(1973) 11 OHC CK 0019

Orissa High Court

Case No: Original Jurisdiction Case No. 889 of 1972

Smt. Surjyomani Bhotto		APPELLANT
	Vs	
Doinu Naiko and Others		RESPONDENT

Date of Decision: Nov. 28, 1973

Acts Referred:

- Constitution of India, 1950 - Article 226, 227

Citation: (1974) 40 CLT 137

Hon'ble Judges: S. Acharya, J; B.K. Patra, J

Bench: Division Bench

Advocate: Y.S.N. Murty and S.P. Raju, for the Appellant; Standing Counsel and S. Mohanty and K.N. Sinha, for the Respondent

Final Decision: Allowed

Judgement

B.K. Patra, J.

This is an application under Articles 226 and 227 of the Constitution praying for the issue of a writ of certiorari quashing the order dated 30-9-1972 passed by the Collector, Koraput in O.S.A.T. 1. P.R. Appeal No. 13 of 1971.

2. Opposite party No. 1 Doinu Naik, is a member of the scheduled tribe. The Orissa Scheduled Areas Transfer of Immoveable Property (By Scheduled Tribes) Regulation. 1956 (Orissa Regulation No. 2 of 1956)(hereinafter referred to as the Regulation) provides in Clause 3(1) thereof that 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 unless made in favour of another member of a Scheduled Tribe or with the previous consent in writing of the competent authority. On 17-1-1959, opposite party No. 1 executed a sale deed in favour of the Petitioner herein, who admittedly is not a member of a Scheduled Tribe, in respect of 16.80 acres of land for a consideration of Rs. 4000/-. It is not disputed before us that

before executing the sale deed, he had obtained the necessary permission from the Revenue Divisional Officer, Nowrangpur who is the competent authority. Out of the 16.80 acres of land covered by the sale deed, possession in respect of 8.75 acres of land was delivered to the Petitioner and possession in respect of the balance 8.05 acres of land was not given. The Petitioner, therefore, instituted a suit on 27-7-1959 in the Court of the Munsif, Jeypore being Title Suit No. 41 of 1959 against opposite party No. 1 and his brother Bhagaban Naiko praying for declaration of his title in respect of the aforesaid 8.05 acres of land and for recovery of possession thereof, or, in the alternative, for recovery of Rs. 2,000/- from opposite party No. 1. On 2-2-1961. a compromise petition was filed in Court signed by the Petitioner as Plaintiff and by opposite party No. 1 and his brother Bhagaban Naiko who were Defendants in the suit. Annexure-1 is the compromise petition. To the compromise petition is appended a schedule. Schedule (a) consists of three plots with a total area of 8.75 acres, said to be in possession of the Plaintiff in the suit. Schedule (b) consists of three plots with a total area of 4.76 acres said to be in possession of Defendant No. 2 Bhagaban Naiko. Schedule (c) consists of three plots with a total area of 3.29 acres said to be in possession of Defendant No. 1 Doinu Naiko. Obviously after the execution of the sale deed, the Petitioner was given possession of the lands mentioned in Schedule (a) above, but was not given possession of the lands mentioned in Schedules (b) and (c), and the suit filed by him was to recover possession of the (b) and (c) schedule lands, having a total area of 8.05 acres. Under the compromise, the Defendants agreed to pay Rs. 2,000/- to the Plaintiff (Petitioner) on or before 1-5-1961 and in default thereof to deliver to the Plaintiff the disputed lands. There was a further clause in the compromise petition that if after payment of Rs 2,000/- referred to above, a further sum of Rs. 2,500/- was paid to the Plaintiff by the Defendants before the Phalguna Pumima of 1962, the sale deed executed by Defendant No. 1 on 13-1-1959 in favour of the Plaintiff would stand cancelled in which event the Plaintiff would deliver back to the Defendants the 8.75 acres of land of which he had already taken possession. Admittedly, the Defendants did not pay to the Plaintiff (Petitioner) the sum of Rs. 2,000/- and therefore on 10-5-1961 the Petitioner took delivery of the 8.05 acres of land through Court.

3. Thereafter, in the year 1970, Dainu Naiko (opposite party No. 1) filed a petition under Clause 3(2) of the Regulation before the Sub-Divisional Officer praying for restoration to him of the 16.80 acres of land on the ground that the land had been transferred to the Petitioner without necessary permission from the competent authority. The Sub-Divisional Officer, it seems, on 16-11-1971 held inter alia that opposite party No. 1 had obtained permission from the competent authority to sell 16.80 acres of land to the Petitioner and that consequently he was not entitled to any relief. Against the order passed by the Sub-Divisional Officer, opposite party No. 1 filed an appeal before the Collector. He, in agreement with the Court below, held that prior to the execution of the sale deed, Dainu : Naiko had obtained necessary permission from the competent authority to execute the sale deed. But he found

that out of the 16.80 acres of land covered by the sale deed, Dainu Naiko was entitled to and was in possession of only 12.04 acres of land and that the remaining 4.76 acres of land belonged to his brother Bhagaban Naiko who was in possession thereof. It may be mentioned here that the 4.76 acres of land correspond to the lands mentioned in Schedule (b) of the compromise petition - Annexure 1. He, therefore, allowed the appeal in part and ordered restoration of the 4.76 acres of land. Although it is not clear from the order as to whom the lands were to be restored, it is the admitted case of the parties that the 4.76 acres of land were restored to opposite party No. 1.

4. Several contentions were raised in the writ petition. It is stated firstly that the Collector erred in coming to the conclusion that the 4.76 acres of land belonged to Bhagaban Naiko. Secondly assuming that Bhagaban was the owner of the land, his title was extinguished by reason of the Civil Court decree Annexure 2 which remained unchallenged. In any case, the Collector had no jurisdiction to order restoration of the 4.76 acres of land in the absence of any application by Bhagaban himself.

5. The finding by the Collector that Bhagaban was the owner of the 4.76 acres of land is a finding of fact which cannot be challenged in this writ petition. That apart, there is sufficient material on record to justify, the Collector's conclusion on this point. If the entire 16, 80 acres of land covered by the sale deed executed by opposite party No. 1 in favour of the Petitioner belonged to opposite party No. 1, there was no necessity for the Petitioner to implead Bhagaban as a Defendant in the suit. These 4. 76 acres of land form the (c) Schedule I in the plaint filed by the Petitioner vide Annexure - 2. It is stated in the plaint itself that the (c) schedule lands stood recorded in settlement papers in the name of Bhagaban. In the compromise petition annexure - 1, these lands were described as being in possession of Bhagaban Defendant No. 2 therein. Having regard, therefore, to these materials on record, the Collector was justified in coming to the conclusion that Bhagaban was the owner of the 4.76 acres of land. Admittedly, Bhagaban had not obtained any permission from the competent authority to sell to the Petitioner these 4. 76 acres of land, nor had he joined his brother opposite party No. 1 in executing the sale deed. Consequently, the Petitioner cannot lay any claim to these lands on the basis of the sale deed. It is argued by Mr. Murty appearing for the Petitioner that he does not lay any claim to the 4.76 acres of land on the basis of the sale deed, but that his claim is based on the compromise decree annexure - 2 to which Bhagaban is a party and it is contended by him that as the Petitioner did not obtain title by reason of any transfer made in his favour by Bhagaban, he is not affected by any of the provisions of the Regulation. The expression "Transfer of immovable property" is defined in Clause 2(f) of the Regulation and means mortgage with or without possession, lease, sale, gift, exchange or any other dealings with such property not being a testamentary disposition and includes a charge or contract relating to such property. It is true that opposite party No. 1 had obtained from the competent

authority permission to sell the entire 16.80 acres of land including the disputed 4.76 acres of land belonging to his brother Bhagaban. But the permission in so far as it relates to the 4.76 acres of land is invalid having not been obtained by the owner of the lands. The sale deed in so far as it relates to the 4.76 acres of land did not therefore confer any title on the Petitioner. Mr. Murty is, therefore, right that under the sale deed, there was no transfer of this disputed 4.76 acres of land within the meaning of Clause 3(1) of the Regulation. But in the suit to which Bhagaban was a party, the latter had agreed by the compromise that the Petitioner would get possession of some lands including the 4.76 acres of laid in the event of non-payment of the sum of Rs. 2000/- within the stipulated date. This was clearly "dealing with the property" within the meaning of Clause 2(f) of the Regulation by Bhagaban and was consequently a transfer within the meaning of Clause 3(1) of the Regulation. As admittedly this transfer was made in favour of the Petitioner who was not a member of a Scheduled tribe, and as permission of the competent authority had not been obtained for such transfer, it is clearly hit by Clause 3(1) of the Regulation, and consequently, the transfer in so far as it relates to the 4.76 acres of land is null and void. That the transfer so effected has been sanctified by a decree of the Civil Court cannot avail the Petitioner as the decree itself is a nullity having been passed in contravention of the provisions of the Regulation.

6. Mr. Murty then contends that in the absence of any application by Bhagaban, the Collector should not have ordered restoration on the application made to him by opposite party No. 1. Sub-clause (2) of Clause 3 of the Regulation provides that where a transfer of immovable property is made in contravention of Sub-section (1), the competent authority may, either on application by anyone interested therein or on his own motion and after giving the parties an opportunity of being heard, order ejectment against any person in possession of the property claiming under the transfer and shall cause restoration Of possession of such property to the transferor or his heirs. Doubtless the application for restoration had not been made by Bhagaban but by his brother opposite party No. 1. Even if opposite party No. 1 cannot be considered to be a person interested in the restoration, yet it was open to the Collector to act suo motu when had come to his notice that a transfer had been made in contravention of the provisions of the Regulation. We are, therefore, unable to accept Mr. Murty's contention that the order for restoration was passed by the Collector without jurisdiction. Mr. Murty, however, is right in his contention that the Collector was wrong in ordering restoration in favour of opposite party No. 1 and that the restoration should have been in favour of Bhagaban or, if he is dead, in favour of his heirs.

7. We would accordingly allow this application, quash the impugned order passed by the Collector and direct that the records be sent down to him expeditiously for disposal afresh according to law and in the light of the observations made above. In the circumstances, we make no order as to costs.

S. Acharya J.

8. I agree.