

ORISSA HIGH COURT; CUTTACK

FIRST APPEAL NO. 158 OF 2001

From a judgment and decree dated 16.4.1999 and 21.4.1999 respectively passed by Shri B.K. Dash, learned Ist Additional Civil Judge (Senior Division), Cuttack in T.S. No. 312 of 1991.

State of Orissa, through the Collector,
Cuttack and another.

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Appellants

-Versus-

Orissa Olympic Association,
through Hony. General Secretary
and others.

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Respondents

For appellants.

Addl. Government Advocate

For respondents:

M/s. B.H.Mohanty, Sr. Advocate,
D.P. Mohanty, J.K. Bastia,
B.Das, R.K. Nayak,
S.C.Mohanty & T.K.Mohanty.
(for respondent no.1)
M/s. D.Mohapatra, M.Mohapatra
G.R.Mohapatra & A.Dash
(for respondent nos.2 to 5)

Date of judgment: 29 .11.2014.

PRESENT;

THE HONOURABLE SHRI JUSTICE B.P.RAY.

B.P.RAY, J.

This is an appeal under section 96 of the Code of Civil Procedure by the defendants challenging the judgment and decree dated 16.4.1999 and 21.4.1999 respectively passed in T.S. No. 312 of 1991 by the learned First Additional Civil Judge (Senior Division), Cuttack.

2. The land in dispute more fully described in Schedule-A and hereinafter to be referred to as the “suit land” measures Ac.0.705 decimals out of Ac. 0. 880 decimals appertaining to hal plot No. 7 in hal khata no. 203 corresponding to sabik plot No. 139 (part) of mouza – Cuttack Town.

3. Plaintiff's case, in short, is that lease for an area of Ac.20.808 decimals appertaining to Sabik Settlement Plot No.156 and a portion of sabik plot Nos. 139, 143, 155 and 177 was granted in favour of the Orissa Olympic Association for the purpose of construction of a Stadium vide Revenue Department order No. 748 dated 29.6.1949 which was communicated in District Office letter No. 10610 dated 5.7.1949. On the basis of the said order, Lease agreement was executed and registered on 4.9.1949 and 24.9.1949 respectively and the said lease was renewed from time to time. The plaintiff – Association thereafter raised a high compound wall enclosing the leasehold land. However, an area measuring Ac. 0. 075 decimals was left out side the compound wall for the purpose of parking of the vehicles. The leasehold area includes an area measuring Ac. 6.520 decimals in sabik plot no. 139, and an area of Ac.0. 048 decimals out of the same was included within the barbed fencing of the old Secretariat. Though an area of Ac. 0.345 decimals in plot no. 149 has been recorded, but on the spot, an area measuring Ac. 6.568 decimals is available and the entire area is within the compound of the Association excepting an area of Ac. 0.075 decimals which has been left out beyond the Compound Wall for the purpose of parking. Due to lack of supervision, during the Hal Settlement the suit land was kept in Rakhit Khata of the State in Hal plot No. 7, khata no. 203 though the plaintiff is in actual physical possession of the said land. Though the hal settlement khatian was published on 11.4.1988, hal settlement map was not made available for which the mistake could not be detected immediately. While the matter stood thus, the Tahasildar initiated an encroachment case, bearing Encroaching Case No. 213/1/90-91 and threatened to dispossess the plaintiff-Association

from out of the suit land. As the plaintiff-Association has been in possession of the suit land right from the year 1949, it has perfected its title by way of adverse possession. The plaintiff-Association thereafter issued notice under section 80 C.P.C. and on completion of the prescribed period filed the suit.

4. The defendants-appellants filed written statement admitting that the plaintiff-association is in possession of the area as claimed and has constructed a massive stadium. While denying that the leasehold area of Ac.20.808 decimals includes an area of AC. 6.520 decimals of sabik plot no. 139, they pleaded that the included area is only Ac. 6.222 decimals. It was averred that an area Ac. 20.808 decimals has been leased out for twenty years for construction of stadium as per Government order in letter no. 17484 dated 29.6.1949 and lease deed bearing No. 4524 dated 29.9.1949 was executed and subsequently renewed vide Deed No. 2526 dated 19.4.1974 for a period of another twenty years, i.e., up to 20.4.1989. It was also pleaded that the Government sanctioned an area Ac. 2.703 decimals in their Sanction Order No. 11680 dated 22.2.1959 for construction of Indoor Stadium and an area of Ac. 1.939 decimals for sinking a Swimming Pool, Swimming Club and a Restaurant, but no lease deed in respect of Ac.1.939 has been executed. It was further pleaded that during hal settlement, the total area of Ac. 24.733 decimals has been recoded in the name of the plaintiff-Association including an area of Ac.1.222 decimals out of Ac.1.939 as referred to above for which no lease deed has yet been executed and the differential area measuring Ac. 0. 717 decimals (Ac.1.939-Ac.1.222) has been recorded during hal settlement in Government Rakhit Khata and the plaintiff-Association is in unauthorized possession of Ac. 0. 634 decimals out of the said area of Ac.0.717 for which encroachment case was initiated and an order of eviction has been passed.

5. On the basis of the pleadings of the parties, the following five issues were framed:-

1. Whether the plaintiff is in possession of the suit land from the year 1949 and has perfected title by adverse possession ?
 2. Whether the suit land has been recorded in Rakhit Khata due to lapses of the plaintiff association ?
 3. Whether the suit land is liable to be settled on lease basis in favour of the plaintiff ?
 4. Whether notice U/s 80- C.P.C. has not been served ?
 5. To what relief if any the plaintiff is entitled to ?
6. The plaintiff examined only one witness, who is the Manager of the plaintiff-Association. The defendants have not examined any witness in support of their case.

The trial court by its judgment dated 10.4.1999 decreed the suit and permanently restrained the defendants from disturbing the possession of the plaintiff-Association over the suit land.

7. Being aggrieved by the aforesaid judgment and decree, an appeal was filed on 27.7.2001 with delay of 733 days. A copy of the petition was served on the learned counsel for the plaintiff-respondent and the Court directed personal appearance of the Collector, Cuttack to appear in person on 20.12.2002 and file an affidavit clearly explaining the delay caused in filing the appeal and indicating the officers responsible for the same. The Collector, Cuttack appeared on 20.12.2002 and filed an affidavit stating that the conducting advocate did not inform the deponent, the Collector, Cuttack, till 17.4.2000 even though the decree was passed on 21.4.1999. Thereafter, the State Government was moved to permit the appellants to prefer appeal before this Court. In anticipation of the approval, the appeal was filed on 27.7.2001. However, the Law Department accorded sanction to file appeal as per its letter No. 15784 dated 28.9.2001. It was undertaken in the said affidavit that an enquiry will be conducted to find out the

reasons for delay in filing the appeal and the officials responsible for the same.

8. The State Government filed before this Court Misc. Case No. 497 of 2001 seeking leave to produce the final order passed in the O.P.L.E. Case No. 213/1/90-91 as additional evidence, Misc. Case No. 121 of 2003 for appointment of a receiver and Misc. Case No. 122 of 2003 under Order 1, Rule 10 C.P.C. to implead M/s. INCON ASSOCIATES, represented through its Managing Partner M/s. Sanjit Samal, registered office at Mahatab Road, Cuttack-12 as respondent no. 3, Sanjit Samal, Managing Partner of M/s. INCON ASSOCIATES, Mahatab Road, Cuttack – 12 as respondent no. 4 and Sanjaya Behera, partner of M/s. M/s. INCON ASSOCIATES, S/O. Ashirbad Behera, Seikh Bazar, Chandin Chouk, P.S. Lalbag, Cuttack as respondent no.5. Misc. Case No. 122 of 2003 having been allowed on 17.11.2014, the aforesaid persons have been impleaded as co-respondents in this appeal.

Vide order dated 11.3.2003, it was agreed for an early hearing of the First Appeal for which it was not considered to appoint a receiver and the learned counsel for the appellant did not press Misc. Case No. 121 of 2003, i.e., the application for appointment of receiver for the time being. The appeal, however, could not be taken up for hearing as early as agreed upon and ultimately, it was heard by this Court on 21. 10.2014 and 22.10.2014 and judgment was reserved.

9. Learned counsel for the appellants submitted that the land in question was never part of the leasehold land. At no point of time, the suit land was included in the leasehold land or the land sanctioned to be leased out. This was at best a permissive possession of the plaintiff-Association for parking purpose. According to him, the plaintiff filed the suit and managed to obtain decree from the trial court in collusion with the then Government Pleaders and the officers. This is a very valuable piece of Government land and the suit was filed in order to prevent the statutory authority from passing an order of eviction in exercise of statutory powers under the O.P.L.E. Act. Even though the

plaintiff - respondent had appeared in the O.P.L.E. Proceeding through its counsel, it did not file any show cause in the said proceeding much less claiming adverse possession. Rather, an application for injunction was filed before the trial court under Order 39, Rules 1 and 2 C.P.C. wherein the learned Civil Judge (Senior Division) directed the parties to maintain status quo and the order of status quo ultimately, the said application was dismissed by order dated 27.1.1996 holding that the application for injunction was not maintainable in view of the judgment in the case of **Cotton Corporation of India Ltd. V. United Industrial Bank Ltd. And others**, AIR 1983 SC 1272, wherein the Hon'ble apex Court vide paragraph- 10 held as follows:-

“.....There is a clear bar in Section 41(b) against granting this relief. The Court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, *ipso facto* temporary relief cannot be granted in the same terms. The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings”.

10. It be mentioned here that the plaintiff filed the suit on 2.7.1991 and by then, a proceeding under the Orissa Prevention of Land Encroachment Act, 1972 (for short, 'the OPLE Act') was pending against him to his knowledge for encroachment of an area of Ac.0.634 out of Ac. 0.880 appertaining to hal plot no. 7 under khata no. 203 and the plaintiff made no effort to challenge the said proceeding in Encroachment Case No. 213/1 of 1990/1991 in which, ultimately, final order was passed on 24.8.1991 directing eviction of the plaintiff from the aforesaid land and the said order has not been challenged by the plaintiff in any forum whatsoever.

11. Learned counsel for the State further submitted that the suit for declaration of right, title and interest is not maintainable in view of the provisions contained in the O.P.L.E. Act and the suit is barred under Section 16 of the said Act. He further submitted that since the land has been recorded in the rakhit khata, the direction to lease out the suit property and the decree for permanent injunction as passed by the court below is contrary to the provisions contained in Section 9 of the C.P.C.. He also submitted that from the conduct of some state officials it appears that the interest of the State has not been properly safeguarded, as a result, the decree has been passed.

12. State is ordinarily rated as a virtuous litigant and it goes without saying that the property recorded in Government khata is the property of the Public at large. When the State is arrayed as a party to a lis before a Court, the Officer, who represents the State or the Attorney who is engaged to defend the State is also required to be equally honest and free from blemish. In the case of **Grama Panchayat of Village Naulakha v. Ujagar Singh and others**, AIR 2000 SC 3272, the Hon'ble apex Court observed as follows:-

“Further property of a public institution cannot be allowed to be jeopardized by persons who, at an earlier point of time, might have represented it and who were expected to effectively defend public interest and community property. Persons representing public bodies are expected to discharge their functions faithfully and in keeping with the trust reposed in them”

13. What is ‘collusion’, the Hon'ble apex Court in the aforesaid decision made a reference to Spencer Bower and Turner (para-378) as follows:

“Collusion, say Spencer-Bower and Turner (para 378), is essentially play-acting by two or more persons for one common purpose- a concerted performance of a fabula disguised as a

judicium-an unreal and fictitious pretence of a contest by confederates whose game is the same. As stated by Lord Selborne LC in *Boswell v. Cooks* (1894) 6 Rep.167, there is no judge; but a person invested with the ensigns of a judicial office, is misemployed in listening to a fictitious cause proposed to him, there is no party litigatingno real interest brought into question and to use the words of a very sensible civilian on this point, *fabula nonjudicium, hoc est; in scena, non in foro, res agitur*. That, in our view, is the true meaning of the word 'collusion' as applied to a judicial proceeding"

14. The court while dealing with a dispute involving public property should also be at guard against any fraud, collusion or concoction militating against the fair-play of justice jeopardising the interest of the State. In the case of ***State of Rajasthan v. Harphool Singh***, (2000)5 Supreme Court Cases 652, the Hon'ble apex Court has held that where perfection of title by adverse possession is claimed in respect of public property, the question requires more effective and serious consideration because it involves the possible destruction of the rights and title of the State.

15. On perusal of the pleadings of the parties, it appears that the Tahasildar, even though, was arrayed as a defendant, was never authorized by the Collector to file written statement admitting the claim. The Collector, under the Code of Civil Procedure, represents the State. No written statement without the authorization of the Collector could have been filed admitting the claim of the plaintiff and the trial court ought not to have accepted the said written statement as that of the defendant no.1 - Collector, who represented the State. It is further pertinent to mention that the case record of the OPLE Proceeding was kept away from the trial court and no evidence, either oral or documentary, was adduced from the side of the defence during the trial. As indicated here-in-before, the present appeal was also not filed with due promptitude inasmuch as according to the Collector, Cuttack vide

his affidavit filed on 20.12.2002, the conducting Advocate did not inform him the result of the suit till 17.4.2000 though the decree was passed on 21.4.1999.

I have also perused the material evidence adduced on behalf of the plaintiff-respondent. It appears to me that the Tahasildar colluded with the plaintiff and a collusive decree has been passed. Therefore without expressing any opinion on merit of the suit, I set-aside the judgment dated 16.04.1999 and decree dated 21.04.1999 passed by the learned First Additional Civil Judge (Senior Division), Cuttack, in Title Suit No.312 of 1991 and remit the matter back for adjudication in accordance with law. This being an order of open remand of the suit as per the provision under Order 41, Rule-23A of the C.P.C., there shall be a retrial of the suit before the court below. If so advised, the defendants may amend the written statement and adduce evidence which the trial court shall permit in accordance with law. The plaintiff also shall not be precluded from amending his plaint or adducing additional evidence. But this being a suit of the year 1991, the trial court shall make endeavour to dispose of the same within six months from the date of communication of this order. Both the parties are directed to cooperate with the trial court in this regard.

16. In this appeal, an application under Order 40, Rule 1 C.P.C. sworn to by the Tahasildar, Sadar, Cuttack was filed for appointment of receiver which was registered as Misc. Case No. 121 of 2003. In the said application, it has been averred that the suit land was never leased out to the Orissa Olympic Association and that the order of eviction was passed on 24.8.2001 under the OPLE Act and, therefore, the suit is not maintainable in view of Sections 16 and 17 of the OPLE Act.

It was further averred in the said application that the plaintiff- Orissa Olympic Association during pendency of the suit inducted one M/s. INCON Associates as a tenant vide Deed Agreement dated 20.7.1998 for a monthly rent of Rs. 17,000/- in respect of the

suit land. A copy of Deed of Agreement made between M/s. INCON Associates and the Orissa Olympic Association has been enclosed to the said application.

17. On perusal of the said agreement, it appears that before entering into the agreement, the Orissa Olympic Association has permitted M/s. INCON Associates to construct a KALYAN MANDAP which was subsequently reduced into writing on 20.7.1998. It is not known, when the construction work started by the said M/s. INCON Associates. The terms and conditions of the agreement are quoted herein below:

1. That the party of the SECOND PART shall construct the Mandap on the piece of land and building belonging to the party of the FIRST PART on the drawings and designs as specified by the party of the FIRST PART.
2. That the Mandap will be constructed with a main entrance gate and inside a beautiful specious pendal for cultural programmes.
3. That, the mandap shall be provided a 100 KV special transfer along with it's cable and other spare-parts and accessories.
4. That, the mandap shall be fitted with Air Conditioning machine provided with a stand by generator along with other facilities such as parking space for vehicles, lawn and enhancing musical fountain with overhead decorative towers, conference hall with beautiful ceilings, befitting furnitures and sound systems etc.
5. That, the cost of construction along with Air Conditioning machine and stand by generator, 100 KV special transformer with its cable other spare-parts and accessories, construction of main entrance gate and beautiful spacious pendal, parking space for vehicles, lawn, enhancing musical fountain with overhead decorative towers, conference hall with beautiful ceilings, befitting furnitures, and sound system shall not exceed Rs.40,00,000.00. Any expenditure over and above this

limit shall not be considered by the party of the FIRST PART.

6. That, the party of the SECOND PART is at liberty to engage contractor for timely completion of the work.
7. That the party of the FIRST PART has the right to inspect the progress and quality of construction at any time during the construction period through its officials or consultants and advisors.
8. That the party of the SECOND PART shall pay a monthly rent of Rs. 17,000/- to the party of the FIRST PART before the 7th of the succeeding month.
9. That 50% of the above rent shall be adjusted from the cost of construction and the remaining 50% shall be paid in shape of cash, cheque, bank draft or pay order.
10. That the party of the SECOND PART shall provide the Mandap free of cost to the party of the FIRST PART thrice every year for conducting meetings, conferences etc. The dates for the above shall be intimated to the party of the SECOND PART well in advance and preferably before one month of the meeting or conference.
 11. That the rent shall be paid w.e.f. 01.12.1998.
 12. That, this agreement shall remain valid till the expenditure towards cost of construction incurred by the party of the SECOND PART is fully adjusted from monthly rent payable by the party of the SECOND PART or 28 years whichever is earlier.
 13. That after the completion of this agreement, if the party of the FIRST PART decides to let out the Mandap again, then party of the SECOND PART shall be given priority after fulfilling all the conditions and only after written refusal by the party of the SECOND PART, the Mandap can be let out to other parties.
 14. That, all repairs and maintenance charges shall be borne by the party of the SECOND PART.

15. That the Mandap shall be let out to third parties by the PARTY OF THE SECOND PART and party of the FIRST PART shall in no way make any interference in such let out or collection of rent.
16. That the original agreement entered between both the above parties stands cancelled due to this fresh agreement.
17. That any dispute that may arise in future shall be decided mutually by ORISSA OLYMPIC ASSOCIATION and M/S. INCON ASSOCIATES”.

It was agreed that out of the rent payable by the Second Part, 50% of the rent, i.e., Rs. 8500/- shall be adjusted towards the cost of the construction and the agreement shall remain valid till the expenditure towards the cost of construction incurred by the party of the Second Part is fully adjusted from the monthly rent payable by the party to the Second Part or twenty years whichever is earlier. The Orissa Olympic Association is a public body. Admittedly, no public notice was given inviting applications to invest in the construction of KALYAN MANDAP. It may be remembered that the suit was filed after receipt of the notice in the O.P.L. E. proceeding and the learned Civil Judge (Senior Division), Cuttack by order dated 7.11.1991 passed the status quo order even though the court was aware that for the self-same land, a proceeding under the OPLE Act was continuing. It is also admitted in the objection/counter affidavit filed before this Court that a portion of the land is situated over the alleged encroached area. The order of status quo was vacated by the learned Civil Judge (Senior Division) by order dated 27.11.1996.

Therefore, the construction made appears, prima facie, to be in violation of the statutory prohibition and status quo order passed by the trial court.

18. The object of appointment of a receiver is the safeguarding of the suit property for the benefit of those who would ultimately be adjudged to be entitled thereto. It is also the settled principle of law that a court may appoint a receiver not as a matter of course, but as a matter of prudence having regard to the justice of the situation. When the property is under mis-management or is exposed to danger or decay, the same should be left at the disposal of a receiver in view of the provisions under Order 40, Rule 1 C.P.C.

19. Admittedly, the suit property is in the Rakshit khata of the State Government. The Olympic Association on his own saying entered into the same by way of lease and hence his possession thereover is prima facie permissive in nature. I have quoted above the conditions of lease, wherein the lease-hold area has not been defined and no schedule is attached to the agreement. In the facts and circumstances, in my considered view, the suit property being under mal management is exposed to danger and decay. Therefore, I appoint the Collector, Cuttack as the receiver of the suit property pending disposal of the suit.

20. The appellant no. 1 – State of Orissa, represented by the Collector, Cuttack is directed to take over possession of the property, whereafter, the Collector shall open an interest bearing Bank Account and deposit in the said Account the rent collected from the tenants including the rent received from the Kalyan Mandap by M/s. INCON Associates. M/s. INCON Associates is also directed to deposit the advance money received from the prospective occupants from today with the Collector and the balance amount shall be collected by the Collector and deposited in the Bank account during the pendency of the suit. The Collector, Cuttack is also directed to secure the property and the income thereof in due promptitude and to take all necessary steps for preventing the same from any damage or danger and report compliance to this Court through the trial court.

21. It also prima facie appears to me that the affairs of the Olympic Association are not clean and its entire deal is fraught with mala fide. In my opinion, it should be enquired into by the State.

I, therefore, direct the Additional Director General of Police, Crime Branch, Cuttack to make an enquiry into the entire affairs of the Olympic Association, which in my prima facie view, has become the parental property of some individuals. If prima facie materials emerged during enquiry, a case should be registered under appropriate sections of the Indian Penal Code or any other provisions of law, and the same should be investigated. The report of the Additional Director General of Police, Crime Branch and/or the Investigating Officer, shall be placed before this Court within three months from today.

22. It may be noted here that the views expressed or observations made here-in-before by me are prima facie, and the trial court shall not be influenced by any of the same and dispose of the suit in accordance with law keeping in view the authoritative pronouncements governing the field. The application filed by the appellants for additional evidence is allowed and the entire case records in Encroachment Case No. 213/1990-91 be transmitted to the trial court for being marked as exhibit from the side of the defendants.

23. If the trial court arrives at conclusion that taking advantage of the suit, the plaintiff-respondents have enriched themselves, the State will also be at liberty to recover the ill gotten by initiating appropriate legal proceeding. The State is also directed to make appropriate audit in respect of the financial affairs of the Olympic Association and take suitable action as deemed proper under law.

The Registrar (Judicial) of this Court is directed to serve a copy of the judgment on the office of the learned Advocate

General, who shall transmit the same to the Additional D.G. of Police, Crime Branch Cuttack and the Collector, Cuttack for taking necessary action at their end.

The First Appeal is accordingly disposed of.

The L.C.R. be sent back forthwith.

Sd/- B.P.Ray,J.

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***Orissa High Court, Cuttack.
November 29th, 2014/Biswal.***

