

(2002) 05 OHC CK 0013

In the Orissa High Court

Case No : A.H.O. No. 243 of 2001 and OJC No. 2884 of 2002

Sunil Krishna Ghosh and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-05-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Government Land Settlement (Amendment) Act, 1990 — Section 3(4)
Orissa Government Land Settlement Rules, 1983 — Rule 5
Trusts Act, 1882 — Section 51, 52, 53

Citation : (2002) 05 OHC CK 0013

Hon'ble Judges : P.K. Balasubramanyan, C.J.; P.K. Tripathy, J

Bench : Division Bench

Advocate : P.K. Routray, P.R. Sutar, M.R. Dash, R.K. Rout and H.K. Deo, in A.H.O. No. 243 of 2001 and R.C. Mohanty, D.K. Mohanty, K.K. Mishra, P.K. Ratha, A.P. Bose, D. Mohapatra and P.K. Satapathy, in OJC No. 2884 of 2002, for the Appellant; R.K. Mohanty, D.K. Mohanty, K. Rath, A.P. Bose and S.N. Biswal for Respondents Nos. 4, 5 and 6 in in A.H.O. No. 243 of 2001 and A. Routray, A.G.A. for Respondents Nos. 1, 2 and 3 and P.K. Routray, P.R. Sutar, M.R. Dash, B.G. Mishra, N.K. Deo and R.K. Rout for Opp, Party Nos. 4 and 5 in OJC No. 2884 of 2002, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, C.J.—A.H.O. No. 243 of 2001 is filed by opposite party Nos. 4 in 5 in OJC No. 691 of 2001 on the file of this Court. OJC No. 2884 of 2002 is filed by opposite party Nos. 4 to 6 in OJC No. 691 of 2001. Both the cases were heard together in view of the fact that they were intrinsically connected and the subject-matter of the proceedings is the same. OJC No. 2884 of 2002 is formally admitted. Mr. P.K. Routray has taken notice therein on behalf of opposite party Nos. 4 and 5 and the Additional Government Advocate Mr. A. Routray has take notice on behalf of opposite party Nos. 1 to 3. Learned Counsel for the parties were heard in detail. For convenience we hereafter refer to the ranks of the parties as in A.H.O. No. 243 of 2001.

2. Since on the first date of hearing we felt that it was necessary to peruse the original transferee's plaint in the Administration Suit No. 2992 of 1969 and the original deeds of composition of Trust, we directed the parties to produce them and the said documents were produced before we took up the hearing again and the documents were referred to as agreed to by the counsel for both parties, and since there was no dispute about the validity and the contents of those documents. We refer to this aspect since those documents have not been formally marked in this proceeding, but are referred to by us in this judgment.

3. The property in dispute is an extent of about one acre of land in Puri town with buildings thereon. The land was originally leased out to one Hariballav Bose on 2.5.1904. On the death of Hariballav Bose in April, 1913, this property alongwith his other properties devolved on his sons. On a partition among them, this property came into the hands of his son Nityananda Bose. Nityananda Bose incurred debts and was in involved circumstances. To pay up the creditors and to sell the estate to the extent possible for that purpose, he executed a deed of trust constituting Siddheswar Ghosh, his brother-in-law (wife's brother) as the trustee, under the deed dated 27.9.1921, charging him with the right and the obligation to pay up the creditors and to pay the amounts for the maintenance of himself and his three sons, until the sons attained majority. He however, provided therein that the trustee Siddheswar Ghosh, was entitled to sell the properties for the purpose of liquidation the debts and he had also the liberty to mortgage the properties. At this stage it may be noted that Nityananda Bose left behind Bibhuti Bose. Chandra Sekhar Bose and Parthasarathi Bose as his heirs, since his wife Kamala the sister of the trustee, had died in the meanwhile. Siddheswar Ghosh took up the obligation and discharged the debts. He appears to have sold some properties. On 25.7.1922, he purported to transfer unto himself the property involved herein with the two buildings, namely. Sagar Soudha and Sindhu Nibas. They were valued at Rs. 25.000/- and Rs. 21.000/- respectively. Siddheswar Ghosh continued to discharge his obligation as a trustee. It appears that the first deed of trust dated 17.12.1921 did not cover all the items held by Nityananda Bose. So a second deed dated 23.9.1925 was executed by Nityananda Bose constituting his brother-in-law Siddheswar Ghosh as the trustee in respect of the properties referred to therein on the same terms as contained in the trust deed dated 17.12.1921. Siddheswar Ghosh died on 13.2.1930, leaving his widow and daughter surviving him. Though on the terms of the trust deed, the widow could have-acted as the trustee, she declined office. Nityananda Bose thereupon executed a fresh deed of trust dated 17.4.1930 constituting Akshaya Kumar Ghosh Anr. of his brother-in-law (younger brother of Siddheswar Ghosh) as the trustee. The terms of the deed were the same as those in the deed of mist of the year 1921, and all the properties were included. In the year 1931. Akshaya Kumar Ghosh executed a Will bequeathing his rights and constituting Duial Chand Aich and Pravash Chandra Mallick as Administrators. He also conferred on his wife, the right to adopt. On the death of Akshaya Kumar Ghosh, the wife adopted one Asit Kumar Ghosh as her son.

Meanwhile, in the year 1934, the original lease expired. The legatees under the Will executed by Akshaya Kumar Ghosh, obtained a renewal of the lease for a further term of 30 years. Meanwhile, Asit Kumar Ghosh the adopted son filed Original Suit No. 838 of 1947 in the High Court of Calcutta against the legatees under the Will executed by Akshaya Kumar Ghosh. He obtained a decree for possession and took possession of the property from the legatees. The renewed terms of the lease meanwhile expired in the year 1964, but there was a further renewal.

3. At this stage opposite party Nos. 4 and 5 filed an Administration Suit i.e. Suit No. 2992 of 1969 in the High Court of Calcutta against Asit Kumar Ghosh in his individual capacity and as a transferee from the trustee as per the deed created by Nityananda Bose Ors. were also impleaded. In paragraph 10 of that Plaint. opposite party Nos. 4 and 5. who claimed through Nityananda Bose, the original settler, contended that Siddheswar Ghosh, the trustee had transferred unto himself one item of property containing the two buildings Sagar Soudha and Sindhu Nibas in Pun town, but he continued to act as the trustee to collect the rents, issues and profits of the remaining trust properties. In that plaint, the ultimate prayer was for a declaration that the trust created by Nityananda Bose had come to an end and for a decree directing Asit Kumar Ghosh, who was acting as a trustee to surrender the properties and to account for the income and expenditure and for other incidental and consequential reliefs. That suit ultimately ended in a compromise and the compromise decree is marked Annexure-4 in OJC No. 2884 of 2002 filed by opposite party Nos. 4 : and 5. By that compromise decree, the Plaintiffs-opposite party Nos. 4 and 5, the persons who claim under and through Nityananda Bose, agreed to a sum of Rs. 90.000/- being paid to Asit Kumar Ghosh in full settlement of his dues and to receive payment of a sum of Rs. 58.518-65 jointly. It was also agreed between the parties that the trust created by the deeds of settlement would come to an end on the payments being made. Asit Kumar Ghosh, who was acting as trustee was to deliver to the Plaintiffs all the documents and the papers of the trust estate. The properties that were still in tact were to be taken possession by the Plaintiffs. Regarding the disputed property, paragraph 6 of the compromise decree provided as hereunder:

6. Save as aforesaid the Plaintiffs and the Defendant No. 1 have no claim against each other in any manner arising out of the Trust Estate. In particular the Plaintiffs have no claim against the Defendant No. 1 whatsoever in respect of the two properties mentioned in paragraph 10 of the plaint and belonging to the Defendant No. 1

(Emphasis supplied)

The properties referred to in paragraph 10 are the properties involved in this litigation, namely the one acre of land with the two buildings. Sagar Soudha and Sindhu Nibas. Thus, the representatives of Nityananda Bose gave up their claim to the property, whatever" might have been the sustainability or otherwise of the

transaction dated 25.7.1922 when the trustee Siddheswar Ghosh transferred unto himself the property. Meanwhile, the term of the renewed lease expired or was expire by 1.5.1944. In the record-of-nghts Asit Kumar Ghosh had been recorded as the lessee. On 25.2.1994, Asit Kumar Ghosh applied for a renewal of the lease. Meanwhile, the Orissa Government Land Settlement Act (Orissa Act 1 of 1990) came into force with effect from 9.1.1991. Section 3(4)(e) of that Act conferred right on those who were lawfully holding the land on the appointed day. According to the Appellants, as on the appointed day, Asit Kumar Ghosh was lawfully holding the land and hence his right under the Act should have been recognised and the property should have been settled on him. In the application for renewal of the lease filed by Asit Kumar Ghosh, it was held by the Tahasildar that the property was liable to be settled in the names ox opposite party Nos. 4 and 5 and that Asit Kumar Ghosh had no right over the property. Asit Kumar Ghosh challenged this decision before the Revenue Divisional Commissioner (Central), Cuttack in an appeal. The appeal was admitted and the order of the Tahasildar was stayed. Asit Kumar Ghosh executed a Will bequeathing the property to the Appellants, ana one Pallav Kumar Banerji who died subsequently. The Appellants and the said Pallav Kumar Banerji were constituted executors and trustees of his estate. The executors of the Will made an application for substitution in the place of deceased Appellant Asit Kumar Banerji, in Khasmahal Lease Appeal No. 2 of 1994 pending before the Revenue Divisional Commissioner (Central), Cuttack. On 10.4.1996 the appellate authority rejected that application by the executors to come on record, on the ground that the Will had not been probated. The appellate authority also dropped the appeal Though the Appellants challenged the decision of the appellate authority before this Court in OJC No. 3762 of 1996, this Court dismissed the writ petition agreeing with the Appellate Authority that in the absence of a probate of the Will, the executors cannot step into the shoes of Asit Kumar Ghosh and pursue the appeal. Though the Appellants sought to challenge the decision of this Court in the Supreme Court, the appeal was not successful. The Appellants thereupon filed P.L.A. No. 257 of 1996 in the High Court of Calcutta for probate of the Will of Asit Kumar Ghosh. By judgment dated 25.4.2000, the High Court of Calcutta granted probate of the Will. It appears that the grant of the probate has been challenged in the High Court of Calcutta and the matter is said to be pending. On obtaining probate of the Will, the Appellants filed an application before the Revenue Divisional Commissioner (Central). Cuttack." seeking to get themselves impleaded in Khasmahal Lease Appeal No. 2 of 1994 and to have the order dropping the appeal set aside and for condonation of delay and to set aside the abatement. The appellate authority on a consideration of those applications, allowed the prayer for substitution after condoning the delay and set aside the abatement and also set aside the dropping" of the proceeding and reopened the appeal and ordered notice of that appeal to opposite party Nos. 4 to 6 herein. The appellate authority also directed that the status quo be maintained until a decision was taken on the appeal. Opposite party Nos. 4 to 6 filed OJC No. 691 of 2001 challenging the order of the Revenue Divisional Commissioner dated 16.11.2000

restoring the appeal.

4. Meanwhile, opposite party Nos. 4 to 6 filed an application for assignment of the land in their favour on the terms of the Orissa Government Land Settlement Act on the basis that as successors-in-interest of Nityananda Bose, they are entitled to such settlement under the Act. That application was allowed. Opposite party No. 5 thereafter moved the Collector to take possession of the land from the Appellants and to handover the same to him. Possession was taken over by the Collector. But he did not deliver possession as sought for by opposite party No. 5. OJC No. 6630 of 2000 was filed for issue of a direction to the Collector to deliver possession and for disposing of the proceeding pending before the "Collector. According to the Appellants, there was no proceeding pending before the Collector at that time. Whatever it may be without notice to the Appellants herein, this Court disposed of that writ petition on 1.8.2000 directing the Collector to dispose of the proceeding alleged to be pending before him. The property was directed to be retained and to be maintained by the Government. Pursuant to this, the Collector, Puri took up B.P.L. Case No. 43 of 1996 and ultimately held that opposite party Nos. 4 and 5 had failed to fulfill the basic condition envisaged by Section 3(4)(c) of the Orissa Government Land Settlement Act and Rule 5(b) of the Rules framed thereunder and the prayer for settlement of the Khasmahal land on raiyati basis and the claim for permanent tenancy was not sustainable in law and their claim was liable to be rejected. It was also held that the property was in Khasmahal possession of the Government and the Executive Engineer was to look after and maintain the property and the buildings. Feeling aggrieved, by the rejection of their claim, opposite party Nos. 4 and 5 have filed OJC No. 2884 of 2002.

5. In the judgment under appeal in A.H.O. No. 243 of 2001, the learned Single Judge held that the Revenue Divisional Commissioner had not heard both parties and had really passed an ex parte order. But the fact remained that the order substituting the executors of Asit Kumar Ghosh and setting aside the order closing the appeal only facilitated the reopening of Khasmahal Lease Appeal which stood dropped on 2.7.1996. Since opposite party Nos. 4 and 5 had initiated proceedings under the Orissa Government Land Settlement Act registered as B.P.L. Case No. 43 of 1996 no useful purpose will be served by Khasmahal Lease Appeal No. 2 of 1994 being reopened and re-heard since it only related to the claim for renewal of the lease made by the Appellants. Hence, the order of the Revenue Divisional Commissioner re-opening that appeal was liable to be quashed and it was necessary to direct the connector to proceed with B.P.L. No. 43 of 1996, in accordance with law and in terms of the order passed by this Court in OJC No. 6630 of 2000 and dispose of the same expeditiously. As noticed, it is feeling aggrieved by this decision, that the appeal has been filed by the Appellants, who claim under Siddheswar Ghosh and Asit Kumar Ghosh. As already referred to, the claim of opposite party Nos. 4 and 5 for permanent settlement was also rejected on the ground that they were not persons qualified for settlement under the Orissa Government Land Settlement Act and they have

challenged that decision in OJC No. 2884 of 2002.

6. Learned Counsel for the Appellants contended that the learned Single Judge was not justified in interfering with the reopening of Khasmahal Lease Appeal in the circumstance of the case. The learned Single Judge has acted unfairly in ignoring the legal effect of the compromise decree in the Administration Suit in the Calcutta High Court to which opposite party Nos. 4 and 5 are parties and which decree was binding on them, and has also erred in not understanding the legal effect of that decree. The learned Counsel submitted that as on the appointed day the Appellants were holding the land under a valid lease granted in favour of their predecessor, the term of which had not expired and it had to be held that they were lawfully holding the property within the meaning of the Act. It was also submitted that the sale of the disputed property effected on 25.7.1922 by Siddheswar Ghosh, the trustee of Nityananda Bose in his capacity as trustee in favour of himself, whatever might have been the defect then attached to it, had subsequently been accepted by opposite party Nos. 4 and 5 claiming under or through Nityananda Bose as evidenced by the compromise decree in the Administration Suit and that in the circumstances opposite party Nos. 4 and 5 cannot be heard to contend that they had any subsisting right over the disputed property. Learned Counsel also submitted that even if any infirmity was attached to the sale dated 25.7.1922 in view of the status of Siddheswar Ghosh as a trustee, the said transaction not having been challenged by Nityananda Bose during his life time and for all these years, the opposite parties were incompetent to question it now. Since they did not also persist in their challenge in the Administration Suit, the rights if any of Nityananda Bose and his successors had become barred and especially in the context of the compromise decree, the learned Judge was not justified in interfering with the reopening of the Khasmahal Lease Appeal. The learned Counsel for opposite party Nos. 4 and 5 contended that the sale by Siddheswar Ghosh unto himself was in violation of the relevant provisions of the Indian Trust Act, especially Sections 51, 52 and 53 thereof since no right can be claimed by the Appellants on the strength of that sale deed. The learned Counsel further submitted that no useful purpose would be served by reopening the appeal and the learned Single Judge was justified in interfering with that order. Counsel also faintly suggested that the dismissal of OJC No. 13175 of 1999 would also stand on the way of the Appellants. We may note here that writ petition filed by the alleged power-of-attorney Holder of Asit Kumar Ghosh challenging an order of the Collector directing the Tahasildar to take possession of the buildings was dismissed on the ground that by the time the writ petition was filed, Asit Kumar Ghosh had passed away and hence the power-of-attorney stood revoked and the power-of-attorney holder could not pursue the claim.

7. On the broad facts, there cannot be any doubt that the property purchased by Siddheswar Ghosh came into the hands of Asit Kumar Ghosh, one of the sons of the executor. This position is clearly admitted by opposite party Nos. 4 and 5 when they filed Administration Suit No. 2992/69 in the High Court of Calcutta to

put an end to the Trust and to recover the property. If the sale by the trustee of the disputed property unto himself was invalid, obviously in the Administration Suit opposite party Nos. 4 and 5 should have sought for and got recovery of possession of that property, on that issue being adjudicated by the Court. But opposite party Nos. 4 and 5 bargained for a settlement of the dispute on the terms set out in the compromise decree in that suit marked Annexure-4 in OJC No. 2884 of 2002. By that compromise decree, opposite party Nos. 4 and 5 clearly gave up their claim and their right over the disputed property and bargained for possession of other properties and a settlement of accounts of the estate of Nityananda Bose and for a division of the residue between themselves and the trustee, and for putting an end to the Trust. Thus, it is not open to opposite party Nos. 4 to 5 to raise a claim that they are entitled to the settlement of the land under the Orissa Government Land Settlement Act on the basis that they were in lawful possession of the property on the appointed day. On the appointed day, the possession was with Asit Kumar Ghosh and that was on the basis of a renewed lease for thirty years in favour of his predecessors in interest. Thus, the predecessor in interest of Asit Kumar Ghosh, were in lawful possession of the property on the basis of a lease taken from the Government, and on the appointed day, the possession of Asit Kumar -Ghosh was clearly lawful possession and. therefore, he was entitled to the settlement. Opposite party Nos. 4 and 5 could not claim any subsisting right in the property in view of the sale of property on 25.7.1922 which remained unchallenged within the time prescribed in law and in any event not certainly after the compromise decree in Administration Suit No. 2992 of 1969 (Annexure-4) whereunder opposite party Nos. 4 and 5 clearly gave up their claim over the disputed property. Whether it be a case of renewal of the Khasmahal lease or one for settlement, the right "to it vested with the Appellants, and not with opposite party Nos. 4 and 6.

8. The proceedings in OJC No. 13175 of 1999 arose when the Collector ordered the Tahasildar to take possession of the buildings. One Manju Mohanti claiming to be the Power-of-Attorney Holder of Ashwini Kumar Ghosh filed that writ petition. This Court dismissed that writ petition on the ground that the Power-of-Attorney Holder could not prosecute the proceeding since the Principal was dead. This Court also observed that as things stood, the lease stood renewed in favour of Pradeep Kumar Ghosh. That dismissal by this Court was also confirmed. In that case, there was no adjudication of rights and further, if at all, the renewal of the lease in favour Pradeep Kumar Ghosh was taken note of this proceeding does not in any manner help the opposite parties.

9. In this situation, we find that the learned Single Judge was in error in interfering with the order of the Revenue Divisional Commissioner in reopening the Khasmahal Lease Appeal especially in view of the fact that the said appeal had been closed earlier without impleading the executors only on the ground that the executors had not obtained the Probate of the Will. Now that the said Will had been probated, the executors were only given an opportunity by the Revenue Divisional Commissioner to pursue their appeal and in our view the said

order of the Revenue Divisional Commissioner was well within his jurisdiction and did not call for interference by this Court exercising jurisdiction under Articles 226 of the Constitution of India. Moreover, the order was a just one in the sense that the executors were only being given an opportunity to pursue the appeal filed by the testator, who certainly had a reasonable grievance to put forward. The jurisdiction of this Court under Article 226 of the Constitution of India should not have been exercised to thwart a proper enquiry.

10. In the B.P.L. Appeal referred to above, the Collector was also in error in holding that the land can be kept by the Government since no one had a right to have the settlement". The said view cannot be sustained. But, to the extent that the " claim of opposite party Nos. 4 to 6 was rejected by the Collector, the same is justified, and at the instance of opposite party Nos. 4 to 5, who had no right to the land, no interference is called for in OJC No. 2884 of 2002 against the rejection of their claim for settlement of the land in their favour.

11. Learned Counsel for the Appellants submitted that in the circumstances the Appellants must be given an opportunity to apply for settlement of the land in their favour under the Orissa Government Land Settlement Act or the application for renewal of the lease may be treated as an application for settlement under the Act. We think that in view of the reopening of the Khasmahal Lease Appeal and the direction to consider that appeal on merits in the light of the findings rendered by us above, the Appellants should be given an opportunity to make an application for settlement of the land in their favour impleading opposite party Nos. 4 to 6 also as party-Respondents so as to enable the authority under the Orissa Government Land Settlement Act to consider the claim of the Appellants in the light of the relevant materials and the findings rendered by us in this judgment.

12. Thus, we allow A.H.O. No. 243 of 2001, set aside the judgment of the learned Single Judge and restore the order passed by the Revenue Divisional Commissioner (Central), Cuttack in Khasmahal Lease Appeal No. 2 of 1994 directing reopening of the appeal and dismiss OJC No. 691 of 2001 filed by opposite party Nos. 4 to 6. We direct the Revenue Divisional Commissioner to "dispose of that appeal afresh in accordance with law and in the light of our findings rendered above. We permit the Appellants to make an application for settlement of the land in their favour under the Orissa Government Land Settlement Act impleading opposite party Nos. 4 to 6 showing them as party-respondents and direct the concerned authority to consider their claim in the light of the relevant transactions referred to by them and the findings recorded in this judgment by us, It is made clear that the finding of the Collector that the land and the buildings can be kept by the Government itself since no one is entitled to settlement is set aside to the extent it relates to the Appellants in the appeal. Since we have found that the respondents in the appeal, who are Petitioners in OJC No. 2884 of 2002 have no right to settlement, the order to the extent it holds that the Petitioners therein, opposite party Nos. 4 to 6 in the OJC,

are not entitled to the settlement under the Orissa Government Land Settlement Act is upheld.

13. In the result, the appeal is allowed and the judgment of the learned Single Judge is set aside and the writ petition"(OJC No. 691 of 2001) filed by opposite party Nos. 4 to 6 is dismissed. The finding of the Collector that the land can be kept by the Government since no right is vested on any one under the Orissa Government Land Settlement Act is set aside. The decision challenged in OJC No. 2884 of 2002 by opposite party Nos. 4 to 6 in A.H.O. No. 243 of 2001 is affirmed and that writ petition is dismissed except as regards the finding that the Government can keep the land and no one is entitled to a settlement under the Act. In the circumstances we direct the parties to suffer their respective costs.

P.K. Tripathy, J.

14. I agree.