

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.A. No.975 of 2021

Tophan Kumar Behera

....

Appellant

Mr. Gautam Mukherji, Senior Advocate with
Ms. Ankita Mukherji

-versus-

State of Odisha & others

....

Respondents

Mr. L. Samantaray,
Addl. Govt. Advocate

CORAM:

**JUSTICE JASWANT SINGH
JUSTICE M.S. SAHOO**

**JUDGEMENT
25.01.2022**

Order No.

2. 1. The appellant by filing the writ appeal, has challenged the order dated 24.11.2021 passed by the learned Single Judge in W.P.(C) No.26041 of 2017, disposing of the writ petition.
2. In the writ petition, the petitioner-appellant, inter alia, had prayed for a direction not to evict the appellant from the occupation of a Govt. land, adjacent to the National Highway No.16, over plot no.1577, presently plot no.639/3368 of Khata no.3293, measuring Ac.0.215 dec., out of Ac.1.530.
3. The appellant/petitioner has averred in the writ petition that the appellant's father had plot nos.663 & 664 in the mouza-Nayapally and plot no.639/3368, owned by the Govt., was adjacent to the said plots. By occupying plot no.639/3368, the appellant had

opened a Dhaba, selling food, in the name and style, “Maa Mahima Dhaba”, claiming it to be in existence since very long.

It is not disputed by the appellant/petitioner that the Dhaba was running on a Government plot, near Kalinga Stadium. When the Kalinga Stadium was refurbished and expanded for holding International Hockey Match, the petitioner was evicted and the Government plot was utilized, by the authorities.

4. Mr. Mukherji, learned Senior Counsel appearing for appellant submits that the nature of the land having been described as “Pathara Bani”, it can be said to be “Abadi Land”, as per Section 3(4)(a) of the Odisha Government Land Settlement Act, 1962 (hereinafter ‘the Act, 1962’ for short). Therefore, it is further submitted by the learned senior counsel that the appellant is entitled for settlement of Government land as provided under Section 3(4)(a) of the Act, 1962.

5. Mr. L. Samantaray, learned Additional Government Advocate appearing for respondent no.1- General Administration (hereinafter “G.A.” for short) Department, which owns the Government land in the capital City of Bhubaneswar, submits that the appellant does not have any enforceable legal right to encroach and occupy a valuable Government land for

whatever purpose and the utilization of the land by the Govt. is for the larger public interest, for expansion of an International Hockey Stadium and beautification of the road, besides the National Highway, NH-16. He further submits that the order passed by the learned Single Judge is just and proper and the appellant has not brought any material before this Court for exercising its appellate jurisdiction under Letters Patent, as the appellant has failed to point out any error apparent on the face of record.

6. Regarding the inapplicability of the Act, 1962, it is further contended by the learned Additional Government Advocate that the land within the area of Bhubaneswar Municipal Corporation belong to Govt. in the General Administration Department, allotment of the land were only granted as per The Government Grants Act, 1895 which has been repealed by the Govt. of India, by 'Repealing Amending (Second) Act, 2017', Act 4 of 2018, dated 05.01.2018.

7. In the counter affidavit filed in the writ petition on behalf of the General Administration Department, who owns the land, it has been stated that the Government land is recorded as "Pathara Bani" and not "Ghara Bari". It is further stated that there is no note of any kind of possession, in the up-to-date Revenue Record of Rights (ROR), which indicates that the appellant is a trespasser. It has been further stated that the

appellant obtaining license to run the Dhaba, availing the power supply, getting telephone connection and paying trade license fees to Municipal Corporation, does not fructify to a right of the appellant to encroach and occupy the Government land.

8. The respondents have also harped on the aspect that the land being owned by Government, was required and utilized for expansion of “Kalinga Stadium”, which is a project of National importance and that the appellant had violated Section 403 of the Odisha Municipal Corporation Act, 2003 and has been evicted following the power and procedure provided under Section 407 of the said Act, 2003.

9. The said Sections 403 & 407 of the Odisha Municipal Corporation Act, 2003 have been specifically referred to in the counter filed by the Bhubaneswar Municipal Corporation-respondent no.5.

Section 403 of the Act provides : Prohibition of structures or fixture which cause obstruction in street; Section 407 provides : “Commissioner may, without notice, cause to be removed any wall, fence, rail, post, step, booth or other structure, whether fixed or movable and whether of a permanent or a temporary nature, or any fixture which shall be erected or set up in or upon or over any street,... in

contravention of the Act.” Both the G.A. Department : Respondent No.1, as well as Respondent no.5-BMC have also referred to the requirement of the land as it is adjacent to the busy National Highway, N.H.16.

10. Regarding the plea of the adverse possession, it has been specifically averred on behalf of respondent no.1-G.A. Department, Government of Odisha, who owns all the Government land within the area of Bhubaneswar Municipal Corporation that the appellant’s plea of adverse possession is untenable, in view of the law laid down by the Hon’ble Supreme Court in the cases of ***Karnataka Board of Wakf v. Government of India and others : (2004) 10 SCC 779 and Krishna Murthy S Setlur v. O.V. Narasimha Setty : (2007) 3 SCC 569***

11. The decision in ***Karnataka Board of Wakf*** (*supra*) at para-11, page-784 of SCC, lays down that

“.....It is a well-settled principle that a party claiming adverse possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over statutory period”.

As noted above, none of the conditions as laid in the ***Karnataka Board of Wakf*** (*supra*) is satisfied by

the appellant inasmuch as, he had never tried to prove the factum of adverse possession in a properly constituted proceeding, before a civil court of jurisdiction, rather, opted to invoke the extraordinary writ jurisdiction, based on disputed questions of fact.

12. In **Krishna Murthy S Setlur** (supra), it has been laid down (para-13, p.579 of SCC),

“.....In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be an owner by adverse possession has to plead actual possession. He has to plead period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner.”

Applying the above principles, the appellant in the present case, did lose possession by eviction, has not proved that his possession was exclusive and undisturbed. Lastly instead of petitioner having a hostile title, the owner of the land, i.e., G.A. Department has been hostile to the petitioner. In any event, for proving this factual aspects, the petitioner never sought recourse to proper judicial proceeding under the provisions of the CPC.

13. In **Ravinder Kaur Grewal v. Manjit Kaur :** (2019) 8 SCC 729; at paragraphs 60 and 63 of SCC

(Pages 777 & 778) the following has been held, as quoted herein :

60. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, *nec vi* i.e. adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus possidendi under hostile colour of title is required. Trespasser's long possession is not synonymous with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and large the concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

xx xx xx xx

63. When we consider the law of adverse possession as has developed vis-à-vis to property dedicated to public use, courts have been loath to confer the right by adverse possession. There are instances when such properties are encroached upon and then a plea of adverse possession is raised. In such cases, on the land reserved for public utility, it is desirable that rights

should not accrue. The law of adverse possession may cause harsh consequences, hence, we are constrained to observe that it would be advisable that concerning such properties dedicated to public cause, it is made clear in the statute of limitation that no rights can accrue by adverse possession."

(Emphasis Supplied)

14. On perusal of the pleadings of the parties and applying the principles laid down in the aforesaid decision of the Hon'ble Supreme Court, the appellant's plea of adverse possession as against G.A. Department does not sustain, more so, when the ownership of the land being that of the Government Department was undisputed and the purpose of utilization being of larger public interest, i.e., expansion of an International Stadium and beautification of the land adjacent to the National High Way No.16, close to the stadium. It is otherwise well accepted that the plea of adverse possession is a plea of defence and not a plea of seeking declaration.

15. On perusal of the records of the writ petition, no such plea claiming benefits, purportedly under Section 3(4)(a) of the OGLS Act, 1962 was found to have been taken in the writ petition, before the learned Single Judge or before any authority prior to filing of the writ petition. In the writ petition, the appellant did not lay any claim as a beneficiary under Section 3(4)(a) of the Act. However, the claim

assuming for the sake of argument to be question of law only, based on the interpretation of accepted revenue entries and provisions of the enactment, is delved into, in the present appeal.

16. Learned Senior counsel for the appellant, though referred to a lexicon/Glossary, to contend that “Pathara Bani” is “Abadi Land”, such contention is misconceived, inasmuch as, the “Government land” has been defined in the statute i.e. Act, 1962, vide Section-2 (b), b(i), b(ii), b(iii), b(iv).

Further, the “Final Report on the Revision Settlement of Orissa (1922-1932 A.D.)” at APPENDIX XVIII, GLOSSARY (Showing the sense in which words have been used in the record-of-rights), indicates “Abadi” to be “Cultivated”.

17. Further, the word “Abadi” is to be read, *noscitur a sociis*, along with other words “Khasmahal”, Nazul, Gramakantha Parambok, as they appear in S. 3(4)(a) of the Act, 1962 and none of the words would indicate “Pathara Bani” to be “Abadi”, i.e., cultivated. As stated by the Privy Council : “It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them” : **Angus Robertson v. George Day, (1879) 5 AC 63**; Referred to in

M.K.Ranganatham v. Govt. of Madras : AIR 1955 SC 604 (Para-21 of AIR)

18. The case of the appellant/petitioner is that he occupied Government land adjacent to the vacant land of his father which was acquired for construction of the Kalinga Stadium and such land, at any stretch of imagination, can not be held to be “abadi”, i.e., “cultivated”. Further the appellant has not produced any revenue record to shows that the area is an “abadi” area. The appellant himself contends that he had opened a “Dhaba” before being evicted, thus not put to cultivation and cannot be “Abadi”.

19. To further consider the submission of learned Senior Counsel for the appellant/petitioner, the relevant provisions of the 1962 Act, as well as Odisha Government Land Settlement Rules, 1983 (1983 Rules) need to be adverted to and are quoted herein :

“Section 3. Reservation and settlement of Government land :- (4) Notwithstanding anything to the contrary contained in the preceding sub-sections or in any law or any custom, practice or usage having the force of law-

(a) any land of the category of Khasamahal, Nazul, Gramkantha Parambok or Abadi, wherever situated and used for any purpose, may, on application, be permanently settled with heritable and transferable right with the person

who is in occupation of such land either on the basis of lease or otherwise for a period of at least three years prior to the appointed date, in such manner and subject to payment of such amount to the Government as may be prescribed;

(Emphasis Supplied)

Explanation :- The word 'lease' includes sub-lease or subsequent lease by the lessee or the sub-lessee, as the case may be."

Rule-5-B of the 1983 Rules (substituted vide Orissa Gazette Extraordinary dated 17th February, 2010) provides as follows :

5-B. Settlement of Khasmahal, Nazul, Gramakantha Paramboke and Abadi lands - Notwithstanding anything contained in Rules 3, 5, 5-A, 8, 11, 12 and 13, settlement of Khasmahal and Nazul land leased out, and Gramakantha Paramboke and Abadi land occupied, prior to 26th day of February, 2006 and used for homestead purpose shall be made in the manner prescribed in Schedule-V.

(Emphasis Supplied)

Rule-5-BB of 1983 Rules (inserted vide Odisha Gazette Extraordinary dated 11.11.2014) provides as follows :

5BB. Settlement of Khasmahal, Nazul, Gramakantha Paramboke and Abadi land for the purposes other than homestead and agriculture - Notwithstanding anything contained in rules 3, 5, 5-A, 8, 11, 12 and 13,

settlement of Khasmahal and Nazul land leased out, and Gramakantha Paramboke and Abadi land occupied, for a continuous period of three years prior to the 26th day of February, 2009 and used for the purposes other than homestead and agriculture shall be made in the manner prescribed in Schedule-V-A.

Emphasis Supplied)

20. Concededly, the appellant/petitioner has never resorted to any procedure as contained in the Section 3(4)(a) read with Rule 5-B and Section 3(4)(a) read with Rule 5-BB, for settlement of the land in question in his favour, during the time he was in possession as claimed.

21. To consider the contention raised by learned Senior Counsel for the appellant regarding applicability of OGLS Act, 1962, it requires determination as to whether the OGLS Act, 1962 is/was applicable to the area within the limits of Bhubaneswar Municipal Corporation, which are owned by General Administration Department, the relevant provisions are quoted herein :

Section 8 of the 1962 Act (inserted vide Odisha Act No.2 of 1990) provides as follows :

8. Delegation of power:- The Government may by notification in the Official Gazette direct that any power exercisable by it under this Act shall, subject to such conditions, if any , as may be specified in the direction, be exercisable also by

any authority not below the rank of a Revenue Officer.

(Emphasis Supplied)

Rule 11 of the 1983 Rules provides as follows :

11. Authorities competent to dispose settlement -
Disposal of application for settlement of land for various purposes shall be made by the authorities specified in Schedule II up to the extent mentioned therein. All other cases for settlement of land shall be referred to the Government for orders.

(Emphasis Supplied)

The Schedule II of the 1983 Rules provides as follows :

SCHEDULE II [See Rule 11] POWER TO SANCTION SETTLEMENT OF GOVERNMENT LAND				
Sl.No.	In whose favour	Officer exercising powers	In rural area	<u>In urban area excluding Bhubaneswar, Rourkela, Sunabeda</u>

(Emphasis Supplied)

22. A conjoint reading of Section-8 of the Act, 1962, Rule-11 & Schedule II of the Rules, 1983, leads to an irresistible conclusion that the Government had not delegated the power to settle Government land in the urban area of Bhubaneswar, under the provisions of the OGLS Act, 1962 and the 1983 Rules. Therefore, the appellant's contention to take benefit of the OGLS Act, 1962 under Section 3(4)(a) would be untenable as

per the statutory scheme, the Government land in the urban area of Bhubaneswar having been specifically excluded from the purview of the exercises of power by any delegatee under the OGLS Act, 1962 and Rules, 1983, as amended.

23. It has to be further noted that for settlement of Govt. land under Section 3(4)(a) of the Act, the Government has notified the procedure by notification dated 10.09.2019 issued by the Revenue and Disaster Management Department, i.e., for “Settlement of Khasmahal, Nazul, Gramkantha, Paramboke and Abadi category of land in the State-“Submission of Application”. The appellant has not made out any case that he was/is an applicant for settlement under Section 3 (4)(a) of the Act, 1962, read with the notification dated 10.09.2019.

24. Although it is not the pleaded case, a further development, which could have a bearing on the case of the appellant, is that after the repeal of Government Grants Act, by the Govt. of India w.e.f. 5.1.2018, the State of Odisha has amended the Rules, 1983 by OGLS (Second amendment) Rules, 2020. The said Amendment Rule was published in the Gazette on 08.09.2020.

25. By the amendment Rules, 2020, Rule 5AA has been introduced along with Schedule IV-A.

Rule 5-AA provides as follows :

“5-AA. Notwithstanding anything contained in rules 3, 5, 8, 10,11, 13 and 14, settlement of Government land situated within the limits of the Bhubaneswar Municipal Corporation area shall be made in the manner prescribed in Schedule IV-A”.

(Emphasis Supplied)

The newly introduced Schedule-IV-A provides as follows :

“Schedule-IV-A

(See rule-5-AA)

Rules for settlement of Government land situated within the limits of Bhubaneswar Municipal Corporation Area”

26. A reading of the now amended Rules, 1983, amended w.e.f. 8th September, 2020, would go to show that a *non-obstante* clause has been introduced by inserting Rule-5AA, therefore, the Rule 5-AA and Schedule-IV-A are to operate notwithstanding the exception carved out earlier, in Schedule-II read with Rule 11 of the Rules, 1983.

After the amendment, 2020, in view of the *non-obstante* clause, the land owned by Govt., G.A. Department, conterminous to the area of the Bhubaneswar Municipal Corporation, can be allotted as per the procedure prescribed in the newly

introduced Rules : “Schedule-IV-A”, read with Rule 5-AA of Rules, 1983, but such settlement of Govt. land, situated within the limits of BMC area is to be made by the authority specified, i.e., “Land Allotment Committee” constituted as per Rule 3 of the Rules (Schedule-IV-A) and for the purposes as specified in Rule 2 (Schedule IV-A), which defines “purpose for settlement”.

Testing the claim of the appellant/petitioner for the sake of argument, we find that the position would not change in any manner for the following reasons :

- i. It is not the case of the appellant that he had ever applied in any manner under the provisions of the Act, 1962 prior to or post amendment, 2020 in tune with the prescribed statutory scheme. Even otherwise, the application for such settlement prior to the amended provision w.e.f. 8.9.2020 would not have succeeded in light of the Govt. land belonging to G.A. not legally permitted to be dealt with within the area of BMC, moreover no such plea has been taken in the writ petition.
- ii. Concededly, eviction proceedings were concluded in the year 2017 prior to the amended provisions were introduced in 2020 which have prospective application,

thereby providing no succour to the set up claim of the appellant/petitioner;

- iii. appellant admittedly was operating a “Dhaba”, on Govt. land, and it is evident that such activity/category is not permissible for settlement as per Rule-2 (Schedule IV) of amendment Rules 2020, notifying Rules for settlement of Govt. land situated within the limits of BMC Area;

27. Lastly it has been contended by Mr. Mukherjee, learned Senior Counsel for the appellant that “*the appellant could not have been relegated to the status of a street vendor.*” We may agree such contention raised by the learned Senior Counsel that the appellant cannot be described as a street vendor under the provisions of Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014. With a benevolent objective that the appellant/petitioner may get relief in the form of rehabilitation at any of the permitted vending zones within the area of BMC, the learned Single Judge, taking a sympathetic view, has made those observations. We refrain from expressing any opinion on the said contention raised by the learned Sr. Counsel for appellant. Further, it would be open for the appellant/petitioner to avail any benefit under the said Act, 2014 or not.

28. In view of the aforesaid discussions, the writ appeal fails being devoid of any merit and is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.

(Jaswant Singh)
Judge

(M.S.Sahoo)
Judge

January , 2022
Cuttack/ dutta

