
(1968) 09 OHC CK 0002
In the Orissa High Court
Case No : Second Appeal No. 583 of 1964

Baban Bhoi and Others

APPELLANT

Vs

Bidhubhusan Panigrahi and Another

RESPONDENT

Date of Decision : 17-09-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Orissa Communal Forest and Private Lands (Prohibition of Alienation) Act, 1948 —
Section 2

Citation : (1968) 34 CLT 1340

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : R.N. Misra and R.C. Patnaik, for the Appellant; B. Mohapatra, S. Misra and P.C. Misra and Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—Plaintiffs are the villagers of Biswanathpur. The disputed property is a tank situate in plot No. 1760 with an area of 0"9 acre appertaining to Anabadi Khata No. 773. The Plaintiffs brought the suit under Order I, Rule 8, Civil Procedure Code. Their case is that they have been using the water of the tank for all purposes. In other words, they use the water for bathing, drinking and irrigation purposes without any restriction and they have been catching fish from the tank since time immemorial without any interruption. They claim the tank to be a communal land as defined in Section 2(a) (it) of the Orissa Communal, Forest and Private Lands (Prohibition of Alienation) Act, 1948 (Orissa Act 1 of 1948) (hereinafter to be referred to as the Act). Their further case is that the original landlords Gangamani Debi and Satyabadi Satpathy had each 8 annas interest in the tank and were in exclusive possession. The estate vested in the State of Orissa. Defendant No. 1 purchased half of the disputed tank by a registered sale deed (Ext. F) dated 29-10-1956 and took lease of the other half by a registered lease deed (Ext. 1?) dated 8-7-1953. As it is a communal land there could not have been any alienation without the previous sanction of the

Collector. Though the State of Orissa has recognized the lease and the sale, they are void in law and do not convey any title to Defendant No. 1.

Defendant No. 2 is the State of Orissa. Both the Defendants have a common case. Their stand is that the disputed tank is not a communal land and there is therefore no restriction on alienation. The Plaintiffs are entitled only to use the water for drinking, bathing and for irrigation purposes during drought, and they have no other right.

Both the Courts below have concurrently found that the disputed tank is a communal land. They however upheld the claim of the Plaintiffs that they have a right of bath and also a right to use the water of the tank for irrigation during drought. Against the confirming decree the Plaintiffs have filed his Second Appeal. There are many other details of facts which are not being referred to as they are thoroughly irrelevant for the purpose of discussion of the point in issue.

2. Mr. Misra for the Appellants raised two contentions : (1) that the suit tank is a communal land, and (2) that the Courts below should have granted relief to the Plaintiffs in respect of the rights that were recognized by Defendant No. 1 under the compromise (Ext. C) dated 28-9-1959.

Both the contentions require careful examination.

3. Section 2(0)(ii) defines communal land in relation to cases governed by the Orissa Tenancy Act, 1913. The disputed tank is situate in Puri district which is governed by the Orissa Tenancy Act. The definition runs thus:

2. In this Act, unless there is anything repugnant in the subject or context:

(a) "communal land" means:

... ..

(ii) in relation to cases governed by the Orissa Tenancy Act, 1913, lands recorded as gochar, rakshit or sarbasadharan in the record-of-rights or waste lands which are either expressly or impliedly set apart for the common use of the villagers, whether recorded as such in the record-of-rights or not;

It is the common case of the parties that the tank is not recorded as gochar, rakshit or sarbasadharan in the record-of-rights. The first part of the definition has therefore no application. There is no dispute that the suit tank constitutes waste land as it was a part of the Anabadi khata. The only question for consideration is whether the tank was either expressly or impliedly set apart for the common use of the villagers whether recorded as such in the record-of-rights or not.

It is also the common case of the parties that in the record-of-rights it has been noted that the villagers have the right at irrigation from the tank during drought. This tank is situate in the very heart of the village and it is not disputed that it is

used by the villagers for bath and drinking purposes. The success of the parties will depend upon the construction of the expression "expressly or impliedly set apart for the common use of the villagers." Mr. Misra contends that on the accepted position that the tank was being used for bathing purpose and for irrigation during drought the tank must be taken either expressly or impliedly to have been set apart for the common use of the villagers. In this tank admittedly the ex-land lord had the right-of fishery and it is the concurrent findings of the Courts below that the Plaintiffs have no right of fishery. It is thus clear that the Plaintiffs are not entitled to the exclusive 16 annas user of the tank. Where It property is capable of a number of users and some of the users exclusively vest in the owner the property cannot be said to be set apart for the common use of the villagers. Doubtless the word "exclusively" is not used in the section, and that is responsible for this controversy. But to give it reasonable construction to the expression "expressly or impliedly set apart for the common use of the villagers" necessarily the word "exclusively" must govern the expression. Otherwise it would lead to absurd results. By this very illustration when the right of fishery exclusively vests in the ex-landlord, it cannot be said that the land itself has been set apart for the common use of the villagers. All that can be said is that some of the users of the land have been exclusively set apart for the villagers. These two are two different concepts and the distinction must be kept in view. On the aforesaid analysis I am clearly of opinion that where there is reservation of some of the users in the landlord the land cannot be said to expressly or impliedly set apart for the common me.

There is no direct authority on this point. Some reliance was placed by the Courts below in support of their conclusion on *Oh. Gangadhar Das v. Collector of Cuttack and Ors.* 21 C.L.T. 382. There the entire land wherein only the right of way was in dispute was claimed to be communal land. Their Lordships negatived the contention in paragraph 3 of the judgment. This case strictly does not bring into bold relief the distraction pointed out by me in determining whether the land is communal or not. But all the flame the aforesaid view seems to have been a dominant consideration why their Lordships rejected the claim that it was not a communal land.

On the aforesaid analysis I hold that, the Courts below rightly held that the disputed tank is not a communal land.

4. Even though the disputed tank is not a communal land both the Courts have recognized the rights of the Plaintiffs for bath and for irrigation from the tank during drought. No appeal has been filed by the Defendants against this part of the decree and this has become final. Mr. Misra however contends that the Courts below ought to have gone further on the basis of the compromise Ext. C which was accepted to be genuine by both the Courts below. Therein there is a term to the following effect:

Defendant No. 1 undertakes not to plant any trees either temporary or permanent on the eastern, western and southern ridges of the tank. He also

undertakes not, to put fence around those three ridges.

Mr. Mohapatra has no objection if the Plaintiffs get a decree in respect of this right. The decree of the lower Appellate Courts modified accordingly. The Plaintiffs would have right of bath and irrigation in the tank during the time of drought. Defendant No. 1 has no right to plant any trees on the eastern, western and southern ridges of the tank, nor is he entitled to put any fence around these ridges.

5. The judgment of the lower Appellate Court is modified as indicated above. The appeal is allowed in part. In the circumstances parties to bear their own costs.