LINCAI GAMANGO AND ORS. A

v.

DAYANIDHI JENA AND ORS.

MAY 31, 2004

B

[BRIJESH KUMAR AND ARUN KUMAR, JJ.]

Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956; Sections 2(f), 3(1) & 5(2) :

C

Immovable property/land—Allegedly forcibly occupied by respondents, non-tribals—Owners, belonging to tribal community, filed petition claiming possession—Allowed by Competent Authority—Appellate authority remanded the cases to trial Court for further enquiry—Trial Court dismissed the petition holding that since the suit land was in possession of the respondents for more than the prescribed period of limitation, D *provisions of the Regulation not attracted—Reversed by Appellate Court restoring back possession of the land to owners—Challenge to—Allowed by High Court—On appeal, Held : Disputed land falls within scheduled area in possession of respondents, non-tribals—A non-tribal would not acquire right and title on the basis of adverse possession—High Court* E *ought to have dealt with the issues regarding possession and ownership of the land with reference to burden of proof before arriving at its finding—Hence finding of the High Court not sustainable—Matter remanded to High Court for fresh hearing and decision.*

F

Appellants-owners of the suit land, belonging to a scheduled tribe community, filed petitions before the Competent Authority claiming possession over the suit land on the ground that the respondents had taken over possession of the disputed land forcibly. The Authority decided in favour of the petitioners-owners and directed respondents to hand over possession to them. Appellate authority remanded the G **matter to trial Court for further enquiry. In the meantime, the State Government promulgated Orissa Scheduled Area Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956 in terms thereof the disputed land falls in scheduled area. Trial Court dismissed the petition holding that since the suit land was in possession of the** H

A respondents for more than 30 years, it would not attract the provisions of the Regulations. Appellate Court found that since the appellants were deprived of possession over the disputed land forcibly by the respondent, they were entitled to get back possession in terms of the Regulations. Aggrieved, respondents filed a writ petition which was B allowed by the High Court. Hence the present appeals.

Allowing the appeals, the Court

HELD : 1.1. Generally subject to certain exceptions, alienation of immovable property by a tribal to a non-tribal is impermissible and C it is invalid, null and void. [828-G]

1.2. It is clear that a non-tribal would not acquire right and title on the basis of adverse possession. Hence, the ground for setting aside the order passed by the Appellate Court falls through, other factual D aspect about the possession of the respondents over the disputed land and entries in their favour may also not be of much consequence. In any case, this aspect of the matter has to be seen and considered afresh in the light of other facts and circumstances of the case. [832-B-C-D]

E *Amrendra Pratap Singh* v. *Tej Bahadur Prajapati & Ors.*, JT (2003) 9 SC 201; *Madhavrao Waman Saundalgekar & Ors.* v. *Raghunath Venkatesh Deshpande & Ors.*, AIR (1923) P.C. 205 and *Karimullakhan s/o. Mohd. Ishaqkhan & Anr.* v. *Bhanupratapsingh*, AIR 36 (1949) Nagpur 265, relied on.

F *Madhiya Nayak* v. *Arjuna Pradhan & Ors.*, 65 (1988) C.L.T. 36, distinguished.

1.3. The question of acquisition of right and title by adverse possession by non-tribal over the land in the scheduled area belonging G to a member of the Scheduled Tribe does not arise. The finding of the High Court on this point is not sustainable; the whole matter needs a fresh look by the appellate authority. If necessary, other relevant evidence on the record as sought to be pointed out by the appellants may also have to be seen in the light of the provisions of Regulation H No. 2 of 1956. The implications of the claim of the respondents for

allegedly having perfected their rights by adverse possession may also have to be examined. Hence, the matter is remanded to the High Court for fresh hearing and decision. [832-H; 833-A-B-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 868-74 of 1998.

From the Judgment and Order dated 27.10.92 of the Orissa High Court in O.J.C. Nos. 3992, 3993, 3994, 3995, 3996, 3997 and 3998 of 1989.

S.P. Sharma, M.P. Raju, Ms. Leni Thomas, Ashwani, Abhishek Atrey and Shishir Singh for the Appellant.

Janaranjan Das, Swetaketu Mishra, Ms. Moushumi Gahlot, Mrs. Kirti Renu Mishra and Y. Prabhakara Rao for the Respondents.

The Judgment of the Court was delivered by

BRIJESH KUMAR J. : The proceedings of these appeals before this Court arise out of the Revenue Miscellaneous Cases No. 150 to 156 of 1976 filed by the appellants separately against the separate respondents under the provision of Orissa Regulation No. 2 of 1956 before the Project Administrator, I.T.D.A., Parlakhemundie and Addl. District Magistrate, Ganjam in the State of Orissa. The cases were filed by the appellants who belong to Scheduled Tribes of Khariaguda village in Gumma block whereas the respondents who have been impleaded as opposite parties in different cases are Pano Christians of Asharyaguda village. It appears that the land in dispute falls in village Khariaguda which is a scheduled area under the provisions of the Regulation No. 2 of 1956. The claim of the appellants who filed different cases is that the land belongs to them but it has been forcibly occupied by the respondents. The cases were decided in favour of the appellants with a direction for restoration of suit land to them vide order dated 28.2.1979 passed by O.S.D., Parlakhemundie. On appeal, however, the Addl. District Magistrate, Ganjam, Chatrapur, remanded the cases for further inquiry with an observation that the identity of the suit land was to be ascertained in reference to kabala of 5.5.1927 T.S. No. 16/61 with assignment of plot numbers etc. in the said settlement.

A Before further proceeding with the matter, it would be relevant to mention that the State of Orissa promulgated the Regulation in exercise of power conferred by sub-para (2) of para 5 of the Fifth Schedule to the Constitution, known as the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956, known as the Orissa B Regulation No. 2 of 1956, to be referred to as such hereinafter. According to clause (f) of Section 2, "Transfer of immovable property" has been defined to mean :

> "mortgage with or without possession, lease, sale, gift, exchange or any other dealings with such property not being a testamentary C disposition and includes a charge or contract relating to such property."

Section 3 of the Regulation provides that transfer of any immovable property by a member of a Scheduled Tribe to anyone not belonging to D a Scheduled Tribe shall be absolutely null and void except where it is with previous consent, in writing, of the competent authority. Sub-section 2 of section 3 also provides that the competent authority may on his own motion order for ejectment of a person in possession in contravention of sub-section (1) of Section 3. Sub-section (1) of Section 3 reads as E under :

> "3.(1) Notwithstanding anything contained in any law for the time being in force any transfer of immovable property situated within a Scheduled Area, by a member of a Scheduled Tribe shall be absolutely null and void and of no force or effect whatsoever F unless made in favour of another member of a Schedule Tribe or with the previous consent in writing of the competent authority.
>
> (2) xxx xxx xxx"

G We further find that under sub-section 2 of section 5 a even surrender or relinquishment is deemed to be a transfer of property within the meaning of the Regulation with certain exceptions. It is thus clear that generally subject to certain exception, alienation of immovable property by a tribal to a non-tribal is impermissible and it is invalid, null and void.

H Coming back to the facts of this case, we find that after the remand,

the matter was heard and it also transpires that some other parties were also allowed to intervene. The Revenue Inspector who was assigned the job of identification of the plots, submitted his report and also entered into the witness box for his cross-examination. The Trial Court, on considering the report of the Revenue Inspector, observed as under : "..... From the above it can be seen that the boundaries indicated by the Revenue Inspector in his cross-examination is nearly co-terminus with the boundary indicated in the kabala of 1927 and is to be accepted". The Project Administrator, I.T.D.A, Parlakhemundie further observed that as per report of the Revenue Inspector the suit land had been recorded in the names of some of the second and third party respondents. It is also observed on the basis of the report of the Revenue Inspector that the petitioners, namely, appellants herein (the tribals) had not raised any objection at any stage of the settlement operation claiming the suit land. It is though not indicated which of the respondents are in possession of the suit land but it is observed that some of them are in possession as per kabala of 1927 for more than 30 years which is the limitation period according to Section 7-D. Therefore, it would not attract Section 3 A(1) of the Orissa Regulation No. 2 of 1956. Accordingly, the Trial Court dismissed the petitions. The whole order seems to be based on the report of the Revenue Inspector.

Aggrieved by the order passed by the Trial Court, the appellants preferred appeals, separately, which have been numbered as Regulation Appeal No. 1 of 1987 to Regulation Appeal No. 7 of 1987. The Collector and District Magistrate, Ganjam, the appellate authority allowed the appeals setting aside the order dated 25.3.1987 passed by the Trial Court after remand with a direction to restore the possession to the appellants forthwith as per direction given by the Trial Court in its earlier order. The appellate court observed that the Addl. District Magistrate, while remanding the case, only wanted the lower court to give a definite finding as to the identity of the lands with reference to the R.S.D. of 1927 entry in the ROR and order of Title Suit of 1961. In this connection the appellate court observed that since the respondents admit possession of the land in dispute as claimed by the appellants the question of identity in reference to the documents was not much relevant. Actual possession over the disputed land was not disputed. The appellate court then found that the Trial Court had non-suited the appellants relying upon the evidence of Amin, whose deposition in cross-examination tallied with the documentary evidence of

A 1927, but while doing so the earlier report was not taken into consideration at all which supported the case of the appellants. It was observed that the order of the Trial Court relying on the cross-examination of the Amin was erroneous and incorrect. Thereafter the appellate court observed that during the settlement operation, whosoever is found in possession, is so recorded
B accordingly. The respondents have admittedly been in forcible possession since 1958. Hence it was quite obvious that their names were recorded in the revenue records. Hence no reliance could be placed on such records since it is observed that litigation in respect of this land had been going on since long. Thus the appellate court ultimately found that since the appellants were deprived of their possession forcibly by the respondents,
C they were entitled to be restored back the possession, more particularly, in view of the fact that the Regulation 2 of 1956 is meant to protect the rights and privileges of the downtrodden people of the tribal areas and to save them from exploitation by other classes.

D Aggrieved by the order passed by the appellate court, the respondents filed a writ petition which has been allowed and the order passed by the appellate court has been set aside. The High Court formulated two questions on the basis of which the order of the appellate court was challenged. Firstly, the finding that the land belonged to the members of
E Scheduled Tribe was without any evidence or material to sustain any such finding and secondly since the respondents have been admittedly in possession of the disputed land, taken forcibly since 1958, as per the findings of the appellate court itself, the respondents had acquired title by adverse possession. It is further found that the amendment vide Orissa
F Regulation 1 of 1975 giving retrospective effect to the period of limitation enhancing it from 12 to 30 years for prescription of right by adverse possession became effective from 2.10.1973 whereas the respondents had already perfected their right on completion of 12 years from 1958 i.e. much before 2.10.1973. In this connection, the High Court placed reliance upon a decision of the Orissa High Court reported in 65 (1988) C.L.T. p. 360,
G *Madhiya Nayak* v. *Arjuna Pradhan & Ors.*, Thus, the only two reasons given by the High Court for allowing the writ petition and to set aside the orders passed by the appellate authority in different appeals are that the appellate authority jumped to the conclusion that the disputed land had been owned and possessed by the appellant (respondent No. 5 before the
H appellate authority) without there being any evidence in support of that

conclusion and the reason that the respondents had been in unauthorized occupation of the land in dispute and had perfected their rights by adverse possession.

We find both these reasons given by the High Court are not sustainable. Coming first to the second point, we find that there is a decision of this Court direct on the point. It is reported in JT (2003) 9 SC 201, *Amrendra Pratap Singh* v. *Tej Bahadur Prajapati & Ors.* The matter related to transfer of land falling in tribal area belonging to the Schedule Tribes. The matter was governed by Regulations 2, 3 and 7-D of the Orissa Scheduled Area Transfer of Immovable Property (By Scheduled Tribes) Regulations, 1956 *viz.* the same Regulations which govern this case also. The question involved was also regarding acquisition of right by adverse possession. Considering the matter in detail, in the light of the provisions of the aforesaid Regulation, this Court found that one of the questions which falls for consideration was "whether right by adverse possession can be acquired by a non-aboriginal on the property belonging to a member of aboriginal tribe"? (para 14 of the judgment). In context with the above question posed, this Court observed in para 23 of the judgment as follows :

> "..... The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognized by doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant....."

This Court then noticed two decisions one that of the Privy Council reported in AIR (1923) P.C. 205, *Madhavrao Waman Saundalgekar & Ors.* v. *Raghunath Venkatesh Deshpande & Ors.*, AIR 36 (1949) Nagpur 265, *Karimullakhan s/o. Mohd Ishaqkhan & Anr.* v. *Bhanupratapsingh*, holding that title by adverse possession on inam lands, Watan lands and Debutter was incapable of acquisition since alienation of such land was prohibited in the interest of the State. We further find that the decision in the case of *Madhiya Nayak* (supra) relied upon by the High Court was referred to before this Court and it is observed that the question as to whether a non-

A tribal could at all commence prescribing acquisition of title by adverse possession over the land belonging to a tribal which is situated in a tribal area, was neither raised nor that point had arisen in the case of *Madhiya Nayak*. It is further observed that the provisions of Section 7-D of the Regulations are to be read in the light of the fact that the acquisition of B right and title by adverse possession is claimed by a tribal over the immovable property of another tribal but not where the question is in regard to a non-tribal claiming title by adverse possession over the land belonging to a tribal situate in a tribal area. It is, therefore, clear in view of the decision in the case of *Amrendra Pratap Singh* (supra) that a non-C tribal would not acquire right and title on the basis of adverse possession. Therefore, the second ground for setting aside the order passed by the appellate court falls through. Therefore, the other factual aspect about the possession of the respondent over the disputed land and entries in their favour may also not be of much consequence, in any case, this aspect of the matter has to be seen and considered afresh in the light of other facts D and circumstances of the case.

Again so far the other question is concerned, namely, the appellate court, according to the High Court, having jumped to the conclusion that the land in question was owned and possessed by the appellants without E there being any material on the record, we feel that the High Court has dealt with this aspect very cursorily. There seems to be no dispute about the fact that the disputed land falls in the tribal area. The appellate authority, whose judgment has been set aside by the High Court in the writ petition, has dealt with and referred to orders passed in suits filed earlier by different parties F and the effect of such orders. The respondents are in possession over the land in tribal area but the appellants pleaded their dispossession at the hands of the respondent non-tribals forcibly. The High Court, without considering all those aspects, as considered by the appellate court, came to the conclusion that the appellate court had jumped to the conclusion about the possession and ownership of the land in favour of the appellants G without any evidence. The High Court would better have perused other orders passed by the authorities dealing with the point regarding possession and ownership of land in reference to question of burden of proof.

In our view, the order passed by the High Court is not sustainable. H The question of acquisition of right and title by adverse possession by non-

tribal over the land in the scheduled area belonging to a member of the Scheduled Tribe does not arise. Since the finding of the High Court on this point is not sustainable, in our view, the whole matter needs a fresh look considering the facts as indicated in detail in different orders passed at different stages namely, the first order passed by the Project Administrator which matter was later on remanded in appeal by order dated 8.4.1982 and thereafter the facts as mentioned in the subsequent orders including one passed in appeal which has been set aside by the High Court by means of the impugned order. If necessary, other relevant evidence on the record as sought to be pointed out by the learned counsel may also have to be seen in the light of the provisions of the Regulation No. 2 of 1956 before holding that there is no evidence or material supporting ownership, title or possession of the applicants *viz.* the tribals. The implications of the claim of the respondents for allegedly having perfected their rights by adverse possession may also have to be examined.

In the result, the appeals are allowed and the order and judgment passed by the High Court is set aside and the matter is remanded to the High Court for fresh hearing and decision after notice to the parties, in the light of the observations made in this judgment. Since the matter is hanging for long, the High Court may perhaps do well to consider for expeditious hearing and disposal of the case.

Costs easy.

S.K.S. Appeals allowed.