Hajuri P.C.Khuntia and others

Vs

Brundaban R.Das and others

Civil Appeal No. 4215 of 2000

(Mr. M. Jagannadha Rao and Mr. Doraiswamy Raju, JJ.)

25.07.2000

JUDGMENT

M. Jagannadha Rao, J.:— Leave granted.

The appellants are the successors-in-interest of Sri Balabhadra Khuntia. Mr. Khuntia was an 'ex-intermediary' under Section 2(hh) of the Orissa Estates Abolition Act, 1951 (Act 1 of 1952). A claim was made by Mr. Khuntia's son for settlement from the Government in respect of an extent of Ac O.168 & 5 Kadis in mouza Dandimalasahi, Puri, (in Khata 27, Plot 364), treating the said property as 'homestead' of the ex-'intermediary' Mr. Khuntia under section 2(i) of the Act. The respondent is the tenant who was inducted by the above said ex-intermediary as a tenant on 11.6.1957 for 20 years. The estate vested in the State on 29.3.63. The application was filed by the son of the Ex-intermediary on 30.10.63 under sections 6 and 7 of the Act. The respondent filed objections and claimed that as a 'deemed tenant', the respondent was entitled to settlement under section 8. The Orissa Estates Abolition Collector (Tahsildar) passed an order on 8.3.88 allowing the application made on behalf of the ex-intermediary and the appellate authority (Add). District Magistrate) confirmed the said order on 7.7.90. The respondent's revision to the Member, Board of Revenue, Orissa was dismissed on 28.9.1991. The respondent filed writ petition in the High Court. The writ petition was allowed under the impugned judgment dated 6.5.98 by the Division Bench.

The High Court framed two points for consideration, one relating to the 'restoration' of the case (a point on which no arguments were advanced before us) and the other one which is the more important one, namely, "whether the settlement of the suit land in favour of the landholder under sections 6 and 1 of the Act was illegal inasmuch as the landlord was not in possession of the suit land on the date of vesting"? On the second issue, the High Court held that from the record of the case, it was clear that the ex-intermediary had executed a registered lease deed and delivered possession for construction of a Cinema Hall to the tenant and that the said Cinema Hall still existed. The lease period was 20 years with a clause that the tenant would be entitled to get extension for another period of 20 years. The Act came into force on 29.3.1963 when the estate, including the disputed land vested in the State under section 3. Inasmuch as a Cinema was constructed much before the disputed land vested in the State, the High Court held that the tenant was in possession on the date of vesting and not by the intermediary. Under section 6, if the intermediary was in "possession" of a 'homestead' on the date of vesting, he would be entitled to settlement thereof and would become a tenant under the State on payment of rent while section 7 refers to lands in "khas possession" of the intermediary, he can retain the same on payment of rent as a ryot having occupancy right. The High Court then observed that the present property though it was in the 'possession' of the tenant, that person was holding the land for the landlord. Inasmuch as the writ petitioner (respondent before this Court) was holding the land as tenant, he was holding the

land on behalf of the ex-intermediary and therefore, the tenant's possession amounted to possession by ex-intermediry. For purposes of section 6, khas possession of the intermediary was not necessary. The High Court, however, felt that, taking into account the definition of 'homestead' in section 2(i), it must be a dwelling house used by the intermediary for the purposes of residence or for the purpose of letting out on rent. A Cinema Hall, (one which was constructed by the writ petitioner-tenant) was not a dwelling house and hence, it was held, the intermediary would not get the benefit of section 6.

The above finding was sufficient for disposal of the case before the High Court. But the High Court then went further into the claim of the tenant under section 8 — a matter which was not before the High Court and which was pending in another case filed by the tenant - and held that the property vested in the tenant automatically under section 8 and section 8 was merely declaratory and no inquiry was necessary. The writ petition of the tenant was allowed. Having said all this, in para 22, the High Court passed an order of remand to the Tahasildar for a 'fresh' decision. The relevant portion in para 22 reads thus:

"From the above discussion, we find that the above legal aspect, namely, Section 8(1) of the Act, and the question whether the disputed property is dwelling house ornot has not been property considered by the Tahasildar as well as the appellate authority. Therefore, it is a fit case to exercise our jurisdiction.

In the result, the petition is allowed and the impugned judgment and orders are quashed.

The matter is remanded back to the Tahasildar, Puri to consider the above aspect afresh".

Thus, it will be seen that even the quetion of law whether the property was a dwelling house or not was directed to be decided afresh by the authorities but this was done after holding that the property was being used as a Cinema Hall and not as a dwelling house and that section 6 did not apply. Again, thoughthe issue regarding section 8 rights claimed by the tenant was not one arising out of these proceedings under section 6 and 7, the same was also directed to be decided after making observations in favour of the respondents-writ petitioners.

In this appeal, learned senior counsel for the appellants Sri P.N. Mishra submitted that the High Court, if it wanted the questions of law and fact under sections 6 and 7 to be decided by the authorities under the Act "afresh", it should not have made any observations or given any findings on law or fact against the appellants. Further, the High Court had wrongly gone into the issues concerning section 8 rights of the tenant which did not arise at this stage. In fact, a tenant,if he ws using the property as a Cinema Hall, could not benefit from section 8 which was meant only for the tillers of the soil or the tenants who were actually cultivating the land. Learned senior counsel also submitted that section 6 referred not only to "homestead" but also to "such buildings or structures together with the lands on which they stand" — other than those used for primarily as offices or kutcheries or rest houses for estate servants on duty, for factories or mills for the purpose of trade, manufacture or commerce or used for storing grains or keeping cattle or implements for purposes of agriculture and constructed or established and used for the aforesaid purpose before 1.1.1946 — and that the High Court ought to have gone into the question whether the building in question did not fall within the excluded category of buildings/structures - and if it did not fall in the excluded category, it would still come under section 6, even if it was not a dwelling house. If the property was not used for office or kutcheries of the staff of the estate nor was it used as a factory or mill, nor for purposes of trade, manufacture or commerce nor used for grains or for keeping cattle or

implements for agriculture, then it would come under section 6 even if it was not a dwelling house. What was let out to the tenant was a dwelling house. The use to which the tenant had put the property did not alter its character as a dwelling house. In any event, the tenant using it as a Cinema Hall would not bring the case into the specified excluded categories of buildings. These are the contentions on behalf of the appellants.

On the other hand, learned counsel for the respondents, Sri Vinoo Bhagat submitted that the case of the appellants under sections 6 and 7 must fail as the property was not being used as a dwelling house/homestead. It did not come under the remaining part of section 6. Counsel argued that the High Court's observations in favour of the tenant under section 8 need not be disturbed.

We may state, at the outset, that the proceedings before the High Court were one arising out of sections 6 and 7 of the Act and the matter under section 8 was pending elsewhere. It was therefore wholly unjustified for the High Court to decide this question by the lower authorities, on remand. We may also state that the counsel argued that in any event section 8 applied only to a person who cultivated the land. That question could be person who cultivated the land. That question could be decided only if Government was made a party. We are of the view that the entire discussion on section 8 and the findings given thereon, - both on law and fact — were uncalled for and there was no question of remiting section 8 issue to the lower authorities. In fact, the State was not a party in the High Court and the question under section 8 could not be decided without hearing the State Government and deciding whether section 8 applied only to a tiller and not to a Cinema Hall owner. The application of the tenant under section 8 was pending - even as noticed by the High Court - and that could be taken up only after the right to settlement of the 'intermediary' was finally negatived. We, therefore, set aside these findings, observations and the remittal of section 8 issues to the lower authorities.

We shall next come to the main point of the appellants claim under section 6 and 7. We shall refer to section 2(1) and 6. They read as follows:

"Section 2(i) — `homestead' means a dwelling house used by the intermediary for the purposes of his own residence or for the purpose of letting out on rent together with any courtyard, compound, garden, orchard and out-buildings attached thereto and includes any tank, library and place of worship appertaining to such dwelling house but does not include any building comprised in such estate and used primarily as office or kutchery for the administration of the estate on and from the 1st day of January, 1946.

Section 6 — Homesteads of Intermediaries and Buildings together with lands on which such buildings stand in the possession of Intermediaries and used as golas, factories or mills to be retained by them on payment of rent — (1) with effect from the date of vesting, all homesteads comprised in an estate and being in the possession of an intermediary on the date of such vesting, and such buildings or structures together with the lands on which they stand, other than any buildings, used primarily as offices or kutcheries or rest houses for estate servants on duty as were in the possession of an intermediary at the commencement of this Act and used as golas (other than golas used primarily for storing rent in kind), for factories or mills for the purpose of trade, manufacture or commerce, or used for storing grains or keeping cattle or implements for the purpose of agriculture and constructed or established had used for the aforesaid purpose before the 1st day of January, 1946, shall, notwithstanding contained in this Act, be deemed to be settled by the Government with such Intermediary and which all the share-holders owning the estate, who shall be entitled to retain possession of such homesteads of such buildings or structuers together with the

lands on which they stand, as tenants under the State Government subject to the payment of such fair and equitable ground rent as may be determined by the Collector in the prescribed manner:

Provided that where the Intermediaries have come to any settlement among themselves regarding the occupation of buildings and file a statement to that effect before the Collector, the buildings shall be deemed to have been settled with the Intermediaries according to that settlement:

Provided further that homesteads in actual possession of the Intermediary shall be settled with him free of ground-rent in those areas where no ground-rent is charged under the existing law on homestead lands.

(2) x x x

(3) x x x

The question is whether the appellants can be said to be in possession of a "homestead". Question arises as to what are the terms of the registered lease deed and whether the use of the property for a Cinema Hall by the tenant could lead to the inference that the intermediary was not using the property as a homestead. Here there are two aspects of the matter. The learned senior counsel for the appellants contended that if the High Court decided to remit the questions of fact/law under section 6 to the authorities under the Act to decide `afresh', the High Court ought not to have made any observations either on law or fact. Secondly, the High Court did not notice that apart from the premises used as dwelling house, there could be other "buildings" in his possession through a tenant which, if they did not come under the excluded categories referred to section 6 - namely being used as offices or kutcheries or rest houses for estate servants on duty, or for factories or mills, for purposes of trade, manufacture or commerce, or for storing grains or keeping cattles or implements for purposes of agriculture, then such buildings could still come under section 6.

We are of the view that the High Court should not have gone into the merits on fact/law if it was remitting the matter both on law and fact for a 'fresh' decision by the authorities. The claim of the intermediary for setlement was to be considered under section 6 not only from the point of the property being used as dwelling house but also from the point as to whether it comes within "such buildings or structures together with the lands on which they stand" — other than the specified excluded categories. This aspect was also gone into by the High Court.

We, therefore, set aside the judgment of the High Court. We hold that the findings and observations in regard to selection 8 and the rights of the tenant were clearly outside the scope of the writ petition. The writ petition arose only out of section 6 and 7 proceedings. Hence all these findings and observations under section 8 are set aside including the remittal on section 8 issue. We also set aside the judgment of the High Court in so far as it gave findings on merits in law/fact on section 6 and 7 rights of the intermediary when it was remitting the matter on law and fact to the lower authorities for a decision 'afresh'.

This being an old matter, we are of the view that the remand need not be to the primary authority (i.e. the O.E.A. Collector (Tahasildar). Instead, we direct that the matter be remitted to the Member, Board of Revenue to decide the issues arising under sections 6 and 7 of the Act 'afresh' without being influenced by any observations made or findings given by the High Court, as stated above. The Member, Board of Revenue will decide the matter within four months from today by giving a reasoned order, after hearing the appellants and the respondents. Issues concerning section 8 will be

kept out of this inquiry.

The appeal is allowed and the judgment of the High Court is set aside the matter is remitted to the Member, Board of Revenue, as stated above. There will be no order as to costs.