J.C. No. 1091/69. The other claim case was numbered as 13/50 which was also subject matter of the Orissa Estates Abolition Appeal No. 15 of 1963-64. The decision of this appeal is subject matter of O.J.C. 1113 of 1969. As both the appeals Nos. 13 and 15 of 1963-64 were heard analogously the aforesaid two writ applications have also been ordered to be heard together.

3. The facts may now be stated. One parent touzi No. 3847 belonged to three co-sharers proprietors, Ramesh Chandra Rai Choudhury, Susil Chandra Rai

Choudhury and Charu Chandra Rai Choudhury. In a Touzi partition the parent touzi was allotted to Ramesh Chandra Rai Choudhury and the newly carved out touzi No. 8036 was allotted to his brothers Susil Chandra Rai Choudhury and Charu Chandra Rai Choudhury. This touzi comprised of plots 71 (mango tope), plots 72 and 73 (Gharbari), appertaining to Nizjot holding 28 and of plot 82 (Bari) appertaining to Nijchas Holding 29. These four plots are the subject matter of the present controversy. The parent Touzi which was allotted to Ramesh Chandra Rai Choudhury was sold to present opposite party on 10-5-1935, who established a Math with a presiding deity Sri Radha Nikunja Thakur on a portion of it.

4. The Petitioner in O.J.C. 1091/69 is the son of Susil Chandra Rai Choudhury and the Petitioner in O.J.C. No. 1113/69 is the son of other co-sharer proprietor Charu Chandra Rai Choudhury. They inherited this Touzi on the death of their respective fathers. On abolition of this Touzi 8036 on 14-9-1953 these Petitioners filed two separate claim cases in respect of the aforesaid four plots. The opposite party filed his objection in the claim cases. The Tahasildar, Patamundai allowed the claim cases after rejecting the objections. The opposite parties preferred two appeals to the A.D.M. Cuttack. The appeals were heard together and allowed. The aforesaid 4 plots are situated within the Municipal area of Kendrapara town. Plot Nos. 71, 72 and 73 comprise one compact block. These plots have been recorded as mango tope and Gharbari appertaining to touzi No. 8036 in the settlement of record of rights. Considering the evidence of possession adduced on behalf of the objector and believing the same, the A.D.M. found that these plots were in khas possession of the objector, i.e. of the present opposite party, on the date of vesting. Consequently, he rejected the claim cases and held that these plots are to be settled with the opposite party provided he agreed to deposit necessary premiums for the lands and pay arrear rent from the date of vesting.

5. The claimants filed second appeals before the Board of Revenue from this decision of the A.D.M. The Second Appeals having been allowed, the opposite party came to this Court in O.J.Cs. 46 and 47 of 1965 challenging the maintainability of the Second Appeals before the Board of Revenue. These writ petitions were allowed on 10-4-1969 and the decision of the Board of Revenue was quashed. Thereafter, O.J.C. No. 1091/69 was presented on 15-12-1969 and the other O.J.C. No. 1113/69 was filed on 23-12-1969. From the date of decision of the A.D.M. Cuttack which was rendered on 2-3-1964 these writ applications have been filed more than 5 years thereafter, and about lapse of 8 months from the date of decision of this Court in O.J.C. Nos. 46 and 47 of 1965.

6. Out of 4 plots in dispute, the A.D.M. found that before vesting plots 71 and 82 had been recorded as Anabadi and plots 72 and 73 as Gharbari which means "homestead". According to the Petitioners they have a house and a granary thereon. Physically these plots have been included within the Math premises constructed by the opposite party for about 20 years. Having regard to the

nature and character of the various plots the claim to plots 72 and 73 would lie, u/s 6 of the Act and the claim to the other two plots would be u/s 7 of the Act. There is no controversy that the objector was in khas possession of all the plots, on the date of vesting. Thus claim to plots Nos. 71 and 82 u/s 7 of the Act must fail and has been rightly negated by the A.D.M. as the Petitioners are not entitled to settlement in respect thereof, being not in khas possession of the same.

7. Dispute here centres round the plots 72 and 73 which have been recorded as homestead. Mr. Pal's contention with regard to these two plots is substantially founded on the objector's statement in his objection petition. The objector has stated that after he had purchased the parent touzi he approached the father's of these Petitioners who were then the owners of the touzi 8036, for settlement of these 4 plots with him as a tenant on payment of premium. The then proprietors had orally agreed to the proposal of the objector and had delivered possession of these plots to the latter in part performance of this agreement, and before any formal deed of settlement- as per the agreement was brought about they died. The objectors however, continued in possession. Mr. Pal's contention is that this possession of the objector would be that of a licensee; in other words, the Petitioners shall be deemed to be in constructive possession of these two plots. The expression "Possession" as used in Section 6 in contradistinction to the expression "Khas possession" as used in Section 7 of the Act brings within its sweep constructive possession of the intermediary. In the context of the objector's story the Petitioners must be taken to be in possession of these plots within the meaning of Section 6 of the Act.

There is no controversy that Section 6 of the Act is applicable. It provides that all the homestead comprised in an estate and in possession of an intermediary on the date of vesting shall be deemed to be settled by the State Government with such intermediary and with all the share holders owning the estate and they shall be entitled to retain possession of such homesteads and of such buildings or structures together with the lands on which they stand, as tenants under the State Government subject to the payment of such fair and equitable ground-rent as may be determined by the Collector in the prescribed manner. Section 6 refers to homestead as defined in Section 2(i) of the Act. According to this definition, the homestead means a dwelling house used by the intermediary for the purposes of his own residence or for the purpose of letting out on rent together with any courtyard, compound, orchard and out buildings attached thereto but does not include any building comprised in such estate and used primarily as office or kutchery for the administration of the estate on and from the 1st day of January, 1946. It is thus clear that a dwelling house not used for the purposes of ex-intermediaries and not used for the purpose of letting out on rent by him cannot be subject of deemed settlement as envisaged in Section 6 of the Act. The onus obviously is on the Petitioners claiming these two plots u/s 6 of the Act to satisfy the Estates Abolition Collector that the houses standing on these plots are covered by the definition of "homestead" before the deemed settlement can

be said to operate in their favour. In this case no attempt has been made on their behalf to establish that these two plots with houses standing thereon constitute "homestead" as defined u/s 2(i) of the Act. The Supreme Court dealing with a case under the Bihar Land Reforms Act, Section 5 whereof is similar to Section 6 of the Act, in the case of *Smt. Sabitri Devi Thirani v. Satya Narain Mandap* AIR 1972 S.C. 45, said that:

Under Section 5 it is only the "homestead" which is in the possession of an intermediary on the date of vesting of which the intermediary is entitled to retain possession.

Thus, irrespective of whether the story of contract to settle these plots with the objector as a tenant is true or not Section 6 is not attracted and cannot be invoked unless the Petitioners prove their plots containing house constitute "homestead" as defined u/s 20 of the Act, which they have failed to establish.

8. Even if it is assumed that these two plots constitute homestead, objector's possession cannot be construed as possession of the intermediaries within the meaning of Section 6 of the Act. If under a contract the objector took possession but the contract was never fully effectuated by execution of formal deed of settlement and payment of premium, the possession of the objector would obviously be adverse to his lessor or his representative-in-interest, because his possession cannot be referable to any legal title. If, on the other hand, the objector's possession is presumed to be referable to a lawful title, it would only give him the status and possession of a tenant and 12 years of such possession would create only a tenant's title in him. In such a case the objector would be a tenant under the State on abolition of the estate. Thus, in either case his possession cannot be deemed to be constructive possession of the Petitioners, and Section 6 of the Act cannot be applied.

9. Mr. Pal relied upon the case of *Gummalapura Taggina Matada Kotturuswami Vs. Setra Veeravva and Others*, which is a case u/s 14 of the Hindu Succession Act and contended that the word "Possession" in Section 6 of the Act should comprise not only actual physical possession or personal occupation of the exintermediaries, but would also comprise possession in law, which would include possession of lessee, licensee or mortgagee. The word "possession" should be construed in a broad sense of state of owning or having in one's hand or power. Even assuming that the broad sense is included in the expression "possession" in Section 6 of the Act, the materials are scanty to show that the Petitioners were in a state of owning or having in their hands or power these plots, on the date of vesting. In view of scantiness of materials, it is not necessary in the present case to decide whether the words in possession of in Section 6 of the Act would include the notion of all kinds of possession in law.

For the aforesaid reasons Mr. Pal's contention must fail.

10. There is another ground why these writ applications shall be dismissed. It is well settled that in applications for writ of certiorari findings of fact arrived at by

the Tribunal whose decisions or orders are sought to be quashed cannot be interfered with except when they suffer from some legal infirmities or base upon no evidence or are based upon extraneous materials not germane to the point at issue, or, on account of some error of law apparent on the face of record. In the present case, the findings of the A.D.M. cannot be impeached on any of these available grounds.

11. As already been stated these applications have been filed 5 years after the impugned order of the A.D.M. was passed and 8 months after the earlier O.J.Cs. were disposed of by this Court. There may be some explanations for the 5 years delay, because it might reasonably be said that a lot of time was expended in the proceeding before the Board of Revenue and in prosecuting the earlier O.J.Cs. in this Court. But there is absolutely no explanation for the 8 months delay which lapsed between the final decision of the earlier O.J.Cs. and filing of the present writ applications. This delay is also another ground which induces us to reject these applications.

12. For the aforesaid reasons we are satisfied that the A.D.M. was justified in rejecting the claim petitions in respect of the homestead.

13. The A.D.M. in the penultimate paragraph of his order directed settlement of the land with the opposite parties. It is true that while hearing the appeal u/s 9 of the Act, the A.D.M. should not have given any direction regarding the settlement of the lands with the opposite parties. That part of the order is a surplusage and was not warranted within the scope of the jurisdiction which the A.D.M. was exercising u/s 9 of the Act, but that would not affect the legality of the main part of the order dismissing the claim cases.

14. In the result, therefore, both these applications fail and are dismissed. But in the circumstances, there would be no order for costs.

K.B. Panda, J.

15. I agree.