

HIGH COURT OF ORISSA: CUTTACK.

O.J.C. No.7126 of 2001

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Bruti Pradhan and another Petitioners.

-Versus-

Rampriya Pradhan (died)
Prasanna Pradhan and others Opposite Parties

For petitioners : Sri B. Sahoo

For Opp. Parties : M/s. J.K. Mishra, S.N. Nayak,
S. Mahanty and P.C. Behera
(O.Ps.2 to 6)

PRESENT:

THE HONOURABLE SHRI JUSTICE B.K. PATEL

Date of argument – 14.01.2011 :: Date of judgment - 22.02.2011

B.K.PATEL, J. In this writ application, petitioners have assailed the legality of order dated 5.7.2000 passed in Revision Case No.671 of 1998 under Section 37 (1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short 'the Act') by learned Joint Commissioner of Settlement and Consolidation, Sambalpur (for short 'the

Commissioner') setting aside the common order passed in Dispute Case Nos.7 of 1979 and 8 of 1979 by Assistant Consolidation Officer, Talab.

2. Case land was originally recorded in the name of Mahadev Pradhan who died issueless in the year 1969 leaving behind his widow Mathura who died in the year 1985. Petitioners are descendents of late Prafulla Pradhan whereas opposite parties are descendents of late Ambika Pradhan. Dispute Case Nos.7 of 1979 and 8 of 1979 were initiated to adjudicate the rival claims of late Prafulla and late Ambika over the case land. Prafulla's claim was based on registered adoption deed no.17 dated 22.1.1948 executed by Mahadev and Mathura. He also placed on record photographs and documents to substantiate the claim that he performed Mahadev's 'Asthi Bisarjan' at Allahabad. Ambika's claim over the case land was based on registered gift deed no.204 dated 10.1.1968 executed by Mahadev and Mathura. Ambika also produced deed of cancellation no.308 dated 10.10.1952 purported to have been executed by Mahadev and Mathura to cancel the deed of adoption in favour of Prafulla. That apart, Ambika claimed to be in possession of the case land since the date of execution of gift deed in his favour. In support of their rival assertions, oral evidence was also adduced on behalf of Prafulla and Ambika. On appraisal of evidence on record, learned Assistant Consolidation Officer, Talab by order dated 10.4.1980 upheld

Prafulla's claim of adoption and directed to record the case land in his name.

Learned Commissioner in passing the impugned order rejected the claim that Prafulla was the adopted son of Mahadev and Mathura and upheld the claim of Ambika to be in possession over the case land since the date of execution of gift deed in his favour and to have thereby acquired title by way of adverse possession. Consequently, order passed by Assistant Consolidation Officer, Talab was set aside and Consolidation Officer, Sambalpur was directed to correct the record in favour of the opposite parties.

3. In assailing the revisional order it was submitted by the learned counsel for the petitioners that learned Assistant Consolidation Officer disposed of Dispute Case Nos.7 and 8 of 1979 on merits considering the evidence adduced by the parties. Finding in support of Prafulla's claim was recorded upon appraisal of rival contentions. Despite availability of provision for instituting appeal under the Act, the petitioners chose to remain silent for about two decades before approaching the revisional authority under Section 37(1) of the Act. It is contended that the learned Commissioner ought to have refrained from invoking revisional jurisdiction in view of inordinate delay in filing the revision. It is further contended that learned Commissioner should not have interfered with the findings of fact recorded by the Assistant Consolidation Officer on the basis of evidence on record. There is no

scope for reappraisal of the evidence by the revisional authority especially when the petitioners did not exhaust the remedy of statutory appeal. It is submitted that adoption of Prafulla's by Mahadev and Mathura in the year 1948 is admitted. However, stand of the opposite parties is that the adoption was cancelled. Referring to decisions of some of the High Courts it is contended that in view of admitted adoption there is no scope for the learned Commissioner to hold that the adoption was cancelled. A valid adoption once made cannot be cancelled by the adoptive father and other parties thereto. Claim of the opposite parties over to the suit land is based on gift deed executed in favour of Ambika by Mahadev and Mathura. Admittedly, possession of predecessor-in-interest of opposite parties over to the case land was permissive. Moreover, materials on record do not indicate that pleadings and evidence from the side of the opposite parties in the dispute cases make out a case of adverse possession. In fact, materials on record do not indicate that Ambika's possession over the case land was adverse or hostile against Prafulla. Learned Commissioner, without any basis recorded the finding of adverse possession in favour of the opposite parties.

4. A counter affidavit has been filed. Learned counsel for the opposite parties argued that Section 37(1) of the Act does not prescribe any period of limitation for filing revision. Therefore, discretion exercised by the learned Commissioner to entertain the revision is immune from

criticism. It is further contended that opposite parties produced registered deed of cancellation by virtue of which adoption of Prafulla made by Mahadev and Mathura was revoked. Evidence on record does not indicate that Prafulla ever resided with Mahadev and Mathura. Considering the materials on record learned Commissioner has rightly held that Ambika and his successors-in-interest remained in possession over the case land all along since 1952 and thereby acquired title by way of adverse possession.

5. Learned counsel for the opposite parties relying upon certain judicial pronouncements made an attempt to urge that consolidation authorities have no jurisdiction to decide the question of adoption. However, such proposition has been negated by this Court in **Jairam – vrs.- Baikuntha** : 1991 (I) OLR 29 wherein it has been held:

“.....Except in case where title is claimed on the basis of transactions *inter vivos* in most cases title is claimed on the basis of relationship, say as son, father, mother, husband or wife etc. Each such question of relationship is a question pertaining to legal character or status. Don't the consolidation authorities decide such question of legal character in cases after cases day in and day out ? If then the consolidation authorities have jurisdiction to decide the question as to whether a person is son by birth, by what logic or law are they denied jurisdiction to decide if a person is son by way of adoption ? Sonship is acquired either by birth or by way of adoption. They are the different modes of acquisition. If title to property as son by birth can be adjudicated upon by the consolidation authorities, we fail to understand why adjudication of claim to title as son by way of adoption should be out of bounds to them. We are, therefore, of the view that the stagement of law that the consolidation authorities have no jurisdiction to decide the question of adoption, they being a question of status, is not correct. In almost every

case, consolidation authorities are deciding the question of status but a declaration of the law to the effect that the consolidation authorities have no jurisdiction to decide the question of adoption, if such question arises ancillary or incidentally for adjudication of right, title and interest in property, is insupportable.....”

6. In the present case, registered adoption deed in favour of Prafulla was executed in the year 1948. Said deed is alleged to have been cancelled in the year 1952. Registered gift deed was executed in favour of Ambika in the year 1968. Dispute cases were raised in the year 1979. Final order in Dispute Case Nos.7 and 8 of 1979 was passed on 10.4.1980. It appears that in Dispute Case No.8 of 1979 Ambika was advised to file objection petition for mutation during Section 9 (1) stage in the village. Admittedly, Ambika Pradhan filed neither objection at Section 9 stage nor appeal under Section 12 of the Act. Opposite parties filed application under Section 37(1) of the Act in Revision Case No.671 of 1998 on 8.7.1998 i.e. after lapse of eighteen years from the date of passing of the order in Dispute Cases. Alongwith revision application, opposite parties appear to have filed an application for condonation of delay in preferring the revision.

7. Section 37 (1) of the Act reads as follows:

“The Consolidation Commissioner may call for and examine the records of any case decided or proceedings taken up by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings or as to the correctness, legality or propriety of any order passed by such authority in the case or proceedings and may, after allowing the parties concerned a reasonable opportunity of being heard make such order as he thinks fit.”

8. Contentions raised on behalf of the present petitioners against maintainability of the revision was dealt with and decided by the learned Commissioner by observing as follows:

“First of all I concentrate my attention on maintainability of the present revision raised u/s 37(1) of the Act by the petitioners and vehemently opposed by the O.Ps. to its stand. It is evident that the litigation starts right from the year 1948 where and when it was told that an adoption deed was executed by Mahadev & Mathura in favour of Prafulla which did not see the light of the day for long other then & suddenly emerged in Consolidation operation at the time of preparation of the land register of Unit Jhankarpali emerged through dispute case No.7/79 & 8/79 & concluded by the A.C.O. on the floor of a top & regular contest from all its angles & heavy opposition revolved round it. It is alleged that the claim & grievance of the parties were not considered properly from its four corners in instance of the relevant evidence laid down by them & the pros & cons of the matter was not considered and finalized by the A.C.O. holding the decision in favour of the predecessor of the O.Ps. It is true that the petitioners and their predecessor Ambika remained silent all along and during entire operation held below but when there is strong opposition to present recording and also evident from the records on its perusal. I admit the revision u/s 37(1) of the Act applying the inherent jurisdiction granted by the statute and consider the same & thus the question of limitation and maintainability of the present proceeding raised by the learned advocate for the O.Ps. is disposed of accordingly”

It is observed that learned Commissioner while considering the maintainability of the revision in view of inordinate delay in filing the application under Section 37(1) of the Act has not assigned any reason for ignoring the delay in order to invoke revisional jurisdiction to interfere with valuable rights which had accrued in favour of the petitioners. Learned Commissioner has also not taken note of the fact that opposite parties and their predecessor-in-interest Ambika did not challenge the

order passed in Dispute Cases by filing statutory appeal before the competent authority.

9. Undoubtedly, no limitation has been prescribed for preferring an application under Section 37(1) of the Act. Therefore, jurisdiction to entertain revision by the Commissioner is wide. However, that does not mean that the power can be exercised in an unfettered manner. In **Mansaram -vrs. S.P. Pathak** : A.I.R. 1983 SC 1239 it has been held by the Hon'ble Supreme Court:

“When the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner. Exercise of power in a reasonable manner inheres the concept of its exercise within a reasonable time.”

10. Scope and ambit of jurisdiction under Section 37 of the Act came for consideration before a Full Bench of this Court in **Gulzar Khan -vrs.- Commissioner of Consolidation** : 76 (1993) C.L.T. 161 wherein it has been held:

“Though section 37 has conferred an unfettered power, it is settled law that every power, be it administrative or judicial, has to be exercised in a reasonable manner, and the reasonable exercise of power inheres in its exercise within a reasonable time. This apart, no power is really unfettered; every power has to be exercised according to rules of reason and justice, not according to private opinion; according to law, and not according to humour. The exercise of discretionary power cannot be arbitrary, vague and fanciful; it has to be legal and regular.”

11. In **Sri Pratap Patnaik -vrs.- Commissioner, Consolidation and Settlement, Orissa, Bhubaneswar and others** : 2009 (Supp.-II) OLR 257 this Court has held that exercise of revisional power under

Section 37(1) of the Act after passage of about nearly twenty years was improper and without jurisdiction. Similar view was also taken by this Court in **Shri Abhaya Charan Mohanty -vrs.- State of Orissa and others** : 2003 (Supp.) OLR 882.

12. Analysing the scheme of the Act it has been observed by this Court in **Kasinath Das -vrs.- Commissioner of Consolidation, Board of Revenue, Orissa** : 72 (1991) C.L.T. 878:

“The power under section 37(1) of the act vested with the Commissioner for the purpose of satisfying himself as to the regularity of the proceeding or as to the correctness, legality or propriety of any order passed by such authority subordinate to him. Unless any order passed by a subordinate authority suffers from such infirmities or unless the Commissioner is satisfied that the proceedings have been conducted irregularly, the order is not available to be varied nor the proceeding is available to be quashed. Section 37(1) does not contemplate the Commissioner to function as an original authority. If objections are raised at the section 9 stage, the party against whom the objections are raised gets an opportunity to rebut the objections, if necessary, by leading evidence. The decision of the original authority is also available to be challenged in appeal under section 12 of the Act. If the matter is agitated for the first time under section 37, the party against whom objection is raised is deprived of such opportunity and besides by adoption of such procedure the very purpose of the Act is defeated as by resorting to successive applications under section 37(1), the entire consolidation operation may be effectively checked and the very finality which is intended to be achieved expeditiously would be frustrated.”

13. There is absolutely no explanation from the side of the opposite parties for not preferring appeal under Section 12 of the Act against the order passed by learned Assistant Consolidation Officer. Therefore, obviously, opposite parties slept over the order passed in

Dispute Case Nos.7 and 8 of 1979 till filing of the revision before the learned Commissioner. In **Maguni Pradhan –vrs.- Commissioner of Consolidation and Ors.** : 1992 (I) OLR 246, relied upon by the learned counsel for the opposite parties also it has been held:

“...Unless compelling and plausible circumstances are shown as to why the remedy available under the statute was not availed, the Commissioner would be slow to act under Section 37 of the Act.”

14. Opposite parties do not dispute the execution of registered adoption deed by Mahadev and Mathura in favour of Prafulla in the year 1948. However, deed of cancellation executed in the year 1952 is relied upon in order to deprive Prafulla of the status which he acquired by virtue of the adoption. It is not the case of the opposite parties that Prafulla’s adoption was not a valid adoption. It is well settled that status of an adopted son cannot be revoked by any subsequent instrument. A valid adoption once made cannot be cancelled. It has been held in **Bhupati Nath –vrs.- Basanta Kumari** : A.I.R. 1936 Calcutta 556:

“Once a person is given in adoption he becomes transferred to the adoptive family and gets the status of an adopted son and the adoptive father cannot by any subsequent instrument alter the status that has been conferred on him as an adopted son.”

In **Deoki Nandan –vrs.- Rikhi Ram** : A.I.R. 1960 Punjab 542

also it has been held :

“Adoption once completed has the effect of irrevocably transferring the adopted by from his natural family to the adoptive family and to confer upon the adoptee the same rights and privileges in the family of the adoptor as the natural legitimate son, except in certain cases like those relating to marriage, adoption, etc. It is

undoubtedly open to the adopted son to renounce his right of inheritance in the adoptive family, but his status as adopted son can never be renounced by him.”

In **Asa Bai -vrs.- Prabhulal** :A.I.R. 1960 Rajastan 304

also it has been held :

“A valid adoption once made cannot be cancelled by the adoptive father or other parties thereto. It is not open to the adopted son to renounce his status as such and to return to his family of birth though he may renounce his right of inheritance in the adoptive family in which case the inheritance would go to the next heir.”

15. The basis of possession of the opposite parties over the case land is the gift deed stated to have been executed in the year 1952. Therefore, opposite parties admit that initial entry of Ambika over the case land was permissive. It is well settled that a permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of true owners for a period of twelve years or more. In this connection, decision of the Hon’ble Supreme Court in **State of Travancore -vrs.- A.K. Panicker**: AIR 1971 SC 996 may be referred to. On the basis of materials on record learned Assistant Consolidation Officer disallowed the claim of adverse possession raised by the opposite parties. Having perused the materials on record, especially nature of pleadings and evidence of the opposite parties in support of the claim of adverse possession, there appears no cogent reason which could have prompted the learned Commissioner to interfere with such findings of fact while entertaining the revision, in the circumstances narrated above.

16. In view of the above discussions, order passed by the learned Joint Commissioner of Settlement and Consolidation, Sambalpur in Revision Case No.671 of 1998 is found to be not sustainable in law. The order is liable to be quashed.

17. Accordingly, order passed by the learned Joint Commissioner of Settlement and Consolidation, Sambalpur in Revision Case No.671 of 1998 is quashed.

The writ petition is allowed.

.....
B.K. Patel, J.