

(2006) 05 OHC CK 0054
In the Orissa High Court
Case No : OJC No. 5332 of 2002

Swastik Builders and Developers Pvt. Ltd.	APPELLANT
Vs	
Revenue Divisional Commissioner (Central Division) and Others	RESPONDENT

Date of Decision : 09-05-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Government Land Settlement (Amendment) Act, 1991 — Section 3(4)
Orissa Government Land Settlement (Amendment) Rules, 1993 — Rule 5B
Orissa Government Land Settlement Act, 1962 — Section 3(4)
Orissa Government Land Settlement Rules, 1983 — Rule 1, 3, 5B
Orissa Sales Tax Act, 1947 — Section 2

Citation : (2006) 1 OLR 719 Supp

Hon'ble Judges : P.K. Tripathy, J;A.K. Parichha, J

Bench : Division Bench

Advocate : G. Mukherjee, P. Mukherjee, S. Patnaik, M.K. Mazumdar and A. Pradhan, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Parichha, J.—Petitioner, which is a Company incorporated under the Companies Act, 1956 and engaged in the business of development of property has prayed for quashing of Annexures 4 and 6, the order passed by the Collector, Puri in B.P.L. Case No. 2 of 1999 and the appeal order of Revenue Divisional Commissioner, Central Division, Cuttack in O.G.L.S. Appeal No. 1 of 2001 respectively. The case of the Petitioner can be summarily narrated as follows:

Some persons of West-Bengal and Orissa desirous of owning dwelling units in Puri town approached the Petitioner for purchase and development of a property at Puri so as to provide them their desired dwelling units. Petitioner accordingly negotiated with the landowners and purchased the land in question (hereinafter called as "case land") situated at VIP Road, Puri from the recorded owners and applied to the Puri Development Authority for sanction of building plan to

accommodate 63 residential apartments. It also applied to the Revenue authorities for transfer and grant of permanent lease of the case land in its favour. Tahasildar, Puri caused enquiry into the said petition and submitted his report for approval by the Collector, Puri. The latter approved the transfer of the lease in favour of the Petitioner, but taking note of the fact that the Petitioner was constructing flats for customers levied annual rent at the commercial rate and directed that the lease agreement in favour of Petitioner shall be executed in Form III of O.G.L.S. (Amendment) Rules, 1993. Learned Collector also imposed a penalty of 12 times of the annual rent as the lessees transferred the case land in favour of the Petitioner without obtaining prior permission of the Collector violating the condition of the lease. Aggrieved with such order of the Collector imposing commercial rent, penalty and directing execution of the lease in Form III Petitioner preferred O.G.L.S. Appeal No. 1 of 2001 raising contentions that it did not utilize the case land for commercial purpose, but simply constructed residential units on the land for interested persons on self finance basis and it is, therefore, not liable to pay commercial rent or execute the lease in Form III. It also challenged the legality of the penalty imposed by saying that there is no provision for levying such penalty. The said appeal having been dismissed, Petitioner has filed the present writ petition with the prayer to quash that order, Annexure-6 together with original order Annexure-4.

2. Opp. parties 2 and 3 in their joint counter supported the orders Annexures-4 and 6 and inter alia contended that the case land was purchased by Petitioner from the lessees vide Sale deed Nos. 2593 dated 18.07.1998, 4271 dated 21.8.1998 and 4272 dated 16.10.1998 without taking prior permission of Collector, Puri which constituted violating condition No. 2 of the lease agreement and accordingly Petitioner is liable to pay penalty. They also stated that Petitioner obtained permission from Puri-Konark Development Authority vide Order No. 32 dated 21.1.1999 for construction of a seven storied building containing 63 residential apartments and sold those apartments to different persons obtaining commercial benefits and as per the guidelines provided in Revenue Department G.O. No. 10055-G.E.(GL)-59/75 (Annexure-A/3) Petitioner is liable to pay annual rent on commercial basis. They further claimed that since the case land was used for commercial purpose and purchasers of residential apartments are neither the lessees nor did they themselves apply for lease, therefore, Petitioner was asked to execute the lease agreement in Form III as provided under Clause 2(a) and (f) of Schedule "V" of O.G.L.S. (Amendment) Rules, 1993.

3. Mr. G. Mukherjee, learned Counsel for Petitioner states that 63 interested persons approached the Petitioner to acquire and develop property for them on self-finance basis and in response Petitioner acquired the case land from the previous lease holders, developed the same and constructed 63 residential apartments for those persons and so the land was used for residential purpose as per the conditions of the lease. Mr. Mukherjee submitted that such construction not being for any commercial use, the Revenue authorities had no justification of demanding annual rent meant for commercial land or for execution of the lease

agreement in Form III. To substantiate his stand Mr. Mukherjee referred to the definition of "Commerce". He also argued that as per Section 3(4) of the O.G.L.S. (Amendment) Act lease is automatically to be held as permanent if the lessee remains in possession/occupation of the land as homestead for more than 5 years by the appointed date and so there was no justification on the part of the opp. parties 1 and 2 to impose penalty of 12 times of the annual rent on the Petitioner. He further indicated that there is no provision in the Act or Rules for imposition of such exorbitant penalty.

4. Mr. Ch. P.K. Mishra, learned Addl. Govt. Advocate on the other hand argued that if a land was leased for homestead purpose and the lessee himself resided on the lease land for more than 5 years by the date of publication of the notification, then the lease can be deemed to be permanent lease as per Section 3(4) of the O.G.L.S. (Amendment) Act, 1991, but if instead of using the land as his own homestead, the lessee utilizes the land for commercial purpose, such as building apartments and selling those to buyers, then it amounts to commercial use of the land and benefit of Section 3 (4) of the Act will not be available to him and in such case annual rent would be collected at the rate meant for commercial land. He indicated that Petitioner purchased the case land in 1998 and applied for permanent lease in the very same year and as such there was no occasion of it's having own homestead on the case land for 5 years; and since the original lessee in whose favour lease was subsisting had not filed any application for grant of permanent lease status, benefit of Section 3(4) (c) of the O.G.L.S. (Amendment) Act was not available to the Petitioner. On the contrary for purchasing such lease land without prior permission of the Collector it was liable for penalty contemplated for violation of condition No. 2 of the lease deed. Mr. Mishra further argued that Rule 5-B of the Amended O.G.L.S. Rules provides that settlement of Khas Mahal land would be made in the manner prescribed in Schedule "V" of the Rules and Schedule "V" prescribes that for Khas Mahal leases of land other than homestead land the lease deed is to be executed in Form III. He states that because the Petitioner instead of having its own homestead on the case land, built 63 apartments and sold those apartments, it is liable to execute the lease deed in form No. III. In support of his contentions Mr. Mishra relied on Letter No. GE(GL)S-143/97-29717/ dated 12th June, 1998, copy of the letter No. 5808/R Dated 19.1.1978 issued by the Secretary to Government in Revenue Department, Notification No. 100055-GE (GL)- 59/76-R of the Revenue Department dt. 29th December 1976 and the relevant provisions of the O.G.L.S. (Amendment) Act and Rules.

5. Admittedly, the case land was leased out to one Lalita Bala Sen for the period from 1922-1952 in Balu Misc. Case No. 166 of 1922. The said lease was renewed from 4.5.1952 to 3.5.1982 in Lease Case No. 6/1953. The lease of the same land was then granted in favour of Samitr Ranjan Sen, Niranjana Sen and Sanjaya Sen, the successors in interest of Lalita Bala Sen for the period from 4.5.1982 to 4.5.2012, vide Lease Case Nos. 1/1983, 2/1983 and 4/1983 respectively. These lessees sold the case land to the Petitioner under registered sale deeds executed

on 3.7.1998, 28.8.1998 and 16.10.1998 without obtaining prior permission of Collector, Puri. After purchase of the case land from the lessees, Petitioner raised a seven storied building comprising of 63 apartments and sold those apartments to different persons. It also applied for approval of transfer and grant of permanent lease of the case land and Collector, Puri as already indicated allowed such prayer of the Petitioner, but imposed penalty to the tune of 12 times of the annual rent and assessed annual rent on commercial scale and further directed for execution of the lease deed in Form No. III. On appeal, the said order was confirmed by learned R.D.C. In such factual backdrop, the Petitioner now questions in above stated manner legality of the decision of learned Collector and RDC.

6. In Chambers 21st Century Dictionary the meaning of the word "Commerce" has been given as "buying and selling of commodities and Services" and the meaning of the word "business" has been noted as "buying and selling of goods and services and also known as commerce". The definition of "business" in Section 2(b) of the Orissa Sale Tax Act, 1947 has been mentioned as follows:

"Business" includes-

- (i) any trade, commerce or manufacture or any adventure of concern in the nature of trade, commerce or manufacture, whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make again or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and
- (ii) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure of concern.

So any adventure or concern in the nature of trade without motive to make gain or profit would amount to business/commerce.

In the instant case Petitioner purchased the case land from the previous lessees in its own name and applied to the Puri-Konark Development Authority for permission to build 63 apartments on the said land and later on those apartment to different persons. It also applied to the Revenue authorities for grant of permanent lease of the case land in its favour. If the case land was purchased by 63 apartments owners and the apartment were constructed by those persons and Petitioners simply helped them their construction work, then there was no reason why it acquired the case land in its own name, applied for grant of permanent lease in its favour and why it applied to the Development Authority for building permission in its name. The very claim of the Petitioner that it is a Company engaged in business of development of property and has a brilliant track record of making developmental and construction itself shows that it acquired the case land, constructed apartments thereon in course of its business. Once element of business is involved the transaction becomes commercial even though profit may not be the motive or outcome and therefore, learned Collector, Puri and R.D.C. had justification of demanding annual rent on commercial scale.

7. Rule 5-B of the O.G.L.S. Rules, 1983 says that settlement of Khasmahal and Nazul land, Gramakantha Perambok and Abadi land leased out prior to the 9th day of January, 1991 shall be made in the manner prescribed in Schedule V. Schedule V. contains rules for lease and settlement of Khasmahal and Nazul land etc. which were leased out prior to 9th January, 1991. Rule 1 of this Schedule reads thus:

1. Manner of recording of leases/sub-leases, etc. in respect of Nazul/Khasmahal lands, payment of compensation- (a) Tahasildar shall record the holder of Khasmahal/Nazul-lease-hold land of a lessee if such land was leased out prior to the 9th day of January, 1991. The holder of such land includes a lessee, sub-lessee and a subsequent sub-lessee. This provision shall not apply to cases of Khasmahal/Nazul lease hold lands utilised for homestead purpose in any urban area.

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(f) All the lessees so recorded in the manner indicated in the preceding sub-clauses shall execute a lease-deed in Form III.

Admittedly, Petitioner purchased the case land from the lessees in the year 1989 and applied for recording of the said land in its name on permanent lease basis. It is also admitted that Petitioner was not having its homestead on that land rather it had raised a multi-storied building containing 63 apartments for sale. That being the position, protection stipulated under Rule 3 or the proviso to Rule 1 of Schedule v. of the Rules, 1983 is not available to it. More over, in the general letter bearing No. GE (GL) S-143/97-29717/R dated 12th June, 1998 clarification has been issued that Sub-Section 4 (c) of Section 3 of the Act, 1962 as amended is to be invoked only for settlement of homestead Khasmahal land in urban areas in favour of the occupiers who had held the Khasmahal land in question for not less than 5 years as on 9.1.1991 and were using the same as homestead. The Petitioner acquired land in 1989. So, by the appointed date i.e., 9.1.1991 it had not possessed the said land for 5 years and it had no homestead on it. The previous lessees have never come forward to claim the benefit of Section 3(4) (c) of the Act. So benefit of Section 3 of Sub-section (4) (c) of the Act was also not available to Petitioner. Therefore, rightly the Revenue authorities directed it to execute the lease deed in Form III as per Rule 1(f) of Schedule V.

8. Annexure A/3 is a copy of the Govt. order dated 29.12.1975, which clearly stipulates that annual rent @ 1% of the market value of the land is to be charged for the land used for trade or commerce. Basing on this instruction of the Government annual rent @ 1% of the market value has bee assessed for the case land with effect from the date of acquisition of the land by Petitioner. Such order, being in conformity with the rules and the instruction of the Government, cannot be called illegal or arbitrary.

9. Lease condition No. 2 stipulates that permission of the Collector is necessary for alienation of lease land and Government letter No. 5808/R dated 19.1.1978

at paragraph 2(f) says that in case of unauthorized transfer, transfer fee at the rate of 12 times the annual rental shall be chargeable. Admittedly, the lessees had not obtained the permission of Collector, Puri before transferring the case land in favour of Petitioner. So, for such irregular and unauthorized transfer penalty by way of 12 times of annual rental was chargeable. Learned Collector and the R.D.C. were, therefore not at all in legal error in imposing penalty amounting to 12 times of the annual rental.

10. The discussions and analysis supra clearly show that the impugned orders do not suffer from any legal infirmity or error of record. The same are, therefore, sustainable in the eye of law and cannot be quashed by invoking power under Articles 226 and 227 of the Constitution of India. Consequently, the writ petition is found to be without any merit and is dismissed with cost.

P.K. Tripathy, J.

11. I agree.