
(2008) 02 OHC CK 0060

In the Orissa High Court

Sunil Kumar Dass (dead) by L.Rs. and Others

APPELLANT

Vs

The Revenue Divisional Commissioner, Central Division and
Others
 Arun Kumar Das and Others Vs State of
Orissa and Others

RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 54

Citation : (2008) 105 CLT 819 : (2008) 1 OLR 530

Hon'ble Judges : B.P. Das, J;A.K. Samantaray, J

Bench : Division Bench

Judgement

B.P. Das, J.—These two writ petitions are directed against a common order dated 20.9.2001 (Annexure-1) passed by the Revenue Divisional Commissioner, Central Division, Cuttack, in Khasmahal Lease Appeal Nos. 1 and 3 of 2000 affirming an order dated 24.12.1999 (Annexure-2) passed by the Collector, Puri, in Misc. Case No. 2 of 1999.

2. The petitioners in OJC No. 13094/2001 were the appellants in the aforesaid Khasmahal Lease Appeal No. 1/2000 while the petitioners in W.P.(C) No. 14085/2003 were the appellants in Khasmahal Lease Appeal No. 3/2000. As the petitioners in both these writ petitions challenge the same orders Annexures-1 and 2, the same were heard together. On an application filed by Sipra Das Biswas (opposite party No. 5 in OJC No. 13094/2001 and opposite party No. 4 in WP (C) No. 14085/2003), which was registered as Misc. Case No. 2 of 1999, the Collector by the aforesaid order Annexure-2 had cancelled the approval of permanent lease in B.P.L. Case No. 153/1994 in respect of Ac. 0.161 out of Ac. 0.500 on the ground that the same was obtained by suppression of real fact and practising fraud and directed the Tahsildar, Puri, to take over possession of the entire leasehold land measuring Ac. 0.500. The order Annexure-2 was challenged in two appeals before the Revenue Divisional Commissioner, Central Division, Cuttack, registered as Khasmahal Lease Appeal Nos. 1 and 3 of 2000, but the said appellate authority vide order Annexure-1 having affirmed the order of the

Collector Annexure-2, being aggrieved these two Writ Petitions have been filed by the respective petitioners.

3. Before entering into the facts, it would be appropriate to notice the relationship of the contesting parties from the following genealogy as set out in O.J.C.No. 13094/2001:

Chandi Charan Das (died 4.11.1943) =Khagendra Bala Dassi (died 12.7.1948)
_____|_____|_____|_____|_____|_____|
Hrishikesh Jogeswar Moni Bisweswar Maheswar Jagadish (died (died Mohan
(died (died (died 2.9.72)= 24.9.73) (died 22.3.84) 31.12.88) 8 7.94) Amiya |
12.2.94) = Malati = Radha | Dass | Mala Rani | (died | | | ____| | 24.9.73)
Arun Ku. | | | ____|_____| Dass | Pratip | | | (son) | Dass | Suvra
Moushumi | | (son) | Dutta Roy | | | (daughter) (daughter) | | | | ____|
_____| | | | | Rajib Amit | | Dass Dass | | (son) (son) | | |
_____|_____|_____|_____|_____|_____|
Murari Sujit Sushanta Samir Anjana | Dass Dass Dass Dass Sen | (son) (son)
(son) (son) (daughter) | ____|
_____|_____|_____|_____|_____|_____|
Dass Sipra Ellora Ajanta Dass (son) Dass Paul Dass (son) Biswas (daughter)
(daughter) (daughter)

4. The dispute in both the Writ Petitions relates to a Govt. Khasmahal leasehold property, situated in Puri town having an extent of Ac. 0.500 of land. From the facts set out in OJC No. 13094 of 2001, it appears that on 1.4.1943 Smt. Khagendra Bala Dassi, wife of Chandi Charan Dass, with the permission of the Govt. of Orissa got the said leasehold property by assignment and/or transfer from another lessee during the subsistence of the lease which was for a period of thirty years and was to continue till 18.10.1965. On 2.5.1948 said Khagendra Bala Dassi executed her last Will in favour of her six sons, namely, Hrishikesh Dass, Bisweswar Dass, Maheswar Dass, Jogeswar Dass, Moni Mohan Dass, and Jagadish Dass. Khagendra Bala having died on 12.7.1948, the Will executed by her was administered in the year 1950.

5. Hrishikesh, the father of original petitioner No. 1-Sunil Kumar Dass and also opposite party No. 5-Sipra Das Biswas in"OJC No. 13094/2001, had 1/6th interest in the aforesaid leasehold property of Ac. 0.500 of land. Sunil Kumar Dass having died during pendency of the writ petition, his legal heirs have been substituted in his place as petitioner Nos. 1/a, 1/b and 1/c. On 14.11.1966 Hrishikesh had executed a Will in favour of his wife Amiya Dass stating:

I give, devise and bequeath all my real and personal estates including monies lying in my name in any Banks to my wife the said Srimati Amia Dass absolutely forever.

On 18.6.1972 the State Government renewed the lease of the aforesaid leasehold of Ac. 0.500 dec. of land in favour of Hrishikesh and his other five brother/co-sharers, namely, Jogeswar, Moni Mohan, Bisweswar, Maheshwar and

Jagdish for thirty years with effect from 19.10.1965. Hrishikesh died on 3.9.1972 leaving behind his legal heirs, namely, widow Amiya Dass, two sons namely Sunil Kumar Dass and Ajit Dass, and three daughters namely Sipra Dass Biswas, Ellora Paul and Ajanta Dass. Thereafter the Will executed by Hrishikesh on 14.11.1966 was probated by the District Judge, Alipore, which, according to the petitioners, was made on the consent of Sipra Das Biswas and the entire 1/6th residuary interest of Hrishikesh in the leasehold of Ac. 0.500 dec. was left to Amiya Dass. On 23.6.1973 Amiya Dass executed a Will bequeathing all her movable and immovable properties, except the properties specifically mentioned in the Will in favour of her eldest son Sunil Kumar Dass. On 22.8.1978 Sipra also filed a petition before the concerned Court in probate proceeding giving her consent to the grant of probate of the Will dated 23.6.1973 executed by her mother Amiya Dass and probate was accordingly granted on 9.4.1980.

6. In 1991, petitioner Nos. 1 to 6 filed a suit, being Partition and Administration Suit No. 386 of 1991, in the High Court at Calcutta against Moni Mohan, Jogeswar and Bisweswar and their respective heirs for partition of Calcutta property and the leasehold property at Puri, The Calcutta High Court ultimately passed a final decree in the suit on 8.7.1994, vide Annexure-5, declaring the shares of the parties in the disputed properties and directing the Collector, Puri, to partition the leasehold property at Puri and to help the parties to raise boundary walls around their respective shares. After the final decree was passed, petitioner Nos. 1 to 6 along with other co-sharers having interest in the leasehold property made an application to the Collector for partition of the said property and for granting lease thereof. The Collector having directed on receipt of the said application, the Tahsildar, Puri, made a survey of the property in question, demarcated the shares of the respective parties and allotted separate numbers in respect of those shares. On 19.9.1996 the Collector passed an order directing the Tahsildar for settlement of the property in favour of petitioner Nos. 1 to 6 on the terms and conditions indicated in the communication, vide Annexure-6. Ultimately lease was granted in favour of petitioner Nos. 1 to 6, vide the lease deed dated 21.9.1996, Annexure-7.

7. On 17.11.1997 O.P. No. 5-Sipra Dass Biswas filed an application in the High Court at Calcutta praying to recall the Final Decree passed in the partition suit with regard to the leasehold property at Puri in which she claimed to be a co-sharer. The Calcutta High Court dismissed the said application by order passed on 26.11.1997, vide Annexure-8. Against the said order of the Calcutta High Court vide Annexure-8, O.P. No. 5-Sipra Das Biswas filed a SLP before the Supreme Court, but the same was dismissed as withdrawn with liberty to O.P. No. 5 to file a civil suit before a competent civil Court ventilating her grievances, vide the order Annexure-9. Thereafter O.P. No. 5 filed a suit in the Calcutta High Court impleading O.P. No. 2 (Collector, Puri) as a defendant. The said suit is still subjudice.

8. It is worthwhile to mention here that in December, 1995 petitioner Nos. 1 to 6

had executed a deed in favour of petitioner No. 7 purporting to transfer their right, title and interest in the said leasehold property at Puri. Though the said deed was executed before the Registrar of Assurance, Calcutta, could not be registered as O.P. No. 2 (Collector, Puri) did not inform the value of the disputed leasehold property for payment of stamp duty. Thus the right, title and interest of petitioner Nos. 1 to 6 in the said leasehold property continued to remain with them, in 1997 petitioner Nos. 1 to 6 executed a Deed of Assignment and Ratification in favour of the daughter of petitioner No. 7 and the said deed was registered at Puri.

9. While matter stood thus, O.P. No. 5 Sipra Das Biswas made an application to the Collector, Puri, to cancel the permanent lease with regard to the 1/6th share in the leasehold property at Puri granted in favour of petitioner Nos. 1 to 6 and to grant lease thereof exclusively in her favour. On the aforesaid application, O.P. No. 2 Collector passed the order dated 24.12.1999 (Annexure-2) cancelling the permanent lease granted to petitioner Nos. 1 to 6 and purported to resume the entire leasehold property of Ac. 0.500 in question.

Aggrieved by the said order dated 24.12.1999 (Annexure-2) cancelling the permanent lease the petitioners appealed to the R.D.C., Central Division, Cuttack, vide Khasmahal Lease Appeal No. 1/2000. The R.D.C. after hearing parties by his order dated 20.9.2001 Annexure-1, dismissed the appeal and affirmed the order of the Collector.

10. According to the learned Counsel for the petitioners, the orders passed by the Collector as well as the R.D.C. are illegal and are the outcome of non-application of mind to the position of law, as it stood, and the proceeding for cancellation of permanent lease and resumption of the leasehold land was vitiated by flagrant error of procedure resulting in manifest injustice. According to the petitioners, the finding of the Collector as well as the RDC that the lease was obtained fraudulently to the detriment of O.P. No. 5 is manifestly erroneous. O.P. No. 5-Sipra Dass Biswas never had any right, title or interest in the said leasehold property and the allegation that the lease was obtained by petitioner Nos. 1 to 6 to the detriment of the interest of Sipra Dass Biswas was unfounded. That apart, Hrishikesh Dass, who had only 1/6th share in the said leasehold property, had executed a Will in favour of his wife Amiya Dass, i.e., the mother of Sipra Das Biswas, and Amiya Dass had inherited the interest of her husband. She bequeathed her entire interest inherited by her in favour of petitioner No. 1-Sunil Kumar Dass, the predecessor in interest of petitioner Nos. 1/a to 1/c by a Will which was probated with the consent of Sipra Das Biswas. Further, the finding of the RDC that the omission to implead the Collector as a party to the partition suit was a serious" error of law is untenable as in a suit for partition of a leasehold property, the lessor is neither a necessary nor a proper party.

11. A counter affidavit has been filed by O.P. No. 5-Sipra Das Biswas, who is the main contestant in this writ petition and on whose application the Collector had passed the impugned order Annexure-2, which was confirmed in appeal by the

R.D.C. vide order Annexure-1. She had taken the stand in the Memorandum of Settlement entered into on 18.9.1972 that she along with her two sisters had given consent to the grant of probate of the Will left by Hrishikesh Dass. In the said Memorandum of Settlement the property at Puri was not mentioned. On 14.7.1978 the learned District Judge, Alipore granted probate of the last Will and Testament of Hrishikesh Dass to Sunil Dass as the sole executor as the other executrix, i.e., her mother-Amiya Dass, had died since 24.9.1973. Till 14.7.1978, administration of the Will was not complete and no follow-up action had been taken in accordance with law. Amiya Dass had executed her last Will and Testament on 23.6.1973 wherein the property in dispute at Puri was not included. According to O.P. No. 5, her mother-Amiya Dass all along was of the view that the property at Puri was the joint family property of all the heirs of her husband Hrishikesh Dass and other lessees as aforesaid, and as such the same was not specifically bequeathed in her Will. After the death of Amiya Dass on 24.9.1973, O.P. No. 5 gave her consent to grant of probate of the last Will and Testament of her mother-Amiya Dass since the Will did not contain any provision as to bequeathing the disputed property at Puri. Such consent was given on 22.8.1978. The probate of the Will of Amiya Dass was granted by the learned District Delegate at Alipore on 9.4.1980 and a copy of the Will and probate of Amiya Dass was sent to O.P. No. 5 on 15.4.1980. In the affidavit with regard to the assets of said Amiya Dass, vide Annexure-A/5, the leasehold property at Puri was not mentioned as the same was not specifically bequeathed nor was that intended to be bequeathed since the property was a joint family property.

12. According to O.P. No. 5, partition suit being Partition and Administration Suit No. 386 of 1991 was filed in the High Court at Calcutta on 2.5.1991 by some of the heirs of the three original lessees, namely, Sunil Kumar Dass, son of Hrishikesh, Malati Mala Dass, widow of Bisweswar, Pratip Kumar Dass, son of late Bisweswar, Radha Rani Dass, widow of Maheswar, Rajib Dass and Amit Dass, both sons of late Maheswar. In the said suit, Arun Kumar Dass, son of Jogeswar Dass, Moni Mohan Dass and Jagadish Chandra Dass, both sons of Chandi Charan Dass and Khagendra Bala Dassi, were defendants. According to her, all the other heirs of Hrishikesh were not made parties to the partition suit in which the petitioner-Sunil Kumar Dass was shown as the only son of Hrishikesh and he claimed to be the sole beneficiary and/or legatee of the Will executed by Hrishikesh. O.P. No. 5 has stated that she was not a party to the partition suit although she was the daughter of late Hrishikesh. According to O.P. No. 5, a decree in the said suit was fraudulently obtained by wilfully suppressing the facts that Puri property was impartible as the same was a Govt. Khasmahal revenue paying leasehold property and the names of the heirs of the original lessee were on record. By suppressing these facts, the plaintiffs practised fraud on Court and also on the Govt. of Orissa and obtained a decree. On 2.3.1992 the High Court at Calcutta passed a preliminary decree of partition and the Commissioner of Partition made partition of the Puri property on 30.4.1993 without sending the preliminary decree to the Collector for partition u/s 54 read with Order 20, Rule

18(1) of the Civil Procedure Code. According to O.P. No. 5, due to the aforesaid fraud perpetrated on Court, the lease in B.P.L. Case No. 153/1994 was granted on 21.9.1996 in favour of petitioner Nos. 1 to 6, i.e., Sunil Kumar Dass, Malati Mala Dass, Pratit Kumar Dass, Radharani Dass, Rajib Dass and Amit Dass, in respect of the property to the extent of Ac. 0.161 out of the total leasehold area of Ac. 0.500. The sum and substance of the contention of the learned Counsel for O.P. No. 5 is that the order passed by the Collector Annexure-2 so also the order passed by the appellate authority Annexure-1 confirming the order of the Collector are legal, correct and in accordance with law, as the property was a Khasmahal leasehold property. Further, as the Collector was not a party to the partition suit, the disputed property could not have been partitioned and the order granting the lease basing upon the partition decree was outcome of fraud and accordingly the same has been rightly cancelled by the Collector and affirmed by the R.D.C.

13. A counter affidavit has been filed on behalf of the State, i.e., O.P. No. 1-R.D.C. and O.P. No. 2-Collector. Learned Addl. Govt. Advocate appearing for the State while justifying the orders passed by the Collector as well as the R.D.C. argued that the property in question being a Khasmahal property, the executrix Amiya Dass, wife of Hrishikesh Dass, could not have executed the Will without permission of the lessor, i.e., the Collector, Puri. The petitioners could not have transferred the leasehold property or any portion thereof to any other person without obtaining prior permission from the Collector and as there was structural alteration without written permission of the Collector thereby violating the terms and conditions of the lease agreement, the order for resumption of the land is legal and correct.

14. Before proceeding to examine the merits of the case, it would be appropriate to record the following facts, which are not in dispute.

The property is a Khasmahal leasehold property. The lease in respect of Ac. 0.161 out of the total leasehold area of Ac. 0.500 was last granted in the year 1996 in favour of six persons, namely, Sunil Kumar Dass, Malati Mala Dass, Pratip Dass, Radhamani Dass, Rajib Dass and Amit Dass on the basis of the decree passed in a partition suit, O.P. No. 5-Sipra Das Biswas, is one of the daughters of Hrishikesh. On the application made by O.P. No. 5 Sipra Das Biswas, the permanent settlement made in favour of petitioner Nos. 1 to 6 in respect of Ac. 0.161 was cancelled and the entire property of Ac. 0.500 was ordered to be resumed.

Shri R.K. Rath, learned Senior Counsel appearing for petitioner No. 7, advanced same arguments as were advanced by Shri Asoke Mukherji, learned Senior Counsel for petitioner Nos. 1 to 6 challenging the orders passed by the Collector and the R.D.C.

15. In W.P.(C) No. 14085 of 2003 filed by Arun Kumar Das, the legal heir of Jogeswar Dass and Suvra Dutta and Moushumi Roy, the legal heirs of Jagadish

Dass, the same orders as challenged in OJC No. 13094 of 2001 are also under challenged. They have averred that the order passed by the Collector directing resumption of the entire leasehold area of Ac. 0.500 and the order passed by the RDC in appeal confirming the order of the Collector are illegal since no opportunity of hearing was extended to them in the proceeding before the Collector.

16. From the aforesaid, pleadings of the parties, the following questions arise for adjudication in the writ petitions:

(1) Whether the final decree obtained in Partition and Administration Suit No. 386 of 1991 by practising fraud on the High Court at Calcutta is legally binding on the Collector, Puri, until and unless the same is set aside by a competent Court?

(2) Whether resumption of the land due to non-performance of certain conditions in the lease deed was justified?

(3) Whether the order passed by the Collector directing resumption of the entire leasehold area of Ac. 0.500 without giving opportunity of hearing to the petitioners in W.P.(C) No. 14085/2003 was legal and correct?

17. In the preliminary decree passed by the High Court at Calcutta in Partition and Administration Suit No. 386 of 1991, as indicated earlier, 1/6th share in the disputed property was allotted to each of the sons of Khagendra Bala Dassi. Accordingly, Sunil Kumar Dass inherited the property allotted to Hrishikesh Dass as per the decree by virtue of a Will executed by Amiya Dass in his favour and thereafter the branches of Jogeswar (Arun Kumar Dass being his son), Moni Mohan Dass and Jagadish Dass filed applications for settlement of the lands allotted to their shares way back in 1994, registered as B.P.L. Case Nos. 113 and 114 of 1994 before expiry of the lease period of the suit land, i.e. 18.10.1995. As it appears, while no order had been passed on the said B.P.L. Cases, Sipra Das Biswas filed M.C.No. 2/1999 before the Collector, Puri, in which the Collector passed the impugned order Annexure-2. According to petitioner-Arun and Ors., they were never parties to the proceeding initiated at the instance of Sipra Das Biswas before the Collector and the Collector before passing the impugned order Annexure-2 ought to have made all the legal heirs of Chandi Charan Das parties to the proceeding. From this, it emerges that Sipra Das Biswas disputed the inheritance of her brother-Sunil Kumar Dass, who claimed to have exclusively inherited 1/6th share of Hrishikesh Dass.

18. Shri Mukherji for the petitioners in OJC No. 13094 of 2001 strenuously argued that even if Puri property was not included in the Will executed by Amiya Dass, the said property can be treated to be a residue legatee and there was no irregularity in Sunil Kumar Dass inheriting the same, Sipra Das Biswas having already given her consent in the partition suit, as stated in the foregoing paragraph.

In these proceeding we are not inclined to enter into the dispute whether the leasehold property at Puri is a property of residue legatee.

19. Shri Dayananda Mohapatra, learned Counsel appearing for the petitioners in W.P.(C) No. 14085/2003, which was filed by Arun Kumar Dass and Ors., submitted that since the right of renewal was vested with the lessee, the Collector could not have passed the impugned order Annexure-2 in respect of the property belonging to Arun on an application filed by Sipra Das Biswas because if ultimately Sipra Das Biswas succeeds, she can only get a share in the 1/6th interest that devolved upon her father-Hrishikesh and thereafter by virtue of the Will to her mother Amiya Dass.

20. Shri R.K. Rath appearing for petitioner No. 7 in OJC No. 13094/2001, i.e. Prabir Roy Chowdhury " Purnendu Roy Chowdhury, is a party to the transaction relating to the property held by Sunil Kumar Dass.

Though much has been said by O.P. No. 5 regarding the role played by said Prabir Roy Chowdhury " Purnendu Roy Chowdhury, who is the attorney of Sunil Kumar Dass, discussion on that is not necessary for the disposal of this writ petition.

21. The question emerges now is - What is the status of Khasmahal leasehold property?

Law is well settled regarding the principles of resumption of Khasmahal land and renewal of lease of such land. In this regard, we may refer to a decision of this Court in Republic of India v. Prafulla Kumar Samal ILR 1976 Cut 1392, in paragraph 4 of whereof it was held:

...Rights of a lessee in Khasmahal lands are in no way different from those which one has in his own private land. Clause (15) of the lease-deed confers a right of renewal on the lessee, and as has been pointed out earlier, the said right cannot be denied by the lessor. Besides the lessee's right in the Khasmahal land being heritable and transferable the lessee can create a permanent right of tenancy in his holding. Thus, in all respect the rights of a lessee are just similar to those of an owner of a private land. (See 1935 CLT 34 : Munshi Abdul Kadir Khan v. Munshi Abdul Latif Khan and 1937 CLT 67 : Madhusudan Swain v. Durga Prasad Bhagat)

The decisions rendered by this Court in the cases of Shankarlal Verma and Others Vs. Smt. Uma Sahu and Others, and Satyapriya Mohapatra v. Ashok Pandit 59 (1985) CLT407, make it crystal clear that Khasmahal land is heritable and transferable with a right of renewal and right of lessee in respect of such land is in no way different from that which one has in his own private land.

In Abhimanyu Sahu Vs. Narayan Chandra Sahu and Others, this Court while dealing with a case in which the trial Court had rejected the prayer of the plaintiff for partition on the ground that the property being Khasmahal Property and the lease having expired and having not been renewed, the parties could not claim

any right for partition, took the aid of the decisions rendered in Prafulla Kumar Samal (supra) as well as Braja Kishore Sahu and Others Vs. Smt. Sailabala Sahu and Others, and did not accept the plea of the trial Court.

Looking at the above judicial pronouncements, it is clear that impletion of the Collector as a party to the claim for partition of Khasmahal property is not necessary. In all respect the rights of a lessees are similar to those of an owner of a private land.

22. So far as the impugned order passed by the Collector to resume the land on the allegation of fraud is concerned, learned Counsel for the petitioners submitted that the finding of the Collector that fraud was practised as Sipra Das Biswas was not impleaded as a party to the suit and the partition suit was based upon fraudulent documents and transfer documents and transfer of property to Prabir Roy Chowdhury, being matters of dispute pending before the Calcutta High Court, the Collector could not have resumed the property and rejected the application for renewal of lease filed by the petitioners in OJC No. 13094/2001. According to the petitioners in both the writ petitions, the question whether the decree for partition was obtained by practising fraud can only be decided by a competent Court of law and in the present case when a proceeding is pending before the Calcutta High Court in this regard, the Collector should not have bypassed the order of the Calcutta High Court. According to the petitioners, until and unless the Calcutta High Court decides the question of fraud, the Collector" could not term the transaction a fraudulent one and could not have passed the impugned order.

23. In this regard, Shri R.K. Rath appearing for petitioner No. 7 placed reliance upon a decision of the apex Court in State of Punjab v. Gurdev Singh AIR 1991 SC 2219, in which the apex Court referred to a decision in Smith v. East Elloe Rural District Council (1956) AC 736 at p. 769 and observed as follows:

An order even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of validity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose-as the most impeccable of orders.

Shri Rath relied upon another decision of the apex Court in Tayabbbhai M. Bagasarwalla and another Vs. Hind Rubber Industries Pvt. Ltd. etc., , wherein it was held that even if the civil Court was ultimately found to have no jurisdiction to entertain the suit, then the defendants can be punished for violation of the interim order of injunction passed in the suit.

Shri Rath supporting the case of other petitioners wanted to make out a case that even if for the sake of argument it is held that the decree in the partition suit was obtained by misrepresentation and by practising fraud on Court and Collector in the matter of renewal of lease of a part of the leasehold property in question, the decree shall be held to be valid document unless and until a

competent Court of law sets aside the same.

24. In this regard we may refer to a decision of the apex Court in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , which the Collector referred while passing the impugned order, wherein it was held -

...The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation.

25. So far as the objection of the petitioners to the order of the Collector recalling his own order passed relating to lease of a part of the leasehold property is concerned, we may refer to the decision of the apex Court in Budhia Swain v. Gopinath Deb 1999 (II) OLR (SC) 151. Paragraph 6 thereof dealing with the inherent power of Court to recall is quoted hereunder:

6. What is a power to recall? Inherent power to recall its own order vesting in Tribunals or Courts was noticed in Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., , vide para 23, this Court has held that the Courts have inherent power to recall and set aside an order.

(i) obtained by fraud practised upon the Court,

(ii) when the Court is misled by a party, or

(iii) when the Court itself commits a mistake which prejudices a party.

In A.R. Antulay Vs. R.S. Nayak and Another, , the apex Court in paragraph-8 held how a judgment can be recalled. The said paragraph is quoted hereunder:

8. In our opinion a Tribunal or a Court may recall an order earlier made by it if-

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the Court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised when the ground for

reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.

We may refer to a decision of the apex Court in *Kiran Singh and Others Vs. Chaman Paswan and Others*, wherein it was held:

...It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, & that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties....

In *The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao*, the apex Court held:

"Fraud", as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by deed 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....

"Fraud" and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence....

26. Now let us see the impugned order passed by the Collector "vis-a-vis" whether the said order can withstand the reasoning of fraud. In this regard we are reminded of the legal maxim "*Fraus et jus nunquam cohabitant*", i.e., fraud and justice never dwell together. Before the Collector, *Sipra Das Biswas* filed an application (M.C.No. 2/1999) to cancel the permanent lease with regard to 1/6th share in the leasehold property at Puri granted in favour of petitioner Nos. 1 to 6 and to grant lease thereof exclusively, in her favour, on the grounds stated therein. After a threadbare discussion, the Collector, who was the fact finding authority, came to the conclusion that fraud had been practised by *Sunil Kumar Dass* and Ors. in obtaining the permanent settlement of the land from the Collector in BPL Case No. 153/1994 under Sub-rule (3)(c) of Rule 5-B of the Orissa Government Land Settlement Act in respect of Ac. 0.161 out of the total leasehold area of Ac. 0.500. Applications for renewal/settlement in respect of the rest portion out of Ac. 0.500 were filed by the petitioners in W.P.(C) No. 14085/2003 and others and the Collector also resumed the said portion of the leasehold area. The finding of the Collector is that certain facts were not brought to the notice of the Calcutta High Court and the fact that *Sipra Das Biswas* is a legal heir of *Hrishikesh* was suppressed.

In S.P. Chengalavaraya Naidu (*supra*), it was held:

It is the settled proposition of law that a judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. Such a judgment/decree - by the first Court or by the highest Court - has to be treated as a nullity by every Court, whether superior or inferior.

27. On examining the law on the subject and perusing the facts placed by the parties as well as the impugned orders passed by the Collector and the RDC, we do not find any illegal exercise of power by the said authorities, who had exercised their power under the statute. In other words, there is no error in the order of the Collector in resuming the land measuring Ac. 0. 161, which was settled in favour of Sunil Kumar Dass and Ors. in BPL Case No. 153/1994. But with regard to the rest of the leasehold land, in our considered opinion, the Collector should have given an opportunity of hearing to the petitioners in W.P. (C) No. 14085/2003, even though they had intervened in the appeal before the R.D.C. and got an opportunity of hearing at the appellate stage.

28. For the aforesaid reasons, we quash the direction in Annexures-1 and 2 so far as resumption of the land measuring Ac. 0.339 out of the entire leasehold area of Ac. 0.500 is concerned, and direct the Collector, Puri, to extend an opportunity of hearing to the petitioners in WP(C) No. 14085 of 2003 and pass fresh orders. In that regard in accordance with law.

29. The order passed by the Collector so far as it relates to cancellation of the permanent lease and resumption of the land measuring Ac. 0.161 out of the said leasehold area is affirmed. We, however, direct that status quo of the disputed area of Ac. 0.339 in the leasehold as existing today shall be maintained until fresh orders as directed above are passed by the Collector.

30. The Writ petitions are accordingly disposed of. There shall be no order as to costs.

A.K. Samantaray, J.

31. I agree.