

HIGH COURT OF ORISSA: CUTTACK

O.J.C. No.4382 of 1997

In the matter of an application under Article 227 of the Constitution of India.

Jahna Satapathy

....

Petitioner

Versus

Satyabadi Behera and another

....

Opposite parties

For Petitioner

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Mr.G.C.Mohapatra
Advocate

For Opp. Parties

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None
(For O.P.1)

Ms.Sanjivani Mishra,
A.S.C.
(For O.P.2)

PRESENT:

THE HON'BLE DR. JUSTICE A.K.RATH

Date of Hearing :02.03.2016

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Date of Judgment:16.03.2016

DR. A.K.RATH, J. Aggrieved by and dissatisfied with the order dated 7.12.1996 passed by the Commissioner of Consolidation, Orissa, Bhubaneswar-opposite party no.2 in Revision Case No.3038 of 1993, under Annexure-5, the petitioner has filed this writ application. By the said order, opposite party no.2 allowed the application filed by opposite party no.1 under Section 37 (1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 and held that alienation of land made by opposite party no.1 in favour of the petitioner under Section 22(5) of the Orissa Land Reforms

Act is void and directed to prepare the record in favour of opposite party no.1.

2. Bereft of unnecessary details, the short facts of the case of the petitioner are that he had purchased a piece of land appertaining to sabik khata no.138, sabik plot no.182, measuring an area AO.38 dec, mouza-Kharagaon, P.S.Gop in the district of Puri from opposite party no.1 by means of a registered sale deed no.460 dated 24.2.1976 for a consideration of Rs.500/-, which corresponds to hal khata no.135, hal plot no.579, area AO.33 dec. In the sale deed opposite party no.1 mentioned that he does not belong to scheduled caste and that he belongs to the caste 'Kaibarta'. The consolidation record of right was published in favour of the petitioner. While the matter stood thus, opposite party no.1 filed an application under Section 37(1) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as "the Act") before the Commissioner of Consolidation, Orissa, Bhubaneswar-opposite party no.2 being R.C.No.3038 of 1993 stating therein that he intended to mortgage the land in question to the petitioner by a registered sale deed no.460 dated 24.2.1976, but the same was styled as sale deed. He is a member of scheduled caste. Without obtaining the prior permission from the authorities under the Orissa Land Reforms Act (hereinafter referred to as "the OLR Act"), the sale deed was executed and as such the same is void. It was further stated that basing on the said deed, the consolidation authorities prepared the record of right in favour of the petitioner and directed to correct the record. Pursuant to issuance of notice, the petitioner entered appearance and submitted that at the time of execution of sale deed, opposite party no.1 endorsed therein that he does not belong to scheduled caste. In the Mutation Proceeding, he reiterated the same. At the time of execution of sale deed on 24.2.1976, the caste 'Kaibarat' to which opposite party no.1 belongs to, was not included in the list of scheduled caste. The sale deed was executed for

valid consideration and he is in peaceful possession over the land. Opposite party no.2 came to hold that the caste of opposite party no.1 is Kaibarta. In view of decision of this Court, Kaibarta is part of Dewar Caste. Since it is clarificatory in nature, it has retrospective effect. Further as per Section 22 (5) of O.L.R. Act, transfer by a member of scheduled caste to non-scheduled caste is void. Adverse possession in such cases arises after 30 years. Thus question of prescriptive title does not arise. Mutation by Tahasildar does not alter the legal position. Held so, opposite party no.2 allowed the application on 7.12.1996 and directed to prepare the record in the name of the petitioner.

3. Heard Mr.G.C.Mohapatra, learned counsel for the petitioner and Ms. Sanjivani Mishra, learned Additional Standing Counsel for opposite party no.2. None appeared for opposite party no.1.

4. Opposite party no.1 is 'Kaibarta' by caste. The sale deed was executed on 24.2.1976. The submission of Mr.Mohapatra, learned counsel for the petitioner is that at the time of execution of sale deed, caste 'Kaibarta' was not included in the Constitution (Scheduled Castes) Order. The same was included in the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002 on 18.12.2002. Thus, no permission was required to be obtained at the time of alienation of the land. The opposite party no.2 misread and misapplied the law laid down by this Court.

5. In *Sebati Behera Vrs. Subasi Nayak and another*, 2015 (I) ILR-Cut-496, the petitioner and opposite party no.1 had contested for the post of Sarpanch of Kalada Grama Panchayat under Parjang Police Station in the district of Dhenkanal. The post of Sarpanch was reserved for candidates belonging to scheduled castes. Necessary nominations was filed along with caste certificates and the Election Officer had accepted the nominations after scrutiny. Both the candidates contested the said election and the petitioner

ultimately succeeded in the election and was declared elected. It is apt to state here that caste certificate had been granted in her favour describing her a sub-caste as 'Dewar' (Kaibarta). Thereafter opposite party no.1, the defeated candidate, laid an election dispute in the court of the learned Civil Judge (Jr. Division), Kamakhyanagar challenging the election of the petitioner on the ground that at the time of filing of nomination, the petitioner was not a member of the scheduled caste. The contention was sought to be substantiated by placing reliance on the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002, which came to force on 18.12.2002 and as a consequence of such amendment, the sub-caste was clarified/declared and included as a Scheduled Caste in Entry No.24 of the Act. The Election Tribunal allowed the election case holding, inter alia, that inclusion of 'Kaibarta' as a scheduled caste was made only on 18.12.2002 and the same is prospective in nature and the petitioner had been erroneously declared as sub-caste 'Dewar'. The petitioner unsuccessfully challenged the same before the learned Ad hoc Additional District Judge, Kamakhyanagar in F.A.O.No.5/2 of 2003-2004, which was eventually dismissed. Thereafter she filed the writ application. The said writ application was heard by a Division Bench of this Court. The learned Judges differ. One view was that the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002, so far as entry no.24 of Orissa Scheduled Castes List, is not retrospective in operation. The other view was that amendment in question is declaratory and curative in nature. The amendment in the Presidential Order is having retrospective effect even though there is no express provision to that effect. On a difference of opinion expressed by the learned Judges, the matter was referred to the learned 3rd Judge. The learned referral Court in paragraph-7 of the report held thus:-

"7. With greatest respect to the Hon'ble Judges and after perusing the same, I am in respectful agreement with the views expressed by Hon'ble Shri Justice P. Mohanty and, in

particular, the judgment of the Hon'ble Supreme Court in the case of Zile Singh (supra) where it has been held that, the presumption against retrospective operation is not applicable to "declaratory statute" and further that where a statute is passed for the purpose of supplying an obvious omission in a former statute or to 'explain' a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are "explanatory and declaratory" in nature. In the case at hand, this Court in the case of Narayan Behera (supra) had already directed 'Kaibarta' to be issued with caste certificates having held the same to be synonymous with 'Dhibara' and since 'Kaibarta' has come to be included by way of the Constitution (Scheduled Castes) Order (Second Amendment) Act, 2002 dated 18.12.2002, yet ever since the date of the judgment of this Court in the case of Narayan Behera (supra) came delivered on 05.11.1979, till the date of the Constitutional Amendment, the judgment of Narayan Behera was the law on the subject and the Tahasildar, Parjang, having acted in terms of the direction of this Court in the case of Narayan Behera (supra) (though at the time prior to the Constitutional Amendment), the certificate issued by him in favour of the petitioner was valid and could not have been declared void without any challenge thereto and consequently, for the reason noted herein above, this Court record its opinion and agrees with the views render by the Hon'ble Shri Justice P. Mohanty. Accordingly, the writ petition is allowed in terms of the aforesaid judgment." (emphasis laid)

6. This Court in no uncertain words in the case of Sebati Behera (supra) predicted that ever since the date of the judgment of this Court in the case of Naryana Behera (supra) till the date of Constitutional Amendment, the judgment of Narayan Behera was law on the subject. In the instant case the sale deed was executed on 24.2.1976 i.e., much before the enunciation of law laid down by the Court in the case of Narayan Behera. Thus no permission was required to be taken by a person belonging to 'Kaibarta' caste prior to 05.11.1979 under Section 22 of the OLR Act for alienation of land. The opposite party no.2 misread and misinterpreted the law laid down by this Court. If the order is allowed to stand, the same will cause miscarriage of justice.

7. In the wake of the aforesaid, the order dated 7.12.1996 passed by opposite party no.2 in R.C.No.3038 of 1993, vide Annexure-5, is quashed. The writ petition is allowed. There shall be no order as to costs.

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Dr.A.K.Rath, J.

