

IN THE HIGH COURT OF ORISSA AT CUTTACK**AHO No.34 of 2000**

Orissa State Housing Board, **Appellant**
Bhubaneswar

-versus-

Sebati Dei @ Routray (since dead) **Respondents**
represented by her LRs.

Appeared in this case:

For Appellant : Mr. Dayananda Mohapatra,
Advocate

For Respondents : Mr. G. M. Rath, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAİK

JUDGMENT

10.05.2022

Dr. S. Muralidhar, CJ.

1. This appeal by the Orissa State Housing Board (OSHB), Bhubaneswar is directed against an order dated 19th November, 1999 passed by the learned Single Judge of this Court in First Appeal (FA) No.260 of 1997. By the said impugned judgment, the learned Single Judge set aside the judgment dated 7th August, 1997 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Original Suit (O.S.) No.333 of 1993-I filed by the present Appellant as a Plaintiff against the Respondent

No.1/Defendant No.1 (who was the Appellant in FA No.260 of 1997).

Background facts

2. The aforementioned suit had been filed by the OSHB for a declaration of title in respect of land admeasuring Ac.7.500 decimal in District Khurda, Mouza Chandrasekharpur [which is now within the Bhubaneswar Municipal Corporation (BMC) limits] under Sabak Khata No.303, Plot No.218, out of a larger area of Ac. 184.018 dec of a 1931 settlement which corresponds to Sabak Khata No.472 Plot No.258 and which further corresponds to Hal Khata No.619 Plot No.258/2020 (hereafter ‘the land in question’).

3. The case of the Appellant is that the land in question was Kisam ‘Jhati Jungle’ as recorded in the Record of Rights (RoR). Initially in 1931, it belonged to one Sri Madhusudan Deb, the Raja of Patia and was subsequently vested in the State upon the coming into force of the Orissa Estate Abolition Act (‘OEA Act’). It is stated that since no tenant induction document was filed, the State Government became owner and possessor of the land in question. Subsequently an order dated 4th January, 1954 was issued by the State Government whereby all Khasmahal lands were transferred from the State Government to the Cabinet Department [initially termed as Political and Service (P and S) Department and later as G.A. Department (Respondent No.5)].

Thus the G.A. Department had control over the land in question since 1954. It is claimed by the Appellant that during the 1974 settlement, the land in question was recorded in the name of the G.A. Department.

4. Subsequently, by Notification No.773/72 dated 25th November 1972, all the Government lands included in Bhubaneswar Tahasil were transferred to the management and control of Respondent No.5 including the land in Plot No.218. Later, Ac.31.982 decimal of land appertaining to Plot No.258 and 258/2020 was transferred to the Appellant under Allotment Order No.8318 on 29th April, 1989. The land was to be utilized by the OSHB for construction and sale of houses to individuals in the Lower Income Group (LIG) Housing Scheme. The OSHB was required to pay a premium of Rs.63,96,400/- to the State Government within 60 days from the date of the aforementioned order. Possession of the land consequent upon demarcation of the allotted area was to be made only after payment of premium and execution of the lease deed. Respondent No.1 filed a writ O.J.C.No.3181 of 1989 before the Hon'ble High Court and obtained a stay of construction in Plot No.258/2020.

T.S. No. 5 of 1988

5. As far as Respondent No.1 is concerned, she filed Title Suit (TS) No.5 of 1988 as *informa pauperis* in 1986, vide Miscellaneous Case No.518 of 1986. That Miscellaneous Case

518 of 1986 was allowed on contest on 6th January, 1988. Thereafter, the plaint was formally registered and numbered as TS No.5 of 1988. The State of Orissa through its Secretary, Revenue Department, the Collector Puri and the Tahasildar, Bhubaneswar were all impleaded in the said Misc. Case. They were the Defendants in TS No.5 of 1988 as well. It is stated that by the time of institution of the aforementioned TS No. 5 of 1988, the land in question stood recorded in favour of the State of Orissa. By a judgment dated 10th January, 1989 of the Civil Judge (Senior Division), Bhubaneswar, TS No.5 of 1988 was decreed *ex parte* on 10th January, 1989 declaring the title of Respondent No.1 herein in the land in question and confirming her possession. The Defendants to the suit were permanently restrained from interfering with the Plaintiff's possession of the land.

6. After the passing of the decree, the Government of Orissa filed Misc. Case No.26 of 1989 under Order 9 Rule 13 CPC for setting aside the *ex parte* order. Misc. Case No. 26 of 1989 was dismissed for non-prosecution on 11th July, 1990. To restore this application, another application under Section 151 of the CPC was filed being Misc. Case No.193 of 1990. This too was dismissed on 19th September, 1990.

7. According to Respondent No.1, in the year 1933, the Patia Estate/Zamindari was sold in execution of a mortgaged decree and, therefore, was purchased by the Raja of Kanika. The

ownership of the Estate was therefore changed from Raja Madhusudan Deb to the Raja of Kanika. Respondent No.1 traced her title from the Patta granted in her favour by the ex-zamindar of Kanika, Shri Shailendra Narayan Bhanja deo. The Patta/lease was claimed to be executed in the prescribed form by the Raja and was exhibited in the trial Court, as Ext.1. It was claimed that after grant of the aforesaid lease, the Raja of Kanika was realizing rents from the Plaintiff-lessee i.e. Respondent No.1 herein. On the abolition of the Estate by the OEA Act, the Raja of Kanika is stated to have submitted an *Ekpadia* to the Anchal and on the basis of the said *Ekpadia*, a Tenants' Ledger was maintained by the Anchal (Local Revenue Office).

8. According to Respondent No.1, the fact of change in the proprietary title of the Patia Estate was noticed and recognized in a judgment of this Court in ***Maheswar Naik & others v. Tikayet Sailendra Narayan Bhanj Deo, AIR 1951 Ori. 327***. In addition thereto, in the subsequent revenue documents, it is stated that the name of Shailendren Narayan Bhanja deo, the Raja of Kanika, finds place as proprietor. The Raja of Kanika is stated to have paid the competition for the vesting of the Patia Estate.

9. The occasion for Respondent No.1 to file TS No.5 of 1988 was the settlement of 1973, whereby the leasehold land in question was recorded in favour of the State of Orissa. Therefore, the aforementioned TS No.5 of 1988 was filed for a declaration of the

right, title and interest, and confirmation of possession of Respondent No.1. It is stated that pursuant to the *ex parte* decree dated 10th January 1989, the RoR had been corrected to show the name of Respondent No.1 as the tenant of the suit land. She claimed to have been regularly paying rent to the local revenue authorities.

O.S. No. 333 of 1993-I

10. More than 3 years after the decreeing of TS No.5 of 1988, the OSHB filed O.S. No.333 of 1993–I in the court of the same Civil Judge (Senior Division), Bhubaneswar against Respondent No.1 as a Defendant. The Revenue Department, the Collector, Puri, the Tahasildar, Bhubaneswar and even the GA Department were all impleaded as proforma Defendants. The main reason for OSHB preferring the aforementioned suit was that when it took possession of the land on 29th April 1989, Respondent No.1 had filed a writ petition being O.J.C.No.3181 of 1989.

11. OSHB claimed that it was only after the filing of the above writ petition, did it come to know that Respondent No.1 had obtained an *ex parte* decree in TS No.5 of 1988 to which the GA Department had not been made a party. It was alleged that Respondent No.1 had by suppressing several material facts and documents fraudulently obtained an *ex parte* decree ignoring the real owner i.e. GA Department of the Government of Orissa. It was accordingly contented that the decree in TS No.5 of 1988 is a

void one and would not affect the right, title and interest of the GA Department as well as the OSHB in any manner.

12. Resisting the above suit, Respondent No.1 questioned its maintainability, on the ground that it was barred by the principles of *res judicata*. It was contended that all the Government land of Chandrashekharapur was included within the area of the Bhubaneswar Notified Area Council in 1972 and all the Government land in Bhubaneswar Tahasil was transferred to the GA Department. Accordingly, it was pointed out that the suit land was never transferred to the GA Department. Even when in the 1974 settlement the suit land was recorded in the name of the GA Department, the note of the possession of Respondent No.1 had been recorded in the RoR in view of her continuous possession thereof since 1942.

Judgment of the trial Court

13. The trial Court, which decided O.S. No.333 of 1993–I by the judgment dated 7th August 1997, framed as many as 11 issues including one whether the suit was barred by the principles of *res judicata* and most importantly, whether the decree passed in TS No.5 of 1988 was void and not binding on the OSHB as well as the GA Department. This issue was taken up first for decision by the trial court.

14. The trial Court agreed with the Plaintiff that the circumstances under which the *ex parte* decree was obtained in TS No.5 of 1988 showed that the decree was fraudulently obtained and that it was void and not binding on the OSHB as well as the GA Department. In coming to the above conclusion, it was held that the entire Plot 258 (Sabik Plot 218) was to an extent of 184.19 decimal of which the land in question was to an extent of Ac.7.50 decimal. Respondent No.1 had claimed, in TS No.5 of 1988, title based on the Hata Patta. On perusal of the said document (Ext.1), it appeared that Ac.7.50 decimal was leased out in favour of Respondent No.1 in Plot No.218, but the boundary, and other description and sketch map were not mentioned in the document.

15. Further, it was noted that in TS No.5 of 1988, Respondent No.1 had only proved the Hata Patta, two rent receipts and the order of the settlement officer in Appeal Case No. 481 of 1988. Thus, according to the trial Court, Respondent No.1 had suppressed the above material documents and obtained the decree without making the GA Department a party. It was further noted that Respondent No.1 had, in O.J.C. No. 3181 of 1989 filed in this Court, included the order dismissing OEA Case No.95 of 1983 due to default on 10th December, 1985. It was sought to be contented by the OSHB that had the trial Court while deciding TS No.5 of 1988 been made aware of the *ex parte* dismissal of OEA Case No. 95 of 1983, then the suit might never had been decreed.

Impugned order of the Single Judge

16. Aggrieved by the above decree, Respondent No.1 filed FA No. 260 of 1997 before the Single Judge. The findings in the impugned order dated 19th November, 1999 of the learned Single Judge were as under:

(i) As per the requirement of section 80 CPC and Order XXVII CPC, the State Government is to be represented through Secretary. Since the State Government was represented through the Secretary, Revenue in TS No.5 of 1988, it could not be said that the State Government had not been properly represented. Moreover, the Collector of the district is also considered to be a representative of the State and he had been impleaded as Defendant No.2.

(ii) It was not the case of OSHB that notice to Defendants 2 to 4 i.e. the Revenue Secretary, the Collector and the Tahasildar had been suppressed in the suit. On the other hand, there was no explanation on the side of the aforementioned three Defendants or even GA Department which was espousing the cause of the OSHB regarding the steps taken or not taken by the parties in the earlier suit. That *ex parte* decree was within the knowledge of all concerned as was evident from the averments in O.J.C. No.3181 of 1989.

(iii) Therefore, merely because the GA Department had not been impleaded as a party as such in the earlier suit, it could not be said that the decree is not binding on the State, which had been represented through the Revenue Secretary or the Collector. The earlier decree was therefore binding on all concerned including the Plaintiff, who claimed to be a subsequent lessee;

(iv) Even otherwise, the title of Respondent No.1 over Ac.7.50 decimal of land had been found on the basis of the admitted fact that the lease had been executed by the ex-zamindar in her favour in 1942. Subsequently, *Ekpadia* had been submitted indicating her name in tenants' role as was evident from Exts.A and C. Since she was a tenant in respect of the land in question prior to vesting, under section 8 (1) of the OEA Act, she continued on the same terms and conditions under the State Government. The mere dismissal of OEA Case No. 95 of 1983 for default cannot have the effect of negate the right of Respondent No.1 since that application was essentially administrative in nature;

(v) The learned single judge then commented on the finding of the trial Court that while the Plaintiff i.e. Respondent No.1 herein had laid claim over the plot No.258/2020, the description of the land in question in the decree was different. The learned Single Judge observed that if there was any discrepancy in the plaint on the one hand and the judgment in decree on the other, it cannot be raised

in the collateral proceedings to impugn the validity of the earlier judgment or decree.

The present appeal

17. Assailing the above order of the learned Single Judge in FA No.260 of 1997, the above appeal has been filed in this Court by the OSHB. Initially, on 18th September, 2001 the present appeal by OSHB was dismissed by the Division Bench (DB) of this Court by an order dated 18th September, 2001. The DB was of the view that the decision in the earlier suit i.e. TS No.5 of 1988 operated as *res judicata*. That *ex parte* decree was within the knowledge of all concerned as was evident from O.J.C. No.3181 of 1989. The DB simply noted “We have perused the impugned judgment and do not find any illegality therein.”

18. The above order of the DB was set aside by the Supreme Court by the order dated 4th August 2003 in Civil Appeal No. 5515 of 2003 filed by the OSHB. The said order reads as under:

“Heard learned counsel for the parties.

Leave granted.

The High Court of Orissa has dismissed the Letters Patent appeal only on the ground that an ex-parte decree obtained in an earlier suit would operate as *res-judicata*. In our view this reasoning cannot be sustained as the suit was filed for a declaration that the earlier decree was null and void. We, therefore, set aside the impugned judgment and remit the matter back to the High Court for disposal on merits. As this is an old

matter, we request the High Court to dispose of this case, as expeditiously as possible, in any case within a period of one year.

The appeal is disposed off accordingly. No order as to costs.”

19. Consequently, it has been argued on behalf of the OSHB that the point regarding *res judicata* would no longer be available to be argued by Respondent No.1 in the present case. This Court, therefore, proceeds to examine all the other issues arising from the order of the learned Single Judge.

Submissions on behalf of OSHB

20. On behalf of the OSHB, Mr. Dayananda Mohapatra, learned counsel made the following submissions:

(i) Respondent No.1, who had filed O.J.C. No.3181 of 1989 against the OSHB and Respondent Nos.2 to 5 praying for an injunction not to take any recourse to construction work, subsequently withdrew the writ petition and this led the OSHB to filing a suit i.e. O.S. No.333 of 1993–I where it assailed the decree granted in favour of Respondent No.1 in TS No.5 of 1988. OSHB also challenged the genuineness of the alleged *Hata Patta*, *Ekipadia* and the status of the intermediary i.e. the ex-landlord.

(ii) Respondent No.1 had in her plaint noted the subsequent transfer of land to the GA Department, but she referred to the note of possession as reflected in Ext.3 over suit plot No.258/2020.

Defendant No.5 in the suit was Respondent No.5 in the appeal. It was earlier the P and S Department. It filed a written statement with the specific contention that consequent upon vesting of the entire land in the Government and the recording made during the 1974 settlement (Ext.2) and the 1988 Settlement (Ext.3), the Department was the owner of the land.

(iii) Respondent No.5 also referred to the filing of OEA Case No.95 of 1983 by Respondent No.1 before the OEA Collector claiming right, title and interest over the schedule property and her not succeeding in doing so. Respondent No.5 also referred to the discrepancy in recording of the note of possession in Ext.3, which was conspicuously silent in Ext.2 i.e. the RoR prepared on 1st April, 1974. It was also pointed out that the Hata Patta refers to Plot No.258 in Sabak Khata No.303 but the said plot was assigned during 1974 Settlement (Ext.2). Prior to 1974, the schedule plot corresponded to Sabak Plot No.218 (Ext.1). This fact itself indicated that the Hata Patta referred to in Ext.A is a subsequent creation to grab the property.

(iv) The consequence of not impleading the GA Department as a necessary party meant that the judgment passed in the earlier suit T.S. No. 5 of 1988 does not bind the GA Department any more. The GA Department being the rightful owner, allotted the land to the OSHB under Ext.4.

(v) In view of the judgment of the Supreme Court setting aside the earlier order passed by this Court in the present appeal, the question of the present proceedings being barred by the principles of *res judicate* does not arise.

(vi) It was revealed from Ext.5 i.e. the order of the Settlement Authority arising out of the objection filed by the Respondent No.1 to impleading the GA Department as a party that Respondent No.1 was aware that the GA Department was a necessary party. The suit was filed in 1988 whereas the aforementioned proceedings commenced from 24th December, 1987. Deliberately, therefore, Respondent No.1 did not implead GA Department as a party. Reliance is placed on the decision of the Supreme Court in ***S. P. Chengalvaraya Naidu v. Jagannath, AIR 1994 SC 853*** to urge that this amounts to a fraud.

(vii) The *informa pauperis* application of the Respondent No.1 i.e. Misc Case No. 518 of 1986 was disposed of by the trial Court on 6th January, 1988. Prior to this, Respondent No.1 had filed a Settlement Misc. Case No.181 of 1987, which was subsequently converted into Appeal No.481 of 1988. In those proceedings, Respondent No.1 had impleaded the GA Department as a party and the said proceedings commenced from 24th December, 1987. It was disposed of on 13th June, 1988 i.e. much prior to the institution of the suit. Therefore, Ext.5 showed that the Respondent No.1 was aware of the ownership of the GA

Department so far as the property in question was concerned, but deliberately did not implead it.

(viii) The learned Single Judge referred to service of notice under Section 80 CPC on the Collector and the Secretary, Revenue Department and held that this was binding on the GA Department. Ext.3 refers to land recorded in the name of GA Department as per Rule 21 of the Odisha Survey and Settlement Rules, 1962. Once the GA Department has been recorded as the owner of the land neither the Collector nor the Secretary is competent to represent the GA Department save and except a Secretary to the GA Department. Consequently, the finding of the learned Single Judge in this regard was not sustainable in the eye of law.

(ix) The purpose of Section 80 CPC was to give the Government or the public officers sufficient notice so that they may consider the position and decide whether the claim of the Plaintiff should be accepted or resisted. The following decisions of the Supreme Court were referred to: ***State of Punjab v. M/s. Geeta Iron and Brass Works Ltd. AIR 1978 SC 1608***, ***Raghunath Das v. Union of India AIR 1969 SC 674*** and ***The State of Madras v. C.P. Agencies AIR 1960 SC 1309***. Mere service of notice under Section 80 CPC on other Departments cannot be construed as service on the true owner i.e. GA Department.

(x) Ext.A viz., the Hata Patta relied upon by Respondent No.1 could not be a document of title. A plain examination of said Hata Patta would reveal that it was created at a subsequent point in time in order to grab the property of the GA Department. The following features of the said Hata Patta would prove that it was fabricated:

(a) Though it refers to permanent lease, it is not a registered one as required under Section 17 of the Indian Registration Act. The decision of the Supreme Court reported in ***State of Orissa v. Harapriya Bisoi (2009) 12 SCC 378***.

(b) It was not issued by the Intermediary and does not contain the signature of the Ex-Landlord.

(c) Swapneswara Mishra, who issued such Hata Patta, is not the owner of scheduled property. The authority of Sri Mishra has not been pleaded or proved.

(d) The said Swapneswara Mishra or the intermediary was not a party in the T.S.No.5 of 1988 and were not examined as witnesses.

(e) The original ROR of the year 1931 prepared under Odisha Tenancy Act refers to Khata No.303 plot no.218 area 184.18 of Kissam Jhata Jungle. Though the Hata Patta said to have been issued in the year 1942, it refers to Khata No.303 and Plot No.258. The said plot no.258 was introduced for the first time during settlement in the year 1974 (Exhibit-2). This proves that, "Exhibit-A" i.e. the Hata Patta was created/fabricated after the Hal settlement ROR issued in the year 1974. This itself proves the fraud committed by the Respondent No.1 before the Court relying upon created documents.

(f) Though the aforesaid Hata Patta refers to permanent lease of Ac 7.5 dec out of total area of Ac 184.18 dec, there is no sketch map attached to identify the alleged lease land out of the vast area.

(g) Exhibit-A (Hata Patta) reveals the seal which shows the name of Sailendra Narayan Bhanja Deo whereas Exhibit-B (the rent receipt given by the landlord and Exhibit-B/1 the alleged Ekpadia) refers to name of Rajendra Narayan Bhanj Deo.

(h) Exhibit-A does not show the boundary of the lease hold land, Exhibit-B shows the name of Kila as “Gadaken” whereas the suit land is in Kila “Patia”.

(i) Exhibit-B rent receipt said to have been received by Ex-Landlord does not show any date of payment of the rent. Year of printing of Exhibit-B was covered by pasting in white paper. The printed SAL (Odia Calendar Year) was over-written as 1349 erasing the original reference of SAL No.1352. It shows pre-dating of the year.

(j) Exhibits A, B, B-1 and C were not referred to in T.S. No.05 of 1988 and/or before the settlement Authority in Appeal No.481 of 1988 (Exhibit-5). For the first time those documents saw the light of the day while produced in the present suit.

(k) A cumulative assessment of the above facts would show that these are all subsequent creation including Exhibit-C.

(xi) Prior to filing of the suit and settlement appeal vide Ext.5, Respondent No.1 had filed OEA Case No. 95 of 1983 impleading State of Orissa as a party. The same was dismissed for default. The creation of tenancy was also negatived in Ext.5. Once Respondent No.1 had resorted to an OEA proceeding, she could

not have maintained the suit as it was barred under Section 39 of the OEA Act.

(xii) Next, it was submitted that the claim of tenancy was raised 35 years after vesting of the Estate. At no point in time, had the OEA Collector recognized Respondent No.1 as tenant or accepted the rent. All of the above facts pointed out to the creation of the exhibits subsequently with the help of certain government officials. Reference was made to the judgment of the Supreme Court in *State of Orissa v. Harapriya Bisoi, 2009 (12) SCC 378* about a massive fraud to grab valuable property situated in the city of Bhubaneswar. Accordingly, it was submitted that the above facts would show the nature of fraud, creating documents and suppressing production of documents and, therefore, the learned trial Court had rightly passed the judgment and decree against Respondent No.1.

(xiii) The plaintiff-OSHB had produced Ext.17, the agenda of a Board Meeting of the OSHB held on 8th January, 1991, Ext.17/a (Memorandum) and Ext.18 (proceeding approved by the Chairman) in support of the construction of the houses and handing over of LIG houses to the GA Department (Ext.29). Ext.27 (letter dated 29th December, 1993), Ext.28 (letter dated 28th August, 1996) and Ext.L (the advance notice issued by Respondent No.1 admitting the possession of Appellant), Ext.6/b (copy of the writ petition and its contentions in paras-13 and 14),

the Ext.8 (the withdrawal memo filed by Respondent No.1 withdrawing the writ admitting to the possession of the Appellant). All of these documents support the case of the Plaintiff that it was the GA Department which was the rightful owner and possessor of the suit land and it was the GA Department that throughout was in possession of the schedule property and its project had been constructed over the schedule property. The reversal of the well reasoned judgment of the trial Court would jeopardize all the above constructions, and the flats and title thereto of the persons, who had been allotted those flats.

Submissions on behalf of Respondent 1

21. In reply to the above submissions, Mr. G.M. Rath, learned counsel appearing on behalf of Respondent No.1 submitted as under:

(a) The entire case of the Appellant is based on a letter of allotment dated 29th April, 1989 of the Government of Orissa in the GA Department whereunder an area of approximately Ac.31.882 decimal in Mouza Chandrasekharapur (now within the BMC limits) was stated to have been allotted in favour of OSHB for construction and sale of houses. It is submitted that such letter does not and cannot constitute a document of title. It simply proposed that the land would be leased in favour of OSHB subject to compliance by the OSHB of the terms and conditions stated therein whereupon a lease deed was to be executed in favour of the OSHB.

(b) In terms of such order, OSHB was required to pay premium of Rs.63,96,400/- within 60 days from the date of the order and get the lease deed executed in his favour. Possession of the land consequent upon demarcation was to be made only after payment of premium and execution of the lease deed aforesaid. Referring to the deposition of Plaintiff's Witness No.1 in para 27, it is pointed out that this condition had perhaps not been complied with. The said witness is supposed to have said as under:

“.... The suit land was allotted to the State Housing Board subject to the condition that the housing board will enter into an agreement of lease on payment of premium to the Government. There is no order of the Government relaxing this condition. The state Housing Board has not yet entered into any agreement and has not paid the premium till today.”

(c) OSHB had not pleaded or proved any other source of title and letter of allotment other than Ext.4 (the letter dated 29th April, 1989). With the conditions therein not having been complied with, the factual and legal presumption had to be that the allotment stood cancelled and, therefore, OSHB had no *locus standi* to file the suit or the present appeal.

(d) As regards the *ex parte* decree in TS No.5 of 1988 for declaration of title in favour of Respondent No.1, it is submitted that Misc. Case No.518 of 1986 was allowed on contest on 6th January, 1988 and Respondent No.1 was allowed to sue *informa pauperis*. The Opposite Parties in the said Misc. Case were the

State of Orissa through the Secretary, Revenue Department, the Collector, Puri and the Tahasildar, Bhubaneswar and they therefore continued as Defendants in TS No.5 of 1988. By this time, the suit land stood recorded in favour of the State of Orissa. Respondent No.1 exhibited the RoR as Ext.2. Therefore, the institution of TS No.5 of 1988 against the Revenue Department was perfectly legitimate and in accordance with law. The mere fact that subsequently there was a transfer of the land by the Revenue Department to the GA Department would not affect the constitution of the suit or its result. Reference is made to the deposition of P.W.1 before the trial Court where he stated as under:

“Government is the owner of all khas mahal and other Government lands. For proper utilization and maintenance different Government and khas mahal land are kept in charge of different departments from time to time. Collector of the District or a Secretary of the Government represents the Government in all litigations relating to all such properties as per Section 80 CPC.”

It is accordingly submitted that in TS No.5 of 1988, the State Government was properly represented.

(e) The GA Department in whose favour the land was assigned during the pendency of the suit could not therefore avoid the decree on the plea that it was not a party to the suit. It was bound by the *ex parte* decree and, therefore, the subsequent transferee i.e. OSHB was equally bound by it.

(f) It could not be said that the Government of Odisha was not aware of the *ex parte* decree in TS No.5 of 1988 dated 10th January, 1989. The Government itself had filed Misc. Case No.26 of 1989 under Order 9 Rule 13 of the CPC for setting aside the *ex parte* decree. This was dismissed for non-prosecution on 11th July, 1990. An application being Misc. Case No.193 of 1990 to restore the said Misc. Case No.26 of 1989 was also dismissed on 19th September, 1990. The above sequence of events demonstrated that Government of Odisha was at all times fully aware of the *ex parte* decree. The subsequent suit being O.S. No.333 of 1993–I was clearly, therefore, barred in law.

(g) Respondent No.1 derived her title from the patta granted by the ex-Zamindar of Kanika, Shri Shailendra Narayan Bhanja Deo. The said patta/lease was in the prescribed form of the Raja, which had been proved as Ext.A in the lower Court. This document was also filed and proved in TS No.5 of 1988 and marked as Ext.1. After the grant of the lease, the Raja of Kanika realized rent from the plaintiff-lessee. Such payment of rent had been proved under Ext.B in O.S. No.333 of 1993–I. These were also exhibited in TS No.5 of 1988 as Exts.2 and 3. On abolition of the Estate, the landlord i.e. the Raja of Kanika submitted an *Ekpadia* to the Anchal and on the basis of the said *Ekpadia*, Tenants' Ledger was maintained by the *Anchal*. Ext.C was the certified copy of the *Ekpadia* obtained from the office of the Tahasildar.

(h) OSHB has tried to build a case contrary to facts by alleging that the Raja of Kanika had no right to grant any lease in favour of Respondent No.1. It is explained that the Patia Estate originally belonged to Raja Madhusudan Deo. In 1933, the Patia Estate/Zamindari was sold in execution of a mortgaged decree and was purchased by the Raja of Kanika. This fact of change in the proprietary title of the Patia Estate was noticed by the Orissa High Court in a judgment reported in ***Maheswar Naik v. Tikayet Sailendra Narayan Bhanj Deo*** (*supra*). In addition thereto, in the subsequent revenue papers the name of Raja of Kanika i.e. Sri Shailendra Narayan Bhanja Deo also finds place as proprietor. This is borne out by the official gazette of the State of Orissa published at the time of vesting of the Estate/Zamindari and the same has been exhibited as Ext.M. The Raja of Kanika also paid compensation for the vesting of the Patia Estate. The compensation assessment order was exhibited as Ext.N. In the premises, the status of Raja of Kanika as proprietor of Killa Patia is beyond dispute.

(i) In the above circumstances, when in the Hal Settlement the leasehold land of Respondent No.1 was erroneously recorded in favour of the State of Odisha, Respondent No.1 had filed TS No.5 of 1988 for declaration of right, title and interest and confirmation of possession. When attempts at having the *ex parte* decree set aside failed, it became final and was binding on all the parties including the GA Department and its successor-in-interest i.e. the

OSHB. The RoR showing the name of Respondent No.1 as tenant was exhibited as Ext.H. It is stated that subsequent thereto, the local revenue office authorities have been regularly receiving the rent from Respondent No.1. One of the rent receipts was exhibited as Ext.J.

(j) The following conclusions were irrefutable:

- (i) The Patia Estate was sold to the Raja of Kanika in execution of mortgage decree in 1932-33 and therefore the Raja of Kanika became the proprietor of Killa Patia.
- (ii) The Raja of Kanika settled the suit land in favour of the Respondent no.1 herein in the year 1942, pursuant to which the said Respondent became a tenant in respect of the suit land.
- (iii) Upon such vesting, the Raja of Kanika submitted an *ekpadia* (list of tenants) showing the name of Sebati Dei (Respondent No.1) as one of the tenants (tenant in respect of the suit land) on the basis whereof the Tenants Ledger was prepared and maintained by the local revenue office.
- (iv) Ignoring such Rent Roll, the suit land was recorded in favour of the State of Odisha in the Hal Settlement Khatian and it is this that led Respondent No.1 Sebati Dei (the tenant) to file Title Suit No.5 of 1988 for declaration of her title, confirmation of possession and other consequential relief. This suit was decreed as aforesaid on 10th January, 1989 and repeated attempts to set aside the said *ex parte* decree proved abortive.
- (v) During the pendency of the suit aforesaid, Government of Odisha in the Revenue Department administratively transferred the land to the GA Department. It is submitted that if such department-wise allocation of Government land is treated/considered as assignment, the GA Department being a *pendente lite*

assignee/transferee is bound by the decree passed against the State Government of Odisha in Title Suit No.5 of 1988.

(vi) After the decree dated 10th January, 1989 in T. S 5 of 1988, the name of Respondent No.1 has been incorporated in the *Khatian* and she has been paying rent to the Government.

(k) It is accordingly submitted that the well reasoned order of the learned Single Judge calls for no interference and the appeal ought to be dismissed.

Is the subsequent suit of the OSHB barred by res judicata?

22. In the first place, the Court would like to deal with the issue whether the *ex parte* decree in TS No.5 of 1988 would constitute *res judicata* as far as the OSHB filing the subsequent suit i.e. O.S. No.333 of 1993–I in the Civil Court?

23. As already noticed, the Supreme Court set aside the order dated 18th September, 2001 of this Court dismissing the present appeal primarily on the ground that the present suit filed by the OSHB was to declare the earlier decree to be unlawful and, therefore, it could not be barred by the principle of *res judicata*.

24. Consequently, the conclusion as far as this issue is concerned has to be in favour of the OSHB and against Respondent No.1. In other words, the mere fact that there was an *ex parte* decree in TS No.5 of 1988, which the State of Odisha unsuccessfully tried to

have set aside, would not bar the OSHB from maintaining O.S. No.333 of 1993–I in the Civil Court. Consequently, the entire edifice of the argument - that the Government of Odisha had filed a Misc. Case under Order 9 Rule 13 CPC to have the *ex parte* decree set aside, and that the said Misc. Case itself stood dismissed for non-prosecution and that the application to restore it also stood dismissed - would make no difference to the settled position as far as the present case is concerned that *ex parte* decree in TS No.5 of 1988 would not come in the way of OSHB maintaining O.S. No.333 of 1993–I.

Locus standi of OSHB to institute the subsequent suit

25. The next issue to be considered is the locus standi of OSHB to institute the subsequent suit O.S. No. 333 of 1993-I. While it is true that OSHB is seeking to establish its title by the allotment of the land in favour of the GA Department through the letter dated 29th April 1989, the fact of the matter is that Respondent No.1 appears to have been aware of this development even when she filed TS No.5 of 1988. It is not correct on the part of the counsel for the Respondent No.1 to contend that transfer of the land in favour of the GA Department was a development subsequent to the filing of TS No.5 of 1988.

26. It now transpires that this development had taken place even earlier. There are two settlements in the present case, which are critical. One is the settlement of 1974 and the next is the

settlement of 1988. Even before TS No.5 of 1988 was filed, Respondent No.1 had filed OEA proceedings. What is unable to be disputed by Respondent No.1 is that the said OEA proceedings was dismissed in default. It commenced on 24th December, 1987 and was disposed of on 13th June, 1988. This was initiated as Settlement Misc. Case No.181 of 1987 and was subsequently converted to Appeal No.481 of 1988. In this settlement proceedings, Respondent No.1 had herself impleaded the GA Department as a party and this is evident from Ext.5. Therefore, Respondent No.1 was clearly aware of the ownership of the GA Department so far as scheduled property is concerned. The fact that by the letter dated 29th April, 1989 the land in question was allotted in favour of the GA Department formally by the Government would make no difference to the fact that the Respondent No.1 acknowledged the GA Department to be the rightful owner of the suit land even prior to filing of TS No.5 of 1988. There is merit in the contention of the OSHB that for the reasons not explained by Respondent No.1 despite being aware of the above development, she chose not to implead GA Department as a party in T.S. No. 5 of 1988.

27. The learned Single Judge in discussing the requirement of a prior notice under Section 80 CPC appears to have overlooked the above important development. If indeed Respondent No.1 herself had initiated OEA proceedings, and was unsuccessful in those proceedings, and did not carry the matter any further in that

direction, she could not have, while instituting TS No.5 of 1988, dropped the GA Department as a party to the suit. Thus, it appears to be a deliberate suppression by her of a material fact. The following observations in ***S. P. Chengalvaraya Naidu*** (*supra*) are relevant in this context:

"5.xxx.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.

6.xxxNon-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the Court. We don't agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side than he would be guilty of playing fraud on the Court as well as on the opposite party."

28. In view of the above facts, OSHB was well within its rights to institute a suit to question the very validity of the decree in TS No.5 of 1988. That in fact was the main prayer in the suit.

The mandatory requirement of Section 80 CPC

29. There is merit in the contention of the OSHB that it was the GA Department, which should have been competent to answer the notice since it was the owner of the property. The decisions in ***M/s. Geeta Iron and Brass Works Ltd. (supra)***, ***Raghunath Das (supra)*** and ***C.P. Agencies (supra)*** bring out the object and the purpose of the 80 CPC. While at a theoretical level, it may be possible to contend that State of Odisha is one entity and all the Departments functioned as State of Odisha, the fact remains that in the matter of this nature unless the appropriate Department is impleaded, it cannot be said that the suit against one Department would tantamount to a suit against the other as well.

30. Since the ownership of the land in question is specifically recorded in the name of the GA Department representing the State of Odisha and not the Revenue Department, it becomes critical to implead the right Department in the suit. That not having been done, the *ex parte* decree in TS No.5 of 1988 cannot be said to be binding on the GA Department and consequently on the OSHB.

The legal effect of the Hata Patta

31. Turning now to the Hata Patta, there is no answer at all provided by Respondent No.1 to the various deficiencies pointed out in the Hata Patta. The background to the allegation of fraud in creation of records cannot be said to be unfounded. In ***Harapriya Bisoi (supra)***, the Supreme Court did take account of the massive

fraud that was being committed in the matter of transfer of lands of the ex-intermediaries. In para 31 of the said judgment, it was observed as under:

"31. It is the stand of the appellant State that the "hatapatta" on the basis of which Kamala Devi has claimed her title is an unregistered document. Section 107 of the Transfer of Property Act, 1882 (in short "the T.P. Act") read with Section 17 of the Registration Act, 1908 mandates that the conveyance of title through a written instrument of any immovable property worth more than Rs.100 for a period of one year or more must be registered. If such an instrument is not registered then Section 49 of the Registration Act read with Section 91 of the Evidence Act, 1872 precludes the adducing of any further evidence of the terms and contents of such a document. (See *S. Sita Maharani v. Chhedi Mahto* AIR 1955 SC 328). There is a further requirement of registration of the instrument of conveyance/agricultural lease under Sections 15 and 16 of the Orissa Tenancy Act, 1913."

32. In the present case, also there was no occasion for the Civil Court to examine the validity of the Hata Patta particularly since the decree was *ex parte* decree with no one challenging the exhibits at the time of their being produced in evidence. There was no testing of those documents in the true sense. What is serious is that Ext.A, which reveals the seal and shows the name of Shri Shailendra Narayan Bhanja Deo is different from Ext.B, which is supposed to be the rent receipt given by the landlord, which refers to the name of Rajendra Narayan Bhanja Deo. The Hata Patta refers to a permanent lease of Ac 7.5 out of the total

area of Ac184.18 dec, but there is no sketch map attached to identify the lease land out of the vast area.

33. There is also a problem with the reference to the Khata numbers and Plot numbers. The Hata Patta issued in 1942 refers to Khata No.303 and Plot No.258 whereas the original RoR of 1931 refers to Khata No.303 and Plot No.218 with an area of 184.18 with the Kisam 'Jhati Jungle'. Therefore, there are serious doubts created about the Hata Patta documents themselves.

34. Also, there is no answer to the submission of Mr. Mohapatra appearing for OSHB that the year of printing of Ext. B was covered by pasting it in white paper. The printed SAL (Orissa Calendar year) was over-written as 1349 erasing the original reference of SAL No.1352. This revealed the predating of the year. Serious doubts have in fact been created over the validity of these documents, which had been relied upon in TS No.5 of 1988.

Fraud vitiates all transactions

35. There is also merit in the contention on behalf of the OSHB that fraud vitiates all transactions. Warrington, C.J. in ***Short v. Poole Corporation (1926) 1 Ch 66*** held that:

"No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be of that body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative."

36. In *Lazarus Estates Ltd. v. Beasley (1956) 2 QB 702* Lord Denning, LJ. held:

"No judgment of a Court, no order of Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

37. In the same *Lazarus* case Lord Parker, C.J. added:

"'Fraud' vitiates all transactions known to the law of however high a degree of solemnity."

38. The Supreme Court of India reiterated the above settled principle in *Ram Chandra Singh v. Savitri Devi (2003) 8 SCC 319* where it was held thus:

"15.xxx. Fraud as is well known vitiates every solemn act. Fraud and justice never dwell together.

16.xxx Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by word or letter.

17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.

18. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.

23. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous.

25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*."

39. In *A. V. Papayya Sastry v. Govt. of A.P. (2007) 4 SCC 221*, the Supreme Court observed: "21. Now it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law."

40. Once it is shown that the documents, which formed the basis of the claim in TS No.5 of 1988, are themselves doubtful and a nullity, the learned Single Judge could not have ignored these stark facts to set aside the well-reasoned judgment and decree of the trial Court.

41. Further, this Court finds that the various documents placed by OSHB on record about construction of houses and handing over of LIG flats to the GA Department, have not been accounted for. All of these show that the GA Department was in continuous possession of the land in question and has developed flats, which have been handed over and which are now under occupation of various flat owners (allottees). The impugned judgment of the learned Single Judge overlooks the consequences of reversing the decree of the trial Court and what that would mean for all the subsequent transactions that have taken place.

Conclusion

42. Consequently, this Court is unable to sustain the impugned judgment of the learned Single Judge and it is hereby set aside. The Judgment and decree of the trial Court decreeing O.S. No.333 of 1993–I in favour of OSHB is restored to file. The interim order is vacated. The LCR be sent back forthwith.

43. The appeal is allowed in the above terms with cost of Rs.10,000/-, which shall be paid by the LRs of Respondent No.1 to the OSHB within four weeks.

(S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

M. Panda