

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.11781 OF 2013

Brajakishore Prusty

....

Petitioner

Mr. Soumya Mishra, Advocate

-versus-

***The Member, Board of Revenue,
Odisha, Cuttack and others***

....

Opp. Parties

Mr. Sarojananda Mishra,
Additional Government Advocate

CORAM:

JUSTICE K.R.MOHAPATRA

ORDER

21.03.2022

Order No.

- 23.
1. This matter is taken up through hybrid mode.
 2. The Petitioner in this writ petition seeks to challenge the order dated 12th April, 2013 (Annexure-8) passed in O.S.S. Case No.68 of 2012 filed by the Petitioner under Section 32 of the Odisha Survey and Settlement Act, 1958 (for short, 'the OSS Act'), wherein learned Member, Board of Revenue, Odisha, Cuttack held that in absence of confirmation by the Board of Revenue under Section 5(i) of the Odisha Estate Abolition Act, 1951 (for short, 'the OEA Act'), the orders passed by the O.E.A. Collector in O.E.A. Case Nos.5447 and 5449 of 1976 in favour of the lessees are illegal and it amounts to usurping the power of Board of Revenue by the O.E.A. Collector and dismissed the revision.
 3. Mr. Mishra, learned counsel for the Petitioner submits that the Petitioner is the owner in possession of the land pertaining to Plot Nos. 1788 and 1793 to an extent of area Ac. 2.38 decimals under Khata No.519 situated in Mouza Dhanipur under Jajpur Tahasil in the district of Jajpur, which corresponds to Sabik Plot No. 1457 under Sabik Khata No.1032 of the same Mouza recorded under Kisam 'Jora' (for convenience referred to as 'the case land').

4. It is the case of the Petitioner that the case land originally belonged to the ex-intermediary, Sri Narayan Prasad Ray and Sri Nrusingha Charan Ray. By virtue of a Hata Patta executed by the ex-intermediary in respect of the case land in favour of the predecessor of the Petitioner and predecessor of one Bhagabat Prusty, they came in cultivating possession over the case land. After vesting of the estate, the Petitioner filed an application under Sections 6 and 7 of the O.E.A. Act, which was registered as O.E.A Case No.5447 of 1976 before the OEA Collector, Jajpur, who treating it to be an application under Section 8(1) of the O.E.A. Act, opened the tenancy ledger in favour of the Petitioner in respect of the case land. Similarly, O.E.A Case No.5449 of 1976 was also initiated in respect of the land purchased by the Petitioner from one Bhagabat Prusty vide registered sale deeds dated 21st April, 1980 and 19th June, 1981. After purchase of the land from Bhagabat Prusty, the Petitioner filed Mutation Case No.2325 of 1982 and Mutation Case No. 9271 of 1980, which were allowed directing to make necessary correction in the R.O.R. When the matter stood thus, settlement operation started in the said area and the Petitioner filed Objection Case No. 1685 of 2002 before the Assistant Settlement Officer for recording of the land in question in his name by submitting relevant records in support of his case. The Assistant Settlement Officer being satisfied with the claim of the Petitioner allowed the prayer vide his order dated 3rd July, 2002 and directed to prepare R.O.R. in favour of the Petitioner. After publication of the draft R.O.R in the name of the Petitioner, the State of Odisha filed an appeal under Section 22 of the Act before the Settlement Officer challenging the entry in the draft R.O.R. in favour of the Petitioner, which was registered as Appeal Case No.154 of 2012. The appeal was filed on the ground

that the case land was recorded in Government Khata before vesting of the estate and it is not known how the same was leased out prior to vesting of the estate by the ex-intermediary. That apart, another ground was taken in the appeal to the effect that prior approval under Section 5(i) of the O.E.A. Act was not taken by the O.E.A. Collector before settling the case land in favour of the Petitioner. The Settlement Officer vide his order dated 21st February, 2012 under Annexure-7 allowed the appeal and directed to record the case land in Government Khata under '*Abadajogya Anabadi*' status. Being aggrieved by the order passed in the appeal, the Petitioner filed a revision under Section 32 of the Act, which was registered as O.S.S. Case No. 68 of 2012. The Member, Board of Revenue, Odisha, Cuttack held that as no confirmation by the Board of Revenue under Section 5(i) of the O.E.A. Act was obtained by the O.E.A. Collector in O.E.A. case Nos. 5447 and 5449 of 1976 before settling the case land in favour of the lessees, the same is illegal as the O.E.A Collector has usurped the power of the Board of Revenue.

5. Mr. Mishra, learned counsel for the Petitioner assailing the same submits that the lease in question was granted prior to 1st January, 1946. Hence, confirmation under Section 5(i) of the OEA Act was not necessary at the relevant time. It is his submission that the case land was settled in favour of the Petitioner by the O.E.A. Collector on 28th April, 1980. By that time, the law laid down in the case of *State of Orissa and others –vrs.- Brundaban Sharma and another*, reported in 1995 Supp. (3) SCC 249, was not in force. Thus, it cannot be said that the O.E.A Collector has usurped his jurisdiction by not obtaining the confirmation under Section 5(i) of the O.E.A. Act. He further submits that the legality and propriety of the settlement made in favour of the Petitioner under the O.E.A. Act

can only be assailed in a properly constituted proceeding under the O.E.A. Act. The Settlement Authority exercising power either under Section 22 or Section 32 of the Act cannot sit over the settlement made by the O.E.A. Collector and hold it to be illegal. In support of his contention, he relied upon a Division Bench decision of this Court in the case of ***Trilochan Singh and another –v- Commissioner of Land Records and Settlement, Orissa and others***, reported in 1995 (I) OLR 537, the relevant paragraphs of which are quoted hereunder:

“4. Order of settlement in favour of petitioners could be set at naught in a proceeding under the Estates Act. The settlement having created a right in favour of petitioners, the same is presumed to be valid unless declared otherwise. It is, therefore, for the person assailing its validity to get such a declaration from a proper forum in a proper proceeding. Unless that is done, order remains enforceable. The duty was, therefore, clearly on the opp. party No. 3 to raise the plea of illegality of the order of settlement before an appropriate authority under the Estates Act. Unless the order is declared invalid at its instance, enforceability of the order cannot be doubted. Similar view was expressed by apex Court in Shiv Chander Kapoor v. Amar Bose, (1990) 1 SCC 234 : A.I.R. 1990 S.C. 325. The position was also elaborated by one of us (Pasayat, J.) in Hiradhar Patel v. Lalindra Gand @ Naik and another, 1993 (1) O.L.R. 4.

5. In the words of Lord Diplock, “the order would be presumed to be valid unless the presumption was rebutted in competent legal proceedings by a party entitled to sue”. In Wade's Administrative Law, 6th Edition, there is an illuminating discussion of this topic. It has been pointed out that ‘Void’ is meaningless in an absolute sense, and unless necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset it will remain as effective for its ostensible purpose as the most impeccable of orders. The order of settlement has at least a de facto operation unless and until it is declared to be void or nullity by a competent body or Court. In Smith v. East Elloe Rural District Council, (1956) A.C. 736 at page 769 Lord Redcliffs observed.....”

The ratio decided in the aforesaid case (supra) has been followed in the case of ***Prafulla Chandra Muduli and others -v- State of Orissa and others***, reported in 2005 (Supp.) OLR 950.

6. It is further submitted that the order of the O.E.A. Collector has never been challenged and hence, attained its finality. The only scope to set aside the said order was by filing a revision under Section 38(B) of the O.E.A. Act. Admittedly, no such revision being filed, the Member, Board of Revenue, Odisha, Cuttack has to respect the settlement made by the O.E.A. Collector. He, therefore, submits that the Member, Board of Revenue, Odisha, Cuttack has usurped his jurisdiction by sitting over the order of settlement made by the O.E.A. Collector. He further submits that a void order needs to be declared as such as held in the case of ***State of Kerala -v- M.K. Kunhikannan Nambiar Manjeri Manikoth***, reported in (1996) 1 SCC 435, wherein it has been held at paragraphs-7 and 8 as follows:

“7. In our opinion, even a void order or decision rendered between parties cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter partes until it is successfully avoided or challenged in a higher forum. Mere use of the word ‘void’ is not determinative of its legal impact. The word ‘void’ has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity depending upon the gravity of the infirmity, as to whether it is, fundamental or otherwise and in this case, the only complaint about the initiation of the suo motu proceedings by the Board was, that it was not initiated on intimation by the State Land Board about the non-filing of the statement as required by Section 85(7) of the Kerala Land Reforms Act. In our opinion, this is not a case where the infirmity is fundamental. It is unnecessary to consider the matter further.

8. In *Halsbury's Laws of England*, 4th Edn., (Re-issue) Vol. 1(1) in para 26, p. 31, it is stated, thus:

"If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved."

In the *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 1995 Edn., at pp. 259-60 the law is stated thus:

"The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly impatient with the distinction, to the extent that the situation today can be summarised as follows:

(1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction."

Similarly, Wade and Forsyth in *Administrative Law*, Seventh Edn., 1994, have stated the law thus at pp. 341-342:

".... every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Radcliffe said:

'An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'

This must be equally true even where the brand of invalidity is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

He also relied upon the decision in the case of ***Inderjit Singh Grewal –v- State of Punjab***, reported in (2011) 12 SCC 588, wherein it is held that “*even if a decree is void ab initio, declaration to that effect has to be obtained by the person aggrieved from the competent court. More so, such a declaration cannot be obtained in collateral proceedings.*”

He, therefore, submits that the impugned order is not sustainable in the eyes of law and the same is liable to be set aside.

7. Mr. Mishra, learned Additional Government Advocate refuting the same submitted that initiation of the proceeding by the O.E.A. Collector entertaining an application filed by the Petitioner is illegal as he had no jurisdiction to entertain the same under the provisions of the O.E.A. Act. No application by a tenant is contemplated under Sections 6, 7 or 8(i) of the O.E.A. Act. Thus, the impugned order suffers from fundamental infirmity and it requires no such declaration. The Settlement Authority can ignore such settlement and pass an order on the basis of the materials available on record. In view of the ratio decided in the case of ***Brundaban Sharma*** (supra), the lease made before or after 1st January, 1946 requires confirmation by the Board of Revenue under Section 5(i) of the O.E.A. Act. Admittedly, no such confirmation has been made in the case at hand. Thus, the Member, Board of Revenue, Odisha, Cuttack has committed no error in holding that the O.E.A. Collector has usurped the power of the Board of Revenue by settling the case land in favour of the Petitioner. A void order can be avoided as it is *non est* in the eyes of law. Therefore, the writ petition merits no consideration and the same is liable to be dismissed.

8. Heard learned counsel for the parties and perused the materials on record including the case laws relied upon by the learned counsel for the parties.

9. OEA Case Nos. 5447 and 5449 of 1976 were initiated by the OEA Collector pursuant to G.O. No. 4399/R dated 2nd March, 1996. It conferred power on the O.E.A. Collector to entertain application filed by the tenants for settlement of the land under lease principles. Accordingly, by orders under Annexures-1 and 2, the case land was settled in favour of the Petitioner. Thus, it cannot be said that the O.E.A. Collector lacked inherent jurisdiction to entertain such applications. The legality of said orders was never questioned before any competent authority. Admittedly, no revision under Section 38(B) of the O.E.A. Act was ever filed assailing the orders under Annexures-1 and 2. Thus, the said orders of settlement attained finality. During settlement operation, the Assistant Settlement Officer considering the settlement made in favour of the Petitioner by the O.E.A. Collector directed to prepare the R.O.R. in his name. Accordingly, draft R.O.R. was also prepared in the name of the Petitioner. Subsequently, the State of Odisha filed an appeal under Section 22 of the OEA Act. The Settlement Officer holding that no confirmation as required under Section 5(i) of the OEA Act was obtained before settlement of the case land in favour of the Petitioner directed to record the case land in Government Khata under '*Abadajogya Anabadi*' status. The said order was challenged by the Petitioner in a revision under Section 32 of the OSS Act, which was upheld by the Member, Board of Revenue, Odisha, Cuttack observing that no confirmation under Section 5(i) of the O.E.A. Act was obtained before settlement of the case land in favour of the Petitioner by the O.E.A. Collector.

10. Learned counsel for the parties submitted that final R.O.R. under Section 12-B of the OSS Act has not yet been published in respect of Mouza Dhanipur under Jajpur Tahasil in the district of Jajpur. Thus, this Court can proceed to examine the correctness of the order under Annexure-8 passed under Section 32 of the OSS Act.

11. As discussed above, the case land was recorded in the name of the ex-intermediary. Thus, the O.E.A. Collector had power to entertain application for settlement of the land in favour of the Petitioner under lease principles. As such, it cannot be said that the orders passed by the O.E.A. Collector under Annexures-1 and 2 suffer from inherent lack jurisdiction and are *void ab initio*. As held by Hon'ble Supreme Court in the case of **Inderjit Singh Grewal** (supra), a void order also requires declaration by the competent court to make it ineffective and unenforceable. In the case of **M.K.Kunhikannan** (supra), Hon'ble Supreme Court has clarified that the word 'void' is not determinative of its legal impact. It has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. Hence, it can be avoided. There are degrees of invalidity depending upon the gravity of the infirmity, as to whether it is fundamental or otherwise. From the materials on record, it can never be said that the order passed by O.E.A. Collector was fundamentally invalid. Since the OEA Collector had jurisdiction to entertain an application in view of the Government Order referred to above, the orders under Annexures-1 and 2 cannot be said to be void. It further appears that by the time the orders under Annexures-1 and 2 were passed, i.e., on 28th April 1980, the legal position spelt out in the case of **Brundaban Sharma** (supra) had not come into existence. Thus, at the relevant time, confirmation under Section 5(i)

of the O.E.A. Act was not required. The applicability and impact of the ratio in case of **Brundaban Sharma** (supra) to the orders passed under Annexures-1 and 2 could only be questioned before the competent court in an appropriate proceeding, i.e., by filing a revision under Section 38(B) of the O.E.A. Act. Certainly, the validity of the orders under Annexures-1 and 2 cannot be questioned in a proceeding initiated under Section 32 of the OSS Act. Thus, the Settlement Authority should have respected the order passed by the O.E.A. Collector having jurisdiction to pass such an order.

12. In view of the above, the observation basing upon which the impugned order under Annexure-8 has been passed is not sustainable in the eyes of law. Accordingly, the impugned order under Annexure-8 is set aside and the matter is remitted back to the Member, Board of Revenue, Odisha, Cuttack to consider the matter afresh in accordance with law keeping in mind the observations made hereinabove and giving opportunity of hearing to the parties concerned.

13. In order to avoid further delay in the matter, parties are directed to appear before the Member, Board of Revenue, Odisha, Cuttack on 18th April, 2022 along with certified copy of this order to receive further instruction in the matter.

14. This writ petition is allowed to the aforesaid extent.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

bks/ms