IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No. 88 of 2013

[In the matter of an appeal under Section 100 of the Code of Civil Procedure, 1908.

AFR Latika Kar & others ...... Appellants

-Versus-

State of Odisha & others ..... Respondents

Advocate(s) appeared in this case :-

For Appellants	:	M/s. Sourya Sundar Das, Sr. Advocate With M/s. K. Behera, S. Modi, P.K. Ghosh, S.S. Pradhan, S. Pradhan & M. Pattnaik, Advocates.
For Respondents:		M/s. S. Pattanaik, Addl. Government Advocate

CORAM
JUSTICE SASHIKANTA MISHRA

JUDGMENT
13th December, 2023

SASHIKANTA MISHRA, J. The present appeal is directed against the judgment dated 02.02.2013 passed by learned District Judge, Khurda in RFA No. 37 of 2008, whereby the judgment passed by learned 2nd Additional Civil Judge (Sr. Division), Bhubaneswar in Title Suit No. 119/440 of

2005/1997 on 24.05.2008 was confirmed. The plaintiffs of the said suit are the appellants before this Court.

2. For convenience, the parties are referred to as per their respective status in the Court below.

3. The suit was originally filed by one Sankar Kar and Gourkrushna Kar for declaration, correction of record of right, confirmation of title and permanent injunction in respect of the suit land.

4. The case of the plaintiffs, briefly stated, is that one Nabakrushna Kar of village-Barabati was settled with an area measuring Ac.5.000 dec. appertaining to Plot No. 3550 under Khata No.1118 in Mouza-Badagada as per order dated 06.09.1934 in case No. 8/33-34 on payment of rent. The plot is called "Chilli Pokhari". Nabakrushna died leaving behind the plaintiffs and other children, who possessed the same as per mutual partition among them. During pendency of the suit, Sankar Kar died leaving behind his widow and sons, who were substituted in his place. It is claimed that the plaintiffs are enjoying the suit property with right to repair and maintain the same at their own cost by keeping the tank clean for the purpose of

bathing, drinking, irrigation etc. and by constructing a temporary structure over the same. The suit tank was however, recorded in the name of the Government in G.A. Department in current settlement as Plot No. 1680 and 1071 with a reduced area of Ac.1.135 dec. The plaintiffs filed a revision before the Commissioner, Settlement and Land Records bearing Revision No.815/91, but the same was withdrawn and thereafter the suit was filed.

5. The defendants, on the other hand contested the suit challenging its maintainability, inter alia on the ground of limitation. It was stated that the plaintiffs have no manner of right, title and interest over the suit land and the G.A. Department being the lawful owner, the ROR was rightly published in its name. In the 1988-89 settlement ROR, a note of illegal possession by the plaintiffs was recorded but the same is without jurisdiction and not binding on the defendants. A case for eviction being, O.P.P. Case No. 983 of 1999 was initiated against the plaintiff for eviction and by order dated 31.05.2002, the Estate Officer directed the plaintiffs to vacate the suit land. It is further stated that the revision petition was filed after the statutory

period of limitation and the plaintiffs having come to know that they have no possession and title over the suit land withdrew the same and filed the suit to grab the suit land.

6. On the above pleadings, the trial Court framed six issues, of which Issue Nos. (iii) and (iv) being important are as follows:

> *(iii) Whether the suit is barred by law of limitation?*
>
> *(iv) Whether the plaintiffs have right, title, interest and possession over the suit land and direction be given to the defendants to correct the R.O.R. in respect to right of user of the plaintiffs over the suit land?*

7. Plaintiffs examined three witnesses from their side and exhibited 24 documents. Defendants examined one witness and marked one document as exhibit from their side.

8. The trial Court took up Issue Nos.(iii) and (iv) for consideration at the outset. After scanning the oral and documentary evidence, it was of the view that the suit land was given in favour of Nabakrushna Kar for a limited purpose namely, to look after the tank and to clean the same at his own cost for the purpose of use of the villagers. As such, the claim of title by the plaintiffs over the suit

land merits no consideration. As regards limitation, the trial Court held that the ROR was published in the year 1988-89 but the suit was filed in the year 1997, i.e., after a lapse of 9 years. As such, the suit is barred by limitation. On such findings on the pivotal issues, the other issues were also answered against the plaintiffs to the extent that the plaintiffs having claimed possession on the basis of the note in the ROR are deemed to have accepted the title of the defendants and therefore, do not have a better title than the defendants over the suit land in order to claim the relief of injunction. On the above findings, the suit was dismissed.

9. The plaintiff carried the matter in appeal mainly challenging the findings of the trial Court with regard to Issue Nos.(iii) and (iv). Learned District Judge took note of the certified copy of the ROR in respect of the suit plot marked Ext.1 and particularly, the entries made therein to hold that the status of Nabakrushna was 'Dafadar' and the nature of the tenancy was 'Dafayat'. According to learned District Judge, Dafayat is akin to a licence and not lease. The disposition in favour of the plaintiff vide Ext.1 does not

speak of settlement of land in his favour nor is a lease but a mere conferment of right of user along with right of the public. Learned District Judge also concurred with the finding of the trial Court regarding limitation with reference to Section 42 of the Orissa Survey and Settlement Act, 1958, which provides that a suit for correction of record of rights has to be filed within a period of three years from the date of publication of ROR. Learned District Judge held that even assuming that the claim of the plaintiffs is based on title, then also they having failed to prove title over the suit land, their possession cannot be stated to have matured into title. On such findings, the appeal was dismissed.

10. Heard Mr. S.S. Das, learned Senior Counsel with Mr. A. Pradhan, learned counsel for the appellants and Mr. S. Pattanaik, learned Addl. Government Advocate for the State.

11. Before proceeding to refer to the rival contentions put forth by the parties, it would be proper to mention that the present appeal has been admitted on the following substantial questions of law.

"(1). Whether both the courts below misdirected themselves in holding that the suit is barred by limitation in view of provisions under Section 42 of the Orissa Survey and Settlement Act, 1958?

(2) Whether, in view of the fact that the plaintiffs' claim for correction of ROR in the suit is based upon the claim for relief of declaration and confirmation of title, the appellate court should have held that cause of action for filing of the suit arose after 1989? and

(3) Whether the lower appellate court was justified in holding that the plaintiffs were licensees and not tenants under Ext 1?"

12. Mr. S.S. Das, learned Senior Counsel has argued that both the Courts below have misdirected themselves in holding the suit as one for declaration of right, title, interest and possession of the plaintiffs. The fact that the suit was for correction of record of right and declaration of right of user over sabik plot No. 3551 -3553 along with permanent injunction was lost sight of by both the courts below. The plaintiffs have also not laid any claim of adverse possession and therefore, finding of the trial Court in such regard is entirely wrong. The suit land was leased out to the plaintiffs for a limited purpose on payment of rent but the courts below misconstrued the lease deed (Ext.1) as a licence. The law of limitation as applied by the courts below in the case is erroneous for the

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reason that the record of right was though published in the year 1988-89, the plaintiffs filed the suit in the year 1997 only being faced with the imminent threat of dispossession. Moreover, the revision preferred earlier was withdrawn and therefore, the suit cannot be treated as being barred by limitation. According to learned Senior Counsel the term 'Dafayat' as per *Purnachandra Odia Bhasakosh* means rent to be paid as 'Jala Kara, Phala Kara' etc. and therefore, the lease deed vide Ext.1 reflects grant of a permanent lease by the ex-intermediary with some conditions attached in conformity with Section 105 of the Transfer of Property Act. The term 'Dafayat' cannot convert a lease to a licence. As per Section 105 of the T.P. Act, lease creates a right on the lessee to enjoy the property in perpetuity, if not otherwise expressed. Therefore, the findings of the courts below to the contrary is entirely erroneous and a product of misconception of the nature of the relationship between ex-intermediary and the predecessor-in-interest of the plaintiffs.

13. Mr. S. Pattnaik, learned State Counsel on the other hand contends that the prayer in the plaint being for

correction of record of right published in the year 1988-89, the suit ought to have been filed within three years of its publication but having been filed admittedly after lapse of nine years, it is therefore, grossly barred by limitation. As regards the prayer for declaration of right of user, the right being mentioned as Dafayati in Ext.-1 cannot be held to be a lease but is a licence. In any case, the document (Ext.1) itself suggests the right of the public over the suit land and therefore, the same is essentially communal in nature without any exclusive or independent right being conferred upon the plaintiffs. According to Mr. Pattanaik therefore, both the courts below rightly rejected the claim of the plaintiffs.

14. From the rival contentions noted above, it is evident that two questions primarily fall for consideration before this Court as reflected in the substantial questions of law referred to earlier, (i) whether the suit is barred by limitation. (ii) whether the disposition of the suit land under Ext.-1 is in the nature of a lease or licence.

15. In order to determine the issue of limitation, it would be apposite to refer to the relief claimed in the plaint, which is reflected hereinbelow:

> *"(i) Direction to defendants to correct the Record of Right in respect of an area of Ac.5.000 decimal, corresponding to Sabik Plot No.3554 (Hal Plot No. 1680/1071) and portions of Plot No.3550/4673 & 3550/4674, corresponding to such Hal records to which they may co-relate.*
> *(ii) Declaration of rights of user of the plaintiffs in respect of Hal Plot Nos. 1070, 1072, 1116, 1117 & 1114 (part), corresponding to Sabik Plot Nos. 3551 & 3553, with noting of the same in the Record of Right.*
> *(iii) Permanently restraining the defendants from invading the plaintiffs' right in respect of such property.*
> *Xxx xxx xxx"*

16. There is no dispute that the ROR was published in the year 1988-89 in the name of the Government in G.A. Department with note of illegal possession by the plaintiffs. It is claimed that a revision was filed in the year 1991 being Revision Case No.815 of 1991 before the Commissioner, Settlement and Land Records. It is stated that said Revision was withdrawn on 28.08.1997. The suit was filed a few days before i.e. on 12.08.1997. Section 42 of the Odisha Survey and Settlement Act, 1958 reads as follows:

> ***"42. Limitation of jurisdiction of Civil Court.*** *- (1) No suit shall be brought in any Civil Court in respect of any order directing survey, preparation of record-of-rights or settlement of*

rent under this Act or in respect of publication, signing or attestation of any record thereunder or any part thereof :

Provided that any person aggrieved by any entry in or omission from any record finally published under Sections 6-C, 12-B or 23 in pursuance of Section 36 may, within three years from the date of such publication, institute a suit for relief in a Civil Court having jurisdiction.

(2) When such Court has passed final orders it shall notify the same to the Collector of the district and all such alterations as may be necessary to give effect to the orders of the said Court shall be made in the records published as aforesaid."

17. Therefore, ordinarily a suit for correction of record of rights could be filed within three years from the date of publication of ROR. Learned Senior Counsel, Mr. Das has argued that mere entry in the record of right neither creates nor extinguishes title in favour of any person. A title holder continues to remain in possession of the property despite the wrong recording because the erroneous ROR cannot extinguish his right, title and interest over the property nor does be become disentitled to continue to be in possession. He has relied upon the judgment passed by the court in the case of **Basanti @ Basantirani Jena vs. State of Odisha,** reported in 2016 (Supp.-1) OLR 529.

18. This Court is however, unable to accept the contention of learned Senior Counsel in this regard for the reason that the ratio of the cited case would apply only when the person concerned is actually the title holder notwithstanding the wrong recording of the ROR. Here it has been specifically contended that the plaintiffs are not claiming title over the suit property but their prayer is for correction of record of right simpliciter along with declaration of right of user. The filing of the revision and its subsequent withdrawal by the plaintiffs cannot have any bearing on the present case since the suit was filed on the same prayer i.e., correction of record of right. Both the Courts below have held and according to this Court, rightly so, that in so far as the relief for correction of record of right is concerned, the suit is clearly barred by limitation having regard to the provision under Article 58 of the Limitation Act read with Section 42 of the Orissa Survey and Settlement Act. This Court holds accordingly.

19. As regards the nature of disposition of the property conveyed under Ext-1, i.e., whether it is lease or

licence, it would be proper to refer to the document itself. In the remarks column of Ext.-1 which purports to be certified copy of the ROR, the name of Nabakrushna Kar is mentioned under the tenant column with further reference to case No. 8/1934-35. Further, the term 'dafayat' has been mentioned. The special remark runs as follows;

> *"DAFADARA BYAYARE POKHARIRA PANKODHARA KARIBA; DAFADARA HUDA SABU MARAMATA KARI BHALABHABARE RAKHIBA; GRAMABASIMANE KHAIBA, GADHOIBA O FASALA SAKASHE POKHARIRA PANI BEBAHARA KARIPARIBE; GOMAHISADI ETHIRE GADHOIBE NAHIN".*

20. As regards the meaning of the term 'Dafayat', learned Senior Counsel has referred to Purnchandra Odia Bhasakosh, which refers to 'Dafayat'- "Jala Kara, Phala Kara, Machha Diaa, Pattu Jamira Khajana etc." On such basis it is submitted by learned Senior Counsel that the tenant being required to pay rent, the document is nothing but a lease deed. Mr. S. Pattnaik, learned State Counsel on other hand submits that dafayati is not a tenancy right but a right to enjoy usufructs of land on payment of certain fees. Moreover, had it been in nature of a lease no communal right would have accrued to the general public

over the suit land and the same would have been conferred on the person concerned for his exclusive enjoyment. Such is however, not the case as the expression "GRAMABASIMANE KHAIBA, GADHOIBA O FASALA SAKASHE POKHARIRA PANI BEBAHARA KARIPARIBE" clearly shows the communal nature of the property notwithstanding the responsibility cast upon Nabakrushna Kar to maintain and repair the embankment and to desilt the tank. Here payment of rent is nothing but payment of fees charged for user of the property not rent as such.

21. As to whether a particular disposition is a lease or licence, law is well settled that the crucial test is the intention of the parties. If the intention was to create an interest in the property it would be lease but it if did not, it would be licence. Reference can be had in this regard to the decision of the Apex Court in the case of **Puran Singh Sahani vs. Sundari Bhagwandas Kripalani,** reported in (1991) 2 SCC 180, wherein relying upon an earlier judgment rendered in the case of **Sohan Lal Naraindas vs.**

Laxmidas Raghunath Gadit, reported in (1971) 1 SCC 276 it was held as follows;

> *15. Following Sohan Lal Naraindas v. Laxmidas Raghunath Gadit [(1971) 1 SCC 276] , we reiterate that the intention of the parties to an agreement has to be gathered from the terms of the agreement construed in the context of the surrounding, antecedent and consequent circumstances. The crucial test would be what the parties intended. If in fact it was intended to create an interest in the property, it would be a lease, if it did not, it would be a licence. In determining whether the agreement was a lease or licence, the test of exclusive possession, though of significance, is not decisive. Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than title.*
>
> *16. Lease has been defined in Section 105 of the Transfer of Property Act as under:*
>
> > *"105. A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."*
> >
> > *The essential elements of a lease are:*
> >
> > *1. the parties*
> > *2. the subject matter, or immovable property*
> > *3. the demise, or partial transfer*
> > *4. the term, or period*
> > *5. the consideration, or rent."*

22. Thus, the intention behind the disposition of the property in question is to be inferred from the surrounding facts and circumstances. Plaintiffs would insist that the disposition was in the nature of a permanent lease whereas the defendants insist that it was nothing but a licence. The facts leading to initiation of the lease case, i.e. Case No. 8/33-34 are not forthcoming from the materials on record nor put forth before this Court by the parties. Per force, the recitals/remarks in the documents (Ext.1) are to be interpreted in order to ascertain the intention of the ex-intermediary in making the disposition in favour of the predecessor-in-interest of the plaintiffs. The recitals have already been referred to hereinbefore. As is evident, the predecessor-in-interest of the plaintiffs was granted a right to enjoy the property, which is a pond, on payment of rent but then such right of enjoyment is qualified by the direction to desilt the pond, maintain and repair its embankment and most importantly, it also confers the right on the general public (villagers) to enjoy such property by way of using the water of the pond for bathing, cooking, washing and for irrigation purpose. So,

the right of user that was purported to be transferred on the predecessor-in- interest of the plaintiffs was not an exclusive right nor such possession was exclusive and absolute to him as others had right to use the pond too. To such extent therefore, it cannot be said that the disposition was in the nature of lease. Had it been an exclusive or independent right of user on the plaintiffs' predecessor-in-interest, it would certainly have qualified as a lease but in view of what has been said hereinbefore, such is not the case. Moreover, it cannot be said that the disposition intended to create an exclusive interest of the plaintiffs' predecessor- in-interest in the property. Under such circumstances, it can only be treated as licence to occupy the property and for enjoyment of the usufructs but only upon discharging certain responsibilities/duties. The so-called rent payable therefore, has to be treated as fees for the licence and not rent for any lease.

23. Reference can be made again to the case of **Puran Singh Sahani** (supra) in this regard, wherein it was observed as follows;

> *"17. The relationship of lessor and lessee is one of contract. In Bacon's Abridgement, a lease is defined as "a contract between the lessor and the lessee for the possession and profits of land, etc., on the one side and recompense by rent or other consideration on the other". Hence it has been held that "a mere demand for rent is not sufficient to create the relationship of landlord and tenant which is a matter of contract assented to by both parties". When the agreement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and is a lease. The section defines a lease as a partial transfer, i.e., a transfer of a right of enjoyment for a certain time."*

24. Thus, merely because the plaintiffs claim to be in possession for a long time and also paid rent till about 1997 cannot transform the licence granted to their predecessor-in-interest into a lease as such possession is not exclusive to them. The Lower Appellate Court has examined the evidence to be convinced that mere conferment of right of user does not make it a permanent lease regard being had to the right of the public also in the property.

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25. In view of the discussion made above, this Court finds itself in agreement with the reasoning adopted by the Lower Appellate Court and is therefore, not inclined to accept the contentions raised by learned Senior Counsel

that the property had been leased out permanently in favour of the predecessor-in-interest of the plaintiffs.

26. Once it is held that the disposition was a licence, it automatically nullifies the claim of the plaintiffs for declaration of the right of user for the reason that the licensor has the right to annul the licence at any point of time, which in the instant case is reflected by refusal of the State to receive rent from the plaintiffs. Evidently, the plaintiffs could not establish their claim over the suit property before the settlement authorities during current settlement operations in the manner that they claimed in the suit nor challenged the record of rights so published within the statutory period of limitation. Thus, there is no way by which the relief claimed in the suit could be granted to the plaintiffs.

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27. Thus, from a conspectus of the analysis of the facts, law and the contentions raised by the parties, this Court is of the considered view that both the courts below have correctly decided the lis between the parties leaving no room whatsoever for this Court to interfere. The appeal

must therefore, fail for the reasons indicated in detail hereinbefore.

28. In the result, the appeal is dismissed but in the circumstances, without any cost.

....
Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 13th December, 2023/ A.K. Rana, P.A.