

(1970) 02 OHC CK 0027

In the Orissa High Court

Case No : Civil Revision No. 341 of 1968

Daitari Prasad Naik and Others

APPELLANT

Vs

Umakanta Nayak and Others

RESPONDENT

Date of Decision : 11-02-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2)

Citation : (1970) 36 CLT 1038

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

Bench : Single Bench

Advocate : R.K. Mohapatra and R.K. Patnaik, for the Appellant; A.K. Misra, P.K. Sengupta and S.C. Adhikari and A.G., for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—The plaintiffs are the petitioners. They filed Original Suit No. 24 of 1968 in the Court of the Subordinate Judge, Balasore, for partition of the disputed property consisting of 2.30 acres. The plaint allegation was that the disputed property belonged to late Narayan Sahu who died leaving behind a son (defendant No. 4) and two daughters (defendants 5 and 6). He is said to have acquired this land by a patta and about 11 years before the suit he entered into a contract with the plaintiff No. 1 for selling the northern half of the suit property. He took an advance of Rs. 200/-and delivered possession of the northern half but died before he could execute the sale deed. Plaintiff No. 1 (petitioner No. 1) built a house on the northern part of the suit plot after possession was delivered to him and was residing and carrying on his business there. The house was, however, washed away in the unprecedented floods of 1961 and the petitioner received compensation for the loss of the house from Government. After the death of Narayan Sahu plaintiff No. 1 made repeated requests for execution of sale deed by defendants 4 to 6. Defendant No. 4 did not execute any sale deed. Defendants 5 and 6 however executed a registered sale deed in favour of the plaintiffs in respect of their two-thirds share of the suit property from the

northern side of the suit lands, on 30-12-67 on receipt of proper consideration. Thus, the plaintiffs acquired title and are in possession of two-thirds. Defendant No. 4 sold his one-third share to defendants 1 to 3 by a registered sale deed on 4-10-61. That sale is collusive, fraudulent and without consideration. Defendants 1 to 3 had notice of the prior contract executed by Narayan Sahu in favour of the plaintiff.

2. Defendants 1 to 3 contested the suit alleging denial of notice of the previous contract. They claimed that the disputed land was Anabadi and belonged to them as a part of their ancestral estate and had fallen to their share in a partition of the estate. After vesting of the estate they came to know that the property has been leased out in favour of Narayan Sahu, though the property was in their possession and enjoyment. They stated that in good faith they purchased the suit land except for 0.02 1/2 acre from defendant No. 4, and continued in possession. Plaintiffs' title and possession were denied.

3. Gouri Bewa is the aunt of Amulya Ch. Mohapatra and they are members of a joint family. They filed a petition under Order 1, Rule 10(2), C.P.C. for being impleaded as parties alleging that the late Upendra, father of Amulya, had acquired the suit property from the landlords by virtue of a patta and was in possession of the same. The petitioners were in possession in their own right after the death of Upendra and were paying rents in respect thereof.

4. The learned Subordinate Judge allowed the application. Against that order the plaintiffs have filed this civil revision.

5. Mr. R.K. Mohapatra contends that the learned Subordinate Judge exercised his jurisdiction illegally and with material irregularity in allowing the prayer of third party interveners to be impleaded, on the only ground that multiplicity of suits will be avoided even though the title claimed by the third-party interveners is adverse to, and quite distinct from, the title claimed by both the plaintiffs and the defendants, and that the effect of the order impleading them would be to compel the plaintiffs to proceed against a party in respect of a question of title foreign to that between the plaintiffs and the defendants against their wishes.

6. This contention requires careful examination. On either side, a large many authorities of different High Courts in India have been cited. It is not necessary to go through them as the identical question has been traversed in a series of decisions of this Court.

In *Narahari Mohanti and Others Vs. Ghanashyam Bal and Others*, this Court observed as follows:

"Two conditions must, however, be satisfied before a party is considered to be a necessary party. They are: (i) there must be a right to some relief against the party not joined. This means that no decree can be passed without affecting the rights of the absentee-party and (ii) the presence of the absentee-party should be necessary in order to enable the court: to effectually adjudicate upon and

settle all questions involved in the suit. This concept includes the idea that no decree should be passed by a court which would be rendered infructuous or would become ultimately inexecutable. If a case satisfies these tests, then the absentee-party is a necessary party and the suit cannot be effectually and completely adjudicated upon in respect of all questions involved, without that party being impleaded in the suit."

The question in issue would be examined in the light of these tests.

7. In 34 (1968) CLT 956 (Damodar Mohapatra v. State of Orissa) the question was examined from another point of view. It was contended therein that the plaintiff being generally dominus litis there was no principle of justice upon which he can be compelled to fight against some other litigant not of his own choice, unless such a person is required by positive rule of law. The expression "all the questions involved in the suit" in Order 1, Rule 19 (2) C.P.C. was canvassed to be confined only to questions as between the parties to the litigation. This narrow view of the powers conferred on the Court under Order 1, Rule 10(2) was not accepted in that case. It was laid down therein that in a suit relating to property, in order that a person may be added as a party he should have a direct interest as distinct from a commercial interest in the subject-matter of the litigation. Some of the decisions cited now by the learned Advocates were critically examined in that case.

In 34 (1968) CLT 1410 (Kartick Chandra Mohanty v. State of Orissa) both the aforesaid decisions were noticed and this Court accepted the wider view. It was held that the expression "questions involved in the suit" in Order 1, Rule 10 (2) need not be confined only to questions as between the parties to the litigation. Third parties are also entitled to be impleaded under the rule, as parties to the suit provided the two tests laid down in ILR 1963 Cut 841 are fulfilled.

It is needless to add that the conclusion in each individual case would follow according to the facts and circumstances of that case.

8. Before, however, applying the aforesaid two tests, it would be appropriate to critically examine the question to be determined in between the plaintiffs and the defendants in this litigation. Plaintiffs asked for partition on the assumption that they have a valid title to two-thirds of the disputed property. Defendants 1 to 3 contest the plaintiffs' case for partition alleging that they have no title at all. Thus, before the relief of partition can be granted, plaintiffs' title must be gone into. If the plaintiffs fail to establish the title of their vendor, the suit for partition must fail.

9. In this context, the question for consideration is whether the title set up by the interveners should be gone into, to effectually and completely adjudicate upon and settle the question of title involved in the suit.

In my view the plaintiffs have a right to the relief against the interveners if their case of title is ultimately accepted to be true. Thus, no decree can be passed in

favour of the plaintiffs without affecting the rights of, the absentee-parties.

10. The second test is also applicable. If the interveners are not added as parties, the decree passed by the Court in favour of the plaintiffs would be rendered infructuous as the interveners claim possession in the land also, and the decree would become ultimately inexecutable. When the question of title would be gone into, no confusion would be introduced in allowing the interveners to get their title canvassed, in the same litigation.

10A. As has already been stated, it is unnecessary to refer to the various authorities cited by Mr. Mohapatra which can be distinguished on the ground that they are based on a narrow construction of Order 1, Rule 10(2) which has been rejected by this Court.

It would, however, be instructive to refer to AIR 1927 Mad 834 (Chidambaram Chettiar v. Subramaniam Chettiar), where the following passage occurs:--

"The Code does not contemplate a triangular duel of this sort in which one plaintiff shoots at the other, and both at the defendants. And if joinder of plaintiffs is impossible under Order 1, Rule 1, it does not become possible under Order 1, Rule 10."

That case is distinguishable as the interveners wanted to be added as plaintiffs and the provision that came in for consideration was Order 1, Rule 10(2) read with Order 1, Rule 1, C.P.C. But the real point is whether a triangular duel is wholly out of the purview of Order 1, Rule 10. I am not inclined to accept the broad proposition laid down in the aforesaid passage. In fact, in Parasuram Mangacharyulu and Others Vs. Parasuram Balarama Krishnamacharyulu and Another, such an argument was raised and it was contended that allowing such an application (by the sister of the plaintiff) will lead to a triangular fight about title and the effect of including her as a party would be to convert the suit, which was one in ejectment to a suit based on title. The contention was rejected.

11. In Razia Begum Vs. Sahebzadi Anwar Begum and Others, the majority held that it has been firmly established--as a result of judicial decisions that, in order that a person may be added as a party to a suit, he should have a direct interest in the subject-matter of the litigation, whether it raises questions relating to moveable or Immovable property and that he should not have merely commercial or indirect interest. The position of law is the same in England. Order XVI, Rule 11, R.S.C. corresponds to Order 1, Rule 10(2) C.P.C. It has been consistently held in English law that a proprietary right of the intervener in the subject-matter of the action is sufficient to entitle him to be impleaded as a party to the suit. The law has been further extended to cover cases where the right is akin to property right.

In (1878) 9 Ch D 351 (Vavasour v. Krupp) an intervener was allowed to be impleaded as a party defendant as he claimed proprietary right in the subject-matter of the action.

This principle was consistently followed as would appear from two recent decisions of the English courts.

In (1950) 2 ALLER 605, *Dollfus Mieg et Compagnie v. Bank of England*, the facts were as follows. A French company was the owner of 64 identifiable gold bars which were looted by the Germans during their occupation of France and were later found and seized by the Allied Armies. The custody of the bars was acquired by a tripartite Commission consisting of the representatives of the Governments of the United Kingdom, United States of America and France which was set up under treaty arrangements between the United Nations for the purpose of acquiring and eventually distributing, in accordance with the provisions of the treaty, the gold and treasure looted by the Germans. The 64 gold bars were conveyed to England and deposited by the Commission with the Bank of England; on learning this, the French Company asserted its claim to them. On 18-10-48 the company issued the writ in an action against the bank claiming delivery up of the bars or damages for their detention. The bank applied for an order to set aside the writ and all subsequent proceedings on the ground that the bars were in possession or under the control of the three Governments and that the action impleaded two foreign sovereign States who declined to submit to the jurisdiction. The case proceeded on the basis that the bars were returnable in specie to the three Governments on demand and the learned Judge made the order which was asked for. The company appealed. At the appellate stage the Governments of the United States of America and France applied under R.S.C. XVI, Rule 11 to be added as defendants to the action. For the purpose of the application they did not assert title to the bars, but contended that if they could establish that they had possession and control over them, through the bank, the company would fail to obtain from the court an order in its favour by reason of the doctrine of immunity which applied to foreign sovereign States and therefore the applicants would retain possession and control over the bars and be able to dispose of them. Wynn-Parry, J., held that in determining whether or not the applicants had proprietary rights in the subject-matter of the action sufficient to entitle them to be joined as defendants, the test lay, not so much in an analysis of what were the constituents of their rights, but rather in what would be the result on the subject-matter of the action if their rights could be established. Although the applicants did not assert title to the bars the result of a successful intervention by them would be that as between the company and themselves they would, for all practical purposes, be the true owners and therefore although their right arose indirectly, viz., by the invocation of the doctrine of immunity and through the bank as bailee, they had a direct interest in the subject-matter of the action which was similar to a proprietary right and was of such a nature as would entitle them to an order that they be joined as defendants, if it could be shown that in their absence, their claim could not effectually be put forward.

In (1956) 1 All ER 273 (*Amon v. Raphael Tuck & Sons*) the facts were as follows. Plaintiff alleged that he was the inventor of a new design of adhesive dispenser in the shape of a pen known as the Fastik pen; that he disclosed the "know how" of

the pen to the defendants during negotiations for an agreement whereby the defendants were to market the pen; that in February 1954 the negotiations broke down; that there was an implied contract that the defendants would treat as confidential the information given to them during the negotiations; and that the defendants were in breach of that contract in that they had made use of the information by manufacturing an adhesive dispenser called the Stixit pen which contained three distinctive features of the Fastic pen. The plaintiff claimed damages against the defendant and an injunction to restrain them from disclosing to other persons or making use of the information disclosed by the plaintiff without his consent. The defendants before filing a defence applied by summons under R.S.C. Order XVI, Rule 11, for leave to join as a defendant. The intervener filed an affidavit alleging that he was the inventor of the Stixit pen. Subsequently he filed another affidavit alleging that the defendants were under contractual obligation to him to manufacture and distribute the Stixit pen in certain territories.

Delvin J. held that the test whether the Court had jurisdiction to add as a defendant a person whom the plaintiff did not wish to sue, was whether the order for which the plaintiff was asking in the action might directly affect the intervener by curtailing the enjoyment of his legal rights. In that case, the plaintiff claimed that he was the owner, while the intervener alleged that he was the owner of the right, and both disputes should be tried at the same time.

12. In the present case, there was a contest regarding title between the plaintiffs and defendants 1 to 3. The interveners set up a title challenging the title of both the plaintiffs and defendants 1 to 3. If the interveners have a title, the plaintiff's case for partition as against defendants 1 to 3 is liable to be rejected. The interveners directly claim a proprietary title in the subject-matter of the action. If their claim is accepted, then the decree to be passed in favour of the plaintiffs would be rendered infructuous unless the interveners are added as parties to the suit. The two tests laid down in *Narahari Mohanti and Others Vs. Ghanashyam Bal and Others*, apply to this case, inasmuch as the plaintiffs claim relief as regards their title and no decree can be passed in their favour without affecting the rights of the interveners. In the absence of the interveners, any decree passed would ultimately become inexecutable as the interveners would not be bound by the decree unless they are impleaded as parties. The interveners also have a direct interest in the subject-matter of the action. Thus all the tests are applicable and the interveners should be impleaded as parties.

13. Further, as was laid down in the Supreme Court case the question of addition of parties under Order 1, Rule 10 C.P.C. is generally not one of initial jurisdiction of the court, but of judicial discretion which is to be exercised in view of the facts and circumstances of a particular case, though in some cases it may raise a controversy as to the power of the court in contradistinction to its inherent jurisdiction, or in other words, of jurisdiction in the limited sense in which, it is used in Section 115 of the Code.

14. For reasons analysed above, the learned Subordinate Judge did not exercise his jurisdiction illegally or with material irregularity. Neither was there improper exercise of discretion on his part.

15. In the result, the civil revision fails and is dismissed, but in the circumstances without costs.