
(2003) 01 OHC CK 0081

In the Orissa High Court

Case No : Miscellaneous Appeal No. 305 of 2000

Bidesi Bagarty

APPELLANT

Vs

Jogendra Sahu and Others

RESPONDENT

Date of Decision : 27-01-2003

Acts Referred:

Citation : (2003) 2 OLR 42

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : M. Mishra, P.K. Das. and B. Mishra, for the Appellant; S. Pujhari, P.K. Patnaik and B. Sahoo, for the Respondent

Judgement

B.P. Das, J.—This miscellaneous appeal is directed against the judgment and decree dated 10.1.2000 and 20.1.2000 respectively passed by the District Judge, Balangir in Title Appeal No. 25 of 1996. While disposing of the said appeal, the appellate Court set aside the judgment and decree passed by the Civil Judge (Senior Division), Balangir in Title Suit No. 65 of 1992 and remitted the suit to the trial Court with the following direction :

"To frame an additional issue to the effect whether there was partition between Satya and Baji. and whether in such partition part of the suit land measuring Ac. 0.62 decimals corresponding to 1936 settlement plot No. 582 fell to the share of Baji and to decide the said issue by giving opportunities to the defendants to lead further evidence. The plaintiff shall in no circumstance be allowed to participate in the hearing of the fresh issue. After evidence in the new issue is received, the trial Court is to decide the suit afresh on the basis of the evidence already on record and also the new evidence."

3. The brief facts leading to this case are that the present appellant filed the aforesaid suit for declaration of his right, title and interest and confirmation of possession over the suit land. The specific case of the plaintiff is that the suit land along with other lands was the ancestral property of the plaintiff and

defendants 3 to 6 and was recorded jointly in the names of their ancestors, i.e.. Satya and Baji in the previous settlement. While the plaintiff and defendants 3 and 4 (respondents 3 and 4) belong to the branch of Satya, defendants belong to the branch of Baji. Satya and Baji effected partition amongst themselves by metes and bounds long ago and possessed their respective shares of land separately, but the record of holding continued to remain joint.

4. The plea of defendants 5 and 6 before the trial Court was that prior to the settlement of 1936 Satya and Baji partitioned their properties and thereby they were possessing and enjoying their respective shares of land separately.

5. According to the learned counsel for the appellant, defendants 3 and 4, who belong to the branch of Satya, filed their written statement stating therein that there was no partition between Satya and Baji. The respective parties led evidence and exhibited documents in support of their respective pleadings. The trial Court decreed the suit on contest declaring the right, title and interest of the plaintiff over the suit land and confirming his possession therein. The trial Court while decreeing the suit also found that there was no effective partition amongst the members of the plaintiffs family and on the other hand, the joint recording of record of rights in 1976 settlement shows that the family properties are joint in nature.

The aforesaid decree was challenged by defendants 1, 2, 5 and 6. The appellate Court relied upon the plea of defendants 3 and 4 taken in their written statement that there was no partition between Satya and Baji and ultimately held that the defendants 3 and 4 filed their written statement at a belated stage and no issue was framed on the question of partition between Satya and Baji. It was further held that as there was no issue as regards the previous partition, none of the parties could lead any evidence in that direction. As the question of partition between Satya and Baji has not been decided by the trial Court, the appellate Court set aside the judgment, and decree and directed for rehearing of the suit on the question of partition between Satya and Baji and allotment of suit plot No. 582 measuring an area of Ac. 0.62 decimals in favour of Baji. The appellate Court while making the aforesaid direction for rehearing estopped the plaintiff from participating in the hearing on the fresh issue.

6. According to the counsel for the appellant, the plaintiff- appellant will suffer irreparable loss if the hearing of the suit proceed without giving a chance of hearing to him. According to him when there is a positive finding of the appellate Court that no issue has been framed to the effect whether there was a partition between Satya and Baji, which is necessary for just decision of the aforesaid suit, the plaintiff should also be given the chance of participating in the proceeding.

7. On a perusal of the lower Court record, I find that the specific claim of the plaintiff is that he has exclusive title over the suit land as in the first partition between Satya and Baji, the suit land fell to the share of Satya and in the later partition between himself and defendants 3 and 4, the suit land fell to his share

and he is in exclusive possession of the same.

8. By the impugned judgment, the appellate Court in disposing of an application filed by defendants 1. 2. 5 and 6 for acceptance of a map of 1936 settlement in regard to the suit land as additional evidence granted liberty to those defendants to prove the said map in the trial Court while adducing evidence.

9. Mr. Mishra, learned counsel for the appellant contends that the appellate Court while remanding the matter to the trial Court and allowing the defendants to prove certain documents in leading evidence should not have disallowed the plaintiff to participate in the hearing and there is no cogent reason for giving such a direction.

10. Upon hearing the parties, I am of the view that when the lower appellate Court found that further materials were necessary to do proper justice to the case effectively, it should have framed the issue and refer the same to trial Court to record the findings. There was no justification to vacate the judgment of the trial Court and remand the entire litigation for fresh determination (See AIR 1971 Ori 303 : Basanta Misra and Ors. v. Laxmi alias Jagyaseni Misrani).

11. Accordingly, the impugned order is set aside; the appellate Court is directed to maintain the appeal in its file and frame an additional issue regarding the question of partition of the property between Satya and Baji and refer the same to the trial Judge to return a finding on the same issue within a time frame and thereafter decide the appeal on its own merit. It goes without saying that while deciding the aforesaid issues, all the parties shall be given opportunity of hearing and adducing evidence by the trial Judge.