

ORISSA HIGH COURT : CUTTACK

**Second Appeal No. 98 OF 1993**

From the judgment dated 23.12.1992 and decree dated 6.1.1993 passed by Shri B.K. Mishra, Sub-Judge, Puri in T.A. No. 2/100 of 1992-91 reversing the decision dated 30.9.1991 passed by Shri P.K. Das, Munsif, Puri in O.S. No. 402 of 1986.

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The State of Orissa, represented  
Through the Collector, Puri ..... Appellant

-Versus-  
Santi Kumar Mitra and another ..... Respondents.

For Appellant : Addl. Government Advocate.

For Opp. Parties : M/s. Prasant Mohanty,  
P.K. Mohapatra, A.K. Rath,  
P.K. Rath, D.R. Ray,

S.P. Choudhury,  
D.N.Mohapatra, R.K.Mohanty,  
D.Mohapatra, P.K. Mohapatra,  
A.P.Bose, B.P. Routray,  
B.Naik & G. Mishra.  
(For respondents 1 & 2)

M/s. G.K. Mohanty,  
G.P. Samal, C.Panigrahi,  
D.K.Nanda, B.Ghadei &  
N.M.Mishra.  
(For Intervenor)

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Decided on 13.11. 2009.  
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**P R E S E N T :**

**THE HONOURABLE SHRI JUSTICE M. M. DAS**

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***M.M. Das, J.***

This appeal has been filed by the State of Orissa against  
a reversing judgment passed in T.S. No.161/402 of 1980/1986 by

the learned District Judge, Puri in T.A. No.100/1999. The suit property was leased out on 26.09.1905 in favour of one Shailendranath Mitra for 30 years under a registered sale-deed. The same was a Khasmahal lease. During the subsistence of the lease, Shailendranath Mitra expired and the property was succeeded by his legal heirs Nalininath Mitra, Jatindranath Mitra and Khagendra Mitra. In Mutation Case No.410 of 1935-36 the property was mutated in favour of the above named legal heirs of late Shailendranath Mitra. On 22.01.1944, the lease was renewed and a fresh registered lease deed was executed by the Governor of Orissa represented through the Collector, Puri in favour of the said legal heirs as well as Gouribala Mitra, widow of one of the legal heirs. In 1965, there are being small family dissensions, a partition suit bearing no.1377 of 1967 was filed by Khagendra Mitra in the Calcutta High Court under its original jurisdiction in respect of the joint family properties including the present suit properties. A receiver was appointed to remain in-charge of the management and custody of the entire suit property. The receiver upon coming to know about the expiry of the lease applied to the Khasmahal Authority (Collector, Puri) for renewal of the lease. However, no intimation was received by him and no action was taken thereon. Several correspondences were made between the respondents and the Collector, Puri. The partition suit pending in the Calcutta High

Court was disposed of and the present suit properties were exclusively allotted to the share of the plaintiffs-respondents. Upon disposal of the said suit, the plaintiffs approached the Khasmahal Authority for renewal of the lease and filed number of petitions requesting for renewal. As nothing was done, on inquiry in the year 1983, they came to learn that a suo motu proceeding was initiated by the Collector for resumption of the lease, which was registered as Resumption Case No. 6 of 1975 even though the renewal application filed earlier was numbered as Lease Renewal Case No.11 of 1972. The plaintiffs finding no other alternative filed the present suit, i.e., T.S. No.402 of 1986 against the State of Orissa before the Munsif, Puri (now Civil Judge) which was renumbered as O.S. No.161 of 1990. The learned trial court upon hearing the suit after framing six issues dismissed the suit on contest on the ground that the plaintiffs have not applied for renewal of the lease three months prior to expiry of the term and have violated the conditions of the lease. He further found that the plaintiffs did not maintain the building. Being aggrieved, the plaintiffs preferred an appeal before the learned District Judge, Puri numbered as T.A. No.100 of 1991. The appeal was heard by the learned Subordinate Judge, Puri being renumbered as T.A. No.2/100 of 1992-91. The learned appellate court after hearing the appeal set aside the judgment and decree passed by the learned trial court by reversing

the said finding and decreed the suit of the plaintiffs. The State of Orissa being aggrieved by the said judgment of reversal has preferred the present second appeal.

The substantial question of law on which the appeal has been admitted is:

“Whether the partition of lease having expired long since and not being renewed the impugned judgment of the lower appellate court is at all sustainable in law and whether the lower appellate court is justified in holding that the Government cannot take possession of the land even though it has held earlier that the State can resume possession in accordance with law.”

Before addressing the above question as framed to be determined in this second appeal, this Court feels it appropriate to refer to the lease deed, in question, which was exhibited before the learned trial court as Ext.4. The lease is a Khasmahal lease nomenclatured as “Lease for Balukhand Khasmahal, Puri”. The relevant Clauses-9 and 15 of the lease, which are necessary to be referred, read as follows:

“9. That the LESSEES shall make such sanitary improvement as may be ordered by the Collector.

15. That on breach or non-observance of any of the aforesaid terms or conditions, the Collector may declare that the lease has determined and become void, that an order of the Collector declaring that there has been such breach or non-observance shall be final and conclusive proof of such breach or non-observance as between the parties hereto and that on the expiry of one month from the date of

such order the Collector or any Officer or person appointed in that behalf by the Collector shall be entitled to take possession of the land leased and the buildings erected thereon.

PROVIDED that the Collector shall at the time of such declaration, either offer to pay reasonable compensation for the structures and other improvements made with the consent of the Collector or direct the LESSEES to remove the structures or other improvement within a specified time and, if the LESSEES fail to remove them accordingly, the Collector shall cause such removal to be effected and recover the cost from the LESSEES. Where compensation is offered, the amount of such compensation shall be fixed by the Collector whose decision shall be final, conclusive and binding on the LESSEES, subject to revision by the Revenue Commissioner. ”

It is the case of the appellant that the lease was resumed on account of non-observance of the Clause-9 of the lease-deed.

Learned counsel for the appellant-State relying upon the decision in the case of **Pabitra Kumar Swain vs. State of Orissa**, 84 (1997) C.L.T. 762 submits that this Court in the said case has laid down that cancellation of a lease does not amount any breach of Fundamental Right and does not amount to any illegality or irregularity on the part of the State. The facts of the said case are distinguishable from the facts of the present case. In the said case, this Court was in seisin of a writ petition, where the petitioner sought for a writ of certiorari quashing the order cancelling the petitioner's lease of the Sand Source of Barimund Ghat in River Kuakhai. The Collector, Khurda approved sanction lease of the said Sand Source in favour of the petitioner therein subject to limitation of lifting of sand not exceeding 20,000 cubic meters for a period of two years on the basis of the report of the concerned Tahasildar and recommendation of the Sub-Collector. The petitioner was intimated about the approval of the lease by the Collector and conditions of the said lease and was directed to deposit Rs.1,00,000/- towards royalty and further amount towards rent and security. Thereafter, the petitioner executed the agreement and got the same registered. When the petitioner intended to deposit the remaining amount towards royalty to obtain the work order, he was served with a notice of cancellation of lease, which was challenged in the said writ petition. This Court

finding that the Collector on perusal of the case record and the report of the Sub-Collector cancelled the lease of the Sand Source/ Ghat in view of danger to the river embankment at Patia did not interfere with such cancellation.

In the present case, however, the lease is a Khasmahal lease. Mr. G.K. Mohanty, learned counsel for the intervenor/respondent submits that it has been repeatedly held by this Court that a lease-hold estate in a Khasmahal land is heritable and transferable with a right of renewal. In the case of **Republic of India Vrs. Prafulla Kumar Samal and Another**, ILR 1976 (Cuttack) 1392, this Court held that lease-hold estate in the Khasmahal land is heritable and transferable with a right of renewal. The right of lease in respect of such land is in no way different from that which one has in his own private land. The lessee's right in Khasmahal land being heritable and transferable, the lessee can create a permanent right of tenancy in his holding.

In the case of **Shankarlal Verma and Others Vrs. Smt. Uma Sahu and Others**, 1993 (I) OLR 187, this Court had the occasion to deal with a Khasmahal lease property. Relying upon the decision in the case of Republic of India (*Supra*) and the case of **Janab Jahada Begum Sahib Vrs. State of Orissa**, 28(1962) CLT 209, it was observed that law is well settled that interest of a lessee in a Khasmahal land is both heritable and transferable and his

right is only similar to those of a private land. His interest is regulated by the terms of lease between him and the Khasmahal authorities and the parties to the lease are governed by the provisions of the Transfer of Properties Act. In the instant case, the lease was cancelled on the allegation that Clauses-9 and 20 of the lease deed were violated by the lessee. However, nothing was brought before this Court that there were materials before the Collector to come to the conclusion that the said clauses have been violated. It is an admitted position that the Lease Renewal Case No.11 of 1972 was initiated for renewal of the lease during pendency of which the Resumption Proceeding No.6 of 1975 was suo motu registered by the Collector and no notice of the said resumption case was served on the respondent before passing the final order, which action was questioned in the suit. The Khasmahal lease was a registered lease. Applying the ratio of the aforementioned case laws, there can be no dispute that the provisions of the Transfer of Properties Act are applicable to a Khasmahal lease and the property in a Khasmahal lease shall be treated to be akin to a private land of the lessee, which is both heritable and transferable. Though Clause-15 of the lease deed, as quoted above, provides the modalities for determination of lease by the Collector, the State, as defendant, has brought no materials before the trial court to show that such determination of lease



made by the Collector was in accordance with Clause-15 of the lease deed. In the case of **Sourindra Narayan Bhanja Deo Vrs. Member, Board of Revenue, Orissa and Others**, 2004 (II) OLR 332, this Court was considering the legality of determination of a Khasmahal lease in a resumption proceeding. The facts of the said case are similar to the present case. Referring Sub-Rule-(5) of Rule -28 of Bihar and Orissa Government Estates Manual, 1919 and the earlier decisions of this Court, it was held that Clause-18 of the lease deed provides that on expiry of lease the lesser shall, if the lessee has duly observed and performed all the conditions of the lease, be bound at the option of the lessee to renew the lease for a further period of 30 years. In other words, the above renewal has been left with the lessee and not with the Khasmahal authorities. Since material has been brought before the Court that such a renewal application was pending, the said application could not have been rejected otherwise than finding that the lessee has not duly observed and performed all the conditions of the lease. The State has not brought any material to show that there was any specific public purpose for which the aforesaid land was required as provided in Rule 28 of the Bihar and Orissa Government Estate Manual, 1919. The power of presumption provided to the Khasmahal authority is under the said Rule 28, which can only be exercised if the land is required for public purpose. Such a case

has not been made out by the appellant-defendant. It is, therefore, clear from the facts of the case and the materials before the learned court below that the unilateral resumption of the lease in favour of the plaintiffs/their predecessors cannot be sustained when the lessee has not approached the common law forum for determination of the lease by declaring the lease to be void or for eviction of the lessees on the ground of violation of any of the terms of the lease. Even where there is violation of the conditions of the lease, which entails resumption of the lease and re-entry by the lesser, such action cannot be unilaterally taken by the lesser without taking course of law for evicting the lessee.

Learned lower appellate court, therefore, has rightly reversed the judgment and decree of the learned trial court and decreed the suit of the plaintiff. The question of law framed in this appeal should, therefore, be answered in the affirmative.

In the result, the Second Appeal fails and the judgment and decree of the lower appellate court is confirmed.

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**M.M. Das, J.**

*Orissa High Court, Cuttack.*  
*November 13th, 2009/Himansu.*





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