

(2004) 07 OHC CK 0030
In the Orissa High Court
Case No : Case No. 6736 of 1999

Sourindra Narayan Bhanja Deo	Vs	APPELLANT
Member, Board of Revenue and Others		RESPONDENT

Date of Decision : 14-07-2004

Acts Referred:

Orissa Government Land Settlement Act, 1962 — Section 3, 3(4)

Citation : (2004) 98 CLT 397 : (2004) 2 OLR 332

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

Bench : Single Bench

Advocate : Samareswar Mohanty and R.C. Sahoo, for the Appellant; G.K. Mohanty, Additional Government Advocate, P.K. Patnaik, S.N. Senapati, A.K. Dwibedy, S.K. Patnaik and M.R. Mishra, for the Respondent

Final Decision : Allowed

Judgement

B.P. Das, J.—The petitioner has filed this writ petition under Articles 226 and 227 of the Constitution with the following prayers :

- (i) to quash the proceeding initiated in Resumption Case No. 2 of 1993 in respect of the disputed Khasmahal leasehold land pending before the Collector, Puri;
- (ii) to quash the order of the Member, Board of Revenue under Annexure-5, sanctioning the resumption; and
- (iii) to direct opposite parties 2 and 3 to settle the said land permanently with the petitioner and his brothers, opposite parties 5 and 6, with heritable and transferable rights in terms of Section 3(4)(c) of the Orissa Government Land Settlement Act, 1962.

2. The brief facts leading to this writ application as delineated tend to reveal that the petitioner's father Raja Sailendra Narayan Bhanja Deo was the lessee in occupation of the case land in Mouza Bankimuhan (Unit No. 26) Tahasil - Puri Sadar under a Khasmahal Lease, the extent of which was Ac. 1.566. The said

lease was subsisting on 19.7.1982, when the petitioner's father - Raja Sailendra Narayan Bhanja Deo died. After the death of the petitioner's father, opposite party No. 4, the mother of the petitioner, and opposite parties 5 and 6, his brothers, remained in possession of the case land having succeeded to the interest of the petitioner's deceased father. According to the petitioner, his father built a huge building upon the case land and after using it for residential purpose for some years had let it out to the Deputy Accountant General, Government of India . which was used as office and residential purpose. The said tenant continued to occupy the premises even till the date of filing of the writ application and was paying rent. The said premises have been assessed to Municipal Holding Tax in the name of petitioner's father and a holding number has been assigned to the said premises by the Puri Municipality. The petitioner has been paying the holding tax. The current record-of-rights has been published in the name of the petitioner's deceased father and rent has been paid up-to-date. The petitioner and opposite parties 4, 5 and 6 before expiry of the lease filed an application for renewal of the same, which was registered as Lease Case No. 21 of 1996 and is pending before the Tahasildar, Sadar, Puri. According to the petitioner, while the renewal application of the petitioner was pending, opposite party No. 2 the Collector, Puri initiated Resumption Case No. 2 of 1993 and the orders passed therein, copy of which is annexed as Annexure-2 indicate that the lease expired on 8.6.1977 and as no steps were taken for renewal of the same, a show cause was issued as to why the said lease-hold land would not be resumed by the Government and utilized for public purposes. The order sheet dated 15.7.1998 of the Collector indicates that the matter was referred to the Member, Board of Revenue, seeking sanction of resumption of the lands involved in present Resumption Case No, 2 of 1993 as well as Resumption Case Nos. 3 of 1993 and 4 of 1993. The petitioner filed his show cause in the aforesaid case. The order dated 15.7.1998 shows that the matter was referred to the Member, Board of Revenue, simply rejecting the show cause of the petitioner without any reason and without even giving an opportunity of hearing to the petitioner. Ultimately, the Member, Board of Revenue passed the order in Annexure-5 according sanction to proceed with resumption of the said land.

3. The aforesaid order (Annexure-5) is challenged on the ground that the Khasmahal lease-hold land is heritable and transferable. The order passed by the Collector does not contain anything to show that the land is required for public purpose. The order dated 15.7.1998 passed by the Collector in Annexure-2 has been passed without due application of mind and without giving an opportunity of hearing to the petitioner. The order in Annexure-5 passed by the Board of Revenue, Orissa according sanction to proceed with the resumption case is a mechanical one, there is no element of public purpose attached to the same and hence the same is liable to be quashed.

4. A counter affidavit has been filed by opposite party No. 5, the brother of the petitioner, wherein it is stated that the case land was leased out in favour of his father on 8.10.1947 and though the lease expired on 7.10.1977, his father

continued to possess the case lands as tenant holding over and after his death on 19.7.1982, his legal heirs including opposite party No. 5 are in possession of the land. The petitioner on behalf of all the legal heirs voluntarily exercised his option for renewal of the lease and filed renewal application before the statutory authority vide Lease Case No. 22 of 1996.

5. A counter affidavit has been filed on behalf of the Tahasildar, Puri (Opposite Party No. 3) which tends to reveal that the case land was originally leased out in favour of Raja Sailendra Narayan Bhanja Deo for a period of 30 years, from 9.6.1917 to 8.6.1947, with a condition to use the said land for residential purpose. The lease of the said land was renewed for another period of 30 years, from 9.6.1947 to 8.6.1977. The Tahasildar relying upon the Jamanbandi Register, copy of which is annexed as Annexure-A/3, has stated that the said lease period expired on 8.6.1977. It is further stated that though the lease expired since 1977, the original lessee Raja Sailendra Narayan Bhanja Deo who expired on 19.7.1982, did not file any application for renewal of the lease during his life time. Even after his death, his legal heirs, i.e., the petitioner and opposite parties 4, 5 and 6 did not file any application for renewal of the lease in their names. According to the Tahasildar, since the lease term was violated, resumption case was initiated by the Collector, Puri. After perusing the show cause filed by the present petitioner, as no valid reason had been assigned, the same was rejected by the Collector, Puri vide order dated 15.7.1998 and the lease was cancelled. However, as it was found that no sanction order from the Member, Board of Revenue had been obtained, necessary sanction was sought for taking physical possession of land and after receipt of necessary sanction order, physical possession of case land and the building standing thereon was taken. It has been further averred that as the renewal application was filed after initiation of the resumption proceeding, the same was also rejected. According to the Tahasildar, the provision of Clause (c) of Sub-section (4) of Section 3 of the Orissa Government Land Settlement Act (in short "the Act") as amended by the Orissa Act 1 of 1991 which came into force on 2.9.1992, is not applicable to the petitioner's case for the simple reason that though the lease expired on 8.6.1977 and the original lessee died in the year 1982, his legal heirs did not make any application for renewal of the lease in their names forthwith as per the terms and conditions of lease deed. Moreover, neither the present petitioner nor opposite parties 4 to 6 being not in possession of the case land and the term of the lease having expired, they are not entitled to permanent settlement as per the Act as amended by the Orissa Act 1 of 1991. As it appears, under the provisions of Clause (c) of Sub-section (4) of Section 3 of the Act, Khasmahal land, which is used and in occupation by any person as homestead in any urban area for not less than five years as on the appointed date, shall be settled with the person lawfully holding such land.

6. The sum and substance of the argument of the learned counsel for the State basing upon the averments made in the counter affidavit is that the building on the case land was dilapidated, the petitioner and his brothers were neither in

possession of the said [and nor did they apply for renewal of the lease. But there is nothing to dislodge the averments of the petitioner that the house in question was built by his father and the same was given on rent to the Deputy Accountant General Government of India. So far as the public purpose is concerned, according to the learned Additional Government Advocate, there is acute shortage of land for public purpose and for establishment of educational institutions. A portion of the building having been dilapidated and not managed by the petitioner and as no application for renewal was made as per the terms and conditions of the lease, the Government started the resumption proceeding and rightly so.

7. In this regard, let me have a look at Sub-rule (5) of Rule 28 of Bihar and Orissa Government Estates Manual, 1919 which speaks as follows :

* * * When a tenant holds land from Government, under a lease containing a clause which authorizes the lessor to resume possession of the whole or part of the lands of the tenancy, this power of resumption shall only be exercised if the land is required for a public purpose, and the power of resumption shall not be exercised without the sanction of the Board of Revenue.

If such land be required for the use of persons other than Government, e.g., for a local body, it should ordinarily be acquired under the provisions of the Land Acquisition Act, and not under the power of resumption given by the lease."

8. After hearing the rival contentions of the parties and looking at the provisions as stated above, it is crystal clear that the land in question was a Khasmahal land which was given on lease to Raja Sailendra Narayan Bhanja Deo, the father of the petitioner, and over which a big building was constructed and the same was used for residential purpose. Later on, the same was let out to the Deputy Accountant General, Government of India. It is also not disputed, and even in the rejoinder affidavit filed by the present petitioner to the counter affidavit of opposite party No. 3, that by order dated 6.4.1999 in RP Case Nos. 156, 157 and 158 of 1996, the name of the petitioner's deceased father has been directed to be replaced by the names of the petitioner and opposite parties 5 and 6. The said order was passed by the Land Reforms Commissioner, Board of Revenue, Orissa, Cuttack for correcting the Records of Right finally published on 6.4.1988. The deed of lease, copy of which has been filed as Annexure A/5 to the counter affidavit of opposite party No. 5, inter alia, has made provisions in Clause 11 for resumption of the land. The said Clause 11 is quoted below :

"That should the land leased or any portion thereof be at any time required by the Government of Orissa for any purpose declared by Government to be a public purpose the Collector, may resume on giving three months notice in writing may through any officer or person authorized on that behalf reenter and take possession of the said land or portion thereof the lessee shall there upon be entitled to a reduction in the rent payable under the lease proportionate to the area taken by the Collector and shall be further entitled to compensation for

standing crops and trees planted by him as well as for houses erected or other improvements made with the consent of the Collector on the land resumed the amount of such compensation to be fixed by the Collector whose decision shall be final, conclusive and binding on the lessee subject to revision by the revenue Commissioner."

9. So far as the law regarding the Khasmahal land is concerned, such land shall be treated as the private land of the lessee, which is both heritable and transfereable. In this context, reference may be made to a decision of this Court in the case of *Republic of India v. Prafulla Kumar Samal and Anr.* ILR 1976 Cut 1392, in paragraph-4 whereof it has been observed thus :

"xxx Rights of a lessee in Khasmahal lands are in no way different from those which one has in his own private, land. The lessee's right in the Khasmahal land being heritable and transferable the lessee can create a permanent right of tenancy in his holding. Thus in all respects the rights of a lessee are just similar to those of an owner of a private land (See 1935 CLT 43, *Munshi Abdul Kadir Khan v. Munshi Abdul Latif Khan* and 1937 CLT 67 *Madhusudan Swain v. Durga Prasad Bhagat.*)".

10. But in the present case, the lease of the leasehold land had already been expired. Clause 18 of the lease deed provides that on expiry of this lease the lessor shall, if the lessee has duly observed and performed all the conditions of the lease, be bound at the option of the lessee to renew the lease for a further period of thirty years. In other words, in the matter of renewal, option is left with the lessee and not with the Khasmahal authorities. Such authorities cannot refuse renewal of the lease, if the lessee opts for the same. It is to be borne in mind that the renewal application for lease was filed by the legal heirs of the deceased, the original leaseholder after the expiry of the lease period. The lease deed does not provide that the lessee has to apply for renewal of the lease before expiry of the term. If renewal is prayed after expiry of the term, the lessor cannot deny the same with retrospective effect. If the lessee, who is entitled to renewal, fails to apply for renewal, then only course open to the Khasmahal authorities is to resume the land with the consent of the lessee and take possession thereof. If the lessee does not consent for resumption and does not give up possession, the only course open to the Khasmahal authorities is to take possession through process of Civil Court as provided under Rule 20, Chapter-I of the Bihar and Orissa Government Estates Manual 1919. From the decisions as cited in cases of *Shankarlal Verma and Others Vs. Smt. Uma Sahu and Others*, and *Satyapriya Mohapatra v. Ashok Pandit* and Ors. 59 (1985) CLT 407, it is crystal clear that the Khasmahal land is heritable and transferable with a right of renewal and right of a lessee in respect of such land is in no way different from that which one has in his own private land. In the case at hand, the Record-of-Rights was corrected substituting the name of the original lessee by the names of his legal heirs. Even after a resumption case was started, the legal heirs of the original lessee have filed their application for renewal of the leasehold land in

their favour, which was ultimately denied. So, the intention of the legal heirs of the original leaseholder is to get the lease renewed in their favour. But the ground for resumption of the said land, as it appears from the counter affidavit of opposite party No. 3 as well as from the orders passed by the Collector and the Member, Board of Revenue, is that it is for public purpose as a portion of the building has been dilapidated and as there is acute shortage of land for establishment of educational institutions. By such mere assertion, it cannot at all be said that the land is sought to be resumed for any public purpose. There is also nothing in the order passed by the Collector or by the Board of Revenue that the land had been used for any purpose other than for which the lease was granted, as required u/s 3(b) of the Act. There is also no indication if any specific public purpose for which the aforesaid land is required. The counter affidavit filed by opposite party No. 3 shows that recourse was taken to Sub-rule (5) of Rule 28 of the Bihar and Orissa Government Estates Manual 1919, which provides that, the power of resumption can only be exercised if the land is required for public purpose. Neither the order of the Collector nor that of the Board of Revenue indicates the specific public purpose for which the aforesaid land was required. The mere assertion that the building was dilapidated and there was acute shortage of land cannot be a ground to exercise the power of resumption of a leasehold Khasmahal land. The power conferred under Sub-rule (5) of Rule 28 of the Bihar and Orissa Government Estates Manual, 1919 cannot be abused and cannot be used arbitrarily.

11. Mere saying that it is required for public purpose is not enough. There should be description of definite public purpose, which is absent in the order passed by the Collector as well as the order of sanction passed by the Board of Revenue. The order appears to be vague and indefinite in the absence of details about the alleged public purpose for which the property was sought to be resumed. It further indicates that the authorities are not sure about the public purpose for which the land was sought to be resumed. The aforesaid actions expose the non-application of mind by the authorities initiating resumption proceeding and according sanction for the same".

12. From a bare reading of the provisions of Rule 28 of the Bihar and Orissa Government Estates Manual 1919, it appears that the power of resumption can only be exercised if the land is required for public purpose. Clause 11 of the lease deed provides that should the land leased or any portion thereof be at any time required by the Government of Orissa for any purpose declared by Government to be a public purpose, the Collector may resume on giving three months notice in writing, may through any officer or person authorised on that behalf re-enter and take possession of the said land or portion thereof the lessee shall thereupon be entitled to a reduction in the rent payable under the lease proportionate the area taken by the Collector. So, it follows that there should be a declaration by the Government that the case land is required for a specific public purpose, which is totally absent in the present case. The order passed by the Collector (Annexure-2) also suffers from arbitrariness because it has neither given an

opportunity of hearing to the petitioner nor has a reasoned order been passed while rejecting the show cause of the petitioner.

13. Now the question is whether the petitioner can get the benefit u/s 3(4) of the Act. Section 3(4) of the Act, runs as follows :

"3(4) notwithstanding anything to the contrary contained in the preceding subsections or in any law or any custom, practice or usage having the force of law :

(a) any Khasmahal land or Nazul land, except where such land is used as homestead in any urban area, which has been leased out prior to the appointed date, shall whether the lease, where it had already expired, has been renewed or not prior to such date, be deemed to have been leased out under this Act to the person holding such land whether as a lessee, or as a sub-lessee either under the lessee or under a sub-lessee ;

Provided that :

(a) (i) any such lessee who is entitled to receive any rent from sub-lessee under him, or

(ii) any such sub-lessee who is entitled to receive any rent from a subsequent sub-lessee under him,

under any instrument executed for such lease or sublease, as the case may be, shall be paid a compensation by the sub-lessee or subsequent sub-lessee, as the case may be, equivalent to ten times the said rent in the manner . as may be prescribed.

(b) the compensation so payable shall, if not paid by the concerned sub-lessee or subsequent sub-lessee, as the case may be, within the prescribed period, be recoverable from him by the Tahasildar having jurisdiction over the area as arrears of land revenue and be paid to the concerned lessee or sub-lessee, as the case may be, in the manner as may be prescribed;

(c) any Gramakantha Parambok land or Abadi land, except where such land is used as homestead in any urban area, which is in occupation by any person for not less than five years as on the appointed date, shall be settled with the said person in such manner, by such officer and subject to such terms and conditions as may be prescribed :

Provided that any such land, which is situated in an urban area, shall be settled on leasehold basis and in case of other lands settlement shall be on raiyati basis;

(d) any Khasmahal land, Nazul land, Gramakantha Parambok land or Abadi land, which is used and in occupation by any person as homestead in any urban area for not less than five years as on the. appointed date, shall, subject to the payment of compensation in the case of Khasmahal and Nazul land as mentioned in the proviso to Clause (a), be settled :

(i) in the case of Khasmahal or Nazul land, with the person lawfully holding such land on and from the date the compensation is paid; and

(ii) in the case of Gramakantha Parambok and Abadi land, with the person in occupation of such land on and from the appointed date,

on permanent basis with heritable and transferable rights."

The appointed date was 9.1.1991 when it was published in the extra-ordinary issue of the Orissa Gazette.

14. Fact remains that after the death of the original leaseholder on 19.7.1982, the petitioner and his other co-heirs are in joint possession of the land. It is well settled that the land is a heritable one and so the same has devolved on the petitioner and his co-sharers. In the counter affidavit, a stand has been taken by the Government that as the lease has already expired during the life-time of the original lease-holder and as the legal heirs did not apply for renewal forthwith and they being not in possession of the said land are not entitled to the settlement of the same in terms of the amended provisions of the Orissa Act 1 of 1991. In the foregoing paragraphs, this question has already been answered taking into consideration several judicial pronouncements on the subject. This requires no further deliberation. The mere averments made by the Tahasildar that opposite parties 4 to 6 are not in possession, will not serve the purpose. There is no dispute that the petitioner's father built a huge house on the said plot. The petitioner and the legal heirs of the deceased original leaseholder are in possession of the said land. The argument advanced by the learned counsel for the State absolutely does not hold good in this regard. In my considered opinion, the further stand taken by opposite party No. 3 that the legal heirs of the original lessee have not applied as per the terms and conditions laid down in Clause 2 of the lease deed for mutation of the said land in case of succession by inheritance or by will, also does not in any manner extinguish the right of the petitioner as well as other legal heirs of the original leaseholder to get the lease renewed in their names because it is clear that the mutation is only for fiscal purpose of the Government and does not determine the title. Mere non-mutation of the property will not destroy the title devolved on the petitioner and opposite parties 4, 5 and 6. Now, coming to the question of applicability of Section 3(4)"of the Act as amended by Orissa Act of 1 of 1991. in view of discussion made in the foregoing paragraphs, there is no iota of doubt as regards its application. It may be concluded that the said provision is squarely applicable to the case of the petitioner.

15. Accordingly, the writ petition is allowed. For the reasons stated above, the proceeding initiated in Resumption Case No. 2 of 1993 and the order of sanction passed by opposite party No. 1 in Annexure-5 are quashed. The authorities are directed to take recourse to Section 3(4)(c) of the Orissa Government Land Settlement Act. No cost.