
(2009) 07 OHC CK 0041
In the Orissa High Court

State of Orissa and Another

APPELLANT

Vs

Fakir Ch. Sethy and Others

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144, 145

Citation : (2009) 108 CLT 519 : (2009) 2 OLR 263 Supp

Hon'ble Judges : I.M. Quddusi, Acting C.J.;S.R. Singharavelu, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.R. Singharavelu, J.—We have jointly heard FA No. 10 of 2001 & three other Writ Petitions i.e. W.P. 7437 of 2008, W.P. 7962 of 2008 & 8874 of 2008. The details of the suit against the decree of which FA had arisen is given below. The Plaintiffs in that suit are the sons of the person called Nidhi Sethi. In order to protect the decree, they have filed W.P. 7962 of 2008 ft W.P. 8874 of 2008. Their prayer in those Writ Petitions are that as they are entitled to the suit land, the allotment of the same or part of it by the State Govt. in favour of the Petitioner in W.P. 7437 of 2008 is illegal that it is to be cancelled; that the attempt made thereon to make construction is to be prevented & the allotment itself is to be quashed. On the contrary, the Petitioner in W.P. 7434 of 2008 prayed that the land never belonged to the Petitioners in the other Writ Petitions who are plaintiffs in the suit, that the settlement records in their favour shall be quashed as illegal & direction shall be passed to make use of the disputed land for public purpose.

2. In all these matters, the issue is as to whether the disputed land belongs to the Govt. to be rightly allotted to the Petitioner in 7434 of 2008 or it belongs to the Respondents in FA, so that Govt. may not interfere. These are concerned with disputed questions of law & fact &, therefore, whatever result that is arrived in FA may flow to the Writ Petitions. Now we will deal with the FA first.

3. At the outset, we make it clear that there is no prejudice caused if a subject matter of single Bench be heard & decided by a Division Bench & it is only the converse that will be not permitted. Since all the four matters are interconnected a joint hearing is required & when one matter could be heard by a Single Bench, no prejudice is caused it being heard by Division Bench. As a matter of fact, we have got the concurrence of the advocates of the either party in each of the above said proceedings for being heard in Division Bench.

4. The Respondents-Plaintiff had filed the suit for declaration of right of occupancy & for confirmation of possession. Their contention in the plaint are as follows:

(a) That the plaintiffs are Scheduled Caste persons. The suit property belongs to the estate of patia & its proprietor Kanika Raja. The father of the Plaintiff Nidhi Sethi was serving as Dhobi in the estate of Kanika Raja. Tenancy right was created in suit land for the service rendered as Dhobi. On 14.3.1942, Nidhi was delivered with an extent of Ac.44.16 of land with clear demarcation out of Ac.75 Plot No. 292 of Khata No. 393. Nidhi acquired the right to hold the land. He reclaimed the land"& brought it for cultivation. The plaintiffs are the successors of Nidhi.

(b) On & from the date of induction, the said Nidhi held the land under the proprietor & the contract was to pay rent for the land. Nidhi continued to possess as tenant under the inter-mediary & also paid rent to the Govt. Thus, Nidhi became a settled raiyat & got occupancy right by the operation of provisions of Orissa Estate Abolition Act (herein after referred to as the "Act").

(c) In 1964, settlement operation was started that was finalized in 1974. During 1967 Nidhi died & Plaintiffs could not take appropriate steps to record their name & as a result, the entire sabik plot along with area of Plaintiffs were wrongly recorded in the name of the Govt. Nidhi's right cannot be extinguished & was heritable. Govt. is entitled only to claim arrears of the rent.

(d) After publication of 1974 ROR when Plaintiff tendered the rent, RI did not accept it. Non-payment of rent by Plaintiff cannot be a ground to cancel his occupancy right.

(e) In the 1988 settlement also the officers copied the ROT of 1974 recording the name of Govt. except identifying the suit area as a separate holding with a note of possession of plaintiffs family. Due to Intervention of Defendant Nos. 3 & 4 in 1990, proceedings u/s 144 Cr.P.C was initiated, wherein it was found that possession of Plot No. 1950 was handed to NCC Directorate. Although aforesaid Defendant Nos. 3 & 4 could raise boundary wall over a portion of the suit property during the pendency of the above proceedings, Plaintiff still continued in possession by residing in the premises. But the above Defendants with the assistance of the Govt. were trying to raise building. Therefore, the suit is filed for declaration of occupancy right of Plaintiff & injunction.

5. Defendant Nos. 1 & 2 filed the written statement in which the following were contended:

(a) That the present suit is not maintainable & is barred by limitation & has no cause of action.

(b) As per 1913 settlement record, the sabik Plot No. 292 in Khata No. 303 was with an area of Ac.75 described as "Jhati Jungle". In the 1974 settlement, the corresponding Plot No. was 332/1636 with an extent of Ac.71.99 of Khata No. 472 & it stood in the name of the Govt. with classification "Unnata Jojana Jogya". There was no remark in the said ROR about the possession of Sethi. In 1988 settlement, the said sabik Plot No. was 332 11636 of 1950 with an area of Ac.4.16 under Hal Khata No. 619 & the said Khata stood in the name of G.A. Deptt., but in the remark column of the said ROR, the note of illegal possession of Fakir Charan Sethi was recorded.

(c) There was no zamabandi in favour of Nidhi Sethi, the father of the Plaintiffs; nor the ex-intermediary submitted any zamabandi/rent roll/ekpadia in his favour. No delivery of possession with clear demarcation out of Ac.75 of Plot No. 292 was shown to have been given to plaintiffs father.

(d) While the suit land, was recorded in favour of Madhusudan, there is no question of. payment of rent to Kanika Raja. After 1931, there are 2 settlement RORs. They are 1973-74 & 1988-89; in which the Govt. was found to be in possession. After abolition of the estate, the suit land was vested in the Govt. & accordingly ROR was finally published in 1974. The suit land was recorded in favour of Govt. The father bf Plaintiff was never in possession. The certified copy of the tenancy roll said to have been filed by the intermediary & other documents are forged.

(e) The claim of the plaintiffs was rightly rejected by settlement authorities during the current settlement proceeding against which the plaintiffs have not preferred any appeal.

(f) As Govt. was in possession, settlement of land was allotted to Defendant No. 3 & a Transfer Deed has been executed along with possession. Thus, the Defendants became the owner. Hence, the suit is liable to be dismissed.

6. The written statement filed by the Defendant No. 3 & 4 contends the following pleadings:

The suit land was intermediary estate. After abolition of estate, the same was vested with Govt. of Orissa. While the suit land was in Khas possession of State Govt., the G.A. Deptt. Of Orissa allotted a piece of land in Plot N.0.41/A for the purpose of construction of building for NCC directorate, Orissa. Subsequently, Plot No. 945 was changed to Plot No. 948 on 6.9.1986 & registered lease deed was executed & possession was delivered to Defendant No. 3. That lease hold land is now being falsely claimed by the Plaintiff. He was never entitled for the same & never was in possession. Even in the proceeding u/s 145 Cr.P.C, the

Learned S.D.J.M, Bhubaneswar observed that Defendants were in possession of the suit land. The Plaintiffs are not entitled to claim. The suit is liable to be dismissed.

7. Upon the above pleadings, the Trial Court has recasted the following issues.

(a) Is the suit maintainable?

(b) Is there any cause of action to bring the suit?

(c) Is the suit barred by limitation?

(d) Did the plaintiffs father acquired occupancy right over the suit land being a tenant under the ex-proprietor?

(e) Are the plaintiffs & their father was in continuous possession of suit land since 1942?

8. There was a trial in which Fakir Charan Sethi & Balaram Nayak was examined as P.Ws. 1 & 2 & one Dhruba Charan Swain was examined as D.W.1. There were 27 documents & 9 documents respectively marked on either side. Most of the documents filed on the side of the Defendants were regarding the lease in favour of Defendant Nos.3 & 4 & the record of delivery of possession. The plaintiff's documents contain the hatapatta by Kanika king in favour of father of Plaintiff (Ext. 1) & three Nos. of rent receipts issued by Tahasildar office (Ext.3). Exts.4 & 5 are respectively the copies of ekpadia & tenancy ledger. Exts.6,8 & 10 are respectively, the ROR in the year 1931, 1974 & 1989.

9. After going through the entire evidence on record oral & documentary, the Trial Court found on issue No. 4 as to whether plaintiffs father acquired occupancy right of suit land being a tenant under ex-proprietor in favour of the plaintiffs. On Issue No. 5, the Trial Court found that the plaintiffs were found in possession continuously. On positive answer on the other issues, the suit was decreed.

10. While dealing with the plaintiffs occupancy right as being a tenant under the ex-proprietor, the objection of the Defendants was that there was no evidence on the side of the plaintiff. The Trial Court found that there is material to show the transaction of auction purchase in the year 1935 by Kanika Raja & that fact was also found in Ext.5. While the Trial Court relied upon the hatapatta - unregistered lease deed under Ext. 1 & the rent receipts under Ext.2 series which were said to have been granted by the ex-proprietor, the objection of the Defendants was that the lease under Ext. 1 is non-specific; that out of a big plot of Ac.75 (Sabik Plot No. 292), there is no specific area of Ac.4.16 & that boundary of the land leased out & the specific location was not mentioned in the lease deed. In that connection, the lower Court relied upon Ext.9 which is the enquiry report of the Asst. Settlement Officer who has categorically said in the report that Hal Suit Plot No. 332/ 1950 was found to be in Khas possession of plaintiffs. Ext. 11 was also relied on in favour of plaintiffs, as it was the order of the Executive Magistrate

showing Ac. 208/90, in possession of plaintiff. Ext.12, the Amin's report, was also showing his possession. D.W.1 who personally visited the spot in his report in Ext.26 mentioned that the plaintiffs were staying in the suit land. Ext.14 the residential certificate issued by the Tahasildar, Bhubaneswar is also in support of the same. Further Ext. 15 series are the receipts granted by Bhubaneswar Municipal Corporation & Ext. 16 series are the receipts for payment of current charges. Similarly, the case of plaintiffs possession of suit land was found in his driving licence marked as Ext. 17. The bank pass book (Ext. 18), the ration card (Ext. 19) & the telephone bills (Ext. 20 series), the receipt" granted by Tahasildar (Ext.3) also prove their possession. Thus, by relying upon Exts.A/1 & A/2 as well as Ext.4, the rent roll, Ext. 5, the certified copy of the tenancy ledger, Ext.7 & the certified copy of draft khata of 1974 settlement, the issues were answered in favour of Plaintiff.

11. Regarding question of law, it was found that suit land being an intermediary interest was vested to the State in the year 1954 & the tenant under the ex-proprietor was deemed to be the tenant under the State Govt. The Revenue authorities can have no right to decide on the question of occupancy rights created by operation of the Statute.

12. For the argument of the Learned Govt. pleader that the plaintiffs as the successors of Sethi did not take any step to settle the suit land in their favour after vesting, it was rightly answered by the Trial Court that the person who was tenant under the ex-intermediary before vesting was deemed to be tenant under the State after vesting & the revenue authorities are incompetent to deal with any dispute over the same & that the Civil Court alone has got jurisdiction.

13. Besides the above points, the overall gist of the contention of the Defendants side was that the documents on the side of the plaintiffs were forged more particularly Exts.1, 2, 4 & 5.. On this aspect, the Trial Court found that there was no proof to hold that the document relied on by plaintiffs were forged. Therefore, the Trial Court had ultimately decreed the suit.

14. We have heard Mr. Srikanata Nayak(I) Learned Counsel for the Appellants & Mr. R.C. Sarangi Learned Counsel for the Respondents.

15. Before us it was argued by the Learned Counsel for the Defendants that as per 1931 Settlement the suit land was only described as Kisam land "Jati Jungle". During 1973-74 settlement, it was recorded in the name of the State Govt. under Rakhit Khata No. 4 72. There was no note of possession, in the name of the plaintiffs. During 1988-89 settlement, the disputed land came under Khata No. 619 & recorded in the name of G.A Deptt with classification "Unnata Jojana Jogya" but in the remarks column a note of the illegal possession of Fakir Sethi with Kisam "Gharabari" was recorded.

16. It was further contended that as father of the Plaintiff Nidhi was not proved to have served as a Dhobi under Kanika Raja, there was no chance for the latter to settle Act.4-16 out of Ac.75 of Plot No. 292 to Nidhi on tenancy basis. There

was also no delivery of possession.

17. In the preparation of settlement record of right in 1998-99, Plaintiff No. 1 by influencing the settlement authorities has manipulated the record with a note of illegal possession in the remarks column even though factually he was not in possession. It is important to note that plaintiffs have not applied u/s 8(1) of the Act for settlement of rent. The tenancy ledger purported to have been filed by the intermediary after vesting is absolutely a manufactured document.

18. In this background it was argued by the Learned Govt. advocates that the Trial Court had wrongly presumed Ext. 1 as the lease deed. It was further pointed out that Ext.2 series were not to be relied upon & much less they are not for the year 1953-54 when the vesting took place. It was submitted that at the worst, it can be said that the possession of Nidhi was between 1947 & 1952 & not at the time of vesting in the year 1954 & so according to Defendants, Nidhi cannot be accepted as a raiyat as per the definition of Section 2 (b) of the Act, as he was not shown to have been actually tilling.

19. The Govt. has also taken necessary steps in informing the police to investigate the mutation & forgery of documents. Therefore, it was argued that the lower Court was not right in decreeing the suit. Since there is a vehement attack on the side of the Govt. by contending that Exts.1, 2, 3, 6 & 9 are not to be relied upon & that Exts.4 & 5 etc. are forged documents, we have analyzed the entire documents.

20. Ext.1 is a hatapatta issued by the Raja of Kanika on 14.3.1942. It indicates that the ex-intermediary had inducted one Nidhi Sethi, deceased father of Plaintiff, as raiyat on the basis of permanent lease. Relying upon Ext.1 different authorities have recognized Nidhi's possession from 1942 & that aspect is revealed from Exts.7 & 11/A. Ext. 11/A is a report submitted by the ASI, Sahidnagar P.S. in a proceeding u/s 144 Cr.P.C. That indicates the induction of the father of Plaintiff as tenant in the year 1942 & continuance thereof since then. Ext.7 which is not a final ROR prepared by the Settlement Authority prior to 1973 settlement, indicates in the remarks column that possession of Plaintiff was continuing from 1942. That is why the Government in the written argument submitted that possession of plaintiffs father upto 1952 might have been proved & that there is no possession proved in the year 1953-54 at the time of vesting.

21. In order to make Ext.I believable, Ext.2 series were filed & they are the rent receipts issued by the ex-intermediary. They show that prior to the date of vesting, plaintiffs were paying rent to the ex-intermediary. That is why Ext.4 the certified copy of Ekpada showed Nidhi Sethi as tenant under Kanika Raja. There is a tenancy ledger under Ext.5 issued by Tahasildar, Cuttack based upon Ext.4 indicating the possession of Nidhi as tenant under the estate during vesting. Therefore, it is futile to say that plaintiff's father was not in possession in 1954. So, the benefit of the Statute shall be available to him. No where it is shown that the erstwhile possession proved by other documents of Nidhi was taken away by

the ex-intermediary. That could not have occurred because even after vesting Tahasildar, Cuttack in Ext.4, tenancy ledger, had described Nidhi as a tenant after vesting.

22. The transfer of Patia estate to King of Kanika was made in an auction held in 1932 & that aspect has been made clear in a subsequent case law reported in *Sebati Dei alias Sebati Rautray Vs. Orissa State Housing Board and Others*, .

23. Surprisingly, in the Settlement record of the year 1973-74, the certified copy of which was marked as Ext. 8, the land was shown to have been recorded in the name of the State, since in the not-final ROR prepared prior to final publication as shown in Ext. 7, there was note of possession in favour of Plaintiff, the burden lies on the Defendant to show as per which order of settlement authority such entry was deleted at the time of final publication of ROR (Ext.8). That burden has not been discharged by the State Government. Above all, the contents of Ext.7 in favour of Plaintiff was reiterated in Ext. 10 which is the ROR finally published on 7.7.1988. That happens to be the latest ROR in favour of the truthfulness of which, there is a statutory presumption as laid down in the proviso to Section 13(1) of Survey & Settlement Act. This presumption in favour of the correctness of the latest ROR was also laid down in a case law reported in *A.A. Haja Muniuddian Vs. Indian Railways*, ; *Suryakant Venkatarao Mahadik Vs. Saroj Sandesh Naik (Bhosale) (Smt)*, . It is as such the entry in favour of plaintiffs in Ext. 10 cannot be eschewed. That is why the Addl Tahasildar, Bhubaneswar in OEA Misc. Case No. 22 of 1997 by Order Dated 22.10.1999 recognized the tenancy right of Plaintiff but declined to record the land in favour of Plaintiff on account of delay & due to lack of power to do so. The subsequent documents Ext.13 to 19 also indicate the residential possession of plaintiffs in the suit land.

24. Ext. 9 is a certified copy of the Order Dated 6.2.1988 passed by Addl. Settlement Officer in Settlement Case No. 2794 of 1988 u/s 22(3) of Survey & Settlement Act where it has been stated that Plot No. 332/1950 was found in the possession of Fakir Charan Sethi, S/o- Nidhi Sethi & he has maintained the portion with well identified boundaries & that was done under the basis of the hatapatta from ex-intermediary.

25. Thus, as mentioned earlier the ex-intermediary has given Ekpadia mentioning the possession of Nidhi, father of Plaintiff from 1942 & that he was also shown to have paid rent through Ext.2 & 3 series. Further among the subsequent ROR, the latest ROR alone is to be considered as per the presumption laid in the proviso to Section 13(1) of Survey & Settlement Act & the latest is of the year 1989 under Ext. 10, the State has not successfully rebutted the presumption by showing that an error occurred in Exts.7 & 10 & entry in Ext.8 ought to have been followed in Ext. 10, which is the latest.

26. Further, the tenancy right shown to have been created by the ex-intermediary cannot also be undone by the Estate Abolition Collector & that it can be done only by the Court. This proposition was fortified in *Kumar Bimal*

Chandra Sinha Vs. State of Orissa, & Achutananda Swain Vs. Hadibandhu Swain and Others, .

27. The Learned Govt. advocate cannot be heard to say that the entry of possession of the plaintiffs or his father made in the Govt. records cannot be looked into, in view of the fact that they are not supposed to do any enquiry under the Act for vesting or settlement of land in Tenancy Right. This proposition that Revenue authorities have no such power was laid down in Kumar Bimal Chandra Sinha Vs. State of Orissa, & 33 (1991) OJD 539 (Smt. Basanti Kumar Sahu v. State of Orissa and Anr.). There is also proceeding contemplated u/s 8(1) of the Act & no power to confer tenancy right is vested upon any of the revenue authorities. The dispute can be resolved only by Court. But at the same time, it is to be mentioned that as held in Rabindranath Dikhit Vs. Padma Charan Samanta Singhar after him Saila Samanta Singhar and Others, Section 8(1) of the Act protects the rights of tenancy while vesting of the lands with the State. The said Section stipulates that a tenant inducted prior to vesting & who is in possession of land as a tenant on the date of vesting would continue as a tenant under the State. It was further held in (90) 2000 CLT 395 (Golak Bihari Chhotray v. State of Orissa) that Section 8(1) of the Act makes no provision for an application & the Section is merely declaratory of the continuity of the tenure of tenancy as it was immediately before the date of vesting. That has been also found so in the Full Bench of the Orissa High Court reported in 57 (1984) CLT 1405 (Radhamani Dibya v. Brajamohan Biswal).

28. Therefore, when plaintiffs family was found in possession prior to & during vesting it will automatically become a tenant under the State & no machinery of State could undo it except Court. The mere fact of possession will be converted into a tenancy right under the Govt. u/s 8(1) of the Act. However, the foremost point is that as per operation of the proviso to Section 13(1) of the Survey & Settlement Act, it is only the latest ROR that will have a presumptive value & i.e. in May 1988 under Ext. 10 which is favouring possession of plaintiffs side. Whatever favourable factor to the State Government found in the earlier ROR (1973-74) will prima facie go behind the scene & be ignored unless the Government establishes as to why such deviation from Ext. 8 occurred in 1989 settlement (Ext. 10), which is not found in settlement in 1973-74 (Ext. 8). The State has not at all explained this aspect. On these aspects the plaintiffs tenancy right in the suit land becomes established.

29. The next aspect of the case of the Defendants is that Exts. 4, 5 & 10 are forged. To answer the question as to whether Defendants have sufficiently proved the case of forgery the observation made in the following cases would throw light upon the yardstick of proof required in this aspect.

(i) Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, (where all prior cases were relied upon).

(ii) 69 (1990) CLT 465 (D.B) (State of Orissa and Anr. v. Dinanat Mohanto and

Ors.).

30. In both these cases, it was held that general allegation of fraud & forgery is not sufficient, that the full particulars of specific type of forgery & fraud should have been pleaded & vivid particulars thereof should have been given. It was again held in 2006(3) CCC 80 (Karnataka) (D.B.) Ranganayakamma and Anr. v. K.S. Prakash and Ors. that the general allegation of fraud is not sufficient. In 2008(1) CCC 177 (P & H) (Smt. Kamala Devi v. Smt. Gainda Devi and Ors.) it was held that mere vague allegations cannot be entertained. Again in Special Secretary to Govt. in General Administration Deptt. and Another Vs. Shri Bansidhar Naik, it has been found that the evidence of both sides should be looked into & finding shall be given on preponderance of probabilities. The Trial Court has rightly observed that as no positive materials come forth, it cannot be said that mere vague allegations of fraud & forgery in creating the documents relied on by the plaintiffs, levelled by the Defendant stood proved in the eye of law.

31 .Excepting the mere allegation on assumption that the documents are forged & fabricated one, the Defendants have not come forward to produce any material to show that they are forged. Simply because the Govt. have instituted a complaint before the Vigilance Department, that too in some other case, which was investigating the matter, we cannot jump into any conclusion against the Plaintiff or in favour of the Defendants. The allegation that the State Vigilance has taken cognizance is in respect of other case (not in the instant case). The matter while in investigation either before the Vigilance or elsewhere cannot be considered as if a proved finding was given by a Court of Law. No forensic expert has been sent for examination of the alleged forged documents. Thus case of forgery is not proved.

32. To say that there was no signature of king of Patia in the relevant document cannot be appreciated as judicial notice can be taken that kings do not personally sign in maintaining records of the raiyat. To say that certified copy under Exts.4 & 5 were not issued by the competent authority is again unacceptable not only because of non-production of its original but also that their forged nature was not proved. That entry can be looked into as collateral evidence for proving possession. Again when parties & more especially officials of the Govt. have not objected to the factual aspect of vesting of suit land in State subsequent to the Act, no purpose is going to be achieved by claiming that prior to 1930, the land was designated as "Jungle".

33. The Learned Government Advocate next relied upon the copy of the Judgment of the Supreme Court in Civil Appeal No. 827 -28 of 1994 for reference. That was a case where the Tahasildar exercised quasi judicial power u/s 8(1) of the Act after 27 years. The Board of Revenue u/s 38(b) reviewed the matter & set aside the same. The Hon'ble Apex Court found that such powers are available with the Government to review any quasi judicial order passed u/s 8 (1) of the Act. There could be no second opinion against that proposition of law

& in the facts & circumstances of this particular case, what we are concerned is that the settlement report under Ext. 10 is presumably true as per proviso u/s 13 of the Survey & Settlement Act. There is no proof on the side of the Defendants that the entry made earlier in the settlement 1973-74 (Ext.8) was true & that the latter entry in 1989 under Ext. 10 was false. That burden of successfully rebutting the presumption has not been satisfactorily discharged. The documents do show the possession of the plaintiffs father & as mentioned earlier, we have got satisfactory evidence to show their possession at the time of vesting in 1954.

34. The only alternative & final argument that was advanced by the Learned Government Advocates is that the subject matter is to be remanded back to the Trial Court as no issue was framed as to whether the documents alleged as forgery were proved so by Defendants. It was contended that had there been an issue framed on that aspect, there would have been an opportunity to lead evidence & to prove the case of Defendants that most of the relied on documents of the plaintiffs were unreliable as they were forged & fabricated.

35. At the outset, it is to be mentioned that there is no mention in the appeal memo of grounds & even now by lapse of time, of limitation, the Govt. cannot be allowed to incorporate the above said ground in the appeal memo. It was so held in AIR 1952 Raj Jodhpur Bench that if a fresh point had not been raised in the ground of appeal, it could not be allowed in appeal after expiry of period of limitation & especially when the Appellant had ample time in the period during which the appeal was pending to raise it by way of amendment of memorandum of appeal. This was also fortified in AIR 1932 Lah 444 (Uttam Singh v. Mt.Datar Kaur and Ors..

36. In Girdhari Lal Vs. Spedding Dinga Singh and Co., it was held that under Order 41 Rule 2 CPC raising of point not set forth in memorandum of appeal may amount to clear prejudice to the Respondent. AIR 1946 Nag 135 (Birdhichand and Anr. v. Mt. Kachri Bai also fortified this aspect.

37. As per Section 58 of the Limitation Act of 1963, the suit should have been filed within 3 years from the date when the right to sue accrued. There can be no right to sue until there is assertion in that suit of such an accrual of right & its infringement; or at least it shall be mentioned a clear act of Infringement of that right by Defendant against whom the suit is to be instituted. In the present case, the Plaintiff was in exclusive possession of the suit land & the right to sue accrued to the Plaintiff when the Defendants actually threatened to take forcible possession & not when the mutation was sanctioned for so long. We cannot hold that the suit of Plaintiff was tempered only on the ground that the sanction of mutation was in favour of Defendants. The Defendants have lost their time of appeal during which time only they could have made an amendment of memorandum of appeal. Thus, the Defendants are forbidden from arguing the point that the suit has to be remanded for failure of framing of issues as to whether Defendants proved their case of forgery of documents by plaintiff.

38. Further, if both the parties were aware of the issue & led evidence, there can be no prejudice caused to any party by non-framing of issue. The case laws on this issue are detailed below. In *Nedunuri Kameswaramma Vs. Sampati Subba Rao*, it was held that since the parties went to trial fully knowing the rival case & lead all the evidence not only in support of that contention but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case or that there was mis-trial which vitiates the proceeding. The suit could not be dismissed on this narrow ground & also that there is no need to lead evidence which has been done sufficiently to reach the right conclusion; the following cases were relied upon on this aspect:

Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, ; *Sahadeb Naik and Another Vs. Lingaraj Balabantrai and Others*, 2008 (1) CCC 220 (Bom) *Asaram Manikrao Bhandwale v. Kantrao Baburao Kakade*) *Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.*, . *Mool Chand Bakhru and Another Vs. Rohan and Others*, .

39. One cannot but mention that there was total supine indifference on the part of the Defendants before the Trial Court in not even moving a single stone even after releasing that burden of proving their allegation. The Defendants have been satisfied much in saying that their officials have not erred & what all found in documents about possession of Plaintiff was forged & fabricated. So they felt satisfied with it & needed no further evidence, they also, invited a finding over it. Now they cannot turn round & say that no opportunity was given to them.

40. The Division Bench of the Hon''ble Supreme Court in 2008(1) CCC 220 (S.C.) (*Kannan (dead) by Lrs. and Ors. v. V.S. Pandurangam (dead) by Lrs. and Ors.* observed that if parties have availed the opportunity in leading evidence, then there is no prejudice caused in non-framing the issue. The Hon''ble Supreme Court went to the extent of saying that the Appellate Court cannot shirk his duties by simply remanding the matter in a routine manner. It also stressed that the conditions provided under Order 41 Rule 23 CPC should be satisfied before ever such order is passed.

41. To sum up, no rem& for fresh trial could be ordered since-

(i) Both sides knowing their plea had fought for their case vehemently. Although opportunity was given to Defendants, it had availed the same but refrained from making any attempt to prove their case of forgery of documents relied on by Plaintiff either by seeking those documents to be scientifically examined for getting a finding in their favour in that respect. Defendants have also failed in accelerating the complaint that they have filed in this regard which is still said to be pending in the Vigilance.

(ii) Defendants had not bothered itself to have departmentally taken action against its own official whose signature was apparently found in the documents relied on by plaintiffs.

(iii) Defendants instead of facing the actuality of the documents against their interest besides failing to prove it by scientific method had simply argued for the impossibility of existence of such documents. In this manner one cannot imagine that officials alone erred in creating document.

(iv) No mention was made in the grounds of appeal about this plea & even that could not be made now as it is time-barred.

42. Thus, no remand for fresh trial is necessary. No case of forgery alleged by the Defendants was found proved. During the time of vesting in 1954, the possession of the suit land on the side of the plaintiffs was established by documents of Defendants-authorities. By operation of law, occupancy right was created in favour of the plaintiffs; the correctness of which cannot be decided by the revenue authorities. As it could be decided only by judicial forum & the Defendants never initiated the same, they had no positive case in their favour. As against the entries found in the latest ROR in favour of the plaintiffs, no successful rebuttal was made by the Defendants; nor could they satisfactorily explain as to the alleged incorrectness entering in the latest entry of the ROR. Decided cases show that tenancy under the ex-intermediary after vesting will be the tenancy under the State who can only claim rent & not for dispossession. The State machinery even at the time of vesting might have created suitable limbs to survey & find out the actuality of possession of such land as a disputed one. On such failure, the Defendants now turn round & blame their officials or disown the latter's entry in the disputed documents. For the above reasons, we do confirm the Judgment & decree of the lower Court. We find no reason to interfere with the same. We dismiss the State's appeal.

43. The Respondents/Plaintiff have also preferred a Cross Appeal aggrieved over the part of the Judgment & decree of the Court below withholding award of exemplary cost in favour of the Appellant. The Learned Counsel for the Respondents/Plaintiff submitted that the Respondents are entitled for exemplary cost in view of the situation that he was unnecessarily dragged on to this litigation on account of high handed action of the other side. The claim of exemplary cost was stressed due to shortcomings of the Government & other parties claiming under it in harassing the plaintiffs who belong to Scheduled Caste & who valued his Cross Appeal at Rs. 26 lakhs.

44. We may at once say that it is by virtue of preponderance of probabilities as discussed above the decree gets sustained especially when the Government availed the opportunity of proving their case of forgery, but could not strenuously pursue it in a scientific method due to their own default. Therefore, it cannot be termed that there was no basis at all for the Appellants/Defendant to have resisted the case of the Respondents/plaintiff, but the reality is that in their effort they have utterly failed. In this view of the matter, we feel that exemplary cost may not be awarded in the present scenario of the case. Thus, the Cross Appeal of the Respondents/Plaintiff is disallowed. Documents under Order 41, CPC filed by Appellants show only that forgery is not uncommon, & in that regard some

other documents were produced saying that they are also forged like the documents under dispute. That by itself will not discharge the burden of proof of forgery required in the disputed documents. So, that petition is dismissed as the documents are irrelevant to the issue.

45. In view of our finding that suit land is un"der the occupancy right of the plaintiffs who are Writ Petitioners in W.P. Nos.7962 of 2008 & 8874 of 2008 State Govt. cannot interfere & so these Writ Petitions are allowed. Consequently as the State Govt. had no right to give possession of the same to anyone else including the Writ Petitioner in W.P. 7434 of 2008, the same is dismissed.

I.M. Quddusi, ACJ.

I agree.