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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.11784 of 2009

Rama Chandra Sahoo (since dead) ***Petitioners***
represented by his L.Rs. Ganesa
Chandra Sahoo and others

Ms. Sujata Jena, Advocate

-versus-

State of Orissa and others ***Opposite Parties***
Mr. Debakanta Mohanty, Additional Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAİK

ORDER
21.07.2022

Order No.

Dr. S. Muralidhar, CJ.

25. 1. This writ petition challenges an order dated 3rd August, 2009 passed by the Board of Revenue (BoR) in OEA Misc. Case No.13 of 2007 arising out of OEA RC No.56 of 2003. By the said order, the Member, BoR allowed the above application of the State of Orissa and recalled an earlier order dated 28th March 2005, which had been passed by the Member, BoR allowing the original Petitioner's OEA RC No.56 of 2003.
2. Initially in the present writ petition, this Court passed an order on 30th June 2010, where in the operative portion, it was said "now by the impugned order, the order dated 28th March, 2005 has been recalled. So there is no cause of action of the Petitioner to file this

writ petition, which is accordingly dismissed. The interim order dated 10th September, 2009 stands vacated.”

3. Aggrieved by the above order, the Petitioner filed a Special Leave Petition (Civil) [SLP (C)] No.21175 of 2010 in the Supreme Court of India. That SLP came to be disposed of by the Supreme Court on 10th January, 2018 by the following order:

“We have heard learned counsel for the parties.

The petitioner had challenged an order dated 3rd August, 2009 passed by the Member, Board of Revenue in OEA Misc. Case No.13 of 2007. By that order, the Member, Board of Revenue recalled his earlier order dated 28th March, 2005.

The High Court took the view that since the order dated 28th March, 2005 has been recalled, there is no cause of action in favour of the petitioner to pursue the writ petition.

In our opinion, the High Court was in error in coming to this conclusion. The High Court ought to have considered whether the Member, Board of Revenue had the power and jurisdiction to recall the order and, if so, the effect of the decision.

Under the circumstances, we set aside the impugned judgment and order dated 30th June, 2010 passed by the High Court in WP No.11784 of 2009 and remand the matter to the High Court for consideration of the writ petition filed by the petitioner on merits.

The special leave petition stands disposed of.”

4. Consequent upon the above order, the Petitioner filed I.A. No.13129 of 2020 in this petition. In an order dated 20th April 2021, this Court listed out the questions that were required to be answered by learned counsel for the Petitioner, (I) Whether the claim of the Petitioner late Ramachandra Sahoo that he was granted Ekpadia by the Former King of Kanika State on 31st March 1949, which never

saw the light of day before 2nd May 2003, should have been relied upon by the learned Member Board of Revenue in purported exercise of revisional jurisdiction? It was observed “his direction to record the name of the Petitioner in an apparent and the de facto abuse of an original jurisdiction.” Learned counsel was also asked to apprise the Court (II) “about the proposition of law that any Court, quasi-Judicial Authority, Revenue Authority has jurisdiction to recall any of its own order, which is later found to be without jurisdiction?”

5. On the next date i.e. 22nd June 2021, an adjournment was sought on behalf of the Petitioners, which was granted at the cost of Rs.5000/- since the request was not found to be reasonable. On 21st March 2022, the present counsel stated that she would file Vakalatnama on behalf of the Petitioners and sought an adjournment.

6. Today, the Court has heard the submissions of Ms. Sujata Jena, learned counsel appearing for the Petitioners and Mr. Debakanta Mohanty, learned Additional Government Advocate for the State.

7. The facts relevant for the purposes of the present case are that the Petitioner had approached the BoR with an OEA Revision Case No.56 of 2003 filed by him under Section 38-B of the Orissa Estates Abolition Act, 1951 (‘OEA Act’) praying for a direction to the Tahasildar-cum-OEA Collector, Bhubaneswar to recognize the Petitioner as a Sthitiban tenant in respect of two parcel of lands (i)—Sabik Plot No.259 to an extent of Ac.0.88 decimals and Sabik Plot No.272 to an extent of Ac.0.50 decimals stated to be owned by

the ex-ruler of Kanika, Shri Sailandranarayan Bhanjadeo. The claim made by the Petitioner in the said petition was that the ex-ruler had inducted him as tenant on 31st March, 1949 and granted Patta with a rent of Rs.9/- and Pathakara of 5 Annas. It was accordingly claimed that the record had been prepared in favour of the Petitioner in the Raja's Estate. The Petitioner was claimed to be paying rent to the ex-ruler from 1935 to 1952 i.e. up to the date of vesting of the Estate in the State Government under the provisions of the OEA Act. It was claimed that the tenancy was protected under Section 8(1) of the OEA Act. Therefore, it was claimed that since the Petitioner was a tenant under the landlord before the date of vesting, he should be deemed to be a tenant after vesting of the land in the State Government.

8. On that application, the Member, BoR called for a field enquiry report from Tahasildar, Bhubaneswar. In his report, the Revenue Inspector, Kalarahanga informed the Tahasildar by a letter dated 8th October, 2004 that the Petitioner was in possession of the Plot Nos.309(part) to an extent of Ac.0.500 decimals and 267(part) to an extent of Ac.0.884 decimals and had constructed two residential houses and planted certain trees. This was forwarded to the Member, BoR by the Tahasildar by a letter dated 31st January, 2005. Acting on the above report, an order was passed by the Member, BoR on 28th March, 2005 negating the objection of the learned counsel for the State that he had no jurisdiction under Section 38-B of the OEA Act to entertain the said application. Since on merits it was found that the Petitioner had a 'strong case' on Sabik Plot Nos.259 Ac.0.88 and No.272 Ac.0.50 corresponding

to Hall Plot Nos.267 (part) and 309 (part) and since the fact of possession had been confirmed, it was held to satisfy the legal requirement under Section 8 (1) of the OEA Act. The order of the Member, BoR ended with the statement “it can be safely concluded that tenancy has been created and subsists over said Plots.”

9. The State of Orissa filed OEA Misc. Case No.13 of 2007 before the BoR for recalling of the above order dated 28th March, 2005. When the said application was filed, the Petitioner filed a writ petition i.e. W.P.(C) No.12817 of 2008 in this Court challenging the initiation of the aforementioned proceedings by the Member, BoR. The grievance made by the Petitioner was that despite questioning the maintainability of such an application, the Member, BoR was “proceeding with hearing of the case on merit.” It was accordingly prayed that only after deciding the issue of maintainability should the Member, BoR proceed with hearing the case on merits. By an order dated 26th September 2008, this Court disposed of the above writ petition directing the Member, BoR to first decide the question of maintainability and only after being satisfied about the maintainability to proceed with hearing the case on merits.

10. Thereafter, the impugned order was passed by the Member, BoR on 3rd August, 2009. On the issue of maintainability, the Member, BoR relied on the decision of the Supreme Court of India in ***Budhia Swain v. Gopinath Deb 1999 (II) OLR (SC) 151*** and concluded that since in the present case by an order dated 28th March 2005, the Tribunal acted without jurisdiction, it had the power to recall its earlier order. In particular, it was pointed out that the language of Section 38-B of the OEA Act was clear that a

revisional power could be exercised “only against a decision made or an order passed by the sub-ordinate authorities under the provisions of the OEA Act.” Since nothing was indicated in the application before the Member, BoR regarding the decision or order of the subordinate authority which has been assailed, it was plain that the Member, BoR had in entertaining the OEA RC No.56 of 2003 and passing the order dated 28th March 2005, acted without jurisdiction.

11. As regards the merits of the Petitioner’s claim, the Member, BoR was found that unless, prior to the vesting of the estate in the State, the rights of the tenants were incorporated in the records of rights by the Tahasildar on the basis of entries in the revenue records transferred by the ex-Intermediaries, it was not open to the OEA Collector-cum-Tahasildar, soon after the vesting in the State, to enquire into and adjudicate on the claims of the Applicants that they were tenants prior to the vesting of the Estate. The incorporation of tenants in the above manner was not an administrative decision and did not involve any enquiry or adjudication. In the present case, there was no record in the form of an Ekpadia of the ex-Intermediary nor any intimation regarding maintenance of any tenants’ ledger showing the name of the present Petitioner as a tenant. This was the reason why in the settlement of 1973 and 1988, the land in question was recorded in favour of the State of Orissa. If in fact the Petitioner claimed that his name had been wrongly left out by the ex-Intermediary from the tenants’ ledger then the remedy of the Petitioner lay in the Civil Court. Section 8(1) of the OEA Act did not provide for entertaining an

application for recognizing a person as a deemed tenant under the OEA Act. Therefore, the entire proceedings before the Member, BoR was without jurisdiction. Reference was made to the decision in *State of Orissa v. Brundaban Sharma, 1995 Supp. (3) SCC 249* that if an OEA Collector concludes that a lease, transfer or settlement was made prior to vesting of an ex-Estate, such OEA Collector should obtain prior confirmation from the BoR under Section 5(i) of the OEA Act. This legal position was reiterated in *State of Orissa v. Harapriya Bisoi 2009 (2) OJR 54 (SC)*. Since been nothing brought on record before the Member, BoR to the effect that such confirmation of the claimed tenancy had in fact been granted, the order dated 28th March, 2005 of the Member, BoR was without jurisdiction. For the aforementioned reasons, the order dated 28th March, 2005 passed by the Member, BoR was by the order dated 3rd August, 2009, recalled.

12. Ms. Jena, learned counsel for the Petitioner, submitted that the power of the Member, BoR to recall an earlier order is traceable only to Section 38-A of the OEA Act, which reads as under:

“38-A. Review -Any decision made or order passed under this Act, whether before or after the commencement of the Orissa Estates Abolition (Amendment) Act, 1973 (other than a decision or order against which an appeal or revision has been preferred under this Act) may, within one year from the date of the decision or order, as the case may be, and after giving all persons interested an opportunity of being heard, be reviewed by the officer who made the decision, or passed the order, or his successor in office on the ground that there has been a clerical or arithmetical mistake in the course of any proceeding under this Act.”

13. According to her, outside of the above provision, there is no power or jurisdiction in the Member, BoR to entertain an application for recall of its order of more than one year after it had been passed and particularly when the relief claimed was not limited to correcting clerical or arithmetical mistakes. She accordingly submitted that the impugned order dated 3rd August 2009 of the Member, BoR was without jurisdiction.

14. On merits it was submitted by Ms. Jena that the documents available with the Petitioner were not appreciated by the Member, BoR. The report of the Tahasildar was in favour of the Petitioner. It showed that he was in possession of the two plots in question, had constructed houses thereon and had remained there for many years. It was submitted that on merits also therefore the Member, BoR erred in recalling the earlier order.

15. Mr. Debakanta Mohanty, learned Additional Government Advocate, on the other hand, submitted that the power of Member, BoR to recall an earlier order, which was vitiated for inherent lack of jurisdiction has been settled in the decision of the Supreme Court in ***Budhia Swain*** (*supra*). In the present case, since there was no occasion for the Member, BoR in the first instance to have exercised powers under Section 38-B of the OEA Act, since there was no order of the subordinate authority, which had to be revised, the order dated 28th March, 2005 was plainly without jurisdiction. It satisfied the test laid down by the Supreme Court in ***Budhia Swain*** (*supra*) and, therefore, there was every justification in the Member, BoR recalling the earlier order.

16. On merits, Mr. Mohanty pointed out that merely being in possession of the land in question was hardly sufficient to recognize the right of a person as a deemed tenant within the meaning of the OEA Act. With there being no Ekpadia, no tenants' ledger and no other similar documents produced by the Petitioner, the question of recognizing the Petitioner as a 'deemed tenant' on the date of the vesting of the land in the State even within the meaning of Section 8 (1) of the OEA Act did not arise. He pointed out that on merits also, therefore, no case whatsoever was made out by the Petitioner for grant of the relief prayed for.

17. The above submissions have been considered. On the question of the power of the Member, BoR to recall an earlier order which was vitiated by lack of jurisdiction, the decision of the Supreme Court in **Budhia Swain** (*supra*) is instructive. That was a case arose under the OEA Act itself. A specific question in that case also was about the power of the OEA Collector to review or recall an earlier order. Importantly, just like in the present case in that case also an argument was advanced that the power of review was available only under Section 38-A of the OEA Act, which had not been invoked in that case. In para 5, the Court noted as under

“5. The only provision for review in the Act is to be found in Section 38-A whereunder a review may be sought for within one year from the date of the decision or order but only on the ground that there has been a clerical or arithmetical mistake in the course of any proceedings in the Act. It was also conceded by the learned counsel for the appellants that the proceedings initiated by the appellants were certainly not under Section 38-A. It was also conceded at the bar that the subsequent action of the OEA Collector could be sustained only if supportable by the power to recall.”

18. That the Supreme Court proceeded to discuss the purport of power of recall and observed as under:

*“6. What is a power to recall? Inherent power to recall its own order vesting in Tribunals or Courts was noticed in **Indian Bank v. Satyam Fibres (India) (P) Ltd:** (1996) 5 SCC 550, vide para 23, this Court has held that the Courts have inherent power to recall and set aside an order*

*(i) obtained by fraud practised upon the Court,
(ii) when the Court is misled by a party, or
(iii) when the Court itself commits a mistake which prejudices a party.*

*In **A.R. Antulay v. R.S. Nayak:** AIR 1988 SC 1351, (vide para 130), this Court has noticed motions to set aside judgments being permitted where*

*(i) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all and was shown as served or in ignorance of the fact that a necessary party had died and the estate was not represented,
(ii) a judgment was obtained by fraud,
(iii) a party has had no notice and a decree was made against him and such party approaches the Court for setting aside the decision ex debito justitiae on proof of the fact that there was no service.*

7. In Corpus Juris Secundum (Vol. XIX) under the Chapter "Judgment Opening and Vacating" (paras.265 to 284, at pp 487-510) the law on the subject has been stated. The grounds on which the Courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorising such actions. Invalidity of the judgment of such a nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the face of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter a judgment may be vacated on that ground. However, in

general, a judgment will not be opened or vacated on grounds which could have been pleaded in the original action. A motion to vacate will not be entered when the proper remedy is by some other proceedings, such as by appeal. The right to vacation of a judgment may be lost by waiver or estoppel. Where a party injured acquiesces in the rendition of the judgment or submits to it, waiver or estoppel results.

8. In our opinion a Tribunal or a Court may recall an order earlier made by it if

(i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,

(ii) there exists fraud or collusion in obtaining the judgment,

(iii) there has been a mistake of the Court prejudicing a party, or

(iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.

The power to recall a judgment will not be exercised when the ground for re-opening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence.”

19. The above discussion makes it clear that the Supreme Court did recognize the power of a Tribunal or Court to recall its order notwithstanding absence of any specific provisions in the statute under which such Court or Tribunal functions. One specific instance where such power of recall could be exercised was where the proceedings suffered from “inherent lack of jurisdiction” and where “such lack of jurisdiction is patent.” In the present case, it

will be recalled that even in the first instance, the State did object to the exercise of jurisdiction under Section 38-B of the OEA Act by the Member, BoR by pointing out that the jurisdictional requirement of that provision was not met in the present case. This was however brushed aside by the Member, BoR when the initial order dated 28th March, 2005 was passed.

20. Section 38-B (1) and (2) of the OEA Act reads as under:

“38-B. Revision -(1) *The Board of Revenue may, on its own motion or on a report from the Collector, call for and examine the record of any proceeding in which any authority sub-ordinate to the Board of Revenue has made any decision or passed an order under this Act (not being a decision against which an appeal has been preferred to the High Court or the District Judge under Section 22) for the purpose of satisfying itself as to the regularity of such proceeding or the correctness, legality or propriety of such decision or order and if in any case it appears to the Board of Revenue that any such decision or order ought to be modified, annulled, reversed or remitted, it may pass order accordingly.*

(2) *The Board of Revenue shall not, -*

*[(i)****]*

(ii) revise any decision or order under this section without giving the parties concerned an opportunity of being heard in the matter.”

21. A plain reading of Section 38-B (1) of the OEA Act reveals that the occasion to exercise the revisional power by the BoR will arise only where there any “record of any proceeding in which any authority subordinate to the Board of Revenue has made any decision or passed an order under this Act....” With there being no order or decision of the subordinate authority under the OEA Act, the occasion for the BoR to exercise the revisional power simply

did not arise. This is a jurisdictional requirement of Section 38-B (1) of the OEA Act. It was not met as far as the present case is concerned. When the Petitioner approached the Member, BoR with the petition under Section 38-B of the OEA Act, there was no order or decision of any subordinate authority under the OEA Act. The very first paragraph of the order dated 28th March, 2005 of the Member, BoR reveals that the said revision petition was for a direction to the Tahasildar-cum-OEA Collector “to recognize the Petitioner as a Sthitiban tenant and to accept rent from him.” In other words, it was in a kind of declaratory relief coupled with a mandamus, neither of which is envisaged as a relief that can be granted under Section 38-B (1) of the OEA Act. On the face of it, therefore, the entire proceedings stood vitiated by inherent lack of jurisdiction of the Member, BoR.

22. The Court is therefore satisfied that the tests laid down by the Supreme Court in para 8 of the decision in *Budhia Swain (supra)* for declaring an earlier order to be invalid are satisfied in the present case and, therefore, there was legal justification for the Member, BoR to have entertained the application filed by the State of Orissa for recalling of the above order dated 28th March, 2005. In other words, the said application was maintainable before the Member, BoR.

23. On merits, learned counsel for the Petitioners was unable to point out that there was in fact an Ekpadia and a tenants’ ledger in the present case that was available with the Petitioners and could be produced before the OEA Collector. The fact of the matter is that there is no such document even as of today. The only material that

was available with the BoR when the Petitioner's revision petition was first heard, and which is the report of the Revenue Inspector which was forwarded by the Tahasildar to the BoR stating that the Petitioner was in possession of the lands in question and had constructed buildings and planted trees. Certainly, this is not the material on the basis of which the Petitioner can be expected to be declared a 'deemed tenant' under Section 8(1) of the OEA Act and that being a tenant under the ex-Intermediary he automatically continued as such on the date of the vesting of the land in question in the State. As correctly pointed out by the BoR in the impugned order dated 3rd August, 2009 without there being the Ekpadia and tenants ledger provided by the ex-Intermediary to the State authorities, the question of OEA Collector or Tahasildar entertaining an application for recognition of a person as a deemed tenant would not even arise. It is for this reason that the BoR has correctly observed that if the Petitioner had a grievance about his name being left out from the tenants' ledger then the only remedy lies in the Civil Court and not elsewhere.

24. The other important aspect of the matter is in connection with the prayer of a person to be declared as a 'deemed tenant'. Such a declaration cannot be granted by an OEA Collector without there being confirmation by the BoR in terms of Section 5(i) of the OEA Act as has been explained by the Supreme Court in its decision in ***Brundaban Sharma*** (*supra*) and reiterated in ***Harapriya Bisoi*** (*supra*).

25. With the legal position being absolutely clear, there can be no doubt that in the present case the Petitioner has failed to make out

any case on merits for being declared to be a 'deemed tenant' as prayed for by him.

26. For the aforementioned reasons, the Court finds no error having been committed by the Board of Revenue in passing the impugned order dated 3rd August, 2009 and it recalling the earlier order dated 28th March, 2005.

27. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs.

M. Panda.

