

(2013) 05 OHC CK 0016
In the Orissa High Court
Case No : Civil Revision No. 43 of 2004

Bishnu Charan Mohanty and Another	Vs	APPELLANT
Rahas Bihari Das and Others		RESPONDENT

Date of Decision : 03-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 99, 115
Limitation Act, 1963 — Section 17, 17(1)(b), 18(1)(d), 5

Citation : AIR 2013 Ori 165 : (2013) 116 CLT 889

Hon'ble Judges : S.K. Mishra, J

Bench : Single Bench

Advocate : P.K. Kar, D.K. Rath, B. Padhi, A. Acharya and R.P. Dalai, for the Appellant; J. Sahu, H.K. Tripathy, M.K. Rout, J.P. Patra and S.P. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—In this Civil Revision filed u/s 115 of the Code of Civil Procedure, 1908, hereinafter referred as the "Code" for brevity, the petitioners being the opposite parties in Misc. Case No. 95 of 1987 of the court of Subordinate Judge, Bhubaneswar, has assailed the order passed by the learned Addl. District Judge, Bhubaneswar upholding the order passed by the learned Subordinate Judge in the aforesaid case, thereby directing the petitioners to put back the suit land to the possession of the opposite parties. The case of the petitioners before the original court may be stated as follows:

The petitioner purchased a piece of land measuring Ac. 0.189 decimals from plot no. 151/1312 under Khata No. 42 and from plot no. 151/1314 under Khata No. 171 as per the details given in schedule of the petition under a registered sale deed dated 15.04.1958 for a consideration of Rs. 470/- and was delivered with possession of the same and continued to remain in possession by constructing boundary walls and paying rent regularly. The petitioner being a Government servant and was posted at different places, she could not take appropriate steps

in settlement proceeding though she was in physical possession and subsequently came to know that settlement proceeding was finalized and R.O.R. was published in the year 1962. However, the petitioner in 1964 applied for mutation of her name as the possessed area of the petitioner was included in plot no. 260/1372 and 260 under Khata No. 179 of mouza-Laxmisagar in 1962 Settlement. In the said mutation proceeding, the Tahasildar, Bhubaneswar after due inquiry mutated the name of this petitioner by carving out a separate Khata bearing no. 313/54 out of Khata No. 179. Taking into consideration the possessed area of the petitioner, two plots were carved out bearing plot no. 260/1372/1612 having an area of Ac. 0.110 decimals and plot no. 260/1613 having an area of Ac. 0.79 decimals corresponding to Sabik plot no. 151/1314 and 151/1312 respectively. The tenancy ledger and the village map were corrected accordingly and the petitioner continued to pay rent.

2. In the current settlement, the suit village was renamed as Saralanagar under Unit No. 31 and the possession of the petitioner was noted and a new plot was assigned to the possessed area of the petitioner and draft record of right was published in favour of the petitioner with respect to new plot no. 71 having an area of Ac. 0.189 decimals. Thus, the petitioner remained in physical possession of the suit plot from the date of her purchase having a good title over the same. The petitioner retired from her service on 31.01.1987 and on 20.02.1987 she came to know that opposite parties 1 and 2 after demolishing a part of boundary wall have trespassed into the schedule area and have cultivated the same forcibly. On enquiry it was revealed that opposite parties 1 and 2 instituted a suit before this court bearing O.S. No. 32 of 1977 against opposite parties 3 to 5 for partition of certain lands including the suit land and the suit was decreed preliminarily on 14.04.1980. It was made final on 21.02.1984 confirming the report of the Commissioner and thereafter Execution Case No. 18 of 1975 was initiated and the opposite parties 1 and 2 alleged to have taken possession under the execution of the said decree. The petitioner was not a party to the aforesaid litigation nor she was aware of the execution of the decree. Only after 20.02.1987, the petitioner came to know about her dispossession. The further case of the petitioner is that opposite parties 1 and 2 and their predecessors are the subsequent purchasers from the daughters of the petitioners' vendor and daughter of Bika Behera had sold land from the schedule khata when Bika Behera was alive, for which no title could be passed. However, the sale if any shall be subject to earlier sale made by Bika Behera in favour of the petitioner and the area purchased by the petitioner should not have been included as suit land in the partition. But opposite parties 1 and 2 without disclosing the true fact and their source of title have practiced fraud on the court and opposite parties 1 and 2 in order to make unlawful gain have not produced the up to date tenancy ledger and have deliberately concealed the facts of current settlement, which is in progress since 1974 and parcha of which were made available in 1976. Opposite parties 1 and 2 while obtaining the schedule property as the holder of the decree have dispossessed the petitioner who is not a judgment-debtor nor is

bound by the decree. Moreover, the schedule plot bears a different number and as per tenancy ledger the suit land has a distinct entry for which the area could not have been the subject matter of suit nor was liable to be taken possession of the suit land in execution of the decree. It is further stated by the petitioner that the petitioner was and is the lawful title holder and is in physical possession of the schedule property is not in any way bound by the decree, she is entitled to be put in possession and remain in possession over the schedule property. Hence, the Misc. Case was filed by the petitioner praying for the aforesaid relief.

3. The opposite parties challenge that the petition of the petitioner is not maintainable since the petitioner cannot legally claim her purchased land by way of adjustment from out of the land fallen to the share of the opposite parties in a duly constituted partition suit between four co-sharers. Therefore, the opposite parties, i.e. the petitioners in this revision, have prayed to dismiss it. The learned Subordinate Judge after taking into consideration the materials placed before him came to the conclusion that the suit land has been wrongly included in the schedule of the partition suit and this fact was not known to the petitioner. Therefore, finding her to be the lawful owner of the suit plot passed an order for restoration of the land in question to her. Such order was assailed in the Misc. Appeal No. 41/101 of 2002/97 and the learned Addl. District Judge, Bhubaneswar, as per judgment dated 22.03.2004 dismissed the appeal upholding the order passed by the learned Subordinate Judge. Such concurrent findings of facts have been assailed in this Civil Revision.

4. In course of hearing of the Civil Revision, in essence, two legal questions were advanced by the learned counsel for the petitioners i.e. the decree holder. Firstly, it was contended that after disposal of the execution case, a petition under Order XXI, Rule 99 or 100 is not maintainable. Secondly, it was contended that as per Article 128 of the Limitation Act, 1963, hereinafter referred as the "Act" for brevity, the application for possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree is thirty days from the date of possession. Since the petitioner was dispossessed on 20.08.1986 and the petition under Order XXI, Rule 99 of the Code was filed on 22.01.1987, it is contended by the learned counsel for the decree-holder-petitioner in this writ application that the application is barred by limitation.

5. As far as the first question is concerned, both the courts below i.e. appellate and original have come to the finding that the petition for restoration of property delivered in an execution proceeding wrongly to another person can be restored under Order XXI, Rule 100 of the Code even after disposal of the execution case. Order XXI, Rules 99 and 100 of the Code reads as follows:

99. Dispossession by decree-holder or purchaser.-(1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an

application to the Court complaining of such dispossession.

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. Order to be passed upon application complaining of dispossession—Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,—

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

So an application for recovery of possession is to be filed under Rule 99, whereas the Court has power to order for restoration of the property to the petitioner under Rule 100. In *Rajendra Kishore Pal Chaudhury and Another Vs. Asirulla and Another*, the Calcutta High Court has held that an order under Order XXI, Rule 100 of the Code can be entertained by the court, even where dispossession had taken place after termination of execution proceedings. In *Bhukhal Tewari Vs. Ramdayal Sah and Others*, ; the Patna High Court has held that the applicant was aggrieved by the delivery of possession though he came to know of it subsequently when the auction-purchaser actually went and interfered with his possession. The Court has further held that the application was maintainable under the provisions of Order XXI, Rule 100 of the Code even after disposal of the execution case. So the contention raised by the learned counsel for the petitioner-decree holder is not sustainable and the same is therefore rejected.

6. Coming to the next question of limitation, this Court takes note of the fact that it is admitted that the dispossession took place on 20.08.1986 and the petition for restoration of the suit has been filed on 23.02.1987. Thus, admittedly, the restoration petition has been filed after 30 days of the dispossession. In this connection, learned counsel for the petitioners has relied upon the reported case of *Hemanta Kumar Dey Vs. Taramani Devi Tibriwalla*, and *Damodaran Pillai and Others Vs. South Indian Bank Ltd.*, .

7. In the case of *Hemanta Kumar Dev v. Taramani Devi Tibriwalla* (supra), the Calcutta High Court has very clearly laid down that application u/s 5 of the Limitation Act is not applicable to any provision of the Order XXI of the Code and it is held that an application under the rule filed after thirty days period of possession from the date of dispossession is liable to be dismissed in limine.

8. In the case of *Damodaran Pillai and others v. South Indian Bank Ltd.* (supra), the Supreme Court has held that for restoration of execution application, the limitation will start from the date of order of dismissal of the execution application and not the knowledge thereof. So the ratio decided in the aforesaid case is not applicable to the case in hand. However, the ratio decided in the case of *Hemanta Kumar Dev v. Taramani Devi Tibriwalla* (supra) is applicable to the present case. So it is to be seen whether the restoration petition under Order

XXI, Rule 99 is barred by limitation or not.

9. In course of hearing, learned counsel for the opposite parties has relied upon the provision of Section 17 of the Limitation Act, which is quoted below:

17. Effect of fraud or mistake.- (1) Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,-

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid; or

(c) the suit or application is for relief from the consequences of a mistake; or

(d) where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him;

the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production:

Provided that nothing in this section shall enable any suit to be instituted or application to be made to recover or enforce any charge against, or set aside any transaction affecting any property which-

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

(2) Where a judgment-debtor has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the Court may, on the application of the judgment-creditor made after the expiry of the said period extend the period for execution of the decree or order;

Provided that such application is made within one year from the date of the discovery of the fraud or the cessation of force, as the case may be.

In interpreting this provision of law, the Supreme Court in *Pallav Sheth Vs.*

Custodian and Others, at paragraph 47 has held that

47. Section 17 of the Limitation Act, inter alia, provides that where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the defendant or his agent. (Section 17(1)(b)) or where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him (Section 18(1)(d)), the period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production. These provisions embody fundamental principles of justice and equity, viz., that a party should not be penalized for falling to adopt legal proceedings when the facts or material necessary for him to do so have been willfully concealed from him and also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud.

The ratio decided in the case of Pallv Sheth v. Custodian and others (supra) is applicable to this case. It is admitted that neither the plaintiff nor the defendants has actually brought to the notice of the Court that the opposite parties have purchased the land in question from their predecessor in interest. Such concealment amounts to fraud on the Court. Only after she came to know about her dispossession from other source, she has filed an application for restoration of the property in her favour.

In that view of the matter, this Court is of the opinion that the period of limitation will run from the date of her knowledge and not from the date of dispossession from the property in question. Accordingly, this Court comes to the conclusion that the learned Subordinate Judge, Bhubaneswar has not committed any error nor the Addl. District Judge has committed any error by confirming the finding recorded by the learned Subordinate Judge. There is hardly any scope to interfere with the orders passed by the original court as well as the confirmed order passed by the appellate court.

The Civil Revision is accordingly dismissed. But keeping in view the fact of the case, there is no order as to costs.