

(2009) 04 SC CK 0086

In the Supreme Court Of India

Case No : Civil Appeal No. 2656 of 2009 (Arising out of S.L.P. (C) No. 10223 of 2007) and Civil Appeal 2657 of 2009 (Arising out S.L.P. (C) No. 11960 of 2007)

State of Orissa and Others

APPELLANT

Vs

Harapriya Bisoi

RESPONDENT

Date of Decision : 20-04-2009

Acts Referred:

Contract Act, 1872 — Section 17
Evidence Act, 1872 — Section 91
Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 — Section 56(1), 63
Orissa Estates Abolition Act, 1951 — Sec

Citation : AIR 2009 SC 2991 : (2009) AIRSCW 4806 : (2009) 1 CLR 1100 : (2009) 7 JT 92 : (2009) 2 OLR 229 : (2009) 12 SCC 378 : (2009) 7 SCR 34 : (2009) 7 UJ 3326

Hon'ble Judges : Lokeshwar Singh Pantaa Panta, J;Arijit Pasayat, J

Bench : Division Bench

Advocate : Gopal Subramaniam, ASG, Arunav Patnik, Subir Palit, Mukul Kumar, Mino Kumar and Milind Kumar, for the Appellant; Altaf Ahmad, U.U. Lalit, Jana Kalyan Das, Banshidhar Baug, Avijett Bhujabal and Sabyasachi Burma, for the Respondent

Final Decision : Allowed

Judgement

Arijit Pasayat, J.—Leave granted.

2. Challenge in these appeals is to the order passed by a Division Bench of the Orissa High Court allowing the writ petition filed by the respondent in Writ Petition (C) No. 8282/2004 dated 27.10.2005 and the order dated 10.1.2007 passed in the Review Petition No. 13/2006 arising out of said writ petition.

3. The background facts as highlighted by the appellants are as follows:

The dispute relates to an alleged lease of 53.95 acres of land executed by Hatapatta dated 25.1.1933 by erstwhile intermediaries i.e. Chakradhar

Mohapatra and Ramakrushna Mohapatra in favour of one Kamala Devi. The respondent Harapriya Bishoi claimed to be the successor in interest of Kamala Devi. Undisputedly, the alleged Hatapatta is an unregistered document. The land is presently situated in the capital city of Bhubaneswar in the State of Orissa. The purported Hatapatta described the land as being for permanent cultivation but as per records or rights published in 1930-31 the land is classified as "uncultivable" within Anabadi Land. The land is further described as Jhudi jungle i.e. bushy forest. The estate of intermediaries Chakradhar Mohapatra and Ramakrushna Mohapatra is vested in the State by virtue of a Notification dated 1.5.1954 issued u/s 3 of the Orissa Estate Abolition Act, 1951 (in short the 'Act'). In respect of the land in question the Orissa Estate Abolition Case 4 of 1970 was registered. Originally the case was registered as OEA 18 of 1967 with OEA Collector, Cuttack. On transfer of certain villages from Cuttack district to Puri District, the case was transferred to OEA Collector, Bhubneshwar and was re-numbered as OEA Case No. 4 of 1970.

By order dated 6.1.1971 in the said OEA case the OEA Collector set aside the disputed lease deed on the ground of not being genuine. The Collector found that since the lands were lying fallow, the rent receipts were not genuine. The Ekpadia or Zamabandi Register in the Tahsil Officer had no mention of Kamala Devi as a lessee. The lease was unregistered even though vast tracts of land were transferred. It was thus held that the lease deed was back dated and was created with the object of defeating the purpose of the Act. The said order dated 6.1.1971 was upheld by Additional District Magistrate, Puri by order dated 28.5.1974.

Between the period 1962 to 1973 settlement proceedings were carried out under the Orissa Survey and Settlement Act, 1958 (in short the 'Settlement Act'). By publication dated 6.12.1973, the State was recorded as the owner/title holder of the entire land of 1056.8 acres under Khatian No. 1076 of village Gadakana of which the disputed land is a part. Further, by Revenue Department Notification No. 13699-EA-1- ND-1/74/R published in the Extraordinary Gazette No. 371 dated 18.3.1974, the Government of Orissa notified that the intermediaries interest of all intermediaries in respect of all estates other than those which have vested in the State have passed to and became vested in the State free from all encumbrances.

The order dated 28.5.1974 was challenged before the Orissa High Court by filing OJC No. 882 of 1974. The High Court by order dated 29.10.1976 directed the OEA Collector, Bhubneshwar to examine the matter afresh by issuing notice to the lessor and the lessee and also to ensure that the interest of the State was protected. Pursuant to the order of the High Court dated 29.10.1976 remanding the matter to the OEA Collector, the Collector heard the matter afresh and by order dated 24.4.1989 held that the lease was entered into prior to 1.1.1946. But he found that the claimant was only in possession of 7 acres of land and hence recommendation was made only for registering a settlement in respect of

such 7 acres of land. Significantly, the General Administration Department (in short GA Department) was not brought on record in the proceedings. The record was then submitted to the Board of Revenue. By order dated 27.4.1991, the Board of Revenue held that due enquiry had not been made as per the orders of the High Court in the earlier writ petition and the matter was returned to the Collector for fresh enquiry. Interestingly, the order of OEA Collector dated 24.4.1989 was challenged in OJC 2063 of 1992 in the High Court. There was, however, no challenge to the order passed by the Board of Revenue dated 27.4.1991. By order dated 2.11.1992 the High Court allowed the writ petition being of the view that the finding of the Collector was to the effect that the lease was not executed after 1.1.1946, so as to defeat the provisions of the Act. Therefore, the OEA Collector had no jurisdiction to proceed further in the matter. Thus (a) the determination of the extent of possession of the parties and (b) referral of the matter to the Board of Revenue was beyond jurisdiction of the Collector. The High Court quashed the order of the Collector directing settlement of portion of the leased property and declared the proceedings before the Board of Revenue to be non est.

The High Court confined its order only to issue of jurisdiction and the scope of power u/s 5(i) and there was no finding recorded regarding the genuineness of the lease dated 25.1.1933. Additionally, the GA Department of the State which is the relevant Department under the Orissa Government Rules of Business was not a party in the writ petition.

After the death of Kamala Devi, her purported successor Kishore Chandra Pattnaik filed a writ petition bearing No. OJC 15984 of 1997 praying for a direction to the State to accept rent in respect of the disputed property. Again, the GA Department was not arrayed as a party in the case at the time of filing of the writ petition. The GA Department was later arrayed as a party pursuant to the order dated 3.8.2000 passed in said OJC. One Anup Kumar Dhirsamant who was the Power of Attorney holder of Kishore Chandra Pattnaik executed a sale deed dated 6.3.2000 covering 23.30 acres of land on behalf of the latter in favour of the present respondent who is also the mother of Dhirsamant. Thus, the respondent came into the picture as a vendee of Kishore Chandra Pattnaik who in turn is the son of Kamala Devi. Kishore Chandra Pattnaik claimed that the original power of attorney did not empower the holder to sell the land. His plea was that the aforesaid sale was in pursuance of a forged and interpolated document. The sale deed dated 6.3.2000 was an impounded document for evasion of stamp duty. On 8.4.2002, a Settlement Rent Objection case under the Settlement Act bearing case No. 4013 of 2002 was instituted by the Assistant Settlement Officer, Gadakna on the strength of the petition filed by GA Department for recording the case land in favour of GA Department. The petition was allowed on 30.12.2002 in favour of the GA Department. Against the said order, Settlement Appeal cases were preferred by Kishore Chandra Pattnaik and present respondent Harapriya Bisoi. The appeals were disposed of by order dated 7.10.2004 and the record of rights in favour of GA Department was directed not

to be interfered with. The respondent also filed a Civil Suit bearing No. 2/12 of 2004 before learned Civil Judge, Senior Division, Bhubaneswar, for a declaration of right, title and interest in respect of disputed land. The IAs were dismissed and the Civil Court held that the right, title and interest of the present respondent had not been determined finally by OJC 2063 of 1992. It was held that the findings of the High Court related only to the power and jurisdiction of the Collector and the Board of Revenue. Respondent filed OJC 8282 of 2004 seeking a direction to the State to accept rent from her in respect of the case land, for a declaration of tenancy in her favour and for an injunction against the State restraining them from interfering with her possession. By order dated 27.10.2005 the High Court allowed the writ petition and that is the subject matter of challenge in one of the present appeals.

It is to be noted that in its order dated 27.10.2005 the High Court relied upon the earlier judgment in OJC 2063 of 1992 and held that in view of the finding in that case Kamala Devi and Kishore Chandra Pattnaik were deemed to be tenants under the State government u/s 8(1) of the Act and the present respondent being successor in interest of Kamala Devi was to step into her shoes and has to be treated as a tenant under the Act. The relevant findings of the High Court in the judgment are as follows:

(i) In paras 10 and 11 of the judgement of the High Court in OJC No. 2063/1992 it was held that the lease deed having been executed prior to 1.1.1946 and the same have been found to be a genuine document, the OEA Collector could not have proceeded with the case any further and he should have dropped the proceeding.

(ii) In the subsequent paras in the judgment in OJC No. 2063/1992, the Court held that the OEA Collector had no jurisdiction to decide the question of actual possession and make a recommendation to the Board of Revenue for concurrence. "The orders passed by the Board of Revenue in pursuance of the references of the case by the OEA Collector shall be taken to be non-est. The proceedings initiated u/s 5 (i) of the OEA Act shall be taken to have been dropped."

(iii) This Court while disposing of the earlier writ application taking note of Section 5 (i) has held that Late Kamla Devi was a tenant under the ex-intermediaries before the vesting and on the date of vesting and was in possession of the entire disputed property - hence Late Kamla Devi was a deemed tenant u/s 8 (1) of the OEA Act.

(iv) In view of the decision of the High Court in OJC No. 2063/1992, late Kamla Devi and thereafter her successor Kishore Chandra Pattnaik are deemed to be tenants under the State Government and therefore the Tahasildar, Bhubaneswar was duty bound to collect rent from them.

(v) Kishore Chandra Pattaik being deemed to be a tenant under the State Government, the, Petitioner, Harpriya Bishoi, has stepped into his shoes after

purchasing the land from him and, consequently, the Petitioner is to be treated as a tenant under the State and rent is to be collected from her.

4. In support of the appeals, learned Counsel for the State submitted that the High Court has completely mis-construed the decision in OJC 2063 of 1992. In the said judgment the High Court had not returned any finding or expressed any observation with regard to the genuineness of the lease deed of 1933. The only issue before the High Court was whether the OEA Collector had exercised its powers correctly u/s 5(i) of the Act. No further issue was under consideration of the High Court. Only the scope and jurisdiction of the Collector and the Board of Revenue was decided. In the said decision the High Court had not returned any finding that late Kamala Devi was a tenant under the ex-intermediaries before the vesting and on the date of vesting and was in possession of the entire disputed property. The High Court has erroneously recorded the said finding in the impugned judgment. Therefore, the High Court was in error by holding that Kamala Devi and thereafter her successor Kishore Chandra Pattnaik were deemed to be tenants u/s 8(1) of the Act. It is pointed out that the proceedings in OEA Case No. 4 of 1970 were u/s 5(i) of the Act and not u/s 8(1) of the Act. Neither the order of OEA Collector in OEA Case No. 4 of 1970 dated 24.4.1989 nor the High Court's order in OJC 2063 of 1992 recognizes the predecessors in interest of the respondent as tenants u/s 8(1) of the Act. The OEA Collector had categorically held in the order dated 24.4.1989 that the plea of the claimants that the proceedings to be treated as one u/s 8(1) does not hold water. The OEA Collector was therefore conscious of the fact that there was no exercise of power u/s 8(1) of the Act, but only u/s 5(i) of the Act. Further, the High Court was in error in its interpretation of Section 5(i) of the Act. The settlement of the lease in favour of the lessee under the first proviso of Section 5(i) has to be necessarily confirmed by a member, Board of Revenue.

5. It has also been highlighted that a decision of this Court in *State of Orissa v. Brindaban Sharma* has been completely lost sight of. The conceptual difference between Section 5(i) of the Act and Section 8 has been lost sight of. It was clearly observed in Brundaban's case (*supra*) that the order of the Collector u/s 5(i) of the Act is required to be confirmed by Board of Revenue even if Collector upholds genuineness of the lease. Several gross acts of fraud have been committed by the respondent and/or others involved. This clearly invalidates every action. The vendor's claims are pending adjudication before various courts. The record of rights has attained finality in the settlement proceedings and the High Court should not have unsettled them in the manner done. Therefore, it is submitted that the impugned judgment of the High Court cannot be maintained.

6. On the other hand, learned Counsel for the respondent submitted that consequences of vesting and the finding of the Collector that the lease was prior to 1.1.1946 and is a genuine one has been confirmed in the earlier judgment. The same has attained finality. The State of Orissa was represented by the Secretary to Government, Revenue Department, Bhubneshwar and the Member,

Board of Revenue was also a party. It is submitted that the decision in Brundaban's case (supra) was rendered in a different set up and has no application to the facts of the present case.

7. Certain factors need to be noted in the present case.

8. In Brundaban's case (supra) this Court held that even in a case where the OEA Collector "decides not to set aside the lease, he should have referred the case to the Board of Revenue. The object of conferment of such power on the Board of Revenue appears to be to prevent collusive or fraudulent acts or actions on the part of the intermediaries and lower level officers to defeat the object of the Act." This Court further held that even if the OEA Collector decides that a lease was purported to have been granted before 1.1.1946 and is not liable to be set aside, without reference or confirmation by the Board of Revenue, such lease would not attain finality. The judgment finally concludes that, "the order passed by the Tehsildar (exercising powers as the OEA Collector) without confirmation by the Board is non est. A non est order is a void order and it confers no title and its validity can be questioned or invalidity be set up in any proceeding or at any stage."

9. It is important to note, that in the facts of the present case, the Member, Board of Revenue in its order dated 27.4.1991 while considering the decision of the OEA Collector in OEA Case No. 4 of 1970, had observed that a detailed enquiry had not been made by the OEA Collector "to ascertain who was in possession of the case land prior to 1.1.1946 and from 1.1.1946 to 1.5.1954 (date of vesting of estate) and thereafter". The Member, Board of Revenue, had further stated that, "the OEA Collector should have verified the records to ascertain who were the ex-intermediaries (lessors) and if they had right to alienate the land and if they have got compensation u/s 28 of the OEA Act". Further, "the O.Ps did not press their claim for a considerable period of time" and "after notice was published in the newspaper 'Prajatantra' dated 22.7.87, a number of interveners have preferred their claims before the OEA Collector", who have not been examined.

10. The Member, Board of Revenue in its order had concluded that, "the case land are within Bhubaneswar Municipality where the capital of state has been established and a number of Government institutions have developed.. In view of the above points it is necessary on the part of the OEA Collector to conduct a detailed enquiry".

11. Without such confirmation by Member, Board of Revenue, the order of the OEA Collector had not attained finality, and hence, the lease deed in favour of Kamala Devi did not attain finality.

12. Certain provisions of the Act need to be noted.

13. Section 2(h) defines an 'intermediary' as follows:

Intermediary' with reference to any estate means a proprietor, sub-proprietor,

landlord, land holder, malguzar, thikadar, gaontia, tenure-holder, under-tenure holder and includes an inamdar, a jagirdar, Zamindar, Illaquedar, Khorposhdar, Parganadar, Sarbarakar and Maufidar including the ruler of an Indian State merged with the State of Orissa and all other holders or owners of interest in land between the raiyat and the State.

14. Section 2(hh) defines as 'intermediary interest' as an estate or any rights or interest therein held or owned by or vested in an Intermediary.

15. Significantly, as the above definitions would show, an 'intermediary' and an 'intermediary interest' cover all the holders or owners of interest in land between the State and the 'Raiyat' i.e. the actual cultivator or tiller of the soil. This is in line with the object and purpose of the 1951 Act i.e. to establish a direct relationship between the tiller and the State, and to abolish all intermediary interests, by whatever name called.

16. 'Raiyat' is the actual tiller of the soil, and is defined in Section 2(n) as:

'Raiyat' means any person holding the land for the purpose of cultivation and who has acquired the right of occupancy according to the tenancy law or rules for the time being in force in that area or in the absence of such law or rules, the custom prevalent in that area.

17. Section 3 of the Act empowers the State to declare,, by notification, that the estate specified in the notification has passed to and become vested in the State free from all encumbrances. In similar vein, Section 3A empowers the State to declare by notification that the intermediary interests of all intermediaries or a class of intermediaries in the whole or part of the estate have passed to and become vested in the State free from all encumbrances.

18. Upon a notification being issued under the provisions of Sections 3, 3A or 4 of the Act, the entire estate vests in the State free from encumbrances and the intermediary ceases to have any interest in such estate other than the interests expressly saved under the Act. Where a lease or transfer has been made prior to 1.1.1946, solely with the object of defeating the provisions of the Act or to claim higher compensation, Section 5(i) empowers the collector to set aside such lease, settlement or transfer and take possession of the land from such person.

19. By virtue of Section 8, any person who immediately before the vesting of an estate in the State government was in possession of any holding as a tenant under an intermediary, would on the from the date of the vesting, be deemed to be a tenant of the State government. The words 'holding as a tenant' mean the 'Raiyat' and not any other class of tenant: Reference in this regard may be drawn to the definition of 'holding' in the Orissa Tenancy Act, 1913. 'Holding' means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy".

20. Section 8 thus confers protection only on the 'Raiyat' i.e. the actual tiller of the soil.

21. Significantly, a 'lease' and 'lessee' on the one hand are defined separately from the 'Raiyat' under the Act. Thus, the mere execution of a lease by the intermediary in favour of a person would not confer the status of a 'raiyat' on the lessee nor would protect the possession of such lessee u/s 8. In fact, a 'lease' would amount to a transfer of an interest of the intermediary in the land to the lessee. In such a situation, far from being a tenant protected u/s 8, the lessee would in fact step into the shoes of the intermediary with his interest being liable for confiscation and his entitlement limited to compensation from the State. On the other hand, for protection u/s 8, one has to be a Raiyat cultivating the land directly and having the rights of occupancy under the tenancy laws of the State. Thus, a 'lessee' who is not actually cultivating the land i.e. who is not a 'raiyat', would not be within the protection of Section 8 of the Act. Section 2(h) of the Act in its residuary part states that 'intermediary' would cover all owners or holders of interest in land between the raiyat and the State. In *Kumar Bimal Chandra Sinha Vs. State of Orissa*, , this Court while considering the scope of the Act has held as follows:

the position in law is that 'estate' includes the interest, by whatever name called, of all persons, who hold some right in land between the State at the apex and the raiyat at the base. That is to say, the Act is intended to abolish all intermediaries and rent receivers and to establish direct relationship between the State, in which all such interests vest, after abolition under the Act, and the tillers of the soil.

22. On the facts of the present case, it is clear that the land was not under cultivation by Kamala Devi. As per the record of rights published in 1930-31, the disputed land is classified as Anabadi Land i.e. uncultivable. The land is further described in the records as Jhudi jungle, i.e. bush forest. In addition, by order dated 6.1.1971 in OEA Case 4 of 1970, the OEA Collector, Bhubaneswar had found that the lands were lying fallow and were not in physical possession of any person. The land thus not being cultivated, Kamala Devi cannot prima facie be considered as a 'Raiyat' under the Act.

23. It is the stand of the appellant-State that the 'Hatapatta' on the basis of which Kamala Devi has claimed her title is an unregistered document. Section 107 of the Transfer of Property Act, 1882 (in short the 'T.P. Act') read with Section 17 of the India Registration Act, (in short the 'Registration Act') mandates that the conveyance of title through a written instrument of any immovable property worth more than Rs. 100 for a period of one year or more must be registered. If such an instrument is not registered then Section 49 of the Registration Act read with Section 91 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') precludes the adducing of any further evidence of the terms and contents of such a document. See *Sri 5 Sita Maharani and Others Vs. Chhedi Mahto and Others*, . There is a further requirement of registration of the instrument of conveyance/agricultural lease under Sections 15 and 16 of the Orissa Tenancy Act, 1913 (in short the 'Tenancy Act').

24. It is further submitted that even presuming that the 'Hatapatta' is legal and valid, it would, make Kamla Devi a 'tenure-holder' as opposed to a 'raiyat'. Section 2(h) of the Act defines 'intermediary' to include 'tenure-holder'. Thus, a "tenure holder" being an "intermediary" under the Act- the rights and liabilities of such tenure holder would stand extinguished under the Act.

25. According to the proviso to Section 5(5) of Tenancy Act where the area held by the tenant exceeds 33 acres the tenant shall be presumed to be a 'tenure-holder' (which includes her successors-in-interest) until the contrary is proved. As under the 'Hatapatta', purportedly more than 53.95 acres of land has been given by way of lease by the ex-intermediary to Kamala Devi, she or her successor-in-interest is presumed to be a 'tenure-holder' and, therefore, an 'intermediary' under the Act.

26. It is highlighted by learned Counsel for the appellant, as various claims on prime government land in the city of Bhubaneswar have been surfacing on the basis of fraudulent title papers (called 'Hatapattas') allegedly to have been issued by ex-- intermediaries, the State Government in the General Administration Department, has handed over the issue of fraudulent 'Hatapattas' to the Crime Branch, CID, Cuttack for inquiry and necessary legal action vide Capital Police Station Case No. 178/2005 dated 20.5.2005. An interim report of the Inspector/ CID-Crime Branch dated 31.8.2007 with respect to the suit land has been submitted.

27. The Crime Branch Report states that the Power of Attorney through which the suit land has been sought to be alienated in favour of the Respondent herein has been tampered and manipulated by the Power of Attorney holder, Anup Kumar Dhirsamant, Managing Director, M/s Milan Developers & Builders (P) Ltd. The vendor, Kishore Chandra Pattnaik had not given any powers of alienation to his Power of Attorney holder Anup Kumar Dhirsamant. The respondent Harapriya Bisoi is the mother of the Power of Attorney holder. The Crime Branch also states that Anup Kumar Dhirsamant had interpolated the deed of Power of Attorney giving himself powers to enter into a sale deed so as to be able to alienate the property in favour of his mother, Harapriya Bisoi, the respondent herein. The report concludes that prima facie offences u/s 420/468/471/477A/167/120B of the Indian Penal Code, 1860 (in short 'IPC'), inter-alia, have been made out against respondent Harapriya Bisoi and Anup Kumar Dhirsamant.

28. It has also come to light that the Sale Deed (RSD) No. 1196/2000 dated 6.3.2000 executed in favour of Harapriya Bisoi, the Respondent herein, has been impounded for non-payment of adequate stamp duty with the deficit stamp duty and registration fee amounting to about Rs. 1.03 crores.

29. In Settlement Rent Objection Case No. 4013/2002 under the Settlement Act, the Asst. Settlement Officer by its order dated 10.3.2003 had recorded the suit land in favour of the G.A. Department.

30. Thereafter, the Respondent filed Settlement Appeal Case, being Suit No. 205

of 2003, to set aside the above order. The Settlement Officer by its order dated 7.10.2004 had dismissed the appeal holding that the draft. Record of Rights in respect of the suit land shall not be interfered with. The officer returned the following findings:

(1) On perusal of the impugned order passed by the Asst. Settlement Officer in the said objection case it is revealed that necessary field enquiry was made in presence of the parties.

(2) It is observed that there exists no such field/plot as found in the not final map in respect of suit land relating to Hal Plot Nos. 7590 Ac 3.000, 7592 Ac.3.400, 7626 Ac 1.940 and 7646 Ac.5.000 - the map in respect of those plots are imaginary.

(3) The land relating to Hal Plot No. 7646 Ac 5.000 have been allotted to Sainik School since the year 1962-63 and comes under the premises of Sainik School.

(4) The alleged possession of suit land by the appellant is found to be disputed with others like Dijabar Behera S/o Bhima Behera and Golakh Behera S/o Kesab Behera.

(5) Besides, an area of Ac 2.300 dec. out of the suit land i.e. Sabik Plot No. 4706 along with its adjoining land to the extent of Ac. 39.399 dec. have been leased to the Government of India, Ministry of Railways, for the purpose of construction of office and residential complex of East Coast Railway, Bhubaneswar. It is also observed by the Asst. Settlement Officer that no jamabandi in respect of the suit land has been opened in the Tahsil records.

(6) The Appellant adduced no evidence as regards to acquiring of right, title, interest and possession over the suit land which is Government land as per the finally published ROR of the year 1973-74.

(7) Creation of tenancy right in favour of the Appellant by way of deeming provision u/s 8 (1) of the Act has also not been recognized by the Tahasildar, Cuttack/Bhubaneswar; the claim of possession by the appellant over the suit land is not confirmed.

31. In course of hearing of the appeals, a query was made as to what is the effect of the order of the High Court in OJC 2063 of 1992 i.e. whether it covers the area of 7 acres or the whole area of 53.95 acres of land. Learned Counsel for the respondent submitted that in view of the finding that the order of the Collector was indefensible, obviously the right, title and interest of the respondent extended to the whole area. This stand is clearly unsustainable. The Collector's order only referred to certain enquires made to confirm possession of only 7 acres of land. The High Court apparently has not considered this aspect. The High Court has also not considered the effect of alleged fraud and the fact that the relevant department was not a party in the proceedings before the High Court in OJC 2063 of 1992.

32. It is necessary to consider the effect of fraud.

33. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from the ill will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable or of money and it will include and any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. See *Dr. Vimla Vs. Delhi Administration*, and *Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd.*, .

34. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. See *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, .

35. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury enures therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. See *Ram Chandra Singh Vs. Savitri Devi and Others*, .

36. "Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary "fraud" in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, "fraud" is defined as an intentional perversion of truth

for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Indian Contract Act, 1872 defines "fraud" as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false. In a leading English case i.e. Derry and Ors. v. Peek (1886-90) All ER 1 what constitutes "fraud" was described thus: (All ER p. 22 B-C) "fraud" is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false". But "fraud" in public law is not the same as "fraud" in private law. Nor can the ingredients, which establish "fraud" in commercial transaction, be of assistance in determining fraud in Administrative Law. It has been aptly observed by Lord Bridge in *Khawaja v. Secretary of State for Home Deptt.* (1983) 1 All ER 765, that it is dangerous to introduce maxims of common law as to effect of fraud while determining fraud in relation of statutory law. "Fraud" in relation to statute must be a colourable transaction to evade the provisions of a statute. "If a statute has been passed for some one particular purpose, a court of law will not countenance any attempt which may be made to extend the operation of the Act to something else which is quite foreign to its object and beyond its scope. Present day concept of fraud on statute has veered round abuse of power or mala fide exercise of power. It may arise due to overstepping the limits of power or defeating the provision of statute by adopting subterfuge or the power may be exercised for extraneous or irrelevant considerations. The colour of fraud in public law or administration law, as it is developing, is assuming different shades. It arises from a deception committed by disclosure of incorrect facts knowingly and deliberately to invoke exercise of power and procure an order from an authority or tribunal. It must result in exercise of jurisdiction which otherwise would not have been exercised. The misrepresentation must be in relation to the conditions provided in a section on existence or non-existence of which the power can be exercised. But non-disclosure of a fact not required by a statute to be disclosed may not amount to fraud. Even in commercial transactions non-disclosure of every fact does not vitiate the agreement. "In a contract every person must look for himself and ensures that he acquires the information necessary to avoid bad bargain. In public law the duty is not to deceive. See *Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers*, .

37. In that case it was observed as follows:

Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of the fact with knowledge that it was false. In a leading English case *William Derry, J. C. Wakefield, M. M. Moore, J.* what constitutes fraud was described thus : (All Er p. 22 B-C)

'Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false'.

38. This aspect of the matter has been considered by this Court in *Roshan Deen Vs. Preeti Lal*, ; *Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others*, ; *Ram Chandra Singh's case (supra)* and *Ashok Leyland Ltd. Vs. State of Tamil Nadu and Another*, .

39. Suppression of a material document would also amount to a fraud on the court. see *Gowrishankar and Another Vs. Joshi Amba Shankar Family Trust and Others*, and *S.P. Chengalvaraya Naidu's case (supra)*.

40. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in *Ram Preeti Yadav's case (supra)*.

41. In *Lazarus Estates Ltd vs. Beasley*, Lord Denning observed at pages 712 & 713, "No judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything." In the same judgment Lord Parker LJ observed that fraud vitiates all transactions known to the law of however high a degree of solemnity.

42. There is another statute which has great relevance to the present dispute, i.e. The Orissa Communal Forest and Private Lands (Prohibitions of Alienation) Act, 1948 (in short 'Communal Forest Land').

43. In *Maganti Subramanyam Vs. The State of Andhra Pradesh*, it was observed as follows:

4. The purpose of the Act was to prohibit the alienation of communal, forest and private lands in estates in the Province of Madras and the preamble to the Act shows that it was enacted to prevent indiscriminate alienation of communal, forest and private lands in estates in the Province of Madras pending the enactment of legislation for acquiring the interests of landholders in such estates and introducing ryotwari settlement therein. No fixed duration of the Act was specified and it is impossible to hold that merely because of the above preamble the Act became a temporary Act. The definition of 'forest land' is given in Section 2(b) of the Act reading: 'forest land' includes any waste land containing trees and shrubs, pasture land and any other class of land declared by the State Government to be forest land by notification in the Fort St. George Gazette.

Sub-section (1) of Section 3 prohibited landholders from selling, mortgaging, converting into ryoti land, leasing or otherwise assigning or alienating any communal or forest land in an estate without the previous sanction of the District Collector, on or after the date on which the ordinance which preceded the Act came into force, namely, 27th June, 1947. Section 4(1) provided that:

Any transaction of the nature prohibited by Section 3 which took place, in the case of any communal or forest land, on or after the 31st day of October, 1939 ... shall be void and inoperative and shall not confer or take away, or be deemed to have conferred or taken away, any right whatever on or from any party to the transaction:

* * *

This Sub-section had a proviso with several clauses. Our attention was drawn to Clauses (iii), (iv) and (v) of the proviso but in our opinion none of these provisos was applicable to the facts of the case so as to exclude the operation of Sub-section (1) of Section 4. Under Sub-section (3) of Section 4:

If any dispute arises as to the validity of the claim of any person to any land under (i) to (v) of the proviso to Sub-section (1), it shall be open to such person or to any other person interested in the transaction or to the State Government, to apply to the District Judge of the district in which the land is situated, for a decision as to the validity of such claim." Under Sub-section (4) the District

Judge to whom such application is made was to decide whether the claim to the land was valid or not after giving notice to all persons concerned and where the application was not made by the State Government, to the Government itself, and his decision was to be final. Madras Act 26 of 1948, was passed on April 19, 1949, being an Act to provide for the repeal of the Permanent Settlement, the acquisition of the rights of landholders in permanently settled and certain other estates in the Province of Madras, and the introduction of ryotwari settlement in such estates. Apparently because of the preamble to the Act it was contended that with the enactment of the repeal of the Permanent Settlement by the Act of 1948, which also provided for the acquisition of the rights of landholders in permanently settled estates, the Act stood repealed. We fail to see how because of the preamble to the Act it can be said that it stood repealed by the enactment of the later Act unless there were express words to that effect or unless there was a necessary implication. It does not stand to reason to hold that the alienation of large blocks of land which were rendered void under the Act became good by reason of the passing of the later Act. Our attention was drawn to Section 63 of the later Act which provided that:

If any question arises whether any land in an estate is a forest or is situated in a forest, or as to the limits of a forest, it shall be determined by the Settlement Officer, subject to an appeal to the Director within such time as may be prescribed and also to revision by the Board of Revenue.

In terms the section was only prospective and it did not seek to impeach any transaction which was effected before the Act and was not applicable to transactions anterior to the Act. In our opinion Section 56(1) of the later Act to which our attention was drawn by the learned Counsel does not fall for consideration in this case and the disputes covered by that section do not embrace the question before us.

5, Madras General Clauses Act 1 of 1891, deals with the effect of repeals of statutes Section 8, Sub-section (f) thereof provides that:

Where any Act, to which this Chapter applies, repeals any other enactment, then the repeal shall not-

(a)-(e) * * *

(f) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such fine, penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

This shows that even if there was a repeal any investigation started before the repeal would have to be continued and legal proceedings under the Act could be prosecuted as if the repealing Act had not been passed.

6. There is also no force in the contention that unless there was a notification u/s

2(b) of the Act declaring a particular land to be forest land, the applicability of the Act would be excluded. The definition of 'forest land' in that section is an inclusive one and shows that 'forest land' would include not only waste land containing trees, shrubs and pasture lands but also any other class of lands declared by Government to be forest land. This does not mean that before a piece of land could be said to be forest land there would have to be a notification by the Government under the Act.

44. In view of the aforesaid conclusions we are of the considered view that the matter needs to be re-considered by the High Court.

45. The High Court while re-hearing the matter shall also consider the effect of the aforesaid observations of this Court, and various aspects highlighted above.

46. In the background of the massiveness of apparent fraud involved, effective and participative role of officials of the State cannot be lost sight of. Without their active and effective participation manipulation of records, tampering with documents could not have been possible. The State would do well to pursue the matter with seriousness to unravel the truth and punish the erring officials and take all permissible actions (including criminal action) against every one involved.

47. The appeals are allowed to the aforesaid extent.